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~~NO. 7098-0-1~~

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

STATE OF WASHINGTON,

Appellant,

v.

LG ELECTRONICS, INC. et al.,

Respondents.

BRIEF OF APPELLANT STATE OF WASHINGTON

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I. INTRODUCTION

Defendants¹ participated in a massive conspiracy to fix the prices of CRT² panels that were distributed throughout the United States and purchased in Washington State in televisions, laptops, and monitors. This case presents the question of whether a state court can constitutionally exercise jurisdiction over these defendants in a Consumer Protection Act enforcement action. It is also the only possible avenue of redress for millions of consumers who are victims of the Defendants' illegal activity.

This case was brought pursuant to the Consumer Protection Act's long-arm statute, which authorizes out-of-state personal service of process on any person "if such person has engaged in conduct in violation of this chapter which has had impact in this state which [the Consumer Protection Act] reprehends." RCW 19.86.160.

A state court properly exercises personal jurisdiction over a non-resident defendant where the defendant has sufficient minimum contacts with the forum state and exercising jurisdiction would not offend

¹ Defendants dismissed below, which are subject to this motion, are Koninklijke Philips Electronics N.V., Philips Electronics Industries (Taiwan), Ltd., Panasonic Corporation, Hitachi Displays, Ltd., Hitachi Asia, Ltd., Hitachi Electronic Devices (USA), Inc., LG Electronics, Inc., Samsung SDI, Samsung SDI America, Samsung SDI Mexico, Samsung SDI Brazil, Samsung SDI Shenzhen, Samsung SDI Tianjin, and Samsung SDI Malaysia. Other named Defendants were not dismissed and remain parties.

² A cathode ray tube, commonly referred to as a CRT, is a piece of technology consisting of a vacuum tube in which a hot cathode emits electrons and a picture is produced on a screen. This was the dominant technology used in televisions, computer monitors, and other display units prior to the ascendancy of flat screen technology.

traditional notions of fair play and substantial justice. A defendant has sufficient minimum contacts when it purposefully avails itself of the privilege of conducting business in the forum state. Under the standard articulated by a majority of the U.S. Supreme Court in World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297-98, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980), and adopted by the Washington Supreme Court, a non-resident defendant purposefully avails itself of a forum when the sale of its products in the forum state arise from the defendant's efforts, directly or indirectly, to target its products to that state. This standard is amply satisfied here, where Defendants have purposefully caused to be delivered hundreds of millions of CRT panels to the United States, a sizeable number of which were eventually, inevitably, purchased as part of finished goods in Washington State.

In addition, asserting jurisdiction over Defendants comports with traditional notions of fair play and substantial justice. There is no alternative forum for this action, and it is the sole means by which Washington's consumers and state agencies can be compensated for their injuries under the Consumer Protection Act. The exercise of jurisdiction is patently reasonable here. The State pled sufficient facts, uncontested by Defendants, to support jurisdiction and to overcome a motion to dismiss.

Finally, this Court should reverse the trial court orders granting Defendants' attorneys' fees. The trial court incorrectly applied the general long-arm statute when considering fees, instead of the specific provisions of the Consumer Protection Act which are controlling.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting Defendants' Motions to Dismiss where Defendants had sufficient contacts with Washington State and the exercise of jurisdiction comported with notions of fair play and substantial justice. CP 584-593.

2. The trial court erred in not allowing jurisdictional discovery to be conducted. CP 584-593.

3. The trial court erred in concluding that RCW 4.28.185(5), rather than RCW 19.86.080(1), provides the analytical framework for the award of attorneys' fees when the state brings an action to enforce the Consumer Protection Act. CP 1070-1080.

III. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Does jurisdiction under the Consumer Protection Act exist where a foreign defendant knowingly and intentionally targets a high volume of price-fixed products to Washington State consumers? [Assignment of Error 1]

2. Does jurisdiction exist where, under an analysis of traditional notions of fair play and substantial justice, there is no other available forum for Washington State consumers to seek relief? [Assignment of Error 1]

3. Did the trial court err in failing to order jurisdictional discovery where the extent of Defendants' contacts with Washington and their intent to reach Washington markets are at issue? [Assignment of Error 2]

4. Did the trial court err in concluding that Defendants are entitled to request attorneys' fees under RCW 4.28.185(5), a statutory provision of general applicability, when the Consumer Protection Act specifically provides for the award of attorneys' fees and has been interpreted to embody a set of legal and policy considerations that are unique to a state enforcement action? [Assignment of Error 3]

IV. STATEMENT OF THE CASE

A. Defendants' Participation in a Price-Fixing Conspiracy.

As detailed in the underlying Complaint, 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. One defendant, Samsung SDI, paid a \$32,000,000 fine to the United States Department of Justice and

pled guilty to violating Section 1 of the Sherman Act by fixing prices, reducing output and allocating market shares of CRT Products. Compl. ¶ 96, CP 25. Several executives from various defendant corporations have been indicted by a federal grand jury. Compl. ¶ 99, CP 25. Defendant Chungwa is actively cooperating with the Department of Justice regarding the federal government's investigation into the massive price-fixing enterprise. Compl. ¶ 100, CP 25. The same price-fixing scheme involving Defendants is, or has been, the subject of litigation in many private actions (MDL No. 1917, Case No. 3:07-CV-5944, In Re Cathode Ray Tube (CRT) Antitrust Litigation, in the US District Court for the Northern District of California), and several state actions, including complaints brought by the states of Florida (consolidated with MDL No. 1917), California (Case No. CGC-11-51578, Superior Court of the State of California, County of San Francisco), Oregon (Case No. 120810246, Circuit Court of the State of Oregon, County of Multnomah), and Illinois (Case No. 12CH35266, Circuit Court of Cook County, Illinois County Department, Chancery Division).

