

1 JACKLIN CHOU LEM (CASBN 255293)
ALEXANDRA J. SHEPARD (CASBN 205143)
2 HOWARD J. PARKER (WASBN 07233)
3 ANDREW J. NICHOLSON-MEADE (CASBN 284070)
PARADI JAVANDEL (CASBN 295841)
4 KELSEY LINNETT (CASBN 274547)
U.S. Department of Justice, Antitrust Division
5 450 Golden Gate Avenue
6 Box 36046, Room 10-0101
San Francisco, CA 94102
7 Telephone: (415) 934-5300
8 jacklin.lem@usdoj.gov

9 Attorneys for the United States

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

14
15 UNITED STATES OF AMERICA

16 v.

17 RUBYCON CORPORATION,

18
19 Defendant.
20
21
22
23
24
25
26
27
28

No. CR-16-0367-JD

**REDACTED VERSION OF
DOCUMENT SOUGHT
TO BE SEALED**

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

DATE: September 28, 2016 (requested,
pending Court approval)

TIME: 9:30 am

COURT: Hon. James Donato

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION 1

II. BACKGROUND 2

 A. Product 2

 B. Conspiracy 2

 C. Grand Jury Investigation 4

III. RUBYCON CORPORATION 5

 A. Company Background 5

 B. Role in the Conspiracy 5

 C. Plea Agreement 5

IV. LEGAL STANDARDS 6

V. RECOMMENDED SENTENCE 7

 A. Fine 7

 1. Determining the Base Fine 7

 2. Calculating the Guidelines Fine 10

 3. Inability to Pay 11

 4. Motion for Substantial Assistance Departure 14

 B. Probation 17

 C. Restitution 20

VI. CRIME VICTIMS 20

VII. REQUEST FOR EXPEDITED SENTENCING 21

VIII. CONCLUSION 21

1 **I. INTRODUCTION**

2 Rubycon Corporation has agreed to plead guilty to a criminal antitrust charge for its role
3 in a conspiracy to fix the price of and rig bids for certain electrolytic capacitors. It has agreed to
4 pay a \$12 million criminal fine and serve a five-year term of probation during which it will
5 report annually on its progress in implementing an effective corporate compliance program.
6 The \$12 million recommended fine reflects the government’s determination—following a
7 comprehensive, year-long review of Rubycon’s finances by a forensic accounting expert—that
8 Rubycon cannot pay a substantially greater fine without jeopardizing its continued viability.
9 *See* U.S.S.G. §8C3.3. The recommended fine also reflects the value of Rubycon’s substantial
10 assistance in the government’s ongoing investigation. *See* U.S.S.G. §8C4.1. [REDACTED]

11 [REDACTED]
12 [REDACTED]
13 Rubycon accepts responsibility for its criminal conduct, acknowledges its wrongdoing,
14 is taking steps to strengthen its existing antitrust compliance program, and has pledged
15 continuing cooperation. The Court should accept the Rule 11(c)(1)(C) plea agreement and
16 impose the jointly recommended sentence of a \$12 million fine, a five-year term of probation,
17 no restitution, and a special assessment of \$400. That sentence is supported by the sentencing
18 factors in 18 U.S.C. § 3553(a), including the applicable sentencing guidelines range, and is a
19 reasonable, sufficient, and just sentence. The recommended fine reflects harm from the sale of
20 capacitors in the United States, Rubycon’s current and projected financial status, and the benefit
21 to the government from Rubycon’s substantial assistance. [REDACTED]

22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 Accompanying this memorandum are: (1) declaration of Andrew J. Nicholson-Meade
27 (“Nicholson-Meade declaration”); (2) plea agreement between the United States and Rubycon
28 (filed as Exhibit A to the Nicholson-Meade declaration), portions of which the government

1 requests be filed under seal to protect the identity of individuals named in Attachment A to the
2 plea agreement; (3) motion, proposed order, and declaration to file portions of the sentencing
3 memorandum, plea agreement, and selected exhibits attached to the Nicholson-Meade
4 declaration under seal; and (4) proposed order for expedited sentencing.

