SUPREME COURT OF THE STATE OF WASHINGTON

Washington Supreme Court No. 91391-9

Court of Appeals No. 70298-0-I

THE STATE OF WASHINGTON,

Respondent,

v.

LG ELECTRONICS, INC.; KONINKLIJKE PHILIPS ELECTRONICS N.V. A/K/A ROYAL PHILIPS ELECTRONICS N.V.; PHILIPS ELECTRONICS INDUSTRIES (TAIWAN), LTD.; SAMSUNG SDI CO., LTD. F/K/A SAMSUNG DISPLAY DEVICE CO., LTD.; SAMSUNG SDI AMERICA, INC.; SAMSUNG SDI MEXICO S.A. DE C.V.; SAMSUNG SDI BRASIL LTDA.; SHENZHEN SAMSUNG SDI CO., LTD.; TIANJIN SAMSUNG SDI CO., LTD.; SAMSUNG SDI (MALAYSIA) SDN. BHD.; PANASONIC CORPORATION F/K/A MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD.; HITACHI DISPLAYS, LTD. (N/K/A JAPAN DISPLAY INC.); HITACHI ELECTRONIC DEVICES (USA), INC.; HITACHI ASIA, LTD.

Petitioners.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONERS

Koninklijke Philips Electronics N.V. a/k/a Royal Philips Electronics N.V. ("KPNV"), Philips Electronics Industries (Taiwan), Ltd. ("PTL"), Panasonic Corporation f/k/a Matsushita Electric Industrial Co., Ltd.,'Hitachi Displays, Ltd. n/k/a Japan Display Inc., Hitachi Asia, Ltd., Hitachi Electronic Devices (USA), Inc. ("HED(US)"), LG Electronics, Inc. ("LGEI"), Samsung SDI America, Inc. ("SDI America"), Samsung SDI Co., Ltd. f/k/a Samsung Display Device Co., Ltd. ("SDI"), Samsung SDI (Malaysia) Sdn. Bhd. ("SDI Malysia"), Samsung SDI Mexico S.A. de C.V. ("SDI Mexico"), Samsung SDI Brasil Ltda. ("SDI Brazil"), Shenzhen Samsung SDI Co., Ltd. ("SDI Shenzhen"), Tianjin Samsung SDI Co., Ltd. ("SDI Tianjin"), appellees below, petition for review of the court of appeals' decision identified in Part B.

B. COURT OF APPEALS' DECISION

Petitioners seek review of the published opinion issued by the Court of Appeals for Division I in the case of *State of Washington, et al. v. LG Electronics, Inc., et al.*, No. 70298-0-I, 2015 WL 158858, on January 12, 2015 (attached as Appendix A). Petitioners have previously filed a petition for review from another court of appeals' decision in the same underlying case, and that petition is currently pending in this Court in *State of Washington v. LG Electronics, et al.*, No. 91263-7.

C. ISSUES PRESENTED FOR REVIEW

1. Whether Washington courts may properly exercise personal jurisdiction over nonresident component-part manufacturers solely because the manufacturers knew that other companies would incorporate those parts into products that would eventually be sold in meaningful quantities in Washington.

2. Whether, in considering a motion to dismiss under CR 12(b)(2), the court of appeals erred by refusing to consider uncontested affidavits that contradicted the bare jurisdictional allegations in the complaint, an approach in conflict with precedents from Division I and Division II and inconsistent with federal law.

D. STATEMENT OF THE CASE

Plaintiff, the State of Washington, alleges in its complaint that Defendants violated the Consumer Protection Act ("CPA") by "conspiring to suppress and eliminate competition by agreeing to raise prices in the market for cathode ray tubes, commonly referred to as CRTs," in violation of RCW 19.86.030 (attached as Appendix B). CP 2, 27. The State did not allege a conspiracy to affect the price of the finished products that incorporate CRTs, such as televisions and computer monitors.

The State also did not allege that any conspiratorial activity occurred in Washington. CP 17-25. Instead, the State sought to establish personal jurisdiction over Petitioners by alleging that they sold CRTs "into [the]

international stream of commerce" with the "knowledge, intent and expectation" that such CRTs would be incorporated into CRT products to be sold by other third parties to consumers "throughout the United States, including in Washington State." CP 13.

Petitioners moved to dismiss for lack of personal jurisdiction.[1] CP 29-208. Petitioners argued that the State had not alleged sufficient facts to support personal jurisdiction and submitted affidavits detailing their virtually total absence of contacts with Washington. CP 40-42, 56-64, 84-86, 104-06, 203-06. For example, these affidavits establish that Petitioners manufactured and sold CRTs entirely outside of Washington, with two narrow exceptions: (1) KPNV's affidavit reveals that it is merely a holding company and does not manufacture or sell *anything*, CP 105; and (2) the affidavits for SDI, SDI Mexico, and SDI Malaysia establish that they shipped CRT component parts to a single Washington manufacturer, CP 206. The State did not contest any of the affidavits.

The trial court agreed with Petitioners and granted their motions to dismiss. CP 616-34. The trial court recognized that placing a product into the stream of commerce, without more, is not sufficient to confer personal jurisdiction over the Petitioners: "[J]ust put[ting] it into the stream of commerce throughout the country is not enough." Hr'g Tr. 57 (attached as Appendix C).

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[1] A number of other defendants in the case, including many domestic entities in the same corporate families as Petitioners, did not challenge Washington's personal jurisdiction over them.

The trial court correctly observed that the State was "really advocating for an expansion, or a change in the law." Hr'g Tr. 58.

The court of appeals reversed. The court first refused to consider the uncontested affidavits. Op. at 7-13. It then invoked Justice Breyer's concurrence in *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011), to fashion a new and far-reaching rule for personal jurisdiction. Op. at 13-31. The court held that Washington courts could exercise personal jurisdiction over Petitioners because other companies incorporated their component parts into finished products that were later sold in meaningful quantities in Washington: "[W]e hold that because a product manufactured by these foreign corporations was sold—as an integrated component part of retail consumer goods—into Washington in high volume over a period of years, the corporations 'purposefully' established 'minimum contacts' in Washington . . . [and] exercise [of personal jurisdiction] would not offend notions of 'fair play and substantial justice.'" Op. at 2.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. The court of appeals misinterpreted recent United States Supreme Court precedent to work a sea change in personal-jurisdiction law

The court of appeals vastly extended Washington's view of personal jurisdiction based on its mistaken belief that the Court's divided opinion in *J. McIntyre* announced a new, more expansive doctrine of personal jurisdiction. The court of appeals read *J. McIntyre* as sanctioning personal jurisdiction over a foreign component-part manufacturer "if the incidence or volume of [completed-

product] sales into a forum points to something systematic—as opposed to anomalous." Op. at 24. But *none* of the Justices endorsed that extreme view. The court of appeals' aggressive approach to personal jurisdiction contravenes any reasonable interpretation of *J. McIntyre*, as numerous courts have recognized.

a. The pre-*J. McIntyre* state of personal-jurisdiction law

1. *J. McIntyre* is the latest in the United States Supreme Court's long line of cases on specific personal jurisdiction. The Court has explained that the Due Process Clause limits the reach of a forum state's jurisdiction over nonresident defendants. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985). The "constitutional touchstone" of this analysis is "whether the defendant purposefully established 'minimum contacts' in the forum State." *Id.* at 474. "[T]here [must] be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* at 475 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). And the "litigation [must] result[] from alleged injuries that 'arise out of or relate to' those activities." *Id.* at 472 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)). Additionally, the assertion of personal jurisdiction must "comport with 'fair play and substantial justice.'" *Id.* at 476 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)).

The Court has been clear that the contacts must be made *by the defendant*: "Jurisdiction is proper . . . where the contacts proximately result from actions by

the defendant himself that create a "substantial connection" with the forum State." *Id.* at 475. "[U]nilateral activity of another party or a third person is not an appropriate consideration . . . ." *Helicopteros*, 466 U.S. at 417. For example, a "seller of chattels[']" "amenability to suit . . . [does not] travel with the chattel," such that a buyer's unilateral actions bringing the chattel into the forum state creates personal jurisdiction over the seller. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296 (1980).

2. In *Asahi Metal Industry Co. v. Superior Court of California, Solano County*, 480 U.S. 102 (1987), the Court considered the precise question presented here: whether "the mere awareness on the part of a foreign defendant that the components it manufactured, sold, and delivered outside the United States would reach the forum State in the stream of commerce" satisfies the constitutional "minimum contacts" test for personal jurisdiction. *Id.* at 105. Asahi was a Japanese valve assembly manufacturer who had delivered valve assemblies to a tube manufacturer, Cheng Shin, in Taiwan, who then sold those tubes worldwide, including in California. *Id.* at 106.

The United States Supreme Court unanimously agreed that California could not exercise personal jurisdiction over Asahi, but the Justices split four-to-four over the appropriate test for establishing minimum contacts, with Justice Stevens taking no position on the issue. Writing for four Justices, Justice O'Connor favored the "stream-of-commerce plus" theory of personal jurisdiction. Under this approach, minimum contacts requires "something more" than "a

defendant's awareness that the stream of commerce may or will sweep the product into the forum State." *Id.* at 111-12. The defendant must also purposefully direct his conduct towards the forum state, such as by "designing the product for the market in the forum State[or] advertising in the forum State." *Id.* Because Asahi had not targeted California, it did not have the minimum contacts with California required for personal jurisdiction. *Id.* at 112-13.

Justice Brennan, also writing for four Justices, focused on foreseeability rather than targeted conduct. He rejected the need for an additional showing beyond a defendant placing goods in the stream of commerce with the awareness that "the regular and anticipated flow of products from manufacture to distribution to retail sale" would bring the product to the forum state. *Id.* at 117 (Brennan, J., concurring in judgment). Justice Brennan thus concluded that "Asahi's regular and extensive sales of component parts to a manufacturer it knew was making regular sales of the final product in California" established minimum contacts. *Id.* at 121.[2]

Asahi left much confusion in its wake. Many courts adopted Justice O'Connor's stream-of-commerce plus test, while others preferred Justice Brennan's approach. *See* Todd David Peterson, *The Timing of Minimum Contacts*, 79 Geo. Wash. L. Rev. 101, 119-20 (2010).

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[2] Justice Brennan went on to conclude "that the exercise of personal jurisdiction over Asahi in this case would not comport with 'fair play and substantial justice.'" *Asahi*, 480 U.S. at 116. Thus, the Court was unanimous in holding that personal jurisdiction could not be exercised over Asahi.

This Court has never analyzed the issue in any depth. The closest it came was in *Grange Insurance Association v. State*, 110 Wn.2d 752, 757 P.2d 933 (1988), a case far afield from the foreign component-part manufacturer context here. This Court then merely noted the split opinions in *Asahi* before observing in dicta that the issue in the case could be resolved under its own precedent because the defendant targeted Washington with specific products—it "knew that these particular cows would be immediately shipped into Washington." *Id.* at 762.

This Court did note that its pre-*Asahi* case law tended to find minimum contacts when an "out-of-state manufacturer places its products in the stream of interstate commerce." *Id.* at 761. But a closer look at those cases reveal that their facts satisfy Justice O'Connor's stream-of-commerce plus approach just as they do Justice Brennan's approach. For example, in *Smith v. York Food Machinery Co.*, 81 Wn.2d 719, 504 P.2d 782 (1972), the manufacturer defendants "advertised in trade magazines circulated here; they mailed literature to potential customers here; and, they communicated by telephone and telegraph with food processors here." *Id.* at 723. Thus, *Grange* did not announce a definitive interpretation of *Asahi* for Washington courts.

b. Under *J. McIntyre*, Washington's assertion of personal jurisdiction over Petitioners violates due process

That was the unsettled state of affairs until the United States Supreme Court weighed in on the stream-of-commerce issue again in *J. McIntyre*, a case involving a foreign manufacturer who engaged a distributor to sell its finished

products in the United States. 131 S. Ct. at 2789. New Jersey exercised personal jurisdiction over the manufacturer based on the fact that at least one of its machines ended up in New Jersey and caused injury there. *Id.* The Supreme Court reversed, with a four-Justice plurality and a two-Justice concurrence carrying the day. *Id.* at 2785-94.

The court of appeals interpreted *J. McIntyre* as adopting Justice Brennan's approach in *Asahi*, Op. at 18-24 & n.23, but that gets the Court's holding precisely backwards. The best view of the Court's holding is that it adopted Justice O'Connor's stream-of-commerce plus theory of personal jurisdiction. The most that can be argued in the other direction is that *J. McIntyre* preserved the status quo on the issue. But there is no reasonable argument supporting the court of appeals' conclusion that *J. McIntyre* adopted Justice Brennan's stream-of-commerce approach, which *none* of the Justices endorsed.

1. Justice Kennedy's four-Justice plurality opinion in *J. McIntyre* explicitly rejects Justice Brennan's foreseeability-based approach to personal jurisdiction: "Justice Brennan's concurrence . . . is inconsistent with the premises of lawful judicial power." 131 S. Ct. at 2789. The personal jurisdiction question is instead one of authority and sovereignty: "The question is whether a defendant has followed a course of conduct directed at the society or economy existing within the jurisdiction of a given sovereign, so that the sovereign has the power to subject the defendant to judgment concerning that conduct." *Id.* Accordingly, merely placing items into the stream of commerce, without some purposeful

direction towards the forum state, is insufficient to establish personal jurisdiction: "The defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum . . . ." *Id.* at 2788. Thus, Justice Kennedy adopted a theory of personal jurisdiction that was "consistent with Justice O'Connor's opinion in *Asahi*," although one based more explicitly in notions of authority and sovereignty. Applying that test, Justice Kennedy concluded that New Jersey could not exercise personal jurisdiction because the manufacturer had not "engaged in conduct purposefully directed at New Jersey" when it shipped its finished products to an Ohio distributor who in turn targeted the United States as a whole. *Id.* at 2790.

Justice Breyer's two-Justice concurrence in the judgment echoed the plurality's concern about a foreseeability-based approach. He rejected the view that "a producer is subject to jurisdiction for a products-liability action so long as it 'knows or reasonably should know that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states.'" *Id.* (citation omitted). But he also shied away from adopting the plurality's sovereignty-based theory, expressing concern that the facts did not present any of the "many recent changes in commerce and communication" that complicate jurisdictional questions. *Id.* at 2791; *see also id.* at 2793. Justice Breyer instead concluded that the facts of the case—a foreign manufacturer engaging a distributor to sell its machines in the United States, resulting in one sale to the forum state—would not support jurisdiction under any of the Court's

precedents, including both O'Connor's and Brennan's *Asahi* opinions, and thus he felt no need to take a firm position on the plurality's approach. *Id.* at 2791-92.

2. The court of appeals somehow concluded from these opinions that the *J. McIntyre* Court adopted Justice Brennan's approach to personal jurisdiction, a view no Justice endorsed. Op. at 18-24 & n.23. Because no opinion commands a majority, the Court's holding "may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (citation omitted). That does not mean that a court must choose among the available opinions and apply one to the exclusion of the others: "This inquiry . . . does not require us to determine a single opinion which a majority joined, but rather determine the 'legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree.'" *State v. Hickman*, 157 Wn. App. 767, 774, 238 P.3d 1240 (2010) (citation omitted).

In *J. McIntyre*, both the plurality and the concurrence expressed reservations about a foreseeability-based approach and adopted positions consistent with Justice O'Connor's stream-of-commerce plus test. The plurality went further and announced a new sovereignty-based theory of personal jurisdiction, while the concurrence hesitated to make any broad pronouncements. But the two opinions overlap in their toleration of Justice O'Connor's test: the plurality by adopting an approach "consistent with Justice O'Connor's opinion in *Asahi*," *J. McIntyre*, 131 S. Ct. at 2790, and the concurrence by applying Justice

O'Connor's requirement of "something more" than placing goods in the stream of commerce, *id.* at 2792. Therefore, the stream-of-commerce plus test is the law going forward. *See Smith v. Teledyne Cont'l Motors, Inc.*, 840 F. Supp. 2d 927, 931 (D.S.C. 2012); *N. Ins. Co. of N.Y. v. Constr. Navale Bordeaux*, No. 11-60462-CV, 2011 WL 2682950, at *5 (S.D. Fla. July 11, 2011); *see also Williams v. Romarm, SA*, 756 F.3d 777, 785 (D.C. Cir. 2014) (interpreting *J. McIntyre* to require "facts showing [the foreign manufacturer] targeted the District or its customers in some way").

Petitioners are not subject to personal jurisdiction in Washington under that test. The State has alleged none of the "plus" factors needed to demonstrate targeting of the Washington market. Nor did the court of appeals identify any such plus factors.

Another plausible reading of *J. McIntyre* is that the Court's holding simply maintains of the status quo ante. *See In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 753 F.3d 521, 541 (5th Cir. 2014); *AFTG-TG, LLC v. Nuvoton Tech. Corp.*, 689 F.3d 1358, 1363 (Fed. Cir. 2012). This approach elevates to a holding of the Court Justice Breyer's statements that "resolving this case requires no more than adhering to our precedents" and that "this is an unsuitable vehicle for making broad pronouncements that refashion basic jurisdictional rules." *J. McIntyre*, 131 S. Ct. at 2792-93.

Under this reading of *J. McIntyre*, the jurisdictional issue in this case would turn on whether Washington follows the O'Connor or Brennan approach

from *Asahi*. Because this Court has not resolved that issue, the court of appeals would have had to choose between those approaches to resolve this case.

Rather than follow either of these plausible interpretations of *J. McIntyre*, the court of appeals instead settled on the erroneous view that the Court adopted Justice Brennan's foreseeability approach. Op. at 18-24 & n.23. The court of appeals supported this holding with snippets of Justice Breyer's concurrence in which he explains that the facts would not support jurisdiction even under the Brennan test.[3] Op. at 22-23.

But even the *dissent* in *J. McIntyre* did not adopt the Brennan test. It instead focused on McIntyre's efforts to market its products in the United States and specifically distinguished the case from pure stream-of-commerce cases like *Asahi*: "Asahi, unlike McIntyre UK, did not itself seek out customers in the United States, it engaged no distributor to promote its wares here, it appeared at no tradeshows in the United States, and, of course, it had no Web site advertising its products to the world." 131 S. Ct. at 2803 (Ginsburg, J., dissenting). And particularly relevant here, the dissent pointed out the different considerations at

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[3] The court of appeals cited one of its recent cases, *State v. AU Optronics Corp.*, 180 Wn. App. 903, 328 P.3d 919 (2014), to support this view. Op. at 24-26. That case settled while the defendants' petition for review was pending in this Court. *See* Consent Decree, *State v. AU Optronics Corp.*, No. 10-2-29164-4SEA (King Cnty. Sup. Ct. Jan. 9, 2015). *AU Optronics* relied extensively on the flawed Oregon Supreme Court case of *Willemsen v. Invacare Corp.*, 352 Or. 191, 282 P.3d 867 (2012), which also understood *J. McIntyre* as adopting Justice Brennan's approach, even as it noted the presence of Justice O'Connor's "plus" factors in the case. *See id.* at 203 ("CTE agreed to manufacture the battery chargers . . . in compliance with federal, state, and local requirements.").

play in *Asahi* because "Asahi was a component-part manufacturer with 'little control over the final destination of its products once they were delivered into the stream of commerce.'" *Id.* (citation omitted).

Thus, the court of appeals adopted as the holding of *J. McIntyre* a view that no Justice endorsed. And that was the only way for it to find jurisdiction here, because, given the similarities between Petitioners and the component-part manufacturer in *Asahi*, it is doubtful that even the dissenting Justices would find jurisdiction on these facts.[4]

This Court should correct the court of appeals' misguided and untenable interpretation of *J. McIntyre*. This Court should be the final word on this important constitutional question that turns on the interpretation of United States Supreme Court case law.

2. The court of appeals compounded its error by refusing to consider uncontested, dispositive evidence on the personal-jurisdiction question

The court of appeals exacerbated its flawed personal-jurisdiction holding by refusing defendants the opportunity to extricate themselves from false claims of personal jurisdiction early in a case. As discussed, the State failed to offer any

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[4] Moreover, even if the court of appeals were correct in its minimum contacts analysis, Petitioners still would not be subject to personal jurisdiction here because it would offend "traditional notions of fair play and substantial justice." *Asahi*, 480 U.S. at 113 (internal quotation marks omitted). As in *Asahi*, the burden on Petitioners is "severe" because, with the exception of the few domestic Petitioners, they would be forced to submit to "to a foreign nation's judicial system." *Id.* at 114. Further, dismissing Petitioners imposes no great burden on the State because it would still be able to obtain recovery from the other defendants in the case, many of whom are domestic entities that are part of the same corporate family as Petitioners. *See id.* at 113-14.

allegations—much less evidence—establishing a prima facie case for personal jurisdiction under the proper *J. McIntyre* standard. What is more, Petitioners offered uncontested affidavits that would have factually defeated the complaint's jurisdictional allegations under the proper test—and for some Petitioners even under the faulty Justice Brennan test applied by the court of appeals.

The court of appeals nonetheless turned a blind eye to this evidence under its conception of the standard of review at this procedural stage. The court of appeals recognized Petitioner's argument: "The Companies contend that when a defendant moves to dismiss for lack of personal jurisdiction and, in doing so, offers affidavits or declarations to rebut the allegations in the plaintiff's complaint, the plaintiff may not rely on the complaint's factual averments but, rather, must submit evidence in order to satisfy its burden of proof." Op. at 9. But the court rejected the argument as contrary to Washington law, concluding that "[f]or purposes of determining jurisdiction, this court treats the allegations in the complaint as established." Op. at 9-10 (citation omitted). Washington courts have not fully elucidated the CR 12(b)(2) procedures, and this Court should take the opportunity to do so now.

