
NO. 03-12-00576-CV

IN THE COURT OF APPEALS FOR THE THIRD DISTRICT
AUSTIN, TEXAS

DR. ANDREW J. WAKEFIELD, MB, BS,

Appellant,

v.

THE BRITISH MEDICAL JOURNAL PUBLISHING GROUP, LTD.,
BRIAN DEER and DR. FIONA GODLEE,

Appellees.

On Appeal from the 250th Judicial District Court
Travis County, Texas
Trial Court Cause No. D-1-GN-12-000003

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STATEMENT OF THE CASE

- Nature of the Case:** In this libel case, Appellant Dr. Andrew Wakefield challenges reporting by Appellees BMJ Publishing Group Ltd. (“BMJ”) (erroneously identified in the style of this appeal as “The British Medical Journal Publishing Group Ltd.”), reporter Brian Deer and editor Dr. Fiona Godlee in the *British Medical Journal* (“*BMJ*”) regarding Wakefield’s research misconduct in London in the 1990’s.
- Trial Court:** The 250th Judicial District Court of Travis County, Texas, the Honorable Amy Clark Meachum, Honorable Gisela D. Triana, and the Honorable Rhonda Hurley, presiding.
- Trial Court Disposition:** On April 26, 2012, the trial court (Hon. Gisela Triana) entered an order holding that Appellees had not waived their Special Appearances contesting personal jurisdiction. On August 3, 2012, the trial court (Hon. Amy Clark Meachum) entered a final order of dismissal granting Appellees’ Special Appearances.
- On April 12, 2012, the trial court (Hon. Amy Clark Meachum) issued a letter order denying Appellant’s Motion to Strike the hearing on Appellees’ Motion to Dismiss under Chapter 27 of the Texas Civil Practice and Remedies Code (“Anti-SLAPP Motion to Dismiss”). Instead, the trial court continued the Anti-SLAPP hearing until Appellees’ Special Appearances were resolved. Because the trial court granted the Special Appearances, it did not hold a hearing on the Anti-SLAPP Motion to Dismiss.

RECORD REFERENCES

Citations will be made as follows:

Clerk's Record (Volumes 1-3):	[Vol.]CR[Page]
Supplemental Clerk's Record (Vol. 1-2)	[Vol.]SCR[Page]
Reporter's Record for the April 12, 2012, Special Appearances hearing before the Hon. Gisela Triana:	RR[Page]
Supp. Reporter's Record for the March 29, 2012, Motion for Continuance Hearing before the Hon. Rhonda Hurley:	2SRR[Page]
Supp. Reporter's Record for the April 12, 2012, Motion to Strike and Motion for Continuance Hearing before the Hon. Amy Clark Meachum:	3SRR[Page]
Supp. Reporter's Record for the July 30, 2012, Special Appearance hearing before the Hon. Amy Clark Meachum:	4SRR[Page]
Appellant's Brief:	Br. at [Page]

ISSUES PRESENTED

1. Did the trial court correctly hold that none of the following actions by Appellees waived their Special Appearances challenging personal jurisdiction:
 - (a) filing an Anti-SLAPP Motion to Dismiss, which was filed *after* their Special Appearances and *never* heard by the trial court;
 - (b) requesting administrative assignment of the entire case to a single judge under the trial court's local rules;
 - (c) resetting, by agreement, the hearings on the Special Appearances and Anti-SLAPP Motion to Dismiss in order to accommodate court-ordered discovery requested by Appellant;
 - (d) complying with the trial court's order compelling, over Appellees' objections, Appellees to respond to Appellant's discovery requests; and
 - (e) requesting a briefing schedule for the Special Appearances and Anti-SLAPP Motion to Dismiss?

2. Did the trial court correctly grant Appellees' Special Appearances, where the record evidence supports findings that:
 - (a) BMJ distributed only 20 print copies of the challenged publications in Texas, which represents far less than 1% of the *BMJ's* total worldwide circulation;
 - (b) the challenged publications concerned Appellant's activities in the United Kingdom more than a decade ago, did not mention Texas, and did not rely on any Texas sources;
 - (c) Appellees did not know that Appellant resided in Texas at the time of the publications;
 - (d) the litigation of this dispute in Texas would impose an undue burden and unfair disadvantage on Appellees, given that the Texas court would lack subpoena power to compel third parties in the United Kingdom to testify and produce relevant documents; and

(e) the resolution of Appellant's claims would force the Texas court into the inappropriate position of having to review the correctness of adjudicated findings of misconduct against Appellant by a duly-established regulatory body of the United Kingdom?

3. Should the Court decline Appellant's invitation to rule on the trial court's April 12, 2012, order denying Appellant's Motion to Strike Appellees' Anti-SLAPP Motion to Dismiss, which had no bearing on the trial court's jurisdictional ruling?

If the Court decides to resolve this additional issue, should it affirm the trial court's order where:

(a) Appellant's Motion to Strike was not timely filed or properly set for hearing;

(b) the undisputed record evidence demonstrates that the docket conditions of the trial court required that the Anti-SLAPP hearing be set more than 30 days after the filing of Appellees' Motion to Dismiss; and

(c) the 30-day period in Section 27.004 of the Texas Civil Practice and Remedies Code is not jurisdictional, and nothing in the text or purpose of the statute requires dismissal of Appellees' Anti-SLAPP Motion?

STATEMENT OF FACTS

In this libel case, a British-born and British-trained former doctor, Appellant Andrew Wakefield, challenges the reporting of an award-winning investigative journalist based in the United Kingdom, Appellee Brian Deer. For several years, Deer has exposed the fraud and misconduct at the heart of Wakefield’s notorious 1998 paper in the U.K. medical journal, *The Lancet*, which purported to link the life-saving Measles, Mumps, and Rubella (“MMR”) vaccine with the development of Autism in young children. Wakefield’s claims sparked a public health disaster, as immunization rates plummeted and the United Kingdom saw outbreaks of deadly, yet preventable, diseases. 3CR92-93.

Subsequent studies have proven that there is no link between MMR and Autism, and Wakefield’s medical license has been revoked by the General Medical Council (“GMC”)—the United Kingdom’s equivalent of the Texas Medical Board—for repeated acts of “serious professional misconduct.” 2CR557. *Time* magazine has labeled Wakefield one of modern history’s “Great Science Frauds,” and *The New York Times* has described him as “one of the most reviled doctors of his generation.” 2CR129,104. *The Lancet*’s own editor, who published Wakefield’s 1998 paper, has characterized the adjudicated findings against Wakefield as “the most appalling catalog and litany of some the most terrible behavior in any research[.]” 2CR132. *The Lancet* has since retracted Wakefield’s

article in its entirety. 2CR126. Last year, a U.K. court observed that “there is now no respectable body of opinion which supports [Wakefield’s] hypothesis.” 1CR909.

Deer’s reporting on Wakefield’s misconduct won him the British Press Award, the United Kingdom’s equivalent of the Pulitzer Prize. 2CR753. It also made him a defendant in three separate libel lawsuits filed by Wakefield—all of them in London, and all of them unsuccessful. 2CR212,242-86. In one of those cases, the judge criticized Wakefield for his prosecution of dubious claims for apparent “public relations purposes.” 2CR302.

Having decamped to Austin after the GMC began investigating him, Wakefield has renewed his harassment of Deer and Deer’s U.K. publishers by bringing meritless libel claims against Appellees *in Texas*. Wakefield has been soliciting donations for the litigation, telling his anti-vaccine supporters that this Texas case represents “a new day,” after so many failures before U.K. tribunals. 2CR456. But the trial court disagreed, granting Appellees’ Special Appearances and dismissing all claims against them for lack of personal jurisdiction.

I. This Dispute Has a Long History in the United Kingdom.

A. Wakefield’s U.K. Medical Career and 1990’s *Lancet* Research.

Born and educated in the United Kingdom, Wakefield spent virtually his entire medical career in London. In 1998, while working at London’s Royal Free

Hospital School of Medicine, Wakefield published his *Lancet* paper. 1CR847,858. The paper was based on research he conducted at the Royal Free, attempting to link the MMR vaccine with Autism and bowel disease. 1CR1014-45. Three years later, embroiled in controversy surrounding his *Lancet* paper, Wakefield left the Royal Free, but he stayed in London to continue his anti-vaccine activism. 1CR847. When the GMC began investigating him, Wakefield absconded to Texas. 1CR834. He has never lawfully practiced medicine in this State. 1CR847.

B. Brian Deer's Reporting on Wakefield's Research Misconduct.

In February 2004, London's *Sunday Times* newspaper published Deer's first exposé of Wakefield's *Lancet* research. 2CR211-12,1340-45. Deer's reporting revealed that several of the twelve anonymous children who had been the subjects of Wakefield's *Lancet* study had been actively sourced by him from anti-vaccine litigation groups preparing class-action claims against MMR manufacturers. *Id.* Deer also revealed that Wakefield had been hired as an expert for the plaintiffs in that litigation. *Id.* Wakefield had not disclosed these obvious conflicts of interest to *Lancet* readers, who were led to believe that the twelve anonymous *Lancet* children had been routinely referred to the Royal Free. 2CR554-55.

Within two weeks of Deer's *Sunday Times* reports, ten of Wakefield's twelve *Lancet* co-authors retracted their claim to have found a temporal link between the MMR vaccine and the onset of symptoms. 3CR1116. Later that year,

Deer produced a documentary for the U.K.'s Channel 4, which reported additional details of Wakefield's research misconduct, including that Wakefield had submitted a patent application for a "safer" vaccine, while he used his *Lancet* research to launch the MMR Scare. 2CR211-12. Throughout this time, Deer published his reporting on his personal website, www.briandeer.com. 2CR212.

C. Wakefield's U.K. Libel Litigation over Deer's Reporting.

In 2005, Wakefield filed three libel suits in London, complaining about Deer's reporting on his personal website, in his Channel 4 documentary, and in his *Sunday Times* articles. 2CR212,242-86. Immediately, Wakefield sought a stay of all three cases. 2CR212. *The Sunday Times* agreed, but Deer and Channel 4 did not, forcing Wakefield to apply to the High Court. *Id.* After a two-day hearing, Mr Justice Eady, the Chief Judge of the High Court's media subdivision, denied the stay, criticizing Wakefield's litigation tactics:

[Wakefield] wished to use the existence of libel proceedings for public relations purposes, and to deter critics, while at the same time isolating himself from the 'downside' of such litigation, in having to answer a substantial defence of justification.

2CR302. Wakefield later dismissed all three libel suits and was forced to pay the defendants' legal fees. 2CR213.

D. Wakefield's Medical License Is Permanently Revoked.

Wakefield then turned his attention to another legal proceeding in London—the GMC's Fitness-to-Practise Panel hearing into allegations of dishonesty and

other “serious professional misconduct” against him. 2CR559. It would be the longest Fitness-to-Practise Panel hearing in U.K. history, running 2½ years. 3CR96. The Panel heard evidence on the misreported data concerning the children who were subjects of the *Lancet* study, Wakefield’s biased procurement of the study’s subjects, his ties to litigation against vaccine manufacturers, and his undisclosed patent application. The Panel also heard evidence regarding Wakefield’s “unethical conduct,” including his admission that he once paid children attending his son’s birthday party £5 each to have their blood drawn there. 2CR556. Throughout the Panel proceeding, both the GMC and Wakefield were represented by teams of U.K. lawyers, including solicitors and barristers. 2CR497.

On January 28, 2010, the Fitness-to-Practise Panel issued its findings, concluding that Wakefield had been “dishonest,” violated basic research ethics rules, and showed a “callous disregard” for the suffering of the young children. 2CR558. The Panel further found that Wakefield’s *Lancet* research was “irresponsible,” “misleading,” and inaccurate, and his conduct “was such as to bring the medical profession into disrepute.” 2CR551-59. Shortly after the Panel issued its findings, *The Lancet* fully retracted Wakefield’s paper on the grounds that key claims in it had been “proven to be false.” 3CR1117.

