

IN THE SUPREME COURT OF MISSOURI

APPEAL NO. SC97991

LG CHEM, LTD.,

Relator,

vs.

THE HONORABLE NANCY WATKINS MCLAUGHLIN,
CIRCUIT JUDGE, DIVISION 21, MISSOURI CIRCUIT COURT,
21st JUDICIAL CIRCUIT, ST. LOUIS COUNTY

Respondent.

BRIEF OF RESPONDENT
THE HONORABLE NANCY WATKINS MCLAUGHLIN

Appeal from the Circuit Court of the St. Louis County, Missouri
The Honorable Nancy Watkins McLaughlin, Circuit Judge

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I. INTRODUCTION

Though 184¹ cases concerning injuries caused by exploding LG 18650 Li-Ion batteries are pending in courts across the country, LG Chem, Ltd. (“LG”) takes the position that it essentially has immunity and cannot be sued in any state in the country, depriving American citizens like Mr. Bishop of a forum to seek redress for their injuries other than the tribunals of Seoul, South Korea. This matter arises out of the explosion of an LG Li-Ion battery—a battery that was shipped to Missouri, purchased from a Missouri retailer, that was used in Missouri, that exploded in Missouri, seriously injured a Missouri resident, and caused medical treatment to occur in Missouri. Tens of thousands of the identical model LG HG2 18650 battery have been sold across the United States, including Missouri. This identical battery has been the subject of dozens of lawsuits, including lawsuits filed by injured Missouri residents in cases pending across Missouri. Tens of thousands of LG batteries did not suddenly appear in the U.S. and Missouri market, but rather poured into Missouri, as Plaintiff pleaded and the evidence shows, as a result of a targeted, concerted, and purposeful effort on part of LG to serve the Missouri market. Missouri Supreme Court and United States Supreme Court precedent support the finding of jurisdiction here. Respondent respectfully requests the Court issue an Order Quashing its Preliminary Order in Mandamus, deny Relators’ Petition for Writ of Prohibition in its entirety and permit Respondent to proceed with the underlying cause. In the alternative, this Court should remand the case with directions to Respondent to consider whether jurisdictional discovery

¹ **Ex. 1**, Sanctions Order, Cannon Kenneth v. LG Chem, Ltd, et al, Case No. CV-2018-900998.00, p. 8 (noting that 184 identical cases were pending in courts across the country as of June 24, 2019)

is appropriate as originally requested by Mr. Bishop, and for such further relief as the Court deems just and proper under the circumstances.

II. STATEMENT OF FACTS

LG is a multi-national publically traded company headquartered in Seoul, South Korea. LG designs, manufactures, and distributes lithium ion batteries, including a design known as the LG HG2 18650. It is undisputed that the LG HG2 18650 is the battery at issue in this case. And it is undisputed that the subject HG2 that injured Mr. Bishop was a genuine authentic LG HG2 battery designed, manufactured, and distributed by LG. Ex. 2, Dep. Jim Buchanan, Corp. Rep. of Smoke Smart, LLC, (5/1/2018), 92:17-20. The LG HG2 battery went into mass production in March or May of 2014. Ex. 3, Dep. Joon Young Shin, 77:4-7.

Since that date, LG has distributed tens of millions of 18650 batteries into the stream of commerce, including tens of millions of LG HG2 18650 batteries. Ex. 3, Dep. Joon Young Shin, 69:14-20; 125:16-21. LG claims to have never sold the LG 18650 Li-Ion battery for use in e-cigarettes. Relators Brief at 18. But it agrees that there are tens of thousands, if not millions, of LG 18650 batteries circulating the e-cigarette market. Ex. 3, 129:7-17. The single Missouri retailer in this case has, by itself, sold more than 16,500 LG 18650 in Missouri alone. Ex. 4, Dep. Jim Buchanan (11/7/2018), 27:19-28:3, *Kruep v. Smoke Smart, LLC, et al.* Mr. Buchanan, the owner of the Missouri retailer who served as its corporate representative, was clear that he was far from the only retailer selling LG HG2 batteries. He testified that the LG HG2 was the most popular battery in St. Louis and

nationwide. Ex. 4, 27:14-18. He called the LG HG2 the “industry standard.” Ex. 4, 26:6-18. He testified that he tried e-mailing and calling LG multiple times to get answers regarding the LG HG2 batteries—and that LG responded to him and told him that “I would have to just find a supplier.” Ex. 4 at 162:20-163:7. Mr. Buchanan testified that within shipments of LG HG2 batteries he received in Missouri that he did remember seeing paperwork with LG information on it. Ex. 4, 166:15-167:2.

