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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO DIVISION

11
12 UNITED STATES OF AMERICA,
13 Plaintiff,
14 v.
15 HSUAN BIN CHEN, et al.,
16 Defendant.

Case No. CR-09-00110-SI (MJ)

**DEFENDANT HSUAN BIN CHEN'S
SENTENCING MEMORANDUM AND
MOTION FOR DEPARTURE**

Judge: Hon. Susan Illston
Date: September 20, 2012
Time: 10:00 a.m.
Courtroom: 10, 19th Floor

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1 **I. INTRODUCTION**

2 After over two years of investigation, preparation, and trial, Hsuan Bin Chen now appears
3 before the Court for sentencing on a single violation of the Sherman Act. The trial, despite its
4 length, shed faint light on only a small part of Mr. Chen's professional life, to say nothing of his
5 personal life. But pursuant to 18 U.S.C. § 3553(a), the Court must consider a far broader array of
6 facts about Mr. Chen in crafting a sentence that is "sufficient, but not greater than necessary, to
7 comply with the purposes" of sentencing. This sentencing memorandum seeks to illuminate the
8 totality of Mr. Chen's life as a devoted husband and father, well respected business leader, and
9 generous contributor to his community.

10 The Presentence Report essentially ignores all of Mr. Chen's personal characteristics and
11 instead paints with a broad brush his role in the alleged conspiracy and his responsibility for the
12 already flawed volume of commerce calculation. The resulting recommendation is, not
13 surprisingly, shockingly disparate with the sentences imposed on other defendants in the TFT-
14 LCD conspiracy. Even worse, the Presentence Report ignores the section 3553(a) factors and
15 fails to properly consider Mr. Chen's admirable personal history and characteristics.

16 Accompanying this sentencing memorandum, Mr. Chen submits letters from family,
17 friends, and colleagues who bear witness to his character based on meaningful relationships that
18 span years or decades. These letters attest to Mr. Chen's unselfishness, devotion, integrity,
19 discipline, and compassion. They demonstrate that Mr. Chen's conviction is an anomaly in a life
20 of humility and service. Mr. Chen respectfully requests that the Court consider these letters, and
21 the arguments below, in fashioning an appropriate sentence.

22 **II. MR. CHEN'S PERSONAL HISTORY¹**

23 **A. Family**

24 Hsuan Bin Chen, age 60, was born and raised in Hsinchu, Taiwan along with his two
25 brothers. His father was a schoolteacher, his mother a homemaker. They provided a stable,

26 _____
27 ¹ The facts provided in this section are drawn from the Presentence Report, the letters submitted
28 on behalf of Mr. Chen (attached as Exhibits A-L to the Declaration of Michael A. Attanasio in
Support of Defendant Hsuan Bin Chen's Sentencing Memorandum ("Attanasio Decl.")), and
records and papers on file in this action.

1 caring, and happy home for Mr. Chen. With this foundation, Mr. Chen embraced the cultural and
2 Confucian custom of filial piety, respect for one's parents and ancestors. As but one example,
3 Mr. Chen paid for the restoration of his family's temple, a gathering place for his extended family
4 to honor their ancestors. Mr. Chen also demonstrates intense devotion to his parents. As his
5 parents aged and their health declined, Mr. Chen became their primary source of support, both
6 financially and emotionally.

7 In recent years, both of his parents have suffered serious health problems. His mother,
8 who passed away just three months ago, suffered from liver cancer, gastric ulcers, delirium and
9 mental changes, and had multiple spinal surgeries. She spent her final months at a cancer
10 treatment center receiving around-the-clock care. Mr. Chen's father suffers from cardiovascular
11 disease, impaired vision, disequilibrium, limited mobility, dementia, incontinence, and stroke. He
12 has lived in the Chong De nursing home since June of 2006. The excellent care his parents have
13 received is made possible by Mr. Chen, who pays for their significant living expenses and
14 medical care.

15 In addition to this financial support, Mr. Chen provides his parents' primary emotional
16 support. Before his arrival in the United States to defend the charges in this case, Mr. Chen and
17 his wife enjoyed a weekly visit with their parents. Every weekend, with rare exceptions,
18 Mr. Chen and his wife would visit their parents at their assisted living facilities, bringing their
19 favorite foods, and then take them all out to lunch together. For holidays and occasional
20 weekends, Mr. Chen would bring his father home to spend extra time with the entire family.
21 These visits were vitally important to his parents. His father considers Mr. Chen to be the center
22 of his life.

23 Mr. Chen shares a close relationship with his brothers as well. He speaks with them
24 regularly, and has provided them with financial support at times. For example, Mr. Chen gave his
25 older brother a car to facilitate travel between Taipei and Hsinchu, so that his brother could spend
26 more time with their ailing parents.

27 While his parents and siblings are enormously important to Mr. Chen, he is equally
28 devoted to his wife and three daughters. He married his wife Chin Chih nearly 32 years ago. As

1 is apparent from Mrs. Chen's letter, they share a loving and supportive relationship that continues
2 to this day.

3 Together, they have raised three remarkable daughters. Jodi Chen Nienaber, the eldest,
4 graduated from Duke University Medical School. Along with her husband, she is now a
5 physician at the Mayo Clinic in Rochester, Minnesota. She recently gave birth to a daughter,
6 Mr. Chen's first grandchild. Jodi credits much of her success to her father's example, guidance,
7 and support. While she knew that he expected her to work hard and succeed, he was always
8 gentle and kind, exhorting and praising her in equal measure. He also imparted important values
9 through his actions, not just his words. When Jodi was short just one penny at the local grocery
10 store, Mr. Chen returned with her to pay the debt even though the shopkeeper was happy to let it
11 go. This lesson sticks with Jodi to this very day.

12 Mr. Chen's second daughter, Ellen, earned an undergraduate degree from the University
13 of Pennsylvania and a Master's Degree from the Harvard University School of Design. She is an
14 architect living in New York. She too is inspired by her father's example to live a life of integrity
15 and compassion. Her father taught her at a young age to recognize the blessings in her own life,
16 and to help those less fortunate. Ellen has taken this to heart through volunteer projects building
17 an orphanage in Nicaragua and an emergency shelter in Sri Lanka. In both case, Mr. Chen further
18 fostered Ellen's good work with generous donations to her projects.

