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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA v. AU OPTRONICS CORPORATION, *et al.*, 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' STATEMENT REGARDING JURY QUESTIONNAIRE

The United States objects to the proposed jury questionnaire submitted by defendants AU Optronics Corporation and AU Optronics Corporation America on November 23, 2011 and requests that the Court not use a questionnaire in this case.

The issue of a jury questionnaire was raised at the hearing on November 18, 2011. The Court found defendants' previously proposed jury questionnaire overly burdensome and intrusive. The Court further indicated that it would consider using a questionnaire if the parties were able to *jointly* propose a less intrusive, less burdensome version by November 23, 2011.[1] Following the hearing, defendants made no effort to meet and confer with the government on the issue and simply re-submitted a shorter, but still objectionable, version of their own form of questionnaire. Defendants did not forward their proposed version to the government for comment before filing it and ignored many of the government's previously expressed complaints about the questionnaire.

The government objects to the questionnaire submitted by defendants and requests that the Court reject it. As described below, in addition to being redundant, overbroad and very burdensome, many questions in the questionnaire are highly intrusive and presume biases.

- This latest version of defendants' questionnaire improperly adds a question about prospective jurors' gender. (Question #1) This question did not appear on prior versions of defendants' questionnaire. It is an inappropriate question because using a peremptory challenge to exclude a juror on the basis of gender would be a violation of the Equal Protection Clause. *J.E.B. v. Alabama*, 511 U.S. 127, 129 (1994) (extending *Batson v. Kentucky*, 476 U.S. 79 (1986) to gender-based peremptory challenges). After *J.E.B.*, asking potential jurors to specify their gender is no more appropriate than asking them to specify their race. There is simply no legitimate reason for asking this question.
- The questionnaire asks whether English is the jurors' native language and, if not, asks them to indicate their native language. (Question #2) These questions are irrelevant to a juror's ability to serve or be fair in this case.

[1] The Court did not request each side to submit dueling versions of a questionnaire.

- Defendants ignored the Court's guidance from the November 18, 2011 hearing and included a question asking for ten years of employment history. (Question #8) As recognized by the Court, this question is overbroad and unduly burdensome.
- Question #27 is another example of a question that is exceedingly overbroad. It asks if the respondent has "*ever* belonged to an organization, civic club, professional associations [sic], recreational groups [sic], or clubs [sic]." (emphasis added) Presumably, this would include organizations ranging from the Girl Scouts to AARP and everything in between. A positive response would require the respondent to list the organization and dates of membership. This question is overly intrusive and overbroad, especially for older potential jurors who are likely to have belonged to many organizations, of one sort or another, throughout their lives.
- Several of the questions are highly intrusive and invade too far into jurors' private lives. These include questions about how much time jurors spend watching television (Question #16), what magazines they read, what newspapers they read, what periodicals they read, what internet websites they frequent, what internet blogs they read, (Question #15) and how much time they spend playing videogames. (Question #16) Defendants ignored the government's previously expressed concerns about these questions.
- Several of defendants' questions are redundant. For example, after asking about the current and past employment of prospective jurors, their job duties, their education and college majors, defendants' questionnaire goes on to ask another series of questions about education and training in twelve specific fields (Question #24), and then further asks about nine additional legal related jobs areas (Question #30). Not only are these questions redundant, they are not even-handed because they only ask about certain fields and job duties. For example, Question #30 asks about law enforcement and prosecution jobs (which would be of interest

to defendants) but does not ask about public defender or prisoner rights jobs (which would be of interest to the government). The government previously raised these concerns.

