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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA v. SHIU LUNG LEUNG, aka CHAO-LUNG LIANG and STEVEN LEUNG, Defendant.	No. CR-09-0110 SI UNITED STATES' REPLY TO DEFENDANT'S SENTENCING MEMORANDUM Date: April 29, 2013 Time: 11:00 a.m. Court: Hon. Susan Illston Place: Courtroom 10, 19th Floor

I. INTRODUCTION

Defendant Steven Leung contends that the Court should sentence him far more leniently than his convicted co-defendants H.B. Chen and Hui Hsiung and more leniently even than co-conspirators who long ago accepted responsibility, pleaded guilty, and cooperated in the government's TFT-LCD investigation. Leung's contention is premised on a misapplication of the Sentencing Guidelines and equitable factors that either already have been taken into account or are not entitled to any consideration. Accordingly, his arguments should be rejected, and he should be sentenced to serve a 30-month sentence and pay a $50,000 fine. This recommended sentence is appropriate because it is a significant departure from the 108 to 135-month sentence advised by the Guidelines, it incorporates all of the equitable factors already considered by the Court in the sentencing of Chen and Hsiung, and it takes Leung's lesser role in the offense into account. Leung offers no basis in his sentencing memorandum that would justify departing any more than the 73 percent reduction he has already been given by the government's recommended sentence.

II. ARGUMENT

A. Leung's Sentencing Guidelines Arguments Are Erroneous

Leung first argues that the Probation Office incorrectly analyzed the Sentencing Guidelines applicable to his conviction in three respects: (1) that the volume of affected commerce (VOC) calculation was incorrect; (2) that a two-level downward departure for a minor role, rather than a three-level role-in-the-offense enhancement, is appropriate; and (3) that a two-level downward adjustment should be given for acceptance of responsibility. Each argument fails.

1. The Volume of Commerce Was Correctly Calculated

Leung was charged with, and convicted of, participating in the TFT-LCD conspiracy from May 2002 until December 2006. He never withdrew from the conspiracy, and he never argued withdrawal at trial. Based on the Court's factual findings at the sentencing of AU Optronics Corp. (AUO), AU Optronics Corp. America, H.B. Chen, and Hui Hsiung, there is no

dispute that AUO sold approximately $2.3 billion in LCD panels during the period of Leung's participation in the conspiracy.[1]

Leung argues that the entire volume of AUO commerce cannot be attributed to him because he only sold monitor panels, and he only attended crystal meetings until August 2003—a contention that was never proven at trial and that the government disputes. Leung's argument fails, factually and legally. Leung attended crystal meetings on behalf of AUO at which agreements were reached not only on monitor panels, but also notebook panels. *See, e.g.*, Tr. Exs. 23, 30, 31. In fact, he was the only AUO attendee at some meetings at which agreements were reached. *See* Tr. Ex. 418T. Moreover, Leung participated in the crystal meetings far more regularly and for a longer period of time than both Chen and Hsiung. Yet, the volume of commerce attributed to his co-defendants correctly included sales until the end of the conspiracy in December 2006, even though it is undisputed that Chen and Hsiung had stopped attending crystal meetings well before that date. Furthermore, Leung's conspiratorial conduct was not limited to attending crystal meetings. He engaged in a wide variety of collusive communications, including bilateral pricing communications and alignment with competitors throughout the conspiracy. *See, e.g.*, Tr. Exs. 95, 189. Leung remained involved until the end. And despite having put on nearly as many witnesses at trial as the government, Leung did not introduce any evidence to contradict his continued participation, and he never argued that he withdrew from the conspiracy.

More importantly, Leung, like his co-defendants, is responsible not just for his personal panel sales, but all of AUO's panel sales to the United States. Guidelines section 2R1.1(b)(2) provides: "For purposes of this guideline, the volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him *or his principal* in goods or services that were affected by the violation." (emphasis added); *see also United States v. Hayter*

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[1] The defendant incorrectly claims that the presentence report used the volume of commerce for all conspiring companies for the entire conspiracy period to calculate Leung's VOC. Dkt. 1143 at 4. AUO's total panel sales to the United States during the entire conspiracy period (from October 2001 to December 2006) were $2.34 billion. Leung's $2.3 billion volume of commerce excludes approximately $400 million of panel sales made prior to his joining the conspiracy.

Oil Co., 51 F.3d 1265, 1273 (6th Cir. 1995) (concluding that "the volume of commerce attributable to a particular defendant . . . includes all sales of the specific types of goods or services which were made by the defendant or his principal during the period of the conspiracy."). Leung joined and participated in a conspiracy to fix the price of monitor, notebook, and TV panels, and he represented AUO at crystal meetings in which agreements were reached on these panels. Furthermore, pricing agreements on any particular panel are presumed to affect *all* panel sales. *See United States v. Andreas*, 216 F.3d 645, 678 (7th Cir. 2000) (holding that "the presumption must be that all sales during the period of the conspiracy have been affected by the illegal agreement, since few if any factors in the world of economics can be held in strict isolation"). Indeed, a variety of similar arguments were made by Leung's co-defendants and rejected by the Court in connection with their sentencing in September 2012. Tr. of Proc. at 8-9 (9/20/12), Dkt. 963. They should also be rejected here.

