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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.

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

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INTRODUCTION

Appellant AU Optronics Corporation America appeals a King County Superior Court order directing it to produce certain documents in response to a Civil Investigative Demand (“CID”) issued by the State of Washington (“State”). This Court should reverse the order because it is based on an aggressive and extraordinary effort by the State to misuse the civil discovery process and expand its investigatory powers beyond those granted to it by state law.

The State wishes to obtain confidential documents belonging to several foreign entities—AU Optronics Corporation (“AUO Taiwan”), HannStar Display Corporation, several Chi Mei-related entities, and several Toshiba-related entities. Rather than propound CIDs to those entities directly, however, the State impermissibly seeks to obtain the documents through a CID propounded to AU Optronics Corporation America (“AUO America”), the domestic subsidiary of AUO Taiwan. The State’s theory is that because counsel for AUO America has strictly limited custody of these documents in connection with federal civil litigation in California, then AUO America itself is in “possession, custody or control” of these other companies’ documents and must produce them to the State.

This Court should reject such tactics. First, as a threshold matter, even if the State’s circuitous discovery were permissible (which it is not), AUO America is *not* in “possession, custody or control” of these documents by virtue of its counsel’s limited custody. It is indisputable that AUO America is not physically in custody or possession of the documents, and that AUO America does not have “the legal right to obtain [the] documents upon demand,” which is the definition of control. Under the terms of the protective order in the federal California multidistrict litigation (“federal California MDL” or “California MDL”), AUO America’s counsel cannot provide—or even show—the documents to AUO America. AUO America thus does not have “possession, custody or control” of these other entities’ documents.

Second, the State’s roundabout discovery efforts are themselves objectionable. Statutory and constitutional law limits the State’s ability to collect evidence to persons subject to its jurisdiction. Clearly the State knows it cannot collect this evidence from the foreign companies directly (or it would have done so), so it is attempting to do so from AUO America (or, more precisely, its counsel). The State should not be permitted to evade these constitutional limitations on its ability to collect evidence.

Third, in addition to requiring AUO America’s counsel to produce these documents generally, the Superior Court’s order also directs that the

CID be given continuing effect, i.e., that AUO America has a duty to “supplement” its responses over an apparently unlimited period of time. Washington law prohibits CIDs from containing any term not appropriate for a subpoena duces tecum. Such “continuing” terms are not permitted for subpoenas duces tecum, and therefore cannot be contained in the State’s CID.

I. ASSIGNMENTS OF ERROR

Appellants appeal from the trial court’s Order Denying Contempt and Granting Motion to Enforce Civil Investigative Demand to AU Optronics Corp., America (“Order”) (CP 290-291).¹

Appellants assign error to the following provisions of the Order:

A. The trial court’s conclusion that confidential foreign documents in the limited custody of the AUO America’s counsel must be produced in response to a CID directed to AUO America was an error of law.

B. The trial court’s implicit conclusion that the State may use a CID directed at AUO America to obtain confidential foreign documents produced in the course of the federal California MDL was an error of law.

¹ A copy of the Order is included in the Appendix to this Brief.

C. The trial court’s conclusion that the so-called “duty to supplement” supposedly imposed by the CID should be enforced was an error of law.

Issues pertaining to these assignments of error include:

A. Whether documents in the limited custody of AUO America’s counsel are within the “possession, custody or control” of AUO America for purposes of responding to a CID where (i) the documents in question are not and have never been physically in the possession of AUO America; (ii) the documents were provided by other parties to AUO America’s counsel only for purposes of the federal California MDL; and (iii) the protective order in the federal California MDL prohibits AUO America’s counsel from providing—or even showing—the documents to AUO America.

B. Whether the State may use a CID directed to AUO America to obtain confidential foreign documents belonging to third parties that are in the limited custody of AUO America’s counsel only as a result of the federal California MDL and the use of those documents is restricted to that proceeding.

C. Whether the State may impose a “duty to supplement” in a CID where (i) RCW 19.86.110 prohibits CIDs from containing any requirement that would be improper if contained in a subpoena duces

tecum and (ii) a continuing duty to supplement is improper if contained in a subpoena duces tecum.

II. STATEMENT OF THE CASE

A. The California Antitrust Multi-District Litigation

This proceeding arises in connection with civil antitrust litigation pending in the United States District Court, Northern District of California, Case No. 07-1827-SI. (CP 202; CP 432; CP 375). The California MDL involves numerous federal putative class action cases that are consolidated as a “multi-district litigation” (or “MDL”) before U.S. District Court Judge Susan Illston. These consolidated cases concern the sale of TFT-LCD panels, or “flat panels,” which are manufactured primarily by TFT-LCD manufacturers located outside the United States. (In a separate manufacturing process, the TFT-LCD panels are ultimately incorporated in products such as televisions, computer monitors and cell phones.) Broadly speaking, the plaintiffs in the California MDL allege that a number of the foreign TFT-LCD manufacturers have conspired to fix the prices of TFT-LCD panels.

Appellant here, AUO America, is a defendant in the California MDL. (CP 466). It is a wholly-owned subsidiary of AUO Taiwan, a Taiwanese corporation that manufactures TFT-LCD panels. (CP 65). AUO Taiwan is also a defendant in the California MDL. (CP 466).

Millions of pages of documents have been produced in the California MDL, by AUO America, AUO Taiwan, and numerous other foreign and domestic companies, including the Intervenor-Appellants (HannStar, the Chi Mei-related entities, and the Toshiba-related entities). Because of the commercial sensitivity of many of those documents, Judge Illston has issued a protective order governing their use. (CP 432-458). Among other things, the protective order provides that

A Receiving Party may use Protected Material [i.e., material designated as Confidential or Highly Confidential] only in connection with this action for prosecuting, defending, or attempting to settle this action.

(CP 438 (Section 7.1)).

