No. 02-06-00244-CV

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

GAMAL ABDEL-HAFIZ,

Appellant,

v.

ABC, INC., ABC NEWS, INC., ABC NEWS HOLDING COMPANY, INC., CHARLES GIBSON, BRIAN ROSS, ROBERT WRIGHT AND JOHN VINCENT,

Appellees.

On Appeal From Cause No. 067-203396-03; in the 67th Judicial District Court of Tarrant County, Texas, the Honorable Donald J.Cosby presiding

BRIEF OF APPELLEES, ROBERT WRIGHT AND JOHN VINCENT

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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

This is a defamation case brought in Tarrant County, Texas on December 17, 2003, by Appellant, Gamal Abdel-Hafiz ("Abdel-Hafiz") against various ABC News organizations ("ABC"); two of ABC's employees; and two nonresident individuals – Appellees, Robert Wright ("Wright") and John Vincent ("Vincent") (CR 20). Wright, an Indiana resident (CR 74), and Vincent, an Illinois resident (CR 99), specially appeared challenging Texas jurisdiction (CR 54; 79; 2136). Although Abdel-Hafiz filed initial responses (CR 34; 44) to Wright and Vincent's Special Appearances, he failed to respond to either of their First Amended Special Appearances (CR 54; 79) or the later Supplement thereto (CR 2136). Moreover, his Affidavit was stricken from the record (Supp. CR 9).

And, despite the passage of over two years since the inception of the case, and despite having deposed both Wright and Vincent, Abdel-Hafiz failed to discover – much less plead – any facts to support jurisdiction in Texas. To the contrary, as evidenced by the trial court's June 14, 2006, orders of dismissal (CR 3358; 3359), Wright and Vincent have irrefutably negated personal jurisdiction in Texas. Indeed, having considered the pleadings, evidence, and arguments of counsel, the trial court agreed that it lacked jurisdiction over Wright and Vincent (*Id.*). As such, the only issue before this Court, with respect to Appellees Wright and Vincent, is Abdel-Hafiz's appeal (CR 3370) of the orders granting their Special Appearances.[1]

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1 Although Wright and Vincent did file – subject to their special appearances – an original answer and a motion for summary judgment, their motion was never reached below as the trial court made its jurisdictional rulings prior to the summary judgment hearing. The hearing on ABC's motion for summary judgment then went forward without Wright and Vincent. ABC's motion was then properly granted by the trial court – no tort was ever committed. That ruling is also being appealed by Abdel-Hafiz and will be addressed separately by ABC in its own response.

ISSUE PRESENTED FOR REVIEW

I. Whether the trial court properly sustained Wright's and Vincent's objections to jurisdiction by granting their respective Special Appearances; thereby dismissing all claims against them because Texas is without personal jurisdiction – general or specific.

STATEMENT OF FACTS

Aside from Abdel-Hafiz's obvious attempt to impose liability on ABC for allegedly "juxtaposing" various otherwise admittedly *factual* statements made by Wright, Vincent, and others, along with his tortured attempt to split hairs in an elaborate exercise of verbal gymnastics over whether he actually refused an "order" to record another Muslim or, instead, simply refused the *admitted* "request" to do so, Abdel-Hafiz's "Statement of Facts" and "Argument" are devoid of any citations to the record that support Texas jurisdiction over Wright or Vincent (Appellant's Brief at 2-12; 40-48). Perhaps this is because the record itself is devoid of any pleadings or evidence to support jurisdiction in this State. In any event, to the extent that the jurisdictional issues have not now been *waived* by Abdel-Hafiz, if any, Wright and Vincent submit this rendition of the facts as an aid to the Court's informed consideration of this most interesting of cases.

A. Contextual Overview[2]

This case stems, not from the actions of "disgruntled FBI agents," but from a chain of events that bookend the most unthinkable atrocity in American history – 9/11. In 1999, Federal Bureau of Investigation ("FBI") Special Agents Wright and Vincent were working international terrorism cases out of the FBI's Chicago Field Office. As part of a

2 Although this "contextual overview" is not dispositive of the central issue on appeal – whether Texas has personal jurisdiction over Wright or Vincent – an explanation of events over the many years leading up to this point is believed vital to the Court's understanding of the *context* in which this case arose. The overall story is simply too complicated to tell – much less understand – when relying solely upon the rather narrow "jurisdictional" record.

Thus, with the Court's indulgence, and although completely supported by the broader "summary judgment" record, this "contextual overview" section is intended solely for context and therefore contains no citations to the record. Instead, proper citations to the "jurisdictional" record in support of the trial court's dismissal are provided below in the "jurisdictional facts" section of the Statement of Facts.

particular investigation code-named "Vulgar Betrayal" – involving terrorist financing and international money laundering – Wright and Vincent, along with the United States Attorney's Chicago office, wished to obtain a recording of a conversation with a Muslim subject subsequently proven to have ties – not only to international terrorist financing - but to Osama bin Laden as well.

In the course of their investigations, Wright and Vincent learned that Abdel-Hafiz, then an FBI Special Agent in Dallas, had personal ties with and access to the Muslim subject. Astonishingly, the Muslim subject had indirectly contacted Abdel-Hafiz seeking "advice" on how the subject should handle his entanglement in Federal Grand Jury subpoenas stemming from a major terrorism investigation. As a result, Wright and Vincent, along with the United States Attorney's Chicago Office, requested that Abdel-Hafiz meet with the Muslim subject and wear a "wire" to consensually[3] record their conversations regarding the subject's concern about the subpoenas. Abdel-Hafiz refused.

On April 15, 1999, a conference call took place between the United States Attorney's Chicago Office and the FBI Dallas Field Office pertaining to the Vulgar Betrayal investigation and the need to record conversations with the Muslim subject. On that call in Chicago were Wright, Vincent, and three Assistant United States Attorneys; in Dallas were Abdel-Hafiz and his FBI supervisor, Ronald Patton. During the call Abdel-Hafiz expressed his repeated "reluctance" to wear a wire while meeting with the Muslim subject. Finally, when pressed as to the reason he was refusing to cooperate, Abdel-Hafiz stated that "a Muslim does not record another Muslim."

3 A "consensual" recording is one in which the FBI agent knows of the recording but the subject does not.

Obviously, Wright and Vincent, along with the other parties to the conference call, were shocked by such a response coming from an FBI Special Agent. Abdel-Hafiz's statement was followed by an extended period of awkward silence as all who had heard the ghastly refusal were in a state of disbelief. Abdel-Hafiz tried to explain away his admitted refusal to record Muslims as a "cultural issue" that the (ostensibly non-"Muslim") parties to the conference call "would not understand." Apparently, a Muslim secretly recording another Muslim is considered the "ultimate act of betrayal."[4]

It was later learned by Wright and Vincent that this was *not* the first time that Abdel-Hafiz had refused to record a Muslim in the course and scope of his FBI duties. Indeed, Abdel-Hafiz had previously refused to cooperate with FBI Special Agent Barry Carmody in a separate investigation out of Tampa, Florida involving the need to record Muslim terrorist suspect Sami Al-Arian.

Heated internal FBI discussions regarding Abdel-Hafiz's refusal to record the Muslim subjects eventually culminated into Abdel-Hafiz's initiation of an EEOC complaint against Wright in May of 1999 alleging "religious discrimination." This would be the first in a long series of actions whereby Abdel-Hafiz voluntarily thrust himself into the glare of public scrutiny under the auspices of his Muslim religion. As part of his defense of the EEOC claim, and as required by agency procedures, Wright executed a sworn statement dated March 21, 2000, wherein he recounted the events surrounding Abdel-Hafiz's refusal to cooperate in the Vulgar Betrayal investigation on

4 Although ironic and somewhat mind boggling, one must assume that it's purely coincidental that the very act of secretly recording a Muslim – in furtherance of an FBI terrorism investigation code-named "Vulgar Betrayal" – would itself be considered the "ultimate act of betrayal."

the grounds that "a Muslim does not record another Muslim." Ultimately, the EEOC complaint would be dismissed by Final Order from the Department of Justice with no finding of discrimination. And, far from being sanctioned over his admitted refusal to record fellow Muslims, in December of 2000, Abdel-Hafiz was promoted from Dallas to be the FBI's assistant legal attaché at the American Embassy in Riyadh, Saudi Arabia.

Fast-forward to 9/11. On September 11, 2001, four commercial airliners were hijacked by international terrorists. Two planes were deliberately crashed into the World Trade Center, a third into the Pentagon, and the fourth into a field in Pennsylvania. In a matter of hours, these premeditated terrorist events resulted in the intentional killing of approximately 3,000 people on American soil.

