

No. ~~70298-0~~

70298-0

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

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON

Plaintiff/Appellant,

v.

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 AMERICA, INC.,
SAMSUNG SDI CO., LTD., SAMSUNG SDI (MALAYSIA) SDN. BHD.,
SAMSUNG SDI MEXICO S.A. DE C.V., SAMSUNG SDI BRASIL LTDA.,
SHENZEN SAMSUNG SDI CO., LTD., TIANJIN SAMSUNG SDI CO., LTD.

Defendants/Respondents.

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I. INTRODUCTION

Respondents¹ are foreign entities located primarily in Asia and Europe with no ties to Washington sufficient to support the State's exercise of personal jurisdiction over them. Respondents submitted extensive evidence below establishing that none of them had any business presence in Washington or purposefully engaged in any activity in the State related to the claims asserted by the Attorney General of Washington (the "Attorney General"). The evidence demonstrates that Respondents did not even sell cathode ray tubes ("CRTs") – components of electronic products such as televisions and computer monitors – to the State and its agencies or any Washington consumers, who instead purchased them from third parties.

The Attorney General does not address, much less contradict, this undisputed evidence. Instead, he contends that Washington may assert jurisdiction over Respondents based on their manufacture or sale of CRTs

¹ Respondents are Koninklijke Philips N.V., Philips Taiwan Limited, Panasonic Corporation, Hitachi Displays, Ltd., Hitachi Asia, Ltd., Hitachi Electronic Devices (USA), Inc., LG Electronics, Inc., Samsung SDI Co., Ltd., Samsung SDI America, Inc., Samsung SDI Mexico S.A. de C.V., Samsung SDI Brasil Ltda., Shenzhen Samsung SDI Co., Ltd., Tianjin Samsung SDI Co., Ltd. and Samsung SDI Malaysia Sdn. Bhd. Other named Defendants – including affiliates of Respondents – did not move to dismiss on jurisdiction grounds and remain parties.

entirely outside of Washington that were subsequently incorporated into finished consumer products and distributed worldwide, including in some instances to consumers and State agencies in Washington. According to the Attorney General, a company placing its goods into the “international stream of commerce” is subject to suit in *every* forum – anywhere in the world – in which a non-trivial amount of its products may end up, without any showing that the company specifically targeted that forum in some way. As the court below rightly found, the Due Process Clause of the Fourteenth Amendment prohibits such a boundless exercise of personal jurisdiction.²

The Attorney General stretches the “stream of commerce” metaphor beyond recognition and in a manner foreclosed by clear pronouncements of the United States Supreme Court and the Washington appellate courts. *See* Hr’g Tr. 58:6-10 (Judge Eadie observing that the Attorney General “[is] really advocating for an expansion, or a change in the law”).³ It is well-settled that a defendant’s “amenability to suit [does

² Moreover, the Attorney General’s stream of commerce argument has no application to a respondent such as KPNV, which does not manufacture or place any products into the international stream of commerce.

³ The transcript of the November 15, 2012 hearing is attached as Appendix G to Appellants’ Opening Brief in linked Case No. 70299-8-I addressing the applicable statute of limitations, filed before this Court on

not] travel with the chattel” he makes or sells. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296, 100 S. Ct. 559, 62 L.Ed.2d 490 (1980). Rather, due process mandates that a plaintiff must in every instance establish that a defendant purposefully targeted the particular forum and did “something more” than merely place his wares in the stream of commerce. *See J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2792, 180 L. Ed. 2d 765 (2011) (Breyer, *J.*, concurring). Under the majority view in *Nicastro*, a plaintiff must show a “specific effort” by a defendant “to sell in [that particular state]” in order to assert jurisdiction. *See id.*; *see also* Hr’g Tr. 55:12-16.

The Attorney General has not and cannot meet this burden. Despite the millions of pages of documents Respondents produced to the Attorney General, the Attorney General offers no evidence of any purposeful conduct by Respondents targeting Washington, or that Respondents purposefully availed themselves of the privilege of conducting business in Washington. These failures are fatal to the Attorney General’s attempt to assert jurisdiction over Respondents. This was the very conclusion reached not just by the court below, but also by the Superior Court in an analogous action alleging an antitrust conspiracy

October 14, 2013. To avoid redundant filings, Respondents have not attached the same transcript here, but will do so upon the Court’s request.

relating to liquid crystal display (“LCD”) products filed by the Attorney General on behalf of the State and its consumers.⁴

Due process requires the Attorney General to demonstrate not only purposeful availment, but also that Respondents’ purposefully directed conduct, as opposed to the conduct of third parties, was the “but for” cause of the alleged injuries that occurred in Washington, *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 772, 783 P.2d 78 (1989), and that the exercise of jurisdiction comports with traditional notions of fairness. None of these requirements is met here where Respondents are primarily foreign entities and where the Attorney General can identify no purposeful conduct in Washington related to the injuries alleged.

Respondents also ask the Court to affirm the trial court’s award of reasonable attorneys’ fees and costs for work related to personal jurisdiction issues. CP 1070-1083. The trial court’s award was fully supported by the applicable statutes and the record evidence, and the trial court did not abuse its discretion in ordering the Attorney General to pay the expenses. An additional award of attorneys’ fees and costs related to this appeal should also be awarded under RAP 18.1.

⁴ See CP 81-83 (Order Granting Defendants LG Display Co., Ltd. and LG Display America, Inc.’s Motion to Dismiss for Lack of Personal Jurisdiction, *The State of Washington v. AU Optronics Corp. et al.*, Docket No. 202, King County Cause No. 10-2-29164-4 SEA (July 30, 2012)).

II. STATEMENT OF THE ISSUES

(1) Has the Attorney General satisfied his burden of establishing personal jurisdiction based solely on “stream of commerce” allegations that Respondents’ goods were resold by other persons or entities to consumers in Washington, where the Complaint does not allege that Respondents took any actions in Washington or specifically targeted Washington for the sale of CRTs?

(2) Did the trial court abuse its discretion in denying additional jurisdictional discovery where the Attorney General had already received substantial discovery and did not make a threshold showing that jurisdiction existed?

(3) Should the trial court’s award of attorneys’ fees and costs for work on the personal jurisdiction motions be affirmed because the award is proper under Washington’s long-arm statute, RCW 4.28.185(5), and/or the Consumer Protection Act, RCW 19.86.080(1)?

III. STATEMENT OF THE CASE

A. THE ATTORNEY GENERAL'S COMPLAINT FAILS TO ALLEGE ANY SUFFICIENT CONNECTION BETWEEN RESPONDENTS AND WASHINGTON

The Attorney General alleges that Respondents engaged in a conspiracy to fix the prices of CRTs, which are components of finished products such as televisions and computer monitors ("CRT Products"). Compl. ¶ 1, 6; CP 2-3.

The Attorney General does not allege a conspiracy to affect the price of CRT Products. The damages sought are only for alleged overcharges on CRTs themselves that the Attorney General claims were passed on to Washington customers who purchased CRT Products through a chain of distribution that includes numerous third parties. Compl. ¶¶ 49-51, CP 14.

The Attorney General does not allege that any conspiratorial activity occurred in Washington. Compl. ¶¶ 68-95, CP 17-25. Rather, to support his attempt to assert personal jurisdiction over Respondents, the Attorney General alleges that Respondents sold CRTs "into [the] international stream of commerce" with the "knowledge, intent, and expectation" that such CRTs would be incorporated into CRT Products to be sold by other third-parties to consumers "throughout the United States, including in Washington State." Compl. ¶¶ 46, CP 13.

