CITATION: Allott v. Panasonic Corporation, 2021 ONSC 5148
COURT FILE NO.: 1899/15CP
DATE: 20210722

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Sean Allott, Plaintiff

AND:

Panasonic Corporation; Panasonic Corporation of North America; Panasonic Canada Inc.; KOA Corporation; KOA Speer Electronics, Inc.; ROHM Co. Ltd.; ROHM Semiconductor U.S.A., LLC.; Vishay Intertechnology, Inc.; Hokuriku Electric Industry Co.; HDK America Inc.; Kamaya Electric Co., Ltd.; Kamaya, Inc.; ALPS Electric (North America), Inc.; Midori Precisions Co., Ltd.; Midori America Corporation; Susumu Co., Ltd.; Susumu International (USA) Inc.; Tokyo Cosmos Electric Co.; and TOCOS America, Inc., Defendants

BEFORE: Justice R. Raikes

COUNSEL: Jonathan Foreman, Linda Visser, Jean-Marc Metrailler, and Sarah Bowden - Counsel for the Plaintiff

Sandra Forbes and Maura O'Sullivan – Counsel for the Kamaya Defendants

Katherine Kay and Sinziana Hennig – Counsel for the KOA Defendants

Paul Martin – Counsel for the ROHM Defendants

Donald Houston and Gillian Kerr – Counsel for Vishay

Robert Tighe and Paul Wearing – Counsel for Hokuriku and HDK

Kyle Taylor, James C. Orr, and Annie Tayyab – Counsel for the ALPS Defendants

Kevin Wright, Todd Shikaze, and Wendy Sun – Counsel for the Susumu Defendants

David Kent and Samantha Gordon – Counsel for the Tokyo and TOCOS Defendants

No one appearing for the Midori Defendants

HEARD: July 6, 2021

ENDORSEMENT

[1] The plaintiff brings two motions:

1. To discontinue this action as against six defendants: Vishay Intertechnology Inc. (hereafter "Vishay"), ALPS Electric (North America), Inc. (hereafter "ALPS), Midori Precisions Co., Ltd. and Midori America Corporation (hereafter collectively "Midori"), and Tokyo Cosmos Electric Co. and TOCOS America, Inc (hereafter collectively "TOCOS"); and

2. To certify this action for settlement purposes in respect of a settlement reached with the Kamaya defendants and for approval of the notices and notice plan.

[2] This is a proposed price fixing class action. The plaintiff alleges in his statement of claim that the defendants participated in an unlawful conspiracy to fix, raise, maintain, or stabilize the price of linear resistors in Canada with the intent to raise prices of linear resistors and products containing linear resistors.

[3] Linear resistors are devices that regulate the flow of electric current. They are found in a wide range of electronic products including computers, televisions, cell phones etc..

[4] The settlement with the Kamaya defendants is the second partial settlement in this action. The plaintiffs previously settled with the Panasonic defendants. That settlement was approved March 12, 2021.

[5] The return date for the motion to approve the Kamaya settlement is October 13, 2021. If the settlement and the discontinuances are approved, there will be four remaining sets of defendants.

Discontinuance

[6] Court approval is required for discontinuance as against a party to a class proceeding or proposed class proceeding: s. 29(1) *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

[7] To approve a discontinuance under s. 29, the court must be satisfied that the interests of the class will not be prejudiced: *Durling v. Sunrise Propane Energy Group Inc.*, 2009 CarswellOnt 9181 (S.C.J.) at paras. 14, 16, 17 and 19. Prejudice to remaining defendants is not a valid consideration: *Durling* at paras. 20 and 37.

[8] The plaintiff has entered into Tolling and Standstill Agreements (4) with each of the defendants against whom the plaintiffs seek to discontinue. The Agreements were negotiated at arm's length over a period of months by counsel for the plaintiff and respective defence counsel. There are some differences in the Agreements consistent with discrete negotiations.

[9] The Agreements toll all limitation periods applicable to the claims as at the date the statement of claim was filed naming the defendant. There were two actions commenced

that were subsequently consolidated. The limitation period toll date varies by defendant depending whether it was named in the first or second action.