LG has not, and cannot offer any explanation for how tens of thousands of LG 18650 Li-Ion batteries came to saturate the Missouri market. But there is clear evidence that tens of thousands of LG HG2 batteries made their way through the chain of commerce and into Missouri in a matter of a couple years. Without evidence, LG appears to claim that distributors engaged in the unauthorized sale of LG HG2 batteries for use in e-cigarettes. Relators Brief, p. 19. But there is no evidence submitted to support this assertion. Indeed, LG’s corporate representative in a sister case² has testified that he has not seen a single piece of paper, objective piece of evidence supporting the idea that the current circumstances are the result of the unilateral actions of some rogue distributor causing this to happen. Ex. 3, Dep. Joon Young Shin, 131:5-12. And, as the *Berven* Court explained, the manner of use may be a defense to liability, it is not pertinent to the question of personal jurisdiction.³

² *Erik Kruep v. LG Chem, Ltd and Smoke Smart, LLC*, 1622-CC11455, 22nd Judicial Circuit, City of St. Louis

³ *Berven v. LG Chem, Ltd.*, No. 118CV01542DADEPG, 2019 WL 1746083, at *11 (E.D. Cal. Apr. 18, 2019), *report and recommendation adopted*, No. 118CV01542DADEPG, 2019 WL 4687080 (E.D. Cal. Sept. 26, 2019) (“Certainly, whether the product was wrapped and/or used in an authorized manner will be relevant to the question of liability in this product liability action. But the question for personal jurisdiction is whether LG Chem placed this product in the stream of commerce with such additional contacts related to that product to fairly subject LG Chem to personal jurisdiction in California.”)

LG 18650 batteries have caused injuries to hundreds of consumers across the country, including Missouri. One Court noted that there were, as of 6/24/2019, *at least* 184 similar exploding battery lawsuits pending nationwide. **Ex. 1**, Sanctions Order, Cannon Kenneth v. LG Chem, Ltd, et al, Case No. CV-2018-900998.00, p. 8; *See also Ex. 5, Plf. Eriksen's response to Def. LG's Motion to Dismiss* (stating that a single lawyer is involved in eight (8) different cases in Washington state alone); *See Ex. 6, Matt Hamilton, Glendale Man Burned His Genitals and Legs. The Culprit? An e-cigarette battery, new lawsuit claims*, LA Times, (Feb. 21, 2018) (stating that more than 15 cases have been filed in California by a single attorney alone).⁴ There are at least four (4) currently pending in State Courts in Missouri, some of which have been stayed pending the outcome of this action. *Devin Todd v. Elevape, LLC et al.*, Case No. 1816-CV26036; *Christopher Milan v. LG Chem, Ltd., et al.*, Case No. 19AB-CC00172; *Bryan Durham v. Vapor Exchange, LLC, et al.*, Case No. 1911-CC00938; *Robert A. Williams v. Vapor Wize Midwest, LLC, et al.*; 1811-CC00952. LG's corporate representative agreed there are many more incidents involving exploding batteries that injured American consumers than there are lawsuits. **Ex. 3**, Dep. Joon Young Shin, 160:15-24.

LG has consented to personal jurisdiction in many of these cases pending across the country, including a case in Missouri. In the *Kruep* case, a case that was pending in the 22nd Judicial Circuit, 9.2 miles away from where the instant action is pending, LG stipulated that personal jurisdiction was proper over LG. **Ex. 7**, *Erik Kruep v. LG Chem*,

⁴ Retrieved from <https://www.latimes.com/local/lanow/la-me-ln-electronic-cigarette-lawsuits-20180221-story.html>.

Ltd and Smoke Smart, LLC, 1622-CC11455, 22nd Judicial Circuit, City of St. Louis (January 30, 2018). LG entered into this binding stipulation while this action was pending—at the very same time it was arguing to Respondent that jurisdiction was not appropriate. *Id.*

Mr. Bishop is a citizen and resident of Missouri. **Ex. 8**, Plf. 4th Amend. Pet. ¶ 2. On January 16, 2016, Smoke Smart, LLC, a Missouri retailer, sold Mr. Bishop an LG 18650 HG2 lithium ion battery. **Ex. 2**, Dep. Jim Buchanan, Corp. Rep. of Smoke Smart, LLC, 104:5-7. Smoke Smart, LLC is located in Missouri. **Ex. 8**, ¶ 4. Mr. Jim Buchanan testified that the LG batteries sold to Mr. Bishop were genuine and authentic. **Ex. 2**, 92:17-20. The battery was designed, manufactured, and sold by LG. **Ex. 8**, ¶ 3.

On October 20, 2016, Mr. Bishop went to work at AT&T, located at 125 Corporate Office Drive, Earth City, Missouri 63045. **Ex. 8**, ¶ 9. The LG 18650 battery was in his pocket. **Ex. 8**, ¶ 10. He attended a meeting in a conference room. **Ex. 8**, ¶ 11. As he sat at the conference room table, the subject LG battery suddenly exploded, combusting into flames. **Ex. 8**, ¶ 12. Flames began shooting out of his pocket, an estimated 18 inches out from Mr. Bishop's body. **Ex. 9**, Dep. Derrick Skibinski, 9:14-10:1. Mr. Bishop fell back out of his chair, and rolled around on the floor attempting to get the burning battery out of his pocket. **Ex. 8**, ¶ 13. The battery burned for nearly half a minute before it ceased exuding flames. **Ex. 8**, ¶ 14; **Ex. 9**, 10:13-18. Mr. Bishop was taken via ambulance to Mercy Hospital in St. Louis where he received emergency treatment for his burn injuries. **Ex. 8**, ¶ 15. Mr. Bishop remained at Mercy for nine (9) days. *Id.*