The Panel delivered its formal sanction five months later, ordering that Wakefield’s medical license be permanently revoked, which the Panel found to be

the only penalty appropriately “proportionate to the serious and wide-ranging findings made against him.” 2CR559. Wakefield filed an appeal, but later voluntarily dismissed it. 2CR751. Accordingly, the Fitness-to-Practise Panel’s findings and sanctions became final, and Wakefield’s name was erased from the U.K.’s Medical Register. 1CR1114.

E. Wakefield Challenges Deer’s 2009 *Sunday Times* Reporting.

In London, Deer followed the Fitness-to-Practise Panel proceedings closely. 2CR735-36. Based on evidence introduced during the hearing, Deer published new reports in *The Sunday Times* in February 2009. 2CR213,344-51. These articles detailed Wakefield’s alterations and misreporting of patient data in his *Lancet* research and publication. *Id.* Deer’s reporting won him a British Press Award, the United Kingdom’s highest honor for a newspaper journalist. 2CR723.

Wakefield challenged Deer’s 2009 *Sunday Times* reporting with a formal petition to the U.K.’s Press Complaints Commission. 2CR214,353-409. Wakefield objected to numerous statements in Deer’s reports, and he described the overall gist and sting of the *Sunday Times* reports as an allegation of “fraud”:

The articles presented, as fact, *allegations that I committed scientific fraud* inasmuch as I “*changed and misreported results in [my] research*” in a paper in the medical journal *The Lancet* in 1998[.]

2CR353 (emphasis added). The PCC stayed the proceeding pending the completion of the then-ongoing Fitness-to-Practise Panel hearing, but Wakefield

still contends that the complaint is “active and . . . being pursued.” 2CR214.

F. The *BMJ*’s January 2011 Series, “Secrets of the MMR Scare.”

In June 2010—just after the Fitness-to-Practise Panel had issued its sanctions order against Wakefield—the *BMJ* commissioned Deer to write a series of articles, looking back at the MMR Scare and Wakefield’s role in it. 2CR210. The *BMJ* published this three-part series, entitled “Secrets of the MMR Scare,” in January 2011. The first article, “How the Case against the MMR Vaccine Was Fixed,” exposed the major inaccuracies in Wakefield’s *Lancet* paper. 2CR210. This article was essentially the same as Deer’s 2009 *Sunday Times* articles, albeit written for a medically-qualified readership and sourced with more than 100 footnotes. 2CR214; 1CR22-31. Deer’s second article, “How the Vaccine Crisis Was Meant to Make Money,” reported on Wakefield’s conflicts of interest and his commercial ventures designed to capitalize on the MMR Scare. 1CR353-72. Based on Deer’s reporting, the *BMJ* published an editorial on Wakefield’s misconduct, opining that it constituted “fraud.” 2CR1368-70.

II. Wakefield Files Suit in Texas, and Appellees Challenge Personal Jurisdiction.

In January 2012, exactly one year after the “Secrets” series was published, Wakefield sued for libel. 1CR4-19. But rather than file in London—where he had practiced medicine for two decades, conducted the *Lancet* research at issue, published the *Lancet* paper, previously sued Deer, and had an “active” complaint

pending with the PCC over virtually identical reporting—Wakefield sued *in Texas*. *Id.* Wakefield’s allegations in this case are essentially identical to the claims he made in the prior U.K. libel cases and his PCC Complaint, and to the defenses he asserted in the Fitness-to-Practise Panel hearing. In essence, Wakefield contends that he did not engage in any research misconduct and that his *Lancet* paper was entirely accurate. *Id.*

Appellees responded by filing Special Appearances, which established that they did not have any significant contacts with Texas. 1CR49-110. Reporter Deer and *BMJ* editor Godlee live in London and Cambridge, respectively. 2CR207 (Deer); 2CR575 (Godlee). They do not have any property, financial assets, accounts, or contact information in Texas. 2CR208 (Deer); 2CR576 (Godlee). With the exception of layovers at DFW Airport, they have not visited Texas in more than a decade. 2CR208 (Deer); 2CR576 (Godlee). Similarly, *BMJ* lacks any significant presence in Texas. Headquartered in London and incorporated under U.K. law, *BMJ* has no employees, offices, or assets in Texas. 2CR140-44. It has not designated an agent for service of process in Texas, and it has no phone, address, or other contact in Texas. 2CR144. The *British Medical Journal* is distributed worldwide, but less than 1% of its subscribers reside in Texas. 2CR145.

In developing the “Secrets” series, none of the Appellees made any contacts with Texas. They had no Texas sources and used no Texas documents. 2CR208-09; 2CR141-42. They did not need to. This reporting concerned research by Wakefield in the 1990’s in London and Wakefield’s publication of that research in a London-based medical journal. Indeed, none of the Appellees even knew that Wakefield was residing in Texas at the time the “Secrets” series was published. 2CR209-10 (Deer); 2CR142 (BMJ); 2CR577-78 (Godlee).

Appellees set the hearing on their Special Appearances for the first available date on the court’s docket—April 12, 2012. 2CR54. Appellees showed up at the April 12 hearing, ready for the trial court to resolve their Special Appearances. But, as discussed below, although the court opened the hearing on April 12, it did not decide the Special Appearances. Instead, the trial court granted Wakefield’s request for discovery, which delayed the conclusion of the Special Appearances hearing until July 2012.

III. Wakefield Conducts Discovery on Appellees’ Special Appearances and Anti-SLAPP Motion to Dismiss.

Having succeeded in delaying the trial court’s resolution of Appellees’ Special Appearances, Wakefield spent the next several weeks conducting discovery on jurisdiction and Appellees’ Anti-SLAPP Motion to Dismiss, which they filed in March 2012 after Wakefield declined their offer to put off all Anti-SLAPP proceedings until after the Special Appearances were resolved.

A. Appellees File an Anti-SLAPP Motion to Dismiss, *Subject to and without Waiving their Special Appearances.*

Because Wakefield’s claims in this case arise from Appellees’ exercise of free-speech rights, they are subject to dismissal under the Texas’s new Anti-SLAPP¹ statute, the Citizens Participation Act of 2011. *See* Tex. Civ. Prac. & Rem. Code § 27.001 *et seq.* Under the Anti-SLAPP statute, Appellees’ deadline for filing their Motion to Dismiss was March 9, 2012. *See* § 27.003(b) (motion to dismiss must be filed within 60 days after service of the legal action). But with pending Special Appearances—which had to be resolved first—Appellees proposed extending their Anti-SLAPP deadline until after the Special Appearances were resolved. 2CR53-55. Wakefield refused. *Id.*

Accordingly, Appellees filed their Anti-SLAPP Motion to Dismiss, expressly stating that it was being filed “subject to and without waiving their special appearances challenging personal jurisdiction.” 1CR122. With the Special Appearances already set for hearing on April 12, Appellees set the Anti-SLAPP Motion to Dismiss on the next available hearing date—April 26, 2012. 1CR176; 2CR53-55.

B. The Court Orders Appellees to Respond to Discovery.

On April 12, 2012, the trial court, the Honorable Gisela Triana presiding, opened its hearing on Appellees’ Special Appearances. RR4. Wakefield began the

¹ “SLAPP” stands for Strategic Lawsuits Against Public Participation.

hearing before Judge Triana by arguing that Appellees had waived their jurisdictional challenge by filing the Anti-SLAPP Motion to Dismiss and by submitting an administrative request under Travis County Local Rule 2.6 to have the complex case taken off the Central Docket and assigned to a single judge (“LR 2.6 Request”). RR38-40; 1CR1220-1227. Wakefield also argued that, if Judge Triana did not agree with him on waiver, she should either deny the Special Appearances on the merits or continue the hearing so that Wakefield could conduct additional jurisdictional discovery.² 1CR1255-56.

While Judge Triana was hearing the Special Appearances, a separate hearing was taking place before the Honorable Amy Clark Meachum. 3SRR1-25. In that hearing, Wakefield argued that Appellees had waived their Anti-SLAPP Motion to Dismiss by setting it for hearing more than 30 days after the motion was filed. 3SRR6. In the alternative, Wakefield asked Judge Meachum to continue the April 26 Anti-SLAPP hearing so that he could conduct Anti-SLAPP discovery. 3SRR6. Appellees objected to both requests. 3SRR13-20; 1CR1021-1039.

Unbeknownst to the parties and Judge Triana, Appellees’ LR 2.6 Request had been granted, and the entire case had already been administratively assigned to Judge Meachum. 3SRR; 1CR1343-44. After conferring on break, Judge

² Wakefield had previously moved the court to continue the Special Appearances hearing for 120 days so that he could conduct jurisdictional discovery. 1CR179-190. The Honorable Rhonda Hurley denied that motion without prejudice to Wakefield renewing it at the April 12 Special Appearances hearing. 1CR1001.

Meachum and Judge Triana decided that Judge Triana would continue the Special Appearances hearing, but resolve *only* Wakefield's argument that Appellees had waived their Special Appearances. Judge Meachum would resolve all other issues in the case. RR29.

Both waiver issues were decided in Appellees' favor. On April 12, Judge Meachum issued a letter ruling denying Wakefield's motion to strike the Anti-SLAPP hearing. 1CR1003. A few days later, Judge Triana issued a letter ruling rejecting Wakefield's argument that Appellees had waived their Special Appearances. 1CR1344,1347.

Wakefield was more successful, however, on the discovery front. Judge Meachum ordered "limited, specific discovery" on jurisdiction and Anti-SLAPP issues, and she continued both hearings until after that discovery was completed. 1CR1345-46. Judge Meachum further ordered the parties to confer regarding how to implement her discovery ruling. *Id.* If agreement could not be reached as to any of Wakefield's specific discovery requests, the parties were to submit the dispute to her for resolution. *Id.*

C. The Parties Conduct the Court-Ordered Discovery.

After the parties were unable to reach agreement on the contours of the "limited, specific discovery" ordered by Judge Meachum, she resolved the remaining disputes in a letter ruling on May 4, 2012, in which she granted certain

of Wakefield's requests for additional document production and depositions on jurisdictional and Anti-SLAPP topics. 1CR1500-01. These rulings required Appellees to produce of thousands of pages of documents generated during the development of the "Secrets" series. Moreover, the depositions were to be taken in London, which required finding dates on which the witnesses and counsel could attend. *Id.* Recognizing that they could not complete this discovery before the scheduled Special Appearances and Anti-SLAPP hearings later that month, the parties *agreed* to continue those hearings until July 2012. 2SCR at Ex. 9.

IV. The Court Grants Appellees' Special Appearances.

On July 30, 2012, with the court-ordered discovery finally complete, the trial court reopened the Special Appearances hearing. 4SRR5. At the hearing, Judge Meachum denied Wakefield's request to reconsider Judge Triana's prior ruling on waiver, and she ruled against him on his new waiver arguments. 4SRR66-67. After hearing the parties' respective arguments and evidence on the merits of the Special Appearances, Judge Meachum took them under advisement. 4SRR127-28. On August 3, 2012, Judge Meachum signed an order granting Appellees' Special Appearances and dismissing Wakefield's claims in their entirety for lack of personal jurisdiction. 3CR1517. Because the trial court granted the Special Appearances, it never held a hearing on Appellees' Anti-SLAPP Motion to Dismiss.

