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Jul 19 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM UNION COUNTY
Court of Common Pleas
William A. McKinnon, Circuit Court Judge

Appellate Case No. 2021-000557

Civil Action No. 2019-CP-44-00054

Dwayne Thompson, Respondent,

v.

LG Chem, Ltd.; LG Chem America, Inc.; and Rolling Fog
Vapor Company, LLC..... Defendants,

Of which LG Chem, Ltd. and LG Chem America, Inc., are
the..... Appellants.

MEMORANDUM IN SUPPORT OF IMMEDIATE APPEALABILITY

Appellants LG Chem, Ltd. (“LG Chem”) and LG Chem America, Inc. (“LGCAI”) (collectively, “Appellants”) submit this memorandum in response to the Court’s letter questioning the immediate appealability of the challenged orders. Appellants filed this appeal seeking review of the circuit court’s rulings permitting the litigation to go forward against Appellants despite the absence of minimum contacts with South Carolina sufficient to support the exercise of personal jurisdiction consistent with the Due Process requirements of the Fourteenth Amendment to the United States Constitution.

As detailed below, appealability must be determined on a case-by-case basis. *Stone v. Thompson*, 426 S.C. 291, 295, 826 S.E.2d 868, 870 (2019). Therefore, although the Supreme Court considered whether the denial of a motion to dismiss based on lack of personal jurisdiction

was immediately appealable in *Mid-State Distributors v. Century Importers*, 310 S.C. 330, 426 S.E.2d 777 (1993), the Court’s statement there that “the denial of a motion to dismiss under Rule 12(b)(2), SCRPC, is interlocutory and not directly appealable,” necessarily addressed the arguments and facts and circumstances in *Mid-State*, and did not foreclose all interlocutory appeals of orders denying motions to dismiss under Rule 12(b)(2) SCRPC no matter the arguments made or the facts and circumstances present. *Id.* at 336, 426 S.E.32d at 781.

Here, the subject orders are immediately appealable because Appellants have raised arguments that were not argued to or ruled upon by the Supreme Court in *Mid-State* regarding both the merits and appealability itself, and because the procedural history and facts and circumstances here are different than those before the court in *Mid-State*. Therefore, the Court should find the Orders involved to be immediately appealable and instruct the parties to engage in the appellate briefing procedures outlined in the South Carolina Appellate Court Rules.

Background

In this products liability action, Respondent Dwayne Thompson seeks to recover for injuries allegedly sustained when a lithium ion battery cell allegedly exploded in his pocket. (**Ex. A**, Compl. ¶¶ 2, 8, 11–12.) Respondent asserts that he purchased the battery cell from Defendant Rolling Fog Vapor Company, LLC (“Rolling Fog”), as a standalone battery to use with his e-cigarette device. (*Id.*) Respondent also alleges, generically and in conclusory fashion, that Appellants designed, manufactured, supplied, sold, imported, and distributed the subject battery and expected the battery to be sold in South Carolina. (*Id.* at ¶¶ 5-7.)

LG Chem is a Korean corporation with its headquarters and principal offices in Seoul, South Korea. (**Ex. B**, Aff. of Sung Han Ryu, filed April 24, 2019, ¶ 4; Compl. ¶ 3.) LGCAI is a Delaware corporation with its principal place of business in Atlanta, Georgia. (**Ex. C**, Aff. of

HyunSoo Kim, filed April 24, 2019, at ¶ 5; **Ex. A**, Compl. ¶ 4.) LGCAI is a wholly-owned subsidiary of LG Chem, and is a separate and independent corporate entity. Appellants do not design, manufacture, distribute, advertise, or sell lithium ion battery cells to consumers for use as standalone, replaceable batteries with e-cigarette devices, or for any other purpose. (**Ex. B**, Ryu Aff. ¶ 13; **Ex. C**, Kim Aff. ¶ 10, 13.) Appellants have never conducted any business with the retailer (Rolling Fog) and have never served a consumer market for such standalone, replaceable batteries in South Carolina—or anywhere else. (**Ex. B**, Ryu Aff. ¶ 15; **Ex. C**, Kim Aff. ¶ 12.)

Notwithstanding these facts, Respondent successfully argued to the circuit court that Appellants are subject to specific personal jurisdiction in South Carolina under a “stream of commerce” theory based on *State v. NV Sumatra Tobacco Trading, Co.*, 379 S.C. 81, 666 S.E.2d 218 (2008). Respondent waived the opportunity to pursue discovery concerning the extent of Appellants’ suit-related contacts with South Carolina, and successfully argued to the circuit court that the defendant could be subjected to the burden of litigating the merits of the case merely because the Respondent Plaintiff alleged in his complaint that Appellants placed a product into the stream of commerce and expected that it would make its way to South Carolina.

As Appellants will detail in their merits brief, the circuit court should not have denied Appellants’ motion to dismiss because Respondent Plaintiff’s formulaic and conclusory allegations were legally insufficient to meet his burden of proving that Appellants had sufficient minimum contacts with South Carolina to satisfy constitutional due process, and Respondent Plaintiff offered no admissible facts or evidence to support that burden.

In fact, the first circuit court judge to hear the Appellants’ motions—Judge Maddox—expressly concluded that he could not determine that the defendants had sufficient contacts with South Carolina to support the exercise of personal jurisdiction based on the allegations of the

Complaint alone and an inadmissible chart of irrelevant import records prepared by Plaintiff's counsel.

After Respondent Plaintiff was provided the *opportunity* to conduct jurisdictional discovery to attempt to obtain admissible facts concerning any suit-related contacts Appellants may have formed with South Carolina, Respondent did not pursue such discovery, and instead expressly asked a second circuit court judge—Judge McKinnon—to decide the motions on the same record he initially presented to Judge Maddox (which Judge Maddox had previously correctly found insufficient). Judge McKinnon then ruled that the allegations of Plaintiff's complaint were sufficient to meet his burden of establishing a prima facie case of jurisdiction, and denied Appellants' motions to dismiss. Alternatively, Judge McKinnon found the inadmissible and irrelevant chart of import records produced by Plaintiff's counsel was sufficient to establish minimum contacts as to LG Chem, Ltd. and that this chart and a business registration in the state was sufficient to establish minimum contacts as to LG Chem America, Inc.¹

This was error. For a court of this state to exercise specific personal jurisdiction over Appellants consistent with constitutional due process, Respondent Plaintiff would have to establish that his claims “arose out of or related to” contacts formed by Appellants with South Carolina. He failed to do so. By contrast, Appellants introduced *admissible, uncontroverted* evidence establishing that they had no suit-related contacts with South Carolina, including because neither Appellant ever served a consumer market for standalone, replaceable lithium ion batteries in South Carolina, or anywhere else.

¹ The chart was an inadmissible summary of unidentified documents described as import records illustrating shipments of other products to industrial customers in the state, not shipments of lithium ion battery cells to anyone in the consumer vaping industry. The circuit court concluded that this unrelated business was sufficient to satisfy *J. McIntyre* and *Bristol-Myers* and did not address the Supreme Court's most recent personal jurisdiction decision in *Ford*.

Therefore, the circuit court—Judge McKinnon—should have found that Respondent Plaintiff failed to meet his burden of establishing constitutional minimum contacts. The circuit court erred in relying on *Sumatra*, when the facts of this case were highly distinguishable, and when the U.S. Supreme Court’s three decisions on specific personal jurisdiction since *Sumatra* was decided² make clear that constitutional due process cannot be satisfied based on conclusory allegations that a foreign defendant placed a product into the stream of commerce and expected that it would make its way to the forum or by allegations concerning unrelated business conducted in the state.³ Instead, the court must have facts, which it did not have in this case, showing that the defendant directed some activity to South Carolina that was sufficiently related to the plaintiff’s claims to satisfy constitutional due process according to the Supreme Court, as discussed in *Bristol-Myers* (2017) and *Ford* (2021).

Because those facts were not presented to the court in this case, as the first circuit court judge to consider the issue expressly found; because, to the contrary, Appellants presented

² *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 877-78 (2011); *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1781 (2017); and *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021).

³ As applied in products liability cases, *Sumatra* is not consistent with the law governing specific jurisdiction. See *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 877-78 (2011); *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1781 (2017); and *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021). In *Nicastro*, the Supreme Court expressly rejected the type of “nationwide” stream of commerce jurisdiction that the South Carolina Supreme Court approved in *Sumatra*. See 564 U.S. at 877-78. Moreover, in 2017, the Supreme Court reiterated in *Bristol-Myers* that specific jurisdiction requires “a connection between the defendant’s contacts with the forum and the specific claims at issue,” and “[e]ven regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales.” 137 S. Ct. 1773, 1781 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 931 n.6 (2011)). Therefore, interpreting *Sumatra* to allow the exercise of personal jurisdiction based on allegations that a defendant placed a product into the stream of commerce with knowledge or awareness or expectation it might make its way to South Carolina, or conducted unrelated business in the state, and when the only admissible evidence in the record showed that the plaintiff’s claims are not related to any contacts the defendants formed with the forum state itself, directly conflicts with these United States Supreme Court decisions.

admissible facts establishing that constitutional minimum contacts were lacking; and because one circuit judge cannot overrule another, this Court should find that the challenged orders are immediately appealable.

Argument

I. The subject orders are immediately appealable because a finding of sufficient minimum contacts implicates a defendant's substantial constitutional right to due process.

S.C. Code Ann. § 14-3-330(2) provides that “[a]n order affecting a substantial right” is immediately appealable if it “in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action.” *Id.* The Supreme Court has recognized that “by its nature, however, the question of whether an order is immediately appealable is determined on a *case-by-case basis*.” *Stone v. Thompson*, 426 S.C. 291, 295, 826 S.E.2d 868, 870 (2019) (emphasis added). This Court should therefore analyze the circumstances presented here and determine appealability.

Although the Supreme Court held in 1993 that “the denial of a motion to dismiss under Rule 12(b)(2), SCRCPP, is interlocutory and not directly appealable,” *Mid-State*, Appellants here raised several arguments to the circuit court that were not before the *Mid-State* Court, and raise arguments regarding appealability itself that were not argued to the *Mid-State* court. *Mid-State* **did not** expressly address whether a ruling that a foreign defendant could be required to defend suit - based on conclusory allegations that minimum contacts existed without a showing of admissible, supporting facts, and in the face of competing, admissible facts showing that minimum contacts were lacking - affects a substantial right. *Mid-State* expressly overruled two prior cases to the extent they conflicted with the *Mid-State* ruling. Notably, however, the court did not expressly overrule *Keller v. Keller*, 296 S.C. 411, 373 S.E.2d 692 (Ct. App. 1988), which **permitted** an

interlocutory appeal from an order denying a motion to dismiss for lack of personal jurisdiction where the sufficiency of minimum contacts was at issue, as it is here.

A review of the Supreme Court briefing in *Mid-State* is instructive and confirms that the arguments raised by Appellants here were not before the court there. (*See generally* **Ex. D**, Br. of Appellant; **Ex. E**, Br. of Resp't; and **Ex. F**, Reply Br. of Appellant.) Appellant did not address appealability in its opening brief in *Mid-State*. (*See generally* **Ex D**.) Respondent in *Mid-State* challenged appealability in its brief by highlighting the lack of finality and comparing the subject ruling to an order denying a motion to dismiss under 12(b)(6). (Br. of Resp. at 6-7.) Respondent also contended that permitting interlocutory appeal would “open the floodgates” to appeals of orders denying motions to dismiss for lack of personal jurisdiction. (*Id.* at 7-8.) Appellant’s reply to respondent’s arguments in *Mid-State* consisted *solely* of a short point citing a case from 1890 that the appellant contended supported immediate appealability, along with three subsequent cases that were in accord.⁴ (*See* Reply Br. at 1.) Appellant there did not specifically address the finality or judicial economy arguments raised by the respondent. Most importantly, the appellant there did not raise *any* arguments about the sufficiency of a defendant’s minimum contacts or due process or provide any analysis regarding whether the challenged rulings implicated a substantial right, which is the basis Appellants raise here. (*See id.*)

Mid-State also came before the Supreme Court under an entirely different procedural posture from this matter. In *Mid-State* the case had been pending 18 months when the motion to

⁴ Notably *Mid-State* only expressly overruled the 1890 case cited by appellant: *National Exchange v. Stelling*, 32 S.C. 102, 10 S.E.2d 766 (1890). The court also overruled a second case that was not cited by the appellant, *Agnew v. Adams*, 24 S.C. 86 (1885), but did not discuss the other three cases detailed in the appellant’s reply brief: *Atlantic Soft Drink Co. of Columbia, Inc. v. S.C. Nat’l Bank*, 287 S.C. 228, 336 S.E.2d 876 (1985); *Kay v. Meadors*, 216 S.C. 483, 58 S.E.2d 893 (1950); and *Keller v. Keller*, 296 S.C. 411, 373 S.E.2d 692 (Ct. App. 1988).

dismiss was heard and denied, and the court had previously heard and denied a motion for summary judgment and found there were genuine issues of material fact for trial. The case was nearly up for trial at the time of the hearing on the motion to dismiss in *Mid-State*. (See **Ex. B** at 1-2 & n.1.) The present matter is far different. Here, there has been no merits discovery, the case is likely several years away from a trial, and the plaintiff specifically argued to the trial court that it could decide the question of jurisdiction based solely on the allegations of the complaint. In fact, after the first circuit judge to consider the issues decided that *more information was required* before it could decide the issue of personal jurisdiction, Respondent Plaintiff later argued to the second circuit judge that he did not need additional facts, that he was waiving his opportunity to pursue jurisdictional discovery, and that the issue could—and should—be decided solely on the pleadings.

