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CAUSE NO. 2016-59771

RAIDEN COMMODITIES, LP & ASPIRE COMMODITIES, LP	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	HARRIS COUNTY, TEXAS
vs.	§	
PATRICK de MAN	§	
Defendant.	§	125th JUDICIAL DISTRICT

PLAINTIFFS' RESPONSE TO DEFENDANT'S SPECIAL APPEARANCE TO OBJECT TO JURISDICTION

Plaintiffs file this brief in opposition to the Defendant's special appearance pursuant to Texas Rule of Civil Procedure 120a(3).

INTRODUCTION

This case principally concerns an employment and alleged partnership relationship entered into in Texas between a non-resident and two limited partnerships for work to be performed in Texas. The two limited partnerships, Plaintiffs Raiden Commodities LP ("Raiden") and Aspire Commodities LP ("Aspire"), are engaged primarily in the business of trading electricity in the Texas power market. From 2011 until July 2016, the Defendant worked as a trader for the Plaintiffs, engaged throughout that time in the business of trading electricity in Texas. Although the Defendant can work remotely (and has lived in both Connecticut and Puerto Rico while working for the Plaintiffs), both the locus of the Plaintiffs' business and the Defendant's work for the Plaintiffs has at all times been centered on Texas.

In July of 2016, the Defendant ended his working relationship with the Plaintiffs, claiming however that he was a partner in both companies and was therefore entitled to distributions and the repurchase of his partnership interests. Plaintiffs filed this suit seeking a

declaratory judgment that the Defendant is not a partner in either company, as well as relief from Defendant's misappropriation of trade secrets that were developed in Texas and designed to be used in the Texas energy trading market, and the conversion of computers on which those trade secrets reside. The court has personal jurisdiction over the Defendant because, among other reasons, one of the limited partnerships in which the Defendant claims an interest is a Texas limited partnership,[1] the operative partnership agreements of both companies provide for jurisdiction in Texas over disputes related to the partnerships, and the Defendant's relationship with and work for the Plaintiffs has always been centered on Texas. The court should deny the Defendant's special appearance.

LEGAL STANDARD

A Texas court may exercise jurisdiction over a nonresident defendant if authorized by the Texas long-arm statute and if the exercise of jurisdiction is consistent with federal and state constitutional guarantees of due process. *Mort Keshin & Co., Inc. v. Houston Chronicle Pub. Co.*, 992 S.W.2d 642, 646 (Tex. App.—Houston [14th Dist.] 1999, no pet.). The Texas long-arm statute provides for jurisdiction if the nonresident defendant contracts with a Texas resident and either party is to perform the contract in whole or in part in Texas, if the nonresident defendant commits a tort in whole or in part in Texas, or based on "other acts that may constitute doing business." TEX. CIV. PRAC. & REM. CODE. § 17.042(1), (2). "The doing business requirement permits the statute to reach as far as the federal constitutional requirements of due process will allow." *Mort Keshin*, 992 S.W.2d at 646; *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 575 (Tex. 2007). Therefore, the long arm statute is satisfied if the exercise of personal

[1] At all times, Aspire has been a Texas limited partnership. As discussed further below, Raiden was organized under the laws of the U.S. Virgin Islands from its formation until 2016, when it was re-domiciled as a Texas limited partnership. Because that change occurred after the Defendant ended his relationship with the Plaintiffs, however, Raiden is treated as a U.S. Virgin Islands partnership for the purposes of the analysis herein.

jurisdiction comports with due process. *Moki Mac*, 221 S.W.3d at 575. Personal jurisdiction comports with due process when the defendant purposefully establishes minimum contacts with Texas and when the exercise of jurisdiction comports with fair play and substantial justice. *Mort Keshin*, 992 S.W.2d at 646.

A defendant's minimum contacts justify personal jurisdiction when the defendant "purposefully avails himself of the privileges of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Moki Mac* 221 S.W.3d at 575. Only the defendant's contacts are considered; the contacts must be purposeful rather than random, fortuitous, or attenuated; and the defendant must seek some benefit, advantage, or profit by availing himself of jurisdiction in Texas. *Id*.

There are two types of personal jurisdiction, general and specific. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002). General jurisdiction is proper when the defendant's contacts are continuous or systematic. *Id* at 796. If a defendant's contacts warrant a finding of general jurisdiction, then a court may exercise jurisdiction regardless of whether the claims relate to the defendant's contacts with the state. *Id*. With respect to specific jurisdiction, courts will examine the relationship between the defendant, forum, and litigation. *Moki Mac*, 221 S.W.3d at 575-76. "Specific jurisdiction is established if the defendant's alleged liability arises out of or is related to an activity conducted within the forum." *Id* (internal quotations omitted).

Once the court determines that the nonresident defendant established the requisite minimum contacts with Texas, it must then determine whether the assertion of personal jurisdiction comports with fair play and substantial justice. The court considers the following factors: "(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 obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering fundamental substantive social policies." *Schexnayder v. Daniels*, 187 S.W.3d 238, 246 (Tex. App.—Texarkana 2006, pet. dism'd w.o.j.)

The plaintiff bears the initial burden of pleading sufficient allegations to invoke the court's jurisdiction. *Moki Mac*, 221 S.W.3d at 574. The nonresident defendant then bears the burden of negating all of those bases for jurisdiction. *Id.* If the defendant produces sufficient evidence to negate jurisdiction, the burden shifts back to the plaintiff to show that the court has jurisdiction over the defendant. *M.G.M. Grand Hotel, Inc. v. Castro*, 8 S.W.3d 403, 408 (Tex. App.—Corpus Christi 1999, no pet.).

