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16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18 SAN FRANCISCO DIVISION

19 UNITED STATES OF AMERICA

20 v.

21 NIPPON CHEMI-CON CORPORATION,
22 Defendant.

No. 4:17-CR-00540-JD

**UNITED STATES' SENTENCING
MEMORANDUM**

Date: October 3, 2018

Time: 10:30 am

Court: San Francisco Courthouse

1 **I. INTRODUCTION**

2 Nippon Chemi-Con Corporation (“NCC”) was indicted on October 18, 2017 for its role
3 in a long-running conspiracy to fix prices and rig bids for electrolytic capacitors. In February
4 2018, the government became aware of a potential conflict of interest arising from the conduct of
5 a former associate who worked on NCC’s defense and later joined the Justice Department’s
6 Criminal Division in the Office of International Affairs (“OIA”), where—without disclosing his
7 prior representation—he helped the capacitors team execute a mutual-legal-assistance-treaty
8 request (“MLAT”) for a voluntary interview of a foreign-located witness in the investigation of
9 NCC and its co-conspirators.

10 The government does not dispute that the OIA attorney knew or should have known of
11 the conflict presented by his prior representation of NCC. The government does not condone his
12 conduct. In the Antitrust Division’s assessment, however, the conflict-of-interest issue caused
13 NCC no prejudice, and no remedy would be warranted. NCC disagrees, and contends that the
14 appropriate remedy would be dismissal of the Indictment or, in the alternative, exclusion of some
15 part of the government’s evidence. Litigating this issue to determine what, if any, remedy is
16 warranted would create significant litigation risk in this Court and on appeal.

17 In light of these extremely unusual extenuating circumstances, the parties entered into a
18 Rule 11(c)(1)(C) plea agreement, in which NCC pleaded guilty to one count of violating the
19 Sherman Antitrust Act through its participation in the electrolytic capacitors conspiracy from at
20 least as early as November 2001 until in or about January 2014, and which stipulates a fine in a
21 range of \$40 to \$60 million.

22 The government has determined that, due to the litigation risk arising from the conflict
23 issue, the Rule 11(c)(1)(C) plea agreement represents a just and effective resolution of the
24 matter, and is the only way to ensure that NCC receives a significant sentence and is held
25 accountable for its leadership role in this long-running price-fixing conspiracy. In recognition of
26 this extraordinary circumstance, the United States believes that a \$60 million fine is in the
27 interest of justice. The government respectfully requests that the Court sentence NCC as
28 provided by the plea agreement, and impose a fine of \$60 million.

1 **II. GUIDELINES FINE CALCULATION**

2 The United States requests that the Court adopt the guideline calculation in Probation’s
3 final Presentence Report (“PSR”), which calculates the largest of the three base-fine alternatives
4 as \$106 million (twenty percent of NCC’s \$530 million volume of affected commerce). (PSR
5 ¶27.)¹

6 The United States agrees with the volume-of-commerce calculation set forth in Paragraph
7 25 of the PSR. Consistent with other pleading corporate conspirators already sentenced by the
8 Court, the starting point for calculating NCC’s volume of commerce is the value of stand-alone
9 capacitors sold to customers in the United States during the relevant period: November 2001 to
10 January 2014. Paragraphs 14-19 of the PSR provide additional detail about the scope of NCC’s
11 participation in the conspiracy. Because NCC participated broadly in—and, indeed, was a leader
12 of—the conspiracy for its duration, all U.S. sales for the charge period are included.

13 The PSR correctly concludes that “the guideline fine range is *\$190,800,000 to*
14 *\$381,600,000*”; however, because “the statutory maximum fine in this case is \$100,000,000 . . .
15 the guideline range fine is **\$100,000,000.**” (PSR ¶58 (emphasis in original).)²

16 **III. A \$60 MILLION FINE IS IN THE INTERESTS OF JUSTICE**

17 Although the guidelines fine is the statutory maximum of \$100 million, a \$60 million fine
18 is in the interests of justice. The litigation risk created by the conflict issue justifies the
19 imposition of a \$60 million fine as a discretionary non-Guidelines sentence. In the alternative, a
20 \$60 million fine is warranted as a departure under §5K2.0(a)(2), which authorizes the Court to
21 depart from the Guidelines sentence in an “exceptional circumstance” such as the highly unusual

22 _____
23 ¹ The base fine calculated from the Offense Level Fine Table is \$1.6 million (PSR ¶22), and a
24 base fine calculated from pecuniary gain would unduly complicate and prolong the sentencing
25 process (PSR ¶23).