B. RESPONDENT’S AFFIDAVITS CONFIRM THAT THEY HAD NO SUBSTANTIVE CONTACTS WITH WASHINGTON

As described below, each Respondent submitted uncontested affidavits demonstrating that it had no substantial contacts with Washington for jurisdictional purposes. *See* CP 40-42, 56-64, 84-86, 104-06, 203-06. The Attorney General’s Opening Brief fails to acknowledge this uncontroverted evidence or address any Respondent’s specific and individualized factual showing, and instead relies solely on an “international stream of commerce” allegation that lumps all Respondents together. Compl. ¶ 46, CP 13.

1. LGEI Had No Substantive Contacts With Washington

LG Electronics, Inc. (“LGEI”) is a Korean corporation with its principal place of business in Seoul, Korea. CP 40. LGEI is not licensed to and does not conduct regular business in Washington. LGEI does not have a designated agent for service of process in Washington, does not own or rent property in Washington, has never paid, or been required to file Washington state taxes, does not maintain any offices, facilities, mailing addresses, telephone numbers or employees in Washington, and it has never held any formal or informal meetings of its directors or shareholders in Washington. CP 42.

LGEI has not sold any CRTs or CRT Products to customers in Washington. CP 41. LGEI has not sold any products of any kind to consumers in Washington during the alleged Conspiracy Period. CP 42.

LG Electronics USA, Inc. (“LGEUSA”) sold CRT Products manufactured by LGEI in the United States. LGEUSA is a separately incorporated subsidiary of LGEI and is also named as a defendant in this action. CP 41. LGEUSA has not contested Washington courts’ jurisdiction over it and remains a defendant.

2. Hitachi Displays, Ltd, Hitachi Asia Ltd And Hitachi Electronic Displays (USA), Inc. Had No Substantive Contacts With Washington

Hitachi Displays Ltd was a Japanese company with its principal place of business located in Tokyo, Japan. CP 60. Hitachi Asia Ltd is a Singaporean company with its principal place of business located in Singapore. CP 57. Hitachi Electronic Displays (USA), Inc. (“HED(US)”) is incorporated in Delaware and has its headquarters in Lawrenceville, Georgia. CP 63.

None of these Hitachi entities manufactured or sold any CRTs or CRT Finished Products to customers in Washington. CP 57, 60, 63. HED(US) sold CRTs to customers in North America, including the United States, but never manufactured in Washington and has no record of selling CRTs to any customers in Washington. CP 63.

These Hitachi entities have never been licensed to conduct business in Washington. These Hitachi entities do not have a designated agent for service of process in Washington, do not own or rent property in Washington, have never paid, or been required to file Washington state taxes, do not maintain any offices, facilities, mailing addresses, telephone numbers, or employees in Washington, and they have never held any formal or informal meetings of its directors or shareholders in Washington. CP 57, 58, 60, 61, 63.

The entirety of any of the Hitachi entities' contacts with Washington is limited to HED(US)'s occasional business trips to Washington to meet with customers regarding a non-CRT business line, and attendance several years ago at the SID Trade Show in Seattle for another business line that resulted in no sales. CP 64.

3. Panasonic Corporation Had No Substantive Contacts With Washington

Panasonic Corporation ("Panasonic Corp.") is a foreign corporation, incorporated under the laws of Japan, with its principal place of business in Osaka, Japan. Panasonic Corp. did not manufacture or sell CRTs or CRT televisions or monitors (*i.e.*, the products at issue in this case) in Washington at any time during the alleged conspiracy period, nor has it ever sold a CRT tube or finished CRT television or computer

monitor to customers in Washington. CP 85. Indeed, Panasonic Corp. did not engage in any other conduct in Washington from which the Attorney General's claims arose. *Id.*

Panasonic Corp. is not now, nor has it ever been, licensed or qualified to do business in Washington. Panasonic Corp. has never had a designated agent for service of process in Washington, does not own or rent property in Washington, has never paid, or been required to file, Washington state taxes, and does not maintain any offices, facilities, mailing addresses, telephone numbers or employees in Washington. CP 85.⁵ It has never engaged in any state-related advertising in Washington, and no Panasonic Corp. employee, officer, or director resides in Washington. *Id.* Panasonic Corp. has no bank account or assets located in Washington. *Id.* Furthermore, it does not maintain any records in Washington, and it has never held any formal or informal meetings of its directors or shareholders in Washington. *Id.*

Moreover, two of Panasonic Corp.'s subsidiaries – Panasonic Corporation of North America (“Panasonic Corp. NA”) and MT Picture Display Co., Ltd. (“MTPD”) – have not contested jurisdiction, have

⁵ For a period ending more than nine years ago, a few Panasonic Corp. employees worked on a short-term, temporary basis in Washington for Panasonic Avionics Corporation, a business unrelated to CRTs or CRT finished products. CP 85-86.

answered the State's Complaint, and will remain in this case regardless of the outcome of this appeal. The joint venture MTPD was the entity actually involved in the manufacturing and sale of the CRT tubes that are at issue in this case, and it was Panasonic Corp. NA that sold finished Panasonic-brand televisions to retailers in the United States, and independently conducts business, including advertising, in Washington. CP 85. Panasonic Corp. was not involved in any of these activities.

4. The Philips Entities Had No Substantive Contacts With Washington

Koninklijke Philips N.V. ("KPNV") is a Dutch holding company with its principal place of business in Amsterdam, The Netherlands. CP 105.⁶ KPNV has employed, over the duration of the alleged conspiratorial period, approximately 12 individuals. *Id.* It does not engage in production, sales, or distribution operations – in Washington or anywhere else in the world. *Id.* Specifically, KPNV does not manufacture, market, sell, or distribute any products, including CRTs or CRT products, to consumers in Washington. *Id.* Rather, KPNV guides high-level strategic and financial decisions of the entities that form the Philips group of

⁶ Since the filing of the Attorney General's complaint, defendant Koninklijke Philips Electronics N.V.'s corporate name has been changed to Koninklijke Philips N.V.

companies. *Id.* It does not, however, direct the daily management or operation of these entities. *Id.*

Philips Taiwan Limited (“PTL”) is a Taiwanese company with its principal place of business in Taiwan. CP 105.⁷ PTL has not engaged in manufacturing any CRTs or CRT Products in Washington. *Id.*

These Philips Entities have never been licensed to conduct business in Washington. *Id.* These Philips Entities have never conducted any advertising or marketing in Washington or directed any marketing or advertising toward Washington consumers. CP 106. These Philips Entities do not have a designated agent for service of process in Washington, do not own or rent property in Washington, have never paid, or been required to file state taxes, do not maintain any offices, facilities, mailing addresses, telephone numbers, or employees in Washington, and they have never traveled to Washington for the purpose of conducting any business. *Id.*

Philips Electronics North America Corporation (“PENAC”) sold CRT Products in the United States. CP 5, ¶ 14. PENAC is a Delaware corporation with its principal place of business in Massachusetts and is

⁷ Since the filing of the Attorney General’s complaint, defendant Philips Electronics Industries (Taiwan), Ltd. has been merged into Philips Taiwan Limited.

named as a defendant in this action. *Id.* PENAC has not contested Washington courts' jurisdiction over it and remains a defendant.

5. The SDI Entities Had No Substantive Contacts With Washington

SDI is a Korean company with its principal place of business in Korea. CP 204. SDI America is a California corporation with its principal place of business in California. CP 204. SDI Mexico is a Mexican company with its principal place of business in Tijuana, Mexico. CP 204. SDI Brazil is a Brazilian company with its principal place of business in Brazil. CP 204. SDI Shenzhen is a Chinese company with its principal place of business in Shenzhen, China. CP 205. SDI Tianjin is a Chinese company with its principal place of business in Tianjin, China. CP 205. SDI Malaysia is a Malaysian company with its principal place of business in Malaysia. CP 205.

The SDI Respondents have never been licensed to conduct business in Washington, have never been incorporated in Washington, and have never had a principal place of business in Washington. CP 205. The SDI Respondents do not have designated agents for service of process in Washington, do not own or rent property in Washington, and do not maintain any offices, facilities, mailing addresses, telephone numbers or employees in Washington. CP 205. None of these SDI entities has ever

advertised in Washington, nor do they design products specifically for use by Washington customers. CP 205.

