

No. 69318-2-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

THE STATE OF WASHINGTON,

Appellant,

v.

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

Respondents.

Filed
RECEIVED
COURT OF APPEALS
DIVISION ONE
MAY 17 2013 *W*

**BRIEF OF RESPONDENTS LG DISPLAY CO., LTD. AND
LG DISPLAY AMERICA, INC.
[REDACTED]**

Michael K. Vaska, WSBA #15438
Kathryn C. McCoy, WSBA #38210
FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3400
Seattle, Washington 98101-3299

Lee F. Berger (*pro hac vice*)
PAUL HASTINGS LLP
875 15th Street, N.W.
Washington, DC 20005

TABLE OF CONTENTS

	<i>Page</i>
I. INTRODUCTION	1
II. STATEMENT OF THE ISSUES	3
III. STATEMENT OF THE CASE	4
A. THE STATE REPRESENTS CONSUMERS OF FINISHED PRODUCTS INCORPORATING LCD PANELS.	4
B. LG DISPLAY KOREA’S SPORADIC CONTACT WITH WASHINGTON STATE DID NOT GIVE RISE TO THE STATE’S PRICE-FIXING CLAIM.	5
C. LG DISPLAY AMERICA IS A CALIFORNIA COMPANY WHOSE LIMITED WASHINGTON CONTACTS DID NOT GIVE RISE TO THE STATE’S CLAIMS.	6
D. THE TRIAL COURT CORRECTLY RULED THAT LG DISPLAY LACKED THE PURPOSEFUL CONTACTS NECESSARY TO OVERCOME DUE PROCESS LIMITATIONS ON PERSONAL JURISDICTION.	8
E. FOLLOWING DISMISSAL, LG DISPLAY KOREA AND LG DISPLAY AMERICA WERE GRANTED ATTORNEYS’ FEES AND COSTS “IN CONCEPT.”	9
IV. STANDARD OF REVIEW	9
V. ARGUMENT	10
A. THE DUE PROCESS CLAUSE DOES NOT ALLOW PERSONAL JURISDICTION OVER EITHER LG DISPLAY KOREA OR LG DISPLAY AMERICA.	11
1. Neither LG Display Company Purposefully Acted in Washington.	14
2. The State Has Not Met the “Relatedness” Requirement Under Washington’s Personal Jurisdiction Analysis.....	16

3.	The State’s “Stream of Commerce” Theory Violates the Due Process Clause.	18
a.	In the Thirty-Three Years Since <u>World-Wide Volkswagen</u> , No Washington Court Has Asserted Jurisdiction Based Solely on the Stream of Commerce.	19
b.	The United States Supreme Court in <u>J. McIntyre</u> Forecloses the State’s “Stream of Commerce” Theory of Personal Jurisdiction.	23
c.	The Trial Court Correctly Identified <u>J. McIntyre</u> as Binding Authority.	25
d.	Washington Law Must Be Interpreted Consistently with United States Supreme Court Decisions, Including <u>J. McIntyre</u>	27
e.	Other Jurisdictions Agree that <u>J. McIntyre</u> Rejects a Broad “Stream of Commerce” Theory.	28
4.	LG Display Korea’s Contract With Dell Does Not Constitute Purposeful Availment.	31
5.	Other Jurisdictions Have Held That Participation in the Stream of Commerce Alone Is Insufficient to Establish Jurisdiction in a Price-Fixing Case.	32
B.	THE COURT WAS NOT REQUIRED TO EVALUATE FAIR PLAY AND SUBSTANTIAL JUSTICE BECAUSE LG DISPLAY HAS INSUFFICIENT CONTACTS WITH WASHINGTON.	35
a.	Fairness and Justice Also Dictate Dismissal of LG Display Korea and LG Display America.	36
C.	LG DISPLAY KOREA AND LG DISPLAY AMERICA ARE ENTITLED TO REASONABLE ATTORNEYS FEES BOTH AT THE TRIAL COURT AND ON APPEAL.	39

	<u>Page</u>
1. The Trial Court Properly Awarded LG Display Attorneys' Fees And Costs Under Washington's General Long-Arm Statute.	40
2. Washington's CPA Also Provides Authority For An Award of Attorneys' Fees to LG Display Korea and LG Display America.	42
3. The LG Display Companies' Fee Requests Are Reasonable Under Both RCW 4.28.185(5) and RCW 19.86.080(1).	44
4. The LG Display Companies Are Entitled To Fees And Costs Associated With This Appeal Under RAP 18.1.	45
VI. CONCLUSION	46

TABLE OF AUTHORITIES

CASES	Page(s)
<u>Abel v. Montgomery Ward Co., Inc.</u> , 798 F. Supp. 322 (E.D. Va. 1992)	32
<u>Asahi Metal Industry Co. v. Superior Court</u> , 480 U.S. 102, 107 S.Ct. 1026 (1987)	passim
<u>Blewett v. Abbott Laboratories</u> , 86 Wn. App. 782, 938 P.2d 842 (1997).....	37
<u>Bowers v. Transamerica Title Ins. Co.</u> , 100 Wn.2d 581, 675 P.2d 193 (1983).....	10, 44, 45
<u>Burger King Corp. v. Rudzewicz</u> , 471 U.S. 462, 105 S.Ct. 2174 (1985)	15, 16, 18, 23
<u>Costa v. Wirtgen Int’l GmbH & Co. KG</u> , 5:12-CV-05669-EJD, 2013 WL 1636043 (N.D. Cal. Apr. 16, 2013).....	29
<u>CTVC of Hawaii, Co. Ltd. v. Shinawatra</u> , 82 Wn. App. 699 (Div. 1 1996).....	passim
<u>Davidson v. Hensen</u> , 135 Wn.2d 112, 954 P.2d 1327 (1998).....	25, 26
<u>Dow Chem. Canada ULC v. Superior Court</u> , 202 Cal. App. 4th 170, 134 Cal. Rptr. 3d 597 2011).....	29
<u>Four B Corp. v. Ueno Fine Chemicals Indus., Ltd.</u> , 241 F. Supp. 2d 1258 (D. Kan. 2003).....	32
<u>Frankenfeld v. Crompton Corp.</u> , 2005 S.D. 55, 697 N.W.2d 378 (2005).....	33, 34
<u>Golden Gate Hop Ranch, Inc. v. Veisicol Chem. Corp.</u> , 66 Wn.2d 469 (1965).....	22

	<u>Page</u>
<u>Grange Ins. Ass'n v. State,</u> 110 Wn.2d 752, 757 P.2d 933 (1988).....	passim
<u>Gray v. Bourgette Const., LLC,</u> 160 Wn. App. 334, 249 P.3d 644 (Div. 1, 2011).....	45
<u>Holder v. Haarmann & Reimer Corp.,</u> 779 A.2d 264 (D.C. 2001).....	33
<u>In re Chocolate Confectionary Antitrust Litig.,</u> 602 F. Supp. 2d 538 (M.D. Pa. 2009).....	33
<u>In re Pers. Restraint of Isadore,</u> 151 Wn.2d 294, 88 P.3d 390 (2004).....	25
<u>In re TFT-LCD (Flat Panel) Antitrust Litig.,</u> 267 F.R.D. 291 (N.D. Cal. 2010)	7, 17, 37
<u>Int'l Shoe Co. v. State of Wash.,</u> 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945).....	12
<u>J. McIntyre Mach., Ltd. v. Nicastro,</u> 131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011).....	passim
<u>LaMon v. Butler,</u> 112 Wn.2d 193, 770 P.2d 1027 (1989).....	18
<u>Lorix v. Crompton Corp.,</u> 680 N.W.2d 574 (Minn. Ct. App. 2004).....	32
<u>Mahler v. Szucs,</u> 135 Wn.2d 398, 957 P.2d 632 (1998).....	44
<u>Marks v. United States,</u> 430 U.S. 188, 97 S. Ct. 990 (1977)	25, 26
<u>MBM Fisheries, Inc. v. Bollinger Machine Shop and Shipyard,</u> 60 Wn. App. 414 (Div. 1 1991).....	10, 11, 23, 32
<u>Melhuish v. Crompton Corporation,</u> 2004 WL 5203353 (Me. Super. Feb. 26, 2004).....	34

	<u>Page</u>
<u>N. Ins. Co. of New York v. Constr. Navale Bordeaux,</u> 2011 WL 2682950 (S.D. Fla. July 11, 2011)	29
<u>NV Sumatra Tobacco, — S.W.3d —, 2013 WL 1248285, *27-29,</u> 35 (Tenn. Mar. 28, 2013).....	29
<u>Omstead v. Brader Heaters, Inc.,</u> 5 Wn. App. 285, 487 P.2d 234 (Div. 2 1971).....	22
<u>Ortel v. Bradford Trust Co.,</u> 33 Wn. App 331 (Div. 1 1983).....	15
<u>Oticon, Inc. v. Sebotek Hearing Sys., LLC,</u> 865 F. Supp. 2d 501 (D.N.J. 2011).....	29
<u>Oytan v. David-Oytan,</u> 171 Wn. App. 781, 288 P.3d 57 (2012).....	30, 31
<u>Perry v. Hamilton,</u> 51 Wn. App. 936, 756 P.2d 150 (Div. 3 1988).....	16
<u>Raymond v. Robinson,</u> 104 Wn. App. 627, 15 P.3d 697 (Div. 2 2001).....	12, 14, 31
<u>Reader’s Digest, 81 Wn.2d at 277-78.....</u>	20, 41
<u>Schneider v. Crompton Corp.,</u> 2003 WL 25456311 (D.C. Sup. Ct. Sept. 22, 2003).....	34
<u>Scott Fetzer Co. et al v. Weeks,</u> 114 Wn.2d 109, 786 P.2d 265 (1990).....	42
<u>SeaHAVN, Ltd. v. Glitnir Bank,</u> 154 Wn. App. 550 (Div. 1 2010).....	passim
<u>Shute v. Carnival Cruise Lines,</u> 113 Wn.2d 763, 783 P.2d 78 (1989).....	16
<u>Singleton v. Frost,</u> 108 Wn.2d 723, 742 P.2d 1224 (1987).....	44
<u>Smith v. New York Food,</u> 81 Wn.2d 719, 504 P.2d 782 (1972).....	20, 22

	<u>Page</u>
<u>State v. A.N.W. Seed Corp.</u> , 116 Wn.2d 39, 802 P.2d 1353 (1991).....	42
<u>State v. Black</u> , 100 Wn.2d 793, 676 P.2d 963 (1984).....	42, 43, 44
<u>State v. Hickman</u> , 157 Wn. App. 767, 238 P.3d 1240 (Div. 2 2010) (interpreting a plurality U.S. Supreme Court opinion).....	25
<u>State v. State Credit Ass’n, Inc.</u> , 33 Wn. App. 617, 657 P.2d 327 (Div. 1 1983).....	42
<u>Tyee Const. Co. v. Dulien Steel Products, Inc., of Wash.</u> , 62 Wn.2d 106, 381 P.2d 245 (1963).....	28
<u>Walker v. Bonney-Watson Co.</u> , 64 Wn. App. 27, 823 P.2d 518 (Div 1 1992).....	35
<u>Wilkinson v. Smith</u> , 31 Wn. App. 1, 639 P.2d 768 (1982).....	45
<u>Willemsen v. Invacare Corp.</u> , 352 Or. 191, 282 P.3d 867 (2012) <u>cert. denied</u> , 133 S. Ct. 984 (2013).....	30
<u>Williamson v. Petroleum Helicopters, Inc.</u> , 31 F. Supp. 2d 548 (S.D. Tex. 1998).....	34
<u>World-Wide Volkswagen Corp. v. Woodson</u> , 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980).....	passim

STATUTES

RCW 4.28.185	41
RCW 4.28.185(3)	41
RCW 4.28.185(5)	passim
RCW 4.28.185(5), and the Consumer Protection Act, RCW 19.86.080(1)?.....	passim

	<i>Page</i>
RCW 19.86.080(1)	41, 42, 44, 45
RCW 19.86.160	11, 40, 41

OTHER AUTHORITIES

16 Moore’s Federal Practice (3d Ed.) § 108.42 [5] [b], 108-74	35
RAP 18.1	3, 45
U.S. Const. Amend. XIV, § 1	11
Wash. R. App. P. 18.1(a)	45
Wright & Miller § 1067.4, Volkswagen, Asahi, and Stream of Commerce Theory, 4 Fed. Prac. & Proc. Civ. § 1067.4 (3d ed.)	30

I. INTRODUCTION

The State's appeal seeks to expand personal jurisdiction beyond the limits set by the Due Process Clause of the Fourteenth Amendment. The State's argument would, for the first time, allow the government's power to reach a party on the other side of the world who merely sold component parts for other products into the stream of commerce and had no purposeful contacts with Washington State from which the claim arose.

This "stream of commerce" theory would permit personal jurisdiction over a foreign defendant who allegedly injured consumer-products manufacturers located outside the state because the injury was allegedly "passed on" to Washington consumers by those manufacturers or by retailers to which those manufacturers sold their products. Washington courts have consistently limited personal jurisdiction to parties with purposeful contacts in this state from which the underlying claims arise – facts which the State has not alleged. Jurisdictions that have considered the "stream of commerce" theory in a price-fixing case such as this one have rejected it.

A majority of U.S. Supreme Court justices recently rejected a broad "stream of commerce" theory in J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011). The trial court properly cited to J. McIntyre in holding that "something more" than

putting goods into the stream of commerce was required before personal jurisdiction could be asserted.

In its opening brief, the State does not allege that either LG Display Co., Ltd. (“LG Display Korea”) or LG Display America, Inc. (“LG Display America”) (together, “LG Display”) committed the necessary purposeful acts from which the State’s claims arose. The alleged conspiracies to fix the prices of TFT-LCD panels (“LCD panels”) occurred outside this state. LG Display’s last purposeful act was the sale of LCD panels to consumer-electronics and other manufacturers outside of Washington. The Attorney General alleges these foreign buyers were injured by the price-fixing conspiracy because they paid higher prices for LCD panels. He then alleges that foreign third-party buyers and those buyers’ retail customers “passed on” this injury to Washington consumers. The “pass on” is not a purposeful act by LG Display, but rather an independent action of a third-party manufacturer deciding to incorporate LG Display’s LCD panels into laptops, televisions, and other electronics, and sell those products to third-party retailers, who sell those products into this state.

Thus, the State alleges LCD panels reached Washington consumers only through the unilateral and independent decisions of third-party LCD-product manufacturers and retailers. While LG Display had

sporadic contacts with Washington companies, the State does not allege that these contacts give rise to its price-fixing claims. The trial court's dismissal for lack of personal jurisdiction should be affirmed because LG Display lacked purposeful contacts with Washington State and because the State does not allege the claims arise from any purposeful contacts here. Ultimately, "the stream-of-commerce metaphor cannot supersede either the mandate of the Due Process Clause or the limits on judicial authority that Clause ensures." J. McIntyre, 131 S. Ct. at 2791 (plurality op.).

LG Display Korea and LG Display America also ask the Court to affirm the trial court's award of reasonable attorneys' fees and costs for work related to personal jurisdiction issues. An additional award of attorneys' fees and costs on appeal is also supported under RAP 18.1.

II. STATEMENT OF THE ISSUES

(1) Has the State satisfied its burden of proving personal jurisdiction by (a) proving the necessary purposeful acts in Washington State (b) from which its claims arose when LG Display Korea and LG Display America allegedly injured third-party, foreign manufacturers by selling parts in other jurisdictions and that injury was allegedly "passed on" to Washington consumers because those parts were incorporated by third parties into consumer products in other jurisdictions, distributed into

the global stream of commerce, and eventually sold by third parties to consumers?

(2) Should the trial court's award of attorneys' fees and costs to LG Display Korea and LG Display America for work on personal jurisdiction issues be affirmed because the award is proper under Washington's long-arm statute, RCW 4.28.185(5), and the Consumer Protection Act, RCW 19.86.080(1)?

III. STATEMENT OF THE CASE

A. The State Represents Consumers of Finished Products Incorporating LCD Panels.

The State seeks damages from alleged price-fixing conspiracies between foreign LCD-panel manufacturers.¹ CP 1-24. The State alleges the conspiracy occurred in jurisdictions outside of Washington. *Id.* It claims that the conspiracies injured third-party manufacturers who bought LCD panels in other jurisdictions and built them into televisions, laptops, and other electronic products. *E.g.*, Op. Br. 4-8, 14. The State claims the injury suffered by those manufacturers was passed on to retailers, who in turn passed on their injury to consumers who purchased televisions and laptops in Washington. *Id.*

¹ LG Display Korea and LG Display America pled guilty to price-fixing conspiracy charges in federal court. *See* CP 2.

The State has not alleged that any conspiratorial meetings occurred in Washington, and it has not shown that LG Display Korea or LG Display America conducted significant business here.

B. LG Display Korea’s Sporadic Contact with Washington State Did Not Give Rise to the State’s Price-Fixing Claim.

Respondent LG Display Co., Ltd. is a Korean company with its principal place of business in Seoul. CP 39. LG Display Korea designs, manufactures, and sells LCD panels – the flat glass screens used as components in televisions, monitors, laptops, mobile phones, and other devices. Id. LG Display Korea sells its panels to television, computer, and other electronics manufacturers, as well as to systems integrators, original design manufacturers, and resellers. Id. It does not sell LCD panels to consumers. CP 40.

LG Display Korea does not control where or to whom its purchasers sell their finished products. Once LG Display Korea sells its panels, they may be shipped anywhere in the world to any electronics-manufacturing facility. See CP 150. Then, after incorporation into a television, laptop, or other product, they may be shipped again anywhere in the world for sale to a distributor or retailer.² See id.

² Despite the State’s implication to the contrary, LG Electronics, Inc. and LG Display are separate companies. CP 146, 149. LG Electronics makes consumer electronics and other finished products and was a customer (not

During the alleged conspiracy period, 1998-2006, LG Display Korea *did not make a single sale* to a customer in Washington. CP 40.

Although representatives of LG Display Korea have made sporadic visits to Washington, none of those trips resulted in any sales. CP 41. Most of the trips also occurred after 2006, when the State alleges the conspiracy had ended. See CP 2, ¶ 1, CP 41, ¶¶ 18-21.

LG Display Korea has never had employees residing in Washington, nor was it ever licensed or qualified to do business here. CP 40. It did not advertise its panels for sale here. Id. LG Display Korea does not have a Washington mailing address, telephone listing, or office, and has not filed or been required to file Washington State taxes. Id.

C. LG Display America Is a California Company Whose Limited Washington Contacts Did Not Give Rise to the State's Claims.

Respondent LG Display America is a California company with its principal place of business in San Jose, California. CP 43. Like LG Display Korea, LG Display America does not sell finished products to consumers. Id. Rather, it sells LCD panels to television, laptop, and other manufacturers, systems integrators, original design manufacturers, and resellers. Id.

the largest) of LG Display, buying from LG Display on an arm's length basis. CP 146, 150.

During the relevant period, LG Display America's contacts with Washington were limited. The company sold LCD panels to two customers: one panel to Bell Microproducts, USA ("Bell") for \$148 and 84 panels to General Dynamics Itronix Corporation ("Itronix") for \$23,500.³ CP 44. Neither Bell nor Itronix are end-users of LCD panels. These contacts do not relate to the State's claims for price-fixed panels incorporated into finished products. CP 22, ¶ 113. Claims for direct sales to Bell and Itronix were included in the Direct Purchaser class action in federal district court, which has been settled and dismissed.⁴

LG Display America representatives also made a small number of trips to Washington from 2001 to 2012. CP 45-46. Those trips did not result in any sales. Id.

LG Display America was never licensed or qualified to do business in Washington, and it never advertised here. CP 44. It does not have a mailing address, telephone listing, office, or other facility in the State. Id. It was never required to file Washington State taxes, and none of its employees have ever resided in Washington. CP 44-45.

³ The State's assertion that LG Display America sold \$178,000 worth of panels to Itronix, see Op. Br. 9, is incorrect and unsupported by the record.

⁴ See In re TFT-LCD (Flat Panel) Antitrust Litig., 267 F.R.D. 291 (N.D. Cal. 2010) (order granting in part and denying in part direct purchaser plaintiffs' motion for class certification); D.I. 4438-3 (final order approving Direct Purchaser Plaintiffs' settlement with LG Display).

D. The Trial Court Correctly Ruled that LG Display Lacked the Purposeful Contacts Necessary to Overcome Due Process Limitations on Personal Jurisdiction.

Pointing to their limited contacts with Washington, LG Display Korea and LG Display America moved to dismiss for lack of personal jurisdiction. See CP 25-38. No other defendant filed a jurisdiction motion. Both LG Display companies submitted affidavits challenging jurisdiction and refuting the State’s reliance on a “stream of commerce” theory. See CP 39-46; CP 86-92. After the brief was filed, the State took jurisdictional discovery from LG Display Korea and LG Display America, including discovery related to their contacts with Washington. See CP 108, ¶¶ 3-4,

Citing to the U.S. Supreme Court’s decision in J. McIntyre, Judge Inveen granted LG Display Korea’s and LG Display America’s motion to dismiss. See CP 47-49. Judge Inveen held that due process requires “something more” than participation in the stream of commerce to demonstrate minimum contacts with Washington. CP 48-49. Here, there is “no state related design, advertising, or marketing directed to Washington” and “no showing that the LG Defendants have purposefully availed themselves of the privilege of conducting themselves in Washington.” Id. They have not “delivered their product into the stream of commerce with the expectation that it would be purchased by

Washington users.” CP 49. Under these facts, the trial court ruled that “a finding of specific jurisdiction [would] not satisfy constitutional due process.” *Id.* The State’s case is now continuing against fifteen other defendants in state court, whom the State will likely argue are jointly and severally liable for all damages allegedly resulting from any proven conspiracy, including those attributable to LG Display sales. CP 1-2.

E. Following Dismissal, LG Display Korea and LG Display America Were Granted Attorneys’ Fees and Costs “In Concept.”

The trial court’s dismissal order authorized LG Display to request attorneys’ fees and costs. CP 49. LG Display Korea and LG Display America submitted briefing and affidavits with detailed support for the requested fees. CP 195-226. The trial court granted an award of fees “in concept,” but found that additional documentation supporting the fee request was required. CP 279-281. The parties agreed to stay briefing on the amount of fees to be awarded pending this appeal. The State appeals the fee award as improper under Washington’s long-arm statute, RCW 4.28.185(5). Op. Br. 3.

IV. STANDARD OF REVIEW

The State has the burden of proving that personal jurisdiction over LG Display Korea and LG Display America is proper in Washington. SeaHAVN, Ltd. v. Glitnir Bank, 154 Wn. App. 550, 563 (Div. 1 2010).

At least a prima facie showing is required. MBM Fisheries, Inc. v. Bollinger Machine Shop and Shipyard, 60 Wn. App. 414, 418 (Div. 1 1991).

Because the trial court considered evidence outside of the pleadings, its dismissal for lack of personal jurisdiction is reviewed under the summary judgment standard. CTVC of Hawaii, Co. Ltd. v. Shinawatra, 82 Wn. App. 699, 707-08 (Div. 1 1996). All facts, and reasonable inferences drawn from the facts, are reviewed in the light most favorable to the State as the nonmoving party. Id. at 708. The allegations in the State's Complaint are taken as true. Id.

Like summary judgment, questions of law and the application of undisputed facts to the law are reviewed *de novo*. See MBM Fisheries, 60 Wn. App. at 418. The State does not dispute the jurisdictional facts on which the trial court based its decision. The parties agree that a *de novo* standard applies to this appeal. Op. Br. 12. On the other hand, the trial court's award of fees is reviewed for abuse of discretion. Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 595, 675 P.2d 193 (1983).

V. ARGUMENT

The State has not shown that either LG Display Korea or LG Display America committed any purposeful act in Washington State sufficient to establish the minimum contacts required by the Due Process

Clause. In addition, the State has failed to show facts related to its claims on behalf of Washington purchasers of consumer-electronics products. To avoid the consequence of these twin failures – dismissal for lack of personal jurisdiction – the State argues a “stream of commerce” theory that would subject any person, wherever located, to jurisdiction solely based on her decision to place products into the global stream of commerce with the hope that the product would reach as wide a market as possible. The U.S. Supreme Court rejected this exact theory in its recent decision J. McIntyre. Thus, the trial court correctly concluded that asserting personal jurisdiction over LG Display “does not satisfy constitutional due process.” CP 49.

A. The Due Process Clause Does Not Allow Personal Jurisdiction Over Either LG Display Korea or LG Display America.

Washington’s long-arm statutes, including RCW 19.86.160, “authorize[] courts to exercise jurisdiction over nonresident defendants [only] to the extent permitted by the due process clause of the United States Constitution.” MBM Fisheries, 60 Wn. App. at 423; see also U.S. Const. Amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law.”).

“Due process protects the defendant’s right not to be coerced except by lawful judicial power.” J. McIntyre, 131 S. Ct. at 2785 (plurality

op.). Its purpose is, in part, to “limit[] the power of a state court to render a valid personal judgment against a nonresident defendant” in order to “protect[] the defendant against the burdens of litigating in a distant or inconvenient forum.” World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92, 100 S. Ct. 559, 564, 62 L. Ed. 2d 490 (1980). And it “ensure[s] that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.” Id. at 292. It is meant to guarantee the “fair and orderly administration of the laws.” Int’l Shoe Co. v. State of Wash., 326 U.S. 310, 319, 66 S. Ct. 154, 160, 90 L. Ed. 95 (1945).

In analyzing personal jurisdiction, Washington courts adhere to the restraints of the Due Process Clause by applying a three-part test: “(1) [the defendant] must have purposefully done some act or consummated some transaction in this state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the exercise of jurisdiction must not offend traditional notions of fair play and substantial justice.” Raymond v. Robinson, 104 Wn. App. 627, 637, 15 P.3d 697, 702 (Div. 2 2001).

The State points to no evidence showing that LG Display “purposefully” acted *in Washington* in any way that gave rise to the Attorney General’s price-fixing lawsuit on behalf of consumers who

purchased televisions, laptops, and other electronic products. The State does not allege that the LG Display companies made any agreement to fix prices in Washington. LG Display also did not advertise in Washington, had no office, employees, or any other physical presence here. CP 39-41, 44-45.

The last purposeful act by LG Display – the sale of LCD panels to consumer-electronics manufacturers – occurred in foreign jurisdictions. The State alleges that those foreign consumer-electronics manufacturers were injured when they paid higher-than-competitive prices and that this injury was “passed on,” first when consumer electronics that contained LCD panels were sold to retailers, and then when those products were sold by those third-party retailers to Washington residents. E.g., Op. Br. 4-8, 14. To support its “stream of commerce” theory, the State alleges that LG Display Korea and LG Display America sold LCD panels knowing it was possible that the foreign buyer *might* manufacture a product that could be sold to a distributor or retailer who *might* in turn sell the finished products to Washington consumers. Id.

Judge Inveen correctly ruled that exercising specific jurisdiction over LG Display Korea and LG Display America would violate due

process because merely selling products into the global stream of commerce cannot qualify as a “purposeful act in this state.”⁵

1. Neither LG Display Company Purposefully Acted in Washington.

The purposefulness requirement is the core of the personal jurisdiction analysis. See, e.g., J. McIntyre, 131 S. Ct. at 2783 (plurality op.) (“it is the defendant’s purposeful availment that makes jurisdiction consistent with ‘fair play and substantial justice’ notions. No ‘stream-of-commerce’ doctrine can displace that general rule. . . .”); Grange Ins. Ass’n v. State, 110 Wn.2d 752, 753-54, 757 P.2d 933, 934 (1988); SeaHAVN, 154 Wn. App. at 564-65; CTVC of Hawaii, 82 Wn. App. at 710.

“Due process precludes Washington courts from extending long-arm jurisdiction over an out-of-state defendant unless that defendant has purposefully established minimum contacts here.” Grange, 110 Wn.2d at 753-54. “[T]here must be evidence that [the defendant] purposefully did some act or consummated some transaction *in this state*.” Raymond, 104 Wn. App. at 637 (emphasis added). “Absent this showing, jurisdiction cannot be imposed.” Grange, 110 Wn.2d at 760. Where a defendant’s contacts are “insignificant” and do not establish “continuing obligations”

⁵ The State acknowledges that Washington lacks general jurisdiction over both LG Display Korea and LG Display America. See Op. Br. 13 n.3.

within the forum, Washington courts have consistently found they do not have jurisdiction. SeaHAVN, 154 Wn. App. at 564-65 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475-76, 105 S.Ct. 2174 (1985)).

The State does not identify actual, purposeful contacts with Washington, by either LG Display Korea or LG Display America. If it is not enough for the State to allege that a wrongful act occurring in a foreign jurisdiction caused an injury in Washington state, Ortel v. Bradford Trust Co., 33 Wn. App 331, 337 (Div. 1 1983), then the State's allegations of indirect or "passed on" injury are even further from meeting jurisdictional requirements. The State alleges that the wrongful acts occurred in foreign jurisdictions, that the injury to consumer-electronics manufacturers occurred in foreign jurisdictions, and that this injury was "passed on" to consumers because manufacturers and retailers decided to sell products incorporating LG Display parts in this state. E.g., Op. Br. 4-8, 14.

Here, LG Display's actual contacts with Washington were, at most, occasional and entirely unrelated to the State's claims. See CP 39-46. Between 2001 and 2011, the LG Display companies' contacts with Washington consisted of transshipments passing through the Port of Tacoma en route to European markets, rare employee visits to attend trade shows and unrelated meetings, and a *de minimis* number of direct sales by LG Display America to Washington LCD-product manufactures. Id.

Washington courts consistently hold “that a defendant will not be hailed into [Washington] solely as a result of ‘random’, ‘fortuitous’, or ‘attenuated’ contacts.” SeaHAVN, 154 Wn. App. at 565 (citing Burger King, 471 U.S. at 475). Even “the foreseeability that an injury might occur in another state is not a ‘sufficient bench mark’ for exercising jurisdiction.” Perry v. Hamilton, 51 Wn. App. 936, 941, 756 P.2d 150, 153 (Div. 3 1988) (citing World-Wide Volkswagen, 444 U.S. at 295).

Washington consumers’ alleged purchases of electronics products containing LG Display panels resulted from the independent actions of products manufacturers and retailers. The State does not and cannot identify a single sale of laptops, televisions, or other electronic products from LG Display to Washington consumers. Nor can it show that LG Display directed or controlled any such sales. They did not.

2. The State Has Not Met the “Relatedness” Requirement Under Washington’s Personal Jurisdiction Analysis.

To meet its burden to establish personal jurisdiction, a plaintiff must demonstrate that its injuries would not have occurred “but for” defendant’s purposefully directed acts. Shute v. Carnival Cruise Lines, 113 Wn.2d 763, 772, 783 P.2d 78 (1989). Satisfying this “but for” test provides the necessary “relatedness” of the defendant’s contact with the state to the claimed injury. See SeaHAVN, 154 Wn. App. at 571.

The State has not alleged facts to support the “but for” test. The LG Display companies’ sporadic direct contacts with Washington had no bearing on the State’s alleged injuries. See CP 39-47; Op. Br. 4-8, 14. Their limited panel sales to Washington residents are not part of this case because Bell’s and Itronix’s claims were already resolved in the multi-district litigation and resellers are not included in the State’s alleged *parens patriae* class. None of the other contacts is remotely relevant.⁶

The State’s entire argument to meet its burden to show relatedness encompasses two sentences of the opening brief. It writes:

...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.

See Op. Br. 39 (emphasis added).

The State alleges that its claims arose from acts occurring outside Washington State, the alleged price-fixing agreement. E.g., Op. Br. 4-8, 14. The State admits consumers did not buy LG Display products here, as these electronic parts are not sold to consumers. Id.; see also CP 40, 43. Washington consumers bought what the State describes as “LCD products”—televisions, laptops, and other consumer electronics—not from LG Display but from third parties, consumer-electronics manufactures or

⁶ See In re TFT-LCD, *supra* n. 4.

retailers. E.g., Op. Br. 4-8, 14. The State cannot prove the “but for” test by pointing to the unilateral actions of independent third parties. Washington law and the U.S. Supreme Court direct this Court to focus on the *defendant’s* conduct. See, e.g., J. McIntyre, 131 S. Ct. at 2793 (Breyer, J. concurring); Burger King, 471 U.S. at 475; SeaHAVN, 154 Wn. App. at 571 (the “but for” test looks only at the “defendant’s acts in the forum state”).

The trial court correctly found that neither LG Display Korea nor LG Display America had sufficient minimum contacts with Washington. Thus the trial court’s judgment may also be affirmed under the second prong of the specific jurisdiction inquiry, requiring “relatedness.” See LaMon v. Butler, 112 Wn.2d 193, 200–01, 770 P.2d 1027 (1989) (trial court may be affirmed on any ground supported by the record).

3. The State’s “Stream of Commerce” Theory Violates the Due Process Clause.

The Attorney General’s Office concedes that neither LG Display Korea nor LG Display America had actual Washington contacts from which the State’s claims against LG Display arose. See, e.g., Op. Br. 4-8, 14. Because it cannot meet the traditional test, the State argues that LG Display’s placement of electronic component parts into the global stream of commerce should satisfy the Due Process Clause’s “purposeful

availment” requirement. E.g., Op. Br. 14, 16. The State’s “stream of commerce” theory is not supported by Washington decisions and was rejected by the U. S. Supreme Court in J. McIntyre. See 131 S. Ct. at 2788 (plurality op.); 2791-93 (Breyer, J. concurring).

a. In the Thirty-Three Years Since World-Wide Volkswagen, No Washington Court Has Asserted Jurisdiction Based Solely on the Stream of Commerce.

The State principally relies on World-Wide Volkswagen, 444 U.S. 286, and claims the decision supports a broad reading of the “stream of commerce” theory. World-Wide Volkswagen does no such thing. It supports affirming the judgment.

World-Wide Volkswagen rejects the claim that a transitory product (there a car) subjects its manufacturer or seller to jurisdiction anywhere the product goes. Id. at 296. The Court refused to embrace a rule where “[e]very seller of chattels would in effect appoint the chattel his agent for service of process.” Id. The Court made clear it is not enough that it is foreseeable the product might end up in a given forum. Id. at 298. Thus, even though it was foreseeable a car sold in one state (New York) might travel to another (Oklahoma), there was no jurisdiction, because the defendant had no “conduct and connection” with the forum. Id. at 297. A third party took the car to Oklahoma, not the seller, and the “unilateral

activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.”
Id. at 298.

As in World-Wide Volkswagen, the products sold by LG Display end up in Washington because of the acts of third parties. As a component-part manufacturer, LG Display has no say over where the television, laptop, or other consumer-electronics manufacturers or distributors sell their products.

In the three decades since World-Wide Volkswagen, no Washington appellate court has asserted personal jurisdiction based solely on the placement of products into the stream of commerce, even with the intent to serve the widest market possible. Washington courts have consistently required something more – a purposeful act directed at the state. E.g., Grange, 110 Wn.2d at 760 (no jurisdiction); Smith v. New York Food, 81 Wn.2d 719, 723, 504 P.2d 782 (1972) (manufacturers advertised in trade magazines, mailed literature to, and communicated by telephone and telegraph with Washington customers); Reader’s Digest, 81 Wn.2d at 277-78 (sweepstakes promotions mailed directly to Washington consumers).

The State incorrectly suggests that Grange supports a “stream of commerce” exception to the purposeful-contacts requirement. It does not.

In Grange, the Court held there was no jurisdiction even where the defendant actually *knew* that the products were being sold from Idaho to Washington consumers. Grange, 110 Wn.2d at 755 (“Each certificate also indicated that the destination address for the cattle was that of a Washington buyer.”). Here, the State does not allege LG Display knew where its products would end up, only that it was foreseeable LG Display panels would be incorporated into consumer products which *might* be sold in Washington. E.g., Op. Br. 4-8, 14.

Grange also rejected the argument that the purposefulness element need not be shown when there is a “commission of a tortuous act within this state.” 110 Wn.2d at 759. Noting many of the Washington cases that seemed to eliminate this element “were decided at a time when the United States Supreme Court had not clearly established that the purposeful nature of minimum contacts is a separate requirement,” the Grange court held “there is no longer any doubt that a party asserting long-arm jurisdiction must show ‘purposefulness’ as part of the first due process element.” Id. at 759-60.

The Grange court did discuss the “stream of commerce,” in passing dicta. Id. at 761. Even there, however, the court confirmed the “purposefulness” requirement, clarifying that “a retailer’s mere placing of a product into interstate commerce is not by itself a sufficient basis to infer

the existence of purposeful minimum contacts,” id. at 762, citing, Smith v. York Food Mach. Co., 81 Wa.2d at 723, where the out-of-state manufacturer met the “purposefulness” requirement by advertising its machines in this state and had other direct contacts with customers from which the claim allegedly arose.

Finally, Grange predates the U.S. Supreme Court’s recent “stream of commerce” decision, J. McIntyre. 131 S. Ct. 2780. As explained below, J. McIntyre confirms the holding in Grange, that the “purposefulness” element must be met in each case, concluding it is *not* enough that the defendant could have predicted its goods would reach the forum State. Id. at 2788 (plurality op.); 2791-93 (Breyer, J. concurring). The defendant must still have taken some action to avail itself of the benefit of the forum. Id.

For the same reason, the State’s analysis of the outdated Omstead v. Brader Heaters, Inc. decision is unpersuasive.⁷ 5 Wn. App. 258, 487 P.2d 234, 242 (Div. 2 1971), opinion adopted, 80 Wn.2d 720, 497 P.2d 1310 (1972). The Omstead court found jurisdiction in a products-liability case because “it was foreseeable to [defendant] that the [product]

⁷ Many of the cases cited by the State are outdated. Grange, 110 Wn.2d at 759 (pointing out that early Washington cases – like Golden Gate Hop Ranch, Inc. v. Veisicol Chem. Corp., 66 Wn.2d 469 (1965) and Smith v. York Food Mach. Co., 81 Wn.2d 719 (1972) – were not in accord with modern U.S. Supreme Court jurisprudence).

would be used in the United States and, therefore, in any of the states.”
Omstead, 5 Wn. App. at 269.

Numerous *subsequent* U.S. Supreme Court decisions, however, have explicitly stated that “foreseeability alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause.” World-Wide Volkswagen, 444 U.S. at 295 (quotation omitted); *see also* Burger King, 471 U.S. at 474 (same). Omstead’s holding is no longer good law.

b. The United States Supreme Court in J. McIntyre Forecloses the State’s “Stream of Commerce” Theory of Personal Jurisdiction.

Judge Inveen correctly relied on the U.S. Supreme Court’s decision in J. McIntyre in finding no personal jurisdiction over LG Display. The Due Process Clause of the U.S. Constitution establishes the outer limits of Washington State court jurisdiction. *See* MBM Fisheries, 60 Wn. App. at 423. The U.S. Supreme Court recently addressed whether “stream of commerce” theories may satisfy due process for purposes of asserting personal jurisdiction. J. McIntyre, 131 S. Ct. 2780. A majority of justices in J. McIntyre explicitly rejected the argument that a defendant satisfies purposeful availment in a specific forum by placing its product into the stream of commerce with the hope that it reaches the widest

market possible. See 131 S. Ct. at 2788 (plurality op.); 2791-93 (Breyer, J. concurring).

The J. McIntyre plurality explained that, “as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.” Id. at 2788 (plurality op.); see also 2792 (Breyer, J. concurring). Thus, the State must show a “specific effort” by LG Display “to sell in [Washington].” Id. at 2792 (Breyer, J. concurring). To hold otherwise would be, as the Court noted, to:

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.** 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.’

Id. at 2793 (internal citations omitted; emphasis added).

The State’s claims are based on an alleged injury suffered by out-of-state and foreign consumer-electronics manufacturers that was passed on to retailers, who in turn passed on the injury to Washington consumers. E.g., Op. Br. 4-8, 14. The State has neither alleged nor shown that LG Display made specific efforts to sell to or otherwise target Washington consumers through the stream of commerce. The State alleges that LG Display targeted a *national* market with the intent that, by selling LCD

panels to as many consumer-electronics manufacturers as possible, their products reach as many forums as possible. E.g., Op. Br. 14. This is exactly the argument rejected by a majority of the Court in J. McIntyre.

c. The Trial Court Correctly Identified J. McIntyre as Binding Authority.

Plurality decisions, like J. McIntyre, are binding when a combination of opinions form a cohesive majority holding. Marks v. United States, 430 U.S. 188, 193, 97 S. Ct. 990 (1977); Davidson v. Hensen, 135 Wn.2d 112, 128, 954 P.2d 1327 (1998) (applying Marks). The “Marks rule, does not require [courts] to determine a single opinion which a majority joined, but rather [to] 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 (Div. 2 2010) (internal citations omitted) (interpreting a plurality U.S. Supreme Court opinion). In other words, “[w]here there is no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds.” Davidson, 135 Wn.2d at 128.

As such, the State incorrectly relies on In re Isadore in an effort to dodge J. McIntyre’s holding. See Op. Br. 35-36 (citing In re Pers. Restraint of Isadore, 151 Wn.2d 294, 302, 88 P.3d 390, 394 (2004)). In re Isadore

addresses treatment of Washington plurality decisions, not those of the U.S. Supreme Court, and is not applicable in light of Marks and Davidson.

In J. McIntyre, a two-member concurrence, authored by Justice Breyer, joined a four-member plurality in rejecting the broad “stream of commerce” theory relied upon by the New Jersey Supreme Court – the same theory the State has argued here. See 131 S. Ct. at 2788 (plurality op.); 2791-93 (Breyer, J. concurring). Six justices agreed that the plaintiff had “shown no specific effort by the [defendant] to sell in [the forum]” despite having demonstrated that “the [defendant] permitted, indeed wanted, its independent American Distributor to sell its machines to anyone in America willing to buy them.” J. McIntyre, 131 S. Ct. at 2791 (Breyer, J. concurring); see also 2788 (plurality op.).

Under the narrowest holding of J. McIntyre, simply placing a product into the stream of commerce and targeting the general U.S. market does not establish the forum contact required to satisfy due process. The trial court’s ruling that “something more” is required to assert personal jurisdiction over LG Display Korea and LG Display America is supported by J. McIntyre and by Washington law.

d. Washington Law Must Be Interpreted Consistently with United States Supreme Court Decisions, Including J. McIntyre.

Under J. McIntyre, a pure “stream of commerce” theory is not enough to subject a defendant to personal jurisdiction. See 131 S. Ct. at 2788 (plurality op.); 2791-93 (Breyer, J. concurring). J. McIntyre clarified the holding in Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 107 S.Ct. 1026 (1987), which Washington had previously found ambiguous. 131 S. Ct. at 2791; see also Grange, 110 Wn.2d at 761 (noting the ambiguity in Asahi).

In Asahi, the Court was faced with facts similar to those alleged here. The defendant, Asahi, was a component manufacturer that made tire valve assemblies, which ended up in tires sold to California. Asahi, 480 U.S. at 106. In determining that Asahi had insufficient contacts with California to confer jurisdiction, Justice O’Connor wrote for a plurality that a defendant’s “awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.” Id. at 112. “Additional conduct” was required, which the plaintiff had failed to show. Id.

In Asahi, as here, there was no evidence the defendant had “design[ed] the product for the market in the forum State, advertis[ed] in

the forum State, establish[ed] channels for providing regular advice to customers in the forum State, or market[ed] the product through a distributor who [] agreed to serve as the sales agent in the forum State.”
Id.

J. McIntyre applies a similar rule. The Court rejected New Jersey’s broad “stream of commerce” theory as there was no showing of the defendant’s state-related design, advertising, or marketing – the same standard the trial court applied in finding LG Display was not subject to jurisdiction. J. McIntyre, 131 S. Ct. at 2792 (Breyer, J. concurring).

Although Washington has not addressed J. McIntyre in a published decision, Washington law should continue to be interpreted consistent with binding U.S. Supreme Court precedent, including J. McIntyre’s holding. E.g., Tyee Const. Co. v. Dulien Steel Products, Inc., of Wash., 62 Wn.2d 106, 109, 381 P.2d 245, 247 (1963). As explained above, no Washington case following World-Wide Volkswagen has actually asserted personal jurisdiction based on a “stream of commerce” theory alone.

e. Other Jurisdictions Agree that J. McIntyre Rejects a Broad “Stream of Commerce” Theory.

Other courts analyzing J. McIntyre have recognized that the decision clarified constitutional limitations on the “stream of commerce”

theory of personal jurisdiction.⁸ For example, in Dow Chem. Canada ULC v. Superior Court, the California Court of Appeals explained that “the Supreme Court resolved the question in Asahi left unresolved by the competing opinions.” 202 Cal. App. 4th 170, 176, 134 Cal. Rptr. 3d 597, 601 (2011), as modified (Dec. 21, 2011), review denied (Apr. 18, 2012), cert. denied, 133 S. Ct. 427, 184 L. Ed. 2d 258 (2012). It held J. McIntyre requires plaintiffs to show that a defendant engaged in additional forum-directed conduct before personal jurisdiction may be asserted. Id. at 179.

Wright & Miller note that under J. McIntyre, “it appears that the Court is moving steadily towards a more restrictive test for the constitutional limits of personal jurisdiction, requiring purposeful direction toward the forum state by each and every party before the court.” See

⁸ See, e.g., NV Sumatra Tobacco, — S.W.3d —, 2013 WL 1248285, *27-29, 35 (Tenn. Mar. 28, 2013) (“Beyond the act of placing its United brand cigarettes in the international stream of commerce, NV Sumatra’s targeted behavior at the United States was minimal at most. It had no specific interest in Tennessee. The company’s awareness—largely after the fact—that its cigarettes were being sold in Tennessee fails to evidence purposeful availment of the Tennessee market.”) (awaiting publication); N. Ins. Co. of New York v. Constr. Navale Bordeaux, 2011 WL 2682950, *5 (S.D. Fla. July 11, 2011) (“‘something more’ than merely placing a product into the stream of commerce is required for personal jurisdiction”) (citing J. McIntyre, 131 S. Ct. 2780 (Breyer, J. concurring)); see also Oticon, Inc. v. Sebotek Hearing Sys., LLC, 865 F. Supp. 2d 501, 514 (D.N.J. 2011); Costa v. Wirtgen Int’l GmbH & Co. KG, 5:12-CV-05669-EJD, 2013 WL 1636043 (N.D. Cal. Apr. 16, 2013) (slip op.).

Wright & Miller § 1067.4, Volkswagen, Asahi, and Stream of Commerce Theory, 4 Fed. Prac. & Proc. Civ. § 1067.4 (3d ed.).

The State's reliance on one contrary case, Willemsen v. Invacare Corp., 352 Or. 191, 282 P.3d 867, 875 (2012) cert. denied, 133 S. Ct. 984 (2013), does not change this analysis. Invacare was a personal injury case, in which the Oregon Supreme Court asserted jurisdiction over a foreign manufacturer of wheelchair battery chargers. 352 Or. at 204. The Oregon court noted that the foreign manufacturer supplied almost all of the battery chargers that the defendant distributor sold to Oregon customers. Id. at 196 n.6.

Invacare's reasoning directly conflicts with Grange, which disclaimed those Washington cases that did not require a showing of "purposefulness" to establish jurisdiction in tort cases, 110 Wn.2d at 759-760, and with long-established Washington law that "[i]t is the quality and nature of the defendant's activities which determine if the contact is sufficient, not the number of acts" Oytan v. David-Oytan, 171 Wn. App. 781, 288 P.3d 57, 69 (2012) (quoting CTVC of Hawaii, 82 Wn. App. at 707).

4. LG Display Korea's Contract With Dell Does Not Constitute Purposeful Availment.

In a last attempt to establish jurisdiction, the State points to a contract between LG Display Korea and Texas-based Dell Corporation, claiming that it demonstrates purposeful availment with Washington. See Op. Br. 9-10, 29-34. The State argues that, because [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] s. Op. Br. 30; see also CP 79-80.

LG Display Korea's Dell contract does not support jurisdiction here. *First*, the Dell Agreement is [REDACTED]

[REDACTED] CP 83. [REDACTED]

[REDACTED]. Id. Any claims under the agreement would not be brought in Washington, [REDACTED]

Second, the State does not allege that the contract was negotiated, executed, or carried out in Washington. See Op. Br. 9-10. The agreement does not relate to the State of Washington in any way – the word “Washington” appears nowhere in the agreement. See CP 73-85.

Third, Dell is a manufacturer and retailer based in *Texas*. CP 73. If “the mere execution of a contract with a state resident alone is not sufficient to fulfill the ‘purposeful act’ requirement,” Raymond, 104 Wn.

App. at 638, the execution of a contract with a foreign company is “insufficient to establish purposeful interjection into the forum,” even if “the subject of the contract might be used in Washington” or “might cause damage” here. MBM Fisheries, 60 Wn. App. at 424.

Finally, the authority cited by the State, Abel v. Montgomery Ward Co., Inc., 798 F. Supp. 322 (E.D. Va. 1992), considered facts in which the manufacturer had numerous purposeful contacts from which the claims arose – facts not alleged here. See Op. Br. 30. The defendant had a *direct relationship* to the forum through the issuance of its own instruction manual and third-party warranties, which were distributed to consumers, “thereby establishing ‘continuing obligations’ between itself and such consumers.” Id.

5. Other Jurisdictions Have Held That Participation in the Stream of Commerce Alone Is Insufficient to Establish Jurisdiction in a Price-Fixing Case.