B. The Washington Attorney General's Action.

The complaint alleges that, beginning from at least March 1, 1995, through at least November 25, 2007, Defendants participated in a worldwide conspiracy to fix the prices of CRTs which resulted in higher

prices for Washington State citizens and state agencies purchasing products containing CRTs. CP 2. The State alleges that Defendants manufactured, marketed, sold, and/or distributed CRTs and CRT products to customers in Washington State, and that they knew or expected that millions of products containing their CRTs would be sold into Washington. CP 17. The State seeks (1) injunctive relief, (2) civil penalties, (3) damages for state agencies, and (4) restitution for consumers who purchased CRTs directly from Defendants or indirectly through a finished good. CP 27-28.

C. Procedural History.

After accepting service of process, and prior to any discovery being conducted, Defendants filed motions, supported by declarations, to dismiss the State's lawsuit for lack of personal jurisdiction. CP 29-110, 127-208. The State, while conceding the court had no general jurisdiction over Defendants, argued that it had pled facts sufficient to support personal jurisdiction. CP 209-268. The trial court disagreed and granted those motions. CP 584-593. Upon an agreed motion, the court entered Final Judgment and the State filed a timely appeal. CP 598-642.

During the pendency of this appeal, the trial court considered applications for attorneys' fees made by Defendants. CP 643-655, 765-779, 803-815, 930-941. The court awarded fees to the Defendants

pursuant to RCW 4.28.185. CP 1070-1080. Pursuant to RAP 2.4(g), the State herein includes its appeal of those awards.

By stipulation of the parties, the underlying litigation is currently stayed.

V. ARGUMENT

A. The Standard of Review is *De Novo*.

A plaintiff need only make a prima facie showing of jurisdiction. Freestone Capital Partners L.P. v. MKA Real Estate Opportunity Fund I, LLC, 155 Wn. App. 643, 654, 230 P.3d 625 (2010). The court must view the allegations in the complaint as established for purposes of determining jurisdiction. Id. All facts, and reasonable inferences drawn from the facts, are reviewed in the light most favorable to the nonmoving party. Id. at 653-54. When the trial court considers matters outside the pleadings on a motion to dismiss for lack of personal jurisdiction, the Court reviews the trial court's ruling under a *de novo* standard of review. Id. at 653.

The trial court's orders granting fees are subject to *de novo* review because they are premised upon a legal determination that RCW 4.28.185, rather than the Consumer Protection Act, governs the award of fees in this case. Thus, the issue before the Court is a question of statutory interpretation, and "[s]tatutory interpretations are questions of law

reviewed *de novo*.” Kustura v. Dep’t of Labor and Indus., 169 Wn.2d 81, 233 P.3d 853 (2010).

B. The Consumer Protection Act’s Long-Arm Statute Confers Jurisdiction Over Defendants.

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

Jurisdiction over Defendants exists pursuant to RCW 19.86.160, the Consumer Protection Act’s long-arm statute. See State v. Reader’s Digest Ass’n, Inc., 81 Wn.2d 259, 276, 501 P.2d 290 (1972) (applying RCW 19.86.160, the “long-arm provision in the Consumer Protection Act”). RCW 19.86.160 states:

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

Defendants' participation in a price-fixing conspiracy constitutes a violation of the Act's prohibition on restraints of trade. See RCW 19.86.030 (prohibiting every contract, combination, or conspiracy in restraint of trade); Ballo v. James S. Black Co., Inc., 39 Wn. App. 21, 26, 692 P.2d 182 (1984) (referring to price-fixing as *per se* illegal). Defendants' conduct impacted the state by causing state agencies and consumers to pay inflated prices for products containing Defendants' products. Thus, the only inquiry for this Court is whether the assertion of jurisdiction comports with due process.

C. The Exercise of Jurisdiction Over Defendants Does Not Violate Due Process.

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

jurisdiction.³ The Washington Supreme Court applies a three-part test to determine when a court may exercise specific personal jurisdiction over a non-resident defendant. A non-resident defendant must (1) purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice. Grange, 110 Wn.2d at 758.

The exercise of jurisdiction in this case falls squarely within the bounds of due process. Case law establishes that Defendants have purposefully availed themselves in Washington State by releasing hundreds of millions of their CRTs into the stream of commerce with the expectation and intent that they would be incorporated into finished goods to be sold throughout the United States. Defendants' conduct spanned many years, and it targeted as broad a market as possible, in part by selling products to companies that directly do business in the U.S. through retail distribution. In addition, this action arises from Defendants' contacts with the state. By purchasing products containing Defendants' price-fixed

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

panels, consumers and state agencies were harmed, and this enforcement action arises out of those purchases. Finally, the exercise of jurisdiction over Defendants does not offend traditional notions of fair play and substantial justice. There is no other forum for this action and, without it, consumers in Washington State will be left with no remedy for Defendants' predatory behavior.

