No. 69A22 FOURTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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ERIC MILLER,
Plaintiff-Appellant,

v.

LG CHEM LTD., LG CHEM AMERICA, INC., FOGGY BOTTOMS VAPES LLC, CHAD & JACLYN DABBS D/B/A SWEET TEA'S VAPE LOUNGE, DOE DEFENDANTS 1–10,
Defendants-Appellees.

FROM DURHAM COUNTY

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PLAINTIFF-APPELLANT'S CORRECTED NEW BRIEF

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PLAINTIFF-APPELLANT'S CORRECTED NEW BRIEF

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INTRODUCTION

In 2017, Eric Miller purchased two LG Chem 18650 lithium-ion batteries in North Carolina. The batteries provided no warning of a risk of explosion that was well known to the manufacturer. When one of the batteries did, in fact, explode in Mr. Miller's pocket while he was at his home in North Carolina, causing him severe and lasting burns, he brought suit exactly where one would expect: North Carolina. Mr. Miller sued LG Chem—the Korea-based manufacturer, whose 18650 batteries can be found for sale at over one hundred stores and in countless household items throughout North Carolina—and LG Chem America, the American affiliate that marketed the batteries in North Carolina.

Personal jurisdiction on these facts should have been obvious. The Due Process Clause bars jurisdiction over defendants who lack "fair warning" that they may face suit in a state; but it doesn't act as a "territorial shield" for companies "to avoid interstate obligations that have been voluntarily assumed." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985). So, when a corporation ships out its products knowing and expecting that they will end up on store shelves across North Carolina, or intentionally markets those products here, the state's courts may hear the claims of North Carolinians injured, by those very products, in North Carolina.

If there were any doubt about that proposition before, the U.S. Supreme Court eliminated it in *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021). *Ford*, handed down while this appeal was pending, involved two "products-liability suit[s] stemming from [two] accident[s]." *Id.* at 1022. In both suits (as here), "[t]he accident[s] happened in the State where suit was brought," each "victim was one of the State's residents," and the defendant "did substantial business in the State"—including selling the same type of product that "the suit claims is defective" (there, a vehicle; here, a battery). *Id. Ford*'s holding is simple: So long as a company "serves a market for a product in a State and that product causes injury in the State to one of its residents, the State's courts may entertain the resulting suit." *Id.* at 1022. That rule controls this case. LG Chem shipped its batteries into North Carolina

through multiple channels, LG America marketed them there, and those batteries injured Mr. Miller in the state.

The court below nonetheless affirmed the trial court's dismissal, over Judge Inman's dissent, based on two key errors. *First*, it failed to address the claims against LG America. It merely recounted some facts in the record, ignored others, and, most important, offered no analysis of why the trial court's order dismissing the American affiliate from the case should stand in light of unrebutted allegations that LG America marketed 18650 batteries in North Carolina.

Second, as to LG Chem, the court of appeals found jurisdiction lacking because, in its view, Mr. Miller's intended use of his battery (to power an e-cigarette) meant that he wasn't injured by the "specific product" that LG Chem expected to reach North Carolina. That was error. The battery was the same model of battery, and how Mr. Miller planned to use it has no jurisdictional relevance. Rather, what matters is whether the defendant had "fair warning." And every manufacturer knows that consumers won't use products to their exact specifications. That's especially true here: The product is an interchangeable battery, uniform in size, that looks much like an AA battery. Its chief competitive advantage is that it is rechargeable and thus reusable. The defendants can't credibly claim that they lacked fair warning.

In essence, the court of appeals imposed a proximate-cause requirement: Because Mr. Miller planned to use his battery in a supposedly unauthorized way—

an intervening cause—the court found that a "causal connection" between his claims and LG's contacts was lacking. But *Ford* rejected an even less exacting but-for causation requirement. The car company's main argument in the case was that there was no "causal link" between its forum contacts and the plaintiffs' injuries because the accidents involved used cars that had been re-sold "outside the forum States, with consumers later selling them to the States' residents." *Ford*, 141 S. Ct. at 1026. The court explained that no causal link was required and that it was sufficient instead for claims to "relate to" a defendant's contacts with the state. *Id.* at 1029.

The court of appeals' contrary rule would not only erect an even more robust causation hurdle but also would produce absurd results. It would allow a carmaker to dodge jurisdiction if a car crash victim failed to perform regular oil changes. It would permit a table-saw manufacturer to force a North Carolinian to litigate abroad based on improper use of a safety guard. And it would empower corporations to avoid jurisdiction through the fine print of their instruction manuals. That is not the law.

At the very least, if there is any remaining doubt whether personal jurisdiction exists—and there should be none—this Court should send the case back to allow jurisdictional discovery. The trial court dismissed Mr. Miller's claims without ruling on two pending motions to compel discovery on topics that go to the heart of

personal jurisdiction. That failure to exercise any discretion is an abuse of discretion that independently warrants reversal and remand.

ISSUES PRESENTED

1. ***Personal jurisdiction over LG Chem America.*** When a nonresident company markets a product in North Carolina and that product causes injury in the state to one of the state's residents, does the Due Process Clause bar North Carolina's courts from entertaining the resident's resulting product-liability suit?

2. ***Personal jurisdiction over LG Chem.*** When a nonresident manufacturer serves a market for a product in North Carolina—by shipping the product into the state and allowing it to be found on the shelves of more than one hundred North Carolina stores—and that product causes injury in the state to one of the state's residents, does the Due Process Clause bar North Carolina's courts from entertaining the resident's resulting product-liability suit?

3. ***Jurisdictional discovery.*** Did the trial court abuse its discretion by dismissing the plaintiff's claims without acting on pending motions to compel jurisdictional discovery?

STATEMENT OF THE CASE

North Carolina resident Eric Miller suffered severe burns when an LG Chem 18650 lithium-ion battery spontaneously exploded in his pocket. Mr. Miller then

brought product-liability claims against LC Chem and LG Chem America, along with the two North Carolina stores from which he bought LG Chem batteries.

After LG Chem and LG America moved to dismiss the suit for lack of personal jurisdiction, Mr. Miller sought jurisdictional discovery from both companies. Because the parties couldn't resolve their discovery disputes, Mr. Miller responded to the motions to dismiss, citing LG Chem and LG Chem America's extensive contacts with North Carolina—including their marketing and shipment of thousands of 18650 lithium-ion batteries into the state. He also sought, in the alternative, to compel jurisdictional discovery.

The trial court granted the motions to dismiss but failed to produce any reasoning or decision with respect to Mr. Miller's alternative request for jurisdictional discovery. After the trial court's decision, the U.S. Supreme Court decided *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017 (2021). The court of appeals nevertheless affirmed the order granting the motion to dismiss and held that the trial court did not abuse its discretion in failing to grant the motions to compel. Judge Inman dissented from both holdings.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

This appeal is before the Court as a matter of right from a decision of the court of appeals in which there is a dissent. *See* N.C.G.S. § 7A-30(2); N.C. R. App. P. 14.

STATEMENT OF THE FACTS

I. Factual Background

A. The LG defendants play a leading role in supplying and marketing 18650 lithium-ion batteries throughout the world, including in North Carolina.

LG Chem is a Korea-based company that is, among many other things, the world's largest manufacturer of 18650 lithium-ion batteries. R p 23.[1] Like AA batteries, 18650 lithium-ion batteries are versatile and interchangeable—the "18" and "65" refer to the width and height of the battery in millimeters—and are designed to be capable of powering a wide variety of devices. These batteries provide an advantage over other rechargeable batteries by holding a longer charge. R p 12.

The global market for 18650 batteries is substantial—$63 billion as of 2020.[2] And so is LG Chem's share of that market: Along with two other companies, LG Chem controls 80 percent of the global market for 18650 batteries.[3] Batteries manufactured by LG Chem have been sold and used in the United States to power laptops, power tools, flashlights, headlamps, vaping devices, and much more.

Through its outsized role in the 18650-battery market, LG Chem has formed numerous contacts with North Carolina. It is unrebutted in this case that LG Chem

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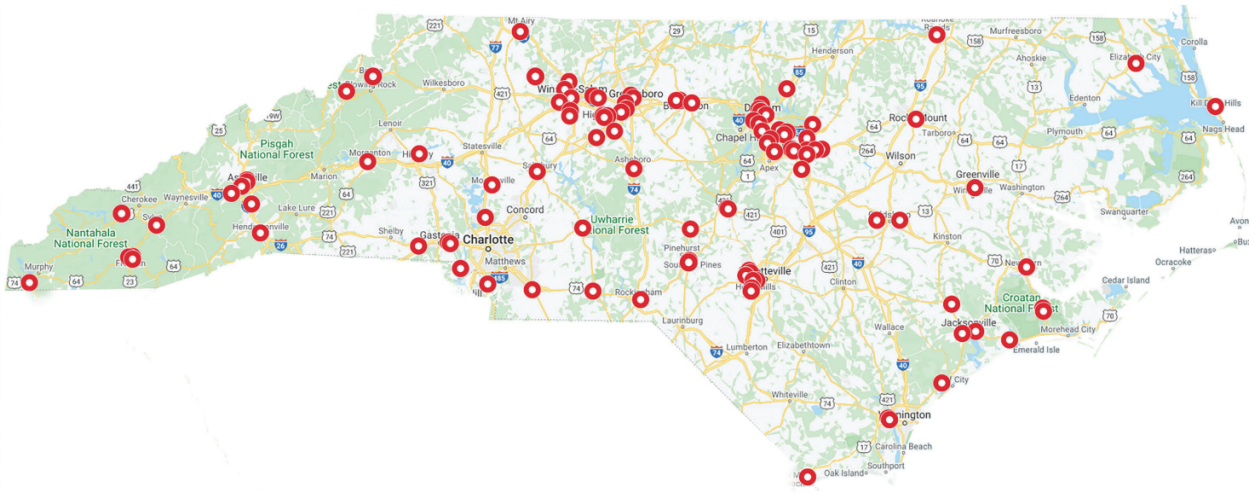
[1] The record in this case has four parts. We cite the original record on appeal as "R p _"; the amendment to the record as "AR p _"; the 11(c) supplement to the record as "11(c) R p _"; and the sealed record as "Sealed R S p _."

[2] Industry Research, *GlobeNewswire* Feb. 14, 2022 (https://perma.cc/AQF4-DHB8).

[3] *Id.*

manufactures and distributes 18650 lithium-ion batteries with the knowledge and expectation that consumers in North Carolina will purchase them. R p 9. LG Chem shipped over 2,000 pounds of 18650 batteries to a North Carolina company, 11(c) R pp 2, 51–52; LG Chem places its batteries into the stream of commerce to be incorporated into commonplace goods like power tools and laptops that North Carolinians purchase, R pp 9, 21; and its batteries are sold by scores of North Carolina retailers, R p 226. A non-exhaustive investigation conducted during the limited discovery period in this case revealed that over 100 "vape shops"—stores that focus on e-cigarette merchandise—spread throughout North Carolina carried LG Chem's 18650 batteries for purchase:



R pp 179, 226. LG Chem even sources its lithium from North Carolina and uses North Carolina ports to send its 18650 lithium-ion batteries to customers elsewhere in the United States. 11(c) R p 70; *Miller v. LG Chem, Ltd.*, 2022-NCCOA-55, ¶ 11 (2022) .

LG America is LG Chem's United States-based affiliate, with headquarters in Georgia. It has distributed 18650 batteries in the United States. Although LG America has denied distributing 18650 batteries directly to North Carolina, it has not rebutted that it markets them here. *Compare* R p 7 (alleging marketing activity) *with* R pp 154–58 (LG America affidavit denying certain contacts but not marketing). The company also has a registered agent in North Carolina. 11(c) R p 157.

B. The use of lithium-ion batteries to power e-cigarettes results in numerous and substantial injuries.

One use of 18650 batteries is to power e-cigarettes. Whereas traditional cigarettes provide nicotine through the burning of tobacco, e-cigarettes do it by vaporizing a liquid infused with nicotine. R p 11. The process of turning the liquid to a vapor that can be inhaled requires energy to occur. R p 11. So, just as combustible cigarettes need matches or a lighter to work, e-cigarettes need a charge.

18650 batteries fill that need. Because of their size, 18650 batteries are small enough to fit into handheld vaping devices (roughly the size of a flashlight) and, when a spare is needed, the user's pocket or purse. R pp 12, 14–15. 18650 lithium-ion batteries also have a longer battery life than other rechargeable batteries. R pp 12, 14. The advantage of portable charging has paved the way for lithium-ion batteries to become the most common battery used in vaping devices. R p 14.

Like the 18650-battery market that helps power it, the e-cigarette market is large and growing. In 2008, vaping devices generated approximately $20 million in

revenue across the United States. R p 6. Half a decade later, in 2014, that figure mushroomed to $1.5 billion. R p 6. By 2021, it reached $6 billion.[4]

But the attributes of lithium-ion batteries that enable longer charges and make them attractive for e-cigarette users come with risks as well. Lithium-ion batteries contain an electrolyte solvent that is highly flammable. R p 17. If the battery short-circuits, an increase in the internal temperature of the battery combined with the flammable solvent can cause the battery to explode and catch fire. R p 17.

This danger has been well documented for years. A 2014 report from the U.S. Fire Administration, a division of FEMA, identified the increasing prevalence of injuries resulting from 18650 battery explosions, which the report compared to a "bullet or small rocket" being "propelled across the room." R pp 18–19. A July 2017 update to the report identified an even greater number of injuries from lithium-ion batteries across the country, including in North Carolina.[5] R p 19. The report put its conclusion in plain terms: "Lithium-ion batteries should not be used in e-cigarettes." R p 20.

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[4] Becky Sullivan & Bill Chappell, *The FDA Postpones a Long-Awaited Decision on Juul's Vaping Products*, NPR (Sept. 10, 2021) https://perma.cc/8FW4-MD8F.

[5] United States Fire Administration, Electronic Cigarette Fires and Explosions in the United States 2009 – 2016 at 24, 26 (documenting injuries to e-cigarette users in North Carolina that included temporary blindness, a lost eye, and third-degree burns).

Although LG Chem became aware of the dangers at least as early as 2016, its batteries continued to be sold in North Carolina without any warning as late as mid-2018. R pp 21–22.

C. Mr. Miller suffers catastrophic injuries after an LG Chem battery, lacking any warning, explodes.

Mr. Miller is among the millions of people who have switched from combustible cigarettes to e-cigarettes in pursuit of a safer alternative for smoking. In 2017, he purchased a vaping kit from Foggy Bottoms Vapes, a vape shop in Bahama, North Carolina. R p 23. Along with a vaping device, the kit included an LG Chem 18650 lithium-ion battery, but no warning—on the battery or elsewhere—about the dangers of using lithium-ion batteries in a vaping device. R pp 23–24. In October 2017, Mr. Miller purchased a second LG Chem 18650 battery to power his vaping device from Sweet Tea's Vape Lounge in Creedmor, North Carolina. R p 24. Once more, the battery had no warning about the risk of explosion and fire. R pp 24–25.

In March 2018, Mr. Miller placed one of these two batteries—he is uncertain which—into his pocket. R p 25. As he was seated at his desk working, the battery spontaneously exploded, sending flames and burning chemicals down his leg. R p 26. When he tried to put out the fire, he burned his hand as well. R p 26 He immediately went to his local hospital but, because of the severity of the injuries, was quickly transferred by ambulance to the University of North Carolina's Burn Center. R p 26.

Mr. Miller was left in excruciating and lasting pain. R p 26. He sustained severe burns to his thigh, knee, and lower leg that required surgery and skin grafts with tissue removal down to the layer of connective tissue covering the muscle. R p 26. He soon found himself back in the hospital after the skin grafts became infected. R p 26. Although months of physical therapy enabled Mr. Miller to recover range of motion in his knee, he has been left with daily discomfort and pain as well as scarring. R p 26.

II. Procedural Background

Filing, motions practice, and jurisdictional discovery. Mr. Miller filed this lawsuit in North Carolina in January 2019 against LG Chem and LG America, the manufacturer and marketer of the battery that injured him, as well as the two vape shops that sold it to him, Foggy Bottoms and Sweet Tea's. He asserted claims of failure to warn, defective manufacture, negligence, and breach of warranty.

LG Chem and LG America both responded by filing an answer, a motion to dismiss under Rule 12(b)(6), and a motion to dismiss for lack of personal jurisdiction, all in one combined filing per company. R pp 62, 90. The motions asserted "facts" that contradicted Mr. Miller's complaint, but they did not attach any supporting documents substantiating the LG defendants' claims.

Although LG Chem's batteries pervaded the North Carolina market, the motion to dismiss came as no surprise. In the numerous jurisdictions in which LG

Chem has been sued—from California to South Dakota to Georgia and in between—the company's answer has been the same: You can't sue us here. *LG Chem, Ltd. v. Lemmerman*, 361 Ga. App. 163, 173, 863 S.E. 2d 514 (2021), cert. denied (Mar. 8, 2022); *LG Chem Am., Inc. v. Morgan*, 2020 WL 7349483, at *10 (Tex. App. Dec. 15, 2020); *Tieszen v. EBay, Inc.*, 2021 WL 4134352, at *6 (D.S.D. Sept. 10, 2021); *Williams v. LG Chem, Ltd.*, No. 4:21-CV-00966-SRC, 2022 WL 873366, at *5 (E.D. Mo. Mar. 24, 2022); *Berven v. LG Chem, Ltd.*, 2019 WL 1746083, *11 (E.D. Cal. April 18, 2019), *adopted by Berven v. L.G. Chem, Ltd.*, 2019 WL 4687080 (E.D. Cal. Sept. 26, 2019); *Sullivan v. LG Chem, Ltd.*, No. 21-11137, 2022 WL 452501, at *8 (E.D. Mich. Feb. 14, 2022). LG Chem has pushed, as it does in this case, for a jurisdictional rule that would allow the company to be the leading manufacturer of a product that powers the billion-dollar U.S. e-cigarette market—and generate all the revenue that entails—without being subject to suit for any of the injuries caused by its products in any court in the country.

Before responding to the motions, Mr. Miller attempted to conduct limited discovery to obtain evidence, consistent with the allegations in the complaint, that the LG defendants knowingly saturated the North Carolina market with 18650 batteries. Sweet Tea's and Foggy Bottoms cooperated. They provided responses to interrogatories asking how they purchased the 18650 batteries eventually sold to Mr. Miller. Both disclosed that they had obtained the batteries from U.S.-based distributors. Sweet Tea's two distributors also responded to a discovery request,

disclosing that they obtained the batteries from a Chinese company and a California company.

The LG defendants, however, stonewalled. The plaintiffs served multiple interrogatories and requests for production to address personal jurisdiction. The companies largely refused to provide responsive answers to the interrogatories based on ambiguous—and, in violation of Rule 33, unsworn—statements that it had not sold or distributed 18650 batteries to North Carolina. AR p 46. And the company refused to provide any documents at all based on a variety of boilerplate objections.

With discovery at a standstill, Mr. Miller opposed the motion to dismiss and filed his own motions to compel.[6] In his opposition brief, he argued that the allegations in the complaint, along with evidence obtained during the limited discovery period, were sufficient to establish personal jurisdiction over both companies. But, as alternative relief, Mr. Miller asked the Court to compel the jurisdictional discovery to which the LG defendants refused to respond.

The LG defendants then filed briefs supporting their motions to dismiss that, for the first time, disclosed two affidavits, one from an official in each company. Those affidavits denied some of the contacts that Mr. Miller alleged the LG defendants had with North Carolina, but not all of them. Critically, LG Chem did

[6] Because the LG defendants had not yet responded to the plaintiff's requests for production at the time he filed his motion to compel responses to interrogatories, the motion to compel the production of documents was filed separately.

not deny that it expected North Carolina consumers to purchase its batteries and LG America did not deny that it marketed the batteries in North Carolina. Then, after a hearing on the motion to dismiss, LG Chem submitted a second affidavit that described its actions—around and after the time of Mr. Miller's injuries—to limit the sale of 18650 batteries for use with e-cigarettes. Sealed R S pp 15–16.

The trial court's decision. The trial court granted the motions to dismiss. The court made limited findings of fact based on the limited evidence presented. It found that "LG Chem does not sell 18650 lithium-ion cells *directly* to consumers and has never authorized any entity to do so either. Rather, it sells 18650 lithium-ion cells to sophisticated companies for incorporation into products such as power tools and power packs." R p 235 (emphasis added). But it made no findings about LG Chem's *indirect* sales or distribution of 18650 batteries into North Carolina. As for LG America, the court found that its sales into North Carolina were limited to petrochemicals and that "these sales ha[d] no relationship to the distribution of 18650 lithium-ion cells for sale to North Carolina consumers for use in electronic cigarettes and vaping devices," R p 235, but it made no finding regarding LG America's marketing activities.

Nonetheless, on the basis of these findings, the trial court concluded that exercising jurisdiction over the defendants would violate the Due Process Clause. As to LG Chem, the court held that Mr. Miller's injuries did not "arise from" the

company's activities in North Carolina because it "tried to limit the distribution of its 18650 lithium-ion cells for use by consumers as standalone, replaceable, rechargeable batteries in electronic cigarettes and vaping devices." R p 235. As to LG America, the court held that Mr. Miller's injuries did not "arise from" its activities in North Carolina because petrochemical sales are unrelated to 18650 batteries. The court—which issued its opinion before *Ford*—did not address whether the suit "relates to" either of the defendants' contacts with the state.

The court had nothing to say about Mr. Miller's pending motions to compel or his alternative request for discovery. It dismissed the case without acting on them.

The court of appeals' decision. In an opinion authored by Judge Tyson, the court of appeals affirmed. The court of appeals did not explain its reasoning for upholding the dismissal of LG America. As for the dismissal of LG Chem, the court found an insufficient "connection" between Mr. Miller's claims and LG Chem's contacts with North Carolina because the company manufactured 18650 batteries to be used as "industrial component products" but Mr. Miller intended to use the product as a "standalone" battery. *Miller,* 2022-NCCOA-55, ¶¶ 35–36. In the court's view, that meant that Mr. Miller's claims did not arise from or relate to LG Chem's contacts with the state.

The majority also affirmed the trial court's tacit denial of Mr. Miller's motions to compel. In a single paragraph of discussion, the court held that "discovery was not

warranted" because Mr. Miller had not offered sufficient facts to establish jurisdiction over the LG defendants. *Id.* ¶ 39.

Judge Inman dissented on both points. Starting with jurisdiction, she explained that the majority had misconstrued the record and applied the wrong legal standard. On the facts, she noted that LG Chem had not controverted Mr. Miller's allegation that it knowingly served a market for 18650 batteries in North Carolina, only that it made direct sales for use as standalone batteries. *Id.* ¶¶ 62–64. Likewise, she observed that LG America had not rebutted the allegations about its marketing activity. *Id.* ¶ 63.

That mattered, Judge Inman further explained, because the U.S. Supreme Court's recent decision in *Ford* confirms that the Due Process Clause does not require a strict causal relationship between a defendant's contacts and the plaintiff's injuries. And here, Judge Inman concluded, Mr. Miller's injury "related to" the LG defendants' uncontested contacts with North Carolina—regardless of whether those contacts were focused on sales to sophisticated consumers—as multiple other courts have held. *Id.* ¶ 70 (citing *Lemmerman*, 361 Ga. App. at 173; *Tieszen*, 2021 WL 4134352 at *6).

Judge Inman also parted ways with the majority's decision to affirm the trial court's "implied[]" discovery ruling. *Id.* ¶ 76. She reasoned that the trial court's decision, though unexplained, likely rested on its undue focus on proof of a "causal

link." *Id.* Because *Ford* explained that a causal link is not required, Judge Inman concluded that the trial court should have been permitted to determine, in the first instance, "whether further jurisdictional discovery is warranted in light of the 'related to' standard as defined in *Ford Motor Co*." *Id.* ¶ 77.

SUMMARY OF ARGUMENT

I. North Carolina may exercise personal jurisdiction over the LG defendants. Under the doctrine of specific, or "case-linked," jurisdiction, a nonresident defendant may be sued in a state if three requirements are met: (1) the defendant has purposefully availed itself of the privilege of conducting business in that state, (2) the plaintiff's claims arise out of or relate to those contacts, and (3) the exercise of jurisdiction is consistent with notions of fair play and substantial justice. The LG defendants challenge only the first two factors, but both are satisfied.

A. The record is clear that both companies have sufficient contacts with North Carolina. Mr. Miller has alleged that LG America marketed 18650 batteries in North Carolina. LG America has submitted no evidence to controvert that claim. No more is needed. Marketing in the forum state is a classic example of purposeful availment.

LG Chem's contacts with the state are just as robust. It shipped thousands of pounds 18650 batteries to North Carolina. The company ships its batteries to be sold in North Carolina as a part of countless household goods. And its batteries can be found on the shelves of over a hundred North Carolina stores.

B. Mr. Miller's claims also have a strong connection to the LG defendants' contacts with the state.

1. The product that LG America marketed in North Carolina is the product that injured Mr. Miller. That means his claims "relate to" the company's contacts. Under *Ford*, if a company markets a product in a state and that product injures a resident of the state—in *Ford*, cars; here, batteries—personal jurisdiction exists. In reaching the opposite conclusion, neither court below addressed LG America's marketing contacts.

2. Mr. Miller's claims also "relate to" LG Chem's contacts with the state. *Ford* further teaches that, if a nonresident company serves a market for a product in a state, the state's courts can exercise personal jurisdiction over the company for any claim of injury stemming from the use of that product in the state. That's what happened here: LG Chem supplied 18650 batteries to North Carolina through multiple channels—that is, it served a market here—and an 18650 battery injured Mr. Miller in the state.

The court of appeals found jurisdiction lacking because, in its view, Mr. Miller's intent to use his battery to vape meant he was injured by a different "specific product" than the one LG Chem expected to reach North Carolina. That was mistaken. The battery is the same battery, and the intended manner of use cannot deprive North Carolina's courts of jurisdiction that they otherwise possess. That's

because the Due Process Clause operates to ensure that defendants have "fair warning" that they may be sued in a state's courts, and every manufacturer knows that consumers may deviate from the exact specifications of intended use. That is especially true here, where the product at issue is a battery capable of powering any number of goods and specifically designed to be rechargeable for continued use. At most, Mr. Miller's planned use may provide LG Chem with a defense on the merits.

3. Even if Mr. Miller's planned use of the battery were relevant, jurisdiction would still be proper. LG Chem's batteries could be found throughout the state—in over a hundred stores—and Mr. Miller purchased one that eventually exploded and injured him. That straight causal relationship is sufficient.

The trial court found, and the court of appeals agreed, that these contacts do not support jurisdiction because LG Chem tried to "limit" the use of batteries for vaping. But the record does not support that LG Chem did so before it injected *Mr. Miller's* batteries into the stream of commerce. One "limiting" action that LG Chem took was placing a warning label on its batteries, but Mr. Miller's had no warning. That means either that LG Chem's efforts came after shipping out Mr. Miller's batteries or that it took only half-measures it knew would not end sales. Either way, those efforts do not preclude jurisdiction. If a car company tries to pull out of a state, it can still be sued for cars purchased before it leaves. So, too, here.

II. If the Court has any doubt about whether the record supports personal jurisdiction, it should remand to the trial court with instructions to grant Mr. Miller's motions to compel jurisdictional discovery or, at a minimum, to rule on those motions in the first instance. The trial court dismissed the case without acting on Mr. Miller's pending motions. The failure to exercise any discretion at all in this way is a patent abuse of discretion that would independently warrant reversal.

ARGUMENT

I. Because the LG defendants serve a market for a product (the 18650 lithium-ion battery) in North Carolina, and because that product caused injury in the state to one of the state's residents, North Carolina's courts may entertain the resulting suit.

North Carolina may exercise personal jurisdiction over the LG defendants in this case. "When a company like [LG Chem] serves a market for a product in a State and that product causes injury in the State to one of its residents, the State's courts may entertain the resulting suit." *Ford Motor Co.*, 141 S. Ct. at 1022. That rule governs this case.

North Carolina law vests the state's courts with authority to exercise jurisdiction over non-resident defendants to the fullest extent allowed by the Due Process Clause of the Fourteenth Amendment. *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 676, 231 S.E.2d 629, 630 (1977). That authority is expansive. In recognition of a state's "manifest interest in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors," the Due Process Clause, as

relevant here, precludes jurisdiction only when a defendant has "no meaningful contacts, ties, or relations" with a state such that the exercise of jurisdiction would violate its "liberty interest." *Burger King Corp.*, 471 U.S. at 473 (quoting *Int'l Shoe Co. v. State of Wash., Off. of Unemployment Comp. & Placement*, 326 U.S. 310, 319 (1945)); *Beem USA Ltd.-Liab. Ltd. P'ship v. Grax Consulting LLC*, 373 N.C. 297, 302, 838 S.E.2d 158, 161 (2020).

Subject to that limitation, the Due Process Clause permits courts to exercise jurisdiction in two scenarios. First, a court may exercise "general jurisdiction" over a defendant when its "affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). Where general jurisdiction exists, courts will entertain any claim against a defendant, regardless of its connection to the forum. Second, when general jurisdiction is lacking, a court may still exercise "specific jurisdiction" over the non-resident defendant. This form of jurisdiction, sometimes called "case-linked" jurisdiction, requires "[s]ome affiliatio[n] between the forum and the underlying controversy." *Beem*, 373 N.C. at 303.

When, as here, specific jurisdiction is at issue, courts have distilled the inquiry into three steps. *First*, the defendant must purposefully avail "itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King Corp.,* 471 U.S. at 475 (1985). *Second*, the suit "must

arise out of or relate to the defendant's contacts" with the forum. *Ford Motor Co.*, 141 S. Ct. at 1025. These two factors together ensure that the defendant has "fair warning that a particular activity may subject [it] to the jurisdiction of a foreign sovereign." *Burger King Corp.*, 471 U.S. at 472; *see also, e.g.*, *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 365, 348 S.E.2d 782 (1986) (personal jurisdiction exists when a defendant's conduct related to a forum allows it to "reasonably anticipate being haled into court there"). *Third*, even if the first two factors are satisfied, jurisdiction must still be reasonable and comport with "notions of fair play and substantial justice." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

In reviewing an order dismissing a case for lack of personal jurisdiction, this Court reviews the trial court's conclusions of law *de novo*. *Nat'l Util. Rev., LLC v. Care Centers, Inc.*, 200 N.C. App. 301, 303, 683 S.E.2d 460, 463 (2009). It also determines whether the trial court's findings of fact are supported by competent evidence in the record. *Button v. Level Four Orthotics & Prosthetics, Inc.*, 2022-NCSC-19, ¶ 36, 869 S.E.2d 257 (2022). When determining whether "competent evidence" exists, this Court considers "(1) any allegations in the complaint that are not controverted by the defendants' affidavits; (2) all facts in the affidavits; and (3) any other evidence properly tendered." *Id.*

In this case, the LG defendants have challenged only the first two prongs of the specific jurisdiction inquiry—purposeful availment and the connection of Mr.

Miller's claims to the defendants' contacts. And like the courts below, the defendants are wrong at both steps. The record contains ample evidence that the defendants—the manufacturer of the batteries sold and used throughout the state and the affiliate responsible for marketing them here—have substantial contacts with North Carolina and that Mr. Miller's injuries arise out of or relate to those contacts.

What the record does not support is what the decisions below would hold—that the Due Process Clause saps North Carolina courts of power to hear residents' claims and that Mr. Miller must go to Korea to sue LG Chem and to Georgia to sue LG America, all while continuing a third lawsuit against the vape shops in this state.

A. The LG defendants purposefully availed themselves of the privilege of conducting business in North Carolina.

The purposeful-availment requirement is satisfied when a nonresident defendant engages in activity directed toward the forum state. *Ford Motor Co.*, 141 S. Ct. at 1024. To further the requirement's aim of providing defendants with "fair warning" that they may be sued in the forum's courts, these contacts must be knowing and voluntary, not "random, isolated, or fortuitous." *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 774 (1984). That limitation provides nonresidents with the notice needed to avoid, or mitigate the consequences of, lawsuits. *See World-Wide Volkswagen Corp.*, 444 U.S. at 297.

Courts have explained that a variety of activities can provide the requisite contact with a forum to support jurisdiction. For example, marketing a product in a

state constitutes purposeful availment. *See Ford Motor Co.*, 141 S. Ct. at 1038 (identifying advertising in local media as a classic example of purposeful availment); *Shoppers Food Warehouse v. Moreno*, 746 A.2d 320, 336 (D.C. 2000) (advertising by nonresident in forum state provided basis for jurisdiction); *Wallace v. Smith*, 2003 WL 22952113 at *3 (N.C. App. 2003) (same). Courts have also held that a manufacturer forms the requisite minimum contacts with a state when it sells its products directly into the state, *Keeton*, 465 U.S. at 774, or places them "into the stream of commerce with the *expectation* that they will be purchased by consumers in the forum State." *Mucha v. Wagner*, 378 N.C. 167, 2021-NCSC-82, ¶ 15 (2021) (quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 298) (emphasis in *Mucha*).

Applying these principles here, both LG defendants plainly engaged in sufficient contacts with North Carolina to satisfy this requirement.

1. Start with LG America. Mr. Miller has alleged that it marketed 18650 batteries in the state. R p 7. LG America has not submitted evidence to rebut this allegation. The furthest it went is to assert in an affidavit that it does not "advertise[]" the batteries "for use by individual consumers as standalone, replaceable, rechargeable batteries in electronic cigarette or vaping devices." R p 161. But that does not deny marketing for other uses. Duracell could not avoid jurisdiction by claiming that it markets batteries only for toys when it is sued by someone who purchased a battery to power a tool. LG America's partial denial is equally irrelevant.

Because unrebutted allegations are taken as true on a motion to dismiss for lack of personal jurisdiction, *see Button*, 2022-NCSC-19, ¶ 36, no more is needed for due process. *See Miller,* 2022-NCCOA-55, ¶ 66. LG America's conceded marketing activity aimed at the state is an archetypal example of when a defendant company "purposefully direct[s] [its] activities at residents of the forum." *Burger King Corp.*, 471 U.S. at 472*; see Mucha*, 378 N.C. 167, 2021-NCSC-82, ¶ 15; *Ford Motor Co.*, 141 S. Ct. at 1038.

2. The record is equally clear that LG Chem has sufficient contacts with North Carolina. Mr. Miller has alleged that the company expects its batteries to be purchased by North Carolina consumers, and LG Chem has not rebutted that allegation. R pp 9, 154–58. For good reason: LG Chem's batteries pervade the state, and the company has surely profited handsomely from it. Contemporaneous records show that LG Chem shipped thousands of pounds of 18650 batteries to a North Carolina business the same year that Mr. Miller filed this suit. *See Tom Togs, Inc.*, 318 N.C. at 367 (personal jurisdiction proper where defendant made a single $44,000 purchase of shirts from North Carolina seller because defendant "knew [seller] to be located in North Carolina"). Further, evidence shows that LG Chem placed its 18650 batteries into the stream of commerce expecting them to reach North Carolina—with the batteries ultimately being sold to consumers in over 100 stores in the state or incorporated into countless consumer products purchased in the state. R pp 9, 21, 179,

226*;* 11(c) R pp 2, 51–52; *Miller*, 2022-NCCOA-55, ¶ 64 (Inman, J., dissenting). Finally, there is good reason to believe that LG America markets batteries in North Carolina on behalf of LG Chem, and for the benefit of LG Chem, adding yet another activity aimed at the state. Given that LG America itself has no direct sales in the state, it is unclear how the marketing activity could generate any benefit unless it was done in collaboration with LG Chem—a role that LG America has admitted it plays in other cases. *See Celgard, LLC v. LG Chem, Ltd.*, 2015 WL 2412467, at *26 (W.D.N.C. May 21, 2015) (declarant for LG America admitting it is "responsible for marketing [LG Chem] . . . batteries to customers in the United States").

There is no doubt that this evidence satisfies purposeful availment. Courts routinely find sufficient contacts based on far less. Consider the Washington Supreme Court's decision concerning one of LG Chem's other affiliates, LG Electronics. *See State v. LG Elecs., Inc.*, 186 Wash. 2d 169, 375 P.3d 1035 (2016). The plaintiff in that case alleged that the defendants "dominated" the cathode ray tube market, with four defendants controlling a 78 percent stake (similar to the 80 percent stake of the 18650 battery market that LG Chem shares with two other companies). *Id.* at 174. Those tubes were incorporated into millions of televisions and computers sold in North America, including in Washington. *Id.* On those allegations, the court found personal jurisdiction proper, concluding that "the presence of millions of CRTs in Washington was not the result of chance or the random acts of third parties,

but a fundamental attribute of [the Companies'] businesses." *Id.* at 182. Numerous other cases are in accord.[7]

Here, too, the presence of LG Chem's 18650 batteries in products throughout North Carolina and over a hundred stores across the state can hardly be said to be random or fortuitous. To the contrary, not only did the company make no effort to exclude North Carolina from its sale and distribution, but the company expected batteries to reach the state through both direct and indirect sales. *See* AR 210 (LG Chem discovery response admitting its contracts did not limit distribution to North Carolina). By any measure, the company purposefully availed itself of the privilege of conducting business in North Carolina.

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[7] *See, e.g.*, *Griffin v. Ste. Michelle Wine Ests. LTD.*, 169 Idaho 57, 491 P.3d 619, 637 (2021) (jurisdiction proper where manufacturer sent, via a distributor, "43 million bottles" to the United States because, "[g]iven the extensive network into which [the defendant] sent its bottles, it cannot credibly maintain it was unforeseeable that its bottles would end up in . . . Idaho," and thousands did); *Ainsworth v. Moffett Eng'g, Ltd.*, 716 F.3d 174, 179 (5th Cir. 2013) (jurisdiction proper in Mississippi where manufacturer sold thousands of forklifts to distributor, knowing it would sell them in the U.S., made "no attempt to limit the territory in which [the distributor] sells its products," and 1.55% of its U.S. sales went to Mississippi); *Willemsen v. Invacare Corp.*, 352 Or. 191, 203, 282 P.3d 867, 874 (2012) (jurisdiction proper even where manufacturer did not specifically direct distributor to target Oregon because "1,100 CTE battery chargers within Oregon over a two-year period shows a regular flow or regular course of sales in Oregon").

B. Mr. Miller's injuries arise out of or relate to the LG defendants' contacts with the state.

Mr. Miller's claims also satisfy the second requirement of personal jurisdiction: that his injuries "arise out of or relate to" LG Chem's contacts with North Carolina. "The first half of that standard"—that is, "arise out of"—"asks about causation; but the back half, after the 'or,' contemplates that some relationships will support jurisdiction without a causal showing." *Ford Motor Co.*, 141 S. Ct. at 1026. Both halves ultimately work to ensure "an affiliation between the forum and the underlying controversy," distinguishing specifical jurisdiction from general jurisdiction. *Id.* In the absence of a nexus requirement, Mr. Miller could, for example, sue LG Chem in North Carolina for a slip and fall sustained at its Korea headquarters.

Here, Mr. Miller's claims bear a strong connection to the LG defendants contacts in North Carolina, and jurisdiction is therefore proper.

1. Begin with LG America once more. Mr. Miller's injuries, which were caused by an LG-manufactured 18650 battery, certainly "relate to" LG America's activity marketing those batteries in the state.

The U.S. Supreme Court's decision in *Ford* addressed how the "relate to" prong operates and differs from the "arise from" prong. *Ford* arose out of two car crashes—one in Montana and one in Minnesota—involving Ford vehicles that were originally sold in other states and made their way to the sites of the crash only after sales as used vehicles. The plaintiffs, residents of Montana and Minnesota, sued Ford

in their respective states. Ford then argued that personal jurisdiction was lacking because there was no "causal link" between its contacts with each state and the plaintiffs' injuries. In other words, Ford argued that the specific cars involved in the accidents had to be sold, manufactured, or designed in the state for personal jurisdiction to attach. 141 S. Ct. at 1023.

The Court unanimously rejected that contention. It explained that the Due Process Clause does not require a "strict causal relationship between the defendant's in-state activity and the litigation." *Id.* at 1026. Rather, it is sufficient if the injury "relates to" the defendant's contacts with the forum, even without a "causal showing." *Id.* In *Ford*, the plaintiffs' claims "related to" Ford's contacts with Montana and Minnesota because the company had distributed and marketed the same type of products (that is, the car models) that malfunctioned in the state. That provided an adequate connection between "the defendant, the forum, and the litigation—the 'essential foundation' of specific jurisdiction"—even though the specific cars involved in the crashes were originally sold elsewhere. *Id.* at 1028. And because of that, the Court did not require the plaintiffs to establish that their particular purchases "arose out of" Ford's marketing and other services in the state: Jurisdiction does not "ride on the exact reasons for an individual plaintiff's purchase, or on his ability to present persuasive evidence about them." *Ford Motor Co.*, 141 S. Ct. at 1029.

That reasoning controls. Regardless of whether Sweet Tea's, Foggy Bottoms, or Mr. Miller purchased LG 18650 batteries specifically because of LG America's marketing activity in North Carolina, the company surely could expect that someone would. It thus had fair notice that it could be sued in North Carolina for injuries caused by the batteries in that state. That's all that is needed to satisfy the relatedness requirement.

Neither court below grappled with any of this. The trial court, which addressed the question without the benefit of *Ford*, made two errors. First, it focused solely on whether LG America's petrochemical sales provided a basis for jurisdiction without mentioning its marketing activity. R p 237. Second, it considered only whether Mr. Miller's claims "arise from" LG America's petrochemical contacts, not whether the claims "relate to" those contacts. The court of appeals, for its part, gave no explanation for its decision to affirm dismissal against LG America. After summarizing some of the contacts that LG America had with North Carolina—though failing to mention the marketing activity—the court analyzed only personal jurisdiction against LG Chem. *Miller,* 2022-NCCOA-55, ¶¶ 32–36. That constitutes reversible error.

2. As Judge Inman explained, *Ford* also shows why Mr. Miller's claims "relate to" LG Chem's contacts with North Carolina. *Id.* ¶¶ 68–72. This case parallels *Ford* in every material way. In *Ford*, the manufacturer served a market for cars in Montana

and Minnesota. Here, LG Chem serves a market for 18650 batteries in North Carolina. In *Ford*, the same type of product that Ford shipped into Montana and Minnesota—the Ford Explorer model and the Ford Crown Victoria model—malfunctioned there. Here, the same product that LG Chem shipped (directly and through intermediaries) to North Carolina—18650 batteries—malfunctioned in the state. So, just as the "essential foundation of specific jurisdiction" existed in *Ford*, 141 S. Ct. at 1028, it is present here, too. Multiple courts addressing LG Chem's motions to dismiss in battery explosion cases in other states have reached this same conclusion based on analogous facts. *See, e.g.*, *Lemmerman*, 361 Ga. App. at 173 (2021); *Morgan*, 2020 WL 7349483 at *10; *Tieszen,* 2021 WL 4134352 at *6; *Williams*, 2022 WL 873366 at *5.

The trial court, as noted, never considered whether Mr. Miller's claims "related to" LG Chem's contacts with North Carolina. The court of appeals did, but its attempt to distinguish the case falls flat. The court concluded that, unlike in *Ford*, Mr. Miller's injury does not involve "the specific products" that LG Chem expected North Carolinians to purchase because LG Chem manufactures 18650 batteries as "industrial component products," not "consumer products." *Miller,* 2022-NCCOA-55, ¶¶ 35–36. That's just wrong. A screw manufactured to be part of a computer does not become a different product when it is distributed separate from the computer. Nor do the batteries here.

The court's confusion about the product at issue appears to have stemmed from its focus on Mr. Miller planned *use* of the battery as a "standalone" battery for "the devices [he] purchased" (i.e., for vaping), rather than for use as an "industrial component" part. *Id.* ¶ 36. But the plaintiff's intended use of a product—and whether the manufacturer "authorizes" it—does not control whether there is personal jurisdiction. Rather, as Judge Inman explained, "any alleged alteration or misuse of an 18650 battery," if established, might be "a defense on the merits to Plaintiff's products liability suit," but it is "not a dispositive factor in the specific jurisdiction analysis." *Id.* ¶ 71; *see also Lemmerman,* 863 S.E.2d at 524; *Morgan,* 2020 WL 7349483 at *10; *Berven*, 2019 WL 1746083 at *11.

The majority's contrary rule—allowing unauthorized use to defeat personal jurisdiction—cannot be right because it injects an even more stringent causation requirement than the one rejected in *Ford*. *See Ford*, 141 S. Ct. at 1034 (Gorsuch, J., concurring) (describing the majority as rejecting a "but-for causation test," which "isn't the most demanding"). After all, the claim that unintended use precludes jurisdiction is just a different way of asserting that proximate cause is lacking because there was an intervening cause—modification of the product—of the plaintiff's injuries. Because *Ford* rejected the laxer but-for causal test, it cannot be correct that the Due Process Clause demands proximate causation.

