Pages 1 - 100

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Edward M. Chen, Judge

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	**NO. CR 18-00203 EMC**
	)	
CHRISTOPHER LISCHEWSKI,	)	
	)	
Defendant.	)	
	)	

San Francisco, California
Tuesday, June 16, 2020

TRANSCRIPT OF PROCEEDINGS

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Also Present: **CATHERYN GRIER, U.S. PROBATION**

REPORTED VIA ZOOM BY: ANA M. DUB, CSR NO. 7445, RDR, CRR, CCRR
OFFICIAL REPORTER

Tuesday - June 16, 2020 **9:31 a.m.**

P R O C E E D I N G S

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(Defendant present, out of custody.)

THE CLERK: Court is now in session. The Honorable Edward M. Chen is presiding.

Calling Criminal Action 18-203, United States of America versus Christopher Lischewski.

Counsel, please state your appearances for the record, beginning with Government's counsel.

MR. KUMAR: Good morning, Your Honor. Manish Kumar for the United States. Your Honor, I'm joined by my colleagues Leslie Wulff and Mikal Condon, and our fourth colleague, Andy Sh- --

THE COURT: You have to unmute yourself. We couldn't hear you.

MR. KUMAR: I apologize, Your Honor.

Manish Kumar for the United States. I'm joined by my colleagues Leslie Wulff and Mikal Condon. And our colleague Andy Schupanitz is in the building. He's watching the telecast via Zoom. Thank you, Your Honor.

THE COURT: All right. Thank you, Mr. Kumar.

MR. PETERS: Good morning, Your Honor. Elliot Peters on behalf of Christopher Lischewski, who is present in court along with his wife, Louise Lischewski. And I'm joined by my

colleagues Elizabeth McCloskey and Nick Goldberg, and our colleague Chris Kearney is on Zoom and not present in the courtroom.

THE COURT: All right. Thank you. Good morning. Good morning, Mr. Lischewski.

MS. GRIER: And Catheryn Grier with U.S. Probation.

THE COURT: Thank you, Ms. Grier.

Does that cover everyone here this morning? I think it does.

THE CLERK: Yes, Your Honor.

THE COURT: All right. Let's start off by -- let me just reiterate the last motion that was before me yesterday, which was the motion to exclude counsel for victims from appearing.

I did issue an order overruling that objection. Just briefly, I find that the objection was waived on June 3rd by defense counsel.

Second of all, even if it weren't waived, it's clear that the CVRA is designed to make victims full participants, not secondary participants; and to say that they can't appear and speak unless they appear in the courtroom and could not appear otherwise, such as by letter or by phone or by videoconference, in my view, would turn the CVRA on its head. It's very common for this Court to take letters from victims, and if victims can write letters, there's no logical reason why victims cannot

appear telephonically or electronically.

And with respect to counsel appearing as a lawful representative, the CVRA is explicit on that. Crime victims' lawful representatives can appear to make statements pursuant to the CVRA.

And, finally, to the extent there's an argument as to whether or not these are truly victims because of the lack of evidence of actual damages, I don't believe that a predicate for asserting rights under the CVRA is proof of damages. It's clear who the victims are once a violation is found. The extent of those damages is not a predicate to exercising rights under the CVRA. And that's why I overruled the objection.

Now, let me also say that, I think it was on June 3rd -- was it? -- we had a sort of a preliminary discussion, a very robust discussion about the guideline calculations. And I have taken all that into effect -- into account.

Mr. Lischewski, I think, participated remotely and wasn't here for that. And for that reason, I want to make sure that we complete that discussion here and, if there's anything he wants counsel to add, that you have that opportunity, because I treated that as really kind of a predicate to the sentencing.

So let me just briefly review the procedural history of this case.

On May 16th, 2018, a one-count indictment was filed in this court charging Mr. Lischewski with a violation of

Title 15, U.S.C. Section 1, price-fixing.

On December 3rd, 2019, the defendant was found guilty at a trial on Count 1, and the jury determined that the conspiracy involved the defendant along with StarKist and Chicken of the Sea.

Judgment and sentencing were set for April 8th, and it's been continued, because of the various circumstances, to today's date.

I have received extensive briefing, several rounds of briefing, both on guideline calculations as well as the 3553(a) factors, which I have reviewed, along with extensive documentation and support letters and Mr. Lischewski's personal statement, which I have reviewed and received.

So, and I noted there are several objections to the PSR that were submitted by the defendant. They are sort of fourfold.

One is objections based on facts of the offense, some of the narrative that's contained. Second is to the obstruction of justice calculation, and determination of the volume of commerce, which we have and will continue to discuss, and the organizer/leader enhancement.

The latter three, I intend to take further presentation, if there are any, and so we can hold that.

With respect to the facts of the offense, I guess I'll let the Government respond. I think Probation responded.

But if you have something brief to say about that, I will listen to that. So, Mr. Kumar.

MR. KUMAR: Your Honor, with regard to the objections in the Presentence Report to the offense conduct? Is that what Your Honor was --

THE COURT: Yeah.

MR. KUMAR: Okay.

THE COURT: Yeah.

MR. KUMAR: I don't believe I have anything -- anything to add other than, Your Honor, that the trial evidence in this case is what it is. We believe that a number of the objections made by the defense are lacking in merit. They attempt to argue a number of factual points which were essentially denied by the jury through its verdict.

THE COURT: Okay.

MR. KUMAR: Submitted.

THE COURT: All right. Mr. Peters, any further comments on that?

You're on mute, I think.

MR. PETERS: Thank you, Your Honor.

I don't want to reargue this at length. Obviously, the Court is familiar with the trial record. We've made -- the Presentence Report, to which we were not allowed, really, to have any input -- I asked the probation officer if we could -- after the interview, if we could comment on any disputed items

or have a dialogue with her. She said we could, and then pretty much wrote a factual statement which reads very much from the Government's standpoint.

And I know that it's the Government's view that because the jury convicted Mr. Lischewski, they must have resolved every disputed factual issue in their favor; but in fairness, that's not what the jury verdict means.

And so the factual story told in the Probation Report, a hundred percent from the perspective of the prosecutors, we don't believe is a fair and balanced recitation of the facts. We objected for that reason. But I think the Court -- I don't think you need to hear me review those arguments in order to understand the differences of opinion and to resolve factual issues on your own.

But I do repeat that I take strong exception to what counsel just said: that everything in the Probation Report must be right because of the jury's verdict. The jury's verdict was that there was an agreement under the per se rule, and it didn't go as far as the Government's view of the facts is.

But I don't need to go any further than that, and I'll submit it. Thank you.

THE COURT: All right. Thank you, Mr. Peters.

I'm going to overrule the objection, and I do so not simply on the basis of the jury verdict. The jury verdict did

find, necessarily, some essential facts: the fact that it was a price-fixing conspiracy; the fact that Mr. Lischewski participated in that. But I do find that the recitation is generally and materially an accurate representation of the facts as I understood them. There may be some areas where some particular points may not -- were more questionable as a matter of fact than others, but not in a material way that would color this Court's analysis of the guideline calculations or the 3553(a) factors.

So I think I'm going to note the exceptions made by defendant. That's on the record. But I'm going to overrule the objections and not order that any changes be made to the PSR in that regard.

So let's talk about the guideline calculations, sort of picking up where we left off last time. I have had a chance to look more closely at the case law with respect to the burden of proof issue. And one thing is clear to me, that we have the six factors the Ninth Circuit lays out. And some of those factors do weigh in favor of preponderance of the evidence; namely, I do think that the volume of commerce here is a measure of the extent of the conspiracy. I know that was not an element and there was not evidence taken of that at trial, but it does relate to the conspiracy.

And importantly, if you look to the other surrounding factors -- I think it's Number 3 and 4 -- they are kind of

related. Does this reverse the burden of proof? Does this require proof of an element for a separate offense? And that's somewhat related to the factor of whether or not this measures the extent of the conspiracy. And I think those are factors that weigh against the clear and convincing standard, at least with respect to the volume.

On the other hand, we have a situation where the enhancement is, I think, extremely disproportionate. If I were to take the 12-level increase due to the volume, it far exceeds the four-level benchmark that's one of the factors. It also more than doubles -- it quadruples, almost, the sentence.

And so I think the law is clear that no one factor is dispositive. So the fact that, even if the measure is a -- measures the extent -- volume of commerce measures the extent of the conspiracy, a factor that weighs heavily against the application of the clear and convincing standard, I think it is also clear that it is not a dispositive factor.

The Court has to look at all six factors, and given the extent of the impact here, I am going to apply the clear and convincing standard with respect to the volume question. But I do think that the preponderance of the evidence applies to the other two factors in applying that six-factor test.

Now, having said that, I will tell you, my view is that even under the higher clear and convincing standard, I do believe the volume of commerce, as asserted by the Government

showing, has been met, at least sort of prima facie. As I think we stated last time, the sort of threefold aspects of the conspiracy, which span the entirety of the alleged conspiracy period, involved an agreement to fix list price and timing; agreement with respect to guidance, which is the guidance, guidelines given to salespeople in terms of discounts and that sort of thing; and there was the limit -- agreement to limit promotions. Although not followed to the T, there was an agreement to limit promotions; and there's some evidence that the number of promotions, at least during part of the period, did drop. The 10-for-10 became less prevalent.

But because of the pervasive nature and the way prices are set -- and I know that the defendant argues otherwise, that defense are keyed only to cost -- I find that the evidence showed that the list price and guidance together has some effect on price. And so if there's fixing of either one of those or, in this case, both of those, that has an influence or an effect on price.

And as we discussed the case law last time, even without the Sixth Circuit -- relying on the Sixth Circuit *Hayter* case, which is a minority rule, but going to the other circuits, it's clear that the word "affect" is intended to be used broadly, to be interpreted broadly.

And the guidelines make clear that one of the purposes of the way the guidelines are set up is to minimize the burden of

having to sort of retry a civil damages case. I think the guidelines were intended to avoid a trial within a trial, and that's why there are sort of shorthand rules.

And so I think the law is pretty clear that you don't require transaction-by-transaction or a detailed econometric analysis to determine. And so I do think, in the first instance, this was a pervasive structural kind of conspiracy and that it did affect commerce during the period and that, as a starting point, I believe that the Government is correct that the effect in commerce were canned tuna at the consumer size and, even if we limit it to the smaller, I guess it was a 5-ounce size, that the volume of commerce is still over 600 million.

However, I do want the Government to respond because Dr. Levinsohn has a chart and analysis that suggests there was no effect on price. And I'm not talking about the variability. I understand there's going to be variability and that's inevitable. And variability alone does not mean that there wasn't an effect. And no one's denying that individual prices -- prices are negotiated on an individual sort of retailer-by-retailer basis. But that's not inconsistent with finding that all of those, to the extent they were informed at least in part by list price, by guidance, and by an agreement to limit promotions, variability does not necessarily negate effect. This is not a single commodity in a small-type market

with very limited number of buyers and sellers. So some variability is not necessarily a negative in that regard.

However, there is an argument by Dr. Levinsohn that there was no effect on prices; that, in fact, prices were lower than what one would have expected, given the rise in costs.

So I do want the Government to respond to that point, because the law is clear that if a conspiracy is totally ineffectual, then volume of commerce -- you can't count the volume of commerce in that ineffectual period.

MS. CONDON: Yes, Your Honor. Can you hear me?

THE COURT: Yes.

MS. CONDON: Your Honor -- sorry. I think there's some feedback.

As we discussed in the last hearing, Professor Levinsohn was discussing a but-for world in which he has gone back and looked at things and, in his opinion, he believes the prices should have been higher.

But you heard testimony from three conspirators who explained what really happened in the real world, and I don't believe that any but-for retroactive look back by somebody who has no knowledge of the industry and was not a member of the conspiracy can outweigh the testimony of Mr. Worsham, Mr. Cameron, and Mr. Hodge, testimony that the Court found was legion, showing the existence of a conspiracy, and their explanation of how that conspiracy affected prices and that, in

fact, the conspiracy was necessary to have an effect on prices. They could not have done it alone. They needed each other's agreement to take the prices up. After they took the prices up, prices did, in fact, rise.

So that's the real-world evidence demonstrating that there was an effect on the conspiracy.

But moreover, we do have -- the Government did introduce two charts. And I don't know if it's possible for us to share documents in some format.

THE COURT: I think we can; right, Angie? You can do share document? Mm-hmm. Share screen?

THE CLERK: Yes, we can.

THE COURT: Okay.

MS. CONDON: My colleague, Mr. Kumar, is our document person here; so he's going to pull up two charts that the Government introduced at trial, demonstrating that, in fact, the majority of the prices charged during the period -- and these were charts that were counteracting Professor Levinsohn's charts -- fell within the nets that were agreed to by the conspirators. And that meant the conspirators reached collusive pricing agreements as to what nets were allowed -- and nets were, as you'll recall, Your Honor, the amount off -- the net amount off of the list price that retailers would pay -- were within the collusive agreements that they reached.

