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JURISDICTIONAL STATEMENT

Upon petition of Relator LG Chem, Ltd. (“LG Chem”), this Court issued a Preliminary Writ of Prohibition on September 3, 2019. LG Chem now seeks a Permanent Writ of Prohibition preventing the Honorable Nancy Watkins McLaughlin (“Respondent”) from enforcing her April 1, 2019 Order denying LG Chem’s Motion to Dismiss the Plaintiff’s Fourth Amended Petition for lack of personal jurisdiction.

This Court has jurisdiction over this proceeding pursuant to article V, section 4.1 of the Missouri Constitution, which grants the Supreme Court “general superintending control over all courts and tribunals” and the authority to “issue and determine original remedial writs.” Mo. Const. art. V, § 4.1. Section 530.020 of the Missouri Revised Statutes grants this Court the “power to hear and determine proceedings in prohibition.” Mo. Rev. Stat. § 530.020.

This proceeding affords the Court the opportunity to correct Respondent’s erroneous conclusion that a foreign manufacturer can be subject to personal jurisdiction in Missouri under a “stream of commerce” theory of jurisdiction, despite the absence of any allegation or evidence showing a nexus connecting the foreign manufacturer to the State of Missouri and the plaintiff’s claims. In disregard of controlling precedent, Respondent concluded that the allegation of awareness by the manufacturer that third parties were re-selling its product throughout the world, including in Missouri, could support the exercise of personal jurisdiction.

STATEMENT OF FACTS

In the underlying lawsuit, plaintiff Peter Bishop alleged that he was injured on or about October 20, 2016, when a lithium ion battery he was carrying in his pocket exploded. (A25, ¶¶ 9–12.) Bishop alleged the subject battery was manufactured by LG Chem and that he purchased it from Smoke Smart, LLC (“Smoke Smart”), a Missouri-based retailer, for use as a rechargeable, replaceable battery with his e-cigarette device. (A25, ¶ 4–8.) Bishop did not allege that LG Chem took a single action directly connected to the State of Missouri in relation to Bishop’s claims. Instead, Bishop alleged only that LG Chem was aware that third parties were re-selling its products throughout the world, including in Missouri.

Bishop brought this lawsuit in the Circuit Court of St. Louis County, Missouri against Smoke Smart and Samsung Electronics America, Inc. (“Samsung”), initially contending that Samsung was responsible for the manufacture and distribution of the subject battery. (A9.)¹ On June 18, 2018, Bishop filed a Third Amended Petition, adding LG Chem as a defendant, (A23.) and alleging that it was LG Chem, not Samsung, that “designed, manufactured, sold, and/or otherwise distributed the subject battery at issue in this lawsuit.” (A24, ¶ 3.) Bishop did not plead facts illustrating how the battery arrived in Missouri, and his Third Amended Petition contained no factual allegations that, if true, would show any connection between LG Chem and Missouri related to Bishop’s claims.

¹ The case is styled *Bishop v. LG Chem, Ltd. and Smoke Smart, LLC*, Cause No. 17SL-CC00708 (Mo. Cir. Ct., St. Louis Cty.) and is before the Respondent in Division 21. (A1, A345.)

LG Chem moved to dismiss the Third Amended Petition for lack of personal jurisdiction, showing that Bishop's Third Amended Petition lacked sufficient facts to support the exercise of personal jurisdiction over LG Chem. (A44.) LG Chem also introduced the Affidavit of Sung Han Ryu in further support.² Through Mr. Ryu's uncontroverted Affidavit, LG Chem showed that it is a Korean company with its headquarters in Seoul, South Korea and that it has no systematic connections with the State of Missouri, including that it is not registered to do business in Missouri, does not own or lease any real property in Missouri, and has no offices or employees in Missouri. (A59, ¶¶ 4–9.) Through Mr. Ryu's uncontroverted Affidavit, LG Chem also showed that it does not design, manufacture, distribute, advertise, or sell its 18650 lithium ion battery cells, including the HG2 model at issue here, to consumers for use as standalone, replaceable, rechargeable batteries with e-cigarette devices, and has never authorized any distributor or retailer to do so either. (*Id.* ¶¶ 10–12.) Finally, LG Chem showed that it has no relationship with Smoke Smart, has never conducted business with Smoke Smart, and has never sold or distributed any 18650 lithium ion cells to Smoke Smart or any other retail store located in Missouri. (A60, ¶ 13.)

² In Respondent's Answer and Return of the Respondent to the Petition for a Writ of Prohibition and her Suggestions in Opposition to the Petition, she incorrectly argues that Mr. Ryu's affidavit constituted hearsay and that the trial court was free to believe or disbelieve the statements. (*See* Return at 10; Suggestions at 4.) To the contrary, the sworn and notarized affidavit was based on Mr. Ryu's *personal knowledge* as Senior Manager and authorized representative for LG Chem and is not hearsay. (*See* A58, Aff. of Sung Han Ryu, ¶ 2.) Respondent herself referenced Mr. Ryu's affidavit in her order and did not state or imply that she rejected the statements in the Affidavit or that it contained hearsay.

Bishop submitted a Response to LG Chem’s Motion to Dismiss on November 13, 2018. (A62.) For his Response, Bishop introduced information printed from LG Chem’s website related to LG Chem’s global business activities, copies of three other complaints filed by other Missouri plaintiffs against LG Chem, and the testimony of two witnesses taken in one of those other lawsuits, including a representative of Smoke Smart, the same retailer that sold Bishop the subject battery in the instant case. According to the testimony of Smoke Smart’s representative, Smoke Smart never conducted any business with LG Chem directly. To the contrary, Smoke Smart’s representative confirmed that he was unable to acquire lithium ion battery cells directly from LG Chem, and instead obtained them from a China-based supplier, Shenzhen Feyate Technology Co., Ltd., that in turn purportedly acquired its supply from a China-based e-bike manufacturer that apparently supplied Feyate and other companies in the vaping industry with surplus LG brand lithium ion battery cells in violation of the manufacturer’s instructions. (A280–83.)

The Motion was called, heard and submitted on November 16, 2018. (A344.) Respondent then directed Bishop to file an Amended Petition, setting forth allegations to explain how Smoke Smart obtained the lithium ion battery it sold to Bishop for use as a replaceable, rechargeable battery with his e-cigarette device. (A345.) Bishop filed his Fourth Amended Petition on December 16, 2018, in which he alleged that “LG distributed the subject battery to a distributor, who in turn sold and shipped the subject battery to Smoke Smart, LLC in St. Louis, County” and that LG allegedly “knew, or should have known, that its distributor was distributing and/or selling its 18650 batteries to consumers across the United States, including in Missouri.” (A345, ¶ 6.)

On January 2, 2019, LG Chem filed its Motion to Dismiss the Fourth Amended Petition, incorporating the grounds from its Motion to Dismiss the Third Amended Petition, and seeking an order dismissing the Fourth Amended Petition for lack of personal jurisdiction on the same grounds. (A360.) On April 1, 2019, Respondent, the Honorable Nancy Watkins McLaughlin, denied LG Chem’s Motion to Dismiss the Fourth Amended Petition for lack of personal jurisdiction. (A371.) Respondent determined that personal jurisdiction could be exercised over LG Chem despite Bishop’s failure to allege any facts that, if true, would support the exercise of personal jurisdiction over LG Chem and in disregard of controlling precedent establishing that jurisdiction cannot be exercised over LG Chem consistent with due process in this case.

