

No. ~~70298-0~~ I

70298-0

JUL 29 2014

King County Superior Court No. 12-2-15842-8 SEA

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON

Plaintiff/Appellant,

v.

PHILIPS ELECTRONICS N.V., PHILIPS ELECTRONICS
INDUSTRIES (TAIWAN), LTD., PANASONIC
CORPORATION, HITACHI DISPLAYS, LTD., HITACHI ASIA,
LTD., HITACHI ELECTRONIC DEVICES (USA), INC., LG
ELECTRONICS, INC., SAMSUNG SDI AMERICA, INC.,
SAMSUNG SDI CO., LTD., SAMSUNG SDI (MALAYSIA)
SDN. BHD., SAMSUNG SDI MEXICO S.A. DE C.V.,
SAMSUNG SDI BRASIL LTDA., SHENZEN SAMSUNG SDI
CO., LTD., TIANJIN SAMSUNG SDI CO., LTD.

Defendants/Respondents.

SDI DEFENDANTS' SUPPLEMENTAL BRIEF

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COURT OF APPEALS
DIVISION ONE
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I. INTRODUCTION

This supplemental brief is submitted by Defendants/Respondents Samsung SDI, Samsung SDI America, Samsung SDI Mexico, Samsung SDI Brazil, Samsung SDI Shenzhen, Samsung SDI Tianjin, and Samsung SDI Malaysia (collectively, “SDI Defendants”) in response to the ruling of the Court by Commissioner Mary Neel dated June 12, 2014, directing the parties to file supplemental briefs addressing the impact of *State v. AU Optronics Corp.*, No. 69318-2-I, on this case.

State v. AU Optronics Corp., --- P.3d ----, 2014 WL 1779256 (May 5, 2014) reversed the trial court decision dismissing antitrust claims alleging price fixing by two foreign corporations, LG Display Co. Ltd. and LG Display America Inc. (collectively, “LG Display”), for lack of personal jurisdiction. As the Court noted, LG Display manufactures and distributes components for retail consumer goods that third parties mass-market throughout the United States. *Id.* at *1. It does not manufacture or distribute any component within the state of Washington. *Id.*

The thrust of *AU Optronics* was to distinguish *J. McIntyre Machinery, Ltd. v. Nicastro*, --- U.S. ----, 131 S.Ct. 2780, 2792, (2011) (Breyer, J., concurring), which was decisive for the trial court in its ruling dismissing the claims against LG Display because federal due process limitations underlying personal jurisdiction restrictions require Washington courts to apply federal constitutional law, including United States Supreme Court decisions. *See AU Optronics*, 2014 WL 1779256, at *7. The Court of Appeals noted that the aspect of *J. McIntyre*’s holding

that controlled the decision in *AU Optronics* was that “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.”¹ *Id.* at *5. However, the Court went on to identify and summarize a record before it that was rich in factual detail regarding the specific volume of products that LG Display had indirectly shipped to the State of Washington, and specific actions LG Display had taken, which established that it expected to directly or indirectly ship many millions of its products into the State of Washington. *See id.* at *2 (“To resolve the personal jurisdiction issue, the trial court considered the following allegations. . . .”); *id.* at *8 (“LG Display’s alleged conduct plus a large volume of expected and actual sales established sufficient minimum contacts for a Washington court to exercise specific jurisdiction over it.”).

No such record exists in this case with respect to any of the SDI Defendants — indeed, the Complaint does not even allege any such facts as to the SDI Defendants. Therefore, *AU Optronics* does not apply as to the SDI Defendants, and the Court must affirm their dismissal.

¹ Applying the rule that “the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment[] on the narrowest grounds,” this Court concluded that, “[u]nder the narrowest holding of *J. McIntyre*,” Justice Breyer’s concurring opinion, “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.” *AU Optronics*, 2014 WL 1779256, at *5-6.

II. ARGUMENT

In *AU Optronics*, the Court examined the factual record that was before it that allegedly supported personal jurisdiction over LG Display as follows:

LG Display's alleged conduct plus a large volume of expected and actual sales established sufficient minimum contacts for a Washington court to exercise specific jurisdiction over it. LG Display understood the third parties would sell products containing its LCD panels throughout the United States, including large numbers of those products in Washington. LG Display Co. Ltd. sold its LCD panels to a particular global consumer electronics manufacturer that sold products containing these panels nationwide and in Washington through national electronic appliance distribution chains. These sales accounted for approximately 19–25 percent of LG Display's annual revenues. Washington State purchased "in excess of 100 Million dollars of product ... includ[ing] LCD Products" from this manufacturer. This original equipment manufacturer also entered into a master purchase agreement with LG Display Co. Ltd. in which the company agreed to obtain and maintain all necessary U.S. regulatory approval. And LG Display representatives met with various companies in Washington and in other states.

