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7 **UNITED STATES DISTRICT COURT**
8 **NORTHERN DISTRICT OF CALIFORNIA**

9 UNITED STATES OF AMERICA,

10 Plaintiff,

11 v.

12 PETER KIM,

13 Defendant.

CASE NO. 21-CR-438 BLF

**PETER KIM'S SENTENCING
MEMORANDUM AND MOTION FOR
DOWNWARD VARIANCE UNDER 18
U.S.C. § 3553(a)**

Date: September 20, 2022

Time: 8:30 a.m.

Judge: Hon. Beth Labson Freeman

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1 **SENTENCING MEMORANDUM**

2 Defendant Peter Kim, through his counsel, Julia M. Jayne, submits this Sentencing
3 Memorandum in support of his request for a sentence of six months of home confinement, 100
4 hours of targeted community service, and three years of probation.

5 **I. INTRODUCTION**

6 *“One mistake does not define you.”*

7 - R. J. Palacio, author.

8 In July 2020, Peter Kim made the most regrettable mistake of his life. This single, reckless
9 decision to copy his employer’s confidential files had a painful ripple effect on his life that he can
10 never undo. His mistake put his family in great distress, jeopardized his freedom, tarnished his
11 professional reputation, and brought on a depression he hadn’t experienced since the loss of his
12 sister. But his foolish and short-sighted actions on those five days in July 2020 do not represent
13 the honest person he has strived to be his entire life.

14 It is true that Peter Kim earned a reputation for honesty and hard work in the 22 years he
15 was employed at Broadcom. He dedicated his entire career to growing Broadcom’s success.
16 Numerous letters have been submitted to this Court from those whose lives have been improved
17 by knowing Mr. Kim over the years. These letters reveal a man of inspiration and humility who
18 has led a simple and upstanding life. *See* Letters of Support submitted by Probation on September
19 6, 2022.

20 And yet Mr. Kim stands convicted by his guilty plea of theft of trade secrets from the very
21 employer he dedicated his life’s work to. He is the first to acknowledge that this violation of
22 Broadcom’s trust is irreconcilable with his decades of honest work. He sincerely regrets his
23 conduct – not just because it landed him in this Court but because it impacts his former colleagues
24 and tarnishes the stellar reputation he worked so hard to establish. The consequences of the
25 charges and the conviction have taken a serious toll on Mr. Kim – his career in the semiconductor
26 industry is over, he has been diagnosed with depression, and he is ashamed for his failure.

27 On May 10, 2022, Peter Kim signed a plea agreement in open court acknowledging his
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1 responsibility for theft of Broadcom's trade secrets and he now stands ready to accept the sentence
2 this Court will hand down to hold him accountable for his wrongdoing. Mr. Kim recognizes that
3 he alone is the one responsible for the situation in which he now finds himself. *See* Exhibit A
4 (Peter Kim letter). No matter what else he has achieved, he will forever have to accept that he is
5 now a convicted felon. He never imagined such a fate for himself and deeply regrets the actions
6 which led him here.

7 Mr. Kim trusts that, in fashioning a just sentence, this Court will appreciate that Mr. Kim is
8 much more than this singular, irresponsible decision he made. As demonstrated by the numerous
9 letters submitted by his family, friends, colleagues and other supporters, he is a fundamentally
10 good and hardworking man – one who has never before committed a criminal offense, who is a
11 father to two successful young adults and a stepfather to a teenage girl new to America, and
12 someone who never intended to harm Broadcom in the way the company perceives he has.

13 Under the terms of his plea agreement, the government has agreed to seek *no greater* than
14 a 15-month sentence for Mr. Kim. The guideline departure on the part of the government reflects a
15 determination that Mr. Kim's conduct is mitigated by his early acceptance of responsibility and,
16 presumably, his lack of personal profit or prior wrongdoing. The Probation Office recommends a
17 six-month term of imprisonment. Mr. Kim proposes this term be served on home-confinement.

18 Mr. Kim accepted responsibility for his actions early in the process and did not litigate any
19 aspect of this case. Pleading guilty to his wrongdoing is consistent with his strong sense of
20 personal integrity and accountability. He paid restitution to Broadcom, and he believes the best
21 way to warn others not to repeat his mistake is through education: that taking any property from
22 one's employer is illegal, misguided, and not worth it, whatever one's motivations are. This
23 criminal case has brought a mountain of shame, depression, and heartache for Mr. Kim. He would
24 not wish a criminal prosecution, regardless of the sentence, on anyone.

25 What is most devastating for Mr. Kim is that everything was going well: he was in the
26 process of starting a new life with his wife and step-daughter, he was taking on a very new role
27 with a startup company, and he was looking forward to a new leadership challenge prior to
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1 retirement. Yet when it came time to leave Broadcom, he made the fateful mistake of copying and
2 taking files that didn't belong to him and which he was prohibited from taking. He put his own
3 fears of memory loss and concerns for inadequacy above his moral compass.

4 It was improper, and unquestionably a breach of Broadcom's security protocols, for Mr.
5 Kim to take the test plans, design verification environmental files and design specifications. But
6 the fact that he did not commit the more egregious act of actually using the information to cause
7 competitive harm to Broadcom or financially benefit himself, must also be weighed by the Court
8 in evaluating the overall magnitude of Mr. Kim's offense. Mr. Kim did not share the files with
9 Mersenne, he did not seek to give Mersenne a competitive advantage, and he certainly did not
10 threaten the national security of the United States.

11 His conduct was exclusively the result of his personal insecurity, as evidenced by the fact
12 that he wasn't engaged in any surreptitious emails with Mersenne, there was no evidence he was
13 passing the files to Mersenne, and he downloaded the files two weeks before his departure,
14 haphazardly leaving an electronic trail of copying. Further, none of the other employees who left
15 for Mersenne were accused of copying or taking any Broadcom files. Unequivocally, this was Mr.
16 Kim acting independently and for the (unjustified) purpose of having a reference source, which he
17 recognizes can nonetheless harm Broadcom.

18 Thus, in determining what constitutes "just punishment" in this matter, Mr. Kim urges this
19 Court to also consider the significant collateral consequences of this prosecution and his
20 conviction, his early acceptance of responsibility, and his otherwise law-abiding life. He submits
21 that these factors, along with the fact that he has made full restitution to the victim of this crime,
22 are more than sufficient to demonstrate that the objectives of sentencing can be met in this case
23 with a period of home confinement, without the need to impose a formal custodial sentence. This
24 would be consistent with other sentences for theft of trade secrets in this district.

