

CITATION: Cygnus Electronics et al v. Panasonic et al, 2023 ONSC 7278
COURT FILE NO.: 3795/14CP
DATE: 20231229

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/k/a Holystone Polytech Co., Ltd.; Milestone Global Technology, Inc. d/b/a Holystone International; and Holy Stone Holdings Co., Ltd., Defendants

PROCEEDING UNDER THE CLASS PROCEEDINGS ACT, 1992, S.O. 1992, c. 6

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 Holystone Polytech Co., Ltd., Defendants

PROCEEDING UNDER THE CLASS PROCEEDINGS ACT, 1992, S.O. 1992, c. 6

BEFORE: Justice R. Raikes

COUNSEL: J. Foreman, J.M. Metrailler - Counsel, for the Plaintiffs

E. Dufour and B. Whitwham - Counsel, for the AVX Defendants

J.T. Curry and Paul-Erik Veel - Counsel, for the Fujitsu Defendants

K. Kay, E. Kolers, M. Walli - Counsel, for the Hitachi Defendants

D. Akman and E. Buist - Counsel, for the KEMET Defendants

A. Goodman and C. Snider - Counsel, for the Matsuo Defendants

Dr. N. Campbell and W. Wu - Counsel, for the Nichicon Defendants

G. Capern and M. Fenrick - Counsel, for the Nippon Chemi-Con and United Chemi-Con Defendants

P. Martin - Counsel, for the ROHM Defendants

W. M.G. Osborne - Counsel, for the Rubycon Defendants

M. Evans and S. Walker - Counsel, for the Shinyei Defendants

N. Hooge, R. Anderson, L. Herbst - Counsel, for the Shizuki Defendants

R. Kwinter - Counsel, for the Soshin Defendants

HEARD: October 23, 2023

ENDORSEMENT

- [1] The plaintiffs entered into partial settlement agreements with the following defendants in the above two actions: ROHM, Fujitsu, KEMET, Nichicon, and NCC/UCC.
- [2] Pursuant to those agreements, the defendants paid in aggregate \$42,165,000 to the credit of action #3795/14CP (hereafter “the Electrolytic action”) and \$1,075,000 to the credit of action # 1272/16CP (hereafter “the Film action”).

- [3] Each settlement agreement provides for an “all in” payment by the settling defendant; *viz.* there is no express contribution by any defendant on account of costs.
- [4] Class counsel in the Electrolytic and Film actions comprise counsel from firms in Ontario, British Columbia, and Quebec. They work cooperatively and collaboratively to advance the claims of the class.
- [5] Class counsel move for an order in the Film action approving disbursements incurred by counsel in the amount of \$130,807.94, and payment of those disbursements from the settlement funds received in that action. They do not seek approval of class counsel fees at this time.
- [6] Class counsel also move for an order for approval of class counsel fees and disbursements in the Electrolytic action; in particular, they seek an order,
- i. approving a contingent fee to Ontario and British Columbia counsel of \$8,350,279.82 plus applicable taxes;
 - ii. directing that 80% of that amount (\$6,686,559.45 plus tax) be paid upon the Effective Date of the settlement agreements and the remaining 20% (\$1,663,720.37 plus tax) be paid upon further court order either upon commencement of a distribution process for the benefit of class members and/or further settlements with the remaining defendants; and
 - iii. approving disbursements of \$35,942.61 plus applicable taxes incurred by Ontario and British Columbia class counsel and directing that they be paid to counsel from the settlement funds immediately.
- [7] The full contingent fee sought by class counsel in the Electrolytic action is \$10,523,264.35; however, Quebec counsel’s fee of \$2,181,984.53 is carved out and will be considered by the Quebec court. I am dealing only with fee and disbursement approval for Ontario and British Columbia counsel as it relates to the Electrolytic action on the motion before me.
- [8] The aggregate contingency fee sought by class counsel is 25% of the above partial settlements (\$42,165,000 x 25%).