SUMMARY OF THE ARGUMENT

In this case, a former British doctor, Andrew Wakefield, seeks to prosecute libel claims in Texas against three British defendants over reporting in the *British Medical Journal* on Wakefield's research misconduct more than fifteen years ago in London. Unable to effectively challenge any of the trial court's presumed, implied factual findings and legal conclusions in support of its order granting Appellees' Special Appearances, Wakefield now relies primarily on several waiver theories. But none of his theories finds any support in Texas law or the record evidence. Wakefield's argument that Appellees waived their Special Appearances by subsequently filing an Anti-SLAPP Motion to Dismiss ignores the clear language of Tex. R. Civ. P. 120a, which provides that a party does not waive its special appearance if it follows Rule 120a's due-order-of-pleading and due-order-of-hearing requirements, which Appellees did here. Wakefield's other waiver theories are based on mischaracterizations of the trial-court proceedings. In fact, none of the actions Wakefield challenges constituted a request for affirmative relief inconsistent with Appellees' jurisdictional challenge or recognized that this action was properly pending in Texas.

Wakefield is also unable to identify any evidence sufficient to overturn the trial court's implied factual findings and legal conclusions in support of its order granting Appellees' Special Appearances. None of the Appellees has any

significant contacts with Texas. Less than 1% of *BMJ* subscribers are located in Texas, and Appellees did nothing to aim the challenged reports at Texas. The reports never mention Texas and do not rely on any Texas sources. Indeed, none of the Appellees even knew at the time of the publication that Wakefield was living in Texas. Moreover, litigation of these claims in Texas, over conduct and events that transpired in London over the last two decades, would be unreasonable. A Texas court would be unable to compel the depositions or trial testimony of U.K.-based third-party witnesses, such as Wakefield's co-authors or the *Lancet* children's parents, or to require them to produce relevant documents. And Wakefield's claims would inappropriately force the Texas court to sit in review of a U.K. regulatory body's adjudicated findings against him.

The Court need not consider Wakefield's third issue, which has nothing to do with jurisdiction. But if the Court chooses to decide this additional issue, it should affirm the trial court's order denying Wakefield's motion to strike the hearing on Appellees' Anti-SLAPP Motion to Dismiss. Wakefield's motion was untimely filed and improperly noticed for hearing, and the trial court's order can be affirmed on those grounds. Moreover, Wakefield's argument fails on the merits. Appellees fully complied with the statutory timing requirements of the Anti-SLAPP statute, and nothing in the text or purpose of the statute required the trial court to strike Appellees' Motion to Dismiss.

STANDARD OF REVIEW

Personal jurisdiction over a nonresident defendant is a mixed question of law and fact. *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). The ultimate issue of jurisdiction is a question of law, which is reviewed *de novo*. *Id.* But, where necessary, the trial court must resolve questions of jurisdictional facts. *Leesboro Corp. v. Hendrickson*, 322 S.W.3d 922, 926 (Tex. App.—Austin, 2010, no pet.). And where, as here, the trial court has not issued findings of fact and conclusions of law, this Court must “infer all fact findings necessary to support the trial court’s jurisdictional determination and any legal theory that is supported by the evidence.” *Id.* (citing *BMC Software*, 83 S.W.3d at 795). These implied findings may be challenged only for legal and factual sufficiency. *Leesboro*, 322 S.W.3d at 926. A finding is legally insufficient only if there is not “more than a scintilla” of evidence to support it and factually insufficient only if it is “so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust.” *Id.* Under this standard, “[t]he trial court is the sole judge of witness credibility and the weight to be given to testimony, and [this Court] ‘will not disturb a trial court’s resolution of conflicting evidence that turns on the credibility or weight of the evidence.’” *Id.* at 926-27 (citation omitted). In conducting this inquiry, the Court must review “all relevant evidence that was before the trial court.” *Id.* at 927.

ARGUMENT AND AUTHORITIES

I. Appellees Did Not Waive Their Special Appearances.

In his first issue, Wakefield argues that Appellees have waived their Special Appearances. Wakefield's various waiver arguments fall into two general categories, including that Appellees waived their Special Appearances (1) by filing their Anti-SLAPP Motion to Dismiss,³ and (2) by taking certain administrative actions and complying with the trial court's discovery orders. None of these waiver arguments has any merit.

A. Appellees' Filing of Their Anti-SLAPP Motion to Dismiss Did Not Waive Their Previously-Filed Special Appearances.

Wakefield's argument that Appellees waived their Special Appearances by filing an Anti-SLAPP Motion to Dismiss—which was filed *after* their Special Appearances and *never* heard by the trial court—ignores Rule 120a and the case law applying it. As the Texas Supreme Court has held, a defendant's compliance with Rule 120a ensures that the defendant does not waive its jurisdictional challenge by entering a general appearance. *See Exito Elecs. Co. v. Trejo*, 142 S.W.3d 302, 305 (Tex. 2004) (Tex. R. Civ. P. 120a “governs” special appearances); *Dawson-Austin v. Austin*, 968 S.W.2d 319, 323 (Tex. 1998)

³ Wakefield mischaracterizes Appellees' Anti-SLAPP Motion to Dismiss as a “statutory claim.” Br. at 16. But a motion to dismiss under the Anti-SLAPP statute is not a “claim”; it is simply a *motion to dismiss*. *See* Tex. Civ. Prac. & Rem. Code § 27.003(a) (“If a legal action is based on...a party's exercise of the right of free speech...that party may file a *motion to dismiss* the legal action.”) (emphasis added).

(“Because [the defendant’s] motion and pleas fully complied with Rule 120a, they did not constitute a general appearance.”).

Rule 120a expressly anticipates that a defendant may file “pleas, pleadings, and motions” that might otherwise seek affirmative relief inconsistent with its special appearance, as long as the defendant complies with two procedural requirements. First, the special appearance must be filed “prior to . . . any other plea, pleading or motion.” Tex. R. Civ. P. 120a(1). This is referred to as the “due-order-of-pleading” requirement. *See Klingenschmitt v. Weinstein*, 342 S.W.3d 131, 133-34 (Tex. App—Dallas 2011, no pet.) (citation omitted) Second, the special appearance must be “heard and determined” before any other plea, pleading, or motion. Tex. R. Civ. P. 120a(2). This is referred to as the “due-order-of-hearing” requirement. *Id.* Here, there is no dispute that Appellees complied with both requirements of Rule 120a: they filed their Special Appearances *before* their Anti-SLAPP Motion to Dismiss, and the Motion to Dismiss was *never* heard by the trial court.⁴

Wakefield ignores Appellees’ undisputed compliance with Rule 120a, instead proposing a “disjunctive” test, under which a defendant waives a special appearance by filing a motion seeking affirmative relief inconsistent with its

⁴ Even though Texas law does not require it, Appellees’ Anti-SLAPP Motion to Dismiss expressly stated that it was being filed “subject to and without waiving” their Special Appearances. 1CR122. *See Dawson-Austin*, 968 S.W.2d at 323 (express “subject to” language not required).

jurisdictional challenge *or* by violating Rule 120a. But Wakefield’s proposed test cannot be reconciled with well-settled law, including several of the cases he cites. For example, although Wakefield contends that his test is “inherent in the analytical framework of [the Texas Supreme Court’s decisions in] *Dawson-Austin* and *Exito*,” Br. at 14, the holdings of these cases do not support his argument.

In *Dawson-Austin*, the Texas Supreme Court considered four separate motions and pleas, and it held that none of them waived the defendant’s special appearance. 968 S.W.2d at 322-23. With regard to three of them, the Court relied *solely* on the fact that the defendant had complied with Rule 120a. *Id.* at 323 (“[B]ecause [the defendant’s] motion and pleas fully complied with Rule 120a, they did not constitute a general appearance.”). And with regard to the fourth (a motion for continuance), the Court held that there was no waiver for several alternative reasons, including compliance with Rule 120a. *Id.* That the motion for continuance did not seek affirmative relief was just one of several independent bases for finding no waiver. *Id.*

In *Exito*, the defendant filed a Rule 11 agreement *before* filing its special appearance. 142 S.W.3d at 305. Accordingly, it could not rely on compliance with Rule 120a. *Id.* The *Exito* Court therefore considered whether the Rule 11 agreement sought “affirmative” relief or otherwise recognized that the action was properly pending. *Id.* at 306. The *Exito* Court never suggested that, where Rule

120a's due-order-of-pleading requirement is satisfied, a court must undertake the same analysis. *Id.*

Wakefield also cites court of appeals cases that do not support his argument or his proposed "disjunctive" test. *See* Br. at 13 (citing *Exchequer Fin. Grp., Inc. v. Stratum Dev., Inc.*, 239 S.W.3d 899, 906 (Tex. App.—Dallas, 2007, no pet.) ("We conclude appellees' filing of the motion to dismiss did not waive its special appearance") and *Klingenschmitt*, 342 S.W.3d at 133-34 (considering whether motion to dismiss sought affirmative relief only after noting that defendant had failed to comply with the due-order-of-hearing requirement)).⁵ And Wakefield ignores numerous other published cases that expressly reject his argument. *See, e.g., Yuen v. Fisher*, 227 S.W.3d 193, 197-98 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (defendant's filing of a motion to set aside a default judgment and award sanctions against the plaintiff's counsel did not waive the defendant's previously-filed special appearance); *Silbaugh v. Ramirez*, 126 S.W.3d 88, 93-94

⁵ Wakefield's reliance on the Fort Worth Court of Appeals' unpublished decision in *SBG Development Services, L.P. v. NuRock Group, Inc.*, No. 02-11-00008-CV, 2011 WL 5247873 (Tex. App.—Fort Worth, Nov. 3, 2011, no pet.) (mem. op.), is misplaced. In that case, the defendant violated Rule 120a's due-order-of-hearing requirement by having a motion to strike pleadings *heard before the special appearance*. *Id.* at *3. The court separately discussed whether the motion sought affirmative relief inconsistent with the jurisdictional challenge. *Id.* To the extent that the memorandum opinion can be read to characterize these as "alternative" holdings, it is incorrectly reasoned. As discussed above, the analysis of whether a motion seeks affirmative relief inconsistent with a jurisdictional challenge comes into play only if the defendant has not complied with Rule 120a. Accordingly, the better reading of the opinion is that the defendant's violation of the due-order-of-hearing requirement was significant *because* the motion sought affirmative relief. *Id.* at *3-4.

(Tex. App.—Houston [1st Dist.] 2002, no pet.) (defendant’s filing of a motion to strike an intervention on non-jurisdictional grounds did not waive her previously-filed special appearance); *Lang v. Capital Res. Invs.*, 102 S.W.3d 861, 864 (Tex. App.—Dallas 2003, no pet.) (defendant’s subsequent filing of a motion for new trial did not waive previously filed special appearance).⁶

In short, Wakefield’s proposed “disjunctive” test gets special-appearance law all wrong. Under *Dawson-Austin*, *Exito*, and numerous published court of appeals decisions, Appellees’ undisputed compliance with Rule 120a precludes any finding of waiver.

B. Wakefield’s Other Waiver Theories Are Meritless.

Unable to argue credibly that Appellees waived their Special Appearances by *subsequently filing* their Anti-SLAPP Motion to Dismiss, Wakefield accuses Appellees of “*aggressively litigating*” the Motion. But Wakefield’s characterization of Appellees’ actions as “aggressively litigating” the Anti-SLAPP Motion to Dismiss cannot be reconciled with the record evidence, and Wakefield cannot identify any action by Appellees that constituted a request for affirmative

⁶ Wakefield suggests that Appellees waived their Special Appearances by setting the Anti-SLAPP hearing 14 days after the Special Appearances hearing, which was within the 20-day period for filing an interlocutory appeal of a denial of a special appearance. *See* Br. at 17-18. But Wakefield’s suggestion that a motion to dismiss hearing must be set at least 20 days after a special appearance hearing finds no support in Rule 120a or the case law applying it. In fact, the hearings can be set *on the same day*, as long as the special appearance is heard and determined before the other motion hearing opens. *See Lang*, 102 S.W.3d at 864 (“[T]he setting of the motion for new trial for hearing on the same day as the special appearance did not constitute a general appearance.”).

relief that was inconsistent with their jurisdictional challenge or recognized that the action was properly pending in Texas. *See Exito*, 142 S.W.3d at 307.

