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8	UNITED STATES DISTRICT COURT	
9	NORTHERN DISTRICT OF CALIFORNIA	
10	SAN FRANCISCO DIVISION	
11	UNITED STATES OF AMERICA	No. 4:16-cr-00365-JD
12	v.	REDACTED VERSION OF DOCUMENT
13		SOUGHT TO BE SEALED
14	ELNA CO., LTD.,	UNITED STATES' SUPPLEMENTAL
15	Defendant.	SENTENCING MEMORANDUM
16		DATE: September 13, 2017 TIME: 10:30 am
17		COURT: San Francisco Courthouse
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SUPPLEMENTAL SENTENCING MEMO U.S. v. ELNA, 4:16-cr-00365-JD

I. INTRODUCTION

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

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

II. VOLUME OF COMMERCE

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

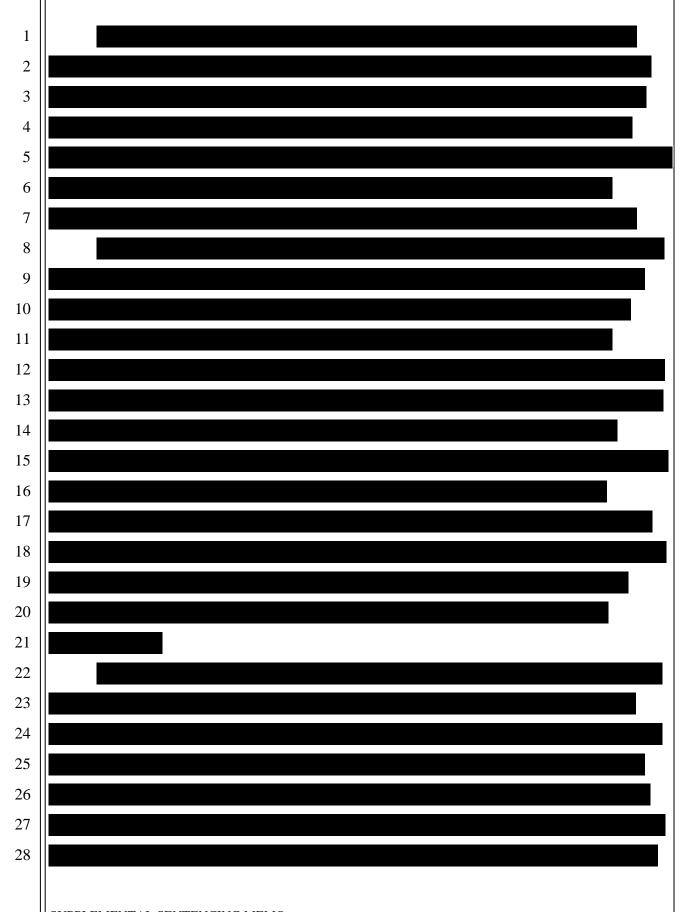
1 case, has taken an approach to volume of commerce that is calibrated to reflect the harm in the 2 United States. The volume of commerce, therefore, includes sales that bear some relationship to 3 the United States, not every sale worldwide. Here, calculation of Elna's volume of commerce 4 begins with 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 , the parties agreed to exclude \$30.2 million: 18 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 21 22 23 24 25 26 27 28

