MANISH KUMAR (CSBN 269493)
LESLIE A. WULFF (CSBN 277979)
MIKAL J. CONDON (CSBN 229208)
ANDREW SCHUPANITZ (CSBN 315850)
U.S. Department of Justice, Antitrust Division
450 Golden Gate Avenue
Box 36046, Room 10-0101
San Francisco, CA 94102
Telephone: (415) 934-5300
leslie.wulff@usdoj.gov

Attorneys for the United States

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

| | |
|---|---|
| UNITED STATES OF AMERICA<br><br>v.<br><br>CHRISTOPHER LISCHEWSKI,<br><br>Defendant. | No. 18-cr-00203-EMC<br><br>**UNITED STATES'S RESPONSE TO DEFENDANT'S SENTENCING MEMORANDUM, OBJECTIONS TO THE FINAL PRESENTENCE REPORT, AND MOTION FOR DEPARTURE**<br><br>Date: June 3, 2020<br>Time: 2:30 p.m.<br>Judge: Hon. Edward M. Chen<br>Courtroom: 5, 17th Floor |

# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

## INTRODUCTION

At a time when millions of law-abiding Americans are still sheltering in place, defendant—who stands convicted of a criminal conspiracy—argues that a just punishment would consist of home confinement and a fine less than one-thirtieth of the annual salary he earned while price fixing. Defendant's proposed sentence would effectively communicate two things: that white-collar crime is unworthy of serious punishment and that white-collar defendants are worthy of privileged treatment.

The government's requested sentence reflects an accurate application of the Sentencing Guidelines and is consistent with 18 U.S.C. § 3553(a). Defendant's guidelines calculation is significant because it correctly reflects the seriousness and scope of defendant's crime, his subsequent efforts to thwart the government's investigation and prosecution, and a complete lack of mitigating circumstances in this case. The Sentencing Commission unequivocally discourages noncustodial dispositions in antitrust cases, and there is no constitutional or statutory obstacle to the Court tailoring certain aspects of a custodial sentence—such as the surrender date or the facility recommendation—to the current circumstances, while still imposing a just punishment. By comparison, defendant's requested sentence would permit him to escape any significant financial punishment and would allow him to spend his confinement in surroundings significantly more opulent than most Americans—let alone convicted felons serving a sentence. It would also make defendant an outlier, imposing on him the lowest sentence of any defendant convicted at trial of violating the Sherman Act in the past twenty years.

Defendant was convicted for what he did, not who he is. He led Bumble Bee and its employees into a criminal conspiracy that raised prices on a staple food for American families in an attempt to increase Bumble Bee's profitability and line his own pockets. Rather than using his position to stop this conduct, he engaged in collusion firsthand and had his employees do the same. While defendant engaged in good deeds in his private life and has submitted letters of support on his behalf, that is not unusual for defendants in his position and provides no reason to vary downward from a guidelines sentence. It is his criminal conduct—not defendant's personal

//

life or the social standing that his privileged position affords him—that should be the Court's lodestar in determining a just sentence.

## ARGUMENT

### I. Preponderance of the Evidence Is the Appropriate Standard

The Court should use a preponderance-of-the-evidence standard in determining whether guidelines adjustments apply because all of the government's recommended adjustments relate to the nature and extent of defendant's conduct. The Ninth Circuit has repeatedly held that "sentencing determinations relating to the extent of a criminal conspiracy need not be established by clear and convincing evidence." *United States v. Treadwell*, 593 F.3d 990, 1002 (9th Cir. 2010) ("'[P]reponderance of the evidence' was the appropriate standard of proof for determining the amount of loss caused by the conspiracy."); *see also United States v. Berger*, 587 F.3d 1038, 1047-49 (9th Cir. 2009) (preponderance was the appropriate standard in determining amount of loss because enhancement was "based entirely on the extent of the fraud conspiracy for which Berger was convicted"); *United States v. Riley*, 335 F.3d 919, 926 (9th Cir. 2003) ("The fact that an enhancement is based on the extent of a conspiracy for which the defendant was convicted weighs heavily against the application of the clear and convincing evidence standard of proof."); *United States v. Johansson*, 249 F.3d 848, 857 (9th Cir. 2001) (preponderance was the appropriate standard where defendant's "offense level was increased because of the nature and extent of the offense to which he pled guilty, rather than for acquitted or uncharged crimes"). This Court has recognized the same: "Where, as here, a defendant has been convicted of conspiracy, '[s]entencing enhancements based entirely on the nature and extent of the conspiracy . . . do not require proof by the clear and convincing standard' but rather require proof by a preponderance of the evidence." *United States v. Nosal*, No. 08-CR-237, 2014 WL 121519, at *3 (N.D. Cal. Jan. 13, 2014) (quoting *United States v. Jenkins*, 633 F.3d 788, 808 n.8 (9th Cir. 2011)). Due process does not alter this clear rule because enhancements based on the scope of the conspiracy "neither negate[] the presumption of innocence nor alter[] the burden of proof;" nor do they hold defendant "responsible for any offenses for which [he has] not been convicted by a jury." *Treadwell*, 593 F.3d at 1001.