25 In making this request, Mr. Kim is not asking to escape the consequences of his conduct.
26 Rather, he submits that he can deliver a far more powerful message of deterrence to others in the
27 semiconductor and high-tech industry by using his period of home confinement to speak about the

1 personal and professional consequences that result from the taking of another company’s trade
2 secrets. Mr. Kim is uniquely situated to speak on this subject because he knows firsthand and
3 bears personal responsibility for the devastation that taking Broadcom’s trade secrets wreaked
4 upon his life. Mr. Kim thus asks the Court to impose a term of community service that includes a
5 public outreach or message component, should the Court be so inclined.

6 For the reasons set for the below, the defense submits that a sentence of six months of
7 home confinement, 100 hours of community service, and three years of probation are “sufficient”
8 and “no greater than necessary” to fulfill the statutory objectives of federal sentencing. Further, a
9 sentence of home confinement is not inconsistent with the types of sentences imposed in criminal
10 trade secret cases involving conduct comparable to or more egregious than Mr. Kim’s.

11 **II. PROCEDURAL BACKGROUND**

12 Mr. Kim was indicted for theft of trade secrets, 18 U.S.C. § 1832(a), on November 4,
13 2021. On May 10, 2022, he pled guilty to three counts of Section 1832: Counts 13, 14, and 15. On
14 September 20, 2022, he will stand before this Court for sentencing. Under the terms of his Plea
15 Agreement, Mr. Kim is not limited in what sentence he can ask the Court to impose. The
16 government, in turn, has agreed “to recommend a sentence of no more than 15 months of
17 imprisonment” and a \$5,000 fine. Dkt. 29 (Plea Agreement), ¶ 17. Per his Plea Agreement and the
18 United States Sentencing Commission (USSC) guidelines, Mr. Kim’s adjusted offense level is 15
19 and his Criminal History Category is I.

20 The U.S. Probation Officer recommends a sentence of six months custody and three years
21 of supervised release.

22 **III. INDIVIDUAL BEFORE THIS COURT**

23 **A. Personal Background**

24 1. Early Life and Family

25 Mr. Kim was born in South Korea. He moved to the United States with his family when he
26 was 11 years old and has lived in the Bay Area ever since. Presentence Report (“PSR”), ¶ 46-48.

1 He had a relatively healthy upbringing, with the most traumatic event being the illness and death
2 of his of his sister in 2006. PSR ¶ 46. He became more introverted as a result, which he believes
3 may have contributed to the dissolution of his first marriage.

4 Mr. Kim got married at age 25 and has two children with his first wife. PSR ¶ 49. They
5 formally divorced in 2019. *Id.* His daughter just graduated from college and his son is still in
6 college and their expenses are split between their parents. *Id.*

7 Mr. Kim was fortunate enough to meet Heeyung Chai through a Korean Catholic music
8 group in Korea. PSR ¶ 50. They married last year, and he has described their relationship as far
9 more compatible than his last. Heeyung moved to the United States in 2021 with her daughter,
10 who is now Mr. Kim's step-daughter. He has a very close relationship with both of them, though
11 the uncertainty of this case has weighed heavily on their relationship. His wife is worried about
12 living alone should he have to go custody. *See* Letters at 2-4.

13 2. Career at Broadcom

14 After working for one company for a few years, Mr. Kim joined Allayer Technologies in
15 1998. It was his second job out of college. Two years later, the company was acquired by
16 Broadcom. Mr. Kim originally worked in the network switch group. In 2004, he was moved to the
17 Broadband Processor Group as a design verification engineer. From 2007- 2020, Mr. Kim worked
18 in the network Switch Group as a design verification engineer in various positions.

19 In July 2020, he joined Mersenne Technologies as a design verification director after being
20 recruited by a former Broadcom employee and the co-founder of Mersenne. While he was offered
21 a compensation package equivalent to Broadcom, the more appealing part to him was the
22 opportunity to work in management at a new company. It seemed like an exciting final phase of
23 his career. Had Mr. Kim only left empty-handed from Broadcom, things would have turned out
24 very differently for him.

25 **B. The Offense Conduct**

26 While Mr. Kim's plea agreement accurately describes his conduct, what it doesn't reflect is
27 the *reason* Mr. Kim copied Broadcom files, other than the admission it was for "reference
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1 purposes.” Plea Agreement at p. 4. Indeed, the taking wasn’t for his personal financial gain, it
2 wasn’t at the behest of a competitor, and it wasn’t some sort of vengeful act towards Broadcom. It
3 was, quite simply, foolish, and for no reason other than fear: fear of forgetfulness, fear of
4 inadequacy, and fear of failure. As he told FBI agents in his first interview on April 29, 2021, Mr.
5 Kim “worked at Broadcom for 20 years and had forgotten what he did there just five or six years
6 ago.” US-PKK-10000640.

7 Stepping into a new role at Mersenne, Mr. Kim was worried he would not be able to
8 remember all that he worked on and learned at Broadcom and would therefore be unable to keep
9 up with the more technical and younger engineers. Since he was not well-versed in design
10 architecture or feature details, Mr. Kim was cautiously insecure stepping into a position where he
11 would be in charge of the entire verification team. As he consistently told FBI agents, Mr. Kim:

12 spent 20 years at Broadcom doing the same thing over and over again. He had no
13 opportunity to move into management there and realized his skills were not as sharp as
14 they once were, just like an aging athlete. The attraction of Mersenne for [him] had been
15 the opportunity to be a manager. [He] had realized that he did not have many years left to
do technical work as it was becoming more difficult to do as his skills diminished and he
was not able to focus as he once had. [He] had wanted a different challenge and thought his
people skills were better than his technical skills.

16 US-PKK-1000641.

17 Hence, his insecurity led him to copy hundreds of files from Broadcom in order to have a
18 crutch if and when he needed one. Rather than start anew, Mr. Kim decided that he couldn’t quite
19 let go of all those years of work. He simply failed to consider the ramifications of his breach.

