**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

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| **ORGANIC ENERGY CORPORATION and GEORGE GITSCHEL** | ) | |
| **Plaintiffs,** | ) | |
| **vs.** | ) | |
| | ) | **No. 4:16-cv-894** |
| **LARRY BUCKLE, et al.** | ) | |
| **Defendants.** | ) | |

**PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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| | | |
|---|---|---|
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**PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION**

Come now the plaintiffs, Organic Energy Corporation ("OEC") and George Gitschel ("Gitschel"), and file their response to Defendants Gregory Harris, Kurt Garner, Conly Hansen, and Carl Hansen's Motion to Dismiss for Lack of Personal Jurisdiction ("Motion to Dismiss"), and in support thereof would respectfully show the court as follows:

## I. Nature and Stage of the Proceedings

This is a civil lawsuit in which OEC and Gitschel seek to hold accountable shareholders, officers, and others who have engaged in various schemes to seize control of OEC and the intellectual property owned by the company, all of which was invented by Gitschel. OEC was formed in 2009 and has created technology that will result in the transformation of virtually all waste and recycling materials into usable products. Thus, OEC is a company whose goal is to build plants that will efficiently process municipal solid waste and leave "zero waste."

In the years between 2009 and 2016, Gitschel worked to implement OEC's technology and to market it to end-users. One of the most viable prospects for OEC's technology was to

secure a contract with the City of Houston to build plants to service the residents of Houston. Gitschel was primarily responsible for the success of this effort, which began in August of 2011 and culminated with OEC's submission of a "request for qualification" to Houston in August 2013; OEC was selected as a finalist for the Houston project in November 2014.

During this process, in February of 2014, OEC and Gitschel became aware that defendants Buckle and Condon were taking actions contrary to the best interests of OEC and its shareholders. Thus, OEC and Gitschel sued these defendants in Texas state court for conspiracy and breaches of duty, among other causes of action.[1] OEC and Gitschel were unaware at that time of the scope of the cooperation among the defendants; they subsequently learned that the defendants – including these movants – were engaged in concerted activity to profit from the wrongful acquisition of the technology owned by OEC.

As the City of Houston project proceeded, the movants and the remaining defendants had secret communications regarding how they might gain control of OEC.[2] One of the plans implemented by the movants concerned a "stock purchase agreement" ("SPA") that had been signed by all OEC shareholders in June 2012.[3] The SPA effectuated a change in ownership of the stock of OEC so that Gitschel was the majority shareholder. After signing this agreement, but under circumstances that are unknown to OEC and Gitschel, the movants made the decision to ignore their obligations under the SPA. In addition, movants Harris and Gardner, along with OEC shareholder Buckle, surreptitiously assigned their "rights" under the stock purchase agreement to defendant Darrin Stanton and defendant Brian Crawford.[4] On information and

[1] *See* the state court pleadings at Appendix to Removal 2-11 (Plaintiff's Original Petition) and 12-22 (Plaintiff's First Amended Petition).
[2] Plaintiffs allege numerous, additional acts by non-movant defendants that were designed to illegally obtain stock in or control of OEC; this pleading focuses on the actions of the movants.
[3] *See* Exhibit 1 (June 2012 stock purchase agreement).
[4] OEC and Gitschel currently have no knowledge of the nature, timing, or consideration for the "assignments" among the defendants. According to footnote 2 of the complaint filed in Delaware: "As discussed below in

belief, movants Conly Hanson and Carl Hanson made a similar assignment or concurred in the action by Harris and Gardner, or otherwise supported this action.[5] These assignments were the foundation for the filing, in April 2015, of a lawsuit by Stanton and Brian Crawford's entity (HNL, LLC) in Delaware. The goal of this lawsuit, as the movants concede, is to oust Gitschel from control of OEC.[6] This lawsuit, if successful, also would increase the movants and Buckle's combined stock equity from approximately 32% of OEC to approximately 70% of OEC's stock equity, at the expense of Gitschel, by attempting to capture 38% of the OEC shares currently owned by Gitschel. Thus, the Delaware lawsuit is a continuation of actions that began in or before February of 2014 by which the defendants engaged in concerted, tortious behavior, the goal of which was to obtain control of OEC and eliminate Gitschel as its CEO.

Gitschel and OEC did not appreciate the full extent of the conspiratorial nature of the conduct of the movants and the remaining defendants until the months following the filing of the Delaware lawsuit, when discovery materials were produced in that lawsuit. OEC and Gitschel amended the Texas state court complaint in February 2016. The current proceeding is the result of the removal that occurred after the joinder of additional parties.

## II. Issues Presented and Standard of Review

The question presented is whether the movants are subject to personal jurisdiction in Texas. The standards by which this determination is to be made are included in the argument section below. Supporting evidence accompanies this pleading.[7]

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Paragraph 27, Stanton and HNL have been assigned the right to pursue claims held by Larry Buckle, Gregory Harris, and Kurt Gardner. Further, as discussed in Paragraph 28, Stanton has also been assigned the right to pursue claims held by creditor Bernard Gorey." *See* Exhibit 2 (Delaware complaint). HNL is an entity created by defendant Brian Crawford, but it is alleged this entity is the mere alter ego of Crawford. Thus, Brian Crawford is personally responsible for the actions of HNL, LLC.