On April 19, 2019, Relator LG Chem sought a Writ of Prohibition in the Missouri Court of Appeals. (Relator’s Pet. for Writ of Prohibition, E.D. Missouri Court of Appeals.)³ On June 26, 2019, the Missouri Court of Appeals denied LG Chem’s Petition for Writ of Prohibition. (A379.) Relator then filed its Petition for Writ of Prohibition in this Court on July 9, 2019. This Court issued a Preliminary Writ of Prohibition on September 3, 2019, directing Respondent to file an Answer by October 3, 2019 and to take “no further action” in the case except to file the written return. Bishop filed an Answer and Return to the Writ on October 3, 2019.

³ Relator also sought a stay of proceedings pending the outcome of its Writ Petition, which Respondent granted on May 3, 2019. (A378.)

POINTS RELIED ON

- I. Relator is entitled to an order prohibiting Respondent from enforcing her order denying LG Chem's Motion to Dismiss because LG Chem is not subject to personal jurisdiction in this case in that: Bishop does not argue that LG Chem is subject to general jurisdiction, and LG Chem showed that it is not; Bishop cannot show that LG Chem engaged in any conduct bringing it within the reach of Missouri's long-arm statute because Bishop does not allege facts that, if true, would show that LG Chem either transacted business in or committed a tortious act in Missouri so as to satisfy Missouri's long-arm statute; and Due Process prevents the exercise of specific personal jurisdiction over LG Chem based on Bishop's allegation that LG Chem placed the subject product into the stream of commerce when Bishop's own allegations establish that the product at issue arrived in Missouri as the result of the unilateral actions of multiple third party intermediaries and not as the result of any connection formed between LG Chem and Missouri, and when the only connection Bishop attempts to make between LG Chem and Missouri is the allegation that LG Chem allegedly knew or should have known that third parties would sell its products throughout the United States, including in Missouri, when controlling precedent establishes that awareness that a product may reach the forum state is insufficient to satisfy due process.

Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cnty., 137 S. Ct. 1773 (2017).

BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549 (2017).

State ex rel. Norfolk S. Ry. Co. v. Dolan, 512 S.W.3d 41 (Mo. banc 2017).

- II. Relator is entitled to an order prohibiting Respondent from enforcing her order or ordering jurisdictional discovery because Bishop's Answer does not provide any basis to support any action other than immediate dismissal of Bishop's cause against LG Chem, including because neither LG Chem's consent to personal jurisdiction in another case brought in Missouri, nor the fact that counsel for LG Chem engaged in communications with Bishop's counsel regarding the time period for filing a responsive pleading in this case can constitute a waiver of LG Chem's personal jurisdiction defense; and when Bishop is not automatically entitled to conduct jurisdictional discovery and when a foreign defendant like LG Chem should not be subjected to the burden of engaging in jurisdictional discovery when Bishop's own allegations and facts offered by Bishop in opposition to LG Chem's motion to dismiss presented to the court below establish that jurisdiction cannot be exercised consistent with due process, and therefore due process protects LG Chem from the burden of engaging in discovery when the facts necessary to determine that jurisdiction does not exist are already before the Court.

Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985).

Andra v. Left Gate Prop. Holding, Inc., 453 S.W.3d 216 (Mo. banc 2015).

White v. Marsh, 646 S.W.2d 357 (Mo. banc 1983).

Dow Chem. Co. v. Calderon, 422 F.3d 827 (9th Cir. 2005).

STANDARDS OF REVIEW

A. Motion to Dismiss for Lack of Personal Jurisdiction

The plaintiff has the burden of proving that personal jurisdiction is proper. *Bryant v. Smith Interior Design Grp., Inc.*, 310 S.W.3d 227, 231 (Mo. banc 2010) (“When personal jurisdiction is contested, ‘it is the plaintiff who must shoulder the burden of establishing that defendant's contacts with the forum state were sufficient.’”). Whether Bishop met his burden is a question of law to be reviewed *de novo*. *Andra v. Left Gate Prop. Holding, Inc.*, 453 S.W.3d 216, 225 (Mo. banc 2015).

“A reviewing court evaluates personal jurisdiction by considering the allegations contained in the pleadings to determine whether, if taken as true, they establish facts adequate to invoke Missouri’s long-arm statute and support a finding of minimum contacts with Missouri sufficient to satisfy due process.” *Bryant*, 310 S.W.3d at 231. When a motion to dismiss for lack of personal jurisdiction is based on facts not appearing in the record, a court may also consider affidavits properly filed in support of the motion. *Andra*, 453 S.W.3d at 224.

A plaintiff seeking to establish a *prima facie* case of specific personal jurisdiction must show that (1) the defendant purposefully availed itself of the privilege of conducting activities within the forum State such that the defendant should reasonably anticipate being haled into court in this state, and (2) the suit arises out of or relates to the contacts formed between the defendant and the forum state. *Andra*, 453 S.W.3d at 226 (citing *Bryant*, 310 S.W.3d at 232–33). If the plaintiff makes this showing, the burden shifts to the defendant

to show that the exercise of jurisdiction would not be reasonable. When, as here, the first two elements are lacking, the Court need not conduct this reasonableness inquiry.

B. Writ of Prohibition

“The essential function of prohibition is to correct or prevent an inferior court or agency from acting without or in excess of its jurisdiction.” *State ex rel. Calzone v. Missouri Ethics Comm'n*, 531 S.W.3d 515, 520 (Mo. App. 2017) (quotation omitted).

Prohibition will only issue to (1) prevent a court from acting in excess of its authority or jurisdiction; (2) remedy a court acting in excess of its authority or jurisdiction or abusing its discretion; or (3) avoid irreparable harm to a party. *State ex rel. PPG Indus., Inc. v. McShane*, 560 S.W.3d 888, 890 (Mo. banc 2018). “Prohibition is the proper remedy to prevent further action of the trial court where personal jurisdiction of the defendant is lacking.” *Id.*

In numerous cases in recent years, Missouri appellate courts have issued writs of prohibition when trial courts have inappropriately denied motion to dismiss based on an absence of personal jurisdiction, admonishing trial courts to strictly enforce the limits of due process on the exercise of personal jurisdiction over non-resident defendants. *See, e.g., State ex rel. Coleman v. Wexler Horn*, 568 S.W.3d 14 (Mo. banc 2019); *PPG Indus.*, 560 S.W.3d 888, 894; *State ex rel. Norfolk S. Ry. Co. v. Dolan*, 512 S.W.3d 41, 45 (Mo. banc 2017); *State ex rel. Bayer Corp. v. Moriarty*, 536 S.W.3d 227, 234 (Mo. banc 2017); *State ex rel. Wills v. DePriest*, 486 S.W.3d 459, 452 (Mo. App. 2016).