THE COURT: So why don't you re-explain this chart. I do recall seeing this, but tell me what it shows.

MS. CONDON: So the chart -- the underlying chart itself was a chart that Professor Levinsohn created. We then ran the blended net -- here, this is StarKist Chunk Light Halves. So we ran across -- the line, the yellow line that runs across the chart is the blended net that's in -- it's set forth in StarKist's guidance. And it shows that the prices hover right around the agreed-upon -- and I should be clear -- the collusively agreed-upon blended net price that the conspirators agreed to.

And is this -- we have 17-B as well.

Is this 17-B?

THE COURT: It's the same chart. Is there a different chart you want to put up?

While he's doing that, let me ask you this point. I understand -- so this is evidence that there was some adherence, plus or minus, to the blended net that was agreed upon or that you believe the evidence showed.

How do you reconciliate the regression analysis that was featured in the papers twice, I think, by the defendants that showed that actual prices were below that, which one would have forecasted giving rising price? Are they consistent, in other words, to have an agreement that elevates the price below what it would have been but still have the final product below what

you would have thought, given costs?

MS. CONDON: Yes.

THE COURT: Can you reconciliate those?

MS. CONDON: Your Honor, Professor Levinsohn's chart assumes that everybody independently would have naturally raised the price of canned tuna the amount of the increase. They would have just pushed through the cost of the fish increase. And he would have expected to see a straight line, and he doesn't see that. What he sees is a narrowing line, and then it gets larger as the conspiracy becomes effective.

So, in fact, Professor Levinsohn's chart shows a conspiracy. But the initial assumption is inaccurate because the tuna industry does not have -- does not allow for the type of price increases that you might expect independently in an industry where you can raise your prices incrementally whenever your input costs go up and just have the customers accept that.

And that's what the conspirators explained. That's why it was not inevitable, as counsel keeps saying, that the price would go up, because they needed the agreement. If they didn't all take prices up, the price increase would be rejected because they didn't have the power to force a price increase through independently.

So what they did is they collusively agreed that they would all increase the price of canned tuna, allowing them to recoup some of the lost margins, which is still illegal,

regardless of whether or not their margins had shrunk. That's business. In a free economy, if the input costs go up and you're competing with your competitors, your margins are going to shrink for that time period.

But they didn't want that to happen because they needed their margins to stay high because they had made representations to their new investor that they would have high EBITDA and that they needed their margins to stay high to reach that EBITDA.

THE COURT: So in short, what you're saying is that the regression line that extrapolates is based on false assumptions. First of all, it may not be linear like that because, as you increase costs, there are some limits. You can't expect a straight one-to-one relationship; and, in fact, it would have bent anyway, using graph language.

And, two, I think what you're telling me is that prices would have been even lower had it not been for the conspiracy; that the dots, the dispersion would have looked even differently but for the conspiracy.

MS. CONDON: I appreciate the Court's much more succinct summary of the chart and economic law. But, yes, that's exactly it.

THE COURT: Okay. And what's this green bar chart again?

MS. CONDON: Aah. It's the same thing, Your Honor.

It's the blended net for Chicken of the Sea in February of 2012.

THE COURT: And the blended net, which is the $53.28 -- is that what it is?

MS. CONDON: Yes, Your Honor.

THE COURT: And how does that relate to proving the conspiracy or conspiracy prices?

MS. CONDON: Well, again, Your Honor, this is to the effectiveness of the conspiracy, but this was a collusively agreed-upon blended net price.

THE COURT: How do we know that's a collusively produced blended net as opposed to a market blended net?

MS. CONDON: Because -- well, first of all, this is the blended net that's set out in the Chicken of the Sea guidance.

THE COURT: Oh. It coincides with the guidance, you're saying.

MS. CONDON: This is what's in the guidance documents. This 53.28 is not --

THE COURT: Oh, oh. I see. I see. So that was the guidance. And each individual sale shows you how they fell within -- compared to the guidance?

MS. CONDON: Yes, Your Honor. And the same is true of -- 16-B and 17-B are the same intent, different companies.

THE COURT: So what's significant is that you don't

see a lot of bars far below the guidance. The guidance, it is more or less kind of a floor --

MS. CONDON: Yes, Your Honor.

THE COURT: -- that shows some adherence.

MS. CONDON: Yes, Your Honor.

THE COURT: Okay.

All right. Mr. Peters?

MR. PETERS: I think we just saw two charts about -- one about StarKist and one about Chicken of the Sea. The volume of commerce is Bumble Bee's volume of commerce. That's the billion-dollar number that they've come up with.

The Government doesn't have an economics expert. And with all respect to counsel, I don't think the comments we just heard were responsive to the Court's question or to what Dr. Levinsohn actually testified to in the trial or what he did in connection with that chart that the Court is concerned about.

He didn't talk to the cooperators. He didn't talk to Mr. Lischewski. He looked at the data, and he used his expertise as an economist to look at 15 years of cost and pricing data to develop a predictive model using well-accepted economic methodology.

And based on what -- what the Government keeps leaving out of this -- of their recitation of the facts but which the Court is aware of is that there was an unprecedented increase in

costs during this period. Fish prices went through the roof. And so what Professor Levinsohn did is he analyzed 15 years of the relationship between cost and pricing data in the tuna fish industry in order to be able to predict, based solely on data, what that relationship would have indicated the pricing would be during this conspiracy period, which was also a period in which costs increased to historic levels and by massive amounts.

And what his conclusion was, based on that data, was the actual pricing was below what the historical data would have predicted you would expect during this period, suggesting quite strongly that there was actually no effect on -- actual effect on the pricing in the marketplace from this conspiracy because the prices were actually lower than all of this historical cost data. And he went through a tremendous amount of data.

THE COURT: Well, it's lower than what historical cost data would have suggested if extrapolated. But you've just said -- and this is true -- that these were historically unprecedented fish costs that went up during this period.

MR. PETERS: Yes.

THE COURT: So it does take extrapolation. In other words, this is not -- this is not something that's within the typical realm of experience. It does require extrapolation.

It looks like -- from this graph, it looks like a linear relationship. And those of you who do statistical work know

that a linear relationship is one form of regression analysis. There are also logarithmic and other forms.

So it does require some extrapolation. Right? That's what the purpose of this exercise was. And any time you extrapolate, you have to look at the assumptions.

And what the Government is saying, the fish costs went so high, as you concede is historically high, that at some point the curve bends. You just can't continue to raise prices in the same way you would have done it five years ago when it went from Level A to Level B. Now you're Level C to Level D. So there is some guess -- this is not -- I mean, it looks like science and it is a form of science, but there are assumptions made underneath this regression analysis.

MR. PETERS: Well, there's a lot of data underneath it, and what he -- I'm not sure, really, that there are assumptions beneath it. He's just setting forth what the relationship is; and then I guess how you interpret that relationship, how you interpret that data is something about which you can have a discussion.

And the Government posits: Well, these prices were higher than they otherwise would have been. But based on what? They don't -- they have never offered -- and it's not that it's beyond their ability. They have never offered a peep from an economist or a qualified person. We know they hired one. They had someone sitting in the courtroom during the trial. They've

never put in anything before Your Honor to respond to this data because it's accurate.

So what do we hear? We hear, "Oh, their cooperators said that it had an effect." Well, that's not very scientific, to say that.

And, of course, they say -- we just heard them say we keep saying that these price increases were inevitable. That was what Mr. Worsham said on the witness stand. That's why we keep using the word "inevitable." Worsham said, "Yeah, these price increases were inevitable because of the cost data," which brings us back around to a point that I'm just going to briefly touch on that I made when we spoke last week, Your Honor, which was that the retailers asked for and received our cost data.

They were -- the idea that they were kind of pawns in this game where prices were being forced on them could not be further from the truth, because as the Safeway witness testified, he demanded and received detailed cost data from Bumble Bee which was used to evaluate what their negotiations were going to be and what price they were ultimately going to pay.

There was a list price because that was required by the Robinson-Patman Act that there be a list price for this product. The price that was actually paid by the retailers was the subject of negotiation during this period from very sophisticated, willing buyers and very sophisticated sellers

based on data.

And so I think Professor Levinsohn's data -- he's just setting forth the data, and he's very qualified to do it. And the Government has nothing to respond to it. Yet they have a burden of proof about showing this effect.

So that's our view, Your Honor.

MS. CONDON: Your Honor, if I might --

THE COURT: Yeah, I'll give you a chance to respond, and then we'll move on.

MS. CONDON: I wanted, first of all, to say that while there may be a lot of data underlying this chart, we actually did put forward an objection to the use of this chart at all in the last hearing, which is that this chart very misleadingly conflates all of the fishes. And those fishes had different prices.

So the result of conflating them all into a single linear backward but-for price examination misleadingly flattens the results. This doesn't purport to disaggregate by albacore or other fish types. And that actually makes this chart incredibly misleading.

So we do have an objection to how this chart is presented, and I wanted, because this has been two weeks since our last hearing, to reraise that objection.

THE COURT: Are you saying this chart -- right now it says Bumble Bee Solid White and Chunk Light White Halves.

That's the chart I'm looking at, TX 2702. You're saying there's other fish involved?

MS. CONDON: Well, it's conflating Solid White and Chunk Light.

THE COURT: Well, but both were the subject of the conspiracy.

MS. CONDON: Yes, Your Honor, but at different prices.

THE COURT: All right. You didn't have a -- you didn't run an analysis separating those out? I mean, there's been --

MS. CONDON: No, Your Honor, because, to the point that we've raised, we do not believe that you can look at this chart in a but-for world and somehow contradict or overmine the testimony of the conspirators, who explained that while this was an unprecedented rise in input costs, without a collusive agreement with their competitors to raise prices, they simply wouldn't have been able to achieve a price increase. The agreement was necessary.

THE COURT: All right. I've reviewed the evidence. This point here is the strongest point, I think, that the defendants have made with respect to countering the volume of commerce affected; but I don't think it is sufficient to overcome the evidence if it is credited; and I do credit the testimony of the witnesses who talked about how the conspiracy was implemented, how prices -- list prices were fixed, how

guidance was fixed.

And so the chart has some probative value, but I think it is limited, to a certain extent, by the assumptions about rising prices and what would be, on an extrapolation basis, the price. These were a historically novel increase in fish costs, and the fact that the actual prices didn't reflect what appears to be an assumption of the linear relationship does not disprove the fact that prices were affected.

Again, using the broad definition of "effect" that's been set forth in the various cases, including the Second Circuit, the Eleventh Circuit, as well as the Seventh Circuit -- *Andreas*, *Giordano, Giordano* -- and the *Metal* case out of the Second Circuit, the *SKW Metal* case.

And so in light of that, I do find the Government has met its burden by clear and convincing evidence to show the volume of commerce is either $1 billion based on all canned consumer-size tuna or something in excess of 600 million if based on the smaller -- confined to the -- I believe it's the 5-ounce size.

MS. CONDON: Yes, Your Honor.

THE COURT: I will say as a preview, though, to the 3553(a) factors, the lack of evidence of the actual dollar effect on the economy and consumers is something I'm going to consider when I get to the 3553(a) factors, particularly on the question of whether, having found that commerce enhancement,

whether that may overstate the sentencing guidance here. But we'll talk about that in a minute.

I also find that the evidence is very strong with respect to the leader and organizer of the conspiracy. I understand the objections, but if we credit -- and I do credit -- the basic testimony of those witnesses who testified as to the nature of the conspiracy and Mr. Lischewski's involvement, knowledge -- active involvement and knowledge and supervision, I find that that enhancement has been proved. Even if the clear and convincing evidence standard were to apply to that, which I don't think it does, I think that that has been met.

With respect to obstruction of justice, that is a tougher question because courts -- I think all courts are concerned about the countervailing considerations of affording the defendant a right to testify. And we don't want to get into a situation where any time a defendant testifies, takes the stand and exercises his constitutional right or her constitutional right to testify, that once convicted, they are subject almost automatically to a two-level obstruction of justice here.

And I understand the Government's argument that, here, there was just not a denial, but several instances of outright untruths. And I will say that the ones that stand out -- a couple of things that stand out for me is, number one, sort of denial of any knowledge of relationship and fact of his two lieutenants having engaged in an agreement seemed to me very

inconsistent with the management style of Mr. Lischewski. The idea that he would not know what was going on if, in fact, it was going on, is very hard to believe.

The Curto testimony -- he is somebody that had no ax to grind and, in fact, is somebody who admires and respects Mr. Lischewski -- I think was quite convincing because those were contemporaneous notes by a third party who had no bias against the -- no reason, no motivation to give untruthful testimony.

The peace proposal explanation, I understand the timing preceded the conspiracy period, preceded the Lion Capital acquisition. Nonetheless, I found that explanation not only puzzling and incoherent but, frankly, not credible.