Each of the enhancements sought here—volume of commerce, leadership, and obstruction—are directly tied to the scope of and defendant's role in the conspiracy, and are therefore subject to the preponderance standard. The Sentencing Commission has found that volume of commerce is the appropriate measure of the "scale or scope" of an antitrust offense, just as "loss serves as a measure of the seriousness of [a fraud] offense[.]" *Compare* U.S.S.G § 2B1.1 background at ¶ 3 *with* U.S.S.G. §2R1.1 background at ¶ 4. Accordingly, volume of commerce—like loss—is directly tied to the nature and extent of the conspiracy. *Cf. Treadwell*, 593 F.3d at 1002; *Berger*, 587 F.3d at 1047-49. The recommended leadership enhancement is tied directly to the evidence regarding defendant's role in planning, orchestrating, and maintaining the conspiracy, as well as overseeing and directing his subordinates' participation in the conspiracy. (*See* Government Sentencing Memorandum ("U.S. Mem."), Dkt. No. 663 at 21-27.) And the obstruction enhancement is based on defendant's own self-serving, implausible, and self-contradictory testimony at trial, as well as evidence presented at trial about defendant's attempt to obstruct the government's investigation by threatening Scott Cameron, then-SVP of Sales at Bumble Bee. (*See* U.S. Mem. at 27-35.)

An analysis of the "totality of the circumstances" of defendant's enhancements underscores the point that preponderance is the correct standard. *United States v. Jordan*, 256 F.3d 922, 928 (9th Cir. 2001). Defendant's sentence—even after the commerce enhancement—falls within the maximum sentence in 15 U.S.C. § 1. *See Treadwell*, 593 F.3d at 1002. Because the enhancements relate to defendant's role in the conspiracy, they do not hold defendant responsible for any offenses for which he has not been convicted by a jury. Neither the leadership nor obstruction enhancement result in an "extremely disproportionate effect" that would warrant a clear and convincing standard of proof. *United States v. Montgomery*, 275 Fed. Appx. 647, 649 (9th Cir. 2008) (leadership enhancement does not have "extremely disproportionate effect" warranting application of clear and convincing standard where it had the effect of increasing sentence range by 84 to 105 months); *United States v. Pounpanya*, 218 Fed. Appx. 618, 618-19 (9th Cir. 2007) (because a two-level obstruction enhancement does "not have 'an extremely disproportionate effect on the sentence relative to the offense of conviction,' the

court was not required to find facts pursuant to a clear and convincing evidence standard"); *United States v. Ramirez*, 35 Fed. Appx. 332, 333-34 (9th Cir. 2002) (due process was satisfied by application of a preponderance standard in determining four-level leadership adjustment); *United States v. Moran-Romero*, 35 Fed. Appx. 622, 623 (9th Cir. 2002) (obstruction finding is not an "exceptional case" requiring application of the higher standard of proof). Although the volume of commerce enhancement is large, that "does not raise the due process concerns that urge 'clear and convincing' proof[,]" *Treadwell*, 593 F.3d at 1001-02; it captures the scope and magnitude of defendant's leadership role in a pervasive criminal conspiracy affecting over $1 billion in sales of a pantry staple.

While the appropriate standard is preponderance of the evidence, the government has met its burden under either standard. As set forth in its initial sentencing memorandum, the evidence at trial established, both by a preponderance of the evidence and by clear and convincing evidence, that a 12-level adjustment for volume of commerce is appropriate.[1] Cameron; Kenneth Worsham, former SVP of Trade Marketing at Bumble Bee; and Stephen Hodge, former SVP of Sales at StarKist, all testified under oath that there was a conspiracy and that it broadly affected list prices, quarterly pricing guidance, and promotional price points for sales of retail-sized branded solid-white and chunk-light canned tuna.[2] Similarly, the evidence at trial proved by either standard that defendant, Bumble Bee's CEO, was the organizer or leader of the conspiracy

---

[1] As detailed in the Government's Sentencing Memorandum, the evidence supports that $1.002 billion is the correct volume of commerce affected by defendant's criminal conduct. (U.S. Mem. at 11-21.) Further, there is no set of circumstances that would result in a volume of commerce below $600 million necessary for defendant to receive less than a 12-level adjustment under the Guidelines. (*Id.* at 19-20.)

