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No. 64677-0-I

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

AU OPTRONICS CORPORATION, ET AL.

Appellants,

v.

STATE OF WASHINGTON

Respondent.

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INTRODUCTION

The State of Washington (“State”) is improperly seeking Appellants’¹ foreign and confidential documents for use in its investigation of the pricing of goods known as TFT-LCD panels. The State made no effort to obtain Appellants’ foreign documents by serving proper discovery requests—known under the applicable statute (RCW 19.86.110) as “civil investigative demands” or “CIDs”—on the foreign Appellants themselves. Instead, the State attempted an end-run around the limits of its statutory and jurisdictional authority by serving a CID on plaintiffs’ counsel in a federal civil case pending in another state, in which Appellants and other third-parties are defendants. By serving the CID on plaintiffs’ counsel, the State attempted to deprive Appellants of their rights to assert jurisdictional and statutory objections to the CID and their ability to protect their confidential and proprietary information as provided by Washington and U.S. Constitutional law.

Appellants challenged the State’s CID in King County Superior Court. The trial court below, however, concluded that Appellants lacked standing to raise several of their objections to the propriety of the CID in

¹ Appellants are AU Optronics Corporation, AU Optronics Corporation America, ChiMei Innolux Corporation, Chi Mei Corporation, CMO Japan Co., Ltd., Chi Mei Optoelectronics USA, Inc., Nexgen Mediatech, Inc., HannStar Display Corporation, Toshiba Corporation, Toshiba Mobile Display Co., Ltd., and Toshiba America Electronic Components, Inc.

the first instance. The trial court reasoned that only plaintiffs’ counsel in the federal case—a law firm opposed to Appellants in that case with no interest in protecting Appellants’ foreign and confidential documents—has standing to raise those objections. The trial court further rejected Appellants’ objection that the State’s CID exceeds its authority under RCW 19.86.110, concluding that “the State may issue a CID to ‘any person’ believed to be in possession, custody, or control of documents, even if the documents belong to another person or (entity).” (Emphasis added). Based on these rulings, the trial court entered an order denying Appellants’ Joint Motion to Quash Civil Investigative Demand (the “Motion”) and dismissing their Petition to Quash a Civil Investigative Demand (the “Petition”).²

The trial court’s order below erred as a matter of law in several respects. First, under well-established Washington law, Appellants have standing to object to the CID based on the lack of personal jurisdiction and the federal protective order. Appellants are within the “zone of interests” protected by the CID statute, which expressly contemplates petitions by both the recipients of a demand and other persons with cause to do so. Appellants will also suffer an “injury in fact” if they are not permitted to

² The trial court did not reach the merits of Appellants’ jurisdictional and protective-order objections due to its ruling on standing.

challenge the State’s CID—a demand that specifically targets Appellants’ documents and which no other party has an adequate interest in protecting. To the extent deemed necessary, Appellants also have what is known as “third-party standing” to challenge the CID on behalf of the plaintiffs’ counsel. The trial court’s Order must be reversed as to the standing ruling and, at a minimum, remanded for a determination on the merits of the personal jurisdiction and protective order objections.

Second, the trial court erred as a matter of law in concluding that the State has virtually unlimited authority to issue a civil investigative demand to any person, wherever located, and irrespective of the manner in which the person came into possession of the documents sought by the State. RCW 19.86.110 is not nearly so broad. The statute specifically provides that the State is not permitted to issue a demand that would be improper or unreasonable if contained in a subpoena duces tecum, or which would require the production of documents that could not be required by a subpoena duces tecum. The trial court ignored these limitations in ruling that the CID was within the State’s authority under RCW 19.86.110. The trial court’s Order should be reversed for this reason as well.

I. ASSIGNMENTS OF ERROR

Appellants appeal from the trial court's Order Denying Petitioners' Joint Motion to Quash Civil Investigative Demand ("Order") (CP 390-93).

Appellants assign error to the following provisions of the Order:

1. The trial court's conclusion that Appellants lack standing to challenge the Washington State's personal jurisdiction over the CID recipients and Appellants' documents is an error of law (CP 392).

2. The trial court's conclusion that Appellants lack standing to challenge the CID on the grounds that the TFT-LCD Antitrust Litigation's Protective Order prohibits production of the documents under the circumstances presented in this case is an error of law (CP 392).

3. The trial court's conclusion that the civil investigative demand statute, RCW 19.86.110, provides the State with authority to issue a lawful CID to an out-of-state law firm holding Appellants' foreign and confidential documents for restricted use in a separate federal case is an error of law (CP 391).

4. The trial court's denial of Appellants' Joint Motion to Quash is an error of law (CP 393).

5. The trial court's dismissal of the Petition to Quash Civil Investigative Demand is an error of law (CP 393).

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Do Appellants have standing to move to quash the CID for lack of personal jurisdiction where (i) RCW 19.86.110 permits any person or entity to petition to set aside a CID upon a showing of “good cause”; (ii) the documents sought by the CID are owned by Appellants and the CID recipient has no interest in resisting the CID; and (iii) the documents were produced to the CID recipients under the terms of a Protective Order mandating that Appellants appear and object to the CID in the courts of this state? (Assignment of Error No. 1).

B. Do Appellants have standing to move to quash the CID on the basis that it is precluded by the Protective Order where (i) RCW 19.86.110 permits any person or entity to petition to set aside a CID upon a showing of “good cause”; (ii) the documents sought by the CID are owned by Appellants and the CID recipient has no interest in resisting the CID; and (iii) the CID recipients cannot produce Appellants’ documents to third parties under the terms of a Protective Order, except pursuant to an adjudicated “lawful order,” and the Protective Order mandates that Appellants appear and object to the CID in the courts of this state? (Assignment of Error No. 2).