At no time during the relevant period did any of the SDI Respondents sell CRTs or CRT Products to Washington consumers or the State of Washington. CP 205. SDI America, SDI Brazil, SDI Shenzhen or SDI Tianjin never sold or shipped CRTs to any customer in Washington. CP 205. The only contact that SDI, SDI Mexico, and SDI Malaysia have had with the State of Washington is that they shipped CRT component parts to a single Washington manufacturer, another alleged co-conspirator. CP 206.

C. THE TRIAL COURT DISMISSES RESPONDENTS FOR LACK OF PERSONAL JURISDICTION

Respondents moved to dismiss the Attorney General's complaint for lack of personal jurisdiction. *See* CP 29-208. After reviewing the motions and hearing argument, Judge Eadie granted each Respondent's motion. CP 616-634; *see also* Hr'g Tr. 76:5-8 (“[T]here has been no showing of these moving defendants having purposefully avail[ed] themselves of markets in the State of Washington.”).

As the State acknowledges, various other defendants in this dispute did not challenge jurisdiction and remain parties. *See* Appellant's Opening Brief (“AOB”) at 1 n. 1. Thus, in all events, the Attorney

General will be able to proceed against several corporate subsidiaries or affiliates of Respondents, including LG Electronics U.S.A., Inc., PENAC, Panasonic NA, MTPD, and Hitachi Ltd.

D. THE TRIAL COURT GRANTS RESPONDENTS' ATTORNEY'S FEES

The trial court authorized Respondents to request attorneys' fees and costs. CP 616-632. With the exception of the Philips Entities, Respondents submitted briefing requesting fees and supporting these requests with detailed supporting affidavits. CP 643-1069. The trial court found that these fee requests were reasonable and granted the requested fees. CP 1070-83. The trial court rejected the Attorney General's argument challenging the applicability of the fee provision of Washington's long-arm statute, RCW 4.28.185(5).

IV. STANDARD OF REVIEW

The Attorney General has the burden of proving that personal jurisdiction over Respondents is proper in Washington. *SeaHAVN, Ltd. v. Glitnir Bank*, 154 Wn. App. 550, 563, 226 P.3d 141 (2010). At least a prima facie showing is required. *MBM Fisheries, Inc. v. Bollinger Machine Shop & Shipyard*, 60 Wn. App. 414, 418, 804 P.2d 627 (1991). When the defendant makes a positive showing that rebuts a plaintiff's assertions, the plaintiff cannot rest on the allegations in the complaint.

See, e.g., Taylor v. Portland Paramount Corp., 383 F.2d 634, 639 (9th Cir. 1967) (“We do not think that the mere allegations of the complaint, when contradicted by affidavits, are enough to confer personal jurisdiction of a nonresident defendant.”); *Access Road Builders v. Christenson Elec. Contracting Eng’g Co.*, 19 Wn. App. 477, 481, 576 P.2d 71 (1978) (“The party asserting jurisdiction has the burden of establishing it if the jurisdictional allegations are appropriately challenged.”).

Because the trial court considered evidence outside of the pleadings, its dismissal for lack of personal jurisdiction is reviewed under the summary judgment standard. *CTVC of Hawaii Co. Ltd. v. Shinawatra*, 82 Wn. App. 699, 707-08, 919 P.2d 1243 (1996). Questions of law and the application of undisputed facts to the law are reviewed de novo. *See MBM Fisheries*, 60 Wn. App. at 418.

The trial court’s denial of the Attorney General’s request for additional discovery is reviewed for abuse of discretion, *Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 777, 819 P.2d 370 (1991), as is the trial court’s decision to award fees and costs to Respondents. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 595, 675 P.2d 193 (1983). A trial court abuses its discretion when a ruling is manifestly unreasonable. *State ex. rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

V. ARGUMENT

A. THE DUE PROCESS CLAUSE DOES NOT ALLOW PERSONAL JURISDICTION OVER RESPONDENTS

“Due process protects the defendant’s right not to be coerced except by lawful judicial power.” *Nicastro*, 131 S. Ct. at 2785 (plurality op.). Its purpose is, in part, to “limit[] the power of a state court to render a valid personal judgment against a nonresident defendant” in order to “protect[] the defendant against the burdens of litigating in a distant or inconvenient forum.” *World-Wide Volkswagen*, 444 U.S. at 291-92. Washington’s long-arm statute, RCW 4.28.185, “authorizes courts to exercise jurisdiction over nonresident defendants [only] to the extent permitted by the due process clause of the United States Constitution.” *MBM Fisheries*, 60 Wn. App. at 423.

The Attorney General’s suit against Respondents exceeds the bounds of due process. Respondents are foreign corporations mainly headquartered in Asia and Europe with no connection to Washington. The Attorney General concedes that Washington lacks general jurisdiction over them. AOB at 6. Nonetheless, the Attorney General seeks to found jurisdiction on an unprecedented and insupportable version of the “stream of commerce” theory of specific jurisdiction. This attempt is unavailing.

In analyzing a claim of specific jurisdiction, Washington courts apply a three-part test. Specific jurisdiction may not be asserted unless:

(1) The . . . foreign corporation must 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, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.

MBM Fisheries, 60 Wn. App. at 423 (quoting *Tyee Constr. Co. v. Dulien Steel Prods., Inc.*, 62 Wn.2d 106, 115-16, 381 P.2d 245 (1963)). Thus, a Washington court can exercise personal jurisdiction over Respondents only if Respondents engaged in some purposeful activity in Washington, the Attorney General's claims arise from that activity in Washington, and the exercise of jurisdiction would be fair and just. While the Attorney General cites this very same standard in his brief, *see* AOB at 10, he then proceeds to ignore these elements – none of which is satisfied in this case.

1. Respondents Did Not Commit Any Relevant Purposeful Acts In Washington

The Attorney General can point to no evidence showing that Respondents “purposefully” acted *in Washington* in any way that gives rise to the Attorney General's alleged price-fixing lawsuit. Tellingly, the Attorney General's forty-four page opening brief entirely ignores the

extensive evidence Respondents submitted before the trial court establishing that Respondents had no substantive contacts with, or activity in, Washington. *See supra* Section III.B (describing the uncontested declarations submitted by Respondents in support of their underlying motions to dismiss for lack of jurisdiction).

Jurisdiction “cannot be imposed” absent a showing that the defendant “purposefully directed its activities toward this state.” *Grange Ins. Ass’n v. Washington*, 110 Wn.2d 752, 760, 757 P.2d 933 (1988); *see also id.* (“[T]here is no longer any doubt that a party asserting long-arm jurisdiction must show ‘purposefulness’ as part of the first due process element.”). Even “the foreseeability that an injury might occur in another state is not a ‘sufficient bench mark’ for exercising jurisdiction.” *Perry v. Hamilton*, 51 Wn. App. 936, 941, 756 P.2d 150 (1988) (citing *World-Wide Volkswagen*, 444 U.S. at 295). The purposefulness prong of the due process analysis mandates that a defendant must have intentionally targeted the forum state in particular. *See, e.g., World-Wide Volkswagen*, 444 U.S. at 296 (rejecting the notion that every seller’s “amenability to suit ... travel[s] with the chattel” he sold); *Nicastro*, 131 S. Ct. at 2788 (plurality op.) (“[I]t is not enough that the defendant might have predicted that its goods will reach the forum State.”).

