

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable James Donato, Judge

| | | |
|---------------------------|---|--------------------|
| UNITED STATES OF AMERICA, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| VS. |) | NO. CR 16-00367 JD |
| |) | |
| RUBYCON CORPORATION, |) | |
| |) | UNSEALED |
| Defendant. |) | |
| _____ |) | |

San Francisco, California
Wednesday, October 12, 2016

TRANSCRIPT OF PROCEEDINGS UNSEALED

APPEARANCES:

For Plaintiff:

BRIAN J. STRETCH
United States Department of Justice
Antitrust Division
Room 10-0101
San Francisco, California 94102
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HOWARD J. PARKER
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ASSISTANT UNITED STATES ATTORNEYS

For Defendant:

HUNTON AND WILLIAMS
2200 Pennsylvania Avenue
Washington, D.C. 20037
BY: DJORDJE PETKOSKI
DAVID A. HIGBEE
ATTORNEYS AT LAW

Interpreter: Nanaka Yoshida King

Reported By: Rhonda L. Aquilina, CSR #9956, RMR, CRR
Official Court Reporter

1 Wednesday - October 12, 2016

11:03 a.m.

2 P R O C E E D I N G S

3 ---000---

4 **THE CLERK:** Calling criminal 16-367, United States of
5 America versus Rubycon Corporation.

6 At this time anyone that is not directly involved in this
7 case will need to leave the courtroom.

8 **MR. NICHOLSON-MEADE:** Good morning, Your Honor.
9 Andrew Nicholson-Meade on behalf of the United States.

10 **MR. PETKOSKI:** Good morning, Your Honor. Djordje
11 Petkoski with my colleague David Higbee on behalf of Rubycon
12 Corporation.

13 **THE COURT:** One second, counsel.

14 (pause in proceedings.)

15 **THE CLERK:** So counsel from the civil case --

16 **THE COURT:** The civil case you need to go as well,
17 okay. But come up and make an appearance.

18 **MR. SAVERI:** Good morning, Your Honor. Joseph Saveri
19 on behalf of the Direct Purchaser Plaintiffs.

20 **MR. WILLIAMS:** Good morning, Your Honor. Steve
21 Williams on behalf of the Indirect Purchaser Plaintiffs.

22 **MR. SAVERI:** And we received the victims letter from
23 the DOJ in connection with this plea.

24 **THE COURT:** Do you have everything that the DOJ put
25 under seal?

1 Thank you.

2 **THE COURT:** All right.

3 **THE CLERK:** Has the interpreter made her appearance,
4 Your Honor?

5 **THE COURT:** No.

6 **THE CLERK:** Please state your name, please.

7 **INTERPRETER:** I'm Nanaka King.

8 **THE COURT:** Has she been sworn in?

9 **THE CLERK:** Yes, she has, Your Honor.

10 **THE COURT:** Okay. So we're going to take the plea and
11 go to immediate sentencing against the defendant Rubycon
12 Corporation.

13 Who appears for Rubycon?

14 **MR. PETKOSKI:** Your Honor, Djordje Petkoski and David
15 Higbee on behalf of Rubycon, and we have a corporate
16 representative as well with us, Mr. Yukio Komatsu.

17 **THE COURT:** All right. Mr. Komatsu needs a Japanese
18 interpreter?

19 **MR. PETKOSKI:** That's correct, Your Honor.

20 **THE COURT:** Would you swear in Mr. Komatsu, Lisa.

21 **THE CLERK:** Please raise your right hand.

22 (Defendant sworn.)

23 **THE DEFENDANT:** Yes, I do.

24 **THE CLERK:** Okay.

25 **THE COURT:** Get a little bit closer to the microphone,

1 please.

2 I'm going to start -- sorry, Mr. Petkoski?

3 **MR. PETKOSKI:** That's correct, Your Honor.

4 **THE COURT:** All right. Mr. Komatsu, I want you to
5 tell me a little bit about Rubycon. Just tell me about the
6 business, where you're located, what products you make.

7 **THE DEFENDANT:** Rubycon Corporation has its
8 headquarters in the City of Ina, Nagano Prefecture, Japan. It
9 manufactures and sells capacitors and custom power supplies.

10 **THE COURT:** How long has it been in business?

11 **THE DEFENDANT:** 65 years.

12 **THE COURT:** And who owns Rubycon?

13 **THE DEFENDANT:** The current president, Mr. Itsuaki
14 Tonouchi, and several other shareholders that I do not remember
15 their names as I stand here.

16 **THE COURT:** Is it a family-owned business?

17 **THE DEFENDANT:** Yes, it is.

18 **THE COURT:** Okay. And what is Mr. Komatsu's position
19 with Rubycon?

20 **THE DEFENDANT:** I am manager in a corporate management
21 department.

22 **THE COURT:** And how long have you been with the
23 company, Mr. Komatsu?

24 **THE DEFENDANT:** For 32 years.

25 **THE COURT:** All right. Can you tell me what was

1 Rubycon's global revenue on capacitor sales last year?

2 **THE DEFENDANT:** Revenue?

3 **THE COURT:** Rubycon revenue. Yes, revenue.

4 **THE DEFENDANT:** In Japanese Yen, revenue was about
5 48 billion Yen.

6 **THE COURT:** So is that roughly 4.8 U.S. -- 4.8 billion
7 in U.S. dollars?

8 **THE DEFENDANT:** Yes, it is.

9 **MR. PETKOSKI:** Your Honor, if I may.

10 **THE COURT:** And that was just from last year, 2015; is
11 that right?

12 **THE DEFENDANT:** Yes.

13 **MR. PETKOSKI:** Your Honor --

14 **THE COURT:** And just from capacitor products?

15 **THE DEFENDANT:** No, the capacitors and custom power
16 supplies combined.

17 **THE COURT:** Okay. What about just the capacitors
18 part?

19 **THE DEFENDANT:** There are several types of capacitors.
20 For aluminum electrolytic capacitors, the revenue accounts for
21 about 80 percent of the total, and film capacitors accounts for
22 about 10 percent, and custom power supply account for the
23 remaining five.

24 **THE COURT:** Okay. So of the 4.8 billion in revenue in
25 2015, approximately 90 percent of that is from sales of

1 capacitors?

2 **MR. PETKOSKI:** Your Honor, if I may, I think there
3 was --

4 **THE COURT:** Hang on.

5 **THE DEFENDANT:** Yes.

6 **THE COURT:** Is that right?

7 **THE DEFENDANT:** Yes.

8 **THE COURT:** Okay. Yes, go ahead.

9 **MR. PETKOSKI:** Your Honor, I believe there's a mistake
10 in the conversion from Japanese Yen to U.S. Dollars in the
11 response that Mr. Komatsu provided. Last year the company's
12 total revenue was about \$406 million, not \$4 billion, as the
13 original answer suggested.

14 **THE COURT:** Is that right, Mr. Komatsu?

15 **THE DEFENDANT:** Yes. I am sorry. My attorney is
16 correct.

17 **THE COURT:** No, that's fine.

18 All right. Now, what was Rubycon's profit margin on all
19 of its sales last year?

20 **THE DEFENDANT:** Rubycon as a whole, it's slightly
21 above one percent, about 1.2 percent, Your Honor.

22 **THE COURT:** The profit margin is 1.2 percent?

23 **THE DEFENDANT:** Yes. Net profit would be about --
24 would be around that.

25 **THE COURT:** Seems pretty low, Mr. Komatsu.

1 **THE DEFENDANT:** Yes, it is very low, in fact.

2 **THE COURT:** Why is that?

3 **THE DEFENDANT:** One of the reasons is the selling
4 price been going down significantly, and the other reason would
5 be the strong Japanese Yen.

6 **THE COURT:** Okay. So in the time that you've been
7 with Rubycon, just generally has the profit margin been about
8 1.2 percent every year?