C. Does the State lack statutory authority to issue a CID for Appellants’ documents to the CID recipients where (i) the CID seeks

documents the State could not obtain via a subpoena duces tecum, (ii) the State is attempting to use the TFT-LCD Antitrust Litigation to obtain foreign and confidential documents otherwise outside the State's jurisdiction, and (iii) the CID recipients reside beyond the geographical limits of the State's subpoena power? (Assignment of Error No. 3).

D. Should the trial court's denial of the Joint Motion to Quash Civil Investigative Demand be reversed or, at a minimum, remanded for a determination on the issues the Court did not address below (personal jurisdiction and the implication of the Protective Order) due to its erroneous conclusion that Appellants lacked standing? (Assignment of Error No. 4).

E. Should the trial court's dismissal of the Petition to Quash the Civil Investigative Demand be reversed or, at a minimum, remanded for a determination on the issues the Court did not address below (personal jurisdiction and the implication of the Protective Order) due to its erroneous conclusion that Appellants lacked standing? (Assignment of Error No. 5).

III. STATEMENT OF THE CASE

A. The TFT-LCD Antitrust Litigation

Appellants are foreign³ and U.S. entities named as defendants in civil antitrust litigation in the United States District Court, Northern District of California, Case No. 07-1827-SI (“TFT-LCD Antitrust Litigation”). (CP 41, 45-200). The TFT-LCD Antitrust Litigation involves dozens of federal putative class action cases that are consolidated as “multidistrict litigation” before the Honorable Susan Illston. *Id.* The subject of the TFT-LCD Antitrust Litigation is the sale of TFT-LCD panels, or “flat panels,” which are manufactured and sold in the first instance almost exclusively by TFT-LCD manufacturers located outside the United States, like the foreign Appellants. *Id.* In a separate manufacturing process, the panels are ultimately incorporated in products such as televisions, computer monitors and cell phones. *Id.* The plaintiffs in the TFT-LCD Antitrust Litigation class cases are divided into two groups, each of whom have filed separate consolidated complaints: the Direct Purchaser Plaintiffs and the Indirect Purchaser Plaintiffs.⁴ *Id.*

³ The foreign Appellants are AU Optronics Corporation, ChiMei Innolux Corporation, Chi Mei Corporation, CMO Japan Co., Ltd. HannStar Display Corporation, Toshiba Corporation and Toshiba Mobile Display Co., Ltd.

⁴ As the names suggest, the distinction is between those who purchased TFT-LCD panels directly from a defendant and those who purchased such panels indirectly.

With respect to the Indirect Purchaser Plaintiffs, the law firms of Zelle Hofmann Voelbel & Mason, LLP and the Alioto Firm, both located in San Francisco, California, have been appointed as the interim lead counsel (“Indirect Purchaser Plaintiffs Counsel”). (CP 45-158). Neither law firm has an office in the State of Washington. The Indirect Purchaser Plaintiffs have not alleged, and the federal court has not certified, a class or sub-class of Washington state residents. *Id.*

Appellants, other defendants, and non-defendant third parties have produced a very significant volume of document discovery (numbering in the millions of pages) pursuant to discovery requests in the TFT-LCD Antitrust Litigation. (CP 41). The production, however, has been compulsory and includes many documents produced by the foreign Appellants that are not otherwise located in the United States. *Id.*

The vast majority of these documents contain proprietary and/or trade secret information regarding TFT-LCD panels and products containing TFT-LCD panels. *Id.* Due to their sensitive nature, the U.S. District Court entered a protective order (the “Protective Order”) in the TFT-LCD Antitrust Litigation that precludes Plaintiffs and their counsel from sharing with *any* third parties any documents produced to them that have been designated as “Confidential” or “Highly Confidential,” absent an adjudicated “lawful” order. *Id.*; (CP 221-248). The Protective Order

further mandates that the Plaintiffs and their counsel may use these documents *only* in the TFT-LCD Antitrust Litigation, and must return the documents to the Appellants or other parties that produced them “within thirty days” of the termination of the litigation. (CP 228, 233).

B. The State’s Investigation, Prior Demands and the CID

The State has initiated an investigation into the allegations that gave rise to the TFT-LCD Antitrust Litigation. (CP 41). In April and May 2009, the State purported to serve CIDs on U.S. affiliates of certain foreign Appellants, including AU Optronics America, ChiMei Optoelectronics USA, Inc., and Toshiba America Electronic Components, Inc. (collectively, the “U.S.-based Appellants”).⁵ *Id.* The CIDs sought all documents produced by U.S.-based Appellants in the TFT-LCD Antitrust Litigation. In addition, the State entered into tolling agreements with certain U.S.-based Appellants. (CP 41-42). The proposed tolling agreements, which the State drafted,⁶ identify the focus of the State’s investigation as follows: “whether the TFT-LCD manufacturers or their subsidiaries or affiliates have engaged in price fixing . . . with respect to sales of TFT-LCD panels.” (CP 40-43, 249-254 (Tolling Agreement at p. 1)).

⁵ The State has not served any CID on HannStar, which has no U.S. subsidiary or other U.S. presence. (CP 41).

⁶ Neither Toshiba America Electronic Components, Inc. nor AU Optronics America entered into these agreements.

