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CHRISTOPHER LISCHEWSKI

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

CHRISTOPHER LISCHEWSKI,

Defendant.

Case No. 3:18-cr-00203-EMC

DEFENDANT CHRISTOPHER LISCHEWSKI'S RESPONSE TO THE GOVERNMENT'S SENTENCING MEMORANDUM

Date: June 3, 2020
Time: 2:30 p.m.
Dept. Courtroom 5 – 17th Floor
Judge: Hon. Edward M. Chen

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I. INTRODUCTION

The government asks the Court to ignore Chris Lischewski the human being; to ignore the life he has lived and good deeds he has done; to ignore the disproportionality of the harsh sentence it seeks compared to the other individuals engaged in the same price-fixing scheme; to ignore the sentences that have been imposed in antitrust cases in this district and across the country; and to ignore the once-in-a-century deadly pandemic sweeping the U.S. prison system, which could transform a custodial term into a death sentence.

The government ignores all of this and instead asks the Court to sentence a caricature of a greedy criminal kingpin that bears no resemblance to the kind, generous, hard-working, and loving man, husband, father, and son that is described in dozens of letters submitted to the Court. Instead of providing a fair and objective description of the evidentiary record, the government resorts to conclusions without evidentiary support, overheated rhetoric, *ad hominem* attacks on Mr. Lischewski and his family, and unfounded speculation. For example, the government claims (without citation to evidence) that the price-fixing conspiracy "increased prices paid by millions of Americans," caused "staggering" harm to consumers, and "deprived shoppers of the ability to … buy a loaf of bread." Gov't Mem. at 27, 44, 46–47 (ECF 665). None of this is true and there is not a shred of evidence in the record to support it. The government similarly claims that Mr. Lischewski was "motivated by greed," wanted a multi-million dollar "payday," and engaged in criminal conduct to "preserve his payout." *Id.* at 3, 38. As the President and CEO of a packaged seafood company in a competitive environment, Mr. Lischewski wanted Bumble Bee to succeed, but there is no evidence in the record to support the accusation that Mr. Lischewski was driven by an all-consuming desire to maximize his own wealth. To the contrary, letter after letter describes Mr. Lischewski as a generous person who puts the well-being of others ahead of his own. The government has never alleged, much less proven, that Mr. Lischewski gained an extra nickel from the conduct at issue in this case.

The government is forced to distort the facts because it requests a distorted sentence: 8 to 10 years of imprisonment. Although the government has alleged that 16 other "high-level executives" from Bumble Bee, StarKist, and Chicken of the Sea participated in the same price-

fixing conspiracy, the government has singled out Mr. Lischewski alone for over-the-top punitive treatment. *See* Gov't Not. of Coconspirator Stmts. at 5, 14–19. The government has never charged 13 of these individuals, and apparently is comfortable allowing them to avoid any punishment whatsoever for engaging in the same conduct that the government says warrants a decade behind bars in this case. Further, the government's recommended sentence drastically exceeds any recommendation the government will offer in the cases of its pleading cooperators, Scott Cameron, Kenneth Worsham, and Stephen Hodge.[1] The government already has agreed to request a sentence no longer than 10–16 months for Mr. Cameron—a sentence *ten times* less than the government's recommended sentence here. And, these cooperators almost certainly will enlist the government's assistance in seeking non-custodial sentences, as Mr. Cameron and Mr. Worsham admitted they intend to do. *See* Trial Tr. at 810:2–811:24 (Cameron); *id.* at 2074:18–25, 2080:24–2081:3 (Worsham). Every one of the 16 co-conspirators identified as such by the government participated in the exact same conspiracy at issue here. Yet, the government asks the Court to sentence Mr. Lischewski alone to a term of imprisonment of 8–10 years while all the rest skate entirely or get slaps on the wrist. How is that fair or proportionate?

The government's requested sentence in this case is so disproportionate that it cannot cite any antitrust case *ever* that has imposed a sentence of this magnitude, and the defense is aware of none. The government's requested sentence in this case is more than three times longer than the 36-month sentences Judge Illston imposed on senior executives of AU Optronics following trial in a case the government described as "the largest, most egregious antitrust conspiracy that the Department of Justice has ever prosecuted." *United States v. AU Optronics Corp.*, No. 09-cr-00110-SI, ECF 948 at 51 (N.D. Cal. Sept. 11, 2012). Recognizing the unprecedented nature of its requested sentence in the annals of criminal antitrust law, the government falls back to the sentences imposed on the likes of Jeffrey Skilling of Enron, Bernard Ebbers of WorldCom, and Timothy Rigas of Adelphia—some of the most massive criminal frauds in history that bear zero

[1] The government has delayed the sentencings of Mr. Cameron, Mr. Worsham, and Mr. Hodge until after sentencing in this case, presumably so it does not have to go on record with its disproportionate sentencing recommendations for its cooperators before Mr. Lischewski is sentenced.

resemblance to this case. Those comparisons are as unfair as the government's requested sentence.

In the end, the Court's duty is to impose a fair and proportionate sentence that is "sufficient but not greater than necessary," considering not only the conduct underlying the offense but also Mr. Lischewski as a human being. 18 U.S.C. § 3553(a). No just purpose can be achieved by singling out Mr. Lischewski for grotesquely severe punishment among many others similarly situated, and Section 3553 explicitly warns against such unwarranted disparities. *See id.* § 3553(a)(6). The Court should reject the government's sentencing request and impose a sentence of no more than 12 months of home confinement, with a condition of 1,000 hours of community service at Big Brothers Big Sisters of San Diego County.

II. THE GOVERNMENT DISTORTS THE FACTUAL RECORD AND MR. LISCHEWSKI'S CHARACTER

The government's sentencing memorandum seeks to rewrite the factual record to vilify Mr. Lischewski. Rather than stick to the actual evidence, the prosecutors use this opportunity to embellish and exaggerate. In so doing, they reveal an unwillingness to confront the significant limitations and gaps in the evidence. Mr. Lischewski sets forth in more detail below the extent of the government's mischaracterizations of the record, *see* Section IV, but here addresses the most egregious unsupported accusations now advanced by the government.

A. The government invents its claim of consumer harm.

Both before and during trial, the government specifically disclaimed the need to produce any evidence of consumer harm or impact on sales.[2] It now reverses course. In a transparent bid to artificially inflate the volume of commerce, the government not only invents a theory of customer harm, but hammers it hard, acting as if consumer harm was its central focus at trial. Indeed, the very first paragraph of the government's brief includes a blatant falsehood. It asserts that "[Mr. Lischewski's] conspiracy impacted billions of dollars in goods purchased by American

[2] The government maintained that it had no obligation to prove that any sales were affected by the conspiracy, repeatedly encouraging the Court to "give no consideration" to the "actual effect on competition." *See, e.g.*, ECF 353, Gov't Mot. to Exclude Test. of Deft.'s Expert Witness, at 4 (internal quotations and citation omitted).

households," Gov't Mem. at 1, when there is not one iota of evidence in the record that supports that bold claim. That first paragraph is just the beginning.

On at least ***five separate occasions*** in its sentencing memorandum**,** the government claims that the alleged price-fixing conspiracy harmed consumers, and each time the government fails to cite a single piece of evidence. The government cites *no* evidence for its assertion that the conspiracy "cheat[ed] American consumers out of competitive prices" because there is none. Gov't Mem. at 1:14–15. The government cites *no* evidence for its claim that the conspiracy "led to higher on-shelf pricing that was ultimately paid by consumers" because there is none. *Id.* at 12:19. The government cites *no* evidence for its statement that the conspiracy "increased prices paid by millions of American consumers in all fifty states" because there is none. *Id.* at 27:6–8. The government cites *no* evidence for its claim that the conspiracy "stole" consumers' "hard-earned dollars" causing "staggering" harm because there is none. *Id.* at 44:4–6.

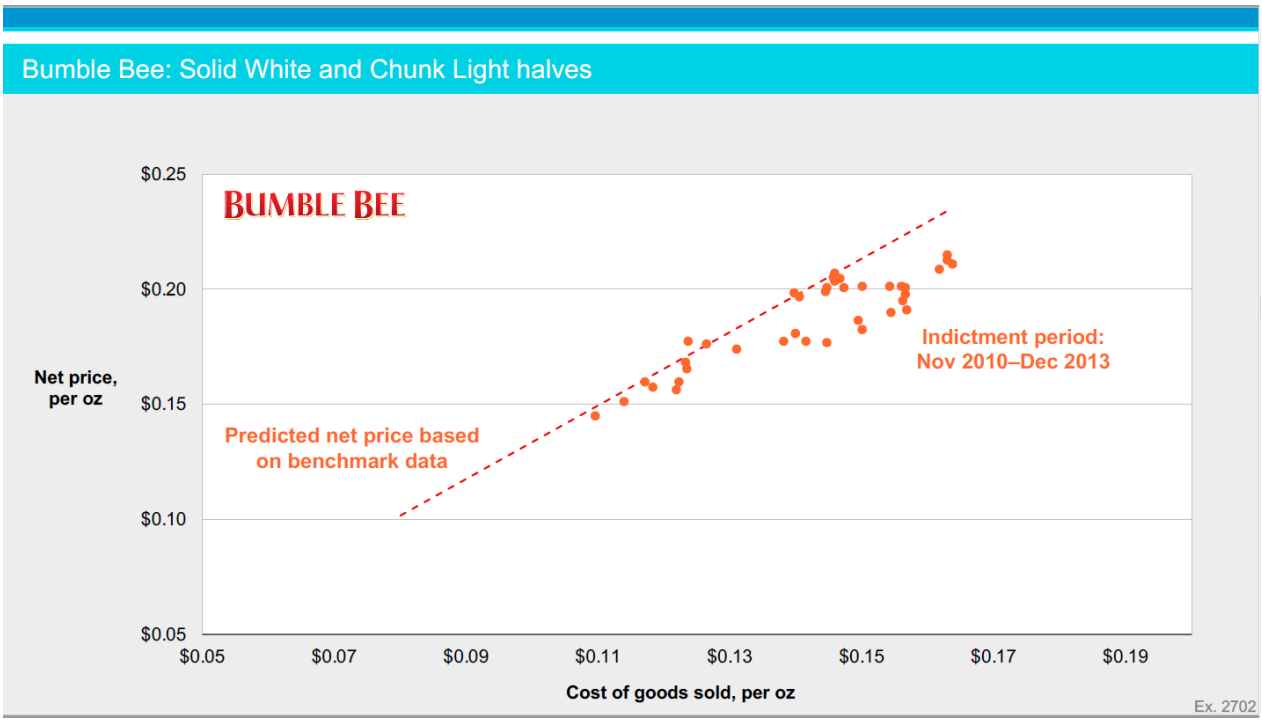
Instead, the factual record confirms that the conspiracy caused no harm to consumers. There is no evidence that the conspiracy led to consumers paying higher prices for tuna fish. As the government's own witnesses admitted, and as the economic data confirms, tuna prices increased during the conspiracy period due to skyrocketing fish costs—not as a result of the charged conspiracy. *See, e.g.*, *See* Trial Tr. at 1840:7–11 (Worsham), 1422:15–1423:23; 1467:14–1468:4 (Hodge); *see also id.* at 856:15–17, 889:3–7 (Cameron); 448:9–12 (Chang); TX 2662, 2663, 2664. But to acknowledge the lack of harm now, the government would have no volume of commerce theory (and a much less compelling story to tell), so it resorts to hyperbolic accusations unsupported by evidence.

