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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA v. AU OPTRONICS CORPORATION; AU OPTRONICS CORPORATION AMERICA; HSUAN BIN CHEN, aka H.B. CHEN; HUI HSIUNG, aka KUMA; LAI-JUH CHEN, aka L.J. CHEN; SHIU LUNG LEUNG, aka CHAO-LUNG LIANG and STEVEN LEUNG; BORLONG BAI, aka RICHARD BAI; TSANNRONG LEE, aka TSAN-JUNG LEE and HUBERT LEE; CHENG YUAN LIN, aka C.Y. LIN; WEN JUN CHENG, aka TONY CHENG; and DUK MO KOO, Defendants.	No. CR-09-0110 SI UNITED STATES' MOTION TO PRECLUDE CERTAIN JURY NULLIFICATION ARGUMENTS AT CLOSING Date: TBA Court: Hon. Susan Illston Place: Courtroom 10, 19th Floor

INTRODUCTION

The United States moves under Federal Rules of Evidence 401, 402, and 403 for an order limiting the arguments that defendants may make in closing about the Executive Cooperation and Employment Agreements ("Agreements") that witnesses Brian Lee and C.C. Liu entered into with their employer Chunghwa Picture Tubes, Ltd ("CPT"). While defendants should be free to argue how the Agreements bear on the witnesses' bias and credibility, they should not be permitted to attack the witnesses' credibility based on arguments about when the defendants learned of the Agreements or when and how the defendants obtained the Agreements. Any suggestion that defendants only learned of the Agreements on the eve of trial or even during Mr. Lee's testimony would be untrue and misleading. Moreover, any suggestion that the government attempted to prevent defendants from discovering or obtaining the Agreements is equally untrue. In fact, AUO and AUOA learned of these Agreements while deposing C.C. Liu in the parallel civil litigation nearly two years ago. In addition, the government notified the defendants about the existence of the agreements weeks before trial. Defendants' failure to obtain the Agreements well before trial was the result of their inaction, not some attempt by the government to hide the Agreements' existence. In addition, defendants should be prohibited from arguing that the Agreements' provisions obligating CPT to pay the witnesses' criminal fines were illegal or otherwise improper. Permitting the defense to make either of these arguments in closing would only mislead and confuse the jury on irrelevant issues and invite jury nullification.

BACKGROUND

A. AUO Knew of the Executive Cooperation Agreements and Did Nothing to Obtain Them from CPT before Mr. Lee and Mr. Liu Took the Stand

In their questioning of Brian Lee, defendants attempted to establish that Lee, CPT, and the government had long known of these Executive Cooperation and Employment Agreements and somehow acted to prevent defendants from discovering or obtaining a copy of the Agreements until after Lee had taken the stand. Specifically, their questioning of Mr. Lee included the following questions:

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- "In late 2008 and early 2009, did you tell the government lawyers that you were negotiating financial benefits with CPT while you were considering whether to accept your plea agreement with the government?" Tr. Vol. 11 at 1888.

- "We have this agreement in court now (Indicating), because when you stepped down from that witness stand earlier in your testimony one day, the defense gave you a subpoena to finally produce it. Is that correct?" Tr. Vol. 12 at 2002-03.

- "And when you personally, and CPT as a corporation, received the defense subpoena to finally bring this (Indicating) to court, you filed papers through your lawyer to block the subpoena. Correct?" *Id.* at 2003.

- "On your behalf, your lawyers filed a motion asking that the subpoena be quashed, or stopped, or blocked, so that you did not have to produce this EXECUTIVE COOPERATION AND EMPLOYMENT AGREEMENT (Indicating quotation marks). Correct?" *Id.*

- "To your knowledge, did the Government ever issue you a subpoena or request that you produce the employment agreement that you had with CPT (Indicating)?" *Id.* at 2006.

- "So, to the extent we hear 'Well, we have it in our hands and there it is,' that's solely – that's only because the defense issued you a subpoena for it after you took that witness stand. Is that correct?" *Id.*

They also asked Mr. Lee if he had filed a declaration in support of the motion to quash "in an effort to keep the defense from obtaining your employment agreement." Tr. Vol. 12 at 2002-03. Lee's declaration was placed into evidence as proof of this fact, though the declaration contains no indication that Lee intended to prevent production of the agreement. *Id.* *See* Ex. D8621 (attached as Exhibit A). It simply states, in sum, that Lee's attorney received the subpoena on the day Lee started his testimony and that it was not possible to comply with the subpoena deadline of 11:00 a.m. the following day because any responsive documents were in Lee's office or home in Taiwan. *Id.*

In contrast, what came to light during the examination of C.C. Liu was that, in fact, AUO has known of the existence of these Agreements for almost two years. In the civil lawsuit relating to the LCD investigation, counsel for AUO participated in a three-day deposition of Mr. Liu in April 2010. Tr. Vol. 17 at 2956. During the deposition, Mr. Liu answered questions that counsel for AUO and AUOA asked about his Executive Contract with CPT. *Id.* at 2958. Mr. Liu acknowledged in the deposition that CPT paid him a cash allowance (*id.* at 2965), paid his

salary while he was incarcerated at Lompoc (*id.* at 2967), and paid his legal fees (*id.*). While the deposition of Mr. Lee did not address whether or not he had a similar agreement, it should have been obvious to defendants that if one CPT executive who pleaded guilty to price fixing had such an agreement with CPT, it was likely that others did as well.