Moreover, the protective order dictates how Protected Material is kept and strictly limits the persons to whom Protected Material may be shown. All Protected Material “must be stored and maintained by a Receiving Party at a location and in a secure manner that ensures that access is limited to the persons authorized under this order.” (CP 438-439 (Section 7.1)). In terms of access, Confidential Information may only be shown to outside counsel, experts, court personnel, etc., and may only be shown to parties or their employees to the extent necessary “for this litigation.” (CP 439). Highly Confidential Information may be shown to similar persons, except that no provision is made for any access by parties

or their employees (except persons who authored or have already seen the document). (CP 440). In other words, Confidential and Highly Confidential Documents may not be disclosed to parties in the California MDL except in very limited circumstances, and, even then, only “for this litigation.” (CP 438).

Nossaman LLP is counsel for both AUO Taiwan and AUO America in the California MDL. (CP 254 n.7). Nossaman LLP is located in San Francisco, California. In the course of that representation, Nossaman LLP has come into custody of documents produced by the parties in the case, including AUO Taiwan, AUO America, and various other defendants. Many of these documents contain proprietary and/or trade secret information regarding TFT-LCD panels and products containing TFT-LCD panels, and have therefore been marked Confidential or Highly Confidential by the respective producing parties. There is no evidence that Nossaman LLP has shared any of those documents with any party, including AUO America, in contravention of the protective order. (See CP 139 ¶ 10 (Nossaman LLP has not provided protected documents to AUO America)).

B. The State’s CID to AUO America

In April 2009, the State issued a CID to AUO America in connection with its own investigation into whether there was price-fixing

by TFT-LCD manufacturers. (CP 13-30).² The State did not issue a CID to AUO Taiwan, or to any of the other foreign defendants.

Correctly, as required by statute, the CID to AUO America purported to request only those documents within AUO America's "possession, custody or control." (CP 14 (defining "document" as those documents with the recipient's "possession, custody or control"), CP 13 (State issued CID to AUO America because it believes AUO America to be in "possession, custody or control" of documents relevant to the State's investigation)). Thus, while the CID did request documents provided to any party in the California MDL (CP 26-27 (RFPs Nos. 2, 9)), all such requests were by definition limited to documents in the "possession, custody or control" of AUO America.

C. AUO America's Jurisdictional Objection

Because it had no operations in Washington, AUO America initially objected to the CID on the grounds that the State lacked personal jurisdiction to issue the CID to AUO America. (CP 34). In response to this objection, the State brought a motion to enforce the CID. (CP 1-11). On June 30, 2009, the Superior Court heard extensive oral argument on the jurisdictional question. (CP 623-671 (transcript of hearing)). At the

² Although the CID was signed March 11, 2009, it was not mailed to AUO America until April 24, 2009. (CP 32).

conclusion of that hearing, the Superior Court concluded that the jurisdictional threshold for a CID was lower than the threshold for a civil suit (CP 660), and ordered AUO America to comply with the CID. (CP 87-88). There was no suggestion by the State in the briefing or at oral argument of its view that all documents in the possession of Nossaman LLP as a result of the California MDL were documents in the “possession, custody or control” of AUO America.

D. Following the June 2009 Order, AUO America Produced Documents Within Its Possession, Custody or Control

AUO America immediately undertook to comply with the June 2009 order. It began collecting documents, and, on July 15, it conferred with the State regarding certain requests for which the State wanted responses. (CP 188). The State indicated that, at least for the moment, it wanted responses to requests for production nos. 1 and 2, and the parties also agreed that AUO America would provide responses to 15 of the interrogatories by July 31, 2009. (CP 188).

AUO America then produced approximately 3 million pages of documents to the State. (CP 137 ¶ 5). At the conclusion of that production, Nossaman LLP informed the State that it had produced the requested documents and information within AUO America’s possession, custody or control (subject to privilege). (CP 193-194). With respect to

entities other than AUO America, the State's only response at that juncture was that documents and information relating to AUO Taiwan should be produced "to the extent that such data is within the possession of AUOA." (CP 193). Nossaman LLP then promptly informed the State that documents and information of other entities produced in the California MDL (such as certain sales figures of AUO Taiwan) was not within the possession, custody or control of AUO America, and therefore the CID could not obligate AUO America to produce it. (CP 193). The State did not respond to this assertion, and Nossaman LLP reasonably concluded that the issue was closed. (CP 137 ¶ 5).

There the matter sat for approximately two months, until December 2009, when the State wrote to Nossaman LLP, demanding responses to the remaining RFPs and interrogatories. (CP 197). In this demand letter, the State *for the first time* took the position that all documents received by Nossaman LLP in the course of the California MDL from other parties, including foreign parent corporations, were effectively within the possession, custody or control of AUO America and therefore must be produced under the CID. (CP 197). AUO America's counsel informed counsel for HannStar, the Chi Mei entities and the Toshiba entities of the State's new request, and each of those entities timely objected to the production of their documents pursuant to the

California MDL Protective Order. (CP 465; CP 138). The State was informed of these objections, yet it still took no action to issue a subpoena directly to the foreign entities.

Pursuant to the State's demand for responses to all RFPs and interrogatories in the CID, AUO America promptly provided a complete set of responses. (CP 827-867). AUO America did not, however, agree that all documents within the possession of Nossaman LLP as a result of the California MDL were thereby within the possession of AUO America for purposes of responding to the CID. To the contrary, AUO America specifically noted its objection to the extent that the CID sought "information or documents that are not within AUOA's possession, custody or control." (CP 829). AUO America reiterated this point in a May 14, 2010, letter, regarding both documents produced by its co-defendants (Chi Mei, HannStar, and Toshiba) and by its foreign parent company, AUO Taiwan. (CP 465-466).³

³ AUO America's May 14 letter was itself in response to a May 4 letter from the State. (CP 225-226). In that letter, the State argued that a May 4, 2010, order from Judge Illston clarifying the protective order required AUO America to produce these documents, even though Judge Illston specifically indicated that objections, including issues of "control" over documents at issue in any CID or subpoena, should be litigated in the relevant court, i.e., the "issuing court." (CP 228). It is bizarre that the State has interpreted Judge Illston's order specifically referring these issues to Washington courts as somehow itself deciding the questions being referred.

