

CITATION: Fady Samaha v. Yamashita Rubber Co. et al, 2019 ONSC 3192

DATE: 20190529

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Anti-Vibration Rubber Parts	<i>Fady Samaha et al v Yamashita Rubber Co., Ltd. et al</i>	CV-13-472262-CP
Autolights	<i>Sheridan Chevrolet et al v Koito Manufacturing Co., Ltd. et al</i>	CV-13-478642-CP
Automotive Hoses	<i>Sheridan Chevrolet et al v Hitachi Metals, Ltd. et al</i>	CV-15-524185-CP
Ceramic Substrates	<i>Sheridan Chevrolet et al v NGK Insulators, Ltd. et al</i>	CV-16-549735-CP
Electric Powered Steering Assemblies	<i>Sheridan Chevrolet et al v JTEKT Corporation et al</i>	CV-14-506652-CP
Electronic Throttle Bodies	<i>Sheridan Chevrolet et al v Hitachi, Ltd. et al</i>	CV-14-506649-CP
Fan Motors	<i>Sheridan Chevrolet et al v Denso Corporation et al</i>	CV-14-506635-CP
Fuel Injection Systems	<i>Sheridan Chevrolet et al v Hitachi, Ltd. et al</i>	CV-14-506683-CP
Power Window Motors	<i>Sheridan Chevrolet et al v Denso Corporation et al</i>	CV-14-506679-CP
Shock Absorbers	<i>Sheridan Chevrolet et al v Kayaba Industry Co. Ltd. et al</i>	CV-16-549728-CP
Starters	<i>Sheridan Chevrolet et al v Denso Corporation et al</i>	CV-13-478127-CP
Windshield Washer Systems	<i>Sheridan Chevrolet et al v Denso Corporation et al</i>	CV-14-506669-CP
Windshield Wiper Systems	<i>Sheridan Chevrolet et al v Denso Corporation et al</i>	CV-13-478180-CP

Proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. c.6

BEFORE: Justice Edward P. Belobaba

COUNSEL: *Charles M. Wright, Jean-Marc Leclerc, and Jonathan Schachter* for the Plaintiffs

Robert Kwinter for the Defendants NGK Insulators, Ltd., NGK Ceramics USA, Inc., NGK Automotive Ceramics USA, Inc., NGK Insulators of Canada, Ltd., Koito Manufacturing Co., Ltd., North American Lighting, Inc., NSK Ltd., NSK Americas, Inc., NSK Canada Inc., NSK Steering Systems America, Inc., NSK

Steering Systems Co., Ltd., Mikuni Corporation and Mikuni American Corporation

Lisa Parliament and *Benjamin Bathgate* for the Defendants Mitsuba Corporation and American Mitsuba Corporation

Kevin Wright for the Defendants Hitachi, Ltd., Hitachi Automotive Systems, Ltd. and Hitachi Automotive Systems Americas, Inc.

Chantelle Cseh for the Defendants Denso Corporation, Denso International America, Inc., Denso Manufacturing Canada, Inc., Denso Sales Canada, Inc., Denso International Korea Corporation, Denso Korea Automotive Corporation, ASMO North Carolina, Inc., ASMO Co. Ltd., ASMO Manufacturing, Inc., ASMO North America, LLC; ASMO Greenville of North Carolina, Inc. and Korea Wiper Blade Co., Ltd.

Emrys Davis for the Defendants Bridgestone Corporation, Bridgestone Elastech Co. Ltd., Bridgestone APM Company, Hitachi Metals, Ltd. and Hitachi Cable America Inc.

James Gotowiec for the Defendants Toyoda Gosei Co., Ltd., Toyoda Gosei North America Corporation, TG Fluid Systems USA Corporation, TG Kentucky, LLC, Showa Corporation, American Showa, Inc. and Showa Canada Inc.

Casey Halladay for the Defendants Toyo Tire & Rubber Co. Ltd., Toyo Tire North America OE Sales LLC, Toyo Automotive Parts (USA) Inc., Stanley Electric Co., Ltd., Stanley Electric U.S. Co., Inc. and II Stanley Co., Inc.

Katherine Kay for the Defendants Ichikoh Industries, Ltd., Corning, Inc., Corning International Kabushiki Kaisha, Keihin Corporation and Keihin North America, Inc.

