Case No. 02-18-00106-CV

IN THE COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS FORT WORTH

THE CITY OF SAN FRANCISCO, DENNIS J. HERRERA, IN HIS OFFICIAL CAPACITY AS CITY ATTORNEY FOR THE CITY OF SAN FRANCISCO, AND EDWARD REISKIN, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF TRANSPORTATION FOR THE SAN FRANCISCO MUNICIPAL TRANSPORTATION AGENCY
Appellants,

vs.

EXXON MOBIL CORPORATION
Appellee.

On Appeal from the 96th Judicial District Court, Tarrant County
The Hon. R.H. Wallace, Jr. Presiding

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE CASE

Nature of the Case:	ExxonMobil ("Exxon") filed its petition for pre-suit discovery to investigate alleged civil conspiracy, abuse of process, and constitutional tort claims against San Francisco and other California municipalities. Exxon alleges that its claims arose out of lawsuits filed against it for public nuisance in California Superior Court brought by the People of the State of California.
Course of Proceedings:	The City of San Francisco and its City Officials (collectively, "San Francisco Appellants" or "Appellants") filed Special Appearances challenging personal jurisdiction over them in Texas. Exxon filed an Opposition to Appellant's responses, and Appellants filed Replies to Exxon's Opposition. A hearing was held on March 13, 2018.
District Court's Disposition:	The Hon. R.H. Wallace, Jr. of the 96th Judicial District Court in Tarrant County denied Appellants' Special Appearances on March 13, 2018 and subsequently issued Findings of Fact and Conclusions of Law on April 24, 2018.

STATEMENT REGARDING ORAL ARGUMENT

The San Francisco Appellants request oral argument so that they have an opportunity to aid the Court's decisional process by emphasizing and clarifying the written arguments in the briefs and by answering any questions from the Court.

ISSUES PRESENTED

Whether the district court erred by denying Appellants' special appearances, specifically:

1. **Whether Exxon met its burden to plead sufficient allegations to establish specific jurisdiction over Appellants, including:**
   a) Whether Exxon showed that Appellants are within the reach of the Texas long-arm statute.
   b) Whether Exxon showed that Appellants purposefully availed themselves of Texas' jurisdiction to establish minimum contacts.
   c) Whether Exxon's foundational allegation that Appellants conspired to target Texas lacks support by credible record evidence and should be set aside.
2. **Whether Appellants met their corresponding burden to negate the bases of jurisdiction alleged.**
3. **Whether the exercise of specific jurisdiction over Appellants offends traditional notions of fair play and substantial justice.**
4. **Whether the Texas long-arm statute reaches Appellants in their official capacities.**

INTRODUCTION

Personal jurisdiction is a prerequisite to any grant of pre-suit discovery under Rule 202. The question before this Court is whether a district court in Fort Worth, Texas has specific personal jurisdiction over a city and its officials of another sovereign state when the only alleged contact is the filing of a lawsuit in California against a Texas resident.

Appellants are: (a) the City and County of San Francisco, California; (b) San Francisco's City Attorney; and (c) San Francisco's Transportation Director. Exxon seeks pre-suit discovery from Appellants in Fort Worth, Texas to investigate Appellants' alleged intent in filing a nuisance lawsuit against Exxon in state court in San Francisco. Appellants filed special appearances contesting the Texas district court's jurisdiction over them. Consistent with the California locus of these transactions, Exxon proffered neither allegation nor evidence that Appellants have any contacts with Texas. Nevertheless, Appellants special appearances contesting personal jurisdiction were denied.

The denial of Appellants' special appearances must be reversed because Exxon's allegations stem solely from acts undertaken outside of Texas, the purported intended effect of those acts on Exxon, and acts of alleged co-conspirators, all of which are insufficient to confer jurisdiction over Appellants in a Fort Worth, Texas court. The denial of Appellants' special appearances must also

be reversed because Appellants negated jurisdiction by showing that they lack minimum contacts with Texas and that subjecting them to jurisdiction offends fair play and substantial justice. In addition, the exercise of personal jurisdiction over Appellants is improper for the independent reason that the Texas long-arm statute does not reach Appellants in their official capacities. Accordingly, the Court should reverse the district court's Order denying Appellants' special appearances and set aside the district court's Findings of Fact and Conclusions of Law.

STATEMENT OF FACTS

For the past sixteen years, Mr. Dennis J. Herrera has served as San Francisco's elected City Attorney. In this capacity, he provides legal services to the Mayor, Board of Supervisors, and approximately ninety-four departments, boards, commissions, and offices of the City and County of San Francisco. (CR1803 at n. 2). These full-time, public-service responsibilities require that Mr. Herrera focus his attention in San Francisco. As City Attorney, Mr. Herrera does not travel to Texas or participate in or otherwise "exploit" Texas markets for his or the City's financial benefit. (CR1831-33). Mr. Herrera's complete lack of contacts with Texas is addressed in his sworn Affidavit filed in support of his Special Appearance. *Id.*

Mr. Edward Reiskin has served as the Director of Transportation for the San Francisco Municipal Transportation Agency ("SFMTA") since 2011. (CR1804 at

n. 5). Like the City Attorney's office, the SFMTA is located in San Francisco and operates on public funding. Mr. Reiskin oversees San Francisco's public transportation system (which carries more than 200 million riders per year), parking, traffic engineering, bicycle and pedestrian safety, accessibility, and taxi regulation. *Id.* Mr. Reiskin has responsibility for more than 5,000 employees. *Id.* These full-time, public-service responsibilities require that Mr. Reiskin focus his attention in San Francisco. As Director of Transportation, Mr. Reiskin does not travel to Texas or participate in or otherwise "exploit" Texas markets for his or the City's financial benefit. (CR1823-25). Mr. Reiskin's complete lack of contacts with Texas is further addressed in his sworn Affidavit filed in support of his Special Appearance. *Id.*

A. San Francisco Files Suit Against Exxon and Other Oil Companies.

On September 19, 2017, the People of the State of California, by and through San Francisco City Attorney Dennis J. Herrera, sued five fossil fuel companies alleging nuisance and other state law claims. (CR972). Exxon was served with the lawsuit in Sacramento, California on September 20, 2017. (CR7166-68). The complaint alleged that defendants, Exxon among them, have contributed to global warming-induced sea level rise, seeking damages in the form

of an abatement fund remedy; it did not seek to enjoin Exxon or the other named defendants from engaging in their business operations.[1] (CR972-78).

B. Exxon Files This Rule 202 Petition in Texas for Pre-suit Discovery.

On January 8, 2018, Exxon filed its Petition for Pre-suit Discovery seeking the depositions of San Francisco's City Attorney and Director of Transportation in their official capacities.[2] (CR6). Exxon devotes just a single paragraph of its 60-page petition to personal jurisdiction:

> This Court has personal jurisdiction over the potential defendants, pursuant to Section 17.04(2) of the Texas Civil Practices and Remedies Code, because the potential abuse of process, civil conspiracy, and constitutional violations were intentionally targeted at the State of Texas to encourage the Texas energy sector to adopt the co-conspirator's desired legislative and regulatory response to climate

[1] The lawsuit was ultimately removed from California state court to the United States Federal District Court for the Northern District of California where it was assigned to Judge William H. Alsup, who recently granted the defendants' motion to dismiss. *City of Oakland v. BP p.l.c.*, No. C. 17-06011 WHA, 2018 WL 3109726 (N.D. Cal. June 25, 2018). While Judge Alsup recognized the legitimacy of the harms raised by the plaintiffs, his dismissal of the complaint was ultimately rooted in concerns about judicial economy and separation of powers:

> "The dangers raised in the complaints are very real. But those dangers are worldwide. Their causes are worldwide. The benefits of fossil fuels are worldwide. The problem deserves a solution on a more vast scale than can be supplied by a district judge or jury in a public nuisance case. While it remains true that our federal courts have authority to fashion common law remedies for claims based on global warming, courts must also respect and defer to the other co-equal branches of government when the problem at hand clearly deserves a solution best addressed by those branches. The Court will stay its hand in favor of solutions by the legislative and executive branches."

Id. at *15-16.

[2] Exxon's Rule 202 Petition requests the depositions of over a dozen California officials in their official capacities, including officials from Oakland and San Mateo. As authorized by Rule 9.7 of the Texas Rules of Appellate Procedure, the San Francisco Appellants incorporate by reference all of the arguments submitted by the Oakland and San Mateo Appellants. *See* Tex. R. App. P. 9.7.

> change. ExxonMobil and 17 other Texas-based companies that are named in the California municipalities' lawsuits exercise their First Amendment right in Texas to participate in the national dialogue about climate change. The speech and other First Amendment activity of the energy sector in Texas is precisely what the potential defendants have attempted to stifle through their abuse of law enforcement powers and civil litigation.

(CR18). The "abuse of process, civil conspiracy, and constitutional violations" in the above paragraph is merely Exxon's characterization of the potential claims for which it seeks pre-suit discovery based on Appellants' filing of property damages lawsuits against Exxon in California.[3] *See* (CR10-11).

C. Exxon Previously Attempted to Preempt Investigations Conducted by Massachusetts and New York by Filing a Similar Action.

Exxon's strategy—initiating civil proceedings in Texas in response to public proceedings in other states—is all too familiar. In 2016, the Attorneys General of New York and Massachusetts initiated investigations into Exxon's business practices and potential consumer and securities fraud in their respective states. (CR1805 at n. 13). Exxon waged war on two fronts—it challenged those investigations directly, and it commenced affirmative litigation in Texas alleging that the Massachusetts and New York Attorney Generals had violated Exxon's constitutional rights and engaged in abuse of process. (CR1805 at n. 15). Exxon's attempt to evade New York and Massachusetts investigative authority via a Texas

[3] Exxon's characterization of San Francisco's lawsuit is inaccurate. The lawsuit does not seek any legislative or regulatory responses. Rather, it seeks an abatement fund remedy as the sole form of relief.

forum failed; the Northern District of Texas transferred the action to the Southern District of New York, where Exxon's claims were dismissed with prejudice.[4] (CR1806 at n. 16;7409). Similarly, Exxon's separate attempt to halt the Massachusetts' Attorney General's investigation was also recently rejected by the Massachusetts Supreme Judicial Court.[5] Despite the fact that Exxon's repeated attempts to interfere with legitimate efforts of state law enforcement have been uniformly and unequivocally rejected, Exxon has nonetheless recycled the allegations and arguments from the Federal and Massachusetts actions in its present Rule 202 petition.

[4] On March 29, 2018, United States District Judge Valerie Caproni issued a forty-eight page opinion dismissing Exxon's case against the Attorneys General of Massachusetts and New York, which was premised on similar claims as those alleged by Exxon in the instant case, including conspiracy, violation of the First Amendment, and abuse of process. *Exxon Mobil Corp. v. Schneiderman*, No. 17-CV-2301 (VEC), 2018 WL 1605572 (S.D.N.Y. Mar. 29, 2018). In dismissing Exxon's claims, the court closely examined Exxon's Second Amended Complaint, which extensively overlaps with the allegations in this case. There, the Court held that "Exxon's allegations that the AGs [were] pursuing bad faith investigations in order to violate Exxon's constitutional rights [were] implausible and therefore must be dismissed for failure to state a claim." *Id.* at *1. The court noted that Exxon failed to establish any facts that showed that the AGs had an improper purpose in seeking state investigations of Exxon's conduct. *Id.* at *20.

[5] On April 13, 2018, the Supreme Judicial Court of Massachusetts issued an opinion denying Exxon's motion to set aside, disqualify, modify, or stay the Massachusetts's Attorney General's ongoing investigation into whether Exxon violated Massachusetts' deceptive practices act by misleading residents about the impact of fossil fuels on climate change. *Exxon Mobil Corp. v. Attorney Gen.*, 479 Mass. 312 (2018). Exxon had argued that the investigative demand was "overbroad and unduly burdensome" and "arbitrary and capricious" and claimed that the entire Attorney General's office should be disqualified from further investigation due to allegedly prejudicial comments made by Attorney General Healy at a Rockefeller Press Conference. *Id.* at 324, 327-28 Nevertheless, the Court dismissed Exxon's bias concerns as unfounded because Healy's comments "were intended only to inform the public of the basis for the investigation into Exxon" and "[a]s an elected official, it is reasonable that she routinely inform her constitutions of the nature of her investigations." *Id*. at 328.

D. The District Court Finds It has Personal Jurisdiction Over the San Francisco Appellants.

After Exxon served Appellants with its Rule 202 Petition, Appellants timely contested the district court's personal jurisdiction by filing special appearances. (CR1802;7137). On March 8, 2018, a hearing was held in the 96th Judicial District Court, Tarrant County, Texas, before the Hon. R.H. Wallace, Jr. to consider the pleadings and evidence alleged. (RR1). On March 13, 2018, the district court issued a one-page Order summarily denying Appellants' special appearances (the "Order"). (CR7210).

Appellants timely perfected appeal. (CR7234). Thereafter, Exxon requested Findings of Fact and Conclusions of Law, (CR7211), and both Appellants and Exxon submitted Proposed Findings of Fact and Conclusions of Law. (CR7214;7293). Appellants also filed objections to Exxon's proposed findings and conclusions. (CR7254). On April 24, 2018, the district court issued forty-one Findings of Fact and nineteen Conclusions of Law. (3SUPPCR113-28). The district court adopted Exxon's Proposed Findings of Fact and Conclusions of Law nearly verbatim.[6]

[6] The district court made only four hand-written edits consisting of the deletion of a total of twenty-three words from Finding Nos. 6, 10, 15, and 35, and the addition of one word to Finding No. 6. (3SUPPCR115-16;118;123).