[5] OEC and Gitschel will shortly file a motion for leave to conduct discovery to learn about the nature, timing and consideration of the various assignments mentioned in this brief.

[6] *See* Motion to Dismiss at Page 2.

[7] Plaintiffs note that the court may determine the jurisdictional issue by receiving affidavits, interrogatories,

## III. Arguments and Authorities

### *A. Standards Governing Personal Jurisdiction*

Personal jurisdiction over a non-resident requires a determination of whether the non-resident is subject to jurisdiction under the laws of the state in which the court sits and the exercise of jurisdiction over the defendant comports with the due process requirements of the United States Constitution.[8] Since the Texas long-arm statute authorizes the exercise of personal jurisdiction to the extent allowed by the Due Process Clause of the Fourteenth Amendment, only the federal due process inquiry needs to be addressed.[9] "Exercising personal jurisdiction over a nonresident defendant is compatible with due process when (1) that defendant has purposefully availed himself of the benefits and protections of the forum state by establishing minimum contacts with the forum state, and (2) the exercise of jurisdiction over that defendant does not offend traditional notions of fair play and substantial justice."[10]

The "minimum contacts" aspect of the analysis can be established through contacts that give rise to general jurisdiction[11] or those that give rise to specific jurisdiction.[12] Specific jurisdiction is appropriate when the non-resident has purposefully directed his activities at the forum state and the litigation results from the alleged injuries that arise out of or relate to those activities.[13]

Plaintiffs accept the general standard of review identified by the movants, which requires

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depositions, oral testimony, or any combination of the recognized methods of discovery. *See Washington v. Norton Manufacturing Co.*, 588 F.2d 441, 443 (5th Cir.), *cert. denied*, 442 U.S. 942 (1979). Thus, supporting evidence is appended to this brief. See the Affidavit of George Gitschel and Exhibits, which are incorporated into this brief.

[8] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-74 (1985); *Panda Brandywine Corp. v. Potomac Electric Power Co.*, 253 F.3d 865, 867 (5th Cir. 2001).

[9] *Latshaw v. Johnston*, 167 F.3d 208, 211 (5th Cir. 1999); *see* Tex. Civ. Prac. & Rem. Code Ann. § 17.041 et seq.

[10] *Panda Brandywine*, 253 F.3d at 867.

[11] General jurisdiction exists when the non-resident's contacts with the forum state are unrelated to the cause of action but are "continuous and systematic." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984); *Alpine View Co., Ltd. v. Atlas Copco AB*, 205 F.3d 208, 215 (5th Cir. 2000).

[12] *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336 (5th Cir. 1999).

[13] *Id.*

that the plaintiffs make a prima facie showing that the four movants have the "requisite minimum contacts with the forum state to justify the court's jurisdiction."[14] More precisely, "the task require[s] only a prima facie showing of the facts on which jurisdiction was predicated, not a prima facie demonstration of the existence of a cause of action."[15] The court is to accept the plaintiff's uncontroverted factual allegations as true and resolve all factual disputes in its favor.[16] Once the plaintiff makes a prima facie showing of minimum contacts, the burden shifts to the defendant to show that the court's exercise of jurisdiction would not comply with "fair play" and "substantial justice."[17]

Turning to the motion, plaintiffs note that the defense motion focuses on the allegations of general jurisdiction; however, the motion does not address the subject of specific jurisdiction. By statute, a non-resident is deemed to do business in Texas if the nonresident "commits a tort in whole or in part in Texas."[18] Plaintiffs' state court petition alleges as follows:

> Specific jurisdiction exists in this case because the nonresidents' liability arises from or is related to activities conducted in Texas. Thus, there is a substantial connection between the contacts of the non-resident defendants contacts and the operative facts of the litigation.[19]

Specific jurisdiction exists if the defendants' alleged liability arises from or is related to their contacts within the forum.[20] The petition contains substantial details regarding the conduct of

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[14] Motion to Dismiss at 3.
[15] *Id.*
[16] *Luv N'care, Ltd. v. Insta-Mix, Inc.*, 438 F.3d 465, 469 (5th Cir. 2006); *Alpine View Co. v. Atlas Copco AB*, 205 F.3d 208, 215 (5th Cir. 2000)(*citing Felch v. Transportes Lar–Mex SA de CV*, 92 F.3d 320, 326 (5th Cir. 1996). When reaching a decision to exercise or decline jurisdiction based on the defendant's alleged commission of a tort, the trial court should examine only the necessary jurisdictional facts and should not reach the merits of the case. *Arterbury v. American Bank & Trust Co.,* 553 S.W.2d 943 (Tex. Civ. App.– Texarkana 1977, no writ); *see also Portland Sav. & Loan Ass'n. v. Bernstein*, 716 S.W.2d 532, 535 (Tex. App.– Corpus Christi 1985, writ ref'd n.r.e.), *overruled on other grounds by Dawson-Austin v. Austin*, 968 S.W.2d 319 (Tex. 1998) (stating that ultimate liability in tort is not a jurisdictional fact and the merits of the cause are not at issue).
[17] *See Freudensprung v. Offshore Technical Servs., Inc*., 379 F.3d 327, 343 (5th Cir. 2004).
[18] Tex. Civ. Prac. & Rem. Code § 17.042.
[19] Second Amended Petition, paragraph 29 (Appendix to Remove 62).
[20] *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 & n. 8 (1984).

the movants that are alleged to constitute torts under Texas law. Hence, jurisdiction may be found as to each of the four movants as a result of their having committed a tort in Texas.