The court of appeals' approach is contrary to Washington law. The court acknowledged that precedents from Division I and Division II would consider Petitioners' uncontested evidence. Op. at 7-13 & n.14 (citing *Carrigan v. California Horse Racing Board*, 60 Wn. App. 79, 802 P.2d 813 (1990); *Access Rd. Builders v. Christenson Elec. Contracting Eng'g Co.*, 19 Wn. App. 477, 576

P.2d 71 (1978); *Puget Sound Bulb Exch. v. Metal Bldgs. Insulation Inc.*, 9 Wn. App. 284, 513 P.2d 102 (1973)). The court also cited this Court for support, claiming that this Court had "recognized this approach and adopted the same." Op. at 10. But the two cases it cited do not address the issue presented here. Neither case involved a defendant's affidavit that conflicted with the unsworn jurisdictional allegations in the complaint. *See FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 963-64, 331 P.3d 29 (2014); *Lewis v. Bours*, 119 Wn.2d 667, 669-70, 835 P.2d 221 (1992).

The court of appeals' holding also ignores this Court's directive that "Washington courts treat as persuasive authority federal decisions interpreting the federal counterparts of our own court rules." *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989). Federal courts have interpreted the federal analogue of CR 12(b)(2) as providing for exactly the type of procedure Petitioners advocate here. In analyzing a motion to dismiss for lack of personal jurisdiction, federal courts credit the plaintiff's allegations if uncontroverted by affidavit, and they credit the plaintiff's affidavits over those of the defendant where there is a conflict. *See Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004). But federal courts elevate the defendant's uncontested affidavit over a bare allegation in the complaint: "[F]or purposes of personal jurisdiction, 'we may not assume the truth of allegations in a pleading which are contradicted by affidavit.'" *Alexander v. Circus Circus Enters., Inc.*,

972 F.2d 261, 262 (9th Cir. 1992) (citation omitted). Yet the court of appeals rejected this well-established federal approach.

The court of appeals' method wastes judicial and private resources and imperils due process rights. There is no reason for parties to remain in a case after they have presented uncontested facts that conclusively demonstrate they are beyond the jurisdiction of the court. The extreme rule adopted by the court of appeals violates a party's due process rights by forcing it to undergo burdensome pre-trial discovery simply to vindicate its right to avoid being haled into a foreign court in the first place. The federal approach employs procedures that safeguard those important substantive rights.

KPNV is the poster child for the injustices of the court of appeals' approach. KPNV is a Dutch *holding company* that manufactures and sells *nothing*, not CRTs or anything else, and it consequently has no relevant connections to Washington whatsoever. CP 105. KPNV's affidavit on these jurisdiction-dispositive facts remains uncontested. But under the court of appeals' approach, KPNV will have to undergo even more burdensome pre-trial discovery—in addition to the over two million pages Petitioners have already produced, Hr'g Tr. 46, 49-50—before it could present its uncontested jurisdictional facts, Op. at 8, 11-13.

The trial court's denial of yet more discovery also cannot justify the court of appeals' ruling. Despite the voluminous documents already produced, the State failed to offer any reason why additional discovery would yield anything

contrary to the dispositive jurisdictional facts in Petitioners' affidavits or even "what discovery would actually be." Hr'g Tr. 66-67, 76. Thus, the trial court did not abuse its broad discretion in denying that additional discovery. *See Terracom v. Valley Nat'l Bank*, 49 F.3d 555, 562 (9th Cir. 1995) (denying jurisdictional discovery when the plaintiff "failed to demonstrate how further discovery would allow it to contradict the [defendant's] affidavits").

3. This Court's guidance is long overdue on these issues of substantial public interest

This Court's guidance is needed on these personal-jurisdiction questions. The United States Supreme Court has twice waded into the stream-of-commerce debate, in *Asahi* and in *J. McIntrye*, each time failing to achieve a majority opinion. State supreme courts across the country have interpreted these touchstone cases to provide direction to the courts of their respective states on this increasingly common issue.[5]

There can be no doubt that this issue is of "substantial public interest" given the enormous implications for companies across the country and across the globe. RAP 13.4(b)(4). Yet this Court has never offered a definitive interpretation of either key case, leaving lower Washington courts adrift in the delicate and complex area of stream-of-commerce personal jurisdiction. Indeed,

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[5] *See, e.g., Ex Parte Edgetech I.G., Inc.*, 2014 WL 3700359, at *9-12 (Ala. July 25, 2014) (interpreting *J. McIntyre* to preserve the post-*Asahi* status quo); *Russell v. SNFA*, 987 N.E.2d 778, 791-94 (Ill. 2013) (same); *State v. NV Sumatra Tobacco Trading Co.*, 403 S.W.3d 726, 755-59 (Tenn. 2013) (same); *Willemsen v. Invacare Corp.*, 352 Or. 191, 196-209, 282 P.3d 867 (2012) (interpreting *J. McIntyre* to adopt Justice Brennan's approach from *Asahi*).

this Court has not addressed a stream-of-commerce personal jurisdiction question at all in over twenty-five years, and even that was dicta. *See Grange*, 110 Wn.2d at 762.

This case arises in a factual setting that has become increasingly common in the globalized economy—a foreign component-part manufacturer who did not specifically target the Washington market, but whose products nevertheless end up being sold as part of finished products in Washington through the actions of third parties over whom the component-part manufacturers had no control. This case presents an ideal opportunity for the Court to end the confusion in this troubled area and announce Washington's theory of stream-of-commerce personal jurisdiction.

The court of appeals' errors make the need for this Court's intervention all the more urgent. If this Court does nothing, component-part manufacturers half a world away who have never taken any actions targeted to Washington will nevertheless be haled into Washington courts based solely on the actions of third parties who incorporate those parts into finished products and sell them in Washington. Just as troubling, companies like KPNV who have done nothing that would justify personal jurisdiction *under any test* will be haled into Washington courts without any opportunity to defend themselves before undergoing pointless discovery. This Court should weigh in on these issues now, before the court of appeals' ill-conceived holdings take root in Washington jurisprudence.

4. Petitioners are entitled to the reasonable attorney's fees awarded by the trial court

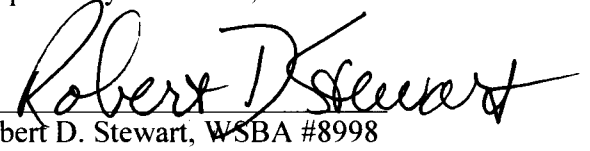
The trial court properly awarded certain Petitioners their attorney's fees and costs under Washington's long-arm statute, RCW 4.28.185(5) (attached as Appendix D). CP 1070-83. The CPA also entitles these Petitioners to recover their fees. RCW 19.86.080(1) (attached as Appendix E). The court of appeals reversed this award of fees only because Petitioners were no longer the prevailing parties after the court's reversal of the trial court's ruling on the motion to dismiss. Op. at 31. Because the court of appeals erred in that ruling, it also erred in reversing the trial court's proper award of attorney's fees.

F. CONCLUSION

For the reasons above, Petitioners request that this Court grant review of this case under RAP 13.4(b) and reverse the court of appeals. Petitioners further request that this Court affirm the trial court's dismissal of the case for lack of jurisdiction and its award of attorney's fees.

Dated this 11th day of February, 2015.

Respectfully submitted,

By 

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APPENDICES TABLE

Appendix	Description
A	Published Opinion issued by the Court of Appeals for Division I in the case of *State of Washington, et al. v. LG Electronics, Inc., et al.*, No. 70298-0-I, 2015 WL 158858, on January 12, 2015
B	RCW 19.86.030
C	11/15/12 Hearing Transcript
D	RCW 4.28.185(5)
E	RCW 19.86.080(1)

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. LG ELECTRONICS, INC.; KONINKLIJKE PHILIPS ELECTRONICS N.V. a/k/a ROYAL PHILIPS ELECTRONICS N.V.; PHILIPS ELECTRONICS INDUSTRIES (TAIWAN), LTD.; SAMSUNG SDI CO., LTD. f/k/a SAMSUNG DISPLAY DEVICE CO., LTD.; SAMSUNG SDI AMERICA, INC.; SAMSUNG SDI MEXICO S.A. DE C.V.; SAMSUNG SDI BRASIL LTDA.; SHENZHEN SAMSUNG SDI CO., LTD.; TIANJIN SAMSUNG SDI CO., LTD.; SAMSUNG SDI (MALAYSIA) SDN. BHD.; PANASONIC CORPORATION f/k/a MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD.; HITACHI DISPLAYS, LTD.; HITACHI ELECTRONIC DEVICES (USA), INC.; HITACHI ASIA, LTD., Appellants, LG ELECTRONICS U.S.A., INC.; PHILIPS ELECTRONICS NORTH AMERICA CORPORATION; TOSHIBA CORPORATION; TOSHIBA AMERICA ELECTRONIC COMPONENTS, INC.; MT PICTURE DISPLAY CO., LTD.; PANASONIC CORPORATION OF NORTH AMERICA; HITACHI, LTD.;	DIVISION ONE No. 70298-0-I (linked with No. 70299-8-I) PUBLISHED OPINION

CHUNGHWA PICTURE TUBES LTD.;)
CPTF OPTRONICS CO., LTD.;)
CHUNGHWA PICTURE TUBES)
(MALAYSIA) SDN. BHD.,)
)
Defendants.) FILED: January 12, 2015
)

DWYER, J. — In resolving this appeal, which requires us to consider the due process limitations on the exercise of personal jurisdiction over certain foreign corporations, we hold that because a product manufactured by these foreign corporations was sold—as an integrated component part of retail consumer goods—into Washington in high volume over a period of years, the corporations "purposefully" established "minimum contacts" in Washington. Owing to our conclusion that the Attorney General alleged sufficient "minimum contacts" to support an exercise of specific jurisdiction by Washington courts, and in view of our further conclusion that such exercise would not offend notions of "fair play and substantial justice," we reverse the trial court's order dismissing the Attorney General's complaint for lack of personal jurisdiction and remand for further proceedings.

I

On May 1, 2012, the Attorney General,[1] acting on behalf of the State and as parens patriae on behalf of persons residing in Washington, brought suit

[1] At the time that the complaint was filed, the Attorney General of Washington was Robert M. McKenna. The current Attorney General is Robert W. Ferguson.

against more than 20 foreign corporate entities.[2] While geographically diffuse, the defendants had a common characteristic—past participation in the global market for cathode ray tubes (CRTs).[3] The Attorney General broadly alleged that the defendants had, in violation of the Washington Consumer Protection Act[4] (CPA), participated in a worldwide conspiracy to raise prices and set production levels in the market for CRTs, which caused Washington State residents and State agencies to pay supracompetitive prices for CRT products.[5]

The Attorney General claimed that the defendants manufactured, sold, and/or distributed CRT products, directly or indirectly, to customers throughout the United States and, specifically, in Washington. He further alleged that the actions of the defendants were intended to and did have a direct, substantial, and reasonably foreseeable effect on United States domestic import trade and commerce, and on import trade and commerce into and within Washington. Indeed, he averred that the defendants' alleged conspiracy to fix prices affected billions of dollars in United States commerce and damaged a large number of Washington State agencies and residents.

In support of this, the Attorney General maintained that because, until recently, CRTs were the dominant technology used in displays such as

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[2] These entities were scattered across four continents and ten different countries, including South Korea, Taiwan, China, Japan, Malaysia, Singapore, the United States of America, Mexico, Brazil, and the Netherlands.

[3] A cathode ray tube is a display technology used in televisions, computer monitors, and other specialized applications. According to the Attorney General, CRTs, until recently, represented the "dominant technology for manufacturing televisions and computer monitors."

[4] Ch. 19.86 RCW.

[5] The Attorney General defined CRT products as "CRTs and products containing CRTs, such as televisions and computer monitors."

televisions and computer monitors, this translated into the sale of millions of CRT products during the alleged conspiracy period, which resulted in billions of dollars in annual profits to the defendants. The Attorney General alleged that during the entirety of the alleged conspiracy period, North America represented the largest market for CRT televisions and computer monitors, and that the 1995 worldwide market for CRT monitors was 57.8 million units, 28 million of which were purchased in North America. The Attorney General claimed that CRT monitors accounted for over 90 percent of the retail market for computer monitors in North America in 1999 and that CRT televisions accounted for 73 percent of the North American television market in 2004. The Attorney General averred that during the alleged conspiracy period, the CRT industry was dominated by relatively few companies, and that, in 2004, four of the defendants in this case together held a collective 78 percent share of the global CRT markets.

By way of relief, the Attorney General sought (1) injunctive relief, (2) civil penalties, (3) damages for State agencies, and (4) restitution for consumers who purchased CRTs or CRT products, whether directly or indirectly.

After accepting service of process, and prior to any discovery being conducted, certain defendants (collectively Companies[6]) filed motions, supported by affidavits and declarations, to dismiss the Attorney General's complaint for lack of personal jurisdiction pursuant to CR 12(b)(2). These affidavits and

[6] Koninklijke Philips Electronics N.V., Philips Electronics Industries (Taiwan), Ltd., Panasonic Corporation, Hitachi Displays, Ltd., Hitachi Asia, Ltd., Hitachi Electronic Devices (USA), Inc., LG Electronics, Inc., Samsung SDI America, Inc., Samsung SDI Co., Ltd., Samsung SDI (Malaysia) SDN. BHD., Samsung SDI Mexico S.A. DE C.v., Samsung SDI Brasil LTDA., Shenzhen Samsung SDI Co., Ltd., and Tianjin Samsung SDI Co., Ltd.

declarations contained testimony that the Companies had never sold CRTs or CRT products to Washington customers or done any business in Washington.

In response, the Attorney General maintained that, for purposes of resolving the Companies' dispositive motions, the aforementioned affidavits and declarations should not be considered by the trial court. In the event that they were considered, however, the Attorney General requested an opportunity to conduct both general and jurisdictional discovery. The Companies opposed the Attorney General's request.

The trial court granted the Companies' motions and dismissed the Attorney General's complaint as against them. In doing so, the trial court denied the Attorney General's request to conduct discovery. Upon an agreed motion, the trial court entered final judgment with prejudice pursuant to CR 54(b).[7] The Attorney General filed a timely appeal.

Additionally, the trial court authorized the Companies to request attorney fees and costs. With the exception of the Philips entities, the Companies submitted briefing requesting fees, along with supporting affidavits. The trial

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[7] **Judgment Upon Multiple Claims or Involving Multiple Parties**. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination in the judgment, supported by written findings, that there is no just reason for delay and upon an express direction for the entry of judgment. The findings may be made at the time of entry of judgment or thereafter on the court's own motion or on motion of any party. In the absence of such findings, determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

court granted their request for fees pursuant to RCW 4.28.185(5).[8] The Attorney General appeals from this award pursuant to RAP 2.4(g).[9]

Certain defendants[10] sought and obtained discretionary review of two issues related to whether certain claims of the Attorney General were time-barred. That matter has been resolved by separate opinion. State v. LG Electronics, Inc., No. 70299-8-I (Wash. Ct. App. Dec. 22, 2014). The underlying litigation has been stayed.

II

The Attorney General contends that the trial court's order dismissing his complaint for lack of personal jurisdiction over the Companies was entered in error. We agree. The allegations in the Attorney General's complaint, when treated as verities, are sufficient to satisfy his prima facie burden of showing that personal jurisdiction comports with due process considerations. Considered together, the Attorney General's allegations demonstrate the following: (1) that the Companies "purposefully" established "minimum contacts" with Washington, (2) that the harm claimed by the Attorney General "arose" from those minimum contacts, and (3) that the exercise of jurisdiction in this matter is consistent with

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[8] This is the attorney fee provision of Washington's long-arm statute. It states that, "[i]n the event the defendant is personally served outside the state on causes of action enumerated in this section, and prevails in the action, there may be taxed and allowed to the defendant as part of the costs of defending the action a reasonable amount to be fixed by the court as attorneys' fees." RCW 4.28.185(5).

[9] "An appeal from a decision on the merits of a case brings up for review an award of attorney fees entered after the appellate court accepts review of the decision on the merits." RAP 2.4(g).

[10] LG Electronics, Inc., LG Electronics U.S.A. Inc., Koninklijke Philips Electronics N.V. a/k/a Royal Philips Electronics N.V., Philips Electronics North America Corporation, Toshiba Corporation, Toshiba America Electronic Components, Inc., Hitachi, Ltd., Hitachi Displays, Ltd., Hitachi Electronic Devices (USA), Inc., and Hitachi Asia, Ltd.

notions of "fair play and substantial justice."

A

Civil Rule 12 is entitled "Defenses and Objections." Section (b), entitled "How Presented," reads as follows:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, *(2) lack of jurisdiction over the person*, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. *If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.*

(Emphasis added.)

Thus, whereas CR 12 envisions the possibility that the submission of evidence by one party may cause a CR 12(b)(6) motion to be converted into a CR 56 motion, it does not, by its terms, envision the same for motions brought pursuant to subsection (b)(2).[11]

[11] "When interpreting court rules, the court approaches the rules as though they had been drafted by the Legislature." State v. Greenwood, 120 Wn.2d 585, 592, 845 P.2d 971 (1993).

Nevertheless, our case law does not prohibit the introduction of evidence in support of a motion brought pursuant to CR 12(b)(2). However, when this occurs prior to full discovery, neither CR 12(b) itself, nor controlling case law, provides that the motion be analyzed as if it were brought pursuant to CR 56. Instead, our case law sets out the particular requirements for evaluation of such a CR 12(b)(2) motion.[12]

"'When the trial court considers matters outside the pleadings on a motion to dismiss for lack of personal jurisdiction, we review the trial court's ruling under the de novo standard of review for summary judgment.'" Columbia Asset Recovery Grp., LLC v. Kelly, 177 Wn. App. 475, 483, 312 P.3d 687 (2013) (quoting Freestone Capital Partners LP v. MKA Real Estate Opportunity Fund I, LLC, 155 Wn. App. 643, 653, 230 P.3d 625 (2010)). When reviewing a grant of a motion to dismiss for lack of personal jurisdiction, we accept the nonmoving party's factual allegations as true and review the facts and all reasonable inferences drawn from the facts in the light most favorable to the nonmoving party. Freestone, 155 Wn. App. at 653-54; accord Walden v. Fiore, __ U.S. __, 134 S. Ct. 1115, 1119 n.2, 188 L. Ed. 2d 12 (2014). It is the plaintiff's burden to establish a prima facie case that jurisdiction exists. Freestone, 155 Wn. App. at 654; see also FutureSelect Portfolio Mgmt, Inc. v. Tremont Grp. Holdings, Inc.,

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"The language must be given its plain meaning according to English grammar usage." State v. Raper, 47 Wn. App. 530, 536, 736 P.2d 680 (1987).

[12] After a fair opportunity for discovery, a party may, of course, bring a motion to dismiss for want of personal jurisdiction as a CR 56 motion. Similarly, if the facts are in dispute, and if there is not otherwise a right to have a jury determine the particular facts at issue, CR 12(d) provides for a determinative hearing on the matter prior to trial.

175 Wn. App. 840, 885-86, 309 P.3d 555 (2013) ("The plaintiff has the burden of demonstrating jurisdiction, but when a motion to dismiss for lack of personal jurisdiction is resolved without an evidentiary hearing," the plaintiff's burden is only that of a prima facie showing of jurisdiction), aff'd, 180 Wn.2d 954, 331 P.3d 29 (2014).

The Companies agree that review is de novo. However, they assert that the allegations in the Attorney General's complaint may not be treated as verities for purposes of determining personal jurisdiction. The Companies contend that when a defendant moves to dismiss for lack of personal jurisdiction and, in doing so, offers affidavits or declarations to rebut the allegations in the plaintiff's complaint, the plaintiff may not rely on the complaint's factual averments but, rather, must submit evidence in order to satisfy its burden of proof. Given that, in support of their motions to dismiss, the Companies offered sworn testimony controverting the Attorney General's allegations, they maintain that it was incumbent upon the Attorney General to offer evidence to substantiate his allegations.[13] The Companies' position, which is at variance with our prior decisions, is untenable.

