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

13 UNITED STATES OF AMERICA

14 v.

15 ELNA CO., LTD.,

16 Defendant.

No. 4:16-cr-00365-JD

REDACTED VERSION OF
DOCUMENT SOUGHT TO BE SEALED

**UNITED STATES' SENTENCING
MEMORANDUM, MOTION FOR
DEPARTURE, AND REQUEST FOR
EXPEDITED SENTENCING**

DATE: June 14, 2017

TIME: 10:30 am

COURT: San Francisco Courthouse

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1 **I. INTRODUCTION**

2 Elna Co., Ltd. has agreed to plead guilty to a criminal antitrust charge for its role in a
3 conspiracy to fix prices and rig bids for electrolytic capacitors. It has agreed to pay a \$3.825
4 million criminal fine and to serve a five-year term of probation during which it will report
5 annually on its progress in implementing an effective corporate compliance program. The
6 recommended \$3.825 million fine falls below the guidelines fine range. This is so for two
7 reasons: first, the reduced fine reflects the value of Elna's substantial assistance in the ongoing
8 electrolytic capacitor investigation and second, Elna cannot pay a substantially greater fine
9 without endangering its continued operation.

10 The sentencing statutes and guidelines support a court's consideration of a defendant's
11 ability to pay when imposing a fine. The sentencing statute directs that a "court *shall* consider .
12 . . the defendant's income, earning capacity, and financial resources" in determining "whether to
13 impose a fine, and the amount, time for payment, and method of payment." 18 U.S.C. §
14 3572(a)(1) (emphasis added). The sentencing guidelines echo this statutory direction: they
15 allow a court to impose a fine below the guidelines range "to avoid substantially jeopardizing
16 the continued viability of the organization." U.S.S.G. §8C3.3.

17 Imposing a fine that preserves Elna's continued viability and presence in the market as
18 an effective competitor is in the public interest. The purpose of the antitrust laws is to promote
19 free and open competition in the marketplace. Competition benefits consumers through lower
20 prices, better quality, and greater choice. As a general rule, it is in the public's interest to
21 impose fines that do not eliminate viable competitors. And while there may be exceptions to
22 that general rule, this is not one. Elna is a valuable alternative supplier to larger firms in its
23 markets, with the potential to discipline their pricing. It accepts responsibility for its criminal
24 conduct, acknowledges its wrongdoing, is taking steps to strengthen its existing antitrust
25 compliance program, has already provided valuable and substantial assistance in the capacitor
26 investigation, and has pledged continuing cooperation. Moreover, its continued existence is
27 important to the success of the government's prosecutions in this matter. The government is

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1 still pursuing prosecutions of multiple companies and individuals, and it needs Elna's assistance
2 to bring those conspirators to justice.

3 Accompanying this memorandum are a: (1) declaration of Howard J. Parker ("Parker
4 declaration"); (2) plea agreement between the United States and Elna (filed as Exhibit A to the
5 Parker declaration); (3) report of financial consultant Dale Zuehls on Elna's ability to pay (filed
6 as Exhibit B to the Parker declaration); and (4) motion, proposed order, and declaration to file
7 portions of the sentencing memorandum and portions of the exhibits attached to the Parker
8 declaration under seal.

9 Counsel for the defendant has reviewed portions of this memorandum. They have
10 advised the government that they do not oppose the memorandum. Elna will separately request
11 expedited sentencing and waive a presentence report.

12 **II. BACKGROUND**

13 **A. Product**

14 As described to the Court in previous sentencing memorandum filed in related cases,
15 electrolytic capacitors are fundamental components in electrical circuits. Their primary
16 function is to store and regulate electrical current. Electrolytic capacitors are found in most
17 products that use electricity, including desktop and notebook computers, televisions, DVD
18 players, video and still digital cameras, gaming systems, and car engine and airbag systems.
19 Electrolytic capacitors can be subdivided into tantalum and aluminum electrolytic capacitors.
20 They are purchased by major electronics companies such as Apple, Dell, Intel, Sony, Canon,
21 Foxconn, Nintendo, and Philips.

