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9  
10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO  
12

13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 vs.

16 EAGLE EYES TRAFFIC INDUSTRIAL  
CO., LTD; E-LITE AUTOMOTIVE, INC.;  
17 HOMY HONG-MING HSU; and YU-  
CHU LIN, AKA DAVID LIN,

18 Defendants.  
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25

Case No. CR-11-0488 RS

**DEFENDANTS EAGLE EYES' AND E-  
LITE AUTOMOTIVES:**

**[1] STATEMENT REGARDING  
MATERIAL TERMS OF GUILTY PLEA;**

**[2] UNOPPOSED REQUEST FOR  
IMMEDIATE/EXPEDITED SENTENCING  
UNDER L.R. 32-1(b); AND**

**[3] SENTENCING MEMORANDUM.**

[Filed concurrently herewith: (1) Declaration of  
Kenneth B. Julian; (2) Declaration of Hwai-  
Tang Chen; and (3) Notice of Lodging  
Corporate Resolutions.]

HON. RICHARD SEEBORG  
DATE: OCTOBER 16, 2012  
TIME: 2:30 P.M.

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I.

**INTRODUCTION**

On September 19, 2012, at this Court’s invitation, the parties participated in a Settlement Conference before Hon. Joseph C. Spero. Under the supervision of Judge Spero, the parties reached a settlement. Although there is no formal plea agreement, the settlement terms are documented in a letter, dated September 25, 2012, from the government to counsel for Eagle Eyes and E-Lite (the “Settlement Letter”). See Settlement Letter 9/25/2012, Exh. A to the Declaration of Kenneth B. Julian (“Julian Decl.”). The settlement terms are as follows: Eagle Eyes and E-Lite are to (1) plead guilty to the charges in the Indictment; and (2) request a \$5,000,000 reduced fine of (the “Reduced Fine”) under Section 8C3.3 of the Sentencing Guidelines, payable without interest, over five years, on the following payment schedule:

- (1) \$100,000 due at time of sentencing;
- (2) \$300,000 due in one year from sentencing;
- (3) \$600,000 due in two years from sentencing;
- (4) \$1 million due in three years from sentencing;
- (5) \$1.5 million due in four years from sentencing; and
- (6) \$1.5 million due in five years from sentencing (collectively, the “Reduced Fine Payment Terms”).

See Settlement Letter, Exh. A at 1 to Julian Decl.

For its part, the government will not contest or dispute with the United States Probation Office and/or the Court the imposition of the Reduced Fine, without interest, on the Reduced Fine Payment Terms, to be imposed jointly and severally upon Eagle Eyes and E-Lite, pursuant to Sections 8C3.3 and 8C3.2 of the Sentencing Guidelines and 18 U.S.C. § 3572(d)(1). Id. Additionally, the government indicated in the Settlement Letter that it will not contest or dispute, among other things, that the Reduce Fine and Reduced Fine Payment Terms constitutes an appropriate sentence in this case. Id. at 1-2.

Eagle Eyes and E-Lite have waived preparation of a presentence report under Local Criminal Rule 32-1(b) and each of them request immediate/expedited sentencing. See Corporate

1 Resolutions for Eagle Eyes and E-Lite, lodged concurrently herewith. The government does not  
2 oppose Eagle Eyes' and E-Lite's request for immediate/expedited sentencing. The only other  
3 corporate defendants to be sentenced in this case, co-defendants Maxzone Vehicle Lighting  
4 Corp., Ltd. and Sabry Lee, Inc., both received reduced fines under Section 8C3.3 and immediate  
5 sentencing. See Julian Decl., ¶¶ 8,9,12, and 13.

6 For the reasons discussed below, Eagle Eyes and E-Lite respectfully request that, upon  
7 entry of their guilty pleas, the Court immediately sentence Eagle Eyes and E-Lite to pay:

- 8 (1) a total fine of \$5,000,000, jointly and severally with each other,  
9 according to the Reduced Fine Payment Terms; and  
10 (2) a Special Assessment of \$400 due immediately (collectively  
11 the "Requested Sentence").