This Court has previously indicated that an order implicating a party's constitutional rights is immediately appealable because it concerns a substantial right. *E.g., Bateman v. Rouse*, 358 S.C. 667, 675, 596 S.E.2d 386, 390 (Ct. App. 2004). Here, the constitutional guarantee of due process is implicated where the court finds there are sufficient minimum contacts to subject a foreign defendant to the burden of litigation and trial. In this case, the order at issue was based on Respondent Plaintiff's conclusory allegations that minimum contacts are satisfied, even though Appellants introduced *admissible, uncontroverted* evidence showing the constitutional minimum contacts were *absent* and even though Respondent Plaintiff disclaimed any interest or need to pursue discovery to obtain admissible facts to support his burden of proving jurisdiction. This alone warrants a finding of immediate appealability, as explained further below.

South Carolina courts have frequently looked to North Carolina law for guidance in addressing whether an order is immediately appealable. *See, e.g., Salmonsens v. CGD, Inc.*, 377

S.C. 442, 451, 661 S.E.2d 81, 86-87 (2008); *Hagood v. Sommerville*, 362 S.C. 191, 197, 607 S.E.2d 707, 710 (2005); *Shields v. Martin Marietta Corp.*, 303 S.C. 469, 470, 402 S.E.2d 482, 483 (1991); *Pocisk v. Sea Coast Const. of Beaufort*, 380 S.C. 584, 589, 671 S.E.2d 98, 101 (Ct. App. 2008) (all looking to North Carolina case law on immediate appeal questions). North Carolina's appealability statute is similar to South Carolina's and likewise permits interlocutory appeals of orders "affecting a substantial right." See N.C. Gen. Stat. Ann. § 7A-27(b)(3). Although the North Carolina statutory language has an additional provision permitting "immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant," N.C. Gen. Stat. § 1-277(b), the North Carolina courts have interpreted this right to be *limited* to where the appeal raises questions concerning due process and minimum contacts, because those are the questions *affecting a substantial right*.

As the North Carolina Court of Appeals explained in *Hardee ex rel. White v. Lowe's Companies, Inc.*, 640 S.E.2d 445 (N.C. Ct. App. 2007) (table), this is because a substantial right exists where the interlocutory order denying a motion to dismiss for lack of personal jurisdiction "raises questions concerning due process and minimum contacts." *Id.* at *2. This ensures that parties who have less than minimum contacts with the state "will never be forced to trial against their wishes," "promotes judicial economy[,] and protects the constitutional rights of foreign defendants." *Love v. Moore*, 291 S.E.2d 141, 146 (N.C. 1982). The same concerns and points support appealability under South Carolina's appealability statute, which also permit immediate appeals "affecting a substantial right."

Therefore, in light of the foregoing authorities and the requirement that appealability must be determined on a case-by-case basis, Appellants submit that immediate appeal is proper in this narrow circumstance where the question of constitutional minimum contacts is at issue, and

especially where, as here, one circuit judge ruled that Respondent Plaintiff's showing *was not* enough to determine whether minimum contacts existed and a second circuit judge then decided the *same* showing *was* enough.

With respect to a ruling affecting a substantial right for appealability purposes, this case should be viewed as somewhat analogous to *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005). In *Hagood*, the South Carolina Supreme Court found that an order disqualifying a party's counsel of their choice was an immediately appealable order. The respondent there argued any error could be corrected on appeal after final judgment. Yet, the Supreme Court, looking to the points made by other courts concerning the appealability of such an order – including a decision from North Carolina – held that the order affected a substantial right and should be immediately appealable.

The orders appealed here require a foreign defendant who has put forth admissible evidence negating any constitutional minimum contacts with South Carolina, to nonetheless defend itself fully in litigation here without any showing by Respondent Plaintiff of admissible facts establishing the defendant engaged in sufficient suit-related minimum contacts with South Carolina to satisfy due process. This affects the substantial right of the foreign defendant to the constitutional guarantee of due process. North Carolina law should again be taken into account and followed with respect to allowing immediate appellate review of such orders.

II. The lack of available appellate remedies has led to a dearth of precedent to guide the circuit courts.

If the Court views *Mid-State* as a blanket rule against immediate appealability of all orders denying motions to dismiss for lack of personal jurisdiction, it will essentially foreclose Appellants from safeguarding their due process rights in derogation of both the state and federal Constitutions.

A litigant has an arduous road in the absence of immediate appellate consideration of a denial of a motion to dismiss for lack of personal jurisdiction and, particularly, a ruling regarding the sufficiency of minimum contacts. The litigant under such circumstances could not appeal until after final judgment and, only then, if the litigant loses on one or more issues. *See* S.C. Code Ann. § 18-1-30 (“Any party aggrieved may appeal”); *State v. Looper*, 421 S.C. 384, 388–89, 807 S.E.2d 203, 205 (2017) (“[A]n aggrieved party is one who is injured in a legal sense or has suffered an injury to person or property.”). Even if the litigant loses the final judgment and appeals, it must then establish that the order was reversible error. This process would likely take many years, and Appellants would be forced through the entirety of these proceedings all the while being compelled to litigate in the absence of minimum contacts supporting personal jurisdiction.

Further, a litigant who loses at trial will likely have multiple potential appellate issues and must make a tactical decision about which issues—and how many issues—are important enough and strong enough to raise in its appellate brief.⁵ And even if a litigant raises a jurisdictional issue on appeal, an appellate court may not reach the issue. *See Skydive Myrtle Beach, Inc. v. Horry Cty.*, 428 S.C. 638, 643 n.1, 837 S.E.2d 485, 488 n.1 (2020) (noting an appellate court need not address an issue if its ruling on another issue is dispositive (citing *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999))); *Ledford v. Dep’t of Pub. Safety*, 428 S.C. 387, 392 n.5, 835 S.E.2d 509, 511 n.5 (2019) (citing *Futch*); *cf. Davis*, 409 S.C.

⁵ *See, e.g., Jones v. Barnes*, 463 U.S. 745, 751–52 (1983) (“Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.”); *State v. Pelletier*, 552 A.2d 805, 807–08 (Conn. 1989) (“Most cases present only one, two, or three significant questions. . . . Usually . . . if you cannot win on a few major points, the others are not likely to help. . . . The effect of adding weak arguments will be to dilute the force of the stronger ones.” (alterations in original) (quoting R. Stern, *Appellate Practice in the United States* 266 (1981))).

at 281, 762 S.E.2d at 543 (addressing a contempt ruling but declining to address the underlying discovery orders).

The lack of appellate review of circuit court orders finding sufficient minimum contacts creates, in turn, a lack of precedent addressing what is constitutionally sufficient. Trial judges and counsel are left to apply outdated principles with little guidance, as the trial court did here, relying on a decision rendered in 2008 without further guidance as to the three separate decisions issued by the U.S. Supreme Court in 2011, 2017, and 2021 addressing the very constitutional standard at issue in this case. Published decisions addressing the modern confines of personal jurisdiction will create uniformity and stability within the state judicial system, avoid disparate treatment by the trial bench, and reduce costs because litigants will not fight over matters governed by precedent.

The guarantees of due process are illusory if there is no opportunity for appellate review until after final judgment simply because a trial court finds plaintiff's conclusory allegations of minimum contacts are sufficient to proceed with subjecting the foreign defendant to the burden of litigation. Recognizing this potentially harsh result, the federal courts and a number of states permit interlocutory appeal of jurisdictional orders, whether by right⁶, by direct application to an intermediate appellate court,⁷ or by asking the trial court to certify the issue for discretionary appellate review.⁸ South Carolina, however, has no such discretionary procedure, other than direct

⁶ *See, e.g.*, N.Y. C.P.L.R. § 5701(a)(2)(v); Fla. R. App. P. 9.130(a)(3)(C)(i); N.C. Gen. Stat. § 1-277(b); Texas Civil Practice and Remedies Code § 51.014(a)(7).

⁷ *See, e.g.*, N.J. R.A.R 2:2-4; Mich. Ct. R. 7.203(b); Ill. R. S. Ct. 306.

⁸ *See, e.g.*, 28 U.S.C. § 1292(b) (permitting district judge to certify issue for interlocutory appeal where it presents a controlling question of law as to which there is substantial ground for difference of opinion and immediate appeal from the order may materially advance the ultimate termination of the litigation); Ga. O.C.G.A. § 5-6-34(b); C.A.R. 4.2(b); M. R. A. P. 5; Pa. R.A.P. 311(b) (permitting interlocutory appeal as of right of order sustaining personal jurisdiction where the lower court finds a substantial issue of jurisdiction is presented); Ind. R. App. P. 14(B)(1) (permitting interlocutory appeal upon trial court's certification if one of three grounds are met: (1)

petition to the Supreme Court for an extraordinary writ of certiorari in its original jurisdiction. Therefore, because this matter implicates Appellants’ substantial constitutional right to due process, the facts of this case illustrate why interlocutory review as of right is appropriate when, as here, the U.S. Constitution limits the authority of the trial court to subject a foreign defendant to the burden of litigation and trial.

III. Recognizing the propriety of immediate review regarding sufficiency of minimum contacts will not “open the floodgates” to the appellate courts.

To the extent the Court is concerned with the potential ramifications of approving of an immediate appeal in this matter, the facts of this case both highlight the necessity for a foreign defendant to have access to appellate review when its constitutional rights are at stake and illustrate that opening the door here will not “open the floodgates” to the appellate courts.

The South Carolina Supreme Court has long recognized that “[w]ithout minimum contacts, the court does not have the “power” to adjudicate the action.” *Cockrell v. Hillerich & Bradshy Co.*, 363 S.C. 485, 492, 611 S.E.2d 505, 508 (2005) (quoting *Southern Plastics Co. v. Southern Commerce Bank*, 310 S.C. 256, 260, 423 S.E.2d 128, 131(1992).)