It was later learned that U.S. intelligence agencies, including the FBI, had dropped the ball on international terrorism investigations that could possibly have prevented the 9/11 attacks. It was widely reported that the FBI failed to "connect the dots." Indeed, the controversy continues to this very day. As it turns out, the overall controversy regarding Abdel-Hafiz's repeated refusals to record Muslims would be just one in a host of agency-wide FBI bungles relating to botched international terrorism investigations. And it was these combined transgressions that finally convinced Wright and Vincent to go public with their concerns about America's safety.[5]

5 Although Abdel-Hafiz has chosen to describe Wright and Vincent as "disgruntled FBI agents" – others have more accurately used the phrase "American heroes." Notably, since Wright and Vincent risked their respective careers by going public with issues that they could no longer ignore, many aspects of the American government have been completely reorganized including but not limited to the creation of the Department of Homeland Security.

For example, as part of the raging public debate over international terrorism in the aftermath surrounding the events of 9/11, on May 30, 2002, a public-interest foundation known as Judicial Watch, Inc. held a press conference in Washington, D.C. At the heart of the story was the FBI's negligence and recklessness with respect to the events leading up to 9/11. Wright attended the press conference and gave an emotional rendition of FBI failures including the FBI's inexplicable attempts to thwart various comprehensive investigations aimed at identifying and neutralizing international terrorists and their finances prior to 9/11.

As part of his presentation, Wright released a redacted copy of his March 21, 2000, sworn statement arising from Abdel-Hafiz's failed EEOC complaint. A copy of the sworn statement had previously been released by the FBI under the Freedom of Information Act and was redacted to hide privileged investigative matters including Abdel-Hafiz's name. Although Wright knew Abdel-Hafiz's identity, the sworn statement was read at the press conference as redacted by the FBI referring to Abdel-Hafiz only as "Special Agent [blank]."

Also released at the Judicial Watch press conference was the sworn declaration of FBI Special Agent Barry Carmody recounting his own personal experience with Abdel-Hafiz's prior refusal to record Muslim suspect Sami Al-Arian. Considering that the FBI had already threatened Wright with imprisonment if he revealed "privileged" FBI information, out of an abundance of caution, Abdel-Hafiz's name was also redacted from

Carmody's statement. Indeed, Abdel-Hafiz has never been identified by Wright or Vincent.

This is an important point because Abdel-Hafiz *himself* is not now – and never was – the *focus* of Wright's or Vincent's public outcries regarding agency-wide FBI incompetence. To Wright, Vincent, and others, Abdel-Hafiz's "identity" was but a footnote in history as it relates to the *overall* story of FBI incompetence and how 9/11 and other terrorist attacks against America became unthinkable realities. Ironically, it was the FBI itself who later released Abdel-Hafiz's identity in an FBI statement released in advance of ABC's December 19, 2002, airing of the *Primetime Live* story primarily at issue in this case.

Even a cursory review of the record reveals that there is simply no doubt that what Wright, Vincent, and others have said and/or reported about Abdel-Hafiz's refusal to record other Muslims is true. Abdel-Hafiz has himself admitted – not only his reluctance to record other Muslims – but also the fact that he never did record the Muslim subjects as repeatedly requested by both the U.S. Attorney's Chicago Office and several fellow FBI Special Agents. And the indisputable truth of these matters – as further evidenced in no small part by the trial court's granting of ABC's motion for summary judgment – is to some degree inseparable from the overall jurisdictional analysis before this Court.

In short, by his own admitted acts and omissions, and as an FBI Special Agent with a history of "working" terrorism cases, Abdel-Hafiz has and continues to inject himself into the public debate and concern over international terrorism, its financing, and

America's safety. Indeed, this lawsuit is yet another example of Abdel Hafiz's apparently insatiable quest for notoriety – he knows full well that what Wright and Vincent have said is true. He has admitted that he refused to record Muslims. Thus, no tort was ever committed. Yet Abdel-Hafiz goes full-steam-ahead with these frivolous "defamation" claims and harassing appeals against Wright and Vincent. One must ask - *why*?

B. Jurisdictional Facts

As mentioned, on April 15, 1999, a conference call was placed from the U.S. Attorney's Chicago office to the FBI's Dallas field office related to the need for Abdel-Hafiz's assistance in the Vulgar Betrayal investigation (RR 4/12/16 at PX 11A at 5).[6] On that call in Chicago were FBI Special Agents Wright and Vincent along with Assistant United States Attorneys Mark Flessner, Steve Chanenson, and Joe Ferguson; and in Dallas were FBI Special Agent Abdel-Hafiz and his supervisor Ron Patton (*Id.*). The conference call was actually a follow-up to a separate conference call the day before wherein Abdel-Hafiz "decide[ed] not to pursue a meeting" with the Muslim subject in aid of the Vulgar Betrayal investigation (*Id.* at 4-5). As set forth in Abdel-Hafiz's Supplemental Petition, he apparently had "procedural misgivings" about the requested recording (CR 118).

But when pressed by the Assistant United States Attorneys as to the reason for his refusal to cooperate in the investigation by consensually recording the Muslim subject,

6 Abdel-Hafiz introduced these documents at the Special Appearance hearing and testified that they were internal FBI documents and were "accurate" (RR 4/12/06 at 77).

Abdel-Hafiz stated that such action "would create a grave safety issue for himself and his family" (*Id.* at 5). Abdel-Hafiz further stated that he "did not trust the FBI to protect him or his family" from the perceived dangers, insisting that "the secret recording of a conversation between Muslims is regarded as the ultimate act of betrayal" (*Id.* at 5-6). Finally, Abdel-Hafiz related that "it was a cultural issue that [Mr. Flessner] wouldn't understand" (*Id.* at 6). Chicago later requested a reconsideration of the covert recording "if, at any time in the future, the perceived problem of consensually monitoring a Muslim seeking advice[7] regarding a major U.S. Government criminal investigation is overcome" (RR 4/12/16 at PX 40 at 2).

At the time of the April 15, 1999 conference call, and at all times relevant hereto, it is undisputed that Wright was a resident of the State of Indiana (CR 74) and Vincent was a resident of the State of Illinois (CR 99); both were FBI Special Agents working out of the Chicago Field Office. Also in 1999, it is undisputed that Abdel-Hafiz was an FBI Special Agent working out of the Dallas Field Office. And other than the two written follow-ups through May 1999 – as cited above relating to the requested recording of the Muslim subject – neither Wright (RR 4/12/16 at PX 2 at 32; CR 77) nor Vincent (RR 4/12/16 at PX 3 at 13; CR 102) have had any further dealings with Abdel-Hafiz.

On December 13, 2000, Abdel-Hafiz was reassigned from Dallas and promoted to be the FBI's assistant legal attaché at the American Embassy in Riyadh, Saudi Arabia

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7 The Muslim subject that Chicago wanted recorded had actually approached Abdel-Hafiz on March 12, 1999, for "advice" and wanted to meet with Abdel-Hafiz on what to do about a Federal Grand Jury subpoena. It was only after Abdel-Hafiz later relayed this information to Wright that a consensual recording was requested – the subject was *already* a part of a major criminal investigation (RR 4/12/16 at PX 11A at P.3-4).

(RR 4/12/06 at 46-47; 65; CR 2163; 2190[8]). Abdel-Hafiz actually relocated to Riyadh in early 2001 to commence what was originally a *minimum* "two-year" term of assignment through at least February 13, 2003 (RR 4/12/06 at 46; CR 2169-70; 2190).

But, because things were going so well in Riyadh, and because he "did not want to come back" to Dallas, at Abdel-Hafiz's *own* request this initial "term" was extended through at least August 31, 2003, (RR 4/12/06 at 62; CR 2149; 2167-72). Abdel-Hafiz even admits that, although his original assignment papers (CR 2190) state that he claims his actual residence as "Dallas, Texas," his residency claims actually have "nothing" at all to do with where he resides; instead, the "residency" claims only relate to which office he was transferring from when he left for Riyadh (RR 4/12/06 at 61-62; CR 2163-65). "They just told [him] to write Dallas, Texas and sign it" (CR 2164). Indeed, when he left Dallas, Abdel-Hafiz never "intended" to return here and in fact did not want to "uproot" his family after only "two years" in Riyadh – he "didn't want to come back" (CR 2171). Rather, his plans were to grow with the FBI and to obtain further promotions wherever that might lead – *anywhere in the world* (CR 2172; 2177).[9]

Meanwhile, back in the United States – just months after Abdel-Hafiz left for Riyadh in early 2001 – along comes 9/11. Wright and Vincent watched in horror as four commercial airliners, the World Trade Center, and the Pentagon burst into deadly

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8 Abdel-Hafiz testified at his deposition (CR 2163) that the signature set forth on "Exhibit 26" (CR 2190) is his.

9 Unfortunately, after his requested extension had been granted, Abdel-Hafiz's intentions to stay in Riyadh were foiled when allegations of past "insurance fraud" came back to haunt him. And on February 26, 2003, an FBI administrative inquiry and temporary suspension forced Abdel-Hafiz back from Riyadh; he arrived back in Texas on March 14, 2003; and he was eventually fired by the FBI (RR 4/12/06 at 50-51;63; CR 2149; 2168-69; 2176).

infernos; each worried silently for months that the very men they might have stopped years earlier were involved in the terrorist attacks (Appellant's Brief at 8). Eventually, as public debate over 9/11 continued to rage, Wright and Vincent could no longer stay silent about incompetence that they had witnessed firsthand as FBI Special Agents.