The State has made *no attempt* to serve any CIDs on the foreign Appellants. (CP 41). Instead, on September 14, 2009, the State served the CID at issue on the Indirect Purchaser Plaintiffs Counsel. (CP 255-260). The CID demands the production of “all documents, information or other materials submitted or produced to [plaintiffs] pursuant to any request made by [plaintiffs] relating to the subject matter of the [TFT-LCD Antitrust Litigation].” *Id.* The CID is not limited to documents produced by Appellants or other defendants in the TFT-LCD Antitrust Litigation, but would include documents produced by non-defendant third parties. *Id.*

Although the CID purports to be directed to “all plaintiffs and their counsel,” *id.*, there was no evidence below that the State served the CID on any of the named plaintiffs in the TFT-LCD Antitrust Litigation, nor on the interim lead counsel for the Direct Purchaser Plaintiffs. Moreover, the State provided *no notice* of the CID to the Appellants (nor, apparently, any of non-defendant third parties) even though the CID seeks the production of their documents. (CP 41-42, 261-62).

C. The Indirect Purchaser Plaintiffs Counsel’s Objections

The Indirect Purchaser Plaintiffs Counsel notified Appellants’ counsel of the CID, as required by the Protective Order. *Id.* On September 18, 2009, the Indirect Purchaser Plaintiffs Counsel sent the State a letter referring the State to the Protective Order and noting that

such Counsel had no contacts with the State of Washington. (CP 261-62). On October 5, 2009, the Indirect Purchaser Plaintiffs Counsel indicated to Appellants' counsel that objections to the CID had been or would be served on the State (the "Objections"). (CP 263-65). The Objections are based on the following five grounds: (i) lack of personal jurisdiction over the Indirect Purchaser Plaintiffs and their counsel; (ii) that the TFT-LCD Antitrust Litigation Protective Order precludes disclosure; (iii) the excessive cost of compliance required to retrieve and produce the documents; (iv) that the Indirect Purchaser Plaintiffs Counsel are the incorrect party, as neither counsel nor the parties they represent are the owners of the documents; and (v) that the Indirect Purchaser Plaintiffs Counsel have sorted and analyzed the documents in such a manner that they now constitute attorney work product. *Id.*

D. Appellants' Motion to Quash the CID

On October 9, 2009, Appellants filed a Petition to Quash Civil Investigative Demand (the "Petition") pursuant to RCW 19.86.110, the Washington statute governing the State's CID to the Indirect Purchaser Plaintiffs Counsel. (CP 1-11). On October 15, 2009, Appellants filed Petitioners' Joint Motion to Quash Civil Investigative Demand (the "Motion"). (CP 23-39). The Motion sought to quash the CID on the following grounds: (i) the CID improperly exceeds the statutory limits of

the State's authority to reach Appellants' foreign documents and is an improper attempt to "piggy back" on the TFT-LCD Antitrust Litigation; (ii) the State lacks personal jurisdiction over the Indirect Purchaser Plaintiffs Counsel and Appellants' documents; (iii) the substantial questions about the State's subject matter jurisdiction over the scope of its investigation supports quashing the CID; (iv) the strict limitations in the Protective Order on the Indirect Purchaser Plaintiffs Counsel's use and control over Appellants' foreign and confidential documents precludes the State from compelling production of such documents; and (v) the CID is duplicative, wasteful, unduly broad and unduly burdensome. (CP 30-38).⁷

The trial court held a hearing on the Motion on November 6, 2009. The Court reserved ruling at the hearing and, on November 23, 2009, issued a four-page Order denying the Motion and dismissing the Petition. (CP 390-93). The trial court's Order is summarized as follows: (i) the State has the statutory authority to issue a lawful CID to "any person" believed to be in possession, custody or control of documents, even if the documents belong to another person (or entity)" and the State is not precluded from "piggybacking" on discovery in the TFT-LCD Antitrust Litigation; (ii) Appellants lack standing to raise personal jurisdiction on behalf of the CID recipients; (iii) Appellants' subject matter jurisdiction

⁷ Appellants address the first, third and fourth grounds in this appeal.

arguments are not presently before the trial court; (iv) Appellants lack standing to object on the basis of the Protective Order because “the CID recipients raise no such challenge.” *Id.*

Appellants filed the notice of this appeal on December 23, 2009.

E. The Federal Court Clarifies Its Protective Order

After notice of this appeal was filed, the State moved to intervene in the TFT-LCD Antitrust Litigation. Appendix A (Order Clarifying Stipulated Protective Order at 1-2).⁸ The State sought to modify the Protective Order to permit the State to obtain the Foreign Appellants’ documents through the CID process. *Id.* The federal court in the TFT-LCD Antitrust Litigation issued an Order on May 4, 2010, stating in relevant part as follows:

After consideration of the briefing and argument on this matter, the Court hereby clarifies that the Stipulated Protective Order does not and was not intended to interfere with any lawfully issued State subpoena or civil investigative demand. The Court finds it unnecessary to modify the Stipulated Protective Order. If any party receives a discovery request, subpoena or civil investigative demand (“CID”) that would compel disclosure of information or items designated in this action as “confidential” or “highly confidential,” that party must comply with Section 8 of the Stipulated Protective Order, which requires, *inter alia*, that the “Receiving Party” provide notice of the discovery request, subpoena or CID to

⁸ This Court may take judicial notice of the federal court’s Clarifying Order in the TFT-LCD Antitrust Litigation. *See Eugster v. City of Spokane*, 118 Wn. App. 383, 401 n.4, 76 P.3d 741 (2003) (taking judicial notice of federal court’s rulings).

