

**CITATION:** Cygnus Electronics v. Panasonic Corporation, 2022 ONSC 2761  
**COURT FILE NO.:** 3795/14CP  
**DATE:** 20220509

**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

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**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

**BEFORE:** Justice R. Raikes

**COUNSEL:** Jonathan Foreman, Jean-Marc Metraillier, Anne Legate-Wolfe -Counsel, for the Plaintiffs

Donald Houston, Akiva Stern - Counsel, for the HolyStone Defendants

Kevin Wright, Todd Shikaze – Counsel, for the ELNA Defendants

Brian Whitwham, Eric Dufour – Counsel for the Defendant, AVX Corporation

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

Katherine Kay, Mark Walli – Counsel, for the Hitachi Defendants

Davit Akman, Tegan O’Brien – Counsel, for the KEMET Defendants

Dr. Neil Campbell, William Wu – Counsel, for the Nichicon Defendants

Paul Martin – Counsel, for the ROHM Defendants

W. Michael G. Osborne – Counsel, for the Rubycon Defendants

Mark Evans, Sandy Walker – Counsel, for the Shinyei Defendants

Robert Kwinter – Counsel, for the Samsung Defendants

Gordon Capern – Counsel, for the Nippon Defendants

Adam Goodman, Chloe Snider – Counsel, for the Matsuo Defendants

Robert Anderson, Nicholas Hooge – Counsel, for the Shizuki Defendants

**HEARD:** March 21, 2022

## **ENDORSEMENT**

### **The Motions**

- [1] These are alleged price fixing actions. The first action (Cygnus Electronics Corporation et al v. Panasonic Corporation et al) relates to electrolytic capacitors (hereafter “the Electrolytic action”) and the second action (Allott v. AVX Corporation et al) relates to film capacitors (hereafter “the Film action”). Some defendants are common to both actions.

- [2] The plaintiffs in the two actions are represented by the same counsel.
- [3] The plaintiffs have entered into separate settlements with the ELNA defendants and HolyStone defendants, respectively. The settlements apply to both actions and are contingent upon approval in both actions; *viz.* to be effective, the settlement must be approved in both actions.
- [4] Pursuant to the ELNA settlement, the ELNA defendants will pay \$2.5 million - \$2,475,000 to the credit of the Electrolytic action and \$25,000 to the credit of the Film action.
- [5] Pursuant to the HolyStone settlement, the HolyStone defendants will pay \$800,000 - \$790,000 to the credit of the Electrolytic action and \$10,000 to the credit of the Film action.
- [6] Both settlements also contain cooperation obligations which are detailed below.
- [7] The plaintiffs move for approval of the settlements in each action.
- [8] In addition, plaintiffs' counsel moves for approval and payment of their fees and disbursements in the Electrolytic action, and disbursements in the Film action.

#### **Nature of Actions**

- [9] In the Electrolytic action, 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.
- [10] Parallel actions making similar allegations have been commenced in British Columbia and Quebec. The settlements in the Electrolytic action are contingent upon approval of the courts in all three actions.
- [11] The Electrolytic action was certified for settlement purposes only as against the ELNA defendants by order dated November 29, 2021, and as against the HolyStone defendants by order dated December 10, 2021. Parallel orders were made in the British Columbia and Quebec actions.
- [12] In the Film action, the plaintiff alleges that the defendants participated in an unlawful conspiracy to fix, maintain, increase, or control the price and supply of film capacitors. A parallel action making similar allegations was commenced in British Columbia; however, the HolyStone defendants are not named in the British Columbia action nor in a Quebec action related to film capacitors. Thus, they are defendants only in the within Film action and the class definition covers all persons and entities in Canada.
- [13] The Film action was certified for settlement purposes only as against the ELNA defendants by order dated November 29, 2021, and as against the HolyStone defendants by order dated January 10, 2022.
- [14] On December 23, 2021, the British Columbia court acknowledged the November 29, 2021 order of this court certifying the Film action, and ordered that no further opt-out period was

necessary for persons in British Columbia who purchased a film capacitor or a product containing a film capacitor during the class period.