Even where the trial court has considered matters outside the pleadings on a CR 12(b)(2) motion to dismiss for lack of personal jurisdiction, "[f]or purposes of determining jurisdiction, this court treats the allegations in the

[13] The Companies' position is based on the premise that, in a CR 56 context, the nonmoving party must produce evidence in support of its claims and may not merely rely on the allegations in its complaint or other pleadings. See Baldwin v. Sisters of Providence in Wash., Inc., 112 Wn.2d 127, 132, 769 P.2d 298 (1989).

complaint as established." Freestone, 155 Wn. App. at 654; accord State v. AU Optronics Corp., 180 Wn. App. 903, 912, 328 P.3d 919 (2014); FutureSelect, 175 Wn. App. at 885-86; SeaHAVN, Ltd. v. Glitnir Bank, 154 Wn. App. 550, 563, 226 P.3d 141 (2010); Shaffer v. McFadden, 125 Wn. App. 364, 370, 104 P.3d 742 (2005); CTVC of Haw. Co. v. Shinawatra, 82 Wn. App. 699, 708, 919 P.2d 1243, 932 P.2d 664 (1996); Hewitt v. Hewitt, 78 Wn. App. 447, 451-52, 896 P.2d 1312 (1995); In re Marriage of Yocum, 73 Wn. App. 699, 703, 870 P.2d 1033 (1994); Harbison v. Garden Valley Outfitters, Inc., 69 Wn. App. 590, 595, 849 P.2d 669 (1993); MBM Fisheries, Inc. v. Bollinger Mach. Shop & Shipyard, Inc., 60 Wn. App. 414, 418, 804 P.2d 627 (1991); see also Raymond v. Robinson, 104 Wn. App. 627, 633, 15 P.3d 697 (2001) (Division Two); Precision Lab. Plastics, Inc. v. Micro Test, Inc., 96 Wn. App. 721, 725, 981 P.2d 454 (1999) (Division Two); Byron Nelson Co. v. Orchard Mgmt. Corp., 95 Wn. App. 462, 467, 975 P.2d 555 (1999) (Division Three). Our Supreme Court has recognized this approach and adopted the same. See FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc., 180 Wn.2d 954, 963-64, 331 P.3d 29 (2014) (standard applies when full discovery has not been conducted); Lewis v. Bours, 119 Wn.2d 667, 670, 835 P.2d 221 (1992).[14]

[14] We note the existence of two cases from the electric typewriter era that indicate to the contrary. Access Rd. Builders v. Christenson Elec. Contracting Eng'g Co., 19 Wn. App. 477, 576 P.2d 71 (1978) (Division One), and Puget Sound Bulb Exch. v. Metal Bldgs. Insulation Inc., 9 Wn. App. 284, 513 P.2d 102 (1973) (Division Two). In both cases, it appears that each party offered evidence and that neither plaintiff sought to have the court treat the allegations in its complaint as established. Neither case discusses the issue as presented herein and both, to the extent that they are inconsistent with recent precedent, have been overtaken by the previously cited, uniform authority from the Supreme Court and all three divisions of the Court of Appeals. Similarly, in Carrigan v. California Horse Racing Board, 60 Wn. App. 79, 802 P.2d 813 (1990), which cited to

Resolving jurisdictional matters at an early stage is an important objective;[15] yet, our liberal notice pleading system,[16] which allows plaintiffs to "use the discovery process to uncover the evidence necessary to pursue their claims," tempers this aspiration. Putman v. Wenatchee Valley Med. Ctr., P.S., 166 Wn.2d 974, 983, 216 P.3d 374 (2009);[17] cf. Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 222, 829 P.2d 1099 (1992) ("The notice pleading rule contemplates that discovery will provide parties with the opportunity to learn more detailed information about the nature of a complaint."); Mose v. Mose, 4 Wn. App. 204, 209, 480 P.2d 517 (1971) ("the notice pleading concept inherent in the rules anticipates that the issues to be tried will be delineated by pretrial discovery"). See generally FutureSelect, 180 Wn.2d at 963 ("At this stage of the litigation, the

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Access Road Builders as authority for treating the motion to dismiss as a CR 56 motion, it does not appear that the plaintiff argued that the court should treat the allegations in the complaint as true.

In this matter, the trial judge did not purport to be holding the Attorney General to the standard of production that must be satisfied in order to withstand a CR 56 motion for summary judgment: "I don't mean that this is a summary judgment motion. I am not trying to convert this into a summary judgment motion." This disavowal indicates that the trial judge, in spite of his erroneous dismissal of the Attorney General's complaint, understood correctly that, in considering whether to dismiss the Attorney General's complaint for want of personal jurisdiction over the Companies, it was incumbent upon the court to treat as verities the averments contained therein.

[15] See, e.g., Sanders v. Sanders, 63 Wn.2d 709, 715, 388 P.2d 942 (1964) ("[W]hen jurisdictional problems are left unsettled while various other matters are presented . . . [t]he result is too often confusion, guess work and uncertainty, as well as probable delay, hardship and expense to the parties.").

[16] "Washington follows notice pleading rules and simply requires a 'concise statement of the claim and the relief sought.'" Champagne v. Thurston County, 163 Wn.2d 69, 84, 178 P.3d 936 (2008) (quoting Pac. Nw. Shooting Park Ass'n v. City of Sequim, 158 Wn.2d 342, 352, 144 P.3d 276 (2006)); accord CR 8.

[17] In Putman, our Supreme Court struck down a statute requiring medical malpractice plaintiffs to submit a certificate of merit from a medical expert prior to discovery, ruling that this requirement violated the plaintiffs' right of access to the court, which "'includes the right of discovery authorized by the civil rules.'" 166 Wn.2d at 979 (quoting John Doe v. Puget Sound Blood Ctr., 117 Wn.2d 772, 780, 819 P.2d 370 (1991)).

A simple rule emerges from Putman and the cases previously cited: If the defendant's motion to dismiss is to be decided by crediting the averments in the plaintiff's complaint, discovery is not required. However, if the defendant's motion to dismiss is to be decided based on evidence or the lack thereof, full and reasonable discovery must be afforded.

allegations of the complaint establish sufficient minimum contacts to survive a CR 12(b)(2) motion. . . . [The defendant] may renew its jurisdictional challenge after appropriate discovery has been conducted.") Were we to embrace the Companies' position, we would create a false world—one existing solely as the result of litigation strategies. Here, the Companies brought their CR 12(b)(2) motions, submitting factual averments therewith, prior to full discovery taking place. The Companies then successfully resisted the Attorney General's attempt to conduct discovery directed to the personal jurisdiction issue. This is a litigation strategy designed to subvert, rather than advance, the purpose of our liberal notice pleading regime—to facilitate a proper decision on the merits.[18] See Stansfield v. Douglas County, 146 Wn.2d 116, 123, 43 P.3d 498 (2002).

We need not disrupt our notice pleading regime in an effort to accommodate defendants following the invocation of a CR 12(b)(2) affirmative defense. In fact, accommodation has been made by rule. CR 12(d) permits any party to seek an evidentiary hearing prior to trial when "lack of jurisdiction over the person" has been raised as an affirmative defense pursuant to CR 12(b)(2): "[U]nless the court orders that the hearing and determination thereof be deferred until the trial," "[t]he defenses specifically enumerated (1)-(7) in section (b) of this rule . . . shall be heard and determined before trial on application of any party." CR 12(d). Following an evidentiary hearing, the plaintiff's burden is no longer that of a prima facie showing. Cf. FutureSelect, 175 Wn. App. at 885-86 ("when

[18] For this reason, were we to accept the Companies' position, we would be compelled to conclude that the trial court abused its discretion when it refused to permit the Attorney General to conduct jurisdictional discovery.

a motion to dismiss for lack of personal jurisdiction is resolved without an evidentiary hearing," the plaintiff's burden is only that of a prima facie showing).

In spite of this accommodation, it is apparent, given the Companies' litigation strategy—for instance, their opposition to the Attorney General's request that he be allowed to participate in general and jurisdictional discovery—that their objective has been to avoid engaging in discovery. While not unusual or inherently problematic, this objective—when pursued in a manner antithetical to the purpose of notice pleading and the structure of the Civil Rules—must be rebuffed. Accordingly, we decline to countenance the submittal of sworn testimony as a means of compelling plaintiffs to substantiate their allegations at the pleadings stage. Because the allegations in the complaint are treated as established, when a CR 12(b)(2) motion is made prior to full discovery, any individual allegation cannot be defeated by a statement to the contrary in a declaration submitted in support of the motion to dismiss.[19]

With this articulation of the proper standard of review accomplished, we proceed to set forth and examine in some detail the legal principles pertinent to the due process analysis conducted herein.

B

The Attorney General asserts specific personal jurisdiction over the Companies pursuant to RCW 19.86.160—the long-arm provision of the CPA:

[19] The effect of our decision is not to mandate that affidavits or declarations submitted in support of a motion to dismiss be henceforth stricken. We hold only that such submissions do not alter the manner in which we treat the allegations in the complaint.

> Personal service of any process in an action under this chapter may be made upon any person outside the state if such person has engaged in conduct in violation of this chapter which has had the impact in this state which this chapter reprehends. Such persons shall be deemed to have thereby submitted themselves to the jurisdiction of the courts of this state within the meaning of RCW 4.28.180 and 4.28.185.

This provision "extends the jurisdiction of Washington courts to persons outside its borders" and "'is intended to operate to the fullest extent permitted by due process.'" AU Optronics, 180 Wn. App. at 914 (quoting In re Marriage of David-Oytan, 171 Wn. App. 781, 798, 288 P.3d 57 (2012), review denied, 177 Wn.2d 1017 (2013)). Our "exercise of jurisdiction under RCW 19.86.160 must satisfy both the statute's requirements and due process." AU Optronics, 180 Wn. App. at 914. The Companies limit their jurisdictional challenge to the State's alleged attempt to violate due process.

A framework for analyzing whether Washington courts may exercise personal jurisdiction consistent with the Due Process Clause—derived from certain United States Supreme Court decisions discussed infra—has emerged.

> (1) That purposeful "minimum contacts" exist between the defendant and the forum state; (2) that the plaintiff's injuries "arise out of or relate to" those minimum contacts; and (3) that the exercise of jurisdiction be reasonable, that is, that jurisdiction be consistent with notions of "fair play and substantial justice."

Grange Ins. Ass'n v. State, 110 Wn.2d 752, 758, 757 P.2d 933 (1988) (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472-78, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)); accord Failla v. FixtureOne Corp., __ Wn.2d __, 336 P.3d 1112, 1116 (2014); FutureSelect, 180 Wn.2d at 963-64; AU Optronics, 180 Wn. App. at 914.

While this framework may serve as a useful analytical tool, given its derivation, its value is dependent upon ascertaining the manner in which the United States Supreme Court has applied the principles embodied therein. In recognition of this, we turn our attention to the United States Supreme Court's personal jurisdiction jurisprudence.

"The Due Process Clause of the Fourteenth Amendment constrains a State's authority to bind a nonresident defendant to a judgment of its courts." Walden, 134 S. Ct. at 1121. "'The canonical opinion in this area remains International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), in which [the United States Supreme Court] held that a State may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if the defendant has "certain minimum contacts with [the State] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."'" Daimler AG v. Bauman, __ U.S. __, 134 S. Ct. 746, 754, 187 L. Ed. 2d 624 (2014) (internal quotation marks omitted) (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, __ U.S. __, 131 S. Ct. 2846, 2853, 180 L. Ed. 2d 796 (2011)). "International Shoe's conception of 'fair play and substantial justice' presaged the development of two categories of personal jurisdiction," commonly referred to as "specific jurisdiction" and "general jurisdiction." Daimler, 134 S. Ct. at 754. Specific jurisdiction, which since "'has become the centerpiece of modern jurisdictional theory,'" requires that suit arise out of or relate to the defendant's contacts with the forum. Daimler, 134 S. Ct. at 754-55 (quoting Goodyear, 131 S. Ct. at 2854). General jurisdiction, which since

"'[has played] a reduced role,'" permits the exercise of personal jurisdiction over a nonresident defendant where the defendant's "'continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.'" Daimler, 134 S. Ct. at 754-55 (alterations in original) (quoting Goodyear, 131 S. Ct. at 2854; Int'l Shoe, 326 U.S. at 318).[20]

"'[T]he constitutional touchstone' of the determination whether an exercise of personal jurisdiction comports with due process 'remains whether the defendant purposefully established "minimum contacts" in the forum State.'" Asahi Metal Indus. Co. v. Superior Court of Cal., Solano County, 480 U.S. 102, 108-09, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987) (plurality opinion) (alteration in original) (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)); accord Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958). The minimum contacts "inquiry . . . 'focuses on "the relationship among the defendant, the forum, and the litigation."'" Walden, 134 S. Ct. at 1121 (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 775, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984)) (quoting Shaffer v. Heitner, 433 U.S. 186, 204, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977)); accord Failla v. FixtureOne Corp., __ Wn.2d __, 336 P.3d 1112, 1116 (2014). Indeed, "[d]ue

[20] The United States Supreme Court has condemned the "'elid[ing]'" of "'the essential difference[s]'" between specific and general jurisdiction, observing that "[a]lthough the placement of a product into the stream of commerce 'may bolster an affiliation germane to *specific* jurisdiction,' . . . such contacts 'do not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant.'" Daimler, 134 S. Ct. at 757 (quoting Goodyear, 131 S. Ct. at 2855, 2857). We are careful to note that our analysis herein is limited to determining whether specific jurisdiction may be exercised over the Companies.

process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the 'random, fortuitous, or attenuated' contacts he makes by interacting with other persons affiliated with the State." Walden, 134 S. Ct. at 1123 (quoting Burger King, 471 U.S. at 475). In view of this, "the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum," but, "[r]ather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980). Thus, it has been said that "[t]he 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." World-Wide Volkswagen, 444 U.S. at 297-98 (emphasis added).

"The strictures of the Due Process Clause forbid a state court to exercise personal jurisdiction . . . under circumstances that would offend '"traditional notions of fair play and substantial justice."'" Asahi, 480 U.S. at 113 (quoting Int'l Shoe, 326 U.S. at 316) (quoting Milliken v. Meyer, 311 U.S. 457, 463, 61 S. Ct. 339, 85 L. Ed. 278 (1940)). Thus, "[o]nce it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" Burger King, 471 U.S. at 476 (quoting Int'l Shoe, 326 U.S. at 320).

"[M]inimum requirements inherent in the concept of 'fair play and substantial justice' may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities." Burger King, 471 U.S. at 477-78. "[C]ourts in 'appropriate case[s]' may evaluate 'the burden on the defendant,' 'the forum State's interest in adjudicating the dispute,' 'the plaintiff's interest in obtaining convenient and effective relief,' 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies,' and the 'shared interest of the several States in furthering fundamental substantive social policies.'" Burger King, 471 U.S. at 477 (second alteration in original) (quoting World-Wide Volkswagen, 444 U.S. at 292).

In 2011, the United States Supreme Court revisited its personal jurisdiction jurisprudence in the noteworthy case of J. McIntyre Machinery, Ltd. v. Nicastro, __ U.S. __, 131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011). Although the decision failed to yield a majority opinion, Justice Breyer's concurring opinion, which—as the opinion setting forth the narrowest ground of decision—represents the Court's holding,[21] expounded upon familiar, but often difficult to administer, principles. Given that the decision is instructive in resolving the matter before us, we examine it in some detail.

The facts in J. McIntyre are relatively straightforward. A British

[21] Because the Court's plurality opinion did not garner assent among at least five justices, we must, in order to ascertain the Court's holding, determine whether the plurality opinion or the concurrence decided the case on the narrowest grounds. See, e.g., Marks v. United States, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977). Consistent with our recent decision in AU Optronics, we conclude that Justice Breyer's concurring opinion represents the more narrow ground of decision and is, thus, the Court's holding. 180 Wn. App. at 919

manufacturer sold metal shearing machines to a United States distributor, which, in turn, marketed and sold the machines throughout the United States. 131 S. Ct. at 2786 (plurality opinion). A single machine, which had been manufactured in Britain, was sold by the United States distributor to a New Jersey company.[22] J. McIntyre, 131 S. Ct. at 2786 (plurality opinion). Thereafter, Robert Nicastro, an employee of the New Jersey company, seriously injured his hand while using the machine. J. McIntyre, 131 S. Ct. at 2786 (plurality opinion). Nicastro subsequently filed suit against the British manufacturer in New Jersey. J. McIntyre, 131 S. Ct. at 2786 (plurality opinion). The New Jersey Supreme Court held that because the manufacturer knew or reasonably should have known "that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states," New Jersey courts could, consistent with the Due Process Clause, exercise jurisdiction over the manufacturer. Nicastro v. McIntyre Mach. Am., Ltd., 201 N.J. 48, 76-78, 987 A.2d 575 (2010).

The United States Supreme Court reversed; however, the case produced no majority opinion—four justices signed Justice Kennedy's plurality opinion, two justices signed Justice Breyer's concurring opinion, and three justices signed Justice Ginsburg's dissenting opinion. While the plurality opinion and the concurring opinion relied on different reasoning, both reached the same

[22] Whereas the plurality opinion stated that "no more than four machines . . . ended up in New Jersey," Justice Breyer's concurring opinion stated, "The American Distributor on one occasion sold and shipped one machine to a New Jersey customer." J. McIntyre, 131 S. Ct. at 2791. As explained herein, Justice Breyer's opinion controls and, thus, we presume that only one machine entered New Jersey.

conclusion: a foreign manufacturer's sale of its products through an independent, nationwide distribution system is not sufficient, absent something more, for a state to assert personal jurisdiction over the manufacturer when only one of its products enters a state and causes injury in that state. Compare J. McIntyre, 131 S. Ct. at 2791 (plurality opinion), with Id. at 2892 (Breyer, J., concurring in the judgment).

The plurality identified the appropriate inquiry as focusing on "the defendant's actions, not his expectations." J. McIntyre, 131 S. Ct. at 2789 (plurality opinion). The plurality required evidence that the foreign defendant "targeted" the forum state in some fashion. J. McIntyre, 131 S. Ct. at 2789-90 (plurality opinion). That it was simply foreseeable that the defendant's products might be distributed in the forum state—or in all 50 states, for that matter—was insufficient. J. McIntyre, 131 S. Ct. at 2789-90 (plurality opinion). Therefore, despite evidence that the British manufacturer had targeted the United States (by virtue of utilizing a nationwide distributor), given that there was no evidence showing that the manufacturer had targeted New Jersey specifically, the plurality reasoned that New Jersey could not exercise personal jurisdiction over the manufacturer. J. McIntyre, 131 S. Ct. at 2790-91 (plurality opinion).

Justice Breyer concurred in the judgment, yet he voiced his disapproval of the plurality's "strict rules that limit jurisdiction where a defendant does not 'inten[d] to submit to the power of a sovereign' and cannot 'be said to have targeted the forum.'" J. McIntyre, 131 S. Ct. at 2793 (Breyer, J., concurring in the judgment) (alteration in original) (quoting Id. at 2788). Justice Breyer explained

that because certain issues with "serious commercial consequences . . . are totally absent in this case," strict adherence to prior precedents "and the limited facts found by the New Jersey Supreme Court" was the better approach. J. McIntyre, 131 S. Ct. at 2793-94 (Breyer, J., concurring in the judgment).

He also rejected the New Jersey Supreme Court's "absolute approach," in which "a producer is subject to jurisdiction for a products-liability action so long as it 'knows or reasonably should know that its products are distributed through a nationwide distribution system that *might* lead to those products being sold in any of the fifty states.'" J. McIntyre, 131 S. Ct. at 2793 (Breyer, J., concurring in the judgment) (quoting Nicastro, 201 N.J. at 76-77). He disavowed this formulation as inconsistent with prior precedent.

> For one thing, to adopt this view would abandon the heretofore accepted inquiry of whether, focusing upon the relationship between "the defendant, the *forum*, and the litigation," it is fair, in light of the defendant's contacts *with that forum*, to subject the defendant to suit there." Shaffer v. Heitner, 433 U.S. 186, 204 S. Ct. 2569, 53 L. Ed. 2d 683 (1977) (emphasis added). It would ordinarily rest jurisdiction instead upon no more than the occurrence of a product-based accident in the forum State. But this Court has rejected the notion that a defendant's amenability to suit "travel[s] with the chattel." World-Wide Volkswagen, 444 U.S., at 296.
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> For another, I cannot reconcile so automatic a rule with the constitutional demand for "minimum contacts" and "purposeful[l] avail[ment]," each of which rest upon a particular notion of defendant-focused fairness. Id., at 291, 297 (internal quotation marks omitted). A rule like the New Jersey Supreme Court's would permit every State to assert jurisdiction in a products-liability suit against any domestic manufacturer who sells its products (made anywhere in the United States) to a national distributor, no matter how large or small the manufacturer, no matter how distant the forum, and no matter how few the number of items that end up in the particular forum at issue.

J. McIntyre, 131 S. Ct. at 2793 (Breyer, J., concurring in the judgment) (alteration in original).

In Justice Breyer's estimation, "the outcome of this case is determined by our precedents"—in particular, World-Wide Volkswagen, 444 U.S. 286, and Asahi, 480 U.S. 102. J. McIntyre, 131 S. Ct. at 2791-92 (Breyer, J., concurring in the judgment). Justice Breyer explained that evidence of either a "'regular . . . flow' or 'regular course' of sales"[23] in the forum State *or* of "'something more,' such as special state-related design, advertising, advice, marketing, or anything else" was necessary in order to support New Jersey's assertion of jurisdiction. J. McIntyre, 131 S. Ct. at 2792 (Breyer, J., concurring in the judgment). Given the absence of either, Justice Breyer concluded that there was no evidence showing that the British manufacturer "'purposefully avail[ed] itself of the privilege of conducting activities' within New Jersey, or that it delivered its goods in the stream of commerce 'with the expectation that they [would] be purchased' by New Jersey users." J. McIntyre, 131 S. Ct. at 2792 (Breyer, J., concurring in the judgment) (first alteration in original) (quoting World-Wide Volkswagen, 444 U.S. at 297-98).

Justice Breyer did not offer a mathematically precise means of computing the requisite incidence or volume of sales that must occur in a forum state in order to constitute sufficient minimum contacts. Nonetheless, in seeking to ascertain a threshold above which a certain incidence or volume of sales will

[23] The phrases "'regular . . . flow' or 'regular course' of sales" originated from Justice Brennan's and Justice Stevens's separate concurring opinions in Asahi. 480 U.S. at 117, 122.

constitute a "regular flow" or "regular course," certain observations made by Justice Breyer are revealing.

In rejecting the New Jersey Supreme Court's "absolute approach," as irreconcilable "with the constitutional demand for 'minimum contacts' and 'purposefu[l] avail[ment],' each of which rest upon a particular notion of defendant-focused fairness," Justice Breyer was troubled by the potential for a small foreign manufacturer to be haled into court in a distant forum by virtue of a large distributor's sale of a single product made by the manufacturer.