Daphne Papadatos for the Defendants Yamashita Rubber Co., Ltd. and Yusa Corporation, Maruyasu Industries Co. Ltd.

Ahmed Shafey for the Defendants Kayaba Industry Co. Ltd., d/b/a/ KYB Corporation and KYB Americas Corporation

HEARD: May 28, 2019

**Auto Parts Class Actions
HIAMS, Mitsuba, NGK and Sumitomo Riko Settlements
Settlement and Fee Approvals**

Reasons for Decision

[1] I am currently case-managing some 42 class actions alleging price-fixing in the global automotive parts industry. The actions are at various stages of litigation and involve a variety of auto parts produced by a wide range of suppliers. The class actions materialized in the aftermath of high-profile criminal and regulatory investigations in the United States, Canada and Europe.

[2] The auto parts cases are being prosecuted on a coordinated basis by class counsel in Ontario, British Columbia and Quebec. The Canadian settlements to date total some \$46 million.

[3] The plaintiffs bring this motion for judicial approval of 13 discrete auto part settlements with the HIAMS, Mitsuba, NGK and Sumitomo Riko defendants. The actions were certified for settlement purposes as against the settling defendants when the notices were approved.

[4] The applicable law on settlement approval in Ontario is well established. The court must be satisfied that the proposed settlement is fair and reasonable and in the best interests of the class. The key question is whether the settlement falls within a zone of reasonableness.¹ The plaintiffs support the settlements and no objections have been filed.

[5] I note that in addition to the settlement amounts discussed below, each of the four suppliers has also agreed to co-operate in the continuing price-fixing litigation and has provided information about the global auto parts industry and the scope and content of the alleged conspiracy.

[6] I am satisfied on the evidence presented by the plaintiffs that each of the proposed settlements falls within a zone of reasonableness and should be approved. In each case, the Canadian settlement when compared to the related American settlement (which I must accept as reasonable) falls within the appropriate proportions. I am also persuaded that class counsel's legal fees should also be approved. I will explain these conclusions in more detail.

Settlement Approvals

[7] The settling defendants have collectively agreed to pay approximately \$14.8 million as set out below:

¹ *Dabbs v. Sun Life Assurance*, (1998) 40 O.R. (3d) 429 (Gen. Div.), aff'd (1998) 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused Oct. 22, 1998; *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.); *Urlin Rent a Car v Furukawa Electric*, 2016 ONSC 7965 at para 5.

Defendant	Action	Amount (CAD)
Hitachi, Ltd., Hitachi Automotive Systems, Ltd., and Hitachi Automotive Systems Americas, Inc. (collectively, " HIAMS ")	Shock Absorbers	\$1,818,000.00
Mitsuba Corporation and American Mitsuba corporation (collectively, " Mitsuba ")	Autolights	\$150,000.00
	Electric Powered Steering Assemblies	\$150,000.00
	Electronic Throttle Bodies	\$150,000.00
	Fan Motors	\$476,042.96
	Fuel Injection Systems	\$179,105.24
	Power Window Motors	\$2,491,762.84
	Starters	\$1,228,599.32
	Windshield Washer Systems	\$201,100.67
	Windshield Wiper Systems	\$4,273,388.97
Total	\$9,300,000.00	
NGK Insulators, Ltd., NGK Ceramics USA, Inc., NGK Automotive Ceramics USA, Inc., and NGK Insulators of Canada, Ltd. (collectively, " NGK ")	Ceramic Substrates	\$2,128,160.00
Sumitomo Riko Company limited (formerly known as Tokai Rubber Industries, Ltd.), SumiRiko Ohio, Inc. (formerly known as DTR Industries, Inc.) ² and SumiRiko Tennessee, Inc. (formerly known as DTR Tennessee, Inc.) ³ (collectively, " Sumitomo Riko ")	Anti-Vibration Rubber	USD \$1,150,000.00
	Automotive Hoses	USD \$50,000.00
	Total	USD \$1,200,000 (Converted to CAD \$1,590,000 upon receipt)

² SumiRiko Ohio, Inc. is a party only to the Sumitomo Riko Settlement Agreement in the AVR action.

³ SumiRiko Tennessee, Inc. is a party only to the Sumitomo Riko Settlement Agreement in the Automotive Hose action.

[8] I will discuss each of the settlements in turn.

