

MARVIN N. PRICE, JR. (D.C.B.N. 367149)
U.S. Department of Justice
Antitrust Division
950 Pennsylvania Avenue NW
Washington, DC 20530
Telephone: (202) 307-0719
marvin.price@usdoj.gov

Attorney for the United States

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

v.

NIPPON CHEMI-CON CORPORATION,

Defendant.

No. 4:17-CR-00540-JD
VIOLATION: 15 U.S.C. § 1
Price Fixing
JOINT STATUS REPORT

The United States of America and Nippon Chemi-Con Corporation (“NCC”) file this joint status conference statement to inform the Court of developments in this case that led to the change of plea hearing scheduled for May 30th, where the parties will present the Court with a proposed plea agreement under Federal Rule of Criminal Procedure 11(c)(1)(C), and request that the Court refer the matter to Probation for the preparation of a Presentence Report.

//
//
//
//
//
//
//

1 **I. GOVERNMENT’S POSITION**

2 On February 15, 2018, the Department of Justice received a letter from NCC’s counsel
3 that identified a Department attorney with a potential conflict of interest. The Antitrust Division
4 attorneys prosecuting this case had previously been unaware of this issue. NCC was able to
5 identify the issue when the government produced discovery materials indicating that a certain
6 attorney in the Department of Justice Criminal Division’s Office of International Affairs (“OIA”)
7 had performed tasks related to the Antitrust Division’s efforts to obtain foreign legal assistance
8 in connection with its criminal investigation of NCC. Counsel for NCC recognized this attorney
9 as a former associate at a different law firm (“Firm A”) who had participated in that firm’s
10 representation of NCC in the criminal price-fixing investigation, as well as in related private civil
11 litigation. The attorney left Firm A and joined OIA in February 2015. Shortly thereafter, in
12 March 2015, he performed several tasks to assist the Antitrust Division in executing and
13 transmitting a Mutual Legal Assistance Treaty (“MLAT”) request to interview a witness in
14 Japan, on topics including NCC’s conduct in the charged price-fixing conspiracy. The Antitrust
15 Division remained unaware of his prior representation of NCC until February 15, 2018.

16 As soon as NCC brought the issue to the Department’s attention, the Antitrust Division
17 immediately conducted a thorough investigation, including interviewing relevant personnel
18 within the Antitrust Division and at the Criminal Division’s OIA, as well as the subject attorney.¹
19 At the Antitrust Division’s invitation, NCC’s counsel met with Division leadership and members
20 of the case team on March 1 to discuss the issue. The parties met again on March 7, at which
21 time the Antitrust Division described the relevant facts in its possession and the steps taken to
22 collect and review relevant materials. Since that time, the Antitrust Division voluntarily
23 produced over 1200 pages of relevant documents to NCC, and has continued to confer with
24 NCC’s counsel through multiple additional in-person meetings and by telephone.

25 Based on the Antitrust Division’s review, and in light of NCC’s statements concerning
26 the attorney’s former representation of NCC while at Firm A, the Antitrust Division believes that
27 the OIA attorney should have been recused from this matter. Counsel for NCC has proffered

28 ¹ By this time, the attorney had left OIA and no longer had any role in this matter or any
Antitrust Division cases.

1 that Firm A billed NCC for approximately 240 hours of the attorney's time in 2014 and early
2 2015. Counsel for NCC states that this attorney, while an associate at Firm A, had access to
3 NCC's confidential client information and criminal defense strategy in this matter. Therefore,
4 the Antitrust Division has assessed that when this attorney left Firm A, joined OIA, and shortly
5 thereafter was assigned to assist with an MLAT request seeking evidence in the capacitors price-
6 fixing investigation, he either knew or should have known that he had previously represented
7 NCC in the same matter. The Antitrust Division further believes that this prior representation
8 should have precluded him from working on the MLAT request. But he did not recuse himself.

9 Nevertheless, this attorney's work had little, if any, effect on the Antitrust Division's
10 investigation into NCC's criminal conduct. As an OIA attorney, he worked on only a discrete
11 portion of the investigation relating to processing the MLAT request and the resulting interview.
12 The MLAT request was prepared by Antitrust Division prosecutors and primarily handled by
13 another OIA attorney. The former associate became involved only in the final days before the
14 request was submitted to Japan, serving as a backup when the primary OIA attorney went on
15 official travel.

16 After the submission of the request, the former associate's involvement in the matter was
17 even more circumscribed. He played a limited role as a conduit between the Antitrust Division
18 and the Japan Ministry of Justice to facilitate the interview by Japanese prosecutors after the
19 MLAT request was granted. He never suggested or made any material changes to the list of
20 questions that the Antitrust Division prepared for the Japanese prosecutors conducting the
21 interview. And based on the Antitrust Division's review and current understanding, he did not,
22 at any point, reveal any NCC client confidences to the Antitrust Division or OIA.