19 Ivy, Mr. Chen's youngest daughter, graduated with a degree in engineering from
20 Columbia University. Currently, she is a PhD candidate studying Material Science at the
21 University of Michigan. Like her sisters, Ivy has always depended on Mr. Chen for support and
22 wise counsel when facing challenges. During frustrating times, Ivy can always depend on her
23 father's keen sense of humor and faith in her abilities to cheer her up and re-invigorate her to
24 continue working towards her goals.

25 Mr. Chen demonstrates his family devotion on a daily basis. While the demands of his
26 career have been great, Mr. Chen has made it a priority to spend as much time as possible with his
27 family. When his daughters were growing up, he always made a point of being home for dinner
28

1 so that the family could spend valuable time together. Weekend outings—to hike in the hills of
2 Taiwan or Malaysia—were common.

3 Even now, Mr. Chen maintains a close relationship with his daughters. He speaks with
4 them at least every week, and still offers wisdom and guidance to them on topics ranging from
5 professional success to raising his first grandchild. Even while subject to his bail conditions,
6 Mr. Chen has made every effort to visit his daughters as much as possible. With permission of
7 this Court, he helped Ivy move in and get settled when she started her graduate work at the
8 University of Michigan. He spent time with Jodi and her family upon the birth of his
9 granddaughter and again this summer (again with the Court’s approval). While Mr. Chen
10 cherishes these moments with his family, the letters submitted by his daughters make clear that
11 they value them equally. In her letter to the Court, Jodi aptly describes Mr. Chen as the “glue”
12 holding their family together. Nothing could be more apt; Mr. Chen is wholly attached to them.

13 **B. Professional Life**

14 After graduating with a degree in electrical engineering from National Chiao Tung
15 University in Taiwan, Mr. Chen served the required two years in the Taiwanese army. After an
16 honorable discharge as a second lieutenant, Mr. Chen began his career as a junior electronic
17 engineer at Philips Corporation. After five years, he took a job at Acer Incorporate. Because of
18 his strong work ethic, integrity, and interpersonal skills, Mr. Chen quickly established himself as
19 a leader at Acer. He was soon promoted to be a quality control manager and then a plant
20 manager. Then, in 1992, he became the Managing Director of Acer Peripheral, Inc., which
21 required him to relocate to Penang, Malaysia.

22 After successfully leading Acer Peripheral, Inc. for five years, Mr. Chen was again
23 promoted. He moved back to Taiwan in 1997 and became the president of Acer Display
24 Technology, Inc. Despite his professional success, this was initially a difficult time for Mr. Chen
25 as his family did not immediately move from Malaysia to Taiwan with him. Fortunately,
26 however, his family eventually returned to Taiwan where Mr. Chen has lived and worked ever
27 since.

28

1 In 2001, Acer Display Technology and Unipac Optoelectronics merged and formed AU
2 Optronics Corporation (“AUO”). Mr. Chen—who believed the merger was in the best interests
3 of both companies—encouraged the merger despite negative personal consequences. As a result
4 of the merger, Unipac Optoelectronics’s president became Chairman and CEO of the merged
5 company, while Mr. Chen served below him as the President of the merged company.
6 Nonetheless, Mr. Chen’s enthusiastic support for the merger was vital to its completion.

7 Mr. Chen helped manage AUO during a period of great expansion. Through aggressive
8 research and development leading to technological breakthroughs and increased market share,
9 AUO grew from fewer than 8,000 employees in 2001 to over 60,000 employees today. During
10 the same time, its market share expanded from approximately 8% to nearly 16% by the end of
11 2010. In 2007, Mr. Chen became Vice Chairman and CEO of AUO. With Mr. Chen’s tenure as
12 CEO, AUO experienced its most productive years. Unfortunately, the worldwide economic
13 recession led AUO to suffer significant losses in recent years.

14 In addition to his leadership of AUO, Mr. Chen has helped two of its sister corporations—
15 Wellypower Optronics Corporation and Lextar Electronics Corporation—achieve success as well.
16 Mr. Chen has served as the Chairman of Wellypower Optronics since 2005, and its CEO since
17 2006. During that time, Wellypower experience significant growth. It more than doubled its
18 revenues and significantly expanded its workforce. Similarly, Lextar Electronics performed
19 admirably while Mr. Chen served as its Chairman and CEO in 2009 and 2010. During his
20 leadership tenure, Lextar more than quadrupled its revenue and greatly increased its market share
21 in a competitive industry.

22 Mr. Chen’s leadership at AUO, Wellypower, and Lextar extends to corporate
23 responsibility as well. As more fully described in its sentencing memorandum, AUO has become
24 a leader in environmental initiatives and charitable giving. AUO has consistently won awards
25 from the Taiwan government’s Ministry of Economic Affairs for achievements in technological
26 excellence and environmental preservation. In particular, AUO is a frontrunner for green
27 packaging of its products, reducing consumption and waste in its fabs, and overall sustainability.
28 During just the past three years, AUO and Lextar have donated nearly \$3.5 million to charitable

1 causes including natural disaster relief, student scholarships, and the BenQ Foundation. In
2 addition, AUO and Lextar have coordinated the donation of an additional \$2.2 million directly
3 from their employees.

4 Through Mr. Chen's effort and leadership, AUO, Wellypower, and Lextar have become
5 important corporate citizens in Taiwan. Taiwan's Ministry of Economic Affairs recognizes that
6 AUO contributes significantly to Taiwan's economy and society through employment,
7 technological innovation, environmental stewardship, and community service. In recognition of
8 his leadership, Mr. Chen has received the Taiwan Ministry of Economic Affairs' Gold Panel
9 Display Award for Outstanding Industry Contribution and the Society of Information Display's
10 Special Recognition Award.

11 Mr. Chen's entire career has been marked by hard work, discipline, integrity, and
12 unselfishness. The letters submitted on Mr. Chen's behalf unswervingly paint a picture of a man
13 respected by everyone he meets, including peers, superiors, and subordinates.² He is routinely
14 described as a man of integrity, who places the interests of the company and his employees above
15 his own. Though uncommon in Taiwanese companies, he always maintained an open door to all
16 employees.