(1) HIAMS

[9] Hitachi, Ltd., Hitachi Automotive Systems, Ltd., and Hitachi Automotive Systems Americas, Inc. (collectively “HIAMS”) settled the Shock Absorbers action for CAD\$1,818,000. As the first settlement in the action, an important objective was receiving cooperation. HIAMS agreed to provide cooperation in the ongoing litigation, including a proffer due within 60 days of execution. The proffer was held in April 2019.

[10] During negotiations, the plaintiffs accepted that there were no potentially-tainted direct sales in Canada. As a result, the discussions were premised largely on HIAMS’ U.S. indirect settlements. HIAMS was the first to settle the U.S. Shock Absorbers litigation, involving a payment of USD\$17.5 million to resolve the dealer and end-payor actions.

[11] HIAMS’ Canadian settlement is worth approximately 8% of its U.S. indirect settlements adjusted for currency. This falls within the historic range and is comparable to the previous HIAMS settlements (8.16% of the U.S. settlement amount). Class counsel say they used confidential commerce information provided by HIAMS regarding its potentially-tainted indirect Canadian sales to confirm that the settlement was within the range of reasonableness.

[12] I accept this evidence and I agree that the settlement falls within a range of reasonableness.

(2) Mitsuba

[13] Mitsuba Corporation and American Mitsuba Corporation (collectively “Mitsuba”) settled nine actions for CAD\$9.3 million. Mitsuba also agreed to provide cooperation in the ongoing litigation including a pre-approval attorney proffer that took place in February 2019.

[14] During negotiations, the plaintiffs accepted that there were no potentially-tainted direct sales in Canada. As a result, the discussions were premised largely on Mitsuba’s U.S. indirect settlements. Mitsuba settled the American dealer and end-payor actions for USD\$95 million. Mitsuba’s Canadian settlement is worth approximately 7.39% of its

U.S. indirect settlements (less Radiators⁴) adjusted for currency. Class counsel agreed to a number slightly below the normal 8-10% range based on the relative order of settlements in the U.S., compared to Canada. In the U.S., Mitsuba settled after Denso and therefore faced greater joint and several liability. In the U.S., defendants are potentially liable for treble damages. In Canada, Mitsuba settled before Denso, there is no liability for treble damages and the law is undecided as to joint and several liability.

[15] Mitsuba was the first to settle in four of the nine actions and agreed to provide an early proffer. I agree with class counsel that this early cooperation across multiple cases was valuable and worth a discount, compared to defendants who might subsequently settle these cases.

[16] The allocation of the settlement amount is based on the allocation in the U.S. settlement, information supplied by Mitsuba during the course of negotiations and by certain other settled defendants pursuant to their cooperation obligations. Allocated amounts are adjusted for a minimum payment of CAD\$150,000.⁵

[17] I accept this evidence and I agree that the settlement falls within a range of reasonableness.

(3) NGK

[18] NGK Insulators, Ltd., NGK Ceramics USA, Inc., NGK Automotive Ceramics USA, Inc., and NGK Insulators of Canada, Ltd. (collectively "NGK") settled the Ceramic Substrates action for CAD\$2,128,160. As the first settlement in the case, an important objective was receiving cooperation. NGK agreed to provide cooperation in the ongoing litigation including a pre-approval attorney proffer that was held in April 2019.

[19] During negotiations, the plaintiffs were persuaded that there were no potentially-tainted direct sales in Canada. As a result, the discussions were premised largely on NGK's U.S. indirect settlements. NGK was the second to settle the U.S. litigation. NGK settled its dealer and end-payor actions for USD\$16 million. NGK's Canadian settlement is worth approximately 10% of its U.S. settlements, adjusted for currency.

⁴ Mitsuba settled the U.S. radiators cases for USD\$4 million. Class counsel is not aware of any evidence that Mitsuba manufactured radiators and Mitsuba was not identified in the T. Rad proffer as a competitor or a co-conspirator. Indeed, Mitsuba's counsel was uncertain as to why Mitsuba was named in the U.S. litigation.

⁵ I accept the plaintiff's evidence that this minimum payment is consistent with the allocation in other similarly-sized settlements where there is limited exposure and/or commerce.

[20] Class counsel used the commerce information disclosed in NGK's guilty plea (USD\$251 million) to support their submission that the settlement was within the range of reasonableness.