Washington has not addressed personal jurisdiction in the context of a price-fixing case. Many other jurisdictions have. Those courts consistently held that participation in the stream of commerce alone does not support personal jurisdiction. See, e.g., Lorix v. Crompton Corp., 680 N.W.2d 574, 580 (Minn. Ct. App. 2004) (contacts held by defendant’s customers “may not be imputed” to defendant); Four B Corp. v. Ueno Fine Chemicals Indus., Ltd., 241 F. Supp. 2d 1258, 1265-66 (D. Kan. 2003)

(placement of goods into the stream of commerce with an effect on the Kansas economy is insufficient); In re Chocolate Confectionary Antitrust Litig., 602 F. Supp. 2d 538, 560-64 (M.D. Pa. 2009) (defendant’s “status as a fountainhead of chocolate products” – without more – did not establish a prima facie case of personal jurisdiction).

In Holder v. Haarmann & Reimer Corp., for example, a citric acid manufacturer accused of price-fixing was not subject to jurisdiction in the District of Columbia. 779 A.2d 264, 267 (D.C. 2001). Like LCD panels, citric acid is a component that is incorporated into finished products purchased by consumers. See id. The Holder court held that, if the defendant’s product “wound up in the District at all, this was solely the result of ‘the unilateral activity of another party or a third person,’ namely that of [the defendant’s] own customers and other persons or entities further down the chain of distribution.” Id. at 274. The defendant’s contacts with the forum were insufficient to establish jurisdiction. Id.

Similarly, in Frankenfeld v. Crompton Corp., a South Dakota court dismissed the defendants, who sold chemicals to tire manufacturers. 2005 S.D. 55, 697 N.W.2d 378, 387 (2005). “No facts indicated that they expected their chemicals to end up in South Dakota nor had they engaged in any action directed at South Dakota.” Id. The court found that the

is not met, then jurisdiction cannot be maintained here, regardless of the plaintiff's interest in obtaining relief." Id. Because the State failed to show purposeful availment or relatedness, the Court may affirm the trial court's judgment without further analysis. Should the Court reach the "reasonableness" requirement, it too supports affirming the judgment.

a. Fairness and Justice Also Dictate Dismissal of LG Display Korea and LG Display America.

Due process forbids a court from exercising jurisdiction over a defendant if doing so would offend "traditional notions of fair play and substantial justice." Asahi, 480 U.S. at 113. "In making this determination, courts consider the [1] quality, nature, and extent of the defendant's activity in Washington, [2] the relative convenience of the plaintiff and the defendant in maintaining the action here, [3] the benefits and protection of Washington's laws afforded the parties, and [4] the basic equities of the situation." CTVC of Hawaii, 82 Wn. App. at 720. Courts "must also weigh . . . 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." Asahi, 480 U.S. at 113 (citation and internal quotation marks omitted). These factors weigh against jurisdiction in this case.

Under the first factor, the “quality, nature, and extent” of LG Display’s activity in Washington unequivocally favor dismissal, as the State has not shown that LG Display had purposeful contacts from which the State’s claims arose.

As to the second factor, the relative convenience to the parties of litigating in Washington, courts give the unique burdens of defense in a foreign jurisdiction “significant weight.” Asahi, 480 U.S. at 114. Requiring LG Display to litigate in a state where they have no offices, employees, or other resources on its own presents a significant burden. See CP 39-46; see also SeaHAVN, 154 Wn. App. at 571 (requiring an Icelandic bank “to defend the lawsuit in Washington would create a substantial burden on [the defendant]”).

The third factor analyzes the benefits and protections of the State’s laws. Here, Washington direct purchasers recovered for their claims against LG Display in the Direct Purchaser class action litigated in federal court.¹⁰ See In re TFT-LCD (Flat Panel) Antitrust Litig., 267 F.R.D. 291

¹⁰ Blewett v. Abbott Laboratories, relied upon by the State, does not undermine this argument. See Op. Br. 41-42; Blewett, 86 Wn. App. 782, 938 P.2d 842, 846 (1997). In Blewett, the court determined that there was no “compelling reason” to reject the Illinois Brick rule barring private consumers’ indirect purchaser claims. Id. at 788-89. The court explained that direct purchasers could still maintain suit against price-fixing defendants, noting that “the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party ‘injured in his

(N.D. Cal. 2010). The State’s “strong interest in protecting its citizens,” on its own, is an insufficient basis for finding jurisdiction. J. McIntyre, 131 S. Ct. at 2791 (plurality op.).

The “basic equities” of the situation similarly weigh against the exercise of jurisdiction. Where litigation relates to conduct that took place outside Washington and only incidental contacts occurred in Washington, “the basic equities of the situation dictate[] that Washington should not exercise jurisdiction.” CTVC of Hawaii, 82 Wn. App. at 721. Here, the State alleges conduct that occurred primarily in Asia and has provided no direct, related link to Washington residents.

Furthermore, there is little risk that dismissing the LG Display companies from this case will limit the State’s recovery at trial. Fifteen defendants remain in the case, and the State will likely argue that each defendant is jointly and severally liable for all of its alleged injuries. See CP 2, 23.

business or property[.]” Id. at 790 (internal citation omitted). The court held that “an indirect purchaser has not suffered cognizable injury under the CPA.” Id. Accordingly, without reservation, the court held that private indirect purchaser suits were barred under Washington law. Id. The State may object to Washington’s policy decision not to repeal Illinois Brick and create a private right of action, but that is a policy argument best directed to the legislature. It is not Washington’s current law, and it does not address whether LG Display purposefully availed itself of the Washington forum.

The final factor is the interstate judicial system's interest in obtaining the most efficient resolution of controversies. A national-contacts test ultimately subjects small companies to jurisdiction in far-off places. As J. McIntyre noted, “[i]f foreseeability were the controlling criterion, the farmer could be sued in Alaska or any number of other States’ courts without ever leaving town.” 131 S. Ct. at 2790 (plurality op.).

Finding jurisdiction here would establish an acceptable practice for other sovereigns to exercise jurisdiction over Washington-based companies—Wenatchee Apple Growers, Tacoma Glass Blowers, or Seattle-area software and aerospace companies—anywhere in the world their products are eventually sold or resold. Washington law and U.S. Supreme Court precedent limit the “stream of commerce” theory under the Due Process Clause to avoid the exercise of jurisdiction under these circumstances. The trial court’s order should be affirmed.

C. LG Display Korea and LG Display America Are Entitled to Reasonable Attorneys Fees Both at the Trial Court and on Appeal.

The trial court, using its broad discretion, properly awarded LG Display Korea and LG Display America attorneys’ fees and costs under Washington’s long-arm statute, RCW 4.28.185(5). Attorneys’ fees are

also appropriate under Washington's Consumer Protection Act ("CPA"), RCW 19.86.160.

An award of attorneys' fees serves at least three purposes: (a) to compensate LG Display for being forced to litigate in a foreign jurisdiction; (b) to vindicate them as the prevailing parties; and (c) to deter the State from abusing its immense prosecutorial power.

The fees requested by LG Display are reasonable in light of the complexity of the case and quality of the work. LG Display Korea and LG Display America, therefore, request that the trial court's award of attorneys' fees "in concept" be affirmed and an additional award of attorneys' fees and costs be made for this appeal. See CP 279-281.

1. The Trial Court Properly Awarded LG Display Attorneys' Fees And Costs Under Washington's General Long-Arm Statute.

Washington's general long-arm statute provides for reasonable attorneys' fees where, as here, defendants obtain dismissal for lack of personal jurisdiction. RCW 4.28.185(5). The State's claim against LG Display was brought under RCW 19.86.160, the long-arm provision of the Washington CPA.

These two long-arm provisions are expressly integrated. RCW 19.86.160 states that out-of-state defendants served under the CPA are "deemed to have thereby submitted themselves to the jurisdiction of

the courts of this state within the meaning of RCW 4.28.185.” Washington case law and commentary have explained that in “analyzing the proper application of [RCW 19.86.160], the court has used the same methods and precedents as it uses in applying [RCW 4.28.185].” 14 Wash. Prac. § 4:24; see also Reader’s Digest, 81 Wn.2d at 277 (analyzing personal jurisdiction asserted under the CPA by using case law interpreting RCW 4.28.185).

For purposes of applying RCW 4.28.185, then, a violation of the CPA should be considered a cause of action enumerated under that statute. This is because “[o]nly causes of action arising from acts enumerated [in RCW 4.28.185] may be asserted against a defendant in an action in which jurisdiction over him or her is based upon this section.” RCW 4.28.185(3). The State’s arguments that, under principles of statutory interpretation, the specific CPA fee provision trumps a more “general” long-arm fee provision should fail. See Op. Br. 47. The trial court’s award was, therefore, proper under RCW 4.28.185(5) because the State unreasonably hailed LG Display Korea and LG Display America into Washington court.

The trial court’s award of fees under RCW 4.28.185(5) is further supported by the unique purposes served by each statute. RCW 19.86.080(1) serves, in part, to curtail governmental abuses of

discretion and prosecutorial power. State v. Black, 100 Wn.2d 793, 806, 676 P.2d 963 (1984). The general long-arm statute specifically compensates foreign defendants who are unreasonably hailed into Washington courts. See Scott Fetzer Co. et al v. Weeks, 114 Wn.2d 109, 120, 786 P.2d 265 (1990).

2. Washington’s CPA Also Provides Authority For An Award of Attorneys’ Fees to LG Display Korea and LG Display America.

RCW 19.86.080(1) provides separate authority for an award of attorneys’ fees to the LG Display companies. See Op. Br. 45. Under RCW 19.86.080(1), “the prevailing party may, in the discretion of the court, recover the costs of said action including a reasonable attorney’s fee.” Determination of the prevailing party is likewise left to the discretion of the trial court. State v. A.N.W. Seed Corp., 116 Wn.2d 39, 50-51, 802 P.2d 1353 (1991).

While fee awards to a prevailing defendant under the CPA should not be automatic, “[t]he public policy served by allowing prevailing defendants to recover litigation expenses from the State is a *fundamental* one.” State v. State Credit Ass’n, Inc., 33 Wn. App. 617, 626, 657 P.2d 327 (Div. 1 1983) (emphasis added).

The Washington Supreme Court thus considers a number of factors when considering a fee award under RCW 19.86.080(1), including: the

need to curb serious abuses of governmental power; the necessity of the lawsuit; the complexity and length of the case; the strong public interest in continued vigorous State prosecution of consumer protection violations; the necessity of avoiding hindsight logic; and the necessity of providing fair treatment to vindicated defendants. Black, 100 Wn.2d at 806.

In Black, for example, the Court awarded fees to the prevailing defendant, in part, to deter the government from exceeding its power to force businesses into litigation. Id. at 805-06. The Court also emphasized the duplicative nature of the lawsuit, the complexity of the case, and the extensive amount of time spent in discovery.¹¹ Id. Like Black, the facts in this case favor an award of fees to the defendant.

First, courts are important gatekeepers in limiting the State’s prosecutorial discretion to haul foreign businesses and individuals into Washington State. Id. The State should not be permitted to assert its “powerful litigation resources” without adequate investigation and proof that jurisdiction is proper. Black, 100 Wn.2d at 805.

Second, this case is duplicative of the pending multidistrict litigation. See In re TFT-LCD (Flat Panel) Antitrust Litig., No. 3:10-cv-03517-SI (N.D. Cal.). The State argues that other courts lack subject

¹¹ State v. Black appears to be the only appellate decision that has applied these factors.

matter jurisdiction over its claims, but Attorneys General from all over the country – from as far away as Florida – have successfully submitted claims in the multidistrict litigation on behalf of their constituents.

Third, both the underlying antitrust claims and the personal jurisdiction analysis are complex. As in Black, this case involved multiple parties, lengthy procedural disputes, and extended time spent on research and analysis regarding pertinent discovery. See Black, 100 Wn.2d at 806.

For these reasons, an award of attorneys’ fees under the CPA is also appropriate to properly vindicate LG Display Korea and LG Display America for prevailing in its motion to dismiss for lack of personal jurisdiction and to deter abuses in prosecutorial discretion.

3. The LG Display Companies’ Fee Requests Are Reasonable Under Both RCW 4.28.185(5) and RCW 19.86.080(1).

Washington courts have broad discretion under both the general long-arm statute and the CPA to award a reasonable amount of attorneys’ fees and costs. Mahler v. Szucs, 135 Wn.2d 398, 435, 957 P.2d 632 (1998). The trial court’s award of fees should “be overturned only for a manifest abuse of discretion.” Bowers, 100 Wn.2d at 595. “An abuse of discretion exists only where no reasonable person would take the position adopted by the trial court.” Singleton v. Frost, 108 Wn.2d 723, 730, 742

P.2d 1224 (1987) (quoting Wilkinson v. Smith, 31 Wn. App. 1, 14, 639 P.2d 768 (1982)).

The trial court did not abuse its discretion in granting LG Display's application for attorneys' fees "in concept." CP 279-281. Although the LG Display companies provided the same type of detailed affidavits that the Washington Supreme Court accepted in Bowers, 100 Wn.2d at 598, the trial court held that additional "documentation" was required "for the court to determine the reasonableness and necessity of the fees requested." CP 206-226, 280. While the LG Display companies do not agree that additional documentation is required, they ask this court to affirm the trial court's order preliminarily granting attorneys' fees and costs. An award of reasonable fees and costs are proper under both RCW 4.28.185(5) and RCW 19.86.080(1).

4. The LG Display Companies Are Entitled To Fees And Costs Associated With This Appeal Under RAP 18.1.

"In general, where a prevailing party is entitled to attorney fees below, they are entitled to attorney fees if they prevail on appeal." Gray v. Bourgette Const., LLC, 160 Wn. App. 334, 345, 249 P.3d 644 (Div. 1, 2011) (internal citations omitted); Wash. R. App. P. 18.1(a). LG Display Korea and LG Display America accordingly request an award of reasonable attorneys' fees and costs associated with this appeal.

VI. CONCLUSION

Respondents LG Display Co., Ltd. and LG Display America, Inc. respectfully request that this Court (1) affirm the trial court's dismissal for lack of personal jurisdiction; (2) affirm the trial court's award of attorneys' fees "in concept"; and (3) grant Respondents' request for reasonable attorneys' fees on appeal.

Dated this 16th day of May, 2013.

FOSTER PEPPER PLLC



Michael K. Vaska, WSBA #15438
Kathryn C. McCoy, WSBA #39210

PAUL HASTINGS, LLP



Lee F. Berger (*pro hac vice*)

*Attorneys for Respondents
LG Display Co., Ltd. and LG
Display America, Inc.*

No. 69318-2-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

THE STATE OF WASHINGTON,

Appellant,

v.

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

Respondents.

**UNPUBLISHED, NON-WASHINGTON AUTHORITY CITED IN
BRIEF OF RESPONDENTS LG DISPLAY CO., LTD. AND LG
DISPLAY AMERICA, INC.**

Michael K. Vaska, WSBA #15438
Kathryn C. McCoy, WSBA #38210
FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3400
Seattle, Washington 98101-3299
*Attorneys for Respondent LG
Display Co. Ltd.*

Jonathan A. Mark, WSBA #38051
Assistant Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
Attorneys for State of Washington

Pursuant to GR 14.1(b), true and correct copies of the unpublished, non-Washington cases cited in Respondents' brief are attached hereto.

Those cases are:

1. Costa v. Wirtgen Int'l GmbH & Co. KG, 5:12-CV-05669-EJD, 2013 WL 1636043 (N.D. Cal. Apr. 16, 2013) (slip op.) (cited on page 29 of Respondents' Brief);

2. In re TFT-LCD (Flat Panel) Antitrust Litig., 267 F.R.D. 291 (N.D. Cal. 2010) (final order D.I. 4438-3) (cited on page 7 n. 4, 17, 37, and 44 of Respondents' Brief);

3. Melhuish v. Crompton Corporation, 2004 WL 5203353 (Me. Super. Feb. 26, 2004) (cited on page 33 of Respondents' Brief);

4. N. Ins. Co. of New York v. Constr. Navale Bordeaux, 2011 WL 2682950 (S.D. Fla. July 11, 2011) (cited on page 29 of Respondents' Brief);

5. NV Sumatra Tobacco, — S.W.3d —, 2013 WL 1248285 (Tenn. Mar. 28, 2013) (cited on page 29 of Respondents' Brief); and

6. Schneider v. Crompton Corp., 2003 WL 25456311 (D.C. Sup. Ct. Sept. 22, 2003) (cited on page 34 of Respondents' Brief).

Dated this 16th day of May, 2013.

FOSTER PEPPER PLLC



Michael K. Vaska, WSBA #15438
Kathryn C. McCoy, WSBA #38210
1111 Third Avenue, Suite 3400
Seattle, WA 98101
Telephone: (206) 447-4400
Fax: (206) 447-9700
Email: vaskm@foster.com,
cardk@foster.com

1

2013 WL 1636043

Only the Westlaw citation is currently available.
United States District Court, N.D. California,
San Jose Division.

Rui COSTA and Kimberly Costa, Plaintiffs,

v.

WIRTGEN INTERNATIONAL GMBH & CO.

KG and Wirtgen America, Inc., Defendants.

No. 5:12-CV-05669-EJD. | April 16, 2013.

Attorneys and Law Firms

J. William Dawson, Belmont, CA, John Charles Stein, The Boccardo Law Firm, San Jose, CA, for Plaintiffs.

Donald Douglas Shureen, McMillan & Shureen LLP, Santa Rosa, CA, Jeffrey William Gunn, Joseph Nicholas Stella, Morris and Stella, Chicago, IL, for Defendants.

Opinion

ORDER DENYING DEFENDANTS' MOTION TO DISMISS AND GRANTING DEFENDANTS' MOTION TO TRANSFER VENUE

EDWARD J. DAVILA, District Judge.

*1 Presently before the court in this product liability action is Defendants Wirtgen International GmbH & Co., KG and Wirtgen America, Inc.'s (collectively, "Defendants") Motion to Dismiss Under Fed.R.Civ.P. 12(b)(3) and Motion to Transfer Venue Under 28 U.S.C. § 1404(a). Dkt. No. 6. Having reviewed the parties' briefing, the court determines that a hearing is not necessary and hereby VACATES the hearing currently set for April 19, 2013. For the foregoing reasons, the court DENIES Defendants' Motion to Dismiss and GRANTS Defendants' Motion to Transfer Venue.

I. Background

On November 5, 2012, Plaintiffs Rui Costa and Kimberly Costa (collectively, "Plaintiffs") filed this action seeking to recover damages they incurred as a result of an accident on August 5, 2011. On that day, Mr. Costa and a coworker were attempting to load Defendants' W2000 Cold Milling Machine, a piece of heavy equipment used to remove and grind pavement, onto a tractor trailer when the machine's rear

crawler tracks turned outside of the profile of the machine. Dkt. No. 1 at ¶ 12. During this maneuver, a crawler track caught Mr. Costa's leg, causing him to be drawn underneath the machine and allowing the machine to roll over his lower extremities. *Id.* Both of Mr. Costa's lower extremities were ultimately amputated. *Id.* The incident occurred on State Highway 395 in the city of Alturas, CA, which is located within Modoc County. *Id.* at ¶ 6. Mr. Costa was airlifted to Oregon, where he received emergency medical care from the date of the accident until September 13, 2011. *Id.* at ¶ 7. Plaintiff then transferred to Santa Clara Valley Medical Center, where he remained for inpatient rehabilitation until November 3, 2011. *Id.*

A year later, Plaintiffs filed this lawsuit alleging common law claims of product liability, breach of implied warranty, negligence, and loss of consortium. Dkt. No. 1. Defendants filed the present Motion to Dismiss and Motion to Transfer Venue on December 20, 2012. Dkt. No. 6. The court now turns to the substance of that motion.

II. Legal Standard

A defendant may raise a Rule 12(b)(3) motion to dismiss for improper venue in its first responsive pleading. Fed.R.Civ.P. 12(b)(3). The venue statute, 28 U.S.C. § 1391, provides that an action may be brought in:

- (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; or
- (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is subject of the action is situated; or
- (3) If there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such an action.

28 U.S.C. § 1391(b).

Once the defendant challenges venue, the plaintiff bears the burden of establishing that venue is proper. *Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 496 (9th Cir.1979). When considering a Rule 12(b)(3) motion to dismiss, the court need not accept the pleadings as true, and "may consider facts outside the pleadings." *Richardson v. Lloyd's of London*, 135 F.3d 1289, 1292 (9th Cir.1998).

However, the court must “draw all reasonable inferences in favor of the nonmoving party and resolve all factual conflicts in favor of the nonmoving party.” *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1138–39 (9th Cir.2003). If the court determines that venue is improper, it may dismiss the case, or, if it is in the interest of justice, transfer the case to any district in which it properly could have been brought. 28 U.S.C. § 1406(a). The decision to transfer rests in the discretion of the court. 28 U.S.C. § 1404(b).

III. Discussion

*2 In order to resolve Defendants' Motion to Dismiss, the court must determine whether venue in the Northern District of California is appropriate under any section of 28 U.S.C. § 1391. Sections 1391(a) (1) and (a)(3) both require a corporate defendant to be subject to personal jurisdiction in the district in order for the chosen venue to be proper. *See* 28 U.S.C. § 1391(c)(2) (stating that for venue purposes, a corporate defendant “shall be deemed to reside ... in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question”). To be subject to personal jurisdiction in any venue, the corporate defendant must either have “continuous and systematic” contacts sufficient to establish general personal jurisdiction, or more limited contacts sufficient to establish specific personal jurisdiction. *See Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir.1990). The parties agree that Defendants are not subject to general personal jurisdiction. Thus, the court must determine only whether specific personal jurisdiction applies.

The Ninth Circuit applies the following three-prong test to determine whether a defendant has sufficient contacts to be susceptible to specific personal jurisdiction:

- (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
- (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and
- (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Brayton Purcell LLP v. Recordon & Recordon, 606 F.3d 1124, 1128 (9th Cir.2010) (citing *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir.2004)).

Here, Defendants have no physical presence in California. Wirtgen International makes all sales to Wirtgen America in Tennessee. Wirtgen America makes sales to its exclusive dealer, Nixon–Negli, a resident of California located in San Joaquin and San Bernadino counties, which fall within the Eastern and Central Districts of California, respectively. *See* 28 U.S.C. §§ 84(b), 84(c)(1). Under very limited circumstances, Wirtgen America has sold machines to an end-user in Santa Clara County, a county falling within the Northern District of California. 28 U.S.C. § 84(a). Despite Plaintiffs' assertion to the contrary, the court finds that Defendants have not “targeted” this forum in a way sufficient to establish the first prong of the sufficient contacts test. *See J. McIntyre Mach. Ltd. v. Nicastro*, — U.S. —, —, 131 S.Ct. 2780, 2788, 180 L.Ed.2d 765 (June 27, 2011).

Even if the sale to end-user were sufficient to establish purposeful availment under the first prong of the test, such availment could not have given rise to the cause of action in this case as required by the second prong—Plaintiffs have not provided any evidence suggesting that this enduser has any relationship to Mr. Costa, his employer, the sale of the machine at issue, or the project at issue. *See Sher*, 911 F.2d at 1361. Additionally, the accident giving rise to Plaintiffs' causes of action occurred in Modoc County, which falls within the Eastern District of California. 28 U.S.C. § 84(b); Dkt. No. 1 at ¶ 6. Thus, even if Defendants' sales to the end-user in Santa Clara County were connected to the incident in this case, the second prong still could not be satisfied because the injury occurred outside of this district. Similarly, the fact that Mr. Costa subsequently received treatment in Santa Clara County, which falls within the Northern District of California, does not satisfy Plaintiffs' burden under the second prong. Such allegations only demonstrate that Plaintiffs incurred damages in the Northern District, not that their claims themselves arise out of it. *See, e.g. Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 807 (9th Cir.2004) (finding that the fact that the defendant's act eventually caused harm to the plaintiff in the forum at issue was insufficient to confer jurisdiction because the defendant's “express aim” was focused on a different jurisdiction).

*3 Having found that Plaintiffs have failed to meet their burden to satisfy both the first and second prongs of the specific jurisdiction test, the court concludes that specific personal jurisdiction cannot be found in this case. Without such jurisdiction, venue cannot be properly found under

Sections (a)(1) or (a)(3) of the venue statute. *See* 28 U.S.C. § 1391.

Under Section (a)(2) of the venue statute, venue can separately be deemed appropriate in the “judicial district in which a substantial part of the events or omissions giving rise to the claim occurred.” 28 U.S.C. § 1391(a)(2). As discussed above, the incident giving rise to Plaintiffs’ claims occurred in Modoc County, in the Eastern District of California. Thus, only Plaintiffs’ damages—not their causes of action—accrued in the Northern District. As such, venue is improper under Section 1391(a)(2).

IV. Conclusion

Having found that venue in this court is improper under each section of 28 U.S.C. § 1391, the court has two options:

(1) dismiss the action; or (2) transfer venue to the Eastern District of California if the interests of justice so require. 28 U.S.C. § 1406(a). Defendants here request that the court do both simultaneously. Such a result is not possible under § 1406(a). The court takes this request as an indication that Defendants do not object to a transfer. It appears likely that, in the event the court dismisses this case, the Plaintiffs would simply refile their claims in the Eastern District of California. Thus, to avoid extra expense and delay for both parties, the court finds that transfer, rather than dismissal, is appropriate here. Accordingly the court DENIES Defendants’ Motion to Dismiss and GRANTS Defendants’ Motion to Transfer. The Clerk shall transfer the file to the United States District Court for the Eastern District of California and close the file.

IT IS SO ORDERED.

End of Document

© 2013 Thomson Reuters. No claim to original U.S. Government Works.

2

267 F.R.D. 291
United States District Court,
N.D. California.

In re TFT-LCD (FLAT PANEL)
ANTITRUST LITIGATION.
This Order Relates to: All Cases.

No. M 07-1827 SI. | MDL
No. 1827. | March 28, 2010.

Synopsis

Background: Direct and indirect purchasers brought antitrust class action against manufacturers, sellers, and distributors of thin film transistor liquid crystal display (TFT-LCD) panels, alleging global price-fixing conspiracy. Direct purchasers moved for class certification and defendants moved to strike certain declarations as untimely.

Holdings: The District Court, Susan Illston, J., held that:

[1] inclusion of unnamed coconspirators in class definition presented ascertainability issues;

[2] numerosity prerequisite for certification was met;

[3] commonality prerequisite for certification was met;

[4] typicality prerequisite was met, despite defendants' challenges on numerous grounds;

[5] adequacy of representation prerequisite for certification was met; and

[6] class action was maintainable on ground that common questions predominated and class action was superior method of resolution.

Plaintiffs' motion granted in part and denied in part; defendants' motion granted.

West Headnotes (40)

[1] Federal Civil Procedure

↔ Evidence; pleadings and supplementary material

Plaintiffs seeking class certification bear burden of showing that each of the four prerequisites of numerosity, commonality, typicality and adequacy and at least one requirement for maintainability have been met. Fed.Rules Civ.Proc.Rule 23(a, b), 28 U.S.C.A.

[2] Federal Civil Procedure

↔ Consideration of merits

In determining propriety of class action, question is not whether plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether requirements of class action rule are met. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[3] Federal Civil Procedure

↔ Antitrust plaintiffs

Class actions play an important role in antitrust enforcement; accordingly, when courts are in doubt as to whether certification is warranted, courts tend to favor class certification.

[4] Federal Civil Procedure

↔ Identification of class; subclasses

While class action rule does not expressly require class to be ascertainable, it has been read to imply this requirement. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

1 Cases that cite this headnote

[5] Federal Civil Procedure

↔ Identification of class; subclasses

Identifiable class exists if its members can be ascertained by reference to objective criteria. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

2 Cases that cite this headnote

[6] Federal Civil Procedure

↔ Identification of class; subclasses

Class definition is sufficient if description of class is definite enough so that it is administratively feasible for court to ascertain whether individual is member. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

3 Cases that cite this headnote

[7] **Federal Civil Procedure**

↔ Antitrust plaintiffs

Inclusion of unnamed coconspirators in class definition presented ascertainability issues in direct purchasers' proposed antitrust class action against manufacturers, sellers, and distributors of thin film transistor liquid crystal display (TFT-LCD) panels, so coconspirators would be limited to those identified in complaint, and plaintiffs had to specifically identify affiliates to enable parties and class members to determine who was in the class. Fed.Rules Civ.Proc.Rule 23(a) 28 U.S.C.A.

1 Cases that cite this headnote

[8] **Federal Civil Procedure**

↔ Antitrust plaintiffs

Numerosity prerequisite for certification of direct purchaser class was met in antitrust action against manufacturers, sellers, and distributors of thin film transistor liquid crystal display (TFT-LCD) panels; plaintiffs asserted that thousands of class members throughout the United States purchased TFT-LCD products during class period, and given nature of product market and international scope of alleged conspiracy, common sense dictated that joinder would be impracticable. Fed.Rules Civ.Proc.Rule 23(a)(1), 28 U.S.C.A.

[9] **Federal Civil Procedure**

↔ Antitrust plaintiffs

Very nature of conspiracy antitrust action compels finding, for class certification purposes, that common questions of law and fact exist. Fed.Rules Civ.Proc.Rule 23(a)(2), 28 U.S.C.A.

[10] **Federal Civil Procedure**

↔ Antitrust plaintiffs

Commonality prerequisite for certification of direct purchaser class was met in antitrust action against manufacturers, sellers, and distributors of thin film transistor liquid crystal display (TFT-LCD) panels; questions of law and fact common to class included (1) whether defendants engaged in contract, combination, and/or conspiracy to fix, raise, maintain, or stabilize prices of TFT-LCD products sold in United States. (2) whether contract, combination, or conspiracy violated Sherman Act, (3) duration of illegal contract, combination, or conspiracy, (4) whether defendants' conduct caused prices of TFT-LCD products sold in United States to be set at artificially high or noncompetitive levels, and (5) whether class members were injured by defendants' conduct and, if so, appropriate classwide measure of damages. Fed.Rules Civ.Proc.Rule 23(a)(2), 28 U.S.C.A.

[11] **Federal Civil Procedure**

↔ Representation of class; typicality

Generally, class representatives must be part of class and possess the same interest and suffer the same injury as class members. Fed.Rules Civ.Proc.Rule 23(a)(3), 28 U.S.C.A.

1 Cases that cite this headnote

[12] **Federal Civil Procedure**

↔ Representation of class; typicality

Questions of class "typicality" focus on whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct. Fed.Rules Civ.Proc.Rule 23(a)(3), 28 U.S.C.A.

[13] **Federal Civil Procedure**

↔ Representation of class; typicality

In evaluating typicality prerequisite for class certification, court should consider whether named plaintiffs' individual circumstances are markedly different or if legal theory upon which claims are based differs from that upon which

claims of other class members will perforce be based. Fed.Rules Civ.Proc.Rule 23(a)(3), 28 U.S.C.A.

[14] **Federal Civil Procedure**

☞ Representation of class; typicality

Under class action rule's permissive standards, representative claims are "typical" if they are reasonably coextensive with those of absent class members; they need not be substantially identical. Fed.Rules Civ.Proc.Rule 23(a)(3), 28 U.S.C.A.

[15] **Federal Civil Procedure**

☞ Antitrust plaintiffs

In cases involving alleged price-fixing conspiracy, representative plaintiff's claim is usually considered typical even though plaintiff followed different purchasing procedures, purchased in different quantities or at different prices, or purchased different mix of products than did members of class. Fed.Rules Civ.Proc.Rule 23(a)(3), 28 U.S.C.A.

[16] **Federal Civil Procedure**

☞ Antitrust plaintiffs

In direct purchasers' antitrust action against manufacturers, sellers, and distributors of thin film transistor liquid crystal display (TFT-LCD) panels, fact that plaintiffs' motion for class certification did not include any specific information about proposed class representatives' purchases did not preclude court from assessing typicality; supplemental declarations which court directed plaintiffs to file provided information sufficient to assess named plaintiffs' typicality, as they provided information about dates of purchases, description of products or panels purchases, and names of defendants from whom products or panels were purchased. Sherman Act, § 1, 15 U.S.C.A. § 1; Fed.Rules Civ.Proc.Rule 23(a)(3), 28 U.S.C.A.

[17] **Federal Civil Procedure**

☞ Antitrust plaintiffs

In direct purchasers' antitrust action against manufacturers, sellers, and distributors of thin film transistor liquid crystal display (TFT-LCD) panels, proposed eleven-year class period did not defeat typicality required for class certification even though class representatives did not purchase panels or products during the first several years of the alleged conspiracy, where plaintiffs had consistently alleged a single, overriding conspiracy spanning the entire class period; however, it was appropriate to shorten class period by three years. Sherman Act, § 1, 15 U.S.C.A. § 1; Fed.Rules Civ.Proc.Rule 23(a)(3), 28 U.S.C.A.

[18] **Federal Civil Procedure**

☞ Antitrust plaintiffs

In direct purchasers' antitrust action against manufacturers, sellers, and distributors of thin film transistor liquid crystal display (TFT-LCD) panels, fact that proposed class representatives did not purchase TFT-LCD panels and products in large volumes did not render them atypical for purposes of class certification motion; at most, defendants had shown that their top 20 customers represented 87.2% of total U.S. panel sales and that various purchasing practices such as nonnegotiable "spot" purchasing of TFT-LCD and individually negotiated purchases of customizable products existed in the market for TFT-LCD products, but panel sales to outside customers accounted for 12.8% of sales and, when aggregated, represented defendants' second-largest source of panel sales. Sherman Act, § 1, 15 U.S.C.A. § 1; Fed.Rules Civ.Proc.Rule 23(a)(3), 28 U.S.C.A.

[19] **Federal Civil Procedure**

☞ Antitrust plaintiffs

With alleged price-fixing conspiracy, typicality requirement for class certification does not mandate that products purchased, methods of purchase, or even damages of named plaintiffs must be the same as those of absent class members. Sherman Act, § 1, 15 U.S.C.A. § 1; Fed.Rules Civ.Proc.Rule 23(a)(3), 28 U.S.C.A.

[20] **Antitrust and Trade Regulation**

↔ Market Power; Market Share

In monopolization cases, proof of market power will necessarily hinge on particular categories of products and distribution channels at issue, in a way that proof of participation in Sherman Act conspiracy does not. Sherman Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

[21] **Federal Civil Procedure**

↔ Antitrust plaintiffs

On motion to certify class of direct purchasers in antitrust action against manufacturers, sellers, and distributors of thin film transistor liquid crystal display (TFT-LCD) panels, because plaintiffs alleged horizontal price-fixing conspiracy the claims of any class representative would necessarily be typical of other purchasers, regardless of purchaser's volume or distribution channel; all claims would substantially hinge on proving that defendants conspired to fix prices for TFT-LCD panels and products. Sherman Act, § 1, 15 U.S.C.A. § 1; Fed.Rules Civ.Proc.Rule 23(a)(3), 28 U.S.C.A.

1 Cases that cite this headnote

[22] **Federal Civil Procedure**

↔ Antitrust plaintiffs

In antitrust action against manufacturers, sellers, and distributors of thin film transistor liquid crystal display (TFT-LCD) panels, inclusion in proposed class representatives of purchasers of both TFT-LCD panels and of TFT-LCD products that incorporated a panel did not defeat typicality required for class certification; however, it was appropriate to limit class of direct purchasers of TFT-LCD products to those who purchased televisions, computer monitors and notebook computers. Sherman Act, § 1, 15 U.S.C.A. § 1; Fed.Rules Civ.Proc.Rule 23(a)(3), 28 U.S.C.A.

2 Cases that cite this headnote

[23] **Federal Civil Procedure**

↔ Antitrust plaintiffs

In antitrust action against manufacturers, sellers, and distributors of thin film transistor liquid crystal display (TFT-LCD) panels, purchasers of finished products did not face unique *Illinois Brick* defenses, thus rendering those plaintiffs atypical for class certification purposes; that case did not address or place limitations on direct purchaser antitrust suits, and its prohibition against suits by indirect purchasers extended only to indirect purchaser plaintiff, not to price-fixed product itself if incorporated into another product. Sherman Act, § 1, 15 U.S.C.A. § 1; Fed.Rules Civ.Proc.Rule 23(a)(3), 28 U.S.C.A.

[24] **Antitrust and Trade Regulation**

↔ Antitrust and Foreign Trade

Foreign Trade Antitrust Improvement Act (FTAIA) excludes from the Sherman Act's reach much anticompetitive conduct that causes only foreign injury. Sherman Act, § 7, 15 U.S.C.A. § 6a.

[25] **Federal Civil Procedure**

↔ Antitrust plaintiffs

Possibility of Foreign Trade Antitrust Improvement Act (FTAIA) defense did not bar action by class of direct purchaser class in antitrust action against manufacturers, sellers, and distributors of thin film transistor liquid crystal display (TFT-LCD) panels based on failure to satisfy typicality prerequisite for certification. Sherman Act, § 6(a), 15 U.S.C.A. § 6(a); Fed.Rules Civ.Proc.Rule 23(a)(3), 28 U.S.C.A.

[26] **Federal Civil Procedure**

↔ Representation of class; typicality

Resolution of two questions determines legal "adequacy of representation" prerequisite for class certification; (1) whether named plaintiffs and their counsel have any conflicts of interest with other class members and (2) whether named plaintiffs and their counsel will prosecute

action vigorously on behalf of class. Fed.Rules Civ.Proc.Rule 23(a)(4), 28 U.S.C.A.

[27] **Federal Civil Procedure**

⇌ Antitrust plaintiffs

Proposed class representatives satisfied adequacy requirement for certification of direct purchaser class in antitrust action against manufacturers, sellers, and distributors of thin film transistor liquid crystal display (TFT-LCD) panels; proposed class representative's industrial application (IA) panel purchases were so unusual they precluded it from representing the class, and nothing in the record suggested that representative was "recruited" by plaintiffs through their expert consultant or that there was any other impropriety connected to representative and consultant. Sherman Act, § 1, 15 U.S.C.A. § 1; Fed.Rules Civ.Proc.Rule 23(a)(4), 28 U.S.C.A.

[28] **Federal Civil Procedure**

⇌ Common interest in subject matter, questions and relief; damages issues

To determine whether "predominance" requirement for maintaining class action is satisfied, court must identify issues involved in case, and determine which are subject to common proof and which are subject to individualized proof. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

2 Cases that cite this headnote

[29] **Federal Civil Procedure**

⇌ Antitrust plaintiffs

There are three key elements of price-fixing conspiracy claim for which plaintiffs seeking class certification must establish the predominance of common issues: (1) whether there was a conspiracy to fix prices in violation of the antitrust laws, (2) the fact of plaintiffs' antitrust injury, or impact of defendants' unlawful activity, and (3) the amount of damages sustained as a result of the antitrust violations. Sherman Act, § 1, 15 U.S.C.A. § 1; Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

[30] **Federal Civil Procedure**

⇌ Antitrust plaintiffs

Length of proposed class period did not defeat predominance requirement for maintaining antitrust class action against manufacturers, sellers, and distributors of thin film transistor liquid crystal display (TFT-LCD) panels where court had shortened class period from eleven to eight years, and complaint did not allege multiple, separate conspiracies as defendants contended. Sherman Act, § 1, 15 U.S.C.A. § 1; Fed.Rules Civ.Proc.Rule 23(b)(3) 28 U.S.C.A.

[31] **Limitation of Actions**

⇌ Concealment of Cause of Action

Plaintiff asserting fraudulent concealment must prove that defendant actively misled him, and that he had neither actual nor constructive knowledge of the facts constituting his claim for relief despite his diligence in trying to discover the pertinent facts.

[32] **Federal Civil Procedure**

⇌ Antitrust plaintiffs

For purposes of motion to certify class of direct purchasers in antitrust action against manufacturers, sellers, and distributors of thin film transistor liquid crystal display (TFT-LCD) panels, common issues would predominate with respect to whether fraudulent concealment tolled statute of limitations, and to extent there were individualized issues they could be adjudicated in a later phase. Sherman Act, § 1, 15 U.S.C.A. § 1; Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

[33] **Federal Civil Procedure**

⇌ Antitrust plaintiffs

Whether price-fixing conspiracy exists is common question that predominates over other issues, for purposes of class certification; proof of alleged conspiracy will focus on defendants' conduct and not on conduct of individual class members. Sherman Act, § 1, 15 U.S.C.A. § 1.

[34] **Antitrust and Trade Regulation**

↔ Injury to Business or Property

“Antitrust impact” is injury that results from violation of antitrust laws. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

[35] **Federal Civil Procedure**

↔ Antitrust plaintiffs

For antitrust injury element of price-fixing claim, plaintiffs seeking to maintain class action must be able to establish, predominantly with generalized evidence, that all or nearly all members of class suffered damage as result of defendants' alleged anticompetitive conduct. Sherman Act, § 1, 15 U.S.C.A. § 1; Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

1 Cases that cite this headnote

[36] **Federal Civil Procedure**

↔ Antitrust plaintiffs

At class certification stage of antitrust suit, court's inquiry is limited to determining whether plaintiffs have made a sufficient showing that evidence they intend to present concerning antitrust impact will be made using generalized proof common to class and that these common issues will predominate. Sherman Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

1 Cases that cite this headnote

[37] **Federal Civil Procedure**

↔ Antitrust plaintiffs

Antitrust plaintiffs seeking to maintain class action on price-fixing claim had advanced plausible methodology to demonstrate that antitrust injury could be proven on a classwide basis. Fed.Rules Civ.Proc. Rule 23(b)(3), 28 U.S.C.A.

[38] **Federal Civil Procedure**

↔ Antitrust plaintiffs

In price-fixing cases, plaintiffs are not required at class certification stage to supply precise damage formula and need only demonstrate proposed method for determining damages that is not so insubstantial as to amount to no method at all. Sherman Act, § 1, 15 U.S.C.A. § 1.

[39] **Federal Civil Procedure**

↔ Antitrust plaintiffs

Antitrust plaintiffs seeking to maintain class action on basis that common issues predominated had met their burden to show that damages could be established using common proof. Sherman Act, § 1, 15 U.S.C.A. § 1; Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

[40] **Federal Civil Procedure**

↔ Superiority, manageability, and need in general

If common questions are found to predominate in antitrust action, then superiority requirement for maintaining class action is generally satisfied. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

1 Cases that cite this headnote

Opinion

***295 ORDER GRANTING IN PART AND DENYING IN PART DIRECT PURCHASER PLAINTIFFS' MOTION FOR CLASS CERTIFICATION; GRANTING DEFENDANTS' MOTION TO STRIKE UNTIMELY DECLARATIONS ALL CASES**

SUSAN ILLSTON, District Judge.

Now before the Court is the direct purchaser plaintiffs' motion for class certification. For the reasons set forth below, the motion is GRANTED in part and DENIED in part. The Court GRANTS defendants' motion to strike certain declarations as untimely.

*296 BACKGROUND

I. The TFT-LCD market

This multidistrict litigation stems from allegations of a global price-fixing conspiracy in the market for Thin Film Transistor Liquid Crystal Display (“TFT-LCD”) panels. TFT-LCD panels are used in a number of products, including but not limited to computer monitors, laptop computers, televisions, and a number of other products. TFT-LCD panels are made by sandwiching liquid crystal compound between two pieces of glass called substrates. The resulting screen contains hundreds of thousands of electrically charged dots, called pixels, which form an image. The panel is then combined with a backlight unit, a driver, and other equipment to create a “module” allowing the panel to operate and be integrated into a television, computer monitor, or other product.

TFT-LCD panels are sold in a variety of sizes, and vary across a number of technical dimensions. For example, larger panels used for televisions require high contrast ratios for vibrant colors and wider viewing angles, while smaller panels used in mobile phones require small size and low weight. TFT-LCD panels have no independent utility, but have value only as components of other products. When a TFT-LCD panel is incorporated into a finished product, the panel is not modified, and remains a discrete, physical object within the finished product. TFT-LCD panels are purchased by many different types and sizes of customers through different manufacturing and distribution channels. The parties dispute the complexity of the distribution chain, with defendants contending that it is multi-layered and heterogeneous, and plaintiffs asserting that the distribution chain is relatively simple and not materially different from the distribution chains in other high-tech industries.

Defendants collectively dominated the market for TFT-LCD panels and products during the relevant time period. Together, defendants controlled between 82% and 95% of the market between 1996 and 2006. During this period, the TFT-LCD industry experienced significant consolidation, including the creation of defendant AU Optronics in 2001 through the merger of Acer Display and Unipac Electronics; the creation of defendant Toshiba Matsushita in 2002; Fujitsu Ltd.'s transfer of its TFT-LCD business to defendant Sharp in 2005; the formation of defendant IPS Alpha in 2005 by defendants Toshiba and Hitachi and named co-conspirator Panasonic; and defendant AU Optronics' acquisition in 2006 of Quanta Display, which resulted in AU Optronics becoming the third-

largest manufacturer of TFT-LCD panels and products. The TFT-LCD industry is also marked by a number of cross-licensing agreements, joint ventures, and other cooperative arrangements which plaintiffs allege facilitate collusion. Second Amended Direct Purchaser Consol. Compl. ¶ 92, Ex. A (diagram illustrating industry licensing arrangements).

Although panel prices vary according to the finished product, the panel is usually a significant cost component in finished TFT-LCD products. Plaintiffs have submitted evidence showing that a panel can constitute as much as 60-80% of the price of computer monitors and other finished products. Necessarily, however, the price-component of a panel in a finished product varies both by product and manufacturer. Defendants cite different estimates, asserting that TFT-LCD panels represent approximately 35 to 40% of the finished television price, 10 to 15% of the price for notebook computers, and 5 to 10% of the price of cell phones. *See* Sorensen Decl. Ex. 13. The complaint¹ alleges that during the class period, 14-inch and 15-inch notebook computers and 15-inch to 17-inch computer monitors were the most popular TFT-LCD products, representing as much as 80% of all TFT-LCDs produced for notebook computers or computer monitors. Second *297 Amended Direct Purchaser Consol. Compl. ¶ 85.

Plaintiffs allege that during the class period, defendants formed a cartel to interfere with the normal cycle of supply and demand for TFT-LCD panels, known in the TFT-LCD industry as the “crystal cycle.” *Id.* ¶ 96. According to plaintiffs, defendants agreed on prices, agreed to limit production, and agreed to manipulate the supply of TFT-LCD panels and products so that prices remained artificially high. Plaintiffs allege that defendants executed their price-fixing scheme by participating in surreptitious group and bilateral meetings, as well as communicating with each other by telephone and e-mail. Compl. ¶¶ 106-134.

Plaintiffs allege that some group meetings were formalized and known as “Crystal Meetings.” *Id.* ¶ 107. These meetings were attended by employees at three levels of defendants' corporations, including “CEO” or “top” meetings, attended by Chief Executive Officers and/or Presidents; “commercial” or “operation” meetings, attended by management-level personnel; and working group meetings attended by lower-level sales and marketing personnel. *Id.* Plaintiffs allege that at these “Crystal Meetings,” as well as in other communications, participants discussed supply and demand and general market conditions for TFT-

LCD products; exchanged fabrication plant and production capacity information; reached agreements on target prices, floor prices, and price ranges for TFT-LCD panels and products; planning consistent public statements on anticipated supply and demand; and disciplined new market entrants and pressured them to abide by agreed-upon pricing and production. Plaintiffs have submitted considerable evidence in the form of detailed meeting reports, e-mails and memoranda documenting at least 58 meetings involving various defendants at which defendants shared price information and agreed on pricing and production levels. *See e.g.*, Fastiff Decl. Ex. 1-12.²

II. The Department of Justice Investigation

In about 2006, the Antitrust Division of the Department of Justice began investigating a number of the defendants' alleged participation in a global conspiracy to fix prices of TFT-LCD panels. The investigation is ongoing. To date, seven corporate defendants in this action have pled guilty to Sherman Act violations relating to suppressing and eliminating competition by fixing the prices of TFT-LCD panels. Those defendants are Sharp Corporation (CR 08-802 SI); LG Display Co. Ltd. and LG Display America, Inc. (CR 08-803 SI), Chunghwa Picture Tubes, Ltd. (CR 08-804 SI); Hitachi Displays Ltd. (CR 09-247 SI); Epson Imaging Devices Corporation (CR 09-854 SI)³; and Chi Mei Optoelectronics Corporation (CR 09-1166 SI).⁴ The DOJ has also confirmed that it has signed a conditional leniency agreement with a company in the TFT-LCD industry; price-fixing cartel participants may qualify for amnesty under the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, P.L. 108-237 ("ACPERA") by providing concrete evidence of a price-fixing agreement. *See* Fastiff Decl. ¶¶ 3-4.

No defendant has, as part of its criminal plea, made or promised any restitutionary payments to entities or individuals injured by the wrongful acts.

Four of the defendants (LG Display Co., Ltd., LG Display America, Inc., Chunghwa Picture Tubes, Ltd., and Chi Mei Optoelectronics Corporation) pled guilty to participating *298 in a conspiracy from 2001 to 2006 among "major TFT-LCD producers, the primary purpose of which was to fix the price of certain TFT-LCD sold in the United States and elsewhere." Three of the defendants (Sharp Corporation, Hitachi Displays Ltd., and Epson Imaging Devices Corporation) pled guilty to participating in price-fixing conspiracies with "major TFT-LCD producers" with

regard to sales of specific types of products to specific entities. For example, Sharp pled guilty to participating in a conspiracy to fix prices of TFT-LCD panels sold to Dell, Inc. for use in computer monitors and laptops from April 2001 to December 1, 2006; participating in a conspiracy to fix prices of TFT-LCD sold to Apple Computer Inc. for use in iPod portable music players from September 2005 to December 2006; and for participating in a conspiracy to fix prices of TFT-LCD sold to Motorola Inc. for use in Razr mobile phones from the fall of 2005 to the middle of 2006. *See* CR 08-802 SI.

The grand jury investigation is continuing.

