No. ____

IN THE
Supreme Court of the United States

KONINKLIJKE PHILIPS N.V. A/K/A ROYAL PHILIPS, PHILIPS ELECTRONICS INDUSTRIES (TAIWAN), LTD., SAMSUNG SDI AMERICA, INC., SAMSUNG SDI BRASIL LTDA., SHENZHEN SAMSUNG SDI CO., LTD., AND TIANJIN SAMSUNG SDI CO., LTD.,
Petitioners,

v.

THE STATE OF WASHINGTON,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Due Process Clause permit a forum state to exercise specific personal jurisdiction over a nonresident defendant based solely on that defendant's placing component parts into the stream of commerce by selling them to third parties who make finished products that foreseeably may come to the forum state?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners Koninklijke Philips N.V. a/k/a Royal Philips, Philips Electronics Industries (Taiwan), Ltd., Samsung SDI America, Inc., Samsung SDI Brasil Ltda., Shenzhen Samsung SDI Co., Ltd., and Tianjin Samsung SDI Co., Ltd. were the defendants in the superior court, the appellees in the court of appeals, and the petitioners in the Washington Supreme Court.

The State of Washington was the plaintiff in the superior court, the appellant in the court of appeals, and the respondent in the Washington Supreme Court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Petitioner Koninklijke Philips N.V. a/k/a Royal Philips ("KPNV") states that it has no parent corporation and no publicly held company owns 10% or more of its stock. Petitioner Philips Electronics Industries (Taiwan), Ltd. ("Philips Taiwan") is wholly owned, directly or indirectly, by KPNV. Other than KPNV, no publicly held company owns 10% or more of Philips Taiwan's stock.

Petitioners Samsung SDI America, Inc., Samsung SDI Brasil Ltda., Shenzhen Samsung SDI Co., Ltd., and Tianjin Samsung SDI Co., Ltd. state that their parent company is Samsung SDI Co., Ltd., and that no other publicly held company owns 10% or more of their stock.

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IN THE

Supreme Court of the United States

KONINKLIJKE PHILIPS N.V. A/K/A ROYAL PHILIPS, PHILIPS ELECTRONICS INDUSTRIES (TAIWAN), LTD., SAMSUNG SDI AMERICA, INC., SAMSUNG SDI BRASIL LTDA., SHENZHEN SAMSUNG SDI CO., LTD., AND TIANJIN SAMSUNG SDI CO., LTD.,

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Petitioners Koninklijke Philips N.V. a/k/a Royal Philips, Philips Electronics Industries (Taiwan), Ltd., Samsung SDI America, Inc., Samsung SDI Brasil Ltda., Shenzhen Samsung SDI Co., Ltd., and Tianjin Samsung SDI Co., Ltd. respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Washington.

OPINIONS BELOW

The Washington Supreme Court's opinion (App., *infra*, 1a-45a) is reported at 375 P.3d 1035. The court of appeals' opinion (App., *infra*, 46a-78a) is reported at 341

P.3d 346. The superior court's orders (App., *infra*, 79a-84a) are unreported.

STATEMENT OF JURISDICTION

The judgment of the Washington Supreme Court was filed on July 21, 2016. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. XIV, § 1 provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PRELIMINARY STATEMENT

This case involves perhaps the most notorious and persistent split of authority in American jurisprudence. It presents a foundational constitutional question that has vexed the lower courts for nearly three decades: whether the Due Process Clause permits a forum state to exercise personal jurisdiction over a nonresident defendant based solely on the defendant's placing a product (or even, as here, just a component of a third party's finished product) into the stream of commerce that foreseeably brings the product to the forum state.

This Court confronted that question in *Asahi Metal Industry Co.* v. *Superior Court of California, Solano County*, 480 U.S. 102 (1987). The Court unanimously found jurisdiction lacking, but no majority supported any rationale. Justice O'Connor and three Justices held that personal jurisdiction requires "something more" than "a defendant's awareness that the stream of commerce may

or will sweep the product into the forum State." *Id.* at 111-112. The defendant, Justice O'Connor explained, must also "purposefully direct[]" its conduct "toward the forum State," by, for example, "designing the product for the market in the forum State[or] advertising in the forum State." *Id.* at 112. In contrast, Justice Brennan and three Justices allowed personal jurisdiction to be premised solely on a defendant's placing goods into the stream of commerce with an awareness that "the regular and anticipated flow of products from manufacture to distribution to retail sale" would bring the product to the forum state. *Id.* at 117.

That fractured opinion has generated pervasive confusion in lower state and federal courts. Many of those courts have adopted Justice O'Connor's "stream-of-commerce plus" test, but a roughly equal number have opted for Justice Brennan's "pure stream-of-commerce" approach. The result is a widely recognized, deeply entrenched, and thus far intractable split that begs resolution by this Court.

Notably, in the three decades since *Asahi*, this Court has repeatedly rejected expansive theories of personal jurisdiction. The Court has emphasized that *the defendant*—and not third parties—must take actions that target the forum state. These decisions are difficult, if not impossible, to square with the approach taken in Justice Brennan's *Asahi* opinion, under which third parties' independent actions within the stream of commerce generate jurisdiction over a foreign defendant who never targeted the forum state.

This case presents the Court with an ideal opportunity to resolve this festering split and bring the stream-of-commerce rationale into line with the Court's more recent decisions. Petitioners are foreign component-part manufacturers who sold their wares to foreign finished-product manufacturers, who in turn ultimately transmit-

ted those finished products directly or indirectly to Washington. Petitioners did nothing to target the Washington market. The choice between Justice O'Connor's or Justice Brennan's approach is dispositive of whether Washington courts must decline or may exercise jurisdiction. There are no factual complications; the issue is purely legal, and because the Washington Supreme Court followed Justice Brennan's expansive approach, it upheld personal jurisdiction.

This case thus offers a rare opportunity for a majority of the Court to finally dispel the chaos that continues to plague the lower courts.

STATEMENT

I. BACKGROUND

The State of Washington "sued more than 20 foreign electronics manufacturing companies (including the petitioners) for price fixing" of cathode-ray tubes ("CRTs") in violation of Washington antitrust law. App., *infra*, 2a. "CRTs were the dominant display technology used in televisions and computer monitors before the advent of LCD (liquid crystal display) panels and plasma display technologies." *Id.* at 2a-3a. The State alleged not that it or its residents had purchased the CRTs themselves, but rather that "Washington consumers and the State of Washington itself paid supracompetitive prices for the products" that contained the price-fixed CRTs. *Id.* at 3a.

The State sought to establish personal jurisdiction exclusively via a pure stream-of-commerce theory. Specifically, the State alleged in its complaint that "[e]ach of the Defendants sold CRTs into international streams of commerce with the knowledge, intent and expectation that such CRTs would be incorporated into CRT Products to be sold to consumers throughout the United

States, including in Washington State." CP 13.[1] The State did not allege that petitioners targeted the Washington market (or even the United States market) by designing the CRTs for that market or advertising in that market. The State instead based its assertion of personal jurisdiction solely on the foreseeable acts of third parties who incorporated the CRTs into finished products and ultimately elected to sell those finished products in Washington. App., *infra*, 3a.

II. PROCEEDINGS BELOW

A. Proceedings in the superior court and court of appeals

Petitioners moved to dismiss for lack of personal jurisdiction,[2] arguing that the State had not alleged sufficient Washington contacts to establish personal jurisdiction under the Due Process Clause. CP 90-106, 127-141. In response, the State argued only the pure stream-of-commerce theory it had alleged in the complaint, framing the issue as whether "the Court ha[s] jurisdiction under the [antitrust statute] where defendants have purposefully availed themselves of the Washington market via stream-of-commerce." CP 258.[3]

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[1] Accord App., *infra*, 2a (recounting State's allegation that "the foreign companies conspired to fix prices by selling CRTs (cathode ray tubes) into international streams of commerce intending they be incorporated into products sold at inflated prices in large numbers in Washington State").

[2] Other defendants in the case, including a Delaware corporation that is in the Philips corporate family, did not challenge Washington's personal jurisdiction.

[3] Petitioners filed affidavits that detailed their lack of contacts with Washington. App., *infra*, 4a, 15a-16a; CP 105-106, 205. Ultimately, the Washington Supreme Court held that it could not consider the affidavits at this procedural stage of the case. App., *infra*, 4a, 15a-16a. Petitioners do not challenge that ruling here, and thus the case comes to this Court based exclusively on the State's pleaded allega-

The superior court agreed with petitioners and granted their motions to dismiss. App., *infra*, 79a-84a. It rejected the State's stream-of-commerce theory and held that placing a component part into the stream of commerce, without more, is not sufficient to confer personal jurisdiction over petitioners: "[J]ust put[ting] it into the stream of commerce throughout the country is not enough." Hr'g Tr. 57. The superior court perceived that the State was "really advocating for an expansion, or a change in the law." *Id.* at 58.

The court of appeals reversed, holding that the State's pure stream-of-commerce theory was constitutionally sufficient. App., *infra*, 46a-78a. The court of appeals reasoned that Washington courts could exercise personal jurisdiction over petitioners because other companies incorporated their component parts into finished products that were later sold in meaningful quantities in Washington: "[W]e hold that because a product manufactured by these foreign corporations was sold—as an integrated component part of retail consumer goods—into Washington in high volume over a period of years, the corporations 'purposefully' established 'minimum contacts' in Washington." *Id.* at 47a.

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tions, as framed by their legal arguments below. Three entities—Samsung SDI Co., Ltd., Samsung SDI Mexico S.A. de C.V., and Samsung SDI (Malaysia) Sdn. Bhd.—filed affidavits acknowledging that they sold directly to a Washington manufacturer. CP 206. Those entities do not join this petition. (The dissent below confuses the names of the Samsung SDI entities that filed such affidavits with those of the Samsung SDI entities that filed affidavits detailing their lack of contacts with Washington (and that are petitioners here). Compare App., *infra*, 19a n.4, 36a n.13., with CP 205-206. The dissent's references to upholding personal jurisdiction over the "SDI Defendants" thus were meant to refer to the three Samsung SDI entities who are not petitioners here. See App., *infra*, 19a n.4 (defining Samsung SDI entities who sold CRTs to a Washington manufacturer as "SDI Defendants").

B. The Washington Supreme Court's decision

1. A divided Washington Supreme Court, sitting *en banc*, affirmed the court of appeals by a six-to-three vote. App., *infra*, 1a-45a. The majority rejected petitioners' arguments for a stream-of-commerce test that required something more than knowledge that third parties would incorporate the component parts and sell the finished products in the forum. *Id.* at 8a-9a, 11a-12a. Instead, relying on its reading of Justice Breyer's concurrence in *J. McIntyre Machinery, Ltd.* v. *Nicastro*, 564 U.S. 873 (2011), the majority adopted a broad stream-of-commerce approach that allowed "personal jurisdiction over a foreign defendant where a substantial volume of sales took place in a state as part of the regular flow of commerce." App., *infra*, 11a. The majority's rule requires no targeting of the forum state.

Applying that test, the majority agreed with the "[t]he State['s] argu[ment] that the Companies have established purposeful minimum contacts by placing CRTs into the stream of commerce with the knowledge and intent that their CRTs would be incorporated into products sold in massive quantities throughout the United States, including in large numbers in Washington." *Id.* at 7a-8a.

2. Three Justices disputed the majority's application of this Court's stream-of-commerce cases. *Id.* at 24a-25a. They recognized that the majority "takes the position that *J. McIntyre* adopted the bulk of Justice Brennan's *Asahi* concurrence (without saying so)." *Id.* at 25a. Justice Brennan had advocated the same pure stream-of-commerce approach adopted by the majority, which rejects the need for any additional showing beyond a defendant's placing goods in the stream of commerce knowing that "the regular and anticipated flow of products from manufacture to distribution to retail sale" would likely bring the product to the forum state. *Asahi*, 480

U.S. at 117. The dissenting Justices below objected to the majority's interpretation of *J. McIntyre* because "*J. McIntyre* did not silently adopt Justice Brennan's *Asahi* concurrence." App., *infra*, 26a.

The dissent would have instead applied a test similar to the "stream-of-commerce plus" test from Justice O'Connor's four-Justice opinion in *Asahi*, under which personal jurisdiction requires "something more" than "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State." *Asahi*, 480 U.S. at 111-112. A defendant must also "purposefully direct[]" its conduct "toward the forum State," such as by "designing the product for the market in the forum State[or] advertising in the forum State." *Id.* at 112.

The dissent reasoned that "foreseeability of a defendant's product eventually entering the forum state, alone, is not sufficient to support jurisdiction." App., *infra*, 38a. "Nor can jurisdiction be based on the fact that the defendant benefited financially from some collateral relation with the forum state." *Ibid.* Instead, "[t]here must be purposeful availment by the defendant." *Ibid.* "[U]nilateral activity" by third parties is not enough. *Ibid.* Yet here, "[t]he only connection the complaint alleged between Defendants and Washington stemmed from the unilateral activities of others in incorporating Defendants' CRTs into new end products for sale in Washington." *Id.* at 38a-39a. The dissent thus concluded that the State failed to allege that petitioners purposefully availed themselves of the Washington forum such that jurisdiction would be proper under the Due Process Clause. *Id.* at 38a-41a.

The dissent noted that "[s]everal of our sister and lower courts have come to the same conclusion" as the dissent had. *Id.* at 39a. The dissent cited decisions by the South Dakota Supreme Court and the District of Columbia Court of Appeals, each of which rejected the pure

stream-of-commerce approach and found personal jurisdiction lacking over allegations that defendants fixed the price of a component part that was ultimately sold in the forum state as part of finished products. *Id.* at 39a-40a.

3. The dissent differed from the majority in another way as well; it would have applied the "effects test" from *Calder* v. *Jones*, 465 U.S. 783 (1984), to find no personal jurisdiction. App., *infra*, 19a. That test shares the "stream of commerce plus" test's focus on targeting, finding jurisdiction only when the defendant's conduct was "expressly aimed at [the forum state]." *Calder*, 465 U.S. at 789. Applying the *Calder* effects test, the dissent concluded that Washington lacks jurisdiction because "[t]he State did not allege any facts showing that the conspiracy targeted purchasers of CRTs in Washington." App., *infra*, 32a. Petitioners "did not direct activities toward the forum state (Washington) and did not sell products to customers here." *Id.* at 36a-37a.

The majority declined to apply the *Calder* effects test because, in its view, "neither of the parties asked us to distinguish these tests and disregard the stream of commerce one." *Id.* at 13a n.4.

REASONS FOR GRANTING THE PETITION

I. COURTS ARE INTRACTABLY DIVIDED OVER WHICH STREAM-OF-COMMERCE TEST IS CONSTITUTIONALLY MANDATED

Federal and state courts across the United States have divided over what should be one of the most basic constitutional principles—when courts in our country may exercise power over out-of-state defendants *at all*. Specifically, courts are at loggerheads concerning whether the Due Process Clause permits personal jurisdiction to be based solely on a defendant's having placed a product into the stream of commerce that foreseeably brings the product to the forum state—including when the

product is just a component that a third party uses to create finished goods that are ultimately sold in the forum.

A. The Due Process Clause limits the reach of a forum state's jurisdiction over nonresident defendants who place products into the stream of commerce

1. *Basic jurisdictional principles*

The "constitutional touchstone" for determining if a forum state may exercise personal jurisdiction over nonresident defendants is "whether the defendant purposefully established 'minimum contacts' in the forum State." *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 474 (1985); see also *Int'l Shoe Co.* v. *Wash.*, 326 U.S. 310, 316 (1945). "[T]here [must] be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King*, 471 U.S. at 475 (quoting *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958)).

This Court, therefore, has been clear that the forum contacts must be made *by the defendant*. *Id.* at 475. "[U]nilateral activity of another party or a third person is not an appropriate consideration * * * ." *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 417 (1984). As the Court explained in *World-Wide Volkswagen Corp.* v. *Woodson*, a "seller of chattels[']" "amenability to suit [does not] travel with the chattel." 444 U.S. 286, 296 (1980). Rather, it "arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States." *Id.* at 297.

2. *The fractured opinions in* Asahi *and* J. McIntyre

a. The Court squarely confronted the stream-of-

commerce issue in *Asahi*. Defendant Asahi was a Japanese valve assembly manufacturer who had delivered valve assemblies to a tube manufacturer, Cheng Shin, in Taiwan, who then sold those tubes worldwide, including in California. *Asahi*, 480 U.S. at 106. The question was whether "the mere awareness on the part of a foreign defendant that the components it manufactured, sold, and delivered outside the United States would reach the forum State in the stream of commerce" satisfies the constitutional "minimum contacts" test for specific personal jurisdiction. *Id.* at 105.

This Court split four-to-four over the appropriate test for establishing minimum contacts, with Justice Stevens taking no position on the issue.[4] Writing for four Justices, Justice O'Connor favored what has come to be known as the "stream-of-commerce plus" theory of personal jurisdiction. Under that approach, minimum contacts requires "something more" than "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State." *Id.* at 111-112. The defendant must also "purposefully direct[]" its conduct "toward the forum State," such as by "designing the product for the market in the forum State[or] advertising in the forum State." *Id.* at 112. Because Asahi had not targeted California when it sold its component parts, it did not have the minimum contacts with California required for personal jurisdiction. *Id.* at 112-113.

Justice Brennan, also writing for four Justices, focused on foreseeability rather than targeted conduct. He rejected the need for an additional showing beyond a de-

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[4] Justice Stevens instead concluded that "this case fits within the rule that 'minimum requirements inherent in the concept of "fair play and substantial justice" may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities.'" *Asahi*, 480 U.S. at 121-122.

fendant's placing goods in the stream of commerce with the awareness that "the regular and anticipated flow of products from manufacture to distribution to retail sale" would bring the product to the forum state. *Id.* at 117. Justice Brennan thus concluded that "Asahi's regular and extensive sales of component parts to a manufacturer it knew was making regular sales of the final product in California" established minimum contacts. *Id.* at 121.[5]

b. In the nearly thirty years since *Asahi*, this Court has never achieved a majority opinion on the stream-of-commerce question that had fractured the Court. It touched upon the issue only once in that timespan, in *J. McIntyre*. That case involved a foreign finished-product manufacturer who engaged a U.S. distributor to sell its finished products throughout the United States. 564 U.S. at 878-879. New Jersey exercised personal jurisdiction over the manufacturer because at least one of its machines ended up in New Jersey and caused injury there. *Ibid.* The particular factual setting of that case prevented the Court from producing a majority opinion, resulting instead in a splintered four-two-three result.

Justice Kennedy's four-Justice plurality opinion in *J. McIntyre* explicitly rejected Justice Brennan's foreseeability-based approach to personal jurisdiction: "Justice Brennan's concurrence * * * is inconsistent with the premises of lawful judicial power." 564 U.S. at 883. Merely placing items into the stream of commerce, without some purposeful direction towards the forum state, is insufficient to establish personal jurisdiction. Instead, "[t]he defendant's transmission of goods permits the ex-

[5] Justice Brennan went on to conclude "that the exercise of personal jurisdiction over Asahi in this case would not comport with 'fair play and substantial justice.'" *Asahi*, 480 U.S. at 116. Thus, the Court was unanimous in holding that personal jurisdiction could not be exercised over Asahi.

ercise of jurisdiction only where the defendant can be said to have targeted the forum * * * ." *Id.* at 882. Justice Kennedy thus adopted a theory of personal jurisdiction that is "consistent with Justice O'Connor's opinion in *Asahi*." *Id.* at 885. Justice Kennedy concluded that New Jersey could not exercise personal jurisdiction because the manufacturer had not "engaged in conduct purposefully directed at New Jersey" when it shipped its finished products to an Ohio distributor who in turn targeted the United States as a whole. *Id.* at 886.

Justice Breyer's two-Justice concurrence in the judgment declined to "announce a rule of broad applicability" because "the outcome of this case is determined by our precedents." *Id.* at 887. Justice Breyer reasoned that New Jersey would lack jurisdiction under either stream-of-commerce approach from *Asahi*. Personal jurisdiction was improper under Justice Brennan's test because there was "no 'regular . . . flow' or 'regular course' of sales in New Jersey." *Id.* at 889. Nor could personal jurisdiction be sustained under Justice O'Connor's approach because "there is no 'something more,' such as special state-related design, advertising, advice, marketing, or anything else." *Ibid.* Justice Breyer "would not go further," and declined to "mak[e] broad pronouncements that refashion basic jurisdictional rules" on the factual record of that case. *Id.* at 890.