20 Once at Mersenne, Mr. Kim indeed found himself in development meetings with the
21 architecture engineers who discussed product specifications and technical features that he was
22 unfamiliar with. Though Mr. Kim had never worked as a technical architect, he held meetings
23 where the teams would discuss scheduling and status of their progress, while Mr. Kim provided
24 the verification perspective of how much effort it would take to verify certain architecture. When
25 the engineers discussed in-depth technical features or the architectural pros and cons, Mr. Kim was
26 unable to keep up; he often did not understand the terminology they used. So, after the meetings,
27 he occasionally looked at the Broadcom files to see if he could get insights into what the engineers
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1 were talking about. Typically, the files proved unhelpful because there was just too much data. Yet
2 Mr. Kim understands, as admitted in his Plea Agreement, that having those Broadcom files could
3 advance the quality of his work at Mersenne and thus, indirectly, benefit the company.

4 Notably, when Mr. Kim began working for Mersenne, he learned that they wrote their
5 scripts in a different language than Broadcom, so the scripts couldn't be copied even if he had
6 wanted to do so. Broadcom used Perl, which is a "feature-rich programming language. . .[that]
7 runs on over 100 platforms . . . and is suitable for both rapid prototyping and large scale
8 development projects." <https://www.perl.org/about.html>. But Mersenne used the language Python,
9 which is an "interpreted, object-oriented, high-level programming language with dynamic
10 semantics . . . for use as a scripting or glue language to connect existing components together."
11 See <https://www.python.org/doc/essays/blurb/>. The two programming languages have different
12 symbols, file extensions, statement blocks, and datatypes. [https://www.geeksforgeeks.org/perl-vs-](https://www.geeksforgeeks.org/perl-vs-python/)
13 [python/](https://www.geeksforgeeks.org/perl-vs-python/). Thus, when Mr. Kim looked at Broadcom files, it was indeed for reference purposes – as
14 admitted to in his Plea – but not for copying and pasting or giving to Mersenne developers.

15 The three counts Mr. Kim pled to – Counts 13, 14, and 15 – relate to port speed modes, test
16 plans, packet sizes used for testing the chips, register models, and Sbus protocols, consisting of a
17 total of seven files containing Broadcom's trade secrets. Thus, of the 539 files he copied, Mr. Kim
18 has admitted in his plea to taking 7 of Broadcom's trade secrets (out of a *potential* 14 alleged trade
19 secrets).

20 **III. COMMENTS AND OBJECTIONS TO PRESENTENCE REPORT**

21 The probation officer noted the defendant's objections in the final PSR and responded.
22 However, the objections regarding the use of Judiciary Sentencing Information ("JSIN") have not
23 been resolved and are discussed below and analyzed in Section V(D)(1), *infra*.

24 **JUDICIARY SENTENCING INFORMATION**

25 Paragraphs 82-85

26 Defense counsel objects to the inclusion of JSIN statistics as reported in the PSR. It is not
27 listed in Monograph 107 as one of the items that should be in the presentence report.

1 Paragraph 82

2 Defense counsel additionally objects to the description that JSIN sentencing data as data
3 for “similarly situated” defendants. That term is highly misleading in this context. JSIN provides
4 aggregate statistics for all defendants that fall in a particular guidelines cell (offense level and
5 criminal history category), but the offenders included in this cell are not necessarily “similar” and
6 there is no way to determine in which ways they are similar or dissimilar. Its inclusion in the
7 report is also contrary to an individualized assessment of Mr. Kim, as required under § 3553(a).

8 Paragraph 83

9 Defense counsel objects to the specific JSIN sentencing statistics regarding mean and
10 median length of imprisonment for several reasons. First, they do not indicate how the sentences
11 are distributed (e.g., clustered toward the bottom with few high outliers, evenly distributed, etc.).
12 The statistics only date back five years. They also exclude cases missing the information necessary
13 to complete the analysis. Additionally, including only median and average by itself is misleading,
14 as there is more to a statistical analysis than just the average. Therefore, the statistics present an
15 incomplete and potentially misleading picture.

16 Further, the statistics are aggregated at the national level and are not reflective of this
17 district. The inclusion of national statistics compares Mr. Kim to offenders across the country and
18 thus does not aid in determining how a sentence for Mr. Kim would compare to similarly situated
19 defendants (i.e. defendants in this district and the Ninth Circuit).

20 If this Court is going to consider JSIN data, then Mr. Kim respectfully requests that the
21 Court incorporate the more complete data discussed in Section V(D)(1) of this sentencing memo.

22 **IV. LEGAL STANDARD**

23 A sentencing court must impose a sentence that takes account of the factors enumerated in
24 18 U.S.C. § 3553(a). In particular, a court must fashion a sentence that is “sufficient, but not
25 greater than necessary,” to serve the purposes of sentencing set forth in the statute. 18 U.S.C. §
26 3553(a)(2); *see Kimbrough v. United States*, 522 U.S. 85, 111 (2007). As the Supreme Court
27 explained, “[t]he overarching statutory charge for a district court is to ‘impose a sentence

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1 sufficient, but not greater than necessary’ to reflect the seriousness of the offense, promote respect
2 for the law, and provide just punishment; to afford adequate deterrence; to protect the public; and
3 to provide the defendant with needed educational or vocational training, medical care, or other
4 correctional treatment.” *United States v. Carty*, 520 F.3d 984, 991 (9th Cir. 2008) (citing 18
5 U.S.C. § 3553(a)).

6 The Sentencing Guidelines are just one factor among many a court must consider at
7 sentencing, *United States v. Ressam*, 593 F.3d 1095, 1117-18 (9th Cir. 2010), and the Court “may
8 not presume that the Guidelines range is reasonable.” *Carty*, 520 F.3d at 991. The Court must
9 make an individualized assessment and fashion a sentence that reflects the particulars of the
10 offense and the unique characteristics of the offender. *Ressam*, 593 F.3d at 1117-18.

11 In undertaking this analysis, this Court must examine the factors unique to the defendant—
12 namely, his lifetime of good conduct, hard work, and commitment to family obligations—as those
13 factors are highly relevant to determining whether a particular sentence is reasonable and not
14 greater than necessary. *See, e.g., United States v. Ruff*, 535 F.3d 999, 1001, 1003 (9th Cir. 2008)
15 (history of strong employment, family support), *United States v. Whitehead*, 532 F.3d 991, 993
16 (9th Cir. 2008) (devotion to building a business, dependence of family); *United States v.*
17 *Menyweather*, 447 F.3d 625, 634 (9th Cir. 2006) (family responsibilities); *United States v.*
18 *Ameline*, 409 F.3d 1073, 1093 (9th Cir. 2005) (Wardlaw, J. concurring and dissenting)
19 (“defendant’s family ties and responsibilities, his or her educational and vocational skills, and his
20 or her military, civic, charitable, or public service record” and other factors are “essential to
21 sentencing consistent with 18 U.S.C. § 3553(a)”).