E. The State’s Motion for Contempt

In response to AUO America’s insistence that these documents were outside the scope of the CID, the State brought a motion for contempt. (CP 293-304). With respect to the AUO Taiwan documents, the State argued that AUO America had sufficient possession, custody or control of those documents because of an alleged “corporate identity” between AUO America and AUO Taiwan. (CP 296). With respect to the documents of Intervenor-Appellants, the State took the position that— notwithstanding AUO America’s repeated statements to the contrary— AUO America “has acknowledged that it is in possession, custody and control” of those documents. (CP 299). The only basis for this assertion was the State’s reference to a cover letter transmitting sets of documents involving *other* entities, specifically, co-defendants in the California MDL Action who had not objected to Nossaman LLP’s production of their particular documents. (CP 431). The State apparently felt that because Nossaman LLP produced documents from other, non-objecting co-defendants, it must therefore be free to produce documents from the remaining co-defendants who had formally objected on the grounds that Nossaman LLP had no right to produce the documents to the State.

In opposition, AUO America repeated its position that it was not in “possession, custody or control” of either the Intervenor-Appellants’

documents or the AUO Taiwan documents. (CP 238). It noted the undisputed fact that, under the protective order, AUO America could not have possession of these documents; only its counsel, Nossaman LLP, was permitted to maintain and review them. (CP 248). It also pointed out that since those issues had not been at stake in any prior proceeding or order of the court, contempt would be a particularly inappropriate remedy. (CP 237).

At oral argument, the Superior Court quickly put aside the issue of “control” as argued by the State and indicated that only the issue of “possession” of the documents was before the Court. (RP 9). It then summarily stated that documents in the “possession” of Nossaman LLP were within the “possession” of AUO America, and should be produced. (RP 58). It also decided, contrary to the CID statute, that the CID would be treated as imposing a continuing obligation on AUO America. (RP 53). The Court’s ruling was reflected in the Order. No additional findings or conclusions were entered.

AUO America timely appealed. On August 9, 2010, Commissioner Neel stayed the Order pending appeal, finding that debatable issues existed.

III. STANDARDS OF REVIEW

AUO America is aware of no Washington decision establishing the

standard of review for a trial court order enforcing a pre-filing civil investigatory demand.

This Court should adopt the standard employed by the Ninth Circuit for review of trial court decisions on the enforcement of pre-filing administrative subpoenas, which is *de novo*. *Reich v. Montana Sulphur & Chemical Co.*, 32 F.3d 440, 443 (9th Cir. 1994) (“We review *de novo* the district court’s decision regarding enforcement of an agency subpoena.”), *cert. denied*, 514 U.S. 1015 (1995); *see also FDIC v. Garner*, 126 F.3d 1138, 1142 (9th Cir. 1997) (same).

Application of the *de novo* standard is supported by *CLEAN v. City of Spokane*, 133 Wn.2d 455, 475, 947 P.2d 1169 (1997), in which the Supreme Court held in the related context of the Public Records Act that “[w]here the record consists solely of documentary evidence, the standard of review of a trial court’s public disclosure ruling is *de novo*.” The same is true here, where the record consists solely of documentary evidence that this Court can examine just as effectively as the Superior Court.

If the Court determines that an abuse-of-discretion standard applies (which it should not), “[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).

Questions of statutory interpretation are questions of law which this Court will review de novo. *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005).

IV. ARGUMENT

A. The Trial Court Erred In Equating the Limited Custody of Nossaman LLP With Possession by AUO America

1. The Documents Produced by the Other Defendants in the California MDL to Nossaman LLP Are Not Within the Possession, Custody or Control of AUO America

- a. CIDs may only command production of documents within the possession, custody or control of the CID recipient

By definition, CIDs can only reach documents and information within the “possession, custody or control” of a CID recipient. This fundamental point is reflected in the statute, general subpoena law, and has been acknowledged by the State.

RCW 19.86.110(1)⁴ authorizes the attorney general to issue CIDs to persons in “possession, custody or control” of relevant documents. Further, RCW 19.86.110(3) provides that no CID can contain any requirement that would be “improper if contained in a subpoena duces tecum”, nor can it require the “disclosure of any documentary material . . .

⁴ A copy of the statute is included in the Appendix to this Brief.

which for any [] reason would not be required by a subpoena duces tecum.” In turn, CR 45(a)(3) only allows subpoenas to compel the production of those documents “in the possession, custody or control” of the person to whom the subpoena is directed. “The party to whom a subpoena for records is issued must produce only those records which are in his ‘possession, custody or control.’” *United States v. Int’l Union of Petroleum and Industrial Workers, AFL-CIO*, 870 F.2d 1450, 1452 (9th Cir. 1989) (“*Int’l Union*”); *see also* Moore’s Federal Practice 3d, § 45.10[3][b] at 45-40 (“A subpoena may reach documents, electronically stored information, or tangible things that are in the ‘possession, custody, or control’ of the person”). The State acknowledged this rule in the CID itself, defining “documents” to include only those within the “possession, custody or control” of AUO America. (CP 14).

The party seeking discovery bears the burden of proving that the documents it seeks are within the “possession, custody or control” of the party subject to discovery. *Int’l Union*, 870 F.2d at 1452; *E.W. v. Moody*, 2007 WL 445962, *4 (W.D. Wash. Feb. 7, 2007).

