

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Cygnus Electronics Corporation and Sean Allott, Plaintiffs

AND:

Panasonic Corporation, Panasonic Corporation of North America; Panasonic Canada Inc.; Sanyo Electric Co. Ltd.; NEC Tokin Corporation; NEC Tokin America Inc.; Kemet Corporation; Kemet Electronics Corporation; Nippon Chemi-Con Corporation; United Chemi-Con Corporation; Hitachi Chemical Co. Ltd.; Hitachi Chemical Company America, Ltd.; Hitachi Canada; Nichicon Corporation; Nichicon (America) Corporation; AVX Corporation; Rubycon Corporation; Rubycon America Inc.; Elna Co. Ltd.; Elna America Inc.; Matsuo Electric Co. Ltd.; Toshin Kogyo Co. Ltd.; Samsung Electro-Mechanics; Samsung Electro-Mechanics America Inc.; Samsung Electronics Canada Inc.; Rohm Co. Ltd.; Rohm Semiconductor U.S.A., LLC.; Hitachi AIC Inc.; Hitachi Chemical Electronics Co., Ltd.; FPCAP Electronics (Suzhou) Co.; Fujitsu Ltd.; Fujitsu Canada, Inc.; Holy Stone Enterprise Co., Ltd.; Vishay Polytech Co. Ltd. f/k/a HolystonePolytech Co., Ltd.; Milesone Global Technology, Inc. d/b/a Holystone International; and Holy Stone Holdings Co., Ltd., Defendants

BEFORE: Justice R. Raikes

COUNSEL: Counsel, for the Plaintiffs – Jonathan Foreman and Jean-Marc Metrailler
Counsel, for the NEC Tokin Defendants – Eric Hoaken and Ian Matthews
Counsel, for other Defendants – see Schedule “A”

HEARD: November 5, 2018

ENDORSEMENT

- [1] The plaintiffs seek approval of a settlement reached with the defendants, TOKIN Corporation and TOKIN America Inc., formerly known as NEC Tokin Corporation and NEC TOKIN America Inc. (hereafter “the TOKIN defendants”) pursuant to s. 29 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (“CPA”). The terms of the settlement are set out in an agreement dated May 30, 2018.
- [2] For reasons which follow, I find the settlement to be fair, reasonable and in the best interests of the class and approve the settlement conditional upon approval of the settlement in parallel class proceedings in Quebec and British Columbia.

Nature of Claim

- [3] The plaintiffs allege that the defendants, including the TOKIN defendants, participated in an unlawful conspiracy to fix, maintain, increase or control the price for the supply of aluminum and tantalum electrolytic capacitors (“Electrolytic Capacitors”), and/or to enhance unreasonably the price of Electrolytic Capacitors, and/or unduly lessen the competition in the sale of Electrolytic Capacitors.

Procedural Background

- [4] This action is one of three parallel class proceedings in Canada as against the defendants. The actions in Quebec and British Columbia deal with the claims of residents of those two Provinces, respectively. The Ontario action advances the claims of class members across the rest of Canada.
- [5] The certification motion in the Ontario action has yet to be heard; however, on June 28, 2018, I certified this action for settlement purposes as against the TOKIN defendants only. The courts in Quebec and British Columbia did likewise in July 2018.
- [6] The settlement with the TOKIN defendants is conditional on court approval in each of the Ontario, Quebec and British Columbia. If any of the three courts decline to approve the settlement, the certifications are undone and there is no settlement; the actions revert to their previous status with the TOKIN defendants among the many non-settling defendants.
- [7] Pursuant to the June 28, 2018 order, notices were published and disseminated in accordance with approved plan of dissemination. The court approved notices resulted in two companies, likely related to one another, who opted out of the class.