22 As a result of the COVID-19 pandemic, courts across the nation have also weighed what
23 constitutes a “sufficient, but not greater than necessary” sentence within the context of the grave
24 danger inherent in a custodial sentence during a time when COVID-19 remains a threat to public
25 health. Recognizing these concerns, the Department of Justice has offered guidance that
26 underscores the need to make use of *alternative sentences*. On March 26, 2020, the Attorney
27 General directed the Bureau of Prisons to “prioritize the use of [its] various statutory authorities to
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1 grant home confinement for inmates seeking transfer in connection with the ongoing COVID-19
2 pandemic,” particularly for those “at-risk inmates who are non-violent and pose minimal risk of
3 recidivism and who might be safer serving their sentences in home confinement rather than in
4 BOP facilities.” Off. of the Att’y Gen., Mem. for Dir. of Bureau of Prisons, Prioritization of Home
5 Confinement as Appropriate in Response to COVID-19 Pandemic (March 26, 2020) at
6 <https://www.justice.gov/coronavirus>. Even more recently, the DOJ proposed a rule on June 21,
7 2022 in the Federal Register that would affirm that the Director of the BOP would have the
8 authority to allow prisoners placed in home confinement under the CARES Act to remain in home
9 confinement after the expiration of the covered emergency period. *See*
10 <https://www.govinfo.gov/content/pkg/FR-2022-06-21/pdf/2022-13209.pdf>. The increased use of
11 home confinement as an alternative to incarceration provides protection not only for the
12 transferred inmates, but for all of those incarcerated, as well as for the corrections staff. And
13 while the Attorney General’s guidance was intended to address those currently incarcerated, the
14 concerns animating this guidance apply in equal measure to the question of whether a custodial
15 sentence is appropriate, in the first instance, for a similarly situated defendant (i.e. non-violent and
16 poses minimal risk of recidivism). The reality remains that those incarcerated in BOP facilities
17 continue to face a greater risk of contracting COVID-19. *See, e.g.*, Walter Pavlo, Statistics Show
18 Federal Bureau Of Prisons Unable To Implement Key Policies During Crisis (February 7, 2022),
19 available at <https://bit.ly/3zSLItD> (“[E]ven those who are vaccinated are prone to being reinfected
20 if they are in tight living quarters with those who become infected and are not vaccinated. Prisons
21 present an environment where people are exposed to higher doses of infection that can overwhelm
22 their dose of vaccine protection.”).

23 As Mr. Kim is non-violent with no risk of recidivism, there is truly no penological need to
24 expose him to the health risks inherent in a BOP custodial setting. Alternative sentencing is
25 available and should be utilized in this instance.

26 **V. SECTION 3553(a) FACTORS STRONGLY FAVOR A DOWNWARD VARIANCE**

27 Mr. Kim recognizes that he must be held accountable. We respectfully submit, however,
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1 that any sentence of imprisonment at the BOP does not fully take into account all the applicable 18
2 U.S.C. § 3553(a) factors, Mr. Kim’s obligations to his new wife and stepdaughter, other
3 comparable sentences for defendants convicted of theft of trade secrets, or the unprecedented risks
4 inherent in the ongoing pandemic. All of these factors, weighed together, lead to the conclusion
5 that a sentence to be served on home confinement, coupled with the restitution Mr. Kim has
6 already paid, plus a substantial community service requirement, is sufficient but not greater than
7 necessary to comply with the statutory purposes of sentencing in this case.

8 More important than incarceration – if the goal is to reduce crime, educate the public, and
9 send a message – there is no better way to do it than to have someone who has gone through it tell
10 his story. As part of his community service, Mr. Kim can be required to speak to the public
11 (especially, to those exposed to trade secrets) about how seriously they must take their
12 confidentiality agreements and nondisclosure obligations and how even well-intentioned people
13 can find themselves facing criminal prosecution for copying files. There are undoubtedly others in
14 his shoes who are reluctant to depart their workplaces empty-handed, particularly after long
15 careers. His experience, including the shame of criminal prosecution, the reputational damage, and
16 the financial toll would serve as an important warning.

17 **A. History and Characteristics of Mr. Kim**

18 This Court has a window into Mr. Kim’s life and character beyond the conduct that
19 brought him to the courtroom. Whether from former colleagues or friends from church, the letters
20 of support submitted on his behalf paint a consistent picture in describing Mr. Kim as a very
21 humble, caring, altruistic and loyal person. Mr. Kim’s wife describes him as someone with strong
22 family relationships, dedicated to his stepdaughter and his elderly parents. Letters at 2-3. She
23 recounts how he helps his neighbors and lives a simple life. *Id.* She is very worried about living
24 alone as a new immigrant to the United States.

25 Mr. Kim’s former colleagues all describe a wonderful friend and inspirational runner who
26 helped them improve, motivated them to attain their goals and who worked tirelessly for many
27 years. The following are a few excerpts from the letters:

1 “He has shown to be a committed father, committed employee and committed friend . . .
2 He is generous with his time and money . . . he is a loyal friend.” Letters at 13.

3 “He taught me the power of mind over body . . . Peter was always willing to go an extra
4 mile to help others. He truly served as a guide and inspiration . . . There are a few
5 genuinely wonderful people in this world and Peter is one of them.” *Id.* at 14-15.

6 “Personally, I choose my friends carefully based on integrity, honesty, egalitarian and non-
7 discriminatory character. Peter Kim has all these qualities . . . These are rare qualities in a
8 person, and I can speak for myself and others that Peter is a well-regarded and respected
9 person.” *Id.* at 17-18.

10 “I felt I would be failing my conscience if I don’t write vouching for the good character of
11 my friend Peter Kim. He is definitely an honest, upright and warm human being.” *Id.* at 20.

12 “I have never known Peter to be driven by money. I saw a generous and caring man.” *Id.*
13 at 21.

14 Similarly, his friends from church write:

15 “Peter is a friend who truly cares about his friends and family and is willing to go extra
16 miles for others. His dedication to serve even in very challenging situations has been
17 exceptional. I could count on him as he always keeps his commitment.” *Id.* at 5.

18 “The most amazing thing Peter does, not many people notice . . . He does the thing that
19 nobody wants to do with a smile.” *Id.* at 7.