9 **THE DEFENDANT:** Although I do not recall numbers from
10 many years ago, it's been around that percentage this past ten
11 years with slight ups and downs.

12 **MR. PETKOSKI:** Your Honor, if it would help the Court,
13 I also have some detailed information on the company's revenue
14 and margins for the last ten years, as well as the years that
15 are covered by the plea period.

16 **THE COURT:** Did you share that with the Government?

17 **MR. PETKOSKI:** We have, Your Honor.

18 **THE COURT:** Why don't you hand that to Ms. Clark.

19 Do you have two copies?

20 **MR. PETKOSKI:** Yes, I have multiple copies.

21 **THE COURT:** I want one for my clerks as well.

22 All right. Mr. Petkoski, tell me what this represents.

23 **MR. PETKOSKI:** Your Honor, this is a summary of the
24 company's financials derived from its accounting books. And I
25 have handed Your Honor two sheets. The first one covers the

1 last ten fiscal years, so fiscal year 2006 to 2015, and this
2 was a period for which the company has been consolidating its
3 financials. The second sheet covers the period from fiscal --

4 **THE COURT:** I only have one.

5 **MR. PETKOSKI:** Oh, I'm sorry, Your Honor.

6 Your Honor, I've handed both of them to you now.

7 **THE CLERK:** Are these the same sheets?

8 **MR. PETKOSKI:** No, Your Honor. One covers the years
9 2006 through '15, and the second one covers the years 2002 to
10 '13, but the format is the same.

11 **THE COURT:** So I need one more copy of the '02 to '13,
12 that one she has.

13 All right. So how were these -- so for the years that
14 overlap, why are these different?

15 **MR. PETKOSKI:** Your Honor, we prepared two copies,
16 because for the last ten fiscal years, so 2006 through '15, the
17 company consolidated. It had consolidated financials. And
18 this was the period that was the focus of the ability-to-pay
19 analysis that was conducted by the DOJ's expert Mr. Zuehls. We
20 also replicated -- created a chart with similar information for
21 the years 2002 to 2013 which cover the bulk of the plea period.

22 In the 2002 to 2013 chart, the first three years are
23 derived from the largest operating entity within the Rubycon
24 corporate family, and, as I said, during those three years the
25 group's financials were not consolidated.

1 **THE COURT:** All right. Net sales represents Rubycon
2 sales of every product it makes; right?

3 **MR. PETKOSKI:** That's correct, Your Honor.

4 **THE COURT:** Mr. Nicholson-Meade, is the Government in
5 agreement with these numbers?

6 **MR. NICHOLSON-MEADE:** Yes, Your Honor.

7 **THE COURT:** Okay. All right. We will get back to
8 this a little bit down the line. Let me turn now to the plea.

9 So I understand, Mr. Komatsu, that Rubycon wishes to plead
10 guilty today to the offense charged in the August 22, 2016
11 information. I'm going to ask you some questions to make sure
12 that you, as Rubycon's representative, understands what we're
13 doing today, and the nature of the guilty plea, and the
14 consequences of that plea.

15 Now, remember you are under oath as you speak on behalf of
16 the corporation, and you need to make sure that you answer all
17 of my questions truthfully. If you don't, the Government may
18 bring additional charges against you personally, above and
19 beyond the charges that are pending against the defendant
20 corporation.

21 Do you understand that?

22 **THE DEFENDANT:** Yes, I do.

23 **THE COURT:** All right. Now, I need to hear from you
24 about how you have been authorized to speak on behalf of
25 Rubycon and enter a plea in its behalf.

1 **THE DEFENDANT:** The Board passed a resolution which
2 authorized me to come to the United States and plead guilty on
3 behalf of the company.

4 **THE COURT:** All right. So I have a Japanese and
5 English language translation that is attached to the Plea
6 Agreement that's described as Board Meeting Minutes for Meeting
7 Held on August 22nd, 2016. Is that the resolution you're
8 referring to, Mr. Komatsu?

9 **THE DEFENDANT:** Yes.

10 **THE COURT:** All right. And that resolution authorizes
11 you to appear on behalf of the corporation and enter a guilty
12 plea for it?

13 **THE DEFENDANT:** Yes.

14 **THE COURT:** All right. Any concerns about that,
15 Mr. Nicholson-Meade?

16 **MR. NICHOLSON-MEADE:** No, your Honor.

17 **THE COURT:** All right. So I am satisfied that
18 Mr. Komatsu is authorized to enter a plea on behalf of Rubycon.

19 Now, when I ask you the next series of questions, I'm
20 going to use the word "you," and I am referring to Rubycon
21 Corporation, not to you personally. So make sure you
22 understand that, Mr. Komatsu, okay?

23 **THE DEFENDANT:** Yes.

24 **THE COURT:** All right. And if you need to speak with
25 your attorney at any time before you answer my questions,

1 that's fine. Just let me know, and you can have a private word
2 with him.

3 **THE DEFENDANT:** Yes, I understand.

4 **THE COURT:** And it's very important that you
5 understand my questions before you answer. So if there's any
6 hint or concern you have about not being clear, stop before you
7 answer, and I'll see if I can help you out, all right?

8 **THE DEFENDANT:** Yes.

9 **THE COURT:** Now, have you received a written copy of
10 the charges pending against Rubycon?

11 **THE DEFENDANT:** Yes.

12 **THE COURT:** And have you had the opportunity to fully
13 discuss those charges and your case and defense in general with
14 your attorney?

15 **THE DEFENDANT:** Yes.

16 **THE COURT:** All right. Mr. Nicholson-Meade, I want
17 you to state the elements of the charged offense and the
18 factual basis, all right. No penalties at this point, just the
19 elements of the offense and the facts for them.

20 **MR. NICHOLSON-MEADE:** Yes, Your Honor.

21 In order to prove a violation of section 1 of the Sherman
22 Act, the United States would have to prove beyond a reasonable
23 doubt that the conspiracy described existed at or about the
24 time alleged, that the defendant knowingly became a member of
25 the conspiracy, and the conspiracy either substantially

1 affected interstate and U.S. import, trade, or commerce, or
2 occurred within the flow of interstate or U.S. import, trade,
3 or commerce, or had a direct, substantial, and reasonably
4 foreseeable effect on interstate or U.S. import, trade, and
5 commerce, and that effect in part gives rise to the charge.

6 The factual basis of the plea is in paragraph four of the
7 proposed Plea Agreement. And had this case gone to trial, the
8 United States would have presented evidence sufficient to prove
9 the following:

10 That the relevant period is the period beginning at least
11 as early as August 2002 until in or about January 2014.

12 During the relevant period, the defendant was a
13 corporation organized and existing under the laws of Japan.

14 The defendant had its principal place of business in Ina,
15 Japan.

16 During the relevant period, the defendant manufactured
17 aluminum electrolytic capacitors, and was engaged in the sale
18 of such electrolytic capacitors in the United States and
19 elsewhere.

20 Electrolytic capacitors are a major subcategory of
21 capacitors which are fundamental components of electrical
22 circuits used primarily to store and regulate electrical
23 current. Aluminum capacitors are a type of electrolytic
24 capacitor.

25 During the relevant time period, the defendant, through

1 its officers and employees, including high-level personnel of
2 the defendant, participated in a conspiracy among the
3 manufacturers of electrolytic capacitors. The primary purpose
4 of the conspiracy was to fix prices and rig bids of certain
5 electrolytic capacitors sold in the United States and
6 elsewhere.

7 In furtherance of the conspiracy, the defendant, through
8 its officers and employees, at times engaged in discussions and
9 attended meetings with representatives of other manufacturers
10 of electrolytic capacitors. During certain of these
11 discussions and meetings, the conspirators agreed to fix the
12 prices and/or rig bids of certain electrolytic capacitors to be
13 sold in the United States and elsewhere. And during the
14 relevant period the defendant and its co-conspirators
15 manufactured certain electrolytic capacitors outside the United
16 States and sold them in the United States for delivery to the
17 United States.