## **Previous Settlements**

### **a. Electrolytic Action**

- [15] The settlements with ELNA and HolyStone are the third and fourth partial settlements, respectively, in the Electrolytic action.
- [16] On April 14, 2021, a settlement was approved with the Panasonic defendants by which they paid \$5,950,000 for the benefit of the class in the Electrolytic action.
- [17] On December 6, 2021, a settlement was approved with the TOKIN defendants by which they paid \$2,900,000 for the benefit of the class in the Electrolytic action.
- [18] Thus, the aggregate paid by way of settlement in the Electrolytic action to this point is \$8,850,000.

### **b. Film Action**

- [19] The settlements with ELNA and HolyStone are the fourth and fifth partial settlements, respectively, in the Film action.
- [20] On April 14, 2021, a settlement with the Panasonic defendants was approved pursuant to which the Panasonic defendants paid \$1,350,000 for the benefit of the class in the Film action.
- [21] On December 7, 2018, settlements with the Okaya defendants and Nitsuko Electronics Corporation, respectively, were approved. Okaya paid \$460,000 and Nitsuko paid \$248,900 for the benefit of the class in the Film action.
- [22] Thus, the aggregate paid by way of settlement to this point in the Film action is \$2,058,900.

## **Negotiations**

- [23] The negotiations with the ELNA and HolyStone defendants proceeded on separate tracks. The negotiations with ELNA took more than a year after the first offer was made. The negotiations with HolyStone took two years. At times, a settlement with the HolyStone defendants appeared imminent only to be derailed or new concerns arose that elongated those negotiations.
- [24] Plaintiffs' counsel points to information acquired through cooperation from earlier settling defendants that assisted and informed their discussions and ultimate resolution with the ELNA and HolyStone defendants.
- [25] The negotiations leading to these settlements were adversarial and at arms length. No third-party mediator was involved. It is clear from the evidence filed that class counsel

considered risks and benefits to the class and did their due diligence before entering into these settlements.

### **Settlement Terms**

- [26] I have already set out above the amounts payable by the defendants in each action pursuant to their respective settlement agreements.
- [27] The amounts payable by the ELNA and HolyStone defendants in the Film action are very modest (\$25,000 and \$10,000) and a far cry from the amounts paid in the Electrolytic action. That difference derives from the fact that neither ELNA nor HolyStone manufactured film capacitors during the class period. Thus, it is very unlikely that they participated in the alleged conspiracy in respect of film capacitors; in fact, they deny any participation in either alleged conspiracy.
- [28] As mentioned, both settlement agreements contain cooperation obligations but only in the Electrolytic action.
- [29] The ELNA defendants have agreed to provide the following cooperation as a term of the settlement in the Electrolytic action:
1. an attorney proffer;
  2. documentary production including documents produced by ELNA to the Canadian Competition Bureau and United States Department of Justice, to the plaintiffs in similar U.S. civil litigation including deposition transcripts and answers to written interrogatories;
  3. transactional data, including automotive industry data, customer and sales data to customers in Canada, global sales statistics, and major original equipment manufacturers, reasonably known to have purchased electrolytic capacitors that were incorporated enter product sold in Canada during the class period;
  4. an employee witness interview; and
  5. testimonial evidence from a current employee knowledgeable of the alleged conspiracies for use at trial.
- [30] The Vishay defendants are related to HolyStone. The defendant, Holystone Polytech, was acquired by the Vishay defendants in 2014 as an asset purchase. HolyStone Polytech manufactured tantalum electrolytic capacitors. HolyStone was previously owned and operated by the Hitachi defendants. HolyStone Polytech is the only company in the HolyStone group of companies that was involved in the alleged conspiracy and is the only company to provide cooperation under the HolyStone settlement.
- [31] The HolyStone settlement agreement provides the following cooperation benefits to the plaintiffs in the Electrolytic action:

1. document production on an ongoing basis including documents provided in the US litigation and to EU S Department of Justice which includes, *inter alia*, sales data, cost data, and transaction data and deposition transcripts;
2. an attorney proffer; and
3. an interview with a representative of HolyStone under oath.