Retainer Agreements

- [9] The retainer agreements with the Ontario representative plaintiffs have previously been approved in both actions.
- [10] The retainer agreement with Cygnus Electronics Corporation in the Electrolytic action provides that in the event of success by way of settlement or judgment, a contingency fee of 25% of the recovery shall be payable to counsel plus applicable taxes and disbursements. The agreement also contemplates that the percentage can be increased to 30% at the discretion of Cygnus, if it determines that a fee in that range is warranted. The agreement expressly provides that the legal fees charged are subject to court approval.

- [11] The retainer agreement with Mr. Allott is slightly different. It provides that Foreman & Company will charge “a maximum legal fee of 30% of the value of the result obtained on behalf of the class in the event of success.”

Earlier Settlements and Fees/Disbursements Ordered

- [12] The above settlements are not the first partial settlements reached in the Electrolytic action. The plaintiffs previously entered into partial settlements with each of the TOKIN, Panasonic, ELNA, and Holy Stone defendants. Those settlements have been approved. The gross amount paid pursuant to those settlements was \$12,115,000. Thus, together with the partial settlements listed in paragraph one above, the aggregate gross settlement funds paid by settling defendants to date is \$54,280,000.
- [13] To date, the approved class counsel fees paid to counsel in the Electrolytic action are \$3,028,750 which is 25% of \$12,115,000.
- [14] Earlier disbursements incurred by counsel in the Electrolytic action have also been approved and paid from earlier settlement funds. The amount requested for disbursements on this motion (\$35,942.61) represents disbursements incurred between March 1, 2022 and August 31, 2023.
- [15] In the Film action, the plaintiff entered into earlier partial settlement agreements with the Okaya, Nitsuko, Panasonic, ELNA and Holy Stone defendants. Those settlements were approved. The gross amount of those earlier settlements is \$2,092,000. The aggregate settlement funds paid by settling defendants to date in the Film action is \$3,167,000.
- [16] By order dated April 13, 2021, I approved payment of disbursements incurred of \$31,673.70 from the Panasonic settlement funds in the Film action. The disbursements requested in the motion before me in the Film action reflect unpaid disbursements to August 31, 2023.
- [17] I turn now to consideration of the reasonableness of the disbursements in both actions.

Disbursements

- [18] The disbursements in the Film action are itemized by category at paragraph 46 of Ms. Bowden’s affidavit. As mentioned, these disbursements were incurred by class counsel up to August 31, 2023 and do not include disbursements previously incurred and paid by earlier orders.
- [19] By far, the largest expense is expert fees in the amount of \$68,413.64. The plaintiff has prepared his certification materials which includes expert reports by an economist and others. The next highest disbursement category is ‘process server’ at \$22,878.18. The defendants in the Film action are almost entirely foreign corporations. Notice costs of \$14,505.10 were also incurred.

- [20] I am satisfied that the disbursements are reasonable on their face and are approved. Therefore, class counsel shall be reimbursed the sum of \$130,807.94 plus applicable taxes from the settlement funds held in the Film action.
- [21] With respect to the disbursements in the Electrolytic action, the amount requested is \$35,942.61 plus applicable taxes. There are additional disbursements incurred, but I am advised that those disbursements will be sought as part of the approvals in the Québec action.
- [22] The largest disbursement cost item at paragraph 44 of Ms. Bowden's affidavit is the cost of notice to the class in the amount of \$14,710.79. The disbursements are reasonable and are approved. The disbursements shall be paid to class counsel from the settlement proceeds in that action.

Class Counsel Fees

- [23] 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 v. Cadbury Adams Canada Inc.*, 2010 ONSC 2752, at para. 23; *Abdulrahim v. Air France*, 2011 ONSC 512, at para. 8.)

These factors can be broadly understood to address: 1) results achieved, 2) risks assumed, and 3) responsibility undertaken.

- [24] In *Allott v. Panasonic Corporation*, 2023 ONSC 5749, at paras. 22 and 23, I set out the benefits of interim counsel fee approvals from partial settlements in the following terms:

[22] The settlement here is with some but not all defendants. Approval of payments to counsel as and when partial settlements are achieved benefit the class and counsel. First, the payment incentivizes counsel to take on complex claims with multiple defendants. Second, the payment provides counsel with monies needed to continue the litigation with the remaining defendants. Third, it signals to the remaining defendants and their counsel that plaintiff's counsel have the means to continue to vigorously pursue the claim.

