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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' SUPPLEMENTAL
SENTENCING MEMORANDUM**

DATE: September 13, 2017

TIME: 10:30 am

COURT: San Francisco Courthouse

1 **I. INTRODUCTION**

2 Elna Co., Ltd. appeared before this Court on June 14, 2017, for a change of plea and
3 expedited sentencing hearing. The Court had before it the United States’ sentencing
4 memorandum (Dkt. 8) and Elna’s waiver of a presentence report (Dkt. 11). At the hearing, Elna
5 pled guilty, but the Court declined to impose the parties’ Rule 11(c)(1)(C) recommended
6 sentence and rejected the plea agreement. The Court gave three reasons for its declination: (1)
7 the volume of commerce, including the exclusion for Elna’s cooperation under U.S.S.G.
8 §1B1.8, was insufficiently explained; (2) Elna had not carried its burden to show its inability to
9 pay; and (3) the value of Elna’s cooperation was insufficiently described. Elna then withdrew
10 its guilty plea.

11 Elna is now scheduled for a change of plea on September 13, 2017. The parties again
12 will ask the Court to accept the Rule 11(c)(1)(C) plea agreement previously presented. This
13 request is based on the filings submitted for the June 14 hearing (docket numbers 8 and 11), as
14 supplemented by this additional sentencing memorandum from the United States and an
15 additional filing from Elna. The United States’ supplemental sentencing memorandum gives
16 the government perspective on two issues that the Court identified at the June 14 hearing that
17 are uniquely within the government’s purview—*new* incriminating information leading to
18 exclusions from the volume of commerce under U.S.S.G. §1B1.8 and the *value* of Elna’s
19 cooperation justifying a downward departure under U.S.S.G. §8C4.1.

20 **II. VOLUME OF COMMERCE**

21 Determining the volume of affected commerce “does not require a sale-by-sale
22 accounting, or an econometric analysis, or expert testimony.” *United States v. SKW Metals &*
23 *Alloys, Inc.*, 195 F.3d 83, 91 (2d Cir. 1999); see also *United States v. Giordano*, 261 F.3d 1134,
24 1146 (11th Cir. 2001). Rather, courts have uniformly held that all sales made by the defendant
25 during the conspiracy period should be presumed affected. *Giordano*, 261 F.3d at 1146; *United*
26 *States v. Andreas*, 216 F.3d 645, 678 (7th Cir. 2000); *United States v. Hayter Oil Co.*, 51 F.3d
27 1265, 1273 (6th Cir. 1995). And while not required under the guidelines, case law, or the
28 FTAIA (Foreign Trade Antitrust Improvements Act, 15 U.S.C. §6a), the United States, in this

1 case, has taken an approach to volume of commerce that is calibrated to reflect the harm in the
2 United States. The volume of commerce, therefore, includes sales that bear some relationship to
3 the United States, not every sale worldwide. Here, calculation of Elna's volume of commerce
4 begins with determining the value of *all* stand-alone electrolytic capacitors shipped to customers
5 *in the U.S.* between August 2002 and January 2014, the period for which Elna is charged with
6 participating in the conspiracy. The United States and Elna agreed that there were **\$110.9**
7 **million** of such capacitors.

8 From this \$110.9 million number, the parties agreed to exclude two categories of
9 capacitors shipped to the U.S. First, the parties agreed to exclude **\$28.7 million** of products
10 unaffected by the conspiracy. The government expects that Elna will provide the Court further
11 detail about this agreed exclusion.

12 A second category of capacitor sales was excluded from the volume of commerce under
13 U.S.S.G. §1B1.8. That provision states that information provided by a defendant pursuant to a
14 cooperation agreement, concerning unlawful activity of others and not previously known to the
15 government, will not be used against the defendant in determining the applicable guidelines
16 range. In recognition of Elna's cooperation in providing information concerning price-fixing of
17 products sold to the customers [REDACTED], the parties agreed to exclude **\$30.2 million**:

18 [REDACTED] Separate from
19 Elna's cooperation, the government was unaware of this price-fixing conduct. The §1B1.8
20 exclusion credits Elna for providing new information [REDACTED]

21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
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26 None of this [REDACTED] information was known to the government before Elna disclosed it.
27 This is a classic scenario that merits cooperation credit under U.S.S.G. §1B1.8. *See* U.S.S.G.
28 §1B1.8 (restricting application of §1B1.8 if the defendant’s information is known to the

1 government prior to entering into the cooperation agreement), n.1 (“This provision does not
2 authorize the government to withhold information from the court but provides that self-
3 incriminating information obtained under a cooperation agreement is not to be used to determine
4 the defendant’s guidelines range”). Elna sold [REDACTED] Under
5 §1B1.8, those sales are excluded from the company’s volume of commerce.

6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]

12 The total value of excluded sales is \$58.9 million (\$28.7 million for sales unaffected by
13 the conspiracy + \$30.2 million for sales to [REDACTED]). Excluding these sales from the
14 \$110.9 million of capacitors sold in the U.S. from August 2002 to January 2014 results in a
15 volume of commerce of **\$52 million**. Twenty percent of Elna’s volume of commerce is **\$10.4**
16 **million**. This \$10.4 million number is Elna’s base fine. The guidelines range is further
17 calculated by computing a culpability score and applying minimum and maximum multipliers.
18 These calculations are shown in the United States’ initial sentencing memorandum. Dkt. 8, pgs.
19 9-10. Elna’s guidelines fine range is **\$12.5-\$25 million**. And, as explained in the initial
20 sentencing memorandum, the parties agreed that within the guidelines range, assuming an ability
21 to pay, Elna’s fine should be **\$14.9 million**. *Id.*, p.10.

22 **III. MOTION FOR SUBSTANTIAL ASSISTANCE DEPARTURE**

23 As noted in its initial sentencing memo, the United States moves under U.S.S.G. §8C4.1
24 for a downward departure in recognition of Elna’s substantial assistance. This motion reduces
25 Elna’s fine from \$4.5 million (the threshold at which Elna has the ability to pay without
26 substantially jeopardizing its continued viability or ability to pay restitution) to **\$3.825 million**, a
27 number below the guidelines range. See Dkt. 8, p. 12.

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[REDACTED]

Elna's assistance has been substantial, timely, and valuable. [REDACTED]

[REDACTED]

[REDACTED] The government requests that the Court grant the government's motion for a downward departure for Elna's substantial assistance, lowering Elna's fine to \$3.825 million.

DATED: September 6, 2017

Respectfully submitted,

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