On March 30, 2002, Wright appeared at a press conference hosted by Judicial Watch, Inc. in Washington, DC (CR 26; 76-77). Wright released of copy of the sworn statement that he had prepared on March 21, 2000, in defense of the religious discrimination claims asserted by Abdel-Hafiz just after internal FBI controversy over his refusal to record the Muslim subject (*Id.*). Wright actually obtained a copy of the statement from the FBI pursuant to the Freedom of Information Act and it had already been redacted to hide Abdel-Hafiz's identity and other privileged matters (*Id.*). And although Wright knew his identity, at no time did Wright or anyone else at the press conference ever disclose Abdel-Hafiz's identity (*Id.*). Indeed, as alleged in Abdel-Hafiz's petition, he was simply referred to as an "unnamed Muslim agent" (CR 26).[10]

Later, on December 9, 2002, Wright and Vincent conducted a joint interview with ABC in Chicago (RR 4/12/06 at PX 1; PX 2 at 7; PX 3 at 6; CR 75; 100). Portions of the interview were aired by ABC on December 19, 2002, and form the primary focus of this litigation (CR 20; 75-76; 100-02; 112). Again, neither Wright (RR 4/12/06 at PX 2 at 7;

10 Abdel-Hafiz also complains of a Wall Street Journal piece (CR 27; 113) that essentially regurgitates the material set forth in Wright's March 31, 2000 sworn statement, as well as Mr. Carmody's March 30, 2002 declaration pertaining to the prior refusals to record Muslims. When asked why he did not sue the Wall Street Journal, Abdel-Hafiz replied "because they attributed everything to somebody" (RR 4/12/06 at 81-81). It remains unclear as to exactly how the Wall Street Journal obtained Abdel-Hafiz's identity.

CR 76) nor Vincent (CR 100) ever disclosed Abdel-Hafiz's identity[11] during the ABC interview (RR 4/12/06 at PX 1).

The interview was conducted in Chicago; had no connection to Texas; did not focus upon Texas; and was never intended for or directed to a Texas audience (RR 4/12/06 at PX 1; CR 75-76; 100-101). Nor did Wright (CR 75-76) or Vincent (CR 100-101) ever foresee that any harm might occur in Texas. Indeed, at the time of the ABC interview, it was Wright's (CR 76) and Vincent's (CR 101) understanding that Abdel-Hafiz had been assigned to and was residing in Saudi Arabia. Wright and Vincent were told just before the December 9, 2002, ABC interview that Abdel-Hafiz was in Riyadh; they had no personal knowledge of where his travels had taken him since their last encounter with him in April of 1999; and had no reason to doubt that he was, in fact, in Riyadh (CR 76; 101; RR 4/12/06 at PX 2 at 32; PX 3 at 13; 46). And as set forth above, it turns out that he was.

Moreover, as Abdel-Hafiz himself urges herein (Appellant's Brief at 9; 14), at no time did either Wright or Vincent ever say that he had refused an "order" to do anything. The only thing that Wright and Vincent said about the fact of Abdel-Hafiz's repeated refusals of the requests to record the Muslim subject was the very reason that Abdel-Hafiz himself gave to them – "a Muslim doesn't record another Muslim" (Appellant's

11 Other than blind speculation unsupported by any credible evidence, it remains unclear how Abdel-Hafiz claims to be the only Muslim agent in the FBI. Neither Wright (CR 76) nor Vincent (CR 102) know the exact religious affiliation of all FBI agents; nor are they aware of any such statistics kept by the FBI; and they are certainly unable to identify a "Muslim" by simply looking at him or her.

Brief at 10; RR 4/12/06 at PX 1 at 55-56; PX 2 at 8; PX 3 at 14; *see also generally,* PX 11A ; PX 40).

Indeed, contrary to his apparent belief, and as corroborated by the undisputed fact that they never named him, neither Abdel-Hafiz himself nor the State of Texas was ever the *focus* of Wright and Vincent's overall dismay with the ill-state of international terrorism investigations conducted by the FBI in the years preceding 9/11 (CR 75; 100). Thus, nothing that Wright (CR 75-76) or Vincent (CR 100-101) said about Abdel-Hafiz was ever "intended" to be "directed" at the State of Texas – he wasn't even here – he was in Riyadh (RR 4/12/06 at 61-63; 65; CR 2149; 2163; 2168-70; 2190). Instead, their comments were intended for the global consumption of Americans generally on matters of legitimate public debate (CR 76; 101). They were concerned for all Americans – not just Texans.

In short, as evidenced throughout the record, Wright and Vincent never said anything that was false about Abdel-Hafiz. Therefore, no tort was ever committed – not in Texas – not anywhere. And neither Wight (CR 73; 74-78; Supp. CR 8) nor Vincent (CR 98; 99-104; Supp. CR 7) have had any other contacts with the State of Texas that rise to level of minimum contacts for purposes of general jurisdiction under the constitutional constraints of due process. And this truth is not shaken by the fact that Vincent traveled to Dallas on March 4-5, 2003, in the course and scope of his new employment[12] with Judicial Watch, Inc. – for the purpose of a press conference related to

12 Just after the December 9, 2002 ABC interview in Chicago, Vincent retired from the FBI after 27 years of faithful and loyal service (RR 4/12/06 at PX 3 at 14; CR 100).

the D/FW area's ties to international terrorist money laundering fronts such as the Holy Land Foundation located in Richardson, Texas (RR 4/12/06 at PX 3 at 4; 27-28; 33; CR 98; 102; 104).

After his FBI retirement, Judicial Watch hired Vincent as its Counterterrorism Director specifically in furtherance of its investigations into overall governmental incompetence leading up to 9/11 (RR 4/12/06 at PX 3 at 33; CR 98; 102; 104). The press conference had no relationship to – nor did anyone ever refer to – Abdel-Hafiz (*Id.*). Basically, he was "old" news. Moreover, as set forth above, Abdel-Hafiz was *still* in Riyadh at the time of the March 5, 2003, Dallas press conference. And it was only after the Judicial Watch press conference concluded that reporters presented Vincent with unsolicited questions about Hafiz (CR 102).

From all accounts, the press at large was starting to probe – not into the Muslim recording issues – but instead into the more recent developments related to Abdel-Hafiz's FBI suspension over alleged insurance fraud matters (RR 4/12/06 at 50-51; 63; CR 77; 102; 2149; 2168-69; 2176). But at the time of the Judicial Watch press conference, Vincent had no personal knowledge related to the facts of Abdel-Hafiz's recent FBI suspension or, for that matter, where Abdel-Hafiz was located (CR 102). The last Vincent had heard was that Abdel-Hafiz was "hiding out" after being suspended from Saudi Arabia (*Id.*). There is simply no evidence that *any* statements made by Vincent

ever defamed Abdel-Hafiz or even referred to his alleged ties to the State of Texas.[13]

In fact, Abdel-Hafiz's March 18, 2004 Affidavit (CR 42-43; 52-53) was *stricken* from the record upon Wright and Vincent's motion (Supp. CR 2; 9). The stricken Affidavit (CR 42; 52) was Abdel-Hafiz's only attempt at supporting his allegation that Vincent somehow committed a tort while physically here in Texas during the March 4-5, 2003, business trip for Judicial Watch. Thus, there is simply no evidence of any tortious conduct by Vincent *in* Texas.

Indeed, judging from the entire record, the only allegations that relate to any statements made by either Wright *or* Vincent that 1) actually refer to Abdel-Hafiz by name; and 2) occurred while Abdel-Hafiz actually "resided" in Texas (i.e. had a physical presence combined with a colorable intent to stay here) are related to a PBS *Frontline* story that aired in October of 2003 (CR 120). The story itself was actually *about* Abdel-Hafiz and his various escapades through his years with the FBI – including the so-called "Lackawanna Six" case (CR 102-103).

As part of the story, in August of 2003 a PBS reporter initiated unsolicited contact with Vincent via a telephone call into his Judicial Watch office located in Chicago (*Id.*). Like those of the Dallas reporters earlier on, her inquiries focused – not upon the Muslim

13 However, as set forth above, the evidence does show that on February 26, 2003, an FBI administrative inquiry and temporary suspension forced Abdel-Hafiz out of Riyadh; he arrived back in Texas on March 14, 2003; and he was eventually fired by the FBI (RR 4/12/06 at 50-51;63; CR 2149; 2168-69; 2176). As such, he did not arrive back in Texas until nine days after the Judicial Watch press conference. There was simply no way for Vincent to have predicted these events and he certainly had no control over them.

recording issues[14] – but upon her quest to determine the broader issue of why Abdel-Hafiz had been fired by the FBI (*Id.*). Again, there was never any mention of Texas during the conversation and Abdel-Hafiz's actual whereabouts and/or "intentions" were still unknown to Vincent (*Id.*).