22 **B. Conspiracy**

23 The government and grand jury investigation to date has uncovered a cartel among
24 Japanese manufacturers of electrolytic capacitors. The cartel—charged as a 17-year continuing
25 conspiracy—began to function at least as early as September 1997 (the precise date of origin
26 still being unknown to the government) and continued until early 2014. The objectives of the
27 charged conspiracy were to minimize and, where possible, eliminate competition through price
28 fixing and bid rigging.

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9 [REDACTED]
10 [REDACTED]

11 **C. Grand Jury Investigation**

12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]

16 [REDACTED] The grand jury investigation continues.

17 To date, six companies and ten individuals have been charged. The six companies that
18 have been charged are: NEC TOKIN (CR-15-0426-JD), which was sentenced to pay a \$13.8
19 million fine; Hitachi Chemical (CR-16-0180-JD), which was sentenced to pay a \$3.8 million
20 fine; Rubycon (CR-16-0367-JD), which was sentenced to pay a \$12 million fine; Matsuo (CR-
21 17-00073-JD), whose plea and sentencing have been continued to a future date; Elna (CR-16-
22 0365-JD), which has been scheduled for plea and sentencing for June 14, 2017; and Holy Stone
23 (CR-16-0366-JD), which has been scheduled for plea and sentencing for July 12, 2017. The
24 charges against nine of the individuals are together in a second superseding indictment returned
25 December 14, 2016. *See U.S v. Matsuzaka et al*, CR-15-0163-JD. None of the indicted
26 individuals has made an initial appearance. A tenth individual, Satoshi Okubo, was recently
27 charged by Information filed on February 8, 2017. *See U.S. v. Okubo*, CR-17-00074-JD. His
28 entry of plea and sentencing occurred on May 10, 2017.

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 **III. ELNA**

5 **A. Company Background**

6 Elna is a publicly-held corporation headquartered in Shin-Yokohama, Japan. Of the
7 corporate conspirators, Elna was among the smallest; its worldwide market share for electrolytic
8 capacitors is about 2-3%. At one point, during the earlier part of the conspiracy, Elna
9 manufactured both aluminum and tantalum electrolytic capacitors. But in 2009, Elna stopped
10 making tantalum electrolytic capacitors. Since then, its business has been the manufacture of
11 aluminum electrolytic capacitors (with a niche supply of such capacitors to the automotive
12 industry) and assembly of printed circuit boards. In recent years, its revenue from capacitors
13 has accounted for 45% of total revenues.

14 Elna operates factories in Japan, Thailand, and Malaysia, and has sales offices
15 throughout the world, including in Japan, Singapore, China, and the United States. It is
16 represented by sales agencies in Europe and Hong Kong. Some of Elna’s customers include
17 Alpine, Bose, Bosch, Continental, Pioneer, and Panasonic. From August 2002 through January
18 2014, Elna shipped to the United States approximately \$110.9 million worth of aluminum
19 electrolytic capacitors. During that same time period, it also shipped approximately \$1 billion
20 worth of aluminum electrolytic capacitors to destinations outside the United States.

21 **B. Role in the Conspiracy**

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]

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1 **C. Plea Agreement**

2 The plea agreement between the United States and Elna is Exhibit A to the Parker
3 declaration. Under the Rule 11(c)(1)(C) plea agreement, Elna will plead guilty to participating
4 in the electrolytic capacitors conspiracy from at least as early as August 2002 to about January
5 2014. The parties have agreed to jointly recommend a sentence of a \$3.825 million fine, a five-
6 year term of probation, no restitution, and a special assessment of \$400. Elna has agreed to
7 cooperate in the ongoing electrolytic capacitors investigation. The United States has agreed that
8 it will not bring further criminal charges against Elna; its subsidiaries; current directors, officers,
9 or employees of Elna and its subsidiaries; or certain individuals identified in paragraph 1 of
10 Attachment A to the plea agreement. The nonprosecution protections do not apply to
11 individuals identified in paragraph 2 of Attachment A. These are individuals who have been
12 separately and publicly charged for the same offense as Elna.