> What might appear fair in the case of a large manufacturer which specifically seeks, or expects, an equal-sized distributor to sell its product in a distant State might seem unfair in the case of a small manufacturer (say, an Appalachian potter) who sells his product (cups and saucers) exclusively to a large distributor, who resells a single item (a coffee mug) to a buyer from a distant State (Hawaii). . . .
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> . . . .
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> It may be that a larger firm can readily "alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to consumers, or, if the risks are too great, severing its connection with the State." World-Wide Volkswagen, supra, at 297. But manufacturers come in many shapes and sizes. It may be fundamentally unfair to require a small Egyptian shirt maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer, selling its products through international distributors, to respond to products-liability tort suits in virtually every State in the United States, even those in respect to which the foreign firm has no connection at all but the sale of a single (allegedly defective) good.

J. McIntyre, 131 S. Ct. at 2793-94 (Breyer, J., concurring in the judgment).

The above-quoted passage, considered in concert with Justice Breyer's application of World-Wide Volkswagen and Asahi, leads to an inference that the minimum contacts inquiry, as viewed by Justice Breyer, seeks to determine whether the incidence or volume of sales into a forum signifies something

systematic—informed by either the purpose or the expectation of the foreign manufacturer—such that it is fair, in light of the relationship between the defendant, the forum, and the litigation, to subject the foreign defendant to personal jurisdiction in the forum. Stated differently, if the incidence or volume of sales into a forum points to something systematic—as opposed to anomalous—then "purposeful availment" will be found.[24, 25]

C

This court's prior interpretation of J. McIntyre is consistent with the foregoing assessment. Recently, in AU Optronics, we were given occasion to interpret and apply J. McIntyre in a factual context similar to the one presented by this appeal. In AU Optronics, the Attorney General of Washington brought suit against 20 defendants, including a foreign corporation that successfully moved, on its own behalf, to dismiss the complaint for lack of personal jurisdiction. 180 Wn. App. at 908, 911-12. In asserting personal jurisdiction over

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[24] The presence of state-related design, advertising, advice marketing, or anything else that could fall within that which has been described as "something more," will inform the foregoing inquiry and, in some instances, may be sufficient to sustain the exercise of personal jurisdiction.

[25] Justice Ginsburg's dissenting opinion, which was joined by Justices Sotomayor and Kagan, reasoned that the manufacturer—by virtue of "engag[ing] a U.S. company to promote and distribute the manufacturer's products, not in any particular State, but anywhere and everywhere in the United States the distributor can attract purchasers"—had purposefully availed itself of the privilege of conducting business in all states, including New Jersey. J. McIntyre, 131 S. Ct. at 2799, 2801 (Ginsburg, J., dissenting). From this reasoning it may be inferred that, even in the absence of a substantial volume of sales into a forum state, Justices Ginsburg, Sotomayor, and Kagan would still find purposeful availment in the event that a foreign manufacturer targeted a national market. It may be further deduced that the three dissenting justices in J. McIntyre would be at least as amenable as the two concurring justices, if not more so, to the notion that purposeful availment is satisfied when a plaintiff alleges that a foreign manufacturer, in targeting a national market, intended or expected that its products would be sold in one of the several states, and that such products were, in fact, sold into the forum state in substantial volume. Thus, any case in which the facts satisfied the demands of the two concurring justices would also satisfy the demands of the three dissenting justices, resulting in a majority decision, if not a unified majority view.

the foreign corporation, the Attorney General alleged that it had, in violation of the CPA, manufactured and distributed LCD panels as component parts for retail consumer goods, which were then sold by third parties in high volume throughout the United States, including in Washington. AU Optronics, 180 Wn. App. at 908-09.

After closely examining J. McIntyre, we held that the foreign manufacturer's alleged violation of the CPA "plus a large volume of expected and actual sales established sufficient minimum contacts for a Washington court to exercise specific jurisdiction over it." AU Optronics, 180 Wn. App. at 924. In so holding, we emphasized the fact that the foreign manufacturer "understood the third parties would sell products containing its LCD panels throughout the United States, including large numbers of those products in Washington." AU Optronics, 180 Wn. App. at 924. This was apparent, in part, by virtue of the fact that the foreign manufacturer "sold its LCD panels to a particular global consumer electronics manufacturer that sold products containing these panels nationwide and in Washington through national electronic appliance distribution chains." AU Optronics, 180 Wn. App. at 924.

While acknowledging that "'nationwide distribution of a foreign manufacturer's products is not sufficient to establish jurisdiction over the manufacturer when that effort results in only a single sale in the forum state,'" we concluded that "the record here shows that during the conspiracy period, various companies and retailers sold millions of dollars' worth of products containing [the foreign manufacturer's] LCD panels in Washington." AU Optronics, 180 Wn.

App. at 924-25 (quoting Willemsen v. Invacare Corp., 352 Or. 191, 203, 282 P.3d 867 (2012), cert. denied, 133 S. Ct. 984 (2013)). Consequently, as alleged "[s]ales to Washington consumers were not isolated; rather, they indicated a '"regular . . . flow'" or '"regular course"' of sales in Washington."[26] AU Optronics, 180 Wn. App. at 925 (quoting J. McIntyre, 131 S. Ct. at 2792).

Our decision in AU Optronics was based on the analysis of J. McIntyre adopted by the Oregon Supreme Court in Willemsen v. Invacare Corporation, 352 Or. 191. AU Optronics, 180 Wn. App. at 922.[27] In Willemsen, a Taiwanese manufacturer of battery chargers, CTE, supplied its products for installation in motorized wheelchairs that were built by an Ohio corporation, Invacare. 352 Or. at 194. Invacare then sold the wheelchairs throughout the United States, including in Oregon. Willemsen, 352 Or. at 194. In Oregon, between 2006 and 2007, Invacare sold 1,166 motorized wheelchairs, nearly all of which came equipped with CTE's battery chargers. Willemsen, 352 Or. at 196. After their mother died in a fire, which was allegedly caused by a defect in CTE's battery charger, the plaintiffs filed suit against CTE in Oregon. Willemsen, 352 Or. at 194.

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[26] In dicta, we observed that the foreign manufacturer "also entered into a master purchase agreement" with another company "in which the company agreed to obtain and maintain all necessary U.S. regulatory approval." AU Optronics, 180 Wn. App. at 924. We also noted that representatives of the foreign manufacturer "met with various companies in Washington and in other states." AU Optronics, 180 Wn. App. at 924. While it is possible that these circumstances alone could have been sufficient to satisfy due process, they were not, in that instance, necessary to do so.

[27] In response to the foreign manufacturer's contention that Willemsen's reasoning conflicted with our Supreme Court's decision in Grange Ins. Ass'n v. State, 110 Wn.2d 752, we explained that the analysis in Willemsen was based upon Justice Breyer's concurring opinion in J. McIntyre, and that Grange "predates the United States Supreme Court's more recent interpretations of the federal due process clause." AU Optronics, 180 Wn. App. at 925.

Relying on Justice Breyer's concurrence in J. McIntyre, the Oregon Supreme Court determined, "The sale of the CTE battery charger in Oregon that led to the death of plaintiffs' mother was not an isolated or fortuitous occurrence." Willemsen, 352 Or. at 203. Given that "the sale of over 1,100 CTE battery chargers within Oregon over a two-year period shows a '"regular . . . flow'" or '"regular course'" of sales in Oregon," the court held that sufficient minimum contacts existed to exercise specific jurisdiction over CTE. Willemsen, 352 Or. at 203-04 (internal quotation marks omitted) (quoting J. McIntyre, 131 S. Ct. at 2792 (Breyer, J., concurring in the judgment)). "Put differently, the pattern of sales of CTE's battery chargers in Oregon establishes a 'relationship between "the defendant, the *forum,* and the litigation," [such that] it is fair, in light of the defendant's contacts *with* [*this*] *forum*, to subject the defendant to suit [h]ere.'" Willemsen, 352 Or. at 207 (alterations in original) (quoting J. McIntyre, 131 S. Ct. at 2793 (Breyer, J., concurring in the judgment) (quoting Shaffer, 433 U.S. at 204).

Having set forth in some detail the precedents upon which we rely in resolving this matter, we now apply them to the facts herein.

D

The Attorney General contends that Washington's exercise of jurisdiction over the Companies is consistent with due process. This is so, he asserts, because (1) the large volume of CRT products that entered Washington constituted a regular flow or regular course of sales, (2) the Attorney General's claims arose from the Companies' contacts with Washington because consumers

were injured by paying inflated prices as a result of the Companies' price-fixing, and (3) the concern for otherwise remediless consumers and the danger of insulating foreign manufacturers from the reach of Washington antitrust laws outweigh any inconvenience to the Companies. We agree.

"Although '[t]o be sure, nationwide distribution of a foreign manufacturer's products is not sufficient to establish jurisdiction over the manufacturer when that effort results in only a single sale in the forum state,'" the presence of "a large volume of expected and actual sales" establishes sufficient minimum contacts to support the exercise of jurisdiction. AU Optronics, 180 Wn. App. at 924 (quoting Willemsen, 352 Or. at 203). While the facts in this case differ from those in J. McIntyre—as well as the precedents upon which Justice Breyer relied—the reasoning set forth in his opinion therein nevertheless dictates the outcome in this matter.

As alleged, the defendants, together, exercised hegemony over a prodigious industry responsible for manufacturing and supplying critical component parts to be integrated into consumer technology products, which were ubiquitous in North America during the turn of the century. The defendants understood that third parties would sell products containing their CRT component parts throughout the United States, including large numbers of those products in Washington. Their actions were intended to and did, in fact, result in "substantial" harm to "a large number of Washington State agencies and residents."

Applying the teachings of Justice Breyer in J. McIntyre, we conclude that

the Companies, by virtue of the substantial volume of sales that took place in Washington, "purposefully availed" themselves of the privilege of conducting activities within Washington. A reasonable inference to be drawn from the Attorney General's allegations, which we treat as verities at this stage of the litigation, is that a "regular flow" or "regular course" of sales into Washington during the conspiracy period did, in fact, occur. The presence, in large quantity, of the defendants' products in Washington demonstrates that their contacts were not random, fortuitous, or attenuated. Instead, they point to a systematic effort by the defendants to avail themselves of the privilege of conducting business in Washington. Thus, Justice Breyer's concern of a small foreign manufacturer being haled into court based on an anomalous sale of one of its products by a large distributor is not implicated herein. In view of the foregoing, we conclude that the Companies purposefully established minimum contacts with Washington.[28]

"Due process also requires the [Attorney General] to show this cause of action arises from [the Companies'] indirect sales to Washington consumers." AU Optronics, 180 Wn. App. at 925. The Attorney General claims that, as a result of the defendants' price-fixing conduct, Washington State agencies and residents paid supracompetitive prices for CRT products, which resulted in injury to them. The Companies argue that consumers purchased CRT products from independent third parties. We rejected a similar argument in AU Optronics, 180

[28] As indicated, supra at n.24, while the presence of "something more" may be sufficient, under certain circumstances, to establish "purposeful availment," it is not necessary where, as here, a substantial volume of sales occurred in the forum.

Wn. App. at 925, and do so here.

While we conclude that the Attorney General has sufficiently alleged both that the Companies "purposefully availed" themselves of the privilege of doing business in Washington and that his cause of action "arises from" their indirect sales to Washington consumers, we must still determine whether the exercise of personal jurisdiction would offend traditional notions of fair play and substantial justice. See Asahi, 480 U.S. at 113. We have "consider[ed] 'the quality, nature, and extent of the defendant's activity in Washington, the relative convenience of the plaintiff and the defendant in maintaining the action here, the benefits and protection of Washington's laws afforded the parties, and the basic equities of the situation.'" AU Optronics, 180 Wn. App. at 926 (quoting CTVC of Haw., 82 Wn. App. at 720).

The Attorney General alleged that the defendants manufactured, sold, and/or distributed millions of CRTs and CRT products to customers throughout the United States and in Washington during the conspiracy period. He alleged that the actions of the defendants were intended to and did have a direct, substantial, and reasonably foreseeable effect on import trade and commerce into and within Washington.

Although it may be inconvenient for the Companies to defend in Washington, this inconvenience does not outweigh the strong interest that Washington has in providing a forum in which recovery on behalf of indirect purchasers may be pursued. See AU Optronics, 180 Wn. App. at 927 (given that indirect purchasers in Washington have no private right of action, the benefits

and protections of Washington law favor the exercise of jurisdiction). Nor does any inconvenience outweigh the inequitable result that would occur if the Companies were insulated from liability simply because other defendants could provide sources of compensation. See AU Optronics, 180 Wn. App. at 928 ("Considering modern economic structures, it is unreasonable to expect that [a foreign manufacturer] would target Washington consumers directly.")

We hold that requiring the Companies to appear and defend in Washington does not offend traditional notions of fair play and substantial justice. The Attorney General's allegations were sufficient to withstand the Companies' dispositive CR 12(b)(2) motions and, thus, the trial court erred by dismissing the Attorney General's complaint against them.

III

The Companies seek to recover attorney fees on appeal. The Attorney General seeks reversal of the attorney fees awarded to the Companies in the trial court. Given that the Companies are no longer "prevailing parties," we reverse the award of fees in the trial court and decline to award fees on appeal.

Reversed and remanded.

We concur:

Specimen, C.J.

Cox, J.

APPENDIX B

RCW 19.86.030

Contracts, combinations, conspiracies in restraint of trade declared unlawful.

Every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is hereby declared unlawful.

[1961 c 216 § 3.]

Notes:

Monopolies and trusts prohibited: State Constitution Art. 12 § 22.

APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

WASHINGTON STATE, PLAINTIFF,	)	CASE NO.
VERSUS	)	12-2-15842-8SEA
LG ELECTRONICS, et al., DEFENDANTS.	)	

Proceedings Before Honorable RICHARD D. EADIE

KING COUNTY COURTHOUSE
SEATTLE, WASHINGTON

DATED: NOVEMBER 15, 2012

A P P E A R A N C E S:

FOR THE PLAINTIFF:

BY: ASSISTANT ATTORNEY GENERAL:
DAVID KERWIN, ESQ.,
JONATHAN MARK, ESQ.,

A P P E A R A N C E S:

FOR THE DEFENDANTS:

LG ELECTRONICS:

BY: DAVID LUNDSGAARD, ESQ.,
HOJOON HWANG, ESQ.,

PHILIPS ELECTRONICS, ET AL.,

BY: DAVID EMANUELSON, ESQ.,
TIMOTHY MORAN, ESQ.

HITACHI LTD., ET AL.,

BY: MICHELLE PARK CHIU, ESQ.,
MOLLY TERWILLIGER, ESQ.,

SAMSUNG, ET AL.,

BY: ARIC JARRETT, ESQ.,
JOHN R. NEELEMAN, ESQ.,
LARRY S. GANGES, ESQ.,

TOSHIBA CORPORATION, ET AL.,

BY: MATHEW HARRINGTON, ESQ.,
DANA E. FOSTER, ESQ.,

PANASONIC CORPORATION:

BY: DAVID YOLKUT, ESQ.

P R O C E E D I N G S

(Open court.)

09:02:13 THE BAILIFF: All rise, court is in session. The Honorable Richard D. Eadie presiding in the Superior Court in the State of Washington in and for King County.

09:06:43 THE COURT: Please be seated. Thank you.

09:06:56 We only have two hours this morning and two hours this afternoon. We have to squeeze it all in during that time.

09:07:05 I have gone over the materials. I am open to any order of proceeding that you think is going to work the best. But it occurred to me that it may be best to take the statute of limitations issue first and address that, because that was the first one that I came to -- that was developed, and not everyone raised that issue, and it was raised by the Hitachi parties.

09:07:44 So, would it make sense to hear from the Hitachi parties on the statute of the limitations?

09:07:54 MR. KERWIN: I think that it would make sense; David Kerwin for the State.

09:07:59 I think that probably makes sense, when we get into the motions on the summary judgment. I think

09:08:06 that there is probably more efficient ways that we can
09:08:08 handle -- for instance, the State only needs to reply
09:08:11 once to all of the motions for personal jurisdiction,
09:08:15 but we can tackle that one.
09:08:17 THE COURT: All right.
09:08:21 Mr. Kerwin, I think that I misspoke to you
09:08:24 earlier about citation form. I think that I was
09:08:28 meaning to speak to the Kipling firm lawyer. All
09:08:31 right. My apologies.
09:08:33 MR. KERWIN: All right; Your Honor.
09:08:35 THE COURT: All right.
09:08:37 I think that -- let's just do the statute
09:08:41 of the limitations first. And then my question to you
09:08:45 is does the rest of the case really turn on the stream
09:08:58 of commerce argument?
09:09:01 Is that the dispositive issue for virtually
09:09:05 every other case?
09:09:06 MR. KERWIN: David Kerwin, Your Honor, the
09:09:08 State's position is that it almost entirely does, yes.
09:09:12 THE COURT: All right.
09:09:13 Connected with that, there is really no
09:09:18 general jurisdiction issue being raised.
09:09:20 MR. KERWIN: David Kerwin, Your Honor. The
09:09:23 State concedes that we do not have general
09:09:25 jurisdiction in this case.

09:09:26 THE COURT: We are down to the long-arm, or
09:09:35 personal jurisdiction, based on the stream of commerce
09:09:39 issue. That seems to be the dispositive issue. All
09:09:44 right.
09:09:44 So, then, we will talk about how to address
09:09:56 that after we address the statute of limitations. Let
09:09:58 me get my note pad.
09:10:04 Hitachi is going to do the statute of
09:10:07 limitations argument?
09:10:09 MR. EMANUELSON: David Emanuelson for the
09:10:11 Phillips entities.
09:10:13 The statute of limitations argument, all of
09:10:16 the defendant are similarly situated.
09:10:18 THE COURT: But not all of them raised it.
09:10:21 MR. EMANUELSON: Correct. The entities
09:10:22 that raised are the Phillips entities, Hitachi
09:10:26 entities, Toshiba entities and the LG entities.
09:10:30 Myself, as well as my colleague, Dana Foster, with
09:10:34 White & Case will be arguing.
09:10:36 THE COURT: Why don't you argue that and
09:10:38 then I am going to ask if any one has anything to add
09:10:41 to your argument. How is that?
09:10:42 MR. EMANUELSON: That sounds great, Your
09:10:44 Honor.
09:10:44 THE COURT: On the statute of limitations I

09:10:46 would tell you that the two cases that I have in front
09:10:49 of me are State of Nevada versus the Bank of America
09:10:54 Corporation, and the Major League Baseball case.
09:10:57 All right.
09:10:58 MR. EMANUELSON: Thank you, Your Honor.
09:11:00 THE COURT: The other thing that I would
09:11:01 say for all of you, you don't have to stand when you
09:11:05 speak. You may, probably 50 percent of lawyers, when
09:11:10 we talk about that choose to, but it is not required.
09:11:13 As long as we can hear you, as long as everybody can
09:11:16 hear you, that is all we need.
09:11:17 MR. EMANUELSON: All right.
09:11:19 Your Honor, this case involves an attempt
09:11:27 by the State of Washington, Attorney General, to
09:11:31 repackage and save an antitrust damages claim under
09:11:36 the Washington Consumer Protection Act, or CPA, that
09:11:40 through its own inactivity the Attorney General has
09:11:43 allowed to become stale.
09:11:45 The Attorney General admits that it has not
09:11:49 filed -- failed to file suit within over four and a
09:11:54 half years, since first receiving notice of its
09:11:58 claims.
09:11:58 It further admits that it has no tolling
09:12:00 argument against the particular moving defendants.
09:12:04 THE COURT: Right.

09:12:05 MR. EMANUELSON: Because of this, its claim
09:12:08 violates the CPA's four-year statute of the
09:12:12 limitations. For the simple reason that the CPAs
09:12:17 limitation provision provides a four-year limitations
09:12:22 for any action that seeks damages under Section 90 of
09:12:27 the CPA.
09:12:28 And the Attorney General brings a claim for
09:12:30 damages on -- full damages on behalf of both State
09:12:35 agencies and under its parens patriae authority for
09:12:40 representing Washington consumers. The Attorney
09:12:45 General claims that there are two arguments in
09:12:48 response to that.
09:12:49 First, that its single cause of action
09:12:52 should actually be split into two. That only its
09:12:57 State claim on behalf of State agencies is subject to
09:13:01 the CPA four-year limited provision, but the other
09:13:06 request on behalf of the consumer is not subject to
09:13:11 any provision. Then they also assert that there is
09:13:14 another statute that immunizes them from the
09:13:19 limitations.
09:13:20 Before I explain why that is an incorrect
09:13:24 reading of the law, Your Honor, I would just like to
09:13:26 provide a little bit of an overview of road map of how
09:13:29 we got here today.
09:13:30 In November of 2007 news broke of an

09:13:36 international investigation by the United States
09:13:40 Department of Justice and the European Commission into
09:13:44 actions by manufacturers of cathode tubes or CRTs that
09:13:51 go into television and monitors.
09:13:53 Immediately, private action claims,
09:13:55 literally, within a week of the news breaking brought
09:13:58 various federal claims in various federal courts.
09:14:01 Those claims have now been consolidated into the
09:14:04 Northern District of California and they are pending,
09:14:07 and being litigated by the same parties here today.
09:14:10 Overtime other parties got involved in the
09:14:14 action. Many are large purchasers of products contain
09:14:19 CRTs opted out of the claims, for example, Costco
09:14:23 which is a Washington based company and also the State
09:14:26 Attorney General got involved. California brought a
09:14:28 claim, and of course, the State of Washington. The
09:14:32 State of Washington actually started its investigation
09:14:34 in February of 2009. It issued a series of CIDs to
09:14:40 many of defendants in this room. They also obtained
09:14:43 tolling agreements with some of the defendants in this
09:14:45 case.
09:14:46 However, they did not obtain any tolling
09:14:48 agreements with any of the defendants that are
09:14:50 bringing this motion. That is critical. Because it
09:14:54 was not until May 1st of 2012, four and a half years

09:15:00 after receiving notice, that they brought their case.