## 12 II.

### 13 PERTINENT FACTS

#### 14 A. Relevant Background<sup>1</sup>

15 On February 10, 2009, the Antitrust Division served upon E-Lite a subpoena *duces tecum*  
16 in connection with an investigation of antitrust violations in the aftermarket automotive lighting  
17 equipment industry" (the "Subpoena"). Although the Subpoena did not require the production of  
18 overseas documents, Eagle Eyes/E-Lite voluntarily did so because they sought to establish  
19 themselves as the "second-in" cooperator under the Antitrust Division's Corporate Leniency  
20 Program for the purpose of negotiating a pre-indictment disposition of this case.

21 As such, starting in March 2009, Eagle Eyes voluntarily provided the government with  
22 copies of overseas records, detailed attorney proffers of the relevant conduct, and answers to  
23 government-propounded interrogatories. Very early on, Eagle Eyes produced tape recordings of  
24 conspiratorial meetings attended by Eagle Eyes, TYC Brother Industrial Co., Ltd. ("TYC") and

25 \_\_\_\_\_  
26 <sup>1</sup> The Court is well-aware of the background facts of this case by and through the following two  
27 motions: (1) Eagle Eyes' Motion to Enforce Prosecutorial Promise [Docket # 70]; and (2) Eagle  
28 Eyes' Motion to Exclude Document and Communications Provided During Plea Negotiations  
[Docket # 236]. Eagle Eyes and E-Lite therefore provide an abbreviated factual statement herein  
and incorporates by this reference the parties' briefing on those motions, the supporting  
declarations and exhibits.

1 Depo Auto Parts Industrial, Ltd. (“Depo”) at which the pricing of aftermarket autolights was  
2 discussed. In fact, this Court recognized that Eagle Eyes and E-Lite took these cooperative  
3 actions and produced documents located overseas that were against their interests for the express  
4 purpose and goal of negotiating a disposition of the case:

5 THE COURT: Why would they -- if they are not subject to the  
6 subpoena power over those documents, why on earth would they  
7 give them to you, other than for a plea negotiation? They just  
8 wanted to help you? I mean, it doesn't make any sense.

9 See Reporter's Transcript, 9/10/2012 Hearing at 34.

10 From approximately March 2009 through June 2010, the parties unsuccessfully engaged  
11 in a first round of plea negotiations. Months later, under new counsel, Eagle Eyes resumed plea  
12 negotiations with the government. As part of this second round of negotiations, the parties  
13 engaged experts to conduct an analysis of Eagle Eyes' inability to pay a guidelines fine under  
14 Section 8C3.3.

15 The government's expert, Dale Zuehls, and Eagle Eyes' expert, Hwai-Tang Chen,  
16 concluded that Eagle Eyes had the ability to pay a fine of only \$5 million, without interest, over  
17 five years. Eagle Eyes understood that, in undertaking the inability to pay analysis, it was relying  
18 upon a government promise to resolve the case on that basis (the “Hand-Shake Deal”). But when  
19 Eagle Eyes tried to settle this case on those terms, the government denied there ever was a Hand-  
20 Shake Deal and declined to extend a plea agreement to Eagle Eyes.

21 On November 30, 2011, the government caused Eagle Eyes and E-Lite to be indicted.  
22 Eagle Eyes and E-Lite thereafter filed a Motion For An Order Enforcing Prosecutorial Promise.  
23 [Docket # 70]. On March 20, 2012, this Court denied that motion and the parties prepared the  
24 case for trial. Order 3/20/2012 [Docket # 122]. On September 19, 2012, at this Court's  
25 invitation, the parties participated in a voluntary settlement conference before Hon. Joseph C.  
26 Spero. As a result of the settlement conference, on September 25, 2012, the government and  
27 Eagle Eyes and E-Lite reached the settlement set forth in the Settlement Letter.