17 Many of the anecdotes within the letters submitted on Mr. Chen's behalf illuminate the
18 type of businessman he is. In 1999, when Mr. Chen was CEO of Acer Display Technology, he
19 learned of a vegetarian employee who could not eat at the company's cafeteria because it lacked
20 vegetarian options. The very next day, at Mr. Chen's direction, the cafeteria added vegetarian
21 dishes. Even within the formal business culture in Taiwan, Mr. Chen's employees are
22 comfortable enough to approach Mr. Chen outside of work to say hello and introduce their
23 families. Mr. Chen has voluntarily foregone larger bonuses, preferring to distribute the available
24 funds to more employees. These stories, and others like them, show why Mr. Chen is held in
25 such high regard.

26
27 _____
28 ² See Attanasio Decl., Ex. F (letter from James Clappin), Ex. G (letter from Amy Ku), Ex. H
(letter from Bing-De Liu).

1 **C. Community Service**

2 Along with his family and his career, Mr. Chen's life has been devoted to helping those in
3 need. As fully described in the letters submitted on his behalf, Mr. Chen donates generously to a
4 variety of charities throughout the world. The list of recipients is long: National Chao Tung
5 University, Koo Foundation Sun Yat-Sen Cancer Center, World Vision (an organization aiding
6 Taiwanese aboriginal victims of a land slide), Red Cross, Duke University, Blue Sky Home (a
7 Catholic charity helping youth from dysfunctional homes), and others. Many of Mr. Chen's
8 donations have been quite large, totaling over \$65,000 in some years. But Mr. Chen has never
9 sought recognition for these donations. His reward has always been in giving.

10 **D. Life Today**

11 Before this prosecution began, Mr. Chen lived a simple life in Taiwan revolving around
12 his family and career. That simple life has been thrown into disarray, as Mr. Chen has been
13 uprooted from his home, lost his position as CEO of AUO, and suffered the stress of criminal
14 prosecution.

15 Perhaps his greatest burden these past years is his forced exile from Taiwan. Because of
16 his bail conditions restricting him to the Northern District of California, Mr. Chen is at the mercy
17 of the Court to visit his home and wife, or even to visit his children in the United States.
18 Although his wife is able to visit him occasionally, Mr. Chen is nonetheless mostly separated
19 from the family he adores. Most painfully, Mr. Chen could not be with his mother when she
20 passed. He fears the same may happen with his critically ill father. Mr. Chen greatly appreciates
21 the compassion of the government and the Court, which allowed him to travel to Taiwan to
22 mourn his mother according to Taiwanese tradition and to visit his children on occasion.

23 Despite the enormous challenges Mr. Chen has faced during the past two years, and which
24 will continue through the appeal process, he remains even-tempered, good-natured, and devoted
25 to his family, career, and helping others. Once he is able to put this unfortunate period in his life
26 behind him, Mr. Chen looks forward to returning to Taiwan and spending as much time as
27 possible with his family while continuing his distinguished career until retirement.

28

1 **III. SENTENCING GUIDELINES CONSIDERATIONS**

2 **A. Sentencing Factors Require Proof by Clear and Convincing Evidence**

3 In calculating the Guidelines recommendation, facts that have an “extremely
4 disproportionate effect on the sentence relative to the offense of conviction” must be found by
5 clear and convincing evidence. *United States v. Berger*, 587 F.3d 1038, 1047 (9th Cir. 2009)
6 (quotations and emphasis omitted) (citing *United States v. Restrepo*, 946 F.2d 654, 659-60 (9th
7 Cir. 1991)). The court should look at the “totality of circumstances” in determining whether to
8 apply a clear and convincing standard. *United States v. Jordan*, 256 F.3d 922, 928 (9th Cir. 2001)
9 (citing *United States v. Valensia*, 222 F.3d 1173, 1182 (9th Cir. 2000)). Relevant circumstances
10 include (1) “whether the enhanced sentence falls within the maximum sentence for the crime
11 alleged in the indictment;” (2) “whether the increase in sentence is based on the extent of a
12 conspiracy;” (3) “whether an increase in the number of offense levels is less than or equal to
13 four;” and (4) “whether the length of the enhanced sentence more than doubles the length of the
14 sentence authorized by the initial sentencing guideline range in a case where the defendant would
15 otherwise have received a relatively short sentence.” *Id.*

16 Under this multi-factor test, the Sentencing Guidelines adjustments recommended by the
17 Presentence Report (“PSR”) must be found by clear and convincing evidence. First, regarding
18 volume of commerce, nothing will have a greater impact on the Sentencing Guidelines
19 calculation. The PSR, adopting the government’s position on volume of commerce, would
20 increase Mr. Chen’s base offense level by sixteen, far more than four levels identified as a
21 threshold in *Jordan*. *See id.* In addition, the sixteen-level adjustment would more than double
22 Mr. Chen’s calculated sentence, from 10-16 months to 78-97 months. Finally, in combination
23 with the PSR’s recommendation for a four-level increase under section 3B1.1(a), the calculated
24 sentence is pushed beyond the statutory maximum of ten years.

25 The recommended adjustment under section 3B1.1 must also be found by clear and
26 convincing evidence. If applied to the base offense level of twelve, the four-level adjustment
27 would double the Guidelines range from 10-16 months to 21-27 months. It also meets *Jordan*’s
28 four-level threshold. *See id.* Finally, an adjustment under section 3B1.1 is based on the “extent

1 of a conspiracy” and Mr. Chen’s role within it. *Id.* For these reasons, the Court must find facts
2 supporting these adjustments by clear and convincing evidence.

3 **B. The Government Overstates the Volume of Commerce Affected by the**
4 **Violation**

5 Under the Sentencing Guidelines for antitrust offenses, the volume of affected commerce
6 drives the offense level calculation more than any other factor. With a criminal history score of 0,
7 before any other adjustments, the Guidelines range for the base offense level of 12 is 10-16
8 months. Using the government’s volume of commerce of \$2.34 billion, the offense level rises to
9 28, yielding a sentence range of 78-97 months. As pointed by AUO in its briefs, the
10 government’s calculation overstates the volume of commerce applicable in this case. And
11 because of the mechanical manner in which the Guidelines operate, the government’s volume of
12 commerce estimate would also result in an unfairly draconian sentence for Mr. Chen. Mr. Chen
13 adopts in full, and incorporates herein, the arguments of AUO regarding the proper volume of
14 commerce to be applied.

