

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
MEMPHIS DIVISION**

**MONICA ROSS HASSELL, individually)
and as surviving spouse of ANTONIO)
JAMES HASSELL,)**

Plaintiff)

vs.)

**INNOVATION VENTURES, LLC)
dba Living Essentials, a Michigan)
corporation; BIO CLINICAL)
DEVELOPMENT, INC.; and)
MANOJ BHARGAVA)**

Defendants)

CASE NO. 3:07CV1174

JURY DEMAND

COMPLAINT FOR DAMAGES

NATURE OF THE CASE

1. This is an action for personal injuries and wrongful death brought by Monica Hassell as the surviving spouse of Antonio James Hassell who, at age twenty-seven, suffered a sudden heart attack (ventricular arrhythmia) on August 2, 2009 and subsequently died on March 1, 2009 in Memphis, Tennessee as a direct and proximate result of his consumption of the widely advertised “5-hour ENERGY” drink. This lawsuit asserts claims for negligence, strict product liability for design defect, strict product liability for failure to warn, breach of implied warranty and punitive damages against each defendant. Each defendant was responsible for the design, manufacture, production, testing, study, inspection, mixture, labeling, marketing, advertising, sales, promotion, and/or distribution of “5-hour ENERGY. ”

JURISDICTION AND VENUE

2. This court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. §1332 (diversity of citizenship). The matter in controversy in this civil action exceeds the sum or value of \$75,000, exclusive of costs and interests, as to each defendant, and is between citizens of different states.

3. Venue in this District is proper under 28 U.S.C. §1391. The events giving rise to this cause of action occurred in substantial part in this District, where defendants transact business.

THE PARTIES

Plaintiff

4. Plaintiff Monica Hassell seeks wrongful death and survivor damages as a result of her husband's consumption of defendants' homeopathic "energy drink" product – "5-hour ENERGY." Plaintiff Monica Hassell and her deceased husband, Antonio J. Hassell were at all times relevant citizens and residents of Tennessee.

Defendants

5. Defendant, Innovation Ventures, LLC d/b/a Living Essentials ("Innovation" or "Living Essentials" herein), is a Michigan limited liability company with its principal place of business in Novi, Michigan. At all relevant times, this defendant was engaged in the design, manufacture, production, testing, study, inspection, mixture, labeling, marketing, advertising, sales, promotion, and/or distribution of "5-hour ENERGY." Defendant, Innovation Ventures, LLC d/b/a Living Essentials may be served with process by service on its registered agent for service of process: Matthew S. Dolmage, 39855 Farmington Hills, Michigan 48331.

6. Defendant Bio Clinical Development, Inc. is a Michigan corporation with its principal place of business in Farmington Hills, Michigan. At all relevant times, this

defendant was engaged in the design, manufacture, production, testing, study, inspection, mixture, labeling, marketing, advertising, sales, promotion, and/or distribution of “5-hour ENERGY.” Defendant Bio Clinical Development, Inc. may be served with process by service on its registered agent for service of process: Oakland Law Group, PLLC, 39855 Hills Tech Drive, Farmington Hills, Michigan 48331. Plaintiff avers, upon information and belief, that Bio Clinical Development, Inc. and/or Defendant Manoj Bhargava are operating Innovation and Living Essentials as an alter ego or as a single business enterprise. Plaintiff further avers an agency relationship exists between these defendants.

7. Defendant Manoj Bhargava is a citizen and resident of Michigan. At all relevant times, this defendant was engaged in the design, manufacture, production, testing, study, inspection, mixture, labeling, marketing, advertising, sales, promotion, and/or distribution of “5-hour ENERGY.” He may be served with process at: 34643 Berkshire Court, Farmington Hills, Michigan 48331. Plaintiff avers, upon information and belief, that Bio Clinical Development, Inc. and Innovation are the alter ego/agents of Manoj Bhargava and he runs these companies as a single business enterprise.

8. For purposes of this Complaint, all of the above defendants, companies, corporations, subsidiaries, and divisions will be collectively referred to as “Innovation.” “Innovation” includes any and all parents, subsidiaries, affiliates, divisions, franchises, partners, joint venturers and organizational units of any kind, their predecessors, successors and assigns and their present officers, directors, employees, agents, representatives and other persons acting on their behalf, including but not limited to Innovation Ventures, LLC; Living Essentials, LLC; Bio Clinical Development, Inc. and Manoj Bhargava.

FACTUAL ALLEGATIONS

Antonio J. Hassell's Injuries

9. Antonio J. Hassell consumed defendants' energy drink supplement "5-hour ENERGY." He began consuming this product in June 2009 to help keep him awake and alert at work in a warehouse where he worked from 4:00 p.m. until 1:00 and 2:00 a.m. He bought "5-hour ENERGY" at a local Exxon gas station and, on occasion at Walgreens.

10. Antonio J. Hassell had a sudden cardiac event (arrhythmia) while playing basketball on August 2, 2009 at Overton High School in Memphis, Tennessee with his friends. He was transported to the hospital and attended to by physicians at Delta Medical Center. Mr. Hassell was a non smoker, non drinker, did not use drugs and was in excellent health. His physicians noted in the medical records his use of energy drinks and identified energy drinks as the sole causative risk factor for his cardiac event. Mrs. Hassell was told by Mr. Hassell's treating physician at Delta Medical Center that the energy drink "5-hour ENERGY" was the cause of Mr. Hassell's cardiac event and encephalopathy because of his consumption of "5-hour ENERGY."

11. Mr. Hassell sustained anoxic encephalopathy and suffered seizures. He was transferred to Baptist East Hospital and died on March 1, 2009 from acute respiratory failure and pneumonia associated with sepsis and anoxic encephalopathy. He endured a prolonged hospitalization in an unresponsive condition, yet able to breathe on his own. *See Exhibit 1* (photo of Mr. Hassell).

12. Mr. Hassell was survived by his wife and two young children (Jhamya L. Hassell, now age 5 and Antonio J. Hassel, Jr., now 3). Mr. Hassell also supported Monica Hassell's six year old son Jhamal Ross.

13. Mr. Hassell worked as an "order puller" at a warehouse in Memphis and earned \$17.61/hr.

Defendants' Misconduct

14. At all material times, each defendant was responsible for designing, manufacturing, producing, testing, studying, inspecting, mixing, labeling, marketing, advertising, selling, promoting, and/or distributing "5-hour ENERGY" described herein, which Mr. Hassell consumed.

15. Defendant Manoj Bhargava started a tiny company in suburban Detroit called Living Essentials, which began sales with only one "product" -- a claimed antihangover pill called "Chaser". The FDA chastised Mr. Bhargava for making unfounded drug claims that "Chaser" helped to prevent hangovers and helped to prevent hangovers by absorbing elements in beer, wine and liquor that cause hangovers. In fact the "Chaser" pill product marketed by Bhargava contained vegetable carbon and activated calcium carbonate.

16. On or about 2004 Bhargava and his "Living Essentials" LLC began selling a product called "5-hour ENERGY", a concoction of caffeine and amino acids packaged in small plastic bottles. Today, "5-hour ENERGY" accounts for about 80 percent of the rapidly expanding "energy drinks" market market, according to published reports. Living Essentials heavily advertises "5-hour ENERGY". It spends \$60 million a year on television advertising.

17. Initially Living Essentials hired against a Texas company called Custom Nutrition Laboratories to develop the formula for 5-hour ENERGY and Custom Nutrition Laboratories first manufactured and bottled 5-hour ENERGY and Living Essentials and handled the marketing, distribution and sales. Then, in late 2007, Living Essentials fired Custom Nutrition and at the times material herein manufactured 5-hour ENERGY at its new plant in Warsaw, Indiana at the site of a former Superfund clean up site.

18. Both companies (Custom Nutrition and Innovation/Living Essentials) claimed ownership of 5-hour ENERGY's supposedly secret recipe. Unlike older energy drinks, 5-Hour Energy does not contain sugar and has no real "energy" ingredients that would fuel a human body. The principal ingredients of 5-Hour Energy are caffeine combined in an "energy blend" with taurine, glucuronolactone, malic acid, N-acetyl, L-Tyrosine, L-phenylalanine and citicoline. Defendants, however, refuse to reveal exactly what is in the product, saying only that it is about as much caffeine as in a cup of coffee. The caffeine in coffee can vary widely, from about 80 to 175 milligrams in an eight ounce cup. Living Essentials makes broad claims for 5-Hour Energy, saying that it is "packed with B vitamins for energy and amino acids for alertness and focus."

19. In a court cases between Custom Nutrition, Innovation/Living Essentials and Manoj Bhargava, Custom Nutrition asserted that Manoj Bhargava ran defendant Innovation Ventures, LLC dba Living Essentials as his alter ego and intentionally transferred virtually all assets out of Innovation Ventures, LLC dba Living Essentials to make the company "judgment proof." In fact in a brief filed by Manoj Bhargava, he admitted that "Kevin Zwierzchowski and Tom Morse, two former employees of Living Essentials, both said Bhargava told them that he wanted to distribute as much cash out of the company as possible to keep it judgment proof, and both said cash distributions were made consistently." In the same brief Bhargava admitted that in a deposition, Bhargava testified "that the net income for the year 2007 was. \$5,000 less than total distributions." The trial court found Bhargava was subject to personal jurisdiction in Texas as an *individual* defendant. These circumstances warrant piercing the corporate veil because the corporations are controlled by defendant Bhargava and are shams or dummies where

the corporations' supposed separate existence has been used to work a fraud or injustice in contravention of public policy. A copy of the subject brief is attached as **Exhibit 2** to this Complaint. This case was settled on appeal. Accordingly, Plaintiff submits these admissions by Bhargava in his appellate brief and the ruling of the Texas court stand as irrefutable proof and collateral estoppel on the alter-ego issue.

20. Each defendant had an independent obligation to know, analyze, and disclose scientific and medical information about its "5-hour ENERGY" drink in a timely and adequate manner, and to provide warnings about risks and side effects as soon as it was aware of them. Each defendant failed to do so with respect to the "5-hour ENERGY" that Mr. Hassell consumed, including by failing to know, analyze, and/or disclose an increased incidence and risk of heart attacks, compromised cardiac function, strokes and increased risk of cardiac arrhythmia.

21. Reliable scientific and medical evidence establish that "energy drinks" containing caffeine and amino acids (e.g. taurine) present material adverse health risks including the risk of heart attack, seizures, detrimental heart effects and death.

22. In a 2008 review article published in the *Journal of the American Pharmacists Association*, 48 J. Am. Ph. Ass'n No. 3 (May-June 2008), the authors reviewed the medical literature and stated: "[f]our documented case reports of caffeine-associated deaths were found, as well as four separate cases of seizures associated with the consumption of energy drinks."

23. Health Canada (the Canadian "FDA") has received 59 adverse reaction reports associated with energy drinks including nausea, vomiting and heart irregularities.

24. On July 29, 2010 Canada's leading medical journal published an editorial calling for strict regulations for high-caffeine energy drinks noting:

"Energy drinks are very effective high-concentration caffeine delivery systems. These sugar-loaded syrups typically contain 80 to 140 mg of

caffeine per 250 mL — the equivalent caffeine in one cup of coffee or two cans of cola. However, beverage companies are offering formulations with caffeine concentrations as high as 500 mg.”

...

Given the potential for harm, regulatory authorities such as Health Canada should step in. Regulations could include government-mandated restrictions on labelling, sales and marketing, or self-imposed industry-wide standards with clear labelling accompanied by public education.

Many countries have either imposed or tried to impose strict regulations because of potential health risks of caffeine. Until 2008, France did not even allow the sale of Red Bull™, and in Denmark, sale was prohibited as of 2009.”

“Caffeinating Children and Youth,” *Canadian Medical Association Journal* (July 29, 2010).

25. In a study published in March 2009 in *The Annals of Pharmacotherapy* medical researchers at Wayne State University and Henry Ford Hospital in Detroit conducted a study to “determine the cardiac effects of a commercially available, multicomponent energy drinks.” The study found that in healthy volunteers heart rate increased an average 5-7 beats/min and systolic blood pressure increased 10 mm Hg after energy drink consumption. “Effect of ‘Energy Drink’ Consumption on Hemodynamic and Electrocardiographic Parameters in Healthy Young Adults in healthy volunteers,” *The Annals of Pharmacotherapy*: Vol. 43, No. 4, pp. 596-60 (March 2009).

26. According to this study 47% of the subjects reported shakiness or being jittery (n=4), gastrointestinal symptoms or abdominal cramping (n=3), increased urination (n=1) and more forceful heart beats (n=1) at some point during the seven day study period.

