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

12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 v.

15 HSUAN BIN CHEN, et al.,

16 Defendant.

Case No. CR-09-00110-SI

**DEFENDANT HSUAN BIN CHEN'S  
OPPOSITION TO UNITED STATES'  
SENTENCING MEMORANDUM**

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

1 **I. INTRODUCTION**

2 In its sentencing memorandum, the government paints a picture of Mr. Chen and his role  
3 in the alleged conspiracy with the same broad brush as the Presentence Report. Ignoring both Mr.  
4 Chen's admirable personal qualities and its own sentencing recommendations for other Crystal  
5 Meeting defendants, the government now seeks a statutory maximum sentence ten to twenty  
6 times longer than those imposed on others convicted of the same conduct.

7 But there are only two possible differences—one imaginary, one improper—between Mr.  
8 Chen and the previously-sentenced defendants that can justify a disparate sentence. First, each  
9 company had its own volume of affected commerce. This is an imaginary difference, as AUO's  
10 properly-calculated volume of affected commerce falls in the middle of the range for all relevant  
11 companies. Second, Mr. Chen exercised his constitutional right to trial and put the government to  
12 its proof. This is an improper basis for a significantly disparate sentence.

13 Mr. Chen urges the Court to ignore the government's hyperbole and consider all the  
14 factors under 18 U.S.C. § 3553(a), including the abundant information he has submitted about his  
15 commendable contributions to his family, his community, and the companies for which he has  
16 worked. For the reasons explained in Mr. Chen's primary sentencing memorandum, the Court  
17 should grant a significant downward departure from the Guidelines range and impose a sentence  
18 in line with those imposed on other Crystal Meeting defendants.<sup>1</sup>

19 **II. THE GOVERNMENT MUST PROVE SENTENCE ENHANCEMENTS BY CLEAR AND**  
20 **CONVINCING EVIDENCE**

21 The government is wrong that it need only prove sentencing enhancements by a  
22 preponderance of the evidence. (*See* ECF No. 948, United States' Sentencing Memorandum  
23 ("USSM"), 7). As explained in Mr. Chen's sentencing memorandum, the government must prove  
24 sentencing facts by clear and convincing evidence. *United States v. Berger*, 587 F.3d 1038, 1047  
25 (9th Cir. 2009).

26  
27  
28 <sup>1</sup> Mr. Chen joins the oppositions to the government's sentencing memorandum filed by both AU  
Optronics Corporation and Hui Hsiung.

1 **III. THE GOVERNMENT FAILS TO PROVE THAT MR. CHEN WAS AN “ORGANIZER OR**  
2 **LEADER IN A CRIMINAL ACTIVITY”**

3 Even viewed in the light most favorable to the government, the government’s evidence of  
4 Mr. Chen’s role fails to demonstrate that he organized or led the conspiracy. *See* U.S.S.G.  
5 § 3B1.1. At best, it indicates that Mr. Chen merely *participated* in the conspiracy. To make up  
6 for its lack of evidence, the government exaggerates certain evidence by mixing it with  
7 unsupported argument. This effort to exact maximum punishment on Mr. Chen should not be  
8 accepted by the Court.

9 Relying on supposition, the government argues that Mr. Chen’s participation in the  
10 Crystal Meetings was necessary for their success. The government extrapolates this from two  
11 benign facts—that in Taiwanese culture, a top executive’s attendance at a meeting signals its  
12 importance and that some of the Crystal Meeting attendees “were quite famous” in the industry—  
13 neither of which are about Mr. Chen specifically. This inferential leap is not supported by facts  
14 or law. As Mr. Chen’s sentencing memorandum shows, his leadership of AUO is not sufficient to  
15 show he organized or led the Crystal Meeting conspiracy. *See United States v. Kelly*, 993 F.2d  
16 702, 705 (9th Cir. 1993); *United States v. Starnes*, 583 F.3d 196, 217 (3d Cir. 2009); *United*  
17 *States v. DeGiovanni*, 104 F.3d 43, 46 (3d Cir. 1997); *United States v. Litchfield*, 959 F.2d 1514,  
18 1523 (10th Cir. 1992).