ARGUMENT

I. Relator is entitled to an order prohibiting Respondent from enforcing her order denying LG Chem's Motion to Dismiss because LG Chem is not subject to personal jurisdiction in this case in that: Bishop does not argue that LG Chem is subject to general jurisdiction, and LG Chem showed that it is not; Bishop cannot show that LG Chem engaged in any conduct bringing it within the reach of Missouri's long-arm statute because Bishop does not allege facts that, if true, would show that LG Chem either transacted business in or committed a tortious act in Missouri so as to satisfy Missouri's long-arm statute; and Due Process prevents the exercise of specific personal jurisdiction over LG Chem based on Bishop's allegation that LG Chem placed the subject product into the stream of commerce when Bishop's own allegations establish that the product at issue arrived in Missouri as the result of the unilateral actions of multiple third party intermediaries and not as the result of any connection formed between LG Chem and Missouri, and when the only connection Bishop attempts to make between LG Chem and Missouri is the allegation that LG Chem allegedly knew or should have known that third parties would sell its products throughout the United States, including in Missouri, when controlling precedent establishes that awareness that a product may reach the forum state is insufficient to satisfy due process.

A. Introduction

In this product liability action, Bishop contends he was injured when a lithium ion battery he purchased from Defendant Smoke Smart, LLC for use as a replaceable, rechargeable battery with his e-cigarette device exploded in his pocket. Bishop initially alleged the subject battery was manufactured by Samsung, but later amended his petition to allege the subject battery was manufactured by LG Chem, Ltd.

LG Chem is a Korean company with its headquarters in Seoul, South Korea. LG Chem does not design, manufacture, distribute, advertise, or sell lithium ion battery cells for use by individual consumers as replaceable, rechargeable batteries in e-cigarette devices, and has never authorized any manufacturer, distributor, retailer, or re-seller to do so either. LG Chem has never conducted any business with Smoke Smart, LLC, the retailer

that sold the subject battery to Bishop, and nor any other retailer of 18650 lithium ion batteries in the State of Missouri.

In his pleadings and evidence that Bishop presented to attempt to support jurisdiction, Bishop contended only that LG Chem placed the subject battery in the stream of commerce and was allegedly aware that third parties were distributing its product throughout the United States, including in Missouri. Bishop never identified a single action allegedly taken by LG Chem directed to or connected in any way to the State of Missouri related to his claims, and LG Chem introduced admissible evidence that no such connections exist. Due process does not allow the exercise of jurisdiction over a foreign defendant based solely on allegations that a defendant placed its product into the stream of commerce with alleged knowledge or awareness that the product would make its way into the forum state. LG Chem should therefore be dismissed from this action for lack of personal jurisdiction.

Pursuant to Missouri Appellate Rule 84.04(e), LG Chem confirms that it raised a defense of lack of personal jurisdiction by filing a motion to dismiss on this basis and has preserved its personal jurisdiction defense throughout the pendency of the underlying suit and this appeal.

B. LG Chem is not “at home” in Missouri, and no exceptional circumstances exist that would justify the exercise of general jurisdiction in Missouri when LG Chem is a Korean company with its headquarters in Seoul, South Korea.

With regard to general jurisdiction, Bishop alleges in his Fourth Amended Petition that LG Chem is a “South Korean company with its principal place of business in Seoul, South Korea.” (A345.) Here, Bishop did not allege any facts that, if true, would support

the conclusion that LG Chem was “at home” in Missouri, and LG Chem affirmatively introduced uncontroverted evidence, through the Affidavit of Sung Han Ryu, establishing that it is not. *See BNSF Ry. v. Tyrrell*, 137 S. Ct. 1549, 1559 (2017) (absent exceptional circumstances, the only relevant considerations for general jurisdiction for a corporate defendant are the corporation’s state of incorporation and principal place of business); *Daimler AG v. Bauman*, 571 U.S. 117, 122 (2014) (a defendant is subject to a court's general personal jurisdiction only when its contacts are “so constant and pervasive as to render it essentially at home” in the forum); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *State ex rel. Norfolk S. Ry. Co. v. Dolan*, 512 S.W.3d 41, 47 (Mo. 2017).

Bishop never argued to the trial court that general jurisdiction existed, the trial court’s Order on review did not address general jurisdiction, and Bishop’s Answer to this Court’s Preliminary Writ likewise does not address general jurisdiction. Therefore, Bishop has essentially abandoned this issue and conceded the absence of general jurisdiction.

C. LG Chem is entitled to an order prohibiting Respondent from exercising specific personal jurisdiction over it because Missouri’s long-arm statute is not satisfied, in that the Plaintiff’s allegations regarding LG Chem’s activities are insufficient to place its conduct within the statute’s reach.

Missouri's long-arm statute expands a court’s jurisdictional reach only to the extent allowed by the due process clause of the Fourteenth Amendment of the United States Constitution. *See Andra v. Left Gate Prop. Holding, Inc.*, 453 S.W.3d 216, 226 (Mo. banc 2015); *State ex rel. Norfolk S. Ry. Co. v. Dolan*, 512 S.W.3d 41, 46 (Mo. banc 2017) (citing *Daimler AG v. Bauman*, 134 S. Ct. 746, 751 (2014)).

In pertinent part, Missouri’s long-arm statute authorizes Missouri courts to exercise jurisdiction over any company, whether or not a citizen or resident of Missouri, for causes of action arising from (1) the transaction of any business within the state; (2) the making of any contract within the state; (3) the commission of a tortious act within the state; or (4) the ownership, use, or possession of any real estate within the state. *See* Mo. Rev. Stat. § 506.500.1(1)-(4). The statute further explains that “[o]nly causes of action arising from acts enumerated in this section may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.” *Id.* § 506.500.3. In applying the long-arm statute, Missouri courts have held that “[a]ctivities which satisfy the provisions of (the long-arm statute) must also be the basis of plaintiff’s cause of action.” *Anderson Trucking Serv., Inc. v. Ryan*, 746 S.W.2d 647, 650 (Mo. App. 1988) (citing *State ex rel. Bank of Gering v. Schoenlaub*, 540 S.W.2d 31, 35 (Mo. banc 1976)).

Here, Respondent incorrectly found that Missouri’s long-arm statute was satisfied, solely based on Bishop’s allegation that “he was injured in Missouri as a result of a defective battery designed and manufactured by LG Chem.” (A374.) This finding ignores the fact that LG Chem itself did not transact any business within the state; make any contract within the state; commit a tortious act within the state; or own, use, or possess of any real estate within the state. The subject battery arrived in the State of Missouri through the unilateral actions of at least three third parties, including the Missouri-based retailer, Smoke Smart, the China-based supplier, Shenzhen Feyate, and the unnamed China-based e-bike manufacturer that allegedly supplied the subject LG brand cells to Shenzhen Feyate,

according to a witness's statement in another case. Therefore, Respondent erred in finding that Missouri's long-arm statute was satisfied.

D. LG Chem is entitled to an order prohibiting Respondent from exercising specific personal jurisdiction over it because due process cannot be satisfied when Plaintiff's claims do not "arise out of or relate to" any contacts formed between LG Chem and Missouri but instead arise out of the unilateral actions of third parties responsible for directing LG Chem's product to a consumer market in Missouri.

Bishop argued to the court below that specific jurisdiction could be exercised over LG Chem pursuant to a "stream of commerce" theory. (A69–74.) Respondent erroneously concluded, relying principally on *Andra v. Left Gate Prop. Holding, Inc.*, 453 S.W.3d 216, 224 (Mo. banc 2015) and *Dillaplain v. Lite Indus., Inc.*, 788 S.W.2d 530 (Mo. App. 1990), that personal jurisdiction could be exercised over LG Chem based on Bishop's allegations in his Fourth Amended Petition that LG Chem placed its product into the stream of commerce "with the expectation or knowledge that the battery would ultimately be offered to consumers in Missouri." (A375.) In reaching this conclusion, Respondent disregarded the fact that Plaintiff had failed to show that his claims arose out of any connection formed by LG Chem with Missouri, as required by due process.