26 ² Because the guidelines fine is \$100 million, it is not necessary to apply the factors in §8C2.8 to
27 select a fine within the guidelines fine range. If NCC’s guidelines fine were below the statutory
28 maximum, the government would seek to adjust the fine above the guidelines minimum based on
three factors. The first is the timeliness of NCC’s cooperation relative to the other pleading co-
conspirators. The second factor reflects the value of capacitors sold abroad but incorporated into
finished goods sold in the United States. Both factors were applied to determine guidelines fines
for other corporate co-conspirators. The third factor, unique to NCC, relates to its leadership role
in the offense under §8C2.8(a)(2).

1 circumstances of the conflict, which create a substantial risk of a result in this case that is unfair
2 and unjust.

3 A. Imposition of a \$60 Million Non-Guidelines Fine Is Within the
4 Discretion of the Court and Serves the Interests of Justice

5 The Court has discretion to impose a below-guidelines fine of \$60 million, which is a just
6 sentence that is sufficient to satisfy the purposes of punishment. The conflict issue present here
7 creates a risk that this Court or the court of appeals might dismiss the Indictment or exclude
8 critical evidence, considerably impairing the government's ability to prosecute this serious
9 criminal offense. Consequently, the parties' negotiated resolution serves the interests of justice
10 because it is the only way to ensure that NCC pays a substantial fine and is held accountable for
11 its significant role in the long-running conspiracy. Thus, sentencing NCC to a fine at the top end
12 of the recommended range of \$40-60 million satisfies the § 3553(a) factors.

13 1. *The Court Has Discretion to Accept a Plea Agreement*
14 *With a Stipulated Below-Guidelines Fine*

15 Rule 11 vests the Court with “considerable discretion to assess the wisdom of plea
16 bargains,” *In re Morgan*, 506 F.3d 705, 712 (9th Cir. 2007),³ and to accept a stipulated sentence
17 below the guideline range. *United States v. Pacheco-Navarette*, 432 F.3d 967 (9th Cir. 2005).
18 In exercising its discretion, a sentencing court should make an individualized assessment of a
19 stipulated sentence's propriety in light of the specific facts and circumstances presented,”
20 including whether the sentence is “in the best interest of society” or “serve[s] the public interest.”
21 *In re Morgan*, 506 F.3d at 711. A trial court must also “be aware of and give[] due deference to
22 the prosecutorial choices reflected in a particular plea bargain”—including “the prosecutor's
23 reasons for framing the bargain as he did[.]” *United States v. Miller*, 722 F.2d 562, 566 (9th Cir.
24 1983).

25 The guidelines provide a structure for a sentencing court to evaluate the fairness and
26 appropriateness of the sentence for an individual offender, without eliminating the thoughtful

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28 ³ See also Fed. R. Crim. P. 11 (1999) Advisory Committee's Note (a sentencing court has
“absolute discretion whether to accept a plea agreement”).

1 imposition of individualized sentences. S. Rep. No. 98-225, 98th Cong., 1st Sess. (1983), 1983
2 WL 25404 *52-53. The legislative history of the Sentencing Reform Act of 1984 makes clear
3 that Congress intended to preserve a sentencing court’s flexibility and independent judgment,
4 including the discretion to impose a sentence outside the guidelines range. “[T]he sentencing
5 judge has an obligation to consider all the relevant factors in a case *and to impose a sentence*
6 *outside the guidelines in an appropriate case.*” *Id.* at *52 (emphasis added).

7 Moreover, any doubt about a court’s discretion to impose a sentence outside of the
8 guidelines range was “erased by the Supreme Court’s [] decision in *United States v. Booker*, 543
9 U.S. 220 (2005).” *United States v. Cieslowski*, 410 F.3d 353, 363 (7th Cir. 2005); *United States*
10 *v. Bundy*, 359 F. Supp. 2d 535, 538 (W.D. Va. 2005) (“After *Booker*, of course, there can be no
11 reasonable argument that the court does not have the authority to accept an agreed sentence
12 below the guideline range”). Following *Booker*, the Guidelines are just one factor that the Court
13 must consider in fashioning a sentence that is “sufficient but not greater than necessary” to
14 achieve the purposes of sentencing. 18 U.S.C. § 3553(a).