1. Defendants Purposefully Availed Themselves in Washington State.

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

A non-resident manufacturer purposefully avails itself of a forum state where it delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980); Grange, 110 Wn.2d at 761-62 (stating, “[t]his court has decided that purposeful minimum contacts are established when an out-of-state manufacturer places its products in the stream of interstate commerce . . .”). This rule does not authorize jurisdiction in a scenario where the sale of a product is merely an isolated occurrence. Rather, if the sale “arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its products in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.” World-Wide Volkswagen, 444 U.S. at 297-98. This standard rests not on the mere foreseeability that a product may find its way into the forum state. Rather, it is whether a defendant’s conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there. Id. at 297.

Defendants’ conduct falls squarely within the constitutional bounds set out in World-Wide Volkswagen. Defendants’ CRTs were incorporated into countless televisions, monitors, and notebook computers

that were intentionally and purposefully marketed in the United States during the course of the conspiracy. Defendants' calculated efforts to target as wide a market as possible through, and deriving monetary benefit from, their indirect sales into Washington, are precisely the level of contacts sufficient for the exercise of jurisdiction under World-Wide Volkswagen.

In reliance upon the principles laid down in World-Wide Volkswagen, many federal courts have exercised jurisdiction over foreign manufacturers that specifically contemplated sales into the U.S. through nationwide distribution. For example, the Federal District Court for the Southern District of Texas exercised jurisdiction over AMPEP, a European manufacturer of ball-bearings for helicopters. Williamson v. Petroleum Helicopters, Inc., 31 F. Supp. 2d 548 (S.D. Tex. 1998). AMPEP argued that it had no employees or representatives in Texas, did not dispatch any representatives or solicit business in Texas, and that less than 1% of its total sales derived from the U.S. The court nonetheless found that the exercise of jurisdiction was appropriate. It noted that AMPEP sold its bearings for use in "virtually all makes of European helicopters" and that therefore "the possibility that helicopters using its bearings would end up [in the forum state] was foreseeable." Id. at 551-52. The court went on to hold:

[T]he essential analysis concerns itself not with the product that actually caused the accident but rather with the total number of products fabricated by the defendant and incorporated as component parts of products sold throughout the stream of commerce.

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

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

For the same reason jurisdiction was appropriate over AMPEP, it is warranted over Defendants. Defendants developed a business model reliant on selling to companies that do extensive business in all parts of the world. Thus, Defendants' CRTs make their way into Washington not through "unpredictable currents or eddies, but [through] the regular and

⁴ See, e.g., Beverly Hills Fan Co. v. Royal Sovereign Corp., 21 F.3d 1558 (Fed. Cir. 1994) (jurisdiction over Chinese fan manufacturer that distributed copyright-infringing fans throughout the U.S.); Bean Dredging Corp. v. Dredge Tech. Corp., 744 F.2d 1081 (5th Cir. 1984) (jurisdiction over steel cast manufacturer that delivered thousands of products throughout U.S. as components); Oswalt v. Scripto, Inc., 616 F.2d 191, 199-200 (5th Cir. 1980) (jurisdiction over Japanese cigarette lighter manufacturer that delivered millions of lighters to U.S. distributor, did not limit the states where lighters were sold, and "had every reason to believe" its product would be sold in the forum state); Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distrbts. Pty. Ltd., 647 F.2d 200 (D.C. Cir. 1981) (jurisdiction over Australian wine producers who sold nationally, and thus "affirmatively welcomed" sales throughout the U.S.); Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Aerohawk Aviation, Inc., 259 F. Supp. 2d 1096 (D. Idaho 2003) (jurisdiction proper over aircraft parts manufacturer where it sold to aircraft manufacturer whom "it knew to distribute its aircrafts nationally"); Motorola Inc., v. PC-Tel, Inc., 58 F. Supp. 2d 349 (D. Del. 1999) (jurisdiction proper because "[The Defendant's products] are integrated into a variety of consumer electronic products which are manufactured by well-known multi-national corporations like Compaq, Phillips, Samsung, Sharp, Sony . . . [which are] then put into world-wide distribution networks which place them for sale in equally well-known retail stores such as . . . Circuit City, CompUSA, Office-Max, Sears [etc].").

anticipated flow of products from manufacturer to distribution to retail sale.” Asahi Metal Industry Co., Ltd., v. Superior Court, 480 U.S. 102, 117, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987) (J. Brennan concurring in part).

World-Wide Volkswagen famously holds that mere foreseeability that a product may find its way into the forum is insufficient for the exercise of personal jurisdiction. World-Wide Volkswagen, 444 U.S. at 297. That holding is too easily taken out of the context of that case to suggest that no matter how many products are released into the stream of commerce, and no matter how predictable and intentional it is that those products will reach a certain state, that as long as a middleman is utilized the defendant is immune from personal jurisdiction. This reading does a disservice to World-Wide Volkswagen and is not supported by caselaw.