The three-Justice dissent in *J. McIntyre* would have found personal jurisdiction based on the defendant's efforts to market its products throughout the United States. *Id.* at 905. The dissent reasoned that "McIntyre UK, by engaging McIntyre America to promote and sell its machines in the United States, 'purposefully availed itself' of the United States market nationwide, not a market in a single State or a discrete collection of States." *Ibid.* Unlike the majority, the dissent did not see the lack of specific targeting of New Jersey as an impediment to

jurisdiction because the defendant's "actions target[ed] a national market." *Ibid.* The dissent distinguished *Asahi* because Asahi targeted neither the United States nor the forum-state market: "Asahi, unlike McIntyre UK, did not itself seek out customers in the United States, it engaged no distributor to promote its wares here, it appeared at no tradeshows in the United States, and, of course, it had no Web site advertising its products to the world." *Id.* at 908. Instead, the dissent emphasized, "Asahi was a component-part manufacturer with 'little control over the final destination of its products once they were delivered into the stream of commerce.'" *Ibid.*

B. For nearly three decades, state supreme courts and federal courts of appeals have been divided over competing formulations of the stream-of-commerce test for personal jurisdiction

In the three decades since *Asahi*, the question of the correct version of the stream-of-commerce test has fractured the lower courts. The 2011 decision in *J. McIntyre* has not mended the breach, and the judgment below has only exacerbated it.

1. *J. McIntyre* itself acknowledged that "[s]ince *Asahi* was decided, the courts have sought to reconcile the competing opinions," 564 U.S. at 883 (plurality), yet "[t]he rules and standards for determining when a State does or does not have jurisdiction over an absent party have been unclear because of decades-old questions left open in *Asahi* * * * ." *Id.* at 877. As Wright & Miller puts it, "the *Asahi* Court's four to four division on the scope of the stream of commerce principle left matters in somewhat of a muddle," with "[e]ach approach find[ing] considerable representation in lower federal court decisions." Wright, et al., 4 Fed. Prac. & Proc. Civ. § 1067.4

(4th ed. 2015).[6]

Many federal courts of appeals and state supreme courts have followed Justice O'Connor's "stream-of-commerce plus" test and required proof that the defendant targeted the forum state. See, *e.g.*, *Bridgeport Music, Inc.* v. *Still N The Water Publ'g*, 327 F.3d 472, 479-480 (6th Cir. 2003); *Lesnick* v. *Hollingsworth & Vose Co.*, 35 F.3d 939, 945-946 (4th Cir. 1994); *Boit* v. *Gar-Tec Prods., Inc.*, 967 F.2d 671, 682-683 (1st Cir. 1992); *State* v. *NV Sumatra Tobacco Trading Co.*, 403 S.W.3d 726, 754-759 (Tenn. 2013); *Spir Star AG* v. *Kimich*, 310 S.W.3d 868, 873 (Tex. 2010); *State* v. *N. Atl. Ref. Ltd.*, 999 A.2d 396, 406 (N.H. 2010); *CSR, Ltd.* v. *Taylor*, 983 A.2d 492, 507 (Md. 2009).

And a number of other federal courts of appeals and state supreme courts have followed Justice Brennan's pure stream-of-commerce approach, declining to require any evidence of targeting by the defendant. See, *e.g.*, *Luv N' Care, Ltd.* v. *Insta-Mix, Inc.*, 438 F.3d 465, 470 (5th Cir. 2006); *Dehmlow* v. *Austin Fireworks*, 963 F.2d 941, 947 (7th Cir. 1992); *State* v. *Atl. Richfield Co.*, 142 A.3d 215, 223-225 (Vt. 2016); *Ex parte DBI, Inc.*, 23 So. 3d 635, 645-649, 654-656 (Ala. 2009); *State* v. *NV Sumatra Tobacco Trading, Co.*, 666 S.E.2d 218, 222-223 & n.5 (S.C. 2008); *Kopke* v. *A. Hartrodt S.R.L.*, 629 N.W.2d 662, 674-675 (Wis. 2001); *Hill by Hill* v. *Showa Denko, K.K.*, 425 S.E.2d 609, 616 (W.V. 1992).[7]

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[6] Various courts have long noted the split. See, *e.g.*, *Commissariat A L'Energie Atomique* v. *Chi Mei Optoelectronics Corp.*, 395 F.3d 1315, 1322 (Fed. Cir. 2005) (recognizing that "[t]he regional circuits * * * remain divided on the proper due process standard" for stream-of-commerce personal jurisdiction).

[7] This is not an exhaustive list. Leading treatises and commentators have catalogued the split in more detail. See 4 Wright, et al., Fed. Prac. & Proc. Civ. § 1067.4 (4th ed. 2015); 16 Moore et al., Moore's Federal Practice § 108.42[4][b] (3d ed. 2016); Grossi, Personal Ju-

2. Many other courts and commentators have confirmed those observations—and, more importantly, have confirmed that *J. McIntyre*'s splintered opinions and idiosyncratic fact pattern have done nothing to alleviate the split among the lower courts. To the contrary, courts have "largely declined to alter their pre-existing jurisdictional framework based on *Nicastro*." Jacobs, A Fork in the Stream: The Unjustified Failure of the Concurrence in *J. McIntyre Machinery Ltd.* v. *Nicastro* to Clarify the Stream of Commerce Doctrine, 12 DePaul Bus. & Com. L.J. 171, 194 (2014).[8]

Indeed, *J. McIntyre* has *exacerbated* the division by adding another layer to the confusion. While "many lower courts have indicated that Justice Breyer's concurring opinion constitutes the Court's holding, * * * many [other] lower courts have relied on Justice Kennedy's plurality opinion." 4 Wright, et al., Fed. Prac. & Proc.

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risdiction: A Doctrinal Labyrinth with No Exit, 47 Akron L. Rev. 617, 648-649 (2014); Peterson, The Timing of Minimum Contacts, 79 Geo. Wash. L. Rev. 101, 119 (2010).

[8] See, *e.g.*, *Ainsworth* v. *Moffett Eng'g, Ltd.*, 716 F.3d 174, 177-178 (5th Cir. 2013) (rejecting the argument that "the Fifth Circuit's stream-of-commerce approach is no longer proper after the Supreme Court's decision in *McIntyre*" and reaffirming the Fifth Circuit's adoption of a test that is consistent with Justice Brennan's approach); *NV Sumatra Tobacco*, 403 S.W.3d at 754-755, 759 (observing that "*J. McIntyre Machinery* fails to signal a change in the law" and reaffirming Tennessee's pre-*J. McIntyre* adoption of a test consistent with Justice O'Connor's approach); see also *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 753 F.3d 521, 541 (5th Cir. 2014) (noting "that the law remains the same after *McIntyre*, and that circuit courts may continue to attempt to reconcile the Supreme Court's competing articulations of the stream of commerce test"); *Russell* v. *SNFA*, 987 N.E.2d 778, 794 (Ill. 2013) ("*McIntyre* has not definitively clarified the proper application of the stream-of-commerce theory.").

Civ. § 1067.4 (4th ed. 2015).[9] Wright & Miller further notes that "[c]ourts have also disagreed about whether *McIntyre* declared a winner as between Justice O'Connor's and Justice Brennan's approaches in *Asahi*." *Ibid.* Other commentators have echoed those conclusions. See, *e.g.*, 16 Moore et al., Moore's Federal Practice § 108.42[4][b] (3d ed. 2016) ("The three opinions in *Nicastro* provide no more authoritative guidance to the lower courts on the stream-of-commerce question than did the three opinions in *Asahi*."); Grossi, Personal Jurisdiction: A Doctrinal Labyrinth with No Exit, 47 Akron L. Rev. 617, 649 (2014) ("*McIntyre* did nothing to allay that confusion.").

3. The Washington Supreme Court has now extended this entrenched split by joining the courts that favor Justice Brennan's pure stream-of-commerce approach. It adopted a test permitting "personal jurisdiction over a foreign defendant where a substantial volume of sales took place in a state as part of the regular flow of commerce," with no requirement that the component-part manufacturer have targeted the forum. App., *infra*, 11a. The dissent correctly recognized that the majority

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[9] Compare, *e.g.*, *ESAB Grp., Inc.* v. *Zurich Ins. PLC*, 685 F.3d 376, 392 (4th Cir. 2012) (citing Justice Kennedy's plurality for the proposition that "merely plac[ing] a product into the stream of commerce foreseeing that it might ultimately reach the forum state" is insufficient and instead that a defendant must "'target[] the forum' with its goods"), and *Carreras* v. *PMG Collins, LLC*, 660 F.3d 549, 555 (1st Cir. 2011) (citing Justice Kennedy's plurality for the proposition that "[p]urposeful availment re[quires that] * * * a defendant deliberately target[] its behavior toward the society or economy of a particular forum"), with, *e.g.*, *Ainsworth*, 716 F.3d at 178 ("Justice Breyer's concurring opinion, joined by Justice Alito, furnished the narrowest grounds for the decision and controls here."), and *AFTG-TG, LLC* v. *Nuvoton Tech. Corp.*, 689 F.3d 1358, 1363 (Fed. Cir. 2012) ("The narrowest holding is that which can be distilled from Justice Breyer's concurrence—that the law remains the same after *McIntyre*.").

"adopt[ed] the bulk of Justice Brennan's *Asahi* concurrence." *Id.* at 25a. Indeed, the majority expressly rejected petitioners' arguments in favor of the "stream-of-commerce plus" test and declined to add any requirements beyond the minimal showing that Justice Brennan found sufficient. See *id.* at 8a-9a, 11a-12a.

II. THE PURE STREAM-OF-COMMERCE APPROACH IS AT ODDS WITH THIS COURT'S RECENT CASE LAW AND BASIC JURISDICTIONAL PRINCIPLES

No matter how the Washington Supreme Court had ruled on the stream-of-commerce question, it would have accentuated the split on that issue. But in selecting the pure stream-of-commerce approach, that court opted for a test at odds with this Court's recent case law and well-established jurisdictional principles. The Court should disapprove that approach.

A. The pure stream-of-commerce test contradicts the jurisdictional principle that *the defendant's* contacts with *the forum* are the *sine qua non* of purposeful availment: "For a State to exercise jurisdiction consistent with due process, that relationship must arise out of contacts that the 'defendant *himself*' creates with the forum and must be analyzed with regard to the defendant's contacts with the forum itself * * * ." *Walden* v. *Fiore*, 134 S. Ct. 1115, 1118 (2014) (citations omitted). The defendant must make "efforts * * * to serve directly or indirectly, the market for its product in other States." *World-Wide Volkswagen*, 444 U.S. at 297. Thus, a third party's targeting of the forum cannot create personal jurisdiction over the defendant, even where those third-party actions are foreseeable. See *Helicopteros*, 466 U.S. at 417 ("[U]nilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction."); *World-*

Wide Volkswagen, 444 U.S. at 295 ("'[F]oreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause."). By the same token, a defendant's contacts with third parties somehow linked to the forum—as opposed to contacts with the forum itself—are insufficient: "We have consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State." *Walden*, 134 S. Ct. at 1122. Disregarding these bedrock jurisdictional principles, the Washington Supreme Court found personal jurisdiction here even though, as the dissent noted, "[t]he only connection the complaint alleged between Defendants and Washington stemmed from the unilateral activities of others in incorporating Defendants' CRTs into new end products for sale in Washington." App., *infra*, 38a-39a.

The pure stream-of-commerce test improperly shifts the focus from petitioners' contacts with Washington to their contacts with third-party manufacturers of finished products who ultimately transmit the products to Washington and elsewhere. Here, as in *Walden*, the State has not alleged that any "part of [petitioners'] course of conduct occurred in [the forum state]," and thus petitioners "formed no jurisdictionally relevant contacts with [the forum state]." 134 S. Ct. at 1124. As had the Ninth Circuit in *Walden*, "[t]he [Washington Supreme Court] reached a contrary conclusion by shifting the analytical focus from [petitioners'] contacts with the forum to [their] contacts with" third parties who manufactured the finished product and sold it in Washington. *Ibid.* That eviscerates the principle that "it is the defendant, not the plaintiff or third parties, who must create contacts with the forum State." *Id.* at 1126. And it totally disregards *World-Wide Volkswagen*'s teaching that "financial benefits accruing to the defendant from a collateral relation to

the forum State will not support jurisdiction if they do not stem from a constitutionally cognizable contact with that State." 444 U.S. at 299.

Finally, the pure stream-of-commerce approach upends this Court's insistence that "the Due Process Clause 'giv[e] a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King*, 471 U.S. at 472 (quoting *World-Wide Volkswagen*, 444 U.S. at 297); see also *Daimler AG* v. *Bauman*, 134 S. Ct. 746, 761-762 (2014) (rejecting a theory of personal jurisdiction that "would scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit'") (quoting *Burger King*, 471 U.S. at 472). Parties cannot structure their conduct to limit their jurisdictional exposure if their "amenability to suit * * * travel[s] with the chattel." *World-Wide Volkswagen*, 444 U.S. at 296. Yet the pure stream-of-commerce test embraces precisely the opposite logic, finding purposeful availment by foreign manufacturers based solely on third parties' transmitting their products into the forum.

In short, although the Washington Supreme Court could not avoid adding to the existing split, it made the wrong choice about *how* to do so. Rather than follow this Court's recent case law and the bedrock principles guiding the personal-jurisdiction analysis, the Washington Supreme Court instead adopted the pure stream-of-commerce approach and thus found personal jurisdiction in a factual setting devoid of the basic ingredients for minimum contacts and purposeful availment.

B. The pure stream-of-commerce approach is especially ill-suited for the component-part context of this case, making it a particularly inviting vehicle for plenary

review. As the three dissenting Justices in *J. McIntyre* explained when distinguishing *Asahi*, component-part manufacturers like Asahi (and petitioners) possess "little control over the final destination of [their] products once they [are] delivered into the stream of commerce." 564 U.S. at 908. Component-part manufacturers' economic interests end once they sell their components to their finished-product manufacturer customers. Absent specific evidence of forum-targeted design or marketing, there is no reason to believe that component-part manufacturers direct or care *where* the finished-product manufacturers sell their finished products.

That is why even a high volume of sales of finished products in a forum cannot establish personal jurisdiction over a component-part manufacturer who does not target the forum. "As Justice O'Connor explained in *Asahi*, 'the placement of a product into the stream of commerce'—even hundreds of thousands of it—'without more, is not an act of the defendant purposefully directed toward the forum State.'" App., *infra*, 25a n.5 (dissenting opinion) (quoting *Asahi*, 480 U.S. at 112); see *Asahi*, 480 U.S. at 106, 112-113 (declining to find minimum contacts by a component-part manufacturer despite the sales of hundreds of thousands of finished products in the forum). Much like the principle that any number multiplied by zero always equals zero, millions of finished-product sales cannot create purposeful availment absent some evidence of forum targeting by *the defendant* component-part manufacturer. To be sure, a low volume of finished-product sales may be relevant to *defeat* jurisdiction even when coupled with some indication of targeting, as Justice Breyer suggested in his *J. McIntyre* concurrence. See 564 U.S. at 888 ("None of our precedents finds that a single isolated sale, even if accompanied by the kind of sales effort indicated here, is sufficient."). But volume alone means nothing absent the essential link back to the

component-part manufacturer's purposeful direction.

A test that hinges on a high volume of finished-product sales offers only the illusion of predictability. When a manufacturer purchases components from multiple suppliers, each individual component supplier has no means of anticipating where the finished products containing *its* components will ultimately be sold, much less in what volume. Such a jurisdictional regime "would require every product manufacturer, large or small, selling to American distributors to understand not only the tort law of every State, but also the wide variance in the way courts within different States apply that law." *Id.* at 892 (Breyer, J., concurring in judgment).

C. The *J. McIntyre* dissenters also recognized that the forum state will usually have personal jurisdiction over the defendant company that sells directly into the forum state—as Washington does here, *supra* p. 5 nn. 2-3—which reduces the concern about a plaintiff being left without a responsible party to sue. See *id.* at 908 ("It was important to the Court in *Asahi* that 'those who use Asahi components in their final products, and sell those products in California, [would be] subject to the application of California tort law.'"). There is consequently no reason to strain the Due Process Clause to exercise jurisdiction over component-part manufacturers who have not purposefully targeted the forum.

The sound reasoning summarized above undergirds the decisions of many courts that, contrary to the Washington Supreme Court, have rejected personal jurisdiction based solely on a foreign component-part manufacturer's placement of its components into the stream of commerce, where third parties have incorporated those components into finished products and sold those products—even in high volume—in the forum state. See, *e.g.*, *Rodriguez* v. *Fullerton Tires Corp.*, 115 F.3d 81, 84-85 (1st Cir. 1997); *Lesnick*, 35 F.3d at 946-947; *Frankenfeld*

v. *Crompton Corp.*, 697 N.W.2d 378, 380-381, 384-386 (S.D. 2005); *Holder* v. *Haarmann & Reimer Corp.*, 779 A.2d 264, 266, 273-274 (D.C. 2001); *Anderson* v. *Metro. Life Ins. Co.*, 694 A.2d 701, 703 (R.I. 1997); *In re Minn. Asbestos Litig.*, 552 N.W.2d 242, 246-247 (Minn. 1996).

III. This Issue Is Important And Is Well Suited For Plenary Review In This Case

A. This case is a good vehicle for resolving the split

1. *This case presents the stream-of-commerce issue as a dispositive legal question without factual or procedural complications*

This case presents the stream-of-commerce issue cleanly. It is a dispositive legal question with no factual complications. Under Justice Brennan's pure stream-of-commerce approach, the Washington Supreme Court upheld personal jurisdiction over petitioners. The State alleged that third parties would foreseeably incorporate petitioners' CRTs into finished products and ultimately sell those products in Washington, App., *infra*, 2a-3a, and that is sufficient for personal jurisdiction under Justice Brennan's approach. Under Justice O'Connor's "stream-of-commerce plus" test—or any other formulation that requires some purposeful targeting by the defendant—Washington lacks personal jurisdiction over petitioners. The State has alleged none of the "plus" targeting factors required for personal jurisdiction under the "stream-of-commerce plus" test, nor has it otherwise attempted to meet any burden higher than that imposed by the pure stream-of-commerce approach. See *id.* at 25a n.5 (dissenting opinion) ("[T]he State's complaint clearly fails Justice O'Connor's 'stream of commerce plus' test * * * . Here, the State has not alleged that Defendants marketed in Washington State or designed their products to target Washington purchasers."). Accordingly,

settling the dispute over whether the pure stream-of-commerce test is consistent with the Constitution answers the question of whether Washington possesses personal jurisdiction over petitioners in this case.

This case is also an attractive vehicle because the State has sought to establish personal jurisdiction only under a pure stream-of-commerce theory. That theory is framed by its pleadings and legal arguments below, without any factual disputes as the case comes to this Court. See *supra* pp. 4-5 & n.3. The Washington Supreme Court—both the majority and dissent—addressed the stream-of-commerce question explicitly and came to opposite conclusions, mirroring the broader split among the lower courts. See *supra* pp. 7-9. When the dissent concluded that Washington also lacked jurisdiction under the *Calder* effects test, it relied on the same lack of targeting that dooms Washington's jurisdiction under the "stream-of-commerce plus" test. App., *infra*, 32a ("The State did not allege any facts showing that the conspiracy targeted purchasers of CRTs in Washington."); *id.* at 36a-37a. In sum, nothing prevents the Court from deciding whether the pure stream-of-commerce test is constitutionally compliant, or whether some targeting of the forum state is required.[10]

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[10] Much like the targeting required under the "stream-of-commerce plus" test, the *Calder* effects supports personal jurisdiction only if the defendant's conduct was "expressly aimed at [the forum state]." *Calder*, 465 U.S. at 789. This convergence makes sense because the tests are merely tools to aid courts in determining whether a defendant has "purposefully established 'minimum contacts' in the forum State." *Burger King*, 471 U.S. at 474.

