

IN THE SUPREME COURT OF MISSOURI

LG CHEM, LTD.,)	
)	
Relator,)	
)	
vs.)	Appeal No.: SC97991
)	
THE HONORABLE NANCY WATKINS)	
MCLAUGHLIN, CIRCUIT JUDGE,)	
DIVISION 21, MISSOURI CIRCUIT)	
COURT, 21ST JUDICIAL CIRCUIT,)	
ST. LOUIS COUNTY,)	
)	
Respondent.)	

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

THE HONORABLE NANCY WATKINS MCLAUGHLIN
CIRCUIT JUDGE

REPLY BRIEF OF RELATOR LG CHEM, LTD.

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TABLE OF CONTENTS

Table of Contents.....	2
Table of Authorities.....	4
Introduction	6
Statement of Facts	9
Argument.....	12
I. Respondent cannot establish that specific jurisdiction may be exercised over	
LG Chem consistent with due process.	12
A. Introduction	12
B. Respondent concedes general jurisdiction is lacking in Missouri.	13
C. Missouri’s long-arm statute is not satisfied.....	13
D. Respondent sidesteps the applicable personal jurisdiction standard, erroneously arguing for a balancing of factors test that is simply not the law.	15
E. Respondent cannot show that Bishop’s claims “arise out of or relate to” any contacts formed between LG Chem and Missouri when the subject battery indisputably arrived in Missouri as the result of the unilateral actions of third parties.	18
1. Respondent ignores the legal authority establishing that 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. 18

2. Respondent mischaracterizes testimony by the retail vape
shop’s owner in a thinly disguised attempt to create a factual
dispute where none exists..... 19

3. Respondent incorrectly attempts to anchor jurisdiction on
connections formed with Missouri by others– not by LG Chem.
..... 20

II. LG Chem did not waive its personal jurisdictional defense, and the case
should be dismissed, not remanded. 24

A. Respondent ignores the legal authority cited by LG Chem establishing
that consent to suit in one prior case did not waive personal
jurisdiction here. 24

B. Respondent offers no legal authority to support the contention that an
e-mail exchange between counsel to secure an extension of time to
plead could waive personal jurisdiction. 25

C. Respondent’s alternative request for remand should be denied. 27

Conclusion 29

Certificate of Service 31

Certificate of Compliance..... 32

Certification Under Rule 55.03(A)..... 33

TABLE OF AUTHORITIES

Cases

<i>A.T. ex rel. Travis v. Hahn</i> , 341 F. Supp. 3d 1031 (E.D. Mo. 2018)	23
<i>Andra v. Left Gate Prop. Holding, Inc.</i> , 453 S.W.3d 216 (Mo. banc 2015)	16, 18, 21
<i>Bristol-Myers Squibb v. Superior Court</i> , 137 S. Ct. 1773 (2017)	16, 17, 21
<i>Bryant v. Smith Interior Design Group, Inc.</i> , 310 S.W.3d 227 (Mo. banc 2010)	14
<i>Burger King Corp. v. Rudzewicz</i> , 471 U.S. 462 (1985)	16
<i>Crouch v. Crouch</i> , 641 S.W.2d 86 (Mo. banc 1982)	24, 25
<i>Dillaplain v. Lite Industries, Inc.</i> , 788 S.W.2d 530 (Mo. App. 1990)	18
<i>Dow Chem Co. v. Calderon</i> , 422 F.3d 827 (9th Cir. 2005)	25
<i>Flair v. Campbell</i> , 44 S.W.3d 444 (Mo. App. 2001)	26
<i>Fullerton v. Smith & Nephew, Inc.</i> , No. 1:18CV245 RLW, 2019 WL 2028712 (E.D. Mo. May 8, 2019)	23
<i>Goodyear Dunlop Tires Operations, S.A. v. Brown</i> , 564 U.S. 915 (2011)	21
<i>Interest of A.R.B.</i> , No. WD 82162, 2019 WL 4145028 (Mo. App. Sept. 3, 2019)	26
<i>Klinghoffer v. S.N.C. Achille Lauro Ed Altri–Gestione Motonave Achille Lauro in Amministrazione Straordinaria</i> , 937 F.2d 44 (2d Cir. 1991)	25
<i>M.J. ex rel. Oliver v. Ford Motor Co.</i> , No. 4:19CV1846 HEA, 2019 WL 4194372 (E.D. Mo. Sept. 4, 2019)	18
<i>Osborn & Barr Commc'ns, Inc. v. EMC Corp.</i> , No. 4:08-CV-87 CAS, 2008 WL 341664 (E.D. Mo. Feb. 5, 2008)	28
<i>Pohlmann v. Bil-Jax, Inc.</i> , 954 S.W.2d 371 (Mo. Ct. App. 1997)	18

State ex rel. Antoine v. Sanders, 724 S.W.2d 502 (Mo. banc 1987) 25

State ex rel. Cedar Crest Apartments, LLC v. Grate, 577 S.W.3d 490 (Mo. banc 2019)..... 17, 21