the Designating Party, and that the receiving party inform the party who caused the discovery request, subpoena or CID to issue of the existence of the Stipulated Protective Order. To the extent that the party to the Stipulated Protective Order wishes to challenge any aspect of a discovery request, subpoena or CID, including the question of whether the party has “control” over the relevant documents, Section 8 of the Stipulated Protective Order provides that the party **shall do so in the issuing court.**

Id. (emphasis added). By the terms of the federal court’s Clarifying Order, the forum for challenging the lawfulness of the State’s CID is exclusively in the courts of Washington. *Id.*

IV. STANDARDS OF REVIEW

Whether a party has standing to sue is a question of law. *Spokane Airports v. RMA, Inc.*, 149 Wn. App. 930, 939, 206 P.3d 364 (2009). This Court will review a standing determination de novo. *Id.* See also *West v. Thurston County*, 144 Wn. App. 573, 578, 183 P.3d 346 (2008) (standing is a question of law that court reviews de novo).

The determination of whether a superior court has personal jurisdiction is a question of law that this Court will review de novo. *Lewis v. Bours*, 119 Wn.2d 667, 669, 835 P.2d 221 (1992). In particular, where (as here) facts are not in dispute, this Court will review a lower court’s ruling on personal jurisdiction under the de novo standard of review. *Id.* See also *Precision Lab. Plastics, Inc. v. Micro Test, Inc.*, 96 Wn. App. 721, 725, 981 P.2d 454 (1999).

Questions of statutory interpretation are questions of law which this Court will review de novo. *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005).

V. ARGUMENT

Under the Washington statute governing civil investigative demands, RCW 19.86.110, any person or entity may contest a civil investigative demand as follows:

(8) At any time before the return date specified in the demand, or within twenty days after the demand has been served, whichever period is shorter, a petition to extend the return date for, or to modify or set aside a demand issued pursuant to subsection (1), stating good cause, may be filed in the superior court for Thurston county, or in such other county where the parties reside. A petition, by the person on whom the demand is served, stating good cause, to require the attorney general or any person to perform any duty imposed by the provisions of this section, ***and all other petitions in connection with a demand***, may be filed in the superior court for Thurston County, or in the county where the parties reside. The court shall have jurisdiction to impose such sanctions as are provided for in the civil rules for superior court with respect to discovery motions.

Emphasis added.

Appellants timely exercised their right to petition for relief under RCW 19.86.110, and made a compelling showing that the CID (i) exceeded this state's personal jurisdiction over the Indirect Purchaser Plaintiffs Counsel and Appellants' documents, (ii) improperly required the Indirect Purchaser Plaintiffs Counsel to take action prohibited by the

Protective Order, and (iii) reached beyond the State’s statutory authority. Yet, the trial court incorrectly rejected Appellants’ objections to personal jurisdiction and the restrictions of the Protective Order based on a misapplication of the standing doctrine. The trial court further erred in interpreting RCW 19.86.110 to provide the State with virtually unlimited authority to pry Appellants’ foreign and/or confidential documents from the strictly-controlled setting of the TFT-LCD Antitrust Litigation. Each of these legal errors independently mandates reversal and—at a minimum with respect to standing—remand for a determination on the merits of Appellant’s objections to the CID.

A. The Trial Court Erred as a Matter of Law in Concluding that Appellants Lack Standing to Contest Personal Jurisdiction and Object on the Basis of the Protective Order.

Under Washington law, “standing” to bring an action has only two requirements: that a party (i) arguably falls within the zone of interests that the statute in question protects or regulates, and (ii) will suffer an injury in fact, economic or otherwise. *See Branson v. Port of Seattle*, 152 Wn.2d 862, 875-76, 101 P.3d 67 (2004); *Save a Valuable Environment v. City of Bothell*, 89 Wn.2d 862, 866, 576 P.2d 401 (1978).

In addition to the ordinary standing doctrine, Washington courts have permitted “third-party standing”—the right to assert the interests of others—where the following three requirements are satisfied: (i) the

litigant has suffered an injury-in-fact, giving it a sufficiently concrete interest in the outcome of the disputed issue, (2) the litigant has a close relationship to the third party, and (3) there exists some hindrance to the third party's ability to protect his or her own interests. *See Mearns v. Scharbach*, 103 Wn. App. 498, 512, 12 P.3d 1048 (2000) (beneficiary under life insurance policy had third-party standing to assert constitutional rights on behalf of deceased); *See also T.S. v. Boy Scouts of America*, 157 Wn.2d 416, 425 n.6, 138 P.3d 1053 (2006) (acknowledging the *Mearns* test for third-party standing).

In this case, the trial court incorrectly concluded that (i) Appellants lack standing to challenge Washington's personal jurisdiction over the Indirect Purchaser Plaintiffs Counsel and Appellants' foreign documents, and (ii) Appellants lacked standing to object to the CID on the basis that the Protective Order precludes the Indirect Purchaser Plaintiffs Counsel from producing Appellants' foreign and confidential documents. Each of these conclusions was an error of law. Appellants have both direct standing and, to the extent applicable, third-party standing to challenge personal jurisdiction over the CID recipients and Appellants' documents, as well as the State's attempt to contravene the restrictions of the Protective Order. The trial court's "standing" rulings must be reversed.

1. Appellants have standing to challenge personal jurisdiction as to the Indirect Purchaser Plaintiffs Counsel and Appellants' documents.