[10] The discontinuances are without prejudice and without costs. The latter is more important to plaintiff's counsel who agreed in their retainer agreement to indemnify the representative plaintiff against any adverse cost awards. Only the representative plaintiff is exposed to an adverse cost award; other class members are not.

[11] The discontinuances do not constitute a release of any causes of action that any class member may wish to pursue against that defendant. Thus, class members are not foregoing their right to sue.

[12] The ALPs Agreement requires the defendant to promptly inform the plaintiff if it, or any of its affiliates, make public disclosure of being the subject of an investigation related to linear resistors by any government regulator. ALPS has also agreed to provide the plaintiff with a confidential interview of an employee or former employee to answer general questions regarding the market for linear resistors and or potentiometers.

[13] The Midori Agreement requires the defendants to promptly inform the plaintiff if they, or any of their affiliates, discover any information indicating their participation in discussions that are the subject of the allegations in the Ontario action. The defendants must also promptly inform the plaintiff if they or any of their affiliates become aware that they are the subject of an investigation related to linear resistors by any government regulator. Midori has provided some document and information disclosure and has agreed to provide a confidential interview with a knowledgeable employee or former employee to answer general questions regarding the market for linear resistors and/or potentiometers

[14] The TOCOS Agreement requires TOCOS to promptly inform the plaintiff if it or any of its affiliates discover information credibly indicating TOCOS participation in discussions with any of the other defendants to this action as alleged herein, or if they become aware of being subject to an investigation related to matters alleged in this action by government regulator. TOCOS also agreed to provide a confidential interview with a knowledgeable employee or former employee to answer general questions regarding the linear resistors and/or potentiometer market in North America.

[15] The Vishay Agreement requires Vishay to notify the plaintiff if it, or any of its affiliates, discovers information relating to conduct of Vishay that would give rise to liability under Part VI of the *Competition Act* in respect of linear resistors as pleaded in this action. Similarly, Vishay will notify the plaintiff if it, or any of its affiliates, becomes aware of being the subject of an investigation related to linear resistors by any government regulator. Vishay agreed to provide a confidential interview with a knowledgeable representative to answer general questions regarding the market for linear resistors.

[16] The disclosure and interview obligations in these Agreements are time limited and expire when the Agreement terminates, automatically or otherwise. The Agreements automatically terminate within relatively short time periods after the discontinuance order

is made. The TOCOS Agreement was entered into on October 15, 2020 and on my reading of the automatic termination clause, it may well automatically terminate immediately following discontinuance. Even if so, the plaintiff has had months since the Agreement was signed and years since this litigation started to unearth evidence of their involvement in the alleged conspiracy.

[17] The Agreements also contain clauses allowing either party to terminate the Agreement for any reason. If so, the plaintiff can move to add the defendant back into the action and the defendant can oppose that motion. The affected defendants submit that the whole purpose of the settlement from their standpoint is to avoid being party to lengthy, expensive litigation. Terminating the Agreement before it expires automatically carries the risk that they will be faced with the very expense they sought to avoid.

[18] I find that the Agreements do not prejudice the plaintiff class and, in fact, provide a marginal benefit.

[19] All defendants who are parties to the Tolling and Standstill Agreements deny any involvement or participation in the alleged conspiracy that is at the heart of the claims made in this action. The affidavit of Ms. Legate-Wolfe indicates that they were named by the plaintiff in the statements of claim issued because they were mentioned in US antitrust investigations and/or were named as a defendant in an individual price fixing action brought in the United States.

[20] The individual lawsuit and all US antitrust litigation concerning the linear resistors price fixing conspiracy have been resolved. Some of these defendants were not named in any US litigation. None of the defendants for whom a discontinuance is sought were named by the US Department of Justice as parties to its antitrust prosecution. None of these defendants paid any money to resolve any claim asserted. Those claims were dismissed with no finding adverse to them.

