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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. HUI HSIUNG, et al. Defendants.	CR 09-0110 SI **DEFENDANT HUI HSIUNG'S REPLY SENTENCING MEMORANDUM** Date: September 20, 2012 Time: 10:00 a.m. Judge: Hon. Susan Illston Courtroom: 10, 19th Floor

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INTRODUCTION

In recommending that Dr. Hui Hsiung spend an unprecedented ten years in prison and pay $1 million in fines, the government ignores the central directive of the sentencing statute: "The court shall impose a sentence sufficient, *but not greater than necessary*, to comply with the purposes" of punishment. 18 U.S.C. § 3553(a) (emphasis added). That mandate requires more than mechanically tallying up Guidelines scores (and inflated ones at that), but that is all the government offers. And that is why the government's sentencing memorandum never addresses the fundamental issue in this sentencing proceeding: How can it be "necessary" to sentence Dr. Hsiung to a full decade in prison when ten other executives—all convicted of participating in the same price-fixing conspiracy—served no more than 6 to 14 months?

The answer, of course, is that such a draconian sentence is neither necessary nor sound. The government certainly fails to justify its recommendation under any of the specific factors that this Court must consult in reaching an appropriate sentence. A decade of imprisonment does not "avoid"—but rather exacerbates—"unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." *Id.* § 3553(a)(6). Ten years behind bars is not carefully tailored to—but rather wildly exceeds—"the need for the sentence imposed" to serve the goals of punishment. *Id.* § 3553(a)(2). And a ten-year sentence does not reflect—but rather demeans—the history and characteristics of this defendant. *Id.* § 3553(a)(1). This Court should therefore reject the government's recommendation. In its place, the Court should adopt a more meaningful measure of Dr. Hsiung's life, the offense, and the sentences of other executives in these proceedings. That approach honors Congress's directive in § 3553(a), still vindicates the government's interest in deterrence, and yet at the same time promotes fairness and uniformity in our sentencing laws.

I. The Government's Recommended Sentence Creates Unwarranted Disparities

The government cannot dispute (indeed, it mostly ignores) that this Court has already sentenced ten corporate executives convicted of the *exact same* offense as Dr. Hsiung. While the government would have this Court look the other way, those sentences provide a proper benchmark for Dr. Hsiung's own. Those executives, like Dr. Hsiung, held managerial positions in their companies, many actually serving in a higher-level role than he did—some even company CEOs. Most of them, like Dr. Hsiung, attended Crystal Meetings, many attending dozens more of these meetings than he did over the course of the conspiracy. Those executives, like Dr. Hsiung, worked at companies with considerable sales of TFT-LCD panels, many employed by companies that sold hundreds of millions of dollars more than AUO during the conspiracy period. This record, in short, provides the Court with a unique opportunity in this sentencing proceeding: It can identify a broad range of "defendants with similar records who have been found guilty of similar conduct" here. 18 U.S.C. § 3553(a)(6).

Against all this, the government provides just one reason for this Court to ignore the sentences given to the TFT-LCD co-conspirators: They pleaded guilty and cooperated with the government. U.S. Sentencing Memorandum 41-42, 51 ("U.S. Memorandum"). But the Ninth Circuit has squarely rejected previous government arguments that "a sentencing court may not depart on the basis of co-defendant sentence disparity if the co-defendant cooperated with the government and the defendant did not." *United States* v. *Caperna*, 251 F.3d 827, 831 (9th Cir. 2001) (rebuffing this contention);[1] *see, e.g.*, *United States* v. *Daas*, 198 F.3d 1167, 1180-81 (9th

[1] In addition, the Ninth Circuit in *Caperna* held that a downward departure based on a co-defendant's sentence is not warranted "unless the co-defendant used as a barometer for judging the disparity was convicted of the same offense as the defendant." 251 F.3d at 831. That requirement is, of course, satisfied here. Indeed, it is hard to imagine a better barometer than ten individuals not only convicted of the same offense generally, but convicted based on their involvement in *the exact same conspiracy*.