1. Due Process prevents the exercise of jurisdiction based solely on a manufacturer's placement of a product into the stream of commerce with alleged knowledge or awareness the product would reach the forum state.

Due process prevents the exercise of jurisdiction based *solely* on a manufacturer's placement of a product into the stream of commerce with alleged knowledge or awareness that the product would reach the forum state. Instead, due process requires a showing that the defendant's own actions, not the actions of the plaintiff or other third parties, create a

substantial connection with the forum state *and* that the suit arose from those contacts. *State ex rel. PPG Indus., Inc. v. McShane*, 560 S.W.3d 888 (Mo. 2018); *Andra v. Left Gate Prop. Holding, Inc.*, 453 S.W.3d 216 (Mo. banc 2015); *see also M.J. ex rel. Oliver v. Ford Motor Co.*, No. 4:19CV1846 HEA, 2019 WL 4194372, at *1 (E.D. Mo. Sept. 4, 2019) (“Actual in-forum conduct by a defendant—not merely an unrelated third party, is necessary to establish specific personal jurisdiction.”).

In *Andra*, the Missouri Supreme Court recognized that for a foreign defendant to be subject to minimum contacts under a “stream of commerce” theory of jurisdiction, the foreign defendant’s “conduct and connection with the state must be such that it should reasonably anticipate being haled into court there.” 453 S.W.3d at 231 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

Following *Andra*, the U.S. Supreme Court in *Bristol-Myers* put to rest any debate about whether “something more” than foreseeability is required for stream of commerce jurisdiction (it is). Rather, a plaintiff must establish a connection between the non-resident defendant itself, the forum, and the claims at issue. *Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cnty.*, 137 S. Ct. 1773, 1778 (2017) (rejecting the argument that the defendant was subject to personal jurisdiction in California simply because it had contracted with a California distributor to sell its products in the state, when those actions were not connected to the plaintiffs’ claims.);⁴ *see also J. McIntyre Mach., Ltd. v. Nicastro*,

⁴ Plaintiff Peter Bishop’s Suggestions in Opposition to Relator’s Petition for Writ of Prohibition (at page 6), filed in the Missouri Supreme Court on July 22, 2019, argues that *Bristol-Myers* “is not helpful” because that case is a mass tort case with 600 defendants, most of whom were not residents or injured in the forum state. However, *Bristol-Myers* is

564 U.S. 873, 883 (2011) (“[I]t is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment.”).

Indeed, even before the Supreme Court’s decision in *Bristol-Myers*, Missouri courts have long recognized that “placement of a product into the stream of commerce without more is not an action of defendant purposefully directed toward the forum state.” *Pohlmann v. Bil-Jax, Inc.*, 954 S.W.2d 371, 373 (Mo. Ct. App. 1997).

In *Pohlmann v. Bil-Jax, Inc.*, 954 S.W.3d 371, 373 (Mo. App. 1997), the court addressed a products liability case in which the sale of a product—which was manufactured by the nonresident defendant, later sold in Missouri, and injured the plaintiff in Missouri—was the only evidence of the defendant’s contacts with Missouri. In *Pohlmann*, the court found that even though it was foreseeable to the defendant that the product might be sold in Missouri, that kind of foreseeability was not enough to give rise to personal jurisdiction:

Foreseeability alone is not a sufficient benchmark for personal jurisdiction. The foreseeability that is critical to due process is not the mere likelihood that a product will find its way into the forum state; rather it is that the defendant’s conduct and connection with the forum state are such that it should reasonably anticipate being haled into court there. “The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state.” The placement of a product into the stream of commerce without more is not an action of defendant purposefully directed toward the forum state.

not limited to mass tort cases. To the contrary, this Court has relied on *Bristol-Myers* when deciding personal jurisdiction in a case involving only one plaintiff. *See PPG Indus.*, 560 S.W.3d at 891 (citing to *Bristol-Myers* in a case involving one plaintiff and two defendants, as in Bishop’s case); *see also Oliver*, 2019 WL 4194372, at *2, 3, 4 (relying on *Bristol-Myers* in a case involving one plaintiff and one defendant). Of note, the Oklahoma Supreme Court rejected a similar argument in *Montgomery v. Airbus Helicopters, Inc.*, 414 P.3d 824, 833 (Okla. 2018), concluding that *Bristol-Myers* has virtually eliminated stream of commerce jurisdiction. Therefore, citing to *Bristol-Myers* does not constitute a “false analogy.”

Id. The court further opined that just because the defendant assigned Missouri as a territory to a sales representative, without some evidence that the defendant exercised control over the salesperson’s activities regarding sales in Missouri, was not sufficient to establish minimum contacts, and “the mere likelihood that its product would find its way into Missouri does not satisfy constitutional due process.” *Id.* “Likewise, the intent to market and sell in Missouri is not sufficient to support jurisdiction, because jurisdiction is premised on the defendant’s activities of the defendant which *were calculated* to reach Missouri, not on its *intentions* regarding Missouri.” *Id.* at 373–74 (emphasis added).

In this case, Respondent relies on *Dillaplain v. Lite Industries, Inc.*, 788 S.W.2d 530, 535 (Mo. App. 1990), for the proposition that placing a product into the stream of commerce plus knowledge of its ultimate destination is sufficient for personal jurisdiction. *Dillaplain* was decided long before the Supreme Court’s clarifying pronouncement in *Bristol-Myers*, and the Missouri Court of Appeals reached the opposite conclusion in *Pohlmann*. Further, since *Bristol-Myers* was issued, *Dillaplain* has not been cited for the proposition that personal jurisdiction may be exercised over a non-resident based on the mere foreseeability that a defendant may know that its product may eventually be distributed by an unrelated third party in Missouri. Instead, as recognized by the federal district court recently in *A.T. ex rel. Travis v. Hahn*, 341 F. Supp. 3d 1031, 1038-39 (E.D. Mo. 2018), “such a theory is inapplicable in light of *Bristol-Myers*.” Specifically, the court in *Hahn* stated that “[t]o the extent plaintiffs’ stream-of-commerce theory purports to attach specific personal jurisdiction on the basis of mere foreseeability related to a defendant’s

relationships with third parties, without any attention paid to a defendant's own discrete efforts to target a specific forum, the Court finds that such a theory is inapplicable in light of *Bristol-Myers*.” *Id.* at 1038–39. Further, the court likewise recognized that in *Bristol-Myers*, “[t]here was no suggestion that mere expectation or knowledge of the effects of a distributing relationship sufficed to establish personal jurisdiction.” *Id.* at 1037 (emphasis added).