This Court has also previously recognized that, in order to establish a prima facie case based on the allegations in his complaint, a plaintiff must set forth *specific facts*, not just conclusory allegations, to establish the minimum contacts constitutionally necessary to invoke specific jurisdiction. *See Power Prods. & Servs. Co., Inc. v. Kozma*, 379 S.C. 423, 433, 434, 436, 665 S.E.2d 660, 665–67 (Ct. App. 2008). In *Mid-State*, the Supreme Court recognized that this

appellant will suffer substantial expense, damage or injury if the order is erroneous and the determination of the error is withheld until after judgment; (2) the order involves a substantial question of law, the early determination of which will promote a more orderly disposition of the case; or (3) the remedy by appeal after final judgment is otherwise inadequate); Tenn. R. App. P. 9 (permitting interlocutory appeal by permission where discretionary approval is given by both the trial court and appellate court and where there is a need “to prevent irreparable injury,” “to prevent needless, expensive, and protracted litigation,” and “to develop a uniform body of law”).

standard was modeled after the federal court rule and commented that “[i]t is sound public policy to modify the procedure currently in place and conform our case law to the established limits of constitutionality.” 310 S.C. at 335. Appellants respectfully submit that “a correction is needed to conform the case law to the established limits of constitutionality.”⁹

Federal law is in accord with this Court’s precedent establishing that facts (as opposed to conclusory allegations) are needed to make a prima facie showing of minimum contacts, *including* numerous federal courts that have *granted* motions to dismiss filed by LG Chem in cases involving virtually indistinguishable facts. *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc.*, 334 F.3d 390, 397, 403 (4th Cir. 2003) (affirming order dismissing defendant for lack of personal jurisdiction and finding no abuse of discretion when trial court denied request for jurisdictional discovery “based on bare allegations in the face of specific denials made by defendants”); *Reyes v. Freedom Smokes, Inc.*, No. 5:19-CV-2695, 2020 WL 1677480, at *2 (N.D. Ohio Apr. 6, 2020) (dismissing LG Chem, Ltd. from a similar action, the Ohio federal court stated, “[w]hen faced with a properly supported 12(b)(2) motion, “the plaintiff may not stand on his pleadings but must, by affidavit or otherwise, set forth specific facts showing that the court has jurisdiction.”); *Walsh v. LG Chem Am.*, No. CV-18-01545-PHX-SPL, 2019 WL 4394550, at *1 (D. Ariz. Sept. 13, 2019), *aff’d sub nom. Walsh v. LG Chem Ltd.*, 834 F. App’x 310 (9th Cir. 2020) (dismissing LG Chem,

⁹ Federal and state appellate courts in other jurisdictions have *repeatedly* found that constitutional due process is not satisfied by the exercise of personal jurisdiction over Appellant LG Chem, Ltd. in other states based on similar allegations, including the Supreme Court of Missouri, which found personal jurisdiction lacking in a writ proceeding challenging a trial court’s order that had been decided on a similarly erroneous view of stream of commerce jurisdiction. *State ex rel. LG Chem, Ltd. v. McLaughlin*, 599 S.W.3d 899 (Mo. 2020); *see also, Eriksen v. ECX, LLC, et al.*, No. 79473-I, 2020 WL 6395534 (Wash. Ct. App. Nov. 2, 2020) (unpublished); *Walsh v. LG Chem, Ltd.*, 834 Fed. App’x 310 (9th Cir. Nov. 2, 2020); *Schexnider v. E-Cig Central, LLC*, No. 06-20-00003, 2020 WL 6929872 (Tex. Ct. App. Nov. 25, 2020), *reh’g denied* (Dec. 15, 2020). And, like trial courts in numerous states including Texas, California, Washington, New York, New Jersey, Oklahoma, and Arizona, a North Carolina trial court dismissed Appellants from a similar suit involving the identical issues of constitutional due process. *See Miller v. LG Chem, Ltd.*, No. 19 CVS 1721, 2020 WL 4635627, at *3 (N.C.Super. Apr. 20, 2020).

Ltd. from a similar action, the Arizona federal court stated, “[t]he Court may not, however, “assume the truth of allegations in a pleading that are controverted by affidavit.”)) Under the federal rule, if a court postpones the decision to permit discovery (which is what the first circuit judge did here), the plaintiff’s burden at that point shifts to a preponderance of the evidence standard. *Informaxion Sols., Inc. v. Vantus Grp.*, 130 F. Supp. 3d 994, 998 (D.S.C. 2015).

Here, the circuit court found the following conclusory allegations were sufficient to meet Respondent’s burden:

[LG Chem and LGCAI have] continuing contacts with South Carolina by transacting substantial business in this state and manufacturing, distributing, and/or selling goods with the reasonable expectation that they will be used in this state and which are used in this state.

(**Ex. A**, Compl., ¶ 7.) These allegations were comparable to the allegations this court found to be insufficient in *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 723 S.E.2d 835, 838 (Ct. App. 2012), and amount to nothing more general legal conclusions, unsupported by a single fact. Respondent Plaintiff argued that the above conclusory allegations were sufficient to satisfy the standard in this state, and the second circuit judge agreed, even after the first circuit judge found Respondent Plaintiff’s showing was not sufficient to decide the issue. By contrast, Appellants’ introduced *admissible, uncontroverted* evidence establishing that they did not serve a consumer market in South Carolina for the product at issue in this case (lithium ion battery cells sold as standalone, replaceable e-cigarette batteries) and that they did not engage in any activities in or directed to South Carolina related in any way to plaintiff’s claims.

The constitutional protections guaranteed by the Due Process Clause of the United States Constitution, and the above-cited authorities of this Court, demand more than subjecting a foreign defendant to the burdens of litigation in the courts of this state simply based on conclusory and formulaic allegations in a complaint, unsupported by *admissible* evidence, particularly when the

defendants introduced *admissible, uncontroverted* evidence showing that constitutional minimum contacts were lacking.

Conclusion

For all of these reasons, the Court should hold that an order finding that a plaintiff has established sufficient minimum contacts to justify the exercise of personal jurisdiction consistent with due process implicates a substantial right supporting immediate appeal under S.C. Code Ann. § 14-3-330.

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Columbia, SC
July 19, 2021

EXHIBIT A
(Complaint)

STATE OF SOUTH CAROLINA)
)
COUNTY OF UNION)
)
DWAYNE THOMPSON,)
)
Plaintiff,)
)
v.)
)
LG CHEM, LTD., LG CHEM AMERICA,)
INC., and ROLLING FOG VAPOR)
COMPANY, LLC,)
)
Defendants.)
)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2018-CP-44-

SUMMONS
(Jury Trial Requested)

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at 101 Mulberry Street East, Post Office Box 457, Hampton, SC 29924, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

-signature page to follow-

Alexander P. Lewis
SC Bar No. 78991
W. Blake Cummings
SC Bar No. 80067
Cummings & Lewis, LLC
Post Office Box 5766
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alex.lewis@cummingslewis.com
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-and-

PETERS, MURDAUGH, PARKER, ELTZROTH
& DETRICK, P.A.

BY: s/Austin H. Crosby
Ronnie L. Crosby
SC Bar No. 66481
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101 Mulberry Street East
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ATTORNEYS FOR PLAINTIFF

March 4, 2019
Hampton, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF UNION)
)
DWAYNE THOMPSON,)
)
Plaintiff,)
)
v.)
)
ROLLING FOG VAPOR COMPANY,)
LLC, LG CHEM, LTD., and LG CHEM)
AMERICA, INC.,)
)
Defendants.)
)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2018-CP-44-

COMPLAINT
(Jury Trial Requested)

The Plaintiff alleges:

1. That he is a resident of Union County, South Carolina.
2. That Defendant, Rolling Fog Vapor Company, LLC (“Rolling Fog”), is a domestic limited liability company with its principal place of business in Spartanburg County, South Carolina, and is engaged in the business of selling vapor accessories, e-liquids, lithium-ion rechargeable batteries including, but not limited to, the LG Brown Hg2 INR 18650 3000mAh (“subject battery”) and other e-cigarette/vaporizer products.
3. That Defendant, LG Chem, Ltd. (“LG”), is a foreign corporation organized under the laws of Korea with its principal place of business in Seoul, South Korea, and is engaged in the business of manufacturing, designing, testing, marketing, certifying, supplying, selling, importing and distributing lithium ion rechargeable batteries including, but not limited to, the subject battery that forms the basis of this action.
4. The Defendant, LG Chem America, Inc., (“LGA”), is a foreign corporation organized under the laws of Delaware and is engaged in the business of manufacturing, designing, testing, marketing, certifying, supplying, selling, importing and distributing lithium ion

rechargeable batteries including, but not limited to, the subject battery that forms the basis of this action.

5. The subject battery was manufactured, designed, supplied, sold, imported and distributed by LG and LGA.

6. At all times mentioned herein, Defendants were engaged in the business of manufacturing, fabricating, designing, assembling, distributing, selling, inspecting, warranting, retailing, wholesaling, and advertising the e-cigarette products that the Plaintiff purchased and used.

7. LG and LGA have continuing contacts with South Carolina by transacting substantial business in this state and manufacturing, distributing, and/or selling goods with the reasonable expectation that they will be used in this state and which are in fact used in this state.

8. Each cause of action alleged against the Defendants arises out of a battery explosion in Spartanburg County, South Carolina, on July 27, 2018, that seriously and permanently injured the Plaintiff.

9. Plaintiff purchased the subject battery, which was manufactured, designed and imported by LG and LGA, from Defendant Rolling Fog's store located at 958 East Main Street in Spartanburg, South Carolina.

10. A case was not provided with the purchase of the subject batteries.

11. While at his place of employment located at 2155 S 2006, Spartanburg, South Carolina, the subject battery exploded and burst into flames in Plaintiff's right front pant pocket.

12. As a result of the explosion and the chemicals from the subject battery, Plaintiff sustained third degree burns on numerous portions of his body requiring skin grafts. He also suffered and continues to suffer permanent injury and/or disfigurement to his body, pain and

suffering, mental anguish, emotional distress, loss of wages and related medical, hospital and caretaking expenses.

13. Plaintiff's injuries and damages were due to and proximately caused by the negligent, reckless and careless conduct of the Defendants in the following particulars, for which the Defendants are liable:

FIRST CAUSE OF ACTION

(Negligence as to Defendant Rolling Fog Vapor Company, LLC)

14. The above allegations are incorporated as if repeated verbatim.

15. Plaintiff is informed and believes the Defendant was negligent, willful, wanton, careless, reckless and grossly negligent in the following particulars:

- a. In selling a lithium-ion battery such as the subject battery that was designed and manufactured without a positive temperature coefficient thermistor or similar device to prevent rapid discharge when short circuited, leading to overheating and catastrophic failure;
- b. In selling a battery that was designed and manufactured without internal temperature controls and/or protective circuitry;
- c. In selling a battery with manufacturing defects present;
- d. In selling a battery that was unreasonably dangerous for its foreseeable and intended use;
- e. In selling a battery that failed to comply with generally accepted engineering safety standards applicable to lithium-ion batteries;
- f. In failing to sell and market the subject battery with a package or container that would prevent short circuiting that could lead to rapid discharge, overheating, and catastrophic failure;
- g. In failing to warn customers that the subject battery should not be stored in a pocket and that short circuiting of the battery could lead to catastrophic failure;
- h. In failing to train personnel with regard to industry standards, proper use, and proper storage of the 18650 lithium-ion Hg2 batteries;

- i. In failing to provide adequate warnings and instructions to warn the users of the dangers associated with the use and failure of the lithium-ion Hg2 INR 18650 3000mAh batteries;
- j. In failing to warn of the defective condition of the subject battery; and
- k. In such other particulars as the evidence may establish.

SECOND CAUSE OF ACTION
(Negligence as to Defendants LG and LGA)

- 16. The above allegations are incorporated as if repeated verbatim.
- 17. Plaintiff is informed and believes the Defendants were negligent, willful, wanton, careless, reckless and grossly negligent in the following particulars:
 - a. In failing to include a positive temperature coefficient thermistor or similar device to prevent rapid discharge which short circuited, leading to overheating and catastrophic failure;
 - b. In failing to incorporate any other protection circuitry, current interrupt devices, or other protections against rapid discharge, overheating, and explosion;
 - c. In failing to sell and market the subject battery with a package or container that would prevent short circuiting that could lead to rapid discharge, overheating, and catastrophic failure;
 - d. In failing to warn consumers that the subject battery should not be stored in a pocket and that short circuiting of the subject battery could lead to catastrophic failure;
 - e. In failing to manufacture, design, assemble, test, instruct, warn, distribute, supply and/or sell the subject battery in such a condition so that it would operate safely as a reasonable consumer would expect;
 - f. In failing to manufacture, design, assemble, test, instruct, warn, distribute, supply and/or sell the subject battery in such a manner that it would not spontaneously explode;
 - g. In failing to manufacture, design, assemble, test, instruct, warn, distribute, supply and/or sell the subject battery in such a manner that it would not spontaneously heat and catch fire;

- h. In failing to provide reasonable and adequate warnings to the suppliers, purchasers and users of the subject battery to alert users about the dangerous conditions described herein; and
- i. In such other particulars as the evidence may establish.

THIRD CAUSE OF ACTION
(Strict Liability as to All Defendants)

- 18. The above allegations are incorporated as if repeated verbatim.
- 19. Defendants are engaged in the business of selling vaporizing products to the public, including selling the subject battery to the Plaintiff.
- 20. Defendants placed into the stream of commerce the subject battery, which was defective, unfit, and unreasonably dangerous to the intended users or consumers, including Plaintiff.
- 21. Plaintiff's injuries and damages occurred because the subject battery was designed, manufactured, imported, and sold by the Defendants in a defective condition that was unreasonably dangerous to the Plaintiff.
- 22. The subject battery was in the same or substantially the same condition as when sold by the Defendants and was being used in a reasonably foreseeable manner.
- 23. The Defendants sold the subject battery in an unreasonably dangerous and defective condition, and as a result, the Defendants are strictly liable, pursuant to S.C. Code Ann §15-73-10, to Plaintiff in an amount to be ascertained by the jury at the trial of this action.