State ex rel. Key Insurance Co. v. Roldan, No. SC 97623, 2019 WL 5558334 (Mo. Oct. 29, 2019) 13

State ex rel. Norfolk S. Ry. Co. v. Dolan, 512 S.W.3d 41 (Mo. banc 2017) 17, 25

State ex rel. PPG Industries, Inc. v. McShane, 560 S.W.3d 888 (Mo. banc 2018).... 14, 15, 18

State ex rel. William Ranni Associates, Inc. v. Hartenbach, 742 S.W.2d 134 (Mo. banc 1987) 14, 27

White v. Marsh, 646 S.W.2d 357 (Mo. 1983) 24, 25, 26

Other Authorities

Wright & Miller, 4A Federal Practice & Procedure § 1069 (4th ed.) 17

Rules

V.A.M.R. 55.27(g)..... 26

INTRODUCTION

The outcome of this proceeding depends upon Respondent's ability to show that Bishop's claims arose out of contacts LG Chem formed with the State of Missouri. Because Respondent cannot meet this burden, considerations of Bishop's convenience, or interests of the forum in litigating this dispute, simply do not come into play. Likewise, the fact that other plaintiffs have filed similar lawsuits against LG Chem in various U.S. jurisdictions, the number of such suits, or the volume of unauthorized third-party sales of LG Chem's lithium ion battery cells in the United States, and in Missouri, are irrelevant to the issue of jurisdiction currently before the Court.

Respondent studiously avoids addressing how the subject battery at issue in this case arrived in the United States and, as relevant here, in Missouri. The undisputed facts – according to Bishop's own pleadings and the deposition testimony Respondent submitted – establish unequivocally that the subject battery arrived in the State of Missouri as the result of the actions of at least three intermediaries unconnected to LG Chem, and not as the result of any action directed by LG Chem to the State of Missouri. These facts are dispositive of the jurisdictional issue.

Respondent ignores the undisputed evidence in the record establishing that LG Chem does not design, manufacture, distribute, advertise, or sell its 18650 lithium ion battery cells for use by consumers as standalone, replaceable, rechargeable batteries for e-cigarette devices, and that LG Chem has never authorized any manufacturer, distributor, wholesaler, retailer, or re-seller to do so either. Respondent also ignores the undisputed evidence in the record establishing that the retailer responsible for selling the subject

battery to Bishop for use as a replaceable, rechargeable battery with his e-cigarette device obtained his supply of 18650 batteries from a Chinese supplier acting without LG Chem's authorization. Accordingly, the record plainly establishes that the subject battery did not arrive in Missouri for sale to Bishop as the result of any action LG Chem directed to Missouri.

The circumstances under which the product at issue in this case arrived in a Missouri vape shop for sale to Bishop determines the jurisdictional issue. Respondent McLaughlin erroneously concluded 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. Regardless of whether LG Chem was aware of the possibility that its product could end up in a Missouri vape shop, a fact which has not been established, these allegations are legally insufficient to satisfy due process. LG Chem showed in its Relator's Brief that Respondent's conclusion otherwise was legally erroneous because it was inconsistent with due process under well-established precedents, and Respondent has offered no response.

In fact, Respondent appears to have abandoned the "stream of commerce" basis for the Order on review entirely, changing course again and arguing, for the first time in this case, that jurisdiction can be premised on testimony from the Missouri retailer (from another lawsuit) regarding his unsuccessful attempts to obtain a supply of batteries directly from LG Chem. In addition to the fact that Respondent grossly mischaracterizes the testimony at issue, LG Chem cannot be subject to jurisdiction in Missouri because a

Missouri retailer allegedly attempted – unsuccessfully – to purchase a supply of batteries from LG Chem. Jurisdiction cannot be premised on the Missouri-based actions of Bishop or the retailer that sold him the subject battery.

Confronted with the unassailable legal principles precluding the exercise of personal jurisdiction here, Respondent alternatively insists, without authority, that LG Chem waived its right to assert its defense of lack of personal jurisdiction through consent to jurisdiction in one other case or limited pre-suit communications between counsel. Respondent offers no law to support this absurd result, which is not only foreclosed by the controlling law cited in LG Chem’s initial brief, but as a policy matter would grind to a halt any pre-suit correspondence or cooperation between counsel.

Finally, there is no basis to remand this case for jurisdictional discovery. The relevant facts are not in dispute, and the law is clear. Where, as here, Respondent cannot show that Bishop’s claims arose out of contacts formed between the non-resident defendant and the forum state, personal jurisdiction is lacking, and this Court should make Permanent its Preliminary Writ of Prohibition preventing Respondent from enforcing Her Honor’s April 1, 2019 Order denying LG Chem’s Motion to Dismiss the Plaintiff’s Fourth Amended Petition for lack 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 replaceable, rechargeable 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 his claims. Instead, Bishop alleged only that LG Chem was aware that third parties were re-selling its products throughout the world, including in Missouri. Specifically, Bishop 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 Missouri.” (A345, ¶ 6.)