When specific jurisdiction is asserted, the minimum contacts analysis is much narrower than that of general jurisdiction; the focus stays on the relationship between the defendant, the forum, and the acts or conduct that triggered the litigation.[21] The court will examine whether there is a substantial connection between the plaintiffs' causes of action and the transaction the defendant consummated in the state.[22] Jurisdiction may be found if the defendant has "purposefully directed" his activities at residents of the forum and the litigation results from alleged injuries that "arise out of or relate to" those activities."[23] The Fifth Circuit has specifically held that, "when a nonresident defendant commits . . . an act outside the state that causes tortious injury within the state, that tortious conduct amounts to sufficient minimum contacts with the state" to constitutionally permit the exercise of personal jurisdiction over the tortfeasor.[24] A single act by the defendant directed at the forum state can be enough to confer jurisdiction if that act gives rise to the claim being asserted,[25] such as occurred in the present action.

Movants urge that an important issue is their physical presence, or lack thereof, in Texas, but this factor is not determinative. The nonresidents need not be physically present in Texas in order for due process to be satisfied. If the defendants' activities outside the state have

[21] *Id*. at 414 n. 9, 104 S. Ct. 1868; *Schlobohm v. Schapiro*, 784 S.W.2d 355, 357 (Tex. 1990); *EMI Music Mexico, S.A. de C.V.* 97 S.W.3d 847, 855 (Tex. App. – Corpus Christi 2001, *no pet*.).
[22] *Id*., 97 S.W.3d at 855; *Ahadi v. Ahadi* 61 S.W.3d 714, 719 (Tex. App.-Corpus Christi 2001, pet. denied).
[23] *Burger King v. Rudzewicz*, 471 U.S. at 482.
[24] *Guidry v. United States Tobacco Co., Inc.*, 188 F.3d 619, 628 (5th Cir. 1999).
[25] *Ruston Gas Turbines, Inc. v. Donaldson Co., Inc*., 9 F.3d 415, 419 (5th Cir. 1993); *see generally Calder v. Jones*, 465 U.S. 783 (1984)(court may examine the effects of the out of state conduct on the forum); *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957)(one contact sufficient to establish jurisdiction because it was substantial and the dispute arose directly from that contact); *see generally Hanson v. Denckla*, 357 U.S. 235 (1958).

reasonably foreseeable consequences in the forum, jurisdiction may be found.[26] "Even an act done outside the state that has consequences or effects within the state will suffice as a basis for jurisdiction in a suit arising from those consequences if the effects are seriously harmful and were intended or highly likely to follow from the nonresident defendant's conduct."[27]

Plaintiffs' state court petition contains detailed allegations pertaining to each of the movants that are sufficient to establish a prima facie showing of the facts on which jurisdiction was predicated.[28] Therefore, the motion to dismiss should be denied. Additional arguments and evidence are presented below.

***B. The movants are not protected by the "fiduciary shield" doctrine***

The movants primary argument is that they had no substantial contacts with Texas, except perhaps for their work with OEC, and they served as officers of OEC prior to the time it was headquartered in Houston, Texas. These arguments miss the entire point of the jurisdictional allegations against these defendants and misapply the fiduciary shield doctrine.

Insofar as is relevant to this motion, Plaintiffs do not allege that the movants' conduct as officers of OEC subjects them to jurisdiction in Texas. On the contrary, it is their personal behavior that constitutes a tort and thereby renders them amenable to answer in Texas courts.

Defendants rely heavily on the "fiduciary shield doctrine" to urge that their acts directed at the State of Texas do not subject them to the jurisdiction of Texas courts. The defense

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[26] *Siskind v. Villa Foundation for Education, Inc*., 642 S.W.2d 434, 438, n.5 (Tex. 1982).
[27] *Guidry v. U.S. Tobacco Co., Inc*., 188 F.3d at 628.
[28] Plaintiffs' Second Amended Original Petition is found at Appendix to Removal 55-210. This petition outlines numerous torts committed by these movants. The current pleading addresses only those torts that were committed, in whole or in part, in Texas. The factual allegations pertaining to the SPA agreement, addressed infra, are found at Appendix to Removal 121-125, 142-145. The precise allegations of conspiracy regarding the "assignment" issue are found at Appendix to Removal 149. The breach of duty allegations as to movants are found at Appendix to Removal 161. Other tortious acts are specifically alleged as to the movants at Appendix to Removal 180-187 and 195-197, among others. Plaintiffs acknowledge the federal rules of civil procedure provide unique pleading requirements contrasted with the state court rules; plaintiffs will, therefore, seek leave to amend their complaint to ensure that it comports with the pleading requirements of the federal rules. This motion is unopposed by the defendants.

argument fails for two primary reasons.[29]

Initially, Texas courts applying the fiduciary shield doctrine have expressly limited its application to attempts to exercise *general* jurisdiction over a nonresident defendant.[30] The assertion in this case is one of *specific* jurisdiction arising from the individual, tortious behavior of the movants. Thus, the fiduciary shield doctrine is inapplicable to the pending motion.