[32] Nothing in the HolyStone settlement agreement prevents of the plaintiffs from seeking or obtaining testimony, discovery, information or documents from former officers, directors and/or employees of HolyStone who are also formerly associated with the Hitachi defendants.

### **Objections to Settlements**

[33] Of the settlements and settlement approval hearing was given to class members in both actions good class members were given the opportunity and means to object to the settlement(s) and/or class counsel fees. No objections were made.

### **Settlement Approval - Applicable Legal Principles**

[34] Settlement of a class proceeding requires court approval: s. 29 *CPA*. Once approved, the settlement binds all class members: s. 29(3) *CPA*.

[35] 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.

[36] 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.

[37] 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. (6<sup>th</sup>) 93 (Ont. S.C.) at para. 7; *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2643 at para. 31.).

[38] 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. (6<sup>th</sup>) 305 at para. 12; *Parsons v. Canadian Red Cross Society* (1999), 40 C.P.C. (4<sup>th</sup>) 151 at paras. 71 – 73.

[39] 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.

[40] 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.

[41] 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**

### **a. Film Action**

[42] The amounts to be paid by the ELNA and HolyStone defendants are nuisance payments. They reflect the following:

1. neither defendant manufactured film capacitors in the relevant time period;
2. both sets of defendants deny any involvement or participation in the alleged price fixing conspiracy which, given (1) preceding, makes sense;
3. the plaintiffs have no evidence to contradict the denials of these defendants and, in fact, cooperation from earlier settling defendants appears to confirm the reliability of their denials;
4. keeping these defendants in the action serves no valid purpose and exposes the plaintiffs to additional cost and cost exposure; and
5. removing unnecessary parties from the action will likely improve efficiency and timeliness moving forward.

[43] I am satisfied without the settlements with the ELNA and HolyStone defendants in the Film action are fair, reasonable, and in the best interests of the class. They are within the range of reasonable outcomes. Accordingly, the settlements with these defendants in the Film action are approved.

### **b. Electrolytic Action**

[44] I will address the settlements with the ELNA and HolyStone defendants separately.

#### **ELNA**

[45] Plaintiffs' counsel has put forward an economic analysis by which the plaintiffs estimate their potential recovery if successful at trial. The analysis includes assumptions which may or may not prove valid at the end of the day. No expert report is provided but the analysis provided is nevertheless helpful to understand counsel's assessment of the settlement and the compromise made to reflect risk.

[46] Based on that approach, plaintiffs' counsel conservatively estimates the potential exposure of the ELNA defendants to be \$3.1 million before prejudgment interest and \$3.7 million with prejudgment interest. Neither figure includes any contribution to costs.



[47] The settlement amount payable by the ELNA defendants is roughly 67% of the ELNA defendants' potential exposure inclusive of prejudgment interest and 80% if prejudgment interest is not factored in. By way of comparison, the settlement with the Panasonic defendants was roughly 50% of its calculated exposure using the same approach.

[48] Counsel for the settling defendants understandably often have little to add to submissions made by plaintiffs' counsel on settlement approval motions. Here, Mr. Wright for the ELNA defendants made brief but compelling submissions that assisted the court in assessing the merits of the settlement. He submitted that:

1. I previously approved the Panasonic settlement which saw the Panasonic defendants pay a lesser percentage of their potential exposure for damages;
2. settlements in the autoparts litigation have been approved where the amount paid was roughly 8-10 % of amounts paid to settle parallel litigation in the United States. Here, the amount paid to settle the U.S. litigation was \$2.25 million (U.S.D.). The amount paid to settle this action is roughly 80% of that paid in the U.S. litigation despite the much larger market there; and
3. while he does not agree with the likely potential recovery estimated by the plaintiffs, the settlement reached here is reasonable by any measure.

[49] I agree. The settlement reflects a reasonable compromise. It reflects the very real risks faced including,

1. the claim may not be certified as a class proceeding;
2. aggregate damages may not be certified as a common issue;
3. the defendants may ultimately prevail at trial;
4. even if successful on certification and at trial, those results could be overturned on appeals;
5. the damages awarded if successful could be significantly less than that estimated by counsel; and
6. important evidence could be lost and memories fade in the time it takes to get to trial.