Mr. Bishop filed the instant action on February 23, 2017. On June 25, 2018, the Court granted Plaintiff leave to add LG as a defendant. LG was added as a Defendant, and served pursuant to the Hague convention on August 7, 2018. Before LG's was added as a Defendant, and before any objection to jurisdiction was ever asserted, LG's counsel Paul Kim of Lewis Brisbois began litigating the merits of Plaintiff's case in Missouri. **Ex. 10**, Pre-Answer Correspondence with Paul Kim of Lewis Brisbois, Counsel for LG. Specifically, Mr. Kim requested that Plaintiff's counsel provide photographs of the subject battery and the CT scan that Plaintiff's consulting expert conducted to determine the identity of the battery's manufacturer. *Id.* This was done, reportedly, to determine whether the subject battery was actually LG's battery to "help [LG Chem] to properly answer" Plaintiff's Third Amended Petition. *Id.* Mr. Kim specifically stated that he sent the materials provided by Plaintiff to their expert, who was going to "identify and confirm that the incident cell is indeed an LG battery." *Id.*, p. 5. Based on LG Chem's representations made through its agent and retained counsel, Plaintiff acquiesced in LG's requests. Mr. Kim then asked for an extension to respond to Plaintiff's Third Amended Petition—but specifically acknowledged that he expected to receive "the results" of his expert's inspection the week of September 4, 2018. *Id.*, p. 5. Then, instead of an Answer to Plaintiff's Petition, as promised by LG Chem's counsel, Plaintiff was met a Motion to Dismiss for Lack of Personal Jurisdiction on September 17, 2018.

Plaintiff, without the benefit of any discovery, responded to LG's motion on November 13, 2018. The Trial Court denied LG's motion on April 1, 2019, without deciding whether Plaintiff should be granted leave to conduct jurisdictional discovery. LG

sought a writ of prohibition in the Missouri Court of Appeals, Eastern District, on April 19, 2019. LG's writ was denied on June 26, 2019. Relator 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. Respondent filed an Answer and Return to the Writ on October 3, 2019. Relator filed its opening brief on November 15, 2019. Respondent submits this brief in opposition, and requests that the preliminary writ be denied in its entirety.

III. ARGUMENT

A. RELATOR MISSTATES FULL STANDARD OF REVIEW CONCERNING MOTIONS TO DISMISS FOR LACK OF PERSONAL JURISDICTION.

Relator provides an abbreviated and incomplete standard of review as it concerns the appropriate standard for reviewing motions to dismiss. Respondent provides the full and complete standard below.

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." *Bryant v. Smith Interior Design Grp., Inc.*, 310 S.W.3d 227, 231 (Mo. 2010). 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. *Id.* "In the assessment of that proof, the allegations of the petition are given an intendment most favorable to the existence of the jurisdictional

fact.” *Moore v. Christian Fid. Life Ins. Co.*, 687 S.W.2d 210, 211 (Mo. Ct. App. 1984). Although Plaintiff is “required to make a prima facie showing of their claim, they need not prove that ‘all of the elements that combine to spell ultimate liability in tort are present.’” *Dillaplain v. Lite Indus., Inc.*, 788 S.W.2d 530, 534 (Mo. Ct. App. 1990) (internal citations omitted). The evidentiary showing required at this stage is “minimal.” *K-V Pharm. Co. v. J. Uriach & CIA, S.A.*, 648 F.3d 588, 592 (8th Cir. 2011). To prove the jurisdictional factum, the proponent may resort to discovery or other evidence relevant to that purpose. *Moore*, 687 S.W.2d at 211. And while a Court may consider affidavits submitted in support of a motion to dismiss for lack of personal jurisdiction, “the trial court may believe or disbelieve the statements made in said affidavits.” *State ex rel. Harmon v. Scott*, 820 S.W.2d 101, 103 (Mo. Ct. App. 1991); *Shirkey v. McMaster*, 876 S.W.2d 648, 650 (Mo. Ct. App. 1994) (“Where affidavits are presented, the court may believe or disbelieve the statements made in the affidavits. *Id.* Such factual determinations are left to the sound discretion of the trial court.”). Once Plaintiff makes a prima facie showing of jurisdiction, the burden shifts to Defendant to “make a compelling case that jurisdiction would be unreasonable.” *Andra v. Left Gate Prop. Holding, Inc.*, 453 S.W.3d 216, 234 (Mo. 2015).

B. POINT RELIED ON II — RELATOR WAIVED DEFENSE OF PERSONAL JURISDICTION BECAUSE IT TOOK ACTIONS WHOLLY INCONSISTENT WITH ITS ASSERTION THAT THE TRIAL COURT IS WITHOUT JURISDICTION.

