

NO. 69318-2-1

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**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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THE STATE OF WASHINGTON,

Appellant,

v.

LG DISPLAY CO., LTD. and LG DISPLAY AMERICA, INC.

Respondents.

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**BRIEF OF APPELLANT STATE OF WASHINGTON  
[REDACTED]**

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## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ASSIGNMENT OF ERROR.....	2
III.	ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR.....	3
IV.	STATEMENT OF THE CASE .....	4
	A. LGD’s Participation in a Criminal Price-Fixing Conspiracy .....	4
	B. The Washington Attorney General’s Action .....	5
	C. LGD and Its Relevant Commercial Conduct.....	6
	1. LGD’s Manufacturing and Sales of Panels Destined for Sale in the United States .....	6
	2. Contractual Obligations.....	9
	D. Procedural History .....	10
V.	ARGUMENT .....	11
	A. LGD Does Not Dispute that the Consumer Protection Act’s Long-Arm Statute Confers Jurisdiction Over LGD .....	12
	B. The Assertion of Jurisdiction Over LGD Does Not Violate Due Process.....	13
	1. LGD purposefully delivered hundreds of millions of panels to the United States which were purchased in finished products in Washington State.....	15
	2. This Action Arises from LGD’s Contacts with Washington.....	39

3. The exercise of Personal Jurisdiction over LGD  
comports with traditional notions of fair play and  
substantial justice.....39

C. Attorney Fees are Controlled By Specific Provisions of  
the Consumer Protection Act, Not The General Attorney  
Fee Provisions of RCW 4.28.185(5).....45

VI. CONCLUSION .....49

## TABLE OF AUTHORITIES

### Cases

<u>Abel v. Montgomery Ward Co., Inc.</u> 798 F. Supp. 322 (E.D. Va. 1992) .....	30
<u>Asahi Metal Industry Co., Ltd., v. Superior Court.</u> 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987).....	passim
<u>Ballo v. James S. Black Co., Inc.</u> 39 Wn. App. 21, 692 P.2d 182 (1984).....	13
<u>Bean Dredging Corp. v. Dredge Tech. Corp.</u> 744 F.2d 1081 (5th Cir. 1984) .....	18, 43
<u>Beverly Hills Fan Co. v. Royal Sovereign Corp.</u> 21 F.3d 1558 (Fed. Cir. 1994) .....	18
<u>Blewett v. Abbott Labs.</u> 86 Wn. App. 782, 938 P.2d 842 (1997).....	41, 42
<u>Burger King Corp. v. Rudzewicz.</u> 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).....	13, 15, 40
<u>DeJames v. Magnificence Carriers, Inc.</u> 654 F.2d 280 (3d Cir. 1981) .....	20, 21
<u>Freestone Capital Partners L.P. v. MKA Real Estate Opportunity Fund I, LLC.</u> 155 Wn. App. 643, 230 P.3d 625 (2010).....	11, 12
<u>Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp.</u> 66 Wn.2d 469, 403 P.2d 351 (1965).....	22, 29
<u>Goodyear Dunlop Tires Operations, SA v. Brown.</u> 131 S. Ct. 2846 (2011).....	13
<u>Grange Ins. Ass'n v. State.</u> 110 Wn.2d 752, 757 P.2d 933 (1988).....	passim

<u>Griffiths &amp; Sprague Stevedoring Co. v. Bayly, Martin &amp; Fav. Inc.,</u> 71 Wn.2d 679, 430 P.2d 600 (1967).....	22, 29
<u>Hicks v. Kawasaki Heavy Industries,</u> 452 F. Supp. 130 (M.D. Pa. 1978).....	32, 33
<u>Illinois Brick Co. v. Illinois,</u> 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977).....	41
<u>In re Pers. Restraint of Isadore,</u> 151 Wn.2d 294, 88 P.3d 390 (2004).....	36
<u>Int'l Shoe Co. v. State of Wash.,</u> 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945).....	13
<u>Irving v. Owens-Corning Fiberglas Corp.,</u> 864 F.2d 383, 386 (5th Cir. 1989) .....	29
<u>J. McIntyre Mach. v. Nicastro, Ltd.,</u> ___ U.S. ___, 131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011).....	passim
<u>Kustura v. Dep't of Labor and Indus.,</u> 169 Wn.2d 81, 233 P.3d 853 (2010).....	47
<u>Motorola Inc., v. PC-Tel, Inc.,</u> 58 F. Supp. 2d 349 (D. Del. 1999).....	19
<u>Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Aerohawk Aviation,</u> <u>Inc.,</u> 259 F. Supp. 2d 1096 (D. Idaho 2003) .....	19
<u>Nelson v. Park Indus., Inc.,</u> 717 F.2d 1120 (7th Cir. 1983) .....	20
<u>Omstead v. Brader Heaters, Inc.,</u> 5 Wn. App. 258, 487 P.2d 234 (1971), <i>opinion adopted</i> , 80 Wn.2d 720, 497 P.2d 1310 (1972).....	23, 24, 26, 29
<u>Oswalt v. Scripto, Inc.,</u> 616 F.2d 191, (5th Cir. 1980) .....	18

<u>Perry v. Hamilton,</u> 51 Wn. App. 936, 756 P.2d 150 (1980).....	15
<u>Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council,</u> 165 Wn.2d 275, 197 P.3d 1153 (2008).....	47
<u>Rockwell Int'l Corp. v. Costruzioni Aeronautiche Giovanni Agusta,</u> 553 F. Supp. 328 (E.D. Pa. 1982).....	31, 32, 33, 34
<u>Scott Fetzer Co. v. Weeks,</u> 114 Wn.2d 109, 786 P.2d 265 (1990).....	46
<u>Smith v. York Food Mach.,</u> 81 Wn.2d 719, 504 P.2d 782 (1972).....	28, 29, 39
<u>Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Disrtibs. Pty. Ltd.,</u> 647 F.2d 200 (D.C. Cir. 1981).....	19
<u>State v. Black,</u> 100 Wn.2d 793, 806, 676 P.2d 963 (1984).....	46
<u>State v. Reader's Digest Ass'n, Inc.,</u> 81 Wn.2d 259, 276, 501 P.2d 290 (1972).....	passim
<u>Tyee Constr. Co. v. Dulien Steel Prods., Inc.,</u> 62 Wn.2d 106, 381 P.2d 245 (1963).....	25
<u>Wark v. Wash. Nat'l Guard,</u> 87 Wn.2d 864, 557 P.2d 844 (1976).....	47
<u>Washington v. Chimei Innolux Corp.,</u> 659 F.3d 842 (9th Cir. 2011) .....	43
<u>Willemsen v. Invacare Corp.,</u> 352 Or. 191, 282 P.3d 867 (2012) .....	passim
<u>Williamson v. Petroleum Helicopters, Inc.,</u> 31 F. Supp. 2d 548 (S.D. Tex. 1998).....	17, 18

World-Wide Volkswagen v. Woodson,  
444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)..... 1

**Statutes**

RCW 19.86.030 ..... 12

RCW 19.86.080 ..... 47

RCW 19.86.080(1)..... 3, 4, 45, 46

RCW 19.86.080(3)..... 41

RCW 19.86.160 ..... 12, 48

RCW 19.86.920 ..... 45

RCW 4.28.185 ..... 49

RCW 4.28.185(1)(a)-(f)..... 48

RCW 4.28.185(5)..... passim

## I. INTRODUCTION

LG Display Co., Ltd., (“LGD Korea”) and LG Display America, Inc. (“LGD America”) (collectively, “LGD”) have admitted to criminally participating in a conspiracy to fix the prices of LCD panels that were distributed throughout the United States and purchased in Washington state in televisions, laptops, and monitors. This case presents the question of whether a state court can constitutionally exercise jurisdiction over these defendants in a Consumer Protection Act enforcement action.

A state court properly exercises jurisdiction over a non-resident defendant where the defendant has sufficient minimum contacts with the forum state and exercising jurisdiction would not offend traditional notions of fair play and substantial justice. A defendant has sufficient minimum contacts when it purposefully avails itself of the privilege of conducting business in the forum state. Under the standard articulated by a majority of the U.S. Supreme Court in World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297-98, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980), and adopted by the Washington Supreme Court, a non-resident defendant purposefully avails itself of a forum when the sale of its products in the forum state arises from the defendants’ efforts, directly or indirectly, to target its products to that state. This standard is amply satisfied here, where LGD has purposefully delivered hundreds of millions of LCD

panels to the United States, a sizeable number of which were eventually purchased as part of finished goods in Washington State. These sales in Washington were not merely isolated purchases; they arose from LGD's purposeful efforts to target Washington State and as broad a market as possible for its products.