Then you have the editing of the e-mail forwarded to Lion Capital about the conversations with Mr. Chan. The explanation about grammatical fixes didn't hold much water.

But the question is: Does that deserve a two-level increase for obstruction of justice? And I don't know what that line is exactly, but I'm hesitant. I guess one could say, at some point you cross that line if you tell specific untruths or things that are found to be not truth two, three, four, five, six times perhaps. I don't think the line is very clear.

But I'm hesitant with respect to the conversation with Mr. Cameron. The problem with that is, that one is -- there's no corroboration for that. I found Mr. Cameron generally

credible on that point, but I will say, of all the testimony, that one was not as compelling as some of the other testimony.

So, again, I hesitate to impose obstruction of justice on just that piece. And although there were a number of, I think, inaccurate statements made and, frankly, untruthful statements that were made on the stand, I'm hesitant to impose the obstruction of justice.

I will say, in the final analysis -- I'll give you a preview now -- that under the 3553(a) factors, it frankly is not going to make any difference to this Court's application of those factors whether we are at a Level 30 or a Level 28. So the obstruction of justice enhancer is immaterial to the ultimate analysis.

But I will -- I do have to make a determination, and I'm going to determine that I'm not going to apply that two-level increase in that instance. That will yield an offense level of 28 and a criminal history category, of course, of I. But that's the starting point, and now we need to get to the heart of the matter here. What is the appropriate sentence in light of that?

And in that regard, I do want to give the victims a chance to make their statement, and I think this is as good a time as any to do that before we launch into the 3553(a) factors, because I want to take consideration of everything before we have that full discussion.

So, Mr. Kumar, I don't know if you have them in some order. You're managing their participation. But why don't you tell me who would like to speak.

MR. KUMAR: Your Honor, I would defer to Ms. Meuleman on sort of controlling the Zoom session to allow the victims to participate.

THE COURT: All right. We can do the hand raising thing.

THE CLERK: Your Honor, we have Christopher Lebsock who has raised their hand, Steve Six, and Betsy Manifold and Blaine Finley.

THE COURT: All right. Why don't we just take one at a time. I'll let you --

THE CLERK: Okay. Mr. Lebsock is going to be promoted.

MR. LEBSOCK: Can you hear me?

THE COURT: Yes.

MR. LEBSOCK: Okay. Thank you.

Your Honor, my name is Chris Lebsock. I am one of the attorneys on behalf of the direct purchaser plaintiffs in the related civil litigation. And on behalf of my client, Olean Wholesale Grocery Cooperative and the class of direct purchasers, we wish to thank the Court for the opportunity to speak here today.

Olean is a grocery cooperative. It was founded in 1922 in

Western New York. Its central business purpose was to consolidate the buying power of small, independent grocers in Western New York, Northwestern Pennsylvania, and Eastern Ohio. It was designed to allow these small grocers, primarily in rural communities, the ability to compete with larger grocers in the area.

The grocery business has always been characterized by thin margins, and that remains true today. In fact, it has become a more competitive business as new entrants like Amazon, Costco, and Walmart have become more prevalent.

Mr. Lischewski's conduct in this case had a direct and tangible consequence on Bumble Bee's customers. The direct purchasers in this case -- in the related civil case, I should say, have performed a study, an econometric study of prices before the conspiracy started with those during the active phase of the conspiracy and what we call a lingering effects period that lasted after the active conspiracy may have ended.

What that analysis shows is that all three of the major tuna packers -- that means StarKist, Bumble Bee, and Chicken of the Sea -- sold approximately $5 billion worth of packaged tuna products to direct purchasers. And what the economist study shows is that prices during the conspiracy period were approximately 10 percent higher than they should have been when compared to the period before the conspiracy started.

In Olean's case, that means that Olean purchased approximately $2 million worth of packaged tuna products during this conspiracy period and during the lingering effects period that followed it and that its damages in this case are approximately $200,000.

That is $200,000 that Olean was not able to use to invest in additional innovation, to better compete with more efficient and larger distributors. It is $200,000 that was not repatriated to the grocers that Olean represented, either through lower prices or through dividends that were returned to the members of the cooperative.

Now, this was facilitated -- this conspiracy was facilitated -- and the proof showed it in the criminal trial -- that it was facilitated by Mr. Lischewski and that he organized this conspiracy because he made a promise to the new owners of Bumble Bee in late 2010 that he would raise revenues.

And the whole idea was that the hedge fund, Lion Capital, which was the new owner, would hold Bumble Bee for a couple of years and then sell it when revenues were at their high point. Mr. Lischewski had a personal motivation in that. He was due to profit by about $42 million if he was successful in raising revenue for Bumble Bee. And that is what started this conspiracy, at least in major part.

So a felony is a felony, in our view, and it doesn't matter if the felony was committed by somebody in the C suite

or somebody on the street. The law must not favor one or the other. And Mr. Lischewski, at the time he committed these crimes, was certainly a powerful man, he was wealthy, and he should be held account.

We have two hopes here. We do not specifically recommend any particular sentence. We hope that Mr. Lischewski, if he has not already done so, will reflect on his conduct and the impacts it's had on those that were involved in the packaged tuna industry.

We further hope that the Court will consider all of the facts and all of the interests that are present here when deciding what the appropriate sentence is. And those include, for example, Mr. Lischewski's profit motivation; the evidence that he was the ringleader; the role of the Government in ferreting out criminal behavior, in deterring it in the future, and in punishing those that were involved in it; society's interest in a free and open competitive marketplace. That has been the rule since 1890 when the Sherman Act was first enacted in the United States, and it has driven this economy to be the greatest economic engine in the history of the world.

We hope that the Court will consider the impact on the direct customers, including Olean and the other members of the direct class. And I know that others will speak about other levels in the chain of distribution as well.

We hope the Court will consider the impact this has had on

Bumble Bee itself. Bumble Bee was forced into bankruptcy as a direct result of this illegal conduct. That led to layoffs within Bumble Bee. Employees lost their jobs because of this. And two, in particular, lost their jobs as a result of participating in this conduct. Those were Mr. Cameron and Mr. Worsham, who not only lost their jobs but are going to suffer additional consequences in this Court and in society at large for the conduct that they engaged in at the direction of Mr. Lischewski.

So Harry Truman famously said, "The buck stops with the president." Mr. Lischewski was the president, and the buck has to stop with him because he was in charge and he's the one that directed this. And we hope that the Court will consider that when it imposes the sentence.

Those are my remarks, Your Honor. I can answer any questions. And I appreciate, again, the time to make them.

THE COURT: All right. Thank you, Mr. Lebsock.

We'll next hear from -- is it Mr. Six?

THE CLERK: Mr. Lebsock, please leave the meeting and then reenter as an attendee.

MR. LEBSOCK: Thank you.

THE CLERK: Mr. Six is now allowed to speak.

THE COURT: Okay.

MR. SIX: Good morning. Can you hear me?

THE COURT: Yes.

MR. SIX: Good morning, Your Honor. My name is Steve Six. I represent Associated Wholesale Grocers, the nation's largest cooperative grocery wholesaler, based in Kansas City, Kansas, and a purchaser of Bumble Bee tuna products during the conviction period. I've got three points I'd like to raise today.

First, AWG brought an individual case against Mr. Lischewski in the District of Kansas which was then transferred to the MDL in the Southern District of California. That case has been subject to a stay pending resolution of Mr. Lischewski's criminal proceedings. Recently the judge in the MDL court granted Mr. Lischewski's motion to dismiss based on personal jurisdiction. It was a dismissal without prejudice to refile, and we are in the process of refiling the case against him. We are the only plaintiff in the MDL, a civil plaintiff who has brought a case against Mr. Lischewski and are in a unique position as a victim here for that reason.

Second, AWG was damaged and the net prices it paid were affected by Mr. Lischewski's price-fixing.

The Court heard and has discussed this morning Mr. Cameron's testimony, the senior vice president of sales. He testified he was instructed by Mr. Lischewski to reach agreements with competitors on list prices, and my client, AWG, received these list prices from Bumble Bee.

Mr. Lischewski directed Mr. Cameron to conspire on

promotional guidance. That guidance was used by Bumble Bee's sales and brokers with AWG to arrive at net prices. The promotional guidance were the rules of the road, and Mr. Cameron said they conspired to fix those. Absent the conspiracy, that guidance would have been in different parameters, and that affected the net prices my client paid.

And as the Court knows, Mr. Cameron testified that on the defendant's instructions, he reached a truce with the competitors of Bumble Bee on promotional discounts, to back off aggressive pricing on pouch tuna and to back off low pricing on Chunk Light. And AWG bought a lot of Chunk Light tuna. And Mr. Cameron testified that the truce resulted in changes in prices in the marketplace. So those changes, obviously, are other than competitive. And absent that price-fixing it is reasonable to infer that as costs increased, as was discussed earlier, that some defendants -- excuse me -- some tuna companies would have chosen to sacrifice margin to increase market share and others would have made other choices. And all of that would have resulted, through competition, in lower prices to my client.

Mr. Cameron is an expert in the tuna business. He's worked in it, as the Court heard, for years. Mr. Levinsohn was a statistician unfamiliar with the tuna business, and I think the Court was aware of that testimony.

Third and finally, as the only civil plaintiff with a case

against Mr. Lischewski, I think it's fair for him to be held to account to AWG and pay damages, if he's able, to AWG to make them whole for the conduct he has been found guilty of.

I would encourage the Court here that the most effective way that the Court could recognize AWG's unique position as a victim -- that between 2010 and 2013, we purchased $4.386 million of Bumble Bee tuna products that are part of the price-fixing conspiracy -- would be for the Court to adopt the proposal it heard at the StarKist sentencing, which is to have Mr. Lischewski pay into court to protect the money against the coming storm of various factors that are likely headed his way, but to pay that money into the court now at the amount requested by the Government of $1 million. And he would then be given credit off that for monies paid to AWG in the civil case down to the $100,000 fine recommended by the Probation Department. And if no money is paid or otherwise it is less than the 900,000 spread there, that money then would go to the Government.

That proposal was more detailed and outlined in the StarKist sentencing document, 57-2 at page 9, and in AWG's letter to the Court of May 21st, 2019, on the StarKist sentencing.

I realize that the Court didn't adopt that proposal before StarKist, and there may be different financial circumstances that achieve that result. If the Court is not interested in

doing that here, we would advocate that the Court recognize Mr. Lischewski's situation; and to maximize the opportunity for him to be in a position to perhaps pay the civil judgment in the AWG case, that the Court impose a lower fine, either the one that Mr. Lischewski advocates for in his -- by his counsel or the one recommended by the Probation Office.

AWG takes no position, Your Honor, on what the sentence should be or the terms of confinement. Personally, we advocate for justice.

And not on behalf of my client, but personally, I think we incarcerate far too many people for far too long in this country, and I'm not sure what benefit it would show here to incarcerate Mr. Lischewski for a long period of time and would urge the Court to exercise the discretion it has available to shade things to work toward a lower incarceration level and lower sentences. But those are just my personal views, not on behalf of my client.

And with that, Your Honor, I conclude my remarks.

THE COURT: All right. Thank you.

And next, is it Mr. Finley?

THE CLERK: Yes, Your Honor.

THE COURT: Okay.

THE CLERK: Mr. Finley?

Oh, Your Honor, we have Mr. Blechman.

THE COURT: Okay.

THE CLERK: Mr. William Blechman?

MR. BLECHMAN: Good morning, Your Honor. William Blechman. Can you hear me?

THE COURT: Good morning.

MR. BLECHMAN: I'm going to move, because I was using a different mechanism to speak. So let me move -- I apologize, Your Honor -- so that there's no feedback.

THE COURT: All right. Sounds like you have multiple devices going because we're hearing an echo.

MR. BLECHMAN: And I just turned the other one off. I apologize.

THE COURT: Okay. Good.

MR. BLECHMAN: This should work.

William Blechman from Kenny Nachwalter, Your Honor. I appreciate the opportunity to appear on behalf of our client, Safeway, which is a victim of this conspiracy.

I want to start, Your Honor, by saying that I've never met Mr. Lischewski. He obviously rose to a position of responsibility and prominence at Bumble Bee, which to me is an indication of his skill and his smarts.

And I should say that I bear him no ill will in connection -- with respect to anything that I say here. But I think there are a few remarks that I want to make on Safeway's behalf -- Safeway now owned by Albertsons, Your Honor -- to inform the Court's thinking about the

sentencing.

The Court has heard remarks from the Government already about the effect that the conspiracy had on prices. And I can tell you, with respect to Safeway, there was evidence provided in the trial by Safeway's witness Mike Baribeau about the fact that as a result -- or during the conspiracy, Bumble Bee's list prices to Safeway on canned tuna went up, which had the effect of increasing shelf prices. Bumble Bee, during the conspiracy, went from a promotion of ten cans for $10 to two cans for $3, which represented another price increase.