Second, the nature of this "shield" is misconstrued by the movants. An individual is liable for his tortious behavior, regardless of his role as an officer of a corporation. "The general rule in Texas is that corporate agents are individually liable for fraudulent or tortious acts committed while in the service of their corporation."[31] Hence, the doctrine upon which the movants rely does not preclude personal jurisdiction if an officer, while doing business on behalf of a corporation, committed a tort in Texas.[32] Such are the facts in the case at bar.

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[29] Plaintiffs challenge the validity of this doctrine as a general proposition, in addition to the other arguments presented in this brief. *See generally Brown v. Gen. Brick Sales Co., Inc.*, 39 S.W.3d 291, 293, 300 (Tex. App.-Fort Worth 2001, no pet.) (in a suit against corporate agents for breach of contract, fraud, negligent misrepresentation, unfair competition, and misappropriation of proprietary information involving negotiations and performance in Texas, the court concluded, "we hold the trial court correctly refused to apply the fiduciary shield doctrine.").

[30] *Stern v. KEI Consultants, Ltd*., 123 S.W.3d 482, 488 (Tex. App. - San Antonio 2003, no pet.); *Tabacinic v. Frazier*, 372 S.W.3d 658, 668 (Tex. App. - Dallas 2012, no pet.)("Courts that have applied the fiduciary shield doctrine, however, have limited its application to attempts to exercise *general* jurisdiction over a nonresident defendant.").

[31] *See Shapolsky v. Brewton*, 56 S.W.3d 120, 133 (Tex. App.-Houston [14th Dist.] 2001, pet. denied). *Crithfield v. Boothe*, 343 S.W.3d 274, 287 (Tex. App.-Dallas 2011, no pet.); *Ennis v. Loiseau*, 164 S.W.3d 698, 707 (Tex. App.-Austin 2005, no pet.). Even if the actions of the movants were solely in their capacity as officers of OEC, this status would not protect them from being subject to jurisdiction in Texas. It is well-settled that a corporate agent can be held individually liable for fraudulent statements or knowing misrepresentations even when they are made in the capacity of a corporate representative. *Shapolsky v. Brewton*, 56 S.W.3d 120, 133 (Tex. App. Houston [14th Dist.] 2001, pet. denied); *see also Barclay v. Johnson*, 686 S.W.2d 334, 336-37 (Tex. App. Houston [1st Dist.] 1985, no writ) (holding corporate agent personally liable for false representations); *D.H. Blair Investing Banking Corp. v. Reardon*, 97 S.W.3d 269, 278 (Tex. App. Houston [14th Dist.] 2002, pet. dism'd w.o.j.)(refusing to apply fiduciary shield doctrine to protect defendant from personal jurisdiction based on alleged misrepresentations that were directed into Texas and foreseeably relied on in Texas, despite defendant's claim that he acted only in corporate capacity).

[32] *See, e.g., Donovan v. Grim Hotel Co*., 747 F.2d 966, 974 (5th Cir. 1984) ("Nor is due process offended when a nonresident corporate agent or employee is made subject to personal jurisdiction in the forum state for a foreseeable consequence therein of his personal act performed elsewhere, although allegedly performed only as a corporate functionary."); *Morris v. Khols-York*, 164 S.W.3d 686, 697 (Tex. App. – Austin 2005, no pet.)("The fiduciary shield doctrine does not protect a corporate employee from the exercise of specific jurisdiction as to fraudulent activities or torts for which the employee may be held individually liable. . . . There is no blanket protection from jurisdiction simply because a defendant's alleged acts were done in a corporate capacity.")

A corporate agent can be held liable for committing a tort or wrong while engaged in the business of the corporate principal based on the agent's personal acts.[33] Hence, one frequently stated exception to the fiduciary shield doctrine is that it does not protect an officer or employee of a business entity from liability for torts the individual is alleged to have committed while conducting the business of his employer because individuals are liable for the torts they commit.[34]

There are various torts that are alleged to have been committed by these movants in their individual capacities, including breaches of duty and conspiracy. In addition, a misrepresentation made by a nonresident defendant directed toward Texas is sufficient to assert specific jurisdiction.[35] Similarly, in a negligent misrepresentation case, even if the representation occurs outside the state of Texas, a tort is committed in Texas if reliance thereon occurs in Texas.[36] Moreover, "[w]hen the actual content of communications with a forum gives rise to intentional tort causes of action, this alone constitutes purposeful availment. The defendant is purposefully availing himself of 'the privileges of causing a consequence' in Texas."[37] In this case, these movants intentionally entered into a relationship with other defendants to wrongfully

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[33] *See generally Stull v. LaPlant*, 411 S.W.3d 129, 137–38 (Tex. App.-Dallas 2013, no pet.), *citing to Stuart v. Spademan, 772 F.2d 1185, 1197 (5th Cir. 1985); Hyman Farm Serv., Inc. v. Eath Oil & Gas Co., Inc., 920 S.W.2d 452, 455 (Tex. App. – Amarillo 1996, no writ).*

[34] *See TexVa, Inc. v. Boone*, 300 S.W.3d 879, 889 (Tex. App.-Dallas 2009, pet. denied) (fiduciary shield doctrine "does not shield an officer or employee for their actions that are tortious or fraudulent"); *see generally State v. Mink*, 990 S.W.2d 779, 783 (Tex. App.-Austin 1999, pet. denied) ("an officer of a corporation is always primarily liable for his own torts, even though the principal is also liable for those actions").