In addition, asserting jurisdiction over LGD comports with traditional notions of fair play and substantial justice. There is no alternative forum for this action, and it is the sole means by which Washington's consumers and state agencies can be compensated for their injuries under the Consumer Protection Act. The exercise of jurisdiction is patently reasonable here.

Finally, this Court should reverse the trial court order granting LGD's application for attorney's fees "in concept." LGD must seek its fees under specific provisions of the Consumer Protection Act, not the general long-arm statute.

## **II. ASSIGNMENT OF ERROR**

1. The trial court erred by holding that constitutional due process requires "something more than placing one's goods in the stream of commerce, knowing that a sale may ultimately take place in the forum state," thus misapprehending the U.S. Supreme Court's binding standard

for exercising specific personal jurisdiction under the stream of commerce theory adopted in World-Wide Volkswagen v. Woodson. CP 48.

2. The trial court erred in concluding that the State had not shown that LGD purposefully availed itself of the privilege of conducting business in Washington or that it delivered its products into the stream of commerce with the expectation that they would be purchased by Washington users.

3. The trial court erred in failing to consider, in a case with no private cause of action and no other forum in which to proceed, whether the exercise of personal jurisdiction over LGD comports with traditional notions of fair play and substantial justice.

4. The trial court erred in concluding that RCW 4.28.185(5), rather than RCW 19.86.080(1), provides the analytical framework for the award of attorney's fees when the state brings an action to enforce the Consumer Protection Act.

### **III. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Whether jurisdiction exists where a nonresident defendant knowingly, directly or indirectly, targets its products to Washington State?

[Assignments of Error 1, 2]

2. Whether the trial court erred in holding that constitutional due process simply requires “something more than placing one’s goods in the stream of commerce, knowing that a sale may ultimately take place in the forum state?” [Assignments of Error 1, 2]

3. Whether the trial court erred in failing to assess whether jurisdiction lies, under an analysis of traditional notions of fair play and substantial justice, where there is no other available forum for this action. [Assignment of Error 3]

4. Whether the trial court erred in concluding that LGD is entitled to attorney’s fees under RCW 4.28.185(5), a statutory provision of general applicability, and not the Consumer Protection Act, where RCW 19.86.080(1) expressly provides for the award of attorney’s fees and has been interpreted to embody a set of legal and policy considerations that are unique to a state enforcement action. [Assignment of Error 4]

#### **IV. STATEMENT OF THE CASE**

##### **A. LGD’s Participation in a Criminal Price-Fixing Conspiracy**

After a criminal investigation by the United States Department of Justice, LGD Korea, two of its executives, and LGD America, pled guilty to criminal charges arising from their participation in a conspiracy to fix the prices for TFT-LCDs, a common type of LCD panel used in a variety of consumer products, including televisions, monitors, and laptop

computers. CP 2-3. LGD and its executives admitted that they participated in highly structured meetings and bilateral exchanges with their competitors to exchange competitively sensitive information, agree on and/or stabilize the prices of LCD panels, and manipulate the LCD supply. CP 14, 15, 18-19. Shortly after DOJ's investigation was announced, a variety of class actions were filed and consolidated for pretrial proceedings in the Northern District of California. CP 52. The class actions sought relief for direct and indirect purchasers who paid inflated prices for LGD's LCD panels and products incorporating those panels. CP 37. Washington's indirect purchasers—consumers and state agencies that purchased finished goods containing LGD's panels—are not represented for purposes of monetary relief in any of those actions.

**B. The Washington Attorney General's Action**

In early 2009, the Attorney General of Washington (the "State") issued Civil Investigative Demands to the various defendants, including LGD. After over a year and a half of investigation, the State, on behalf of itself and as *parens patriae* on behalf of Washington's consumers, filed an antitrust lawsuit against LGD in August 2010. CP 1. The complaint alleges that, beginning from at least January 1, 1998, through at least December 1, 2006, LGD participated in a worldwide conspiracy to fix the prices of LCD panels which resulted in higher prices for Washington state

citizens and state agencies purchasing products containing LCD panels.

CP 2. The State alleged that both LGD Korea and LGD America manufactured, marketed, sold, and/or distributed LCD panels and LCD products to customers in Washington State, and that they knew or expected that products containing their LCD panels would be sold into Washington. CP 3, 7. The State seeks (1) injunctive relief, (2) civil penalties, (3) damages for state agencies, and (4) restitution for consumers who purchased panels directly from LGD or indirectly through a finished good. CP 23.

### **C. LGD and Its Relevant Commercial Conduct**

#### **1. LGD's Manufacturing and Sales of Panels Destined for Sale in the United States**

LGD Korea is a leading manufacturer of TFT-LCD panels. CP 7. LGD's TFT-LCD panels do not have a stand-alone use; they are a component incorporated into televisions, monitors, notebook computers, mobile phones, and other finished goods. CP 39-40. LGD sells its panels to original equipment manufacturers, system integrators, and resellers.<sup>1</sup> CP 39. During the course of the conspiracy, LGD's panels made their way into Washington via several channels. First, LGD Korea sold panels

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<sup>1</sup> An original equipment manufacturer is a company that manufactures products using components purchased from other companies and then sold under its own brand name. For example, Dell purchases LCD panels from manufacturers such as LGD, and, along with other components, assembles them into Dell branded products.

to customers that made extensive use of retail network chains throughout the United States to distribute products containing its LCD panels. One such customer was [REDACTED], a global consumer electronics brand and principle shareholder of LGD Korea. CP 149. For example, in 2002-2004, LGD Korea's sales to [REDACTED] accounted for [REDACTED] [REDACTED], respectively, of its revenues. CP 149. [REDACTED] in turn sold computers monitors and televisions with LGD Korea's panels throughout the United States and in Washington by making use of [REDACTED] [REDACTED] [REDACTED] CP 156. As a result, in 2004, [REDACTED] reported a [REDACTED] spike in sales revenues that it attributed to increased sales of LCD monitors and monitor products through [REDACTED] [REDACTED] which [REDACTED] [REDACTED] CP 156-56. During the conspiracy, [REDACTED] operated [REDACTED] retail stores throughout Washington State and sold LG-branded products in those stores. CP 193. [REDACTED] has also sold to [REDACTED] a Washington-based specialty consumer electronics retailer and wholly-owned subsidiary of [REDACTED]. CP 171. During the conspiracy, [REDACTED] [REDACTED] [REDACTED]. CP 112, 171.

A second significant channel for the sale of LGD Korea's panels in Washington was via sales by its wholly-owned U.S subsidiary LGD America.<sup>2</sup> According to its SEC filing, LGD Korea, via LGD America, sold hundreds of millions of dollars' worth of TFT-LCD panels to original equipment manufacturers such as [REDACTED], and [REDACTED]. CP 124, 137, 146. For example, [REDACTED] was one of LGD America's top five customers during the conspiracy. CP 137. Initially, LGD's [REDACTED] business was for [REDACTED] [REDACTED]. CP 138. From 2001-2002, LGD America sold more than [REDACTED] [REDACTED]. CP 109, 132. In 2002-2003, [REDACTED] [REDACTED]. CP 109, 132. The State purchased millions of dollars' worth of electronics equipment from [REDACTED], including LCD monitors. CP 108. LGD also sold panels to [REDACTED] and other U.S.-based original equipment manufacturers. CP 146.

Both LGD Korea and LGD America had a number of direct contacts with Washington as well. LGD Korea made direct shipments of over 14,000 TFT-LCD panels to the port of Tacoma, where they awaited shipment to Europe. CP 40. LGD Korea representatives also met with

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<sup>2</sup> In response to the State's discovery requests for LGD's panel sales data, LGD Korea and LGD America cited to the same transaction documents. CP 108, 115-21. LGD Korea and LGD America do not differentiate their sales data to U.S. companies, and did not dispute this characterization of its sales data below.

Microsoft representatives thirteen times from 2001 to 2010. CP 41. In addition, from July 2001 to March 2003, LGD America sold over \$178,000 worth of panels to General Dynamics Itronix Corporation in Spokane Valley. CP 44. Representatives from LGD America made 26 trips to Washington from 2001 to 2010, for meetings with Microsoft, Costco, Best Buy, Target, and Rockwell/APC. CP 45.

