

CITATION: Cygnus Electronics Corporation v. Panasonic Corporation, 2021 ONSC 7623
COURT FILE NO.: 3795/14CP
DATE: 20211117

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

COURT FILE NO: 1272/16CP

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Sean Allott, Plaintiff

AND:

AVX Corporation; ELNA Co., Ltd.; ELNA America Inc.; Hitachi Chemical Co., Ltd.; Hitachi Chemical Company America, Ltd.; Hitachi Canada; Hitachi AIC Inc.; Kemet Corporation; Kemet Electronics Corporation; Matsuo Electric Co., Ltd.; Nichicon Corporation; Nichicon (America) Corporation; Nippon Chemi-Con Corporation; United Chemi-Con Corporation; Nissei Electric Co. Ltd.; Nitsuko Electronics Corporation; Okaya Electric Industries Co., Ltd.; Okaya Electric America, Inc.; Panasonic Corporation; Panasonic Corporation of North America; Panasonic Canada Inc.; ROHM Co., Ltd.; ROHM Semiconductor U.S.A., LLC f/k/a ROHM Electronics U.S.A., LLC; Rubycon Corporation; Rubycon America Inc.; Shinyei Kaisha; Shinyei Technology Co., Ltd.; Shinyei Capacitor Co., Ltd.; Shizuki Electric Co., Ltd.; American Shizuki Corporation; Soshin Electric Co., Ltd.; Soshin Electronics of America Inc.; Taitso Corporation; Taitso America, Inc.; Toshin Kogyo Co., Ltd.; Holy Stone Enterprise Co., Ltd.; Milestone Global

Technology, Inc. d/b/a Holystone International; and Vishay Polytech Co., Ltd.
f/k/a Holysone Polytech Co., Ltd., Defendants

BEFORE: Justice R. Raikes

COUNSEL: Jonathan Foreman, Sarah Bowden and Anne Legate-Wolfe – Counsel for the Plaintiffs

Eric Dufour, Pascale Cloutier and Brian Whitwham, Counsel for AVX Defendants

Kevin Wright, Todd Shikaze and Emily Snow, Counsel for the Elna Defendants

J. Thomas Curry, Paul-Erik Veel and Lauren Mills Taylor, Counsel for the Fujitsu Defendants

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

Davit Akman and Michelle Maniogo, Counsel for the Kemet Defendants

Adam Goodman and Chloe Snider, Counsel for the Matsuo Defendants

Neil Campbell and William Wu, Counsel for the Nichicon Defendants

Gordon 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

Robert Kwinter, Counsel for the Soshin Defendants

Mark Evans and Sandra Walker, Counsel for the Shinyei Defendants

Nicholas Hooge, Robert Anderson and Ludmila Herbst, Counsel for Shizuki Defendants

HEARD: October 27, 2021

ENDORSEMENT

- [1] The plaintiffs in the above two actions have entered into a settlement agreement with the ELNA defendants. They move to certify each action for settlement purposes, and to approve the notices and notice plan to inform class members of the settlement approval hearing including how to object to same.

Certification for Settlement Purposes

- [2] Both actions are alleged price fixing claims. The first (3795/14CP) involves electrolytic capacitors (hereafter “the Electrolytic Capacitor Action”), and the second (1272/16CP) involves film capacitors (hereafter “the Film Capacitor Action”).
- [3] The Electrolytic Capacitor Action is one of three parallel actions related to the alleged price fixing conspiracy. The Quebec action is restricted to Quebec residents. The British Columbia action is restricted to British Columbia residents. The proposed class definition

in this action is for a national class excluding Quebec and British Columbia residents. The ELNA defendants are named defendants in all three actions.

- [4] The requested order to certify the Electrolytic Capacitor Action for settlement purposes and any subsequent order that might approve the settlement reached will be contingent on similar orders and approvals from the other two courts. Unless all three courts certify and approve, the settlement is void as if it never happened.
- [5] This is the third partial settlement in the Electrolytic Capacitor Action. The plaintiffs previously settled with the Tokin and Panasonic defendants. Those settlements were approved by all three courts.
- [6] The Film Capacitor Action stands on slightly different footing. There are three parallel actions in Ontario, Quebec, and British Columbia but the ELNA defendants are named as defendants only in the Ontario action. For purposes of this settlement, the plaintiff in the Film Capacitor Action proposes that the class be defined to encompass all of Canada.
- [7] There have been three prior partial settlements in the Film Capacitor Action. The plaintiff previously settled with the Okaya, Nitsuko, and Panasonic defendants. Those defendants were named defendants in the three parallel actions. Those settlements were approved by all three courts. Of course, prior to settlement approval, the three courts each certified the actions for settlement approval process. Thus, the opportunity to opt out of those actions has passed.
- [8] Pursuant to the settlement agreement, the ELNA defendants will pay \$2,475,000 to the plaintiff class in the Electrolytic Capacitor Action, and \$25,000 to the plaintiff class in the Film Capacitor Action. There is a reason for the significant difference between the two amounts which is best addressed at the settlement approval hearing.
- [9] The material filed for the motions to certify for settlement purposes mirrors that previously filed for the earlier settlements. The only wrinkle, as mentioned, is the scope of the class definition in the Film Capacitor Action; that class definition is broader than the class definitions used for the earlier settlements because, unlike the ELNA defendants, the prior settling defendants were parties to all three actions.
- [10] In *Allott v. Panasonic Corporation*, 2021 ONSC 5148, I dealt with a similar motion to expand the class definition beyond that pleaded to capture a defendant not named in a parallel class proceeding. I wrote at para. 21:

In my view, the court must consider the following non-exhaustive considerations when asked to expand the class definition into another jurisdiction where there is a companion class proceeding in respect of the same alleged wrongdoing and the settling defendant is not named in that litigation:

1. Will the expanded class definition undermine judicial comity?
2. Are the parties engaged in jurisdiction shopping?

3. Will expanding the class definition prejudice class members?
4. Will proceeding in this manner be a more efficient use of judicial resources?
5. Where will the settlement funds be held pending distribution?

[11] Having regard to those factors in the context of the Film Capacitor Action and the motion before me to certify for settlement purposes, I find as follows:

1. There is little chance that the proposed class definition will undermine judicial comity. The law applicable to certification and settlement approvals is comparable in both jurisdictions. Settlement approval, if granted, will not impact the action in British Columbia nor conflict with decisions made in that action.
2. The parties are not jurisdiction shopping. The settlement amount payable is very modest. Moving to add the ELNA defendants to the British Columbia action, then bringing a companion motion to certify for settlement purposes is both inefficient and cost prohibitive. Common sense should apply.
3. There is no prejudice to class members. Any monies paid into the settlement pot will inure to the benefit of class members in the three actions.
4. As a corollary to #2 above, it is a more efficient use of judicial resources to do in one motion what would otherwise require two.
5. The settlement funds paid will go into a single pot to the credit of the class members in all three actions. The final distribution to class members will require approval of all three courts.

[12] Accordingly, the proposed expanded class definition in the Film Capacitor Action is appropriate as part of the certification for settlement purposes.

[13] These actions were commenced in 2014 and 2016, respectively. The transition provision in s. 39(1)(a) of the *CPA*, as amended, applies. Accordingly, the applicable test for certification is set out in s. 5(1) of the *CPA* as it read before the amendments in 2020.

[14] Section 5(1) stated:

5 (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

- (a) the pleadings or the notice of application discloses a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

- (c) the claims or defences of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) there is a representative plaintiff or defendant who,
 - i. would fairly and adequately represent the interests of the class,
 - ii. has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
 - iii. does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[15] The burden rests on the plaintiff to satisfy all the criteria: *AIC Limited v. Fischer*, [2013] S.C.R. 949 at para. 48. Certification is mandatory where the requirements of s. 5(1) are satisfied: *Hurst v. Berkshire Securities Inc.*, [2006] O.J. No. 3647 (S.C.J.) at para. 11.

[16] The test for certification is relaxed in the context of a settlement approval. The same factors are considered but the test is not as rigorously applied: *Currie v. McDonald's Restaurants of Canada Ltd.*, 2006 CarswellOnt 1213 (S.C.J.), at para. 18; *CSL Equity Investments Ltd. v. Valois*, 2007 CarswellOnt 2521 (S.C.J.), at para. 5.

[17] Both actions have previously been certified for settlement purposes multiple times. There is no material difference between the motion materials filed in respect of the ELNA defendants and the earlier approved settlements save as to the class definition in the Film Capacitor Action which I have addressed above. There is no need to repeat the analysis previously set out. I am satisfied that the criteria for certification are met given the relaxed standard applicable to settlements. The rationale previously stated in my earlier decisions applies with equal force to this motion and I adopt it.

[18] Accordingly, the Electrolytic Capacitor Action and Film Capacitor Action are each certified for settlement purposes.

Notices and Notice Plan

[19] The notices proposed are virtually identical to those approved for the earlier settlements save for the details of this settlement. They provide a clear and understandable summary of the settlement, how to object, the fact of the counsel's request for counsel fees in the Electrolytic Capacitor Action, and how to object to those fees. The notices are approved.

[20] The notice plan to disseminate the notices to alert and inform class members is slightly different than that used previously. The difference lies in the omission of any print publication of the notice in a newspaper. Instead, the focus of the notice plan is largely through electronic means. There is still a press release which may garner newspaper interest. The news release may lead to the story being picked up in some quarters.

- [21] The knock on print notices rests on the following: 1) it is typically run in a single newspaper on a single day; 2) it is very expensive; 3) the prospect of a class member reading that particular newspaper on that particular day, and the section of the newspaper in which the notice is found is very modest; and 4) many consumers do not buy hard copy newspapers any more – they get their news online. The cost/benefit analysis favours devoting resources to effectively promote notice to the class through other means.
- [22] The notice plan includes banner ads, a press release, notice to interested organizations, posting on various social media platforms. In my view, that is a reasonable approach. The notice plan is approved.
- [23] Counsel are asked to provide draft orders for my signature.



Justice R. Raikes

Date: November 17, 2021