JURISDICTIONAL FACTS

1. Adam Sinn is an entrepreneur who specializes in trading commodities related to electrical power in Texas. Mr. Sinn began his career as a commodities trader in 2002. *See* Declaration of Adam Sinn, Ex. A ¶ 4. After several years of trading for established trading houses, Mr. Sinn accumulated sufficient capital to begin his own trading operations. *Id*. In 2009, while residing in Texas, Mr. Sinn formed Aspire Capital Management, LLC, a Texas limited liability company based in Houston, Texas, to engage in commodities trading. *Id*. Mr. Sinn subsequently reformed that company as Plaintiff Aspire, which is a Texas limited partnership. *Id*. Mr. Sinn manages Aspire as the sole manager of its general partner (Aspire Commodities 1, LLC). *Id*. As explained further below, Mr. Sinn also subsequently formed Plaintiff Raiden in 2011. *Id*. ¶¶ 4, 12. As also discussed below, from their formation until 2013 (when Mr. Sinn moved his personal residence to Puerto Rico for tax reasons), both Aspire and Raiden had their

principal place of operations in Houston. *Id*. ¶ 4. Mr. Sinn managed both companies from his home or office in Houston. *Id*.

2. Mr. Sinn developed commodities trading strategies involving Texas electrical power contracts traded in the market administered by the Energy Reliability Council of Texas ("ERCOT"). *Id*. ¶ 5. Alongside a small number of trades in the Northeast United States, trades in the Texas market governed by ERCOT represent the significant majority of both Aspire's and Raiden's business in the power business. *Id*.

3. ERCOT is a nonprofit corporation that manages the flow of electric power to millions of Texas customers representing about 90% of the state's electric load. ERCOT is subject to oversight by the Public Utility Commission of Texas and the Texas Legislature. http://www.ercot.com/about.

4. Mr. Sinn met the Defendant in 2005 or 2006, when they were both employees at Lehman Brothers. Ex. A ¶ 6. At the time, Defendant was a Dutch citizen living in Connecticut and working for Lehman Brothers as an analyst in New York, while Mr. Sinn was a Texas citizen living in Houston and working as a trader in Lehman's Houston office. *Id*. In early 2008, the Defendant moved to Houston to support the ERCOT trading group, which Mr. Sinn managed, as an analyst. The personal and professional relationship between the two flourished at that time. *Id*.

5. After Lehman declared bankruptcy in September 2008, the Defendant returned to New York, where he worked for the Lehman bankruptcy estate for some time. *Id*. Mr. Sinn then helped the Defendant find a job as an analyst for another company. *Id*. When that company closed its operations in early 2011, Mr. Sinn began serious discussions with Mr. de Man about

coming to work with him as a trader. *Id*. By that time, Aspire had achieved some success, and had added several additional traders already. *Id*.

6. In late 2010 into the spring of 2011, Mr. de Man and Mr. Sinn, then residing in Texas, negotiated the terms of Mr. de Man's employment. *Id*. ¶ 7. While they initially discussed forming a partnership, the Defendant did not have the capital required to fund his trading and they believed the Defendant's immigration status could bar him from being a partner. *Id*. Consequently, the parties mutually determined that they were unable to form a partnership at that time and that the Defendant would work as an employee until those two conditions changed. *Id*.

7. Once it became clear that a partnership was impracticable, the parties negotiated an employment relationship. *Id*. ¶ 8. They discussed the Defendant's responsibilities and his compensation structure, which differed somewhat from that of a typical trader. *Id*. They also discussed potential trading strategies to be used on ERCOT. *Id*. These discussions implicated the trade secrets that are also at issue in this case. *Id*. Those discussions happened principally by telephone, email, or Instant Message, between the Defendant in the New York area and Mr. Sinn in Houston. *Id*.

8. Those discussions culminated in an offer letter for the Defendant to become an employee of Aspire, which both the Defendant and Mr. Sinn reviewed and discussed. *See* Exhibit A-1. Section 11 of that offer letter contained the following provision regarding the place of performance, choice of law, and jurisdiction for disputes:

> This agreement is performable in whole or in part in Harris County, Texas. This Agreement shall be construed and the legal relations between the parties determined in accordance with the laws of the State of Texas, without giving effect to any choice of law rules which may direct the application of the laws of any other jurisdiction. If a party wishes to pursue legal action pertaining to this agreement, we agree that such action shall be commenced and prosecuted in the courts of Harris County, Texas, or in the United States District Court for the Southern District of

> Texas, if appropriate, and we each submit to the exclusive jurisdiction of said courts and respectively waive the right to change venue.

The Defendant suggested revisions to several sections of the offer letter, but at no time raised any disagreement that his work for Aspire would be deemed performable in, or that disputes related to the employment relationship would be subject to jurisdiction and venue in, Harris County, Texas. Ex. A ¶ 11; ex. A-1 ("I put in a few comments, but those are minor. There is nothing really fundamental that I need to add."). It is not surprising that the Defendant raised no issue with that clause, because it reflected the reality that while the Defendant could reside anywhere and "telecommute" to work, the job was based in Texas. The company was a Texas limited liability company operating in Texas, the focus of the work he would be doing was based in Texas, and it only made sense that any dispute about his employment would be resolved in Texas rather than wherever Mr. de Man chose to live. Ex. A ¶ 11.

9. The parties never executed the offer letter, primarily because they were continuing to discuss the terms on which the Defendant might someday become a partner. *Id*. Nonetheless, the Defendant commenced work for Aspire as an employee in April 2011 on material terms mirroring those laid out in the offer letter. *Id*.

10. Mr. Sinn also decided around that time to form another trading company, Plaintiff Raiden, to trade commodities that involved different products and trading strategies from Aspire. *Id*. ¶ 12. More specifically, Raiden focused on trading financial transmission rights, whereas Aspire primarily traded futures and virtuals. *Id*. Mr. Sinn elected to conduct these trading operations through separate entities to separate risk between the two trading books, choosing to isolate the risk generated by the Defendant's long-term trading of transmission rights from Mr. Sinn's short-term futures trading. *Id*.

11. Raiden is a limited partnership formed under the laws of the U.S. Virgin Islands, because at that time Mr. Sinn contemplated moving the business there for tax reasons. *Id*. ¶ 13. At the time of its formation, however, Mr. Sinn operated Raiden from Houston, Texas. *Id*. At that time, Raiden consisted entirely of Defendant's trading strategy, which initially targeted the Northeast U.S. PJM market and expanded to include the Texas market shortly after he began his employment. *Id*. Mr. Sinn agreed in principle with the Defendant that if he accumulated sufficient capital to fund half of his strategy, Mr. Sinn would allow the Defendant to "buy in" as a partner in Raiden (although the details of that arrangement were never fully worked out). *Id*. Mr. Sinn made that preliminary agreement with Defendant from Texas. *Id*. Subsequently, Raiden expanded to include trading books and strategies managed by Mr. Sinn and others; Mr. Sinn never agreed that the Defendant could buy into half of any aspect of Raiden's business outside the trading book he would manage. *Id*.