**2. Contractual Obligations**

LGD Korea entered into a variety of purchase agreements for the sale of its TFT-LCD panels. For example, LGD Korea (then known as LG Philips LCD Co., Ltd.) entered into a Master Purchase Agreement with [REDACTED] CP 73. This agreement contained [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Specifically, LGD Korea agreed it would:

defend, indemnify, and hold harmless, Dell, Dell Computer

[REDACTED]

[REDACTED]

■ [REDACTED]

■ [REDACTED]

■ [REDACTED]

CP 79 (emphasis added). The agreement further provided that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**D. Procedural History**

LGD filed a motion to dismiss the State’s lawsuit for lack of personal jurisdiction. CP 25. The trial court granted that motion. CP 47. The trial court stated, in relevant part, that “something more” than placing one’s goods into the stream of commerce—such as “state related design, advertising, or marketing directed to Washington”—is required for the exercise of specific personal jurisdiction, and that there was “no showing that the LG Defendants purposefully availed themselves of the privilege of conducting themselves in Washington, or have delivered their product into the stream of commerce with the expectation that it would be purchased

by Washington users.” CP 48-49. The court did not address the legal relevance of LG’s contractual obligations, nor did it consider whether the exercise of jurisdiction was reasonable. Upon the State’s motion, the court entered Final Judgment on the Order Dismissing LGD on August 22, 2012, and the State filed a timely appeal. CP 53, 57.

During the pendency of this appeal, LGD filed an application for attorney’s fees under RCW 4.28.185(5). Although the trial court ordered further briefing from the parties on the reasonableness and necessity of LGD’s fee request, the court granted LGD’s fee application “in concept.”

## V. ARGUMENT

Washington courts have jurisdiction over a foreign cooperation when (1) a state long-arm statute confers jurisdiction; and (2) imposing jurisdiction does not violate constitutional principles. See Grange Ins. Ass’n v. State, 110 Wn.2d 752, 756, 757 P.2d 933 (1988). In Washington, a court’s ability to exercise long-arm jurisdiction over a foreign defendant operates to the fullest extent permitted by due process. Freestone Capital Partners L.P. v. MKA Real Estate Opportunity Fund I, LLC, 155 Wn. App. 643, 652, 230 P.3d 625 (2010).

A plaintiff need only make a *prima facie* showing of jurisdiction. Id. at 654. The court must view the allegations in the complaint as established for purposes of determining jurisdiction. Id. All facts, and

reasonable inferences drawn from the facts, are reviewed in the light most favorable to the nonmoving party. Id. at 653-54. When the trial court considers matters outside the pleadings on a motion to dismiss for lack of personal jurisdiction, the court reviews the trial court's ruling under a *de novo* standard of review. Id. at 653.

**A. LGD Does Not Dispute that the Consumer Protection Act's Long-Arm Statute Confers Jurisdiction Over LGD**

LGD was served pursuant to RCW 19.86.160, the Consumer Protection Act's long-arm statute. See State v. Reader's Digest Ass'n, Inc., 81 Wn.2d 259, 276, 501 P.2d 290 (1972) (referring to RCW 19.86.160 as the "long-arm provision in the Consumer Protection Act"). RCW 19.86.160 states:

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.

In the proceedings below, LGD did not dispute that the Consumer Protection Act's long-arm statute authorized the exercise of personal jurisdiction in this case. Nor could it. LGD's participation in a price-fixing conspiracy constitutes a violation of the Act's prohibition on restraints of trade. See RCW 19.86.030 (prohibiting every contract, combination, or

conspiracy in restraint of trade); Ballo v. James S. Black Co., Inc., 39 Wn. App. 21, 26, 692 P.2d 182 (1984) (referring to price-fixing as *per se* illegal). LGD's conduct impacted the state by causing state agencies and consumers to pay inflated prices for products containing LGD's panels. Thus, the only inquiry for this Court is whether the assertion of jurisdiction comports with due process.

**B. The Assertion of Jurisdiction Over LGD Does Not Violate Due Process.**

A state court's assertion of personal jurisdiction over a non-resident defendant is consistent with due process if that defendant has sufficient minimum contacts with the forum state, and maintenance of the suit would not offend traditional notions of fair play and substantial justice. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72, 476, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) (citing Int'l Shoe Co. v. State of Wash., 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)). Where, as here, the assertion of jurisdiction arises from a defendant's activities within the forum, a state court exercises specific, rather than general jurisdiction.<sup>3</sup> The Washington Supreme Court applies a three-part test to determine when a court may exercise specific personal jurisdiction over a

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<sup>3</sup> General jurisdiction exists when the non-resident defendant's affiliations with the state are so continuous and systematic as to render them essentially at home in the forum state. Goodyear Dunlop Tires Operations, SA v. Brown, 131 S. Ct. 2846 (2011). The state does not allege that a state court can exercise general jurisdiction over LGD.

non-resident defendant: A non-resident defendant must (1) purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice. Grange, 110 Wn.2d at 758.

The exercise of jurisdiction in this case falls squarely within the bounds of due process. Case law establishes that LGD has purposefully availed itself in Washington by releasing hundreds of millions of its LCD panels into the stream of commerce with the expectation and intent that they would be incorporated into finished goods to be sold throughout the United States. LGD's conduct spanned many years, and it targeted as broad a market as possible by selling panels both to companies that directly do business in the U.S. through retail distribution and through its U.S. subsidiary. In addition, this action arises from LGD's contacts; by purchasing products containing LGD's price-fixed panels, consumers and state agencies were harmed, and this enforcement action arises out of those purchases. Finally, the exercise of jurisdiction over LGD does not offend traditional notions of fair play and substantial justice; there is no other forum for this action and, without it, consumers in Washington will be left with no remedy for LGD's violations.

**1. LGD purposefully delivered hundreds of millions of panels to the United States, many of which were purchased in finished products in Washington State.**

In order to satisfy the minimum contacts standard, “there must be some act by which [a non-resident defendant] purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.” Burger King, 471 U.S. at 474; CTVC of Hawaii Co., Ltd., v. Shinawatra, 82 Wn. App. 699, 710, 919 P.2d 1243 (1996). The purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, or attenuated contacts, or of the unilateral activity of another party or a third person. Burger King, 471 U.S. at 475. Ultimately, “[i]t is the quality and nature of the activities which determine if the contact is sufficient, not the number of acts or mechanical standards.” Perry v. Hamilton, 51 Wn. App. 936, 940, 756 P.2d 150 (1980).

**a. Under the U.S. Supreme Court’s Binding Decision in World-Wide Volkswagen, LGD Purposefully Availed Itself In Washington by indirectly delivering products to this state.**

A non-resident manufacturer purposefully avails itself of a forum state where it 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 Corp. v. Woodson, 444 U.S. 286, 297-98, 100

S. Ct. 559, 62 L. Ed. 2d 490 (1980); Grange, 110 Wn.2d at 761-62 (“This court has decided that purposeful minimum contacts are established when an out-of-state manufacturer places its products in the stream of interstate commerce . . .”). This rule does not authorize jurisdiction in a scenario where the sale of a product is merely an isolated occurrence. Rather, if the sale “arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its products in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.” World-Wide Volkswagen, 444 U.S. at 297-98. This standard rests not on the mere foreseeability that a product may find its way into the forum state; rather, it is such that the defendant’s conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there. Id. at 297.

LGD’s conduct falls squarely within the constitutional bounds set out in World-Wide Volkswagen. LGD’s TFT-LCD panels were incorporated into countless LCD televisions, monitors, and notebook computers that were intentionally and purposefully marketed in the United States nationally during the course of the conspiracy. LGD Korea’s executives identified and targeted a growing United States national market, sought to serve that market as broadly as possible, and [REDACTED]

[REDACTED]

[REDACTED]

CP 160-61, 164, 168. LGD established a U.S. subsidiary for the sale of its panels to U.S.-based customers that transacted hundreds of millions of dollars' worth of TFT-LCD panels with highly visible nationwide consumer electronics brands, such as [REDACTED]. CP 132, 137, 142, 134, 146. Televisions and monitors containing LGD panels were regularly sold at nationwide retail chains such as [REDACTED], who operated at least [REDACTED] stores in Washington during the conspiracy. CP 193-94. LGD's calculated efforts to target as wide a market as possible through, and deriving monetary benefit from, its indirect sales into Washington, are precisely the level of contacts sufficient for the exercise of jurisdiction under World-Wide Volkswagen.

