

1 PETER K. HUSTON (Cal. Bar No. 150058)
MICHAEL L. SCOTT (Cal. Bar No. 165452)
2 HEATHER S. TEWKSBURY (Cal. Bar No. 222202)
E. KATE PATCHEN (N.Y. Reg. No. 41204634)
3 Antitrust Division
U.S. Department of Justice
4 450 Golden Gate Avenue
Box 36046, Room 10-0101
5 San Francisco, CA 94102-3478
Telephone: (415) 436-6660
6 Facsimile: (415) 436-6687
7 peter.huston@usdoj.gov

8 Attorneys for the United States

9
10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION
13

14 UNITED STATES OF AMERICA) No. CR-09-0110 SI
15 v.) UNITED STATES' MOTION FOR
16 AU OPTRONICS CORPORATION;) ADDITIONAL JURY INSTRUCTION
17 AU OPTRONICS CORPORATION AMERICA;)
18 HSUAN BIN CHEN, aka H.B. CHEN;)
HUI HSIUNG, aka KUMA;)
19 LAI-JUH CHEN, aka L.J. CHEN;)
SHIU LUNG LEUNG, aka CHAO-LUNG)
20 LIANG and STEVEN LEUNG;)
BORLONG BAI, aka RICHARD BAI;)
21 TSANNRONG LEE, aka TSAN-JUNG LEE)
and HUBERT LEE;)
22 CHENG YUAN LIN, aka C.Y. LIN;)
WEN JUN CHENG, aka TONY CHENG; and)
23 DUK MO KOO,)
24 Defendants.)

1 Earlier today, the Court received a note from the jury which sought direction on “How to
2 Proceed Regarding Juror Refusing to Deliberate or Consider Evidence, Personal Beliefs &
3 Ability to Stay Awake.” In response to this note, the Court appropriately reinstructed the jury
4 regarding their duty to deliberate, but left unaddressed two other potential issues raised by the
5 note: (1) a refusal to follow the Court’s instruction regarding “Duties of Jury to Find Facts and
6 Follow Law” and (2) sleeping during deliberations. The United States requests an additional
7 jury instruction to address both issues.

8 First, the jury note suggests that some juror may be refusing to deliberate or consider the
9 evidence based, at least in part, on personal beliefs. In *Williams v. Cavazos*, 646 F.3d 626, 648
10 (9th Cir. 2011), a case cited by the Court, the Ninth Circuit recognized that “refusing to follow
11 the law or refusing to deliberate would be ‘good cause’ for discharging” a juror.¹ Although the
12 government is not suggesting that the Court should yet inquire whether any juror has engaged in
13 misconduct that would warrant discharge, the government believes that it would be appropriate
14 for the Court to remind the jury not only of their continuing duty to deliberate, but also their duty
15 to “apply the law” and “not be influenced by any personal likes or dislikes, opinions, prejudices,
16 or sympathy.” These duties are described in the second paragraph of the “Duties of Jury to Find
17 Facts and Follow Law” jury instruction.

18 Second, courts have frequently dismissed sleeping jurors from cases. *See, e.g., Miller v.*
19 *Stagner*, 757 F.2d 988, 995 (9th Cir. 1985) (affirming dismissal of juror who had fallen asleep
20 during the rereading of testimony during deliberations); *United States v. Barrett*, 703 F.2d 1076,
21 1083 (9th Cir. 1983) (remanding a case to the trial court with instructions to conduct a hearing to
22 determine whether a juror had been sleeping); *United States v. Bradley*, 173 F.3d 225, 230 (3d
23 Cir. 1999) (affirming dismissal of a sleeping juror); *United States v. Fajardo*, 787 F.2d 1523,
24 1525 (11th Cir. 1986) (“A separate hearing on a juror’s incapacity is not required where the
25

26 ¹ The central holding of *Williams*, that there was a “reasonable possibility” that a request to
27 remove a juror “was directly connected to the juror’s views on the merits” of that case, is not
28 implicated here. *Id.* at 647. The government does not seek the removal of any juror; it merely
seeks additional instruction regarding the jury’s duties during deliberations in light of the issues
raised by the jury’s note.

1 juror’s inability to continue is clear; the court may assume that jurors who . . . have slept in open
2 court will be unable to discharge their duties.”) (citation omitted); *United States v. Warner*, 690
3 F.2d 545, 555 (6th Cir. 1982) (affirming dismissal of a sleeping juror “since a juror who sleeps
4 through much of the trial testimony cannot be expected to perform his duties”). Because
5 sleeping precludes the ability of a juror to perform his or her duty to deliberate, the jurors should
6 be instructed of their obligation to stay awake during deliberations.

7 Accordingly, the government proposes the following additional jury instruction:

8 Yesterday, I reminded you of your duty to deliberate. I now want to remind you of your
9 duty to find facts and follow the law. As I instructed you at the end of trial, it is your
10 duty to weigh and to evaluate all the evidence received in the case and, in that process, to
11 decide the facts. It is also your duty to apply the law as I give it to you to the facts as you
12 find them, whether you agree with the law or not. You must decide the case solely on the
13 evidence and the law and must not be influenced by any personal likes or dislikes,
14 opinions, prejudices, or sympathy. You will recall that you took an oath promising to do
15 so at the beginning of the case.

16 Finally, it is necessary that you remain awake during deliberations in order to carry out
17 your duties. As I have instructed you, you can set your own schedule for deliberations.
18 You should feel free to take breaks during the day or to shorten the length of your daily
19 deliberations. Although I do not expect that any juror will sleep during deliberations, you
20 can notify me with a note if any juror is sleeping during your further deliberations.

21 Should the Court wish to hear further from the government on this issue, we are available
22 at the Court’s convenience.

23 Dated: March 6, 2012

24 Respectfully submitted,

25 /s/ Peter K. Huston
26 Peter K. Huston
27 Antitrust Division
28 U.S. Department of Justice