5 The government requests that plea and sentencing occur on the same day, September
6 28, 2016 or on the next available date in the Court’s calendar. Counsel for the defendant has
7 reviewed portions of this memorandum. They have advised the government that they do not
8 oppose the memorandum. Counsel will separately request expedited sentencing and waive a
9 presentence report.

10 The United States understands that the Court has a “strong commitment to supporting
11 the development of our next generation of trial lawyers.” Standing Order for Civil Cases, ¶ 13.
12 To that end, and in response to the Court’s standing order, the government advises the Court
13 that Trial Attorney Andrew Nicholson-Meade, who has just under five years of experience, will
14 appear on behalf of the United States at any scheduled plea and sentencing hearing.

15 **II. BACKGROUND**

16 **A. Product**

17 Electrolytic capacitors are fundamental components in electrical circuits. Their primary
18 function is to store and regulate electrical current. Electrolytic capacitors are ubiquitous and are
19 found in many products that use electricity, including desktop and notebook computers,
20 televisions, DVD players, video and still digital cameras, gaming systems, and car engine and
21 airbag systems. Electrolytic capacitors can be subdivided into tantalum and aluminum
22 electrolytic capacitors. They are purchased by major electronics companies such as Apple,
23 Dell, Intel, Sony, Canon, Foxconn, Nintendo, and Philips.

24 **B. Conspiracy**

25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

[REDACTED]

1 [REDACTED]

2 [REDACTED]

3 **C. Grand Jury Investigation**

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 This is the fourth case to be filed in the government's ongoing investigation. NEC
12 TOKIN was the first corporation to be charged. It agreed to plead guilty and was sentenced by
13 this Court on January 21, 2016 to pay a \$13.8 million fine. *See U.S. v. NEC TOKIN Corp.*, CR-
14 15-0426-JD (Information filed September 2, 2015). Hitachi Chemical agreed to plead guilty
15 and was sentenced by this Court on June 9, 2016 to pay a \$3.8 million fine. *See U.S. v. Hitachi*
16 *Chemical*, CR-16-0180-JD (Information filed April 27, 2016). Previously, a grand jury returned
17 an indictment against Takuro Isawa [REDACTED]
18 *See U.S. v. Takuro Isawa*, CR-15-0163-JD (Indictment filed March 12, 2015).

19 On August 22, 2016, simultaneous to the filing of the Rubycon Information, the
20 government filed Informations charging Elna and Holy Stone for their participation in the
21 conspiracy. Elna and Holy Stone have both agreed to plead guilty, but they have not yet been
22 scheduled for plea and sentencing hearings. [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 //

28 //

1 **III. RUBYCON CORPORATION**

2 **A. Company Background**

3 Rubycon Corporation is a privately held corporation headquartered in Ina, Japan. Its
4 primary business—the manufacture and sale of aluminum electrolytic capacitors—accounts for
5 about 85% of total revenue (the remaining revenue comes from polymer and film capacitors and
6 a small power supply business). Rubycon operates factories in Japan and Indonesia and has
7 established sales offices throughout the world, including in the United States, Singapore, Taiwan,
8 Korea, China, and Europe. Some of Rubycon’s customers include Sony, Canon, Dell, Intel,
9 Philips Lighting, Pioneer, and Foxconn. [REDACTED]

10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]

14 **B. Role in the Conspiracy**

15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

23 **C. Plea Agreement**

24 The plea agreement between the United States and Rubycon is attached to the
25 Nicholson-Meade declaration as Exhibit A. The material terms of the agreement are:

- 26 • Rubycon will plead guilty under Fed. R. Crim. P. 11(c)(1)(C) to a one-count
27 Information charging the company with participating in a conspiracy, from at least as
28 early as August 2002 to at least as late as January 2014, to suppress and eliminate

1 competition by fixing prices and rigging bids of certain electrolytic capacitors in the
2 United States and elsewhere. Nicholson-Meade Decl., Ex. A, ¶ 2.