Indeed, even through discovery in this case, it has been difficult to pinpoint exactly what Abdel-Hafiz "intended" and even where he "resided" at any given time. In this regard, the stricken Affidavit (CR 42-43; 52-53) is a prime example in that it too played fast-and-loose with various dates relating to exactly *when* Abdel-Hafiz allegedly "resided" or had a "home" in Texas. And as the record reveals, the stricken Affidavit was Abdel-Hafiz's only notable attempt to support his theory of Texas "residency" in his failed attempt to bootstrap Texas jurisdiction over Wright and Vincent in the trial court below.

Thus, it is little wonder that Wright and Vincent had to request a Supplemental Clerk's Record (Supp. CR 11) to bring the defining moment of the stricken Affidavit to this Court's attention. Apparently, Abdel-Hafiz would have preferred that the Court never learn of his ill-fated "Affidavit" (Supp. CR 2; 9). But there is also little doubt that its absence further explains why, as set forth above, Abdel-Hafiz's "Statement of Facts" and "Argument" are wholly devoid of any citations to the record that support Texas jurisdiction over Wright or Vincent (Appellant's Brief at 2-12; 40-48).

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14 Abdel-Hafiz's allegations (CR 30) seem to insinuate that Wright prepared an affidavit for the PBS story. In reality, the reference is to the same sworn statement prepared by Wright as part of Abdel-Hafiz's EEOC complaint. The story specifically states that Wright was unable to comment (CR 77). And Wright was still unaware of Abdel-Hafiz's location at the time (*Id.*).

In short, other than thinly veiled legal conclusions yearningly cast as unsupported "factual allegations," combined with failed "evidence" that has been ruled inadmissible as lacking any probative value, the overall record is simply devoid of any pleadings, evidence, or other support for the exercise of personal jurisdiction over Wright or Vincent in Texas. Instead, the facts, the record, and the law irrefutably negate jurisdiction in this State – Texas is without personal jurisdiction over Wright or Vincent.

SUMMARY OF ARGUMENT

While this case may involve several legal issues that are sometimes intertwined, and the factual background might fairly be described as somewhat perplexing, the bottom line issue is really quite simple – in the exercise of personal jurisdiction over nonresident defendants, states are bound by the Constitutional constraints of Due Process. Thus, before jurisdiction may be asserted over nonresidents in any Texas Court, it must first be shown that both our State and Federal Constitutional safeguards are fully honored.

As best as can be deciphered from his conclusory allegations, the apparent gist of Abdel-Hafiz's jurisdictional argument is that Wright and Vincent have somehow "directed" defamatory statements toward the State of Texas. The theory's foundation is comprised of the unsupportable notion that, since Wright and Vincent "knew" Abdel-Hafiz worked in Dallas, Texas in April of 1999, they necessarily must have "thought" he "resided" in Tarrant County, Texas in December of 2002, such that they "directed" the ABC interview toward Texas. But, as the trial court found below, the law and facts irrefutably negate Abdel-Hafiz's flawed jurisdictional theory. To be sure, the theory's foundation crumbles under the weight of informed judicial scrutiny.[15]

The trial court below was no doubt guided, not only by the record, but also by the Texas Supreme Court's express disapproval of the so-called "directed a tort" theory of jurisdiction that Abdel-Hafiz relies upon herein. *See Michiana Easy Livin' Country, Inc. v. Holten,* 168 S.W. 3d 777, 789-792 (Tex. 2005). Quite simply, a Texas court may not assert jurisdiction over a nonresident unless *his* contacts with this State are constitutionally

15 Moreover, Abdel-Hafiz has failed to preserve review of his "challenge" to the trial court's orders of dismissal.

sufficient. In this regard, Texas law provides that, even *if* tortious conduct is alleged to have occurred *in* Texas, the assertion of personal jurisdiction over Wright and Vincent based upon Abdel-Hafiz's alleged Texas residency is, without more, unconstitutional.

This is so because the jurisdictional inquiry is strictly limited to Wright's and Vincent's "contacts" with Texas – not those of Abdel-Hafiz. And in any event, Abdel-Hafiz's claims of Texas "residency" are dubious at best. Thus, even assuming *arguendo* that Abdel-Hafiz enjoyed Texas "residency" during the relevant timeframes, neither his "unilateral" activity, nor that of any other third party such as the FBI, ABC or PBS, would be relevant to the jurisdictional inquiry at hand. And assuming even further that Abdel-Hafiz's hypothetical Texas residency was somehow relevant, it would still have to be shown that Wright and Vincent also "knew" he resided in Texas such that they "directed" their alleged tortious activity toward this State – an impossible task. Thus, even when one ignores the facts and ignores the law – giving all benefit of any doubt solely to Abdel-Hafiz – he still loses.

In sum, if it were found that Texas has jurisdiction over this matter, one could hardly imagine a future set of facts that might escape the halls of a Texas Courthouse. Therefore, the trial court's dismissal must be affirmed lest our State fall back into its darkest days and reputation as being a forum-shoppers' delight. As a matter of law - informed by constitutional safeguards and sound public policy – Texas is without jurisdiction.

ARGUMENT

I. The trial court properly sustained Wright's and Vincent's objections to jurisdiction by granting their respective Special Appearances; thereby dismissing all claims against them because Texas is without personal jurisdiction – general or specific.

A. Jurisdictional Burdens of Proof and Standards of Appellate Review

The plaintiff bears the burden of pleading sufficient allegations to bring a nonresident defendant within the provisions of the Texas long-arm statute. *BMC Software Belgium, N.V. v. Marchand,* 83 S.W.3d 789, 793 (Tex. 2002). A nonresident challenging Texas jurisdiction must then specially appear and negate the jurisdictional allegations. *Id.* And although factual questions exist in the determination of whether a trial court has jurisdiction over a nonresident, jurisdiction itself is a question of law. *Id.* at 794; *Michel v. Rocket Eng'g Corp.,* 45 S.W. 3d 658, 667 (Tex. App. – Fort Worth 2001, no pet.).

In order to develop the necessary evidence to address any factual issues that may arise in the determination of jurisdiction, Texas Rule of Civil Procedure 120a provides that a special appearance be made by "sworn" motion; and that the trial court must determine the special appearance on the basis of the pleadings, such affidavits and attachments as may be "filed," the results of discovery, and any oral testimony. TEX. R. CIV. P. 120a. (App. Tab 1).

Upon the appeal of a jurisdictional ruling and where, as here, the trial court has not been requested to and has not issued findings of fact, the reviewing court should presume that the trial court resolved all factual disputes in favor of its judgment. *Marchand,* 83 S.W.3d 789, 794-795. Moreover, the appellate court must uphold the trial court's order

on any legal theory finding support in the evidence. *Michel,* 45 S.W. 3d at 667. However, where, also as here, the record includes both the clerk and reporter's records, the trial court's implied findings are not necessarily conclusive and may be challenged by "legal" and/or "factual" sufficiency points. *Id.* at 667-668 (emphasis added). If sufficiency of the evidence is challenged, the standard of review is the same as that applied in reviewing a jury's finding or a trial court's findings of fact. *Id.* at 668. In such instance, the appellate court must consider all the evidence that was before the trial court, including pleadings, affidavits, exhibits, the results of discovery, and oral testimony. *Id.*

Thus, in the determination of a "no evidence" or "legal" sufficiency challenge, the appellate court must consider only the evidence, along with all reasonable inferences drawn therefrom – which, when viewed in their most favorable light tend to support the finding – while disregarding all evidence and inferences to the contrary. *Holt Atherton Indus. Inc., v. Heine,* 835 S.W. 2d 80, 84 (Tex. 1992). As such, if there is more than a scintilla of evidence to support the finding, a no evidence challenge necessarily fails. *Id.*

By contrast, in determining "factual" sufficiency, the appellate court may reverse the trial court's decision only if, after reviewing all of the evidence, the disputed factual determination is so against the great weight and preponderance of the evidence as to be manifestly wrong. *Michel,* 45 S.W. 3d at 667-668. However, in determining factual sufficiency, the reviewing court cannot simply substitute its own conclusions for those of the fact finder; if there is sufficient evidence to support the finding it must be sustained.

McCulley Fine Arts Gallery, Inc. v. "X" Partners, 860 S.W. 2d 473, 480-481 (Tex. App. – El Paso 1993, no writ).

In this regard, it is not within the province of the appellate court to resolve evidentiary conflicts or to pass on the weight and/or credibility of a witness's testimony. *Id.* at 481 (citing *Benoit v. Wilson,* 239 S.W. 2d 792, 796 (Tex. 1951)). Instead, if there is conflicting evidence on appeal, the trial court's decision is generally regarded as conclusive. *"X" Partners,* 860 S.W. at 480-481*; see also, Michel,* 45 S.W. 3d at 668 (citing *"X" Partners,* 860 S.W. 2d at 480).

