CITATION: Cygnus Electronics Corporation v. Panasonic Corporation, 2021 ONSC 2767
COURT FILE NO.: 3795/14 CP
DATE: 20210413

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., Ltd.; Fujitsu Ltd.; Fujitsu Canada Inc.; Holy Stone Enterprise Co., Ltd.; Vishay Polytech Co., Ltd. f/ka Holystone Polytech Co., Ltd; Milestone Global Technology, Inc. d/b/a Holystone International; and Holy Stone Holdings Co., Ltd., Defendants

BEFORE: Justice R. Raikes

COUNSEL: Jonathan Foreman, Sarah Bowden, Anne Legate-Wolfe, Counsel for the Plaintiffs
John Rook, Emrys Davis and Ian Thompson, Counsel for Panasonic and Sanyo Defendants
Eric Dufour, Pascale Cloutier and Brian Whitwham, Counsel for AVX Defendants
Kevin Wright, Todd Shikaze and Emily Snow, Counsel for the Elna DefendantsJ. Thomas Curry and Paul-Erik Veel, Counsel for the Fujistu DefendantsKatherine Kay, Eliot Kolers and Mark Walli, Counsel for the Hitachi Defendants Davit Akman, Moshe Grunfeld and Carolyn Wong, Counsel for the Kemet DefendantsAdam Goodman and Chloe Snider, Counsel for the Matsuo Defendants
Neil Campbell and William Wu, Counsel for the Nichicon DefendantsGordon Capern, Michael Fenrick and Daniel Rosenbluth, Counsel for the Nippon Chemi-Con and United Chemi-Con Defendants
Paul Martin and Vera Toppings, Counsel for the ROHM Defendants
Michael Osborne and Jessica Kuredjian, Counsel for the Rubycon Defendants
Robert Kwinter, Counsel for the Samsung Defendants
Donald Houston, Peter Leigh and Gillian Kerr, Counsel for Holystone Defendants
Kenji Kasahara, Counsel for Toshin Kogyo Defendant

HEARD: February 25, 2021

ENDORSEMENT

[1] This endorsement will deal with two motions in this matter. First, the plaintiffs move for court approval of a settlement with the Panasonic defendants pursuant to s. 29(2) of the *Class Proceedings Act, 1992,* S.O. 1992, c. 6, as am. ("*CPA*"). Second, plaintiffs' counsel seek approval of the retainer agreements with the representative plaintiffs and payment of class counsel fees and disbursements and applicable HST from the settlement proceeds.

[2] I will deal with the motions in the same order as above.

Settlement Approval Motion

[3] This is a price fixing conspiracy action commenced August 6, 2014. The plaintiffs allege that the defendants participated in an unlawful conspiracy to fix, maintain, increase or control the price and supply of aluminum and tantalum electrolytic capacitors.

[4] A capacitor is an electronic device that stores an electric charge. Electrolytic capacitors are a type of capacitor that uses an electrolyte (ionic conducting liquid) as one of its conducting plates to achieve greater capacitance. Electrolytic capacitors are used in a wide variety of devices.

[5] Parallel actions have been commenced in British Columbia and Quebec. Approval of the settlement with the Panasonic defendants is also sought in those parallel actions.

[6] The settlement agreement requires that all three courts approve the settlement for the settlement to be binding and effective. If any court declines approval, the orders made approving the settlement are rescinded and the actions proceed as if there never was any settlement.

[7] I certified this action for settlement approval purposes by order dated November 20, 2020.

[8] An earlier settlement with the NEC defendants was approved on December 6, 2018. The NEC defendants paid $2.9 million.

Class Definition

[9] The class definition is:

> All persons in Canada who purchased Electrolytic Capacitors or a product containing an Electrolytic Capacitor during the Electrolytic Class Period other than (1) all BC Settlement Class Members (2) all Quebec Settlement Class Members and (3) excluded persons.
>
> Electrolytic Capacitor means: aluminum and tantalum electrolytic capacitors; and

Electrolytic Class Period means: September 1, 1997 to December 31, 2014.

(The capitalized words in the class definition are defined terms in the settlement agreement.)

Procedural Status

[10] The certification motion was scheduled but stayed to await the outcome of an appeal to the Supreme Court of Canada on issues material to this litigation. That decision was released last year, then the pandemic intervened. The suspension of in-court hearings, and the gradual re-opening and transition to virtual hearings has taken time. Thus, the action has yet to gain needed traction.

[11] The settlement with the Panasonic defendants takes place relatively early in the procedural life of the action but, as is evident, it has taken too long to get this far. I will be communicating with counsel to fix a date for the certification motion to be heard this year, if possible.