- 3 • The parties agree to recommend a sentence of a \$12 million fine, a five-year term of
4 probation, no restitution, and a special assessment of \$400. *Id.*, ¶ 9.
- 5 • The United States and Rubycon agree to conditions of probation that require the
6 company to continue its efforts to develop and implement a corporate compliance
7 program, submit an annual report on the implementation of the compliance program,
8 and refrain from committing any other crimes. The parties also agree that the term
9 and conditions of probation imposed by the Court will not void the plea agreement
10 even if they are different than the recommended term and conditions. *Id.*, ¶ 9(d).
- 11 • The United States agrees that it will not bring further criminal charges against
12 Rubycon; subsidiaries in which Rubycon has a greater than 50% ownership interest;
13 any current director, officer, or employee of Rubycon or its subsidiaries; or any
14 individual listed in paragraph 1 of Attachment A to the plea agreement. *Id.*, ¶¶ 15–
15 16.
- 16 • Rubycon agrees to cooperate fully and truthfully in the ongoing electrolytic
17 capacitors investigation. *Id.*, ¶ 13.

18 The nonprosecution protections and corresponding cooperation obligations of the plea
19 agreement will not apply to the individuals listed in paragraph 2 of Attachment A to the plea
20 agreement. The government has requested that Attachment A to the plea agreement be filed
21 under seal to protect the identity of the individuals named in the attachment.

22 **IV. LEGAL STANDARDS**

23 A district court should begin all sentencing proceedings by correctly calculating the
24 applicable range under the sentencing guidelines. *U.S. v. Gall*, 552 U.S. 38, 49–50 (2007).
25 While the guidelines are now advisory, the district court must consider them along with the
26 other sentencing factors listed in 18 U.S.C. § 3553(a). *U.S. v. Booker*, 543 U.S. 220, 259–60
27 (2005). Section 3553(a) directs the court to impose a sentence “sufficient, but not greater than
28 necessary” to comply with the purposes set forth in subparagraph two, that is, the need for the

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

6 **V. RECOMMENDED SENTENCE**

7 **D. Fine**

8 The sentencing guidelines provide a multistep process for determining the guidelines
9 range and sentence for organizations like the defendant that are not operated primarily for
10 criminal purposes. U.S.S.G. §§8C2.1–2.8. First, the court determines the base fine. *Id.*
11 §8C2.4. Second, it calculates a culpability score, uses that score to determine minimum and
12 maximum multipliers, and applies those multipliers to the base fine to yield a guidelines fine
13 range. *Id.* §§8C2.5–2.7. Third, the court considers the various factors in choosing a guidelines
14 fine within that range. *Id.* §8C2.8. Fourth, the court may consider a reduction of the fine based
15 on the defendant’s inability to pay. *Id.* §8C3.3. Finally, the court may consider various
16 departures from the guidelines fine range, including departures for substantial assistance to
17 authorities in the investigation or prosecution of coconspirators. *Id.* §8C4.1

18 **1. Determining the Base Fine**

19 The starting point for determining the base fine is section 8C2.4. It states that the base
20 fine is the greatest of three alternatives: (1) the amount from a table in subsection 8C2.4(d)
21 corresponding to the offense level, (2) “the pecuniary gain to the organization from the
22 offense,” or (3) “the pecuniary loss from the offense caused by the organization.” U.S.S.G.
23 §8C2.4(a). Section 8C2.4 also provides that “if the applicable offense guideline in Chapter Two
24 includes a special instruction for organizational fines, that special instruction shall be applied, as
25 appropriate.” *Id.* §8C2.4(b). For antitrust offenses, a special instruction in section 2R1.1(d)(1)
26 directs the court to use 20 percent of the volume of affected commerce instead of pecuniary
27 loss.