1. Appellees' Administrative Request for Single-Judge Assignment.

Wakefield's argument that Appellees waived their Special Appearances by requesting administrative assignment of the case to a single judge under Travis County Local Rule 2.6 is premised on his mischaracterization of that request as relating *solely* to Appellees' Anti-SLAPP Motion to Dismiss. *See Br.* at 19 (“requesting the Anti-SLAPP Motion be specially assigned”), 20 (“This request served no function related to jurisdiction”).

In fact, Appellees sought assignment of the *entire case* to a single judge, not just the Anti-SLAPP Motion to Dismiss. 1CR302-04. And the impetus for the request was a dispute over the scope of *jurisdictional* discovery and the timing of the *Special Appearances* hearing. In late March 2012, Wakefield sought leave to conduct four months of additional jurisdictional discovery. 1CR179-214. But rather than wait for the scheduled April 12 Special Appearances hearing to make this request, Wakefield set his motion for hearing on the trial court's continuance docket. 1CR189. Under the Travis County Central-Docket procedures, this meant that two different judges would have to familiarize themselves with the complicated history of this dispute, the jurisdictional facts relevant to the Special

Appearances, and the substantive law governing jurisdictional challenges in libel cases—possibly within the same two-week period.

And it meant that Wakefield would get two bites at the apple: if the continuance-docket hearing on his request for jurisdictional discovery did not go well, he would simply make the same request to a different judge during the Special Appearances hearing two weeks later. This seemed an unnecessary waste of party and judicial resources, and judicial economy clearly favored having a single judge assigned to the case. A single-judge assignment would also help coordinate the scheduling of the Special Appearances and Anti-SLAPP proceedings consistent with Rule 120a. 1CR303-04. Accordingly, Appellees submitted a LR 2.6 Request, asking that any assignment be made prior to the March 29, 2012, continuance-docket hearing on Wakefield’s motion for jurisdictional discovery. 1CR302-04.

In short, Wakefield’s assertion that the LR 2.6 Request “served no function related to jurisdiction” is disingenuous. And any suggestion that the Request sought affirmative relief inconsistent with Appellees’ Special Appearances or recognized that the case was properly pending in Texas ignores the Request and the context in which it was made.

2. The Parties' Agreed Resetting of the Hearings.

Wakefield argues that “Appellees further invoked the jurisdiction of the court in furtherance of their own claims when they sought (and obtained) a continuance of the hearing on their Anti-SLAPP motion.” Br. at 21. Again, this mischaracterizes the trial-court proceedings. As background, in late April 2012, the hearings on Appellees’ Special Appearances and (if necessary) their Anti-SLAPP Motion to Dismiss were reset for May 22-23, 2012. 1CR1345-46,1500. At the time, however, Wakefield was seeking additional jurisdictional and Anti-SLAPP discovery. *Id.* Appellees objected to this discovery, but the trial court ruled against them in a May 4 order, which required extensive document production and several depositions to be taken in London.⁷ 2CR1649-50. Recognizing that this new, court-ordered discovery could not be accomplished before the hearings set for later that month, the parties *agreed* to continue the hearings until after the discovery had been completed.⁸ 2SCR at Ex. 9. This

⁷ Wakefield incorrectly states that Appellees relied on the Anti-SLAPP’s discovery stay, *see* Tex. Civ. Prac. & Rem. Code 27.003(c), in objecting to his jurisdictional discovery requests. *See* Br. at 16. In fact, as Wakefield’s own cited record evidence confirms, Appellees “have never taken the position that the filing of their anti-SLAPP motion stay[ed] jurisdictional discovery[.]” 1CR224 n.47.

⁸ Notably, although the court ordered discovery on both the Special Appearances and the Anti-SLAPP Motion to Dismiss, the jurisdictional discovery alone was so extensive that it would have left the parties no choice but to reset the hearing on Appellees’ Special Appearances. And because the Anti-SLAPP hearing had to follow the hearing on the Special Appearances, that hearing also would have needed to be reset. *See Dawson-Austin*, 968 S.W.2d at 323 (no waiver where defendant moved for continuance of all pending motions, as Rule 120a’s due-order-of-hearing requirement mandated that the special appearance be heard first).

agreement did not require any affirmative relief from the trial court; it merely involved taking the May 2012 hearings off the calendar and re-noticing them, *by agreement*, for July 30-31, 2012. 1CR1502-03. *See Silbaugh*, 126 S.W.3d at 93 (defendant’s “filing notice of a hearing and setting a hearing on the trial court’s docket did not waive her special appearance”).

Even if this agreed resetting of the hearings on the Special Appearances and Anti-SLAPP Motion to Dismiss could be accurately characterized as a “motion for continuance,” Wakefield’s reliance on the First Court of Appeals’ unpublished decision in *Branckaert v. Otou* is misplaced. *See* No. 01-08-00637-CV, 2011 WL 3556949 (Tex. App.—Houston [1st Dist.] Aug. 11, 2011, no pet.) (mem. op.). In *Branckaert*, the defendant filed a motion for continuance *in order to conduct his own offensive discovery on an issue unrelated to jurisdiction*. *Id.* at *3. Here, Appellees did not seek any offensive discovery, and the agreed resetting of the hearings merely reflected the parties’ recognition that the trial court had ordered Appellees to participate in more discovery than could reasonably be completed in the time before the scheduled hearings.

3. Appellees’ “Participation” in Discovery.

Wakefield also argues that Appellees waived their Special Appearance by “participating” in discovery unrelated to jurisdiction. But he fails to acknowledge that this was not discovery that Appellees requested. Indeed, Appellees opposed

all Anti-SLAPP discovery, but the trial court ordered them to respond to certain of Wakefield's requests. 1CR1021-1039; 2CR1649-50.

Wakefield fails to cite any cases in which a party's compliance with court-ordered discovery waived the party's special appearance.⁹ And Wakefield cannot credibly argue that, by complying with the trial court's discovery order, Appellees invoked the court's jurisdiction on any issue or sought affirmative relief from the court. *See Exito*, 142 S.W.3d at 305. Nor can he muster any theory as to how a party's compliance with a court's order to participate in discovery reflects a recognition that the action is properly pending in this jurisdiction. Of course, it does not. Appellees' "participation" in court-ordered discovery merely reflected their recognition that the trial court ruled against them.

⁹ Wakefield correctly points out that the Texas Supreme Court did not decide this issue in *Exito*, but he ignores other authority holding that participation in non-jurisdictional discovery does not waive a party's special appearance—even when the party challenging jurisdiction is the one *seeking* the non-jurisdictional discovery. *See, e.g., Silbaugh*, 126 S.W.3d at 93 (defendant's discovery did not waive special appearance, as nothing in Rule 120a "limit[s] discovery to only those issues that are related to the special appearances"); *Case v. Grammar*, 31 S.W.3d 304, 310-11 (Tex. App.—San Antonio 2000, no pet.) ("[Rule 120a] specifically contemplates ongoing discovery by both the party challenging jurisdiction and the party invoking it, and nothing in the rule limits discovery to matters relating to the special appearance."), *disapproved of on other grounds by BMC*, 83 S.W.3d 789, 794 & n.1 (Tex. 2002); *Peninsula Asset Mgm't (Cayman) Ltd. v. Hankook Tire Co., Ltd.*, No. 2-04-254-CV, 2006 WL 1030185, at *3 (Tex. App.—Fort Worth Apr. 20, 2006, pet. denied) (mem. op.) ("[S]everal of our sister courts have held that even if a defendant's discovery is unrelated to the special appearance and involves the merits of the case, he has not waived his special appearance."). Moreover, *Exito* involved a nonresident defendant's own discovery *motion*. *See* 142 S.W.3d at 306. Appellees did not file any discovery motions.

4. Appellees' Request for a Briefing Schedule.

Finally, Wakefield argues that Appellees waived their jurisdictional challenge by requesting a briefing schedule “related specifically to their Anti-SLAPP Motion to Dismiss.” Again, this misrepresents the record. With the Special Appearances set for hearing, and the Anti-SLAPP Motion to Dismiss set to be heard (if at all) immediately after the trial court ruled on the Special Appearances, Appellees requested a briefing schedule for both motions so that the trial court would be given an opportunity to digest the parties’ legal arguments, consider the evidence, and focus the hearing on those issues for which oral argument would provide meaningful assistance.¹⁰ The request was *not* limited to the Anti-SLAPP Motion to Dismiss, nor did it recognize that the case was properly pending in Texas. Indeed, Appellees’ correspondence with the court made clear that the Special Appearances would be heard first and that the Anti-SLAPP hearing might not even be necessary.¹¹ 2CR1505.

¹⁰ Appellees made this request in response to Wakefield’s decisions to file his Special Appearance briefing, as well as his motion to strike the Anti-SLAPP hearing, on the morning of the April 12 hearings, therefore depriving Appellees an opportunity to reply or provide the court with contrary authority prior to those hearings. 1CR1220,1004.

¹¹ Wakefield’s repeated suggestions that Appellees were attempting to gain some strategic advantage by forcing Wakefield “to muster his proof and detail his [Anti-SLAPP] arguments” before the Special Appearances hearing ignores the fact that Appellees offered to put off *all* Anti-SLAPP proceedings until after their Special Appearances were resolved. 2CR53-55. Because Wakefield refused this offer, he has only himself to blame for having to respond to Appellees’ Motion to Dismiss.

II. Appellees Lack Minimum Contacts to Support Specific Jurisdiction in this Libel Case, and Jurisdiction in Texas Would Be Unreasonable.

Unable to rely on waiver, Wakefield also fails to mount any effective attack on the trial court's determination of the legal and factual merits of Appellees' Special Appearances. The standards governing the jurisdictional analysis are well settled. Because the Texas long-arm statute extends as far as due process permits, the analysis collapses into the two-prong inquiry of whether (1) the defendant purposefully availed itself of the benefits and protections of the forum state by establishing minimum contacts with that state; *and* whether (2) the exercise of jurisdiction is reasonable or would offend traditional notions of fair play and substantial justice. *Kelly v. Gen. Interior Constr., Inc.*, 301 S.W.3d 653, 657-58 (Tex. 2010). Here, the trial court is deemed to have ruled against Wakefield on the minimum-contacts prong *and* the reasonableness prong. *Leesboro*, 322 S.W.3d at 928-29. In addition, the trial court is deemed to have made all factual findings necessary to support its implied rulings on each prong, and these findings are reviewed only for legal and factual sufficiency. *Id.* at 926.

A. The Trial Court's Implied Ruling that Appellees Did Not Have Sufficient Minimum Contacts with Texas Is Supported by the Record Evidence.

In attacking the trial court's implied ruling that Appellees did not have minimum contacts, Wakefield ignores the applicable standard of review and confuses the legal standards for determining specific jurisdiction in a libel case.

When the evidence of Appellees' *relevant* contacts is viewed in the light most favorable to them and the correct legal standards are applied, it is clear that the trial court's conclusion that Appellees negated any basis for specific jurisdiction must be affirmed.

1. The Applicable Legal Standards for Determining Specific Jurisdiction in a Libel Case Are Well Established.

Although Wakefield initially asserted (and conducted extensive discovery on) *general* jurisdiction, he has abandoned that argument. *See* Br. at 28. Accordingly, only *specific* jurisdiction is now at issue. In analyzing specific jurisdiction, the focus is limited to the “relationship among the defendant, the forum[,] and the litigation.” *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 575-76 (Tex. 2007) (citation omitted). Only those forum-contacts with “a substantial connection” to “the operative facts of the litigation” are relevant to specific jurisdiction. *Id.* at 579, 585. And only the *defendant's* contacts and expectations are relevant; the actions of the plaintiff or third parties cannot be considered. *See Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 790 (Tex. 2005) (minimum-contacts assessment “focuses solely on the actions and reasonable expectations of the defendant”).