[2] Defendant's single-worded excerpts misconstrue their testimony. As each of the pleading coconspirators explained, the agreements were necessary to attain their financial targets: a list price issued by only one company "would not end up being effective"; the companies "needed the agreement"; if a company attempted to raise prices on their own they "would have gotten killed" and "would have never made the number or gotten close to the number without an agreement from our competition to move as well. . . . We couldn't have done it by ourselves. We needed that agreement." (Trial Tr. 1485:18-19; 597:18-21; 597:22-598:8; 720:13-22.) And, as an illustration of the inefficacy of unilateral price increases, Mr. Hodge explained that, in the middle of the escalating fish prices, StarKist attempted to take a unilateral price increase, but it was unsuccessful. (*Id.* at 1490.)

and far and away its most culpable member. Finally, the evidence at trial proved defendant's obstruction under either standard. Defendant's broad denials and self-serving testimony was contradicted by his own testimony and statements made during the conspiracy, as well as testimony and contemporaneous statements of other witnesses.

## II. Defendant's Testimony and Conduct Merit a Two-Level Increase for Obstruction of Justice

Defendant took the stand at trial and presented a self-serving alternate reality that twelve of his peers swiftly and unanimously rejected beyond a reasonable doubt. Defendant's testimony was self-contradictory, evasive, and nonsensical. A two-level adjustment for obstruction of justice is appropriate.

Defendant did not merely offer "unembellished denials" of his participation in the price-fixing conspiracy like the defendant in *United States v. Aguilar-Portillo*, 334 F.3d 744, 748 (8th Cir. 2003) (cited in Defendant's Objections to the Final Presentence Investigation Report and Motion for Downward Departure ("Def. PSR Objections"), Dkt. No. 664. at 18).[3] Defendant testified substantively for several days, during which he denied all knowledge of the existence of a conspiracy or the participation of his subordinates in it, despite days of witness testimony and numerous exhibits to the contrary. Defendant made a number of provably false and fantastical claims, any one of which would be the appropriate basis for an enhancement. Appendix 1, attached hereto, compares defendant's false and misleading statements with the other evidence and testimony that contradict them.

Defendant's testimony taken as a whole "told a story that was simply not true, based on the totality of the evidence," *United States v. Taylor*, 749 F.3d 842, 848 (9th Cir. 2014), and properly supports an enhancement under §3C1.1. Defendant seeks to excuse his obstruction by erroneously claiming §3C1.1 requires the government to prove that defendant's statements "were

[3] *Aguilar-Portillo* is inapposite on this basis alone. The district court even noted at sentencing that had the defendant given false testimony beyond "just a plain no he said here, then I would certainly be having a problem." *Aguilar-Portillo*, 334 F.3d at 748. The other *Aguilar-Portillo* factors cited by defendant are similarly unavailing here: the jury took mere hours to convict defendant, and there is no evidence for a "probable lie" by the government's cooperating witnesses beyond defendant's tireless assertions to that effect.

literally false in response to the questions asked; answers which are merely non-responsive, incomplete, or misleading are insufficient." (Def. PSR Objections at 17:9-12.)[4] That is not what the law requires, as the litany of cases cited in the government's sentencing memorandum make clear. (U.S. Mem. at 33:25-34:13.)

Moreover, defendant's false testimony was willful; he was prepared by vigorous and competent counsel, and there can be no claim that his repeated lies and evasions on the stand were "a result of confusion, mistake, or faulty memory." *United States v. Dunnigan*, 507 U.S. 87, 95 (1993). An obstruction enhancement is warranted.

**III. A Guidelines Sentence Is Appropriate**

The Court should reject defendant's request for a one-year sentence of home detention in lieu of the guidelines prison term as grossly inconsistent with the considerations contained in 18 U.S.C. § 3553(a). "When the guidelines, drafted by a respected public body with access to the best knowledge and practices of penology, recommend that a defendant be sentenced to a number of years in prison, a sentence involving no . . . imprisonment can be justified only by a careful, impartial weighing of the statutory sentencing factors." *United States v. Goldberg*, 491 F.3d 668, 673 (7th Cir. 2007). No facts warrant the extraordinary treatment defendant seeks.

**A. Defendant's Proposed Sentence Is Neither Punitive Nor Deterrent**

Congress, through the Sentencing Guidelines, has pointedly rejected defendant's argument that the emotional toll of his conviction on him and his family, the loss of his professional status,[5] and the embarrassment of prosecution are punishment enough for his crime. *See* 28 U.S.C. § 994(d) ("The Commission shall assure that the guidelines and policy statements are entirely neutral as to . . . socioeconomic status of offenders."); U.S.S.G. §5H1.10

---

[4] Defendant cites to *Bronston v. United States*, 409 U.S. 352, 358-59 (1973), for this point, but *Bronston* involved a perjury conviction for statements that were "literally truthful" but "unresponsively addressed" to the defendant's company's assets rather than his own. *Id.* at 354-55. This does not mean that the government must prove statements were "literally false," or that misleading testimony cannot serve as the basis for an enhancement for obstruction of justice.

