

# **SUPERIOR COURT**

(Class Action)

CANADA  
PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

No: 500-06-000504-106

DATE: March 1, 2019

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

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**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  
**HITACHI, LTD.**  
and  
**HITACHI CANADA, LTD.**  
and  
**HITACHI AMERICA LTD.**  
and  
**LG ELECTRONICS, INC.**  
and  
**LG ELECTRONICS CANADA**  
and  
**LG ELECTRONICS USA, INC.**  
and  
**HITACHI-LG DATA STORAGE, INC.**  
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

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**JUDGMENT**

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

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

[3] An agreement dated October 24, 2018 (the “Settlement Agreement”), providing for a settlement in the amount of \$ \$4,400,000 CDN, has been reached in the Canadian Proceedings between the Petitioner in the Quebec Action and the plaintiffs in the Ontario Action and the B.C. Action and 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” or the “Settling Respondents”).

[4] The Petitioner is now seeking to:

- (i) Authorize the class action for the sole purpose of approving the settlement in this file with the Settling Respondents;
- (ii) Approve the publication,<sup>5</sup> short-form<sup>6</sup> and long-form<sup>7</sup> 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”.<sup>8</sup>

[5] The Petitioner and the Settling Respondents have agreed to the terms of the Settlement Agreement, the whole subject to the approval of this Court, without any admission of liability whatsoever by the Settling Respondents and for the sole purpose of resolving the dispute between these parties.

[6] 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;

<sup>1</sup> *The Fanshawe College of Applied Arts and Technology v. Sony Optiarc et al.*, 2013 ONSC 1477, Commenced at London, Court File No. 1501/10CP (the “Ontario Action”).

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

<sup>3</sup> Another action was commenced in Manitoba relating to similar allegations. Class Counsel is not working with counsel in the Manitoba action and is not aware of any active steps being taken in that action.

<sup>4</sup> Class Counsel means the following law firms: Camp Fiorante Matthews Mogeran LLP, Branch MacMaster LLP, and Consumer Law Group Inc.

<sup>5</sup> Exhibit R-2.

<sup>6</sup> Exhibit R-3.

<sup>7</sup> Exhibit R-4.

<sup>8</sup> Exhibit R-5.

- (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.

[7] As part of the notice published in relation to the above 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.

[8] In 2016, the B.C. Action was certified on behalf of residents of British Columbia with two subclasses, namely “Non-Umbrella Purchasers<sup>9</sup>” and “Umbrella Purchasers<sup>10</sup>”. The certification decision was upheld by the British Columbia 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.

[9] 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 on 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.

[10] The litigation is continuing against the remaining Respondents (the “Non-Settling Respondents”).

## AUTHORIZATION

[11] The Settling Respondents consent to the present Application to authorize a class action for the purposes of settlement only, which consent shall be withdrawn should the Settlement Agreement not be approved by the Court.<sup>11</sup>

[12] The present 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 shall not affect any position a Non-Settling Respondent

<sup>9</sup> 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.

<sup>10</sup> 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.

<sup>11</sup> *Communication Méga-Sat inc. c. LG Philips LCD Co. Ltd.*, 2013 QCCS 5592; *Lavoie c. Régie de l'assurance maladie du Québec*, 2013 QCCS 866; *Option Consommateurs c. Infineon Technologies, a.g.*, 2012 QCCS 6405; *9085-4886 Québec inc. c. Visa Canada Corporation*, 2014 QCCS 6701.

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.

[13] 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 is flexible and takes into account the fact of the settlement.<sup>12</sup>

[14] The allegations of the Motion for Authorization dated April 7, 2010, the Exhibits in support thereof and the Affidavit of the Petitioner dated January 23, 2018, justify granting the present Application in accordance with the criteria set forth at article 575 C.C.P. for settlement purposes only.

[15] The Petitioner and the Settling Respondents have agreed to seek authorization for the following Quebec Settlement Class defined as:

All Persons in Quebec who purchased ODD\* and/or ODD Products\*\* during the Class Period\*\*\*, except Excluded Persons\*\*\*\*.

\* 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.

\*\* ODD Products 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 Persons 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, and those Persons who validly and timely opt-out of the Proceedings in accordance with orders of the applicable Court.

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

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<sup>12</sup> *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.

Did the Settling Defendants conspire to fix, raise, maintain and/or stabilize the prices of ODD directly or indirectly in Canada during the Class Period? If so, what damages, if any, did Settlement Class Members suffer?

[17] The facts alleged appear to justify the conclusions sought.<sup>13</sup>

[18] The proposed common issue differs slightly from the common issue previously certified by this Court for the purposes of settlement. The proposed common issue excludes the issue of allocating markets and rephrases a portion of the previously certified common issue pertaining to damages payable by the Settling Defendants to Settlement Class Members. Below is a blackline comparison of the previously certified common issue with the proposed common issue.

~~Did the Settling Defendants, or any of them, conspire to fix, raise, maintain, and/or stabilize the prices of, or allocate markets and customers for, ODD price of ODD and ODD Products~~ 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~~ did Settlement Class Members suffer?

