

SUPERIOR COURT
(Class Action)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000504-106

DATE: August 1st, 2019

BY THE HONOURABLE THOMAS M. DAVIS, J.S.C.

CARLOS FOGELMAN

Petitioner

v.

SONY CORPORATION

and

SONY OF CANADA LTD.

and

SONY CORPORATION OF AMERICA

and

SONY OPTIARC, INC.

and

SONY OPTIARC AMERICA INC.

and

SONY NEC OPTIARC, INC.

and

TOSHIBA CORPORATION

and

TOSHIBA AMERICA CONSUMER PRODUCTS, LLC

and

TOSHIBA OF CANADA LIMITED

and

SAMSUNG ELECTRONICS COMPANY, LTD.

and

SAMSUNG ELECTRONICS AMERICA INC.

and
SAMSUNG ELECTRONICS CANADA INC.
and
TOSHIBA SAMSUNG STORAGE TECHNOLOGY CORPORATION
and
KONINKLIJKE PHILIPS ELECTRONICS N.V.
and
PHILIPS ELECTRONICS NORTH AMERICA CORPORATION
and
PHILIPS CANADA LTD.
and
LITE-ON IT CORPORATION
and
PHILIPS & LITE-ON DIGITAL SOLUTION CORPORATION
and
PHILIPS & LITE-ON DIGITAL SOLUTIONS USA, INC.
and
NEC CORPORATION
and
NEC ELECTRONICS AMERICA, INC.
and
TEAC CORPORATION
and
TEAC AMERICA, INC.
and
TEAC CANADA LTD.
Respondents

JUDGMENT

[1] The Petitioner commenced the Quebec Action on April 7, 2010, alleging that the Respondents conspired to fix prices in the market for optical disc drives (“ODD”) and certain products containing ODDs.

[2] Parallel class actions were commenced in Ontario¹ in June 11, 2010 and in British Columbia² on September 27, 2010 (together with the Quebec Action, the

¹ *The Fanshawe College of Applied Arts and Technology v. Sony Optiarc, Inc. et al.*, Ontario Superior Court of Justice, commenced at London, Court File No. 1501/10CP.

² *Neil Godfrey v. Sony Corporation et al.*, Supreme Court of British Columbia, Vancouver Registry, Court File No. S-106462.

“Canadian Proceedings”)³. Class Counsel⁴ in the Canadian Proceedings are working cooperatively with each other.

[3] A settlement has been reached in the Canadian Proceedings between the Petitioner in the Quebec Action and the plaintiffs in the Ontario Action and B.C. Action and Philips & Lite-On Digital Solutions Corporation and Philips & Lite-On Digital Solutions USA, Inc. (together “PLDS” or the “Settling Respondents”) dated March 28, 2019 (the “PLDS Settlement Agreement”) in the amount of \$ \$5,695,000 CDN.

[4] The Petitioner is now seeking to:

- (i) Authorize the class action for the sole purpose of approving the settlements in this file with the Settling Respondents;
- (ii) Approve the publication⁵, short-form⁶ and long-form⁷ notices of authorization and settlement approval hearing (collectively, the “Pre-Approval Notice”);
- (iii) Obtain permission to distribute the Pre-approval Notice in accordance with the “Plan of Dissemination”⁸.

[5] The class action will continue against the remaining Respondents (the “Non-Settling Respondents”).

[6] The PLDS Quebec Settlement Class is defined as:

All Persons in Quebec who purchased an ODD* and/or an ODD Product** during the Class Period***, except the Excluded Persons****.⁹

* ODD means any device which reads and/or writes data from and to an optical disk, including but not limited to, CD-ROMs, CD-recordable/rewritable, DVD-ROM, DVD recordable/rewritable, Blu-Ray, Blu-Ray-recordable/rewritable, and HD DVD, as well as Super Multi-

³ Actions were also commenced in Manitoba and Saskatchewan relating to similar allegations. Class Counsel is not working with counsel in the Manitoba and Saskatchewan actions and is not aware of any active steps being taken in those actions. The plaintiffs in those actions did not exercise the right to opt-out of the proceedings.

⁴ Class Counsel means the following law firms: Camp Fiorante Matthews Mogergerman LLP, Siskinds LLP, and Consumer Law Group Inc.