28 //

1 In this case, Rubycon's agreed-upon volume of commerce is \$108.8 million. Twenty
 2 percent of that is **\$21.8 million**. This number should be used as the base fine because it is the
 3 greatest among the three base-fine alternatives in section 8C2.4(a). First, the offense level fine
 4 table in subsection 8C2.4(d) results in a base fine of \$910,000, a number much smaller than
 5 \$21.8 million.¹ Second, for reasons explained in the government's sentencing memorandum
 6 filed in *U.S. v. Hitachi Chemical*, calculating pecuniary gain from price fixing in this case,
 7 though not impossible, would be difficult, time-consuming, and costly, and in this plea context,
 8 would unduly complicate and prolong the sentencing process. See Dkt. 12 in CR-16-0180-JD,
 9 pgs. 9-11; U.S.S.G. §8C2.4(c). Third, the remaining base-fine alternative is pecuniary loss, but
 10 again, the guidelines special instruction at section 2R1.1(d)(1) directs that for antitrust offenses,
 11 20 percent of the volume of affected commerce shall be used in place of loss. See Dkt. 12 in
 12 CR-16-0180-JD, pgs. 11-13; U.S.S.G. §8C2.4(b).

13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]

25 //

26 ¹ Rubycon's base offense level is twelve (§2R1.1(a)). To that, a one-level increase is added to
 27 reflect bid-rigging conduct (§2R1.1(b)(1)). Then, an eight-level increase is added based on the
 28 agreed-upon volume of affected commerce of \$108.8 million (§2R1.1(b)(2)(D)). Thus,
 Rubycon's combined offense level is twenty one (12 + 1 + 8). For an offense level of twenty
 one, the offense level fine table (from the guidelines in effect on November 1, 2014, see
 §8C2.4(e)(1)) gives a base of fine of \$910,000.

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]

14 Rubycon’s agreed-upon volume of affected commerce does not include every sale
15 worldwide. Again, the starting point is sales of capacitors shipped to customers in the U.S.
16 While not required under the guidelines or caselaw, the government has taken an approach to
17 volume of commerce that is calibrated to reflect the harm and effect in the United States and is
18 consistent with the approach taken in other Antitrust Division investigations. The government
19 believes this approach achieves a fair and deterrent sentence. A criminal fine is not the only
20 financial consequence Rubycon will potentially face as a result of its conviction. Rubycon is a
21 defendant in the parallel civil litigation pending before this Court, where a plea agreement is
22 *prima facie* evidence of liability, 15 U.S.C. § 16(a). It is also under investigation by sister
23 competition authorities including the Taiwan Fair Trade Commission (TFTC), the Japan Fair
24 Trade Commission (JFTC), and several other authorities. The Taiwanese and Japanese
25 competition authorities have already imposed fines against Rubycon. Nicholson-Meade Decl.,
26 Exs. B, C (TFTC and JFTC announcements).

27 //
28 //

1 **2. Calculating the Guidelines Fine**

2 Rubycon's agreed-upon volume of commerce is \$108.8 million. Rubycon's base fine,
3 twenty percent of \$108.8 million, is \$21.8 million. Rubycon's jointly recommended guidelines
4 fine range is further calculated by determining a culpability score and applying minimum and
5 maximum multipliers to the base fine:

6 (a) **Base Fine:** The base fine is 20% of the volume of affected **\$21.8**
7 commerce of \$108.8 million (§2R1.1(d)(1) and §8C2.4(b)). **million**

8 **(b) Culpability Score**

9 i. **Base:** Five points are assigned as a starting point for **+5**
10 calculating the culpability score (§8C2.5(a)).