In this case, the Attorney General’s Complaint does not contain a single allegation that any Respondent intentionally targeted Washington or its consumers. Respondents’ alleged purposeful conduct – the sale and manufacture of CRTs and CRT Products – occurred entirely in foreign jurisdictions and before any of the products entered Washington. The record shows that none of Respondents sold CRTs or CRT Products to Washington consumers or State agencies, the parties alleged by the Attorney General to have suffered antitrust injury, and whose purchases are the basis of the Attorney General’s claims. CP 41-42, 57-63, 85, 105, 204-05.⁸ On this record, there is no evidence that any Respondent

⁸ In the Superior Court and in its opening brief herein, the Attorney General did not contend that the CRT component part sales by SDI, SDI Mexico, and SDI Malaysia to a single Washington manufacturer and alleged co-conspirator constituted relevant jurisdictional contacts; indeed, having never even mentioned this fact in either brief, the Attorney General has waived any reliance thereon. *See* Rules of Appeal Procedure 2.5(a). Instead, the Attorney General relies exclusively on his global “stream of commerce” theory as to all Respondents.

Even if considered, these limited component sales to one manufacturer are not material to the jurisdictional analysis because the Attorney General alleges antitrust injury only to Washington consumers and State agencies for purchases of CRT finished products, and the Attorney General does not allege that the three involved SDI defendants had any control over the prices paid by the State or Washington consumers for those CRT Products. *See In re Chocolate Confectionary Antitrust Litigation*, 602 F. Supp. 2d 538, 557 (M.D. Pa. 2009) (“Mars Canada and Nestlé Canada’s production and supply of chocolate candy into the United States *bear no clear relationship to the price-fixing harms of which plaintiffs complain and*

“purposefully directed its activities toward this state.” *See Grange*, 110 Wn.2d at 760.

Indeed, the Attorney General does not allege that any Respondent had any presence in Washington – much less that any alleged conspiratorial activity occurred in Washington. Respondents are not licensed to conduct business in Washington; do not have designated agents for service of process in Washington; do not own or rent property in Washington; have never paid, or been required to file Washington state taxes; do not maintain any offices, facilities, mailing addresses, telephone numbers or employees in Washington; and have never conducted business in Washington. CP 41-42, 57-63, 85, 105, 204-05. Although these factors are typically weighed in considering general jurisdiction⁹ – which the Attorney General concedes does not exist – the total absence of *any* activity by Respondents in, or directed at, Washington also underscores

cannot support personal jurisdiction. . . . Mars Canada[']s or Nestlé Canada[']s . . . status as remote suppliers of chocolate confectionary products does not buttress the claims of alleged antitrust harm that occurred after the products left their dominion and control. . . . A plaintiff cannot hold a manufacturer liable for a price-fixing harm occurring after the product left the manufacturer's hands absent a showing that the manufacturer retained control over product pricing” (emphasis added).

⁹ *See generally Raymond v. Robinson*, 104 Wn. App. 627, 633-34, 15 P.3d 697 (2001) (considering activities sufficient to establish substantial and continuous business transactions in Washington).

the Attorney General's inability to identify a constitutional basis for specific jurisdiction. *See Swartz v. KPMG LPP*, 476 F.3d 756, 766 (9th Cir. 2004) ("mere 'bare bones' assertions of minimum contacts with the forum or legal conclusions unsupported by specific factual allegations will not satisfy a plaintiff's pleading burden.").

2. The Attorney General Cannot Satisfy The "Arising From" Requirement Of Due Process

To meet its burden to establish personal jurisdiction, a plaintiff also must demonstrate that its injuries arose from the defendant's purposefully directed acts in the forum state. *See SeaHAVN*, 154 Wn. App. at 571. That is, a plaintiff must show that its injuries would not have occurred "but for" defendant's purposefully directed acts (*i.e.*, the "arising from" inquiry). *Shute*, 113 Wn.2d at 772.

The Attorney General fails to allege any facts that would show that the arising from requirement is met. Indeed, the Attorney General's entire argument in this regard consists of these two sentences of the opening brief. They read:

[T]his action arises from Defendants' contacts with the state. By purchasing products containing Defendants' price-fixed panels [*sic*], consumers and state agencies were harmed, and this enforcement action arises out of those purchases.

See AOB at 10-11.¹⁰ But Respondents did not sell or distribute those CRT Products to Washington consumers or State agencies. Rather, third-party manufacturers, retailers, and distributors sold those products to consumers and State agencies. Moreover, the alleged price fixing occurred abroad.

Thus, the Attorney General’s argument entirely misses the point of the “arising from” test, which examines “*defendant’s* acts in the forum state.” *See SeaHAVN*, 154 Wn. App. at 571 (emphasis added). The Attorney General has not met his burden of demonstrating that this action arises out of Respondents’ purposeful acts directed at Washington and not from the acts of third parties. It is the unilateral activity of the third-party resellers – not Respondents – that gives rise to the Attorney General’s alleged claims. None of the allegations of the complaint arises from Respondents’ minimal to non-existent contacts with Washington. On this independent ground alone, the trial court’s judgment should be affirmed. *See LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989) (trial court may be affirmed on any ground supported by the record).

¹⁰ Although the Attorney General refers to “panels” repeatedly throughout the Opening Brief, CRTs are distinct from liquid crystal display or LED “panels” that are also used in TVs and computer monitors. Such panels are not part of the claims in this case. Nor do laptop computers, also referenced in the AOB, contain any CRTs.

3. The Attorney General's Expansive Interpretation Of The "Stream Of Commerce" Metaphor Violates Due Process

The Attorney General asserts that the "purposeful acts" and "arising from" requirements set forth above are met merely because Respondents placed CRTs into a global stream of commerce that included Washington.¹¹ *See, e.g.*, AOB at 12-13. This is not the law. *See* Hr'g Tr. 58:6-10 (finding that the Attorney General "[is] really advocating for an expansion, or a change in the law").

A defendant's participation in the stream of commerce does not displace the constitutional mandate that "jurisdiction should only be imposed if a defendant 'purposefully avails itself' of the privilege of acting within the forum state, thereby invoking the benefits and protection of its laws." *Grange*, 110 Wn.2d at 760. Thus, a company's "mere placing of the product into interstate commerce is not by itself sufficient basis to infer the existence of purposeful minimum contacts." *Id.* at 761-762; *see also Nicastro*, 131 S. Ct. at 2788 (plurality op.) (finding that the stream of commerce metaphor "does not amend the general rule of

¹¹ The Attorney General's "stream of commerce" argument is inapplicable to respondents such as KPNV that did not manufacture CRTs or place them into the stream of commerce. Given that the Attorney General offers no other basis to exercise personal jurisdiction over KPNV, the Court must affirm the trial court's dismissal of KPNV.

personal jurisdiction”). The Attorney General’s argument to the contrary strains the stream of commerce metaphor far beyond its intended meaning and finds no persuasive support in the case law. On the contrary, the United States Supreme Court has consistently eschewed such a broad stream of commerce theory, including in its recent decision in *Nicastro*.

a. The United States Supreme Court’s Jurisprudence, Including *World-Wide Volkswagen*, Forecloses the Attorney General’s Stream of Commerce Arguments

A majority of justices in *Nicastro* explicitly rejected the argument advanced by the Attorney General that a defendant satisfies purposeful availment in a specific forum merely by placing its product into the stream of commerce intending that it reach the widest market possible. *See* 131 S. Ct. at 2788 (plurality op.); *id.* at 2791-93 (Breyer, *J.*, concurring).¹²

¹² The Attorney General incorrectly relies on *In re Isadore* in an effort to dodge *Nicastro*’s plurality holding. *See* AOB at 28 (citing *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 302, 88 P.3d 390 (2004)). *In re Isadore* addresses treatment of Washington plurality decisions, not those of the U.S. Supreme Court. The Supreme Court’s decisions are binding when, as in *Nicastro*, a combination of opinions form a cohesive majority holding. *See Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990 (1977); *cf. Davidson v. Hensen*, 135 Wn.2d 112, 128, 954 P.2d 1327 (1998) (applying *Marks*). The “*Marks* rule, does not require [courts] to determine a single opinion which a majority joined, but rather [to] determine the legal standard which, when applied, will necessarily produce results with which a majority of the Court from that case would agree.” *State v. Hickman*, 157 Wn. App. 767, 774, 238 P.3d 1240 (2010) (internal citations omitted) (interpreting a plurality U.S. Supreme Court