In reliance on the principles laid down in World-Wide Volkswagen, many federal courts exercise jurisdiction over foreign manufacturers that specifically contemplated sales into the U.S. through nationwide distribution. For example, the Federal District Court for the Southern District of Texas exercised jurisdiction over AMPEP, a European manufacturer of ball-bearings for helicopters. Williamson v. Petroleum Helicopters, Inc., 31 F. Supp. 2d 548 (S.D. Tex. 1998). AMPEP argued that it had no employees or representatives in Texas, did

not dispatch any representatives or solicit business in Texas, and that less than 1% of its total sales derived from the U.S. The court disagreed and held that the exercise of jurisdiction was permissible. It noted that AMPEP sold its bearings for use in “virtually all makes of European helicopters” and that therefore “the possibility that helicopters using its bearings would end up [in the forum state] was foreseeable.” *Id.* at 551-52. The court went on to hold:

[T]he essential analysis concerns itself not with the product that actually caused the accident but rather with the total number of products fabricated by the defendant and incorporated as component parts of products sold throughout the stream of commerce. Here, AMPEP produced numerous bearings and sold them to European helicopter manufacturers, who then incorporated them into their aircraft, which in turn they sold in markets throughout the world. The possibility that such aircraft would end up in [the forum state] was foreseeable . . . . Consequently, AMPEP had clear notice that it would be amenable to suit in this state.

*Id.* (citing World-Wide Volkswagen) (internal citations omitted).

Williamson is but one of many cases recognizing that it is appropriate to assert jurisdiction over a foreign manufacturer that targets the national United States market.<sup>4</sup>

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<sup>4</sup> See, e.g., Beverly Hills Fan Co. v. Royal Sovereign Corp., 21 F.3d 1558 (Fed. Cir. 1994) (jurisdiction over Chinese fan manufacturer that distributed copyright-infringing fans throughout the U.S.); Bean Dredging Corp. v. Dredge Tech. Corp., 744 F.2d 1081 (5th Cir. 1984) (jurisdiction over steel cast manufacturer that delivered thousands of products throughout U.S. as components); Oswalt v. Scripto, Inc., 616 F.2d 191, 199-200 (5th Cir. 1980) (jurisdiction over Japanese cigarette lighter manufacturer

For the same reason jurisdiction was appropriate over AMPEP, it is warranted over LGD. LGD developed a business model reliant on selling to companies that do extensive business in all parts of the world. Thus, LGD's panels make their way into Washington not through "unpredictable currents or eddies, but [through] the regular and anticipated flow of products from manufacturer to distribution to retail sale." Asahi Metal Industry Co., Ltd., v. Superior Court. 480 U.S. 102, 117, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987) (J. Brennan concurring in part).

This case does not run afoul of World-Wide Volkswagen's admonition that mere foreseeability a product may find its way into the forum is insufficient for the exercise of personal jurisdiction. World-Wide Volkswagen, 444 U.S. at 297. There, the Court rejected the notion that a car wholesaler and retailer could be sued in a jurisdiction *outside the three states where it had sold cars* simply on the notion that it was foreseeable a car could be driven outside of that market; in that case, there would be no

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that delivered millions of lighters to U.S. distributor, did not limit the states where lighters were sold, and "had every reason to believe" its product would be sold in the forum state); Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Disrtibs. Pty. Ltd., 647 F.2d 200 (D.C. Cir. 1981) (jurisdiction over Australian wine producers who sold nationally, and thus "affirmatively welcomed" sales throughout the U.S.); Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Aerohawk Aviation, Inc., 259 F. Supp. 2d 1096 (D. Idaho 2003) (jurisdiction proper over aircraft parts manufacturer where it sold to aircraft manufacturer whom "it knew to distribute its aircrafts nationally"); Motorola Inc., v. PC-Tel, Inc., 58 F. Supp. 2d 349 (D. Del. 1999) (jurisdiction proper because "[The Defendant's products] are integrated into a variety of consumer electronic products which are manufactured by well-known multi-national corporations like Compaq, Phillips, Samsung, Sharp, Sony . . . [which are] then put into world-wide distribution networks which place them for sale in equally well-known retail stores such as . . . Circuit City, CompUSA, Office-Max, Sears [etc].").

“conduct and connection with the forum state . . . such that he should reasonably anticipate being sued there.” Id. Necessarily then, jurisdiction would have been constitutional within the three states because it is where the defendants products were sold. World-Wide Volkswagen thus implicitly recognizes that the scope of a foreseeable market is necessarily broader “with respect to manufacturers and primary distributors of products who are at the start of a distribution system . . . who . . . derive economic benefit from a wider market . . . [and] that such manufacturers and distributors purposely conduct their activities to make their product available for purchase in as many forums as possible.” Nelson v. Park Indus., Inc., 717 F.2d 1120, 1125-26 (7th Cir. 1983) (discussing World-Wide Volkswagen); see also Asahi, 480 U.S. at 120 (noting the Court “took great care to distinguish ‘between a case involving goods which reach a distant state through a chain of distribution and a case involving goods which reach the same State because a consumer . . . took them there.’” (Brennan, J. concurring) (alteration in original); DeJames v. Magnificence Carriers, Inc., 654 F.2d 280, 285 (3d Cir. 1981) (“[b]y increasing the distribution of its products through indirect sales within the forum, a manufacturer benefits legally from the protection provided by the laws of the forum state for its products, as well as economically from

indirect sales to forum residents.”), *cert denied*, 454 U.S. 1085, 102 S. Ct. 642, 70 L. Ed. 2d 620 (1981).

Here, LGD’s panels did not arrive in this forum through a fortuitous occurrence, or through the unilateral actions of a consumer. LGD’s panels arrived as a result of its deliberate attempts and hopes that its customers would sell products containing its panels to as broad a market as possible. LGD’s conduct is precisely the type of conduct that World-Wide Volkswagen, and the many courts that have applied its lessons, acknowledge creates “a connection with the forum state . . . such that [it] should reasonably anticipate being haled into court there.” World-Wide Volkswagen, 444 U.S. at 297.

**(1) Washington Courts Consistently Follow the Stream of Commerce standard established in World-Wide Volkswagen.**

Washington courts have consistently applied the World-Wide Volkswagen standard to uphold jurisdiction over out-of-state defendants that release their products into the stream of commerce.

In a statement that presaged the U.S. Supreme Court’s liberalization of personal jurisdiction, the Washington Supreme Court long ago recognized:

The [state long-arm statute] does tacitly recognize as an economic fact of modern life that large segments of

commerce . . . [and] manufacturing . . . inevitably seek out a connection with or link to customers, consumers, users, fabricators, processors, or subcontractors in other states who intend or contemplate that the product, process or article of commerce [or] manufacturing . . . shall be consumed, used, or employed in states other than the place of origin or beginning.

Griffiths & Sprague Stevedoring Co. v. Bayly, Martin & Fay, Inc., 71 Wn.2d 679, 684, 430 P.2d 600 (1967). As a result of this economic fact of modern life, the State Supreme Court has held that “the start of a commercial process outside the forum state on the assumption that the article will be sold, used, or acted upon or within many other states *but with no particular jurisdiction in actual contemplation*” constitutes a link sufficient to exercise jurisdiction over a nonresident defendant. Id. (emphasis added) (citing Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp., 66 Wn.2d 469, 403 P.2d 351 (1965), *disagreed with on other grounds by Grange*, 110 Wn.2d 752)). “The existence of these phenomena of modern economy are ordinarily enough to bring the parties within the long-arm statute without engendering an unjust or oppressive extension of jurisdiction.” Id.

Division II relied on these principles in a case upholding state court jurisdiction to hear a case regarding a Japanese manufacturer of a component product. Omstead v. Brader Heaters, Inc., 5 Wn. App. 258, 487 P.2d 234 (1971), *opinion adopted*, 80 Wn.2d 720, 497 P.2d 1310

(1972). In Omstead, the plaintiffs brought suit against a local heater company and Kubota, a Japanese manufacturer of defective piping that was used in the heaters. Kubota argued that jurisdiction was inappropriate because it had no registered agent in Washington, did not maintain sales agencies in the U.S., used independent distributors to broker its sales, and its sole U.S.-based employee was stationed in Los Angeles.