18 During the relevant period, one or more of the conspirator
19 firms sold certain foreign manufactured electrolytic capacitors
20 outside the United States for incorporation into products that
21 were sold in or for delivery to the United States. And during
22 the relevant period, certain electrolytic capacitors sold by
23 one or more of the conspirator firms traveled in interstate
24 commerce.

25 Finally, acts in furtherance of this conspiracy were

1 carried out within the Northern District of California, and
2 certain electrolytic capacitors that were the subject of this
3 conspiracy were sold by one or more of the conspirators to
4 customers in this district.

5 **THE COURT:** All right. Thank you.

6 Mr. Petkoski, any objection to the Government's
7 statements?

8 **MR. PETKOSKI:** No objections, Your Honor.

9 **THE COURT:** All right. Mr. Komatsu, you've heard the
10 antitrust charge against Rubycon and the facts the Government
11 believes supports that charge. Do you understand the elements
12 and the facts?

13 **THE DEFENDANT:** Yes.

14 **THE COURT:** All right. Now, are you satisfied that
15 you've had enough time to review the Plea Agreement with your
16 lawyer and have all your questions about it answered?

17 **THE DEFENDANT:** Yes.

18 **THE COURT:** Are you confident that your attorney
19 explained the Plea Agreement to you completely, and that you
20 understood all of it before you signed it?

21 **THE DEFENDANT:** Yes.

22 **THE COURT:** All right. Where is the written plea?
23 Would you hand that to -- just hand it to Mr. Komatsu.

24 All right. Mr. Komatsu, you have now in your hand the
25 signed Plea Agreement. Would you turn to the signature page,

1 please.

2 **THE DEFENDANT:** Yes.

3 **THE COURT:** All right. Is that your signature on the
4 Plea Agreement?

5 **THE DEFENDANT:** Yes, it is.

6 **THE COURT:** And you made that signature on behalf of
7 the defendant Rubycon Corporation; is that right?

8 **THE DEFENDANT:** Yes.

9 **THE COURT:** And before you signed it, you did --
10 you're confident you understood each and every term of that
11 agreement; is that right?

12 **THE DEFENDANT:** Yes.

13 **THE COURT:** And does that Plea Agreement represent
14 your complete and full understanding with the Government?

15 **THE DEFENDANT:** Yes.

16 **THE COURT:** All right. Mr. Petkoski, did you share
17 with your client all the formal plea offers from the
18 Government?

19 **MR. PETKOSKI:** Yes, I did, Your Honor.

20 **THE COURT:** Okay. And Mr. Komatsu, are you fully
21 satisfied with the legal representation and advice given to you
22 by your attorneys in this case?

23 **THE DEFENDANT:** Yes.

24 **THE COURT:** Has anyone in any way attempted to force
25 you to plead guilty or otherwise threaten you in connection

1 with your plea today?

2 **THE DEFENDANT:** No.

3 **THE COURT:** Has anyone made any promises or assurances
4 to you of any kind, other than the terms included in your Plea
5 Agreement, to try to convince you to plead guilty today?

6 **THE DEFENDANT:** No.

7 **THE COURT:** And are you pleading guilty today of your
8 own free will because as a matter of fact Rubycon Corporation
9 is guilty of the charged offense?

10 **THE DEFENDANT:** Yes.

11 **THE COURT:** All right. Now, I'm going to describe to
12 you the rights that are being given up as a result of pleading
13 guilty, if I accept the plea.

14 You are giving up certain rights, including the right to
15 plead not guilty to any offense charged against you, the right
16 to a trial by a jury of twelve citizens of this district
17 selected at random who would presume your innocence, and who,
18 to convict you, would, all twelve, have to agree that the
19 Government has proven your guilt beyond a reasonable doubt, and
20 the right at trial to present evidence, to confront and
21 cross-examine witnesses, and to compel the attendance of
22 witnesses.

23 And do you understand that by entering a plea of guilty,
24 if I accept that plea, there will be no trial, and you will
25 have waived or given up your right to a trial, as well as those

1 rights associated with the trial that I just described?

2 **THE DEFENDANT:** Yes, I do understand.

3 **THE COURT:** And do you also understand that if I
4 choose not to follow the terms of the Plea Agreement, you will
5 have an opportunity to withdraw your plea of guilty. And that
6 if you choose not to withdraw your plea, I may impose a more
7 severe or different sentence without being bound by the Plea
8 Agreement.

9 Do you understand that?

10 **THE DEFENDANT:** Yes.

11 **THE COURT:** And do you also understand that your Plea
12 Agreement contains a waiver which says that you are giving up
13 your right to appeal or attack the merits of your case, which
14 means that you cannot appeal or otherwise attack your
15 conviction or sentence for the offense with which you are
16 charged.

17 Do you understand that?

18 **THE DEFENDANT:** Yes.

19 **THE COURT:** Have you discussed these waivers with your
20 attorney?

21 **THE DEFENDANT:** Yes.

22 **THE COURT:** Are you making these waivers today freely
23 and voluntarily?

24 **THE DEFENDANT:** Yes.

25 **THE COURT:** All right. Mr. Nicholson-Meade, would you

1 state the maximum possible penalty faced by the defendant and
2 any mandatory minimums, please.

3 **MR. NICHOLSON-MEADE:** Yes. The maximum penalty for
4 violations --

5 **THE COURT:** Remember, we've got a simultaneous
6 translation, so be slow and measured.

7 **MR. NICHOLSON-MEADE:** Certainly, Your Honor. Thank
8 you.

9 The maximum penalty for a violation of section 1 of the
10 Sherman Act is a fine in the amount equal to the greatest of a
11 hundred million dollars, twice the pecuniary gain derived from
12 the crime, or twice the gross pecuniary loss caused to the
13 victims of the crime, restitution to the victims of the
14 offense, a term of probation of at least one year, but not more
15 than five years, and a \$400 special assessment.

16 **THE COURT:** All right. Mr. Petkoski, any objections
17 to the Government's statements?

18 **MR. PETKOSKI:** No objections, Your Honor.

19 **THE COURT:** All right. Mr. Komatsu, the Government
20 and your lawyer agree that the maximum possible penalty
21 provided by law for the offense you intend to plead guilty to
22 today is a fine in an amount equal to the greater of
23 \$100 million or twice the gross pecuniary gain derived from the
24 crime, or twice the gross pecuniary loss caused to the victims
25 of the crime.

1 Do you understand that?

2 **THE DEFENDANT:** Yes.

3 **THE COURT:** And do you understand that I can also
4 impose up to five years of probation, restitution to the
5 victims of the offense, and a \$400 mandatory special
6 assessment?

7 **THE DEFENDANT:** Yes.

8 **THE COURT:** All right. And do you understand that
9 when I determine the sentence of Rubycon, I will consider
10 something called the Sentencing Guidelines, and I will
11 calculate what is called the guidelines range, and consider
12 that range, possible departures from that range, and other
13 sentencing factors under 18 United States Code Section 3553(a).

14 Do you understand that?

15 **THE DEFENDANT:** Yes.

16 **THE COURT:** Have you talked to your lawyers about how
17 the advisory Sentencing Guidelines might apply to your case?

18 **THE DEFENDANT:** Yes.

19 **THE COURT:** Have they answered all of your questions
20 about those Sentencing Guidelines?

21 **THE DEFENDANT:** Yes.

22 **THE COURT:** All right. Mr. Nicholson-Meade, what are
23 the essential terms of the Plea Agreement, please?

24 **MR. NICHOLSON-MEADE:** The material terms of the Plea
25 Agreement are that it's a Rule 11(c)(1)(c) agreement, a fine in

1 the amount of 12 million payable in installments without
2 interest, pursuant to 18 United States Code
3 Section 3612(f)(3)(A) as follows: \$500,000 within 30 days of
4 imposition of sentence, \$500,000 at the one-year anniversary of
5 the sentence, \$1.5 million at the two-year anniversary,
6 2.5 million at the three-year anniversary, 3.5 million at the
7 four-year anniversary, and 3.5 million at the five-anniversary,
8 no order of restitution, in light of the civil cases that are
9 pending before this Court, and a five-year term of probation
10 with certain conditions that are outlined in the Plea
11 Agreement.