The *Nicastro* plurality explained that, “as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.” *Id.* at 2788 (plurality op.); *see also id.* at 2792 (Breyer, *J.*, concurring). “[I]t is the defendant’s actions, not his expectations, that empower a State’s courts to subject him to judgment.” *Id.* at 2789; *id.* at 2792 (Breyer, *J.*, concurring). New Jersey lacked personal jurisdiction over the defendant manufacturer in *Nicastro* because while the manufacturer may have “reveal[ed] an intent to serve the *U.S. market*” it had “not... purposefully availed itself of the *New Jersey market*.” *Id.* at 2790 (emphasis added) (noting that defendant directed “marketing and sales efforts at the United States,” but did not “engage[] in conduct purposefully directed at New Jersey”); *id.* at 2792 (Breyer, *J.*, concurring) (noting that evidence “has shown no specific efforts to sell in New Jersey”); *see also Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 110, 107 S.Ct. 1026 (1987) (personal jurisdiction requires “something more” than placing a product into the stream of commerce).

In *Nicastro*, a two-member concurrence, authored by Justice Breyer, joined the four-member plurality. The Attorney General

opinion). In other words, “[w]here there is no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds.” *Davidson*, 135 Wn.2d at 128.

emphasizes that this concurring opinion concluded that personal jurisdiction was not proper because the record showed few sales in New Jersey. *See* AOB at 29-30. But Justice Breyer’s concurring opinion also agreed with the plurality that a state must show a “specific effort” by a defendant “to sell in [the state]” in order to assert jurisdiction. *Id.* at 2792 (Breyer, *J.*, concurring). To hold otherwise would:

abandon the heretofore accepted inquiry of whether, focusing upon the relationship between ‘the defendant, the forum, and the litigation,’ it is fair, in light of the defendant’s contacts with that forum, to subject the defendant to suit there. It would ordinarily rest jurisdiction instead upon no more than the occurrence of a product-based accident in the forum State. But this Court has rejected the notion that a defendant’s amenability to suit ‘travel[s] with the chattel.’

Id. at 2793 (Breyer, *J.*, concurring) (internal citations omitted).

Thus, under the narrowest holding of *Nicastro*, simply placing a product into the stream of commerce and targeting the general U.S. market, as the Attorney General alleges here (AOB at 12-13), does not constitute sufficient contact with the forum state to satisfy due process. Rather, regardless of the number of products at issue, the plaintiff must establish “‘something more,’ such as special state-related design, advertising, advice, marketing or something else.” *Id.* at 2792.

The Attorney General attempts to sidestep *Nicastro*’s narrow reading of the “stream of commerce” theory by relying on the Supreme

Court's earlier ruling in *World-Wide Volkswagen*. Yet *World-Wide Volkswagen* likewise rejects the broad "stream of commerce" theory advanced by the Attorney General and instead requires proof of some "conduct and connection" with the forum state in order to assert personal jurisdiction. 444 U.S. at 297.

In *World-Wide Volkswagen*, the Court rejected the claim that a transitory product (there a car) subjects its seller to jurisdiction anywhere the product goes. *Id.* at 296. The Court refused to embrace a rule like the one advanced by the Attorney General here that "[e]very seller of chattels would in effect appoint the chattel his agent for service of process." *Id.* The Court made clear that personal jurisdiction is not present merely because it is foreseeable a product might end up in a given forum. *Id.* at 298 ("foreseeability alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause" (quotation omitted)); see also *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S. Ct. 2174, 85 L.Ed.2d 528 (1985) (same); *Asahi*, 480 U.S. at 110. "[T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State," but instead the foreseeability "that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen*, 444 U.S. at 297.

World-Wide Volkswagen uses the phrase “stream of commerce” exactly once in the majority opinion. The Court stated, “The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.” 444 U.S. at 298. The Court then explained, however, that the expectation element of this theory was not present where the defendant had no “conduct and connection” with the forum state. *Id.* at 297; *see also Nicastro*, 131 S. Ct. at 2788 (plurality op.) (discussing *World-Wide Volkswagen*’s single invocation of the “stream of commerce theory” and noting that *World-Wide Volkswagen* “merely observes that a defendant may in an appropriate case be subject to jurisdiction without entering the forum”). *World-Wide Volkswagen* concluded that the “unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.” 444 U.S. at 298.

In this case, the Attorney General advances the very argument that *Nicastro* and *World-Wide Volkswagen* expressly reject – that the unilateral activity of manufacturers and retailers other than Respondents in selling CRT Products in Washington is sufficient to support the exercise of personal jurisdiction over Respondents, despite the absence of any

evidence that Respondents specifically targeted Washington. The Attorney General has not alleged that Respondents made specific efforts to sell to or otherwise target Washington consumers through the stream of commerce. As in *Nicastro*, the Attorney General merely alleges that Respondents targeted a *global* market with the intent that, by selling CRTs and CRT Products to as many consumer-electronics manufacturers and third-party retailers as possible, their products would reach as many forums as possible. *See, e.g.*, AOB at 14. This untargeted approach – with no specific efforts directed at Washington – was not sanctioned by *World-Wide Volkswagen* as a basis to assert personal jurisdiction and was explicitly rejected under even the most narrow holding of *Nicastro*. *See, e.g.*, 131 S. Ct. at 2792 (Breyer, *J.*, concurring) (Plaintiff “has shown no specific effort” by defendant to sell in the forum state).

b. A Boundless Stream of Commerce Theory Finds No Support in Washington’s Modern Case Law

Consistent with the United States Supreme Court’s jurisprudence, Washington’s current case law does not recognize personal jurisdiction based solely on the placement of products into the stream of commerce. Washington courts consistently require “something more” – that is, a purposeful act directed at the state. *See, e.g., Grange*, 110 Wn.2d at 760 (cattle specifically bound for Washington); *Smith v. New York Food*, 81

Wn.2d 719, 723, 504 P.2d 782 (1972) (manufacturers advertised in trade magazines, mailed literature to, and communicated by telephone and telegraph with Washington customers); *State v. Reader's Digest Ass'n, Inc.*, 81 Wn.2d 259, 277-78, 501 P.2d 290 (1972) (sweepstakes promotions mailed directly to Washington consumers).

The Attorney General incorrectly suggests that *Grange* supports an unlimited “stream of commerce” exception to the purposeful-contacts requirement.¹³ It does not. In *Grange*, the court considered whether health inspections of cattle conducted in Idaho could subject the State of Idaho to suit in Washington. *Grange*, 110 Wn.2d at 762. The court ultimately found jurisdiction lacking, but noted that if the rules applicable to commercial defendants were applicable to governmental agencies then “Idaho would be deemed to have established purposeful minimum contacts in this state on the basis that its own employee *knew that these particular cows* would be immediately shipped into Washington...” *Id.* at

¹³ The Attorney General also incorrectly suggests that the holding in *Grange* “expressly equates the analysis of stream of commerce in Washington with the *World-Wide Volkswagen* standard.” AOB at 21. This suggestion completely ignores the fact that *Grange* never once cites to *World-Wide Volkswagen*. Moreover, the Attorney General’s argument is premised on the errant contention that both *Grange* and *World-Wide Volkswagen* require nothing more than a defendant’s participation in global commerce for a state to exercise personal jurisdiction. In fact, both opinions reject this boundless standard, as explained above.

762; *see also id.* at 755 (“Each certificate also indicated that the destination address for the cattle was that of a Washington buyer.”). Thus, the court in *Grange* repeatedly emphasized that the defendants in that case had directed their activities specifically at Washington.