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. Relator did not

waive personal jurisdiction by requesting an extension. It did so by stating that it was requesting an extension to “file an answer,” and by engaging in merit discovery, including engaging an expert, obtaining evidence, reportedly having an expert analyze the most central evidence in the case prior to challenging jurisdiction, after it had stipulated in an identical sister case pending in the 22nd Judicial Circuit that personal jurisdiction was appropriate. These are steps which “are clearly inconsistent with any claim of want of personal jurisdiction,” factors that were explicitly not considered by the Court in *State ex rel. White v. Marsh*, 646 S.W.2d 357, 362 (Mo. 1983), the “seminal case” concerning waiver. Relators’ Brief, p. 40. There is no information about the battery cell that LG needed to “inspect” or “test” in order to raise the instant motion—which is simply a copycat motion that had been raised before by LG in courts across the country. This is abundantly clear, as there is no mention of anything about the results of LG’s testing, or even the product at all, contained in LG’s actual motion to dismiss or brief submitted to this Court. “The defense [of personal jurisdiction] may [] be waived if the defendant takes action that is wholly inconsistent with his assertion that the trial court is without jurisdiction.” *Crouch v. Crouch*, 641 S.W.2d 86, 90 FN 4 (Mo. 1982); *Smead v. Granger*, 684 S.W.2d 573, 575 (Mo. Ct. App. 1984). LG’s actions prior to filing the motion to dismiss for lack of personal jurisdiction that is the subject of these proceedings, including stipulating to jurisdiction in the City of St. Louis in an identical case and engaging in merits discovery in this case, were wholly inconsistent with its current assertion that the Court is now without jurisdiction. Consequently, the defense of lack of personal jurisdiction has been waived.

C. POINT RELIED ON I— PERSONAL JURISDICTION OVER LG IS PROPER BECAUSE LG’S CONDUCT FALLS WITHIN THE LONG-ARM STATUTE AND LG HAS REQUISITE MINIMUM CONTACTS SO AS NOT TO OFFEND DUE PROCESS.

Missouri courts employ a two-step analysis to evaluate personal jurisdiction. *Bryant*, 310 S.W.3d at 231. First, the court inquires whether the defendant’s conduct satisfies Missouri’s long-arm statute, MO. REV. STAT. § 506.500. *Id.* If so, the court next evaluates whether the defendant has sufficient minimum contacts with Missouri such that asserting personal jurisdiction over the defendant comports with due process. *Id.* In a products liability case involving a product being placed into the stream of commerce, such as this one, the minimum contacts required are less stringent than in other areas. *Pohlmann v. Bil-Jax, Inc.*, 954 S.W.2d 371, 372–73 (Mo. Ct. App. 1997).

1. Point Relied on I—General Jurisdiction Not at Issue in This Case.

Respondent does not, and has never, asserted general jurisdiction over LG. According to LG, it is only “at home” in South Korea, unless it concedes otherwise. The South Korean legal system substantially differs from that of the United States, in numerous ways. Most importantly, “South Korea does not have a jury system for civil actions, so there are no jury trials in product liability case[s].” *Product liability and safety in South Korea: overview*, Practical Law Country Q&A w-017-6785. Even assuming Mr. Bishop could afford to litigate in South Korea, which is not true, requiring him to do so would in effect deprive him and other litigants of their right to a trial by jury under both the Missouri and U.S. Constitutions. South Korea is forum that is unavailable to Plaintiff. General jurisdiction is out of the question in this case, and all others pending across the country. It

is simply not an intellectually honest framework by which to analyze personal jurisdiction in this case and all others concerning this product.

2. Point Relied On I—Missouri’s Long Arm Statute Easily Satisfied.

The Missouri long arm statute extends jurisdiction to the fullest extent of the due process clause. In other words, if jurisdiction comports with due process, it comports with the Missouri long arm statute. As this Court explained:

In enacting § 506.500, the ultimate objective was to extend the jurisdiction of the courts of this state over non-resident defendants to that extent permissible under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States. Pursuant to this objective, Missouri courts have interpreted the words “transaction of any business within this state” or “commission of a tortious act within this state” broadly so as not to deny jurisdiction under § 506.500 in situations in which the due process clause would permit the assertion of personal jurisdiction.

State ex rel. Newport v. Wiesman, 627 S.W.2d 874, 875 (Mo. 1982). LG ignores precedent, and the plain language of Missouri’s Long Arm Statute, which compels the finding that the long arm statute is satisfied. In short, LG fails to conduct or even acknowledge the appropriate analysis that shows they committed a tortious act within the meaning of the statute. The Long Arm Statute states in pertinent part:

Any person or firm, whether or not a citizen or resident of this state, or any corporation, who in person or through an agent does any of the acts enumerated in this section, thereby submits such person, firm, or corporation, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of such acts:

(3) The commission of a tortious act within this state;

MO. REV. STAT. § 506.500. LG acknowledges this is a products liability case, in which Plaintiff asserts claims for strict and negligent products liability. Products liability is a tort

and has been considered such for almost 50 years. *State ex rel. Apco Oil Corp. v. Turpin*, 490 S.W.2d 400, 405 (Mo. App. 1973) (“A products liability case is now considered to be tortious and any recovery is really in tort.”) The tort, defectively designing, manufacturing, and testing, a product, was committed outside of Missouri. But “for purposes of the analysis under the long-arm statute, the question is whether the nonresident defendant committed acts in Missouri that constitute a tort, or committed tortious acts outside Missouri with actionable consequences in this state” *State ex rel. Key Ins. Co. v. Roldan*, No. SC 97623, 2019 WL 5558334, at *6 (Mo. Oct. 29, 2019). This includes tortious acts constituting negligence and product defect. *State ex rel. William Ranni Assocs., Inc. v. Hartenbach*, 742 S.W.2d 134, 139 (Mo. 1987) (“Commission of a tortious act within this state includes extraterritorial acts of negligence producing actionable consequences in Missouri”) *Bryant v. Smith Interior Design Grp., Inc.*, 310 S.W.3d 227, 232 (Mo. 2010); (“[E]xtraterritorial acts that produce consequences in the state,” are subsumed under the tortious act section of the long-arm statute.”) LG’s extraterritorial acts in negligently designing a defective and unreasonably dangerous product caused Mr. Bishop to suffer injuries in Missouri, an actionable consequence in this state. This is exactly what Respondent found. The Long Arm Statute is unquestionably satisfied.