In this case, like the plaintiff in *Pohlmann*, Bishop has not alleged that LG Chem *calculated its activities* to reach Missouri, nor has he alleged that the third-party distributor is LG Chem’s agent or that LG Chem controlled the distributor’s activities, nor could he. Bishop himself introduced deposition testimony of Smoke Smart’s own representative, establishing that Smoke Smart’s supply of LG brand lithium ion batteries did not come from LG Chem and did not come from a supplier directly connected to LG Chem. To the contrary, the very witness on whose testimony Respondent relied in opposition to LG Chem’s Motion to Dismiss, Smoke Smart employee James Buchanan, confirmed that Smoke Smart obtained the LG HG2 batteries for sale to consumers (in plain, white boxes that did not bear any LG label or insignia) solely through the actions of intermediaries, including Shenzhen Feyate Technology Co., Ltd. (“Feyate”) and not from LG Chem, nor from any supplier authorized by LG Chem. (A280, A283, A288, A308, A314.)

Therefore, Respondent erred by finding that placing the battery in the stream of commerce in this case, “with the [alleged] expectation or knowledge that the battery would ultimately be offered to consumers in Missouri” is enough to satisfy the requirement that “something more” is needed for personal jurisdiction than merely delivering its products

into the stream of commerce. In this case, the product's distribution in Missouri resulted from the actions of multiple third parties, and there is nothing to connect LG Chem, Missouri, and Plaintiff's claims. Respondent's Order must be reversed.

2. Plaintiff's claims do not "arise out of or relate to" any of LG Chem's contacts with Missouri.

Respondent erred by finding personal jurisdiction when the lawsuit did not arise from or relate to Plaintiff's contacts with Missouri. Both the U.S. Supreme Court and Missouri courts hold that for a state court to exercise specific jurisdiction, the lawsuit must arise out of or relate to the defendant's contacts with the forum. *See, e.g., Bristol-Myers*, 137 S.Ct. at 1780; *Daimler AG v. Bauman*, 571 U.S. 117, 122 (2014); *Andra*, 453 S.W.3d at 226 (citing *Bryant*, 310 S.W.3d at 232–33). "In other words, there must be 'an affiliation between the forum and the underlying controversy, principally, [an] activity or occurrence that takes place in the forum State.'" *Bristol-Myers*, 137 S. Ct. at 1780. Stated another way, for a state to exercise specific jurisdiction, "the suit" must "arise out of or relate to the defendant's contacts with the forum." *Id.* at 1780 (modifications and emphasis in original) (citing *Daimler*, 134 S.Ct. at 754). "When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State." *Id.* at 1781; *see also Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 931, n.6 (2011) ("[E]ven regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales").

Therefore, to establish that Bishop's alleged injuries "arise out of or relate to" LG Chem's contacts with Missouri, he must show that his alleged injuries "arise proximately"

from LG Chem’s “purposefully derived benefit” and contacts with the State of Missouri. *See State ex rel. Cedar Crest Apartments, LLC v. Grate*, 577 S.W.3d 490, 494 (Mo. banc 2019) (holding that no personal jurisdiction existed because, among other things, the plaintiff’s causes of action did not arise out of the defendant’s contacts with Missouri—even though the defendant was registered to do business in Missouri, solicited business here, filed lawsuits here, and owned property here—and refusing to impute contacts of the defendant’s managing member, who lived in Missouri); *see also Bristol-Myers*, 137 S. Ct. at 1783 (2017) (holding that the plaintiff must show a sufficient nexus between the defendant’s forum-related contacts and the claims at issue); *Walden v. Fiore*, 571 U.S. 277, 291 (2014).

The U.S. District Court for the Eastern District of Missouri recently addressed this issue in a product liability case and found that the court had no personal jurisdiction over an American manufacturer (Ford) because the plaintiff’s claims did not arise out of or relate to Ford’s contacts with Missouri. In *Oliver v. Ford Motor Co.*, No. 4:19CV1846 HEA, 2019 WL 4194372, at *1 (E.D. Mo. Sept. 4, 2019), the facts showed that Ford had designed, manufactured, assembled, and supplied the accident vehicle in which the steering wheel dislodged from its steering column, causing a crash that killed the plaintiff’s decedent. Further, Ford had designed, manufactured, contracted, assembled, and inspected the allegedly defective steering wheel and column. The court found that Ford had substantial contacts with Missouri: it was registered to do business in Missouri; did substantial and continuous business activities in Missouri; derived substantial and continuous business revenue from its business activities in Missouri; maintained offices in St. Louis, Missouri;

placed vehicles for sale in Missouri; and had a manufacturing plant in Missouri. *Id.* Like Bishop, the plaintiff in *Oliver* did not allege that the car was manufactured in Missouri or that Ford itself sold the car to any party in Missouri. Instead, Ford had last distributed the car to a dealership in Tennessee, and the plaintiff did not allege that the car ended up in Missouri by Ford, its agent, or alter ego. *Id.* at *4. *Cf. Pohlmann*, 954 S.W.2d at 372 (“Examples of conduct evincing an intent to serve the market include . . . marketing the product *through an agent who has agreed to serve as the sales agent in the forum state.*”) (emphasis added).

In *Oliver*, the only connection between Ford and the accident was the fact that the decedent was a Missouri resident who was injured in Missouri, a fact that the plaintiff relied on to support jurisdiction. The court held that, under Supreme Court precedent, “ ‘The proper question is *not where the plaintiff experienced a particular injury or effect* but whether the *defendant’s conduct* connects him to the forum in a meaningful way.’ ” *Oliver*, 2019 WL 4194372, at *3 (emphasis in original) (quoting *Walden v. Fiore*, 571 U.S. at 290). The court continued: “Put another way, it is impermissible under due process to “allow[] a plaintiff’s contacts with the defendant and forum to drive the jurisdictional analysis.” Accordingly, the location of the Plaintiff’s injury in Missouri does not confer the Court with specific personal jurisdiction over Ford.” *Id.*

Instead, the acts giving rise to the claim in *Oliver* were the design, manufacture, assembly, or installation of the steering wheel and design, manufacture, sale, distribution, and failure to warn about the car. *Id.* at *1, 3. The plaintiff, however, did not allege that any of those acts were performed in Missouri. *Id.* at *3. Therefore, despite Ford’s

undeniably substantial contacts in Missouri, its alleged acts giving rise to the lawsuit were not connected to Missouri: “Exercising personal jurisdiction over Ford here would do nothing more than create the sort of ‘loose and spurious general jurisdiction’ condemned in *Bristol-Myers*. This Court declines to do so.” *Id.*

Other Missouri federal district courts, also relying on U.S. Supreme Court precedents, have uniformly rejected the arguments that Bishop and Respondent rely on. *See, e.g., Fullerton v. Smith & Nephew, Inc.*, C.A. No. 1:18-CV-245, 2019 WL 2028712, at *4 (E.D. Mo. May 8, 2019) (dismissing medical product manufacturer for lack of personal jurisdiction, finding that an allegation the manufacturer marketed, promoted, and sold a product in the state does not establish specific jurisdiction absent some facts connecting the injury to the manufacturer’s contacts with Missouri)⁵; *Allied Ins. Co. of Am. v. Ecovacs Robotics, Inc.*, No. 1:19-cv-13, 2019 WL 2173430, at *1–3 (E.D. Mo. May 20, 2019) (finding no personal jurisdiction in products liability case because claims lacked a nexus with defendant manufacturer’s contacts with Missouri, and plaintiff did not allege that the defendant’s selling, marketing, advertising, distributing, branding, or shipping of the product occurred in Missouri).