09:15:01 That case mirrors the federal private cases

09:15:05 in both substance and style. It alleges the same

09:15:11 parties as the private federal cases. Essentially, it

09:15:15 is the same substantive violation, even though that

09:15:20 the Washington case is under the State Act. It is the

09:15:23 same -- the language which prohibits conspiracy and

09:15:26 the restrain of trade is parrots the language of the

09:15:29 Federal Sherman Act.

09:15:31 The claim actually goes so far as to copy

09:15:34 and paste many of the allegations in the private class

09:15:39 action complaints. In response to that the defendants

09:15:42 here filed a motion to dismiss on the statute of the

09:15:45 limitations grounds.

09:15:46 So first, Your Honor, I would like to talk

09:15:49 about why the Attorney General's claims violate the

09:15:55 four-year limitations provision of the CPA. Just to

09:16:01 provide an overview of the CPA. There are several

09:16:04 sections of it that, again, substantively mirror

09:16:09 federal law. Section 30 mirrors the Section 1 of the

09:16:12 Sherman Act. Section 40 prohibits monopolization,

09:16:18 mirrors another section of the federal law. That is

09:16:20 substantive layout of the CPA.

09:16:22 Beyond that there are two sections in the

09:16:25 CPA that give the Attorney General authority to bring

09:16:28 a lawsuit.

09:16:29 The first is Section 80, which explicitly
09:16:32 refers to their parens patriae authority. However,
09:16:36 that section only allows the Attorney General to bring
09:16:39 a claim for injunctive relief or restitution.

09:16:43 It is only Section 90 of the CPA that
09:16:47 allows the Attorney General to bring a claim for
09:16:50 damages. It also allows private parties to bring a
09:16:53 claim for damages, but it allows -- it specifically
09:16:59 invokes the AG's right to bring a claim. There is
09:17:03 nothing in that statute that would preclude
09:17:06 application of that statute to parens partiae suits.

09:17:10 Finally, Section 120 of the CPA, which
09:17:14 provides, I quote, a four-year limitation provision to
09:17:20 "any action to enforce a claim for damages under
09:17:23 Section 90." So any action that enforces Section 90.

09:17:29 So, three points on why the CPA should
09:17:32 apply here.

09:17:33 First, just an application of the CPA to
09:17:37 the plain language, plain reading of the Attorney
09:17:40 General's complaints.

09:17:42 THE COURT: Do I have a copy of the
09:17:44 attorney general's complaint any of the attachments
09:17:50 that any of you filed?

09:17:51 MR. KERWIN: We didn't file it as an

attachment, Your Honor. It is in the underlying file, but we didn't file it as attachment.

MR. EMANUELSON: I have one. Would you like one, Your Honor?

THE COURT: I can't tell you, in general, summary judgment type cases how useful that can be. Not in every case, but in general it is very useful for judge reading that to be able to see the complaint -- sometimes the answer, but the complaint --

MR. EMANUELSON: Would you like.

THE COURT: I have finished my studying now. I was just wondering if I missed that some where. I didn't want to miss that opportunity to beat that drum a little.

Go ahead.

MR. EMANUELSON: Thank you, Your Honor.

Again, our first argument is a plain language, plain application of the language of the CPA to the language of the complaint.

The second, is that even if this court were to accept the Attorney General's construction of his complaints, that it alleges only damages for State agencies and does not allege -- seek damages on behalf of parens partiae authority. It is still incumbent upon there court to apply a four-year limitation

09:19:07 provision across the board.

09:19:08 Then, finally, if there were any doubts,
09:19:11 ambiguity in this court's interpretation of the
09:19:15 statute, this court should look to guidance to the
09:19:17 federal law and as provided under the language of the
09:19:21 statute and the Blewett case, which is cited by both
09:19:24 parties in their papers.

09:19:28 So starting with the plain language
09:19:32 argument, Your Honor. The only logical reading of the
09:19:35 Attorney General's complaint is that the complaint
09:19:44 itself brings a damages action, on behalf of State
09:19:49 agencies and under its parens patriae authority.

09:19:54 The complaint alleges a single cause of
09:19:56 action in violation of Section 30 of the CPA. There
09:20:00 is no citation or delineation of its claims by
09:20:04 reference to Section 80 or Section 90. The claim, in
09:20:10 the request for relief, I am quoting here, the AG asks
09:20:16 the court "to award full damages and restitution to
09:20:22 the State of Washington, on behalf of its state
09:20:24 agencies and residents."

09:20:27 Any normal construction of that request
09:20:31 should be that it is -- the State AG is requesting
09:20:35 damages both for the State agencies and on behalf of
09:20:39 its residents. Because of that, it brings an action
09:20:45 in Section 90 and in the CPA applies and it should be

09:20:48 subject to the four-year limitations provision.

09:20:50 Now, the Attorney General in their response
09:20:56 brief have essentially disavowed their pleadings.
09:20:59 They actually want to split their single cause of
09:21:02 action into two causes of action.

09:21:04 First, a claim on behalf of the State
09:21:07 agencies. That is subject to Section 90 and the
09:21:14 four-year limitations provision. Then its claim on
09:21:17 behalf of the consumers that is not subject to Section
09:21:21 90, only under Section 80, and should not have any
09:21:24 limitations provision applied to it at all.

09:21:27 As a threshold matter, if that is truly the
09:21:31 Attorney General's intent, then its complaint does not
09:21:35 meet the basic standards for notice pleading. Because
09:21:38 it does not provide notice to the defendants on the
09:21:41 relief that it is requesting for its claims.

09:21:44 However, even if this court accepted the
09:21:47 Attorney General's construction, four-year statute of
09:21:51 limitations provision should apply across the board.
09:21:56 That is because you would have an absurd result where
09:22:00 one single cause of action has two different
09:22:03 limitations provision s -- limitations periods applied
09:22:06 to it.

09:22:07 Just to go back to Section 120, that
09:22:11 section applies to any action to enforce a claim for

09:22:15 damages. Well, even if only a portion of their action
09:22:18 is seeking damages, it still invokes the statute of
09:22:22 limitations provision under Section 120.
09:22:27 Then, finally, Your Honor, the final point
09:22:30 under the CPA is why there court should look to
09:22:33 federal law for guidance.
09:22:35 As, again, in Section 92 of the CPA, the
09:22:43 Washington legislature explicitly makes clear that the
09:22:47 CPA is designed to compliment the federal body of law
09:22:50 and that court should look to it for guidance.
09:22:52 The Blewett court, which is Appellate Court
09:22:56 decision in the first district division, puts some
09:23:00 color on that. Held that the intent of the
09:23:04 legislature here was to "minimize the conflict between
09:23:07 the enforcement of the State and federal antitrust
09:23:10 laws and avoid subjecting Washington businesses to
09:23:14 divergent regulatory approaches for the same conduct."
09:23:18 So, by construing the statute here, in
09:23:25 opposition to how the federal law applies the statutes
09:23:30 of limitations, would be a violation to the policies
09:23:37 behind both the statute itself and the reasoning of
09:23:40 the Blewett court. Here the federal law is clear.
09:23:43 There is a single provision under the
09:23:46 federal law at Section 15 (b) of the Clayton Act. It
09:23:51 subjects "any type of action brought any by party to

09:23:54 the same four-year limitation provision. That would
09:24:00 be by a private party, a federal government or State
09:24:03 Attorney General that are bringing claims under the
09:24:05 federal law.
09:24:06 So, just to add a little bit of spin on
09:24:10 that, it is not a situation where we are asking the
09:24:15 court to -- the Washington legislature has spoken and
09:24:20 we are saying, "no, you need to construct your laws
09:24:23 differently and change the construction of the CPA to
09:24:26 an accord with the federal law."
09:24:29 At the very least, this is an open question
09:24:31 of construction. The legislature has not spoken.
09:24:35 There is no precedent on it. The idea that you should
09:24:38 apply -- the legislator has spoken that there should
09:24:41 be a four-year limitation provision to the damages
09:24:45 claims.
09:24:45 Then to say, "we will have a four-year
09:24:50 limitation provision for that. But the other claim is
09:24:51 not going to be subject to any limitation provision"
09:24:54 would be certainly a divergent regulatory approach as
09:24:58 opposed to the federal law.
09:24:59 THE COURT: All right. Go ahead.
09:25:02 MR. EMANUELSON: I am finished on the CPA
09:25:05 portion of the argument.
09:25:07 THE COURT: All right. Go ahead.

09:25:10 MR. EMANUELSON: Given that the CPA applies here, Your Honor, the Attorney General's only option here is to turn to a different provision of the Washington code, and that is section, RCW 4.16.160. I will refer to it as Section 160 for ease of application, Your Honor.

That provision applies to:

"Actions brought in the name of or for the benefit of the State."

However, as the Major League Baseball Facilites case held, and as clear under other line of precedent, it does not -- Section 160 does not apply to actions that are normally associated with private X.

If you look at the cases overtime here, this is quite an old statute dates back to 1864. It typically applied to taxing actions by the government, involvement of maintaining parks, buildings, schools, or in the Major League Baseball case a public corporations construction of a baseball stadium.

It has never been and the Attorney General cites no case where Section 160 has been applied to a parens partiae action. That is for good reason.

This action, which is a representative action, on behalf of private individuals, is clearly

09:26:45 associated with a private act.

09:26:49 As kind of, I explained in the background,
09:26:52 Your Honor, the private acts have been ongoing. They
09:26:56 have been ongoing for now upwards of five years. This
09:27:00 case is a follow-on action. It is a representative
09:27:03 action, representing the same injury to consumers that
09:27:06 those private actions bring. It involves the same
09:27:10 parties and the same substantive facts.

09:27:13 So, Your Honor, it would be a perverse
09:27:15 application to allow the Attorney General -- I am
09:27:18 sorry, perverse application of Section 160 to allow
09:27:21 the Attorney General a limited time for copycat
09:27:26 damages claims based on a purported sovereign
09:27:35 interest.

09:27:35 Your Honor, what does the State the
09:27:39 Attorney General cite in support of his claim?

09:27:43 They cite the Cissna case, Hermann versus
09:27:48 Cissna, Your Honor, which is the only case that they
09:27:50 bring to its support in their argument or under 160.
09:27:56 In that case actually involved the highly regulated
09:28:01 insurance industry, where an insurance commissioner
09:28:04 actually took over a defunct company as its
09:28:07 rehabilitator and brought an action -- brought an
09:28:11 action against the prior management of the insurance
09:28:15 company.

09:28:15 In that case, essentially, the insurance
09:28:20 company was the State. It was not bringing a case on
09:28:22 behalf of private interests. It actually was the
09:28:27 insurance company at that point.
09:28:31 THE COURT: Well, is that really so?
09:28:34 I mean, the insurance commissioner is the
09:28:36 receiver, essentially, of an insolvent insurance
09:28:41 company.
09:28:41 We have an insurance indemnity fund, which
09:28:47 pays claims on an insolvent insurance company. Is it
09:28:51 really the State or really the indemnity fund that is
09:28:54 the party there?
09:28:55 It doesn't make any difference. Maybe not.
09:29:00 MR. EMANUELSON: Your Honor, I probably was
09:29:03 a little bit loose with my language there in terms
09:29:06 of -- certainly indemnity fund. But in terms of, it
09:29:11 had taken over a company. It was not suing on behalf
09:29:14 of a company as an outside third-party.
09:29:14 THE COURT: Right.
09:29:20 MR. EMANUELSON: That circumstance the
09:29:23 insurance industry is very similar to the banking
09:29:25 industry, the company is insolvent. It is not about
09:29:27 the company itself. It is about all of the
09:29:30 policyholders that if the State cannot restore
09:29:34 solvency or provide some type of indemnity then all of

09:29:39 those policyholders are out. It is not applicable
09:29:43 here to what is essentially a private action in a
09:29:46 different form.
09:29:46 THE COURT: I am not aware that it is a
09:29:48 general charge, though, that the claims against the
09:29:50 insolvent insurance company are generally charged
09:29:52 against the State rather than against the indemnity
09:29:55 fund. I don't know that for sure. But I am certainly
09:29:58 not aware that it becomes a State obligation.
09:30:01 MR. EMANUELSON: All right, Your Honor.
09:30:02 I did not mean that it would be a State
09:30:04 obligation.
09:30:07 THE COURT: All right.
09:30:09 MR. EMANUELSON: So, finally, the State --
09:30:14 the Attorney General, what they do and as you
09:30:19 mentioned you read the -- you are familiar with the
09:30:22 Nevada case.
09:30:22 THE COURT: I have it before me the Nevada
09:30:24 case, which says in part, it is the 9th Circuit case,
09:30:28 apparently, there is some agreement that we should
09:30:30 refer to federal law at some point in this.
09:30:33 It says at one point "the States,
09:30:36 California and Washington, are the real parties in the
09:30:38 interest" -- that is the issue there, apparently --
09:30:40 "because both States have a sovereign interest in the

09:30:44 enforcement of the Consumer Protection and antitrust
09:30:48 laws."
09:30:48 That is the point that I picked up out of
09:30:50 the arguments on that.
09:30:53 MR. EMANUELSON: Sure, exactly, Your Honor.
09:30:55 THE COURT: Isn't this about whether the
09:30:57 State is bringing this, and as a sovereign, is
09:31:00 pursuing a sovereign interest, and if it is a
09:31:03 sovereign interest, aren't they except under
09:31:08 41.16.160?
09:31:09 MR. EMANUELSON: Your Honor, if the
09:31:10 standard was the real party in interest, or whether
09:31:13 the State had a sovereign interest in enforcing its
09:31:16 laws, then there would be no --
09:31:18 THE COURT: Actually, the State Supreme
09:31:21 Court case refers to it as the State's sovereign
09:31:25 powers. It was an exercise of the State's sovereign
09:31:28 powers.
09:31:29 MR. EMANUELSON: Your Honor, if that was
09:31:32 the standard -- first of all, that case is not the
09:31:36 standard. That is a case that applies a very specific
09:31:42 jurisdictional issue, whether a case is a mass action
09:31:46 under the federal legislation. It is not an
09:31:52 application of the act here.
09:31:55 If it was an application, there would be no

09:31:56 limiting principle. Any action by any State agency,
09:32:01 to enforce any law would ultimately fall under Section
09:32:07 160. That is not what the actual case law of Section
09:32:11 160 says. So, it has to be more than that. It has to
09:32:11 be more than that.
09:32:15 Just because the State is bringing a
09:32:16 lawsuit they have an interest in the lawsuit, does not
09:32:20 make it a sovereign act within the meaning of Section
09:32:23 160.
09:32:23 THE COURT: My understanding is that would
09:32:25 be a correct statement.
09:32:30 MR. EMANUELSON: Your Honor, to conclude,
09:32:39 this action it is untimely. It applies under the
09:32:44 plain language of the CPA. Section 160 does not
09:32:47 exempt it from the application. Therefore, the claim
09:32:50 should be dismissed.
09:32:51 THE COURT: All right.
09:32:53 I think that I have a general agreement
09:32:55 that this was going to be the primary, at least,
09:32:57 argument on the statute of limitations on behalf of
09:33:00 the defendants. Does any -- I hope that was an
09:33:03 understanding that we all had.
09:33:04 Is there any other party representing or
09:33:10 any other party that wants to be heard on this
09:33:15 statute? Any other defendant who wants to be heard on

09:33:18 this statute of limitations argument, basically?

09:33:22 I would ask if you have anything to add to

09:33:24 the argument that has already been made? All right.

09:33:27 For the record, no response.

09:33:31 We will proceed then. I will do that on

09:33:34 the same on the reply, when we come around to the

09:33:35 reply.

09:33:36 Go ahead, Mr. Kerwin.

09:33:37 MR. KERWIN: Thank you, Your Honor, David

09:33:40 Kerwin for the State.

09:33:41 No matter how much you squint at the RCW

09:33:44 you can't find a statute of limitation that applies to

09:33:48 the 080 parens claims brought by the State. RCW

09:33:56 19.86.030 is Washington basic antitrust statute.

09:34:06 There are three types of claims that can be

09:34:08 brought under 030, that the State can bring under 030,

09:34:12 080 claims and 090 claims and 140 claims.

09:34:16 140 authorizes the State to seek civil

09:34:18 penalties. 090 authorizes two types of suits for

09:34:23 violating -- for violations of the Consumer Protection

09:34:26 Act.

09:34:26 The first is a suit brought by the private

09:34:29 plaintiffs. The second is a suit brought by the State

09:34:31 for damages incurred by itself, such as, by State

09:34:34 agencies.

09:34:36 080, on the other hand, allows the State to
09:34:40 bring suit of the parens patriae, when the residents
09:34:44 and citizens of the state are injured. Two sections
09:34:46 compliment each other, but they represent two distinct
09:34:49 types of claims. The State could seek restitution
09:34:52 under any three of these statutes, without necessarily
09:34:54 implicating the other. It is worth stressing how
09:34:57 different the claims are under 080 and 090.
09:35:00 Under 090, the State seeks damages for
09:35:03 State purchases. For instance, in an over-charge that
09:35:07 say to the Department of Transportation, that the
09:35:09 plaintiff incurred when bought a CRT television at
09:35:13 some point.
09:35:13 The meat of our case is -- are 080 parens
09:35:20 claims. Under 080, the State represents all consumer
09:35:22 indirect purchasers in the State as parens partiae
09:35:26 seeking restitution. 080 claims include equitable
09:35:31 claims. There is no case law on this, Your Honor.
09:35:34 This is the first time that we know of that
09:35:36 the defendants have attempted to take the statute of
09:35:40 the limitations from 120 and apply it to 080 claims.
09:35:44 That is accurate. There is no case law on this that
09:35:47 we could look at.
09:35:48 The defendants, obviously, believe strongly
09:35:50 that there should be a statute of limitations on a 080

09:35:53 1 claims. But that doesn't make it so in this case.
09:35:55 2 The analysis for this court is really quite
09:35:58 3 straightforward.
09:35:58 4 The defendants don't point to a statute of
09:36:01 5 limitations that lists 080 -- that claims 080.
09:36:06 6 120 contains the four-year statute of
09:36:10 7 limitations on 090 claims. The argument seems to be
09:36:13 8 that because the State brought 080 and 090 claims that
09:36:18 9 the statute of limitations somehow applies to both.
09:36:20 10 I would submit, Your Honor, this defies
09:36:23 11 common sense. If the court were to decide that our
09:36:27 12 090 claims, or our 140 claims, were barred by the
09:36:30 13 statute of limitations and 140 and 120, they could
09:36:33 14 quite easily allow the 080 claims to go forward.
09:36:37 15 In the most simple terms, in the statute of
09:36:40 16 the limitations of 120 in the clearest possible
09:36:42 17 language it applies to the 090 claims. 080 parens
09:36:46 18 claims are very different than the 090 claims. There
09:36:48 19 is no reason to believe that 120 applies to 080.
09:36:51 20 There is several straw men that the
09:36:55 21 defendants raise and we could address those quickly.
09:36:59 22 First, this motion that the State might pick and
09:37:02 23 choose, that it might bring a 080 claim or a 090
09:37:05 24 claim, depending upon when it brought it, in order to
09:37:08 25 avoid the statute of limitations.

09:37:10 There is really no reasonable argument
09:37:13 because there is no overlap between 080 and 090 claims
09:37:16 in a way that makes this a concern.
09:37:18 These are entirely different statutes
09:37:21 covering entirely different claims. They claim that
09:37:23 there is some inequity, because the statute of
09:37:26 limitations would apply to a private party, when it is
09:37:29 bringing its claims, but not to the State, when it is
09:37:31 bringing the same exact claim on behalf of the same
09:37:33 exact party.
09:37:34 Again, Your Honor, this ignores the
09:37:36 difference in 080 and 090 claims, indirect purchasers,
09:37:39 indirect purchasers in Washington cannot bring their
09:37:42 own claims. Only the State can bring those claims for
09:37:45 those purchasers under 080.
09:37:47 I know that there is no way around it.
09:37:52 Sounds like a broken record between 080 and 090
09:37:54 claims, but there is absolutely the key here.
09:37:57 I think that we could trust if the
09:38:00 legislature wanted 120 to apply to 080, it would have
09:38:03 said that in 120.
09:38:07 Defendants make much of the fact that in
09:38:09 our complaint, while we do layout the restitution that
09:38:14 we seek, we don't necessarily link it directly to
09:38:18 Sections 080 and 090 and 140. I don't think that

09:38:22 anybody here had any trouble discerning which claim
09:38:28 went back to which statute. But we would be happy to
09:38:32 add the -- to amend our complaint and add that, if
09:38:35 that would somehow save us from the statute of
09:38:38 limitations. I don't think that that is the issue
09:38:40 here.
09:38:41 THE COURT: All right.
09:38:43 MR. KERWIN: Defendants argue that the
09:38:44 tolling provision found in 120 would somehow be
09:38:47 meaningless, if 120 statute of limitations isn't
09:38:50 extended to cover 080 parens claims.
09:38:52 Your Honor, it is the simple reading of 120
09:38:55 shows that the private claims brought pursuant to the
09:38:58 090 would be stayed pending any state action which
09:39:01 relates to the same subject matter. That is what 120,
09:39:03 the tolling in 120 does.
09:39:05 We all know that the anti-trust cases --
09:39:08 direct claims, indirect claims -- are quite distinct,
09:39:11 but they also deal with the same general subject
09:39:13 matter. There is a ton of overlap there. It makes
09:39:17 perfect sense that the legislature would want to
09:39:21 choose to toll private claims, while the same subject
09:39:26 matter is being litigated by the State as well as the
09:39:29 parens.
09:39:29 I think that this is just what you see when

09:39:32 the legislature seeks judicial efficiency and you
09:39:35 avoid duplicative litigation. It gives the State the
09:39:41 first crack at the case for benefit of the privates.
09:39:43 The defendants say that there is a public
09:39:45 policy issue that the court must address. Your Honor,
09:39:49 I would submit that this is not the case.
09:39:50 Cases where we see the courts bring public,
09:39:54 decides that there is a public policy or a judicial
09:39:57 policy questions, that needs to be decided. There is
09:40:00 cases where there is a statute of limitations
09:40:02 involved. The question involved is has it started to
09:40:05 run, has it been tolled or what is the timing
09:40:08 involved?
09:40:08 There is simply no statute of limitation
09:40:11 that applies to 080 parens claims, Your Honor. There
09:40:15 is no issue. There is no policy issue here.
09:40:17 The defendants argument at its basic is
09:40:20 that the statute of limitations in 120 applies to 090
09:40:23 claims.
09:40:24 The State 080 claims are mixed in. And
09:40:26 they kind of look the same, therefore, the statute of
09:40:30 limitations must apply to 080 as well.
09:40:33 Each is clear and have distinct differences
09:40:36 through the 080 and 090 claims. The court's analysis
09:40:39 of 080 and our parens claims of 080 doesn't need to go

09:40:43 any further than this.