FOURTH CAUSE OF ACTION
(Breach of Warranty as to All Defendants)

- 24. The above allegations are incorporated as if repeated verbatim.
- 25. That by act, word, and/or deed at the time of sale, the Defendants made certain Express Warranties, certain Implied Warranties of Merchantability, and certain Implied

Warranties of Fitness for a Particular Purpose, regarding the subject battery, which was part of the basis of the bargain and/or which arose by operation of law.

26. Plaintiff rightfully and reasonably relied upon the warranties of the Defendants to his great detriment, injury, and damage.

27. The Defendants expressly and impliedly warranted at the time of sale that the subject battery was fit, safe, in good condition, of merchantable quality, and was fit for a particular purpose, namely a safe vaporizer battery, when in fact, the subject battery was unfit, unsafe, not of merchantable quality, and was not fit or suited for its particular purpose.

28. By reason of and in consequence of Defendants' breach of express and implied warranties, Plaintiff suffered the injuries and damages as set forth herein, for which the Defendants are liable.

29. In order to investigate this claim, Plaintiff will need access to certain information concerning the design and manufacture of the subject battery including, but not limited to, design specifications with change histories, design evaluations, chemistry, materials, and manufacture process. Some or all of this information may fall subject to a claim of trade secret. Without access to this information, Plaintiff will be substantially prejudiced in her investigation and proof of defect herein. Plaintiff believes that access to this information will likely lead to admissible evidence at the trial of this case.

WHEREFORE, Plaintiff prays for judgement against the Defendants for actual damages, together with punitive damages in an appropriate amount, for the costs of this action, and for such other and further relief as the Court may deem just and proper.

-signature page to follow-

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-and-

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ATTORNEYS FOR PLAINTIFF

March 4, 2019
Hampton, South Carolina

EXHIBIT B

(Affidavit of Sung Han Ryu for LG Chem, Ltd.)



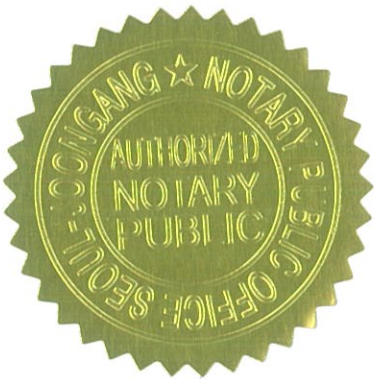
서울 영등포구 여의나루로 67
(여의도동, 신송빌딩) 1401호
[별지 제41호서식]

서울중앙 공증인 합동사무소

(전화) 02-3478-8200
(팩스) 02-3478-5544

Registered No. 2019 - 847

NOTARIAL CERTIFICATE



NOTARY PUBLIC OFFICE
SEOUL-JOONGANG

floor 14 Sinsong Bldg

67, yeouinaru-ro, yeongdeungpo-gu, Seoul, Korea

ELECTRONICALLY FILED - 2019 Apr 24 2:55 PM - UNION - COMMON PLEAS - CASE#2019CP4400054
ELECTRONICALLY FILED - 2020 Nov 02 5:32 PM - UNION - COMMON PLEAS - CASE#2019CP4400054

STATE OF SOUTH CAROLINA)
)
 COUNTY OF UNION) IN THE COURT OF COMMON PLEAS
) SIXTEENTH JUDICIAL CIRCUIT

DWAYNE THOMPSON,) Civil Action No. 2019-CP-44-00054
)
 Plaintiff,)
)
 vs.) **AFFIDAVIT OF SUNG HAN RYU**
)
 ROLLING FOG VAPOR COMPANY,)
 LLC, LG CHEM, LTD., and LG CHEM)
 AMERICA, INC.,)
)
 Defendants.)



Personally appeared before me, Sung Han Ryu, who first being duly sworn, deposes and says:

1. I am over the age of eighteen and am competent to testify to the matters contained in this affidavit.
2. I am a Team Leader and authorized representative for Defendant LG Chem, Ltd. (“LG Chem”). I have personal knowledge of the facts described in this affidavit. If called upon as a witness, I could and would testify competently under oath as to all such facts based upon my personal knowledge and my review of the business records of LG Chem.
3. This affidavit is submitted in support of Defendant LG Chem’s Motion to Dismiss and Quash Service of Process, and I have been authorized by LG Chem to execute this affidavit for this purpose.
4. LG Chem is a Korean company with its headquarters and principal offices in Seoul, South Korea.
5. LG Chem has never had an office in South Carolina.
6. LG Chem has never been registered to do business in the State of South Carolina, and has never sought qualifications to do business in South Carolina, or registered as a corporation with the South Carolina Secretary of State.
7. LG Chem has never owned or leased any real property in South Carolina.

8. LG Chem has never had a registered agent for the service of process in South Carolina.

9. LG Chem has never had a telephone number, post office box, mailing address, or bank account in South Carolina.

10. LG Chem has never paid income or property taxes in South Carolina.

11. LG Chem has no employees that reside or work in South Carolina.

12. LG Chem manufactures 18650 lithium-ion power cells for use in specific applications by sophisticated companies.

13. 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.

14. The type of battery identified in the complaint in this case is described as an “LG Brown Hg2 INR 18650 3000mAh.” If the subject battery identified in Plaintiff’s complaint was, in fact, an LG brand 18650 lithium-ion cell, the 18650 lithium-ion cell was not designed or manufactured in South Carolina.

15. Plaintiff alleges that he purchased the subject e-cigarette equipment and battery from Defendant Rolling Fog Vapor Company, LLC (“Rolling Fog”), which Plaintiff alleges is a “domestic limited liability company with its principal place of business in Spartanburg County, South Carolina.” Compl., ¶¶ 2, 9. LG Chem has no relationship with Rolling Fog. LG Chem does not direct or control the actions of Rolling Fog. LG Chem has never authorized Rolling Fog to advertise, distribute, or sell LG 18650 lithium-ion power cells for use by individual consumers as replaceable, rechargeable batteries in e-cigarette devices.

16. LG Chem has never authorized any distributor, wholesaler, retailer or re-seller to advertise, distribute or sell LG 18650 lithium-ion power cells for use by individual consumers as replaceable, rechargeable batteries in e-cigarette devices.



I, Sung Han Ryu, hereby declare under penalty of perjury that the foregoing statements made by me are true and correct. I am aware that if any foregoing statements made by me are willfully false, I am subject to punishment.

Executed this 24th day of April, 2019.

Ryu, Sung Han
Sung Han Ryu

SWORN to and subscribed before me

this 24th day of April, 2019.

_____(L.S.)

Notary Public for **SEOUL JOONGANG**
NOTARY PUBLIC OFFICE

S.K. CHUNG

My Commission Expires: 2024. 2



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등부 2019 년 제 847호

Registered No. 2019-847

인 증

NOTARIAL CERTIFICATE

SUNG HAN RYU-----

위 선서진술서-----

에 기재된 유 성 한-----

personally appeared before me and
admitted his(her) subscription to the
attached AFFIDAVIT OF SUNG HAN RYU.

은 본 공증인의 면전에서 위 사서증서에
자기가 서명 - 한 것임을 자인하였다.

2019년 04월 24일

This is hereby attested on this
24th day of Apr. 2019 at this office.

이 사무소에서 위 인증한다.



서울중앙 공증인 합동사무소

**NOTARY PUBLIC OFFICE
SEOUL-JOONGANG**

서울남부지방검찰청 소 속

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정성광



공증인

정성광

S. K. Chung

Signature of the Notary Public

Sung Kwang Chung

본 사무소는 인가번호 제158호에 의거하여
2014년 01월 20일 법무부 장관으로부터
공증인 업무를 행할 것을 인가 받았다.

This office has been authorized by the
Minister of Justice, the Republic of
Korea, to act as Notary Public Since
20, Jan. 2014 Under Law No.158.

EXHIBIT C

(Affidavit of HyunSoo Kim for LG Chem America, Inc.)

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF UNION) SIXTEENTH JUDICIAL CIRCUIT

DWAYNE THOMPSON,) Civil Action No. 2019-CP-44-00054
)
Plaintiff,)
)
vs.) **AFFIDAVIT OF HYUNSOO KIM**
)
ROLLING FOG VAPOR COMPANY,)
LLC, LG CHEM, LTD., and LG CHEM)
AMERICA, INC.,)
)
Defendants.)
)

Personally appeared before me, HyunSoo Kim, who first being duly sworn, deposes and says:

1. I am over the age of eighteen (18) and am competent to testify to the matters contained in this Affidavit.
2. I am the Compliance Manager and authorized representative for LG Chem America, Inc. ("LGCAI"). I have personal knowledge of the facts described in this Affidavit, and I have been authorized by LGCAI to make this Affidavit. If called upon as a witness, I could and would testify competently under oath as to all such facts based upon my personal knowledge and the business records of LGCAI.
3. This affidavit is submitted in support of LGCAI's Motion to Dismiss for Lack of Personal Jurisdiction.
4. LGCAI sells and distributes various petrochemical materials and products including ABS resin, Engineered Plastic (EP), Rubbers, Acrylate, Super Absorbent Polymer (SAP), and Specialty Polymers. LGCAI does not have any manufacturing plants, and it focuses on sales and/or distribution only.
5. LGCAI is a Delaware incorporated entity with its principal place of business in the State of Georgia. It was incorporated in the State of Delaware on March 1, 2009.

6. LGCAI does not presently, nor has it ever owned, leased, rented, purchased, or controlled any property in the State of South Carolina.

7. LGCAI does not presently, nor has it ever maintained a bank account in the State of South Carolina.

8. LGCAI does not presently, nor has it ever maintained a mailing address, telephone, or telefax number in the State of South Carolina.

9. LGCAI has no employees that reside or work in South Carolina.

10. LGCAI does not and has never designed, manufactured, distributed, advertised, or sold any lithium-ion power cell for use by individual consumers as replaceable, rechargeable batteries in electronic cigarette devices.

11. Plaintiff Dwayne Thompson alleges he was injured while carrying a battery in his pants pocket. Compl., ¶ 11. Plaintiff identifies the subject battery as an "LG Brown Hg2 INR 18650 3000mAh." *Id.*, ¶ 2. If the subject battery identified in Plaintiff's Complaint was, in fact, an LG brand 18650 lithium-ion cell, the cell could not have been manufactured by LGCAI, as LGCAI does not have any manufacturing plants.

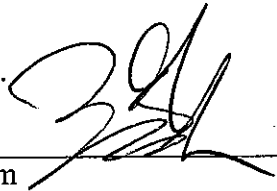
12. The Complaint alleges that Plaintiff Dwayne Thompson "purchased the subject battery . . . from Defendant [Rolling Fog Vapor Company, LLC]'s store located at 958 East Main Street in Spartanburg, South Carolina." Compl., ¶ 9. LGCAI has never conducted any business with Rolling Fog Vapor Company, LLC ("Rolling Fog"), and does not direct or control the actions of Rolling Fog. LGCAI has never authorized Rolling Fog to distribute or sell LG brand lithium ion battery cells for any purpose, and did not authorize Rolling Fog to distribute or sell LG branded lithium ion battery cells for use by individual consumers as replaceable, rechargeable batteries in e-cigarette devices.

13. LGCAI has never authorized any distributor, retailer, or re-seller to distribute or sell any lithium ion battery cells for use by individual consumers as replaceable, rechargeable batteries in e-cigarette devices.

I, HyunSoo Kim, hereby declare under penalty of perjury that the foregoing statements made by me are true and correct. I am aware that if any foregoing statements made by me are willfully false, I am subject to punishment.

Executed this 24th day of April, 2019.

HyunSoo Kim



SWORN to and subscribed before me

this 24th day of April, 2019.

David Hyun Kwak (L.S.)

Notary Public for _____

My Commission Expires: _____

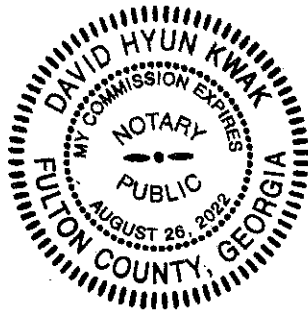


EXHIBIT D
(Mid-State Brief of Appellant)

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
CIRCUIT COURT

The Honorable L. Henry McKellar
Circuit Court Judge

Case No. 90-CP-40-4980

Mid-State Distributors, Inc., Respondent,

vs.

Century Importers, Inc., Carlton and United
Breweries Limited, Molson Breweries U. S.
Holdings, Inc., Fosters Brewing Group
Limited, f/k/a Elders IXL, and Capital Wine
and Beverage Distributing Co. of Columbia,
Inc.

OF WHOM

Carlton and United Breweries
Limited, is..... Appellant.

