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

13 UNITED STATES OF AMERICA

No. 4:16-cr-00365-JD

14 v.

15 ELNA CO., LTD.,

**UNITED STATES' SECOND
SUPPLEMENTAL SENTENCING
MEMORANDUM**

16 Defendant.

DATE: January 31, 2018
TIME: 10:00 am
COURT: San Francisco Courthouse

1 **I. INTRODUCTION**

2 Elna Co., Ltd. (“Elna”) entered and the Court accepted a plea of guilty on October 11,
3 2017, pursuant to a Rule 11(c)(1)(B) plea agreement (Dkt. 40). The Probation Department
4 circulated a pre-sentence report on January 2, to which the government has no substantive
5 objection. This memorandum will provide further detail in support of the conclusions of the pre-
6 sentence report, make a motion for downward departure for substantial assistance, and explain
7 why the government believes the recommended sentence is appropriate under the standards of
8 Section 3553.

9 The pre-sentence report recommends a fine of \$4.3 million paid in installments, less any
10 amount warranted for Elna’s substantial assistance to the government’s investigation, as well as
11 five years probation. In order to take into account Elna’s substantial assistance, the government
12 and the defendant propose that the corporate fine be \$3.825 million, paid in installments. This is
13 an appropriate fine that takes into account all of the relevant facts and is consistent with the
14 Section 3553(a) factors.

15 The Probation Office, the government’s financial expert, and Elna’s financial expert all
16 agree that Elna’s financial condition justifies a fine below the guidelines range, which is
17 calculated by Probation at \$5.16-\$10.32 million. There is no dispute as to the sentencing
18 guidelines calculations and the volume of affected commerce of \$21.5 million that underpins
19 those calculations.

20 Moreover, the recommended fine satisfies the 3553(a) factors because it holds Elna
21 accountable for the effect of its conduct in the United States. It is proportionate to the sentences
22 imposed by the court on other corporate defendants in this case, because it relies on the same
23 method used to determine the sentences of these other defendants.

24 Elna’s financial condition also justifies the recommended fine to avoid the potential
25 injustice of penalizing innocent workers, creditors, victims, customers, and others who could be
26 adversely impacted by a penalty that causes an Elna bankruptcy. The objectives of Section 3553
27 would not be served by penalizing these innocents in a bankruptcy scenario.

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1 And finally, the fine is justified by Elna's substantial cooperation with the government's
2 investigation, which is described in detail in the government's two prior sentencing memoranda.
3 In order to take into account Elna's substantial assistance, the government and Elna recommend
4 a fine that is 11 percent lower than the fine proposed by the U.S. Probation Office. The
5 government's evaluation of Elna's assistance to the government's investigation is that an 11
6 percent lower fine is well-warranted.

7 The government will not repeat the arguments made in its prior sentencing memoranda,
8 but the pertinent parts will be cross-referenced in this memo. *See* United States' Sentencing
9 Memorandum, Motion for Departure and Request for Expedited Sentencing, April 20, 2017
10 (Dkt. 8) (redacted), and unredacted copy filed under seal; United States' Supplemental
11 Sentencing Memorandum, September 6, 2017 (Dkt. 32) (redacted), and unredacted copy filed
12 under seal.

13 **II. RECOMMENDED SENTENCE**

14 **A. Plea Agreement**

15 On October 11, 2017, the Court accepted a Rule 11(c)(1)(B) plea agreement between the
16 parties (Dkt. 40). This plea agreement is substantially the same as the earlier Rule 11(c)(1)(C)
17 agreement between the parties. In paragraph 9 of the plea agreement, the government agrees to
18 recommend a fine of \$3.825 million, payable in installments. Elna agrees that it will not present
19 evidence or arguments to the Court in opposition. *Id.* Pursuant to Rule 11(c)(1)(B), Elna cannot
20 withdraw its guilty plea if the Court orders a different sentence from what the parties
21 recommend. Other material provisions of the plea agreement are a five-year term of probation,
22 no restitution, and a special assessment of \$400.