[5] Defendant erroneously claims that the government requested that Bumble Bee remove defendant from his position. (Ex. 1 to Def. Mem. at 6.) The government played no role in the company's decision to place defendant on a leave of absence after the grand jury returned its indictment.

(socioeconomic status not relevant); *see also* U.S.S.G. §5H1.2 (vocational skills and education not ordinarily relevant); U.S.S.G. §5H1.5 (employment record not ordinarily relevant); U.S.S.G. §5H1.6 (family ties and responsibilities not ordinarily relevant). Courts have repeatedly agreed that "it is impermissible for a court to impose a lighter sentence on white-collar defendants than on blue-collar defendants because it reasons that white-collar offenders suffer greater reputational harm or have more to lose by conviction." *United States v. Prosperi*, 686 F.3d 32, 47 (1st Cir. 2012). *See also United States v. Musgrave*, 761 F.3d 602, 608–09 (6th Cir. 2014) (finding it impermissible for the district court to rely heavily on the fact that the defendant had already "been punished extraordinarily" through years of legal process, the loss of his CPA license, and his felony conviction). Defendant relies on *United States v. Vigil* for the opposite conclusion, but that reliance is mistaken. (Defendant's Sentencing Memorandum ("Def. Mem."), Dkt. No. 663 at 18.) The court in *Vigil* expressly found that it was *not* sufficient punishment for a white-collar criminal to be humiliated by media reports on his crime: "Vigil does not, however, cite a case, and the Court has not found one in its independent research, which suggests that a convicted criminal defendant should receive a reduced sentence because of his loss of high status or because of his large legal bills." 476 F. Supp. 2d 1231, 1315 (D.N.M. 2007).[6]

There is nothing about defendant's family or community circumstances that warrants the extraordinary reduction he seeks. On the contrary, defendant's resources, opportunities, and position in the community should weigh in favor of a guidelines sentence. Defendant did not need to commit the crime, yet he did so. By his own admission, defendant already was a highly successful and wealthy CEO (Defendant's Motion in Limine #11, Dkt. No. 215 at 2), yet he committed the crime motivated by the potential for personal gain. Similarly, defendant's charitable "and similar prior good works are not ordinarily relevant in determining whether a

//

[6] Defendant also relies on *United States v. Edwards* for the point that a conviction alone is sufficient deterrence. (Def. Mem. at 25.) But the court's finding in *Edwards* was based on the significant remediation the defendant had made during the five years before sentencing, and after taking "special note of Edwards's sincerity during allocution," neither of which are present here. 595 F.3d 1005, 1010 (9th Cir. 2010).

sentence should be outside the applicable guideline range." U.S.S.G. §5H1.11. For good reason. "It is *usual* and *ordinary*" for professionally successful defendants to be involved in charities and to have strong professional and personal relationships. *United States v. Repking*, 467 F.3d 1091, 1095-96 (7th Cir. 2006) (quoting *United States v. Kohlbach*, 38 F.3d 832, 838-39 (6th Cir. 1994)) (emphasis in original). White-collar defendants "should not be allowed to treat charity as a get-out-of-jail card." *United State v. Vrdolyak*, 593 F.3d 676, 682 (7th Cir. 2010). *See also United States v. Barbera*, No. 02-CR-1268 (RWS), 2005 WL 2709112, at *12-13 (S.D.N.Y. Oct. 21, 2005); *United States v. Fishman*, 631 F. Supp. 2d 399, 403 (S.D.N.Y. 2009) (noting that a defendant's "good name and good works" should not serve as "the human shield he raises to seek immunity or dramatic mitigation of punishment when he is caught"). Those who, like defendant, make charitable contributions because they *can* should not gain an advantage over those who *cannot*.

Nor was defendant's criminal conduct the "dramatic outlier" as he seeks to cast it. Defendant orchestrated a price-fixing conspiracy from the highest levels of his company for three years. It was not a fluke or a product of happenstance. It was sustained, systematic, and intentional criminal conduct. That defendant's family and friends were not aware of the criminal conduct comes as no surprise given the steps defendant took to shield even Bumble Bee's private-equity owners from his conspiracy. (*See, e.g.*, Trial Exs. 298, 298A, 299.)