[21] Defence counsel for these defendants separately approached plaintiff's counsel to advise that their clients were not involved in the alleged price fixing conspiracy. Plaintiff's counsel conducted their own investigations to verify the information provided by defence counsel and to ascertain whether there was any evidence of their participation in the alleged conspiracy. That investigation included information obtained from the Panasonic defendants and the Kamaya defendants, both of whom provided oral evidentiary proffers as a term of their settlements. Those defendants confirmed that they had no information that any of the discontinuing defendants was party to the alleged conspiracy.

[22] In essence, the plaintiff has no evidence that the ALPS, Midori, TOCOS, or Vishay defendants were involved in the alleged linear resistors price fixing conspiracy. Continuing to pursue this action against these defendants in these circumstances is pointless and worse, would unduly complicate an already complex action. The plaintiff class will benefit from a more streamlined and focused action. If not discontinued, each of these defendants could and likely would oppose certification, bring a motion for summary judgment, and add to the cost and time needed for this action to reach trial.

[23] Thus, I am satisfied that the plaintiff class will not be prejudiced by the discontinuance of the action as against these defendants. The discontinuance against the ALPS, Midori, TOCOS, and Vishay defendants is approved.

[24] Subsection 29(4) *CPA* requires the court to consider whether notice of the discontinuance need be given to class members under s. 19. The plaintiff proposes that no notice be given and that the fact of discontinuance be placed only on counsel's website for this action.

[25] As indicated above, the plaintiff also seeks certification for settlement purposes for the settlement reached with the Kamaya defendants. Notices are being distributed for the purpose of alerting class members to that settlement and giving them the opportunity to object to same.

[26] In my view, a separate notice is not required for the discontinuance. Notice to class members of the discontinuance can be addressed in the certification notice. Counsel are asked to amend the long and short form notices and press release to reflect the discontinuance as against the ALPS, Midori, TOCOS, and Vishay defendants. I agree that a copy of the discontinuance order should be available to class members to view on class counsel's website for this action.

Certification

[27] This action was commenced in 2015. 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.

[28] Section 5(1) states:

> 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;
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> (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.

[29] 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.

[30] 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.

[31] This class proceeding is one of three parallel class actions concerning the same alleged price fixing conspiracy. The other two actions are in Quebec and British Columbia. Counsel for the plaintiffs in the three actions are working collaboratively.

[32] As mentioned, there was an earlier settlement with the Panasonic defendants. That settlement was approved in each of the three actions and the class definitions used accorded with the scope of the class asserted in each action. That is because the Panasonic defendants were named as defendants in all three actions.

[33] There is a wrinkle in the motion before me. The Kamaya defendants are not named defendants in the British Columbia action. Since the settlement agreement was negotiated, they have been added to the Quebec action. Thus, they are now named defendants in two of the three actions.

[34] The settlement agreement negotiated between the parties includes a release in favour of the Kamaya defendants for **all** purchasers of linear resistors in Canada including purchasers in British Columbia. The plaintiff asks that this action be certified using a broader class definition than was used for the Panasonic settlement so as to capture purchasers from British Columbia.

[35] The proposed class definition is:

> All persons or entities in Canada who purchased Linear Resistors or a product containing a Linear Resistor between July 9, 2003 and September 14, 2015 other than (1) all Quebec Settlement Class members and (2) Excluded Persons.
>
> (All capitalized words are defined terms in the settlement agreement.)

[36] The class definition proposed by the plaintiff for this settlement is broader than the class definition sought in the plaintiff's latest pleading in this action. The pleaded class definition excludes British Columbia purchasers.

[37] Allowing the class to be defined as the plaintiff asks in this motion will avoid a motion to add the Kamaya defendants to the British Columbia action and a companion settlement approval motion. Counsel asserts that requiring those added steps would be inefficient, a waste of court resources, add unnecessary time, and be more costly. The British Columbia representative plaintiff signed the settlement agreement and plaintiff's counsel in the British Columbia action were part of the negotiations of that agreement. They are on board with this approach.