⁵ Contrary to Respondent’s contention that *Fullerton* is inapposite here, (Respondent’s Suggestions in Opposition to the Writ, at page 7), *Fullerton* supports the proposition that specific jurisdiction cannot be exercised when the claims at issue do not arise from the defendant manufacturer’s contacts with Missouri. *Fullerton* also establishes that a plaintiff’s allegation that the manufacturer marketed, promoted, and sold a product in Missouri cannot establish jurisdiction without facts connecting the injury to the manufacturer’s contacts with Missouri.

Here, Bishop alleged in his Fourth Amended Petition that LG Chem placed the subject battery into the stream of commerce and that the Missouri-based retailer that sold the subject battery to Bishop acquired the cell from an unnamed distributor allegedly connected to LG Chem. (A346, ¶ 5.) Bishop never named the purported distributor in his Fourth Amended Petition, but he offered the deposition testimony of a representative of the retailer, Smoke Smart, taken in another case. Smoke Smart's representative, Jimmy Buchanan, testified that Smoke Smart purchased its supply of LG batteries from a China-based supplier, Shenzhen Feyate Technology Co., Ltd.—not from LG Chem. (A280.) Mr. Buchanan also testified that he believed Shenzhen Feyate obtained its supply of LG batteries from a China-based e-bike manufacturer—again, not from LG Chem. (A372.) Finally, Mr. Buchanan confirmed that Smoke Smart never purchased battery cells directly from LG Chem, and he knew that he could not. (A280–81.) Bishop did not allege that LG Chem itself engaged in any activities in or directed to Missouri, nor did Bishop allege that LG Chem exercised any control over the China-based e-bike manufacturer that apparently re-directed the battery cells to Feyate, in China. Accordingly, Bishop's allegations, taken as true, were insufficient to establish any connection between LG Chem and Missouri related to Bishop's claims.

Moreover, LG Chem introduced admissible and unconverted evidence that it never authorized any distributor, wholesaler, retailer, or re-seller to advertise, distribute, or sell LG 18650 lithium-ion battery cells for use by individual consumers as replaceable, rechargeable batteries in e-cigarette devices. (A59, Aff. of Sung Han Ryu, ¶ 11.) Further,

LG Chem provided sworn testimony that it has no relationship with the retailer in this case, Smoke Smart. (A60, ¶ 13.)

Under these facts, Plaintiff cannot show that his claims arise out of any act of LG Chem connected to Missouri. Respondent's Order did not explicitly find that Bishop's claims arose from or related to LG's contacts with Missouri, and indeed, precedent from the United States Supreme Court and Missouri state and federal courts support the opposite conclusion: Bishop's claims do not arise out of any contacts formed between LG Chem and Missouri. Therefore, Respondent erred by holding that the court could exercise personal jurisdiction.

3. Respondent's reliance on orders issued by courts in other jurisdiction is not only misplaced, but also misleading.

In his Answer to the Supreme Court's Preliminary Writ, Bishop contends that two other courts have recently analyzed this very issue, and concluded that personal jurisdiction was appropriate over LG Chem in California and South Carolina. LG Chem's personal jurisdiction defense is based on due process, which depends on Missouri law and the controlling decisions of the United States Supreme Court. In addition, whether LG Chem had sufficient minimum contacts with California or South Carolina to support the exercise of personal jurisdiction in those cases (it did not), is not relevant to the question whether LG Chem created sufficient contacts with the State of Missouri to support the exercise of personal jurisdiction here.

Further, Bishop has misrepresented not only the issue before those courts, but has also created the false impression that other courts have found that due process can support

the exercise of personal jurisdiction based on placement of a product in the stream of commerce coupled with allegations of constructive knowledge that a distributor was distributing or selling a product to consumers across the United States. Two other federal district courts (in the Eastern District of Washington and the District of Arizona) and multiple state courts (including in Washington, New Jersey, and Oklahoma) have dismissed similar actions against LG Chem for lack of personal jurisdiction in those states, recognizing that due process does not allow the exercise of jurisdiction over LG Chem when its product arrived in the forum state as the result of the unilateral actions of third parties and not as the result of any purposeful conduct directed by LG Chem to the State of Missouri. At least two intermediate appellate courts in other jurisdictions are currently faced with similar issues, and no state or federal court of appeal has yet to address this issue. This Court is bound only by the limits of due process, as interpreted by the United States Supreme Court and Missouri Supreme Court, and should make its Preliminary Writ of Prohibition permanent in order to correct the erroneous order issued by the Respondent below.

E. Conclusion

Ultimately, the undisputed record in this case establishes that LG Chem is a foreign company that manufactured and sold lithium ion battery cells outside the State of Missouri. Even if LG Chem could have foreseen that third parties might sweep its lithium ion battery cells into the United States, to be sold by third parties to consumers in the United States, including in Missouri, for use as replaceable, rechargeable batteries with e-cigarette, such alleged awareness is insufficient to support the exercise of personal jurisdiction when the

defendant itself has not formed a connection to the forum state giving rise to the plaintiff's claims. No such connection exists here, and personal jurisdiction is lacking.

II. Relator is entitled to an order prohibiting Respondent from enforcing her order or ordering jurisdictional discovery because Bishop's Answer does not provide any basis to support any action other than immediate dismissal of Bishop's cause against LG Chem, including because neither LG Chem's consent to personal jurisdiction in another case brought in Missouri, nor the fact that counsel for LG Chem engaged in communications with Bishop's counsel regarding the time period for filing a responsive pleading in this case can constitute a waiver of LG Chem's personal jurisdiction defense; and when Bishop is not automatically entitled to conduct jurisdictional discovery and when a foreign defendant like LG Chem should not be subjected to the burden of engaging in jurisdictional discovery when Bishop's own allegations and facts offered by Bishop in opposition to LG Chem's motion to dismiss presented to the court below establish that jurisdiction cannot be exercised consistent with due process, and therefore due process protects LG Chem from the burden of engaging in discovery when the facts necessary to determine that jurisdiction does not exist are already before the Court.

A. Introduction

In response to LG Chem's Petition for a Permanent Writ of Prohibition, Bishop argues that the exercise of personal jurisdiction is "reasonable" because LG Chem consented to personal jurisdiction in a prior case. Respondent reached the same conclusion below. However, consent to personal jurisdiction in one case does not constitute a waiver of the personal jurisdiction defense in that forum for all future cases. Further, the question of reasonableness should not be reached because Bishop has failed to meet his burden of establishing the first two elements of the specific jurisdiction test.

Bishop also argues, for the first time in this case, that LG Chem waived its personal jurisdiction defense by the action of its counsel having communicated with Bishop's counsel to request an extension of time to file a responsive pleading. Bishop has provided the Court with no supporting authority for this proposition, nor does such authority exist. Missouri courts have consistently allowed such extensions in substantially similar

circumstances without finding any waiver, and Missouri's waiver doctrine requires that affirmative conduct occur in the court action that is not present here.

In a final attempt to avoid application of the due process analysis, Bishop requests this Court to remand this case to allow discovery on the issue of personal jurisdiction. The Court should reject this request. The undisputed record before this Court plainly demonstrates that LG Chem is not subject to personal jurisdiction in Missouri, nor has Bishop shown that there is any contradictory evidence requiring further explication. As such, due process protects LG Chem from the burden of any such discovery process.

Pursuant to Missouri Appellate Rule 84.04(e), LG Chem confirms that it raised a defense of lack of personal jurisdiction by filing a motion to dismiss on this basis and has preserved its personal jurisdiction defense throughout the pendency of the underlying suit and this appeal.