- The questionnaire includes questions which appear to be asking about anti-Asian bias. (Questions #22, 23) But these questions do not ask, in an open-ended, neutral way, whether jurors believe they can be fair to defendants from Taiwan. Rather, defendants' questions are framed in a non-neutral manner that *presumes* bias and *introduces* it. The questions are priming the respondents to express bias. Bias is built in to the question ("Asian companies these days have an advantage over their American competitors. Agree, Disagree, Unsure"). Moreover, these questions are not relevant. Question 22 asks about competition between Asian companies and American companies, but this case concerns the lack of competition among several global companies, none of which are headquartered in America. It asks about "Asian companies" but does not define what is included within "Asia." By many definitions it would include everything east of the Suez Canal and Ural mountains and north of Australia, including the Mid-East, and Southeast Asia (including India and Indonesia). The Asian companies involved in this case, however, are headquartered only in Taiwan and South Korea, a tiny fraction of that area. The government has previously expressed these concerns to defendants.
- Defendants' Questions #40, 41, 42, 44, 45, incorporate legal concepts from jury instructions such as the burden of proof, the jurors' oath, and jury nullification. The government respectfully suggests that questions of this nature are more appropriately asked by the Court. Moreover, there are several problems with these questions. First, they focus only on certain jury instructions, and in that way they are biased. Second, some of them are not accurate. For example, while it is true that the government has the burden of proof with respect to the elements of the charge, the defendants have the burden of proof with respect to affirmative

defenses. Third, they are not couched in neutral language.

- Defendants' questionnaire includes many open ended follow-up questions requiring respondents to write out explanations for their responses. For example, Question #11 asks respondents whether they considered past jury experience as a positive, neutral, or negative experience, and then asks them to explain their answer. As another example, Question #29(a) asks respondents who have been accused of a serious crime or who are close to someone who has been accused of a serious crime to describe what happened and whether there was an arrest, among other questions. Many other questions require a narrative explanation or response: *See, e.g.*, Questions #11(b); 12(b); 13(a); 14(a); 14(c); 18(a); 24(a); 25(a); 26(a); 28(a); 29(a); 29(c); 30(a); 31(a); 32(a); 35(a); 36(a); 37(a); 39(a); 40(a); 41(a); 42(a); 43(a); 44(a); 45(a); 46(a); 47(a); and 48(a). Having to write narrative responses to these questions would make the questionnaire overly burdensome, as the government has previously expressed.
- Question #17 asks not only whether respondents have purchased a flat screen television, laptop computer, flat screen desktop monitor or mobile wireless handset between 2001 and 2006, but requires respondents to identify each such purchase and list when each was purchased and what brand it was. (Question #17(a), (b), (c))[2] Expecting respondents to search their records to find this information (under threat of perjury) is overbearing. Moreover, this case does not concern LCD panels for mobile wireless handsets.
- Defendants' questionnaire is also objectionable because it did not include questions that the government had previously suggested which were designed to

[2] On September 9, 2011 the government submitted a statement to the Court suggesting a simple modification to the civil class definitions to exclude from the classes jurors seated in this case (following the exclusion which is already in place for jurors seated in the civil case.) (*See* Dkt. 386) As the government noted, class plaintiff's counsel do not object to such a modification. *Id*. AUO and AUOA indicated that they did not have an objection to such a modification and that they would contact class counsel with respect to an appropriate stipulation. (Dkt. 387).

identify anti-government bias that might be difficult for prospective jurors to discuss in open court. For example, the government suggested questions about whether the jurors have been the subject of a government investigation or litigation or accused of illegal or unethical conduct at work.

- Lastly, the declaration included at the end of defendants' questionnaire is heavy-handed and threatening. Defendants questionnaire asks jurors to declare the truth of their responses under penalty of perjury. The declaration also asks the prospective jurors to acknowledge being bound by an order of the Court which, read literally, they could not possibly comply with. As written, respondents would understand that they have been ordered by the Court not to obtain information about the Court, or the parties (which includes the United States). It threatens them with contempt of court, jail time and/or a monetary fine for violation. While defendants surely do not intend for the Court to hold potential jurors in contempt for visiting the Court's website (for example, to find directions), or for reading or watching a news report involving the United States government, its proposed declaration is poorly drafted and likely to induce angst among potential jurors.

A juror questionnaire in this case will be associated not only with the Court, but with the parties. For the reasons set forth above, the government does not want to be associated with defendants' proposed questionnaire and urges the Court to reject it.

Dated: November 25, 2011

Respectfully submitted,

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