An example helps illustrate the problems with the court of appeals' undue focus on intended use. Imagine a non-resident manufacturer who distributes into North Carolina a table saw that comes with a safety guard. Under the court of appeals' reasoning, if a consumer disabled the safety feature, or even used it improperly—say, inside a home when it was meant to be used at open-air construction sites—the manufacturer could avoid jurisdiction because the consumer did not operate the saw as authorized. That, of course, is not the law. *See, e.g.*, *Cohen v. Cont'l Motors, Inc.*, 279 N.C. App. 123, 2021-NCCOA-449, ¶ 30 (personal jurisdiction proper even though nonresident defendant's product had been altered by a third party out of state before making its way into North Carolina). Personal jurisdiction depends on whether the nonresident defendant "reasonably anticipates" or has "fair warning" of a suit. All manufacturers are on notice that their products may be used in any number of ways other than what the manufacturer specifically intends and thus have the requisite fair warning.

The product at issue here perfectly illustrates why LG Chem, like every manufacturer, has fair warning of "unauthorized" uses. 18650 batteries are a uniform size, specifically manufactured to be versatile and adaptable to power a wide range of products. Indeed, a chief selling point is that it holds particularly long charges for a rechargeable battery. A manufacturer of a product designed to be *reusable* can hardly claim a lack of fair warning when that product is reused. So, just as LG Chem

could be sued in North Carolina by a North Carolina resident whose battery exploded in a power tool, it could be sued by the same resident who removed the battery from the tool to put it in a vaping device, in a flashlight, or any other product. In fact, could anyone doubt that if that same person left the battery on the floor and his infant child suffered injuries after swallowing it, North Carolina courts would be able to hear a claim against LG Chem? The answer, of course, is no—and it's no because there is no absence of fair warning and no lack of fairness to the defendant.

The only difference here is that, in the case of Mr. Miller's injury, intermediary distributors facilitated the purported misuse. But as far as the Due Process Clause is concerned, that is no difference at all. *Ford* makes clear that if a direct purchaser could sue, then so can a person who obtains the same product indirectly. In *Ford*, that meant that if a new car purchaser could sue, then so could someone who purchased the car used. And, here, it means that if a North Carolina purchaser from "authorized" sellers can sue, then so can Mr. Miller.

A final point: Concern with unauthorized use is particularly misplaced in this case. Mr. Miller's battery did not explode because of some sort of chemical reaction with his vaping device. It exploded in his pocket. And he just as well could have been using the battery for a flashlight, because he took it out of a power tool, or even because he picked it up off the factory floor of one of LG Chem's industrial clients.

That reality confirms that what matters is the product—18650 batteries—not the intended use.

3. Even if this Court were to conclude that 18650 batteries put to "standalone" use are a different product for jurisdictional purposes than the same batteries incorporated as component parts, the record would still support the inference that Mr. Miller's injuries "arise from" or "relate to" LG Chem's contacts with North Carolina.

Mr. Miller has alleged that LG Chem manufactured 18650 batteries and shipped them out with the expectation that they would be purchased in large quantities by North Carolina consumers. R p 9. And that is exactly what happened, with Mr. Miller among the purchasers. That straight line—from LG Chem manufacturing the battery and starting the distribution chain to Mr. Miller purchasing the battery and it exploding in his pocket—provides even the kind of causal link rejected by *Ford* as unnecessary, and hence would indisputably confer jurisdiction.

The court of appeals elided this simple result by resting its decision on a finding of fact unsupported by the record. The court premised its conclusion that a "causal connection" is lacking here, *Miller*, 2022-NCCOA-55, ¶ 40, on its view that LG Chem "never served [] a market in North Carolina for standalone, removable consumer

batteries" or made "purposeful efforts to flood North Carolina" with its batteries.[8] *Id.* ¶ 36. That simply cannot be squared with the factual record here. LG Chem has not rebutted the allegation that it "expected" North Carolina consumers to purchase its batteries. R p 9. The most LG Chem denied was that it sold or distributed batteries "in or to" North Carolina before March 2018, but that denial of direct shipments into the state does not undermine the allegation that LG Chem expected its batteries to make it into the state through intermediaries. And that's not surprising, given that the batteries could be found in numerous stores in every corner of the state. R pp 179, 226. LG Chem, in other words, *did* "serve the market"—and Mr. Miller's injuries arose directly from that activity.

The trial court's reasoning is flawed as well. It concluded that Mr. Miller's injuries did not "arise from" LG Chem's contacts with North Carolina because the company "tried to limit the distribution of its 18650 lithium-ion cells for use by consumers as standalone, replaceable, rechargeable batteries in electronic cigarettes and vaping devices." R pp 235, 237.

But nothing in the record supports the assumption that LG Chem acted to stop this distribution prior to the shipment of the batteries that *Mr. Miller* purchased.

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[8] The court of appeals wrote that LG Chem did not "serve *as* a market in North Carolina" for batteries. *Miller,* 2022-NCCOA-55, ¶ 36. Because there is no requirement that a defendant serve "as a market," we presume that the court meant to convey that the company did not "serve a market."

The trial court appears to have based its conclusion on the description of LG Chem's actions in the company's second affidavit (submitted after the motion to dismiss and thus untested), which is conspicuously ambiguous about *when* the company's efforts actually resulted in any changes. For example, it states that the company sent its distributors declarations of commitment "seeking" their agreement not to sell batteries for use with vaping devices in July 2016 without describing any response. Sealed R S p 16. And the record suggests that there was none, as the company then sent out a second round of requests, once again "seeking" commitment, and eventually resorted to contract changes not finalized until just before Mr. Miller's purchases—almost certainly after Mr. Miller's batteries had already been shipped. Sealed R S p 16. Even then, the affiant leaves unstated when the contract took effect or the time it took for batteries to travel from factory floor to store shelves.

But what is clear is this: When Mr. Miller purchased his batteries, they had no warning despite LG Chem claiming it first started placing warnings on batteries in September 2016, the same time it claims it began taking steps to limit distribution. Sealed R S p 16. That means one of two things. First, Mr. Miller's batteries shipped *before* LG Chem's actions (and took time, moving halfway around the world, to reach North Carolina shelves), making the company's later actions irrelevant here. Or, second, LG Chem took only half measures—changing only some labels or telling

only some distributors—and allowed the batteries to continue to flow into the North Carolina market without warnings or limitation.

Under either scenario, the trial court's finding that the company took steps to "limit" the distribution of its batteries does not preclude jurisdiction. If LG Chem acted only to *partially* address the issue, then it still expected the batteries to flow into the stream of commerce, benefited from the distribution, and could still "reasonably anticipate" being haled into court here.[9] That is the only reasonable inference to draw from the record—further supported by LG Chem's admission that it waited until "late 2018," well after Mr. Miller's purchases, to actually ask vape shops not to sell its batteries. Sealed R S p 16.

4. North Carolina's strong interest in adjudicating this dispute further bolsters the conclusion that jurisdiction is proper here. The rules constraining specific jurisdiction function not only to guarantee fairness to the defendant, but also to ensure that forums with "little legitimate interest" in adjudicating a dispute do not "encroach on [forums] more affected by the controversy." *Ford Motor Co.*, 141 S. Ct.

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[9] The trial court's holding that Mr. Miller's injuries did not "arise from" LG Chem's contacts with North Carolina could also be interpreted to rest on its legal conclusion that LG Chem "did not purposefully inject 18650 lithium-ion cells into the stream of commerce to be sold to consumers for use as standalone, replaceable, rechargeable batteries in electronic cigarettes and vaping devices." R p 237. But purposeful availment looks at the contacts with the state, not the specific use of the products a manufacturer ships there. And, in any event, because that legal conclusion also rested solely on the court's finding that LG Chem attempted to "limit" that type of use, it is flawed for the same reasons just discussed.

at 1025. A lack of personal jurisdiction here would undermine that latter aim. North Carolina has a strong interest in providing a forum for its residents who are injured in state by a product that can be found throughout the state. And that interest dwarfs any interest that Korea might have in hearing a North Carolina claim by a North Carolina resident who was injured in North Carolina by a product purchased in North Carolina.

II. Mr. Miller is entitled to additional discovery.

If the Court has any doubts about jurisdiction here, it should remand to the trial court to allow Mr. Miller to develop a more complete record through jurisdictional discovery. Mr. Miller served multiple discovery requests about the LG defendants' contacts with North Carolina, and when they failed to provide adequate responses, he moved to compel. Rather than grant those motions, the trial court ignored them. That was error that warrants remand.

1. A court's ruling on discovery is reviewed for abuse of discretion. *See, e.g.*, *Ritter v. Kimball*, 67 N.C. App. 333, 336, 313 S.E.2d 1, 2 (1984). This standard, though deferential, still demands that a court exercise *some* discretion. *See, e.g.*, *Vinci v. Consol. Rail Corp.*, 927 F.2d 287, 288 (6th Cir. 1991) ("The failure to exercise discretion can also constitute an abuse of discretion."). Otherwise, there is no application of judgment to which the reviewing court can defer—the essence of the abuse of discretion standard. Courts therefore find an abuse of discretion when a court fails to act on a

motion at all. *See, e.g.*, *Brewton v. N.C. Dep't of Pub. Safety*, 2022-NCCOA-156, ¶ 10 (2022) (reversing for abuse of discretion when "nothing in the order suggest[ed] that the Commission made any determination regarding Plaintiff's claim for damages based on the value of the books"); *Taylor v. Soc. Sec. Admin.*, 842 F.2d 232, 233 (9th Cir. 1988) (reversing for abuse of discretion where it was "unclear whether the district court considered [the plaintiff's] motion at all").

2. That's what happened here. The trial court did not merely fail to explain its reasons for denying Mr. Miller's motions to compel: The court did not deny them at all. The order dismissing Mr. Miller's complaint makes no mention of his motions to compel—even though Mr. Miller specifically requested that the court rule on them. 11(c) R p 186. There is therefore no basis to believe that the court exercised any discretion whatsoever when it ended the case without granting Mr. Miller's request to compel discovery. At best, as Judge Inman posited, the trial court may have tacitly concluded that none of Mr. Miller's requests were relevant to proving that his claims "arose from" LG Chem's contacts with North Carolina. *Miller*, 2022-NCCOA-55, ¶¶ 75–76 . As we explain below, that's plainly wrong under North Carolina's broad discovery rules. But more important, it would be an insufficient ground to deny discovery because personal jurisdiction can be based on claims that "relate to" a company's contacts as well. So even giving the trial court's silence the benefit of the doubt, it still exercised its discretion based on a misunderstanding of the law—and

therefore abused it. *Da Silva v. WakeMed*, 375 N.C. 1, 5 n.2, 846 S.E.2D 634, 638 n.2 (2020) ("[A]n error of law is an abuse of discretion.").

3. In refusing to reverse, the court of appeals ignored the trial court's abdication of its role and substituted its own, albeit sparse, explanation to justify the denial of discovery. The court of appeals' replacement reasoning cannot resurrect the trial court's lack of a decision. This Court reviews the trial court's decision for abuse of discretion, not the court of appeals'.

Regardless, neither of the reasons the court of appeals provided can salvage the trial court's error.

A. The court first asserted that discovery is not warranted because Mr. Miller had not "allege[d] facts to support assertion of jurisdiction." *Miller,* 2022-NCCOA-55 at ¶ 39. To the extent that the court meant that Mr. Miller's complaint, taken as a true, fails to adequately allege a basis for personal jurisdiction, that cannot be squared with the law of personal jurisdiction. Indeed, not even the LG defendants have taken the position that the complaint, taken on its own, is lacking. Their request for dismissal has always been premised on an attempt to contradict the allegations in the complaint. R pp 63–64, 90–93.

The reason why is obvious. The complaint alleges that LG Chem knowingly "caused [18650] batteries to be distributed and sold . . . within the State of North Carolina." R pp 7, 9. Likewise, the complaint alleges that LG America "did

substantial and continuous business in the State of North Carolina by marketing, distributing, and selling or causing to be sold lithium-ion batteries in the State." R pp 7, 9–10. That's more than sufficient for personal jurisdiction.

To the extent that the court of appeals meant that Mr. Miller had not made an adequate evidentiary showing in response to the LG defendants' affidavits, that's a reason to grant jurisdictional discovery, not to deny it. Jurisdictional discovery is needed only when the plaintiff lacks independent access to sufficient evidence to withstand a dismissal motion.

B. The court of appeals also attempted to sustain the trial court's tacit denial on the ground that Mr. Miller's "stream of commerce theory of jurisdiction over Defendants violates due process" and "is contrary to established precedents." *Miller,* 2022-NCCOA-55, ¶ 39. Not so. Mr. Miller argued that "North Carolina follows the original stream of commerce test from *World-Wide Volkswagen*." Opening Br. at 23. That's consistent with, not contrary to, this Court's recent decision in *Mucha*. But even if Mr. Miller's argument below could be construed as advocating for a more liberal theory when considering the motion to dismiss, that would not provide a basis to deny his request for discovery, which could (and almost assuredly would) reveal facts necessary to satisfy more demanding tests.

4. Even a cursory review of Mr. Miller's discovery demonstrates that his requests were well within the "broad scope of discovery" permitted under North

Carolina's Rules of Civil Procedure. *Friday Invs., LLC v. Bally Total Fitness of the Mid-Atl., Inc.*, 370 N.C. 235, 238, 805 S.E.2d 664 (2017); N.C.G.S. § 1A-1, 26(b)(1) (permitting a party to "obtain discovery regarding any matter, not privileged, that is relevant to the subject matter in the pending action"). They are aimed at facts central to the personal jurisdiction inquiry. Indeed, the record is sufficiently clear that this Court could remand with instructions to the trial court to grant Mr. Miller's motions.

Consider, for example, the central question of how 18650 batteries got from the LG Chem's factory floor to the shelves in North Carolina stores. Mr. Miller has alleged that LG Chem knew and expected the batteries to be purchased in the state, but to the extent the Court declines to credit that allegation—despite LG Chem not rebutting it—that is exactly what Mr. Miller's requests seek to corroborate: He asked LG Chem to describe its distribution channels, including the identity of any intermediaries in the distribution chain. R pp 46–47. Mr. Miller could use that information to determine what those distributors communicated to LG Chem about the location of downstream buyers. That is all "reasonably calculated" to lead to the discovery of admissible evidence, *Shellhorn v. Brad Ragan, Inc.*, 38 N.C. App. 310, 314, 248 S.E.2d 103 (1978)—in particular, evidence that would substantiate Mr. Miller's core allegation that LG Chem expected North Carolina consumers to purchase its batteries.

Mr. Miller also sought evidence that would establish that LG Chem did not seek to limit the distribution of 18650 batteries for standalone use prior to when the batteries Mr. Miller purchased were shipped. As explained above, LG Chem's affidavit describing its effort to limit that use is notably ambiguous about the exact timing and scope of the company's actions and how those efforts corresponded to the time it took for the batteries to travel across the world. Mr. Miller sought the documentation that would clarify the record, but LG Chem refused to produce it. AR pp 228–29 (requests for production 42 and 43). That refusal was improper to begin with, but it was made especially prejudicial by the company's decision to then submit an affidavit that touched on that exact subject after the hearing on the motions to dismiss.

The trial court, had it properly exercised its discretion, also should have compelled discovery responses about LG America's contacts with the state. For instance, Mr. Miller's eighth interrogatory to LG America asked that it "describe any manufacturing, sales, marketing, and/or distribution activity related to 18650 batteries." AR p 26. The company denied—again, without complying with Rule 33's requirement that its answers be provided under oath—that it "manufactur[ed], design[ed], distribute[d], or s[old]" batteries, but made no denial, and provided no information, about its marketing activities. AR p 27. Those marketing activities, as we explained above and Judge Inman agreed, provide a sufficient foundation for

personal jurisdiction. *Miller*, 2022-NCCOA-55, ¶ 63. But at a minimum, where LG America failed to deny marketing activity in either its affidavit or unsworn interrogatory response, the activities should be discoverable so that Mr. Miller can supplement the record.

None of the defendants' objections justify their refusal to provide this discovery either. Most of it was generic boilerplate that cannot justify withholding information or documents. *See, e.g.*, AR p 26 (stating, in response to interrogatory 8, "LGCAI objects to this request because it lacks foundation and assumes facts not in evidence"); *K2 Asia Ventures v. Trota*, 215 N.C. App. 443, 448, 717 S.E.2d 1, 5 (2011) (boilerplate objections are insufficient.). Other objections, such as that Mr. Miller did not expressly limit his requests to distribution channels that reached North Carolina, AR p 46, at most warrant the defendants producing a subset of the documents or information requested, not refusing to produce anything at all.

5. The refusal to permit this (and other) jurisdictional discovery is particularly problematic because of the timing of the defendants' submission of affidavits. They waited until after Mr. Miller filed his response brief to disclose two of the affidavits and until after the hearing on the motion to dismiss to disclose the third, so Mr. Miller never had an adequate opportunity to test the assertions in those affidavits or to investigate any ambiguities. Many of his requests would have accomplished that directly. Others would have provided the foundation needed for Mr. Miller to take

depositions of the affiants, to seek other written discovery from the defendants, and to serve discovery on additional third parties identified in the responses. The trial court's failure to act on Mr. Miller's motions deprived him of that opportunity to substantiate his allegations about the defendants' contacts with North Carolina—and with it, deprived him of the opportunity to seek compensation for the substantial injuries for which the defendants are responsible.

CONCLUSION

The Court should reverse the order granting LG Chem and LG America's motion to dismiss. In the alternative, the Court should remand to the trial court to allow jurisdictional discovery.

Respectfully submitted, this 19th day of May, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, counsel for Plaintiff certifies that the foregoing brief, which was prepared using a 14-point proportionally spaced font with serifs, is 11,500 words (excluding covers, captions, indexes, tables of authorities, counsel's signature block, certificates of service, this certificate of compliance, and appendixes) as reported by the word-processing software.

/s/ Deepak Gupta
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing brief on counsel for Defendant by depositing a copy, contained in a first-class postage-paid wrapper, into a depository under the exclusive care and custody of the United States Postal Service, addressed as follows:

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ADDENDUM

2019 WL 1746083
Only the Westlaw citation is currently available.
United States District Court, E.D. California.

Rachel BERVEN, et al., Plaintiffs,

v.

LG CHEM, LTD., Defendant.

Case No.: 1:18-CV-01542-DAD-EPG
|
Signed 04/18/2019

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FINDINGS AND RECOMMENDATIONS RECOMMENDING THAT THE MOTION TO DISMISS FOR LACK OF JURISDICTION BE DENIED AND THAT THE MOTION FOR LEAVE TO AMEND THE COMPLAINT BE GRANTED

Erica P. Grosjean, UNITED STATES MAGISTRATE JUDGE

***1** Before the Court, on referral from District Judge Dale A. Drozd (ECF No. 23), are Defendant's Motion to Dismiss for Lack of Personal Jurisdiction (ECF No. 7) and Plaintiffs' Motion for Leave to Amend the Complaint to Add Jurisdictional Allegations (ECF No. 17). For the reasons discussed below, the Court recommends that Defendant's Motion to Dismiss for Lack of Personal Jurisdiction (ECF No. 7) be denied, and that Plaintiffs' Motion for Leave to Amend the Complaint to Add Jurisdictional Allegations (ECF No. 17) be granted.

I. BACKGROUND

A. Plaintiff's Original Complaint

This is a product liability action brought by Plaintiffs, Rachel Berven and James Berven (collectively "the Bervens") against Defendant, LG Chem, Ltd. ("LG Chem"). According to the Complaint (ECF No. 1), in November 2015, Ms. Berven went to Switch to Vapor, a retail store located in California, and purchased an electronic cigarette ('e-cigarette" or "e-cig") and related parts, including a replacement cylindrical battery manufactured by LG Chem—the LG 18650 lithium-ion battery ("18650 battery"). (ECF No. 1.) On February 25, 2016, Ms. Berven decided to replace the battery in her e-cigarette. She removed the old battery, put the lithium-ion battery that she had purchased from Switch to Vapor into her e-cigarette, put the e-cigarette up to her mouth, and pressed the activation button. (*Id.* at 20-21.) The e-cigarette "suddenly *exploded*—causing her hair, face, neck, shirt, pants, and thighs to catch on fire." (*Id.* at 21.) Ms. Berven's resulting injuries include first, second, and third-degree burns to her face, neck, thighs, arm, and hand; a fractured jaw; top and bottom lip split; and two teeth knocked out and another tooth shattered in half. (*Id.*)

On February 23, 2018, the Bervens filed this product liability action against LG Chem in Stanislaus County Superior Court. The Complaint alleges that the explosion and Ms. Berven's resulting injuries were caused by the defective e-cigarette products, including the replacement battery manufactured by LG Chem. (*Id.* at 22.) The Complaint brings claims against LG Chem for strict product liability and negligent product liability.

On November 6, 2018, LG Chem removed the action to federal court based on diversity jurisdiction, and on November 9, 2018, LG Chem filed a motion to dismiss for lack of personal jurisdiction. (ECF No. 7.) On December 19, 2018, the Bervens moved for leave to file a first amended complaint ("proposed FAC" or "FAC") to add additional jurisdictional allegations against LG Chem. (ECF No. 17.) LG Chem opposes the motion to amend, arguing that leave to amend should be denied because the Bervens cannot meet their burden of establishing personal jurisdiction and that amendment would accordingly be futile. (ECF No. 21.)

B. Proposed First Amended Complaint

The FAC alleges that the Court has specific personal jurisdiction over LG Chem because the incident occurred in California and LG Chem "has purposefully availed itself of the privileges and benefits of doing business in California." (ECF No. 17-1 at 6.) LG Chem "has past, present, ongoing, and continuing contacts with California by transacting substantial and regular business in this state and manufacturing, distributing, and/or selling goods with the reasonable expectation and knowledge that they will be used in this state and which are in fact used in this state." (ECF No. 17-1 at 5-6.) The FAC includes the following additional allegations in support of personal jurisdiction:

***2** LG Chem is a global supplier of products, and touts its global reach, noting that LG "is literally the company leading the chemical industry in Korea. The company has built the *global network for production, sales and R&D* not only in Korea but also in main bases across the world and has provided globally competitive products including ABS, polarizers, and EV battery cells, raising its global position as a material supplier ... LG Chem is committed to becoming a *global company.*" LG also stresses that it is "the only chemistry-based company among global battery cell manufacturers, [which] has led the world lithium-ion battery market ... positioned as a global leader ... and has secured the battery production capacity as a global player ...."

LG's Company Profile boasts that it is responsible for "manufacturing the first domestic Lithium-ion Battery that is leading the global market with superior technology and productivity." It lists as "major customers" such worldwide brands as LG Electronics, Apple (headquartered in Cupertino, CA), Dell, Hewlett Packard (headquartered in Palo Alto, CA), Bosch, Asus, Lenovo, Stanley Black&Decker, and others. And its most recent Annual Report discloses its drive that "we will become the undisputable top maker of lithium-ion batteries within the next few years."

LG Chem sells its batteries to worldwide markets, utilizing distributors across the globe to ensure the reach of its battery products in all markets. This is particularly true in California, where LG has, upon information and belief, established particular lithium-ion battery distributors to which it ships large quantities of its cylindrical lithium-ion batteries. These batteries are then redistributed, sold, packaged, transported, or provided to end users in California and across the United States for use. The regular course and scope of LG Chem's batteries involves the shipping of huge quantities of its batteries, both the cylindrical lithium-ion battery at issue here, as well as LG Chem's other energy storage products, into and throughout California, and indeed the world. LG Chem's known California distributors—to which it directly ships thousands if not millions of battery products—include the following:

i. Energy Sales, headquartered at 1380 Borregas Ave., Sunnyvale, CA 94089, which states that it is a "value-added assembler and distributor specializing in the most widely accepted brands of batteries," and specifically lists LG Chem as one of its primary suppliers of battery cells for lithium-ion, lithium-polymer, and silver-oxide batteries.

ii. House of Batteries, headquartered at 19010 Talbert Ave., Fountain Valley, CA 92708. That company claims it is a "US-based supplier of LG Chem batteries."

iii. Based on information and belief, during at least the years 2013 to present, LG Chem supplied, sold, shipped, distributed and provided directly to consumers and distributors throughout the State of California, thousands (if not millions) of its products, including cylindrical lithium-ion batteries, which were sold for use, and used, in California. Based on information and belief, LG Chem marketed, advertised, targeted customers, and promoted the sale of its various products, including lithium-ion batteries, to numerous consumers and distributors throughout California. Upon information and belief, those distributors, and other distributors located throughout the United States and the world, in turn sold large quantities of products, including LG lithium-ion batteries to wholesalers and retailers located in California for direct sale to California consumers, where said products were purchased by California residents and used in the State. Based on information and belief, LG's marketing, advertising, sale, distribution network, and provision of batteries to California resulted in the use of thousands, if not millions, of LG products, particularly cylindrical lithium-ion batteries, in the State of California—and comprising one of LG's primary distribution channels for its products.

***3** In addition to the authorized LG Chem batteries shipped directly to California, LG Chem also engages,

upon information and belief, in a grading process for the various batteries it manufactures. Upon information and belief, those batteries that fail to achieve a sufficient grade or conform appropriately to standards are not discarded. Instead, in the interests of profit, LG Chem sells those inferior or nonconforming lithium-ion battery products to other distributors, with LG knowing full well that they may be using those batteries for individual electronic or other uses—uses that may not be explicitly authorized, but are certainly permitted by LG Chem in the interest of maintaining its profitability. In addition, based upon information and belief, in the manufacturing process, LG Chem ends up with a significant quantity of batteries with cosmetic defects in the wrapper, without a wrapper at all, or with batteries with other types of cosmetic and other defects. Again, instead of discarding those batteries, LG Chem knowingly sells those substandard batteries to various distributors throughout the world to remove the cosmetically defective or missing wrapper, apply their own wrapping, and then sell those batteries for other uses. Those batteries are then sold to consumers throughout the world, and readily and rapidly reach California shores, all at the reasonable expectation or explicit knowledge of LG Chem. Based on these two avenues, LG Chem ultimately sells huge quantities of lithium-ion batteries that end up in the electronic cigarette market in California, and end up in the hands of California consumers, including upon information and belief, the battery at issue in this matter.

For at least the last six years, it has been well known in the electronic cigarette industry, and based upon information and belief, well known to LG Chem, that its lithium-ion batteries were being used in connection with electronic cigarettes and were even *recommended* by multiple online sources for e-cig use. For example, the following electronic cigarette stores located in California and selling LG Chem batteries advertise those batteries as follows:

i. Vapor Authority – (located in San Diego) and website says: "LG is world renown as producing very high quality products, and their electronic cigarette batteries are not exception. Their extremely powerful 18650 e-cig batteries work wonderfully in virtually all devices. LG pays meticulous attention to quality, ensuring that their lithium-ion ecig batteries are made to be stable, consistent, and safe. If you're looking for a vape battery for your electronic cigarette device, you can't go wrong with LG."

ii. Element Vape – (California) and website says: "LG HG2 18650 20A 3000mAh battery is a high quality and excellent battery that offers maximum discharge current at 20 Amp. It is great battery to use all the variable voltage/wattage and other mods/devices in the market."

iii. Vape Craft (Vista, CA – note OUT OF STOCK): "LG HG2 18650 300mAh 20A is a great battery to use in your vape mod. Whether you are planning to use this LG battery in your vape, remote, flashlight, or whatever, this is a great battery to use. Please read up on general battery safety, especially if you are going to use this in an advanced mod/mech mod. We thank you for being safe. Get yours before we're out of stock again!"

...

Indeed, LG batteries are so widely available in California that *more than 20* of those batteries have exploded in the hands of California consumers (and that is active litigation handled by Bentley & More LLP alone).

LG Chem's contacts with California also include significant actions that go far beyond merely placing batteries into the stream of commerce, with LG Chem directly delivering products, directly negotiating contracts, directly entering into sale and distribution agreements, or directly partnering with California business, entities, and other California residents:

i. First, LG Chem boasts that it "delivered and commissioned the largest battery system installed in North America" in 2014 in Tehachapi, CA, "including overall project and construction management, system engineering and design, and battery rack systems." "LG Chem demonstrated its system engineering capabilities and the modularity and flexibility of its battery solutions by designing, engineering, and installing the utility-scale battery system" in Tehachapi, CA, which included "604 battery racks, 10,872 battery modules, and 608,832 individual battery cells" of its automotive lithium-ion battery.

ii. Second, LG Chem has entered into direct contracts with (at least) three California utilities to provide Brackish Water Reverse Osmosis membranes, including for utilities located in Orange County, Silicon Valley, and Los Angeles County.

***4** iii. LG Chem has partnered with California companies such as Sullivan Solar Power, SunRun, and Vivint Solar, Inc. to directly sell and install, in homes across California, LG Chem lithium-ion battery energy storage units—including choosing Carlsbad, California as the site of the first LG Chem residential energy storage unit in the continental United States. This partnering process included a "written certification test" for installers that was generated by LG Chem before it would approve the ability to install LG Chem's batteries in the homes of more than 200 Californians.

iv. LG Chem has invested directly into California companies, such as Enevate Corporation, which has its principal place of business at 101 Theory, Suit 200, Irvine, CA 92617. Enevate is a California-based firm that has done pioneering work in rapid charging of lithium-ion batteries, allowing them to be charged to 75 percent capacity in as little as 5 minutes, and received a "strategic investment from LG Chem," and entered a "strategic partnership[ ] with companies such as LG Chem ...."

v. In 2010, LG Chem applied for, and was selected, to provide lithium-ion battery packs for Southern California Edison's pilot program involving energy storage systems for residential and small commercial applications.

vi. LG Chem partnered with AES Energy Storage and supplied the necessary lithium-ion batteries to competitively bid for, and win, a Southern California Edison project to install a 100MW/300MWh battery to be installed in 2022 at the Alamitos Energy Centre storage project in Long Beach, California, which will supply electricity under a 20-year power purchase agreement with the utility.

vii. LG Chem engaged in the direct selling of lithium-ion batteries to automakers for use in electric vehicles, including supplying Tesla Motors (located in Silicon Valley, California) with battery cells for Tesla's Roadster "3.0" battery-pack upgrade. These involved the shipment of thousands of battery packs to Tesla under a direct contract. LG Chem also supplies lithium-ion cells to almost a dozen automakers among its other customers.

viii. LG Chem agreed to a massive $2.4 billion supply contract with Faraday Future, a company based in California with its principal business and executive offices located in Los Angeles, to supply cylindrical lithium-ion batteries, after working closely with that company "to develop a tailored cell chemistry to optimize the range and safety of our mass production battery hardware," with teaser pictures closely resembling the 18650 cell at issue in this matter.

ix. In the year 2013, LG Chem pled guilty and was forced to pay a $1.056 million criminal fine for charges relating to price fixing involving batter cells. The case against LG Chem related to a one-count felony charge brought against it by the U.S. Department of Justice in the Northern District of California. The charge was that LG Chem had conspired with another entity to fix the price of cylindrical lithium-ion battery cells used in notebook computer battery packs. Based upon information and belief, LG Chem has been the subject of numerous other lawsuits brought and litigated in California.

In addition to its global profile, global distribution network, and quest to be global leader in selling and distributing lithium-ion batteries, LG Chem operates a number of subsidiaries in the United States, and specifically in California:

i. LG Chem America, Inc., is a direct, 100% owned and controlled subsidiary of LG Chem, and operates as one of the principal marketing, sales, and trading subsidiaries for LG Chem in the United States. Although its principal executive office is claimed to be at 3475 Piedmont Road NE, Suite 1200, Atlanta, GA 30305, LG Chem America has voluntarily designated a "principal business office in California" in its registration with the Secretary of State, designating 2540 N. First, #400, San Jose, CA 95131 as its principal business office in the State. LG Chem America transacts business in California, has a principal place of business in California, ships product to California, markets its products directly in California, and conducts regular, repeated business with California entities on behalf of its parent company, LG Chem.

***5** ii. LG Chem Michigan Inc. is a direct, 100% owned and controlled subsidiary of LG Chem and operates as one of LG Chem's principal manufacturing plants in the United States, specifically manufacturing LG Chem's lithium-ion batteries. Although its principal executive office is located in 1 LG Way, Holland, MI 49423, LG Chem Michigan has voluntarily designated a "principal business office in California" in its registration with the Secretary of State, designating 2540 N. 1st Street,

Suite 300, San Jose, CA 95131 as its principal place of business in this state. LG Chem Michigan transacts business in California, has a principal place of business in California, ships product to California, markets its products directly in California, and conducts regular, repeated business with California entities on behalf of its parent company, LG Chem.

iii. LG NanoH_2O, Inc. is the result of a California business that LG Chem acquired in or about 2014 at the cost of approximately $200 million. LG Chem sought out, purchased, and directly acquired and made its subsidiary the California corporation named NanoH_2O, Inc. That new corporation (LG NanoH_2O, Inc.) continued to operate in California, manufacturing products and conducting marketing on behalf of LG Chem. LG NanoH_2O is listed as a "marketing subsidiary" for LG Chem and operates as a direct subsidiary of the company, being 100% owned and controlled by LG Chem. LG NanoH_2O has both its principal executive office and its principal place of business the property located at 21250 Hawthorne Blvd., Suite 330, Torrance, CA 90503. That is the office LG Chem *still* continues to list as the principal place of business of its direct subsidiary. LG NanoH_2O transacts business in California, has a principal place of business in California, ships product to California, markets its products directly in California, and conducts regular, repeated business with California entities on behalf of its parent company, LG Chem.

iv. Based upon information and belief, the actions of the subsidiaries in establishing principal places of business in California, transacting business in California, selling and marketing products to individuals in California, and having regular, repeated conduct with California should be imputed to LG Chem because LG Chem intended for its subsidiaries to serve as its marketing and production arms in the United States and to act on behalf of LG Chem (to which the subsidiaries, directly and wholly controlled by LG Chem agreed) and LG Chem exercised full, total, and explicit control of its direct subsidiaries in their conducting business in and through California. For example, based upon information and belief, employees of LG Chem, Ltd. and LG Chem America, Inc., used the "lgchem.com" domain name for their email addresses. Personnel regularly shifted between LG Chem and its subsidiaries, blurring the distinctions between the foreign parents and the U.S. subsidiaries.

v. Based upon information and belief, LG Chem directs and controls the actions of its subsidiaries, including LG Chem America, LG Chem Michigan, and LG NanoH_2O, causing its subsidiaries to sell and ship products directly to California companies and consumers, to regularly place products into the stream of commerce *within* California as well as *from* California, as well as directing and controlling its subsidiaries to advertise, market, promote, and seek to develop further business with California businesses and California residents. LG Chem, through its direct actions and through the control of its subsidiaries: (a) transacted business in the United States, including in this District; (b) sold or marketed substantial quantities of Lithium Ion Batteries throughout the United States, including in this District; (c) had substantial aggregate contacts with the United States as a whole, including this District; and (d) purposefully availed itself of the laws of the United States, and of California in particular.

***6** In addition to the contacts of LG Chem and its subsidiaries with California, LG Chem has been repeatedly haled into court in California for the explosions of its cylindrical lithium-ion batteries. In the last three years, Plaintiff's counsel has brought or litigated more than 20 personal injury actions against LG due to the explosion of one of its 18650 lithium-ion batteries. Of those matters, in at least 7-10 LG Cham *voluntarily* accepted service of the summons and *voluntarily* consented to the personal jurisdiction of California for the injuries resulting from the explosion of its product. It used some of the *same* counsel it has retained in this matter (Lewis Birsboi Bisgaard & Smith LLP), and actively litigated those cases, serving and answering discovery, filing motions, attending mediations, and settling claims against it. In addition, based upon a docket review, LG Cham has been repeatedly named as a defendant in actions litigated throughout California, including in a series of antitrust class-action claims currently being litigated in the USDC – Northern California. LG Chem has been repeatedly, knowingly, and regularly haled into court in California state and federal courts.

(ECF No. 17-1 at 6-19 (citations omitted) (alterations and emphasis in original) (certain numbering altered during formatting).)

C. Motion to Dismiss

LG Chem seeks dismissal of this action based on lack of personal jurisdiction. The Bervens oppose dismissal, contending that LG Chem is subject to personal jurisdiction under the "stream of commerce plus" test.

Summary of Defendant's Argument

LG Chem argues that it is not subject to personal jurisdiction in California. LG Chem explains that it is a Korean company that has never had an office in California, and has never been licensed to do business in California, and lacks the purposeful minimum contacts with California necessary to establish specific personal jurisdiction over it.

LG Chem does not dispute, for purposes of the motion to dismiss, that it manufactured the battery at issue in this case (the "Battery"), that the Battery is an LG 18650 lithium-ion battery ("18650 battery"),[1] and that LG Chem sells the same type of battery—the 18650 battery—in California through authorized distributors with the full support and marketing of LG Chem. LG Chem contends, however, that it is not subject to personal jurisdiction in California because (1) the Battery was not sold by an LG Chem authorized distributor in California, but instead reached California through an "unauthorized" distributor; (2) the Battery had been rewrapped into an "MXJO"[2] wrapper and this rewrapping was not authorized by LG Chem; and (3) the Battery was used in an unauthorized way—by an individual consumer in an e-cigarette.

LG Chem contends that it

> has not engaged in any purposeful business activities in or directed to the State of California related to the allegations at issue in the complaint. LG Chem does not design, manufacture, distribute, advertise, or sell 18650 lithium-ion power cells for use by individual consumers as replaceable, rechargeable batteries in electronic cigarette devices. Instead, LG Chem manufactures 18650 lithium-ion power cells for use in specific applications by sophisticated companies.... LG Chem has never authorized any manufacturer, wholesaler, distributor, retailer, or re-seller, including Switch to Vapor, to advertise, distribute, or sell LG 18650 lithium-ion power cells in California, or anywhere else, for use by individual consumers as replaceable batteries in e-cigarette devices.
>
> ....
>
> .... LG Chem never authorized Switch to Vapor to distribute or sell LG 18650 lithium-ion power cells for use by individual consumers as replaceable, rechargeable batteries in e-cigarette devices, including re-wrapped as MXJO batteries.... LG Chem did not authorize or approve the re-wrapping of the cell ....

***7** (ECF No. 7 at 8, 13; *see* ECF No. 24.)

Summary of Plaintiffs' Argument

The Bervens oppose the motion to dismiss, and contend that the Court has specific personal jurisdiction over LG Chem under the stream of commerce plus test. (ECF No. 22.) The Bervens note that LG Chem manufactured the Battery and placed the Battery into the stream of commerce; and that the Battery was sold in California, used in California, exploded in California, and injured a California resident. Further, "LG Chem has a plethora of contacts that directly tie its activities to California, and show its intent to 'serve directly or indirectly, the market for its product' in California" as set out in the proposed FAC. (*Id.* at 6.) These activities include substantial sales of lithium-ion batteries—including 18650 batteries—in California by LG Chem through authorized distributors, and the marketing and support of those batteries by LG Chem. Further, the Bervens argue that it would be unfair to preclude the exercise of jurisdiction here merely because LG Chem sells its nonconforming and inferior batteries—such as the one at issue in this case—to "unauthorized" distributors, and that LG Chem should not be able to avoid the exercise of jurisdiction on such a basis.

II. LEGAL STANDARDS

A. Legal Standard for Motion to Dismiss

On a motion to dismiss for lack of personal jurisdiction brought pursuant to Fed. R. Civ. P. 12(b)(2), the plaintiff bears the burden of demonstrating that the court's exercise of jurisdiction is proper. *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1073 (9th Cir. 2011). When, as here, the court's determination is based on written materials rather than an evidentiary hearing, "the plaintiff need only make a prima facie showing of jurisdictional facts." *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008) (quotation marks and citation omitted).

In resolving the motion on written materials, the court must "only inquire into whether [the plaintiff's] pleadings and affidavits make a prima facie showing of personal

jurisdiction." *Id.* (alteration in original) (quotation marks and citation omitted). "That is, the plaintiff need only demonstrate facts that if true would support jurisdiction over the defendant." *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995). Uncontroverted allegations in the complaint must be taken as true. *Boschetto*, 539 F.3d at 1015. "Conflicts between the parties over statements contained in affidavits must be resolved in the plaintiff's favor." *Id.* (quoting *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004)). In addition, "[t]he court may consider evidence presented in affidavits to assist it in its determination and may order discovery on the jurisdictional issues." *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001). However, "conflicts between the facts contained in the parties' affidavits must be resolved in [plaintiff's] favor for purposes of deciding whether a prima facie case for personal jurisdiction exists." *AT & T v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir. 1996).

B. Legal Standard for Determining Personal Jurisdiction

***8** Federal courts generally follow state law in determining the bounds of their jurisdiction over persons. *See* Fed. R. Civ. P. 4(k)(1)(A). California's long-arm statute allows the exercise of personal jurisdiction to the full extent permissible under the U.S. Constitution. *See* Cal. Civ. Proc. Code Ann. § 410.10 (courts may exercise personal jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States"). Thus, the issue the Court must decide is whether the assertion of personal jurisdiction over LG Chem comports with the limits imposed by federal due process. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 464, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985); *see also Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 131 S.Ct. 2846, 180 L.Ed.2d 796 (2011) ("The Due Process Clause of the Fourteenth Amendment sets the outer boundaries of a state tribunal's authority to proceed against a defendant.").

Under the Due Process Clause, a court may exercise personal jurisdiction over a non-resident defendant only if the defendant has "certain minimum contacts ... such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945). This due process analysis focuses on whether a nonresident defendant's conduct and connection with the forum state are such that it should reasonably anticipate being haled into court there. *World–Wide Volkswagen Corp. v, Woodson*, 444 U.S. 286, 297, 100 S.Ct. 580, 62 L.Ed.2d 490 (1980). It is based on the presumption that it is reasonable to require a defendant to be subject to the burden of litigating in a state in which it conducts business and benefits from its activities in that state. *Brainerd v. Governors of the University of Alberta*, 873 F.2d 1257, 1259 (9th Cir. 1989). This requirement is met if the contacts proximately result from actions by the defendant itself that create a substantial connection with the forum, such as where the defendant has deliberately engaged in significant activities within the forum or has created continuing obligations between itself and forum residents. *Burger King Corp*, 471 U.S. at 474-76, 105 S.Ct. 2174. A defendant may not, however, be haled into a jurisdiction as a result of the defendant's random, fortuitous, or attenuated contacts with the forum, based on the unilateral activity of another party or a third person. *Id.* at 475, 105 S.Ct. 2174.

There are two kinds of personal jurisdiction that a court may exercise over a foreign defendant—"general jurisdiction" and "specific jurisdiction." *Id.* at 919, 131 S.Ct. 2846. General jurisdiction exists if the defendant's contacts with the forum are "so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." *Int'l Shoe*, 326 U.S. at 318, 66 S.Ct. 154. Specific jurisdiction, on the other hand, exists where the litigation is derived from obligations that "arise out of or are connected with the [company's] activities within the state." *Id.* at 319, 66 S.Ct. 154.

Here, the Bervens do not contend that the Court has general jurisdiction over LG Chem. Rather, the Bervens contend that the Court has specific personal jurisdiction over LG Chem under the "stream of commerce" test.

A majority of the U.S. Supreme Court has not agreed on a stream of commerce test for specific personal jurisdiction. *See Asahi Metal Industry Co. v. Superior Court of California, Solano County*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987); *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 131 S.Ct. 2780, 180 L.Ed.2d 765 (2011). However, the Ninth Circuit has adopted the "stream of commerce plus" test set forth in Justice O'Connor's concurrence in *Asahi*, 480 U.S. at 112, 107 S.Ct. 1026. *See Holland Am. Line Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 450, 459 (9th Cir. 2007) (applying the "stream of commerce plus" test set out by Justice O'Connor in *Asahi*).[3]

***9** In *Asahi*, the underlying incident was a motorcycle accident in California that was alleged to have been the result of a defective motorcycle tire. Asahi, a Japanese company, manufactured a component part of motorcycle tires and then

sold that component part in Taiwan to a Taiwanese tire tube company, which then integrated the component part into tire tubes, including the tire tube that was on the motorcycle at issue in the case. The Taiwanese company was sued in California state court in a product liability action, and the Taiwanese company filed a cross-complaint against Asahi, seeking indemnification.

The California Supreme Court held that Asahi's awareness that its products would enter the stream of commerce and be sold in California was sufficient to establish personal jurisdiction. The U.S. Supreme Court disagreed and unanimously held that California did not have personal jurisdiction. However, none of the three opinions from the Court commanded a majority.

Justice O'Connor, writing for herself and three other justices, applied the following test, which has become known as the "stream of commerce plus" test:

> The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.