Here, it is undisputed that the documents in question—which are documents produced by AUO Taiwan and the Intervenor-Appellants in the California MDL Action—are not physically within the possession or custody of AUO America; instead, they are only in the limited custody of

Nossaman LLP for purposes of the California MDL. There has been no CID served on Nossaman LLP. Thus, the only way that documents held by Nossaman LLP can be in the “possession, custody or control” of AUO America is if the limited custody of Nossaman LLP in the California MDL is somehow equated to possession by AUO America or if AUO America has “control” of those documents through its relationship to Nossaman LLP. Neither of these possibilities exists here.

b. AUO America does not have “possession” of documents in the limited custody of its counsel

For purposes of discovery requests, physical possession or custody by counsel is not equivalent to possession by the client. (“Control” is a separate issue discussed further below.) This point was recognized by Judge Burgess in *Moody, supra*, in which the plaintiff sought to compel documents in the possession of defense counsel. Judge Burgess denied the motion, holding that if the plaintiff wished to use discovery against the defendants to obtain documents held by defense counsel, he would have to show that the defendants had “control” of those documents and the plaintiff had failed to make that showing. *Id.* at *4. The mere fact that the documents were physically in the possession of defense counsel was clearly not enough, in itself, to allow them to be demanded through discovery directed at the client. Judge Burgess recognized that for

purposes of discovery, the law firm qualified as a “nonparty” to the litigation, not as a mere extension of the client. *Id.* The same thing is true here: for purposes of discovery, Nossaman LLP is a non-party to this litigation.

Other courts are in accord. *See, e.g., 800537 Ontario Inc. v. Auto Enterprises, Inc.*, 205 F.R.D. 195, 196-198 (E.D. Mich. 2000) (documents in the possession of the plaintiff’s criminal counsel for purposes of a criminal case were not within the “possession, custody or control” of the plaintiff for purposes of responding to civil discovery).

This is also the conclusion reached by Judge Epstein in very similar circumstances in Illinois pertaining to the Illinois’ Attorney General’s parallel investigation. In *AU Optronics Corporation America v. State of Illinois*, the State of Illinois sought to compel AUO America to produce documents obtained by Nossaman LLP in the California MDL, arguing (as the State of Washington does here) that Nossaman LLP’s custody of the documents was sufficient to bring them within the “possession, custody or control” of AUO America. Judge Epstein rejected this argument, holding:

Given the highly restricted nature of the discovery process in the California [MDL], it is unreasonable to conclude that AU America has possession, custody or control of any of the Protected Materials it did not itself produce merely because its outside counsel is able to review those

documents.

(Appendix J to Motion to Stay at 6-7).

For this reason, the trial court erred as a matter of law in concluding that the limited custody of Nossaman LLP was sufficient in itself to equal possession by AUO America and therefore subject these documents to the State's CID.

- c. AUO America does not have "control" of documents its counsel is barred from disclosing to it under the Protective Order

In the absence of "possession" of the documents by AUO America, the only other question is whether those documents are within the "control" of AUO America. "Control" is also not defined in Washington law, but, under federal law, "Control is defined as the legal right to obtain documents upon demand." *Int'l Union*, 870 F.2d at 1452. "[P]roof of theoretical control is insufficient; a showing of actual control is required." *In re Citric Acid Litig.*, 191 F.3d 1090, 1107 (9th Cir. 1999).

Here, the State made no showing that AUO America could obtain these documents from Nossaman LLP "on demand," nor did the Superior Court make any findings to that effect. That is enough to reject this as a possible basis for forcing Nossaman LLP to produce these documents.

Moreover, the record clearly indicates that AUO America could *not* obtain these documents from Nossaman LLP "on demand,"

particularly for use in responding to a CID. Under the protective order, Nossaman LLP is prohibited from showing or providing these documents to AUO America because they are the confidential documents of third parties.

This is not an argument that the protective order itself “precludes” compliance with a lawfully-issued CID. Instead, it is simply a recognition that the protective order *defined the rights that Nossaman LLP obtained when it was provided these documents* for purposes of the California MDL. Those rights did not include the right to provide the documents to AUO America, and therefore AUO America does not “control” these documents. *See In re Shell E&P, Inc.*, 179 S.W.3d 125 (Tex. App. 2005) (even though lawyers had physical possession of documents belonging to prior defendant, they did not have “legal possession” per the terms of the protective order such that they could produce the documents in collateral discovery).

As a consequence, there is no basis for the trial court’s holding that AUO America must produce the documents held by Nossaman LLP. This is true either under a *de novo* standard because the decision was incorrect, and under an abuse-of-discretion because it is based on untenable and unreasonable grounds. In either case, this provision of the order should be reversed.

2. AUO America Did Not “Concede” Possession, Custody or Control of These Documents

Below, the State argued that AUO America “conceded” its possession, custody, or control of these documents. (CP 294-95, 299). The State is wrong.

First, with respect to the Intervenor-Appellants’ documents, the *sole* basis for the State’s argument is a December 20, 2009 letter from AUO America’s counsel (CP 431) transmitting the documents of certain *other* entities who were not objecting to the production of their documents. AUO America was not conceding that it had possession, custody or control of the documents of the other, objecting parties. Instead, AUO America and its counsel did exactly what the protective order contemplated: when faced with the State’s demand for documents produced by third parties under the protective order, they asked for those third parties to indicate whether they objected to the production. When many of them did not, Nossaman LLP was then authorized to produce the documents as to those non-objecting parties. As to the objecting parties (specifically, AUO Taiwan, HannStar, the Chi Mei-related entities, and the Toshiba-related entities), Nossaman LLP was still bound by the limitations on its rights under the protective order, and therefore could not produce the documents.

Moreover, the State's argument that this production constitutes a "concession" is supported by neither logic nor law. According to the State, because *some* parties did not object to the production of their documents, Nossaman LLP somehow was relieved of its obligations as to those *other* third parties who did object. But how can the decisions of those non-objecting parties with respect to *their* documents determine the rights of the objecting parties? The result simply makes no sense.