1           **B.     Eagle Eyes Inability to Pay a Guidelines Range Fine**

2                   **1.     Government Expert Dale Zuehls**

3           Dale Zuehls is a Certified Public Accountant with a Ph.D. in accounting, who has been  
4 retained on numerous occasions by the Antitrust Division to perform an independent assessment  
5 of the ability of a company to pay a criminal fine for an antitrust violation, including ability-to-  
6 pay assessments of companies in the airline cargo and passenger industries, the computer memory  
7 industry, and the domestic water freight industry, among others. See Zuehls' Declaration,<sup>2</sup> Exh.  
8 C to Julian Decl.

9           In the Settlement Letter, the government states that the "amount of the Reduced Fine and  
10 the Payment Terms are consistent with the conclusions and opinion of the government's retained  
11 expert, Dale Zuehls, as set forth in a letter to the Antitrust Division dated September 7, 2011."  
12 See Exhs. A and B to Julian Decl. Dale Zuehls' letter to the government of September 7, 2011,  
13 recounts the following facts:

14                   (1) Eagle Eyes is subject to a guideline fine of up to \$30  
15 million for various antitrust violations. Eagle Eyes advised the  
16 DOJ that it simply does not have the ability to pay a fine of that  
17 magnitude. Eagle Eyes was diligent and cooperative in responding  
18 to numerous requests for information and has submitted hundreds  
19 of pages of documents and financial information.

20                   (2) Zuehls reviewed all the documentation provided,  
21 conducted his own independent research and used his own  
22 financial modeling programs to determine the appropriate level of  
23 fines that might be borne by Eagle Eyes based upon its current and  
24 forecast ability to pay.

25                   (3) Eagle Eyes is a relatively small company dealing solely  
26 in providing automobile aftermarket parts. As a smaller company

27 \_\_\_\_\_  
28 <sup>2</sup> During discovery, the government produced an *unsigned* copy of the Declaration of Zuehls.  
See Zuehls' Declaration, Exh. B to Julian Decl.



1 in the global auto lights after-market, they are confronted with  
2 significant issues:

3 (a) Their annual gross sales ranged from \$60 million in  
4 2004 and have slid down to \$88 million by 2009,

5 (b) For the most recent 3 year period of 2008 through  
6 2010, Eagle Eyes has seen their profit margins squeezed  
7 significantly by Mainland Chinese competition,

8 (c) Eagle Eyes' balance sheet ratios and its cash and cash  
9 equivalents position have eroded significantly,

10 (d) Cash flow and liquidity are increasingly weakened due  
11 to the need for new molds for the adaptive lighting technology  
12 change,

13 (e) Eagle Eyes has a U.S. civil class action suit pending  
14 with probable opt-outs, in addition to 2 civil class action claims in  
15 Canada along with a Canadian criminal investigation and the  
16 European Union is now instituting an investigation,

17 (f) Significant capital expenditures are required in order  
18 for increased volume of sales to offset the increases in material  
19 costs and the decrease in margins in order to remain competitive  
20 and viable,

21 (g) The first 2 years of any payment plan will be most  
22 challenging for Eagle Eyes due to the likely civil settlements,  
23 burdensome legal fees and its current borrowing limits.

24 After a lengthy and detailed review, Zuehls recommended that Eagle Eyes' approximate  
25 guidelines fine of \$30 million fine be reduced to \$5 million, payable over 5 years with no interest,  
26 as reflected in the Reduced Fine Payment Schedule. See Zuehls' Letter dated 9/7/2011, Exh. B to  
27 Julian Decl.

1                                   **2.     Defense Expert Hwai-Tang Chen**

2                   Eagle Eyes’ financial expert is Hwai-Tang Chen. Ms. Chen came to the attention of Eagle  
3 Eyes through the recommendation of Dale Zuehls, the government’s expert. Julian Decl., ¶ 5.  
4 Ms. Chen has 35 years of experience in complex accounting matters, including accounting and  
5 business valuation issues involving cross-border international transactions, and served as an audit  
6 Principal at Arthur Andersen & Co. in charge of the Chinese practice for the entire United States  
7 Western Region. See Chen Decl., ¶¶ 2-4.