[19] 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.

[20] 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;

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

- e) Participated in the settlement negotiations by providing input to his attorneys, ultimately instructing its attorneys to sign the Settlement Agreement;
- f) Has a good understanding of what this class action is about and what the settlement provides to settlement class members;
- g) Has performed his responsibilities as the representative of the class and he will continue to do so insofar as the proposed settlement is 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

[21] 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.

[22] 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<sup>14</sup> (subject to each having reasonable publication deadlines and costs):

<b>Newspaper</b>	<b>Average Daily Circulation (2015)</b>
The Globe and Mail (National Edition)	336,487
Le Journal de Montréal (French)	232,332
The Vancouver Sun	136,787
Le Soleil (French)	78,455

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

<sup>14</sup> 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](https://nmc-mic.ca/wp-content/uploads/2016/06/2015-Daily-Newspaper-Circulation-Report-REPORT_FINAL.pdf).

- b) Sent to the Settling and Settled Respondents' direct 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
- d) Sent to the following industry associations for voluntary distribution to their membership:
  - i. Retail Council of Canada;<sup>15</sup> and
  - ii. *Conseil québécois du commerce de détail* (Quebec Retail Council);<sup>16</sup>

Long-Form Notice (Posted or Upon Request)

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

[23] The proposed Plan of Dissemination is similar to the Plan of Dissemination that was most recently approved by this Honourable Court. Some changes were made with respect to the distribution of the publication and short-form notice. Most notably, the number of newspapers publications was reduced to account for the fact that the opt-out has run and the Information Technology Association of Canada was dropped from the list of trade organizations, as it was learned that this organization does not distribute class action legal notices to its members.

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

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

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

[26] **AUTORISE** l'exercice de cette action [26] **AUTHORIZES** the bringing of a class collective contre Sony Corporation, Sony action against Sony Corporation, Sony of

<sup>15</sup> 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.

<sup>16</sup> 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".



of Canada Ltd., Sony Corporation of America, Sony Optiarc, Inc., Sony Optiarc America Inc., et Sony NEC Optiarc, Inc. à des fins de règlement seulement;

[27] **ATTRIBUE** au Requéran le statut de représentante des Membres du Groupe Québécois de Règlement ci-après décrit :

« Tous les résidents du 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. »

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

« Est-ce que les Défenderesses qui règlent ont comploté avec d'autres pour fixer, augmenter, maintenir, et/ou stabiliser les prix des LDO et les Produits contenant des LDO directement ou indirectement au Canada pendant la Période visée? Dans l'affirmative, quels dommages, le cas échéant, les Membres du groupe visé par le règlement ont-ils subis ? »

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

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

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

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

"Did the Settling Defendants conspire to fix, raise, maintain and/or stabilize the prices of ODD directly or indirectly in Canada during the Class Period? If so, what damages, if any, did Settlement Class Members suffer?"

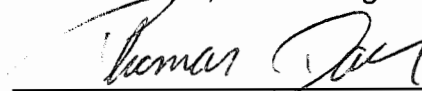
[29] **DECLARES** that the authorization of the Quebec Action as against the Settling Respondents for settlement purposes, including the definition of the Quebec Settlement Class and the Common Issue, is without prejudice to the rights and defences of the Non-Settling Respondents in connection with the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

- [30] **APPROUVE** la forme et le contenu des Avis de pré-approbation ci-joints comme pièces R-2, R-3, et R-4;
- [30] **APPROVES** the form and content of the Pre-Approval Notices attached hereto as Exhibits R-2, R-3, and R-4;
- [31] **ORDONNE** que les Avis de pré-approbation soient publiés et diffusés en conformité avec le Plan de Diffusion ci-joint comme pièce R-5;
- [31] **ORDERS** that the Pre-Approval Notices shall be published and disseminated in accordance with the Plan of Dissemination attached hereto as Exhibit R-5;
- [32] **ORDONNE** que les frais de diffusion des Avis de pré-approbation soient acquittés suivant les termes de la Convention de règlement;
- [32] **ORDERS** that the costs of disseminating the Pre-Approval Notices 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;
- [33] **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 soit 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 leur ordonnance respective;
- [34] **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 requête pour approuver la Convention du règlement aura lieu le 29 mai 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 »);
- [35] **ORDERS** that the hearing to approve the Settlement Agreement will be held on May 29, 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 les Avis de pré-approbation, bien qu'elles
- [36] **ORDERS** that the date and time of the Settlement Approval Hearing shall be set forth in the Pre-Approval Notices, but may be subject to adjournment by the Court without

puissent être reportées par la Cour sans further publication notice to the Class  
autre avis signifié aux Membres du Members, other than such notice which will be  
Groupe, exception faite de l'avis qui sera posted on the settlement website at  
affiché sur le site web du Règlement <http://www.siskinds.com/odd/>;  
<http://www.siskinds.com/odd/>;

**LE TOUT**, sans frais de justice.

**THE WHOLE**, without legal costs.



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