[12] The settlement agreement reached with the Panasonic defendants resolves the claims against the Panasonic defendants in this action and a second price fixing conspiracy action dealing with film capacitors: *Allott v. AVX Corporation et al*, London Court File No. 1272/16CP. The settlement must be approved in both actions to be binding.

[13] Many of the defendants and counsel are common to both actions. For that reason, the settlement approval motions in the two actions were heard together. However, I am providing separate reasons in each action for the sake of keeping the files discrete.

[14] To that end, I will focus in this endorsement on the terms of the settlement and benefits to the class in this action since court approval requires that any settlement be fair, reasonable and in the best interests of the class defined above – the class in this action. In other words, the issue to be determined is whether the settlement reached meets the test for approval in this action without regard to the merits of the settlement in the other action involving a different class.

Settlement Agreement

[15] The settlement agreement is dated October 12, 2020. Pursuant to the settlement agreement,

1. Panasonic will pay $5.9 million inclusive of costs and prejudgment interest for the benefit of the class; and

2. Panasonic will provide cooperation as described below.

[16] The cooperation obligations include,

1. An attorney proffer;

2. Employee witness interviews;

3. Document production including deposition transcripts and productions from US litigation and US DOJ investigations;

4. Transaction data; and

5. Affidavit and testamentary evidence at trial, on certification, or on contested hearings in the action.

[17] The cooperation to be provided by the Panasonic defendants offers a window into the alleged conspiracy, how it worked, who was involved, when, and provides data that plaintiffs' counsel indicates will be particularly helpful in economic modelling to calculate damages. It adds to information obtained through cooperation provided by the NEC Tokin defendants in their settlement.

[18] All of the Panasonic information comes to the plaintiffs early in the litigation, before any examination for discovery. There are limits on the cooperation to be provided. These are spelled out in the settlement agreement and have been taken into account in my assessment of the settlement.

[19] The settlement agreement contains the usual clauses that protect the rights and interests of the non-settling defendants. The presence of such provisions ensures that the non-settling defendants will not oppose the settlement and, in fact, that is the case here. The remaining non-settling defendants take no position on the settlement approval motion, although counsel did foreshadow future issues that may arise related to some of the cooperation terms.

[20] In return for the monies paid and cooperation to be provided, the Panasonic defendants get certainty and closure. The action is dismissed as against them. They are released from any claims that could be advanced by members of the class. Plaintiffs' counsel will not pursue other litigation against them in respect of the alleged conspiracy.

The Negotiations

[21] Both sides are represented by very experienced counsel. The negotiations took place between counsel over several months. No mediator was involved. Numerous draft settlement terms were exchanged. This was not a "quick and easy" settlement. The negotiations were arm's length and adversarial.

Notice to Class and Objectors

[22] Notice was provided to class members regarding the terms of the settlement in accordance with my order dated November 20, 2020. The notice program included, *inter alia*, newspaper publication, a press release, a banner ad, notices to various organizations for whom the settlement would be relevant, and postings on social media sites dedicated to this action. Class members were advised of their right to oppose the approval of the settlement including how to do so.

[23] No objections were received in advance of the settlement approval hearing and no one attended the settlement approval hearing to voice any concern or opposition.

Legal Principles

[24] Class action settlements require court approval: *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 29.

[25] In a recent decision in another price fixing conspiracy action (*Allott v. Panasonic Corporation*, London Court File No. 1899/15CP), I summarized the principles applicable to a motion to approve a settlement in a class proceeding. Counsel in this action are substantially the same as those in that action. I will simply reiterate what I wrote in that decision.

[26] In *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2643, Strathy J. (as he then was) adopted the summary of principles applicable to a motion for settlement approval from the decision of the Cullity J. in *Nunes v. Air Transat A.T. Inc.*, [2005] O.J. No. 2527 at para. 7:

a) to approve a settlement, the court must find that it is fair, reasonable and in the best interests of the class;

b) the resolution of complex litigation through the compromise of claims is encouraged by the courts and favoured by public policy;

c) there is a strong initial presumption of fairness when a proposed settlement, which was negotiated at arm's length by counsel for the class, is presented for court approval;

d) to reject the terms of a settlement and require the litigation to continue, a court must conclude that the settlement does not fall within a zone of reasonableness;

e) 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. However, the court must balance the need to scrutinize the settlement against the recognition that there may be a number of possible outcomes within a zone or range of reasonableness. All settlements are the product of compromise and a process of give-and-take. Settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when considered in light of the risks and obligations associated with continued litigation;

f) it is not the court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement. Nor is it the court's function to litigate the merits of the action or simply rubber stamp a proposed settlement; and

g) the burden of satisfying the court that a settlement should be approved is on the party seeking approval.