In Response to LG Chem’s Motion to Dismiss filed on November 13, 2018, Bishop introduced information printed from LG Chem’s website related to LG Chem’s global business activities; copies of three complaints filed by other Missouri plaintiffs against LG Chem; and the testimony of James Buchanan, a representative of Smoke Smart, the retailer that sold Bishop the subject battery in the instant case and also sold a battery to the plaintiff in another lawsuit in Missouri. In response to LG Chem’s initial brief in this proceeding, Respondent attached additional, selected excerpts of testimony adduced in that lawsuit, some of which are not part of the record and none of which affect the outcome here.

LG Chem is a Korean company with its headquarters in Seoul, South Korea and has no physical presence in Missouri. (A59, Aff. of Sung Han Ryu, ¶¶ 4–9.) LG Chem does not design, manufacture, distribute, advertise, or sell lithium ion battery cells for use by individual consumers as replaceable, rechargeable batteries with e-cigarette devices and has never authorized any distributor, wholesaler, retailer, or re-seller to do so either. (A59, ¶¶ 10–11.) In addition, LG Chem never conducted any business with the retailer, Smoke Smart, or any Missouri-retailer selling LG 18650 lithium ion batteries to consumers. (A60, ¶ 13.) Respondent argues these facts are unsupported by evidence, but, as the above citations reflect, the record directly contradicts that assertion.

In addition, the testimony of James Buchanan garnered in another lawsuit and offered by Respondent here corroborates LG Chem’s evidence. On behalf of Smoke Smart, Buchanan confirmed that neither he, nor anyone else in the consumer vaping industry, could purchase lithium ion battery cells from LG Chem for sale to consumers as standalone, replaceable batteries for their e-cigarette devices. (A280–81 [49:4-54:19].) Buchanan never testified that LG Chem directed him to another supplier, as Respondent claims for the first time in this litigation in Respondent’s Brief. Quite the contrary, Buchanan testified repeatedly that he attempted to contact LG Chem, but had no response. (A280 [52:19-22], A281 [53:24-54:19], A308 [162:20-163:7].)

On June 18, 2018 Bishop filed his Third Amended Petition, naming LG Chem as the alleged manufacturer of the subject battery, whereas Bishop had previously alleged the manufacturer was Samsung Electronics America, Inc. In response, and after securing an agreement by counsel for Bishop of the time to respond, LG Chem filed its Motion to

Dismiss for lack of personal jurisdiction on September 17, 2018. The Motion was called, heard, and submitted on November 16, 2018, and Bishop was granted 30 days to file an Amended Petition “to show how Smoke Smart, LLC obtained the subject battery.” (A232.)

Bishop filed his Fourth Amended Petition on December 16, 2018 (A345), and LG Chem renewed its motion to dismiss. (A360.) Respondent entered the Order on review on April 1, 2019, concluding that due process was satisfied based on Bishop’s allegation that LG Chem sold the subject battery “with the expectation or knowledge that the battery would ultimately be offered to consumers in Missouri.” (A375.) Bishop’s allegation was unsupported by evidence, and LG Chem introduced admissible evidence showing that it does not design, manufacture, distribute, advertise, or sell lithium ion batteries for use by individual consumers as standalone, replaceable, rechargeable batteries for e-cigarette devices and never authorized any distributor, wholesaler, retailer, or re-seller to do so either. (A59, ¶¶ 10–11.) In addition, neither Bishop nor Respondent ever identified a single action of LG Chem directed to the State of Missouri related to Bishop’s claims, and there are none. Accordingly, Due Process cannot tolerate the exercise of personal jurisdiction over LG Chem, and Bishop’s action should be dismissed against it.

ARGUMENT

I. Respondent cannot establish that specific jurisdiction may be exercised over LG Chem consistent with due process.

A. Introduction

Respondent McLaughlin erred when denying LG Chem's Motion to Dismiss for Lack of Personal Jurisdiction, and LG Chem seeks a Permanent Writ of Prohibition, preventing Respondent from enforcing that order. LG Chem supported its request for relief with well-established, controlling case law, and Respondent has offered no legal authority or argument that could support any other outcome. In fact, Respondent appears to have abandoned the original analysis purportedly supporting the exercise of personal jurisdiction, which was set forth in the Order on review and argued in Respondent's Answer. Respondent's Brief largely ignores LG Chem's legal arguments, which illustrate why Respondent's Order was erroneous. Instead, and without citation to any authority, Respondent appears to be asking this Court to disregard the requirements of Constitutional Due Process in favor of Bishop's preference for a Missouri forum.