09:40:45 However, if the court was to consider the
09:40:49 statute of limitations, or to consider the State's 090
09:40:51 claims, or 140 claims separately, something that the
09:40:55 defendants haven't necessarily argued, but if the
09:40:57 court were to do that, I think that it would also find
09:41:00 that RCW 4.16.160 provides an obvious exception to the
09:41:06 statute of limitations on those claims.

09:41:07 Of course, 160 is -- it says, "there should
09:41:10 be no limitation to actions brought in the name of or
09:41:12 for the benefit of the State."

09:41:15 Of course, this doesn't mean literally that
09:41:17 any action where the State is the plaintiff is exempt
09:41:19 from the statute of limitations.

09:41:22 But it does mean that where the State
09:41:25 actions is for the primary benefit of the public that
09:41:28 160 does apply. This case is the perfect example of
09:41:31 that kind of an action.

09:41:32 The State seeks restitution and injunctive
09:41:35 relief on behalf of the public. It brings these
09:41:37 claims that only the State can bring in its role as a
09:41:41 parens. We know from the 9th Circuit and others, very
09:41:44 recently, in these parens cases the State is the real
09:41:47 party in interest. This is the very definition of the
09:41:49 purely State function being carried out.

09:41:52 The best example of the court applying 160, I think, is Hermann v Cissna. The Hermann case is an insurance case. And the State Supreme Court considered whether the action brought by the State Insurance Commissioner is for the benefit of the State under 160. It decided that it was, also, the statute of limitations do apply.

In holding that the State actions benefit the State, the court declared that the statute, under the State -- under which the State brought the action is for the benefit of the public and the legislature clearly had in mind in enacting the insurance code that such actions on the part of the commissioner would benefit the public generally.

The CPA, we have this language: "The CPA is to protect the public and Foster fair and honest competition in bringing its claims under the CPA, that is what the State seeks to do."

There is no question, like as in Hermann, that there are a set of potentially -- as a part of the claims -- private individuals that are going to benefit. It is an only a subset of the case. But as in Hermann, you could argue, obviously, that there are certain sets of private individuals that would benefit. But that doesn't change the fact that the

09:43:05 case is brought for the -- primarily for the public
09:43:07 interests.
09:43:09 As we outlined in our brief, as Your Honor
09:43:12 discussed, the 9th Circuit fundamentally answered this
09:43:17 question, in Washington v. Chimei and in Nevada V.
09:43:25 Bank of America.
09:43:26 The question that the court was considering
09:43:28 there, as you discussed, was removal under the CAFA.
09:43:32 But the question was much the same. Is the State the
09:43:35 real party in the interest, or is it merely
09:43:38 representing private parties, and should be treated as
09:43:40 any other private party or class representative?
09:43:43 The 9th Circuit said that the State is the
09:43:46 real party in interest, because it is a sovereign
09:43:49 interest in the supporting of the Consumer Protection
09:43:52 and Antitrust Laws in securing an honest marketplace
09:43:55 and the economic well being.
09:43:58 Your Honor, there is no statute that
09:44:00 applies to the 080 parens claims.
09:44:05 THE COURT: Reply is generally brief.
09:44:09 MR. EMANUELSON: Yes, Your Honor.
09:44:11 First of all, Your Honor, the Attorney
09:44:17 General -- much of his argument under the opposition
09:44:21 to our CPA argument was a policy based argument. We
09:44:24 are not making a policy based argument here. That is

09:44:28 only -- I think that is our secondary argument.
09:44:32 THE COURT: Let me ask you. Is this issue
09:44:37 resolved in determining whether the State is
09:44:40 exercising the sovereign power agreement in bringing
09:44:44 this action?
09:44:45 Because it seems to me that from your
09:44:48 opening arguments, it is my understanding that any
09:44:50 action brought by the State exercising its sovereign
09:44:53 power has no statute of limitations, is that correct?
09:44:56 Is that your understanding?
09:44:57 MR. EMANUELSON: That would -- if you found
09:45:00 it that way, that would resolve it.
09:45:02 THE COURT: The question is is this a
09:45:04 sovereign power?
09:45:05 MR. EMANUELSON: That is the question. It
09:45:06 is not a sovereign power.
09:45:08 THE COURT: Then how do we deal with the
09:45:10 Nevada case?
09:45:13 There is language -- let me make clear.
09:45:16 That there is language also in the baseball case that
09:45:20 says that "the principal test for determining
09:45:24 whether" -- that was in the municipality. A
09:45:28 municipality in that case that was acting under a
09:45:31 delegated power that the court, the Supreme Court,
09:45:35 determined to be an exercise of the sovereign power of

09:45:38 the State. It is a sovereign power of the State issue
09:45:41 analysis.
09:45:42 The principal test is determining whether
09:45:45 ones acts involve a sovereign or proprietary function
09:45:51 the court said, "is whether the act is for the common
09:45:55 good or whether it is for the specific benefit or
09:45:59 profit of the corporate entity."
09:46:01 The corporate entity being in that case the
09:46:03 municipal corporation of the State.
09:46:06 Then lay that over the Nevada case, which
09:46:14 is not a controlling authority, but which we look to
09:46:22 -- you all agreed that we look to that -- That the
09:46:24 State has sovereign interests, specifically Washington
09:46:27 State has a sovereign interest in the enforcement of
09:46:29 its Consumer Protection and Antitrust Law.
09:46:32 So does that make it a sovereign matter?
09:46:35 If it is a sovereign matter? Doesn't that
09:46:40 fall outside of the statute of limitations?
09:46:42 MR. EMANUELSON: It does not, Your Honor.
09:46:43 Just by using the word sovereign does not all of a
09:46:46 sudden make -- just because the case used the word
09:46:50 sovereign, does not make it an action that falls under
09:46:53 the definition.
09:46:54 THE COURT: But if the Washington Supreme
09:46:56 Court defines it, then we do.

09:46:58 MR. EMANUELSON: Sure, but that case
09:47:00 involved an actual construction of a facility for the
09:47:04 public interest.
09:47:04 THE COURT: Right.
09:47:05 MR. EMANUELSON: This involves run of the
09:47:06 mill, antitrust damages action that follows on the
09:47:11 private action.
09:47:12 Your Honor, if I may I would like to point
09:47:15 the court's attention to the Washington Power case and
09:47:17 also the Pacific Northwest Bell case that the
09:47:21 defendants provided in the reply brief.
09:47:23 Both of those cases involved a government
09:47:26 action to enforce laws. So, again, they are the real
09:47:29 party in the interest. They have some type of
09:47:33 interests in enforcing their laws. But in both of
09:47:36 those cases the court said that the Section 160 did
09:47:39 not apply.
09:47:40 THE COURT: Right.
09:47:41 MR. EMANUELSON: The first one, Pacific
09:47:44 Northwest Bell case, said that the State's interest is
09:47:49 "merely derivative of the private interests."
09:47:51 They were just suing, they had tried to
09:47:55 propagate a law that, essentially, stood in the shoes
09:48:00 of private parties. That is very similar to the
09:48:02 representative action that the Attorney General is

here.

The second one, I think that the Washington Power case is even more instructive. Because the court looked and that involves a municipal corporation bringing a breach of contract action against General Electric. The municipal corporation made the power.

The court looked at what did the municipal corporation do?

They said, yes, the municipal corporation has -- the State, in general, over all, has an interest in energy policy, in clean and efficient use of energy. But what the specific task that was delegated to the entity that was bringing the suit there did not fall under the sovereign interest. Because the State in that capacity was not acting in any way different than a private entity, who made its power would act.

The State here, similarly, is bringing a lawsuit. Sure, they have some aspects of it that they can ask for civil penalties.

However, the injunctive relief and the -- most importantly -- the damages is what makes this no different and at its core no different than a private right of action.

THE COURT: Thank you.

09:49:25 Any further parties subject to this motion
09:49:29 wants to add anything to the reply? All right. I did
09:49:33 it.
09:49:34 I do focus on the baseball case, which the
09:49:40 language of the baseball case is taken from the Public
09:49:45 Power Supply System, which we use today refer to
09:49:49 somewhat unfortunately as WOOPS, the WPPS versus
09:49:55 General Electric case. It relies on that.
09:49:58 In determining the State's sovereign
09:50:03 powers, it goes on to say -- it seems to me an
09:50:07 important in this case:
09:50:08 "The principal test is whether it is
09:50:13 sovereign or proprietary function is whether the act
09:50:15 is for the common good or whether it is for the
09:50:19 specific benefit of the corporate agency like a
09:50:24 contract, like a construction contract."
09:50:26 If somebody, if the State contracts, it
09:50:29 seems to me, for a highway, and then seeks to bring a
09:50:36 suit against the contractor -- breach of contract
09:50:38 suit -- that would be subject to the statute of
09:50:43 limitations in that case, because that is for the
09:50:47 specific benefit or profit of the corporate agency,
09:50:50 which is the State in that case, or a city, or
09:50:53 anything else such as that.
09:50:55 But in this case, I am persuaded that this

09:51:00 is a case that is brought for whatever other reasons
09:51:05 is one that would fall under the definition that the
09:51:08 Supreme Court gives us as for the act or action
09:51:12 brought for the common good.
09:51:13 I think that is how our Supreme Court would
09:51:15 view this. I think that the Supreme Court would say
09:51:17 that this is a 4.16.160 case.
09:51:22 I am going to deny the motions, all of the
09:51:24 motions, then, for dismissal under the statute of
09:51:29 limitations.
09:51:29 That brings us on to part two.
09:51:31 Part two is the issue with respect to --
09:51:42 narrowing it down to the stream of commerce analysis
09:51:46 issue. So, a couple of things, I want to tell you, I
09:51:50 have a group coming in at 11 o'clock. But I will keep
09:51:53 them here until 11:30 and give you until 11:30, if you
09:51:58 wish. We will hold them off a little bit, any way.
09:52:04 Then I have, not previously scheduled, but
09:52:10 kind of an emergency thing came up on a sentencing,
09:52:15 which we will do at 1 o'clock. Very likely we will be
09:52:20 through at 1:30 or very close to 1:30. We would be
09:52:24 able to resume at 1:30, if you are not finished this
09:52:27 time.
09:52:28 We have statutory requirements for breaks.
09:52:35 We will honor those statutory requirements. I will

09:52:38 check with the court reporter, because reporting oral
09:52:41 argument is often more demanding than in a trial,
09:52:47 where there are a lot more pauses and instances like
09:52:50 that. I am going to confer on that. I don't set any
09:52:54 time limit. I haven't set any time limit. I don't
09:52:57 generally. Although, when I generally have a summary
09:53:00 judgment motion, we consider it an hour. But this was
09:53:04 an extraordinary setting, because of the number of the
09:53:06 parties involved. So we haven't set time limits. I
09:53:10 have never done that in closing arguments or opening
09:53:13 statements in cases. And it has never stung me until
09:53:17 a month or so ago in which a closing argument that was
09:53:22 estimated at an hour was 2 1/2. But still it usually
09:53:29 works out. I don't put any time limits on that, but
09:53:32 that is the schedule that we will have. That is the
09:53:34 schedule that you will have. If you want to try to
09:53:37 fit this in this morning, then it is on you to do
09:53:43 that.
09:53:44 How are you doing? We will just take a
09:53:49 short break and then we will resume.
09:53:54 THE BAILIFF: All rise. Court is in recess.
09:53:55 (Court was recessed.)
10:00:56 THE BAILIFF: All rise. Court is in
10:00:57 session.
10:00:57 THE COURT: Please be seated. Have you

10:00:59 decided who is going to speak?

10:01:00 I take it that was a little disagreement

10:01:03 with my suggestion. Did you decide who was going to

10:01:07 present your argument?

10:01:39 MR. HWANG: Yes, we are ready, Your Honor,

10:01:44 Hojoon Hwang for the LG entities.

10:01:44 THE COURT: Which are the entities that you

10:01:46 represent?

10:01:46 MR. HWANG: LG Electronics, Inc., and LG

10:01:51 USA.

10:01:52 THE COURT: All right.

10:01:53 MR. HWANG: Your Honor, just to respond to

10:01:59 your comments regarding the scheduling, barring any

10:02:02 unforeseen, and frankly, from my perspective

10:02:05 undesirable development, we should be done by 11:30.

10:02:08 THE COURT: All right.

10:02:11 MR. HWANG: Your Honor, to address the

10:02:14 personal jurisdiction motion that LG Electronics has

10:02:18 brought, I will note at the outset that the facts are

10:02:21 undisputed.

10:02:23 We have submitted an affidavit affirming

10:02:26 that LG Electronics, Inc., has conducted no business

10:02:30 in Washington, has no customers, offices or employees

10:02:34 in Washington.

10:02:36 It has no contacts to speak of with the

10:02:42 State of Washington. The State has conceded this
10:02:44 morning that general jurisdiction is not being
10:02:47 asserted over any of the defendants. So that we are
10:02:49 really down to specific jurisdiction based on the
10:02:53 stream of commerce. I will turn to that.
10:02:57 THE COURT: All right.
10:02:58 MR. HWANG: So based on the record, Your
10:03:01 Honor, because of the facts that are undisputed, it
10:03:04 doesn't much matter from my perspective whether this
10:03:07 is a summary judgment or a pleading motion.
10:03:10 But, we have a record that shows no
10:03:13 particular activity by LG Electronics, or any other
10:03:17 defendant that it is directed to Washington State. So
10:03:24 close to serving the United States market as a whole,
10:03:28 indifferent as to which State the product might end
10:03:32 up, or even for that matter, which country the product
10:03:35 might go to.
10:03:36 Under those facts, or any conceivable
10:03:40 standard for finding specific jurisdiction, those
10:03:43 facts are just not good enough.
10:03:45 Unless you take the most extreme reading of
10:03:52 Justice Brennan's concurrence in the Hitachi Metal
10:03:56 case that once a retailer places goods in commerce,
10:04:00 that retailer is subject to jurisdiction anywhere and
10:04:04 everywhere those products might end up in.

10:04:07 Now, that standard is no longer the law, I
10:04:11 would submit, because that is exactly what the Supreme
10:04:15 Court emphatically rejected in the most recent case on
10:04:19 the specific jurisdiction the McIntyre Machinery case.
10:04:23 In that case, the defendant British
10:04:29 manufacturer had conducted marketing campaigns in the
10:04:34 United States, held trade shows in San Diego, San
10:04:38 Francisco, New Orleans, et cetera. So some of their
10:04:41 products ended up in the State of New Jersey, where it
10:04:45 gave rise to the cause of action.
10:04:47 The New Jersey Supreme Court said that
10:04:50 there was personal jurisdiction and articulated the
10:04:53 standard as follows. They said:
10:04:56 "Whenever a manufacturer knows or
10:04:59 reasonably should know that its products are
10:05:02 distributed through a nationwide distribution
10:05:06 system, that might lead to those products being sold
10:05:09 in any of the 50 states, then all of the 50 states
10:05:14 do have personal jurisdiction."
10:05:15 That standard was rejected. Specifically,
10:05:21 was also rejected not only in the plurality opinion,
10:05:26 which adopted a fairly strict standard, but also
10:05:30 Justice Briar and Justice Oleado concurrent at 130.124
10:05:35 and 27.93. Supreme Court Justice Briar quotes that
10:05:38 language that I just quoted and said "that is not the

10:05:40 1 law."
10:05:41 2 Why is that significant?
10:05:43 3 Because, of course, this court is bound by
10:05:46 4 the ground of the decision that commanded a majority
10:05:49 5 of the United States Supreme Court.
10:05:51 6 Here we have a plural opinion, concurring
10:05:54 7 opinion, both agreeing that it is just simply not
10:05:57 8 enough for the manufacturer to have known or
10:06:00 9 reasonably should have known that a product put into a
10:06:04 10 national system of distribution may end up in a wrong
10:06:07 11 State and the manufacturer would be amenable to the
10:06:10 12 jurisdiction there. That is exactly what we have in
10:06:12 13 this case.
10:06:16 14 The Attorney General, having put no facts
10:06:18 15 in dispute, and in its response, the entirety of their
10:06:24 16 allegation, the prima facie case for the personal
10:06:27 17 jurisdiction that they need to make when they admit
10:06:30 18 that burden is that "the defendants knew, or expected
10:06:35 19 that the products contained their CRTs would be sold
10:06:39 20 in the United States and in the Washington," that is
10:06:41 21 paragraph 5 of their complaint.
10:06:43 22 This is exactly the kind of
10:06:46 23 undifferentiating national marketing of the products,
10:06:52 24 indifference to which state it might end up in, with
10:06:55 25 no particular activity directed at the State of

10:06:58 Washington that the courts have including both in the
10:07:02 McIntyre Machinery and in the plurality is that the
10:07:06 courts have said is not enough.
10:07:07 THE COURT: May I ask you a question?
10:07:10 I don't remember if it was in your
10:07:11 briefing. I was looking and I couldn't see it. It
10:07:14 was in one of the defendants briefing, that
10:07:16 criticized, if I understood it correctly, the State
10:07:19 for relying on Grange, our State case in Grange
10:07:26 Insurance Company.
10:07:28 MR. HWANG: I believe that more than one
10:07:30 defendant has said that, Your Honor.
10:07:31 THE COURT: That is why I remember it.
10:07:33 It caused me, based on my reading of that,
10:07:36 to wonder why -- what is it about Grange that you
10:07:41 think is inconsistent?
10:07:42 I look at the Grange decision and I see in
10:07:45 the Grange decision this language:
10:07:53 "A retailer's mere placing of the product
10:07:56 into interstate commerce is not by itself sufficient
10:07:59 basis to infer the existence of purposeful minimum
10:08:04 contacts."
10:08:05 Isn't that what you just argued?
10:08:07 MR. HWANG: Yes, Your Honor, I have that
10:08:08 highlighted in my copy of Grange. I was going to

10:08:11 bring that up.

10:08:12 I think that our criticism of the State's
10:08:15 argumentation on this, at least the way that -- when I
10:08:18 wrote the reply brief was not so much that they rely
10:08:21 on Grange, because, in fact, I believe that Grange
10:08:23 supports our point of view. But that they didn't
10:08:26 deal with McIntyre Machinery at all --

10:08:28 THE COURT: All right. Fine.

10:08:31 MR. HWANG: -- which is the more recent
10:08:33 authority.

10:08:34 But in Grange, too -- I would, the State
10:08:37 relies on various parts of the language from the
10:08:40 Grange case. It is dicta, in fact, because the court
10:08:47 ultimately said that there was no personal
10:08:49 jurisdiction on some different grounds.

10:08:50 THE COURT: Correct.

10:08:51 MR. HWANG: But even in Grange itself, at
10:08:53 the page 761 and 762, the court says exactly what Your
10:08:58 Honor just read.

10:08:59 "A retailer's mere placing of the product
10:09:01 into interstate commerce is not by itself sufficient
10:09:05 basis to infer the existence and purposeful minimum
10:09:09 contact."

10:09:10 On that basis, too, the motion should be
10:09:12 granted, because that is exactly what we have here and

10:09:15 nothing more.

10:09:16 Other than the allegation that the
10:09:19 defendants have placed products into commerce, there
10:09:22 is nothing alleged, nothing shown, that goes
10:09:26 specifically to the State of Washington as a target,
10:09:32 or as a -- some activity directed to the State of
10:09:36 Washington, as opposed to the State of New Jersey.

10:09:39 The McIntyre Machinery court said, clearly,
10:09:42 that that's not enough. There is a distinction
10:09:45 between our national campaign and purposefully
10:09:49 availing oneself of a particular forum.

10:09:51 I was looking for, you know, some of the
10:09:55 lower court's discussions of that concept and we cited
10:10:00 in the LG papers the Opticon case from the District of
10:10:04 New Jersey. It doesn't yet have a Federal Supplement
10:10:08 number.

10:10:09 But in that case, Judge Wolfson said,

10:10:12 "looking at both the plurality opinion and
10:10:15 concurrence, one thing that really comes out clear
10:10:18 is that the national marketing campaign is not
10:10:21 enough."