23 There is one new provision in the current plea agreement: paragraph 4 sets forth an
24 agreed-upon volume of affected commerce of \$21.5 million. This amount of commerce is less
25 than the \$52 million volume of affected commerce that the parties set forth in the June 6, 2017
26 sentencing memorandum filed in connection with the earlier Rule 11(c)(1)(C) plea agreement.
27 *See* the unredacted United States' Sentencing Memorandum (Dkt. 8), at pages 7-10; *see also* the
28 unredacted United States' Supplemental Sentencing Memorandum (Dkt. 32), at page 4.

1 The reasons for this change in the agreed-upon volume of affected commerce are as
2 follows. During early plea negotiations between Elna and the government, it became apparent
3 that Elna would be unable to pay a fine within the Sentencing Guidelines range. Consequently,
4 the government and Elna agreed to stop further discussions about the volume of affected
5 commerce and accept the volume of commerce as it was at that time, \$52 million. Elna agreed to
6 this number in order to proceed expeditiously to an analysis of its financial condition, which
7 ultimately became the basis for the agreed-upon disposition in the Rule 11(c)1(C) plea
8 agreement. The \$52 million of commerce thus was an overstated number based on negotiations
9 that were never completed. *See* Elna's description of the end of discussions at the unredacted
10 Defendant Elna Co., Ltd.'s Supplementary Sentencing Memorandum, (Dkt. 36), at pages 10-13.

11 After the Court rejected the parties' Rule 11(c)(1)(C) plea agreement, the parties resumed
12 discussions about the volume of affected commerce in connection with a prospective Rule
13 11(c)1(B) plea agreement. The government, Elna, and also now the U.S. Probation Office,
14 calculate a volume of affected commerce of \$21.5 million. The basis for this lower volume of
15 affected commerce is explained below and reflected in the guidelines calculations set forth in the
16 pre-sentence report, with which the government concurs.

17 **B. Volume of affected commerce**

18 Calculation of Elna's volume of affected commerce begins with a consideration of the
19 value of stand-alone capacitors sold to customers in the United States between August 2002 and
20 January 2014, the period for which Elna is charged with participating in the conspiracy. That
21 number is **\$110.9 million**. Focusing on sales to the United States ensures that a company's fine
22 reflects the harm and effect in the United States. This number, however, is simply the
23 company's total sales to the United States, not the volume of affected commerce for purposes of
24 sentencing.

25 A task during the course of the plea negotiations was to determine how much of that
26 \$110.9 million in total sales to the U.S. is volume of affected commerce for sentencing. The
27 parties determined that two categories are not part of the volume of affected commerce. The
28 first category of U.S. sales that is not volume of affected commerce is sales *unaffected* by the

1 conspiracy. The United States' Supplemental Sentencing Memorandum (Dkt. 32), at pages 1-2,
2 set forth the legal framework for identifying which commerce is influenced by the violation and
3 thus affected commerce. Using this framework, the parties identified \$4.3 million in sales of
4 double-layer capacitors that were not a subject of the conspiracy and thus not within the scope
5 of the charges. The parties also identified \$28.7 million in other unaffected sales, which are
6 described in paragraph 21(2) of the pre-sentence report. Elna provided more information about
7 the \$28.7 million in sales in Defendant Elna Co., Ltd.'s Supplementary Sentencing
8 Memorandum (portions under seal)(Dkt. 36), at page 12.

9 A second category of sales that is not part of the volume of affected commerce for
10 sentencing is sales subject to U.S.S.G. §1B1.8. Under §1B1.8, “[w]here a defendant agrees to
11 cooperate with the government by providing information concerning unlawful activities of
12 others, and as part of that cooperation agreement the government agrees that self-incriminating
13 information provided pursuant to the agreement will not be used against the defendant, then such
14 information shall not be used in determining the applicable guideline range, except to the extent
15 provided in the agreement.” While the Ninth Circuit has not directly ruled on the issue of
16 whether courts are bound by §1B1.8 after *U.S. v. Booker*, the Sixth Circuit has held that §1B1.8
17 does bind the courts in sentencing. *U.S. v. Milan*, 398 F.3d 445 (6th Cir. 2005). The Fifth
18 Circuit also noted in *U.S. v. Ordonez* that the Sentencing Guidelines “explicitly require a court to
19 enforce an agreement by the Government that it will not use self-incriminating information
20 against the defendant in calculation of a sentence.” 334 F. App’x 619, 623 (5th Cir. 2009).