12. Defendant commenced work for Aspire in April of 2011. *Id*. ¶ 14. Along with trading his strategy, the Defendant provided analytical support to traders making trades through Raiden and Aspire. These trades were entirely on the Texas market. The Defnedant also had to seek Mr. Sinn's approval before executing significant trades. *Id* Although the Defendant lived in Connecticut at the time, his work was directed at Aspire's and Raiden's operations in Texas. *Id*. Mr. Sinn and the Defendant communicated daily by phone and Instant Message about the market. *Id*. Also, Aspire and Raiden leased an office in Houston in 2012 and the Defendant worked out of the Houston office on several occasions. *Id*. ¶ 15. The Defendant also came to Houston to interview candidates for an analyst position supporting Mr. de Man's trades. *Id*. The parties even discussed his moving to Texas to work out of that office permanently. *Id*. The Defendant also registered as a User Security Administrator with ERCOT, and was the principal

person involved in executing Raiden's ERCOT-related trades. *Id*. He routinely liaised with Mr. Sinn in Texas regarding the operation of the business and maintained contact with ERCOT staff in his role as User Security Administrator. *Id*.

13. After years of operating his business from Texas, Mr. Sinn moved his personal residence to Puerto Rico in 2013 as part of a tax-management strategy; the profits of Aspire and Raiden "flow through" to Mr. Sinn personally for federal tax purposes, and are taxed at a favorable rate in Puerto Rico. *Id*. ¶ 16. In 2013, the Defendant also moved to Puerto Rico for the same reason. *Id*. Nonetheless, the locus of Aspire's and Raiden's business remained in Texas. *Id*. The same trades were made based on the same trading strategy on the same Texas market managed by ERCOT. *Id*. Aspire remains a Texas limited partnership to this day. Moreover, many administrative functions are still Texas-based. Both Aspire and Raiden maintain their banking relationships with financial institutions in Texas and salaries are paid out of these Texas banks. *Id*. Legal and human resources functions are also based out of Texas. *Id*. Health insurance was also arranged by a broker in Houston. *Id*. In fact, when the Defendant first started working, he took the lead in setting up the company's health insurance and worked directly with the Houston insurance broker in doing so. *Id*.

14. At the time of their original formation, the partnership agreements of Aspire and Raiden contained no provisions expressly governing jurisdiction for disputes related to the partnerships. *Id*. ¶ 17. The 2013 amended partnership agreements for the two companies provide for jurisdiction and venue over such disputes in Texas. *Id*. For instance, Section 7.10 of the Second Amended Limited Partnership Agreement provides in pertinent part:

> Any dispute arising hereunder or among the Partners or General Partners (or their Affiliates) shall be resolved in the courts of Harris County, Texas. Except as otherwise provided in this Agreement, in the event a dispute arises between any Persons hereto (or their Affiliates), the prevailing party shall be entitled to recover

reasonable attorney's fees and court costs incurred. **ALL PARTIES HEREBY IRREVOCABLY AND UNCONDITIONALLY SUBMIT TO THE EXCLUSIVE JURISDICTION OF ANY TEXAS STATE DISTRICT COURT SITTING IN HARRIS COUNTY, TEXAS, UNITED STATES OF AMERICA IN ANY ACTION OR PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY OTHER ANCILLARY AGREEMENTS, AND, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, EACH PARTY HEREBY IRREVOCABLY AND UNCONDITIONALLY (I) AGREES THAT ALL CLAIMS IN RESPECT OF SUCH ACTION OR PROCEEDING MAY BE HEARD AND DETERMINED IN SUCH TEXAS STATE DISTRICT COURT, (II) WAIVES ANY OBJECTION WHICH IT MAY NOW OR HEREAFTER HAVE TO THE LAYING OF VENUE OF ANY SUIT, ACTION OR PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY ANCILLARY AGREEMENTS, (III) WAIVES ANY CLAIM THAT ANY SUCH SUIT, ACTION OR PROCEEDING BROUGHT IN ANY SUCH COURT HAS BEEN BROUGHT IN AN INCONVENIENT FORUM, (IV) TO THE GREATEST EXTENT ALLOWED BY UNITED STATES LAW CONSENTS TO THE SERVICE OF ANY AND ALL PROCESS, SUMMONS, NOTICE OR DOCUMENT IN ANY SUCH ACTION OR PROCEEDING BY THE MAILING OF COPIES OF SUCH PROCESS TO THE ADDRESS FOR THE PARTY SPECIFIED IN THIS AGREEMENT AND (V) AGREES THAT A FINAL JUDGMENT IN ANY SUCH SUIT, ACTION OR PROCEEDING SHALL BE CONCLUSIVE AND MAY BE ENFORCED IN OTHER JURISDICTIONS BY SUIT ON THE JUDGMENT OR IN ANY OTHER MANNER PROVIDED BY LAW WITHOUT NECESSITY OF REHEARING THE MERITS OF SUCH. SHOULD IT BE NECESSARY, AND AT THE REQUEST OF ANOTHER PARTNER OR GENERAL PARTNER, ALL PARTIES AGREE TO PROMPTLY APPOINT AN AGENT FOR SERVICE OF PROCESS IN THE STATE OF TEXAS AND TO INFORM GENERAL PARTNER OF ITS SELECTION OF SUCH AGENT**.

Ex. A-2.[2]

15. These provisions were added to the limited partnership agreements because, although Mr. Sinn had moved his personal residence to Puerto Rico (and thus conducted a substantial amount of his work for the companies from Puerto Rico), the locus of the companies' business remained in Texas, and thus Texas was the most appropriate forum for disputes related to partnership issues. Ex. A ¶ 18. It made no sense for disputes related to those partnerships to be

[2] The Aspire Amended Limited Partnership Agreement has a comparable provision. Ex. A-3 § 7.10.

resolved in Puerto Rico courts, where proceedings are conducted in Spanish, just because Mr. Sinn had moved there for tax reasons. Although the Defendant never executed those agreements (because the Defendant was never a partner of either Aspire or Raiden and was still operating as an employee), other traders who did become limited partners were required to accept those terms (among others) in the Limited Partnership agreements. *Id.*; ex. A-4 at pp. 2, 7.