Second, with respect to the AUO Taiwan documents, the State cites only to a July 16, 2009 letter (CP 188-189) and a September 20, 2009 email from AUO America's counsel (CP 468-470) as evidence of AUO America's "concession" that it controls AUO Taiwan's documents. In both instances, AUO America's counsel indicated that it was extracting AUO Taiwan data and documents from the AUO America production from the MDL production sets, which the State takes as an "admission" that AUO America is in possession, custody or control of AUO Taiwan's documents.

But these communications show only what it is undisputed, namely, that Nossaman LLP has limited custody of these documents for purposes of the California MDL. It does not show that *AUO America* has possession of the documents, or that it has control over the documents in Nossaman LLP's limited custody. To the contrary, Nossaman LLP's

insistence on removing the AUO Taiwan documents and information from the AUO America production only reinforces the proposition that AUO America does not control AUO Taiwan's documents and information.

3. AUO America Did Not Waive Its Position on “Possession, Custody or Control” by Not “Objecting” Earlier

The State has taken the position that AUO America waived its position on “possession, custody or control” by not raising objections on that point at the June 30, 2009 hearing on the jurisdictional issue—a date on which the State had not yet asserted that the foreign-entity documents at issue in this appeal were within AUO America's possession, custody or control. Indeed, the State did not demand the foreign-entity documents at issue until five months *after* the June 30, 2009 hearing, and did not seek relief from the trial court as to those documents until May 2010.

The State's “waiver” argument fails for at least three reasons. First, this is not an issue that a party in AUO America's position can waive. There are only two possibilities: either AUO America has “possession, custody or control” of these other parties' documents, or it does not. If AUO America does have “possession, custody or control,” the waiver issue is moot. If AUO America does not have “possession, custody or control”, it cannot *create* such control over other parties' documents through its own actions.

Second, the State’s argument misapprehends the nature of the “possession, custody or control” inquiry. Although parties sometimes raise an “objection” claiming that they do not have to produce documents outside their “possession, custody or control,” this is not truly an “objection”; instead, it is an *inherent limitation* in the request itself. As noted above, all subpoenas duces tecum in Washington, and therefore by extension all CIDs in Washington, are by their nature qualified by the limitation that they may only request documents within the “possession, custody or control” of the party to whom they are directed. Thus, when in Request No. 2, for example, the CID asks for “A complete copy of all documents provided to any party in the [California MDL Action],” by law it is asking for “A complete copy of all documents provided to any party in the [California MDL Action] within your possession, custody or control.”

This means that AUO America could have had no obligation to raise this “objection” earlier, because it is, in fact, not an objection but rather merely a restatement of the request itself. It was only later, when the State took the position that documents of third parties that Nossaman LLP had limited custody of as a result of the California MDL were within the “possession, custody or control” of AUO America that the issue was properly joined and litigated before the Superior Court. Since AUO

America had no obligation to raise the issue earlier, it could not have waived the issue by not raising it at the June 30, 2009 hearing (or at some earlier time).

Moreover, the results of the rule the State urges are absurd. For example, should AUO America have asked the Superior Court for an order at the June 30, 2009 hearing that the CID only covered documents within the “possession, custody or control” of AUO America? That would have been asking the court to reiterate the CID itself, and would have added nothing. The State may contend that at the June 30, 2009 hearing AUO America should have raised specific possible categories of documents that the State *might* want and as to which the State *might* take the position were within the “possession, custody or control” of AUO America and asked for judicial rulings at that time. But there is no obligation for parties to preemptively anticipate discovery disputes and bring them to the Court’s attention before they even arise; to the contrary, the civil rules are generally designed to *discourage* parties from preemptively raising discovery issues and asking for advisory opinions. At the very least, the State has never cited any case law for the proposition that a party subject to a CID has the obligation to anticipate such disputes.

Third, the State’s waiver argument is also particularly inapt as to each of the two specific categories of documents, although for slightly

different reasons.

With respect to the documents of AUO America's parent, AUO Taiwan, the State previously acknowledged that it elected not to pursue those documents. As the State acknowledged to the Superior Court in the November 6, 2009 hearing:

So in the CIDs we issued before, including the one involving AUO America, it does actually request the foreign parent documents. I think I can fairly say that everybody started [sic] an objection to that in one form or another, and *we have not pursued it against them.*

(*See* Appendix K to Motion to Stay at 41:23 – 42:2). Given the State's acknowledgment that the defendants were objecting to producing their parent company documents (including AUO Taiwan's) and its further acknowledgment that it had elected not to pursue the issue, it is not well taken for the State to now argue that AUO America waived that issue by not asserting it at an earlier hearing where the point was not at issue. (*See also* CP 626 (June 30, 2009 Transcript at 5:14-16 (State expressly noting that "there is no CID to [AUO Taiwan]. There is no issue of jurisdiction over a foreign corporation."))).

With respect to the HannStar, Chi Mei, and Toshiba documents, the State is essentially arguing that those parties lost their right to object to production of their documents pursuant to the AUO America CID because of AUO America's supposed failure to raise the issue at the June 2009

hearing. Even if this Court were inclined to find that AUO America waived its right to assert that it did not have “possession, custody or control” of these documents (which, for the reasons discussed above, it should not), the issue cannot have been waived as to legitimate rights and interests of HannStar, Chi Mei and Toshiba, each of which objected to the State’s demand for their documents.⁵

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

Not only is the State’s attempt to obtain these documents through Nossaman LLP unavailing because those documents are not within the “possession, custody or control” of AUO America, but the State’s attempt to obtain the documents of these companies from AUO America at all is fundamentally flawed.