The presentence report correctly calculates the volume of commerce attributable to Leung by looking at *his principal* AUO's total panel sales during the time period that Leung participated in the conspiracy. The volume of affected AUO commerce from May 2002 until December 2006 was approximately $2.3 billion.

2. A Three-Level Role-in-the-Offense Adjustment Is Appropriate

The evidence at trial overwhelmingly established that Leung attended crystal meetings, reached agreements, and implemented those agreements to customers. *Compare* Tr. Exs. 18 and 192 (agreeing and then implementing a $190 price to Dell for 15" monitor panels). He also reached agreements with competitors outside of crystal meetings and implemented those agreements. *Compare* Tr. Exs. 95 and 168 (agreeing and then implementing prices to Dell). He was in a key position to make the conspiracy succeed because he was the AUO senior attendee at crystal meetings where agreements were reached and had broad authority to decide what prices his sales representatives would quote to his customers such as Dell and HP. *See, e.g.*, Ex. 418T; (Trial Tr. vol. 12, 1846:9-1847:3 (stating that Leung had authority to quote prices to customers that were between the bottom price and the target price). Contrary to Leung's arguments in his sentencing memorandum, Leung used his subordinates to carry on collusive pricing discussions

with competitors to gather the information that would be used to set AUO's prices to specific customers. *See, e.g.*, Tr. Exs. 166, 167. As such, his conduct differs little from other conspirators, like C.C. Liu and Brian Lee of Chunghwa Picture Tubes (CPT), from whom Leung tries to distinguish himself. Moreover, AUO was a much larger company than CPT, and, as a result, the collusive pricing agreements implemented by Leung had far more effect on large U.S. customers. *Compare* CPT's $357 million in commerce (Case No. 3:08 cr-00804-SI, Dkt. 10) to AUO's $2.3 billion.

Leung argues for a downward departure for a minor role, something that no other individual sentenced in this matter has received. This argument is baseless. In order to eligible for that departure, Leung bears the burden of proving that he "was 'substantially' less culpable than [his] co-conspirators." *United States v. Rosas*, 615 F.3d 1058, 1067 (9th Cir. 2010) (quoting *United States v. Cantrell*, 433 F.3d 1269, 1283 (9th Cir. 2006)). The evidence at trial highlighted Leung's significant role and pervasive participation in the conspiracy, which is fatal to Leung's claim for a minor role adjustment. Moreover, Leung cannot avail himself of the minor role departure when he continues to assert that he never participated in the LCD conspiracy. *Cantrell*, 433 F.3d at 1286.

As explained in more detail in the government's sentencing memorandum, Leung's own words prove his role in the conspiracy. Indeed, in his self-assessment to L.J. Chen, Leung gave himself credit for "coordinat[ing] TFT industry communications and price stabilization." Tr. Ex. 261. Accordingly, a three-level role-in-the-offense adjustment is well justified for Leung.

3. Leung Has Not Accepted Responsibility for His Criminal Conduct

"When a defendant chooses to put the government to its burden of proof at trial, a downward adjustment for acceptance of responsibility should be 'rare.'" *United States v. Weiland*, 420 F.3d 1062, 1080 (9th Cir. 2005) (citing U.S.S.G. §3E1.1). A defendant would be "eligible for a downward adjustment if, and only if, he has otherwise demonstrated sincere contrition." *United States v. Ramos-Medina*, 706 F.3d 932, 940 (9th Cir. 2013) (internal quotation marks and citation omitted). Like his AUO co-defendants, Leung continues to deny his conduct, deny the criminality of his conduct, and deny his significant role in the conspiracy.

In fact, Leung argues that his conduct was not only justified, but actually beneficial to U.S. consumers. Dkt. 1143 at 20 ("Ironically, if the companies had not engaged in the charged conduct, it is highly likely many of them would not have survived the economic climate of the time. If that had happened, the consumer would probably have ended up in a worse position, with TFT/LCD flat screen panels costing more than they would have without the charged conduct."). Leung has not shown even a glimmer of remorse or contrition for his conduct and, as a result, he is not entitled to any credit for acceptance of responsibility.

Leung nonetheless claims that he is entitled to a two-level adjustment for acceptance of responsibility under U.S.S.G. §3E1.1 because "there are significant unresolved legal issues in regards to how the FDAIA [sic] and Rule of Reason should be applied to foreign nationals accused of price fixing." Dkt. 1143 at 7. This argument fails for at least three reasons. First, Leung is not a foreign national. [2] He is a United States citizen. Moreover, he met with customers in the United States in furtherance of the conspiracy, and directed Michael Wong and others in the United States to engage in collusive contacts with competitors. There is no question that the Sherman Act applies to his conduct. Second, the Court ruled that these are *not* unresolved legal issues when it denied H.B. Chen and Hsiung's motions for bail pending appeal. Dkt. 1094. Finally, even if this argument were available to him, Leung could not qualify for it because he did not concede the conduct, but instead contested that price-fixing agreements were reached, attacked the credibility of government witnesses, and actively contested other parts of the government's case. *Weiland*, 420 F.3d at 1080 (holding that a defendant was not eligible for acceptance-of-responsibility adjustment for challenging the constitutionality of a criminal statute because he actively contested other parts of the government's case).