19 The government then states that Mr. Chen “attended at least five CEO-level crystal  
20 meetings during the crucial early part of the conspiracy between October 2001 and December  
21 2002.” Mr. Chen has never disputed that he attended those meetings. But the evidence nowhere  
22 mentions that these meetings were “crucial.” On the contrary, the government repeatedly  
23 described the first three Crystal Meetings—which Mr. Chen did not attend—as “crucial.” (RT  
24 322-324). The government’s cited evidence does not even attribute any statements to Mr. Chen,  
25 much less demonstrate that he led or organized any aspect of the meetings. (*See* Trial Exs. 405T,  
26 306T, 330, 449, 308T, 407T, 310T, 411T, 419T). Two of the government’s trial exhibits—330  
27 and 449—do not even identify Mr. Chen as one of the Crystal Meeting attendees. Instead of  
28 showing Mr. Chen’s leadership, trial exhibit 306T shows other defendants (specifically Hannstar,

1 CMO, and CPT), not AUO, taking initiative in reaching out to Japanese LCD manufactures.

2 The government further argues that “as the top executive responsible for AUO’s sales  
3 efforts, [Mr. Chen] ensured that the illegally fixed prices were implemented and charged to  
4 AUO’s customers.” There are two problems with the government’s evidence in support of this  
5 statement. First, the government misrepresents the evidence by citing to CC Liu’s testimony on  
6 two different subjects as if it were one. (*See* USSM 32). At RT 3037:2-5, CC Liu testified that  
7 “H.B. Chen participate in this process that [he] described that eventually resulted in the consensus  
8 reached at the meetings.” The government would have the Court believe that the “process”  
9 referred to is what CC Liu described at RT 3018:19-22: “To -- to foster healthy operations,  
10 development of the industry, the chief executives of the companies authorized their sales  
11 executives to -- to push to -- to reach -- to implement the meeting and to reach consensus.” But in  
12 the nineteen pages between these two portions of testimony, CC Liu describes in detail the  
13 “process at the crystal meeting by which a pricing consensus was reached” (RT 3036:16-19),  
14 which is the “process” he referred to at RT 3037:2-5. The second problem with this evidence is  
15 that, even if CC Liu testified as the government represented, he has no foundation for testifying  
16 about the internal operations of AUO.

17 Next, the government identifies a number of bilateral meetings between Mr. Chen and  
18 representatives of LG—one of AUO’s largest *customers*—in which prices were allegedly fixed.  
19 At most, these meetings indicate that Mr. Chen participated in the conspiracy, not that he  
20 organized or led it. Indeed, one of the cited exhibits clearly shows LG organizing the meeting.  
21 (*See* Trial Ex. 501T (LG executive writing “I will arrange with AUO so that they will call you”)).  
22 The government’s cited evidence on this point is also contradicted by trial testimony. Stanley  
23 Park, the author of exhibit 501T, testified that he did not participate in the meeting, he does not  
24 know what was discussed, and he was not even sure if it occurred. (RT 2304:23-2305:4,  
25 2331:15-25). Mr. Park further testified that he did not fix any prices with AUO representatives at  
26 the meetings mentioned in exhibits 505T and 515T. (RT 2337:9-12, 2344:19-2345:7).

27 The government also makes much of three emails that Steven Leung sent to Mr. Chen,  
28 among many other recipients, which summarize three Crystal Meetings. (*See* Trial Exs. 12T,

1 14T, 16T). At most, these exhibits show Mr. Chen’s knowledge of the meetings. They do not  
2 evidence Mr. Chen directing anyone—not even his own employees—to conduct any price-fixing  
3 activities.

4 Finally, the government makes no mention of the fact that it seeks a larger adjustment  
5 under section 3B1.1 than any of the previously-sentenced participants received. But the  
6 government provides no basis for finding that Mr. Chen had a larger role than the other  
7 participants. Indeed, the government admits that Mr. Chen was not present when the conspiracy  
8 was organized; it does not contest Mr. Chen “did not attend the inaugural crystal meeting.”  
9 (USSM 32 n.13). As discussed in Mr. Chen’s sentencing memorandum, other defendants—who  
10 received three-level adjustments pursuant to section 3B1.1(b)—demonstrably organized and led  
11 the Crystal Meeting conspiracy. The government has not carried its burden to apply any role  
12 adjustment to Mr. Chen, much less a larger one than other defendants received.