This brings us to Safeway's Michael Baribeau, and the government's attempt to use Mr. Baribeau's testimony as its sole basis to prove consumer harm. The government contends that Mr. Baribeau's testimony establishes that conspiratorial pricing led to higher on-shelf pricing for consumers, depriving shoppers of the ability to buy a loaf of bread. Gov't Mem. at 12–14, 18. This is false. In reality, Mr. Baribeau testified that, to the extent tuna prices rose during the conspiracy period, it was ***entirely due to the cost of fish***. Trial Tr. at 1055:9–15; 1056:6–16, 1068:4–24 (Baribeau). He explained that fish costs increased to record levels in 2011 and 2012,

and that due to those rising fish costs (and not due to any conspiracy), Safeway—like the branded tuna companies—was forced to increase the price of its private label tuna. *Id.* Likewise, Mr. Baribeau testified that the increase in fish costs prevented Safeway from offering certain promotions for its private label tuna, including 10 cans of albacore for $10.00 (known as "10/$10s"). Trial Tr. at 1068:4–24 (Baribeau). That Safeway could not offer aggressive discounts, during a period of extreme increases in the cost of fish, simply resulted from market dynamics—not from any conspiracy.

Consistent with testimony from other witnesses, Mr. Baribeau's testimony also revealed that Bumble Bee, StarKist, and Chicken of the Sea could not have forced unjustified price increases on their customers—Safeway, Wal-Mart, Target, and others. These customers had tremendous market leverage with the tuna companies. Trial Tr. at 1428:1–1429:11 (Hodge). Mr. Baribeau explained that Safeway, like all other customers of Bumble Bee, StarKist, and Chicken of the Sea, was able to, and did, verify the branded tuna companies' costs. *Id.* at 1051:6–1055:1 (Baribeau). So, when those companies tried to increase their prices due to rising fish costs, Safeway fact-checked those costs—and had they not panned out, Safeway would have rejected the price increases. *Id.* Further, when Safeway wanted the branded tuna companies to lower their prices, it simply demanded lower prices. *Id.* at 1057:24–1058:13, 1065:7–10 (Baribeau). When Bumble Bee offered a low price, Safeway used that price to negotiate with StarKist, and vice versa. *Id.* The government's reliance on Mr. Baribeau's testimony to prove consumer harm reveals the flimsiness of its claim that consumers were harmed.

In fact, contrary to the government's storytelling, the data proves that, in light of skyrocketing fish costs, tuna prices should actually have been ***higher*** than they were during the conspiracy period. As set forth in Mr. Lischewski's objections to the presentence report, Yale economics professor James Levinsohn conducted an economic analysis comparing Bumble Bee's actual net prices during the conspiracy period to predicted prices based on historical cost and sales price data. *See* TX 2701 & 2702. This analysis shows that Bumble Bee's actual net prices during the conspiracy period were below the predicted prices one would expect based on Bumble Bee's costs during that period:



TX 2702.[3] Professor Levinsohn's analysis unequivocally disproves the government's post-trial argument that the charged conspiracy caused harm to consumers.

Because the government has no evidence of consumer harm, it tries to distract this Court's attention. In so doing, it goes so far as to exploit the legitimate hardship many people are facing during the current coronavirus public health crisis to advance its case. According to the government, "the coronavirus pandemic demonstrates the importance of affordable protein for Americans," and because of a conspiracy that, by the government's own admission, ended more than six years ago, "a shopper buying a few cans of tuna might be unable to also buy a loaf of bread." Gov't Mem. at 46:20–47:2. Yet again, the government cites *no* evidence for this because there is none. The criminal justice system should demand more from federal prosecutors who have a heightened duty of candor to the Court. *See* ABA Standards for Criminal Justice: Prosecution and Def. Function, §3-1.4 (4th ed. 2015) ("In light of the prosecutor's public responsibilities, broad authority and discretion, the prosecutor has a heightened duty of candor to

[3] As noted in Mr. Lischewski's objections to the PSR, Trial Exhibit 2702 was not introduced into evidence at trial due to the Court's *in limine* rulings applying the *per se* rule, however, it is proper for the Court to consider it now for purposes of sentencing. *See* Deft.'s Objs. to PSR at 7; Fed. R. Evid. 1101; U.S.S.G. §6A1.3(a); *United States v. Hunter*, 145 F.3d 946, 952 (7th Cir. 1998).

the courts . . . .").

B. The government exaggerates Mr. Lischewski's role.

Similarly, the government's contention that Mr. Lischewski was "the most culpable member of the conspiracy," Gov't Mem. at 2, is belied by the record. First, the government claims that Mr. Lischewski initiated the conspiracy to further his own financial interests. It asserts that, immediately after Lion Capital acquired Bumble Bee, rising fish costs threatened Mr. Lischewski's "$43 million payday," causing Mr. Lischewski to send an email to his Chief Operating Officer Doug Hines, with the phrase "peace proposal," which kicked off the charged conspiracy. *Id.* at 2–3. That accusation is disproven by the simplest timeline. Mr. Lischewski sent the email at issue in September 2010, months ***before*** Lion Capital acquired Bumble Bee, months before the financial models which the government claims gave rise to a purported financial motive were created, and months ***before*** the government even alleges that the conspiracy started.

Second, the government distorts both the trial testimony and documentary evidence to support its assertion that Mr. Lischewski had any expectation of a $43 million payday. This alleged payday was addressed by the trial testimony of the government's first trial witness, Lion Capital partner Jeff Chang. As Mr. Chang testified, the financial modeling presented in TX 324 (upon which the government now relies, Gov't Mem. at 3) was entirely hypothetical. It was one possibility among thousands. TX 324 is merely a spreadsheet that used to model a range of scenarios for Bumble Bee's business, projected many years in the future, and assuming a sale of a hypothetical version of Bumble Bee to a hypothetical seller for a hypothetical amount. Trial Tr. at 421:15–21, 423:13–18, 424:13–24 (Chang). But this evidence couldn't be further from what the government's brief suggests, which is that Mr. Lischewski alone conceived of and started the conspiracy in a desperate attempt to protect a $43 million check already in his pocket.[4] The

[4] The testimony by Mr. Chang cited by the government does not even suggest that Mr. Lischewski "stood to receive $43 million." *See* Gov't Mem. at 3:1 (citing Trial Tr. at 393:21-396:14). In fact, Mr. Chang testified to the contrary. *See* Trial Tr. at 396:8-14 (Chang) ("Q. Is that money all profit for the defendant? . . . A. No. Q. Why not? A. Because that -- that includes his amount of money that he reinvested back in the business.").

government's accusations about Mr. Lischewski's financial motivations are 100% speculative. There is no evidence that Mr. Lischewski was motivated to participate in price fixing to reap the hypothetical rewards set forth in these speculative financial models.

Third, the trial evidence shows that the conspiracy was led by Mr. Cameron and Mr. Worsham in their communications with StarKist and Chicken of the Sea—not by Mr. Lischewski. Mr. Cameron and Mr. Worsham were the ones to reach agreements with competitors. They managed the day-to-day operations of the conspiracy and exercised decision-making authority over it. Their communications with competitors show not that Mr. Lischewski was directing the conspiracy, but that Mr. Cameron and Mr. Worsham were, and further, that they hid their inculpatory communications from Mr. Lischewski. *See, e.g.*, TX 254, TX 309. But in an effort to inflate the Guidelines with an improper role enhancement, the government again mischaracterizes the evidence. For example, the government trumpets the "443 phone activations between Bumble Bee and StarKist employees during the course of the conspiracy," Gov't Mem. at 4:4–5. But in a footnote, it is forced to concede that not a single one of these calls involved Mr. Lischewski. *Id.* at n.2. Instead, those calls involved the true ringleaders of the conspiracy—Mr. Cameron, Mr. Worsham, and Mr. Hodge.

Some of the government's efforts to gin up evidence showing that Mr. Lischewski was the most culpable conspirator borders on the incredible. For example, the prosecutors would have this Court believe that, in the fall of 2011, after Mr. Handford left StarKist, Mr. Lischewski directed Mr. Worsham to find a new contact at StarKist with whom he could coordinate prices. Gov't Mem. at 5 (citing Trial Tr. 1635:3–1636:11). Then, without Mr. Worsham doing a thing, Steve Hodge of StarKist just happened reach out to Mr. Worsham *two months later* to "reaffirm[] StarKist's commitment to the conspiracy." *Id.* This simply is not believable. Everyone familiar with the factual record knows that it was Bob Worsham, Ken Worsham's father, who connected Ken and Steve Hodge. Although the government tries to paint Mr. Lischewski as the evil mastermind, there is no credible evidence that he managed or supervised anyone in connection with the alleged criminal conduct. The jury's verdict found only that Mr. Lischewski was a participant. The government now lacks sufficient evidence to prove he was the leader.