STANDARD OF REVIEW

Texas Rule of Civil Procedure 202 permits a district court to authorize limited pre-suit discovery under certain extraordinary circumstances.[7] Tex. Civ. Prac. & Rem. Code Ann. § 202.1(a) & (b). Personal jurisdiction is a prerequisite to any grant of pre-suit discovery under Rule 202. *In re Doe*, 444 S.W.3d 603, 608 (Tex. 2014) ("*Trooper*"). The potential plaintiff on a Rule 202 petition bears the initial burden of pleading sufficient allegations to establish personal jurisdiction. *See Trooper*, 444 S.W.3d at 608; *Kelly v. Gen. Interior Const., Inc.*, 301 S.W.3d 653, 658 (Tex. 2010) (citations omitted). The burden then shifts to the potential defendant (or potential witness) filing a special appearance to negate all bases of personal jurisdiction alleged. *See id*. A defendant may negate personal jurisdiction factually, by presenting counter-evidence negating their alleged "contacts with Texas," or legally by demonstrating: "(1) those facts are not sufficient to establish jurisdiction, (2) the defendant's Texas contacts fall short of purposeful availment, (3) the claims do not arise from the defendant's Texas contacts, or (4) exercising jurisdiction over the defendant would offend traditional notions of fair play and

[7] "Rule 202 depositions are not now and never have been intended for routine use." *In re DePinho*, 505 S.W.3d 621, 623 (Tex. 2016) (quoting *In re Jorden*, 249 S.W.3d 416, 423 (Tex.2008)). In the few years since Rule 202 was enacted into law, myriad Texas courts have recognized the "practical as well as due process problems [under Rule 202] with demanding discovery from someone before telling them what the issues are." *In re DePinho*, 505 S.W.3d at 623 (Tex. 2016) (quoting *In re Jorden*, 249 S.W.3d at 423).

substantial justice." *OZO Capital, Inc. v. Syphers*, No. 02-17-00131-CV, 2018 WL 1531444, at *4 (Tex. App.-Fort Worth Mar. 29, 2018, no pet. hist.).

A district court's determination of specific personal jurisdiction over a nonresident is a question of law that is reviewed de novo. *Moncrief Oil Int'l Inc. v. OAO Gazprom*, 414 S.W.3d 142, 150 (Tex. 2013) (citation omitted). When a district court issues findings of fact and conclusions of law, an appellant may challenge the findings on factual and legal sufficiency grounds. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). A district court's findings will be legally insufficient if: (1) the record discloses a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence establishes conclusively the opposite of a vital fact. *Lake v. Cravens*, 488 S.W.3d 867, 890 (Tex. App.—Fort Worth 2016) (citing *Ford Motor Co. v. Castillo*, 444 S.W.3d 616, 620 (Tex. 2014); *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 334 (Tex. 1998), *cert. denied*, 526 U.S. 1040 (1999)). A district court's findings will be factually insufficient if the credible evidence supporting the findings is so weak, or so contrary to the great weight of all the evidence, that the finding should be set aside. *Cravens*, 488 S.W.3d at 891 (citing *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex.1986) (op. on reh'g); *Cain v.*

Bain, 709 S.W.2d 175, 176 (Tex. 1986); *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965)).

SUMMARY OF THE ARGUMENT

As a potential plaintiff on a Rule 202 petition, Exxon failed to carry its burden of pleading to establish personal jurisdiction over Appellants under the Texas long-arm statute and in compliance with federal due process guarantees. *Trooper*, 444 S.W.3d at 610. Exxon's petition alleges that the San Francisco Appellants conspired to commit an abuse of process with the intention of violating Exxon's free speech rights under the First Amendment by filing a nuisance lawsuit against Exxon in state court in San Francisco. However, Exxon has alleged no act that could form the basis for a Texas state court in Fort Worth to have personal jurisdiction over the San Francisco Appellants. And Appellants have met their corresponding burden to negate all bases of jurisdiction alleged.

Thus, Exxon has made no allegation that Appellants ever contracted in Texas, ever did business in Texas, or ever traveled to Texas. Similarly, there is no allegation in the record that Appellants ever called, emailed, or posted in online forums with Texas residents. There is no allegation that any San Francisco Appellant committed any act in Texas to chill any of Exxon's free speech rights—nor is there any allegation that any Exxon speech has been chilled. In contrast, Appellants have submitted record evidence demonstrating their complete lack of

minimum contacts with Texas, and they have shown that the exercise of personal jurisdiction over them would offend traditional notions of fair play and substantial justice.

In short, this Court does not have personal jurisdiction over the San Francisco Appellants for the following independent reasons:

1. The filing of a lawsuit against Exxon in California is insufficient to confer specific jurisdiction over the San Francisco Appellants in Texas because it fails to allege a tort in Texas or to show any purposeful minimum contacts in Texas.

2. The Texas Supreme Court has expressly rejected both directed-a-tort jurisdiction and jurisdiction based on the alleged acts of alleged co-conspirators.

3. Exxon's foundational factual allegation that Appellants conspired to target Texas is contradicted by the great weight of the evidence.

4. Appellants affirmatively negated jurisdiction by showing that they do not have minimum contacts in Texas and because the exercise of jurisdiction over them would offend traditional notions of fair play and substantial justice.

5. The Texas long arm statute does not reach the City and County of San Francisco or its officials acting in their official capacities because they are not "non-residents" within the meaning of the statute.

Exxon's jurisdictional allegations are fatally infirm and, paired with the complete absence of any purposeful contacts between San Francisco and Texas in the record, establish that the district court erred in denying Appellants' special appearances and that this Court has no personal jurisdiction over Appellants. Accordingly, the Court should reverse the district court's Order denying

Appellants' special appearances and set aside the district court's Findings of Fact and Conclusions of Law.

ARGUMENT

I. Exxon's Allegations, as Pled, Fail to Show Specific Jurisdiction Over the San Francisco Appellants (Issue No. 1).

As a potential plaintiff on a Rule 202 petition, Exxon bears the initial burden of pleading allegations sufficient to establish personal jurisdiction. *Trooper*, 444 S.W.3d at 608. However, Exxon failed to plead any facts showing that San Francisco or its Officials are subject to specific jurisdiction in Texas. Rather, Exxon's jurisdictional allegations consist of acts undertaken outside of Texas, the purported intended effect of those acts on Exxon, or acts of alleged "co-conspirators"—none of which is sufficient to confer jurisdiction over Appellants in a Fort Worth, Texas court.

A. Exxon's Sole Allegation Regarding San Francisco—the Filing and Service of a Lawsuit Against Exxon in San Francisco, California—Does Not Confer Specific Jurisdiction over the City and County of San Francisco or Its Officials in Fort Worth, Texas as a Matter of Law (Issue Nos. 1(a) & 1(b)).

To withstand appellate scrutiny, a district court's exercise of specific jurisdiction must stand on credible allegations showing that jurisdiction is authorized under the Texas long arm statute and is consistent with federal due process guarantees. U.S. Const. amend. XIV, § 1; Tex. Civ. Prac. & Rem. Code Ann. §§ 17.041 - 045; *Moncrief*, 414 S.W.3d at 149 (citing *Moki Mac River*

Expeditions v. Drugg, 221 S.W.3d 569, 574 (Tex. 2007)). The Texas long arm statute runs coextensively with the limits of the United States Constitution; thus, federal due process renders the boundary of Texas courts' jurisdictional reach. *Searcy v. Parex Res., Inc.*, 496 S.W.3d 58, 66 (Tex. 2016), reh'g denied (Sept. 23, 2016) (citation omitted). Due process requires that a denial of a special appearance must be reversed on appeal if a nonresident lacks "minimum contacts" with Texas or if subjecting a nonresident to jurisdiction in Texas offends "traditional notions of fair play and substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-76 (1985); *BMC*, 83 S.W.3d at 79.

The lone jurisdictional allegation in Exxon's petition concerning the San Francisco Appellants—and the sole basis relied upon by the district court for denying Appellants' special appearances—is that the City and County of San Francisco brought a complaint for public nuisance against five investor-owned fossil fuel companies, including Exxon, which it filed in California Superior Court and served on Exxon in Sacramento, California. (CR979-85;2021;7166-68). However, the filing and service of a lawsuit in California fails to confer specific personal jurisdiction over Appellants in Texas because it exclusively alleges acts outside of Texas which neither satisfy the pleading requirements of the long arm statute nor demonstrate any minimum contacts between Appellants and Texas.

1. Filing Suit in California Against a Texas Resident Is Not a Tort "in Texas" for Long Arm Jurisdiction (Issue No. 1(a)).

In Conclusion No. 46, the district court found that Appellants fall within the reach of the Texas long-arm statute under Tex. Civ. Prac. & Rem. Code Ann. § 17.042(2), "which allows a Texas court to exercise jurisdiction over nonresidents who commit a tort in whole or in part in Texas." (3SUPPCR126).[8]

But in a tort case, "the plaintiff must plead that the defendant committed a tortious act *in Texas*." *Touradji v. Beach Capital P'ship, L.P.*, 316 S.W.3d 15, 23 (Tex. App.—Houston [1st] 2010, no pet.) (emphasis added); *see also Kelly*, 301 S.W.3d at 659–60 (holding that plaintiff failed to plead facts within the reach of the long arm statute because it did not allege that defendants committed torts "in Texas"); *OZO Capital, Inc. v. Syphers*, No. 02-17-00131-CV, 2018 WL 1531444, at *10 (Tex. App.—Fort Worth Mar. 29, 2018, no pet. hist.), reh'g denied (May 10, 2018) ("Although appellants claim that appellees both committed a tort 'in Texas,' there is no evidence in the record that appellees committed a tort while physically present in Texas."). There is no allegation in the record that San Francisco or its officials ever committed any act in Texas—much less an act constituting a tort. For

[8] Conclusion No. 46. "The exercise of personal jurisdiction over the Potential Defendants to the anticipated action would be permitted under the Texas long-arm statute, which allows a Texas court to exercise jurisdiction over nonresidents who commit a tort in whole or in part in Texas. Tex. Civ. Prac. & Rem. Code § 17.042(2). Each of the Potential Defendants is a nonresident within the meaning of the long-arm statute."

example, Exxon did not allege that Appellants ever physically entered into Texas, that Appellants served Exxon's agent in Texas in relation to the San Francisco lawsuit, or that Appellants ever contacted Exxon in any capacity in Texas. And if the filing and service of a lawsuit by California public officials—pursuant to California law, in a California state court in San Francisco, California—is to be considered a tort at all, it is a tort that necessarily took place in California, the place of every alleged individual act, not Texas.

Relatedly, in Conclusion No. 47, the district court found that a "violation of First Amendment rights occurs where the targeted speech occurs or where it would otherwise occur but for the violation" and so Exxon's "anticipated claims therefore concern potential constitutional torts committed in Texas." [9] (3SUPPCR127). But again, Exxon did not allege that it suffered any injury in Texas or that its First Amendment rights have been violated, only that Exxon suspects that Appellants have acted under an "ulterior motive" to "apply pressure on ExxonMobil [. . .] to change their perceived positions on climate change." (CR51;61). Neither the district court nor Exxon provided any legal basis for this conclusion, which is contradicted by the great weight of case law holding that "effects-based"

[9] Conclusion No. 47. "A violation of First Amendment rights occurs where the targeted speech occurs or where it would otherwise occur but for the violation. ExxonMobil exercises its First Amendment rights in Texas, and Texas is the site of the speech challenged by the Potential Defendants' lawsuits. The anticipated claims therefore concern potential constitutional torts committed in Texas."

allegations that a nonresident "directed-a-tort" at the plaintiff are insufficient to establish contact with the forum state. *See, e.g.*, *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 790 (Tex. 2005).[10]

Exxon's failure to plead that Appellants committed a tort in Texas is determinative of the absence of long arm jurisdiction over Appellants in Texas, and Conclusion Nos. 46 and 47 must be reversed.

2. Filing Suit in California Against a Texas Resident Does Not Constitute "Purposeful Availment" (Issue No. 1(b)).

For want of any allegation that Appellants acted in Texas, Exxon also failed to plead facts to support Conclusion Nos. 48, 51, and 53 that Appellants "purposefully availed" themselves of Texas' jurisdiction. (3SUPPCR126-27).[11]

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[10] Exxon's opposition to Appellants' special appearances cites *Electronic Frontier Foundation v. Global Equity Management (SA) Pty Ltd*. as support for the assertion that Appellants "purposefully availed themselves of the forum by [. . . .] intentionally suppressing speech in Texas of ExxonMobil and other Texas-based energy companies." (CR2035). In that case, the Northern District of California found jurisdiction "under the [*Calder*] effects test where plaintiff alleged First Amendment violations in connection with defendant's conduct, via litigation in another forum [.]" *Electronic Frontier Foundation v. Global Equity Management (SA) Pty Ltd*., No. 17-cv-02053-JST, 2017 WL 5525835 (N.D. Cal. Nov. 17, 2017). But while such language may appear to support Exxon's contention when quoted in isolation, the facts of *Electronic Frontier Foundation* are easily distinguishable. Namely, central to the court's holding in *Electronic Frontier Foundation* was the fact that the defendant had mailed demand letters to the plaintiff in the forum, had obtained an injunction from the Supreme Court of South Australia against the plaintiff in the forum, and had sought to enforce that injunction against the plaintiff in the forum by serving the plaintiff with the injunction at the plaintiff's office in the forum. *Id*. at *6-9. Moreover, importantly, that the injunction in question had issued from an Australian court not subject to the safeguards of the United States Constitution created a unique threat not present here.

