

No. 65554-0-I
No. 65750-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

AU OPTRONICS CORP. AMERICA,

Appellant,

and,

HANNSTAR DISPLAY CORP., CHI MEI INNOLUX CORP., CHI MEI
CORP., CMO JAPAN CO., LTD., CHI MEI OPTOELECTRONICS
USA, INC., NEXGEN MEDIATECH, INC., TOSHIBA CORP.,
TOSHIBA MOBILE DISPLAY CO., LTD., and TOSHIBA AMERICA
ELECTRONIC COMPONENTS, INC.,

Intervenor-Appellants.

**REPLY BRIEF OF APPELLANT AU OPTRONICS
CORPORATION AMERICA**

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ARGUMENT

A. **The Trial Court Erred in Equating the Limited Custody of Documents by Nossaman LLP With Possession, Custody or Control by AUO America.**

1. AUO America Does Not Have Possession, Custody or Control of These Documents

In its opening brief, AUO America assigned error to the trial court's decision to equate the limited custody of the documents at issue by a law firm (Nossaman LLP) with "possession, custody or control" by AUO America. (Appellant's Br. at 15-20). AUO America demonstrated that it is not in physical possession of these documents and that it does not "control" the documents because it does not have the right to demand them from Nossaman LLP. The State's opposition does not demonstrate that AUO America in fact has "possession, custody or control" of these documents notwithstanding these facts. Instead, the State sets forth a number of broad statements of legal principle that do not support a result in the State's favor, tries without authority to re-write the test for what constitutes "control" of these documents, and fails to effectively counter any of the authority cited by AUO America in support of its position.

As a threshold matter for the analysis of this question, the State agrees with AUO America that this issue is subject to *de novo* review on appeal. (Respondent's Br. at 11). The State also does not dispute or

contest that it is the State's burden—as the party seeking discovery—to demonstrate that the documents in question are within AUO America's "possession, custody or control."

The State effectively concedes that the documents are not within the physical possession of AUO America. (Respondent's Brief at 17 (arguing that "documents subject to production are not limited to those in a person's physical possession")). Notably, though, the trial court elected to rely solely on "possession" rather than "control" in its ruling that these documents were subject to production. (RP 9). Since the documents at issue are indisputably *not* in the possession of AUO America, and any demand for production in this case must be based on a theory of "control," this ruling was error.

The State argues that a party "cannot avoid production by turning documents over to a nonparty." (Respondent's Br. at 18 (quotations omitted); *see also id.* at 20 (party should not be allowed "to hide the documents by simply handing them to counsel")). This argument is a straw man: there is no evidence that AUO America *ever* had possession of these documents and then turned them over to Nossaman LLP as an attempt to avoid production. To the contrary, these are documents received by Nossaman LLP directly from entities other than AUO America in production in the California MDL.

The State next urges the broad principle that “a client has control over documents in the possession of counsel.” (Respondent’s Br. at 18). Logically and legally, this broad statement of principle cannot be true.

Logically, it simply cannot be the case that all documents in the possession of counsel are under the control of the client. At a basic level, most lawyers represent multiple clients. It should be indisputable that Client X does not “control” the documents of Client Y in the lawyer’s possession. The mere fact that the lawyer has “possession” of documents, particularly documents belonging to other clients, *cannot* mean that the client has “control” of those documents; otherwise, every client of the lawyer would “control” the documents of every other client. Thus, there must be something *more* than the lawyer’s mere *possession* of a document that puts it within the “possession, custody or control” of the client.

That something more is the potential “control” of the documents based on the specifics of the relationship between lawyer and client. With respect to those documents that the client has the right to obtain from the lawyer—such as the client’s own documents—the client has “control”, but this does and cannot extend automatically to every document within the lawyer’s possession.