Asahi, 480 U.S. at 112, 107 S.Ct. 1026.[4]

III. ANALYSIS OF PERSONAL JURISDICTION

Turning to the present case, the issue the Court must decide is whether LG Chem's contacts with California, as alleged in the First Amended Complaint, provide the "plus" needed to satisfy the stream of commerce plus test for the assertion of personal jurisdiction.

LG Chem does not contest, for purposes of this motion, the plethora of contacts alleged in the amended complaint, including the substantial marketing, sales and support for 18650 batteries in California. Instead, LG Chem argues that such contacts should not be considered for specific jurisdiction because they concerned sales by authorized distributors who wrapped the product in an authorized way for use in an authorized manner. In contrast, LG Chem argues, the 18650 battery at issue in the complaint was sold through an unauthorized distributor and wrapped and used in an unauthorized manner.

***10** The Court has not found any case addressing whether sales, marketing and contacts through "authorized" distributors should be considered in evaluating specific jurisdiction over sales of the same product through unauthorized distributors. LG Chem does not cite to any case supporting its argument that contacts regarding sales through authorized distributors should be excluded from such consideration. However, LG Chem argues that it would be unjust to subject it to personal jurisdiction over sales from unauthorized distributors who package and use a product in an unauthorized manner, no matter how extensively it markets and sells the same product through its authorized distributors.

To resolve this question, we turn to the stream of commerce plus test set forth by Justice O'Connor in *Asahi* in evaluating specific jurisdiction regarding the product at issue here. This test asks the Court to evaluate a defendant's additional contacts regarding the "product" in the forum state. *See Asahi*, 480 U.S. at 112, 107 S.Ct. 1026 ("Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State."). Here, the Court finds that the "product" at issue is the battery, i.e., a cylindrical battery manufactured by LG Chem—the LG 18650 lithium-ion battery ("18650 battery"). When defined this way, it is clear that the allegations in Plaintiff's First Amended Complaint regarding LG Chem's support for such product qualifies as the "plus" needed to satisfy the stream of commerce plus test. *See Asahi*, 480 U.S. at 112, 107 S.Ct. 1026; *J. McIntyre*, 564 U.S. at 888-89, 131 S.Ct. 2780. Specifically, LG Chem has extensive contacts with California in relation to sales of the 18650 battery including, among other things, LG Chem's establishment of distribution networks in California to market and sell LG's lithium-ion batteries, including 18650 batteries; LG Chem's sale and shipment of thousands if not millions of lithium-ion batteries, including 18650 batteries, to California, for use,

resale, redistribution, packaging, transport, and provision to end users in California and across the United States; LG Chem's marketing, promotion, and advertising of its lithium-ion batteries in California, which targets both consumers and distributors in California; and LG Chem's maintenance of an interactive informational website through which potential customers can inquire about LG Chem batteries, including 18650 batteries, and receive prompt responses. (*See* ECF No. 17-1 at 6-22 (jurisdictional allegations in proposed FAC).) In other words, if the "product" is defined as the battery at issue, LG Chem's acts of purposeful availment are more than sufficient to provide the "plus" necessary for the stream of commerce plus test. *See Asahi*, 480 U.S. at 112, 107 S.Ct. 1026 (listing additional conduct that may provide the necessary "plus" for the stream of commerce plus test as including "advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State"); *J. McIntyre*, 564 U.S. at 888-89, 131 S.Ct. 2780 (finding the "plus" required for the stream of commerce plus test to be missing where there was " 'no regular ... flow' or 'regular course' of sales in [the forum]; and there [was] no 'something more,' such as special state-related design, advertising, advice, marketing, or anything else").

***11** In its attempt to exclude these substantial contacts from consideration, LG Chem argues that the product should not be defined as the battery itself—rather it is a battery as distributed and used a certain way. Thus, in arguing that it does not have any contacts related to the product in suit, Defendant states "LG Chem does not design, manufacture, distribute, advertise, or sell 18650 lithium-ion power cells *for use by individual consumers as replaceable, rechargeable batteries in electronic cigarette devices.* Instead, LG Chem manufactures 18650 lithium-ion power cells *for use in specific applications by sophisticated companies.*" (ECF No. 7 at 8, 13; *see* ECF No. 24.) (emphasis added). But the Court does not agree with LG Chem's framing of the "product" as limited to a certain battery distributed in a certain way, for a certain use, in certain packaging. The method of distribution is not part of the definition of the product. Nor is the manner of use. When it comes to evaluating contacts for jurisdiction under case law, including *Asahi*'s stream of commerce plus test, the "product" is the product being sold, which, in the present case, is the 18650 battery.

This is not to say that the manner of packaging and use is irrelevant to this lawsuit. 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. Assuming such contacts exist, as the Court finds they do here, a defendant cannot avoid jurisdiction based on allegations that the product was mis-wrapped or mis-used. *See Prescott v. Slide Fire Solutions*, 341 F.Supp.3d 1175 (D. Nevada 2018) (defendant subject to personal jurisdiction even though product was used for unintended purpose).

In deciding whether to consider contacts regarding products sold through authorized channels in the forum when evaluating personal jurisdiction for the same products sold through unauthorized channels, the Court is also mindful of the principles of fair play and substantial justice that underlie every personal jurisdiction analysis. *See Int'l Shoe*, 326 U.S. at 316, 66 S.Ct. 154 (court may exercise personal jurisdiction over non-resident defendant only if the defendant has "certain minimum contacts ... such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice"). Here, Plaintiff has alleged that LG Chem sells 18650 batteries that meet quality standards to authorized distributors in California, but sells 18650 batteries that do not meet quality standards—i.e., the inferior or nonconforming batteries—to unauthorized distributors, knowing and expecting that these inferior or nonconforming batteries will reach the California market and be sold to individual consumers for use in California, including in e-cigarettes. Accepting these allegations as true for purposes of this motion to dismiss, allowing LG Chem to avoid jurisdiction regarding products sold through unauthorized dealers would allow a defendant to enjoy all the advantages of the forum when selling safe products while avoiding jurisdiction to answer for its less safe products. Such a result does not comport with transitional notions of fair play and substantial justice.

The present case is also distinguishable from *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County,* —— U.S. ——, 137 S. Ct. 1773, 198 L.Ed.2d 395 (2017), relied on by LG Chem. In *Bristol-Myers Squibb*, a group of plaintiffs consisting of both California residents and residents of other states filed an action in California state court alleging that a drug called Plavix damaged their health. The defendant, Bristol-Myers Squibb ("BMS"), which both manufactured and sold Plavix, challenged the California court's exercise of personal jurisdiction over it for purposes

of the claims brought by the *nonresident* plaintiffs; BMS did not challenge the exercise of jurisdiction over it for purposes of claims brought by the California resident plaintiffs. *Id.* at 1778.[5]

***12** The Supreme Court held that there was no personal jurisdiction over BMS for the claims asserted by the *nonresident plaintiffs*, noting: "What is needed—and what is missing here—is a connection between the forum and the specific claims at issue." *Id.*

> In order for a state court to exercise specific jurisdiction, "the suit" must "aris[e] out of or relat[e] 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 and is therefore subject to the State's regulation. For this reason, "specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction."

Id. at 1780 (citations omitted).

The Court went on to explain:

> As noted, the nonresidents were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California. The mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents' claims. As we have explained, "a defendant's relationship with a ... third party, standing alone, is an insufficient basis for jurisdiction." This remains true even when third parties (here, the plaintiffs who reside in California) can bring claims similar to those brought by the nonresidents. Nor is it sufficient—or even relevant—that [the defendant] conducted research in California on matters unrelated to Plavix. What is needed—and what is missing here—is a connection between the forum and the specific claims at issue.

Id. at 1781 (citing and quoting *Goodyear*, 564 U.S. at 919, 131 S.Ct. 2846; *World-Wide Volkswagen*, 444 U.S. at 295, 100 S.Ct. 580).

In contrast to *Bristol-Myers Squibb*, in the present case, the individual injured by the product—Ms. Berven—is a resident of the forum, purchased the product in the forum, used the product in the forum, and was injured by the product in the forum. Thus, the present case has the exact type of connections between the claims and the forum that were missing in *Bristol-Myers Squibb*. *See id.* at 1781 (holding personal jurisdiction over defendant lacking for claims brought by plaintiffs who were not residents of the forum, did not purchase the product in the forum, did not ingest the product in the forum, and were not injured in the forum).

The present case is also distinguishable from *Holland America Line Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 450 (9th Cir. 2007), also relied on by LG Chem. In *Holland America*, the underlying incident was an engine explosion on a cruise ship that then caused the ship to catch on fire, destroying the ship entirely and causing it to sink while on a voyage near Tahiti. Holland America, the operator of the cruise ship, brought an action in federal court in Washington against numerous defendants, including a Finnish entity that Plaintiff alleged either designed, manufactured, or sold a faulty engine part that contributed to the engine explosion. *Id.* at 454. The Ninth Circuit found allegations that the Finnish entity had placed the allegedly faulty engine part into the stream of commerce to be insufficient to establish personal jurisdiction:

> ***13** The placement of a product into the stream of commerce, without more, is not an act purposefully directed toward a forum state. Even a defendant's awareness that the stream of commerce may or will sweep the product into the forum state does not convert the mere act of placing the product into the stream of commerce into an act purposefully directed toward the forum state.

Id. at 459 (citing *Asahi*, 480 U.S. at 112, 107 S.Ct. 1026). That the Finnish entity may have sent representatives to various industry trade shows in Washington and maintained an "entirely passive website" and advertisements in publications that may have made their way to Washington, was also insufficient to demonstrate that the Finnish entity purposefully availed itself of the Washington market. *Id.*

Finally, there was no nexus between the forum and Holland America's claim:

> The injury occurred in Tahiti, not Washington. The engine that blew up was manufactured in France, with no connection to Washington. And even if the claim stems [from the allegedly faulty engine part], Holland America offered no specific allegations as to when or where [that part] was purchased or installed: it has alleged only that [the Finnish entity] once mailed to Seattle a replacement part for one of the [destroyed ship's] sister ships.

Id. at 460-61.

In the present case, unlike the Finnish entity in *Holland America*, LG Chem has extensive contacts with the forum regarding the product, as discussed above, including establishing distributors in California through which there is a "regular flow" or "regular course" of sales in California of LG Chem lithium-ion batteries, including 18650 batteries; advertising and marketing in California targeted to both consumers and distributors; and maintaining an informational and interactive website through which LG Chem records and stores information about potential customers, and potential customers can inquire about LG Chem's lithium-ion batteries (including 18650 batteries) and receive prompt replies to those inquiries. Further, unlike *Holland America*, here there is a direct nexus between the forum and the Bervens' claims: the Battery was purchased in California from a California retailer, the Battery was used in and exploded in California, and the injury occurred in California and to a California resident. *See Holland America*, 485 F.3d at 460-61 (finding nexus lacking where the product blew up and the injury occurred outside the forum, and there was no allegation that the product was purchased in or shipped to the forum).[6]

In sum, given that LG Chem placed the product in the stream of commerce, the individual injured by the product is a resident of California and purchased the product, used the product, and was injured by the product in California, the Court finds that the very substantial contacts of LG Chem in marketing and selling this battery in California through many authorized distributors provide the "plus" necessary to meet the "stream of commerce plus" test, and that the exercise of personal jurisdiction over LG Chem is accordingly appropriate and does not violate the Due Process Clause.

IV. LEAVE TO AMEND

***14** Leave to amend a complaint under Federal Rule of Civil Procedure 15 "shall be freely given when justice so requires." *Carvalho v. Equifax Info. Svs.*, LLC, 629 F.3d 876, 892 (9th Cir. 2010) (citing *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)). The Supreme Court has instructed lower courts to heed carefully the command of Rule 15. *See Foman*, 371 U.S. at 182, 83 S.Ct. 227. As the Supreme Court has stated:

> In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowing the amendment, futility of the amendment, etc.—the leave sought should, as the rules require, be "freely given."

Foman, 371 U.S. at 182, 83 S.Ct. 227. "Absent prejudice, or a strong showing of any of the remaining *Foman* factors, there exists a presumption under Rule 15(a) in favor of granting leave to amend." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

As noted previously, LG Chem opposes the motion for leave to amend only because amendment would be futile because the Court lacks personal jurisdiction over LG Chem. Because the Court recommends finding that it has personal jurisdiction based in part on the allegations made in the proposed amended complaint, the Court finds that amendment would not be futile. Accordingly, leave to amend the complaint should be granted.

V. CONCLUSION AND RECOMMENDATIONS

Based on the foregoing, the Court finds that the exercise of personal jurisdiction over LG Chem is appropriate, and that leave to amend the complaint should be granted. Accordingly, the Court recommends:

1. That Defendant's Motion to Dismiss for Lack of Jurisdiction (ECF No. 7) be DENIED;

2. That Plaintiff's Motion for Leave to Amend the Complaint (ECF No. 17) be GRANTED;

3. That Plaintiff be DIRECTED to file its First Amended Complaint (*see* ECF No.17-1); and

4. That Defendant's Request for Leave to Submit Brief Statement of Supplemental Authority (ECF No. 27) be GRANTED.

These findings and recommendations are submitted to the district judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(l). Within **twenty-one days** after being served with these findings and recommendations, the parties may file written objections with the court. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations."

The parties are advised that failure to file objections within the specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014) (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

All Citations

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Footnotes

1 The battery at issue is an LG HG2 18650 battery. During the hearing on the motion to dismiss and motion to amend, the parties referred to the battery as an LG HG2 battery, but in the proposed FAC and other pleadings, the battery primarily has been referred to as a 18650 battery. For purposes of consistency with the proposed FAC, the Court will refer to the type of battery as a 18650 battery.

2 MXJO is apparently a Chinese company.

3 The parties also agreed during the February 8, 2019, hearing that the stream of commerce plus test set out by Justice O'Connor in *Asahi* is the appropriate test for this Court to apply in determining whether LG Chem is subject to personal jurisdiction in California.

4 The other two opinions in *Asahi* were authored by Justice Brennan and Justice Stevens. Justice Brennan, writing for himself and three other justices, concurred in the judgment but disagreed that a plaintiff needed to show that a defendant engaged in "additional conduct" directed toward the forum state before a court could exercise personal jurisdiction over a defendant. 480 U.S. at 116-17, 107 S.Ct. 1026. "The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale," such that a defendant who has participated "in this process is aware that the final product is being marketed in the forum State, [and] the possibility of a lawsuit there cannot come as a surprise." *Id.* at 117, 107 S.Ct. 1026.

Justice Stevens, joined by two others, concurred in the judgment but disagreed that the Court needed to articulate any test under the circumstances beyond the factors set forth in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 580, 62 L.Ed.2d 490 (1980). Justice Stevens emphasized that whether Asahi's "conduct rises to the level of purposeful availment requires a constitutional determination that is affected by the volume, the value, and the hazardous character of the components." 480 U.S. at 121, 107 S.Ct. 1026.

5 BMS was not incorporated in California, was not headquartered in California, and did not maintain operations in California. *Id.* at 1777-78. BMS did, however, engage in business activities in California, including having research and laboratory facilities, over 250 sales representatives, and a small state-government advocacy office in California. *Id.* at 1778. BMS also sold almost 187 million pills in California between 2006 and 2012, taking in more than $900 million from those sales, which was about one percent of BMS's nationwide sales revenue. *Id.* Further, although BMS manufactured and sold Plavix in California, it "did not develop Plavix in California, [did] not create a marketing strategy for Plavix in California, and did not manufacture, label, package, or work on the regulatory approval of the product in California." *Id.*

6 The Court has considered and finds inapposite additional cases cited by LG Chem in support of its assertion that personal jurisdiction is lacking. In one of those cases, *Death v. Mabry*, 2018 WL 6571148 (W.D. Wash. Dec. 13, 2018), the district court held that personal jurisdiction over LG Chem was lacking in a case alleging an incident similar to the one at issue in the present case, but where LG Chem did not have any contacts or conduct tying it to the forum state. Thus, although LG Chem placed the battery at issue in *Death* into the stream of commerce, LG Chem did not have contacts with the forum —Washington—sufficient to supply the "plus" needed to satisfy the "stream of commerce plus" test. *See id.* at *3-*5.

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United States District Court, E.D. California.

Rachel BERVEN, et al., Plaintiffs,

v.

LG CHEM, LTD., Defendant.

No. 1:18-cv-01542-DAD-EPG
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Signed 09/25/2019
|
Filed 09/26/2019

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ORDER ADOPTING FINDINGS AND RECOMMENDATIONS, DENYING DEFENDANT'S MOTION TO DISMISS AND GRANTING PLAINTIFF'S MOTION FOR LEAVE TO AMEND

Dale A. Drozd, UNITED STATES DISTRICT JUDGE

***1** This matter is before the court on a motion to dismiss filed by defendant LG Chem, Ltd., (Doc. No. 7), and a motion for leave to amend filed by plaintiffs Rachel Berven and James Berven. (Doc. No. 17.) Pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302(a), the court referred both motions to the assigned magistrate judge on January 24, 2019, for issuance of findings and recommendations. (Doc. No. 23.)

On April 18, 2019, the assigned magistrate judge issued findings and recommendations, recommending that the motion to dismiss be denied and the motion for leave to amend be granted. (Doc. No. 38.) The findings and recommendations were served on the parties and contained notice that any objections were to be filed within twenty-one (21) days from the date of service. Defendant filed objections on May 16, 2019, plaintiffs filed a response to those objections on May 30, 2019, and defendant requested leave to reply on June 6, 2019 (which the magistrate judge granted in the findings and recommendations). (Doc. Nos. 38, 41, 42, 43.)

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), the court has conducted a *de novo* review of this case. Having carefully reviewed the entire file, including defendant's objections, (Doc. No. 41), plaintiffs' response to those objections, (Doc. No. 42), and defendant's reply to plaintiffs' response, (Doc. No. 43-1), the court finds the findings and recommendations to be supported by the record and by proper analysis.

Defendant objects primarily on the basis that "personal jurisdiction does not arise from the contacts of a third party ... [it] must arise out of contacts that the defendant itself creates with the forum State .... [T]he unilateral actions by the unidentified third parties that have allegedly acquired LG Chem's lithium ion cell, re-wrapped it as a consumer 'MXJO battery', and brought it to the State of California, cannot support the exercise of jurisdiction here." (Doc. No. 41 at 8.)

However, as plaintiffs have alleged in their proposed first amended complaint, which the magistrate judge directed the plaintiffs to file, the defendant "has past, present, ongoing, and continuing contacts with California by transacting substantial and regular business in this state and manufacturing, distributing, and/or selling goods with the reasonable expectation and knowledge that they will be used in this state and which are in fact used in this state." (Doc. Nos. 17-1 at 5–6; 38 at 2–3.) These contacts include the sale and distribution of lithium ion cells, including the particular kind of battery that is at issue in this case (the "Battery").

Defendant argues that these contacts and activities are irrelevant because: (1) plaintiff's allegations do not show that LG Chem purposefully directed any activities at California *for the Battery in question*; and (2) at any rate, LG Chem's alleged contacts fail the "but for" test used to determine whether plaintiff "would have suffered injury even if none of the [defendant's forum] contacts had taken place." *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 272 (9th Cir. 1995); *see also Morrill v. Scott Fin. Corp.*, 873 F.3d 1136, 1151 (9th Cir. 2017) ("[T]he 'but for' test is used to determine whether claims arise out of the [defendant's] contacts.").

***2** However, the magistrate judge noted in the findings and recommendations that plaintiffs allege in their proposed first amended complaint the following:

> In addition to the authorized LG Chem batteries shipped directly to California, LG Chem also engages, upon information and belief, in a grading process for the various batteries it manufactures. Upon information and belief, those batteries that fail to achieve a sufficient grade or conform appropriately to standards are not discarded. Instead, in the interests of profit, LG Chem sells those inferior or nonconforming lithium-ion battery products to other distributors, with LG knowing full well that they may be using those batteries for individual electronic or other uses—uses that may not be explicitly authorized, but are certainly permitted by LG Chem in the interest of maintaining its profitability. In addition, based upon information and belief, in the manufacturing process, LG Chem ends up with a significant quantity of batteries with cosmetic defects in the wrapper, without a wrapper at all, or with batteries with other types of cosmetic and other defects. Again, instead of discarding those batteries, LG Chem knowingly sells those substandard batteries to various distributors throughout the world to remove the cosmetically defective or missing wrapper, apply their own wrapping, and then sell those batteries for other uses. Those batteries are then sold to consumers throughout the world, and readily and rapidly reach California shores, all at the reasonable expectation or explicit knowledge of LG Chem. Based on these two avenues, LG Chem ultimately sells huge quantities of lithium-ion batteries that end up in the electronic cigarette market in California, and end up in the hands of California consumers, including upon information and belief, the battery at issue in this matter.
>
> For at least the last six years, it has been well known in the electronic cigarette industry, and based upon information and belief, well known to LG Chem, that its lithium-ion batteries were being used in connection with electronic cigarettes and were even recommended by multiple online sources for e-cig use.

(Doc. Nos. 17-1 at, 38 at 3.)

These allegations, if true, would be sufficient to demonstrate that defendant directed activities related to the Battery at California and that plaintiffs would not have been injured but for defendant's actions. *See* *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995) ("[T]he plaintiff need only demonstrate facts that if true would support jurisdiction over the defendant."). Because plaintiffs' pleadings need only "make a prima facie showing of personal jurisdiction," the above allegations meet that standard. *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008) (quotation marks and citation omitted).

Accordingly:

1. The findings and recommendations issued on April 18, 2019, (Doc. No. 38), are adopted in full;

2. Defendant's request for leave to submit brief statement of supplemental authority, (Doc. No. 27), is granted;

3. Defendant's request for leave to submit a reply to plaintiffs' response to defendant's objections, (Doc. No. 43), is granted;

***3** 4. Defendant's motion to dismiss for lack of jurisdiction, (Doc. No. 7), is denied;

5. Plaintiffs' motion for leave to amend the complaint, (Doc. No. 17), is granted;

6. Plaintiffs are directed to file their first amended complaint, (Doc. No.17-1); and

7. This case is referred back to the assigned magistrate judge for further proceedings.

IT IS SO ORDERED.

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United States District Court, W.D. North Carolina, Charlotte Division.

CELGARD, LLC, Plaintiff,

v.

LG CHEM, LTD., and LG Chem America, Inc., Defendants.

No. 3:14–cv–00043–MOC–DCK.
|
Signed May 21, 2015.

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ORDER

MAX O. COGBURN, JR., District Judge.

***1 THIS MATTER** is before the court on Plaintiff's "Objections to Magistrate Judge's Order Granting Defendants' Alternative Motion to Transfer Venue" (Document No. 266), the associated response (Document No. 269), and the supplemental briefs allowed by the court (Document Nos. 275–1; 278). The court heard oral argument on the objections on April 8, 2015. Also before the court are Defendants' "Motion To Dismiss Counts III, IV, V, VI of Celgard's First Amended Complaint ..." (Document No. 222), Defendants' "Motion To Dismiss Plaintiff's First Amended Complaint For Lack Of Personal Jurisdiction" (Document No. 226), and the associated briefs. Having considered the briefs, the oral arguments of counsel as to the objections, the Magistrate Judge's Order, and the record in this matter, the court enters the following Order.

I. Introduction

Celgard, LLC ("Plaintiff" or "Celgard") initiated this patent infringement action on January 30, 2014, asserting claims against LG Chem, Ltd. ("LGC") and LG Chem America, Inc. ("LGCAI") (together "LG Chem" or "Defendants") for: (1) direct infringement of U.S. Patent No. 6,432,586; and (2) induced infringement of U.S. Patent No. 6,432,586. (Document No. 1, pp. 10–12). The underlying patent, U.S. Patent No. 6,432,586 (the " '586 patent"), is titled "Separator for a High Energy Rechargeable Lithium Battery," and relates to "separators" used in the construction of high energy rechargeable lithium-ion batteries. *See* (Document No. 1, ¶ 7); (Document No. 1–A, p. 1). Put simply, this technology reduces the likelihood that a battery will fail, catch fire, or experience a short. *See* (Document Nos. 16, p. 4; 1–A, p. 1).

Plaintiff's Amended Complaint generally alleges that LG Chem obtains uncoated polymeric base films from third parties, to which it applies a ceramic coating layer to create battery separators that fall within the scope of the '586 Patent. (Document No. 217, ¶ 51). The separators are then sold by LGC and/or LGCAI to third parties, or used in Defendants' own production of lithium-ion batteries, all allegedly in violation of the '586 Patent. *Id.* at ¶¶ 106–09. Plaintiff alleges that batteries containing infringing separators manufactured by Defendants are used in various consumer electronic devices and electric vehicles that are sold throughout the United States, including North Carolina. *Id.* at ¶¶ 16, 52–53, 106.

A. Factual Background and Relationship Of The Parties

As previously discussed by this court, *see* (Document No. 128), the factual setting of this patent dispute is somewhat unique and, as it relates to the contested issue of personal jurisdiction, bears repeating here. In contrast to the typical patent litigation in which the parties produce the same or similar product, compete for the same customers, and have little or no prior relationship with the opposition, the parties in this case have been involved with each other in the production of lithium ion batteries since 2005. Beginning in 2006 and continuing through 2008, Celgard supplied LGC, on an as-needed purchase order basis, with uncoated base films to be used in the production of lithium-ion batteries for consumer-

electronic ("CE") products. (Document No. 18, Declaration of Mitchell Pulwer ("Pulwer Decl."), ¶¶ 4–5; Document No. 217, ¶ 67). In 2008, at LGC's request, the relationship significantly expanded as the parties entered into discussions regarding the prospect of Celgard becoming LGC's exclusive supplier of base film for lithium-ion batteries to be used in electric vehicles ("EVs"). (Pulwer Decl., ¶ 6; Document No. 217, ¶ 17).

***2** As the parties began negotiating the terms of a Long Term Supply Agreement ("LTA") that would solidify their new relationship, LGC notified Celgard that it would need to increase its production capacity to satisfy LGC's supply demands. (Pulwer Decl. ¶ 8). Negotiating the terms of the LTA for Celgard was its Vice President and General Manager Mitch Pulwer. *Id.* at ¶ 1. During these negotiations, Jai Ham, a Vice President of LGC, explained to Pulwer that if Celgard "demonstrated its commitment" to LGC and their new relationship by expanding its production capacity, LGC would enter into the LTA, with Celgard becoming the exclusive supplier of base film for LGC's EV program. *Id.* at ¶ 8. Plaintiff states that in reliance on this representation and in order to meet LGC's supply demands, Celgard began a five-phase expansion project including an expansion to its Charlotte, North Carolina facility and the construction of a new facility in Concord, North Carolina, costing in excess of $300,000,000. *Id.* at ¶ 9; (Document No. 217, ¶ 68–70). LGC stopped purchasing base film for use in CE devices in 2008 in order for Plaintiff to be able to focus exclusively on producing base film for EVs. (Pulwer Decl. ¶ 6).

Despite Celgard's expansion, the parties were unable to reach an agreement on the LTA. According to Celgard, LGC continuously rejected terms to which the parties had previously agreed, made counterproposals that included only minor changes, and requested changes that included terms that it had rejected during previous rounds of negotiations. *Id.* at ¶ 11. The parties were able to agree to a Memorandum of Understanding ("MOU") as a precursor to an LTA. *Id.* at ¶ 13; MOU (Document No. 18–1), p. 2 ("LGC and Celgard understand that this is a non-binding MOU and is made in anticipation of the parties entering into a long-term supply agreement").

Under the MOU, the parties agreed to "work together in a collaborative effort" during the "Collaboration Period," which ran from March 11, 2011, to December 31, 2015. *Id.* at p. 2–3. However, the agreement was non-binding and stated that neither party was bound to enter into a subsequent supply agreement. *Id.* Generally speaking, the MOU includes the following principal terms: (1) that LGC will purchase separators[1] "primarily" from Celgard as long as Celgard is able to supply separators to LGC meeting certain qualifications and "overall program objectives which includes price competitiveness, in the quantity needed"; (2) that "LGC intends to purchase the majority of separator required for each application in which Celgard is qualified as long as the Celgard separator" meets the above conditions; and (3) that LGC will give "priority" to Celgard separators in any new application for the electric drive vehicle ("EDV") and energy storage system ("ESS") markets. *Id.*

Following the execution of the MOU in 2011, the parties' relationship began to sour over price and quantity disputes. According to Celgard, between 2009 and July 2013, LGC purchased substantially all of its base film requirements for the EV industry from Celgard. (Pulwer Decl., ¶ 19). In November of 2012, LGC demanded that Celgard significantly reduce its prices and threatened to use other base film suppliers should Celgard refuse. *Id.* at ¶ 21. Believing that LGC's price demands were contrary to past negotiations and course of dealings, Celgard refused to lower its prices. *Id.* at ¶ 23. After that, the parties' relationship spiraled downward. In June 2013, LGC gave notice that Celgard was being phased out of the EV program beginning in September 2013, with Celgard being completely out by April 2014. *Id.* at ¶ 25. Celgard filled all outstanding orders but stopped taking additional purchase orders from LGC. *Id.* at ¶ 26. Its final shipment of base film material to LGC was in July 2013. (Document No. 80 ("Paulus Decl."), ¶ 7). Celgard filed this suit in January 2014, bringing the above-mentioned claims for patent infringement.

B. Procedural History

***3** Approximately one month after filing the original complaint in this matter, on March 5, 2014, Plaintiff filed a "Motion For Preliminary Injunction." (Document No. 15). On March 19, 2014, Defendants filed a "Motion To Dismiss Plaintiff's Complaint For Lack Of Personal Jurisdiction" (Document No. 30). On April 7, 2014, Plaintiff filed an "Alternative Motion For Jurisdictional Discovery." (Document No. 58). On April 23, 2014, Defendants filed an "Alternative Motion To Transfer Venue To The Eastern District Of Michigan." (Document No. 71). On May 14, 2014, the undersigned held a hearing on the aforementioned motions, during which the court primarily

considered arguments on the issues of personal jurisdiction and a preliminary injunction.

The undersigned issued an "Order" (Document No. 128) on July 18, 2014, granting Plaintiff's "Motion For Preliminary Injunction" (Document No. 15) and Plaintiff's "Alternative Motion For Jurisdictional Discovery" (Document No. 58), and directing that "The LG Chem Defendants' Motion To Dismiss Plaintiff's Complaint For Lack Of Personal Jurisdiction" (Document No. 30) and "The LG Chem Defendants' Alternative Motion To Transfer Venue To The Eastern District Of Michigan" (Document No. 71) be referred to Magistrate Judge Keesler for consideration after jurisdictional discovery. The Order also discussed the factual setting, the history of the parties' business transactions, the relationship of the parties to North Carolina, and the appropriateness of jurisdictional discovery. (Document No. 128, at p. 2–6). Judge Keesler issued an "Order" (Document No. 139) on July 21, 2014, setting limits and deadlines for jurisdictional discovery. Also on July 21, 2014, Defendants filed a "Notice of Appeal" as to the Order granting the Preliminary Injunction. (Document No. 150). On July 22, 2014, the undersigned issued an Order, (Document No. 160), granting Defendants' "Motion to Stay Preliminary Injunction Pending Appeal." On August 13, 2014, the undersigned entered an Order, (Document No. 188), denying Plaintiff's Motion for Reconsideration of the Order Granting LG Chem's Motion to Stay. (Document No. 165). On August 15, 2014, Plaintiff filed a "Notice of Appeal" (Document No. 191) as to the Order granting Defendants' Motion to Stay, and from the Order denying Plaintiff's Motion for Reconsideration. Both appeals are currently before the Court of Appeals for the Federal Circuit. *See Celgard, LLC v. LG Chem, Ltd .,* No. 14–01675, (Fed.Cir.2014).

On August 26, 2014, Judge Keesler issued an "Order And Memorandum And Recommendation" (Document No. 204) allowing Plaintiff to file an Amended Complaint incorporating the results of jurisdictional discovery, and recommending that the pending motions to dismiss and transfer (Document Nos. 30 and 71) be denied as moot.

Plaintiff filed its "First Amended Complaint" (Document No. 217) on September 5, 2014. The Amended Complaint re-asserts claims for direct infringement and induced infringement of the '586 Patent by both Defendants. Plaintiff alleges that after the parties' business relationship went sour, "Defendants walked away from their prior commitments and chose to purchase, coat and sell infringing ceramic coated separator with base film from other suppliers, despite their knowledge that these actions infringed on Celgard's exclusive patent rights." (Document No. 217, ¶ 1). The Amended Complaint also adds claims against LGC (only) for: unfair and deceptive trade practices; breach of contract; breach of the implied covenant of good faith and fair dealing; and, in the alternative, unjust enrichment. *Id.* at ¶¶ 115–143. The new claims against LGC relate to Plaintiff's role as a supplier of separator base film for lithium-ion batteries manufactured by LGC for EVs. *Id.* at ¶ 1. Plaintiff's additional counts contend that LGC is liable for its "repeated false promises to use Celgard as its exclusive and/or primary long-term supplier of base film for the electric vehicle industry." *Id.* ¶ 116.

***4** On September 29, 2014, Defendants filed: (1) "Motion To Dismiss Counts III, IV, V, VI, Celgard's First Amended Complaint ..." (Document No. 222); (2) "Motion To Dismiss Plaintiff's First Amended Complaint For Lack Of Personal Jurisdiction" (Document No. 226); and (3) "Alternative Motion To Transfer Venue To The Eastern District Of Michigan In Whole Or In Part." (Document No. 230). On February 18, 2015, Judge Keesler issued an Order (Document No. 262) granting Defendants' "Alternative Motion to Transfer." In this Order, Judge Keesler declined to address the merits of, or make any recommendations regarding, the two Motions to Dismiss. In doing so, Judge Keesler cited, among other authority, *BSN Medical, Inc. v. American Medical Products,* LLC, 3:11cv092–GCM–DSC, 2012 WL 171269, at *2 (W.D.N.C. Jan.20, 2012), wherein another magistrate judge in this district granted an alternative motion to transfer without reaching the merits of the motion to dismiss. Plaintiff has timely objected to Judge Keesler's Order pursuant to 28 U.S.C. § 636(b) and Fed.R.Civ.P. 72(a). Defendants have responded to such objections and the matter is now ripe for review.

II. Alternative Motion to Transfer

A. Standard of Review

When a magistrate judge issues an order on a non-dispositive matter, "[t]he district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law." Fed.R.Civ.P. 72(a). *See also* 28 U.S.C. § 636(B)(1)(A) ("A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law."). In engaging in such review, a finding is " 'clearly erroneous' when, although there is evidence to support it, the reviewing court ... is left

with the definite and firm conviction that a mistake has been committed." *High Voltage Beverages, L.L.C. v. Coca–Cola Co.,* No. 3:08–CV–367, 2010 WL 2342458, at *1 (W.D.N.C. June 8, 2010) (citing *Walton v. Johnson,* 440 F.3d 160, 173–74 (4th Cir.2006)). A magistrate judge's order is "contrary to law" where he "failed to apply or misapplied statutes, case law, or procedural rules." *Id.* (citing *Miceli v. KBRG of Statesville, L.L.C.,* No. 5:05–CV–265–V, 2008 WL 2945451, at *1 (W.D.N.C. July 24, 2008)).

B. Discussion of Plaintiff's Objections

1. Standing Order Regarding Magistrate Judge Referrals

This court's "Standing Order" regarding referrals to Magistrate Judges in this District, No. 3:11–mc–25–MOC (W.D.N.C., Mar. 16, 2011) provides, in relevant part:

> pursuant to 28, United States Code, Section 636(b) and Local Civil Rule 72.1, in civil and miscellaneous cases, magistrate judges shall be specifically referred the following duties:
>
> ...
>
> to dispose of non-dispositive civil motions, including but not limited to motions for ... transfer to another division or district ... Where a non-dispositive motion is pled in the alternative to a dispositive motion, a Memorandum and Recommendation will be entered as to both motions.

***5** *Id.* Plaintiff's first objection centers on the argument that because Judge Keesler issued an order on a non-dispositive motion (to transfer) without addressing the merits of the two dispositive motions (to dismiss) through a Memorandum and Recommendation, Judge Keesler violated this Court's Standing Order and thus is contrary to law. Plaintiff argues that the proper remedy for this error is to require Judge Keesler to issue a Memorandum and Recommendation for each of the dispositive motions, as well as the non-dispositive alternative motion.

As discussed at the hearing, the undersigned regards the Standing Order as an in-house policy for chambers to follow in an attempt to efficiently resolve the merits of motions and move the docket along. While the court always finds it helpful to have recommendations on legal issues from the magistrate judges of this district, a magistrate judge's failure to comply with the procedures of the Standing Order does not constitute grounds for overturning his decision. The court will therefore overrule Plaintiff's objection as to Judge Keesler's non-compliance with the Standing Order.

The court finds in this situation, however, that the merits of the dispositive motions have a significant bearing on the resolution of the alternative motion to transfer. In light of the fact that the uncertainty of the jurisdictional issue was a significant reason for Judge Keesler's Order transferring venue, *see* (Document No. 262, pp. 7–9), the court finds that the proper course of action here would have been to address the issue of personal jurisdiction (raised in the dispositive Motion to Dismiss for Lack of Jurisdiction) simultaneously with the issue of transfer. The court will therefore address both of the dispositive motions along with the objections to the Order transferring venue.

2. Transfer of Venue

i. *Legal Standards*

28 U.S.C. § 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." *Id.* 28 U.S.C. § 1400(b), which specifically governs venue in patent actions, provides, "[a]ny civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business." *Id.* A motion to transfer pursuant to § 1404(a) in a patent case requires application of the law of the regional circuit. *In re Link_A_Media Devices Corp.,* 662 F.3d 1221, 1222–23 (Fed.Cir.2011).

Upon a motion to transfer, the moving party carries a heavy burden. *Duke Energy Florida, Inc. v. Westinghouse Elec. Co.,* No. 3:14–CV–00141–MOC, 2014 WL 2572960, at *5 (W.D.N.C. June 9, 2014) (citing *Datasouth Computer Corp. v. Three Dimensional Technologies, Inc.,* 719 F.Supp. 446, 451 (W.D.N.C.1989)). A court's decision to grant a motion to transfer venue under 28 U.S.C. § 1404(a) is largely discretionary. *3A Composites USA, Inc. v. United Indus., Inc.,* No. 5:13CV83–RLV, 2014 WL 1471075, at *1 (W.D.N.C. Apr.15, 2014) (citing *Landers v. Dawson Const. Plant Ltd.,* 201 F.3d 436, 1999 WL 991419, *2 (4th Cir.1999)). In exercising such discretion, the court applies a balancing test and considers various factors in deciding whether transfer is appropriate. *Jim Crockett Promotions, Inc. v. Action Media Grp., Inc.,* 751 F.Supp. 93 (W.D.N.C.1990). The factors to be considered include:

***6** 1. The plaintiff's initial choice of forum;

2. The residence of the parties;

3. The relative ease of access of proof;

4. The availability of compulsory process for attendance of witnesses and the costs of obtaining attendance of willing witnesses;

5. The possibility of a view by the jury;

6. The enforceability of a judgment, if obtained;

7. The relative advantages and obstacles to a fair trial;

8. Other practical problems that make a trial easy, expeditious, and inexpensive;

9. The administrative difficulties of court congestion;

10. The interest in having localized controversies settled at home and the appropriateness in having the trial of a diversity case in a forum that is at home with state law that must govern the action; and

11. The avoidance of unnecessary problems with conflict of laws.

Id. "The above factors fall into three categories: (1) factors that favor neither party, (2) factors that favor Defendant, and (3) factors that favor Plaintiff." *Cohen v. ZL Technologies, Inc.,* No. 3:14–CV–00377–FDW, 2015 WL 93732, at *2 (W.D.N.C. Jan.7, 2015) (citing Crockett, 751 F.Supp. at 98). The court must analyze the eleven factors based on quality, not just quantity. *Id* . (citing Crockett, 751 F.Supp. at 96). In most cases, the plaintiff's choice of forum should be given significant weight, and should not be disturbed unless the balance is strongly in favor of transfer. *Collins v. Straight, Inc.,* 748 F.2d 916, 921 (4th Cir .1984) (citing *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508, 67 S.Ct. 839, 91 L.Ed. 1055 (1947)). A motion should not be granted if transfer "would merely shift the inconvenience from the defendant to the plaintiff, or if the equities lean but slightly in favor of the movant after all factors are considered." *Jim Crockett Promotions, Inc. v. Action Media Grp., Inc.,* 751 F.Supp. 93, 95 (W.D.N.C.1990).

On a motion to transfer, the facts as alleged in the complaint are accepted as true and all reasonable inferences are drawn in the plaintiff's favor. *Century Furniture, LLC v. C & C Imps., Inc.,* No. 1:07cv179, 2007 WL 2712955, at *2 (W.D.N.C. Sept.14, 2007).

As noted by Judge Keesler, "While a court typically decides the question of personal jurisdiction over a defendant before considering venue, the Supreme Court has held that 'when there is a sound prudential justification for doing so, ... a court may reverse the normal order of considering personal jurisdiction and venue.' " *BSN Medical, Inc. v. American Medical Products, LLC,* 3:11cv092–GCM–DSC, 2012 WL 171269, at *2 (W.D.N.C. Jan.20, 2012) (citing *Leroy v. Great W. United Corp.,* 443 U.S. 173, 180, 99 S.Ct. 2710, 61 L.Ed.2d 464 (1979)). "A court need not have personal jurisdiction over a defendant to transfer a case pursuant to 28 U.S.C. §§ 1404(a) or 1406(a)." *Id.*

ii. *The Magistrate Judge's Order*

Judge Keesler found good cause to allow Defendants' motion to transfer to the Eastern District of Michigan and, citing *BSN Medical,* declined to make any recommendation as to the pending dispositive motions, including the motion pertaining to personal jurisdiction. Judge Keesler found that the question of personal jurisdiction over Defendants in North Carolina presented a "close call upon which reasonable minds could differ," and that the issue remained uncertain even after a round of briefing, oral arguments, and a jurisdictional discovery period prior to the filing of an Amended Complaint and renewed motions. (Document No. 262, p. 7). Judge Keesler also noted that this court recently rejected many of the same jurisdictional arguments that Plaintiff made in this case in a different patent infringement lawsuit filed by Plaintiff against a different defendant. *See* (Document No. 262, p. 7) (citing *Celgard, LLC v. SK Innovation, Co., Ltd.,* 3:13cv254–MOC–DSC, 2014 WL 5430993 (W.D.N.C. Aug.29, 2014)). He noted that he found it doubtful that this court has personal jurisdiction over both Defendants with regard to all the claims asserted against them, but that Defendants admit to jurisdiction in Michigan.[2] *Id.*

***7** In making the decision to grant transfer in light of what he found to be "doubtful" jurisdiction over both Defendants in North Carolina and Defendants' concessions that they are subject to jurisdiction in Michigan, Judge Keesler cited several decisions from district courts in this circuit doing the same. *See* (Document No. 262, pp. 8–9 (citing *La Casa Real Estate & Inv., LLC v. KB Home of S.C., Inc.,* No. 1:09CV895, 2010 WL 2649867, at *2 (M.D.N.C. June 30, 2010) ("in the interests of convenience, fairness and judicial

economy, the Court elects to consider Defendant's Motion to Transfer pursuant to 28 U.S.C. § 1404(a) before reaching any issues related to the Court's jurisdiction."); *Nacco Materials Handling Grp., Inc. v. Lilly Co.,* 2011 WL 2119097, at *4 (E.D.N.C. May 25, 2011) (granting motion to transfer when personal jurisdiction over defendant remained "in serious doubt"); *Waldron v. Atradius Collections, Inc.,* 2010 WL 2367392, at *3 (D.Md. June 9, 2010) ("[T]he constitutional question of personal jurisdiction is a close one upon which reasonable minds could differ. There is no reason to inject such a question into the case unnecessarily."); *Jenkins v. Albuquerque Lonestar Freightliner, LLC,* 464 F.Supp.2d 491, 494 (E.D.N.C.2006) (granting motion to transfer in part because "the absence of personal jurisdiction over the defendant" in the original forum but not the transferee forum is an "impediment to a decision on the merits"); *Tyler v. Gaines Motor Lines, Inc.,* 245 F.Supp.2d 730, 734 (D.Md.2003) (transferring case in interest of justice because the question of personal jurisdiction was a "close one" and "would inject into the case an unnecessary legal issue that would render the entire litigation null and void, if, on appeal, jurisdiction were found to be lacking")). While the court agrees that the issue of personal jurisdiction presents a "close call" in this case, it also believes that the parties deserve a thorough analysis of the dispositive question of personal jurisdiction before this matter is transferred to another district.

iii. *Review of Crockett Analysis*

Plaintiff argues that Judge Keesler's Order should be set aside as clearly erroneous and contrary to law based on his analysis of the *Crockett* factors. Judge Keesler found that five factors —residence of the parties, access to proof, attendance of witnesses, fair trial, and practical problems affecting trial expediency and efficiency—weighed in favor of transfer, while the remaining factors were neutral. (Document No. 262, pp. 9–14). Plaintiff argues that each of these factors, as well as its choice of forum and local resolution factors, weigh against transfer or, at a minimum, are neutral, and that none of the *Crockett* factors weigh in favor of transfer. Judge Keesler found the following factors to be neutral: the possibility of a view by the jury; the enforceability of a judgment; the relative court congestion between the districts; and the avoidance of conflict of laws. Plaintiff does not challenge the venue order based on these factors and the court will therefore not disturb Judge Keesler's determinations on those factors.

