

CITATION: Cygnus Electronics et al v. Panasonic et al, 2023 ONSC 6014
COURT FILE NO.: 3795/14CP
DATE: 20231025

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

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

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

**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: September 28 and October 23, 2023

ENDORSEMENT

- [1] On September 28, 2023, I heard motions in the above two class proceedings for court approval of partial settlements reached with the ROHM, Fujitsu, KEMET, and Nichicon defendants, respectively. I reserved my decision.
- [2] On October 23, 2023, I heard motions in the above two class proceedings to approve a further partial settlement reached with the Nippon Chemi-Con and United Chemi-Con Defendants (hereafter “the NCC/UCC defendants”).

- [3] This endorsement will address all five partial settlements. There was also a motion for approval of class counsel fees and disbursements arising from the five settlements heard on October 23, 2023. The fee approval motion is reserved and will be addressed in a separate endorsement.

History of Court File No. 3795/14CP (aka the “Electrolytic Capacitor Action”)

- [4] The Electrolytic Capacitor Action was commenced August 6, 2014. A second claim was brought in June 2016 against additional defendants. The two actions were consolidated. The action is a claim for damages for an alleged price fixing conspiracy. 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.
- [5] There are parallel actions in Quebec and British Columbia.
- [6] The plaintiffs entered into partial settlements with each of the TOKIN, Panasonic, ELNA, and Holy Stone defendants. Those settlements have been approved. The gross amount of those settlements is \$12,115,000.
- [7] The ROHM, Fujitsu, KEMET, Nichicon, and NCC/UCC settlements are the fifth through ninth partial settlements. If approved, there will be four groups of defendants remaining: AVX, Hitachi, Rubycon, and Matsuo.
- [8] For each settlement reached, the action has been certified for settlement purposes. Class members had the opportunity to opt out on the first settlement. There is no further opt out opportunity.
- [9] On April 28, 2023, I certified the Electrolytic Capacitor Action on a contested basis. The remaining non-settling defendants have sought leave to appeal that decision.

History of Court File No. 1272/16CP (aka the “Film Capacitor Action”)

- [10] This action was commenced May 13, 2016. It is also an alleged price fixing conspiracy action albeit in respect of film capacitors. Some defendants are common to both actions.
- [11] There are parallel actions in British Columbia and Quebec. The settling defendants, ROHM, Fujitsu, KEMET, and Nichicon, are not named in the BC action or the Quebec action.
- [12] The plaintiff entered into partial settlement agreements with the following defendants: Okaya, Nitsuko, Panasonic, ELNA, and Holy Stone. Those settlements have been approved by the Court. The gross amount of those settlements is \$2,092,000.
- [13] Orders were made to certify the Film Capacitor Action for settlement purposes for each of the earlier settlements. A contested certification motion has not been scheduled. The parties await the outcome of the proposed appeal in the Electrolytic Capacitor Action.

[14] Again, class members have had the opportunity to opt out as part of the first partial settlement. There is no further opportunity to opt out.

ROHM Settlement

[15] The ROHM defendants are named as defendants in both actions. The plaintiffs entered into a settlement agreement with the ROHM defendants on September 13, 2022. The settlement resolves the claims against the ROHM defendants in both actions. Pursuant to the settlement agreement,

1. ROHM will pay CAD \$450,000 for the benefit of class members in the Electrolytic Capacitor Action;
2. ROHM will provide the cooperation to the plaintiffs as detailed in the settlement agreement;
3. the Electrolytic Capacitor Action and the Film Capacitor Action will be dismissed as against the ROHM defendants with prejudice; and
4. ROHM will receive a full and final release in both actions.

Fujitsu Settlement

[16] The Fujitsu defendants are named as defendants only in the Electrolytic Capacitor Action. The plaintiffs entered into a settlement agreement with the Fujitsu defendants on December 15, 2022. The settlement agreement provides that:

1. Fujitsu will pay CAD \$465,000 for the benefit of class members in the Electrolytic Capacitor Action;
2. Fujitsu will provide cooperation to the plaintiffs as detailed in the settlement agreement;
3. the Electrolytic Capacitor Action will be dismissed as against the Fujitsu defendants including FPCAP Electronics (Suzhou) Co., Ltd. (“FPCAP”);
4. Fujitsu will receive a full and final release in the Electrolytic Capacitor Action.

KEMET Settlement

[17] The KEMET defendants are named as defendants in both actions. The plaintiffs entered into a settlement agreement with the KEMET defendants on January 31, 2023. The settlement agreement provides that:

1. KEMET will pay CAD \$6.2 million for the benefit of class members in the Electrolytic Capacitor Action;

2. KEMET will pay CAD \$325,000 for the benefit of class members in the Film Capacitor Action;
3. KEMET will provide cooperation to the plaintiffs in both actions as detailed in the settlement agreement;
4. both actions will be dismissed as against the KEMET defendants; and
5. the KEMET defendants will receive a full and final release in both actions.