World-Wide Volkswagen implicitly recognizes that the scope of a foreseeable market is necessarily broader “with respect to manufacturers and primary distributors of products who are at the start of a distribution system . . . who . . . derive economic benefit from a wider market . . . [and] that such manufacturers and distributors purposely conduct their activities to make their product available for purchase in as many forums as possible.” Nelson v. Park Indus., Inc., 717 F.2d 1120, 1125-26 (7th Cir. 1983) (discussing World-Wide Volkswagen); see also Asahi, 480 U.S. at

120 (noting the Court “took great care to distinguish ‘between a case involving goods which reach a distant state through a chain of distribution and a case involving goods which reach the same State because a consumer . . . took them there.’” (Brennan, J. concurring) (alteration in original); DeJames v. Magnificence Carriers, Inc., 654 F.2d 280, 285 (3d Cir. 1981) (“[b]y increasing the distribution of its products through indirect sales within the forum, a manufacturer benefits legally from the protection provided by the laws of the forum state for its products, as well as economically from indirect sales to forum residents.”), cert denied, 454 U.S. 1085, 102 S. Ct. 642, 70 L. Ed. 2d 620 (1981).

Here, Defendants’ products did not arrive in this forum through a fortuitous occurrence, or through the unilateral actions of a consumer, or even through foreseeable yet unintended means. Defendants’ panels arrived as a result of their deliberate attempts and plans that their products would be sold to as broad a market as possible, including Washington State. Defendants’ conduct is precisely the type of conduct that World-Wide Volkswagen, and the many courts that have applied its lessons, acknowledge creates “a connection with the forum state . . . such that [they] should reasonably anticipate being haled into court there.” World-Wide Volkswagen, 444 U.S. at 297.

2. Washington Courts Consistently Follow the Stream of Commerce Standard Established in World-Wide Volkswagen.

Washington courts have consistently applied the same stream of commerce standard as established in World-Wide Volkswagen to uphold jurisdiction over out-of-state defendants.

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

Division II relied on these principles in a case upholding state court jurisdiction to hear a case regarding a Japanese manufacturer of a component product. Omstead v. Brader Heaters, Inc., 5 Wn. App. 258, 487 P.2d 234 (1971), opinion adopted, 80 Wn.2d 720, 497 P.2d 1310 (1972). In Omstead, the plaintiffs brought suit against a local heater

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

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

commerce, or sends them to a foreign state.” Id. at 270-71 (internal citations and quotations omitted) (citing Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958)). The Washington Supreme Court subsequently adopted the opinion in full as its own. Omstead v. Brader Heaters, Inc., 80 Wn.2d 720, 722, 497 P.2d 720 (1972) (“Omstead II”).

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

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

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

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

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

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

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

3. Even If the Court Applies the Heightened “Stream of Commerce Plus” Standard Described in Asahi, There is Still Jurisdiction Over Defendants.

The phrase “something more” is invoked in Justice O’Connor’s plurality opinion in Asahi Metal Industry Co., Ltd. v. Superior Court, 480 U.S. at 108-113. In Asahi, a fractured Court offered competing views on whether a Japanese tire valve manufacturer, whose product was

incorporated into a tire sold in California, had engaged in purposeful minimum contacts. Four justices, led by Justice O'Connor, held that purposeful minimum contacts could not be established absent a showing of "something more" - additional conduct indicating intent or purpose to serve the specific forum state (an analysis now known as "stream of commerce plus"). *Id.* at 112. In contrast, four justices reasoned that purposeful minimum contacts were satisfied under World-Wide Volkswagen because the manufacturer had placed its good into the stream of commerce and indirectly benefited from the "regular and anticipated flow of products" into the forum state. *Id.* at 117 (Brennan, J., concurring).⁵

Asahi produced no majority, leaving the stream-of-commerce framework established in World-Wide Volkswagen intact. Indeed, the Washington Supreme Court recognized as much in Grange, which was decided after Asahi. The Grange Court was in a unique position to assess the impact of the U.S. Supreme Court's competing stream of commerce opinions on Washington case law. *Id.* at 761. After acknowledging the

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

disparity between World-Wide Volkswagen and Asahi, Grange resolved the questions left unanswered in Asahi by stating:

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

Grange, 110 Wn.2d at 761. In making this determination, the court cited to Smith v. York Food Machinery, “and cases cited therein.” Id. (citing Smith v. York Food Mach., 81 Wn.2d 719, 723, 504 P.2d 782 (1972)). In Smith, the Washington Supreme Court held that a state court could constitutionally exercise jurisdiction over a manufacturer and its wholly owned subsidiary that sold a defective food processing machine into the stream of commerce and which caused injury in Washington. It noted that “the scope of one’s marketing activity is an important consideration” and noted that the defendants had “knowingly [made] out-of-state sales by placing their products in the broad stream of interstate commerce.” Id. at 724-725. In support of its holding, Smith cited to both Golden Gate Hop Ranch and Omstead. Id. at 722-723.

Grange was the Court’s opportunity to overrule Golden Gate Hop Ranch, Omstead, and Smith in light of Asahi. But it did just the opposite

– it invoked the principles of these cases and revitalized them, by expressly reconciling them with World-Wide Volkswagen.⁶ Grange thus culminates a long line of Washington Supreme Court cases establishing that due process is satisfied where a foreign manufacturer intentionally deals with a wide array of intermediaries with the intent to serve as broad a market as possible in the United States. These cases remain good law in Washington, and strongly support jurisdiction here.