[2] It is surprising that Leung now claims he is a foreign national when he vigorously argued during the arraignment proceedings that he is a U.S. citizen, he grew up in San Francisco, his parents still live in San Francisco, he went to school in the Bay Area, and he worked in the Bay Area. He further represented that if he had been deemed a fugitive, his U.S. passport could have been revoked, he would be without citizenship, and he would be deportable since he has no status in Taiwan. Defendant Steven Leung's Motion for Pretrial Release, Dkt. 62. Based on these representations, the government did not ask that Leung's passport be taken and that he remain in the district, as it did for his foreign national co-defendants.

Similarly, Leung is not entitled to an acceptance-of-responsibility adjustment merely because he faced a difficult decision regarding whether to plead guilty. This is undoubtedly the case for many criminal defendants, but they forego an adjustment for acceptance of responsibility when they choose to go to trial. Leung could have plead guilty before trial and obtained the benefits of U.S.S.G. §3E1.1, but he chose not to do so.[3] Instead, he put the government to its burden, vigorously contested its evidence, and even having lost, still refuses to concede his guilt and role in the offense.

B. Relevant Rule 3553(a) Factors Support a 30-Month Sentence

Leung also argues that equitable factors under 18 U.S.C. § 3553(a) warrant a reduction of his sentence. As discussed in the government's sentencing memorandum, a number of these very factors – lack of personal profit, an otherwise law-abiding career, and the beneficial nature of the product – were already been taken into account by the Court in reducing the sentences of H.B. Chen and Hsiung from the 120-month statutory maximum to 36 months. Because Leung's Guidelines sentence also supports a statutory maximum sentence, those same equitable factors are fully taken into account by reducing his sentence to 36 months. His lesser role in the offense is the only factor that supports a further reduction of his sentence to 30 months. None of the other factors cited by Leung warrant any further reduction.

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[3] The government and defendant participated in a settlement conference in September 2012, and the government was surprised to see Leung's account of that conference in his sentencing memorandum because the government understood that the settlement conference was confidential. Suffice it to say, the government does not agree with Leung's self-serving account of the settlement conference. During the settlement conference, the government did state that it was considering internally whether to appeal the 36-month sentences of H.B. Chen and Hsiung and that, as a result, the government could not base any plea resolution on those sentences. However, the government acknowledged that the sentences imposed on H.B. Chen and Hsiung essentially set a ceiling for Leung and offered to stand silent and not advocate for any particular sentence if Leung entered a plea under Fed. R. Crim. P. 11(c)(1)(B) and argued for a lower sentence. The Magistrate Judge acknowledged that this was a valuable concession by the government and would put Leung in an advantageous position if he would agree to plead guilty. He opted instead to go to trial. Moreover, it is the government's understanding, based on those settlement negotiations, that Leung's decision not to plead was motivated in part by his reluctance to admit to the crime. Leung now asks the Court to reduce his sentence based on acceptance of responsibility when his inability to admit guilt and accept responsibility was the very thing that prevented him from pleading guilty.

Leung attempts to compare himself to co-conspirators who pled guilty. They are not comparable. Those co-conspirators all accepted responsibility and cooperated with the government. Leung did not. Leung continues to deny and minimize the conspiracy and his role in it. They do not. They have expressed remorse and contrition. Leung has not. Accordingly, reduced sentences for those co-conspirators was appropriate. *See United States v. Corona-Verbera*, 509 F.3d 1105, 1120 (9th Cir. 2007) (disparity between defendant who accepted responsibility and defendant who went to trial did not render sentence unreasonable); *United States v. Winters*, 278 Fed. Appx. at 783, 2008 WL 2080732, 1 (9th Cir. 2008) (same). Based on this distinction, no "unwarranted disparity" will result from Leung receiving a longer sentence than pleading coconspirators.

Leung also argues that this was an aberrant act in an otherwise "exemplary life." It was not. He did not merely attend a single meeting or engage in just a single criminal act. He actively and fully engaged in a criminal scheme for more than four years. He embraced the scheme and worked hard to make it a success, well-aware that it was illegal and that it was harming its victims. The government disagrees that this is an aberrant act. His was not a momentary lapse. It was a sustained choice for which he sought credit and approval from his superiors time and time again.

Finally, Leung cites health issues and family obligations as departure factors. They are not appropriate departure factors for the reasons stated in the government's sentencing memorandum. Dkt. 1142 at 14.

III. CONCLUSION

The government recommends a 30-month term of incarceration for Leung, a fine of $50,000, and a three-year term of supervised release.

Dated: April 25, 2013

Respectfully submitted,

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