Finally, the government's argument that Mr. Lischewski oversaw Chicken of the Sea's involvement in the conspiracy is similarly unbelievable, in significant part because Mr. Chan's trial testimony failed to establish that he had ever reached an anticompetitive agreement with Mr. Lischewski. Even the government appears to concede as much. Indeed, the government states that Mr. Lischewski sent emails to Mr. Chan, and that, over breakfast, Mr. Chan told Mr. Lischewski "that it was not Chicken of the Sea's strategy to offer low promotions," but it no longer tries to act as if Mr. Chan and Mr. Lischewski reached any kind of agreement. *See* Gov't Mem. at 6–7. And this Court has agreed. As it stated during trial, "there was no explicit commitment on the part of Mr. Lischewski. There was no evidence that he agreed to anything." Tr. at 2468:20–25 (Court). Mr. Lischewski's sporadic communications with Mr. Chan fail to show that Mr. Lischewski was, as the government declares, "the most culpable member of the conspiracy." Gov't Mem. at 2.

C. The government gratuitously attempts to demonize Mr. Lischewski and his family.

The government's sentencing brief goes to great lengths to fictionalize Mr. Lischewski as a greedy executive who was so focused on an imagined payout that he was willing to sacrifice everything, including a career that he had worked his entire life to achieve. But while the government may believe that this caricature will advance its bloodthirsty sentencing goals, it is entirely inconsistent with the descriptions offered by everyone who has met Mr. Lischewski—from the testimony of the government's own witnesses, including Jeff Chang ("hardworking." "forthright," "truthful," "law-abiding," Trial Tr. at 410:4–13) and Renato Curto ("a good leader," *id.*, at 1100:4–18); to the account of Wayne Kay, former CEO of Big Brothers Big Sisters of San Diego County ("[Chris] has an impeccable reputation. He's honest. He's straightforward. He operates by the rules of the game, and he is nothing but a huge support," "Honest in every way, someone who always met their commitments, oftentimes exceeding their commitments, and one of the leading contributors to the Big Brothers Big Sisters organization," *id.*, at 2623:13–25); to the descriptions of the generous, kindhearted, and loving man described in the nearly 50 letters

submitted to the Court ("consistently honorable," a "strong moral character," a "loving heart"[5]).

The government's attempt to demonize Mr. Lischewski and his family reveals that it is not actually interested in the Court imposing a just punishment, but instead wants to use the sentencing process to advance a self-aggrandizing vendetta against Mr. Lischewski. This is most obvious in the government's many pointed references to Mr. Lischewski's personal assets. For example, in arguing for the statutory maximum fine of $1 million—$900,000 more than what the Probation Office recommended—the government painstakingly analyzed a full year of Mr. Lischewski's and his wife's credit card transactions. Gov't Mem. at 36, 39. Why put before the Court (and the public), in a sentencing brief, which concerns Mr. Lischewski's freedom, the amount he spent on wine over eight years ago, or call out the expenses of Mr. Lischewski's wife, who is a devastated spouse and mother, not a party to this case? There is nothing in the law which makes a defendant's personal economic circumstances—wealth or poverty—a proper sentencing consideration. Fixating on such improper considerations as wine purchases and retail spending is the cruel grandstanding of a playground bully, not the thoughtful, measured analysis worthy of the United States Department of Justice. Indeed, the repeated fictional and mean-spirited personal attacks made here by the government calls into question whether its sentencing position is even worthy of serious consideration by this Court.

III. THE GOVERNMENT'S RECOMMENDED SENTENCE FAILS TO PROPERLY ACCOUNT FOR THE SECTION 3553 FACTORS

A. The government's recommended sentence creates unwarranted disparities.

The government's recommended sentence of 97 to 120 months would result in massive disparities, both in this packaged seafood investigation and with respect to other Sherman Act cases. The government cannot dispute and thus ignores that it intends to recommend significantly lower sentences for every single other member of the conspiracy, even though each engaged in similar if not identical conduct. Indeed, the government already has agreed to request a sentence no longer than 10–16 months for Mr. Cameron. The government also would have the Court look

[5] ECF 663 at Exh. 2-35 (Humphreys); Exh. 2-23 (Horn); Exh. 2-9 (Pane).

the other way while it allows other members of the purported conspiracy to get off scot free for actions that it contends are horrific criminal conduct in Mr. Lischewski's case. Chicken of the Sea and every one of its executives received amnesty. Thus, Shue Wing Chan, Mike White, and others will never be prosecuted at all, much less punished. StarKist's Chuck Handford, Hubert Tucker, and Bob Worsham were never charged. But somehow Mr. Lischewski deserves to spend 8 to 10 years in prison? The government makes no effort to justify this disparity.

The government offers only one reason to view the other members of the conspiracy differently—some cooperated with the government. *See, e.g.*, Gov't Memo at 41 ("Cameron, Worsham, and Hodge accepted responsibility for their crimes and provided prompt and substantial cooperation with the government's investigation."). This includes Mr. Cameron, Mr. Worsham, and Mr. Hodge, but also all of the Chicken of the Sea executives, pursuant to their amnesty agreement. But the Ninth Circuit has squarely rejected previous government arguments that a 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. *See United States v. Caperna*, 251 F.3d 827, 831–82 (9th Cir. 2001). And, even this false excuse does not work for people like Mr. Handford and Mr. Tucker, who did not cooperate and have never been and never will be charged. The government is content to never hold them to account for conduct it claims in Mr. Lischewski's case entitles him to a decade in prison. Though the prosecutors seek to punish Mr. Lischewski—and drastically—for his failure to enlist as a cooperating witness, that is not how sentencing works. To enhance Mr. Lischewski's sentence based on his decision to go to trial rather than become a cooperating witness would violate his Fifth and Sixth Amendment rights. *Cf. Mitchell v. United States*, 526 U.S. 314, 327-30 (1999). The Sentencing Guidelines are supposed to treat all defendants who engaged in the same course of conduct equally. If someone cooperates, they get a 5K1.1 departure, but section 5K1.2 makes equally clear that a defendant's refusal to cooperate "may not be considered as an aggravating sentencing factor." U.S.S.G. §5K1.2. But here the government eschews that system and concocts a whole new set of Guidelines just for Mr. Lischewski.

Further, the government's proposed sentence in this case would result in massive

disparities in sentences in other antitrust cases. The sentence the government demands for Mr. Lischewski is so disproportionate that it cannot cite to a single antitrust case that has imposed a sentence of this magnitude. As noted above, the government's requested sentence in this case is more than three times longer than the 36-month sentences Judge Illston imposed on senior executives of AU Optronics following trial in a case the government described as "the largest, most egregious antitrust conspiracy that the Department of Justice has ever prosecuted." *United States v. AU Optronics Corp.*, No. 09-cr-00110-SI, ECF 948 at 51 (N.D. Cal. Sept. 11, 2012).

The cases cited by the government provide no justification for such a disproportionate sentence for Mr. Lischewski. In *United States v. VandeBrake*, to which the government cites repeatedly, the defendant pled guilty to *three* violations of the Sherman Act relating to the sale of ready-mix concrete. 771 F. Supp. 2d 961 (N.D. Iowa 2011). There, the Guidelines range was 21 to 27 months, but the District Court doubled Mr. VandeBrake's sentence to 48 months, due, in part, as set forth in a 54-page opinion, to the court's disapproval of Mr. VandeBrake's conduct and character and its decision to apply the fraud table of Guidelines Section 1B1.1. The court noted that concrete is used more than any other man-made material in the world, *id.* at 1003; that there were few concrete companies in northwest Iowa where Mr. VandeBrake's company was operating, *id.* at 1003–04; and that, by entering into three separate conspiracies, VandeBrake effectively created his own concrete cartel, *id.* at 1004. Further, the court wrote: "Equally troubling is the fact that VandeBrake is one of the few white collar defendants I have sentenced where the sentencing record is totally devoid of any community work, participation in any service organizations, or charitable giving. There is no record evidence of even a single good deed done by VandeBrake for anyone other than his family." *Id.* at 1008. There is no question that both Mr. VandeBrake's conduct and character differ tremendously from Mr. Lischewski's, and even still, Mr. VandeBrake's 48-month sentence was less than half what the government is here requesting. Likewise, in *United States v. Green*, the court sentenced Ms. Green to a 90-month sentence, where she was "the mastermind of a massive fraudulent scheme that bilked the federal government out of almost $60 million" that was earmarked for technology projects at schools and libraries. 592 F.3d 1057, 1060 (9th Cir. 2010). And in *United States v. Peake*, Mr. Peake was

sentenced to a 60-month sentence for "participating in one of the largest antitrust conspiracies in the history of the United States," by orchestrating a scheme to fix the prices of freight shipments to Puerto Rico. 804 F.3d 81, 84 (1st Cir. 2015). Needless to say, while these sentences for the most part do not come close to what the government is requesting for Mr. Lischewski, the conduct at issue is not comparable to even the most exaggerated version of the case against Mr. Lischewski.

Finally, because the government could not locate any Sherman Act sentence anywhere close to the 97 to 120 months it here demands, it instead conducted an extensive search for the longest white-collar criminal sentences ever ordered. *See* Gov't Mem., Appendix A. This brings the government to compare Mr. Lischewski to, among others, Jeffrey Skilling of Enron, Bernard Ebbers of WorldCom, Mathew Martoma of S.A.C Capital Advisors, Raj Rajaratnam of the Galleon Group, and Timothy Rigas of Adelphia. As this Court wells knows, these are perhaps the most massive criminal frauds and insider trader schemes in history that bear no resemblance to this case. It reveals both desperation and bloodlust that the government cites to these totally inapposite sentences in an effort to justify the 10 years it wants Mr. Lischewski to serve in prison.

B. The government's recommended sentence is unnecessary for deterrence.

The government essentially gives deterrence the back of its hand, stating in one conclusory paragraph that deterrence is important in white-collar cases, and thus, a "serious sentence" is here required. Gov't Mem. at 39. And even though 18 U.S.C. § 3553 dictates that the court must weigh both specific and general deterrence, the government fails even to mention—let alone acknowledge—that there is zero risk that Mr. Lischewski specifically will reoffend. However, not only does the Probation Office agree that Mr. Lischewski will not reoffend, but the Ninth Circuit has explicitly recognized that a "felony conviction and the conditions of probation constitute[] specific deterrence to prevent [defendants like Mr. Lischewski] from engaging in similar conduct in the future." *See United States v. Edwards*, 595 F.3d 1005, 1011 (9th Cir. 2010); *see also United States v. Gupta*, 904 F. Supp. 2d 349, 355 (S.D.N.Y. 2012).