Moreover, there is no legal support for the State’s broad assertion. To the contrary, the cases cited by the State demonstrate that documents

within the possession of counsel are *not* automatically within the possession, custody or control of the client. The State cites to *CSI Investment Partners II, L.P. v. Cendant Corp.*, 2006 WL 617983 (S.D.N.Y. 2006), which does contain a broad quote in *dicta* about the possession of documents by counsel. However, that quote is from *MTB Bank v. Federal Armored Express, Inc.*, 1998 WL 43125, *4-*5 (S.D.N.Y. 1998), which is based on the principle that documents in counsel's possession are within the client's control *because the client can demand them*. As the *MTB Bank* court explained, "control is defined as the legal right, authority, or ability to obtain upon demand documents in the possession of another," *id.* at *4 (quotation omitted), and where the client has the right to demand the documents from its counsel, the client has control of the documents. *MTB Bank* cannot be read—and does not stand—for the broad proposition that all documents in the possession of counsel are automatically within the control of counsel. Indeed, through its reliance on the "right to demand" test for "control," the *MTB Bank* case—and, by extension, the *CSI Investment* case relying on it—demonstrate that mere possession by counsel alone is *not* sufficient.

This is the point made by Judge Burgess in *E.W. v. Moody*, 2007 WL 445962 (W.D. Wash. 2007), cited by AUO America in its opening brief. In that case, Judge Burgess rejected the argument that documents in

the possession of counsel were *per se* within the “possession, custody, or control” of the client. He recognized that such documents could possibly be within the “control” of the client, but where there was no showing that the client had “the legal right to obtain” the documents, there was no control and therefore the client need not produce them. *Id.* *4.¹

The State argues that *Moody* was really based on the grounds that the documents in question were privileged (Respondent’s Br. at 21-22), but that is a misreading of the case. First, it appears that the assertion in *Moody* that all documents held by counsel were “privileged” was merely a contention by the defendant, not a finding by Judge Burgess, as it immediately follows a sentence that begins “Defendant Battle Ground responds” *Id.* More important, it is clear that Judge Burgess rested his *decision* on the grounds that:

Plaintiff has failed to meet the burden of establishing Battle Ground’s control of documents in the possession of its law firm. Plaintiff may use the provisions of Rule 45 to seek documents in the possession [of] a nonparty.

Id. at *4. The decision was based on lack of possession and control, not on privilege.

¹ The Ninth Circuit’s decision in *In re Grand Jury Subpoenas*, 2010 WL 4948545 (9th Cir. 2010), is not to the contrary. In that case, the subpoenas in question were issued directly to the law firms in possession of the documents. *Id.* * 1. The question of whether the documents were in “possession, custody or control” of the client was therefore not presented in the manner in which it is here.

More subtly, the State argues that even if AUO America could not demand these documents from Nossaman LLP due to the terms of the federal protective order, it has the “practical ability to order [Nossaman LLP] to provide the documents to the Attorney General in response to the CID,” (Respondent’s Br. at 23), and thus has sufficient “control” of the documents. There are at least two major problems with the State’s attempt to evade the limited rights granted to Nossaman LLP under the protective order.

First, the State provides no authority supporting this rewriting of the test for “control.” As AUO America explained in its opening brief, “Control is defined as the legal right to obtain documents upon demand.” (Appellant’s Br. at 19 (quoting the Ninth Circuit’s decision in *United States v. Int’l Union*, 870 F.2d 140 (9th Cir. 1989))). The test says nothing about the “practical ability” to “order” someone else to produce the documents, and the State is thus seeking to rewrite the *Int’l Union* test to serve its desires in this litigation. Tellingly, the State cites no authority for its novel proposition.

Even the cases from outside the Ninth Circuit cited by the State do not define “control” so broadly as to include a supposed “practical ability” to direct the production of documents in the absence of a right or ability to obtain the documents from the non-party. *See, e.g., MTB Bank* *4 (control

is the “legal right, authority, or ability *to obtain* upon demand documents in the possession of another”) (emphasis added); *Hancock v. Shook*, 100 S.W.3d 786, 797 (Mo. 2003) (control requires ability “to obtain” the documents from a non-party). No court has adopted the test urged by the State, which is why the State provides no citation for it.

Second, in any event there has in fact been no showing that AUO America in fact has the right or ability to direct Nossaman LLP to produce these documents to the State. To the contrary, the protective order gives parties the right to use documents “only in connection with this action for prosecuting, defending, or attempting to settle this action.” (CP 438). AUO America has no right to use the documents for any other purpose, or to direct Nossaman LLP to use the documents for any other purpose, such as producing them to the State.