11 ii. **Involvement in or Tolerance of Criminal Activity:** The **+3**
12 parties have agreed that the unit of the organization within
13 which the offense was committed had more than 200
14 employees but fewer than 1,000 employees and that an
15 individual within high-level personnel of the unit
16 participated in, condoned, or was willfully ignorant of the
17 offense (§8C2.5(b)(3)). The parties agree that a three-level
18 upward adjustment is warranted.

19 iii. **Prior History:** Rubycon does not have any prior history of **0**
20 misconduct (§8C2.5(c)).

21 iv. **Violation of Order:** Rubycon has not violated any orders **0**
22 (§8C2.5(d)).

23 v. **Obstruction of Justice:** The government is not aware of any **0**
24 conduct by Rubycon that impeded or obstructed justice
25 (§8C2.5(e)).

26 vi. **Effective Compliance and Ethics Program:** Rubycon did **0**
27 not have an effective compliance and ethics program with
28 respect to antitrust violations at the time the offense
 occurred. The parties agree that no downward adjustment is
 warranted (§8C2.5(f)).

//

//

//

1 vii. **Self-Reporting, Cooperation, and Acceptance of Responsibility:** Rubycon has fully cooperated in the -2
 2 investigation and clearly demonstrated recognition and
 3 affirmative acceptance of responsibility for its criminal
 4 conduct. The parties agree that a two-point reduction is
 warranted. (§8C2.5(g)(2))

5 (c) **Total Culpability Score** **6**

6 (d) **Minimum and Maximum Multipliers:** Based on a culpability **1.2 – 2.4**
 7 score of 6, the minimum multiplier is 1.2 and the maximum
 8 multiplier is 2.4 (§8C2.6).

9 (e) **Minimum and Maximum Fine Range:** Applying the minimum and **\$26.1 –**
 10 maximum multipliers to the base fine of \$21.8 million, the fine range **\$52.3**
 is between \$26.1 million and \$52.3 million (§8C2.7). **million**

11 The parties have agreed that within the guidelines fine range of \$26.1–\$52.3 million,
 12 before accounting for Rubycon’s ability to pay and before accounting for a substantial assistance
 13 downward departure, Rubycon’s fine should be **\$30.7 million**. Section 8C2.8 lists factors a court
 14 should consider when determining the amount of the fine within the applicable guideline range.
 15 Of the listed factors, section 8C2.8(a)(1) provides a basis for an upward adjustment from the
 16 bottom of the guidelines range to a fine of \$30.7 million. Specifically, an upward adjustment of
 17 \$4.6 million is warranted to account for the value of electrolytic capacitors sold outside the
 18 United States, but incorporated into personal desktop and laptop computers sold in the United
 19 States under major U.S. brands. By taking into account sales of capacitors made overseas, but
 20 incorporated into a major category of finished goods sold by U.S. companies, this adjustment
 21 further reflects the seriousness of the offense and its harm in the United States. U.S.S.G.
 22 §8C2.8(a)(1).

23 **3. Inability to Pay**

24 When sentencing an organization, a court may consider a company’s financial status and
 25 inability to pay. Under guidelines section 8C3.3, a court may impose a fine below that otherwise
 26 required by the section 8C2.7 guidelines fine range if the court finds that the organization is not
 27 able and, even with the use of a reasonable installment schedule, is not likely to become able to
 28 pay the minimum, section 8C2.7 guidelines fine. U.S.S.G. §8C3.3(b); *see also* 18 U.S.C. §

1 3572(a)(1) (directing a court to consider, when imposing a sentence of a fine, the defendant's
2 income, earning capacity, and financial resources). A fine reduction is required to the extent the
3 full guidelines fine would impair the defendant's ability to make restitution to victims. U.S.S.G.
4 §8C3.3(a); 18 U.S.C. § 3572(b); *see also U.S. v. Eureka Laboratories, Inc.*, 103 F.3d 908, 912
5 (9th Cir. 1996). The defendant bears the burden of proving its inability to pay. *U.S. v. Nathan*,
6 188 F.3d 190, 215 (3d Cir. 1999).