15 **C. The Sentencing Guidelines Overstate Mr. Chen’s Culpability**

16 Courts have recognized that the Sentencing Guidelines, because they focus mechanically
17 on metrics like loss amount and volume of commerce, often overstate a defendant’s personal
18 culpability. *See, e.g., United States v. Milne*, 384 F. Supp. 2d 1309, 1312 (E.D. Wis. 2005)
19 (“With their almost singular focus on loss amount, the guidelines sometimes are insufficiently
20 sensitive to personal culpability.”); *United States v. Costello*, 16 F. Supp. 2d 36, 38-40 (D. Mass.
21 1998) (departing downward because loss calculation overstated defendant’s gain and culpability);
22 *United States v. Redemann*, 295 F. Supp. 2d 887, 900 (E.D. Wis. 2003) (departing downwards
23 because “defendant's gain was minuscule compared to the total amount taken”) (citing *United*
24 *States v. Stuart*, 22 F.3d 76, 82 (3d Cir.1994)).

25 *United States v. Prosperi*, 686 F.3d 32 (1st Cir. 2012), a recent decision by the First
26 Circuit, illustrates the Sentencing Guidelines’ deficiencies in calculating appropriate sentences for
27 some white collar defendants like Mr. Chen. In *Prosperi*, the First Circuit upheld the district
28 court’s sentence of home confinement, probation, and community service where the Sentencing

1 Guidelines calculated an 87- to 108-month sentence. *Id.* at 34. Two central considerations
2 supported both the district court’s and the circuit court’s decisions: (1) the loss amount was “an
3 uncertain figure” that was heavily disputed by the parties; and (2) “the defendants did not seek to
4 enrich themselves personally and did not personally benefit from the scheme.” *Id.* at 43, 44.
5 These considerations made the loss amount “an unfair proxy for culpability.” *Id.* at 44.

6 Because both of these considerations—uncertainty of the loss amount and lack of personal
7 benefit—exist here, the Sentencing Guidelines produce an excessive sentence in light of
8 Mr. Chen’s personal culpability. First, regarding the uncertainty of the loss amount, this is amply
9 demonstrated by the lengthy briefing, supported by extensive expert declarations, of both AUO
10 and the government about the volume of commerce affected by the violation. This is a
11 complicated issue, as the Probation Officer recognized in stating that he could not resolve the
12 economic disputes between the parties. Second, regarding Mr. Chen’s personal benefit, there is
13 no evidence in the record that Mr. Chen either sought to enrich himself or actually did personally
14 benefit from the Sherman Act violation. Accordingly, even applying AUO’s methodology for
15 calculating the volume of commerce affected by the violation, the Sentencing Guidelines
16 calculation should not “control [the court’s] sentencing determination.” *Id.*

17 **D. The Court Should Not Apply a Four-Level Enhancement for Mr. Chen’s Role**
18 **in the Offense**

19 The PSR recommends applying a four-level enhancement under section 3B1.1, which
20 provides that the Court may increase the offense level under the following circumstances.

- 21 (a) If the defendant was an organizer or leader of a criminal activity that
22 involved five or more participants or was otherwise extensive, increase by
23 4 levels.
- 24 (b) If the defendant was a manager or supervisor (but not an organizer or
25 leader) and the criminal activity involved five or more participants or was
26 otherwise extensive, increase by 3 levels.
- 27 (c) If the defendant was an organizer, leader, manager, or supervisor in any
28 criminal activity other than described in (a) or (b), increase by 2 levels.

1 U.S.S.G. § 3B1.1. Mr. Chen submits that no increase should be imposed for an aggravating role
2 in the offense. If any enhancement is applied, however, it should be for no more than three levels
3 under subsection (b).

4 **1. There Is No Evidence That Mr. Chen Organized or Led the Crystal**
5 **Meeting Conspiracy**

6 In order to apply any enhancement under section 3B1.1, the Court must find that
7 Mr. Chen was an organizer, leader, manager, or supervisor of *a criminal activity*. *Id.*; *United*
8 *States v. Kelly*, 993 F.2d 702, 705 (9th Cir. 1993) (“The leadership enhancement addresses . . .
9 [defendant’s] role within the group of coconspirators.”). It is not enough that Mr. Chen led AUO,
10 the enhancement only applies if he led the Crystal Meeting conspiracy. *See United States v.*
11 *Starnes*, 583 F.3d 196, 217 (3d Cir. 2009) (district court “properly gave no weight to
12 [defendant’s] formal job title in assessing whether he should be characterized as an organizer”);
13 *United States v. DeGovanni*, 104 F.3d 43, 46 (3d Cir. 1997) (defendant’s “sergeant-status in the
14 police department as an overall supervisor of other police officers . . . was not enough to
15 substantiate an enhancement for *active supervision of other members of the conspiracy*.”); *United*
16 *States v. Litchfield*, 959 F.2d 1514, 1523 (10th Cir. 1992) (finding aggravating role adjustment
17 does not apply where “defendant might be termed an organizer or leader of the mining operation,
18 [but] that operation was not itself a criminal activity”).

19 While the jury found that Mr. Chen agreed to fix prices, there was no evidence at trial that
20 Mr. Chen organized or led the Crystal Meeting conspiracy. In fact, the evidence at trial
21 conclusively showed that the Crystal Meeting conspiracy was organized in September 2001 at
22 meetings that Mr. Chen did not attend. (Trial Exs. 302T, 303T, 304T, 404T). The roots of the
23 conspiracy go back even further. As early as February 2001, Samsung and CPT—but not AUO
24 or its predecessors—met and discussed the need for Taiwanese LCD makers to “take consistent
25 actions.” (RT 1623:1-1630:7, Trial Ex. 333T).