[11] The district court concluded that:

- Conclusion No. 48. "Exercising jurisdiction over the Potential Defendants in the anticipated action would comport with due process because the potential claims arise

Only a nonresident that is shown to have "purposefully avail[ed] itself of the privilege of conducting activities within the forum [s]tate, thus invoking the benefits and protections of its laws" will have sufficient minimum contacts for specific jurisdiction. *Searcy*, 496 S.W.3d at 67 (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). The Texas Supreme Court thus requires that every finding of purposeful availment for specific jurisdiction accord with three key criteria:

1. The relevant contacts relied upon must be those of the nonresident defendant, and the unilateral activity of another person or a third party is not pertinent;
2. The contacts that establish purposeful availment must be purposeful rather than random, fortuitous, isolated, or attenuated; and
3. The nonresident must have sought some benefit, advantage, or profit by "availing" themselves of the jurisdiction.

Id. at 67 (citing *Michiana*, 168 S.W.3d at 784–85).

None of these criteria support a finding of purposeful availment here: Exxon did not allege that the San Francisco Appellants have any contacts in Texas; Exxon did not allege that the San Francisco Appellants purposefully acted in Texas; Exxon did not allege that the San Francisco Appellants sought any "benefit, advantage, or profit" of Texas' jurisdiction. Simply put, Exxon failed to plead even

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from minimum contacts initiated by the Potential Defendants which purposefully target Texas, including speech, activities, and property in Texas.";

- Conclusion No. 51. "The Potential Defendants' contacts were deliberate and purposeful, and not random, fortuitous, or attenuated.";
- Conclusion No. 53. "Based on the foregoing findings of fact, ExxonMobil's potential claims of First Amendment violation, abuse of process, and civil conspiracy would arise from the Potential Defendants' contacts with Texas."

a scintilla of evidence that any purposeful contacts exist between the San Francisco Appellants and Texas.

Instead, Exxon buried the insufficiency of its allegations in imagined intrigue. Exxon's Petition tells a tantalizing story of political subterfuge and backdoor dealing in which Exxon, the largest energy company in America, features as the hapless victim of a cloak-and-dagger scheme to "stifle ExxonMobil's exercise, in Texas, of its First Amendment right to participate in the national dialogue about climate change and climate policy." (CR6). However, while Exxon's so-called "Relevant Facts" section runs for a full thirty-two pages, just five short paragraphs are given to the San Francisco Appellants—not one of which offers any jurisdictional link to Texas. (CR41-44). In fact, the only time that Exxon's Petition refers to Texas and the San Francisco Appellants in the same sentence is when Exxon mentions that "the San Francisco Complaint lists two Texas-based energy companies as defendants, including ExxonMobil." (CR42). Exxon's allegations primarily concern alleged acts of third parties, such as the Attorneys General of Massachusetts and New York—allegations that have already been rejected by other courts, and for which Exxon offers no evidence of any relevance to the claims anticipated by its Petition.[12] (CR19-30).

[12] Both the Southern District of New York and the Supreme Judicial Court of Massachusetts recently rejected similarly allegations by Exxon against the Attorneys General of New York and Massachusetts. *See* Notes 3 and 4, *supra*.

Ultimately, these tall tales fall short of the requisite facts that Exxon must plead to confer specific jurisdiction over Appellants in a Texas court. For all of the sensationalized fodder in Exxon's Petition, the only "contact" alleged in this case purporting to connect San Francisco or its Officials to Texas is the filing and service of a California lawsuit against Exxon, a Texas resident. But specific jurisdiction "does not turn on where a plaintiff happens to be, and does not exist where the defendant's contacts with the forum state are not substantially connected to the alleged operative facts of the case." *Searcy*, 496 S.W.3d at 70 (citations omitted) (internal quotations omitted). Absent Texas-specific contacts, the filing of a lawsuit in California against a Texas resident—even one that is allegedly tortious—fails to show "purposeful availment" of Texas' jurisdiction because "the focus of [purposeful availment] is properly on the extent of the defendant's activities in the forum, not the residence of the plaintiff." *Moncrief*, 414 S.W.3d at 157. "There is no debate on these points, as the Supreme Court [of the United States] has consistently rejected attempts to satisfy the defendant-focused minimum contacts inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State." *Searcy*, 496 S.W.3d at 70.

Accordingly, Exxon failed to plead any facts showing that the San Francisco Appellants purposefully availed themselves of a benefit, advantage, or profit of Texas' jurisdiction, and Conclusion Nos. 48, 51, and 53 must be reversed.

B. The Remainder of Exxon's Jurisdictional Allegations—Conduct Outside of Texas and Alleged Acts of Non-Parties—Fail as a Matter of Law to Support Jurisdiction Because the Texas Supreme Court Has Expressly Rejected Directed-a-Tort Jurisdiction and Jurisdiction Based on Alleged Conduct of Co-Conspirators (Issue No 1(b)).

Lacking any Texas contacts on which to base specific jurisdiction, Exxon instead alleged—and the district court found—that Appellants purposefully availed themselves of Texas by allegedly aiming tortious activity *at* Texas as part of a "potential conspiracy" to "suppress speech and corporate behavior" *in* Texas.[13] However, Exxon's novel redefinition of "purposeful availment" cannot withstand appellate scrutiny because it relies on unconstitutional theories of "directed-a-tort" jurisdiction and "conspiracy" jurisdiction and fails to justify jurisdiction over Appellants on its face.

1. The Texas Supreme Court Rejected "Directed-a-Tort" Jurisdiction (Issue No. 1(b)).

The district court adopted Exxon's proposed redefinition of purposeful availment in Conclusion of Law No. 52, which provides in part that "[p]urposeful availment is satisfied where Texas is the focus of the Potential Defendants' activities[.]" (3SUPPCR127). Thus, in addition to being unworkably vague, Conclusion No. 52 is improper first and foremost because the purported "focus" of

[13] Conclusion No. 52. "Purposeful availment is satisfied where Texas is the focus of the Potential Defendants' activities and where the object of the potential conspiracy is to suppress speech and corporate behavior in Texas. See, e.g., *TV Azteca v. Ruiz*, 490 S.W.3d 29, 40 (Tex. 2016); *Hoskins v. Ricco Family Partners, Ltd*., Nos. 02-15-00249-CV, 02-15-00253-CV, 2016 WL 2772164, at *7 (Tex. App.—Fort Worth May 12, 2016)."

a nonresident's activities cannot *itself* satisfy purposeful availment. That is, the purported "focus" of a nonresident's conduct is irrelevant unless it is manifested by minimum contacts with Texas which are: (1) independent of the activities of the plaintiff or third parties; (2) purposeful; and (3) which show intent to obtain an advantage afforded by Texas' jurisdiction. *Searcy*, 496 S.W.3d at 67.

Nor can the "focus" of a nonresident's conduct satisfy purposeful availment if that term is defined by nothing more than the alleged potential effects of a nonresident's out-of-state activities on a Texas plaintiff—as in the case at bar.[14] The Texas Supreme Court has expressly rejected "directed-a-tort" jurisdiction as an illegitimate "effects-based" approach to minimum contacts that "inappropriately shifts the jurisdictional analysis from the relationship between 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 (emphasis in original). The exercise of specific jurisdiction over a nonresident must stem from the nonresident's actions within the forum state, not the plaintiff's alleged harm or injury. *Id*. "[T]he mere fact that [a nonresident's] conduct affected plaintiffs with connections to the forum [s]tate does not suffice to authorize jurisdiction." *Searcy*, 496 S.W.3d at 67–68. This is true even if "a nonresident knows that the effects of its actions will be felt

[14] *See* (RR105) (Counsel for Exxon: "[The Potential Defendants' intent doesn't matter. What matters is: What effect did those lawsuits have on energy companies in Texas?").

by a resident plaintiff, [because] that knowledge alone is insufficient to confer personal jurisdiction over the nonresident." *Searcy*, 496 S.W.3d at 69; *see also Proskauer Rose LLP v. Pelican Trading, Inc.*, No. 14-08-00283-CV, 2009 WL 242993, at *2-4 (Tex. App.—Houston [14th Dist.] Feb. 3, 2009, no pet.) (mem. op.) (holding that torts merely directed to a Texas organization from a different forum state cannot form the basis for exercising specific jurisdiction in Texas).

Here, the San Francisco Appellants' only alleged contact with Texas arises from an alleged intent to injure Exxon in Texas by filing suit against Exxon in San Francisco, California. But if the lone allegation that the San Francisco lawsuit aims to "stifle" Exxon's corporate speech in Texas is sufficient to show purposeful availment, then any "nonresident defendant would be subject to jurisdiction in Texas . . . simply because the plaintiff's complaint alleged injury in Texas to Texas residents regardless of the defendants' contacts, and would have to appear in Texas to defend the suit no matter how groundless or frivolous the suit may be." *Panda Brandywine Corp. v. Potomac Electric Power Co.*, 253 F.3d 865, 870 (5th Cir. 2001). In other words, the "focus" of a nonresident's conduct on Texas cannot establish purposeful availment "if [the] nonresident's only contact with the forum is injury to a forum-state resident arising from contacts outside the forum state[.]" *Searcy*, 496 S.W.3d at 87 (citing *Walden v. Fiore*, 571 U.S. 277, 134 S. Ct. 1115, 1124–25 (2014)).

This Court's recent holding in *OZO Capital, Inc. v. Syphers* is particularly instructive. No. 02-17-00131-CV, 2018 WL 1531444, at *10. The defendants in *OZO* were nonresident investors who had been sued by several Texas businesses related to a deal gone awry. *Id. at* *1-3. The Texas businesses argued that the nonresident investors were subject to specific jurisdiction in Texas based on allegations that the nonresidents had purposefully directed torts at Texas by negotiating and approving an allegedly tortious settlement agreement with two Texas companies. *Id.* at *9-10. Affirming the district court's dismissal of the plaintiffs' claims for lack of specific jurisdiction, this Court held that "the gist of appellants' complaint [was] that the effect of the [. . .] settlement agreement would ultimately injure two Texas companies," and therefore appellants had failed to show "that appellees directed any alleged individual actions at Texas rather than merely at a Texas resident." *Id.* at *10-11. In the instant case, Exxon argues that the San Francisco Appellants "intentionally target[ed]" Texas by filing an allegedly tortious complaint against Exxon in California. (RR38). Thus, like the plaintiffs' allegations in *OZO*, the "gist" of Exxon's petition is that "the effect of the [San Francisco Complaint will] ultimately injure [Exxon, a Texas resident]," and therefore Exxon "likewise ha[s] not shown that [the San Francisco Appellants] directed any alleged individual actions at Texas rather than merely at a Texas resident." *Id.*

Nevertheless, Exxon appears to argue that specific jurisdiction is proper precisely because it alleges that the San Francisco lawsuit allegedly tortiously "targets" Exxon in order to "commence litigation for the ulterior motive of coercing ExxonMobil to adopt preferred policy responses to climate change." (CR61). As this Court recently observed, the Texas Supreme Court has "expressly disapproved of the notion that specific jurisdiction turns on whether a defendant's contacts were tortious rather than the contacts themselves." *Estate of Hood*, No. 02-16-00036-CV, 2016 WL 6803186, at *7 (Tex. App.—Fort Worth Nov. 17, 2016, no pet.) (citations omitted) (internal quotations omitted). So also it remains true that "a trial court may exercise specific jurisdiction over a defendant only if the suit arises out of or relates to the defendant's forum contacts." *OZO*, No. 02-17-00131-CV, 2018 WL 1531444, at *4. Exxon has not identified any contacts that the San Francisco Appellants have with Texas—again, the sum of Exxon's allegations is that the San Francisco Appellants filed suit against Exxon in another state. "That conclusion does [not] change merely because of Appellee's allegation that . . . contact was tortious." *Hood*, No. 02-16-00036-CV, 2016 WL 6803186, at *7.[15] Only by improperly relying on Exxon's Texas residency is it possible to find

[15] The cited quotation from the *Hood* opinion does not include the word "not," however, this appears to be a typographical error. *See Hood*, No. 02-16-00036-CV, 2016 WL 6803186, at *7 ("That conclusion ***does*** change merely because of Appellee's allegation that Ringer's contact was tortious. ***Nor*** is our conclusion altered by Appellee's allegations that Ringer's contact with Texas forms a 'crucial, integral, and substantial' part of their tort claims against Appellants.") (citations omitted) (emphasis added).

that by bringing suit against Exxon in California—on behalf of the People of California, for claims under California law, pled in California Superior Court, and served in California—the San Francisco Appellants "purposefully availed" themselves of a "benefit, advantage, or profit" of *Texas'* jurisdiction.