15 With respect to sentence bargains under Rule 11(c)(1)(C), the Court can accept such
16 agreements if “the agreed sentence is outside the applicable guideline range for *justifiable*
17 *reasons[.]*” U.S.S.G. § 6B1.2(c) (emphasis added).⁴ Guidelines section 6B1.2 does not change,
18 or constrain, a court’s discretion to accept a plea bargain outside a Guidelines range (and did not
19 do so, even pre-*Booker*), as the Ninth Circuit held in *Pacheco-Navarette*, 432 F.3d 967. In
20 *Pacheco-Navarette*, the Ninth Circuit upheld the sentencing court’s imposition of a non-
21 guidelines sentence pursuant to a Rule 11(c)(1)(C) plea agreement and expressly found that a
22 sentencing court has the power to accept a non-guidelines plea:

23 Even before *Booker*, this court accepted implicitly that stipulated sentences could fall
24 outside the otherwise applicable Guidelines range. . . . We accept this proposition
25 explicitly: *as the Guidelines are advisory only, . . . there can be no reasonable argument*
that the court does not have the authority to accept a stipulated sentence that does not
comport with them.

26 ⁴ Earlier language that defined “justifiable reasons” (as “*i.e.* that such departure is authorized by
27 18 U.S.C. 3553(b)”) was eliminated in 2011, and the current version of the 6B1.2 commentary
28 does not define or limit “justifiable reasons.” The Commission noted that the reason for the
deletion was to reflect *Booker* and subsequent case law. U.S.S.G. App. C, Vol. III, Amendment
757.

1 432 F. 3d at 970 (emphasis added). *Pacheco-Navarette* makes clear that “[t]he provisions of the
2 Guidelines relating to plea agreements [including 6B1.2] are policy statements only. The
3 binding law is (and was then) [Rule 11].”⁵ *Id.* at 971.

4 2. *Litigation Risk Is an Appropriate Consideration Justifying*
5 *Imposition of a Below-Guidelines Fine.*

6 The parties’ Rule 11(c)(1)(C) plea agreement is in the interests of justice because of the
7 significant litigation risk to the government’s case arising from the conflict of interest issue,
8 which could either result in the case against NCC being dismissed or significantly weaken the
9 government’s ability to obtain a conviction. Courts have evaluated such prosecutorial
10 concerns—including litigation risk and the likelihood that such risk could create difficulty of
11 proof at trial—in exercising their discretion to accept plea agreements with stipulated sentences
12 falling below the applicable guidelines range. *See, e.g., United States v. Goodall*, 236 F.3d 700,
13 703-06 (D.C. Cir. 2001); *United States v. Bundy*, 359 F. Supp. 2d 535, 538-39 (W.D. Va. 2005).
14 And, like here, sentencing courts often must weigh the non-guidelines fine against the likelihood
15 that litigation risk could result in a culpable defendant receiving no (or significantly reduced)
16 punishment for his criminal acts.

17 Thus, for example, in *Bundy*, the court accepted a plea agreement with a stipulated
18 below-guidelines sentence where the government wanted closure on a complex prosecution, and
19 where the proposed sentence left the defendant with a felony conviction which created certainty
20 that he would be precluded from possessing firearms in the future as weighed against the
21 uncertainty of the result if the case were to proceed to trial. The court found that although “the
22 exigencies of plea bargaining from the government’s point of view—limited resources and
23 uncertainty of result—are not specific sentencing goals of § 3553(a)” the court is “not prohibited
24 from considering these factors, so long as the sentence is otherwise reasonable in light of
25 § 3553(a).” 359 F. Supp. 2d at 538-39. The court found the non-guidelines sentence to be

26 ⁵ Even when the Guidelines were mandatory, a court still retained authority to accept a below-
27 guidelines sentence even if there was no applicable departure. That is because Congress, in
28 enacting the 1984 Sentencing Reform Act, did not intend to change or modify existing plea
bargaining practices. S. Rep. No. 98-225, 98th Cong., 1st Sess. 52-53 (1983).

1 “reasonable, taking into account the goals of the Sentencing Reform Act” and that the decision to
2 enter into a lower-than-guidelines plea was “not lightly made, or for any undisclosed motive.”
3 *Id.* at 539.