The court held that jurisdiction was appropriate because it was foreseeable to Kubota that its piping would be used in the United States and, therefore, in any of the states. Id. at 269. In the first instance, the court recognized that Kubota had “placed [its products] into the broad stream of interstate commerce and minimum contacts with [Washington] could be inferred if a tortious act occurred in this state and if Kubota was a manufacturer in any of the United States.” Id. at 267. It went on to conclude that jurisdiction over a foreign manufacturer was appropriate because Kubota (1) had a world-wide market for its products and its pipes were used extensively in the United States; (2) manufactured its piping to conform to United States specifications; (3) sold directly to an independent distributor with knowledge that piping was destined for the United States, and that Seattle had been listed as a port of entry for the vessel carrying the piping at issue. Id. at 269-71. Ultimately, the court said, “the purposeful act requirement of Hanson v. Denckla is satisfied in

tortious cases when the manufacturer places the goods in the broad stream of commerce, or sends them to a foreign state.” Id. at 270-71 (internal citations and quotations omitted). The Washington Supreme Court subsequently adopted the opinion in full as its own. Omstead v. Brader Heaters, Inc., 80 Wn.2d 720, 722, 497 P.2d 720 (1972) (“Omstead II”).

Importantly, in Omstead, the court recognized the importance of these considerations in fashioning an effective consumer protection regime: the court stated that it “would be striking a serious blow at consumer protection if we did not recognize such jurisdiction.” Omstead, 5 Wn. App. at 272. The court further noted that a foreign manufacturer is often the only entity liable. “We cannot expect consumers in this state to travel to Japan or other parts of the world to litigate injuries from tortious acts committed in this state – fairness to the foreign manufacturer does not require that hardship to local consumers.” Id. These considerations went on to inform a Washington Supreme Court decision upholding jurisdiction over an out-of-state defendant in a consumer protection enforcement action. See Reader’s Digest, 81 Wn.2d at 276-78. In Reader’s Digest, the State Supreme Court held that the “performance of an unfair trade practice in this state by a foreign corporation which has no agents, employees, offices, or other property in the state is a sufficient contact to establish jurisdiction.” Id. at 276. The Court based its holding on two

important grounds: (1) prior precedent in which jurisdiction was recognized based on damages suffered “within the state even though they resulted from” conduct occurring outside the state; and (2) recognition that “[i]n recent years, there has been a clearly discernible trend to liberalize the requirements for establishing personal jurisdiction over non-residents.” Id. at 276 (citing Tyee Constr. Co. v. Dulien Steel Prods., Inc., 62 Wn.2d 106, 381 P.2d 245 (1963)).

Reader’s Digest wholly supports the exercise of jurisdiction over LGD. LGD, like Reader’s Digest, lacks a physical presence in Washington, but has nonetheless committed a violation of the Consumer Protection Act that has produced effects within the state. LGD placed its products into the interstate stream of commerce and consumer goods containing LGD’s price-fixed TFT-LCD panels were purchased in Washington, and the economic injury accompanying those purchases has befallen both the state itself and its consumers. Washington is the locus for the interests at issue here and therefore has an unequalled interest in adjudicating this dispute. As Reader’s Digest establishes, this impact on Washington’s consumers “satisfies the minimum contacts requirement that a foreign corporation purposefully do some act within the forum state.” Id. at 278. In this scenario, “[i]t is [thus] the duty of the state to protect its residents from such unfair practices.” Id. at 278 (holding that assumption

of jurisdiction over an out-of-state defendant that has profited by violating the Consumer Protection Act action does not offend traditional notions of fair play and substantial justice).

Omstead II has never been overturned; in fact, its basic principle—that an out-of-state manufacturer that injects products into the broad stream of commerce engages in purposeful minimum contacts with the state—has been reaffirmed by the State Supreme Court and remains good law. In Grange, the Supreme Court specifically held:

This court has decided that purposeful minimum contacts are established when an out-of-state manufacturer places its products in the stream of interstate commerce, because under those circumstances it is fair to charge the manufacturer with knowledge that its conduct might have consequences in another state.

Grange, 110 Wn. 2d at 761. This standard expressly equates the analysis of stream of commerce in Washington with the World-Wide Volkswagen standard.

**(b) Even If the Court Applies the Heightened Stream of Commerce Plus Standard Described in *Asahi*, the Court Still has Jurisdiction over LGD.**

World-Wide Volkswagen stands as the Court's best articulation of the stream of commerce, and the Court's only opinion on this issue to have won a majority. Despite this, the trial court dismissed LGD on grounds that the State failed to provide "something more" than the standard

announced in World-Wide Volkswagen. CP 48. The trial court's reference to "something more" invokes Justice O'Connor's plurality opinion in Asahi Metal Industry Co., Ltd. v. Superior Court, 480 U.S. at 108-113. In Asahi, a fractured Court offered competing views on whether a Japanese tire valve manufacturer, whose product was incorporated into a tire sold in California, had engaged in purposeful minimum contacts. Four justices, led by Justice O'Connor, held that purposeful minimum contacts could not be established absent a showing of "something more" - additional conduct indicating intent or purpose to serve the specific forum state (an analysis now known as "stream of commerce plus"). Id. at 112. In contrast, four justices reasoned that purposeful minimum contacts were satisfied under World-Wide Volkswagen because the manufacturer had placed its good into the stream of commerce and indirectly benefited from the "regular and anticipated flow of products" into the forum state. Id. at 117 (Brennan, J., concurring).<sup>5</sup>

Asahi produced no majority, leaving the stream-of-commerce framework established in World-Wide Volkswagen intact. Indeed, the Washington Supreme Court recognized as much in Grange, which was

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<sup>5</sup> All the justices agreed that jurisdiction would have offended traditional notions of fair play and substantial justice; the tire-valve manufacturer was brought into the action as a third-party plaintiff by the tire manufacturer. However, the tire manufacturer and the plaintiff settled, leaving only a third-party action between two international companies before a California state court. Under these circumstances, the Court agreed jurisdiction was unreasonable. Id. at 116.

decided after Asahi. Thus, Grange Court was in a unique position to assess the impact of the U.S. Supreme Court's competing stream of commerce opinions on Washington case law. Id. at 761. After acknowledging the disparity between World-Wide Volkswagen and Asahi, Grange resolved the questions left unanswered in Asahi by stating:

There seems to be no similar split of authority within this state's courts, at least as far as nonresident manufacturers and retailers are concerned. This court has decided that purposeful minimum contacts are established when an out-of-state manufacturer places its products in the stream of interstate commerce, because under those circumstances it is fair to charge the manufacturer with knowledge that its conduct might have consequences in another state.

Grange, 110 Wn.2d at 761. In making this determination, the court cited to Smith v. York Food Machinery "and cases cited therein." Id. (citing Smith v. York Food Mach., 81 Wn.2d 719, 723, 504 P.2d 782 (1972)). In Smith, the Washington Supreme Court held that a state court could constitutionally exercise jurisdiction over a manufacturer and its wholly owned subsidiary that sold a defective food processing machine into the stream of commerce and which caused injury in Washington. Id. at. It noted that "the scope of one's marketing activity is an important consideration" and noted that the defendants had "knowingly [made] out-of-state sales by placing their products in the broad stream of interstate

commerce.” In support of its holding, York cited to both Golden Gate Hop Ranch and Omstead.

Grange was the Court’s opportunity to overrule Golden Gate Hop Ranch, Omstead, Smith and Bayly, Martin & Fay, in light of Asahi. But it did just the opposite – it invoked the principles of these cases and revitalized them, by expressly reconciling them with World-Wide Volkswagen.<sup>6</sup> Grange thus culminates a long line of Washington Supreme Court cases establishing that due process is satisfied where a foreign manufacturer intentionally deals with a wide array of intermediaries with the intent to serve as broad a market as possible in the United States. These cases remain good law in Washington, and strongly support jurisdiction here.

Nevertheless, even if this court were to agree with the trial court and conclude that Justice O’Connor’s “stream of commerce plus” analysis is the proper standard, for two reasons, the facts of this case still warrant the exercise of personal jurisdiction over LGD.