Put another way, California public officials are no different than Texas public officials. Like Texas officials, California officials work on behalf of state residents, under the confines of state law, within state borders. They do not transcend settled notions of state sovereignty and interstate comity by enforcing their state's laws against a nonresident within their state borders. For this very reason, courts in Texas routinely refrain from exercising jurisdiction over public officials of other states for claims arising out of the enforcement of their respective state's laws against Texas residents—even when the effects may be felt in Texas. *See, e.g.*, *Stroman v. Wercinski*, 513 F.3d 476, 486-87 (5th Cir. 2008) (finding that the service of a cease and desist order on the plaintiff in Texas and communications with the Texas Real Estate Commission and Texas Attorney General's office were insufficient to establish minimum contacts); *Saxton v. Faust*, No. 3:09-CV-2458-K, 2010 WL 3446921, at *3 (N.D. Tex. Aug. 31, 2010) ("The Fifth Circuit recently rejected the idea that a nonresident government official may be haled into a Texas court simply because the effects of a ruling are felt in

Texas."); *Shia v. Boente*, No. CV H-17-1255, 2017 WL 6033741, at *5 (S.D. Tex. Nov. 16, 2017), *report and recommendation adopted*, No. CV H-17-1255, 2017 WL 6025546 (S.D. Tex. Dec. 5, 2017) ("The Fifth Circuit has rejected the idea that a nonresident government official may be haled into a Texas court simply because the effects of a ruling were felt in Texas."); *Stroman Realty, Inc. v. Grillo*, No. CIV.A. H-05-2066, 2006 WL 492458, at *4–5 (S.D. Tex. Feb. 28, 2006) (finding no personal jurisdiction over Illinois government official for enforcement of Illinois laws and regulations in Illinois against Texas-based business). For this same reason, the City and County of San Francisco and its officials do not become subject to specific jurisdiction in Texas merely by filing suit in California against Exxon, an international corporation with operations spanning the globe, but which happens to have a headquarters in Irving, Texas.

Accordingly, Exxon's proposed redefinition of "purposeful availment" adopted in Conclusion of Law No. 52 was based on an unconstitutional application of "direct-at-tort" jurisdiction, and so the district court's finding of minimum contacts must be reversed.

2. The Texas Supreme Court Has Rejected "Conspiracy" Jurisdiction (Issue No. 1(b)).

Conclusion of Law No. 52 continues by providing that purposeful availment is also met when "the object of the potential conspiracy is to suppress speech and corporate behavior in Texas." (3SUPPCR127). As with direct-a-tort jurisdiction,

Exxon's proposed theory of purposeful availment on the basis of participation in a "potential conspiracy" is similarly improper. The Texas Supreme Court has rejected the exercise of jurisdiction based on allegations pertaining to the conduct of alleged co-conspirators. In *National Industrial Sand*, the Texas Supreme Court disclaimed conspiracy jurisdiction, stating:

> [W]e decline to recognize the assertion of personal jurisdiction over a nonresident defendant based solely upon the effects or consequences of an alleged conspiracy with a resident in the forum state. Instead, we restrict our inquiry to whether [the nonresident] itself purposefully established minimum contacts such as would satisfy due process, and hold that it did not.

Nat'l Indus. Sand Ass'n v. Gibson, 897 S.W.2d 769, 773 (Tex. 1995); *see also M & F Worldwide Corp. v. Pepsi-Cola Metro. Bottling Co., Inc.*, 512 S.W.3d 878, 888 (Tex. 2017) (finding that allegations that nonresidents began conspiring to defraud the plaintiff during negotiations that took place in Texas were "akin to insufficient jurisdictional contacts" because "[t]he transactions giving rise to those torts simply did not occur in Texas.").

Here too, allegations concerning a nonresident's participation in any conspiracy will not satisfy purposeful availment unless the plaintiff has sufficiently alleged credible facts that show minimum contacts between the nonresident and Texas which are: (1) independent of the activities of the plaintiff or third parties; (2) purposeful; and (3) which show intent to obtain an advantage afforded by Texas' jurisdiction. *Searcy*, 496 S.W.3d at 67; *see also M & F*, 512 S.W.3d at 887

("The [nonresident] defendants' alleged conspiracy with the Texas-resident [] defendants, by itself, does not subject the [nonresident] defendants to Texas courts' jurisdiction."). In the absence of such contacts, Exxon failed to establish that the San Francisco Appellants are subject to this Court's jurisdiction, and so Conclusion No. 52 rests on an unconstitutional application of "conspiracy" jurisdiction and the district court's finding of minimum contacts must be reversed.[16]

C. In Addition to Its Legal Infirmities, the Allegation upon Which Exxon Relies—That San Francisco and Its Officials Conspired to Target Texas—Is Contradicted by the Great Weight of the Evidence and Should Be Set Aside (Issue No. 1(c)).

The district court's finding of specific personal jurisdiction was also in error because Exxon's allegation that the San Francisco Appellants conspired to target Texas is contradicted by the great weight and preponderance of the evidence in the record. *Cravens*, 488 S.W.3d at 891.

[16] Conclusion of Law No. 52 is bookended by a "*see, e.g.*," citation to two cases: *TV Azteca v. Ruiz*, 490 S.W.3d 29, 40 (Tex. 2016) and *Hoskins v. Ricco Family Partners, Ltd.*, Nos. 02-15-00249-CV, 02-15-00253-CV, 2016 WL 2772164, at *7 (Tex. App.—Fort Worth May 12, 2016, no pet.) (mem. op.). (3SUPPCR127). In both of these cases, however, jurisdiction was based on evidence that a nonresident engaged in business in Texas and obtained or sought to obtain real property in Texas—allegations that do not exist here. *See TV Azteca*, 490 S.W.3d at 49, 52 (finding jurisdiction because defendants "had a business office and production studio in South Texas," "physically entered into Texas to produce and promote their [defamatory] broadcasts, derived substantial revenue and other benefits by selling advertising to Texas businesses, and made substantial efforts to distribute their programs and increase their popularity in Texas") (internal quotations omitted); *Hoskins*, No. 02-15-00249-CV, 2016 WL 2772164, at *3, 7 (finding jurisdiction because defendants "fil[ed] a fraudulent lien in the Denton County, Texas public records" in order to obtain "title to real property located in Denton County").

1. There Is Insufficient Evidence for Finding No. 26 That the San Francisco Lawsuit Is Part of Any Alleged Conspiracy (Issue No. 1(c)).

As discussed above, the district court's exercise of specific jurisdiction was premised on Exxon's unconstitutional redefinition of purposeful availment, adopted in Conclusion No. 52, that the San Francisco Appellants "directed-a-tort" at Texas as part of a "potential conspiracy" to "suppress speech and corporate behavior" in Texas. (3SUPPCR127). To this end, Fact No. 26 provides that "following through on the strategy Mr. Pawa outlined in his memorandum to NextGen America, [. . .] San Francisco filed [a] public nuisance lawsuit[] against ExxonMobil and four other energy companies[.]" (3SUPPCR121).[17]

However, Exxon has not put forward any evidence that the San Francisco Appellants have taken any action, including filing a lawsuit, in furtherance of an alleged "strategy Mr. Pawa outlined in his memorandum to NextGen America." Instead, Exxon "has offered nothing more than speculation and innuendo" for this claim. *Old Republic Nat'l Title Ins. Co. v. Goldsmith*, No. 02-15-00207-CV, 2016 WL 7245700, at *6 (Tex. App.—Fort Worth Dec. 15, 2016), review granted (Dec. 15, 2017), aff'd sub nom. *Old Republic Nat'l Title Ins. Co. v. Bell*, No. 17-0245,

[17] Finding No. 26. "Following through on the strategy Mr. Pawa outlined in his memorandum to NextGen America, Potential Defendants Parker, Herrera, and the Cities of Oakland and San Francisco filed public nuisance lawsuits against ExxonMobil and four other energy companies, including Texas-based ConocoPhillips. Mr. Pawa represents the plaintiffs in those actions, and Ms. Parker and Mr. Herrera signed the complaints on behalf of the City of Oakland and the City of San Francisco, respectively. They used an agent to serve the complaints on ExxonMobil's registered agent in California, whose role is to transmit legal process to ExxonMobil in Texas."

2018 WL 2449360 (Tex. June 1, 2018) (affirming the grant of a special appearance in part because the plaintiff "offered no evidence to connect [the defendant] to" allegedly fraudulent financial disclosures prepared by third parties). The only "evidence" that Exxon points to in support of its allegation that the San Francisco Appellants acted in furtherance of an alleged "strategy" set forth by Mr. Pawa is the basic fact that Mr. Pawa "also signed the San Francisco Complaint." (CR44). But Exxon has offered no actual evidence to connect the San Francisco Appellants to the alleged NextGen Memorandum and similarly has offered nothing to connect the NextGen Memorandum to the present case.

For example, Exxon did not allege that San Francisco or its Officials has ever even seen, spoken about, or otherwise been associated with any such memorandum, nor did Exxon care even to elaborate precisely how Appellants' actions purport to "follow through" on its supposed directives. Moreover, neither Mr. Pawa's alleged conduct nor the alleged conduct of any other alleged "co-conspirator" is relevant to the question of whether personal jurisdiction exists over the San Francisco Appellants.[18] *See Nat'l Indus. Sand Ass'n,* 897 S.W.2d at 773 (declining "to recognize the assertion of personal jurisdiction over a nonresident

[18] Exxon's allegations with respect to Mr. Pawa are similarly irrelevant in that they assert jurisdiction based on a chain of speculative inferences about Mr. Pawa's alleged intent—a factor which merits no consideration in jurisdictional determinations—while also improperly attributing statements to Mr. Pawa that were made by other people. *See* Oakland Appellants' Brief at Section IV. A.

defendant based solely upon the effects or consequences of an alleged conspiracy"); *see also* Section II.B.ii., *supra*. Exxon cannot shirk its burden to plead sufficient allegations to permit the trial court to exercise personal jurisdiction over each *individual* potential defendant merely by wadding potential defendants together under a blanket of loosely-threaded allegations. *Trooper*, 444 S.W.3d at 610.

Accordingly, Finding No. 26 that the San Francisco Appellants followed through on a "strategy Mr. Pawa outlined in his memorandum to NextGen America" must be reversed because Exxon failed to provide any evidence for this allegation.

2. There Is Insufficient Evidence for Conclusion No. 50 and Finding Nos. 28, 29, and 31 That the San Francisco Complaint "Targets" Texas or Any Speech, Activities, or Property in Texas (Issue No. 1(c)).

The exercise of specific jurisdiction over the City and County of San Francisco and its Officials was also based on Exxon's allegation underlying Conclusion No. 50 that Appellants "initiated contact and created a continuing relationship with Texas" by "filing [a] complaint[] that expressly target[s] the speech, research, and funding decisions of ExxonMobil [. . .] to chill and affect speech, activities, and property in Texas" and by "using an agent to serve

ExxonMobil in Texas." (3SUPPCR127).[19] In support of this conclusion, Exxon proposed Finding Nos. 28, 29, and 31, which collectively allege that the San Francisco Complaint "expressly target[s]" Exxon's speech and "explicitly focuses on" Exxon's property in Texas. (3SUPPCR121-22).[20] But none of these findings are substantiated by the evidence in the record.

To be clear: the San Francisco complaint alleges public nuisance claims against Exxon and four other energy companies and requests an abatement fund remedy to pay for sea walls and other adaptation infrastructure. (CR972-78).

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[19] Conclusion No. 50. "All of the Potential Defendants initiated contact and created a continuing relationship with Texas by (i) developing, signing, approving, and/or filing complaints that expressly target the speech, research, and funding decisions of ExxonMobil and other Texas-based energy companies to chill and affect speech, activities, and property in Texas; and (ii) using an agent to serve ExxonMobil in Texas."

[20] The district court found that:

- Finding No. 27. "Each of the seven California complaints expressly target speech and associational activities in Texas."
- Finding No. 29. "The Oakland and San Francisco complaints, for example, target ExxonMobil's Texas-based speech, including a statement by 'then-CEO Rex Tillerson' at 'Exxon's annual shareholder meeting' in Texas, where they claim Mr. Tillerson allegedly 'misleadingly downplayed global warming's risks.' These complaints also target corporate statements issued from Texas, such as ExxonMobil's 'annual 'Outlook for Energy' reports,' 'Exxon's website,' and 'Exxon's 'Lights Across America' website advertisements.' In addition, the complaints target ExxonMobil's associational activities in Texas, including corporate decisions to fund various non-profit groups that perform climate change-related research that the complaints deem to be 'front groups' and 'denialist groups.'"
- Finding No. 30. "Each of the seven California complaints also explicitly focus on ExxonMobil property in Texas, including ExxonMobil's internal memos and scientific research. (Imperial Beach Compl. ¶¶ 86-88, 91-92, 95-97, 99-102; Marin County Compl. ¶¶ 86-88, 91-92, 95-97, 99-102; San Mateo Compl. ¶¶ 86-88, 91-92, 95-97, 99-102; Oakland Compl. ¶¶ 60-61; San Francisco Compl. ¶¶ 60-62; County of Santa Cruz Compl. ¶¶ 130-32, 135-37, 140-42, 144-47; City of Santa Cruz Compl. ¶¶ 129-31, 134-36, 139-41, 143-46.)"

Nowhere in the San Francisco Complaint is there any assertion, explicit or implicit, that Exxon's speech or activities should be restricted or any reference to tangible property in Texas. (*See* CR991-96). Texas is not mentioned even once in the San Francisco Complaint—precisely because Texas has no bearing on claims pled under California law in a California state court. Exxon's statements, on the other hand, are directly relevant to San Francisco's claim that Exxon has contributed to the public nuisance of global warming. That San Francisco's complaint *against Exxon* references statements made *by Exxon* is not evidence of an "express[]" intent to "target" Texas—it is an essential prerequisite of pleading under California law. If merely referencing a defendant's statements in a lawsuit against that defendant amounted to "targeting" them in the place where they reside, then virtually every plaintiff would become subject to the jurisdiction of any out-of-state defendant's residence simply by adequately pleading their case.