The State’s authority to issue CIDs is not unlimited. Among other things, the State must first establish personal jurisdiction over an entity in order to enforce a CID against it. The CID statute (RCW 19.86.110) clearly limits the State’s authority to demand documents to those entities or persons that are subject to at least minimal jurisdiction within the State

⁵ There is no evidence that any of these third parties authorized the “intentional relinquishment of a known right,” as would be required to establish a waiver. *See State v. Sweet*, 90 Wn.2d 282, 287, 581 P.2d 579 (1978).

of Washington. First, no CID may require the disclosure of documents “which for any other reason would not be required by a subpoena duces tecum issued by a court of this state.” RCW 19.86.110(3)(b). Because a civil subpoena duces tecum issued by a Washington court cannot compel production of documents by persons not subject to jurisdiction within Washington, a CID that seeks the production of such documents is likewise “improper.” *See* Civil Rule 45(e)(2), (3). To obtain *foreign* documents, the State must secure issuance of a subpoena or equivalent process “in accordance with the laws of that foreign country.” CR 45. Moreover, any enforcement action must be brought “in the trial court of general jurisdiction of the county in which such person resides, is found, or transacts business.” RCW 19.86.110(9). If a person does not reside or transact business in *any* county in Washington, it follows that such person would not subject to an enforcement action.

The Superior Court agreed with this point. While it did overrule AUO America’s personal jurisdiction challenge, it did so on the grounds that there was simply a lower threshold required in “the investigative stage versus a lawsuit phase,” not on the grounds that no personal jurisdiction threshold existed. (CP 660 at 39:13-25 (June 30, 2009 hearing)).

Case law from other jurisdictions is in accord. *See Silverman v. Berkson*, 661 A.2d 1266, 1276 (N.J. 1995); *Federal Trade Comm’n v.*

Compagnie v. Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1323 (D.C. Cir. 1980).

Here, it is undisputed the State has not even attempted to obtain personal jurisdiction over these other entities (AUO Taiwan or the Intervenor-Appellants) or to pursue more direct avenues for obtaining the foreign documents it wants. Instead, the State has served a CID on AUO America to obtain documents belonging to the foreign entities, seeking to strip the Intervenor-Appellants and AUO Taiwan of their right to assert jurisdictional and other objections to the production of their documents.

This Court should not endorse the State's gambit. Numerous courts have recognized that the government should not be able to use private civil litigation to evade or circumvent statutory and constitutional limitations on its ability to gather evidence. *See, e.g., Osband v. Woodford*, 290 F.3d 1036, 1042-43 (9th Cir. 2002) ("A litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions on criminal discovery and thereby obtain documents he would not otherwise be entitled to for use in his criminal suit.") (citations omitted); *McSurely v. McClellan*, 426 F.2d 664, 671-72 (D.C. Cir. 1970) ("civil discovery may not be used to subvert limitations on discovery in criminal cases, either by the government or by private parties"); *Sharjah Inv. Co. (UK) Ltd. v. P.C. Telemart, Inc.*, 107

F.R.D. 81, 83 n.1 (S.D.N.Y. 1985) (“discovery materials may be protected from disclosure to the government” where “the private litigant is a ‘stalking horse’ for government prosecutors who are using the civil action to circumvent the discovery limitations of criminal procedure”) (quotations omitted).

Most of these cases arise in the criminal context, but the basic point—that the government should not be permitted to use discovery in one matter to avoid its legal limitations in another—is the same. If the government were permitted to do so, limitations on its authority would become meaningless. It would also be an invitation for abuse: The State may not have drafted the discovery requests for the private plaintiffs that led to the production of these documents in the first place (or at least AUO America is not aware that they did), but if the State is permitted to proceed against AUO America here there is little reason to believe that it is not the logical next step.⁶

⁶ In this matter, the question is whether the government can use discovery in one matter to avoid its legal limitations in another, and the concerns are greater given the enormous powers of government investigators and prosecutors. However, even in the private context, courts have rejected efforts to use discovery in one case to evade restrictions in another. *See Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962) (“A litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions on criminal discovery and thereby obtain documents he would not otherwise be entitled to for use in his criminal suit.”), *cert. denied*, 371 U.S. 955 (1963);

The State's attempt to circumvent ordinary process will also have adverse collateral consequences on the administration of justice generally. As the Supreme Court recognized in *Rhinehart v. Seattle Times Co.*, 98 Wn.2d 226, 254, 654 P.2d 673 (1982), the abuse of discovery for purposes other than the litigation for which it is produced will have a chilling effect on the proper administration of justice. "[P]arties generally are not eager to divulge information about their private affairs, and [] when called upon to do so in a lawsuit, will be even more reluctant if they are not assured that the information which they give will be used only for the legitimate purposes of litigation." *Rhinehart*, 98 Wn.2d at 254.

The parties can dispute the meaning and significance of the protective order, but one thing is indisputable: these foreign documents were produced in the California MDL on the assumption and with the expectation that Protected Materials would be "used only in connection with this action for prosecuting, defending, or attempting to settle this action." (CP 438 (Protective Order § 7.1)). If the State is able to obtain the documents of these foreign companies, particularly through the circuitous route it has taken, these expectations will be defeated. Courts

Beard v. New York Central Railroad Co., 20 F.R.D. 607, 610 (N.D. Ohio 1957) ("a plaintiff has no right to use [discovery in] a federal court as a mere auxiliary forum through which to obtain assistance in the preparation of a similar case pending in the state court").

and parties in future cases will have a harder time obtaining basic discovery necessary for their disputes, because non-domestic companies will learn that promises like “the documents will only be used for purposes of this litigation” are not enforceable.

This Court should not sanction such a result. Instead, it should hold that if the State wishes to obtain the documents of AUO Taiwan and the Intervenor-Appellants (HannStar, Chi Mei, and Toshiba), it should propound appropriate discovery and/or CIDs to those entities, not seek to circumvent the ordinary process by directing a CID to a party like AUO America.