Cir. 1999) (holding, in a case involving a non-cooperating defendant who sought to rely on the sentences given to cooperating co-conspirators, that "[d]ownward departure to equalize sentencing disparity is a proper ground for departure under the appropriate circumstances"). Contrary to the government's view, the Ninth Circuit has emphasized that "the decision whether to depart based on sentence disparity among cooperating and non-cooperating defendants is properly left within the sound discretion of the sentencing judge." *Caperna*, 251 F.3d at 831-832.[2]

In exercising that discretion here, this Court should reject the government's extreme sentencing recommendation as irrational and unfair. The government, after all, is asking this court to sentence Dr. Hsiung to a term of imprisonment that is more than *three thousand days* longer than that given to any other co-conspirator in the TFT-LCD proceedings merely because he exercised his constitutional right to trial when the others pleaded. In circumstances like these, sentencing courts have not hesitated to grant a downward variance to alleviate, at least in part, disparities between a defendant who went to trial and cooperating co-defendants who did not. *See, e.g.*, *United States* v. *Presley*, 547 F.3d 625, 628-29 (6th Cir. 2008) (district court granted a 20-year downward departure for a defendant who went to trial to alleviate the disparity with a co-defendant sentenced pursuant to a plea agreement); *United States* v. *Corona-Verbera*, 509 F.3d 1105, 1120 (9th Cir. 2007) (district court imposed a sentence 76 months below the Guideline range to account for co-conspirator sentences, even though the co-conspirators, unlike

[2] These cases were decided under a mandatory Guidelines sentencing system, in which the trial judge was required to justify departures on the basis of rules developed within the Guidelines themselves. In the post-*Booker* era, the Guidelines enjoy no presumption of correctness and courts have complete freedom to exercise their discretion to avoid unwarranted disparities under 18 U.S.C. § 3553(a)(6). This Court should exercise that discretion here by measuring Dr. Hsiung's sentence by reference to the sentences imposed on defendants convicted of participating in the same conspiracy, through substantially the same (if not more culpable) offense conduct.

the defendant, had pleaded guilty, accepted responsibility, and cooperated with the government); *United States* v. *Arenas*, 340 F. App'x 384, 387 (9th Cir. 2009) (unpub.) (district court granted a 12-month downward departure to account for the disparity between the defendant's sentence and the sentences of co-defendants who accepted responsibility and cooperated with the government); *United States* v. *Bochicchio*, 23 F. App'x 751, 756 (9th Cir. 2001) (unpub.) (district court granted a ten-level downward variance to a defendant who went to trial to eliminate the disparity with a co-defendant who pleaded guilty). Here, although the co-conspirators' cooperation may justify some variation in the bottom-line sentence, a near-double-digit disparity in years of imprisonment would be disproportionate, inequitable, unwarranted, and unjust.[3]

Pulling back the camera to evaluate sentences doled out to other antitrust defendants in other cases around the country confirms just how excessive the government's sentencing recommendation is. *See* U.S. Memorandum 40 (acknowledging that 18 U.S.C. § 3553(a)(6) also "seeks to promote national uniformity in sentencing"). According to data from the United States Sentencing Commission spanning fiscal years 2006 to 2010, "the mean sentences for antitrust offenders fluctuated between 5.8 and 19.2 months, and the median sentences fluctuated between 5 and 14.5 months." *United States* v. *VandeBrake*, 679 F.3d 1030, 1049 (8th Cir. 2012) (Beam, J., dissenting); *id.* at 1051 (collecting data in an appendix); *see also United States* v. *Parris*, 573 F. Supp. 2d 744, 752 (E.D.N.Y. 2008) (considering sentencing disparities in part by examining

[3] The government cannot justify its extreme sentencing recommendation by observing that Congress and the U.S. Sentencing Commission have increased the penalties for antitrust offenses in recent years. U.S. Memorandum 46-47. After all, these changes occurred long before the government stipulated to sentences for the ten co-conspirators in the TFT-LCD proceedings. Those sentences accordingly remain an appropriate benchmark to measure Dr. Hsiung's punishment under the existing penalty regime.

"the mean terms of imprisonment, in months, imposed by district courts nationwide").[4] It does not take a statistician to see that the 120 months the government recommends in this case varies dramatically from these terms of imprisonment. Indeed, a 120-month sentence would be more than twice the length of the longest jail sentence *ever* imposed on *any* defendant nationwide for violating the antitrust laws in the 100-plus-year history of the Sherman Act. *See VandeBrake*, 679 F.3d at 1049 n.19 (Beam, J., dissenting) (noting that the longest prison term ever imposed for a single antitrust violation clocks in at 48 months).