Moreover, the notion that the San Francisco Complaint "expressly targets" Texas quickly falls apart in view of the fact that Exxon is just one of multiple nonresidents against which Appellants brought suit—the majority of which do not reside in Texas. Of the five defendants named in the San Francisco Complaint, only two claim Texas residency; the remaining three reside in California, England, and the Netherlands. (CR980-82). As discussed above, Exxon cannot merely point

to its residence as evidence that the San Francisco Appellants have purposeful contacts with Texas or that the San Francisco Complaint "expressly targets" Texas.

As in *Estate of Hood*, this Court recently reversed a finding of specific jurisdiction over a defendant who mailed an allegedly tortious estate petition to the plaintiff, a Texas resident, as well as to multiple other nonresidents, in part because "had [the plaintiff] resided in one of those states rather than Texas, [the defendant] presumably would have interacted with him the exact same way." No. 02-16-00036-CV, 2016 WL 6803186, at *6 (Tex. App.—Fort Worth Nov. 17, 2016); *see also Searcy*, 496 S.W.3d at 74–75 (finding that the defendant's communications with the plaintiff's Texas-based employees did not support purposeful availment in part because the defendant would have conducted itself similarly regardless of the employee's location). In other words, that "[the plaintiff] happened to live in Texas [was a] circumstance[] over which [the defendant] had no control." *Hood*, No. 02-16-00036-CV, 2016 WL 6803186, at *6. That Exxon happens to have its headquarters in Texas is a circumstance over which the San Francisco Appellants have no control—and it is certainly not evidence that Appellants have "expressly target[ed]" Texas.

Furthermore, there is also no evidence for Conclusion No. 50 that the San Francisco Appellants "us[ed] an agent to serve ExxonMobil in Texas." (3SUPPCR127). In fact, this assertion is contradicted by the district court's own

Finding No. 26, which states that the San Francisco Appellants "used an agent to serve the complaint[] on ExxonMobil's registered agent in California[.]" (3SUPPCR121). Regardless, even if the San Francisco Appellants had served Exxon in Texas, that act is insufficient to confer jurisdiction over a nonresident in a Texas court. *See, e.g.*, *Wercinski*, 528 F.3d at 386-87.

Accordingly, Conclusion No. 50 and Finding Nos. 26, 28, 29, and 31 must be reversed because Exxon failed to provide any evidence for its allegation that the San Francisco Appellants "initiated contact and created a continuing relationship with Texas."

3. There Is Insufficient Evidence for Finding Nos. 35, 36, and 41 That a Discrepancy Between the San Francisco Complaint and San Francisco's Municipal Bond Disclosure Shows an "Improper Purpose" (Issue No. 1(c)).

The exercise of specific jurisdiction over Appellants was also based on Exxon's claim that the allegations in the San Francisco Complaint "are contradicted by [San Francisco's] municipal bond disclosure[.]" (3SUPPCR123). Specifically, Exxon argues that the San Francisco Complaint's allegation that Exxon's "conduct will continue to cause ongoing and increasingly severe sea level rise harms" contradicts "the municipal bonds issued by [. . .] San Francisco [which] disclaim knowledge of any such impending catastrophe" and thus Appellants must have "brought [the San Francisco lawsuit] for an improper

purpose."[21] (3SUPPCR127). But Exxon's claim is both irrelevant to the jurisdictional analysis and refuted by the record evidence.

To begin, whether Appellants allegedly acted with "improper purpose" is a determination on the merits which has no bearing on whether Appellants have minimum contacts with Texas. *See Michiana*, 168 S.W.3d at 791 ("[Jurisdictional] contacts are generally a matter of physical fact, while tort liability [. . .] turns on what the parties thought, said, or intended. Far better that judges should limit their jurisdictional decisions to the former rather than involving themselves in trying the

[21] The district court found that:

- Fact No. 35. "These allegations are contradicted by the Respondents' own municipal bond disclosures. While the California municipalities alleged in their complaints against the energy companies that the impacts of climate change were knowable, quantifiable, and certain, they told their investors the exact opposite. These contradictions raise the question of whether the California municipalities brought these lawsuits for an improper purpose."
- Fact No. 36. "For example, Oakland and San Francisco's complaints claim that ExxonMobil's and other energy company's 'conduct will continue to cause ongoing and increasingly severe sea level rise harms'to the cities. However, the municipal bonds issued by Oakland and San Francisco disclaim knowledge of any such impending catastrophe, stating the Cities are 'unable to predict' whether sea-level rise 'or other impacts of climate change' will occur, and 'if any such events occur, whether they will have a material adverse effect on the business operations or financial condition of the City" or the 'local economy.'"
- Fact No. 41. "Potential Defendants Pawa, Parker, Herrera, Beiers, Dedina, Lyon, Washington, McRae, Condotti, County of San Mateo, County of Marin, City of Imperial Beach, City of Santa Cruz, County of Santa Cruz, City of Oakland, and City of San Francisco either approved or participated in filing the lawsuits against the Texas energy sector. That conduct was directed at Texas-based speech, activities, and property. Prospective Witnesses Landreth, Reiskin, Maltbie, Hall, Hymel, Palacios, and Bernal approved the contemporaneous disclosures that contradict the allegations in the municipal complaints. Those witnesses, along with the Potential Defendants, are likely to have evidence pertaining to that contradiction."

latter."). Moreover, the City Attorney's office, the branch of government formally in charge of filing the San Francisco lawsuit, is not tasked with valuation of San Francisco's municipal bonds, which have nothing to do with the claims in the San Complaint. In any case, the allegation that San Francisco's municipal bond disclosure "disclaims any knowledge" of climate change apparently ignores the entire section in that very document entitled "Risk of Sea Level Changes and Flooding." (CR1785).

Accordingly, Finding Nos. 35, 36, and 41 that the San Francisco Appellants may have "brought [the San Francisco lawsuit] for an improper purpose" must be reversed because Exxon failed to provide any evidence for this allegation, which is irrelevant to the determination of specific personal jurisdiction.

II. Appellants Affirmatively Negated All Possible Bases of Jurisdiction (Issue Nos. 2 & 3).

Exxon's failure to plead that Appellants have any contacts with Texas dictates this Court's lack of personal jurisdiction over Appellants. But the denial of Appellants' special appearances was also in error because Appellants correspondingly negated jurisdiction. Indeed, Appellants affirmatively established that they lack minimum contacts with Texas, that subjecting them to jurisdiction in Texas offends fair play and substantial justice, and that the precedent cited by

Exxon fails to support the exercise of personal jurisdiction over Appellants in Texas.[22]

A. Appellants' Record Evidence Established That They Do Not Have Minimum Contacts with Texas (Issue No. 2).

"If the [potential] plaintiff fails to plead facts bringing the defendant within reach of the long-arm statute (i.e., for a tort claim, that the defendant committed tortious acts in Texas), the [potential] defendant need only prove that it does not live in Texas to negate jurisdiction." *Kelly*, 301 S.W.3d at 658–59. In addition to filing special appearances, Appellants submitted affidavit testimony establishing that none of the Appellants:

- Are a resident of Texas or are domiciled in Texas;
- Maintain an office, phone listing or post office box in Texas;
- Have a registered agent for service of process in Texas;
- Are licensed to practice law in Texas;
- Engage in routine sales or other profit making activities in Texas;
- Hold any interest in real or personal property in Texas;
- Incur or pay taxes in Texas or file tax returns in Texas;
- Have employees who reside in Texas or who regularly travel to Texas;
- Have any bank accounts in Texas;

[22] San Francisco first contested this Court's jurisdiction by and through the special appearance of its City Officials, Dennis J. Herrera and Edward Reiskin, filed with this Court on February 12, 2018. "It is fundamental that a suit against a state official is merely another way of pleading an action against the entity of which [the official] is an agent" *Texas A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 844 (Tex. 2007) (quoting *Kentucky v. Graham*, 473 U.S. 159, 166 (1985)) (internal quotations omitted). Claims anticipated against government officials in their official capacities, such as those alleged by Exxon in its Petition, "actually seek[] to impose liability against the governmental unit rather than on the individual specifically named and [are], in all respects other than name, ... a suit against the entity." *Id.*

- Have ever been party to a litigation in state or federal court in Texas;
- Have ever entered into a contract in Texas regarding the subjects raised by Exxon's Petition, apart from retaining Texas-based counsel in this proceeding;
- Have ever served Exxon with process in the state of Texas.

(CR 1823-25;1831-33;7172-73). Although Exxon's failure to plead any Texas-specific allegations means that Appellants need only prove that they are not residents of Texas to negate jurisdiction, the dearth of contacts between Appellants and Texas cannot be overstated. Appellants' affidavits are sufficient evidence that Appellants met their burden to negate jurisdiction.

To hold Appellants to answer in a court where they lack any contacts—let alone minimum contacts—violates due process. *Burger King*, 471 U.S. at 474-76 (1985); *BMC*, 83 S.W.3d at 79. Accordingly, Appellants' record evidence shows that they do not have minimum contacts with Texas, and the finding of specific jurisdiction over Appellants provided in Conclusion Nos. 45, 48, 50, 51, and 53 must be reversed.

B. Subjecting the San Francisco Appellants to Personal Jurisdiction in Texas Offends Fair Play and Substantial Justice (Issue No. 3).

In view of Exxon's failure to plead any Texas-specific allegations and Appellants' correspondent negation of any jurisdictional contacts with Texas, the district court's denial of Appellants' special appearances was also in error because it offends traditional notions of fair play and substantial justice. *Moncrief*, 414

S.W.3d at 154 (Tex. 2013); *Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 341 (Tex. 2009).

The Texas Supreme Court considers five factors to determine when personal jurisdiction over a nonresident will offend traditional notions of fair play and substantial justice: (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 judicial system's interest in the most efficient resolution of controversies; and (5) the shared interests of the several states in furthering fundamental substantive social policies. *Guardian Royal Guardian Royal Exch. Assur., Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 232 (Tex. 1991). Each factor counsels against jurisdiction here.

First, an exercise of personal jurisdiction would create an immediate and undue hardship on Appellants by forcing them to expend public funds to litigate in an unfamiliar jurisdiction seventeen-hundred miles away from their place of employment as municipal officials. Similarly, personal jurisdiction would unduly burden the city government of San Francisco, and by extension city residents, by demanding the valuable time and attention of two indispensable senior city officials, the City Attorney and the Director of Transportation.

Second, Texas has no legitimate interest in adjudicating a Rule 202 Petition initiated by Exxon, a multinational corporation with a global presence, against

California public city officials for the purported purpose of investigating vague claims allegedly relating to state and federal judicial proceedings initiated in California on behalf of Californians by a California public advocate.

Third, Exxon's interest in obtaining "convenient and effective relief," is exceedingly low given that Exxon could seek the same relief in California from a California court. This limited interest is underscored by the fact that Exxon has elected to seek said remedy via a Texas discovery mechanism that the Texas Supreme Court has repeatedly held is limited to remarkable circumstances. *See, e.g.*, *Trooper*, 444 S.W.3d at 611 ("We will not interpret Rule 202 to make Texas the world's inspector general."); *In re Does*, 337 S.W.3d 862, 865 (Tex. 2011) ("The intrusion into otherwise private matters authorized by Rule 202 outside a lawsuit is not to be taken lightly."); *Jorden*, 249 S.W.3d at 423 ("Rule 202 depositions are not now and never have been intended for routine use."). If Exxon believes the conspiracy theory that it espouses, and that deposing the San Francisco Head of Transportation and City Attorney about municipal bonds is an essential form of relief, that relief should be sought in California, where Exxon is currently engaged in litigation and is represented by California counsel.

Fourth and fifth, the interstate judicial system's interest in the most efficient resolution of controversies and the shared interests of the several states in furthering fundamental substantive social policies are best furthered by denial of

personal jurisdiction over California public officials in the interest of comity. As a general matter, courts should be wary of upsetting principles of federalism when considering personal jurisdiction over a non-forum public official, especially where there is no evidence of commercial benefit being accrued. *See Wercinski*, 513 F.3d at 482, 488; *see also Markland v. Bay Cty. Sherriff's Office*, No. 1:14-CV-572, 2015 WL 3430120, at *1 (E.D. Tex. May 28, 2015) (finding that personal jurisdiction over a Nevada Sherriff's Office would "offend traditional notions of fair play and substantial justice").

For these reasons, the exercise of personal jurisdiction over the San Francisco Appellants would offend traditional notions of fair play and substantial justice because "to allow discovery of a potential claim against a defendant over which the court would not have personal jurisdiction denies him the protection Texas procedure would otherwise afford." *Trooper*, 444 S.W.3d at 608. Accordingly, Conclusion Nos. 54-59 must be reversed.

C. The Precedent upon Which Exxon Relies Does Not Support a Texas Court's Exercise of Personal Jurisdiction over the City of San Francisco or Its Officials (Issue No. 2).

The complete absence of any contacts between Appellants and Texas is bolstered by Exxon's failure to identify any case or statute that supports its argument that personal jurisdiction in Texas is proper based on filing a lawsuit in a different state. Rather, the cases Exxon has cited confirm that, for a Texas court to

have personal jurisdiction over an alleged tortfeasor, the alleged tortfeasor must commit a tort in Texas or have other minimum contacts with Texas.