First, Justice O’Connor’s requirement that there be “something more” than awareness that one’s product may be swept into the forum

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<sup>6</sup> Grange’s analysis echoes the sentiments of several of the circuit courts of appeal that have also continued to apply World-Wide Volkswagen in light of the unresolved questions in Asahi. See, e.g., Irving v. Owens-Corning Fiberglas Corp., 864 F.2d 383, 386 (5th Cir. 1989) (“... the Court’s splintered view of minimum contacts in Asahi provides no clear guidance ... [and] we continue to gauge ... contacts ... by the stream of commerce standard as described in World-Wide Volkswagen ...”).

state is satisfied because LGD [REDACTED]

A contractual undertaking to [REDACTED]

[REDACTED] a manufacturer on notice that it should

reasonably anticipate being haled into court and is an act of purposeful

avilment. *E.g.*, Abel v. Montgomery Ward Co., Inc., 798 F. Supp. 322,

327 (E.D. Va. 1992). In Abel, an injured plaintiff sued a Taiwanese

bicycle manufacturer that sold bicycles to Montgomery Ward for resale

throughout the United States. Like LGD, the manufacturer agreed to

indemnify and hold harmless Montgomery Ward, and to defend it in suits

for injuries arising out of the use of its bicycles. The court held that

personal jurisdiction over the Taiwanese manufacturer was appropriate,

*inter alia*, because it had utilized a nationwide distribution system under

which it knew its products would be resold through the United States,

derived a benefit from those sales, and it contractually reserved the right to

defend its products and obligated itself to defend Montgomery Ward. *Id.*

at 325.

As in Abel, LGD necessarily understood that it was subjecting

itself to potential litigation in any forum where its products were sold

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. See also Willemsen v. Invacare Corp., 352 Or. 191, 195-96, 282 P.3d 867 (2012) (personal jurisdiction warranted where component manufacturer entered into indemnification obligation). Thus, LGD should not be permitted to have it both ways and now argue that it could not have foreseen litigation in this forum as a result of the sale of its products.

Second, Justice O'Connor's reasoning in Asahi does not foreclose the idea that a defendant, like LGD, that seeks to serve the U.S. market as a whole, also seeks to serve the individual states that comprise the U.S. market. First, in support of her assertion that Asahi had not "designed its product in anticipation of sales in California," she cited Rockwell International Corp. v. Costruzioni Aeronautiche Giovanni Agusta, 553 F. Supp. 328 (E.D. Pa. 1982). Asahi, 480 U.S. at 113. In Rockwell, the Defendant was SNFA, a French manufacturer of ball-bearing assemblies used in a helicopter that Rockwell had purchased. The assemblies were sold to SNFA's Italian subsidiary, which in turn sold them to an Italian helicopter manufacturer which incorporated the assemblies. The helicopters were eventually purchased via a U.S. distributor. The court held that personal jurisdiction over SNFA was appropriate because it had purposefully designed its ball-bearing assemblies for the helicopter, and

therefore “was aware that [it] was targeted for the executive corporate transport market in the United States and Europe.” Rockwell, 553 F. Supp. at 330. Thus, had SNFA “had ample reason to know and expect that its bearing, as a unique part of a larger product, would be marketed in *any or all states . . . .*” Id. at 333.

Similarly, in support of her assertion that Asahi “did not create, control, or employ the distribution system that brought its product to the forum,” Justice O’Connor cited to Hicks v. Kawasaki Heavy Industries, 452 F. Supp. 130 (M.D. Pa. 1978). Asahi, 480 U.S. at 112. Hicks upheld jurisdiction over a Japanese motorcycle manufacturer that sold motorcycles into the U.S. through its exclusive U.S. sales agent, reasoning that the manufacturer had done business in the forum state through indirect shipments of its goods. Hicks, 452 F. Supp. at 134. It was irrelevant that “the product was not directly placed in the state by [the Japanese manufacturer], but rather was marketed by one whom the [manufacturer] could foresee would cause the product to enter [the forum state].” Id. Justice O’Connor’s citations to these cases suggests that a manufacturer’s efforts to serve the U.S. market generally constitutes purposeful efforts to serve the several states under her stream of commerce “plus” analysis.

Here, as in Rockwell and Hicks, LGD has had every reason to know, and fully expected that its LCD panels, as a component of LCD televisions, laptops, and monitors, would be sold and used in any or all states, including Washington. During the conspiracy, executives from LGD attended illicit meetings with their competitors to identify, among other things, [REDACTED]. CP 124.

[REDACTED]  
[REDACTED]  
[REDACTED]. CP 160-161, 164, 168. LGD America, LGD Korea's U.S.

subsidiary and sole sales and marketing arm in the U.S., transacted hundreds of millions of dollars' worth of TFT-LCDs panels with highly visible nationwide consumer electronics brands, such as [REDACTED], CP 132, 137, 142, [REDACTED], CP 134, and [REDACTED]. CP 146. LGD Korea's panels were sold for use in [REDACTED] monitors and televisions. CP 149-50. [REDACTED] in turn did substantial business throughout the U.S., and even saw its monitor sales revenue increase substantially as a result of utilizing [REDACTED] nation-wide retail distribution, which include stores in Washington. CP 156-57, 193-94. There is no evidence that LGD ever took any affirmative steps to limit the states in which its panels might be sold. Rather, LGD made a calculated effort to target as wide a market as possible, and derived monetary benefit from its indirect sales into

Washington. Cf. Rockwell Int'l, 553 F. Supp. at 33 (“By virtue of the sale of the bearing in question, defendant derived, at a minimum, an indirect pecuniary benefit from [the forum state].”).

Accordingly, though the State is not required to satisfy Justice O’Connor’s heightened stream of commerce standard in Asahi, LGD’s agreement to indemnify and defend Dell (and its other original equipment manufacturer purchasers) for actions arising out of the sale of its products, in addition to its yearly efforts to target and sell hundreds of millions of TFT-LCD panels into the U.S. market, constitutes the “something more” Justice O’Connor contemplated in her plurality opinion.

**(c) The U.S. Supreme Court’s decision in *J. McIntyre Machinery v. Nicastro* Does Not Alter the Jurisdictional Analysis**

The U.S. Supreme Court’s most recent decision on the stream of commerce is J. McIntyre Mach. v. Nicastro, Ltd., \_\_\_ U.S. \_\_\_, 131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011). In J. McIntyre, a foreign manufacturer was sued in New Jersey state court after a worker was injured by one of the defendant’s allegedly defective metal-shearing machines. At most, four of the manufactures machines had been sold into New Jersey, including the allegedly defective machine. Justice Kennedy led four justices in holding that a New Jersey court could not exercise jurisdiction under the stream of commerce theory. Id. at 2790. Justice Brennan

concluded, noting that the facts disclosed neither either a “‘regular . . . flow’ or ‘regular course’ of sales in New Jersey,” nor was there “‘something more,’ such as special state-related design, advertising [etc].” Id. (Brennan, J., concurring) (citing Asahi, 48 U.S. at 111) (O’Connor, J., plurality). Thus, Justice Brennan concluded that jurisdiction was not appropriate under either Justice O’Connor’s or Justice Brennan’s plurality opinions in Asahi, nor World-Wide Volkswagen.

For a host of reasons, J. McIntyre is not dispositive in the present case. Factually, the sheer number of finished goods containing LGD’s panels in Washington based on its hundreds of millions of panel sales into the U.S. towers above the four shearing machines that travelled to New Jersey. LGD’s indemnification agreements also place it apart from J. McIntyre. In addition, J. McIntyre, like Asahi, does nothing to alter the previous legal framework. Justice Kennedy’s plurality does not upset the holding in World-Wide Volkswagen. J. McIntyre, 131 S. Ct. at 2788 (noting that “placing goods into the stream of commerce ‘with the expectation that they will be purchased by consumers within the forum State’ may indicate purposeful availment.”) (Kennedy, J., plurality) (citing World-Wide Volkswagen, 444 U.S. at 298). Nor could it - as the Court could only muster a fractured plurality, the decision carries “limited precedential value and is not binding.” See In re Pers. Restraint of

Isadore, 151 Wn.2d 294, 302, 88 P.3d 390 (2004). Accordingly, J. McIntyre leaves intact the framework created by World-Wide Volkswagen, and has limited applicability except to cases presenting the same factual scenario, and it was an error for the trial court to hold the State to any standard other than the World-Wide Volkswagen standard.