20 “He was always the one who came before anyone else and the one who stayed till the end
21 to take care of the last and more. He has been always trustworthy and dependable friend
22 and someone who I and parish members can rely on for volunteering and service for the
23 community. And he has been doing all these without seeking any personal gain or honor.
24 He was humble and kind to people, finding joy in sharing what he had; his time, money,
25 passion and musical talent with community for the greater good.” *Id.* at 8.

26 “He is simply not a person who would lack integrity for personal gain.” *Id.* at 9.

27 As the Court may accept, Mr. Kim’s conduct was entirely out of character for him. He is
28 not a selfish, greedy, materialistic, or hurtful person. Hence, his friends and colleagues express
surprise and shock upon learning of the allegations. This too is corroborative of Mr. Kim’s plea
and the facts: he never took the trade secrets for a malicious or harmful purpose. His conduct was
driven exclusively by insecurity and negligence.

29 **B. Nature and Circumstances of the Offense**

30 When this investigation began, Broadcom may have suspected that Mr. Kim took
31 Broadcom files at the direction of or for the benefit of his new employer, Mersenne. But this

1 suspicion was never borne out, because it was not true. Mr. Kim was never asked by anyone at
2 Mersenne to copy files. As described in his Plea Agreement, Mr. Kim took the files for a purely
3 personal reason – to help himself stay knowledgeable. Rather than trusting that he would have the
4 skills to carry out his job, he broke the law for a crutch. He accessed the files to remind himself of
5 terminology and certain features. At the time, he rationalized his behavior as not harmful because
6 he didn't believe he was taking Broadcom's "secret sauce" to give to his new employer. His self-
7 rationalization was unjustified, of course.

8 Copying the files was neither necessary nor, in the end, useful. He never actually
9 implemented the files in any technology development at Mersenne and he never tried to profit
10 from having the files. Nevertheless, Mr. Kim appreciates that despite his intentions, his actions
11 had the potential to cause economic and reputational harm to Broadcom.

12 Mr. Kim does not wish to make excuses for his conduct, nor does he claim that his
13 behavior was harmless to Broadcom. Understanding the context in which Mr. Kim was acting, and
14 the reasons for his behavior, helps to provide a more nuanced view of the nature and
15 circumstances of the offense, particularly in comparison to other cases. It shows how an otherwise
16 law-abiding person has come before this Court to be sentenced for theft of trade secrets.

17 1. Response to Broadcom's Victim Impact Statement

18 Broadcom submitted a "Victim Impact Statement" to this Court which attempted to outline
19 the offense conduct. Without disputing that Broadcom is indeed a victim and entitled to submit
20 input to the Court, Mr. Kim would be remiss not to respond to some of the overstatements and
21 errors in the letter written by O'Melveny & Myers LLP.

22 First, Broadcom alleges that Mr. Kim used the trade secrets to develop competing products
23 at Mersenne. *See* Broadcom Letter dated July 25, 2022, at 1. As described in this sentencing
24 memo and reflected in his plea agreement, Mr. Kim never incorporated the trade secrets into any
25 of the product development at Mersenne. He referenced the files to refresh his memory as to
26 certain procedures, terminology and to remind himself of how things were done at Broadcom, but
27 he never used that data to "develop" products. No other employees were even aware Mr. Kim had
28

1 Broadcom’s files. As a result, it is quite an exaggeration to assert that Mr. Kim singlehandedly
2 threatened the “national security of the United States.” *Id.* The Court should not place weight on
3 such dramatic mischaracterizations of his conduct. Mr. Kim doesn’t deny the harm caused to
4 Broadcom, and he admitted as much. But Broadcom knows the facts of this case: Mersenne never
5 got the trade secrets, Mr. Kim acted independently, and Mr. Kim’s intentions were never to injure
6 Broadcom.

7 O’Melveny also makes sweeping claims that by “stealing Broadcom’s trade secrets and
8 using them as a foundation for its own work, Mersenne could more quickly design and produce its
9 chips to meet market demand from Chinese companies.” *Id.* at 5. While this may be true for
10 particular trade secrets prosecutions where defendants are found to have shared or incorporated
11 trade secrets into competing product development, those are simply not the facts of this case. And
12 thus, again, Broadcom attempts to emote outrage at the advantage supposedly received by
13 Mersenne, when there is no evidence Mersenne stole the trade secrets or used them as foundation
14 for anything. Mr. Kim is not Mersenne; this is not a case where a defendant stole trade secrets to
15 start his own company. Thus, such advocacy, while dramatic, should not inform the Court’s
16 ultimate sentence.

17 In support of its position, Broadcom goes so far as to misstate the facts of the case: it
18 claims that Mr. Kim’s responsibilities included verification for Tomahawk 4 chips. *Id.* at 2. That is
19 not true. Mr. Kim never worked on Tomahawk and did not even have access to Tomahawk files.
20 Nor did Mr. Kim “intentionally use[] a scheme devised to cover up his download activity.” *Id.* at
21 4. To the contrary – he simply used the Box account, which required several steps. He had to use
22 his cellphone for verification purposes, but he did not “download” the files to his iPhone (as
23 reported in discovery, the iPhone got offline access). He didn’t try to hide his IP address or take
24 furtive actions. He deleted his Box account when he departed, but it included many of his own
25 personal files. In fact, the open and easily detectible manner in which Mr. Kim copied the files
26 suggests he did not put much thought into getting caught. This is consistent with his intentions to
27 begin with: preserving his life’s work for himself.

1 Broadcom further claims that Mr. Kim helped Mersenne steal and copy Broadcom's
2 technology. *Id.* at 4. What evidence can Broadcom identify to support this accusation, which
3 suggests Mersenne put him up to this? While yes, Mr. Kim worked for a competitor, Mersenne
4 was not involved in the copying of files and never received the files. These facts are consistent
5 with the government's own investigation. Yet Broadcom seems intent on disbelieving that it's
6 possible for one to act in his own self-interest. Theft of trade secret cases are not cookie cutter: not
7 every fact pattern is identical. Hence, the grandiose allegations in Broadcom's letter are more
8 appropriate for different scenario, one with actual evidence of a competitor's conspiracy.
9 Broadcom can't just copy and paste outrage.