First, Exxon cited to several cases in which courts found that contracts signed or performed in a forum state could confer personal jurisdiction in that forum. *See, e.g., Alencar v. Shaw*, 323 S.W.3d 548 (Tex. App.—Dallas 2010, no pet.) (the defendant made trips and phone calls to Texas, entered into Texas contracts, and had an outstanding judgment against him in Texas); *Aviva Life & Annuity Co. v. Goldstein*, 722 F. Supp. 2d 1067 (S.D. Iowa 2010) (defendant's agent submitted application materials, sent payments, and delivered a letter contesting the contract's recession to the plaintiff in Iowa); *Fox Lake Animal Hosp. PSP v. Wound Mgmt. Techs., Inc.*, No. 02-13-00289-CV, 2014 WL 1389751 (Tex. App.—Fort Worth Apr. 10, 2014, pet. denied) (defendant executed Texas contracts with the plaintiff and accepted shares in a Texas corporation); *Olympia Capital Assocs., L.P. v. Jackson*, 247 S.W.3d 399 (Tex. App.—Dallas 2008, no pet.) (the Texas court declined to exercise jurisdiction even though the defendants had negotiated, executed, and performed a contract in Texas). Appellants have not signed any contracts with Texas residents—other than to retain counsel for representation in their special appearances in the instant suit—that could form the basis for any tort alleged by Exxon. (CR1823-25;1831-33;7172-73).

Second, Exxon cited to several cases in which courts found that mailings, email, internet message board postings, and telephone calls with forum-state residents could confer personal jurisdiction in that forum. *See, e.g., Bear Stearns Cos. v. Lavalle*, No. 3:00 Civ. 1900-D, 2001 WL 406217 (N.D. Tex. Apr. 18, 2001) (defendant engaged in a campaign of harassing emails and phone calls to Texas residents); *Glencoe Capital Partners II, L.P. v. Gernsbacher*, 269 S.W. 3d 157 (Tex. App.—Fort Worth 2008, no pet.) (defendants had a multi-year relationship with Texas residents via "many telephonic board meetings at regular intervals" in which defendants allegedly perpetuated fraud against the plaintiffs); *Long v. Grafton Exec. Search, LLC*, 263 F. Supp. 2d 1085 (N.D. Tex. 2003) (defendant engaged in numerous emails and phone calls with a Texas agency, was an international company, and most of the witnesses resided in Texas); *McVea v. Crisp*, No. SA-07-CA-353-XR, 2007 WL 4205648 (W.D. Tex. Nov. 5, 2007), aff'd, 291 F. App'x 601 (5th Cir. 2008) (defendants had a prior working relationship with the Texas plaintiff and posted comments on a Texas website about Texas history); *Middlebrook v. Anderson*, No. 3:04-CV-2294, 2005 WL 350578 (N.D. Tex. Feb. 11, 2005) (defendants specifically sent emails to individuals in Texas that contained the allegedly defamatory statements that gave rise to the dispute); *Paul Gillrie Institute, Inc. v. Universal Computer Consulting, Ltd.*, 183 S.W.3d 755 (Tex. App.—Houston [1st Dist.], 2005, no pet.) (the

defendants committed an act in Texas to secure a benefit by mailing a journal containing defamatory statements to fifty Texas-based customers). There is no evidence or allegation that the Appellants ever sent any Texas residents mail, email, internet message board postings, or telephone calls related to the filing of the lawsuit in California. Further, Appellants do not maintain any telephone listings, post office boxes, or properties in Texas and have not otherwise made any communications that could form the basis of any tort alleged by Exxon. (CR1823-25;1831-33;7172-73).

Third, Exxon cited to several cases in which courts found that a defendant physically coming to a forum state to do business could confer personal jurisdiction in that forum. *See, e.g.*, *Elton v. McClain*, No. SA-11-CV-00559-XR, 2011 WL 6934812 (W.D. Tex. Dec. 29, 2011) (defendants' allegedly fraudulent acts consisted of repeated visits to Texas to carry out solicitations from Texas residents and maintain ongoing relationships with Texas residents); *EMI Music Mex., S.A. de C.V. v Rodriguez*, 97 S.W.3d 847 (Civ. App.—Corpus Christi 2003, no pet.) (defendant sent its employees physically to Texas in connection with the actions forming the allegations in the underlying lawsuit); *Horizon Shipbuilding, Inc. v. BLyn II Holding, LLC*, 324 S.W.3d 840 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (defendant made misrepresentations while physically in Texas); *Infanti v. Castle*, No. 05-92-00061-CV, 1993 WL 493673 (Tex. App.—Dallas Oct.

28, 1993, no writ) (defendant entered into a contract with a Texas company for the sale of a truck, drove Texas roads to deliver the truck, and had an accident on a Texas highway). But Appellants have not physically come to Texas to do business that could form the basis of any tort alleged by Exxon. (CR1823-25;1831-33;7172-73).

Fourth, Exxon cited to several cases in which courts found that a defendant's use of the courts or the state's investigative power *in the forum* could confer personal jurisdiction in that forum. *See, e.g., Electronic Frontier Foundation v. Global Equity Management (SA) Pty Ltd.*, No. 17-cv-02053-JST, 2017 WL 5525835 (N.D. Cal. Nov. 17, 2017) (defendant invoked the power of the California courts to enforce an unlawful foreign injunction); *Hoskins v. Ricco Family Partners, Ltd.*, Nos. 02-15-00249-CV, 02-15-00253-CV, 2016 WL 2772164, at *7 (Tex. App.—Fort Worth May 12, 2016) (defendants falsified documents and filed them in Texas in order to cloud title to a Texas property); *Motor Car Classics, LLC v. Abbott*, 316 S.W.3d 223 (Tex. App.—Texarkana 2010, no pet.) (defendants admitted to jurisdictional facts that established systematic contacts with Texas when they failed to respond to plaintiff's requests for admissions); *Smith v. Cattier*, No. 05-99-01643, 2000 WL 893243 (Tex. App.—Dallas July 6, 2000, no pet.) (defendant committed an overt act in Texas when he engaged in an FBI interview in Texas). But Appellants have not used the Texas courts or the state's

investigative power that could form the basis of any tort alleged by Exxon. (CR1823-25;1831-33;7172-73).

Fifth, Exxon cited to several cases in which courts found that a defendant actually doing business in the forum state could confer personal jurisdiction in that forum. *See, e.g.*, *McFadin v. Gerber*, 587 F.3d 753 (5th Cir. 2009) (defendants purposefully directed an individual to make sales in Texas and that action gave rise to the asserted tort claim); *Spir Star AG v. Kimich*, 310 S.W.3d 868 (Tex. 2010) (defendant established a Texas corporation to boost its product sales and the lawsuit arose out of one such sale); *Trois v. Apple Tree Auction Ctr., Inc.*, No. 16-51414, 2018 WL 706517 (5th Cir. Feb. 5, 2018) (defendant attempted to secure financial benefit from the sale of Texas-based property and made misrepresentations related to that property); *TV Azteca v. Ruiz*, 490 S.W.3d 29 (Tex. 2016) (defendant sold broadcast advertisements to Texas companies and promoted its broadcast in Texas). Appellants have not done any business in Texas that could form the basis of any tort alleged by Exxon. (CR1823-25;1831-33;7172-73).

In short, Exxon's arguments attempt to conflate a cause (action by an alleged tortfeasor) with an effect (a result of said action), but the fact remains that the Appellants do not have minimum contacts with Texas and did not commit any act—much less a tortious one—in Texas.

III. Exxon Admitted That the Texas District Court Does Not Have Personal Jurisdiction to Order the Requested Discovery by Invoking the Uniform Interstate Depositions and Discovery Act.

Whereas Exxon urges this Court to affirm the exercise of specific jurisdiction over Appellants by a Texas court, Exxon argued below that "as with discovery in any civil suit, Exxon's depositions of [Appellants] would ultimately be guided by California's—not Texas's—procedures for conducting that nonparty discovery." (CR2028-29). However, California law expressly prohibits pre-suit discovery for "purposes of either ascertaining the possible existence of a cause of action or a defense to it, or of identifying those who might be made parties to an action not yet filed." Cal. Civ. Proc. Code § 2035.010(b); *see also* Cal. Judges Benchbook Civ. Proc. Discovery § 10.1 (explaining that California pre-suit discovery "differs from most other discovery procedures in that it may not be used for investigative purposes").

Here, Exxon seeks pre-suit discovery "to investigate its potential claims of abuse of process and constitutional torts, and to perpetuate testimony for a suit it anticipates filing in Texas in connection with those claims[.]" (CR64). Thus, by admitting that enforcement of the subpoenas sought after in its Petition requires an action by a California court pursuant to California Civil Procedure Code § 2029.300, Exxon concedes that Texas courts lack the required jurisdiction to order and compel the pre-suit depositions of Appellants.

IV. San Francisco and Its Officials Are Not "Nonresidents" Within the Meaning of the Texas Long Arm Statute (Issue No. 4).

The denial of Appellants' special appearances was also in error for the independent reason that the City and County San Francisco and Officials are not "nonresidents" within the meaning of the Texas long-arm statute when acting in their official capacities, as in the instant case. As a result, the district court's Conclusion No. 46 that "jurisdiction [. . .] would be permitted under the Texas long-arm statute" must be reversed.

The Texas long-arm statute defines a "'nonresident" as: (1) an individual who is not a resident of [Texas]; and (2) a foreign corporation, joint-stock company, association, or partnership." Tex. Civ. Prac. & Rem. Code Ann. § 17.041. Exxon's petition seeks pre-suit deposition testimony from Mr. Herrera, the San Francisco City Attorney, and Mr. Reiskin, San Francisco's Director of Transportation, in their official capacities as employees of respective branches of the San Francisco city government. (CR43-44). However, a government employee acting in an "official capacity," is not an "individual" for the purpose of acquiring jurisdiction because their conduct constitutes "state action." *See, e.g.*, *Wercinski*, 513 F.3d 476, 482 (5th Cir. 2008) (finding no personal jurisdiction over an Arizona state government official "in [. . .] her official capacity for enforcing Arizona statutes"); *Stroman Realty, Inc. v. Antt*, 528 F.3d 382 (5th Cir. 2008) (finding no personal jurisdiction over Florida and California state government officials for

official capacity claims regarding enforcement of Florida and California regulatory laws against a Texas advertiser); *Shia*, No. CV H-17-1255, 2017 WL 6033741, at *5 (dismissing official capacity claims against Eastern District of Virginia Federal judges and U.S. Attorneys on sovereign immunity grounds, and finding no personal jurisdiction over remaining individual capacity claims).[23]

The Fifth Circuit's seminal decision in *Wercinksi* offers germane guidance on this issue. In that case, the court affirmed the district court's dismissal of claims against the Commissioner of the Arizona Department of Real Estate for lack of specific jurisdiction, recognizing that the Commissioner was not an "individual" in her "official capacity" as a government employee because her conduct as such constituted "state action" outside the intended scope of Texas Civil Practice and Remedies Code Section 17.041(1). *See Wercinksi*, 513 F.3d at 482-83. Like the Arizona Commissioner in *Wercinksi*, San Francisco's City Attorney and Director of Transportation and are not "individuals" in their "official capacit[ies]" because their conduct constitutes "state action" to which the Texas long-arm statute does not apply.

[23] That the San Francisco's City Official's conduct constitutes "state action" beyond the reach of the long-arm statute is apparent in the jurisdictional allegations on which Exxon's claims are based. That is, while Mr. Herrera was responsible for filling and serving the San Francisco lawsuit in his capacity as the San Francisco City Attorney, the lawsuit itself was brought by the People of the State of California pursuant to California Code of Civil Procedure § 731. *California v. Purdue Pharma L.P.*, 2014 WL 6065907, at *3 (C.D. Cal. Nov. 12, 2014) ("the People of the State of California—and therefore the State itself—are the real party in interest" in public nuisance case by district attorney and county attorney on behalf of the People of the State of California).

Accordingly, San Francisco Appellants are not within the reach of the Texas long-arm statute as public officials acting in their official capacities, and so the district court's exercise of personal jurisdiction over Appellants based on Conclusion No. 46 must be reversed.

PRAYER

In light of the foregoing, the district court's Findings of Fact and Conclusions of Law must be set aside, and the district court's Order denying Appellants' special appearances must be reversed. Appellants pray that this Court grant the relief requested herein and for such additional relief as the Court deems proper.

Dated: July 6, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2018, a true and correct copy of the ***The City and County of San Francisco, Dennis J. Herrera, and Edward Reiskin's Brief of Appellants*** was served on all counsel of record by electronic mail or by another manner authorized by Texas Rule of Civil Procedure 21a.

/s/ Richard A. Kamprath
Richard A. Kamprath

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Tex. R. App. P. 9.4(i)(2)(A) because it contains 12,962 words on pages 13,032 excluding the parts of the brief exempted by Tex. R. App. P. 9.4(i)(1). This brief complies with the typeface and type style requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a typeface using Times New Roman 14 point font in text and Times New Roman 12 point font in footnotes.

/s/ Richard A. Kamprath
Richard A. Kamprath

Case No. 02-18-00106-CV

IN THE COURT OF APPEALS FOR THE
SECOND DISTRICT OF TEXAS
FORT WORTH

THE CITY OF SAN FRANCISCO, DENNIS J. HERRERA, IN HIS OFFICIAL CAPACITY AS CITY ATTORNEY FOR THE CITY OF SAN FRANCISCO, AND EDWARD REISKIN, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF TRANSPORTATION FOR THE SAN FRANCISCO MUNICIPAL TRANSPORTATION AGENCY
Appellants,

vs.

