No. 91391-9

SUPREME COURT OF THE STATE OF WASHINGTON

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 F/K/A MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD.; HITACHI DISPLAYS, LTD. (N/K/A JAPAN DISPLAY INC.); HITACHI ELECTRONIC DEVICES (USA), INC.; HITACHI ASIA, LTD.

Petitioners.

BRIEF OF AMICUS CURIAE WASHINGTON DEFENSE TRIAL LAWYERS AND DRI – THE VOICE OF THE DEFENSE BAR

Christopher W. Nicoll, WSBA #20771
Noah S. Jaffe, WSBA #43454
Shannon L. Trivett, WSBA #46689
Nicoll Black & Feig PLLC
1325 Fourth Avenue, Suite 1650
Seattle, WA 98101
Telephone: (206) 838-7555
Facsimile: (206) 838-7515
cnicoll@nicollblack.com

Stewart A. Estes, WSBA #14405
Keating Bucklin & McCormack, Inc., P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104
Telephone: (206) 623-8861
Facsimile: (206) 223-9423
sestes@kbmlawyers.com

Attorneys for Amicus Curae Washington Defense Trial Lawyers and DRI – The Voice of the Defense Bar

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington Defense Trial Lawyers Association (WDTL), established in 1962, includes more than 750 Washington attorneys engaged in civil defense litigation and trial work. The purpose of WDTL is to promote the highest professional and ethical standards for Washington civil defense attorneys and to serve our members through education, recognition, collegiality, professional development and advocacy. One important way in which WDTL represents its member is through amicus curiae submissions in cases that present issues of statewide concern to Washington civil defense attorneys and their clients.

Amicus curiae DRI—The Voice of the Defense Bar is an international organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to promote the role of defense attorneys, to address issues germane to defense attorneys and their clientele, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system fairer, more consistent, and more efficient. To promote these objectives, DRI participates as *amicus curiae* in cases that raise issues important to its membership, clientele, and the judicial system.

The Court of Appeals' decision in this case implicates applicable concerns for both organizations. For the reasons set forth below, WDTL

and DRI respectfully request that this Court reverse the Court of Appeals' decision.

II. STATEMENT OF THE CASE

Amici rely upon the facts set forth in Petitioner's Supplemental Brief and Petition for Review.

III. ARGUMENT

A. *Walden v. Fiore*[1] (Holding that the Defendants' Suit-Related Conduct Must Create a Substantial Connection with the Forum) Effectively Requires Adoption of *Asahi's* "Stream of Commerce Plus" Test for Personal Jurisdiction Over a Component Manufacturer.

1. Long-Arm Jurisdiction Generally: Minimum Contacts.

Washington's long-arm statute, chapter 4.28 RCW, authorizes the court to exercise jurisdiction over a nonresident defendant to the extent permitted by the due process clause of the United States Constitution. *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 766, 783 P.2d 78 (1989). In *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S. Ct. 154 (1945), the Supreme Court held that, in order to exercise personal jurisdiction over a non-resident defendant, "due process requires ... certain minimum contacts with [the forum] such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice," *International Shoe, supra,* 326 U.S. at 316, 61 S.Ct. at 158 (*quoting Milliken v. Meyer,* 311 U.S. 457, 463, 61 S.Ct. 339 (1940)).

---

[1] *Walden v. Fiore*, ___ U.S. ___, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014).

International Shoe and its progeny set forth the criteria by which a defendant's contacts with the forum must be evaluated to determine whether an exercise of either "general" or "specific" jurisdiction is valid. The Court of Appeals and the parties alike have acknowledged that general jurisdiction is not applicable in this case. *See State v. LG Electronics, Inc.*, 185 Wn. App. 394, 417, 341 P.3d 346, *review granted*, 183 Wn.2d 1002, 349 P.3d 856 (2015). To determine whether the exercise of specific jurisdiction over a foreign corporation will comport with due process, courts in Washington have traditionally applied a three-part test:

> (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) (*quoting Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472–78, 105 S.Ct. 2174, 2181–85, 85 L.Ed.2d 528 (1985)).[2]