LG Chem timely asserted its personal jurisdiction defense in its pre-answer Motion to Dismiss and established that personal jurisdiction was lacking because Bishop cannot show that his claims arise out of any Missouri-directed conduct by LG Chem. None of the arguments offered by Respondent, whether in the Order on review, Respondent's Answer to this Court's September 3, 2019 Preliminary Writ, or Respondent's Brief, can justify exercising personal jurisdiction over LG Chem in this case. Therefore, this Court should make its Preliminary Writ Permanent.

B. Respondent concedes general jurisdiction is lacking in Missouri.

Respondent concedes that general jurisdiction is lacking in Missouri, and further states that “[g]eneral jurisdiction is out of the question in this case, and all others pending [against LG Chem] across the country.” (Response Brief at 9.) Notwithstanding this concession, Respondent argues that LG Chem should be subject to jurisdiction in Missouri based on the assertion that Bishop cannot “afford to litigate in South Korea.” *Id.* As discussed below, because Respondent cannot show that Bishop’s claims arise out of activities LG Chem directed to Missouri, considerations of Bishop’s convenience in litigating his claims simply do not come into play. The Court’s analysis must be guided by Due Process, not by Respondent’s appeal that Bishop would be inconvenienced if required to litigate in Korea.

C. Missouri’s long-arm statute is not satisfied.

Respondent argues that the long-arm statute is satisfied because “extraterritorial acts in [allegedly] designing a defective and unreasonably dangerous product caused Mr. Bishop to suffer injuries in Missouri.” (Response Brief at 11.) Respondent cites inapposite cases in support. Further, as discussed below, Missouri’s long-arm statute must yield to the requirements of due process, which cannot be satisfied here.

In Respondent’s first case, *State ex rel. Key Insurance Co. v. Roldan*, No. SC 97623, 2019 WL 5558334 (Mo. Oct. 29, 2019), Respondent’s citation is drawn from a portion of the *dissenting* opinion. *See id.* at *6 (Wilson, J., dissenting). The case itself involved allegations that the defendant insurer failed to provide benefits under its contract to insure

a person, property, or risk in Missouri. Therefore, the Court found the claim directly arose out of allegedly tortious acts connecting the defendant to Missouri. *Id.* at *3.

In Respondent's second case, *State ex rel. William Ranni Associates, Inc. v. Hartenbach*, 742 S.W.2d 134 (Mo. banc 1987), the Court did not reach the issue of whether the claims arose out of the commission of a tort in Missouri. *Id.* at 139–41. Instead, the Court held that “[a] party relying on a defendant's commission of a tort within this state to invoke long arm jurisdiction must make a prima facie showing of the validity of his claim.” *Id.* at 139. The *Ranni* plaintiffs failed to meet that requirement. *Id.* at 140–41.

In Respondent's third case, *Bryant v. Smith Interior Design Group, Inc.*, 310 S.W.3d 227, 232 (Mo. banc 2010), which Respondent also relied on in the Order on review, the plaintiff alleged that the defendant sent false and misleading documents to him in Missouri and misrepresented or concealed information in subsequent contacts to the plaintiff in Missouri by telephone, e-mail, and letter. *Id.* at 232.

Therefore, none of the authorities offered by Respondent support the proposition that a foreign manufacturer can be haled into court in Missouri under the long-arm statute based solely on allegations that the foreign manufacturer designed an allegedly defective product, when not a single fact connects the *manufacturer* to the plaintiff's purchase and use of the product in Missouri.

This Court's recent decision in *State ex rel. PPG Industries, Inc. v. McShane*, 560 S.W.3d 888 (Mo. banc 2018) illustrates the fallacy in Respondent's argument. In *PPG Industries*, a Missouri plaintiff argued a Pennsylvania corporation was subject to jurisdiction under § 506.500(1)(3) of Missouri's long-arm statute because the plaintiff

alleged the defendant had committed tortious acts within Missouri by making alleged misrepresentations in Missouri on its website. The *PPG Industries* plaintiff argued—like Respondent—that the defendant’s actions caused “consequences in the state” to fall within the long-arm statute. Relying on *Bristol-Myers*, this Court disagreed that consequences alone were sufficient and held that “ ‘there must be an ‘affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State’s regulation.’ ” *Id.* at 891 (citations omitted). This Court distinguished *Bryant* based on the fact that PPG sent nothing into Missouri, did not solicit web traffic from Missouri, and made no direct or individual communication to the plaintiff. *Id.* at 892–93. The Court then found that PPG’s connection to Missouri, based solely on its internet activity, was “so very attenuated and so very remote that any consequences felt in Missouri in this case cannot reasonably be attributed to PPG’s online activity.” *Id.* at 893. Therefore, the defendant’s conduct did not fall within Missouri’s long-arm statute. *Id.*

D. Respondent sidesteps the applicable personal jurisdiction standard, erroneously arguing for a balancing of factors test that is simply not the law.

