# SUPERIOR COURT

(Class Action)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000504-106

DATE: August 24, 2020

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**IN THE PRESENCE OF: THE HONOURABLE THOMAS M. DAVIS, J.S.C.**

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**CARLOS FOGELMAN**
Petitioner

v.

**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
**BENQ AMERICA CORPORATION**
and
**BENQ CANADA CORP.**
and
**PANASONIC CORPORATION OF NORTH AMERICA**
and
**PANASONIC CANADA INC.**

and
**PIONEER NORTH AMERICA, INC.**
and
**PIONEER ELECTRONICS (USA) INC.**
and
**PIONEER ELECTRONICS OF CANADA, INC.**
Respondents

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**JUDGMENT ON THE AUTHORIZATION OF A CLASS ACTION FOR THE PURPOSES OF SETTLEMENT AND ON THE APPROVAL OF NOTICE TO CLASS MEMBERS**

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[1] On April 7, 2010, the Petitioner filed a Motion to Authorize the Bringing of a Class Action & to Ascribe the Status of Representative (the "Motion for Authorization" and the "Quebec Action") alleging that the Respondents conspired to fix prices in the market for optical disc drives ("ODDs") and certain products containing ODDs.

[2] Parallel class actions were commenced in Ontario[1] on June 11, 2010 and in British Columbia[2] on September 27, 2010 (together with the Quebec Action, the "Canadian Proceedings")[3]. Class Counsel[4] in the Canadian Proceedings are working cooperatively with each other.

[3] On August 7, 2019, the Motion for Authorization was amended to bring the file up-to-date and to add seven additional Respondents to be consistent with the Canadian Proceedings.

[4] A settlement has been reached in the Canadian Proceedings between the Petitioner in the Quebec Action and the plaintiffs in the Ontario and B.C. Actions and Toshiba Corporation, Toshiba Samsung Storage Technology Corporation, Toshiba Samsung Storage Technology Korea Corporation, Toshiba America Consumer Products, LLC, Toshiba of Canada Limited, and Toshiba America Information Systems, Inc. Samsung Electronics Co., Ltd., Samsung Electronics Canada Inc., and Samsung Electronics America, Inc. (together the "Settling

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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 (the "Ontario Action").

2 *Neil Godfrey* v. *Sony Corporation et al.*, Supreme Court of British Columbia, Vancouver Registry, Court File No. S-106462 (the "B.C. Action).

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 Mogerman LLP, Siskinds LLP, and Consumer Law Group Inc.

Respondents")[5] dated June 10, 2020 (the "Settlement Agreement") in the amount of $5,695,000 CDN.

[5] The Petitioner is now seeking to:

(i) Authorize the class action for the sole purpose of approving the Settlement Agreement in this file with the Settling Respondents;

(ii) Approve the publication[6], short-form[7] and long-form[8] 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[9].

[6] The class action will continue against the remaining Respondents (the "Non-Settling Respondents").

[7] The "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****.[10]
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> * 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- Drives, other combination drives, and optical disk drives designed to be attached externally to computers or other devices.
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> ** 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.
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> *** Class Period means January 1, 2000 through to December 31, 2010.

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5 Toshiba Samsung Storage Technology Korea Corporation and Toshiba America Information Systems, Inc. were not named in the Quebec Action, only being named in the Ontario and BC Actions.
6 Exhibit R-2.
7 Exhibit R-3.
8 Exhibit R-4.
9 Exhibit R-5.
10 See Schedule A to the Settlement Agreement.

**** 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.

[8] The Petitioner and 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 and the Supreme Court of British Columbia without any admission of liability whatsoever by the Settling Respondents and for the sole purpose of resolving the dispute between these parties.

[9] Previous settlements were reached and approved by the Courts in Quebec, Ontario and British Columbia 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;

(d) 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;

(e) Philips & Lite-On Digital Solutions Corporation and Philips & Lite-On Digital Solutions USA, Inc. (together "PLDS") in the amount of $ $5,695,000 CDN.

[10] The total amount of settlement funds to date, not including the present Settlement Amount is CDN$18,948,940 and USD$500,000.

[11] As part of the notice published in relation to the TEAC, the NEC, and the 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.

[12] In November, 2016, the B.C. Action was certified (authorized) as a class proceeding by order of the Supreme Court of British Columbia, which certification

was affirmed by the British Columbia Court of Appeal on August 18, 2017[11] and by the Supreme Court of Canada on September 20, 2019[12].

[13] Certification of the Ontario Action had been scheduled to take place on February 27, 28, and March 1, 2019. Due to the forthcoming decision from the Supreme Court in the B.C. 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) The Quebec action remains active.

[14] By order entered January 14, 2020, the BC Court amended the certified class definition to provide for a national class. The current class definition is as follows:

> Non-Umbrella Purchasers Subclass:
>
> All persons resident in Canada who purchased optical disc drives ("ODD") manufactured or supplied by the defendants in this action, or products that contain ODD ("ODD Products") in which the ODD was manufactured or supplied by the defendants in this action, in the period from January 1, 2004 through January 1, 2010.
>
> ODDs means a device that reads and/or writes to CD-ROM, CD-R/RW, DVDROM, DVD-R/RW, Blu-Ray, Blu- Ray R/RW, and HD DVD.
>
> ODD Products means computers, video game consoles and ODDs that are designed to be attached externally to devices such as computers.
>
> Umbrella Purchasers Subclass:
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> All persons resident in Canada who purchased optical disc drives ("ODD") that were not manufactured or supplied by the defendants in this action, or products that contain ODD ("ODD Products") in which the ODD was not manufactured or supplied

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11 *Godfrey* v. *Sony Corporation*, 2017 BCCA 302.
12 *Pioneer Corp.* v. *Godfrey*, 2019 SCC 42.

by the defendants in this action, in the period from January 1, 2004 through January 1, 2010.