3. Point Relied On I —Due Process Satisfied Because LG Has Requisite Minimum Contacts and The Lawsuit Arises Out of Those Contacts.

This Court recently set forth the law of specific jurisdiction, mirroring that of the latest pronouncement from the U.S. Supreme Court in *Bristol-Myers-Squibb* (“BMS”):

Specific jurisdiction requires consideration of the ‘relationship among the defendant, the forum, and the litigation. It encompasses only those cases in which the suit arise[s] out of or relate[s] to the defendant’s contacts with the forum. In other words, 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. For this reason, specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction.

State ex rel. Bayer Corp. v. Moriarty, 536 S.W.3d 227, 233 (Mo. 2017) (citations and quotations omitted). More recently, this Court pronounced:

Missouri courts may still assert personal jurisdiction over a non-domiciliary defendant corporation without violating due process if that entity has at least one contact with this state *and* the cause of action being pursued arises out of that contact.

State ex rel. Cedar Crest Apartments, LLC v. Grate, 577 S.W.3d 490, 494 (Mo. 2019); *State ex rel. Caine v. Richardson*, 600 S.W.2d 82, 84 (Mo. Ct. App. 1980) (“It is clear that such minimum contacts are met by a single act done or a single transaction consummated within the forum state if the cause of action arises from that act or transaction.”); *State ex rel. William Ranni Assocs., Inc. v. Hartenbach*, 742 S.W.2d 134, 139 (Mo. 1987) (“A single tortious act is sufficient to support personal jurisdiction consistent with due process standards.”) LG tellingly fails to cite to this most recent, controlling, precedent. LG is a non-domiciliary defendant. It sold through a distribution network (i.e. a supplier) a defective product in this state, receiving and speaking to the very retailer that sold Mr. Bishop the battery in the process. Ex. 4, Dep. Jim Buchanan, 162:20-163:7; 166:15-167:2. The subject battery was sold in Missouri, was subsequently used in Missouri, and exploded in Missouri, causing injury to a Missouri resident that required extensive medical treatment

in Missouri. The lawsuit unquestionably arises out of LG's contact with Missouri, and the lawsuit is directly related to this single contact. *Grate*, 577 S.W.3d at 494. Personal jurisdiction is proper under this Court's precedent.

LG appears to argue *BMS* worked a sea change over the law of personal jurisdiction, even going as far to question the validity of the entirety of "stream of commerce"⁵ jurisprudence, and attempts to use it as a sword because it has been utilized to seemingly narrow the scope of personal jurisdiction. But the facts and principles enunciated by *BMS* only support the finding of personal jurisdiction here.

BMS was a mass tort case. More than 600 plaintiffs brought a state court product liability action against Bristol-Myers Squibb due to injuries they alleged they suffered due to the ingestion of a drug called Plavix. Only 86 were California residents. There was no dispute that BMS did not manufacture, label, package, or work on the regulatory approval of the product in California. *Id.* at 1778. But BMS did sell Plavix in California. Similarly, Plaintiff alleges LG sold and sells the defective battery here in Missouri. Ex. 8, ¶¶ 3-6

The Supreme Court's analysis was keenly focused on the claims asserted by *out of state* plaintiffs, those who did not reside in California, to which the Court referred to as

⁵ To the extent that the "stream of commerce theory" has been laid to rest, this Court has not acknowledged such. To the extent the stream of commerce analysis is dead, this change would overwhelmingly favor Plaintiff, and weigh in favor of finding personal jurisdiction here. LG's entire basis is that it did not intend to serve or target the market through an agreed upon distribution scheme. If the stream of commerce jurisprudence is no longer relevant or binding, then that argument is wholly irrelevant. All that matters is "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." *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 137 S. Ct. 1773, 1780, 198 L. Ed. 2d 395 (2017) (quotations omitted). There is certainly an affiliation between the forum and underlying controversy—an explosion of a product designed and manufactured by LG, that was sent to Missouri, sold in Missouri, used in Missouri, and injured a Missouri resident, that required medical treatment in Missouri.

“non-resident” plaintiffs. *Id.* But it is the Court’s pronouncements, and treatment, of the California residents’ claims that overwhelmingly support the finding of jurisdiction here. Unlike the California residents’ claim, the Court wrote, the “non-resident plaintiffs did not allege that they obtained Plavix through California physicians or from any other California source; nor did they claim that they were injured by Plavix or were treated for their injuries in California.” *Id.* at 1778. The reason it made this comparison was to clearly illustrate why personal jurisdiction was proper over the *California* residents, but improper over the non-resident plaintiffs—i.e. to illustrate the affiliation between the California Plaintiffs, the forum, and the underlying controversy, that was lacking in the case of the non-resident plaintiffs and the forum state. Here, Mr. Bishop’s claim is abundantly more similar if not identical to that of the claims of the California residents:

BMS (California Residents)	Mr. Bishop
California Residents	Missouri Resident
Prescribed in California	Purchased in Missouri
Used or Ingested in California	Used in Missouri
Suffered Harm in California	Suffered Harm in Missouri
Treated for Injuries in California	Treated for Injuries in Missouri
Lawsuit about ingestion of Plavix, a product designed, manufactured, and sold by BMS	Lawsuit about explosion of battery, a product designed, manufactured, and sold by LG

In other words, the present case has the exact type of connections between the claims and the forum that were missing in *BMS*. To find personal jurisdiction, “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.’” *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 137 S. Ct. 1773, 1780, (2017) (quotations omitted). There is an obvious affiliation

between the forum and the controversy, and an occurrence that occurred in Missouri at issue here.