The promotions are something a little different than usual because in the supermarket business, especially with respect to canned tuna, it's a loss leader. And when there are promotions, it has the effect of drawing people into stores, buying more. So the fact that the conspiracy had a muted effect on promotions and actually increased the price had a ripple effect throughout other parts of what was sold in the stores.

And Your Honor's already heard evidence about the increase in Bumble Bee's EBITDA, E-B-I-T-A [sic], from 128 to 145 million dollars between 2010 and 2014, despite the fact that fish costs went up, fish costs being the single most expensive input for producing canned tuna.

Based on that and other information in the record, Your Honor, Safeway believes itself to have been directly and

proximately harmed by the conspiracy.

I will add that Safeway, now owned by Albertsons, has filed a civil antitrust case in the Southern District of California. You've heard about that. And in that case, Safeway and Albertsons have an economist by the name of Michael Bays, the former head of Competition Bureau -- Bureau of Competition, Federal Trade Commission; and he submitted an expert report that opined, in part, that as a result of the conspiracy, Safeway, during the period before it was owned by Albertsons and during the conspiracy here, overpaid Bumble Bee by millions of dollars as a result of the events here.

Why does all this matter to Safeway? This matters to Safeway, now Albertsons, Your Honor, for three reasons.

First, canned tuna is a source of low-cost protein for many of Safeway's customers; and the fact of the matter is that as a result of the conspiracy, those prices went up.

Second of all, as a matter of economic principle and as a matter of how Safeway operates, it believes that price competition generates lower prices, higher quality, and product innovation. And those were casualties, Your Honor, of this conspiracy.

And, finally, Your Honor, Safeway depends on its suppliers to be honest with Safeway, and Albertsons does to this day. When you walk through a Safeway or an Albertsons store, you'll see more than 100,000 products, or thereabouts, that are for

sale on the shelves. And those products are bought by people who are in charge of purchasing not just any one product but many products.

Mr. Baribeau, case in point, was responsible during the conspiracy for buying not just canned tuna but about 12 other separate products that had nothing to do with canned tuna. And each of those separate products, including canned tuna, each themselves has any number of multiple suppliers who are selling product to Safeway. And in those circumstances, Your Honor, Safeway has to depend on the honesty of its suppliers in pricing product and in not manipulating the market; and unfortunately, that did not happen here.

I heard remarks, Your Honor, earlier about the fact that Safeway and others, perhaps, were provided with cost information about fish costs during the conspiracy period. And in listening to those remarks, Your Honor, I thought about: What is a conspiracy to the extent -- what does this look like to a company like Safeway during the course of the conspiracy? And what I analogize it to, Your Honor, is asking someone to describe the contents of a room by looking through the keyhole of a door.

You can see what's through the keyhole as defined by the boundaries of the keyhole. You can see what's inside the room. And in this instance, by analogy, it might be fish costs which may have been provided in reports to Safeway or others. But

what you cannot see, Your Honor, is when there are people behind the door that are standing on either side of the keyhole, and that's what happened here is that standing on the other side of the door on either side of the keyhole were a number of companies, including Bumble Bee, that conspired not to compete in the pricing and sale of canned tuna to Safeway and others.

Your Honor, Safeway believes that the conspiracy caused a direct and proximate harm to it, increasing its prices and in causing it to pay higher prices and overcharges as a result of the conspiracy.

We leave, Your Honor, to the sound discretion of this Court the sentencing itself.

Thank you again, Your Honor, for the opportunity to be heard.

THE COURT: All right. Thank you, Mr. Blechman.

Who do we have next, Angie?

THE CLERK: Mr. Blaine Finley is who we have next.

THE COURT: All right. Mr. Finley?

MR. FINLEY: Good afternoon, Your Honor. Can I be heard?

THE COURT: Yes.

MR. FINLEY: Can I be heard?

THE COURT: Yes.

MR. FINLEY: Thank you so much. I apologize for the

technical difficulties earlier.

I work for Cuneo Gilbert & LaDuca, and the firm has been appointed by Judge Sammartino to represent the commercial food preparer plaintiff class in the civil litigation in the Southern District of California.

Legally speaking, this class is composed of purchasers from six specified intermediaries; and more concretely, our class members are entities like restaurants, nursing homes, and others that prepare food.

As a preliminary matter, my group would like to take issue with some of the comments that have been made about controlling for fish cost. And in doing so, my group would like to make the suggestion that today what was shown to the Court was based on controlling for cost by firm-specific costs which are the result of accounting norms, among other things, that may very well not be the relevant way to control for costs.

And unfortunately, my group cannot have its expert here today to have a battle of the experts on this subject. However, as a general matter, in which way a defendant might be incentivized to portray its input costs when committing a price-fixing conspiracy, it might be worth pointing out that if guilty, there would be an incentive to overstate costs as a pretext for increasing prices because, otherwise, a customer might have the thought of: Well, gee, why else are prices increasing in this kind of competitive, commoditized industry

if not because of an input cost increase?

Setting aside the issue of controlling for cost, the theme for the rest of my remarks will be that the commercial food preparer plaintiff class would like to point out defendant's apparent lack of remorse.

It's our understanding that yesterday there was a claim made in papers that the CFPs, the commercial food preparer plaintiffs, this class of -- class action on behalf of restaurants, among other entities, should not speak today. And, of course, this is a class that has been certified via court order; and, in fact, this class does assert that it has been damaged by defendants. After trebling -- including Mr. Lischewski.

After trebling, funds owed to the commercial food preparer class are estimated to be in excess of $100 million, and that is an estimate that is causal and made using a regression analysis.

And furthermore, in asserting damages in this case, the commercial food preparer plaintiff class has submitted expert reports. In fact, there has been live testimony by these experts before Judge Sammartino. And as a result of three days of hearings, one of which applied to the commercial food preparer plaintiff class, Judge Sammartino issued an order certifying a class of commercial food preparer plaintiffs among the other classes.

And so for these reasons, we suggest -- my group would suggest that we have, in fact, been damaged by the conspiracy that Mr. Lischewski joined and presided over.

In addition, my group takes the standpoint, these commercial food preparer plaintiff class members, that the defendants have not sought summary judgment in the civil case in a way that would wholesale eliminate our claims. In other words, we would take this as a recognition that we were damaged by this conspiracy to some degree, or at least that this conspiracy did apply to the commercial food preparer plaintiff class.

Lastly, we would make the point that the guilty pleas in this matter apply to packaged seafood or canned seafood without delineation. And, in fact, that also supports the idea that this was a conspiracy that was overarching and affected restaurants, among other entities.

And as another thread supporting lack of remorse, as has already been mentioned, my class would point out that no compensation has been paid to the CFPs, of course, by Mr. Lischewski, but also not by Bumble Bee, which is now in bankruptcy.

And as a closing remark, while my group will not recommend a specific sentence or does not seek to recommend or request a specific sentence, we would just point out that the damages at stake and the amount that this group has been harmed are

significant on a per restaurant basis, we assert into the hundreds of dollars per restaurant type figure. And we would also assert that these are amounts of funds that are significant to anyone, let alone a small business owner, particularly in this time.

And with that, I will end my remarks unless the Court has questions. Thank you.

THE COURT: No. Thank you, Mr. Finley.

And do we have Ms. Manifold?

THE CLERK: We do, Your Honor.

THE COURT: Okay.

THE CLERK: Ms. Manifold?

MS. MANIFOLD: Good morning.

THE COURT: Good morning.

MS. MANIFOLD: This is Betsy Manifold, Wolf Haldenstein, on behalf of the end-payer plaintiffs in the civil price-fixing action suit that's now pending in the Southern District of California.

I'd like to thank the Court for the opportunity to speak on behalf of the end-payer plaintiffs.

The criminal pleas before this Court have established that the defendant tuna companies, Chicken of the Sea, Bumble Bee, and StarKist, coordinated increases in their national price list and net price for packaged tuna and have admitted the time period during which they did so. So my comment, as one of my

colleagues noted earlier, it's very troubling to the consumers that the defendant here takes no responsibility for either the criminal conduct or harm.

The defendants have admitted a price-fixing conspiracy, and that has real-world experience and consequences on everyday consumers, which are the end-payer plaintiffs that I represent. These consumers are the real victims in this conspiracy, and they suffered actual monetary harm by overpaying for a simple staple purchased by thousands.

The impact of the conduct is clear. I will leave the exact quantification of the hundreds of millions of dollars of harm done to consumers to the civil action.

So let me tell you about the victims. These consumers were overcharged because tuna companies, acting through their corporate officers like the defendants, conspired to fix the price of canned tuna, one of the most popular seafood products in the U.S. and an affordable source of protein for lower-income households, the elderly, and larger families. The end-payer plaintiff representatives in the civil court are a diverse group, and they represent a diverse group of consumers who enjoy this lower-income and lower-priced staple protein.

So in our class below, let me introduce a little bit some of the class plaintiffs so you can get to know them. For example, we have a Florida paramedic. We have a veterinarian. We have a hotel housekeeper. We have a California detention

officer. We have a Maine police officer. We have a retired military officer from Maryland and Washington, D.C. We have three stay-at-home moms. We have full-time teachers in Kansas and Florida and Tennessee. And that also includes, in addition to that, two college professors. These are the faces of the victims that were impacted by the conduct here.

As a matter of economic theory, overcharge rolls downhill, and the people who get left holding the bag are the people that are least able to vindicate the harm imposed by a criminal price-fixing cartel. For these consumers, it'll be the civil action or no remedy at all. It's the only practical method for them to recover any damages.

Unfortunately, Bumble Bee has been driven into bankruptcy which substantially impairs any ability to get restitution for these victims, leaving them with no practical method to recover damages. They're the ones that are left holding the bag by the harm that the defendant inflicted.

That's the summary of my remarks. Thank you, Your Honor, for the opportunity.

Is there anything else that I could answer or any other questions?

THE COURT: No. I appreciate your participation, Ms. Manifold. Thank you.

All right. Angie, do we have anybody else?

THE CLERK: Not at this time, Your Honor.

THE COURT: All right. I do want to give the defense a chance to respond, but let's do that in the context of the 3553(a) factors that I want to now talk about.

And in that regard, let me give you some of my observations, and I'll let you sort of respond to that. Because I'm aware and I've read all of your papers; there's been extensive briefing. So I understand each of your respective points.

Circumstances of the offense, which is the first 3553(a) factor, here, I don't think we can understate the seriousness of this offense. Number one, this was widespread, pervasive, affecting an entire industry and, as this Court has found, affecting a volume of commerce to the tune of $1 billion. The conduct was deliberate; it was planned. It was sustained over a three-year period. So this was not a rash act; for instance, having to commit a crime under distress, under episodic circumstances as we see sometimes. This was a contemplated and deliberate plan.

Two, I will say that I am not going to rely on, with respect to the victim statements, any of the quantitative data here, any of the dollar amounts. I don't think that's appropriate. That's not evidence that I'm going to consider.

But I do think it is clear that a couple of things that are not -- I don't think are disputed is that the product in question is a basic food staple. It is not expensive LCD

screens. It is not some part of high-priced consumer goods or computers. This is food, food for people who I think it's fair to assume includes those who are at the lower end of the socioeconomic scale based on the pricing of this product. And so the impact has particular meaning when you look at the nature of the product in question.

And so one has to think about what are the consequences and who suffers and how much do they suffer. It's one thing to pay a few extra dollars for some consumer product, a few extra dollars for something that is expensive, that is not an item of necessity. But when you come to food, especially a low-cost staple, the impact on those who can least afford it is something that contributes to the circumstances of this offense and the need for just punishment.

On the other hand, I recognize the history and the characteristics of Mr. Lischewski, who has led a crime-free, laudatory life; who has come to the rescue of friends, relatives; who's devoted much of his career and time to charitable events that he didn't have to. And this was not -- this is -- I think he has a history of demonstrating charity before this event, before this prosecution. So this is not a situation where somebody suddenly, after they get wind of potential criminal proceedings, decides to volunteer at the local Salvation Army or do something. I do believe that his devotion to service is one that is genuine and longstanding and

that he has been, in all other respects, an upstanding citizen and a contributor to the economy in his efforts, including efforts with respect to sustainability and everything else.

So we have those two characteristics that really tug in completely opposite directions.

With respect to just punishment, the volume of commerce, although I have found it, and found it under a high level of standard of proof; nonetheless, I do agree with Probation that it tends to overstate the sentence, the culpability, the guideline calculations here. And I say that not just because it's a big number, but because the volume of commerce calculation and the use of volume of commerce was meant by the guidelines to serve as kind of a shorthand. As you can see from the guidelines, fines are fixed in way that's sort of meant to obviate detailed econometric proof, sort of a shorthand. And volume of commerce is a measure of culpability.