AUO America’s rights in this regard are not altered by the procedures set forth in Section 8 of the protective order. That section merely describes the *procedures* that must be followed when a CID or subpoena is received that purports to demand production of confidential documents. In itself it does not *authorize* the use of such documents for purposes other than “prosecuting, defending, or attempting to settle” the federal MDL. And absent the authorization of such use, AUO America has no right to direct Nossaman LLP to use the documents for any such

other purpose, and therefore has no “control” over the documents, even under the State’s revision of the test.

Nor does Judge Illston’s May 4, 2010 “clarifying” order (CP 227-28) provide such authorization. That order indicates that the stipulated protective order is not designed to “interfere” with any lawfully issued subpoena or CID. (CP 227). But AUO America is not arguing that the federal protective order “interferes” with its ability to produce documents it in fact “controls”; instead, it is merely arguing that it has no right to direct Nossaman LLP to use these documents for purposes other than which they are authorized and therefore does not “control” them. AUO America had no right to control the documents *prior* to the litigation, the protective order does not give it that right, and it has no right to control them now. The protective order does not “interfere” with an otherwise permissible use of the documents, because AUO America *never* had the right to use the documents in that fashion.

An example may be useful. Imagine a tenant leases a commercial building. The lease defines the uses to which the building can be put. The tenant then attempts to sell the building in fee simple to a third party. This is illegal, because the tenant does not have the right to sell the building. But it is not the *lease* that prevents the illegal sale, it is the independent legal fact that the tenant does not have fee simple ownership of the

building to sell. Similarly here, it is not the protective order that *deprives* AUO America of control over these documents, it is the independent legal fact that AUO America *never* had control of these documents. The protective order is only relevant inasmuch as it recognizes the limited rights in the documents that AUO America was given, just as the lease is only relevant in the example inasmuch as it recognizes the limited rights the tenant was given in the commercial building.

Lastly, the State provides no effective rebuttal to the well-reasoned decision of the Illinois Circuit Court, described on pages 18-19 of AUO America's opening brief, that AUO America does not have control of these documents. The State argues that Judge Epstein's decision should be disregarded because it was issued before Judge Illston's May 4, 2010 "clarifying" order. (Respondent's Br. at 22 n.8). But Judge Epstein's decision was based on whether AUO America has "possession, custody or control" of these documents, and Judge Illston specifically stated that the question of "control" over the documents should be addressed by the respective state courts. (CP 228). The clarifying order therefore in no way undermines Judge Epstein's conclusion. Moreover, as the State should know, Judge Epstein denied reconsideration of his original order on June 23, 2010, well after Judge Illston's "clarifying" order. (*See* Appendix).

2. AUO America Does Not Have “Control” Of Its Parent Company’s Documents

Entangled with its arguments about the legal significance of Nossaman LLP’s limited custody of these documents is a contention by the State that AUO America may also generally “control” the documents of its parent company, AUO Taiwan. (*See, e.g.*, Respondent’s Br. at 18-19 (arguing “[a] subsidiary can control documents of its parent company”). Although the State does not acknowledge it, this argument would by definition apply only to the documents of AUO Taiwan, not the documents of the Intervenor-Appellants, which have no corporate relationship to either AUO America or AUO Taiwan.

While it is theoretically possible for a subsidiary to “control” some of its parent company’s documents for purposes of discovery, the State has made no showing whatsoever that such control exists here, or over what subset of documents. It is obviously an unusual case where a subsidiary is deemed to “control” assets in the possession of its parent, since by the nature of the relationship it is the parent that controls the subsidiary, not the other way round. The State’s own cases recognize that this is a very “difficult standard” to meet. *Ferber v. Sharp Electronics Corp.*, 1984 WL 912479, *2 (S.D.N.Y. 1984).

Here, the State has not even attempted to meet this “difficult

standard.” On page 19 of its opposition brief, the State lists several factors that it claims should be considered in evaluating control of a parent by a subsidiary, yet it identifies *no evidence* supporting the presence of any of those factors. (Respondent’s Br. at 19). Since it is the State’s burden to demonstrate “control”, and it has not even attempted to do so, this cannot be a basis for upholding the trial court’s ruling as to the AUO Taiwan documents.