27. Under the Wayne State/Henry Ford Hospital study an increase in blood pressure was also noted. The increase in pulse pressure occurred most prominently on the 7th day suggesting that this effect occurs with repeated use of energy drinks.

28. According to Dr. Kalus a consumer product that increased blood pressure could have significant health implications. According to the lead author of the study, Dr. James Kalus, a 50/50 chance of experiencing an adverse side effect is significant. The

blood pressure findings in the study were material enough for the authors to recommend that persons with high blood pressure or heart disease should avoid energy drinks.

29. In an Australia a man's heart stopped after consuming the Red Bull energy drink. In a published article, "Man's heart stops after Red Bull overdose" (Daniel Dasey, August 19, 2007) the cardiologist who treated the victim, Dr Malcolm Barlow, a cardiologist at Newcastle's John Hunter Hospital, said "it appeared excessive consumption of energy drinks had precipitated the heart attack." The article further stated that "NSW Health [New South Wales Health] has urged people to be extremely cautious of overdosing on stimulant products. Department spokesman Dr Robert Batey said "consuming high levels of stimulants had the potential to cause heart attacks."

30. This case report led to a medical investigation of the case that was published in the *Medical Journal of Australia*, 2009 Jan 5;190(1):41-3: "Cardiac arrest in a young man following excess consumption of caffeinated 'energy drinks.'" The authors reported that an otherwise healthy 28-year-old man had a cardiac arrest after a day of motocross racing. He had consumed excessive amounts of a caffeinated "energy drink" throughout the day. The authors concluded that a combination of excessive ingestion of caffeine- and taurine-containing energy drinks and strenuous physical activity can produce myocardial ischaemia by inducing coronary vasospasm.

31. Energy drinks have also been associated with the onset of seizures. In 2007 an article published in *Epilepsy & Behavior*. 2007 May;10(3):504-8, "New-onset seizures in adults: possible association with consumption of popular energy drinks," medical researchers at the Department of Neurology, Barrow Neurological Institute, St. Joseph's Hospital and Medical Center, Phoenix, reported a series of four patients who had discrete seizures on multiple occasions, following heavy consumption of energy drinks. Once the patients were abstinent from the energy drinks, no recurrent seizures were reported. The authors proposed that the large consumption of energy drinks rich in caffeine, taurine, and guarana seed extract could have provoked these seizures.

32. A medical study conducted in Australia in and published in *The American Journal of Medicine*, “Detrimental Effects of Energy Drink Consumption on Platelet and Endothelial Function,” Volume 123, Issue 2, Pages 184-187 (February 2010) noted that energy drink consumption has been anecdotally linked with sudden cardiac death and, more recently, myocardial infarction. As myocardial infarction is strongly associated with both platelet and endothelial dysfunction, the authors *tested* the hypothesis that energy drink consumption alters platelet and endothelial function and found that *it did*.

33. Fifty healthy volunteers (34 male, aged 22±2 years) participated in the study. Platelet aggregation and endothelial function were tested before, and 1 hour after, the consumption of 250 mL (1 can) of a sugar-free energy drink. The authors concluded “Energy drink consumption acutely increases platelet aggregation and decreases endothelial function in healthy young adults” and that “myocardial infarction is strongly associated with both platelet and endothelial dysfunction.”

34. The published findings in this study were followed up by statements by the study’s authors in articles noting: “Researchers from the Royal Adelaide Hospital are warning that the drink “could be deadly” for people with heart abnormalities. Lead researcher Scott Willoughby stated although the incidence is low “the drink could be more deadly for people who have an unknown cardiovascular abnormality.” “Researchers warn of heart risks from energy drinks,” *Medical News* (August 17 2008).

35. Concerns over the health risks of energy drinks have caused strong warnings and regulations throughout the world except, notably, in the United States where companies and actors like Defendants have sold their products without research, studies, warnings or labeling to alert consumers of the true risks of these products.

36. Deaths attributed to energy drink consumption have been reported in Australia, Ireland and Sweden. “Caffeinated Energy Drinks -- A Growing Problem,” *Drug Alcohol Depend.* 2009 January 1; 99(1-3): 1–10.

37. Professor Jose Missri, a cardiology specialist at Temple University Hospital

and a professor of cardiovascular medicine at Temple's School of Medicine "emphasized the harmful effects of energy drinks over time on the heart and body", stating "People have died over it." "Energy boosters could be cause of heart failure" *The Temple News* (March 31, 2009).

38. The European Union requires that energy drinks have a "high caffeine content" label (European Union, 2007) and Canada requires labels indicating that these drinks should not be mixed with alcohol and that maximum daily consumption not be exceeded. (Health Canada, 2005). Norway restricts the sale of Red Bull to pharmacies, while France (until recently) and Denmark have prohibited the sale of Red Bull, for example altogether.

39. In a medical case report published in *Clin Auton Res.* 2008 Aug;18(4):221-3 (Aust 5, 2008) the authors reported postural tachycardia syndrome associated with a vasovagal reaction in a young volleyball player after an excess intake of Red Bull as a refreshing energy drink. The authors concluded the energy drink be considered a possible cause of orthostatic intolerance.

40. Each defendant made claims regarding the benefits of using its "energy drink" and wholly failed to warn or disclose and the known risks and side effects of these "energy drinks." Each defendant knew or should have known the claims for "5-hour ENERGY" were false and misleading. Each defendant failed to adequately disclose the true health consequences, and the true risks and side effects from "5-hour ENERGY" including the increased incidence and risks of strokes, heart attacks and compromise to cardiac function.

41. Each defendant failed to conduct adequate testing, studies or clinical testing and research, and failed to conduct adequate marketing surveillance, to determine the safety of "5-hour ENERGY" including with respect to the causal connection between "5-hour ENERGY" and risks of strokes, heart attacks and compromise to cardiac function.

42. Each defendant failed to disclose on its warning labels or elsewhere that adequate pre-marketing clinical testing and research, and adequate post-marketing surveillance, had not been done, thereby giving the false impression that “5-hour ENERGY” had been tested. Each defendant knew or should have known that, at all material times, its communications about the benefits, risks, and adverse effects of its of “5-hour ENERGY” including communications in labels, advertisements and promotional materials, were materially false and misleading. In the alternative, the each defendant was ignorant of whether or not its communications about of “5-hour ENERGY” were true in material ways.

43. Antonio J. Hassell would not have used of “5-hour ENERGY” described herein, or would have discontinued their use, or would have used safer alternative products, had each defendant disclosed the true health consequences, risks, and adverse events, including the increased incidence and risk of strokes, blood clots, heart attacks, and other illnesses, caused by energy drinks containing caffeine, taurine and the other ingredients in “5-hour ENERGY.”

44. Each defendant’s nondisclosures and misrepresentations as alleged herein were material, and were substantial factors that contributed directly and causally, and naturally and necessarily, to the serious injuries and damages that plaintiff has suffered.

CLAIMS FOR RELIEF

First Claim Against All Defendants

(Negligence)

45. Plaintiff realleges all previous paragraphs.

46. Each defendant introduced of “5-hour ENERGY” described herein into the stream of commerce. At all material times, each defendant had a duty to plaintiff’s decedent and other consumers of “5-hour ENERGY” to exercise reasonable care in order to properly design, manufacture, produce, test, study, inspect, mix, label, market, advertise, sell, promote, and distribute these products. This includes a duty to warn of

side effects, and to warn of the risks, dangers, and adverse events associated with caffeine “energy drinks” laced with amino acids.

47. Each defendant knew, or in the exercise of reasonable care should have known, that its of “5-hour ENERGY” drink was of such a nature that it was not properly designed, manufactured, produced, tested, studied, inspected, mixed, labeled, marketed, advertised, sold, promoted, and distributed, and they were likely to cause injury to those who ingested them.

48. Each defendant was negligent in the design, manufacture, production, testing, study, inspection, mixture, labeling, marketing, advertising, sales, promotion, and distribution of of “5-hour ENERGY” and breached duties it owed to plaintiff. In particular, each defendant:

- a. Failed to use due care in the preparation of its of “5-hour ENERGY” drink to prevent the aforementioned risks when the drink was consumed, especially in cases of exercise;
- b. Failed to use due care in the design of of “5-hour ENERGY” to prevent the aforementioned risks;
- c. Failed to conduct adequate pre-clinical testing and research to determine the safety of “5-hour ENERGY”;
- d. Failed to conduct adequate post-marketing surveillance to determine the safety of “5-hour ENERGY”;
- e. Failed to study, develop, and/or acquire safer alternative components to replace the potentially harmful ingredients in of “5-hour ENERGY”;
- f. Failed to accompany its product with proper warnings regarding all possible adverse side effects associated with the use of its product and the comparative severity of these adverse side effects;

- g. Failed to use due care in the development of “5-hour ENERGY” to prevent the aforementioned risks to individuals when the drugs were ingested;
- h. Failed to use due care in the manufacture of “5-hour ENERGY” to prevent the aforementioned risks to individuals when the so-called “energy shot” was ingested;
- i. Failed to use due care in the inspection of its of “5-hour ENERGY” product to prevent the aforementioned risks to individuals when the drugs were ingested;
- j. Failed to use due care in the labeling of its hormone therapy drugs to prevent the aforementioned risks to individuals when the so-called “energy shot” was ingested;
- k. Failed to use due care in the marketing of “5-hour ENERGY” to prevent the aforementioned risks to individuals when the product was consumed.
- l. Failed to use due care in the promotion of to prevent the aforementioned risks to individuals when the drugs were ingested;
- m. Failed to use due care in the selling of “5-hour ENERGY” to prevent the aforementioned risks to individuals when the product was ingested;
- n. Failed to warn adequately about the health consequences, risks, and adverse events caused by “5-hour ENERGY”; and
- o. Was otherwise careless and negligent.

49. Each defendant knew or should have known that “5-hour ENERGY” caused unreasonable harm and dangerous side effects that many users would be unable to remedy by any means. Despite this, each defendant continued to promote and market “5-hour ENERGY” its for use by consumers, including plaintiff Antonio Hassell.

50. It was foreseeable to each defendant that consumers, including plaintiff's decedent, would suffer injury as a result of its failure to exercise ordinary care as described herein.

51. As a direct and proximate result of each defendant's conduct, Antonio J. Hassell suffered a sudden loss of cardiac function, brain damage and death with substantial injuries and damages specified herein.

Second Claim Against All Defendants

(Strict Liability: Design Defect)

52. Plaintiff realleges all previous paragraphs.

53. Each defendant manufactured, sold, supplied "5-hour ENERGY" and had significant involvement in distribution including the capability of exercising control over quality.

54. Each defendant placed "5-hour ENERGY" into the stream of commerce. "5-hour ENERGY" was expected to, and did, reach Antonio J. Hassell without substantial change in its condition. Antonio J. Hassell consumed "5-hour ENERGY" and it caused his heart attack and death.

55. At the time "5-hour ENERGY" left each defendant's hands, "5-hour ENERGY" was in a condition not contemplated by plaintiff's decedent and was unreasonably dangerous and defective. "5-hour ENERGY" was (and is) dangerous to an extent beyond that which would be contemplated by the ordinary consumer who the supposed "energy drink." "5-hour ENERGY" was more dangerous than Antonio J. Hassell or reasonable consumers contemplated.

56. The risks of "5-hour ENERGY" outweighs any claimed or perceived utility. There are practicable, feasible safer alternatives to achieve "energy" and increased awareness than defendants' "5-hour ENERGY".

57. Defendants' "5-hour ENERGY" was defective and unreasonably dangerous.

58. As a direct and proximate result of each defendant's conduct, Antonio J. Hassell suffered the injuries and damages specified herein.

Third Claim Against All Defendants

(Strict Liability: Failure to Warn)

59. Plaintiff realleges all previous paragraphs.

60. Each defendant manufactured, sold, and supplied "5-hour ENERGY" described herein, and at all material times was in the business of doing so. Each defendant placed "5-hour ENERGY" into the stream of commerce. "5-hour ENERGY" was expected to, and did, reach Antonio J. Hassell without substantial change in its condition. Antonio J. Hassell consumed "5-hour ENERGY" and it caused grievous injuries and his death.

61. When each defendant placed "5-hour ENERGY" into the stream of commerce, they failed to accompany "5-hour ENERGY" with adequate warnings. Each defendant failed to warn of the true risks and dangers, and of the symptoms, scope and severity of the potential side effects of the "5-hour ENERGY" product Antonio J. Hassell ingested. These risks, dangers, and side effects include, but are not limited to a significant increased risk of strokes, blood clots, heart attacks and cardiac arrhythmias.