⁵ Exhibit R-2.

⁶ Exhibit R-3.

⁷ Exhibit R-4.

⁸ Exhibit R-5.

⁹ See Schedule A to the PLDS Settlement Agreement.

Drives, other combination drives, and optical disk drives designed to be attached externally to computers or other devices.

** ODD Product means products incorporating ODD, including but not limited to desktop computers, mobile/laptop computers, videogame consoles, CD players/recorders, DVD players/recorders and Blu-Ray disc players/recorders.

*** Class Period means January 1, 2000 through to December 31, 2010.

**** Excluded Person means each Defendant, the directors and officers of each Defendant, the subsidiaries or affiliates of each Defendant, the entities in which each Defendant or any of that Defendant's subsidiaries or affiliates have a controlling interest and the legal representatives, heirs, successors and assigns of each of the foregoing.

[7] The Petitioner, plaintiffs in the Canadian Proceedings and the Settling Respondents have agreed to the terms of the Settlement Agreement, the whole subject to the approval of this Court the Supreme Court of British Columbia and the Ontario Superior Court and without any admission of liability whatsoever by the Settling Respondents and for the sole purpose of resolving the dispute between these parties.

[8] Previous settlements were reached and approved by the Courts in Quebec, Ontario and B.C. in the following amounts and with the following parties:

- (a) TEAC Corporation, TEAC America, Inc. and TEAC Canada, Ltd. (together "TEAC") in the amount of \$500,000 USD;
- (b) NEC Corporation and NEC Canada, Inc. (together "NEC") in the amount of \$730,000 CDN; and
- (c) Hitachi-LG Data Storage Inc. and Hitachi-LG Data Storage Korea, Inc. (together Hitachi-LG") in the amount of \$8,123,940 CDN;

[9] Concurrent with the present Application before this Court is a fourth settlement in the file – with Sony Corporation, Sony Optiarc, Inc., Sony Optiarc America Inc., Sony of Canada Ltd., Sony Electronics, Inc. Sony Corporation of America, and Sony NEC Optiarc, Inc. (together "Sony") in the amount of \$4,400,000 CDN. Should the Sony settlement agreement be approved, the total amount held in trust by Class Counsel, not including the PLDS Settlement Agreement with be \$13,753,940 CDN.

[10] As part of the notice published in relation to the TEAC, NEC, and Hitachi-LG settlements, putative settlement class members were advised of their right to opt-out of the respective litigation and that no additional right to opt-out would be provided. There were no opt-outs.

[11] In 2016, the B.C. Action was certified on behalf of residents of British Columbia with two subclasses, namely "Non-Umbrella Purchasers¹⁰" and "Umbrella Purchasers¹¹". The certification decision was upheld by the B.C. Court of Appeal. Defendants obtained leave to appeal to the Supreme Court of Canada. The Supreme Court of Canada heard the Defendants' appeal on December 11, 2018. The decision is currently under reserve;

[12] Certification of the Ontario Action was scheduled to take place on February 27, 28, and March 1, 2019. Due to the forthcoming decision from the Supreme Court in the BC Action, the parties agreed to focus the litigation in British Columbia and dispense with a separate and duplicative process in Ontario. Specifically, the parties agreed that:

- (i) The Ontario Action would be permanently stayed immediately;
- (ii) Once the form of the B.C. Action was known, if one remained, the parties would consent to a motion in the B.C. Action to expand the class to include all Canadians;
- (iii) At this time the Quebec action remains active;

[13] The litigation in Quebec is continuing against the remaining 7 Respondents – the "Non-Settling Respondents":

- a) Toshiba Corporation
- b) Toshiba America Consumer Products, LLC
- c) Toshiba of Canada Limited
- d) Samsung Electronics Company, Ltd.
- e) Samsung Electronics America Inc.
- f) Samsung Electronics Canada Inc.
- g) Toshiba Samsung Storage Technology Corporation

¹⁰ ODDs that were manufactured or supplied by the defendants in this action or ODD Products in which the ODD was manufactured or supplied by the defendants in this action.

¹¹ ODDs that were not manufactured or supplied by the defendants in this action or ODD Products in which the ODD was not manufactured or supplied by the defendants in this action.