2. *This case arises in an ideal factual context that involves none of the issues that prevented the Court from resolving the stream-of-commerce question in* J. McIntyre

a. *J. McIntyre* did not present a clear opportunity to resolve the *Asahi* split because it was not a traditional stream-of-commerce case.[11] It did not involve a foreign component-part manufacturer that sold its components into the stream of commerce, where foreign third-party manufacturers then incorporated those components into finished products and ultimately transmitted them into the forum state. Instead, *J. McIntyre* involved a finished-product manufacturer that had directly retained an American distributor for the express purpose of selling the product in the United States. The issue in *J. McIntyre* was less whether the defendant engaged in purposeful availment and more whether availment of the entire U.S. market was sufficient or whether specific targeting of the forum state was required.

b. By contrast, this case arises in a favorable factual context for resolving the stream-of-commerce split. Under the State's allegations, petitioners are nonresident component-part manufacturers with no connection to Washington other than that third parties incorporated their products into finished products that were later sold in Washington. App., *infra*, 2a-4a. This Court has approached greater consensus on the stream-of-commerce test in this component-part manufacturer context. Indeed, the three dissenting Justices in *J. McIntyre* ap-

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[11] See *J. McIntyre*, 564 U.S. at 877 (plurality) ("[T]he 'stream of commerce' metaphor carried the [lower court's] decision far afield."); *id.* at 905 (Ginsburg, J., dissenting) (rather than merely placing its product into the stream of commerce, "McIntyre UK * * * engag[ed] McIntyre America to promote and sell its machines in the United States * * * .").

peared to acknowledge that a pure stream-of-commerce approach could not support jurisdiction over component-part manufacturers. The dissenters distinguished *Asahi* because "Asahi was a component-part manufacturer with 'little control over the final destination of its products once they were delivered into the stream of commerce.'" 564 U.S. at 908. In contrast, the defendant in *J. McIntyre* specifically targeted the entire U.S. market for direct sales via its distributor. *Ibid.* The dissenters also noted that in the component-part context, the manufacturer or seller that directly serves the forum market is amenable to suit in the forum state—as is the case here, *supra* p. 5 nn. 2-3—which alleviates concerns about a jurisdictional approach that requires targeting. See *ibid.* ("It was important to the Court in *Asahi* that 'those who use Asahi components in their final products, and sell those products in California, [would be] subject to the application of California tort law.'"). The foreign component-part manufacturer context of this case thus offers the Court a better opportunity to reach a majority opinion on this issue that has long divided the lower courts.

c. Nor does this case implicate the question about the relevant target market that plagued *J. McIntyre*. The Court divided over whether targeting of the entire United States—rather than of the forum state specifically—was sufficient for personal jurisdiction. Compare *id.* at 886 (plurality) ("These facts may reveal an intent to serve the U.S. market, but they do not show that [the defendant] purposefully availed itself of the New Jersey market."), with *id.* at 905 (Ginsburg, J., dissenting) ("[By targeting] the United States market nationwide, not a market in a single State * * * [the defendant] thereby availed itself of the market of all States in which its products were sold * * * .").

That divisive issue is absent here. The State did not allege that petitioners engaged a U.S.-focused distribu-

tor, designed their component parts specifically for the U.S. (or Washington) markets, advertised their products in the United States, or otherwise promoted their products in either the United States or Washington. The *J. McIntyre* dissent reflects that this makes petitioners analogous to Asahi rather than McIntyre. See *id.* at 908 ("Asahi, unlike McIntyre UK, did not itself seek out customers in the United States, it engaged no distributor to promote its wares here, it appeared at no tradeshows in the United States, and, of course, it had no Web site advertising its products to the world."). The *J. McIntyre* dissenters thus strongly indicated that personal jurisdiction cannot be exercised over component-part manufacturers, absent some showing that they specifically targeted the United States for sales.

While the component-part scenario divided the Court four-to-four in *Asahi*, jurisprudential developments discussed above now make it likely that a strong majority—if not a unanimous Court—would join Justice O'Connor's opinion today, at least as applied to component-part manufacturers. This case therefore presents the Court with an opportunity to definitively resolve the *Asahi* split in the very factual context of *Asahi*.

B. This Due Process issue cries out for a uniform, nationwide standard

The limits the Due Process Clause imposes on a state's power to exercise personal jurisdiction is a critical issue that demands a national standard. Such basic constitutional rights should not depend on where a plaintiff files suit against a defendant. Yet, as it stands now, even courts with jurisdiction over the same state differ on this issue, allowing the plaintiff to pick a favorable rule of law by filing in federal court. Compare *Luv N' Care, Ltd.* v. *Insta-Mix, Inc.*, 438 F.3d 465, 470 (5th Cir. 2006) (adopting the pure stream-of-commerce approach), with *Spir*

Star AG v. *Kimich*, 310 S.W.3d 868, 873 (Tex. 2010) (adopting the "stream-of-commerce plus" test). The arbitrariness is particularly unjust and widespread because the pure stream-of-commerce test commonly empowers plaintiffs to choose among numerous fora—often all 50 states and all 94 federal districts—in which to file suit. Any state where a finished-product manufacturer happened to sell a significant number of products containing the defendant's components may exercise jurisdiction.

The lower courts are hopelessly divided over the competing versions of the stream-of-commerce test. This question implicates such weighty issues as a foreign defendant's "due process [right] * * * to be subject only to lawful power" and the "power of a sovereign to resolve disputes through judicial process." *J. McIntyre*, 564 U.S. at 879, 884. It is "a question that arises with great frequency in the routine course of litigation." *Id.* at 877. This important question merits this Court's immediate attention. The Court should resolve this damaging split and restore a uniform standard on this critical issue.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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October 2016

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

NO. 91391-9

THE STATE OF WASHINGTON,

Respondent,

v.

LG ELECTRONICS, INC.; KONINKLIJKE PHILIPS ELECTRONICS N.V. A/K/A ROYAL PHILIPS ELECTRONICS N.V.; PHILIPS ELECTRONICS INDUSTRIES (TAIWAN), LTD.; SAMSUNG SDI CO., LTD. F/K/A SAMSUNG DISPLAY DEVICE 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.; SAMSUNG SDI (MALAYSIA) SDN. BHD.; PANASONIC CORPORATION OF NORTH AMERICA; HITACHI DISPLAYS, LTD.; HITACHI ELECTRONIC DEVICES (USA), INC.; HITACHI ASIA, LTD.,

Petitioners,

and

LG ELECTRONICS U.S.A., INC.; PHILIPS ELECTRONICS INDUSTRIES; PHILIPS ELECTRONICS NORTH AMERICA CORPORATION; TOSHIBA CORPORATION; TOSHIBA AMERICA ELECTRONIC COMPONENTS, INC.; HITACHI, LTD.; MT PICTURE DISPLAY CO.; PANASONIC CORPORATION F/K/A MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD.; CHUNGHWA PICTURE TUBES LTD.; CPTF OPTRONICS CO.

LTD.; AND CHUNGHWA PICTURE TUBES (MALAYSIA) SDN. BHD.,

Defendants.

(July 21, 2016)

En Banc

GONZÁLEZ, J.—The State of Washington sued more than 20 foreign electronics manufacturing companies (including the petitioners) for price fixing. The State claimed the foreign companies conspired to fix prices by selling CRTs (cathode ray tubes) into international streams of commerce intending they be incorporated into products sold at inflated prices in large numbers in Washington State.

The trial court dismissed on the pleadings, finding it did not have jurisdiction over the foreign companies. The Court of Appeals reversed, concluding the State alleged sufficient minimum contacts with Washington to satisfy both the long arm statute and the due process clause. We affirm the Court of Appeals.

FACTS

In 2012, the State, through the attorney general, filed suit against a number of foreign electronics manufacturers. The State's complaint alleged that between March 1995 and November 2007, the defendants violated the antitrust provision of the Washington Consumer Protection Act, RCW 19.86.030, by conspiring to raise prices and set production levels in the market for CRTs. CRTs were the dominant display technology used in televisions and

computer monitors before the advent of LCD (liquid crystal display) panels and plasma display technologies. Due to the unlawful conspiracy, the State alleged, Washington consumers and the State of Washington itself paid supracompetitive prices for the products.

According to the State's complaint, North America was the largest market for CRT televisions and computer monitors during the conspiracy period. Clerk's Papers (CP) at 24. In 1995 alone, 28 million CRT monitors were purchased in North America. *Id.* CRT monitors "accounted for over 90 percent of the retail market for computer monitors in North America in 1999," CRT televisions "accounted for 73 percent of the North American television market in 2004," and "the CRT industry was dominated by relatively few companies." *Id.* at 17, 15. In 2004, four of the defendants together held a collective 78 percent share of the global CRT market. *Id.* at 15. The State alleged that during the conspiracy period, all the defendants manufactured, sold, and/or distributed CRT products, directly or indirectly, to customers throughout Washington.

The State asserted jurisdiction pursuant to the long-arm provision of the Washington Consumer Protection Act, RCW 19.86.160. The State also asserted that venue is proper in King County in part because

> the Defendants' and their co-conspirators' activities were intended to, and did have, a substantial and foreseeable effect on Washington State trade and commerce; the conspiracy affected the price of CRTs and CRT Products purchased in Washington; and all Defendants knew or expected that products containing their CRTs would be sold in the U.S. and into Washington.

CP at 3.

Before any discovery took place, certain defendants (collectively Companies) moved to dismiss the State's complaint for lack of personal jurisdiction under CR l2(b)(2). The Companies supported their motions to dismiss with affidavits and declarations stating that the Companies did not sell any products directly to Washington consumers and did not conduct any business in Washington. The Companies also requested attorney fees under Washington's long-arm statute.

The State argued it had pleaded facts sufficient to establish personal jurisdiction at the pleading stage. The State also argued that if the trial court were to consider the Companies' affidavits and declarations, the motions to dismiss would necessarily be converted into CR 56 motions for summary judgment. The State requested the opportunity to conduct general and jurisdictional discovery. The Companies opposed the State's discovery request.

The trial court granted the motion to dismiss for lack of personal jurisdiction without expressly addressing the State's discovery request. *Id.* at 578-79. The trial court also authorized the Companies to request costs and attorney fees. *Id.* at 597. In March 2013, the trial court entered final judgment with prejudice under CR 54(b). *Id.* at 598-608. It then granted the requests for costs and attorney fees. [1] *Id.* at 1070-83. The State appealed.[2]

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[1] The Philips entities, which did not submit briefing requesting costs and attorney fees, are an exception.

[2] Certain defendants also moved to dismiss on the grounds that the State's claims were time barred. The trial court denied the motion and certified the matter for discretionary review. The Court of Appeals granted discretionary review of that issue, linked the appeals,

The Court of Appeals reversed. *State v. LG Elecs., Inc.,* 185 Wn. App. 394, 425, 341 P.3d 346 (2015). It held that the State had sufficiently alleged facts establishing personal jurisdiction and that an assertion of jurisdiction did not offend traditional notions of fair play and substantial justice. *Id.* at 423-24. The Court of Appeals reversed the award of attorney fees below because the Companies were no longer prevailing parties, and declined to award fees on appeal. *Id.* at 425.

We granted the Companies' petition for review. *State v. LG Elecs., Inc.,* 183 Wn.2d 1002, 349 P.3d 856 (2015). The Companies are supported by the Washington Defense Trial Lawyers and DRI–The Voice of the Defense Bar (on one brief) and the United States Chamber of Commerce as amici curiae. The State is supported in part by the Washington State Association for Justice Foundation as amicus curiae.

ANALYSIS

I. Standard of Review

We review CR 12(b)(2) dismissals for lack of personal jurisdiction de novo. *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.,* 180 Wn.2d 954, 963, 331 P.3d 29 (2014) (citing *In re Estate of Kordon,* 157 Wn.2d 206, 209, 137 P.3d 16 (2006)). When a motion to dismiss for lack of personal jurisdiction is resolved without an evidentiary hearing, the plaintiff's burden is only that of a prima facie showing of jurisdiction. *MBM Fisheries, Inc. v. Bollinger Mach. Shop & Shipyard, Inc.* , 60 Wn. App.

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and affirmed the trial court's denial of the statute of limitations motions in a separate published opinion. We granted the defendants' petition for review in that case as well and resolve the statute of limitations question by separate opinion in *State v. LG Electronics, Inc.,* No. 91263-7 (Wash. July 14, 2016).

414, 418, 804 P.2d 627 (1991) (citing *Pedersen Fisheries Inc. v. Patti Indus., Inc.,* 563 F. Supp. 72, 74 (W.D. Wash. 1983)).

II. Personal Jurisdiction

The parties do not dispute that as long as the assertion of personal jurisdiction complies with due process, personal jurisdiction exists under the long-arm provision of the CPA, RCW 19.86.160. The due process clause "requir[es] that individuals have 'fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign.'" *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 472, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) (second alteration in original) (quoting *Shaffer v. Heitner,* 433 U.S. 186, 218, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977)). Thus, a state may authorize its courts to exercise personal jurisdiction over an out-of-state defendant only if the defendant has certain minimum contacts with the state, such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945). For personal jurisdiction to comply with due process, three elements must be met: (1) purposeful "'minimum contacts'" must exist between the defendant and the forum state, (2) the plaintiff's injuries must "'arise out of or relate to'" those minimum contacts, and (3) the exercise of jurisdiction must be reasonable, that is, consistent with notions of "'fair play and substantial justice.'" *Grange Ins. Ass'n v. State,* 110 Wn.2d 752, 758, 757 P.2d 933 (1988) (quoting *Burger King,* 471 U.S. at 472-78).

To establish purposeful minimum contacts, there must be some act by which the defendant "'purposefully avails itself of the privilege of conducting activities within the

forum State, thus invoking the benefits and protections of its laws.'" *Burger King,* 471 U.S. at 475 (quoting *Hanson v. Denckla,* 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958)). The parties agree on the applicable test but disagree over whether this requirement has been met.

A foreign manufacturer or distributor does not purposefully avail itself of a forum when the sale of its products there is an "isolated occurrence" or when the unilateral act of a consumer or other third party brings the product into the forum state. *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 295, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980); *Williams v. Romarm, SA,* 410 U.S. App. D.C. 405, 756 F.3d 777 (2014). But where a foreign manufacturer seeks to serve the forum state's market, the act of placing goods into the stream of commerce with the intent that they will be purchased by consumers in the forum state can indicate purposeful availment. *J. McIntyre Mach., Ltd. v. Nicastro,* 564 U.S. 873, 881-82, 131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011) (Kennedy, J., plurality opinion); *id.* at 888-89 (Breyer, J., concurring); *Asahi Metal Indus. Co. v. Superior Court,* 480 U.S. 102, 109-13, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987) (lead opinion of O'Connor, J.); *id.* at 117-21 (Brennan, J., concurring); *id.* at 122 (Stevens, J., concurring); *World-Wide Volkswagen,* 444 U.S. at 295-97; *Grange Ins. Ass'n,* 110 Wn.2d at 761-62. The stream of commerce theory does not allow jurisdiction based on the mere foreseeability that a product may end up in a forum state. *See, e.g., World-Wide Volkswagen,* 444 U.S. at 295-97. Instead, the defendant's conduct and connection with the state must be such that it should reasonably anticipate being haled into court there. *Id.* The State argues that the Companies have established purposeful minimum contacts by placing CRTs into the stream of commerce with

the knowledge and intent that their CRTs would be incorporated into products sold in massive quantities throughout the United States, including in large numbers in Washington. *See* State of Wash.' s Suppl. Br. at 1.

The Companies argue that the State cannot rely solely on the substantial volume of sales in Washington to establish purposeful availment. *See* Suppl. Br. of Pet'rs at 13-15. The Companies argue that the State is required to show additional actions specifically targeting Washington, such as forum-specific design or in-forum advertising. The Companies rely on *Asahi,* 480 U.S. 102, and *J. McIntyre,* 564 U.S. 873, where the United States Supreme Court issued fractured opinions on the stream of commerce theory.

In *Asahi,* the United States Supreme Court considered the stream of commerce theory in the context of an indemnification action brought in California by Cheng Shin, a Taiwanese tire manufacturer, against Asahi, the Japanese tire valve manufacturer that had sold an allegedly defective component part to Cheng Shin. 480 U.S. at 106. Cheng Shin had bought and incorporated into its tire tubes hundreds of thousands of Asahi valve assemblies annually for five years, and sold finished tubes throughout the world, including California. *Id.* The United States Supreme Court unanimously held that regardless of whether Asahi had sufficient minimum contacts with California, it would be unfair to assert personal jurisdiction over the two foreign parties in the indemnity action. *Id.* at 114. However, the court fractured on whether Asahi had sufficient minimum contacts.

In a lead opinion authored by Justice O'Connor, four justices concluded that placing a product into the stream of commerce with the mere awareness that the product

will be swept into the forum state is insufficient to establish minimum contacts. The justices who signed the lead opinion would have required additional conduct indicating an intent or purpose to serve the specific forum state, including, for example, "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Id.* at 112 (lead opinion of O'Connor, J., joined by Rehnquist, C.J., and Powell and Scalia, JJ.). The lead opinion concluded that Asahi did not have purposeful minimum contacts. *Id.* at 113.

Justice Brennan's concurrence, joined by three justices, concluded that Asahi had sufficient minimum contacts with California. Those justices concluded that a defendant can be subject to jurisdiction consistent with due process whenever the "regular and anticipated flow of products," as opposed to "unpredictable currents and eddies," leads the product to be marketed in the forum state. *Id.* at 116-17 (Brennan, J., joined by White, Marshall and Blackmun, JJ.).

Justice Stevens concurred separately, finding no need to address the minimum contacts inquiry but indicating that whether placement of a product into the stream of commerce rises to purposeful availment will depend on "the volume, the value, and the hazardous character of the components" and opining that Asahi "has arguably engaged in a higher quantum of conduct than '[t]he placement of a product into the stream of commerce, without more.'" *Id.* at 122 (alteration in original) (Stevens, J., joined by White and Blackmun, JJ.). He noted that "[i]n most circumstances I would be inclined to con-

clude that a regular course of dealing that results in deliveries of over 100,000 units annually over a period of several years would constitute 'purposeful availment' even though the item delivered to the forum State was a standard product marketed throughout the world." *Id.*

In *J. McIntyre,* the United States Supreme Court again considered the stream of commerce theory and again issued a fractured opinion. 564 U.S. 873. J. McIntyre Machinery Ltd., a British manufacturer, sold its metal shearing machines to an independent United States distributor, which marketed the machines throughout the United States. *Id.* at 878 (lead opinion of Kennedy, J., joined by Roberts, C.J., and Scalia and Thomas, JJ.). The distributor sold no more than four of the machines to a company in New Jersey, and one allegedly malfunctioned and injured the plaintiff. *Id.* Justice Kennedy's plurality, joined by three justices, adopted a position consistent with Justice O'Connor's *Asahi* opinion and concluded that the plaintiff had not established that J. Mcintyre engaged in conduct purposefully directed at New Jersey. *Id.* at 885-86.

Justice Breyer, joined by Justice Alito, concurred, but rejected the plurality's strict rule and concluded on narrow grounds that under the court's split opinions in *Asahi* , personal jurisdiction could not be exercised on the basis of a single sale in a state because there was no regular flow of sales *or* a showing of forum-specific targeting. *Id.* at 888-89 (Breyer, J., concurring, joined by Alito, J.). These justices also rejected the expansive view proposed by New Jersey that a manufacturer is subject to personal jurisdiction so long as it places its products into the stream of commerce and should know that its products might end up being sold in any of the 50 states,

reasoning that such an expansive rule would permit every State to assert jurisdiction against any domestic manufacturer who sells its products to a national distributor "no matter how large or small the manufacturer, no matter how distant the forum, and no matter how few the number of items that end up in the particular forum at issue." *Id.* at 891.

When a fragmented United States Supreme Court decides a case "and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks v. United States,* 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977) (quoting *Gregg v. Georgia,* 428 U.S. 153, 169 n.15, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (plurality opinion)). Applying the *Marks* standard, we conclude that Justice Breyer's concurring opinion represents the holding of *J. McIntyre.* We reject the Companies' argument that Justice Breyer's opinion endorsed Justice O'Connor's construction of the stream of commerce theory in *Asahi.* Justice Breyer explicitly did not choose either test from *Asahi. J. McIntyre,* 564 U.S. at 889-90 (Breyer, J., concurring).

Under *J. McIntyre,* a foreign manufacturer's sale of products through an independent nationwide distribution system is not sufficient, absent something more, for a State to assert personal jurisdiction over a manufacturer when only one product enters a state and causes injury. *Id.* at 888-89 (Breyer, J., concurring). *J. McIntyre* did not foreclose an exercise of personal jurisdiction over a foreign defendant where a substantial volume of sales took place in a state as part of the regular flow of commerce. Our interpretation of *McIntyre* is consistent with that of

other courts. *See Russell v. SNFA,* 2013 IL 113909, 987 N.E.2d 778, 370 Ill. Dec. 12 (rejecting defendant's contention that Justice Breyer's concurrence should be construed as adopting Justice O'Connor's construction of the stream of commerce theory); *Willemsen v. Invacare Corp.,* 352 Or. 191, 282 P.3d 867 (2012) (finding that the sale in Oregon in a two-year period of more than 1,000 wheelchairs containing the manufacturer's component part established sufficient minimum contacts); *see also Monje v. Spin Master Inc.,* No. CV- 09-1713-PHX-GMS, 2013 WL 2369888 (D. Ariz. May 29, 2013) (court order) (finding that the sale of 4.2 million products throughout the United States indicates purposeful availment of forum state market);[3] *cf Oticon, Inc. v. Sebotek Hearing Sys., LLC,* 865 F. Supp. 2d 501, 513 (D.N.J. 2011) (finding insufficient minimum contacts where the defendant targeted the national market but only five to nine sales of the product occurred in the forum state).