21 Here, Elna has provided self-incriminating evidence concerning unlawful activities by
22 itself and its co-conspirators. Elna reported information to the government about price fixing in
23 the automotive sector that was previously unknown to the government (Decl. of Howard Parker
24 ISO United States' Second Supplemental Sentencing Memorandum, ¶ 3); this information is set
25 forth under seal at pages 2-3 of the United States' Supplemental Sentencing Memorandum (Dkt.
26 32). The \$56.4 million in §1B1.8 credit represents sales Elna made to three automotive
27 customers identified in the pre-sentence report at paragraph 21(1).

28 Pursuant to §1B1.8, the government has agreed not to use that information to increase

1 Elna's volume of affected commerce (see paragraph 8 of the plea agreement). Due to the
2 application of §1B1.8, therefore, **\$56.4 million** in sales to the U.S. (out of the \$110.9 million in
3 total sales to the U.S.) are not included in the volume of affected commerce.

4 In order to receive this §1B1.8 credit, Elna had to incriminate itself *without knowing*
5 *whether the government already knew about the conduct Elna was reporting*. Because Elna was
6 the first to report this conduct, it received §1B1.8 credit. Had the government learned about it
7 from some other source, §1B1.8 would not apply and Elna would not receive the credit.

8 In sum, Elna's volume of affected commerce is **\$21.5 million**. This results from the
9 following calculations: \$110.9 million (total sales to the U.S.) minus \$4.3 million (double-layer
10 capacitors) minus \$28.7 million (other sales not affected by the conspiracy) minus \$56.4 million
11 (§1B1.8 credit) = \$21.5 million.

12 Using the special instruction at U.S.S.G. §2R1.1(d)(1), the base fine is calculated as 20
13 percent of the volume of affected commerce of \$21.5 million, or **\$4.3 million**. The fine for Elna
14 recommended by Probation, before a consideration of the government's motion for substantial
15 assistance, is this base fine amount of \$4.3 million. Elna's substantial assistance that warrants a
16 fine lower than \$4.3 million is discussed below.

17 **C. Inability to Pay**

18 The United States concurs with Probation's assessment of Elna's inability to pay a
19 guidelines fine and defers to Elna for any further elaboration of the company's financial
20 situation. The defendant bears the burden of proving its inability to pay. *U.S. v. Nathan*, 188
21 F.3d 190, 215 (3d Cir. 1999). Regarding the legal framework applicable to ability to pay, the
22 government notes that when sentencing an organization, a court should consider a company's
23 financial status and ability to pay. *See* 18 U.S.C. § 3572(a)(1) (directing a court to consider,
24 when imposing a sentence of a fine, the defendant's income, earning capacity, and financial
25 resources); U.S.S.G. §8C3.3(b) (allowing a court to impose a fine below the guidelines range to
26 the extent "necessary to avoid substantially jeopardizing the continued viability of the
27 company"). A fine reduction is *required* to the extent the full guidelines fine would impair the
28 defendant's ability to make restitution to victims. U.S.S.G. §8C3.3(a).