Appellants have direct standing to challenge the State's personal jurisdiction over both the CID recipients (the Indirect Purchaser Plaintiffs Counsel) and Appellants' documents. To the extent Appellants may be deemed to require third-party standing to assert an objection to personal jurisdiction over the Indirect Purchaser Plaintiffs Counsel, Appellants also meet the three-part *Mearns* test in this case.

- a. *Appellants are within the "zone of interests" protected by RCW 19.86.110 and RCW 4.28.185.*

Appellants' objection to the CID based on the lack of personal jurisdiction is within the "zone of interests" protected by the Washington civil investigative demand statute, RCW 19.86.110. By its terms, RCW 19.86.110(8) does not limit petitions to "set aside" a CID to the recipient of the CID:

(8) At any time before the return date specified in the demand, or within twenty days after the demand has been served, whichever period is shorter, a petition to extend the return date for, or to modify or set aside a demand issued pursuant to subsection (1), stating good cause, may be filed in the superior court for Thurston county, or in such other county where the parties reside. A petition, by the person on whom the demand is served, stating good cause, to require the attorney general or any person to perform any duty imposed by the provisions of this section, ***and all other petitions in connection with a demand*** may be filed in the superior court

(Emphasis added).

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The CID statute expressly contemplates petitions filed by both the CID recipient (“the person on whom the demand is served”) and others (“all other petitions in connection with a demand”). The importance of this distinction is particularly relevant where, as here, the entity on which the demand was served (Indirect Purchaser Plaintiffs Counsel) has no financial or other interest in challenging the CID. In contrast, the Appellants have a compelling interest in protecting their confidential and foreign documents from disclosure to a state Attorney General who has no jurisdiction over the Appellants or the CID recipients. To hold otherwise would mean that the entity who owns documents subject to CID would have no right to challenge such a CID merely because copies of the documents were, temporarily, in the restricted custody of another person. Nothing in RCW 19.86.110 indicates the potential for such an absurd result.

Appellants are also within the zone of interests protected by the Washington long arm statute, RCW 4.28.185, which limits jurisdiction over non-residents to those who undertake certain enumerated actions occurring in or affecting the State of Washington. The State made no showing below that Appellants or their foreign documents are subject to

the jurisdiction of this state.⁹ Because certain copies of Appellants' documents are the subject of the CID, Appellants have standing to assert jurisdictional defenses as to those documents. The State also failed to make any showing below that the foreign Appellants or Indirect Purchaser Plaintiffs Counsel had any contacts with Washington sufficient to confer personal jurisdiction. Indeed, the Indirect Purchaser Plaintiffs Counsel specifically objected to the CID on this basis.

Appellants' interest in protecting their rights under RCW 19.86.110 is further exemplified by the federal court's recent clarification that Appellants must seek relief from the CID in the court from which the CID issued:

To the extent that the party to the Stipulated Protective Order wishes to challenge any aspect of a discovery request, subpoena or CID, including the question of whether the party has "control" over the relevant documents, Section 8 of the Stipulated Protective Order provides that the party ***shall do so in the issuing court.***

Appendix A (emphasis added). Thus, Washington courts are the only forum in which Appellants are able to challenge the legality of the CID.

⁹ Notably, RCW 19.86.110(8), (9) provide that petitions to modify, set aside, or enforce a civil investigative demand are generally to be made in the county where the party or person resides, implying that Washington courts would obtain personal jurisdiction by virtue of residency.

- b. *Appellants have suffered or will suffer an “injury in fact” as a result of the State’s attempt to issue a CID to an entity over whom there is no jurisdiction and who has no interest in protecting the subject documents.*

Courts have recognized the “injury in fact” prong of the standing analysis to include any “invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical” *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60, 112 S.Ct. 2130 (1992). Appellants face an imminent “injury in fact” as a result of the State’s CID for two reasons. First, the State is attempting to compel the production of Appellants’ foreign and confidential documents through a CID on an entity over whom the State has no jurisdiction, and as to documents over which it has no jurisdiction, in order to deprive Appellants of their statutory and Due Process rights to contest the CID. Appellants own the documents in question. The documents were copied from foreign files and business records and submitted to the Indirect Purchaser Plaintiffs Counsel under the strict limitations of the Protective Order. In producing the documents under those circumstances, Appellants were not submitting the documents to the jurisdiction of Washington or to any other U.S. forum other than the TFT-LCD Antitrust Litigation. The State’s attempt to both reach beyond its

jurisdictional limits and prevent Appellants from objecting to the State's overreaching is an injury to Appellants that should not be countenanced.

Second, Appellants also face the very real possibility that the State will disseminate their foreign and confidential documents to other governmental entities. Under RCW 19.86.110, the State may provide such materials to certain other entities. *See* RCW 19.86.110(7)(c) ("The attorney general may provide copies of such documentary material, answers to written interrogatories, or transcripts of oral testimony to an official of this state, the federal government, or other state, who is charged with the enforcement of federal or state antitrust or consumer protection laws"). Such other entities may or may not maintain the confidentiality of the documents and, similar to the State here, may otherwise lack the statutory authority and jurisdiction to obtain such documents. Appellants would also suffer an "injury in fact" by such a widespread dissemination of their confidential and/or foreign documents.

c. To the extent Appellants are deemed to be asserting objections to the CID on behalf of the CID recipients, Appellants also have "third-party standing" to do so.

Under the *Mearns* test, a litigant has standing to assert the rights of others where (1) the litigant has suffered an injury-in-fact, (2) the litigant has a close relationship to the third party, and (3) there exists some hindrance to the third party's ability to protect his or her own interests.