Indeed, even after J. McIntyre was decided, courts have continued to uphold personal jurisdiction over foreign manufacturers that have targeted the United States national market. For example, the Oregon Supreme Court recently upheld the exercise of personal jurisdiction over CTE, a Taiwanese manufacturer of battery chargers that targeted and distributed its batteries throughout the United States. Invacare, 352 Or. 191.<sup>7</sup> In Invacare, a case decided subsequent to the trial court's decision below, the plaintiffs brought a wrongful death action in Oregon state court against Invacare, an Ohio wheelchair manufacturer, and CTE, a Taiwanese corporation that manufactured battery chargers used in those wheelchairs, after an accident caused by a defective charger in a wheelchair. Like LGD here, CTE supplied the battery chargers pursuant to a master supply

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<sup>7</sup> Invacare's procedural history is noteworthy. The trial court denied CTE's motion to dismiss for lack of personal jurisdiction, and the Oregon Supreme Court refused to issue a writ of mandamus directing the trial court to vacate its order. CTE then filed a petition for certiorari. The U.S. Supreme Court granted CTE's petition, vacated the Oregon Supreme Court's order, and remanded the case to the Oregon Supreme Court for further consideration in light of J. McIntyre. Thereafter, the Oregon Supreme Court issued an alternative writ to the trial court directing it to vacate its order or show cause. The trial court refused to vacate its order, and the issue finally came up for review before the Oregon Supreme Court.

agreement that obligated it, among other things, to defend, indemnify, and hold Invacare harmless for claims, losses, damages, charges, and expenses arising out of the battery chargers. *Id.* at 196. CTE's only contacts with Oregon were that its batteries were incorporated in 1,102 motorized wheelchairs sold in Oregon over a two-year period.

The Oregon Supreme Court held that the exercise of personal jurisdiction was proper. *Id.* at 208-09. CTE argued that it could not have purposefully availed itself of doing business in Oregon because it had simply sold batteries to Invacare, and the mere fact it may have expected its chargers to end up in Oregon was insufficient to support jurisdiction under *J. McIntyre*. The court rejected that argument, noting that CTE sold over 1000 battery chargers into Oregon over a two-year period, which it reasoned constituted a “‘regular . . . flow’ ” or ‘regular course’ of sales” in Oregon. *Id.* at 207 (quoting *J. McIntyre*, 131 S. Ct. at 2791 (Breyer, J., concurring)). CTE's volume and pattern of sales established 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.” *Id.* (quoting *J. McIntyre*, 131 S. Ct. at 2792 (Breyer, J., concurring)). The court specifically rejected the argument that *J. McIntyre* precluded jurisdiction, noting that the opinion produced no majority, was not controlling, and that the most could be said

for it was that J. McIntyre did not support jurisdiction over a foreign manufacturer when nationwide distribution results in only a single sale in the forum state. Id. at 203 (citing J. McIntyre at S. Ct. 2791).

Like CTE, LGD sold its products over several years to companies that sought to market and sell those products nationally and in Washington. But the extent of LGD's conduct vastly exceeds CTE's conduct in Invacare. Cf. Asahi, 480 U.S. at 122 (Stevens, J., concurring in part and concurring in judgment) ("the volume, the value, and the hazardous character of a good may affect the jurisdictional inquiry."). LGD sold hundreds of millions of TFT-LCD panels directly and indirectly through sales channels targeting the United States. From 2001-2004, it sold at least \$600 million worth of panels to Dell. The State itself purchased millions of dollars' worth of electronics equipment from Dell, including LCD monitors – vastly exceeding the 1000 chargers that supported jurisdiction in Invacare. These sales arise precisely from LGD's delivering its "goods in the stream of commerce 'with the expectation that they will be purchased by' [Washington users]." J. McIntyre, 131 S. Ct. at 2792 (Breyer, J., concurring) (citing *World-Wide Volkswagen*, 444 U.S. at 297-98)). These sales show a "'regular . . . flow' or 'regular course of sales'" in Washington. Id. (Breyer, J., concurring)

(ellipsis in original). LGD's conduct, like CTE's in Invacare, properly subjects it to jurisdiction in Washington.

**2. This Action Arises from LGD's Contacts with Washington**

Based on the foregoing, there can be no serious dispute that the State's action arises from LGD's indirect panel shipments into Washington. The State's complaint alleges that Washington consumers and state agencies have been injured by paying supracompetitive prices for LCD products as a result of LGD's price-fixing conduct. CP 22. See Smith, 81 Wn.2d at 724 (action arose from Defendant's contacts because injury occurred in Washington).

**3. The exercise of Personal Jurisdiction over LGD comports with traditional notions of fair play and substantial justice.**

The final inquiry for this court is whether the assertion of jurisdiction would offend traditional notions of fair play and substantial justice. Grange, 110 Wn.2d at 758. In weighing this standard, courts give consideration to (1) the quality, nature, and extent of the activity in the forum state; (2) the relative convenience of the parties; (3) the benefits and protections of the laws of the forum state afforded the respective parties; and (4) the basic equities of the situation. Id. All of these factors overwhelmingly favor the exercise of jurisdiction.

As a threshold matter, by failing to conduct any analysis of this element, the trial court erred as a matter of law. The U.S. Supreme Court has stated that “[considerations of fair play and substantial justice] sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.” Burger King, 471 U.S. at 477. Accordingly, even though the court concluded that LGD’s contacts with Washington—whether its indirect contacts via the stream of commerce, or its direct contacts with Washington—were insufficient, its jurisdiction analysis should not have ceased there. CP 40, 44-45. The trial court should have conducted a reasonableness inquiry.

The quality, nature, and extent of LGD’s activity resoundingly weighs in favor of jurisdiction. As previously described, LGD identified and targeted a growing U.S. market, established a U.S. subsidiary for the sale of its panels to U.S.-based customers boasting an extensive retail infrastructure, and sold hundreds of millions of TFT-LCD panels that were incorporated into countless LCD televisions, monitors, and notebook computers that were intentionally and purposefully marketed throughout the United States during the course of the conspiracy. CP 160-161, 164, 168. Televisions and monitors containing LGD panels were regularly sold at nationwide retail chains such as [REDACTED], who operated at least [REDACTED]

stores in Washington during the conspiracy. CP 193-94. This factor supports jurisdiction.

The benefits and protections the laws of the forum state affords the parties also heavily favors jurisdiction. State law provides a remedy for consumers in this case that does not exist under federal law. The Consumer Protection Act recognizes that Washington's indirect purchasers—the consumers who purchased finished consumer electronics goods containing LGD's price-fixed panels—are entitled to recover their wrongfully-taken funds.<sup>8</sup> However, indirect purchasers in Washington have no private right of action; only the State is authorized to bring this action on behalf of indirect-purchaser consumers. RCW 19.86.080(3); Blewett v. Abbott Labs., 86 Wn. App. 782, 790, 938 P.2d 842 (1997).<sup>9</sup> Thus, without the current enforcement action, consumers in Washington are wholly denied the opportunity to obtain relief for LGD's violations. Upholding LGD's dismissal shuts the door to recovery for these consumers and, more seriously, undermines future consumer enforcement against out-of-state defendants—concerns the Washington Supreme Court

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<sup>8</sup> This entitlement is in stark contrast to the federal antitrust laws, which specifically deny a cause of action to indirect purchasers. Illinois Brick Co. v. Illinois, 431 U.S. 720, 728, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977).

<sup>9</sup> In Blewett, this Court recognized that federal law denies a private cause of action to indirect purchasers and adopted that same limitation in private causes of action under the Consumer Protection Act. 86 Wn. App. at 788-89. However, in reasoning that indirect purchasers should not have a private cause of action, the Court noted that these consumers would not be wholly without a remedy, and specifically recognized that the limitation on indirect purchaser actions did not apply to the Attorney General. Id. at 790.

in Reader's Digest specifically recognized would be anathema. *See Reader's Digest*, 81 Wn.2d at 278 (“If our courts are not open, the state will be without a remedy in any court and the Consumer Protection Act will be rendered useless.”).

Affirming LGD's dismissal would also undermine a critical element of this Court's analysis in Blewett. In Blewett, this Court recognized that federal law denies a private cause of action to indirect purchasers and adopted that same limitation in private causes of action under the Consumer Protection Act. Blewett, 86 Wn. App. at 788-89. In reasoning that indirect purchasers should not have a private cause of action, the Court noted that these consumers would not be wholly without a remedy, and specifically recognized that the limitation on indirect purchaser actions did not apply to the Attorney General. *Id.* at 790. Thus, this Court has previously demonstrated an appreciation for the importance of the State's role as chief enforcer of the Act, and relied on that statutory function in interpreting and shaping its provisions on consumer relief. This Court should be wary of upholding an order that denies an avenue of relief for consumers the court has previously recognized.