III. This litigation

The direct purchaser plaintiffs filed this multidistrict antitrust class action on behalf of all persons and entities which purchased TFT-LCD panels or a product containing a TFT-LCD panel in the United States from the named defendants, any subsidiaries or affiliates thereof, or any co-conspirators as identified in the complaint. DP-CC ¶ 1. Plaintiffs allege a horizontal conspiracy among defendants to raise, fix, maintain, and stabilize artificially the price of TFT-LCD panels between January 1, 1996 through December 11, 2006, all in violation of Section 1 of the Sherman Act. The named plaintiffs are eleven⁵ corporations and partnerships located throughout the United States that purchased TFT-LCD panels and products during the proposed eleven-year class period. Plaintiffs have moved for certification of the following class:

All persons and entities who, between January 1, 1996 and December 11, 2006, directly purchased a TFT-LCD Product in the United States from any defendant or any subsidiary or affiliate thereof, or any co-conspirator. Excluded from the Class are defendants, their parent companies, subsidiaries and affiliates, any co-conspirators, all governmental entities, and any judges or justices assigned to hear any aspect of this action.
Compl. ¶ 67.

LEGAL STANDARD

[1] Plaintiffs bear the burden of showing that each of the four requirements of Rule 23(a) and at least one requirement of Rule 23(b) have been met. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186, *amended*, 273 F.3d 1266 (9th Cir.2001). A district court may certify a class only if: "(1) the class is so numerous that joinder of all members is

impracticable; (2) there are questions of law and fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.” Fed.R.Civ.P. 23(a). The court must also find that one of the requirements of Rule 23(b) has been satisfied. Plaintiffs contend the class should be certified pursuant to Rule 23(b)(3), which requires the court to find that “questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed.R.Civ.P. 23(b)(3).

[2] The Ninth Circuit has recently reaffirmed the principle that “ ‘[i]n determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met’ and ‘nothing in either the language or history of Rule 23 ... gives the court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a *299 class action.’ ” *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int’l Union, AFL-CIO v. ConocoPhillips Co.*, 593 F.3d 802, 808 (9th Cir.2010) (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-79, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974)); see also *Staton v. Boeing Co.*, 327 F.3d 938, 954 (9th Cir.2003). “Although certification inquiries such as commonality, typicality, and predominance might properly call for some substantive inquiry, the court may not go so far as to judge the validity of these claims.” *United Steel*, 593 F.3d at 808 (internal quotations omitted); see also *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir.1975). However, although the Court may not require preliminary proof of the claim, it “need not blindly rely on conclusory allegations which parrot Rule 23 requirements. Courts may also consider the legal and factual issues presented by plaintiff’s complaint.” 2 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, 7.26 (4th ed.2005). Sufficient information must be provided to form a reasonable and informed judgment on each of the requirements of Rule 23. See *Blackie*, 524 F.2d at 901 n. 17. In order to safeguard due process interests and the judicial process, the Court conducts an analysis that is as rigorous as necessary to determine whether class certification is appropriate. See *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 961 (9th Cir.2005); see also *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982).

[3] The Supreme Court has long recognized that class actions play an important role in antitrust enforcement. See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979); *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 262, 266, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972). “Accordingly, when courts are in doubt as to whether certification is warranted, courts tend to favor class certification.” *In re Static Random Access (SRAM) Antitrust Litig.*, C 07-1819 CW, 2008 WL 4447592, at *2 (Sept. 29, 2008) (“SRAM”) (citing *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 258 (D.D.C.2002), and *In re Playmobil Antitrust Litig.*, 35 F.Supp.2d 231, 238 (E.D.N.Y.1998)). “Courts have stressed that price-fixing cases are appropriate for class certification because a class-action lawsuit is the most fair and efficient means of enforcing the law where antitrust violations have been continuous, widespread, and detrimental to as yet unidentified consumers.” *In re Rubber Chem. Antitrust Litig.*, 232 F.R.D. 346, 350 (N.D.Cal.2005) (internal quotations and citation omitted).

I. Rule 23(a)

A. Ascertainability

[4] [5] [6] Defendants object that the inclusion of undefined “affiliates” and “co-conspirators” in the class definition renders the proposed class unclear. While Rule 23(a) does not expressly require a class to be ascertainable, courts have read the rule to imply this requirement. *Zapka v. Coca-Cola Co.*, No. 99 CV 8238, 2000 WL 1644539, at *2 (N.D.Ill. Oct.27, 2000) (citing *Alliance to End Repression v. Rochford*, 565 F.2d 975, 977 (7th Cir.1977) (quotation marks omitted)). “An identifiable class exists if its members can be ascertained by reference to objective criteria.” *Zapka*, 2000 WL 1644539, at *3 (declining to certify class where definition referred to state of mind: “all individuals who consumed diet Coke *deceived* by marketing practices ... into *believing* that fountain diet Coke does not contain saccharin”). A class definition is sufficient if the description of the class is “definite enough so that it is administratively feasible for the court to ascertain whether an individual is a member.” *O’Connor v. Boeing North American Inc.*, 184 F.R.D. 311, 319 (C.D.Cal.1998).

[7] The Court agrees that the inclusion of unnamed co-conspirators in the class definition presents ascertainability issues. At the hearing on this matter, plaintiffs agreed to limit the “co-conspirators” to those identified in the complaint, namely Epson Imaging Devices Corporation,

Hydis Technologies Co., Ltd., IPS Alpha Technology, Ltd., Mitsubishi Electronic Corporation, Mitsui & Co., Ltd., NEC LCD Technologies, Ltd., Panasonic Corporation, and Panasonic Corporation of America. Compl. ¶¶ 59-66. The Court further finds that plaintiffs must specifically identify the affiliates to enable the parties *300 and class members to determine who is in the class. Accordingly, the class definition (and class notice) shall specifically identify the co-conspirators and affiliates.

B. Numerosity

[8] Rule 23(a)(1) requires the proposed class to be “so numerous that joinder of all members is impracticable.” Fed.R.Civ.P. 23(a)(1). Plaintiffs assert there are thousands of class members throughout the United States who purchased TFT-LCD products during the class period. Given the nature of the TFT-LCD market and the international scope of the alleged conspiracy, common sense dictates that joinder would be impracticable. Defendants do not contest numerosity, and the Court finds that this requirement is met.

C. Commonality

[9] [10] For a proposed class to be certified, Rule 23(a)(2) requires that there be “questions of law or fact common to the class.” Fed.R.Civ.P. 23(a)(2) “Where an antitrust conspiracy has been alleged, courts have consistently held that ‘the very nature of a conspiracy antitrust action compels a finding that common questions of law and fact exist.’ ” *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 2006 WL 1530166, at *3 (N.D.Cal. June 5, 2006) (“*DRAM*”) (citing *In re Rubber Chem. Antitrust Litig.*, 232 F.R.D. at 351). Plaintiffs assert that questions of law and fact common to the class include (1) whether defendants engaged in a contract, combination, and/or conspiracy to fix, raise, maintain, or stabilize prices of TFT-LCD products sold in the United States; (2) whether the contract, combination, or conspiracy violated Section 1 of the Sherman Act; (3) the duration of the illegal contract, combination, or conspiracy; (4) whether defendants’ conduct caused the prices of TFT-LCD products sold in the United States to be set at artificially high, or non-competitive, levels; and (5) whether class members were injured by defendants’ conduct, and, if so, the appropriate class-wide measure of damages. Defendants concede that there are some common issues of law and fact, but vigorously contend that plaintiffs cannot meet the Rule 23(b)(3) requirement that common issues predominate over individualized questions. The Court finds that plaintiffs have

established that there are common issues, and will address the predominance of those issues *infra*.

D. Typicality

[11] [12] [13] [14] The typicality requirement of Rule 23(a)(3) is fulfilled when “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” Fed.R.Civ.P. 23(a)(3). Generally, the class representatives “must be part of the class and possess the same interest and suffer the same injury as the class members.” *Falcon*, 457 U.S. at 156, 102 S.Ct. 2364. Questions of class typicality focus on “whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir.1992) (quoting *Schwartz v. Harp*, 108 F.R.D. 279, 282 (C.D.Cal.1985)). “In evaluating typicality, the court should consider whether the named plaintiffs’ ‘individual circumstances are markedly different or [... if] the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based.’ ” *DRAM*, 2006 WL 1530166, at *4. “Under the rule’s permissive standards, representative claims are ‘typical’ if they are reasonably co-extensive with those of absent class members; they need not be substantially identical.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir.1998).

[15] “In cases involving an alleged price-fixing conspiracy, the representative plaintiff’s claim is usually considered typical even though the plaintiff followed different purchasing procedures, purchased in different quantities or at different prices, or purchased a different mix of products than did the members of the class.” *DRAM*, 2006 WL 1530166, at *4. Instead, “[t]he overarching scheme is the linchpin of plaintiffs’... complaint, regardless of the product purchased, the market involved or the price ultimately paid. Furthermore, the various products *301 purchased and the different amount of damage sustained by individual plaintiffs do not negate a finding of typicality, provided the cause of those injuries arises from a common wrong.” *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 480 (W.D.Pa.1999).

Defendants challenge the typicality of the proposed class representatives on a number of grounds. First, defendants argue that the Court cannot assess plaintiffs’ typicality because plaintiffs’ motion does not include any specific information about the proposed class representatives’ purchases. Second, defendants challenge the length of the

class period. Third, defendants argue that the absence of large-volume purchasers as class representatives defeats typicality. Fourth, defendants challenge the typicality of including both TFT-LCD panels and finished products within the proposed class. Fifth, defendants argue that *Illinois Brick* defeats typicality for proposed class members who purchased finished products. Finally, defendants argue that members of the proposed class who purchased finished products will face unique jurisdictional defenses under the Foreign Trade Antitrust Improvements Act (“FTAIA”).⁶

1. Information about named plaintiffs

[16] In the initial briefing on this motion, plaintiffs asserted that the claims of these named plaintiffs are typical of the class because the named plaintiffs were injured by defendants' TFT-LCD cartel when they purchased TFT-LCD products from defendants, and their claims are based on the same legal theories: price fixing in violation of 15 U.S.C. § 1. Defendants objected that plaintiffs did not offer any specific information about the named plaintiffs' purchases of TFT-LCD Products, such as the volumes purchased, whether their purchases were individually negotiated, the number of purchases they made, and whether the panels or products they purchased were customized.

After the hearing on this matter, the Court directed plaintiffs to file declarations from the named plaintiffs providing information about the dates of plaintiffs' purchases, a description of the products (or panels) purchased, and the names of the defendants from whom the products or panels were purchased. Plaintiffs submitted these declarations, which state:

Between October 19, 2004 and February 2, 2007, Orion Home Systems LLC purchased at least 57 LCD television sets from LG Electronics USA Inc.⁷

On or around August 17, 2004, Omnis Computer Supplies, Inc. purchased two LG computer monitors from LG Electronics USA Inc. via a faxed order. On or around February 15, 2005, Omnis purchased two Samsung computer monitors from defendant Samsung via a faxed order. These purchases were made pursuant to a program set up by defendant Samsung Electronics America, Inc., according to which Omnis was directed by Samsung to send payment to a third party for processing.

Between 1999 and 2001, Texas Digital Systems, Inc. purchased 1,108 raw TFT-LCD panels from defendant Sharp. The panels were used for incorporation into quick-serve restaurant order confirmation displays.

Between 2001 and 2005, Royal Data Services, Inc. purchased 52 LCD products from defendant Tatum Company of America. From the information supplied, it appears most of these purchases were of computer monitors.

Between 2004 and 2005, Home Technologies Bellevue LLC purchased 21 LCD television sets from defendant Sharp Electronics Corporation.

In 2005, Cargo Inc. purchased 64 LCD monitors from defendant NexGen Mediatech *302 USA, Inc., a wholly-owned and controlled subsidiary of defendant Chi Mei Optoelectronics Corporation.

In 2006, CMP Consulting Services, Inc. purchased four LCD computer notebooks from defendant Toshiba America as a member of its “Preferred Partner Reseller Program.” According to CMP's declaration, the “Preferred Partner Reseller Program” is a tiered incentive program offered to Toshiba's most valued customers.

In 2002 and 2006, A.M. Photo & Imaging Center, Inc. purchased a total of two LCD notebook computers from an American affiliate of defendant Toshiba Corporation.

Between 2001 and 2006, Weber's World Company purchased 1,127 LCD televisions and monitors from defendant Sharp Electronics Corporation, an American affiliate of defendant LG Display Co., Ltd., and an American affiliate of co-conspirator Mitsubishi Electric Corporation.

Between 2001 and 2003, Nathan Muchnick, Inc. purchased 22 LCD television sets from named co-conspirator Panasonic Consumer Electronics Company, a unit of Matsushita Electric Company of America (now known as Panasonic Corporation of North America).

Between 1998 and 2006, Univisions-Crimson Holding, Inc. purchased 9,354 LCD products and 3 LCD panels. Univisions-Crimson Holding, Inc. purchased the products from defendant Sharp Electronics Corporation, and American affiliates of defendants Epson, LG Display, Hitachi, Samsung, and Toshiba. Univisions-Crimson Holding, Inc. also purchased LCD products from American affiliates of

named co-conspirators Mitsubishi, NEC, and Panasonic. Based upon the chart submitted by Univisions-Crimson Holding, Inc., it appears most of the purchases were of projectors, televisions, and monitors. Univisions-Crimson Holding, Inc. also purchased 3 panels from defendant Sharp Electronics Corporation and an American affiliate of named co-conspirator NEC.

The Court finds that the supplemental declarations provide information sufficient to assess the named plaintiffs' typicality. The Court will now turn to defendants' specific challenges to typicality.

2. Class period

[17] Defendants raise a number of related challenges to the proposed 11 year class period. As a matter of typicality, defendants note that the class representatives did not purchase panels or products during the first several years of the alleged conspiracy. According to the information provided by the class representatives, it appears that the earliest purchases are Univisions-Crimson Holding, Inc.'s purchases of monitors in the latter half of 1998.⁸ The earliest purchases of panels were those of Texas Digital Systems in 1999. Defendants argue that the claims of the class representatives are not typical of class members who purchased panels and products between 1996 and 1998-1999. Plaintiffs do not specifically respond to this argument, except to assert that the claims of the named plaintiffs need not be identical to those of the class members.

Defendants also argue that the very length of the proposed class period defeats predominance for a variety of reasons, and they argue that plaintiffs' price-fixing claims are based principally on the "Crystal Meetings" among defendants, which allegedly began in 2001. Defendants contend that even under plaintiffs' allegations, the alleged conspiracy involved several distinct episodes of price-fixing, as well as periods when the conspiracy broke down and prices and competition increased. Defendants argue that plaintiffs have actually alleged the existence of multiple, separate conspiracies, and they cite comments made by the Department of Justice regarding "multiple" conspiracies, as well as defendants' plea agreements in which defendants have pled guilty to several "separate" price-fixing conspiracies. *See, e.g.*, Sharp Corp. Plea Agreement (Docket No. 750-1) 2-4. The Court rejects defendants' attempts to recharacterize plaintiffs' allegations, as well as defendants' attempts to limit the alleged conspiracy by reference to the criminal guilty pleas and DOJ's statements.

Plaintiffs respond that defendants are improperly recharacterizing their allegations, *303 and they argue that there is ample evidence of a price-fixing conspiracy before 2001. The Court agrees with plaintiffs that defendants may not recast plaintiffs' allegations, and plaintiffs have consistently alleged a single, overriding conspiracy spanning the entire class period. As plaintiffs note, the Supreme Court has held that "[t]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962). In addition, the scope and nature of the criminal guilty pleas are not determinative of the plaintiffs' potential claims in a civil antitrust suit. Indeed, "[S]herman Act] civil actions may be brought in cases in which criminal prosecution would not have been justified Thus, a civil action may succeed ... [even] if the government [does] not show that the violation constituted a criminal act." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 741 F.2d 482, 501 n. 51 (2d Cir.1984), *rev'd on other grounds*, *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985).

Nevertheless, the Court does find it appropriate to shorten the proposed class period, and therefore certifies a class period of January 1, 1999 to December 31, 2006.⁹ The class representatives' earliest purchases of both panels and products occurred in 1999. While the class representatives' claims need not be identical to those of class members, the absence of any purchases in the early years of the alleged conspiracy, coupled with the fact that the bulk of the evidence submitted in support of plaintiffs' motion is from 1999 and beyond, persuades the Court that it is more prudent to certify a class period of January 1, 1999 to December 31, 2006. A seven year class period is not unusually long, and courts have certified antitrust classes with far longer class periods. *See, e.g.*, *In re Fine Paper Antitrust Litigation*, 82 F.R.D. 143 (E.D.Pa.1979) (certifying an 11 year class period); *In re Corrugated Container Antitrust Litig.*, 80 F.R.D. 244 (S.D.Tex.1978) (certifying an 18 year class period).

3. Absence of large-volume purchasers

[18] Defendants argue that the proposed class representatives are not typical of class members who purchased TFT-LCD panels and products in large volumes. Defendants argue that compared with purchasers of a single TFT-LCD panel, high-volume purchasers such as Sanyo, Apple, Dell, and HP have significantly more bargaining

power when purchasing TFT-LCD panels, and that the lower prices the high-volume purchasers paid for panels reflects that power. The top five purchasers of TFT-LCD panels, “who account for nearly 50% of all sales [of six defendants], each purchased between \$57 million and \$177 million worth of panels (between October 2001-December 2006) relative to less than \$10,000 each for the small buyers.” Ordover Decl. ¶ 58. Defendants argue that the proposed class representatives’ typicality is defeated by lumping together class members with such vast disparities in bargaining power and purchasing quantities.

[19] With an alleged price-fixing conspiracy, however, “[t]he typicality requirement does not mandate that products purchased, methods of purchase, or even damages of the named plaintiffs must be the same as those of the absent class members.” *In re Vitamins Antitrust Litig.*, 209 F.R.D. at 261; see also *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 691 (D.Minn.1995) (“Nor will differing damages, resulting from varied methods of procuring and purchasing the product, defeat satisfaction of Rule 23(a)(3).”). “That the proposed class representatives had different purchasing positions from [other] class members does not mean that the class representatives’ claims are atypical, considering that all members of the proposed plaintiffs’ class have alleged [a] horizontal price-fixing conspiracy.” *In re Bulk (Extruded) Graphite Products Antitrust Litig.*, No. Civ. 02-6030(WHW), 2006 WL 891362, *6 (D.N.J. Apr.4, 2006).

[20] Defendants rely primarily on two cases—*Deiter v. Microsoft Corporation*, 436 F.3d 461 (4th Cir.2006), and *In re Graphics *304 Processing Units Antitrust Litigation*, No. C 06-7417 WHA, 253 F.R.D. 478 (N.D.Cal.2008) (“*GPU*”)—to support their contention that the proposed class representatives are not typical of the putative class due to the absence of large-volume purchasers. In *Deiter*, the Fourth Circuit upheld a district court’s denial of class certification based on the differences between the class representatives’ purchasing channel and those of absent class members, who largely purchased in bulk through individually negotiated transactions. *Deiter*, 436 F.3d at 466. However, there the plaintiffs’ claims stemmed from a violation of § 2 of the Sherman Act, requiring the plaintiffs to demonstrate that the defendant possesses monopoly power in the relevant market in order to prove their claims. “As such, proof of plaintiffs’ claims did not depend on whether all defendants participated in the same conspiracy, but rather on whether defendant possessed sufficient market power in the relevant market.” *DRAM*, 2006 WL 1530166, at *5 (discussing

Deiter) (emphasis in original). In monopolization cases, proof of market power will necessarily hinge on the particular categories of products and distribution channels at issue, “in a way that proof of participation in a § 1 conspiracy does not.” *Id.* Here, plaintiffs’ claims arise under § 1, not § 2, of the Sherman Act.

In *GPU*, the plaintiffs sought certification of a class of direct purchasers of computer graphics chips and cards in an alleged price-fixing action against two defendants, Nvidia and ATI Technologies. *GPU*, 253 F.R.D. at 480. Similar to the TFT-LCD panels and finished products in this case, graphics chips were sold directly to purchasers and were also used as an input in graphics cards, and the graphics cards were also sold to purchasers. There, the proposed direct purchaser class included purchasers of graphics chips and graphics cards, yet the proposed class representatives each purchased only a single graphics card directly from ATI. *Id.* at 489. The other defendant, Nvidia, did not sell directly to individual consumers at all. *Id.* Direct sales of graphics cards to individual consumers—an admittedly unusual practice in the market in question—accounted for only .5% of defendants’ sales, while wholesale purchasers of chips and cards accounted for the remaining 99.5% of defendants’ business. *Id.* at 490. In denying a broad class certification, the *GPU* court held that “[t]he atypicality and detachment of the named plaintiffs’ claims from those of the remaining [wholesale purchaser] class obstruct their ability to adequately pursue and prove the claims of the absent class members.” *Id.* The court certified a more limited class of individuals who had purchased graphics cards directly from defendants online.

The purchases of the proposed class representatives in this case are not comparable to the atypicality of the purchases of the class representatives in *GPU*. At most, defendants have shown that the defendants’ top 20 customers represented 87.2% of total U.S. panel sales and that various purchasing practices—non-negotiable, “spot” purchasing of TFT-LCD products and individually-negotiated purchases of customizable products—existed in the market for TFT-LCD products. See Ordover Decl. Ex. 11. However, all other sales—that is, panel sales to customers outside of defendants’ largest 20 customers—account for 12.8% of sales, and when aggregated, these sales represent defendants’ second-largest source of panel sales. See Ordover Dec. Ex. 11. In contrast, in *GPU*, the proposed class representatives’ method of purchasing accounted for .5% of defendants’ sales. See *GPU*, 253 F.R.D. at 480.

[21] “[T]here is substantial legal authority holding in favor of a finding of typicality in price fixing conspiracy cases, even where differences exist between plaintiffs and absent class members with respect to pricing, products, and/or methods of purchasing products.” *DRAM*, 2006 WL 1530166, at *5; see also *SRAM*, 2008 WL 4447592, at *3 (rejecting argument that named plaintiff who purchased “fast SRAM” was not typical of class members who purchased “slow SRAM”); see also *In re Vitamins Antitrust Litig.*, 209 F.R.D. at 260-61; *In re Rubber Chem. Antitrust Litig.*, 232 F.R.D. at 351; *In re Bulk (Extruded) Graphite Prod. Antitrust Litig.*, 2006 WL 891362, at *6. “These cases recognize that, in conspiracy cases, plaintiffs’ claims are typical of the class because proof of their section 1 claim will depend *305 on proof of violation by defendants, and not on the individual positioning of the plaintiff.” *DRAM*, 2006 WL 1530166, at *5 (emphasis in original). Here, even if large-volume purchasers interacted with and purchased from defendants in different ways than the proposed class representatives, because of the alleged price-fixing scheme, prices paid for all TFT-LCD panels and products were artificially inflated and supracompetitive. Because plaintiffs allege a horizontal price-fixing conspiracy, the claims of any class representative will necessarily be typical of other purchasers—regardless of the volume or distribution channel of the purchaser. All claims will substantially hinge on proving that defendants conspired to fix prices for TFT-LCD panels and products. The Court finds that the named plaintiffs’ claims are “reasonably co-extensive with those of absent class members; they need not be substantially identical.” *Hanlon*, 150 F.3d at 1020.

4. Inclusion of purchasers of TFT-LCD panels and products within the same class

[22] The proposed class representatives include both purchasers of TFT-LCD panels and purchasers of TFT-LCD products that incorporate a panel. Defendants contend that named plaintiffs who purchased TFT-LCD products cannot represent class members who purchased TFT-LCD panels, and vice versa, because purchasers of products will have to prove antitrust impact and calculate damages in markets that are one or two steps removed from the panel markets where the alleged price-fixing occurred. Although the Court is not persuaded that the differences between the two groups are as meaningful as defendants contend, the Court finds it appropriate to certify separate classes of direct purchasers of TFT-LCD panels and direct purchasers of TFT-LCD products. The Court addresses defendants’ arguments about the differences between different sizes and types of

panels *infra* in connection with the parties’ arguments about predominance of common issues.

Defendants also argue that purchasers of TFT-LCD products cannot be included within the same class because of the variety of TFT-LCD products. Defendants note that all of the named plaintiffs who purchased products purchased televisions, computer monitors, or notebook computers, and that none of the named plaintiffs purchased cell phones, PDAs, other mobile devices, or a number of other TFT-LCD products such as digital cameras and refrigerators.¹⁰ Defendants also argue that every TFT-LCD product has a separate market, and thus purchasers of different types of finished products are not typical of each other.

While the named plaintiffs’ claims need only be “reasonably co-extensive” with those of absent class members, the Court finds that it is appropriate for a number of reasons to limit the class of direct purchasers who purchased TFT-LCD products to those who purchased televisions, computer monitors, and notebook computers. The Court reaches this conclusion in part due to typicality concerns because the named plaintiffs’ purchases are almost exclusively of these three products. In addition, the Court is persuaded that by limiting the class to class members who purchased these three types of products, issues of liability and damages will be more susceptible to common proof. Plaintiffs have submitted considerable evidence showing that TFT-LCD panels for televisions, computer monitors and notebook computers were standardized and interchangeable; that defendants set base prices for various panel sizes used in these three products; and TFT-LCD panels are the main cost component in TFT-LCD televisions, monitors and notebook computers. The record contains much less evidence about standardization and setting of base prices for panels used in other products, and while the panels are a significant cost component in other TFT-LCD products, they are not the main cost component. For example, defendants have submitted evidence showing that TFT-LCD panels comprise approximately 5-10% of the price of cell phones.

*306 To the extent defendants contend that there are typicality problems posed by having class representatives who purchased televisions represent class members who purchased different types of televisions (as just one example), the Court disagrees. As noted above, there is no requirement that the claims of the named plaintiffs be identical to the claims of the class members, only that they be “reasonably co-extensive.” There is ample support in the antitrust case law for

certifying classes in which there are some variations between products, customers, marketing and distribution channels. See, e.g., *SRAM*, 2008 WL 4447592 (certifying class alleging price-fixing conspiracy for both “fast” and “slow” SRAM); see also *SRAM*, 264 F.R.D. 603, 2009 WL 4263524, at *9 (certifying class of indirect purchaser plaintiffs where “SRAM is but one component of an end-product and that it was sold to indirect purchasers as a stand-alone product but to others bundled with other products.”); *DRAM*, 2006 WL 1530166 (certifying class alleging price-fixing scheme for DRAM, which defendants primarily produced in “two forms, component and module, both of which c[a]me in different densities, speeds, and frequencies (e.g. 16, 64, 128, 256 Mb)”); *In re Citric Acid Antitrust Litig.*, No. C 95-1092 FMS, 95-2963 FMS, 1996 WL 655791 (N.D.Cal. Oct.2, 1996) (certifying class alleging price-fixing of citric acid, which “comes in a variety of forms, including crystal, powder, and liquid”); *In re Flat Glass Antitrust Litig.*, 191 F.R.D. at 475 (certifying class alleging conspiracy to fix prices for flat glass and all products created from flat glass, where the “purpose and effect of defendants’ conspiracy was to fix, raise and stabilize artificially the price of all flat glass products, both primary and fabricated.”); *In re Fine Paper Antitrust Litigation*, 82 F.R.D. 143 (certifying a class alleging conspiracy in the market for “all printing and writing papers and all paper products into which such papers are converted”); *In re Corrugated Container Antitrust Litig.*, 80 F.R.D. 244 (certifying class that purchased corrugated sheets and highly-customizable corrugated containers, in which corrugated sheets are an input).

5. *Illinois Brick*

[23] Next, defendants assert that purchasers of finished products face unique *Illinois Brick* defenses, thus rendering those plaintiffs atypical. In *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), the Supreme Court held that “the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party ‘injured in his business or property’ within the meaning of the [Clayton Act].” *Id.* at 729, 97 S.Ct. 2061. Defendants argue, as they did in the motion to dismiss the complaint, that plaintiffs who purchased TFT-LCD products directly from defendants are actually indirect purchasers because the alleged price-fixing conspiracy existed only with regard to TFT-LCD panels, and not finished products. However, contrary to defendants’ assertions, *Illinois Brick* does not address nor place limitations on direct purchaser antitrust suits. Defendants do not cite any case holding that a plaintiff who purchases directly from an alleged cartel

does not have standing. In contrast, courts have found antitrust standing where plaintiffs purchased downstream goods directly from a cartel of manufacturers who made, and fixed the price of, a component of those goods. See, e.g., *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 159-60 (3d Cir.2002) (“*Linerboard I*”) (holding *Illinois Brick* does not bar a suit by a plaintiff who purchases directly from the alleged offender, but buys a product (corrugated sheets and boxes) which incorporates the price-fixed product (linerboard) as one of its ingredients).

Illinois Brick’s prohibition against suits by indirect purchasers extends only to the indirect purchaser plaintiff, not to the price-fixed product itself if incorporated into another product. See *id.*; see also *In re Sugar Indus. Antitrust Litig.*, 579 F.2d 13, 18 (3d Cir.1978). If the case were otherwise, producers would be free to fix the price of component prices, provided those components were later incorporated into another finished product: under this scenario, any purchaser of a finished product containing a price-fixed component would automatically become an indirect purchaser and, thus, *307 barred from suit. See *id.* (“But just as the [price-fixed] sugar sweetened the candy, the price-fixing enhanced the profits of the candy manufacturers [who were also sugar refiners]. The situation is the same as if the general contractor which sold the building to the plaintiff in *Illinois Brick* were the manufacturer of the concrete block which went into the structure. In that situation, the concern which the Supreme Court expressed about the proration of overcharge among a number of entities in the chain would not have been present.”).

While “there will be some additional complications underlying the damage claims” because the prices of TFT-LCD finished products were not, themselves, fixed, “this must not be allowed to obscure the fact that the plaintiff[s] did purchase directly from the alleged violator[s].” *Id.* at 17. The plaintiffs here are “direct purchaser[s] and, therefore, entitled to recover the full extent of the overcharge.” *Id.* at 18; see also *In re Flat Glass Antitrust Litig.*, 191 F.R.D. at 480 (holding *Illinois Brick* “does not preclude a suit by a plaintiff who purchases directly from the alleged offender ... but buys a product which incorporates the price-fixed product as one of its ingredients”).

6. FTAIA

Defendants also contend that some purchasers of finished TFT-LCD products would face a jurisdictional defense under the Foreign Trade Antitrust Improvement Act (“FTAIA”),

15 U.S.C. § 6(a), that some purchasers of TFT-LCD panels would not face, thus presenting typicality problems.

[24] The FTAIA “excludes from the Sherman Act’s reach much anticompetitive conduct that causes only foreign injury.” *F. Hoffmann-La Roche, Ltd. v. Empagran S.A. (Empagran I)*, 542 U.S. 155, 158, 124 S.Ct. 2359, 159 L.Ed.2d 226 (2004). “It does so by setting forth a general rule stating that the Sherman Act ‘shall not apply to conduct involving trade or commerce ... with foreign nations.’ 96 Stat. 1246, 15 U.S.C. § 6a. It then creates exceptions to the general rule, applicable where (roughly speaking) that conduct significantly harms imports, domestic commerce, or American exporters.” *Id.*

Defendants argue that most of the TFT-LCD products purchased directly from defendants were manufactured outside the United States using TFT-LCD panels that were manufactured and sourced in Asia. Defendants argue that the alleged price-fixing, and the antitrust injury, occurred in the foreign markets for TFT-LCD panels, not in the United States, and thus that the FTAIA bars claims arising from purchases of finished products.

Plaintiffs argue that because TFT-LCD products purchased by direct purchasers are “imports,” the FTAIA does not apply. The plain language of the FTAIA exempts “import trade or import commerce” from the statute, and plaintiffs’ proposed class consists of purchasers of TFT-LCD products who purchased “in the United States.” Compl. ¶ 66. Plaintiffs argue that *Empagran I* demonstrates that their claims are not barred. *Empagran I* involved vitamin sellers around the world that agreed to fix prices, leading to higher vitamin prices in the United States and independently leading to higher vitamin prices in other countries such as Ecuador. *Empagran I*, 542 U.S. at 159, 124 S.Ct. 2359. The Supreme Court held that “a purchaser in the United States could bring a Sherman Act claim under the FTAIA based on domestic injury, but a purchaser in Ecuador could not bring a Sherman Act claim based on foreign harm.” *Id.* “[O]ur courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress domestic antitrust injury that foreign anticompetitive conduct has caused.” *Id.* at 165, 124 S.Ct. 2359 (emphasis in original). Plaintiffs argue that because the class seeks recovery for their purchases of imports purchased in the United States, the FTAIA creates no unique defenses that could affect certification.

Defendants rely primarily on two cases, *United States v. LSL Biotechnologies*, 379 F.3d 672 (9th Cir.2004), and *United Phosphorus, Ltd. v. Angus Chem. Co.*, 131 F.Supp.2d 1003 (N.D.Ill.2001). Neither case involved imports into the United States, and in both *308 cases the courts lacked jurisdiction over the antitrust claims because the alleged domestic antitrust injury was speculative. In *LSL Biotechnologies*, as a result of foreign litigation between an American company and an Israeli company, the companies entered into a restrictive agreement which prohibited the Israeli company from selling certain types of as-yet undeveloped tomato seeds in North America. *Id.* The United States filed an antitrust complaint against the American company, alleging that the exclusion of the Israeli company from the North American market excluded “one of the few firms with the experience, track record and know-how likely to develop seeds that will allow United States and other North American farmers to grow better fresh-market tomatoes for United States consumers during winter months.” *LSL Biotechnologies*, 379 F.3d at 676. The government also alleged that the “Restrictive Clause may also allow defendants to charge more for their seeds ... than they otherwise would.” *Id.* The district court dismissed the claims as they related to conduct in the United States for failure to state a claim, and dismissed the claims as they related to the sale of seeds in Mexico for lack of jurisdiction. The Ninth Circuit affirmed and held that there was no jurisdiction, since the alleged anticompetitive effects did not constitute a “direct, substantial and reasonably foreseeable effect” on domestic commerce because the government’s claims were speculative: the government had not shown that the Israeli company could even produce a similar genetically modified tomato seed, let alone that their participation in the Mexican market would lower the price of tomatoes eventually imported to the United States. *Id.* at 680-82.

Similarly, in *United Phosphorus Ltd. v. Angus Chemical Company*, 131 F.Supp.2d 1003, 1013 (N.D.Ill.2001), the court dismissed an action brought by foreign plaintiffs for lack of subject matter jurisdiction. The foreign plaintiffs were prospective manufacturers of a drug (AB) used in the manufacture of tuberculosis medication (ethambutol), and they alleged Sherman Act monopolization claims against an American company that had brought a trade secret action in state court against the foreign plaintiffs to prevent its employee from disclosing technology needed to manufacture AB. After reviewing an extensive factual record, the court dismissed the antitrust claims, finding that the foreign plaintiffs had no intent or ability to sell AB in the United

States. *Id.* at 1013. The court also held that the foreign plaintiffs could not claim domestic injury by supposing that their exclusion from the foreign AB market had an effect on domestic sales of ethambutol, because there was no evidence of a link between alleged misconduct in the foreign AB market and the supply or price of ethambutol in the United States. *Id.* There was also no evidence that the foreign plaintiffs intended to make ethambutol, or that they were prevented from making a single sale of ethambutol. *Id.* *United Phosphorus* is both procedurally distinguishable in that it was decided upon a full factual record, and factually distinguishable in that it did not involve imports.

[25] The Court finds that the possibility of an FTAIA defense does not bar class certification. The applicability, if any, of the FTAIA will be resolved with common evidence of defendants' conduct. See *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 398 (2d Cir.2002) (the FTAIA "clearly reveals that its focus is not on the plaintiff's injury but on the defendant's conduct"), *abrogated on other grounds by Empagran I*, 542 U.S. 155, 124 S.Ct. 2359, 159 L.Ed.2d 226.

E. Adequacy

[26] Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon*, 150 F.3d at 1020. Defendants do not challenge the qualifications of plaintiffs' counsel, and the Court finds that the plaintiffs' counsel is qualified and able to litigate this case.

Defendants argue that proposed class representative Texas Digital Systems ("TDS") is *309 an inadequate class representative because TDS' industrial application ("IA") panel purchases are so unusual that they preclude TDS from representing the class. Defendants' argument about the atypicality of TDS' IA panel purchases—that IA panels are generally purchased in "spot" markets and are structurally different from those panels used in PC monitors, television, cell phones, and notebook computers—is essentially a reprise of the typicality argument discussed *supra*.

Defendants also challenge TDS' adequacy because they assert that TDS was "recruited" as a class representative by David Holmes, plaintiffs' expert consultant and a former vice-president of TDS. However, the deposition testimony

submitted by defendants does not support this assertion. Mr. Holmes testified that he was contacted by one of plaintiffs' counsel, Daniel Owen, in July or August of 2008 when Mr. Owen had been searching for an expert. Mr. Owen located Mr. Holmes after he came across a declaration that Mr. Holmes had provided in another TFT-LCD case. Holmes Depo. at 142:20-145:11 (Supp. Fastiff Decl. Ex. T). Mr. Holmes testified that Mr. Owen did not ask him to contact TDS, and that he provided Mr. Owen's contact information to TDS on his own behalf. *Id.* at 146:21-147:1. When asked if anyone has given him anything of value for passing Mr. Owen's contact information to TDS, Mr. Holmes replied "no." *Id.* at 147:12-14.¹¹

[27] Defendants' reliance on *Bodner v. Oreck Direct LLC*, C 06-4756 MHP, 2007 WL 1223777 (N.D.Cal. Apr.25, 2007), is unavailing. In that case, Judge Patel denied a motion for class certification as a result of "plaintiff's undeniable and overwhelming ignorance regarding the nature of the action" and because "plaintiff's counsel constructed [the] lawsuit before it had a plaintiff." *Id.* at *3. In *Bodner*, not only did counsel place an advertisement in a local newspaper soliciting plaintiffs for the proposed class action, but the proposed representative plaintiff never read the complaint and only first met his counsel the day before his deposition. *Id.* Moreover, the plaintiff's counsel had already attempted, and failed, to bring the action in another district: the case was "nothing more than [plaintiff's counsel] bringing its show to the Northern District and continuing its practice of selecting stand-in plaintiffs, even ones who are inappropriate." *Id.* Judge Patel denied certification, finding that "the conduct in this action does not look good, does not sound good, and does not smell good. In fact, it reeks. The court will not participate in this scheme by certifying a class." *Id.* In contrast, there is nothing in the record to suggest that TDS was "recruited" by plaintiffs through Mr. Holmes, or that there is any other impropriety connected to TDS and Mr. Holmes. The Court finds that proposed class representatives satisfy Rule 24(a)(4)'s adequacy requirement.

II. Rule 23(b)(3)

Plaintiffs seek certification pursuant to Rule 23(b)(3). "To qualify for certification under Rule 23(b)(3), a class must meet two requirements beyond the Rule 23(a) prerequisites: Common questions must 'predominate over any questions affecting only individual members'; and class resolution must be 'superior to other available methods for the fair and efficient adjudication of the controversy.'" *Amchem Prods.*

Inc. v. Windsor, 521 U.S. 591, 615, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (quoting Fed.R.Civ.P. 23(b)(3)). “When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis.” *Hanlon*, 150 F.3d at 1022 (internal quotations omitted).

[28] [29] Defendants contend that plaintiffs cannot show that “questions of law or fact common to class members predominate over any questions affecting only individual *310 members,” as required by Rule 23(b)(3). To determine whether the predominance requirement is satisfied, the Court must identify the issues involved in the case, and determine which are subject to common proof and which are subject to individualized proof. “There are three key elements of plaintiffs’ section 1 claim for which plaintiffs must establish the predominance of common issues: (1) whether there was a conspiracy to fix prices in violation of the antitrust laws; (2) the fact of plaintiffs’ antitrust injury, or ‘impact’ of defendants’ unlawful activity; and (3) the amount of damages sustained as a result of the antitrust violations.” *DRAM*, 2006 WL 1530166, at *7 (citing *In re Vitamins Antitrust Litig.*, 209 F.R.D. at 257).

A. Class period

[30] As an initial matter, defendants contend that the length of the proposed class period defeats predominance. In part, defendants’ objections are addressed by the Court’s certification of a shorter class period than that proposed by plaintiffs. To the extent that defendants’ arguments are based on their recharacterization of plaintiffs’ complaint as alleging multiple, separate conspiracies, the Court rejects those contentions for the reasons stated *supra*. Moreover, “[w]hether the proof ultimately adduced will establish the existence of a national conspiracy among the defendants is not in issue here; it is not the court’s function to weigh this evidence for its truth but merely to ascertain whether it is of a type suitable for classwide use.” *In re Corrugated Container Antitrust Litig.*, 80 F.R.D. at 250.

[31] Defendants also contend that individual issues predominate with respect to whether fraudulent concealment tolls the statute of limitations on pre-December 2002 claims. Plaintiffs allege that claims arising prior to December 13, 2002 are timely due to defendants’ fraudulent concealment. A plaintiff asserting fraudulent concealment must prove that defendant “actively misled him, [and] that he had neither actual nor constructive knowledge of the facts constituting

his claim for relief despite his diligence in trying to discover the pertinent facts.” *Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 249-50 (9th Cir.1978). Defendants argue that these are fact-intensive inquiries that do not lend themselves to class adjudication.

[32] While there may be some differences between class members regarding the statute of limitations and tolling, “the issue of the fact of concealment is the predominating question, ... because the inquiry necessarily focuses on defendants’ conduct, that is, what defendants did, rather than what plaintiffs did.” *In re Flat Glass*, 191 F.R.D. at 488. As the Third Circuit has explained, “[k]ey questions will not revolve around whether Appellees knew that the prices paid were higher than they should have been or whether Appellees knew of the alleged conspiracy among Appellants. Instead, the critical inquiry will be whether defendants successfully concealed the existence of the alleged conspiracy, which proof will be common among the class members in each class.” *In re Linerboard Antitrust Litig.*, 305 F.3d at 163 (internal quotations and citation omitted); *see also In re Urethane Antitrust Litig.*, 237 F.R.D. 440, 452 (D.Kan.2006). The Court believes that common issues will predominate the fraudulent concealment question. To the extent there are individualized issues, they can be adjudicated in a later phase. *See id.*; *see also In re Fine Paper Antitrust Litig.*, 82 F.R.D. at 154-55 (“[I]f the predominating elements of the question of fraudulent concealment do not prove susceptible to generalized proof,” the court can bifurcate the trial into liability and damages phases).

B. Antitrust violation

[33] The parties appear to agree that common issues predominate with respect to the first element of plaintiffs’ section 1 claim, namely the existence of a price-fixing conspiracy. Courts have frequently found that whether a price-fixing conspiracy exists is a common question that predominates over other issues because proof of an alleged conspiracy will focus on defendants’ conduct and not on the conduct of individual class members. *See e.g., DRAM*, 2006 WL 1530166, at *7; *In re Bulk (Extruded) Graphite Prod. Antitrust Litig.*, 2006 WL 891362, at *9; *311 *In re Flat Glass Antitrust Litig.*, 191 F.R.D. at 484. Here, plaintiffs allege that defendants conspired to raise, fix, maintain and stabilize the prices of TFT-LCD panels through group and bilateral meetings, as well as telephone and e-mail communications. This claim requires proof common to all class members, and thus common issues predominate as to the element of antitrust violation.

C. Antitrust impact

[34] [35] The second element of plaintiffs' section 1 claim is antitrust impact, which is the injury that results from a violation of the antitrust laws. For this element, "[p]laintiff[s] must be able to establish, predominantly with generalized evidence, that all (or nearly all) members of the class suffered damage as a result of Defendants' alleged anti-competitive conduct." *SRAM*, 2008 WL 4447592, at *5. However, as courts have stated,

[D]uring the class certification stage, the court must simply determine whether plaintiffs have made a sufficient showing that the evidence they intend to present concerning antitrust impact will be made using generalized proof common to the class and that these common issues will predominate. The court cannot weigh in on the merits of plaintiffs' substantive arguments, and must avoid engaging in a battle of expert testimony. Plaintiffs need only advance a plausible methodology to demonstrate that antitrust injury can be proven on a class-wide basis.

DRAM, 2006 WL 1530166, at *9; see also *SRAM*, 2008 WL 4447592, at *5; *In re Bulk (Extruded) Graphite Prod. Antitrust Litig.*, 2006 WL 891362, at *14; *In re Indus. Diamonds Antitrust Litig.*, 167 F.R.D. 374, 384 (S.D.N.Y.1996). The Ninth Circuit recently emphasized that "[a]lthough certification inquiries such as commonality, typicality and predominance might properly call for some substantive inquiry, the court may not go so far ... as to judge the validity of these claims." *United Steel*, 593 F.3d at 808 (holding district court abused discretion in denying certification based on court's assessment of validity of plaintiffs' claims).

Plaintiffs have submitted the expert report of Dr. Kenneth Flamm, an economist and professor in International Affairs at the University of Texas at Austin. Dr. Flamm specializes in applied microeconomics, and has conducted extensive research on the economics of trade, technology and industrial competition in the computer, communications and electronics industries. Dr. Flamm has studied the TFT-LCD industry for over 15 years. Dr. Flamm was previously a Senior Fellow

at the Brookings Institution doing research in these same areas. Dr. Flamm also worked as a senior official in the U.S. Department of Defense where he supervised a federal interagency task force that issued a report examining the flat panel industry.

Dr. Flamm has examined the TFT-LCD industry and market to determine if plaintiffs would have suffered impact as a result of the alleged price-fixing conspiracy. Dr. Flamm's report¹² assumes that there was a conspiracy among TFT-LCD manufacturers as plaintiffs have alleged. Dr. Flamm's report asserts that there are a number of characteristics that make the TFT-LCD industry highly susceptible to cartelization and price-fixing, including (1) costly manufacturing facilities that raise significant barriers against new entrants; (2) a concentrated market dominated by a small number of producers; (3) industry-wide practices of cross-licensing and partnerships between supposed competitors; (4) a boom-bust "crystal cycle" that makes demand unpredictable and supports compliance with the conspiracy; (5) an industry-wide, standardized hierarchy of product specifications that allowed defendants to agree on base prices and then easily derive prices for TFT-LCD panels with different or better features; (6) an industry-wide practice of reference pricing and most-favored-nation pricing arrangements; and (7) widely-available public information about price, capacity, production and costs.

Dr. Flamm also conducted quantitative analyses of price relationships in the TFT-LCD market, and concludes based on these analyses that plaintiffs can prove class-wide impact and damages through common evidence and methodologies. Dr. Flamm states *312 that the TFT-LCD industry is characterized by a "price ladder," which means that a "price fixed increase in the minimum price for the low end of some applications and sizes of display would have induced a wave of price increases for higher quality displays and substitute displays of different sizes." Flamm Report ¶ 47. Dr. Flamm conducted two types of quantitative analyses-hedonic regression analysis and "matched model" price-index analyses-and concludes that prices for all TFT-LCD panels and products were highly correlated across all defendants, with prices moving together in similar amounts and at similar times during the class period. Dr. Flamm performed a hedonic regression analysis using individual sales transaction data from three defendants for monitors, televisions, notebook computers, and mobile devices. Dr. Flamm's analysis demonstrates common price effects across products, manufacturers, and time. See also Flamm Report ¶¶

77-84; Flamm Reply Report ¶¶ 110-113 (expanded hedonic regression analysis). For the “matched model” price index analysis, Dr. Flamm analyzed the pricing of those defendants that had not yet produced data sufficient for a hedonic price regression analysis. Dr. Flamm found that “[d]espite the weakness [of matched model prices indexes], common instances where all defendants’ prices rise and fall together are clearly discernable in all defendants’ transaction data.” Flamm Report ¶ 81.

Dr. Flamm also concludes that there are five possible methodologies for demonstrating class-wide impact as well as the amount of overcharge caused by the conspiracy (the “cost-based,” “structural supply and demand,” “reduced form,” “before and after,” and “benchmark” methods).¹³ Dr. Flamm bases his analyses and conclusions on defendants’ transactional data, industry data, discovery and depositions in this case, the structure and market characteristics of the TFT-LCD industry, articles and publicly available documents related to the industry, and defendants’ economic performance over the period of the alleged collusion.

Defendants, through their own expert Dr. Janusz Ordovery, attack Dr. Flamm’s analyses and conclusions. Dr. Ordovery is a Professor of Economics at New York University, and former Deputy Assistant Attorney General for Economic at the Antitrust Division of the DOJ. Defendants contend that the complexity and heterogeneity of the TFT-LCD market makes common proof of impact impossible. To an extent, defendants’ objections have been addressed by the shortened class period, the certification of separate classes for purchasers of panels and purchasers of products, and the limitation of the purchasers of products to purchasers of televisions, monitors, and notebook computers. Still, even with these limitations, many of defendants’ objections remain because defendants essentially contend that there are a virtually infinite number of distinct markets for every type of panel and type of product, and corresponding different type of purchaser. Defendants emphasize the variations among the different types of panels and products (e.g., customized panels versus non-customized panels), variations among customers (e.g., large volume purchasers versus small volume purchasers), variations in the industry over time, and variations in the methods of purchasing TFT-LCD panels and products (e.g., spot market transactions versus negotiated contract prices). Dr. Ordovery, asserts that “the heterogeneity in the TFT-LCD industry means that individuated analyses are required to determine how the study [of antitrust impact] should be designed for each time period, panel, finished

product, or buyer, and what (if anything) the results reveal about impact and damages for any particular sub-group within the putative class.” Ordovery Report ¶ 15.¹⁴ Dr. Ordovery critiques Dr. Flamm’s economic analyses, and performs his own analyses, including hedonic regression analyses, and reaches conclusions diametrically opposed to those of Dr. Flamm.