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See 103 Wn. App. at 512. Each of the *Mearns* requirements is satisfied in this case as to the Indirect Purchaser Plaintiffs Counsel’s objection that Washington lacks personal jurisdiction.

First, as described above, Appellants have made a showing of “injury in fact” as a result of the State’s attempt to reach outside its jurisdictional bounds to obtain Appellants’ foreign and confidential documents. Appellants would be harmed if their documents could be haled into Washington without authority and without any ability to assert their defenses to such action. Appellants also face the potential dissemination of their documents, without any prior notice, to any number of other governmental agencies, which may not protect the confidentiality of those documents.

Second, Appellants and the Indirect Purchaser Plaintiffs Counsel are linked by the TFT-LCD Antitrust Litigation Protective Order, thus fulfilling the second element required for third-party standing. The Protective Order places limitations on the Indirect Purchaser Plaintiffs Counsel’s use of the documents and requires the return of the documents at the conclusion of the litigation. The Protective Order further obligates the Indirect Purchaser Plaintiffs Counsel to notify Appellants when they receive a CID. The notification requirement exists for the express purpose of allowing Appellants to challenge the CID in this state. With respect to

Appellants' foreign and confidential documents, there is a close, legal relationship between Indirect Purchaser Plaintiffs Counsel and Appellants.

Finally, the Indirect Purchaser Plaintiffs Counsel are "hindered" from exercising their own rights to challenge personal jurisdiction by the undisputed fact that they have no interest in protecting Appellants' foreign and confidential documents from production to third parties. The Indirect Purchaser Plaintiffs Counsel do not own the documents, do not have unlimited control over the documents, and have no financial interest in protecting the confidentiality of the documents. Indeed, objecting to the State's CID would impose significant time and monetary costs on the Indirect Purchaser Plaintiffs Counsel, with no discernable benefit to them or their clients. The Indirect Purchaser Plaintiffs Counsel are sufficiently "hindered" in their assertion of a personal jurisdiction objection such that Appellants' should be permitted to assert the objection on their behalf.

2. Appellants have standing to object to the CID based on the restrictions of the TFT-LCD Antitrust Litigation Protective Order.

Under the standing doctrine, the right to assert the protections of the TFT-LCD Antitrust Protective Order is within the "zone of interests" governed by RCW 19.86.110 and Appellants will suffer an injury in fact from the State's attempts to compel the Indirect Purchaser Plaintiffs Counsel to produce Appellants' documents.

First, as discussed above, RCW 19.86.110 allows parties other than the CID recipient to challenge the CID for “good cause.” Additionally, RCW 19.86.110(3)(a) and (b) provides that “[n]o such [CID] shall . . . [c]ontain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum . . . issued by a court of this state [or] [r]equire the disclosure of any documentary material . . . for any other reason would not be required by a subpoena duces tecum issued by a court of this state.” Although the law in Washington is sparse with respect to standing to object to subpoenas,¹⁰ federal courts have frequently concluded that a party or other person has standing to challenge a subpoena where it has a right or interest affected by the subpoena. *See, e.g., Nova Products, Inc. v. Kisma Video, Inc.*, 220 F.R.D. 238, 241 (S.D.N.Y. 2004) (a party has standing to quash a subpoena directed to a non-party if it is seeking to protect a personal privilege or right); *U.S. v. Tomison*, 969 F. Supp. 587, 596 (E.D. Cal. 1997) (“A party has standing to move to quash a subpoena addressed to another if the subpoena infringes upon the movant’s legitimate interests”); *U.S. v. Raineri*, 670 F.2d 702, 712 (7th Cir. 1982) (same). Thus, to the extent the CID requests

¹⁰ A civil investigative demand under RCW 19.86.110 is in many ways analogous to a Civil Rule 45 subpoena issued to third-parties in litigation, though in the context of a CID the State has yet to establish *any jurisdiction* over a person or the subject matter of investigation.

Appellants' foreign/confidential documents and would be improper, unreasonable or impermissible if contained in a subpoena, Appellants are within the zone of interests protected by RCW 19.86.110.

Second, Appellants will suffer an "injury in fact" if the State is permitted to compel the Indirect Purchaser Plaintiffs Counsel to produce Appellants' documents in contravention of the Protective Order, which provides in relevant part as follows:

7.1 Basic Principles. A Receiving Party may use Protected Material that is disclosed or produced by a Producing party only in connection with this action for prosecuting, defending or attempting to settle this action. Such Protected Material may be disclosed only to the categories of persons and under the conditions described in this Order. When the Litigation has terminated, a Receiving Party must comply with the provisions of section 11 below [requiring each Receiving Party to "return all Protected Material to the Producing Party].

(CP 228, 233) (emphasis added).¹¹ The Protective Order was necessary as "special protection from public disclosure and from use for any purpose other than prosecuting [the TFT-LCD Antitrust Litigation]" with respect to Appellants' confidential and foreign documents. (CP 222) (emphasis added).