26 When Mr. Chen began attending the Crystal Meetings, he did not ascend to a leadership
27 position within the conspiracy. In fact, the evidence overwhelmingly demonstrated that
28 Mr. Chen’s participation was limited. He only attended five of the sixty Crystal Meetings. None

1 of the other participants in the meetings, nor any of the Crystal Meeting recaps, attributed specific
2 statements to Mr. Chen. The cooperating witnesses who testified at trial placed Mr. Chen at a
3 small number of meetings but attributed no other overt acts to him, much less any displays of
4 leadership. Indeed, none of the witnesses testified that he or she took instructions from Mr. Chen.
5 No documentary evidence shows Mr. Chen giving direction to any alleged conspirator. This lack
6 of evidence makes any enhancement under section 3B1.1 inappropriate.

7 **2. Any Enhancement, If Applied, Should Not Exceed Three Levels**

8 In the event that the Court finds an aggravating role enhancement appropriate, Mr. Chen
9 submits that such enhancement should not exceed the three-level enhancement applied to other
10 members of the Crystal Meeting conspiracy.

11 Evidence shows that other conspirators organized and led the Crystal Meetings. Samsung
12 began meeting with competitors as early as 1998, and initiated the Crystal Meetings. JY Ho of
13 CMO attended the first Crystal meeting, encouraged competitors to stabilize prices, and goaded
14 other to keep the meetings secret.³ CC Liu of CPT helped instigate Crystal Meetings by
15 approaching competitors, led implementation of Crystal Meeting prices, was one of “the most
16 senior executive[s] involved in the LCD conspiracy,” was “the senior sales person at the Crystal
17 [M]eetings,” and was “viewed as the godfather of the industry.”⁴ There is no evidence to suggest
18 that Mr. Chen led the conspiracy in the same manner as these defendants, much less that he had a
19 *larger* role. To find otherwise would promote an unsubstantiated sentencing disparity between
20 Mr. Chen and other, more culpable members of the Crystal Meeting conspiracy.

21 **E. The Court Should Apply a Downward Departure Based On Aberrant**
22 **Behavior**

23 The Sentencing Guidelines are intended to carve out a “heartland,” a “set of typical cases
24 embodying the conduct that each guideline describes. When a court finds an atypical case, one to

25 ³ DOJ Interview of Ho, May 28, 2010, pp. 5-6, 12; Sentencing Hearing Transcript in No. 3:10-cr-
26 00355, pp. 12-15.

27 ⁴ DOJ Interview of Liu, Aug. 22, 2008, pp. 6-9; DOJ Interview of Kwon, Feb. 5, 2009, p. 10;
28 DOJ Interview of Lee, Aug. 27, 2007, p. 4; Lee Proffer, Aug. 27, 2007, p. 8; Lee Proffer, May 13,
2008, p. 1.

1 which a particular guideline linguistically applies but where conduct significantly differs from the
2 norm, the court may consider whether a departure is warranted.” U.S.S.G. Ch. 1, Pt. A, § 4(b).
3 This is just such a case.

4 For many years, courts recognized that the Sentencing Guidelines were often excessively
5 harsh to defendants whose criminal conduct was uncharacteristic of their otherwise law-abiding
6 lives, and for whom there was an innocent explanation for their conduct. *See, e.g., United States*
7 *v. Lam*, 20 F.3d 999, 1002-05 (9th Cir. 1994); *United States v. Takai*, 941 F.2d 738, 743-44 (9th
8 Cir.1991); *United States v. Fairless*, 975 F.2d 664, 667-68 (9th Cir.1992). In these cases, courts
9 departed downwards from the Sentencing Guidelines range because the criminal conduct was
10 “aberrant behavior” for the defendant.

11 In response to a circuit split over the proper standard for a downward departure on
12 aberrant behavior grounds, the Sentencing Commission added section 5K2.20 to the Sentencing
13 Guidelines. *United States v. Guerrero*, 333 F.3d 1078, 1081 (9th Cir. 2003). It authorizes a court
14 to depart downward from the recommended sentence where the defendant’s criminal conduct “(1)
15 was committed without significant planning; (2) was of limited duration; and (3) represents a
16 marked deviation by the defendant from an otherwise law-abiding life.” U.S.S.G. § 5K2.20.
17 Notably, section 5K2.20 restricted prior Ninth Circuit law on the availability of a downward
18 departure for aberrant behavior, which was less rigid about finding the first two elements
19 established by section 5K2.20. *Guerrero*, 333 F. 3d at 1081 (the new guideline rejected “the
20 ‘totality of the circumstances’ approach” adopted by the Ninth Circuit); *see, e.g., United States v.*
21 *Takai*, 941 F. 2d 738, 743 (9th Cir. 1991) (granting downward departure for aberrant behavior
22 despite conduct comprising “a whole series of acts lead up to the commission of the crime”).

23 Since *Booker*, and with the re-ascendance of the section 3553(a) factors, the policy
24 underlying Ninth Circuit law on aberrant behavior departures is once again relevant to the
25 sentencing decision. Accordingly, *United States v. Lam* is instructive. In *Lam*, the defendant was
26 convicted of possessing a sawed-off shotgun, which produced a Guidelines sentence of 18 to 24
27 months. 20 F.3d at 1000. But the Ninth Circuit found that the defendant could be entitled to a
28 downward departure on the ground of aberrant behavior for three reasons. *Id.* at 1005. First, the

1 defendant had lived a law-abiding life. *Id.* at 1003. Second, the defendant was unaware of his
 2 technical violation of the law—the shotgun barrel was only two inches too short. *Id.* at 1002-03,
 3 1005. Third, the defendant had an innocent explanation for possessing the illegal firearm; he
 4 obtained it in order to protect his family after they were the victims of an armed robbery at their
 5 place of business. *Id.* at 1000, 1005.

6 Similar considerations suggest a downward departure for Mr. Chen. It is undisputed that
 7 Mr. Chen has lived an honorable and law-abiding life. Mr. Chen’s conduct in this case, while
 8 found to constitute a violation of the law by a United States jury applying United States law, was
 9 described by witnesses as a more benign event within Asian business culture at the time. The
 10 government presented no evidence to show that Mr. Chen was personally aware that his conduct
 11 ran afoul of United States antitrust law. And even accepting the jury’s verdict, it is clear that
 12 Mr. Chen had innocent reasons to attend the Crystal Meetings in order to help AUO, and its
 13 thousands of employees, survive severe challenges then confronting the industry.⁵ These
 14 considerations, coupled with Mr. Chen’s lack of any criminal history, merit a significant
 15 downward departure from the Guidelines sentence.