AUTHORIZATION

[14] The Settling Respondents consent to the authorization of the present Application as a class proceeding for the purposes of settlement only, which consent shall be withdrawn should the Settlement Agreement not be approved by the Court, the Supreme Court of British Columbia and the Ontario Superior Court.

[15] This Judgment, including the authorization of the class action against the Settling Respondents and the definition of the Quebec Settlement Class, the Class Period, and the Common Issue are without prejudice to any position a Non-Settling Respondent may take in this or in any other proceeding on any issue, including the issue of whether the Quebec Action should be authorized as a class action as against the Non-Settling Respondents. For greater certainty, this judgment is not binding on and shall have no effect on the continuing proceedings as against the Non-Settling Respondents.

[16] Where a respondent consents to the authorization of a class action for settlement purposes only, the analysis of the criteria set forth at article 575 C.C.P. must still be met, but are flexible, and take into account the fact of the settlement¹².

[17] Under reserve of the rights of the Settling Respondents and the Non-Settling Respondents, the Motion for Authorization dated April 7, 2010 and the Exhibits in support thereof, justify granting the present Application in accordance with the criteria set forth at article 575 C.C.P. for settlement purposes only.

[18] The Petitioner and the Settling Respondents have agreed to seek authorization for the following identical, similar or related issue of law or fact, namely:

Did the Settling Defendants, or any of them, conspire to fix, raise, maintain or stabilize the prices of, or allocate markets and customers for, ODD directly or indirectly in Canada during the Class Period? If so, what damages, if any, are payable by the Settling Defendants, or any of them to the Settlement Class Members?

[19] The facts alleged appear to justify the conclusions sought¹³.

¹² *Dupuis c. Polyone Canada inc.*, 2016 QCCS 2561; *Vallée c. Hyundai Auto Canada Corp.*, 2014 QCCS 3778; *Schachter c. Toyota Canada inc.*, 2014 QCCS 802; *Markus c. Reebok Canada inc.*, 2012 QCCS 3562; *Richard c. Volkswagen Group Canada inc.*, 2012 QCCS 5534; *9085-4886 Québec inc. c. Visa Canada Corporation*, 2015 QCCS 5914.

¹³ Articles 7 and 1457 of the *Civil Code of Québec*, CQLR, c. C-1991, and sections 36, 45, and 46 (1) of the *Competition Act*, R.S.C. 1985, c. C-34.

[20] The composition of the class makes it difficult or impracticable to apply the rules for mandates to sue on behalf of others or for consolidation of proceedings because:

- a) Potential Quebec Settlement Class Members are dispersed across the province;
- b) Given the costs and risks inherent in instituting an action before the courts, people could hesitate to institute individual actions against the Settling Respondents;
- c) Individual litigation of the factual and legal issues raised would increase delay and expenses to all parties and would place an unjustifiable burden on the court system.

[21] The Petitioner, who is requesting to obtain the status of representative, will fairly, properly, and adequately protect and represent the interest of the Quebec Settlement Class Members since he:

- a) Is a settlement class member;
- b) Was instrumental in instituting this class action and in engaging counsel with extensive experience in class actions;
- c) Provided his attorneys with relevant information and instructed them to proceed with the present proceedings;
- d) Ensured that settlement class members would be kept up-to-date through his attorneys' website;
- e) Participated in the settlement negotiations by providing input to his attorneys, ultimately instructing his attorneys to sign the Settlement Agreement;
- f) Has a good understanding of what this class action is about and what the settlements provide to settlement class members;
- g) Has performed its responsibilities as the representative of the class and he will continue to do so insofar as the proposed settlements are concerned;
- h) Has always acted in the best interests of the settlement class members;
- i) Has not indicated any possible conflict of interest with the settlement class members.

CLASS NOTICE

[22] The Petitioner and plaintiffs in the Canadian Proceedings and the Settling Respondents have agreed on the form and content of the Pre-Approval Notice. The Pre-Approval Notice will advise settlement class members of the basic terms of the PLDS Settlement Agreement and their right to opt out of the Canadian Proceedings and participate in the settlement approval hearings.