[23] This action is complex litigation. The defendants are large, international corporations with significant resources with which to litigate. The balance of the action could well take years to play out. The cost of the litigation could be enormous. Disbursements alone could be a significant financial burden, one borne exclusively by counsel. Staff need to be paid. The landlord needs to be paid to mention but two of many operating costs. The risks and expense of this type of litigation are not for the faint of heart. It is important that counsel be remunerated as and when they achieve success.

[25] In *Adams v. Apple Inc.*, 2023 ONSC 2957 and more recently in *Allott v. Panasonic Corporation*, *supra*, at paras. 11-36, I concluded that class counsel fees should be determined net of disbursements and an appropriate notional contribution to costs by the settling defendants where the settlement amount did not expressly set out such a contribution. Disbursements do not include notice costs for purposes of calculating the recovery to the class.

[26] The partial settlements on which the counsel fee request is based total \$42,165,000. The disbursements in the Electrolytic action are quite limited. When notice costs are excluded, the amount of disbursements is \$21,231.82. The total recovery from the partial settlements is likewise reduced by that amount to \$42,143,768.

[27] Four of the five partial settlements occurred before the certification motion was argued. The settlement with the NCC/UCC defendants occurred after the certification motion was argued but before the decision was released. Counsel advised during the certification motion that there was an agreement in place pursuant to which neither side would seek costs against the other if successful on the certification motion.

[28] In these circumstances, it seems to me that the notional contribution to costs by the defendants would be quite limited. I fix the notional contribution to costs at \$200,000. That contribution reduces the total recovery from these partial settlements to \$41,943,768.

[29] I turn now to the factors enumerated above.

[30] **Factual/Legal Complexity** – This is a global price fixing class action involving an electronic component manufactured outside of Canada which is used in a wide range of products sold in Canada. The law relating to claims by indirect and umbrella purchasers including the requirements and scope of expert evidence necessary for certification has literally evolved as this litigation has proceeded. It is complex litigation both legally and factually.

- [31] **Risk Undertaken** – The certification motion and preliminary steps for that motion were vigorously contested. Leave to appeal certification has been sought. I am unaware of the outcome of that motion. The plaintiffs faced a jurisdiction motion from two defendants including Fujitsu. Leave to appeal that decision is also sought.
- [32] Cross-examinations on affidavits, expert witness evidence, and detailed investigation of the facts underlying the claim including regulatory prosecutions in other jurisdictions has occurred.
- [33] The defendants are large corporations with the means to litigate this action for years to come. There is no guarantee of success. There was no guarantee of certification, and it remains to be seen whether leave to appeal will be granted and, if so, whether the appeal will change the outcome of that motion. The risks in the litigation are referred to in my decision approving the partial settlements. I adopt them for purposes of this analysis.
- [34] **Degree of Responsibility** – Class counsel has assumed a high degree of responsibility for the prosecution of this action and in the negotiations by which partial settlements have been achieved. Class counsel have agreed to indemnify the representative plaintiffs against adverse cost awards.
- [35] **Monetary Value** – The amounts at stake in the action, if successful, are potentially large. The settlements reached to date reflect the monetary value of the claim. They are necessarily compromised figures but the total of all partial settlements to date is significant.
- [36] **Degree of Skill and Competence** – There is no issue with the skill and competence of class counsel. They have been diligent, well-prepared, and appear to have a thorough grasp of the matters in issue.
- [37] **Results Achieved** – Each of the partial settlements has been approved as fair, reasonable, and in the best interests of the class. The aggregate recovery through settlements to date has produced tangible benefits for the class.
- [38] **Ability of Class to Pay** – The economics of individual claims is discussed in my certification decision. There is no reason to believe that most class members would be able to afford to pay to prosecute this action, nor is there any evidence of a ‘white night’ riding in to do so. But for the contingent fee arrangement, this litigation would likely not proceed.
- [39] **Class Expectations re Amount of Fees** – I venture that most class members have no idea what a fair and reasonable class counsel fee should be. The fee requested is within the percentages contemplated by the retainer agreements. I note that the Cygnus retainer agreement calls for 25% even if the matter goes all the way to trial which remains an unknown. Any increase above 25% is in the discretion of the client and subject to court approval.
- [40] **Opportunity Cost** – The affidavit of Ms. Bowden sets out at para. 41 the time docketed by lawyers, staff, students, and clerks at the three firms from inception of the file. Hourly rates are provided as a range for each identified lawyer etc. For example, Mr. Mogergerman,

a 1997 call to the Bar, shows a range of \$625-1000/hour. Ms. Bowden, a 2009 call to the Bar, shows a range of \$300-525/hour. Law clerks are billed at \$140-250/hour.