62. Due to the inadequate warnings as alleged herein, at the time "5-hour ENERGY" left each defendant's hands, "5-hour ENERGY" was in a condition not contemplated by plaintiff's decedents or reasonable consumers and were unreasonably dangerous to Antonio J. Hassell. "5-hour ENERGY" was dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchased the so-called "energy shot." "5-hour ENERGY" was more dangerous than contemplated. Furthermore, its risks outweighed its utility.

63. Defendants' "5-hour ENERGY" drink described herein is defective and unreasonably dangerous.

64. Had each defendant provided adequate warnings and instructions, plaintiff's decedent would not have consumed "5-hour ENERGY" and would not have suffered the personal injuries and death that ensued.

65. As a direct and proximate result of each defendant's conduct, plaintiff's decedent suffered the injuries and damages specified herein.

Fourth Claim Against All Defendants

(Strict Liability: Rest. 2nd § 402B)

66. Plaintiff realleges all previous paragraphs.

67. Section 402B of the Restatement (Second) of Torts provides that a defendant engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though it is not made fraudulently or negligently, and the consumer has not bought the chattel from or entered into any contractual relation with the seller.

68. Here Defendants misrepresented the drink as an "energy drink" promising "hours of energy", "5-hour energy", a recommendation to take "one whole bottle (two ounces) for maximum energy" and a promise of "no crash later." These were misrepresentations. "5-Hour Energy" and the claims made on the bottle and in advertisements ("Hours of Energy Now" and "No Crash Later") are literally false. This product does not, and cannot, produce energy, a defined scientific term, for the period of time that defendants claimed, in any measurable amount." Energy is the ability to do work, a scientific meaning, not the "energized feeling" which a user may obtain from substances such as caffeine. Plaintiff supports her argument that "energy" as used on the bottles means physical energy by noting the picture on the bottle (a person running on the top of a mountain) and the pictures contained in defendant's television and print advertisements of people completing physical activities. Defendants clearly intended to

convey to the consumer that the “5-hour energy product” gives a person the biomechanical energy to complete athletic endeavors. These claims are false and misleading and induced Antonio Hassell to consume the misrepresented product.

Fifth Claim Against All Defendants

(Breach of Implied Warranties)

69. Plaintiff realleges all previous paragraphs

70. At the time each defendant designed, manufactured, produced, tested, studied, inspected, mixed, labeled, marketed, advertised, sold, promoted, and distributed “5-hour ENERGY” each defendant knew of the use for which “5-hour ENERGY” was intended, and impliedly warranted its products to be of merchantable quality and safe and fit for their intended use.

71. Contrary to this implied warranty, defendants’ “5-hour ENERGY” drink was not of merchantable quality or safe or fit for intended use because “5-hour ENERGY” is unreasonably dangerous and unfit for the ordinary purposes for which it is used, as alleged herein.

72. As a direct and proximate result of each defendant’s conduct, plaintiff Antonio J. Hassell suffered the injuries and damages specified herein.

Sixth Claim Against All Defendants

(Punitive Damages)

73. Plaintiffs realleges all previous paragraphs.

74. Each defendant’s actions, described above, were performed with malice and in conscious and reckless disregard for the rights of Antonio J. Hassell and consumers who took “5-hour ENERGY” in the mistaken belief it provided “energy.” Each defendant’s failure to investigate and warn against the risks harms of so-called “energy drinks” such as “5-hour ENERGY has resulted substantial cardiac risks and injury in Tennessee alone.

Further, each defendant's conduct is continuing as long as it keeps its "5-hour ENERGY" product on the market.

75. At a minimum, each defendant's acts and omissions, when viewed objectively from the standpoint of each defendant at the time of their occurrence, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others and the negligible (if non-existent "benefit" from the caffeine and amino acid homeopathic cocktail known as "5-hour ENERGY." Each defendant had actual and subjective awareness of the risk involved but nevertheless proceeded to market "5-hour ENERGY" with conscious indifference to the rights, safety or welfare of others, including plaintiffs. Accordingly, plaintiffs are entitled to punitive damages against each defendant.

PRAYER FOR RELIEF

76. WHEREFORE, plaintiff, jointly and severally, seeks judgment in their favor against each defendant as follows:

- a. Economic and non-economic damages of fifteen million dollars (\$15,000,000.00) for the personal injury damages, wrongful death survival damages. As a direct and proximate result of the aforementioned actions and omissions of Defendants, Antonio J. Hassell sustained injuries including, but not limited to, physical pain and suffering, emotional pain and suffering, loss of future earning capacity, medical expenses, loss of enjoyment of life. Plaintiff asserts all available damages under Tennessee and Federal law, including loss of spousal and parental consortium
- b. Punitive damages in an amount of one hundred fifty million dollars (\$150,000,000.00) as to each defendant as provided by law and to be supported by the evidence at trial;
- c. An award of attorneys' fees and costs of suit, as provided by law;
- d. Such other legal and equitable relief as this Court deems just and proper.

JURY DEMAND

Plaintiffs request trial by jury.

DATED this 30th day of July, 2010.

Respectfully Submitted,

By: s/ Corey B. Trotz
Corey B. Trotz, TN Bar #)14512.
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Exhibit 1



Exhibit 2

For Opinion See [2009 WL 4207382](#)

Court of Appeals of Texas, Dallas.
Manoj BHARGAVA, Appellant,
v.

CUSTOM NUTRITION LABORATORIES, INC., Appellees.

No. 05-09-00378-CV.

July 8, 2009.

On Appeal from County Court at Law No. 5, Dallas County, Texas, Trial Court Cause No. CC-07-14515-E

Brief of Appellant, Manoj Bhargava

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Nature of Case:

This is an accelerated appeal from the trial court's denial of a special appearance.

Course of Proceedings:

CNL filed its Original Petition against Innovation Ventures, LLC d/b/a Living Essentials (“Living Essentials”) and Gilbert Hernandez on October 27, 2007 for breach of contract and theft. (CR 15-20) Manoj Bhargava was added as defendant to CNL's Second Amended Petition. (Plaintiff's Second Amended Petition, pg. 3)^[FN1] Bhargava then filed his First Special Appearance and Original Answer.

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***X STATEMENT REGARDING ORAL ARGUMENT**

Appellant Manoj Bhargava respectfully requests oral argument because it will significantly aid the Court in considering and determining the legal issues presented in the brief. The trial judge denied the special appearance of Manoj Bhargava, appellant and CEO of a corporation sued in Texas. Bhargava resides in Michigan and the corporation is headquartered in Michigan. The Plaintiff's petition requested the trial court to pierce the corporate veil and alleged that Bhargava committed torts. Bhargava has brought this appeal because the evidence is legally and factually insufficient to 1) support a decision to pierce the corporate veil, 2) establish general or specific jurisdiction, or 3) show that Bhargava committed in tort in Texas.

STATEMENT OF CASE

(CR 43-48) CNL filed its Third and Fourth Amended Petitions, alleging that Bhargava operated Living Essentials as his alter-ego. (CR 49, 59, Plaintiff's Fourth Amended Petition, pp. 24, 37) CNL also filed two supplements to its Fourth Amended Petition. (CR Supp. 6, 33)

Bhargava filed his First and Second Amended Special Appearances in response to these new petitions. (CR 87 & 133) The trial court held a hearing on Bhargava's special appearance on February 27, 2009. On March 16, 2009, the trial court signed a letter order denying Manoj Bhargava's special appearance and asking the parties to submit proposed orders. (CR 239) The trial court signed a formal order denying the special appearance on April 3, 2009. (CR 240) Bhargava timely appeals from this Order. (CR 4)

Trial Court Disposition:

Denied Manoj Bhargava's special appearance.

FN1. When the Clerk prepared the record in this matter, Plaintiffs Second Amended Petition and Plaintiffs Fourth Amended Petition were omitted from the record by the Clerk. Counsel for Appellant has requested a supplemental record, but at the time of filing of this brief, the Clerk had not completed the supplemental record. When these documents are added to the record, Appellant will submit another brief with the proper citations. For the purpose of this brief, the documents will be cited directly.

ISSUES PRESENTED

- The trial court erred in denying Manoj Bhargava's special appearance because he is not amenable to suit in Texas.
- No evidence or factually insufficient evidence support the trial court's implied finding of general jurisdiction over Manoj Bhargava.
- No evidence or factually insufficient evidence supports exercising jurisdiction via an alter-ego claim.
- No evidence or factually insufficient evidence supports an implied finding of specific jurisdiction over Bhargava individually.
- The trial court erred in denying Manoj Bhargava's special appearance because the evidence is legally and factually insufficient to support a finding that Texas has jurisdiction over Bhargava because he committed a tort

in Texas.

***1 TO THE HONORABLE FIFTH COURT OF APPEALS:**

Appellant, Manoj Bhargava files this Brief and shows this Court the following:

STATEMENT OF FACTS

I. Relationship between Living Essentials and CNL.

This is an appeal from the denial of a special appearance filed by Manoj Bhargava. Bhargava is the CEO of Innovation Ventures, LLC d7b/a Living Essentials ("Living Essentials"). (CR 150) He is a resident of Michigan. (CR 150) Bhargava has never resided in Texas. (CR 155) Living Essentials is a foreign limited liability company organized and headquartered in Michigan. (CR 151) Living Essentials markets energy supplements to wholesale dealers and retail markets in

the United States. (CR 151) One of these supplements is the “5 Hour Energy” shot. (CR 151) CNL bottled and manufactured 5 Hour Energy for Living Essentials.

In May of 2004, Bhargava and CNL representatives began discussing the development and manufacturing of a 2-ounce energy drink. (CR 153) Also, in May 2004, Bhargava inspected CNL's facilities in Dallas and signed a Confidentiality Agreement with CNL regarding 5 Hour Energy. (CR 154) Bhargava signed this contract in his corporate capacity as Living Essentials' CEO. (CR 154) Bhargava had many other discussions with CNL representatives either over the phone or in Living Essentials' offices in Michigan. (CR 153-154) Bhargava always participated in these conversational as Living Essentials' representative--never in any personal capacity. (CR 154)

Several years into their business relationship, Living Essentials and CNL entered into a Manufacturing Agreement. (CR 121-26, 154) Bhargava did not sign the Manufacturing Agreement. It was signed by Living Essential's President, Scott Henderson. As part of this agreement, executed on January 29, 2007, Living Essentials engaged CNL to manufacture and bottle 5 Hour Energy liquid energy supplement. (CR 121-25)

But, in the fall of 2007, after CNL disclosed that one of its employees-- Gilbert Hernandez--had been stealing the 5 Hour Energy product from its warehouse and selling the product on the black market, the parties' business relationship was terminated. (CR 15-18) Sometime thereafter, CNL sued Living Essentials and Hernandez for breach of contract and theft. (CR 15-20) CNL later added Bhargava and other officers and shareholders as individual defendants attempting to allege an alter-ego theory. The main issue in the underlying litigation between CNL and Living Essentials is ownership of the 5 Hour Energy Formula.

In February of 2009, the trial court held a special appearance hearing. CNL presented Alan Jones, President and CEO of CNL, as a live witness. (RR 64-94) In addition, CNL introduced e-mails, various contracts, selected financial data, and excerpts from the depositions of Bhargava, and two former employees of Living Essen-

tials. (Plaintiff's Ex. 1-5, 7-15)

At the conclusion of testimony, the judge heard arguments from counsel for each party. On March 16, 2009, the trial judge sent a letter to all counsel of record in which he found that the following orders should be entered relevant to the special appearance: an order granting the special appearances of Edward Snyder, Ravinder Sajwan, and Indu Rawat and dismissing CNL's claims against them, and; an order denying Manoj Bhargava's special appearance. (CR 239) On April 3, 2009, the trial judge signed the “Order Denying the Special Appearance of Manoj Bhargava.” (CR 240) Bhargava filed a Notice of Appeal for the Letter Order (CR 4-6), and an Amended Notice of Appeal for both the Letter Order and the order. (CR 249-251)

II. Jurisdictional Facts and Allegations Specific to Manoj Bhargava.

In its Second Amended Petition, CNL added Manoj Bhargava^[FN2] for various causes of action, including breach of contract, tortious interference, fraud, and misappropriation of trade secrets. (See generally, Plaintiff's Second Amended Petition) Bhargava filed his special appearance and original answer in response to this petition. (CR 43) On September 24, 2009, CNL filed its Third Amended Petition alleging that Bhargava was “operating Living Essentials as [his] alter ego” (CR 49, 59, 62-63) No other allegations were made against Bhargava in his individual capacity in this petition.