2. Foreseeabilty is Not Sufficient: Purposeful Availment is Required.

Federal and state law both require that the defendant must have done some act by which it "purposefully avails itself of the privilege of

[2]In *Walden v. Fiore*, *supra,* a specific jurisdiction case, the Supreme Court clarified that the focus must be on whether the defendant's "suit-related conduct" (i.e., its "challenged conduct") "create[d] a substantial connection with the forum State." 134 S.Ct. at 1121, 1125.

conducting activities within the forum state, thereby invoking the benefits and protections of its laws." *Walker v. Bonney–Watson Co.,* 64 Wn. App. 27, 34, 823 P.2d 518 (1992) (*citing Hanson v. Denckla,* 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958)). Foreseeability of causing injury in another state is not a "sufficient benchmark" for exercising personal jurisdiction. *Burger King Corp.*, 471 U.S. at 474 (*quoting World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980)). "Instead, 'the foreseeability that is critical to due process analysis ... is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.'" *Burger King Corp.*, 471 U.S. at 474. "'[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State.'" *Id.* at 474–75. "This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or as a result of the 'unilateral activity of another party or a third person.'" *Id.* at 475 (internal citations omitted). "Jurisdiction is proper 'where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." *Id*. (emphasis in original; citation omitted). The legacy and result of *Burger King Corp*. and *World-Wide Volkswagen* is to delineate and limit the stream-of-commerce doctrine, by focusing on the defendant's suit-related conduct that results in a

substantial connection with the forum state because its products ultimately wind up there.

3. The *Asahi* Plurality: Stream of Commerce Plus.

The U.S. Supreme Court revisited and expounded upon the personal jurisdiction analysis in the stream of commerce context in *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 107 S. Ct. 1026, 1028, 94 L. Ed. 2d 92 (1987). *Asahi* has been analyzed at length in the parties' briefing, but in short, while the Supreme Court unanimously agreed that the trial court's exercise of personal jurisdiction over a Japanese component manufacturer was unreasonable, the rationale supporting that conclusion split the Court into two divergent plurality opinions of four justices each, and ultimately left a muddled landscape for courts attempting to apply the stream of commerce theory. In what has come to be known as the "stream of commerce plus" theory of personal jurisdiction, Justice O'Connor, opined that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Id*. at 112. Instead, Justice O'Connor concluded that some "additional conduct" was required, which would indicate "an intent or purpose to serve the market in the forum State," beyond defendant's mere awareness or the foreseeability that its product "may or will sweep the product into the forum State." *Id.* The second plurality opinion, authored by Justice Brennan, took a more inclusive view of the stream of commerce approach, rejecting Justice O'Connor's requirement for some "additional conduct." Justice Brennan

argued that a defendant should be subject to jurisdiction whenever "the regular and *anticipated* flow of products," as opposed to "unpredictable currents or eddies," leads the product to be marketed in the forum state—in essence concluding that awareness alone was sufficient. *Id*. at 117.

As the Petitioners note in their Supplemental Brief, *Asahi* left considerable confusion in its wake, and while this Court came closest to addressing the issue in *Grange Insurance Association v. State*, that case was far afield from the foreign component-part manufacturing context. Consequently, the issue of which test to apply in the component manufacturer setting has yet to be decisively resolved or analyzed in meaningful depth. 110 Wn.2d 752, 757 P.2d 933.

4. *Walden v. Fiore*: Specific Jurisdiction Requires that the Defendants' "Suit-Related Conduct" Create a Substantial Connection with the Forum

This case involves foreign manufacturers of component parts, as well as an intermediary third party positioned in the stream of commerce between the defendant part manufacturer and the eventual retail consumer. The State alleges that the Petitioners violated Washington's Consumer Protection Act ("CPA") by intentionally and wrongfully fixing prices in the CRT market. CP 2, 27. The State does not allege that Petitioners committed the alleged conspiratorial activity in Washington. CP 17-25. And Petitioners' undisputed affidavits establish that they did not have any contacts with Washington—indeed, Petitioners manufactured and sold the CRTs entirely outside the state of Washington. CP 40-42, 56-64, 84-86,

104-06, 203-06. Instead, the State's sole basis for establishing personal jurisdiction hinges on its allegation that Petitioners sold the CRTs "into international streams of commerce" and that they possessed the "knowledge, intent, and expectation" that those CRTs would be incorporated into finished products by third parties, and ultimately sold to consumers across the country, including in Washington. CP 13.