B. Abdel-Hafiz Has Waived Appellate Review

With a description of these admittedly intertwined standards of review for jurisdictional rulings at hand, and based upon an analysis of Abdel-Hafiz's Brief, it is, at best, unclear exactly what type of challenge he is asserting herein. (Appellant's Brief at 16; 40-48). A complaint on appeal must address specific error and not merely attack the trial court's order in general terms. *Pacific Emplrs. Ins. Co. v. Dayton, 958 S. W. 2d 452, 454-455 (Tex. App. – Forth Worth 1997, pet. denied); see also, Woodside v. Woodside,* 154 S.W. 3d 688, 690-691 (Tex. App. – El Paso 2004, no pet.).

As such, with respect to the trial court's granting of Wright and Vincent's Special Appearances, Abdel-Hafiz's legal and/or factual sufficiency points, if any, are waived. By failing to identify his complaint, and as compounded by his failure to cite to any allegations in the record or any legal authorities to support his contentions, he has failed to preserve any arguments for review. TEX. R. APP. P. 38.1(h) (App. Tab 2); *see also,*

Keever v. Finlan, 988 S.W. 2d 300, 314 (Tex. App. – Dallas 1999, pet. dism'd). Nevertheless, to the extent that the issues are not waived, if any, Wright and Vincent present the following review of constitutional standards for the assertion of jurisdiction over nonresidents in Texas.

C. Long-Arm Jurisdiction

1. Due Process

The Due Process Clause of the U.S. Constitution limits the power of a state court to exert personal jurisdiction over nonresident defendants. *Asahi Metal Industry Co. v. Superior Court,* 480 U.S. 102, 108, (1987). Indeed, a court's primary consideration in the assertion of long-arm jurisdiction is whether the court's assertion of jurisdiction over a nonresident defendant is consistent with the federal Constitutional requirements of Due Process. *Guardian Royal Exch. v. English China,* 815 S.W.2d 223, 226 (Tex. 1991).

Due process requires that the exercise of personal jurisdiction over nonresidents meet a two-prong test; first, the defendant must have purposefully established "minimum contacts" with the forum; and second, the exercise of jurisdiction must satisfy traditional notions of "fair play and substantial justice." *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 472-474, (1985). It is the quality and nature of the defendant's contacts with the forum that are determinative. *International Shoe Co. v. Washington,* 326 U.S. 310, 319 (1945).

In this regard, foreseeability is an important consideration in deciding whether a nonresident defendant has purposefully established minimum contacts. *Marchand,* 83

S.W.3d at 795. This is so because individuals must have fair warning that a particular activity may subject them to the jurisdiction of a foreign state. *SITQ E.U., Inc. v. Reata Restaurants, Inc*., 111 S.W.3d 638, 646 (Tex. App. – Fort Worth 2003, pet. denied). But, as will be shown, although foreseeability provides the necessary fair warning, it alone will not support personal jurisdiction.

Under the minimum contacts analysis, personal jurisdiction exists only if the defendant's contacts with the forum give rise to either general or specific jurisdiction. *Marchand,* 83 S.W.3d at 795. If the litigation does not arise from the defendant's contacts with the forum, but his contacts are "continuing and systematic," then the exercise of "general" jurisdiction may be proper; otherwise, when the litigation does arise out of or relate to the defendant's contacts with the forum, the exercise of "specific" jurisdiction may be considered. *Id.* Wright and Vincent will address the jurisdictional issues herein under both recognized theories – *general and specific.*

2. General Jurisdiction

Again, general jurisdiction applies when a controversy does not grow out of a defendant's specific contacts with Texas, but rather when a defendant's contacts with Texas are "continuing and systematic" such that the constitutional test of minimum contacts is satisfied. *Guardian Royal,* 815 S.W.2d at 230. And since the cause of action need not arise from the contacts with the forum, general jurisdiction requires a more demanding minimum contacts analysis than would that for specific jurisdiction. *Marchand,* 83 S.W.3d at 797.

The minimum contacts analysis asks whether the nonresident defendant has purposefully availed himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *Guardian Royal,* 815 S.W. 2d at 226. This ensures that a nonresident defendant will not be haled into a jurisdiction based solely upon random, fortuitous or attenuated contacts. *Id.* Indeed, an essential goal of the analysis is to protect the defendant. *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 292 (1980).

Therefore, a plaintiff must make a more particularized showing of the defendant's contacts with Texas in order to establish general jurisdiction. *American Type Culture Collection v. Coleman,* 83 S.W.3d 801, 807 (Tex. 2002). And a defendant need only negate any bases for personal jurisdiction that a plaintiff has actually alleged. *Kawasaki Steel Corp. v. Middleton,* 699 S.W.2d 199, 203 (Tex. 1985). Thus, in the absence of sufficient "general" jurisdiction allegations, a defendant meets his burden of proof by merely presenting evidence that he is a nonresident. *Siskind v. Villa Found. for Educ., Inc.,* 642 S.W. 2d 434, 437-38 (Tex. 1982). Wright and Vincent have gone above and beyond this burden.

As set forth above, Abdel-Hafiz bears the initial burden of pleading sufficient allegations to bring a nonresidents Wright and Vincent within the provisions of the long-arm statute and due process principles. *Marchand,* 83 S.W.3d at 793. And Abdel-Hafiz has not specifically pled (CR 20; 112), nor does he appear to argue herein (Appellant's

Brief at 16), that either Wright or Vincent have any continuing and systematic contacts with Texas.

As set forth in their Affidavits (CR 74; 99), which were attached to and filed with their sworn (CR 73; 98)) First Amended Special Appearances (CR 54; 79) and incorporated therein by reference, Wright and Vincent are nonresidents of Texas. This fact is undisputed. Further, Wright (CR 75) and Vincent (CR 100) have no continuing or systematic contacts with the State of Texas and have not availed themselves of the privileges, benefits or protections of Texas law. Moreover, any "general" contacts with this State arising from Wright's or Vincent's respective employment with the FBI and/or Judicial Watch, Inc. are protected under the fiduciary shield doctrine. *See e.g. SITQ E.U., Inc. v. Reata Restaurants, Inc.,* 111 S.W. 3d 638, 651 (Tex. App. – Fort Worth 2003, pet. denied); (CR 2140; RR 4/12/06 at 85-87). As such, Texas is without general jurisdiction over Wright or Vincent.

3. Specific Jurisdiction

Recall that specific jurisdiction arises *directly from* the defendant's contacts with the forum. Therefore, when specific jurisdiction is alleged the inquiry has two parts: first, the defendant's activities must have been purposefully directed to the forum; and second, the litigation must result from injuries that arise out of or relate to those activities. *Zac Smith & Co. v. Otis Elevator Co.*, 734 S.W.2d 662, 663 (Tex. 1987). And although some courts have held that a single contact may be sufficient to establish

specific jurisdiction, the contact itself must have resulted from the defendant's purposeful conduct – not the unilateral activity of the plaintiff or other third parties.

In this regard, the very touchstone of jurisdictional due process is "purposeful availment." *Michiana Easy Livin' Country, Inc. v. Holten,* 168 S.W. 3d 777, 784 (Tex. 2005).[16] Therefore, in each case it is essential that there be some act by which the defendant purposely avails himself of the privileges and protections of the laws of the forum state. *Id.* And it is only the defendant's contacts with the forum – not those of the plaintiff or any other third party – that count. *Id.* at 785. The defendant's acts must be purposeful rather fortuitous. *Id.* Indeed, the defendant must purposefully seek some "benefit, advantage, or profit" by availing himself of the forum. *Id.* In sum, the relevant inquiry is the extent of the defendant's activities, not merely the residence of the alleged victim. *Id.* at 789.

Thus, even though allegations that a tort was committed in Texas may satisfy the jurisdictional requirements of the long-arm statute, more is required to satisfy the constitution. *Id.* at 788. Mere "foreseeability" of where a plaintiff may bear the brunt of his injury is simply not a "sufficient benchmark" for exercising personal jurisdiction. *Id.* at 789 (citing *Burger King Corp. v. Rudzewicz,* 471 U.S. 462 (1985). And even though on one occasion, as discussed more fully below, the United States Supreme Court upheld specific jurisdiction based upon alleged defamation intentionally "directed" at a forum state, *Calder v. Jones,* 465 U.S. 783 (1984), a companion case decided the same day,

16 Abdel-Hafiz has tried to downplay the significance of *Michiana* because it is not a defamation case. Nevertheless, it is a tort case and, as will be shown, constitutional safeguards don't fluctuate based solely upon the cause of action asserted against nonresidents such as Wright and Vincent.

Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984), shows that the deciding factor was the "extent" of the defendant's activities and their presence in the forum, not merely the residence of the alleged defamation victim. *See Michiana,* 168 S.W. 3d at 789.

And whether or not a jury might have found the underlying articles in these Supreme Court cases to be defamatory, there was no question that the articles themselves constituted a substantial "presence" in the forum states by the defendants. *Id.* And so it is here – the record is clear that Wright and Vincent have no extensive activities or presence in Texas. And they are certainly not employees of any of the publishers at issue.