Moreover, *Grange* cited with approval two prior Washington Supreme Court opinions that found the exercise of jurisdiction contingent on the defendants’ specific conduct directed at Washington – not their mere participation in a global stream of commerce. *See Smith*, 81 Wn.2d at 723 (jurisdiction present because manufacturers solicited and communicated directly with Washington customers); *Oliver v. Am. Motors Corp.*, 70 Wn.2d 875, 425 P.2d 647 (1967) (jurisdiction lacking because defendants did not sell products in Washington).

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

The one Washington decision the Attorney General identifies to the contrary is no longer good law. The Attorney General relies extensively on *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). See AOB at 17-19, 21. However, *Omstead* not only predates all of the pertinent precedents of the United States Supreme Court, but *no* Washington state court has relied on *Omstead*'s jurisdictional analysis in almost forty years.¹⁴ Washington courts have moved past *Omstead* for good reason: the United State Supreme Court's binding holdings, discussed above, have rejected the notion embodied in *Omstead* that a foreign manufacturer's insertion of goods into a broad stream of commerce is sufficient to support jurisdiction, even when it is foreseeable

¹⁴ *Scott Fetzer Co. v. Kirby Co. Div. v. Weeks*, 114 Wn.2d 109, 112, 786 P.2d 265 (1990), is the only Washington state opinion that has cited *Omstead* since 1975. *Scott Fetzer* discussed *Omstead* in dicta unrelated to personal jurisdiction. Indeed, many of the cases cited in the AOB are outdated. See *Grange*, 110 Wn.2d at 759 (pointing out that early Washington cases – like *Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp.*, 66 Wn.2d 469 (1965) – are not in accord with modern U.S. Supreme Court jurisprudence); see also AOB at 14 n.4 (citing various out-of-state cases all significantly predating *Nicastro*); *id.* at 25-26 (discussing 1978 district court opinion, *Hicks v. Kawasaki Heavy Industries*, 452 F. Supp. 130 (D.C. Pa. 1978)).

that the goods would reach the forum.¹⁵ See, e.g., *World-Wide Volkswagen*, 444 U.S. at 295-98; see also *Burger King*, 471 U.S. at 474; *Nicastro*, 131 S. Ct. at 2791. The United States Supreme Court’s opinions, not *Omstead*, control the present analysis.

c. Other Persuasive Authorities Reject Broad Application of Stream of Commerce Theory

Courts that have analyzed price fixing allegations similar to the ones at issue here have consistently held that participation in the stream of commerce alone does not support personal jurisdiction. See, e.g., *In re Automotive Parts Antitrust Litig.*, 2013 WL 2456611, at *4-*5 (E.D. Mich. June 6, 2013) (defendant’s ability to predict that its goods would reach the forum insufficient to support jurisdiction where the defendant neither controlled nor cared where its distributors sold its products); *In re Chocolate Confectionary Antitrust Litig.*, 602 F. Supp. 2d 538, 560-64 (M.D. Pa. 2009) (defendant’s “status as a fountainhead of chocolate products” – without more – did not establish a prima facie case of personal

¹⁵ In any event, *Omstead* also is not persuasive in the present case because the defendant in *Omstead* – unlike the Respondents – manufactured its product knowing that particular orders would be delivered to customers in Washington. See 5 Wn. App. 258 at 262, 268-69; see also 80 Wn.2d at 722 (adopting the appellate court’s ruling in *Omstead* on the ground that it is “substantially comparable upon the facts” to *Deutsch v. West Coast Machinery Co.*, Wash., 80 Wn.2d 702, 497 P.2d 1311 (1972) – which itself relied on the defendants’ contacts with Washington and awareness that specific products would be sold in Washington).

jurisdiction); *Lorix v. Crompton Corp.*, 680 N.W.2d 574, 580 (Minn. Ct. App. 2004) (contacts held by defendant's customers "may not be imputed" to defendant); *Four B Corp. v. Ueno Fine Chemicals Indus., Ltd.*, 241 F. Supp. 2d 1258, 1265-66 (D. Kan. 2003) (placement of goods into the stream of commerce with an effect on the Kansas economy is insufficient).

In *Holder v. Haarmann & Reimer Corp.*, 779 A.2d 264 (D.C. 2001), the court found the defendant citric acid manufacturer's contacts with the forum were insufficient to establish jurisdiction. The court found jurisdiction lacking because, as in the present case, if the defendant's product "wound up in the District at all, this was solely the result of 'the unilateral activity of another party or a third person,' namely that of [the defendant's] own customers and other persons or entities further down the chain of distribution." *Id.* at 274.¹⁶

Courts analyzing *Nicastro* in other contexts have likewise recognized that modern jurisprudence requires a plaintiff to show that a defendant engaged in specific forum-directed conduct before personal jurisdiction may be asserted. *See, e.g., Dow Chem. Canada ULC v.*

¹⁶ *See also Melhuish v. Crompton Corp.*, 2004 WL 5203353, at *1 (Me. Super. Feb. 26, 2004) (that defendants were "on notice" their products might be used in goods sold in Maine was insufficient to establish personal jurisdiction); *Schneider v. Crompton Corp.*, 2003 WL 25456311, at *1 (D.C. Sup. Ct. Sept. 22, 2003) (receipt of substantial revenue from the forum state insufficient to establish personal jurisdiction).

Superior Court, 202 Cal. App. 4th 170, 176, 134 Cal. Rptr. 3d 597, 601 (2011), *as modified* (Dec. 21, 2011), *review denied* (Apr. 18, 2012), *cert. denied*, 133 S. Ct. 427 (2012). *Dow Chemical* found jurisdiction lacking over a manufacturer defendant because, like Respondents here, “it never sold products in, or to customers in, California; it never maintained an office or other facility of any kind in California; it has never been qualified to do business in California; and it has no agent for service of process in California.” *Id.* The court emphasized that “[d]ue process requires that Dow have engaged in additional conduct, directed at the forum, before it can be found to have purposefully availed itself of the privilege of conducting activities within California.” *Id.*¹⁷

¹⁷ See also, e.g., *NV Sumatra Tobacco*, 403 S.W.3d 726, 765 (Tenn. 2013) (“Beyond the act of placing its United brand cigarettes in the international stream of commerce, NV Sumatra’s targeted behavior at the United States was minimal at most. It had no specific interest in Tennessee. The company’s awareness—largely after the fact—that its cigarettes were being sold in Tennessee fails to evidence purposeful availment of the Tennessee market.”); *N. Ins. Co. of New York v. Constr. Navale Bordeaux*, 2011 WL 2682950, at *5 (S.D. Fla. July 11, 2011) (“‘something more’ than merely placing a product into the stream of commerce is required for personal jurisdiction”) (citing *Nicastro*, 131 S. Ct. 2780 (Breyer, J., concurring)); see also *Oticon, Inc. v. Sebotek Hearing Sys., LLC*, 865 F. Supp. 2d 501, 514 (D.N.J. 2011) (“there is no doubt that *Nicastro* stands for the proposition that targeting the national market is *not* enough to impute jurisdiction to all forum States”); *Costa v. Wirtgen Int’l GmbH & Co. KG*, 2013 WL 1636043, at *2 (N.D. Cal. Apr. 16, 2013) (slip op.) (finding that foreign defendant did not target forum “in a way sufficient to establish [the] first prong of the sufficient contacts test”).