FN2. CNL also sued Edward Synder, Indu Rawat, and Ravinder Sajwan--various investors with Living Essentials. All of these individuals filed special appearances, which the trial court granted. Thus, these special appearances are not part of this appeal.

However, in its Fourth Amended Petition (hereafter “Petition”),^[FN3] filed not long before the special appearance hearing, CNL alleged the following facts as to Bhargava (under the section titled “Factual Background”):

FN3. CNL also filed two supplements to the Fourth Amended Petition. (CR Supp. 6, 33)

These supplements will be addressed with the allegations made in the Fourth Amended Petition.

3. ...Additionally, CNL asserts that Living Essentials is the alter-ego of its owners and is operated as a sham...(Plaintiff's 4th Amended Petition, p. 2, ¶3)

23. ...Upon information and belief, Manoj sought the disclosure of the Formula so that he could have the Product manufactured by other vendors. Upon information and belief, Manoj and Living Essentials determined that they could obtain manufacturing of the Product from other vendors at less cost since such other vendors did not have any research and development costs which needed to be recouped. (Plaintiff's 4th Amended Petition, p. 8, ¶23)^[FN4]

FN4. In its First Supplement to the Fourth Amended Petition, CNL expands this allegation by further alleging, among other things, that Bhargava knew that CNL would not consent to the disclosure of its confidential information to another manufacturer and Bhargava--upon learning CNL's manufacturing process during his visit--then passed this knowledge to Living Essentials' new manufacturer. (CR Supp. 8) CNL further alleged that Bhargava sought disclosure of CNL's confidential information so that he could have the product manufactured by new manufacturer. (CR Supp. 8)

CNL's Second Supplement to its Fourth Amended Petition also elaborates this allegation by stating, among other things, that Bhargava misrepresented the "real" reason why he wanted the Formula and Bhargava gave CNL's confidential information to a new manufacturer. (CR Supp. 37-39)

24. ...Additionally, upon information and belief, Manoj and Living Essentials believed that, by terminating the relationship with CNL, and sticking CNL with a large receivable, they could effectively drive CNL out of business thereby eliminating it as a manufacturing source for Living Essentials' competitors in the energy shot market. (Plaintiff's 4th Amended Petition, p. 9,

¶24)

25. ...Upon information and belief, Manoj and Living Essentials had already conspired with others to supply the Formula, a confidential CNL trade secret, to third parties to manufacture 5 Hour Energy. (Plaintiff's 4th Amended Petition, p. 9, ¶25)

27. Upon information and belief, at the time Living Essentials executed the 2007 Agreement, Manoj and Living Essentials caused it to do so with the intent of reducing CNL's margins and driving up CNL's receivables and thereafter breach the agreement and force CNL out of business... Of course, CNL did not know that Defendants intended to terminate the relationship, claim rights in the Formula, and thereafter attempt to drive CNL out of business...Manoj and Living Essentials knew that CNL would have to acquire the raw materials. (Plaintiff's 4th Amended Petition, p. 10, ¶21)^[FN5]

FN5. CNL also expands this allegation in both its supplements to the Fourth Amended Petition (CR Supp. 9, 39-40) CNL asserts that not only was it forced to enter into the 2007 Agreement, Bhargava induced CNL to move its facilities, at a great expense to CNL, by representing that there was going to be a huge increase in sales. (CR Supp. 9, 39-40).

34. Upon information and belief, Manoj and Living Essentials have engaged in the foregoing conduct in order to drive CNL out of business, thereby eliminating it as a manufacturer for its competitors in the energy shot market. Now, upon information and belief, Manoj and Living Essentials are using CNL's stolen Formula and related trade secrets to manufacture the product elsewhere. (Plaintiff's 4th Amended Petition, pp. 13-14, ¶34)

35. Upon information and belief, Manoj and/or Living Essentials has [sic] also disclosed the Formula to the USPTO in one or more pending patent applications. As a result, the Formula will enter the public domain as result of Manoj and Living Essentials' wrongful conduct. (Plaintiff's 4th Amended Petition, p. 14, ¶35)

47. Manoj... [is] operating Living Essentials as [his] al-

ter ego. First, as set forth above, Manoj has used Living Essentials to perpetuate a fraud upon CNL as set forth herein. Further, Kevin Zwierzchowski testified in his deposition that Manoj was transferring all of the money out of the company in order to keep Living Essentials “lawsuit proof.” ... (Plaintiffs 4th Amended Petition, p. 24, ¶47)

48. Further, the financial documents produced by Living Essentials, true and correct copies of portions of which are attached hereto as Exhibit “E” evidence that Living Essentials is, in fact, distributing all of its cash to its members... (Plaintiffs 4th Amended Petition, p. 25, ¶48)

In its Fourth Amended Petition (under the section title “Causes of Action”), CNL alleges the following causes of action against Bhargava:

D. Count Four--Fraud.

64. As set forth more fully above, Manoj and Living Essentials made untrue representations of material fact to CNL. At the time such representations were made, Manoj and Living Essentials knew or should have known that they were untrue or was [sic] reckless as to the truth of the statements. (Plaintiffs 4th Amended Petition, p. 29-30.)

65. The false statements were made to, *inter alia*, (1) induce CNL to disclose the Formula to Manoj and Living Essentials and (2) induce CNL to enter into the 2007 Agreement. (Plaintiff's 4th Amended Petition, p. 30.)

66. In reasonable reliance upon the false statements and representations, CNL *inter alia*, (1) disclosed to Manoj and Living Essentials the Formula and (2) entered into the 2007 Agreement. *Id.*

F. Count Six--Theft.

75. Additionally, Living Essentials and Manoj committed the theft and misappropriation of trade secrets owned by CNL, at common law, and pursuant to [Tex. Penal Code §31.05](#)... More specifically, Living Essentials and Manoj, without CNL's effective consent, (1) stole the Formula which is a CNL trade secret; (2) made

a copy of the Formula, or a derivative thereof, which is a CNL trade secret, and/or (3) communicated or transmitted the Formula, or a derivative thereof, which is a CNL trade secret. (Plaintiff's 4th Amended Petition, p. 31).^[FN6]

FN6. CNL's First and Second Supplements to its Fourth Amended Petition allege this cause of action against Bhargava. (CR. Supp. 9-10; 41) The cause of action appears to be essentially the same with the exception that CNL also alleges that Bhargava stole “CNL's manufacturing process” as well as the formula. (CR Supp. 10, 41).

G. Count Seven--Michigan Misappropriation of Trade Secrets.

80. Living Essentials and Manoj have misappropriated CNL's trade secrets, as set forth herein, under Michigan law. (Plaintiff's 4th Amended Petition, p. 32)

H. Count Eight--State Law Unfair Competition.

82. The conduct described above was engaged in by Living Essentials and Manoj for purposes of driving CNL out of business. Specifically, Living Essentials and Manoj are attempting to monopolize the two ounce energy drink market, in which Living Essentials is the dominant player, and to restrain trade and competition by driving CNL, a highly competent private label manufacturer, out of the two ounce energy drink market. (Plaintiff's 4th Amended Petition, p. 32-33)

K. Count Eleven--Corporate Fiction.

103. Plaintiff alleges, upon information and belief, that Manoj... [is] operating Living Essentials as [his] alter ego or as a single business enterprise. (Plaintiff's 4th Amended Petition, p. 37).

A little more than a week before the special appearance hearing CNL filed its First Supplement to Fourth Amended Original Petition (Supp. CR 6-10), and the day of the special appearance filed its Second Supplement to Fourth Amended Original Petition (Supp. CR 33-44). Although both petitions add some additional facts, they contain no new causes of action.

SUMMARY OF ARGUMENT

CNL has sued Bhargava, a Michigan resident, in Texas. But CNL's live pleadings contain no specific allegations of general jurisdiction, nor any allegations of specific jurisdiction as to Bhargava individually.

In addition, the evidence at the special appearance hearing does not prove that general or specific jurisdiction exists over Bhargava. The CEO of CNL admitted at the hearing that Bhargava's two trips to Texas to visit CNL were in his capacity as CEO of Living Essentials.

CNL's alter ego claim also fails because the financial data CNL relies on to prove alter ego is after the relevant time period for proving alter ego. Even using the latest date possible--the date CNL sued Bhargava--CNL's data contains financial information from four months later. Financial data ending in August, the closest relevant period, 2007 shows Living Essentials with a positive net income.

Finally, although CNL alleges that Bhargava committed torts, it does not allege that he committed any in Texas. Of the two allegedly tortious acts listed in CNL's fraud cause of action, one occurred in Michigan and the undisputed evidence at the hearing shows that the other one was not a misrepresentation. Regarding the theft and misappropriation of the trade secrets, again the petition does not allege any acts relating to that cause of action that Bhargava committed in Texas, and no evidence at the hearing shows that the formula was transferred to third parties in Texas. In addition, the record contains no details as to when and how Living Essentials allegedly stole the formula. Finally, regarding the state unfair competition claim, one alleged tort occurred outside of Texas. As to the second alleged tort, CNL does not allege that *Bhargava* committed it. Finally, a third group of alleged torts also occurred while Bhargava was in Michigan.

STANDARD OF REVIEW

Whether a trial court has personal jurisdiction over a defendant is a question of law. *BMC Software Belgium, N. V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002); *Wolf*

v. Summers-Wood, L.P., 214 S.W.3d 783, 787 (Tex. App.--Dallas 2007, no pet.). In reviewing a trial judge's ruling on a special appearance, a court examines all the evidence in the record to determine if the nonresident defendant negated all possible grounds for personal jurisdiction. *Reiff v. Roy*, 115 S.W.3d 700, 705 (Tex. App.--Dallas 2003, pet. denied).

However, when the plaintiff asserts that personal jurisdiction exists under an alter ego theory, an exception arises. *BMC Software*, 83 S.W.3d at 798-99. In these circumstances, jurisdiction can be based on an alter ego theory only if the "party seeking to ascribe one corporation's actions to another by disregarding their distinct corporate entities [proves] this allegation." *BMC Software*, 83 S.W.3d at 798. The underlying reason for shifting the burden to the claimant is that "Texas law presumes that two separate corporations are indeed distinct entities." *BMC Software*, 83 S.W.3d at 798; *Wolf*, 214 S.W.3d at 788. Once the defendant has negated the jurisdictional allegations, the plaintiff must come forward with evidence to support its claims. *Perna v. Hogan*, 162 S.W.3d 648, 653 (Tex. App.--Houston [14th Dist.] 2005, no pet.). The plaintiff bears the ultimate burden to *11 establish that the Texas court has personal jurisdiction over the defendant as a matter of law. *Onyx Capital Int'l, Inc. v. Sage Apts., L.L.C.*, 167 S.W.3d 432, 441 (Tex. App.--San Antonio 2005, no pet.)

The trial judge did not state any reason for his decision. (CR 239 & 340) In that case, the appellate court implies all facts necessary to support the judgment--as long as they are supported by the evidence. *Id.*; see also *BMC Software Belgium*, 83 S.W.3d at 795 (citing *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990)). When, as here, the appellate record includes the reporter's and clerk's records, implied findings are not conclusive and may be challenged for legal and factual sufficiency on appeal. *BMC Software Belgium*, 83 S.W.3d at 795.

JURISDICTIONAL PRECEPTS

I. To Exercise Personal Jurisdiction, Texas Courts Must Have Either Specific Or General Jurisdiction Over An Individual Defendant.

“Texas courts may assert personal jurisdiction over a nonresident if (1) the Texas long-arm statute authorizes the exercise of jurisdiction, and (2) the exercise of jurisdiction is consistent with federal and state constitutional due-process guarantees.” *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 574 (Tex. 2007). “Minimum contacts are sufficient for personal jurisdiction when the nonresident defendant ‘purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.’ ” *Id.* at 575.

*12 The Texas Supreme Court has explained that three parts comprise a purposeful availment inquiry. “First, ... only the defendant's contacts with the forum ... count: purposeful availment ‘ensures that a defendant will not be haled into a jurisdiction solely as a result of... the unilateral activity of another party or a third person.’ ” *Michiana Easy Livin' Country v. Holten*, 168 S.W.3d 777, 784-85 (Tex. 2005). Second, the contacts relied upon must be purposeful rather than random, fortuitous, or attenuated. *Id.* at 785. Third, the “defendant must seek some benefit, advantage or profit by ‘availing’ itself of the jurisdiction.” *Id.*

There are two types of jurisdiction: general and specific.

A. General And Specific Jurisdiction Involve Different Inquiries.

Specific jurisdiction and general jurisdiction over a non-resident defendant are based on different measurements and give the forum state different authorities over a defendant. This is because they are based on different grounds. *PCH-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 168-170 (Tex. 2007).