Further, the investigation, indictment, trial, and sentencing of Mr. Lischewski, all of

which have been publicized widely, undoubtedly already served as general deterrence. More so than anyone else, CEOs of companies who are in the public eye understand the acute pain and embarrassment of prosecution that Mr. Lischewski has endured, and will continue to endure for the rest of his life, even after sentencing is complete. Executives like Mr. Lischewski, who reached their level of success through grit and hard work, and not through privilege, can surely imagine how it would feel to have that all taken away. While the government attempts to mush Mr. Lischewski together with all other faceless and nameless "defendants in white-collar cases" who it contends deserve to be locked up indefinitely, a careful consideration of the deterrent effect clearly weighs in favor of the sentence requested by Mr. Lischewski.

C. The government's recommended sentence ignores Mr. Lischewski's personal history and good character.

While the government fails to grapple with the Section 3553(a) factors, a careful consideration of each factor, including in particular Mr. Lischewski's personal history and characteristics, warrants a substantial downward variance.

Mr. Lischewski is a kind, hardworking, generous, and compassionate man. The letters submitted to this Court are consistent in describing Mr. Lischewski's good spirit—his love for his mother, wife, and son; his dedication to the San Diego community; and his warmth and thoughtfulness in mentoring and guiding others. Success was not handed to him. Rather, he worked diligently and honestly, dedicating himself to the companies and industries in which he worked. And once he had achieved success, he continued to look behind him, helping others up, both those different from and similar to himself. While Mr. Lischewski has been convicted of a crime, scores of his friends and relatives describe Mr. Lischewski as honest, trustworthy, honorable, and straightforward. By all accounts, the conduct for which he was convicted is completely out of character. All of this deserves to be considered at sentencing.

D. Section 3553 supports a sentence of 12 months' home confinement with a condition of community service.

Based on each of the Section 3553(a) factors, a non-custodial sentence of 12 months' home confinement, with a condition of 1,000 hours of community service, is "sufficient but not

greater than necessary" to serve the purposes of sentencing in Mr. Lischewski's case.

This Court has the authority to sentence Mr. Lischewski to a term of 12 months' home confinement. The Sentencing Guidelines provide that home confinement "may be imposed as a condition of probation or supervised release . . . as a substitute for imprisonment." U.S.S.G. §5F1.2. While, under the Sentencing Guidelines, a term of probation (with a condition of home confinement) is available for defendants whose Guidelines range falls within Zone A or B of the Sentencing Guidelines[6], the Guidelines are not binding and the present extenuating circumstances in the nation's prisons provide more than sufficient justification for this Court to sentence Mr. Lischewski to probation with a condition of home detention.[7] *Nelson v. United States*, 555 U.S. 350, 352 (2009) (citations omitted) ("The Guidelines are not only not mandatory on sentencing courts; they are also not to be presumed reasonable."). And indeed, courts take into consideration specific circumstances relating to the defendant to depart downward, including from a Zone C Guidelines range to a sentence of probation, and have sentenced defendants similarly situated to Mr. Lischewski to home confinement. *See, e.g., United States v. Repp*, 464 F. Supp. 2d 788, 790–91 (E.D. Wis. 2006) (where defendant's Guidelines range fell within Zone C, the court imposed a sentence of three-years supervised probation, including six months' home detention); *United States v. Joachim*, Case No. 2:11-cr-00511, ECF No. 563 (E.D. Cal., Sept. 26, 2016) (where defendant's Guidelines range fell within Zone C, the court imposed a sentence of time served, based on a consideration of the Section 3553 factors); *United States v. Karatz*, Case No. 2:09-cr-00203-ODW, ECF No. 452 (C.D. Cal., Nov. 10, 2010) (sentencing former KB Homes CEO Bruce Karatz, who was convicted of securities fraud, to a term of five years' supervised release, including 2,000 hours of community service and eight months' home confinement).

[6] Properly computed, Mr. Lischewski's Guidelines range falls within Zone C.

[7] 18 USC § 3561 also makes clear that Mr. Lischewski can be sentenced to a term of probation. It provides that "A defendant who has been found guilty of an offense may be sentenced to a term of probation unless—(1)the offense is a Class A or Class B felony and the defendant is an individual; (2)the offense is an offense for which probation has been expressly precluded; or (3)the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense that is not a petty offense." Here, Mr. Lischewski has been convicted of a Class C felony. 18 USC § 3559; *see also United States v. Broadcom Voice & Data, Inc.*, 2006 WL 5044733 (S.D.N.Y. Sept. 29, 2006) (a violation of the Sherman Act is a Class C felony). Thus, a term of probation, with a condition of home confinement, is appropriate.

Further, a sentence of home confinement, with a condition of community service, will have a sufficiently punitive effect and will serve the public interest. Mr. Lischewski will be confined to his home and will only be allowed to leave for pre-approved activities, which will be a clear restraint on his liberty. *See Gall v. United States*, 552 U.S. 38, 48–49 (2007) (recognizing that even probation has considerable punitive effect and greatly restricts a convicted person's liberty). And a sentence of home confinement will allow Mr. Lischewski to continue to serve the San Diego community, including by working for Big Brothers Big Sisters. *See United States v. Turner*, 915 F.2d 1574, 1990 WL 150475, at *4 (6th Cir. Oct. 5, 1990) ("It seems ill-conceived to deprive the ... community of [defendant's] service by sentencing him to prison when other means of punishment are available.").

IV. THE GOVERNMENT'S GUIDELINES CALCULATION IS OVERSTATED

The flaws inherent in the advisory Guidelines are compounded by the government's faulty application of them. As a result of multiple errors in its Guidelines calculation—every one of which has the effect of substantially increasing the advisory sentencing range—the government takes a Guidelines calculation that already overstates the harm in antitrust cases and moves it into the realm of the absurd. The correct offense level is 12, not 30.

A. The government must prove sentencing enhancements by clear and convincing evidence.

The government does not dispute that, as "the party seeking to adjust the offense level," it "bears the burden of proving the facts necessary to apply the adjustment[s]." *See* Gov't Mem. at 14. The government nonetheless fails to acknowledge the magnitude of its heavy burden. The government cites *United States v. Allen*, 434 F.3d 1166 (9th Cir. 2006), which suggests that the government can satisfy its burden with a preponderance of the evidence.[8] But, as explained in Mr. Lischewski's objections to the PSR, where, as here, the enhancements would have an "extremely disproportionate effect on the sentence relative to the offense of conviction," the

[8] Unlike the 18-levels of enhancements the government seeks here, in *Allen*, the government merely sought a 2-level enhancement for possessing counterfeiting paper, which did not have an extremely disproportionate effect on the sentence relative to the offense of conviction in that case.

government is required to prove them with clear and convincing evidence. *United States v. Berger*, 587 F.3d 1038, 1047 (9th Cir. 2009) (citation omitted); *see* Deft.'s Objs. to PSR (ECF 664) at 3–4.

Recognizing the lack of support in the record for its overstated volume of commerce figure, the government attempts to shirk its burden of proof altogether, claiming that Mr. Lischewski bears the burden of proving that sales were "completely unaffected" by price fixing. Gov't Mem. at 17. That is wrong under the government's own authority. In *Allen*, the Ninth Circuit rejected the argument that the government may shift the burden of proof to the defendant to prove that sentencing enhancements are inapplicable. In that case, the government sought to shift to the defendant the burden of proving that "the quality of the counterfeit currency" at issue did not qualify for an enhancement for possessing a "counterfeiting device or materials used for counterfeiting" under Section 2B5.1(b)(2)(A) of the Guidelines. *Allen*, 434 F.3d at 1170–71, 1173. The court disagreed, holding that a "defendant does not bear the burden of proof with regard to sentencing enhancements, as it is not the defendant who is seeking a higher offense level." *Id.* at 1173. The same is true here. As the party "seeking a higher offense level," the government bears the burden of establishing volume of commerce and the other enhancements—Mr. Lischewski "does not bear the burden of proof with regard to sentencing enhancements." *Id.*

The government's out-of-circuit authorities do not support a contrary conclusion. To the extent those authorities are persuasive at all on the burden of proof—a dubious proposition considering the Ninth Circuit's holding in *Allen*[9]—they make clear that the volume of commerce framework in the Guidelines "does not excuse altogether the government's need to prove that the prices charged were 'affected by' the conspiracy." *SKW Metals*, 195 F.3d at 91. As the Eleventh

[9] The government cites the Seventh Circuit's decision in *United States v. Andreas*, 216 F.3d 645 (7th Cir. 2000), which relies on Judge Newman's concurrence "in substantial part" in the Second Circuit's decision in *United States v. SKW Metals & Alloys, Inc.*, 195 F.3d 83 (2d Cir. 1999). *See* Gov't Mem. at 17. But the "substantial part" of the Second Circuit's opinion in *SKW Metals* to which Judge Newman concurred did *not* include the majority's holding on the burden of proof, which, as noted above, places the burden on the government. Judge Newman disagreed with the "majority's approach" to the burden of proof, criticizing it as "unclear." *See SKW Metals*, 195 F.3d at 93 (Newman, J., concurring in substantial part). In any event, to the extent these out-of-circuit authorities suggest shifting the burden of proof onto Mr. Lischewski, they conflict with the Ninth Circuit's holding in *Allen* that such burden shifting is improper.

Circuit explained in *United States v. Giordano,* "the Government must prove that the prices charged were 'affected by' the conspiracy." 261 F.3d 1134, 1146 n.15 (11th Cir. 2001) (internal quotation marks and citation omitted). The government has failed to meet its burden of proving the volume of commerce and other enhancements by clear and convincing evidence.

B. The government has failed to prove an enhancement for volume of commerce.

As detailed in Mr. Lischewski's objections to the PSR, the record fails to demonstrate that the conspiracy affected any commerce at all. *See* Deft.'s Objs. to PSR at 5–11. Although the burden of proof rests with the government to establish the volume of affected commerce by clear and convincing evidence, Mr. Lischewski demonstrated with uncontested economic evidence that any agreements with competitors had no impact on actual transactions. That evidence showed that Bumble Bee's customers did not pay list prices, net prices changed independent of list prices, net prices the companies charged did not follow the allegedly fixed pricing guidance, and net prices customers paid were dictated by costs. *See id.* at 7–9 (collecting evidence). An economic analysis conducted by Professor James Levinsohn, a distinguished Yale economist, leaves no doubt that the government cannot meet its burden of demonstrating that commerce was "affected" by the conspiracy. That analysis, described in detail in Mr. Lischewski's earlier briefing, and above, demonstrates that Bumble Bee's actual net prices during the conspiracy period were *below* predicted prices one would expect given Bumble Bee's costs during that same period. *See id.* at 7–8; TX 2702. This unrebutted economic analysis disproves the government's speculation that commerce was affected by the conspiracy.