Next, the *BMS* Court said that “in determining whether personal jurisdiction is present, a Court **must consider** a variety of interests,” including “interests of the forum State and of the plaintiff in proceeding with the cause in the plaintiff’s forum of choice.” *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1780. The primary concern, the Court said, is the “burden on the defendant.” *Id.* None of these interests, which the U.S. Supreme Court stated “must be considered” are raised or even discussed in Relators’ brief. Each interest weighs in favor of finding personal jurisdiction over LG in this case.

i. The Interests of the Forum State

“A State generally has a ‘manifest interest’ in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors.” *Andra v. Left Gate Prop. Holding, Inc.*, 453 S.W.3d 216, 233 (Mo. 2015). The State of Missouri has a substantial interest in protecting its citizens from injuries caused by defective and unreasonably dangerous products made by foreign corporations. *Mulligan v. Truman Med. Ctr.*, 950 S.W.2d 576, 583 (Mo. Ct. App. 1997), *overruled on other grounds by Budding v. SSM Healthcare Sys.*, 19 S.W.3d 678 (Mo. 2000). This interest is particularly keen here, where multiple lawsuits concerning the same product, same company, and injuries to Missouri residents are pending, and whose results are largely contingent on the outcome of these proceedings. Missouri residents will be at a severe disadvantage at the expense of a multi-national foreign corporation, as each will be left without a forum to litigate except for the tribunals of South Korea. Each will be forced to follow LG to a foreign jurisdiction,

where they are deprived of their Constitutional right to trial by jury, where they may not be able to afford the cost of bringing an action in the forum, where they would be deprived of crucial witnesses and evidence available in Missouri that would not be available in the foreign jurisdiction. *See McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957). In addition, the Eighth Circuit has noted that “Missouri has a strong interest in applying its punitive damages laws to deter conduct by corporations doing business in Missouri that harms Missouri residents,” a claim that is sought here. *Winter v. Novartis Pharm. Corp.*, 739 F.3d 405, 410 (8th Cir. 2014). Moreover, the legislature has evinced a clear intent that the designer or manufacturer of the product, and not an innocent Missouri retailer, should be liable for harm a defective product causes a Missouri consumer. Mo. Rev. Stat. § 537.762. Finding that personal jurisdiction lacks of LG here would submit innocent Missouri retailers and small businesses like Smoke Smart to strict liability in tort, not solely in this case but in others like it, eviscerating entirely the intent and effect of the innocent seller statute.

In short, the State of Missouri has an overwhelming interest in protecting the rights of the thousands of Missouri consumers (including the 16,500 customers of smoke Smart) that have purchased and may fall victim to the defect contained in LG’s 18650 batteries. The interests of the State of Missouri weigh heavily in favor of finding personal jurisdiction over LG in this case.

ii. Interests of the Plaintiff

Mr. Bishop’s interests certainly weigh in favor of finding personal jurisdiction over LG. He is a Missouri resident, and resident of St. Louis County. A Missouri Court is the

most obvious and convenient forum for him. A Missouri resident like Mr. Bishop cannot afford to fly to South Korea, hire a Korean lawyer and litigate a claim in a system that is not his own and be forced to accept a lesser remedy than is available in his home state. Mr. Bishop has a right under the Missouri Constitution and U.S. Constitutions to a trial by jury. That right would be eviscerated if forced to litigate in South Korea. Notably, in *Bristol-Meyers-Squibb*, the Defendant conceded that lawsuits concerning Plavix “could be brought in either New York or Delaware.” *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1783. Here, other than stipulating to the propriety of personal jurisdiction in the City of St. Louis (and in many other cherry-picked cases), LG has contested personal jurisdiction in every state in which it has been sued for its exploding batteries including: (1) Alabama; (2) Arizona; (3) California; (4) Georgia; (5) New Jersey; (6) Oklahoma; (7) Missouri; (8). South Carolina; (9) Texas; and (10) Washington. According to LG, it can be sued nowhere—not a single state in the United States—though its products have saturated the market and injured hundreds of American consumers. Mr. Bishop either litigates in Missouri, his home state where he brought the product, where he was injured, where the witnesses saw the product explode, and where he was treated for his injuries—or Korea. Mr. Bishop’s circumstances are not uniquely his, but describes those of each Missouri resident who has suffered severe injuries due to LG’s defective product and tortious conduct.