10:10:21 That is ultimately what Judge Inveen of
10:10:23 this court said with respect to the LTD Powell
10:10:27 defendants in the AUO Electronics case. She said she
10:10:29 recognized correctly that she needs to look at both

10:10:32 the plurality and the concurrence and says that there
10:10:35 has to be something more.
10:10:37 She read Judge Briar's opinion saying that:
10:10:40 "There has to be something more that distinguishes
10:10:43 the situation from the under differentiated national
10:10:50 market and places one in a category them of
10:10:52 purposefully directing their activities in the State
10:10:55 of Washington."
10:10:55 Therefore, she granted the motion to
10:10:59 dismiss. We think that it should be applied here.
10:11:02 THE COURT: She commented that she had gone
10:11:04 through the entire complaint and couldn't find more
10:11:07 there or the --
10:11:08 MR. HWANG: Right. I am sure that Your
10:11:10 Honor has, or will, but I would submit to you that the
10:11:12 paragraph that I read is the entirety.
10:11:15 THE COURT: I understand that you cited
10:11:18 fairly the portions that you think are appropriate.
10:11:21 So go ahead, I didn't mean to interrupt.
10:11:24 MR. HWANG: With that, we will end, Your
10:11:26 Honor.
10:11:27 THE COURT: Any of the other defendants
10:11:30 wish to be heard on the rest of the issues in this
10:11:39 case, now dealt with issue?
10:11:42 MS. CHIU: For the Hitachi defendants,

10:11:44 Michele Park Chiu. We join in the argument that
10:11:49 Mr. Hwang has submitted on behalf of his clients. We
10:11:51 would like to highlight a couple of other facts that
10:11:56 the State raised in their reply to the motion that the
10:11:59 Hitachi defendants raised.
10:12:02 In particular, in response to the AUO
10:12:07 Electronics decision, the State noted that extensive
10:12:09 discovery had been taken in that case, which permitted
10:12:12 them -- or excuse me, permit ted the judge to make the
10:12:15 decisions that she had at that point.
10:12:17 The Hitachi defendants would like to note
10:12:19 that extensive discovery has also taken place in this
10:12:22 matter. Since December 30, 2011 to the present the
10:12:27 Hitachi defendants alone have produced over 319,000
10:12:32 pages of discovery to the State.
10:12:35 This is discovery that was produced in the
10:12:37 multi-district litigation in the Federal Court. The
10:12:42 State has had access to those documents. No where in
10:12:45 their papers have the State been able to raise any
10:12:49 facts or documents that were produced to indicate that
10:12:52 there is any facts to support personal jurisdiction in
10:12:56 this case.
10:12:56 In fact, the facts -- excuse me, the
10:12:59 affidavits that were submitted by the Hitachi
10:13:02 defendants, substantiating the fact that there are no

10:13:06 substantial contacts between the Hitachi defendants
10:13:08 and the Washington State have been unrebutted by
10:13:11 anything that was produced by the Hitachi defendants.
10:13:14 So, we would like to note that there should
10:13:18 be nothing regarding the discovery that would prevent
10:13:20 this court from also granting the motions to dismiss
10:13:23 in this case. And we believe that, in addition to the
10:13:26 Hitachi defendants, other defendants also have
10:13:29 produced the essential discovery to the State as well.
10:13:34 THE COURT: All right.
10:13:35 Is that it?
10:13:36 MS. CHIU: Yes, Your Honor.
10:13:44 MR. YOLKUT: David Yolkut, on behalf of
10:13:45 Panasonic Corporation. I, too, would like to join in
10:13:48 Mr. Hwang's and Ms. Chiu's argument.
10:13:50 We believe that the Panasonic Corporation
10:13:53 is situated from similar to the LG defendant, and the
10:13:57 Hitachi defendant.
10:13:58 We would also like to point out that
10:14:00 Panasonic Corporation is only the one of three
10:14:05 Panasonic defendants to have moved on personal
10:14:08 jurisdiction grounds. Panasonic Corporation of North
10:14:11 America is another defendant, and Toshiba Picture
10:14:15 Display Code, LTD., is also a defendant. They have
10:14:19 both answered the complaint and they don't contest the

personal jurisdiction.

But as to the Panasonic Corporation, which is a foreign entity, headquartered in Osaka, Japan and incorporated in the laws of Japan. We have submitted the evidence that the Panasonic corporation does not manufacture anything, including CRT tubes, or products containing CRT tubes, to this State, or directed to its any of its consumers.

That Panasonic Corporation has had no CRT television or computer monitor sales in this State.

Additionally, although jurisdiction has not been contested, Panasonic Corporation last no office, no facility, no records, no bank accounts, no assets or mailing address here.

On these facts, which remain unrebutted and unchallenged by the State, Panasonic Corporation, too, would like to stress that the State has wholly failed to site or distinguish the G. McIntyre decision from the Supreme Court. We would rest on that authority.

Thank you, Your Honor.

THE COURT: Thank you. Any further parties?

MR. NEELEMAN: John Neeleman for Samsung SDI companies.

We would reiterate that the Samsung is,

10:15:35 1 also -- the Samsung entities are also parties in the
10:15:39 2 multi district in California, have made substantial
10:15:42 3 discovery. And other than that we would join in the
10:15:45 4 prior argument and would reserve the reply.
10:15:50 5 MR. EMANUELSON: David Emanuelson, again,
10:15:52 6 for the Phillips entities.
10:15:53 7 Specifically, in this part of the motion,
10:15:57 8 Phillips Electronics, a Dutch corporation and Phillips
10:16:04 9 electronics Industries, in Taiwan limited, a Taiwanese
10:16:06 10 Corporation. Again, we join in the motion.
10:16:10 11 The Taiwanese corporation is similarly
10:16:13 12 situated to the defendants in the fact that it has no
10:16:17 13 sales or contacts in Washington.
10:16:20 14 I will refer it as KPE.
10:16:22 15 It does not have any sales at all. It is a
10:16:24 16 wholly company, and again, we would refer to the
10:16:28 17 brief, to the affidavits attached to our briefs.
10:16:31 18 THE COURT: I read your papers.
10:16:33 19 MR. YOLKUT: David Yolkut, on behalf of
10:16:35 20 Panasonic Corporation.
10:16:37 21 This is certainly not a game of one
10:16:41 22 up-mannship.
10:16:42 23 Ms. Chiu referenced 319,000 pages. I would
10:16:46 24 also note that the Panasonic defendants have produced
10:16:49 25 over two million pages of the discovery to the

10:16:52 Attorney General. They have not cited any discovery
10:16:54 in their opposition papers that would warrant any
10:16:58 further discovery in this matter.
10:17:06 THE COURT: Any other defendant parties
10:17:08 that want to be heard at this point?
10:17:11 All right. The State's reply?
10:17:15 MR. KERWIN: Thank you, Your Honor.
10:17:18 Your Honor, we are not talking here about
10:17:23 mere foreseeability or possibility. We are talking
10:17:26 about inevitability. We are talking about a huge
10:17:29 volume of commerce here. We are not talking about a
10:17:31 huge inevitability. We are talking about knowing and
10:17:35 intentional inevitability.
10:17:37 If there is a stream of commerce to be had
10:17:39 in State of Washington, this is it. This notion, I
10:17:43 have a little bit of trouble getting my mind around
10:17:45 the notion if you target State of Washington and
10:17:49 other states, there is probably jurisdiction. If you
10:17:51 target State of Washington and 40 others states there
10:17:55 might be jurisdiction. If you target Washington State
10:17:55 and 49 states, all of a sudden it can have a statue of
10:17:59 limitation as to four years.
10:18:00 THE COURT: My understanding is that there
10:18:01 is no targeting of Washington, period.
10:18:04 And that in my understanding is that the

10:18:06 argument includes that part of the law that refers to
10:18:15 putting the product into interstate commerce is not,
10:18:19 by itself, sufficient.
10:18:20 Now, if you take that as a proper statement
10:18:22 of the law, and in terms of the specific jurisdiction,
10:18:31 then -- isn't there -- it just seems to me that
10:18:38 logically there has got to be something more there,
10:18:42 something more than putting it into the stream of
10:18:47 commerce.
10:18:48 MR. KERWIN: Under the stream of commerce
10:18:50 analysis, I think it defies logic that at some point
10:18:57 you aren't saturating a market so much, and putting so
10:19:00 many -- I will make two points on this.
10:19:02 The first is that you are saturating the
10:19:04 market so much and putting so many products into the
10:19:09 stream of commerce, that it is not possible for you
10:19:12 not to know that your products are reaching Washington
10:19:16 State.
10:19:16 Also, we plead in this case that the
10:19:19 defendants knowingly and intentionally did reach
10:19:22 Washington State with their products.
10:19:24 Now, they sold through middle-men. They
10:19:27 didn't send advertisements to the State of Washington.
10:19:30 They didn't set up offices in the Washington State.
10:19:33 We are not arguing that the physical minimal contacts

10:19:37 generally existed, although some defendants did admit
10:19:39 to some amounts of actual physical contacts.
10:19:43 THE COURT: There is some other language in
10:19:45 a couple of cases that I want to share with you, if
10:19:48 you will give me a second.
10:19:49 But one, if we go back to Grange again.
10:19:53 Grange said that "extending jurisdiction is justified,
10:19:56 only if the defendant has purposefully availed itself
10:20:00 of the forum State's markets."
10:20:04 Your argument, I take it, on that is
10:20:06 saturation in that there is nothing in your response
10:20:10 to that that says that there was a specific targeting
10:20:15 of Washington State. It is just the saturation of the
10:20:20 entire country.
10:20:21 MR. KERWIN: That is my shorthand for it,
10:20:23 yes, Your Honor.
10:20:24 THE COURT: All right.
10:20:24 MR. KERWIN: Now, we do make the allegation
10:20:27 that the defendants knowingly targeted Washington
10:20:30 State. We expect, during the discovery, to find
10:20:33 evidence that they targeted all 50 states, including
10:20:37 Washington State.
10:20:38 The concept that they didn't intend to sell
10:20:42 television and monitors containing their price fixed
10:20:45 products in Washington State, just defies logic.

10:20:53 If the State were to take a pass on a case
10:20:55 like this, we would say to the large corporations, go
10:20:58 ahead and pump your CPA violated products into
10:21:02 Washington State, as fast as you want. Just be
10:21:04 careful not to set up any offices here. Be careful
10:21:07 not to have too many physical contacts. Don't drive
10:21:10 through Washington State on your way to somewhere
10:21:13 else. You want plausible deniability for your clients
10:21:16 in court here to argue about it.
10:21:16 Go ahead and do that, and you cannot be
10:21:18 held responsible for your actions and victimization of
10:21:21 Washington State consumers.
10:21:23 THE COURT: You just described something to
10:21:25 me that sounds a little bit about the distinction
10:21:29 between general jurisdiction and specific
10:21:31 jurisdiction, if that is the term that you are using
10:21:33 here.
10:21:35 MR. KERWIN: Your Honor, let me say that
10:21:38 the stream of commerce analysis satisfies the element
10:21:43 of personal jurisdiction in its analysis.
10:21:46 THE COURT: You all cited, but nobody has
10:21:48 argued the Worldwide Volkswagen case.
10:21:52 MR. KERWIN: Yes, Worldwide Volkswagen is
10:21:55 the law in Washington State. That is what controls.
10:21:58 THE COURT: When they talk about the due

process part of specific jurisdiction there, the part that I am looking at is at page 297, and it talks about foreseeability.

The court says at 297:

"But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State, rather it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being hailed into the court there." End of quotation.

They go on with a number of examples, like the tire manufacturer, who sells tires, or the -- I don't know if it is a manufacturer or the dealer, who sells tires in the California and you have a flat tire in Pennsylvania. Can you bring the California party, who sold the tire, to trial in Pennsylvania?

They talk about soda pop from California to Alaska, things -- a number of situations like that, where you get a product one place and it causes a problem some place else.

They said, "no, that doesn't -- that doesn't meet the standard."

MR. KERWIN: Right.

THE COURT: You get here and in the part of

10:23:22 this, when I hear your argument, that raised the
10:23:27 question in my mind it is not the likelihood that the
10:23:32 product is going to be in the Washington State. That
10:23:36 is not the test of the foreseeability, when we talk
10:23:40 about the due process part of the special
10:23:45 jurisdiction.
10:23:45 The court says:
10:23:45 "Rather it is the defendant's conduct and
10:23:49 connection with the forum State, if there are such
10:23:56 that he should reasonably anticipate being hailed
10:24:02 into court."
10:24:04 There that seems -- that language seems to
10:24:09 implicitly require that there would be some
10:24:12 defendants' conduct in connection with the forum
10:24:14 State. That seems to be absent in all of this, other
10:24:18 than your saturation argument.
10:24:20 MR. KERWIN: I see what you are saying,
10:24:22 Your Honor.
10:24:22 I would say, first, that the conduct is
10:24:26 putting this massive amount of products in this stream
10:24:30 of commerce and knowingly targeting all 50 States.
10:24:33 The connection comes through the stream of commerce
10:24:36 argument that we have.
10:24:37 In this case, Worldwide Volkswagen, the
10:24:40 cases that it cites, this highlights the transition

10:24:43 that we see from the older cases, where you have a car
10:24:46 purchased in New York that is driven to, you know,
10:24:51 McIntyre, Ford products brought into the State of New
10:24:51 Jersey.
10:24:57 In Grange the court says "look Worldwide
10:25:03 Volkswagen is the law here in Washington."
10:25:04 THE COURT: Right.
10:25:05 MR. KERWIN: Asai isn't; for the same
10:25:09 reasons that would I argue that McIntyre isn't. The
10:25:11 language on Worldwide Volkswagen anticipates a larger
10:25:15 and more purposeful stream of commerce bringing
10:25:19 jurisdiction to the State.
10:25:20 They say:
10:25:21 "If the State does not violate the due
10:25:23 process, if it asserts personal jurisdiction
10:25:26 over the company, that delivers the products into
10:25:28 the stream of commerce, the expectation that they
10:25:30 will be purchased by the consumers in the forum
10:25:33 State."
10:25:34 THE COURT: That is not enough; is it?
10:25:37 MR. KERWIN: I believe that stream of
10:25:40 commerce analysis, it is, Your Honor.
10:25:42 When you have this volume of commerce --
10:25:46 THE COURT: All right.
10:25:47 MR. KERWIN: -- if there is such thing as

10:25:48 stream of commerce in Washington State, this is it.
10:25:54 That connection to the State in a case like this is
10:25:59 satisfied by -- Your Honor, I want to be clear.
10:26:01 We are pleading that these companies
10:26:04 intentionally targeted Washington State, just as they
10:26:09 did every other state.
10:26:11 We see the court adopt the standard from
10:26:13 Worldwide Volkswagen in Grange.
10:26:15 THE COURT: Yes.
10:26:16 MR. KERWIN: It said that:
10:26:18 "Purposeful minimum contacts are
10:26:27 established, when an out-of-state manufacturer
10:26:29 places its products in the stream of the interstate
10:26:33 commerce, because under those circumstances it is
10:26:35 fair to charge the manufacturer with knowledge that
10:26:37 its conducts might have consequences in another
10:26:40 State."
10:26:41 It is undoubtable that these defendants
10:26:44 knew that their products would be purchased by
10:26:48 consumers in Washington State and that Washington
10:26:51 State consumers would be harmed by their price fixing
10:26:55 activities.
10:26:55 THE COURT: We seem to have a law that
10:26:57 says, just put it into the stream of commerce
10:26:59 throughout the country is not enough.

10:27:02 MR. KERWIN: I think -- when applied to
10:27:07 those earlier cases, where you had a limited number of
10:27:11 products and a lot more -- I think that the language
10:27:17 of these cases anticipates that there can be more,
10:27:21 that there can be a stream of commerce.
10:27:23 THE COURT: You are really advocating for
10:27:26 an expansion, or a change in the law, to reflect
10:27:30 current business practices, that result in a
10:27:33 saturation that should put any one on notice.
10:27:36 MR. KERWIN: I don't believe that this is
10:27:39 in any kind of a way a new law, or a change in the
10:27:42 law.
10:27:43 I think that, absolutely, when you look at
10:27:45 Worldwide Volkswagen, even when you look at cases like
10:27:47 Asai and McIntyre that don't apply here, that you see
10:27:51 the court anticipating that there would be the stream
10:27:58 of commerce situation that will grant -- but those
10:28:00 cases aren't it. They aren't quite there yet. Those
10:28:05 facts fall short.
10:28:06 THE COURT: I hate to go off on a tangent
10:28:08 and but let me try it. It is products liability law.
10:28:13 When products liability -- talking specifically about
10:28:17 asbestos products. Our courts have said a couple of
10:28:21 times recently -- very recently, that manufacturer,
10:28:26 who creates a product that is safe, which later

10:28:30 becomes unsafe because of asbestos being put on it,
10:28:34 that the original manufacturer has no liability; that
10:28:40 is, cannot be held responsible to warn of the dangers
10:28:45 because they haven't provided the dangers even --
10:28:49 unless they put that into the stream of commerce.
10:28:51 That is getting to that point, the stream of commerce,
10:28:54 that you have an innocent product, even though that it
10:28:56 goes in the stream of commerce at some point and
10:28:59 becomes a kind of a product that requires warnings
10:29:05 that there is no liability on that initial
10:29:10 manufacturer, even though that they end up in the
10:29:14 stream of commerce where there may be some.
10:29:16 It just -- that sounded to me a little bit
10:29:23 like this this case or the issues in this case.
10:29:28 MR. KERWIN: I think that it is on --
10:29:30 THE COURT: If you can have a product that
10:29:32 goes into market in this State of Washington, sold in
10:29:38 the State of Washington and may be harmful and require
10:29:42 or products, such as these, which are over-priced.
10:29:47 But that that doesn't reach back to the
10:29:53 original manufacturer, or in this -- in our context,
10:29:58 with our cases, that the original entity that puts it
10:30:03 into a national kind of a market rather than targeting
10:30:09 the State of Washington, but that seemed to repeat or
10:30:14 reinforce.

10:30:15 MR. KERWIN: There are certainly
10:30:16 similarities. The key difference there is liability
10:30:21 versus jurisdiction. It also reminds me here that a
10:30:24 big part of the analysis and a big part of the minimum
10:30:27 contact analysis is fairness. The second step that we
10:30:32 have to take to get jurisdiction would this defendant
10:30:35 traditional claims of fair play and substantial
10:30:40 justice.
10:30:41 THE COURT: It sounds like -- I don't
10:30:43 recall reading anywhere in any brief -- but it sounds
10:30:46 like virtually all of the defendants in this case are
10:30:53 subject to federal action, as well; is that correct?
10:30:59 MR. KERWIN: They are subject to all types
10:31:00 of actions every where. It is an oppressive list.
10:31:04 THE COURT: When you talk about --
10:31:05 MR. KERWIN: But the Washington State
10:31:09 indirect consumers, this is their only avenue for
10:31:12 restitution. This is it. If they don't have
10:31:13 jurisdiction here, millions of consumers in Washington
10:31:17 State go without restitution.
10:31:18 THE COURT: -- is there federal
10:31:20 jurisdiction over this alleged conspiracy and price
10:31:25 fixing?
10:31:26 MR. KERWIN: If they were to bring suit?
10:31:28 THE COURT: No. With the suits that are

10:31:29 presently -- I don't want to get into factual matters
10:31:31 that aren't in the record here.
10:31:34 But if these folks are subject to the
10:31:36 federal lawsuit, because it certainly involves -- may
10:31:41 involve interstate commerce -- aren't they subject to
10:31:49 whatever damages that the law provides for their
10:31:53 wrongful action?
10:31:54 MR. KERWIN: Not in terms of Washington
10:31:58 State and direct consumers and indirect purchasers,
10:32:02 no.
10:32:03 They are not represented in any of the
10:32:06 NBLs, or any of the actions going on. They can't be.
10:32:10 The Attorney General is the lone representative of the
10:32:14 millions of citizens, Your Honor.
10:32:16 The CPA intends that cases should be
10:32:19 brought by the Attorney General to represent those
10:32:22 plaintiffs.
10:32:22 THE COURT: So, the more -- when you are
10:32:27 looking for whatever more is there, the more is a
10:32:32 saturation. That is the kind of a term that I think
10:32:35 that you used and I grabbed on to, because I think
10:32:38 that it is a good term to describe what you were
10:32:41 saying.
10:32:42 MR. KERWIN: I think that it is, Your
10:32:43 Honor. I don't necessarily think that you need the

more in this case. But if you do need the more, that is absolutely it.

THE COURT: All right.

MR. KERWIN: Talking a little bit about how this is their only venue, this is the only form for purchaser of CPA, CRT products in the Washington State, the State is their only representative, that equity element weighs very heavy for the jurisdiction here. The defendants lists all of the contacts that they don't have all with the State offices and the FAX numbers.

What they don't do is they don't deny that they fix the prices. They don't deny that maybe they would profit from Washington State's citizens purchasing these products.

THE COURT: But in this case, we have this case, we have, apparently, some other defendants that aren't here.

MR. KERWIN: Yes, Your Honor.

THE COURT: At this motion, are those distributors to this case those persons have more direct connection with distributing the products in this State?

MR. KERWIN: I don't think that I can say that in a blanket manner.