We find the allegations in the State's complaint sufficient to establish a prima facie case of purposeful minimum contacts. The State alleges that (1) the Companies together dominated the global market for CRTs, (2) the Companies sold CRTs into international streams of commerce with the intent that the CRTs would be incorporated into millions of CRT products sold across the United States and in large quantities in Washington, and (3) along with their coconspirators, the Companies intended for their price-fixing activities to elevate the price of CRT Products purchased by consumers in Washington. CP at 15, 3. Taking these allegations as verities, as we must at this stage, we agree with the State that "[t]he

[3] We note that this opinion is unpublished and citation by the parties is proper under GR 14.l(b) and Fed. R. App. P. 32.l (a).

presence of millions of CRTs in Washington was not the result of chance or the random acts of third parties, but a fundamental attribute of [the Companies'] businesses." State of Wash.'s Suppl. Br. at 17.[4]

An exercise of jurisdiction based on the allegations in the State's complaint is not foreclosed by *J. McIntyre*, and to dismiss at this stage before relevant jurisdictional discovery would be inconsistent with the legal standards we apply under CR 12(b). While we have few CR 12(b)(2) cases, we find our CR 12(b)(6) cases helpful by analogy. Our liberal notice pleading rules are intended "to facili-

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[4] The Companies also call to our attention *Walden v. Fiore*, where the United States Supreme Court concluded that a Nevada court could not assert personal jurisdiction over a police officer who seized cash from the plaintiffs at an airport in Georgia while they were traveling from Puerto Rico to Nevada. _ U.S. _, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014). The court concluded it was not sufficient to base minimum contacts solely on the plaintiff's connections with Nevada and the fact that the plaintiffs felt the effects of the delayed return of their gambling funds while they were residing in Nevada. Under those circumstances, the police officer's connection to Nevada was not purposeful but merely "'random'" and "'fortuitous.'" *Id.* at 1123 (quoting *Burger King*, 471 U.S. at 475). *Walden* is not helpful to our analysis in the present case, where it is alleged that the Companies intended to serve the Washington market and injure Washington consumers with price-fixed CRT Products. *See* CP at 3, 27; *Calder v. Jones*, 465 U.S. 783, 791, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984) (holding that jurisdiction in California was proper because intentional conduct by defendants in Florida was "calculated to cause injury to respondent in California").

The dissent posits that we should look only to *Calder* and *Walden*, not to the *J. McIntyre* line of cases, in our personal jurisdiction analysis, distinguishing between a "stream of commerce" test and an "effects" test. Dissent at 6. We note that this question is not presented in this case, as neither of the parties asked us to distinguish these tests and disregard the stream of commerce one. In the absence of briefing from the parties, we decline to adopt the dissent's approach.

tate the full airing of claims having a legal basis." *Berge v. Gorton*, 88 Wn.2d 756, 759, 567 P.2d 187 (1977). Consistent with this purpose, CR 8(a)(l) provides that a complaint need only set forth "a short and plain statement of the claim showing that the pleader is entitled to relief," and we have repeatedly emphasized that we grant CR 12(b)(6) motions for failure to state a claim very "'sparingly and with care.'" *Orwick v. City of Seattle*, 103 Wn.2d 249, 254-55, 692 P.2d 793 (1984) (quoting 27 FEDERAL PROCEDURE § 62:465 (1984) and citing 5 CHARLES ALLEN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURES § 1349, at 541 (1969)). A complaint survives a CR 12(b)(6) motion if *any* state of facts could exist under which the claim could be sustained. *Id.* at 255; *Corrigal v. Ball & Dodd Funeral Home, Inc.*, 89 Wn.2d 959, 961, 577 P.2d 580 (1978). We see no reason to apply a different approach to a CR 12(b)(2) motion, and in fact we previously took such an approach in *FutureSelect*, where we reversed a trial court's decision to dismiss on the pleadings after considering numerous arguments for dismissal, including a CR 12(b)(2) argument. 180 Wn.2d at 959. There, we concluded that "[a]t this stage of litigation, the allegations of the complaint establish sufficient minimum contacts to survive a CR 12(b)(2) motion." *Id.* at 963. We found that the trial court dismissed prematurely, some limited discovery was warranted, and defendant "may renew its jurisdictional challenge after appropriate discovery has been conducted." *Id.* at 966, 963. Consistent with these standards, we find the State's complaint survives. Nothing in our opinion precludes the Companies from renewing their motions after further discovery bearing on relevant facts.[5] The Companies ar-

[5] Our dissenting colleague concludes the court lacks personal juris-

gue that since they submitted declarations the State cannot stand on the allegations in its complaint but must submit evidence to meet its burden, citing federal case law holding that courts are not permitted to "'assume the truth of allegations in a pleading which are contradicted by affidavit.'" Suppl. Br. of Pet'rs at 19 (internal quotation marks omitted) (quoting *Alexander v. Circus Circus Enters., Inc.*, 972 F.2d 261, 262 (9th Cir. 1992)). None of the Companies' affidavits contradict the stream of commerce allegations in the complaint, however, except arguably that of Koninklijke Philips Electronics NV (KPNV), which claims it is merely a holding company and did not manufacture any products. *See* CP at 105. Jurisdictional discovery as to KPNV at this stage may be warranted because "'pertinent facts bearing on the question of jurisdiction are controverted.'" *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008) (quoting *Data Disc, Inc. v. Sys. Tech. Assocs.*, 557 F.2d 1280, 1285 n.l (9th Cir. 1977)). Prior to appropriate discovery, however, we decline to find that an allegation in the complaint is defeated by a contrary statement in a declaration.[6] With the State having sufficiently asserted purposeful minimum contacts at this stage, the burden shifts to the Companies

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diction because the State did not specifically allege in its complaint that the defendants had control over the prices of CRT products sold in Washington. We note that, as discussed, the State alleged that the defendants conspired with CRT and CRT product manufacturers to "ensure[] that price increases for CRTs were passed on to indirect purchasers of CRT Products." CP at 20. These allegations are sufficient to survive a motion to dismiss on the pleadings.

[6] Given our resolution of the case, we decline the invitations of the parties and amici curiae to outline specific procedures required for a trial court to resolve CR 12(b)(2) motions. At this juncture, we leave it to the discretion of trial courts to resolve CR 12(b)(2) motions in accordance with relevant Washington court rules.

to present a compelling case that the exercise of jurisdiction is unreasonable and inconsistent with 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.'" *FutureSelect,* 180 Wn.2d at 963-64 (internal quotation marks omitted) (quoting *Shute v. Carnival Cruise Lines,* 113 Wn.2d 763, 767, 783 P.2d 78 (1989)). At this stage, all of these considerations weigh strongly in favor of finding that jurisdiction is reasonable. The inconvenience for the large multinational Companies to defend themselves in the forum they intentionally targeted with price fixed products does not outweigh the State's strong interest in ensuring Washington citizens receive the protection of state antitrust laws, especially since Washington is the only forum in which indirect consumers of CRTs may be entitled to recovery.

CONCLUSION

Taking the allegations of the complaint as true, we find that the State has made a prima facie showing of purposeful minimum contacts and that asserting personal jurisdiction over the Companies is not unfair or unreasonable. We affirm the Court of Appeals and remand for further proceedings consistent with this opinion.[7]

/s/ Gonzalez, J.

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[7] Given our disposition, we conclude that the Court of Appeals properly reversed the trial court's award of attorney's fees to the companies, and we decline the companies' request for attorney's fees for this appeal.

WE CONCUR:

/s/ *Wiggins, J.*

/s/ *Johnson, J.*

/s/ *Yu, J.*

/s/ *Fairhurst, J.*

/s/ *Hunt, J.P.T.*

No. 91391-9

GORDON McCLOUD, J. (concurring in part and dissenting in part)—The State filed this antitrust action against several foreign manufacturers of CRTs[1] and their out-of-state distributors alleging a conspiracy to fix the global market price of CRTs. Defendants[2] moved to dismiss due to lack of personal jurisdiction under Civil Rule (CR) 12(b)(2) and supported their motions with unrebutted declarations about their lack of contacts in our state.

This case involves an intentional conspiracy to fix prices in violation of RCW 19.86.030—not a defective product.[3] The majority nevertheless applies a "stream of

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[1] CRTs (cathode ray tubes) are a form of display technology that was widely used in televisions and computer monitors until the introduction of LCD (liquid crystal display) and LED (light-emitting diode) displays.

[2] Some defendants did not challenge Washington's jurisdiction. The relevant defendants here are Koninklijke Philips Electronics NV; Philips Electronics Industries (Taiwan) Ltd.; LG Electronics Inc.; Samsung SDI Co. Ltd.; Samsung SDI America Inc.; Samsung SDI Mexico SA de CV; Samsung SDI Brasil Ltda.; Shenzhen Samsung SDI Co. Ltd.; Tianjin Samsung SDI Co. Ltd.; and Samsung SDI (Malaysia) SD. Bhd. (Defendants).

[3] Under RCW 19.86.030, "[e]very contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is hereby declared unlawful." The legislature patterned this provision after the federal Sherman Act, 15 U.S.C. § 1. When the Washington Legislature passed the Consumer Protection Act, ch. 19.86 RCW, it intended for our courts to be guided by the interpretation that the federal courts give to the corresponding federal statutes. RCW 19.86.920. Federal courts apply two tests to evaluate conduct that allegedly violates the Sherman Act. Both tests require proof of intentional wrongdoing. *Arizona v. Maricopa County Med. Soc'y,* 457 U.S. 332, 344-45, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982) (plurality

commerce" test derived from fractured Supreme Court opinions involving products liability, i.e., *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987) (plurality opinion) and *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011) (plurality opinion), and concludes that the trial court had jurisdiction under one of the nonmajority, nonplurality opinions in one of these cases. Majority at 8, 15. The Supreme Court, however, has applied a different test to intentional torts. It holds that when a plaintiff claims injury from the *intentional* acts of another, the test for whether a court has specific personal jurisdiction over an out-of-state defendant is the "effects" test articulated in *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984). *See also Walden v. Fiore*, ___U.S. __, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014). I would apply *Calder's* "effects" test and find no jurisdiction. But even if a "stream of commerce" analysis applied, most Defendants [4] filed unrebutted declarations showing that Washington lacked sufficient minimum contacts to support jurisdiction under the controlling "purposeful availment" standard for the "stream of commerce" analysis articulated in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980). I therefore respectfully dissent.

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opinion) (per se price-fixing violations of Sherman Act section l); *Reid Bros. Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292, 1296 (9th Cir. 1983) (non-per-se violations).

[4] There is one exception. Three defendants (Shenzhen Samsung SDI Co. Ltd., Samsung SDI Brasil Ltda., and Samsung SDI (Malaysia) Sdn. Bhd. (collectively SDI Defendants) submitted declarations admitting that they shipped CRT component parts to a manufacturer in Washington during the alleged conspiracy period. CP at 206.

FACTUAL BACKGROUND

The State filed this antitrust action in Washington State against several foreign manufacturers, marketers, and sellers of CRTs, alleging that they colluded to fix the global market price of CRTs at supracompetitive levels in violation of the Consumer Protection Act, chapter 19.86 RCW. Specifically, the complaint alleged that Defendants sold these CRTs at inflated prices to out-of-state assemblers and that these assemblers then incorporated the CRTs into end products (CRT Products) and then later sold these CRT Products to consumers in Washington. According to the State, the end purchasers of CRT Products suffered the ultimate harm from the passed-on overpricing. Clerk's Papers (CP) at 18, 20. In its complaint, the State does not estimate how many CRT Products—or even how many of Defendants' CRTs—were purchased by Washington consumers during the 12-year conspiracy period, but notes that 28 million CRT monitors were purchased in North America in 1995 alone and that Defendants collectively held a 78 percent share of the global CRT market. CP at 24, 15.

Defendants, who are not Washington residents, moved to dismiss due to lack of personal jurisdiction. They argued, and filed declarations, to prove that they lacked sufficient minimum contacts with the Washington forum. The State acknowledges that Defendants operated mainly outside of Washington, with their principal places of business in the Netherlands, South Korea, Taiwan, China, Malaysia, Brazil, Mexico, and California. CP at 4-12. The State did not contest Defendants' declarations filed in support of their CR 12(b)(2) motions showing that they maintained no offices in Washington and employed no Washington employees. CP at 40-42, 56-64, 84-86, 104-06,

203-06. The State did not challenge Defendants' showing that for many of them, their only connection with Washington was that the CRTs they manufactured were incorporated into CRT Products by immediate purchasers, and then the CRT Products were sold by those immediate purchasers to nonparticipants in that original purchase, i.e., to Washington consumers.

The majority contends that personal jurisdiction is proper in Washington because the complaint alleged that "(1) the [Defendants] together dominated the global market for CRTs, (2) the [Defendants] sold CRTs into international streams of commerce with the intent that the CRTs would be incorporated into millions of CRT products sold across the United States and in large quantities in Washington, and (3) along with their coconspirators, the [Defendants] intended for their price-fixing activities to elevate the price of CRT Products purchased by consumers in Washington." Majority at 15 (citing CP at 15, 3). Nowhere in the complaint, however, did the State allege that Defendants had control over what costs their direct buyers passed on to the indirect end purchasers or that they controlled where their buyers would choose to sell the CRT Products.

ANALYSIS

I. CONSPIRACY TO FIX PRICES IN VIOLATION OF RCW 19.86.030 IS AN INTENTIONAL WRONG, NOT A PRODUCT DEFECT, SO JURISDICTION SHOULD BE DETERMINED UNDER THE *CALDER* "EFFECTS" TEST APPLICABLE TO INTENTIONAL HARMS, NOT A "STREAM OF COMMERCE" TEST APPLICABLE TO PRODUCTS LIABILITY

A. *The Supreme Court Has Adopted Two Different Tests for Analyzing a Defendant's "Minimum Contacts"*

The majority is certainly correct that a court cannot exercise specific personal jurisdiction over an out-of-state defendant unless such jurisdiction is consistent with the due process clause. Majority at 6-7; U.S. CONST. amend. XIV, § 1. It is also correct that the due process clause requires sufficient "minimum contacts" between the defendant and the forum state to support such jurisdiction. *Id.* at 7 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)).

The Supreme Court, however, has applied two different tests for evaluating the sufficiency of "minimum contacts" to support specific personal jurisdiction: (1) the "stream of commerce" test derived from product liability cases, *World-Wide Volkswagen*, *Asahi*, and *J. McIntyre;* and (2) the "effects" test derived from intentional tort cases, *Calder* and *Walden*. The first question for us is which test applies here.

B. *The Majority Finds Jurisdiction under Justice Brennan's "Chain of Distribution" Analysis, Derived from Product Liability Cases, Even Though J. McIntyre Requires "Something More"*

The majority applies a "stream of commerce" analysis to the jurisdictional question in this case. More specifically, the majority applies one of several different "stream of commerce" tests that some Supreme Court justices have endorsed but that no Supreme Court majority has ever adopted as a holding. Majority at 8-14.

The "stream of commerce" analysis was adopted by the Supreme Court in product liability cases and has

been applied by that Court only to product liability cases. It was introduced as a basis for evaluating minimum contacts in *World-Wide Volkswagen*–a products liability case involving a defective automotive fuel system. 444 U.S. at 297-98. In that case, the Court unanimously recognized that in the right circumstances, a corporation could be subject to personal jurisdiction in a foreign forum based on the distribution of its products in that foreign forum. *Id.* The Court began by explaining that personal jurisdiction arises if the corporation "deliver[ed] its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *Id.* at 298. The Court further clarified, though, that jurisdiction attached only where "the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from *the efforts of the manufacturer or distributor* to serve, directly or indirectly, the market for its products in [the forum state]." *Id.* at 297 (emphasis added). The Court rejected the notion that jurisdiction could exist simply because it was foreseeable that the defendant's product might enter the forum state. *Id.* at 296. The defendant's purposeful availment of the benefits of the forum, the Court explained, is key. *Id.* at 295-98.

Although the *World-Wide Volkswagen* Court unanimously agreed that placement of a product in the "stream of commerce" could support jurisdiction over an out-of-state defendant in product liability actions in certain circumstances, it later split on what activities would be sufficient to trigger such jurisdiction. The fractured opinions on this topic began in 1987 in *Asahi.* In *Asahi,* the question was whether a California court could exercise jurisdiction over foreign manufacturers who sold component products overseas, based on the fact that the

overseas purchasers integrated those component parts into retail products and some of those retail products were sold in California. 480 U.S. at 106-07. Justice O'Connor's plurality opinion proposed a "stream of commerce plus" test for evaluating personal jurisdiction over an out-of-state defendant in such cases. Under that test, the plaintiff must show that the defendant did more than simply place its products into the stream of commerce to support such jurisdiction. The plaintiff must also show "conduct of the defendant" indicating an intent or purpose to serve the market in the forum state, such as designing the product for the forum market or marketing the product there. *Id.* at 112.

In contrast, Justice Brennan proposed a "chain of distribution" test. Under that test, the plaintiff need show only that the "regular and anticipated flow of products from manufacture to distribution to retail sale" occurred in the forum state to support personal jurisdiction there. *Id.* at 117 (Brennan, J., concurring).

Justice Stevens used a third test. That test considered the defendant's "course of dealing[s]" including the "volume, the value, and the hazardous character of the components." *Id.* at 122 (Stevens, J., concurring).

None of these tests garnered a majority. Indeed, at least five justices rejected each test. A majority of the Court instead resolved the jurisdictional question on other grounds related to traditional notions of fair play and substantial justice. *Id.* at 113. Thus, the Court left open the confusing question of what to do with the various tests that were articulated and then rejected.

As the majority correctly observes, the Supreme Court clarified these tests somewhat in *J. McIntyre*. In that 2011 decision, the Court ruled that the plaintiff must

show that the defendant did "something more" than just sell its products through a nationwide distributor with the hope that they might be sold in the forum state to support forum jurisdiction. *J. McIntyre,* 564 U.S. at 888-89 (Breyer, J., concurring); *see* majority at 13-14. This "something more," the majority recognizes, modified Justice Brennan's "chain of distribution" test. *See* majority at 13-14.

The majority, however, denies that this "something more" is the equivalent of Justice O'Connor's "plus" factor.[5] *See* majority at 14. Instead, the majority interprets this "something more" as merely requiring more than a single, isolated product ending up in the forum state. Majority at 13-14. Thus, the majority takes the position that *J. Mcintyre* adopted the bulk of Justice Brennan's *Asahi* concurrence (without saying so).

The majority then applies Justice Brennan's "chain of distribution" test (not Justice O'Connor's *Asahi* plurality or *World-Wide Volkswagen)* and holds that the trial court has jurisdiction over Defendants in this case because the State alleged that Defendants placed large quantities of their products into international streams of

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[5] This is probably because the State's complaint clearly fails Justice O'Connor's "stream of commerce plus" test, which requires that the defendant either designed its product for or actually marketed its products in the forum state. As Justice O'Connor explained in *Asahi,* "the placement of a product into the stream of commerce"—even hundreds of thousands of it—"without more, is not an act of the defendant purposefully directed toward the forum State." *Asahi,* 480 U.S. at 112. Here, the State has not alleged that Defendants marketed in Washington State or designed their products to target Washington purchasers. On the contrary, the complaint alleged that Defendants had agreed to use *uniform* CRT designs in order to make it easier for them to monitor their agreement to fix prices for *identical* items. CP at 13. This is not enough to satisfy O'Connor's plus factor.

commerce with the knowledge that they will likely enter the Washington market at some point, and that many more than one of them did enter our state. Majority at 15. This is probably a correct application of Justice Brennan's test.

But *J. McIntyre* did not silently adopt Justice Brennan's *Asahi* concurrence. In fact, a majority of the justices in *J. McIntyre* held that New Jersey, the forum state, *lacked* jurisdiction over the foreign manufacturer, despite the fact that its metal-shearing machine was sold to a distributor who resold it there, and despite the fact that the machine seriously injured a worker there. When one compares those facts to the facts in the instant case, it is clear that there is even less of a connection between the manufacturers and the plaintiff here than between the manufacturer and the plaintiff there: J. McIntyre at least entered the United States' stream of commerce, rather than just the global, international market; attended annual conventions in the United States; and sold its machines to a domestic distributor, knowing that those machines would be sold throughout the United States. *J. McIntyre,* 564 U.S. at 878. The State's complaint does not allege that the Defendants ever even visited the United States, let alone Washington.