The interests of Plaintiff weigh overwhelmingly in favor of finding personal jurisdiction over LG.

iii. Burden on Defendant

LG spends pages of its brief arguing that consent to jurisdiction in an identical matter in this jurisdiction is legally irrelevant to the jurisdictional analysis. That's incorrect, as it relates directly to a matter the U.S. Supreme Court has stated a Court **must consider**: the burden on the defendant. LG doesn't discuss any burden it would suffer litigating this claim in a Missouri Court, because it indeed would incur no burden. LG has plenty of resources to litigate this claim in Missouri, and has assembled a legal team (including national and local counsel) to handle litigation involving exploding batteries in Missouri. The burden is so minimal that LG stipulated in the *Kruep* case that jurisdiction was appropriate in the 22nd Judicial Circuit, a court house in this state merely 9.2 miles away from where the underlying action is pending. *BMS* mandates that a Court consider the "burden on the defendant." The burden on Defendant is non-existent.

4. Point Relied On I - The Arrival of The LG HG2 In Missouri Was Not Fortuitous, But Resulted as a Result of a Calculated and Purposeful Scheme by LG to Target Missouri.

LG alleges that Plaintiff has only adduced evidence that LG placed the product into the stream of commerce. That's not correct. Plaintiff pleaded and has shown via undisputed evidence a concerted effort on part of LG to target the Missouri market. Ex. 8, ¶¶3-6. Mr. Buchanan, the corporate representative, testified that the single Missouri retailer in this case has, by itself, sold more than 16,500 LG 18650 in Missouri alone. Ex. 4, Dep. Jim Buchanan (11/7/2018), 27:19-28:3, *Kruep v. Smoke Smart, LLC, et al.* Mr. Buchanan testified that he tried e-mailing and calling LG multiple times to get answers regarding the LG HG2 batteries—and he was told by an LG employee that "I would have

to just find a supplier,” to provide him the batteries. *Id.* at 162:20-163:7. Mr. Buchanan testified that within shipments of LG HG2 batteries he received that he did remember seeing paperwork with LG information on it. Ex. 4, Dep. Jim Buchanan, 166:15-167:2. LG HG2 18650 batteries, Mr. Buchanan testified, were widely available for sale from other Missouri retailers, including Battery Outfitters in St. Peters, Missouri. Ex. 4, Dep. Buchanan, 50:22-51:11. A quick google search proves Mr. Buchanan’s testimony remains true, and that local retailers continue to advertise individual LG HG2 18650 batteries for sale in Missouri, explicitly stating that their purpose is to power e-cigarettes.⁶ LG agrees that there are tens of thousands, if not millions, of LG 18650 batteries circulating the e-cigarette market. Ex. 3, Dep. Joon Young Shin, 129:7-17. These real world circumstances belie and contradict the contentions in the self-serving affidavit that LG did not “calculate its activities to reach Missouri.” Finding otherwise would require this Court to make a factual and credibility determination—opposite the one made by Respondent. *Adoption of K.M.W.*, 516 S.W.3d 375, 381 (Mo. Ct. App. 2017) (“We defer to the trial court’s determinations of witness credibility and factual issues.”); *Just Enterprises, Inc. v. Spruce*, 243 S.W.3d 549, 550 (Mo. Ct. App. 2008) (“As a result, issues about the credibility of witnesses are for the trial court to resolve and are not matters that appellate courts can review”).

5. Plaintiff’s Claims Arise out of and Relate to LG’s Contacts with Missouri.

⁶ See *Battery Outfitters*, <https://batteryoutfitters.com/products/single/18650-LGHG2> (accessed on 12/2/2019)

The parties agree that, to exercise personal jurisdiction over LG, 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. . .” *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1781. It appears the disagreement concerns what that occurrence consists of in this case. The “occurrence” here is the sale of a defective product into Missouri and its subsequent explosion. All of this occurred in Missouri. The claim relates directly and arises out of that occurrence. The Court’s holding in *State ex rel. Cedar Crest Apartments, LLC v. Grate*, 577 S.W.3d 490, 493 (Mo. 2019) perfectly illustrates this principle. *Grate* was a premises liability case where plaintiff was electrocuted. There were two sets of defendants: defendants who owned the premises and the defendants who managed the premises. Plaintiff alleged the owner defendants “owned, controlled, and/or maintained” the premises and argued that, due to these contacts, personal jurisdiction was proper. This Court rightly decided that personal jurisdiction was lacking over the owner defendants. This Court explained: the owner defendants in *Grate* might have “owned, controlled and/or maintained,” the property where Plaintiff was injured. *Id.* at 492. But there was no connection between their ownership, control, and or maintenance of the property that lead to plaintiff being electrocuted—another defendant made the decisions that lead to his electrocution, and thus had a connection between the tortious conduct and the claims. *Grate*, 577 S.W.3d at 495. Here, LG’s tortious conduct resulted in injury, and the lawsuit relates directly to that contact. There is an “affiliation between the forum and the underlying controversy,” specifically an “occurrence” that took place in the forum state to

which this lawsuit relates. *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1781. Personal jurisdiction is proper.

The decisions of federal trial courts cited by Relator are easily distinguishable. Their facts are nothing like those of the case at bar. *See Oliver v. Ford Motor Co.*, No. 4:19CV1846 HEA, 2019 WL 4194372, at *1 (E.D. Mo. Sept. 4, 2019) (the product at issue was not shipped to or sold to any party in Missouri). That is the opposite of what is pleaded and what actually happened here. Plf. 4th Amend. Pet. ¶¶ 3-6. And contrary to Relators' suggestions, Respondent did not find jurisdiction appropriate simply because Mr. Bishop was injured in Missouri, but because the record supported the conclusion that LG Chem made a calculated effort to serve the Missouri market, sold a defective product into Missouri, and injured a Missouri resident.