INITIAL BRIEF OF APPELLANT

Harold W. Jacobs, Esquire
Julian Hennig III, Esquire
NEXSEN PRUET JACOBS & POLLARD
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Columbia, South Carolina 29202
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Attorneys for Appellant

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 1976, does not confer long-arm jurisdiction
 over Carlton. 5

 B. The exercise of personal jurisdiction over
 Carlton by the State of South Carolina
 would violate the traditional notions of
 fair play and substantial justice required
 by the Due Process Clause of the Fourteenth
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STATEMENT OF ISSUES ON APPEAL

1. Does § 36-2-803(1), S. C. Code of Laws, (1976) confer long arm jurisdiction over defendant Carlton and United Breweries Limited?
2. Are defendants Carlton and United Breweries' contacts with South Carolina sufficient to meet the Due Process requirements of fair play and substantial justice?
3. Was the lower court's ruling the result of bias and prejudice.

STATEMENT OF THE CASE

The Complaint in this case was filed on October 30, 1990, alleging that Respondent Mid-State Distributors, Inc.'s ("Mid-State") beer distributorship franchise was wrongfully terminated by defendant Century Importers, Inc. ("Century") in violation of Title 61, Chapter 9 of the South Carolina Code of Laws (1976). An Amended Summons and Complaint was served on December 28, 1990, naming Appellant Carlton and United Breweries ("Carlton") as a defendant. On February 7, 1991, Carlton filed a Motion To Dismiss on the grounds of lack of jurisdiction over the person.

A Second Amended Summons and Complaint was subsequently served. On April 14, 1992, Carlton refiled its Motion to Dismiss for lack of jurisdiction over the person, with the attached Affidavit of K. R. Carnie, dated January 16, 1991.

Carlton's Motion To Dismiss was heard on April 20, 1992. The Order denying the motion was filed on April 21, 1992. Carlton's Notice Of Appeal was served on April 29, 1992.

STATEMENT OF FACTS

The facts of this case are not in dispute. (See transcript of representations of counsel made to trial court during argument on motion to dismiss.)

Carlton, an Australian corporation, produces Fosters Lager beer in Australia. (Affidavit of K. R. Carnie, dated January 16, 1991) It originally entered into a contract with All Brand Importers, Inc., a foreign corporation, ("All Brand") giving it the right to import its product into the United States. All Brand, in turn, contracted with Mid-State to distribute Fosters Lager in central South Carolina.

Subsequently, All Brand was acquired by Guinness, which brewed a product which was a major competitor to Fosters Lager. Because of the competitive situation, Carlton terminated its relationship with All Brand and contracted with Century Importers, Inc., a Virginia corporation, ("Century") to become its United States importer.

Century did not choose Mid-State as its central South Carolina distributor of the Fosters product. Instead it contracted with Capital Wine and Beverages Distributing Co. of Columbia, Inc. ("Capital") to distribute its product. As a result, Mid-State instituted this action to retain its former distribution rights.

Carlton does not conduct any business in the State of South Carolina, has not qualified to do business in South Carolina, has no property, real or personal, in South Carolina and has no other contact with the State of South Carolina; further, no

officer, employee, representative or agent of Carlton has ever had any contractual relationship with Mid-State; and all of its Fosters products are produced outside of the United States. (Affidavit of K. R. Carnie, dated January 16, 1991).

ARGUMENT

THE TRIAL COURT ERRED IN DENYING CARLTON'S MOTION TO DISMISS FOR LACK OF JURISDICTION OVER THE PERSON

The party seeking to invoke personal jurisdiction against a foreign corporation by utilization of South Carolina's long-arm statute has the burden of establishing jurisdiction. Aviation Associates And Consultants, Inc. v. Jet Time, Inc., 303 S.C. 502, 402 S.E.2d 177, 178 (1991); White v. Stephens, 300 S.C. 241, 387 S.E.2d 260, 262 (1990). In the instant case, Mid-State failed to meet this burden. The lower court's determination that the court had jurisdiction over Carlton, therefore, is not supported by the evidence and is manifestly controlled by error of law. Hammond v. Cummins Engine Co., 287 S.C. 200, 336 S.E.2d 867, 869 (1985); Askins v. Firedoor Corp. of Florida, 281 S.C. 611, 316 S.E.2d 713, 715 (1984).

At the pre-trial stage of determining jurisdiction, the plaintiff must make a prima facie showing of jurisdiction "by his pleadings and affidavits that the trial court should exercise jurisdiction." Aviation supra, at 178-79. See also, Springmasters, Inc. v. D & M Manufacturing, 303 S.C. 528, 402 S.E.2d 192, 193 (Ct. App. 1991). As Mid-State filed no affidavits in response to Carlton's motion, the record was limited to the allegations of Mid-State's Second Amended

Complaint in determining whether Mid-State successfully met its burden of making a prima facia showing of jurisdiction. The Second Amended Complaint alleges personal jurisdiction over Carlton on the grounds that Carlton "is a corporation organized and existing under the laws of the Commonwealth of Australia, and distributing goods, to wit: Fosters Lager beer, with the reasonable expectation and intention that those goods are to be consumed in South Carolina." (Second Amended Complaint, paragraph 2). For the reasons set forth hereinbelow, the fact that the beer brewed by Carlton is sold to an importer, who in turn sells it, among other places, in South Carolina is not sufficient contact with South Carolina to subject Carlton to the jurisdiction of South Carolina's courts for the purpose of determining the relationship between its independent importer and a South Carolina beer wholesaler.

In determining whether personal jurisdiction can be exercised over a nonresident, "the first step is whether the nonresident's conduct meets the requirements of the South Carolina long-arm statute; and if so, whether, under the particular circumstances, a finding of minimum contact comports with 'traditional notions of fair play and substantial justice.'" Clark v. Key, ___ S.C. ___, 405 S.E.2d 599, 600 (1991). Carlton's conduct neither meets the requirements of the South Carolina long-arm statute, nor does it form the basis for a finding of minimum contract with the State for personal jurisdictional purposes.

A. § 36-2-803(1), South Carolina Code of Laws, 1976, does not confer long-arm jurisdiction over Carlton.

§ 36-2-803(1) states in pertinent part that:

A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's....

(h) production, manufacture, or distribution of goods with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed. (emphasis added)

Plaintiff's cause of action is not based upon any damages flowing from Carlton's product. Rather, its cause of action is based upon alternative theories; (a) pursuant to the terms of §61-9-1010(1)(b), South Carolina Code of Laws, 1976, Century may not terminate Mid-State's contractual relationship with All Brand (Carlton's initial U.S. importer); (b) Century entered into a new distribution contract with Mid-State which is protected from termination by the provisions of §61-9-1010(1)(b). Hence, Mid-State's cause of action does not arise from Carlton's brewing of Fosters Lager, but from a controversy between Mid-State and Century as to whether Mid-State is entitled to distribute it in central South Carolina.

B. The exercise of personal jurisdiction over Carlton by the State of South Carolina would violate the traditional notions of fair play and substantial justice required by the Due Process Clause of the Fourteenth Amendment.

In order for the courts to have statutory authority to exercise jurisdiction, the nonresident must have sufficient contacts with South Carolina so that the constitutional

standards of due process are not violated. White v. Stephens, 300 S.C. 241, 387 S.E.2d 260, 262 (1990). These contacts must be generated by the defendant and not the unilateral actions of some other entity. Aviation at 180. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490, 501 (1980); Helicopteros Nacionales v. Hall, 466 U.S. 408, 417, 104 S.Ct. 1868, 1873, 80 L.Ed. 404, 412 (1984) ("unilateral activity of another party or a third person is not an appropriate consideration"). The contacts unilaterally generated by other entities must therefore be excluded when conducting an analysis of Carlton's minimum contacts with South Carolina.

It is therefore necessary to separate from the analysis of Carlton's minimum contacts the contacts generated by All Brand and Century. Fosters Lager beer is sold in Australia by Carlton to a United States importer (previously All Brand, and now Century). The United States importer then markets and distributes the product throughout the United States through a network of distributors. The U.S. importer, therefore, and not Carlton, contracts with, and sells Fosters Lager to, the South Carolina distributors. Carlton has never had a contractual relationship with Mid-State and has never sold anything to Mid-State. (Affidavit of K. R. Carnie, dated January 16, 1991). Thus, Carlton is not a party to the franchise agreement between All Brand and Mid-State or to any agreement which Century allegedly entered into with Mid-State, which are the alternative bases of Mid-State's Complaint.

Mid-State's contention that Carlton's minimum contacts are established because Carlton and Century are related entities¹ is without merit. Yarborough & Co. v. Schoolfield Furniture Industries, Inc., 275 S.C. 151, 268 S.E.2d 42, 44 (1980). In Yarborough, this Court held that the "acquisition and control of a domestic subsidiary's capital stock does not subject the foreign parent to jurisdiction of that State's courts," See also, Cannon Manufacturing Co. v. Cudahy, 267 U.S. 333, 45 S.Ct. 250, 69 L.Ed. 634 (1924). A fortiori, if a direct ownership interest in a domestic corporation is not sufficient minimum contact to justify in personam jurisdiction for the parent corporation, the tenuous connection existing between Carlton and Century does not. (Carlton's parent owns a company, which is a partner in a company, which owns a company, which owns Century.)

Four factors should be considered in determining whether due process will be offended by imposing jurisdiction over a non-resident defendant:

- (1) The duration of the activity of the nonresident within this State;
- (2) The character and circumstances of the commission of the nonresident's acts;

¹ Defendant Foster's Brewing Group Limited owns Carlton. Foster's Brewing Group Limited also has an interest in Defendant Century through the following chain of entities: Foster's Brewing Group Limited owns Carling, which is a partner in Molson Canada, which owns an Ontario Numbered Company, which owns Molson USA, which owns Defendant Century.

(3) The inconvenience resulting to the parties by conferring or refusing to confer jurisdiction over the nonresident; and

(4) The state's interest in exercising jurisdiction.

Clark v. Key, ___ S.C. ___, 405 S.E.2d 599, 601 (1991); White v. Stephens, 300 S.C. 241, 387 S.E.2d 260 (1990); Colite Industries v. G.W. Murphy Const., 297 S.C. 426, 377 S.E.2d 321 (1989).

Applying these factors to the instant case, the imposition of personal jurisdiction over Carlton offends the notions of fair play and substantial justice.

a. The duration of the activity of the nonresident within this state.

Carlton conducts no activities in South Carolina. The United States importer (All Brand, then Century), not Carlton, contracted with, and sold beer to, the local distributors. "(U)nilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts...." Helicopteros, 466 U.S. at 417, 104 S.Ct. at 1873.

b. The character and circumstances of the commission of the nonresident's acts.

The record is barren of the commission of any act in South Carolina by Carlton which is the basis of this litigation. Every business transaction and activity related to this litigation arose in South Carolina solely between Mid-State and Century, not Carlton.

- c. The inconvenience resulting to the parties by conferring or refusing to confer jurisdiction over the nonresident.

There is no inconvenience to Mid-State if the Court does not confer jurisdiction over Carlton. It can obtain complete relief from the allegations of its complaint relative to its rights under its franchise agreement with All Brand or, in the alternative, under its alleged franchise agreement with Century, without Carlton's presence. The fact that Carlton brews Fosters Lager and sells it to Century for importation into the United States in no way impinges on Mid-State's relationship, or lack thereof, with Century.

On the other hand, to require Carlton, an Australian corporation, with its principal place of business there, to defend a quarrel between Mid-State and Century in South Carolina would not only be inconvenient, but totally unnecessary.

In Asahi Metal Industry Co. Limited v. Superior Court of California, Solano County, 480 U.S. 102, 107 S.Ct. 1026, 1033, 94 L.Ed.2d 92 (1987), a tire valve stem manufactured by Asahi in Japan was involved in a motorcycle accident in California. The Supreme Court concluded that Asahi's burden of traveling from Japan to California and being forced to defend in a foreign legal system outweighed both the State's and plaintiff's interests of having the dispute resolved in California. "The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal

jurisdiction over national borders." See also, Parry v. Ernst Home Center Corp., 779 P.2d 659 (Utah 1989). In the instant case where, unlike Asahi, Carlton's product has no causal relationship with Mid-State's complaint, which is its dispute with Century over the right to sell the product, the burden of forcing Carlton to defend a suit in South Carolina, in which complete relief is available to the plaintiff in Carlton's absence, far outweighs whatever tenuous benefits Mid-State could conceivably receive by forcing Carlton to remain a party.

d. The state's interest in exercising jurisdiction.

South Carolina has no interest in exercising jurisdiction over Carlton where it can afford the interested parties complete relief in its absence.

c. The Lower Court's Ruling Was Incorrectly Based On Judicial Bias And Prejudice.