Much of Respondent’s Brief focuses on Bishop’s interests and the supposedly competing interests of Missouri and LG Chem. But the Court need not progress to this step of the analysis, for Respondent cannot satisfy the primary jurisdictional requirement: to show that Bishop’s claims arise out of activities LG Chem directed to Missouri. Respondent’s argument that this Court “‘must consider’” other factors (Response Br. at

14) rests on a misreading of the U.S. Supreme Court’s decision in *Bristol-Myers Squibb v. Superior Court*, 137 S. Ct. 1773 (2017).

In *Bristol-Myers*, the Supreme Court first set out the familiar rule of specific jurisdiction: “for a state court to exercise specific jurisdiction, the suit must arise out of or relate to the defendant’s contacts with the forum.” 137 S. Ct. at 1780 (internal quotation marks and brackets omitted). Then, in the next section of its opinion, the Court identified “a variety of interests” relevant to the ultimate analysis of personal jurisdiction, including “the interests of the forum State and of the plaintiff in proceeding with the cause in the plaintiff’s forum of choice.” *Id.* (internal quotation marks omitted).

But the opinion did not purport to change the settled rule that a plaintiff must first demonstrate the requisite minimum contacts. As both this Court and the U.S. Supreme Court have explained, only “[o]nce it has been established that a defendant has sufficient minimum contacts with the forum state” does the court need to “assess the reasonableness of its assertion of personal jurisdiction over a defendant,” “based on a consideration of the burden on the defendant, the forum’s interest in adjudicating the dispute, and the plaintiff’s interest in obtaining convenient and effective relief.” *Andra v. Left Gate Prop. Holding, Inc.*, 453 S.W.3d 216, 233 (Mo. banc 2015) (internal quotation marks omitted); *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (“Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice.”) (internal quotation marks omitted); *accord* Wright & Miller, 4A Federal Practice & Procedure §

1069 (4th ed.) (“Specific jurisdiction also allows the court to inquire whether—even if those minimum contacts are established—asserting personal jurisdiction would be ‘reasonable’ and comport with ‘fair play and substantial justice.’ ” (emphasis added).

Bristol-Myers itself explains that “even if the defendant would suffer minimal or no inconvenience from being forced to litigate,” and “even if the forum State has a strong interest in applying its law,” and “even if the forum State is the most convenient location,” the Due Process Clause can “divest the State of its power to render a valid judgment.” 137 S. Ct. at 1780–81 (internal quotation marks omitted). That divestment occurs when there is not a sufficient “affiliation between the forum and the underlying controversy.” *Id.* at 1781 (internal quotation marks omitted). Absent a direct connection between a plaintiff’s claims and the defendant’s forum-directed activities, there can be no specific jurisdiction, regardless of any other interests.

Because the initial requirement is for the plaintiff to show that the underlying claim arises out of the defendant’s contacts with the forum, this Court recently and often disposes of specific personal jurisdiction cases without reaching the balancing of interests. *See, e.g., State ex rel. Cedar Crest Apartments, LLC v. Grate*, 577 S.W.3d 490, 495 (Mo. banc 2019); *State ex rel. Norfolk S. Ry. Co. v. Dolan*, 512 S.W.3d 41, 49-51 (Mo. banc 2017). It should do so again here, for Bishop’s claims do not arise out of any Missouri-directed activities of LG Chem.

E. Respondent cannot show that Bishop’s claims “arise out of or relate to” any contacts formed between LG Chem and Missouri when the subject battery indisputably arrived in Missouri as the result of the unilateral actions of third parties.

1. Respondent ignores the legal authority establishing that 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.

Respondent makes no effort to address or respond to LG Chem’s argument, set forth on pages 22–27 of its Brief, showing that Respondent erred when initially concluding that jurisdiction could be exercised over LG Chem based on allegations that it placed its product into the stream of commerce with alleged knowledge or awareness that the product would reach the forum state, and further showing that Respondent erred by relying on *Dillaplain v. Lite Industries, Inc.*, 788 S.W.2d 530, 535 (Mo. App. 1990) for this erroneous proposition. Instead, due process requires a showing that the defendant’s own actions created a substantial connection with the forum and that the suit arose from those contacts. *See State ex rel. PPG Indus., Inc. v. McShane*, 560 S.W.3d 888 (Mo. banc 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 *4 (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.”); *Pohlmann v. Bil-Jax, Inc.*, 954 S.W.2d 371, 373 (Mo. Ct. App. 1997). Respondent’s lack of any response on these points should be considered recognition that Respondent erred by relying on this analysis to deny LG Chem’s motion to dismiss.

2. Respondent mischaracterizes testimony by the retail vape shop's owner in a thinly disguised attempt to create a factual dispute where none exists.