- [41] It is clear that substantial time and resources have been devoted to this litigation. No doubt, that time and those resources could have been dedicated to finding and working on other cases.
- [42] In their factum, class counsel placed emphasis on the multiplier – that the value of docketed time relative to the fees sought and already recovered is entirely reasonable, perhaps unduly moderate. I note the following, however,
- i. There are twelve lawyers named on the list of lawyers who spent considerable time on the case, and each firm has a further category for “other lawyers”;
 - ii. There is no evidence that any discount was applied to reflect the inevitable duplication that comes from having so many lawyers at three firms working the file;
 - iii. The hourly rates are very generous and, in some cases, excessive. Counsel point in their factum to even higher hourly rates charged by some defence counsel as justification for their rates. That does not affect my view of the hourly rates used by class counsel. Too high is too high; and
 - iv. This action remains in its procedural infancy yet class counsel claim to have docketed fees valued at an astonishing \$6,567,082.

Suffice to say that the use of a multiplier to justify the fees claimed in this case is challenging given the distortion from the excessive time and hourly rates, the lack of discount for duplication, and the sheer volume of lawyers and clerks who purport to have worked on the file. I do not doubt that much work has been done. I do not question the results obtained on the approved settlements. I do have concerns with the above and its impact on the utility of the multiplier as a check.

- [43] As already mentioned above, class counsel have already received payment of class counsel fees of \$3,028, 750 plus applicable taxes. Their disbursements have likewise been approved and paid. The amount of disbursements carried on this file at any one time has been relatively modest.
- [44] Class counsel point to counsel fees approved in other class proceedings involving components where partial settlements were achieved, and costs awarded at 25% with no holdback. Counsel contends that 25% was held to be “presumptively valid” in those cases.
- [45] The case law provided is helpful much like sentencing cases or damages awards assist the trial judge in achieving parity. They provide a touchstone for assessing the reasonableness of fee request in similar cases. I do not take the case law cited to set a firm rule that 25% is the appropriate award in every case. What is fair and reasonable depends on the facts and evidence before the court for each case.

- [46] What then is a reasonable counsel fee based on the partial settlements obtained – the five settlements referred to in paragraph one above? The amount requested by class counsel excluding Quebec is roughly 79.3% of the overall fee request.
- [47] I find that a fair and reasonable fee payable to Ontario and British Columbia class counsel based on the partial settlements reached with the defendants in paragraph one above is \$7,750,000 plus applicable taxes. I arrive at that figure through consideration of the risks taken, the payments already received, the results achieved, and the responsibility taken by counsel. That amount seems to me to properly and adequately reward and incentivize counsel for their efforts.
- [48] I further find that it is appropriate to holdback \$1,500,000 pending further order of the court. I do not tie that further order to distribution or future settlements although both events may be a reasonable point to address the holdback. The holdback is appropriate given that class members have yet to receive any monies while counsel will have received significant payments.

Conclusion

- [49] For the reasons above, I order as follows:
- i. In the Film action, disbursements of \$130,807.94 plus applicable taxes are approved and shall be paid to class counsel from the settlement funds in that action.
 - ii. In the Electrolytic action, disbursements of \$35,942.61 plus applicable taxes are approved and shall be paid to class counsel from the settlement funds in that action.
 - iii. In the Electrolytic action, class counsel fees of \$7,750,000 plus applicable taxes are approved and \$6,250,000 plus taxes shall be paid to class counsel immediately from the settlement funds in that action. The remainder (\$1,500,000 plus taxes) shall continue to be held in the settlement funds in trust pending further court order.



Justice R. Raikes

Date: December 29, 2023