Nevertheless, even if this court were to agree that Justice O'Connor's "stream of commerce plus" analysis is the proper standard, the facts of this case still warrant the exercise of personal jurisdiction over Defendants.

Justice O'Connor's reasoning in Asahi does not foreclose the idea that a defendant that seeks to serve the U.S. market as a whole also seeks to serve the individual states that comprise the U.S. market. First, in support of her assertion that Asahi had not "designed its product in anticipation of sales in California," she compared that case with Rockwell International Corp. v. Costruzioni Aeronautiche Giovanni Agusta, 553 F. Supp. 328 (E.D. Pa. 1982). Asahi, 480 U.S. at 113. In Rockwell, the

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

Defendant was SNFA, a French manufacturer of ball-bearing assemblies used in a helicopter that Rockwell had purchased. The assemblies were sold to SNFA's Italian subsidiary, which in turn sold them to an Italian helicopter manufacturer which incorporated the assemblies. The helicopters were eventually purchased via a U.S. distributor. The court held that personal jurisdiction over SNFA was appropriate because it had purposefully designed its ball-bearing assemblies for the helicopter, and therefore "was aware that [it] was targeted for the executive corporate transport market in the United States and Europe." Rockwell, 553 F. Supp. at 330. Thus, SNFA "had ample reason to know and expect that its bearing, as a unique part of a larger product, would be marketed in *any* or *all* states" Id. at 333.

Similarly, in support of her assertion that Asahi, "did not create, control, or employ the distribution system that brought its product to the forum," Justice O'Connor differentiated the case from Hicks v. Kawasaki Heavy Industries, 452 F. Supp. 130 (M.D. Pa. 1978). Asahi, 480 U.S. at 112. Hicks upheld jurisdiction over a Japanese motorcycle manufacturer that sold motorcycles into the U.S. through its exclusive U.S. sales agent, reasoning that the manufacturer had done business in the forum state through indirect shipments of its goods. Hicks, 452 F. Supp. at 134. It was irrelevant that "the product was not directly placed in the state by [the

Japanese manufacturer], but rather was marketed by one whom the [manufacturer] could foresee would cause the product to enter [the forum state].” Id. Justice O’Connor’s citations to these cases suggests that a manufacturer’s efforts to serve the U.S. market generally constitutes purposeful efforts to serve the several states under her “stream of commerce plus” analysis.

Here, as in Rockwell and Hicks, Defendants have had every reason to know, and fully expected and intended, that their CRTs, as a components of televisions, laptops, and monitors, would be sold and used in any and all states, including Washington. During the conspiracy, executives from Defendants attended illicit meetings with their competitors to identify, among other things, the anticipated future demand for their products. CP 17-24. Defendants made a calculated effort to target as wide a market as possible, and derived monetary benefit from indirect sales into Washington. Cf. Rockwell Int’l, 553 F. Supp. at 33 (“By virtue of the sale of the bearing in question, defendant derived, at a minimum, an indirect pecuniary benefit from [the forum state].”).

Accordingly, though the State is not required to satisfy Justice O’Connor’s heightened stream of commerce standard in Asahi, Defendants’ efforts to target and sell hundreds of millions of CRTs into the U.S. market via incorporation into end products constitutes the

“something more” Justice O’Connor contemplated in her plurality opinion.

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

The U.S. Supreme Court’s most recent decision on stream of commerce is J. McIntyre Mach. v. Nicastro, Ltd., ___ U.S. ___, 131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011). In J. McIntyre, a foreign manufacturer was sued in New Jersey state court after a worker was injured by one of the defendant’s defective metal-shearing machines. At most, four of the manufacturer’s machines had been sold into New Jersey, including the defective machine. Justice Kennedy led four justices in holding that a New Jersey court could not exercise jurisdiction under the stream of commerce theory. Id. at 2790. Justice Brennan concurred, noting that the facts disclosed neither a “‘regular . . . flow’ or ‘regular course’ of sales in New Jersey,” nor was there “‘something more,’ such as special state-related design, advertising, [etc].” Id. (Brennan, J., concurring) (citing Asahi, 48 U.S. at 111) (O’Connor, J., plurality). Thus, Justice Brennan concluded that jurisdiction was not appropriate under either Justice O’Connor’s or Justice Brennan’s plurality opinions in Asahi, nor World-Wide Volkswagen.

For a host of reasons, J. McIntyre is not dispositive in the present case. Factually, the sheer number of finished goods containing Defendants' products in Washington based on its enormous sales into the U.S. towers above the four shearing machines that travelled to New Jersey. In addition, J. McIntyre, like Asahi, does nothing to alter the previous legal framework. Justice Kennedy's plurality does not upset the holding in World-Wide Volkswagen. J. McIntyre, 131 S. Ct. at 2788 (noting that "placing goods into the stream of commerce 'with the expectation that they will be purchased by consumers within the forum State' may indicate purposeful availment.") (Kennedy, J., plurality) (citing World-Wide Volkswagen, 444 U.S. at 298). Nor could it - as the Court could only muster a fractured plurality, the decision carries "limited precedential value and is not binding." See In re Pers. Restraint of Isadore, 151 Wn.2d 294, 302, 88 P.3d 390 (2004). Accordingly, J. McIntyre leaves intact the framework created by World-Wide Volkswagen, and has limited applicability except to cases presenting the same factual scenario, and it was an error for the trial court to hold the State to any standard other than the World-Wide Volkswagen standard.