Further opining on these and "disapproving" of other "directed a tort" type cases, the *Michiana* Court stated as follows:

> Several problems arise if jurisdiction turns not on a defendant's contacts, but on where it "directed a tort." First, it shifts a court's focus from the "relationship among the *defendant*, the forum, and the litigation" to the relationship among the *"plaintiff*, the forum . . . and the litigation." The place where a plaintiff relies on fraud may determine the choice of law, but choice-of-law analysis considers all parties, local courts, legal policies, interested states, and the interstate and international systems. By contrast, minimum-contacts analysis focuses solely on the actions and reasonable expectations of the defendant.
>
> Second, directed-a-tort jurisdiction confuses the roles of judge and jury by equating the jurisdictional inquiry with the underlying merits. If purposeful availment depends on whether a tort was directed toward Texas, then a nonresident may defeat jurisdiction by proving there was no tort. Personal jurisdiction is a question of law for the court, even if it requires resolving questions of fact. But what if a judge and jury could disagree? May a trial judge effectively grant

summary judgment in a local jurisdiction by deciding contested liability facts in favor of the defendant? And if a jury absolves a defendant of tort liability, is the judgment void because the court never had jurisdiction of the defendant in the first place?

Business contacts are generally a matter of physical fact, while tort liability (especially in misrepresentation cases) turns on what the parties thought, said, or intended. Far better that judges should limit their jurisdictional decisions to the former rather than involving themselves in trying the latter.

Third, in cases dealing with commerce, a plaintiff often has the option to sue in either contract or tort. Here, for example, Holten alleged tort, contract, and statutory claims, as Texas law often allows a plaintiff to do. If directing a tort at Texas is enough, then personal jurisdiction arises when plaintiffs allege a tort, but not when they allege breach of contract. Thus, the *defendant's* purposeful availment depends on the form of claim selected by the *plaintiff*.

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In their dissenting opinion, our colleagues remind us seven times that Michiana did not deny Holten's fraud allegations. Of course, Michiana did deny his allegations in its answer, but rightly focused its jurisdictional affidavits on lack of *contacts* rather than lack of *culpability*. Jurisdiction cannot turn on whether a defendant denies wrongdoing -- as virtually all will. Nor can it turn on whether a plaintiff merely alleges wrongdoing -- again as virtually all will. If committing a tort establishes jurisdiction, our colleagues will have to decide who is correct -- and then the Texas jurisdictional rule will be: guilty nonresidents can be sued here, innocent ones cannot. The dissenting opinion shows little doubt on that score; but if we address jurisdictional questions in this spirit, nonresidents will avoid not just our courts but our state and all its residents as well.

For the reasons stated above, we disapprove of those opinions holding that (1) specific jurisdiction is necessarily established by allegations or evidence that a nonresident

> committed a tort in a telephone call from a Texas number, or that (2) specific jurisdiction turns on whether a defendant's contacts were tortious rather than the contacts themselves.

Michiana, 168 S.W. 3d at 790-792 (Tex. 2005)(citations omitted)(emphasis in original).

In the instant case, other than legal conclusions (CR 25-26), Abdel-Hafiz appears to base the gist of his jurisdictional argument largely on the notion that Wright and Vincent "directed" defamatory statements toward the State of Texas under the theory that they somehow "knew" he allegedly "resided" or was "employed" here (*see e.g.* CR 28; 30; 113; 116; 119).[17] Not only does this jurisdictional theory rely upon unsubstantiated speculation as to what Wright or Vincent "intended," it would be improper at the jurisdictional stage to attempt to reach into Wright's or Vincent's mind in an effort to determine what they "thought." As set forth in *Michiana*, the proper focus must remain on "physical" facts.[18]

In this regard, there is no evidence that Abdel-Hafiz actually did "reside" or "work" in Texas at the relevant times. Wright and Vincent have negated these allegations – he was residing and working in Riyadh (Supp. CR 9; RR 4/12/06 at 61-63; 65; CR 2149; 2163; 2168-70; 2190). In one isolated instance, Abdel-Hafiz alleges that in 2003, "Vincent purposely traveled to Texas to defame, libel, and slander Plaintiff" (CR 36). Likewise, in one isolated instance, Abdel-Hafiz alleges that in 1999, "Wright as an

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17 Most of these "Texas" references are sprinkled throughout Abdel-Hafiz's Supplemental Petition, which was filed after Wright and Vincent specially appeared. In any event, Wright and Vincent have negated not only any allegations that Abdel-Hafiz "resided" in Texas but certainly any allegations that they "thought" he did.

18 *See, Lewis v. Indian Springs Land Corp.,* 175 S.W.3d 906, 913-18 (Tex. App. – Dallas 2005, no pet.)(analyzing *Michiana* and recognizing that jurisdiction turns only on defendant's physical contacts with forum; not on whether the contacts were tortious; and not on where defendant knew the brunt of any injury would be felt).

FBI Agent had telephone contact with the Dallas office of the FBI." (CR 45). Notably, both of these allegations are set forth in Abdel-Hafiz's responses to Wright's and Vincent's initial pleadings, which were later superseded by their First Amended Special Appearances (CR 54; 79). Abdel-Hafiz never responded to either of these live pleadings or the Supplement (CR 2136) thereto.

And aside from these two "physical facts", the overall allegations in Abdel-Hafiz's pleadings focus generally on what the parties thought or intended in or around 2002 with respect to his "residency" theory. Other than repetitious legal conclusions, what Abdel-Hafiz fails to do is to show how any of these allegations translate into constitutionally permissible jurisdiction. This hurdle he cannot overcome because the jurisdictional focus must remain on Wright's and Vincent's physical "contacts" with Texas – not on whether their "contacts" were "tortious" or on what they might have "thought" or "intended."

Quite simply, there is no valid authority holding that one phone call to Dallas, or a single trip to Texas, amounts to the purposeful availment of the privileges and protections of the laws of this State. *See Michiana,* 168 S.W. 3d at 789-90. Thus, even if it were shown that Abdel-Hafiz "resided" in Texas at any relevant time, *and* further shown that Wright and Vincent somehow "knew" he resided here – such that they "directed" the alleged defamation toward this forum – the constitutional mandates of due process would still require dismissal of his claims.

This is so because, without *more*, merely directing a tort toward Texas is a constitutionally insufficient ground for asserting personal jurisdiction over nonresidents

such as Wright and Vincent. And not only has Abdel-Hafiz failed to specifically plead, much less come forward with evidence of anything "more," he cannot even show that he *resided* in Texas – his "residency" has been negated. Moreover, Abdel-Hafiz certainly cannot show, nor, despite having deposed them, is there any evidence that Wright or Vincent somehow "knew" he "resided" in Texas – he didn't. (RR 4/12/06 at 46-47; 65; CR 76; 101; 2149; 2163-72; 2190; etc.)

D. Texas Residency

While intent is necessary to establish residence, it alone is not sufficient. *Mills v. Bartlett*, 377 S.W.2d 636, 637 (Tex. 1964). In fact, "[n]either bodily presence nor intention alone will suffice to create residence, but when the two coincide – at that moment the residence is fixed and determined." *Id.* That is, a permanent residence in Texas requires a home and fixed place of habitation to which a person intends to return when away. *Owens Corning v. Carter,* 997 S.W.2d 560, 571 (Tex. 1999). Therefore, physical presence, along with a home and fixed place of habitation in Texas, are each indispensable for the creation of residency in this State. Abdel-Hafiz can show neither - Wright and Vincent have negated both.

And, as set forth above, Abdel-Hafiz himself readily admits not only absence from the State but also that he "didn't want to come back" to Texas. He never specifically "intended" to return to Texas after being "promoted" then "reassigned" from Dallas to be the FBI's assistant legal attaché at the American Embassy in Riyadh, Saudi Arabia (RR 4/12/06 at 46-47; 65; CR 2163; 2169-70; 2190). Indeed, because things were going so

well in Riyadh, and because he "did not want to come back" to Dallas, at Abdel-Hafiz's *own* request this initial "term" was extended through at least August 31, 2003, (RR 4/12/06 at 62; CR 2149; 2167-72).

Abdel-Hafiz further admits that, although his original assignment papers (CR 2190) state that he claims his actual residence as "Dallas, Texas," his residency claims actually have "nothing" at all to do with where he resides; instead, the claims only relate to the office from which he was transferring when he left for Riyadh (RR 4/12/06 at 61-62; CR 2163-65). "They just told [him] to write Dallas, Texas and sign it" (CR 2164). Indeed, when he left Dallas, Abdel-Hafiz never "intended" to return here and in fact did not want to "uproot" his family after only "two years" in Riyadh – he "didn't want to come back" (CR 2171). Rather, his plans were to grow with the FBI and to obtain further promotions wherever that might lead – *anywhere in the world* (CR 2172; 2177).

It was not until an FBI "administrative inquiry" arose related to insurance fraud that, despite his prior requested and approved "extension" in Riyadh through at least August of 2003, Abdel-Hafiz was removed from Saudi Arabia by the FBI on March 14, 2003. (RR 4/12/06 at 50-51; 63; CR 2149; 2168-69; 2176). This date is well after the occurrence of all but one of the alleged defamatory publications – March 30, 2002, Judicial Watch Washington, D.C. press conference; November 26, 2002 Wall Street Journal article; December 19, 2002, ABC broadcast; March 5, 2003, Judicial Watch Dallas, Texas press conference.

