

*In the  
First Court of Appeals*

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\_\_\_\_\_  
No.: 01-16-00943-CV

\_\_\_\_\_  
**Omar Salgado, Appellant,**  
v.  
**OmniSource Corp., Appellee,**

-----  
**On Appeal from the 295th District Court Harris County, Texas**  
**Trial Court Cause No. 2015-25643**  
-----

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## ORAL ARGUMENT

Oral argument is not requested.

### IDENTITIES OF PARTIES AND COUNSEL

Pursuant to TEX. R. APP. P. 38.1(a), a complete list of the names of all

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Judge Carolyn Baker	259 <sup>th</sup> Judicial District Harris County, TX	Trial Judge

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## STATEMENT OF THE CASE

Appellant Omar Salgado filed suit against CS Metals, Inc., on May 4, 2015, for negligence in relation to Salgado's November 2014 work-site injury. CS Metals is registered to do business in Texas. (Plaintiff's Amended Petition, p. 1). The work-site injury alleged in his complaint occurred at a job site in Morgan City, Louisiana. (Plaintiff's Amended Petition, p. 2).

On February 12, 2016, Salgado amended his petition to include OmniSource as a defendant. Pursuant to Rule 120(a) of the Texas Rules of Civil Procedure, Defendant OmniSource moved to dismiss on the basis that it is not subject to jurisdiction in Texas. That motion was granted on November 8, 2016.

## STATEMENT OF FACTS

OmniSource sells processed scrap metal. OmniSource is incorporated in Indiana with its principal place of business in Indiana. (Exhibit 1, Poinsett Affidavit, at p.2). OmniSource has never been domiciled in the State of Texas. *Id.* OmniSource does not own any property in the State of Texas. *Id.* OmniSource does not derive any income from Texas. *Id.* OmniSource does not have any bank accounts in Texas. *Id.* OmniSource does not have any employees or agents in Texas. *Id.* OmniSource has never maintained a telephone number, office, or place of business in Texas. *Id.*

OmniSource and CS Metals signed an Agreement for Services ("the

Agreement”) on April 15, 2014, whereby CS Metals agreed to perform work as a contractor of OmniSource. (Exhibit 2, Agreement for Services, p. 1). Pursuant to the Agreement, OmniSource and CS Metals acknowledged that all workers were “at all times” employees of CS Metals. (Exhibit 2, Agreement for Services, ~[ 3(c)). Further, CS Metals agreed that “OmniSource has not and will not assume any duty of care for or with respect to [CS Metals] or [its] employees.” (Exhibit 2, Agreement for Services, ~ 3(e)). Additionally, both parties agreed that CS Metals was to be solely responsible for compliance with OSHA and other safety requirements. (Exhibit 2, Agreement for Services, ~ 4). Finally, CS Metals agreed to “defend, indemnify, and hold [OmniSource] harmless from and against any and all losses, claims, suits, judgments, liabilities, penalties, damages, costs, or expenses” arising from CS Metals’s services. (Exhibit 2, Agreement for Services, ~ 6).

Salgado is and has at all relevant times been an employee of CS Metals. (Plaintiff's Amended Petition , p. 2). Plaintiff was injured while he was performing job duties as an employee of CS Metals. This injury occurred on a job site in Morgan City, Louisiana. (Plaintiff s Amended Petition , p. 2). Salgado is not, and has never been, an employee of OmniSource.



## SUMMARY OF ARGUMENT

Salgado argues that the decision below should be reversed because 1) OmniSource negligently entered into a contract with CS Metals, a Texas resident, which CS Metals's agent apparently negotiated and signed from her home in Texas; and 2) OmniSource files Texas Franchise Tax Reports, previously had a registered agent in the state, and was engaged in litigation in Harris County, Texas, thirty years ago. Strikingly, Salgado does not cite a single case in support of these contentions.

The decision should be affirmed because 1) this particular contact with a Texas resident does not show that OmniSource "purposefully directed" its activities at the forum, or that the alleged injuries "arise out of or relate to" OmniSource's activities nominally directed at the forum, and 2) corporate certificates of authority, not franchise reports, are indicative of general business operations in the state, and a former registered agent and thirty-year-old court case are plainly not sufficient to establish general jurisdiction.