What is the government's answer to this economic evidence demonstrating that the conspiracy did not affect any commerce? It has none. The government admits that Professor Levinsohn's economic evidence is "uncontested," but attempts to brush aside its critical significance by claiming that "one would expect to see pricing variation at different customers." Gov't Mem. at 21. But that was just one of the many "uncontested" points that Professor Levinsohn made. The government has no response to the others, including the uncontested evidence that the actual prices Bumble Bee charged during the conspiracy period were dictated by Bumble Bee's costs and, in fact, were *lower* than one would expect given those costs. Nor has

the government attempted to submit any economic evidence of its own, instead pointing to a lone sentence in the Second Circuit's opinion in *SKW Metals* that the "volume of affected commerce does not require a sale-by-sale accounting, or an econometric analysis, or expert testimony." 195 F.3d at 91. But that says nothing of the scenario here, where the defense *has* offered unrebutted and uncontested expert testimony establishing that the conspiracy failed to affect any commerce.

The government's memorandum does not address its critical failure of proof. Instead, the government advances a fundamentally inconsistent position than the one it has taken throughout this case. Before and during trial, the government maintained that it need not prove that the conspiracy had any effect on actual sales because it charged a *per se* case and the agreement itself is the crime. *See* Deft.'s Objs. to PSR at 6–7. Now, when it comes time for sentencing, the government takes the position that the price-fixing agreements alone are "sufficient to show that the canned tuna sold by Bumble Bee during the conspiracy was affected." Gov't Mem. at 19. On this basis, the government asks the Court to assume that "the conspiracy affected the prices of all sales of branded retail-sized canned tuna made during the conspiracy." *Id.* at 18. The government is talking out of both sides of its mouth.

Aside from its doublespeak, the government's approach directly contravenes the law. Virtually every appellate court that has analyzed the issue has rejected the government's theory that the Court may simply assume that *all* sales during the conspiracy were "affected." In *SKW Metals*, the government argued, as it does here, that because the jury found an illegal agreement "all sales made by SKW between the inception and the end of the conspiracy were 'affected by' the illegal agreement, whether the sale prices were at, above, or below the target price." 195 F.3d at 90. The Second Circuit flatly rejected the government's "all-inclusive formula" for calculating volume of commerce. *Id.* As the court explained, "a conspiracy warranting conviction can exist even if, for sentencing purposes, it does not succeed in affecting prices throughout the entire period of the conspiracy, or at all, and we therefore reject the government's all-inclusive formula." *Id.* The court concluded that, although sales need not have occurred at a specific agreed-upon price to have been affected, they must have been "influenced" in some measurable way—with above-market pricing or unfair terms—to be included in the volume of commerce

calculation. *See id.* at 90. On the other hand, where, as here, an illegal agreement was "ineffectual and had no effect or influence on prices," then those sales were not "affected by the illegal agreement, and should be excluded from the volume of commerce calculation." *Id.* at 91. On remand, the district court held that only sales within a three-month period of the two-year conspiracy were shown to have been made at an elevated price, and thus were affected by the conspiracy, and the Second Circuit affirmed. *See United States v. SKW Metals & Alloys, Inc.*, 6 Fed. App'x 65, 66 (2d Cir. 2001).

The Eleventh Circuit reached a similar conclusion in *United States v. Giordano*. In *Giordano*, the volume of commerce calculation was based only on a two-month period where the government presented "detailed pricing summaries showing that [the defendants'] sales during this period were consistently at or near the prices agreed upon…." 261 F.3d at 1147. As the government concedes, the evidence in this case shows the exact opposite—actual sale prices "varied based on retail customer, input costs, and even the day of a given transaction," and did not occur at or near any agreed-upon prices. *See* Gov't Mem. at 21. Where, as here, a conspiracy "does not succeed in affecting price" it has "no effect on commerce." *Giordano*, 261 F.3d at 1145 (citation omitted). "When the illegal agreement is ineffectual during a certain period of time, those sales should not be included in the volume of commerce, because they were not 'affected by' the illegal agreement." *Id.* at 1146–47 (citation omitted).

The Seventh Circuit's decision in *United States v. Andreas* is in accord. There, the court "disagree[d]" with the same argument that the government advances here—"that all sales during the time period of the price-fixing conspiracy should be counted" for volume of commerce "simply because they occurred during the period of the conspiracy." *Andreas*, 216 F.3d at 677. As that court recognized, "sales that were entirely unaffected did not harm consumers and therefore should not be counted for sentencing because they would not reflect the scale or scope of the offense." *Id.* at 678.[10]

[10] It bears mention that the Seventh Circuit's application of a lower "preponderance of the evidence" standard and burden shifting onto the defendant are inconsistent with Ninth Circuit authority, as discussed above. *See Andreas*, 216 F.3d at 678–79.

Instead of attempting to carry its burden of proving by clear and convincing evidence that any specific commerce was supposedly "affected" by the conspiracy, the government asserts that every single retail sale of Bumble Bee canned tuna from November 2010 through December 2013 was affected because the conspiracy was effective "as soon as it started." Gov't Mem. at 11. That argument is unsupported by the record. The government's own witnesses acknowledged that the conspiracy was not effective from the start and remained ineffective throughout the conspiracy period. *See, e.g.*, Trial Tr. at 536:18–24, 545:25–546:5, 568:23–569:23, 831:24–832:10, 833:2–11, 834:3–16, 847:25–848:18, 851:24–852:18, 868:17–869:6, 918:21–23 (Cameron); 1834:21–1835:18, 1893:18–1894:10, 1940:1–21, 2009:14–22, 2018:5–9, 2022:14–18, 2039:18–21 (Worsham); 1406:5–7, 1441:10–14, 1442:1–8, 1453:9–1454:3, 1460:2–11, 1461:6–14, 1464:14–21 (Hodge); 443:3–10, 445:10–23, 447:4–17, 450:12–23, 459:3–16 (Chang); 2291:4–7, 2293:25–2295:13, 2298:10–14, 2305:3–12, 2308:4–8, 2316:4–6 (Chan). The contemporaneous documentary evidence shows that the canned tuna market was extremely competitive during the entire conspiracy period, with all three companies consistently undercutting each other to compete for business and Chicken of the Sea routinely pricing below cost. *See, e.g.*, TX 154, 187, 199, 200, 299, 310, 2131A, 2149, 2154, 2171, 2192, 2214, 2279, 2624, 2648, 2768. The government conceded in its closing argument that "it took longer than expected" for the price-fixing agreements "to be reflected in the market." Trial Tr. at 3218:24–3219:7 (government). As the government acknowledged, "[t]here was still evidence of competition in 2011, and we don't dispute that." *Id.* Because the government has admitted that the conspiracy was "ineffectual during [] certain time period[s]" of the conspiracy, it has necessarily conceded that its volume of commerce calculation, which sweeps in every single sale during these "ineffectual" periods, is incorrect. *See Giordano*, 261 F.3d at 1146–47.

The government also asserts that because prices increased and certain promotional price points diminished, the conspiracy must have "affected" commerce. *See* Gov't Mem. at 13–14, 18. But, as the government's own witnesses admitted at trial, and as the economic data confirms, prices increased and certain promotions had to be limited during the conspiracy period because costs skyrocketed to unprecedented levels during the same period. Price increases were

"inevitable" and the companies "had no choice" but to take them due to the escalating fish costs. *See* Trial Tr. at 1840:7–11 (Worsham), 1467:14–1468:4 (Hodge); *see also id.* at 856:15–17, 889:3–7 (Cameron); 448:9–12 (Chang), 1422:15–1423:23 (Hodge). The government has conceded as much. *See* Oct. 18, 2019 Hr'g Tr. at 101:12–17 (acknowledging that "the relevant evidence is that costs were increasing; and with costs increasing" the tuna companies increased their prices). Notwithstanding the government's attempt to distort his testimony, Safeway's Mike Baribeau admitted the same. Mr. Baribeau testified that the increases in tuna prices during the conspiracy period were caused by increases in fish costs. *See* Trial Tr. at 1055:9–15; 1056:6–16, 1068:4–24 (Baribeau). Indeed, Safeway increased its own prices for Safeway's private label tuna and ceased offering certain promotional price points, including 10/$10s, due to rising costs. *Id.* at 1068:4–24 (Baribeau).

The government tacitly concedes that its more than $1 billion volume of commerce calculation is overstated by presenting a "more limited calculation" of the volume of commerce. *See* Gov't Mem. at 20. This alternative volume of commerce figure—which is barely above the $600 million minimum for the government's proposed 12-level enhancement—suffers from the same fatal flaws as the government's original overstated calculation. The government assumes that every single sale of Bumble Bee's 5-ounce cans from June 2011 through December 2013 was "affected" by the conspiracy. But, again, the government ignores all of the economic and other evidence described above demonstrating that Bumble Bee's sales during this period were not impacted by the conspiracy. *See, e.g.*, Trial Tr. at 847:25–848:18 (Cameron testimony that StarKist and Chicken of the Sea were "competing at the depths of pricing" *after* the first list price took effect in June 2011); TX 187, 199, 200, 310, 2149, 2154, 2171, 2192, 2214, 2279, 2648.

Finally, the government's approach to calculating volume of commerce in this case cannot be squared with its substantially lower volume of commerce calculation for Mr. Cameron and Mr. Worsham. *See* Deft.'s Objs. to PSR at 9–10. The government attempts to legitimize this disparity by pointing to Mr. Cameron's and Mr. Worsham's "cooperation." Gov't Mem. at 20. But, as noted above, the Guidelines account for cooperation through downward departures under Section 5K1.1 and acceptance of responsibility under Section 3E1.1, not through a more lenient

application of the volume of commerce. The government suggests that these cooperators are entitled to a reduction for "providing self-incriminating information previously unknown to the government." Gov't Mem. at 20. However, the government fails to identify any specific "previously unknown" information that each of these cooperators provided that would impact the volume of commerce calculation, and fails to explain how Mr. Cameron and Mr. Worsham each provided "previously unknown" information that had the exact same impact on the volume of commerce calculations in their respective cases. Moreover, the government admits that it first learned this supposedly "previously unknown" information through Bumble Bee's corporate cooperation. *See id.* As such, the government cannot justify its reduction for Mr. Cameron and Mr. Worsham under Section 1B1.8 of the Guidelines, because the information they provided was already "known to the government." U.S.S.G. §1B1.8(b)(1).

