

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

9 Attorneys for the United States

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.

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

15 ELNA CO., LTD.,

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

16 Defendant.

17 DATE: May 10, 2017 (requested, pending  
18 Court approval)  
19 TIME: 10:30 am  
20 COURT: Oakland Courthouse

**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 ..... 3

    C. Grand Jury Investigation ..... 4

III. ELNA ..... 5

    A. Company Background ..... 5

    B. Role in the Conspiracy ..... 6

    C. Plea Agreement ..... 6

IV. LEGAL STANDARDS ..... 6

V. RECOMMENDED SENTENCE ..... 7

    A. Fine ..... 7

        1. Determining the Base Fine ..... 7

        2. Calculating the Guidelines Fine ..... 9

        3. Inability to Pay ..... 11

        4. Motion for Substantial Assistance Departure ..... 12

    B. Probation ..... 14

    C. Restitution ..... 15

VI. CRIME VICTIMS ..... 15

VII. REQUEST FOR EXPEDITED SENTENCING ..... 16

VIII. CONCLUSION ..... 16

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  
28

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), portions of which the government requests be filed under seal to protect the  
6 identity of individuals named in Attachment A to the plea agreement; (3) report of financial  
7 consultant Dale Zuehls on Elna's ability to pay (filed as Exhibit B to the Parker declaration), (4)  
8 motion, proposed order, and declaration to file portions of the sentencing memorandum, plea  
9 agreement, and portions of the exhibits attached to the Parker declaration under seal; and (5)  
10 proposed order for expedited sentencing.

11 The government requests that plea and sentencing occur on the same day, May 10,  
12 2017. If that date is unavailable, the parties request that plea and sentencing occur on the next  
13 available date on the Court's calendar, but not on May 24, 2017 (as financial consultant Dale  
14 Zuehls is unavailable on that date). Counsel for the defendant has reviewed portions of this  
15 memorandum. They have advised the government that they do not oppose the memorandum.  
16 Elna will separately request expedited sentencing and waive a presentence report.

## 17 **II. BACKGROUND**

### 18 **A. Product**

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

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28 //

1           **B.     Conspiracy**

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

8           [REDACTED]

9           [REDACTED]

10          [REDACTED]

11          [REDACTED]

12          [REDACTED]

13          [REDACTED]

14          [REDACTED]

15          [REDACTED]

16          [REDACTED]

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18          [REDACTED]

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16 [REDACTED]

17 **C. Grand Jury Investigation**

18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]

23 To date, six companies and ten individuals have been charged. The six companies that  
24 have been charged are: NEC TOKIN (CR-15-0426-JD), which was sentenced to pay a \$13.8  
25 million fine; Hitachi Chemical (CR-16-0180-JD), which was sentenced to pay a \$3.8 million  
26 fine; Rubycon (CR-16-0367-JD), which was sentenced to pay a \$12 million fine; Matsuo (CR-  
27 17-00073-JD), which has been scheduled for plea and sentencing on May 24, 2017; and Elna  
28 (CR-16-0365-JD) and Holy Stone (CR-16-0366-JD), both of which await entry of plea and

1 sentencing. The charges against nine of the individuals are together in a second superseding  
2 indictment returned December 14, 2016. *See U.S. v. Matsuzaka et al*, CR-15-0163-JD. None of  
3 the indicted individuals has made an initial appearance. A tenth individual was recently  
4 charged by Information filed on February 8, 2017. *See U.S. v. Okubo*, CR-17-00074-JD. That  
5 individual has entered into a plea agreement with the government. His entry of plea and  
6 sentencing is scheduled for May 10, 2017.

7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]

### 10 **III. ELNA**

#### 11 **A. Company Background**

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

20 Elna operates factories in Japan, Thailand, and Malaysia, and has sales offices  
21 throughout the world, including in Japan, Singapore, China, and the United States. It is  
22 represented by sales agencies in Europe and Hong Kong. Some of Elna's customers include  
23 Alpine, Bose, Bosch, Continental, Pioneer, and Panasonic. From August 2002 through January  
24 2014, Elna shipped to the United States approximately \$110.9 million worth of aluminum  
25 electrolytic capacitors. During that same time period, it also shipped approximately \$1 billion  
26 worth of aluminum electrolytic capacitors to destinations outside the United States.