***313 [36]** At the class certification stage, the Court’s inquiry is limited to determining “whether plaintiffs have made a sufficient showing that the evidence they intend to present concerning antitrust impact will be made using generalized proof common to the class and that these common issues will predominate.” *DRAM*, 2006 WL 1530166, at *9. “[O]n a motion for class certification, the Court only evaluates whether the method by which plaintiffs propose to prove class-wide impact could prove such impact, not whether plaintiffs in fact can prove class-wide impact.” *In re Magnetic Audiotape Antitrust Litig.*, No. 99 CIV 1580, 2001 WL 619305, at *4 (S.D.N.Y. June 1, 2001); *see also In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 660 (7th Cir.2002) (in certified direct purchaser class case, reversing grant of summary judgment in favor of defendants and holding that expert battle over regression variables was an issue for trial: “[t]he defendants presented a competing regression analysis done by one of their economic experts, who added a couple of variables to the analysis of the plaintiffs’ expert and, presto, the [key] variable ceased to be statistically significant.”¹⁵); *Natchitoches Parish Hosp. Serv. Dist. v. Tyco Intern., Ltd.*, 247 F.R.D. 253, 270 (D.Mass.2008) (“To determine predominance, a court need not plunge into the weeds of an expert dispute about potential technical flaws in an expert methodology.”).

[37] The Court concludes that plaintiffs have advanced a plausible methodology to demonstrate that antitrust injury can be proven on a class-wide basis. Dr. Flamm’s report is supported by defendants’ transactional data as well as industry data, and courts have accepted multiple regression and correlation analyses as means of proving antitrust injury and damages on a class-wide basis. *See, e.g., SRAM*, 2008 WL 4447592, at *6 (correlation analysis); *DRAM*, 2006 WL 1530166, at *9 (correlation analysis); *In re (Extruded) Bulk Graphite Prod. Antitrust Litig.*, 2006 WL 891362, at *13 (multiple regression analysis); *Freeland v. AT & T Corp.*, 238 F.R.D. 130, 149 & n. 15 (S.D.N.Y.2006) (hedonic regression analysis). Dr. Flamm supports his analyses with evidence-disputed by defendants-that pricing in the industry is characterized by a “price ladder.” Defendants’ challenges to

plaintiffs' evidence and Dr. Flamm's analyses go to the merits of plaintiffs' claims, and will be resolved by the trier of fact. See *In re Commercial Tissue Products*, 183 F.R.D. 589, 595 (N.D.Fla.1998) (certifying direct purchaser class and stating that "even if there is considerable individual variety in pricing because of individual price negotiations, class plaintiffs may succeed in proving classwide impact by showing that the minimum baseline for beginning negotiations, or the range of prices which resulted from negotiation, was artificially raised (or slowed in its descent) by the collusive actions of defendants.").

The Court also finds that the cases relied on by defendants are distinguishable. In *In re Medical Waste Services Antitrust Litigation*, No. 2:03MD1546 DAK, 2006 WL 538927 (D.Utah Mar.3, 2006), the "Plaintiffs instructed their expert to ignore issues of liability and causation, and thus to assume impact for all their causes of action." *Id.* at *7. Here, Dr. Flamm has specified the methods by which plaintiffs can prove class-wide impact and damages using common evidence. In *GPU*, the court held that the direct purchaser plaintiffs' expert failed to use the certain regression variables necessary to show common impact, such as variables relating to product attributes, and accounting for variations in type of customer. *GPU*, 253 F.R.D. at 496. Notably, the expert failed to include individual customers who purchased graphics cards online even though all the representative plaintiffs were within that very small percentage of customers who purchased graphics cards that way. *Id.* Here, Dr. Flamm's analyses have accounted for product variables such as application, size, resolution, and contrast ratio, and he has accounted for variations in type of customer and purchasing volume.

Defendants also rely on Judge Hamilton's decision not to certify a class of indirect *314 purchasers in *California v. Infineon Technologies, AG*, No. C 06-4333 PJH, 2008 WL 4155665 (N.D.Cal. Sept.5, 2008), in which Dr. Flamm was the plaintiffs' expert. However, the relevance of *Infineon* to the instant motion is limited because Judge Hamilton denied certification largely because she concluded that there was an insufficient showing that overcharges paid by direct purchasers were passed through to indirect purchasers. *Id.* at *10-11. In addition, the specific methodological concerns identified by Judge Hamilton are not present here. Judge Hamilton found that Dr. Flamm's analyses in *Infineon* were largely theoretical, and that he did not provide a sufficiently detailed explanation as to how he proposed to apply any particular methodology to the specific facts or data of the case.

Id. at *9 ("[W]hile Appendix C contains a good explanation for a hypothetical equation applicable to the relationship between personal computers, input costs, and price, there is no indication that the information contained in Appendix C is tethered in any way to concrete data or information relevant to the actual personal computers purchased by potential members of the class in this case."). Here, in contrast, Dr. Flamm has conducted an extensive analysis of the discovery produced in this case, including defendants' transactional data and data from industry sources. Although defendants disagree with Dr. Flamm's interpretation of the data, Dr. Flamm's report in this case is "tethered to concrete data and information."

C. Proof of Damages

[38] In price-fixing cases, "[p]laintiffs are not required to supply a precise damage formula at the certification stage." *SRAM*, 2008 WL 4447592, at *6. Plaintiffs need only demonstrate a proposed method for determining damages that is "not so insubstantial as to amount to no method at all." *DRAM*, 2006 WL 1530166, *10; see also *Yokoyama v. Midland Nat. Life Ins. Co.*, *Yokoyama v. Midland Nat. Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir.2010) ("[D]amage calculations alone cannot defeat certification. '[T]he amount of damages is invariably an individual question and does not defeat class action treatment.'") (quoting *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir.1975)); see also *In re Rubber Chem. Antitrust Litig.*, 232 F.R.D. at 351.

[39] The Court finds that plaintiffs have met their burden to show that damages can be established using common proof. Dr. Flamm has submitted a number of commonly-used methodologies, any one of which he asserts can be used to determine damages. The parties' arguments on this point are largely similar to those discussed *supra*, with defendants contending that the variability and heterogeneity in the TFT-LCD market prevents the methodologies from working on a class-wide basis. For the reasons discussed above, the Court finds that plaintiffs have met their burden and that defendants' arguments are directed to the merits of plaintiffs' claims and Dr. Flamm's analyses. However, the validity of those methods "will be adjudicated at trial based upon economic theory, data sources, and statistical techniques that are entirely common to the class." *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 521 (S.D.N.Y.1996). Moreover, courts have approved these same methodologies at the class certification stage in similar cases. See, e.g., *id.* at 521-22 (collecting cases); *SRAM*, 2008 WL 4447592, at *8 (benchmark, before-and-after, and structured cost methodologies for damages);

DRAM, 2006 WL 1530166, at * 10 (before-and-after and benchmark methods); *In re Rubber Chem. Antitrust Litig.*, 232 F.R.D. at 353; *In re Linerboard Antitrust Litig.*, 203 F.R.D. 197, 220 (E.D.Pa.2001).

D. Superiority

[40] Rule 23(b)(3) also requires that a class action be superior to other methods of adjudication. “[I]f common questions are found to predominate in an antitrust action, ... courts generally have ruled that the superiority prerequisite of Rule 23(b)(3) is satisfied.” Wright, Miller & Kane, *Federal Practice and Procedure: Civil Procedure* § 1781, at 254-55 (3d ed.2004). The *SRAM* court's analysis of this issue applies here: “In antitrust cases such as this, ... damages ... are likely to be too small to justify litigation, but a class action would offer those with small claims the opportunity for meaningful *315 redress.” *SRAM*, 2008 WL 4447592, at *7. The Court finds that a class action is superior to other available methods of adjudication.

III. Objections

Defendants' objections to Dr. Flamm's reply report have been addressed by the filing of Dr. Ordovery's sur-reply.

Defendants also object to the reply declarations of David Holmes, Yin-Hua Hsu and Fu-Chia Hsu on numerous grounds, including the fact that defendants have not had the opportunity to depose Yin-Hua Hsu and Fu-Chia Hsu. The Court finds that Mr. Holmes' declaration is responsive to matters raised in defendants' opposition regarding Texas Digital Systems, and DENIES defendants' motion to strike that declaration. However, the Court agrees with defendants that the declarations of Yin-Hua Hsu and Fu-Chia Hsu are untimely, and STRIKES those declarations on that ground.

Finally, defendants raise several objections to the supplemental declarations filed by the class representatives. To the extent defendants object that the named plaintiffs have not properly authenticated the “inventory lists” attached to their declarations, those objections are overruled. The named plaintiffs have sufficiently provided a description of the products purchased. Similarly, the Court overrules defendants' objections to Mr. Northrup's statements in the Unvisions' declaration. Defendants may probe the accuracy of Mr. Northrup's statements about panel purchases in discovery. Defendants also object to some named plaintiffs using the terms “affiliate” and “co-conspirator” when describing their purchases. While the Court agrees that

from the face of the declarations there is nothing to suggest that the declarants have personal knowledge about defendants' affiliations or the scope of the alleged conspiracy, the declarations and/or the purchase orders sufficiently identify the proposed class representatives' purchases. Lastly, defendants' objection that Home Technologies Bellevue LLC did not disclose earlier that it filed for Chapter 7 bankruptcy relief on July 7, 2009 is not an evidentiary objection.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for class certification is GRANTED IN PART and DENIED IN PART. (Docket Nos. 933, 939). The Court previously GRANTED defendants' request to file the sur-reply report of Dr. Ordovery. (Docket No. 1261). Defendants' motion to strike the declarations filed with plaintiffs' reply is GRANTED in part and DENIED in part. (Docket No. 1261). The Court ORDERS:

1. The following Classes are certified for purposes of litigation and trial:¹⁶

All persons and entities who, between January 1, 1999 and December 31, 2006, directly purchased a TFT-LCD panel from any defendant or any subsidiary thereof, or any named affiliate or any named co-conspirator. Specifically excluded from the Class are defendants; the officers, directors, or employees of any defendant; the parent companies and subsidiaries of any defendant; the legal representatives and heirs or assigns of any defendant; and the named affiliates and co-conspirators. Also excluded are any federal, state or local governmental entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

All persons and entities who, between January 1, 1999 and December 31, 2006, directly purchased a television, computer monitor, or notebook computer containing a TFT-LCD panel, from any defendant or any subsidiary thereof, or any named affiliate or any named co-conspirator. Specifically excluded from the Class are defendants; the officers, directors, or employees of any defendant; the parent companies and subsidiaries of any defendant; the legal representatives and heirs or assigns of any defendant; and the named affiliates

and co-conspirators. *316 Also excluded are any federal, state or local governmental entities, any judicial officer presiding over this action and the members of his/her immediate family and judicial staff, and any juror assigned to this action.

2. Representative plaintiffs A.M. Photo & Imaging Center, Inc., CMP Consulting Services, Inc., Crago, Inc., Home Technologies Bellevue LLC, Nathan Muchnick, Inc., Omnis Computer Supplies, Inc., Orion Home Systems, LLC, Royal Data Services, Inc., Texas Digital Systems, Inc., Univisions-Crimson Holding, Inc., and Weber's World Company are designated and appointed as representatives for the Class on all claims asserted on behalf of the Class.

3. The following law firms are designated and appointed as Class Counsel for the direct purchaser plaintiffs: Lief, Cabraser, Heimann & Bernstein, LLP and Pearson, Simon, Warshaw & Penny LLP.

4. As soon as practicable after the entry of this Order, all parties shall meet and confer to develop a plan for dissemination of notice to the Class.

IT IS SO ORDERED.

Parallel Citations

2010-1 Trade Cases P 76,945

Footnotes

- 1 At the time plaintiffs moved for class certification, the operative complaint was the Second Amended Direct Purchaser Consolidated Complaint. In December 2009, plaintiffs filed a Third Amended Direct Purchaser Consolidated Complaint. That complaint, *inter alia*, added new defendants and new agents and co-conspirators. The parties agree that the Court's resolution of the motion for class certification is limited to the claims and parties set forth in the Second Amended Direct Purchaser Consolidated Complaint.
- 2 Plaintiffs have submitted extensive evidence in support of their allegations that defendants engaged in a price-fixing conspiracy. This evidence has all been submitted under seal, and is found at the following: Fastiff Decl. Ex. 1-12, 19, 28, 43, 45, 70; Fastiff Decl. Ex. A, D, E, J, O, P, S, T; Supp. Fastiff Decl. Ex. 5-13, 24, 26, 28, 30, 34; Supp. Fastiff Decl. Ex. M. This list is not intended to be exhaustive, as plaintiffs have submitted well over 100 exhibits, all under seal, in support of their motion.
- 3 Epson Imaging Devices Corporation was first named as a defendant in the Third Amended Direct Purchaser Plaintiffs' Consolidated Complaint. Docket No. 1416 ¶ 21.
- 4 In addition, several individual executives from LG Phillips and Chunghwa Pictures Tubes, Ltd., have pled guilty to criminal violations of the Sherman Act. *See* CR 09-44 SI, CR 09-45 SI and CR 09-437 SI.
- 5 As discussed *infra*, plaintiffs have withdrawn Phelps Technology as a proposed class representative.
- 6 Defendants also challenge the typicality and adequacy of proposed named plaintiff Texas Digital Systems. The Court addresses defendants' arguments *infra* in the adequacy section. Defendants' challenges to proposed named plaintiff Phelps Technologies have been mooted by plaintiffs' withdrawal of Phelps Technologies as a class representative.
- 7 LG Electronics USA Inc. is not a named defendant, and presumably plaintiffs assert that LG Electronics USA Inc. is an affiliate of defendants LG Display Co., Ltd. and LG Display America, Inc.
- 8 Univisions also purchased projectors in 1998.
- 9 The Court extends the class period to December 31, 2006 in the interest of consistency between the direct purchaser classes and the indirect purchaser classes.
- 10 The sole exception appears to be Univisions-Crimson Holdings, Inc., which also purchased projectors.
- 11 Defendants suggest that Mr. Holmes was paid to recruit TDS by claiming that Mr. Holmes "has received \$20,000-\$30,000 for services he cannot clearly describe." Opposition at 23:6-7. However, a review of the deposition excerpts shows that Mr. Holmes answered the questions put to him, and defendants did not ask Mr. Holmes to describe the services for which he had been paid. *See* Holmes Depo. at 164:15-165:9.
- 12 Dr. Flamm has submitted several reports in connection with the class certification motion.
- 13 Dr. Flamm states that he did not attempt to undertake the "before and after" or "benchmark" analyses given current limitations in the produced data, but that these methods "should logically be available in this case." Flamm Report ¶¶ 22, 92.
- 14 As with Dr. Flamm, Dr. Ordober has submitted a report, a reply report, and a sur-reply report.
- 15 Judge Posner might have, but did not, refer to President Truman's desire for a one handed economist.
- 16 The Court has modified the class definitions with respect to exclusions to be consistent with the indirect purchaser class definitions.

End of Document

© 2013 Thomson Reuters. No claim to original U.S. Government Works.

1 Richard M. Heimann (State Bar No. 63607)
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
2 275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
3 Telephone: (415) 956-1000
Facsimile: (415) 956-1008
4

5 Bruce L. Simon (State Bar No. 96241)
PEARSON, SIMON, WARSHAW & PENNY, LLP
44 Montgomery Street, Suite 2450
6 San Francisco, CA 94104
Telephone: (415) 433-9000
7 Facsimile: (415) 433-9008

8 *Co-Lead Counsel for the Direct Purchaser Class Plaintiffs*

9
10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 IN RE TFT-LCD (FLAT PANEL)
14 ANTITRUST LITIGATION

Case No. M07-1827 SI

MDL No. 1827

15
16 This Document Relates To:
17 ALL DIRECT PURCHASER CLASS
18 ACTIONS

**~~[PROPOSED]~~ ORDER GRANTING FINAL
APPROVAL OF SETTLEMENT AND
ENTERING FINAL JUDGMENT OF
DISMISSAL WITH PREJUDICE AS TO
DEFENDANTS LG DISPLAY CO., LTD.
AND LG DISPLAY AMERICA, LTD.**

19 Date: December 19, 2011

20 Time: 4:00 p.m.

Courtroom: 10, 19th Floor

21 The Honorable Susan Illston

1 This matter has come before the Court to determine whether there is any cause why this
2 Court should not approve the settlement with defendants LG Displays Co., Ltd. and LG Display
3 America, Ltd. (collectively "LG") set forth in the Settlement Agreement ("Agreement"), dated
4 June 13, 2011, relating to the above-captioned litigation. The Court, after carefully considering
5 all papers filed and proceedings held herein and otherwise being fully informed in the premises,
6 has determined (1) that the settlement should be approved, and (2) that there is no just reason for
7 delay of the entry of this final judgment approving the Agreement. Accordingly, the Court directs
8 entry of Judgment which shall constitute a final adjudication of this case on the merits as to the
9 parties to the Agreement. Good cause appearing therefore, it is:

10 **ORDERED, ADJUDGED AND DECREED THAT:**

11 1. The Court has jurisdiction over the subject matter of this litigation, and all actions
12 within this litigation and over the parties to the Agreement, including all members of the Class
13 and LG.

14 2. The definitions of terms set forth in the Agreement are incorporated hereby as
15 though fully set forth in this Judgment.

16 3. The Court hereby finally approves and confirms the settlement set forth in the
17 Agreement and finds that said settlement is, in all respects, fair, reasonable, and adequate to the
18 Class pursuant to Rule 23 of the Federal Rules of Civil Procedure.

19 4. Pursuant to Federal Rule of Civil Procedure 23(g), Class Counsel, previously
20 appointed by the Court (Lief, Cabraser, Heimann & Bernstein, LLP and Pearson, Simon,
21 Warshaw & Penny, LLP), are appointed as Counsel for the Class. These firms have, and will,
22 fairly and competently represent the interests of the Class.

23 5. The persons/entities identified in [Amended] Direct Purchaser Class Plaintiffs'
24 Notice of Class Member Exclusions [Dkt. No. 2384] have timely and validly requested exclusion
25 from the Class and, therefore, are excluded. Such persons/entities are not included in or bound by
26 this Final Judgment. Such persons/entities are not entitled to any recovery from the settlement
27 proceeds obtained through this settlement.

28

1 6. The Court hereby dismisses on the merits and with prejudice the individual and
2 class claims asserted against LG, with Plaintiffs and LG to bear their own costs and attorneys'
3 fees except as provided herein.

4 7. All persons and entities who are Releasors are hereby barred and enjoined from
5 commencing, prosecuting, or continuing, either directly or indirectly, against the LG Releasees, in
6 this or any other jurisdiction, any and all claims, causes of action or lawsuits, which they had,
7 have, or in the future may have, arising out of or related to any of the Released Claims as defined
8 in the Agreement.

9 8. The LG Releasees are hereby and forever released and discharged with respect to
10 any and all claims or causes of action which the Releasors had or have arising out of or related to
11 any of the Released Claims as defined in the Agreement.

12 9. The notice given to the Class of the settlement set forth in the Agreement and the
13 other matters set forth herein was the best notice practicable under the circumstances, including
14 individual notice to all members of the Class who could be identified through reasonable efforts.
15 Said notice provided due and adequate notice of those proceedings and of the matters set forth
16 therein, including the proposed settlement set forth in the Agreement, to all persons entitled to
17 such notice, and said notice fully satisfied the requirements of Rules 23(c)(2) and 23(e) of the
18 Federal Rules of Civil Procedure and the requirements of due process.

19 10. Only two class members have objected to the settlement. Those objections have
20 been overruled in a separate order.

21 11. Without affecting the finality of this Judgment in any way, this Court hereby
22 retains continuing and exclusive jurisdiction over: (a) implementation of this settlement and any
23 distribution to class members pursuant to further orders of this Court; (b) disposition of the
24 Settlement Fund (c) hearing and determining applications by the Class Representatives for
25 representative plaintiff incentive awards, attorneys' fees, costs, expenses, including expert fees
26 and costs, and interest; (d) LG until the final judgment contemplated hereby has become effective
27 and each and every act agreed to be performed by the parties all have been performed pursuant to
28 the Agreement; (e) hearing and ruling on any matters relating to the plan of allocation of

1 settlement proceeds; and (f) all parties and Releasors for the purpose of enforcing and
2 administering the Agreement and Exhibits thereto and the mutual releases and other documents
3 contemplated by, or executed in connection with, the Agreement.

4 12. In the event that the settlement does not become effective in accordance with the
5 terms of the Agreement, then the judgment shall be rendered null and void and shall be vacated,
6 and in such event, all orders entered and releases delivered in connection herewith shall be null
7 and void and the parties shall be returned to their respective positions *ex ante*.

8 13. The Court finds, pursuant to Rules 54(a) and (b) of the Federal Rules of Civil
9 Procedure, that this Final Judgment should be entered and further finds that there is no just reason
10 for delay in the entry of this Judgment, as a Final Judgment, as to the parties to the Agreement.
11 Accordingly, the Clerk is hereby directed to enter Judgment forthwith.

12
13 Dated: 12/27/11



The Honorable Susan Illston
United States District Judge

3

2004 WL 5203353 (Me.Super.) (Trial Order)
Superior Court of Maine.

Geoffrey MELHUIISH, Plaintiff,

v.

CROMPTON CORPORATION, UNIROYAL CHEMICAL COMPANY, INC., Uniroyal
Chemical Company Limited, Flexsys NV, Flexsys America LP, Bayer AG, Bayer
Corporation, Rhein Chemie Rheinau GmbH, and Rhein Chemie Corporation, Defendants.

No. CV-02-567.
February 26, 2004.

Order on Defendants' Motions to dismiss

Robert E. Crowley, Justice.

CUMBERLAND, ss.

Before the court are Motions to Dismiss Plaintiff's Class Action Complaint for Lack of Personal Jurisdiction made by (1) Defendants Crompton Corporation, Uniroyal Chemical Company Inc., and Uniroyal Chemical Company limited (collectively "Crompton"), (2) Defendants Flexsys NV & Flexsys America L.P. (collectively "Flexsys"), and (3) Defendant Bayer Corporation ("Bayer").

FACTUAL BACKGROUND

This action stems from an alleged illegal price fixing agreement between the three primary producers of rubber-processing chemicals, Crompton, Flexsys, and Bayer. Plaintiff is a Cumberland County resident who purchased tires in July of 2001 from Sears, Roebuck and Co. in South Portland, Maine and in April of 2000 from VIP in Westbrook, Maine. Plaintiff represents all persons within the State of Maine who purchased automobile tires that were manufactured using rubber-processing chemicals sold by Defendants since 1994.

Plaintiff's complaint alleges that Defendants have violated the Maine Antitrust Act, 10 M.R.S.A. § 1101 *et seq.* He alleges that Defendants were parties to an illegal cartel agreement, contract, combination and/or conspiracy designed to fix, raise, stabilize and maintain the price for rubber-processing products. Plaintiff prays that the court: (a) certify a Class consisting of all persons within the State of Maine who purchased tires that were manufactured using rubber processing chemicals sold by Defendants since 1994 (excluding all Defendants and their respective officers, directors, employees, subsidiaries, and affiliates, as well as all governmental entities and all judges or justices assigned to hear any aspect of this case); (b) appoint Plaintiff as representative of the Class; (c) appoint Plaintiff's counsel as counsel for the Class; (d) enter judgment in favor of Plaintiff and the Class; (e) award Plaintiff and the Class their damages, trebled; (f) award Plaintiff and the Class reasonable attorneys' fees; (g) award Plaintiff and the Class costs reasonably incurred in the prosecution of this litigation; and (h) award such other relief as the court deems just and proper under the circumstances.

DISCUSSION

Standard of Review

There are two types of personal jurisdiction that courts recognize: general and specific. General jurisdiction is achieved when the defendant has engaged in substantial or systematic and continuous activity, unrelated to the subject matter of the action in the forum state. *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 290 F.3d 42, 51 (1st Cir. 2002); *Scott v. Jones*, 984 F. Supp. 37, 43 (D. Me. 1997). Specific jurisdiction is conferred “where the cause of action arises directly out of, or relates to, the defendant's forum-based contacts.” *United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1088-89 (1st Cir. 1992).

Maine's long-arm statute provides only for the exercise of specific personal jurisdiction. *Danton v. Innovative Gaming Corp. of Am.*, 246 F. Supp. 2d 64, 68 (D. Me. 2003). Under 14 M.R.S.A. § 704-A, the exercise of personal jurisdiction is permissible as long as it is consistent with the Due Process Clause of the Federal Constitution. 14 M.R.S.A. § 704-A (2003); *Suttie v. Sloan Sales*, 1998 ME 121, ¶ 4, 711 A.2d 1285, 1286. (citing *Mahon v. East Moline Metal Prods.*, 579 A.2d 255, 256 (Me. 1990)). For Maine to exercise specific personal jurisdiction over a nonresident defendant, “due process requires that (1) Maine have a legitimate interest in the subject matter of [the] litigation; (2) the defendant, by his conduct, reasonably could have anticipated litigation in Maine; and (3) the exercise of jurisdiction by Maine's courts comports with traditional notions of fair play and substantial justice.” *Suttie*, 1998 ME 121, ¶ 4, 711 A.2d at 1286 (citing *Murphy v. Keenan*, 667 A.2d 591, 593 (Me. 1995)).

The plaintiff bears the burden of establishing the first two prongs of the specific personal jurisdiction test. *Suttie*, 1998 ME 121, ¶ 4, 711 A.2d at 1286 [text illegible] 667 A.2d at 594). The plaintiff's showing must be based on specific facts set forth in the record, and the record should be construed in a light most favorable to the plaintiff. *Frazier v. Bankamerica Int'l* 593 A.2d 661, 662 (Me. 1991). Once Plaintiff makes this requisite showing, the burden shifts to the defendant to establish that asserting jurisdiction does not comport with traditional notions of fair play and substantial justice. *Id.*

In the present case, the heart of both parties' pleadings and oral arguments focuses on the second prong of this three-part test, viz: whether Defendants, by their conduct, could have reasonably anticipated litigation in Maine. Although Plaintiff offers four arguments in support of his position, for the reasons set forth below, the court finds none of the arguments convincing and grants Defendants' motions to dismiss for lack of personal jurisdiction.

Jurisdiction Under 14 M.R.S.A. § 704-A(2)(B)

Plaintiff argues that Defendants should reasonably have anticipated litigation in Maine when they violated the Maine Antitrust Act and committed tortious acts within the state under 14 M.R.S.A. § 704-A(2)(B).¹ While there is no Maine case law that directly addresses the question of whether price fixing is a tortious act in Maine, guidance can be found from other jurisdictions. Several federal courts have recently held that the act of price fixing does not constitute a tort. See e.g. *Free v. Abbott Labs., Inc.*, 164 F.3d 270, 273-74 (5th Cir. 1999) (holding that price fixing did not amount to a tort where neither the Legislature or State Supreme Court recognized its existence as a tort); *Four B Corp. v. Ueno Fine Chems. Indus., Ltd.*, 241 F. Supp. 2d 1258, 1262-63 (D. Kan. 2003) (prohibiting the plaintiffs from invoking the state's long-arm statute where the plaintiffs failed to provide legal support for the contention that a violation of the state's antitrust laws constituted tortious behavior); *Indiana Grocery Co. v. Super Valu Stores, Inc.*, 684 F. Supp. 561, 584 (S.D. Ind. 1988) (holding that price fixing is not a tort; rejecting plaintiffs' invitation to expand state law not recognized by controlling precedent).

The authority set forth by Plaintiff for the purpose of establishing that other jurisdictions have found liability in tort for violation of state antitrust laws is unpersuasive. See *GTE New Media Servs., Inc. v. Ameritech Corp.*, 21 F. Supp. 2d 27, 37 (D.D.C. 1998); *Origins Natural Res., Inc. v. Kotler*, 133 F. Supp. 2d 1232, 1234 (D.N.M. 2001). Such cases are distinguishable from the case at bar. *GTE* and *Origins* involve wrongful interference with a competitor's business and trademark infringement respectively. The acts of wrongful interference with a competitor's business and trademark infringement were considered tortious at common law, whereas price fixing was not. See *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 497 (1940) (under common law, agreements to fix prices gave no rise to an actionable wrong); see also *Mosley v. V. Secret Catalogue, Inc.*, 123 S. Ct 1115, 1122 (2003) (trademark infringement was tortious at common law); see also Note, *Contribution in Private Antitrust Suits*, 63 Cornell L. Rev. 682, 692-97 (1978) (arguing that whether a private antitrust suit sounds in tort should depend on the particular nature of

the violation; stating that an antitrust violation that takes the form of wrongful interference with a competitor's business closely resembles the common-law tort of wrongful interference with a trade or calling).

This court refrains from deeming price fixing tortious behavior where neither the Law Court nor the Legislature has done so. *See Free* 164 F.3d at 273-74; *Four B Corp. v. Ueno Fine Chems. Indus., Ltd.*, 241 F. Supp. 2d at 1262-63; *Indiana Grocery Co. v. Super Valu Stores, Inc.*, 684 F. Supp. at 584. Accordingly, Plaintiff's argument that jurisdiction is proper in Maine under section 704-A(2)(B) is rejected.

Jurisdiction Under 14 M.R.S.A. § 704-A(2)(I)

Plaintiff also asserts that personal jurisdiction is warranted under 14 M.R.S.A. § 704-A(2)(I), based on Defendants' maintenance of relationships with the state.² To evaluate Plaintiff's assertion, it is necessary to examine Defendants' relationships with the state. Defendant Bayer benefits from substantial revenues from the sale of its products here in Maine. *See* Pl.'s Ex. E (Bayer's annual sales revenues in Maine between 1998 and 2001 ranged from \$34 million to \$54 million). In addition, during the relevant time period, Defendant Bayer has employed between five and eleven employees, whose salaries were subject to Maine personal income tax, as well as reported property located in Maine with a total average yearly value of over \$1 million. *See* Pl.'s Ex. E. However, during the relevant period, Defendant Bayer did not sell tires or rubber processing chemicals in Maine (Niemeck Decl. ¶¶ 4-5). Likewise, Crompton Defendants have fourteen customers in Maine to whom they supply products and from whom they have generated \$6.5 million in sales revenue for the years 1999 through 2002. *See* Pl.'s Ex. C. However, Crompton Defendants have not sold any rubber processing chemicals in Maine that were used to manufacture tires. (Shainman Decl. ¶ 13.) Finally, Flexsys Defendants do not sell any product directly to Maine, nor do they hold property, maintain bank accounts, or employ people in Maine. *See* Pl.'s Ex. E.

I. Maintain any other relation to the State or to persons or property which affords a basis for the exercise of jurisdiction by the courts of this State consistent with the Constitution of the United States.

14 M.R.S.A. § 704-A(2)(I) (2003).

Based on the nature of their relationships with the state, the court concludes that none of the Defendants are subject to section 704-A (2)(I) of Maine's long-arm statute. *See* 14 M.R.S.A. § 704-A(2)(I). Although Defendant Bayer and the Crompton Defendants have maintained relationships with the state, the relationships are unrelated to the present cause of action as required by law. Nor are Flexsys Defendants subject to section 704-A(2)(I), as they have not maintained any relationship whatsoever with the state.

Jurisdiction Under 704-A(2)(A)

Plaintiff also argues that Defendants were "on notice" that their rubber processing chemicals would be used to produce tires that might later be sold in Maine and, hence, the present action arises from the transaction of business in Maine and gives the court jurisdiction under section 704-A(2)(A). However, given recent state law and well-established federal case law on point, this argument is unavailing. *See Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 112 (1987) (plurality opinion) (holding "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State"); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295-96 (1980) (holding a state may not exercise personal jurisdiction over an out-of-state automobile dealer simply because an automobile's inherent mobility made it likely that the automobile would enter the forum state);³ *Alers-Rodriguez v. FullertonTires Corp.*, 115 F.3d 81, 85 (1st Cir. 1997) (holding that even if defendant had specific knowledge that its tire rims would be moved into Puerto Rico "this awareness alone would not be enough to constitute the purposeful availment which is necessary for a showing of minimum contacts"); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984) (holding State's assertion of personal jurisdiction over a defendant must be

based on the defendant's own decision to avail itself of the State's markets; stating "unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum state to justify an assertion of jurisdiction); *Murphy v. Keenan*, 667 A.2d 591, 595 (1995) (holding that Maine did not have personal jurisdiction over seller of boat located in New Hampshire, in suit by Maine buyer, even though it was claimed that seller could foresee possibility that boat would enter Maine);⁴ compare *Keeton v. Hustler Magazine Inc.*, 465 U.S. 770 (1984) (defendant directly sold the libelous magazine in the forum state).

DECISION

Based upon the foregoing analysis, and pursuant to M. R. Civ. P. 79(a), the Clerk is directed to enter this Order on the Civil Docket by a notation incorporating it by reference and the entry is

Defendants' Motions to Dismiss are GRANTED.

Dated at Portland, Maine this 26th day of February 2004.

<<signature>>

Robert E. Crowley

Justice, Superior Court

Footnotes

- 1 Section 704-A provides that courts may exercise jurisdiction over an entity "[d]oing or causing a tortious act to be done, or causing the consequences of a tortious act to occur within this state." 14 M.R.S.A. § 704-A(2)(B) (2003).
- 2 Section 704-A(2) provides, in relevant part:
Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated in this section, thereby submits such person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of such acts:
- 3 This opinion rejects the Law Court's suggestion to the contrary in *Tyson v. Whitaker & Son, Inc.*, 407 A.2d 1, 5 (Me. 1979) that it might be proper to assert personal jurisdiction over an automobile dealer who sold, outside of Maine, a car that caused injury in Maine.
- 4 *But see Mahon v. East Moline Metal Products*, 579 A.2d 255 (Me, 1990) (holding that where defendant manufacturer knew that its product would end up in Maine, and where the burden on defendant to defend the action in Maine was small when balanced against Maine's interest in the litigation and the plaintiffs need to bring the action in Maine, the court's exercise of jurisdiction was proper).

4

2011 WL 2682950

Only the Westlaw citation is currently available.
United States District Court,
S.D. Florida.

NORTHERN INSURANCE CO. OF
NEW YORK, a/s/o Leslie Gray, Plaintiff,
v.
CONSTRUCTION NAVALE
BORDEAUX, d/b/a Lagoon, Defendant.

No. 11–60462–CV. | July 11, 2011.

Attorneys and Law Firms

Alexander Philip Koffler, Fertig & Gramling, Fort
Lauderdale, FL, for Plaintiff.

Eric Lowell Ray, Eduardo Alberto Ramos, Holland & Knight,
Miami, FL, for Defendant.

Opinion

ORDER GRANTING MOTION TO DISMISS

JAMES I. COHN, District Judge.

***1 THIS CAUSE** is before the Court upon Defendant's Motion to Dismiss for Lack of Personal Jurisdiction [DE 8], Plaintiff's Response in Opposition [DE 32], and Defendant's Reply [DE 35]. The Court has carefully considered the motion, response, and reply, and is otherwise fully advised in the premises.

This case involves a dispute between Northern Insurance Co. ("Plaintiff"), as subrogee of its insured, Leslie Gray, and Construction Navale Bordeaux ("Defendant"), manufacturer of a motor vessel owned by Gray. Plaintiff contends that Defendant (doing business as "Lagoon"), a company who designs, manufactures, and sells motor vessels, including the one purchased from a dealer by Mr. Gray, is responsible for the damages to the vessel. Defendant, a French corporation, moves to dismiss this action for lack of personal jurisdiction [DE 8]. On April 4, 2011, the Court granted Plaintiff's unopposed motion for a period of sixty days to complete jurisdictional discovery and to respond to the motion to dismiss [DE 13]. After an additional seven day extension to complete this discovery, the parties finished briefing on the motion to dismiss on June 21, 2011.

I. BACKGROUND

Plaintiff, a New York corporation, sues Defendant, a French corporation, in Florida for damages to the vessel "Tabby" occurring off the waters of Florida. Most of the facts in this dispute are uncontested. Leslie Gray, Plaintiff's insured, is a resident of Rhode Island who bought the vessel in 2004 from Sound Catamarans, LLC, a vessel dealer in Connecticut. Affidavit of Leslie Gray [DE 32–4]. Gray received a warranty from the dealer that came from Defendant Lagoon. In 2006, Gray made a warranty claim under the Lagoon express warranty through Sound Catamarans, though the work was performed by a marina in Rhode Island. In late 2007, Gray relocated the vessel to Miami Beach, Florida. On December 6, 2007, while on a voyage from Miami Beach to Key West, the vessel's bilge pump caught fire, resulting in damage to the vessel. Gray delivered the vessel to another Lagoon dealer, Catamaran Sales, Inc. ("CATCO"), based in Fort Lauderdale, Florida. CATCO provided Gray with another copy of the Lagoon warranty, and is a Lagoon warranty repair facility. Plaintiff paid Gray \$247,832.13 for the damage to the vessel.

Defendant Lagoon is a French company with all of its employees working in France. Defendant does not have an office in Florida, is not registered with the Florida Department of State, holds no licenses, and does not own any property or bank accounts in Florida. Declaration of Jean-Louis Chaput [DE 8–1]. Defendant has no employees, agents, or sales representatives in Florida, derives no income from Florida, and pays no taxes to the State of Florida. *Id.* Defendant does not directly sell any boats to consumers in the United States, let alone in Florida. Exhibit 2 to Plaintiff's Response, Defendant's Answers to Interrogatories at p. 3 [DE 32–2]. Instead, Defendant sells vessels to independent dealers, one of which (CATCO) is located in Florida. These dealers also sell vessels from any other manufacturers. Since 2009, Defendant has sold 20 boats to CATCO in Florida. *Id.* 7. Defendant attends two boat shows each year in Florida, *id.* at 5–6, advertises in some industry print publications in the United States, Exhibit 3 to Plaintiff's Response [DE 32–3], and has a "Lagoon" trademark registration from the United States Patent and Trademark Office, Exhibit 5 to Plaintiff's Response [DE 32–5]. Plaintiff served the summons in this action upon Defendant's Commercial Sales Director in Florida while he was attending the Miami International Boat Show. Affidavit of John Van Steenkiste, Exhibit 1 to Plaintiff's Response [DE 32–1].

II. DISCUSSION

A. Personal Jurisdiction

*2 “A federal district court in Florida may exercise personal jurisdiction over a nonresident defendant to the same extent that a Florida court may, so long as the exercise is consistent with federal due process requirements.” *Licciardello v. Lovelady*, 544 F.3d 1280, 1283 (11th Cir.2008) (citing Fed.R.Civ.P. 4(e)(1)). The Court must apply the Florida long-arm statute as the Florida Supreme Court would. *Oriental Imports & Exports, Inc. v. Maduro & Curriel's Bank, N.V.*, 701 F.2d 889, 890–91 (11th Cir.1983). Further, the Court must strictly construe the long-arm statute. *Id.*

When the district court does not conduct a discretionary evidentiary hearing on a motion to dismiss for lack of personal jurisdiction, the plaintiff must establish a *prima facie* case of personal jurisdiction over a nonresident defendant. *See Cable/Home Communication Corporation v. Network Productions, Inc.*, 902 F.2d 829, 855 (11th Cir.1990). A *prima facie* case is established if the plaintiff presents enough evidence to withstand a motion for directed verdict. *E.g. Morris v. SSE, Inc.*, 843 F.2d 489, 492 (11th Cir.1988) (citations omitted). “The plaintiff bears the burden of proving ‘by affidavit the basis upon which jurisdiction may be obtained’ only if the defendant challenging jurisdiction files ‘affidavits in support of his position.’” *Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1214 (11th Cir.1999) (quoting *Venetian Salami Co. v. Parthenais*, 554 So.2d 499, 502 (Fla.1989)). Here, Defendant has filed an affidavit to support its argument that this Court lacks jurisdiction over Defendant. *See* Chaput Declaration. Where the parties’ affidavits conflict, the district court must construe all reasonable inferences in favor of the plaintiff. *Robinson v. Giarmarco & Bill, P.C.*, 74 F.3d 253, 255 (11th Cir.1996) (citing *Madara v. Hall*, 916 F.2d 1510, 1514 (11th Cir.1990)).

Plaintiff contends that Defendant is subject to personal jurisdiction in Florida based on personal service executed upon Lagoon’s Commercial Sales Director while he was in Florida on business, and upon various sections of Florida’s long-arm statute, including general personal jurisdiction due to substantial activity and specific jurisdiction based upon operating a business and breaching a contract in Florida.

1. Service Upon Defendant while in Florida

Plaintiff argues that because it served a director of Defendant while he was physically present in Florida, the Court can find personal jurisdiction without further inquiry. Defendant responds by stating that the case law on which Plaintiff relies only pertains to individuals and not corporations. In *Burnham v. Superior Court of California*, 495 U.S. 604, 619, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990), the United States Supreme Court stated that “jurisdiction based on physical presence alone constitutes due process.”¹ However, the main plurality opinion’s only reference to foreign corporations appears to state that the Court expresses no views “with respect to these matters,”—presumably whether service upon a corporate officer is sufficient for jurisdiction without a contacts-based analysis. 495 U.S. at 610, n. 1. The case the Supreme Court mentions in this footnote, *Perkins v. Benguet Cons.Mining Co.*, 342 U.S. 437, 447–48, 72 S.Ct. 413, 96 L.Ed. 485 (1952), did not hold that service in a state upon an officer of a corporation obviates the need to do a minimum contacts analysis.

*3 The Florida cases that support the notion that jurisdiction can be solely based upon physical presence also involve individuals, not corporations. *Garrett v. Garrett*, 668 So.2d 991, 994 (Wells, J. concurring); *Durkee v. Durkee*, 906 So.2d 1176, 1177 (Fla.Dist.Ct.App.2005); *Keveloh v. Carter*, 699 So.2d 285, 288 (Fla.Dist.Ct.App.1997). As Defendant asserts, Plaintiff has not put forth any published opinion that holds that service upon a corporate officer or director in the United States establishes personal jurisdiction over a foreign corporation without regard to a minimum contacts analysis. Therefore, the Court will engage in the traditional two-part personal jurisdiction analysis described above.

2. General Jurisdiction

Florida courts have general jurisdiction over defendants under § 48.193(2), Florida Statutes, provided the defendant:

is engaged in substantial and not isolated activity within this state, whether such activity is wholly interstate, intrastate, or otherwise, is subject to the jurisdiction of the courts of this state, whether or not the claim arises from that activity.

Fla. Stat. § 48.193(2).

Plaintiff bases its argument for general jurisdiction upon Defendant's alleged control over CATCO, an independent dealer. Pursuant to Fla. Stat. § 48.181(3),

Any person, firm, or corporation which sells, consigns, or leases by any means whatsoever tangible or intangible personal property, through brokers, jobbers, wholesalers, or **distributors** to any person, firm, or corporation in this state is conclusively presumed to be both engaged in substantial and not isolated activities within this state and operating, conducting, engaging in, or carrying on a business or business venture in this state.

West's F.S.A. § 48.181(3) (emphasis added). Florida courts have interpreted this subsection to mean that a plaintiff must show that the defendant "has some degree of control over the broker or control over the [property] in the hands of the broker." *Dinsmore v. Martin Blumenthal Associates, Inc.*, 314 So.2d 561, 566 (Fla.1975). Defendant relies on the general statements of its Vice-President that Lagoon does not exert any right of control over the actions of CATCO, or any dealers, and that CATCO sells other vessels. Chaput Declaration at ¶¶ 22, 39. Plaintiff, however, cites to various specific provisions in the distribution contract between CATCO and Lagoon which do indicate some control by Lagoon over the manner in which CATCO sells Lagoon's products in Florida and control over the vessels themselves. Exhibit 1 to Chaput Declaration [DE 8-1] (hereinafter, "Distribution Contract"). For example, Lagoon retains title to the products until it has received payment in full for a vessel. Distribution Contract, ¶ 3.6 at 12. Lagoon controls the geographic territory of CATCO, the amount of money CATCO spends on advertising and promotion, the minimum inventory and age of the Lagoon vessels it sells, the manner in which the vessels are presented to customers, the communication of terms of Lagoon's warranty, the prices of the vessels, the minimum sales quota of CATCO for Lagoon vessel's, and CATCO must "maintain the necessary facilities, personnel and tooling to carry out such [warranty] services [which] Lagoon may verify ... in order to ensure quality." *Id.* ¶ 2 (definitions); ¶¶ 2.2-2.4, 2.7, 3.3, 4, 8.1.

*4 The Court concludes that Plaintiff has sufficiently shown a prima facie case of control to satisfy § 48.181(3), which in turn provides a conclusive presumption that § 48.193(2) and § 48.193(1)(a) of the long-arm statute are satisfied. This evidence thus distinguishes this decision from this Court's ruling in *Bluewater Trading LLC v. Fountaine Pajot, S.A.*, 2008 WL 2705432 (S.D.Fla.2008), *aff'd*, 335 Fed. App'x. 905, 907 (11th Cir.2009). In that action, the plaintiff did not raise § 48.181(3), and the Court of Appeal stated that the evidence did not show that the French manufacturer controlled its Florida distributor in its sales or warranty service.

3. Specific Jurisdiction

Plaintiff contends that Defendant is subject to specific jurisdiction under Florida's long-arm statute because it operates a business and breached a contract in Florida. Section 48.193 states:

(1) Any person, whether or not a citizen or resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself and, if he or she is a natural person, his or her personal representative to the jurisdiction of the courts of this state *for any cause of action arising from* the doing of any of the following acts:

(a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.

(g) Breaching a contract in this state by failing to perform acts required by the contract to be performed in this state.

As discussed in the prior section of this Order, Plaintiff has shown that Lagoon had sufficient control over CATCO under § 48.181(3) to conclusively presume that § 48.193(1) (a) applies.

Plaintiff further contends that Lagoon breached a contract by failing to perform acts required by the contract to be performed in Florida. The Court disagrees. Plaintiff does allege that Lagoon issued an express warranty and breached its warranty by failing to repair the Tabby's defects, but does not allege that the breach took place in Florida. Complaint, ¶¶ 33, 34, 71. Plaintiff also alleges that the repairs performed by CATCO in Florida were done in compliance with the Lagoon warranty, and that Lagoon "issued warranties in Florida." *Id.*

¶¶ 42–44, 46. However, under the Distribution Contract, the Distributor is the one responsible to the customer for warranty repairs. Lagoon is responsible under certain conditions for payment for the repairs to the Distributor, not the customer. Distribution Contract, Article 8 [DE 8–1 at p. 14–15]. There also is no requirement that the repairs be done in Florida. Chaput Declaration ¶ 45. While the terms of the Distribution Contract require dealers to perform their own repairs on boats they sell “free of charge,” dealers are required to undertake all repairs on any Lagoon-built product, whether or not they sold the boat. Distribution Contract, ¶¶ 8.1–8.2. In the latter circumstance, which would apply in this action, Lagoon is to repay the dealer. Thus, Plaintiff has not shown that Lagoon breached a contract with Leslie Gray by failing to perform an act required to be performed in Florida.

B. Due Process

*5 Having concluded that Defendant's contacts with Florida subject it to general jurisdiction under Florida's long-arm statute, the Court must now evaluate whether Defendant's contacts meet the requirements of due process. The due process component of personal jurisdiction involves a two-part inquiry. In the first prong, the Court must consider whether Defendant engaged in minimum contacts with the state of Florida. In the second prong, the Court must consider whether the exercise of personal jurisdiction over Defendant would offend “traditional notions of fair play and substantial justice.” *Cronin v. Washington Nat'l Ins. Co.*, 980 F.2d 663, 670 (11th Cir.1993) (citing *Int'l Shoe Co. v. State of Wash., Office of Unemployment Compensation*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945); *Madara*, 916 F.2d at 1515–16).

1. Minimum Contacts

Minimum contacts involve three criteria: First, the contacts must be related to the plaintiff's cause of action or have given rise to it. Second, the contacts must involve some purposeful availment of the privilege of conducting activities within the forum, thereby invoking the benefits and protections of its laws. Finally, the defendant's contacts within the forum state must be such that it should reasonably anticipate being hailed into court there. *Sculptchair, Inc. v. Century Arts, Ltd.*, 94 F.3d 623, 631 (11th Cir.1996). The Supreme Court recently reiterated the importance of the “purposeful availment” requirement. *J. McIntyre Machinery, Ltd. v. Nicastro*, —

U.S. —, — S.Ct. —, — L.Ed.2d —, 2011 WL 2518811, * 5 (June 27, 2011).²

Although Lagoon has no offices, telephone, bank account, or property of any kind in the state of Florida, except a few vessels waiting for sale by CATCO, that may or may not still be titled to Lagoon, its contacts are related to Plaintiff's cause of action for violation of federal warranty law regarding a vessel sold by a dealer of Lagoon. It is important to note that the vessel in question was not sold in Florida, and not sold to a Florida resident. However, the vessel incurred damage in Florida's waters and was repaired in Florida. The only ongoing contacts with Florida are two trips per year for international boat shows, and national advertising in print media that was not particularly targeted at Florida. The Court concludes that although these contacts do provide evidence of purposeful contact with the state, they do not lead to the finding that Lagoon should reasonably anticipate being hailed into court here over this incident.