1 **D. Motion for Substantial Assistance Departure**

2 The pre-sentence report recommends a \$4.3 million fine, which is below the guidelines
3 range of \$5.16 to \$10.32 million and calculated before any consideration of substantial
4 assistance. In Elna’s case, a substantial assistance departure is warranted. Under U.S.S.G.
5 §8C4.1(a), a court may depart from the guidelines, “[u]pon motion of the government stating
6 that the defendant provided substantial assistance in the investigation or prosecution of another
7 organization that has committed an offense, or in the investigation or prosecution of an
8 individual not directly affiliated with the defendant who has committed an offense.” The size of
9 the departure is determined by such factors as “the significance and usefulness of the
10 organization’s assistance, taking into consideration the government’s evaluation of the
11 assistance rendered,” and the nature, extent, and timeliness of the assistance. *Id.* §8C4.1(b)(1)–
12 (3).

13 In cases where a company is unable to pay a guidelines fine and has its fine reduced for
14 inability to pay under §8C3.3, the government nonetheless may seek substantial assistance
15 credit for those companies that provide substantial and valuable cooperation. Because a fine
16 calculated under §8C3.3 represents the maximum fine a company can pay without jeopardizing
17 its viability, a company in severe financial distress normally has little incentive to incur the
18 additional and often significant expense of full cooperation if it cannot receive additional
19 sentencing credit for that cooperation. And it is in the government’s interest to incentivize such
20 cooperation, because evidence and information provided by co-conspirators like Elna is key to
21 building cases against non-cooperating companies and individuals. The government relies
22 heavily on insider cooperation to break up cartels which, by their nature, are secretive.
23 Cooperation from cartel insiders is extraordinarily valuable, and indeed essential, in the
24 investigation and prosecution of price-fixing conspiracies.

25 Here, Elna has provided substantial and valuable cooperation. The specifics of Elna’s
26 cooperation are set forth in the unredacted United States’ Supplemental Sentencing
27 Memorandum (Dkt. 32), at pages 2-3 and 4-8. The government, therefore, moves for a
28 downward departure under §8C4.1 to reduce Elna’s fine below the threshold at which Elna has

1 the ability to pay without substantially jeopardizing its continued viability or ability to pay
2 restitution.

3 Taking into account Elna's cooperation, the parties' agreed-upon recommended fine is
4 **\$3.825 million**, a number below the guidelines minimum and 11 percent below the \$4.3 million
5 fine recommended by probation without consideration of Elna's cooperation.¹

6 **E. Probation**

7 The government does not normally recommend probation under circumstances like
8 these, where the defendant has made demonstrable improvements in its compliance program
9 since it discovered and terminated its conduct. The parties, nevertheless, jointly recommend a
10 five-year term of probation during which Elna will continue to develop and implement an
11 effective corporate compliance program. The plea agreement sets forth the specifics of a
12 corporate compliance program to which Elna and the government both agree, at paragraph 9(d).
13 (Dkt. 40.) The terms and conditions of probation jointly recommended for Elna are identical to
14 the terms and conditions of probation imposed by the Court when it sentenced co-conspirators
15 Hitachi Chemical and Rubycon.

16 **F. Restitution**

17 The parties have agreed to recommend that restitution not be imposed in light of the
18 related civil litigation, to which Elna is a party. The United States concurs with the assessment
19 in the pre-sentence report as to restitution.

20 **III. CRIME VICTIMS**

21 Under the Crime Victims' Rights Act, 18 U.S.C. § 3771, the government has notified
22 crime victims of the date and time of sentencing in this matter.

23 **IV. CONSIDERATION OF § 3553(a) FACTORS**

24 Section 3553(a) directs the court to impose a sentence "sufficient, but not greater than
25 necessary" to comply with the purposes set forth in subparagraph two of Section 3553(a): the

26 ¹ Prior to consideration of Elna's financial condition, the government was prepared to
27 recommend that Elna's guidelines fine be reduced by 25% on the basis of its substantial
28 cooperation. That recommendation is moot because Elna proceeded with an inability to pay
claim. However, it does give the Court an indication of the government's valuation of Elna's
cooperation.

1 need for the sentence imposed to, among other things, reflect the seriousness of the offense,
2 promote respect for the law, provide just punishment for the offense, and afford adequate
3 deterrence. Section 3553(a) further directs a court to consider additional factors such as the
4 nature and circumstances of the offense, the history and characteristics of the defendant, and the
5 need to avoid unwarranted sentencing disparities.