13 **IV. LEGAL STANDARDS**

14 A district court should begin all sentencing proceedings by calculating the applicable
15 range under the sentencing guidelines. *Gall v. U.S.*, 552 U.S. 38, 49–50 (2007). While the
16 guidelines are now advisory, the district court must consider them along with the other
17 sentencing factors listed in 18 U.S.C. § 3553(a). *U.S. v. Booker*, 543 U.S. 220, 259–60 (2005).
18 Section 3553(a) directs the court to impose a sentence “sufficient, but not greater than
19 necessary” to comply with the purposes set forth in subparagraph two, that is, the need for the
20 sentence imposed to, among other things, reflect the seriousness of the offense, promote respect
21 for the law, provide just punishment for the offense, and afford adequate deterrence. Section
22 3553(a) further directs a court to consider additional factors such as the nature and
23 circumstances of the offense, the history and characteristics of the defendant, and the need to
24 avoid unwarranted sentencing disparities.

25 **V. RECOMMENDED SENTENCE**

26 **A. Fine**

27 The sentencing guidelines provide a multistep process for determining the guidelines
28 range and sentence for organizations like the defendant that are not operated primarily for

1 criminal purposes. U.S.S.G. §§8C2.1–2.8. First, the court determines the base fine. *Id.*
2 §8C2.4. Second, it calculates a culpability score, uses that score to determine minimum and
3 maximum multipliers, and applies those multipliers to the base fine to yield a guidelines fine
4 range. *Id.* §§8C2.5–2.7. Third, the court considers the various factors in choosing a guidelines
5 fine within that range. *Id.* §8C2.8. Fourth, the court may consider a reduction of the fine based
6 on the defendant’s inability to pay. *Id.* §8C3.3. Finally, the court may consider various
7 departures from the guidelines fine range, including departures for substantial assistance to
8 authorities in the investigation or prosecution of co-conspirators. *Id.* §8C4.1.

9 1. Determining the Base Fine

10 The starting point for determining the base fine is section 8C2.4. It states that the base
11 fine is the greatest of three alternatives. The first alternative is the amount from a table in
12 subsection 8C2.4(d) corresponding to the offense level. U.S.S.G. §8C2.4(a)(1). In Elna’s case,
13 that amount is \$500,000¹. The second base-fine alternative is pecuniary gain. *Id.* §8C2.4(a)(2).
14 As explained in the sentencing memorandum filed in *U.S. v. Hitachi Chemical* (CR-16-0180-
15 JD, Dkt. 12, pgs. 9-11), pecuniary gain should not be used in this case because calculating it
16 would unduly complicate and prolong the sentencing process. *Id.* §8C2.4(c). The third base-
17 fine alternative is pecuniary loss. *Id.* §8C2.4(a)(3). But because the antitrust offense guideline
18 in Chapter Two contains a special instruction, 20 percent of the volume of affected commerce
19 should be used instead of pecuniary loss. *Id.* §8C2.4(b); §2R1.1(d)(1). Here, Elna’s agreed-
20 upon volume of affected commerce is \$52 million. Twenty percent of that is **\$10.4 million**.
21 This number should be used as the base fine because it is the greatest of the three alternatives.

22 The starting point for calculating Elna’s volume of affected commerce is the value of all
23 electrolytic capacitors shipped to customers in the U.S. between August 2002 and January 2014,
24 the period for which Elna is charged with participating in the conspiracy. As reflected in Elna’s
25

26 ¹ Elna’s base offense level is twelve (§2R1.1(a)). To that, a one-level increase is added to reflect
27 bid-rigging conduct (§2R1.1(b)(1)). Then, a six-level increase is added based on the agreed-
28 upon volume of affected commerce of \$52 million (§2R1.1(b)(2)(D)). Thus, Elna’s combined
offense level is nineteen (12 + 1 + 6). For an offense level of nineteen, the offense level fine
table (§8C2.4(d)) gives a base of fine of \$500,000 (per the Guidelines in effect on November 1,
2014, as directed by §8C2.4(e)(1) of the 2016 Guidelines).