12 **THE COURT:** All right. What about the cooperation
13 requirements?

14 **MR. NICHOLSON-MEADE:** Yes. The Plea Agreement
15 provides for continuing cooperation from the company which
16 includes producing to the United States all documents,
17 information, and other materials wherever located that are not
18 protected under the attorney-client privilege or the
19 work-product doctrine, and providing those documents with
20 translations into English that are in possession, custody, or
21 control of the defendant or any of its related entities that
22 are requested by the United States in connection with any
23 federal proceeding, and using its best efforts to secure the
24 full, truthful, and continuing cooperation of the current and
25 former directors, officers, and employees of the defendant or

1 any of its related entities, as may be requested by the United
2 States. This excludes the individuals listed in paragraph two
3 of Attachment A, which is being requested that it's filed under
4 seal. But such efforts will include making persons available
5 in the United States at a mutually agreed-upon location, at the
6 defendant's expense, for interviews and the provision of
7 testimony in the Grand Jury trial and other judicial
8 proceedings in connection with any federal proceeding.

9 **THE COURT:** So let me understand that attachment. Why
10 are there no names listed in paragraph one?

11 **MR. NICHOLSON-MEADE:** Your Honor, paragraph one
12 incorporated individuals who are former individuals who the
13 United States would have deemed necessary to provide
14 non-prosecution protection as a component of the plea. There
15 are no former employees that the United States has determined
16 warrant non-prosecution protection.

17 **THE COURT:** All right. But it's the Government's
18 understanding that if this case goes to trial, either in a
19 criminal context or the civil side, a Rubycon witness will
20 appear and testify in person; is that right?

21 **MR. NICHOLSON-MEADE:** Yes, Your Honor.

22 **THE COURT:** Okay. All right. And Mr. Petkoski, any
23 objections to the Government's statements?

24 **MR. PETKOSKI:** No, your Honor. But perhaps one
25 clarification. I do not believe that the Plea Agreement binds

1 the company in terms of its conduct or cooperation in a civil
2 litigation. It's an obligation to cooperate with the
3 Government, its proceedings, and any future prosecutions by the
4 Government.

5 **THE COURT:** You're saying they're not obligated to
6 appear in a civil trial?

7 **MR. PETKOSKI:** Not under the terms of this Plea
8 Agreement, Your Honor.

9 **THE COURT:** Is that right, Mr. Nicholson-Meade?

10 **MR. NICHOLSON-MEADE:** The Government's position is
11 that it would pertain to the Government's criminal trial,
12 criminal case, yes.

13 **THE COURT:** Okay. You agree, Mr. Petkoski, that if
14 there's a criminal trial, a Rubycon witness will appear and
15 testify; is that right?

16 **MR. PETKOSKI:** That's correct, Your Honor, consistent
17 with our obligations under the Plea Agreement. And I believe
18 the company's obligations are to use best efforts to ensure
19 that witnesses appear if they are called by the Government.

20 **THE COURT:** Called by?

21 **MR. PETKOSKI:** Called by the Government.

22 **THE COURT:** Well, is it best efforts, or are they
23 guaranteed to be here, which one is it?

24 **MR. PETKOSKI:** Well, Your Honor, the company will use
25 its best efforts. I'm not sure we can guarantee any --

1 **THE COURT:** Well, what does "best efforts" mean? You
2 know that's an empty phrase in contract law. What does it
3 mean? "Best efforts" means nothing. What does it mean?

4 **MR. PETKOSKI:** The company will do everything within
5 its power to bring witnesses to testify.

6 **THE COURT:** Well, wait a second. You're giving me
7 bromide. What is "best efforts" and "within our power"? Are
8 they going to take someone, put them on a plane and fly them
9 out here or not?

10 **MR. PETKOSKI:** Well, I'm not sure we have the power to
11 physically put people on an airplane to fly here. We can
12 certainly discipline them.

13 **THE COURT:** Are they going to fire them if they
14 refuse?

15 **MR. PETKOSKI:** If we are called to do that, we will
16 certainly go to that extent.

17 **THE COURT:** All right. Mr. Komatsu, do you understand
18 the Government's description of the essential terms of the Plea
19 Agreement?

20 **THE DEFENDANT:** Yes.

21 **THE COURT:** Is there anything about your Plea
22 Agreement in writing or what you've heard today or anything
23 about what we've discussed today that you do not understand?

24 **THE DEFENDANT:** No, nothing in particular.

25 **THE COURT:** Okay. I am getting to the point now where

1 I'm going to ask you to enter your plea. Before I do that, do
2 you need to speak to your lawyer for any reason?

3 **THE DEFENDANT:** No, nothing in particular.

4 **THE COURT:** All right. How then does Rubycon
5 Corporation plead to the offense charged in the information
6 dated August 22, 2016 which alleges a violation of section 1 of
7 the Sherman Antitrust Act, 15 United States Code Section 1,
8 guilty or not guilty.

9 **THE DEFENDANT:** It wishes to plead guilty.

10 **THE COURT:** All right. It is my finding that
11 defendant Rubycon Corporation, through its authorized
12 representative, is fully competent and capable of entering an
13 informed plea. The defendant is aware of the nature and
14 factual basis of the charge, and the consequences of the plea,
15 and that the plea of guilty is a knowing and voluntary plea
16 supported by an independent basis in fact containing each of
17 the essential elements of the offense. So I am going to accept
18 the plea of guilty, and defendant Rubycon Corporation is now
19 adjudged guilty of the charged offense.

20 We are going to go directly now to sentencing. Under
21 Federal Rule of Criminal Procedure 32(c)(1)(A)(2), and at the
22 parties' joint request, I am going to find that the information
23 in the record enables me to exercise my sentencing authority
24 meaningfully under 18 United States Code Section 3553,
25 specifically the information, the United States' sentencing

1 memorandum, the attachments, and the Plea Agreement provide
2 enough detail for me to assess the relevant factors under
3 section 3553(a), and I am now going to proceed immediately to
4 sentencing, pursuant to criminal local Rule 32-1b.

5 Now, moving on to sentencing.

6 I have some concerns, which I am sure I have telegraphed
7 to you, but we'll get to them in a moment. I have received and
8 considered the United States' sentencing memorandum and motion
9 for departure, and the Government's declarations in support of
10 the memorandum, and the attachments of the declarations, as
11 well as the Plea Agreement, and I've also received Rubycon
12 Corporation's notice of waiver, of presentence report, and
13 request for expedited sentencing, which Rubycon states that it,
14 quote, agrees with the sentencing recommendation in the United
15 States' sentencing memorandum, close quote. That's docket
16 number 10.

17 That's the universe of documents, right,
18 Mr. Nicholson-Meade? Nothing else?

19 **MR. NICHOLSON-MEADE:** Yes.

20 **THE COURT:** Nothing else, Mr. Petkoski.

21 **MR. PETKOSKI:** No, your Honor. Although it is
22 consistent with our provision to you of financial information,
23 we're happy to provide information about the company's
24 activities in the United States, sales, size, profitability,
25 and the like, and of course we're happy to answer any

1 additional questions Your Honor may have about the company,
2 about its past cooperation, and about its commitment to
3 continue to cooperate with the Government.

4 **THE COURT:** All right. We will get to that. Thank
5 you.

6 The Plea Agreement in this case, which was signed under
7 Rule 11(c)(1)(c) of the Federal Rules of Criminal Procedure,
8 contains a proposed agreed disposition consisting of a criminal
9 fine of \$12 million to be paid in six installments over five
10 years, no restitution, a five-year term of probation, and a
11 special assessment of \$400.