Respondent blatantly mischaracterizes testimony by Jimmy Buchanan, the owner of the retail store responsible for supplying Bishop with a lithium ion battery for use as a standalone, replacement power source for his Joyetech e-cigarette mod. Curiously, Respondent claims that Bishop has “shown via undisputed evidence a concerted effort on part [sic] of LG to target the Missouri market” despite the fact that the evidence shows the opposite. (Response Br. at 17.) Although Buchanan testified that his store and other retailers in Missouri sold thousands of batteries purported to be “LG” brand, he also testified that neither he nor any other retailer could acquire their supply from LG Chem. Buchanan testified that Smoke Smart acquired its supply from a Chinese company he refers to as “Silida Technologies” or “Feyate.” (A280 [49:15-19].) Tellingly, Buchanan testified that his Chinese supplier refused to tell him where it acquired purported LG batteries and failed to provide any documentation regarding the authenticity of the batteries it provided to Buchanan. (A283 [61:21-64:13].) Buchanan was specifically asked whether he had any documentation from his Chinese supplier to indicate that it was an authorized distributor of “LG batteries,” and he confirmed he did not. (A313-14 [184:20-185:7]) While Buchanan indicated that he was not quite “comfortable” with this arrangement, he stated that it was necessary because “it was the only way that any shop was able to obtain 18650s to use in [e-cigarette] devices.” (A283 [62:19-63:1].)

Buchanan also testified repeatedly that he “tried” to contact LG Chem, but had no response, including stating that: “I tried calling around. I couldn’t – I couldn’t make any

contact with – with LG, Samsung, Sony.” (A280 [52:19-22]); “You know, I’d send out a couple of emails and not hear anything back.” (A281 [53:24-54:19]); “On multiple times I tried e-mailing and calling LG. I wasn’t able to get an answer.”) (A308 [162:20-163:7]) Although Buchanan vaguely claims that he spoke to “somebody,” he also said that unknown individual told him that LG Chem does not “deal with the public directly” and did not sell him any batteries. (A308 [162:20-163:14].) Put simply, even if Buchanan had any contact with LG Chem, which is not supported by any admissible evidence, his testimony could show at most that LG Chem rebuffed his attempt to purchase batteries. It is nonsensical to suggest that LG Chem targeted the Missouri marketplace by refusing to sell to a Missouri retailer.

3. Respondent incorrectly attempts to anchor jurisdiction on connections formed with Missouri by others– not by LG Chem.

Respondent appears to argue for a “jurisdiction by default” analysis—suggesting that because a large volume of LG 18650 batteries are available for purchase by consumers in Missouri, LG Chem must be subject to jurisdiction in Missouri. But Respondent offers no legal support for this argument, and there is none. Respondent mistakenly focuses on a connection between the underlying facts and the forum created by third parties, but due process explicitly requires that the connection between the underlying facts and the forum must be created by the defendant itself.¹

¹ LG Chem did not argue that *Bristol Myers* created a “sea change,” as Respondent suggests. *Bristol Myers* confirmed and reinforced the long-standing principles of due process that control the outcome here, including that due process requires Respondent to show that Bishop’s claims arise out of connections formed with the forum by the defendant.

Respondent again misreads *Bristol-Myers Squibb* by arguing that “the sale of a defective product into Missouri and its subsequent explosion” alone satisfy the requirement that there “be an affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that takes place in the forum State.” 137 S. Ct. at 1781 (internal quotation marks and brackets omitted); Response Br. at 18; *see also* Response Br. at 12 n.5, 13-14. But as the U.S. Supreme Court made clear, “the suit must arise out of or relate to the defendant’s contacts with the forum.” 137 S. Ct. at 1780. Thus, in the sentence immediately following the one repeatedly quoted by Respondent, the Court explained that “[w]hen 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. “Even regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales.” *Id.* (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 931, n.6 (2011)) (internal quotation marks omitted). In other words, the relevant “occurrence” must connect the forum to the controversy *through the defendant’s activities*. As Respondent’s own case explains, “the cause of action being pursued” must “aris[e] out of th[e defendant’s] contact” with the forum. *State ex rel. Cedar Crest Apartments, LLC v. Grate*, 577 S.W.3d 490, 494 (Mo. banc 2019). And the relevant “contacts must proximately result from actions by the defendant himself that create a substantial connection with the forum State.” *Andra v. Left Gate Prop. Holding, Inc.*, 453 S.W.3d 216, 226 (Mo. banc 2015) (internal quotation marks omitted).

Here, Respondent cannot satisfy Bishop’s burden of showing that LG Chem created any connection between Missouri and the controversy. It is undisputed that the battery at

issue did not arrive in Missouri as the result of any action by LG Chem directed to Missouri. Respondent's chart (Response Br. at 13) inexplicably focuses on the *California* plaintiffs in *Bristol-Myers*, whose claims were not at issue in the Court's decision because the defendant did not contest personal jurisdiction over their claims. See *Bristol-Myers*, 137 S. Ct. at 1778. *Bristol-Myers* illustrates that the extent of a defendant's in-state activities is irrelevant if the claims at issue do not arise out of those activities. And the defendant's in-state activities in *Bristol-Myers* were extensive, including five research laboratories that employed 160 employees, 250 in-state sales representatives, and an in-state government advocacy center – all for the product purchased and used in California by the California plaintiffs whose claims were not at issue in the jurisdictional analysis. *Id.* Here, Respondent failed to identify a single suit-related action of LG Chem directed to Missouri, and LG Chem showed there are none.