For libel cases, specific jurisdiction exists for either “(1) a publication with adequate circulation in the state, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 773-74 (1984), or (2) an author or publisher who ‘aims’ a story at the state

knowing that the ‘effects’ of the story will be felt there. *Calder v. Jones*, 465 U.S. 783, 789-90 (1984).” *Fielding v. Hubert Burda Media, Inc.*, 415 F.3d 419, 425 (5th Cir. 2005). In applying these tests, the contacts of each defendant must be assessed individually, and each challenged statement must be considered separately. *See Morris v. Kohls-York*, 164 S.W.3d 686, 693 (Tex. App.—Austin 2005, pet. dismiss’d) (“When, as here, there are multiple defendants, we must test each defendant’s actions and contacts with the forum separately.”); *see also Clemens v. McNamee*, 608 F. Supp. 2d 811, 819 (S.D. Tex. 2009), *aff’d*, 615 F.3d 374 (5th Cir. 2010). Here, Wakefield cannot satisfy the *Keeton* circulation test or the *Calder* “effects” test for any of Appellees’ challenged publications.

2. BMJ’s Circulation Is Inadequate to Support Specific Jurisdiction under *Keeton* and *Fielding*.

In *Keeton*, the U.S. Supreme Court held that *Hustler* magazine had purposely availed itself of the forum state by distributing 10,000 to 15,000 copies there, which it characterized as a “substantial” circulation. 465 U.S. at 773-74. Here, the *BMJ*’s circulation in Texas is nowhere near that threshold. According to Wakefield, when the “Secrets” series was published in January 2011, “the *BMJ* had at a minimum 47-48 Texas subscribers[.]” Br. at 33. This actually overstates the number of relevant subscribers because it includes both *print* and *online* subscribers. But the main articles and editorial at issue in this case were not

disseminated through online subscriptions.¹² Rather, they were published in print and on the *BMJ* website, freely available to subscribers and non-subscribers alike. 2CR142-43. Accordingly, the number of online subscribers is irrelevant; only print subscriptions should factor into the analysis here. *See Revell v. Lidov*, 317 F.3d 467, 472 (5th Cir. 2002) (libel claims did not arise out of subscriptions section of website, and therefore “those portions of the website need not be considered”). And, in January 2011, the *BMJ* had only 20 print subscribers in Texas.¹³ 2CR142. Either way, the total circulation at issue in this case is a tiny fraction of the circulation found to be sufficiently “substantial” by the *Keeton* Court.

For a more analogous precedent, the Court need only look to the Fifth Circuit’s decision in *Fielding v. Hubert Burda*, which involved libel claims brought in Texas against a German publication with approximately 70 subscriptions in Texas. *See* 415 F.3d at 426. The Fifth Circuit held that to be insufficiently “substantial” under *Keeton*, particularly given that it represented less than 1% of the German publication’s total worldwide circulation. *See id.* at 426. Here, the *BMJ*’s circulation is appreciably less than the 70 subscriptions at issue in *Fielding*, and the *BMJ*’s Texas subscriber base is also less than 1% of its worldwide base.

¹² A short introduction to the “Secrets” series, akin to the “editor’s notes” in the front of a magazine, was published online behind the pay wall. 2CR1452.

¹³ No single-copy sales of the “Secrets” series were made in Texas. 2CR142.

Wakefield fails to discuss *Keeton* or *Fielding*, relying instead on cases from the Ninth Circuit and a district court within the Ninth Circuit—*Gordy v. The Daily News*, 95 F.3d 829 (9th Cir. 1996), and *Miracle v. NYP Holdings, Inc.*, 87 F. Supp. 2d 1060 (D. Haw. 2000). Wakefield contends that these cases stand for the proposition that even miniscule circulation totals—13 to 18 copies in *Gordy* and two copies in *Miracle*—are, standing alone, sufficient to establish minimum contacts. See Br. at 29-30. But *Gordy* and *Miracle* were not decided under the *Keeton* “substantial circulation” test. Rather, they were decided under the *Calder* “effects” test, and nothing in those opinions suggests that they would have been decided the same way under *Keeton*.¹⁴

Wakefield’s reliance on the First Court of Appeals’ decision in *Paul Gillrie Institute, Inc. v. Universal Computer Consulting, Ltd.*, 183 S.W.3d 755 (Tex. App.—Houston [1st Dist.] 2005, no pet.), is similarly misplaced. In that case, Florida defendants sent approximately fifty print copies of an allegedly defamatory publication to Texas. *Id.* at 761. While the court held that this circulation was sufficient to support the exercise of jurisdiction, it is unclear whether the court based its holding on *Keeton* or *Calder*. Cf. *id.* at (“We found the facts in this case to be comparable to those in *Calder* . . .”). Moreover, the court went out of its

¹⁴ As discussed below, *Gordy* and *Miracle* are easily distinguishable on the *Calder* standard.

way to note that the defendant had failed to submit evidence showing the relative percentage of these subscriptions to the overall subscriber base:

We also note that the record is void of any evidence related to the number of subscribers to the [defendants'] journal . . . who reside in Texas versus those who reside in other states To the extent [defendants] are attempting to bolster their jurisdictional challenge with these facts, they have failed to provide any evidentiary support.

Id. at 762. Accordingly, there was no way for the *Gillrie* court to have determined the extent to which that level of circulation reflected an effort to specifically target Texas. By contrast, the record in this case shows that the *BMJ*'s subscriptions in Texas (even counting the irrelevant online subscriptions) represent less than 1% of its worldwide total. *Gillrie* therefore cannot answer the jurisdictional question presented in this case. The Court should rely instead on *Fielding* in affirming the trial court's implied holding that the *BMJ* did not have "substantial" circulation in Texas at the time of the publication of the "Secrets" series.¹⁵

3. *Calder* Cannot Support the Jurisdiction in this Case.

The record evidence also supports the trial court's implied determination that Wakefield failed to satisfy his burden under *Calder*. In *Calder*, a famous

¹⁵ Even if the 20 *BMJ* subscriptions were found to be sufficiently "substantial" under *Keeton*, that would not justify the exercise of jurisdiction over Godlee or Deer. Godlee was not involved in the *BMJ*'s subscription sales or distribution, and Deer testified that he did not know that the *BMJ* had any Texas subscribers. Furthermore, *BMJ* subscriptions are irrelevant to the jurisdictional analysis of Deer's and Godlee's statements to the media, as well as Godlee's NIH lectures. See, e.g., *Johns Hopkins Univ. v. Nath*, 238 S.W.3d 492, 499 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (no jurisdiction over nonresident doctor based on lecture about plaintiff doctor, a Texas resident, where lecture was delivered in Maryland and defendant "did not come to Texas, he did not call, and he did not send correspondence to Texas").

California actress brought suit in California alleging that she was libeled in an article published in the *National Enquirer*. See 465 U.S. at 785-86. In holding that the minimum-contacts prong of the due-process test was satisfied, the U.S. Supreme Court relied on the defendants' "aiming" of the story at California:

The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The article was drawn from California sources, and the brunt of the harm, in terms both of [the actress'] emotional distress and the injury to her professional reputation, was suffered in California. *In sum, California is the focal point both of the story and of the harm suffered.*

Id. at 788-89 (emphasis added). The Texas Supreme Court has since narrowed *Calder*'s application by holding that Texas courts may not rely on the plaintiff's connection with the forum state. See *Michiana*, 168 S.W.3d at 789. Likewise, the Fifth Circuit has distilled the *Calder* holding into the following test, which focuses on the *defendants*' targeting of the forum state:

the plaintiff seeking to assert specific personal jurisdiction over a defendant in a defamation case [must] show "(1) the subject matter of and (2) the sources relied upon for the article were in the forum state."

Clemens v. McNamee, 615 F.3d 374, 380 (5th Cir. 2010) (quoting *Fielding*, 415 F.3d at 426).

Here, the "subject matter" of the challenged publications in this case had nothing to do with Texas. Instead, the publications concerned Wakefield's conduct in London in the 1990's and the evidence submitted during the U.K. Fitness-to-

Practise Panel hearing. Texas is not even mentioned in any of the challenged publications. Under virtually identical facts, where a Texas resident sued an out-of-state publisher for reporting on events that had occurred several years earlier in another jurisdiction, the Fifth Circuit held that *Calder* had not been satisfied:

[T]he article . . . contains no reference to Texas, nor does it refer to the Texas activities of [the plaintiff], and it was not directed at Texas readers as distinguished from readers in other states. Texas was not the focal point of the article

Revell, 317 F.3d at 473. Other courts have reached the same conclusion. See *Clemens*, 615 F.3d at 380 (“[Plaintiff] has not made the prima facie showing that [the defendant] made statements in which Texas was the focal point: the statements did not concern activity in Texas”); *Fielding*, 415 F.3d at 423-24 (no jurisdiction where articles concerned plaintiffs’ conduct in Germany); *Young v. New Haven Advocate*, 315 F.3d 256, 258 (4th Cir. 2002) (no jurisdiction in Virginia over libel claim by Virginia resident against Connecticut newspapers about housing of Connecticut prisoners); *Reynolds v. Int’l Amateur Athletic Fed’n*, 23 F.3d 1110, 1112 (6th Cir. 1994) (no jurisdiction in Ohio over libel claim by Ohio resident against London-based publisher of press release concerning plaintiff’s conduct outside forum state).¹⁶

¹⁶ Wakefield’s reliance on the Ninth Circuit’s decision in *Gordy* is misplaced. In that case, the plaintiff was a prominent record executive whose career had been centered in Los Angeles for nearly 25 years, and it was undisputed that the defendant knew the plaintiff lived in California. See 95 F.3d at 831-32. Similarly in *Miracle*, the article at issue identified the plaintiff as a resident of the forum state. 87 F. Supp. 2d at 1066.

Similarly, this Court must presume that the trial court found that Appellees did not rely on any Texas sources, a finding supported by the record evidence. Deer testified that, in drafting the “Secrets” series, he did not interview any Texas residents or obtain any documents from Texas. 2CR208-09. Wakefield points to two email contacts sent by Deer in 2006 and 2009 to Wakefield and his Austin employer, *see* Br. at 41-42, but he ignores the record evidence that these contacts were made in connection with reporting for *The Sunday Times*, not the *BMJ* articles at issue in this case. 2CR210. Indeed, the “Secrets” series was not conceived until June 2010.¹⁷ *Id.* Accordingly, the trial court’s implied finding that these contacts were not “substantially connected to the operative facts of the litigation” should therefore not be disturbed. *See Leesboro*, 322 S.W.3d at 929. Moreover, even if these isolated contacts were “substantially related” to the publications at issue in this case, they would be insufficient to confer jurisdiction under *Calder*. *See Fielding*, 415 F.3d at 426 (no jurisdiction even though one of the defendants used Texas sources, as the “clear thrust of the articles . . . show[ed] the marginal importance of this Texas research”).

In addition, courts applying the *Calder* test have required the plaintiff to show that the defendant had actual knowledge at the time of publication that the plaintiff was residing in the forum state. *See, e.g., Revell*, 317 F.3d at 475

¹⁷ Deer’s 2006 and 2009 emails to Wakefield and The Thoughtful House therefore cannot be imputed to Godlee or BMJ, as Deer sent them in connection with his *Sunday Times* reporting.