10 Finally, Broadcom references *United States v. Zhang* and *United States v. Liew* as cases
11 with comparable sentences. *Id.* at 4. These cases better serve to highlight the disparity in offense
12 conduct. For example, in *Zhang*, defendant was sentenced to 18 months after being *convicted* of
13 multiple economic espionage, theft of trade secrets, and conspiracy counts. He started a competing
14 company for the benefit of the People's Republic of China and was ordered to pay \$476,835 in
15 restitution. According to the government, Mr. Zhang's Total Offense Level was 22. 15-cr-00106-
16 EJD at Dkt. 346. If Mr. Zhang – *post-trial* – was sentenced to 18 months, then Mr. Kim, who did
17 not litigate his case and who did not engage in economic espionage or start his own company,
18 should not be sent to prison.

19 *Liew's* case is also a good example of Mr. Kim's lesser culpability. Mr. Liew was
20 convicted at trial of many counts, including witness tampering, conspiracy, economic espionage
21 (benefiting the PRC), theft of trade secrets, false statements, and false tax returns. 11-cr-00573
22 JSW. Defendant Liew was alleged to have made over \$20 million. Once again, while not excusing
23 Mr. Kim's conduct by any means, Broadcom's comparison to Mr. Kim should not be well-taken.

24 **C. The Court Should Consider General Deterrence in Combination with Other** 25 **Factors**

26 There is no question that this Court will consider general deterrence as a goal of
27 sentencing. By the same token, deterrence is just one of many factors the Court must consider
28

1 under § 3553(a) – and, as a matter of law, no one factor is primary. *See Carty*, 520 F.3d at 991. A
2 sentence imposed solely or mainly to make an example of a defendant violates the Supreme
3 Court’s directive that sentencing must be individualized to a particular defendant. *See United*
4 *States v. Musgrave*, 647 Fed. Appx. 529, 533 (6th Cir. 2016) (“[T]here is no justice in imposing a
5 sentence merely to make an example out of a defendant.’ Other § 3553(a) factors must be
6 considered, including the particular circumstances of the defendant and crime, because ‘[t]he
7 punishment should fit the offender and not merely the crime.’”) (quoting *Williams v. New York*,
8 337 U.S. 241, 247 (1949)); *accord Koon v. United States*, 518 U.S. 81, 113 (2008) (“It has been
9 uniform and constant in the federal judicial tradition for the sentencing judge to consider every
10 convicted person as an individual and every case as a unique study in the human failings that
11 sometimes mitigate, sometimes magnify, the crime and punishment to ensue.”).

12 Moreover, a court need not impose a custodial term to achieve a deterrent effect. “Section
13 3553(a), for instance, does not require the goal of general deterrence be met through a period of
14 incarceration.” *United States v. Edwards*, 595 F.3d 1004, 1016 (9th Cir. 2010)). Nor does the
15 pertinent legislative history, which reflects Congress’s view that “[i]t may very often be that
16 release on probation under conditions designed to fit the particular situation will adequately satisfy
17 any appropriate deterrent or punitive purpose.” *Id.* at 1016 n.9 (quoting S. Rep. No. 98-225, at
18 92). The Supreme Court has confirmed that felony probation is a weighty sanction that subjects
19 an offender to “several standard conditions that substantially restrict their liberty.” *Gall*, 552 U.S.
20 at 48. On top of these standard conditions, the Court can layer additional restrictions, including
21 home confinement, that further punish and constrain a defendant. *See United States v. Walker*, 918
22 F.3d 1134, 1150 (10th Cir. 2019) (“[I]mposition of the two years of home confinement certainly
23 increased the severity of Mr. Walker’s punishment; home confinement itself functions as an
24 alternative to a period of incarceration in prison.”); *Musgrave*, 647 Fed. Appx. at 533 (Sixth
25 Circuit noted that the district court had “adequately addressed how supervised release joined with
26 home confinement and a severe financial penalty, though not imprisonment, nevertheless afforded
27 adequate general deterrence in this context.”).

28

1 Other circuits, including the Ninth, have likewise confirmed that when the need for
2 deterrence is substantially counterbalanced by other sentencing considerations, a noncustodial
3 sentence is a lawful and appropriate result. *See Edwards*, 595 F.3d at 1016 & n.9 (rejecting
4 argument that incarceration was necessary to achieve general deterrence); *Walker*, 918 F.3d at
5 1149 (requirement that district court consider general deterrence on remand did not require court
6 to impose a term of imprisonment).

7 Here, there are several reasons the Court should conclude that a noncustodial sentence is
8 sufficient to achieve, among other purposes, the goal of general deterrence. In addition to Mr.
9 Kim’s personal history and characteristics, one of the most compelling arguments is to avoid
10 sentencing disparities.

11 **D. The Need to Avoid Unwanted Sentencing Disparities**

12 Section 3553(a)(6) also requires the Court to consider “the need to avoid unwarranted
13 sentence disparities among defendants with similar records who have been found guilty of
14 similar conduct.” Based on our review of trade secret sentences resolved by guilty plea or trial in
15 this District, Mr. Kim’s conduct in wrongfully taking trade secrets is most analogous to cases in
16 which the courts have imposed a probationary sentence rather than a term of incarceration.

17 For instance, in *United States v. Zhiqiang Zhang*, 5:10-cr-00827 (LHK) (N.D. Cal.), the
18 defendant pled guilty to replicating trade secret source code belonging to his old employer at the
19 new firm he founded. Dkt. 134, p. 2. He was alleged to have taken over 100,000 files constituting
20 millions of lines of source code from SiRF worth \$7.7 million to the company he formed in order
21 to sell the source code in the U.S. and China. He was sentenced to **60 months of probation, six**
22 **months of electronic monitoring**, a fine of \$20,000, and restitution of \$75,000.

23 Similarly, in *United States v. West*, 5:08-cr-00709 (JW) (N.D. Cal.), the defendant, an
24 engineer who generated 12 patents, copied trade secret computer files from his prior employer. At
25 his new employer, he accessed files “sporadically” before his crime was discovered. *Id.* at Dkt. 15,
26 p. 4. He was sentenced to **36 months of probation**, a fine of \$5,000 and ordered to pay \$100,000
27 in restitution. *Id.* at Dkt. 18.

1 Further, in *United States v. Murphy*, 5:11-cr-00029 (DLJ) (N.D. Cal.), the defendant
2 engineer was alleged to have taken 8800 files from KLA Tencor, his former employer, to the new
3 competing company he founded. *Id.* at Dkt. 1. After pleading guilty, Mr. Murphy was sentenced to
4 **36 months of probation with six months of electronic monitoring.** *Id.* at Dkt. 10.