16. The trade secrets at issue in this case are also Texas-focused. The majority of them were developed in Texas and designed for use in the Texas market. Ex. A ¶ 19. Some were discussed with the Defendant during negotiations in 2011 from Texas. *Id*. The parties contemplated protecting the trade secrets in their negotiations and draft agreements. *Id.*; ex. A-1 ¶ 8. The parties also contemplated resolving disputes about these trade secrets in a Texas court under Texas law. Ex. A-1 ¶ 11.

17. The trade secrets are comprised of confidential and proprietary information, including, *inter alia*, analyses of weather, transmission congestion, and historical pricing, as well as models that test the data by manipulating these underlying variable. Ex. A ¶ 20. Raiden's and Aspire's trading strategies are based on these models. *Id*. Aside from some analyses that Mr. de Man developed for trades on the Northeast PJM market, the vast majority of the trade secrets are Texas-centric. *Id*. Aspire, Raiden, and its employees spent considerable time, effort, and capital to develop their trading models, which are dependent on data generated in Texas and are still used to make trades in the Texas market to this day. *Id*.

18. Moreover, most of the computers on which the trade secrets reside were purchased by Mr. Sinn on behalf of Aspire from a Texas vendor to enable the Defendant to execute trades on a Texas market. *See* Ex. A ¶ 21; ex. A-5; ex. A-6; ex. A-7. The Defendant's

Dell computer and his most recent laptop were purchased by the Defendant, but he was reimbursed by Aspire for those purchases from its bank account in Texas. Ex. A ¶ 21.

19. In 2016, after the Defendant severed his connections with the Plaintiffs, Raiden was formally re-domiciled as a Texas limited partnership, in order to align its corporate formalities with the reality that it is a Texas-based business. Ex. A ¶ 22; ex. A-10.

20. After terminating his employment, the Defendant claimed that he was a partner in Aspire and Raiden. Ex. A ¶ 23; ex. A-11; ex A-12.

21. On January 3, 2017, the Defendant served Mr. Sinn with a complaint in the Bayamon Superior Court, a court of first instance in Puerto Rico. Though neither Mr. Sinn nor the Defendant speak Spanish (Ex. A. ¶ 16), the complaint is in Spanish. Ex. A ¶ 24; ex. A-11. The complaint, a translation of which is included as Exhibit B-2, concerns the same partnerships, agreements, and conduct that are in dispute in this case. The complaint references, for example, the Aspire and Raiden Partnership agreements. Exs. A-11 and B-2 at 2 n2 and ¶ 80. The complaint's allegations include breach of fiduciary duty; breach of the operating agreement of Raiden's general partner; breach of partnership agreement, "illegal appropriation" and conversion of capital contribution; fraud and "breach of the obligation to negotiate fairly and in good faith;" unjust enrichment; and claims for various other damages. *Id*. ¶¶ 66-101. The factual allegations upon which these causes of action are based are the same ones that will be litigated in this case, including the parties negotiations (*Id*. ¶¶ 28-36), their course of performance (*Id*. ¶¶ 37-49), their dispute about whether the Defendant was admitted as a partner (*Id*. ¶¶ 50-56), and the termination of their relationship (*Id*. ¶¶ 56-64).

ANALYSIS

22. This court should deny Defendant's special appearance and exercise personal jurisdiction over the Defendant because he established minimum contacts by purposefully availing himself of the privilege of doing business in Texas and his liability arises from those contacts.[3] The Defendant should not be surprised to face suit in a Texas court given all of his contacts with this state.

A. This court has jurisdiction under the Texas Long Arm Statute.

23. This court has jurisdiction under the Texas long arm statute. The Defendant negotiated with a Texas resident and contracted with a Texas limited partnership to work as an employee in Texas and perform trades in the Texas electricity market. *See* TEX. CIV. PRAC. & REM. CODE. § 17.042(1) and *infra* § B. The Defendant was also "doing business" in Texas through the same conduct. *Id.* § 17.042(1) and *infra* § B. "The doing business requirement permits the statute to reach as far as the federal constitutional requirements of due process will allow." *Moki Mac*, 221 S.W.3d at 575; *Mort Keshin*, 992 S.W.2d at 646. Therefore, the long arm statute is satisfied because the exercise of personal jurisdiction comports with due process in that the Defendant purposefully established minimum contacts with Texas and the exercise of jurisdiction comports with fair play and substantial justice, as described below. *See Moki Mac*, 221 S.W.3d at 575; *Mort Keshin*, 992 S.W.2d at 646; *infra* §§ B-D.

[3] The court may also find that the Defendant's contacts satisfy the requirements for general jurisdiction due to their continuous and systematic nature. Because the claims in this case relate to the Defendant's contacts with the state, however, the remainder of this brief addresses the narrower requirements of specific jurisdiction.

B. The Defendant established minimum contacts by negotiating and entering into a business relationship in Texas with a Texas Limited Partnership for work to be performed in Texas.

24. The exercise of jurisdiction over the Defendant with respect to the declaratory judgment and, if applicable, breach of partnership agreement causes of action comports with due process because the Defendant established purposeful and ongoing contacts with Texas, directed his activity toward Texas, sought to establish a business relationship in Texas with a Texas resident, and there is a substantial connection between Texas and the operative facts of this litigation.

1. The Defendant negotiated in Texas with a Texas resident for work to be performed in Texas.

25. The Defendant established minimum contacts by negotiating in Texas with a Texas resident and entering into an employment relationship with a Texas limited partnership for work to be performed in Texas. "It is these factors—prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing—that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum." *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 478–79 (1985). These contacts were purposeful and ongoing, not random, fortuitous, or attenuated. In *Citrin Holdings, LLC v. Minnis,* the court found that the defendant had made minimum contacts when, among other contacts, he contracted with a Texas resident concerning a business relationship to be performed in part in Texas; held discussions with a Texas resident before signing partnership-related documents and an operating agreement; communicated with the plaintiff face to face in Texas and via phone, fax, and email; and drafted and signed disputed agreements in Houston. *Citrin Holdings, LLC v. Minnis,* 305 S.W.3d 269, 282–83 (Tex. App.—Houston [14th Dist.]