## ARGUMENT

### A. Standards Of Review

This Court reviews de novo the trial court's order granting a special appearance based on the absence of personal jurisdiction. *Moki Mac River*

*Expeditions v. Drugg*, 221 S.W.3d 569, 574 (Tex. 2007); *see also Kelly v. Gen. Interior Constr., Inc.*, 301 S.W.3d 653, 657 (Tex. 2010). However, the analysis of whether personal jurisdiction exists requires the trial court to resolve any factual disputes before applying the jurisdictional formula. *Am. Type Culture Collection, Inc., v. Coleman*, 83 S.W.3d 801, 805–06 (Tex. 2002). Where, as here, the trial court does not file findings of fact and conclusions of law in support of its special appearance ruling, the Court infers all facts necessary to support the judgment. *Id.*

### **B. Applicable Standards**

To establish personal jurisdiction over a non-resident corporation, two preconditions must be met: (1) the Texas long-arm statute must authorize the exercise of jurisdiction over the non-resident; and (2) the assertion of jurisdiction over the non-resident must comport with the Fourteenth Amendment due process clause. *Schlobohrn v. Schapiro*, 784 S.W.2d 355,356 (Tex. 1990); *see also Jones v. PettyRay Geophysical, Geosource Inc.*, 954 F.2d 1061, 1067 (5th Cir. 1992). The Texas long-arm statute, Texas Civil Practice & Remedies Code § 17.042, provides as follows:

In addition to other acts that may constitute doing business, a nonresident does business in this state if the nonresident:

- (1) contracts by mail or otherwise with a Texas resident and either party is to perform the contract in whole or in part in this state;
- (2) commits a tort in whole or in part in this state; or
- (3) recruits Texas residents, directly or through an intermediary located in this state, for employment inside or outside this state.

Because Texas's long-arm statute has been held to extend to the limits of due process, the Court must determine whether jurisdiction over the defendant is constitutionally permissible. *PettyRay Geophysical*, at 1067-68. Over the years, the analysis of what is constitutionally permissible has been refined to the following two elements: (1) the defendant must have purposely availed itself of the benefits and protections of the forum by establishing "minimum contacts" with that state such that it would reasonably anticipate being hailed into court there; and (2) the exercise of jurisdiction over the defendant must not offend traditional notions of fair play and substantial justice. *Id.* at 1068.

The "minimum contacts" test can only be met by contracts giving rise to either specific or general jurisdiction. *Johnston*, 523 F.3d at 610. Specific jurisdiction exists when the cause of action arises from the non-resident defendant's contacts with the forum state. *Gundle Lining Constr. Corp. v. Adams County Asphalt, Inc.*, 85 F.3d 201, 205 (5th Cir. 1996). General

jurisdiction exists when the non-resident defendant's contacts with the forum state, even if unrelated to the cause of action, are continuous, systematic, and substantial. *Johnson*, 523 F.3d at 610. In either context, the outcome depends on the totality of the circumstances; no single factor is determinative. *Stuart v. Spademan*, 772 F.2d 1185, 1192 (5th Cir. 1985).

**C. Salgado Failed To Show That OmniSource Established Minimum Contacts With the State of Texas and Therefore The Decision Should be Affirmed**

**1. No Specific Personal Jurisdiction Exists Over OmniSource in Texas**

**a. Jurisdictional Formula**

Salgado argues that OmniSource should be subject to specific jurisdiction in Texas because OmniSource “knowingly recruited Texas residents for employment.” Appellant Br. at 9. This argument is a nonstarter, because Salgado confuses the contract for service (in Louisiana) between OmniSource and CS Metals with a contract for employment, which it is not. OmniSource neither recruited nor has employees in Texas, and did not employ anyone having anything to do with Salgado's allegations.

The analysis can end there, but for purposes of the jurisdictional formula, Salgado clearly fails the specific-jurisdiction standard. Courts focus on two prongs when considering specific jurisdiction: (i) purposeful availment and (ii) relatedness. *See Retamco Operating, Inc. v. Republic*