The Supreme Court's recent decision in *Walden v. Fiore*, __ U.S. __, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014), is particularly instructive here, as the present case—with its conspiracy and price-fixing allegations—is ultimately most closely analogous to the intentional tort context contemplated in *Walden* (improper seizure of cash and filing a false and misleading affidavit), as well as *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482, 79 L.Ed.2d 804 (1984) (libel), which the *Walden* Court relied upon.[3] As *Walden* clarified, all of the due process considerations and personal jurisdiction principles that are ordinarily applicable also "apply when intentional torts are involved." *Walden*, 134 S. Ct. at 1123.

In *Walden*, the defendant, a law enforcement officer, had seized a large amount of cash from the plaintiffs at a Georgia airport and allegedly

[3] *Asahi,* and the more recent case of *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011) also involve foreign manufacturers of component parts, as well as an intermediary third party positioned in the stream of commerce between the defendant part manufacturer and the eventual retail consumer. But, unlike those cases, which arose in the strict product liability context, the present case concerns allegations of intentional and wrongful fixing of prices in violation of state statutes, which are much closer to the allegations in *Walden*.

filed a false and misleading affidavit in support of forfeiture. *Id*. at 1120-21. The plaintiffs had residences in both California and Nevada, and ultimately decided to file suit in Nevada. *Id*. at 1121. The trial court dismissed the suit, finding that the seizure of cash in Georgia could not support the exercise of personal jurisdiction in Nevada. *Id*. at 1120. The Ninth Circuit reversed, holding that the defendant officer's false affidavit was sufficient to establish personal jurisdiction in Nevada, because he "aimed" it at that state, by virtue of his knowledge that the plaintiffs had a significant connection with the state through their residence there. *Id*.

Writing for a unanimous court, Justice Thomas' opinion reversed the Ninth Circuit and held that the Court of Appeals erroneously focused its analysis not just on the defendant's contacts with the forum, but also on his contacts with the plaintiffs. *Id*. at 1124-25. "[The Ninth Circuit's] approach to the 'minimum contacts' analysis impermissibly allows a plaintiff's contacts with the defendant and forum to drive the jurisdictional analysis." *Id*. The *Walden* Court noted, instead, that personal jurisdiction "must arise out of contacts that the 'defendant himself' creates with the forum State" and "the plaintiff cannot be the only link between the defendant and the forum." *Id*. at 1122. The Supreme Court has "consistently rejected attempts to satisfy the defendant focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State." *Id*. (*citing Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417, 104 S.Ct. 1868, 80 L.Ed.2d

404 (1984)). "[A] defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction." *Id*. at 1123.

Under *Walden*, the Court of Appeals' analysis in this case should similarly have limited its focus to the Petitioner/defendants and whatever contacts they had with Washington. That defendant-focused inquiry cannot be satisfied by contacts between Petitioners and either the allegedly injured consumers (on whose behalf the State pursued its CPA claim) or the intermediary end-product manufacturers who purchased the CRTs from Petitioners and incorporated them into finished products. The Court of Appeals appears to have disregarded the uniform evidence that Petitioners had no contact with Washington in this case. The evidence demonstrated that the CRTs were manufactured and sold entirely outside of Washington, and the State does not even allege that Petitioners committed the conspiratorial activity in Washington. CP 17-25, 40-42, 56-64, 84-86, 104-06, 203-06. Just as *Walden* found the Ninth Circuit to have erroneously focused its analysis on defendant's contacts with the plaintiffs rather than defendant's contacts with the forum, here the Court of Appeals looked beyond Petitioners' lack of direct contacts with Washington, and relied on their attenuated contact with either Washington consumers or the third-parties who purchased and eventually incorporated the CRTs into finished products and later sold them in Washington. *See Id*. at 1124-25.