But the problem here is that there's not been much quantification, and that's because that wasn't necessary to the case. We went into that, and I ruled prior to trial that the Government did not have to prove, in order to prove its case, unlike a civil damages case, quantification. So it's understandable that there wasn't much on that.

But be that as it may, as I sit here today, I am convinced that prices were affected, as I stated, and the charts seem to show that, but what I don't know is how much difference there

would have been. I understand that evidence is being developed in the civil arena, and we heard a little bit about that, but I'm not going to take that into account because that's not evidence before me.

And so my concern is that without much evidence of the magnitude of the actual harm, the impact that a 12-level increase -- which almost quadruples the guideline range -- is problematic. So I'm not saying that in every case you can't do a 12-level increase, and I'm not saying that for a smaller-scale case you need to prove up a civil case. I'm just saying in these circumstances, given the magnitude, I think the 12-level increase tends to overstate the guideline range, and that's one indicator in the other direction.

The need to avoid unwarranted sentencing disparities. There's a lot about the tables here. I will say that the most apt comparison are the *AU Optronics* case, given the guideline ranges that were faced there, guideline ranges that exceeded the level here a bit but yielded sentences of 24 to 36 months. I note the next, sort of, closest range of guidelines had levels of 19 and 21 that yielded 30 and 21 months, respectively. And so I do look at those. I'm not bound by those.

And the goal of this Court is to avoid unwarranted sentencing disparities. And there are differences. I understand that -- at least my understanding; maybe

the Government can correct me -- that at least one of the defendants in the *AU Optronics* case was elderly, was 70 years old or something like that, and that may have been a factor as to why there was such a large variance given in that case. But I do look to those. I think they provide some guidance.

Deterrence. There's no need for individual deterrence here. I'm confident that Mr. Lischewski will not and will not be in a position to effectuate any further harm. However, there is societal and more broad deterrence. And I think it is important to send a message that those who engage in high-level economic crimes need to face punishment as much as those who commit low-level economic crimes, street crimes, because if we don't, I think that perpetuates the perception and, I think, the reality of a dual system of justice.

And so the idea that if you come from high education, a good background, noble background, but you commit a crime that affects hundreds, thousands, millions of people, economic crime, that your fall from grace alone is enough punishment, your embarrassment, your stigma is enough punishment...

Unfortunately, so many in our society that we see that come across this bench who are subject to charges and conviction don't have that opportunity, don't have that same argument to make; and it seems to me we have to take that into account, that deterrence from social stigma and other things that attach to a conviction alone can't be the end of the

inquiry.

The protection of the public is another factor. Same thing. I think it overlaps with deterrence. I don't think there is a need for individual deterrence/protection of the public from Mr. Lischewski in this point, and that is significant. On the other hand, there is a need for societal deterrence.

And finally, with respect to the COVID crisis, this is something that confronts every court, every judge in this courthouse and every courthouse across the nation at this point. What do we do? What do we do when people otherwise should be given a custodial sentence but we know that there are risks?

It varies between regions, states, facilities, state versus federal. And there's debate about how well each particular institution is dealing with this. Some of it is very troubling in terms of some of the infection rates. And yet it seems, we simply can't say: Well, we're not going to impose a sentence that otherwise would be due.

If somebody meets the criteria for compassionate release, which is set forth in the legislation, perhaps that might be considered up-front. There may be appropriate room for that. It's not clear that it is.

But in this case, other than Mr. Lischewski's age, 59, approaching 60, there are no other risk factors -- health risk

factors here that would warrant, I think, any special consideration in that regard.

That may inform the question of a selection of surrender date if a custodial sentence is imposed. It may inform a recommendation as to place. It may inform some other things. But I don't think it can inform the ultimate, fundamental question of whether there should be a custodial sentence here.

And then, finally, I will state that I am aware of the defendant's request for, essentially, home confinement for one year as the sentence, and I am not favorably disposed for the reasons why I stated that; that it seems to me that the guidelines -- and there's some specific commentary in the field that the antitrust guidelines were intended to ensure that custodial sentences were not just simply sloughed off; that this was an important matter and that's why there are specific guidelines in this area that contemplate custodial time.

And I will say that, again, when I look at the sentencings that I have done over the last ten years and the ones that have come across this bench, it seems to me there would be something fundamentally unfair, because if I were to take a guideline range that goes from 97 to 120 months and to impose a non-custodial sentence, considering the kinds of people that we have sentenced here -- and I think properly so, at least given this current state of the law -- to significant time for much

lesser crimes in a sense of the effect on the numbers of people, the dollars, et cetera, and under much more extenuating circumstances.

I've had cases where I've had to sentence people when they were engaged in fraud or engaged in some form of economic crime in order to pay for the education of their child, or health services, or driven by the stress of having to care for a mother who is dying of Alzheimer's. I mean, these are literally the kinds of cases I've had. And yet, when the law is broken, we take that into account. But there are folks who have served custodial time under extremely extenuating circumstances and don't have the advantages that Mr. Lischewski has.

So I do think in the larger picture of justice, as well as looking at the guidelines and all the analysis, the 3553(a) factors here, I am not disposed to a non-custodial sentence. On the other hand, I am not disposed to a guideline range here. I think a variance is warranted for the reasons that I've stated. And so I'm going to be transparent. It's not going to be one end or the other.

And I do look to the sentences that have been handed out in antitrust cases. And there does suggest at least some range there, and it's not that far different, frankly, from what Probation has recommended. Probation has recommended a 48-month sentence.

So I want to be transparent as to what I'm thinking so you can focus your comments on that rather than -- I don't want to start from scratch. I don't need to hear the same remarks that have been made. You've each submitted almost three rounds of briefing, more than I've ever received. So I'm well familiar with your positions. But I'd like you to respond to at least where I'm at at this point.

And since the Government has the burden, I'll let you go first.

MS. CONDON: Yes, Your Honor. I'd like to respond with respect to *AUO* and other comparable sentences in antitrust crimes.

I think it's important to acknowledge that in *AUO*, the individual defendants who went to trial weren't the decision-makers. They were middle-level managers following the business culture of the companies that they worked for. Here, the defendant was the CEO, and he set the business culture of his company. And instead of setting it for full and robust competition, he set that culture to be criminal.

As an additional distinction, the defendants in *AUO* voluntarily submitted to the jurisdiction of the United States courts. They were Taiwanese natives -- nationals -- I'm sorry -- and they came to the United States voluntarily to submit to trial here.

Finally, Judge Illston found in *AUO* that the defendants'

actions there demonstrated that for the majority of the conspiracy, the defendants were unaware that their actions were wrong. The defendant's actions here are to the contrary. He kept his hands clean and ordered his lieutenants to do the dirty work. He threatened them when they wanted to come clean. And he testified at trial here that he knew that antitrust -- that price-fixing was a crime; and when pressed three times, he admitted that it was also wrong. So I think that the defendants in *AUO* are distinguishable.

I'd also like to draw -- I'm sorry. One further distinction is that Judge Illston also found the defendants in the *AUO* case had little personal motivation in the crime. But Mr. Lischewski orchestrated this conspiracy for one reason only, which was his personal gain. I know Your Honor is familiar with the motive evidence in this case. Mr. Lischewski stood to gain over $42 million if the conspiracy was successful. And it's worth noting again that the only reason it wasn't successful is at the 11th hour, while defendant was poised on the precipice of realizing the gains of his criminal enterprise, the Department of Justice learned of that crime.

I'd also like to draw the Court's attention to the *Peake* case and the sentence that was imposed in that case.

THE COURT: Yes.

MS. CONDON: So Peake received a five-year sentence for his role in a conspiracy with a $500 million effect on

commerce. I think it's worth noting that it's an apt comparison because the defendant in *Peake* was also the CEO of his company. However, the defendant -- the conspiracy in *Peake* affected only Puerto Rico; and by contrast, the conspiracy here affected every state in the United States of America.

So I believe that the sentence in *Peake* is an apt starting point but that the defendant's conduct here merits an additional term of imprisonment.

THE COURT: Let me ask. Your comments about *AU Optronics*, despite middle management and all the factors that you mentioned, the guideline range was still quite high. What's behind that? Do you know?

MS. CONDON: I believe it was also driven by the volume of commerce, Your Honor, which was significant in that case.

THE COURT: Do you know whether, in fact, at least one of the defendants there was elderly?

MS. CONDON: Yes, Your Honor. I believe one of the defendants was elderly. And then the 24-month sentence was an individual with lesser involvement, lesser participation in the meetings that were held, the "Crystal Meetings."

THE COURT: Okay. All right. Thank you. Appreciate that.

MR. KUMAR: And, Your Honor, I have some points that I'd like to make with regard to the other 3553 factors, if it

would please the Court, and I'll try to keep them as brief as possible.

THE COURT: Yeah. Why don't you go ahead. And then I'm going to take a short break to give the defense a chance to gather their thoughts, and then we'll come back. So we'll complete with your presentation as well.

MR. KUMAR: Thank you, Your Honor.

And so I very much appreciate, Your Honor, the very detailed description of your thought process that Your Honor has provided. And so there's some comments that I want to make in response to those. If at any point -- I don't want to just be standing up here and making a speech to Your Honor. So please do feel free to interrupt me, Your Honor, because I would like to have a conversation with you about some of the points that you made.

So I want to start out in talking about the need under 3553 for the punishment to reflect the seriousness of the offense here. And Your Honor has already, I think, very eloquently described, at least from the United States' perspective, how harmful this conspiracy was.

And I just want to make the point that from my perspective as a supervisor of the office -- of an office of the Antitrust Division at the DOJ, this is really one of the largest and most pernicious domestic price-fixing conspiracies ever prosecuted.

So my colleague Ms. Condon mentioned, as a datapoint, the

Peake case. We believe that the volume of commerce here and the impact of the conspiracy was far greater.

Another datapoint for Your Honor to consider is the *VandeBrake* case, which is also described in our papers. In that case, the defendant received a term of custody of 48 months, and he was involved in fixing prices for ready-mix concrete sold just in the state of Iowa.

So this conspiracy, for the reasons that Your Honor stated, had a far greater impact. And, of course, every case, Your Honor, should be judged on its own merits. We should look at the facts of the specific case, which I think Your Honor also recognizes as well.

But the point that I want to make here, Your Honor, is that not only was this conspiracy very harmful, but the defendant was the most culpable participant in the conspiracy. He exerted his influence, he used his title as the CEO to lead and organize the conspiracy. He brought his company into the conspiracy, and it has suffered the consequences. He brought his employees into the conspiracy. They will suffer the consequences. And he brought the rest of the industry into this conspiracy as well. Two companies have pleaded -- the two other -- two companies have pleaded guilty before Your Honor, and one of those companies has received a statutory maximum penalty.

So I think what's remarkable about this case is the fact

that the offense conduct essentially infected an entire industry selling goods within the United States. But the Government views the defendant as the most culpable member of this conspiracy because he played such a central role in it.

So Your Honor heard testimony about how this all started with a truce between Bumble Bee and StarKist. Well, that truce with StarKist was the defendant's brainchild.

During the conspiracy, you heard testimony that there was constant collusion going on between the executives at these companies. Well, the defendant directed his employees to engage in that. He approved, repeatedly, the price changes -- the price-fixed pricing changes that came about as a result of that collusion.

And the defendant, of course, colluded with a rival CEO himself. He used his influence in the industry, his -- the fact that he was the CEO of a large tuna company to basically deter that smaller company, Chicken of the Sea, from offering lower pricing that would have disturbed the fruits of the conspiracy.

And I know Your Honor has already made a finding with regard to the obstruction of justice enhancement, and I won't belabor that point except to say that, you know, that conduct is very troubling. And I think even Your Honor acknowledged that what the defendant engaged in when he took the stand in this case was not truthful, and so that should be part of

the Court's calculus as well, as well as the fact that, you know, even today he still has not -- he continues to be unrepentant. He's made no kind of apology for what's happened, what happened to the United States economy, to his company, to his employees, to the industry.

He, even on cross-examination, struggled to acknowledge the fact that price-fixing is wrong. I had to ask him on cross-examination three times "Is price-fixing wrong?" before the defendant would acknowledge -- even in the middle of this trial after all of the proceedings that have happened to date, before he would acknowledge finally that, yes, price-fixing is wrong.

And so, Your Honor, we ask that -- in addition to the fact that the conspiracy was very large, we also ask you to take into account the fact that the defendant played such a central role in the conspiracy.

So I'd like to now address some of the comments that Your Honor made with regard to the guidelines, if that would please the Court, and specifically the volume of commerce enhancement.

So the point that I want to make, Your Honor, is that the guidelines explicitly reject the argument that the defense has repeatedly tried to make about, you know, there is no evidence of damage or profit that were occasioned by the conspiracy. The guidelines make the point that we're supposed to use volume

of commerce as a metric, as Your Honor stated, for the impact of the conspiracy. As a factual matter, the United States in no way concedes that there wasn't significant economic damage caused by this conspiracy, and there's a couple of pieces of evidence that I want to point you toward.