*Drilling Co.*, 278 S.W.3d 333, 338 (Tex. 2009). Purposeful availment is the touchstone of jurisdictional due process—it is “essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 784 (Tex. 2005) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). The purposeful availment prong analyzes (i) the defendant’s own actions but not the unilateral activity of another party; (ii) whether the defendant’s actions were purposeful rather than random, isolated, or fortuitous; and (iii) whether the defendant sought some benefit, advantage, or profit by availing itself of the privilege of doing business in Texas. *Jani–King Franchising Inc. v. Falco Franchising, S.A.*, No. 05–15–00335–CV, 2016 WL 2609314, at \*3 (Tex. App.–Dallas May 5, 2016, no pet.) (citing *Michiana*, 168 S.W.3d at 785). The defendant’s activities must justify a conclusion that the defendant could reasonably anticipate being called into a Texas court. *Am. Type Culture*, 83 S.W.3d at 806 (citing *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

The “relatedness” prong analyzes the relationship among the defendant, the forum, and the litigation. *Searcy v. Parex Res., Inc.*, 496 S.W.3d 58, 67 (Tex. 2016). For a nonresident defendant’s forum contacts to

support an exercise of specific jurisdiction, there must be a “substantial connection between those contacts and the operative facts of the litigation.” *Cornerstone Healthcare Grp. v. Nautic Management*, VI L.P. 493 S.W.3d 65, 73–74 (Tex. 2016); *Moncrief Oil*, 414 S.W.3d at 156.

Thus, Salgado must show that OmniSource “purposefully directed” its activities at the forum, and the litigation must result from alleged injuries that “arise out of or relate to” the defendant’s activities directed at the forum. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-73 (1985); *Aviles v. Kunkle*, 978 F.2d 201, 204 (5th Cir. 1992).

**b. Merely Contracting With A Texas Entity Is Not Purposeful Availment**

Salgado contends that the contract alone satisfies the specific jurisdiction standard, but the law is clear that contracting with a Texas resident does not of itself constitute purposeful availment. *See Univ. of Ala. v. Suder Found.*, No. 05–16–00691–CV, 2017 WL 655948, at \*6 (Tex. App.–Dallas Feb. 17, 2017, no pet. h.). This is particularly true when the contract is to be performed out-of-state. *Mitchell v. Freese & Goss, PLLC*, No. 05–15–00868–CV, 2016 WL 3923924, at \*4 (Tex. App.–Dallas July 15, 2016, pet. pending) (“Merely contracting with a Texas entity is insufficient to constitute purposeful availment for jurisdictional purposes, especially when the contractual obligations are performed outside the forum state.”).

*See also Ahrens v. DeAngelli, P.L.L.C. v. Flinn*, 318 S.W.3d 474, 484 (Tex. App.–Dallas 2010, pet. denied); *Counter Intelligence, Inc. v. Calypso Water Jet Sys., Inc.*, 216 S.W.3d 512, 518 (Tex. App.–Dallas 2007, pet. denied).

Instead, a contract’s significance in a minimum contacts analysis turns on (i) prior negotiations; (ii) contemplated future consequences; (iii) terms of the contract; and (iv) the actual course of dealing. *See Gustafson v. Provider HealthNet Servs., Inc.*, 118 S.W.3d 479, 483 (Tex. App.–Dallas 2003, no pet.) (citing *Burger King Corp.*, 471 U.S. at 479.) Salgado does not present facts to support a finding of specific jurisdiction under this analysis, and, even if Salgado had presented facts to indicate that OmniSource was contemplated a sustained contractual relationship with CS Metals, jurisdiction still would not be found because the contract in this case is centered around “operations outside Texas.” *McFadin v. Gerber*, 587 F.3d 753,760 (5th Cir. 2009); *Ashdon, Inc. v. Gary Brown & Assocs., Inc.*, 260 S.W.3d 101, 113 (Tex. App.–Houston [1st Dist.] 2008, no pet.) (contract calling for performance outside Texas will not subject nonresident to jurisdiction there)

**c. The Fact That The Contract Was Negotiated Through Communications with Texas Residents Is Not Enough**

Salgado contends that the communications between a CS Metals agent in Texas and OmniSource satisfies the minimum contacts analysis. Yet, courts have time and again held that even numerous telephone and facsimile communications with people in Texas relating to an alleged contract do not establish minimum contacts. *See KC Smash 01, LLC v. Gerdes, Hendrichson, Ltd, L.L.P.*, 384 S.W.3d 389, 393 (Tex. App.–Dallas 2012, no pet.) (contacts via phone and email and “the sending of payments” to a party in Texas were not contacts demonstrating purposeful availment); *Olympia Capital Assoc., L.P. v. Jackson*, 247 S.W.3d 399 (Tex. App.–Dallas 2008, no pet.) (“The existence of a contract between the nonresident defendant and a resident of the forum and engaging in communications related to the execution and performance of that contract are insufficient to establish the minimum contacts necessary to support the exercise of specific personal jurisdiction over the nonresident defendant.”); *Alenia Spazio, S.p.A. v. Reid*, 130 S.W.3d 201, 213 (Tex. App.–Houston [14th Dist.] 2003, pet. denied) (“numerous telephone and facsimile communications with people in Texas relating to an alleged contract do not establish minimum contacts”).