1 transactional sales data, that number is \$110.9 million, a small percentage of the \$1 billion in
2 electrolytic capacitor sales Elna made worldwide during the same period.

3 From the starting point of \$110.9 million, the parties agreed to exclude two categories of
4 capacitors shipped to the U.S. First, the parties agreed to exclude \$28.7 million in sales of
5 products unaffected by the conspiracy, either because Elna retained nearly 100% of the market
6 and did not compete directly with any of the co-conspirators or because Elna priced using
7 formulas that were independent of the conspiracy. Second, the parties agreed to exclude certain
8 U.S. sales under U.S.S.G. §1B1.8. That provision states that information provided by a
9 defendant pursuant to a cooperation agreement, concerning the unlawful activity of others, will
10 not be used against the defendant in determining the applicable guidelines range. In recognition
11 of Elna's cooperation in providing information concerning [REDACTED]
12 [REDACTED], the parties agreed to exclude a total of \$30.2 million. The total
13 amount of exclusions is \$58.9 million (\$28.7 million + \$30.2 million). Subtracting \$58.9
14 million from the starting point of \$110.9 million equals a volume of affected commerce of \$52
15 million.

16 Elna's agreed-upon volume of affected commerce does not include every sale
17 worldwide. Again, the starting point is sales of capacitors shipped to customers in the U.S.
18 While not required under the guidelines or case law, the government has taken an approach to
19 volume of commerce that is calibrated to reflect the harm and effect in the United States and is
20 consistent with the approach taken in other Antitrust Division matters. The government
21 believes this approach achieves a fair and deterrent sentence. A criminal fine is not the only
22 financial consequence Elna will potentially face as a result of its conviction. Elna, as the Court
23 knows, is a defendant in the parallel civil litigation pending before this Court, where a plea
24 agreement is *prima facie* evidence of liability, 15 U.S.C. § 16(a). It is also under investigation
25 by various foreign competition authorities. The Taiwanese competition authority has already
26 imposed a \$2.3 million fine against Elna. Parker Decl. ¶ 5.

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1 **2. Calculating the Guidelines Fine**

2 After considering the base fine, a court then calculates a fine range by determining a
3 culpability score and applying minimum and maximum multipliers to the base fine:

- 4
- 5 (a) **Base Fine:** The base fine is 20% of the volume of affected **\$10.4**
6 commerce of \$52 million (§2R1.1(d)(1) and §8C2.4(b)). **million**
- 7 (b) **Culpability Score**
- 8 i. **Base:** Five points are assigned as a starting point for **+5**
9 calculating the culpability score (§8C2.5(a)).
- 10 ii. **Involvement in or Tolerance of Criminal Activity:** The **+3**
11 parties have agreed that the unit of the organization within
12 which the offense was committed had more than 200
13 employees but fewer than 1,000 employees and that an
14 individual within high-level personnel of the unit
15 participated in, condoned, or was willfully ignorant of the
16 offense (§8C2.5(b)(3)). The parties agree that a three-level
17 upward adjustment is warranted.
- 18 iii. **Prior History:** Elna does not have any prior history of **0**
19 misconduct (§8C2.5(c)).
- 20 iv. **Violation of Order:** Elna has not violated any orders **0**
21 (§8C2.5(d)).
- 22 v. **Obstruction of Justice:** The government is not aware of **0**
23 any conduct by Elna that impeded or obstructed justice
24 (§8C2.5(e)).
- 25 vi. **Effective Compliance and Ethics Program:** Elna did not **0**
26 have an effective compliance and ethics program with
27 respect to antitrust violations at the time the offense
28 occurred. The parties agree that no downward adjustment is
 warranted (§8C2.5(f)).
- vii. **Self-Reporting, Cooperation, and Acceptance of** **-2**
 Responsibility: Elna has fully cooperated in the
 investigation and clearly demonstrated recognition and
 affirmative acceptance of responsibility for its criminal
 conduct. The parties agree that a two-point reduction is
 warranted. (§8C2.5(g)(2)).