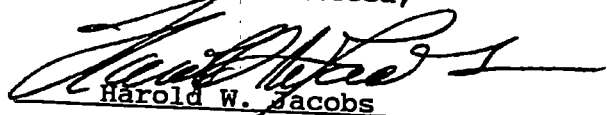
The trial court incorrectly denied Carlton's motion on the basis of prejudice and bias as evidenced the following commentary from the Bench:

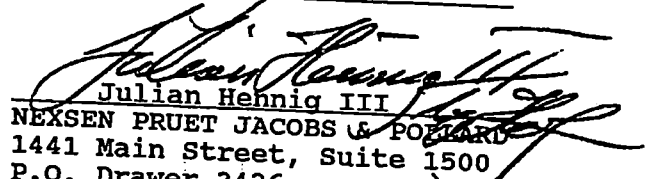
"Well about ten years ago, the Australian courts ruled that they had personal jurisdiction over SCN. So if Australia has got jurisdiction over SCN, we've got jurisdiction over Fosters." (Transcript 14/9-12).....If Australia has got jurisdiction over South Carolina corporations, we've got jurisdiction over Australian corporation. I may be wrong, but I will be right for a year." (Transcript 21/3-8).

CONCLUSION

For the reasons set forth above, Mid-State failed to meet its burden of establishing jurisdiction over Carlton and the lower court's denial of its motion to dismiss, as a result, was without support in the evidence and was manifestly controlled by error of law. The lower court's Order should, therefore, be reversed.

Respectfully submitted,


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August 5, 1992

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
CIRCUIT COURT

The Honorable L. Henry McKellar
Circuit Court Judge

Case No. 90-CP-40-4980

Mid-State Distributors, Inc., Respondent,

vs.

Century Importers, Inc., Carlton and United
Breweries Limited, Molson Breweries U. S.
Holdings, Inc., Fosters Brewing Group
Limited, f/k/a Elders IXL, and Capital Wine
and Beverage Distributing Co. of Columbia,
Inc.

OF WHOM

Carlton and United Breweries
Limited, is..... Appellant.

PROOF OF SERVICE

I certify that I have served a copy of the Initial Brief of Appellant on all parties by causing a copy of same to be deposited in the United States Mail, proper postage prepaid, this 5th day of August, 1992, addressed to their attorneys of record as follows:

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EXHIBIT E
(Mid-State - Brief of Respondent)

*Verntial Brief of
Respondent
Mid-State Distributors Inc.
Century^{vs} Imported*

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**COUNTERSTATEMENT OF
QUESTIONS PRESENTED**

I.

IS THE ORDER APPEALABLE?

II.

**WHERE THE AUSTRALIAN BREWER SHIPS ITS
PRODUCT DIRECTLY INTO SOUTH CAROLINA
FOR SALE BY FRANCHISED DISTRIBUTORS TO
RETAILERS AND THENCE TO THE CONSUMER,
DOES A SOUTH CAROLINA COURT HAVE
PERSONAL JURISDICTION OF THE BREWER IN
A SUIT ARISING OUT OF THE TERMINATION OF
A DISTRIBUTOR'S FRANCHISE?**

STATEMENT OF THE CASE

This is an action to vindicate plaintiff's statutory rights as wholesale distributor of Foster's Lager Beer in central South Carolina. One of the defendants, Carlton & United Breweries, Ltd., is the Australian brewer of Foster's. Carlton & United was brought into the case in December 1990. In its second amended complaint plaintiff sought, among other things, a declaration "that plaintiff is protected as a franchised beer wholesaler of Foster's Lager Beer within the meaning of §§ 61-9-1020 and -1021, S.C. Code Ann. (1990); and *** that the attempted termination of plaintiff's franchise was and is null and void *** ." [Complaint, pp. 8-9.] Plaintiff further sought "a permanent injunction prohibiting the defendants from terminating plaintiff's franchise, and enjoining defendants from supplying plaintiff's customers through other distributors or by other means *** ." Carlton & United moved to dismiss in February 1991. The motion was refiled in April 1992, supported by the same January 1991 affidavit as was the original motion. The motion was not heard until April 1992, and was denied.

This interlocutory appeal followed, delaying the trial of this action, already eighteen months old when the motion to dismiss was heard and denied.

STATEMENT OF FACTS¹

Plaintiff ("Mid-State") is a Columbia beer distributor. This controversy concerns Mid-State's claim to possess a protected franchise right to sell Foster's Lager Beer, an Australian product, at wholesale in central South Carolina.

Foster's Brewing Group, Ltd. ("Foster's Group") is an Australian holding company which owns the appellant, Carlton & United Breweries, Ltd. ("Carlton & United"). Carlton & United is an Australian corporation which brews Foster's Lager Beer. Through an international chain of subsidiaries, Foster's Group also owns a beneficial half-interest in a Virginia-based corporation, Century Importers, Inc. ("Century").² Century is the importing arm of Molson USA, which is the U. S. operating division of Molson Breweries of Canada, which is effectively half-owned by Foster's Group of Australia.

¹ Before the court as part of the case file at the hearing of the motion to dismiss was the earlier order denying defendant Century's motion for summary judgment. [See Tr. 7, lines 18-21, drawing the court's attention to the order denying summary judgment.] The summary judgment order was based upon numerous depositions. [See Order of December 12, 1991, at p. 1.] The order denying summary judgment contains numerous findings of fact, and findings of genuine issues of material fact, relevant to Carlton & United's motion to dismiss. The order denying summary judgment, appearing at pages ____ of the Record on Appeal, is freely borrowed from in this Statement of Facts.

² Foster's Group owns Carling, which is a partner in Molson Canada, which owns an Ontario Numbered Company, which owns Molson USA, which owns Century. Thus, Carlton & United, the brewer, is wholly owned, and its sister corporation, Century, the importer, is beneficially half-owned by Foster's Group, an Australian holding company. [See Complaint, ¶¶ 4-5.]

Century is the "registered producer" of Foster's Lager Beer in South Carolina under the South Carolina Beer Wholesalers Act of 1974.³ Century assumed that role when Carlton & United, the brewer, terminated the importation rights of the previous importer. Until April 1, 1990 Foster's Lager Beer was imported into the United States from Australia by All Brand Importers, Inc. Mid-State was All Brand's duly appointed franchisee for Foster's Lager Beer in central South Carolina, and as such enjoyed the protection of the Act. In early 1990, All Brand was taken over by the Guinness brewing interests of the United Kingdom. Not wanting the importation of its products to be handled by Guinness -- a competitor -- Carlton & United terminated its importation agreement with All Brand. Carlton & United thereupon appointed its half-sister, Century, as the new importer. Century named Capital Wine and Beverage Company of Columbia, Inc., as its Foster's distributor in central South Carolina.

Mid-State brought this action to enjoin Century and Carlton & United from terminating Mid-State's franchise, and for a declaration, binding upon Carlton & United, that Mid-State is the statutorily protected distributor of Foster's Lager Beer in central South Carolina.

Mid-State contends that Century recognized Mid-State as its franchisee following Century's appointment as importer. [Complaint, ¶¶ 13-14.] Moreover, Mid-State contends that its statutory franchise protection extends to the case where a foreign brewer,

³ S.C. Code Ann. §§ 61-9-1010, et seq. (Supp. 1991).

such as Carlton & United, jettisons an independent importer and thereafter imports the beer itself, either directly or through a related entity, regardless of whether a new franchise contract is thereafter substituted for the previous one.

Four months before Carlton & United brought on its motion to dismiss for a hearing, the court had determined, on Century's summary judgment motion, that there existed a genuine issue of material fact as to whether Mid-State's franchise was reconfirmed by Century after it took over the importation of Foster's. [Order of December 12, 1991.] The summary judgment court had further held that the beer franchise protection afforded by the statute cannot be circumvented by the foreign brewer's termination of the previous importer and taking over the importation itself or by appointing a related entity. In denying summary judgment, the court observed:

Mid-State held the Foster's Beer franchise in central South Carolina while an independent importer, All Brand, was bringing in the beer from Australia to South Carolina. Mid-State was the only person authorized to sell Foster's Beer at wholesale within the confines of its franchised area. It is this exclusive right to sell the product at wholesale which is at the heart of the franchise. The Australian brewer can change importers as it wishes, or can even dispense with an independent importer and import the product itself (or vicariously), as was done here; but the franchise of Mid-State to sell Foster's Beer at wholesale in central South Carolina remains the object of statutory protection, regardless of what middlemen may stand between the foreign brewer and the local wholesale franchisee.

Since Mid-State's franchise exists independently of any specific agreement between Mid-State and Century, § 61-9-1010 prohibits the manufacturer, acting alone or through a related corporation -- the new importer, Century --

from terminating Mid-State's franchise without just cause.

[Order of December 12, 1991 at _____.]

Century, the Virginia importer, beneficially half-owned by the same Australian holding company which owns the brewer, receives orders from its 460 American distributors and places each such order directly with the brewer, Carlton & United, in Australia. Each order is individually filled by shipment direct to the port of entry closest to the distributor.⁴ Each order by an American distributor (e.g., Mid-State) is shipped from Australia by Carlton & United specifically to fill the order of the American distributor. [Tr. 16, line 25, through p. 17, line 12.]

⁴ Depositions which confirm the method of sale were filed earlier in connection with the summary judgment motion. They were not specifically refiled at the hearing of the motion to dismiss, but the substance of the testimony was represented to the court by counsel. See Alston v. Blue Ridge Transfer Co., ____ S.C. ____, 417 S.E.2d 631 (Ct. App. 1992). Appellant says that the facts so represented are undisputed [Brief at 2]; and so they are, except for the contrary statement of counsel for Carlton & United's codefendant, Capital Wine and Beverage. Century does not, as suggested by Capital's counsel at the hearing below, purchase a stock of beer from Australia, then warehouse the beer and sell it to the American distributors as they call for it. Capital was not privy to the motion being heard and had no right to address the court in regard to the motion, in any event.

ARGUMENT

I.

The order denying Carlton & United's motion to dismiss is only preliminary. The motion can be renewed and finally determined at trial. The order is not appealable.

The Court has heard a number of direct appeals from orders denying Rule 12(b)(2) motions to dismiss, but the undersigned cannot find a case where the appealability of such orders was challenged. It appears to respondent that 12(b)(2) denials do not fit the description of immediately appealable orders. By analogy, orders denying motions to dismiss under Rule 12(b)(6) are not directly appealable, except under extraordinary circumstances. Moyd v. Johnson, 289 S.C. 482, 347 S.E.2d 97 (1986); Bowen & Smoot v. Plumlee, ___ S.C. ___, 417 S.E.2d 855 (1992).

These preliminary jurisdictional rulings under the long-arm statute do not involve the merits.⁵ See generally Link v. School District of Pickens County, 302 S.C. 1, 393 S.E.2d 176 (1990). In fact, they are unrelated to the merits. They represent a procedural skirmish in a wider war. Nor do Rule 12(b)(2) denials affect a substantial right thereby determining the action, as that key

⁵ "The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal: (1) Any intermediate judgment, order or decree in a law case involving the merits *** ." S.C. Code Ann. § 14-3-330(1) (1976).

phrase is used in the appellate jurisdiction statute,⁶ since the ruling is preliminary only.

At this pretrial stage of determining jurisdiction, the respondents need only make a prima facie showing by pleadings and affidavits that the trial court should exercise personal jurisdiction *** .

Allen v. Columbia Financial Management, Ltd., 297 S.C. 481, 377 S.E.2d 352 (Ct. App. 1988), citing Askins v. Firedoor Corp., 281 S.C. 611, 316 S.E.2d 713 (Ct. App. 1984). Accord: Aviation Associates v. Jet Time, Inc., 303 S.C. 502, 402 S.E.2d 177 (1991); White v. Stephens, 300 S.C. 241, 387 S.E.2d 260 (1990). The final determination of personal jurisdiction awaits trial. The preliminary, nonfinal quality of an order denying a Rule 12(b)(2) motion to dismiss is shown by the fact that the *unsworn* allegations of the complaint are properly to be weighed in favor of jurisdiction at this early stage. Springmasters, Inc. v. D & M Mfg. Co., 303 S.C. 528, 402 S.E.2d 192 (Ct. App. 1991). A *final* determination in favor of personal jurisdiction could not rest upon unsworn allegations, inadmissible to prove anything at any other stage of the case. The denial of a 12(b)(2) motion is simply a conclusion that enough has been shown preliminarily to require the case to progress toward trial.