13 **IV. THE GOVERNMENT’S RECOMMENDED SENTENCE WOULD PROMOTE UNWARRANTED**  
14 **DISPARITY AND IMPROPERLY PUNISH MR. CHEN FOR EXERCISING HIS**  
15 **CONSTITUTIONAL RIGHT TO TRIAL**

16 As Mr. Chen explained in his sentencing memorandum, the Court must avoid unwarranted  
17 sentencing disparities with the ten Crystal Meeting defendants already sentenced. Following  
18 closely the government’s recommendations, these sentences ranged from 6 to 14 months. Despite  
19 this, the government seeks a statutory maximum sentence for Mr. Chen ten to twenty times  
20 longer. The government asserts that its recommended sentence is not disparate from other Crystal  
21 Meeting defendants for two reasons. First, the government argues, AUO has its own volume of  
22 affected commerce. Second, unlike other Crystal Meeting defendants, Mr. Chen did not plead  
23 guilty and cooperate with the government, instead exercising his constitutional right to trial.  
24 These reasons are inadequate to support the harsh and unreasonably disparate sentence  
25 recommended by the government.

26 **A. Volume of Affected Commerce**

27 Regarding AUO’s separate volume of affected commerce, as fully explained in AUO’s  
28 sentencing memorandum and opposition to the government’s sentencing memorandum, this  
difference is imaginary. While AUO certainly has its own volume of affected commerce, that

1 does not justify a longer sentence. AUO's volume of affected commerce is not larger than those  
2 of other Crystal Meeting defendants. The government's flawed analysis, and use of a new  
3 method not applied to other Crystal Meeting defendants, fails to carry its burden to enhance Mr.  
4 Chen's sentence based on its inflated volume of affected commerce figure. As noted above, Mr.  
5 Chen adopts and incorporates AUO's objections to the government's sentencing memorandum.

6 **B. Right to Trial and Sentencing Disparity**

7 Regarding Mr. Chen's choice to exercise his constitutional right to trial, this is an  
8 improper basis for justifying a significant sentencing disparity. *United States v. Capriola*, 537  
9 F.2d 319, 320 (9th Cir. 1976) (finding that sentences 150-300% longer than coconspirators'  
10 sentences indicated violation of constitutional right to trial). Some leniency for defendants who  
11 accept responsibility and cooperate with the government is plainly acceptable. *See* U.S.S.G.  
12 § 3E1.1. But by focusing almost exclusively on Mr. Chen's choice for trial, the government  
13 elevates acceptance of responsibility—an adjustment which Mr. Chen does not even seek—into  
14 the primary, nearly the only, sentencing factor. According to the government, this one factor  
15 justifies a sentence ten to twenty times larger than other Crystal Meeting defendants.

16 There is no basis in law or common sense for the government's position. The Sentencing  
17 Guidelines treat acceptance of responsibility as a relatively minor factor in the sentencing  
18 decision, adjusting the offense level by only two or, in certain circumstances, three levels.  
19 U.S.S.G. § 3E1.1. At the base antitrust offense level of 12, an acceptance of responsibility  
20 adjustment can reduce a defendant's sentencing range by only four to six months.