The Attorney General's reliance on a handful of cases in other jurisdictions (*see* AOB at 30-33) does not change this analysis. *Russell v. SNFA*, 987 N.E.2d 778, 782, 793-94 (Ill. 2013), was a personal injury action where the defendants' representative had visited Illinois repeatedly and sought to design products specifically for sale in Illinois. No such evidence of specific targeting of Washington has been presented here. Similarly, *Willemssen v. Invacare Corp.*, 352 Or. 191, 282 P.3d 867, 875 (2012), *cert. denied*, 133 S. Ct. 984 (2013), was a personal injury case, in which the Oregon Supreme Court affirmed the state's jurisdiction over a foreign manufacturer of wheelchair battery chargers. 352 Or. at 204. Personal jurisdiction was proper there, the Oregon court found, because the plaintiff had shown "something more": among other things, the batteries had specifically been manufactured to comply with the state's standards. *Id.* at 203. In any event, to the extent *Willemssen* and other non-controlling authorities relied on by the Attorney General can be read to endorse a broad stream of commerce theory based solely on the flow of goods into the forum state without more, these decisions directly conflict with *Nicastro* and *Grange* and, as a result, are not persuasive.

4. Traditional Notions Of Fair Play And Substantial Justice Mandate Dismissal

A court need not even reach the fairness analysis where, as here, the plaintiff has failed to identify sufficient purposeful contacts with Washington. The “fairness” inquiry is an additional requirement of due process that should be examined only if the first two requirements for personal jurisdiction (purposeful availment and arising from) are met. *Walker v. Bonney-Watson Co.*, 64 Wn. App. 27, 36, 823 P.2d 518 (1992). The court’s analysis need not continue where either of the first two due process elements are lacking because “the fairness factors [of the third due process element] cannot of themselves invest the court with jurisdiction over a nonresident when the minimum-contacts analysis weighs against the exercise of jurisdiction.” *Grange*, 110 Wn.2d at 760 (internal citation omitted).¹⁸

¹⁸ The Supreme Court emphasized this point in *World-Wide Volkswagen*:

Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

World-Wide Volkswagen, 444 U.S. at 294.

If the fairness factors are considered here, every factor weighs decidedly in Respondents' favor and against the exercise of jurisdiction. Due process forbids a court from exercising jurisdiction over a defendant if doing so would offend "traditional notions of fair play and substantial justice." *Asahi*, 480 U.S. at 113. "In making this determination, courts consider the [1] quality, nature, and extent of the defendant's activity in Washington, [2] the relative convenience of the plaintiff and the defendant in maintaining the action here, [3] the benefits and protection of Washington's laws afforded the parties, and [4] the basic equities of the situation." *CTVC of Hawaii*, 82 Wn. App. at 720. Courts "must also weigh . . . the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies." *Asahi*, 480 U.S. at 113 (citation and internal quotation marks omitted).

Each of these factors weighs against jurisdiction in this case. The first factor, the "quality, nature, and extent" of Respondents' activity in Washington unequivocally favors dismissal because the Attorney General has not shown that *any* Respondent had purposeful contacts with Washington from which the Attorney General's claims arose. Indeed, the Attorney General has not and cannot point to any purposeful acts in this forum supporting specific jurisdiction, and thus haling these foreign

Respondents into this forum to defend the Attorney General's claims would impose a substantial and unnecessary burden on Respondents in a manner that offends traditional notions of fair play and substantial justice.

As to the second factor, the relative convenience to the parties of litigating in Washington, courts give the unique burdens of defense in a foreign jurisdiction "significant weight." *Asahi*, 480 U.S. at 114.

Requiring Respondents to litigate in a state where they have no offices, employees, or other resources presents a significant burden. *See SeaHAVN*, 154 Wn. App. at 571 (requiring an Icelandic bank "to defend the lawsuit in Washington would create a substantial burden on [the defendant]").

The third factor analyzes the benefits and protections of the State's laws. Here, Washington residents who directly purchased CRT Products have recovered for their injuries in the Direct Purchaser class action (*In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 3:07-cv-5944 SC (N.D. Cal.)) through a number of settlements and they have the opportunity to recover more. The State's "strong interest in protecting its citizens," on its own, is an insufficient basis for finding jurisdiction. *Nicastro*, 131 S. Ct. at 2791 (plurality op.).

Moreover, contrary to the Attorney General's suggestion, the unavailability of private suits by indirect purchasers under Washington

law lends no weight in favor of jurisdiction. *See* AOB at 34 (discussing *Blewett v. Abbott Laboratories*, 86 Wn. App. 782, 938 P.2d 842 (1997)). For one thing, the availability of indirect purchaser actions has no bearing on whether Respondents purposely availed themselves of the Washington forum. Even if indirect purchaser actions were permitted, a plaintiff still would have to show that a defendant met the statutory and constitutional requirements for personal jurisdiction. Moreover, in *Blewett*, the court determined that there was no “compelling reason” to reject the *Illinois Brick* rule barring private consumers’ indirect purchaser claims. *Id.* at 788-89. Accordingly, without reservation, the court held that private indirect purchaser suits were barred under Washington law. *Id.* The Attorney General may object to Washington’s policy decision not to repeal *Illinois Brick* and create a private right of action, but that is a policy argument best directed to the legislature.

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

Washington residents. Thus, while it is wholly equitable for the State to proceed against those Defendants who have not contested jurisdiction, it offends due process to inject *these* Respondents – all of whom are foreign companies that did not purposefully avail themselves of this State – into this case.

The final factor is the interstate judicial system’s interest in obtaining the most efficient resolution of controversies. A broad stream of commerce theory would inefficiently subject small companies to jurisdiction in far-off places. As *Nicastro* noted, “[i]f foreseeability were the controlling criterion, the farmer could be sued in Alaska or any number of other States’ courts without ever leaving town.” 131 S. Ct. at 2790 (plurality op.). Washington law and U.S. Supreme Court precedent limit the “stream of commerce” theory to avoid this result.

In sum, as a result of the Attorney General’s inability to satisfy any of the three elements of the due process analysis necessary to establish personal jurisdiction, the trial court’s order should be affirmed.

B. JURISDICTIONAL DISCOVERY IS INAPPROPRIATE AND WAS PROPERLY DENIED

The trial court properly denied the Attorney General’s request for jurisdictional discovery. Under the Attorney General’s own authority, jurisdictional discovery may be appropriate 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 & Commercial Workers v. SDC Inv., Inc.*, 788 F.2d 535, 540 (9th Cir. 1986) (internal quotation mark and citation omitted) (cited in AOB at 37).

Here, there are no controverted facts bearing on jurisdiction: the Attorney General does not and cannot dispute any of the facts on which Respondents’ underlying jurisdictional motions relied. Moreover, the Attorney General has already received more than two million pages of documents in this litigation and has nevertheless failed to identify any basis to allege that Respondents had sufficient relevant contacts with Washington. Unfounded speculation that additional discovery may turn up any meaningful contacts between this State and Respondents is not a sufficient basis on which to compel jurisdictional discovery. *See Butcher’s Union*, 788 F.2d at 540 (noting that “speculation” that “discovery will enable [plaintiff] to demonstrate sufficient California business contacts” is not enough).

The Attorney General has proffered no good faith or reasoned basis, as it must, to justify the costly and time-consuming discovery it requests. *See, e.g., Pelton v. Tri-State Memorial Hosp., Inc.*, 66 Wn. App. 350, 356-57, 831 P.2d 1147 (1992). The Attorney General’s desire to

adduce facts regarding Respondents' intent and the effect of these facts on "U.S. domestic import trade and commerce" (AOB at 38), even if fruitful, would be irrelevant to the issue of whether Respondents targeted Washington State in particular, as *Nicastro* requires.

The Attorney General argues for the first time on appeal that it is entitled to jurisdictional discovery because certain Respondents had wholly-owned subsidiaries doing business in Washington. AOB at 38-39. This argument has been waived by the Attorney General's failure to present it to the trial court. *See* RAP 2.5(a). Moreover, this argument is unpersuasive because the mere existence of local subsidiaries does not raise a colorable question regarding the Respondents' own meaningful contacts – of which there are none – with Washington. *See Williams v. Canadian Fishing Co.*, 8 Wn. App. 765, 768-69 (1973) (“[T]he ownership of a subsidiary by a parent, with nothing more, is not sufficient to constitute ‘doing business,’ for jurisdictional purposes.”); *accord Doe I v. Unocal Corp.*, 248 F.3d 915, 925 (9th Cir. 2001) (“The existence of a relationship between a parent company and its subsidiaries is not sufficient to establish personal jurisdiction over the parent on the basis of the subsidiaries’ minimum contacts with the forum.”). In any event, these subsidiaries have not contested jurisdiction and will be subject to discovery in the normal course of this litigation.