1	(c) Total Culpability Score	6
2	(d) Minimum and Maximum Multipliers: Based on a culpability	1.2 – 2.4
3	score of 6, the minimum multiplier is 1.2 and the maximum	
4	multiplier is 2.4 (§8C2.6).	
5	(e) Minimum and Maximum Fine Range: Applying the minimum	\$12.5 –
6	and maximum multipliers to the base fine of \$10.4 million, the fine	\$25
7	range is between \$12.5 million and \$25 million (§8C2.7).	million

8 The parties have agreed that within the guidelines fine range of \$12.5–\$25 million, before
9 accounting for Elna’s ability to pay and before accounting for a substantial assistance downward
10 departure, Elna’s fine should be **\$14.9 million**. Section 8C2.8 lists factors a court should
11 consider when determining the amount of the fine within the applicable guideline range. Of the
12 listed factors, two are used to adjust Elna’s fine above the \$12.5 million minimum to \$14.9
13 million. The first upward adjustment (\$1.1 million) accounts for the value of electrolytic
14 capacitors sold outside the United States, but incorporated into personal desktop and laptop
15 computers sold in the United States under major U.S. brands. By taking into account sales of
16 capacitors made overseas, but incorporated into a major category of finished goods sold by U.S.
17 companies, this adjustment further reflects the seriousness of the offense and its harm in the
18 United States. U.S.S.G. §8C2.8(a)(1). The second upward adjustment (\$1.3 million) accounts
19 for the relative timeliness of Elna’s cooperation and acceptance of responsibility. While Elna
20 has accepted responsibility and cooperated in the investigation, it did not agree to accept a plea
21 agreement until October 2014, which was later than other cooperating companies. *Id.*
22 §8C2.8(a)(9) (allowing for adjustment within the fine range for “partial but incomplete
23 satisfaction” of any culpability-score provision).

23 3. Inability to Pay

24 When sentencing an organization, a court should consider a company’s financial status
25 and ability to pay. 18 U.S.C. § 3572(a)(1) (directing a court to consider, when imposing a
26 sentence of a fine, the defendant’s income, earning capacity, and financial resources); U.S.S.G.
27 §8C3.3(b) (allowing a court to impose a fine below the guidelines range to the extent “necessary
28 to avoid substantially jeopardizing the continued viability of the company”). A fine reduction is

1 required to the extent the full guidelines fine would impair the defendant's ability to make
2 restitution to victims. U.S.S.G. §8C3.3(a). The defendant bears the burden of proving its
3 inability to pay. *U.S. v. Nathan*, 188 F.3d 190, 215 (3d Cir. 1999).

4 During the course of plea negotiations, Elna asserted an inability to pay, and as described
5 below, presented a variety of financial documents and information to support its claim. To
6 evaluate Elna's assertion, the United States retained Dale Zuehls, a forensic accounting expert.
7 Zuehls is the same expert who evaluated the ability to pay of co-conspirator Rubycon (which the
8 court sentenced in January 2017). As he did in Rubycon's case, Zuehls evaluated Elna's
9 inability-to-pay claim following the methodology he has used in the past. Zuehls' approach,
10 generally, is to understand (a) the *historic* performance of the company, (b) its *current* financial
11 position and balance sheet strength, and (c) the *future* prospects for the company and the industry
12 in which it operates. Zuehls reviews information and documents presented by the company and
13 conducts his own independent research. His expert report on Elna's ability to pay is Exhibit B to
14 the Parker declaration.