16 **F. The Fine Recommended by the Sentencing Guidelines and Presentence**
 17 **Report Is Excessive**

18 The Sentencing Guidelines calculate the fine for an individual convicted of an antitrust
 19 offense as “from one to five percent of the volume of commerce.” U.S.S.G. § 2R1.1(c)(1).
 20 Adopting the government’s inflated volume of commerce, the PSR calculates a fine of \$23.4
 21 million to \$117 million, notes the statutory maximum fine of \$1 million, and recommends a fine
 22 of \$500,000.⁶

23 A \$500,000 fine is excessive on the facts of this case. Most notably, Mr. Chen did not
 24 reap any benefit from the offense of conviction. *See* U.S.S.G. § 5E1.2(d)(1) (requiring a court to
 25 consider “the gain to the defendant” in setting the fine amount). The Court must also consider

26 ⁵ *See* RT 3289:15-3290:5, 3291:25-3292:18 (testimony by Dr. Leffler that the TFT-LCD industry
 27 was facing significant challenges in 2001).

28 ⁶ Even applying a proper calculation for the volume of commerce, the Guidelines fine is the \$1
 million statutory maximum.

1 AUO's civil obligations through which it is making restitution to the victims of the Crystal
2 Meeting conspiracy. U.S.S.G. § 5E1.2(d)(4)-(5). These and other "pertinent equitable
3 considerations," U.S.S.G. § 5E1.2(d)(8), including Mr. Chen's charitable contributions and
4 financial support of his family, strongly militate in favor of a below-Guidelines fine in this case.

5 The PSR also ignores the need to avoid unwarranted disparities in sentencing regarding
6 the recommended fine. *See* 18 U.S.C. § 3553(a)(6). The largest fine imposed on a Crystal
7 Meeting defendant thus far is just \$50,000, a mere one-tenth the amount recommended by the
8 PSR for Mr. Chen.

9 Finally, the Court should consider Mr. Chen's "ability to pay the fine . . . in light of his
10 earning capacity and financial resources" and "the burden that the fine will place on the defendant
11 and his dependents." U.S.S.G. § 5E1.2(d)(2)-(3). While Mr. Chen has a good salary and
12 comfortable lifestyle in Taiwan, his compensation from AUO is not commensurate with the
13 American-style executive compensation that serves as a backdrop to the Sentencing Guidelines'
14 recommendations. Moreover, a significant portion of his net worth is tied up in restricted stock,
15 and cannot be used to pay a fine. And as he approaches retirement, his earning capacity will
16 diminish quickly and he will become more dependent on his current resources to sustain him and
17 his family. For these reasons, the recommended fine is excessive and the Court should impose a
18 fine comparable to the fines imposed on other Crystal Meeting defendants.

19 **IV. SECTION 3553(A) FACTORS**

20 Although the Court must accurately calculate the Sentencing Guidelines range, it is not
21 bound by it. Rather, a district court must impose a sentence that is "sufficient, but not greater
22 than necessary, to comply with the purposes" of sentencing, namely:

- 23 (A) to reflect the seriousness of the offense, to promote respect for the law, and to
24 provide just punishment for the offense;
- 25 (B) to afford adequate deterrence to criminal conduct;
- 26 (C) to protect the public from further crimes of the defendant; and
- 27 (D) to provide the defendant with needed educational or vocational training, medical
28 care, or other correctional treatment in the most effective manner;

1 18 U.S.C. § 3553(a). In doing so, the court must also consider: the nature and circumstances of
2 the offense and the history and characteristics of the defendant; the kinds of sentences available;
3 the sentencing range established by the Sentencing Guidelines; any pertinent policy statements
4 issued by the Sentencing Commission; the need to avoid unwarranted sentencing disparities; and
5 the need to provide restitution. *Id.*

6 **A. Mr. Chen’s Personal History and Characteristics Favor Leniency**

7 Perhaps the most important factor in any sentencing is the personal history and
8 characteristics of the defendant. *See* 18 U.S.C. § 3553(a)(1). The Court has received letters from
9 Mr. Chen’s family, friends, co-workers, and others who hold Mr. Chen in the highest regard. The
10 letters describe a man who has lived a life of great purpose, and who has left a sterling impression
11 and positive impact on everyone he has touched.

12 Mr. Chen has reached three groups of people in particular. First, and most powerfully, he
13 plays a central role in the lives of every generation of his family. From his father to his
14 granddaughter, he gives guidance, support, and love vital to their happiness. Second, Mr. Chen’s
15 enlightened leadership, dedication, and integrity have inspired the respect of his colleagues and
16 business associates. Third, thousands of people unknown to Mr. Chen—at-youth risk, tsunami
17 and earthquake survivors, college students—have improved their lives with his help.

18 Courts often consider such factors in their sentencing decisions. *See, e.g., United States v.*
19 *Ruff*, 535 F.3d 999, 1001 (9th Cir. 2008) (history of strong employment, family support); *United*
20 *States v. Whitehead*, 532 F.3d 991, 993 (9th Cir. 2008) (devotion to career; dependence of
21 family); *United States v. Menyweather*, 447 F.3d 625, 634 (9th Cir. 2006) (family
22 responsibilities); *United States v. Ameline*, 409 F.3d 1073, 1093 (9th Cir. 2005) (Wardlaw, J.
23 concurring and dissenting) (“defendant’s family ties and responsibilities, his or her educational
24 and vocational skills, and his or her military, civic, charitable, or public service record” and other
25 factors are “essential to sentencing consistent with 18 U.S.C. § 3553(a)”); *United States v.*
26 *Canova*, 412 F.3d 331, 335 (2d Cir. 2005) (good works); *United States v. Rioux*, 97 F.3d 648, 663
27 (2d Cir. 1996) (charitable giving); *United States v. Prosperi*, 686 F.3d 32, 48-49 (1st Cir. 2012)

28

1 (dependence of family). Mr. Chen respectfully urges the Court to do the same, and consider these
2 letters as a basis for the Court's discretionary exercise of leniency in sentencing.