**d. Salgado Made No Showing That the Contract Is Related to the Alleged Injury**

Even if it can be said that OmniSource “purposefully directed” its activities at the State of Texas by entering into an agreement with CS Metals, Salgado failed to allege that OmniSource committed any harmful acts in Texas. Rather, Salgado admitted in his Amended Petition that his alleged injuries occurred in Morgan City, Louisiana, not in Texas. (Plaintiffs Amended Petition, p. 2). Even when it entered into the Agreement with CS Metals, OmniSource would have had no reason to believe that it would be held responsible in a Texas court for an injury to one of CS Metals’s employees that occurred in Louisiana. Because Salgado failed to plead facts to support a finding of specific jurisdiction, the trial court’s judgment should be affirmed.

**2. No General Personal Jurisdiction Exists Over OmniSource in Texas**

**a. “Doing Business”**

Without clarifying whether he is arguing for specific or general jurisdiction, Salgado claims that the judgment below should be reversed because OmniSource “does business in Texas.” App. Brief at 6. Salgado contends, without any support in the caselaw, that OmniSource’s contract

with CS Metals alone, which CS Metals’s agent apparently negotiated and signed from her home in Texas, is enough to establish sufficiently “systematic, continuous, and substantial” contact with Texas to justify general jurisdiction over the company. It appears that Salgado is arguing for general jurisdiction, yet, general jurisdiction must be assessed by evaluating a defendant’s contacts with the forum over a reasonable number of *years*, up to the date the suit was filed. *Johnston*, 523 F.3d at 610. The contacts must be reviewed as a whole, and not on an individual basis, and certainly this one isolated contract for a specific and defined short-term project to be executed outside of Texas does not qualify. *Id.*

OmniSource recognizes that the United States Supreme Court has stated that a single contact can support jurisdiction, but that contact must create a “substantial connection.” *Burger King*, 471 U.S. at 475 n. 18 (quoting *World–Wide Volkswagen*, 444 U.S. at 299). Indeed, it is “difficult to establish general jurisdiction[,]” *Citrin Holdings, LLC v. Minnis*, 305 S.W.3d 269, 279 (Tex. App.Houston [14th Dist.] 2009), and time and again Texas courts have declined jurisdiction on the basis of a single contract. For example, in *Michiana*, 168 S.W.3d at 784–85, the Texas Supreme Court concluded that a single product sale by a non-resident to a Texas resident, negotiated and executed by phone as in the case *sub judice*, was not a

purposeful contact sufficient to satisfy the due-process minimum-contacts test. *Id.* at 781, 785–86. Like OmniSource, Michiana did not advertise in Texas and undertook no affirmative efforts to solicit business there. *Id.* The Court held that the alleged commission of a tort by making misrepresentations during a phone call was insufficient, by itself, to establish jurisdiction. *Id.* at 791–92. Such a test, the Court reasoned, would improperly focus the analysis on the form of the action chosen by the plaintiff rather than on the defendant's efforts to avail itself of the forum. *Id.* at 791. The Court also held that, standing alone, delivery of the single RV to Texas to accommodate Holten was a similarly deficient basis for jurisdiction. *Id.* at 786–88.

**b. Franchise Reports, a Former Registered Agent, and a Thirty-Year-Old Court Case**

Salgado argues that OmniSource is subject to general jurisdiction because it files Texas Franchise Reports, formerly had a registered agent in the state, and participated in a court case in Texas thirty years ago. It is OmniSource's position that these contacts are random and isolated events, and the law is clear that a nonresident defendant will not be haled into a jurisdiction solely based on contacts that are random or isolated.

Under Texas corporation law, foreign corporations are not deemed to be transacting business until they obtain a certificate of authority to engage

in transactions. Tex. Bus. Corp. Act. Ann. art. 8.0 1, §§ B(7) , B(8) , B(12). The mere filing of Texas Franchise Reports is too far afield from a certificate of authority to establish general jurisdiction, and this series of reports is too random and isolated to establish the general presence required.