The government's overreaching is not limited to its bottom-line sentencing recommendation, but extends also to the disparities it proposes for Dr. Hsiung's Guidelines calculation; according to the government, Dr. Hsiung's Guidelines range must be determined under a different set of rules. Although no co-conspirator in this case has received more than a three-level role enhancement, the government asks this court to impose four levels on Dr. Hsiung. U.S. Memorandum 34-35. And the government freely admits that it has "augment[ed] the plea methodology" for calculating volume of commerce, *id.* at 13, boosting this adjustment for Dr. Hsiung even though co-conspirators who worked for far larger companies—most notably LG—received a more modest increase.[5]

The government cannot legitimize these disparities by pointing to any relevant factual distinctions between Dr. Hsiung and these other individuals; after all, other executives played an even larger role in the TFT-LCD conspiracy and worked at companies with greater sales than

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[4] It is notable that among the 108 antitrust offenders sentenced during this time period, only 15 received a sentence within the Guidelines range, and sentencing courts granted a downward variance in some 93 cases. *VandeBrake*, 679 F.3d at 1051 Tbl. 2 (Beam, J., dissenting).

[5] As Dr. Hsiung noted in his sentencing memorandum, and as AUO's memorandum describes in detail, the government's "augmented" volume-of-commerce methodology is fundamentally flawed. To avoid repetition, Dr. Hsiung fully adopts AUO's response to the government's volume-of-commerce arguments.

AUO. Hsiung Sentencing Memorandum 19-20, 22. The government's labored attempt to now argue that Dr. Hsiung was somehow responsible for the conspiracy contradicts the evidence at trial. According to Brian Lee, a CPT employee and one of the government's witnesses, Samsung initiated the conspiracy by prodding Taiwanese manufacturers into meeting with competitors. RT 1251:17-1257:13; 1633:12-1635:9; Ex. 333T; Ex. 334T. Dr. Hsiung did not even attend the first three such meetings—where the government contends that the conspiracy was hatched and put into action—and he attended only one meeting after 2002.[6]

Nor can the government contend that the co-conspirators' cooperation justifies giving them a break on their proper Guidelines calculation. The Guidelines account for cooperation through downward variances under U.S.S.G. § 5K1.1 and an acceptance-of-responsibility reduction under § 3E1.1, not through more lenient application of the role and volume-of-commerce enhancements.

Indeed, manipulating the role and volume-of-commerce calculations as the government proposes would undermine the entire raison d'être of the Guidelines: uniformity in sentencing. As the Supreme Court has put it: "The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice." *Koon* v. *United States*, 518 U.S. 81, 113 (1996); *see also, e.g.*, *United States* v. *Williams*, 894 F.2d 208, 212-13 (6th Cir. 1990) (holding that the district court had abused its discretion based on its inconsistent application of a

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[6] The government makes much of the one meeting Dr. Hsiung attended after 2002, in July 2004. U.S. Memorandum 49. But the government fails to note that, according to its own witness at trial, no pricing agreements were reached at that meeting. RT 2453:4-23. Nor is it plausible for the government to suggest that the Crystal Meeting participants knew their conduct was illegal yet failed to be deterred by that fact; the trial testimony by co-conspirators refutes that contention. *See, e.g.*, RT 712:15-713:7; 776:24-778:5; 781:11-17 (JY Ho); 1754:15-19 (Brian Lee); 2392:17-20 (Stanley Park); 3096:11-3097:9 (CC Liu).

weapons-possession enhancement to various co-conspirators, which "created the type of disparity which the Guidelines seek to avoid"). Or in the words of Congress: The Guidelines are intended to "provide certainty and fairness in meeting the purposes of sentencing" and to "avoi[d] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B). The important point is that, if those principles are to mean anything, they must mean that a defendant's role and volume-of-commerce enhancements cannot exceed the enhancements doled out to co-conspirators who played a larger role in the offense at far bigger companies.

The government's application of the Guidelines here yields the same sort of disparity the Ninth Circuit found troubling in *United States* v. *Gil*, 58 F.3d 1414, 1424 & n.6 (9th Cir. 1995). There, the government attributed different drug amounts to co-conspirators even though evidence establishing the amount was "equally applicable to both." *Id.* at 1424 n.6. The Ninth Circuit went out of its way to observe that "[i]t could be argued that the district court created an 'unwarranted' sentencing disparity." *Id.* (ultimately declining to resolve the issue because the defendant had not raised it on appeal). Just as the government should not be able to use different scales to measure the drug amount for similarly situated defendants, it should not be permitted to rig Dr. Hsiung's Guidelines calculations to arrive at a higher range for him than his similarly situated co-conspirators.