[50] This settlement provides a real, tangible, certain benefit to class members. This is already lengthy litigation with many steps to be completed before trial. The defendants are mainly large companies that have the necessary resources to vigorously defend this litigation. Settling with these defendants streamlines the litigation, albeit modestly, by reducing the number of parties and counsel moving forward. The cooperation benefits may assist in obtaining further settlements.

[51] The settlement is the product of arms length adversarial negotiations over a lengthy period. It comes after other similar settlements already approved by this court. It compares favourably with those settlements. It is supported by the firm recommendation of experienced counsel who have put in the time and resources to advance the claim. There are no objections.

[52] I am satisfied that procedural and substantive fairness are present. The settlement falls within the range of reasonable outcomes and is in the best interest of the class. The settlement is approved.

### **HolyStone**

[53] HolyStone is an anomaly in that only one company was engaged in the manufacturing of electrolytic capacitors and its exposure relates to only a small portion of the class period. It has limited exposure over a limited period of time.

[54] Plaintiffs' counsel estimates HolyStone's potential exposure if the plaintiffs are successful at trial to be \$536,000 before prejudgment interest or \$643,000 after prejudgment interest. The amount being paid by HolyStone is more than its estimated exposure. There is no apparent discount for risk etc.. The cooperation benefits are icing on the cake.

[55] I adopt my analysis above with respect to risks, the manner in which the settlement was achieved, the recommendation of experienced counsel, and the advantages to the class from this early resolution. There are no objections.

[56] I am satisfied that the settlement is fair, reasonable, and in the best interests of the class. It is approved.

### **Motions re Class Counsel Fees**

[57] Plaintiffs' counsel seeks an order for payment of fees representing 25% of the ELNA and HolyStone settlement amounts in the Electrolytic action (\$816,250) and disbursements of \$218,932.65 in that action.

[58] They also seek payment of partial disbursements only from the ELNA and HolyStone settlements in the Film action of \$7,998.38, plus applicable taxes.

[59] The amounts requested are consistent with the approved retainer agreements in the two actions.

[60] Counsel have assumed significant risk and responsibility for the advancement of these actions. There is no third-party funder. They have agreed to indemnify the representative plaintiffs against adverse cost awards although that risk is somewhat mitigated by the agreement reached with the defendants that neither side will seek costs of the certification motions.

[61] Counsel has invested significant time and out-of-pocket money to prosecute these claims. It is time and money that could have been put to other profitable work.

- [62] I have set out the legal principles applicable to approval of class counsel fees and disbursements in earlier decisions in these actions on similar motions for payment based on the earlier approved settlements. I repeat and adopt those principles for this motion.
- [63] I am satisfied that the disbursements incurred are reasonable and were duly incurred in this litigation. The payment of \$218,932.65 in the Electrolytic action will reduce the disbursements incurred and paid by plaintiffs' counsel to near zero.
- [64] The amount requested for disbursements in the Film action is a modest contribution to what has been paid out and remains unpaid. There will be roughly \$108,000 of disbursement expenses funded and still being carried by plaintiffs' counsel.
- [65] The fees of 25% in the Electrolytic action are fair and reasonable. Plaintiffs' counsel have expended literally thousands of working hours on this litigation. The fee requested when added to amounts already approved and paid provides counsel with only partial reimbursement for their time. It provides necessary cashflow which permits counsel to continue to prosecute the claim. It appropriately rewards counsel for "success" in the action. It recognizes the risk taken by counsel.
- [66] No fees are requested at this time in the Film action.
- [67] I am satisfied that the fees requested are reasonable and appropriate.
- [68] Accordingly, I approve payment from the ELNA and HolyStone settlements to plaintiffs' counsel of \$816,250 plus applicable taxes, together with disbursements of \$218,932.65 plus applicable taxes in the Electrolytic action.
- [69] I further approve payment from the ELNA and HolyStone settlements in the Film action to plaintiffs' counsel of \$7,998.38 plus applicable taxes on account of disbursements in that action.
- [70] Counsel are asked to forward draft orders to my attention for signature.

  
Justice R. Raikes

**Date:** May 9, 2022