Since J. McIntyre did not win a majority, "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. 188, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1988). Most courts applying the Marks rule to J. McIntyre have concluded that Justice Breyer's opinion was the judgment that concurred "on the narrowest grounds" and is therefore the controlling opinion. See, e.g., State v. NV Sumatra Tobacco Trading Co., __ S. W. 3d. __, 2013 WL 1248285 (Tenn. 2013) ("This does strike us as the narrower of the two majority holdings, and, therefore, it is the controlling opinion under Marks.").

Justice Breyer authored a separate concurrence to point out that, while he agreed that jurisdiction was not proper, he disagreed with the plurality's "strict rules" to limit jurisdiction. J. McIntyre, 131 S. Ct. at 2793 (Breyer, J., concurring). After stating that the outcome in J. McIntyre should be "determined by [the Supreme Court's] precedents," rather than making a new pronouncement that would "refashion basic jurisdictional rules," Justice Breyer went on to explain that his conclusion was based on the fact 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." Id. at 2792 (Breyer, J., concurring) (emphasis added). He then systematically described how each of the Court's prior stream-of-commerce cases supported his conclusion, noting: (1) a "single sale to a customer who takes . . . a product to a different State . . . is not a sufficient basis for asserting jurisdiction." Id. (citing World-Wide Volkswagen)

(emphasis added); and (2) the Court “has strongly suggested 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” under the stream of commerce theory. Id. (citing Asahi).

Justice Breyer thus went to great lengths to clarify that he believed jurisdiction was inappropriate because the record only reflected the sale of very few products in New Jersey. See Russell v. SNFA (noting that J. McIntyre only dealt with a “single or isolated sale of a defendant’s products). Any claim that J. McIntyre rejects a pure stream of commerce theory is patently wrong. In fact, J. McIntyre unanimously endorses the continued validity of the stream-of-commerce theory from World-Wide Volkswagen to establish personal jurisdiction. See, e.g., Russell v. SNFA, 987 N. E. 2d 778, 793 (Ill. 2013). No majority in J. McIntyre ever endorses either of the Asahi pluralities. See, e.g., NV Sumatra, 2013 WL 1248285, at *28 (“J. McIntyre preserves the doctrinal status quo.”), Hatton v. Chrysler Canada, Inc., 2013 WL 1296081, at *7 (“Accordingly, the “stream of commerce” test remains good law in the Eleventh Circuit, and J. McIntyre does not, as defendant suggests, alter this.”).

Indeed, even after J. McIntyre was decided, courts have continued to uphold personal jurisdiction over foreign manufacturers that have targeted the United States national market. For example, the Oregon

Supreme Court recently upheld the exercise of personal jurisdiction over CTE, a Taiwanese manufacturer of battery chargers that targeted and distributed its batteries throughout the United States. Willemsen v. Invacare Corp., 352 Or. 191, 282 P.3d 867 (2012).⁷ In Willemsen, plaintiffs brought a wrongful death action in Oregon state court against Invacare, an Ohio wheelchair manufacturer, and CTE, a Taiwanese corporation that manufactured battery chargers used in those wheelchairs, after an accident caused by a defective charger in a wheelchair. CTE's only contacts with Oregon were that its batteries were incorporated in 1,102 motorized wheelchairs sold in Oregon over a two-year period.

The Oregon Supreme Court held that the exercise of personal jurisdiction was proper. Id. at 208-09. CTE argued that it could not have purposefully availed itself of doing business in Oregon because it had simply sold batteries to Invacare, and the mere fact it may have expected its chargers to end up in Oregon was insufficient to support jurisdiction under J. McIntyre. The court rejected that argument, noting that CTE sold over 1000 battery chargers into Oregon over a two-year period, which it

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

reasoned constituted a “ ‘regular . . . flow’ ” or ‘regular course’ of sales” in Oregon. *Id.* at 207 (quoting *J. McIntyre*, 131 S. Ct. at 2791 (Breyer, J., concurring)). CTE’s volume and pattern of sales established a “relationship between ‘the defendant, the *forum*, and the litigation,’ [such that] it is fair, in light of the defendant’s contacts *with [this] forum* to subject the defendant to suit [h]ere.” *Id.* (quoting *J. McIntyre*, 131 S. Ct. at 2792 (Breyer, J., concurring)). The court specifically rejected the argument that *J. McIntyre* precluded jurisdiction, noting that the opinion produced no majority, was not controlling, and that the most that could be said for it was that *J. McIntyre* did not support jurisdiction over a foreign manufacturer when nationwide distribution results in only a single sale in the forum state. *Id.* at 203 (citing *J. McIntyre* 131 S. Ct. at 2791).