Finally, even in the case principally relied upon by the State where a court did find that the subsidiary controlled *some* of its parent-company documents, *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138 (N.D. Ill. 1979), the scope of that control was extremely limited and was based on a specific showing of facts demonstrating control. The *Uranium Antitrust* court found that only documents held by the specific employees and former employees of the two companies that had directed the activities of the subsidiary or both companies jointly were within the “control” of the subsidiary. *Id.* at 1153. Here, the State has made no attempt to make a factual demonstration similar to the one in *Uranium Antitrust* or demonstrate which employees or former employees (if any) would be implicated by such a showing. If anything, the *Uranium Antitrust* court’s context-specific examination of “control” of specific documents by the subsidiary refutes the State’s broad attempts to demonstrate “control” by

assertion rather than evidence.

3. The State Has Abandoned Its “Concession” or “Waiver” Arguments on Appeal

In its opening brief, AUO America addressed at some length arguments that the State had previously made regarding alleged “concessions” made by AUO America’s counsel in producing other documents and alleged waiver by virtue of the June 30, 2009 motion hearing on personal jurisdiction. (Appellant’s Br. at 21-27).

Although it adverts briefly to these other productions and to the June 30, 2009 hearing on personal jurisdiction, the State make no serious attempt to argue these “concession” or “waiver” points. Tellingly, the State does not even respond to the points made by AUO America in the opening brief. The Court should therefore treat those matters as concluded and address the question of “possession, custody or control” solely on the merits.

B. The Trial Court Erred in Allowing the State to Circumvent Limitations on Its Jurisdictional Authority by Seeking to Obtain Foreign Documents That It Could Not Otherwise Obtain Through a CID Directed to AUO America.

AUO America also assigned error to the trial court’s decision to allow the State to evade limits on its jurisdictional authority as to these foreign documents through a CID directed to AUO America. In its opening brief, AUO America explained that the State’s jurisdictional

authority was limited, both constitutionally and by statute, that the State would be unable to obtain these documents directly from AUO Taiwan or the foreign Intervenor-Appellants, and that the effect of the CID was to allow the State to avoid these jurisdictional limitations. (Appellant's Br. at 27-32). AUO America cited numerous cases that recognize that government investigators should be not permitted to use private civil litigation to evade or circumvent statutory and constitutional limitations on its ability to gather evidence. The State's response consists of two red herrings, one serious mistake of law, and a misdirected attempt to place the focus on the State's "intent," none of which address the fundamental problem with what the State is attempting to do here.²

The first red herring concerns personal jurisdiction over AUO America. The State spends over three pages of its response arguing that *AUO America* is subject to personal jurisdiction in Washington as to the State's CID. (*See* Respondent's Br. at 25-28). AUO America did not raise this issue on its appeal, and it is irrelevant to the argument. AUO America did initially challenge personal jurisdiction for purposes of the State's CID in the trial court, but it lost that argument at the June 30, 2009, hearing, and it has not pursued it on this appeal. By focusing on personal

² The State agrees that this issue is subject to *de novo* review. (Respondent's Br. at 10-11).

jurisdiction over AUO America, the State is attempting to divert attention from the real issues associated with its attempt to abuse that jurisdiction and the MDL civil discovery. The State makes no attempt to show that it would have personal jurisdiction—whether for investigation or otherwise—over the relevant foreign companies (AUO Taiwan or the foreign Intervenor-Appellants).

A second red herring is the State’s mischaracterization of AUO America’s position as: “in order to obtain documents that were created by, or originated from a foreign entity the Attorney General must establish personal jurisdiction over the foreign entity.” (Respondent’s Br. at 24). AUO America made no such argument. It is not contending that the mere fact that a document originated overseas shields it from a CID. Instead, it is saying that if such a document does originate overseas, and the only reason that it comes within the United States is in response to compulsory civil discovery, the State should not be permitted to avoid the statutory and constitutional restrictions that would otherwise apply by issuing a CID to a party who is connected to the document only through that discovery. It is the particular circumstance of *how* these documents came to the United States, and the potential for abuse associated with allowing the State to pursue the documents in this fashion that is the key distinguishing feature of this case.