But as an initial matter, I want to make the point that the volume of commerce calculation that's being used for these proceedings that Your Honor has found is conservative by its very nature because it only looks at a single product, 5-ounce cans. It excludes other types of products, such as pouch tuna, which there was testimony during the trial that pouch tuna was affected. It doesn't take into account other types of anticompetitive conduct that could arguably be considered by the Court as affected -- as affected conduct under -- or relevant conduct under the sentencing guidelines. So, for example, it doesn't take into account the conduct related to downsizing cans.

So that's an initial point, Your Honor. The volume of commerce calculation is very conservative in this case. And, in fact, we did sort of like a sensitivity analysis where, even taking out a large portion of the commerce, you still ended up with the same guidelines calculation, even taking -- because we were so much higher than the nearest inflection point in the guidelines. The affected commerce here, Your Honor, was calculated to be, by the United States, somewhere around $1

billion. The inflection point that we're dealing with is $600 million. So that's $400 million that we have to play with.

THE COURT: I don't take issue and I understand that the amount affected, at least as I've determined within the meaning of the guidelines, exceeds 600 million. And I understand this was conservative. You took out -- you didn't include many other forms that could have been included.

I think the point I'm making is that one of the circumstances of the offense, even though you're in that -- once you're in the guideline range, and mindful that we don't want to devolve into a whole new trial on, necessarily, econometrics; but it does seem to me it should make a difference if the conspiracy effected a one-cent difference or one-dollar difference or a 50-cent difference, just the amount of impact on the economy. And I understand we don't want to turn it into a whole trial, but I do have to take that into account in terms of what do we have.

And it may be that that lack of really any sort of quantitative evidence in the end, that's what makes me uncomfortable with applying just straight, without any kind of adjustment, the full amount, considering it is a 12-level adjustment here. If it was a four-level adjustment, maybe it wouldn't be so demanding. And that's why the clear and convincing -- if you get into preponderance, maybe it's a little easier to prove; but as you get higher and higher,

I think properly so, the need for proof gets higher.

So part of it is an order of magnitude here.

MR. KUMAR: Yes. And I understand Your Honor's comments in that regard.

There's a couple of pieces of evidence that I'd like to point to you to give you some reassurance that, in fact, prices were affected in a very significant way, even though, as Your Honor has noted, overcharge was not an element to be proven by the United States in this case.

So I want to just direct Your Honor to the testimony that basically came from all three of the cooperators indicating there was no way that they could have accomplished the price increases that occurred during the conspiracy without getting -- basically, without entering into agreements with one another. Right?

So there was testimony, Your Honor, for example, that a list price would not have ended up being effective. There's testimony that they needed the agreement to accomplish the price increase. There is testimony that they never would have been able to get close to the number without agreement from our competition as well. So the price increases in this case, there's no question that they absolutely needed the conspiracy to be -- to be effective in this case.

Now, in terms of those price increases, Your Honor, let's remember that, as Your Honor observed, we're not dealing with

liquid crystal display panels here. We're dealing with a commodity item. Right? We're dealing with cans of tuna that are approximately a dollar apiece, let's say. And the price increases in this case, Your Honor, had a huge impact on the ultimate price of that can of tuna. Even a 5-cent increase or a 10-cent increase basically was tantamount to a price increase on the order of 10 percent or 20 percent.

So, Your Honor, we were talking at the last hearing about the 10-for-10 promotional price point and how it -- and there was evidence at trial that that move from 10 -- you know, ten cans for $10 all the way to four cans for $5 because of the agreement. Right? And at four cans for $5, you're looking at a can of tuna going from $1 to $1.25, which is really a massive increase in the cost of a can of tuna.

THE COURT: And I understand that's one area where we actually have numbers. We can compare the difference between 5-for-5 and 4-for-3 or 5-for-3, or whatever, 3-for-2. The problem is, I don't know -- that was sort of episodic. I know there's a lot of those, and we can try to -- I don't know if there was evidence of how many dollars that affected.

But the wider systemic increase effect through the list price effect, I don't remember any evidence about, well, in the end, when you combine guidance conspiracy and list price conspiracy, did that have a nickel increase, ten-cent increase per can on average compared to what it would have been after

that?

And I know that's not easy to do, but that's where we have little inklings of that. You can look at the EBITDA difference. You can look at some anecdotal stuff from Safeway. But it's not a lot.

And so if I sit here today and say, "Out of the billion dollars of commerce, what would sales have been -- what would prices have been absent that?" I know that's not an easy thing to do. And I'm mindful of, again, not turning every sentencing in this kind of case into a -- but given what I find to be the higher standard of proof, I think there has to be the more -- the higher the level you get, the stronger the proof has to be.

And that's why I think in this case on this record given this increase, that a 12-level increase, I think, overstates on the record.

MR. KUMAR: So -- and I understand that, Your Honor.

Let me show you just one example, using a document on the screen share, what the impact of the conspiracy was in some dollars and cents. This is one example.

But Your Honor saw during the Trial Exhibit 424. This is a document -- this is a document using StarKist as an example.

And I just want to confirm that Your Honor is able to see the document.

THE COURT: Yes.

MR. KUMAR: So just for the record, this is page 8 of

the presentation. And here, Your Honor, they are talking about possibly taking a price increase, and they're sort of looking at what the impact of various scenarios were.

So one scenario here, Your Honor, is where there's a price increase, but only one of the companies -- but only StarKist -- it's spelled out here.

(Reading):

"We increase the price and the competition does not."

And it says here (reading):

"We gain $2.1 million of operating income."

And then here's an example where -- in Scenario 2, where they're gaming out what would happen if we increase price and the competition -- and the competition followed. And that's what ended up happening as a result of the price-fixing conspiracy in this case. And it says here that they ended up gaining $8.4 million of operating income.

And so if you look at the difference between these two scenarios, you have, from a percipient witness to the conspiracy during the conspiracy, looking at the difference in what the money -- how much more money StarKist was able to gain by effectuating a price increase through the conspiracy, $6 million through this one price increase alone.

So that's one measure that Your Honor can take into account about what, you know -- this happened repeatedly over

the course of the conspiracy. This is just one example that occurred during the three-year conspiracy in this case, and this is some quantification of what the economic effect of the conspiracy was.

THE COURT: All right. Well, it is one snippet based on sort of one projection, and I understand that.

Anything further in that regard?

MR. KUMAR: No. I mean, there was a couple of other comments that I would like to make as well.

THE COURT: Okay.

MR. KUMAR: But I don't know if Your Honor wanted to take -- Your Honor indicated that you were interested in taking a break. I don't know if you'd like to --

THE COURT: Yeah. Well, estimate how much time you want to make your other comments.

MR. KUMAR: Less than five minutes, Your Honor.

THE COURT: Let's do that, because what I want to do is give the defense a chance to gather their thoughts before they make their counterpresentation. So --

MR. KUMAR: Okay.

Your Honor made some comments about the good works that the defendant engaged in, and the United States doesn't disagree with the fact that he may have engaged in certain good acts. I just want to make the point, Your Honor, and as explained in our papers, those types of good acts are not

unusual for white-collar defendants in the defendant's position. It's common for successful business executives to be in a position to have good relationships in the community and have good professional relationships as well.

And so, Your Honor, the guidelines specifically indicate that those types of good acts are not -- are not -- unless really extraordinary, are not a basis for a departure. That's reflected in the sentencing guidelines when they say that prior good works are not ordinarily relevant in determining whether a sentence should be outside the guidelines range.

And I also just want to make the point, Your Honor, that there was -- like all of us, the defendant was neither all good nor all bad, but there was a side to the defendant that wasn't public and outward-facing and engaging in good works; there was a side to the defendant that engaged in criminal conduct repeatedly on a sustained basis when he thought that no one was looking. It was when the defendant didn't think that anyone was looking when he had these private conversations to effectuate the price-fixing conspiracy, when he directed his employees to fix prices, when he approached other members in the industry and engaged in illegal discussions about price.

And so I think that, you know, the reason why the United States is recommending such a substantial period of custody in this case is because there really are no mitigating factors that the United States could identify to take the

sentence below the applicable guidelines range.

Putting aside Your Honor's points about volume of commerce, Your Honor, the defendant's age is not an appropriate basis. The defendant is in good health. And, in fact, his age is part of what allowed him to have the authority that he had within his company and in the industry to carry out this price-fixing conspiracy. So that shouldn't be a basis for a variance.

You know, his familial status, that's not supposed to be something that's considered within the guidelines. That's indicated in the commentary to the guidelines as well.

So what the Government believes, Your Honor, is that it's clear that the defendant came from a good background. He had a good upbringing. He was able to achieve through his career a certain measure of power and wealth and status. But if anything, that is a reason not to give the defendant leniency, because he occupied a position of leniency -- or of influence, rather, but he abused it. He had a number of advantages, as Your Honor observed, but instead of leading his company to be on the right side of the law, he acted out of greed, and he brought his company and its employees into the proceedings that we're dealing with today.

And so we believe that a guideline sentence is necessary because of the -- under 3553 in order to ensure just punishment, to achieve deterrence, in order to reflect the

seriousness of the crime. And that's why the Government believes that a substantial period of incarceration is appropriate in this case.

THE COURT: All right. Thank you. Does that conclude your remarks, Mr. Kumar?

MR. KUMAR: Yes, Your Honor. It may be necessary for me to respond to something that Mr. Peters --

THE COURT: I understand.

MR. KUMAR: But for now, it is.

Thank you, Your Honor.

THE COURT: All right. Let's just take a ten-minute break, and then I will hear from Mr. Peters.

THE CLERK: Court is in recess.

(Recess taken at 11:32 a.m.)

(Proceedings resumed at 11:41 a.m.)

THE COURT: We are back on the record.

I do have a matter at 12:30. I'm hoping we can conclude by then. But I want to give Mr. Peters a chance to respond.

THE CLERK: Please come to order. Court is now in session.

MR. PETERS: Thank you, Your Honor.

And I'm going to respond to Your Honor's comments. That's what matters here. And I'm not going to respond to a number of the things that counsel for the Government said with which we disagree because I want to focus on the Court's concerns.

And I want to start with this of discussion about quantification. And I want to remind the Court of the actual evidence in this case. A number was thrown around about between 2010 and 2014, Bumble Bee's EBITDA grew. But keep in mind that 2014 is after the conspiracy in this case.

Let's talk about what happened during the conspiracy. The evidence presented at the trial showed that StarKist's profitability went completely into the tank. They lost something like 96 percent of their profitability. Chicken of the Sea's chairman testified that they were selling product below cost. Bumble Bee's profitability went down in 2011 and 2012 and 2013. The idea that these companies were reaping profit or that Bumble Bee was profiting from this so-called conspiracy is not consistent with the evidence.

There's also no evidence of actual unfair pricing or overcharges to any of the consumers in this case. The only actual attempt to quantify the relationship between cost and price or to analyze it that's been presented in this case was presented by the defense. We've discussed it already.

And the Government has made -- they have economists. These civil plaintiffs have economists they referred to. And Your Honor has said -- and I appreciate that; I think it's appropriate -- that you're not going to consider that because in those civil cases, the defendants have economists too, and there is a vigorous debate about whether there was any impact

on pricing at all in those cases. And the Government has simply -- they've chosen -- and it's really quite significant. Given what's at stake here and their burden, they bring you no evidence whatsoever.

What do they bring you? They bring you a projection, a page from a projection from StarKist? As if that's proof of actual overcharges or harm to consumers or purchasers. And they say: Well, our well-schooled cooperators testified that without this agreement, we would not have been able to do something, which is purely speculative and is -- it's entitled to what weight you want to give it. But in terms of proving that there was actual harm, that there was some quantitative proof of harm, there simply is no evidence. And it is being hotly litigated in these civil cases. That's what's going on in those cases.

Similarly, Your Honor -- and I just have to respond to it because it really gets under my skin, this repeated comment about motive, that because there was a projection made in late 2010 that showed that under certain scenarios of the sale of the company at some future time, Mr. Lischewski would stand to get a certain amount of money, that that's what motivated him to become involved in this price-fixing activity that he stands convicted of. There's simply no proof of that. There's the fact that he had a potential gain in the future, and then it's just said as if it's a fact that that's why he did it. He was

motivated to get this $42 million.

They have been -- Mr. Lischewski was at this company a long time. And costs go up and costs go down, and prices go up and prices go down. And he operated lawfully throughout his career. And to say -- there's no e-mail that suggests he was motivated by this financial projection. There's no conversation where someone suggests he was motivated by this financial consideration. Yet it's just said over and over again, just like it's said over and over again that there were -- that there were overcharges or that the volume of commerce really is an indicator of harm to the consumer. There's no evidentiary support.