Like CTE, Defendants sold products over several years to companies that sought to market and sell those products nationally and in Washington. But the extent of Defendants’ conduct vastly exceeds CTE’s conduct in *Willemsen*. *Cf. Asahi*, 480 U.S. at 122 (Stevens, J., concurring in part and concurring in judgment) (“the volume, the value, and the hazardous character of a good may affect the jurisdictional inquiry.”). Defendants sold hundreds of millions of CRTs directly and indirectly through sales channels targeting the United States. The State itself purchased millions of dollars’ worth of CRT products, vastly exceeding

the 1000 chargers that supported jurisdiction in Willemsen. These sales arise precisely from Defendants' delivering goods in the stream of commerce with the expectation that they will be purchased by Washington users. See J. McIntyre, 131 S. Ct. at 2792 (Breyer, J., concurring) (citing World-Wide Volkswagen, 444 U.S. at 297-98)). These sales show a “‘regular . . . flow’ or ‘regular course of sales’” in Washington. Id. (Breyer, J., concurring) (ellipsis in original). Defendants' conduct, like CTE's in Willemsen, properly subjects them to jurisdiction in Washington.

5. The Exercise of Personal Jurisdiction Over Defendants Comports with Traditional Notions of Fair Play and Substantial Justice.

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

As pled, Defendants targeted the U.S. market and sold hundreds of millions of CRTs that were incorporated into countless televisions,

monitors, and notebook computers that were marketed and sold throughout the United States during the course of the conspiracy. CP 17. The quality, nature, and extent of Defendants' activity resoundingly weighs in favor of jurisdiction.

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

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

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

to recovery for these consumers and, more seriously, undermines future consumer enforcement against out-of-state defendants—concerns the Washington Supreme Court in Reader's Digest specifically recognized would be anathema to the Consumer Protection Act. See Reader's Digest, 81 Wn.2d at 278 (“If our courts are not open, the state will be without a remedy in any court and the Consumer Protection Act will be rendered useless.”).

Finally, the basic equities of the situation overwhelmingly weigh in favor of jurisdiction. There is no alternative forum for this action. The State has brought an enforcement action under state law to compensate state purchasers, and the federal courts lack subject matter jurisdiction to hear this dispute. Also, the implications of the trial court's orders in this case are as wide-reaching as they are concerning.

The trial court's reasoning erects substantial—perhaps insurmountable—obstacles to a Consumer Protection Act enforcement action that seeks to recover on behalf of indirect purchasers from defendants who manufacture a component of a finished good that is distributed throughout the national U.S market. Where, as here, a component part has no independent use except as part of a finished consumer good, it is simply unreasonable to expect component manufacturers to specifically target consumers without the use of a

middleman. This is an inescapable and very common fact of modern economic life.

Even beyond the case of a component manufacturer, sophisticated defendants who might otherwise sell directly into Washington will be incentivized to avoid liability by structuring their business in such a way as to avoid direct activity in Washington through whatever means might be available. Such an outcome would undermine the Attorney General's ability to effectively enforce the Consumer Protection Act, and is contrary to the plain language of the Act, which instructs courts to liberally construe its provisions so that consumers are rightfully given an avenue for recompense when they are harmed by companies that flaunt state law. RCW 19.86.920 (“[The Act] shall be liberally construed that its beneficial purposes may be served.”). Under applicable case law, there should be no such loophole. World-Wide Volkswagen, 444 U.S. at 297 (“[I]f the sale of a product . . . arises from the efforts of the manufacturer to serve *directly or indirectly*, the market for its product in other States . . . it is not unreasonable to subject it to suit”) (emphasis added); accord Grange, 110 Wn.2d at 761.

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

D. The State Should be Allowed to Conduct Jurisdictional Discovery

Antitrust violations are considered an intentional tort. See, e.g., Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 US 519, 547-8 (1983)(J. Marshall dissenting)(characterizing antitrust violations as “essentially tortious acts,” and as intention torts). As such, if it is shown that a defendant targeted any company or individual in Washington in relation to its price-fixing activities, jurisdiction will be established. See, e.g., Washington Shoe Co. v. A-Z Sporting Goods Inc., 704 F.3d 668, 675 (9th Cir. 2012) (“We have repeatedly stated that the express aiming requirement is satisfied, and specific jurisdiction exists, when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state.”).

The U.S. Supreme Court held in Oppenheimer Fund, Inc. v. Sanders that “where issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues.” Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 n. 13 (1978). “Discovery should ordinarily be granted where ‘pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary.’” Butcher's Union Local No. 498, United Food and Commercial Workers v. SDC Inv., Inc., 788 F.2d 535, 540 (9th Cir. 1986),

citing Data Disc, Inc. v. Systems Technology Associates, Inc., 557 F.2d 1280, 1285 n. 1 (9th Cir. 1977).

It is the State's allegation that the actions of the Defendants and their co-conspirators were **intended** to, and did have a direct, substantial, and reasonably foreseeable effect on U.S. domestic import trade and commerce, and on import trade and commerce into and within the State of Washington. CP 17. In other words, that Defendants specifically contemplated the sale of price fixed products into Washington State and such sales were an unavoidable consequence of their actions.

A limited amount of jurisdictional discovery has the potential to show not only the extent of Defendants' intent to reach Washington markets, but also any direct activities and contacts with the State related to price fixing activities. The complaint alleges facts sufficient to show this, and Defendants have suggested such as well. For example:

a) Defendant Hitachi, Ltd. has a wholly owned subsidiary located in Bellevue, Washington. CP 10.

b) Defendant Hitachi Electronic Displays (USA) admits that it has made business trips to Washington State. CP 64. While it claims these were not for purposes of CRTs business, this matter involves a massive conspiracy, and it would not be surprising at all if illicit meetings were carried out under some other guise.

c) Defendant LG Electronics, Inc. is in control of a wholly owned subsidiary which is registered with the Secretary of State for purposes of doing business in Washington State. CP 5.

d) Defendant Panasonic Corporation controls a wholly owned American subsidiary which is registered to do business in Washington State and which operates a branch office in Kent, Washington. CP 10.

