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January 29, 2018

Via ECF and Electronic Mail to Chambers

Hon. Judge J. Donato
United States District Court
450 Golden Gate Avenue
Courtroom 11, 19th Floor
San Francisco, California 94102

Re: *United States v. Elna Co., LTD., No. 4:16-cr-365-JD*

Your Honor:

In accordance with this Court's statements at the January 11, 2018 hearing, this Court's January 23, 2018 order, and the rights afforded to crime victims under federal law, including the Crime Victim Rights Act ("CVRA"), 18 U.S.C. § 3771, Direct Purchaser Victims ("Victims") respectfully submit this victim statement in relation to the sentencing of Defendant Elna Co., LTD. The Victims write to address the issues of Defendant Elna's professed inability to pay and of redress to the crime Victims.

The Victims agree with the Court that "the proposed sentence [is] simply too low," that there is insufficient "justifiable basis for departing" from the Sentencing Guidelines, and that the recommended sentence is not "in the best interests of justice or in the public interest" for a "criminal corporate defendant who has pled guilty to committing what is possibly one of the most serious crimes against United States economy and consumers." *United States v. Elna Co., LTD.*, Transcript of Proceedings, June 14, 2017 at 19:3-18.

Page 2

Hon. J. Donato

January 29, 2018 January 29, 2018

Inability to Pay

Both the government and Defendant Elna have emphasized Elna's claims of bleak financial conditions and inability to pay, and each has submitted an expert report as to this issue. Victims have had the opportunity to review only Elna's report.¹

A key premise of Defendant Elna's expert report is that Elna will be unable to raise funds to pay a higher penalties or to pay redress to Victims. That premise is questionable.

Elna's Substantial Hard Assets

First, the report indicates that Defendant Elna owns ¥8.825 billion, or over \$81 million, in hard assets, including properties, plants, and equipment (PPE). Deloitte report pp. 38-39. In addition to its hard assets in Japan, Elna owns significant manufacturing PPE assets in Malaysia, through Elna Sonic and Elna PCB, and in Thailand, through Elna Tanin. *Id.* Specifically, since 1980, Elna's Chiangmai factory in Thailand has been its main production facility for aluminum electrolytic capacitors. *See* Ex. 1. In addition that substantial PPE assets in Thailand, Elna owns two manufacturing plants in Penang, Malaysia. One of the Malaysian plants manufactures capacitors, while the other is dedicated to the production of printed circuit boards (PCBs), which accounted for 57% of Elna's total business revenue in 2016. *Id.* at p. 10. In fact, Elna's PCB operations in Penang, Malaysia employ nearly 700 people, and, as of late 2013, Elna planned a significant expansion to its Chiangmai plant. Exs. 1, 2. Nothing in the Deloitte report indicates that any of these PPE assets are encumbered. Thus, Defendant Elna owns substantial equity—over \$80 million—in these assets.

Accordingly, it appears that additional funds could be raised by the sale of such PPE assets or by borrowing funds collateralized by Elna's equity in those assets. While the Deloitte report discusses sale of disposable assets, the report did not address or even mention leveraging or encumbering Elna's \$81 million of PPE assets as a possible means to raise funds.

Moreover, Defendant Elna has pleaded and been adjudicated guilty of participating in a multi-year criminal price-fixing conspiracy that inflicted hundreds of millions of dollars in damages on Victims in the United States. Under these circumstances, the rights of the Victims to redress, and the interest of the government in enforcing antitrust laws through the imposition of adequate criminal fines, should be prioritized over the interests of the wrongdoer in maximizing profits through continuing with normal business operations.

¹ The Victims requested disclosure of the government's expert report on Elna and would have agreed to disclosure subject to a protective order and confidentiality designations. The government refused.