7 During the course of plea negotiations, Rubycon asserted an inability to pay, and as
8 described below, produced a variety of financial documents and information to substantiate its
9 claim. To evaluate Rubycon's inability-to-pay claim, the United States retained Dale Zuehls, a
10 forensic accounting expert. Zuehls is a principal in the consulting firm of Zuehls, Legaspi &
11 Company. He is a Certified Public Accountant with a PhD in Accounting and a Juris Doctor
12 degree. He has over 40 years of experience in complex accounting, fraud, forensic, tax, and
13 consulting matters. Zuehls was originally in the audit practice with Arthur Anderson and later
14 became a partner with the international accounting firm of KPMG. At KPMG, Zuehls was the
15 National Partner in Charge of Class Action Services and in that role, he consulted with major law
16 firms throughout the country on complex forensic accounting, valuation, tax and litigation
17 matters. The Department of Justice Antitrust Division has retained Zuehls on multiple occasions
18 to conduct ability-to-pay assessments in matters involving, for example, the airline cargo and
19 passenger industries, the computer memory industry, the domestic freight industry, and the
20 aftermarket auto lights industry. Zuehls has also handled projects for other government agencies
21 including the FBI, United States Customs, and the Los Angeles Police Department. Zuehls'
22 resume is attached as exhibit D to the Nicholson-Meade declaration.

23 In assessing Rubycon's inability-to-pay claim, Zuehls followed the methodology he has
24 used to perform similar analyses in the past. Zuehls' approach, generally, is to understand (a) the
25 *historic* performance of the company, (b) its *current* financial position and balance sheet
26 strength, and (c) *future* forecasts and prospects for the company and the industry in which it
27 operates as a whole. Zuehls reviews information and documents provided by the company and
28 conducts his own independent research. He then processes the financial information through

1 analytical financial models based upon different iterations of probable future events, gross
2 margins, debt levels, required capital expenditures, non-U.S. government fines, U.S. civil claims,
3 and others. Based upon the financial modeling of numerous iterations, Zuehls then develops a
4 range of probable outcomes which define the range of payment options under an ability-to-pay
5 analysis.

6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 Ultimately, after nearly a year-long review of Rubycon's financial condition, Zuehls
4 concluded that Rubycon could pay a **\$15 million** criminal fine in a series of back-loaded
5 installment payments over five years, without interest.² Accordingly, the parties agree that
6 Rubycon does not have the ability to pay a fine within the guidelines range, without impairing its
7 ability to pay restitution or substantially jeopardizing its continued viability.

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

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

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

25 //

26 _____
27 ² The agreed-upon installment payments are: within thirty (30) days of imposition of sentence --
28 \$500,000; at the one-year anniversary of the imposition of sentence ("anniversary") -- \$500,000;
at the two-year anniversary -- \$1.5 million; at the three-year anniversary -- \$2.5 million; at the
four-year anniversary -- \$3.5 million; at the five-year anniversary -- \$3.5 million. Nicholson-
Meade Decl., Ex. A (plea agreement), ¶ 9(a).

1 Here, Rubycon has provided substantial and valuable cooperation, as described below.
2 The government, therefore, moves for a downward departure under section 8C4.1 to reduce
3 Rubycon's fine below the \$15 million threshold at which Rubycon has the ability to pay without
4 substantially jeopardizing its continued viability or ability to pay restitution. Taking into
5 account Rubycon's cooperation, the parties' agreed-upon recommended fine is \$12 million, a
6 number below the guidelines range and 20% below Rubycon's assessed ability to pay. Based
7 on Rubycon's unique and substantial cooperation, and prior to consideration of Rubycon's
8 ability to pay, the government was prepared to recommend that Rubycon's guidelines fine of
9 \$30.7 million be reduced by 45% to \$16.9 million.³ After Zuehls concluded that Rubycon did
10 not have the ability to pay a fine greater than \$15 million, the government determined that a
11 further reduction of Rubycon's fine was necessary to adequately account for Rubycon's
12 cooperation, and to adequately incentivize continued cooperation from companies, like
13 Rubycon, that are in financial distress and may not be able to pay a guidelines fine.