This leads to the State's principal mistake of law, which is to argue that the cases cited by AUO America stand only for the proposition that "a criminal litigant may not circumvent the restrictions on criminal discovery by seeking the same materials via the more liberal discovery rules." (Respondent's Br. at 32). In other words, the State wishes to narrow those cases to the use of civil discovery to avoid limitations in *criminal* cases.

The decisions are not so limited. While most of the cases involving the government do arise in the criminal context, that is only because the limitations on the government's discovery in criminal cases are so stark, not because those cases are only about the use of civil discovery in criminal proceedings. Indeed, in a case raised by the State in its brief, the federal court specifically noted "the potential for oppression" raised by the use of private discovery "by federal prosecutors, *whether civil or criminal.*" *GAF Corp. v. Eastman Kodak Co.*, 415 F.Supp.2d 129, 132 (S.D.N.Y. 1976) (emphasis added). There is no reason to hold that government enforcers are prohibited from using private civil discovery to avoid criminal discovery limitations, but hold that they are *permitted* to use private civil discovery to avoid similar limitations in civil prosecutions. The "potential for oppression" is qualitatively the same in both instances.

To justify what it is doing, the State cites a number of cases which

supposedly support the proposition that “access to discovery materials is strongly favored.” (Respondent’s Br. at 28). These cases are not persuasive, however, because none involved the circumvention of discovery limitations; instead, they were based on the efficiency objective of not forcing parties to repeat discovery that they were otherwise entitled to conduct. For example, the Ninth Circuit’s decision in *Foltz v. State Farm Mutual Automobile Ins. Co.*, 331 F.3d 1122 (9th Cir. 2003), was based on the explicit assumption that the discovery sought by the “collateral litigants” could have been recreated in the second litigation, and so the issue in allowing them access to the completed discovery in the first litigation was simply “avoiding the wasteful duplication of discovery.” 331 F.3d at 1331-32. *Foltz* did not address the issue here, which is whether the collateral litigants can obtain access to the initial set of discovery to obtain discovery that they would *not* otherwise be entitled to. Indeed, the Ninth Circuit *expressly cautioned* against allowing “collateral litigants from gaining access to discovery materials merely to subvert limitations on discovery in another proceeding.” 331 F.3d at 1132. Avoiding inevitable inefficiency—not evading discovery limitations—was also the issue in *Newby v. Lay*, 229 F.R.D. 126, 131 (S.D. Tex. 2005), which recognized that the government agency in question had the “powers and resources to obtain the protected materials

on its own.” *Foltz* and *Newby* are thus irrelevant to the circumstances here.

Finally, the State attempts to redirect the focus from the effect of its actions to an evaluation of its “intent,” arguing that it was not intentionally using its CID as a “ruse.” (Respondent’s Br. at 31). This attempted redirection is analytically and factually flawed.

Analytically, it is not critical to AUO America’s argument that the State be *intentionally* using the CID to avoid its constitutional and statutory discovery limitations; to the contrary, it is the “potential for oppression” that should govern this Court’s decision as to whether the State should be permitted to use its CID authority in this fashion.

Nor should the degree of the State’s intent affect this Court’s consideration of the policy issues. Even if the State in this case did not consciously seek to avoid limitations on its ability to conduct discovery, if this Court upholds the CID it is likely if not certain that the decision *will be* intentional in the next case—simply in the natural course of vigorous prosecution. And the logical next step after that is for the State to seek not merely production of discovery that has already happened in a private civil case, but rather to suggest to one or the other side in that litigation what discovery to conduct in order as to facilitate the State’s investigation. Requiring a finding of intentional abuse is also undesirable because of the

practical impossibility of divining and proving the government's intent.

Ultimately, the government's use of private civil discovery procedures in this manner will distort private litigation and impede the administration of justice. In this case, for example, the foreign companies were forced to bring foreign documents to the United States in response to private civil discovery in the California MDL. They were promised in the protective order that their confidential documents would be used "only in connection with this action for prosecuting, defending, or attempting to settle this action." (CP 438). Yet for years they have been locked in discovery battles in numerous courts with the U.S. Department of Justice and various state enforcers over whether the documents that they were forced to bring to the United States can in fact be used for purposes *other* than the California MDL. If the conclusion of this process is that the documents are disclosed as a result of private civil discovery in the MDL, foreign companies will have learned a significant lesson about how the U.S. justice system works, and they will correspondingly be that much more reluctant to allow their documents to ever enter the United States in the first place, under any term and on any conditions (because those conditions cannot be relied upon).