1. General Jurisdiction focuses on whether the Defendant has continuous and systematic contacts with Texas apart from the dispute.

With general jurisdiction, the State has global authority to resolve all controversies involving a defendant irrespective of the dispute. See Charles W. “Rocky” Rhodes, *The Predictability Principle in Personal Jurisdiction Doctrine: A Case Study of the Effects of*

“Generally” Too Broad, But “Specifically” Too Narrow Approach to Minimum Contacts, 57 BAYLOR L. REV. 135, 238-42 (2005). To assess if it has general jurisdiction over a nonresident defendant, a court looks *13 to the defendant's activities in the forum. *PCH-Minden*, 235 S.W.3d at 169-170. These contacts must be “continuous and systematic;” qualitatively they must be like the activities of a business based in the state, such as “being engaged in a longstanding business in the forum state, such as marketing or shipping products or performing services or maintaining one or more offices there....” *Id.* at 168-170.

Applying these concepts in *PCH-Minden*, the Texas Supreme Court looked at all of the non-resident defendant's contacts with Texas. The nonresident defendant had sponsored several trips to Texas for employees, paid 136 Texas vendors since 1999, and had three contracts with Texas entities. *Id.* at 170-71. Even these numerous contacts were insufficient to establish general jurisdiction. In fact, it is not the “quantity of contacts” but the “quality of contacts” that matter. *Am. Type Culture Collection, Inc. v. Coleman*, 83 S.W.3d 801, 809-810 (Tex. 2002).

2. Specific Jurisdiction focuses on the operative facts of the litigation and its related Texas contacts.

For specific jurisdiction, the state has limited jurisdiction over the defendant only for that one suit. See Charles W. “Rocky” Rhodes, *The Predictability Principle in Personal Jurisdiction Doctrine: A Case Study of the Effects of “Generally” Too Broad, But “Specifically” Too Narrow Approach to Minimum Contacts*, 57 BAYLOR L. Rev. 135, 238-12 (2005). This limited jurisdiction is based on the incident that is the basis for the suit and the *14 defendant's contacts with the state in connection with that incident. *Id.*; *PCH-Minden*, 235 S.W.3d at 169-70.

For example, in *Michiana*, the Texas plaintiff sued the non-resident defendant RV wholesaler for breach of contract and alleged misrepresentations made during a single telephone conversation concerning the sale of an RV. 168 S.W.3d at 783-90. The non-resident had no contacts with Texas generally. To determine if Texas

had specific jurisdiction, the Court looked only at the nonresident's Texas contacts during the relevant time periods for the cause of action. These were the telephone call in which the sale was negotiated and the shipment of the RV to Texas. *Id.*, see also *Moki Mac*, 221 S.W.3d at 585-88.

Thus, for specific jurisdiction, the focus is on the *defendant's* contacts with the forum that are part of the specific claims pled by the plaintiff.

In addition, several Texas Courts of Appeals as well as the Fifth Circuit have held that the specific-jurisdiction analysis should be done on a claim-by-claim basis. See *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.2d 266, 274-75 (5th Cir. 2006) (analyzing specific jurisdiction on a claim-by-claim basis because the *Due Process Clause* prohibits a court from exercising jurisdiction over a claim that does not arise from or relate to a Defendant's forum contacts, even though the court may have jurisdiction over another claim); *Kelly v. Gen. Interior Constr., Inc.*, 262 S.W.3d 79, 83-88 (Tex. App.--Houston [14th Dist.] 2008, pet. granted June 5, 2009); *Barnhill v. Automated Shrimp Corp.*, 222 S.W.3d 756, 767 (Tex. App.--Waco 2007, no pet.)

***15 B. General And Specific Jurisdiction Involve Different Time Periods For Assessing Contacts With The Forum State.**

This case also raises an issue regarding the relevant time periods for looking at contacts that allegedly support jurisdiction. Different time periods apply to each type of jurisdiction.

1. General Jurisdiction reviews contacts with the forum state until the time suit is filed.

Because general jurisdiction gives the State global authority to resolve all controversies regarding the defendant, the relevant time period for considering contacts with the forum ends when suit is filed. *PCH-Minden*, 235 S.W.3d at 169-70. Thus, any contacts after suit is filed should be ignored when assessing if general jurisdiction exists. *Id.* That is exactly what the *PCH-Minden* court did; it ignored one alleged contact because it oc-

curred after the plaintiff filed suit. *Id.* at 171. That also is what this Court should do.

2. Specific jurisdiction considers only contacts during the operative facts of the dispute.

As discussed above, specific jurisdiction is a limited jurisdiction based on the defendant's contacts with the State in connection with the operative facts of the litigation. *Moki Mac*, 221 S.W.3d at 585. A substantial connection must exist between the forum contacts and the operative facts of the dispute. *Id.*

As a result, in deciding if specific jurisdiction exists, a Court must consider only contacts or events occurring during the operative facts of the dispute. See *id.* (holding that since the operative facts of the suit revolved around a hiking *16 expedition, the contacts that mattered occurred at time of the hiking expedition, not the earlier contacts *Moki Mac* had through promotional literature). A court may not consider contacts or events occurring before or after the operative facts of the dispute. *Id.*; see also *IRA Resources*, 221 S.W.3d 592, 597-599 (Tex. 2007) (looking only at contacts occurring during operative facts of dispute, which included signing-up the Texas plaintiffs for an IRA account and all contacts occurring during the disputed time period).

ARGUMENT AND AUTHORITIES

I. No Evidence Or Factually Insufficient Evidence Supports An Implied Finding Of General Jurisdiction.

As noted earlier, the trial court did not give any reason for its order. As a result, Bhargava must attack all bases on which the order could be based. Bhargava first addresses general jurisdiction. Bhargava challenges both the legal and factual sufficiency of the evidence. See *City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex. 2005) (legal sufficiency challenge); *Formosa Plastics Corp. U.S.A. v. Presidio Eng'r and Contractors, Inc.*, 960 S.W.2d 41, 48 (Tex. 1998) (same); *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (factual sufficiency challenge).

A. CNL's Pleadings Do Not Allege Any Contact

Between Bhargava Individually And Texas.

As with any claim, a plaintiff alleging jurisdiction over a non-resident defendant has the burden to allege facts establishing jurisdiction over the nonresident defendant. *Am. Type Culture*, 83 S.W.3d at 807; *BMC Software Belgium*, 83 S.W.3d 789 at 793; *Asshauer v. Farallon Capital Partners, LP.*, No. 05-05-16 *17 01219-CV, 2008 Tex. App. LEXIS 1118 at *12-13 (Tex. App.--Dallas 2008, pet. denied). “[A]bsent allegations of any specific, purposeful act through which the defendant can be said to have sought a benefit by ‘availing itself of the jurisdiction,’ evidence that a defendant is a non-resident is sufficient to meet its burden.” *Asshauer*, 2008 Tex. App. LEXIS 1118, at *13.

Only CNL's Second Supplement to its Fourth Amended Petition alleges any contact with Texas, but its allegations are conclusory and without any supporting facts. (Supp. CR. P. 33-34) For example, it states without elaboration that Bhargava “has continuous and systematic contacts with the State of Texas such that the exercise of general jurisdiction is appropriate.” (Supp. CR 33-34) In addition, the other allegations--equally conclusory in nature--also contain no recitation of facts to support them and list acts taken by Bhargava in his capacity as CEO of Living Essentials. (Supp. CR 34) Although the Fourth Amended Petition mentions that CNL did certain things at the request of Living Essentials, the petition never specifically states that Bhargava--or even Living Essentials--did any act in Texas.^[FN7] (Plaintiff's Fourth Amended Petition, pp. ¶ 14-15; 6, ¶ 17-18; 7 ¶ 22; 9, ¶ 25; 10, ¶ 28; 11, ¶ 29-30; 29-30, ¶ 63-68; 31-33, ¶ 73-86; 37, ¶ 102-103)

FN7. The petition alleges that Bhargava is the alter ego of Living Essentials (Plaintiffs Fourth Amended Petition, p. 39, ¶ 102-03), but alter ego is discussed *infra* at Section II.

B. The Special Appearance Proof Also Does Not Support General Jurisdiction

At the special appearance hearing, CNL produced some evidence that *18 Bhargava had been in Texas occasionally over the years. This evidence came from deposition testimony of Bhargava, live testimony of Alan

Jones, and an affidavit of Linda Spain. (CR 105-109; RR 64-94; Supp. CR 15-17) But as discussed below, this evidence does not show the systematic and continuous contacts necessary to establish general jurisdiction.

1. Bhargava's contacts with the State of Texas are, at best, only periodic.

General jurisdiction does not exist unless the contacts are “continuous and systematic.” The contacts must be fairly substantial. *See PHC-Minden*, 235 S.W.3d at 168. A general jurisdiction analysis involves a more demanding minimum contacts analysis. *See CSR Ltd. v. Link*, 952 S.W.2d 591, 595 (Tex. 1996).

The evidence in the record from Bhargava's special appearance affidavit shows the following. Bhargava is a resident of the State of Michigan and has been a resident of Michigan since 1997. (CR 105) He has never maintained a banking, savings, or investment account in Texas. (CR 109) He has never personally owned, leased, or rented real property within the State of Texas. (CR 109) He has never recruited a Texas resident, directly or through an intermediary located in Texas for employment. (CR 108)

Bhargava testified by affidavit that he also has not committed a wrongful act, in whole or in part, in Texas that resulted in injury to another's person, property, or reputation, nor has he ever been accused of such acts. (CR 108)

*19 Bhargava did not expect to ever be called into the courts of Texas and there were no facts that he was aware of that alerted him to the possibility that he might be called into a Texas court. (CR 109)

Bhargava did not purposefully avail himself of the privilege of conducting activities within Texas. (CR. 109) He has never personally conducted business in Texas and has never conducted business in an individual capacity with CNL. (CR 109)

The evidence at the special appearance hearing showed the following. By 1999, Bhargava had been to Texas 8-10 times for a company called Prime PVC and since then another 5-6 times--in short a total of 13-16 visits.

(Exhibit A to Special Appearance hearing, Deposition of Manoj Bhargava, pages 166-171) In the last two years Bhargava visited his brother in McKinney, Texas twice, once for a day or two and once while on a trip to CNL. (*Id.*; Exhibit B to Special Appearance Hearing, Deposition of Manoj Bhargava, pp. 330-332.) Alan Jones testified that Bhargava came to Dallas twice, both times in his capacity as CEO of Living Essentials. (RR 65-66; 73)

2. Linda Spain's affidavit contains only minor differences with Bhargava's Testimony.

Linda Spain's affidavit also does not support a finding of general jurisdiction over Bhargava. Linda Spain was a joint venturer with Bhargava in a company called ChemicalPartners.com. (CR. Supp. 15-16)

On pages 2-4 of her affidavit, Linda Spain sets forth the contacts she had *20 with Bhargava in Texas. (Supp. CR 15-17) Every single contact she alleges on these two pages and in paragraph eight on page four are contacts or trips to Texas while Bhargava was acting on behalf of a company. (Supp CR 15-17) Not once does she allege that these contacts were for Bhargava individually.

Aside from these contacts on behalf of two businesses, the Spain affidavit alleges only two contacts with Texas: a Christmas party that Bhargava attended and a meeting with a Houston immigration lawyer. (Supp. CR 17)

3. The case law does not support general jurisdiction based on periodic contacts.

Any contacts occurring when Bhargava was acting on behalf of a business cannot be considered to establish general jurisdiction against him individually. See *Siskind v. The Villa Foundation For Education, Inc.*, 642 S.W.2d 434, 438 (Tex. 1982) (holding that a non-resident employee of a foreign corporation cannot be sued in Texas simply because his employer solicits business there); *Wolf*, 214 S.W.3d at 790 (holding that the fiduciary shield doctrine protects a non-resident corporation officer or employee from a trial court's exercise of general jurisdiction over the individual when all

of the individual's contacts with Texas were made on behalf of the employer); *Hoffman v. Dandurand*, 180 S.W.3d 340, 350-31 (Tex. App.--Dallas 2005, no pet.) (stating that, in the absence of fraudulent or tortious acts, an individual's transacting business within the state solely on behalf of a corporation does not create general jurisdiction over that individual). If we discount the business contacts, it appears that Bhargava may have had a maximum *21 of about 4 personal trips to Texas. Clearly this is not enough to establish general jurisdiction.