- B. LG Chem is entitled to an order prohibiting Respondent from exercising personal jurisdiction over it because Respondent erred by concluding the exercise of jurisdiction over LG Chem was reasonable based on LG Chem's consent to suit in another matter filed in Missouri and when Respondent never should have reached this question when Bishop failed to establish a prima facie case of jurisdiction.**

Only if a plaintiff succeeds in satisfying both of the first two prongs of the due process analysis does the burden then shift to the defendant to "present a compelling case" that the exercise of jurisdiction would not be reasonable. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–78 (1985); *Andra*, 453 S.W.3d at 233. Respondent never should have reached this question because Plaintiff failed to meet his burden of establishing that the long-arm statute was satisfied or that LG Chem had sufficient minimum contacts with

Missouri such that due process was satisfied, and it would not be reasonable to exercise jurisdiction over a foreign defendant that has neither continuous and systematic contacts with Missouri nor contacts with Missouri related to the claims at issue, and where any contacts between Bishop's claims and Missouri were formed by third parties, not by LG Chem.

Further, LG Chem's consent to jurisdiction in another case is irrelevant to the question whether due process is satisfied because considerations of reasonableness do not come into play when Plaintiff has not met his initial burden of establishing that his claims arise out of contacts LG Chem itself created with the forum state.

To the extent Plaintiff is suggesting that consent to jurisdiction in one prior case in Missouri can support the exercise of specific jurisdiction here, this is contrary to established governing principles. In *Crouch v. Crouch*, 641 S.W.2d 86, 90 (Mo. 1982), the Supreme Court of Missouri recognized that jurisdiction is not waived by nonappearance, because due process requires that, absent minimum contacts, a defendant must take some action to waive jurisdiction in the case at hand. The Supreme Court of Missouri has also rejected the argument that a corporation's having sued and been sued in Missouri courts in the past constitutes a recognition of jurisdiction in Missouri courts. *State ex rel. Norfolk S. Ry. Co. v. Dolan*, 512 S.W.3d 41, 47 (Mo. 2017), *reh'g denied* (Apr. 4, 2017).

Courts in other jurisdictions have expressly rejected the argument that consent to jurisdiction in one case can support the exercise of specific jurisdiction in another case. *See Dow Chem. Co. v. Calderon*, 422 F.3d 827, 835 (9th Cir. 2005) ("[W]e hold that defense

on the merits in a suit brought by one party cannot constitute consent to suit as a defendant brought by different parties.”); *see also Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 937 F.2d 44, 50 n.5 (2d Cir. 1991) (“A party’s consent to jurisdiction in one case, however, extends to that case alone. It in no way opens that party up to other lawsuits in the same jurisdiction in which consent was given, where the party does not consent and no other jurisdictional basis is available.”); *Megadrill Servs. Ltd. v. Brighthouse*, 556 S.W.3d 490, 498 (Tex. App. 2018) (“Abundant and sensible decisions in other jurisdictions reject the argument that a defendant’s participation in a lawsuit constitutes consent to personal jurisdiction in that forum *ad infinitum*.”); *Fesniak v. Equifax Mortg. Servs. LLC*, No. CIV. 14-3728, 2015 WL 2412119, at *6 (D.N.J. May 21, 2015) (collecting “ample authority” that defendant’s participation in a prior lawsuit in the forum concerning different parties did not amount to waiver of personal jurisdiction).

Accordingly, it is legally irrelevant that LG Chem has been sued in other cases in Missouri and previously consented to personal jurisdiction in one prior case in which it appeared as a defendant, nor has Bishop offered any authority to support this argument.

- C. LG Chem did not waive its argument pertaining to personal jurisdiction, in that Missouri’s waiver doctrine does not cover preliminary inter-counsel communications that did not implicate the trial court and did not constitute taking steps inconsistent with a lack of personal jurisdiction and when LG Chem’s first action in the trial court was to move for dismissal for lack of personal jurisdiction.**

For the first time in this lawsuit, Bishop argues that LG Chem waived the right to contest personal jurisdiction by requesting an accommodation from Bishop’s counsel for

an extension of time to respond to his Petition and by asking Bishop's counsel for information to help determine if the battery at issue in this lawsuit was, in fact, manufactured by LG Chem, also for purposes of responding to the Petition. Bishop never raised this issue to the trial court, nor did Bishop raise this issue in response to LG Chem's Petition for Writ of Prohibition, and for good reason. There was no waiver.

1. Requesting an extension of time to respond to the Petition does not waive the defense of jurisdiction.

The Missouri Supreme Court has directly held that a personal jurisdiction defense is not waived by requesting an extension to respond to a pleading. In *White v. Marsh*, 646 S.W.2d 357, 362 (Mo. banc 1983), the court explained the common-sense rationale for rejecting the contention that requesting an extension to conduct additional factual investigation waives personal jurisdiction:

The longarm provisions serve a useful purpose, but the questions of the maximum reach of this process are intricate and difficult. Substantial interests are involved, for defending at great distance may be expensive and inconvenient. Motions setting forth the facts as to minimum contacts must often be supported by affidavits requiring detailed investigation and careful preparation. A properly prepared affidavit can be of great assistance to the Court in ruling a motion. Under the relators' contentions, a defendant would be put to the requirement of filing something which might be less than satisfactory within 30 days from service, without being able to seek an extension to put the papers in better order.

Id. at 361; *see also State ex rel. Antoine v. Sanders*, 724 S.W.2d 502, 503–04 (Mo. banc 1987) (“[A] party who obtains an extension of time to plead does not, by so doing, waive the right to question jurisdiction over the person or venue.”).

Plaintiff's hyper-technical focus on the use of the term “answer” in one e-mail by LG Chem's counsel as part of an email exchange between counsel, seeking an extension

of the time to file a responsive pleading, is unsupported by any authority; directly undermined by *White v. Marsh*, 646 S.W.2d 357, 362, a seminal case addressing communications between counsel that Bishop fails to address in his Answer (*see* Return and Answer at 8–9); and fails to meet the relevant standard for waiver under Missouri law.

Under Missouri law, the defense of lack of personal jurisdiction is waived only when it is omitted from a responsive pleading or in a pre-answer motion. *See* V.A.M.R. 55.27(g); *see also Flair v. Campbell*, 44 S.W.3d 444, 453–54 (Mo. App. 2001) (“With regard to claims challenging the personal jurisdiction of the trial court, ordinarily, “[a] defending party who wishes to raise defenses of lack of personal jurisdiction . . . must do so either in a pre-answer motion or in the party's answer.” If not raised at that time, challenges to the personal jurisdiction of the court are deemed to have been waived under Rule 55.27(g)(1)(B)). Therefore, personal jurisdiction can be asserted in an answer as well as a motion and could have been asserted regardless of the option LG Chem chose to assert it.

Moreover, Bishop’s counsel’s consent to the extension was not conditioned on a promise that LG Chem would not assert any Rule 55.27(a) defenses, whether by answer or motion. The e-mail correspondence has no mention of any conditions, and there were none. In this case, the requests for an extension of time to answer was exactly what the *White* case envisioned: they allowed LG Chem time to conduct a factual investigation and crystallize its personal jurisdiction defense, which was filed as the first court action.