8                   Ms. Chen conducted detailed examination of Eagle Eyes’ ability to pay a criminal fine  
9 within the meaning of Sections 8C3.2 and 8C3.3 of the Sentencing Guidelines. Ms. Chen  
10 followed industry-accepted-methodology; conducted extensive analysis of the operational results  
11 of Eagle Eyes and its affiliates and subsidiaries, and reviewed budget forecasts, sales by product  
12 lines and geographical market segments, sales returns and allowances, key raw material costs,  
13 product development costs, corporate tax returns filed, minutes, debt agreements, commitments,  
14 and potential contingent liabilities. See Chen Decl., ¶¶ 7-8.

15                   Ms. Chen had discussions with appropriate corporate personnel, requested back-up  
16 support for key areas, and analyzed the historic trends and the forward looking information  
17 through 2016. Ms. Chen considered the financial impact of the pending litigation, both civil and  
18 criminal, related to the current antitrust activities, and their potential effects on the future  
19 profitability, credit facilities and cash flows of the company. See Chen Decl., ¶¶ 9-10.

20                   In September 2011, as with Mr. Zuehls, Ms. Chen concluded that Eagle Eyes only had the  
21 ability to pay a criminal fine of \$5 million over five years. Over the last few weeks, Ms. Chen  
22 analyzed Eagle Eyes financial information from September 2011 through September 2012. Ms.  
23 Chen concluded that, as of September 2012, Eagle Eyes’ ability to pay remained the same and, in  
24 particular, that a “fine of \$5,000,000 and its related ramifications will present a material level of  
25 financial stress to the company’s current financial condition, will diminish the company’s ability  
26 to compete, will greatly challenge the company’s management, but probably can still provide the  
27 company an ability to survive.” Chen Decl., ¶ 15.

28

1           **C. Sentences of Similarly Situated Defendants**

2           Aside from Eagle Eyes and E-Lite, the only other corporate defendants to plead guilty and  
3 be sentenced are co-defendants Maxzone and Sabry Lee. Both Maxzone and Sabry Lee were  
4 sentenced in this case to pay reduced fines pursuant to Section 8C3.3 of the Sentencing  
5 Guidelines. After waiving a presentence report under Criminal Local Rule 32-1(b), Maxzone and  
6 Sabry Lee also were sentenced immediately upon entry of their respective guilty pleas.<sup>3</sup>

7                   **1. Maxzone – Section 8C3.3 Reduced Fine/Immediate Sentencing**

8           On August 22, 2011, government expert Zuehls concluded that, because it was unable to  
9 pay the guidelines fine of approximately \$80 to \$104 million, Depo should receive a reduced fine  
10 pursuant to Section 8C3.3 of \$43 million. See Zuehls Letter Re: Depo 8/22/11 at 1, Exh. E to  
11 Julian Decl. In arriving at this conclusion, Zuehls noted that 2008, 2009 and 2010 were  
12 extremely difficult periods for the world economy and that, as of 2010, the “automotive  
13 replacement parts industry still continues to suffer . . . .” Id.

14           Just a month later on September 20, 2011, the government entered into an plea agreement  
15 with Depo’s subsidiary, Maxzone, pursuant to Rule 11(C)(1)(c) of the Federal Rules of Criminal  
16 Procedure. See Maxzone Plea Agreement, Exh. D to Julian Decl. The terms of this plea  
17 agreement called for *Maxzone* to plead guilty and to pay a reduced fine of \$43 million, without  
18 interest, over a five year period—with *Depo* being only the guarantor of Maxzone’s fine. Id.