15 In a nutshell, Zuehls concluded that the assets currently on Elna's balance sheet, as
16 compared to its liabilities, were minimally sufficient to assure continued operation and that it had
17 little ability to raise additional funds by issuing stock or borrowing more. Future earnings, he
18 concluded, were the only likely source of funds for a fine. To simulate future earnings, Zuehls
19 first examined Elna's historic earnings record on the rationale that historic performance is the
20 best predictor of future performance. Zuehls confirmed that the predictions he was using of
21 future performance were based on appropriate adjustment of Elna's historic earnings for
22 extraordinary items and aberrational episodes. Zuehls then simulated various future scenarios in
23 what Zuehls calls "iterations of probable future outcomes." These iterations test the ability to
24 pay a fine with varying assumptions about what the future will hold. The simulated iterations
25 produced a range of projected fines that Elna has the probable ability to pay.

26 Zuehls ultimately concluded there were likely future earnings sufficient to pay a back-
27 loaded **\$4.5 million** fine over five years, without interest. Based on Zuehls' study, the parties

28 //

1 agree that Elna does not have the ability to pay a fine within the guidelines range without
2 impairing its ability to pay restitution or substantially jeopardizing its continued viability.

3 **4. Motion for Substantial Assistance Departure**

4 Under guidelines section 8C4.1(a), a court may depart from the guidelines, “[u]pon
5 motion of the government stating that the defendant provided substantial assistance in the
6 investigation or prosecution of another organization that has committed an offense, or in the
7 investigation or prosecution of an individual not directly affiliated with the defendant who has
8 committed an offense.” The size of the departure is determined by such factors as “the
9 significance and usefulness of the organization’s assistance, taking into consideration the
10 government’s evaluation of the assistance rendered,” and the nature, extent, and timeliness of
11 the assistance. *Id.* §8C4.1(b)(1)–(3).

12 In cases where a company is unable to pay a guidelines fine and has its fine reduced for
13 inability to pay under section 8C3.3, the government nonetheless seeks substantial assistance
14 credit for those companies that provide substantial and valuable cooperation. Under the
15 guidelines, a company may have its fine reduced for its inability to pay whether or not it has
16 provided cooperation. Because a fine calculated under section 8C3.3 represents the maximum
17 fine a company can pay without jeopardizing its viability, a company in severe financial distress
18 has little incentive to incur the additional and often significant expense of full cooperation if it
19 cannot receive additional sentencing credit for that cooperation.

20 Here, Elna has provided substantial and valuable cooperation, as described below. The
21 government, therefore, moves for a downward departure under section 8C4.1 to reduce Elna’s
22 fine below the \$4.5 million threshold at which Elna has the ability to pay without substantially
23 jeopardizing its continued viability or ability to pay restitution. Taking into account Elna’s
24 cooperation, the parties’ agreed-upon recommended fine is **\$3.825 million**, a number below the
25 guidelines range and 15% below Elna’s assessed ability to pay.²

26 //

27 _____
28 ² Based on Elna’s substantial cooperation, and prior to consideration of Elna’s ability to pay, the government was prepared to recommend that Elna’s guidelines fine of \$14.9 million be reduced by 25% to \$11.175 million.

1 The government relies heavily on insider cooperation to break up cartels which, by their
2 nature, are secretive. Cooperation from cartel insiders is extraordinarily valuable, and indeed
3 essential, in the investigation and prosecution of price-fixing conspiracies. [REDACTED]

4 [REDACTED]
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25 [REDACTED]
26 [REDACTED]

27 Elna has agreed to provide continuing cooperation. Paragraph 13 of the plea agreement
28 requires the defendant's full, truthful, and continuing cooperation. This paragraph requires the

1 company to, among other things, produce documents with English translations and use its best
2 efforts to secure the cooperation of current and former directors, officers, and employees. These
3 efforts include making individuals available in the United States for interviews and trial
4 testimony, at the company's expense. Failure to provide continuing cooperation is a breach of
5 the plea agreement. Should any disputes arise as to Elna's continuing cooperation, the
6 government will be able to bring those disputes to the Court's attention.