Defendant's request for a year of luxury-home detention and a $25,000 fine makes clear that defendant still does not appreciate the seriousness of the crimes he committed against Bumble Bee's customers and American consumers, and does not accept any responsibility for it. *See* 18 U.S.C. § 3553(a)(2)(A). Indeed, if there is any doubt, one need only look to defendant's words and actions before, during, and after he was found guilty by a jury of his peers. For example, in defendant's letter to the Court he continues to disclaim any responsibility for the crime and insist upon his innocence. (Ex. 1 to Def. Mem. at 11.) Defendant also transferred the 4-bedroom, 3.5-bathroom home he and his wife jointly purchased in Napa in 2011 to his wife's name in the middle of trial in this matter. (Wulff Declaration in Support of U.S. Sentencing

//

Response ("Wulff Decl.") ¶¶ 2, 3.)[7] It is defendant's own words and actions that provide the clearest indication of his lack of respect for the law and his lack of remorse for leading his company and its employees into a criminal conspiracy. His behavior is in stark contrast to his coconspirators, who pleaded guilty and cooperated in the investigation. As Cameron explained on cross examination, "actions have consequences[.]" (Trial. Tr. 770:13-15.) Unlike Cameron and the other pleading cooperators in this case, defendant refuses to accept the consequences of his criminal conviction.

Nothing makes this disregard more apparent than defendant's proposed sentence. Rewarding defendant with a noncustodial sentence to be served in a home with a private movie theater, home gym, wine cellar, six bedrooms, and seven and a half bathrooms shared only with two family members, while hundreds of millions of Americans shelter in place in significantly less opulent circumstances, sends a message to corporate executives that they are above the law and that their lifestyle alone is a get-out-of-jail-free card.[8] Accordingly, a guidelines sentence here is necessary to "promote respect for the law" and provide "adequate deterrence to criminal conduct" in boardrooms and executive suites across the country. 18 U.S.C. § 3553(a)(2)(A)-(B).

**B. A Guidelines Sentence Does Not Create Unwarranted Sentencing Disparities**

A guidelines sentence creates no unwarranted sentencing disparities. Defendant's citations to other antitrust sentences in this District are inapposite and understate the harm that

//

---

[7] This is not the only spousal asset that appears to be misleadingly categorized in the PSR, nor is it the only misleading representation regarding the Napa property. Defendant lists the asset value of the Napa property as $3.45 million—the exact same amount as the mortgage he lists as a liability—but defendant has listed the home for sale at $6.25 million. (Wulff Decl. ¶ 4.) The amount defendant apparently believes he can profit on the sale of this Napa home is nearly three times the guidelines maximum fine—and more than one hundred times defendant's proposed fine. Defendant also categorizes his $1.15 million investment in Menon Renewable Products and Menon BioSensors as "spouse's asset." (PSR ¶ 63.) However, in his letter in support of defendant, Suresh Menon, President of Menon Renewable Products, Inc., describes defendant's investment of "his own funds" in the company. (Ex. 29 to Def. Mem.) Lastly, defendant claims a personal loan to his wife for $4,385,055.00 in legal fees despite no indication that the funds were paid from separate property. (PSR ¶ 65.)

[8] Although defendant claims to have recently sold his home in San Diego, it is still identified as his legal address in the presentence report, and the utilities at the residence are still in his name (records show defendant paying through the month of May).

defendant's conspiracy imposed on American consumers. Were the Court to follow defendant's recommendation, it would be *defendant's* sentence that would be out of parity with other cases in this District and others around the country.

Defendant's comparison of his own conduct and potential sentence to those of the defendants in the LCD price-fixing conspiracy is inapt because, as Judge Illston found in imposing a below-guidelines sentence, those defendants (executives who lived and worked in Taiwan) were acting in another country and according to different cultural mores. Sentencing Tr. at 17:22-23, *United States v. AU Optronics Corp.*, No. 09-CR-110, Dkt. No. 963 (N.D. Cal. Sept. 20, 2012). In contrast, defendant's conduct took place in the United States, involved American conspirators, and affected a staple product in American homes. More directly, defendant testified that he knew that price fixing was illegal, and—after some resistance—ultimately admitted that he also knew that it was wrong. (Trial Tr. 2913:8-25.)

Similarly, defendant's comparison of his own conduct to that of individuals sentenced in various local real-estate bid-rigging conspiracies fails to account for the volumes of commerce at issue in those cases—a mere fraction of the commerce affected by defendant's conduct given the nationwide scope and effect of defendant's conduct. Moreover, contrary to defendant's claims, the majority of sentences imposed in the real-estate trials were guidelines sentences, further demonstrating that no departure or variance is appropriate here. Defendant's chart is inaccurate in the following respects:

//

//

//

//

//

//

//

//

//

| Case | Defendant | Guidelines Range | Custodial Sentence | Commentary |
|---|---|---|---|---|
| *United States v. Marr*, 4:14-cr-00580-PJH (N.D. Cal.) | Gregory Casorso | Offense Level of ~~19~~ **15** ~~(30 to 37 months)~~ **(18 to 24 months)** | 18 months | Incorrect range and offense level. **This is a guidelines sentence.** |
| | Javier Sanchez | Offense Level of ~~20~~ **15** ~~(33 to 41 months)~~ **(18 to 24 months)** | 21 months | Incorrect range and offense level. **This is a guidelines sentence.** |
| | Michael Marr | Offense Level of ~~23~~ **19** ~~(46 to 57 months)~~ **(30 to 37 months)** | 30 months | Incorrect range and offense level. **This is a guidelines sentence.** |
| ***United States v. Joyce*, 4:14-cr-0607 PJH (N.D. Cal.)** | **Thomas Joyce** | **Offense Level of 13 (12 to 14 months)** | **12 months and a day** | **Defendant did not include this guidelines sentences imposed on the defendant post-trial.** |
| ***United States v. Guillory*, 4:14-cr-0607 PJH (N.D. Cal.)** | **Glen Guillory** | **Offense Level of 15 (18 to 24 months)** | **18 months** | **Defendant did not include this guidelines sentences imposed on the defendant post-trial.** |
| *United States v. Florida*, 4:14-cr-00582-JD (N.D. Cal.) | John Lee Berry, IIII | Offense level of 15 (18-24 months) | 10 months | |
| | Robert Rasheed | Offense level of 17 (24-30 months) | 14 months | |
| | Refugio Diaz | Offense level of ~~15~~ **13**, with criminal history ~~(24-30 months)~~ **(18 to 24 months)** | 18 months | Incorrect range and offense level. **This is a guidelines sentence.** |
| | Alvin Florida, Jr. | Offense level of 21 (37-46 months) | 21 months | |
| *United States v. Chandler*, 2:11- cr-00511-WBS (E.D. Cal.) | Donald M. Parker | Offense Level ~~20~~ **15** ~~(33-41 months)~~ **(18 to 24 months)** | 6 months | Incorrect range and offense level. |
| | Andrew B. Katakis | Offense Level ~~23~~ **19** ~~(46-57 months)~~ **(30 to 37 months)** | 10 months | Incorrect range and offense level. |

These cases offer no precedent for the sentence proposed by defendant here. The courts imposed custodial sentences—often significant—in *all* of these cases. Judge Breyer even imposed a significant custodial sentence on an 80-year old pleading defendant. *United States v. Giraudo*, No. 14-CR-534, 2018 WL 2197703 (N.D. Cal. May 14, 2018). In sentencing Glen Guillory, Chief Judge Hamilton explained the imposition of a custodial guidelines sentence was necessary:

> Under the guidelines, prison terms should be much more common and usually somewhat longer than typical under pre-guideline practice. Absent adjustments,

> the guidelines require some period of confinement in the great majority of cases that are prosecuted, including all bid rigging cases." […]
>
> This is a very strong statement about how the [S]entencing [C]ommission views this offense. Every offender who has pled guilty or been found guilty following trial in my court has been—has received a custodial sentence, except those who have taken every step within their control to mitigate their conduct by cooperating with the Government in the prosecution or investigation of others, by acceptance of responsibility, by volunteering to make restitution, . . . . *The guidelines apply. The guidelines are appropriate, and there's been no basis presented to the Court for a downward variance.*

Sentencing Tr. at 21:8-22:13, *United States v. Guillory*, No. 14-CR-607, Dkt. No. 350 (N.D. Cal. Sept. 6, 2017) (emphasis added).

The same is true here. Defendant did not cooperate. He did not accept responsibility, still does not accept responsibility, and continues to argue that he did nothing wrong. A guidelines sentence is necessary to avoid unwarranted sentencing disparities.

**C. A Guidelines Sentence Does Not Punish Defendant for Going to Trial**

Imposition of a guidelines fine does not impermissibly punish defendant for exercising his constitutional right to trial. *United States v. Winters*, 278 Fed. Appx. 781, 783 (9th Cir. 2008) ("A necessary corollary of plea bargaining is that defendants who go to trial may receive greater sentences than similarly situated defendants who do not."). Nor do sentencing reductions given to pleading defendants render defendant's guidelines sentence unreasonable under § 3553(a). *Id.* (*See also* U.S. Mem. at 40-42.)

The cases cited by defendant do not command a different result. (Def. Mem. at 21-22.) They simply stand for the uncontroverted proposition that a defendant may not be sentenced disproportionately *only* to punish him for going to trial. That is certainly not the case here. For the reasons discussed above, defendant's guidelines sentence appropriately reflects the scope and scale of the conspiracy, defendant's role in that conspiracy, and the actions he took to obstruct the investigation and trial.

//

//

## IV. A Custodial Sentence Is Appropriate Even Under Current Conditions

Although the COVID-19 pandemic is an extraordinary world event, defendant has failed to show that its impact on him differs from its impact on the American public or the federal prison population as a whole. The government is not attempting to minimize the risks of the current situation. However, the existence of COVID-19, without more, is not a sufficient basis to depart or vary from a guidelines sentence, especially considering the ability of the Court to extend defendant's self-surrender date, the need to avoid unwarranted sentencing disparities, defendant's personal characteristics, the statutory role of the Bureau of Prisons (BOP), and BOP's extensive and professional efforts to stop the spread of the virus. *See United States v. Raia*, 954 F.3d 594, 597 (3d Cir. 2020); *United States v. Shkreli*, No. 15-CR-637, Dkt. No. 734 (May 16, 2020) (denying motion for compassionate release where defendant's place of confinement had no instances of COVID-19 and defendant had no medical conditions placing him at risk).