The government's manipulation of the volume of commerce calculation in Mr. Lischewski's case undermines the entire reason 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 district court abused its discretion based on inconsistent application of 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). If these principles mean anything, they must mean that a defendant's volume of commerce calculation cannot exceed—much less triple—the calculation applied to co-conspirators of the same company charged with participating in the same conspiracy during the same time period.[11]

[11] As Mr. Lischewski previously explained, should the Court find that any volume of commerce was "affected"—which is not the case here—a downward adjustment is warranted because, in this case, the volume of commerce figure greatly overstates the conduct at issue. *See* Deft.'s

Accordingly, the Court should decline to apply any enhancement for volume of commerce because the government has failed to establish that any commerce was affected by the conspiracy.

C. The government has failed to prove an enhancement for role in the offense.

The government's evidence fails to establish that Mr. Lischewski "organized or led" the conspiracy. *See* U.S.S.G. §3B1.1. To make up for its lack of evidence, the government exaggerates the documents and testimony, advances unsupported argument, and attempts to substitute Mr. Lischewski's job title for proof that he organized or led the conspiracy. None of this is sufficient to warrant the government's proposed four-level role enhancement.

The government portrays Mr. Lischewski as the "ringleader" who "orchestrated" the conspiracy, *see* Gov't Mem. at 23, 40, 42, but a fair reading of the record shows that Mr. Lischewski was far from the most culpable person. Contrary to the government's argument, this was not a "top-down" conspiracy. The conspiracy was orchestrated by Mr. Cameron and Mr. Worsham in bilateral communications with their sales and trade marketing counterparts at StarKist and Chicken of the Sea. The government appears to concede as much, recognizing that it was Mr. Cameron and Mr. Worsham who "implemented the conspiracy by reaching price-fixing agreements with their competitors." *Id.* at 25.

Indeed, virtually all of the contemporaneous evidence the government introduced at trial points to the culpability of Mr. Cameron and Mr. Worsham, not Mr. Lischewski. The hundreds of phone calls that the government trumpeted at trial—and again highlights in its sentencing memorandum—involved Mr. Cameron and Mr. Worsham and their counterparts; not Mr. Lischewski. *See* Gov't Mem. at 4 n.2; *see also* TX 1 (phone records); TX 2793 (stipulation that the phone records show no activations between Mr. Lischewski and Mr. Handford, Mr. Hodge, or Mr. White between January 1, 2009 and December 31, 2014). The emails with competitors directly implicate Mr. Cameron and Mr. Worsham, including several where they hid their inculpatory communications from Mr. Lischewski. *See, e.g.*, TX 254, TX 309. Bumble Bee's list price increases were developed by Mr. Worsham's trade marketing team, in consultation with Mr.

Objs. to PSR at 10–11.

Cameron and his sales team. *See* Trial Tr. at 1840:17–22, 1841:24–1842:24 (Worsham). And the supposed agreements on pricing guidance had nothing to do with Mr. Lischewski at all. Mr. Worsham and his trade marketing team were responsible for Bumble Bee's pricing guidance and, as Mr. Worsham conceded, "[n]one of the guidance documents go to Mr. Lischewski." *See id.* at 1924:13–17, 1931:24–25 (Worsham); *see also, e.g.*, TX 120, 127, 144, 146, 174, 178.

The role enhancement addresses the relative culpability of participants in the same conspiracy. "The role enhancement cannot apply if the defendant and the other participant[s] are merely co-equal conspirators." *United States v. Gagarin*, 950 F.3d 596, 606 (9th Cir. 2020) (internal quotations and citation omitted). In *United States v. Holden*, for example, the Ninth Circuit overturned a district court's imposition of a role enhancement where co-conspirators were "comparable in their responsibility" and "co-equal" in their criminal conduct, but the district court impermissibly singled out just one of the defendants for a role enhancement. 908 F.3d 395, 402 (9th Cir. 2018). As in *Holden*, the record shows that Mr. Cameron and Mr. Worsham had a "co-equal" role in the conspiracy—indeed, a far greater one—as compared to Mr. Lischewski. As such, the Court should decline to impose any role enhancement on Mr. Lischewski.

With scarce contemporaneous evidence to support its claim that Mr. Lischewski organized or led the conspiracy, the government suggests that Mr. Lischewski must have organized or led the conspiracy because he had "final authority to approve all pricing decisions." Gov't Mem. at 25. Mr. Lischewski has never disputed that he signed-off on Mr. Worsham's recommendations for Bumble Bee's list prices. *See* Trial Tr. at 2772:13–15 (Lischewski). He had done so for nearly fifteen years prior to the alleged conspiracy without the government ever suggesting that either Mr. Worsham or Mr. Cameron were engaged in price fixing. Because Mr. Lischewski signed off on Mr. Worsham's recommended list prices does not mean that he orchestrated the conspiracy. On the contrary, at the time Mr. Worsham sought Mr. Lischewski's approval for Bumble Bee's list price increase in March 2011—the very first list price increase the government claims was fixed—StarKist had already publicly announced its own list price increase days earlier. *See* Trial Tr. at 1859:19–22 (Worsham); TX 166, 2104. And, by his own account, all Mr. Worsham told Mr. Lischewski about that list price increase when seeking his approval was

"StarKist has taken a list price increase, and in light of that, I recommend the following" list price increase for Bumble Bee. *Id.* at 1861:4–8 (Worsham). That evidence lends no support to the government's spin that Mr. Lischewski had "his hands in nearly every single aspect of the criminal enterprise." Gov't Mem. at 26.

The government further contends that because Mr. Lischewski was "the CEO of Bumble Bee and self-acknowledged industry leader, … [he] led and organized the conspiracy." Gov't Mem. at 23. The government advances this supposition throughout its sentencing memorandum, seeking to twist Mr. Lischewski's reputation as a respected executive and industry leader into evidence that he was a criminal mastermind.[12] But, as explained in his objections to the PSR, Mr. Lischewski's leadership of Bumble Bee (or within the tuna industry more broadly) is insufficient as a matter of law to show that he organized or led criminal conduct. *See* Deft.'s Objs. to PSR at 12; *see also United States v. Starnes*, 583 F.3d 196, 217 (3d Cir. 2009). Rather, to prove a role enhancement, the government must establish that Mr. Lischewski "organized other participants *for the purpose of carrying out the charged crimes*." *Holden*, 908 F.3d at 402 (internal alterations omitted and emphasis added). Under the government's theory, any successful leader in any field—whether it is packaged seafood, finance, or the law—could be exposed to allegations by prosecutors that they "organized or led" criminal conduct simply by virtue of their professional success. That is not the law.

The government also uncritically embraces Mr. Cameron's and Mr. Worsham's self-serving testimony that Mr. Lischewski supposedly "directed" them to fix prices. *See, e.g.*, Gov't Mem. at 5. But, as explained in detail in Mr. Lischewski's Objections to the PSR (at 11–16), that testimony was not credible, was uncorroborated, was not accepted by the jury, and the Court should examine it "with greater caution than that of other witnesses." *See* Final Jury Instrs. (ECF

[12] *See, e.g.*, Gov't Mem. at 2 (arguing that Mr. Lischewski oversaw Bumble Bee's pricing because he "was the senior-most executive at Bumble Bee," and a "hands-on manager" who "directly supervised" Mr. Cameron and Mr. Worsham); *id.* at 21-22 ("As Bumble Bee's CEO, he oversaw and directed Cameron's and Worsham's participation in the conspiracy"); *id.* at 23 ("Defendant was the CEO of Bumble Bee and … was Cameron and Worsham's supervisor"); *id.* at 25 (citing Mr. Lischewski's job title and "hands on leadership style"); *id.* at 26 (citing Mr. Lischewski's "leadership role in the entire packaged-seafood industry").

626), No. 11. Mr. Cameron and Mr. Worsham testified to virtually no specifics supporting their claims that Mr. Lischewski directed them to engage in criminal conduct. *See* Deft.'s Objs. to PSR at 12–15. The few details Mr. Cameron and Mr. Worsham claimed to recall were contradicted by their prior statements, inconsistent with contemporaneous documentary evidence, and illogical. For example, in pre-trial interviews with the government, Mr. Cameron *denied* that Mr. Lischewski ever told him "directly to obtain information from competitors." TX 2439 at 239. And, Mr. Cameron's story that Mr. Lischewski ordered him to reach a "truce" with StarKist in late-2010 makes no sense considering that Mr. Cameron had no ability to effectuate such a truce without Mr. Worsham, who did not enter the conspiracy until months later in March 2011. *See* Trial Tr. at 1834:25–1835:7, 1835:15–18 (Worsham). Likewise, Mr. Worsham's assertion that, in September 2011, Mr. Lischewski directed him to find a new contact at StarKist was demonstrably false. The contemporaneous phone records showed that Mr. Hodge reached out to Mr. Worsham two months later, with Mr. Worsham's father Bob Worsham serving as the intermediary. *See* TX 1, Rows 774–781; Trial Tr. at 1408:3–19 (Hodge). And, Mr. Worsham falsely testified that he told Mr. Lischewski about his first conversation with Mr. Hodge in 2011. *See* Trial Tr. at 1804:24–1805:4 (Worsham). The jury declined to credit Mr. Cameron's and Mr. Worsham's unsubstantiated testimony,[13] and so too should the Court.[14]

The government also takes out of context snippets of emails and speculates about their meaning. A prime example is the government's speculation that Mr. Lischewski's internal

[13] *See* Joshua Sisco, *Former Bumble Bee CEO's jurors relied on documents, not witnesses, to convict*, MLex Global Advisory, Insight, Dec. 3, 2019.

[14] The government's authorities are distinguishable. In those cases, unlike here, there was substantial direct and corroborating evidence that the defendants had organized or exercised control over other criminally-responsible participants, often based on the defendant's own admission. *See United States v. Ingham*, 486 F.3d 1068, 1071 (9th Cir. 2007) (defendant admitted to factual basis in plea agreement that "he acted as a leader and manager of this [drug] importation conspiracy"); *United States v. Berry*, 258 F.3d 971, 974 (9th Cir. 2001) (defendant "admitted" to stealing mail, "being involved in the deposit of stolen checks into the accounts" of others, and bringing another person with him "to carry out" an illegal transaction with a stolen credit card); *United States v. Yi*, 704 F.3d 800, 807 (9th Cir. 2013) (defendant who violated Clean Air Act instructed participant to seek bids for asbestos abatement, rejected those bids, instructed participant to contract for ceiling scraping which violated Act, and approved illegal removal of asbestos by other participant).