Plaintiff principally relies upon the stream of commerce theory. However, “something more” than merely placing a product into the stream of commerce is required for personal jurisdiction. *Nicastro*, — U.S. —, —, 131 S.Ct. 2780, — L.Ed.2d —, —, 2011 WL 2518811, *10 (Breyer, J. concurring) (quoting *Asahi Metal Industry Co. v. Superior Court of Cal.*, 480 U.S. 102, 111–12, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987) (plurality opinion of Justice O'Connor)). The critical question is whether Plaintiff has met that burden in this case. Plaintiff recites the 20 sales in Florida over approximately the last 2.4 years, the control over how the independent dealer makes those sales, the appearance at six trade shows in Florida (two per year), and the industry advertising to be the “something more” that is required where the vessel in question just happened to break down while in Florida's waters. In *Nicastro*, the allegations in support of personal jurisdiction rejected by the Supreme Court were less than present here, consisting of sales from independent distributors of no more than four machines in the forum state; attendance at trade shows in the United States but not in the forum state; defendant held United States patent for the technology in the machine; and the U.S. distributor structured its advertising and sales efforts in accordance with the defendant's direction and guidance whenever possible. — U.S. —, —, 131 S.Ct. 2780, — L.Ed.2d —, —, 2011 WL 2518811, *5. Though the contacts are greater than in *Nicastro*, upon a review of the record, this Court concludes that Plaintiff has not sufficiently shown that Lagoon should reasonably anticipate being hailed into Florida courts over a

warranty dispute for a vessel sold in another state to a resident of another state.

2. Traditional Notions of Fair Play and Substantial Justice

*6 To complete the analysis, the Court will also address the factors to decide whether the assertion of personal jurisdiction comports with “traditional notions of fair play and substantial justice.” These factors are: 1) the burden on the defendant in defending the lawsuit; 2) the forum state’s interest in adjudicating the dispute; 3) the plaintiff’s interest in obtaining convenient and effective relief; 4) the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and, 5) the shared interest of the states in furthering fundamental substantive social policies. *Cronin*, 980 F.2d at 671 (citing *Asahi Metal*, 480 U.S. at 113; *Madara*, 916 F.2d at 1517).

As to the first prong of the due process component, the burden on a French company that sells vessels all over the globe to litigate in Florida is not overly burdensome. With modern technology, travel is not as onerous as it once was, and Lagoon already sends representatives to Florida for trade shows. As to the second prong, Florida has minimal social interest in the outcome of this litigation, as no parties are Florida citizens and federal warranty law will largely control the outcome. Plaintiff, an out of state insurance company, presumably prefers Florida because of the location of CATCO’s warranty repair records. The interstate judicial

system may be better served if the matter were litigated in Connecticut, where the vessel was sold and the Lagoon warranty first presented to Plaintiff’s insured, in a location next to both Plaintiff’s home state of New York and its insured’s home in Rhode Island.

Taking into account all of the factors for traditional notions of fair play and substantial justice, it is not clear that Florida is the best location for this lawsuit, though it is also not clear that asserting personal jurisdiction against Lagoon in Florida is at odds with these factors. As a result, the Court rests its decision that personal jurisdiction is not proper in this case upon the conclusion that Plaintiff has not sufficiently shown that Lagoon should reasonably anticipate being hailed into Florida courts over a warranty dispute for a vessel sold in another state to a resident of another state.

III. CONCLUSION

Accordingly, it is **ORDERED and ADJUDGED** as follows:

1. Defendant’s Motion to Dismiss for Lack of Personal Jurisdiction [DE 8] is hereby **GRANTED**;
2. Plaintiff’s Complaint is **DISMISSED** for lack of personal jurisdiction;
3. The Clerk may close this case.

DONE AND ORDERED.

Footnotes

- 1 Two plurality opinions receiving four votes each reached this result for different reasons. *Burnham*, 495 U.S. at 637–38 (Brennan, J. concurring)
- 2 In *Nicastro*, this point of law was supported in the lead opinion issued by four justices, and a separate concurrence by two more justices.

5

2013 WL 1248285

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN
RELEASED FOR PUBLICATION IN THE
PERMANENT LAW REPORTS. UNTIL RELEASED,
IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of Tennessee,
at Nashville.

STATE of Tennessee

v.

NV SUMATRA TOBACCO TRADING COMPANY.

No. M2010-01955-SC-R11-CV. | June
14, 2012 Session. | March 28, 2013.

Synopsis

Background: State brought action against foreign tobacco product manufacturer for allegedly failing to make payments into the Tobacco Manufacturers' Escrow Fund for cigarettes sold in Tennessee. The Chancery Court, Davidson County, Carol L. McCoy, Chancellor, granted summary judgment in favor of manufacturer. State appealed. The Court of Appeals, 2011 WL 2571851, J. Steven Stafford, J., reversed and remanded. The Supreme Court permitted appeal.

Holdings: The Supreme Court, William C. Koch, Jr., J., held that:

[1] manufacturer's national contacts alone could not justify exercise of specific personal jurisdiction over manufacturer by Tennessee courts; and

[2] sales of 11.5 million of manufacturer's cigarettes in Tennessee over three-year period did not constitute sufficient minimum contacts with that state, under Due Process Clause and long-arm statutes, for exercise of specific personal jurisdiction over manufacturer.

Decision of Court of Appeals reversed; cause dismissed.

Gary R. Wade, C.J. filed a dissenting opinion, in which Sharon G. Lee, J., joined.

West Headnotes (22)

[1] **Pretrial Procedure**

⚡ Want of Jurisdiction

Pretrial Procedure

⚡ Presumptions and Burden of Proof

A trial court is not obligated, on a motion to dismiss for lack of personal jurisdiction, to accept as true factual allegations that are controverted by more reliable evidence and plainly lack credibility. Rules Civ.Proc., Rule 12.02(2).

[2] **Motions**

⚡ Entitling

Courts should give effect to the substance of motions rather than their form or title.

1 Cases that cite this headnote

[3] **Pretrial Procedure**

⚡ Want of Jurisdiction

A motion to dismiss for lack of personal jurisdiction, which challenges the trial court's authority to hear the case, is ideally addressed as a threshold issue. Rules Civ.Proc., Rule 12.02(2).

[4] **Pretrial Procedure**

⚡ Hearing and Determination in General

A trial court may, in complex cases, allow limited discovery and hold an evidentiary hearing on a motion to dismiss for lack of personal jurisdiction, and may even hold motion in abeyance until after a trial. Rules Civ.Proc., Rule 12.02(2).

[5] **Pretrial Procedure**

⚡ Want of Jurisdiction

Pretrial Procedure

⚡ Presumptions and Burden of Proof

Proper question on a motion to dismiss for lack of personal jurisdiction is whether, taking the plaintiff's factual allegations as true and resolving

all reasonably disputed facts in the plaintiff's favor, the plaintiff has shown, by a preponderance of the evidence, that state's courts may properly exercise jurisdiction over defendant, rather than the summary judgment standard of whether a genuine issue as to any material fact exists and whether moving party is entitled to judgment as a matter of law. Rules Civ.Proc., Rules 12.02(2), 56.01 et seq.

[6] **Courts**

↔ Actions by or Against Nonresidents, Personal Jurisdiction In; "Long-Arm" Jurisdiction

The reach of Tennessee's long-arm statutes regarding personal jurisdiction over nonresidents cannot extend beyond the limits set by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. U.S.C.A. Const.Amend. 14; West's T.C.A. §§ 20-2-214(a) (6), 20-2-225.

[7] **Courts**

↔ Related Contacts and Activities; Specific Jurisdiction

"Specific jurisdiction" exists when a defendant has minimum contacts with the forum state and the cause of action arises out of those contacts; general jurisdiction, on the other hand, may be proper even when the cause of action does not arise out of the defendant's activities in the forum state.

[8] **Courts**

↔ Unrelated Contacts and Activities; General Jurisdiction

A state's courts may assert general jurisdiction over a nonresident when the defendant is "essentially at home" in the state; being "essentially at home" means that a nonresident defendant's contacts with the forum state are sufficiently continuous and systematic such that it would be fair to subject the defendant to suit in the forum state, even when the cause of action arises elsewhere.

[9] **Constitutional Law**

↔ Non-Residents in General

Constitutional Law

↔ Manufacture, Distribution, and Sale

Under due process principles, a nonresident defendant can be subject to specific personal jurisdiction of forum state by purposefully directing activities at residents of forum state, delivering products into the stream of commerce with the expectation that they will be purchased by consumers in forum state, purposefully deriving benefit from forum state, deliberately engaging in significant activities within forum state, creating continuing obligations with residents of forum state, and invoking benefits and protections of forum state's laws. U.S.C.A. Const.Amend. 14.

[10] **Constitutional Law**

↔ Manufacture, Distribution, and Sale

A nonresident defendant's placement of a product into the stream of commerce, without more, is not an act purposefully directed at the forum state, so as to provide a basis under due process principles for exercise of specific personal jurisdiction over that defendant, and awareness of where a product will end up is not purposeful direction. U.S.C.A. Const.Amend. 14.

[11] **Constitutional Law**

↔ Non-Residents in General

The Due Process Clause of the Fourteenth Amendment to the United States Constitution protects an individual's liberty interest in being free from binding judgments of a forum with which he or she has no meaningful contacts, ties, or relations. U.S.C.A. Const.Amend. 14.

[12] **Constitutional Law**

↔ Non-Residents in General

Due process requires that individuals be given fair warning that a particular activity may subject

them to the jurisdiction of a foreign sovereign. U.S.C.A. Const.Amend. 14.

protections of its laws. U.S.C.A. Const.Amend. 14.

[13] **Constitutional Law**

☞ Non-Residents in General

When a state court seeks to assert specific jurisdiction over a nonresident defendant who has not consented to suit there, the due-process requirement of fair warning is satisfied as long as the defendant has purposely directed his or her activities at residents of the forum state, and the litigation stems from alleged injuries that arise out of or relate to those activities. U.S.C.A. Const.Amend. 14.

[17] **Constitutional Law**

☞ Non-Residents in General

Assessing a nonresident defendant's minimum contacts with forum state, in context of analyzing whether exercise of specific personal jurisdiction complies with due process, involves a two-part test: the first step is the fact-gathering exercise of identifying the relevant contacts; if the court finds sufficient minimum contacts, then the inquiry should proceed to the second step, at which the defendant bears the burden of showing that, despite the existence of minimum contacts, exercising jurisdiction would be unreasonable or unfair. U.S.C.A. Const.Amend. 14.

[14] **Constitutional Law**

☞ Non-Residents in General

The touchstone of the due process analysis with respect to the exercise of specific personal jurisdiction over a nonresident defendant is whether the defendant has purposefully established "minimum contacts" in the forum state. U.S.C.A. Const.Amend. 14.

[18] **Constitutional Law**

☞ Non-Residents in General

Courts

☞ Related Contacts and Activities; Specific Jurisdiction

Courts

☞ Presumptions and Burden of Proof as to Jurisdiction

A plaintiff bringing action against a nonresident defendant is required to establish by a preponderance of the evidence that minimum contacts exist between defendant and forum state, in context of showing that due process permits exercise of specific personal jurisdiction over defendant. U.S.C.A. Const.Amend. 14.

[15] **Constitutional Law**

☞ Non-Residents in General

Foreseeability of causing injury in the forum state alone is insufficient to satisfy the requirements of due process for exercising specific personal jurisdiction over a nonresident defendant; rather, the question is whether the defendant's conduct and connection with the forum state are such that he or she should reasonably anticipate being haled into court there. U.S.C.A. Const.Amend. 14.

[19] **Constitutional Law**

☞ Non-Residents in General

A court should consider the quantity of nonresident defendant's contacts with forum state, their nature and quality, and the source and connection of the cause of action with those contacts in assessing whether they satisfy the minimum-contacts requirement under Due Process Clause for exercising specific jurisdiction over that defendant. U.S.C.A. Const.Amend. 14.

[16] **Constitutional Law**

☞ Non-Residents in General

In order for due process to be satisfied, it is essential, in each case in which specific personal jurisdiction is exercised over a nonresident defendant, that there 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

[20] **Constitutional Law**

⚡ Non-Residents in General

In determining whether exercising specific personal jurisdiction over nonresident defendant would be unreasonable or unfair so as to violate due process despite the existence of sufficient minimum contacts with forum state, court should consider such factors as the burden on the defendant, the interests of the forum state, the plaintiff's interest in obtaining relief, the judicial system's interest in obtaining the most efficient resolution of controversies, and the state's interest in furthering substantive social policies. U.S.C.A. Const.Amend. 14.

Sales of 11.5 million of Indonesian manufacturer's cigarettes in Tennessee over three-year period did not constitute sufficient "minimum contacts" with that state, under Due Process Clause and long-arm statutes, for exercise of specific personal jurisdiction over manufacturer in action by state arising from manufacturer's alleged failure to make payments into the Tobacco Manufacturers' Escrow Fund; cigarettes were sold through marketing efforts of Florida entrepreneur who purchased them from independent foreign distributor, manufacturer did not exert any control over destination of cigarettes it sold to distributor, and it exercised no control over entrepreneur's company. U.S.C.A. Const.Amend. 14; West's T.C.A. §§ 20-2-214(a) (6), 20-2-225, 47-31-101 et seq.

[21] **Constitutional Law**

⚡ Manufacture, Distribution, and Sale

Courts

⚡ Manufacture, Distribution, and Sale of Products

Indonesian cigarette manufacturer's national contacts alone did not justify exercise of specific personal jurisdiction over manufacturer by a Tennessee court, under Due Process Clause and that state's long-arm statutes, in state's action arising from manufacturer's alleged failure to make payments into the Tobacco Manufacturers' Escrow Fund for cigarettes sold in Tennessee, where manufacture followed minimal regulatory measures of filing trademark application, submitting ingredients list, and conforming its packages to federal standards, and it adopted marketing measure of displaying words "American Blend" prominently on cigarette package, accompanied by stripes and a flying eagle. U.S.C.A. Const.Amend. 14; West's T.C.A. §§ 20-2-214(a)(6), 20-2-225.

Attorneys and Law Firms

Steven C. Douse, Nashville, Tennessee; and Christopher L. Rissetto, Washington D.C., for the appellant, NV Sumatra Tobacco Trading Company.

Robert E. Cooper, Jr., Attorney General and Reporter; William E. Young, Solicitor General; John H. Sinclair, Jr., Deputy Attorney General; and Rebekah A. Baker, Assistant Attorney General, for the appellee, State of Tennessee.

WILLIAM C. KOCH, JR., J., delivered the opinion of the Court, in which JANICE M. HOLDER and CORNELIA A. CLARK, JJ., joined. GARY R. WADE, C.J. filed a dissenting opinion, in which SHARON G. LEE, J., joined.

Opinion

OPINION

WILLIAM C. KOCH, JR., J.

*1 This appeal concerns whether Tennessee courts may exercise personal jurisdiction over an Indonesian cigarette manufacturer whose cigarettes were sold in Tennessee through the marketing efforts of a Florida entrepreneur who purchased the cigarettes from an independent foreign distributor. From 2000 to 2002, over eleven million of the Indonesian manufacturer's cigarettes were sold in Tennessee. After the manufacturer withdrew its cigarettes from the

[22] **Constitutional Law**

⚡ Manufacture, Distribution, and Sale

Courts

⚡ Manufacture, Distribution, and Sale of Products

United States market, the State of Tennessee filed suit against the manufacturer in the Chancery Court for Davidson County, alleging that the manufacturer had failed to pay into the Tobacco Manufacturers' Escrow Fund as required by Tenn.Code Ann. §§ 47-31-101 to -103 (2001 & Supp.2012). The parties filed cross-motions for summary judgment, and the trial court dismissed the suit for lack of personal jurisdiction over the Indonesian manufacturer. The Court of Appeals reversed, granted the State's motion for summary judgment, and remanded the case to the trial court to determine the applicable fines. *State ex rel. Cooper v. NV Sumatra Tobacco Trading Co.*, No. M2010-01955-COA-R3-CV, 2011 WL 2571851 (Tenn.Ct.App. June 28, 2011). We find that, under the Due Process Clause of the Fourteenth Amendment, Tennessee courts lack personal jurisdiction over the Indonesian manufacturer. We therefore reverse the decision of the Court of Appeals and dismiss the case for lack of personal jurisdiction pursuant to Tenn. R. Civ. P. 12.02(2).

I.

This case takes place in the shadow of a nationwide settlement of litigation concerning the responsibility of the leading tobacco companies in the United States for the costs associated with the treatment of tobacco-related health conditions. Between 1993 and 1998, over 800 lawsuits, including 55 class actions and more than 600 individual claims, were filed against the tobacco companies seeking damages and other relief for the harmful effects of smoking.¹ Included among these lawsuits were actions filed by 42 states.²

Between July 1997 and May 1998, the tobacco companies settled with four states and, in doing so, agreed to pay these states \$36.8 billion in damages.³ On November 23, 1998, following negotiations between representatives of the tobacco companies and a negotiating team of eight state attorneys general,⁴ the four largest domestic tobacco companies, controlling 98% of the cigarette market in the United States,⁵ settled with the remaining 46 states, the District of Columbia, and five territories of the United States.⁶ The terms of this settlement are contained in the Master Settlement Agreement ("MSA").⁷

The MSA creates three types of tobacco companies. The first type includes the Original Participating

Manufacturers ("OPMs")—the tobacco companies that originally entered into the MSA.⁸ The second type includes the Subsequent Participating Manufacturers ("SPMs")—the tobacco companies that joined the MSA but are not the OPMs.⁹ There are currently over 50 tobacco companies in the SPM category, and these companies represent most of the remaining 2% of the cigarette market.¹⁰ The third type includes the Non-Participating Manufacturers ("NPMs")—the tobacco companies that are not part of the MSA.¹¹

*2 The settling states agreed to dismiss their pending lawsuits and to release their past and future claims against the OPMs and the SPMs. In return the OPMs agreed to make several regulatory concessions¹² and to make substantial monetary payments to the states.¹³

The NPMs have no financial obligations under the MSA. Accordingly, they were able to "enter the cigarette market and price cigarettes well below the average OPM's price without facing any consequences under the MSA." Traylor, 63 Vand. L.Rev. at 1105. To protect the OPMs from price competition from the NPMs, the MSA provides for a "Non-Participating Market Share Adjustment" ("NPM Adjustment"). MSA § IX(d)(2). This adjustment permits the OPMs to reduce their annual financial obligation to the states if they lose market share to an NPM.

The possible decrease in an OPM's annual payments could have serious financial consequences for the states. Traylor, 63 Vand. L.Rev. at 1106. Accordingly, the MSA provides that states can avoid the impact of the NPM Adjustment by adopting a "qualifying statute."¹⁴ The purpose of this statute is to neutralize the NPMs' cost advantages by requiring them either to join the MSA or to establish an escrow or reserve account to secure damage awards for any successful cigarette-related claim the state might obtain from the NPM. The amount of these annual payments is based on the number of cigarettes sold by an NPM during a particular year. *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1164 (10th Cir.2012). Any funds remaining in an NPM's escrow account are restored to the NPM 25 years after they have been placed in the account. *Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 63 (2d Cir.2007).

Tennessee was one of the 46 states that approved the MSA on November 23, 1998. In 1999, the Tennessee General Assembly enacted the "Tennessee Tobacco Manufacturers'

Escrow Fund Act of 1999”¹⁵ in order to satisfy the requirements of MSA § IX(d)(2)(E). Tenn.Code Ann. § 47-31-103(a) requires “[a]ny tobacco product manufacturer selling cigarettes to consumers within the state of Tennessee” after May 26, 1999, either to become a participating manufacturer by joining the MSA or to begin making payments into a “qualified escrow fund.”

II.

Pacific Coast Duty Free (“Pacific Coast”), a company located in California, purchased a large quantity of cigarettes from an Indonesian cigarette manufacturer named NV Sumatra Trading Company (“NV Sumatra”). The cigarettes were labeled United brand “American Blend” cigarettes. Pacific Coast was unsuccessful in marketing these cigarettes in the United States and decided to sell them in bulk to another distributor. In 1999, Pacific Coast sold its entire inventory of United brand cigarettes to a Florida entrepreneur named Basil Battah.

At one point, Mr. Battah owned and operated a car alarm company named American Automotive Security. In 1986, American Automotive Security started doing business as FTS Distributors (“FTS”) and began importing cigarettes. Nobody else was marketing United brand “American Blend” cigarettes in the United States in 1999, when Mr. Battah purchased Pacific Coast's remaining inventory of United brand cigarettes. He took the cigarettes to tobacco industry trade shows and advertised them in trade magazines. Before long, he sold them all and decided to purchase more cigarettes from NV Sumatra. Mr. Battah also hoped that he would be able to generate enough sales to convince NV Sumatra to grant him the exclusive right to distribute and sell its cigarettes in the United States.

*3 NV Sumatra had already made arrangements for the distribution of its cigarettes. It sold its United brand cigarettes to Unico Trading Pte., Ltd. (“Unico”), a distribution company based in Singapore. In turn, Unico sold the United brand cigarettes to Silmar Trading, Ltd. (“Silmar”), a tobacco distribution company based in the British Virgin Islands. Thus, when Mr. Battah contacted NV Sumatra about purchasing cigarettes to sell in the United States, he was referred to Nabil Hawe, a Silmar employee residing in the United Kingdom. Mr. Battah and Mr. Hawe made arrangements to enable Mr. Battah to import United brand cigarettes into the United States. Thus, on their way from NV

Sumatra to Mr. Battah, the cigarettes passed through at least these two independent distribution companies.¹⁶

Because tobacco is a highly regulated business, Mr. Battah was required to comply with a number of regulatory hurdles before importing United brand cigarettes into the United States. NV Sumatra had already obtained United States trademarks for its United brand cigarettes. Mr. Battah's lawyer made arrangements between NV Sumatra and the United States government to ensure that the United brand cigarettes complied with the FTC's requirements for rotating the warnings on cigarette packages. The attorney also took steps to file the required information regarding the cigarettes' ingredients with the Department of Health and Human Services. In a letter dated March 30, 1999, Mr. Battah's lawyer reminded him that he also had to “comply with all state and local laws regarding the sale and distribution of tobacco products,” including “any state escrow laws that may be in force.”

After taking the steps to ensure that United brand cigarettes could be legally imported into the United States, Mr. Battah began his efforts to cultivate a market for the cigarettes. His goal was to sell 1,000 master cases¹⁷ of United brand cigarettes in each of the fifty states. He created magazine advertisements, assembled a booth with an illuminated United brand logo, and obtained some point-of-sale posters from NV Sumatra. Then he started attending annual tobacco distributor trade shows in Las Vegas where he marketed the cigarettes to smaller regional distributors.¹⁸ Three of the regional distributors that purchased United brand cigarettes from Mr. Battah sold cigarettes in Tennessee.¹⁹

In May 2001, the United States Customs Service notified FTS that the packaging on the United brand cigarettes was confusing because the cigarettes' Indonesian origin was not conspicuous enough and because the wording on the “American Blend” package, which also featured red and white stripes and a drawing of a flying eagle, appeared to suggest that the cigarettes were made in the United States. Mr. Battah's lawyer was able to convince the Customs Service to grant a waiver for the packages in his inventory that had already been printed. However, the Customs Service insisted that no other United brand cigarettes could be sold in the United States until that packaging was changed.

*4 Undaunted by this development, Mr. Battah sent a sales report to NV Sumatra documenting how many United

brand cigarettes he had been selling and where they were being sold. He also included future sales projections and his marketing strategies and requested that NV Sumatra grant him an exclusive distribution agreement in the United States. NV Sumatra's response was not what he had hoped. In a rather impersonal letter dated July 9, 2001, Timin Bingei, NV Sumatra's executive director, stated:

TO WHOM IT MAY CONCERN

We hereby certify that we are the owner of the "United" trademark registered with the United States Patent and Trademark office in International Class 34 (cigarettes). We have appointed Unico Trading Pte. Ltd. Singapore as our sole agent for sale and marketing cigarettes bearing the trademark "United." We further state that we hereby consent to allow Unico Trading Pte. Ltd. to appoint Silmar Trading Limited, British Virgin Islands to be its exclusive-buyer to distribute "United" cigarettes for sale in the United States of America. This certification remains valid until December 31, 2001 and given above is solely to serve the purpose of importing the products into the United States of America. This certification will not have legal binding [sic] and liabilities to the companies mentioned above or the undersigned.

NV Sumatra Tobacco Trading Company

Timin Bingei—Executive Director

When Mr. Battah was shown this letter during his first deposition, he explained it as follows:

We asked for the exclusive distribution [contract to be put] in writing ... an agreement to be made between [FTS and NV Sumatra] because we were spending a lot of money on this trademark and on establishing its marketability and wanted to spend a lot more. And they came back with this letter.... [W]e were going to expend a lot of energy, time, and money on this product and keep it going.... [But][t]hey wanted us to make our agreements with these other companies....

Mr. Battah and FTS encountered another setback. On July 24, 2001, Mr. Hawe, Silmar's employee in the United Kingdom,

sent Mr. Battah a copy of a facsimile he had received from NV Sumatra's International Trade, Sales, and Services Department. The facsimile read:

Your report on the United cigarettes you faxed to us some time ago stated that the said cigarettes can be purchased in California, Washington, Texas, Arizona, Louisiana, Mississippi, Georgia, South and North Carolina, New Hampshire, Oklahoma, Tennessee, and Kentucky. Most of [the] States mentioned are subject to [the] Escrow Fund Act.

We are wondering whether the importer or any party has opened an escrow account with the States Attorney General. We receive[d] notice from the Office of the Attorney General in the 45 States subject to escrow such as Tennessee, New Hampshire, California, Pennsylvania, etc., to request confirmation whether our cigarettes were sold in their States and whether we have opened an account related to the escrow fund.²⁰

*5 The facsimile also noted that these state attorneys general could initiate civil actions to compel compliance with the Escrow Fund Act and seek civil penalties. The facsimile also stated: "Since United cigarettes are imported and distributed in Florida, Miami which is not subject to the requirements of the Escrow Fund, but indirectly distributed to states which require an Escrow Fund, please request FTS to check with their lawyer" on how to respond to the notice.

In order for Mr. Battah to continue selling United brand cigarettes in the United States, he needed NV Sumatra to change the cigarette packages to satisfy the United States Customs Service, and he also needed NV Sumatra either to join the MSA or to open escrow accounts in all the MSA-compliant states in which United brand cigarettes were being sold.²¹ Accordingly, Mr. Battah requested representatives of NV Sumatra, Unico, and Silmar to meet him in Miami to address these issues. Mr. Bingei decided that the meeting should be held in Beijing, China instead.

During the meeting in Beijing, Mr. Battah presented information illustrating how many United brand cigarettes were being sold in each state. He also provided the participants with information about the MSA and the state escrow funds statutes. He insisted that the most advantageous path for NV Sumatra would be to begin paying into the various state escrow funds. Once these issues were resolved, Mr. Battah also hoped that NV Sumatra would grant him an

exclusive contract to distribute its cigarettes in the United States.

As a result of the Beijing meeting, Mr. Battah believed that the packaging issues would be resolved but was unsure what NV Sumatra's decision regarding the state escrow accounts would be. He hoped for a quick and definitive resolution of these issues because his stock of United brand cigarettes was being rapidly depleted.

Mr. Battah also recalled that one or two additional meetings were held in Miami. It is not clear from the record whether or when these meetings occurred. There is no independent corroboration of these meetings, and Mr. Battah's testimony about these meetings is inconsistent. In his first deposition, Mr. Battah stated that the meeting in Beijing was "the only time [he] met with anyone from NV Sumatra in person," and that no one from NV Sumatra ever came to the United States to meet with him. In an affidavit dated May 26, 2010, NV Sumatra's international sales manager stated that "[NV Sumatra's] corporate records do not reflect any trip to the United States by anyone from [NV Sumatra] during the time period 2001 through 2004." Similarly, Mr. Battah's attorney claimed in his May 26, 2010 affidavit that he possessed "no recollection" and no records of any meeting with representatives from NV Sumatra, Unico, or Silmar in Miami in 2001 or 2002.

[1] Therefore, Mr. Battah's allegation (from his second deposition in February 2010) that NV Sumatra representatives met him in Miami is contradicted by Mr. Battah's own prior testimony, the testimony of his own attorney, and the testimony of NV Sumatra. Although we stated, in *Gordon v. Greenview Hosp., Inc.*, 300 S.W.3d 635, 644 (Tenn.2009), that a trial court hearing a Rule 12.02(2) motion "must take as true all the allegations in the plaintiff's complaint and supporting papers, if any, and must resolve all factual disputes in the plaintiff's favor," we also stated that, "in addition to considering the complaint and the supporting or opposing affidavits, the trial court may, in particularly complex cases, allow limited discovery [or] hold an evidentiary hearing." Accordingly, we wish to clarify that a trial court is not obligated to accept as true factual allegations, such as Mr. Battah's illusive Miami meeting, that are controverted by more reliable evidence and plainly lack credibility.²²

*6 Even if these meetings did take place, they did not work out well for Mr. Battah. In January or February 2002, Mr.

Battah received a discouraging telephone call from an NV Sumatra representative. The caller informed Mr. Battah that NV Sumatra had decided not to change the packaging to the United brand cigarettes and that NV Sumatra did not intend to join the MSA or to establish state escrow funds. The caller also informed Mr. Battah that NV Sumatra was withdrawing from the cigarette market in the United States and, therefore, would not enter into an exclusive distribution contract with FTS.

Shortly after this telephone call, FTS sold the last of its inventory of United brand cigarettes. With this venture at an end, Mr. Battah started the American Cigarette Company, which manufactures its own cigarettes. All told, Mr. Battah sold United brand cigarettes in the United States from 1999 to 2002.

III.

On June 5, 2003, the State of Tennessee filed suit against NV Sumatra in the Davidson County Chancery Court. The lawsuit alleged that NV Sumatra had failed to deposit funds into a qualified escrow account as required by Tenn.Code Ann. § 47-31-103. The original complaint concerned cigarette sales made in Tennessee in 2000 and 2001, but it was later amended to include sales made in 2002.

According to Tennessee's licensed tobacco distributor reports and the joint stipulation of the parties, a total of 11,592,800 United brand cigarettes were sold in Tennessee from 2000 to 2002. Based on these sales, the State alleged that NV Sumatra was obligated to deposit a total of \$168,316.83 into a qualified escrow account. Additionally, the State claimed that NV Sumatra was subject to civil penalties of up to 300% of the unpaid escrow amounts and the State's costs and attorney's fees.

On October 26, 2004, NV Sumatra moved to dismiss the complaint for lack of personal jurisdiction under Tenn. R. Civ. P. 12.02(2). The trial court conducted a hearing, and on September 6, 2006, issued a memorandum opinion denying the motion. At that point, discovery commenced.

The parties deposed Mr. Battah in Fort Lauderdale on October 16, 2008. Mr. Battah explained that he believed he had an oral agreement with NV Sumatra establishing FTS as NV Sumatra's exclusive distributor in the United States. Upon further questioning, however, it became abundantly clear that

all of Mr. Battah's agreements were with Silmar or Unico and that NV Sumatra had fastidiously avoided dealing with Mr. Battah directly. NV Sumatra rebuffed Mr. Battah and consistently insisted that he deal with Unico and Silmar instead. Mr. Battah himself testified that

[NV Sumatra] wanted us to make our agreements with these other companies and we didn't want to make agreements with these other companies. We wanted to make agreements with the trademark owner and the manufacturer of the product directly.... [But] they wanted to run it through these other companies ... they wanted to have filters in-between them.

*7 In a similar vein, the record contains an affidavit from NV Sumatra's international sales manager, dated October 25, 2004, stating that NV Sumatra "does not have any contractual relationships with FTS" or any other company that sells NV Sumatra's cigarettes in Tennessee.

At the close of discovery, the parties filed a joint stipulation and cross-motions for summary judgment. Before the hearing on the motions for summary judgment could be held, the State received new information from Mr. Battah. On February 1, 2010, the trial court ordered additional discovery, including a second deposition of Mr. Battah.

During his second deposition on February 23, 2010, Mr. Battah described how he tried to re-establish connections with NV Sumatra in 2004. He sent the company a draft exclusive distribution contract. NV Sumatra returned the draft contract, with Unico substituted as the contracting party. "[A]t this point," Mr. Battah said, "I probably just threw up my hands with these guys, that they just don't get it." Mr. Battah was "pretty upset" by NV Sumatra's "insistence to stick many companies in between" them. In Mr. Battah's mind, Mr. Howe and Unico were merely brokers. He believed that "[t]he real relationship was between myself and NV Sumatra. They made [the cigarettes], I sold them." In Mr. Battah's opinion, "[e]verybody else in between was smoke screens and mirrors and were unnecessary."

After Mr. Battah's second deposition, the parties filed supplemental briefs in support of their respective motions for summary judgment. The motions were argued on June 9, 2010. On August 18, 2010, the trial court granted NV

Sumatra's motion for summary judgment. The trial court held that it had no jurisdiction over the company. The court noted several relevant, uncontested facts:

The uncontested facts reflect that no Sumatra employee ever traveled to Tennessee for the purpose of conducting business, that no Sumatra employee ever initiated contact with any individual or entity in Tennessee, and that Sumatra does not sell any cigarettes in Tennessee directly or through its agent. Further evident from the uncontested facts is that Sumatra owns a U.S. trademark for the United-brand placed on its cigarette packages and that the ingredient report for the United-brand cigarettes had been filed with the Federal Trade Commission ("FTC") in Washington, D.C. In addition, the parties stipulated that the United-brand cigarettes are labeled with the U.S. Surgeon General's warning about the dangers of smoking as required by U.S. law and that the United-brand packaging identifies the product as an American blend.

For purposes of summary judgment only, the State does not dispute that Sumatra does not own or have any interest in UNICO or Silmar Trading nor does Sumatra have any contractual relationship with Silmar Trading permitting or authorizing the sale of United-brand cigarettes in Tennessee.... The State does not dispute that Sumatra has no ownership interest in FTS and FTS has no ownership interest in Sumatra. Also undisputed is the acknowledgement by FTS' President, Mr. Battah, that FTS had complete ownership of the United-brand cigarettes purchased from Silmar Trading and that FTS shipped millions of cigarettes to a free-trade zone in Miami, Florida.

*8 The trial court also noted that its jurisdiction over NV Sumatra was limited by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. After analyzing the substance of this Due Process restriction on its power, the court concluded:

Tennessee courts have analyzed the Due Process Clause to require something more than that the defendant was aware of its product's entry into Tennessee through the stream of commerce in order to exert jurisdiction over the defendant. In this light, the Court requires some evidence that Sumatra did something more purposefully directed at Tennessee than the mere act of

placing cigarettes into the stream of commerce. Absent such proof, the Court cannot exercise specific personal jurisdiction over Sumatra.

The State perfected an appeal to the Court of Appeals. In an opinion handed down on June 28, 2011, the Court of Appeals reversed the trial court and remanded the case with directions to enter a summary judgment for the State. *State ex rel. Cooper v. NV Sumatra Tobacco Trading Co.*, No. M2010-01955-COA-R3-CV, 2011 WL 2571851, at *32 (Tenn.Ct.App. June 28, 2011). Disagreeing with the trial court's assessment of NV Sumatra's contacts with Tennessee, the court found that "the manufacturer intentionally used a distribution system with the desired result of selling its product in all fifty states, including Tennessee, so as to support a finding that the manufacturer had minimum contacts with the State necessary to invoke the exercise of personal jurisdiction." *State ex rel. Cooper v. NV Sumatra*, 2011 WL 2571851, at *1. The court then made a policy argument that "[f]oreign manufacturers should not be allowed to insulate themselves by using intermediaries in a chain of distribution or by professing ignorance of the ultimate destination of their products." To allow a foreign manufacturer to "shield itself from liability" through the use of "middlemen" would permit "a legal technicality to subvert justice and economic reality." *State ex rel. Cooper v. NV Sumatra*, 2011 WL 2571851, at *15 (quoting *Certisimo v. Heidelberg Co.*, 122 N.J.Super. 1, 298 A.2d 298, 304 (1972)). Finally, the court stated that "the stream-of-commerce theory supports personal jurisdiction over foreign manufacturers" like NV Sumatra that "derive benefits from the distribution and sale of their products in the United States." *State ex rel. Cooper v. NV Sumatra*, 2011 WL 2571851, at *15.²³

The day before the Court of Appeals released its decision, the United States Supreme Court published its first ruling on personal jurisdiction in twenty-four years. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. —, 131 S.Ct. 2780, 180 L.Ed.2d 765 (2011). In *J. McIntyre Machinery*, the Court found that New Jersey lacked personal jurisdiction over a British manufacturer that sold an allegedly defective scrap metal processing machine to a New Jersey company through an independent Ohio-based distributor. On July 8, 2011, NV Sumatra filed a petition seeking a rehearing of its case before the Court of Appeals. *State ex rel. Cooper v. NV Sumatra*, 2011 WL 2571851, at *32. NV Sumatra took issue with several of the appellate court's factual findings and argued that

the court's decision was inconsistent with the United States Supreme Court's *J. McIntyre Machinery* decision.

*9 On August 24, 2011, the Court of Appeals denied NV Sumatra's petition for a rehearing. The Court of Appeals distinguished *J. McIntyre Machinery* on its facts. The court noted that this case did not involve "an isolated defective product that found its way into the forum state through the stream of commerce." *State ex rel. Cooper v. NV Sumatra*, 2011 WL 2571851, at *33. Instead, the court emphasized that "the number of Sumatra's United brand cigarettes sold in Tennessee constitutes something more than an isolated event" and, "[NV] Sumatra's contacts with Tennessee were [therefore] neither isolated, nor incidental." *State ex rel. Cooper v. NV Sumatra*, 2011 WL 2571851, at *33. Accordingly, the court held that the sales of NV Sumatra's cigarettes arose from "the efforts of the manufacturer or distributor to serve directly or indirectly the market for its product in other States." Thus, NV Sumatra's "efforts to distribute its product throughout the United States" made it "not unreasonable" to subject NV Sumatra to suit in Tennessee. *State ex rel. Cooper v. NV Sumatra*, 2011 WL 2571851, at *34 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980)). We granted NV Sumatra's application for permission to appeal.

IV.

Before addressing the substantive issues relating to the ability of Tennessee's courts to exercise personal jurisdiction over NV Sumatra under the facts of this case, we first attend to a procedural matter. NV Sumatra originally invoked Tenn. R. Civ. P. 12.02(2) when it requested the trial court to dismiss the State's complaint for lack of personal jurisdiction. The trial court denied the motion, but later NV Sumatra renewed its challenge to personal jurisdiction using a Tenn. R. Civ. P. 56 motion. Because the parties stipulated the facts, the trial court treated the question of personal jurisdiction as a question of law and dismissed the complaint. Because the trial court had considered the proceeding as one for summary judgment, the Court of Appeals did the same. *State ex rel. Cooper v. NV Sumatra*, 2011 WL 2571851, at *7-9.

[2] Courts should give effect to the substance of motions rather than their form or title. See *Brundage v. Cumberland Cnty.*, 357 S.W.3d 361, 371 (Tenn.2011); *Abshure v. Methodist Healthcare-Memphis Hosps.*, 325 S.W.3d 98,

104 (Tenn.2010); *Norton v. Everhart*, 895 S.W.2d 317, 319 (Tenn.1995). Accordingly, the trial court should have followed the procedures applicable to the hearing and disposition of Tenn. R. Civ. P. 12.02(2) motions challenging personal jurisdiction rather than the procedures commonly associated with motions for summary judgment.

In a recent case involving general personal jurisdiction over a non-resident defendant, we held that a defendant's "motion for summary judgment based on lack of personal jurisdiction" should have been decided as a Rule 12.02(2) motion to dismiss for lack of jurisdiction rather than a motion for summary judgment. *Gordon v. Greenview Hosp., Inc.*, 300 S.W.3d at 642. We explained that either challenging or opposing a Tenn. R. Civ. P. 12.02(2) motion using facts beyond the pleadings does not convert the motion into a motion for summary judgment as in the case of a Tenn. R. Civ. P. 12.02(6) motion. *Gordon v. Greenview Hosp., Inc.*, 300 S.W.3d at 643 (citing *Chenault v. Walker*, 36 S.W.3d 45, 55 (Tenn.2001); *Tennessee Farmers Mut. Ins. Co. v. Farmer*, 970 S.W.2d 453, 455 (Tenn.1998); *Bemis Co. v. Hines*, 585 S.W.2d 574, 576 (Tenn.1979); Tenn. R. Civ. P. 1 (reflecting a policy favoring the "just, speedy, and inexpensive determination of every action"))).

*10 [3] [4] A Tenn. R. Civ. P. 12.02(2) motion to dismiss for lack of personal jurisdiction, which challenges the trial court's authority to hear the case, is ideally addressed as a threshold issue. Thus, a defendant may file a Tenn. R. Civ. P. 12.02(2) motion prior to filing its answer or may include the defense in its answer. The defendant may, at its discretion, support the motion with affidavits or other evidentiary materials. The plaintiff then bears the burden of making a prima facie showing of personal jurisdiction, based on its own evidence. When weighing the evidence on a Tenn. R. Civ. P. 12.02(2) motion, the trial court must take all factual allegations in the plaintiff's complaint and supporting papers as true. The court must resolve all factual disputes in the plaintiff's favor. In complex cases, the court may allow limited discovery and hold an evidentiary hearing. The court may even hold the motion in abeyance until after a trial. *Gordon v. Greenview Hosp., Inc.*, 300 S.W.3d at 644.

[5] In this case, the parties and the courts below focused on whether any "genuine issue as to any material fact" existed and whether either moving party was "entitled to judgment as a matter of law." *State ex rel. Cooper v. NV Sumatra*, 2011 WL 2571851, at *8-9, *28-29. Instead, under the rule expressed in *Gordon v. Greenview Hosp., Inc.*, the proper

question in this case is whether, taking the State's factual allegations as true and resolving all reasonably disputed facts in the State's favor, the State has shown, by a preponderance of the evidence, that Tennessee courts may properly exercise jurisdiction over NV Sumatra.

V.

This case invokes two thorny issues regarding personal jurisdiction. The first issue is whether a foreign manufacturer may be subject to a state court's jurisdiction when that manufacturer's product arrives in the forum state through a series of independent intermediaries not under the manufacturer's control. The second issue is whether a foreign manufacturer who has targeted the United States market as a whole can be subject to personal jurisdiction in a state where the manufacturer's products have been sold, when the evidence fails to show that the manufacturer specifically targeted the forum state.

Issues regarding personal jurisdiction in cases such as this implicate the Due Process Clause of the Fourteenth Amendment. Accordingly, the decisions of the United States Supreme Court establish the boundary lines of personal jurisdiction. While the United States Supreme Court's two most recent decisions in this area have produced inconsistent rationales, we can glean from them the principles that enable us to construe and apply our long-arm statutes in a constitutional manner. Even though there may be cases in which it would be permissible to assert personal jurisdiction over a foreign manufacturer whose products reach Tennessee through a series of independent distributors, this is not one of those cases.

*11 Our discussion will begin with Tennessee's long-arm statutes. Because these statutes derive their content from the United States Constitution, our analysis will include a consideration of the relevant precedents of the United States Supreme Court, particularly *J. McIntyre Machinery*. We will also consider the relevant Tennessee case law and then determine whether the decision in *J. McIntyre Machinery* signals a change in the law. Finally, we will address the facts of this case and render a decision.

A.

In 1972, the Tennessee General Assembly amended the long-arm statute to expand its jurisdictional reach as far as constitutionally permissible.²⁴ Thus, Tenn.Code Ann. § 20–2–214(a)(6) now states that “[p]ersons who are nonresidents of this state ... are subject to the jurisdiction of the courts of this state as to any action or claim for relief arising from,” among other things, “[a]ny basis not inconsistent with the constitution of this state or of the United States.” We have observed that this amendment “converted the long-arm statute from a ‘single enumerated act’ statute to a ‘minimum contacts’ statute that permitted Tennessee courts to exercise personal jurisdiction over nonresident defendants to the full limit permitted by due process.” *Gordon v. Greenview Hosp., Inc.*, 300 S.W.3d at 645 (citing *Masada Inv. Corp. v. Allen*, 697 S.W.2d 332, 334 (Tenn.1985)); see also *Shelby Mut. Ins. Co. v. Moore*, 645 S.W.2d 242, 245–46 (Tenn.Ct.App.1981).

Some in the legal community expressed concern that the precise wording of Tenn.Code Ann. § 20–2–214(a)(6) did not actually stretch Tennessee's jurisdictional arm quite as long as the General Assembly intended. See *Gordon v. Greenview Hosp., Inc.*, 300 S.W.3d at 645–46 (citing Robert Banks, Jr., *The Future of General Jurisdiction in Tennessee*, 27 U. Mem. L.Rev. 559, 581–82 (1997)). Accordingly, the General Assembly engrafted another long-arm in 1997.²⁵ Tenn.Code Ann. § 20–2–225 provides that “[a] court of this state may exercise jurisdiction: (1) [o]n any other basis authorized by law; or (2)[o]n any basis not inconsistent with the constitution of this state or of the United States.”²⁶

[6] Both of Tennessee's long-arm statutes, then, derive their scope from the Tennessee and Federal Constitutions. In this context, we have interpreted the due process protections in the Constitution of Tennessee as being co-extensive with those of the United States Constitution. *Gordon v. Greenview Hosp., Inc.*, 300 S.W.3d at 646 (citing *Gallaher v. Elam*, 104 S.W.3d 455, 463 (Tenn.2003); *Newton v. Cox*, 878 S.W.2d 105, 110 (Tenn.1994)). Therefore, the reach of Tennessee's long-arm statutes cannot extend beyond the limits set by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

B.

The United States Supreme Court's seminal modern personal jurisdiction case is *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). In

International Shoe, the Court was tasked with deciding whether a Delaware shoe manufacturer could be sued in the State of Washington for unpaid contributions to that state's unemployment compensation fund. The company employed eleven to thirteen salespersons who lived and worked in Washington and these employees were under “direct supervision and control of sales managers located in St. Louis.” The employees were provided sample inventory and occasionally rented permanent or temporary locations in Washington to showcase their wares. The shoe company itself had no office in the state and kept no stock of merchandise for sale there. *International Shoe*, 326 U.S. at 313–14, 66 S.Ct. 154.

*12 The Washington Supreme Court held that the company's “regular and systematic solicitation of orders” through its salespersons, and the “continuous flow of [International Shoe's] product into the state” made the company amenable to suit in Washington's courts. *International Shoe*, 326 U.S. at 314, 66 S.Ct. 154. The United States Supreme Court agreed, and noted that, “[h]istorically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person.” Accordingly, the defendant's physical “presence within the territorial jurisdiction of [the] court” had previously been a prerequisite to the court's authority to bind the defendant. *International Shoe*, 326 U.S. at 316, 66 S.Ct. 154. However, in the wake of *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1877), and other changes in civil procedure, the Court noted that a new rule had emerged:

[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.”

International Shoe, 326 U.S. at 316, 66 S.Ct. 154 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940)). This “minimum contacts” language has been the crux of personal jurisdiction in America ever since *International Shoe* was decided.

The Court explained that this “minimum contacts” language is actually a way of analogizing physical presence in cases that involve not a physical person, but an abstract entity like a corporation:

Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, it is clear that [a corporation's presence in the forum state] can be manifested only by activities carried on in its behalf by those who are authorized to act for it.... For the terms "present" or "presence" are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process.

International Shoe, 326 U.S. at 316–17, 66 S.Ct. 154 (internal citations omitted). The Court explained that a corporation's "continuous and systematic" activities within a forum give rise to the corporation's legal or metaphorical "presence" in that state. However, a corporate agent's "casual presence" or "his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there." *International Shoe*, 326 U.S. at 317, 66 S.Ct. 154.

The Court also explained that "the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative." *International Shoe*, 326 U.S. at 319, 66 S.Ct. 154. Instead, "[w]hether due process is satisfied must depend rather upon the quality and nature" of the corporation's activities. *International Shoe*, 326 U.S. at 319, 66 S.Ct. 154. The Due Process Clause "does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations." *International Shoe*, 326 U.S. at 319, 66 S.Ct. 154. However,

*13 to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce

them can, in most instances, hardly be said to be undue.

International Shoe, 326 U.S. at 319, 66 S.Ct. 154.

The United States Supreme Court later explained that the concept of minimum contacts performs two related functions. First, "[i]t protects the defendant against the burdens of litigating in a distant or inconvenient forum," and second, "it acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–92, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980).

The minimum contacts inquiry is generally forum-specific and based on fairness to the defendant. In *World-Wide Volkswagen*, the United States Supreme Court noted that "[t]he limits imposed on state jurisdiction by the Due Process Clause, in its role as a guarantor against inconvenient litigation, have been substantially relaxed over the years." This trend, the Court said, "is largely attributable to a fundamental transformation in the American economy." *World-Wide Volkswagen*, 444 U.S. at 292–93, 100 S.Ct. 559. Although commerce has become an increasingly interstate and international affair, the Court said, "we have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution." *World-Wide Volkswagen*, 444 U.S. at 293, 100 S.Ct. 559.

In light of our nation's federalist structure and its commitment to procedural fairness, a state may not make binding judgments against a defendant that has "no contacts, ties or relations" with the state. *World-Wide Volkswagen*, 444 U.S. at 294, 100 S.Ct. 559 (citing *International Shoe*, 326 U.S. at 319, 66 S.Ct. 154). This is true, the Court said, "[e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State[,] even if the forum State has a strong interest in applying its law to the controversy[,] and "even if the forum State is the most convenient location for litigation." Even then, "the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." *World-Wide Volkswagen*, 444 U.S. at 294, 100 S.Ct. 559 (quoting *Hanson v. Denckla*, 357 U.S. 235, 251, 254, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958)).

World-Wide Volkswagen involved a products liability suit in Oklahoma. The Robinson family bought a new Audi automobile in New York. They later moved to Arizona. On the way to Arizona, the Audi crashed in Oklahoma and burst into flames, severely burning the mother and two children. They filed a products liability suit in an Oklahoma state court. Among the defendants were the New York car dealership and Seaway, Audi's regional distributor for New York. The plaintiffs argued that, because of the inherent mobility of an automobile, it was "foreseeable" to the defendants that the Robinsons' Audi could cause injury in Oklahoma. *World-Wide Volkswagen*, 444 U.S. at 288, 295, 100 S.Ct. 559.