Fullerton v. Smith & Nephew, Inc. is inapposite, largely for the very same reasons. No. 1:18CV245 RLW, 2019 WL 2028712, at *1 (E.D. Mo. May 8, 2019). In *Fullerton*, Plaintiff (a citizen of Missouri) was implanted with an allegedly defective medical device in Arkansas, had a surgery to remove the device in Missouri, and then filed a lawsuit in Missouri. *Id.* The Court granted defendants' motion to dismiss for lack of personal jurisdiction for two reasons: First, the Court specifically found that there was no evidence or allegation that a tort was committed in Missouri, and thus the long arm statute was not satisfied. *Id.* at 3. That's obviously not true here. Second, the Court found that the device at issue "shipped to Arkansas, sold in Arkansas, and implanted in Arkansas," and thus jurisdiction in Arkansas was appropriate. *Fullerton v. Smith Nephew, Inc.*, No. 1:18CV245 RLW, 2019 WL 2028712, at *4 (E.D. Mo. May 8, 2019). The facts of *Fullerton* are a far

cry from those here, where the subject battery was shipped to Missouri, sold in Missouri, used in Missouri, exploded in Missouri, and injured a Missouri resident.

Taking the pleading allegations as true, and considering the undisputed facts contained in the record, Plaintiff's claims indisputably arise from LG's concerted effort to serve the Missouri market. Missouri Supreme Court and U.S. Supreme Court precedent support the finding of jurisdiction over LG. Otherwise, Mr. Bishop and dozens if not hundreds of Missouri and American consumers will be completely deprived of a forum to seek redress for their injuries caused by a clearly defective product. Respondent respectfully suggests this Court quash its Preliminary Writ of Prohibition in its entirety.

D. POINT RELIED ON II — SHOULD THE COURT DETERMINE FURTHER DEVELOPMENT OF THE FACTUAL RECORD NECESSARY, JURISDICTIONAL DISCOVERY IS APPROPRIATE.

LG opposes remanding this case for jurisdictional discovery without basis. This Court recently stated in a case involving similar issues that whether jurisdictional discovery is appropriate is left for the trial court to determine. *State ex rel. Bayer Corp. v. Moriarty*, 536 S.W.3d 227, 235 (Mo. 2017) ("It is up to the circuit court in the first instance to consider whether the proposed amended petition should be filed, whether jurisdictional discovery requested by Plaintiffs is appropriate, and whether a protective order is necessary to limit its nature and extent.") Personal jurisdiction is appropriate over LG. But should the Court believe a clearer factual record is necessary to decide this motion, then the propriety of jurisdictional discovery, including determining what that discovery would consist of and the timeframe in which it would be accomplished should be left to the trial court's determination in the first instance.

IV. CONCLUSION

There is a clear affiliation between the claims asserted in this action and the forum. LG ignores the clear teachings of *BMS*, and this Court's precedent that affirms that "Missouri courts may still assert personal jurisdiction over a non-domiciliary defendant corporation without violating due process if that entity has at least one contact with this state *and* the cause of action being pursued arises out of that contact." *State ex rel. Cedar Crest Apartments, LLC v. Grate*, 577 S.W.3d 490, 494 (Mo. 2019); *State ex rel. Caine v. Richardson*, 600 S.W.2d 82, 84 (Mo. Ct. App. 1980) *State ex rel. William Ranni Assocs., Inc. v. Hartenbach*, 742 S.W.2d 134, 139 (Mo. 1987). Respondent was correct in denying LG's motion to dismiss for lack of personal jurisdiction because, the record shows an concerted effort on part of LG to target the Missouri market, the product at issue was shipped to Missouri, sold in Missouri, used in Missouri, exploded in Missouri, injured a Missouri resident, and caused the need for medical treatment in Missouri, and the lawsuit arises out of these contacts. Respondent respectfully requests the Court issue an Order Quashing its Preliminary Order in Mandamus, deny Relators' Petition for Writ of Prohibition in its entirety and permit Respondent to proceed with the underlying cause. In the alternative, this Court should remand the case with directions to respondent to consider whether jurisdictional discovery is appropriate as originally requested by Mr. Bishop, and for such further relief as the Court deems just and proper under the circumstances.

DATED: December 5, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been furnished to all counsel of record via this Court's ECF system on December 5, 2019.

/s/ John M. Simon

CERTIFICATE OF COMPLIANCE

The undersigned certifies under Rule 84.06 of the Missouri Rules of Civil

Procedure that:

1. The Respondent's Brief includes the information required by Rule 55.03;
2. The Respondent's Brief complies with the limitations contained in Rule 84.06;
3. The Respondent's Brief, excluding cover page, signature blocks, certificate of compliance, and certificate of service, contains 7,891 words, as determined by the word-count tool contained in the Microsoft Word software with which this Brief was prepared; and
4. The Respondent's Brief has been scanned for viruses and to the undersigned's best knowledge, information, and belief is virus free.

/s/ John M. Simon