EXXON MOBIL CORPORATION
Appellee.

On Appeal from the 96th Judicial District Court, Tarrant County
The Hon. R.H. Wallace, Jr. Presiding

APPELLANT'S APPENDIX

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COUNSEL FOR APPELLANTS

TABLE OF CONTENTS

TAB 1

CAUSE NO. 096-297222-18

EXXON MOBIL CORPORATION,	§	IN THE DISTRICT COURT OF
	§	
	§	TARRANT COUNTY, TEXAS
Petitioner.	§	
	§	96th JUDICIAL DISTRICT

ORDER ON SPECIAL APPEARANCES

On March 8, 2018, the Court held an oral hearing on the special appearances filed in connection with this matter. Based on the pleadings, affidavits and attachments on file, and the applicable law, the Court has determined that the special appearances should be denied. Accordingly:

IT IS HEREBY ORDERED that the special appearances of **prospective witnesses** John Maltbie, Andy Hall, Matthew Hymel, Sabrina Landreth, Edward Reiskin, Carlos Palacios, and Martín Bernal are DENIED.

IT IS FURTHER ORDERED that the special appearances of **potential defendants and prospective witnesses** Matthew Pawa, John Beiers, Jennifer Lyon, Serge Dedina, Brian Washington, Barbara Parker, Dennis Herrera, Dana McRae, and Anthony Condotti; and **potential defendants** San Mateo County, City of Imperial Beach, Marin County, City of Oakland, City of San Francisco, County of Santa Cruz, and City of Santa Cruz are DENIED.

IT IS SO ORDERED.

Signed on Mar. 14, 2018.

R.H. Wallace Jr.

R.H. Wallace Jr., Presiding Judge

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TAB 2

CAUSE NO. 096-297222-18

EXXON MOBIL CORPORATION,	§	IN THE DISTRICT COURT OF
	§	
	§	TARRANT COUNTY, TEXAS
Petitioner.	§	
	§	96th JUDICIAL DISTRICT

~~[PROPOSED]~~ FINDINGS OF FACT AND CONCLUSIONS OF LAW

On January 8, 2018, Exxon Mobil Corporation ("ExxonMobil") filed a petition under Rule 202 of the Texas Rules of Civil Procedure seeking pre-suit discovery to evaluate potential claims and preserve evidence related to constitutional violations, abuse of process, and civil conspiracy. ExxonMobil's potential claims arise from an alleged conspiracy by California municipalities to suppress Texas-based speech and associational activities on climate policy that are out-of-step with the prevailing views of California public officials. According to ExxonMobil's petition, the California municipalities alleged facts in their lawsuits against the Texas energy sector that are contradicted by contemporaneous disclosures to municipal bond investors. ExxonMobil seeks pre-suit discovery on whether the lawsuits were brought in bad faith as a pretext to suppress Texas-based speech and associational activities by members of Texas's energy sector.

The potential defendants and prospective witnesses named in ExxonMobil's petition (collectively the "Respondents") challenged this Court's personal jurisdiction by filing special appearances under Rule 120a of the Texas Rules of Civil Procedure. ExxonMobil opposed. Both the Respondents and ExxonMobil filed affidavits and evidence in support of their respective positions. At a hearing held on March 8, 2018, the Court accepted all filed affidavits and evidence, as permitted by Rule 120a. Neither ExxonMobil nor the Respondents objected to the evidence at

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the hearing; the parties disputed only the legal significance of the uncontested factual record before the Court. On March 14, 2018, the Court denied all of the special appearances in light of the factual record.

On March 27, 2018, ExxonMobil filed a request for findings of fact and conclusions of law supporting this Court's denial of the special appearances. In accordance with Rule 297 of the Texas Rules of Civil Procedure, the Court makes the following findings of fact and conclusions of law based on the uncontested evidentiary record.

FINDINGS OF FACT

A. Parties

1. Petitioner ExxonMobil is a corporation incorporated under the laws of the State of New Jersey with its principal place of business in Texas. It formulates and issues statements about climate change from its headquarters in Texas. Most of its corporate records pertaining to climate change are located in Texas, and it engages in speech and associational activities in Texas.

2. Potential Defendants the County of San Mateo, the County of Marin, the City of Imperial Beach, the City of Santa Cruz, the County of Santa Cruz, the City of Oakland, and the City of San Francisco are cities or counties in California that do not maintain a registered agent, telephone listing, or post office box in Texas.

3. Potential Defendants Barbara J. Parker, Dennis J. Herrera, John Beiers, Serge Dedina, Jennifer Lyon, Brian Washington, Dana McRae, and Anthony Condotti are California municipal officers who do not reside in Texas or maintain offices or registered agents in Texas.

4. Potential Defendant Matthew F. Pawa is an attorney in private practice,

based in Massachusetts and serving as outside counsel for Potential Defendants the City of Oakland and the City of San Francisco. Mr. Pawa does not maintain an office or registered agent in Texas and is not licensed to practice law in Texas.

5. Prospective Witnesses Sabrina B. Landreth, Edward Reiskin, John Maltbie, Andy Hall, Matthew Hymel, Carlos Palacios, and Martín Bernal are California municipal officers who do not reside in Texas or maintain a registered agent, telephone listing, or post office box in Texas.

B. Preparatory Activities Directed at Texas-Based Speech

Pawa and Others Develop a Climate Change Strategy

6. In June 2012, Potential Defendant Pawa and a group ~~of special interests~~ RHW attended a conference in La Jolla, California, called the "Workshop on Climate Accountability, Public Opinion, and Legal Strategies." Peter Frumhoff, the Director of Science and Policy for the Union of Concerned Scientists; Naomi Oreskes, then a professor at the University of California, San Diego; and Richard Heede, of the Climate Accountability Institute, conceived of this workshop and invited Mr. Pawa to participate as a featured speaker.

7. During the conference, participants discussed strategies to "[w]in [a]cess to [i]nternal [d]ocuments" of energy companies, like ExxonMobil, that could be used to obtain leverage over these companies. The conference participants concluded that using law enforcement powers and civil litigation to "maintain[ ] pressure on the industry that could eventually lead to its support for legislative and regulatory responses to global warming." One commentator observed, "Even if your ultimate goal might be to shut down a company, you still might be wise to start out by asking for compensation for injured parties."

8. At the conference, the attendees also concluded that "a single sympathetic

state attorney general might have substantial success in bringing key internal documents to light."

9. At the conference, Potential Defendant Pawa targeted ExxonMobil's speech on climate change, and identified such speech as a basis for bringing litigation. Mr. Pawa claimed that "Exxon and other defendants distorted the truth" (as Mr. Pawa saw it) and that litigation "serves as a 'potentially powerful means to change corporate behavior.'" Myles Allen, another participant at the La Jolla conference, claimed that "the fossil fuel industry's disinformation has effectively muted a large portion of the electorate."

10. In January 2016, Mr. Pawa engaged participants ~~special interests~~ at the Rockefeller Family Fund offices in New York City to further solidify the "[g]oals of an Exxon campaign" that Mr. Pawa developed at the La Jolla conference. According to a draft agenda for the meeting, the goals of this campaign included: (i) "[t]o establish in [the] public's mind that Exxon is a corrupt institution that has pushed humanity (and all creation) toward climate chaos and grave harm"; (ii) "[t]o delegitimize [ExxonMobil] as a political actor"; (iii) "[t]o drive divestment from Exxon"; and (iv) "[t]o force officials to disassociate themselves from Exxon, their money, and their historic opposition to climate progress, for example by refusing campaign donations, refusing to take meetings, calling for a price on carbon, etc."

11. According to the draft agenda, Mr. Pawa and the other participants aimed to chill and suppress ExxonMobil's speech through "legal actions & related campaigns," including "AGs" and "Tort[]" suits. The draft agenda notes that participants planned to use "AGs" and "Tort[]" suits to "get[] discovery" and "creat[e] scandal."

State Attorneys General Adopt the Climate Change Strategy

12. On March 29, 2016, New York Attorney General Eric Schneiderman, Massachusetts Attorney General Maura Healey, and other state attorneys general, calling

themselves the "Green 20," held a press conference where they promoted regulating the speech of energy companies, including ExxonMobil, whom they perceived as an obstacle to enacting their preferred policy responses to climate change. Attorneys General Schneiderman and Healey discussed their investigations of ExxonMobil. They were also joined by former Vice President Al Gore, an investor in alternative energy companies.

13. At the press conference, Attorney General Schneiderman discussed the need to regulate the energy industry's speech on climate change, just as Potential Defendant Pawa had urged at La Jolla and at the Rockefeller meeting. He stated, "There is no dispute but there is confusion, and confusion sowed by those with an interest in profiting from the confusion and creating misperceptions in the eyes of the American public that really need to be cleared up." Attorney General Schneiderman denounced the "highly aggressive and morally vacant forces that are trying to block every step by the federal government to take meaningful action" and announced that "today, we're sending a message that, at least some of us—actually a lot of us—in state government are prepared to step into this battle with an unprecedented level of commitment and coordination."

14. Attorney General Healey similarly echoed themes from the strategy Mr. Pawa developed at La Jolla. She stated, "Part of the problem has been one of public perception," and she blamed "[f]ossil fuel companies" for purportedly causing "many to doubt whether climate change is real and to misunderstand and misapprehend the catastrophic nature of its impacts." Attorney General Healey announced that those who "deceived" the public "should be, must be, held accountable." In the next sentence, she disclosed that she too had begun investigating ExxonMobil and concluded, before receiving a single document from ExxonMobil, that there was a "troubling disconnect between what Exxon knew . . . and what the company and industry chose

to share with investors and with the American public."

15. At the press conference, former Vice President Al Gore praised Attorney General Schneiderman's efforts to "hold to account those commercial interests" who "are now trying to convince people that renewable energy is not a viable option"~~, a position that aligned well with Mr. Gore's financial stake in renewable energy companies.~~ Mr. Gore also focused on First Amendment-protected activities, condemning the "political and lobbying efforts" of the traditional energy industry.

State Attorneys General Conceal Ties to Pawa

16. At a closed-door meeting held before the March 2016 press conference, Mr. Pawa and Dr. Frumhoff conducted briefings for assembled members of the attorneys general's offices. Mr. Pawa, whose briefing was on "climate change litigation," has subsequently admitted to attending the meeting, but only after he and the attorneys general attempted and failed to conceal it.

17. The New York Attorney General's Office attempted to keep Mr. Pawa's involvement in this meeting secret. When a reporter contacted Mr. Pawa shortly after this meeting and inquired about the press conference, the Chief of the Environmental Protection Bureau at the New York Attorney General's Office told Mr. Pawa, "My ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event."

18. Similarly, the Vermont Attorney General's Office—another member of the "Green 20" coalition—admitted at a court hearing that when it receives a public records request to share information concerning the coalition's activities, it researches the party who requested the records, and upon learning of the requester's affiliation with "coal or Exxon or whatever," the office "give[s] this some thought . . . before [it] share[s] information with this entity."

State Attorneys General Target Texas-based Speech, Activities, and Property

19. Attorney General Schneiderman issued a subpoena and Attorney General Healey issued a civil investigative demand ("CID") to ExxonMobil requesting documents and communications concerning climate change and expressly referencing documents in ExxonMobil's possession in Texas.

20. The Massachusetts CID targets specific statements ExxonMobil and its executives made in Texas. For example, it requests documents concerning (i) a 1982 article prepared by the Coordination and Planning Division of Exxon Research and Engineering Company; (ii) former Chairman and CEO Rex Tillerson's "statements regarding Climate Change and Global Warming . . . at an Exxon shareholder meeting in Dallas, Texas"; (iii) ExxonMobil's 2016 Energy Outlook, which was prepared and reviewed in Texas; and (iv) internal corporate documents and communications concerning regulatory filings prepared at ExxonMobil's corporate offices in Texas. Many of the statements under government scrutiny pertain expressly to matters of public policy, such as remarks by ExxonMobil's former CEO that "[i]ssues such as global poverty [are] more pressing than climate change." The Massachusetts CID also seeks documents pertaining to ExxonMobil's associational activities, including its communications with 12 organizations derided as climate deniers and its reasons for associating with those entities.

21. The New York subpoena also targets ExxonMobil's speech and associational activities in Texas, including investor filings, the "*Outlook For Energy* reports," the "*Energy Trends, Greenhouse Gas Emissions, and Alternative Energy* reports," the "*Energy and Carbon - Managing the Risks Report*," and communications with trade associations and industry groups.

22. ExxonMobil filed a lawsuit seeking injunctive and declaratory relief against

Attorneys General Schneiderman and Healey. The Attorney General of the State of Texas, along with ten other state attorneys general, filed an amicus brief in support of ExxonMobil's claims, stating that a state official's power "does not include the right to engage in unrestrained, investigative excursions to promulgate a social ideology, or chill the expression of points of view, in international policy debates." Judge Ed Kinkeade of the U.S. District Court for the Northern District of Texas questioned whether the New York and Massachusetts Attorneys General were attempting to "further their personal agendas by using the vast power of government to silence the voices of all those who disagree with them."

C. Lawsuits Against the Texas Energy-Sector Are Directed at Texas-Based Speech, Activities, and Property

23. With the investigations of the state attorneys general underway, Mr. Pawa next promoted his La Jolla strategy to California municipalities, as potential plaintiffs in tort litigation that would be filed against energy companies, including ExxonMobil.