4 In *United States v. BP Products North America*, 610 F. Supp. 2d 655 (S.D. Tex. 2009),
5 the court also weighed a below-guidelines fine against the possibility that litigation risk created
6 the potential that there would be no recovery. The court accepted a plea agreement with a
7 stipulated \$50 million fine (against the objections of the victims) because complex causation
8 issues presented a significant likelihood of triggering the § 3571(d) complexity exception,
9 resulting in a maximum fine of \$500,000. *Id.* at 695. The court, citing *Bundy*, took into account
10 “the exigencies of plea bargaining from the government’s point of view,” including “limited
11 resources and uncertainty of result[,]” and found that “[t]he issues in this case . . . present
12 significant risks that absent the plea, the government would not be able to prevail or would only
13 obtain a \$500,000 fine. These risks have been considered in weighing the adequacy and
14 reasonableness of the proposed plea terms.” *Id.* at 662.

15 The court in *United States v. Transocean Deepwater*, Case No. 13-01 “H” (E.D.L.A.
16 2013), reached the same conclusion. There, the parties submitted a 11(c)(1)(C) plea agreement
17 with a below-guidelines fine due to difficulty of proof at trial of a fine under the alternative fine
18 statute, without which recovery was capped at \$2.175 million. In accepting the parties’ \$400
19 million stipulated fine, the court considered the “uncertainty of result.” (Condon Decl. Ex. 1,
20 *Transocean Deepwater* Sentencing Hearing, Tr. 26:9-25.) The court also noted that the \$400
21 million fine was the second highest ever imposed for an environmental crime, which
22 “demonstrate[d] the severity and deterrence benefits of the Plea Agreement.” (*Id.*, Tr. 24:4-21.)

23 Courts have also found that acceptance of a plea agreement with a below-guidelines fine
24 serves “the ends of justice” when—as here—it ensures certainty of punishment against litigation
25 risk arising from the possibility that critical evidence would be excluded. *United States v. Khan*,
26 06-CR-255, 08-CR-640, 09-CR-150 (E.D.N.Y. 2009) (Condon Decl. Ex. 2, *Kahn* Sentencing
27 Hearing, Tr. 22:24-27:22). In *Khan*, the court accepted a non-guidelines sentence of 15 years
28 (instead of the guidelines sentence of life), where the plea took into account litigation risk (and

1 conservation of resources) arising from the likelihood that the court would exclude critical
2 evidence which would then complicate or weaken the government’s case. (Condon Decl. Ex. 2,
3 *Kahn* Sentencing Hearing, Tr. 22:24-27:22.) The court noted that conviction “is never a locked
4 thing,” and described the “uncertainty of the jury verdict” as a “very legitimate reason[]” to
5 accept the parties’ stipulated plea. (*Id.*, Tr. 26:1-27:3.)

6 Following *Bundy*, *BP Products*, *Transocean Shipping*, and *Kahn*, the government
7 respectfully requests that the Court exercise its discretion to accept the parties’ proposed plea
8 agreement and impose a non-guidelines fine within the stipulated range. The conflict-of-interest
9 issue creates a risk that the case against NCC will be dismissed or would complicate the
10 government’s prosecution, and a \$60 million fine ensures just punishment as weighed against the
11 possibility that the conflict issue could result in dismissal or acquittal. The Rule 11(c)(1)(C) plea
12 was “not lightly made, or for any undisclosed motive.” *Bundy*, 359 F. Supp. 2d at 539. To the
13 contrary, the parties disclosed the conflict issue to the Court and the public, and after careful
14 consideration of the risk have determined that the plea agreement represents a just and effective
15 resolution of the matter.

16 3. *A \$60 Million Fine Satisfies Section 3553(a)*

17 *Bundy* counsels that a sentencing court can consider prosecutorial concerns in assessing a
18 stipulated non-guidelines fine, “so long as the sentence is otherwise reasonable in light of
19 § 3553(a).” *Id.* at 538-39. Section 3553(a) directs a court to impose a sentence “sufficient, but
20 not greater than necessary” to comply with the purposes set forth in subparagraph two of Section
21 3553(a): the need for the sentence imposed to, among other things, reflect the seriousness of the
22 offense, promote respect for the law, provide just punishment for the offense, and afford
23 adequate deterrence. A court should also consider additional factors such as the nature and
24 circumstances of the offense, the history and characteristics of the defendant, and the need to
25 avoid unwarranted sentencing disparities. Consideration of these factors demonstrates that the
26 parties’ plea agreement promotes the sentencing goals of 3553(a), and that a \$60 million fine is
27 “reasonable.” *Bundy*, 359 F. Supp. 2d at 539.