7 **B. Probation**

8 Chapter 8, Part D of the sentencing guidelines addresses corporate probation. The
9 guidelines require probation in a number of situations, which are laid out in section 8D1.1(a).
10 When a sentence of probation is imposed in felony cases such as this one, the term of probation
11 must be at least one year but not more than five years. U.S.S.G. §8D1.2; 18 U.S.C. §
12 3561(c)(1). If a sentence of probation is imposed, some conditions of probation are mandatory,
13 while some are discretionary. *See* U.S.S.G. §§8D1.3, 8D1.4 (recommended conditions for
14 corporate probation); 18 U.S.C. § 3563(a) (mandatory conditions) and 3563(b) (discretionary
15 conditions).

16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
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21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
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26 [REDACTED]
27 [REDACTED]
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3 [REDACTED]
4 [REDACTED]
5 The government does not normally recommend probation under circumstances like
6 these where the defendant has made demonstrable improvements in its compliance program.
7 The parties, nevertheless, jointly recommend a five-year term of probation during which Elna
8 will continue to develop and implement an effective corporate compliance program. During its
9 term of probation, Elna will submit annual written reports to the Department of Justice Antitrust
10 Division and the Probation Office describing its implementation progress. The term and
11 conditions of probation jointly recommended for Elna are identical to what the Court imposed
12 when it sentenced co-conspirators Hitachi Chemical and Rubycon. No party recommends a
13 compliance monitor, and none was imposed on Hitachi Chemical or Rubycon.

14 **C. Restitution**

15 The parties have agreed to recommend that restitution not be imposed. Under the
16 Clayton Act, 15 U.S.C. §§ 15, *et seq.*, victims of antitrust offenses may bring civil suits to
17 recover treble damages for antitrust injury. In this case, victims have indeed filed civil suits
18 seeking treble damages. Those cases are pending before this Court. *See In Re: Capacitors*
19 *Antitrust Litigation* (14-CV-03264-JD). Moreover, the Mandatory Victim Restitution Act of
20 1996 does not mandate restitution for Title 15 offenses, such as the one at hand, but only for
21 crimes of violence and certain Title 18 and Title 21 offenses. 18 U.S.C. § 3663A(c)(1)(A).

22 **VI. CRIME VICTIMS**

23 Under the Crime Victims' Rights Act, 18 U.S.C. § 3771, the government will notify
24 crime victims of the date and time of plea and sentencing in this matter. The government will
25 continue to comply with its obligations under the Crime Victims' Rights Act, including
26 notifying crime victims of any public court proceedings in connection with this matter.

27 //

28 //

1 **VII. REQUEST FOR EXPEDITED SENTENCING**

2 Federal Rule of Criminal Procedure 32(c)(1)(A)(ii) permits the Court to impose sentence
3 without the preparation of a presentence report if the Court finds that the information in the
4 record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and
5 the Court explains its finding on the record. *See also* Criminal Local Rule 32-1(b). The
6 government submits that the information contained in this memorandum, the accompanying
7 Parker declaration and attached materials, and the plea agreement are sufficient to enable the
8 Court to exercise its sentencing authority meaningfully without a presentence report.

9 **VIII. CONCLUSION**

10 The United States requests that the Court consider Elna's ability to pay, and additionally
11 grant the government's motion for a downward departure in recognition of Elna's substantial
12 assistance, resulting in the recommended fine of \$3.825 million, a number that departs from the
13 guidelines range. The parties jointly recommend that the \$3.825 million criminal fine be paid
14 over five years, without interest, in the following six installments: \$200,000, \$200,000,
15 \$725,000, \$900,000, \$900,000, and \$900,000. In addition to the fine, the parties jointly
16 recommend that the Court sentence Elna to pay no restitution and a special assessment of \$400
17 and to serve a five-year term of probation.

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19 DATED: June 6, 2017

Respectfully submitted,

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21 /s/ Howard J. Parker

22 HOWARD J. PARKER
23 Trial Attorney
24 U.S. Department of Justice
25 Antitrust Division
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