But even if the business contacts are considered, Bhargava knows of no case in which a Texas court has found general jurisdiction based on the contacts set forth above. Considering all of these contacts, Bhargava has been to Texas approximately 20 times since 1998 or 1999 for both business and personal reasons--an average of 2 visits per year of short duration. This does not qualify as systematic and continuous.^[FN8] See *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 411, 414-416 (1984) (holding that multiple trips to Fort Worth by non-resident company, which had purchased 80% of its helicopter fleet and (worth millions of dollars) in Texas, and the sending of pilots and other personnel to Texas for training, did not support general jurisdiction); *PCH-Minden*, 235 S.W.3d at 170-171 (holding that a company's attendance at 2 Texas meetings, payment of \$1,508,467.20 to 136 Texas entities, and 2 contracts executed with Texas companies did not establish general jurisdiction over non-resident defendant); *National Indus. Sand Ass'n. v. Gibson*, 897 S.W.2d 769, 774 (Tex. 1995) (concluding that attending meeting in Texas, as well as periodic mailings to Texas members, "presented no evidence of general jurisdiction").

FN8. Even if Bhargava's trips to Texas were spaced regularly throughout the 10-year period, and even if we consider the trip Bhargava made to Dallas to meet with CNL, this would not support general jurisdiction. *Am. Type Culture*, 83 S. W.3d at 809-10. In *Am. Type Culture*, the court held that even if goods were purchased at regular intervals, the contacts still were insuffi-

cient. *Id.*

Nor does it qualify as a qualitatively significant figure. In *PCH-Minden*, *22 the Texas Supreme Court noted how pervasive contacts must be to establish general jurisdiction. 235 S.W.3d at 167-168. There, the court discussed the case of *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952) “the only case in which th[e] [U.S. Supreme] court has found general jurisdiction.” *Id.* at 167. The question was whether Ohio courts had jurisdiction over a non-resident corporation. *Id.* In that case, the company's president 1) maintained an Ohio office in which he did many things for the company, 2) maintained company files in Ohio, 3) carried on correspondence in Ohio, 4) drew and distributed salary checks from the Ohio office, 5) used two Ohio bank accounts for company funds, 6) held director's meetings in Ohio, 7) supervised policies dealing with the rehabilitation of the corporation's properties in the Philippines, and 8) dispatched funds from Ohio to pay for the rehabilitation. *Id.* at 167-168; *see also Am. Type Culture*, 83 S.W.3d at 808-10 (Tex. 2002) (holding that company selling products over an 18 year period to Texas residents, accounting for 3.5% of its total annual sales (about \$350,000), contracted with Texas residents, purchased approximately \$378,000 worth of goods over a five-year period from Texas residents, and attended at least five conferences in Texas and exhibiting booths and distributing corporate materials at 4 of the conferences did not have sufficient contacts to support general jurisdiction). The U.S. Supreme Court held that, on those facts, Ohio had jurisdiction. *Id.*

In contrast, the meager number of visits Bhargava made to Texas--approximately 2 a year--does not rise to the qualitatively significant contacts the *23 Texas or U.S. Supreme Courts require for general jurisdiction.

C. Bhargava is protected by the fiduciary-shield doctrine.

Finally, as noted above, the great bulk of Bhargava's visits to Texas were for business. An individual, non-resident defendant does not submit to the jurisdiction of a foreign state when the individual only acts in a corporate capacity. Under the fiduciary shield doctrine,

“[a] corporate officer who signs a contract on behalf of a corporation is... acting in his corporate capacity. Such an act does not constitute a contact for purposes of personal jurisdiction.” *Kelly*, 262 S.W.3d at 83 (holding that a corporate officer's signing a contract in his corporate capacity is not a contact for purposes of personal jurisdiction); *see also Wolf*, 214 S.W. 3d at 792; *Wright v. Sage Eng'g, Inc.*, 137 S.W.3d 238, 250 (Tex. App.--Houston [1st Dist.] 2004, pet. denied) (stating that “[u]nder this doctrine, a corporate officer or employee is shielded from jurisdiction where all of the individual's contacts with Texas were on behalf of his employer.”) (internal quotations omitted); *SITQ E.U., Inc. v. Reata Rest, Inc.*, 111 S.W.3d 638, 650-51 (Tex. App.--Fort Worth 2003, pet. denied) (same); *Amoco Chem. Co. v. Tex. Tin Corp.*, 925 F. Supp. 1192, 1201 (S.D. Tex. 1996).^[FN9]

FN9. Texas courts that have adopted the corporate-fiduciary shield doctrine have limited its application to general jurisdiction. Also, the doctrine does not apply if the individual personally engaged in tortious activities in the forum. *Id.* Bhargava addresses alleged torts *infra*, at III, C.

CNL has not alleged any specific facts about Bhargava's individual involvement in the alleged wrongdoing. All Mr. Bhargava's contacts with Texas, *24 in relation to CNL or to 5 Hour Energy, were made in his capacity as the CEO of Living Essentials. CNL President and CEO Alan Jones testified that the trips Bhargava made to Texas to meet with CNL were as CEO of Living Essentials. (RR 65-66; 73)

II. No Personal Jurisdiction Exists Over Bhargava Through Alter-Ego.

A. Piercing The Corporate Veil To Establish Jurisdiction Involves Different And Higher Proof Than Substantive Veil-Piercing.

CNL alleged that Living Essentials is the alter ego of Bhargava. (Plaintiff's Fourth Amended Petition, p. 24-25, 37) CNL alleges this to obtain personal jurisdiction over Bhargava. But jurisdictional veil-piercing does

not involve the same inquiry as substantive veil piercing; they involve different elements--and degrees--of proof. *PCH-Minden*, 235 S.W.3d at 174 (Tex. 2007).

1. The factors necessary to prove alter-ego.

The party alleging alter-ego has the burden of proving it. *PHC-Minden*, 235 S.W. 3d at 173; *Asshauer*, Tex. App. LEXIS 1118 at *12-13. To prove alter ego, a plaintiff must present evidence on a number of factors: To “fuse” the parent company and its subsidiary for jurisdictional purposes, the plaintiffs must prove the parent controls the internal business operations and affairs of the subsidiary. But the degree of control the parent exercises must be greater than that normally associated with common ownership and directorship; the evidence must show that the two entities cease to be separate so that the corporate fiction should be disregarded to prevent fraud or injustice.

PCH-Minden, 235 S.W.3d at 175. Normal activities for a shareholder of a *25 corporation will not support piercing the veil. As the Texas Supreme Court said again, Appropriate parental involvement includes monitoring the subsidiary's performance, supervision of the subsidiary's finance and capital budget decision, and articulation of general policies.

Id. at 176.

The same reasoning is true for a corporation owned by one or more shareholders.

The control necessary...is not more majority or complete stock control but such domination of finances, policies, and practices that the controlled corporation has, so to speak, no separate mind, will or existence of its own and is but a business conduit for its principal.

Gardemal v. Westin Hotel Co., 186 F.3d 588, 593 (5th Cir. 1999).

Further, for jurisdictional veil-piercing, fraud is not relevant. Although proof of fraud is vital to substantiate a claim of piercing the corporate veil, it “has no place in assessing contacts to determine jurisdiction.” *PHC-Minden*, 235 S.W.3d at 175.

Additionally, undercapitalization alone is not decisive. *Id.* at 174 (citing to *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 425 (9th Cir. 1977).) In *Wells Fargo & Co.*, the court held that undercapitalization, though important for determining whether to pierce the veil for substantive purposes, “may not be relevant to a showing that the two corporations are in fact one to establish that the out-of-state corporation--be it a parent or subsidiary--is present *26 within the forum for jurisdictional purposes.” *Id.*, quoted with approval in *PHC-Minden*, 235 S.W.3d at 174.

The reason for this distinction is this: “personal jurisdiction involves due process considerations ...” *PHC-Minden*, 235 S.W.3d at 174. “These due process considerations may not be overridden by statutes or the common law.” *Id.* Determining whether a common law cause of action creates an independent basis for jurisdiction cannot distract “from the ultimate due process inquiry: whether the out-of-state defendant's contact with the forum are such that it should reasonably anticipate being haled into court in the forum state.” *Nat'l Indus. Sand Ass'n*, 897 S.W.2d at 773.

Necessary for jurisdictional veil-piercing is a “plus” factor, “something beyond the subsidiaries' mere presence within the bosom of the corporate family.” *PCH-Minden*, 235 S.W.3d at 176. (internal quotations omitted). The court concluded that the plaintiff had presented “no evidence of control other than that consistent with [the defendant's investor status, and therefore the court of appeals erred in imputing [one corporation's] contacts to [the other].” See also *Ltd. Logistics Servs. v. Villegas*, 268 S.W.3d 141 (Tex. App.--Corpus Christi 2008, no pet.) (finding that control over the end sought to be accomplished, but not over the means and details of how to accomplish it, is insufficient to create personal jurisdiction).

*27 B. CNL Relies on Two Theories to Establish Alter-Ego But Neither Succeeds

CNL alleged two theories by which Living Essentials should be considered the alter ego of Bhargava. First, by evidence at the special appearance hearing, CNL appears to have attempted to prove that corporate formal-

ities were being ignored. Second, it alleged in its petition that Bhargava distributed all of the cash out of Living Essentials and that, as of the end of 2008, distributions to the shareholders were more than the net worth of the company and that Bhargava's intent was to leave the company "judgment proof." Neither theory succeeds.

1. Either no evidence or insufficient evidence shows that Living Essentials is Bhargava's alter-ego. ^[FN10]

FN10. *City of Keller*, 168 S.W.3d at 802; *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 334 (Tex. 1998).

Although not alleged in the petition, at the special appearance hearing, CNL produced evidence relating to transactions between Living Essentials and other corporate entities owned by Bhargava. CNL's lawyer argued that Bhargava was "running [Living Essentials] however he wants." (RR 97) But when all of the evidence before the judge is reviewed, alter ego is not proved.

a. Bhargava's affidavit establishes that he did not use Living Essentials for personal purposes and no evidence contradicts this.

Bhargava submitted an affidavit addressing the alter-ego claim. He affirmatively states that he did not use Living Essentials for personal purposes:

- The day-to-day business operations of Living Essentials are not decided by the members, but by the corporate personnel in the *28 Living Essentials' offices in Novi, Michigan. (CR153)
- Living Essentials did not require its members, in their capacity as members, to review the expenses of Living Essentials or approve its expenses except pursuant to written consents of actions signed by the members. (CR 153) ^[FN11]

FN11. Bhargava, in his capacity as CEO of Living Essentials was involved in the day-to-day operations of Living Essentials, including its expenses. (CR 153)

- Bhargava's personal bank accounts are separate and distinct from those of Living Essentials. (CR 155)
- Living Essentials is not being operated as a sham to perpetrate a fraud. (CR 155-56)
- Bhargava never loaned any money or provided any advances to Living Essentials (other than his membership contribution). (CR 156)
- Living Essentials never paid any of his personal expenses, did not provide him with an office space for personal business, and has not provided any employees to work personally for him. (CR 156)
- Bhargava never paid any corporate debts with his personal checks or co-mingled his personal funds with the funds of Living Essentials. (CR 156)
- The records, books, and accounts for Living Essentials were kept completely separate from Bhargava's personal records and accounts. (CR 156)
- Bhargava never made any representations that he personally would financially back Living Essentials, other than his member contribution. (CR 156)
- Bhargava has never diverted Living Essentials corporate funds for his personal use. (CR 156)
- Bhargava always took appropriate steps to maintain his personal assets separate from the corporate assets of Living Essentials. (CR 156)
- Other than as a member and as CEO of Living Essentials, Bhargava did not receive any financial benefit from any transaction with CNL.

*29 (CR 157)

- Bhargava never directed Living Essentials to make the company "lawsuit proof." (CR 157)

b. The evidence presented at the hearing does not controvert Bhargava's Affidavit.

CNL's Petition did not list any facts that would support an implied finding of alter-ego. (Plaintiff's Fourth Amended Petition, pp. 24-25, 37) As a result, if the court impliedly found that Bhargava and Living Essentials were alter egos of each other, it had to have been based on evidence of alter ego presented at the special appearance hearing. But the record contains none of the indicia of an alter ego relationship between Bhargava and Living Essentials. From arguments to the trial court, it is clear that CNL thought it had proved an alter

ego relationship based on Bhargava's testimony about transactions between Living Essentials and another company Bhargava owned--BioClinical. (RR 97) But as the discussion below shows, this testimony contains no proof that Bhargava used Living Essentials for personal, rather than business, means.

(1) The deposition testimony does not prove that Bhargava is Living Essentials' alter ego.

As stated above, CNL relied in part on deposition testimony of Bhargava regarding Living Essentials and BioClinical to prove alter-ego. But this testimony, which is quite sparse and concise, does not rise to the level required by the case law. What we have is this.