E. The Award of Attorneys' Fees in this Action is Controlled by Specific Provisions of the Consumer Protection Act, Not the General Attorneys' Fees Provisions of RCW 4.28.185(5).

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

RCW 19.86.080(1) states:

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

Over the years, courts have given meaning and contour to this statutory language—interpretations that are flatly absent from RCW 4.28.185(5). In deciding whether fees are warranted under the Consumer Protection Act, a court must consider a host of factors, including: (1) the need to curb serious abuses of government power; (2) the necessity of providing fair treatment to vindicated defendants; (3) the strong public

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

In contrast, none of these factors appear in RCW 4.28.185(5) or the cases interpreting it. Nor would they. They reflect a balance of policy and other considerations unique to state enforcement of the Consumer Protection Act that are wholly absent in disputes involving private parties. When a court considers awarding attorneys' fees under RCW 4.28.185(5), its primary guidelines are only that a prevailing defendant should recover an amount necessary to compensate it for the added litigation burden of the long-arm jurisdiction; and that a fee award should not exceed an amount that would have been incurred had the jurisdictional defense been presented as soon as grounds for the defense became available. Scott Fetzer Co. v. Weeks, 114 Wn.2d 109, 120, 786 P.2d 265 (1990).

Because the Consumer Protection Act contains its own specific attorneys' fee provision in RCW 19.86.080(1), that provision alone — along with the various cases interpreting that language — control the award of attorneys' fees.

Under principles of statutory interpretation, RCW 19.86.080 is a specific statute that supersedes the general provisions of RCW 4.28.185(5) in this case. “Where concurrent general and special acts are *in pari materia* and cannot be harmonized, the latter will prevail, unless it appears that the legislature intended to make the general act controlling.” Wark v. Wash. Nat’l Guard, 87 Wn.2d 864, 867, 557 P.2d 844 (1976) (holding that where two statutes would allow suit to be brought, the more specific controls and plaintiff does not have their choice of statutes). “Under the general-specific rule, a specific statute will prevail over a general statute.” Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council, 165 Wn.2d 275, 309, 197 P.3d 1153 (2008). “To do otherwise would be to pretend to respect the legislature’s intent while ignoring the clearest indication of that intent as codified by the legislature.” Kustura v. Dep’t of Labor and Indus., 169 Wn.2d 81, 88, 233 P.3d 853 (2010)(holding that where two statutes existed, one providing for payment to plaintiffs from the state, and the other providing specific detail as to the standard for making those payments, the latter prevailed).

There is a conflict between the attorneys’ fees provisions in RCW 4.28.185(5) and the Consumer Protection Act. Both provisions provide that Defendants may make an application for their fees, but provide

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

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

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

Defendants were not, as RCW 4.28.185(5) requires, "served outside the state on [a] cause[] of action enumerated [in the long arm statute]." Those causes of action are enumerated in RCW 4.28.185(1)(a)-(f) and do not include an action to enforce the Consumer Protection Act. Rather, Defendants was served pursuant to the Consumer Protection Act's own long-arm statute, which authorizes out-of-state personal service of process on any person "if such person has engaged in conduct in violation of this chapter which has had impact in this state which [the Consumer Protection Act] reprehends." RCW 19.86.160. Such persons are then deemed to have submitted themselves to the jurisdiction of the courts of the state "within the meaning of RCW 4.28.185"; *i.e.*, the exercise of

jurisdiction is permitted to the fullest extent permitted under due process. The phrase “within the meaning of,” is specific only to jurisdiction. It is not “as if enumerated in...” or “as if brought pursuant to...,” which might suggest that a Consumer Protection Act claim should be considered as if enumerated in RCW 4.28.185. It is not, and it stands apart.

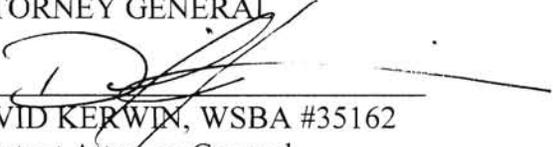
Because the State’s cause of action arises under the Consumer Protection Act, and the Act authorizes service of process in this action, RCW 4.28.185(5)’s fee provision is simply not applicable in this case. The trial court’s order should be reversed.

VI. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court (1) reverse the trial court’s orders granting Defendants’ motions to dismiss, and reinstate Defendants as parties to this action; and (2) reverse the trial court’s orders granting Defendants’ fees applications.

RESPECTFULLY SUBMITTED this 14th day of October, 2013.

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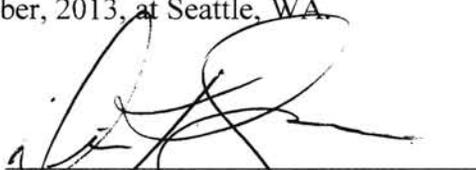
PROOF OF SERVICE

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

Via Electronic Mail

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

DATED this 14th day of October, 2013, at Seattle, WA.



DIANE K. CAMPBELL
Legal Assistant 3