*14 The United States Supreme Court declined to adopt this "foreseeability" rationale. "[F]oreseeability alone," the Court said, "has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *World-Wide Volkswagen*, 444 U.S. at 295, 100 S.Ct. 559. If the Court adopted the plaintiff's theory, then "[e]very seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel." *World-Wide Volkswagen*, 444 U.S. at 296, 100 S.Ct. 559. While foreseeability, the Court said, remained relevant to the analysis,

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 haled into court there.

World-Wide Volkswagen, 444 U.S. at 297, 100 S.Ct. 559.

According to the Court, the Due Process analysis functioned to provide "a degree of predictability to the legal system that allows potential defendants to structure their conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297, 100 S.Ct. 559. Thus,

[w]hen a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State. Hence if the sale of a product of

a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but *arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product 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. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that *delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State*.

World-Wide Volkswagen, 444 U.S. at 297-98, 100 S.Ct. 559 (emphasis added) (quoting *Hanson v. Denckla*, 357 U.S. at 253, 78 S.Ct. 1228).

The emphasized statements in the above quotation have sometimes been taken out-of-context and misapplied. The quotation above, taken as a whole, makes clear that the defendant corporation's relevant "expectation" arises from the company's purposeful availment of the forum state. The "expectation" is what arises from the company's "efforts" to serve the forum state's market. And these "efforts" involve "conduct and connection[s]" with the forum state. "Expectation" in the personal jurisdiction context is not mere foreseeability.

*15 In *World-Wide Volkswagen*, because neither the distributor nor the dealership made "efforts" to serve the market in Oklahoma, they had no "expectation" that their cars would render them liable to suit there. Although it was literally foreseeable that the cars would eventually drive through Oklahoma and possibly crash, "the mere 'unilateral activity' " of the consumer in bringing the product into Oklahoma could not be construed as a "contact" of the defendant with the forum state. *World-Wide Volkswagen*, 444 U.S. at 298, 100 S.Ct. 559 (quoting *Hanson v. Denckla*, 357 U.S. at 253, 78 S.Ct. 1228).

[7] [8] One important development in the doctrine of personal jurisdiction has been the distinction between general and specific personal jurisdiction. The United States Supreme Court recognized this distinction in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 & nn. 8, 9, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984), and this Court did the same in *J.I. Case Corp. v. Williams*, 832 S.W.2d 530, 532 (Tenn.1992), *overruled in part by Gordon v. Greenview Hosp., Inc.*, 300 S.W.3d at 649 n. 11. Specific jurisdiction exists when a defendant has minimum contacts with the

forum state and the cause of action arises out of those contacts. General jurisdiction, on the other hand, may be proper even when the cause of action does not arise out of the defendant's activities in the forum state. A state's courts may assert general jurisdiction when the defendant is "essentially at home" in the state. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. —, —, 131 S.Ct. 2846, 2851, 180 L.Ed.2d 796 (2011). Being essentially at home means that a nonresident defendant's contacts with the forum state are "sufficiently continuous and systematic" such that it would be fair to subject the defendant to suit in the forum state, even when the cause of action arises elsewhere. *Goodyear v. Brown*, 131 S.Ct. at 2854; *see also Helicopteros Nacionales*, 466 U.S. at 414–16, 104 S.Ct. 1868; *Gordon v. Greenview Hosp., Inc.*, 300 S.W.3d at 648–49. Because the parties agree that the State's lawsuit against NV Sumatra implicates specific jurisdiction rather than general jurisdiction, our analysis will focus on specific jurisdiction.

In *Burger King Corp. v. Rudzewicz*, the United States Supreme Court explained that a forum state "legitimately may exercise personal jurisdiction over a nonresident who 'purposefully directs' its activities toward forum residents" because a state has a "manifest interest" in giving its residents "a convenient forum for redressing injuries inflicted by out-of-state actors." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) (quoting *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957)). "Moreover," the Court said, when defendants have "purposefully derive[d] benefit" from their interstate activities, "it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities." *Burger King*, 471 U.S. at 473–74, 105 S.Ct. 2174 (quoting *Kulko v. California Superior Court*, 436 U.S. 84, 96, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978)). The Court explained that

*16 [t]his "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts, or of the "unilateral activity of another party or a third person." Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a "substantial connection" with the forum State. Thus where the defendant "deliberately" has engaged in significant activities within a State, or has created "continuing obligations" between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by "the benefits and protections"

of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.

Burger King, 471 U.S. at 475–76, 105 S.Ct. 2174 (internal citations omitted).

Two years after *Burger King*, the United States Supreme Court decided *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987), which complicated the specific personal jurisdiction analysis. *Asahi* involved a fatal motorcycle accident. The driver filed suit in a California state court, alleging that a defect in the motorcycle's rear tire caused the accident. Among the defendants was the Taiwanese company that had manufactured the tire's inner tube. The inner tube manufacturer sued Asahi Metal Industry Company, the Japanese manufacturer of the inner tube's valve stem, seeking indemnification. The parties eventually settled all claims except the Taiwanese company's indemnification claim against Asahi. *Asahi*, 480 U.S. at 105–06, 107 S.Ct. 1026.

The United States Supreme Court unanimously held that the California state courts could not assert personal jurisdiction over Asahi. However, the plurality opinion's minimum contacts analysis garnered only four votes; while three justices joined Justice Brennan in advocating a more expansive minimum contacts test. Justice Stevens would have avoided the minimum contacts analysis altogether because, in his view, the case could have been decided purely on fairness grounds.

The Court defined the controlling question as

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 constitutes "minimum contacts" between the defendant and the forum State such that the exercise of jurisdiction "does not offend 'traditional notions of fair play and substantial justice.' "

Asahi, 480 U.S. at 105, 107 S.Ct. 1026 (quoting *International Shoe*, 326 U.S. at 316, 66 S.Ct. 154).

The California Superior Court found jurisdiction to be proper, stating that "Asahi obviously does business on an international scale. It is not unreasonable that they defend claims of defect in their product on an international scale." *Asahi*, 480 U.S. at 107, 107 S.Ct. 1026. The Supreme Court of

California likewise held that Asahi's intentional act of placing its components into the stream of commerce together with the company's awareness that some of the components would eventually find their way into California satisfied due process requirements for jurisdiction under *World-Wide Volkswagen*. *Asahi*, 480 U.S. at 108, 107 S.Ct. 1026.

*17 The United States Supreme Court disagreed. Justice O'Connor's plurality opinion cited "the oft-quoted reasoning" that

minimum contacts must have a basis in '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.... Jurisdiction is proper ... where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum state.

Asahi, 480 U.S. at 109, 107 S.Ct. 1026 (quoting *Burger King*, 471 U.S. at 475, 105 S.Ct. 2174).

After noting that minimum contacts must be based on an act of the defendant, the plurality opinion reiterated that the "concept of foreseeability" is "an insufficient basis for jurisdiction under the Due Process Clause." *Asahi*, 480 U.S. at 109, 107 S.Ct. 1026 (citing *World-Wide Volkswagen*, 444 U.S. at 295-96, 100 S.Ct. 559). To establish minimum contacts, there must be a "substantial connection" between the defendant and the forum state. And this connection "must come about by *an action of the defendant purposefully directed toward the forum state.*" *Asahi*, 480 U.S. at 112, 107 S.Ct. 1026 (citing *Burger King*, 471 U.S. at 475-76, 105 S.Ct. 2174). Thus, Justice O'Connor's plurality opinion concluded that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum state." *Asahi*, 480 U.S. at 112, 107 S.Ct. 1026.

Justice O'Connor's mode of analysis in *Asahi* has come to be known as the "stream of commerce plus" doctrine.²⁷ It provides a conceptual framework for determining whether minimum contacts exist in a products liability case involving a nonresident defendant. Justice O'Connor's plurality opinion includes some examples of "[a]dditional conduct" that could provide the "something more," beyond merely selling an item, necessary to demonstrate "purposeful availment" of the forum state. These include

designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State. *But a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.*

Asahi, 480 U.S. at 112, 107 S.Ct. 1026 (emphasis added).

Justice Brennan, joined by three other justices, disagreed, stating:

The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise.... A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity.

*18 *Asahi*, 480 U.S. at 117, 107 S.Ct. 1026 (Brennan, J., concurring in part). In Justice Brennan's view, a manufacturer's awareness that the product would be sold in the forum state established minimum contacts.

The Court then fell silent on specific personal jurisdiction from 1987 to 2011. When the Court spoke again in *J. McIntyre Machinery, Ltd. v. Nicastro*, its opinion did little to resolve the lingering questions left by *Asahi*. The *J. McIntyre Machinery* plurality opinion, authored by Justice Kennedy and joined by three other justices, found that the New Jersey

courts lacked jurisdiction over a British manufacturer of metal shearing machines. In a dissenting opinion, Justice Ginsburg, joined by two other justices, decided that jurisdiction was proper under a somewhat broader version of the stream of commerce theory. In a concurring opinion, Justice Breyer, joined by Justice Alito, agreed with the plurality's result but took issue with Justice Kennedy's reasoning and with Justice Ginsburg's characterization of the facts.

The facts of *J. McIntyre Machinery* are as follows. J. McIntyre Machinery, Ltd. ("McIntyre UK") manufactures metal shearing machines in Nottingham, England. McIntyre Machinery America, Ltd. ("McIntyre America"), located in Stow, Ohio, was its exclusive distributor in the United States. One of McIntyre UK's shearing machines was purchased by Curcio Scrap Metal in Saddle Brook, New Jersey.

In October 2011, Robert Nicastro, an employee of Curico Scrap Metal, seriously injured his hand while operating the metal shearing machine at his employer's place of business. He filed a products liability action against McIntyre UK and McIntyre America in the New Jersey courts. The trial court dismissed Mr. Nicastro's lawsuit against McIntyre UK for lack of personal jurisdiction. The Superior Court of New Jersey, Appellate Division, reversed, *Nicastro v. McIntyre Mach. Am., Ltd.*, 399 N.J.Super. 539, 945 A.2d 92 (N.J.Super.Ct.App.Div.2008), and the New Jersey Supreme Court affirmed the Appellate Division's finding that exercising jurisdiction over the manufacturer comported with due process. *Nicastro v. McIntyre Mach. Am., Ltd.*, 201 N.J. 48, 987 A.2d 575 (2010).

The facts before the New Jersey courts were that McIntyre UK and McIntyre America were independent companies. McIntyre UK held United States patents on its machines, and McIntyre America acted under the "direction and guidance" of McIntyre UK. McIntyre UK encouraged McIntyre America to sell its machines in the United States, and representatives of McIntyre UK attended annual trade conventions in the United States to promote their machines. Representatives of McIntyre UK actually installed machines at scrap metal processing companies in several states. The machine that injured Mr. Nicastro had been assembled in Great Britain and shipped to McIntyre America. In turn, McIntyre America had shipped the machine to Curico Scrap Metal in New Jersey. *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d at 578–79.

*19 It was apparent from the facts that McIntyre UK had purposefully availed itself of the United States market. The key question before the United States Supreme Court was whether McIntyre UK's efforts to target the United States market triggered jurisdiction in New Jersey when only one machine—or possibly up to four machines—had been sold in that state.

The Supreme Court of New Jersey held that targeting the United States market was sufficient to trigger jurisdiction in any state in which McIntyre UK's products were sold. The court held that jurisdiction exists when the manufacturer "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." Because McIntyre UK "knew or reasonably should have known" that its products might reach New Jersey and took no "reasonable step to prevent the distribution of its products" in that state, jurisdiction was held to be proper. *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d at 592–93. Significantly, the Supreme Court of New Jersey did "not find that [McIntyre UK] had a presence or minimum contacts in this State—in any jurisprudential sense—that would justify a New Jersey court to exercise jurisdiction in this case." Rather, Mr. Nicastro's "claim that [McIntyre UK] may be sued in this State must sink or swim with the stream-of-commerce theory of jurisdiction." *Nicastro v. McIntyre Mach. Am., Ltd.*, 987 A.2d at 582.

Justice Kennedy's four-justice plurality opinion expressed concern that the Supreme Court of New Jersey was too swept up in "the 'stream of commerce' metaphor." Justice Kennedy reiterated that the "general rule" that "the exercise of judicial power is not lawful unless the defendant 'purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws,' " was applicable to product liability suits like Mr. Nicastro's. *J. McIntyre Mach.*, 131 S.Ct. at 2785 (quoting *Hanson v. Denckla*, 357 U.S. at 253, 78 S.Ct. 1228).

Accordingly, Justice Kennedy framed the jurisdictional analysis in terms of how a defendant "submits" to the "power" of a "sovereign" through "contact with and activity directed at" that particular sovereign. *J. McIntyre Mach.*, 131 S.Ct. at 2788. To establish specific personal jurisdiction, the defendant must " 'seek to serve' a given state's market." *J. McIntyre Mach.*, 131 S.Ct. at 2788 (quoting *World-Wide Volkswagen*, 444 U.S. at 295, 100 S.Ct. 559). Thus, "[t]he principal inquiry in cases of this sort is whether

the defendant's activities manifest an intention to submit to the power of a sovereign." This happens when the defendant purposefully avails itself of the privilege of conducting activities within the sovereign's territory. A defendant can sometimes do this "by sending its goods rather than its agents." But the transmission of goods only triggers jurisdiction when the defendant has "targeted the forum." Generally, "it is not enough that the defendant might have predicted that its goods will reach the forum State." *J. McIntyre Mach.*, 131 S.Ct. at 2788.

*20 Justice Kennedy criticized Justice Brennan's concurring opinion in *Asahi* for "discard[ing] the central concept of sovereign authority in favor of considerations of fairness and foreseeability." *J. McIntyre Mach.*, 131 S.Ct. at 2788. He pointed out that Justice Brennan's "stream of commerce" approach "made foreseeability the touchstone of jurisdiction." *J. McIntyre Mach.*, 131 S.Ct. at 2788. Parting ways with Justice Brennan, Justice Kennedy explained that "jurisdiction is in the first instance a question of authority rather than fairness" and that "[t]his Court's precedents make clear that it is the defendant's actions, not his expectations, that empower a State's courts to subject him to judgment." *J. McIntyre Mach.*, 131 S.Ct. at 2789. Accordingly, Justice Kennedy's analysis of the relevant precedents led him to conclude that

personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis. 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.... Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State.

J. McIntyre Mach., 131 S.Ct. at 2789.

Under the plurality opinion's framework, McIntyre UK's only relevant contacts were its "purposeful contacts with New Jersey, not with the United States." *J. McIntyre Mach.*, 131 S.Ct. at 2790. According to Justice Kennedy, the minimum contacts analysis centered on three facts: "The distributor

agreed to sell J. McIntyre's machines in the United States; J. McIntyre officials attended trade shows in several States but not in New Jersey; and up to four machines ended up in New Jersey." *J. McIntyre Mach.*, 131 S.Ct. at 2790. "Indeed," he noted, "after discovery the trial court found that the 'defendant does not have a single contact with New Jersey short of the machine in question ending up in this state.'" While these facts might have revealed an intent to serve the United States market, they did not show that McIntyre UK purposefully availed itself of the New Jersey market. *J. McIntyre Mach.*, 131 S.Ct. at 2790. Under these facts, then, New Jersey was "without power to adjudge the rights and liabilities of J. McIntyre, and its exercise of jurisdiction would violate due process." *J. McIntyre Mach.*, 131 S.Ct. at 2791.

Justice Breyer's concurring opinion took issue with the plurality opinion's approach. Justice Breyer noted that there have been "many recent changes in commerce and communication, many of which are not anticipated by our precedents." *J. McIntyre Mach.*, 131 S.Ct. at 2791 (Breyer, J., concurring). However, Justice Breyer thought it "unwise" at that time "to announce a new rule of broad applicability." Justice Breyer preferred to delay formulating new rules in this case because its outcome could be determined with existing precedents. *J. McIntyre Mach.*, 131 S.Ct. at 2791. Accordingly, he concluded that "[n]one of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient" to confer jurisdiction. *J. McIntyre Mach.*, 131 S.Ct. at 2792 (Breyer, J., concurring).

*21 In dissent, Justice Ginsburg chided the "splintered majority" for "turn [ing] the clock back to the days before modern long-arm statutes when a manufacturer, to avoid being haled into court where a user is injured, need only Pilate-like wash its hands of a product by having independent distributors market it." *J. McIntyre Mach.*, 131 S.Ct. at 2795 (Ginsburg, J., dissenting) (quoting Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. Davis L.Rev. 531, 555 (1995)). While acknowledging that McIntyre America was fully independent from McIntyre UK, Justice Ginsburg observed that the machine that injured Mr. Nicastro had arrived in New Jersey "not randomly or fortuitously, but as a result of the U.S. connections and distribution system that McIntyre UK deliberately arranged." *J. McIntyre Mach.*, 131 S.Ct. at 2797 (Ginsburg, J., dissenting).

Unlike the majority opinions, which condensed the record down to three essential facts, Justice Ginsburg exhaustively documented McIntyre UK's marketing efforts toward the United States, as well as its close working relationship with its American distributor. She determined that permitting New Jersey's courts to assert jurisdiction over McIntyre UK was fair and reasonable, especially in light of New Jersey's status as the largest market for scrap metal processing in the United States. Justice Ginsburg asked rhetorically, "[h]ow could McIntyre UK not have intended, by its actions targeting a national market, to sell products in [New Jersey,] the fourth largest destination for imports among all States in the United States and the largest scrap metal market?" *J. McIntyre Mach.*, 131 S.Ct. at 2801 (Ginsburg, J., dissenting). Because McIntyre UK had "purposefully availed itself" of "the United States market nationwide," Justice Ginsburg concluded it "thereby availed itself of the market of all States in which its products were sold by its exclusive distributor." *J. McIntyre Mach.*, 131 S.Ct. at 2801 (Ginsburg, J., dissenting).²⁸ We will return to the *J. McIntyre Machinery* opinion shortly.

[9] [10] The foregoing survey of United States Supreme Court's decisions reveals a pattern of key phrases and concepts that serve as guideposts marking the constitutional boundaries of specific personal jurisdiction. Although "the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State," *Burger King*, 471 U.S. at 474, 105 S.Ct. 2174, certain other phrases appear again and again. These include "meaningful contacts, ties, or relations," "actions by the defendant himself that create a substantial connection," "fair warning," "clear notice," "purposeful availment," "targeting" the forum, "not random, fortuitous, or attenuated contacts," not the "unilateral activity of another party or a third person," "predictability to the legal system that allows potential defendants to structure their primary conduct" to know where they will be liable to suit, and "foreseeability," meaning that the defendant "should reasonably anticipate being haled into court" in the forum state. Jurisdiction can be established by "purposefully direct[ing]" activities at residents of the forum, "deliver[ing] products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state," "purposefully deriv[ing] benefit" from the forum state, "deliberately" engaging in "significant activities" within the forum state, creating "continuing obligations" with residents of the forum state, and invoking the "benefits and protections" of the forum state's laws. Also, it is perfectly clear that placing a product into the stream of commerce, "without more," is not an act

"purposefully directed" at the forum state, and "awareness" of where a product will end up is not purposeful direction. All of these guideposts remain standing after the United States Supreme Court's *J. McIntyre Machinery* decision.

C.

*22 Personal jurisdiction cases in Tennessee have generally hewn closely to the United States Supreme Court's precedents. In *Masada Inv. Corp. v. Allen*, this Court observed that due process only permits personal jurisdiction over a non-resident when the defendant

has minimum contacts with the forum such that "the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" However, the absence of physical contacts will not defeat *in personam* jurisdiction where a commercial actor purposefully directs his activities toward citizens of the forum State and litigation results from injuries arising out of or relating to those activities. In such a case, "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."

Masada Inv. Corp. v. Allen, 697 S.W.2d 332, 334 (Tenn.1985) (internal citations omitted) (finding jurisdiction proper over a defendant who "purposefully availed himself of the privilege of doing business within this state" when he "purposefully directed his activities toward the citizens of this state and his negligent actions resulted in injury here"). We held that, in performing this "minimum contacts" analysis, there are three primary and two secondary factors to consider. The three primary factors are "the quantity of the contacts, their nature and quality, and the source and connection of the cause of action with those contacts." The two lesser factors are "the interest of the forum State and convenience." *Masada Inv. Corp. v. Allen*, 697 S.W.2d at 334 (citing *Shelby Mut. Ins. Co. v. Moore*, 645 S.W.2d 242, 245 (Tenn.Ct.App.1981)).

Although some Tennessee courts continue to use *Masada*'s five-factor framework, this Court and several Court of Appeals panels soon began using the United States Supreme Court's two-part test described in *Burger King*, 471 U.S. 462, 476-77, 105 S.Ct. 2174 (1985). See *Gordon v. Greenview Hosp., Inc.*, 300 S.W.3d 635, 646-47 (Tenn.2009); *Franklin American Mortg. v. Dream House Mortg. Corp.*, No. M2009-01956-COA-R9-CV, 2010 WL 3895531, at *3 (Tenn.Ct.App. Oct. 5, 2010) (No Tenn. R.App. P. 11 application filed); *Mullins v. Harley-Davidson*

Yamaha BMW of Memphis, Inc., 924 S.W.2d 907, 910 (Tenn.Ct.App.1996); *Davis Kidd Booksellers, Inc. v. Day-Impex, Ltd.*, 832 S.W.2d 572, 575 (Tenn.Ct.App.1992). Invoking the five-part *Masada* test is no longer necessary.

Tennessee's Court of Appeals first utilized the *Burger King* two-step personal jurisdiction test in *Davis Kidd Booksellers*:

The minimum contacts test has two steps. First, it requires the court to identify the contacts between the non-resident and the forum. Second, it requires the court to determine whether exercising personal jurisdiction based on these contacts is consistent with traditional notions of fair play and substantial justice. Both steps call for a careful, not mechanical, analysis of the facts of each case with particular focus on the defendant, the forum, and the nature of the litigation.

*23 The first step of the analysis is primarily a fact-gathering exercise. The second step involves some subjective value judgment by the court concerning the quality and nature of the defendant's contacts with the forum and the fair and orderly administration of the law. The court's judgment should be informed by considering, among other matters: the burden on the defendant, the interests of the forum state, the plaintiff's interest in obtaining relief, the judicial system's interest in obtaining the most efficient resolution of controversies, and the state's shared interest in furthering fundamental, substantive social policies.

Davis Kidd Booksellers v. Day-Impex, 832 S.W.2d at 575 (citations omitted).

In *Davis Kidd*, the trial court and the parties viewed the case as an opportunity "to depart from the traditional 'minimum contacts' analysis and to embrace some version of the 'stream of commerce' analysis discussed but not adopted in *Asahi*." The Court of Appeals "decline[d] the invitation," because "[t]he United States Supreme Court itself cannot agree on a stream of commerce test" and the appeal could be decided under the traditional minimum contacts framework. *Davis Kidd Booksellers v. Day-Impex*, 832 S.W.2d at 574.

The Court of Appeals held in *Davis Kidd* that Tennessee lacked personal jurisdiction over a British manufacturer of sprinkler bulbs and its Pennsylvania distributor. A bookstore's inventory was badly damaged due to a defective component part in its sprinkler system. That component part, a glass bulb, was manufactured in Great Britain by Day-Impex. Day-

Impex sold its sprinkler bulbs to its exclusive U.S. distributor, a Pennsylvania company named Sprinkler Bulb. Sprinkler Bulb sold the defective bulb in question to another distributor, a Massachusetts company named Firematic. The bookstore sued all three companies, plus the Nashville contractor and subcontractor who installed the sprinkler system. *Davis Kidd Booksellers v. Day-Impex*, 832 S.W.2d at 574.

The Court of Appeals found that Day-Impex and Sprinkler Bulb had not "purposely directed" their activities toward Tennessee and, therefore, had no contacts in this State. *Davis Kidd Booksellers v. Day-Impex*, 832 S.W.2d at 575-76. Neither Day-Impex nor Sprinkler Bulb had ever sold glass bulbs to anyone in Tennessee. Neither company had "advertised, solicited orders, or maintained an office or employees in Tennessee." No employees from either company had traveled to Tennessee to solicit business. There was no proof of common ownership among the manufacturer or the distributors, and there was no evidence that Day-Impex or Sprinkler Bulb controlled any of Firematic's marketing activities or knew the identity of Firematic's customers. Accordingly, the Court of Appeals held that "[i]n the absence of any other conduct by Day-Impex or Sprinkler Bulb directed toward Tennessee, the nationwide distribution agreement is not evidence of a specific intent or purpose to serve the Tennessee market." *Davis Kidd Booksellers v. Day-Impex*, 832 S.W.2d at 576.

*24 This Court also approved the two-step *Burger King* minimum contacts analysis in *Gordon v. Greenview Hospital, Inc.* We explained that a plaintiff must first prove by a preponderance of the evidence that the defendant has minimum contacts such that it "should reasonably anticipate being haled into court [in Tennessee]." *Gordon v. Greenview Hosp., Inc.*, 300 S.W.3d at 647 (quoting *Lindsey v. Trinity Commc'ns, Inc.*, 275 S.W.3d 411, 418 (Tenn.2009)). We also noted that "[i]f the plaintiff can make that showing, the defendant will have the burden of showing that the exercise of specific jurisdiction would be unfair." *Gordon v. Greenview Hosp., Inc.*, 300 S.W.3d at 647.²⁹

Another significant specific personal jurisdiction case is *Mullins v. Harley-Davidson Yamaha BMW of Memphis, Inc.* This wrongful death suit involved an allegedly defective motorcycle helmet. The helmet had been manufactured in South Korea by the Hong Jin Crown Corporation ("HJC"), which sold the helmet to a Massachusetts distributor, which sold the helmet to the Tennessee retailer. The Court of

Appeals reasoned that asserting jurisdiction over HJC was not proper because:

HJC ... maintains no offices or places of business in the United States. HJC sells its motorcycle helmets directly to the aforementioned distributors. Each distributor is “free to sell to any dealer of their choosing anywhere in the United States.” HJC does not sell directly to dealers and does not suggest names of dealers to any of its distributors. HJC does not sell motorcycle helmets or any other products directly into the State of Tennessee. HJC transacts no business within the state; it maintains no offices or agents and owns no property within the state. HJC did not create or control the distribution system which brought any of its products into the state. HJC does not advertise or participate in the costs of advertising any of its products and does not solicit business in the state. Finally, HJC does not participate in the promotion, or pay any incentives for the promotion, of its products in Tennessee.... HJC was never aware to whom its helmets were ultimately sold or to whom they were sent ... in the United States.

Mullins v. Harley-Davidson, 924 S.W.2d at 909.

The defendant in *Eubanks v. Procraft, Inc.* was a Canadian “liquid siding” manufacturer named Kryton International, which sold products to Kryton-Barbados in the West Indies, which shipped products to another company, Kryton Marketing Division, in Tennessee. *Eubanks v. Procraft, Inc.*, No. E2003-02602-COA-R9-CV, 2004 WL 1732315, at *1 (Tenn.Ct.App. Aug. 3, 2004) *perm. app. denied* (Tenn. Nov. 29, 2004). The Court of Appeals found that these shipments were “not evidence” that Kryton International “intended to serve the Tennessee market.... [M]erely shipping a product to Tennessee at the direction of Kryton-Barbados is not ‘transacting business’ within the state of Tennessee.” *Eubanks v. Procraft, Inc.*, 2004 WL 1732315, at *2 (citing *Gibbons v. Schwartz-Nobel*, 928 S.W.2d 922, 925 (Tenn.Ct.App.1996)). According to the *Eubanks* court, “[*Asahi, Davis Kidd, and Mullins*] establish that simply placing a manufactured item into the ‘stream of commerce’ does not suffice to establish personal jurisdiction,” and “*Asahi* did not represent an exception to the traditional ‘minimum contacts’ analysis.” The fact that Kryton International possessed “presumed knowledge that the products would be sold in Tennessee” was insufficient to establish personal jurisdiction. *Eubanks v. Procraft, Inc.*, 2004 WL 1732315, at *3.

*25 [11] [12] [13] [14] [15] [16] *Attea v. Eristoff* contains a detailed and accurate statement of the law:

The Due Process Clause of the Fourteenth Amendment to the United States Constitution protects an individual's liberty interest in being free from binding judgments of a forum with which he or she has no meaningful contacts, ties, or relations. Due process requires that individuals be given “fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign.” When a state court seeks to assert specific jurisdiction over a non-resident defendant who has not consented to suit there, the requirement of fair warning is satisfied as long as the defendant has “purposely directed” his or her activities at residents of the forum state, and the litigation stems from alleged injuries that “arise out of or relate to” those activities.

The touchstone of the due process analysis is whether the non-resident defendant has purposefully established “minimum contacts” in the forum state. Foreseeability of causing injury in the forum state alone is insufficient to satisfy the requirements of due process. Rather, the question is whether “the defendant's conduct and connection with the forum State are such that he [or she] should reasonably anticipate being haled into court there.”

....

[I]t is essential in each case that there 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.”

Attea v. Eristoff, No. M2005-02834-COA-R3-CV, 2007 WL 1462206, at *2-3 (Tenn.Ct.App. May 18, 2007) (No Tenn. R.App. P. 11 application filed) (internal citations omitted). See also *Franklin American Mortgage v. Dream House Mortgage Corp.*, No. M2009-01956-COA-R9-CV, 2010 WL 3895531, at *9 (Tenn.Ct.App. Oct. 5, 2010) (No Tenn. R.App. P. 11 application filed) (“[A]lthough [the out-of-state defendant] can be charged with knowledge that its product would enter the stream of commerce, it did nothing to direct its activity toward Tennessee, nor did [the defendant corporation] purposely avail itself of the privilege of doing business in Tennessee.... [The defendant's] contacts with Tennessee are simply too tenuous to satisfy the due process requirements”).

In *Precision Castings of Tenn., Inc. v. H & H Mfg.*, our Court of Appeals found that minimum contacts existed where a defendant Pennsylvania corporation solicited a Tennessee company to manufacture some custom parts and

entered into a contract governed by Tennessee law. The fact that no one from the out-of-state corporation “physically visited” Tennessee was “not dispositive” when the defendant “purposefully directed” its activities toward a Tennessee corporation and a breach of contract suit arose from injuries related to those activities. *Precision Castings of Tenn., Inc. v. H & H Mfg.*, No. M2012-00334-COAR3-CV, 2012 WL 3608668, at *3 (Tenn.Ct.App. Aug. 22, 2012) (No Tenn. R.App. P. 11 application filed).

*26 Our survey of Tennessee's leading specific personal jurisdiction cases reveals that Tennessee's appellate courts typically apply the minimum contacts test of *International Shoe*, as elaborated by *World-Wide Volkswagen* and *Burger King*, and that their application of this test is generally consistent with the “stream of commerce plus” doctrine employed by Justice O'Connor in *Asahi*.³⁰ Accordingly, the Court of Appeals' invocation of the Brennesque “stream of commerce” analysis in this case departed from the approach traditionally employed by Tennessee's courts.

D.

Before we proceed to the particular facts of the case at bar, we will address what effect, if any, *J. McIntyre Machinery, Ltd. v. Nicastro* might have had on Tennessee law. We have already established that our interpretation of Tennessee's long-arm statute cannot extend the jurisdiction of Tennessee courts beyond what the Supreme Court of the United States would allow. The relevant question now is whether *J. McIntyre Machinery* altered the Supreme Court's jurisprudence on this subject or overruled some aspect of this Court's traditional approach.

Justice Kennedy's plurality opinion, which adopted a forum-specific analytical framework, is consistent with Tennessee's traditional approach to personal jurisdiction. Justice Kennedy held that targeting the national market provides an insufficient basis for jurisdiction in particular states. Tennessee courts have also indicated that the jurisdictional analysis must be forum-specific. In *Davis Kidd*, for example, the Court of Appeals held that “[a] nationwide distribution agreement is not evidence of a specific intent or purpose to serve the Tennessee market.” *Davis Kidd Booksellers v. Day-Impex*, 832 S.W.2d at 576. In *Mullins*, the actions of a distributor that was “free to sell to any dealer ... anywhere in the United States” did not confer jurisdiction in Tennessee. *Mullins v. Harley-Davidson*, 924 S.W.2d at 909. In *Eubanks*, merely

shipping goods to Tennessee at the request of a national distributor, with presumed knowledge that the goods would arrive in Tennessee, did not confer jurisdiction. *Eubanks v. Procraft, Inc.*, 2004 WL 1732315, at *2-3. These precedents comport with the principle identified by Justice Kennedy in *J. McIntyre Machinery* that “personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis.... [A] defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State.” *J. McIntyre Mach.*, 131 S.Ct. at 2789.

However, in contrast to Justice Kennedy's focus on power and submission, our minimum contacts analysis has always been grounded in fairness and liberty. We have not been asking whether nonresident corporations have submitted themselves to the authority of Tennessee's courts, but whether it would be fair to expect them to defend lawsuits in our State. As the United States Supreme Court has previously stated, “[t]he personal jurisdiction requirement recognizes and protects an individual liberty interest.” It is this “liberty interest” that is “preserved by the Due Process Clause,” and which “represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.” *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982). Cf. *Attea v. Eristoff*, 2007 WL 1462206, at *2 (“The Due Process Clause ... protects an individual's liberty interest....”). See also *International Shoe*, 326 U.S. at 316, 66 S.Ct. 154 (grounding personal jurisdiction on “traditional notions of fair play and substantial justice”). Apart from this conceptual parting of ways, we find no inconsistency in the actual application of the minimum contacts test between Tennessee's leading precedents and the four-Justice *J. McIntyre Machinery* plurality opinion. See Adam N. Steinman, *The Lay of the Land: Examining the Three Opinions in J. McIntyre Machinery, Ltd. v. Nicastro*, 63 S.C. L.Rev. 481, 497-98 (2012) (“Ultimately, choosing to speak in terms of sovereignty or submission does not necessarily entail a substantive difference in terms of the permissible scope of jurisdiction.... In fact, most of Justice Kennedy's more general articulations of what will constitute such submission are uncontroversial and consistent with past precedent”).

*27 However, Justice Kennedy's plurality opinion is not the controlling opinion in *J. McIntyre Machinery*. That role goes to the concurring opinion of Justice Breyer, joined by Justice Alito, under the rule of *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). In its *Marks* opinion, the

United States Supreme Court held that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court 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. at 193, 97 S.Ct. 990 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).³¹

Most courts that have applied the *Marks* rule to *J. McIntyre Machinery* have determined that Justice Breyer's opinion was the judgment that concurred “on the narrowest grounds.”³² Perhaps writing with the *Marks* rule in mind, Justice Breyer characterized the plurality opinion as “a change to the law,” and stated that his own opinion “adhere[s] strictly” to the Supreme Court's precedents. *J. McIntyre Mach.*, 131 S.Ct. at 2794 (Breyer, J., concurring). Justice Breyer explicitly disagreed with the plurality's “seemingly strict” rule that a defendant who does not intend to “submit to the power of a sovereign” cannot be said to have “targeted the forum.” *J. McIntyre Mach.*, 131 S.Ct. at 2793 (Breyer, J., concurring). Instead, Justice Breyer held that the sale of a single item is insufficient to confer jurisdiction when the manufacturer merely placed the product in the national stream of commerce, knowing and hoping that the sale would occur in the forum state. This does strike us as the narrower of the two majority holdings, and, therefore, it is the controlling opinion under *Marks*.

Nevertheless, while Justice Breyer's opinion may be controlling, it fails to resolve the United States Supreme Court's impasse over the stream of commerce theory and, therefore, leaves existing law undisturbed. Unlike Justice Kennedy's plurality opinion, Justice Breyer's concurrence does not articulate a clear conceptual basis for its holding. *See* Effron, 16 Lewis & Clark L.Rev. at 883 (describing Justice Breyer's “equivocation about jurisdictional theories”).

Justice Breyer's analysis in *J. McIntyre Machinery* can be described as a patchwork version of *Asahi*.³³ From Justice O'Connor's opinion in *Asahi*, Justice Breyer appropriated the idea that placing a product into the stream of commerce without “something more” than awareness that the stream “may or will sweep the product into the forum State” is insufficient for establishing jurisdiction. *J. McIntyre Mach.*, 131 S.Ct. at 2792 (Breyer, J., concurring) (quoting *Asahi*, 480 U.S. at 111–12, 107 S.Ct. 1026). From Justice Brennan's concurrence in *Asahi*, Justice Breyer borrowed the idea that

a sale must be part of “the regular and anticipated flow” of commerce, and not a mere “eddy,” in order to confer personal jurisdiction. *J. McIntyre Mach.*, 131 S.Ct. at 2792 (Breyer, J., concurring) (quoting *Asahi*, 480 U.S. at 117, 107 S.Ct. 1026). From Justice Stevens's concurring opinion in *Asahi*, Justice Breyer borrowed the idea that personal jurisdiction is affected by “the volume, the value, and the hazardous character” of the products, and by whether the sale is part of the company's “regular course of dealing.” *J. McIntyre Mach.*, 131 S.Ct. at 2792 (Breyer, J., concurring) (quoting *Asahi*, 480 U.S. at 122, 107 S.Ct. 1026). According to Justice Breyer, when *Asahi*'s separate opinions are patched together in this manner, they “strongly suggest[] that a single sale of a product in a State does not constitute an adequate basis for asserting jurisdiction over an out-of-state defendant, even if that defendant places his goods in the stream of commerce, fully aware (and hoping) that such a sale will take place.” Thus, Justice Breyer concludes, “on the record present here, resolving this case requires no more than adhering to our precedents.” *J. McIntyre Mach.*, 131 S.Ct. at 2792 (Breyer, J., concurring).

*28 Justice Breyer's concurring opinion also featured an austere formulation of the factual record. Justice Breyer based his opinion solely on the “three primary facts” that the New Jersey courts identified as “constitutionally sufficient ‘contacts’ ” with the state: (1) on one occasion McIntyre America sold and shipped one machine to a New Jersey customer; (2) McIntyre UK “permitted, indeed wanted, its independent American Distributor to sell its machines to anyone in America willing to buy them;” and (3) representatives of McIntyre UK attended trade shows several U.S. cities outside New Jersey. *J. McIntyre Mach.*, 131 S.Ct. at 2791–92 (Breyer, J., concurring). When he placed his *Asahi* quilt next to this condensed version of the factual record, Justice Breyer found that the “single isolated sale” was insufficient to confer jurisdiction.

While the New Jersey Supreme Court clearly followed Justice Brennan's broad version of the stream of commerce theory, it is not clear that even Justice Ginsburg's dissent endorsed Justice Brennan's approach. One commentator has described Justice Ginsburg's analysis in *J. McIntyre Machinery* as “grounded in purposeful availment, pure and simple.” Adam N. Steinman, *The Meaning of McIntyre*, 18 Sw. J. Int'l L. 417, 438 (2012). Professor Steinman also described Justice Ginsburg's opinion as “entirely consistent with Justice O'Connor's requirement” that a defendant's actions must

demonstrate an intent to serve the market in the forum state. *Steinman*, 18 Sw. J. Int'l L. at 438.

The facts which Justice Ginsburg emphasized in her dissenting opinion suggest that “Justice O'Connor's something-more standard” was “satisfied” in *J. McIntyre Machinery*. Ides, 45 Loy. L.A. L.Rev. at 385–86. As Justice Ginsburg explained, J. McIntyre UK set up its own exclusive independent U.S. distributor and assisted that distributor in selling its machines in New Jersey, the state with America's largest scrap metal market. Justice Ginsburg's analysis thus established purposeful availment and articulated how McIntyre UK possessed something more than mere awareness that its products would enter New Jersey. It is not clear that Justice Breyer and Justice Ginsburg agree on the stream of commerce theory. Nor is it clear that either Justice endorses Justice Brennan's theory.

Accordingly, we do not read Justice Breyer's opinion as creating a Supreme Court majority that favors Justice Brennan's version of the stream-of-commerce test from *Asahi*. Instead, *J. McIntyre Machinery* merely preserves the doctrinal status quo. Few courts have felt compelled to alter their approach to personal jurisdiction in response to *J. McIntyre Machinery*. See, e.g., *Ainsworth v. Cargotec USA, Inc.*, 2011 WL 6291812, at *4 (“*McIntyre* has little to no precedential value.”); *In re Chinese Manufactured Drywall Prods. Liab. Litig.*, No. MDL 2047, 894 F.Supp.2d —, —, 2012 WL 3815669, at *21 (E.D.La. Sept. 4, 2012) (“Justice Breyer's concurrence provides a clear directive to the Court to apply existing Supreme Court precedent....”); *Sieg v. Sears Roebuck & Co.*, 855 F.Supp.2d 320, 327 (M.D.Pa.2012) (adhering to Third Circuit precedent in light of the *J. McIntyre* majority's failure “to adopt clearly one of the two *Asahi* standards”); *Original Creations, Inc. v. Ready Am., Inc.*, 836 F.Supp.2d 711, 716 (N.D.Ill.2011) (noting that *J. McIntyre Machinery* neither overturned Supreme Court precedent on personal jurisdiction nor disturbed Federal Circuit precedent on the subject); *Lindsey v. Cargotec USA, Inc.*, No. 4:09–CV–00071–JHM, 2011 WL 4587583, at *7 (W.D.Ky. Sept. 30, 2011) (adhering to preexisting precedent post-*J. McIntyre Machinery*). According to one commentator, Justice Breyer's opinion “has done little beyond turning back the clock to precisely where it was after *World-Wide Volkswagen*.” *Effron*, 16 Lewis & Clark L.Rev. at 885. Another commentator has noted that “Justice Breyer's concurrence ... gives no hint as to whether it favors the Brennan or the O'Connor view of the stream of commerce, leaving lower courts marooned as before.”

Patrick J. Borchers, *J. McIntyre Machinery, Goodyear, and the Incoherence of the Minimum Contacts Test*, 44 Creighton L.Rev. 1245, 1265 (2011).

*29 On the other hand, some courts and commentators have read the majority opinion in *J. McIntyre Machinery* as repudiating Justice Brennan's broad stream-of-commerce theory from *Asahi*. One federal court has said that “*McIntyre* clearly rejects foreseeability as the standard for personal jurisdiction,” and observed that Justice Kennedy's and Justice Breyer's opinions “both firmly embrace the continuing significance of individual state sovereignty and ... hold that specific jurisdiction must arise from a defendant's deliberate connection with the forum state.” “Beyond this,” the court said, “*McIntyre* merely affirms the status quo.” The court therefore construed *J. McIntyre Machinery* as “rejecting the foreseeability standard of personal jurisdiction, but otherwise leaving the legal landscape untouched.” *Windsor v. Spinner Indus. Co., Ltd.*, 825 F.Supp.2d 632, 638 (D.Md.2011). See also *Smith v. Teledyne Cont'l Motors, Inc.*, 840 F.Supp.2d 927, 929, 931 (D.S.C.2012) (finding that the “common denominator” in the reasoning of the *J. McIntyre Machinery* majority was the “‘stream-of-commerce plus’ rubric” enunciated by Justice O'Connor in *Asahi*, and that “the ‘stream-of-commerce plus’ test now commands a majority of the Court”); *Oticon, Inc. v. Sebotek Hearing Sys., LLC*, 865 F.Supp.2d 501, 516 (D.N.J.2011) (“Neither knowledge or expectation of sales to a particular forum state is enough to establish jurisdiction according to both the plurality opinion and the concurring opinion [in *J. McIntyre Machinery*].”); *Northern Ins. Co. of New York v. Construction Navale Bordeaux*, No. 11–60462–CV, 2011 WL 2682950, at *5 (S.D.Fla. July 11, 2011) (finding that, after *J. McIntyre Machinery*, “‘something more’ than merely placing a product into the stream of commerce is required for personal jurisdiction”). Shortly after *J. McIntyre Machinery*, a federal court in New Jersey found that the opinion had “overruled the line of cases exemplified by *Tobin [v. Astra Pharm. Prods., Inc.]*, 993 F.2d 528 (6th Cir.1993), *Barone [v. Rich Bros. Interstate Display Fireworks Co.]*, 25 F.3d 610 (8th Cir.1994), and *Power Integrations [v. BCD Semiconductor Corp.]*, 547 F. Supp 2d 365 (D.Del.2008),” which held that “targeting the national market” imputes jurisdiction to all the forum states. *Oticon, Inc. v. Sebotek Hearing Sys., LLC*, 865 F.Supp.2d at 513.

Like one of Dr. Rorschach's amorphous ink blots, Justice Breyer's opinion is susceptible to multiple interpretations. Thus, *J. McIntyre Machinery* fails to signal a change in the

law. Like the court in *Davis Kidd*, we “decline the invitation” to adopt a broader approach to personal jurisdiction. *Davis Kidd Booksellers v. Day-Impex*, 832 S.W.2d at 574.

VI.

Having fully analyzed the relevant legal background, we now return to the facts of the case at bar. We will first reiterate the law of specific personal jurisdiction, as it applies in Tennessee. The following summary is derived from *Burger King*, 471 U.S. at 471–78, 105 S.Ct. 2174; *World-Wide Volkswagen*, 444 U.S. at 291–94, 100 S.Ct. 559; *International Shoe*, 326 U.S. at 316–19, 66 S.Ct. 154; *Gordon v. Greenview Hosp., Inc.*, 300 S.W.3d at 645–49; and *Lindsey v. Trinity Commc'ns, Inc.*, 275 S.W.3d at 417–18.

*30 Tennessee's long-arm statutes are designed to permit its courts to assert personal jurisdiction to the fullest extent authorized by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Due process permits a state to enforce its judgments against a defendant only when the defendant has sufficient minimum contacts with the state that jurisdiction does not offend traditional notions of fair play and substantial justice. Minimum contacts are present when the defendant's purposeful conduct and connection with the forum state are such that the defendant avails itself of the benefits and protections of the state's laws and should, therefore, reasonably anticipate being haled into that state's courts.

[17] [18] [19] Assessing minimum contacts involves a two-part test. The first step is the fact-gathering exercise of identifying the relevant contacts. The plaintiff is required to establish that minimum contacts exist by a preponderance of the evidence. The court should consider the quantity of the contacts, their nature and quality, and the source and connection of the cause of action with those contacts. A defendant's contacts are sufficiently meaningful when they demonstrate that the defendant has purposefully targeted Tennessee to the extent that the defendant should reasonably anticipate being haled into court here.

[20] If the court finds sufficient minimum contacts, then the inquiry should proceed to the second step. At step two, the defendant bears the burden of showing that, despite the existence of minimum contacts, exercising jurisdiction would be unreasonable or unfair. The court, at this stage, should consider such factors as the burden on the defendant, the

interests of the forum state, the plaintiff's interest in obtaining relief, the judicial system's interest in obtaining the most efficient resolution of controversies, and the state's interest in furthering substantive social policies.

We will now apply this minimum contacts test to the facts of the case at hand.³⁴ Our first task is to identify NV Sumatra's contacts with Tennessee. We must then weigh the quantity of those contacts, their nature and quality, and their connection to the cause of action. The ultimate purpose is to determine whether the contacts demonstrate that NV Sumatra has purposefully availed itself of Tennessee's laws, such that it should reasonably anticipate being haled into court here. If not, then exercising jurisdiction over NV Sumatra would automatically be deemed unfair under the Due Process Clause.

The record establishes that NV Sumatra was aware by July 9, 2001, at the latest, that its cigarettes were being sold in Tennessee. In a letter bearing that date, NV Sumatra's executive director refers to the sales of United brand cigarettes in Tennessee and expresses concern over Tennessee's Escrow Fund Act. But, as the United States Supreme Court has instructed us, awareness alone is insufficient for establishing minimum contacts. In *J. McIntyre Machinery*, the plurality and concurring opinions both cited Justice O'Connor's discussion in *Asahi*, where she asserted that “something more” is necessary beyond the mere awareness that the stream of commerce “may or will sweep the product into the forum State.” See *J. McIntyre Mach.*, 131 S.Ct. at 2789–90 (plurality opinion); 131 S.Ct. at 2792 (Breyer, J., concurring) (quoting *Asahi*, 480 U.S. at 111–12, 107 S.Ct. 1026). The record also shows that NV Sumatra stopped shipping cigarettes to FTS around the same time it sent this letter.

*31 Because the record does not reveal that any agent of NV Sumatra has ever entered the State of Tennessee, the State's case is mainly premised on the sales of NV Sumatra's cigarettes here. The State summarizes these contacts as follows:

NV Sumatra, through intermediaries designated by NV Sumatra to import its cigarettes into the United States, sold over 11.5 million cigarettes to Tennessee consumers over a three-year period. The volume of sales establishes a clear indication of NV

Sumatra's deliberate intent to sell in Tennessee and NV Sumatra's knowledge of such sales.

In addition to these sales, the State also asks us to consider what the State describes as "NV Sumatra's contacts at the national level." First, NV Sumatra hired counsel in the United States to assist the company in filing three trademark applications for its United brand cigarettes. Second, the State asserts that NV Sumatra filed its ingredients list with the Office of Health and Human Services for the years 2000 and 2001. The record, however, indicates that it was actually FTS, through its attorney, that filed the ingredients list in 2000. Third, NV Sumatra packaged its Indonesian-made cigarettes with the labeling necessary for sale in the United States. This included syncing the United brand packages with the federal government's rotation of the Surgeon General's warnings.