It is essential to the jurisdictional analysis that Petitioners manufactured and sold the CRTs entirely outside of Washington, and that

the purported conspiracy is *not* alleged by the State to have occurred within Washington, or even to have particularly targeted Washington or its residents. As *Walden* mandates, the jurisdictional analysis must focus on the defendants' "suit-related conduct." "For a State to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State." *Id*. at 1121-22. "Suit-related conduct" means the defendant's "challenged conduct"— conduct that establishes the necessary connection to the forum state. *See Id.* at 1125 ("[The Ninth Circuit's approach] also obscures the reality that *none of petitioner's challenged conduct had anything to do with Nevada itself*." (emphasis added)). Examination of a defendant's challenged conduct is therefore essential to the analysis, and that challenged conduct must create a substantial connection with the forum. Yet the State appears to have conceded that the challenged conduct in this case—the alleged conspiratorial activity—did not occur in Washington or create any connection to this State, let alone a connection that is substantial.

Any argument that the suit-related conduct in this case relates to Washington can only be supported through a tenuous and speculative connection through the stream of commerce, by way of the defendants' relationship with third parties or with the eventual consumers who incidentally happened to reside in Washington (and elsewhere). But as *Walden* plainly articulates, such connections cannot form the basis for the exercise of personal jurisdiction. There is no evidence that defendants

here have any direct connection to the State, nor is there any "act by which the defendant purposefully avail[ed] [themselves] of the privilege of conducting activities within the forum State." *Burger King Corp.* at 474–75.

Courts conducting a specific jurisdiction analysis must adhere to *Walden's* requirement[4] that the defendant's suit-related conduct (i.e., the "challenged conduct") create a substantial connection with the forum.[5] "Jurisdiction is proper 'where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." *Id*. (emphasis in original; citation omitted). In the present

[4] "On matters of federal law, [courts in Washington] are bound by the decisions of the United States Supreme Court." *W.G. Clark Const. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 180 Wn. 2d 54, 62, 322 P.3d 1207, 1210-11 (2014).

[5] Specific jurisdiction cases arising in the product liability setting have looked to *Walden* for guidance. *See Tile Unlimited, Inc. v. Blanke Corp.*, 47 F. Supp. 3d 750 (N.D. Ill. 2014) (in consumer class action for product liability from tile-product malfunction, a foreign distributor and foreign manufacturer prevailed under *Walden* and *J. McIntyre* when the Court held that a company's knowledge that its products would be sold throughout the United States, or indifference to where the distributor ultimately sold them, did not amount to purposeful availment or the requisite targeting of the specific forum); *Gutierrez v. N. Am. Cerruti Corp.*, No. CIV.A. 13-3012, 2014 WL 6969579 (E.D. Pa. Dec. 9, 2014) (product liability action against an Italian manufacturer and distributor of a printing press dismissed for lack of jurisdiction under *Walden*, because defendant did not purposefully direct its activities at the forum); *Shrum v. Big Lots Stores, Inc.*, No. 3:14-CV-03135-CSBDGB, 2014 WL 6888446 (C.D. Ill. Dec. 8, 2014) (in products liability case, under *Walden*, no jurisdiction over a company that tested the malfunctioning torch but did not design/manufacture it and did not distribute/market it—the company's contacts with the forum state were not claims-related); *In re Methyl Tertiary butyl Ether (MTBE) Products Liability Litig.*, No. 07 CIV. 10470, 2014 WL 1778984 (S.D.N.Y. May 5, 2014) (no personal jurisdiction over a gasoline additive company when that company had merely sold its product to a third-party without knowledge of where the third-party would direct the product—under *Walden*, the company's connections were based only on the third party's affiliation with Puerto Rico, and thus too attenuated to comport with due process).

case, there is no evidence or allegation that Petitioners actually targeted or purposefully availed themselves of the Washington market, let alone any evidence that they performed any specific "challenged conduct" that created a connection with the forum state, much less a substantial one.