The majority seems to recognize that its analysis is somewhat inconsistent with *J. Mcintyre,* with the supposed *J. Mcintyre* endorsement of Justice Brennan's test, and even with *World-Wide Volkswagen.* It therefore supports its conclusion with a fact peculiar to this case and missing from those stream of commerce cases: the intentional nature of Defendants' alleged conspiracy. Majority at 15. I agree that that fact is peculiar to this case and hence calls for a different analysis here. But it

does not call for yet another different stream of commerce test made especially for the intentional conspiracy situation. Instead, it underscores the importance of using the "minimum contacts" test that the Supreme Court has already adopted—unanimously—for just such intentional tort situations: the *Calder* "effects" test.[6]

C. *The Calder "Effects" Test Is the One that the Supreme Court Applies Where, as Here, Intentional Torts Are Alleged*

Each time the Supreme Court has answered a jurisdictional question involving an intentional act, it has unanimously applied the "effects" test rather than the "stream of commerce" test. *See Calder*, 465 U.S. 783 (intentional act of libel); *Walden*, 134 S. Ct. 1115 (intentional act of fraud). Under the *Calder* "effects test," the plaintiff must show that the defendant (1) committed an intentional act (2) expressly aimed at the forum state, (3) causing harm, the brunt of which was suffered—and which the defendant knew would likely be suffered—in the fo-

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[6] The majority declines to consider whether the *Calder* "effects" test is the proper test to apply on the ground that that issue is not properly presented. Majority at 16 n.4. But the question presented is whether the State alleged sufficient minimum contacts with Defendants for a Washington court to assert personal jurisdiction over them. To answer that minimum contacts question, we must first decide which minimum contacts test applies. And Defendants did cite *Walden's* minimum contacts rule. Suppl. Br. of Pet'rs at 15-17 ("In *Walden v. Fiore*, the Court reaffirmed the principle that personal jurisdiction must be grounded in actions by the defendant, not those by the plaintiff or third parties."). Amicus United States Chamber of Commerce then expressly argued that we should apply *Walden*, rather than the stream of commerce decisions, to this case. Amicus Br. of United States Chamber of Commerce at 9-11 ("The rule adopted by the court of appeals cannot be reconciled with *Walden's* requirement that the defendant itself create a connection with the forum.").

rum state. *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1077 (9th Cir. 2011) (quoting *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1128 (9th Cir. 2010)).

The Court applied this test for the first time in a case involving the intentional tort of libel. In *Calder*, a California actress filed a lawsuit in California against two employees of a Florida magazine, alleging that they had published a libelous article about her. 465 U.S. at 784. Although the Florida defendants never entered California in connection with the article, the Supreme Court nevertheless held that California had jurisdiction over them. The Court found the defendants had sufficient contacts with California because they made phone calls to California sources to obtain information for their article, they wrote the story about the plaintiff's activities in California, they caused reputational injury in California by writing an allegedly libelous article that was widely circulated in California, and they knew the plaintiff would suffer the brunt of that injury in California where she resided. *Walden*, 134 S. Ct. at 1123; *Calder*, 465 U.S. at 785-90.

The Supreme Court again unanimously applied the "effects" test in evaluating Nevada's jurisdiction over an action for fraud, another intentional act, in *Walden*. In that case, airplane passengers detained at an airport in Georgia filed a *Bivens*[7] action against several Georgia police officers, alleging that they had intentionally seized and kept plaintiffs' cash without probable cause and later lied about it in false affidavits. *Walden*, 134 S. Ct. at 1124. But the plaintiffs filed in Nevada, where they lived,

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[7] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

rather than Georgia, where the seizure occurred. The question for the Supreme Court was whether the Nevada court had personal jurisdiction over these out-of-state officers, since the officers knew at the time of the seizure that the plaintiffs resided in Nevada and that they were headed to Nevada to gamble with the monies seized. *Id.* at 1119. The Supreme Court unanimously held that Nevada lacked jurisdiction. According to the Court, due process requires more than just knowledge of the plaintiffs' strong forum connections or that the plaintiffs would suffer foreseeable harm in the forum from the defendants' acts. *Id.* at 1125. It requires that the defendants themselves have some contact with the forum state. *See id.* at 1122. Because the officers' relevant conduct occurred entirely in Georgia, due process clause protections barred the Nevada court from exercising specific personal jurisdiction over them. *Id.* at 1126.

The *Walden* Court applied *Calder' s* "effects" test but distinguished *Calder' s* outcome because "the reputation-based 'effects' of the alleged libel [in *Calder]* connected the defendants to California, not just to the plaintiff." *Id.* at 1123-24. This strong connection "was largely a function of the nature of the libel tort. However scandalous a newspaper article might be, it can lead to a loss of reputation only if communicated to (and read and understood by) third persons." *Id.* at 1124.

Under controlling Supreme Court precedent, the *Calder* "effects" test applies to actions, such as this, involving an intentional act.

D. *The Supreme Court Unanimously Applied the "Effects" Test in Calder Even Though a Product Was Involved*

To be sure, an antitrust action involving a price-fixing conspiracy over component parts does involve a product, even though it also constitutes an intentional act. Because of this, lower courts have struggled over which test to apply in this hybrid context.

Many apply the "effects" test to such antitrust actions. *E.g., In re Magnetic Audiotape Antitrust Litig.,* 334 F.3d 204, 207-08 (2d Cir. 2003) (per curiam); *In re Cathode Ray Tube (CRT) Antitrust Litig.,* 27 F. Supp. 3d 1002, 1011 (N.D. Cal. 2014); *Am. Copper & Brass, Inc. v. Mueller Eur., Ltd.,* 452 F. Supp. 2d 821, 828-29 (W.D. Tenn. 2006); *In re Vitamins Antitrust Litig.,* 270 F. Supp. 2d 15, 32 (D.D.C. 2003); *see also In re Capacitors Antitrust Litig.,* No. 14-cv-03264-JD, 2015 WL 3638551, at *2 (N.D. Cal. June 11, 2015) (court order); *In re Fasteners Antitrust Litig.,* No. 08-md- 1912, 2011 WL 3563989, at *12 (E.D. Pa. Aug. 12, 2011) (court order); *In re Bulk [Extruded] Graphite Prods. Antitrust Litig.,* No. 02-6030, 2007 WL 2212713, at *6 (D.N.J. July 30, 2007) (unpublished).[8] These courts reason that the "effects" test applies because a price-fixing antitrust action primarily involves an intentional tort. *Bulk [Extruded] Graphite,* 2007 WL 2212713, at *5; *Fasteners* , 2011 WL 3563989, at *12.

Others apply a "stream of commerce" analysis to such antitrust actions. *E.g., Merriman v. Crompton Corp.,* 282 Kan. 433, 467-68, 146 P.3d 162 (2006); *Frankenfeld v. Crompton Corp.,* 2005 SD 55, 697 N.W.2d 378, 385-86; *Holder* v. *Haarmann & Reimer Corp.,* 779 A.2d 264, 273-74 (D.C. 2001); *Four B Corp.* v. *Ueno Fine Chems. In-*

[8] Citation to these unpublished cases is permitted pursuant to GR 14.1(b) and Fed. R. App. P. 32.1 (permitting citation to federal decisions issued on or after January 1, 2007).

dus., Ltd., 241 F. Supp. 2d 1258, 1265 (D. Kan. 2003). The Kansas Supreme Court's only reason for applying the "stream of commerce" analysis in the antitrust price-fixing context was that at least one other court had done so. *Merriman* , 282 Kan. at 468 (citing *Hitt v. Nissan Motor Co.,* 399 F. Supp. 838 (S.D. Fla. 1975)).

Some courts apply both tests. *E.g., In re Chocolate Confectionary Antitrust Litig.,* 602 F. Supp. 2d 538, 562-65 (M.D. Pa. 2009); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.,* No. C 02-1486 PJH, 2005 WL 2988715, at *5-7 (N.D. Cal. Nov. 7, 2005) (court order).[9]

The Supreme Court, however, applied only the "effects" test in *Calder* even though it also involved a product—a magazine—that was widely distributed throughout the forum state. The *Calder* Court upheld jurisdiction in California not based on the fact that 600,000 copies of the defendants' magazine were sold weekly in California, but "based on the 'effects' of their Florida conduct in California." 465 at 789. *Calder* therefore supports applying only the "effects" test in an action such as this, where the gravamen of the claim is the defendant's intentional wrongdoing and not a defect in a traveling product.

II. JURISDICTION IS LACKING UNDER BOTH THE *CALDER* "EFFECTS" TEST AND THE CONTROLLING "STREAM OF COMMERCE" TEST

A. *Washington Lacks Personal Jurisdiction over Most Defendants under the "Effects" Test*

[9] Citation to these unpublished cases is permitted pursuant to GR 14.l(b) and N.D. Cal. Civ. Local R. 3-4(e).

As discussed above, for a court to have personal jurisdiction over an out-of-state defendant under the "effects" test, the plaintiff must show that the defendant (1) committed an intentional act (2) expressly aimed at the forum state, (3) causing harm, the brunt of which was suffered—and which the defendant knew would likely be suffered—in the forum state. *CollegeSource,* 653 F.3d at 1077.

The State did allege that Defendants committed an intentional act—conspiracy to fix the price of CRTs. The injury alleged, however, relates to the inflated price of *CRT Products,* not CRTs. The State did not allege any facts showing that the conspiracy targeted purchasers of CRTs in Washington. Nor did it allege that any of the "unlawful agreements" forming the underlying conspiracy occurred in Washington. In short, the complaint lacks any allegation that Defendants ever sold products in Washington or ever had control over the prices of CRT Products in Washington. The complaint instead alleged that some effects of the conspiracy over CRT prices were ultimately felt in Washington by Washington consumers who purchased *CRT Products* due to passed-on overpricing. CP at 17.

To be sure, the complaint did allege that Defendants *expected* direct purchasers of their CRTs to pass on the inflated prices to retail consumers of CRT Products: "Defendants concluded that they needed to make their price increase on CRTs high enough so that their direct customers would be able to justify a corresponding price increase to indirect purchasers. In doing so, Defendants' actions ensured that price increases for CRTs were passed on to indirect purchasers of CRT Products." CP at 20. But conclusory allegations about Defendants' ex-

pectations are not facts that would support jurisdiction. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032, 750 P.2d 254 (1987). At most, the State alleged that Defendants knew retail consumers of CRT Products would likely be harmed indirectly by their price-fixing of CRTs.

The Supreme Court has already held that this is not enough under the "effects" test. According to its unanimous decision in *Walden*, the plaintiff must allege more than just the defendant's knowledge that the plaintiff resides in the forum state or that some harm would likely be felt there. Indeed, "[t]he proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in any meaningful way." *Walden*, 134 S. Ct. at 1125. This means that "jurisdiction over an out-of-state intentional tortfeasor must be based on intentional conduct *by the defendant* that creates the necessary contacts with the forum." *Id.* at 1123 (emphasis added). From this, it follows that "the plaintiff cannot be the only link between the defendant and the forum," no matter how significant the plaintiff's contact with the forum may be. *Id.* at 1122. As discussed above, the State has not provided any link between Defendants' conduct and this state other than the fact that end consumers indirectly harmed by their alleged price-fixing conspiracy resided here. Jurisdiction is therefore lacking under the Supreme Court's "effects" test.

The Defendants' declarations, for the most part, underscore that failure. Most Defendants[10] submitted dec-

[10] There is one exception. The SDI Defendants submitted declarations admitting that they shipped CRT component parts to a manufacturer in Washington during the time of the alleged conspiracy. CP

larations showing that they neither sold nor advertised CRTs in Washington State. CP at 40-42, 56-64, 84-86, 104-06, 203-06. In the absence of any connection between these Defendants' acts and Washington, *Walden* precludes Washington courts from asserting personal jurisdiction over them.

Several lower courts that have considered this issue in the same context as that presented here—an intentional price-fixing conspiracy claim—have come to the same conclusion. In *Chocolate Confectionary,* for example, the plaintiffs filed an antitrust action in Pennsylvania, alleging that Mars Canada had conspired to fix the price of chocolate confectionary products in the United States and that it caused American consumers to pay artificially inflated prices for chocolate goods. 602 F. Supp. 2d at 548. Defendant Mars Canada disputed Pennsylvania's jurisdiction over it. The district court applied the *Calder* "effects" test and found that it lacked jurisdiction over Mars Canada because the plaintiffs had failed to show that the company had specifically directed conduct toward the relevant forum (there, the United States[11]). *Id.* at 564-65. In particular, the district court noted that the plaintiffs had not alleged that Mars Canada was involved in any discussions about the pricing of American confec-

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at 206. This is sufficient conduct "expressly aimed" at Washington to confer jurisdiction in Washington over the SDI Defendants. *See Vitamins,* 270 F. Supp. 2d at 32-33 (finding specific personal jurisdiction in Kansas under the "effects" test based on the defendant's sale of price-fixed choline chloride products in Kansas over a four year period).

[11] Federal courts have identified the United States as the relevant forum in federal antitrust actions under the Sherman Antitrust Act. *E.g., Go-Video, Inc. v. Akai Elec. Co., Ltd.,* 885 F.2d 1406, 1415-17 (9th Cir. 1989); *CRT Antitrust Litig.,* 27 F. Supp. 3d at 1008.

tionary products or that it had any control over in-forum pricing. *Id.*

Like the plaintiffs in *Chocolate Confectionary,* the State in this case failed to allege that Defendants engaged in discussions about the pricing of CRT Products in Washington or that they controlled the pricing of those products here. This is because the CRT Products were assembled and sold by the direct purchasers not the Defendants.[12] *Accord CRT Antitrust Litig.,* 27 F. Supp. 3d at 1012-13 (dismissing complaint for lack of jurisdiction in an indirect purchaser action involving price-fixing allegations because there were no allegations in the complaint that the defendants specifically shared information with their assemblers about the forum market, or that they coordinated with them about in-forum pricing). Following *Chocolate Confectionary* and *CRT Antitrust Litig.,* Washington courts lack jurisdiction over Defendants in this case.

The court came to the same conclusion in *American Copper & Brass*, 452 F. Supp. 2d at 828-29. In that case, the plaintiffs sued a manufacturer of copper tubing in Tennessee for conspiracy to fix the global price of copper tubing, which resulted in indirect purchasers paying artificially high prices for such products in the United States. *Id.* at 824. The defendant submitted affidavits stating that they never sold, distributed, or sold for distribution

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[12] The majority infers from the State's complaint an allegation of control over the pricing of CRT Products where none exists. Majority at 17 n.5. The State's complaint alleged that "Defendants also agreed on the prices at which some of the Defendants would sell *CRTs* to their own corporate subsidiaries and affiliates that manufactured CRT Products." CP at 20 (emphasis added). The State did not allege that Defendants had control over or made agreements regarding the price of CRT *Products.*

any products into the United States. *Id.* at 828. The court ruled that it lacked jurisdiction over the defendant because there was no allegation of contact between the defendant and the forum (there, the United States). *Id.* at 829. According to that court, it is not enough to say that the defendant "'[was] the leading global manufacturer of copper tubing.'" *Id.* The plaintiff must instead allege conduct by the defendant "'expressly aimed'" at the forum. *Id.*

A district court for the Northern District of California also applied the "effects" test in an antitrust action involving price-fixing allegations and found jurisdiction lacking over the foreign defendants. *DRAM,* 2005 WL 2988715, at *6-7. The district court reasoned, "Although plaintiffs allege that defendants have committed an intentional act by way of their participation in a price-fixing conspiracy, plaintiffs fail to allege that defendants' conspiratorial acts were individually targeted towards any plaintiff whom defendants knew to be residents of [the forum states]. Nor can plaintiffs do so, given the uncontroverted testimony offered by defendants demonstrating that they have never manufactured nor sold any [dynamic random access memory (DRAM)] in any of the forum states, nor do they maintain any business or corporate formalities in the forum states, nor do they receive any substantial revenue from the sales of DRAM (or any other products) in the forum states." *Id.* at *6 (emphasis omitted).

Like the foreign manufacturers in *Chocolate Confectionary, American Copper & Brass,* and *DRAM,* most Defendants[13] here did not direct activities toward the fo-

[13] Koninklijke Philips Electronics NV; Philips Electronics Industries (Taiwan) Ltd.; LG Electronics Inc.; Samsung SDI America Inc.;

rum state (Washington) and did not sell products to customers here. The fact that they dominated the global market share for CRT sales or that their products were later incorporated into other products that were then assembled, sold, and distributed to indirect purchasers by other parties in the forum state is insufficient under these persuasive authorities.

B. *The Result Is the Same under Controlling "Stream of Commerce" Authority*

Even if the majority were correct and the "stream of commerce" analysis did apply here, the result would be the same under controlling "stream of commerce" precedent. As previously discussed, despite the Supreme Court's attempts to clarify "stream of commerce" jurisdiction in *Asahi* and *J. Mcintyre,* it has yet to adopt any of the "stream of commerce" tests articulated by Justice O'Connor, Justice Brennan, and Justice Stevens in *Asahi.* As the majority correctly observes, the only thing five Supreme Court justices agreed on in those cases was that a foreign manufacturer's sale of products through an independent, nationwide distribution system is not sufficient, absent something more, for a state to assert personal jurisdiction over the manufacturer when only one product enters the forum state and causes injury. Majority at 13-14 (citing *J. Mcintyre,* 564 U.S. at 889 (Breyer, J., concurring) for the narrowest holding). But this result, as Justice Breyer observed, stems not from any of the tests articulated in *Asahi* , but from the application of *World-Wide Volkswagen. World-Wide Volkswagen* thus seems to be the only controlling Supreme Court authority on "stream of commerce" analysis even after *Asahi*

Samsung SDI Mexico SA de CV; Shenzhen Samsung SDI Co. Ltd.; and Tianjin Samsung SDI Co. Ltd.

and *J. Mcintyre. Accord State v. Atl. Richfield Co.*, 2016 VT 22, __ Vt. __, __ A.3d __, 2016 WL 556174, at *6 (Feb. 12, 2016).

World-Wide Volkswagen unambiguously holds that foreseeability of a defendant's product eventually entering the forum state, alone, is not sufficient to support jurisdiction. 444 U.S. at 295-96. Nor can jurisdiction be based on the fact that the defendant benefited financially from some collateral relation with the forum state. *Id.* at 299. "Stream of commerce" jurisdiction arises only when *"the defendant's conduct and connection with the forum State* are such that he should reasonably anticipate being haled into court there." *Id.* at 297 (emphasis added). Thus, "the mere 'unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.'" *Id.* at 298 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958)). There must be purposeful availment by the defendant.

The purposeful availment test measures the defendant's conduct and connections with the forum state, not the plaintiffs. This ensures notice and fairness: "When a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State,' it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State." *Id.* at 297 (citation omitted) (quoting *Hanson*, 357 U.S. at 253).

The State's complaint failed to allege such conduct by Defendants in Washington. *See supra* Section II.A. The only connection the complaint alleged between Defend-

ants and Washington stemmed from the unilateral activities of others in incorporating Defendants' CRTs into new end products for sale in Washington. The complaint does not allege that Defendants had any control over these activities. The State also did not rebut or challenge the declarations that Defendants submitted in support of dismissal that, for the most part, highlighted the absence of any contacts between Defendants and Washington. Most Defendants swore that they never sold any CRTs in Washington, never entered Washington, never hired employees in Washington, and never transacted any business in Washington. Based on these uncontroverted facts, Defendants did not purposefully avail themselves of the benefits of doing business in Washington.

