

Will the Antitrust Division Need Its Own Compliance Monitor?

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The headline sounds funny, but the story is no laughing matter. A plea agreement in the electrolytic capacitor investigation between the United States and Nippon Chemi-Con (“NCC”) is in jeopardy because of an unfortunate conflict of interest lapse by an attorney at the Department of Justice. There was a hearing before Judge Donato yesterday on NCC’s change of plea. Judge Donato, who has been critical of previous plea agreements in the electrolytic capacitor investigation, accepted the guilty plea but reserved judgment on the sentence to be imposed.

The plea agreement calls for a fine of between \$40 and \$60 million. NCC may withdraw its plea if the Judge imposes a fine greater than that called for by the plea agreement. A sentencing hearing is scheduled for October 3, 2018.

Background

On October 18, 2017 a federal grand jury returned an indictment against NCC for participating in a conspiracy to fix prices for electrolytic capacitors. The indictment, filed in the U.S. District Court for the Northern District of California, charges that NCC, based in Japan, conspired to fix prices for electrolytic capacitors from as early as September 1997 until January 2014. Three current NCC executives, and one former NCC executive, were previously indicted for their participation in the conspiracy: Takuro Isawa, Takeshi Matsuzaka, Yasutoshi Ohno, and Kaname Takahashi. The DOJ’s press release can be found [here](#).

The indictment alleges NCC carried out the conspiracy by agreeing with co-conspirators to fix prices of electrolytic capacitors during meetings and other

communications. According to the indictment, NCC and its co-conspirators took steps to conceal the conspiracy, including the use of code names and providing misleading justifications for prices and bids submitted to customers in order to cover up their collusive conduct. The indictment can be found [here](#).

To date, eight companies and ten individuals have been charged with participating in the conspiracy to fix prices of electrolytic capacitors.

The Problem (if you're the Government) or Opportunity (if you're the defense)

The issue that was debated at the change of plea hearing before Judge Donato was first identified in a Joint Status Report filed on May 11, 2018. The parties reported that an attorney who formerly had represented NCC left his law firm, joined the Department of Justice and later did some work on an MLAT request the Department filed with the Japanese government that related to NCC. In the Status Report the Antitrust Division wrote:

“The attorney left Firm A and joined OIA in February 2015. Shortly thereafter, in March 2015, he performed several tasks to assist the Antitrust Division in executing and transmitting a Mutual Legal Assistance Treaty (“MLAT”) request to interview a witness in Japan, on topics including NCC’s conduct in the charged price-fixing conspiracy. The Antitrust Division remained unaware of his prior representation of NCC until February 15, 2018.”

The Antitrust Division conceded that the attorney should have recused himself but argued that there was no prejudice to NCC. NCC strongly disagreed about the impact of a defense attorney “switching sides.” The company unsuccessfully lobbied the DOJ to dismiss the indictment. That request was declined but a plea agreement was reached that clearly was more favorable to NCC than the Antitrust Division might have offered without the conflict issue. The complete Status Report on the matter can be found here: **[Case 4-17-cr-00540-JD Document 47 Filed 05:11:18](#)**

The Change of Plea Hearing

Judge Donato accepted the plea of NCC but reserved judgment on the sentence. Sentencing is scheduled for October 3, 2018. Judge Donato has required changes

to negotiated plea agreements with other defendants in the capacitor investigation believing them to be too lenient. If Judge Donato does not agree to sentence NCC within the parameters of its plea agreement, NCC can withdraw its plea. The court spent approximately 30 minutes in closed session exploring the impact on the conflict lapse on the terms the Antitrust Division offered in the plea agreement.

Judge Donato was obviously upset at the lack of procedures at the DOJ to identify and prevent this conflict. The Antitrust Division tried to demonstrate that it took the matter seriously by sending Marvin Price, the Acting Deputy Assistant Attorney General for Criminal Enforcement out to San Francisco to represent the Government at the hearing.

The case is *U.S. v. Nippon Chemi-Con Corp.*, case number 4:17-cr-00540-JD.

More to come.

This post originally appeared on the [Cartel Capers blog](#).