(“Knowledge of the particular forum in which a potential plaintiff will bear the brunt of the harm forms an essential part of the *Calder* test.”). Here, Wakefield asserts that “Defendants knew that Dr. Wakefield lived in Texas,” citing several *BMJ* articles that referred to Wakefield’s professional association with The Thoughtful House in Austin. *See* Br. at 39-41. But these articles, some of them published as early as 2005, are not definitive evidence of what Appellees knew about Wakefield’s residence *at the time of publication in January 2011*. Wakefield neglects to mention that he resigned from The Thoughtful House in early 2010, approximately one year before the “Secrets” series was published. 2CR210. And shortly after publication, Wakefield complained about the series, identifying himself in those complaints as a Texas resident. *Id.* Viewed in this context, a review of Wakefield’s cited articles shows only that Appellees (1) knew before 2010 that Wakefield was associated with the Thoughtful House, (2) knew that he resigned from there in early 2010, and (3) knew only after the “Secrets” series was published that he had, in fact, remained in Austin. But none of the articles cited by Wakefield proves conclusively that any of the Appellees had actual knowledge in January 2011 that Wakefield was living in Texas.

Indeed, Wakefield ignores evidence—including Appellees’ own testimony—that they did *not* know where he was residing when they published the

“Secrets” series.¹⁸ 2CR209-210 (Deer); 2CR142 (BMJ); 2CR577-78 (Godlee). Moreover, none of the emails or drafts generated during the development of the “Secrets” series refers to Wakefield being in Texas. 2CR210. And Wakefield fails to acknowledge the most compelling evidence regarding what the Appellees “knew” at the time of the publication of the “Secrets” series: In December 2010—almost a year after Wakefield’s departure from the Thoughtful House and less than one month before publication of the “Secrets” series—Godlee asked Deer, “*Where is he now?*” 2CR210, 216. After a quick internet search, Deer emailed Godlee a link to a public radio report raising concerns about Wakefield’s experiments on the Somali refugee community *in Minnesota*. *Id.* Neither Godlee nor Deer conducted any additional research on Wakefield’s current whereabouts, given that the *BMJ*’s “Secrets” series was about Wakefield’s activities in the United Kingdom, and his more recent schemes in the United States were no more than a passing curiosity. 2CR210 (Deer); 2CR577-78 (Godlee).

¹⁸ For example, Deer testified that, although he knew Wakefield had established a professional association with Austin’s Thoughtful House (in addition to other organizations in Illinois and Florida), Deer did not know that Wakefield’s family had moved to Texas. 2CR209. And it was only after Wakefield complained about the “Secrets” series that Deer learned that Wakefield had remained in Texas after leaving the Thoughtful House. 2CR210. *See Abel-Hafiz v. ABC, Inc.*, 240 S.W.3d 492, 503 (Tex. App.—Fort Worth 2007, pet. denied) (affirming dismissal for lack of personal jurisdiction, crediting defendants’ testimony that they did not believe plaintiff was in Texas at time of the broadcast, despite their awareness that plaintiff was assigned to the Dallas FBI office in 1999); *Revell*, 317 F.3d at 475 (no jurisdiction under *Calder* where the defendant testified that “he did not even know that [the plaintiff] was a resident of Texas when he posted his article”).

Based on this evidence, the trial court’s implied finding that Appellees did not know where Wakefield was residing at the time of the publication of the “Secrets” series is supported by factually and legally sufficient evidence. *Navasota Res., Ltd. v. Heep Petroleum, Inc.*, 212 S.W.3d 463, 468 (Tex. App.—Austin 2006, no pet.) (where the trial court was presumed to have made findings of fact in favor of specific jurisdiction, the Court of Appeal “may not disturb a trial court’s resolution of evidentiary conflicts that turn on credibility determinations or the weight of the evidence”); *see also Morris*, 164 S.W.3d at 693 (“In [reviewing a special appearance ruling, we consider the entire record, not just the evidence in support of the challenged fact.”).

4. Wakefield’s Reliance on Appellees’ “Additional Contacts” Is Misplaced.

Unable to satisfy either the *Keeton* or *Calder* tests, Wakefield attempts to confuse the issue by citing numerous “additional” contacts, which are legally irrelevant to the jurisdictional analysis in this case. For example, Wakefield relies on BMJ’s occasional Texas sales, marketing, classified advertisements, and customer support, as well as the Texas “hits” to the areas of the BMJ’s website *unrelated* to Wakefield or the “Secrets” series. *See Br.* at 35-38. But none of these contacts concern the challenged statements in this case. Because only those forum contacts with “a substantial connection” to “the operative facts of the litigation”

factor into the minimum-contacts assessment, these additional contacts are of “no jurisdictional relevance.” *Moki Mac*, 221 S.W.3d at 579, 585.¹⁹

Similarly, Wakefield improperly relies on statements by Deer and Godlee to the *national* media, or references to the impact of the “Secrets” series in the United States generally. *See* Br. at 43-46. But national broadcasts do not target Texas any more than any other U.S. state.²⁰ And none of the Appellees ever gave any interviews to any *Texas* media.²¹ *See Abel-Hafiz*, 240 S.W.3d at 503 (no jurisdiction where defendants gave interview outside Texas to national media, as this did not establish that they “directed their statements specifically at Texas...”).

Finally, Wakefield cannot rely on the effect the articles had *on him* in Texas, or on the activities *of third parties* in Texas. For example, Wakefield cites his own

¹⁹ *See also Revell*, 317 F.3d at 472 (general solicitations of customers for subscriptions or other services deemed irrelevant); *Moki Mac*, 221 S.W.3d at 588 (defendant’s in-forum promotion of product or service not sufficiently connected to claims to be relevant); *Wet-A-Line, L.L.C. v. Amazon Tours, Inc.*, 315 S.W.3d 180, 187 (Tex. App.—Dallas 2010, no pet.) (“Wet-A-Line’s operation of a website and sales to Texas residents and [Wet-A-Line’s owner] Schair’s promotional trips to Texas are not related to the operative facts” of defamation).

²⁰ Nor do these statements to national media or about the effect of the “Secrets” series on the American public at large reflect a foreseeability by Appellees that Wakefield would file suit in the United States, much less *in Texas*. Wakefield quotes from a statement Deer made to CNN, inviting Wakefield to sue “*here*” if he is not ““guilty as charged,”” *see* Br. at 45, but Wakefield neglects to mention that Deer was speaking from CNN studios *in London*, and the “*here*” referred to the United Kingdom. 2CR211, 216. In essence, Deer was saying that if Wakefield wanted to challenge Appellees’ reporting about him, Wakefield could sue (again) where he had sued unsuccessfully three times before based on virtually identical reporting—the United Kingdom. *Id.*; 2CR233.

²¹ Wakefield’s reliance on *Arthur v. Stern* is misplaced. In that case, the court found that a national broadcast was “directed at Texas” because the broadcast “*referred to the Texas activities of the Texas plaintiff.*” *See* No. Civ. AH-07-3742, 2008 WL 2620116, at *13 (S.D. Tex. 2008) (emphasis added).

testimony regarding how the challenged publications allegedly harmed him in Texas, but courts have consistently held that such focus on the plaintiff “would turn the jurisdictional analysis on its head, focusing attention not on where the alleged tortfeasor directed its activity, but on where the victim could identify tangential harms.” *Fielding*, 415 F.3d at 427; *see also Michiana*, 168 S.W.3d at 790 (such evidence improperly shifts the “focus from the ‘relationship among the defendant, the forum, and the litigation’ to the relationship among the ‘plaintiff, the forum . . . and the litigation’”) (citation omitted). Similarly, Wakefield cannot rely on the number of persons in Texas who chose to read the “Secrets” series on the BMJ’s website,²² or the number of Texas media outlets that chose to report on the “Secrets” series.²³ Such evidence reflects the actions of third parties, which cannot be imputed to Appellees. *See Michiana*, 168 S.W.3d at 790.

In sum, when the irrelevant “additional contacts” are disregarded and the correct legal standards are applied to the relevant evidence, the trial court’s implied ruling that minimum contacts do not exist must be affirmed.

²² Wakefield misrepresents this evidence in an effort to exaggerate the number of Texans who accessed the “Secrets” series on the BMJ website. *See Br.* at 35-36. The documents Wakefield cites provide only “page-view” tallies, not the number of unique Texas visitors. 2SCR at Ex.2. Because the same Texas visitor might click many times on a single page, the “page-view” tally will be higher than the number of unique visitors to the site.

²³ Wakefield relies on the fact that some Texas media reported on the “Series,” but these Texas media reports were not published by Appellees, and the evidence shows that BMJ did nothing to target Texas with its promotions of the “Secrets” series. It merely sent press releases promoting the series to its regular distribution list of contacts around the world. 2CR153-165. Of more than 2,000 contacts on the list, less than ten were located in Texas. 2CR143.

B. The Trial Court’s Implied Ruling that Jurisdiction in Texas Would Be Unreasonable Is Supported by the Record Evidence.

Even if minimum contacts were found to exist, it would not end the jurisdictional analysis. Due process requires the application of a two-prong test, and minimum contacts is only the first prong. The second prong concerns whether the assertion of jurisdiction would comport with traditional notions of “fair play and substantial justice”—in essence, whether jurisdiction is *reasonable* under the circumstances of the particular case. *Zinc Nacional, S.A. v. Bouche Trucking, Inc.*, 308 S.W.3d 395, 396 (Tex. 2010). This “reasonableness” inquiry requires the careful consideration of five factors: (1) the burden on the defendant; (2) the forum state’s interest in resolving the dispute; (3) the plaintiff’s interest in resolving the dispute; (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 substantive social policies.²⁴ *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 113 (1987). Where, as here, the defendant

²⁴ Applying this test, Texas and federal courts, including this court, have held that the exercise of jurisdiction would be unreasonable even where minimum contacts exist. *See, e.g., Alstom Power, Inc. v. Infrassure, Ltd.*, No. 03-07-006690-CV, 2010 WL 521105, at *4 (Tex. App.—Austin Feb. 12, 2010, no pet.) (even assuming evidence supported finding of minimum contacts, jurisdiction would be unreasonable); *Chaiken v. VV Publ’g Corp.*, 119 F.3d 1018, 1027-28 (2d Cir. 1997) (exercising jurisdiction over nonresident publisher would violate fair play and substantial justice); *see also Guardian Royal Exch. Assurance, Ltd. v. English China Clays*, 815 S.W.2d 223, 226-28 (Tex. 1991); *TH Agric. & Nutrition, LLC v. Ace European Grp. Ltd.*, 488 F.3d 1282, 1292 (10th Cir. 2007) (despite finding minimum contacts, jurisdiction would be unreasonable, noting that “the weaker the plaintiff’s showing on [minimum contacts], the less a defendant need show in terms of unreasonableness to defeat jurisdiction”) (citation omitted).

resides outside the country, the court must be particularly attuned to the potential burden on the defendant and the interests of the defendant's home country in resolving the dispute. *See Lonza AG v. Blum*, 70 S.W.3d 184, 194 (Tex. App.—San Antonio 2001, pet. denied) (burden on Swedish company of litigating in Texas would be unreasonable); *see also English China Clays*, 815 S.W.2d at 232-33 (jurisdiction over British insurer unreasonable despite contacts with Texas).

Here, Appellees submitted substantial evidence showing that litigation of this dispute in Texas would impose undue financial and strategic burdens on Appellees and that the United Kingdom's interest in adjudicating the dispute far outweighs any interest Texas might have. The trial court is deemed to have made findings in Appellees' favor on all of these issues. *Leesboro*, 322 S.W.3d at 928-29. Yet Wakefield addresses only the relative financial burden and conclusorily asserts that Texas has an interest in providing a forum for its own residents. *See Br.* at 47-51. By ignoring the other factors, Wakefield waives any challenge to the trial court's implied findings on them and therefore concedes the reasonableness prong of the due process test. *See Hagberg v. City of Pasadena*, 224 S.W.3d 477, 481 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (“[W]hen a judgment or order may have been based upon grounds not challenged on appeal, a court of appeals must normally affirm.”); *see also Berg v. AMF, Inc.*, 29 S.W.3d 212, 216 n.1 & 217 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (appellant waived challenge

to trial court's implied findings and conclusions on certain *forum non conveniens* factors by not addressing them in brief).