Finally, the Protective Order imposes notice requirements in the event, as here, an outside entity attempts to seek protected documents by

¹¹ The Indirect Purchaser Plaintiffs Counsel is a "Receiving Party" and Appellants are "Producing Parties" under the Protective Order.

discovery request, subpoena or order. (CP 232). The Indirect Purchaser Plaintiffs Counsel was required to notify Appellants of the CID and notify the State of the terms of the Protective Order. *Id.* These notification requirements are imposed to “afford the Designating Party in [the TFT-LCD Antitrust Litigation] an opportunity to try to protect its confidentiality interest in the court from which the discovery request, subpoena or order is issued.” *Id.*

In ruling that Appellants lacked standing to rely on the restrictions of the Protective Order, the trial court denied Appellants the opportunity to protect their interest in the documents. Notably, the trial court did not issue a ruling as to whether the Protective Order prohibits the Indirect Purchaser Plaintiffs Counsel from producing Appellants documents (it does). Rather, the trial court simply concluded that Appellants lacked standing to assert the objection. (CP 392). This Court should reverse, hold that the Protective Order provides “good cause” to set aside the State’s CID, and quash the CID. At a minimum, however, Appellants have standing to challenge the CID on the basis of the Protective Order, and this case should be reversed and remanded for a determination on the merits of that objection.

B. The Trial Court Erred as a Matter of Law in Concluding that the CID is within the State’s Statutory Authority over Foreign and Confidential Documents Produced in Out-of-State Litigation.

Apart from the “standing” ruling discussed above, the trial court also incorrectly analyzed Appellants’ objection that the CID exceeds the State’s statutory authority under RCW 19.86.110. The trial court interpreted RCW 19.86.110 to give the State virtually unlimited authority to issue and enforce a civil investigative demand, disregarding specific sections of the statute that impose limitations on that authority.

In interpreting a statute, the Court’s objective is “to determine the legislative intent.” *Tingley v. Haisch*, 159 Wn.2d 652, 657, 152 P.3d 1020 (2007). In doing so, the Court will first look to the plain meaning of the statute. *State v. Armendariz*, 160 Wn.2d 106, 110-111, 156 P.3d 201 (2007). An appeal based on a lower court’s interpretation of the Washington Consumer Protection Act, RCW 19.86, is a question of statutory interpretation. *See Strenge v. Clarke*, 89 Wn.2d 23, 29, 569 P.2d 60 (1977).

Here, the trial court erred in declining to quash the CID on the grounds that it is an attempt to evade statutory limitations on the State’s ability to obtain third-party documents not directly available to it. As described above, the State has never directed CIDs to the foreign Appellants. Instead, recognizing that Appellants would have significant

defenses to a direct civil investigative demand,¹² the State sought to preclude Appellants from asserting those defenses by seeking the documents indirectly from the Indirect Purchaser Plaintiffs Counsel. This attempted circumvention of RCW 19.86.110 should have been rejected by the trial court.

An examination of the relevant law confirms the point. The CID statute (RCW 19.86.110) clearly limits the State's authority to demand documents to those entities or persons that are subject to at least minimal jurisdiction within the State of Washington. First, no CID may require the disclosure of documents "which for any other reason would not be required by a subpoena duces tecum issued by a court of this state." RCW 19.86.110(3)(b). Because a civil subpoena duces tecum issued by a Washington court cannot compel production of documents by persons not subject to jurisdiction within Washington, a CID that seeks the production of such documents is likewise "improper." *See* Civil Rule 45(e)(2), (3). Second, any enforcement action must be brought "in the trial court of general jurisdiction of the county in which such person resides, is found, or transacts business." RCW 19.86.110(9). If a person does not reside or

¹² If properly served, which would require compliance with international service statutes, including for example the Hague Convention, Appellants could and would assert defenses based on lack of personal jurisdiction, lack of subject matter jurisdiction, and violation of international comity.

transact business in *any* county in Washington, it follows that such person would not subject to an enforcement action.

Given the statutory limitations on requesting these documents directly, the State sought to obtain them indirectly from a California law firm that represents the Indirect Purchaser Plaintiffs in the TFT-LCD Anti-trust Litigation. This Court should not countenance such an evasion, which is in effect an attempt to deprive Appellants of the opportunity to object to, and seek appropriate relief from, the State's discovery demand.

Numerous courts have recognized that the government should not be able to use private civil litigation to evade or circumvent statutory and constitutional limitations on its ability to gather evidence. *See, e.g., Osband v. Woodford*, 290 F.3d 1036, 1042-43 (9th Cir. 2002) ("A litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions on criminal discovery and thereby obtain documents he would not otherwise be entitled to for use in his criminal suit.") (citations omitted); *McSurely v. McClellan*, 426 F.2d 664, 671-72 (D.C. Cir. 1970) ("civil discovery may not be used to subvert limitations on discovery in criminal cases, either by the government or by private parties"); *Sharjah Inv. Co. (UK) Ltd. v. P.C. Telemart, Inc.*, 107 F.R.D. 81, 83 n.1 (S.D.N.Y. 1985) ("discovery materials may be protected from disclosure to the government" where "the

private litigant is a ‘stalking horse’ for government prosecutors who are using the civil action to circumvent the discovery limitations of criminal procedure”) (quotations omitted). Courts have recognized that there is a unique “potential for oppression” in allowing “the use of private litigants’ devices as reinforcement for federal prosecutors, whether civil or criminal.” *See GAF Corp. v. Eastman Kodak Co.*, 415 F. Supp. 129, 132 (S.D.N.Y. 1976).

The same concerns expressed in the cases referenced above, including the “potential for oppression,” are manifest with respect to the State’s CID.¹³ If the State could obtain foreign documents in this fashion, it would effectively and improperly expand its investigatory jurisdiction to *any* foreign person that has any connection with *any other state* in the United States and becomes involved in litigation in that state. The State has not been given statutory authorization to do so.