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1           **B.     Role in the Conspiracy**

2           [REDACTED]

3           [REDACTED]

4           [REDACTED]

5           [REDACTED]

6           [REDACTED]

7           [REDACTED]

8           **C.     Plea Agreement**

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

19          **IV.    LEGAL STANDARDS**

20          A district court should begin all sentencing proceedings by calculating the applicable  
21          range under the sentencing guidelines. *Gall v. U.S.*, 552 U.S. 38, 49–50 (2007). While the  
22          guidelines are now advisory, the district court must consider them along with the other  
23          sentencing factors listed in 18 U.S.C. § 3553(a). *U.S. v. Booker*, 543 U.S. 220, 259–60 (2005).  
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, that is, the need for the  
26          sentence imposed to, among other things, reflect the seriousness of the offense, promote respect  
27          for the law, provide just punishment for the offense, and afford adequate deterrence. Section  
28          3553(a) further directs a court to consider additional factors such as the nature and



1 circumstances of the offense, the history and characteristics of the defendant, and the need to  
2 avoid unwarranted sentencing disparities.

## 3 **V. RECOMMENDED SENTENCE**

### 4 **A. Fine**

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

#### 15 **1. Determining the Base Fine**

16 The starting point for determining the base fine is section 8C2.4. It states that the base  
17 fine is the greatest of three alternatives. The first alternative is the amount from a table in  
18 subsection 8C2.4(d) corresponding to the offense level. U.S.S.G. §8C2.4(a)(1). In Elna’s case,  
19 that amount is \$500,000<sup>1</sup>. The second base-fine alternative is pecuniary gain. *Id.* §8C2.4(a)(2).  
20 As explained in the sentencing memorandum filed in *U.S. v. Hitachi Chemical* (CR-16-0180-  
21 JD, Dkt. 12, pgs. 9-11), pecuniary gain should not be used in this case because calculating it  
22 would unduly complicate and prolong the sentencing process. *Id.* §8C2.4(c). The third base-  
23 fine alternative is pecuniary loss. *Id.* §8C2.4(a)(3). But because the antitrust offense guideline  
24 in Chapter Two contains a special instruction, 20 percent of the volume of affected commerce  
25

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26 <sup>1</sup> 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 should be used instead of pecuniary loss. *Id.* §8C2.4(b); §2R1.1(d)(1). Here, Elna's agreed-  
2 upon volume of affected commerce is \$52 million. Twenty percent of that is **\$10.4 million**.  
3 This number should be used as the base fine because it is the greatest of the three alternatives.

4 The starting point for calculating Elna's volume of affected commerce is the value of all  
5 electrolytic capacitors shipped to customers in the U.S. between August 2002 and January 2014,  
6 the period for which Elna is charged with participating in the conspiracy. As reflected in Elna's  
7 transactional sales data, that number is \$110.9 million, a small percentage of the \$1 billion in  
8 electrolytic capacitor sales Elna made worldwide during the same period.

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

22 Elna's agreed-upon volume of affected commerce does not include every sale  
23 worldwide. Again, the starting point is sales of capacitors shipped to customers in the U.S.  
24 While not required under the guidelines or case law, the government has taken an approach to  
25 volume of commerce that is calibrated to reflect the harm and effect in the United States and is  
26 consistent with the approach taken in other Antitrust Division matters. The government  
27 believes this approach achieves a fair and deterrent sentence. A criminal fine is not the only  
28 financial consequence Elna will potentially face as a result of its conviction. Elna, as the Court

1 knows, is a defendant in the parallel civil litigation pending before this Court, where a plea  
 2 agreement is *prima facie* evidence of liability, 15 U.S.C. § 16(a). It is also under investigation  
 3 by various foreign competition authorities. The Taiwanese competition authority has already  
 4 imposed a \$2.3 million fine against Elna. Parker Decl. ¶ 5.

5 **2. Calculating the Guidelines Fine**

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

8 (a) **Base Fine:** The base fine is 20% of the volume of affected **\$10.4**  
 9 commerce of \$52 million (§2R1.1(d)(1) and §8C2.4(b)). **million**

10 (b) **Culpability Score**

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

13 ii. **Involvement in or Tolerance of Criminal Activity:** The **+3**  
 14 parties have agreed that the unit of the organization within  
 15 which the offense was committed had more than 200  
 16 employees but fewer than 1,000 employees and that an  
 17 individual within high-level personnel of the unit  
 participated in, condoned, or was willfully ignorant of the  
 offense (§8C2.5(b)(3)). The parties agree that a three-level  
 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 any **0**  
 23 conduct by Elna that impeded or obstructed justice  
 (§8C2.5(e)).