***8** The court is mindful of the discretion to the magistrate judge in analyzing a motion to transfer, *3A Composites USA, Inc. v. United Indus., Inc.,* No. 5:13CV83–RLV, 2014 WL 1471075, at *1 (W.D.N.C. Apr.15, 2014), and will only disturb his decision where clearly erroneous or contrary to law. Fed.R.Civ.P. 72(a); 28 U.S.C. § 636(B)(1)(A). The court will address the objections in turn.

a. Plaintiff's choice of forum

Judge Keesler found this factor to be neutral; Plaintiff objects to such a finding, arguing that its choice of forum should have weighed more strongly in its favor. Judge Keesler properly noted that although the choice of forum by the Plaintiff is ordinarily given considerable weight, "that weight is diminished when the conduct giving rise to the complaint did not occur in the forum." *See* (Document No. 262, p. 9); *Hames v. Morton Salt, Inc.,* 3:11cv570–MOC–DSC, 2012 WL 1247201, at *2 (W.D.N.C. Apr.13, 2012) (citing *Parham v. Weave Corp.,* 323 F.Supp.2d 670, 674 (M.D.N.C.2004); *Telepharmacy Solutions, Inc. v. Pickpoint Corp.,* 238 F.Supp.2d 741, 743 (E.D.Va.2003); *Lynch v. Vanderhoef Builders,* 237 F.Supp.2d 615, 617 (D.Md.2002)). Plaintiff argues that the "diminished weight" rule only applies where none or essentially none of the conduct giving rise to the action occurred in the plaintiff's chosen forum. *See Parham,* 323 F.Supp.2d at 674 ("While the plaintiff's choice of forum is accorded substantial weight, the deference given to the plaintiff's choice is proportionate to the relation between the forum and the cause of action." (citations and internal quotations omitted)); *Speed Trac Technologies, Inc. v. Estes Express Lines, Inc.,* 567 F.Supp.2d 799, 803 (M.D.N.C.2008) (noting that choice of forum "receives less weight ... when (1) the plaintiff chooses a foreign forum, or (2) the cause of action bears little or no relation to the chosen forum.").

Judge Keesler found that while Plaintiff had noted some contacts with North Carolina by Defendant LGC, most of the conduct giving rise to the crux of the amended complaint (the patent infringement claims) as to both Defendants occurred in Korea or Michigan. (Document No. 262, p. 10). Judge Keesler thus applied the "diminished weight" rule upon finding that most of the conduct giving rise to the complaint did not occur in North Carolina. However, as explained above, Plaintiff has alleged, and this court can reasonably infer, that much of the conduct giving rise to Defendants' claims *did* occur in North Carolina. Plaintiff's Amended Complaint alleges that at least some conduct giving rise to the alleged patent infringement occurred in North Carolina, (Document No. 217, ¶ ¶ 10–17), and that all of the conduct forming the basis of its state law claims occurred in North Carolina. *See, e.g. id.* at ¶ ¶ 17–32, 80–82, 101. As alleged in the Amended Complaint, Plaintiff argues that the alleged infringement in this case

occurred as a result of the longstanding business relationship of the parties concerning sales of Celgard base film and the ultimate breakdown of such relationship. *See* (Document No. 217, ¶ ¶ 18; 26–28; 49–51). The crux of Plaintiff's argument is that it provided base film to LGC specifically for its use and that when the business relationship went sour, LGC sourced base film from third parties but continued to use Celgard's patented technology without Celgard's permission, which constitutes infringement of the '586 patent. *Id. See also* Pl. Opp. Mot. Transfer (Document No. 243, p. 7) ("Celgard provided LG Chem separator material that Celgard permitted to be ceramic coated pursuant to the patent-in-suit, and the breakdown of this relationship—caused by LG Chem's misconduct—led LG Chem to manufacture and distribute products containing unauthorized separator material, thereby infringing the patent-in-suit.").

***9** Here, while not *all* of the conduct giving rise to the claims asserted against Defendants occurred in North Carolina, much of it did. *See* Section IV, C. Accordingly, the court finds that it was error for the magistrate judge to apply the "diminished weight" rule and that the general rule that the plaintiff's choice of forum should be accorded substantial weight is applicable. *Collins v. Straight, Inc.,* 748 F.2d 916, 921 (4th Cir.1984). As such, the court finds that the Plaintiff's choice of forum weighs in favor of keeping this action in this district.

b. Residence of the parties

Judge Keesler found that this factor slightly favors transfer; Plaintiff objects, arguing that because neither party is a resident of Michigan, this factor should have weighed against transfer or been neutral. Plaintiff is a resident of North Carolina. LGC is a corporation with its principal place of business in Seoul, Korea. LGCAI's principal place of business is in New Jersey. Judge Keesler found that because all LGC subsidiaries have outposts in the Eastern District of Michigan, and Defendants contend they are "at home" in Michigan, this factor weighs in favor of transfer.

For purposes of venue, "a corporate defendant resides in any judicial district in which it is subject to personal jurisdiction at the time the action commences." 28 U.S.C. § 1391(c). *See also VE Holding Corp. v. Johnson Gas Appliance Co.,* 917 F.2d 1574, 1584 (Fed.Cir.1990) (holding that the language of § 1391(c) applies to § 1400(b)); *Trintec Indus., Inc. v. Pedre Promotional Products, Inc.,* 395 F.3d 1275, 1280 (Fed.Cir.2005) ("Venue in a patent action against a corporate defendant exists wherever there is personal jurisdiction.").

Even assuming jurisdiction is proper over both Defendants in Michigan and that they are "residents" within the meaning of the applicable statutes, the disparity in the residencies between Plaintiff and Defendants would make this factor neutral. *See Simpson v. Snyder's of Hanover, Inc.,* No. 1:05–CV–354, 2006 WL 1642227, at *5 (W.D.N.C. June 12, 2006) (affirming magistrate judge's determination that the residence factor was neutral because one party was a resident of the forum and one party was a resident of the proposed venue); *Tracy v. Loram Maint. of Way, Inc.,* No. 5:10–CV–102–RLV, 2011 WL 2791257, at *6 (W.D.N.C. July 14, 2011) ("the Court finds that the residency of the parties is a neutral factor. Plaintiff resides in Catawba County, North Carolina, while Defendant's main place of business is in Minnesota. Regardless of the place of adjudication, one party will benefit to the other's detriment.").

The court finds it was error for the Magistrate Judge to find that residence of the parties favored transfer and finds this factor is, in fact, neutral.

c. Access to evidence

Judge Keesler found that this factor favors transfer; Plaintiff objects and argues that it should have been, at a minimum, neutral. "In patent infringement cases, the bulk of the relevant evidence usually comes from the accused infringer. Consequently, the place where the defendant's documents are kept weighs in favor of transfer to that location." *In re Genentech, Inc.,* 566 F.3d 1338, 1345 (Fed.Cir.2009) (citation omitted). Here, Plaintiffs allege that much of the proof in this case is in North Carolina, including "relevant documents, contracts, and e-mails." (Document No. 243, p. 5). Defendants allege that the bulk of the evidence is likely to come from LGC and its U.S. subsidiaries involved in the lithium battery business and located in Michigan. (Document No. 248, p. 2). Even accepting such argument as true for the patent infringement claims (despite the fact that neither Defendant is headquartered in Michigan), the same cannot be said for all of the state law claims. As such, the court cannot find that the "bulk" of the evidence would be in Michigan, when the documents related to the conduct giving rise to Plaintiff's claims are likely at each party's headquarters —in Korea, New Jersey, and North Carolina. See *MGT Gaming, Inc. v. WMS Gaming, Inc.,* 978 F.Supp.2d 647, 669 (S.D.Miss.2013) ("Presumably, the bulk of the discovery material relating to a corporate party is located at the corporate headquarters.")(citing *In re Acer Am. Corp.,* 626 F.3d 1252, 1256 (Fed.Cir.2010)). The court finds that the magistrate judge erred in finding that this factor favored transfer and

finds that given the nature of the claims and the relevant evidence, this factor is neutral.

d. Availability of compulsory process for witnesses and the costs of transporting and obtaining those witnesses

***10** Judge Keesler found that this factor favors transfer; Plaintiff objects. As the parties note, "[t]he convenience of witnesses, particularly nonparty witnesses important to the resolution of the case, is often cited as the most significant factor in ruling on a motion to transfer ... One strong argument against transfer is that the original forum will be the most convenient for the witnesses. And when transfer will better serve the convenience of the witnesses, the motion under Section 1404(a) is more likely to be granted." 15 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 3851 (4th ed.) (collecting cases).

Here, Plaintiff has identified two witnesses in North Carolina (Document No. 243, pp. 5–6); Defendants have not identified any witnesses. *See* Def. Reply (Document No. 248, p. 3) (stating that "LG Chem's potential witnesses are *likely* numerous ... and none of these potential witnesses are located in North Carolina. In part because of LGCAI's presence in Michigan, witness attendance of both Defendants is far easier in Michigan.") (emphasis added). Judge Keesler found that the facts on this factor are not as developed as he would have hoped, but that to the extent that non-party witnesses existed in this matter (i.e. customers or manufacturers of products that include the allegedly infringing separators), they were more likely to be made available in Michigan. (Document No. 262, p. 11–12). While the court understands the magistrate judge's logic, it simply cannot agree that this factor favors transfer where Defendant has not identified a single witness, let alone one in Michigan. *See Capital One Fin. Corp. v. Drive Fin. Servs., L.P.,* 434 F.Supp.2d 367, 375–76 (E.D.Va.2006) ("The party asserting witness inconvenience has the burden to proffer, by affidavit or otherwise, sufficient details respecting the witnesses and their potential testimony to enable the court to assess the materiality of evidence and the degree of inconvenience."); 15 Fed. Prac. & Proc. Juris. § 3851 ("The party seeking the transfer must identify, typically by affidavit, the key witnesses to be called, state their residence, and provide at least a general summary of what their testimony will cover."). The court therefore finds that Judge Keesler's decision on this factor was in error. The court will therefore construe this factor as neutral.

e. Relative advantages and obstacles to a fair trial

Judge Keesler found that this factor slighted favored transfer; Plaintiff objects. In explaining his determination on this factor, Judge Keesler again discussed availability of witnesses as a consideration. (Document No. 262, pp. 12–13). Plaintiff argues that Judge Keesler erroneously "double counted" the witness availability and that he should have considered the "home field advantage" or bias of a trial in Michigan, where Defendants allegedly have the support of large auto-makers. While this court finds no basis for disturbing Judge Keesler's on the issue of "double counting," and agrees with his determination that there is no basis for any clear advantages or obstacles to fair trial in either district, it does find that his reliance on the presence and availability of unidentified witnesses in Michigan was in error. As explained above, the court finds that as Defendants have not identified any witnesses in the state of Michigan, there is no basis for assuming that the presence of such witnesses will offer any advantages to a fair trial. Regarding Plaintiff's arguments as to Defendants' "home field" advantage in Michigan, the argument as to such advantages goes both ways. *See Rice v. Bellsouth Adver. & Pub. Corp.,* 240 F.Supp.2d 526, 530 (W.D.N.C.2002). The court therefore finds that this factor is neutral.

f. Practical issues affecting trial expediency and efficiency

***11** Judge Keesler found that this factor slightly favored transfer; Plaintiff objects. Judge Keesler noted that no trial is ever easy, expeditious or inexpensive, and that all trials involve air travel and inconvenience. (Document No. 262, p. 13) (citing *Century Furniture, LLC v. C & C Imps., Inc.,* No. 1:07cv179, 2007 WL 2712955, at *5 (W.D.N.C. Sept.14, 2007)). He further stated that after balancing all evidence to date, this factor slightly favored transfer. The court finds that without more evidence to the contrary, this factor clearly does not favor transfer. In *Century,* wherein the plaintiff brought suit in the Asheville division of this district, the court noted that, "the practical problem is access to the situs of the litigation via air transportation, and the mountains of North Carolina simply are not *easily* accessible when engaged in transcontinental litigation." *Id.* Here, litigation in this district will occur in Charlotte, North Carolina, a city with an international airport that is easily accessible by all parties. Indeed, the court notes that three representatives from Defendants' office in Korea were present in Charlotte for the hour-long oral arguments on the objections at issue, and presumably reached the city via airplane. *See* Hearing Transcript (Document No. 274) at 14:24–15:8. Judge Keesler noted in his order that "travel from Korea or New Jersey to North Carolina or Michigan are roughly

equivalent." (Document No. 262, p. 12). In light of the fact that motions to transfer are not to be granted merely to shift the inconvenience from one party to another, *Jim Crockett Promotions, Inc. v. Action Media Grp., Inc.,* 751 F.Supp. 93, 95 (W.D.N.C.1990), and that Judge Keesler appears to have based his determination solely on the inconvenience caused by air travel, the court finds that his determination that this factor weighed in favor of transfer was clearly erroneous. *See Rice v. Bellsouth Adver. & Pub. Corp.,* 240 F.Supp.2d 526, 530 (W.D.N.C.2002) ("In either forum, there will be practical problems such as travel and accommodations for the parties and their counsel. This factor is neutral."). The court therefore finds this factor to be neutral.

g. Interest of resolving localized controversies at home and the appropriateness of having the trial of a diversity case in a forum that is at home with the state law that must govern the action

Judge Keesler found this factor to be neutral; Plaintiff objects. On this factor, Judge Keesler found that, particularly with the aid of very able counsel, any district court would be able to apply the laws of North Carolina to the extent necessary, in addition to patent laws. He noted that this case involves claims of national, if not international patent violations. The court finds no error in this determination and overrules Plaintiff's objection that the focus should have been on the "strong interest in resolving issues locally."

C. Conclusion

***12** In light of the above analysis, the court finds that Judge Keesler clearly erred in weighing several *Crockett* factors, and that the balance of the factors favors maintaining this action in this district. Put another way, the court finds that transfer of this matter "would merely shift the inconvenience from the defendant to the plaintiff," *Jim Crockett Promotions, Inc. v. Action Media Grp., Inc.,* 751 F.Supp. 93, 95 (W.D.N.C.1990), which makes transfer inappropriate. Because the court finds that personal jurisdiction over both Defendants is appropriate in this district, *see* Section IV, and that the balance of factors does not favor transfer, the court will set aside those determinations of the magistrate judge discussed above, and deny Defendants' Alternative Motion to Transfer.

III. Defendants' Motion to Dismiss Counts III–VI of Amended Complaint

The court now addresses Defendants' Motion to Dismiss Counts III, IV, V, and VI of Plaintiff's Amended Complaint. (Document No. 222). Defendants claim that Plaintiff has failed to properly plead facts sufficient to claim (1) unfair and deceptive trade practices; (2) breach of contract; (3) breach of the duty of good faith and fair dealing; and (4) unjust enrichment, as required by Fed.R.Civ.P. 12(b)(6).

A. Legal Standards

To survive a Rule 12(b)(6) motion to dismiss, a claimant must allege facts in his complaint that "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do ..." *Id.* (second alteration in original; citation omitted). A claimant must plead sufficient facts to state a claim for relief that is "plausible on its face." *Id* . at 570. As the Supreme Court elaborated in *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), "[a] claim has facial plausibility when the plaintiff pleads sufficient factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. This "plausibility standard" requires "more than a sheer possibility that a defendant has acted unlawfully." *Id.* Thus, a complaint falls short of the plausibility standard where a plaintiff pleads "facts that are 'merely consistent with' a defendant's liability...." *Id.* While the court accepts *plausible* factual allegations made in a claim as true and considers those facts in the light most favorable to plaintiff in ruling on a motion to dismiss, a court "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." *Eastern Shore Mkt.'s Inc. v. J.D. Assoc.'s, LLP,* 213 F.3d 175, 180 (4th Cir.2000).

B. Discussion

1. Unfair and Deceptive Trade Practices

Defendants argue that Plaintiff has failed to plead a proper claim for unfair and deceptive trade practices under N.C. Gen.Stat. § 75–1.1 because the facts alleged do not amount to the aggravating circumstances required for such a claim. The elements of a claim for unfair and deceptive trade practices in violation of N.C. Gen.Stat. § 75–1.1 are: (1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or to his business. *Id.; Gray v. N. Carolina Ins. Underwriting Ass'n,* 352 N.C. 61, 529 S.E.2d 676, 681 (N.C.2000). Recovery

under such a claim "is limited to those situations when a plaintiff can show that plaintiff detrimentally relied upon a statement or misrepresentation and he or she suffered actual injury as a proximate result of defendant's deceptive statement or misrepresentation." *McLamb v. T.P. Inc.,* 173 N.C.App. 586, 619 S.E.2d 577, 582–83 (N.C.App.2005) (internal quotation and citation omitted). A practice is unfair if it "is immoral, unethical, oppressive, unscrupulous, or substantially injurious to customers." *Deerborne Cottages, LLC v. First Bank,* No. 1:11CV178, 2012 WL 1835240, at *5 (W.D.N.C. Apr.9, 2012) *report and recommendation adopted,* No. 1:11CV178, 2012 WL 1836093 (W.D.N.C. May 21, 2012) (citation and internal quotation omitted). A practice is deceptive where it "has the tendency or capacity to deceive." *Id.* A claim for unfair and deceptive trade practices turns on the facts of each case and therefore involves a "highly fact-specific inquiry." *S. Atl.Ltd. P'ship of Tennessee, L.P. v. Riese,* 284 F.3d 518, 535 (4th Cir.2002).

***13** Here, Plaintiff alleges that LGC: (1) repeatedly promised Celgard that it would make Celgard its exclusive base film supplier for EVs, (2) in order to induce Celgard to increase its production capacity to meet LGC's requirements and provide it with favorable pricing, (3) while at the same time secretly making arrangements to replace Celgard. (Document No. 217 ¶¶ 68–69, 75, 77, 9092, 116.) The Amended Complaint further alleges that despite repeated promises to the contrary, LGC had no intention of entering into an LTA with Celgard, but strung Celgard along in order to ensure that LGC had sufficient supply of base film at discounted prices until LGC was ready to replace Celgard. *Id.* at ¶ 92. Then, LGC allegedly misrepresented to Celgard that the market price for comparable separator material had decreased by over 50% in an attempt to avoid its obligation in the MOU to purchase the majority of separator material from Celgard. *Id.* at ¶¶ 9396, 116. The court finds that such allegations of misrepresentation and false promises fit squarely within the type of conduct that North Carolina courts have found to be in unfair and deceptive. *See, e.g. Deerborne Cottages,* 2012 WL 1835240, at *6. ("Put simply, Plaintiffs allege that Defendants ... made affirmative misrepresentations during Plaintiffs' dealings with The Bank of Asheville, and that Plaintiffs relied upon these misrepresentations in going forward with the project. As various courts have held, affirmative misrepresentations such as these can form the basis of an unfair trade practices claim in certain circumstances."). Although whether Plaintiff will prevail on its claim will ultimately depend on the specific facts in this case, the court finds that the allegations of deception and misrepresentation alleged in the Amended Complaint are sufficient to survive dismissal at this stage of the proceedings. The court will therefore deny Defendants' motion as to the unfair and deceptive trade practices claim.

2. Breach of Contract

Defendants argue that Plaintiff's breach of contract claim cannot succeed because Plaintiff has failed to show that the parties entered an enforceable contract. As Defendants correctly note, "[t]he elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract." *Poor v. Hill,* 138 N.C.App. 19, 530 S.E.2d 838, 843 (N.C.App.2000). Defendants first argue that the MOU is not a contract because it explicitly states in the second paragraph, "LGC and CELGARD understand that this is a non-binding MOU." *See* MOU (Document No. 18–1 at 1). Here, Plaintiff claims that LGC breached the "Supplier Selection Agreement" contained in the MOU when it failed to purchase separator material primarily from Celgard during the Collaboration period. (Document No. 217, ¶ 127). The MOU states, "[b]oth parties agree that except as is explicitly set forth in this MOU, neither party shall be bound by any discussions or written proposals, letters, memos or charts used or exchanged unless and until a definitive and binding agreement is signed." (MOU at 1). Plaintiff argues that the non-binding language applies only to the parties' intent to enter into a long-term supply agreement, not to their interim obligations during the Collaboration Period. Specifically, Plaintiff notes that the MOU expressly provides that "[n]otwithstanding the foregoing":

***14** • "LGC will purchase separator primarily from CELGARD during the Collaboration Period....;"

• "Initial products to be supplied by Celgard and purchased by LGC are Celgard® trilayer products manufactured to specifications mutually agreeable to both parties;" and

• "LGC also agrees to give priority to qualifying CELGARD separator in any/all new cell applications for the EDV and ESS markets....".

(MOU at 1, ¶¶ 1–3 (emphasis added)). The court finds that Plaintiff has put forth sufficiently plausible allegations of the ambiguity of the document's intentions as to the supply of goods during the collaboration period to render dismissal at the 12(b)(6) stage inappropriate. *See Quorum Health Res., LLC v. Hugh Chatham Mem'l Hosp., Inc.,* 552 F.Supp.2d 527, 530 (M.D.N.C.2007) ("If the agreement is ambiguous ... interpretation of the contract is a matter for

the jury. Ambiguity exists where the contract's language is reasonably susceptible to either of the interpretations asserted by the parties.") (internal citations and quotations omitted).

Defendants also argue that Plaintiff has failed to show the existence of a valid contract because the language of the MOU does not present definite and certain terms. *See* *Miller v. Rose,* 138 N.C.App. 582, 532 S.E.2d 228, 232 (N.C.App.2000) ("To be enforceable, the terms of a contract must be sufficiently definite and certain, and a contract that leaves material portions open for future agreement is nugatory and void for indefiniteness.") (internal citations and quotations omitted). The court finds that Defendants' arguments do not merit dismissal of this claim at this stage in the proceedings. While there are certainly questions as to the validity of the parties' agreement as a contract, the court finds that the language of the MOU states general terms for the parties' agreement, including the applicable time period, a quantity of separator material, price, and quality of goods for sale, that could be interpreted as a valid contract. *See* N.C. Gen.Stat. § 25–2204 (providing: "1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract ... [and] (3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy .").

The court will therefore deny Defendants' motion as to the breach of contract claim.

3. Breach of the Duty of Good Faith and Fair Dealing

Defendants' sole challenge to Plaintiff's claim for breach of the covenant of good faith and fair dealing is premised on a finding that the MOU is not a valid and enforceable contract. Because the court will not dismiss Plaintiff's breach of contract claim at this time for the reasons explained above, it similarly declines to dismiss this claim. See *Recycling Equip., Inc. v. E Recycling Sys. ., LLC,* No. 5:14–CV–00056, 2014 WL 6977766, at *5 (W.D.N.C. Dec.9, 2014) ("The implied covenant of good faith and fair dealing is a part of every contract and is breached where one party to a contract does something that injures the right of the other to receive the benefits of the agreement....Where the claim for breach of good faith is part and parcel of a similar claim for breach of an express term of the contract claim, that claim will rise and fall with the other breach of contract claim.") (internal citations and quotations omitted).

4. Unjust Enrichment

***15** Finally, Defendants argue that Plaintiff's alternative claim for unjust enrichment should be dismissed because the facts alleged are insufficient to state a plausible claim, the claim was not properly pleaded, and the claim is barred by the statute of limitations.

In order to establish a claim for unjust enrichment, a plaintiff must allege: (1) it conferred a measurable benefit on the other party; (2) that party consciously accepted the benefit, and (3) the benefit was not conferred officiously or gratuitously. *Booe v. Shadrick,* 322 N.C. 567, 369 S.E.2d 554, 556 (N.C.1988); *Primerica Life Ins. Co. v. James Massengill & Sons Const. Co.,* 211 N.C.App. 252, 712 S.E.2d 670, 677 (N.C.App.2011). Both parties acknowledge that under North Carolina law, "a claim for unjust enrichment may not be brought in the face of an express contractual relationship between the parties." *Madison River Mgmt. Co. v. Bus. Mgmt. Software Corp.,* 351 F.Supp.2d 436, 446 (M.D.N.C.2005) (citing *Se. Shelter Corp. v. BTU, Inc.,* 154 N.C.App. 321, 572 S.E.2d 200, 206 (N.C.App.2002)). However, in the absence of an express contractual agreement, "A claim of unjust enrichment is an alternative to a claim based on breach of contract ..." *Volumetrics Med. Imaging, Inc. v. ATL Ultrasound, Inc.,* 243 F.Supp.2d 386, 411 (M.D.N.C.2003).

The court fist addresses the wording of Plaintiff's alternative pleading. Defendants argue that Plaintiff's alternative claim for unjust enrichment was pleaded improperly because it incorporated all previous allegations in the Amended Complaint by reference. *See* (Document No. 217, ¶ 137); *Howard v. Carroll Companies, Inc.,* No. 1:12CV146, 2013 WL 3791619, at *12 (M.D.N.C. July 19, 2013) (dismissing claim for unjust enrichment where Plaintiff's claim did "not indicate that this claim was made in the alternative" and incorporated by reference all preceeding allegations, including those alleging the existence of the two contracts); *Deltacom, Inc. v. Budget Telecom, Inc.,* No. 5:10–cv–38, 2011 WL 2036676, at *5–6 (E.D.N.C. May 22, 2011) (declining to construe an unjust enrichment claim as an alterative claim when the complaint alleged the existence of a contractual relationship, defendant admitted to contractual relationship, plaintiff expressly incorporated by reference allegations of a contractual relationship in unjust enrichment claim, and failed to make the claim in the alternative). Here, the court finds no basis to dismiss the claim, phrased as "In the Alternative, Unjust Enrichment Against LG Chem," on the basis of Plaintiff's incorporation by reference of previous allegations because the claim was clearly made in the alternative.

See (Document No. 217 at ¶¶ 137–38). Where, as here, Defendants deny the existence of a valid contract and Plaintiff has clearly stated that it makes its claim in the alternative to the contract claims, the court will allow the claim to proceed at this stage.

Defendant also argues that the facts Plaintiff alleges simply show that it voluntarily took steps to improve production capabilities in the hopes of gaining additional LGC business. The court disagrees with such a characterization of the facts alleged. Here, Plaintiff has alleged that it increased its production capabilities and provided LGC with discounted pricing for base film based on promises by LGC that if Plaintiff did so, Plaintiff would become LGC's long-term, exclusive supplier of separator material for the EV industry. (Document No. 217 at ¶¶ 68, 69, 140). Plaintiff states, quite plausibly, that these benefits were not conferred gratuitously, but instead in direct response to, and in reliance on, LGC's promises. The court therefore finds no reason to dismiss Plaintiff's claim based on Defendants' argument that Plaintiff's actions were gratuitous.

***16** The court has also carefully considered the statute of limitations issue raised by Defendants. A claim for unjust enrichment is subject to a three year statute of limitations period that runs from the date the claim accrues. *Mountain Land Properties, Inc. v. Lovell,* No. 2:12–CV–84–MR–DLH, 2014 WL 4542413, at *13 (W.D.N.C. Sept.11, 2014) (citing *Stratton v. Royal Bank of Canada,* 211 N.C.App. 78, 712 S.E.2d 221, 229 (N.C.App.2011); *Housecalls Home Health Care, Inc. v. State, Dept. of Health & Human Servs.,* 200 N.C.App. 66, 682 S.E.2d 741, 744 (N.C.App.2009); *Miller v. Randolph,* 124 N.C.App. 779, 478 S.E.2d 668, 670 (N.C.App.1996)). Generally, a cause of action "accrues when the wrong is complete and, thus, a plaintiff is entitled to assert the claim in court." *Id.* Here, the Amended Complaint alleges that LGC strung Plaintiff along for years, but that the wrong to Plaintiff was not complete until June 20, 2013, when LGC refused to enter into the LTA and instead switched suppliers. (Document No. 217 at ¶¶ 100–01). The court there finds that Plaintiff's claim for unjust enrichment is not barred by the statute of limitations.

C. Conclusion

The court finds that Plaintiff has stated plausible claims for relief based on factual allegations sufficient "to raise a right to relief above the speculative level," *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). It will therefore deny Defendants' 12(b)(6) motion.

IV. Defendants' Motion to Dismiss for Lack of Personal Jurisdiction

Finally, the court considers Defendants' Motion to Dismiss Plaintiff's Amended Complaint for Lack of Personal Jurisdiction pursuant to Rule 12(b)(2). (Document No. 226). Defendants argue that they are not subject to personal jurisdiction in the Western District of North Carolina under any legal theory and that they lack the requisite minimum contacts with this state to make an assertion of jurisdiction over them reasonable or fair. Plaintiff claims that both Defendants are subject to personal jurisdiction here under various theories. Specifically, Plaintiff contends that LGC is subject to specific jurisdiction through its prior business dealings here and that its placement of allegedly infringing products into the stream of commerce also satisfies personal jurisdiction. Plaintiff also argues that LGC is subject to general jurisdiction or, alternatively, nationwide jurisdiction. Plaintiff claims that LGCAI is subject to jurisdiction under the theories of general jurisdiction and its use of the stream of commerce.

A. Standard of Review

The plaintiff bears the burden of establishing personal jurisdiction over the defendant by a preponderance of the evidence. *IMO Indus., Inc. v. SEIM S.R.L.,* No. 305–CV–420–MU, 2007 WL 1651838, at *1 (W.D.N.C. June 4, 2007). When evaluating a motion to dismiss pursuant to Federal Rule 12(b)(2), if no evidentiary hearing is held and the court determines the question of personal jurisdictional based on affidavits and other written materials, the plaintiff need only establish a prima facie case of personal jurisdiction. *Electronics For Imaging, Inc. v. Coyle,* 340 F.3d 1344, 1349 (Fed.Cir.2003). *See also IMO Indus.,* 2007 WL 1651838, at *1. Here, while jurisdictional discovery has been permitted, no formal evidentiary hearing has been conducted to resolve disputed issues of jurisdictional fact. As such, Plaintiff must only make a prima facie case that the court has personal jurisdiction over Defendants, which "is established if the plaintiff presents sufficient evidence to defeat a motion for directed verdict." *ATI Indus. Automation, Inc. v. Applied Robotics, Inc.,* No. 1:09CV471, 2013 WL 1149174, at *2 (M.D.N.C. Mar.19, 2013) (quoting 2 James W. Moore, Moore's Federal Practice § 12.31[5])). In determining whether Plaintiff has made the requisite showing upon a motion to dismiss, a district court must accept the uncontroverted allegations in the plaintiff's complaint as true

and resolve any factual conflicts in the affidavits in the plaintiff's favor. *Electronics For Imaging,* 340 F.3d at 1349.

B. Legal Standards

***17** Federal Circuit case law applies in determining whether this court has personal jurisdiction over an out-of-state accused infringer. *Beverly Hills Fan Co. v. Royal Sovereign Corp.,* 21 F.3d 1558, 1564–65 (Fed.Cir.1994).[3] Federal courts apply the relevant state statute when determining personal jurisdiction over a defendant, even when the cause of action is purely federal. *Id.* at 1569. Because North Carolina's long-arm statute is co-extensive with federal due process requirements, the jurisdictional inquiry here collapses into a single determination of whether this court's exercise of jurisdiction over Defendants comports with due process. *Dillon v. Numismatic Funding Corp.,* 291 N.C. 674, 676, 231 S.E.2d 629 (1977). "The constitutional touchstone for determining whether an exercise of personal jurisdiction comports with due process 'remains whether the defendant purposefully established minimum contacts in the forum State.' " *Nuance Commc'ns, Inc. v. Abbyy Software House,* 626 F.3d 1222, 1230–31 (Fed.Cir.2010) (quoting *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 474, 105 S.Ct. 2174, 85 L.Ed.2d 528, (1985)).

To be consistent with the limitations of due process, a defendant must have "minimum contacts" with the forum state "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945). Minimum contacts may be established by showing "general" or "specific" jurisdiction. *Helicopteros Nacionales de Columbia, S.A. v. Hall,* 466 U.S. 408, 414, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984).

1. General Jurisdiction

A court may exercise general jurisdiction over a non-resident defendant if the defendant has contacts with the state that are so "continuous and systematic" as to render himself "essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S.A. v. Brown,* —— U.S. ——, ——, 131 S.Ct. 2846, 2851, 180 L.Ed.2d 796 (2011). When a defendant maintains such systematic and continuous contacts with the forum state, even when the cause of action has no relation to those contacts, assertion of general jurisdiction is proper. *Grober v. Mako Products, Inc.,* 686 F.3d 1335, 1346 (Fed.Cir.2012) (citing *LSI Indus. Inc. v. Hubbell Lighting, Inc.,* 232 F.3d 1369, 1375 (Fed.Cir.2000); *Helicopteros,* 466 U.S. at 414–16)). Plaintiffs bear a "higher burden" when establishing general jurisdiction than they do when establishing specific jurisdiction. *Avocent Huntsville Corp. v. Aten Int'l Co., Ltd.,* 552 F.3d 1324, 1330 (Fed.Cir.2008). "Sporadic and insubstantial contacts with the forum state ... are not sufficient to establish general jurisdiction." *Campbell Pet Co. v. Miale,* 542 F.3d 879, 884 (Fed.Cir.2008). Further, "continuous activity of some sorts within a state is not enough ... the continuous corporate operations within a state must be so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." International Shoe, 326 U.S. at 318. A court must look at the facts of each case to determine whether a defendant's activities within a state are "continuous and systematic." LSI Indus. *Inc. v. Hubbell Lighting, Inc.,* 232 F.3d 1369, 1375 (Fed.Cir.2000).

2. Specific Jurisdiction

***18** A court has specific jurisdiction over a defendant in a cause of action that arises out of the defendant's activities in the forum state, and "can exist even if the defendant's contacts are not continuous and systematic." *Grober v. Mako Products, Inc.,* 686 F.3d 1335, 1346 (Fed.Cir.2012) (citation omitted). When exercising specific jurisdiction, a court must have jurisdiction over each party as to each claim alleged. *Pan–Am. Products & Holdings, LLC v. R.T.G. Furniture Corp.,* 825 F.Supp.2d 664, 678 (M.D.N.C.2011) (citations omitted).

In analyzing specific jurisdiction over a defendant, the Federal Circuit considers whether: "(1) the defendant purposefully directed its activities at residents of the forum state, (2) the claim arises out of or relates to the defendant's activities with the forum state, and (3) assertion of personal jurisdiction is reasonable and fair." *Grober,* 686 F.3d at 1346 (citing *Elecs. For Imaging, Inc. v. Coyle,* 340 F.3d 1344, 1349 (Fed.Cir.2003)). Plaintiff has the burden of making a prima facie showing of specific jurisdiction by satisfying the first two elements; the burden then shifts to defendant to show that such assertion of personal jurisdiction is not reasonable and fair. *Id.*

3. Stream of Commerce

Where a defendant's contacts with the forum state are indirect and only the result of an intermediary distributorship arrangement, the Federal Circuit has explained that a "stream of commerce" theory is to be applied in lieu of the typical concepts of specific and general jurisdiction. *Viam Corp. v. Iowa Exp.-Imp. Trading Co. .,* 84 F.3d 424, 427

(Fed.Cir.1996); *see also Beverly Hills Fan Co. v. Royal Sovereign Corp.,* 21 F.3d 1558, 1566 (Fed.Cir.1994). The law governing this theory has been concisely summarized by the Federal Circuit:

> In *World–Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 298 (1980), the Supreme Court stated that a defendant could purposefully avail itself of a forum by "deliver[ing] its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum [s]tate." In *Asahi Metal Industry Co. v. Superior Court of California,* 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987), a plurality of four justices concluded that something more was required—"*an action of the defendant purposefully directed toward the forum state* ." *Id.* at 112 (emphasis in original). The cited examples of purposeful direction included "marketing through a distributor ... in the forum [s]tate" and "providing regular advice to customers." *Id.* Four other justices considered the showing of additional conduct unnecessary. *Id.* at 117.

Nuance Commc'ns, Inc. v. Abbyy Software House, 626 F.3d 1222, 1233 (Fed.Cir.2010). Like the Supreme Court, the Federal Circuit has not yet decided whether "something more than the mere act of placing a product in the stream of commerce with the expectation that it would be purchased in the forum state" is required to establish jurisdiction. *Id.* at 1234 (citing *Beverly Hills Fan,* 21 F.3d at 1566). *See also Avocent Huntsville Corp. v. Aten Int'l Co.,* 552 F.3d 1324, 1332 (Fed.Cir.2008) ("We have also applied the stream of commerce theory, although we have not resolved the split in authority reflected in the competing plurality opinions in *Asahi*); *AFTG–TG, LLC v. Nuvoton Tech. Corp.,* 689 F.3d 1358, 1365 (Fed.Cir.2012). However, under either version of the stream of commerce theory, where an alien Defendant: 1) places the accused product into the stream of commerce, 2) knows or should know the likely destination of the product, and 3) its conduct and connections with the forum state are such that it may reasonably foresee being haled into court within that forum, exercise of jurisdiction under the stream of commerce theory is appropriate. *Beverly Hills Fan,* 21 F.3d at 1566. Thus, if the manufacturer purposefully ships the accused products into the forum state through an established distribution channel, with the expectation that those products will be sold in the forum, such action is sufficient to give rise to a proper assertion of jurisdiction. *Nuance Commc'ns,* 626 F.3d at 1233–34.

4. Nationwide Jurisdiction

***19** If neither specific nor general jurisdiction applies, a court may exercise nationwide jurisdiction under Fed.R.Civ.P. 4(k)(2). *See id.* (providing that "For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if: (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction"). Nationwide jurisdiction is appropriate where "the defendant contends that he cannot be sued in the forum state and refuses to identify any other where suit is possible." *Touchcom, Inc. v. Bereskin & Parr,* 574 F.3d 1403, 1415 (Fed.Cir.2009).

5. Reasonability of Jurisdiction

Even where a defendant's contacts with the forum state are sufficient to satisfy personal jurisdiction, a defendant can still defeat jurisdiction "by marshaling a compelling case against jurisdiction on the grounds that its exercise would be unreasonable, [and] contrary to concepts of fair play and substantial justice." *Viam Corp.,* 84 F.3d at 429. This "unreasonableness" test weighs the burden the litigation places on the defendant against the plaintiff's interest in a convenient forum and the forum's interest in resolving the controversy. *Id.; see also Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 477, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). It is a difficult test for a defendant to pass: "these cases are limited to the rare situation in which the plaintiff's interest and the state's interest in adjudicating the dispute in the forum are so attenuated that they are clearly outweighed by the burden of subjecting the defendant to litigation within the forum." *Beverly Hills Fan,* 21 F.3d at 1568. The inquiry under this test includes a balancing of (1) the burden on the defendant; (2) the interests of the forum state; (3) the plaintiff's interest in obtaining relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the interest of the states in furthering their social policies. *Viam Corp. v. Iowa Exp.-Imp. Trading Co.,* 84 F.3d 424, 429 (Fed.Cir.1996) (citing *World Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980)).

6. Supplemental Jurisdiction

28 U.S.C. § 1367(a)) provides that "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." Such claims must arise out of "a common

nucleus of operative fact." *United Mine Workers of Am. v. Gibbs,* 383 U.S. 715, 725, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966); *accord Silent Drive, Inc. v. Strong Indus., Inc.,* 326 F.3d 1194, 1206 (Fed.Cir.2003).

C. Personal Jurisdiction over LGC

1. State Law Claims (Counts III–VI)

i. *Specific Jurisdiction*

As noted above, assertion of specific jurisdiction is proper when the plaintiff's cause of action arises from a defendant's contacts with the forum state. The court finds that assertion of specific jurisdiction is appropriate for all of Plaintiff's claims arising under state law—unfair and deceptive trade practices, breach of contract, breach of the implied covenant of good faith and fair dealing, and alternatively, unjust enrichment—because LGC's contacts with North Carolina throughout the course of its business relationship with Plaintiff gave rise to those claims.

***20** The court first finds that LGC purposefully directed its activities at the forum state. Here, LGC conducted business with Plaintiff, a North Carolina resident, for seven years. In that time, LGC purchased $95 million worth of separator material made in, and shipped from, North Carolina. (Document Nos. 56 ¶ 23; 242–15). The parties entered into a written MOU and extensively negotiated a written LTA for LGC's EV programs. (Document No. 18 ¶ 7, 13). Accepting Plaintiff's allegations as true, Plaintiff spent over $300,000,000 to expand its manufacturing capacity in order to meet LGC's long-term supply requirements based on LGC's representations that it would make Plaintiff its exclusive supplier of separator material for EV batteries if Plaintiff increased production capacity. *Id.* ¶¶ 8–10, 20. Additionally, Plaintiff states that until the expanded capacity became operational, it stopped taking orders from certain CE customers to redirect resources to meet LGC's volume requirements. *Id.* ¶ 18; (Document No. 172 ¶¶ 8, 11).

Throughout the course of these business dealings, LG Chem representatives extensively communicated by e-mail with Plaintiff. *See e.g.,* Documents No. 242–1–12. *See also Electronics For Imaging, Inc. v. Coyle,* 340 F.3d 1344, 1351 (Fed.Cir.2003) (discussing Defendant's contacts with Plaintiff in the forum state by phone and noting "[Defendant's] communications are significant in the personal jurisdiction calculus even though [Defendant] was not physically present in [forum state] when he made these communications."). More significantly, LGC representatives had numerous in-person meetings in North Carolina, occurring "on about at least a quarterly basis." (Document Nos. 37 ¶ 4; 17 ¶ 11; 32 ¶ 9; 52 ¶ 8). Plaintiff has provided the following evidence that high-level LGC executives and other employees traveled to North Carolina for numerous meetings to inspect Celgard's facilities, negotiate agreements, and discuss Celgard's intellectual property rights:

- LGC officers and engineers visited and inspected Celgard facilities in Charlotte and Concord, North Carolina to certify that they met LGC specifications. (Document Nos. 18 ¶ 17; 242–18).
- In October and November 2010, LGC executives traveled to Charlotte to meet with Celgard. (Documents No. 242–7; 242–8).
- In July 2011, LGC personnel attended Celgard's Grand Opening event for the Concord, North Carolina facility. (Document No. 242–11).
- In September 2011, LGC personnel traveled to North Carolina to tour the Concord and Charlotte facilities and to discuss the expansion plan. (Documents No. 242–9; 242–10).
- In November 2012, an LGC executive traveled to Charlotte to discuss LGC's business forecast for 2013, Celgard's pricing proposals, and collaborating to develop new separator products. (Document Nos. 242–6; 56 ¶ 22).
- In February 2013, an LGC executive met in Charlotte to negotiate various options for parties' ongoing relationship, including an LTA. (Document Nos. 242–4; 242–2).

***21** • In August 2013, representatives from LGC met with Celgard in Charlotte for a top management meeting. (Document Nos. 242–1; 242–39; 242–12; 242–29). Among other things, the parties discussed the LTA. (Document No. 242–33).

- In October 2013, LGC executive traveled to Charlotte to discuss the LTA and LGC's "use of Celgard's ceramic coating patents in LGC's current and future CE and EV batteries." (Document Nos. 242–35; 242–36; 242–20; 242–21).

- On December 9, 2013, LGC met with Celgard in North Carolina to discuss pricing and supply. (Document Nos. 37 ¶ 4; 52 ¶ 13).

The court finds that LGC's contacts with the forum state that occurred because of the parties' established commercial relationship were purposefully directed at North Carolina. *See Electronics For Imaging, Inc. v. Coyle,* 340 F.3d 1344, 1351 (Fed.Cir.2003) (finding purposeful availment where, *inter alia,* defendant repeatedly called plaintiff in forum state and sent representatives to form state for purpose of demonstrating patented technology); *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 479, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) (finding purposeful contacts even despite lack of physical ties to forum state where party "reached out" to negotiate with resident of forum state for long-term franchise agreement).