5 In *United States v. Jordanav and Lin*, 21-cr-00227 WHA (N.D. Cal.), the defendants were
6 alleged to have started a biotech company in Asia to compete with Genentech which was valued at
7 \$900 million. The government alleged that their company was built on Genentech's stolen trade
8 secrets regarding highly profitable Genentech biological drugs by recruiting Genentech employees
9 to simultaneously work for them. The defendants' total offense levels were 27 and 29,
10 respectively, with a criminal history category I. They were sentenced to one year in custody. By
11 comparison, Mr. Kim did not start a competing company and he did not personally profit.

12 In cases where defendants went to trial, the sentences included incarceration but were only
13 slightly longer than the sentence the government may propose in Mr. Kim's case. For example, in
14 *United States v. Hao Zhang*, 15-cr-00196 EJD (N.D. Cal.), defendant and five co-conspirators
15 were alleged to have stolen trade secrets for the benefit of the People's Republic of China. The
16 defendants allegedly applied for US patents using stolen technology. After trial, Mr. Zhang
17 received an enhancement for benefiting a foreign government and was sentenced to 18 months in
18 prison.

19 *United States v. Suibin Zhang*, 5:05-cr-00812 (RMW) (N.D. Cal.) is a case where
20 the defendant also went to trial and was convicted of five trade secret theft counts for illegally
21 downloading multiple files from his old employer, Marvell, before leaving to join Broadcom.
22 *Id.* at Dkt. 118, Superseding Indictment. According to the government, he also lied to the FBI. *Id.*
23 at Dkt. 318 at 2. Post-trial, Mr. Zhang was sentenced to **three months in custody**, three years of
24 supervised release, and \$75,000 in restitution. *Id.* at Dkt. 323.

25 In *United States v. Nosal*, 08-CR-237-EMC (N.D. Cal.), after a lengthy trial, the defendant
26 was convicted by jury of 6 counts of conspiracy, trade secret theft, and unauthorized computer
27 access and was sentenced to 12 months in custody.

28

1 Cases in the Central District of California have similar outcomes. For example, in *United*
2 *States v. Sing*, 14-cr-00212-CAS, the defendant was convicted of 32 counts of § 1832 after a
3 bench trial. His guideline range was 51-63 months, and the government alleged a loss of \$1.1
4 million. He was sentenced to 12 months in custody. The starting guideline range for Mr. Sing was
5 over *three times* Mr. Kim's offense level, and Mr. Kim did not make the government go to trial.

6 These cases highlight the disparity of a custodial sentence for Mr. Kim, particularly in light
7 of the numerous mitigating factors at issue. Mr. Kim is convicted of taking seven trade secret
8 documents, he did not act to benefit a foreign government, did not share the documents with his
9 employer, did not benefit financially, and he downloaded far fewer documents than any of the
10 NDCA cases referenced above. These factors all militate strongly in favor of a non-incarceration
11 sentence, similar to the sentences imposed in *Zhiqiang Zhang*, *West*, and *Murphy*, the most
12 analogous cases we could find from this District.

13 1. National Data

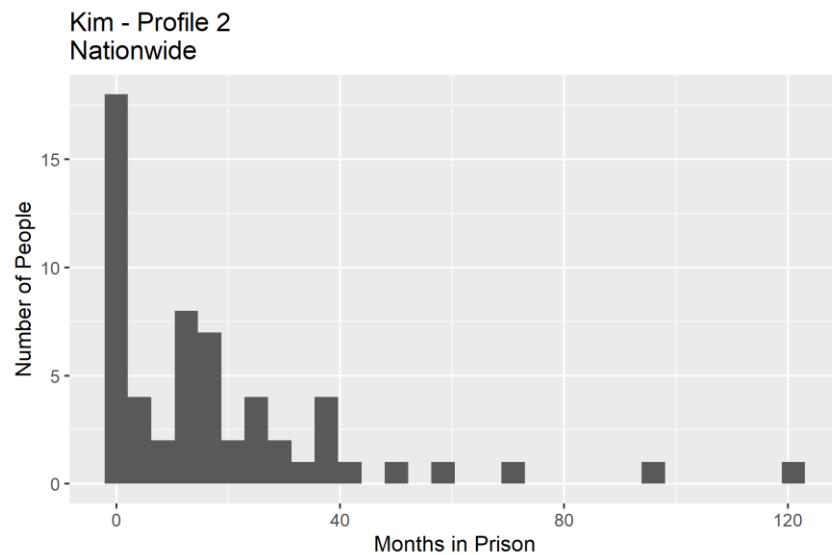
14 Courts throughout the country have sentenced defendants situated similarly to Mr. Kim to
15 sentences of probation, or in the alternative, to home confinement. Probation has referenced some
16 of the JSIN statistics, but as noted in the defense objections, the data provided is incomplete. *See*
17 PSR Addendum. Thus, Mr. Kim employed experienced data analyst Jordan B. Schaer to study
18 criminal sentences of individuals sentenced in federal courts across the country, published
19 annually by the U.S. Sentencing Commission. The results of Mr. Schaer's analysis is attached to
20 this memorandum as Exhibit B and a declaration from Mr. Schaer in support of his analysis is
21 attached as Exhibit C. Mr. Schaer looked at all related federal sentences since 2010.

22 What the statistical analysis shows is that for individuals with Offense Level 15, Criminal
23 History Category I and controlling guideline § 2B1.1, 33% are sentenced to probation, 25% to
24 time served, and nearly 70% to less than 15 months in custody. *See* Exhibit B at 5 ("Profile 1").
25 The percentages are slightly higher for the Northern District of California. *Id.*

26 More specifically, nationwide, 30.65% of offenders with a primary statute of conviction of
27 § 1832(a) in Criminal History Category I were sentenced to probation only. *See* Exhibit B at 8
28

1 (“Profile 2”). Meanwhile in California, 37.50% of the people sentenced to § 1832(a) in Criminal
 2 History Category I were sentenced to probation. *Id.* In this District alone, 40.00% of the people
 3 sentenced to § 1832(a) in Criminal History Category I were sentenced to probation. *Id.* Good
 4 examples of these cases are referenced in the preceding section of this memo.

5 The statistical data also shows that in the Northern District of California, 40% of offenders
 6 in this category were sentenced to six months of alternative confinement. *Id.* In the following
 7 histogram chart,¹ the Court can see that zero custody time is by far the most popular outcome for
 8 individuals sentenced to § 1832(a) in Criminal History Category I.