19           On November 15, 2011, Maxzone pled guilty to one count of price fixing under 15 U.S.C.  
20 § 1, as alleged in the Indictment. See Transcript Maxzone COP/Sentencing 11/15/2011 at 15,  
21 Exh. F to Julian Decl. This Court then immediately sentenced Maxzone to the following: (1) a  
22 fine in the amount of \$43 million, which shall be paid in installments without interest; and (2) a  
23 special assessment of \$400 due immediately. Id. at 20-21. See also Criminal Minutes 11/15/11,  
24 Exh. G to Julian Decl.

25  
26 \_\_\_\_\_  
27 <sup>3</sup> The government granted immunity and/or amnesty to two of Eagle Eyes and E-Lite’s co-  
28 defendants, Depo (Maxzone’s parent company), and TYC Brother Industrial Co., Ltd. (“TYC”). TYC and its subsidiary, Genera Corp., received full immunity from prosecution as the amnesty applicant.



1 further will not contest or dispute with United States Probation and/or the Court that:

2 (1) Eagle Eyes and E-Lite are not able and, even with the  
3 use of a reasonable installment schedule, will not likely become  
4 able, to pay the minimum fine required by U.S.S.G. § 8C2.7  
5 (Guideline Fine Range - Organizations) and U.S.S.G. § 8C2.9  
6 (Disgorgement);

7 (2) The Reduced Fine and the Reduced Fine Payment  
8 Terms are appropriate;

9 (3) Pursuant to U.S.S.G. § 8C3.3(a), Eagle Eyes and E-Lite  
10 are unable to pay a fine greater than the Reduced Fine on the  
11 Reduced Fine Payment Terms without impairing the ability of  
12 those entities to make restitution to victims; and

13 (4) Pursuant to U.S.S.G. § 8C3.3(b), Eagle Eyes and E-  
14 Lite are unable to pay a fine greater than the Reduced Fine on the  
15 Reduced Fine Payment Terms without substantially jeopardizing  
16 the continued viability of Eagle Eyes and E-Lite.

17 It is anticipated that, prior to Eagle Eyes and E-Lite's change of plea, the government:  
18 will: (1) formally make the foregoing its sentencing position and (2) state its non-opposition to  
19 Eagle Eyes and E-Lite's request for immediate/expedited sentencing.

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1 IV.

2 **THE COURT SHOULD IMMEDIATELY IMPOSE THE REQUESTED SENTENCE**

3 Pursuant to Section 8C3.3, Eagle Eyes and E-Lite request that the Court sentence them to  
4 the \$5 million Reduced Fine, payable jointly and severally with each other, without interest, on  
5 the Reduced Fine Payment Terms. The government does not contest or dispute this request.  
6 Moreover, under the circumstances here, the Court may impose the Requested Sentence  
7 immediately under Local Rule 32-1(b), as it did with co-defendants Maxzone and Sabry Lee.

8 **A. Imposition Of A Reduced Fine Under Section 8C3.3 Is Warranted**

9 Section 8C3.3 of the Federal Sentencing Guidelines provides, in pertinent part, as follows:

10 The court may impose a fine below that otherwise required by  
11 §8C2.7 (Guideline Fine Range - Organizations) and §8C2.9  
12 (Disgorgement) if the court finds that the organization is not able  
13 and, even with the use of a reasonable installment schedule, is not  
14 likely to become able to pay the minimum fine required by §8C2.7  
(Guideline Fine Range - Organizations) and §8C2.9  
(Disgorgement).

15 *Provided*, that the reduction under this subsection shall not be more  
16 than necessary to avoid substantially jeopardizing the continued  
viability of the organization.