Law – Settlement Approval

- [8] Settlement of a class proceeding requires court approval: s. 29 *CPA*. Once approved, the settlement binds all class members: s. 29(3) *CPA*.
- [9] On a motion for court approval of a settlement of a class proceeding, the applicable test is whether, in all the circumstances, the settlement is fair, reasonable and in the best interests of those affected by it. The following principles apply to the consideration of a proposed settlement:
- the resolution of complex litigation through compromise of claims is encouraged by the courts and is consistent with public policy
 - a settlement negotiated at arms’ length by experienced counsel is presumptively fair
 - to reject the terms of the settlement and require that litigation continue, a court must conclude that the settlement does not fall within a range of reasonable outcomes

- a court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of litigation rights against the defendants. The court must recognize that there are a number of possible outcomes within a range of reasonableness
- it is not the court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement
- it is also not the court's function to litigate the merits of the action or simply rubber stamp a settlement.

(See *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (Ont. C.J. (Gen. Div.)) at para.9; *Nunes v. Air Transat AT Inc.* (2005), 20 C.P.C. (6th) 93 (Ont. S.C.) at para. 7; *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2643 at para. 31.)

[10] There are several factors which the courts have considered to assess the reasonableness of a proposed settlement. These factors include:

- the likelihood of recovery or likelihood of success, sometimes referred to as litigation risk
- the amount and nature of discovery, evidence or investigation
- the proposed settlement terms and conditions
- the recommendation and experience of counsel
- the likely duration of the litigation
- the number of objectors and the nature of the objections
- the presence of arms' length bargaining and the absence of collusion
- the positions taken by the parties in the litigation and during negotiations.

(See *Marcantonio v. TVI Pacific Inc.* (2009), 82 C.P.C. (6th) 305 at para. 12; *Parsons v. Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151 at paras. 71 – 73.

[11] The court must be satisfied that there is both substantive and procedural fairness. Procedural fairness deals with the manner in which the settlement has been reached. It requires a consideration of the process followed. Hard-fought arms' length negotiations go a long way to satisfy the requirement of procedural fairness.

[12] The burden of satisfying the court that a settlement should be approved is on the party seeking approval: *Nunes*, para. 7 citing *Ford v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1118 (S.C.J.).

Settlement Terms

- [13] The settlement agreement with the TOKIN defendants is the end result of months of arm's length negotiations by counsel. No mediator was used. Plaintiffs' counsel are experienced in price fixing actions and class proceedings. Defence counsel are likewise experienced.
- [14] This settlement is the first with any of the many defendants named in the action. An essential component of the settlement is disclosure of information by the TOKIN defendants that will assist the plaintiffs in pursuit of the remaining defendants. As part of the settlement negotiations, plaintiffs' counsel were provided a without prejudice peek behind the curtain so as to satisfy themselves of the value of that disclosure.
- [15] In addition, plaintiffs' counsel have undertaken additional research as part of their due diligence of the merits of the action. That research was undoubtedly useful in evaluating the expected benefits of early resolution and disclosure by the TOKIN defendants.
- [16] The benefits of the settlement agreement are:
1. The TOKIN defendants will pay CDN \$2.9 million for the benefit of class members;
 2. Disclosure of information and documentation including,
 - i. An attorney proffer;
 - ii. A two day interview with a knowledgeable employee;
 - iii. production of documents internal to the TOKIN defendants;
 3. Authentication of documents, if needed, at any stage of the action including trial.
- [17] The cooperation of the TOKIN defendants includes an attorney proffer where the TOKIN defendants agreed to disclose:
1. Their knowledge of how the alleged conspiracy was formed;
 2. Identification and production of key documents relevant to the alleged conspiracy and to conduct of specific defendants; and
 3. Disclosure of identities and known particulars of TOKIN's key former officers, directors and employees who witnessed and/or participated in the alleged conspiracy.
- [18] The Tokin defendants also agreed to provide the following documentary production to the plaintiffs:

1. Copies of the documents produced to plaintiffs in related United States class action litigation;
2. Copies of documents produced by them to the United States Department of Justice in relation to its investigation of the Electrolytic Capacitors conspiracy;
3. Copies of documents provided by them to the Canadian Competition Bureau; and
4. Copies of existing and future transcripts of depositions given by TOKIN in the United States class action litigation.