28 //

1 NCC's guilty plea and acknowledgement of wrongdoing promotes respect for the law,
2 and a \$60 million fine is a just sentence. A \$60 million fine (payable immediately) is substantial,
3 provides just punishment, promotes deterrence, and demonstrates the severity of the crime.
4 Indeed, a \$60 million criminal fine is comparable to some of the highest fines levied in other
5 significant international criminal cartel cases, including the auto parts and air cargo
6 investigations.⁶ Additionally, the recommended plea agreement includes a five-year probation
7 period, during which NCC must implement an effective compliance program and submit annual
8 written reports on its compliance efforts, which further promotes deterrence and will help to
9 protect the public from further crimes of the defendant.

10 Moreover, a guilty plea establishes prima facie evidence of NCC's liability in the civil
11 litigation, which further promotes the public interest by increasing the likelihood that NCC will
12 compensate victims harmed by its conduct. Accepting the plea agreement will expedite the
13 victims' ability to recover damages. Indeed, the victims here support the plea—unlike in *BP*
14 *Products*, where the court imposed a below-guidelines fine despite the victims' objections. 610
15 F. Supp. 2d at 730. And because the conflict-of-interest issue does not run to the plaintiffs, it
16 will not affect their ability to seek civil damages.

17 Imposing a fine at the top of the \$60-\$40 million range (rather than NCC's recommended
18 fine at the low end of the range) is necessary to avoid unwarranted sentencing disparities with
19 NCC's corporate co-conspirators. A \$60 million fine would be the largest fine imposed on a
20 corporate defendant in this investigation; the second largest fine was \$54.6 million, imposed on
21 Nichicon, the second largest competitor. Sentencing NCC to the highest fine in the investigation
22 would appropriately reflect NCC's long participation in the conspiracy, its leadership role, and
23 its size relative to the other conspirators. Conversely, imposing a fine below \$60 million would
24 be disproportionate, as it would result in NCC paying significantly less than Nichicon,
25 notwithstanding Nichicon's reduced involvement in the conspiracy after 2003. Unlike Nichicon,
26 NCC at no point reduced its involvement in the conspiracy, and participated fully in the
27 conspiracy until government investigations into the conspirators' illegal conduct became public.

28 _____
⁶ <https://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more>

1 B. The Conflict Issue Presents “Exceptional” Circumstances Warranting
2 a §5K2.0 Departure

3 Alternatively, a \$60 million fine is warranted as a departure under §5K2.0(a)(2), which
4 provides that a court may depart from the guidelines “based on circumstances of a kind not
5 adequately taken into consideration,” including “the exceptional case in which there is present a
6 circumstance that the Commission has not identified in the guidelines but that nevertheless is
7 relevant to determining the appropriate sentence.”

8 Here, the “exceptional” circumstances created by the former associate’s conduct are
9 “relevant to determining the appropriate sentence” because they create a risk that NCC will not
10 be held accountable for its criminal conduct. As discussed above and as disclosed in the parties’
11 Status Report (Dkt. No. 47), the facts at issue—involving an undisclosed conflict of an attorney
12 in a non-litigating office in the Department of Justice that assisted in a discrete set of tasks
13 during the course of the investigation that ultimately led to the prosecution of NCC—are highly
14 unusual. As a result, there is a dearth of legal precedent directly on point, and the parties (as
15 detailed in the Status Report, Dkt. No. 47) dispute the applicable legal standard and what, if any,
16 remedy should apply. These circumstances, especially the uncertainty of the outcome if this
17 issue were to be litigated, makes this an “exceptional case” warranting a downward departure
18 from the guidelines fine.

19 A departure from the Guidelines fine of \$100 million, resulting in a fine of \$60 million,
20 represents a fair and just resolution that, as discussed above, holds NCC accountable for its
21 criminal conduct and avoids the risk that it will go unpunished.

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1 **IV. CONCLUSION**

2 For the reasons set forth above, the government respectfully requests that the Court
3 accept the proposed Rule 11(c)(1)(C) plea agreement and impose a sentence of \$60 million.
4

5 DATED: September 19th, 2018

Respectfully submitted,

6
7 /s/ Mikal J. Condon

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