Respondent also attempts to distinguish *Oliver v. Ford Motor Co.* based on his allegation that LG Chem allegedly “serve[d] the Missouri market” and “sold a defective product into Missouri.” (Response Br. at 19.) But this conclusory allegation was unsupported by any allegation of fact or evidence, and was directly contradicted by Respondent's own allegation and evidence showing that the subject battery arrived in Missouri as the result of the actions of at least three third party intermediaries, according to Smoke Smart. Although the plaintiff in *Oliver* purchased the product outside of Missouri, that fact alone cannot possibly support Respondent's extrapolation that purchasing a product inside Missouri is enough to support the exercise of jurisdiction over the alleged manufacturer, when the product did not arrive in Missouri as the result of any

action directed by the manufacturer to Missouri. Indeed, the Court in *Oliver* observed that even “expectation or knowledge of the effects of a distributing relationship” does not “suffic[e] to establish personal jurisdiction.” 2019 WL 4194372, at *4 (quoting *A.T. ex rel. Travis v. Hahn*, 341 F. Supp. 3d 1031, 1037 (E.D. Mo. 2018)). Thus, as in *Oliver*, because LG Chem “did not commit particular acts connecting to the [incident device], this forum, and this litigation, no specific personal jurisdiction over [LG Chem] exists in Missouri.” *Id.*; accord *Fullerton v. Smith & Nephew, Inc.*, No. 1:18CV245 RLW, 2019 WL 2028712, at *4 (E.D. Mo. May 8, 2019) (“Plaintiff’s injury must be connected to Defendant’s contacts with the forum state” (internal quotation marks omitted)).

II. LG Chem did not waive its personal jurisdictional defense, and the case should be dismissed, not remanded.

A. Respondent ignores the legal authority cited by LG Chem establishing that consent to suit in one prior case did not waive personal jurisdiction here.

Respondent continues to argue that consent to jurisdiction in a different case waives the defense of personal jurisdiction here—without citing one single authority to support that argument and making no effort to address or respond to LG Chem’s argument, set forth on pages 37–38 of its Brief, showing that this is not a sustainable basis to exercise jurisdiction. Instead, Respondent contends that this specific issue was not considered by the Court in *White v. Marsh*, 646 S.W.2d 357, 362 (Mo. 1983), a case that LG Chem did not rely on to support this argument. In addition, Respondent cites to a footnote in *Crouch v. Crouch*, 641 S.W.2d 86, 90 n.4 (Mo. banc 1982) for the general proposition that jurisdiction may be waived where a defendant “takes action that is wholly inconsistent with [its] assertion that the trial court lacks personal jurisdiction” (Response Br. at 8), but fails to offer any explanation as to how consent to jurisdiction in one prior case is “wholly inconsistent” with LG Chem’s assertion that it is not subject to personal jurisdiction in this case. The instant case is in no way analogous to one in which a defendant had defended on the merits during four days of hearings on a motion for preliminary injunction before asserting that the trial court lacked jurisdiction, the situation addressed in *Crouch*.

In contrast, LG Chem’s argument was supported by citation to numerous cases in Missouri and other jurisdictions showing that consent to jurisdiction in one prior case in Missouri cannot support the exercise of specific jurisdiction here. *See, e.g., Crouch*, 641

S.W.2d at 90; *State ex. rel. Norfolk S. Ry. Co. v. Dolan*, 512 S.W.3d 41, 47 (Mo. banc 2017) (rejecting the argument that a corporation’s having sued and been sued in Missouri in the past constitutes a recognition of jurisdiction in Missouri); *Dow Chem Co. v. Calderon*, 422 F.3d 827, 835 (9th Cir. 2005); *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). Respondent’s failure to address these authorities should be considered acquiescence in the legal principles for which they were cited.

B. Respondent offers no legal authority to support the contention that an e-mail exchange between counsel to secure an extension of time to plead could waive personal jurisdiction.

Respondent inexplicably leads its waiver argument with the following statement: “Relator does not seriously address Respondent’s assertion that it has waived the defense of personal jurisdiction, ignoring the precedent cited by Respondent in her answer and what Respondent actually argues resulted in waiver of the defense.” (Response Br. at 7.)

LG Chem directly responded to Respondent’s waiver argument on pages 41–42 of its Brief, in which it addressed every one of the cases cited in Respondent’s Answer and showed that none of those cases support Respondent’s newly raised argument that jurisdiction can be waived by pre-suit, out-of-court contact between counsel for the defendant and counsel for the plaintiff.