12 Now, before I get to those terms, I need to calculate the
13 advisory guidelines range under the Sentencing Guidelines for
14 the offense that Rubycon Corporation has pled guilty to, namely
15 price fixing under 15 United States Code Section 1.

16 The Sentencing Guidelines applicable to this case are in
17 section 2R1.1 for antitrust offenses, and in chapter 8 of the
18 sentencing of organizations. Too much?

19 **INTERPRETER:** I'm okay, Your Honor. Thank you.

20 **THE COURT:** You're good? All right. Did you get that
21 last part?

22 **INTERPRETER:** Yes.

23 **THE COURT:** Okay. Now, with respect to the fine under
24 section 8A1.2b, a fine is one element of the possible sentence.
25 Under section 8C2.4A and section 2R1.1D1, the base fine should

1 be the greater of 1) the amount of the table in section 8C2.4D
2 corresponding to the applicable offense level; or 2) the
3 pecuniary gain to the organization from the offense; or 3)
4 20 percent of volume of affected commerce.

5 Now, the Government's sentencing memorandum addresses each
6 of these options, and proposes to me to propose a fine using
7 the volume of commerce special instruction in section 2R1.1D1.
8 I will accept that recommendation, for the reasons stated in
9 the Government's memorandum. I am, however, a little in the
10 dark about the reason why \$54.2 million was excluded from the
11 volume of commerce calculation, and also why -- and in addition
12 to that, why 35.3 million was excluded under Guideline Section
13 1b1.8.

14 So tell me why that happened.

15 **MR. NICHOLSON-MEADE:** Yes, Your Honor. Specifically,
16 the exclusion of 54.2 million came from two parts: One,
17 \$18.9 million were excluded from sales of products that the
18 Government determined were unaffected by the conspiracy.

19 **THE COURT:** How do you determine that?

20 **MR. NICHOLSON-MEADE:** Well, so in this case, these
21 products were high-end strobe capacitors for which Rubycon had
22 nearly a hundred percent or a hundred percent of the market,
23 and so they did not compete directly for the sale of these
24 capacitors with the other co-conspirators in this case.

25 **THE COURT:** And that's the 54 million?

1 **MR. NICHOLSON-MEADE:** That's 18.9 million that was
2 excluded. The other is a \$35.3 million exclusion under United
3 States guideline 1B1.8. The basis for that exclusion concerns
4 the cooperation that Rubycon provided, specifically Rubycon
5 provided information that was previously, for the most part,
6 unknown to the Government about meetings known as the Foreign
7 Trade Meetings. These meetings concerned non-Japanese -- sales
8 to non-Japanese customers, and the total sales during the time
9 period that these meetings were taking place amounted to
10 35.3 million.

11 **THE COURT:** All right. How do you get to the
12 54 million then?

13 **MR. NICHOLSON-MEADE:** The 35.3 plus the --

14 **THE COURT:** 18?

15 **MR. NICHOLSON-MEADE:** -- 18.9.

16 **THE COURT:** All right. Mr. Petkoski, any additional
17 comments on that?

18 **MR. PETKOSKI:** No, your Honor.

19 **THE COURT:** All right. I will accept the proposition
20 that the affected commerce figure is 108.8 million, for the
21 reasons stated in the sentencing memorandum from the
22 Government, which leaves a base fine under the guidelines of
23 21.8 million, which is 20 percent of 108.8 million.

24 So I'm going to move on from that now to calculate what's
25 known as the culpability score under section 8C2.5, starting

1 with five points under subsection (a). The parties agree that
2 an additional three-level upward adjustment is warranted under
3 subsection (b)(3). I'm going to apply that adjustment. The
4 parties also agree that a two-level downward adjustment should
5 be applied under subsection (g)(2) for Rubycon's self-reporting
6 cooperation and acceptance of responsibility. I will accept
7 that downward two-level adjustment as well, and that leaves a
8 total culpability score of 6.

9 Under section 8C2.6, a culpability score of 6 yields a
10 minimum multiplier of 1.2 and a maximum multiplier of 2.4.
11 That, in turn, provides a fine range of 26.1 million to \$53.3
12 million under section 8C2.7. The parties agree that within
13 that guidelines range, and without looking at any other
14 factors, Rubycon's total fine should be \$3.7 million. That
15 number is based on a consideration of the factors set out in
16 Guideline Section 8C2.8, and includes a \$4.6 million upward
17 adjustment from the bottom of the range to account for the
18 value of electrolytic capacitors sold outside the United
19 States, but incorporated into desktop and laptop computers sold
20 in the United States under United States brands. I agree that
21 including that upward adjustment is consistent with the need to
22 reflect the seriousness of the offense, and its harm to the
23 United States under Section 8C2.8A1.

24 Now, here is where we're coming to more of a sticking
25 point for me. The Government asks that I impose a fine that is

1 substantially lower than \$30.7 million, which is what normally
2 Rubycon would be expected to pay under the guideline
3 calculations, to which the parties agree. And there appear to
4 be two reasons for that: One is I am told that Rubycon can't
5 pay under Guideline Section 8C3.3B. That provision states that
6 I may impose a fine below what is normally required if I find
7 that the defendant cannot pay, that the defendant organization
8 cannot pay.

9 The Government has represented to me, without actually
10 supplying me with the documents, that some expert had
11 determined that Rubycon can pay only \$15 million. Not only
12 that, could only pay it in a rather generous series of payments
13 starting with only \$500,000 and then ending with what I will
14 characterize as balloon payments towards the end of a five-year
15 period, with the added bonus of no interest being charged. And
16 that is what the Government is proposing that I do.

17 It is giving me serious heartburn, Mr. Nicholson-Meade. I
18 don't get it. Let me tell you why. This is a family-owned
19 corporation that's been in business for over three decades,
20 from what I've heard. The profit margin is low, but their
21 sales are significant. They sell close to half a billion
22 dollars of goods year in, year out. It is mystifying to me,
23 regardless of the level of cooperation, which we'll get to, it
24 is mystifying to me how you can say this company can afford to
25 pay first only \$500,000 over the next year, and in total only

1 \$15 million for this offense.

2 **MR. NICHOLSON-MEADE:** So, Your Honor --

3 **THE COURT:** Let me just also say -- and I'm sure
4 you've heard this -- I have already had some concerns about
5 what I consider to be low fines in prior guilty plea
6 proceedings. I have gone with them, but I'm having a hard time
7 at this point accepting it. So you need to tell me why that's
8 a good idea.

9 **MR. NICHOLSON-MEADE:** Yes. And we have heard your
10 concerns, Your Honor. What we've tried to do in this case is
11 assess a penalty that reflects harm to U.S. consumers.

12 But to specifically address Rubycon's inability to pay,
13 the Antitrust Division hired an outside consultant, Dale
14 Zuehls. He's been retained by the division over a number of
15 years, has been involved in a number of cases, including the
16 after auto lights market, cargo shipping, domestic freight --
17 the freight industry, and computer memory industry to assess
18 companies' ability to pay. He requested --

19 **THE COURT:** Let me just jump in on that.

20 **MR. NICHOLSON-MEADE:** Sure.

21 **THE COURT:** Now, it is the defendant's burden to prove
22 that they can't fit the bill, they can't pay it, okay.

23 **MR. NICHOLSON-MEADE:** Right.

24 **THE COURT:** I'm taken aback by why the United States,
25 apparently at its own expense -- is that right, you paid for

1 this expert?

2 **MR. NICHOLSON-MEADE:** Yes, Your Honor, we did.

3 **THE COURT:** Why is the United States deciding that
4 it's going to carry the water on what is the defendant's burden
5 to prove.

6 **MR. NICHOLSON-MEADE:** Well, we didn't do it as the
7 United States carrying the burden. Rubycon had to open up its
8 financial books and provide them and convince our expert
9 essentially what their ability to pay was. I'll also say that
10 he --

11 **THE COURT:** What did they tell you? What did Rubycon
12 come to you and say?