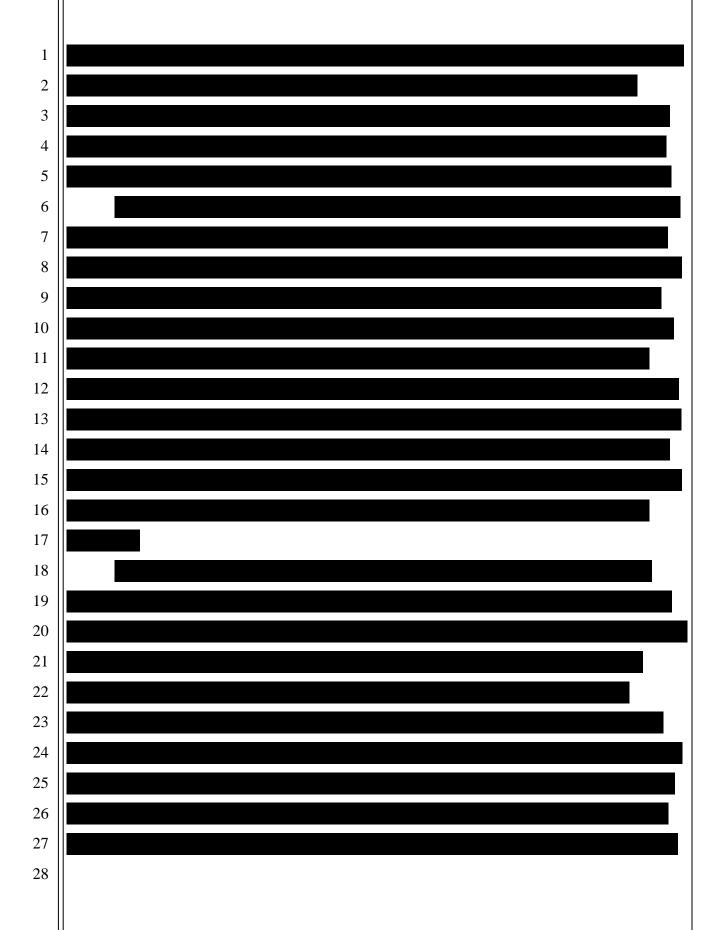


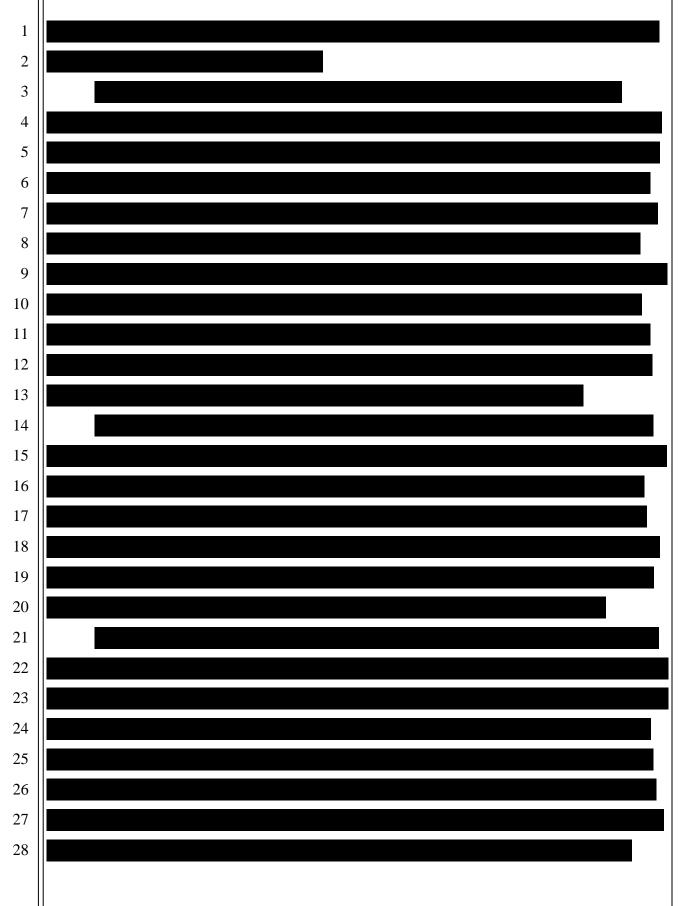
government prior to entering into the cooperation agreement), n.1 ("This provision does not authorize the government to withhold information from the court but provides that self-incriminating information obtained under a cooperation agreement is not to be used to determine the defendant's guidelines range"). Elna sold Under \$1B1.8, those sales are excluded from the company's volume of commerce.

III. MOTION FOR SUBSTANTIAL ASSISTANCE DEPARTURE

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







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4	Elna's assistance has been substantial	, timely, and valuable.	
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13	The government requests that the Court grant the government's motion for a downward		
14	departure for Elna's substantial assistance, lowering Elna's fine to \$3.825 million.		
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17	DATED: September 6, 2017	Respectfully submitted,	
18		/s/ Howard J. Parker	
19		HOWARD J. PARKER	
20		Trial Attorney U.S. Department of Justice	
21		Antitrust Division	
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