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

17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

26 _____
27 ³ Although the government seeks substantial assistance credit for companies like Rubycon whose
28 fines are based on their ability to pay under section 8C3.3, it generally seeks a smaller substantial
assistance credit than it would have had the company paid a full, guidelines fine. The 20%
substantial assistance credit recommended for Rubycon is significantly less than the 45% credit
the government would have sought had Rubycon been able to pay a full guidelines fine.

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]

9 Rubycon has agreed to provide continuing cooperation. Paragraph 13 of the plea
10 agreement requires the defendant’s full, truthful, and continuing cooperation. This paragraph
11 requires the company to, among other things, produce documents with English translations and
12 use its best efforts to secure the cooperation of current and former directors, officers, and
13 employees. These efforts include making individuals available in the United States for
14 interviews and trial testimony, at the company’s expense. Failure to provide continuing
15 cooperation is a breach of the plea agreement. Should any disputes arise as to Rubycon’s
16 continuing cooperation, the government may bring those disputes to the Court’s attention.

17 **E. Probation**

18 Chapter 8, Part D of the sentencing guidelines addresses corporate probation. The
19 guidelines require probation in a number of situations, which are laid out in section 8D1.1(a).
20 When a sentence of probation is imposed in felony cases such as this one, the term of probation
21 must be at least one year but not more than five years. U.S.S.G. §8D1.2; 18 U.S.C. §
22 3561(c)(1). If a sentence of probation is imposed, some conditions of probation are mandatory,
23 while some are discretionary. *See* U.S.S.G. §§8D1.3, 8D1.4 (recommended conditions for
24 corporate probation); 18 U.S.C. § 3563(a) (mandatory conditions) and 3563(b) (discretionary
25 conditions). The term of probation should be “sufficient, but not more than necessary” to
26 accomplish a court’s specific objectives in imposing the term of probation. U.S.S.G. §8D1.2
27 cmt. n.1.

28 //

1 In this case, a term of probation is not required because none of the section 8D1.1
2 factors apply. [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]

28 [REDACTED]

1 The government does not normally recommend probation under circumstances like
2 these where the defendant has made demonstrable improvements in its compliance program.
3 The parties, nevertheless, jointly recommend a five-year term of probation during which
4 Rubycon will continue to develop and implement an effective corporate compliance program.
5 The compliance program must be consistent with the goals and methods described in guidelines
6 section 8B2.1. That section requires a corporation to reasonably design, implement, and
7 enforce a compliance program that is generally effective in preventing and detecting criminal
8 conduct. The plea agreement at paragraph 9(d) also requires, as a condition of probation, that
9 Rubycon conduct periodic trainings, have high-level personnel communicate the company's
10 commitment to the compliance program, and submit annual written reports to the Department of
11 Justice Antitrust Division and the Probation Office describing its implementation progress. The
12 term and conditions of probation jointly recommended for Rubycon are identical to what the
13 Court imposed when it sentenced Hitachi Chemical in June.

14 In addition to these conditions, the parties recommend that the Court impose the
15 following mandatory conditions of probation: (1) that Rubycon will not commit another
16 Federal, State, or local crime during the term of probation, 18 U.S.C. § 3563(a)(1); (2) that
17 Rubycon will notify the Court of any material change in its economic circumstances that might
18 affect its ability to pay restitution, fines, or special assessments, 18 U.S.C. § 3563(a)(7); and (3)
19 that it must pay the fine imposed, 18 U.S.C. § 3563(a).