C. The Trial Court Erred in Approving a Continuing Obligation in Contravention of Washington Law

As noted above, a CID cannot contain or purport to impose any obligation beyond that which could be legitimately included in a subpoena duces tecum. Here, although the CID purports to include an “Instruction” that “the nature of the CID shall be deemed continuing,” there is no basis for such a requirement in the statute and in fact the subpoena case law emphatically rejects it. *See Alexander v. F.B.I.*, 192 F.R.D. 37, 38 (D.D.C. 2000) (“a non-party served with a subpoena duces tecum is under no duty to supplement its discovery responses”); *Financial General Bankshares, Inc. v. Lance*, 28 Fed. R. Serv. 2d 538, 1979 U.S. Dist. Lexis 12590, *9

(S.D.N.Y. May 4, 1979) (non-party has no duty to supplement response to civil subpoena); *see also Erinmedia, LLC v. Nielsen Media Research, Inc.*, 2007 WL 1970860, *4 (M.D. Fla. July 3, 2007) (“A subpoena addresses itself to documents in existence as of the date the subpoena is responded to, not documents created thereafter.”). Because the “continuing obligation” could not be contained in a subpoena duces tecum, it has no place in a CID.

The Superior Court therefore erred as a matter of law by enforcing a requirement contrary to the CID authorizing statute.

As with virtually every other issue that AUO America has ever raised, the State argued below that AUO America waived its objection to the “continuing obligation” demand by not raising it earlier. The State’s theory apparently is that it can expand its investigative authority and contravene its authorizing statute through including illegal terms in the boilerplate of its CIDs in the hopes that recipient parties will not immediately object.

This Court ought to reject the State’s position emphatically. The State should not be permitted to expand its authority and violate the statute through such tactics. As a matter of equity and good conscience, the State should be required to comply with the statute and its limitations regardless of the boilerplate it inserts in its CIDs.

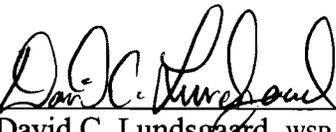
Moreover, the question here concerns a matter of the State's *statutory authorization* to investigate possible violations of law. RCW 19.86.110 provides the State with certain authorizations to conduct such investigations, and imposes certain limitations such as those contained in RCW 19.86.110(3). Under the State's theory, it has the power to expand its statutory authority through the simple expedient of exceeding the statute and then hoping that CID recipients do not act immediately to supervise the State's illegal activities. This Court should not allow the State to unilaterally exceed its statutory authorization in this matter, nor should it sanction a system whereby the question of the State's authorization depends on the action or inaction of a third party. Neither the State nor third parties such as AUO America should be able to alter the statutory framework of RCW 19.86.110 in that fashion. This Court should enforce the statute and reverse paragraph 3 of the Superior Court's order.

V. 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 27th day of October, 2010.

GRAHAM & DUNN PC

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APPENDIX

Honorable Paris Kallas
Noted for Hearing: June 2, 2010, 2:30 P.M.
Oral argument requested

FILED
KING COUNTY, WASHINGTON

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

JUN 03 2010

NO. 09-2-22840-0 SEA

SUPERIOR COURT CLERK
MAUREEN ANN BELL
DEPUTY

STATE OF WASHINGTON
Petitioner

vs.

AU OPTRONICS CORP. AMERICA
Respondent

ORDER DENYING CONTEMPT AND
GRANTING MOTION TO ENFORCE
CIVIL INVESTIGATIVE DEMAND
TO AU OPTRONICS CORP.,
AMERICA

Therefore, good cause appearing, the Court ORDERS as follows:

1. The motion for an order to show cause for contempt is DENIED, and the motion is converted to motion to enforce the Civil Investigative Demand to AU Optronics Corp., America. The motion to compel is GRANTED.

2. AU Optronics Corp., America is ordered to produce documents demanded in the State's Civil Investigative Demand that are in its possession or in the possession of its counsel, with production to take place within 30 days, in order to allow the parties an opportunity to obtain a ruling from the Court of Appeals on the pending motion to stay, to the extent that it involves issues overlapping the present motion, and/or to allow any party to seek protection, clarification or other relief in this Court.

PKS

* in 09-2-36781-7 SEA 1

ATTORNEY GENERAL OF WASHINGTON
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

ORDER DENYING CONTEMPT AND
GRANTING

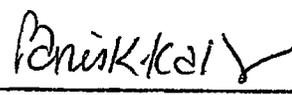
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3. The duty to supplement its responses to the Civil Investigative Demand will be enforced and AU Optronics Corp., America is ordered to comply therewith.

4. An adjudicated failure to comply with this order ^{may} ~~will~~ result in a determination of contempt and in the imposition of sanctions, including attorneys fees.

DATED this 3 day of June, 2010.



PARIS KALLAS, JUDGE

Presented by:



Brady R. Johnson
Attorney for the State of Washington

RCW 19.86.110

Demand to produce documentary materials for inspection, answer written interrogatories, or give oral testimony — Contents — Service — Unauthorized disclosure — Return — Modification, vacation — Use — Penalty.

(1) Whenever the attorney general believes that any person (a) may be in possession, custody, or control of any original or copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, wherever situate, which he believes to be relevant to the subject matter of an investigation of a possible violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, or federal statutes dealing with the same or similar matters that the attorney general is authorized to enforce, or (b) may have knowledge of any information which the attorney general believes relevant to the subject matter of such an investigation, he may, prior to the institution of a civil proceeding thereon, execute in writing and cause to be served upon such a person, a civil investigative demand requiring such person to produce such documentary material and permit inspection and copying, to answer in writing written interrogatories, to give oral testimony, or any combination of such demands pertaining to such documentary material or information: PROVIDED, That this section shall not be applicable to criminal prosecutions.