2009, no pet.). These contacts "culminated" in an agreement to be performed in part in Texas. *Id*. at 283.

26. The Defendant's conduct was similarly purposeful and ongoing here. The Defendant called, Instant Messaged, and emailed Mr. Sinn in Texas numerous times concerning their potential partnership and, once it became clear that a partnership was impracticable at that time, their employment relationship. Ex. A ¶¶ 7-8. They discussed potential trading strategies to be used on the market run by ERCOT.[4] *Id*. They also discussed the Defendant's responsibilities and his compensation structure. *Id*.

27. Key documents negotiated at that time also support jurisdiction. The March 2011 draft offer letter that the parties negotiated in contemplation of the Defendant's employment acknowledged that the Defendant's work would be performed in Texas, provided for jurisdiction and venue in Harris County, Texas, and called for the application of Texas law.[5] Ex. A-1 ¶ 11. The Defendant revised the offer letter, but never raised any disagreement regarding the location of performance of his job functions, the jurisdictional clause, or choice of law, and none of his edits addressed those terms. Ex. A ¶ 11. Although the parties never executed that draft, that was not because of any disagreement relating to those provisions, and thus the draft is strong evidence that the parties both understood that the employment relationship had its locus in Texas and Defendant would be performing his job functions in Texas.

28. The court should exercise jurisdiction even though the Defendant "telecommuted" to work in Texas because of his purposeful contacts with Texas in establishing the business relationship that led to this dispute. The defendant in *The Leader Institute*, an Indiana resident

[4] These discussions implicated the trade secrets that are at issue in this case.

[5] While a choice of law provision is not dispositive, courts will consider it as a factor supportive of jurisdiction. *See Citrin Holdings*, LLC, 305 S.W.3d at 282.

who performed most of his work from Indiana, sought to re-establish a prior independent contractor relationship with the plaintiff in Texas. *The Leader Institute v. Jackson,* 2015 WL 4508424, at *2, *12 (N.D. Tex. Jul. 24, 2015).[6] In asserting jurisdiction, the court stressed the defendant's purposeful action in contacting the plaintiff's president in Texas to regain his independent contractor status. *Id.* at *13. The court also noted that, while many of the defendant's Texas contacts occurred prior to his alleged misconduct (breach of contract, trade secret misappropriation, and other state law claims), the alleged misconduct arose out of or related to the contract that was formed as a result of the defendant's "purposeful efforts to create an ongoing business relationship with" the Plaintiff in Texas. *Id*. at *14.

29. Similarly here, the Defendant reached into Texas to negotiate with a Texas resident in an effort to create a business relationship with a Texas partnership. The negotiations giving rise both to the Defendants' employment relationship and alleged partnership interest occurred largely in Texas. Ex. A ¶ 8. Even though a dispute arose years later, it arose out of this business relationship born through those Texas negotiations.

30. Finally, the operative facts of litigating this cause of action are centered on Texas. They will focus on the terms of the relationship between the parties, the parties' negotiations, and their performance and respective rights under the agreements. *See Citrin Holdings*, 305 S.W.3d at 284.[7] These operative facts are precisely the ones implicated in Plaintiffs' request for

[6] The defendant in *The Leader Institute* signed a contract with the plaintiff, but the court's reasoning and holding would apply just as strongly to an oral agreement as a written one.

[7] Whether an oral employment agreement is enforceable and whether Defendant is a partner in Raiden or Aspire are questions of liability not appropriate for a jurisdictional inquiry. *See Zac Smith & Co., Inc. v. Otis Elevator Co*., 734 S.W.2d 662, 665–66 (Tex. 1987) ("Whether the joint venture agreement in fact creates a joint venture goes to the question of liability for the alleged breach, and not to the question of jurisdiction.") and *Hoagland v. Butcher*, 474 S.W.3d 802, 814 (Tex. App.—Houston [14th Dist.] 2014, no pet.) ("the argument that appellees are not parties to the Operating Agreement is a merits issue that, even if successful, would not deprive the court of jurisdiction."); *see also Citrin Holdings, LLC*, 305 S.W.3d at 284 ("Abundant case law teaches that we should not reach the merits of the parties' dispute in the course of addressing personal jurisdiction").

declaratory judgment or, in the alternative, breach of partnership cause of action, and they are all centered on Texas. *Id*. (finding a substantial connection between the defendant's Texas contacts and the operative facts of the litigation).

31. Finally, the Defendant should expect to be subject to sanction in Texas for the consequences of his actions after reaching into Texas to form a business relationship with a Texas partnership for work to be performed in Texas. *See* Ex. A ¶ 8. As the Supreme Court has long held, "parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities." *The Leader Institute,* 2015 WL 4508424 at *13, quoting *Burger King,* 471 U.S. at 473, 105 S.Ct. at 2182 and *Travelers Health Assn. v. Virginia,* 339 U.S. 643, 647 (1950).

2. The companies were Texas-based companies when the Defendant began his employment, and Defendant's employment has always been focused on Texas, regardless of where the Defendant resided.

32. Also, critically, the work contemplated by the parties in the aforementioned negotiations—trading Texas electricity in Texas' energy trading market—was to be performed in Texas, regardless of where Defendant happened to reside at any particular time or where the partnerships were organized. *See Zac Smith & Co., Inc. v. Otis Elevator Co.*, 734 S.W.2d 662, 665–66 (Tex. 1987) (finding personal jurisdiction even though the contract was signed in another state, because the nonresident company "with no physical ties to Texas still has minimum contacts with Texas when it is clear the company purposefully directed its activities towards Texas"). Similarly here, the Defendant directed his activities toward Texas.