Nichicon Settlement

[18] The Nichicon defendants are named as defendants in both actions. The plaintiffs entered into a settlement agreement with the Nichicon defendants on March 31, 2023. The settlement agreement provides that:

1. the Nichicon defendants will pay CAD \$14,150,000 for the benefit of class members in the Electrolytic Capacitor Action;
2. the Nichicon defendants will pay \$350,000 for the benefit of class members in the Film Capacitor Action;
3. the Nichicon defendants will provide cooperation to the plaintiffs in both actions as detailed in the settlement agreement;
4. both actions will be dismissed as against the Nichicon defendants; and
5. the Nichicon defendants will receive a full and final release in both actions.

NCC/UCC Settlement

[19] The NCC and UCC defendants are named as defendants in both actions. The plaintiffs entered into a settlement agreement with the NCC/ UCC defendants dated July 14, 2023. The settlement agreement provides that:

1. NCC/UCC will pay CAD \$20.9 million for benefit of class members in the Electrolytic Capacitor Action;
2. NCC/UCC will pay CAD \$400,000 for the benefit of class members in the Film Capacitor Action;
3. NCC/UCC will provide cooperation as detailed the settlement agreement;
4. both actions will be dismissed as against the NCC/UCC defendants; and
5. the NCC/UCC defendants will receive a full and final release in both actions.

[20] Each settlement above is conditional on court approval in both actions, where applicable. Thus, if I were to approve the settlement only in the Electrolytic action and decline to do

so in the Film action, the whole settlement would be void and be treated as if it never happened. Likewise, if one approving court declines to approve the settlement, the same result follows.

- [21] I have not spelled out the details of the cooperation specified in each agreement. There are differences. Each settlement agreement was negotiated separate from the others. Each defendant approached settlement negotiations from its distinct perspective. It is hardly surprising that there is no ‘one size fits all’ cooperation arrangement.
- [22] The evidence filed shows that cooperation from previous settled defendants informed and assisted plaintiffs’ counsel in these negotiations. I have previously commented on the potential value of such cooperation in approving earlier settlements and adopt same for this decision.

Settlement Approval - Applicable Legal Principles

- [23] Settlement of a class proceeding requires court approval: s. 29 *CPA*. Once approved, the settlement binds all class members: s. 29(3) *CPA*.
- [24] 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: *Dolmage v. HMQ*, 2013 ONSC 6686, at para. 24.
- [25] Although the proposed settlement must fall within the range of reasonableness, it need not be perfect: *Dolmage*, at para. 25. Compromises that reflect the risk, delay, and expense of continuing litigation are to be expected; *Dolmage*, at para. 36.
- [26] 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.).

[27] In assessing the reasonableness of a proposed settlement, courts have considered several factors including:

- 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.

[28] What falls within the range of reasonable settlements will vary with the subject matter of the litigation, the nature of the damages claimed, the claims and defences raised, and any objections to the settlement: *Parsons*, at para. 70.

[29] The court must be satisfied that there is both substantive and procedural fairness. Procedural fairness deals with the manner by which the settlement was 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.

[30] 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.). While there is a strong initial presumption of fairness where the settlement agreement has been negotiated by experienced counsel at arms-length, class counsel must still present evidence that shows why the settlement amount falls within the range of reasonableness: *Lewis v. Cantertrot Investments Ltd.*, 2011 ONSC 2713, at para. 50; *Rosen v. BMO Nesbitt Burns Inc.*, 2016 ONSC 4752, at para. 17.

Analysis

Procedural Fairness

- [31] Each settlement was negotiated at arms length by experienced counsel over months or years. The negotiations were adversarial. The evidence filed reveals that the negotiations occurred in discrete parallel streams particular to each defendant group. The settlement agreements are not the product of a collective negotiation with a single agreement where parties agreed to chip into a common pot.
- [32] There is no evidence suggestive of collusive behaviour between counsel. To the contrary, both sides fought hard to maximize or minimize their clients' position. Counsel in this case are well-know to the Court. They are senior, experienced class action counsel who diligently investigated the merits of the claims and defences available.
- [33] I am satisfied that the requirement for procedural fairness is established for all five settlements.

Substantive Fairness

- [34] The amounts being paid by the defendants differ significantly. That is because the circumstances of the defendants vary including but not limited to the following:
- a. the amount of commerce each did during the claim period;
 - b. the extent of participation in the alleged cartel varied both by degree and time period;
 - c. the presence or absence of regulatory proceedings and/or civil litigation as against the defendants in the US and elsewhere;
 - d. the availability and strength of information obtained through cooperation from previously settled defendants to confirm participation in or absence from the cartel meetings;
 - e. the amounts paid by some defendants to settle US DOJ proceedings and civil litigation;
 - f. the positions taken by the defendants in this litigation including challenges to jurisdiction; and
 - g. the information defendants supplied to plaintiffs' counsel to support their respective positions.
- [35] The ROHM negotiations took roughly 18 months starting in March 2021. ROHM was involved in US civil litigation but settled that litigation for a relatively modest amount – US \$1.85 million. It was a small player in the electrolytic capacitor market and disputed any participation in the alleged cartels. An employee or consultant attended one meeting

with competitors in 2009. He did so without authorization from his superiors. He was criticized and/or suspended when they learned of it. That level of participation was confirmed by cooperating defendants who previously settled. There is no evidence ROHM was a participant in the alleged film capacitors cartel during the claim period.