(2) Each such demand shall:

(a) State the statute and section or sections thereof, the alleged violation of which is under investigation, and the general subject matter of the investigation;

(b) If the demand is for the production of documentary material, describe the class or classes of documentary material to be produced thereunder with reasonable specificity so as fairly to indicate the material demanded;

(c) Prescribe a return date within which the documentary material is to be produced, the answers to written interrogatories are to be made, or a date, time, and place at which oral testimony is to be taken; and

(d) Identify the members of the attorney general's staff to whom such documentary material is to be made available for inspection and copying, to whom answers to written interrogatories are to be made, or who are to conduct the examination for oral testimony.

(3) No such demand shall:

(a) Contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum, a request for answers to written interrogatories, or a request for deposition upon oral examination issued by a court of this state; or

(b) Require the disclosure of any documentary material which would be privileged, or which for any other reason would not be required by a subpoena duces tecum issued by a court of this state.

(4) Service of any such demand may be made by:

(a) Delivering a duly executed copy thereof to the person to be served, or, if such person is not a natural person, to any officer or managing agent of the person to be served; or

(b) Delivering a duly executed copy thereof to the principal place of business in this state of the person to be served; or

(c) Mailing by registered or certified mail a duly executed copy thereof addressed to the person to be served at the principal place of business in this state, or, if said person has no place of business in this state, to his principal office or place of business.

(5)(a) Documentary material demanded pursuant to the provisions of this section shall be produced for inspection and copying during normal business hours at the principal office or place of business of the person served, or at such other times and places as may be agreed upon by the person served and the attorney general;

(b) Written interrogatories in a demand served under this section shall be answered in the same manner as provided in the civil rules for superior court;

(c) The oral testimony of any person obtained pursuant to a demand served under this section shall be taken in the same manner as provided in the civil rules for superior court for the taking of depositions. In the course of the deposition, the assistant attorney general conducting the examination may exclude from the place where the examination is held all persons other than the person being examined, the person's counsel, and the officer before whom the testimony is to be taken;

(d) Any person compelled to appear pursuant to a demand for oral testimony under this section may be accompanied by counsel;

(e) The oral testimony of any person obtained pursuant to a demand served under this section shall be taken in the county within which the person resides, is found, or transacts business, or in such other place as may be agreed upon between the person served and the attorney general.

(6) If, after prior court approval, a civil investigative demand specifically prohibits disclosure of the existence or content of the demand, unless otherwise ordered by a superior court for good cause shown, it shall be a misdemeanor for any person if not a bank, trust company, mutual savings bank, credit union, or savings and loan association organized under the laws of the United States or of any one of the United States to disclose to any other person the existence or content of the demand, except for disclosure to counsel for the recipient of the demand or unless otherwise required by law.

(7) No documentary material, answers to written interrogatories, or transcripts of oral testimony produced pursuant to a demand, or copies thereof, shall, unless otherwise ordered by a superior court for good cause shown, be produced for inspection or copying by, nor shall the contents thereof be disclosed to, other than an authorized employee of the attorney general, without the consent of the person who produced such material, answered written interrogatories, or gave oral testimony, except as otherwise provided in this section: PROVIDED, That:

(a) Under such reasonable terms and conditions as the attorney general shall prescribe, the copies of such documentary material, answers to written interrogatories, or transcripts of oral testimony shall be available for inspection and copying by the person who produced such material, answered written interrogatories, or gave oral testimony, or any duly authorized representative of such person;

(b) The attorney general may provide copies of such documentary material, answers to written interrogatories, or transcripts of oral testimony to an official of this state, the federal government, or other state, who is charged with the enforcement of federal or state antitrust or consumer protection laws, if before the disclosure the receiving official agrees in writing that the information may not be disclosed to anyone other than that official or the official's authorized employees. The material provided under this subsection (7)(b) is subject to the confidentiality restrictions set forth in this section and may not be introduced as evidence in a criminal prosecution; and

(c) The attorney general or any assistant attorney general may use such copies of documentary material, answers to written interrogatories, or transcripts of oral testimony as he determines necessary in the enforcement of this chapter, including presentation before any court: PROVIDED, That any such material, answers to written interrogatories, or transcripts of oral testimony which contain trade secrets shall not be presented except with the approval of the court in which action is pending after adequate notice to the person furnishing such material, answers to written interrogatories, or oral testimony.

(8) At any time before the return date specified in the demand, or within twenty days after the demand has been served, whichever period is shorter, a petition to extend the return date for, or to modify or set aside a demand issued pursuant to subsection (1), stating good cause, may be filed in the superior court for Thurston county, or in such other county where the parties reside. A petition, by the person on whom the demand is served, stating good cause, to require the attorney general or any person to perform any duty imposed by the provisions of this section, and all other petitions in connection with a demand, may be filed in the superior court for Thurston county, or in the county where the parties reside. The court shall have jurisdiction to impose such sanctions as are provided for in the civil rules for superior court with respect to discovery motions.

(9) Whenever any person fails to comply with any civil investigative demand for documentary material, answers to written interrogatories, or oral testimony duly served upon him under this section, or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the attorney general may file, in the trial court of general jurisdiction of the county in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one county such petition shall be filed in the county in which such person maintains his principal place of business, or in such other county as may be agreed upon by the parties to such petition. Whenever any petition is filed in the trial court of general jurisdiction of any county under this section, such court shall have jurisdiction to hear and determine the matter so presented and to enter such order or orders as may be required to carry into effect the provisions of this section, and may impose such sanctions as are provided for in the civil rules for superior court with respect to discovery motions.

[1993 c 125 § 1; 1990 c 199 § 1; 1987 c 152 § 1; 1982 c 137 § 1; 1970 ex.s. c 26 § 4; 1961 c 216 § 11.]

Notes:

Rules of court: See Superior Court Civil Rules.