Second, the court finds that Plaintiff's state law claims arise out of LGC's contacts directed at the forum state. Plaintiff's deceptive trade practices claim is grounded in LGC's alleged misconduct regarding a product made in North Carolina, including alleged misrepresentations during meetings in North Carolina and significant capital expenses incurred in North Carolina in reliance on such alleged misrepresentations. (Document No. 217, ¶¶ 116–119). Similarly, Celgard's breach of contract, breach of implied covenant of good faith and fair dealing, and unjust enrichment claims are based on the MOU, which governed the North Carolina manufacture and supply of separator material. *Id.* ¶¶ 120–136.

Third, the court has considered whether asserting personal jurisdiction over LGC is reasonable and fair. Here, the court has considered (1) the burden on the defendant, (2) the interests of the forum state, (3) the plaintiff's interest in obtaining relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering fundamental substantive social policies, *Electronics For Imaging, Inc. v. Coyle,* 340 F.3d 1344, 1352 (Fed.Cir.2003), and finds that LGC is unable to demonstrate that it would be unreasonable for this court to exercise jurisdiction over it.

First, litigating in North Carolina will not unreasonably inconvenience LGC. Although LGC is based in South Korea, "progress in communications and transportation has made the defense of a lawsuit in foreign tribunal less burdensome." *Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com. De Equip. Medico,* 563 F.3d 1285, 1299 (Fed.Cir.2009). Indeed, LGC employees traveled to North Carolina numerous times between 2008 and 2013. Additionally, LGC is apparently willing to litigate this dispute in the Eastern District of Michigan, which is not substantially closer to Korea than North Carolina, which indicates that LGC is prepared to accept the burden of travel. (Document No. 231). Second, North Carolina has an interest in adjudicating claims arising out of North Carolina law and relating to wrongs against a North Carolina citizen, as well as claims relating to infringement of a citizen's patent. *See Beverly Hills Fan,* 21 F.3d at 1568 ("Virginia has an interest in discouraging injuries that occur within the state ....that interest extends to design patent infringement actions such as the one here.") (internal citation omitted). Third, Plaintiff has a significant interest in maintaining this action in North Carolina, as much of its evidence and witnesses knowledgeable about the patented invention are located here. As to the fourth and fifth factors, the court does not find that Defendant has offered any compelling reason why the interstate judicial system's interest in obtaining efficient resolution of controversies or the states' interest in furthering substantive social policies necessitates a finding that exercising jurisdiction over LGC is unreasonable or unfair. Accordingly, the court concludes that this case is not one of the "rare situation[s] in which the plaintiff's interest and the state's interest in adjudicating the dispute in the forum are so attenuated that they are clearly outweighed by the burden of subjecting the defendant to litigation within the forum." *Id.* In light of the above analysis, the court finds that specific jurisdiction over LGC is appropriate for each of Plaintiff's state law claims.

2. Patent Claims (Counts I And II)

i. *Supplemental Jurisdiction*

***22** The court next considers whether it is appropriate to exercise supplemental jurisdiction over Plaintiff's patent infringement claims given its finding that it has specific jurisdiction over Plaintiff's state law claims. Plaintiff argues that a common nucleus of operative facts exists here because the facts giving rise to its state law claims are substantially the same as those giving rise to its patent infringement claims. Specifically, Plaintiff contends that Celgard and LGC's seven-year relationship and LGC's decision to terminate the relationship with Celgard and source base film from an alternative source, while continuing to use or cause others to use Celgard's patented technology without permission, form a common nucleus of operative fact. Defendants argue that the facts related to the patent claims (the distribution, importation,

and/or sale of the allegedly infringing product) are distinct from the facts related to the state law claims (LGC's activities in North Carolina related to its alleged obligations under the MOU), and that they are not sufficiently common to render supplemental jurisdiction appropriate. LGC points out that Plaintiff's state law claims concern the now-severed business relationship that centered on sale and purchase of Plaintiff's *uncoated polymeric base film,* whereas its patent infringement claims concern LGC's manufacture of *ceramic coated separator product.* LGC thus argues that the facts giving rise to the alleged injuries are wholly distinct and that supplemental jurisdiction is inappropriate.[4]

As LGC correctly notes, the base film made by Plaintiff, itself, is not the accused infringing product. However, as explained by one of LGC's own employees, base film is a component of the allegedly infringing ceramic-coated separators. Jina Lee, Manager in a Cell Procurement Team at LGC, stated in her affidavit that a separator is a component of a lithium-ion battery that is placed between the anode and the cathode to prevent electrical shorting (i.e.fire). *See* (Document No. 52, ¶ 4, Declaration of Jina Lee "Lee Decl ."). Additionally, Ms. Lee explained:

> There are two types of separators: "wet-type" and "dry-type". *A separator consists of a "base film" and a coating on top of the base film.* "Dry-type" separators are more susceptible to heat than "wet-type." The base film by itself (i.e., without coating)—especially the base film for "dry-type" separators-cannot be used as a separator and cannot even be considered a finished component for use in a battery because of heat safety issues. LGC does not manufacture uncoated base films for "dry-type" separators. Instead, *LGC purchases base films and then performs additional manufacturing, using its own coating technology, in order to arrive at the final, finished separator ... Celgard provided to LGC uncoated base films for "dry-type" separators.*

Document No. 52, ¶ 5 (emphasis added). Accordingly, while the two products are distinct, they are very closely related. Indeed, by Defendants' own description, base film is an essential component of a separator.

***23** LGC also argues that the facts relevant to the state law claims are "[LGC's] termination of Celgard as a supplier of uncoated base film for lithium-ion batteries" and the facts related to the patent claims are "[LGC's] manufacture, distribution, importation, and sale of lithium-ion batteries with SRS-coated separators." (Document No. 275–1, p. 2). While the court agrees, it also believes that LGC's termination of Celgard as a supplier of uncoated base film is factually intertwined with, if not the exact cause of, LGC's manufacture, distribution, importation, and sale of lithium-ion batteries with SRS-coated separators. As noted above, the '586 patent claims ceramic-coated separators and batteries or systems including such separators. (Document Nos. 17 ¶ 8; 16, p. 4). Here, Plaintiff initially provided base film to LGC for use in manufacturing lithium-ion batteries for CE devices. (Document Nos. 18 ¶ 4–5; 217 ¶ 67). In 2008, Plaintiff and LGC began discussions regarding Plaintiff becoming LGC's exclusive supplier of base film for lithium-ion batteries used in EVs. (Document No. 18 ¶ 6; 217 ¶ 68). Pursuant to LGC specifications, Plaintiff designed separator material to which LGC could apply a ceramic coating. (Document Nos. 17 ¶¶ 13, 15; 80 ¶ 3; 19). Plaintiff states that once ceramic coated, this separator embodied the '586 patent, but that because LGC's use of the patent was authorized by Plaintiff at that time, the separator did not constitute infringement. *See* 35 U.S.C. § 271 (infringement requires use "without authority"); Pl. Resp. Def. Mot. Dismiss (Document No. 241, p. 2). Upon the beginnings of the breakdown of the LTA negotiations, Plaintiff discussed its patented technology with LGC, informing LGC that if it was going to cease purchasing its base film, it needed a license to ceramic-coat any non-Celgard separator. *See* (Document Nos. 242–34; 24218; 242–19; 242–21; 242–32; 242–38). The parties also discussed these patent issues during at least one of LGC's visits to Plaintiff in North Carolina. (Document No. 242–30). Plaintiff claims that infringement is occurring because LGC is purchasing base film from third parties and applying a ceramic coating layer to such base film in order to create coated battery separators, which fall within the scope of the patent. (Document No. 217, ¶ 51). The infringement that Plaintiff claims thus arises from LGC's choice to stop using Plaintiff's base film in its separators and to source it from a third party without a license. (Document No. 17, ¶¶ 49–52; 278, p. 4).

In light of the fact that Plaintiff's claims of patent infringement arise from LGC's choice to stop using Celgard base film in its separators, which is very closely related to, if not essentially the same as, the conduct that gave rise to Plaintiff's state law claims, the court finds that a common nucleus of operative facts exists to warrant the exercise of supplemental jurisdiction. In sum, Plaintiff provided base film to Defendants for use in their separators. When the business relationship went sour, LGC sourced base film from a third party. Plaintiff alleges that the use of this third-party base film,

in combination with LGC's application of ceramic coating, constitutes a battery separator that infringes upon the '586 patent. The nature of the parties' business dealings and LGC's decision to stop purchasing base film from Plaintiff after their significant history form a "common nucleus" that renders the patent claims part of the same "case or controversy" as the state law claims.

ii. *Other Jurisdictional Theories*

***24** The court has also considered whether it may exercise personal jurisdiction over LGC on independent grounds under the stream of commerce theory, particularly in light of the extensive briefing on the question and this court's recent decision in *Celgard, LLC v. SK Innovation, Co., Ltd.,* 3:13cv254–MOC–DSC, 2014 WL 5430993 (W.D.N.C. Aug.29, 2014), which found no personal jurisdiction over a foreign defendant under the stream of commerce theory. The question for the court is whether LGC has purposefully shipped its allegedly infringing products through an established distribution channel with the expectation that those products would be sold in the forum. *Nuance Commc'ns, Inc. v. Abbyy Software House,* 626 F.3d 1222, 1234 (Fed.Cir.2010); *Beverly Hills Fan Co. v. Royal Sovereign Corp.,* 21 F.3d 1558, 1566 (Fed.Cir.1994).

Here, Plaintiff has offered the following evidence in support of its argument that LGC meets this requirement:

- LGC supplies batteries containing separators for EVs sold at North Carolina dealerships, including the Cadillac ELR, Hyundai Sonata Hybrid, Kia Optima Hybrid, and Chevrolet Volt (for which LG Chem is the exclusive supplier). (Document Nos. 17 ¶¶ 16–17; 37 ¶ 5; 242–25; 242–26; 56 ¶¶ 14–18; 56–5; 80 ¶ 12; 80–2).

- Between 2011 and 2013, over 1,000 new Chevrolet Volts —each with an LGC battery—were registered in North Carolina; as were over 500 new Kia Optima Hybrids. (Document Nos. 57–4–57–6).

- In 2013, LGC supplied lithium-ion batteries for almost 26% of all plug-in EVs sold in the U.S., 56% of which contained ceramic-coated separators. (Document No. 17 ¶¶ 18–19, 23).

- LGC also sells batteries with separators for use in popular CE devices manufactured by Apple, Hewlett Packard, Nokia, Dell, and LG Electronics, among others. (Document Nos. 17–5, p. 3; 17–10, p. 5; 136, p. 6). These CE devices are widely sold and distributed in North Carolina, including by retailers like Best Buy, Target, and Walmart.[5] (Document Nos. 56 ¶ 25; 136, p. 6).

- LGCAI markets and distributes LGC's products in the U.S. (Document No. 33 ¶ 2).

The court also notes that in defending its motion to stay the preliminary injunction against it in this case, LGC went to great lengths to describe the expanse of its participation in the U.S. economic markets:

> Defendants sell in the order of $ 0.76 million every day attributable to the accused batteries sold or imported into the United States.... Worldwide, that number jumps to $6 million in daily sales. Defendants have yearly revenue of $278 million attributable to the accused batteries sold or imported into the United States (and $2.4 billion worldwide).... Beyond that, Defendants do business ***every day*** with companies at the center of the U.S. economy.

(Document No. 136, p. 4) (emphasis in original). Defendants further described the alleged consequences of such injunction and its use of nationwide distribution channels to distribute infringing goods:

> ***25** In light of the broad scope of the Order, Defendants will be barred from making sales in the United States to downstream customers in consumer electronics (*e.g.,* Apple, Hewlett–Packard, and Dell) and the automotive industry (*e.g.,* General Motors and Ford Motor Company), and the impact of the Order will clearly be detrimental to these customers. Taken to its logical conclusion, not only will the Order take Defendants' batteries "off the shelves" but it also strips Best Buy and Wal–Mart (with respect to consumer electronics products) and car dealerships and distributors of their ability to provide products containing these batteries to consumers. Ultimately, the effect of this Order to a John Doe member of the public is not that he may have to buy a higher priced good, but that there will be no goods for him to buy.

Id. at 6 (footnote omitted).

The court has very carefully considered the evidence put forth by Plaintiff and agrees that LGC has knowingly and intentionally used nationwide distribution channels for its products, with the expectation that its products will be sold throughout the country, including in the state of North Carolina. However, the court finds that Plaintiff has not made the requisite showing that LGC ever placed *the allegedly infringing product* into the stream of commerce or that such product was offered for sale here. *See Nuance Commc'ns,*

626 F.3d at 1234; *Beverly Hills Fan,* 21 F.3d at 1566 (both requiring that for exercise of jurisdiction under the stream of commerce theory to be proper, Defendants must have placed the "accused product" in the stream of commerce). *See also Celgard, LLC v. SK Innovation Co.,* No. 3:13–CV–00254–MOC, 2014 WL 5430993, at *4 (W.D.N.C. Aug.29, 2014) (finding that stream of commerce theory did not succeed where "plaintiff has provided this court with no indication that [defendant] has ever made a sale or even an offer of sale in North Carolina and none of SKI's products have been found in this forum."). Plaintiff's patent infringement claims are premised upon LGC using non-Celgard base film in its separators. Plaintiff admits that when LGC used Celgard base film in its separators, the manufacture of such separators did not constitute infringement because LGC's use of the patent was authorized by Plaintiff at that time. Pl. Resp. Def. Mot. Dismiss (Document No. 241, p. 2). It is difficult for this court to find that the allegedly infringing product has been placed in the stream of commerce when Plaintiff has failed to submit any evidence that LGC has placed a separator *with non-Celgard base film* in the stream of commerce, let alone shown that one was offered for sale in this state. As Defendants note,

> By Celgard's own timeline, it takes four to six months to incorporate a base film into an LGC lithium-ion battery. (Paulus Decl. ¶ 8, Dkt. 80.) Celgard also maintains that LGC "consumed or otherwise used" Celgard base film at least until January 2014. *(Id.* at ¶ 7.) Celgard, however, does not estimate how long it takes for an LGC lithium-ion battery to be incorporated into an EV or CE downstream product, nor does Celgard estimate how long it takes before an assembled EV will ship out to a dealer in North Carolina or a CE downstream product will reach big box stores, like Wal–Mart or Best Buy.

***26** (Def. Reply, Document No. 247, n. 3). Plaintiff has simply offered no evidence that an LGC product with an allegedly infringing separator has been found in this forum. The court will not assume that the LGC separators found in this state within the EV and CE devices sold here are those accused of infringement, particularly when Plaintiff admits that until fairly recently, LGC separators shipped from South Korea to the U.S. were not infringing. Plaintiff's evidence that LGC sells products with separators in this state, alone, is not sufficient to support a finding of jurisdiction under a stream of commerce theory.

Because the court has found that LGC is subject to jurisdiction here through supplemental jurisdiction, it will not address Plaintiff's alternative argument that LGC is subject to nationwide jurisdiction under Rule 4(k)(2). Similarly, because the court believes that the exercise of jurisdiction over LGC under the theory of supplemental jurisdiction is appropriate, it will not undergo further analysis of whether LGC's contacts with North Carolina are so systematic and continuous as to render it subject to general personal jurisdiction here.

D. Personal Jurisdiction over LGCAI

The court next considers whether Plaintiff has established a prima facie case of personal jurisdiction over LGCAI. As noted above, LGCAI, a wholly-owned subsidiary of LGC, is a Delaware company headquartered in Englewood Cliffs, New Jersey. *See* Declaration of Juan (S.H.) Oh ("Juan Decl."), (Document No. 33), ¶ 2; Def. Mem. Mot. Dismiss (Document No. 227), p. 4). LGCAI is responsible for marketing LGC petrochemicals, information and electronic materials, and batteries to customers in the United States. (Juan Decl, ¶ 2). LGCAI also acts as a product distributor for LGC's customers in the U.S. and is responsible for sales and program management to U.S. customers, but has no direct involvement with the manufacture of LGC products and does not share any officers with LGC. *Id.*

Relevant to LGCAI's contacts with the state of North Carolina, LGCAI has no offices, employees, telephone listing, post office box, mailing address, bank account, or advertising in North Carolina. *Id.* at ¶ 3. LGCAI does not own or rent any real property in North Carolina. *Id.* However, LGCAI is registered with the Secretary of State of North Carolina to do business here and has a registered agent for service of process here. *Id.* In the past, LGCAI stored inventory in one of its customer's consignment warehouses here, though it has not stored any inventory there since 2013. *Id.* LGCAI also paid taxes to the state of North Carolina in 2012 related to storing such inventory. (Document No. 217 at ¶ 43; Def.'s Mem. Sup. Mot. Dismiss (Document No. 227, p. 16)). Additionally, between 2009 and 2013, LGCAI had seven customers in North Carolina (unrelated to the products accused of infringement). (Juan Decl. at ¶ 4). LGCAI sold over $14 million worth of products to these customers during that time, which Defendant states accounted for, on average, approximately 0.9% of LGCAI's total revenues in the United States during that period. *Id.* at ¶ 4. LGCAI admits that it "conducts business from time to time in North Carolina for the purpose of selling products for its petrochemical and toner businesses." *Id.*

***27** Plaintiff argues that LGCAI is subject to general jurisdiction because even though LGCAI is a non-resident and its contacts are unrelated to Plaintiff's causes of action

for patent infringement, its contacts with North Carolina are "continuous and systematic." As noted above, sporadic, insubstantial contacts with the forum state are insufficient to establish general jurisdiction. While there is no precise test for determining general jurisdiction, *LSI Indus.Inc. v. Hubbell Lighting, Inc.,* 232 F.3d 1369, 1375 (Fed.Cir.2000), courts have generally focused on two areas of inquiry. *Ashbury Int'l Grp., Inc. v. Cadex Defence, Inc.,* No. 3:11CV00079, 2012 WL 4325183, at *4 (W.D.Va. Sept.20, 2012). First, they look for physical presence in the forum state, such as corporate facilities, bank accounts, agents, registration, or incorporation. *Id.* (citing *Perkins v. Benguet Consol. Mining Co.,* 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952)). Second, "courts have also considered whether the defendant has actively solicited business in the forum state and the extent to which the defendant has participated in the state's economic markets....In other words, courts have examined the "economic reality" of the defendant's activities in the forum state." *Id.* (internal citation omitted). *See also Trierweiler v. Croxton & Trench Holding Corp.,* 90 F.3d 1523, 1533 (10th Cir.1996) (noting that courts consider "(1) whether the corporation solicits business in the state through a local office or agents; (2) whether the corporation sends agents into the state on a regular basis to solicit business; (3) the extent to which the corporation holds itself out as doing business in the forum state through advertisements, listings or bank accounts; and (4) the volume of business conducted in the state by the corporation.") (cited with approval as a non-exhaustive set of appropriate factors in *Delta Sys., Inc. v. Indak Mfg. Corp.,* 4 F. App'x 857 (Fed.Cir.2001) (unpublished)).

Here, LGCAI has physical presence in the state of North Carolina in the form of being registered to do business here, having a registered process agent here, using property in this state for storage, and paying state taxes at least once. Additionally, LGCAI has participated in the economic markets of this state through its sales to North Carolina customers. As noted above, Plaintiffs have submitted evidence that LGCAI sold over $14 million worth of products to seven customers in the state between 2009 and 2013. (Juan Decl., ¶ 4; Lee Decl. (Document No. 242), ¶ 47–53). These sales accounted for, on average, approximately 0.9% of LGCAI's total revenues in the United States during that time (0.9 % in 2010, 1% in 2011%, 1% in 2012, and 0.8% in 2013). *Id.* Though the parties dispute the significance of these sales and revenue percentages, the court notes that "just as it would be inappropriate to permit an exercise of personal jurisdiction solely on the presence of sales into the forum ... it would likewise be inappropriate to entirely disregard a defendant's sales into the forum simply because they only generated a small percentage of the defendant's total revenue." *ATI Indus. Automation, Inc. v. Applied Robotics, Inc.,* No. 1:09CV471, 2013 WL 1149174, at *4 (M.D.N.C. Mar.19, 2013) (internal citation and quotation omitted). Here, though LGCAI earned only a small percentage of its revenue from customers in North Carolina, the dollar figure is by no means insignificant. Additionally, LGCAI earned revenue from such sales for each of the four years before the complaint was filed in this action. The court therefore finds such sales an appropriate factor for consideration. *See id.* at *5 (finding that defendant's sales to North Carolina were appropriate for consideration where they constituted 1.2% of annual sales, and distinguishing *Campbell Pet Co. v. Miale,* 542 F.3d 879, 884 (Fed.Cir.2008), wherein Federal Circuit affirmed district court's finding of no general jurisdiction over defendants who made only 12 sales to Washington residents in eight years, for a total of less than $14,000 in gross revenue (approximately 2% of total sales), and in four of those years made no sales in Washington at all).

***28** While this case presents a close call, the court finds that the evidence of LGCAI's physical presence in North Carolina, as well as its participation in the state's economic markets through its sales to companies here, is sufficient to support a prima facie case of general jurisdiction. *See LSI Indus.Inc. v. Hubbell Lighting, Inc. .,* 232 F.3d 1369, 1375 (Fed.Cir.2000) (finding that non-resident defendant had continuous and systematic contacts with forum state partially based on millions of dollars of sales in the state, despite lack of sale of the allegedly infringing product in forum state); *Ashbury Int'l Grp., Inc. v. Cadex Defence, Inc.,* No. 3:11CV00079, 2012 U.S. Dist. LEXIS 134878, at *6, 2012 WL 4325183 (W.D.Va. Sept. 20, 2012) (finding sales of millions of dollars of products to repeat customers sufficient for general jurisdiction, even absent traditional factors indicating physical presence in forum state).

The court also finds that the exercise of general jurisdiction over LGCAI at this point is reasonable and that LGCAI has failed to meet its burden of showing otherwise. First, litigating in North Carolina will not unreasonably inconvenience LGCAI. LGCAI has its principal place of business in New Jersey and its marketing and sales office for the accused lithium-ion batteries is in California. As noted above, "progress in communications and transportation has made the defense of a lawsuit in foreign tribunal less burdensome." *Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com. De Equip. Medico,* 563 F.3d 1285, 1299 (Fed.Cir.2009). The court, having already found that LGC, a company headquartered

in Korea, will not be unreasonably inconvenienced by litigating here, declines to find that a company headquartered in this country would be so inconvenienced. Additionally, LGCAI is apparently willing to litigate this dispute in the Eastern District of Michigan, which is not substantially closer to California or New Jersey than North Carolina, which indicates that LGCAI is prepared to accept the burden of travel. The court finds that the same analysis applies to LGCAI as to LGC for the remaining four factors for consideration. As noted above, North Carolina has an interest in adjudicating claims relating to infringement of a citizen's patent. Plaintiff has a significant interest in maintaining this action in North Carolina, as much of its evidence and witnesses knowledgeable about the patented invention are located here. Defendant has not offered any compelling reason why the interstate judicial system's interest in obtaining efficient resolution of controversies or the states' interest in furthering substantive social policies necessitates a finding that exercising jurisdiction over LGCAI is unreasonable or unfair. As with LGC, the court finds that LGCAI has not met its burden of showing that being subject to personal jurisdiction here would be unreasonable. In light of the above analysis, the court finds that the exercise of general jurisdiction over LGCAI is appropriate for Plaintiff's patent law claims.

***29** Plaintiff also argues that LGCAI is subject to personal jurisdiction under the stream of commerce theory because it participates in the same distribution chain for LGC's batteries as LGC. The court finds such argument futile in light of the above finding that Plaintiff has failed to show LGC is subject to jurisdiction under such theory, let alone offered any argument as to how any action of LGC can be imputed to LGCAI.

V. Conclusion

For the reasons stated herein, the court finds that this maintenance of this action is appropriate in this district at this time.

ORDER

IT IS, THEREFORE, ORDERED that:

1) Defendants' "Objections to Magistrate Judge's Order Granting Defendants' Alternative Motion to Transfer Venue" (Document No. 266) are **SUSTAINED in part and OVERRULED in part,** as described herein;

2) The Order of the Magistrate Judge transferring venue (Document No. 262) is **REVERSED** and Defendants' Alternative Motion to Transfer Venue to the Eastern District of Michigan (Document No. 230) is **DENIED;**

3) Defendants' Motion to Dismiss Counts III–VI of Plaintiff's First Amended Complaint for Failure to State a Claim (Document No. 222) is **DENIED;** and

4) Defendants' Motion to Dismiss Plaintiff's First Amended Complaint for Lack of Personal Jurisdiction (Document No. 226) is **DENIED.**

All Citations

Not Reported in F.Supp.3d, 2015 WL 2412467

Footnotes

1 The MOU refers to LGC's purchase of "separators" from Celgard, but affidavits filed by both parties makes clear that the "separators" referred to in the MOU are equivalent to "base film," as the term is used in this Order. *See generally* Pulwer Decl.; Declaration of Jina Lee (Document No. 52).

2 More specifically, LG Chem states that it is subject to specific jurisdiction in the Eastern District of Michigan because it sells the accused lithium-ion batteries to electric vehicle manufacturers residing in the district, including General Motors, Ford Motor Company, and Chrysler. (Def. Mem. Sup. Mot. Transfer (Document No. 231, p. 5); ("Declaration of Jun Hong Min ..." ("Min Decl.") ¶ 3, Dkt. 73.) Additionally, all three of LG Chem's U.S. subsidiaries, including LGCAI, have outposts and/or offices in Michigan. (Min Decl. ¶ 2, Dkt. 73).

3 The court has considered whether the law of the Federal Circuit applies to both the state law claims and the claims for patent infringement in this case and notes that both parties have argued their positions on personal jurisdiction solely under the law of the Federal Circuit. *See* Def. Mem. Mot. Dismiss (Doc. No. 227, p. 5, n. 24); Pl. Mem. Opp. (Document No. 241, p. 14–15). The court finds that application of Federal Circuit law is appropriate here as to all of Plaintiff's claims.

In *3D Systems, Inc. v. Aarotech Lab ., Inc.,* 160 F.3d 1373, 1377–78, 48 USPQ2d 1773, 1776 (Fed.Cir.1998), the Federal Circuit held that the law of that circuit, as opposed to the regional circuit, applied in determining that the district court had personal jurisdiction over an out-of-state corporation defending claims for patent infringement and state law claims of trade libel and unfair competition where the exercise of supplemental jurisdiction was proper. *See id.* at 1377–78 ("Because of supplemental jurisdiction under 28 U.S.C. § 1367 ... the propriety of jurisdiction in light of federal due process for both the state law claims and the federal patent law claims is to be analyzed using Federal Circuit law."). The Federal Circuit found that because the patentee's trade libel and unfair competition claims went "hand-in-hand with its patent infringement claims," and because the claims arose out of the same facts, application of Federal Circuit law was appropriate in resolving the personal jurisdiction issue, even though state law claims were involved. *Id.* at 1377.

4 The court has also carefully considered Plaintiff's statements at the hearing in response to questioning by the court as to why its patent law and state law claims are related. *See* Hearing Transcript (Document No. 274) at 25:1026:25; 13:1–25. To the extent Defendants construe Plaintiff's statements as allegations of theft of intellectual property in their supplemental brief (# 275–1), the court is not persuaded that Plaintiff was attempting to assert a new claim against Defendants at the hearing. *See id.* at 26:23–5 ("They completely said, Sorry, you know, Go pound sand. We're going to go run off with your technology and work with someone else."); *id.* at 13:19–23 ("[LG Chem] went and learned about our technology and then they went and took it to someone else and are now infringing our patents with technology that we provided to them and that we taught them."). The court finds that Plaintiff's arguments about the relationship between its patent claims and state law claims at the hearing are consistent with the allegations and arguments it made in its Amended Complaint (Document No. 217) and its Response in Opposition to Defendants' Motion to Dismiss (Document No. 241).

5 Simple internet searches indicate that in the Charlotte, North Carolina area alone, Best Buy has at least nine retail stores, *see* http:// www.bestbuy.c om/site/olspage.jsp?id+cat12092 & type+page & _ requestid +100835, Wal–Mart has at least nine retail stores, *see* http:// www.walmart .com/store/finder?location+charlotte, north carolina & distance+10, and Target has four retail stores, *see* http://www . target.com/store-locator/search-results?address= charlotte#+ north+carolina & fromPage=findStore. Apple has two retail stores in Charlotte and five retail stores in the state of North Carolina, *see* https://www.apple.com/retail/storelist/.

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2020 WL 7349483
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

Court of Appeals of Texas, Houston (1st Dist.).

LG CHEM AMERICA, INC.
and LG Chem, Ltd., Appellants
v.
Tommy MORGAN, Appellee

NO. 01-19-00665-CV
|
Opinion issued December 15, 2020

On Appeal from the 239th District Court, Brazoria County, Texas, Trial Court Case No. 100728-CV

Attorneys and Law Firms

A. Craig Eiland, Angela J. Nehmens, William A. Levin, Bret Stanley, for Appellee.

Christopher Walton, Sean Higgins, for Appellants LG Chem, Ltd.

Sean Higgins, for Appellants LG Chem America, Inc.

Panel consists of Justices Keyes, Hightower, and Countiss.

MEMORANDUM OPINION

Evelyn V. Keyes, Justice

***1** This is an interlocutory appeal of the denial of two special appearances. Appellee, Tommy Morgan, sued multiple defendants, including appellants, LG Chem America, Inc. (LGC America), a Delaware company with its principal place of business in Atlanta, Georgia, and LG Chem, Ltd. (LGC), a South Korean company, for injuries Morgan allegedly sustained when a battery manufactured by LGC and marketed, distributed, and sold by LGC America, which was inside an electronic-cigarette device, exploded and caught fire while in his pants pocket. Morgan asserted strict products liability causes of action against both companies.[1] Appellants filed separate special appearances.

After a hearing, the trial court entered orders denying appellants' special appearances. On appeal, appellants challenge the denial of their special appearances, arguing that they lack minimum contacts with Texas necessary for Texas courts to assert personal jurisdiction over them.

We affirm.

Background

Morgan sued LGC America, LGC, and other defendants in January 2019, alleging that a lithium-ion 18650 battery used in an e-cigarette device "exploded and caught fire" while in his pants pocket, "causing [him] to sustain severe burns and other injuries."[2] Morgan asserted strict products liability claims against LGC and LGC America, alleging that they designed, manufactured, marketed, distributed, and sold the battery and e-cigarette device that injured him and "direct[ed] such products to Texas." According to Morgan, LGC designed and manufactured the battery that injured him and distributed it through its wholly-owned distributor, LGC America, which markets, sells, and distributes LGC's lithium-ion batteries throughout the United States, including in Texas. Morgan further alleged that other defendants manufactured the e-cigarette device, which used LGC's lithium-ion battery, and sold the e-cigarette device—and LGC's battery within it—to Morgan at a store in Brazoria County. Morgan alleged that LGC's battery was defectively manufactured and unreasonably dangerous. He also alleged that neither the e-cigarette device nor LGC's battery included any warnings about foreseeable risks and that he used the e-cigarette device and LGC's battery in a reasonably foreseeable manner for their intended or reasonably anticipated purpose as a battery-powered e-cigarette device.

A. LGC's Special Appearance

LGC filed a special appearance challenging the trial court's exercise of personal jurisdiction over it. LGC supported its special appearance with the affidavit of a senior manager and authorized representative of the company, averring that it is a Korean company with its headquarters and principal offices in Seoul, South Korea, and that it has never had an office in Texas, is not registered to do business in Texas, has never owned or leased real property in Texas, has never had a registered agent for service of process in Texas, and has never had a telephone number, post office box, mailing address,

or bank account in Texas. The senior manager denied that LGC designs or manufactures batteries "for sale to individual consumers as standalone batteries" and denied that LGC itself or through a third party distributes, advertises, or sells the particular type of battery at issue "directly to consumers as standalone batteries" or "as replaceable power cells in e-cigarette or vaping devices." The manager also denied that LGC has conducted business with any defendant other than LGC America, including the defendant that manufactured the e-cigarette device and the defendant that sold the device and LGC's battery to Morgan. Further, LGC denied that the battery that injured Morgan was designed or manufactured in Texas. LGC's manager did not otherwise deny that it manufactures batteries like the one that injured Morgan and that it markets, distributes, and sells those batteries, including through LGC America, to at least some customers in Texas.

***2** Morgan responded that LGC, alone or through LGC America, "targets the U.S. market by selling lithium-ion batteries to various American entities, including but not limited to battery packers and power tool companies throughout the nation." Morgan produced more than 2,200 pages of spreadsheets that he argued showed:

(1) 168 shipments from [LGC] came through the ports of Houston, Texas[,] and Texas City, Texas;

(2) 111 of the 168 imports were consigned by an [LGC] entity with the vast majority being consigned by its subsidiary, [LGC America];

(3) a search of all imports from [LGC] to consignees with a Texas address identified 271 shipments to over 30 different companies with locations in the State, 23 of which arrived in the port of Houston and the remaining arrived in non-Texas ports with their ultimate destination being a company in Texas; [and]

(4) a search of all imports from [LGC] to any Texas address listed as the notifying party showed 823 shipments to over 60 Texas entities, 30 of which arrived in the port of Houston and the remainder arrived via non-Texas ports.

Morgan also produced printouts from LGC's website, which state that, "[i]n 1999, LG Chem succeeded in developing a lithium-ion battery for the first time in Korea," and "[s]ince then, it has continued to increase its sales volume in the battery market," and "LG Chem ... has led the world lithium-ion battery market...." Morgan also produced printouts from the website of Stanley Black and Decker, which is not a party to the underlying lawsuit, showing that that company has three facilities in Texas and that it lists LGC as one of its "peers in innovation in consumer durables...." Morgan further produced an excerpt from a hearing in another lawsuit involving LGC, in which Morgan argued that "counsel for [LGC] conceded [LGC] ships lithium-ion 18650 batteries directly into Texas," and he produced two orders from another lawsuit in North Carolina involving both LGC and LGC America, which Morgan argues show LGC's attempt to serve the greater United States market for its lithium-ion 18650 batteries. Finally, Morgan produced a document entitled "LG Chem, Ltd. and Subsidiaries" for the time period of "September 30, 2016 and 2015," which Morgan argued showed that LGC wholly owns LGC America, a point that neither LGC nor LGC America dispute.[3] Morgan's trial counsel filed a sworn declaration, stating that each exhibit was a true and correct copy, and LGC did not object to Morgan's evidence.

Based on his pleadings and evidence, Morgan argued that LGC is subject to jurisdiction in Texas courts under a stream-of-commerce-plus theory because LGC ships lithium-ion batteries directly into Texas to Texas customers and therefore has purposefully availed itself of the privileges and benefits of conducting activities in Texas. Morgan further argued that the operative facts of the litigation arose from or are related to LGC's forum contacts because Morgan is a resident of Texas and he "purchased, used, and was injured by [LGC's] battery in Texas." Morgan alternatively requested additional jurisdictional discovery "should [the trial court] determine additional information is needed to rule on [LGC's] Special Appearance."

B. LGC America's Special Appearance

***3** LGC America also filed a special appearance, which it supported with a sworn affidavit from its compliance manager, averring that LGC America is incorporated in Delaware and has its principal place of business in Atlanta, Georgia, and that it "has not had any physical presence in the State of Texas since 2013," including owning any real property or having a post office box, bank accounts, employees, officers, or directors in Texas. It conceded that it generates approximately 6.37% of its revenue in Texas. The manager further averred that LGC America sells and distributes—but does not manufacture—various petrochemical materials and products. It denied having ever designed, manufactured, assembled, tested, inspected, or advertised "lithium-ion power cells" in Texas, or having

ever sold or distributed "any power cells meant for e-cigarettes or vaping devices" and, thus, that it "could not have designed, manufactured, tested, inspected, or advertised the power cell(s) at issue." The manager also denied having ever conducted business with the other named defendants except for LGC, including the manufacturer of the e-cigarette device and the seller of the device and LGC battery to Morgan. The manager further denied that LGC America authorized anyone else "to advertise, distribute, or sell LG brand power cells in Texas, or anywhere else, for use by individual consumers as power cells in e-cigarette or vaping devices." LGC America's manager did not deny that it marketed, sold, and distributed products for LGC, including batteries similar to the one that allegedly injured Morgan, to at least some customers in Texas.

In response, Morgan relied on much of the same evidence he used to oppose LGC's special appearance, which we discussed above. He argued that LGC America is LGC's wholly-owned distributor for batteries to the United States market, including Texas. He relied on printouts from LGC's website, which state that LGC developed "a lithium-ion battery for the first time in Korea" in 1999, and, "[s]ince then, it has continued to increase its sales volume in the battery market," and "LG Chem ... has led the world lithium-ion battery market...." Morgan also relied on the illegible printout showing that LGC America is a subsidiary of LGC, which neither LGC nor LGC America disputes, and two orders from a separate North Carolina lawsuit against LGC and LGC America, which Morgan contended showed that LGC serves the greater United States market for its lithium-ion 18650 batteries. Morgan's trial counsel filed a sworn declaration stating that each exhibit was a true and correct copy, and LGC America did not object to Morgan's evidence.

Morgan argued that LGC America did not dispute that "[LGC] ships lithium-ion batteries and other products directly into the State of Texas from Korea and [LGC America]—in its role as shipper and distributor—likely fulfills delivery and distribution of said items both in and throughout [Texas]." Morgan further argued that, "[o]n information and belief, [LGC America] also participates in the delivery of goods directly to the State of Texas." Morgan's response to LGC America's special appearance was similar to his response to LGC's special appearance: he argued that LGC America purposefully availed itself of the Texas market by marketing, selling, distributing, and shipping LGC's lithium-ion 18650 batteries to customers in Texas and that a substantial connection exists between the operative facts of the litigation and LGC America's forum contacts because "Morgan is a resident of Texas" and he "purchased, used, and was injured by [LGC's] battery in Texas." Morgan also asked for additional jurisdictional discovery "should this Court determine additional information is needed to rule on [LGC America's] Special Appearance."

After a hearing, the trial court denied both LGC's and LGC America's special appearances in separate written orders. The record does not indicate that the trial court ruled on Morgan's request for additional jurisdictional discovery, which became moot when the trial court denied the special appearances. *See Allstate Ins. Co. v. Hallman*, 159 S.W.3d 640, 642 (Tex. 2005) ("A case becomes moot if a controversy ceases to exist or the parties lack a legally cognizable interest in the outcome.") (citing *Bd. of Adjustment v. Wende*, 92 S.W.3d 424, 427 (Tex. 2002)). This appeal followed.

Special Appearance

A. Standard of Review

Whether a trial court has personal jurisdiction over a nonresident defendant is a question of law that we review de novo. *E.g., Old Republic Nat'l Title Ins. Co. v. Bell*, 549 S.W.3d 550, 558 (Tex. 2018) (citing *Moncrief Oil Int'l Inc. v. OAO Gazprom*, 414 S.W.3d 142, 150 (Tex. 2013)). When, as here, a trial court does not issue findings of fact and conclusions of law with its ruling on a special appearance, we imply all relevant facts necessary to support the judgment that are supported by evidence. *Id.* (citing *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002)). When the record on appeal includes the clerk's and reporter's records, the trial court's implied findings are not conclusive and may be challenged for legal and factual sufficiency. *Marchand*, 83 S.W.3d at 795 (citations omitted). A no-evidence legal sufficiency challenge fails if the finding is supported by more than a scintilla of evidence. *Id.* (citing *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 84 (Tex. 1992)).

B. Governing Law

***4** Texas courts may exercise personal jurisdiction over a nonresident defendant if: (1) the Texas long-arm statute authorizes the exercise of jurisdiction; and (2) the exercise of jurisdiction is consistent with federal and state constitutional due-process guarantees. *Bell*, 549 S.W.3d at 558 (quoting *Moncrief Oil*, 414 S.W.3d at 149, and citing *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 574 (Tex. 2007)). The Texas long-arm statute is expressly satisfied if, "[i]n

addition to other acts that may constitute doing business," a nonresident: "contracts by mail or otherwise with a Texas resident and either party is to perform the contract in whole or in part in this state" or if a nonresident "commits a tort in whole or in part in this state." Tex. Civ. Prac. & Rem. Code Ann. § 17.042. "However, allegations that a tort was committed in Texas do not necessarily satisfy the United States Constitution." *Bell*, 549 S.W.3d at 559 (citing *Moncrief Oil*, 414 S.W.3d at 149, and *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 788 (Tex. 2005)).

"[F]ederal due process requires that the nonresident must have 'certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." ' " *Id.* (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). A nonresident establishes minimum contacts with a forum when it "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Drugg*, 221 S.W.3d at 575 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), and *Holten*, 168 S.W.3d at 784). "[T]he defendant's in-state activities 'must justify a conclusion that the defendant could reasonably anticipate being called into a Texas court.' " *Bell*, 549 S.W.3d at 559 (quoting *Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 338 (Tex. 2009)).

When determining whether a defendant has purposefully availed itself of the privilege of conducting activities in Texas, we consider three factors:

> First, only the defendant's contacts with the forum are relevant, not the unilateral activity of another party or a third person. Second, the contacts relied upon must be purposeful rather than random, fortuitous, or attenuated.... Finally, the defendant must seek some benefit, advantage or profit by availing itself of the jurisdiction.

Id. (quoting *Moncrief Oil*, 414 S.W.3d at 151); *see TV Azteca v. Ruiz*, 490 S.W.3d 29, 38 (Tex. 2016) (stating that defendant's contacts must be "purposefully directed" towards Texas and "must result from the defendant's own 'efforts to avail itself of the forum' ") (citations omitted). A nonresident may purposefully avoid a jurisdiction "by structuring its transactions so as neither to profit from the forum's laws nor be subject to its jurisdiction." *Holten*, 168 S.W.3d at 785 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985)). "We assess 'the quality and the nature of the contacts, not the quantity.' " *TV Azteca*, 490 S.W.3d at 38 (quoting *Moncrief Oil*, 414 S.W.3d at 151).

A defendant's contacts may give rise to general jurisdiction or specific jurisdiction. *Bell*, 549 S.W.3d at 559 (citing *Moncrief Oil*, 414 S.W.3d at 150); *M&F Worldwide Corp. v. Pepsi-Cola Metro. Bottling Co., Inc.*, 512 S.W.3d 878, 885 (Tex. 2017). General jurisdiction, which is not at issue in this case,[4] is established when a defendant's contacts with the state "are so 'continuous and systematic' as to render [it] essentially at home in the forum State." *M&F Worldwide*, 512 S.W.3d at 885 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)). For a Texas court to exercise specific jurisdiction over a nonresident defendant: (1) the defendant's contacts with Texas must be purposeful; and (2) the cause of action must arise from or relate to those contacts. *Bell*, 549 S.W.3d at 559 (citation omitted); *accord Brown*, 564 U.S. at 919 (stating that specific jurisdiction requires " 'affiliatio[n] 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" and that "specific jurisdiction is confined to adjudication of 'issues deriving from, or connected with, the very controversy that establishes jurisdiction' ") (citation omitted).

***5** A seller's awareness "that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State." *Spir Star AG v. Kimich*, 310 S.W.3d 868, 873 (Tex. 2010) (quoting *CSR Ltd. v. Link*, 925 S.W.2d 591, 595 (Tex. 1996)). The Texas Supreme Court has held that a finding of purposeful conduct generally requires "some 'additional conduct'—beyond merely placing the product in the stream of commerce—that indicates 'an intent or purpose to serve the market in the forum State.' " *Id.* (quoting *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 112 (1987), *Drugg*, 221 S.W.3d at 577, and *Holten*, 168 S.W.3d at 786). Examples of such additional conduct include: (1) designing the product for the market in the forum state, (2) advertising in the forum state, (3) establishing channels for providing regular advice to customers in the forum state, and (4) marketing the product through a distributor who has agreed to serve as the sales agent in the forum state. *Id.* (quoting *Asahi*, 480 U.S. at 112, and citing *Drugg*, 221 S.W.3d at 577, *Holten*, 168 S.W.3d at 786, and *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 201 (Tex. 1985) (per curiam)).

The defendant's purposeful contacts "must be substantially connected to the operative facts of the litigation or form the basis of the cause of action." *Bell*, 549 S.W.3d at 559–60

(citing *Drugg*, 221 S.W.3d at 585, and *Holten*, 168 S.W.3d at 795); *see Walden v. Fiore*, 571 U.S. 277, 284 (2014) ("For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State."). Operative facts are the facts that "will be the focus of the trial, will consume most if not all of the litigation's attention, and the overwhelming majority of the evidence will be directed to that question." *Drugg*, 221 S.W.3d at 585.

In analyzing specific jurisdiction, we focus on the relationship between the forum, the defendant, and the litigation. *Bell*, 549 S.W.3d at 559 (citing *Moncrief Oil*, 414 S.W.3d at 150); *see Walden*, 571 U.S. at 285 ("[O]ur 'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there.") (citing *Int'l Shoe*, 326 U.S. at 319, and *Hanson*, 357 U.S. at 251). "[A] defendant's contacts with the forum State may be intertwined with his transactions or interactions with the plaintiff or other parties," "[b]ut a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction." *Walden*, 571 U.S. at 286 (citing *Rush v. Savchuk*, 444 U.S. 320, 332 (1980)). Specific jurisdiction must be established on a claim-by-claim basis unless all of the asserted claims arise from the same contacts with the forum. *M&F Worldwide*, 512 S.W.3d at 886 (citing *Moncrief Oil*, 414 S.W.3d at 150–51).