Indeed, the only allegation that stems from a period when Plaintiff purports to have been "physically present" and actually "living" in Texas is the mid-2003 PBS *Frontline* interview. And again, there is no evidence that either Wright or Vincent knew of Plaintiff's whereabouts at that time. Nor is there any evidence that the PBS interview of Vincent involved any purposeful contact with Texas. There is not even evidence that Plaintiff "intended" to be back in Texas at that time. Indeed, but for the "insurance fraud" inquiry by the FBI, Abdel-Hafiz was slated to be in Riyadh through *at least* August 31, 2003 – again after PBS called Vincent in Chicago. These facts remain undisputed.

Also undisputed is the fact that Abdel-Hafiz's return to Texas from Riyadh was the direct result of actions beyond the control of Wright or Vincent. It was the FBI that sent Plaintiff back to Texas. He "did not want" to return. (RR 4/12/06 at 62; CR 2149; 2167-72). This is an important point, not only because it further negates the failed "directed a tort" theory of jurisdiction, but also because, as set forth above, the "purposeful availment" doctrine mandates that *only* Wright's and Vincent's individual contacts with the forum be considered. In other words, the unilateral activities of Abdel-Hafiz and/or other third parties such as the FBI, ABC, PBS, etc. are irrelevant to the jurisdictional inquiry as it relates to Wright or Vincent.

Under these facts, if Abdel-Hafiz's "directed a tort" theory were to hold water, then jurisdiction in defamation cases could be unilaterally controlled upon the whim of

any plaintiff who decided to "reside" in any state – any time. This is exactly what the Texas Supreme Court has forbidden.

E. Defamation Cases

Under federal law, defamation cases require knowledge of the particular forum in which a potential plaintiff will bear the brunt of the harm and an intentional direction of conduct toward that forum, as distinguished from any other. These benchmarks form essential parts of the constitutional exercise of jurisdiction over nonresidents. *Revell v. Lidov*, 317 F.3d 467, 475 (5th Cir. 2002). In *Revell,* a case strikingly similar to the instant proceeding, one of the defendants, Mr. Lidov, posted an article on Columbia University's website in which he expressly singled out and named the plaintiff, Mr. Revell. *Id.* at 469. The article charged Mr. Revell, then Associate Deputy Director of the FBI, with prior knowledge of the bombing of Pan Am Flight 103 and accused him of complicity in an alleged cover-up. *Id.* At the time, Mr. Lidov was a resident of Massachusetts and was unaware that Mr. Revell resided in Texas. *Id.* Mr. Revell brought a defamation suit in Texas against both Mr. Lidov and Columbia University. *Id.*

The district court dismissed the case for lack of personal jurisdiction and Mr. Revell appealed. *Id.* On appeal, the Fifth Circuit looked to precedent related to the passivity/interactivity of websites and found that, while the Columbia University website may, in a sense, constitute a presence everywhere in the world, the contacts with Texas were not "substantial." *Id.* at 471. Therefore, there was no basis for general jurisdiction. The court then turned to the issue of specific jurisdiction and found that, while the

website was "interactive" on some level, when considering the focus of the article, any contacts with Texas by the defendants were simply insufficient to satisfy the "effects test" as established by the U.S. Supreme Court. *Id.* at 471-73.

1. The "Effects Test"

Indeed, the "effects test" as created by the U.S. Supreme Court in *Calder,* turns on the notion that a defendant has knowledge of the particular forum in which a potential plaintiff will bear the brunt of the harm coupled with the intentional direction of the defamatory material toward that forum. *Calder v. Jones,* 465 U.S. 783, 789 (1984). In *Calder,* not only did the defendants "know" that the plaintiff in fact resided in California; they were also employees[19] of the publisher who enjoyed a greater circulation in California than any other state; and they aimed the defamatory material at a California audience. *Id.* at 789-90. In light of these facts, the court determined that the defendants' conduct was "calculated" to cause injury in California. *Id.* at 791. That is, the defendants intentionally aimed their defamatory material at a particular forum in which they otherwise also had a substantial "presence."

Without question then, at a minimum, the "effects test" looks to a defendant's "knowledge" as well as his "specific intent" to obtain the desired "defamatory effect" in a particular forum. But, as set forth above, the Texas Supreme Court has chosen to afford even greater constitutional protections for nonresidents and has found that, whether or not

19 Similarly, Abdel-Hafiz makes much of the *Paul Gillrie* case where jurisdiction was found over a corporation and its employees who were responsible for publishing articles and mailing them to Texas subscribers. *Paul Gillrie Institute, Inc. v. Universal Computer Consulting Ltd.,* 183 S.W. 3d 755, 757-758 (Tex. App. – Houston [1st Dist.] 2005, no pet.). But there is no evidence in this case that Wright or Vincent were ever employees of any media outlet responsible for publishing anything about Abdel-Hafiz. And neither Wright (CR 75-76) nor Vincent (CR 100-101) exercised control over where any publications would be released.

a jury might have found the underlying articles in *Calder* to be defamatory, and whether or not the defamation was "directed" toward the forum, there was no question that the articles "themselves" also constituted a substantial "presence" in the forum states by the defendants. *Michiana,* 168 S.W. 3d at 789.

And where, as here, there is no underlying presence and the defendant does not "know" where the plaintiff "resides," it simply cannot be said that the defamatory harm was purposely "directed" to that forum. *Revell*, 317 F.3d at 475. One simply cannot avail oneself of some forum someplace. *Id.* Likewise, courts must also consider whether the defendant acted pursuant to some prearranged plan and whether a "contact" with the forum is initiated for the very purpose of "committing" the tort. *Wilson v. Belin,* 20 F.3d 644, 649 (5th Cir. 1994).

As such, unsolicited questions[20] from reporters in the forum state are insufficient to support specific jurisdiction in a defamation case. *Id.* In other words, even when a tort is "deemed" to have been committed "in" a particular forum, this alone is simply not dispositive of whether jurisdiction is appropriate. *World-Wide Volkswagen,* 444 U.S. at 288-89; s*ee also, Michiana,* 168 S.W. 3d at 789-90.

2. Abdel-Hafiz's Actions

Recall that any "contact" with the forum must have resulted from the defendant's purposeful conduct, *not* the unilateral activity of the plaintiff or others. *See Michiana,* 168 S.W. 3d at 789. In this regard, one must look to Abdel-Hafiz's activities

20 This rule applies with equal force to Abdel-Hafiz's allegations relating to both the Dallas press conference and the PBS story. In both instances, Vincent was approached by reporters who presented unsolicited questions about Abdel-Hafiz (CR 102-103).

as they relate to any alleged contacts with the Texas forum. It is undisputed that in 1999, when the recording of Muslims first became an issue, Abdel-Hafiz was assigned to the Dallas office of the FBI. Soon thereafter, Plaintiff was reassigned and transferred to Saudi Arabia. And it was not until Plaintiff was suspended by the FBI in 2003 that he allegedly returned to "reside" in Texas. (RR 4/12/06 at 46-47; 65; CR 76; 101; 2149; 2163-72; 2190;).

Wright and Vincent cannot reasonably be charged with the knowledge that Plaintiff would be suspended; removed from Saudi Arabia; fired by the FBI; and ultimately reinstated to the Dallas office. Moreover, if this Court were to hold that Plaintiff's unilateral decision to move to Texas after the fact allows for the assertion of jurisdiction over Wright and Vincent, the jurisdictional analysis would simply be reduced to the forbidden mechanical test. Indeed, there would be no need to ever consider minimum contacts. Instead, courts would simply look to where a plaintiff resides, regardless of when, and find that due process is satisfied. This is simply not the law.

F. Texas is Without Jurisdiction

It is clear that Abdel-Hafiz was not present in Texas and did not have a home in this State at the time of the March 2002 Washington, D.C. press conference, the November 2002 Wall Street Journal pieces, or the December 2002 ABC interview. Plaintiff did not "reside" in Texas at these relevant times. And in any event, it is also clear that Abdel-Hafiz was never identified by Wright or Vincent during any of these events. Moreover, there were no contacts between the PBS *Frontline* story and Texas -

with the possible exception of those manufactured by Abdel-Hafiz himself. Indeed, the *Frontline* story was about Plaintiff. He gave the interview. Vincent was merely contacted by the reporter as a follow-up. Neither Abdel-Hafiz's residence nor his alleged contacts with Texas was ever discussed by Vincent.

Quite simply, Wright and Vincent are not chargeable with knowledge of Abdel-Hafiz's state of residency at any relevant time. Wright and Vincent have no substantial connections to Texas with respect to this matter. No harm was ever aimed at the State of Texas. Texas is not uniquely tied to the FBI. And even if the alleged harm "occurred" in Texas, this alone is not sufficient for the exercise of jurisdiction over Wright and Vincent. There is simply no nexus between Wright's and Vincent's limited Texas contacts and Abdel-Hafiz's alleged injuries, if any. Neither Wright nor Vincent has had any meaningful connections to Texas that rise to the constitutional level of "purposeful availment."