18 *Id.* at 9. These numbers are similar if the Court also considers people sentenced to Section 1831.

19 While a sentence of probation or home confinement is supported by the U.S. Sentencing
 20 Commission’s data as discussed above, the government’s request is beyond normal sentences for
 21 people in similar situations. Indeed, 75% of the people in the Ninth Circuit with Mr. Kim’s
 22 guideline calculations, Criminal History Category I, and no departure for providing substantial
 23 assistance were sentenced *below the government’s position*. In other words, even excluding
 24 _____

25 ¹ A histogram chart summarizes data based on its distribution. A histogram is a set of
 26 rectangles along the horizontal axis where the heights of each rectangle corresponds with the
 27 number of individuals represented in each rectangle. *See* P.B. Stark, *Histogram*, in GLOSSARY
 28 OF STATISTICAL TERMS (2021), <https://www.stat.berkeley.edu/~stark/SticiGui/Text/gloss.htm>.
 In the histogram above, the horizontal axis represents the number of months in prison to which
 the trial court sentenced each individual represented in the histogram.

1 cooperators who received lower sentences for assisting the government, *three quarters* of the
2 people in the Ninth Circuit with these Guidelines were sentenced under 15 months.

3 Accordingly, there is no good reason Mr. Kim should belong in the top quarter of these
4 defendants. Rather, Mr. Kim belongs in the *bottom third of defendants who were sentenced to*
5 *probation*, particularly when the fine details of his case are compared to other trade secrets cases.
6 He took fewer documents and had far less ominous intentions than all of the cases noted above.

7 Given his age (over 50) and the fact that he poses no risk to the community, Mr. Kim fits
8 squarely within the Attorney General’s guidance regarding the type of individual for whom home
9 confinement is appropriate. Such a sentence is also most fitting given Mr. Kim’s household role in
10 helping his wife and step-daughter transition to life in the U.S.

11 **E. The Policy Statement For Aberrant Behavior Supports Mr. Kim’s Proposed**
12 **Sentence**

13 The Sentencing Guidelines authorize a court to depart downward for “aberrant” behavior
14 in exceptional cases. USSG § 5K2.20(a) & (b). A crime qualifies as aberrant if it was a “single
15 criminal occurrence or single criminal transaction that (1) was committed without significant
16 planning; (2) was of limited duration; and (3) represents a marked deviation by the defendant from
17 an otherwise law-abiding life.” *Id.* A crime can qualify as a “single criminal occurrence” even if it
18 involved more than a “single criminal act;” the crime only must satisfy § 5K2.20’s other three
19 elements. USSG Supp. To Appx. C, amend 603, commentary, “Reason for Amendment.”

20 As to §5K2.20’s “limited duration” requirement, a crime does not have to be instantaneous
21 to satisfy this element. *See United States v. Vieke*, 348 F.3d 811, 813-14 (9th Cir. 2003) (refusing
22 to overturn downward departure for aberrant behavior in credit card fraud case that lasted several
23 years and involved multiple acts).

24 A defendant can satisfy the third aberrancy requirement as long as he has no criminal
25 history. *United States v. Castro-Hurtado*, 68 Fed. Appx. 106, 108 (9th Cir. 2003).

26 Even if a crime qualifies as aberrant, the court can only depart downward under § 5K2.20
27 in “exceptional cases.” To determine whether a case is “exceptional,” a court may consider the
28

1 defendant's mental and emotional conditions, employment record, record of prior good works,
2 motivation for committing the offense, and efforts at mitigation. § 5K2.20 at n. 3.

3 Here, Mr. Kim deserves a downward departure under § 5K2.20. His crime was an
4 aberration. It did not involve significant planning, as it only occurred shortly before he decided to
5 resign from Broadcom. He did not engage in a nefarious, ongoing scheme with his prospective
6 employer to exploit Broadcom's trade secrets. He didn't hack into its system to steal its
7 intellectual property. Thus, viewed in context, his crime was of limited duration. He worked for
8 Broadcom for 22 years and copied files on five occasions.

9 In addition to requiring little planning and being short-lived, Mr. Kim's crime was aberrant
10 because it marked a one-time deviation from an otherwise law-abiding life. This is not in dispute.

11 Finally, his case is "exceptional." He has an excellent employment record and he was well-
12 regarded by his colleagues. He has been active in his church doing charitable work for many years.
13 And while he rationalized his conduct at the time as his life's work, he ignored the fact that he was
14 harming Broadcom by the very act of copying the files. His rationalization was criminal, but not
15 malicious. And he has since evidenced sincere remorse and mitigated his crimes by quickly
16 accepting responsibility and making full restitution.

17 Thus, Mr. Kim's exceptional situation, coupled with the aberrant nature of his crime, merit
18 a § 5K2.20 downward departure.

19 **F. The Need to Provide Restitution to Broadcom**

20 Mr. Kim agreed as part of his plea agreement to make restitution to Broadcom in the
21 amount of \$48,395. He has already paid the entire sum, as he wanted to show his cooperation and
22 acceptance of wrongdoing as expeditiously as possible. No additional restitution is being sought.
23 The plea agreement further contemplated a \$5,000 fine, which Mr. Kim intends to make as soon as
24 ordered by the Court. With a felony conviction and his age, his job prospects in the technology
25 sector are slim. Nonetheless, he has lived relatively modestly and saved up enough for himself and
26 his family to get by. The \$5,000 fine is reasonable in light of all of these circumstances.

CONCLUSION

“You can’t go back and change the beginning, but you can start where you are and change the ending.” --- C.S. Lewis.

Mr. Kim can’t undo his past actions. But what he can do – and has been doing – is make every possible effort to right his wrongs and continue to live a law-abiding life. He is deeply remorseful for his conduct, and he has tried to make Broadcom whole by taking swift responsibility.

Mr. Kim’s proposed sentence of home confinement is entirely consistent with sentences in this district for defendants convicted of theft of trade secrets. In fact, a custodial sentence would be drastically disproportionate to similarly situated defendants when comparing the offense levels, restitution, specific intentions, number of documents taken, plea/trial, and various enhancements.

For the foregoing reasons, the defense respectfully requests that this Court sentence Mr. Kim to six months of home confinement, with an obligation to perform community service, three years of probation, and a \$5,000 fine.

Dated: September 13, 2022

Respectfully submitted,

/s/

Julia Jayne
Attorneys for Peter Kim