13 **MR. NICHOLSON-MEADE:** Well, Rubycon provided the
14 documents requested by our experts, which consisted of some of
15 the --

16 **THE COURT:** Let me ask my question. That may have
17 been a bad question.

18 Rubycon bears the burden of persuading you and me, namely
19 me, that it cannot pay. So what I hear you saying is Rubycon
20 just threw some documents at you and just said you work out the
21 details. I don't see how that -- why did it happen that way?

22 **MR. NICHOLSON-MEADE:** Well, Rubycon gave presentations
23 and proffers on its ability to pay in an attempt to convince us
24 of its financial ability. But rather than take Rubycon's word
25 for it, we hired our outside expert.

1 could still use whoever you want. They're just going to pay
2 the bill.

3 **MR. NICHOLSON-MEADE:** Well, except that, you know, if
4 an expert is being paid by the defendants, there's at least the
5 potential for a conflict.

6 **THE COURT:** I don't see it. I mean, they're working
7 for you, you retain them. At the end of the day, they're just
8 getting a check from a third party or the defendant. They're
9 not talking -- they're not earning a wage from the defendant in
10 a way a so-called independent expert would in a civil case.

11 Mr. Parker, can you join us for a moment? Why aren't we
12 asking the defendants to pay for this work?

13 **MR. PARKER:** Well, Your Honor, effectively we are,
14 inasmuch as the final conclusion would be what -- how much
15 money does the company have? If they paid us a hundred
16 thousand dollars for the expert, then the conclusion would be
17 they don't have that hundred thousand dollars to pay as a
18 criminal fine. So it doesn't really make a difference at the
19 end of the day.

20 **THE COURT:** Well, but a hundred thousand is coming out
21 of your budget. You're not getting that money back from the
22 defendants.

23 **MR. PARKER:** Well --

24 **THE COURT:** Right? It's not --

25 **MR. PARKER:** Where the money goes when it comes to the

1 Government is above my pay grade. But they are going to be
2 paying a fine, and that is going to be coming to the
3 Government.

4 **THE COURT:** All right. Mr. Nicholson-Meade is a
5 little early in his career, so I just want you to stay up here
6 for a moment. He's doing a fine job.

7 But is it the practice in every case the Antitrust
8 Division pays for this work?

9 **MR. PARKER:** Yes, Your Honor, that's my understanding.

10 **THE COURT:** Let me ask you another question. I mean,
11 why does this -- Rubycon's been around for 33 years. They're
12 not a failing or dying entity. I mean, I just don't get it.
13 Why is this fine so small, given -- in your own papers you tell
14 me they're the third largest of the conspirators. I mean, that
15 just --

16 **MR. PARKER:** We have a high degree of confidence with
17 Dale Zuehls. He really has been doing it many, many times, and
18 he is very rigorous. And from where I sit, when Dale Zuehls
19 does the study and reaches the conclusion, it's the right one.

20 **THE COURT:** Has any court actually ever had him come
21 in and testify or -- I didn't even have the report. I mean,
22 all I have is -- and I'm not saying this is worth nothing. I'm
23 not saying that at all, but all I have is the United States
24 saying, *Take our word for it, Mr. Zuehls is great.* I don't
25 have any data. I don't know what he did. I am not unfamiliar

1 with how economists, you know, do this analysis. I know it
2 with some degree of detail, but I don't have a lick of evidence
3 about what happened with Mr. Zuehls. It's just a big black box
4 out of which comes the punchline: *Take our word for it, Your*
5 *Honor, we're good.* I mean, I'm not comfortable with that.
6 Now, just tell me why I should be.

7 **MR. NICHOLSON-MEADE:** Your Honor, Dale Zuehls'
8 methodology, which was outlined in I think it's page 13 of the
9 sentencing memorandum, portions which are under seal, goes
10 through the process he looked at and the data that he requested
11 from the company.

12 In terms of running the numbers, you know, I think that
13 the United States position is that we rely on this retained
14 expert, we have in the past, and he comes up with a number that
15 puts the -- it's not necessarily the number that the company
16 presents us, but it's a number he independently derives from
17 their accounting papers.

18 **THE COURT:** Well, he comes up with a number that looks
19 like a pretty good deal for Rubycon, so I'm not surprised at
20 all they're not telling you a different number.

21 **MR. PETKOSKI:** Your Honor, I understand you're talking
22 to the Government, but I can also walk Your Honor through some
23 of the financial information that we passed up to Your Honor at
24 the beginning of the hearing which we think illustrates the
25 company's very precarious financial situation, not just today,

1 but historically. And just one piece of data, during the years
2 of the conspiracy, the company's cumulative earnings for the 11
3 years -- and I'm looking here at a full calendar or full fiscal
4 year -- the company's cumulative net income was \$16,000, and
5 that's the FY 2002 to FY 2013 sheet. The bottom table puts the
6 numbers in dollars.

7 **THE COURT:** Let me just jump in. You're telling me
8 that between fiscal year '02 and '13, their net income was
9 \$16,000?

10 **MR. PETKOSKI:** The cumulative income is 16,000.

11 **THE COURT:** I don't understand what net income means,
12 because there's no way you could have a concern that stays
13 alive for 11 years making basically \$1,500 a year. That just
14 doesn't work. That's just not possible. Business does not do
15 that. There's something going on here that gives me tremendous
16 concern. Now, there is no doubt in my mind that a company
17 that's been around for three decades, selling an average of
18 460 million worth of products a year, is not living on a
19 thousand dollars. It's just not true. That just defies
20 rationality or common sense. And I guarantee you the family
21 that owns this is not living in a one-bedroom cold-water walkup
22 flat, which is what they would be living on if they got a
23 thousand dollars a year for their work. So I'm not buying
24 that.

25 And when I see things like "net income" and "net margin,"

1 those are all empty words until I know what that economist
2 actually is doing. They mean nothing to me. I don't have any
3 idea about how net income or net sales were derived other than
4 I get a sheet from somebody.

5 **MR. PETKOSKI:** And Your Honor, perhaps I can point
6 Your Honor to a few more pieces of data that we think are
7 revealing.

8 You mentioned the company's owners. We have information
9 on the dividends that they are drawing from the ownership of
10 the business, and they are very modest. I can run through the
11 numbers that we have available. For the period between their
12 fiscal year 2011 and 2015, the average annual dividend paid to
13 the owners was \$112,000 per year. And I can certainly walk
14 Your Honor through the annual dividend payments. They're in
15 the range of zero and \$360,000, again, per year to all the
16 owners of the company.

17 The company also operates and has historically operated at
18 a very low current ratio, so that's the ratio between its
19 current assets and current liabilities. Consistently the
20 company has operated at a current ratio that's modestly above
21 1, and 1 means current assets and current liabilities are
22 equal. So the company has historically operated on the verge
23 of insolvency. And, again, the information we've provided to
24 Your Honor provides the annual current ratio numbers. For the
25 years covered by the plea, the average current ratio is 1.14,

1 so, again, very close to the equivalency of the current assets
2 in criminal liabilities. And, again, that's consistent
3 throughout the company's history.

4 You had a question of where these numbers come from. This
5 is a summary derived from the company's books and records,
6 which are prepared in the normal course of business by the
7 company's accountants.

8 **THE COURT:** But under Japanese accounting rules.

9 **MR. PETKOSKI:** That's correct, Your Honor.

10 **THE COURT:** And all of this information was provided
11 by Rubycon to the Government for the analysis that Mr. Zuehls
12 conducted.

13 In addition to its historically very precarious financial
14 situation, the company has very significant liabilities as a
15 result of investigations of the same conduct that the
16 Government and the U.S. has been investigating by a number of
17 other jurisdictions --

18 **THE COURT:** Let me ask you this. If this is so dire,
19 how are they going to pay \$500,000 a year from now?