[21] First, we turn our attention to NV Sumatra's "contacts at the national level." Under existing United States Supreme Court precedent, we cannot find that such contacts are completely irrelevant to the minimum contacts analysis. It is clear, however, that such national contacts *alone* cannot justify jurisdiction in an individual state.³⁵

When we consider the quantity, nature, and quality of NV Sumatra's national contacts, they do not add up to much. Filing a trademark application, submitting an ingredients list, and conforming the packages to federal standards are the minimal things a cigarette manufacturer must do to enable its products to be sold in the United States.³⁶ In terms of marketing, the record establishes that NV Sumatra gave Mr. Battah some United brand posters to display in stores. Also, the United brand cigarette packages prominently displayed the words "American Blend," accompanied by stripes and a flying eagle. These minimal regulatory and marketing measures are either less than or equal to what we have seen in other cases where jurisdiction was lacking, such as *J. McIntyre Machinery*, 131 S.Ct. at 2790–92, 2796, 2803 (noting that the manufacturer aggressively marketed its machines at U.S. trade shows) and *Mullins v. Harley-Davidson*, 924 S.W.2d at 909 (noting that the South Korean manufacturer attended U.S. trade shows and engineered the helmets it sold in America to comply with standards and regulations in the United States).

This paucity of national contacts slips into sharper focus when we consider what the record does not reveal. The record does not reveal, for example, an aggressive advertising

campaign aimed at the United States. NV Sumatra itself sent no representatives to trade shows in the United States. Nor is there even evidence of Internet sales targeting United States markets. Even if we assume that agents of NV Sumatra met with Mr. Battah in Florida once or twice, that minimal physical contact with the United States is not the type or quality of contact that would suggest jurisdiction is proper in Tennessee. This is especially true when NV Sumatra took steps to stop the sale of its cigarettes in the United States shortly thereafter. Mr. Battah practically begged NV Sumatra to assist him in targeting the U.S. market for United brand cigarettes, but NV Sumatra declined his invitation. NV Sumatra established only token contacts with the United States, and the connection of these few contacts to Tennessee is extremely attenuated.

*32 [22] Accordingly, the outcome of this jurisdictional issue hinges on the sales of 11.5 million United brand cigarettes in Tennessee. Sales can count as contacts. However, the sales in this case are so attenuated they do not establish meaningful contacts between the Indonesian manufacturer and the State of Tennessee.³⁷

Quantity of sales is a relevant factor in our minimum contacts analysis, and the quantity of sales here is nothing to sneeze at. The parties have various views concerning how these cigarettes should be measured. The Escrow Fund Act taxes manufacturers by the cigarette, and the record indicates that 11,592,800 United brand cigarettes were sold in Tennessee. Consumers, however, buy the cigarettes by the package or by the carton. Each package contains twenty cigarettes, and each carton contains ten packages. This means that 579,640 packages, or 57,964 cartons of United brand cigarettes were sold in Tennessee. The cigarettes are shipped in cases, and each case contains 50 cartons. This suit therefore involves 1,159 cases of cigarettes being shipped to Tennessee. None of these quantities is insignificant.³⁸

But quantity alone is not dispositive. We must also consider the nature and quality of these sales and their connection to the cause of action. In this case, the connection of the cigarette sales to the cause of action could not be greater. The State's lawsuit alleges that the cigarettes were sold in violation of the Tennessee Tobacco Manufacturers' Escrow Fund Act of 1999. Instead, the jurisdictional problem here revolves around the quality and nature of these sales.

The State insists that the heightened regulatory liability that attaches to cigarette sales weighs in favor of asserting

jurisdiction. Most specific personal jurisdiction cases are products liability cases. They typically involve the sale of a single defective product, such as a sprinkler bulb, a motorcycle helmet, a metal shearing machine, or a tire valve. Here, in contrast, by virtue of the Tennessee Tobacco Manufacturers' Escrow Fund Act, every single United brand cigarette sold in Tennessee generated legal liability for NV Sumatra. The State argues that this difference warrants a broader approach to specific personal jurisdiction. However, specific personal jurisdiction has always focused primarily on the defendant, the forum, and the meaningful connections between them. We do not believe the existence of a regulatory regime like the MSA requires us to alter the traditional constitutional minimum contacts calculus.

The fundamental issue with the sales of United brand cigarettes in Tennessee is that NV Sumatra had almost nothing to do with them. This is a classic case of a company placing its items into the international stream of commerce without anything “more” to demonstrate a specific interest in Tennessee. The record reveals that the arrival of NV Sumatra's cigarettes in Tennessee was almost wholly attributable to the initiative of Mr. Battah and FTS, his tobacco distribution company.

*33 In his depositions, Mr. Battah insinuated that FTS and NV Sumatra cooperated directly in bringing the United brand cigarettes to the United States. He suggested that the intervening distribution companies, Unico and Silmar, were unnecessary “smoke screens and mirrors” that acted as “filters” between NV Sumatra and FTS.

However, the documentary evidence repudiates the implication that NV Sumatra exerted any control over the destination of the cigarettes it sold to Unico. Mr. Battah ordered the United brand cigarettes from Mr. Hawe of Silmar, whom Mr. Battah “assumed” to be an employee of NV Sumatra. This assumption was shown to be incorrect. NV Sumatra shipped United brand cigarettes, through Unico, to whatever destination Silmar requested. The record contains numerous receipts, bills of lading, and other documents that chart how the ownership and control over the United brand cigarettes passed from company to company on their way to Miami (and from there to Tennessee).

Additionally, as the trial court noted in its August 18, 2010 order, the State did not dispute that (1) NV Sumatra “does not own or have any interest in” Unico or Silmar, or vice-versa; (2) NV Sumatra does not have any contractual

relationship with Silmar “permitting or authorizing the sale of United brand cigarettes in Tennessee;” (3) NV Sumatra has no ownership interest in FTS, and vice-versa; and (4) “FTS had complete ownership” of the United brand cigarettes it purchased from Silmar. We cannot, as Mr. Battah did, conflate three legally and managerially independent companies—headquartered in three different countries—in order to exert jurisdiction over a manufacturer that remained mostly aloof from the international marketing and distribution of its cigarettes. Mr. Battah's unsubstantiated legal conclusions, such as that NV Sumatra, Unico, and Silmar are interchangeable, are not the sort of factual evidence that courts must accept as true when ruling on a motion to dismiss for lack of personal jurisdiction.

NV Sumatra had no hand in setting up FTS. NV Sumatra exercised no control over FTS. NV Sumatra did not even seek out FTS to distribute its cigarettes. When Mr. Battah solicited NV Sumatra's cooperation in targeting the Tennessee market, NV Sumatra brushed aside his entreaties. As soon as NV Sumatra learned of its products' sales in Tennessee—and the legal ramifications of these sales—it severed its few ties with FTS and sent FTS no more cigarettes. In other words, it was Mr. Battah's purposeful activities, not NV Sumatra's, that were the *proximate* cause of the sale of United brand cigarettes in Tennessee.³⁹ To borrow language from *Burger King*, the arrival of United brand cigarettes in Tennessee materially resulted from the “unilateral activity of another party,” namely Mr. Battah. NV Sumatra did not *itself* “deliberately” engage in “significant activities” within the State or create “continuing obligations” with Tennessee residents. *Burger King*, 471 U.S. at 475–76, 105 S.Ct. 2174.

*34 One key principle underlying the minimum contacts test is that foreign companies should have notice of where they will be susceptible to suit so they can structure their business to know where they might face liability. As the United States Supreme Court explained in *World-Wide Volkswagen*, when a corporation “purposefully avails itself of the privilege of conducting activities within the forum State,” it has “clear notice that it is subject to suit there,” and can act to alleviate the risk of litigation by, among other things, “severing its connection with the State.” *World-Wide Volkswagen*, 444 U.S. at 297, 100 S.Ct. 559 (quoting *Hanson v. Denckla*, 357 U.S. at 253, 78 S.Ct. 1228). The present case illustrates this principle precisely. Once NV Sumatra became aware that it could be sued in states that had adopted the Tobacco Manufacturers' Escrow Fund Act, the company withdrew its products from the United States market. NV Sumatra

deliberately chose *not* to avail itself of the privilege of conducting business in Tennessee.

This case, therefore, illustrates *World-Wide Volkswagen*'s foreseeability principle. Because NV Sumatra made no "effort" to "serve directly or indirectly" the Tennessee market, the company had no effort-based "expectation" that its products would arrive here and subject the company to legal liability.⁴⁰ All of the marketing and sales "effort" in this case is attributable to Mr. Battah and FTS, a company which had few ties to NV Sumatra beyond purchasing and reselling its United brand cigarettes.

Although this is not a product liability case, NV Sumatra's relationship to Tennessee can be compared with that of the defendant in *Davis Kidd*. The British manufacturer in *Davis Kidd* had an exclusive national distribution agreement with an American company, Sprinkler Bulb. The Court of Appeals held that this agreement, absent other conduct by the British manufacturer directed at Tennessee, failed to establish personal jurisdiction. Here, NV Sumatra had no contractual relationship with any American distribution company. Two independent foreign companies stand between the manufacturer and FTS, the national U.S. distributor. Even more so than in *Davis Kidd*, we can discern no "evidence of a specific intent or purpose to serve the Tennessee market." *Davis Kidd Booksellers v. Day-Impex*, 832 S.W.2d at 576.

In terms of relevant personal contacts, NV Sumatra is situated similarly to the South Korean motorcycle helmet manufacturer in *Mullins*. Like that company, NV Sumatra "maintains no offices or places of business in the United States." It sells its products to independent distributors, which are "free to sell to any dealer of their choosing anywhere in the United States." NV Sumatra "transacts no business" in Tennessee and has no agents and owns no property within the State. Like the South Korean manufacturer in *Mullins* and unlike McIntyre UK, NV Sumatra "did not create or control the distribution system" that brought its products into the State. NV Sumatra does not advertise, solicit business, or personally promote its products here. Until Mr. Battah sent his unsolicited sales reports to NV Sumatra, it appears that the company "was never aware to whom its [cigarettes] were ultimately sold or to whom they were sent" in the United States. *Mullins v. Harley-Davidson*, 924 S.W.2d at 909. Even then, like the Canadian "liquid siding" manufacturer in *Eubanks v. Procraft, Inc.*, 2004 WL 1732315, at *2-3, NV Sumatra's "presumed knowledge" that its products were sold in Tennessee does not confer jurisdiction.

*35 This record reveals that NV Sumatra had no meaningful contacts with Tennessee. Beyond the act of placing its United brand cigarettes in the international stream of commerce, NV Sumatra's targeted behavior at the United States was minimal at most. It had no specific interest in Tennessee. The company's awareness—largely after the fact—that its cigarettes were being sold in Tennessee fails to evidence purposeful availment of the Tennessee market. Based on the attenuated nature and quality of the sales of NV Sumatra's cigarettes in Tennessee, we do not find that these sales amounted to minimum contacts sufficient for NV Sumatra to reasonably expect being haled into court in Tennessee. The *International Shoe* does not fit; NV Sumatra cannot wear it. We therefore have no need to proceed to the second step of the minimum contacts analysis.

In personal jurisdiction cases, the law requires us to follow the United States Supreme Court's lead. The Court declined to substantively alter the traditional minimum contacts inquiry in *Asahi* and *J. McIntyre Machinery*. We certainly will not do so here. If New Jersey lacked jurisdiction over *J. McIntyre Machinery*, which vigorously and directly targeted American markets, including New Jersey, then Tennessee surely lacks jurisdiction over NV Sumatra.

VII.

The courts of Tennessee lack personal jurisdiction over NV Sumatra because the State of Tennessee has failed to establish, by a preponderance of the evidence, that NV Sumatra purposely availed itself of the privilege of doing business in Tennessee. Accordingly, the judgment of the Court of Appeals is reversed and the trial court's dismissal of the State's complaint for lack of personal jurisdiction under Tenn. R. Civ. P. 12.02(2) is affirmed. The costs of this appeal are taxed to the State of Tennessee.

GARY R. WADE, C.J. filed a dissenting opinion, in which SHARON G. LEE, J., joined.

GARY R. WADE, C.J., dissenting.

Introduction

*35 In November of 1998, a number of American tobacco manufacturers and a majority of the states and territories of

the United States, including Tennessee, reached a settlement in litigation over tobacco-related healthcare costs. The terms of the settlement permit the tobacco manufacturers that were involved in the litigation to withhold a portion of their liability under the settlement terms based upon loss of market share in a participating state, unless the state enacts a “qualifying statute” requiring manufacturers not party to the litigation to either participate in the settlement or pay an amount into a designated escrow fund based upon annual cigarette sales. The underlying purpose of requiring nonparticipating manufacturers to either join in the settlement or pay into the escrow fund is to assure “a level playing field” for all manufacturers selling cigarettes in the participating states and territories. In consequence, Tennessee adopted a qualifying statute, the Tennessee Tobacco Manufacturers’ Escrow Fund Act of 1999 (“Escrow Fund Act”), Tenn.Code Ann. §§ 47–31–101 to –103 (2001 & Supp.2012), which requires “[a]ny tobacco product manufacturer selling cigarettes to consumers within the state of Tennessee” after May 26, 1999, to either become a party to the existing settlement agreement or make specified payments into a “qualified escrow fund.” *Id.* § 47–31–103(a).

*36 In this instance, the State of Tennessee (the “State”) filed suit to force NV Sumatra Tobacco Trading Company (“NV Sumatra”), a foreign manufacturer, to conform to the statutory requirements by making a payment into the escrow fund. NV Sumatra filed a motion to dismiss, alleging lack of personal jurisdiction, which the trial court denied. After discovery between the parties, NV Sumatra filed a motion for summary judgment on the personal jurisdiction issue, which the trial court granted, holding that our courts could not exercise jurisdiction over foreign manufacturers with such limited contacts in Tennessee. The trial court dismissed the complaint without addressing a motion the State had filed for summary judgment on its claim that NV Sumatra, as a non-participating manufacturer, owes the State payments under the Escrow Fund Act. The trial court did not, of course, conduct a trial on the merits or reserve at the conclusion of the proof a final assessment as to whether the State had established personal jurisdiction by a preponderance of the evidence. On first-tier review, the Court of Appeals reversed the trial court’s ruling as to personal jurisdiction and granted the State’s motion for summary judgment as to the merits of the case.

Now before this Court, NV Sumatra continues to assert that Tennessee courts may not exercise specific personal jurisdiction over it. I disagree and would affirm the judgment

of the Court of Appeals on the jurisdiction issue. Although I believe the majority opinion by this Court generally sets out the appropriate standard for personal jurisdiction and correctly finds that a motion to dismiss under Tennessee Rule of Civil Procedure 12.02(2)—rather than a motion for summary judgment—is the appropriate vehicle for the disposition of the jurisdiction issue, I must dissent because, in my opinion, the statements contained in the affidavits and depositions filed in support of the respective motions for summary judgment warrant a different result.

On a Rule 12.02(2) motion to dismiss based on lack of personal jurisdiction, absent affidavits, depositions, or “live” testimony, trial courts must draw all reasonable inferences in favor of the plaintiff and otherwise accept as true the allegations supporting the complaint. I believe that the State has clearly made a prima facie showing that the contacts of NV Sumatra in Tennessee, directly and through its distributors, are sufficient to establish personal jurisdiction. Moreover, in my view, the contents of the affidavits and depositions that were filed in the trial court not only establish that NV Sumatra’s contacts with Tennessee markedly exceed those of the defendant in *J. McIntyre Machinery, Ltd. v. Nicastro*, — U.S. —, 131 S.Ct. 2780, 180 L.Ed.2d 765 (2011), the United States Supreme Court’s most recent pronouncement on the subject of personal jurisdiction, but also tip the scales in favor of the State on the dispositive question before this Court.

While I would further observe that the result reached by the majority is not necessarily in conflict with the fragmented, limited ruling in *McIntyre*, which produced three separate opinions but none qualifying as a majority ruling, I do not agree that the essential components of *McIntyre* compel this Court to refrain from exercising personal jurisdiction over NV Sumatra. Because NV Sumatra has failed to demonstrate that the exercise of jurisdiction in Tennessee would be unreasonable or unfair, I believe that, based upon the sworn statements appearing in the record, the State has made a showing that justifies personal jurisdiction.

I. Evidentiary Standards for a Rule 12.02(2) Motion

*37 As stated by the majority and in this dissent, the trial court should have treated NV Sumatra’s motion for summary judgment based upon a lack of personal jurisdiction as a supplemental motion to dismiss. *See* Tenn. R. Civ. P. 12.02(2). This is of no real consequence, however,

because both the State and NV Sumatra chose to rely upon facts beyond the pleadings to support their arguments. The standard for adjudicating a Rule 12.02(2) motion was most recently set forth in *Gordon v. Greenview Hospital, Inc.*, 300 S.W.3d 635, 643–45 (Tenn.2009), which is quoted at length by the majority. The crux of the rule is that upon the filing of a motion to dismiss for lack of personal jurisdiction, “[a] trial court must take as true all the allegations in the plaintiff’s complaint and supporting papers, if any, and must resolve all factual disputes in the plaintiff’s favor.” *Gordon*, 300 S.W.3d at 644; *see also Chenault v. Walker*, 36 S.W.3d 45, 56 (Tenn.2001) (stating that when adjudicating Rule 12.02(2) motions, trial courts “should not credit conclusory allegations or draw farfetched inferences”).¹ My initial fear is that the majority not only implies a more exacting standard than required by our rule, suggesting that “a trial court is not obligated to accept as true factual allegations ... that are controverted by more reliable evidence and plainly lack credibility,” but also misses the mark in assessing the value of the evidence presented.

This is not an easy case. I concede that some facts recited in this record by both affidavit and deposition support the conclusion reached by the majority, but there are compelling facts, marginally greater, that support the exercise of personal jurisdiction over NV Sumatra. As indicated, my belief is that the majority has placed too much emphasis on the sworn statements favoring a dismissal at the expense of those facts that support the opposite result.

As a general guideline, I would subscribe to the proposition that each contact that a foreign defendant has with this state should be considered in the aggregate rather than in isolation, as I believe the majority has done. In considering whether the exercise of personal jurisdiction over an out-of-state defendant comports with due process, our courts must consider the nature, quality, and quantity of all of the defendant’s contacts together. *See Gordon*, 300 S.W.3d at 644 (“Dismissal is proper only if *all* the specific facts alleged by the plaintiff *collectively* fail to establish a prima facie case for personal jurisdiction.” (emphasis added)); *see also id.* at 649 (holding that the defendant hospital’s contacts with Tennessee, “taken alone or together,” did not justify the exercise of personal jurisdiction). As explained below, I would classify the collective contacts of NV Sumatra with Tennessee as sufficient to establish personal jurisdiction.

II. Due Process

Because a decision regarding the exercise of personal jurisdiction over a defendant involves a question of law, the standard of review of a trial court’s decision to grant or deny a Rule 12.02(2) motion is de novo with no presumption of correctness. *Id.* at 645. A threshold issue in the due process analysis is the determination of which party bears the burden of proof of personal jurisdiction and precisely what that burden entails. The majority concludes that when the defendant supports its Rule 12.02(2) motion “with affidavits or other evidentiary materials,” the path NV Sumatra has chosen here, “[t]he plaintiff then bears the burden of making a prima facie showing of personal jurisdiction, based on its own evidence.” Elsewhere, however, the majority observes that “[t]he plaintiff is required to establish that minimum contacts exist by a preponderance of the evidence.” In my assessment, trial courts have broad discretion as to how to proceed upon the filing of a Rule 12.02(2) motion to dismiss. Depending upon the relevant circumstances, including the complexities of the case and the nature of the personal jurisdiction issue, the trial court may decide the motion either based solely upon the complaint and the affidavits filed in support of the motion, or in the alternative, based upon deposition testimony or even an evidentiary hearing. *Id.* at 644.

*38 It is important to note, however, that the manner in which the trial court chooses to proceed will affect the standard of review for the motion to dismiss. If the trial court determines that it is appropriate to decide the motion without an evidentiary hearing, then “[d]ismissal is proper only if all the specific facts alleged by the plaintiff collectively fail to establish a prima facie case for personal jurisdiction.” *Id.* If the trial court conducts an evidentiary hearing, then it may assess the credibility of any witnesses that testify to determine if the plaintiff has established personal jurisdiction under a preponderance of the evidence standard. *Id.*; *see also Chenault*, 36 S.W.3d at 56.

Federal Rule of Civil Procedure 12(b)(2), the federal counterpart to Tennessee’s Rule 12.02(2), has been interpreted in this same way:

The most common formulation found in the judicial opinions is that the plaintiff bears the ultimate burden of demonstrating that the court’s personal jurisdiction over the defendant exists

by a preponderance of the evidence, but *needs only make a prima facie showing when the district judge restricts ... review of the Rule 12(b)(2) motion solely to affidavits and other written evidence.*

5B Charles A. Wright et al., *Federal Practice and Procedure* § 1351 (3d ed.2005) (emphasis added). The Sixth Circuit Court of Appeals has specifically addressed how a plaintiff makes out a prima facie case:

When ... a district court rules on a jurisdictional motion to dismiss made pursuant to Federal Rule of Civil Procedure 12(b)(2) without conducting an evidentiary hearing, the court must consider the pleadings and affidavits in a light most favorable to the plaintiff To defeat such a motion, [the plaintiff] need only make a prima facie showing of jurisdiction.

Furthermore, a "court disposing of a 12(b)(2) motion **does not weigh** the controverting assertions of the party seeking dismissal," ... because we want "to prevent non-resident defendants from regularly avoiding personal jurisdiction simply by filing an affidavit denying all jurisdictional facts." Dismissal in this procedural posture is proper only if all the specific facts which the plaintiff ... alleges collectively fail to state a prima facie case for jurisdiction.

CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1262 (6th Cir.1996) (citations omitted) (emphasis added) (quoting *Theunissen v. Matthews*, 935 F.2d 1454, 1459 (6th Cir.1991)). I believe this is the proper approach, as it avoids a premature weighing of the evidence.

In this instance, the trial court decided the personal jurisdiction issue without an evidentiary hearing, and, in this appeal, neither party has challenged the procedure used. The State's burden, therefore, was limited to establishing a prima facie case for personal jurisdiction. As explained below, the State has met this burden.

A. Minimum Contacts

*39 The first step in the due process analysis is to determine whether the defendant has established sufficient contacts with Tennessee. The majority summarizes the varying opinions in the United States Supreme Court's two most recent personal jurisdiction decisions involving products placed into the

stream of commerce by a foreign manufacturer: first, *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987), in which the Court split 4–4 between Justice O'Connor's "stream-of-commerce-plus" position and Justice Brennan's less-demanding "stream-of-commerce" approach, and, second, *McIntyre*, which was intended to resolve the *Asahi* impasse but which also failed to produce an opinion garnering at least five votes. Several state and federal courts have concluded that Justice Breyer's concurrence serves as the controlling opinion in *McIntyre* because it represents the " 'position taken by those Members who concurred in the judgments on the narrowest grounds.' " *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)). I agree with that observation. See, e.g., Arthur R. Miller, *McIntyre in Context: A Very Personal Perspective*, S.C. L.Rev. 465, 476 (2012) ("I view ... [t]he *McIntyre* plurality opinion [a]s an open invitation to defense interests to exploit this stop sign for all it is worth. Next, we will be barring the courthouse door to all but a chosen few."); Johnjerica Hodge, Note, *Minimum Contacts in the Global Economy: A Critical Guide to J. McIntyre Machinery v. Nicastro*, 64 Ala. L.Rev. 417, 441 (2012) ("[C]ourts should not read [*McIntyre*] as requiring that they apply stringent jurisdictional rules like those applied by the plurality in [*McIntyre*]. Such application would result in a farce of due process.").

As the majority observes, "Justice Breyer's concurrence ... is susceptible to multiple interpretations." Clearly, Justice Breyer was content to decide *McIntyre* on its facts and had no interest in participating in any attempt to establish a new jurisdictional standard—either that set out in the plurality opinion by Justice Kennedy or that adopted by the New Jersey Supreme Court, see *Nicastro v. McIntyre Mach. Am., Ltd.*, 201 N.J. 48, 987 A.2d 575 (2010).² Because, as the majority states, "the law requires us to follow the United States Supreme Court's lead" in personal jurisdiction cases, I believe it is highly instructive to compare the sworn statements presented by the State in this instance with the three critical facts set forth in Justice Breyer's concurrence in *McIntyre*—facts which did not, in his view, warrant the Supreme Court's exercise of personal jurisdiction. When performing its analysis using Justice Breyer's concurrence as a guide, the majority concludes that "[i]f New Jersey lacked jurisdiction over J. McIntyre Machinery ... then Tennessee surely lacks jurisdiction over NV Sumatra." I cannot agree with that assessment.

*40 In *McIntyre*, four fingers of Nicastro's right hand were severed while he was operating a metal-shearing machine that had been purchased by his New Jersey employer. He filed a products liability suit against J. McIntyre Machinery, Ltd. ("McIntyre UK"), located in England, which had manufactured and sold the machinery to Nicastro's employer. McIntyre UK defended the suit by asserting, among other things, that the New Jersey courts lacked personal jurisdiction. While agreeing with Justice Kennedy that the state court lacked jurisdiction over McIntyre UK, Justice Breyer pointed to the three facts that the New Jersey Supreme Court had interpreted as vesting personal jurisdiction in the courts of that state and then concluded that those facts fell short:

- (1) Quantity of sales: the independent American distributor, McIntyre Machinery America, Ltd. ("McIntyre America"), had "on one occasion sold and shipped one machine to a New Jersey customer"—Nicastro's employer;
- (2) Relationship with distributors: McIntyre UK "permitted, indeed wanted" McIntyre America "to sell its machines to anyone in America willing to buy them"; and
- (3) Contacts with the national market: representatives of McIntyre UK attended trade shows in various locations in the United States (though not in New Jersey) over a period of several years.

McIntyre, 131 S.Ct. at 2791 (Breyer, J., concurring). After comparing these three pertinent facts in *McIntyre* with the sworn statements and deposition testimony in this record, I have concluded that NV Sumatra's contacts with Tennessee were measurably greater—not only sufficient to survive a motion to dismiss, but also, in consideration of the sworn statements as a substitute for an evidentiary hearing, sufficient to establish personal jurisdiction, even under the preponderance of the evidence standard referenced by the majority.

I. Quantity of Sales

In concluding that McIntyre UK had insufficient contacts with New Jersey, Justice Breyer relied heavily upon the fact that there was only a single sale of a single product in New Jersey.³ Citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980), and both plurality opinions in *Asahi*, Justice Breyer observed that none of the Supreme Court's

precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient. Rather, [its] previous holdings suggest the contrary....

Here, the relevant facts found by the New Jersey Supreme Court show no "regular ... flow" or "regular course" of sales in New Jersey; and there is no "something more," such as special state-related design, advertising, advice, marketing, or anything else.

McIntyre, 131 S.Ct. at 2792 (Breyer, J., concurring) (third alteration in original) (emphasis added).

The quantity of sales in the case before us stands in stark contrast to the single transaction in *McIntyre*. According to licensed distributor reports that were filed with the State of Tennessee, 1,340,000 of NV Sumatra's United brand cigarettes were stamped for sale in Tennessee between January 1 and December 31, 2000. Between January 1 and December 31, 2001, another 9,595,200 United brand cigarettes were stamped for sale in Tennessee. Between January 1 and December 31, 2002, 657,600 more United brand cigarettes were stamped for sale in Tennessee. Thus, the quantity of NV Sumatra's cigarette sales in Tennessee from 2000 to 2002 amounted to 11,592,800 individual cigarettes, 579,964 packs, or nearly 58,000 cartons. While the majority concedes that this quantity of sales is, quoting its exact language, "nothing to sneeze at," it concludes that the numbers are "not dispositive" because "NV Sumatra had almost nothing to do with" the sales, placing the cigarettes "into the international stream of commerce without anything 'more' to demonstrate a specific interest in Tennessee."⁴ The portion of Justice Breyer's opinion quoted above suggests, however, that *either* a "'regular ... flow' or 'regular course' of sales" in the forum state or "'something more,' such as special state-related design, advertising, advice, marketing, or anything else" may support a finding of sufficient contacts. While the majority appears to assume that only the latter can support such a conclusion, a number of courts have interpreted the language in Justice Breyer's concurrence in the disjunctive and ruled that a "regular flow" or "regular course" of sales is or could be sufficient to establish that an out-of-state defendant had minimum contacts with the forum state. *See, e.g., UTC Fire & Sec. Ams. Corp. v. NCS Power, Inc.*, 844 F.Supp.2d 366, 376 (S.D.N.Y.2012) ("[Justice Breyer's] concurrence did not foreclose the possibility that a court might exercise jurisdiction where there is a 'regular course of sales' of defendant's goods in the forum state, or 'something

more, such as special state-related design, advertising, advice, marketing or anything else.’ ” (emphasis added) (quoting *McIntyre*, 131 S.Ct. at 2791–92 (Breyer, J., concurring)); *Huddleston v. Fresenius Med. Care N. Am.*, No. 1:10CV713, 2012 WL 996959, at *5 (S.D. Ohio Mar. 22, 2012) (same).

*41 A recent decision by the Oregon Supreme Court is instructive. A Taiwanese manufacturer of battery chargers supplied its products for installation in motorized wheelchairs built by an Ohio corporation, which then sold the wheelchairs throughout the United States, including in Oregon. *Willemsen v. Invacare Corp.*, 352 Or. 191, 282 P.3d 867, 869 (2012).⁵ After being sued on a products liability claim, the Taiwanese manufacturer challenged the exercise of personal jurisdiction, pointing out that it was the Ohio corporation that had chosen to sell its products in Oregon and arguing “that, under [*McIntyre*], the mere fact that [the Taiwanese manufacturer] may have expected that its battery chargers might end up in Oregon is not sufficient to give Oregon courts specific jurisdiction over it.” *Id.* at 872. Relying on Justice Breyer’s concurrence as the controlling opinion in *McIntyre*, however, the court found that “the sale of over 1,100 [of the Taiwanese manufacturer’s] battery chargers within Oregon over a two-year period shows a ‘regular ... flow’ or ‘regular course’ of sales” in Oregon. *Id.* at 874 (second alteration in original) (quoting *McIntyre*, 131 S.Ct. at 2792 (Breyer, J., concurring)) (internal quotation marks omitted). This volume of sales “was sufficient to show a ‘regular course of sales’ and thus establish sufficient minimum contacts for an Oregon court to exercise specific jurisdiction over” the foreign defendant. *Id.* at 875 (emphasis added). Other courts have similarly distinguished *McIntyre* and held that a foreign defendant is subject to personal jurisdiction in the forum state based upon the volume of sales in that state. *See, e.g., Graham v. Hamilton*, No. 3:11–609, 2012 WL 893748, at *4 (W.D.La. Mar. 15, 2012) (holding that “the *McIntyre* concurrence does not govern the facts of this case” because, unlike the single sale to New Jersey in *McIntyre*, the record showed that the foreign defendant “places over 800,000 vehicles into the U.S. market each year,” many of which “would likely be sold in” the forum state); *Ainsworth v. Cargotec USA, Inc.*, No. 2:10–CV236–KS–MTP, 2011 WL 4443626, at *7 (S.D. Miss. Sept. 23, 2011) (holding that the case was “remove[d] ... from the scope of *McIntyre*’s applicability” because the out-of-state defendant had sold 203 forklifts to customers in the forum state over the previous decade, generating over \$5.3 million in sales).

I agree with the interpretation of Justice Breyer’s concurring opinion set forth by the Oregon Supreme Court. In my view, Justice Breyer’s opinion authorizes a finding of minimum contacts if there is either a “‘regular ... flow’ or ‘regular course’ of sales” in a forum state or “‘something more,’ such as special state-related design, advertising, advice, marketing, or anything else.” *McIntyre*, 131 S.Ct. at 2792 (Breyer, J., concurring). The sale of over 11.5 million products over the course of roughly three years clearly constitutes a “regular flow” or “regular course” of sales for that period. This regular course of sales in Tennessee is reason alone to hold that the State has made out a prima facie case for the exercise of personal jurisdiction over NV Sumatra. Furthermore, the State carried its burden even under a preponderance of the evidence standard because the “something more,” as stated by Justice Breyer as an alternative method of proving personal jurisdiction, has also been established by the sworn statements in the record, which the parties deemed to constitute all of the proof necessary on the subject.

2. Relationship with Distributors

*42 The second pertinent fact in *McIntyre*, as set forth in Justice Breyer’s concurrence, is that *McIntyre* UK “permitted, indeed wanted,” *McIntyre* America “to sell its machines to anyone in America willing to buy them.” *McIntyre*, 131 S.Ct. at 2791 (Breyer, J., concurring). Justice Ginsburg describes the relationship between *McIntyre* UK and *McIntyre* America in further detail in her dissenting opinion. While *McIntyre* America was the exclusive distributor in the United States for *McIntyre* UK during the relevant period, “the two companies were separate and independent entities with ‘no commonality of ownership or management.’ ” *McIntyre*, 131 S.Ct. at 2796 (Ginsburg, J., dissenting) (quoting *Nicastro v. McIntyre Mach. Am., Ltd.*, 399 N.J. Super. 539, 945 A.2d 92, 95 (N.J. Sup. Ct. App. Div. 2008)); *see also id.* at 2786 (plurality opinion) (“[A]n independent company agreed to sell J. *McIntyre*’s machines in the United States ... and there is no allegation that the distributor was under J. *McIntyre*’s control.”). Thus, *McIntyre* UK clearly had a direct, and yet independent, relationship with an American distributor designed to market and sell its products throughout the United States. While it is undisputed that a significant number of NV Sumatra’s United brand cigarettes were sold in the United States—and in Tennessee—from 2000 to 2002, this particular foreign manufacturer’s relationship with its American distributor, FTS Distributors (“FTS”), is less clear, but still sufficient to establish personal jurisdiction.

The State's primary source of information regarding the sale of NV Sumatra's United brand cigarettes in Tennessee and a number of other states is the sworn affidavit and deposition testimony of Basil Battah, the president of FTS. FTS was an importer and distributor of cigarettes based out of the Miami Free Zone—the foreign trade zone in Miami, Florida—and was the only distributor of United brand cigarettes in the United States during the relevant period. Battah testified that the first United brand cigarettes that FTS bought were from a California company called Pacific Coast Duty Free in late 1999 or 2000. The transaction was initiated by Pacific Coast Duty Free; subsequently, according to Battah, “the representative of NV Sumatra asked us to be the importer of the product.” After FTS sold all of the cigarettes it had initially purchased, it “wanted more” and began to place orders by telephone and facsimile for United brand cigarettes to three separate entities simultaneously: NV Sumatra; Unico Trading, a distributor based in Singapore; and Nabil Hawe, an individual based out of London who became a primary point of contact for FTS. Battah testified that, at least initially, he had assumed that Hawe worked for NV Sumatra, when, in fact, Hawe worked for a third entity, Silmar Trading, which was based in the British Virgin Islands. Battah testified that he would often place a direct call to NV Sumatra in Indonesia to follow up on orders. The shipments originated in Indonesia but usually came through Singapore, London, or both, en route to FTS in Miami. The certificates of origin and bills of lading in this record indicate that, whatever the stops along the way, the United brand cigarettes left NV Sumatra in Indonesia identifying their final destination as the United States (specifically, Miami).

*43 Despite the involvement of Unico Trading and Silmar Trading as possible intermediaries, Battah's testimony indicates that he had a direct relationship with NV Sumatra. When asked whether FTS had “enter[ed] into a written or oral contract with anyone from NV Sumatra about distributing their cigarettes,” Battah answered definitively: “We had an oral agreement that I was their exclusive distributor. We wanted to put it in writing but we never got that far because they just stopped selling us cigarettes completely.”⁶ When asked with whom he had those discussions, Battah responded: “With ... several people from NV Sumatra. A contract was going to be written. Never got that far. They gave me their word that I was their exclusive and only distributor for United States of America.” Battah further testified that “[t]he real relationship was between myself and NV Sumatra. They made [the cigarettes], I sold them.... Everybody else

in between w[ere] smoke screens and mirrors and were unnecessary.”

A document dated July 9, 2001, executed by Timin Bingei, the Executive Director of NV Sumatra, indicates that, at least as of that date, NV Sumatra did not have a direct relationship with FTS with regard to the United brand cigarettes. The document provides that NV Sumatra had “appointed Unico Trading ... as [its] sole agent for sale and marketing cigarettes bearing the name ‘United.’ ” It also states that NV Sumatra consented “to allow Unico ... to appoint Silmar Trading ... to be its exclusive-buyer to distribute ‘United’ cigarettes for sale in the United States of America.” Battah, who had been working directly with Hawe of Silmar Trading to market and build the United brand throughout the United States, conceded that this document “made it very clear” that NV Sumatra did not want to have an agreement directly with FTS.

On July 25, 2001, two weeks after executing this document, NV Sumatra sent a facsimile⁷ containing the following statement:

Your report on the United cigarettes you faxed to us some time ago stated that the said *cigarettes could be purchased in California, Washington, Texas, Arizona, Louisiana, Mississippi, Georgia, South and North Carolina, New Hampshire, Oklahoma, Tennessee and Kentucky. Most of States mentioned are subject to Escrow Fund Act.*

We are wondering whether the importer or any party has opened an escrow account with the States Attorney General. *We receive[d] notice from the Office of the Attorney General in the 46 States subject to escrow such as Tennessee, New Hampshire, California, Pennsylvania, etc.* to request confirmation whether our cigarettes were sold in their States and whether we have opened an account related to the escrow fund.

....

Since United cigarettes are imported an[d] distributed in [Miami, Florida,] which is not subject to the requirements of the Escrow Fund, but indirectly distributed to states which require an Escrow Fund, please request FTS to check with their lawyer, Barry Boren on how to respon[d] to the said notice.

*44 (Emphasis added.) This, of course, suggests that NV Sumatra was well aware “some time” prior to July 25, 2001 that FTS was importing and distributing its United

brand cigarettes throughout the United States, including in Tennessee. This information is consistent with escrow fund notices in the record from the Tennessee Attorney General's Office to NV Sumatra in Indonesia, which are dated March 21 and May 7, 2001. The notices describe the potential liability of tobacco products manufacturers under the Escrow Fund Act and request NV Sumatra to return a completed "Certificate of Compliance with the Act" and deposit funds if necessary.

Battah testified that he had numerous meetings with representatives of NV Sumatra, with Hawe from Silmar Trading, and with representatives of Unico Trading. The purposes of these meetings were to formalize the American distribution arrangement for United brand cigarettes and to obtain assurances that NV Sumatra would change the packaging of its cigarettes to alleviate concerns of the United States Customs Service.⁸ The first such meeting took place in November of 2001 in Beijing, China, and was initiated by NV Sumatra. The attendees included Battah, Hawe, and Bingei, NV Sumatra's Executive Director. At the Beijing meeting, the parties discussed the product marking issue, whether NV Sumatra should join the November 1998 settlement with the states, and sales forecasts for United brand cigarettes in the United States. With regard to the latter, FTS "presented all of the facets of every sale, where it went, which states we needed to target and continue our business." Battah showed Bingei and the others present at the meeting charts indicating the number of cigarettes that were being sold in each state, including Tennessee. Battah testified that he presented additional sales figures at a subsequent meeting with Hawe and officials from NV Sumatra and Unico Trading, which took place in Miami in 2002.⁹ Ultimately, NV Sumatra notified Battah via telephone in February of 2002 that it would no longer pursue sales in the United States market. The relationship terminated when Battah sold his remaining inventory of United brand cigarettes.

Based upon the contents of the record evidencing the relationship between NV Sumatra and its distributors, including FTS, the majority describes NV Sumatra as an innocent bystander:

When Mr. Battah solicited NV Sumatra's cooperation in targeting the Tennessee market, NV Sumatra brushed aside his entreaties. As soon as NV Sumatra learned of its products' sales in Tennessee—and the legal ramifications of these sales—it severed its few ties with FTS and sent FTS no more cigarettes.

....

Once NV Sumatra became aware that it could be sued in states that had adopted the Tobacco Manufacturers' Escrow Fund Act, the company withdrew its products from the United States market. NV Sumatra deliberately chose *not* to avail itself of the privilege of conducting business in Tennessee.

*45 This is not an entirely unreasonable inference from the allegations in the record. However, when viewed in the light most favorable to the State, those same allegations are subject to a more plausible alternative interpretation. That is, NV Sumatra had an obvious interest in engaging the United States market because a California distributor, Pacific Coast Duty Free, already had a large inventory of its United brand cigarettes on hand. When Pacific Coast Duty Free could not or would not sell NV Sumatra's cigarettes, it sought out another distributor, FTS, to purchase the inventory. NV Sumatra made informal assurances to Battah, who proceeded under the assumption that he was dealing directly with the manufacturer of the United brand cigarettes. This mutually beneficial relationship flourished until NV Sumatra received escrow fund notices from the Tennessee Attorney General's Office in March and May of 2001. In July of 2001, NV Sumatra made efforts to clarify the steps in the supply chain and seek counsel regarding the legal ramifications of its sales of millions of cigarettes in Tennessee and the other states subject to the escrow fund. NV Sumatra called a meeting in Beijing in November of 2001 to gather information about the volume of sales that were being made on its behalf in the United States by FTS, as well as the regulatory implications of continuing to cultivate that market. Finally, in February of 2002, nearly one year after first having been notified of its potential liability under the Escrow Fund Act and seven months after confirming this potential liability via a facsimile to its distributors, NV Sumatra decided to pull out of the United States market entirely. Of course, it kept the profits it had accumulated from targeting American consumers and did so without paying a cent into the escrow funds of Tennessee and the other participating states, thereby "unleveling" the playing field among cigarette manufacturers. When sued by the states, NV Sumatra used the layers of its distribution chain to distance itself from FTS and claimed that it had never purposefully availed itself of the United States market.

My primary purpose in developing this alternative narrative is, in part, to demonstrate the fallibility of attempting to assess witness credibility based upon allegations in a complaint,

the contents of an affidavit, or the words in a transcript of a deposition. See *Sampson v. Wellmont Health Sys.*, 228 S.W.3d 124, 135 (Tenn.Ct.App.2007) (concluding that when a proceeding is “strictly ‘on the papers,’ ” such as a matter decided on affidavits and deposition transcripts, “testimony cannot be disregarded on the basis of a lack of credibility” (citing *Byrd v. Hall*, 847 S.W.2d 208, 216 (Tenn.1993))). At this stage of the proceedings, the duty of the trial court was to construe the sworn statements in the light most favorable to the State without weighing the credibility of the affiants or the reliability of their assertions. In my view, the State has made a prima facie case that NV Sumatra was aware of the sales of its United brand cigarettes in Tennessee and throughout the United States and purposefully availed itself of those markets through its independent distributors. It is also my opinion that other activities of NV Sumatra and its distributors buttress my conclusion that, based upon this limited record, the State would even be able to prove personal jurisdiction by a preponderance of the evidence standard.

3. Contacts with the National Market

*46 The third and final pertinent fact mentioned by Justice Breyer is that representatives of McIntyre UK had attended trade shows in various locations in the United States, including Chicago, Las Vegas, New Orleans, Orlando, San Diego, and San Francisco. *McIntyre*, 131 S.Ct. at 2791 (Breyer, J., concurring). These actions were representative of the British manufacturer's efforts to target the United States market as a whole. The majority contrasts these actions with those of NV Sumatra and concludes that there is a “paucity of national contacts.” The majority appears to believe that the most important facts are those that “the record does not reveal,” including NV Sumatra's failure to create “an aggressive advertising campaign aimed at the United States,” to send “representatives to trade shows in the United States,” or to engage in “Internet sales targeting United States markets.” This assessment fails to take into account the numerous activities in which NV Sumatra clearly engaged, both directly and through its distributors, that did target the United States and Tennessee markets.

This case raises the question of whether a foreign corporation is subject to personal jurisdiction in a particular forum state where it purposefully avails itself of the United States market and, as a result of this targeting, its products end up in the forum state and subject it to liability there. Justice Kennedy's plurality opinion in *McIntyre* supports the view

that the targeting of a national market can never give rise to personal jurisdiction in a particular state, and proposes that the foreign defendant must also have purposeful and significant contacts with the forum state itself. See *McIntyre*, 131 S.Ct. at 2790 (plurality opinion) (“These facts may reveal an intent to serve the U.S. market, but they do not show that J. McIntyre purposefully availed itself of the New Jersey market.”). Justice Ginsburg, in dissent, emphatically asserted that a foreign manufacturer targeting the entire United States market should be subject to personal jurisdiction anywhere its products cause injury. *Id.* at 2801 (Ginsburg, J., dissenting) (“McIntyre UK, by engaging McIntyre America to promote and sell its machines in the United States, ‘purposefully availed itself’ of the United States market nationwide, not a market in a single State or a discrete collection of States. McIntyre UK thereby availed itself of the market of all States in which its products were sold by its exclusive distributor.”). By explicitly rejecting the plurality's “seemingly strict no-jurisdiction rule,” *id.* at 2793 (Breyer, J., concurring), Justice Breyer's concurrence is more equivocal but leaves for another day the answer to the question of whether marketing and sales activities targeting the United States as a whole may subject a foreign entity to personal jurisdiction in a particular state.

In the case before us, the record indicates that FTS took the lead in marketing and distributing NV Sumatra's United brand cigarettes to the United States market. In so doing, however, FTS built upon the foundation already laid by NV Sumatra and worked in concert with Silmar Trading, another approved entity in the supply chain of United brand cigarettes, through its employee, Hawe. At least two activities of NV Sumatra related to our nation's market support the exercise of personal jurisdiction by this state.

*47 First, it appears that NV Sumatra took several affirmative steps to weave its way through the web of federal regulations required to sell cigarettes in the United States. In 1995, years prior to the formation of FTS, NV Sumatra applied for, and received, a United States trademark for the United brand cigarettes.¹⁰ NV Sumatra also explicitly consented to the sale of its United brand cigarettes in the United States, at least during the second half of 2001. On July 9, 2001, NV Sumatra submitted an ingredient list for its United brand cigarettes to the Centers for Disease Control and Prevention, as required by federal law.¹¹ NV Sumatra worked with FTS by facsimile and telephone to assist the latter in obtaining approval from the Federal Trade Commission for the rotation of warnings to appear on the packages of United brand cigarettes. The cartons of United

brand cigarettes arrived in Miami with the Surgeon General's warning already affixed to the label, and NV Sumatra wrote a letter to the United States Customs Service when FTS was notified of the marking issue with the imported cigarettes.

Second, NV Sumatra, both directly and through its other distributors, worked with FTS to distribute, market, and sell cigarettes in a variety of ways. After NV Sumatra approved Unico Trading to appoint Silmar Trading as its exclusive distributor to the United States market in July of 2001, Howe "came to Miami several times" to discuss "marketing strategy and building the brand and making [United cigarettes] a nationwide brand." The mutual goal of Battah and Howe "was to sell a thousand master cases per state." To further the goal of selling 1000 master cases—the equivalent of 500,000 packs or 10,000,000 cigarettes—in Tennessee and every other state, Battah asked for, and NV Sumatra provided, promotional materials for the United brand cigarettes to be placed in retail stores. Specifically, NV Sumatra provided "eight-by-eleven posters that said 'The Spirit of United,' and they had the health warning on them."¹² Battah also created magazine advertisements and attended trade shows on NV Sumatra's behalf. It was at one such trade show that he met the Tennessee distributors to whom he sold NV Sumatra's products. Taken together, all of these activities by NV Sumatra are indicative of the "something more" described in Justice Breyer's concurrence.

4. Summary of Facts Pertinent to Minimum Contacts Analysis

In summary, the record shows that the three pertinent facts deemed inadequate in *McIntyre* for New Jersey courts to exercise jurisdiction support the opposite conclusion here. First, there was a "regular flow" and "regular course" of sales of NV Sumatra's United brand cigarettes into Tennessee from 2000 to 2002. Second, NV Sumatra delivered its products into the international stream of commerce with awareness that they were being sold in great quantities in Tennessee through its distributors, and that its distributors were specifically targeting the Tennessee market. Finally, NV Sumatra, both directly and through its other distributors, appears to have provided direct assistance to FTS, its American distributor, to help it achieve its own sales goals. Because NV Sumatra's contacts with Tennessee in these three areas exceed, by a clear margin, those that the defendant foreign manufacturer had with New Jersey in *McIntyre*, as set forth in Justice Breyer's

concurring opinion, the State has made a prima facie showing of minimum contacts.

B. Reasonableness Factors

*48 The finding that the State has set forth a prima facie case of minimum contacts crosses the threshold for the personal jurisdiction analysis. There is a second step in the due process analysis in which the burden shifts to NV Sumatra to show that the exercise of personal jurisdiction by Tennessee would be unfair or unreasonable.¹³ If NV Sumatra carries this burden, the courts of this state should not exercise jurisdiction. As Justice O'Connor wrote in her plurality opinion in *Asahi*,

the determination of the reasonableness of the exercise of jurisdiction in each case will depend on an evaluation of several factors. A court must *consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief*. It must also weigh in its determination "*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.*"

480 U.S. at 113, 107 S.Ct. 1026 (plurality opinion) (emphasis added) (quoting *World-Wide Volkswagen*, 444 U.S. at 292, 100 S.Ct. 559).