10:33:50 THE COURT: Why aren't they here in this
10:33:52 motion?
10:33:52 MR. KERWIN: I couldn't answer that, Your
10:33:54 Honor. To some varying degree the defendants
10:33:57 participated in the actual production and distribution
10:34:01 of these products.
10:34:01 THE COURT: I did hear a concession by one
10:34:05 party that they -- some of their subsidiaries and
10:34:09 related organizations did have those kinds of contacts
10:34:12 that they were contesting.
10:34:14 MR. KERWIN: Right.
10:34:15 THE COURT: They were contesting the
10:34:16 specific jurisdiction.
10:34:18 MR. KERWIN: The State pleads that all of
10:34:20 the defendants engaged in the price fixing, engaged in
10:34:23 some way in the distribution of these products and
10:34:27 knew and intended that they are products would reach
10:34:31 Washington State. We have made a prima facie case for
10:34:33 that, Your Honor.
10:34:34 THE COURT: Are the other defendants still
10:34:35 in the case that are not contesting specific
10:34:38 jurisdiction, do they represent all of the products
10:34:43 that were alleged that were distributed in this State?
10:34:48 MR. KERWIN: They do not, Your Honor, not
10:34:50 even close. I think that the burden for the State is

10:34:52 a humble one. I think that it is one that we have met
10:34:55 in the pleadings. This is not a summary judgment
10:34:57 motion. The State need only make a prima facie case
10:35:01 that the jurisdiction is proper.
10:35:02 The defendants pointed out everything that
10:35:05 they have in their declarations. We have looked
10:35:08 forward to finding out who these people might be, what
10:35:10 these executives -- what else they have to say about
10:35:13 the price fixing that they engaged in their companies
10:35:15 and how they might have profited from it from
10:35:18 Washington citizens.
10:35:19 But at this point, they don't contest the
10:35:22 fact that they fix prices. They don't contest the
10:35:27 facts that these products intentionally reached
10:35:30 Washington State.
10:35:31 THE COURT: They probably don't admit it
10:35:34 either.
10:35:34 MR. KERWIN: No, they don't admit it
10:35:36 either. But that is important, because the State has
10:35:38 made its prima facie case in its pleadings. We
10:35:41 deserve to take discovery on this, Your Honor.
10:35:45 I completely reject the notion that there
10:35:49 has been extensive discovery in this case.
10:35:52 CID is a different animal, treated
10:35:54 different ly, handled differently.

10:35:57 What number of documents were produced,
10:36:01 what number of useful document were produced, we have
10:36:07 -- the State shouldn't be held to a double standard
10:36:12 that the other parties wouldn't be held to. I don't
10:36:15 think that we need to get deeply into that. But, Your
10:36:18 Honor, we certainly deserve to take discovery in this
10:36:21 matter.
10:36:24 THE COURT: On that, are we just talking
10:36:26 about the discovery part now?
10:36:27 You have concluded your argument on the
10:36:31 stream of commerce?
10:36:31 MR. KERWIN: Yes, Your Honor.
10:36:32 THE COURT: Except for the -- I want to ask
10:36:36 you about the discovery part.
10:36:38 I am trying to get my rule books so I don't
10:36:43 embarrass myself. But the CR 56, I believe that it is
10:36:49 56 (f) that provides for continuance for discovery, if
10:36:57 I have got that letter wrong, I am sorry. It is in CR
10:37:03 56.
10:37:05 MR. KERWIN: Under the summary judgment
10:37:07 rule.
10:37:07 THE COURT: You put my mind at rest. There
10:37:10 are some specific requirements under CR 56 (f) that
10:37:15 say that in terms of getting a deferral of a judgment
10:37:22 on the summary judgment for further discovery -- I

10:37:25 didn't see any reflection of any of those.
10:37:28 MR. KERWIN: Your Honor, we don't think --
10:37:30 we certainly don't think that we are arguing the
10:37:32 summary judgment here.
10:37:33 THE COURT: No.
10:37:34 MR. KERWIN: There is obfuscation on the
10:37:36 defendant's part on what rule they were filing under
10:37:39 we assumed that it was 12 (b) (2).
10:37:42 THE COURT: I don't mean that this is a
10:37:44 summary judgment motion. I am not trying to convert
10:37:46 this into a summary judgment motion.
10:37:48 I am saying, when you get a dispositive
10:37:50 motion to come up, and then, which is often summary
10:37:56 judgment rather than CR 12 motion, or a motion to
10:38:03 dismiss for lack of jurisdiction, I am not sure that
10:38:06 you have to characterize that as a CR 12 motion or
10:38:12 not, but any way, no jurisdiction. We see those, if
10:38:17 there is that request, I think, what about that?
10:38:20 I look just for comparison purposes and to
10:38:25 guide me somewhat about how it is handled in the
10:38:28 summary judgment motion. In the summary judgment
10:38:30 motion there is usually some showing of exactly what
10:38:32 you would do, exactly what you have done.
10:38:35 We have talked about millions of documents.
10:38:43 You weigh benefits and the burdens of a continuing for

10:38:47 discovery. You do take into consideration somewhat
10:38:51 the costs and the expense of discovery before you put
10:38:58 something over just for discovery.
10:39:01 MR. KERWIN: In terms of cost of the
10:39:02 discovery, there is already quite a bit of litigation
10:39:08 going on, not that we are involved in, but the
10:39:11 defendants are involved in.
10:39:13 A great deal of discovery have been
10:39:16 produced duplicate discovery can be produced easily, I
10:39:21 would guess, from those -- that litigation.
10:39:25 It is certainly something that we would
10:39:28 request. It is certainly -- we would expect to
10:39:31 develop our case, you know, against the assertion that
10:39:35 is we see in the declarations that have been provided
10:39:38 by the defendants.
10:39:40 THE COURT: All right. Thank you. Hold on
10:39:45 for a second before I get replies. I want to get my
10:39:50 cases in front of me. All right.
10:40:41 Reply.
10:40:41 MR. HWANG: Your Honor, with respect to the
10:40:43 discovery, it is interesting that the State now says
10:40:46 that they want to test the assertions in the
10:40:48 affidavits, because earlier today we heard they don't
10:40:52 contest any of those facts.
10:40:53 They don't think that it matters that we

10:40:55 1 didn't have offices; we didn't have employees or
10:40:57 2 customers in the Washington State. They think that
10:41:00 3 the saturation theory is where they are going with it.
10:41:02 4 I don't see how that discovery is relevant.
10:41:06 5 As we were noting in the previous motion --
10:41:09 6 argument on the previous motion, the State has known
10:41:12 7 about these allegations for four and a half years.
10:41:15 8 They have the CID power and they have been
10:41:19 9 coordinating in the discovery, as my colleague has
10:41:25 10 pointed out. We don't see that there is any basis for
10:41:28 11 discovery. I don't think that the State has
10:41:30 12 articulated any reasons for that.
10:41:32 13 The next point that I want to make is that
10:41:34 14 the State's argument that it is just not fair that
10:41:37 15 these defendants arguably, allegedly conspired to fix
10:41:41 16 prices, they are not subject to jurisdiction.
10:41:44 17 The fair play, the motions, the notions of
10:41:49 18 fairness that is additional requirement in that two
10:41:52 19 step test under the Worldwide Volkswagen, the first
10:41:54 20 has to be purposeful availment. They don't get over
10:41:58 21 that, because we, they have alleged no facts. They
10:42:01 22 have shown no facts that says that the defendants at
10:42:04 23 issue in this motion targeted Washington State.
10:42:08 24 Now, whether or not it defies logic to say
10:42:14 25 that a State doesn't have personal jurisdiction over a

10:42:17 defendant that conducts an undifferentiated marketing
10:42:20 campaign for the entire United States, that is a law.
10:42:23 Worldwide Volkswagen, I would suggest, supports us,
10:42:27 but it has to be read in conjunction with McIntyre
10:42:30 Machinery.
10:42:30 This court is actually bound and it
10:42:34 cannot -- it has to follow the position taken by those
10:42:40 justicees who concurred in the judgment of the Supreme
10:42:44 Court in the McIntyre case on the narrow case, the
10:42:48 State versus Higman case in the Washington Supreme
10:42:51 Court. But it comes from the Marks versus The United
10:42:53 States case about how you deal with the plurality of
10:42:56 the opinions.
10:42:56 The law is now that -- perhaps, it has
10:43:00 always been -- that the mere knowledge or expectation,
10:43:05 while they must have known that the products were
10:43:09 going to wind up in Washington, that is not the test.
10:43:12 The test is it has to be more than target the
10:43:14 Washington State. That is exactly what the Supreme
10:43:16 Court said.
10:43:17 Finally, I would note that there would be
10:43:21 entities, who have not moved with respect to LG, we
10:43:25 have moved with respect to LG Electronics, Inc., the
10:43:29 Korean Corporation. We have not moved with respect to
10:43:32 the LG Electronics USA, the American Corporation. By

10:43:37 no means do we mean to suggest that they have any
10:43:40 liability.
10:43:40 However, that is going to be determined in
10:43:42 this case, regardless of how you Your Honor rules on
10:43:46 the jurisdiction issue.
10:43:47 THE COURT: Thank you.
10:43:48 MS. CHIU: Michele Park Chiu for the
10:43:50 Hitachi defendants.
10:43:51 In addition, we would also like to rebut
10:43:55 the State's comment earlier during their argument that
10:43:59 there is inevitability that the products, these moving
10:44:02 defendants were manufacturing would end up in the
10:44:06 Washington State.
10:44:08 The State is making broad brush arguments
10:44:11 without applying the specifically them to the moving
10:44:13 defendant. For example, Hitachi Asia, which is one of
10:44:17 the Hitachi defendants moving here today, in the
10:44:20 affidavit that they submitted, never sold anything
10:44:24 into the United States. So there could be no
10:44:26 inevitability or foreseeability that those products
10:44:29 would end up in State of Washington, as opposed to the
10:44:34 even the greater national market.
10:44:36 It further exposes the fact that the
10:44:38 Attorney General is making very broad brush statements
10:44:40 about the defendants without looking to specific

10:44:44 facts. But more importantly, and more relevant, is
10:44:47 that the foreseeability, even if it were true, which
10:44:50 it is not for all of the defendants, simply is not
10:44:53 enough to establish the personal jurisdiction,
10:44:55 specific personal jurisdiction notice required.
10:44:58 We also joined in the statements made by LG
10:45:01 counsel that the law always has been as seen in
10:45:04 Worldwide Volkswagen and further narrowed in the Jay
10:45:09 McIntyre case that mere foreseeability and entrance to
10:45:13 the stream of commerce specifically cannot support
10:45:17 specific and personal jurisdiction.
10:45:17 We submit on that, Your Honor.
10:45:20 MR. YOLKUT: Your Honor, I think that your
10:45:22 question.
10:45:22 THE COURT: You start with your name.
10:45:25 MR. YOLKUT: Sorry, David Yolkut, on behalf
10:45:27 of Panasonic.
10:45:28 Your question to Mr. Kerwin got it exactly
10:45:31 right. They are looking for an expansion in the law.
10:45:33 For all of the reasons that my colleagues have noted,
10:45:36 McIntyre and the plurality opinion in the McIntyre
10:45:39 combined with Justice Briar's concurrence is indeed
10:45:43 the law that foreseeability is not enough.
10:45:45 Furthermore, with respected to the State's
10:45:48 invocation of equitable principals, Mr. Hwang is

10:45:53 1 absolute correct that you don't need to reach that,
10:45:55 2 third, or second test in Volkswagen, because there is
10:45:57 3 no purposeful availment here. There is no something
10:46:01 4 more.
10:45:02 5 In the concurrence in the Asai, justice --
10:46:07 6 the concurrence looked to the designing the product,
10:46:09 7 advertising the product, that is the type of something
10:46:12 8 more that is wholly absent here.
10:46:14 9 With respect to the equitable principles,
10:46:16 10 even if you want to consider them as I noted, with
10:46:19 11 respect to the Panasonic, there are two other
10:46:21 12 defendants that answered the complaints, they
10:46:23 13 certainly do deny the price fixing of the State. That
10:46:27 14 is news to me. There is certainly isn't denial to
10:46:31 15 each and every one of those allegations. They will be
10:46:35 16 denied. The State is not being being deprived of a
10:46:38 17 forum here.
10:46:39 18 Your Honor is correct, and my clients are
10:46:41 19 in the MDL as well.
10:46:43 20 With that I will submit.
10:46:47 21 MR. NEELEMAN: John Neeleman for Samsung.
10:46:50 22 We have nothing more to add at this time.
10:46:52 23 MR. EMANUELSON: Your Honor, David
10:46:57 24 Emanuelson, again, for the Phillips entities.
10:46:59 25 I just wanted to add as it applies to us

10:47:04 that the same point about the only -- we are only
10:47:09 moving to dismiss on behalf of KPE, and the entities,
10:47:13 Phillips Electronics North America has not joined in
10:47:17 this motion, other all of the other statements would
10:47:19 apply to us.
10:47:21 Really what this goes to a respected and
10:47:23 corporate forum, the State's personal jurisdiction you
10:47:28 cannot blur the forum. You have to look at each
10:47:33 entity specifically in their context in the State.
10:47:36 THE COURT: All right.
10:47:39 Anything further?
10:47:40 MR. KERWIN: Your Honor, if I may.
10:47:41 THE COURT: At a great risk, we can't go on
10:47:44 forever. But go ahead, briefly, if there is something
10:47:47 very specific. Everybody else will get an opportunity
10:47:49 to reply. We have a few minutes.
10:47:50 MR. KERWIN: Very briefly respond to what
10:47:52 they satisfied. McIntyre is not binding law here in
10:47:55 Washington. This is a plurality opinion. There is
10:47:59 not any narrowest grounds between the plurality and
10:48:03 the concurrence.
10:48:04 The very point of concurrence was that the
10:48:08 commerce was changing. That these facts aren't taken
10:48:12 into consideration, there is no broad new rule that
10:48:14 was going to be announced.

10:48:16 This is very similar to Asai, a fractured
10:48:19 ruling from the Supreme Court on this exact issue
10:48:21 Asai. Our Supreme Court said, "no, this is Worldwide
10:48:26 Volkswagen applies."
10:48:27 We absolutely have not conducted any
10:48:30 discovery. We have not conducted discovery. CID is
10:48:36 different. I would wholly reject the argument that
10:48:40 our indirect purchasers have some forum in the
10:48:43 federal. They are not represented in the MDL. This
10:48:46 is -- we are their only representative. This is the
10:48:49 only way that our indirect purchasers can seek relief.
10:48:55 THE COURT: I have said it in the cases and
10:49:00 quoted from them, Worldwide Volkswagen in particular
10:49:05 at 440 US 297 that:
10:49:17 "The foreseeability that is critical to due
10:49:19 process analysis is not mere likelihood that a
10:49:23 product will find its way into a forum State.
10:49:26 Rather it is that the defendant's conduct in
10:49:28 connection with the forum State are such that he
10:49:32 should reasonably anticipate being hailed into
10:49:37 court."
10:49:39 There is more language in that case. The
10:49:45 basis for that kind of a determination, the
10:49:48 foreseeability, because it gives a degree of
10:49:52 predictability, allows potential defendants to

10:49:55 structure their conduct so that they will know where
10:49:58 they are subject to lawsuits and then provide for
10:50:03 insurance and those kinds of avenues in those
10:50:07 jurisdictions. There is a reason, I think, that the
10:50:12 court in Worldwide Volkswagen reached those
10:50:16 conclusions. But in fact, they did. I think that
10:50:18 those conclusions are reinforced by Grange Insurance
10:50:21 Association, 110 Wn.2nd 752.
10:50:27 I read that and sometimes I get on a
10:50:31 defining issue. There may be a distinction that would
10:50:33 be drawn between what is dicta and what is a holding
10:50:40 in a case. I tell you, when I read clear language
10:50:44 from the Supreme Court saying that this is a standard
10:50:48 to be applied, I will give deference to that. I will
10:50:50 pay attention to that, whether it is a holding or not.
10:50:55 I will not ignore it.
10:50:57 Perhaps if it is not fully binding, but I
10:51:00 will certainly recognize that the Supreme Court does
10:51:04 not speak casually or carelessly about any legal
10:51:08 issues.
10:51:09 I have that in mind, when I read that
10:51:12 Supreme Court saying that a retailer's mere placement
10:51:16 of the product placed in the intrastate commerce is
10:51:19 not, by itself, sufficient.
10:51:23 I think then they go on to say that "the

10:51:25 standing jurisdiction is justified only if the
10:51:28 defendant has purposefully availed itself of the forum
10:51:31 State's markets," that has been purposefully availing
10:51:36 has been described elsewhere.
10:51:37 I do think that in this case that there has
10:51:44 been no showing of these moving defendants having
10:51:49 purposefully availing themselves of markets in the
10:51:53 State of Washington.
10:51:55 They are entitled to their motion. I will
10:51:58 grant the motion to dismiss for all of the defendants
10:52:05 here on the jurisdictional grounds.
10:52:08 I am not going to order or continue this
10:52:15 for a discovery. I think that there has been no clear
10:52:20 indication of what discovery would actually be.
10:52:22 In a CR 56 motion we require that. I think
10:52:26 that we require it for a good reasons that there would
10:52:29 be some indication, both of what the discovery would
10:52:32 be, the materiality of the discovery, what the
10:52:34 evidence would show, and why it hadn't been done
10:52:38 before this time.
10:52:39 So, I think for all of those are, perhaps
10:52:43 not directly binding on this motion, under this Rule
10:52:46 12, but they are considerations that guide the court
10:52:51 in making the decision on whether to continue this
10:52:53 motion to allow allow discovery in their case.

10:52:55 I will deny your motion for further
10:52:57 discovery.
10:52:58 Is there anything further that needs to be
10:53:03 addressed with these motions?
10:53:04 MR. YOLKUT: Yes, David Yolkut on behalf of
10:53:07 Panasonic corporation. We also move for our
10:53:09 attorneys' fees as the long arm statute 4.28.185. We
10:53:14 have included that in our proposed order. We would
10:53:17 ask for an award of the attorneys' fees.
10:53:18 THE COURT: My understanding is under
10:53:24 motions such as this, there is an issue about your
10:53:26 entitlement to the attorneys' fees. As you may well
10:53:29 be, and as you have cited -- but that comes as a post
10:53:42 hearing motion.
10:53:42 Unless you show me that there is something
10:53:46 that would impair your rights to attorneys' fees by
10:53:52 requiring you to make those as a post hearing motion,
10:53:56 I am not going to make award of attorneys' fees at
10:54:01 this time.
10:54:01 MR. YOLKUT: Thank you, Your Honor. We will
10:54:02 reserve our rights.
10:54:03 THE COURT: All right. Do we have orders?
10:54:08 Is that going to be a problem?
10:54:10 You will have to look at them.
10:54:12 MR. KERWIN: I haven't seen them yet. If I

10:54:14 did, I missed it. I am sorry.

10:55:58 THE COURT: I have what I believe are -- I
10:56:06 am trying to make sure that I don't give you my, your
10:56:09 brief with my notes on it. I will give you everything
10:56:12 else that you gave me. That is one. You might check
10:56:19 there.

10:56:22 THE BAILIFF: Yes, Phillips needs his
10:56:25 papers, because they don't have a copy of their
10:56:29 orders.

10:56:33 THE COURT: I don't see that I have
10:56:35 anything more from Phillips than that.

10:56:41 MR. MORAN: We will send one later.

10:56:43 MR. HWANG: Your Honor, LG will send an
10:56:46 order in later as well,.

10:56:48 MS. CHIU: As well as Hitachi, Your Honor.

10:56:51 THE COURT: All right. Thank you.

11:00:09 MR. KERWIN: Your Honor, do you have an
11:00:10 order for the statute of limitations ruling?

11:00:14 THE COURT: I don't think so. I haven't
11:00:16 seen one.

11:00:17 MR. KERWIN: We will send you one, Your
11:00:18 Honor.

11:00:18 THE COURT: Thank you.

11:02:09 THE BAILIFF: All rise. Court is in
11:02:10 session.

APPENDIX D

RCW 4.28.185

Personal service out-of-state — Acts submitting person to jurisdiction of courts — Saving.

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

(a) The transaction of any business within this state;

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

(c) The ownership, use, or possession of any property whether real or personal situated in this state;

(d) Contracting to insure any person, property, or risk located within this state at the time of contracting;

(e) The act of sexual intercourse within this state with respect to which a child may have been conceived;

(f) Living in a marital relationship within this state notwithstanding subsequent departure from this state, as to all proceedings authorized by chapter 26.09 RCW, so long as the petitioning party has continued to reside in this state or has continued to be a member of the armed forces stationed in this state.

(2) Service of process upon any person who is subject to the jurisdiction of the courts of this state, as provided in this section, may be made by personally serving the defendant outside this state, as provided in RCW 4.28.180, with the same force and effect as though personally served within this state.

(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him or her is based upon this section.

(4) Personal service outside the state shall be valid only when an affidavit is made and filed to the effect that service cannot be made within the state.

(5) In the event the defendant is personally served outside the state on causes of action enumerated in this section, and prevails in the action, there may be taxed and allowed to the defendant as part of the costs of defending the action a reasonable amount to be fixed by the court as attorneys' fees.

(6) Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law.

[2011 c 336 § 100; 1977 c 39 § 1; 1975-'76 2nd ex.s. c 42 § 22; 1959 c 131 § 2.]

Notes:

Rules of court: Cf. CR 4(e), CR 12(a), CR 82(a).

Uniform parentage act: Chapter 26.26 RCW.

APPENDIX E

RCW 19.86.080

Attorney general may restrain prohibited acts — Costs — Restoration of property.

(1) The attorney general may bring an action in the name of the state, or as parens patriae on behalf of persons residing in the state, against any person to restrain and prevent the doing of any act herein prohibited or declared to be unlawful; and the prevailing party may, in the discretion of the court, recover the costs of said action including a reasonable attorney's fee.

(2) The court may make such additional orders or judgments as may be necessary to restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any act herein prohibited or declared to be unlawful.

(3) Upon a violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, the court may also make such additional orders or judgments as may be necessary to restore to any person in interest any moneys or property, real or personal, which may have been acquired, regardless of whether such person purchased or transacted for goods or services directly with the defendant or indirectly through resellers. The court shall exclude from the amount of monetary relief awarded in an action pursuant to this subsection any amount that duplicates amounts that have been awarded for the same violation. The court should consider consolidation or coordination with other related actions, to the extent practicable, to avoid duplicate recovery.

[2007 c 66 § 1; 1970 ex.s. c 26 § 1; 1961 c 216 § 8.]

Notes:

Effective date -- 2007 c 66: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [April 17, 2007]." [2007 c 66 § 3.]