The cases the government relies on are not to the contrary; they merely stand for the unremarkable principle that disparities may be warranted if co-defendants are not similarly situated. Thus, the court upheld a disparate sentence in *United States* v. *Green* because the defendant was "the ringleader and driving force" behind a fraud scheme, and the participants she enlisted to help carry out the big-rigging process were not as culpable compared to her. 592 F.3d 1057, 1071-72 (9th Cir. 2010). So too in *United States* v. *Saeteurn*, 504 F.3d 1175, 1182

(9th Cir. 2007). There, the court found that the district court had rightly inquired into the "role each defendant had played" in a conspiracy in order to select an appropriate sentenced based on "relative culpability." *Id.* at 1182. And *United States* v. *Marcial-Santiago*, also cited by the government, did not involve co-defendant disparities at all. Instead, it considered the permissibility of disparate sentences in different judicial districts based on whether a particular district embraced "fast track" sentencing in the illegal reentry context. 447 F.3d 715, 717-19 (9th Cir. 2006). None of these cases has any application here, where the government's proposed disparity is based solely on the fact that Dr. Hsiung exercised his right to trial instead of pleading guilty.

The government fares no better by insisting that the Guidelines ordinarily do not produce disparities because they "represent[] a sentence that most similarly situated defendants are likely to receive." *United States* v. *Becerril-Lopez*, 541 F.3d 881, 885 (9th Cir. 2008). For one thing, this hypothesis can hold true only if the Guidelines are applied consistently across cases—a result the government abandons here in favor of an "augmented" methodology for calculating Dr. Hsiung's volume-of-commerce and role enhancements. But more importantly, the Guidelines sentence is emphatically *not* the "sentence that most similarly situated defendants . . . receiv[ed]" in the TFT-LCD proceedings. Each and every one of the ten executives already sentenced in these proceedings received a dramatic downward variance from the Guidelines range. Unlike the situation presented in *Becerril-Lopez*, strict adherence to the Guidelines in Dr. Hsiung's case would produce an enormous, obvious, and unwarranted disparity.

In the end, the government's desire to inflate Dr. Hsiung's Guidelines range smacks of being a penalty, one designed to make Dr. Hsiung pay for putting the government to its proof at trial. But the Constitution prohibits that penalty. As the Ninth Circuit held in *United States* v. *Capriola*, it is impermissible to impose a more severe sentence on a defendant simply because

he exercised his right to stand trial. 537 F.2d 319, 320-21 (9th Cir. 1976) (remanding for the district court to explain the sentencing disparity between defendants who went to trial and co-conspirators who pleaded guilty); *see also United States* v. *Bischel*, 61 F.3d 1429, 1437 (9th Cir. 1995) (considering whether a "sentencing disparity was due to an impermissible motive to punish [a defendant] for exercising his trial rights"). This Court should reject the government's attempt to penalize Dr. Hsiung for going to trial by engineering a higher Guidelines range for him than the ten executives who played a comparable—if not more central—role in the TFT-LCD conspiracy.

II. The Government's Recommended Sentence Is Greater Than Necessary To Serve The Purposes of Punishment

The government's grossly disproportionate proposed sentence flouts another congressional directive: That the sentence imposed be "sufficient, but not greater than necessary" to serve the purposes of punishment. 18 U.S.C. § 3553(a).[7] The government ignores that statutory balance, focusing only on the "sufficient" side of the equation and contending that a ten-year sentence and $1 million fine for Dr. Hsiung will sufficiently promote deterrence. We don't doubt it will. But the question Congress requires this Court to answer is whether there is a less draconian sentence that could likewise provide adequate deterrence.

There is. And we know that because ten other executives—all convicted of the same price-fixing conspiracy—have received anywhere from 6 to 14 months of imprisonment. A ten-

[7] The government essentially concedes that two of those purposes—specific deterrence and rehabilitation—have no application to Dr. Hsiung. And the government's brief discussion of retribution, U.S. Memorandum 49, fails to engage with the proportionality analysis required by the statute. Importantly, while the government notes that price-fixing is often "a crime of greed," *id.* at 47 (internal quotation marks omitted), there is no evidence that Dr. Hsiung participated in the conspiracy to enrich himself at others' expense. *See United States* v. *Prosperi*, 686 F.3d 32, 46 (1st Cir. 2012) (approving district court's downward departure in a white-collar fraud case because there was no evidence the defendants had been motivated by personal gain).

year term of imprisonment overshoots the government's interest in deterrence by roughly a factor of ten. That explains why the government offers no evidence to square its stern sentencing recommendation with Congress's mandate in § 3553(a). *See United States* v. *Adelson*, 441 F. Supp. 2d 506, 514-515 (S.D.N.Y. 2006) (rejecting the government's recommendation in part because it failed to "presen[t] any evidence or cite[] to any studies indicating that a sentence of more than three-and-a-half years was necessary to achieve the retributive and general deterrence objectives applicable to a case like this one"), *aff'd*, 301 F. App'x 93 (2d Cir. 2008).