***First,*** there is no constitutional impediment to taking the current circumstances into consideration by extending defendant's self-surrender date. The Speedy Trial Clause of the Sixth Amendment does not apply to imposition of a sentence, so it follows that it also does not apply to the date of surrender. *Betterman v. Montana*, 136 S. Ct. 1609, 1614 (2016) (recognizing that after conviction defendant is no longer presumed innocent and is, therefore, treated differently under the law).[9] And defendant cannot show a substantial and demonstrable prejudice or unjustified delay where he is out of custody and the reason for delay is to allow mitigation of a public health crisis. *See United States v. Ray*, 578 F.3d 184, 199 (2d Cir. 2009) (finding that a defendant would have to show substantial and demonstrable prejudice and unjustified reasons for the delay to show a violation of due process). Indeed, as he describes in his letter to the Court, defendant has used his leave of absence from Bumble Bee to engage in new business ventures and other projects, activities that can continue before he surrenders to BOP. (Ex. 1. At 9-10.)

[9] Defendant cites to *United States v. Carpenter*, 781 F.3d 599 (1st Cir. 2015) for the argument that the Speedy Trial Clause of the Sixth Amendment applies to a delay before sentencing. But *Carpenter* is a First Circuit opinion that predates *Betterman*.

That defendant may prefer to begin his sentence immediately is of no constitutional import. Courts in this district and elsewhere have extended self-surrender dates in light of COVID-19 without implicating any constitutional rights. For example, in *United States v. Garlock*, Judge Chhabria extended the self-surrender date from June 12, 2020 to September 1, 2020, while leaving the year-and-a-day prison term unchanged. No. 18-CR-418, 2020 WL 1439980 (N.D. Cal. Mar. 25, 2020).[10] Even outside the current circumstances, defendants are occasionally, at their request, given self-surrender dates a few months following imposition of the sentence.

***Second,*** taking the existence of the COVID-19 pandemic, without more, into consideration in determining defendant's sentence introduces unwarranted disparity between defendant's sentence and that of other similarly-situated defendants who were sentenced prior to the current circumstances. As the government discussed in its Sentencing Memorandum, the goal of § 3553(a)(6) is to promote national uniformity in sentences. *See United States v. Saeteurn*, 504 F.3d 1175, 1181 (9th Cir. 2007). The Court should therefore not use the current health situation as a basis for departing from the guidelines and creating an unwarranted sentencing disparity. The cases cited by defendant do not require the Court to find otherwise. (*See* Def. Mem. at 29.) Each of those cases can be factually distinguished from defendant's due to: (1) the health conditions of the defendant (e.g., where the defendant had a severe lung condition or unique health concerns, *see Perez* and *Huneeus*); (2) the status of the detained party (e.g., where the detainee was in custody for an immigration dispute, *see Jimenez* and *Xochihua-Jaimes*); or (3) findings related to the basis for pre-trial detention (e.g., a revised finding that the defendant did not pose a danger to the community warranting pre-trial suspension, *see Stephens*,

//

---

[10] Defendant cited *Garlock* in his Sentencing Memorandum and Motion for Departure, quoting Judge Chhabria as saying that "[b]y now it almost goes without saying that we should not be adding to the prison population during the COVID-19 pandemic if it can be avoided." (Def. Mem. 663 at 30-31.) Defendant's misleading quotation ignores the court's ultimate sentence of incarceration in that case. Indeed, the court imposed a custodial sentence despite the defendant in *Garlock* being a financially destitute, seventy-year old cancer survivor with early stages of dementia, who was also the sole caregiver for his wife, who was herself suffering from stage-four cancer.

or a finding that it was a "close call" whether defendant posed a danger to the community and releasing him to his father with strict conditions regulating his pre-trial release, *see Harris*).