Any connections that Abdel-Hafiz alleges were, at best, merely fortuitous. At no time did Wright or Vincent seek any "benefit, advantage, or profit" by availing themselves of a Texas forum. And there is certainly no evidence that any "book deal" (RR 4/12/06 at 87) with Wright has any relationship to this matter whatsoever – it's yet another of the many red herrings in Abdel-Hafiz's failed attempt to bootstrap Texas jurisdiction. The simple fact is that, under these facts as guided by Texas law, Texas is without jurisdiction over Wright and Vincent. Moreover, the assumption of jurisdiction

over Wright or Vincent would offend traditional notions of fair play and substantial justice.

G. Fair Play and Substantial Justice

As mentioned above, the second prong of the due process analysis requires that the assumption of jurisdiction by the forum state not offend traditional notions of fair play and substantial justice. *Burger King,* 471 U.S. at 472-474. And although the first prong also includes fairness considerations, the jurisdictional analysis requires a separate determination of whether the assertion of personal jurisdiction complies with traditional notions of fair play and substantial justice. *Guardian Royal,* 815 S.W.2d at 226-28.

That is, consideration must be given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation. *Franklin v. Geotechnical Services, Inc.,* 819 S.W.2d 219, 221 (Tex. App. – Fort Worth 1991, writ denied).

In this regard, courts consider the following factors: (1) the burden on the nonresident to litigate in a distant forum; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive social policies. *Guardian Royal,* 815 S.W.2d at 28.

These considerations may sometimes also serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. *Burger King,* 471 U.S. at 477. Conversely, considerations of fair play and substantial justice may affect the strength of the minimum contacts that the court may require. However, regardless of these factors, it must always be established that the nonresident defendant purposely established the requisite minimum contacts with the forum state. *Guardian Royal,* 815 S.W.2d at 28. And even if the nonresident has purposely established minimum contacts with the forum, the exercise of jurisdiction may not be fair and reasonable under the facts of any particular case. *Burger King,* 471 U.S. at 477-78. The instant facts reveal that, in all fairness, Wright and Vincent should be dismissed from this case.

Thus, in the unlikely event that this Court were to find that Wright or Vincent have some tangential contact with the State of Texas, and that such contacts somehow rise to the level of "minimum contacts," the undue burden that would be placed upon Wright and Vincent to litigate in this distant forum would still require dismissal (CR 77; 103). Moreover, Texas has no particular interest in adjudicating a dispute that arises out of activity occurring wholly outside of this State involving numerous nonresidents and internal FBI matters.

And even if Abdel-Hafiz *now* "resides" in Texas, at the relevant times he did not. Abdel-Hafiz's interest in obtaining an efficient resolution of this matter would also more reasonably be served in another forum with more direct contacts to the subject matter of

this action, where the ABC Defendants also have a presence equal to that here in Texas, and where other material witnesses are more likely to be found. There is simply no colorable connection to this State that would justify haling Wright and Vincent into the halls of a Texas Courthouse. The trial court's orders of dismissal must be affirmed.

PRAYER

For the reasons discussed herein, Robert Wright and John Vincent pray that this Court affirm the trial court's dismissal of all claims against them and sustain their jurisdictional objections.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been forwarded to the following via CMRRR on this the ____ day of January, 2007.

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INDEX TO APPENDIX

LEXSTAT TEX. R. CIV. P. 120A

TEXAS RULES

*** THIS DOCUMENT IS CURRENT THROUGH NOVEMBER 30, 2006 ***
*** Annotations current through October 15, 2006 ***

STATE RULES
TEXAS RULES OF CIVIL PROCEDURE
PART II. RULES OF PRACTICE IN DISTRICT AND COUNTY COURTS
SECTION 5. Citation

Tex. R. Civ. P. 120a (2006)

Rule 120a Special Appearance.

1. Notwithstanding the provisions of Rules 121, 122 and 123, a special appearance may be made by any party either in person or by attorney for the purpose of objecting to the jurisdiction of the court over the person or property of the defendant on the ground that such party or property is not amenable to process issued by the courts of this State. A special appearance may be made as to an entire proceeding or as to any severable claim involved therein. Such special appearance shall be made by sworn motion filed prior to motion to transfer venue or any other plea, pleading or motion; provided however, that a motion to transfer venue and any other plea, pleading, or motion may be contained in the same instrument or filed subsequent thereto without waiver of such special appearance; and may be amended to cure defects. The issuance of process for witnesses, the taking of depositions, the serving of requests for admissions, and the use of discovery processes, shall not constitute a waiver of such special appearance. Every appearance, prior to judgment, not in compliance with this rule is a general appearance.

2. Any motion to challenge the jurisdiction provided for herein shall be heard and determined before a motion to transfer venue or any other plea or pleading may be heard. No determination of any issue of fact in connection with the objection to jurisdiction is a determination of the merits of the case or any aspect thereof.

3. The court shall determine the special appearance on the basis of the pleadings, any stipulations made by and between the parties, such affidavits and attachments as may be filed by the parties, the results of discovery processes, and any oral testimony. The affidavits, if any, shall be served at least seven days before the hearing, shall be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify.

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Should it appear to the satisfaction of the court at any time that any of such affidavits are presented in violation of Rule 13, the court shall impose sanctions in accordance with that rule.

4. If the court sustains the objection to jurisdiction, an appropriate order shall be entered. If the objection to

jurisdiction is overruled, the objecting party may thereafter appear generally for any purpose. Any such special appearance or such general appearance shall not be deemed a waiver of the objection to jurisdiction when the objecting party or subject matter is not amenable to process issued by the courts of this State.

NOTES:

LEGISLATIVE NOTE. -- *Change by amendment effective January 1, 1976:* Words are added in the third sentence which permit amendments to the special appearance motion. LEGISLATIVE NOTE. -- *Change by amendment effective September 1, 1983:* To conform to S.B. 898, 68th Legislature, 1983. LEGISLATIVE NOTE. -- *Change by amendment effective September 1, 1990:* To provide for proof by affidavit at special appearance hearings, with safeguards to responding parties. These amendments preserve Texas prior practice to place the burden of proof on the party contesting jurisdiction.

LEXSTAT TEX. R. APP. P. 38.1

TEXAS RULES

*** THIS DOCUMENT IS CURRENT THROUGH NOVEMBER 30, 2006 ***
*** Annotations current through October 15, 2006 ***

STATE RULES
TEXAS RULES OF APPELLATE PROCEDURE
SECTION TWO. Appeals from Trial Court Judgments and Orders

Tex. R. App. P. Rule 38 (2006)

Rule 38 Requisites of Briefs.

38.1 *Appellant's Brief.* --The appellant's brief must, under appropriate headings and in the order here indicated, contain the following:

(a) *Identity of parties and counsel.* --The brief must give a complete list of all parties to the trial court's judgment or order appealed from, and the names and addresses of all trial and appellate counsel.

(b) *Table of contents.* --The brief must have a table of contents with references to the pages of the brief. The table of contents must indicate the subject matter of each issue or point, or group of issues or points.

(c) *Index of authorities.* --The brief must have an index of authorities arranged alphabetically and indicating the pages of the brief where the authorities are cited.

(d) *Statement of the case.* --The brief must state concisely the nature of the case (e.g., whether it is a suit for damages, on a note, or involving a murder prosecution), the course of proceedings, and the trial court's disposition of the case. The statement should be supported by record references, should seldom exceed one-half page, and should not discuss the facts.

(e) *Issues presented.* --The brief must state concisely all issues or points presented for review. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included.

(f) *Statement of facts.* --The brief must state concisely and without argument the facts pertinent to the issues or points presented. In a civil case, the court will accept as true the facts stated unless another party contradicts them. The statement must be supported by record references.

(g) *Summary of the argument.* --The brief must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief. This summary must not merely repeat the issues or points presented for review.

(h) *Argument.* --The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record.

(i) *Prayer.* --The brief must contain a short conclusion that clearly states the nature of the relief sought.

(j) *Appendix in civil cases.*

(1) *Necessary contents.* --Unless voluminous or impracticable, the appendix must contain a copy of:

(A) the trial court's judgment or other appealable order from which relief is sought;

(B) the jury charge and verdict, if any, or the trial court's findings of fact and conclusions of law, if any; and

(C) the text of any rule, regulation, ordinance, statute, constitutional provision, or other law (excluding case law) on which the argument is based, and the text of any contract or other document that is central to the argument.

(2) *Optional contents.* --The appendix may contain any other item pertinent to the issues or points presented for review, including copies or excerpts of relevant court opinions, laws, documents on which the suit was based, pleadings, excerpts from the reporter's record, and similar material. Items should not be included in the appendix to attempt to avoid the page limits for the brief.