The government relies on nothing but its own say-so when it declares that "[o]nly [a ten-year sentence] could possibly . . . provide adequate deterrence." U.S. Memorandum 1. To be sure, the imposition of a prison term can serve the goal of deterrence. But that truism does not get the government to ten years. Indeed, there is "considerable evidence that even relatively short sentences can have a strong deterrent effect on prospective 'white collar' offenders." *Adelson*, 441 F. Supp. 2d at 514 (citing Richard Frase, *Punishment Purposes*, 58 Stan. L. Rev. 67, 80 (2005); Elizabeth Szockyj, *Imprisoning White Collar Criminals*?, 23 S. Ill. U. L.J. 485, 492 (1998)). It is for this reason that the Sentencing Guidelines state that "prison terms for [antitrust] offenders should be much more common." U.S.S.G. § 2R1.1 (Background); *see* U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing* 56 (2004) ("[T]he guidelines were written . . . to ensure '*a short but definite period of confinement*' for a larger proportion of . . . 'white collar' cases, both to ensure proportionate punishment and to achieve adequate deterrence.") (quoting *Sentencing Commission Guidelines: Hearing Before the Senate Comm. on the Judiciary*, 100th Cong. 55 (1987) (statement of Stephen Breyer, then-Commissioner of the United States Sentencing Commission)) (emphasis added). In other words, the *mere fact* of incarceration provides deterrence. Piling on thousands of days of additional jail time would

result in an unnecessarily harsh sentence—and one that is surely "greater than necessary" to achieve the purposes of punishment.

III. The Government's Recommended Sentence Ignores Dr. Hsiung's History And Characteristics

Although 18 U.S.C. § 3553(a)(1) specifically instructs sentencing courts to consider "the history and characteristics of the defendant," the government excuses itself from conducting that inquiry by insisting that "Chen and Hsiung were convicted for what they did, not who they are." U.S. Memorandum 48. There is much wrong with this facile statement. To begin with, the ten other executives were presumably also "convicted for what they did." *Id.* Because what they did was exactly what Dr. Hsiung did, the sentences for all of them should be roughly equal.

But the government's refusal to consider Dr. Hsiung's history and characteristics is particularly troubling because they are the very focus of § 3553(a)(1). And as the numerous letters submitted to this Court demonstrate, Dr. Hsiung is a man of integrity, dedication, and compassion. The government cannot dispute that Dr. Hsiung is a good person who is loved and admired by friends, family, and colleagues. Nor can it deny that courts have given great weight to a defendant's exemplary past history in similar circumstances. *See, e.g.*, *Gall* v. *United States*, 552 U.S. 38, 43 (2007) (affirming a below-Guideline sentence and noting that the district court had relied on a "small flood" of letters from family, friends, and business associates "uniformly praising [the defendant's] character and work ethic"); *United States* v. *Whitehead*, 532 F.3d 991, 993 (9th Cir. 2008); *Adelson*, 441 F. Supp. 2d at 513-514.[8]

[8] The government has the audacity to suggest that this Court should actually hold Dr. Hsiung's "sterling reputation[]" against him when fashioning a sentence. U.S. Memorandum 48-49. Needless to say, it cites no case accepting this backwards inquiry into a defendant's history and characteristics. Dr. Hsiung's personal qualities instead support a lenient sentence here.

In the words of one sentencing court:

> [S]urely, if ever a man is to receive credit for the good he has done, and his immediate misconduct assessed in the context of his overall life hitherto, it should be at the moment of his sentencing, when his very future hangs in the balance. This elementary principle of weighing the good with the bad, which is basic to all the great religions, moral philosophies, and systems of justice, was plainly part of what Congress had in mind when it directed courts to consider, as a necessary sentencing factor, "the history and characteristics of the defendant."

Id. Applying this principle here, Dr. Hsiung's dedication to his family; his strong commitment to his work; his integrity and modesty; his desire and action to improve the lives of others; and his deep humanity all counsel in favor of leniency and compassion at sentencing.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Dr. Hsiung's Sentencing Memorandum, this Court is respectfully requested to reject the government's sentencing recommendation of 10 years in prison and a $1 million fine.

Date: September 17, 2012

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