When personal jurisdiction is challenged, the plaintiff and the nonresident defendant bear shifting burdens of proof. *Bell*, 549 S.W.3d at 559 (citing *Kelly v. Gen. Interior Constr., Inc.*, 301 S.W.3d 653, 658 (Tex. 2010)). The plaintiff bears the initial burden to plead sufficient allegations to bring the nonresident defendant within the scope of Texas's long-arm statute. *Id.*; *see Kelly*, 301 S.W.3d at 658 ("Because the plaintiff defines the scope and nature of the lawsuit, the defendant's corresponding burden to negate jurisdiction is tied to the allegations in the plaintiff's pleading."). The trial court may consider the plaintiff's original pleadings as well as his response to the defendant's special appearance in determining whether the plaintiff satisfied his initial burden. *Washington DC Party Shuttle, LLC v. IGuide Tours*, 406 S.W.3d 723, 738 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (en banc) (citation omitted); *Touradji v. Beach Capital P'ship, L.P.*, 316 S.W.3d 15, 23 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (citation omitted). "In conducting our review, we accept as true the allegations in the petition." *Touradji*, 316 S.W.3d at 23 (citing *Pulmosan Safety Equip. Corp. v. Lamb*, 273 S.W.3d 829, 839 (Tex. App.—Houston [14th Dist.] 2008, pet. denied)). If the plaintiff fails to plead facts bringing the defendant within the reach of the long-arm statute, "the defendant need only prove that it does not live in Texas to negate jurisdiction." *Kelly*, 301 S.W.3d at 658–59.

***6** If the plaintiff meets his initial pleading burden, the burden shifts to the nonresident defendant to negate all bases of personal jurisdiction alleged by the plaintiff. *Bell*, 549 S.W.3d at 559 (citing *Kelly*, 301 S.W.3d at 658). The defendant can negate jurisdiction on either a factual or a legal basis. *Kelly*, 301 S.W.3d at 659. "Factually, the defendant can present evidence that it has no contacts with Texas, effectively disproving the plaintiff's allegations." *Id.* The plaintiff can then respond with his own evidence affirming his allegations, and if he does not present evidence establishing personal jurisdiction, he risks dismissal of his suit. *Id.* Legally, the defendant can show that even if the plaintiff's alleged facts are true, the evidence is legally insufficient to establish jurisdiction; that the defendant's contacts with Texas do not constitute purposeful availment; for specific jurisdiction, that the claims do not arise from the contacts with Texas; or that the exercise of jurisdiction offends traditional notions of fair play and substantial justice. *Id.*

"[J]urisdiction cannot turn on whether a defendant denies wrongdoing—as virtually all will. Nor can it turn on whether a plaintiff merely alleges wrongdoing—again as virtually all will." *Bell*, 549 S.W.3d at 560 (quoting *Holten*, 168 S.W.3d at 791). When conducting a jurisdictional analysis, "we must not confuse 'the roles of judge and jury by equating the jurisdictional inquiry with the underlying merits.' " *Id.* (quoting *Searcy v. Parex Res., Inc.*, 496 S.W.3d 58, 70 (Tex. 2016)).

C. Personal Jurisdiction Over LGC

LGC argues that it only placed its batteries into the stream of commerce without any additional conduct showing it intended to serve the Texas market. LGC further argues that it sells its batteries only to "sophisticated manufacturers," denying that it sells its batteries for use in e-cigarette devices by individual consumers like Morgan. LGC contends that without evidence that it directed the specific battery that allegedly injured Morgan into Texas, it is not subject to jurisdiction in Texas. Thus, LGC contends that even if it purposefully directed other, similar batteries into the Texas market, it is not subject to jurisdiction in Texas courts for Morgan's claims against it. In response, Morgan points out that LGC does not dispute that it manufactures and ships into Texas the same type of battery that allegedly harmed

him, and he contends that LGC construes its Texas activity too narrowly by arguing it targets only a subset of the Texas market for its batteries.

1. Morgan's initial burden to plead sufficient jurisdictional allegations

In his original petition, the live pleading on file when the trial court denied LGC's special appearance, Morgan alleged that he was injured by a battery that LGC "manufactured, marketed, sold, distributed, or otherwise placed into the stream of commerce," and he clarified in his special appearance response that LGC manufactured lithium-ion 18650 batteries like the one that injured him and that it targeted the Texas market for such batteries by selling them to Texas customers through its distributor, LGC America. *See Washington DC Party Shuttle*, 406 S.W.3d at 738 (stating that courts may consider plaintiff's pleadings and response to special appearance in determining whether plaintiff met initial burden to plead sufficient jurisdictional allegations); *Touradji*, 316 S.W.3d at 23 (same). Morgan alleged that he bought an e-cigarette device containing LGC's battery from a store in Brazoria County, that the battery did not include any warning about foreseeable risks, and that he used the e-cigarette device and LGC's battery in a reasonably foreseeable manner for their intended purpose as a battery-powered e-cigarette device. Based on these allegations, Morgan asserted products liability claims against LGC for designing, manufacturing, assembling, marketing, distributing, and selling defective and unreasonably dangerous batteries without warnings of foreseeable risks to customers in Texas, including him.

***7** As evidence supporting his jurisdictional allegations, Morgan produced voluminous spreadsheets, arguing that they showed LGC frequently ships its products, including lithium-ion 18650 batteries like the one that injured him, through Texas ports and to Texas customers, that many of its products are consigned to LGC America, LGC's wholly-owned distributor, and that hundreds of shipments of LGC's products have been delivered to at least eighty Texas entities.[5] Morgan pointed to website printouts from one particular entity, Stanley Black and Decker, showing the company has facilities in Texas and listing LGC as a "peer[ ] in innovation in consumer durables...." These allegations are sufficient to meet Morgan's initial burden to show that LGC was doing business in Texas under the long-arm statute. *See* Tex. Civ. Prac. & Rem. Code Ann. § 17.042; *Spir Star*, 310 S.W.3d at 871 ("We hold that a manufacturer is subject to specific personal jurisdiction in Texas when it intentionally targets Texas as the marketplace for its products, and that using a distributor-intermediary for that purpose provides no haven from the jurisdiction of a Texas court."). The burden thus shifted to LGC to negate all bases of alleged jurisdiction. *See Bell*, 549 S.W.3d at 559 (citing *Kelly*, 301 S.W.3d at 658).

2. Purposeful availment

LGC's only evidence in support of its special appearance was an affidavit of a senior manager and authorized representative who denied that LGC designs or manufactures batteries "for sale to individual consumers as standalone batteries"; denied that LGC distributes, advertises, or sells the type of battery that allegedly injured Morgan directly to consumers or authorizes any third party to do so; denied that LGC conducts business with other defendants except LGC America; and denied that it designed or manufactured the specific battery at issue in Texas. *See Kelly*, 301 S.W.3d at 659 (stating defendant can negate jurisdiction on factual basis by "present[ing] evidence that it has no contacts with Texas, effectively disproving the plaintiff's allegations"). Importantly, however, the affidavit did not deny that LGC designed, manufactured, distributed, marketed, or sold the type of battery that allegedly injured Morgan to Texas customers for at least some applications, and it did not deny that LGC America is its distributor in the United States. *See id.* Nor did LGC argue or produce evidence rebutting the voluminous Texas-imports spreadsheets showing that it ships large quantities of its products, including the type of battery that allegedly injured Morgan, to customers in Texas. *See id.* Therefore, Morgan's undisputed jurisdictional allegations and evidence show that LGC designs and manufactures batteries of the type that injured Morgan for the Texas market, and that it markets, sells, and distributes large quantities of such batteries to customers in Texas.

Generally, jurisdiction does not exist over a nonresident that merely places a product into the stream of commerce with awareness that the product could end up in a forum state; there must be some additional conduct indicating an intent or purpose to serve the market in the forum state. *E.g., Spir Star*, 310 S.W.3d at 873. Morgan's undisputed allegations and evidence indicate that LGC designed and manufactured its lithium-ion 18650 batteries for the Texas market, advertised them in Texas, and marketed them in Texas through a distributor that sold them in Texas. *See id.* (stating that examples of additional conduct include: (1) designing product for forum market, (2) advertising in forum, and (3) marketing product through distributor that has agreed to serve

as sales agent in forum). Thus, LGC's additional conduct indicates its intent to serve the Texas market for its lithium-ion 18650 batteries, at least to "sophisticated manufacturers."

***8** LGC relies on *J. McIntyre Machinery, Ltd. v. Nicastro* to argue that Morgan's evidence may show that it intended to serve the broader U.S. market but not that it intended to serve the Texas market specifically. *See* 564 U.S. 873, 884 (2011) ("Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State."). *Nicastro* held that a nonresident defendant that does not engage in activities revealing an intent to benefit from the market of a particular forum state is not subject to personal jurisdiction in that state's courts even if the activity shows an intent to benefit from the broader United States market. *Id.* at 886–87. In that case, a worker who was injured while using a metal-shearing machine brought a products liability action in New Jersey state court against the machine's manufacturer, J. McIntyre, an English company that manufactured the machine in England and sold its machines to customers in the United States generally through an independent company not subject to J. McIntyre's control. *Id.* at 878. The worker presented evidence that no more than four of J. McIntyre's machines—and likely "only [the] one" that injured him—had ever "ended up in New Jersey," but he presented no evidence that J. McIntyre marketed or shipped its machines to New Jersey. *Id.* J. McIntyre's officials had visited the United States to attend annual conventions with its distributor, but the conventions were never in New Jersey. *Id.* Because these contacts were insufficient to show J. McIntyre intended to invoke or benefit from the protection of New Jersey's laws, even if sufficient to show it intended to benefit from the broader U.S. market, New Jersey courts could not exercise personal jurisdiction over J. McIntyre in Nicastro's suit against it. *Id.* at 886–87.

Here, as we discussed above, there is sufficient evidence that LGC intended to serve the Texas market. Unlike J. McIntyre, the evidence shows that LGC marketed and shipped many lithium-ion 18650 batteries into Texas through a wholly-owned distributor that sold LGC's batteries in Texas. *See id.* at 878 (stating that English company was not subject to jurisdiction in New Jersey because no evidence showed it marketed or shipped its machines to New Jersey, even if it sold its machines in United States through independent distributor not subject to its control); *accord Spir Star*, 310 S.W.3d at 873 (holding that exercising jurisdiction over nonresident requires "some 'additional conduct'—beyond merely placing the product in the stream of commerce—that indicates 'an intent or purpose to serve the market in the forum State' "). LGC designed and manufactured its batteries for the Texas market and marketed and sold and distributed them here. These contacts are more significant than the single (or possibly four) machines that wound up in New Jersey even though J. McIntyre did not market or ship its machines there. *See Nicastro*, 564 U.S. at 886–87. Because the evidence indicates an intent to serve the Texas market specifically, and not just the United States more broadly, *Nicastro* does not support LGC's position. *See id.*

LGC also argues that it is not subject to jurisdiction because there is no evidence it shipped the actual battery that injured Morgan to Texas. We disagree. Morgan alleged that he was injured by one of LGC's batteries and he alleged and presented evidence that LGC manufactures and designs the same types of batteries and markets, sells, and distributes them to Texas. The burden shifted to LGC to negate this allegation, which it did not do. *See Bell*, 549 S.W.3d at 559 (citing *Kelly*, 301 S.W.3d at 658); *Kelly*, 301 S.W.3d at 659 (stating defendant can negate jurisdiction on factual basis by "present[ing] evidence that it has no contacts with Texas, effectively disproving the plaintiff's allegations"). Thus, we presume for purposes of our analysis that LGC shipped the battery that injured Morgan to Texas. Morgan's evidence showed that LGC, directly or indirectly through its distributor, marketed and distributed numerous lithium-ion 18650 batteries to customers in Texas, and it is reasonable to subject it to suit for Morgan's alleged injury from one of its batteries in Texas. *See Spir Star*, 310 S.W.3d at 874 ("[I]f the sale of a product of a manufacturer ... is not simply an isolated occurrence, but arises from the efforts of the manufacturer ... to serve *directly* or *indirectly*, the market for its products in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.") (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

***9** LGC also argues that it is not subject to jurisdiction in Texas because it does not have a relationship with the defendants that manufactured the e-cigarette device and sold the device and LGC battery to Morgan. But even so, we are concerned only with LGC's conduct, not with the unilateral activity of third persons. *See Bell*, 549 S.W.3d at 559 (stating that only defendant's forum contacts are relevant, not unilateral activity of third person). When a foreign manufacturer "specifically targets Texas as a market

for its products," as LGC did, "that manufacturer is subject to a product liability suit in Texas based on a product sold here, even if the sales are conducted through a Texas distributor or affiliate." *See Spir Star*, 310 S.W.3d at 874 (citing *Asahi*, 480 U.S. at 112). "In such cases, it is not the actions of the Texas intermediary that count, but the actions of the foreign manufacturer who markets and distributes the product to profit from the Texas economy." *Id.*; *accord Bell*, 549 S.W.3d at 559 ("[O]nly the defendant's contacts with the forum are relevant, not the unilateral activity of another party or a third person.") (quoting *Moncrief Oil*, 414 S.W.3d at 151).

Morgan's claims are not based on the manner in which LGC's batteries were transported into Texas or the chain of distribution, but rather on LGC's own conduct in manufacturing allegedly defective lithium-ion 18650 batteries and marketing, selling, and distributing them to customers in Texas, including him, through its distributor, LGC America. Thus, Morgan bases his claims on LGC's own conduct. *See Bell*, 549 S.W.3d at 559. Furthermore, manufacturing its batteries for the Texas market and marketing, selling, and distributing them to Texas customers is purposeful conduct—not random, fortuitous, or attenuated conduct—from which LGC profited. *See id.* ("Second, the contacts relied upon must be purposeful rather than random, fortuitous, or attenuated.... Finally, the defendant must seek some benefit, advantage, or profit by availing itself of the jurisdiction."). We conclude that LGC purposefully availed itself of the privilege of conducting activities in Texas, thus invoking the benefits and protections of its laws. *See Drugg*, 221 S.W.3d at 575 (quoting *Hanson*, 357 U.S. at 253, and *Holten*, 168 S.W.3d at 784).

3. Arise from or relate to

Due process requires that Morgan's claims arise from or relate to LGC's contacts with Texas before Texas courts can exercise specific jurisdiction over LGC. *See, e.g., Bell*, 549 S.W.3d at 559. This requires a substantial connection between the operative facts of the litigation and the defendant's purposeful forum contacts. *Id.* at 559–60. Morgan asserted products liability claims against LGC, which will require proof that LGC's battery was in a defective or unreasonably dangerous condition when it was sold and that the condition caused his injury. *See Ranger Conveying & Supply Co. v. Davis*, 254 S.W.3d 471, 479 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (stating elements of products liability action: (1) defendant placed product into stream of commerce; (2) product was in defective or unreasonably dangerous condition; and (3) causal connection existed between condition and plaintiff's injuries) (citing *Houston Lighting & Power Co. v. Reynolds*, 765 S.W.2d 784, 785 (Tex. 1988), and *Armstrong Rubber Co. v. Urquidez*, 570 S.W.2d 374, 376 (Tex. 1978)). Whether the batteries were unreasonably dangerous is generally a fact question for a jury to decide. *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 432 (Tex. 1997) (citing *Turner v. Gen. Motors Corp.*, 584 S.W.2d 844, 848 (Tex. 1979)).

LGC argues that Morgan's claims did not arise from or relate to its Texas contacts because it manufactured its batteries for and advertised, distributed, and sold them only to "sophisticated manufacturers," not to individuals consumers like Morgan for use in e-cigarette devices. As an initial matter, LGC has not disputed Morgan's allegation that the e-cigarette device and battery that injured him were not sold with warnings against the use of LGC's battery in an e-cigarette device or by an individual consumer. Moreover, LGC's affidavit did not define "sophisticated manufacturer,"[6] explain why the manufacturer of the e-cigarette device, in which LGC's battery was used when it allegedly exploded and caught fire, was not a "sophisticated manufacturer," or deny that "sophisticated manufacturers" who use LGC's batteries in their products would in turn sell their products using LGC's batteries to individual consumers.

***10** But more importantly, the issue of whether LGC's batteries were used in a foreseeable manner or were misused goes to the merits of a products liability action because "[f]oreseeability of risk of harm is a requirement for liability for a defectively designed product...." *See Hernandez v. Tokai Corp.*, 2 S.W.3d 251, 257 (Tex. 1999) (citation omitted). Although products do not generally need to be designed to reduce or avoid unforeseeable risks of harm, "the fact that the foreseeable risk of harm is due to a misuse of the product, rather than an intended use, is not an absolute bar to liability" but is instead "a factor that must be considered in allocating responsibility for the injury." *Id.* (citation omitted). "Jurisdiction cannot turn on whether a defendant denies wrongdoing—as virtually all will. Nor can it turn on whether a plaintiff merely alleges wrongdoing—again as virtually all will." *Bell*, 549 S.W.3d at 560 (quoting *Holten*, 168 S.W.3d at 791).

In this interlocutory review of LGC's special appearance, we are concerned only with whether Morgan's claims arise from LGC's forum contacts, not with the merits of Morgan's claims. *See id.* ("[W]e must not confuse 'the roles of judge and jury by equating the jurisdictional inquiry with the underlying

merits.' ") (quoting *Searcy*, 496 S.W.3d at 70). Such an inquiry properly focuses on LGC's forum contacts, not on the identity and unilateral activity of third-party purchasers of LGC's batteries. *See id.* at 559 ("[O]nly the defendant's contacts with the forum are relevant, not the unilateral activity of another party or a third person."). Morgan's undisputed allegations and evidence show that LGC designed and manufactured its lithium-ion batteries for customers in Texas and marketed, sold, and distributed them to Texas customers, and that Morgan's claims arise from or relate to the manufacture, marketing, and sale of LGC's batteries in Texas, which injured Morgan in Texas. *See id.*

LGC relies on *Bristol-Myers Squibb Co. v. Superior Court of California* to argue that it could not expect to be sued in Texas by Texas consumers who acquire its batteries and use them in a manner not intended by LGC. *See* 137 S. Ct. 1773 (2017). Bristol-Myers was a pharmaceutical company that was incorporated in Delaware, headquartered in New York, and maintained substantial operations in New York and New Jersey. *Id.* at 1777–78. It sold a prescription drug, Plavix, in California and engaged in business activities there, including having research and laboratory facilities with about 160 employees and approximately 250 sales representatives in the state, but it did not develop Plavix in California or manufacture, package, or work on regulatory approval in California. *Id.* at 1778. Numerous California residents and nonresidents filed a class-action products liability lawsuit against Bristol-Myers in California, alleging that Plavix damaged their health. *Id.* The nonresident plaintiffs did not allege that they obtained Plavix in California or through California physicians or that they were injured or treated for their injuries in California. *Id.*

Bristol-Myers challenged jurisdiction in California courts over the claims by the nonresident plaintiffs only—but not the claims by the resident plaintiffs. *Id.* The California Supreme Court affirmed a finding of specific jurisdiction over the nonresident plaintiffs' claims against Bristol-Myers, applying a sliding-scale approach that relaxed the connection between a defendant's forum contacts and the specific claims at issue if a defendant had extensive, though unrelated, contacts. *Id.* at 1778–79. The United States Supreme Court disagreed, rejecting the sliding-scale approach to jurisdiction. *Id.* at 1781. The Court held that California courts lacked specific jurisdiction over the nonresident plaintiffs' claims against Bristol-Myers, reasoning that the nonresident plaintiffs could not rely solely on their relationship to the resident plaintiffs, who were prescribed Plavix in California and who ingested it, were injured by it, and were treated for it in California. *Id.* at 1781–82, 1783; *accord Walden*, 571 U.S. at 286, 291 (stating that "defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction" and that where relevant conduct occurred entirely in other state, mere fact that conduct affected plaintiffs with connection to forum state did not confer jurisdiction). Nor could the nonresident plaintiffs rely on Bristol-Myers's conducting research in California on matters unrelated to Plavix, which the Court noted was irrelevant to the jurisdictional inquiry. *Bristol-Myers Squibb*, 137 S. Ct. at 1781. The Court distinguished the nonresidents' claims from the residents' claims, stating that the former "are not California residents[,] ... do not claim to have suffered harm in that State[,] [and,] as in *Walden*, all the conduct giving rise to the nonresidents' claims occurred elsewhere." *Id.* at 1782.

***11** LGC misreads the import of *Bristol-Myers Squibb*, which was that Bristol-Myers could not have expected to be sued in California by nonresident plaintiffs who were not prescribed Plavix by California physicians or sold Plavix in California, did not ingest Plavix in California, and were not treated for their alleged Plavix-related injuries in California, even though Bristol-Myers sold Plavix to residents in California and could expect to be sued by them there. *See id.* at 1781–82. Here, Morgan does not rely on his relationship to other parties; he is a resident of Texas, he bought and used the LGC battery that allegedly injured him in Texas, and he was allegedly injured and treated for his injury in Texas. Thus, unlike the nonresident plaintiffs in *Bristol-Myers Squibb*, Morgan does not rely on a sliding-scale approach to jurisdiction and *Bristol-Myers Squibb* provides no support for LGC's position.

In its reply brief, LGC argues that *Moki Mac River Expeditions v. Drugg* supports a lack of substantial connection between its forum contacts and the operative facts of Morgan's claims. *See* 221 S.W.3d at 585 (holding that, to support exercise of specific jurisdiction, substantial connection must exist between nonresident defendant's forum contacts and operative facts of litigation). We disagree. *Moki Mac* did not involve products liability claims, as this case does, but rather involved claims of negligence and intentional and negligent misrepresentation against Moki Mac, a nonresident river-rafting company, arising from the plaintiffs' son's fatal injury while hiking on Moki Mac's guided rafting tour in Arizona. *Id.* at 573. The plaintiffs argued that Moki Mac misrepresented the safety of its tours in promotional materials it sent to the plaintiffs at their home in Texas, and that but for those

misrepresentations, they would not have sent their son on the rafting tour. *Id.* at 576. The Texas Supreme Court rejected the plaintiffs' argument that but-for causation should be the standard in special appearances, finding that "the but-for test [is] too broad and judicially unmoored to satisfy due-process concerns." *Id.* at 581. Instead, the court held that a substantial connection must exist between a nonresident defendant's Texas contacts and the operative facts of the litigation before Texas courts may exercise jurisdiction over the nonresident. *Id.* at 585 (citing *Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 229–33 (Tex. 1991), and *Rush*, 444 U.S. at 329). The court concluded that the operative facts of the plaintiffs' negligence and misrepresentation claims were not substantially connected to the hike in Arizona because "[o]nly after thoroughly considering the manner in which the hike was conducted will the jury be able to assess the [plaintiffs'] misrepresentation claim." *Id.* "In sum, 'the [alleged misrepresentation] is not the subject matter of the case ... nor is it related to the operative facts of the negligence action.' " *Id.* (quoting *Rush*, 444 U.S. at 329).

LGC argues that "the absence of a substantial connection is even more pronounced in this case than it was in *Moki Mac*" because "the plaintiffs' allegation of reliance made the promotional materials at least a colorable but-for cause of the accident." However, *Moki Mac* rejected a but-for causation standard for special appearances as "too broad and judicially unmoored to satisfy due-process concerns," so it is irrelevant whether Morgan sufficiently alleged a but-for cause of his injuries. *See id.* at 581. As we discussed above, Morgan has alleged that a substantial connection exists between LGC's forum contacts and the operative facts, which is the relevant inquiry. *See Bell*, 549 S.W.3d at 559–60 (citing *Drugg*, 221 S.W.3d at 585, and *Holten*, 168 S.W.3d at 795).

We conclude that Morgan's products liability claims for the LGC battery that allegedly exploded and injured him in Texas arises from or relates to LGC's conduct in designing and marketing its batteries for the Texas market, and marketing, selling, and distributing them to customers here. Based on its forum activities, LGC could reasonably anticipate being called into a Texas court when an allegedly defective and unreasonably dangerous battery causes an injury in Texas. *See id.* at 559.

D. Personal Jurisdiction Over LGC America

***12** LGC America's arguments on appeal are mostly identical to LGC's arguments. For example, LGC America argues that: (1) it did not sell LGC's batteries to individual customers as replacement batteries for e-cigarette devices, but only to sophisticated manufacturers; (2) the evidence only shows LGC America's intent to serve the United States market as a whole, not the Texas market specifically; (3) Morgan bought the LGC battery from a third party with whom LGC America has no relationship and to whom LGC America never sold any batteries; and (4) Morgan presented no evidence that LGC America distributed the actual battery that injured him into Texas. We reject these arguments for the same reasons we discussed above regarding LGC's identical arguments. *See M&F Worldwide*, 512 S.W.3d at 886 (stating appellate courts generally review personal jurisdiction on claim-by-claim basis except where plaintiff's claims arise from same jurisdictional contacts).

Morgan's original petition alleged that LGC or LGC America manufactured, marketed, distributed, sold, and placed into the stream of commerce the battery that injured him. Morgan argued in his special appearance response that LGC America markets, distributes, and sells LGC's batteries to Texas, that LGC America "likely fulfills delivery and distribution" of power cells in Texas, and that, "on information and belief, [LGC America] also participates in the delivery of goods directly to the State of Texas." He further alleged that he bought one of those batteries in Texas, that it did not have a warning label, that he used it for its intended or reasonably anticipated use, and that he was injured when it exploded and caught fire in his pants pocket in Texas. Thus, Morgan met his initial burden to plead allegations bringing LGC America within the Texas long-arm statute. *See Spir Star*, 310 S.W.3d at 873 (stating that marketing product in forum is additional conduct beyond merely placing product into stream of commerce indicating intent or purpose to serve market in forum). The burden thus shifted to LGC America to negate all bases of jurisdiction alleged by Morgan. *See Bell*, 549 S.W.3d at 559 (citing *Kelly*, 301 S.W.3d at 658).

LGC America's evidence consisted only of an affidavit from its compliance manager, who denied that LGC America designed, manufactured, or advertised "lithium-ion power cells" in Texas, that it sold or distributed "any power cells meant for e-cigarettes or vaping devices," including to Texas, or that it authorized any third party to do so. The manager did not deny, however, Morgan's allegations that LGC America marketed, sold, and distributed LGC's batteries to customers in Texas beyond denying that it sold or distributed "any power cells meant for e-cigarette or vaping devices." The manager conceded that LGC America generated approximately 6%

of its revenue from Texas. Because LGC America did not meet its burden to negate these jurisdictional allegations, we consider them true for purposes of our review.[7] *See id.*; *Touradji*, 316 S.W.3d at 23 (citing *Lamb*, 273 S.W.3d at 839).

These allegations are sufficient to show that LGC America purposefully availed itself of the benefits and privileges of Texas laws and that Morgan's claims arise from or relate to LGC America's forum contacts. *See Bell*, 549 S.W.3d at 559. We disagree with LGC America that Morgan attempts to impute LGC's contacts to it. Morgan relies on LGC America's own contacts with Texas by marketing, selling, and distributing LGC's batteries to customers in Texas, which is additional conduct beyond placing a product into the stream of commerce that indicates LGC America's intent to serve the Texas market. *See Spir Star*, 310 S.W.3d at 873. Therefore, we conclude that LGC America purposefully availed itself of the privilege of conducting activities in Texas, thus invoking the benefits and protections of Texas laws. *See Drugg*, 221 S.W.3d at 575.

***13** Morgan's claims also arise from or relate to LGC America's forum contacts. Distributors and sellers of third-party manufactured products can be held strictly liable in a products liability action for putting a defective or unreasonably dangerous product into the stream of commerce. *New Tex. Auto Auction Servs., L.P. v. Gomez De Hernandez*, 249 S.W.3d 400, 403–04 (Tex. 2008). LGC America did not present any evidence that it did not market, distribute, and sell lithium-ion 18650 batteries like the one that allegedly injured Morgan to customers in Texas. The operative facts of Morgan's claims against LGC America will focus on the LGC battery that he bought in Texas and which exploded and caught fire in Texas, injuring Morgan in Texas. The operative facts of Morgan's claims thus arise out of the LGC batteries that LGC America marketed, sold, and distributed to customers in Texas, including Morgan. *See Bell*, 549 S.W.3d at 559.

We conclude that LGC America's purposeful contacts with Texas justify a conclusion that it could reasonably anticipate being called into a Texas court when one of LGC's batteries that it marketed, distributed, and sold is alleged to be defective or unreasonably dangerous. *See id.*

E. Traditional Notions of Fair Play and Substantial Justice

Neither LGC nor LGC America argues that asserting jurisdiction over it would offend traditional notions of fair play and substantial justice, much less presents "a compelling case that the presence of some consideration would render jurisdiction unreasonable" as was required to defeat jurisdiction. *See Spir Star*, 310 S.W.3d at 878–79 (quoting *Guardian Royal*, 815 S.W.2d at 231). A party waives an issue by not briefing it. *See* Tex. R. App. P. 38.1(f), (i); *DiGiuseppe v. Lawler*, 269 S.W.3d 588, 597 n.10 (Tex. 2008) ("Ordinarily, failure to brief an argument waives the claimed error.") (citation omitted). Because appellants did not brief the issue, we conclude that it is waived. *See* Tex. R. App. P. 38.1(f), (i); *DiGiuseppe*, 269 S.W.3d at 597 n.10; *see also Spir Star*, 310 S.W.3d at 878 ("Only in rare cases ... will the exercise of jurisdiction not comport with fair play and substantial justice when the nonresident defendant has purposefully established minimum contacts with the forum state.") (citing *Guardian Royal*, 815 S.W.2d at 231).

We therefore hold that the trial court did not err in denying LGC's and LGC America's special appearances.

We overrule appellants' issues.[8]

Conclusion

We affirm the trial court's orders denying LGC's and LGC America's special appearances. We dismiss any pending motions as moot.

All Citations

Not Reported in S.W. Rptr., 2020 WL 7349483

Footnotes

1 Morgan also asserted causes of action for negligence and gross negligence, breach of express and implied warranties, and violations of the Texas Deceptive Trade Practices–Consumer Protection Act, *see* Tex. Bus. & Com. Code Ann. §§ 17.41–.63, but all parties agree on appeal that Morgan's lawsuit against LGC and LGC America is based on products liability.

2 The other defendants included two entities, WISMEC USA and Vapor Sense, and fifty John and Jane Does. These defendants are not parties to this appeal, and they are not integral to our discussion of this case except as otherwise noted.

3 Morgan used this document to support his response to both LGC and LGC America's special appearances, so this document appears twice in the record on appeal, but both versions appear to be corrupted because all of LGC's "Consolidated subsidiaries" are illegible in both copies. However, neither LGC nor LGC America disputes that LGC wholly owns LGC America.

4 Morgan concedes that neither LGC nor LGC America is subject to general personal jurisdiction in this case.

5 On appeal, LGC characterizes Morgan's evidence as "unauthenticated," but the record does not reflect that LGC objected to Morgan's evidence in the trial court, and LGC does not offer any argument about it on appeal. A general prerequisite to presenting a complaint for appellate review is that the record must show that the complaint was timely made to the trial court with sufficient specificity and that the trial court ruled or refused to rule on the objection. Tex. R. App. P. 33.1(a). Had LGC raised its objection in the trial court, Morgan would have had an opportunity to rebut LGC's objection and, if necessary, to cure the defect by supplementing his special appearance evidence. Because LGC did not object to Morgan's evidence in the trial court, this complaint is waived. *See id.*

6 The affidavit does not mention "sophisticated manufacturers," only "sophisticated companies," a term not defined in the affidavit.

7 For the first time in its reply brief, LGC America argues that "Morgan did not allege that [LGC America] so much as touched the lithium-ion power cell he purchased from a vaping retailer. And [LGC America's] undisputed evidence negates the possibility that it ever sold the product. This ends the inquiry." We disagree. Generally, arguments raised for the first time in reply briefs are waived and need not be considered by this Court. *E.g., McAlester Fuel Co. v. Smith Int'l, Inc.*, 257 S.W.3d 732, 737 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (citations omitted). But even if LGC America did not waive this argument, the face of Morgan's pleadings and LGC America's supporting affidavit belie LGC America's argument.

8 Because we overrule appellants' issues and affirm the trial court's orders denying their special appearances, we do not decide Morgan's "conditional cross point," asking the Court to remand for additional jurisdictional discovery "should this Court determine the trial court erred in denying" the special appearances.

End of Document

2022 WL 452501
United States District Court, E.D. Michigan, Southern Division.

Michael SULLIVAN, Plaintiff,
v.
LG CHEM, LTD. and LG Energy Solution Michigan, Inc., Defendants.

Case No. 21-11137
|
Signed 02/14/2022

Synopsis

Background: Michigan purchaser of lithium-ion batteries for use in electronic cigarettes brought state court action against South Korean battery manufacturer, asserting claims for negligence and gross negligence, arising from incident in which batteries exploded. Following removal, manufacturer moved to dismiss for lack of personal jurisdiction.

Holdings: The District Court, Laurie J. Michelson, J., held that:

court lacked general personal jurisdiction over manufacturer;

manufacturer purposefully availed itself of privilege of acting in Michigan, for purposes of determining whether federal court in Michigan had specific personal jurisdiction;

manufacturer's contacts with Michigan related to consumer's negligence and gross negligence claims;

exercise of specific personal jurisdiction would comport with traditional notions of fair play and substantial justice; but

consumer's failure to argue that his claims arose out of manufacturer's activities in Michigan precluded finding that Michigan's long-arm statute applied to consumer's claims.

Motion granted.

Attorneys and Law Firms

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OPINION AND ORDER GRANTING LG CHEM'S MOTION TO DISMISS [3]

LAURIE J. MICHELSON, UNITED STATES DISTRICT JUDGE

***1** The facts of this case, it turns out, are not unusual. A plaintiff purchases lithium-ion batteries—allegedly manufactured by LG Chem—in his or her home state for use in an electronic cigarette. The batteries later explode and cause the plaintiff serious injuries. The plaintiff sues LG Chem. Cases based on similar facts have been filed in at least 10 jurisdictions.[1] Each time, LG Chem, a South Korean corporation, has filed a motion to dismiss for lack of personal jurisdiction, arguing that it lacks the necessary contacts with each state to satisfy the forum's long-arm statute and the Due Process Clause of the Fourteenth Amendment. In all but two of these cases, LG Chem has been successful. *See Berven v. LG Chem, Ltd.*, No. 118CV01542DADEPG, 2019 WL 4687080 (E.D. Cal. Sept. 26, 2019); *Tieszen v. EBay, Inc. et. al*, No. 4:21-CV-04002-KES, 2021 WL 4134352 (D.S.D. Sept. 10, 2021).

But two things make this case unusual. First, with the benefit of jurisdictional discovery, Sullivan provided the Court with specific facts about LG Chem's activities in Michigan, including direct shipments of LG 18650 batteries to Michigan as well as two contracts with Michigan entities for 18650 batteries. Second, the Supreme Court's most recent opinion on specific personal jurisdiction clarified that "some relationships [between a defendant and a forum] will support jurisdiction without a causal showing," at least where the defendant serves a market in a state for the very product that injured the plaintiff. *See Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, —— U.S. ——, 141 S. Ct. 1017, 1026–28, 209 L.Ed.2d 225 (2021). With these benefits, the Court concludes that LG Chem's contacts with Michigan satisfy the requirements of the Due Process Clause, at least at the motion-

to-dismiss stage. However, in this Court's view, Michigan's long-arm statute might offer additional protection to LG Chem. Yet Sullivan treats Michigan's long-arm statute as if it has the same scope as the Due Process Clause. Because Sullivan has not shown that his cause of action "ar[ose] out of" LG Chem's contacts with Michigan as that phrase is used in the long-arm statute, this Court dismisses the case for want of personal jurisdiction.

I. Background

***2** As discussed at length below, when deciding a 12(b)(2) motion to dismiss for lack of personal jurisdiction without an evidentiary hearing, the Court takes the pleadings and affidavits in the light most favorable to the plaintiff, in this case Sullivan. *See Theunissen v. Matthews*, 935 F.2d 1454, 1459 (6th Cir. 1991).

A. Factual Background

In March 2018, Michael Sullivan's wife purchased an electronic cigarette and four LG HG2 18650 lithium-ion batteries from a local Michigan smoke shop. (ECF No. 1-1, PageID.22.) About seven months later, Sullivan had two of the LG 18650 batteries in his front, left pants pocket when they suddenly exploded. (*Id.*) The explosion caused flames and sparks to "shoot out of his pocket," and Sullivan immediately tried to put out the fire with his hand. (*Id.*) But before it could be extinguished, the flames caused "severe second-and third-degree burns to his left hand and left upper thigh." (ECF No. 1-1, PageID.23.) He was soon transferred to a burn unit, where he underwent debridement treatments to remove the burned skin and received skin graft surgery. (ECF No. 10, PageID.337.)

B. Procedural Background

On December 22, 2020, Sullivan filed a complaint in Genesee County Circuit Court against defendants LG Chem and LG Chem's Michigan-based subsidiary, LG Energy Solutions Michigan (LGESMI). (ECF No. 1-1, PageID.24.) He asserted claims for negligence and gross negligence against both parties. (*Id.* at PageID.24–27.)

LG Chem then removed this action to federal court based on diversity of citizenship, alleging that LGESMI had been fraudulently joined. (ECF No. 3-4, PageID.291.) Sullivan acknowledged this argument, but neither asked this court to remand the case nor contested that LGESMI had been fraudulently joined, so he appears to have waived his claims against LGESMI. *See* (ECF No. 10, PageID.340); *Kennedy v. Comm'r of Soc. Sec.*, 87 Fed.Appx. 464, 466 (6th Cir. 2003) ("[I]ssues which are adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." (internal quotation marks omitted)). So LGESMI is dismissed.

In time—and in keeping with similar cases—LG Chem filed a motion to dismiss for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2). (ECF. No. 3, PageID.235.) Sullivan opposed the motion, conceding that LG Chem is a South Korean corporation, but arguing that LG Chem has "significant contacts with the state of Michigan relating to its lithium-ion battery business." (ECF No. 10, PageID.338; ECF No. 3-2, PageID.268.) He also requested oral argument or jurisdictional discovery. (ECF No. 10, PageID.328.)

The Court held a hearing on the motion and granted Sullivan "limited written jurisdictional discovery on the issue of LG Chem's contacts with Michigan related to the 18650 batteries." (ECF No. 18; ECF No. 20, PageID.708); *see also Malone v. Stanley Black & Decker, Inc.*, 965 F.3d 499, 506 (6th Cir. 2020) (explaining that a consumer in a products liability case may need discovery to reveal whether the defendant is amenable to suit). Discovery has since concluded, and the parties have submitted their supplemental briefs. (*See* ECF Nos. 21, 25.) Sullivan has not asked for further discovery or for an evidentiary hearing, though he did request a second round of oral argument. (*See* ECF No. 25.) But given the extensive briefing and record, the Court considers the motion without additional oral argument. *See* E.D. Mich. LR 7.1(f). For the reasons below, the Court finds that it lacks general and specific personal jurisdiction over LG Chem and DISMISSES this case.

II. Legal Standard

***3** "The party seeking to assert personal jurisdiction bears the burden of demonstrating that such jurisdiction exists." *Schneider v. Hardesty*, 669 F.3d 693, 697 (6th Cir. 2012). But the plaintiff's burden varies depending on the district court's response to the motion to dismiss, as the court may (1) decide the motion on the basis of written submissions and affidavits

alone, (2) permit discovery in aid of the motion, or (3) conduct an evidentiary hearing on the merits of the motion. *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir. 1991).

The Court here selected the second option and permitted Sullivan to take limited jurisdictional discovery. Because there is a factual dispute about precisely how many shipments of 18650 batteries LG Chem sent to Michigan, the burden of proof on Sullivan is the *prima facie* standard. *See Schneider*, 669 F.3d at 697 (discussing potential "exception" to the normal *prima facie* standard where there is neither a factual dispute nor a dispute as to the extent of discovery); *see also Lyngaas v. Curaden AG*, No. 17-CV-10910, 2018 WL 1251754, at *2 (E.D. Mich. Mar. 12, 2018) (discussing standard and collecting cases).

A *prima facie* showing of the court's personal jurisdiction requires that the plaintiff establish "with reasonable particularity sufficient contacts between [the defendant] and the forum state to support jurisdiction." *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 887 (6th Cir. 2002). In response to a motion to dismiss, "the plaintiff may not stand on his pleadings, but must show the specific facts demonstrating that the court has jurisdiction." *Miller v. AXA Winterthur Ins. Co.*, 694 F.3d 675, 678 (6th Cir. 2012). The pleadings and affidavits submitted on a 12(b)(2) motion are "received in a light most favorable to the plaintiff[,] ... [and] the court disposing of a 12(b)(2) motion does not weigh the controverting assertions of the party seeking dismissal." *Theunissen*, 935 F.2d at 1459 (citing *Serras v. First Tennessee Bank Nat. Ass'n*, 875 F.2d 1212, 1214 (6th Cir. 1989)). But the Court is not precluded from considering the undisputed factual representations of the defendant that are consistent with the plaintiff's representations. *Kerry Steel, Inc. v. Paragon Indus., Inc.*, 106 F.3d 147, 153 (6th Cir. 1997). As another court in this circuit succinctly summarized: "The upshot seems to be this: in opposing a motion to dismiss for lack of personal jurisdiction, a plaintiff cannot rely on mere allegations in the complaint, unless they are uncontroverted by the defendant-movant—in which case they can be accepted as true, as can the averments in the plaintiff's declarations (even if contradicted) and the defendant's undisputed factual assertions." *Shelter Mut. Ins. Co. v. Bissell Homecare, Inc.*, No. 3:20-CV-00813, 2021 WL 1663585, at *3 (M.D. Tenn. Apr. 28, 2021). And "[d]ismissal [at the 12(b)(2) stage] is proper only if all the specific facts which the plaintiff ... alleges collectively fail to state a *prima facie* case for jurisdiction." *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1262 (6th Cir. 1996) (citing *Theunissen*, 935 F.2d at 1458).

Having laid out the standard, the Court also finds it helpful to highlight Sullivan's specific jurisdictional allegations.

Sullivan's response to the motion to dismiss references the following from its complaint: (1) LG Chem's filings in a patent infringement case that state that LG Chem, through its subsidiaries in Michigan, "has invested hundreds of millions of dollars and employs hundreds of people in the United States, primarily in Michigan, who are dedicated to the design, ... manufacturing, testing, ... and customer care of its lithium-ion batteries" (ECF No. 10-3, PageID.375); (2) a deposition from a different case where an LG Chem representative explained that LG Chem sells 18650 batteries to major manufacturers, which are in turn incorporated into power tools, which are in turn sold in the state of Michigan (ECF No. 10-4, PageID.399, 411); and (3) a document allegedly showing that LG Chem imported three orders of lithium-ion batteries (maybe or maybe not 18650s) to its subsidiaries in Michigan (ECF No. 10-6). (*See generally* ECF No. 10, PageID.338–40.)

***4** With the benefit of jurisdictional discovery, Sullivan now adds the following in support of establishing personal jurisdiction: (4) one verified shipment of 100 LG 18650 battery cells to a Michigan-based vacuum-cleaner manufacturer (ECF No. 21-4, PageID.808; ECF No. 21, PageID.718); (5) an unknown quantity of shipments of 18650 batteries to an LG Chem subsidiary in Michigan for "research and development purposes" (ECF No. 21, PageID.720); and (6) two supplier agreements with Michigan companies for 18650 batteries, one with the vacuum-cleaner manufacturer mentioned above and one with a Michigan-based automotive supplier which resulted in many shipments of 18650 batteries to a different state (ECF No. 21-4, PageID.808–809). (*See generally* ECF No. 21, PageID.717–720; ECF No. 25, PageID.955–957.)