[38] There are many examples of approved class definitions for settlement purposes that differ from the class definition pleaded. See *Markson v. MBNA Canada Bank,* 2012 ONSC 5891 at paras. 19-21; *Fanshawe College v. Hitachi, Ltd.*, 2016 ONSC 5118, at paras. 41-43; *McSheffrey v. Ontario*, 2012 ONSc 6803, at para. 34; *Leonard v. The Manufacturers Life Assurance Company*, 2020 BCSC 1840, at paras. 87, 132, and 141; *Godfrey v. Sony*, Vancouver Court File No. S-106462, Order dated December 3, 2020 by Masuhara J.. Most simply expand the claim period but some go further and expand the scope of persons captured by the class definition.

[39] Often, the settling defendant wants maximum release for its settlement dollars. As a result, it is not uncommon that the parties seek to expand a previously disputed class definition as part of the settlement: *Robinson v. Medtronic Inc.* (2009), 80 C.P.C. (6th) 87 (Ont. S.C.J.), at paras. 134-137, 139, and 142.

[40] The issue here is slightly different. Should this court expand the class definition to include purchasers from another jurisdiction in respect of defendants who are not parties to the litigation in that jurisdiction?

[41] 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?

[42] There will be no encroachment on judicial comity if the class definition is expanded to include British Columbia purchases in this particular case. The Kamaya defendants are not

parties to the British Columbia action and never have been. The funds to be paid from this settlement, if approved, will be held with the monies already recovered in the Panasonic settlement. The Panasonic settlement funds are held for the benefit of class members from all three jurisdictions by Ontario class counsel.

[43] The monies recovered in the three actions are and will continue to be held in a single pot. Any disbursement from those settlement funds will be contingent upon identical orders being made in all three actions. Accordingly, at the end of the day, the disbursement of whatever pool of monies is ultimately recovered will be considered and determined by all three courts.

[44] Further, I find that the plaintiff is proceeding as he is for reasons of timeliness, cost, and efficiency. It is not a dodge to avoid the court in British Columbia which will continue to have carriage of the British Columbia action. The method of proceeding chosen here will save time and judicial resources. The plaintiff avoids the need for two motions that would undoubtedly delay completion of the settlement, if approved.

[45] I am also mindful that the law with respect to certification and settlement approval in class proceedings is substantially the same in both Ontario and British Columbia. Either court will be attuned to the need to ensure that the settlement is fair and reasonable and in the best interests of the class.

[46] Accordingly, I find that the proposed class definition submitted by counsel in this action is appropriate.

[47] I previously certified this action for settlement purposes in respect of the Panasonic settlement. There is no compelling difference in the analysis of the certification criteria for this motion, save for the class definition discussed above. There is no need to reiterate the analysis of the other criteria. For the reasons above and the reasons set out in my decision concerning certification for settlement purposes for the Panasonic defendants, I find that the criteria for certification for settlement purposes are satisfied.

Notice Plan

[48] I directed counsel to make some minor changes to the form of the notices provided, including reference to the discontinuance against the ALPS, Midori, TOCOS, and Vishay defendants. Plaintiff's counsel will review the proposed wording to be included in the notices concerning the discontinuance with the non-settling defendants.

[49] I observe that the draft notices provided are otherwise substantially similar to those used for the Panasonic settlement. I am satisfied that the notices and plan of dissemination, as revised, are reasonable and appropriate in this case. They employ a multi-media strategy to bring notice to members of the class. There is a real prospect that the terms of the settlement with the Kamaya defendants including how to object will come to the attention of class members.

[50] The notices explain what the action is about, what it means to be a member of the class, what counsel fees are sought and explains that a class member can voice concerns or objections to the proposed settlement and/or counsel fees. The mechanism for objecting to the settlement is reasonable.

[51] If any issues arise in the dissemination of notice, the opt-outs, and/or objections, or the wording of the notice concerning the discontinuances, direction may be sought as needed.

[52] Counsel are asked to provide fresh draft orders for my signature.

Justice R. Raikes

Date: July 22, 2021