20 **MR. PETKOSKI:** They believe they have the ability to
21 pay that amount, consistent with their other liabilities.

22 **THE COURT:** Where is it coming from?

23 **MR. PETKOSKI:** We believe that it will largely come
24 from the company's operations. The company also --

25 **THE COURT:** How does that reflect in this sheet you

1 gave me? Tell me where in these line items, between 2002 and
2 2013, they're going to extract \$500,000? You just told me they
3 cleared 1,600 -- 16,000 over that period. How are they going
4 to come up with 500,000?

5 **MR. PETKOSKI:** Sure. And perhaps Your Honor, again,
6 my goal is to give you as much information as I can. The other
7 sheet provides the company's financials.

8 **THE COURT:** Either sheet is fine with me. You just
9 tell me where that 500,000 is coming from a year from now.

10 **MR. PETKOSKI:** The conclusion by the Government's
11 expert is that the company would be able to draw the funds from
12 its operations based on his view of how the market would
13 develop and the company's performance in that market.

14 **THE COURT:** That means nothing to me. Where is the
15 money coming from?

16 **MR. PETKOSKI:** Again, I believe it will be coming from
17 the company's operations. In 2015, the company's financials
18 improved, and, again, we're providing Your Honor with the more
19 recent numbers. Although in 2016, the company's financials
20 have taken a turn for the worst.

21 **THE COURT:** All right. So their net income for '06 to
22 '15 was about 24 million; right?

23 **MR. PETKOSKI:** That's correct. And, again, that is
24 the cumulative income with relatively healthy performance in
25 the last three years which was driven by a significant

1 weakening of the Yen. That weakening of the Yen was reversed
2 in the last several months, which has resulted in the company
3 starting to incur losses in its current fiscal year or fiscal
4 year that ended in September of this year.

5 **THE COURT:** So how is the company going to go from
6 500,000 in year one to 3.5 million in year five?

7 **MR. PETKOSKI:** That is based on the assumption that
8 the company's economic performance in the out years is
9 consistent with the better years that it has historically been
10 able to attain.

11 **THE COURT:** And what happens if they call you next
12 year and say, *We can't even make year two?*

13 **MR. NICHOLSON-MEADE:** So that is a consideration, Your
14 Honor. Our expert is basing his forecast on forecasts, and
15 some of it is unpredictable. There is a provision in the
16 United States Code if a fine imposed cannot be paid, and in
17 future years, that the Government could petition to modify that
18 fine. We think that Mr. Zuehls' assessment of Rubycon's
19 ability to pay is based on the best available information we
20 have now. But there are uncertainties; for example, Mr. Zuehls
21 accounted for potential civil exposure to account for what
22 would be the restitution in this case. So he's making
23 assessments based on some information that he doesn't have a
24 crystal ball for, but uses his -- a variety of iterations based
25 on all the information he has available to come up with that

1 number. So some of his projections could turn out to be wrong.

2 **THE COURT:** And so what does the United States
3 Government get from that? Say he's wrong, and I have no idea
4 whether he is or not, but say he's wrong or Rubycon just called
5 you up and says, *We can't do it*, what happens next?

6 **MR. NICHOLSON-MEADE:** Well, so if Rubycon were to
7 approach us, you know, a year after judgment is imposed and
8 says, *We can't pay our fine as imposed by judgment*, what the
9 division would likely do is hear them out, reassess their
10 ability to pay through our retained expert, or perhaps a
11 different retained expert, and come up with, you know, what
12 their true ability to pay is.

13 **THE COURT:** Are there any assets or anything in the
14 United States that can be seized? What self help can you do
15 rather than just relying on Rubycon's good graces?

16 **MR. NICHOLSON-MEADE:** Well, Your Honor, Rubycon does
17 have a subsidiary in the United States; however, the Antitrust
18 Division's motion to protect and promote competition we don't
19 think would be furthered by shutting down its operations.

20 **THE COURT:** Look, I'm just concerned about what's
21 already a too generous a deal turning out to be illusory, okay.
22 So that's my concern. So I'm not interested in approving an
23 agreement that has a realistic possibility of resulting in not
24 only a starting fine, which I think is too low, but ending in
25 not even a significant fraction of that being paid. So what I

1 hear is no promises, no guarantees, we'll just see what
2 happens.

3 **MR. NICHOLSON-MEADE:** Well, Your Honor, the assessment
4 of Mr. Zuehls would be conducted and thoroughly analyzed. This
5 original assessment took a full year to assess Rubycon's
6 financial picture.

7 **THE COURT:** Why is that?

8 **MR. NICHOLSON-MEADE:** It's just the request for data,
9 the amount of data, and he's using third-party reports on the
10 industry and trends of the industry, which took him a fair
11 amount of time to complete?

12 **THE COURT:** All right. Any last comments from either
13 side?

14 **MR. PETKOSKI:** Your Honor, a few comments on this.

15 We believe that Rubycon has been the primary cooperating
16 company not just in the Department of Justice, but to each of
17 the jurisdictions that are investigating this conduct. And the
18 company was very early to cooperate with each of those
19 government agencies, and we believe that we provided the key
20 evidence to each of those jurisdictions. Each of those
21 jurisdictions has looked at Rubycon to provide that
22 cooperation, and many of those jurisdictions are looking for
23 Rubycon to continue to provide that cooperation, and I believe
24 that includes the United States Government.

25 The other jurisdictions --

1 **THE COURT:** How much are they paying to the Taiwan
2 enforcement authorities?

3 **MR. PETKOSKI:** The fine that has been assessed by
4 Taiwan is \$19.9 million.

5 **THE COURT:** 19.9.

6 **MR. PETKOSKI:** 19.9.

7 **THE COURT:** And what's their payment plan in Taiwan?

8 **MR. PETKOSKI:** It is equal installments over five
9 years. The first payment was made in February.

10 **THE COURT:** They're paying 4 million a year,
11 basically, to Taiwan.

12 **MR. PETKOSKI:** Correct.

13 **THE COURT:** And they're starting here at a lower fine
14 and paying only 500,000.

15 **MR. PETKOSKI:** Correct. Now, a couple of comments
16 about Taiwan. Taiwan's laws and regulations do not provide for
17 consideration of ability-to-pay issues, unlike the United
18 States.

19 The company is also paying a ten-and-a-half-million-dollar
20 fine in Japan. That fine is due at the end of this month.

21 And another comment is, Your Honor, the United States is a
22 relatively small part of the global capacitor market. Our
23 estimate is that the company's sales to the United States are
24 less than 5 percent of its global capacitor sales. Also, the
25 bulk of the underlying conduct in this case took place in Japan

1 and in Asia. Very little, if anything, physically took place
2 in the United States.

3 And also in addition to Taiwan and Japan, the company has
4 been cooperating with Brazil, where it has agreed to pay a
5 penalty. That penalty is 130,000 U.S. dollars. It is
6 cooperating with the European Commission, with Korea, with
7 Singapore, and with China. And I could give Your Honor the
8 expected liabilities in each of those jurisdictions, which --

9 **THE COURT:** What's the liability in the EU?

10 **MR. PETKOSKI:** The expected liability in the EU is in
11 the 17-to \$25 million range. The company has asked the
12 Commission to consider its precarious financial condition, and
13 the Commission is still conducting its analysis. The
14 Commission generally moves -- its proceedings generally move
15 more slowly than the Department of Justice in the United
16 States.

17 In Korea, the company is expecting liability between four
18 and-a-half and \$8 million.

19 In Singapore, the company is expecting liability between
20 2.1 and \$4.3 million.

21 In China --

22 **THE COURT:** I don't get it. You all are telling me
23 they're on the razor's edge of insolvency. How are they going
24 to pay all this? Who is going to end up getting stiffed here?
25 Everybody? From what you've told me, they can barely write a

1 check for half million dollars to the U.S. How are they going
2 to meet these multi-million-dollar obligations.