This is not to suggest that foreign companies doing business in Washington have any sort of inherent immunity from investigation. If a

foreign company is properly subject to jurisdiction in Washington, investigatory or otherwise, the State can issue a proper CID to that entity, and the process can take its course. What should not happen is for those companies to be forced in one court to bring their documents to the United States for one set of purposes and then have other investigators take advantage of that fortuity to obtain access to documents they would otherwise not be able to get. Submitting to discovery in one lawsuit should not serve as de facto waiver of these other jurisdictional limitations.

Even aside from the point of how “intentional” the State’s attempt to get around foreign service must be to trigger these concerns, however, it is surprising that the State would now contend that there is no evidence that it is seeking these documents from AUO America to avoid the legal issues associated with seeking them from the foreign companies. If anything was previously clear in these legal proceedings, it was that the State had issued a CID to AUO America and not to the foreign companies for *precisely* that reason. Indeed, if the State believed that it had jurisdiction over AUO Taiwan and the foreign Intervenor-Appellants, why did it not even *attempt* to serve CIDs directly on those entities for those documents? This circumstance alone is sufficient evidence that the State’s choice was intentional. Indeed, as the State effectively admitted at the

November 2009 hearing before the Superior Court, its decision to serve AUO America was a conscious decision driven, at least in part, by its desire to avoid legal battles with the foreign companies over jurisdiction. (Nov. 6, 2009 Hearing Tr. at 42 (Motion to Stay, Exh. K)). The State should not be permitted to disclaim this obvious point now.

In sum, the State has not adequately explained why it should be able to use a CID directed to AUO America for documents produced in the federal MDL to avoid otherwise applicable limitations on its ability to gather evidence from these foreign companies. As a matter of law and policy, this Court should not permit the use of a CID in this fashion. Thus, even if the Court determines that the documents are within the “possession, custody or control” of AUO America, it should reverse the Superior Court’s order as to these documents.

C. The Trial Court Erred in Imposing a “Duty to Supplement”

Alternatively, AUO America has assigned error to the trial court’s decision to impose a “continuing obligation” or “duty to supplement” on AUO America’s compliance under the CID. In its opening brief, AUO America explained that the CID statute does not permit the imposition of any requirement that could not be contained in a subpoena duces tecum, that “continuing obligations” cannot be contained in such subpoenas, and that therefore the trial court erred in imposing such a requirement on AUO

America. (Appellant's Br. at 32-34).

In its response, the State seems confused about what is at issue with respect to the "duty to supplement." It states that it is "erroneous[]" to "cast the issue as one involving a continuing duty to produce new documents created after the date of the original production."

(Respondent's Br. at 35). AUO America will take the State at its word, and accept that the trial court's order on the "continuing obligation" is only about "documents in existence as of the date the CID was responded to, and not [] documents 'created thereafter.'" (*Id.* at 35).

But that limitation conceded by the State does not entirely resolve the question on appeal. The principal issue regarding the "continuing obligation" concerns documents subsequently received by Nossaman LLP in the MDL from other non-parties that may have been created earlier by those non-parties, but which were not received by Nossaman LLP in discovery until after the CID in this case. Are *those* documents subject to a "continuing" obligation of production?

The State provides no effective response to AUO America's demonstration that such a requirement is inappropriate in a CID. Initially, the State concedes that "a Rule 45 subpoena . . . does not" contain a continuing obligation to supplement (Respondent's Br. at 34), but it then tries to distinguish AUO America's cases recognizing this point by

asserting—incorrectly—that Rule 45 of the Federal Rules of Civil Procedure is distinguishable from Washington CR 45. (Respondent’s Br. at 36 n.16). It is difficult to discern what the State is arguing here, because the federal and Washington rules are in fact identical on this point: both sets of rules contain a provision requiring supplementation by a “party” in Rule 26(e), and subpoena provisions in Rule 45 that do not. The State’s initial concession that Rule 45 does not contain a duty to supplement is correct, and the Court should ignore the State’s attempts to backtrack.