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

28 vii. **Self-Reporting, Cooperation, and Acceptance of** **-2**  
**Responsibility:** Elna has fully cooperated in the

1 investigation and clearly demonstrated recognition and  
 2 affirmative acceptance of responsibility for its criminal  
 3 conduct. The parties agree that a two-point reduction is  
 warranted. (§8C2.5(g)(2)).

- |   |   |                  |
|---|---|------------------|
| 4 | <b>(c) Total Culpability Score</b>                                  | <b>6</b>         |
| 5 | <b>(d) Minimum and Maximum Multipliers:</b> Based on a culpability  | <b>1.2 – 2.4</b> |
| 6 | score of 6, the minimum multiplier is 1.2 and the maximum           |                  |
| 7 | multiplier is 2.4 (§8C2.6).   |                  |
| 8 | <b>(e) Minimum and Maximum Fine Range:</b> Applying the minimum and | <b>\$12.5 –</b>  |
| 9 | maximum multipliers to the base fine of \$10.4 million, the fine    | <b>\$25</b>      |
|   | range is between \$12.5 million and \$25 million (§8C2.7).          | <b>million</b>   |

10 The parties have agreed that within the guidelines fine range of \$12.5–\$25 million, before  
 11 accounting for Elna’s ability to pay and before accounting for a substantial assistance downward  
 12 departure, Elna’s fine should be **\$14.9 million**. Section 8C2.8 lists factors a court should  
 13 consider when determining the amount of the fine within the applicable guideline range. Of the  
 14 listed factors, two are used to adjust Elna’s fine above the \$12.5 million minimum to \$14.9  
 15 million. The first upward adjustment (\$1.1 million) accounts for the value of electrolytic  
 16 capacitors sold outside the United States, but incorporated into personal desktop and laptop  
 17 computers sold in the United States under major U.S. brands. By taking into account sales of  
 18 capacitors made overseas, but incorporated into a major category of finished goods sold by U.S.  
 19 companies, this adjustment further reflects the seriousness of the offense and its harm in the  
 20 United States. U.S.S.G. §8C2.8(a)(1). The second upward adjustment (\$1.3 million) accounts  
 21 for the relative timeliness of Elna’s cooperation and acceptance of responsibility. While Elna  
 22 has accepted responsibility and cooperated in the investigation, it did not agree to accept a plea  
 23 agreement until October 2014, which was later than other cooperating companies. *Id.*  
 24 §8C2.8(a)(9) (allowing for adjustment within the fine range for “partial but incomplete  
 25 satisfaction” of any culpability-score provision).

26 //

27 //

28 //

### 3. Inability to Pay

When sentencing an organization, a court should consider a company's financial status and ability to pay. 18 U.S.C. § 3572(a)(1) (directing a court to consider, when imposing a sentence of a fine, the defendant's income, earning capacity, and financial resources); U.S.S.G. §8C3.3(b) (allowing a court to impose a fine below the guidelines range to the extent "necessary to avoid substantially jeopardizing the continued viability of the company"). A fine reduction is required to the extent the full guidelines fine would impair the defendant's ability to make restitution to victims. U.S.S.G. §8C3.3(a). The defendant bears the burden of proving its inability to pay. *U.S. v. Nathan*, 188 F.3d 190, 215 (3d Cir. 1999).

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

In a nutshell, Zuehls concluded that the assets currently on Elna's balance sheet, as compared to its liabilities, were minimally sufficient to assure continued operation and that it had little ability to raise additional funds by issuing stock or borrowing more. Future earnings, he concluded, were the only likely source of funds for a fine. To simulate future earnings, Zuehls first examined Elna's historic earnings record on the rationale that historic performance is the best predictor of future performance. Zuehls confirmed that the predictions he was using of future performance were based on appropriate adjustment of Elna's historic earnings for extraordinary items and aberrational episodes. Zuehls then simulated various future scenarios in

1 what Zuehls calls “iterations of probable future outcomes.” These iterations test the ability to  
2 pay a fine with varying assumptions about what the future will hold. The simulated iterations  
3 produced a range of projected fines that Elna has the probable ability to pay.