17 Section 8C3.3 should be applied to limit the amount of the total fine to be imposed, jointly  
18 and severally, upon Eagle Eyes and E-Lite. The government's expert Zuehls initially noted that  
19 "Eagle Eyes was subject to a guideline fine of up to \$30 million for various antitrust violations,"  
20 See Zuehls Letter re: Eagle Eyes 9/7/11 at 1 (emphasis added), Exh. B to Julian Decl. After a  
21 detailed examination, however, both Mr. Zuehls and Ms. Chen concluded that Eagle Eyes and E-  
22 Lite cannot pay more than the recommended \$5 million Reduced Fine, without interest, according  
23 to the Reduced Fine Payment Schedule. Id. at Exh. B, and Chen Decl., at ¶ 15.

24 In this case, based upon the extensive analysis summarized in Zuehls' Letter of September  
25 7, 2011, the government does not contest or dispute any of the facts necessary to support the  
26 appropriateness of the Requested Sentence. Specifically, the government does not contest or  
27 dispute that:

1 (1) Eagle Eyes and E-Lite are not able and, even with the  
2 use of a reasonable installment schedule, will not likely become  
3 able, to pay the minimum fine required by U.S.S.G. § 8C2.7  
4 (Guideline Fine Range - Organizations) and U.S.S.G. § 8C2.9  
5 (Disgorgement);

6 (2) The Reduced Fine and the Reduced Fine Payment  
7 Terms are appropriate;

8 (3) Pursuant to U.S.S.G. § 8C3.3(a), Eagle Eyes and E-Lite  
9 are unable to pay a fine greater than the Reduced Fine on the  
10 Reduced Fine Payment Terms without impairing the ability of those  
11 entities to make restitution to victims; and

12 (4) Pursuant to U.S.S.G. § 8C3.3(b), Eagle Eyes and E-Lite  
13 are unable to pay a fine greater than the Reduced Fine on the  
14 Reduced Fine Payment Terms without substantially jeopardizing  
15 the continued viability of Eagle Eyes and E-Lite.

16 See Settlement Letter 9/25/2012, Exh. A to Julian Decl.

17 In light of the government’s position, and the analysis of Mr. Zuehls and Ms. Chen, the  
18 Court should: (1) impose the Requested Sentence; and (2) find that Eagle Eyes and E-Lite are  
19 “not able and, even with the use of a reasonable installment schedule, [are] not likely to become  
20 able to pay the minimum fine required by § 8C2.7 (Guideline Fine Range - Organizations) and §  
21 8C2.9 (Disgorgement).” Id. Moreover, in light of the civil case filed against Eagle Eyes, E-Lite  
22 and its alleged coconspirators (*see In re Aftermarket Automotive Lighting Products Antitrust*  
23 *Litigation*, No. 09-ML-2007 GW (PJWx) (C.D. Cal.)), this Court should not order restitution as  
24 doing so would potentially allow for multiple and/or duplicative recovery by the alleged direct  
25 purchasers of Eagle Eyes’ and E-Lite’s products.

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1           **B. This Is An Appropriate Case For Immediate/Expedited Sentencing**

2           Criminal Local Rule 32-1(b), which permits “immediate or expedited sentencing,” states  
3 in part that: “If the defendant waives his or her right to a presentence report and the Court finds  
4 that it is able to exercise its sentencing authority meaningfully without a presentence report, *the*  
5 *Court may immediately sentence the defendant or set a sentencing hearing on an expedited*  
6 *schedule.*” (emphasis added).

7           This Court should proceed to immediate sentencing of Eagle Eyes and E-Lite pursuant to  
8 Local Rule 32-1(b). As required by the Rule to be eligible for expedited sentencing, Eagle Eyes  
9 and E-Lite have waived the preparation of a presentence report. See Eagle Eyes’ Corporate  
10 Resolution and E-Lite’s Corporate Resolution lodged concurrently herewith. Moreover, a  
11 presentence report would be unnecessary and superfluous here; the Court can knowingly and  
12 meaningfully sentence Eagle Eyes and E-Lite without a presentence report because of the detailed  
13 and factually extensive work performed to date by both Mr. Zuehls and Ms. Chen, and because  
14 the government’s sentencing will be consistent with these recommendations and conclusions.