[23] The Petitioner and plaintiffs in the Canadian Proceedings and the Settling Respondents have agreed on the Plan of Dissemination, namely:

Publication Notice (Newspaper Publication)

- a) A publication notice designed with minimal text. Its purpose is to draw the attention of settlement class members and direct them to the settlement website for more information. The publication notice will be published once in the following Canadian newspapers with the following average daily circulations¹⁴ (subject to each having reasonable publication deadlines and costs):

Newspaper	Average Daily Circulation (2015)
The Globe and Mail (National Edition)	336,487
Le Journal de Montréal (French)	232,332
Le Soleil (French)	78,455
The Winnipeg Free Press	106,473
The StarPhoenix (Saskatoon)	39,008
The Regina Leader Post	34,136
The Vancouver Sun	136,787

Short-Form Notice (Sent by Email or Direct Mail)

- b) Sent to the Settling and Settled Respondents' direct Canadian purchaser customers of ODD or ODD Products during the relevant period, to the extent that such information has been provided to Class Counsel;
- c) Sent to anyone who has registered with class counsel to receive updates on the status of the ODD class action; and

¹⁴ Newspapers Canada's *Circulation Report: Daily Newspapers 2015*, https://nmc-mic.ca/wp-content/uploads/2016/06/2015-Daily-Newspaper-Circulation-Report-REPORT_FINAL.pdf.

- d) Sent to the following industry associations for voluntary distribution to their membership:
- i. Retail Council of Canada¹⁵; and
 - ii. *Conseil québécois du commerce de détail* (Quebec Council of Retail Trade)¹⁶.

Long-Form Notice (Posted or Upon Request)

- e) Posted in English and in French on class counsel's respective websites; and
- f) Provided by Class Counsel to any person who requests it.

POUR CES MOTIFS, LE TRIBUNAL : **WHEREFORE, THE COURT:**

[24] **ACCORDE** la présente demande; **GRANTS** the present application;

[25] **ORDONNE** que, pour l'application du présent jugement, les définitions énoncées dans la Convention de règlement, pièce R-1, s'appliquent et y sont incorporées par renvoi; **ORDERS** that for the purposes of this judgment, the definitions contained in the Settlement Agreement, Exhibit R-1 shall apply and are incorporated by reference;

[26] **AUTORISE** l'exercice de cette action collective contre Philips & Lite-On Digital Solutions Corporation and Philips & Lite-On Digital Solutions USA, Inc. pour les fins d'un règlement hors cour seulement; **AUTHORIZES** the bringing of a class action against Philips & Lite-On Digital Solutions Corporation and Philips & Lite-On Digital Solutions USA, Inc. for the purposes of settlement only;

[27] **ATTRIBUE** au Requéran le statut de représentant des Membres du Groupe Québécois de Règlement ci-après décrit : **APPOINTS** the Petitioner as representative of the Quebec Settlement Class herein described as:

¹⁵ According to its website, the Retail Council of Canada is the "voice of retail in Canada" and represents more than 45,000 store fronts of all retail formats across Canada, including department, specialty, discount, and independent stores, and online merchants.

¹⁶ According to its website, the *Conseil québécois du commerce de détail* is the "voice of retail in Quebec" and is an association of more than "5,000 commercial establishments, representing nearly 70% of retail-related economic activity in Quebec".

« Toutes les Personnes au Québec qui ont acheté des lecteurs de disques optiques et/ou un produit muni d'un lecteur de disque optique au cours de la Période du Recours, à l'exception des Personnes Exclues. »

"All Persons in Quebec who purchased an ODD and/or an ODD Product during the Class Period, except Excluded Persons."

[28] **IDENTIFIE** aux fins de règlement, la **IDENTIFIES** for the purposes of settlement, question commune comme étant la the common issue as follows: suivante :

« Est-ce que les Défenderesses qui règlent, ou l'une d'entre elles, ont complotées pour fixer, augmenter, maintenir, ou stabiliser les prix des lecteurs de disque optique, ou s'attribuer des marchés et des clients de lecteurs de disque optique, directement ou indirectement au Canada pendant la Période visée? Dans l'affirmative, quels dommages, le cas échéant, sont payables par les Défenderesses qui règlent ou par l'une d'entre elles aux Membres du groupe visé par le règlement? »

"Did the Settling Defendants, or any of them, conspire to fix, raise, maintain or stabilize the prices of, or allocate markets and customers for, ODD directly or indirectly in Canada during the Class Period? If so, what damages, if any, are payable by the Settling Defendants, or any of them to the Settlement Class Members?"

