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Hon. Judge James 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:

ELNA Co., Ltd. ("ELNA") submits this letter to address several incorrect statements made in Direct Purchaser Plaintiffs' ("DPPs") Victim Statement, ECF No. 52, and in the parallel civil litigation, *In re Capacitors Antitrust Litigation*, 3:14-cv-3264-JD.

First, DPPs have continually left the misleading impression that they only recently received access to information about ELNA's financial condition.[1] This is simply untrue, and ELNA has repeatedly asked DPPs to correct the record on this issue. ELNA began to provide financial information to DPPs as early as January 2015 as a part of settlement discussions. By August 2016—before ELNA's first plea agreement was publicly disclosed—ELNA notified DPPs that it would assert inability-to-pay at sentencing and provided virtually all of the records disclosed to DOJ as a part of ELNA's inability-to-pay application. ELNA received no response or additional requests for information from DPPs until January 2018, after the issue was raised by the Court.

Second, DPPs' Victim Statement contains numerous inaccuracies regarding ELNA's current financial state and selectively cherry-picks from the Deloitte report, but fails to provide full context:

ELNA's Encumbered Hard Assets

DPPs incorrectly claim that "Elna owns substantial equity—over $80 million" in its hard assets that DPPs suggest are unencumbered by ELNA's debt obligations and thus could be sold to pay a fine. ECF No. 52 at 2. In the very section cited by DPPs, Deloitte's report makes clear that ELNA does not have any hard assets that it could sell to pay a fine. Deloitte report ¶ 7.2.4 (ELNA's fixed assets ledger contains "no important disposable assets"). Virtually all of ELNA's properties, plants, and equipment are encumbered as security for ELNA's various loans. DPPs' analysis ignores ELNA's substantial liabilities, which are nearly equal to ELNA's assets.

[1] *See, e.g.*, Transcript of Proceedings, *In re Capacitors Antitrust Litigation*, No. 3:14-cv-3264 (N.D. Cal. Jan. 11, 2018) ("We have been told by some combination of the criminal defendant and the Department of Justice that we're not entitled to have that information"); *In re Capacitors*, ECF No. 2046 at 6 ("Elna has disclosed and is continuing to disclose information to Plaintiffs related to Elna's financial condition and claimed inability to pay. Much of this information was not previously disclosed to Plaintiffs") (citation omitted); ECF No. 51 ¶3; ECF No. 50 at 2.

ELNA's total net assets as of the third quarter of 2017 were just $8.7 million. Moreover, any sale of ELNA's factories to pay a fine would jeopardize ELNA's continuing viability. *See* U.S.S.G. § 8C3.3(b).

Potential Transactions

DPPs incorrectly argue that the fact that Nantong Jianghai Capacitor Co., Ltd.'s ("Jianghai") invested $9.2 million in ELNA without due diligence suggests that Jianghai "displayed significant confidence in Elna's business position, value, and future prospects in 2017." ECF No. 52 at 3. DPPs omit the very next sentence in Deloitte's report, which explains that the Jianghai investment was ultimately the purchase of access to ELNA's intellectual property and did not reflect confidence in ELNA's overall business. Deloitte report ¶ 6.3.3 ("The stock issuance is linked to the capital and business alliance agreement with Jianghai and was not a pure financial investment . . . Jianghai's aim was to access ELNA's IP"). In reality, ELNA only agreed to grant its competitor access to its intellectual property because ELNA needed capital to avoid falling into negative net assets, which could lead to it being delisted from the Tokyo Stock Exchange.

DPPs also suggest that Taiyo Yuden Co., Ltd. ("Taiyo") "provided capital" to ELNA in November 2014, and would therefore be a potential source of capital to pay a fine. ECF No. 52 at 3. DPPs again misapprehend the facts. Taiyo Yuden has never made a capital investment in ELNA; it purchased its current holdings from an investment fund. Moreover, as the Deloitte report explains, ELNA has tried and failed to convince Taiyo to inject capital into ELNA. Deloitte report ¶ 6.3.4 ("ELNA has also tried several times to ask its two other primary shareholders, Taiyo Yuden and Asahi Glass if they would be willing to make another equity investment . . . both turned down ELNA's request").

Future Outlook

Finally, DPPs claim that ELNA overstates its inability-to-pay in light of "macroeconomic conditions [that] bode well for Elna's future performance in both the global capacitor and PCB markets." ECF No. 52 at 4. To the extent that ELNA will benefit from macroeconomic improvements in the global capacitor and PCB markets, that benefit is already accounted for in ELNA's budgets and Deloitte's analysis. However, ELNA's recent and historical performance suggests that ELNA will continue to underperform the market and its budgets, which makes overall macroeconomic conditions less meaningful for determining ELNA's ability to pay a fine. DPPs' proposed remedy raises significant securities issues and is simply not workable: it is based

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on the false premise that ELNA is "family-owned"[2] and would require a publicly-traded company to provide material non-public information to third parties.

ELNA will be prepared to discuss these issues further at the sentencing hearing on January 31, 2018, to the extent that the Court has any questions.

Sincerely,

/s/ Thomas Mueller

Thomas Mueller

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[2] ECF No. 52 at 3. Presumably, DPPs are confusing ELNA with Rubycon, which is family owned.