Several of our sister and lower courts have come to the same conclusion. In *Holder,* plaintiffs sued foreign manufacturers for conspiring to fix the price of citric acid, which resulted in higher prices for District of Columbia consumers buying products containing that ingredient. 779 A.2d at 267. The court applied the "stream of commerce" test and held that it lacked personal jurisdiction over the nonforum manufacturers. *Id.* at 269. To hold otherwise, the court explained, would be to find that the defendants could be haled into court anywhere in the world that a product containing any amount of citric acid produced by the defendants was ultimately sold. *Id.* at 267. Extending global jurisdiction to all component part manufacturers, the court found, would offend due process clause protections. *Id.*

The South Dakota Supreme Court applied the "stream of commerce" test and came to the same conclusion—no personal jurisdiction—on similar facts in *Frankenfeld.* 697 N.W.2d at 385-87. In *Frankenfeld,* plaintiffs alleged

that out-of-state manufacturers conspired to fix the price of rubber processing chemicals and that the conspiracy caused South Dakota residents to pay supracompetitive prices for rubber tires (that were manufactured elsewhere with those chemicals but purchased in state). *Id.* at 380-81. The court found the defendants' connections to South Dakota were too attenuated to support jurisdiction because those defendants never delivered their products—the chemicals—into the stream of commerce with the expectation that they would be purchased by consumers in South Dakota, and indeed their products—the chemicals—were not purchased by South Dakotans. *Id.* at 386. Instead, direct purchasers used the defendants' products (chemicals) to manufacture different products (tires) and those direct purchasers then sent those tires to South Dakota. *Id.* This was such an "extremely attenuated connection" that it could not support jurisdiction. *Id.* at 387.

The Kansas Supreme Court applied the same "stream of commerce" test and came to the same conclusion—that it lacked jurisdiction—in a similar antitrust case filed by indirect purchasers against manufacturers of rubber processing chemicals in *Merriman.* 282 Kan. at 470. Like the South Dakota court, the Kansas court based this decision on the fact that the manufacturer of plaintiff s tires did not operate in Kansas and that there was no indication that the defendants had any control over or collaboration with the tire manufacturers about where they marketed their tires. *Id.* These cases illustrate that regardless of whether we apply the "effects" test for intentional acts articulated in *Calder* and *Walden* or the "stream of commerce" analysis articulated in *World-Wide Volkswagen,* the result is the same: Washington

courts lack personal jurisdiction over any of Defendants, except the SDI Defendants.

III. THE MAJORITY ERRS IN IGNORING DEFENDANTS' DECLARATIONS

The majority reaches a contrary result in part by ignoring Defendants' declarations. Majority at 17-18.

The majority's approach is inconsistent with Washington cases stating that once the defendant files a CR 12(b)(2) motion challenging jurisdiction based on affidavits and discovery, the plaintiff must present evidence establishing a prima facie showing of jurisdiction. *See Precision Lab. Plastics, Inc. v. Micro Test, Inc.,* 96 Wn. App. 721, 725, 981 P.2d 454 (1999); *MBM Fisheries, Inc. v. Bollinger Mach. Shop & Shipyard, Inc.,* 60 Wn. App. 414, 418, 804 P.2d 627 (1991); *see also Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.,* 172 Wn. App. 799, 807, 292 P.3d 147 (2013) ("Once challenged, the party asserting personal jurisdiction bears the burden of proof to establish its existence."), *aff'd,* 181 Wn.2d 272, 333 P.3d 380 (2014).

In fact, we have held that when the court considers matters outside the pleadings in ruling on a motion to dismiss for lack of personal jurisdiction, the court should treat the motion as one for summary judgment and view the facts in the light most favorable to the nonmoving party, not ignore all contrary facts as the majority does. *See Failla v. FixtureOne Corp.,* 181 Wn.2d 642, 648 n.1, 649, 336 P.3d 1112 (2014), *cert. denied,* 135 S. Ct. 1904 (2015); *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.,* 180 Wn.2d 954, 959, 334 P.3d 29 (2014); *Beaman v. Yakima Valley Disposal, Inc.*, 116 Wn.2d 697, 701 n.3, 807 P.2d 849 (1991); *see also Schumacher Painting Co. v. First Union Mgmt., Inc.*, 69 Wn.

App. 693, 698, 850 P.2d 1361 (1993); *Carrigan v. Cal. Horse Racing Bd.*, 60 Wn. App. 79, 83 n.3, 802 P.2d 813 (1990); *Access Rd. Builders v. Christenson Elec. Contracting Eng'g Co.*, 19 Wn. App. 477, 481, 576 P.2d 71 (1978); *Puget Sound Bulb Exch. v. Metal Bldgs. Insulation, Inc.,* 9 Wn. App. 284, 288-89, 513 P.2d 102 (1973).

These decisions comport with the approach that the federal courts typically use when applying Fed. R. Civ. P. 12.[14] They permit a trial court to consider material outside the pleadings and to exercise discretion when deciding the proper procedure to resolve whether personal jurisdiction exists.[15]

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[14] The Court of Appeals in this case declined to apply this analysis based on the additional language in our state rule, which provides that "'[i]f, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.'" *State v. LG Elecs., Inc.,* 185 Wn. App. 394, 404, 341 P.3d 346 (emphasis omitted) (quoting CR 12(b)), *review granted* , 183 Wn.2d 1002, 349 P.3d 856 (2015). But the federal rule contains basically the same language in a slightly different spot at Fed. R. Civ. P. 12(d), so that supposed distinction fails.

[15] *See Toys "R" Us, Inc. v. Step Two, SA,* 318 F.3d 446, 456 (3d Cir. 2003) (explaining that although plaintiff bears the burden of demonstrating facts supporting personal jurisdiction, courts are to assist the plaintiff by allowing jurisdictional discovery unless the claim is clearly frivolous (citing *Pinker v. Roche Holdings Ltd.,* 292 F.3d 361, 368 (3d Cir. 2002) and quoting *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n,* 107 F.3d 1026, 1042 (3d Cir. 1997))); *Data Disc, Inc. v. Sys. Tech. Assocs.,* 557 F.2d 1280, 1285 (9th Cir. 1977) (A defendant may move, before trial, to dismiss the complaint for lack of personal jurisdiction, and because there is no statutory method for resolving this issue, the mode of its determination is left to the trial court.); *Krepps v. Reiner,* 588 F. Supp. 2d 471, 479 (S.D.N.Y. 2008)

We applied essentially this analysis in *FutureSelect,* 180 Wn.2d at 959. In that case, we considered whether a New York defendant had sufficient minimum contacts with Washington to support personal jurisdiction. The trial court dismissed on the pleadings after holding a hearing; considering numerous pleadings, declarations, and briefs; and hearing arguments in favor of dismissal, including a CR 12(b)(2) argument. This court reversed, stating that "[a]t this stage of litigation, *the allegations of the complaint* establish sufficient minimum contacts to survive a CR 12(b)(2) motion. However, [defendant] may renew its jurisdictional challenge after appropriate discovery has been conducted." *Id.* at 963 (emphasis added). We explained that in some cases it may be appropriate for the trial court to delay ruling on a CR l 2(b)(2) motion to allow for limited jurisdictional discovery: "Though we leave open [defendant]'s ability to renew its motion, we find the trial court dismissed prematurely. Some limited discovery and a resolution of disputed jurisdictional facts are warranted." *Id.* at 966. We directed the trial court on remand to permit jurisdictional discovery and, if nec-

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("In deciding a pretrial motion to dismiss for lack of personal jurisdiction, the Court has 'considerable procedural leeway. It may determine the motion on the basis of affidavits alone; or it may permit discovery in aid of the motion; or it may conduct an evidentiary hearing on the merits of the motion.'" (quoting *Marine Midland Bank, NA v. Miller,* 664 F.2d 899, 904 (2d Cir. 1981))); *Allen v. Russian Fed'n,* 522 F. Supp. 2d 167, 181-82 (D.D.C. 2007) ("In contrast to a Motion to Dismiss brought under Fed.R.Civ.P. 12(b)(6), the Court need not treat all of Plaintiffs' allegations as true when determining whether personal jurisdiction exists over Defendants. Instead, the Court 'may receive and weigh affidavits and any other relevant matter to assist it in determining the jurisdictional facts.'" (quoting *United States v. Philip Morris, Inc.,* 116 F. Supp. 2d 116, 120 n.4 (D.D.C. 2000))).

essary, hold jurisdictional hearing to resolve any contested material facts. *Id.* at 972.

I acknowledge that we did not explicitly address whether the CR 12(b)(2) motion would essentially be converted to a CR 56 motion at that point. But we have addressed that question in the past, and we have said that the answer is yes. *See Beaman*, 116 Wn.2d at 701 n.3 ("Because the trial court received matters outside the pleadings, Valley's CR 12(b) motion to dismiss for lack of jurisdiction is treated on review as a summary judgment motion and the facts are viewed in the light most favorable to Beaman.").

The majority's decision to analogize the CR 12(b)(2) jurisdictional inquiry to the CR 8(a)(l) notice pleading inquiry strays from the approach of that prior precedent. Majority at 16-17. I would not stray from this approach, especially without any showing that it is incorrect and harmful. It allows the threshold jurisdictional question to be answered more quickly and efficiently. The trial court therefore properly considered Defendants' declarations in ruling on jurisdiction. CP at 597.[16]

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[16] The State did ask for jurisdictional discovery in response to Defendants' motions to dismiss. See CP at 226-27, 239-40, 252-53, 265-66; Pet. for Review at 125-26. The trial court denied that request, but it did so because the State had failed to explain what relevant facts it would seek that might contradict Defendants' declarations. Pet. for Review at 137-38. This is likely because the Defendants' declarations did not contradict the complaint's stream-of-commerce type allegations, but gave other relevant information. CP at 40-42, 56-64, 84-86, 104-06, 203-06. The trial court's decision seems well within its discretion: as both the majority and this dissent show, the jurisdictional question in this case is a legal question on essentially undisputed facts about the limited direct contacts between Defendants and this state.

CONCLUSION

The trial court lacked personal jurisdiction over all Defendants except the SDI Defendants. I would therefore reverse the Court of Appeals and reinstate the trial court's dismissal of the complaint with prejudice as to all but the SDI Defendants.

/s/ Gordon McCloud, J.
/s/ Owens, J.
/s/ Madsen, C.J.

APPENDIX B

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

No. 70298-0-1 (linked with No. 70299-8-1)

STATE OF WASHINGTON,
Respondent,

v.

LG ELECTRONICS, INC.; KONINKLIJKE PHILIPS ELECTRONICS N.V. A/K/A ROYAL PHILIPS ELECTRONICS N.V.; PHILIPS ELECTRONICS INDUSTRIES (TAIWAN), LTD.; SAMSUNG SDI CO., LTD. F/K/A SAMSUNG DISPLAY DEVICE 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.; SAMSUNG SDI (MALAYSIA) SDN. BHD.; PANASONIC CORPORATION F/K/A MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD.; HITACHI DISPLAYS, LTD.; HITACHI ELECTRONIC DEVICES (USA), INC.; HITACHI ASIA, LTD.,
Appellants,

LG ELECTRONICS U.S.A, INC.; PHILIPS ELECTRONICS NORTH AMERICA CORPORATION; TOSHIBA CORPORATION; TOSHIBA AMERICA ELECTRONIC COMPONENTS, INC.; MT PICTURE DISPLAY CO., LTD.; PANASONIC CORPORATION OF NORTH AMERICA; HITACHI, LTD.; CHUNGHWA PICTURE TUBES LTD.; CPTF OPTRONICS CO., LTD.; CHUNGHWA PICTURE TUBES (MALAYSIA) SDN. BHD.,
Defendants.

(January 12, 2015)

PUBLISHED OPINION

DWYER, J. — In resolving this appeal, which requires us to consider the due process limitations on the exercise of personal jurisdiction over certain foreign corporations, we hold that because a product manufactured by these foreign corporations was sold—as an integrated component part of retail consumer goods—into Washington in high volume over a period of years, the corporations "purposefully" established "minimum contacts" in Washington. Owing to our conclusion that the Attorney General alleged sufficient "minimum contacts" to support an exercise of specific jurisdiction by Washington courts, and in view of our further conclusion that such exercise would not offend notions of "fair play and substantial justice," we reverse the trial court's order dismissing the Attorney General's complaint for lack of personal jurisdiction and remand for further proceedings.

I

On May 1, 2012, the Attorney General,[1] acting on behalf of the State and as parens patriae on behalf of persons residing in Washington, brought suit against more than 20 foreign corporate entities.[2] While geographically diffuse, the defendants had a common characteristic—

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[1] At the time that the complaint was filed, the Attorney General of Washington was Robert M. McKenna. The current Attorney General is Robert W. Ferguson.

[2] These entities were scattered across four continents and ten different countries, including South Korea, Taiwan, China, Japan, Malaysia, Singapore, the United States of America, Mexico, Brazil, and the Netherlands.

past participation in the global market for cathode ray tubes (CRTs).[3] The Attorney General broadly alleged that the defendants had, in violation of the Washington Consumer Protection Act[4] (CPA), participated in a worldwide conspiracy to raise prices and set production levels in the market for CRTs, which caused Washington State residents and State agencies to pay supracompetitive prices for CRT products.[5]

The Attorney General claimed that the defendants manufactured, sold, and/or distributed CRT products, directly or indirectly, to customers throughout the United States and, specifically, in Washington. He further alleged that the actions of the defendants were intended to and did have a direct, substantial, and reasonably foreseeable effect on United States domestic import trade and commerce, and on import trade and commerce into and within Washington. Indeed, he averred that the defendants' alleged conspiracy to fix prices affected billions of dollars in United States commerce and damaged a large number of Washington State agencies and residents.

In support of this, the Attorney General maintained that because, until recently, CRTs were the dominant technology used in displays such as televisions and computer monitors, this translated into the sale of millions of CRT products during the alleged conspiracy period, which resulted in billions of dollars in annual profits to

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[3] A cathode ray tube is a display technology used in televisions, computer monitors, and other specialized applications. According to the Attorney General, CRTs, until recently, represented the "dominant technology for manufacturing televisions and computer monitors."

[4] Ch. 19.86 RCW.

[5] The Attorney General defined CRT products as "CRTs and products containing CRTs, such as televisions and computer monitors."

the defendants. The Attorney General alleged that during the entirety of the alleged conspiracy period, North America represented the largest market for CRT televisions and computer monitors, and that the 1995 worldwide market for CRT monitors was 57.8 million units, 28 million of which were purchased in North America. The Attorney General claimed that CRT monitors accounted for over 90 percent of the retail market for computer monitors in North America in 1999 and that CRT televisions accounted for 73 percent of the North American television market in 2004. The Attorney General averred that during the alleged conspiracy period, the CRT industry was dominated by relatively few companies, and that, in 2004, four of the defendants in this case together held a collective 78 percent share of the global CRT markets.

By way of relief, the Attorney General sought (1) injunctive relief, (2) civil penalties, (3) damages for State agencies, and (4) restitution for consumers who purchased CRTs or CRT products, whether directly or indirectly.

After accepting service of process, and prior to any discovery being conducted, certain defendants (collectively Companies[6]) filed motions, supported by affidavits and declarations, to dismiss the Attorney General's complaint for lack of personal jurisdiction pursuant to CR 12(b)(2). These affidavits and declarations contained testimony

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[6] 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., Shenzhen Samsung SDI Co., Ltd., and Tianjin Samsung SDI Co., Ltd.

that the Companies had never sold CRTs or CRT products to Washington customers or done any business in Washington.

In response, the Attorney General maintained that, for purposes of resolving the Companies' dispositive motions, the aforementioned affidavits and declarations should not be considered by the trial court. In the event that they were considered, however, the Attorney General requested an opportunity to conduct both general and jurisdictional discovery. The Companies opposed the Attorney General's request.

The trial court granted the Companies' motions and dismissed the Attorney General's complaint as against them. In doing so, the trial court denied the Attorney General's request to conduct discovery. Upon an agreed motion, the trial court entered final judgment with prejudice pursuant to CR 54(b).[7] The Attorney General filed a timely appeal.

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[7] **Judgment Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination in the judgment, supported by written findings, that there is no just reason for delay and upon an express direction for the entry of judgment. The findings may be made at the time of entry of judgment or thereafter on the court's own motion or on motion of any party. In the absence of such findings, determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Additionally, the trial court authorized the Companies to request attorney fees and costs. With the exception of the Philips entities, the Companies submitted briefing requesting fees, along with supporting affidavits. The trial court granted their request for fees pursuant to RCW 4.28.185(5).[8] The Attorney General appeals from this award pursuant to RAP 2.4(g).[9]

Certain defendants[10] sought and obtained discretionary review of two issues related to whether certain claims of the Attorney General were time-barred. That matter has been resolved by separate opinion. *State v. LG Electronics, Inc.*, No. 70299-8-I (Wash. Ct. App. Dec. 22, 2014). The underlying litigation has been stayed.

II

The Attorney General contends that the trial court's order dismissing his complaint for lack of personal jurisdiction over the Companies was entered in error. We agree. The allegations in the Attorney General's complaint, when treated as verities, are sufficient to satisfy his prima facie burden of showing that personal jurisdic-

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[8] This is the attorney fee provision of Washington's long-arm statute. It states that, "[i]n 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." RCW 4.28.185(5).

[9] "An appeal from a decision on the merits of a case brings up for review an award of attorney fees entered after the appellate court accepts review of the decision on the merits." RAP 2.4(g).

[10] LG Electronics, Inc., LG Electronics U.S.A. Inc., Koninklijke Philips Electronics N.V. a/k/a Royal Philips Electronics N.V., Philips Electronics North America Corporation, Toshiba Corporation, Toshiba America Electronic Components, Inc., Hitachi, Ltd., Hitachi Displays, Ltd., Hitachi Electronic Devices (USA), Inc., and Hitachi Asia, Ltd.

tion comports with due process considerations. Considered together, the Attorney General's allegations demonstrate the following: (1) that the Companies "purposefully" established "minimum contacts" with Washington, (2) that the harm claimed by the Attorney General "arose" from those minimum contacts, and (3) that the exercise of jurisdiction in this matter is consistent with notions of "fair play and substantial justice."

A

Civil Rule 12 is entitled "Defenses and Objections." Section (b), entitled "How Presented," reads as follows:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) *lack of jurisdiction over the person,* (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. *If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to*

> *state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.*

(Emphasis added.)

Thus, whereas CR 12 envisions the possibility that the submission of evidence by one party may cause a CR 12(b)(6) motion to be converted into a CR 56 motion, it does not, by its terms, envision the same for motions brought pursuant to subsection (b)(2).[11]

Nevertheless, our case law does not prohibit the introduction of evidence in support of a motion brought pursuant to CR 12(b)(2). However, when this occurs prior to full discovery, neither CR 12(b) itself, nor controlling case law, provides that the motion be analyzed as if it were brought pursuant to CR 56. Instead, our case law sets out the particular requirements for evaluation of such a CR 12(b)(2) motion.[12]

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[11] "When interpreting court rules, the court approaches the rules as though they had been drafted by the Legislature." *State v. Greenwood*, 120 Wn.2d 585, 592, 845 P.2d 971 (1993). "The language must be given its plain meaning according to English grammar usage." *State v. Raper*, 47 Wn. App. 530, 536, 736 P.2d 680 (1987).

[12] After a fair opportunity for discovery, a party may, of course, bring a motion to dismiss for want of personal jurisdiction as a CR 56 motion. Similarly, if the facts are in dispute, and if there is not otherwise a right to have a jury determine the particular facts at issue, CR 12(d) provides for a determinative hearing on the matter prior to trial.

"'When the trial court considers matters outside the pleadings on a motion to dismiss for lack of personal jurisdiction, we review the trial court's ruling under the de novo standard of review for summary judgment.'" *Columbia Asset Recovery Grp., LLC v. Kelly*, 177 Wn. App. 475, 483, 312 P.3d 687 (2013) (quoting *Freestone Capital Partners LP v. MKA Real Estate Opportunity Fund I, LLC*, 155 Wn. App. 643, 653, 230 P.3d 625 (2010)). When reviewing a grant of a motion to dismiss for lack of personal jurisdiction, we accept the nonmoving party's factual allegations as true and review the facts and all reasonable inferences drawn from the facts in the light most favorable to the nonmoving party. *Freestone*, 155 Wn. App. at 653-54; *accord Walden v. Fiore*, __ U.S. __, 134 S. Ct. 1115, 1119 n.2, 188 L. Ed. 2d 12 (2014). It is the plaintiff's burden to establish a prima facie case that jurisdiction exists. *Freestone*, 155 Wn. App. at 654; *see also FutureSelect Portfolio Mgmt, Inc. v. Tremont Grp. Holdings, Inc.*, 175 Wn. App. 840, 885-86, 309 P.3d 555 (2013) ("The plaintiff has the burden of demonstrating jurisdiction, but when a motion to dismiss for lack of personal jurisdiction is resolved without an evidentiary hearing," the plaintiff's burden is only that of a prima facie showing of jurisdiction), *aff'd*, 180 Wn.2d 954, 331 P.3d 29 (2014).