15           Here, because Eagle Eyes and E-Lite have waived a presentence report, and because the  
16 government does not oppose this request, there is no reason why this Court cannot expedite  
17 sentencing pursuant to Local Rule 31-1(b). Accordingly, Eagle Eyes and E-Lite request that the  
18 Court impose the Requested Sentence immediately upon entry of the guilty pleas.<sup>4</sup>

19           **C. A Complete Determination Of The Guideline Range Fine Is Unnecessary**

20           Where it is “readily ascertainable through a preliminary determination of the minimum of  
21 the guideline fine range” that the defendants “cannot and [are] not likely to become able . . . to  
22 pay such minimum guideline fine,” a “complete determination of the guideline fine range may be  
23 a needless exercise.” U.S.S.G. § 8C2.2(b); *id.*, at Application Note 2. Here, “further  
24 determination of the guideline fine range is unnecessary.” U.S.S.G. § 8C2.2(b).

25           Mr. Zuehls estimated the guideline fine to be \$30 million. Exh. B at 1 to Julian Decl.  
26 However, Mr. Zuehls and Ms. Chen both concluded that Eagle Eyes and E-Lite only have the  
27 ability to pay a reduced fine of \$5 million, without interest, over five years. *Id.* at Exh. B and

28 <sup>4</sup> Alternatively, Eagle Eyes and E-Lite request that they be sentenced on an expedited schedule.



1 Chen Decl. at ¶ 15. Accordingly, regardless of whether the Court were to accept the  
2 government’s anticipated sentencing guideline calculation, or a lower alternative calculation  
3 offered by the defense, any preliminary calculation of the minimum fine will be in excess of  
4 Eagle Eyes’ and E-Lite’s ability to pay it—making a complete guideline determination useless.

5 For example, it is anticipated that the government’s preliminary guidelines calculation  
6 would be based upon a volume of affected commerce exceeding \$100 million. Using this figure  
7 as an estimate, it would yield a preliminary guidelines fine range of \$28 to 58 million, as follows:

8		
9	1. Estimated Base Fine (20% of	\$20 million
10	volume of commerce of \$100	
	million) (§ 2 R1.1(d)(1) &	
	§ 8C2.4(b))	
11	2. Estimated Culpability Score	
12	i. Base (§ 8C2.5(a))	5
13	ii. Involvement in or Tolerance of	2
14	Criminal Activity	
	(§ 8C2.5(b)(4))	
15	iii. Prior History (§ 8C2.5(c))	0
16	iv. Violation of Order (§ 8C2.5(d))	0
17	v. Obstruction of Justice	0
18	(§ 8C2.5(e))	
19	vi. Effective Compliance and Ethics	0
	Program	
20	vii. Self-Reporting, Cooperation,	0
21	and Acceptance of	
	Responsibility (§ 8C2.5(g)(2))	
22	3. Estimate Total Culpability Score	7
23	4. Minimum and Maximum	1.4 — 2.8
24	Multipliers (§ 8C2.6)	
25	5. Minimum and Maximum. Fine	\$28 — \$56 million
	Range (§ 8C2.7)	
26	6. Total Fine Based on U.S.S.G.	\$5,000,000
27	§ 8C3.3(a) & (b)	
28		

1 Thus, a complete determination of the guideline fine range is futile because Eagle Eyes  
2 and E-Lite are not able to pay that guideline fine range.<sup>5</sup> Thus, the Court should instead “use the  
3 preliminary guidelines determination and impose the fine that would result from the application  
4 of § 8C3.3 (Reduction of Fine Based on Inability to Pay).” U.S.S.G. § 8C2.2(b). For this  
5 additional reason, Eagle Eyes and E-Lite request that the Court immediately impose the  
6 Requested Sentence upon Eagle Eyes and E-Lite under Section 8C3.3.<sup>6</sup>