Washington Courts have an understandable interest in exercising personal jurisdiction over cases that may implicate its residents and consumers. But any such assumption of jurisdiction must comport with the Due Process Clause of the Fourteenth Amendment, which necessarily constrains a state's authority to bind a nonresident defendant. *World-Wide Volkswagen Corp*, 444 U.S. at 291. The Court of Appeals' decision here contravenes at least the spirit of the personal jurisdiction analysis set forth in both *Walden* and in the complex chain of case law to come before it. Defendants' challenged conduct—the alleged conspiring and price-fixing—is not even alleged by the State to have occurred in Washington. But more than this, the Court of Appeals' decision runs counter to the prevailing trend in U.S. Supreme Court case law to contract and limit those circumstances where courts may sweep far flung defendants under their authority. *See*, *e.g.*, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011) (tightening the requirements for general jurisdiction and announcing that general jurisdiction requires that the defendant be "essentially at home" in the forum); *Daimler AG v. Bauman*, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014) (reaffirming *Goodyear*'s narrowing of the requirements for general jurisdiction and explicitly rejecting the Ninth Circuit's "agency theory");

Walden v. Fiore, discussed *supra*, 134 S. Ct. 1115. In the context of an increasingly interconnected and globalized world of commerce, exercising personal jurisdiction over defendants when their alleged suit-related conduct has no connection with the forum state only serves to position Washington as a police officer to the world, exporting Washington law to defendants that could not have anticipated being haled into court here. The assertion of personal jurisdiction in this case violated Petitioners' due process rights and broke with established federal law. This Court should reverse the Court of Appeals decision.

B. A trial court can properly consider affidavits or declarations submitted in support of a motion to dismiss pursuant to CR 12(b)(2) without obligating the plaintiff to a higher burden of proof.[6]

With regard to the Petitioners' second claim of error, the Court of Appeals' blanket refusal to consider the Petitioners' affidavits and declarations drastically oversimplified a procedurally complex issue. Although the court correctly articulated the plaintiff's burden of proof on a motion to dismiss for lack of personal jurisdiction, it erred in concluding that the burden of proof was mutually exclusive with considering the Petitioners' proffered evidence.

In some aspects, the analysis for a CR 12(b)(2) motion mirrors the analysis for a CR 12(b)(6) motion. For both motions, the nonmoving party's factual allegations are treated as verities and all facts and

[6] DRI, which limits its activity to issues of national concern, does not join in this portion of the brief, which is Washington-specific.

reasonable inferences drawn therefrom are reviewed in the light most favorable to the nonmoving party. *Freestone Capital Partners L.P. v. MKA Real Estate Opportunity Fund I, LLC*, 155 Wn. App. 643, 653-54, 230 P.3d 625, 630 (2010).

In other aspects, however, the analysis is different. As the Court of Appeals correctly noted, unlike under CR 12(b)(6), a CR 12(b)(2) motion is not converted into a summary judgment motion when evidence outside the complaint is considered. *State v. LG Electronics, Inc.*, 185 Wn. App. 394, 404, 341 P.3d 346 (2015) (interpreting CR 12(b)). As a practical matter, it would be problematic if a defendant challenging personal jurisdiction under CR 12(b)(2) could automatically transform and raise the plaintiff's burden (from prima facie to a preponderance of the evidence) by merely submitting declarations or affidavits in support of its motion to dismiss. When personal jurisdiction is challenged, the vast majority of relevant evidence (i.e., corporate records, etc.) is usually within the sole custody of the defendant. The plaintiff, with no access to this information, is therefore not in a position to prove personal jurisdiction by a preponderance of the evidence without engaging in extensive discovery.

However, it is equally problematic to hold, as the Court of Appeals did in this case, that "any individual allegation cannot be defeated by a statement to the contrary in a declaration submitted in support of the motion to dismiss." *State v. LG Electronics, Inc.*, 185 Wn. App. 394, 408, 341 P.3d 346 (2015). Such a broad and expansive declaration greatly, unnecessarily and improperly inhibits a defendant's ability to resolve

potentially dispositive issues of fact regarding personal jurisdiction at a time in the proceeding when doing so would be most efficient. Consider a situation in which the plaintiff alleges that the defendant maintains a principle place of business in Washington, but the defendant provides a sworn affidavit attesting to the fact that its principle place of business is in New Jersey. Under the Court of Appeals' broad declaration, the plaintiff's allegation is taken as true despite a clear dispute regarding a material fact that could be easily resolved by the trial court.