The unique remedy that state law affords indirect purchasers in this case outweighs any inconvenience LGD may endure defending in state court. LGD has been a defendant in the Multi District Litigation for

several years now, but has recently settled both the direct and indirect purchaser class actions, and a state court action by the California Attorney General. Final Approval Order, Dkt. No. 4438-3, In re TFT-LCD (Flat Panel Antitrust Litigation), MDL No. 1827 (N.D. Cal) (direct class settlement); Prelim. Approval Order, Dkt. No. 6311, In re TFT-LCD (Flat Panel Antitrust Litigation), MDL No. 1827 (N.D. Cal) (indirect and California AG settlement). It is currently a defendant in Illinois state court in an action brought by the Illinois Attorney General. CP 105. Requiring LGD to answer for its wrongs in this forum does not place a unique burden on it. Cf. Bean Dredging, 744 F.2d at 1085 (5th Cir. 1984) (noting the “magnitude” of Defendant’s operations mitigated burden concerns).

Finally, the basic equities of the situation overwhelmingly weigh in favor of jurisdiction. First, there is no alternative forum for this action. The State has brought an enforcement action under state law to compensate state purchasers, and the federal courts lack subject matter jurisdiction to hear this dispute.<sup>10</sup> Second, the implications of the trial court’s order in this case are as wide-reaching as they are concerning. The trial court’s reasoning erects substantial—perhaps insurmountable—obstacles to a CPA enforcement action that seeks to recover on behalf of

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<sup>10</sup> The Defendants removed this action to federal court shortly after it was filed. It was subsequently remanded back to state court on February 5, 2011. CP 105. The order remanding this case was affirmed by the Ninth circuit on October 3, 2011. Washington v. Chimei Innolux Corp., 659 F.3d 842 (9th Cir. 2011).

indirect purchasers from defendants who manufacture a component of a finished good that is distributed throughout the national U.S market.

Where, as here, a component part has no independent use except as part of a finished consumer good, it is simply unreasonable to expect that component manufacturer to specifically target consumers. This is particularly so given that component manufacturers will almost always be in an indirect relationship with consumers due to the chain of distribution—an inescapable fact of modern economic life.

Even beyond the case of a component manufacturer, sophisticated defendants who manufacture directly into Washington will be incentivized to avoid liability by structuring their business in such a way as to avoid direct activity in Washington. These results are contrary to case law. World-Wide Volkswagen, 444 U.S. at 297 (“[I]f the sale of a product . . . arises from the efforts of the manufacturer to serve *directly or indirectly*, the market for its product in other States . . . it is not unreasonable to subject it to suit . . .”) (emphasis added); accord Grange, 110 Wn.2d at 761. These outcomes undermine the Attorney General’s ability to effectively enforce the Consumer Protection Act, and are contrary to the plain language of the Act, which instructs courts to liberally construe its provisions so that consumers are rightfully given an avenue for recompense when they are harmed by companies that flaunt state law.

RCW 19.86.920 (“[The Act] shall be liberally construed that its beneficial purposes may be served.”). These outcomes are at odds with both the letter and the spirit of Reader’s Digest.

For the foregoing reasons, it is both eminently fair and reasonable to require LGD to answer for its wrongs in this forum.

**C. Attorney Fees are Controlled By Specific Provisions of the Consumer Protection Act, Not The General Attorney Fee Provisions of RCW 4.28.185(5).**

The Consumer Protection Act contains its own provisions for the award of attorney’s fees in enforcement actions by the Attorney General.

RCW 19.86.080(1) states:

*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.*

Over the years, courts have given meaning and contour to this statutory language—interpretations that are flatly absent from the general long-arm statute. In deciding whether fees are warranted under the Consumer Protection Act, a court must consider a host of factors, including (1) the need to curb serious abuses of government power; (2) the necessity of providing fair treatment to vindicated defendants; (3) the strong public interest in continued vigorous State prosecution of consumer protection

violations; (4) the necessity of avoiding hindsight logic in making the determination; (5) the complexity and length of the case; and (6) the necessity of the lawsuit. State v. Black, 100 Wn.2d 793, 806, 676 P.2d 963 (1984).

In contrast, none of these factors appear in the long-arm statute or the cases interpreting it. Nor would they – they are reflect a balance of policy and other considerations unique to state enforcement of the CPA that are wholly absent in disputes involving private parties. Thus, when a court considers awarding attorney’s fees under the long-arm statute, its primary guidelines are only that a prevailing defendant should recover an amount more than necessary to compensate it for the added litigation burden of the long-arm jurisdiction, and that a fee award should not exceed an amount that would have been incurred had the jurisdictional defense been presented as soon as grounds for the defense became available. Scott Fetzer Co. v. Weeks, 114 Wn.2d 109, 120, 786 P.2d 265 (1990).

Accordingly, the trial court’s conclusion that RCW 4.28.185(5) controls for purposes of awarding attorney’s fees in this action is flawed. The trial court erred in failing to recognize that, since the CPA contains its own specific attorney fee provision in RCW 19.86.080(1), *that* provision

alone—and the various cases interpreting that language—controls the award of attorney’s fees.

In light of judicially-created considerations for attorney fee awards under the CPA, it is apparent that, under principles of statutory interpretation, RCW 19.86.080 is a specific statute that supersedes the general provisions of RCW 4.28.185(5) in this case. “Where concurrent general and special acts are in *pari materia* and cannot be harmonized, the latter will prevail, unless it appears that the legislature intended to make the general act controlling.” Wark v. Wash. Nat’l Guard, 87 Wn.2d 864, 867, 557 P.2d 844 (1976). Accordingly, “[u]nder the general-specific rule, a specific statute will prevail over a general statute.” Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council, 165 Wn.2d 275, 309, 197 P.3d 1153 (2008). “To do otherwise would be to pretend to respect the legislature’s intent while ignoring the clearest indication of that intent as codified by the legislature.” Kustura v. Dep’t of Labor and Indus., 169 Wn.2d 81, 88, 233 P.3d 853 (2010).

There is a conflict between the attorney’s fees provision in the long-arm statute and the Consumer Protection Act. Both provisions provide that LGD may make an application for its fees after the trial court dismissed it from the state’s lawsuit, but provide different means to that

end. However, the Consumer Protection Act provision is specific to this case.

The plain language of the general long-arm statute all but confirms this analysis. When a defendant is not served pursuant to the long-arm statute, the statute's attorney-fee provision, by its own terms, does not apply. RCW 4.28.185(5) provides

*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*

RCW 4.28.185(5). LGD was not, as RCW 4.28.185(5) requires, "served outside the state on [a] cause[] of action enumerated [in the long arm statute]," which would include conduct ranging from the commission of a tortious act within the state, or contracting to insure a person located in the state. RCW 4.28.185(1)(a)-(f). Rather, LGD was served pursuant to the Consumer Protection Act's own long-arm statute, which authorizes out-of-state personal service of process on any person "if such person has engaged in conduct in violation of this chapter which has had impact in this state which [the Consumer Protection Act] reprehends." RCW 19.86.160. Such persons are then deemed to have submitted themselves to the jurisdiction of the courts of the state "within the meaning of RCW

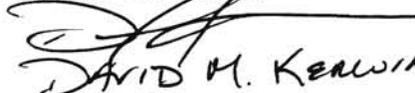
4.28.185"; *i.e.*, the exercise of jurisdiction is permitted to the fullest extent permitted under due process. *Id.* Thus, because the State's cause of action arises under the Consumer Protection Act, and the Act authorized service of process in this action, the long-arm statute's attorney-fee provision is simply not applicable in this case.

## VI. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court (1) reverse the trial court's order granting LGD's motion to dismiss, and to reinstate LGD as defendants in this action; and (2) reverse the trial court's order granting LGD's fee application.

RESPECTFULLY SUBMITTED this 25th day of March, 2013.

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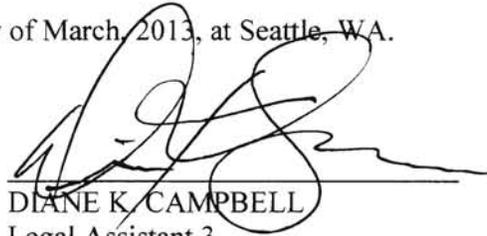
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I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

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