[21] I accept this evidence and I agree that the settlement falls within a range of reasonableness.

(4) Sumitomo Riko

[22] Sumitomo Riko Company Limited (formerly known as Tokai Rubber Industries, Ltd.), SumiRiko Ohio, Inc. (formerly known as DTR Industries, Inc.)⁶ and SumiRiko Tennessee, Inc. (formerly known as DTR Tennessee, Inc.)⁷ (collectively "Sumitomo Riko") settled the Anti-Vibration Rubber Parts ("AVR") and Automotive Hoses actions for USD\$1,200,000 (which converted to CAD\$1,590,000 upon receipt). These are the first settlements in the AVR and Automotive Hoses actions. Sumitomo Riko's agreement to settle and provide an early proffer in AVR was a significant factor in agreeing to the settlement. Class counsel is actively pursuing the AVR case, and Sumitomo Riko's cooperation in providing an early proffer will no doubt be helpful in advancing that case against the remaining defendants.

[23] Unlike the other settlements, discussions were based primarily on volume of commerce information. Yamashita Rubber and Toyo Tire's Canadian guilty pleas indicated that Sumitomo Riko had potentially tainted sales of \$225 million to Toyota and Honda. During negotiations, Sumitomo Riko's counsel advised that this figure was inflated. The plaintiffs were also advised that a large portion of affected Canadian-made vehicles were subsequently exported to the United States and the related claims were resolved through the U.S. settlements.⁸ The plaintiffs were also advised that Sumitomo Riko has resolved any potential claims directly with Toyota. Honda has opted out of most of the auto parts class actions.

[24] Sumitomo Riko's counsel provided confidential information regarding potentially tainted sales. The number provided was less than 20% of that disclosed in the guilty pleas and included (i) potentially tainted sales to OEMs in Canada that were incorporated into automotive vehicles that stayed in Canada, and (ii) potentially tainted sales to OEMs in

⁶ SumiRiko Ohio, Inc. (formerly known as DTR Industries, Inc.) is a party only to the Sumitomo Riko Settlement Agreement in the AVR action.

⁷ SumiRiko Tennessee, Inc. (formerly known as DTR Tennessee, Inc.) is a party only to the Sumitomo Riko Settlement Agreement in the Automotive Hoses action.

⁸ This is supported by the fact that the U.S. guilty pleas took into account imports from Canada.

the United States and Japan that were incorporated into automotive vehicles that were imported into Canada.

[25] Class counsel submits that the proposed settlement is consistent with the result in the U.S. litigation, factoring in the different volumes of commerce. In the U.S., Sumitomo Riko was the first to settle both the AVR and Automotive Hoses cases. Sumitomo Riko settled the dealer and end-payor actions for USD\$15 million. Sumitomo Riko's Canadian settlement is worth approximately 8% of its U.S. settlement which, according to class counsel, falls within a range of reasonableness.

[26] I accept this evidence and I agree that the settlement falls within a range of reasonableness.

[27] I note that the allocation is based on the allocation in the U.S. settlement and the Canadian volume of commerce figures provided by Sumitomo Riko's counsel. The allocation to Automotive Hoses was adjusted downwards to reflect that Sumitomo Riko had limited exposure for this particular auto part.

Conclusion

[28] In sum, I find that each of the settlements that are before me for approval are fair and reasonable and in the best interests of the class.

Legal Fees

[29] Based on the retainer agreements, class counsel are entitled to a 25 per cent contingency fee plus disbursements and taxes. As discussed in *Cannon*,⁹ and as further refined in *Brown*,¹⁰ this contingency fee amount is presumptively valid on the facts herein and should be approved.

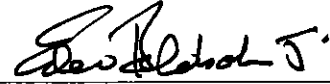
[30] I therefore have no difficulty approving class counsel's fees request in the aggregate amount of \$3,541,304.36 plus disbursements in the amount of \$412,785.27 (including interest) and applicable taxes.

⁹ *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686.

¹⁰ *Brown v. Canada (Attorney General)*, 2018 ONSC 3429.

Disposition

[31] Orders to go approving the settlements and the legal fees as per the draft Orders that were signed by me on May 28, 2019 and provided to class counsel at the hearing.



Justice Edward P. Belobaba

Date: May 29, 2019