21 Courts are wary of allowing marked disparities between defendants who differ only in  
22 whether they or not they chose to plead guilty. In *United States v. Presley*, the Sixth Circuit  
23 affirmed a sentence departing downward from the Guidelines range where the district court found  
24 that "it would violate the spirit of the guidelines and be particularly inequitable for [the defendant  
25 who pleaded guilty] to receive a 96 month sentence and [the defendant who was convicted at  
26 trial] a 360 month sentence for the same conduct." 547 F.3d 625, 631-32 (6th Cir. 2008). Such  
27 disparities can be reversible error. *See, e.g., United States v. Panice*, 598 F.3d 426, 442-43 (7th  
28 Cir. 2010) (vacating sentence where district court "did not seem receptive to considering the need

1 to avoid unwarranted sentencing disparities” and sentence was higher than other similarly-  
2 situated defendants); *United States v. Esso*, No. 11-570-cr, 2012 WL 2401683, at \*1 (2d Cir. June  
3 27, 2012) (vacating sentence where defendant received longer sentence than “more culpable”  
4 codefendant); *United States v. Lazenby*, 439 F.3d 928, 932 (8th Cir. 2006) (vacating sentence  
5 based on “extreme disparity in the sentences imposed on two remarkably similar participants in  
6 the same criminal conspiracy”).

7 Finally, the government’s protestations that “this case represents the most harmful,  
8 egregious antitrust conspiracy ever prosecuted by the United States” ring hollow. (USSM 38). In  
9 reaching plea agreements with the other defendants, similar indignation was nowhere to be found.  
10 The government recommended sentences far below the Guidelines range for each of the pleading  
11 defendants.<sup>2</sup> It seems the government’s position hardened not because of the nature of the  
12 conspiracy, but because Mr. Chen and his codefendants exercised their constitutional right to a  
13 trial.

14 In considering the appropriate course here, *United States v. Parris*, 573 F. Supp. 2d 744,  
15 751 (E.D.N.Y. 2008), is instructive. There, recognizing that the Guidelines sentence created an  
16 unreasonable sentencing disparity with other white collar offenders, the government did “not  
17 advocat[e] for a sentence under the Guidelines, and understood that a reasonable sentence may  
18 well be one less, perhaps significantly less, than the guidelines range.” *Id.* (internal quotations  
19 omitted). “Consequently, the Government joined [the court] and defense counsel in a  
20 collaborative effort to search for an effective means to avoid” an unreasonable sentencing  
21 disparity. *Id.* In contrast, the government here applies a different methodology to artificially  
22 inflate AUO’s volume of affected commerce, misrepresents evidence to try proving a role  
23 enhancement, and dismisses the resulting disparity as warranted by Mr. Chen’s exercise of his  
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25  
26 <sup>2</sup> See, e.g., 07cv1827-SI, ECF Nos. 1170 (JY Ho, 14 months, \$50,000 fine), 1941 (Amigo Huang,  
27 270 days, \$25,000), 2002 (CL Kuo, 270 days, \$35,000), 1719 (James Yang, 270 days, \$25,000),  
28 2129 (Sam Wu, 210 days, \$20,000), 1065 (Bock Kwon, 12 months, \$30,000); 09cr45-SI, ECF  
Nos. 22 (Brian Lee, 180 days, \$20,000), 10 (Frank Lin, 270 days, \$50,000), 24 (CC Liu, 210  
days, \$30,000); 09cr44-SI, ECF No. 7 (CS Chung, 7 months, \$25,000).

1 right to trial. The government’s approach achieves a sentence at the statutory maximum; it does  
2 not achieve justice.

3 **V. CONCLUSION**

4 Courts must sentence “defendants as human beings,” not as “poster children” for  
5 perceived societal or corporate wrongs. *United States v. Prospero*, 686 F.3d 32, 40-41 (1st Cir.  
6 2012). In whole, Mr. Chen has lived an honorable life. His devotion to his family is unmatched.  
7 His career, but for being in Taiwan, evokes the American dream; through hard work, discipline,  
8 and talent, Mr. Chen rose from humble beginnings to the peak of his profession. Yet Mr. Chen  
9 has maintained a generous heart, always helping those he can. As expressed in Mr. Chen’s  
10 sentencing memorandum, and in the letters submitted to the Court on Mr. Chen’s behalf, there are  
11 many reasons for this Court to exercise leniency in sentencing under section 3553(a).

12 Mr. Chen respectfully requests that the Court grant a significant downward departure from  
13 the Guidelines range and impose a monetary fine in line with those previously given to other  
14 individual defendants.

15 Dated: September 17, 2012

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