33. While he was a Texas resident, Mr. Sinn formed Aspire to engage in commodities trading in Texas. Ex. A ¶¶ 4-5. Aspire is a Texas limited partnership that is engaged primarily in the business of trading in the Texas power market. *Id*. Likewise, although Raiden was not until

recently a Texas limited partnership, Mr. Sinn formed that company while he lived in Texas, and Raiden's business also focuses on trading in the Texas electrical power market. *Id*. ¶¶ 4-5, 13.

34. Moreover, at the time that Defendant agreed to become an employee of Aspire to trade commodities for Aspire and Raiden, all of the Plaintiffs' operations were in Texas. *Id*. ¶¶ 4, 13-15. As noted above, Mr. Sinn negotiated the terms of the Defendant's employment from Houston. *Id*. ¶¶ 7-8. He managed both companies from his home or office in Houston, and the Defendant worked out the Houston office on several occasions. *Id*. ¶ 15. The Defendant came to Houston to interview job candidates and communicated via phone and Instant Message with Mr. Sinn daily. *Id* ¶ 15. The Defendant's duties were primarily to execute the Plaintiffs' trading strategies in Texas, and to perform certain administrative functions supporting the Plaintiffs' business in Texas. *Id.* He also registered as a User Security Administrator with ERCOT, and was the principal person involved in executing Raiden's ERCOT-related trades. *Id*. He routinely liaised with Mr. Sinn in Texas regarding the operation of the business and maintained contact with ERCOT staff in his role as User Security Administrator. *Id*. In short, although the Defendant did not reside in Texas, he went to work for a Texas company, "telecommuting" to perform duties that were entirely directed toward Texas. *See id*. ¶ 10.

35. The nature of the Defendant's telecommuting work supports jurisdiction. In *The Leader's Institute, LLC v. Jackson*, the court exerted jurisdiction over a telecommuting defendant with respect to breach of contract and misappropriation of trade secret claims. The court found that it could exercise jurisdiction over the defendant Jackson in part because of the numerous contacts the defendant had with Texas customers. *The Leader Institute*, 2015 WL 4508424 at *12-13. As a contractor for the plaintiff living and working primarily in Indiana, the defendant contacted at least 47 Texas residents trying to sell plaintiff's leadership seminar and succeeded

with respect to 23 of them. He traveled to Texas to conduct eight leadership seminars himself. *Id*. at *2.[8] The connection to Texas is even stronger in the case at bar, because while the *Leader Institute* defendant only contacted 47 Texas residents in less than three years, Mr. de Man was engaged in trades in the Texas electricity market practically every day for five years.

36. Additionally, while Mr. Sinn and the Defendant both subsequently moved their residences to Puerto Rico for tax reasons, that does not change the jurisdictional analysis. Aspire continued to be a Texas limited partnership after the move. The Defendant's job responsibilities did not change, and the trades placed through the Plaintiffs were still of Texas electricity on the Texas market administered by ERCOT. Ex. A ¶ 16. Also, administrative and legal functions continued to be provided from Texas. *Id*. Simply put, the Defendant continued to work for Texas-based, Texas-focused companies trading Texas electricity on a Texas market.[9]

37. The Defendant objects that he made trades on behalf of Plaintiffs and not in his personal capacity (Spec. App. ¶ 5), but this objection is a red herring. Plaintiffs are not third parties to the employment relationship, attempting to establish jurisdiction over an employee based on his employer's relationship with Texas. This is not, for instance, a product liability case in which a Texas consumer is asserting jurisdiction over a Connecticut-based employee because his Connecticut-based employer sold products in Texas. Rather, Plaintiffs point to the Defendant's routine performance of his job duties in Texas in order to show that the parties'

[8] The court also noted that, after terminating his employment, the defendant traveled to Texas to conduct a leadership seminar in competition with, and allegedly based on trade secrets stolen from, the plaintiff. *Id* at *3.

[9] The fact that Puerto Rico may or may not also have jurisdiction is irrelevant to whether the Defendant established minimum contacts with Texas, and only comes into play when deciding whether asserting jurisdiction in Texas comports with fair play and substantial justice, which is does. *See infra* § D.

relationship, the agreements at issue, and the work performed are almost entirely Texas-focused, regardless of where the Defendant resided.

38. For that and other reasons, the Defendant should reasonably foresee being haled into a Texas court. He sought to establish a business relationship with a Texas resident, sought the privilege and benefits of doing business in Texas, and anticipated profiting from his trading operations in Texas. "Thus where the defendant deliberately has engaged in significant activities within a State . . . or has created continuing obligations between himself and residents of the forum . . . he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by the benefits and protections of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well." *Burger King*, 471 U.S. at 475-76.

3. The Defendant Asserts a Partnership Interest in a Texas Limited Partnership, the Operative Agreement for which Provides for Jurisdiction in Texas.

39. Additionally, but no less importantly, this dispute arises directly out of the Defendant's claim that he is a partner in a Texas limited partnership (Aspire) and another limited partnership that has its principal business in Texas (Raiden). Ex. A-9 at 1 of attached letter; ex. A-10 at 1 of attached settlement proposal.[10] Making that claim is yet another way in which the Defendant purposefully availed himself of the privilege of doing business in Texas. *See The Leader's Institute, LLC*, 2015 WL 4508424 at *13.

40. The Defendant's initial contacts with Mr. Sinn in Texas focused on the two forming a partnership. As described above, those Texas contacts included negotiations, phone

[10] These documents are offered to show the Defendant's claim to partnership interests, not to prove or disprove the validity or amount of a disputed claim, and are therefore admissible under Texas Rule of Evidence 408. Tex. R. Evid. 408(b) ("The court may admit this evidence for another purpose…."); *see, e.g., Tarrant County v. English*, 989 S.W.2d 368, 377 (Tex. App.—Fort Worth 1998, pet. denied) (defendant's settlement letter admitted to show plaintiff's state of mind).

calls, Instant Messages, and emails. Ex. A ¶¶ 7-8. Even if the Defendant had never gone to work for the Texas partnership Aspire, this court would still have jurisdiction because the Defendant claims that these negotiations gave rise to an interest in a Texas partnership and another partnership whose primary business is in Texas, and the parties' dispute arises out of this alleged interest.