1. Wakefield's Interest in Litigating this Case in Texas Can Be Overcome by Other "Reasonableness" Factors.

Unable to identify any connection between his claims in this case and Texas, Wakefield asserts that he "has a right to seek redress in this forum" by virtue of his current Texas residency. Br. at 51. But Texas and federal courts have often held that one of the other "reasonableness" factors outweighs a plaintiff's interest in seeking redress at home. For example, in *Crown Sterling, Inc. v. Clark*, a Texas corporation sued a California defendant in Texas over a hotel naming-rights dispute. 815 F. Supp. 199 (N.D. Tex. 1993). In holding that jurisdiction over the California defendant would offend the reasonableness prong, the court explained:

Although the plaintiff always has an interest in obtaining convenient and effective relief, which from any plaintiff's point of view would be best accomplished in a plaintiff's home town, the interstate judicial system's interest in obtaining the most efficient resolution of controversies must be privileged over the plaintiff's interest in litigating in its own back yard.

Id. at 204; *see also Jones v. J.P. Sauer & Sohn*, 27 S.W.3d 157 (Tex. App.—San Antonio 2000, pet. denied), *disapproved of on other grounds by BMC Software*, 83 S.W.3d at 794 & n.1 (jurisdiction unreasonable in lawsuit even though plaintiff was a resident of forum state); *Sheldon v. Khanal*, 605 F. Supp. 2d 1179 (D. Kan. 2008) (same); *Dtex, LLC v. BBVA Bancomer, S.A.*, 405 F. Supp. 2d 639 (D.S.C. 2005)

(same), *aff'd*, 214 F. App'x 286 (4th Cir. 2007). This is particularly true where, as here, the defendant resides outside the United States. *See Lonza AG*, 70 S.W.3d at 194. Moreover, Wakefield has already demonstrated his ability to litigate these issues in the United Kingdom, even while living in Texas. Wakefield claims that he moved to Texas in 2005, *see* 1CR834, and news articles place him here in 2004. *See, e.g.*, 2CR449. This means that Wakefield filed his three previous libel lawsuits against Deer in London, *while he was a Texas resident*. And he defended himself in the 2½-year Fitness-to-Practise Panel proceeding in London, *while he was a Texas resident*. Accordingly, Wakefield cannot overturn the trial court's implied finding that exercising jurisdiction would be unreasonable by relying solely on his Texas residency.

2. The Trial Court's Implied Finding that Litigation of this Dispute in Texas Would Impose Unreasonable Burdens on Appellees Is Supported by the Record Evidence.

In addressing the burden that litigating this dispute in Texas would place on Appellees, Wakefield ignores record evidence that supports the trial court's implied finding. *See Fleming v. Patterson*, 310 S.W.3d 65, 72 (Tex. App.—Corpus Christi 2010, pet. stricken) (appellant waived challenge to sufficiency of implied finding by failing to discuss in brief evidence supporting finding).²⁵

²⁵ Wakefield cannot address this evidence for the first time in his reply brief. *See Howell v. Texas Workers' Compensation Commission*, 143 S.W.3d 416, 439 (Tex. App.—Austin 2004, pet. denied) (“The rules of appellate procedure do not allow an appellant to include in a reply

Wakefield devotes his entire argument on this point to listing the various contacts BMJ has within the United States, but none of these contacts has anything to do with this litigation, and many involve individuals over whom BMJ has no control (such as Texas subscribers, peer reviewers, and authors). *See* Br. at 49-50. To be clear, the undisputed evidence is that Appellees have no employees, offices, or other presence in Texas, and all of them (as well as any BMJ employees) would be required to travel to Texas to attend court proceedings. 2CR144. *See Lonza AG*, 70 S.W.3d at 194 (unreasonable to exercise jurisdiction in Texas, where defendant “has no employees or corporate representatives in Texas. Their representatives would be required to travel from Switzerland to attend court proceedings.”).

Moreover, Wakefield ignores the fact that having to travel to Texas is only a small part of the burden that Appellees would face if forced to defend these claims here. As Appellees argued in the trial court, the greater burden involves Appellees’ inability to rely on the subpoena power of a Texas court to compel production of relevant documents and the attendance of witnesses located in the United Kingdom, outside the control of either party. And there is no question that this is a dispute that has its roots in the United Kingdom. Nearly all of Wakefield’s *Lancet* co-authors, the children in Wakefield’s *Lancet* study, their families, the plaintiffs’ lawyers Wakefield was working for during his *Lancet* research, and

brief a new issue in response to some matter pointed out in the appellee’s brief but not raised by appellant’s original brief.”) (citation omitted).

Wakefield’s former colleagues at the Royal Free Hospital are located in the United Kingdom. Accordingly, they cannot be compelled by a Texas court to testify or produce documents in this case. In addition, the children’s full medical records, which are located with their families, various U.K. doctors, and at the Royal Free, are outside the subpoena power of a Texas court.²⁶ Without any effective way to ensure attendance of these witnesses and production of these documents, Appellees’ presentation of their case in Texas could be “greatly compromised[.]” *See Lonza AG*, 70 S.W.3d at 194. Based on this evidence, which Wakefield ignores, the trial court’s implied finding that the burden on Appellees outweighed Wakefield’s interest in litigating in Texas must be affirmed.

3. The Trial Court’s Implied Finding that the United Kingdom Has a Greater Interest in Resolving this Dispute Is Supported by the Record Evidence.

Wakefield also ignores—and therefore effectively concedes—the trial court’s implied finding that the United Kingdom’s interest in adjudicating this dispute is greater than Texas’s interest in providing a forum for Wakefield. *See Berg*, 29 S.W.3d at 216 n.1 & 217 (holding appellant’s failure to discuss issue or cite evidence in support of implied finding resulted in waiver of challenge); *see*

²⁶ In responding to Appellees’ Anti-SLAPP Motion to Dismiss, Wakefield relied heavily on medical records and other documents located in the United Kingdom. *See, e.g.*, 3CR955; *see generally* 3CR299-1105.

Fleming, 310 S.W.3d at 72 (same).²⁷ As the Texas Supreme Court has recognized, the presence of a foreign defendant raises the possibility that important substantive interests of the defendant’s home country will trump Texas’s interest in resolving the dispute:

When the defendant is a resident of another nation, the court must also consider the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction by a state court.

English China Clays, 815 S.W.2d at 228. This is a highly fact-sensitive analysis, as “[t]he procedural and substantive interests of other nations in a state court’s assertion of jurisdiction over an alien defendant will differ from case to case.” *Id.* (quoting *Asahi*, 480 U.S. at 115). In conducting this analysis, Texas courts should be “unwilling[] to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiffs or the forum State.” *Id.*

In this case, the United Kingdom’s interest is particularly compelling because Wakefield’s libel claims will require him to collaterally attack the U.K. Fitness-to-Practise Panel’s findings of dishonesty and misconduct against him. Under Texas law, the alleged falsity of statements challenged in a libel case is determined under the doctrine of “substantial truth.” *See Rogers v. Dallas Morning News, Inc.*, 889 S.W.2d 467, 472 (Tex. App.—Dallas 1994, writ denied). This standard requires the plaintiff to show that the defendant’s statement were

²⁷ *See supra* at n. 25 (Wakefield cannot address this issue for the first time on reply).

more damaging to his reputation than any literally true statements would have been. *McIlvain v. Jacobs*, 794 S.W.2d 14, 16 (Tex. 1990).

For Wakefield, this means that he will not be able to prove falsity under the substantial-truth standard if the court recognizes as binding any finding that Wakefield engaged in anything close to “fraud” or other misconduct relating to his *Lancet* research and paper. Yet the U.K. Fitness-to-Practise Panel’s findings include proven charges of “dishonesty,” “serious professional misconduct,” and “unethical conduct.” And during the Panel hearing, Wakefield’s own U.K. lawyer acknowledged that Wakefield was essentially being accused of “fraud.” 3CR1494. Wakefield cannot let these findings stand if he wishes to pursue his libel claims in this case.²⁸ See *Swate v. Schiffers*, 975 S.W.2d 70, 75 (Tex. App.—San Antonio, 1998, pet. denied) (findings of professional misconduct by Texas Medical Board against doctor precluded libel claim, on grounds of substantial truth and libel-proof-plaintiff doctrine).

Indeed, a comparison of just two of Wakefield’s most important claims in this case with the respective findings by the U.K. Fitness-to-Practise Panel illustrates this point well:

²⁸ Even if Wakefield could overcome a substantial truth defense based on the Fitness-to-Practise Panel’s findings, those findings would be relevant to damages issues in the case.

Wakefield's Claims in this Case	The U.K. Fitness-to-Practise Panel's Findings against Wakefield
<p data-bbox="212 287 768 449">“When this case goes to trial...I will demonstrate that the Lancet Article accurately presented the information.”</p> <p data-bbox="212 541 347 583">1CR837.</p>	<p data-bbox="855 287 1386 495">“Dr. Wakefield had a clear and compelling duty to ensure that the factual information contained in the paper was true and accurate and he failed in this duty.”</p> <p data-bbox="855 541 990 583">2CR554.</p>
<p data-bbox="212 592 768 716">“The Lancet Report was not prepared as part of a litigation research project.”</p> <p data-bbox="212 888 347 924">1CR839.</p>	<p data-bbox="855 592 1386 842">“[Wakefield] failed to disclose to the Ethics Committee and the Editor of the Lancet his involvement in the MMR litigation and his receipt of funding from the Legal Aid Board.”</p> <p data-bbox="855 888 990 924">2CR554.</p>

Recognizing the fundamental inconsistency between his claims in this case and the U.K. Panel's adjudicated findings against him, Wakefield and his counsel repeatedly attacked the Panel's findings in the trial court. *See, e.g.*, 2SRR25-26; RR55-56. And at the Special Appearances hearing, Wakefield's counsel conceded that he could not see “any way around looking at those findings[.]” 4SRR56. Wakefield also repeatedly stated in the trial court that he intends to file an appeal in the U.K. courts, seeking to overturn the Panel's findings against him. *See, e.g.*, 3CR38; RR56. Either way, the interest of the United Kingdom in this dispute clearly trumps any interest Texas might have. *See, e.g., King Co., Wash. v. IKB Deutsche Industriebank AG*, 769 F. Supp. 2d 309, 321 (S.D.N.Y. 2011)

(dismissing German defendants where claims related to investigation by German government and holding that “comity counsels against pursuing litigation and discovery again in another forum”). A Texas court’s collateral review of a U.K. Fitness-to-Practise Panel’s findings as to a U.K.-licensed doctor would be as inappropriate as a U.K. civil court’s review of findings by the Texas Medical Board regarding a Texas-licensed doctor. And if Wakefield truly intends, years later, to challenge the Panel’s findings in an appeal before the U.K. courts, Texas courts ought to yield to those proceedings.