C. RESPONDENTS ARE ENTITLED TO REASONABLE ATTORNEYS' COSTS AND FEES

The trial court, exercising its broad discretion, properly awarded certain Respondents their attorneys' fees and costs. These fees are appropriate under either Washington's long-arm statute or Washington's Consumer Protection Act ("CPA"), RCW 19.86.160.

While the Attorney General contests the applicability of Washington's long-arm statute's fee provision to this action, he does not dispute on appeal the trial court's conclusion that the awarded fees and costs were reasonable in light of the complexity of the case and quality of the work.¹⁹ CP 1070-1083. Moreover, the Attorney General does not dispute that Respondents are entitled to their fees, in the alternative, pursuant to the CPA.

1. Respondents Are Entitled To Fees And Costs Under Washington's Long-Arm Statute

The Attorney General purports to identify a conflict of law where there is none. The fee recovery measures in Washington's general long-arm statute and its CPA are complementary, and both apply to Respondents' awarded fees. *See* RCW 19.86.160 (out-of-state defendants properly served under the CPA are "deemed to have thereby submitted

¹⁹ Respondents accordingly do not reiterate the evidence and arguments demonstrating the reasonableness of their awarded fees and costs.

themselves to the jurisdiction of the courts of this state within the meaning of ... RCW 4.28.185”).

Washington case law and commentary have explained that in “analyzing the proper application of [RCW 19.86.160], [the Washington Supreme Court] has used the same methods and precedents as it uses in applying [RCW 4.28.185].” Karl Tegland, 14 Wash. Prac. Civil Procedure § 4:24 (2d ed. 2011); *see also State v. Reader’s Digest Ass’n, Inc.*, 81 Wn.2d 259, 277, 501 P.2d 290 (1972) (analyzing personal jurisdiction asserted under the CPA by using case law interpreting RCW 4.28.185). Courts in Washington have consistently awarded fees pursuant to Washington’s general long-arm statute when the claims at issue sound in whole or in part under Washington’s CPA. *See, e.g., SeaHAVN*, 154 Wn. App. at 553, 560-63 (affirming fees awarded under the general long-arm statute where complaint alleged a CPA violation, among others).

The trial court’s order awarding fees to Respondents should likewise be affirmed here. As foreign entities haled into Washington court on less than minimum contacts and forced to defend themselves, Respondents “present[] the paradigm case for an award of fees under RCW 4.28.185(5).” *Scott Fetzer Co. v. Weeks*, 114 Wn.2d 109, 114, 786 P.2d 265 (1990). In *Scott Fetzer Co.*, the Washington Supreme Court held that a defendant is a prevailing party for purposes of cost and fee recovery

where, as here, it prevails on a motion to dismiss for lack of personal jurisdiction. *Id.* The Court explained: “As a direct result of the plaintiff’s resort to the long-arm statute . . . the defendant suddenly finds himself in need of Washington counsel and responsible for abiding Washington laws and court rules – burdens and inconveniences which would have been avoided had the trial been conducted at the place of his domicile.” *Id.* (internal citation and quotation marks omitted); *see also Voicelink Data v. Datapulse*, 86 Wn. App. 613, 627, 937 P.2d 1158 (1997) (award of attorneys’ fees and costs was proper where defendant obtained dismissal for lack of personal jurisdiction); *Hewitt v. Hewitt*, 78 Wn. App. 447, 457, 896 P.2d 1312 (1995) (same). The general long-arm statute specifically compensates parties who are unreasonably haled into Washington courts. *Scott Fetzer Co.*, 114 Wn.2d at 120.

2. Respondents Are Alternatively Entitled To Fees And Costs Under Washington’s CPA

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

The Washington Supreme Court weighs a number of factors when considering a fee award under RCW 19.86.080(1), including: the need to curb serious abuses of governmental power; the necessity of the lawsuit; the complexity and length of the case; the strong public interest in continued vigorous State prosecution of consumer protection violations; the necessity of avoiding hindsight logic; and the necessity of providing fair treatment to vindicated defendants. *State v. Black*, 100 Wn.2d 793, 806, 676 P.2d 963 (1984). While fee awards to a prevailing defendant under the CPA is not automatic, “[t]he public policy served by allowing prevailing defendants to recover litigation expenses from the State is a fundamental one.” *State v. State Credit Ass’n, Inc.*, 33 Wn. App. 617, 626, 657 P.2d 327 (1983). In *Black*, for example, the court awarded fees to the prevailing defendant, in part, to deter the government from exceeding its power to force businesses into litigation. 100 Wn.2d at 805-06. The court also emphasized the duplicative nature of the lawsuit, the complexity of the case, and the extensive amount of time spent in discovery. *Id.*

As in *Black*, the facts in this case show that the fee award below should be affirmed. Courts are important gatekeepers in limiting the Attorney General’s discretion to haul foreign businesses and individuals into Washington. *See id.* at 805-06; *State Credit Ass’n*, 33 Wn. App. at

628 (the fee balancing test must “give sufficient weight to the public interest in restraining abuses of government power”). Fee and cost recovery is particularly appropriate following a personal jurisdictional dismissal because the plaintiff’s attempt to pursue its claims in an improper forum imposes unique and substantial costs on a foreign defendant. *See Scott Fetzer Co.*, 114 Wn.2d at 114.

Finally, the necessity of providing fair treatment to vindicated defendants weighs in favor of a fees and costs award. The right to recover fees “is extremely valuable and should never be compromised or diminished through an inadequate award.” *Griffin v. Eller*, 130 Wn.2d 58, 922 P.2d 788, 792 (1996).

For these reasons, an award of attorneys’ fees under the CPA is also appropriate in the alternative to properly vindicate Respondents for prevailing on their motions to dismiss for lack of personal jurisdiction.

3. The Costs Associated With This Appeal Should Be Awarded to Respondents Pursuant to RAP 18.1

“In general, where a prevailing party is entitled to attorney fees below, they are entitled to attorney fees if they prevail on appeal.” *Gray v. Bourgette Const., LLC*, 160 Wn. App. 334, 345, 249 P.3d 644 (2011) (internal citations omitted); RAP 18.1(a). Respondents accordingly

request an award of reasonable attorneys' fees and costs associated with this appeal.²⁰

VI. CONCLUSION

Respondents respectfully request that this Court (1) affirm the dismissal for lack of personal jurisdiction; (2) affirm the denial of additional discovery; (3) affirm the award of attorneys' fees; and (4) grant the request for reasonable attorneys' fees on appeal.

SUBMITTED this 13th day of November, 2013.

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²⁰ Attorney's fees related to this appeal should be awarded to all respondents. RAP 18.1(a) does not require that the moving party have first sought fees before the trial court. *See* RAP 18.1(a); *see also Scheib v. Crosby*, 160 Wn. App. 345, 353, 249 P.3d 184 (2011) (allowing the recovery of attorney's fees sought for the first time on appeal); *Mutual of Enumclaw Ins. Co. v. Jerome*, 66 Wn. App. 756, 766, 833 P.2d 429 (1992) (same), *rev'd on other grounds* by 122 Wn.2d 157, 856 P.2d 1095 (1993).

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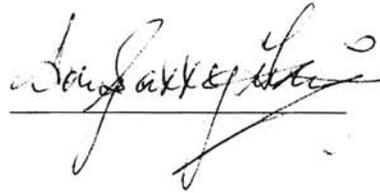
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I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

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 13th day of November, 2013, at Seattle, WA



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