- [36] The Fujitsu defendants brought a jurisdiction motion disputing jurisdiction of this Court. The plaintiffs filed their responding materials. The facts exchanged assisted the parties in understanding the other's positions and the risks in the litigation. Documentation was provided to assist in determining the extent of Fujitsu's sales. Fujitsu had a subsidiary, Fujitsu Media Devices, that had a very small market share. It exited the market in 2008 or 2009. The company was wound up and its assets sold to Nichicon in 2009. The records of the subsidiary are no longer available. Fujitsu likewise settled the US civil litigation for a modest amount – US \$2 million.
- [37] KEMET is unique in that it is a large US-based defendant that was not investigated or charged by the US DOJ. There is no information to suggest that KEMET was ever investigated by competition/anti-trust authorities. There are no findings, no admissions, no guilty pleas by or against KEMET anywhere for anti-trust activities involving capacitors. KEMET was sued civilly in the US and settled that litigation for US \$62M. The cooperation benefits from KEMET are said to be especially helpful to pursuing the claim against AVX, one of the remaining defendant groups.
- [38] The settlement negotiations between the plaintiffs and the Nichicon defendants started before the contested certification motion was argued and intensified after argument. Agreement was reached before the certification decision was released. As it did in its US DOJ guilty plea, Nichicon took the position that its participation was limited to certain periods of time and certain commerce during the class period. Its participation in the cartel activity ended in 2011 per its guilty plea.
- [39] The NCC/UCC negotiations took place principally during the period between September 2022 and July 2023. The defendants disputed liability in both actions. The strength of available information linking them to the alleged cartel activities differed between the Electrolytic and Film actions. US settlements were a combined US \$173.5 million.
- [40] It is fair to say on the available evidence that every settling defendant vigorously disputed the plaintiffs' approach to damages, their exposure/risk, and the figures used by the plaintiffs to estimate what could be awarded against them at trial. Thus, both liability and damages were hotly contested, and the settlements reflect compromise on both sides.
- [41] All but the NCC/UCC settlement were negotiated and agreement reached before the contested certification decision was released. The settlements come before examinations for discovery but after cooperation and disclosure of documents by defendants who settled earlier, investigation and examination of documents and expert evidence from US litigation, examination of records from other foreign regulatory agencies, and disclosure of information and documents from the settling defendants. Suffice to say, plaintiffs' counsel did their due diligence to the extent practicable at this stage.

[42] Price fixing/cartel litigation is notoriously difficult to prosecute. Cartel activities are shrouded in secrecy. There are no Canadian regulatory investigations on which to piggyback. The alleged cartel activity involves global market players where most of the meetings and communications took place outside of Canada. The defendants are well-resourced to fight the long fight and are represented by some of Canada's top class action counsel.

[43] The risks of this litigation are real and significant. They include but are not limited to,

1. the plaintiffs may ultimately fail to prove a conspiracy or anti-trust activity as against all or some defendants, including the settling defendants;
2. the certification motion could have failed or could have been restrictive as to common issues, thereby dramatically undermining the economic viability of the actions;
3. the proposed appeal of the contested certification decision may succeed;
4. the appeal and the litigation steps necessary to get to trial could take years; and
5. the trial judge may determine that aggregate damages are not available or appropriate.

[44] As indicated, these settlements were negotiated and are recommended by experienced counsel. They are not quick and easy settlements that largely benefit the lawyers at the expense of the class. This litigation has struggled to gain traction for various reasons. It is in its procedural infancy and is likely to take considerable time, expense, and effort to get to trial.

[45] There are no objections to the settlements.

[46] The plaintiffs' motion materials contain reference to settlements in the US litigation and in comparable price fixing litigation in Canada as a touchstone to assess the reasonableness of the settlements reached. There are, of course, material differences in US litigation versus that in Canada. Likewise, each cartel action depends in no small measure on the strength of the evidence uncovered. The products vary. The markets vary. The downstream products that incorporate the components vary. The circumstances of individual defendants vary. Nevertheless, nothing in the evidence filed points to a result out-of-step with results in the other litigation.

[47] In my view, each of the settlements reached are reasonable compromises having regard to the risks and potential recovery, if any, years hence. They provide real tangible benefit to class members. Each settlement examined on its own merit is fair, reasonable, and in the best interests of the classes. They fall within the range of reasonable outcomes. I do not have the sense that the plaintiffs left money on the table: to the contrary, they achieved reasonable settlements that materially benefit the classes.

[48] For the reasons above, the settlements are approved in both actions conditional on approvals in the parallel BC and Quebec actions as necessary.



Justice R. Raikes

Date: October 25, 2023