20 The government and the defendant agree that a compliance monitor is not appropriate in
21 this case. Monitors are not routine in antitrust cases; a monitor has been imposed only once
22 before on a criminal antitrust defendant, in the *U.S. v. AU Optronics* case (CR-09-0110-SI, N.D.
23 Cal.). In that case, the government argued for, and the court imposed, a compliance monitor
24 because of unusual circumstances that do not apply here. Following conviction by a jury, AU
25 Optronics continued to disclaim responsibility and insisted that what it did not was wrong or
26 illegal. It also represented that it was working to develop an effective compliance program, but
27 provided few details to allow the court or the government to assess its quality. In contrast to
28 AU Optronics, a compliance monitor is not necessary for a defendant such as Rubycon, which

1 has agreed to plead guilty, accepted responsibility, recognized its wrongdoing, improved its
2 compliance program, and is cooperating against its coconspirators.

3 As reflected at the end of paragraph 9(d) of the plea agreement, the parties agree that the
4 term and conditions of probation ultimately imposed by the Court will not void the plea
5 agreement. The parties urge the Court, however, to accept the jointly recommended term and
6 conditions of probation. The parties believe the recommendation is tailored to the facts of this
7 case and is consistent with section 3553 and the guidelines. U.S.S.G. §8D1.4 cmt. n.1 (“The
8 court should approve any program that appears reasonably calculated to prevent and detect
9 criminal conduct, as long as it is consistent with §8B2.1 (Effective Compliance and Ethics
10 Program), and any applicable statutory and regulatory requirements.”). Moreover, the
11 recommended term and conditions are consistent with the term and conditions imposed by the
12 Court on Hitachi Chemical, which pled guilty in connection with this same investigation in June
13 2016.

14 **F. 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 plea and sentencing on September 28, 2016, should the Court decide to
25 schedule that date. The government will continue to comply with its obligations under the
26 Crime Victims’ Rights Act, including notifying crime victims of any public court proceedings
27 in connection with this matter.

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 Nicholson-Meade declaration and attached materials, and the plea agreement are sufficient to
8 enable the Court to exercise its sentencing authority meaningfully without a presentence report.
9 If the Court finds that it does not have sufficient information to allow for the imposition of
10 sentence on the scheduled date of the plea hearing, the parties are prepared to submit additional
11 information requested by the Court.

12 **VIII. CONCLUSION**

13 The parties respectfully recommend that the Court sentence Rubycon to pay a \$12
14 million criminal fine, no restitution, and a special assessment of \$400 and to serve a five-year
15 term of probation. The parties jointly recommend that the \$12 million criminal fine be paid
16 over five years in the following six installments: \$500,000, \$500,000, \$1.5 million, \$2.5
17 million, \$3.5 million, and \$3.5 million. During the term of probation, the parties agree that
18 Rubycon will: (1) develop and implement an effective corporate compliance program consistent
19 with sentencing guidelines section 8B2.1; (2) report annually in writing on its compliance
20 program to the Antitrust Division and the Probation Office; (3) not commit another Federal,
21 State, or local crime; (4) notify the Court of any material change in its economic circumstances;
22 and (5) pay the fine imposed. The United States requests that the Court consider Rubycon's
23 ability to pay, and additionally grant the government's motion for a downward departure in

24 //

25 //

26 //

27 //

28 //

1 recognition of Rubycon's substantial assistance, resulting in the recommended fine of \$12
2 million, a number that departs from the guidelines range. Finally, the parties also request that
3 the plea and sentencing take place on the same date, September 28, 2016, or the earliest date
4 available on the Court's calendar.

5
6 DATED: September 7, 2016

Respectfully submitted,

7
8 /s/ Andrew J. Nicholson-Meade

JACKLIN CHOU LEM

ALEXANDRA J. SHEPARD

HOWARD J. PARKER

ANDREW J. NICHOLSON-MEADE

PARADI JAVANDEL

KELSEY LINNETT

12 Trial Attorneys

13 U.S. Department of Justice

14 Antitrust Division