In particular, LG Chem relied on the controlling authority of *White v. Marsh*, 646 at 362, in which the Missouri Supreme Court directly held that a personal jurisdiction defense is not waived by requesting an extension to respond to a pleading. *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.”) (emphasis added).

After incorrectly accusing LG Chem of ignoring authority cited in Respondent’s Answer, Respondent proceeds to ignore LG Chem’s citation to Missouri law establishing that defense of lack of jurisdiction is waived only by appearing in court and omitting the defense by motion or in a responsive pleading. *See* V.A.M.R. 55.27(g) (the defense of lack of personal jurisdiction is waived only when it is “neither made my motion . . . nor included in a responsive pleading”); *Interest of A.R.B.*, No. WD 82162, 2019 WL 4145028, at *9 (Mo. App. Sept. 3, 2019) (“A defendant waives personal jurisdiction when he is before the court and fails to properly raise the issue.”); *Flair v. Campbell*, 44 S.W.3d 444, 453–54 (Mo. App. 2001) (“[O]rdinarily, ‘[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.’ ”) (citation omitted). In this case, LG Chem preserved the defense by filing a pre-answer motion to dismiss.

In addition, Respondent offers no authority to support the newly raised argument that waiver may be found based on pre-suit actions purportedly taken by LG Chem’s counsel—outside of court and confidentially—to investigate the claims. Instead, Respondent simply states it is “clear” that such actions are inconsistent with any claim for lack of personal jurisdiction. However, investigations prior to making an appearance are routine, and this Court has previously held that pre-suit investigation and work product cannot effect a waiver. *See White*, 646 S.W.2d at 361 (“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 [on] a motion.”). As in *White*, LG Chem could not have waived its right to challenge personal jurisdiction by any out-of-court investigation it may have conducted into Bishop’s allegations for purposes of responding to the petition.

C. Respondent’s alternative request for remand should be denied.

Respondent requests, in the alternative, an order remanding the case to the trial court to determine “the propriety of jurisdictional discovery.” (Response Br. at 20.) However, even if this Court could remand to the trial court with instructions for further action, such as for jurisdictional discovery, it would be inappropriate to do so.

In *State ex rel. William Ranni Associates, Inc. v. Hartenbach*, 742 S.W.2d 134, 137 (Mo. banc 1987), this Court addressed a similar request:

In the absence of extraordinary circumstances, this Court will either make the writ absolute or quash the preliminary writ, depending on whether plaintiffs have met the burden of establishing sufficient contacts with Missouri to satisfy due process. This dispute regarding the meaning of a discovery term could not be characterized as an extraordinary circumstance. Accordingly, this Court denies plaintiffs’ request for remand and will limit the inquiry to whether plaintiffs have met their burden of establishing jurisdictional contacts.

Id. at 137. Respondent in this case has not taken the position that “extraordinary circumstances” are presented by Bishop’s demand for discovery, and cannot.

Further, even if an order to remand for discovery were appropriate in this Writ proceeding, which it is not, Respondent has not provided even a hint of what discovery is purportedly needed in the way of a “clearer factual record” to decide LG Chem’s motion to dismiss. Bishop already amended his petition once in response to LG Chem’s motion

to dismiss, to set forth specific allegations regarding the way the subject battery arrived in Missouri. Those allegations do not point to a single suit-related action taken by LG Chem directed to Missouri. In addition, Respondent introduced testimony making it absolutely clear that the subject battery arrived in Missouri as the result of the unilateral actions of at least three third party intermediaries, and not as the result of any action directed by LG Chem to Missouri. “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). Therefore, the Court should deny Respondent’s alternative request for remand to conduct jurisdictional discovery.

CONCLUSION

Due process prevents Bishop's suit from moving forward for a straightforward reason: his lawsuit does not arise out of any contacts directed by LG Chem to Missouri. Bishop did not allege that LG Chem engaged in a single activity in or directed to Missouri related to his claims, and LG Chem has shown that it did not. The undisputed evidence shows that LG Chem does not design, manufacture, distribute, advertise, or sell its lithium ion battery cells for use by consumers as replaceable, rechargeable batteries in e-cigarette devices, and never authorized any distributor, wholesaler, retailer, or re-seller to do so either. Therefore, due process requires dismissal of Bishop's action for lack of personal jurisdiction. This Court should deny Respondent's alternative request for remand, make Permanent its Preliminary Writ of Prohibition, and dismiss this action against LG Chem.

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 December 20, 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 Reply Brief includes the information required by Rule 55.03.
2. The Relator's Reply Brief complies with the limitations contained in Rule 84.06;
3. The Relator's Reply Brief, excluding cover page, signature blocks, certificate of compliance, and affidavit of service, contains 6,970 words, as determined by the word-count tool contained in the Microsoft Word 2010 software with which this Relator's Reply Brief was prepared; and
4. Relator's Reply 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