Even if the existence of Lee's Agreement was not clear to defendants in April 2010, defendants were made aware of the Agreements well before Brian Lee took the stand. In a letter dated December 23, 2011, the government made the following disclosure to defendants:

> [T]he government was advised by counsel for CPT that Brian Lee, C.C. Liu and C.H. Lin entered into separate employment agreements with CPT. It is the government's understanding through CPT counsel that these agreements were executed with CPT around the time that Brian Lee, C.C. Liu and C.H. Lin signed their plea agreements. In his deposition in the LCD MDL case, C.C. Liu indicated that he did have a separate employment agreement with CPT.

Letter from Michael L. Scott to Christopher A. Nedeau, et al. (Dec. 23, 2011) (attached as Exhibit B).

The record also shows the defendants did not obtain these Agreements before Brian Lee took the stand because they made no effort to obtain copies of the Agreements from CPT until after Lee took the stand. During a sidebar, counsel for both Mr. Liu and CPT represented to the Court on the record that had anyone from the defense asked for a copy of the Agreement as far back as C.C. Liu's April 2010 deposition, it would have been provided to them. Tr. Vol. 17 at 3076-83. Yet, the defendants waited until these witnesses were on the witness stand to subpoena such information.

B. The Record Shows That It Is Improper to Suggest that CPT Should Not Have Paid Brian Lee's Criminal Fine

Brian Lee testified on direct examination that his employer, CPT, paid his $20,000 criminal fine. Tr. Vol. 6 at 1245. On cross-examination, defendants attempted to suggest that it was improper for CPT to have paid Mr. Lee's criminal fine. Tr. Vol 11 1905-07. The Court sustained the government's objection to that line of questioning and made clear after extensive argument that it did not believe that Mr. Lee's plea agreement required that he pay the fine out of

his own pocket. The Court prohibited the defense from using either his plea colloquy or his deposition to question him further about who paid his fine. Tr. Vol 11 at 1907-15.

ARGUMENT

The jury's sole duty in this case, as in any criminal case, is to be the finder of fact on whether the government has proven the elements of the charged offense – one count of violating the Sherman Act, 15 U.S.C. § 1. The Ninth Circuit adheres to the nearly universal rule disapproving evidence and arguments that ask the jury to decide a criminal case on extraneous matters – that is, to engage in jury nullification. As one judge of this Circuit explained: "I believe neither a defendant nor his attorney has a right to present to a jury evidence that is *irrelevant* to a *legal* defense to, or an element of, the crime charged. Verdicts must be based on the law and the evidence, *not* on jury nullification . . . ." *Zal v. Steppe*, 968 F.2d 924, 930 (9th Cir. 1992) (Trott, J., concurring) (emphasis in original). *See, e.g., United States v. Blixt*, 548 F.3d 882, 890 (9th Cir. 2008) (holding that "the district court, exercising considerable restraint in the face of blatant jury nullification arguments, properly instructed the jury to disregard counsel's statements").

Evidence is relevant "if it has any tendency to make a fact [of consequence] more or less probable than it would be without the evidence." Fed. R. Evid. 401. "Irrelevant evidence is not admissible." Fed. R. Evid. 402. Moreover, even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues. Fed. R. Evid. 403; *see also* Fed. R. Evid. 403 Advisory Committee's Notes (defining "unfair prejudice" as "an undue tendency to suggest decision on an improper basis").

Against the backdrop of these well-settled issues, the government requests that this Court not permit any closing argument suggesting that Mr. Lee, Mr. Liu, CPT, or the government attempted to prevent defendants from discovering or obtaining the Agreements. The defendants had known about the Agreements for nearly two years, and their failure to obtain the Agreements before Mr. Lee took the stand in this trial was the result of their inaction, not any impediment erected by Messrs. Lee or Liu, CPT, or the government. Likewise, any suggestion in closing that it was improper for CPT to pay Messrs. Lee and Liu's criminal fines would be improper and

should be precluded. Such arguments are misleading, irrelevant to the ultimate issue of defendants' guilt or innocence, and would only risk inviting jury nullification.

CONCLUSION

For the reasons stated above, the government requests that this Court grant its motion to limit the arguments that defendants may make in closing about the Executive Cooperation and Employment Agreements.

Dated: February 22, 2012

Respectfully submitted,

/s/ Peter K. Huston
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