[35] *Boissiere v. Nova Capital*, 106 S.W.3d 897, 904-06 (Tex. App. Dallas 2003, no pet.)(concluding that allegations asserted in fraud and negligent misrepresentation case that nonresident defendants made misrepresentations in telephone calls to Texas resident, who relied on representations in Texas and was induced to provide defendants with plaintiff's trade secret information, were sufficient to support specific jurisdiction in Texas); *Shapolsky*, 56 S.W.3d at 135 (holding that plaintiff s allegations that nonresident defendant made intentional misrepresentations to plaintiff in Texas by phone, fax, and mail were sufficient to support specific jurisdiction).

[36] *Mem'l Hosp. Sys. v. Fisher Ins. Agency, Inc.*, 835 S.W.2d 645, 648 (Tex. App.-Houston [14th Dist.] 1992, no writ); *see also Ennis v. Loiseau*, 164 S. W.3d 698, 708 (Tex. App. – Austin 2005, no pet.)(holding that, to establish jurisdiction, "it is not necessary to prove that the officer engaged in intentionally tortious activity . . . . Rather, the plaintiff must establish that the officer committed fraudulent or tortious acts for which he may be held individually liable.").

[37] *Wein Air Alaska Inc. v. Brandt*, 195 F.3d 208, 213 (5th Cir. 1999).

seize control of OEC. This conduct is the precise activity that gives rise to the current lawsuit and renders the movants personally accountable in the courts of Texas to answer for their behavior.

### *C. The movants committed torts that give rise to personal jurisdiction in Texas*

In the pending litigation, there are numerous allegations of torts committed by the movants, each of which individually would subject them to the jurisdiction of Texas courts; the combination of acts even further supports the conclusion that these movants are subject to personal jurisdiction in Texas. In evaluating whether the behavior of these defendants gives rise to specific jurisdiction, the court is to assess whether the defendants' alleged liability arises from or is related to its contacts within the forum.[38] Plaintiffs present to the court the following allegations, facts, and evidence in support of the conclusion that these defendant-movants committed a tort, in whole or in part, in Texas, which subjects them to the jurisdiction of this court.

In the spring of 2012, OEC was working to achieve a deal to recycle and reclaim the waste produced by the City of Houston. The OEC shareholders (four of which are movants), voted to eliminate the title of CEO and to remove George Gitschel from leadership of OEC. This action prompted Gitschel to insist that the shareholders modify their ownership of OEC before Gitschel would continue to commit his time and resources to the Houston project. Defendant Buckle negotiated a reconfiguration of ownership of OEC to more fairly reflect the relative contributions of the parties.[39] In June of 2012, defendant Buckle presented to Gitschel an agreement drafted by defendants Harris and Gardner, which is known as the Stock Purchase

[38] *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. at 414 & n. 8.
[39] Appendix to Removal at 121-123.

Agreement ("SPA").[40] Defendant Buckle assured Gitschel that the SPA had been fairly negotiated, the contract was legally viable in all respects, the parties were in agreement with its terms, and it reflected the free will of all involved. Under the terms of the SPA, Gitschel was to pay specified funds to the OEC founder shareholders 36 months after signing of the SPA – in June 2015. All movants were parties to this agreement.

In furtherance of the Houston project, Gitschel moved his family and the headquarters of OEC to Texas in July 2012. Shortly prior to and during this time, although it was unknown to Gitschel, movants Harris and Gardner signed a secret agreement with Buckle regarding the ownership of OEC – Buckle agreed to share a portion of his stock proceeds with Harris and Gardner.[41]

At all times after June 2012, the actions of defendants Harris and Gardner, in concert with Buckle, were tortious in that they had a duty to disclose the true nature of their relationship and their stock ownership, but they failed to do so. Thus, the deception perpetrated by these defendants in and after June 2012 constitutes a tort in furtherance of an underling conspiracy, which acts were committed in whole or in part in Texas.

Following the signing of the SPA agreement in 2012, Gitschel continued to work to secure the contract with the City of Houston. In August 2013, Gitschel and OEC submitted a "request for qualification" to the City; this was essentially a bid for the City of Houston project. OEC also secured relationships with various entities, all of which made the attainment of the Houston deal more likely. Knowledge regarding the progress of the Houston project was available to all OEC shareholders, including the movants.

In March of 2014, OEC employee and defendant John Condon prepared a "Report to

[40] *Id.*; *see* Exhibit 1 (June 2012 Stock Purchase Agreement).
[41] Appendix to removal at 123; *see* Exhibit 3 (June 2012 – Larry Buckle-Harris & Gardner Stock Agreement).

Shareholders of Organic Energy Corporation."[42] In spite of its title, this report was not provided to Gitschel or any of the other shareholders he had invited to invest in OEC. On the contrary, the "Report to Shareholders" was limited in circulation to individuals who sought to control OEC; on information and belief, this report was available to or known to the movants.

In April of 2014, Gitschel and OEC were forced to sue OEC shareholder Buckle and defendant Condon, who were undermining the efforts to secure the Houston deal. This lawsuit included allegations that Buckle and Condon breached their fiduciary duties, conspired to undermine the work of OEC, and engaged in other, tortious behavior.[43] The knowledge or role of the movants as to these actions is unknown at this time, but they are believed to have had knowledge of and been complicit in the actions of Buckle and Condon; alternatively, they sought to benefit from these actions and failed to fulfill their duty to OEC to contest these actions.