[27] In assessing the reasonableness of a proposed settlement, the following factors are useful:

a) the presence of arm's length bargaining and the absence of collusion;

b) the proposed settlement terms and conditions;

c) the number of objectors and nature of objections;

d) the likelihood of recovery or likelihood of success;

e) the recommendations and *experience* of counsel;

f) the future expense and likely duration of litigation;

g) information conveying to the courts the dynamics of, and positions taken by the parties during the negotiations;

h) the recommendation of neutral parties, if any; and

i) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation.

(See *Osmun*, at para. 32; *Nunes*, at paras. 6-7; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 (S.C.J.), at para. 45).

[28] The above factors are not to be applied in a mechanical way. It is not necessary that all factors be present in every case, nor that they be given equal weight: *Osmun*, at para. 33. These factors are a guide to aid in assessing whether the settlement is fair and reasonable and in the best interests of the class as a whole.

[29] In the absence of evidence to the contrary, the recommendation of experienced counsel should be given great weight. Counsel are well-positioned to assess the potential risks and rewards of the litigation: *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.*, [2005] O.J. No. 1118 (S.C.J.), at para. 142.

[30] Early settlements that help both to finance and advance the prosecution of the action against non-settling defendants are productive for both class counsel and class members: *Mancinelli v. Royal Bank of Canada*, 2016 ONSC 6953, at para. 33.

[31] Cooperation with the first settling defendant is particularly important and offers substantial benefit to the class: *Nutech Brands Inc. v. Air Canada*, 2009 CanLII 7095 (ON SC), at para. 37. In *Osmun*, at para. 36, Justice Strathy observed:

> [36] …In addition, securing the cooperation of Cadbury and ITWAL is an important and immeasurable non-pecuniary benefit. This would be significant in

> any case, but in a conspiracy action, where the allegation is that the defendants share a dark secret, obtaining the cooperation of two of the alleged conspirators to assist the plaintiff in pursuing the alleged co-conspirators is of inestimable value. ...

Analysis

[32] The settlement reached is the product of lengthy adversarial negotiations. There is no basis for concern regarding procedural fairness. This is no "sweetheart" deal.

[33] Plaintiffs' counsel estimates Panasonic's potential exposure in this action to be $11.83 million. That estimate is based on a number of assumptions concerning Panasonic's global sales, the amount of sales reaching Canada, the estimated overcharge, the pass-through rate, and the conversion from US dollars to Canadian. The assumptions used by counsel reflect information gleaned from counsel's investigations. I note that the estimate includes nothing for costs or pre-judgment interest.

[34] The Panasonic defendants do not agree with or accept the figures put forward by the plaintiffs. I would not expect them to do so. If the settlement is not approved and they are forced to continue to defend the action, they would not want the methodology or figures used to be thrown back at them later.

[35] The non-settling defendants likewise do not accept either the methodology used by plaintiffs' counsel or the figures provided. Again, that hardly comes as a surprise. If the settlement is approved, the non-settling defendants will not want to be bound by the plaintiffs' rough calculation of Panasonic's share of the damages if the action ultimately succeeds. Undoubtedly, there are additional reasons why they would not want to be taken to have accepted the approach used or figures provided. Nevertheless, they do not oppose the settlement approval motion because their procedural and substantive interests have been safeguarded by the provisions in the settlement agreement and draft order.

[36] I am well-aware that the numbers used by counsel are estimates. The plaintiffs do not have all the needed financial and transactional data for a comprehensive damage calculation and, depending on what, if anything, is certified, they may never have that information. This settlement is pre-certification and pre-discovery.

[37] Further, the estimated potential exposure ($11.83 million) does not take into consideration any litigation risk. The action might not be certified and, if so, each class member would be left to sue individually. Would any do so? Would such litigation be financially viable?

[38] Even if certified, the defendants including Panasonic may succeed in defending the action on its merits and/or the assumptions inherent in the estimate of the Panasonic defendants' potential exposure could prove to be significantly less. This litigation is no sure thing if such exists.

[39] There is, however, one certainty: if the settlement is not approved, the action will proceed with the Panasonic defendants as parties. It will take years to finish and the outcome is

unknown. Conspiracy actions are notoriously difficult to successfully prosecute. The defendants in this case, including the Panasonic defendants, are large, well-heeled parties with the means to make this litigation the equivalent of Napolean's march on Moscow.