III. Personal Jurisdiction

"A federal court sitting in diversity may not exercise jurisdiction over a defendant unless courts of the forum state would be authorized to do so by state law—and any such exercise of jurisdiction must be compatible with the due process requirements of the United States Constitution." *Malone*, 965 F.3d at 502 (citing *Int'l Techs. Consultants, Inc.*

v. Euroglas S.A., 107 F.3d 386, 391 (6th Cir. 1997)). Personal jurisdiction comes in two forms: general and specific. *See generally Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, —— U.S. ——, 141 S. Ct. 1017, 1024–25, 209 L.Ed.2d 225 (2021). General jurisdiction is proper when a defendant's "contacts with the forum state are of such a continuous and systematic nature that the state may exercise personal jurisdiction over the defendant even if the action is unrelated to the defendant's contacts with the state." *Intera Corp. v. Henderson*, 428 F.3d 605, 615 (6th Cir. 2005) (quoting *Third Nat'l Bank in Nashville v. WEDGE Group, Inc.*, 882 F.2d 1087, 1089 (6th Cir. 1989)). Specific jurisdiction, on the other hand, is proper only when "claims in the case arise from or are related to the defendant's contacts with the forum state." *Id.* Here, Sullivan has failed to make a case for either form of personal jurisdiction.

A. General Jurisdiction

It is not entirely clear if Sullivan is attempting to argue that LG Chem is subject to general personal jurisdiction in Michigan. But because Sullivan cites and briefly discusses Michigan's general jurisdiction long-arm statute for corporations, the Court will address this argument anyway. *See* (ECF No. 10, PageID.342, 344); Mich. Comp. Laws § 600.711. And because the parties focus on the constitutional requirements of general jurisdiction, the Court starts (and ends) its analysis there.

With respect to a corporation, "the place of incorporation and principal place of business are paradig[m] ... bases for general jurisdiction" under the Due Process Clause. *Daimler AG v. Bauman*, 571 U.S. 117, 133, 137, 134 S.Ct. 746, 187 L.Ed.2d 624 (2014) (internal quotation omitted). But in an "exceptional case," a corporation's affiliations with a forum state might be so extensive as to render it "at home" somewhere other than its place of incorporation or principal place of business. *See BNSF Ry. Co. v. Tyrrell*, —— U.S. ——, 137 S. Ct. 1549, 1558, 198 L.Ed.2d 36 (2017) (quoting *Daimler*, 571 U.S. at 129 n.19, 134 S.Ct. 746).

Assuming Sullivan is arguing for general personal jurisdiction, he has not satisfied this burden. First, he acknowledges that LG Chem is a South Korean company with its principal place of business in South Korea. (ECF No. 3-2, PageID.268; ECF No. 10, PageID.342, 344.) But he suggests that LG Chem is subject to general jurisdiction because "LG Chem has bragged about its lithium-ion business in Michigan for years ... [and] has invested 'hundreds of millions of dollars and employs hundreds of people in the United States, primarily in Michigan.' " (ECF No. 10, PageID.344 (quoting patent case filed by LG Chem in the Eastern District of Michigan (ECF No. 10-3)).)

***5** But that is not enough for general personal jurisdiction. First, the language Sullivan quoted above clearly references the activities of LG Chem's Michigan-based subsidiaries when read in the context of that patent suit.[2] (*See* ECF No. 10-3, PageID.375.) And "Michigan law presumes that, absent some abuse of corporate form, parent and subsidiary corporations are separate and distinct entities" for purposes of personal jurisdiction. *See Anwar v. Dow Chem. Co.*, 876 F.3d 841, 850 (6th Cir. 2017) (quoting *Seasword v. Hilti, Inc.*, 449 Mich. 542, 537 N.W.2d 221, 224 (1995)). Sullivan makes no argument that LG Chem has abused its corporate form or that the Michigan subsidiaries are a mere alter ego of LG Chem. (*See* ECF Nos. 10, 25.) Second, even assuming the facts above were true of LG Chem itself, this would not be enough for general jurisdiction. Indeed, that is almost the exact argument that the Supreme Court rejected in *Daimler*: "Plaintiffs would have us ... approve the exercise of general jurisdiction in every State in which a corporation 'engages in a substantial, continuous, and systematic course of business.' ... That formulation, we hold, is unacceptably grasping." *See* 571 U.S. at 137–38, 134 S.Ct. 746.

In sum, because LG Chem is not incorporated in and does not have its principal place of business in Michigan—and because it is not otherwise "at home" in Michigan—LG Chem is not subject to general personal jurisdiction here. *See Daimler*, 571 U.S. at 129 n.19, 134 S.Ct. 746. Because Sullivan has not satisfied the due process requirements, the Court need not consider the state's long-arm statute for general personal jurisdiction.

B. Specific Jurisdiction

That leaves specific jurisdiction. As explained, "[f]or specific jurisdiction to exist in a diversity case, two factors must be satisfied: the forum state long-arm statute, and constitutional due process." *Miller v. AXA Winterthur Ins. Co.*, 694 F.3d 675, 679 (6th Cir. 2012). Because the parties focus their arguments on constitutional due process, the Court will, once again, begin there.

1. Due Process

"The Fourteenth Amendment's Due Process Clause limits a ... court's power to exercise jurisdiction over a defendant." *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, —— U.S. ——, 141 S. Ct. 1017, 1024, 209 L.Ed.2d 225 (2021). As the Supreme Court has explained, the nonresident defendant must have sufficient minimum contacts with the forum state such that the maintenance of the suit is "reasonable ... [and] does not offend traditional notions of fair play and substantial justice." *Id.* (quoting *International Shoe Co. v. Washington*, 326 U. S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945)).

In the Sixth Circuit, courts apply a three-part test to decide whether the exercise of personal jurisdiction is consistent with due process. *AlixPartners, LLP v. Brewington*, 836 F.3d 543, 549 (6th Cir. 2016). Part one asks whether the defendant "purposefully avail[ed] himself of the privilege of acting in the forum state or caus[ed] a consequence in the forum state." *Id.* Part two looks to whether the suit arises from or relates to the defendant's activities in the forum. *Id.*; *see also Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, —— U.S. ——, 141 S. Ct. 1017, 1026, 209 L.Ed.2d 225 (2021). And part three assesses whether the defendants' actions and their consequences "have a substantial enough connection" with Michigan to "make the exercise of jurisdiction over the defendant[s] reasonable." *Brewington*, 836 F.3d at 550.

***6** At step one, the Court considers whether LG Chem purposefully availed itself of the privilege of acting in Michigan. Purposeful availment "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts." *LAK, Inc. v. Deer Creek Enterprises*, 885 F.2d 1293, 1300 (6th Cir. 1989) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985)). Indeed, neither the unilateral activity of a third party nor the "mere injury" of someone in the forum state can satisfy the requirements of purposeful availment. *Walden v. Fiore*, 571 U.S. 277, 290, 134 S.Ct. 1115, 188 L.Ed.2d 12 (2014); *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958). Instead, the defendant must "reach out beyond one state and create continuing relationships and obligations with citizens of another state." *See Burger King*, 471 U.S. at 473, 105 S.Ct. 2174. And the defendant's actions must "connect[ ] him to the forum in a meaningful way." *See id.* In other words, courts must determine whether the defendant has "invoked the benefits and protections" of the forum state's law, which carries with it the reciprocal obligation of "submitting to the burdens of litigation in that forum as well." *Burger King*, 471 U.S. at 476, 105 S.Ct. 2174 (quoting *Hanson*, 357 U.S. at 243, 78 S.Ct. 1228). And the Court can consider LG Chem's contacts with Michigan in the aggregate. *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1265 (6th Cir. 1996) ("Because Patterson deliberately did both of those things [signing a contract and injecting his product into the stream of commerce] ... we believe that ample contacts exist to support the assertion of jurisdiction in this case.").

Under this standard, some of Sullivan's allegations do little, if anything, to establish specific personal jurisdiction. First, as explained above, Sullivan's allegations about LG Chem's alleged business activities and employees in Michigan only apply to its subsidiaries. Because the subsidiaries are distinct legal entities for purposes of personal jurisdiction, their activities are not attributable to LG Chem absent some showing of abuse of the corporate form, which Sullivan has not made. *See Anwar v. Dow Chem. Co.*, 876 F.3d 841, 850 (6th Cir. 2017) (quoting *Seasword v. Hilti, Inc.*, 449 Mich. 542, 537 N.W.2d 221, 224 (1995)). Second, the fact that some of LG Chem's 18650 batteries were incorporated into power tools which different companies then sold in Michigan is just the sort of "unilateral activity of another party" that is insufficient to show that LG Chem purposefully availed itself of Michigan. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). So neither of those jurisdictional allegations are attributable to LG Chem.

However, other evidence does show that LG Chem has purposefully availed itself of the benefits and protections of Michigan law. First, the Court considers various shipments of 18650 batteries from LG Chem directly to the state of Michigan. First, there is one undisputed shipment of 18650 batteries to a Michigan-based vacuum-cleaner manufacturer. (ECF No. 21-4, PageID.808.) And Sullivan submitted a document with import data showing that LG Chem sent three shipments of "lithium-ion batteries" to its Michigan subsidiaries. (ECF No. 10, PageID.340; ECF No. 10-6.) But LG Chem submitted an affidavit showing that only one such shipment—which contained over 50,000 pounds of batteries—was for 18650s, while the other two contained "lithium-ion pouch-type [battery] cells." (ECF No. 17-2, PageID.544–545; ECF No. 10-6.) Because Sullivan never disputed this affidavit and because it is consistent with his statement about shipments of "lithium-ion batteries," the Court considers only that one 50,000-pound shipment of 18650 batteries to

a subsidiary. *See Kerry Steel, Inc. v. Paragon Indus., Inc.*, 106 F.3d 147, 153 (6th Cir. 1997) ("But *Theunissen* [*v. Matthews*, 935 F.2d 1454, 1459 (6th Cir. 1991)] does not require a court to ignore undisputed factual representations of the defendant which are consistent with the representations of the plaintiff.") So that makes two undisputed shipments of 18650s to Michigan.

And there could be more. LG Chem admits in its supplemental brief that it sent an unspecified number of 18650 batteries to a subsidiary in Michigan for "research and development purposes." (ECF No. 21, PageID.720.) And LG Chem says that these shipments were "not the topic of any jurisdictional discovery requests." (ECF No. 21, PageID.720.) Sullivan protests. (ECF No. 25, PageID.957). He says that LG Chem "unilateral[ly]" limited its responses to only those shipments related to "manufacturing and distribution" (versus shipments for "research and development"), when he had requested documents relating to "all" shipments of 18650 batteries to Michigan. (*Id.*) Indeed, the Court allowed discovery "on the issue of LG Chem's contacts with Michigan related to the 18650 batteries." (ECF No. 20, PageID.708.) And, says Sullivan, he now has "no way of knowing how many more batteries were shipped to Michigan during any relevant time period." (*Id.*) While the Court agrees that LG Chem was less than fully forthcoming, it suffices at this stage to conclude that at least two (and perhaps many more than two) shipments of 18650 batteries were sent directly to known entities in Michigan between 2016 and 2020, one of which contained about 25 tons of those batteries.

***7** Additionally, the Court considers two supplier agreements that LG Chem executed with Michigan companies relating to 18650 batteries. The first is with the vacuum-cleaner manufacturer who received the shipment mentioned above. (ECF No. 21, PageID.720.) The second is with a "manufacturer of products for automakers." (*Id.*) The contract says it "shall be considered as a contract made and to be performed in the State of Michigan" and has a Michigan forum-selection clause. That contract resulted in many shipments of 18650 batteries, worth several million dollars, but those batteries were not shipped to Michigan. (ECF No. 25, PageID.956.)

Even excluding the facts about the subsidiaries and the incorporation of 18650 batteries into power tools that were eventually sold in Michigan, the facts of this case satisfy the "purposeful availment" requirement of prong one for several reasons. First, LG Chem "reached out" to Michigan when it shipped at least two (and perhaps many more than two) shipments of 18650 batteries to known Michigan entities. *See Burger King*, 471 U.S. at 473, 105 S.Ct. 2174. And the Court notes that it does not rely on a stream of commerce theory in this analysis; instead, these shipments were sent directly by LG Chem to Michigan entities that LG Chem had on-going relationships with. *Compare Starbrite Distrib., Inc. v. Excelda Mfg. Co.*, 454 Mich. 302, 562 N.W.2d 640, 644 (1997) ("P.D. George did not merely place its product into the stream of commerce, not having further knowledge regarding where that product might end up. Rather, P.D. George purposefully directed its product to a Michigan corporation, which is qualitatively different[.]"), *with Asahi Metal Indus. Co. v. Superior Ct. of California, Solano Cty.*, 480 U.S. 102, 112, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987) (plurality) ("The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State."). In sum, these shipments are more than "random, fortuitous, or attenuated contacts" with the state. *See Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 891–92 (6th Cir. 2002) (citing *Burger King*, 471 U.S. at 475, 105 S.Ct. 2174).

Moreover, while in some cases a contract with an in-state entity does not by itself establish purposeful availment, LG Chem has done much more than that. *See Burger King*, 471 U.S. at 473, 105 S.Ct. 2174. Again, LG Chem "reached out" and executed contracts with two Michigan-based entities for 18650 batteries. *See id.* In the case of the automotive supplier, the contract contained a Michigan forum-selection clause and resulted in over a dozen shipments of 18650 batteries worth several million dollars in the four-year discovery period. *See id.* ("It is these factors—prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing—that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum."); *see also AlixPartners, LLP v. Brewington*, 836 F.3d 543, 550 (6th Cir. 2016). In other words, LG Chem "did not engage in a one-time transaction, but in a continuing business relationship that lasted a period of many years." *See Air Prod. & Controls, Inc. v. Safetech Int'l, Inc.*, 503 F.3d 544, 551 (6th Cir. 2007). And LG Chem "reached out beyond [South Korea's] borders to conduct business with a company whose principal place of business it knew to be in Michigan. Such contacts are not 'random,' 'fortuitous,' or 'attenuated,' but are the result of deliberate conduct that amounts to purposeful availment." *See id.*

In sum, "viewing the cumulative facts in [Sullivan's] favor, this Court concludes that [Sullivan] has adduced evidence sufficient to support a *prima facie* finding of purposeful availment." *See Bridgeport Music, Inc. v. Still N The Water Pub.*, 327 F.3d 472, 484 (6th Cir. 2003).

***8** At step two, the Court considers whether LG Chem's contacts with Michigan "relate[ ] to the operative facts of this controversy." *See MAG IAS Holdings, Inc. v. Schmuckle*, 854 F.3d 894, 903 (6th Cir. 2017). Even before the Supreme Court's most recent opinion on this matter, the Sixth Circuit was clear that "the cause of action need not 'formally' arise from defendant's contacts." *Air Prod.*, 503 F.3d at 553 (quoting *Bird v. Parsons*, 289 F.3d 865, 875 (6th Cir. 2002)). Instead, this has been a "lenient standard" that can be satisfied when the cause of action is "at least marginally related to the alleged contacts" between the defendant and the forum. *Bird*, 289 F.3d at 875; *see also Lyngaas v. Ag*, 992 F.3d 412, 423 (6th Cir. 2021) (applying "lenient" standard).

And, as Sullivan suggests, the Supreme Court's most recent decision on personal jurisdiction supports this reading of "relates to." (ECF No. 10, PageID.345); *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, —— U.S. ——, 141 S. Ct. 1017, 1026, 209 L.Ed.2d 225 (2021). In *Ford*, the Supreme Court explained that "our most common formulation of the rule demands that the suit 'arise out of *or relate to* the defendant's contacts with the forum.' " *Id.* (emphasis in original). It continued: "The first half of that standard asks about causation; but the back half, after the 'or,' contemplates that some relationships will support jurisdiction without a causal showing. That does not mean anything goes.... But again, we have never framed the specific jurisdiction inquiry as always requiring proof of causation—*i.e.*, proof that the plaintiff 's claim came about because of the defendant's in-state conduct." *Id.* (internal citations omitted). Applying this standard, the Court concluded that Ford was subject to specific jurisdiction in Montana and Minnesota because it extensively marketed the same models of car that injured the plaintiffs in the forum states, even if it did not sell the specific cars that injured the plaintiffs there. *Id.* Instead, the Court found that such marketing created a "strong 'relationship among the defendant, the forum, and the litigation'—the 'essential foundation' of specific jurisdiction." *Id.* at 1028. (quoting *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 414, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984)).

While Justices Alito and Gorsuch noted in separate concurrences that this new articulation of "arise from or relate to" is not clearly defined, *see id.* at 1033, 1035, the Court is satisfied that Sullivan has met it here. As Sullivan put it, "[t]he lawsuit alleges that a Michigan plaintiff was injured in Michigan by a LG Chem 18650 lithium-ion battery that was purchased in Michigan during the time that LG Chem was shipping 18650 lithium-ion batteries to its Michigan customers and entering into contracts with Michigan companies for the purchase of 18650 lithium-ion batteries." (ECF No. 25, PageID.961.) The Court agrees. So under both *Ford* and the Sixth Circuit's pre-*Ford* standard, this cause of action "relates to" LG Chem's contacts with Michigan because LG Chem served a market for the very product that the plaintiff alleges malfunctioned and injured him here, thus creating the necessary relationship between the forum, the defendant, and the litigation. *See id.* at 1028.

Resisting this conclusion, LG Chem makes three arguments. First, it repeatedly attempts to define the product and the market very narrowly. For example, it says that it "did not supply 18650 lithium-ion cells to a consumer vaping market in Michigan" and "did not serve a consumer market in Michigan for standalone, replaceable lithium-ion batteries." (ECF No. 21, PageID.717, 718.) But LG Chem provides no authority for these narrow definitions of the product or market. *Cf. Ford*, 141 S. Ct. at 1028 (considering the product at issue to be the Ford Explorer and the Crown Victoria); *Berven v. LG Chem, Ltd.*, No. 118CV01542DADEPG, 2019 WL 1746083, at *10 (E.D. Cal. Apr. 18, 2019) ("[T]he Court finds that the 'product' at issue is the battery, i.e., a cylindrical battery manufactured by LG Chem—the LG 18650 lithium-ion battery."); *see also Murphy v. Viad Corp.*, No. 21-10897, 2021 WL 4504229, at *5 (E.D. Mich. Oct. 1, 2021) (finding no personal jurisdiction over defendant under *Ford* where product that exposed plaintiff to asbestos was never sold in Michigan, but another asbestos-containing product made by defendant was). And if LG Chem wishes to argue that its batteries were misused, that is a defense to liability, not a defense to personal jurisdiction. *See, e.g.*, Mich. Comp. Laws § 600.2947 ("A manufacturer or seller is not liable in a product liability action for harm caused by misuse of a product unless the misuse was reasonably foreseeable."); *see also Tieszen v. EBay, Inc.*, No. 4:21-CV-04002-KES, 2021 WL 4134352, at *6 (D.S.D. Sept. 10, 2021) (considering substantially the same argument and concluding that LG Chem's argument "is relevant to liability, not specific jurisdiction.").

***9** Second, LG Chem says "the greater weight of authority among other courts to consider similar issues supports

dismissal of LG Chem from this action." (ECF No. 21, PageID.724.) The Court agrees that LG Chem has generally been successful in proving that it is not subject to personal jurisdiction in various forums across the country. But it does not follow that LG Chem will also be successful in Michigan. As a sister court aptly explained: "This argument is unavailing because it is possible, indeed quite likely, that LG Chem has purposefully availed itself to the privileges of conducting business in some states (where it would be subject to personal jurisdiction) but not others (where personal jurisdiction would be lacking)." *Reyes v. Freedom Smokes, Inc.*, No. 5:19-CV-2695, 2020 WL 1677480, at *5 (N.D. Ohio Apr. 6, 2020). And the Court notes that many of those cases pre-dated the Supreme Court's decision in *Ford*. *Compare Ford*, 141 S. Ct. at 1034 (Gorsuch, J., concurring) ("Typically, courts have read this second phrase ["relates to"] as a unit requiring at least a but-for causal link between the defendant's local activities and the plaintiff's injuries.... Now, though, the Court pivots away from this understanding."), *with Walsh v. LG Chem Ltd.*, 834 F. Appx 310, 312 (9th Cir. 2020) ("Finally, even had Mr. Walsh established minimum contacts between LG Chem and Arizona, he fails to demonstrate that he would not have sustained his injuries but for LG Chem's forum-related activities."). Further, the courts that have dismissed LG Chem did not have before them evidence of the shipments of the 18650 batteries to forum entities and the contracts for the 18650 batteries with forum companies.

Third, LG Chem argues that the Supreme Court's decision in *Bristol-Myers* forecloses jurisdiction here. *See Bristol-Myers Squibb Co. v. Superior Ct. of California, San Francisco Cty.*, —— U.S. ——, 137 S. Ct. 1773, 198 L.Ed.2d 395 (2017); (ECF No. 3, PageID.257). But the Supreme Court rejected a similar argument in *Ford*: "the plaintiffs [in *Bristol-Myers*] were engaged in forum-shopping—suing in California because it was thought plaintiff-friendly, even though their cases had no tie to the State.... That is not at all true of the cases before us." *See id.* It continued: "But here, the plaintiffs are residents of the forum States. They used the allegedly defective products in the forum States. And they suffered injuries when those products malfunctioned in the forum States." *See id.* That is just as true here; the plaintiff "brought suit in the most natural State—based on an 'affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that t[ook] place' there." *See id.* (quoting *Bristol-Myers*, 137 S. Ct. at 1780).

So Sullivan has made a *prima facie* case that his injury, caused by an 18650 battery, "relate[s] to" LG Chem's shipments of and contracts for 18650 batteries in the state.

At step three, the Court considers whether exercising personal jurisdiction over LG Chem would be fair, "i.e., whether it would comport with traditional notions of fair play and substantial justice." *CompuServe*, 89 F.3d at 1267–68. The Court considers several factors at this stage: (1) "the plaintiff's interest in obtaining relief"; (2) "the interests of the forum State"; and (3) "the burden on the defendant." *Beydoun v. Wataniya Restaurants Holding, Q.S.C.*, 768 F.3d 499, 508 (6th Cir. 2014). And the Court must give "special weight to the 'unique burdens placed upon one who must defend oneself in a foreign legal system.' " *Lyngaas*, 992 F.3d at 423 (quoting *Theunissen v. Matthews*, 935 F.2d 1454, 1460 (6th Cir. 1991)).

The Court finds that the exercise of jurisdiction here would be reasonable. First, Sullivan has a strong interest in obtaining relief for his injuries from the party that he claims is responsible. And Michigan has a strong interest in providing a forum for its residents who are injured in Michigan from products purchased in Michigan. And while LG Chem is a foreign defendant, the Court finds that the burden of litigating in Michigan is minimal because LG Chem is already involved in substantial litigation in the United States, it has signed contracts with Michigan forum-selection clauses, and it has voluntarily litigated patent cases here in the past. (ECF No. 10-3 (patent case filed by LG Chem in the Eastern District of Michigan)); *cf. Lyngaas*, 992 F.3d at 423 (finding exercise of jurisdiction reasonable despite defendant having "no prior contact with the U.S. federal-court system"). Further, when, as here, the first two prongs of the specific personal jurisdiction test are met, then an inference arises that this third factor is also met. *Lyngaas v. Ag*, 992 F.3d 412, 423 (6th Cir. 2021).

***10** So the Court finds that the exercise of personal jurisdiction over LG Chem comports with due process. *See Malone v. Stanley Black & Decker, Inc.*, 965 F.3d 499, 505 (6th Cir. 2020) (finding *prima facie* standard satisfied despite "the complaint [being] sparse on detail"). But that is not the end of the inquiry. "[A]t least in Michigan, if a court concludes that due process *is* met, the court must also separately consider whether the long-arm statute is satisfied. In some cases ... a court's exercise of jurisdiction over the defendant would be improper because the conduct giving rise to the action does not meet the requirements of Michigan's long-arm statute."

King v. Ridenour, 749 F. Supp. 2d 648, 652 n.4 (E.D. Mich. 2010).

2. Michigan's Long Arm Statute

Michigan's long-arm statute extends to claims against corporations "arising out of an act which creates" one of several "relationships." These include "the transaction of any business within the state" and "doing or causing any act to be done, or consequences to occur, in the state resulting in an action for tort." *See* Mich. Comp. Laws § 600.715.

Some Courts, including the Sixth Circuit, have suggested that Michigan's long-arm statute is co-extensive with the Due Process Clause. *See, e.g., MAG IAS Holdings, Inc. v. Schmuckle*, 854 F.3d 894, 899 (6th Cir. 2017); *Children's Legal Servs., PLLC v. Shor Levin & Derita, PC*, 850 F. Supp. 2d 673, 679 (E.D. Mich. 2012); *Comm'r of Ins. v. Arcilio*, 221 Mich.App. 54, 561 N.W.2d 412, 421 (1997). And in the run of cases, the two inquiries do frequently rise and fall together.

But a closer inspection of the Michigan Supreme Court's opinions reveals that that is not always the case. *See also Lyngaas v. Curaden AG*, No. 17-CV-10910, 2018 WL 1251754, at *4 (E.D. Mich. Mar. 12, 2018); *King*, 749 F. Supp. 2d at 652 n.4. Indeed, the Michigan Supreme Court acknowledged that many courts' misunderstanding of the long-arm statute can be traced to *Sifers v. Horen*, 385 Mich. 195, 188 N.W.2d 623 (1971). *Green v. Wilson*, 455 Mich. 342, 565 N.W.2d 813, 816 (1997). But, the Court explained, *Sifers* did not say that the long-arm statute was coextensive with due process, but that "if a defendant's actions or status fit within a provision of a long-arm statute, jurisdiction may be extended as far as due process permits." *Id.* Otherwise, it concluded, the specific categories that the legislature enumerated in the long-arm statute "would be superfluous." *Id.* at 817. Indeed, the Court specifically stated that "there may be instances where a state court will lack the power to exercise personal jurisdiction over a defendant, even though jurisdiction may be constitutionally permissible." *Id.* at 815 (citing *Mallory v. Conida Warehouses*, 317 N.W.2d 597 (Mich. Ct. App. 1982) (finding Idaho was not subject to personal jurisdiction in Michigan because none of the enumerated categories in the long-arm statute contemplated suits against states)).

Perhaps seizing on this, LG Chem argues that Sullivan has not satisfied the long-arm statute. Specifically, it says that "plaintiff's actions do not 'aris[e] out of' the defendant's contacts with Michigan." (ECF No. 3, PageID.249–250; ECF No. 17, PageID.530.) But Sullivan does not explain how the specific jurisdiction long-arm statute for corporations is satisfied despite LG Chem citing the correct statute in its motion to dismiss. (ECF No. 10, PageID.342, 344 (analyzing only general jurisdiction statute for corporations); ECF No. 25 (not mentioning long-arm analysis).). Nor does he address LG Chem's argument that this case does not "arise from" its contacts with the state under the statute. (*See* ECF Nos. 10, 24.)

***11** Instead, Sullivan's only arguments that this action "aris[es] out of" LG Chem's contacts with the forum are made under the Due Process Clause. (ECF No. 10, PageID.347; ECF No. 25, PageID.960–961.) But it is not clear that the standard is the same under the Due Process Clause and the long-arm statute. Indeed, Michigan's long-arm statute uses the phrase "aris[e] from," but not "relate[s] to." *See* Mich. Comp. Laws § 600.715.

And, as explained, *Ford* instructs that "arise from" and "relate to" (at least for purposes of the Due Process Clause) mean different things in the context of personal jurisdiction. "Arise from," the Court explained, "asks about causation," while "relates to" "contemplates that some relationships will support jurisdiction without a causal showing." —— U.S. ——, 141 S. Ct. 1017, 1026, 209 L.Ed.2d 225 (2021); *see also Durham v. LG Chem, Ltd.*, No. 1:20-CV-01277-SDG, 2021 WL 1573899, at *3 (N.D. Ga. Apr. 22, 2021) (rejecting personal jurisdiction in exploding battery case under long-arm statute that used the phrase "arising out of" but not "relates to"); *Rich v. LG Chem, Ltd.*, No. 20-014758-NO (Mich. Cir. Ct. Nov. 30, 2021) ("This court does not have jurisdiction over defendants under ... the [long-arm] statute.... The cause of action does not arise out of the LG Chem's sale or sending the batteries to its subsidiary located in Michigan." (ECF No. 21-7, PageID.839)). And some authority suggests that "arising from" in the Michigan long-arm statute means something more than "relates to." *See Citizens Bank v. Parnes*, 376 F. Appx 496, 501 (6th Cir. 2010) ("Michigan's long-arm statute extends limited personal jurisdiction over a non-resident if the claim 'aris[es] out of an act which creates [certain] relationships,' ... The 'arising from' requirement is met if the cause of action was 'made possible' by or 'lies in the wake of' the defendant's contacts with the forum state." (quoting *Lanier v. Am. Bd. of Endodontics*, 843 F.2d 901, 909 (6th Cir. 1988))).

In any case, the Court need not determine whether Sullivan's claim arises out of LG Chem's activities in Michigan for the purposes of the Michigan long-arm statute. It suffices to say that Sullivan has made no arguments that it does, and so he has not borne even the *prima facie* burden of proving specific jurisdiction over LG Chem. *See Malone v. Stanley Black & Decker, Inc.*, 965 F.3d 499, 505 (6th Cir. 2020).

IV. Conclusion

Accordingly, Sullivan has failed to show that both the due process clause and Michigan's long-arm statute have been satisfied as to either specific or general personal jurisdiction. So LG Chem's motion to dismiss for lack of personal jurisdiction (ECF. No. 3) is GRANTED. A separate judgment will follow.

SO ORDERED.

All Citations

--- F.Supp.3d ----, 2022 WL 452501, Prod.Liab.Rep. (CCH) P 21,357

Footnotes

1 *Walsh v. LG Chem Ltd.*, 834 F. Appx 310 (9th Cir. 2020); *Davis v. LG Chem, Ltd.*, 849 F. Appx 855 (11th Cir. 2021), *cert. denied sub nom. Fullerton v. LG Chem, Ltd.*, —— U.S. ——, 142 S. Ct. 108, 211 L.Ed.2d 32 (2021); *Durham v. LG Chem, Ltd.*, No. 1:20-CV-01277-SDG, 2021 WL 1573899 (N.D. Ga. Apr. 22, 2021), *appeal dismissed sub nom. Kurtz v. LG Chem, Ltd.*, No. 21-11822-DD, 2021 WL 3849396 (11th Cir. June 30, 2021); *Payrovi v. LG Chem Am., Inc.*, 491 F. Supp. 3d 597 (N.D. Cal. 2020); *Tieszen v. EBay, Inc. et. al*, No. 4:21-CV-04002-KES, 2021 WL 4134352 (D.S.D. Sept. 10, 2021), *motion to certify appeal granted, reconsideration denied*, No. 4:21-CV-04002-KES, 2022 WL 79820 (D.S.D. Jan. 6, 2022); *Beaton v. LG Chem, Ltd., et al.*, No. 2:20-cv-06806-BRM-ESK, 2021 WL 3828835 (D.N. J Aug. 26, 2021); *Richter v. LG Chem, Ltd.*, No. 18-CV-50360, 2020 WL 5878017 (N.D. Ill. Oct. 2, 2020); *Yamashita v. LG Chem, Ltd.*, No. 20-CV-00129-DKW-RT, 2020 WL 4431666 (D. Haw. July 31, 2020); *Reyes v. Freedom Smokes, Inc.*, No. 5:19-CV-2695, 2020 WL 1677480 (N.D. Ohio Apr. 6, 2020); *Berven v. LG Chem, Ltd.*, No. 118CV01542DADEPG, 2019 WL 1746083 (E.D. Cal. Apr. 18, 2019), *report and recommendation adopted*, No. 118CV01542DADEPG, 2019 WL 4687080 (E.D. Cal. Sept. 26, 2019); *Death v. Mabry*, No. C18-5444 RBL, 2018 WL 6571148 (W.D. Wash. Dec. 13, 2018); *Eriksen v. ECX, LLC. et al.*, No. 79473-I, 2020 WL 6395534 (Ct. App. Wash. Nov. 2, 2020); *State ex rel. LG Chem, Ltd. v. McLaughlin*, 599 S.W.3d 899, 901 (Mo. 2020); *Kadow v. LG Chem, et al.*, No. B309854, 2021 WL 5935657 (Cal. Ct. App., 2nd Dist. Dec. 16, 2021); *see also Rich v. LG Chem, Ltd., et al.*, No. 20-014758-NO (Mich. Cir. Ct. Nov. 30, 2021) (ECF No. 21-7).

2 The paragraph reads in full: "LGC has extensive involvement in the U.S. market, particularly in the State of Michigan, with its innovative battery technology. LGC supplies, through its plants in Michigan, millions of battery cells to U.S. companies like General Motors, and Chrysler. For example, LGC's subsidiary LG Chem Power Inc. ("LGCPI") has operated a facility in Troy, Michigan since 2005. LGCPI has invested millions of dollars in the Troy facility and employs more than 150 people. Moreover, LGC's subsidiary LG Chem Michigan Inc. ("LGCMI") has operated a facility in Holland, Michigan since 2010. LGCMI has invested hundreds of millions of dollars in the Holland facility and employs more than 450 people. In sum, LGC has invested hundreds of millions of dollars and employs hundreds of people in the United States, primarily in Michigan, who are dedicated to the design, research, development, manufacturing, testing, quality control, and customer care of its lithium-ion batteries for its U.S. customers." (*See* ECF No. 10-3, PageID.376.)

2021 WL 4134352
United States District Court, D. South Dakota, Southern Division.

Ryan TIESZEN, Plaintiff,

v.

EBAY, INC., LG Chem Ltd., LG Chem America, Inc., Vapah, Inc., and the First Doe through Thirtieth Doe, inclusive, Defendants.

4:21-CV-04002-KES
|
Signed 09/10/2021

Attorneys and Law Firms

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Vapah, Inc., Pro Se.

ORDER GRANTING DEFENDANT LG CHEM AMERICA INC.'S MOTION TO DISMISS AND DENYING DEFENDANT LG CHEM, LTD.'S MOTION TO DISMISS

KAREN E. SCHREIER, UNITED STATES DISTRICT JUDGE

***1** Plaintiff, Ryan Tieszen, filed this suit in the State of South Dakota Second Circuit Court for Minnehaha County. Docket 1-1. Defendants include eBay, Inc., LG Chem, Ltd. (LG Chem), LG Chem America, Inc. (LGCAI), Vapah, Inc., and DOES 1 through 30. *Id*. LGCAI removed the matter to federal court under 28 U.S.C. §§ 1332, 1441(b), and 1446. Docket 1. LGCAI and LG Chem each move to dismiss this action for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2). Dockets 14, 29. Tieszen opposes both motions. Dockets 20, 38.

FACTUAL BACKGROUND

Tieszen is a resident of the state of South Dakota. Docket 1-1 ¶ 1. Tieszen alleges that he was injured by two LG 18650 lithium-ion batteries that were purchased from Vapah, a third-party Seller on eBay's online commerce platform, for use in his e-cigarette device. *Id*. ¶¶ 2, 11, 15. The batteries "burst into flames" in his pocket on December 14, 2017, causing first and second-degree burns to his right thigh. *Id*. ¶¶ 12, 15.

LG Chem is a business entity headquartered in Seoul, South Korea. Docket 1 ¶ 9; Docket 1-1 ¶ 5. LG Chem manufactures 18650 lithium-ion battery cells. Docket 30. LGCAI is incorporated in Delaware with its principal place of business in Atlanta, Georgia. Docket 1 ¶ 10; Docket 1-1 ¶ 6. LGCAI sells and distributes petrochemical materials and products. Docket 15 at 2. Tieszen alleges both LG Chem and LGCAI were in the business of designing, manufacturing, marketing, and distributing the 18650 lithium-ion batteries that caused his injuries. Docket 1-1 ¶ 34.

LG Chem and LGCAI state they have never conducted business with eBay or Vapah. Dockets 15, 30. LG Chem contends that the type of battery at issue is manufactured by LG Chem for "specific applications by sophisticated companies." Docket 31 ¶ 19. LG Chem denies having sold or authorized any distributor, retailer, or re-seller to sell any lithium-ion cells as "standalone, removable batteries in e-cigarette devices or for any other purpose." *Id* ¶¶ 24-25.

LGCAI declares it has never designed, manufactured, advertised, or sold any lithium-ion battery for use by "individual consumers as standalone, removable batteries." Docket 15 at 2. LGCAI has no manufacturing plants in South Dakota and focuses on sales and distribution of petrochemical materials and products. *Id*. LG Chem and Tieszen submitted supplemental briefs regarding the United States Supreme Court decision in *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017 (2021) and its implication on questions of personal jurisdiction. Dockets 41, 42.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(2), defendants may move to dismiss a claim for lack of personal jurisdiction. Fed. R. Civ. P. 12(b)(2). "To survive a motion to dismiss, a plaintiff need make only a prima facie case that personal

jurisdiction exists." *Downing v. Goldman Phipps, PLLC*, 764 F.3d 906, 911 (8th Cir. 2014) (citing *Wessels, Arnold & Henderson v. Nat'l Med. Waste, Inc.*, 65 F.3d 1427, 1431 (8th Cir. 1995)). But when personal jurisdiction is challenged by a defendant's affidavits and motions, the plaintiff bears the burden of proving jurisdiction by the same means, not mere allegations of the complaint. *Dever v. Hentzen Coatings, Inc.*, 380 F.3d 1070, 1072-73 (8th Cir. 2004).

***2** The jurisdiction of federal courts is ordinarily determined by laws of the state in which the court is located. *Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014). South Dakota law specifies that a person is subject to jurisdiction of state courts through "any act, the basis of which is not inconsistent with the Constitution ...." SDCL § 15-7-2(14). Thus, the relevant inquiry is whether the exercise of South Dakota's long-arm statute to impose this court's jurisdiction comports with federal due process. *See id.* Due process requires a defendant have "certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Mayer*, 311 U.S. 457, 463 (1940)).

The Supreme Court has recognized two types of personal jurisdiction: "general (sometimes called all-purpose) jurisdiction and specific (sometimes called case-linked) jurisdiction." *Ford*, 141 S. Ct. at 1024. General jurisdiction is established when a defendant is "essentially at home" in the state. *Id.* A corporation's place of incorporation and principal place of business are "paradigm" forums in all but "exceptional case[s]." *Id*. In the case of large national or global corporations, the standard is not merely "doing business" within a forum state, which would render those defendants "at home" everywhere they operate, but is based on claims having a connection to the forum State. *See Daimler*, 571 U.S. at 139 n.20 (2014).

Specific jurisdiction covers a narrower class of claims and requires the defendant to take "some act by which [it] purposefully avails itself of the privilege of conducting activities within the forum State." *Ford*, 141 S. Ct. at 1024 (alteration in original) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). "The contacts must be the defendant's own choice and not 'random, isolated, or fortuitous.' " *Id.* at 1025 (quoting *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 774 (1984)). The contacts must show the defendant engaged in deliberate activity to exploit the forum state's market or enter a contractual relationship centered in the forum state. *Id.* (citing *Walden v. Fiore*, 571 U.S. 277, 285 (2014)). Because the defendant is not "at home" in the forum state though, there needs to be a showing that the plaintiff's claims " 'arise out of or relate to the defendant's contacts' with the forum." *Id.* (*quoting Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773, 1780 (2017)).

The Eighth Circuit employs a five-factor, totality of the circumstances test to determine whether specific jurisdiction exists. *Kaliannan v. Liang*, 2 F.4th 727, 733 (8th Cir. 2021). Under that test, the court analyzes: "(1) the nature and quality of [defendant's] contacts with the forum state; (2) the quantity of such contacts; (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) convenience of the parties." *Id.* (alteration in original) (quoting *Whaley v. Esebag*, 946 F.3d 447, 452 (8th Cir. 2020)). The first three factors are of "primary importance," while the last two are of less importance and not dispositive. *Id.*

DISCUSSION

I. General Jurisdiction

A. LGCAI

LGCAI argues that there is no basis for this court to exercise general jurisdiction over it. Dockets 14, 15 at 4. Conversely, Tieszen contends that this court can exercise general jurisdiction over LGCAI. Docket 20 at 4. Tieszen concedes that LGCAI is not incorporated in South Dakota, nor does LGCAI have its principal place of business in South Dakota. *Id.* at 5. But Tieszen argues that LGCAI's "operations in South Dakota are apparent, extensive, and exceptional" such that LGCAI is essentially at home in South Dakota. *Id.* (emphasis omitted); *see also BNSF Ry. Co. v. Tyrell*, 137 S.Ct. 1549, 1558 (2017) (noting that the exercise of general jurisdiction is not limited to a defendant's place of incorporation and principal place of business, but "in an exceptional case, a corporate defendant's operations in another forum may be so substantial and of such a nature as to render the corporation at home in that State." (internal quotations omitted)).

***3** Here, it is uncontested that LGCAI is incorporated in Delaware and has its principal place of business in Georgia. Docket 1-1 ¶ 6. Thus, the only question is whether this is an "exceptional case" where LGCAI's operations in South Dakota render it essentially at home in the state. *See BNSF*,

137 S.Ct. at 1558. LGCAI submitted an affidavit of HyunSoo Kim, the Compliance Manager and authorized representative for LGCAI, in support of its motion to dismiss for lack of personal jurisdiction. Docket 16. Kim asserts that LGCAI is not registered to do business in South Dakota and does not have a registered agent for service of process in South Dakota. *Id.* ¶ 4. Additionally, Kim states that LGCAI does not have physical office space, does not have any employees, and does not own or lease any real property in South Dakota. *Id.* ¶¶ 5-6. LGCAI's operations in South Dakota are limited to the sale of petrochemical materials and products. *Id.* ¶ 15. Tieszen argues that the sale of these petrochemical materials and products to South Dakota consumers generate unknown amounts of revenue for LGCAI. Docket 20 at 5. Tieszen also contends that "LGCAI's products are used as components to a variety of products that are sold in South Dakota to South Dakota citizens[,]" and "the products which utilize LGCAI's materials [are] bought and utilized by a large number of South Dakotans, and especially, [Tieszen]." *Id.* at 6. Tieszen did not submit any affidavits or exhibits to controvert Kim's affidavit. Instead, Tieszen relies on his compliant and Kim's affidavit for his contentions. *Id.* at 5-6.

Given the evidence before the court, Tieszen fails to carry his burden to show that LGCAI is subject to general jurisdiction in South Dakota. Other than conclusory allegations in the complaint, Tieszen did not submit any evidence to establish that LGCAI is essentially at home in South Dakota. *See Dever*, 380 F.3d at 1072-73 (holding that once a defendant contests personal jurisdiction, the plaintiff's prima facie showing must be tested by affidavits and exhibits, and mere conclusory statements in the complaint will not suffice). LGCAI has no office space or employees in South Dakota, does not own or lease real property in South Dakota, is not registered to do business in South Dakota, and does not have a registered agent for service of process in South Dakota. Docket 16. On these facts, LGCAI cannot be said to be "at home" in South Dakota. Thus, the court finds that LGCAI is not subject to general jurisdiction in South Dakota.

B. LG Chem

LG Chem argues that there is no basis for this court to exercise general jurisdiction over it. Docket 30 at 6-7. Tieszen contends that this court has an adequate basis to assert general jurisdiction over LG Chem. Docket 38 at 4-8. As with LGCAI, Tieszen concedes that LG Chem is not incorporated in South Dakota nor is its principal place of business in South Dakota. *Id.* at 5. But Tieszen argues that "LG Chem's operations in South Dakota are apparent, extensive, and exceptional" such that it is essentially at home in South Dakota. *Id.* at 5-6; *see also BNSF*, 137 S.Ct. at 1558.

It is uncontested that LG Chem is a Korean company with its principal place of business in Seoul, South Korea. Docket 31 ¶ 7. Thus, the question is whether this is an "exceptional case" where LG Chem's operations in South Dakota are so extensive that they render LG Chem essentially at home in South Dakota. *BNSF*, 137 S.Ct. at 1558. In support of its motion to dismiss, LG Chem submitted an affidavit of Wonbae Baek, a former sales professional with LG Chem. Docket 31 ¶ 5. Baek is now employed with LG Energy Solution, Ltd. (LGES), which is a "spin-off of LG Chem, Ltd.'s battery division." *Id.* ¶ 4. LGES is now in possession of LG Chem's business records concerning the design, manufacture, distribution, and sale of 18650 lithium-ion battery cells. *Id.* ¶ 6. Baek states that, as of November 30, 2020, LG Chem did not have an office in South Dakota, was not registered to do business in South Dakota, did not have a registered agent for service of process in South Dakota, did not own or lease any real property in South Dakota, and did not have any employees in South Dakota. *Id.* ¶¶ 8-11. Baek declares that he has no reason to believe that any of that information has changed since November 30, 2020. *Id.* ¶ 13. Tieszen relies on his complaint for the proposition that LG Chem is doing extensive business in South Dakota. Docket 38 at 5. Tieszen did not submit any affidavits or exhibits to controvert Baek's affidavit.