3 **B. The Nature and Circumstances of the Offense are Not Typical of Sherman**
4 **Act Violations**

5 Unlike other defendants convicted of Sherman Act violations, there is no evidence that
6 Mr. Chen was motivated by, or ever obtained, personal financial gain from the conspiracy. *Cf.*
7 *United States v. VandeBrake*, 679 F.3d 1030, 1034 (8th Cir. 2012) (district court described the
8 defendant's conduct as "simply a crime of greed"). The offense in question is also atypical
9 because it occurred in a foreign country. Mr. Chen, a foreign national, was operating within the
10 fabric of a business culture that puts significant emphasis on face-to-face meetings among
11 industry leaders and competitors. His attendance at the meetings was expected if not mandatory.

12 Finally, while the jury found a *per se* violation of the Sherman Act, there was no proof
13 that the Crystal Meeting conspiracy created the anti-competitive effects the Sherman Act is
14 designed to combat. Because the Court ruled that evidence pertaining to the rule of reason would
15 not be presented at trial, the defendants could not present significant evidence that their conduct
16 had pro-competitive effects. Nonetheless, we know that the price of TFT-LCD panels diminished
17 greatly and products incorporating the panels proliferated in the United States over the course of
18 the conspiracy. (*See* Government's Notice of Expert Witness Testimony and Summary of
19 Testimony Under Rule 16(a)(1)(G) for Dr. Keith Leffler, Charts 5A-5E, Sept. 13, 2011). We also
20 know that the majority of AUO's prices fell below the prices agreed to at Crystal Meetings. (RT
21 4517:15-17, 4574:23-4575:17).

22 **C. The Purposes of Sentencing Are Satisfied With a Below-Guidelines Sentence**

23 **1. Retribution**

24 Section 3553(a)(2)(A) directs a court to consider whether a sentence will sufficiently
25 serve the purposes of reflecting the seriousness of the offense, promoting respect for the law, and
26 providing just punishment for the offense. A lengthy prison sentence is not necessary to serve
27 these purposes.

28

1 Mr. Chen is not the typical white collar defendant who is motivated by personal gain. *Cf.*
2 *Prosperi*, 686 F.3d at 46 (“in distinguishing the defendants from other white-collar fraud
3 defendants, the court emphasized the absence . . . of any direct intent . . . to enrich themselves”).
4 Nor is there any evidence that Mr. Chen intended to harm anyone or personally cause
5 anticompetitive behavior. This too separates him from the typical white collar defendant who
6 intends to enrich himself at the expense of others. *Id.* He was motivated to help his company, a
7 company that has provided thousands of jobs and won awards for corporate responsibility. The
8 Sentencing Guidelines therefore vastly overstate the “just punishment” for Mr. Chen’s offense.

9 In addition, the Court should consider that Mr. Chen has already been punished as a result
10 of this case. *Cf. United States v. Redemann*, 295 F. Supp. 2d 887, 894-95 (E.D. Wisc. 2003)
11 (departing downward where collateral consequences of prosecution partially fulfilled purposes of
12 sentencing). For two long years and counting, Mr. Chen has been separated from his home and
13 his family, largely confined to a foreign country, and unable to fully pursue his life’s work. His
14 inability to be with his mother at her passing was particularly painful. Moreover, Mr. Chen’s
15 reputation has also been irreparably harmed; prior to this prosecution, Mr. Chen was widely
16 regarded as a man of impeccable business integrity. For these reasons, a below-Guidelines term
17 of imprisonment is more than sufficient to afford just punishment for his crime.

18 2. General Deterrence

19 Section 3553(a)(2)(B) directs a court to consider the need “to afford adequate deterrence
20 to criminal conduct.” A lengthy prison sentence for Mr. Chen is not necessary to deter other
21 foreign nationals from violating United States antitrust law. The TFT-LCD antitrust proceedings,
22 both criminal and civil, have been widely publicized. Foreign companies have been put on notice
23 that their conduct is subject to the Sherman Act, already creating a general deterrent effect.

24 A lengthy prison sentence for Mr. Chen will not significantly increase the general
25 deterrence already generated by his prosecution. Indeed, there is “considerable evidence that
26 even relatively short sentences can have a strong deterrent effect on prospective ‘white collar’
27 offenders.” *United States v. Adelson*, 441 F. Supp. 2d 506, 514 (S.D.N.Y. 2006); *see also United*
28 *States v. Edwards*, 595 F.3d 1004, 1016 (9th Cir. 2010) (affirming sentence where district court

1 concluded that probation plus “the fact of a felony conviction” provided adequate deterrence).
2 More specifically, this prosecution itself has likely already had a deterrent effect in Taiwan,
3 owing in large measure to the publicity surrounding the case and the efforts of the Taiwanese
4 government to educate businesses about anti-competitive conduct.

5 Furthermore, in some circumstances, “a sentence of imprisonment may work to promote
6 not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh
7 punishment without taking into account the real conduct and circumstances involved in
8 sentencing.” *Gall v. United States*, 552 U.S. 38, 54 (2007). This concern has particular weight
9 here, where foreign conduct is involved. Eight defendants, all foreign citizens, are fugitives in
10 this case. A lengthy sentence of imprisonment for Mr. Chen will only discourage future
11 defendants from submitting to the jurisdiction of the United States, thereby decreasing respect for
12 the law among overseas defendants.

13 **3. Specific Deterrence**

14 Section 3553(a)(2)(C) directs the sentencing court to consider the need “to protect the
15 public from further crimes of the defendant.” There is no such need here. Mr. Chen has been a
16 law-abiding citizen his entire life, save for this conviction. Having resigned from his position as
17 CEO of AUO, and nearing the age of retirement, he is no longer in a position to commit a
18 Sherman Act violation. In short, Mr. Chen’s sentence cannot be justified by the need for specific
19 deterrence. Quite the opposite, given Mr. Chen’s contributions to family, colleagues, and charity,
20 his presence in society is a boon, not a risk.