⁶ "The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal: (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action *** ." S.C. Code Ann. § 14-3-330(2) (1976).

Denials of these motions are not appealable in the federal system, from whence our rule was taken. Cf. In re Heddendorf, 263 F.2d 887 (1st Cir. 1959) (federal appellate court might rarely accept discretionary appeal from order denying motion to dismiss for lack of jurisdiction if new issue of law involved).

Here, the motion was not heard for fourteen months after it was first filed. By then the case was eighteen months old and was almost up for trial. To allow an interlocutory appeal will make this case more than two years old by the time it gets to trial.

Appeals from these 12(b)(2) denials, if routinely allowed, will rise exponentially as South Carolina's economy converges with those of our more-industrialized sisters and interstate parties become more the rule than the exception. Not one in ten of these jurisdictional questions would raise its head if these cases were allowed to progress to judgment in normal course without expensive, dilatory interlocutory appeals.⁷

The circuit court's denial of the motion is presumptively correct. Dicks & Gillam, Inc. v. Cleland, 295 S.C. 124, 367 S.E.2d 430 (Ct. App. 1988). The great majority of pretrial orders are unappealable. Real prejudice from the denial of a 12(b)(2) motion can always be cured in an appeal from final judgment, where the factual record is more full. By that time the issue of personal

⁷ These 12(b)(2) denial appeals will increasingly clog the appellate dockets. Our judiciary already needs a third panel for the Court of Appeals but seems unlikely to get it in this century. Surely, the appellate jurisdiction statute should not be expansively interpreted so as to encourage unnecessary interlocutory appeals under such conditions.

jurisdiction will have been resolved by trial, with live witnesses, cross-examination, discovery, and all the tools designed to ferret out the truth -- not by self-serving affidavits which can seldom be impeached by the adverse party.⁸

This appeal should be dismissed so that the case can proceed immediately to trial. Carlton can reinstate its appeal following judgment if the final determination of personal jurisdiction is the same as was the court's preliminary determination.⁹

II.

Carlton & United is subject to suit in South Carolina.

The Australian brewer is subject to suit in South Carolina under the long-arm statute.¹⁰ Its amenability to suit here does not offend traditional notions of fair play and substantial justice.¹¹

⁸ For example, Carlton & United's affidavit makes no reference to the fact that it fills each South Carolina distributor's order by individualized shipment to that distributor by boat from Melbourne to Charleston (or the closest other port possible).

⁹ Carlton & United appears to say at points in its brief that Mid-State seeks no relief against it, and that the real fight is between Mid-State and Century, the importer. On the contrary, Mid-State seeks and needs a declaration binding upon the Australian brewer, the *real* party in interest, that Mid-State's franchise to distribute Foster's Lager Beer in the midlands cannot be circumvented by changing importers in the manner done here. Unless the Australian brewer is bound by the judgment to be entered in this case, the same manipulation could be repeated at any time.

¹⁰ S.C. Code Ann. § 36-2-803 (1976).

¹¹ International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 310, 90 L.Ed. 867 (1945).

Two subsections of the long-arm statute apply here: the "distribution of goods" provision,¹² and the "transaction of business" provision.¹³

A. This case arises out of the Australian brewer's distribution of beer into South Carolina.

A South Carolina distributor orders, say, 400 cases of Foster's Lager Beer from the importer, Century -- the Australian brewer's half-sister. The importer FAXes the order to Melbourne, Australia, where the brewer fills the order by shipping 400 cases of Foster's on the next ship to Charleston.

If one of those cans of Foster's Lager Beer were unwholesome, and caused injury to the ultimate consumer, there is no doubt that Carlton & United would be subject to suit in South Carolina under the long-arm statute at the instance of the injured victim. The case at bar arises, not from a single bad bottle of beer, but from a long-established course of business in which tens of thousands of bottles of beer are shipped into South Carolina by the Australian brewer. The question is: which Columbia distributor has the franchise to make those purchases and to resell the beer at

¹² "A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's (h) *** distribution of goods with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed." S.C. Code Ann. § 36-2-803(1)(h) (1976).

¹³ "A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's (a) transacting business in this State *** ." S.C. Code Ann. § 36-2-803(1)(a) (1976).

wholesale? The flow of beer from Australia to South Carolina is the *sine qua non* of the suit. If Carlton & United were to stop distributing beer into South Carolina, there would be no suit, for there would be no franchise to fight over. This suit "arises from" the distribution of its product by the Australian brewer in South Carolina, just as surely as would the suit of a consumer injured by a single unwholesome bottle of beer.

Moreover, Carlton & United's shipment of thousands of cases of Foster's Lager Beer over many years into South Carolina is the transaction of business here, within the long-arm statute's meaning. Carlton puts a specific quantity of beer on a boat in Melbourne to fill a particular order of a franchisee in Columbia. It makes no difference whether the consignee's name on the shipping label is Mid-State or is Century Importers. The order is specifically earmarked and bound for Mid-State in Columbia. We are not talking about an isolated transaction but a steady course of commerce extending over many years. This is the transaction of business for purposes of the jurisdiction of our courts.

B. Due process is not offended by holding the Australian brewer to suit in South Carolina, where it ships Foster's Lager Beer for resale by Foster's franchisees for consumption by South Carolina residents.

Carlton & United labels this case as a "stream of commerce" case, and contends that a manufacturer cannot be held to suit in a State of the Union solely on the basis of its placement of its product into the stream of commerce, from whence it ends up in a particular jurisdiction.

The United States Supreme Court has not said the final word on the "stream of commerce" cases, as shown by its 4-4-1 decision in its most recent effort on the subject, Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987). But this is not a "stream of commerce" case in the line of those cases relied upon by Carlton & United. "Stream of commerce" cases typically involve the manufacturer of a *component part* of a chattel. The component part is sold to the manufacturer of the finished product, who then sells it where desired. The component part manufacturer may not even know where the final product is going. The component part manufacturer may have done nothing to avail itself of the benefits of the laws of the remote jurisdiction. The "availment" concept has been central to some of the post-*International Shoe* decisions of the U.S. Supreme Court in this area, most particularly Burger King Corp. v. Rudzewicz, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). See also Hanson v. Denkla, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958).

Even the manufacturer or distributor of the finished product may not be subject to suit in a remote jurisdiction where its product surfaces by random chance. See, e.g., World-Wide Volkswagen v. Woodson, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). Asahi and World-Wide Volkswagen are true "stream of commerce" cases, and the final word has yet to be written there.¹⁴

¹⁴ The weight of scholarly thought favors stream of commerce jurisdiction. Asahi was criticized by a number of legal writers, see, e.g., U.S.C. Professor Stravitz' article, "Sayonara to Minimum Contacts: Asahi Metal Industry Co. v. Superior Court," 40 S.C.L.Rev. 729 (continued...)

The instant case, by contrast, is not a "stream of commerce" case in the usual sense -- where a remote manufacturer's products "end up" in the forum State.¹⁵ Carlton & United is not like the Japanese valve manufacturer in Asahi whose valves ended up in a California motorcycle, nor like the New York distributor in World-Wide Volkswagen, one of whose cars, sold in New York, eventually was involved in a collision in Oklahoma.¹⁶ Carlton & United regularly ships Foster's Lager Beer directly into South Carolina for distribution by Foster's franchisees to retailers, thence to be sold to and consumed by South Carolina customers. When Carlton

¹⁴(...continued)
(1988), since admittedly that case appears to step back somewhat from the stream-of-commerce theory so broadly accepted in the State and lower federal courts. See, e.g., Gray v. American Radiator & Standard Sanitary Supply Corp., 176 N.E.2d 761, 766 (Ill. 1961), the leading "stream of commerce" case, cited with approval twice by the U.S. Supreme Court before Asahi. See 40 S.C.L.Rev. 729, 791. See also In re San Juan Dupont Plaza Hotel Fire Litigation, 742 F.2d 717, 721 (D.P.R. 1990); International Harvester Co. v. Henrickson Mfg. Co., 459 S.W.2d 62, 65 (Ark. 1970), citing Comment, "In Personam Jurisdiction Over Nonresident Manufacturers in Product Liability Actions," 63 Mich.L.Rev. 1028 (1965).

¹⁵ U.S. Supreme Court decisions have differentiated between "a case involving goods which reach a distant state through a chain of distribution and a case involving goods which reach the same state because a consumer *** took them there." World-Wide Volkswagen v. Woodson, 444 U.S. 286, 306-07 (1980) (Brennan, dissenting). Justice White, for the majority in World-Wide Volkswagen, said: "The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." 444 U.S. at 297-98.

¹⁶ But see Parker v. Fireman's Ins. Co., 297 S.C. 166, 375 S.E.2d 325 (Ct. App. 1988) (insurer knew that carnival's vehicles would traverse the eastern seaboard, including South Carolina; long-arm jurisdiction confirmed under the "insure a South Carolina risk" subsection).

& United loads an order in Melbourne bound for Charleston, it knows, expects, intends, hopes and believes that South Carolinians will buy and consume those very bottles of beer. These sales and the resulting profits to Carlton & United could never take place without the operation of South Carolina law at every step to order and protect the merchandising process.¹⁷ Carlton has availed itself of South Carolina law by taking advantage of the opportunity to sell its product here.

The South Carolina Supreme Court has formulated a four-part analysis of the facts of each case to see whether traditional notions of fair play and substantial justice are offended by holding a nonresident to suit in the courts of this State. These are: (1) the duration of the nonresident's activity in this State; (2) the character and circumstances of its acts; (3) the inconvenience to the parties of litigating here as opposed to some other jurisdiction; and (4) the State's interest in adjudicating the controversy here. Aviation Associates v. Jet Time, Inc., 303 S.C. 502, 402 S.E.2d 177 (1991); Clark v. Key, ___ S.C. ___, 405 S.E.2d 599 (1991).

¹⁷ "A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity. These benefits accrue regardless of whether that participant directly conducts business in the forum State, or engages in additional conduct directed toward that State." Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102, 117 (1987) (per Brennan, J., for four members of the Court).

a. Duration of conduct.

This case is not about a single, isolated sale.¹⁸ It is about the right to distribute the appellant's product in central South Carolina over an indefinite course of future time. Carlton & United has been exporting Foster's Lager Beer to South Carolina since at least 1983. Mid-State was the Columbia distributor from then until 1990 when the new importer, a half-owned subsidiary of Foster's Brewing Group of Australia, attempted to terminate Mid-State's franchise. [Complaint, ¶ 10.]

This is a steady, long-standing course of conduct by Carlton & United directed at the consumers of South Carolina. The number of bottles and cans of Foster's Lager Beer brewed by Carlton & United in Australia and shipped by it to South Carolina for consumption in South Carolina is not of record; but clearly it would be a vast number indeed.

b. Character and circumstances of the nonresident's conduct.

By this is meant the extent to which the nonresident defendant has purposefully availed itself of the privilege of conducting business in South Carolina. See Aviation Associates v. Jet Time, Inc., 303 S.C. 502, 402 S.E.2d 177 (1991).

Carlton & United's sales to South Carolina are not random, not fortuitous, not attenuated. See Hammond v. Butler, Means, Evins & Brown, 300 S.C. 458, 388 S.E.2d 796 (1990), citing Keeton v.

¹⁸ See, by contrast, Aviation Associates v. Jet Time, Inc., 303 S.C. 502, 402 S.E.2d 177 (1991).

Hustler Magazine, Inc., 465 U.S. 770, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984). They are planned, regular, deliberate. Most of the larger supermarkets in urban South Carolina carry Foster's Lager Beer on their shelves for sale to South Carolina consumers, shipped here by Carlton & United expressly for sale in this State. These sales are consummated through the medium of an American importer -- which is now beneficially half-owned by the same Australian company which owns the brewer, Carlton & United.¹⁹ But the presence of an importer -- even an independent importer, which Century is not -- does not obscure the basic fact that this Australian firm is selling beer destined from the moment it is brewed to be drunk by people in South Carolina.

When a non-resident purposefully directs activities at the forum jurisdiction, and it seeks to defeat jurisdiction, it must present a compelling case that the forum should not exercise jurisdiction.

Springmasters, Inc. v. D & M Mfg. Co., 303 S.C. 528, 534, 402 S.E.2d 192 (Ct. App. 1991), citing Allen v. Columbia Financial Management, Ltd., 297 S.C. 481, 377 S.E.2d 352 (Ct. App. 1988).

c. Inconvenience.