"peace proposal" email to Doug Hines was an attempt to "begin forming the conspiracy." Gov't Mem. at 3.[15] There is no evidence in the record to support this conjecture. There is no evidence that Mr. Lischewski forwarded the email to any competitor or asked Mr. Hines to do so. The government did not call Mr. Hines to offer his understanding of Mr. Lischewski's message. Mr. Lee, the individual to whom Mr. Hines forwarded the message, has denied that the email had anything to do with price-fixing. *See* ECF 348, Oct. 1, 2019 Crim. Mins., at 6–7. And, contrary to the government's inexplicable and false assertion, that email was not "sent shortly after defendant made aggressive promises to Lion Capital." Gov't Mem. at 24. It was sent in September 2010, approximately three months before the deal with Lion Capital closed and two months before the government alleges that the conspiracy began.

Finally, the government points to the jury's verdict, but the jury merely concluded that Mr. Lischewski "joined the conspiracy." *See* ECF 626, Final Jury Instrs., No. 25. It never found that he organized or led any criminal conduct.

Amid the flurry of distortion and supposition, the government's sentencing brief makes one notable omission: It fails to disclose that the government has not sought a role enhancement for any other co-conspirator in this entire investigation. The government provides no basis for finding that Mr. Lischewski had a larger role in the conspiracy than any of the other participants in the conspiracy, much less a role warranting the maximum four-level enhancement that the

[15] Although the peace proposal email is the most obvious example of the government's willingness to stretch the facts, it is far from the only one. The government cites a snippet of Trial Exhibit 147, where Mr. Lischewski writes to a group of Bumble Bee employees (including two individuals who were not part of the conspiracy) in January 2011, seeking legitimate competitive intelligence about what StarKist was "planning to do." The government also points to Trial Exhibit 496, StarKist pricing information that Mr. Worsham claims to have received from Mr. Hodge on a thumb drive and shown to Mr. Lischewski on May 3, 2012. That information had already been publicly announced to StarKist's customers six days earlier and Mr. Worsham had been aware of it prior to his dinner with Mr. Hodge. *See* TX 496; TX 2901; Trial Tr. at 1821:2–5, 1829:7–10, 1830:9–15 (Worsham). The government also revives its debunked theory that Mr. Lischewski's desire not to lose money on a bid to Kroger evidences price-fixing. *See* Gov't Mem. at 32 (citing TX 179 & TX 450). And, who could forget the government's misleading demonstrative with a series of phone calls between Mr. Lischewski and Mr. Chan without a scintilla of evidence that those calls had anything to do with price-fixing, and a mountain of evidence that they did not. *Compare* Gov't Mem. at 7 (citing a "number of phone a calls with Mr. Chan, several of which coincided with defendant's email complaints about pricing") *with* TX 645, 647, 2210, 2214, 2765, 2766, 2767, 2774, 2788, 2780, 2919; Trial Tr. at 2286:13–23 (Chan).

government seeks to impose on him alone. The government has not carried its burden to apply a role enhancement.

D. The government has failed to prove an enhancement for obstruction.

Mr. Lischewski's objections to the PSR already explained in detail why the Court should not apply any enhancement for obstruction of justice. *See* Deft.'s Objs. to PSR at 16–21. Mr. Lischewski incorporates those arguments here and will not repeat them, but instead emphasizes the following points:

First, the government's proposed obstruction enhancement is a thinly veiled attempt to penalize Mr. Lischewski for exercising his constitutional rights to put the government to its burden of proof at trial and testify in his own defense. Mr. Cameron and Mr. Worsham testified falsely at trial, were impeached time and again on cross-examination with evidence that undermined their stories, and the jury concluded that they were not credible. Mr. Hodge admitted that he lied to the FBI in a pre-trial interview. *See* Trial Tr. at 1410:6–1411:13 (Hodge). Yet, the government gives its cooperators a free pass for perjury and obstruction, while crediting their testimony to argue for an obstruction enhancement for Mr. Lischewski. The government's disparate treatment of Mr. Lischewski once again reveals the unfairness of its approach to sentencing in this case.

Second, the government quotes fragments of Mr. Lischewski's trial testimony and parses the trial record in an effort to convey a misleading impression that Mr. Lischewski testified falsely. The government asserts, for example, that Mr. Lischewski "categorically denied any knowledge of the relationships between Cameron and Worsham and their coconspirators at StarKist and Chicken of the Sea." Gov't Mem. at 28. That is incorrect. As the government concedes elsewhere in its sentencing memorandum, Mr. Lischewski acknowledged that he was aware that Mr. Worsham had a relationship with Mr. Hodge, *see id.* at 9 (citing Trial Tr. at 2667:3–13), and Mr. Lischewski admitted that he understood that Mr. Cameron "had a personal relationship with Mr. Handford of StarKist," Trial Tr. at 2946:18–21 (Lischewski). The government claims that Mr. Lischewski "started" his testimony "with the broad denial" that he was unaware of Mr. Worsham's competitive contacts. Gov't Mem. at 9. That too is incorrect.

The testimony the government cites—which was in response to an unrelated question asking how Mr. Lischewski learned that Mr. Cameron and Mr. Worsham had pleaded guilty—came at the very end of his direct examination, after Mr. Lischewski had already truthfully testified that he was aware of Mr. Worsham's relationship with Mr. Hodge. *Compare* Trial Tr. 2667:7–13 *with id.* at 2905:20–2906:8 (Lischewski). Nor was Mr. Lischewski's testimony "contradicted" by emails that Mr. Lischewski sent following Mr. Hodge's termination from StarKist. *See* Gov't Mem. at 29 (citing TX 311 & 312). Mr. Lischewski's perception that Mr. Hodge, whom Mr. Lischewski knew ran the sales department at StarKist, was a "reasonable competitor" in no way contradicts any aspect of his testimony.

Third, the government cites Mr. Lischewski's supposedly "evasive" testimony regarding the "peace proposal" email. Gov't Mem. at 30. Mr. Lischewski's testimony regarding that email was straightforward and truthful, but even if that was not the case, a witness's evasive answers to questions are insufficient to establish perjury, as the Supreme Court held in *Bronston v. United States*, 409 U.S. 352, 358–59 (1973). An attorney examining a witness is entitled to literally truthful responses to the precise questions asked; the attorney is not entitled to assume that the witness will freely expound whatever helpful information the attorney hopes to elicit. Instead, our adversarial system of justice makes it "the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination." *Id.*[16]

Fourth, there is no merit to the government's assertion that Mr. Lischewski testified falsely about "edit[ing] an email" from W.H. Lee before sending it to his Board to conceal the conspiracy. Gov't Mem. at 8. Mr. Lischewski edited the email because the author, Mr. Lee, was not a native English speaker and his language was confusing and "didn't make any sense" to Mr. Lischewski. *See* TX 298A; Trial Tr. at 2898:20–2899:2 (Lischewski). The government has offered no evidence that Mr. Lischewski's testimony that he "couldn't comprehend" Mr. Lee's

[16] Similarly, Mr. Lischewski's testimony was not "belied" by Mr. Curto's August 2012 email. *See* Gov't Mem. at 29 (citing TX 757). As Mr. Curto conceded at trial, the words in that email were his and his alone, and Mr. Curto had no independent recollection of his conversation with Mr. Lischewski. *See* Trial Tr. 1108:24–1109:5, 1143:15–1144:2, 1147:25–1148:19 (Curto).

email was false. Trial Tr. at 3004:4–11. The government's own witness, FBI Special Agent Barclay, testified that she understood that Mr. Lee was not a native English speaker and that Mr. Lischewski expressly called out in his transmission email the fact that he had edited the email to make the English more legible. *Id.* at 2433:4–20 (Barclay). There is no evidence supporting the government's claim that Mr. Lischewski made changes to this email with the intent of masking a non-existent agreement with Mr. Chan, or that he testified falsely about the email.

Fifth, the government contends that Mr. Lischewski intentionally "misrepresented" trial testimony and documents, but, yet again, it is the government that engages in misrepresentation. *See* Gov't Mem. at 10–11, 31–32. Mr. Lischewski did not intentionally "misrepresent" any aspect of Mr. Chan's testimony. *See* Deft.'s Objs. to PSR at 19–20 & n.5. The government acknowledges that Mr. Lischewski's testimony that he did not "recall Mr. Shue Wing actually saying he had an understanding with me" could be "a simple mistake, rather than a willful attempt to deceive." Gov't Mem. at 34 n.15. And, as the government recognizes, "[n]ot every instance of inaccurate testimony … will amount to a willful attempt to obstruct justice." *Id.* at 33. Nor did Mr. Lischewski "lie[]" in response to the government's improper questioning about the excluded anonymous letter. *See* Gov't Mem. at 32. Mr. Lischewski truthfully testified that he had received the letter "from an unidentified whistleblower" and that there was "nothing specific" in the letter that gave him knowledge "of a violation of the Sherman Act." Trial Tr. at 2934:9–14, 2936:22–2937:1. That testimony was honest and confirmed by the Court's order holding that the letter lacked probative value because it was anonymous and alleged "raising prices, which is different than … reaching an agreement to fix prices." ECF 293, Tr. of Aug. 27, 2019 Pretrial Conference, at 139:9–14, 140:14–15.

Finally, there is no reliable evidence supporting the government's claim that Mr. Lischewski "took actions to obstruct the government's investigation" by "threatening" Mr. Cameron in 2015. *See* Gov't Mem. at 35. Mr. Cameron fabricated that story after beginning to cooperate with the government to get a better deal for himself. *See* Deft.'s Objs. to PSR at 21–22. His story is implausible, uncorroborated, and was credibly denied by Mr. Lischewski at trial. And, while the government maintains "that it is not Mr. Cameron's testimony that lacks

credibility," Gov't Mem. at 35, the jury disagreed. Following trial, the jury foreperson explicitly called out Mr. Cameron as a "mess on the stand" and stated that he "appeared to be lying in order to get a reduced sentence."[17] The government never considered Mr. Cameron's story reliable enough to warrant an obstruction charge, and that story remains insufficient to permit an obstruction enhancement.