21 **4. Rehabilitation**

22 Similarly, the final purpose of sentencing, “to provide the defendant with needed
23 educational or vocational training, medical care, or other correctional treatment in the most
24 effective manner,” 18 U.S.C. § 3553(a)(2)(D), can have no bearing on Mr. Chen’s sentence.
25 Mr. Chen is a healthy, successful, and well-adjusted individual with a stable life awaiting him at
26 home in Taiwan. There is no need for rehabilitation, and no aspect of Mr. Chen’s sentence can
27 help him improve his life.
28

1 **D. The Court Must Avoid Unwarranted Sentence Disparities Between Mr. Chen**
 2 **and the Pleading Defendants**

3 Under section 3553(a)(6), the Court must consider “the need to avoid unwarranted
 4 sentence disparities among defendants with similar records who have been found guilty of similar
 5 conduct.” *See also United States v. Ray*, 930 F.2d 1368, 1373 (9th Cir. 1990) (“The need to avoid
 6 unwarranted sentencing disparity among codefendants involved in the same criminal activity has
 7 long been considered a legitimate sentencing concern.”). For this reason, if no other, the Court
 8 should sentence Mr. Chen below the Guidelines range.

9 The Court has already sentenced ten members of the Crystal Meeting conspiracy who
 10 pleaded guilty. As the chart below illustrates, none of these defendants has faced anywhere near
 11 the *statutory maximum* recommended by the PSR for Mr. Chen:

12 Defendant	13 Company	14 VOC	15 Competitor Contacts	16 Imprisonment	17 Fine
18 CS Chung	19 LG	20 \$2.5 billion	21 39	22 7 months	23 \$25,000
24 Bock Kwon	25 LG	26 \$2.5 billion	27 38	28 12 months	\$30,000
JY Ho	CMO	\$985.5 million	9-11	14 months	\$50,000
Amigo Huang	CMO	\$985.5 million	12	9 months	\$25,000
CL Kuo	CMO	\$985.5 million	6	9 months	\$35,000
James Yang	CMO	\$985.5 million	15-18	9 months	\$25,000
Brian Lee	CPT	\$357.7 million	53	6 months	\$20,000
Frank Lin	CPT	\$357.7 million	0	9 months	\$50,000
CC Liu	CPT	\$357.7 million	43	7 months	\$30,000
Sam Wu	HannStar	\$107 million	27	7 months	\$20,000

 Every one of these defendants was sentenced far below their Guidelines range. Taking
 into account aggravating role (U.S.S.G. § 3B1.1) and acceptance of responsibility (U.S.S.G.
 § 3E1.1) adjustments, the Court varied downward an average of 46.5 months from the minimum
 sentence recommended by the Guidelines.

1 Mr. Chen should be sentenced similarly, for he is no more culpable than these other
2 defendants. As explained in AUO's sentencing memorandum, AUO's volume of commerce falls
3 in the middle of the five companies. *Cf. United States v. Gil*, 58 F.3d 1414, 1424 n.6 (9th Cir.
4 1995) (suggesting district court created unwarranted sentencing disparity by attributing different
5 drug amount to coconspirators despite evidence that amount was "equally applicable to both").
6 Mr. Chen only attended five Crystal Meeting, and had at most twenty seven competitor contacts.
7 Most of these competitor contacts were with LG and Samsung, who are also large *customers* of
8 AUO. Moreover, as already described, Mr. Chen was not a leader or organizer of the Crystal
9 Meeting conspiracy, which began without his presence or knowledge. While the other defendants
10 pleaded guilty and testified at trial, this does give *carte blanche* for a disparate sentence. *United*
11 *States v. Caperna*, 251 F.3d 827, 830-32 (9th Cir. 2001); *United States v. Corona-Verbera*, 509
12 F.3d 1105, 1120 (9th Cir. 2007) (noting that district court departed downward by 76 months to
13 alleviate sentencing disparity with coconspirators who, unlike defendant, pleaded guilty and
14 cooperated with government).

15 In addition, the Court should be cognizant of avoiding sentencing disparities with other
16 antitrust offenders. The longest sentence ever given for a Sherman Act violation is 48 months.
17 *United States v. VandeBrake*, 679 F.3d 1030, 1037 (8th Cir. 2012). The longest sentence for a
18 foreign antitrust offender is even shorter: just 24 months. Leah Nylen, *U.S. Probation Service*
19 *Recommends Maximum Sentence for AUO Executives*, MLEX, Aug. 31, 2012,
20 <http://www.mlex.com/US/Content.aspx?ID=270665>. The yearly average term of imprisonment
21 for antitrust offenders post-*Booker* has varied from 5.8 to 19.2 months. *VandeBrake*, 679 F.3d at
22 1051 (Beam, J. dissenting). While the details of these various sentences are unknown, they are
23 generally consistent with the sentences this Court has already imposed on members of the Crystal
24 Meeting conspiracy. Mr. Chen respectfully submits that the Court should maintain consistency
25 with all of these antitrust sentences by imposing a sentence below the Guidelines range.

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E. Significant Disparity In the Sentences of Mr. Chen and the Pleading Defendants Will Unconstitutionally Punish Mr. Chen for Exercising His Right to Trial

Since 1973, the Ninth Circuit has recognized that a court may not punish a defendant for exercising his constitutional right to trial by imposing a harsher sentence after trial. *See United States v. Stockwell*, 472 F.2d 1186, 1187 (9th Cir. 1973). In *United States v. Capriola*, the Ninth Circuit recognized that a disparity in the sentences of co-conspirators, with those pleading guilty receiving more lenient sentences, can evidence the unconstitutional punishment of a defendant who insists on a trial. 537 F.2d 319, 320 (9th Cir. 1976); *see also United States v. Medina-Cervantes*, 690 F.2d 715, 716-17 (9th Cir. 1982) (vacating sentence where trial record gave “rise to the inference that [defendant] was punished more severely because of his assertion of the right to trial by jury”). Having already sentenced ten individual defendants who pleaded guilty to involvement in the Crystal Meeting conspiracy, this Court has expressed its judgment on the behavior of individuals similarly situated to Mr. Chen. Because significant disparities between the sentences of Mr. Chen and the pleading defendants are not merited by traditional grounds for sentencing, the Court should sentence Mr. Chen within the already-established range.

V. CONCLUSION

For the reasons set forth above, Mr. Chen respectfully requests that the Court grant a significant downward variance from the Guidelines range and impose a monetary fine in line with those previously given to other individual defendants.

Dated: September 11, 2012

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