6 The government agrees with the conclusion in the pre-sentence report that under all the
7 circumstances a fine no greater than \$4.3 million is the appropriate sentence under the standards
8 of Section 3553(a). A criminal fine is not the only financial consequence Elna will potentially
9 face as a result of its conviction. Elna, as the Court knows, is a defendant in the parallel civil
10 litigation pending before this Court, where a conviction is *prima facie* evidence of liability, 15
11 U.S.C. § 16(a). It is also under investigation by various foreign competition authorities. The
12 Taiwanese competition authority has already imposed a \$2.3 million fine against Elna and the
13 Competition Commission of Singapore recently imposed a \$643,136 fine. (Decl. of Howard
14 Parker ISO United States' Second Supplemental Sentencing Memorandum, ¶ 4).

15 The government urges the Court to exercise its discretion with regard to Elna's financial
16 situation. A fine that exceeds the genuine ability of Elna to pay would have collateral
17 consequences for multiple innocent parties. If the fine forces a bankruptcy, innocent workers
18 may lose their livelihood. Retirees may lose pensions. Creditors of Elna may be short-changed.
19 American customers may be deprived of the contributions Elna can make to a future competitive
20 marketplace. The American justice system may be deprived of the assistance that Elna can
21 provide in holding others accountable for the violation at issue. Such consequences for innocent
22 parties would not be just. Such consequences would not promote respect for the law. They
23 would not increase deterrence in any measured and demonstrably effective way.

24 A further Section 3553(a) factor that the government urges the Court to seriously
25 consider is the need to avoid unwarranted sentencing disparities, or the importance of
26 proportionality. The government has undertaken to apply consistent principles in the
27 calculation of fines for all the corporate capacitors defendants that have come before the Court.
28 Sentencing Elna to a fine of \$3.825 million will be proportional to the other sentences because it

1 will be based on the same standards used with the other pleading capacitors defendants. The
2 government has undertaken to apply consistent principles in the calculation of fines for all the
3 corporate capacitors defendants that have pled guilty. The government has used consistent
4 principles to determine what should be included in the calculation of volume of affected
5 commerce, using sales of standalone capacitors to the United States as a starting point. The
6 consistent approach taken by the government extends to the upward adjustment within the
7 guidelines fine range that represents the value of electrolytic capacitors sold outside the United
8 States, but incorporated into personal desktop and laptop computers sold in the United States
9 under five major U.S. brands (Dell, HP, Apple, IBM, and Gateway). This consistent approach
10 also includes an upward adjustment within the fine range that reflects the relative timing of the
11 company's cooperation. The government has also applied the same standards in assessing the
12 value of each pleading company's cooperation. And finally, the consistent approach has
13 extended to the calculation of a downward departure for substantial assistance for several of the
14 defendants, analysis of inability to pay, and determination of §1B1.8 credit where appropriate.
15 The result of the government's effort to use a consistent approach across pleading defendants is
16 fines that are both unique to each defendant's situation and proportionate across defendants.
17 The recommended fine for Elna reflects this consistent approach.

18 **V. Conclusion**

19 The United States requests that the Court consider Elna's ability to pay, and additionally
20 grant the government's motion for a downward departure in recognition of Elna's substantial
21 assistance, resulting in a fine of \$3.825 million. The parties jointly recommend that the \$3.825
22 million criminal fine be paid over five years, without interest, in the following six installments:
23 \$200,000, \$200,000, \$725,000, \$900,000, \$900,000, and \$900,000. In addition to the fine, the

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1 parties jointly recommend that the Court sentence Elna to pay no restitution, to pay a special
2 assessment of \$400, and to serve a five-year term of probation.

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4 DATED: January 17, 2018

Respectfully submitted,

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6 /s/ Howard J. Parker
7 HOWARD J. PARKER
8 Trial Attorney
9 U.S. Department of Justice
10 Antitrust Division
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