ODDs means a device that reads and/or writes to CD-ROM, CD-R/RW, DVDROM, DVD-R/RW, Blu-Ray, Blu- Ray R/RW, and HD DVD.

ODD Products means computers, video game consoles and ODDs that are designed to be attached externally to devices such as computers.

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

a) BENQ America Corporation
b) BENQ Canada Corp.
c) Panasonic Corporation of North America
d) Panasonic Canada Inc.
e) Pioneer North America, Inc.
f) Pioneer Electronics (USA) Inc.
g) Pioneer Electronics of Canada, Inc.

**AUTHORIZATION**

[16] 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 this Court, the Supreme Court of British Columbia or the case not be dismissed by the Ontario Superior Court as against the Settling Respondents.

[17] On July 8, 2020, the Supreme Court of British Columbia ordered the certification of the B.C. Action for the purpose of the Settlement Agreement and approved the notice of settlement approval hearing.

[18] 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.

[19] 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 settlement[13].

[20] Under reserve of the rights of the Settling Respondents and the Non-Settling Respondents, the Amended Motion for Authorization dated August 7, 2019 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.

[21] 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?

[22] The facts alleged appear to justify the conclusions sought[14].

[23] 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; and

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.

[24] 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;

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[13] *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.

[14] 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.

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 settlement 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; and

i) Has not indicated any possible conflict of interest with the settlement class members.

**CLASS NOTICE**

[25] 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 Settlement Agreement and their right to participate in the settlement approval hearings.

[26] 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

circulations[15] (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. Due to the size of the Sony customer list, the mailing to Sony customers will be limited to customers with aggregate purchases of $100,000 or more[16];

c) Sent to anyone who has registered with class counsel to receive updates on the status of the ODD class action; and

d) Sent to the following industry associations for voluntary distribution to their membership:

   i. Retail Council of Canada[17]; and

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15 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.

16 Previous plans of dissemination approved in this action contemplated the short-form notice being sent to every customer of the settled defendants. The cost to complete these mailings was significant, primarily because of the size of the Sony customer lists which contains more than 100,000 names. In order to reduce costs, the proposed Plan of Dissemination provides that the mailing to Sony customers will be limited to customers with aggregate purchases of $100,000 or more.

17 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.

ii. *Conseil québécois du commerce de détail* (Quebec Council of Retail Trade)[18].

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 :**

[27] **ACCUEILLE** la présente demande;

[28] **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;

[29] **AUTORISE** l'exercice de cette action collective contre Toshiba Corporation, Toshiba Samsung Storage Technology Corporation, Toshiba Samsung Storage Technology Korea Corporation, Toshiba America Consumer Products, LLC, Toshiba of Canada Limited, Toshiba America Information Systems, Inc., Samsung Electronics Co., Ltd., Samsung Electronics Canada Inc., et Samsung Electronics America, Inc. pour les fins d'un règlement hors cour seulement;

[30] **ATTRIBUE** au Requérant le statut de représentant des Membres du Groupe Québécois de Règlement ci-après décrit :

« 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,

**WHEREFORE, THE COURT:**

**GRANTS** the present application;

**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;

**AUTHORIZES** the bringing of a class action against Toshiba Corporation, Toshiba Samsung Storage Technology Corporation, Toshiba Samsung Storage Technology Korea Corporation, Toshiba America Consumer Products, LLC, Toshiba of Canada Limited, Toshiba America Information Systems, Inc., Samsung Electronics Co., Ltd., Samsung Electronics Canada Inc., and Samsung Electronics America, Inc. for the purposes of settlement only;

**APPOINTS** the Petitioner as representative of the Quebec Settlement Class herein described as:

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

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[18] According to its website, the *Conseil québécois du commerce de detail* 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".

à l'exception des Personnes Exclues. »

[31] **IDENTIFIE** aux fins de règlement, la question commune comme étant la suivante :

« Est-ce que les Défenderesses qui règlent, ou l'une d'entre elles, ont comploté 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? »

**IDENTIFIES** for the purposes of settlement, the common issue as follows:

"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?"

[32] **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, la Période visée, et la Question Commune, soit 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, the Class Period, and the Common Issue, is without prejudice to the rights and defences of the Non-Settling Respondents in connection with the ongoing Quebec Action;

[33] **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;

[34] **ORDONNE** que l'Avis de préapprobation soit publié et diffusé en conformité avec le Plan de Diffusion ci-joint comme pièce R-5;

**ORDERS** that the Pre-Approval Notice shall be published and disseminated in accordance with the Plan of Dissemination attached hereto as Exhibit R-5;

[35] **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;

[36] **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;

[37] **ORDONNE** que l'audience de la demande pour approuver la Convention du règlement ait lieu le 1er octobre 2020, l'heure et la salle devant être confirmées par un avis qui sera affiché à partir de 9 h à l'extérieur de la salle 2.08 du palais de justice de Montréal, 1, rue Notre-Dame Est (l'« Audience d'approbation du Règlement »), cet avis sera affiché à compter de 9 h le 1er octobre 2020;

**ORDERS** that the hearing to approve the Settlement Agreement be held on October 1st, 2020 at 9:30 in room and at an hour 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"), such notice to be posted as of 9:00 on October 1st, 2020;

[38] **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 http://www.siskinds.com/odd/;

**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/;

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

**THE WHOLE**, without legal costs.

THOMAS M. DAVIS, J.S.C.

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