Moreover, the history of libel litigation between Wakefield and Deer in London over virtually identical reporting favors the United Kingdom’s continued interest in adjudicating this dispute. For example, in *Moni Pulo Ltd. v. Trutec Oil & Gas, Inc.*, the Fourteenth Court of Appeals relied in part on a similar history of litigation between the parties in determining that jurisdiction in Texas over a new case was unreasonable. 130 S.W.3d 170 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). In that case, a Nigerian investment-services corporation sued a Nigerian oil-field lessee for breach of contract, conversion, and related claims in Texas state court. *Id.* at 174. The plaintiff had originally filed suit in Nigeria, but had abandoned that action before later filing in Texas. *Id.* During the pendency of the appeal, the parties were involved in two other foreign actions concerning the same dispute. *Id.* The Court of Appeals held that, even if minimum contacts

existed, exercising jurisdiction would be unreasonable. *Id.* at 180. According to the court, the prior, abandoned foreign litigation in Nigeria counseled against jurisdiction over a new case in Texas:

Having fled the jurisdiction most closely connected to the litigation and the parties, [the plaintiff] would now have Texas courts reach within that jurisdiction to impose an opposite result. *This is reaching too far.*

Id. at 181 (emphasis added).²⁹ For the same reasons, Wakefield’s attempt to convince Texas courts to reach “an opposite result” from their U.K. counterparts is “reaching too far.”

4. The Trial Court’s Implied Finding that Litigation of this Dispute in the United Kingdom Would Be More Efficient Is Supported by the Record Evidence.

Finally, the record evidence also supports the trial court’s implied finding that the interest of efficiency favors resolution of this dispute in the United Kingdom. The fact that so many of the relevant witnesses and documents are located in the United Kingdom not only increases the costs and other hardships associated with bringing them to Texas, it also adds a layer of laws and regulations that must be considered. For example, relevant medical records and other documents might be subject to claims of privilege and privacy under U.K. law, by

²⁹ Other courts have likewise found the exercise of jurisdiction to be unreasonable where the plaintiff attempts to bring claims that are related to pending or past litigation in an out-of-state forum. *See, e.g., TH Agric. & Nutrition, L.L.C. v. Ace European Grp. Ltd.*, 416 F. Supp. 2d 1054 (D. Kan. 2006), *aff’d*, 488 F.3d 1282 (10th Cir. 2007); *Dtex, LLC v. BBVA Bancomer, S.A.*, 405 F. Supp. 2d 639 (D.S.C. 2005); *Exter Shipping Ltd. v. Kilakos*, 310 F. Supp. 2d 1301 (N.D. Ga. 2004).

individuals as well as entities such as the GMC or Royal Free Hospital. Discovery disputes over such evidence would therefore likely require the intervention of the U.K. courts, in addition to the Texas court. Like Appellees, Wakefield has engaged U.K. counsel for this case, no doubt to help him navigate this U.K. legal landscape. 2CR422, 468. Moreover, U.K. courts are in a far better position to deal efficiently with the effect of the prior U.K. proceedings on Wakefield's current claims, including the interplay between Wakefield's claims in this case and the putative appeal of the Fitness-to-Practise Panel findings that Wakefield claims to want to pursue in the U.K. administrative courts.³⁰

In short, Wakefield may wish that, by filing in Texas, he has created "a new day" for himself, *see* 2CR456, and he might not like how the U.K. courts would resolve his claims in this case, but he cannot credibly suggest that litigation of this dispute in Texas would be more efficient or that it would serve anyone's interests other than his own.

III. The Court Need Not Resolve Appellant's Third Issue, But If It Does, the Trial Court's Order Denying Plaintiff's Motion to Strike Appellees' Anti-SLAPP Hearing Should Be Affirmed.

In his third issue, Wakefield argues that the trial court erred in denying his motion to strike the April 26, 2012 hearing on Appellees' Anti-SLAPP Motion to Dismiss ("Motion to Strike"). Of course, if the Court affirms the trial court's order

³⁰ *See* 2CR607 (Foreign Law Declaration of Mark Warby QC, discussing how U.K. courts would handle Wakefield's claims).

granting Appellees' Special Appearances, jurisdiction does not exist. But even if the Court finds jurisdiction, it still does not need to resolve this issue, given that the Anti-SLAPP hearing never happened, and the trial court's final judgment was based *solely* on its ruling that jurisdiction did not exist. Nevertheless, if the Court does decide to resolve Wakefield's third issue, it should affirm the trial court's order denying Wakefield's Motion to Strike, either as untimely filed and improperly noticed, or as factually and legally meritless.

A. Wakefield's Motion to Strike Was Untimely Filed and Improperly Noticed for Hearing.

As with the trial court's jurisdictional ruling, the trial court's April 12, 2012, order denying Wakefield's Motion to Strike did not contain findings of fact or conclusions of law, and it did not state its reasons for denying Wakefield's Motion. Accordingly, this Court must affirm on any legal theory supported by the evidence. *Id.* at 926; *see In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex. 2009) (orig. proceeding) ("Under an abuse of discretion standard, we defer to the trial court's factual determinations if they are supported by evidence, but we review the trial court's factual determinations if they are supported by evidence, but we review the trial court's legal determinations *de novo*.")) (citing *Walker v. Packer*, 827 S.W.2d 833, 839-840 (Tex. 1992)). Here, the trial court's order may be affirmed on the grounds that Wakefield's Motion to Strike was untimely filed, or that it was improperly noticed for hearing. TRCP 21 requires a party setting a hearing to serve

the motion and provide notice at least three days before the hearing. Tex. R. Civ. P. 21. But although Appellees were provided notice of a “continuance” motion, Wakefield did not file his Motion to Strike until the morning of the hearing. 3SRR:15. Moreover, Wakefield set the Motion to Strike hearing on the local continuance docket, which the trial court determined was improper.³¹ 3SRR11. In light of Wakefield’s untimely filing and improper setting of his Motion to Strike, the trial court’s ruling should be affirmed.

B. The Docket Conditions of the Court Required Setting a Hearing More than 30 Days after Filing of the Appellees’ Anti-SLAPP Motion to Dismiss.

Even if it had been properly presented to the court, Wakefield’s motion is legally and factually meritless. Under the Anti-SLAPP statute, a hearing on a motion to dismiss must be set within 30 days of serving the motion “*unless the docket conditions of the court require a later hearing.*” Tex. Civ. Prac. & Rem. Code § 27.004 (emphasis added). As Wakefield notes, Appellees filed and served their Anti-SLAPP Motion to Dismiss on March 9, 2012, and they initially set a hearing on that motion for April 26, 2012. 1CR176. Wakefield asserts that “nothing in the record demonstrates that Defendants...were unable to set [the Anti-SLAPP] hearing earlier because ‘the docket conditions of the court require[d] a later hearing.’” Br. at 55. This is simply incorrect. The undisputed record

³¹ Judge Meachum nevertheless proceeded to begin hearing the motion, until she learned about the late filing, at which point she stated “I think I can stop this right now.” 3SRR16.

evidence shows that the earliest available hearing date for Appellees' *Special Appearances* was more than 30 days after Appellees filed their Anti-SLAPP Motion to Dismiss. 2CR53-55. And, under Rule 120a(2), the first hearing in this case had to be on Appellees' Special Appearances, not their Anti-SLAPP Motion to Dismiss. *See* Tex. R. Civ. P. 120a(2); *Dawson-Austin*, 968 S.W.2d at 323 (defendant was obligated to set hearings on non-jurisdictional motions *after* hearing on special appearance). Accordingly, Appellees noticed the Special Appearances for hearing on April 12 and set the Anti-SLAPP Motion to Dismiss for the *next* available hearing after that—April 26. 1CR55. This evidence plainly supports the trial court's implied ruling that there was no violation of Section 27.004.

C. Nothing in the Text or Purpose of the Anti-SLAPP Statute Requires Dismissal of Appellees' Motion.

Even if Wakefield could overcome the trial court's implied determinations that his Motion to Strike was untimely and that the docket conditions of the trial court required a hearing more than 30 days after Appellees' Motion to Dismiss was served, there is no basis in the text or purpose of the Anti-SLAPP statute for the relief he seeks—an order striking Appellees' Motion to Dismiss. Statutory deadlines are presumed to be nonjurisdictional. *In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 307 (Tex. 2010) (orig. proceeding). Overcoming this presumption requires “clear legislative intent” that the statute was meant to impose

jurisdictional consequences. *City of DeSoto v. White*, 288 S.W.3d 389, 394 (Tex. 2009). Section 27.004 conveys no such intent, as the Legislature did not specify *any* consequence for setting an Anti-SLAPP hearing outside the 30-day window. *See* Tex. Civ. Prac. & Rem. Code § 27.004. *State v. \$435,000*, 842 S.W.2d 642, 644 (Tex. 1992) (per curiam) (“If the Legislature had intended dismissal [for lack of jurisdiction] to be the consequence of a failure to hear [the issue] within the prescribed period, it could easily have said so . . .”); *see also Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 495 (Tex. 2001) (finding a statute nonjurisdictional because the Legislature did not “dictat[e] dismissal for noncompliance”).

The statute does state the hearing “must” be set within 30 days, but the fact that the provision is mandatory does not make it jurisdictional. Many Texas statutes, like this one, say that something “must” be done, but do not say what happens if it is not. *In re Francis*, 186 S.W.3d 534, 539-40 (Tex. 2006) (orig. proceeding) (“As with [these] other statutes, ‘the consequence of noncompliance is not necessarily punishment.’”) (citation omitted). Although courts have not yet considered this issue with regard to the Anti-SLAPP statute, Texas courts interpreting other statutory hearing requirements have held that failure to comply with those requirements does *not* result in dismissal. *See, e.g., \$435,000*, 842 S.W.2d at 643-45 (holding that a 30-day statutory requirement for certain civil-

forfeiture hearings, though mandatory, does not result in the government losing the forfeiture claim if the hearing is not timely held).

There is no reason for the Court to reach a contrary conclusion in this case, as Wakefield's argument would violate the clear purpose of the Anti-SLAPP statute in the service of meaningless formalism. The Legislature expressly directed Texas courts to apply the provisions of the Anti-SLAPP statute "liberally to effectuate its purpose and intent fully." Tex. Civ. Prac. & Rem. Code § 27.011(b). This purpose includes the protection of free speech rights and the speedy dismissal of meritless claims arising out the exercise of those rights. *See id.* at § 27.002 (statute was enacted to "encourage and safeguard the constitutional rights of persons to . . . speak freely"); *see also id.* at § 27.003-.005 (providing for early dismissal of meritless claims). At the same time, the statute is designed to "protect the rights of a person to file meritorious lawsuits for demonstrable injury." § 27.002. But Wakefield cannot credibly argue that Appellees' April 26, 2012, setting of their Anti-SLAPP Motion to Dismiss interfered with the prosecution of his claims. After all, Wakefield knew when he refused to agree to extend Appellees' Anti-SLAPP deadline that the hearing on Appellees' Motion to Dismiss would necessarily follow the hearing on their Special Appearances. Knowing this, he sought a 120-day continuance of Appellees' Special Appearances hearing, which under Rule 120a(2) would require at least as long of a continuance on

Appellees' Anti-SLAPP Motion to Dismiss. 1CR179,187. *See Dawson-Austin*, 968 S.W.2d at 323. Moreover, Wakefield's Motion to Strike expressly sought a continuance of the Anti-SLAPP hearing if the trial did not grant his request to strike the Motion to Dismiss altogether. In other words, except for the brief moment when he was arguing that the Anti-SLAPP hearing had not been set soon enough, Wakefield was doing everything he possibly could to delay that hearing. Nothing in the text or purpose of the Anti-SLAPP statute requires the Court to validate such a cynical strategy by striking Appellees' Motion to Dismiss.

CONCLUSION AND PRAYER

For all of these reasons, Appellees respectfully request that the Court affirm the trial court's order granting Appellees' Special Appearances and dismissing the case in its entirety. Appellees further request such additional relief to which they may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been filed and forwarded on March 4, 2013, to all counsel of record via facsimile and/or via electronic service through CaseFileExpress.

/s/ Marc A. Fuller _____
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is in compliance with the rules governing the length of briefs prepared by electronic means. The brief was prepared using Microsoft Word 2010. According to the software used to prepare this brief, the total word count, including footnotes, but not including those sections excluded by rule, is 14,852.

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