The same result is reached in the analysis of the former registered agent and thirty-year-old court case. OmniSource is not currently maintaining a registered agent in Texas and is not involved in litigation in the State, nor did it have an agent or engage in litigation in the recent past. These contacts are not at all systematic or continuous and therefore could not support a finding of general jurisdiction. Quite simply, the law requires much more. *Primera Vista S.P.R. de R.L. v. Banca Serfin, S.A. Institucion de Banca Multiple Grupo Financiero Serfin*, 974 S.W.2d 918 (Tex. App.—El Paso 1998) (concluding that Texas courts did not have general jurisdiction over Mexican bank was supported by evidence that Bank was resident of Mexico, had its principal offices in Mexico, did not hold certificate to do business in Texas, was not required to and did not maintain registered agent for service of process in Texas, did not maintain offices, agents, servants, or employees in Texas, and did not derive any income in Texas apart from interest on its Texas bank accounts); *Weisskopf v. United Jewish Appeal-Fed'n of Jewish Philanthropies of N.Y., Inc.*, 889 F. Supp. 2d 912 (S.D. Tex.

2012) (Texas court lacked personal jurisdiction over New York based non-profit organization; organization was not authorized or registered to do business in Texas, did not have any employees, offices, or bank accounts in Texas, did not have a mailing address or a telephone number in Texas, did not pay taxes in Texas, did not advertise in or actively solicit donations from Texas, did not have a registered agent for service of process in Texas, and organization's passive investment in oil and gas properties located in Texas was not the product of a deliberate intention to make an investment in Texas and was not related to case at issue); *J.D. Fields & Co. v. W.H. Streit, Inc.*, 21 S.W.3d 599 (Tex. App.—Houston [1st Dist.] 2000) (contacts between nonresident corporation and corporation's guarantor with forum state was not so systematic or continuous to serve as basis for general jurisdiction; corporation's and guarantor's contacts with state were based on one business transaction, corporation and guarantor were not licensed to do business in state, did not maintain offices, employees or registered agent for service in state, did not own or lease property in state, did not solicit employees in state, had no state bank account, did not advertise in state, and did not pay state taxes); *PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 170-71 (Tex. 2007) (holding that isolated trips to Texas, more than

\$1,500,000 in purchases from Texas vendors, and two contracts with Texas entities were not substantial enough to support general jurisdiction).

Salgado has not adduced any contrary legal authority that these isolated and random contacts establish general jurisdiction. As a result, the decision below should be affirmed.

**D. The Exercise of Jurisdiction Over OmniSource Would Offend Traditional Notions of Fair Play and Substantial Justice**

Because Salgado failed to demonstrate that personal jurisdiction exists over OmniSource, it is clear that the exercise of such jurisdiction would offend “traditional notions of fair play and substantial justice.” *See Jones*, 954 F.2d at 1068. Further, any travel to Texas in connection with this lawsuit would be a significant inconvenience and burden on OmniSource. (Exhibit 1, Poinatte affidavit , at 2). And while the State of Texas may have an interest in resolving this controversy, there is no indication that OmniSource, who had no actual connection to Salgado’s alleged injury, should be a part of the litigation. *See Gundle* 85 F.3d at 207. Because Salgado failed to adequately demonstrate OmniSource’s connection to this litigation, the exercise of jurisdiction over OmniSource would offend traditional notions of fair play and substantial justice, and the trial court’s judgment should be affirmed.

## CONCLUSION

OmniSource is not a resident of Texas, nor is it registered to do business in Texas. OmniSource lacks sufficient contacts with Texas to give rise to either general or specific jurisdiction. Further, the imposition of personal jurisdiction over OmniSource by a Texas court would offend the traditional notions of fair play and substantial justice. For these reasons, OmniSource requests that this Court affirm the trial court's decision dismissing the claims against it for lack of personal jurisdiction.

Dated: May 3, 2017

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of this brief were served on all parties by electronic filing as indicated below on the 3rd day of May 2017.

*Seth Kretzer*

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Seth Kretzer

**CERTIFICATE OF COMPLIANCE**

I certify that this brief contains 3,506 words.

*Seth Kretzer*

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Seth Kretzer