There is an email dated August 29, 2014 among non-movant defendants in which defendant Condon sends the Report to Shareholders along with his suggestions for actions "the OEC shareholders should consider" against OEC and Gitschel. Included among these suggestions are "[a] shareholder suit for multiple breaches of fiduciary duty" and an action "to void/nullify the OEC shareholder reorganization agreement….."[44] It later came to pass that the OEC shareholders – including movants Harris and Gardner – did enable this suggestion to become reality. Further, there is evidence that the "OEC shareholders" were, at this time, being counseled by the same attorney who was counseling defendant Stanton.[45]

In early 2015, movants Harris and Gardner signed a second secret deal, this time with

[42] *See* Exhibit 4 (Report to Shareholders). This report includes lengthy attachments; only the 21-page report is appended to this pleading.
[43] *See* the state court pleadings at Appendix to Removal 2-11 (Plaintiff's Original Petition) and 12-22 (Plaintiff's First Amended Petition).
[44] *See* Exhibit 5 (August 29, 2014 email).
[45] *See* Exhibit 6 (September 25, 2014 email).

defendant Darrin Stanton. Pursuant to this agreement, Harris and Gardner assigned to Stanton unspecified "rights" they claimed to possess as shareholders of OEC.[46] The goal of this undertaking, as with prior efforts by the defendants, was to gain control of OEC by alleging wrongdoing by Gitschel or his associates. The role in or knowledge of this scheme by defendants Conly Hansen and Carl Hansen are not presently known, but, at a minimum, these movants were complicit in this endeavor after the fact. Hence, all four movants are guilty of participating in this conspiracy by which they and certain other named defendants sought to seize control of OEC.

Turning to June 2015, under the terms of the Stock Purchase Agreement, Gitschel was to make payment to Harris, Gardner, Conly Hansen, and Carl Hanson in June 2015.[47] In compliance with this agreement, Gitschel sent checks to these movants on June 10, 2015.[48] According to an email dated June 18, 2015, the OEC shareholders – including these movants – were "holding the checks and waiting on directions from [defendant Stanton and his lawyers] on how to handle" the checks.[49] Movants did not cash these checks, thereby consummating the plan to renege on the Stock Purchase Agreement – a commitment that resulted from the assignment of their rights as stockholders pursuant to the "Irrevocable Proxy" signed in favor of defendant Stanton or complicity in this action. Put succinctly, by assigning their rights to defendant Stanton in March 2015, these movants entered into a conspiracy to illegally gain control of OEC and the intellectual property owned by OEC or affirmatively supported this action.

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[46] While the Harris and Gardner document is not yet in the possession of your plaintiffs, an identical contract signed by defendant Buckle is known to exist. *See* Exhibit 7 (Irrevocable Proxy). Moreover, the existence of the Harris and Gardner assignment is verified in a pleading filed on behalf of defendants Stanton and Crawford, as noted *supra*.

[47] *See* Exhibit 1 (June 2012 stock purchase agreement).

[48] *See* Exhibit 8A (Carl Hansen payment to Gitschel pursuant to SPA); Exhibit 8B (Conly Hansen payment to Gitschel pursuant to SPA); Exhibit 8C (Gregory Harris payment to Gitschel pursuant to SPA); Exhibit 8D (Kurt Gardner payment to Gitschel pursuant to SPA); Exhibit 8E (Larry Buckle payment to Gitschel pursuant to SPA).

[49] *See* Exhibit 9 (June 18, 2015 email).

Finally, in July 2015, the pleading from the Delaware lawsuit was transmitted to defendant Stanton by defendant Mark Crawford. Defendant Crawford states in the email: "George is now going to see what litigation cost. It may break him."[50] The clear import of this message is that the movants and remaining defendants were collaborating to put George Gitschel – and OEC – in a financial bind that would make them vulnerable or subject to takeover.

Between the summer of 2012 and the spring of 2015, therefore, the movants collaborated with the other defendants to formulate a plan, the goal of which was to wrongfully and illegally obtain control over OEC and/or its intellectual property. These actions took place in or were consummated in Texas. The key facts are depicted on the following timeline:

- June 2012 – all OEC shareholders, including the four movants, sign a Stock Purchase Agreement, which was drafted by movants Harris and Gardner.
- June 8, 2012 – movants Harris & Gardner sign a secret "sharing" deal with defendant Buckle.
- March 2014 – defendant Condon produces a "report to shareholders of OEC." This report was kept secret from Gitschel.
- April 2014 – OEC and Gitschel filed the Harris County lawsuit, alleging conspiracy, breaches of duty, and other claims against Buckle and Condon.
- March 2015 – defendant Buckle assigns "rights" to defendant Stanton. Stanton represents that this same action was taken by movants Harris and Gardner. This action was known to and supported by movants Carl Hansen and Conly Hansen.
- April 2015 – defendants Stanton and Crawford filed a lawsuit in Delaware based on the assignments from movants.
- June 2015 – Gitschel makes payment under the SPA agreement, but payment is refused by movants under instructions from non-movant defendants.
- February 2016 – OEC and Gitschel filed their amended pleading in Harris County, Texas.
- First quarter of 2016 – OEC and Gitschel first learn of the dealings among the defendants from discovery produced in the Delaware proceeding.

These actions by the movants, in concert with other defendants, constitute a tort or torts committed in whole or in part in Texas.

[50] *See* Exhibit 9 (July 16, 2015 email).