2. Bishop has offered no authority to support his waiver argument.

Asking for information prior to appearing in a lawsuit does not waive a personal jurisdiction defense under Missouri law. Instead, Missouri courts have extended the waiver doctrine only where the defendant first sought to contest personal jurisdiction after appearing in the court without first contesting personal jurisdiction. *See, e.g., Interest of A.R.B.*, No. WD 82162, 2019 WL 4145028, at *9 (Mo. App. Sept. 3, 2019), *reh'g denied* (Oct. 1, 2019).”) (“A defendant waives personal jurisdiction *when he is before the court* and fails to properly raise the issue.”) (emphasis added).

The cases cited in Respondent’s Answer are inapplicable here. None of those cases support Bishop’s argument that jurisdiction can be waived by out-of-court contact between counsel for the defendant and counsel for the plaintiff. In *Abrams v. Four Seasons Lakesites/Chase Resorts, Inc.*, 904 S.W.2d 37, 38–39 (Mo. App. 1995), the court held a defendant made a general appearance and became a party when he appeared and first moved to dismiss the petition, amended the petition, and opposed a motion to compel arbitration. In *Lamastus v. Lamastus*, 886 S.W.2d 721, 725 (Mo. App. 1994), the court found the pro se defendant waived personal jurisdiction by sending a letter to the court, asking for a delay in a divorce proceeding and arguing the merits, which the court determined to be a motion for a continuance without raising the lack of personal jurisdiction. Finally, in *In re Estate of Miller*, 9 S.W.3d 760, 762 (Mo. App. 2000), the court found that the defendant had voluntarily and actively participated in *in-court* proceedings, and therefore he had made a general appearance and was bound by an

unfavorable ruling. *Id.* at 767. Furthermore, the court found the waiver argument was moot and did not address it.

D. This cause should not be remanded to conduct jurisdictional discovery because Bishop’s own allegations and the evidence before the trial court establish that jurisdiction does not exist, and due process protects LG Chem from the burden of discovery.

Having failed to establish that the court may exercise personal jurisdiction, Bishop also asks, in the alternative, for the Court to remand the case for jurisdictional discovery instead of dismissing the case outright. Bishop made a similar request to the trial court; however, Respondent did not address Bishop’s alternative request for jurisdictional discovery because Respondent erroneously concluded that jurisdiction had been established. Bishop has offered no authority in support of his alternative request to conduct discovery, and the authorities initially presented to the trial court below are unavailing.

To the contrary, the authorities Bishop relies on support only a court’s discretion to allow discovery when the legal issue is dependent on contradictory evidence requiring a more developed record. (A280–83.) For example, in *Shouse v. RFB Construction Co.*, 10 S.W.3d 189, 193–95 (Mo. Ct. App. 1999), the parties made conflicting allegations concerning the extent of the defendant’s activities in Missouri, so the court allowed discovery on that issue. *Id.* at 194–95. Similarly, in *Lakin v. Prudential Securities, Inc.*, 348 F.3d 704, 713 (8th Cir. 2003), the parties presented conflicting facts on the issue of whether the defendant’s activity in Missouri was continuous and systematic, and the court concluded that the plaintiffs “must be permitted to have the opportunity to establish these facts.” *Id.* at 709–10. Here, however, Bishop made no similar allegations regarding an

alleged connection between LG Chem and Missouri. See *CRST Expedited, Inc. v. Transam Trucking, Inc.*, No. C16-0052, 2016 WL 4424961, at *3 (N.D. Iowa Aug. 17, 2016) (refusing to follow *Lakin* on those grounds). Nor could he.

Finally, *Concerned Citizens for Crystal City v. City of Crystal City*, 334 S.W.3d 519, 525 (Mo. Ct. App. 2010), and *State ex rel. Cummings v. Witthaus*, 219 S.W.2d 383, 385 (Mo. 1949) did not involve jurisdictional challenges or jurisdictional discovery.

Here, as discussed above, there are no such contradictory facts, and there is no basis to subject LG Chem to the burden of engaging in discovery, particularly when Plaintiff has not attempted to show how the facts sought could change the outcome here, nor could he. Instead, the issues presented by LG Chem's Motion are legal in nature, and Bishop introduced allegations and evidence unequivocally establishing that the subject battery arrived in Missouri as the result of the unilateral actions of multiple third parties and not as the result of any connection formed between LG Chem and Missouri.

As the U.S. District Court in Missouri has opined, "It is the obligation of the plaintiff to undertake at least enough minimal investigation prior to filing a complaint as to permit it to allege a basis for jurisdiction in the complaint. It would be an abuse of the discovery process to allow discovery when the plaintiff fails to meet the minimal jurisdictional requirements." *Osborn & Barr Commc'ns, Inc. v. EMC Corp.*, No. 4:08-CV-87 CAS, 2008 WL 341664, at *2 (E.D. Mo. Feb. 5, 2008); see also *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008) (affirming district court's discretion to deny jurisdictional discovery where the request was based on plaintiff's statement that he "believed" discovery would

reveal jurisdictionally relevant facts). Under such circumstances, jurisdictional discovery should be denied.

E. Conclusion

Bishop's attempts to avoid the result mandated by due process are unavailing. Bishop can offer no legal authority to support his argument that LG Chem waived its jurisdiction defense in this case either by consenting to jurisdiction in a different case in Missouri, or by its counsel communicating with Bishop's counsel regarding an extension of the time to respond to Bishop's petition. To the contrary, Missouri and federal precedent establish otherwise.

In a last ditch effort to prevent dismissal of his claims, Bishop asks in the alternative that this Court remand this case to the trial court for jurisdictional discovery. It should not do so. Not only has Bishop failed to plead facts that, if true, could support the exercise of personal jurisdiction, but Bishop has also introduced affirmative evidence conclusively establishing that LG Chem is not subject to personal jurisdiction in this case because Bishop's claims do not arise out of any connection formed by LG Chem specifically with Missouri. As such, due process protects LG Chem from any further burden in this case, and this Court should grant the relief LG Chem requests.

CONCLUSION

LG Chem respectfully requests the Court to grant the following relief:

A. A permanent writ of prohibition or order directing Respondent to discontinue exercising personal jurisdiction over LG Chem and dismiss the Complaint against LG Chem for lack of personal jurisdiction; and

B. Such other and further relief as the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed through the Missouri Court's electronic filing system on November 15, 2019 to be served on:

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CERTIFICATE OF COMPLIANCE

The undersigned certifies under Rule 84.06 of the Missouri Rules of Civil Procedure that:

1. The Relator's Brief includes the information required by Rule 55.03.
2. The Relator's Brief complies with the limitations contained in Rule 84.06;
3. The Relator's Brief, excluding cover page, signature blocks, certificate of compliance, and affidavit of service, contains 11,787 words, as determined by the word-count tool contained in the Microsoft Word 2010 software with which this Relator's Brief was prepared; and
4. The Relator's Brief has been scanned for viruses and to the undersigned's best knowledge, information, and belief is virus free.

/s/ Teresa M. Young

CERTIFICATION UNDER RULE 55.03(A)

Pursuant to Rule 55.03(a) of the Missouri Rules of Civil Procedure, the undersigned hereby certifies that he/she signed an original of this pleading and that an original of this pleading shall be maintained for a period not less than the maximum allowable time to complete the appellate process.

/s/ Teresa M. Young