[29] **ORDONNE** que l'autorisation de l'Action du Québec contre les Intimées qui règlent à des fins de règlement, y compris la définition des Membres du Groupe Québécois de Règlement et de la Question Commune, est sans préjudice aux droits et moyens de défense des Intimées qui ne règlent pas relativement à l'Action du Québec en cours;

ORDERS that the authorization of the Quebec Action as against the Settling Respondents for settlement purposes, including the definition of the Quebec Settlement Class and the Common Issue, is without prejudice to the rights and defences of the Non-Settling Respondents in connection with the ongoing Quebec Action;

[30] **APPROUVE** la forme et le contenu de l'Avis de préapprobation ci-joint comme pièces R-2, R-3, et R-4;

APPROVES the form and content of the Pre-Approval Notice attached hereto as Exhibits R-2, R-3, and R-4;

[31] **ORDONNE** que l'Avis de préapprobation soit publié et diffusé en

ORDERS that the Pre-Approval Notice shall be published and disseminated in

conformité avec le Plan de Diffusion ci-joint comme pièce R-5; accordance with the Plan of Dissemination attached hereto as Exhibit R-5;

[32] **ORDONNE** que les frais de diffusion de l'Avis de préapprobation soient acquittés suivant les termes de la Convention de règlement; **ORDERS** that the costs of disseminating the Pre-Approval Notice will be paid for in accordance with the Settlement Agreement;

[33] **DÉCLARE** que la période d'exclusion prévue au jugement de cette Cour du 29 janvier 2018, ayant expiré le 15 avril 2018, est maintenue et qu'aucune période d'exclusion additionnelle n'est nécessaire; **DECLARES** that the opt-out period provided pursuant to the Judgment of this Court dated January 29, 2018, having expired on April 15, 2018, stands and that no further opt-out period is necessary;

[34] **ORDONNE** que le présent jugement est conditionnel à ce que des ordonnances parallèles soient rendues par le tribunal de la Colombie-Britannique et le tribunal de l'Ontario, et que le présent jugement n'aura aucun effet tant que le tribunal de la Colombie-Britannique et le tribunal de l'Ontario n'auront pas rendu leurs ordonnances respectives; **ORDERS** that this judgment is contingent upon parallel orders being made by the B.C. Court and the Ontario Court, and the terms of those orders shall not be effective unless and until such orders are made by the B.C. Court and the Ontario Court;

[35] **ORDONNE** que l'audition de la demande pour approuver la Convention du règlement aura lieu le 27 novembre 2019 à 14 h en salle 2.08 [ou toute autre salle d'audience, qui sera indiquée par avis affiché à l'extérieur de la salle d'audience 2.08] au palais de justice de Montréal, 1, rue Notre-Dame Est (l'« Audience d'approbation du Règlement »); **ORDERS** that the hearing to approve the Settlement Agreement will be held on November 27, 2019 at 2 p.m. in room 2.08 [or any other courtroom, which will be indicated by the posting of a sign outside of courtroom 2.08] at the Montreal Courthouse, 1, Notre-Dame Street East (the "Settlement Approval Hearing");

[36] **ORDONNE** que la date et l'heure pour la tenue de l'Audience d'Approbation du Règlement soient indiquées dans l'Avis, bien qu'elles puissent être reportées par la Cour sans autre avis signifié aux Membres du Groupe, exception faite de l'avis qui sera affiché sur le site web du Règlement; **ORDERS** that the date and time of the Settlement Approval Hearing shall be set forth in the Pre-Approval Notice, but may be subject to adjournment by the Court without further publication notice to the Class Members, other than such notice which will be posted on the settlement website at

[http://www.siskinds.com/odd/;](http://www.siskinds.com/odd/)

[http://www.siskinds.com/odd/;](http://www.siskinds.com/odd/)

[37] **LE TOUT**, sans frais de justice.

THE WHOLE, without legal costs.



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Hearing date: May 29, 2019