### *D. The movants should be held accountable in Texas*

Plaintiffs have presented a prima facie case upon which specific jurisdiction may be based. When, as here, the plaintiffs meet their burden of proving minimum contacts, the defendant then has the burden of demonstrating that the exercise of jurisdiction would offend "traditional notions of fair play and substantial justice."[51] In order to meet that burden, the defendant must make "a compelling case that the presence of some other consideration would render jurisdiction unreasonable." The criteria of fairness require that court consider, "among other things, the interest of the state in providing a forum for the suit, the relative conveniences and inconveniences to the parties, and the basic equities."[52] Finally, when conducting this inquiry, the court must bear in mind that only in rare cases will the exercise of jurisdiction not comport with fair play and substantial justice when the nonresident defendant has purposefully established minimum contacts with the state.[53]

Plaintiffs offer the court several considerations that militate strongly in favor of holding these movants accountable in Texas.[54] First, Texas has a strong interest in adjudicating this dispute. Houston is the first city in the nation to implement a process by which waste is minimized or eliminated. This goal foreseeably will be realized in partnership with OEC, utilizing technology invented by Gitschel. As the City's "One Bin For All" website states:

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[51] *See Wien Air*, 195 F.3d at 215, quoting *International Shoe Co.*, 326 U.S. at 316, 66 S. Ct. at 158; *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 343, 85 L.Ed. 278 (1940)); *see also Burger King*, 105 S. Ct. at 2184.

[52] *Southwest Offset, Inc. v. Hudco Publishing Co.*, 622 F.2d 149, 152 (5th Cir.1980); *see Bean Dredging Corp. v. Dredge Technology Corp.*, 744 F.2d 1081, 1085 (5th Cir.1984); *Brown v. Flowers Industries, Inc.*, 688 F.2d 328, 333 (5th Cir.1982), cert. denied, 460 U.S. 1023 (1983).

[53] *Crawford v. Lee*, 2011 WL 2455658, at *3 (N.D. Tex. 2011) (citations omitted); *see also Wien Air*, 195 F.3d at 215; *EMI Music Mexico*, 97 S.W.3d at 859-60.

[54] In making a fundamental fairness determination, a court may examine: (1) the burden on the defendant; (2) the forum state's interests; (3) the plaintiff's interest in convenient and effective relief; (4) the judicial system's interest in efficient resolution of controversies; and (5) the states' shared interest in furthering fundamental social policies. *See Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476, 487 (5th Cir. 2008); *see also Jackson v. Kincaid*, 122 S.W.3d 440, 447 (Tex. App.-Corpus Christi 2003, no pet.).

> One Bin For All (OBFA) is the next evolution of recycling. It would allow Houston residents to place all trash, recyclables, and compostables in one bin, providing for a much higher rate of resource recovery. The City of Houston has a vision for leveraging Houston's legacy of innovation and exploration to change the way the world thinks about recycling.[55]

No other state – or city for that matter – has invested the time, money, and effort into implementing this state of the art technology in the manner undertaken by the City of Houston and the State of Texas. The courts of Texas are the proper forum to resolve this critical dispute that has such a major potential impact on the citizens of Texas.

Second, OEC is now based in Texas – since 2012 – and Gitschel is a resident of Houston. Most of the individual defendants are citizens of Texas. The behavior of these movants will presently impact Texas almost exclusively, and the movants' actions have the potential to cause incalculable financial harm to Texas. The State of Texas has an obvious interest in resolving disputes involving its citizens, particularly disputes in which the movants allegedly committed a tort in whole or in part in Texas.[56]

Third, these movants engaged in deliberate, willful behavior that will result in financial gain to the movants arising from a tort committed in Texas. Harris, Gardner, Conly Hansen, and Carl Hansen had a choice to maintain their shares of OEC and remain independent shareholders. Instead, they affirmatively and voluntarily elected to enter into a "business relationship" – allegedly a conspiracy - with two residents of Texas, Stanton and Crawford, the goal of which was to oust Gitschel from OEC and to take over control of the company. If successful in this endeavor, these movants would realize a substantial increase in their ownership of OEC.[57] These movants purposefully directed their activities at Texas, and this litigation arose out of and is

[55] See Exhibit 11 (City of Houston, One Bin For All)
[56] *Shapolsky*, 56 S.W.3d at 135.
[57] If the SPA agreement is not honored, Harris and Gardner's ownership interest in OEC would increase from 2 ½% to 15% and the Hansen's interest would double from 2 ½% to 5%. Plaintiffs do not know the extent to which these movants have assigned or sold their ownership interest in OEC to defendant Stanton and Crawford or others.

directly related to those activities.[58] Having purposefully availed themselves of the privileges and benefits of engaging in this "business" activity in Texas, these movants could reasonably anticipate being hauled into a Texas court as a result.[59]

Fourth, the defendants named in this lawsuit include the primary culprits whose goal is to seize control of OEC and its intellectual property. One or more of the defendants may assert that there is another lawsuit that should take precedence over the Texas proceedings. However, the Delaware lawsuit was instigated after the litigation in Texas, plus that case does not have the capacity to resolve the interrelated tort claims presented in the case at bar. Hence, not only does Texas have a strong interest in resolving these related claims, there is also the notion that "the interstate judicial system's interest in obtaining the most efficient resolution of controversies" compels the exercise of jurisdiction in Texas.[60]

Last, the "basic equities"[61] of this case strongly favor exercising jurisdiction over the movants. The SPA agreement among the OEC shareholders was signed in June of 2012. At that time, the calculated value of OEC was $1.5 million.[62] Over the next four years, while movants Harris, Garner, Conly Hansen and Carl Hansen did nothing to promote the interests of OEC, Gitschel compelled the growth of OEC so that it was estimated in 2015 to be worth $424 million

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[58] *See Panda Brandywine*, 253 F.3d at 867–68. "Purposeful availment" may be found upon a showing, inter alia, that the nonresident defendant sought some benefit, advantage, or profit by availing itself of the jurisdiction, thus impliedly consenting to its laws. *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 785 (Tex.2005).