Page 3

Hon. J. Donato

January 29, 2018 January 29, 2018

Elna's Potential Deals, Investments, and Partnerships

Further, Elna's Deloitte report did not address raising funds through strategic partnerships or deals with potential new stakeholders, like the joint venture Elna executed with Nantong Jianghai Capacitor Co., Ltd. ("Jianghai") in 2017 that raised ¥1 billion, or about \$9.2 million, in capital. Deloitte report at pp. 34-36. Significantly, Elna was able to execute this deal to raise \$9.2 million *after* Elna publicly agreed to plead guilty in this prosecution in August 2016 and after its exposure in the related civil action was publicly known. *Id.* There is no indication that Jianghai was a stakeholder in Elna at all prior to the deal. *Id.* Despite the posture of the criminal and civil cases and of its conduct giving rise to the litigation, Defendant Elna apparently chose not to use or reserve any of the \$9.2 million capital raised in 2017 to pay criminal fines or to make its crime victims whole.

Moreover, Jianghai *did not* conduct financial due diligence on Defendant Elna before investing \$9.2 million in Elna in 2017, after Elna publicly agreed to plead guilty in this case and the civil case against Elna remains pending. Deloitte report at p. 36. Thus, Jianghai Capacitors, a publicly traded company with over 2,000 employees that operates in the same or similar business segments as Elna, displayed significant confidence in Elna's business position, value, and future prospects in 2017.

Further, Defendant Elna's largest shareholder, Taiyo Yuden Co., Ltd. ("Taiyo"), another publicly traded company operating in the same or similar passive components business segments as Elna, provided capital and obtained its equity holding in Elna in November 2014, after antitrust complaints had been publicly filed against Elna in the civil case. Deloitte report at p. 34. While the Deloitte report does not disclose the amount of capital Elna raised in late 2014 through Taiyo, Taiyo holds 50% more equity in Elna than Jianghai, who provided \$9.2 million in capital in 2017. *Id.* at p. 35. Again, Defendant Elna apparently did not use or reserve any of the capital raised through Taiyo in late 2014 to pay criminal fines or to make its crime victims whole.

Nonetheless, the Deloitte report concluded that, because of the "high uncertainty" due to potential fines and civil judgments—some or all of which were known at the time of the 2014 and 2017 deals—the possibility of raising funds through such means "is considered highly unlikely." *Id.*

Elna's Future Outlook

In addition, Elna appears to overstate the risk of default and insolvency. In the Victims' experience, including in this case, a corporation exercises a strong interest in avoiding judgments through bankruptcy or winding up its assets. That interest is shared by investors and owners, and is particularly strong in corporations in which are family-owned like Elna. There is significant equity in

Page 4

Hon. J. Donato

January 29, 2018 January 29, 2018

the company, and the owners and lenders would be highly incentivized to raise funds if this Court's orders so require. Significantly, there is no representation in the record that sentencing Elna to pay more than the recommended sentence to the United States or to the Victims in restitution would cause Elna to wind up its business affairs.

To the contrary, macroeconomic conditions bode well for Elna's future performance in both the global capacitor and PCB markets, which together make up virtually all of Elna's revenue. Deloitte report p. 10. First, Elna's Deloitte report notes that "[t]he global capacitor market will improve substantially and achieve revenue and unit volume increases of 20% [] and 13%, respectively, by fiscal year 2022." *Id.* at pp. 13-14. In addition, the global PCB market is predicted to grow at a compound annual rate of 3% through 2020, with the largest growth expected in the automotive PCB submarket. *Id.* at pp. 16-17. Fortunately for Elna, over 72% of Elna's total revenue in its PCB division comes from vehicle-mounted equipment. *Id.* at 19.

Accordingly, the Victims respectfully request that this Court remain vigilant and skeptical as to the government's and Defendant Elna's claims regarding Elna's inability to pay. Further, Victims respectfully request that this Court sentence Defendant Elna to a period of probation as jointly recommended by the parties with the following additional condition of probation:

Beginning immediately upon sentencing and continuing throughout the period of Probation, Elna shall make its audited books and records available for examination by the Victims upon the Victims' request, and shall advise the Victims on a regular basis, in advance in writing, of any transaction or business decision that may materially affect Elna's ability to pay any potential or actual criminal restitution, civil damages, or settlement amount to the Victims.