41. Section 7.10 of the Raiden Partnership Agreement, the principal partnership in which Defendant claims to be a partner, provides that any dispute among partners shall be resolved in the courts of Harris County, Texas, and that "all parties hereby irrevocably and unconditionally submit to the exclusive jurisdiction of any Texas state district court sitting in Harris County, Texas, United States of America in any action or proceeding arising out of or relating to this agreement or any other ancillary agreement…." Ex. A-2. The Amended Aspire Partnership Agreement also provides for jurisdiction in Texas (albeit with venue in Montgomery County). Ex. A-3 ¶ 7.10; *see* Ex. A ¶¶ 17-18 These agreements confirm the obvious, that Texas is an appropriate and foreseeable jurisdiction for resolving disputes related to Texas-based limited partnerships.

42. The Defendant argues that he never saw the amended partnership agreements and did not consent to jurisdiction in Texas (Spec. App. ¶ 6), but those arguments are misplaced. Plaintiffs do not argue that the Defendant waived otherwise-valid objections to personal jurisdiction by executing those agreements. Rather, those agreements are offered to show that the companies, at which Defendant was employed and of which the Defendant claims to be a partner, are Texas-based companies. The other partners who did execute those agreements acknowledged that Texas was the most appropriate forum for resolving partnership disputes, notwithstanding their residency in Puerto Rico.

43. Moreover, so long as Defendant claims he is a partner of Aspire and Raiden, he should be estopped from denying the effect of the jurisdictional clause in those companies' governing agreements. The doctrine of quasi-estoppel precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken by the party. *Lopez v. Munoz, Hockema & Reed*, 22 S.W.3d 857, 864 (Tex. 2000). The doctrine applies when it would be unconscionable to allow a party to maintain a position inconsistent with one in which it had acquiesced. *Id.*[11]

44. Here Mr. de Man's position that the court lacks jurisdiction is inconsistent with a position he previously took and is detrimental to Plaintiffs. The Defendant has claimed to be a part of a relationship between other parties (the partnerships and their partners), and seeks to obtain millions of dollars in buyout payments from these parties by virtue of being a partner. Ex. A-9 at 1 of attached letter; ex. A-10 at 1 of attachment. In doing so, he has also claimed to be a part of a relationship in which the other parties have agreed to resolve disputes regarding that relationship in Texas through a valid forum selection clause. It would be unconscionable to allow him to escape the partnership agreements' forum selection clauses only to assert in a different court that he is a partner in the very partnerships whose dispute resolution procedures he seeks to avoid by filing his special appearance. Doing so would rob Plaintiffs of the opportunity to have their claims heard in the proper jurisdiction but leave the Defendant free to assert his claims in another, which he has already done. *See* Ex. A-11; ex B-2.

45. Instead of filing suit in Puerto Rico, the claims in the Defendant's recent complaint should have been brought as counterclaims in this case because they concern the same

[11] "Estoppel is an equitable theory applied at the trial court's discretion, *Carlile Bancshares, Inc. v. Armstrong*, 2014 WL 3891658, at *9 (Tex. App.—Fort Worth Aug. 7, 2014, no pet.), and the court should exercise its discretion and apply it here.

partnerships, agreements and conduct that are in dispute in this case.[12] The complaint alleges, among other causes of action, breach of the operating agreement of Raiden's general partner; breach of partnership agreement, and fraud regarding the parties' negotiations. *Id*. ¶¶ 71-78, 79-87, and 91-94. And, the factual allegations upon which these causes of action are based are the same ones that will be litigated in this case.

46. Moreover, the Defendant should fully expect to be haled into a Texas court to decide whether he is in fact part of these partnerships. The Defendant cannot have it both ways and if the Defendant wanted to avoid jurisdiction in Texas, he should not have claimed to be a partner in two Texas-based, Texas-focused entities with Texas jurisdictional provisions in their formative documents.

C. The Defendant established minimum contacts by misappropriating trade secrets developed in Texas, disclosed in Texas, and intended for use in the Texas electricity trading market.

47. Given the deep and enduring Texas-focus of Plaintiffs' trading operations, it is no surprise that the trade secrets that the Defendant misappropriated are also Texas-focused. It should be foreseeable to the Defendant that he would be haled into a Texas court if he used or threatened to use such trade secrets to compete with Plaintiffs *in Texas.*

48. These secrets were developed in Texas and some were discussed in Texas during the 2011 negotiations. Ex. A ¶ 19. *See Delta Brands, Inc. v. Rautaruukki Steel*, 118 S.W.3d 506, 511–12 (Tex. App.—Dallas 2003, pet. denied) (minimum contacts established when the defendant received confidential information during its sole meeting in Texas and, because the defendant agreed to meet in Texas and knew that confidential information "emanated" from the plaintiff's office in Texas, these contacts were not random, fortuitous, or attenuated and it was

[12] The claims asserted in Puerto Rico arise out of the same transaction and occurrence that is the subject matter of the current Texas lawsuit. *See* Texas Rule of Civil Procedure 97(a).

reasonably foreseeable to defendant that it could be "haled into a Texas court to answer for the alleged improper disclosure of [plaintiff]'s proprietary information"); *Moncrief Oil Intern. Inc. v. OAO Gazprom*, 414 S.W.3d 142, 153–54 (Tex. 2013) (defendants' contacts were purposeful and substantial when their activity was aimed at obtaining benefits from the state when they attended two meetings in Texas at which they accepted trade secrets). Defendants' contacts with Texas far exceed those of the defendants in *Delta Brands* and *Moncrief* over whom the court asserted jurisdiction.

49. In their Texas negotiations, the parties contemplated seeking the protection of Texas law in Texas courts to protect the trade secrets at issue. Ex. A ¶ 19; ex. A-1 ¶ 8. The trade secrets were and are still being used by a Texas partnership's employees to trade Texas electricity on a Texas market. Ex. A ¶ 19.

50. Even though the Defendant does not and did not in the past reside in Texas, the trade secrets remain Texas-focused for the same reasons. The trade secrets were developed in Texas based on data about, among other things, analyses of weather, transmission congestion, and historical pricing, as well as models that test the data by manipulating these underlying variables. *Id*. Such trade secrets are entirely dependent on data generated in Texas, regardless of the fact that the Defendant resided in Puerto Rico when he misappropriated them.