7 **D. The Requested Sentence Is Supported Under 18 U.S.C. § 3553(a)**

8 Pursuant to 18 U.S.C. Section 3553(a), the Court must impose a sentence sufficient, but  
9 not greater than necessary, considering a number of factors listed in the statute. 18 U.S.C. §  
10 3553(a). Here, there is no dispute that the Requested Sentence meets the needs of Section  
11 3553(a)(2). The government does not contest or dispute that the Reduced Fine requested under  
12 Section 8C3.3 is an “appropriate” sentence in this case. See Settlement Letter 9/25/2012, Exh. A  
13 to Julian Decl. Thus, there is no dispute that the Requested Sentence reflects the seriousness of  
14 the offense, promotes respect for the law, and provides just punishment. 18 U.S.C. § 3553(a)(2).

15 Moreover, there is a “need to avoid unwarranted sentence disparities among defendants  
16 with similar records who have been found guilty of similar conduct” and a desire for consistency  
17 in sentencing. 18 U.S.C. § 3553(a)(6). This factor strongly supports imposing the Requested  
18 Sentence. Just as with Eagle Eyes and E-Lite, Maxzone and Sabry Lee were charged with and  
19 pled guilty to violating Section 1 of the Sherman Act. Also, just as with Eagle Eyes and E-Lite,  
20 the government’s expert Zuehls opined that Depo/Maxzone and Sabry Lee were unable to pay the  
21 minimum guidelines fine and recommended a reduced fine under Section 8C3.3. This Court then  
22 immediately sentenced Maxzone and Sabry Lee to reduced fines consistent with Zuehls’  
23 recommendation and the government’s position. Having imposed fines upon Maxzone and Sabry

24 <sup>5</sup> Even if Eagle Eyes and E-Lite were to advocate for a fine range below \$28 to \$56 million based  
25 upon lower volume of affected commerce and a lower culpability score, any such alternative  
26 sentencing guidelines calculation would lead to a fine range in excess of \$5 million—which  
would be more than Eagle Eyes’ and E-Lite’s ability to pay it.

27 <sup>6</sup> Application Note 2 of Section 8C2.2(b) recommends that the Court include a statement that “no  
28 precise determination of the guideline fine range is required because it is readily ascertainable  
that the defendant cannot and is not likely to become able to pay the minimum of the guideline  
fine range . . . ” See U.S.S.G. § 8C2.2(b), Application Note 2.

1 Lee in accordance with their ability to pay them, fairness and parity suggest that the Court do the  
2 same here. 18 U.S.C. § 3553(a)(6).

3 Finally, for more than a year, Eagle Eyes and E-Lite cooperated extensively with the  
4 government as part of a bid to secure “second-in” cooperator status under the Antitrust Division’s  
5 Corporate Leniency Program. Eagle Eyes and E-Lite expect that the government will  
6 acknowledge this cooperation in connection with the sentencing. This Court can consider Eagle  
7 Eyes’ and E-Lite’s cooperation in connection with deciding whether to impose the Requested  
8 Sentence. See, e.g., United States v. Zolp, 479 F.3d 715, 718 (9th Cir. 2007) (district court did  
9 not err by considering defendant’s cooperation with the government in exercising its discretion  
10 under United States v. Booker by reducing defendant’s overall sentence by four years); see also  
11 United States v. Fernandez, 443 F.3d 19 (2d Cir. 2006) (judge must consider “the history and  
12 characteristics of the defendant” and should take under advisement defendant’s efforts to  
13 cooperate, even if those efforts did not yield a government motion for a departure).

14 **V.**

15 **CONCLUSION**

16 From day one, Eagle Eyes and E-Lite cooperated with the government and proposed to  
17 plead guilty. They sought to resolve this case in a responsible manner at every stage of this  
18 proceeding, up to and including the pre-trial settlement process. Because the government does  
19 not contest or dispute it, and because the basis for it is well-supported, Eagle Eyes and E-Lite  
20 respectfully request that the Court impose the Requested Sentence.

21  
22 Dated: October 8, 2012

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