The language of CR 12(b) also supports the proposition that matters outside the complaint can be considered in a motion to dismiss pursuant to CR 12(b)(2). As the Court of Appeals pointed out, CR 12(b) singles out motions under CR 12(b)(6) as the only ones that are converted into summary judgment motions when matters outside the pleadings are considered. *LG Electronics, Inc.*, 185 Wn. App. 404. This does not necessarily mean that motions pursuant to CR 12(b)(1)-(5) and (7) cannot rely on material outside of the pleadings, simply that such evidence changes the analysis only for a motion brought pursuant to 12(b)(6).

Federal case law interpreting CR 12(b)(2)'s federal counterpart provides guidance on this issue. *Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.*, 172 Wn. App. 799, 806, 292 P.3d 147, 151 (2013) *review granted sub nom. Outsource Servs. Mgt. v. Nooksack Bus. Corp.*, 177 Wn. 2d 1019, 304 P.3d 115 (2013) and *aff'd*, 181 Wn. 2d 272, 333 P.3d 380 (2014) ("When a Washington Court Rule is substantially similar to a present Federal Rule of Civil Procedure, [courts] may look to the

interpretation of these federal rules for guidance."). In deciding a challenge to personal jurisdiction under Fed. R. Civ. P. 12 (b)(2), a court may consider evidence presented in affidavits. *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir.2001). Although the plaintiff need only demonstrate facts that, if true, would support jurisdiction, the court need not accept the plaintiff's allegations if the defendant directly controverts them with evidence. *Id.*; *Mavrix Photo, Inc. v. Brand Technologies, Inc.*, 647 F.3d 1218, 1223 (9th Cir. 2011). Further, where material facts are controverted or where a more satisfactory showing of the facts is necessary, the trial court, in its discretion, may order jurisdictional discovery. *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008). The court also has the discretion to take evidence at a preliminary hearing if there are issues of credibility or disputed questions of fact. *Data Disc, Inc. v. Sys. Tech. Associates, Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977). In such a situation, the plaintiff must establish the jurisdictional facts by a preponderance of the evidence. *Id.* Likewise, state law provides for a preliminary hearing to determine issues raised by motions under CR 12. *See* CR 12(d). The preliminary hearing may be a "full evidentiary hearing." *Outsource Servs.*, 172 Wn. App. at 807 (citing *James Wm. Moore, Moore's Federal Practice*, § 12.31[5], at 12–55 (3d ed.2006)). Where, as here, the defendant presents uncontradicted evidence that challenges the plaintiff's personal jurisdiction theory, the issue of jurisdiction should, at the very least, be the subject of an evidentiary

hearing, but the trial court should not be entitled to ignore the defendant's evidence.

Just because a defendant has submitted evidence opposing personal jurisdiction, however, does not mean that such evidence necessarily directly contravenes the plaintiff's allegations. Put differently, the trial court must also consider whether a defendant's evidence creates an actual dispute of material fact or whether such evidence merely contributes to resolution of the underlying legal dispute.

A truly factual dispute is one which can be easily resolved with no analysis or interpretation, for example, the state of incorporation of a party. A legal dispute, couched as a factual dispute, however, requires analysis. Consider a plaintiff's allegation that a nonresident defendant "targeted" Washington State in placing a product into the stream of commerce. A defendant might submit an affidavit describing facts that, as the defendant may argue, indicate a lack of "targeting." Although the defendant has technically contradicted the plaintiff's allegation, the dispute is not one of fact, but one of legal interpretation as to what the term "targeted" means for purposes of analyzing personal jurisdiction. In such a situation, the court may consider the defendant's proffered evidence while still taking the plaintiff's factual allegations as true.