And, again, the only people that tried to bring that support into this courtroom was the defense, and we did so. And so I think it's important to keep that -- to keep that in mind, because I think Your Honor's observation that this 12-level increase based on the volume of commerce overstates the culpability in the absence of further quantification along the lines that I've just discussed is completely correct. And I'm not sure how you discount it. We've proposed that it not be considered at all, that 12-level increase. But under the 3553 factors, Your Honor has to take that into account; and respectably, we suggest that you should.

Let me turn to talk a little bit about Mr. Lischewski, because he is -- he's caricatured by the Government. I think

there's a certain amount of grandstanding going on. And it's obviously important. I understand the point about general deterrence, but the guidelines start out with the process -- with the guiding principle that has not been mentioned yet today, which is that the sentence should be sufficient, but not greater than necessary, to effectuate these objectives of sentencing with which the Court is familiar.

So I'd like to just talk about a couple of the 3553 factors from that perspective.

Who is Mr. Lischewski? The prosecutor just referred to him as a man of privilege, a man of wealth. Your Honor used the term, I think, "noble" a few minutes ago. Mr. Lischewski was born to immigrant parents who came to this country from Germany. He grew up in Las Vegas, and his dad died when he was 15. He was a working-class or lower person. He put himself through college working construction jobs where he had to get up at 3 o'clock in the morning and work in 115-degree heat. He worked himself up in this country through hard work and dedication and being the person that he is: reliable, decent, generous.

And to say that he was -- or suggest that he was born into a life of privilege and that he's taking advantage of it is completely unfair. And I know that Your Honor appreciates that because I know you've read the letters. But that isn't where -- that isn't where Chris Lischewski comes from and

that's not who he is.

And it bears mentioning that he has suffered tremendously as a result of this, as has his family. He's lost his job. He's lost his life savings. He's lost his reputation. He's lost his involvement in the community. He's lost his investment in Bumble Bee, which was basically his life's work. He faces civil litigation. Some of it's been dismissed by the court in San Diego, but apparently, we learned today that some of these folks plan to refile. And so he has suffered tremendously, and he's probably going to have a very hard time ever recovering from that.

And so in sentencing Mr. Lischewski, I think the Court is right that there's absolutely no need for deterrence of him, but he really is entitled to credit for what he has done in his life. He should stand before the Court with a credit balance for his generosity, his philanthropy, his selflessness. It shouldn't be used against him.

He worked himself up from nothing to achieve what he's achieved, and he has seen it all taken away. It's all gone. And he understands that he's likely, in the near future, to be reporting to a federal prison for some period of time based on Your Honor's comments about home confinement. We understand that's where you're going.

So what we're really talking about is: How much of what remains of Mr. Lischewski's life is sufficient, but not greater

than necessary, to achieve the objectives?

In that regard, I want to go to the fourth 3553 factor, the need to avoid unwarranted sentencing disparities.

My understanding of the *AU Optronics* case, Your Honor, contrary to what you were just told, is that one of the defendants there was the president of AU Optronics. He was not some middle-level functionary.

At the time that case was being litigated, the Government, the Department of Justice said that it was the largest, most egregious antitrust conspiracy the DOJ has ever prosecuted. And the sentences in that case were 36 months and 24 months. Two defendants got 36 months, one got 24 months. Those are significant sentences. I'm not suggesting that they're not. But if that's the most egregious antitrust conspiracy the DOJ has ever prosecuted, then that should define the upper limit of what's sufficient, but not greater than necessary.

But also in terms of unwarranted sentencing disparities, I think you have to look at this very case. The Government argues that Mr. Lischewski was the ringleader. I don't think that -- we disagree with that. We don't think that there's proof of that. All they ever proved under the per se rule was that he participated. But how about the CEO of Chicken of the Sea, who's going to get a complete pass? Or everyone from Chicken of the Sea who's going to get a complete pass because the DOJ gave them all amnesty?

How about the cooperators, Cameron and Worsham, who, by agreement, have a different -- for the exact same conspiracy, they have a different volume of commerce number because it was negotiated because they were cooperating? Mr. Cameron has a guideline range of 10 to 16 months. And, of course, that's before any 5K1 comes into it.

When arguing about the admissibility of co-conspirator statements, the Government had a long list of co-conspirators. It includes Mr. Hanford who was never prosecuted. It includes other people from -- it includes other people from Bumble Bee who were never prosecuted.

How is it proportionate or fair that Mr. Lischewski get this extremely long sentence which bears no relationship to anyone else who was engaged in the same conduct that he's been convicted of? How could that possibly be fair? You can argue different gradations, but to just put Mr. Lischewski in this category where he's getting a very, very stiff sentence and other people aren't being prosecuted at all and other people are just getting a slap on the wrist -- and Your Honor's going to decide how this works in terms of the cooperators, but there's a number of people who got absolutely nothing.

So in terms of considering sentencing disparities, I also think you should look at the other cases in this district. I mean, the Government talks about *VandeBrake*. *VandeBrake* is such an outlier. There, the judge decided he was going to use

the loss table, the fraud guidelines. He didn't even use the proper sentencing methodology. It went up on appeal. But it's a complete outlier of a case.

Why don't we talk about cases in California in federal courts, the cases we've cited: the *Marr* case, where people got between 18 and 30 months; the Florida case where the sentences were all under two years; the case I was involved in personally, the *Chandler* case in the Eastern District where the defendants got six months and ten months.

To consider other antitrust cases in Northern and Eastern Districts of California, the highest sentence is in *AU Optronics*, 36 months, and that makes sense, given that the DOJ said that was the most egregious antitrust conspiracy that it had ever prosecuted.

So, Your Honor, I know you've read our briefs. We have raised these issues, and so has the Government. But I want to close by saying one thing.

I've obviously been very close and worked very closely with Chris Lischewski over the course of this case. And any suggestion that he didn't take this incredibly seriously, that he doesn't have the utmost respect for this Court, for his obligations, for the United States of America, for the meaning of the flag, or for a real understanding of what he's facing, the consequences he's facing, that's just completely false.

He has taken these proceedings extremely seriously. He'd

like to make some remarks to Your Honor before you impose sentence. But he is a man of tremendous character. He is a man of tremendous energy. He is a man whose life, putting this -- these events aside, of tremendous accomplishment, courage, generosity.

And I ask you, please, to sentence this man based on the actual evidence relating to his conduct, not general statements. And please keep in mind, give him a sentence that is sufficient, but not greater than necessary, because when the dust settles, despite all the talk about deterrence and thinking about how many months is enough and the Government's just relentless bloodlust to just grind Mr. Lischewski, when it's all said and done, the effect of this is going to be on Mr. Lischewski and his family.

And when he is done with his punishment, he's going to return to society and he's going to be a good man and he's going to be a generous man and he's going to take care of his family and he's never going to get in trouble again. I think we all know that.

So we ask you, put the grandstanding of the prosecutors and the plaintiffs' lawyers aside and sentence Mr. Lischewski to what you think is sufficient, but not greater than necessary. But please understand that the idea of the greater level of deterrence between a sentence of two years and a sentence of three years or four years, it's not going to have

any meaningful effect other than to just grind Mr. Lischewski.

And in that regard, I just want to say one word about COVID, because Your Honor mentioned that. And the reality is, I woke up early this morning. I couldn't sleep last night. So first thing, I opened *The New York Times* and I see there's an article that the incidence of coronavirus in U.S. prisons has doubled. It's really picking up. That's in today's *New York Times*.

What the coronavirus means is that the time Mr. Lischewski serves is going to be harder. When he reports, when he self-reports to a camp, he's going to be put in isolation for two weeks. He's going to start his experience in segregation for two weeks. It's no fun. It's going to be really hard. The coronavirus is going to mean that opportunities for visits, for seeing his wife and his son are going to be fewer. The time he serves because of this situation is going to be harder time. And there's a risk of infection. He's going to be 60 in September, and it's a very serious situation.

You've made clear -- I think you've made clear that you're going to impose a custodial sentence, but I ask you to please take the coronavirus and the reality of his time into account.

And I'd also like to briefly be heard about the conditions of supervised release, but I don't know if you need to hear that now, just because we raise some objections to the Probation Department's suggestions of supervised release terms.

And sometimes at sentencing it seems trivial to start talking about supervised release, but once -- I've found that once a person gets out of prison, those conditions become very, very real and continue to be burdensome.

So we have asked -- I would ask you to consider that a three-year term of supervised release is unnecessary and to give a one-year term, and that the restrictions proposed by the Probation Department about that he can't be in a fiduciary position without the approval of the probation officer; that he can't get a line of credit without the approval of the probation officer; and that the probation officer can run credit checks on him and tax -- and look at his tax returns, those are completely unnecessary and onerous and shouldn't be applied.

I think when Mr. Lischewski gets out, other than whatever minimal additional supervision is required for a year, that to impose these other conditions, which really seem directed at making sure he pays a fine, which he will do promptly if one is imposed, that those are unnecessary and would just saddle him and the Probation Department with unnecessary headaches.

Thank you, Your Honor.

THE COURT: All right. Thank you, Mr. Peters.

Mr. Kumar, briefly, if you could respond just to those points that have been raised, appreciate it. Or Ms. -- I don't know who's -- which one of you.

MS. CONDON: Your Honor, I can respond to unwarranted sentencing disparities, and --

THE COURT: You need to unmute.

MS. CONDON: I can respond to unwarranted sentencing disparities, and Mr. Kumar can handle the rest. I can be very brief.

THE COURT: Okay.

MS. CONDON: With respect to Chicken of the Sea, the leniency applicant, and any of the uncharged co-conspirators, those are not individuals or companies properly considered under 3553(a)(6). The Court is only to look at defendants who have been found guilty of similar conduct. The Government's charging decisions are irrelevant.

With respect to Mr. Cameron and Mr. Worsham, they are just simply not similarly situated and not appropriate benchmarks for all of the reasons set out in our papers, and I don't need to belabor the point here. But they are not similarly situated because they pled early and cooperated fully.

And with respect to the real estate cases, Your Honor, the real estate conspiracies in the Northern District of California are distinguishable. They were bid-rigging cases by individual real estate investors purchasing real estate property at foreclosure auctions during the recession. Those prosecutions were important, and the conduct in that case was criminal, but it was a crime with a limited geographical impact and affecting

significantly less commerce.

And I have explained how this case is different. It was perpetrated by a corporate executive, the CEO at a well-known corporation who was selling a household-name product to American consumers in all 50 states.

THE COURT: All right. Thank you.

Mr. Kumar?

MR. KUMAR: And, Your Honor, I just want to make the point that -- and let me just make sure I'm not muted.

Okay. So, Your Honor, I just want to make the point that, you know, the volume of commerce enhancement that's based off of the affected commerce is the metric that the Sentencing Commission selected for adjudicating these types of offenses for purposes of sentencing. We were not required to prove overcharge. As Your Honor observed and as is noted in the commentary, overcharge is very complicated resource-intensive thing to try to figure out.

And what the guidelines do say is that it's important to tie the offense to the scale or the scope of the offense. And as Your Honor has observed, this was a massive price-fixing conspiracy that caused a huge amount of harm to American consumers. It robbed them of what rightfully belonged to them without them even knowing it.

You know, it's important to note that the Sentencing Commission in 2004 specifically increased the offense levels

for antitrust offenses to bring them more in line with fraud offenses.

And because of the serious crime that was committed against the public, Your Honor, we ask that the Court impose a substantial guideline sentence in this case.

THE COURT: All right. Thank you, Mr. Kumar.

Before I give Mr. Lischewski a chance to address the Court, let me just ask if Ms. Grier from Probation has anything to add.

MS. GRIER: Your Honor, I just wanted to address the issue with the conditions of supervision.

THE COURT: Yes.

MS. GRIER: It is very standard when we recommend a fine to recommend that we monitor the defendant's financial situation, whether that be through credit checks or looking at tax returns. We just want to have a -- it's for the fine.

Now, if the Court were to order the defendant to pay the fine in full within 60 days of sentencing and the defendant were to do that, then I would agree that those particular conditions might not be necessary.

However, in terms of the fiduciary capacity, we look at whenever a client has used their position of trust, of public trust, of private trust, or a position of great discretion to a crime, that we like to at least approve or have a say in the kind of employment they have in the future and approve any

situation where they are in some sort of decision-making or discretionary situation. We would not -- it's not to say we would say no, but it's just to say we would like to be able to weigh in and approve future employment. That's really what --

THE COURT: So you would have no objection to, for instance, Conditions 3 and 4 being eliminated upon payment of fine or if the fine is paid?

MS. GRIER: Your Honor, if you were to order him to pay it in full in a certain period of time, we would absolutely agree that those conditions would not be necessary for our purposes.

THE COURT: Okay.

All right. At this point I want to give Mr. Lischewski a chance to address the Court. I have read your letter in full, but since this is really your opportunity to address the Court directly and personally, I want you to get that opportunity, Mr. Lischewski.