[40] As indicated, counsel for the Panasonic defendants and the non-settling defendants do not accept the accuracy of or appropriateness of the plaintiffs' economic analysis. It would not likely pass muster if tendered as a damage assessment. It does, however, provide insight into plaintiffs' counsel's assessment of the risks of litigation and their perception of the range of potential recovery at this stage based on their investigations. Plaintiffs' counsel are experienced in this kind of litigation. They have approached the litigation and negotiations with diligence, and they recommend this settlement as one that is fair, reasonable and in the best interests of the class. That recommendation carries weight.

[41] I am satisfied that the economic analysis provided gives this court some basis on which to assess the fairness of the amount to be paid by the Panasonic defendants. In *Allott v. Panasonic*, plaintiff's counsel provided similar evidence as here to rationalize the fairness of the amount paid. In that decision, I wrote at para. 31:

> I cannot conclude on the evidence before me that the economic approach taken by plaintiff's counsel at this stage is flawed or deficient. It is one approach to estimating possible future recovery from these defendants. It takes into account the myriad of risks inherent in this litigation. It may not be an approach that would be used in a trial where damages are determined, but that does not mean that it fails to provide the court with some evidence on which to base its assessment of the fairness of the settlement. At a minimum, it provides insight into plaintiff's counsel's rationale for the dollar amount at which settlement was achieved.

That reasoning applies equally here.

[42] I am mindful that this settlement also provides advance information and ongoing cooperation to the plaintiffs to assist them in prosecuting this action as against the remaining non-settling defendants. While the Panasonic defendants are not the first settling defendants, the principle in *Osmun* applies; Panasonic's cooperation is "an important and immeasurable non-pecuniary benefit".

[43] The settlement provides the plaintiff class with $5.9 million plus cooperation benefits that likely will assist in pursuing the claim. I am satisfied that the settlement provides real and significant benefits to the plaintiff class. It falls within the zone of reasonable outcomes. It is fair, reasonable and in the best interests of the class. The settlement with the Panasonic defendants is approved.

Draft Order

[44] Plaintiffs' counsel provided a draft order which is satisfactory save for para 21. The following words should be removed:

> …and, subject to the approval of this Court, after the Effective Date, the Settlement Amount can be used to pay Class Counsel Disbursements incurred for the benefit of the Settlement Classes in the continued prosecution of the Ontario Electrolytic Action against the Non-Settling Defendants

[45] The same wording was present in the draft order in *Allot v. Panasonic Corporation.* I required then, as I do now, that the above be excised from the order. I adopt the rationale provided in that decision.

[46] Counsel are requested to provide me with a clean order for signature.

Counsel Fee Approval Motion

[47] Plaintiffs' counsel in this action seek an order approving their retainer agreement with the representative plaintiffs, and payment of class counsel fees of $1,487,500 plus applicable taxes and disbursements of $141,866.96 plus applicable taxes. The order is contingent on and is not effective until approval of the settlement agreement and the requested fees and disbursements by all three courts.

Retainer Agreements

[48] Mr. Foreman and his team were members of Harrison Pensa LLP when this action was commenced. The retainer agreements with Harrison Pensa LLP were approved by order dated December 10, 2018 when the NEC Tokin settlement and class counsel fees were approved.

[49] Mr. Foreman and his team left Harrison Pensa LLP in 2020. New retainer agreements were signed with the representative plaintiffs. Those agreements are identical to the approved Harrison Pensa LLP retainer agreements. As new retainer agreements, they require approval of the court.

[50] Section 32 of the *CPA* governs the minimum requirements for a retainer agreement in a class proceeding. I find that the retainer agreements with Foreman & Company in this action meet the requirements in s. 32(1) of the *CPA* in that:

a. They are in writing;

b. They state the terms under which fees and disbursements shall be paid;

c. They provide an estimate of the expected fee, whether contingent on success in the class proceeding or not; and

d. They state the method by which payment is to be made - a lump-sum percentage subject to approval of the court.

[51] An affidavit has been filed that clarifies that 1) the time and disbursements for which payment is requested includes time and disbursements from both Harrison Pensa LLP and Foreman & Company, 2) the arrangements between Foreman & Company and Harrison

Pensa LLP are subject to a transition agreement, and 3) there is no prospect that a future claim will be advanced by Harrison Pensa LLP for any fees and disbursements pursuant to its retainer agreements.

[52] Given that the retainer agreements with Foreman & Associates mirror that which was previously approved, there is no need to undertake a fresh analysis of the new retainer agreements. They are approved.