In sum, where the defendant's evidence does not directly contradict the plaintiff's factual allegations, the defendant's evidence should be given credence, but the plaintiff's burden is still only a prima facie showing. The plaintiff's lowered burden of proof is balanced against

the defendant's right to submit evidence. If, however, the defendant creates a genuine issue of material fact by presenting evidence that directly contradicts the plaintiff's factual allegations, then the trial court may order that the parties engage in jurisdictional discovery (or, where necessary, an evidentiary hearing pursuant to CR 12(d)) to give the plaintiff an opportunity to rebut the defendant's evidence. The trial court's decision in this regard should be reviewed for an abuse of discretion. *See Weiss v. Lonnquist*, 173 Wn. App. 344, 362, 293 P.3d 1264, 1273 (2013) *review denied*, 178 Wn. 2d 1025, 312 P.3d 652 (2013) (pretrial discovery orders reviewed for abuse of discretion).

Applying these principles to the present case, the trial court could have concluded that none of the Petitioners' supporting declarations and affidavits directly contradicted the factual allegations in the State's complaint, that is, that such evidence simply asserted different facts relevant to the personal jurisdiction inquiry. The State argued the "stream of commerce" theory of personal jurisdiction, asserting that it need not show a defendant's direct contact with Washington State. *See* CP 169-174, 222-225, 234-238, 247-251, 260-264. In the alternative, the State requested that the trial court first order the parties to engage in jurisdictional discovery. CP 226, 239, 252, 265. The Petitioners, however, utilized their supporting affidavits and declarations to establish that they had little to no contacts with Washington State (i.e., the Petitioners were not incorporated in Washington, did not maintain principle places of business in Washington, were not personally served in Washington, never

owned or leased property in Washington, did not maintain offices, facilities, mailing addresses, telephone numbers, or employees in Washington, maintained no bank accounts in Washington, etc.). See CP 40-42, 56-64, 84-86, 104-106.

At oral argument on the defendants' motions, counsel for LG Electronics, Inc. and LG USA stated that "the facts [were] undisputed." Proceedings Before Honorable Richard D. Eadie, *State v. LG Electronics, Inc., et al.*, No. 12-2-15842-8 SEA (Nov. 15, 2012), Appendix C to Petition for Review, 99:19-20. At the conclusion of oral argument, the trial court not only granted the defendants' motions to dismiss, it also denied the State's request for jurisdictional discovery, stating that "there [was no] clear indication of what discovery would actually be." *Id*. at 137:13-14. Thus, the trial court—having properly considered the defendants' supporting declarations and affidavits—could have concluded that the defendants' evidence did not directly contradict the State's factual allegations and therefore did not necessitate jurisdictional discovery or an evidentiary hearing. Accordingly, the trial court properly exercised its discretion in considering the defendant's proffered evidence, and the Court of Appeals erred in refusing to consider such evidence.

If the Court of Appeals was a trial court, its refusal to consider the Petitioners' evidence at all would qualify as an abuse of discretion, particularly if the evidence directly contradicted the plaintiff's factual claims and was material to the jurisdictional issue. In such a situation, the trial court's only recourse should be to either (a) order jurisdictional

discovery followed by an evidentiary hearing, or (b) defer the jurisdictional issue until trial.

IV. CONCLUSION

This Court should reverse the Court of Appeals' decision.

Respectfully submitted this 10th day of August 2015.

By: Christopher W. Nicoll
Christopher W. Nicoll, WSBA #20771
Noah S. Jaffe, WSBA #43454
Shannon L. Trivett, WSBA #46689
Nicoll Black & Feig PLLC
1325 Fourth Avenue, Suite 1650
Seattle, WA 98101
Telephone: (206) 838-7555
Facsimile: (206) 838-7515
cnicoll@nicollblack.com

By: Stewart A. Estes
Stewart A. Estes, WSBA #14405
Keating Bucklin & McCormack, Inc., P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104
Telephone: (206) 623-8861
Facsimile: (206) 223-9423
sestes@kbmlawyers.com

Attorneys for Amicus Curiae Washington Defense Trial Lawyers and DRI – The Voice of the Defense Bar