Bhargava owns 49% of Living Essentials individually, and owns another 30% through another company he owns. (Special Appearance Notebook, Ex. A, *30 pp. 274--78.) Bhargava also owns 100% of BioClinical Development and is the only employee of that company. (Special Appearance Notebook, Ex. B, pp. 335, 344-45; Ex. C, p. 141-45.) Employees of Living Essentials do accounting work for BioClinical and are paid by Living Essentials. (Special Appearance Notebook, Ex. B, p. 347-48; Ex. C, p. 90-91.) Living Essentials paid BioClinical \$250,000 per year in 2006-2008 as licensing fees. (Special Appearance Notebook, Ex. C, 92.) All of BioClinical's income comes from Living Essentials or by capital contributions from Bhargava. (Special Appearance Notebook, Ex. C, p. 88) Generally, Bhargava as CEO, Scott Henderson, as President, and Matt Dolmage, as CFO, of Living Essentials, each have different jobs, but if there is a disagreement among them on an issue, Bhargava, as CEO, decides what to do. (*Id.* at 135-36) Matt Dolmage, CFO, does work for BioClinical, but does not do work for Bhargava personally. (*Id.* at 145-46.)

This evidence shows several things. First, it shows no fusion between either Living Essentials or BioClinical and Bhargava. In fact, the only testimony touching on Bhargava's personal finances and the finances of the company showed that Living Essentials's CFO, Matt Dolmage, does not do personal accounting work for Bhargava. (Special Appearance Notebook, Ex. C, p. 145.)

Second, it shows that any transfer of an asset or use of employees was between BioClinical and Living Essentials, not BioClinical or Living Essentials and Bhargava. Third, it shows only a very narrow, specific snapshot of transactions between Living Essentials and BioClinical, and no contains no information *31 regarding how the companies are operated generally. And it does not show the breadth of information one normally sees detailed in opinions discussing jurisdictional alter-ego. *See, e.g., PCH-Minden*, 235 S.W. 3d at 112; *BMC Software Belgium*, 83 S.W. 3d at 800; *Commonwealth Gen. Corp. v. York*, 177 S.W. 3d 923-25 (Tex. 2005); *De Castro v. Sanifill, Inc.*, 198 F. 3d 282, 283-85 (1st Cir. 1999) (cited approvingly in *PCH-Minden*, 235 S.W. 3d at 176); *Capital Tech. Info. Serv., Inc. v. Arias & Arias Consultores*, 270 S.W. 3d 741, 752-55 (Tex. App.--Dallas 2008, pet. granted); *Asshauer*, 2008 Tex.App. LEXIS 1118 at *12-13.

But more noteworthy is what this evidence does *not* show. It does not show any personal use by Bhargava of either company. It does not show a control over Living Essentials by Bhargava that is abnormal for a CEO of a small closely-held L.L.C. *See PCH-Minden*, 235 S.W.3d at 172 (not finding alter-ego between two corporations even though parent dominated the subsidiary "immediately and completely.") And, it does not show that Living Essentials or BioClinical completely ignore formalities required of an L.L.C.;^[FN12] in fact, the evidence shows essentially nothing about this. It does not show that Living Essentials or BioClinical and Bhargava have ceased to be separate. *Commonwealth Gen. Corp.*, 177 S.W.3d at 925.

FN12. The only testimony remotely related to this is from Bhargava, who testified that he and the other members have meetings by phone regularly but notes are not taken. (Special Appearance Notebook, Ex. C, p. 127)

In short, this evidence does not show a fusion between Bhargava and *32 Living Essentials. Not showing this, CNL has failed to meet its burden.

2. No evidence or insufficient evidence supports an implied finding that Living Essentials was undercap-

italized.

CNL also has alleged that Living Essentials is undercapitalized. Assuming this is relevant, CNL had the burden to prove undercapitalization. It has failed to meet that burden. At best, the record is inconclusive. Undercapitalization by itself does not establish alter ego. “Undercapitalization, which is important to deciding whether to pierce the veil raised by a subsidiary corporation in order to hold the parent... liable for failure of the subsidiary to meet its debts, may not be relevant to a showing that the two corporations are in fact one....” *Id.* In fact, recently, this Court held that “undercapitalization alone, even if established, is not a sufficient basis to disregard the corporation and assert personal jurisdiction over the shareholders.” *Ramirez*, 165 S.W.3d at 916. Thus, the court need not even reach this issue.

a. Neither the testimony nor the financial documents prove undercapitalization.

CNL relies on two types of evidence to prove undercapitalization: 1) the testimony of Kevin Zwierzchowski, Tom Morse, and Manoj Bhargava, and 2) one page from a set of financial documents. Neither proves what CNL wishes it proved.

(1) The testimony does not prove undercapitalization.

*33 First, consider the testimony. Kevin Zwierzchowski [FN13] and Tom Morse, [FN14] two former employees of Living Essentials, both said Bhargava told them that he wanted to distribute as much cash out of the company as possible to keep it judgment proof, and both said cash distributions were made consistently. (Special Appearance Notebook, Ex. D, p. 42-3, 56-7; Ex. E, 87-89) However, wanting to distribute as much cash as possible does not necessarily equate with undercapitalization. *In re Fabricators, Inc.*, 926 F.2d 1458, 1469 (5th Cir. 1991) (stating that, “[t]he concept of undercapitalization normally refers to the insufficiency of the capital contributions made to a corporation”).

FN13. Kevin Zwierzchowski was controller/

operations manager for Living Essentials. (Special Appearance Notebook, Ex. E, p. 9.)

FN14. Tom Morse was formerly President of Living Essentials. (Special Appearance Notebook, Ex. D, p. 71)

(2) This Court cannot consider the financial proof CNL relies on.

Second this court cannot consider the financial documents CNL relied on because it is past the time frames within which contacts may be considered. As observed earlier, the Texas Supreme Court has held that courts are limited to very specific timeframes within which they may consider contacts to establish personal jurisdiction. For specific jurisdiction that time frame is when the operative facts of the suit occurred; for general jurisdiction it is the date suit is filed. *PCH-Minden*, 235 S.W.3d at 169-70. Even if we use the latest time frame that could apply--general jurisdiction over Bhargava, meaning the date he was sued--the proof is lacking.

*34 To prove the alter ego claim, CNL relied on the testimony of Bhargava and on three documents. In his deposition, Bhargava testified to a specific amount of total distributions for 2007. [FN15] (Special Appearance Notebook, Ex. A, p. 268.) Because of redacting, the record does not reveal what document Bhargava relied on for this amount. In that same deposition, Bhargava testified that the net income for the year 2007 was. \$5,000 less than total distributions. (*Id.*)

FN15. All specific numbers and financial data are under seal and confidential. As a result, Bhargava lists no specific figures, but refers to the documents containing the figures.

To prove distributions and income for 2008, CNL relied on two documents contained in Plaintiffs' Exhibit 14. First, CNL relied on p. 2 of Exhibit 14, which lists distributions from July 2008 through December 2008. (P's Ex. 14, p. 2.) [FN16] That exhibit reflects total distributions through December of 2008. (*Id.*) To prove annual net income for 2008, CNL relied on the fourth page of Plaintiff's Exhibit 14. [FN17] That page shows an annual figure for net income in 2008 that is less than distribu-

tions. (P's. Ex. 14, p. 4.)

FN16. Plaintiff's Exhibit 14 contains financial information from several different documents that do not appear to be related. P's Ex. 14. Page 2 states at the top that it is from Living Essentials's balance sheet.

FN17. The bottom of the document reflects that it is page 5 of 6, but it is not page 5 of Exhibit 14. Apparently, it was page 5 of 6 pages of another document.

This Court cannot consider either of these figures. Both are after the cutoff date for considering jurisdictional contacts of Bhargava: August 14, 2008, when CNL sued Bhargava in the Fourth Amended Petition.

In fact, none of the financial information stops at August 14, 2008. *35 However, we can get very close to August 14, 2008 by looking at p. 2 of Plaintiff's Exhibit 14 and by looking at Exhibit 17 of Exhibit B of the Special Appearance Notebook.

Page 2 of Plaintiff's Exhibit 14 contains year-to-date distribution amounts for July and August of 2008. Exhibit 17 to Exhibit B of the Special Appearance Notebook is the Profit and Loss statement from 2005-2008 for Living Essentials. Pages 6 and 7 of Exhibit 17 reflect the monthly income amounts for 2008. Exhibit 17 reflects a year-to-date net income for July 2008 and August that are greater than the distributions. Thus, if we compare the year-to-date distribution and net income figures for July and August of 2008, they show more income than distributions by a significant amount.

Shortly before and shortly after the cut-off date of August 14, 2008, Living Essentials was not undercapitalized.

In its quest to pierce the jurisdictional veil, it was CNL's burden to prove undercapitalization. *PCH-Minden, Inc.*, 235 S.W. 3d at 173. On this record, CNL did not meet its burden. [FN18]

FN18. Even if this court disagreed that the cut-off date is August 14, 2008 and chose to use

the year-end financial data, CNL still cannot prevail because its evidence does not prove that Living Essentials was undercapitalized. This is because the record contains three different annual net income amounts for 2008 reflecting a wide disparity. The document CNL relies on is found on the fourth page of Plaintiff's Exhibit 14. The second document is on the page just after the document CNL relies on. This document, page 5, of Plaintiff's Exhibit 14, reflects a much different net income. The third document is in the Special Appearance Notebook on page 8 of Exhibit 17. This page reflects a *projected* net income for 2008--yet a third number. In short, the evidence is inconclusive and CNL offered no testimony to support its burden of proof.

***36 b. Even assuming the financials did show undercapitalization, that alone is insufficient to pierce the veil for jurisdictional purposes.**

Even if we assume solely for purposes of argument that Living Essentials was undercapitalized, this record still does not contain enough proof to support jurisdictional veil-piercing. This is so for two reasons. First, undercapitalization "may not be relevant" for jurisdiction veil piercing:

[Undercapitalization] which is important to deciding whether to pierce the veil raised by a subsidiary corporation in order to hold the parent corporation liable for failure of the subsidiary to meet its debts, may not be relevant to a showing that the two corporations are in fact ... to establish that the out-of-state corporation--be it parent or subsidiary--is present within the state for jurisdictional purposes.

PCH-Minden, Inc., 235 S.W.3d at 174.

Second, this court has held that undercapitalization alone, even if established, is not a sufficient basis to disregard the corporation and assert personal jurisdiction over the shareholders. *Ramirez v. Hariri*, 165 S.W.3d 912, 916-17 (Tex. App.--Dallas 2005, no pet.) And, although CNL has alleged that Living Essentials and Bhargava committed torts, CNL has not alleged that Living Essentials is not able to meet its debts or other-

wise function. *Id.* at 916; *see also* [Torregrossa v. Szelc](#), 603 S.W.2d 803, 804 (Tex. 1980).

C. CNL's Single-Business Enterprise Theory Is Invalid.

CNL alleges that Living Essentials' contacts should be imputed to Bhargava under a single business enterprise theory. This can be summarily *37 rejected. The Texas Supreme Court recently rejected the single enterprise doctrine, essentially holding that it is not an accepted basis for imposing one corporation's obligations on another. [SSP Partners v. Gladstrong Invs. Corp.](#), 275 S.W.3d 444, 455-56 (Tex. 2008). Because the single-enterprise theory is not a basis for piercing the corporate veil, it cannot be used for jurisdictional purposes.

III. No Evidence or Factually Insufficient Evidence Supports an Implied Finding of Specific Jurisdiction over Bhargava Individually.

As already noted, the court did not state its reasons for finding that it had jurisdiction over Bhargava. As a result, Bhargava is attacking each alleged basis for asserting jurisdiction over him. In this section, Bhargava discusses the lack of evidence to support an implied finding of specific jurisdiction over him.

A. The Petition Alleges No Conduct in Texas. [FN19]

FN19. Of the 11 Causes of Action, only five--Fraud, Theft, Michigan Misappropriation of Trade Secrets, State Unfair Competition, and Corporation Fiction--allege any acts by Bhargava. The others allege only actions by Living Essentials.

To determine if it had specific jurisdiction over Bhargava, the trial court had to focus its inquiry on Bhargava and his contacts with the forum that were substantially connected with the dispute. [Moki Mac](#), 221 S.W.3d at 575-76. But, CNL did not allege any contacts Bhargava had with Texas in his individual capacity that related to the dispute. Of the many paragraphs containing factual allegations and the causes of action, not one alleges a single act taken by Bhargava, individually in Texas.

Thus, the petition contains no allegations of any contact between Bhargava *38 and Texas. This basis alone was reason for the trial court to dismiss the petition.