51. The operative facts of litigating this cause of action also support jurisdiction in Texas. They will focus on the existence and scope of the alleged trade secrets; how the Defendant came to learn them through negotiations in Texas with a Texas resident and by using the trade secrets to make trades on the Texas energy market while in Plaintiffs' employ; and the Defendant's threatened misuse use of the trade secrets to start his own trading company competing with Plaintiffs on the Texas energy market. The court will have to engage in a Texas-

centric inquiry into the Texas energy trading market in order to evaluate the information and strategies that the Defendant has misappropriated. This is true regardless of the Defendant's physical location.

52. Finally, Plaintiffs' conversion claim springs from the same operative facts. The parties contemplated in their negotiations the return of equipment should the Defendant's employment end. Ex. A-1 ¶ 8 ("In addition, on termination of your employment with Aspire for any reason, you agree to return to Aspire all of its property and records (and copies thereof) of Aspire in your possession or control."). And even though the defendant retained possession of the physical computers in Puerto Rico, their value to Plaintiffs and Defendant derives from the Texas-centric trade secrets they contain. It is also worth noting that most of the computers were purchased by a Texas resident, from a Texas vendor, and intended to be used to execute trades in Texas' energy trading market. Ex. A ¶ 21; ex. A-5; ex. A-6; ex. A-7 The Defendant should reasonably expect to be haled into a Texas court to respond to these claims.

D. The assertion of personal jurisdiction comports with fair play and substantial justice.

53. The exercise of personal jurisdiction over the Defendant comports with fair play and substantial justice for the following reasons. The burden on the defendant is minimal; plaintiffs have an interest in obtaining convenient and effective relief in Texas; Texas has an interest in adjudicating the dispute; resolving the dispute in Texas is more efficient; and doing so promotes the shared interest of the several states in furthering fundamental substantive social policies. *See Schexnayder*, 187 S.W.3d at 246. "Only in rare cases…will the exercise of jurisdiction not comport with fair play and substantial justice when the nonresident defendant has purposefully established minimum contacts with the forum state." *Spir Star AG v. Kimich*, 310 S.W.3d 868, 878 (Tex. 2010) (citing *Burger King*, 471 U.S. at 477).

54. Texas has the strongest interest in adjudicating this dispute out of any possible jurisdiction. The operative facts of the dispute center on Texas. The parties negotiated in Texas, between a nonresident and a Texas resident, for work to be performed in Texas. Ex. A ¶¶ 7-8, 14. Moreover, the dispute involves allegations of misappropriation of trade secrets developed by a Texas Limited Partnership for use on Texas' energy trading market. *Id*. ¶¶ 19-20. Texas has an interest in protecting the integrity of ERCOT, the rights of a Texas limited partnership, and the integrity of Texas trade secrets. *See Schexnayder*, 187 S.W.3d 238, 247 ("this State has an inherent interest in protecting its citizens"). As *amicus curiae* argued in the *Moncrief* case, "there can be no question that the State of Texas has a fundamental interest in enforcing Texas law against foreign business entities that both misappropriate trade secrets and use that information to compete illegally with Texas companies in their own backyard." *Moncrief Oil International Inc*., v. *Oao Gazprom, Amicus Curiae* Br., 2011 WL 9530619, at *5-6 (Tex. Aug. 22, 2011).[13]

55. While there is a burden on the nonresident Defendant to litigate this dispute in Texas, that burden is small. He can communicate with his attorney via phone and internet and need not physically appear in Texas often, if at all. "Nor is distance alone ordinarily sufficient to defeat jurisdiction: 'modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.'" *Spir Star AG*, 310 S.W.3d at 879 (quoting *McGee v. Int'l Life Ins. Co*., 355 U.S. 220, 223 (1957)).

56. In contrast, a trial conducted in Puerto Rico will impose a massive burden on both parties. Proceedings in Puerto Rico court are conducted in Spanish. *See* Affidavit of Kevin Mohr, Ex. B, ¶ 4. Neither party speaks Spanish, nor did they ever conduct business in Spanish. Ex. A ¶

[13] Amicus curiae consisted of the Texas Civil Justice League, Texas Oil & Gas Association, Texas Association of Manufacturers, Association of Electric Companies of Texas, and Texas Association of Business.

16. To advocate their case effectively, both parties would need to translate their pleadings, motions, and documentary evidence, and may need to testify through interpreters. Ex. B, ¶ 4. The cost of such translation would be exorbitant. For example, the cost to translate the complaint alone was $1,500. *Id.*, ¶ 5. *See De Prins v. Van Damme*, 953 S.W.2d 7, 16 (Tex. App.—Tyler 1997, pet. denied) (the court considered language barriers in its jurisdictional analysis); *accord Spir Star*, 310 S.W.3d at 879 (recognizing "the unique and onerous burden placed on a party called to defend a suit in a foreign legal system")

57. Finally, there is a shared interest among the states in furthering social policy here. Individuals and companies should be free to contract as they see fit to trade on ERCOT regardless of their location. *See Moncrief Oil Intern. Inc.*, 414 S.W.3d at 152 ("Supreme Court has recognized state interests in protecting regulatory schemes and contracts"). Texas courts can develop expertise in deciding ERCOT-related cases. And parties should be free to contract and develop trade secrets for trades on the Texas market governed by ERCOT with the confidence that, if a dispute arises in relation to such contract or trade secrets, they can seek redress in a Texas court.

CONCLUSION

The court has personal jurisdiction over the Defendant because of his many, strong, and enduring links to Texas. The Defendant negotiated in Texas with a Texas resident to work for a Texas limited partnership making trades in the Texas electricity market. The operative partnership agreements of both Plaintiffs provide for jurisdiction in Texas. The Defendant's relationship with and work for the Plaintiffs has always been centered on Texas. The trade secrets at issue were developed in Texas, initially disclosed in Texas, and are designed to be used

in Texas. For all of these reasons and the others described above, the court should deny the Defendant's special appearance.

CERTIFICATE OF SERVICE

I hereby certify that, on this 13th day of January, 2017 a true and correct copy of the foregoing has been served upon counsel of record in accordance with the requirements of the Texas Rules of Civil Procedure, addressed as follows:

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