THE DEFENDANT: Thank you, Your Honor --

THE COURT: You need to unmute your -- there you go.

THE DEFENDANT: Thank you, Your Honor, for the opportunity.

I have now been standing in front of you for almost two years -- or for more than two years, and I believe this is the first time I've addressed you individually.

First of all, I want to thank you for taking the time to

read my letters and the large number of letters that were sent in on my behalf.

As you know, I was the president and CEO of Bumble Bee Seafoods for over 20 years. During that period of time, I developed a reputation for honesty and integrity and always managed, through cost increases and decreases, honestly and ethically.

At Bumble Bee, we were always proud to provide a healthy, nutritious, and affordable protein. It's something we took very seriously. And if you look at any other food company -- any other food category in the United States, you'll find that tuna margins are less than half of Campbell's and Kraft and all of the other shelf -- all of the other staples in the pantry.

I testified for three days during my trial, and prior to that, I took an oath to God to tell the truth. I know several people have questioned the truthfulness of my answers, but I was always honest and transparent in the statements I made to the Court.

I realize I was found guilty by a jury of my peers. And yet today, even after that, it seems the Government is still trying to make the case against me in their comments. They're arguing to you what my personality is like in private one-on-one meetings when they've never been in such a meeting. They're talking about the massive harm that was done to American consumers when they've been prosecuting this case for

five years and have never brought an economist to try to validate the data.

I know I was a hands-on manager, and I was accused of that during my trial. But during this three-year conspiracy noted by the Government, what I saw was rapidly increasing fish costs, constant attacks on our brands by StarKist and Chicken of the Sea, reduced -- pressure on profit margins, and reduced profit in all three years of the conspiracy.

I've got to find my spot here.

Again, this was also evident in the profit of all three tuna companies. I know it's difficult to ascertain what the exact cost impact was on a potential consumer. I do believe that Dr. Levinsohn provided very solid data. But another way to look at the data is just company profitability. Bumble Bee profits were down 20 percent each of the three years of the purported conspiracy and then went back up after the conspiracy ended.

I was accused of telling one of my subordinates to negotiate a truce with StarKist in 2010. Well, 2010 was a year of record profitability for the industry. It wasn't a year of price war. And in 2011, the first year of the truce, StarKist's profit dropped 96 1/2 percent. There was no truce. The profit remained down 75 percent the next year.

I was accused of colluding with the CEO of Chicken of the Sea, who said that he reached an agreement with

me to improve the profitability of Chicken of the Sea. Chicken of the Sea lost money in 2011 and 2012 before barely breaking even in 2011.

I do recognize that I've been found guilty of a crime, and I will serve the sentence that you pass down to me. But I do believe that the evidence we provided showed no financial harm or any financial impact of price-fixing on U.S. consumers. I took the responsibility of providing affordable food to American consumers very seriously.

Again, I have been found guilty and I know that you are responsible for sentencing me. I do respectfully ask for leniency as you consider my sentence. I ask you to consider the life I've lived and the service I believe I can continue to provide to society.

Thank you.

THE COURT: All right. Thank you, Mr. Lischewski.

All right. We come to the point where sentence is to be imposed. Let me first reiterate the guideline calculations of this Court.

I have concluded that the proper adjusted offense level here is a Level 28. I do start with the level of 12 of base offense and then adjusted by the volume of commerce effected another 12 levels. I have found that the role in the offense as an organizer/leader has been shown. And I'm not going to adjust for obstruction of justice. That's not to say I don't

believe that there were misleading and untrue statements made on the stand. But as a formal matter, I'm not going to impose that.

That leaves us with a Level 28 and with a criminal history category of I. That leads to a guideline range of 78 to 97 months.

Ms. Grier, you can correct me if I'm wrong, but that's what my --

MS. GRIER: You are correct, Your Honor. And just, because you lowered the total offense level, the fine range drops to 12,500 to a million, rather than 15,000.

THE COURT: All right. Thank you.

The question is whether I'm going to impose a variance in this case. And I've indicated that I will and for the reasons that I have already stated, taking into account all of the 3553(a) factors.

I will make explicit that where the coronavirus does come into play, as I mentioned, does not obviate and excuse custody. But in view of these extraordinary circumstances, it is one of the factors in measuring just punishment, and so I do take that into account.

On the other hand, as I've stated before, the impact of this conspiracy, I will just make the additional note that in addition to consumers, there are the direct purchasers. Whatever the margins are in the grocery business and the food

business, I don't think it's disputed that margins are fairly thin, and so there's an impact on those businesses. And regrettably, there's an impact as a result of all this on the companies. What has happened to the companies and the individuals and the lives that it has affected, including those who participated in this trial, are indelibly changed. And so this does have a wide impact.

I conclude that the proper sentence in this case is a term of 40 months. That is a substantial variance from the 78 to 97 range. It is below what Probation recommended. And I have taken into account all of the factors in order to arrive at that, all of the 3553(a) factors. I will note it is approximately about half of the lower end of the guideline here, and so it is a substantial variance but one that is, I think, a reasonable one.

And in light of the sentences that have been handed down in other cases, there are differences from each, but I do think that the antitrust cases provide some guideposts. I think this Court could have also imposed a longer term. I think the Court could have well within reason imposed the full 48 months that Probation recommended. But for the reasons I've stated, including the need to impose the least restrictive sentence permissible to fulfill the purposes of 3553(a), that is the term that I am going to impose.

Three years is a standard term of release, and I don't see

anything extraordinary here.

I'm going to impose the fine that was recommended by Probation of $100,000. I understand that it's a fraction of the million-dollar fine, and there's certainly evidence that Mr. Lischewski could afford probably more, but I am taking into account the possibility of civil liability that lays out there, and for the same reasons, similar reasons why the Government has not pursued restitution here, in order to make available to the victims the maximum sums that may be available. Whether Mr. Lischewski is ultimately held liable or not, that will be up to the civil courts to determine. But it seems to me taking that into account and the potential liability there, a $100,000 fine is sufficient for purposes of 3553(a) and it is within that guideline range.

I guess one question I should ask now before I impose the formal sentence is whether or not that is something that can -- has Probation asked, recommended that that be paid in full within a given fairly short period of time, which would obviate the need for Conditions 3 and 4?

MR. PETERS: Yes, it can, Your Honor.

Hold on. Let me unmute.

Yes, we believe it can, and I think 120 days to pay it.

THE COURT: Okay. All right.

MR. PETERS: Your Honor, we would also ask the Court to recommend to the Bureau of Prisons that Mr. Lischewski serve

his time at the minimum-security camp at Lompoc or, if that's not available, at the minimum-security camp at Tucson, and that he be given 60 days to self-surrender at the designated facility.

THE COURT: Tucson, not Mendota?

MR. PETERS: Yes. We did further research, and we concluded that Tucson would be a better second choice than Mendota.

MS. CONDON: Your Honor, may the Government -- am I unmuted?

THE COURT: You're unmuted. Yes, I can hear you.

MS. CONDON: The Government wanted to quickly clarify that the $100,000 fine is not a guidelines fine.

THE COURT: Oh.

MS. CONDON: The guidelines, under 2R1.1C, mandate that the fine -- a guidelines fine is 1 to 5 percent of the volume of commerce, which is then, obviously, cut short by the $1 million statutory maximum. But here, a guidelines fine would be $1 million.

THE COURT: Well, I'm hearing from Probation that -- and it says guideline provision was 15 to a million and now it's down to 12.

MS. GRIER: Your Honor, that's using the fine table. The Government is correct, when you look at for price-fixing, that there is a different set of guidelines used to determine

the fine range.

The Court can still impose the $100,000 fine but just say it is a below, just like you're varying on the --

THE COURT: Okay. All right. Thank you for that clarification.

I will vary from the guideline range here and, for the reasons stated, will impose a $100,000 fine to be paid within 120 days.

All right. So let me formally pronounce sentence here.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of this Court that Christopher Lischewski is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 40 months.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three years.

Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the Probation Office in the district to which the defendant is released.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall comply with the standard conditions that have been adopted by this court, except that the mandatory drug testing provision is suspended, and shall comply with the following additional conditions:

Number one, you must not maintain a position of fiduciary capacity without the prior permission of the probation officer. Of course, that doesn't mean you can't. It just simply means you need to get prior permission from Probation.

Number two, you must pay any fine and special assessment that is imposed by this court and that remains unpaid at the commencement of the term of supervised release.

Number three, you must cooperate in the collection of DNA as directed by the probation officer.

Four, you must submit your person, residence, office, vehicle, and any property under your control, including any computers, cell phones, or other electronic devices, to a search. Such a search must be conducted by a U.S. probation officer at a reasonable time and in a reasonable manner based on reasonable suspicion of contraband or evidence of a violation of a condition of supervised release. Failure to submit to such a search may be grounds for revocation. You must warn any residents that the premises may be subject to searches.

It is further ordered that the defendant shall pay to the United States a special assessment of $100. Payment shall be made to the Clerk of U.S. District Court, 450 Golden Gate, Box 36060, San Francisco, California 94102. I assume that that payment will be immediately so I don't have to specify the $25 per quarter during imprisonment.

It is further ordered that the defendant shall pay to the United States a fine in the amount of $100,000. That payment shall be made within 120 days of today's date, and payment shall be made to the Clerk of the U.S. District Court, Attention: Financial Unit, 450 Golden Gate Avenue, Box 36060, San Francisco, California 94102.

The Court orders that the cash bond currently held by the court be applied to any balance due on defendant's criminal monetary penalties, including any interest charged on those balances. Any remaining balance after satisfaction of criminal monetary penalties shall be returned to the client.

The Court does recommend to the Bureau of Prisons that the defendant be designated to the satellite minimum-security prison camp at USP Lompoc, provided that the COVID-19 virus has not infected camp locations.

That is something that the Bureau of Prisons will have to determine. I think Lompoc does have COVID-19 infections to a substantial extent. But from what I read, it appears that the vast majority of inmates have now recovered. So, in fact, if anything, there's a lot of immunity there perhaps. But that will be determined by Bureau of Prisons.

If that is not available, the Court recommends that the defendant be designated to the facility in Tucson, Arizona.

Anything further at this point?

MS. GRIER: Surrender date, Your Honor.

THE COURT: Oh. Surrender date. So we should talk about that.

What is the thought of Mr. Lischewski at this point?

MR. PETERS: 60 days.

THE COURT: All right. And the Government has no objection, I assume.

MR. KUMAR: No, Your Honor.

THE COURT: All right. What is that date, Angie?

THE CLERK: Your Honor, August 15th.

THE COURT: Okay. The surrender date will be August 15th at -- did we designate a time?

THE CLERK: Oh, August 15th is a Saturday. So --

THE COURT: Oh. 17th?

THE CLERK: The 17th.

THE COURT: August 17th. Is it noon? Is that what you usually --

THE CLERK: By 2:00 p.m.

THE COURT: -- 2:00 p.m. to the, I guess, point designated by the Bureau of Prisons.

THE CLERK: Yes, Your Honor.

THE COURT: Okay. All right. That will be the surrender date in this matter.

MR. KUMAR: Your Honor, just a couple of housekeeping matters.

So just so the record is clear, you are overruling the

objections to the Presentence Report with regard to the leader/organizer enhancement and the volume of commerce enhancement, just so the record is clear?

THE COURT: That's correct. And I'm sustaining the objection with respect to the obstruction of justice. That's why I haven't applied the two level to that.

MR. KUMAR: Okay. Thank you, Your Honor.

I also wanted to make sure the record is clear on the fact that I believe there were one or two victim letters that were submitted to the Court yesterday. Just wanted to make sure that those were provided to the Court and, under the CVRA, Your Honor had an opportunity to review them.

THE COURT: Yes, we did receive those. Yes. Thank you.

MR. KUMAR: And finally, Your Honor, just the matter of any briefing schedule for a motion for bail pending appeal.

THE COURT: What's your preference in that regard?

You have to unmute.

MR. PETERS: I said nothing about bail pending appeal. That's why we asked for a 60-day surrender date. Mr. Lischewski is planning to appeal. He's planning to file a brief in the Ninth Circuit fairly soon. But he's not asking for bail pending appeal.

THE COURT: All right. Thank you.

That should answer your question.

All right. Anything further from anyone at this point?

MR. KUMAR: No, Your Honor. Thank you.

THE COURT: All right. Well, that will conclude this matter. And I appreciate the effort that's been put into this.

And I do appreciate and recognize, Mr. Lischewski, the incredible amount of support that you've received from your family and from your associates, and I wish you well.

Thank you.

MR. KUMAR: Thank you, Your Honor.

THE CLERK: Court is adjourned.

(Proceedings adjourned at 12:26 p.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Thursday, June 18, 2020

Ana M. Dub

Ana M. Dub, CSR No. 7445, RDR, CRR, CCRR, CRG, CCG
Official Reporter, U.S. District Court