AU Optronics, 2014 WL 1779256, at *8; *see also id.* at *2 (summarizing the foregoing facts in much greater detail).

In contrast to the rich factual record in that case, here, the State's responsive brief in the proceedings below summarized the facts allegedly supporting personal jurisdiction over the SDI Defendants as follows:

[The SDI Defendants] were participants in a global price-fixing conspiracy that saw an enormous quantity of price-fixed CRT products, including televisions and computer monitors, sold into Washington State where they were purchased at inflated prices by this state's consumers. . . .

In light of the very large number of inflated-price CRT Products estimated to have been purchased by consumers in Washington State, the State filed its Complaint seeking damages under RCW 19.86, the Consumer Protection Act. . . .

Superior Court Docket No. 87 at 1-2.² No other facts are alleged; the State's entire factual summary occupied less than two pages, and its only record citations cited the Complaint, which contained no additional facts. CP 1-28.

As this Court noted, "The trial court's ruling that 'something more' is required to assert personal jurisdiction over [LG Display] is supported by *J. McIntyre* and by Washington law." See *AU Optronics*, 2014 WL 1779256, at *7. Absent evidence of a 'regular ... flow' or 'regular course' of sales," in New Jersey, or evidence of "'something more,' such as special state-related design, advertising, advice, marketing, or anything else," Justice Breyer found the record insufficient to support personal jurisdiction. *Id.* at *7. Thus, in determining whether "something more" existed, which would enable Washington courts to assert personal jurisdiction over LG Display, this Court focused on the volume of sales of LG Display products in this state, and LG Display's activities that suggested it had deliberately caused a high volume of sales in this State to occur. See *id.* at *8 ("Courts in other jurisdictions have similarly distinguished *J. McIntyre* and held that a foreign defendant is subject to personal jurisdiction in the forum state based upon the volume of sales in

² The State did not include its Response to Samsung Defendants' Motion to Dismiss for Lack of Personal Jurisdiction in the Clerk's Papers.

that state.”). However, the existence of “something more” must depend upon the evidence before the Court. “Once challenged, the party asserting personal jurisdiction bears the burden of proof to establish its existence.” *Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.*, 172 Wn. App. 799, 807, 292 P.3d 147 (2013) (citing James Wm. Moore, *Moore’s Federal Practice*, § 12.31, at 12–54 (3d ed. 2006)). Further, “[i]n resolving a motion ... under Rule 12(b)(1) a district court may consider evidence outside the pleadings,” *Doe v. Del. State Police*, 939 F. Supp. 2d 313, 320-21 (S.D.N.Y. 2013) (quoting *Morrison v. Nat’l Australia Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008), *aff’d*, 561 U.S. 247 (2010)), “but it ‘may not rely on conclusory or hearsay statements contained in ‘such evidence.’” *Id.* (quoting *J.S. ex rel. N.S. v. Attica Cent. Sch.*, 386 F.3d 107, 110 (2d Cir. 2004)); *see also First Chicago Int’l v. United Exchange Co.*, 836 F.2d 1375, 1378 (D.C. Cir. 1988) (“Conclusory statements ... do not constitute the prima facie showing necessary to carry the burden of establishing personal jurisdiction”).

Here, the State has completely failed to carry this burden as to the SDI Defendants. Its arguments only rely upon formulaic conclusory allegations repeated as to all of the Defendants regarding the price fixing allegations. The State does not allege any facts, and does not even attempt to make a prima facie case, as to the SDI Defendants’ Washington contacts such as the State accomplished with respect to LG Display. Therefore, as to the SDI Defendants, the *AU Optronics* analysis does not apply, and the Court must affirm dismissal.

RESPECTFULLY SUBMITTED this 29th day of July, 2014.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the United States and the State of Washington, that on July 29, 2014, I served a copy of the foregoing document on all counsel of record as indicated below:

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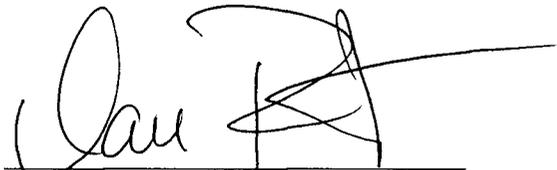
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