4 Zuehls ultimately concluded there were likely future earnings sufficient to pay a back-  
5 loaded **\$4.5 million** fine over five years, without interest. Based on Zuehls’ study, the parties  
6 agree that Elna does not have the ability to pay a fine within the guidelines range without  
7 impairing its 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 Here, Elna has provided substantial and valuable cooperation, as described below. The  
26 government, therefore, moves for a downward departure under section 8C4.1 to reduce Elna’s  
27 fine below the \$4.5 million threshold at which Elna has the ability to pay without substantially  
28 jeopardizing its continued viability or ability to pay restitution. Taking into account Elna’s

1 cooperation, the parties' agreed-upon recommended fine is **\$3.825 million**, a number below the  
2 guidelines range and 15% below Elna's assessed ability to pay.<sup>2</sup>

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

6 [REDACTED]  
7 [REDACTED]  
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27 \_\_\_\_\_  
28 <sup>2</sup> 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 [REDACTED]

2 [REDACTED]

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

11 **B. Probation**

12 Chapter 8, Part D of the sentencing guidelines addresses corporate probation. The  
13 guidelines require probation in a number of situations, which are laid out in section 8D1.1(a).  
14 When a sentence of probation is imposed in felony cases such as this one, the term of probation  
15 must be at least one year but not more than five years. U.S.S.G. §8D1.2; 18 U.S.C. §  
16 3561(c)(1). If a sentence of probation is imposed, some conditions of probation are mandatory,  
17 while some are discretionary. *See* U.S.S.G. §§8D1.3, 8D1.4 (recommended conditions for  
18 corporate probation); 18 U.S.C. § 3563(a) (mandatory conditions) and 3563(b) (discretionary  
19 conditions).

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

18 **C. Restitution**

19 The parties have agreed to recommend that restitution not be imposed. Under the  
20 Clayton Act, 15 U.S.C. §§ 15, *et seq.*, victims of antitrust offenses may bring civil suits to  
21 recover treble damages for antitrust injury. In this case, victims have indeed filed civil suits  
22 seeking treble damages. Those cases are pending before this Court. *See In Re: Capacitors*  
23 *Antitrust Litigation* (14-CV-03264-JD). Moreover, the Mandatory Victim Restitution Act of  
24 1996 does not mandate restitution for Title 15 offenses, such as the one at hand, but only for  
25 crimes of violence and certain Title 18 and Title 21 offenses. 18 U.S.C. § 3663A(c)(1)(A).

26 **VI. CRIME VICTIMS**

27 Under the Crime Victims' Rights Act, 18 U.S.C. § 3771, the government will notify  
28 crime victims of the date and time of plea and sentencing in this matter. The government will

1 continue to comply with its obligations under the Crime Victims' Rights Act, including  
 2 notifying crime victims of any public court proceedings in connection with this matter.

3 **VII. REQUEST FOR EXPEDITED SENTENCING**

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

11 **VIII. CONCLUSION**

12 The United States requests that the Court consider Elna's ability to pay, and additionally  
 13 grant the government's motion for a downward departure in recognition of Elna's substantial  
 14 assistance, resulting in the recommended fine of \$3.825 million, a number that departs from the  
 15 guidelines range. The parties jointly recommend that the \$3.825 million criminal fine be paid  
 16 over five years, without interest, in the following six installments: \$200,000, \$200,000,  
 17 \$725,000, \$900,000, \$900,000, and \$900,000. In addition to the fine, the parties jointly  
 18 recommend that the Court sentence Elna to pay no restitution and a special assessment of \$400  
 19 and to serve a five-year term of probation. Finally, the parties also request that plea and  
 20 sentencing take place on the same date, May 10, 2017, or on the next available date on the  
 21 Court's calendar (but not on May 24, 2017, due to the unavailability of financial consultant  
 22 Dale Zuehls).

23  
 24 DATED: April 20, 2017

Respectfully submitted,

25  
 26 /s/ Howard J. Parker  
 HOWARD J. PARKER  
 Trial Attorney  
 U.S. Department of Justice  
 Antitrust Division