***Third,*** BOP is in the best position to make an individualized assessment regarding where and whether it can appropriately care for and house defendant during the current COVID-19 crisis. *See Tapia v. United States*, 564 U.S. 319, 331 (2011) ("When a court sentences a federal offender, the BOP has plenary control, subject to statutory constraints, over [the place of imprisonment and treatment programs.]"); *United States v. Ceballos*, 671 F.3d 852, 855 (9th Cir. 2011) (per curiam) ("The Bureau of Prisons has the statutory authority to choose the locations where prisoners serve their sentence."); *Reeb v. Thomas*, 636 F.3d 1224, 1226 (9th Cir. 2011) ("Congress delegated to the BOP the duty to manage and regulate all federal penal and correctional institutions."). Twenty of BOP's forty-one low-security facilities, including defendant's second-choice facility, have no COVID-19 cases as of the date of this filing. The Court should allow BOP to determine where to house defendant during his term of custody, since BOP is best able to make an informed designation decision based on the most current information regarding the status of its facilities and the ability to take appropriation precautions to avoid the spread of COVID-19. And where BOP determines that there is increased COVID-19 risk to a particular inmate, BOP is authorized to consider that inmate for transfer to home confinement during the pandemic.[11]

***Fourth***, defendant is a physically healthy 59-year-old male on no medications and with no chronic health conditions. (PSR ¶ 52.) He is not of an age nor does he have any of the health conditions identified by the Centers for Disease Control and Prevention (CDC) that would place him in a high-risk population. ("People Who Are at Higher Risk for Severe Illness," available at https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html.) There is no reason for this Court to find that defendant cannot be adequately cared for while in the custody of BOP.

//

---

[11] *See* U.S. Department of Justice, "Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic," dated March 26, 2020, available at https://dojnet.doj.gov/usao/eousa/ole/tables/misc/aghome.pdf.

***Fifth,*** BOP has taken significant measures to protect the health of the inmates in its charge. BOP has had a Pandemic Influenza Plan in place since 2012.[12] The detailed Action Plan establishes social distancing, hygiene, and cleaning protocols, and addresses the quarantining and treatment of symptomatic inmates. It also includes a number of preventive and mitigation measures to limit transmissions of the disease throughout BOP facilities, including suspension of social visits; restrictions on internal inmate movements, in-person legal visits, official staff travel, training, and access by volunteers and contractors; extensive screening of staff and inmates (including screening of all new inmates); quarantine; and modified operations to maximize social distancing as much as practicable.[13] Staff and inmates have been issued face masks for when social distancing cannot be achieved. All new BOP inmates are screened for COVID-19 symptoms and risk of exposure. Asymptomatic inmates with a documented risk of exposure are quarantined; symptomatic inmates with documented risk of exposure are isolated and tested pursuant to local health authority protocols. In areas with sustained community transmission, all staff are screened for self-reported risk factors and elevated temperatures. Additionally, all inmates in every BOP institution are secured in their assigned cells/quarters for at least 14 days, to stop any spread of the disease. BOP continues to implement more stringent protocols as events develop. Most recently, on May 20, 2020, BOP implemented Phase 7, extending security measures until June 30, 2020.[14]

The extensive measures taken by BOP belie defendant's suggestion that BOP is failing to meaningfully address the risk posed to inmates. (*See* Def. Mem. 663 at 26-31.) To the contrary, they show that BOP has taken the threat seriously, has implemented steps to mitigate it, and continues to update policies and procedures in accord with current facts and recommendations.

---

[12] *See* Federal Bureau of Prisons, Health Services Division, Pandemic Influenza Plan-Module 1: Surveillance and Infection Control (Oct. 2012), available at https://www.bop.gov/resources/pdfs/pan_flu_module_1.pdf.

[13] *See* Federal Bureau of Prisons, BOP Implementing Modified Operations, *available at* https://www.bop.gov/coronavirus/covid19_status.jsp (last accessed May 27, 2020).

[14] *See* Federal Bureau of Prisons, Action Plan Phase VII, *available at* https://www.bop.gov/resources/news/20200520_covid-19_phase_seven.jsp. Further details and updates of BOP's modified operations are available to the public on the BOP website at a regularly updated resource page: www.bop.gov/coronavirus/index.jsp.

In sum, defendant—who has none of the risk factors identified by the CDC—provides no basis for why he deserves special treatment as a result of the global pandemic. Given the Court's ability to fashion the sentence to mitigate risks and BOP's ability to manage the risks post-sentencing, the pandemic should not result in a downward variance or departure.

**CONCLUSION**

As the multimillionaire CEO of a prominent American company, and in search of a potential $43 million payout, defendant conspired to increase prices on an American pantry staple. He did not commit the crime alone—he led his subordinates, his company, and the American packaged-seafood industry into the conspiracy. Defendant's crime harmed consumers across the country seeking an affordable food for their families and left a trail of destruction in his industry. Yet defendant fails to acknowledge his role in the conspiracy, even after conviction and on the eve of sentencing. He is deserving of a just punishment that reflects the seriousness of his offense and deters other corporate leaders from following the same path. Therefore, the government requests that the Court impose a guidelines sentence at offense level 30 with a term of imprisonment between 97 and 120 months and a $1 million fine.

Dated: May 27, 2020

Respectfully submitted,

/s/ *Leslie A. Wulff*
MANISH KUMAR
LESLIE A. WULFF
MIKAL J. CONDON
ANDREW SCHUPANITZ
Trial Attorneys
U.S. Department of Justice
Antitrust Division