23 In the Antitrust Division's assessment, the former associate should have recused himself,
24 but his failure to do so did not cause NCC prejudice. NCC disagrees. Litigating this issue to
25 determine what, if any, remedy is warranted would require substantial expenditure of resources
26 for the parties and the Court. It could also create litigation risk for the government in this Court
27 and perhaps in the Ninth Circuit Court of Appeals. In light of these unusual extenuating
28 circumstances, the government has determined that the plea agreement represents a just and

1 effective resolution of the matter that ensures that NCC will receive a significant sentence for its
2 price fixing.

3 **II. DEFENDANT'S POSITION**

4 NCC recently learned that one of the lawyers who had previously represented it in
5 connection with this case "switched sides" and started working for the government in connection
6 with this case. Given the significance of this issue, NCC immediately sent a letter to the
7 Honorable Rod Rosenstein, Deputy Attorney General of the United States, the Honorable Makan
8 Delrahim, Assistant Attorney General for the Antitrust Division, and other officials within
9 various components of the Department of Justice. That letter explained why dismissal of the
10 Indictment against NCC was warranted and sought an investigation of and explanation for this
11 violation of NCC's due process rights. Over the next month, NCC's counsel held three in-person
12 meetings (and numerous telephone calls) with Mr. Delrahim, members of his staff, and
13 representatives of various other components of the Department. Those discussions, and the
14 discovery produced by the government, have given the parties a set of largely agreed-upon facts,
15 although there is significant disagreement about the issue of prejudice to NCC.

16 In sum: (1) a government lawyer who assisted the trial team in facilitating an MLAT
17 request to interview a witness relating to NCC's conduct in this case previously worked as a
18 member of NCC's defense team in this same case; and (2) this lawyer's prior work on behalf of
19 NCC in this case should have precluded him from working on this matter for the government,
20 but he was not, however, recused.

21 The government asserts that this conduct did not prejudice NCC. NCC strongly
22 disagrees. There is inherent prejudice in having one's own lawyer "switch sides" and then begin
23 working to help the government collect evidence to be used against you and to work to toll the
24 statute of limitations (which the government attorney knew from his prior work was going to be
25 a contested issue in the case, and which, absent this plea agreement, would in fact have been a
26 significant issue at trial). The government also downplays the government attorney's role by
27 making it sound ministerial. It was not.

28

1 In the event the plea is not accepted, NCC would argue for dismissal of the Indictment
2 based on the current record and, in the alternative, would seek discovery and a hearing which
3 would delve not only into the government attorney's conduct, but also whether the Department's
4 processes and procedures for trying to prevent such conflicts are adequate; the adequacy of the
5 response of the Department attorneys who were consulted by and interacted with the government
6 attorney immediately after he had started working on this case for the government regarding his
7 involvement in this matter; whether certain evidence must be suppressed as a result of this
8 conflict of interest; whether the MLAT obtained as a result of the government attorney's work
9 can properly be used to toll the statute of limitations; and whether certain (or all) members of the
10 prosecution team, who interacted repeatedly with the government attorney concerning this case,
11 must be disqualified.

12 At the end of the day, however, NCC submits that these issues need not be decided at this
13 time. After numerous meetings with senior Department officials, NCC agrees with the
14 government that: (1) litigating this issue (and this case generally) will be expensive and time
15 consuming for the parties and the Court; and (2) resolution of these issues creates litigation risk
16 at the trial and appellate levels, on both sides. For these reasons and others to be fully developed
17 through the Presentence Report process, NCC agrees that the plea agreement reflects a
18 reasonable resolution of this case.

19
20 DATED: May 11, 2018

21 Respectfully submitted,

22 /s/ Marvin N. Price, Jr.

23 Marvin N. Price, Jr.

24 Director of Criminal Enforcement

25 Department of Justice

26 Antitrust Division

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

/s/ Theodore V. Wells Jr.
Theodore V. Wells Jr. (admitted *pro hac vice*)
Roberto Finzi (*pro hac vice* pending)
Farrah R. Berse (admitted *pro hac vice*)
PAUL, WEISS, RIFKIND, WHARTON &
GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Telephone: (212) 373-3000
Facsimile: (212) 757-3990
twells@paulweiss.com
rfinzi@paulweiss.com
fberse@paulweiss.com

Charles F. Rule (admitted *pro hac vice*)
Joseph J. Bial (admitted *pro hac vice*)
Daniel J. Howley (admitted *pro hac vice*)
PAUL, WEISS, RIFKIND, WHARTON &
GARRISON LLP
2001 K Street NW
Washington, D.C. 20006-1047
Telephone: (202) 223-7300
Facsimile: (202) 223-7420
rrule@paulweiss.com
jbial@paulweiss.com
dhowley@paulweiss.com

Steven Kaufhold (SBN 157195)
KAUFHOLD GASKIN LLP
388 Market Street, Suite 1300
San Francisco, CA 94111
Telephone: (415) 445-4621
Facsimile: (415) 874-1071
skaufhold@kaufholdgaskin.com

*Counsel for Defendant
Nippon Chemi-Con Corporation*