B. Even If The Special Appearance Evidence Is Considered, Bhargava's Contacts With Texas Were As Agent For Living Essentials.

Even if the evidence submitted at the hearing is considered, it does not prove specific jurisdiction. At the hearing, Plaintiffs submitted deposition excerpts from Kevin Zwierzchowski, Manoj Bhargava, and Tom Morse. (RR 63, 85) Plaintiffs also offered testimony from Alan Jones--CNL's CEO. (RR 65) None of this evidence proves that Bhargava had contacts with Texas in connection with the litigation other than in his corporate capacity. (RR 65-66)

CNL also cites to Bhargava's deposition testimony to show that when he set up Living Essentials, Bhargava recruited investors--one of whom lived in Texas-- Harry Wheat. (Ex. 7, A: Bhargava Dep. at 159-62) CNL also relies on the affidavit of Linda Spain to establish specific jurisdiction. (Supp. CR 14-17) But none of this evidence relates to the operative facts of this suit. Not a single fact alleged in the Spain Affidavit relates to Bhargava's contacts with Texas in connection with this litigation. In fact, the latest contact alleged is "around the end of the 1999 calendar year," (Supp. CR 16-17) years before the earliest date of the operative facts here. (Supp. CR 16-17)

Furthermore, if a person signs a contract in his corporate capacity, he is not a party to the contract individually. *See* [Hotel Partners v. Craig](#), 993 S.W.2d 116, 121 (Tex. App.--Dallas 1994, pet denied) (holding "[w]hen an agent arrives in Texas to represent his principal, only the principal is doing business in Texas."); *39 [Mort Keshin & Co., Inc. v. Houston Chronicle Pub. Co.](#), 992 S.W.2d 642, 647 (Tex. App.--Houston [14th Dist.] 1999, no pet.) (holding "[w]hen an agent negotiates a contract for its principal in Texas, it is the principal who does business in this state, not the agent); [Ross F. Meriwether & Assocs., Inc. v. Aulback](#), 686 S.W.2d 730, 732 (Tex. App.--San Antonio, 1985, no writ) (holding that because appellant negotiated contract "only in his cor-

porate capacity as president” of company, appellant acted only in representative capacity, did not act or consummate any transaction in Texas, and did not individually do business in Texas).

All of Bhargava's acts were in his corporate capacity—he never acted in his personal capacity with any transactions with CNL. (CR 107--111).

Thus, the undisputed jurisdictional evidence in this case shows that CNL's claims do not arise from or relate to any purposeful contacts that Bhargava may have had with the state of Texas. *See Dan Kelly and Laura Hofstatter v. Gen. Interior Const., Inc.*, 262 S.W.3d 79, 84 (Tex. App.--Houston [14th Dist.] 2008, pet. filed) (holding that when a party signs a contract in his corporate capacity, his act is not a contact or purposeful act to impose jurisdiction). There is no specific jurisdiction over Bhargava.

***40 C. The Petition Does Not Allege That Bhargava Committed Torts In Texas.**

1. CNL's petition does not allege that Bhargava committed any tort while in Texas.

CNL also attempted to establish jurisdiction over Bhargava by alleging that he committed torts. But as noted previously, neither CNL's Petition nor its Second Supplement to Fourth Amended Original Petition allege that Bhargava committed any tort *in Texas*. Petition, p. 5, ¶ 14-15; p. 6, ¶ 17-18; p. 7, ¶ 22; p. 9, ¶ 25; p. 10, ¶ 28; p. 11, ¶ 29-30; p. 29-30, ¶ 63-68; pp. 31-33, ¶ 73-86; p. 37, ¶ 102-103; Supp. CR 37-41. In fact, the Petition does not allege where any alleged tort was committed. *See* Petition, p. 8-10, ¶ 23-27, p. 29-30, ¶ 63-68; pp. 31-33, ¶ 73-86; p. 37, ¶ 102-103.

Bhargava filed an affidavit negating jurisdiction. *Perna v. Hogan*, 162 S.W.3d 648, 653 (Tex. App.--Houston [14th Dist.] 2005, no pet.)

2. The evidence at the hearing does not show that Bhargava committed any torts in Texas.

CNL presented Alan Jones live at the special appearance hearing and submitted documentary evidence. He

testified regarding the alleged torts.

The fraud cause of action. CNL alleged fraud in its Petition. Alan Jones testified regarding the fraud allegations. First, he testified that Bhargava asked CNL personnel via e-mail to provide Living Essentials with the formula, representing that Living Essentials needed it for insurance purposes. (RR 67 - 72; P. Ex. 10) Although CNL implies that this representation was untrue, Tom Morse, *41 former President of Living Essentials testified that Living Essentials did need the formula for its insurance carrier. (Special Appearance Notebook, Ex. D, pp. 119-123.) Morse's testimony is not contradicted. In its Second Supplement to the Petition CNL also alleges that “in 2005, Living Essentials requested further detailed information regarding the formula in order to gain approval to import the product into Canada.” (Supp. CR 37-38) Again, CNL implies that this reason was not true, but it does not allege any details or point to any facts detailing when or how Living Essentials requested the additional information. Under the case law, this is insufficient to support jurisdiction. *See Urban v. Baker*, No. 14-06-0387-CV, 2007 Tex. App. LEXIS 1633 (Tex. App.--Houston [14th Dist.] 2007, no pet.) (holding that an allegation supported by no dates or times when misrepresentations could have occurred do not support jurisdiction by a tort.) Additionally, again, Tom Morse said it was needed for this purpose. (Special Appearance Notebook, Ex. D, p. 141) Also, an e-mail was attached as an exhibit to the special appearance hearing that confirmed this. (P's Ex. 6) Again the testimony and evidence was not contradicted.

Alan Jones testified to one other act CNL relied on to allege fraud.^[FN20] He testified that Bhargava stated that if CNL signed a manufacturing agreement, CNL and Living Essentials would have a longstanding relationship. (RR 81-83) However, Jones's testimony is clear that he went to Michigan to meet with *42 Bhargava and Henderson when they discussed the manufacturing agreement with him. (RR 81-83) Thus this alleged tort did not occur in Texas; assuming its truth, it occurred in Michigan and will not support jurisdiction in Texas. *Luxury Travel Source v. Am. Airlines, Inc.*, 276 S.W.3d 154, 165-167 (Tex. App.--Austin 2006, no

pet.) *Niehaus v. Cedar Bridge, Inc.*, 208 S.W.3d 575, 581-83 (Tex. App.--Austin 2006, no pet.)

FN20. CNL's fraud claim alleges two specific acts: 1) inducing CNL to disclose the formula and 2) inducing CNL to enter into the 2007 manufacturing agreement. (Plaintiff's Fourth Amended Petition, p. 30, ¶ 65.) CNL did not supplement its fraud cause of action. (Supp. CR 9-10, 41)

The theft cause of action and Michigan misappropriation of trade secrets. In its next two causes of action, CNL alleges that Bhargava 1) stole the formula, 2) copied the formula or made a derivative of it, and/or 3) communicated the formula to others. (Fourth Amended Petition, pp. 31-32; Supp. CR 41) The record contains no evidence of any sort detailing when or how Bhargava stole the formula. It alleges that Bhargava asked for the formula for insurance purposes, but, as discussed earlier, the uncontroverted testimony was that Living Essentials did need the formula for this reason. (Supp CR 37-38) This allegation is insufficient to support jurisdiction. See *Urban*, 2007 Tex. App. LEXIS 1633 (Tex. App.Houston [14th Dist.] 2007, no pet.) (holding that an allegation supported by no dates or times when misrepresentations could have occurred do not support jurisdiction via a tort).

The other two allegations of theft, that Bhargava copied it and gave it to others, also are lacking because they contain no specifics. However, the evidence does show that another manufacturer, outside of Texas, began manufacturing the product. See e.g., Supp. CR 40 (alleging that Living Essentials contracted with an *43 Indianapolis company); Special Appearance Notebook, Ex. E, p. 77) Thus, if a tort was committed, it occurred outside of Texas, and Texas has no jurisdiction based on it. *Luxury Travel Source*, 276 S.W.3d at 165-67 (Tex. App.--Fort Worth 2008, no pet.); *Niehaus v. Cedar Bridge, Inc.*, 208 S.W.3d 575, 581-83 (Tex. App.--Austin 2006, no pet.)

State law unfair competition claim. In this cause of action CNL claims that Bhargava acted as he did to drive CNL out of business and to monopolize the two-

ounce energy drink market. (Plaintiff's 4th Amended Petition, p. 32-33) Although it is a little unclear what facts CNL relies on for this, CNL appears to rely on the signing of the new manufacturing agreement (Plaintiff's Fourth Amended Petition, p. 27, Supp. CR 39--40), a large purchase order Living Essentials issued but never fully paid because it cancelled the contract after the theft by Hernandez, CNL's former employee, (Plaintiff's Fourth Amended Petition, p. 9, ¶24, pp. 13-14, ¶ 34; Supp. CR 39) and Living Essentials's and Bhargava's demands that CNL increase its production capacity. (Supp. CR 39-40)

Again, the testimony at the special appearance hearing shows that the discussions regarding the manufacturing agreement occurred in Michigan. (RR 81-83) Also the petition alleges only that *Living Essentials* issued the purchase order; it does not mention Bhargava at all. (Fourth Amended Petition, p. 10, ¶ 27) Neither does the evidence at the hearing refer to Bhargava in connection with the large purchase order. RR 67. Regarding the expansion of the facilities, the *44 Second Supplemental Petition alleges that Bhargava represented during the summer of 2006 that CNL must expand its facilities. (Supp CR. 39) The Supplemental Petition does not allege that Bhargava ever made these demands while in Texas. (Supp CR 39). Nor did Jones testify that Bhargava made these demands in Texas; in fact, he confirms that Henderson, president of Living Essentials demanded this in a visit to Dallas. (RR 74-77)

Thus, as with the theft claim, one alleged tort (signing of the 2007 agreement) occurred outside of Texas. *Luxury Travel Source*, 276 S.W.3d at 165-167. The second alleged tort Bhargava did not commit. *Urban*, 2007 Tex. App. LEXIS 1633 at *16. Texas would not have jurisdiction over Bhargava on the basis of either tort. The third alleged tort did not occur in Texas. Again, Texas would not have jurisdiction over it. Although CNL alleges Bhargava made representations to Texas, Texas courts have held that jurisdiction cannot be based on directing a tort to Texas. *Michiana*, 168 S.W.3d at 788-792.

IV. Exercising personal jurisdiction over Bhargava would offend fair play and substantial justice.

This Court's assumption of jurisdiction over Bhargava will offend traditional notions of fair play and substantial justice and will be inconsistent with the constitutional requirements of Due Process. It is fundamentally unfair to compel Bhargava to personally appear in every place in which Living Essentials is sued. *See Siskind, 642 S.W.2d at 438* (holding that "subjecting the individual respondents to the jurisdiction of Texas Courts violates 'traditional notions of fair *45 play and substantial justice' " and that "Siskind's attempt to hail these individuals into a Texas court based on Villa's contacts fails the ultimate test of due process.").

CNL has no legitimate dispute with Bhargava in his individual capacity, and thus has no interest in adjudicating the dispute in Texas.^[FN21] Because there is no true dispute between Plaintiff and Bhargava in his individual capacity, there is no interstate interest in obtaining the most efficient resolution of the controversy or in furthering fundamental social policies. *Moki Mac, 221 S.W.3d at 575*.

FN21. (CR 156)

Finally, the 2007 Manufacturing Agreement on which CNL relies for several of its tort allegations contains a choice of law provision stating that Michigan law applies. This suggests that Bhargava did not intend to avail himself of the benefits of proceeding in Texas, especially since he did not sign the agreement. *See Michigan Easy Living' Country, 168 S.W.3d at 792, citing Burger King v. Ruazewicz, 471 U.S. 462, 482 (1985)*.

CONCLUSION

For all of the reasons discussed above, the trial court did not have general or specific jurisdiction over Bhargava. The alter-ego claim, which CNL had the burden of proving, was not proved by either testimony or financial evidence. Finally, the tort allegations failed to subject Bhargava to jurisdiction because they either were committed outside of Texas or CNL did not allege any facts showing *46 when and how the tort occurred or that Bhargava committed it. Bhargava requests that this court dismiss CNL's claims against Bhargava and dismiss Bhargava.

Appendix not available.

Manoj BHARGAVA, Appellant, v. CUSTOM NUTRITION LABORATORIES, INC., Appellees.
2009 WL 2565818 (Tex.App.-Dallas) (Appellate Brief)

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