3 **MR. PETKOSKI:** And I think, Your Honor, the
4 calculation of the half million-dollar check in the initial
5 installments in the United States takes into account the fact
6 that Taiwan and Japan have both assessed fines that are either
7 almost immediately payable or would be payable over a course
8 that has already started, and that the company will have
9 significant expenditures in fulfilling its --

10 **THE COURT:** Where is the money coming from?

11 **MR. PETKOSKI:** Again, Your Honor, the money is coming
12 largely from the company's operations.

13 **THE COURT:** But, you know, you're just giving me all
14 this data, saying their operations are really bad and terrible.
15 So where is this flowering of income that historically has
16 never happened, but somehow it's going to happen over the next
17 five years, such that they can pay what appears to be on
18 average -- I'm ballparking it -- somewhere between 10 and \$20
19 million a year, year in and year out for the next five years to
20 regulatory agencies.

21 **MR. PETKOSKI:** Your Honor, we think it will be very
22 difficult. And I could make a few comments to that. One is I
23 believe that the fine payment was designed in a way to allow us
24 to come and ask for relief if we believe we could prove that
25 we're in need for relief.

1 In the short term, the company historically has been able
2 to continue its operations even at its very low current ratio
3 by using lines of credit to operate its business, and the plan
4 for the company is to continue to rely on lines of credit to
5 operate its business. And there's a big question of whether
6 any further lines of credit will be available to the company,
7 given, again, its relatively difficult financial position. I
8 think ultimately the company is planning to do everything it
9 can to satisfy these obligations. And then I think the payment
10 schedule is a recognition that its ultimate ability to pay
11 these obligations will be dependent on favorable market
12 developments in the future.

13 **THE COURT:** It's more than favorable. It's going to
14 be, based on past performance, a revolutionary change in their
15 fortunes; right? They're going to go from a net margin of -- a
16 net income of \$1,600 to up to 15 million a year and extra cash
17 to pay enforcement agencies.

18 All right. We're going to take a 15-minute break.

19 **THE CLERK:** All rise. Court is in recess.

20 (Recess taken at 12:18 p.m.)

21 (Proceedings resumed at 12:28 p.m.)

22 **THE COURT:** Okay. I have too many concerns, and
23 there's too much of a black box on this for me to make the
24 finding that I am required to make under Guideline
25 Section 8C3.3B. I cannot find, based on the incomplete record

1 in front of me, that Rubycon is not able to pay even with the
2 use of a reasonable installment schedule, so --

3 **MR. NICHOLSON-MEADE:** Your Honor --

4 **THE COURT:** Here's what we can do. I am happy to have
5 the opportunity to consider a full evidentiary record, if you
6 want to do that. If you don't, then the plea will be
7 withdrawn. But I am not going to go forward on what I have
8 today, because what I have is nothing that allows me to make an
9 informed independent judgment about Rubycon's inability to pay.
10 And I have to say, from what I have seen, my concerns have been
11 magnified, not assuaged, by the data that I've heard today.

12 Yes, Mr. Nicholson-Meade.

13 **MR. NICHOLSON-MEADE:** Yes, Your Honor. During the
14 recess we spoke with Mr. Zuehls. He is available for
15 consultation by phone.

16 **THE COURT:** I'm not doing that. This is not a fly by
17 night, call somebody up on the phone and get a few answers. If
18 you want to proceed, you two will work out a schedule, and you
19 will work out a proffer to me. At that point I will have the
20 proffer, and I will consider it, and then we'll have Mr. Zuehls
21 come in and answer questions under oath. Okay. That's how
22 we're going to do it. I'm not going to pick up the phone and
23 ask some guy in LA that I can't see a couple of questions.
24 That's not going to happen. That is not adequate for me to
25 discharge my obligation, all right.

1 **MR. NICHOLSON-MEADE:** Very well, Your Honor.

2 **THE COURT:** Okay. So that's where we are.

3 Anything else I can help you with today?

4 **MR. NICHOLSON-MEADE:** Your Honor, the United States
5 would just request to get on calendar as early as possible.
6 You know, we've alluded to Rubycon --

7 **THE COURT:** That's fine. Let me just jump in,
8 Mr. Nicholson-Meade. That's fine. You work out a date with
9 your opposing counsel, and you decide how you want to do this.
10 But I want an evidentiary proffer. I don't want argument, I
11 want facts, all right. I want to see this is what the data is
12 going to show. And then you have Mr. Zuehls pick a date when
13 you can come up here and join us for about an hour or so and
14 answer questions, all right.

15 Now, there is a possibility, I think it's unlikely, but
16 there's a possibility that after I see the proffer I may not
17 have any questions. But book it first, find a date, work this
18 out with the two of you, have Mr. Komatsu come back, because he
19 needs to be present for that as well, all right, and there's
20 some other representative of the corporation, the defendant,
21 and I will take it up then. But you're going to have to pace
22 that in a way that fits my schedule as well as your schedule,
23 okay.

24 Now, the good news is I just had a very big trial starting
25 on December 5th go away, so I might actually be able to have

1 you in before the end of the year, okay.

2 **MR. NICHOLSON-MEADE:** Okay, your Honor. The only
3 pending issue is that we had requested that Attachment A be
4 filed under seal.

5 **THE COURT:** That's fine. You can seal anything you
6 want. That's not a problem. Whatever you want to seal is
7 fine.

8 **MR. NICHOLSON-MEADE:** Very well, Your Honor.

9 **MR. PETKOSKI:** And Your Honor, I believe Rubycon would
10 want to withdraw its guilty plea at this time, unless we're
11 staying the proceedings.

12 **THE COURT:** Well, I was going to stay it.

13 **MR. PETKOSKI:** Okay.

14 **THE COURT:** If you withdraw it, then I'll cancel the
15 hearing.

16 **MR. PETKOSKI:** No. No. No. I just want to make sure
17 that --

18 **THE COURT:** You want to withdraw it? You can go back
19 to withdrawing it. I mean, I'm giving you the opportunity to
20 take a second bite. If you don't want it, just say so.

21 **MR. PETKOSKI:** No, Your Honor. We just want to
22 clarify if the proceedings are stayed, then the plea will stay.

23 **THE COURT:** Yeah, it's stayed. Okay.

24 All right. Anything else I can help you with today?

25 **MR. PETKOSKI:** No, your Honor.

1 **MR. NICHOLSON-MEADE:** Nothing from the Government.

2 **THE COURT:** All right. Thank you.

3 So I take it the transcript will be sealed as well?

4 **MR. PETKOSKI:** Yes, please, Your Honor.

5 **MR. NICHOLSON-MEADE:** Yes, Your Honor.

6 **THE COURT REPORTER:** Available to the parties, Your
7 Honor?

8 **THE COURT:** Available only to the United States and
9 Rubycon; right? The transcript?

10 **MR. PETKOSKI:** I'm sorry?

11 **THE COURT:** The transcript will be available only to
12 Rubycon and the United States.

13 **MR. PETKOSKI:** That would be our request.

14 **THE COURT:** Yes.

15 **MR. NICHOLSON-MEADE:** Yes.

16 **THE COURT:** All right. Thanks.

17 (Proceedings adjourned at 12:32 p.m.)

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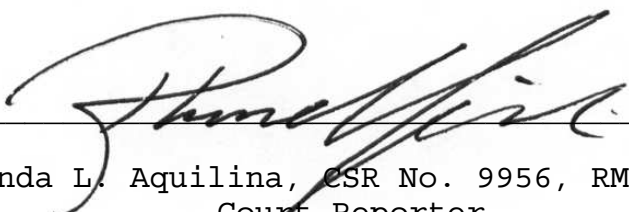
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CERTIFICATE OF REPORTER

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

DATE: Friday, October 13, 2016



Rhonda L. Aquilina, CSR No. 9956, RMR, CRR
Court Reporter