Notably, in addition to its concession that Rule 45 does not contain a duty to supplement, the State cites no case holding that any sort of “continuing obligation” or duty to supplement is *ever* appropriate in a subpoena duces tecum.

Rather than effectively disputing this point, the State’s main contention is that the trial court was not imposing a “continuing obligation” on all CIDs, but was rather “simply enforcing a portion of the CID.” (Respondent’s Br. at 34).

This contention misses the point made by AUO America and contravenes the statute. RCW 19.86.110(3)(a) provides that no CID may “[c]ontain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum,” and RCW 19.86.110(3)(b) provides that no CID may “require the disclosure” of any material “which

for any other reason would not be required by a subpoena duces tecum issued by a court of this state.” If a “continuing” obligation or “duty to supplement” would be objectionable to include in a subpoena duces tecum—and it clearly is—then it cannot be included in a CID and it was error for the trial court to enforce it. Whether or not the trial court intended its holding to apply to all CIDs or merely to this one, “[n]o” CID may “[c]ontain” such requirements.

The fact that the State included such a requirement in the CID itself should be of no moment. The statute clearly forbids any requirement in a CID that could not be contained in a subpoena duces tecum, and the State should not be permitted to try to avoid that prohibition by inserting banned requirements in the boilerplate of its CIDs.

Finally, the State attempts to defend the trial court’s order by contending that, as a mere discovery order, this part of the order is subject only to “abuse of discretion” review. (Respondent’s Br. at 11).

The Court should reject this argument. As AUO America pointed out in its opening brief, the enforcement of administrative subpoenas should be subject to *de novo* review. (Appellant’s Br. at 14 (citing *Reich v. Montana Sulphur & Chemical Co.*, 32 F.3d 440, 443 (9th Cir. 1994); *FDIC v. Garner*, 126 F.3d 1138, 1142 (9th Cir. 1997))). This is supported by the fact that in Washington, public disclosure rulings under the Public

Records Act are subject to *de novo* review. See *CLEAN v. City of Spokane*, 133 Wn.2d 455, 475, 947 P.2d 1169 (1997).

In response, the State does not distinguish AUO America's cases, but instead cites to the portions of the CID statute that provide that trial courts may enter *sanctions* in CID disputes similar to those entered in discovery disputes. (Respondent's Br. at 11). There is, however, no evidence that the trial court imposed a "duty to supplement" as a sanction. To the contrary, as the State itself emphasizes, the record indicates that the trial court was merely enforcing what it believed to be part of the CID. (RP 52). This was not a sanctions issue, and the State's references to the sanctions provisions of RCW 19.86.110 are beside the point.

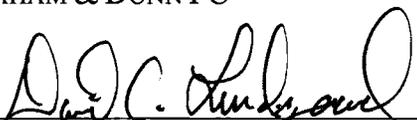
In any event, even if an "abuse of discretion" standard is applied, the trial court's ruling should still be reversed. "A trial court abuses its discretion when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons. Untenable reasons include errors of law." *Noble v. Safe Harbor Family Preservation Trust*, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009). Since the trial court's decision was based on a mistaken understanding of what the CID statute permits to be included in a CID, that was an error of law that constitutes abuse of discretion.

CONCLUSION

For the foregoing reasons, AUO America respectfully requests this Court reverse the trial court's June 3, 2010 order in full.

RESPECTFULLY SUBMITTED this 28th day of January, 2011.

GRAHAM & DUNN PC

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America

APPENDIX

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

AV Optronics America, et al.

v.

The Attorney General of Illinois

No. 09 CH 24490

FINAL ORDER

This matter came before the Court on June 23, 2010, for hearing on the Attorney General's motion for reconsideration of this Court's Memorandum and Order, entered December 18, 2009, the parties present through counsel and the Court being duly advised in the premises,

IT IS HEREBY ORDERED THAT:

- ① The Motion for Reconsideration is DENIED
- ② This is a final order and the case is taken off the call

Atty. No.: 14469

Name: Kirk Jenkins

Atty. for: AV Optronics America

Address: One N Wacker, # 4200

City/State/Zip: Chicago IL 60606

Telephone: 312-641-9050

ENTERED:

ENTERED
JUDGE JAMES E. STEIN-1783

Dated:

JUN 23 2010

DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Judge

Judge's No.