For all of these reasons, and those previously stated in Mr. Lischewski's objections to the PSR, no obstruction enhancement under Section 3C1.1. is appropriate.

V. THE GOVERNMENT'S RECOMMENDED FINE WOULD CREATE A SEVERE SENTENCING DISPARITY

The government's request for the statutory maximum $1 million fine is overstated and would create a massive disparity with the fines for the pleading defendants and the fines imposed in other antitrust cases. The government's requested fine is 5 times larger than the fines Judge Illston imposed on two senior executives of AU Optronics following trial and *40 times* larger than the $25,000 fine the government has agreed to for Mr. Cameron, Mr. Worsham, and Mr. Hodge. *See United States v. AU Optronics Corp.*, No. 09-cr-00110-SI, ECF 969 (N.D. Cal. Sep. 27, 2012); *United States v. Cameron*, Case No. 16-CR-501-EMC, ECF 18, Plea Agreement at 6:13–16 (N.D. Cal. Jan. 25, 2017); *United States v. Worsham*, Case No. 16-CR-535-EMC, ECF 14, Plea Agreement at 6:14–16 (N.D. Cal. Mar. 15, 2017); *United States v. Hodge*, Case No. 17-CR-297-EMC, ECF 13, Plea Agreement at 6:10–12 (N.D. Cal. June 28, 2017). The government's recommendation also is 10 times larger than the fine recommended by the Probation Office in this case. PSR, Sentencing Recommendation (ECF 658) at 1.

The government hardly attempts to justify its overstated fine on the merits. Instead, it uses it as an opportunity to take more gratuitous pot shots at Mr. Lischewski and his family, unnecessarily calling out his family's former neighborhood as a "very upper-class area," disparaging "his wife's annual purchases," and ridiculing the "brand-name clothing, shoes and bags" a probation officer claimed to observe in his home. Gov't Mem. at 36, 39. What the

[17] *See* Sisco, *Former Bumble Bee CEO's jurors relied on documents, not witnesses, to convict*, MLex Global Advisory, Insight, Dec. 3, 2019.

government fails to acknowledge, however, is the fact that Mr. Lischewski already is facing financial ruin as a result of this case. He lost his job and has no steady income; his future employment prospects are bleak; and he has been forced to sell his home and liquidate his other possessions. There is no need for the Court to impose a significant fine on top of the severe financial consequences Mr. Lischewski already faces as a result of this case.[18]

VI. THE GOVERNMENT IGNORES THE DEADLY CORONAVIRUS PANDEMIC SWEEPING THE U.S. PRISON SYSTEM

Although COVID-19 "has wreaked havoc on the federal prison system,"[19] the government's sentencing brief fails even to address the disease's outbreak in the nation's prisons, and the impact it should have on Mr. Lischewski's sentencing. It is unreasonable for Mr. Lischewski to report to a federal prison, when incarceration raises a real risk to his life, while prisons are releasing to home confinement individuals just like Mr. Lischewski—those who are not at risk of reoffending, pose no danger to the public, and are less likely to contract COVID-19 in home confinement than they would be in prison.

In light of the current global health pandemic, it would be inconsistent with Section 3553(a) for the Court to sentence Mr. Lischewski to a term of incarceration, when probation with a condition of home detention is a readily available alternative. Indeed, in the two weeks since Mr. Lischewski submitted his opening brief, the situation in the nation's federal prisons has continued to worsen—with no sign that it will improve anytime soon. The Bureau of Prisons has released more than 750 additional prisoners to home confinement, for a total of 3,183 inmates

[18] The government, the Probation Office, and Mr. Lischewski agree that the Court should not impose any order of restitution. *See* PSR, Sentencing Recommendation at 1 (restitution is "[n]ot applicable" in this case); Gov't Mem. at 37 ("The government is not seeking restitution against defendant."); Deft.'s Objs. to PSR at 23–24 (explaining why restitution is inappropriate).

[19] Reuters, *Death Toll From COVID-19 at Oakdale Prison in Louisiana Continues to Climb* (April 2, 2020), available at https://www.nytimes.com/reuters/2020/04/02/us/02reuters-health-coronavirus-prisons.html.

released.[20] And California prisons have released approximately 3,500 inmates.[21] In spite of these reductions in the prison populations, COVID-19 outbreaks in prisons persist. As the *Los Angeles Times* reported: "At the federal prison at Terminal Island, about 700 inmates have tested positive for the coronavirus, and eight have died. More than 900 inmates in a federal prison in Lompoc contracted the virus, the worst outbreak in the federal prison system. "[22] The BOP is now reporting 1,577 federal inmates and 181 BOP staff who have confirmed positive test results for COVID-19, and another 3,180 federal inmates and 413 staff who have recovered.[23] But because testing in prisons has been grossly insufficient, these numbers are surely inaccurate.[24] Indeed, at least one facility has stopped testing symptomatic inmates altogether, because there are so many that BOP simply presumes "they are COVID-19 positive"—but such "presumed positive" cases are not included in BOP infection tallies.[25]

In light of this ongoing healthy emergency, courts around the country, including in this district, are continuing to release inmates to home confinement. *See, e.g., United States v. Robinson*, No. 18-cr-00597-RS-1, __ F. Supp. 3d __, 2020 WL 1982872 (N.D. Calif. Apr. 27, 2020) (granting compassionate release to prisoner at FCI Lompoc who suffers from psoriasis); *United States v. Trent*, No. 16-cr-00178-CRB-1, 2020 WL 1812242, at *2 (N.D. Cal. Apr. 9, 2020) (finding "extraordinary and compelling reasons" based on combination of "COVID-19 pandemic" and defendant's "medical conditions"); *United States v. Rodriguez*, CR 03-0271 AB,

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[20] *See "COVID-19 Home Confinement Information,"* BOP.gov (last accessed May 26, 2020), available at https://www.bop.gov/coronavirus.

[21] Hamilton, et al., *California prisons and jails have emptied thousands into a world changed by coronoavirus*, Los Angeles Times, (May 15, 2020), available at https://www.latimes.com/california/story/2020-05-17/coronavirus-prison-jail-releases

[22] *Id.*

[23] *See "COVID-19 Cases,"* BOP.gov (last accessed May 26, 2020), *available at* https://www.bop.gov/coronavirus.

[24] Lisa Freeland et al, *We'll see many more covid-19 deaths in prisons if Barr and Congress don't act now*, Washington Post (Apr. 6, 2020) available at https://www.washingtonpost.com/opinions/2020/04/06/covid-19s-threat-prisons-argues-releasing-at-risk-offenders.

[25] Nicholas Chrastil, *Louisiana federal prison no longer testing symptomatic inmates for coronavirus due to "sustained transmission"* (Mar. 31 2020) available at https://thelensnola.org/2020/03/31/louisiana-federal-prison-no-longer-testing-symptomatic-inmates-for-coronavirus-due-to-sustained-transmission.

2020 WL 1627331, *7 (E.D. Pa. Apr. 1, 2020) ("the outbreak of COVID-19 and underlying medical conditions that place [defendant] at a high risk should he contract the disease" justified release); *United States v. Foster*, CR 14-0324, ECF 191 at 10 (MD Pa. Apr. 3, 2020) (finding "no rationale is more compelling or extraordinary" than the "high likelihood of contracting COVID-19 from which he would not be expected to recover"); *United States v. Echevarria*, No. 3:17-cr-44 (MPS), 2020 WL 2113604 (D. Conn. May 4, 2020) (finding 49-year-old with pre-existing respiratory condition, combined with the increased risk of COVID-19 in prisons had demonstrated extraordinary and compelling reasons for relief); *United States v. Early*, No. 09 CR 282, 2020 WL 2112371, at *2 (N.D. Ill. May 4, 2020) ("the Court cannot discount the risk to Mr. Early if he contracts coronavirus, as reliable information places him in a higher-risk category. This, in the Court's view, qualifies as an extraordinary reason warranting consideration of a reduction of Mr. Early's sentence."); *United States v. Soto*, No. 1:18-cr-10086-IT, 2020 WL 2104787 (D. Mass. May 1, 2020) (finding inmate with hypertension at facility with COVID-19 cases located in New York had shown extraordinary and compelling reasons for relief); *United States v. Gorai*, No. 2:18-CR-220-JCM (CWH), 2020 WL 1975372 (D. Nev. Apr. 24, 2020) (granting compassionate release in light of COVID-19 to inmate who suffers from asthma); *Samy v United States,* Case No. 16-20610-1, 2020 WL 1888842 (E.D. Mich. Apr. 16, 2020) (granting compassionate release because "Samy squarely fits the definition of an individual who has a higher risk of dying or falling severely ill from COVID-19" because of her age and underlying medical conditions); *United States v. Zukerma*n, No. 16 Cr. 194 (AT), 2020 WL 1659880, at *5 (S.D.N.Y. Apr. 3, 2020) ("The Court also finds that Zukerman has set forth 'extraordinary and compelling reasons' to modify his sentence, 18 U.S.C. § 3582(c)(1)(A)(i), because of the great risk that COVID-19 poses to an elderly person with underlying health problems.").

Although these prisoners are being released from prison pursuant to the First Step Act, 18 U.S.C. § 3582, under which courts may reduce a previously-imposed sentence where "extraordinary and compelling reasons warrant such a reduction," it makes no sense to force Mr. Lischewski to report to prison, where he may very well contract COVID-19, before being able to seek release under Section 3582. Further, because courts consider the Section 3553(a) in

determining whether a Section 3582 release is warranted—factors that this Court is now addressing—now is the time for this Court to consider the impact of COVID-19 on Mr. Lischewski's sentence.

Mr. Lischewski is exactly the type of individual who should not be put in prison in the midst of this pandemic. He is nearly 60, and thus he is susceptible to severe and potentially fatal complications of COVID-19; he poses no danger to his community; and a balance of the Section 3553 factors warrants a 12-month sentence of home confinement, with a condition of 1,000 hours of community service.

VII. CONCLUSION

For the foregoing reasons, and those stated in Mr. Lischewski's sentencing memorandum and objections to the PSR, the Court should reject the government's inhumane and disproportionate sentencing recommendation and impose a sentence of no more than 12 months of home confinement, with a condition of 1,000 hours of community service at Big Brothers Big Sisters of San Diego County.

Respectfully submitted,

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