Analysis

- [19] I am satisfied that there was procedural fairness in the manner in which the negotiations were conducted. This is not a quick settlement that will benefit counsel more than the class. There is nothing suspicious or concerning in the timing or manner in which the settlement was reached.
- [20] According to information provided by TOKIN to plaintiffs' counsel, their direct sales of Electrolytic Capacitors in Canada were relatively modest (\$770,526) during the class period. No information is provided as to indirect sales in Canada. Plaintiffs' counsel estimates that TOKIN had approximately 9% of the global tantalum electrolytic capacitor market which amounts to roughly 3 % of the global Electrolytic Capacitor market.
- [21] The lack of meaningful information as to indirect sales is troubling; however, the overarching benefits of disclosure together with the not insignificant sum paid by the TOKIN defendants mitigate that concern at this stage. It is to be borne in mind that this is the first settlement and some advantage usually attaches to those who settle early with disclosure of information helpful to the remainder of the case.
- [22] I note that this litigation carries substantial risk. It is complex litigation with multiple defendants who have not settled and who are represented by experienced defence counsel. This case is already four years old with the potential for much longer if vigorously fought through trial. Resolution with other defendants is not assured nor is ultimate success or recovery.
- [23] I am satisfied that the settlement provides meaningful benefits to the class. It is within the range of reasonable outcomes *vis-a-vis* these defendants in the context of the entire litigation.
- [24] There were no objectors to the settlement approval. The terms of the draft order provided to me have been vetted and approved by counsel for those defendants who are not settling. A considerable number of counsel for those defendants were present at the motion. The terms of the settlement agreement and the order have been drafted with an eye to ensuring procedural and substantive fairness to those defendants remaining.

- [25] As indicated, conditional on similar approval by the courts in Quebec and British Columbia, I approve the settlement with the TOKIN defendants.
- [26] Counsel provided a draft order to me during the settlement approval hearing. I have reviewed that order and it is satisfactory save that the date needed to be changed which I have done. I have signed the order.



Justice R. Raikes

Date: December 6, 2018

Schedule "A"

Counsel, for the Hitachi Defendants – Katherine Kay, Eliot Kolers and Mark Walli

Counsel, for the KEMET Defendants – Davit Akman and Denes Rothschild

Counsel, for the Fujitsu Defendants – J. Thomas Curry, Monique J. Jilesen and Paul-Erik Veel

Counsel, for the Nichicon Defendants – Dr. Neil Campbell, Jon Wypych, Joan Young and Sidney Elbaz

Counsel, for the Rubycon Defendants – W. Michael Osborne, Derek Ronde and Alexandra Murphy

ROHM Defendants – Paul Martin and Vera Toppings

Counsel, for the Panasonic and Sanyo Defendants – Emrys Davis, John Rook, Melanie Aitken and Ian Thompson

Counsel, for the Nippon Chemi-Con and United Chemi-Con Defendants – Gordon Capern, Michael Fenrick and Daniel Rosenbluth

Counsel, for the AVX Defendant – Eric Dufour, Pascale Cloutier and Brian Whitwham

Counsel, for the Matsuo Defendant – Adam Goodman, Craig Dennis and Chloe Snider

Counsel, for the Holystone Defendants – Donald Houston, Peter Leigh and Gillian Kerr

Counsel, for the NEC Tokin Defendants – Eric Hoaken and Ian Matthews

Counsel, for the Samsung Defendants – Litsa Kriaris and Robert Kwinter

Counsel, for the Elna Defendants – David T. Neave, Kevin Wright and Todd Shikaze

Representative Director of the Toshin Kogyo Defendant – Kenji Kasahara

FPCAP Electronics - Unrepresented