Carlton argues (Brief at 9) that it is entitled to special consideration because, as a foreigner, it is inconvenienced by being sued in America. The case law does not support that

¹⁹ "If International Shoe stands for anything, *** it is that a truly interstate business may not shield itself from suit by a careful but formalistic structuring of its business dealings." Vencedor Mfg. Co. v. Gouqler Industries, Inc., 557 F.2d 886, 891 (1st Cir. 1977).

proposition. The dicta in Asahi cited in support was subscribed to by a minority of the Court. It has been criticized by legal writers, see, e.g., R. Weintraub, Commentary on the Conflict of Laws § 4.8, at 10 (1987 Supp.); Stravitz, "Sayonara to Minimum Contacts: *Asahi Metal Industry Co. v. Superior Court*," 40 S.C.L.Rev. 729 (1988), and finds no general support in the caselaw. See, e.g., McGee v. International Life Ins. Co., 355 U.S. 220, 223, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957). In this global village in which products like Australian beer are sold and consumed daily all around the world, it makes little practical difference in litigation whether the brewer is located in Melbourne, Australia or Melbourne, Florida. The choice presented to the Court by Carlton & United is not a choice between litigating this case in South Carolina, on the one hand, or in New Jersey or California or some other American jurisdiction, on the other. Their argument can only be that Mid-State must journey to Australia to sue them.²⁰ Since Carlton & United is obviously many times larger than Mid-State, any

²⁰ Carlton & United does not suggest that it is any more amenable to suit in some other American State than it is in South Carolina, or that it would be any less inconvenienced defending itself in any other State than in South Carolina. See Colite Industries, Inc. v. G. W. Murphy Constr. Co., 297 S.C. 426, 377 S.E.2d 321 (1989). If South Carolina's long-arm statute is typical, then the long-arm statutes of other States would not allow Mid-State to sue Carlton elsewhere. Mid-State's cause of action must arise out of Carlton's transaction of business here and its distribution of products here, and not elsewhere. Mid-State's cause of action would not arise out of Carlton & United's shipments to any other State or its transaction of business in any other State.

balancing of inconvenience could only result in South Carolina as the forum which minimizes inconvenience.²¹

d. State's interest in adjudicating the controversy.

South Carolina's beer franchise protection law is for the protection of South Carolina businesses and consumers. It was enacted in the exercise of the police power. South Carolina, thus, has an even greater interest in adjudicating this suit than it normally does in providing justice to its citizens through their own courts. See McGee v. International Life Ins. Co., 355 U.S. 220, 223, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957) ("states have a 'manifest interest in providing effective means of redress' for their residents"). An Australian court would be an unapt forum, unlikely to grasp the background of South Carolina law and practice in which our beer franchise law must be understood, applied, and vindicated.

²¹ Carlton & United bore the burden of submitting evidence on this issue but presented no specific evidence of inconvenience. Springmasters, Inc. v. D & M Mfg. Co., 303 S.C. 528, 402 S.E.2d 192 (Ct. App. 1991); Atlantic Wholesale Co. v. Solondz, 283 S.C. 36, 320 S.E.2d 720 (Ct. App. 1984).

CONCLUSION²²

The appeal should be dismissed without prejudice to Carlton & United's right to appeal the issue of personal jurisdiction after that issue has been finally determined in the circuit court.

On the merits, Carlton & United's purposeful importation of its product into South Carolina renders it subject to the jurisdiction of our courts in a controversy involving the franchise to distribute that product.

Mid-State therefore urges the Court to dismiss the appeal without prejudice, or to affirm on the merits.

All of which is respectfully submitted.

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October 5, 1992.

²² Appellant claims in its third Question Presented that the circuit judge was biased. Appellant knows that such an issue must be presented to the circuit court first, Butler v. Sea Pines Plantation Co., 282 S.C. 113, 317 S.E.2d 464 (Ct. App. 1984), but was not. The third Question Presented is just appellant's way of complaining about Judge McKellar's ironic comment at the hearing about South Carolina companies being held to suit in Australia, and respondent will not burden this brief with further comment about it.

EXHIBIT F

(Mid-State – Reply Brief of Appellant)

ORIGINAL

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
CIRCUIT COURT

The Honorable L. Henry McKellar
Circuit Court Judge

RECEIVED

OCT. 14 1992

S. C. SUPREME COURT

Case No. 90-CP-40-4980

Mid-State Distributors, Inc., Respondent,

vs.

Century Importers, Inc., Carlton and United
Breweries Limited, Molson Breweries U. S.
Holdings, Inc., Fosters Brewing Group
Limited, f/k/a Elders IXL, and Capital Wine
and Beverage Distributing Co. of Columbia,
Inc.

OF WHOM

Carlton and United Breweries
Limited, is..... Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT

A. THE ORDER DENYING APPELLANT'S MOTION TO DISMISS FOR LACK FOR JURISDICTION OVER THE PERSON IS DIRECTLY APPEALABLE.

Respondent is incorrect in stating that no South Carolina case addresses the appealability of an order denying a motion to dismiss for lack of jurisdiction over the person. In National Exchange Bank v. Stelling, 32 S.C. 102, 10 S.E. 766 (1890), the court held that an order sustaining personal jurisdiction involved the merits and was immediately appealable. The court stated that "[h]ere the intermediate decree of Judge Norton, holding that Stelling had been properly made a party, was a vital one to the jurisdiction of the court over the person of Stelling; and he had certainly the right to have the judgement of the court of last resort on the question whether he was a party before he could determine whether he should answer or not." Id. at 768-69.

The Court has since upheld the National Exchange decision in Kay v. Meadors, 216 S.C. 483, 58 S.E.2d 893 (1950). See also, Keller v. Keller, 296 S.C. 411, 373 S.E.2d 692 (Ct. App. 1988); Atlantic Soft Drink Company of Columbia, Inc. v. South Carolina National Bank, 287 S.C. 228, 336 S.E.2d 876 (1985).

B. RESPONDENT SEEKS TO SUBJECT APPELLANT TO JURISDICTION IN A SUIT UNRELATED TO THE BREWING OF FOSTER'S LAGER.

Respondent incorrectly argues that the South Carolina long arm statute is broad enough to extend the jurisdiction of the South Carolina courts to the Appellant in a contract dispute

between a South Carolina distributor and its U.S. supplier merely because the Appellant manufactured the product which is the subject of the distribution contract. S.C. Code Ann. § 36-2-803 (Law. Co-op. 1976), South Carolina's long arm statute, confers personal jurisdiction to the court for "causes of action arising from" a person's specific listed activities in this state. The statute does not confer personal jurisdiction over nonresidents for all causes of action.

The causes of action alleged in the Complaint arise from an alleged breach of a franchise contract between the U.S. importer and its South Carolina distributor. This cause of action does not "arise from" the activities of Appellant Carlton and United Breweries, Ltd. ("Carlton").¹ The U.S. importer, Century Importers, Inc. ("Century"), and not Carlton, contracts with, and sells Fosters Lager to, the South Carolina distributors. Thus, Carlton is not a party to the franchise agreement, whose alleged breach is the subject of the Complaint.

Respondent argues that the instant case is analogous to a suit arising from Foster's Lager being deleterious and causing a personal injury to a resident of South Carolina. In such case, under the South Carolina long arm statute, Carlton would constitutionally be subject to personal jurisdiction in South Carolina. The instant case, however, arises from facts which are not analogous to Respondent's example. Because the South

¹ Carlton brews a product in Australia, which is sold to the United States importer, Century Importers, Inc., then sold to a South Carolina distributor, and eventually consumed in South Carolina.

Carolina long arm statute confers specific, not general, jurisdiction upon the nonresident defendant, a closer analogy to the instant case would be a suit brought by an Australian employee of Carlton suing Carlton in South Carolina for breach of his employment contract. Clearly in such case Carlton would not be subject to personal jurisdiction in South Carolina.

C. RESPONDENT CONFUSES THE CONTRACTS OF CENTURY IMPORTERS, INC. IN SOUTH CAROLINA WHEN DISCUSSING THE MINIMUM CONTACTS OF APPELLANT CARLTON AND UNITED BREWERIES, LTD.

Respondent incorrectly confuses the contacts of Century with those of Carlton in determining whether Carlton has sufficient minimum contacts with South Carolina to subject it to personal jurisdiction in South Carolina's courts. In discussing the minimum contacts of a nonresident corporation, the focus of attention must be the contacts generated by the defendant nonresident corporation, and not the unilateral actions of some other entity. Aviation Associates And Consultants, Inc. v. Jet Time, Inc., 303 S.C. 502, 402 S.E.2d 177, 180 (1991); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490, 501 (1980); Helicopteros Nacionales v. Hall, 466 U.S. 408, 417, 104 S.Ct. 1868, 1873, 80 L.Ed. 404, 412 (1984) ("unilateral activity of another party or a third person is not an appropriate consideration").

Carlton brews the Fosters Lager and then sells it to Century, the United States Importer. Carlton, on behalf of, and pursuant to the instructions of Century, places the beer on

ships bound for ports in the U.S. At no time does Carlton, import or sell beer in South Carolina. The following are examples in the Initial Brief of Respondent of Respondent's confusing Century's activities in South Carolina with the alleged contacts of Carlton:

1. "Each order of an American distributor (e.g., Mid-State) is shipped from Australia by Carlton & United specifically to fill the order of the American distributor." (Respondent's Initial Brief p. 5).

2. "If Carlton & United were to stop distributing beer into South Carolina, there would be no suit. . . ." (Respondent's Initial Brief p. 11).

3. "Moreover, Carlton & United's shipment of thousands of cases of Foster's Lager Beer over many years into South Carolina is the transaction of business here, within the long-arm statute's meaning." (Respondent's Initial Brief p. 11).

4. "Carlton & United regularly ships Foster's Lager Beer directly into South Carolina for distribution by Foster's franchisees to retailers, thence to be sold to and consumed by South Carolina customers." (Respondent's Initial Brief p. 13).

5. "Carlton & United has been exporting Foster's Lager Beer to South Carolina since at least 1983." (Respondent's Initial Brief p. 15).

6. "This is a steady, long-standing course of conduct by Carlton & United directed at the consumers of South Carolina. The number of bottles and cans of Foster's Lager Beer brewed by Carlton & United in Australia and shipped by it to South

Carolina for consumption in South Carolina is not of record. .
.. ." (Respondent's Initial Brief p. 15).

7. "Carlton & United's sales to South Carolina are not random, not fortuitous, not attenuated." (Respondent's Initial Brief p. 15).

Each of these are the acts of importers, not of Carlton & United.


Respondent also argues that because Century and Carlton are "half-sister" corporations, the fact that these are separate entities should be dismissed by the court, and the contacts of Century should be vicariously considered the contacts of Carlton. For the same reasons the foreign parent of a domestic subsidiary is not subject to personal jurisdiction in South Carolina, Respondent's argument is without merit. See, Yarborough & Co. v. Schoolfield Furniture Industries, Inc., 275 S.C. 151, 268 S.E.2d 42, 44 (1980); Cannon Manufacturing Co. v. Cudahy, 267 U.S. 333, 45 S.Ct. 250, 69 L.Ed. 634 (1924).

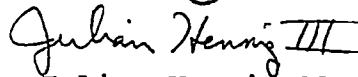
CONCLUSION

For the reasons set forth above, Respondent failed to meet its burden of establishing jurisdiction over Carlton and the lower court's denial of its motion to dismiss, as a result, was

without support in the evidence and was manifestly controlled by error of law. The lower court's Order should, therefore, be reversed.

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October 14, 1992

THE STATE OF SOUTH CAROLINA
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Inc.

OF WHOM

Carlton and United Breweries
Limited, is Appellant.

PROOF OF SERVICE

I certify that I have served a copy of the Initial Reply
Brief of Appellant on all parties by causing a copy of same to
be deposited in the United States Mail, proper postage prepaid,
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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM UNION COUNTY
Court of Common Pleas
William A. McKinnon, Circuit Court Judge

Appellate Case No. 2021-000557

Civil Action No. 2019-CP-4400054

Dwayne Thompson, Respondent,

v.

Rolling Fog Vapor Company, LLC,

Of whom LG Chem, Ltd. and LG Chem America, Inc. are
the.....

Appellants.

PROOF OF SERVICE

I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for LG Chem, Ltd. and LG Chem America, Inc., do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow by manner identified below, pursuant to Supreme Court Order, as Amended May 29, 2020, § (g)(3), on May 21, 2021, and a copy of that electronic mail is attached to this certificate.

Pleading(s): **Appellants' Memorandum in Support of Immediate Appealability**

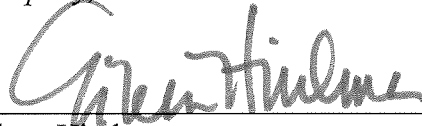
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Eileen Hindman

July 19, 2021