[59] *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *see also EMI Music Mexico, S.A. de C.V. v. Rodriguez*, 97 S.W.3d at 854; *Puri v. Mansukhani*, 973 S.W.2d 701, 710 (Tex. App.-Houston [14th Dist.] 1998, no pet.) (majority shareholder who directed corporate activities in Texas subject to Texas jurisdiction); *see also Ahadi*, 61 S.W.3d at 720 (exercising specific jurisdiction over party who entered into a contract with foreseeable economic effects in Texas); *Tex. Commerce Bank Nat'l Assoc. v. Interpol '80 Limited Partnership*, 703 S.W.2d 765, 772 (Tex. App.-Corpus Christi 1985, no writ) (exercising jurisdiction over corporation who entered into contract in Texas and purchased related goods and services to be delivered in Texas).

[60] *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 113 (1987) (*citing World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

[61] *Southwest Offset, Inc. v. Hudco Publishing Co.*, 622 F.2d at 152; *see Bean Dredging Corp. v. Dredge Technology Corp.*, 744 F.2d at 1085 (5th Cir.1984); *Brown v. Flowers Industries, Inc.*, 688 F.2d at 333.

[62] *See* Exhibit 12 (Draft Organic Energy Patent Portfolio Valuation June 2012); *see also* Exhibit 13 (Summary of Valuation Analysis June 2012 and June 2015)

dollars.[63] Texas courts have a compelling interest in the "fundamental substantive social policies" implicated in this lawsuit.[64] It would be abhorrent to the notion of justice and fairness if these movants were permitted to enter into a relationship with parties in Texas, the goal of which is to seize control of a corporation based in Texas, which would thwart a major project taking place in Texas, to the substantial detriment of the citizens of Texas, without being held accountable for these actions in the courts of Texas.

The facts and equities of this lawsuit are quite compelling in favor of finding that specific jurisdiction exists over Harris, Gardner, Conly Hansen and Carl Hansen.

## IV. Objection to Evidence

Plaintiffs note for the record their objections to the proposed evidence relied upon in the motion to dismiss. The affidavits presented by the movants do not meet the standards for such evidence; any such affidavit must contain facts, not legal conclusions.[65] For example, it is insufficient for the affiant to state simply that the defendants "do not conduct business in Texas" or that a defendant "has no substantial contacts to Texas."[66] Thus, plaintiffs object to the conclusory, legal nature of the statements in the supporting affidavits.

## V. Motions to be Presented

Plaintiffs will file two motions that are relevant to the pending motion. First, plaintiffs will file a motion for leave to file an amended complaint. Plaintiff has consulted with the defendants, and there is no objection to the filing of an amended complaint. Plaintiffs will file this motion and complaint on or before August 1, 2016.

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[63] Exhibit 14 (January 2015 Morgan Stanley OEC Valuation).
[64] *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. at 113.
[65] *See, e.g., A.L. Pickens Co., Inc. v. Youngstown Sheet & Tube Co.*, 650 F.3d 118, 121 (6th Cir. 1981); *Wright v. Sage Eng'g. Inc*., 137 S.W.3d 238, 250 n.8 (Tex. App. – Houston [1st Dist.] 2004, pet. denied)(legal conclusions have no probative force).
[66] Motion to Dismiss at pages 4-5.

Second, plaintiffs will file a motion to stay ruling on the present motion and for leave to conduct discovery pertaining to the movants. This motion will request leave to conduct discovery as to the jurisdictional issue and as to liability, with the alternative request that discovery be permitted as to jurisdictional issues only. This motion will be filed before July 12, 2016.

## VI. Conclusion and Prayer

Wherefore, premises considered, plaintiffs pray that the court deny Defendants Gregory Harris, Kurt Garner, Conly Hansen, and Carl Hansen's Motion to Dismiss for Lack of Personal Jurisdiction, and for such other and further relief to which they may show themselves to be justly entitled, at law or in equity.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 8, 2016, a true and correct copy of the foregoing was sent either electronically, by fax, or by regular mail, postage prepaid, to all counsel of record.

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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

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| **ORGANIC ENERGY CORPORATION and GEORGE GITSCHEL** | ) | |
| **Plaintiffs,** | ) | |
| **vs.** | ) | |
| **LARRY BUCKLE, et al.** | ) | **No. 4:16-cv-894** |
| **Defendants.** | ) | |

**ORDER**

It is ORDERED that Defendants Gregory Harris, Kurt Gardner, Conley Hansen and Carl Hansen's Motion to Dismiss for Lack of Personal Jurisdiction is DENIED.

Signed on_____2016

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UNITED STATES DISTRICT JUDGE