The Companies agree that review is de novo. However, they assert that the allegations in the Attorney General's complaint may not be treated as verities for purposes of determining personal jurisdiction. The Companies contend that when a defendant moves to dismiss for lack of personal jurisdiction and, in doing so, offers affidavits or declarations to rebut the allegations in the plaintiff's complaint, the plaintiff may not rely on the complaint's factual averments but, rather, must submit evidence in order to satisfy its burden of proof. Given

that, in support of their motions to dismiss, the Companies offered sworn testimony controverting the Attorney General's allegations, they maintain that it was incumbent upon the Attorney General to offer evidence to substantiate his allegations.[13] The Companies' position, which is at variance with our prior decisions, is untenable.

Even where the trial court has considered matters outside the pleadings on a CR 12(b)(2) motion to dismiss for lack of personal jurisdiction, "[f]or purposes of determining jurisdiction, this court treats the allegations in the complaint as established." *Freestone*, 155 Wn. App. at 654; *accord State v. AU Optronics Corp.*, 180 Wn. App. 903, 912, 328 P.3d 919 (2014); *FutureSelect*, 175 Wn. App. at 885-86; *SeaHAVN, Ltd. v. Glitnir Bank*, 154 Wn. App. 550, 563, 226 P.3d 141 (2010); *Shaffer v. McFadden*, 125 Wn. App. 364, 370, 104 P.3d 742 (2005); *CTVC of Haw. Co. v. Shinawatra*, 82 Wn. App. 699, 708, 919 P.2d 1243, 932 P.2d 664 (1996); *Hewitt v. Hewitt*, 78 Wn. App. 447, 451-52, 896 P.2d 1312 (1995); *In re Marriage of Yocum*, 73 Wn. App. 699, 703, 870 P.2d 1033 (1994); *Harbison v. Garden Valley Outfitters, Inc.*, 69 Wn. App. 590, 595, 849 P.2d 669 (1993); *MBM Fisheries, Inc. v. Bollinger Mach. Shop & Shipyard, Inc.*, 60 Wn. App. 414, 418, 804 P.2d 627 (1991); *see also Raymond v. Robinson*, 104 Wn. App. 627, 633, 15 P.3d 697 (2001) (Division Two); *Precision Lab. Plastics, Inc. v. Micro Test, Inc.*, 96 Wn. App. 721, 725, 981 P.2d 454 (1999) (Division Two); *Byron Nelson Co. v. Orchard Mgmt. Corp.*, 95 Wn. App. 462, 467, 975

[13] The Companies' position is based on the premise that, in a CR 56 context, the nonmoving party must produce evidence in support of its claims and may not merely rely on the allegations in its complaint or other pleadings. *See Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989).

P.2d 555 (1999) (Division Three). Our Supreme Court has recognized this approach and adopted the same. *See FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 963-64, 331 P.3d 29 (2014) (standard applies when full discovery has not been conducted); *Lewis v. Bours*, 119 Wn.2d 667, 670, 835 P.2d 221 (1992).[14]

Resolving jurisdictional matters at an early stage is an important objective;[15] yet, our liberal notice pleading sys-

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[14] We note the existence of two cases from the electric typewriter era that indicate to the contrary. *Access Rd. Builders v. Christenson Elec. Contracting Enq'g Co.*, 19 Wn. App. 477, 576 P.2d 71 (1978) (Division One), and *Puget Sound Bulb Exch. v. Metal Bldgs. Insulation Inc.*, 9 Wn. App. 284, 513 P.2d 102 (1973) (Division Two). In both cases, it appears that each party offered evidence and that neither plaintiff sought to have the court treat the allegations in its complaint as established. Neither case discusses the issue as presented herein and both, to the extent that they are inconsistent with recent precedent, have been overtaken by the previously cited, uniform authority from the Supreme Court and all three divisions of the Court of Appeals. Similarly, in *Carrigan v. California Horse Racing Board*, 60 Wn. App. 79, 802 P.2d 813 (1990), which cited to *Access Road Builders* as authority for treating the motion to dismiss as a CR 56 motion, it does not appear that the plaintiff argued that the court should treat the allegations in the complaint as true.

In this matter, the trial judge did not purport to be holding the Attorney General to the standard of production that must be satisfied in order to withstand a CR 56 motion for summary judgment: "I don't mean that this is a summary judgment motion. I am not trying to convert this into a summary judgment motion." This disavowal indicates that the trial judge, in spite of his erroneous dismissal of the Attorney General's complaint, understood correctly that, in considering whether to dismiss the Attorney General's complaint for want of personal jurisdiction over the Companies, it was incumbent upon the court to treat as verities the averments contained therein.

[15] *See, e.g., Sanders v. Sanders*, 63 Wn.2d 709, 715, 388 P.2d 942 (1964) ("[W]hen jurisdictional problems are left unsettled while various other matters are presented . . . [t]he result is too often confu-

tem,[16] which allows plaintiffs to "use the discovery process to uncover the evidence necessary to pursue their claims," tempers this aspiration. *Putman v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wn.2d 974, 983, 216 P.3d 374 (2009);[17] *cf. Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 222, 829 P.2d 1099 (1992) ("The notice pleading rule contemplates that discovery will provide parties with the opportunity to learn more detailed information about the nature of a complaint."); *Mose v. Mose*, 4 Wn. App. 204, 209, 480 P.2d 517 (1971) ("the notice pleading concept inherent in the rules anticipates that the issues to be tried will be delineated by pretrial discovery"). *See generally FutureSelect*, 180 Wn.2d at 963 ("At this stage of the litigation, the allegations of the complaint establish sufficient minimum contacts to survive a CR 12(b)(2) motion. . . . [The defendant] may renew its jurisdictional

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sion, guess work and uncertainty, as well as probable delay, hardship and expense to the parties.").

[16] "Washington follows notice pleading rules and simply requires a 'concise statement of the claim and the relief sought.'" *Champagne v. Thurston County*, 163 Wn.2d 69, 84, 178 P.3d 936 (2008) (quoting *Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 352, 144 P.3d 276 (2006)); *accord* CR 8.

[17] In *Putman*, our Supreme Court struck down a statute requiring medical malpractice plaintiffs to submit a certificate of merit from a medical expert prior to discovery, ruling that this requirement violated the plaintiffs' right of access to the court, which "'includes the right of discovery authorized by the civil rules.'" 166 Wn.2d at 979 (quoting *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991)).

A simple rule emerges from *Putman* and the cases previously cited: If the defendant's motion to dismiss is to be decided by crediting the averments in the plaintiff's complaint, discovery is not required. However, if the defendant's motion to dismiss is to be decided based on evidence or the lack thereof, full and reasonable discovery must be afforded.

challenge after appropriate discovery has been conducted."). Were we to embrace the Companies' position, we would create a false world—one existing solely as the result of litigation strategies. Here, the Companies brought their CR 12(b)(2) motions, submitting factual averments therewith, prior to full discovery taking place. The Companies then successfully resisted the Attorney General's attempt to conduct discovery directed to the personal jurisdiction issue. This is a litigation strategy designed to subvert, rather than advance, the purpose of our liberal notice pleading regime—to facilitate a proper decision on the merits.[18] *See Stansfield v. Douglas County*, 146 Wn.2d 116, 123, 43 P.3d 498 (2002).

We need not disrupt our notice pleading regime in an effort to accommodate defendants following the invocation of a CR 12(b)(2) affirmative defense. In fact, accommodation has been made by rule. CR 12(d) permits any party to seek an evidentiary hearing prior to trial when "lack of jurisdiction over the person" has been raised as an affirmative defense pursuant to CR 12(b)(2): "[U]nless the court orders that the hearing and determination thereof be deferred until the trial," "[t]he defenses specifically enumerated (1)-(7) in section (b) of this rule . . . shall be heard and determined before trial on application of any party." CR 12(d). Following an evidentiary hearing, the plaintiff's burden is no longer that of a prima facie showing. *Cf. FutureSelect*, 175 Wn. App. at 885-86 ("when a motion to dismiss for lack of personal jurisdiction is resolved without an evidentiary hearing,"

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[18] For this reason, were we to accept the Companies' position, we would be compelled to conclude that the trial court abused its discretion when it refused to permit the Attorney General to conduct jurisdictional discovery.

the plaintiff's burden is only that of a prima facie showing).

In spite of this accommodation, it is apparent, given the Companies' litigation strategy—for instance, their opposition to the Attorney General's request that he be allowed to participate in general and jurisdictional discovery—that their objective has been to avoid engaging in discovery. While not unusual or inherently problematic, this objective—when pursued in a manner antithetical to the purpose of notice pleading and the structure of the Civil Rules—must be rebuffed. Accordingly, we decline to countenance the submittal of sworn testimony as a means of compelling plaintiffs to substantiate their allegations at the pleadings stage. Because the allegations in the complaint are treated as established, when a CR 12(b)(2) motion is made prior to full discovery, any individual allegation cannot be defeated by a statement to the contrary in a declaration submitted in support of the motion to dismiss.[19]

With this articulation of the proper standard of review accomplished, we proceed to set forth and examine in some detail the legal principles pertinent to the due process analysis conducted herein.

B

The Attorney General asserts specific personal jurisdiction over the Companies pursuant to RCW 19.86.160—the long-arm provision of the CPA:

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[19] The effect of our decision is not to mandate that affidavits or declarations submitted in support of a motion to dismiss be henceforth stricken. We hold only that such submissions do not alter the manner in which we treat the allegations in the complaint.

> 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.

This provision "extends the jurisdiction of Washington courts to persons outside its borders" and "'is intended to operate to the fullest extent permitted by due process." *AU Optronics*, 180 Wn. App. at 914 (quoting *In re Marriage of David-Oytan*, 171 Wn. App. 781, 798, 288 P.3d 57 (2012), *review denied*, 177 Wn.2d 1017 (2013)). Our "exercise of jurisdiction under RCW 19.86.160 must satisfy both the statute's requirements and due process." *AU Optronics*, 180 Wn. App. at 914. The Companies limit their jurisdictional challenge to the State's alleged attempt to violate due process.

A framework for analyzing whether Washington courts may exercise personal jurisdiction consistent with the Due Process Clause—derived from certain United States Supreme Court decisions discussed infra—has emerged.

> (1) That purposeful "minimum contacts" exist between the defendant and the forum state; (2) that the plaintiff's injuries "arise out of or relate to" those minimum contacts; and (3) that the exercise of jurisdiction be reasonable, that is, that jurisdiction be consistent with notions of "fair play and substantial justice."

Grange Ins. Ass'n v. State, 110 Wn.2d 752, 758, 757 P.2d 933 (1988) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-78, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)); *accord Failla v. FixtureOne Corp.*, __ Wn.2d __, 336 P.3d 1112, 1116 (2014); *FutureSelect*, 180 Wn.2d at 963-64; *AU Optronics*, 180 Wn. App. at 914.

While this framework may serve as a useful analytical tool, given its derivation, its value is dependent upon ascertaining the manner in which the United States Supreme Court has applied the principles embodied therein. In recognition of this, we turn our attention to the United States Supreme Court's personal jurisdiction jurisprudence.

"The Due Process Clause of the Fourteenth Amendment constrains a State's authority to bind a nonresident defendant to a judgment of its courts." *Walden*, 134 S. Ct. at 1121. "'The canonical opinion in this area remains *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), in which [the United States Supreme Court] held that a State may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if the defendant has "certain minimum contacts with [the State] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."'" *Daimler AG v. Bauman*, __ U.S. __, 134 S. Ct. 746, 754, 187 L. Ed. 2d 624 (2014) (internal quotation marks omitted) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, __ U.S. __, 131 S. Ct. 2846, 2853, 180 L. Ed. 2d 796 (2011)). "*International Shoe's* conception of 'fair play and substantial justice' presaged the development of two categories of personal jurisdiction," commonly referred to as "specific jurisdiction" and "general jurisdiction." *Daimler*, 134 S. Ct. at

754. Specific jurisdiction, which since "'has become the centerpiece of modern jurisdictional theory,'" requires that suit arise out of or relate to the defendant's contacts with the forum. *Daimler*, 134 S. Ct. at 754-55 (quoting *Goodyear*, 131 S. Ct. at 2854). General jurisdiction, which since "'[has played] a reduced role,'" permits the exercise of personal jurisdiction over a nonresident defendant where the defendant's "'continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." *Daimler*, 134 S. Ct. at 754-55 (alterations in original) (quoting *Goodyear*, 131 S. Ct. at 2854; *Int'l Shoe*, 326 U.S. at 318).[20]

"[T]he constitutional touchstone' of the determination whether an exercise of personal jurisdiction comports with due process 'remains whether the defendant purposefully established "minimum contacts"' in the forum State." *Asahi Metal Indus. Co. v. Superior Court of Cal., Solano County*, 480 U.S. 102, 108-09, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987) (plurality opinion) (alteration in original) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)); *accord Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958). The minimum contacts "inquiry . . .

[20] The United States Supreme Court has condemned the "'elid[ing]'" of "'the essential difference[s]'" between specific and general jurisdiction, observing that "[a]lthough the placement of a product into the stream of commerce 'may bolster an affiliation germane to *specific* jurisdiction,' . . . such contacts 'do not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant." *Daimler*, 134 S. Ct. at 757 (quoting *Goodyear*, 131 S. Ct. at 2855, 2857). We are careful to note that our analysis herein is limited to determining whether specific jurisdiction may be exercised over the Companies.

'focuses on "the relationship among the defendant, the forum, and the litigation."'" *Walden*, 134 S. Ct. at 1121 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984)) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977)); *accord Failla v. FixtureOne Corp.*, __ Wn.2d __, 336 P.3d 1112, 1116 (2014). Indeed, "[d]ue process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the 'random, fortuitous, or attenuated' contacts he makes by interacting with other persons affiliated with the State." *Walden*, 134 S. Ct. at 1123 (quoting *Burger King*, 471 U.S. at 475). In view of this, "the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum," but, "[r]ather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980). Thus, it has been said that "[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the *expectation* that they will be purchased by consumers in the forum State." *World-Wide Volkswagen*, 444 U.S. at 297-98 (emphasis added).

"The strictures of the Due Process Clause forbid a state court to exercise personal jurisdiction . . . under circumstances that would offend "'traditional notions of fair play and substantial justice."'" *Asahi*, 480 U.S. at 113 (quoting Intl Shoe, 326 U.S. at 316) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S. Ct. 339, 85 L. Ed. 278 (1940)). Thus, "[o]nce it has been decided that a defend-

ant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice." *Burger King*, 471 U.S. at 476 (quoting *Int'l Shoe*, 326 U.S. at 320). "[M]inimum requirements inherent in the concept of 'fair play and substantial justice' may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities." *Burger King*, 471 U.S. at 477-78. "[C]ourts in 'appropriate case[s]' may evaluate 'the burden on the defendant,' 'the forum State's interest in adjudicating the dispute,' the plaintiff's interest in obtaining convenient and effective relief,' '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.'" *Burger King*, 471 U.S. at 477 (second alteration in original) (quoting *World-Wide Volkswagen*, 444 U.S. at 292).

In 2011, the United States Supreme Court revisited its personal jurisdiction jurisprudence in the noteworthy case of *J. McIntyre Machinery, Ltd. v. Nicastro*, __ U.S. __, 131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011). Although the decision failed to yield a majority opinion, Justice Breyer's concurring opinion, which—as the opinion setting forth the narrowest ground of decision—represents the Court's holding,[21] expounded upon familiar, but often

[21] Because the Court's plurality opinion did not garner assent among at least five justices, we must, in order to ascertain the Court's holding, determine whether the plurality opinion or the concurrence decided the case on the narrowest grounds. *See*, *e.g.*, *Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977). Consistent with our recent decision in *AU Optronics*, we conclude that Justice Breyer's concurring opinion represents the more narrow

difficult to administer, principles. Given that the decision is instructive in resolving the matter before us, we examine it in some detail.

The facts in *J. McIntyre* are relatively straightforward. A British manufacturer sold metal shearing machines to a United States distributor, which, in turn, marketed and sold the machines throughout the United States. 131 S. Ct. at 2786 (plurality opinion). A single machine, which had been manufactured in Britain, was sold by the United States distributor to a New Jersey company.[22] *J. McIntyre*, 131 S. Ct. at 2786 (plurality opinion). Thereafter, Robert Nicastro, an employee of the New Jersey company, seriously injured his hand while using the machine. *J. McIntyre*, 131 S. Ct. at 2786 (plurality opinion). Nicastro subsequently filed suit against the British manufacturer in New Jersey. *J. McIntyre*, 131 S. Ct. at 2786 (plurality opinion). The New Jersey Supreme Court held that because the manufacturer knew or reasonably should have known "that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states," New Jersey courts could, consistent with the Due Process Clause, exercise jurisdiction over the manufacturer. *Nicastro v. McIntyre Mach. Am., Ltd.*, 201 N.J. 48, 76-78, 987 A.2d 575 (2010).

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ground of decision and is, thus, the Court's holding. 180 Wn. App. at 919

[22] Whereas the plurality opinion stated that "no more than four machines . . . ended up in New Jersey," Justice Breyer's concurring opinion stated, "The American Distributor on one occasion sold and shipped one machine to a New Jersey customer." *J. McIntyre*, 131 S. Ct. at 2791. As explained herein, Justice Breyer's opinion controls and, thus, we presume that only one machine entered New Jersey.

The United States Supreme Court reversed; however, the case produced no majority opinion—four justices signed Justice Kennedy's plurality opinion, two justices signed Justice Breyer's concurring opinion, and three justices signed Justice Ginsburg's dissenting opinion. While the plurality opinion and the concurring opinion relied on different reasoning, both reached the same conclusion: a foreign manufacturer's sale of its products through an independent, nationwide distribution system is not sufficient, absent something more, for a state to assert personal jurisdiction over the manufacturer when only one of its products enters a state and causes injury in that state. *Compare J. McIntyre*, 131 S. Ct. at 2791 (plurality opinion), *with Id.* at 2892 (Breyer, J., concurring in the judgment).

The plurality identified the appropriate inquiry as focusing on "the defendant's actions, not his expectations." *J. McIntyre*, 131 S. Ct. at 2789 (plurality opinion). The plurality required evidence that the foreign defendant "targeted" the forum state in some fashion. *J. McIntyre*, 131 S. Ct. at 2789-90 (plurality opinion). That it was simply foreseeable that the defendant's products might be distributed in the forum state—or in all 50 states, for that matter—was insufficient. *J. McIntyre*, 131 S. Ct. at 2789-90 (plurality opinion). Therefore, despite evidence that the British manufacturer had targeted the United States (by virtue of utilizing a nationwide distributor), given that there was no evidence showing that the manufacturer had targeted New Jersey specifically, the plurality reasoned that New Jersey could not exercise personal jurisdiction over the manufacturer. *J. McIntyre*, 131 S. Ct. at 2790-91 (plurality opinion).

Justice Breyer concurred in the judgment, yet he voiced his disapproval of the plurality's "strict rules that limit jurisdiction where a defendant does not 'inten[d] to submit to the power of a sovereign' and cannot 'be said to have targeted the forum.'" *J. McIntyre*, 131 S. Ct. at 2793 (Breyer, J., concurring in the judgment) (alteration in original) (quoting *Id.* at 2788). Justice Breyer explained that because certain issues with "serious commercial consequences . . . are totally absent in this case," strict adherence to prior precedents "and the limited facts found by the New Jersey Supreme Court" was the better approach. *J. McIntyre*, 131 S. Ct. at 2793-94 (Breyer, J., concurring in the judgment).

He also rejected the New Jersey Supreme Court's "absolute approach," in which "a producer is subject to jurisdiction for a products-liability action so long as it 'knows or reasonably should know that its products are distributed through a nationwide distribution system that *might* lead to those products being sold in any of the fifty states.'" *J. McIntyre*, 131 S. Ct. at 2793 (Breyer, J., concurring in the judgment) (quoting *Nicastro*, 201 N.J. at 76-77). He disavowed this formulation as inconsistent with prior precedent.

> For one thing, to adopt this view 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." *Shaffer v. Heitner*, 433 U.S. 186, 204 S. Ct. 2569, 53 L. Ed. 2d 683 (1977) (emphasis added). 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." *World-Wide Volkswagen*, 444 U.S., at 296.
>
> For another, I cannot reconcile so automatic a rule with the constitutional demand for "minimum contacts" and "purposefu[l] avail[ment]," each of which rest upon a particular notion of defendant-focused fairness. *Id.*, at 291, 297 (internal quotation marks omitted). A rule like the New Jersey Supreme Court's would permit every State to assert jurisdiction in a products-liability suit against any domestic manufacturer who sells its products (made anywhere in the United States) to a national distributor, no matter how large or small the manufacturer, no matter how distant the forum, and no matter how few the number of items that end up in the particular forum at issue.