24. Mr. Pawa sent a memo outlining this strategy to NextGen America, the political action group funded by political activist Tom Steyer. The memo "summarize[d] a potential legal case against major fossil fuel corporations," premised on the claim that "certain fossil fuel companies (most notoriously ExxonMobil), have engaged in a campaign and conspiracy of deception and denial on global warming." Mr. Pawa emphasized that "simply proceeding to the discovery phase would be significant" and "obtaining industry documents would be a remarkable achievement that would advance the case and the cause."

25. Mr. Pawa also gave a number of speeches in which he targeted speech that ExxonMobil formulated and made in Texas. At a 2016 conference, for instance, Mr. Pawa accused ExxonMobil of "undert[aking] a campaign of deception and denial" and targeted a speech concerning climate change delivered by former CEO Tillerson in Texas. In the same speech, Mr.

Pawa also discussed the company's internal memos from the 1980s, where company scientists evaluated potential climate change impacts.

26. Following through on the strategy Mr. Pawa outlined in his memorandum to NextGen America, Potential Defendants Parker, Herrera, and the Cities of Oakland and San Francisco filed public nuisance lawsuits against ExxonMobil and four other energy companies, including Texas-based ConocoPhillips. Mr. Pawa represents the plaintiffs in those actions, and Ms. Parker and Mr. Herrera signed the complaints on behalf of the City of Oakland and the City of San Francisco, respectively. They used an agent to serve the complaints on ExxonMobil's registered agent in California, whose role is to transmit legal process to ExxonMobil in Texas.

27. Potential Defendants Lyon, Washington, Beiers, Condotti, McRae, the City of Imperial Beach, Marin County, San Mateo County, and the City and the County of Santa Cruz filed similar public nuisance complaints against ExxonMobil and other energy companies, including the following 17 Texas-based energy companies: BP America, Inc., Shell Oil Products Company LLC, Citgo Petroleum Corp., ConocoPhillips, ConocoPhillips Company, Phillips 66, Total E&P USA Inc., Total Specialties USA Inc., Eni Oil & Gas Inc., Anadarko Petroleum Corp., Occidental Petroleum Corp., Occidental Chemical Corp., Repsol Energy North America Corp., Repsol Trading USA Corp., Marathon Oil Company, Marathon Oil Corporation, and Apache Corp. Potential Defendants Beiers, Lyon, McRae, Washington, and Condotti signed these complaints. They used an agent to serve the complaints on ExxonMobil's registered agent in Texas.

28. Each of the seven California complaints expressly target speech and associational activities in Texas.

29. The Oakland and San Francisco complaints, for example, target ExxonMobil's Texas-based speech, including a statement by "then-CEO Rex Tillerson" at

"Exxon's annual shareholder meeting" in Texas, where they claim Mr. Tillerson allegedly "misleadingly downplayed global warming's risks." These complaints also target corporate statements issued from Texas, such as ExxonMobil's "annual 'Outlook for Energy' reports," "Exxon's website," and "Exxon's 'Lights Across America' website advertisements." In addition, the complaints target ExxonMobil's associational activities in Texas, including corporate decisions to fund various non-profit groups that perform climate change-related research that the complaints deem to be "front groups" and "denialist groups."

30. The City of Imperial Beach, Marin County, San Mateo County, and the City and County of Santa Cruz complaints similarly focus on ExxonMobil's Texas-based speech and associational activities. For example, they target (i) a 1988 memo from an Exxon public affairs manager that proposes "[r]esist[ing] the overstatement and sensationalization [sic] of potential greenhouse effect"; (ii) a "publication" that "Exxon released" in "1996" with a preface by former "Exxon CEO Lee Raymond"; and (iii) a 2007 Corporate Citizenship Report, issued from the company's Texas headquarters.

31. Each of the seven California complaints also explicitly focus on ExxonMobil property in Texas, including ExxonMobil's internal memos and scientific research. (Imperial Beach Compl. ¶¶ 86-88, 91-92, 95-97, 99-102; Marin County Compl. ¶¶ 86-88, 91-92, 95-97, 99-102; San Mateo Compl. ¶¶ 86-88, 91-92, 95-97, 99-102; Oakland Compl. ¶¶ 60-61; San Francisco Compl. ¶¶ 60-62; County of Santa Cruz Compl. ¶¶ 130-32, 135-37, 140-42, 144-47; City of Santa Cruz Compl. ¶¶ 129-31, 134-36, 139-41, 143-46.)

32. Several Potential Defendants also made statements shortly after filing the lawsuits focusing on Texas-based speech. In a July 20, 2017 op-ed for *The San Diego Union-Tribune*, Potential Defendant Dedina, the mayor of the City of Imperial Beach, justified his

participation in this litigation by accusing the energy sector of attempting to "sow uncertainty" about climate change. In a July 26, 2017 appearance at a local radio station, Mr. Dedina accused ExxonMobil of carrying out a "merchants of doubt campaign."

33. Oakland City Attorney Barbara Parker issued a press release soon after filing suit, asserting that "[i]t is past time to debate or question the reality of global warming." According to Parker, "[j]ust like BIG TOBACCO, BIG OIL knew the truth long ago and peddled misinformation to con their customers and the American public."

34. San Francisco City Attorney Dennis Herrera similarly accused "fossil fuel companies" of launching a "disinformation campaign to deny and discredit what was clear even to their own scientists: global warming is real," and pledged to ensure that these companies "are held to account."

35. These allegations, ~~which pervade Respondents' lawsuits,~~ are contradicted by the Respondents' own municipal bond disclosures. While the California municipalities alleged in their complaints against the energy companies that the impacts of climate change were knowable, quantifiable, and certain, they told their investors the exact opposite. These contradictions raise the question of whether the California municipalities brought these lawsuits for an improper purpose.

36. For example, Oakland and San Francisco's complaints claim that ExxonMobil's and other energy company's "conduct will continue to cause ongoing and increasingly severe sea level rise harms" to the cities. However, the municipal bonds issued by Oakland and San Francisco disclaim knowledge of any such impending catastrophe, stating the Cities are "unable to predict" whether sea-level rise "or other impacts of climate change" will occur, and "if any such events occur, whether they will have a material adverse effect on the

business operations or financial condition of the City" or the "local economy."

37. Similarly, according to the San Mateo Complaint, the county is "particularly vulnerable to sea level rise," with "a 93% chance that the County experiences a devastating three-foot flood before the year 2050, and a 50% chance that such a flood occurs before 2030." Despite this, nearly all of the county's bond offerings contain no reference to climate change, and 2014 and 2016 bond offerings assure that "[t]he County is unable to predict whether sea-level rise or other impacts of climate change or flooding from a major storm will occur."

38. The Imperial Beach Complaint alleges that it is vulnerable to "significant, and dangerous sea level rise" due to "unabated greenhouse gas emissions." Imperial Beach has never warned investors in its bonds of any such vulnerability. A 2013 bond offering, for instance, contains nothing but a boilerplate disclosure that "earthquake . . . , flood, fire, or other natural disaster, could cause a reduction in the Tax Revenues securing the Bonds . . . ."

39. The Marin County complaint warns that "there is a 99% risk that the County experiences a devastating three-foot flood before the year 2050, and a 47% chance that such a flood occurs before 2030." It also asserts that "[w]ithin the next 15 years, the County's Bay-adjacent coast will endure multiple, significant impacts from sea level rise." However, its bond offerings do not contain any specific references to climate change risks, noting only, for example, that "natural or manmade disaster[s], such as earthquake, flood, fire, terrorist activities, [and] toxic dumping" are potential risks.

40. The Santa Cruz complaints warn of dire climate change threats. The county alleges that there is "a 98% chance that the County experiences a devastating three-foot flood before the year 2050, and a 22% chance that such a flood occurs before 2030." The Santa Cruz City Complaint similarly warns that "increased flooding and severe storm events associated with

climate change will result in significant structural and financial losses in the City's low-lying downtown." But none of the city or county bond offerings mention these dire and specific warnings. A 2016 county disclosure merely states that areas within the county "may be subject to unpredictable climatic conditions, such as flood, droughts and destructive storms." A 2017 city bond offering has a boilerplate message that,"[f]rom time to time, the City is subject to natural calamities," including flood and wildfire.

41. Potential Defendants Pawa, Parker, Herrera, Beiers, Dedina, Lyon, Washington, McRae, Condotti, County of San Mateo, County of Marin, City of Imperial Beach, City of Santa Cruz, County of Santa Cruz, City of Oakland, and City of San Francisco either approved or participated in filing the lawsuits against the Texas energy sector. That conduct was directed at Texas-based speech, activities, and property. Prospective Witnesses Landreth, Reiskin, Maltbie, Hall, Hymel, Palacios, and Bernal approved the contemporaneous disclosures that contradict the allegations in the municipal complaints. Those witnesses, along with the Potential Defendants, are likely to have evidence pertaining to that contradiction.

CONCLUSIONS OF LAW

42. Under Rule 202 of the Texas Rules of Civil Procedure, a proper court may allow discovery of a potential claim if the court would have personal jurisdiction over the potential defendants to the anticipated suit.

43. Because this Court is not required to have personal jurisdiction over prospective witnesses who are not potential defendants, the special appearances of Prospective Witnesses Landreth, Reiskin, Maltbie, Hall, Hymel, Palacios, and Bernal are denied.

44. This Court would not have general personal jurisdiction over the Potential Defendants to the anticipated suit.

45. This Court could exercise specific personal jurisdiction over the Potential Defendants for the anticipated claims of constitutional violations, abuse of process, and civil conspiracy.

46. The exercise of personal jurisdiction over the Potential Defendants to the anticipated action would be permitted under the Texas long-arm statute, which allows a Texas court to exercise jurisdiction over nonresidents who commit a tort in whole or in part in Texas. Tex. Civ. Prac. & Rem. Code § 17.042(2). Each of the Potential Defendants is a nonresident within the meaning of the long-arm statute.

47. A violation of First Amendment rights occurs where the targeted speech occurs or where it would otherwise occur but for the violation. ExxonMobil exercises its First Amendment rights in Texas, and Texas is the site of the speech challenged by the Potential Defendants' lawsuits. The anticipated claims therefore concern potential constitutional torts committed in Texas.

48. Exercising jurisdiction over the Potential Defendants in the anticipated action would comport with due process because the potential claims arise from minimum contacts initiated by the Potential Defendants which purposefully target Texas, including speech, activities, and property in Texas.

49. Mr. Pawa initiated contact and created a continuing relationship with Texas by, among other activities, (i) initiating a plan to use litigation to change corporate behavior of Texas-based energy companies at the La Jolla conference; (ii) engaging with the Rockefeller Family Fund to solidify and promote the goal of delegitimizing ExxonMobil as a political actor; (iii) instigating state attorneys general to commence investigations of ExxonMobil in order to obtain documents stored in Texas; and (iv) soliciting and actively promoting litigation by

California municipalities against the Texas energy industry, including ExxonMobil, to target Texas-based speech and obtain documents in Texas.

50. All of the Potential Defendants initiated contact and created a continuing relationship with Texas by (i) developing, signing, approving, and/or filing complaints that expressly target the speech, research, and funding decisions of ExxonMobil and other Texas-based energy companies to chill and affect speech, activities, and property in Texas; and (ii) using an agent to serve ExxonMobil in Texas.

51. The Potential Defendants' contacts were deliberate and purposeful, and not random, fortuitous, or attenuated.

52. Purposeful availment is satisfied where Texas is the focus of the Potential Defendants' activities and where the object of the potential conspiracy is to suppress speech and corporate behavior in Texas. *See, e.g.*, *TV Azteca* v. *Ruiz*, 490 S.W.3d 29, 40 (Tex. 2016); *Hoskins* v. *Ricco Family Partners, Ltd.*, Nos. 02-15-00249-CV, 02-15-00253-CV, 2016 WL 2772164, at *7 (Tex. App.—Fort Worth May 12, 2016).

53. Based on the foregoing findings of fact, ExxonMobil's potential claims of First Amendment violation, abuse of process, and civil conspiracy would arise from the Potential Defendants' contacts with Texas.

54. Exercising jurisdiction over the Potential Defendants for the potential claims would comport with traditional notions of fair play and substantial justice.

55. It would not be burdensome for the Potential Defendants to litigate ExxonMobil's potential claims in Texas, and the Potential Defendants have failed to provide substantial evidence of burden.

56. Texas has a substantial state interest in adjudicating claims concerning

constitutional torts committed in Texas against Texas residents.

57. ExxonMobil has an inherent interest in obtaining convenient and effective relief by litigating its potential claims in Texas.

58. Exercising jurisdiction in this potential action would comport with the interstate judicial system's interest in obtaining the most efficient resolution of controversies because ExxonMobil's anticipated action encompasses claims and parties that are not part of the Potential Defendants' California nuisance suits and ExxonMobil has objected to the exercise of personal jurisdiction in those suits.

59. Exercising jurisdiction in this potential action would support the shared interest of the several states in furthering substantive social policies because ExxonMobil's anticipated action concerns a conspiracy to suppress and chill speech and associational activities of the Texas energy sector. Texas has an inherent interest in exercising jurisdiction over actions that concern the infringement of constitutional rights within its borders.

60. To the extent the Court's findings of fact are construed by a reviewing court to be conclusions of law or vice-versa, the incorrect designation shall be disregarded and the specified finding and/or conclusion of law shall be deemed to have been correctly designated herein.

SIGNED this 24th day of April 2018.

R.H. Wallace Jr., Presiding Judge