¹³ This Court can and should further consider the adverse collateral consequences that the State’s efforts will have on the administration of justice generally. As the Supreme Court recognized in *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 254, 654 P.2d 673 (1982), the abuse of discovery for purposes other than the litigation for which it is produced will have a chilling effect on the proper administration of justice. “[P]arties generally are not eager to divulge information about their private affairs, and [] when called upon to do so in a lawsuit, will be even more reluctant if they are not assured that the information which they give will be used only for the legitimate purposes of litigation.” *Rhinehart*, 98 Wn.2d at 254.

Despite the express limitations on State’s authority under 19.86.110, the trial court concluded that “the State may issue a CID to ‘any person’ believed to be in possession, custody, or control of documents, even if the documents belong to another person or (entity).” (CP 391) (emphasis added). This conclusion is simply not correct. The trial court disregarded the limitations on the State’s jurisdictional reach and the statutory provisions stating that the CID cannot reach documents in a manner that that would be “improper” under, or “would not be required by,” a subpoena duces tecum. *See* RCW 19.86.110(3)(a), (b).

Accordingly, this Court should reverse the trial court and hold that there is “good cause” to set aside the CID based on the State’s attempts to circumvent limits on its authority.

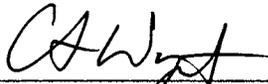
VI. CONCLUSION

For the reasons stated above, Appellants respectfully request this Court reverse the trial court’s Order Denying Motion to Quash or, with

respect to the standing rulings, reverse and remand for a determination on the merits of Appellants' personal jurisdiction and Protective Order objections.

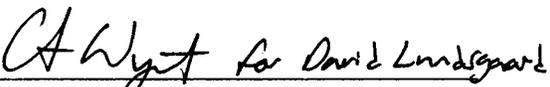
RESPECTFULLY SUBMITTED this 21st day of June, 2010.

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Appendix A

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United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE: TFT-LCD (FLAT PANEL) ANTITRUST
LITIGATION

No. M 07-1827 SI

MDL No. 1827

This Order Relates to:

**ORDER CLARIFYING STIPULATED
PROTECTIVE ORDER**

ALL CASES

On April 30, 2010, the Court heard argument on the motions brought by the States of Washington and Illinois, and by the AUO defendants, to modify or clarify the Stipulated Protective Order. (Docket Nos. 1659, 1661).

After consideration of the briefing and argument on this matter, the Court hereby clarifies that the Stipulated Protective Order does not and was not intended to interfere with any lawfully issued State subpoena or civil investigative demand. The Court finds it unnecessary to modify the Stipulated Protective Order. If any party receives a discovery request, subpoena or civil investigative demand (“CID”) that would compel disclosure of information or items designated in this action as “confidential” or “highly confidential,” that party must comply with Section 8 of the Stipulated Protective Order, which requires, *inter alia*, that the “Receiving Party” provide notice of the discovery request, subpoena or CID to the Designating Party, and that the receiving party inform the party who caused the discovery request,

1 subpoena or CID to issue of the existence of the Stipulated Protective Order.¹ To the extent that any
2 party to the Stipulated Protective Order wishes to challenge any aspect of a discovery request, subpoena
3 or CID, including the question of whether the party has “control” over the relevant documents, Section
4 8 of the Stipulated Protective Order provides that the party shall do so in the issuing court.

5 Additionally, in order to enforce the prior orders of this Court with regard to discovery and the
6 Department of Justice’s ongoing criminal investigation, the Court directs that any party who receives
7 documents marked “confidential” or “highly confidential” pursuant to a discovery request, subpoena
8 or CID shall not provide those documents to the U.S. Department of Justice absent further order of this
9 Court.

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11 **IT IS SO ORDERED.**

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13 Dated: May 4, 2010

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16 SUSAN ILLSTON
17 United States District Judge
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26 _____
27 ¹ The Stipulated Protective Order defines “Receiving Party” as “a Party that receives Disclosure
28 or Discovery Matter from a Producing Party,” and “Designating Party” as “a Party or non-party that
designates information or items that it produces in disclosures or in responses to discovery as
‘Confidential’ or ‘Highly Confidential.’”

No. 64677-0-I

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

AU OPTRONICS CORPORATION, ET AL.

Appellants,

v.

STATE OF WASHINGTON

Respondent.

OPENING BRIEF OF APPELLANTS

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COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION I

AU OPTRONICS CORPORATION, a Taiwanese entity; AUO OPTRONICS CORPORATION AMERICA, a California corporation; CHI MEI OPTOELECTRONICS CORP., a Taiwanese entity; CHI MEI CORPORATION, a Taiwanese entity; CMO JAPAN CO., LTD., a Japanese entity; CHI MEI OPTOELECTRONICS USA, INC., a California corporation; HANNSTAR DISPLAY CORPORATION, a Taiwanese entity; NEXGEN MEDIATECH, INC., a Taiwanese entity; TOSHIBA CORPORATION, a Japanese entity; TOSHIBA MOBILE DISPLAY CO., LTD., a Japanese entity; and TOSHIBA AMERICA ELECTRONIC COMPONENTS, INC., a California corporation,

Appellants,

v.

STATE OF WASHINGTON,

Respondent.

No. 64677-0-1

PROOF OF SERVICE

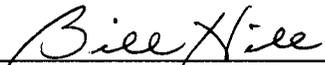
ORIGINAL

I hereby certify under penalty of perjury of the laws of the State of Washington that on this 21st day of June, 2010, I caused true and correct copies of the:

Opening Brief of Appellants

to be delivered via legal messenger to the following:

Brady Johnson, WSBA #21732
Washington State Attorney General
800 5th Ave Ste 2000
Seattle, WA 98104-3188
Attorney for Respondent



Bill Hill

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