J. McIntyre, 131 S. Ct. at 2793 (Breyer, J., concurring in the judgment) (alteration in original).

In Justice Breyer's estimation, "the outcome of this case is determined by our precedents"—in particular, *World-Wide Volkswagen*, 444 U.S. 286, and *Asahi*, 480 U.S. 102. *J. McIntyre*, 131 S. Ct. at 2791-92 (Breyer, J., concurring in the judgment). Justice Breyer explained that evidence of either a "'regular . . . flow' or 'regular course' of sales"[23] in the forum State *or* of "'something more,' such as special state-related design, advertising, advice, marketing, or anything else" was necessary in order to support New Jersey's assertion of jurisdiction. *J.*

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[23] The phrases "'regular . . . flow' or 'regular course' of sales" originated from Justice Brennan's and Justice Stevens's separate concurring opinions in *Asahi*. 480 U.S. at 117, 122.

McIntyre, 131 S. Ct. at 2792 (Breyer, J., concurring in the judgment). Given the absence of either, Justice Breyer concluded that there was no evidence showing that the British manufacturer "'purposefully avail[ed] itself of the privilege of conducting activities' within New Jersey, or that it delivered its goods in the stream of commerce 'with the expectation that they [would] be purchased' by New Jersey users." *J. McIntyre*, 131 S. Ct. at 2792 (Breyer, J., concurring in the judgment) (first alteration in original) (quoting *World-Wide Volkswagen*, 444 U.S. at 297-98).

Justice Breyer did not offer a mathematically precise means of computing the requisite incidence or volume of sales that must occur in a forum state in order to constitute sufficient minimum contacts. Nonetheless, in seeking to ascertain a threshold above which a certain incidence or volume of sales will constitute a "regular flow" or "regular course," certain observations made by Justice Breyer are revealing.

In rejecting the New Jersey Supreme Court's "absolute approach," as irreconcilable "with the constitutional demand for 'minimum contacts' and 'purposefu[l] avail[ment],' each of which rest upon a particular notion of defendant-focused fairness," Justice Breyer was troubled by the potential for a small foreign manufacturer to be haled into court in a distant forum by virtue of a large distributor's sale of a single product made by the manufacturer.

> What might appear fair in the case of a large manufacturer which specifically seeks, or expects, an equal-sized distributor to sell its product in a distant State might seem unfair in the case of a small manufacturer (say, an Appalachian potter)

> who sells his product (cups and saucers) exclusively to a large distributor, who resells a single item (a coffee mug) to a buyer from a distant State (Hawaii). . . .
>
> . . .
>
> It may be that a larger firm can readily "alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to consumers, or, if the risks are too great, severing its connection with the State." *World-Wide Volkswagen*, *supra*, at 297. But manufacturers come in many shapes and sizes. It may be fundamentally unfair to require a small Egyptian shirt maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer, selling its products through international distributors, to respond to products-liability tort suits in virtually every State in the United States, even those in respect to which the foreign firm has no connection at all but the sale of a single (allegedly defective) good.

J. McIntyre, 131 S. Ct. at 2793-94 (Breyer, J., concurring in the judgment).

The above-quoted passage, considered in concert with Justice Breyer's application of *World-Wide Volkswagen* and *Asahi*, leads to an inference that the minimum contacts inquiry, as viewed by Justice Breyer, seeks to determine whether the incidence or volume of sales into a forum signifies something *systematic*—informed by either the purpose or the expectation of the foreign manufacturer—such that it is fair, in light of the relationship between the defendant, the forum, and the litigation, to subject the foreign defendant to personal jurisdiction in the forum. Stated differently, if the incidence or volume

of sales into a forum points to something systematic—as opposed to anomalous—then "purposeful availment" will be found.[24, 25]

C

This court's prior interpretation of *J. McIntyre* is consistent with the foregoing assessment. Recently, in *AU Optronics*, we were given occasion to interpret and apply *J. McIntyre* in a factual context similar to the one presented by this appeal. In *AU Optronics*, the Attorney General of Washington brought suit against 20 defend-

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[24] The presence of state-related design, advertising, advice marketing, or anything else that could fall within that which has been described as "something more," will inform the foregoing inquiry and, in some instances, may be sufficient to sustain the exercise of personal jurisdiction.

[25] Justice Ginsburg's dissenting opinion, which was joined by Justices Sotomayor and Kagan, reasoned that the manufacturer—by virtue of "engag[ing] a U.S. company to promote and distribute the manufacturer's products, not in any particular State, but anywhere and everywhere in the United States the distributor can attract purchasers"—had purposefully availed itself of the privilege of conducting business in all states, including New Jersey. *J. McIntyre*, 131 S. Ct. at 2799, 2801 (Ginsburg, J., dissenting). From this reasoning it may be inferred that, even in the absence of a substantial volume of sales into a forum state, Justices Ginsburg, Sotomayor, and Kagan would still find purposeful availment in the event that a foreign manufacturer targeted a national market. It may be further deduced that the three dissenting justices in *J. McIntyre* would be at least as amenable as the two concurring justices, if not more so, to the notion that purposeful availment is satisfied when a plaintiff alleges that a foreign manufacturer, in targeting a national market, intended or expected that its products would be sold in one of the several states, and that such products were, in fact, sold into the forum state in substantial volume. Thus, any case in which the facts satisfied the demands of the two concurring justices would also satisfy the demands of the three dissenting justices, resulting in a majority decision, if not a unified majority view.

ants, including a foreign corporation that successfully moved, on its own behalf, to dismiss the complaint for lack of personal jurisdiction. 180 Wn. App. at 908, 911-12. In asserting personal jurisdiction over the foreign corporation, the Attorney General alleged that it had, in violation of the CPA, manufactured and distributed LCD panels as component parts for retail consumer goods, which were then sold by third parties in high volume throughout the United States, including in Washington. *AU Optronics*, 180 Wn. App. at 908-09.

After closely examining *J. McIntyre*, we held that the foreign manufacturer's alleged violation of the CPA "plus a large volume of expected and actual sales established sufficient minimum contacts for a Washington court to exercise specific jurisdiction over it." *AU Optronics*, 180 Wn. App. at 924. In so holding, we emphasized the fact that the foreign manufacturer "understood the third parties would sell products containing its LCD panels throughout the United States, including large numbers of those products in Washington." *AU Optronics*, 180 Wn. App. at 924. This was apparent, in part, by virtue of the fact that the foreign manufacturer "sold its LCD panels to a particular global consumer electronics manufacturer that sold products containing these panels nationwide and in Washington through national electronic appliance distribution chains." *AU Optronics*, 180 Wn. App. at 924.

While acknowledging that "'nationwide distribution of a foreign manufacturer's products is not sufficient to establish jurisdiction over the manufacturer when that effort results in only a single sale in the forum state," we concluded that "the record here shows that during the conspiracy period, various companies and retailers sold millions of dollars' worth of products containing [the for-

eign manufacturer's] LCD panels in Washington." *AU Optronics*, 180 Wn. App. at 924-25 (quoting *Willemsen v. Invacare Corp.*, 352 Or. 191, 203, 282 P.3d 867 (2012), *cert. denied*, 133 S. Ct. 984 (2013)). Consequently, as alleged "[s]ales to Washington consumers were not isolated; rather, they indicated a "regular . . . flow" or "regular course"' of sales in Washington."[26] *AU Optronics*, 180 Wn. App. at 925 (quoting *J. McIntyre*, 131 S. Ct. at 2792).

Our decision in *AU Optronics* was based on the analysis of *J. McIntyre* adopted by the Oregon Supreme Court in *Willemsen v. Invacare Corporation*, 352 Or. 191. *AU Optronics*, 180 Wn. App. at 922.[27] In *Willemsen*, a Taiwanese manufacturer of battery chargers, CTE, supplied its products for installation in motorized wheelchairs that were built by an Ohio corporation, Invacare. 352 Or. at 194. Invacare then sold the wheelchairs throughout the United States, including in Oregon. *Willemsen*, 352 Or. at 194. In Oregon, between 2006 and 2007, Invacare sold 1,166 motorized wheelchairs, nearly all of which came equipped with CTE's battery chargers. *Willemsen*, 352

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[26] In dicta, we observed that the foreign manufacturer "also entered into a master purchase agreement" with another company "in which the company agreed to obtain and maintain all necessary U.S. regulatory approval." *AU Optronics*, 180 Wn. App. at 924. We also noted that representatives of the foreign manufacturer "met with various companies in Washington and in other states." *AU Optronics*, 180 Wn. App. at 924. While it is possible that these circumstances alone could have been sufficient to satisfy due process, they were not, in that instance, necessary to do so.

[27] In response to the foreign manufacturer's contention that *Willemsen's* reasoning conflicted with our Supreme Court's decision in *Grange Ins. Ass'n v. State*, 110 Wn.2d 752, we explained that the analysis in *Willemsen* was based upon Justice Breyer's concurring opinion in *J. McIntyre*, and that *Grange* "predates the United States Supreme Court's more recent interpretations of the federal due process clause." *AU Optronics*, 180 Wn. App. at 925.

Or. at 196. After their mother died in a fire, which was allegedly caused by a defect in CTE's battery charger, the plaintiffs filed suit against CTE in Oregon. *Willemsen*, 352 Or. at 194.

Relying on Justice Breyer's concurrence in *J. McIntyre*, the Oregon Supreme Court determined, "The sale of the CTE battery charger in Oregon that led to the death of plaintiffs' mother was not an isolated or fortuitous occurrence." *Willemsen*, 352 Or. at 203. Given that "the sale of over 1,100 CTE battery chargers within Oregon over a two-year period shows a '"regular . . . flow"' or '"regular course"' of sales in Oregon," the court held that sufficient minimum contacts existed to exercise specific jurisdiction over CTE. *Willemsen*, 352 Or. at 203-04 (internal quotation marks omitted) (quoting *J. McIntyre*, 131 S. Ct. at 2792 (Breyer, J., concurring in the judgment)). "Put differently, the pattern of sales of CTE's battery chargers in Oregon establishes 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.'" *Willemsen*, 352 Or. at 207 (alterations in original) (quoting *J. McIntyre*, 131 S. Ct. at 2793 (Breyer, J., concurring in the judgment) (quoting *Shaffer*, 433 U.S. at 204).

Having set forth in some detail the precedents upon which we rely in resolving this matter, we now apply them to the facts herein.

D

The Attorney General contends that Washington's exercise of jurisdiction over the Companies is consistent with due process. This is so, he asserts, because (1) the large volume of CRT products that entered Washington

constituted a regular flow or regular course of sales, (2) the Attorney General's claims arose from the Companies' contacts with Washington because consumers were injured by paying inflated prices as a result of the Companies' price-fixing, and (3) the concern for otherwise remediless consumers and the danger of insulating foreign manufacturers from the reach of Washington antitrust laws outweigh any inconvenience to the Companies. We agree.

"Although '[t]o be sure, nationwide distribution of a foreign manufacturer's products is not sufficient to establish jurisdiction over the manufacturer when that effort results in only a single sale in the forum state," the presence of "a large volume of expected and actual sales" establishes sufficient minimum contacts to support the exercise of jurisdiction. *AU Optronics*, 180 Wn. App. at 924 (quoting *Willemsen*, 352 Or. at 203). While the facts in this case differ from those in *J. McIntyre*—as well as the precedents upon which Justice Breyer relied—the reasoning set forth in his opinion therein nevertheless dictates the outcome in this matter.

As alleged, the defendants, together, exercised hegemony over a prodigious industry responsible for manufacturing and supplying critical component parts to be integrated into consumer technology products, which were ubiquitous in North America during the turn of the century. The defendants understood that third parties would sell products containing their CRT component parts throughout the United States, including large numbers of those products in Washington. Their actions were intended to and did, in fact, result in "substantial" harm to "a large number of Washington State agencies and residents."

Applying the teachings of Justice Breyer in *J. McIntyre*, we conclude that the Companies, by virtue of the substantial volume of sales that took place in Washington, "purposefully availed" themselves of the privilege of conducting activities within Washington. A reasonable inference to be drawn from the Attorney General's allegations, which we treat as verities at this stage of the litigation, is that a "regular flow" or "regular course" of sales into Washington during the conspiracy period did, in fact, occur. The presence, in large quantity, of the defendants' products in Washington demonstrates that their contacts were not random, fortuitous, or attenuated. Instead, they point to a systematic effort by the defendants to avail themselves of the privilege of conducting business in Washington. Thus, Justice Breyer's concern of a small foreign manufacturer being haled into court based on an anomalous sale of one of its products by a large distributor is not implicated herein. In view of the foregoing, we conclude that the Companies purposefully established minimum contacts with Washington.[28]

"Due process also requires the [Attorney General] to show this cause of action arises from [the Companies'] indirect sales to Washington consumers." *AU Optronics*, 180 Wn. App. at 925. The Attorney General claims that, as a result of the defendants' price-fixing conduct, Washington State agencies and residents paid supracompetitive prices for CRT products, which resulted in injury to them. The Companies argue that consumers purchased CRT products from independent third parties. We re-

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[28] As indicated, *supra* at n.24, while the presence of "something more" may be sufficient, under certain circumstances, to establish "purposeful availment," it is not necessary where, as here, a substantial volume of sales occurred in the forum.

jected a similar argument in *AU Optronics*, 180 Wn. App. at 925, and do so here.

While we conclude that the Attorney General has sufficiently alleged both that the Companies "purposefully availed" themselves of the privilege of doing business in Washington and that his cause of action "arises from" their indirect sales to Washington consumers, we must still determine whether the exercise of personal jurisdiction would offend traditional notions of fair play and substantial justice. *See Asahi*, 480 U.S. at 113. We have "consider[ed] 'the quality, nature, and extent of the defendant's activity in Washington, the relative convenience of the plaintiff and the defendant in maintaining the action here, the benefits and protection of Washington's laws afforded the parties, and the basic equities of the situation.'" *AU Optronics*, 180 Wn. App. at 926 (quoting *CTVC of Haw.*, 82 Wn. App. at 720).

The Attorney General alleged that the defendants manufactured, sold, and/or distributed millions of CRTs and CRT products to customers throughout the United States and in Washington during the conspiracy period. He alleged that the actions of the defendants were intended to and did have a direct, substantial, and reasonably foreseeable effect on import trade and commerce into and within Washington.

Although it may be inconvenient for the Companies to defend in Washington, this inconvenience does not outweigh the strong interest that Washington has in providing a forum in which recovery on behalf of indirect purchasers may be pursued. *See AU Optronics*, 180 Wn. App. at 927 (given that indirect purchasers in Washington have no private right of action, the benefits and protections of Washington law favor the exercise of jurisdic-

tion). Nor does any inconvenience outweigh the inequitable result that would occur if the Companies were insulated from liability simply because other defendants could provide sources of compensation. *See AU Optronics*, 180 Wn. App. at 928 ("Considering modern economic structures, it is unreasonable to expect that [a foreign manufacturer] would target Washington consumers directly.")

We hold that requiring the Companies to appear and defend in Washington does not offend traditional notions of fair play and substantial justice. The Attorney General's allegations were sufficient to withstand the Companies' dispositive CR 12(b)(2) motions and, thus, the trial court erred by dismissing the Attorney General's complaint against them.

The Companies seek to recover attorney fees on appeal. The Attorney General seeks reversal of the attorney fees awarded to the Companies in the trial court. Given that the Companies are no longer "prevailing parties," we reverse the award of fees in the trial court and decline to award fees on appeal.

Reversed and remanded.

/s/ Dwyer, J.

We concur:

/s/ Spearman, C.J. */s/ Cox, J.*

APPENDIX C

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF KING

NO. 12-2-15842-8 SEA

THE STATE OF WASHINGTON,

Plaintiff,

v.

LG ELECTRONICS, INC.; LG ELECTRONICS U.S.A., INC.; KONINKLIJKE PHILIPS ELECTRONICS N.V. A/K/A ROYAL PHILIPS ELECTRONICS N.V.; PHILIPS ELECTRONICS NORTH AMERICA CORPORATION; PHILIPS ELECTRONICS INDUSTRIES (TAIWAN), LTD.; SAMSUNG SDI CO., LTD. F/K/A SAMSUNG DISPLAY DEVICE 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.; SAMSUNG SDI (MALAYSIA) SDN. BHD.; TOSHIBA CORPORATION; TOSHIBA AMERICA ELECTRONIC COMPONENTS, INC.; MT PICTURE DISPLAY CO., LTD.; PANASONIC CORPORATION F/K/A MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD.; PANASONIC CORPORATION OF NORTH AMERICA; HITACHI LTD.; HITACHI DISPLAYS, LTD.; HITACHI ELECTRONIC DEVICES (USA), INC.; HITACHI ASIA, LTD.; CHUNGHWA PICTURE TUBES LTD.; CPTF OPTRONICS CO., LTD.; CHUNGHWA PICTURE TUBES (MALAYSIA) SDN. BHD.,

Defendants.

(November 15, 2012)

ORDER GRANTING DEFENDANTS KONINKLIJKE PHILIPS ELECTRONICS N.V., AND PHILIPS ELECTRONICS INDUSTRIES (TAIWAN), LTD.'S MOTION TO DISMISS THE STATE OF WASHINGTON'S COMPLAINT FOR LACK OF PERSONAL JURISDICTION

This matter came before the Court on Defendants Koninklijke Philips Electronics N.V., and Philips Electronics Industries (Taiwan), LTD.'s Motion to Dismiss the State's Complaint for Lack of Personal Jurisdiction. The Court having considered the pleadings filed by the parties and the files and records herein, hereby ORDERS that Defendants' motion is GRANTED and the complaint against Defendants Koninklijke Philips Electronics N.V. and Philips Electronics Industries (Taiwan), LTD. is dismissed.

Defendants Koninklijke Philips Electronics N.V., and Philips Electronics Industries (Taiwan), LTD. may present a motion to determine an award of attorneys' fees and costs within fourteen (14) calendar days of this order.

IT IS SO ORDERED.

DATED this 15th day of November, 2012.

/s/ Richard D. Eadie
JUDGE RICHARD D. EADIE

Presented by:

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APPENDIX D

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF KING

NO. 12-2-15842-8 SEA

THE STATE OF WASHINGTON,

Plaintiff,

v.

LG ELECTRONICS, INC.; LG ELECTRONICS U.S.A., INC.; KONINKLIJKE PHILIPS ELECTRONICS N.V. A/K/A ROYAL PHILIPS ELECTRONICS N.V.; PHILIPS ELECTRONICS NORTH AMERICA CORPORATION; PHILIPS ELECTRONICS INDUSTRIES (TAIWAN), LTD.; SAMSUNG SDI CO., LTD. F/K/A SAMSUNG DISPLAY DEVICE 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.; SAMSUNG SDI (MALAYSIA) SDN. BHD.; TOSHIBA CORPORATION; TOSHIBA AMERICA ELECTRONIC COMPONENTS, INC.; MT PICTURE DISPLAY CO., LTD.; PANASONIC CORPORATION F/K/A MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD.; PANASONIC CORPORATION OF NORTH AMERICA; HITACHI, LTD.; HITACHI DISPLAYS, LTD.; HITACHI ELECTRONIC DEVICES (USA), INC.; HITACHI ASIA, LTD.; CHUNGHWA PICTURE TUBES LTD.; CPTF OPTRONICS CO., LTD.; CHUNGHWA PICTURE TUBES (MALAYSIA) SDN. BHD.,

Defendants.

(November 15, 2012)

ORDER GRANTING MOTION BY SAMSUNG TO DISMISS FOR LACK OF PERSONALJURISDICTION

THIS MATTER came before the Court upon Defendants' 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., Samsung SDI Malaysia Sdn. Bhd. Motion to Dismiss for Lack of Personal Jurisdiction noted for consideration on November 15, 2012. The Court having received and considered the foregoing pleadings, and Plaintiffs' Opposition and 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., Samsung SDI Malaysia Sdn. Bhd. Reply, and all associated papers and documents, the records and files in this matter, and being fully informed, rules as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the COURT dismiss all claims against 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., Samsung SDI Malaysia Sdn. Bhd. and the issue of attorney fees recovery is reserved and may be raised by motion later.

DATED this 15th day of November, 2012.

/s/ Richard D. Eadie
THE HONORABLE RICHARD EADIE

Presented by:

LANE POWELL PC

/s/ John R. Neeleman
Larry S. Gangnes, WSBA No. 08118
John R. Neeleman, WSBA No. 19752
Attorneys for 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., Samsung SDI Malaysia Sdn. Bhd.

Approved as to form:

David Kerwin, AAG