Reasonableness of Counsel Fees Requested

[53] Plaintiffs' counsel seek approval of a payment of counsel fees from the settlement funds of $1,487,500 plus HST which is 25% of the settlement amount in the Panasonic settlement. The retainer agreement provides for a payment of up to 30% subject to court approval.

[54] In determining the reasonableness of class counsel fees, courts have traditionally considered the following factors:

a. the factual and legal complexities of the matters dealt with;

b. the risk undertaken, including the risk that the matter might not be certified;

c. the degree of responsibility assumed by class counsel;

d. the monetary value of the matters in issue;

e. the importance of the matter to the class;

f. the degree of skill and competence demonstrated by class counsel;

g. the results achieved;

h. the ability of the class to pay;

i. the expectations of the class as to the amount of fees; and

j. the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.

(See *Osmun*, para. 23; *Abdulrahim v. Air France*, 2011 ONSC 512 at para. 8.)

[55] As mentioned, this is not the first settlement in this action. The NEC Tokin settlement was approved on December 10, 2018. On the same date, counsel fees were approved in the amount of $725,000. That amount represented 25% of the amount of the settlement with the NEC Tokin defendants.

[56] Counsel for the plaintiffs in the three parallel actions are working together.

[57] The value of docketed time by the three firms since commencement of the action is $3,355,711. Almost $3 million of that amount represents the value of time docketed by plaintiffs' counsel in the Ontario action. The aggregate amount of time docketed must be reduced or credited by the monies previously approved and paid - $725,000. Thus, the value of docketed time net of the previous amount paid is $2,630,711. The amount for which approval is sought will put a significant dent in that amount but will not pay all time expended.

[58] I pause to note that I do not have dockets nor would I expect to have them at this stage given the ongoing litigation with the non-settling defendants. At some point, those dockets will be provided. The retainer agreement is a contingency agreement that provides for a payment of a percentage of the recovery. The value of docketed time is a relevant consideration but not the only consideration at the end of the day.

[59] This action is complex litigation. It carries significant risk for counsel. That risk includes the risk that the action will not be certified on a contested basis, will not be certified on issues related to damages, will not be successful at trial on the merits, may be subject to appeals, and may take years to reach its end. Counsel have committed to pursue this action to the bitter end. They signed onto that risk with their eyes open and they have advanced the interests of the class with diligence to this point.

[60] Counsel are experienced class action litigators. They have assumed significant responsibility. The recovery to the class through the settlement with the Panasonic defendants provides real benefit to the class. The action is important to class members. The amount requested is consistent with the retainer agreements signed. The representative plaintiffs support the motion for fee approval.

[61] Finally, plaintiffs' counsel have agreed to indemnify the representative plaintiffs against any adverse cost award. With so many defendants and counsel on the other side, that indemnity carries additional significant monetary risk.

[62] I am satisfied that the 25% requested is fair and reasonable. It is consistent with similar approvals on partial settlements in several other cases including earlier in this case.

[63] Therefore, I approve payment of counsel fees of $1,487,500 plus HST to be paid from the monies received and held in trust from the settlement with the Panasonic defendants.

[64] I observe that approval of 25% twice in this action should not be taken as a guarantee that the same percentage will be applied to future settlements. Such requests will be addressed on their merits if, and when, brought.

Disbursements

[65] Counsel seek approval for payment of disbursements of $141,866.96 and applicable taxes. The amount of applicable tax is not set out. The affidavit filed on the motion details the disbursements by category of expense. The largest amount is for expert fees of $36,096 which relates to the expert report obtained for the certification motion.

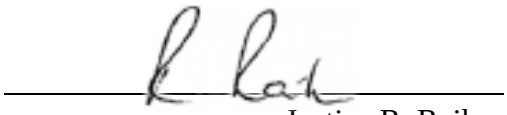
[66] The breakdown of disbursements does not differentiate between those incurred in each of the three actions. Are the disbursements listed in the affidavit incurred only in the Ontario action?

[67] I note that the approval needed for fees and disbursements is from all three courts. Thus, even if the disbursements include out-of-pocket expenses incurred in the other two actions, approval by all three courts will suffice. Counsel will not get paid twice for the same expense.

[68] The disbursements strike me as reasonable and appropriate to this litigation.

[69] Therefore, disbursements of $141,866.96 plus applicable taxes are approved to be paid from the settlement funds received and held in trust from the settlement with the Panasonic defendants.

[70] Counsel have provided a draft order for this motion which is satisfactory. I will sign it when I sign the order for approval of the settlement with the Panasonic defendants.



Justice R. Raikes

Date: April 13, 2021