***4** Here, LG Chem's operations are not so extensive that LG Chem is rendered essentially at home in South Dakota. Accepting the allegations in the complaint as true, LG Chem sells and distributes LG lithium-ion batteries in South Dakota. Docket 1-1 ¶ 5; *see also* Docket 38 at 8. But Tieszen did not present any evidence to controvert Baek's affidavit that LG Chem does not have an office in South Dakota, is not registered to do business in South Dakota, does not have a registered agent for service of process in South Dakota, does not own or lease any real property in South Dakota, and does not have any employees in South Dakota. *See Dever*, 380 F.3d at 1072-73 (holding that once a defendant contests personal jurisdiction, the plaintiff's prima facie showing must be tested by affidavits and exhibits, and mere conclusory statements in the complaint will not suffice). Tieszen's formulation of general jurisdiction in this case calls for the "doing business" test for general jurisdiction specifically rejected in *Daimler*. 571 U.S. at 139 n.20. This is not an "exceptional case" where LG Chem is essentially at home in South Dakota. *BNSF*, 137 S.Ct. at 1558. Thus, this court finds that LG Chem is not subject to general jurisdiction in South Dakota.

II. Specific Jurisdiction

A. LGCAI

LGCAI contends that the court lacks specific jurisdiction over it. Docket 15 at 5. Tieszen argues that this court has an adequate basis to exercise specific jurisdiction over LGCAI because LGCAI has extensive operations in South Dakota, and Tieszen's claims arise out of or relate to those operations. Docket 20 at 8-9. The court will address whether LGCAI is subject to specific jurisdiction in South Dakota under the Eighth Circuit's five-factor test.

The first factor for the court to consider is the nature and quality of LGCAI's contacts with South Dakota, and the second factor is the quantity of those contacts. *Kaliannan*, 2 F.4th at 733. Here, Tieszen contends that "LGCAI's operations in South Dakota are extensive, and are focused primarily on sales and distributions of petrochemical materials and products." Docket 20 at 8. Tieszen alleges that those products are used in a variety of consumer products bought and sold in South Dakota, including the type of LG lithium-ion battery that injured Tieszen. *Id.* Tieszen relies on the allegations in his complaint for the assertion that LGCAI's products are used in LG lithium-ion batteries. *See id.* LGCAI, in the affidavit of HyunSoo Kim, contends that its contacts in South Dakota are limited to selling and distributing petrochemical products "including ABS resin, Engineered Plastic (EP), Rubbers, Acrylate, Super Absorbent Polymer (SAP), and Specialty Polymers." Docket 16 ¶ 10. "LGCAI's sales in ... South Dakota are exclusively limited to petrochemical materials and products; it does not generate any other revenue in South Dakota." *Id.* ¶ 15. The first and second factors weigh in favor of Tieszen because he has established that LGCAI has numerous contacts with South Dakota, and those contacts "were not random, fortuitous, or attenuated, but rather were central to an alleged scheme to purposely avail [itself] of the privilege of conducting activities in [South Dakota]." *Kaliannan*, 2 F.4th at 734 (cleaned up) (quoting *Whaley*, 946 F.3d at 452).

The third factor to consider is the relation of the cause of action to LGCAI's contacts in South Dakota. *Id.* at 733. This factor is crucial for the exercise of specific jurisdiction because "[Tieszen's] claims ... 'must arise out of or relate to [LGCAI's] contacts' with the forum." *Ford*, 141 S.Ct. at 1025 (quoting *Bristol-Meyers*, 137 S.Ct. at 1780). Here, Tieszen contends that his causes of action "are closely related or even directly linked to LGCAI's contacts with South Dakota." Docket 20 at 9. Tieszen argues that LGCAI sells and distributes petrochemicals that are used in LG lithium-ion 18650 batteries, which is the same kind of battery that allegedly injured Tieszen. *Id.* Tieszen points to his complaint and Kim's affidavit to support his contentions. *Id.* LGCAI denies Tieszen's allegations. Docket 26 at 6. Kim's affidavit states that LGCAI primarily sells and distributes petrochemical materials and products, and it "has never designed, manufactured, distributed, advertised, or sold any lithium-ion cell for use by individual customers as standalone, removable batteries." Docket 16 ¶¶ 10-11. LGCAI also asserts that it has never authorized any manufacturer, distributor, wholesaler, retailer, re-seller, or other entity—including eBay or Vapah—to advertise, distribute, or sell LG 18650 lithium-ion batteries. *Id.* ¶¶ 13-14.

***5** As with his arguments for the exercise of general jurisdiction, Tieszen did not submit any affidavits or exhibits to controvert LGCAI's claims. Tieszen cannot rely solely on the pleadings to establish specific jurisdiction; he must specifically controvert LGCAI's affidavit either with affidavits or exhibits of his own. *See Dever*, 380 F.3d at 1072-73. After considering Kim's affidavit, Tieszen fails to establish that his claims arise out of or are related to LGCAI's contacts with South Dakota. Kim's affidavit establishes that LGCAI sells and distributes petrochemical materials and products in South Dakota but does not have any involvement with LG lithium-ion batteries. Docket 16 ¶¶ 10-15. Tieszen's claims center around a malfunctioning LG lithium-ion 18650 battery that caused his injuries. *See* Docket 1-1. Tieszen fails to connect LGCAI's sale and distribution of petrochemical materials and products to his claim that the batteries malfunctioned. Thus, the third factor weighs in favor of LGCAI. This court cannot exercise specific jurisdiction over LGCAI where Tieszen's claims do not "arise out of or relate to [LGCAI's] contacts with the forum." *Ford*, 141 S.Ct. at 1025 (cleaned up) (quoting *Bristol-Meyers*, 137 S.Ct. at 1780).

The fourth and fifth factors—the interest of the forum state in providing a forum for its residents and convenience of the parties—weigh in favor of Tieszen. *Kaliannan*, 2 F.4th at 733. Tieszen is a South Dakota resident and his injuries occurred in South Dakota. Docket 1-1 ¶¶ 1, 12. South Dakota has an interest in providing a forum for its residents who are injured in the state by defective products. South Dakota is also the most convenient forum as Tieszen lives in South Dakota, the injuries occurred in South Dakota, and potential witnesses are likely located in South Dakota. Although LGCAI is not

a resident of South Dakota, it has a national presence and already conducts business in South Dakota. While the fourth and fifth factors weigh in favor of Tieszen, they are not dispositive. *Kaliannan*, 2 F.4th at 733.

Because Tieszen cannot carry his burden to prove that his claims arise out of or relate to LGCAI's contacts with South Dakota, this court cannot exercise specific jurisdiction over LGCAI. Thus, LGCAI's motion to dismiss for lack of personal jurisdiction is granted.

B. LG Chem

LG Chem contends that this court lacks specific jurisdiction over it. Docket 30 at 7-10. Conversely, Tieszen argues that this court has an adequate basis to exercise specific jurisdiction over LG Chem. Docket 38 at 8-11. As with LGCAI, this court will determine whether it can exercise specific jurisdiction over LG Chem under the Eighth Circuit's five-factor test.

The first factor to consider is the nature and quality of LG Chem's contacts with South Dakota. *Kaliannan*, 2 F.4th at 733. Viewed in the light most favorable to the nonmoving party, Tieszen alleges that LG Chem conducts business in South Dakota, including the sale and distribution of LG lithium-ion batteries, including but not limited to the LG lithium-ion batteries purchased by Tieszen that are the subject of this lawsuit. Dockets 1-1 ¶ 5, 38 at 9; *see also Pangea, Inc. v. Flying Burrito LLC*, 647 F.3d 741, 745 (8th Cir. 2011) (noting that the court must look at the facts in the light most favorable to the nonmoving party and resolve factual disputes in favor of the nonmoving party). LG Chem does not explicitly deny that it does business in South Dakota or that it sells lithium-ion batteries in South Dakota; rather, LG Chem states that it "manufactured 18650 lithium-ion battery cells for use in specific application by sophisticated companies." Docket 31 ¶ 19. LG Chem contends that it never sold or authorized anyone else to sell standalone 18650 lithium-ion battery cells to individual customers. *Id.* ¶¶ 20-21. LG Chem focuses on whether it purposefully availed itself of a market in South Dakota for standalone 18650 lithium-ion batteries sold to individual consumers rather than whether it purposefully availed itself generally of a market in South Dakota. Docket 41 at 2-4. Viewing these facts in the light most favorable to Tieszen, the court finds that LG Chem does business in South Dakota and sells LG 18650 lithium-ion batteries in South Dakota. Even if the specific batteries that are the subject of this litigation arrived in South Dakota via third-party intermediaries, LG Chem has still exploited the market in South Dakota for 18650 lithium-ion batteries in general. Put another way, LG Chem has taken "some act by which [it] purposefully avail[ed] itself of the privilege of conducting activities within [South Dakota]." *Ford*, 141 S.Ct. at 1024-25 (first alteration in original) (quoting *Hanson*, 357 U.S. at 253). Thus, the first factor weighs in favor of Tieszen.

***6** The second factor to consider is the quantity of LG Chem's contacts. *Kaliannan*, 2 F.4th at 733. At this stage in the litigation, the quantity of LG Chem's contacts with South Dakota is unclear because Tieszen has not had the opportunity to engage in discovery. *See* Docket 38 at 9. LG Chem does not mention the quantity of its contacts in South Dakota in its briefs or in Baek's affidavit. Thus, this factor does not weigh in favor of either party.

The third factor to consider is the relation of Tieszen's causes of action to LG Chem's contacts in South Dakota. *Kaliannan*, 2 F.4th at 733. As previously mentioned, this factor is crucial to a finding of specific jurisdiction. *See Ford*, 141 S.Ct. at 1025. LG Chem first argues that Tieszen's claim does not arise out of and is not related to LG Chem's contacts with South Dakota because "[its] contact with the forum State must involve the precise product at issue." Docket 41 at 4. LG Chem notes that the precise product at issue in this case is an industrial 18650 lithium-ion battery cell, not every model of lithium-ion cell manufactured by LG Chem. *Id.* at 5. But as noted above, Tieszen alleges that: (1) LG Chem sells and distributes 18650 lithium-ion cell batteries in South Dakota, (2) Tieszen purchased such a battery online while in South Dakota, and (3) Tieszen was injured by an 18650 lithium-ion cell battery in South Dakota. Docket 1-1 ¶¶ 5, 11-16; Docket 42 at 5. Thus, Tieszen's claim and LG Chem's contact with South Dakota both revolve around the 18650 lithium-ion battery.

LG Chem next contends Teiszen's claim does not arise out of and is not related to LG Chem's contacts with South Dakota because LG Chem does not serve a market in South Dakota for standalone, removable consumer batteries. Docket 41 at 5-6. Instead, LG Chem asserts that its "customers are not consumers; they are sophisticated, industrial customers that purchase LG Chem's 18650 lithium-ion cells for use in specific applications, such as power tools, that encase the cells in battery packs with protective circuitry." *Id.* at 6. LG Chem's argument here is relevant to liability, not specific jurisdiction. Tieszen has established a prima facie case here that LG Chem: (1) sells 18650 batteries in South Dakota; (2) Tieszen bought such a battery while in South Dakota; (3) Tieszen is a South Dakota resident; and (4) Tieszen was

injured, allegedly by a malfunctioning 18650 battery, in South Dakota. Docket 1-1 ¶¶ 1, 5, 11-16. LG Chem served a market in South Dakota for the very product that Tieszen alleges malfunctioned and injured him in South Dakota even if he was not LG Chem's intended consumer. *Ford*, 141 S.Ct. at 1028. "So there is a strong 'relationship among the defendant, the forum, and the litigation'—the 'essential foundation' of specific jurisdiction." *Id.* (quoting *Helicopteros Nacionales de Colum. v. Hall*, 466 U.S. 408, 414 (1984)). Thus, the third factor weighs in favor of Tieszen.

As was the case with LGCAI, the fourth and fifth factors —interest of the forum state in providing a forum for its residents and convenience of the parties—weigh in favor of Tieszen. Again, South Dakota has an interest in providing a forum for its residents who are injured in South Dakota by products that they purchased online while in South Dakota. Further, South Dakota is the most convenient forum for the parties because Tieszen is a resident of South Dakota, and LG Chem is a global entity that would not be burdened by litigating in South Dakota. Tieszen, on the other hand, would be heavily burdened by having to litigate elsewhere. Thus, the last two factors weigh in favor of Tieszen.

***7** The court finds that LG Chem has purposefully availed itself of the privilege of conducting activities in South Dakota. Tieszen's claims in this case arise out of or relate to LG Chem's contacts in South Dakota. This court finds that it has specific jurisdiction over LG Chem. Thus, LG Chem's motion to dismiss for lack of personal jurisdiction is denied.

CONCLUSION

Tieszen has failed to meet the burden of proof necessary for this court to exercise personal jurisdiction, general or specific, over LGCAI. But Tieszen has met his burden of proof necessary for this court to exercise specific jurisdiction over LG Chem.

Thus, it is ORDERED

1. Defendant LGCAI's motion to dismiss (Docket 14) is granted.

2. Defendant LG Chem's motion to dismiss (Docket 29) is denied.

All Citations

Slip Copy, 2021 WL 4134352, Prod.Liab.Rep. (CCH) P 21,247

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161 N.C.App. 742
Unpublished Disposition
NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.
Court of Appeals of North Carolina.

Dorothy M. WALLACE, Plaintiff,

v.

Ben R. SMITH, Jr., Defendant.

No. COA03-297.
|
Dec. 16, 2003.

***1** Appeal by plaintiff from order entered 18 November 2002 by Judge Timothy S. Kincaid in Gaston County Superior Court. Heard in the Court of Appeals 20 November 2003.

Attorneys and Law Firms

Garland and Drum, P.A., by J. Boyce Garland, Jr., for plaintiff-appellant.

Arthurs and Foltz, by Nancy E. Foltz, for defendant-appellee.

TYSON, Judge.

I. Background

Ben R. Smith, Jr. ("defendant") owns The Peach Tree, in York County, South Carolina, which sells fruit and vegetables. On 23 June 1999, Dorothy M. Wallace ("plaintiff") was injured while shopping in defendant's store and filed an action in Gaston County, North Carolina on 13 June 2002. In her unverified complaint, plaintiff alleged that she was a citizen and resident of Gaston County, North Carolina, and that defendant was a citizen and resident of York County, South Carolina.

Defendant moved to dismiss for lack of personal jurisdiction on 13 August 2002. In an affidavit attached to his motion, defendant stated that he did not own any real or personal property in North Carolina, did not travel to North Carolina on a regular basis, and did not have any accounts receivable in North Carolina. Defendant admitted placing a three-by-five inch advertisement, approximately twice weekly, in The Charlotte Observer and The Gaston Gazette during June, July, and one week in August. Plaintiff's response to defendant's motion asserted that defendant had placed 379 advertisements for The Peach Tree in The Charlotte Observer and 110 advertisements in The Gaston Gazette. She also attached affidavits and invoices showing advertisements in both newspapers, along with affidavits naming approximately twenty North Carolina residents who had shopped at The Peach Tree.

The trial court granted defendant's motion to dismiss and concluded that "defendant lacks sufficient contact with the State of North Carolina to be subject to jurisdiction of this Court."

II. Issue

The sole issue on appeal is whether the trial court had *in personam* jurisdiction over defendant.

III. Personal Jurisdiction

Plaintiff contends the trial court erred because sufficient minimum contacts existed to give North Carolina courts personal jurisdiction over defendant. "The test for establishing *in personam* personal jurisdiction over a foreign [defendant] is two-fold: first, 'Whether North Carolina's 'long-arm' statute permits courts in this jurisdiction to entertain the action;' and second, 'whether exercise of this jurisdictional power comports with due process of law.' " *Fran's Pecans, Inc. v. Greene,* 134 N.C.App. 110, 112, 516 S.E.2d 647, 649 (1999) (quoting *ETR Corporation v. Wilson Welding Service,* 96 N.C.App. 666, 668, 386 S.E.2d 766, 767 (1990)).

A. Long-Arm Statute

North Carolina's long-arm statute, N.C. Gen.Stat. § 1 75.4, is to be liberally construed in favor of finding jurisdiction. *Starco, Inc. v. AMG Bonding and Ins. Services,* 124 N.C.App. 332, 338, 477 S.E.2d 211, 216 (1996).

***2** The statute allows the exercise of personal jurisdiction in any action claiming injury to person or property within this State arising out of an act or omission outside this State by the defendant, provided in addition that at or about the time of the injury ...:

a. solicitation or services activities were carried on within this State by or on behalf of the defendant....

Fran's Pecans, Inc., 134 N.C.App. at 113, 516 S.E.2d at 649 (citing N.C. Gen.Stat. § 1-75.4(4)(a) (1996)). "To exercise personal jurisdiction over a foreign [defendant], the plaintiff must establish: 1) an action claiming injury to a North Carolina person or property; 2) that the alleged injury arose from activities by the defendant outside of North Carolina; and 3) that the defendant was engaging in solicitation or services within North Carolina at or about the time of the injury." *Fran's Pecans, Inc.,* 134 N.C.App. at 113, 516 S.E.2d at 649-650 (citation omitted).

Here, the parties agree that: (1) the action involves injury to a North Carolina resident, and (2) the injury arose from activities in South Carolina, outside the forum State. The facts at bar present the question of whether defendant was engaged in "solicitation ... within North Carolina at or about the time of the injury." *Id.* This Court has held that two or three visits to North Carolina in furtherance of a contract, along with numerous phone calls regarding that contract, is sufficient to satisfy the third-prong of the long-arm statute test. *Carson v. Brodin,* 160 N.C.App. 366, ----, 585 S.E.2d 491, 495 (2003). We have also held that statutory grounds for personal jurisdiction existed when "[d]efendants admitted coming to North Carolina and discussing the repairs and then loading and transporting the car." *Marion v. Long,* 72 N.C.App. 585, 587, 325 S.E.2d 300, 302, *disc. rev. denied,* 313 N.C. 604, 330 S.E.2d 612 (1985).

Here, defendant placed advertisements in two North Carolina newspapers. He mailed payments to North Carolina addresses to satisfy invoices from both The Charlotte Observer and The Gaston Gazette. These advertisements directly solicited business from Mecklenburg and Gaston counties. Numerous North Carolina residents crossed the state line to shop at defendant's business. We conclude that plaintiff provided sufficient evidence of solicitation to establish statutory jurisdiction under N.C. Gen.Stat. § 1-75.4(4)(a) (2003).

B. Due Process

We must next consider whether the exercise of personal jurisdiction over defendant comports with due process of law. This Court has recognized that "before a state court may subject anon-resident defendant to a judgment *in personam,* 'certain minimum contacts' with the forum state must be established in order that maintenance of the suit not 'offend traditional notions of fair play and substantial justice.' " *Mabry v. Fuller Shuwayer Co.,* 50 N.C.App. 245, 249, 273 S.E.2d 509, 512, *cert. denied,* 302 N.C. 398, 279 S.E.2d 352 (1981) (quoting *International Shoe Co. v. Washington,* 326 U.S. 310, 90 L.Ed. 95 (1945)). In considering what satisfies the minimum contacts requirement in North Carolina, this Court has held:

***3** The test for minimum contacts is not mechanical, but instead requires individual consideration of the facts in each case. The activity must be such that defendant could reasonably anticipate being brought into court there. The factors to consider for minimum contacts include: (1) the quantity of the contacts; (2) the quality and nature of the contacts; (3) the source and connection of the cause of action to the contacts; (4) the interests of the forum state; and (5) the convenience to the parties.

Fran's Pecans, Inc., 134 N.C.App. at 114, 516 S.E.2d at 650 (internal citations omitted). We consider defendant's activities "as a whole, and not as isolated acts" in determining whether sufficient minimum contacts exist. *Dumas v. R. R.,* 253 N.C. 501, 507, 117 S.E.2d 426, 430 (1960).

Our United States Supreme Court has held that "if a foreign [defendant] purposefully avails itself of the benefits of an economic market in the forum State, it may subject itself to the State's *in personam* jurisdiction even if it has no physical presence in the State." *Quill Corp. v. North Dakota,* 504 U.S. 298, 307, 119 L.Ed.2d 91, 103 (1992). That Court also noted a defendant "purposefully avails" himself by indicating "an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State...." *Asahi Metal Industry Co. v. Superior Court of California,* 480 U.S. 102, 112, 94 L.Ed.2d 92, 104 (1987).

Here, defendant purposefully availed himself of North Carolina's economic market. He solicited business by placing at least 400 advertisements over a five-year period in two newspapers doing business in and distributing in North Carolina. Plaintiff's evidence shows that she became aware of The Peach Tree because of these advertisements and that numerous North Carolina residents also responded to these solicitations. Defendant's business is located fifteen miles across the North Carolina border in York County, South Carolina, and adjoins Gaston County, North Carolina where this action was filed.

Considering these activities collectively, we conclude that defendant targeted and marketed to a certain geographical area within North Carolina in order to obtain financial benefit. The quality and quantity of defendant's activities in North Carolina, along with the lack of inconvenience of defending

this action in an adjoining county, is sufficient to allow the exercise of *in personam* jurisdiction over defendant.

IV. Conclusion

The trial court erred in granting defendant's motion to dismiss for lack of personal jurisdiction. We hold that plaintiff established: (1) statutory jurisdiction under North Carolina's long-arm statute, N.C. Gen.Stat. § 1-75.4 (2003), and (2) sufficient minimum contacts within North Carolina, such that exercise of personal jurisdiction over defendant does not "offend traditional notions of fair play and substantial justice." *Mabry,* 50 N.C.App. at 249, 273 S.E.2d at 512. The trial court's order is reversed and this action is remanded.

***4** Reversed and Remanded.

Judges HUDSON and STEELMAN concur.
Report per Rule 30(e).

All Citations

161 N.C.App. 742, 590 S.E.2d 23 (Table), 2003 WL 22952113

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2022 WL 873366
Only the Westlaw citation is currently available.
United States District Court,
E.D. Missouri, Eastern Division.

Robert A. WILLIAMS, Plaintiff(s),

v.

LG CHEM, LTD., Defendant(s).

Case No. 4:21-cv-00966-SRC
|
Signed 03/24/2022

Attorneys and Law Firms

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Rachel A. Hedley, Nelson Mullins LLP, Columbia, SC, for Defendant.

Memorandum and Order

STEPHEN R. CLARK, UNITED STATES DISTRICT JUDGE

***1** Robert Williams sued two LG companies after an electronic cigarette powered by an LG 18650 lithium-ion battery exploded in his pocket and severely injured him. Doc. 1 at pp. 2, 12. The Court previously dismissed LG Chem America because Williams failed to make a prima facie case that personal jurisdiction over LG Chem America existed. Doc. 20. Now LG Chem, Ltd. moves to dismiss the case for lack of personal jurisdiction, asserting by declaration that in the three years before Williams's accident, the company had not sold any 18650 lithium-ion batteries to anyone in Missouri, Doc. 30-1 at p. 3, and that the company "never distributed, marketed, advertised, or sold 18650 lithium ion cells directly to consumers as standalone, replaceable batteries," and never authorized anyone else to do so, Doc. 23-4 at pp. 4–5. Nevertheless, because Williams makes a prima facie case that personal jurisdiction over LG Chem exists, the Court denies LG Chem's motion to dismiss.

After the parties fully briefed the motion to dismiss, Williams moved to strike the declaration LG Chem submitted with its reply, arguing that it contained new evidence that LG should have submitted earlier. As explained below, while the Court considers LG Chem's behavior vexing, the Court nevertheless considers the company's declaration because the company-representative's statements do not change the Court's decision to deny the motion to dismiss.

I. Background

As discussed in the Court's prior order, in the summer of 2018, several weeks after Williams purchased LG 18650 lithium-ion batteries and an electronic cigarette from a retail store in Missouri, two of those batteries exploded in his pocket, causing severe burn injuries to his leg, genitals, and fingers. Doc. 1 at p. 12. Seeking compensation for his injuries, Williams sued LG Chem, Ltd., a Korean company, and one of its American subsidiaries, LG Chem America, Inc, a Delaware company with its principal place of business in Georgia. LG Chem argues that neither the Missouri long-arm statute nor the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution permits the Court to exercise personal jurisdiction over it. Docs. 23-1.

Williams alleges that LG Chem "ship[s] huge quantities of its batteries, including 18650 lithium-ion batteries into Missouri, and that the company "market[s], advertise[s], target[s], and promote[s] the sale of its various products, including lithium-ion batteries, to numerous consumers and distributors throughout Missouri." Doc. 1 at pp. 7–9. Williams claims that LG Chem "has specifically shipped tens of thousands of lithium-ion batteries into Missouri." *Id.* at p. 3. Williams also alleges that LG Chem sells its lithium-ion batteries to third-party distributors with the knowledge and expectation that those batteries will be sold in Missouri. *Id.* As with his response to LG Chem America's motion, Williams does not file any declarations or any other evidence but instead relies entirely on the allegations in his complaint to establish a prima facie case that personal jurisdiction over LG Chem exists.

***2** In support of its motion to dismiss, LG Chem filed two declarations, both by Hwi Jae Lee, who worked as a sales professional for LG Chem from 2015 to 2020. Docs. 23-4, 30-1. Lee swears that "LG Chem did not sell or ship any 18650 lithium ion cells to anyone located in Missouri in the three years preceding the date of Plaintiff's alleged incident (August 7, 2018)." Doc. 30-1 at p. 3. Lee is "not aware of any basis for the assertion that LG Chem sold or shipped tens of thousands of 18650 lithium ion cells to buyers in Missouri." *Id.* He further attests that LG Chem "never advertised, distributed, or sold any lithium ion battery cells

to any distributor, wholesaler, retailer, or other individual or entity known to LG Chem to be engaged in the business of selling 18650 lithium ion cells directly to consumers for use as standalone, replaceable batteries." Doc. 23-4 at p. 5. Lee also states that LG Chem did not design or manufacture 18650 lithium-ion cells in Missouri and the company "is not registered to do business in Missouri, does not have an office in Missouri, and does not own or lease any property in Missouri." Doc. 23-4 at pp. 3, 5.

II. Standard

Federal Rule of Civil Procedure 12(b)(2) allows a party to move to dismiss a lawsuit for lack of personal jurisdiction. When a defendant contests personal jurisdiction, a plaintiff bears the burden at the pleading stage to "make a prima facie showing that personal jurisdiction exists, which is accomplished by pleading sufficient facts to support a reasonable inference that the defendant can be subjected to jurisdiction within the state." *K-V Pharm. Co. v. J. Uriach & CIA, S.A.*, 648 F.3d 588, 591–92 (8th Cir. 2011) (internal quotations and alterations omitted). "Although the evidentiary showing required at the prima facie stage is minimal, the showing must be tested, not by the pleadings alone, but by the affidavits and exhibits supporting or opposing the motion." *K-V Pharm Co.*, 648 F.3d at 592 (internal quotations, alterations, and citations omitted). At this stage, the Court views all the evidence in the light most favorable to the plaintiff and will not dismiss the case if the evidence, when viewed in this light, "is sufficient to support a conclusion that the exercise of personal jurisdiction over [the defendant] is proper." *Creative Calling Solutions, Inc. v. LF Beauty Ltd.*, 799 F.3d 975, 979 (8th Cir. 2015) (citing *Radaszewski ex rel. Radaszewski v. Telecom Corp.*, 981 F.2d 305, 309–10 (8th Cir. 1992) and Fed. R. Civ. P. 56(a)).

III. Discussion

"Specific personal jurisdiction can be exercised by a federal court in a diversity suit only if authorized by the forum state's long-arm statute and permitted by the Due Process Clause of the Fourteenth Amendment," *Viasystems, Inc. v. EBM-Papst St. Georgen GmbH & Co., KG*, 646 F.3d 589, 593 (8th Cir. 2011), and LG Chem argues that neither permits the Court's exercise of jurisdiction here. The Court first considers the due-process issue and then Missouri's long-arm statute, before taking up Williams's motion to strike.

A. Due process

Due process requires a plaintiff to establish that "sufficient 'minimum contacts' exist" between the defendant and the forum state such that " 'traditional notions of fair play and substantial justice' are not offended." *Whaley v. Esebag*, 946 F.3d 447, 451 (8th Cir. 2020) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). These minimum contacts with the forum state must allow the defendant to "reasonably anticipate being haled into court there." *Id.* (quotation omitted). While the Due Process Clause allows the court to exercise general or specific personal jurisdiction over a defendant, *see, e.g.*, *Fastpath, Inc. v. Arbela Tech., Corp.*, 760 F.3d 816, 820 (8th Cir. 2014), because Williams argues only that the Court has specific jurisdiction over LG Chem, Doc. 27 at p. 4, the Court only addresses specific jurisdiction.

A court's jurisdiction over specific claims arises out of a relationship among the defendant, the forum, and the litigation. *Daimler AG v. Bauman*, 571 U.S. 117, 133 (2014). For specific jurisdiction to exist, the suit must "aris[e] out of or relat[e] to the defendant's contacts with the forum." *Bristol-Myers Squibb Co. v. Super. Ct. of Cal., S.F. Cty.*, 137 S. Ct. 1773, 1780 (2017) (alterations in original) (citations and internal quotations omitted); *see also Whaley*, 946 F.3d at 451 (quoting *Walden v. Fiore*, 571 U.S. 277, 284 (2014)) (noting that "the relationship must arise out of contacts that the 'defendant himself' create[d] with the forum State").

***3** The Eighth Circuit has identified five factors for courts to consider in assessing minimum contacts: "(1) the nature and quality of the contacts with the forum state; (2) the quantity of the contacts; (3) the relationship of the cause of action to the contacts; (4) the interest of [the forum state] in providing a forum for its residents; and (5) the convenience or inconvenience to the parties." *K-V Pharm. Co.*, 648 F.3d at 592 (alteration in original) (quoting *Johnson v. Arden*, 614 F.3d 785, 794 (8th Cir. 2010)). The factors are interrelated, and the Eighth Circuit considers them together. *See id.* ("Although the first three factors are primary factors, and the remaining two are secondary factors, we look at all of the factors and the totality of the circumstances in deciding whether personal jurisdiction exists.").

1. The nature, quality, and quantity of LG Chem's Missouri contacts

Turning to the first and second factors, Williams alleges that LG Chem has pervasive business contacts with Missouri. The complaint alleges that the company regularly "ship[s]

huge quantities of its batteries, including 18650 lithium-ion batteries, into and throughout Missouri," and that the company "market[s], advertise[s], target[s], and promote[s] the sale of its various products, including lithium-ion batteries, to numerous consumers and distributors throughout Missouri." Doc. 1 at ¶¶ 10, 30.

LG Chem attempts to controvert these assertions with Lee's statement that LG Chem "did not sell or ship any 18650 lithium ion cells to anyone located in Missouri in the three years preceding the date of Plaintiff's alleged incident," Doc. 30-1 at p. 3, but this statement only targets a limited time period and does not contradict Williams's assertions. Moreover, Lee's personal lack of "aware[ness] of any basis for the assertion that LG Chem sold or shipped tens of thousands of 18650 lithium ion cells to buyers in Missouri," *id.*, similarly does not work a denial.

LG Chem also attempts to controvert Williams's claim that it "market[s], advertise[s], target[s], and promote[s] the sale of its various products" in Missouri. Doc. 30 at p. 13. But LG Chem's representative only swears—with surgical precision—that LG Chem did not advertise 18650 lithium-ion batteries for particular purposes and to certain people and entities. Doc. 23-4 at ¶¶ 14, 15, 19 (For example, "LG Chem never distributed, marketed, advertised, or sold 18650 lithium ion cells *directly* to *consumers* as *standalone, replaceable batteries* ...."). LG Chem's carefully crafted declaration also does not refute the assertion that LG Chem advertised its products in Missouri. *Id.*

Viewing the evidence in the light most favorable to Williams, Williams plausibly alleges that LG Chem advertised its products in Missouri and shipped "huge quantities" of 18650 lithium-ion batteries into Missouri. *See Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1022 (2021) (When a company "serves a market for a product in a State and that product causes injury in the State to one of its residents, the State's courts may entertain the resulting suit.").

2. The relation of Williams's claims to LG Chem's Missouri contacts

The third factor requires the Court to consider the relation of Williams's claim to LG Chem's contacts in Missouri. Under this factor, the Court can only exercise specific personal jurisdiction over a defendant where the claims against that defendant arise out of or relate to the defendant's contacts with the forum. *Ford*, 141 S. Ct. at 1025 ("The plaintiff's claims, we have often stated, 'must arise out of or relate to the defendant's contacts' with the forum."). LG Chem believes Williams fails to satisfy this critical factor for three reasons: first, the Missouri Supreme Court has found that Missouri courts lack jurisdiction over LG Chem, Doc. 23-1 at p. 11–12; second, LG Chem's admitted contacts with Missouri do not "relate" to Williams's claims because LG Chem "never served a consumer market in Missouri for standalone 18650 lithium ion batteries," and instead only sold batteries to "industrial customers in Missouri, to be encased in battery packs with protective circuit[r]y," *id.* at p. 13; and third, all the purported contacts between LG Chem and Missouri "were formed entirely by the Plaintiff and other third parties," *id.* at p. 15.

***4** LG Chem first argues that the Court should follow the holding in *State ex rel. LG Chem, Ltd. v. McLaughlin*, 599 S.W.3d 899 (Mo. 2020), which LG Chem characterizes as a finding that "LG Chem lacks sufficient minimum contacts with Missouri to satisfy due process in a case involving materially indistinguishable claims." Doc. 23-1 at p. 2. But the *McLaughlin* court premised its due-process ruling on the fact that the plaintiff "did not allege LG Chem sold its batteries directly into Missouri," and went on to hold that "[b]ecause the sale of LG Chem's batteries into Missouri by an independent third party is the only contact between LG Chem and Missouri that [plaintiff] alleges, [plaintiff] has failed to establish LG Chem has sufficient minimum contacts with Missouri." *McLaughlin*, 599 S.W.3d at 904. Unlike the plaintiff in *McLaughlin*, Williams alleges that LG Chem shipped "huge quantities" of 18650 lithium-ion batteries into Missouri, Doc. 1 at p. 3, and LG Chem only attempts to refute this with Lee's carefully crafted statements noted above. Williams's uncontroverted allegation that LG Chem itself directed 18650 lithium-ion batteries into Missouri distinguishes *McLaughlin*.

Next, LG Chem argues that Williams's claims do not arise out of or relate to LG Chem's contacts with Missouri because "LG Chem never served a consumer market for standalone, 18650 vaping batteries in Missouri," and instead only sold batteries to "industrial customers in Missouri, to be encased in battery packs with protective circuit[r]y." Doc. 23-1 at pp. 9, 13 (citing Doc. 23-4 at ¶¶ 15, 17–20). But the only evidence LG Chem relies on for these assertions, Lee's declaration, does not establish that LG Chem "never serviced a consumer market." Lee painstakingly swore only that "LG Chem never distributed, marketed advertised, or sold 18650 lithium

ion cells *directly* to consumers as standalone, replaceable batteries, and never *authorized* any ... entity to do so." Doc. 23-4 at ¶ 15 (emphasis added). Lee further swore that "LG Chem never ... sold any lithium ion battery cells to any ... entity known to LG Chem to be engaged in the business of selling 18650 lithium ion cells *directly* to consumers for use as standalone, replaceable batteries," *id.* at ¶ 19 (emphasis added), and had no "distributors for its 18650 lithium ion battery cells located in Missouri," *id.* at ¶ 18. Despite these precisely worded statements, Lee can only swear that "LG Chem did not sell or ship any 18650 lithium ion cells to anyone located in Missouri in the three years preceding the date of Plaintiff's alleged incident." Doc. 30-1 at ¶ 10.

These statements at most establish that LG Chem did not sell 18650 lithium-ion batteries *directly* to consumers, knowingly sell 18650 lithium-ion batteries to an entity that sold *directly* to consumers, or *explicitly authorize* an entity to sell 18650 lithium-ion batteries *directly* to consumers. The declarations do not rule out LG Chem's service of a consumer market through a slightly more complex, hypothetical supply-chain: for example, LG Chem sells 18650 lithium-ion batteries to a Missouri firm, that sells batteries to another firm, that sells batteries directly to consumers. Thus, LG Chem's declarations do not establish that "LG Chem never served a consumer market for standalone, 18650 vaping batteries in Missouri," Doc. 23-1 at p. 9, and do not refute Williams's allegations. The Court therefore need not address LG Chem's legal arguments that depend upon this assertion.

Lastly, LG Chem says "any connections between this lawsuit and Missouri were formed entirely by the Plaintiff and other third parties; none by LG Chem. Therefore, due process is not satisfied." Doc. 23-1 at p. 15. Weighing Williams's allegations against the evidence submitted by LG Chem, the Court disagrees. While personal jurisdiction cannot arise from the unilateral actions of third parties that send a product into a state, *see Bristol-Myers*, 137 S. Ct. at 1781 ("[A] defendant's relationship with a ... third party, standing alone, is an insufficient basis for jurisdiction."), Williams alleges direct contacts between LG Chem and Missouri, including that LG Chem itself shipped "huge quantities" of 18650 lithium-ion batteries directly into Missouri. Thus, Williams's prima facie case does not rely on LG Chem's "relationship with ... third part[ies]." *Id.*

***5** The Court finds a close relation between Williams's claims and LG Chem's Missouri contacts. While "[n]one of [the Supreme Court's] precedents has suggested that only a strict causal relationship between the defendant's in-state activity and the litigation will do," *Ford Motor Co.*, 141 S. Ct. at 1026, "there must be an affiliation between the forum and the underlying controversy," *id.* at 1025 (quoting *Bristol-Myers*, 137 S. Ct. at 1780). Here, a Missourian filed a lawsuit in Missouri, alleging that LG Chem shipped defective batteries into Missouri and that some of those batteries exploded and injured him in Missouri. "So there is a strong 'relationship among the defendant, the forum, and the litigation'—the 'essential foundation' of specific jurisdiction." *Id.* at 1028 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)).

3. Missouri's interest and the convenience of the parties

The fourth factor requires the Court to consider the interest of Missouri in providing a forum to its residents. Here, Williams —a Missouri resident—purchased the batteries in Missouri and suffered injuries in Missouri when the batteries exploded. Doc. 1 at ¶ 1. The fifth factor requires the Court to consider the convenience or inconvenience to the parties. Williams lives in the forum; moreover, Williams's injuries, and the treatment he received for them, happened in the forum. *Id.* at ¶¶ 1, 45. Thus, witnesses also likely live in or near the forum. Moreover, Williams would suffer serious inconvenience should Missouri courts lack jurisdiction over his claims, as South Korea likely serves as Williams's alternative forum for suing LG Chem. On the other hand, LG Chem is a South Korean company with its principal place of business in South Korea. Doc. 23 at ¶ 2. And while consideration of this factor should not "[m]erely shift[ ] the inconvenience from one side to the other," *Terra Intern., Inc. v. Mississippi Chem. Corp.*, 119 F.3d 688, 696–97 (8th Cir. 1997) (so noting in the context of a 28 U.S.C. § 1404(a) motion to transfer), as a "large corporation," LG Chem is likely "ab[le] to protect its interests in this forum." *Nelson v. Master Lease Corp.*, 759 F. Supp. 1397, 1401–02 (D. Minn. 1991) (finding that "the convenience of the parties" weighed in favor of the plaintiff on a 28 U.S.C. § 1404(a) motion to transfer).

Looking at "all the factors" and considering "the totality of the circumstances," the Court concludes that Williams has made a prima-facie showing that LG Chem purposefully availed itself of the privilege of doing business in Missouri by shipping its 18650 lithium-ion batteries into the state, that Williams's claims relate to those contacts, and that the Court's exercise of personal jurisdiction over LG Chem comports with due process. *Johnson*, 614 F.3d at 794. Of course,

Williams continues to "bear[ ] the burden of proof on the issue of personal jurisdiction, and must establish jurisdiction by a preponderance of the evidence at trial ...." *Creative Calling Solutions, Inc.*, 799 F.3d at 979 (citing *Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1387 (8th Cir. 1991)).

B. Missouri's long-arm statute

The Missouri long-arm statute permits a court to assert personal jurisdiction based on a number of acts, including: "(3) the commission of a tortious act within this state." Mo. Rev. Stat. § 506.500.1. "While the long-arm statute extends jurisdiction to the limits of the Due Process Clause, it does so only for acts within its enumerated categories." *Dairy Farmers of Am., Inc. v. Bassett & Walker Int'l, Inc.*, 702 F.3d 472, 475 (8th Cir. 2012).

The Court finds that Williams makes a prima facie case satisfying at least the third category of the Missouri long-arm statute—"the commission of a tortious act within this state." Mo. Rev. Stat. § 506.500.1. Williams asserts several tort claims against LG Chem, and, in Missouri, even " 'extraterritorial acts that produce consequences in the state,' ... are subsumed under the tortious act section of the long-arm statute." *Bryant v. Smith Interior Design Group, Inc.*, 310 S.W.3d 227, 232 (Mo. 2010) (quoting *Longshore v. Norville*, 93 S.W.3d 746, 752 (Mo. Ct. App. 2002)). With his allegations of injury, Williams makes a prima facie case that LG Chem's alleged acts produced consequences in Missouri. *See* Doc. 1 at ¶ 1 ("Williams ... suffered injury in Missouri when that battery exploded while inside of his pocket.")

C. Williams's motion to strike

***6** Arguing that LG Chem "waited until its reply brief to attach a 'supplemental' declaration that purports to deny a particular allegation in the complaint," Williams moves to strike the declaration. Doc. 31 at p. 1. Alternatively, Williams requests that the Court refuse to consider the declaration in deciding the motion to dismiss, or, failing that, permit Williams to depose Lee and conduct other jurisdictional discovery. *Id.* at p. 3.

As LG Chem points out, while the Court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter," Fed. R. Civ. P. 12(f), declarations are not pleadings, Fed. R. Civ. P. 7(a) ("Only these pleadings are allowed: (1) a complaint; (2) an answer to a complaint; (3) an answer to a counterclaim designated as a counterclaim; (4) an answer to a crossclaim; (5) a third-party complaint; (6) an answer to a third-party complaint; and (7) if the court orders one, a reply to an answer."). Thus, Williams's motion to strike lacks a legal basis and the Court denies it. *See, e.g.*, *Carlson Marketing Grp., Inc. v. Royal Indemnity Co.*, No. 4-cv-3368, 2006 WL 2917173, at *2 (D. Minn. Oct. 11, 2006) (denying motion to strike because "neither a memorandum nor an affidavit is a 'pleading' ").

Alternatively, Williams asks the Court to simply disregard LG Chem's reply declaration. Indeed, "[c]ourts generally do not review arguments first raised in a reply brief because the other party has not had adequate opportunity to respond to such arguments." *Bayes v. Biomet, Inc.*, No. 4:13-cv-800, 2021 WL 3330911, at *8 (E.D. Mo. Aug. 2, 2021) (citing *Fish v. United States*, 748 F. App'x 91, 92 (8th Cir. 2019)). By waiting to controvert Williams's allegations that LG Chem shipped 18650 lithium-ion batteries into Missouri, LG Chem smuggled important evidence and argument into the record on reply without adequate justification.

Williams alleged in his complaint that LG Chem "shipp[ed] huge quantities of its batteries, including 18650 lithium-ion batteries, into and throughout Missouri, and each Defendant has specifically shipped tens of thousands of lithium-ion batteries into Missouri." Doc. 1 at ¶ 10. Focusing on the last clause in the preceding sentence, LG Chem argues that these statements did not specifically allege that LG Chem shipped tens of thousands of *18650* lithium-ion batteries into Missouri. Instead, LG Chem says, that specific allegation appears for the first time in Williams's response to LG Chem's motion to dismiss. Doc. 33 at p. 2; *see* Doc. 27 at pp. 1, 9 (Williams's response, characterizing his complaint as alleging that "LG shipped thousands of 18650 lithium-ion batteries to Missouri"). Thus, LG Chem says it justifiably responded to the specific allegation on reply.

LG Chem's argument lacks merit. Williams alleges in his complaint that LG Chem "shipp[ed] huge quantities of its batteries, including 18650 lithium-ion batteries, into and throughout Missouri." In its memorandum in support of its motion to dismiss, LG Chem acknowledged this allegation, Doc. 23-1 at pp. 3–4, and proceeded to make arguments that assumed its truth, *id.* at p. 13 ("Even if LG Chem had shipped 'tens of thousands' of 18650 lithium ion battery cells to industrial customers in Missouri ..."). Thus, LG Chem cannot feign surprise when Williams pointed out that it failed to controvert the allegation by declaration or otherwise.

The Court discourages LG Chem's legerdemain. However, as discussed, Williams makes a prima facie case of jurisdiction even considering the second declaration, and the Court denies Williams's motion to strike.

IV. Conclusion

***7** The Court denies LG Chem's [23] motion to dismiss for lack of jurisdiction and denies Williams's [31] motion to strike.

So Ordered this 24th day of March 2022.

All Citations

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