NV Sumatra has based its personal jurisdiction arguments on the minimum contacts prong of the analysis, but has offered no proof, much less carried its burden of proof, on the issue of reasonableness. In any event, I concur with the reasonableness analysis by our Court of Appeals and that of the South Carolina Supreme Court in a case involving the same analysis and nearly identical facts. *See State v. NV Sumatra Tobacco Trading Co.*, 379 S.C. 81, 666 S.E.2d 218, 223 (2008).¹⁴ The State has a compelling financial interest in adjudicating this dispute against NV Sumatra and collecting the unpaid escrow funds from 2000, 2001, and 2002. Moreover, "[t]he State also has an interest in protecting its citizens and in enforcing the important social policies

that form the basis for the Escrow Fund Act.” *State v. NV Sumatra Tobacco Trading Co.*, No. M2010–01955–COA–R3–CV, 2011 WL 2571851, at *26 (Tenn.Ct.App. Aug. 24, 2011). And finally,

[w]hile it may be inconvenient for [NV] Sumatra to travel to the United States to defend the action against it, the State's interest in exercising jurisdiction outweighs any such inconvenience. *The State has a valid interest in protecting itself against any suits that arise from a person smoking the United brand of cigarettes.* Given the volume of those cigarettes sold within [this state], it is reasonable for [NV] Sumatra to be haled into a [Tennessee] court.

NV Sumatra Tobacco Trading Co., 666 S.E.2d at 223.

In my view, it is neither unfair nor unreasonable, under these circumstances, for Tennessee to exercise jurisdiction over NV Sumatra, and there is no denial of the right to due process. The words of Hillel the Elder, a legendary Jewish leader in the time of King Herod, apply to this jurisdictional issue in

the context of the integrity of the historic tobacco settlement: “If not us, who? If not now, when?”

III. Conclusion

*49 For the reasons set forth in this opinion, I believe that the State has not only made a prima facie showing of minimum contacts, as is required, but has exceeded that threshold, and that NV Sumatra has failed to demonstrate that it would be unreasonable for Tennessee courts to exercise personal jurisdiction. In consequence, I would hold that NV Sumatra is not entitled to a dismissal based upon lack of personal jurisdiction; unlike the Court of Appeals, however, instead of granting the motion for summary judgment by the State, I would remand the case to the trial court for consideration of that summary judgment motion and any defenses that the trial court did not consider after granting NV Sumatra's competing motion.¹⁵

I am authorized to state that Justice Lee, who has made substantial contributions to this analysis, joins in this dissenting opinion.

Footnotes

- 1 Frank A. Sloan & Lindsey M. Chepke, *The Law and Economics of Public Health* 83 (2007).
- 2 See Tobacco Control Archives, Tobacco Litigation Documents, State Lawsuits, UCSF Library, available at <http://library.ucsf.edu/tobacco/litigation/states>. Tennessee was among the eight states that did not sue the tobacco companies. Gregory W. Traylor, Note, *Big Tobacco, Medicaid-Covered Smokers, and the Substance of the Master Settlement Agreement*, 63 Vand. L.Rev. 1081, 1096 n.104 (2010) (“Traylor”).
- 3 W. Kip Viscusi, *Smoke-Filled Rooms: A Postmortem on the Tobacco Deal* 37 (2002) (“Viscusi”); Martha Derthick, *Federalism and the Politics of Tobacco*, 31 Publius: The Journal of Federalism, no. 1, at 47, 52 (Winter 2001); Frank Sloan & Lindsey Chepke, *Litigation, Settlement, and the Public Welfare: Lessons from the Master Settlement Agreement*, 17 Widener L.Rev. 159, 166 (2011) (“Sloan & Chepke”).
- 4 Seth M. Wood, Note, *The Master Settlement Agreement as Class Action: An Evaluative Framework for Settlements of Publicly Initiated Litigation*, 89 Va. L.Rev. 597, 634 (2003); see also The Ward, Kershaw and Minton Environmental Law Symposium: “Up in Smoke: Coming to Terms with the Legacy of Tobacco,” *Tobacco Settlement Summary*, 2 J. Health Care L. & Pol’y 167 (1998).
- 5 See Jeremy Bulow, Director, FTC Bureau of Economics, *The State Tobacco Settlements and Antitrust*, available at <http://www.ftc.gov/speeches/other/abatobacco.shtml> (“Bulow”).
- 6 The signatories on the settlement agreement included Philip Morris, Inc., R.J. Reynolds Tobacco Co., Brown & Williamson Tobacco Corp., and Lorillard Tobacco Co. Together, these companies had a 98% market share of the cigarette sales in the United States. The Liggett Group also signed the settlement agreement. See Bulow, *supra* note 5; Sloan & Chepke, 17 Widener L.Rev. at 170.
- 7 Master Settlement Agreement (1998), available at <http://oag.ca.gov/tobacco/msa>.
- 8 MSA § II(hh).
- 9 MSA § II(tt).
- 10 See Participating Manufacturers under the Master Settlement Agreement as of Nov. 5, 2012, available at http://www.naag.org/backpages/naag/tobacco/msa/participating_manu; *Mariana v. Fisher*, 338 F.3d 189, 193 (3d Cir.2003).

- 11 MSA § II(cc). These companies “almost exclusively market discount brand cigarettes” and are “often companies that were not in the U.S. market in 1998.” Sloan & Chepke, 17 Widener L.Rev. at 171.
- 12 The OPMs agreed to restrict their advertising, sponsorship, lobbying, and litigation activities, particularly as those activities targeted youth; to disband three specific “Tobacco–Related Organizations,” and to restrict their creation and participation in trade associations; generally to make available to the public documents the OPMs had disclosed during the discovery phase of their litigation with the settling states; and to create and fund the National Public Education Foundation, dedicated to reducing youth smoking and preventing diseases associated with smoking.
- KT & G Corp. v. Attorney Gen. of Okla.*, 535 F.3d 1114, 1119 (10th Cir.2008).
- 13 The OPMs agreed to make \$12.7 billion in up-front payments between 1998 and 2003. MSA § IX(b). Beginning in April 2000, the OPMs also agreed to make annual payments in perpetuity to an escrow fund that would be paid out to the states based on an allocation formula agreed to by the states. MSA § IX(c). The amount of these payments does not depend on the volume of sales of cigarettes within each state. *KT & G Corp. v. Attorney Gen. of Okla.*, 535 F.3d at 1120. Between April 2000 and April 2025, the aggregate amount of the annual payments from the OPMs will total \$190 billion. W. Kip Viscusi, *Smoke–Filled Rooms: A Postmortem on the Tobacco Deal* 44 (2002).
- 14 MSA § IX(d)(2)(E). The MSA includes a model statute as “Exhibit T.”
- 15 Act of May 17, 1999, ch. 278, 1999 Tenn. Pub. Acts 630, 630–35 (codified as amended at Tenn.Code Ann. §§ 47–31–101 to –103 (2001 & Supp.2012)).
- 16 The record also appears to reveal the existence of an additional intermediary corporation, Orient Pacific, Ltd., based in the United Kingdom.
- 17 A master case of cigarettes contains 50 cartons of cigarettes. Each carton contains 10 packages, and each package contains 20 cigarettes. Accordingly, a master case contains 10,000 cigarettes.
- 18 These regional distributors customarily purchased cigarettes and then sold them to wholesalers who would, in turn, sell the cigarettes to retail outlets such as gas stations and grocery stores.
- 19 By 2002, FTS had sold United brand cigarettes to regional distributors who sold cigarettes in Tennessee and fifteen other states.
- 20 The record contains Escrow Fund Act notices sent from the Tennessee Attorney General's office to NV Sumatra, dated March 21 and May 7, 2001, and April 4, 2002.
- 21 Based on prior experience, Mr. Battah knew that he would not be permitted to open these escrow accounts himself. He had tried in the past to fund escrow accounts for other imported cigarette brands, but the states had returned the money.
- 22 Nor is a court required to accredit an affiant's legal conclusions, such as Mr. Battah's characterizations of the relationships between NV Sumatra and its distribution companies, or Mr. Battah's belief that he had an informal, “oral” distribution agreement that included NV Sumatra as a party. Mr. Battah has not demonstrated that he possesses the expertise necessary to draw conclusions of this sort, and the record contains no documentary or other reliable evidence to support them.
- 23 The Court of Appeals also addressed the questions of whether the Escrow Fund Act was constitutional and whether the Act properly applied to NV Sumatra. Because we find that Tennessee courts lack jurisdiction to hear this case, we need not address these issues.
- 24 Act of Apr. 4, 1972, ch. 689, 1972 Tenn. Pub. Acts 688, 688–89 (codified as amended at Tenn.Code Ann. § 20–2–214 (2009)).
- 25 Act of May 1, 1997, ch. 226, 1997 Tenn. Pub. Acts 366, 367 (codified at Tenn.Code Ann. § 20–2–225 (2009)).
- 26 Tennessee has a third, vestigial “long-arm” statute found at Tenn.Code Ann. § 20–2–223 (2009). This statute is narrower in scope than Tenn.Code Ann. §§ 20–2–214, –225 and has largely fallen into disuse.
- 27 See 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1067.1, at 461 (3d ed.2002); Robin J. Effron, *Letting the Perfect Become the Enemy of the Good: The Relatedness Problem in Personal Jurisdiction*, 16 Lewis & Clark L.Rev. 867, 878–80 (2012) (“Effron”); Leading Cases, 125 Harv. L.Rev. 311, 312–14 (2011).
- 28 Justice Ginsburg distinguished *Asahi* by noting that “Asahi, unlike McIntyre UK, did not itself seek out customers in the United States.” Unlike McIntyre UK, which made large industrial machines and targeted the American market, “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.’” *J. McIntyre Mach.*, 131 S.Ct. at 2803 (Ginsburg, J., dissenting) (quoting *A. Uberti & C. v. Leonardo*, 181 Ariz. 565, 892 P.2d 1354, 1361 (1995)).
- 29 Although stated differently, the jurisdictional test employed by the United States Court of Appeals for the Sixth Circuit is identical in substance to our approach. As a Nashville federal court recently observed, the Sixth Circuit's three-part *Mohasco* test “remains an accurate statement of existing law” in that jurisdiction:
- First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant

or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise [of] jurisdiction over the defendant reasonable.

Energy Automation Sys., Inc. v. Saxton, 618 F.Supp.2d 807, 812 (M.D.Tenn.2009) (quoting *Southern Mach. Co. v. Mohasco*, 401 F.2d 374, 381 (6th Cir.1968)). In the Sixth Circuit, the “purposeful availment factor” is the “*sine qua non*” of personal jurisdiction. *Dean v. Motel 6 Operating L.P.*, 134 F.3d 1269, 1273 (6th Cir.1998). *Accord Baxter Bailey Inv., LLC v. Harrison Poultry, Inc.*, No. 11–3116, 2012 WL 4062771, at *6 (W.D.Tenn. Sept. 14, 2012).

30 The only significant outlier is *McCombs v. Cerco Rentals*, 622 S.W.2d 822, 825 (Tenn.Ct.App.1981), in which the Court of Appeals found that the purposeful availment requirement was satisfied when the defendant, a French corporation, “voluntarily inject[ed] his product into the stream of interstate commerce” and “should have reasonably foreseen that consequences could result in Tennessee.”
31 *But see Grutter v. Bollinger*, 539 U.S. 306, 325, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) (“[The *Marks* test] is more easily stated than applied to the various [Supreme Court] opinions.... It does not seem ‘useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it.’” (quoting *Nichols v. United States*, 511 U.S. 738, 745–46, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994))).

32 *See, e.g., UTC Fire & Sec. Americas Corp. v. NCS Power, Inc.*, 844 F.Supp.2d 366, 376 (S.D.N.Y.2012); *Ainsworth v. Cargotec USA, Inc.*, No. 2:10–CV–236–KS–MTP, 2011 WL 6291812, at *2 (S.D.Miss. Dec. 15, 2011); *Dram Techs. LLC v. America II Grp., Inc.*, No. 2:10–CV–45–TJW, 2011 WL 4591902, at *2 (E.D.Tex. Sept. 30, 2011); *Willemsen v. Invacare Corp.*, 352 Or. 191, 282 P.3d 867, 873 (2012).

33 One commentator describes Justice Breyer’s legal analysis as a “fabricated ... version of the applicable doctrine.” Allan Ides, *Foreword: A Critical Appraisal of the Supreme Court’s Decision in J. McIntyre Machinery, Ltd. v. Nicastro*, 45 Loy. L.A. L.Rev. 341, 371 (2012) (“Ides”).

34 We note that the Chief Justice’s dissenting opinion adopts the same analytical framework for assessing personal jurisdiction as the majority opinion. The diverging outcomes result primarily from our differing interpretation of several facts in the record and the weight that should be accorded those facts.

35 *See, e.g., World–Wide Volkswagen*, 444 U.S. at 293, 100 S.Ct. 559 (“[W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution.”) Even Justice Ginsburg, dissenting in *J. McIntyre Machinery*, went into great detail explaining how the British manufacturer purposefully availed itself of the New Jersey—not merely the national—market.

36 It is not clear from this record whether NV Sumatra’s use of the term “American Blend” or its choice of package design was intended to make its cigarettes more appealing in the United States market or in foreign markets where American cigarettes are popular.

37 We are aware that, in an almost identical lawsuit, the Supreme Court of South Carolina has held that it wielded specific personal jurisdiction over NV Sumatra for its violations of South Carolina’s Escrow Fund Act. The Supreme Court of South Carolina, adopting Justice Brennan’s version of the stream of commerce approach, held that “[r]egardless of how the cigarettes arrived in South Carolina,” minimum contacts existed under essentially the same facts that we confront today. *State v. NV Sumatra Tobacco Trading Co.*, 379 S.C. 81, 666 S.E.2d 218, 223 (2008). Suffice it to say that, especially in the wake of *J. McIntyre Machinery*, we do not consider it proper to follow South Carolina in eschewing the stream of commerce plus approach that is currently the law of this state. *See State v. NV Sumatra*, 666 S.E.2d at 222 n. 5. It is our view that the United States Supreme Court’s precedents, including all three opinions in *J. McIntyre Machinery*, place a degree of importance on “how the [products] arrived” in the state. *See, e.g., J. McIntyre Mach.*, 131 S.Ct. at 2796–97, 2801 (Ginsburg, J., dissenting) (emphasizing how McIntyre UK cooperated with its exclusive United States distributor to target the United States, specifically New Jersey, the state with the largest scrap metal market).

38 It is also instructive to consider the significance of the sales of United brand cigarettes in Tennessee between 2000 and 2002 in the context to the sales of cigarettes in the United States during the same period. According to the Federal Trade Commission, the six major United States cigarette manufacturers sold 1.2 trillion cigarettes in the United States during the same period. FTC, Cigarette Report for 2000, available at <http://ftc.gov/os/2002/05/2002cigrpt.pdf> (reporting domestic sales of 413.5 billion cigarettes in 2000); FTC, Cigarette Report for 2001, available at <http://ftc.gov/os/2003/06/2001cigrept.pdf> (reporting sales of 398.2 billion cigarettes in 2001); FTC, Cigarette Report for 2002, available at <http://ftc.gov/reports/cigarette/041022cigaretterpt.pdf> (reporting sales of 376.4 billion cigarettes in 2002). In 2002 alone, these manufacturers gave away 11.1 billion cigarettes in the United States. *See Cigarette Report for 2002*, at 2. Thus, the number of cigarettes that the major domestic manufacturers gave away in 2002 is one thousand times greater than the total amount of United brand cigarettes that were sold in Tennessee between 2000 and 2002.

39 As the United States Supreme Court noted in *Burger King*, when defendants “‘purposefully derive benefit’ from their interstate activities,” it is not unfair for these companies to face suit “in other States for consequences that arise *proximately* from such activities.... Jurisdiction is proper,” the Court said, “where the contacts *proximately* result from actions by the defendant *himself* that create a substantial connection with the forum State” *Burger King*, 471 U.S. at 473–75, 105 S.Ct. 2174 (first and second emphases added) (internal quotation marks and citations omitted). *Accord Asahi*, 480 U.S. at 109, 107 S.Ct. 1026.

- 40 As the United States Supreme Court explained in *World-Wide Volkswagen*, “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 haled into court there.” The relevant “expectation” that a company’s product will be purchased in the forum state “arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product” in that state. *World-Wide Volkswagen v. Woodson*, 444 U.S. at 297–98, 100 S.Ct. 559.
- 1 While the motion at issue falls under Rule 12.02(2), I find it persuasive that this Court recently observed that a Rule 12.02(6) motion to dismiss for failure to state a claim upon which relief may be granted “challenges only the legal sufficiency of the complaint, not the strength of the plaintiff’s proof or evidence.” *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn.2011). “In considering a motion to dismiss, courts ‘must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences.’ ” *Id.* (quoting *Tigg v. Pirelli Tire Corp.*, 232 S.W.3d 28, 31–32 (Tenn.2007)). In *Webb*, we declined to adopt the federal “plausibility” standard for determining the sufficiency of a complaint as adopted in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), because the “fact-weighting and merits-based determination aspect of” those United States Supreme Court opinions “is at odds with” well-established principles of Tennessee civil practice.
- In reaching its conclusion, this Court cited two reasons provided by the Washington Supreme Court in *McCurry v. Chevy Chase Bank, FSB*, 169 Wash.2d 96, 233 P.3d 861 (2010), as well as four additional reasons based on both Tennessee-specific concerns and scholarly commentary: (1) *Twombly* and *Iqbal* mark “a substantial departure” from, and have resulted in “a loss of clarity, stability, and predictability in [.] federal pleading practice”; (2) the new federal standard “incorporates an elevation and determination of likelihood of success on the merits ... at the earliest stage of the proceedings,” a procedure that “conflicts with the strong preference embodied in the Tennessee Rules of Civil Procedure that cases stating a valid legal claim brought by Tennessee citizens be decided on their merits”; (3) the plausibility standard is unworkable because “the distinction between whether an allegation is a ‘fact’ or a ‘conclusion’ is fine, blurry, and hard to detect”; and (4) the federal standard is likely to result in an “information asymmetry” problem, under which certain types of cases (e.g., civil rights, employment discrimination, antitrust, conspiracy) are more likely to be dismissed because it is difficult to plead factual sufficiency in such cases without some limited discovery. *Webb*, 346 S.W.3d at 430–35.
- 2 *McIntyre*, 131 S.Ct. at 2791 (Breyer, J., concurring) (“I think it unwise to announce a rule of broad applicability without full consideration of the modern-day consequences. In my view, the outcome of this case is determined by our precedents.”); *id.* at 2792 (“[O]n the record present here, resolving this case requires no more than adhering to our precedents.”); *id.* at 2792–93 (“Because the incident at issue in this case does not implicate modern concerns, and because the factual record leaves many open questions, this is an unsuitable vehicle for making broad pronouncements that refashion basic jurisdictional rules.”); *id.* at 2794 (“I again reiterate that I would adhere strictly to our precedents and the limited facts found by the New Jersey Supreme Court.”).
- 3 The record before the Court appeared to be unclear on this point, with Justice Kennedy stating that “no more than four machines (the record suggests only one), including the machine that caused the injuries that are the basis for this suit, ended up in New Jersey.” *McIntyre*, 131 S.Ct. at 2786 (plurality opinion) (citation omitted). Justice Ginsburg suggested that *McIntyre* UK had resisted “Nicastro’s efforts to determine whether other *McIntyre* machines had been sold to New Jersey customers.” *Id.* at 2797 n. 3 (Ginsburg, J., dissenting). Ultimately, the number of machines did not appear to be as important to Justice Ginsburg and the other dissenters as the fact that the one machine that indisputably caused the injury to Nicastro arrived in his New Jersey workplace “not randomly or fortuitously, but as a result of the U.S. connections and distribution system that *McIntyre* UK deliberately arranged.” *Id.* at 2797.
- 4 The majority seeks to minimize the impact of this highly significant fact by citing to external Federal Trade Commission data, which show that the number of NV Sumatra cigarettes sold in Tennessee from 2000 to 2002 was quite small relative to the total amount of cigarettes sold, or even given away, in the United States by the major domestic cigarette manufacturers during the same time period. This information, external to the record in this case, is irrelevant to the central issue of whether the exercise of personal jurisdiction over NV Sumatra comports with due process. I can only assume that the majority searched for and included the figures for the total sales of cigarettes in the United States in its opinion to try and understate the effect of the raw number of cigarettes that NV Sumatra sold in Tennessee, a fact that weighs against the majority’s ultimate conclusion. Whatever the purpose, I would observe that the majority has gone outside the record and otherwise failed to consider the facts of this case under the proper standard of review.
- 5 Specifically, during the relevant period from 2006 to 2007, the Ohio corporation sold 1166 motorized wheelchairs in Oregon, nearly ninety-five percent of which came with battery chargers manufactured by the Taiwanese corporation. The Taiwanese corporation received approximately \$30,929 for the chargers that the Ohio corporation provided to Oregon purchasers. *Id.* at 870–71.
- 6 The majority declines to accredit Battah’s allegations as to his agreement with NV Sumatra on the grounds that these allegations constitute “legal conclusions” that the State has not corroborated with “documentary or other reliable evidence.” While this maneuver allows the majority to brush aside facts that do not support its conclusion, its stated grounds for ignoring Battah’s allegations are unsound. Initially, an individual’s testimony that he had an agreement with some other entity or individual is not a legal conclusion

that can be ignored in its entirety. Of course, if an individual states that he and another party have a verbal agreement that is legally enforceable under Tennessee law, a court would be correct in declining to accredit the testimony to the extent that it attempts to establish the legal validity of an oral contract. But that is not the case here. In this instance, the State has offered Battah's testimony as proof that representatives of NV Sumatra communicated directly with Battah regarding the sale of United brand cigarettes in the United States. Because Battah's testimony has nothing to do with the legal validity of any agreement between him and NV Sumatra, it should not be disregarded as a "legal conclusion." See *Webb*, 346 S.W.3d at 434 (discussing the "analytical distinction between factual assertions and legal conclusions"). Moreover, contrary to the majority's analysis, there is no requirement that the State corroborate Battah's testimony with "documentary or other reliable evidence."

- 7 The record is unclear as to whom the facsimile was sent. The addressee is handwritten as "Mr. Basil," but the document refers to FTS in the third person.
- 8 Apparently, the Customs Service had issued a "marking notice" to FTS in May of 2001, based upon its determination that the packaging of the cigarettes would be confusing to consumers, as it did not conspicuously state that it was made in Indonesia and could be interpreted as the product having been "Made in the U.S.A." NV Sumatra secured a waiver for all of the cigarettes already in the possession of FTS at that time.
- 9 Battah's recollection of this meeting contradicts his own earlier deposition testimony, in which he was asked whether any representatives from NV Sumatra had ever come to Miami and he responded, "Not to my knowledge." An affidavit from an NV Sumatra representative in May of 2010, more than eight years after the meeting allegedly took place, stated that NV Sumatra's "corporate records do not reflect any trip to the United States by anyone from [NV Sumatra] during the time period 2001 through 2004." Battah's attorney, Barry Boren, averred that "[s]uch a meeting may have occurred, but after the passage of so many years I cannot say whether it did or did not take place."
- 10 NV Sumatra reapplied for the trademark in 2003.
- 11 Because the State entered a joint stipulation that FTS submitted the ingredient list, NV Sumatra asserts that the State should be estopped from arguing to the contrary. The record indicates that the list was submitted by a G.A. Avram of a law office in Winston-Salem, North Carolina, on behalf of his client, "N.V. Sumatra Tobacco Trading Co."
- 12 NV Sumatra claims that this testimony of Battah is contradicted by later testimony that FTS produced some point-of-purchase and advertisement materials. Of course, these events are not mutually exclusive; FTS easily could have received the original marketing materials from NV Sumatra and also produced additional copies emblazoned with its own contact information.
- 13 Because the majority concluded that the State did not meet its burden as to minimum contacts, it did not reach this second prong of the due process analysis.
- 14 The majority is correct in noting that the South Carolina Supreme Court employed the "stream-of-commerce" test espoused by Justice Brennan in *Asahi*, rather than the more rigorous "stream-of-commerce-plus" test of Justice O'Connor that we use in Tennessee. While this difference renders the South Carolina court's minimum contacts analysis of limited value to us, it does not impact the persuasiveness of its reasonableness analysis.
- 15 For example, I would require NV Sumatra to raise its challenges to the constitutionality of the Escrow Fund Act in the trial court.

6

2003 WL 25456311 (D.C.Super.) (Trial Order)
Superior Court for the District of Columbia,
Civil Division.

Laura SCHNEIDER, Individually and On behalf of all Others similarly situated, Plaintiff,
v.
CROMPTON CORPORATION et al., Defendants.

No. 02ca9279.
September 22, 2003.

Order

(202) 383-5414 (fax), Counsel for Defendants Bayer Corp. and Rhein Chemie Corp., Phillip Proger, Esq., Jones Day Reavis & Pogue, 51 Louisiana Avenue, N.W., Washington D.C. 20001-2113, (202) 879-3939, (202) 626-1700 (fax).

Thomas Demitrack, Esq., Jones Day Reavis & Pogue, North Point, 901 Lakeside Avenue, Cleveland, OH 44114-1190, (216) 586-3939, (216) 579-0212 (fax).

Counsel for Flexsys America LP, D. Jarrett Arp, Esq., Gibson Dunn & Crutcher, LLP, 1050 Connecticut Avenue, N.W., Washington, D.C. 20036-5306, (202) 955-8578, (202) 530-9625 (fax).

William Iverson, Esq., Covington & Burling, 1201 Pennsylvania Avenue, N.W., Washington, D.C. 20004-2401, (202) 662-6000, (202) 662-6291 (fax).

Natalia M. Combs Greene, Associate Judge.

Judge Natalia M. Combs Greene

Calendar Eleven

I. Introduction

This matter is before the Court on defendants' Motions to Dismiss for Lack of Personal Jurisdiction ("Motion"), filed on February 28, 2003: 1) the Motion of defendants Crompton Corporation, Uniroyal Chemical Company, Inc., and Uniroyal Chemical Company Limited ("Crompton"); 2) the Motion of defendants Flexsys America LP and Flexsys NV ("Flexsys"); and 3) the Motion of defendant Rhein Chemie Corporation ("Rhein Chemie").

This case arises out of a dispute between plaintiff and the above mentioned defendants and defendant Bayer Corporation in which defendants allegedly fixed the prices of chemicals used in the manufacture of tires that were eventually sold or used in District of Columbia.

II. Discussion

A. Personal Jurisdiction

The burden is on plaintiff to establish that the trial court has personal jurisdiction over the corporation. *See Holder v. Haarmann & Reimer Corp.*, 779 A.2d 264, 269 (D.C. 2001); *see also Parsons v. Mains*, 580 A.2d 1329, 1330 (D.C. 1990) (per curiam).

The burden, however, is not unbearable because “[a]ll factual disputes concerning jurisdiction must be resolved in plaintiffs and plaintiffs need only make a *prima facie* showing of personal jurisdiction in order to defeat defendants' motion.” *Jacobsen v. Oliver*, 201 F.Supp. 2d 93, 104 (D.D.C. 2002).

In the District of Columbia, the courts employ a two part analysis. First, the Court must determine whether the District's long arm statute allows the Court to exercise jurisdiction. Second, the Court must determine whether allowing the suit to be so brought will offend the requirements of the due process clause.

1. The Long Arm Statute

The Court may exercise personal jurisdiction over these defendants consistent with D.C. Code § 13-423. In pertinent part, this statute provides:

(a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's –

(4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he ... derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia...

D.C. Code § 13-423(a)(4) (2003). The analysis, therefore, is two pronged.

a. Tortious Injury in the District of Columbia Committed from Without

Defendant have vehemently argued that they have conducted no business in the District of Columbia. (“District”). Our focus, therefore, is whether plaintiff has made sufficient allegations that defendants committed a tortious injury in the District. The District Court for the District of Columbia has asserted that “it makes no difference that the injury [plaintiff] claims to have suffered derived from alleged antitrust violations because an antitrust injury creates a liability in tort.” *GTE New Media Servs., Inc. v. Ameritech Corp.*, 21 F. Supp. 2d 27, 37 (D.D.C. 1998). Plaintiff has alleged that when she purchased tires in the District of Columbia, a tortious injury occurred. At this point in the proceedings, plaintiff has satisfied this prong.

Defendants direct the Court's attention to the case of *Holder v. Haarman & Reimer Corp.*, 779 A.2d 264 (D.C. 2001). The Court finds this case of only passing interest due to the fact that the Court of Appeals made clear that “we have no occasion to consider arguments supportive of personal jurisdiction over [defendant] under D.C. Code § 13-423(a)(4).” *Holder*, 779 A.2d at 272 n.8. Indeed, the Court of Appeals made clear that it was only considering personal jurisdiction within the parameters of D.C. Code § 13-423(a)(1). *Id.* Consequently, although the facts may be similar, the legal analysis must be considered inapposite.

b. Substantial Revenue from Goods Used or Consumed in the District of Columbia

The D.C. Circuit has reasoned that

Although percentage of total sales may be a factor to be considered, it cannot be dispositive, for a small percentage of the sales of a corporate giant may indeed prove substantial in an absolute sense. On the other hand, it is difficult to identify an absolute, amount which *ipso facto* must be deemed “substantial” ... Thus the test looks *both* at the absolute amount and at the percentage of total sales, and determines what is “substantial” on the facts of each case.

Founding Church of Scientology v. Verlag, 536 F.2d 429, 433 (D.C. Cir. 1976) (quoting *Ajax Realty Corp. v. J.F. Zook, Inc.*, 493 F.2d 818 (4th Cir. 1972)). This Court adopts this reasoning.

According to plaintiffs opposition, defendants Crompton, Flexsys, and Bayer¹ posted approximate revenues of \$1.4 million, \$803,000 and \$530,000 respectively for their sale of tires containing their chemicals in the District of Columbia during the period addressed in this suit. (Pl.'s Opp'n at 5.) The absolute amount appears significant. Although the percentage of the total sales does not appear significant, the companies in question are large enough to make this consideration less important. On the basis of the record before it, the Court finds that defendants derive substantial revenue from goods used or consumed in the District of Columbia.

2. Due Process

In determining whether the Court can exercise personal jurisdiction over a particular defendant, there are no mechanical tests or talismanic formulas. On the contrary, the Court is called upon to subject defendants to a series of principles. See *Shoppers Food Warehouse v. Moreno*, 746 A.2d 320, 329 (D.C. 2000). The general principle is that the Court should only exercise jurisdiction over a defendant that has sufficient contacts with the forum state such that the maintenance of the suit “does not offend ‘traditional notion of fair play and substantial justice.’ ” *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Our Court of Appeals has explained that, simply put, “ ‘there 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.’ ” *Sol Salins, Inc v. Sure Way Refrigerated Truck Transportation Brokers, Inc.*, 510 A.2d 1032, 1034 (D.C. 1986) (quoting *Hanson v. Denkla*, 357 U.S. 235, 253 (1958)).

The Supreme Court has stated that “[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State.” *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 112 (1987) (plurality opinion)). Our Court of Appeals has likewise affirmed this position in that “a defendant's awareness that the stream of commerce may or will sweep the product into the forum state does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum state.” *Holder v. Haarman & Reimer Corp.*, 779 A.2d 264, 273 (2001) (quoting *Asahi Metal Industry Co.*, 480 U.S. at 112)).

Plaintiffs due process argument takes two forms. First, plaintiff argues that “the fact that the defendants receive ‘substantial revenue’ from tires sold and used in the District of Columbia should begin and end the due process analysis.” (Pl.'s Consolidated Opp'n under Seal at 11.) Second, plaintiff asserts that “the D.C. Antitrust Act reflects the District's clear, indeed, explicit, intent to provide a remedy to consumers who are indirectly injured by price-fixing or other restraints of trade.” (Pl.'s Consolidated Opp'n under Seal at 11.)

First, the Court assumes that the D.C. Antitrust Act was drafted in a manner consistent with the Due Process Clause of the Fifth Amendment. Second, plaintiffs argument that defendants' receipt of substantial revenue from tire sold or used in the District, at best, makes it foreseeable that some potential plaintiff might exist in the District. Our Court of Appeals, however, has made it clear that “[t]he constitutional standard, then, is not satisfied through ‘the mere likelihood that a product will find its way into to the forum State,’ without any other relevant contacts between the defendant and the forum.” *Holder*, 779 A.2d at 275 (quoting *World-Wide Volkswagen*, 444 U.S. 286, 297 (2001)). On the record before it, the exercise of personal jurisdiction over defendants would offend traditional notions of fair play and substantial justice because plaintiff has failed to show anything but the most tenuous connection between defendants and the District.

Accordingly, it is this 22 day of September 2003, nunc pro tunc to September 3, 2003

ORDERED that defendants' Motions to Dismiss for Lack of Personal Jurisdiction are hereby GRANTED.

SO ORDERED.

<<signature>>

Natalia M. Combs Greene

Associate Judge

(202) 383-5414 (fax)

Counsel for Defendants Bayer Corp. and Rhein Chemie Corp.

Phillip Proger, Esq.

JONES DAY REAVIS & POGUE

51 Louisiana Avenue, N.W.

Washington D.C. 20001-2113

(202) 879-3939

(202) 626-1700 (fax)

Thomas Demitrack, Esq.

JONES DAY REAVIS & POGUE

North Point

901 Lakeside Avenue

Cleveland, OH 44114-1190

(216) 586-3939

(216) 579-0212 (fax)

Counsel for Flexsys America LP

D. Jarrett Arp, Esq.

GIBSON DUNN & CRUTCHER, LLP

1050 Connecticut Avenue, N.W.

Washington, D.C. 20036-5306

(202) 955-8578

(202) 530-9625 (fax)

William Iverson, Esq.

COVINGTON & BURLING

1201 Pennsylvania Avenue, N.W.

Washington, D.C. 20004-2401

(202) 662-6000

(202) 662-6291 (fax)

Footnotes

1 Rhein Chemie is a wholly owned subsidiary of Bayer Corporation.

End of Document

© 2013 Thomson Reuters. No claim to original U.S. Government Works.

No. 69318-2-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

THE STATE OF WASHINGTON,

Appellant,

v.

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

Respondents.

MOTION TO REDACT

Michael K. Vaska, WSBA #15438
Kathryn C. McCoy, WSBA #38210
FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3400
Seattle, Washington 98101-3299

Lee F. Berger (*pro hac vice*)
PAUL HASTINGS LLP
875 15th Street, N.W.
Washington, DC 20005

*Attorneys for Respondents
LG Display Co., Ltd. and
LG Display America, Inc.*

I. IDENTITY OF MOVING PARTY

Pursuant to this Court's General Orders and GR 15, Respondents ask this Court to redact certain portions of the Brief of Respondents LG Display Co., Ltd. and LG Display America, Inc. ("Response Brief"), which is being filed concurrently with this Motion to Redact.

II. STATEMENT OF RELIEF REQUESTED

The Response Brief contains information derived from materials currently under seal, by order of the trial court. CP 50-53. The sealed information is proprietary and poses significant commercial risks to the LG Display companies if it is made available to their competitors, including co-defendants in the underlying case. The LG Display companies request permission to file a redacted version of their Response Brief to protect the information derived from materials currently under seal. A proposed redacted version of the Response Brief is filed with this Motion.

III. RELEVANT FACTS

In August 2010, the State of Washington filed suit against the LG Display companies and other defendants for violations of the Washington Consumer Protection Act. CP 1-24. On April 28, 2011, the trial court entered a protective order, which included the LG Display companies. After extensive discovery, Respondents filed a Motion to Dismiss for lack of personal jurisdiction and a Motion to Seal certain proprietary

information used in and/or attached to the various pleadings. CP 25-38; 50-53. On July 30, 2012, the trial court granted both motions, dismissing LG Display Co., Ltd. and LG Display America and ordering the clerk to seal the following materials:

1. The Declaration of Lee Berger in Support of Defendants LG Display Co. LTD and LG Display America's Reply;
2. LG Display's Reply in Support of Motion to Dismiss for Lack of Personal Jurisdiction;
3. The Declaration of Jonathan Mark; and
4. The State's Opposition to LG Display's Motion to Dismiss for Lack of Personal Jurisdiction.

CP 52, 54-56. These materials are designated in the clerk's papers. See CP 70-194.

IV. ISSUE

Should this Court require redaction of information derived from materials currently under seal, when those materials have been designated in the record for this appeal?

V. ARGUMENT

A. This Court May Require Redaction of Information from the Public Record when Concerns for Privacy Outweigh the Public Interest in Access to the Record.

GR 15(g) requires that "records sealed in the trial court shall be sealed from public access in the appellate court subject to further order of

the appellate court.” This rule does not, however, automatically protect information derived from sealed materials when that information is contained in the pleadings and submissions at the appellate court. GR 15(g). Without further action, the inclusion of confidential information in pleadings and submissions to the appellate court risks disclosure of otherwise protected information.

Under GR 15(c), any party to a civil case may request redaction of court records. GR 15(c)(1). The rule further states:

After the hearing, the court may order the court files and records in the proceeding, or any part thereof, to be sealed or redacted if the court makes and enters written findings that the specific sealing or redaction is justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record.

GR 15(c)(2).

In making its determination, the court may consider a variety of factors, including: (1) whether “[t]he ... redaction furthers an order entered under CR 12(f) or a protective order entered under CR 26(c)”; and (2) whether another “identified compelling circumstances exists that requires ... redaction.” GR 15(c)(2)(B) & (F). Both of these factors support redaction in this case.

B. Failure to Redact will Frustrate the Parties' Protective Orders and Expose Respondents to Significant Commercial Harm.

In granting LG Display's Motion to Seal, the trial court recognized that public disclosure of certain proprietary information posed a significant risk of commercial harm to LG Display. CP 52. The court made written findings that the harm outweighed the public interest in access to the record, stating that:

[S]ealing ... (1) is necessary to protect LG Display's compelling interest in protecting highly confidential and proprietary business information from exposure to the public, where competitors may use it to gain an unfair bargaining position in the marketplace; (2) furthers a protective order entered under CR 26(c) . . . ; and (3) furthers the protective order entered in the multidistrict litigation in the Northern District of California.

CP 52. This Court is equally justified in requiring redaction of the same proprietary information that remains subject to seal.

First, the LG Display companies only request redaction of confidential information derived from materials already under seal. Second, the commercial risk of public disclosure is a "compelling circumstance . . . that requires sealing or redaction" because the materials under seal contain highly sensitive proprietary business information which competitors could use to gain an unfair advantage over LG Display. GR 15(c)(2)(F). Third, the information LG Display seeks to redact is subject to protective orders, both for this action and for a parallel federal

action in the Northern District of California. Redaction, therefore, furthers the purpose of these protective orders. GR 15(c)(2)(B).

VI. CONCLUSION

For these reasons, Respondents LG Display Co., Ltd. and LG Display America, Inc. respectfully request that the Court enter an order requiring redaction of information derived from materials currently under seal, as provided in the redacted Response Brief accompanying this motion.

Dated this 16th day of May, 2013.

FOSTER PEPPER PLLC



Michael K. Vaska, WSBA #15438
Kathryn C. McCoy, WSBA #38210
1111 Third Avenue, Suite 3400
Seattle, Washington 98101-3299

Lee F. Berger (*pro hac vice*)
PAUL HASTINGS LLP
875 15th Street, N.W.
Washington, DC 20005

*Attorneys for Respondents LG
Display Co., Ltd. and LG Display
America, Inc.*

No. 69318-2-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

THE STATE OF WASHINGTON,

Appellant,

v.

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

Respondents.

CERTIFICATE OF SERVICE

Michael K. Vaska, WSBA #15438
Kathryn C. McCoy, WSBA #38210
FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3400
Seattle, Washington 98101-3299

Lee F. Berger (*pro hac vice*)
PAUL HASTINGS LLP
875 15th Street, N.W.
Washington, DC 20005

*Attorneys for Respondents
LG Display Co., Ltd. and
LG Display America, Inc.*

I, LISA CACHOPO, hereby declare as follows:

I am over the age of eighteen years and not a party to the within action. My business address is 1111 Third Avenue, Suite 3400, Seattle, WA 98101.

On May 16, 2013, I caused the following documents to be served in the manner indicated below:

1. Brief of Respondents LG Display Co., Ltd. and LG Display America, Inc.;
2. Motion to Redact;
3. Unpublished, Non-Washington Authority Cited in Brief of Respondents LG Display Co., Ltd and LG Display America, Inc.; and
4. This Declaration of Service.

<i>Attorneys for Plaintiff State of Washington</i> Brady R. Johnson, WSBA #21732 Tina E. Kondo, WSBA #12101 Jonathan A. Mark, WSBA #38051 OFFICE OF THE ATTORNEY GENERAL OF WASHINGTON 800 5th Ave, Suite 2000 Seattle, WA 98104-3188 Phone: (206) 389-7744 Facsimile: (206) 464-6338 Email: bradyj@atg.wa.gov , tinak@atg.wa.gov , jonathanm2@atg.wa.gov	<input type="checkbox"/> <input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	VIA HAND-DELIVERY VIA EMAIL VIA FACSIMILE VIA US MAIL
--	---	--

Attorneys for Defendants Chi Mei Entities

Michael R. Scott, WSBA #12822
Michael J. Ewart, WSBA #38655
HILLIS CLARK MARTIN & PETERSON P.S.
1221 Second Avenue, Suite 500
Seattle, WA 98101
Phone: (206) 623-1745
Facsimile: (206) 623-7789
Email: mrs@hcmp.com, mje@hcmp.com

- VIA HAND-DELIVERY
- VIA EMAIL
- VIA FACSIMILE
- VIA US MAIL

Of Counsel:

Admitted pro hac vice

James G. Kreissman
Harrison J. Frahn IV
Jason M. Bussey
Akra D. Chatterjee
Melissa Derr Schmidt
SIMPSON THACHER & BARTLETT LLP
2550 Hanover Street
Palo Alto, CA 94304
Phone: 650-251-5000
Facsimile: 650-251-5002
Email: jkreissman@stblaw.com,
hfrahn@stblaw.com, jbussey@stblaw.com,
achatterjee@stblaw.com, mderr@stblaw.com

- VIA HAND-DELIVERY
- VIA EMAIL
- VIA FACSIMILE
- VIA US MAIL

Attorneys for Defendants Epson Entities

Angelo J. Calfo, WSBA #27079
Tyler L. Farmer, WSBA #39912
CALFO HARRIGAN LEYH & EAKES LLP
999 3rd Avenue, Suite 4400
Seattle, WA 98104
Phone: (206) 623-1700
Facsimile: (206) 623-8717
Email: angeloc@calfoharrigan.com,
tylerf@calfoharrigan.com

Of Counsel:
Admitted *pro hac vice*
Stephen P. Freccero
Melvin R. Goldman
Derek F. Foran
Stuart C. Plunkett
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105
Phone: (415) 268-7000
Facsimile: (415) 268-7522
Email: sfreccero@mofo.com,
mgoldman@mofo.com, dforan@mofo.com,
splunkett@mofo.com

- VIA HAND-DELIVERY
- VIA EMAIL
- VIA FACSIMILE
- VIA US MAIL

- VIA HAND-DELIVERY
- VIA EMAIL
- VIA FACSIMILE
- VIA US MAIL

Attorney for Defendants Toshiba Entities

Bradford J Axel, WSBA #29269
Mathew L. Harrington, WSBA #33276
STOKES LAWRENCE, P.S.
800 Fifth Avenue, Suite 4000
Seattle, WA 98104
Phone: (206) 626-6000
Facsimile: (206) 464-1496
Email: bjax@stokeslaw.com, mlh@stokeslaw.com

Of Counsel:
Admitted *pro hac vice*
John H. Chung
Kristen J. McAhren
WHITE & CASE LLP
1155 Avenue of the Americas
New York, NY 10036
Phone: (212) 819-8200
Facsimile: (212) 354-8113
Email: jchung@whitecase.com,
kmcahren@whitecase.com

- VIA HAND-DELIVERY
- VIA EMAIL
- VIA FACSIMILE
- VIA US MAIL

- VIA HAND-DELIVERY
- VIA EMAIL
- VIA FACSIMILE
- VIA US MAIL

Attorney for Defendants AU Entities

David C. Lundsgaard, WSBA #25448
Aimee K. Decker, WSBA #41797
GRAHAM & DUNN
2801 Alaskan Way
Suite 300, Pier 70
Seattle, WA 98121-1128
Phone: (206) 624-8300
Facsimile: (206) 340-9599
Email: dlundsgaard@grahamdunn.com;
adecker@grahamdunn.com

Of Counsel:

Admitted pro hac vice

Carl L. Blumenstein
Christopher A. Nedeau
James A. Nickovich
NOSSAMAN LLP
50 California Street
34th Floor
San Francisco, CA 94111
Phone: (415) 398-3600
Facsimile: (415) 398-2438
Email: cblumentstein@nossaman.com,
cnedeau@nossaman.com,
jnickovich@nossaman.com

- VIA HAND-DELIVERY
- VIA EMAIL
- VIA FACSIMILE
- VIA US MAIL

- VIA HAND-DELIVERY
- VIA EMAIL
- VIA FACSIMILE
- VIA US MAIL

Attorneys for Defendants Samsung Entities

Larry S. Gangnes, WSBA #08118
Erin M. Wilson, WSBA #42454
LANE POWELL P.C.
1420 Fifth Avenue
Suite 4100
Seattle, WA 98101-2338
Phone: (206) 223-7000
Facsimile: (206) 223-7107
Email: gangnesl@lanepowell.com,
wilsonem@lanepowell.com

Of Counsel:

Admitted pro hac vice

Robert D. Wick
Neil K. Roman
Derek Ludwin
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401
Phone: (202) 662-6000
Facsimile: (202) 662-6291
Email: rwick@cov.com, nroman@cov.com,
dludwin@cov.com

VIA HAND-DELIVERY

VIA EMAIL

VIA FACSIMILE

VIA US MAIL

VIA HAND-DELIVERY

VIA EMAIL

VIA FACSIMILE

VIA US MAIL

Attorneys for Defendants Hitachi Entities

Ralph H. Palumbo, WSBA #4751
Lynn H. Engel, WSBA #21934
Molly A. Terwilliger, WSBA #28449
SUMMIT LAW GROUP PLLC
315 Fifth Avenue South, Suite 1000
Seattle, WA 98104
Telephone: 206-676-7000
Facsimile: 206-676-7001
Email: ralphp@summitlaw.com,
lynne@summitlaw.com, mollyt@summitlaw.com

- VIA HAND-DELIVERY
- VIA EMAIL
- VIA FACSIMILE
- VIA US MAIL

Clifford D. Sethness, WSBA #14110
MORGAN, LEWIS & BOCKIUS LLP
300 South Ground Avenue, 22nd Floor
Los Angeles, CA 90071
Telephone: 213-612-2500
Facsimile: 213-612-2501
Email: csethness@morganlewis.com

- VIA HAND-DELIVERY
- VIA EMAIL
- VIA FACSIMILE
- VIA US MAIL

Of Counsel:

Admitted pro hac vice

Kent M. Roger
Herman J. Hoying
MORGAN, LEWIS & BOCKIUS LLP
One Market, Spear Street Tower
San Francisco, CA 94105-1596
Telephone: (415) 442-1000
Facsimile: (415) 442-1001
Email: kroger@morganlewis.com,
hhoying@morganlewis.com

- VIA HAND-DELIVERY
- VIA EMAIL
- VIA FACSIMILE
- VIA US MAIL

Attorneys for Defendants Sharp Corporation

Paul R. Taylor, WSBA #14851
BYRNES KELLER CROMWELL LLP
1000 Second Avenue, 38th Floor
Seattle, WA 98104
Telephone: (206) 622-2000
Facsimile: (206) 622-2522
Email: ptaylor@byrneskeller.com

Of Counsel:

Admitted pro hac vice

John M. Grenfell
Jacob R. Sorensen
PILLSBURY WINTHROP SHAW PITTMAN
LLP
Four Embarcadero Center, 22nd Floor
San Francisco, CA 94111
Telephone: (415) 983-1000
Facsimile: (415) 983-1200
Email: john.grenfell@pillsburylaw.com
jake.sorensen@pillsburylaw.com

Fusae Nara
PILLSBURY WINTHROP SHAW PITTMAN
LLP
1540 Broadway
New York, NY 10036
Telephone: 212-858-1187
Facsimile: 212-858-1500
Email: fusae.nara@pillsburylaw.com

VIA HAND-DELIVERY
 VIA EMAIL
 VIA FACSIMILE
 VIA US MAIL

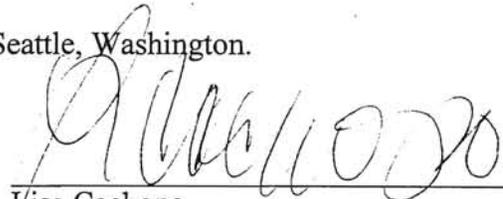
VIA HAND-DELIVERY
 VIA EMAIL
 VIA FACSIMILE
 VIA US MAIL

VIA HAND-DELIVERY
 VIA EMAIL
 VIA FACSIMILE
 VIA US MAIL

<i>Attorneys for Defendant LG Display Co., Ltd. and LG Display America, Inc.</i>	<input type="checkbox"/> <input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	VIA HAND-DELIVERY VIA EMAIL VIA FACSIMILE VIA US MAIL
Lee F. Berger PAUL HASTINGS LLP 875 15 th Street, N.W. Washington, DC 20005 Telephone: (202) 551-1772 Facsimile: (202) 551-0172 Email: leeberger@paulhastings.com ,	<input type="checkbox"/> <input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	VIA HAND-DELIVERY VIA EMAIL VIA FACSIMILE VIA US MAIL
Kevin C. McCann Holly A. House PAUL HASTINGS LLP 55 Second Street San Francisco, CA 94105 Telephone: (415) 856-7000 Facsimile: (415) 856-7100 Email: kevinmccann@paulhastings.com , hollyhouse@paulhastings.com ,	<input type="checkbox"/> <input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	VIA HAND-DELIVERY VIA EMAIL VIA FACSIMILE VIA US MAIL

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 16th day of May, 2013 at Seattle, Washington.



Lisa Cachopo