Redress to Crime Victims

While the government and Defendant Elna negotiated a deal that would allow Elna to forgo making restitution to the Victims of Elna's crime, the Victims did not agree to such an arrangement. Further, it is well within this Court's broad sentencing discretion in a non-binding plea agreement to sentence the defendant to make victim restitution, even if the parties do not recommend it. In fact, the Ninth Circuit long has held that a district court may properly sentence a defendant to pay restitution even for losses arising from uncharged and acquitted conduct in a conspiracy offense. *United States v. Castro*, 554 F. App'x 664, 667 (9th Cir. 2014); *United States v. Reed*, 80 F.3d 1419, 1423 (9th Cir.1996).

Here, there is no question that Defendant Elna's crime resulted in significant, concrete, and compensable loss to Victims in the United States. Moreover, because limited funds may be available, the interests of justice may not be best

Page 5

Hon. J. Donato

January 29, 2018 January 29, 2018

served if payment into the United States Treasury exhausts available funds at the expense of making the crime Victims whole. *See, e.g., U.S. v. Kaczynski*, 416 F.3d 971, 977 (9th Cir. 2005) (“Enforcing the restitution order by reasonable means, if nothing else, requires the government to take prompt action to see that the victims are awarded restitution in a commercially reasonable manner calculated to maximize monetary return. Anything less would be inadequate.”) (citation omitted).

Thus, the crime Victims respectfully request that this Court sentence Defendant Elna to pay a criminal fine, and that this Court sentence Defendant Elna to pay restitution to crime Victims in an amount equal to or greater than the amount of the criminal fine imposed.

Having a concrete restitution amount made public is important to this case. Defendants have leveraged the ambiguous “to be determined” nature of Victim redress to argue for reductions to the negotiated criminal sanction *and* reductions to settlement amounts. For example, even though the Deloitte report concluded that Elna owes outstanding criminal fines totaling only \$1.5 million and would have about \$12 million in surplus cash available for FY2017 through FY 2020 if it remains solvent, the report suggests that Elna would be able to pay no more than \$3.825 million in criminal fines to the United States, in installments, with no mention of any accounting for any redress to Victims. Deloitte report pp. 54-58. Further, having a restitution order in place commiserate with the criminal fine also ensures against the perverse result of exhausting funds to pay the United States Treasury at the expense of compensating crime Victims.

As a practical matter, the restitution amount will be accounted for in settlement negotiations, should they occur, and in any damages award, should the civil case against Defendant Elna proceed to trial. Moreover, the plea agreement expressly contemplates that the civil case may provide “recovery of a multiple of actual damages.” Thus, restitution reflecting a criminal fine amount with a substantial assistance reduction, an acceptance of responsibility reduction, and an inability to pay reduction certainly will not outstrip an expressly contemplated “recovery of a multiple of actual damages.”

Further, the payment of restitution is punitive in nature and does not foreclose or limit the availability of victim redress in civil litigation, whether through judgment at trial or by settlement. The Ninth Circuit has settled that a sentence of restitution and a civil settlement or judgment are not mutually exclusive alternatives. *United States v. Anderson*, 189 F.3d 475 (9th Cir. 1999) (“Anderson contends that the district court erred by ordering restitution in the amount of \$40,249.76 because the victim was fully compensated through a civil settlement agreement. This contention lacks merit because a civil settlement does not preclude the court from ordering restitution in a criminal case.”); *United States v. Hankins*, 858 F.3d 1273, 1277 (9th Cir. 2017) (“[R]estitution is not foreclosed even where a defendant and victim entered into a civil settlement before the

Page 6

Hon. J. Donato

January 29, 2018 January 29, 2018

defendant was sentenced[.]”); *United States v. Didier*, 668 F. App’x 775, 776 (9th Cir. 2016) (“A civil release of liability does not preclude further criminal liability for an offense, and civil settlements and criminal restitution orders serve largely different interests.”).

Finally, crime Victims respectfully request leave of this Court to make an oral statement at the sentencing hearing of Defendant Elna on January 31, 2018.

Sincerely,

/s/

JOSEPH R. SAVERI