IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pro-Sys Consultants Ltd. v. Infineon Technologies AG,* 2014 BCSC 1936

Date: 20141014
Docket: L043141
Registry: Vancouver

Between:

Pro-Sys Consultants Ltd.

Plaintiff

And:

Infineon Technologies AG, Infineon Technologies North America Corp., Hynix Semiconductor Inc., Hynix Semiconductor America Inc., Hynix Semiconductor Manufacturing America, Inc., Samsung Electronics Co., Ltd. Samsung Semiconductor, Inc., Samsung Electronics America, Inc., Samsung Electronics Canada Inc., Micron Technology, Inc. and Micron Semiconductor Products, Inc. doing business as Crucial Technologies, Elpida Memory, Inc., Elpida Memory (USA) Inc., Nanya Technology Corporation, Nanya Technology Corporation USA, NEC Corporation, NEC Corporation of America, NEC Canada, Renesas Electronics Corporation fka NEC Electronics Corporation, Renesas Electronics America Inc. fka NEC Electronics America, Inc., Hitachi, Ltd., Hitachi America, Ltd., Hitachi Electronic Devices (USA), Inc., Hitachi Power Systems Canada Ltd. Renesas Electronics Canada Ltd., Mitsubishi Electric Corporation, Mitsubishi Electric Sales Canada Inc., Mitsubishi Electric & Electronics USA, Inc., Toshiba Corporation, Toshiba America Electronics Components Inc., Toshiba of Canada Limited, Winbond Electronics Corporation and Winbond Electronics Corporation America

Defendants

BROUGHT UNDER THE *CLASS PROCEEDINGS ACT*, R.S.B.C. 1996, c. 50

Before: The Honourable Mr. Justice D. M. Masuhara

Reasons for Judgment
In Chambers

Counsel for Plaintiff:	J.J. Camp, QC R.M. Mogerman J.R. Facchin
Counsel for the Defendants, Infineon Technologies AG and Infineon Technologies North America Corp.:	K.L. Kay E.N. Kolers
Counsel for the Defendants, Mitsubishi Electric Corporation, Mitsubishi Electric Sales Canada Inc. and Mitsubishi Electric & Electronics USA, Inc.:	L. Plumpton
Counsel for the Defendants, Toshiba Corporation, Toshiba America Electronic Components Inc., and Toshiba of Canada Limited:	L. Cooper Z. Maladwala
Counsel for the Defendants, Winbond Electronics Corporation and Winbond Electronics Corporation America:	D.G. Edmonstone K. Reilly
Place and Date of Hearing:	Vancouver, B.C. September 8, 2014
Place and Date of Judgment:	Vancouver, B.C. October 14, 2014

I. Introduction

[1] This decision deals with three applications. Approval is sought for settlement agreements with the remaining defendants in this class action; the distribution plan for total settlement funds of over $80 million and the administration of the process for distribution; and a counsel fee of $16,851,367.64, plus applicable taxes and disbursements. The total fee approved in this litigation to date would then be $22,666,368. There is one further application for fee approval scheduled for early 2015.

II. Background

[2] This class action has been litigated for close to ten years. The writ was filed in December 2004 and I have been case management judge since December 2005. The action relates to an allegation of a large scale price fixing conspiracy against manufacturers of dynamic random access memory ("DRAM") located in Asia, Europe and North America. This class action deals with the period April 1, 1999 to June 30, 2002.

[3] DRAM is a semiconductor memory product which provides high speed storage and retrieval of information found in computers, servers, telecommunications equipment and host of consumer electronic equipment. This action has been litigated on behalf of direct and indirect purchasers of DRAM on a national basis (the "Proceedings").

[4] Parallel proceedings have been presided over before Mr. Justice P-C Gagnon in Quebec (*Option Consommateurs c. Infineon Technologies AG*) and Mr. Justice P. Perell in Ontario (*Eidoo v. Infineon Technologies AG*). In addition to numerous conferences and contested hearings in this court, joint hearings before the three courts have also been conducted.

[5] The Settlement Agreements are national in scope and subject to court approval in British Columbia, Ontario and Quebec. The Quebec settlement approval hearing was heard by Mr. Justice P-C Gagnon on September 5, 2014 and the Ontario settlement approval hearing was heard by Mr. Justice Perell on

September 19, 2014. As invited by counsel to do so, I have conferred with Justices Gagnon and Perell in respect to the present applications.

[6] Class Counsel are: Camp Fiorante Matthews Mogerman (British Columbia); Belleau Lapointe, LLP (Quebec); Sutts, Strosberg LLP (Ontario); and Harrison Pensa LLP (Ontario).

[7] A trial of the case against Infineon had been scheduled to commence before me in September of this year, but was adjourned as a result of a settlement.

[8] The present applications essentially bring to a close the litigation against all of the defendants in this action. To date, settlement agreements with the Elpida, Micron, Nanya, NEC, Hitachi, Samsung and Hynix group of defendants have been approved. Including the subject settlement agreements, the total settlement amount achieved in this class action inclusive of accrued interest is over $80 million (the "Settlement Funds"). Counsel advises that the settlements in this case represent the second-largest recovery in Canadian competition class action history.

[9] Specifically, counsel for the plaintiff has applied for:

(a) the approval of settlement agreements with Infineon Technologies AG and Infineon Technologies North America Corp. (collectively "Infineon") dated June 18, 2014 (the "Infineon Settlement Agreement"); Toshiba Corporation, Toshiba America Electronics Components Inc. and Toshiba of Canada Limited (collectively "Toshiba") dated June 16, 2014 (the "Toshiba Settlement Agreement"); Mitsubishi Electric Corporation, Mitsubishi Electric Sales Canada Inc. and Mitsubishi Electric & Electronics USA, Inc. (collectively "Mitsubishi") dated June 24, 2014 (the "Mitsubishi Settlement Agreement"); and Winbond Electronics Corporation and Winbond Electronics Corporation America (collectively "Winbond") dated June 16, 2014 (the "Winbond Settlement Agreement"), (collectively, the "Settling Defendants" and the "Settlement Agreements").

(b) the approval of a distribution protocol and appointment of a Claims Administrator; and

(c) the approval of Class Counsel fees and disbursements. The fee sought in this application is $16,851,367.64. Fees of $5.815 million have already been approved and paid out. As a result, the total fees which would be paid out to Class Counsel will be $22,666,367.64. The fee is calculated by counsel at 30% of all settlement amounts in this action paid or payable on or before September 19, 2014. A further fee calculated on the same basis will be applied for in early 2015 when the second tranche of the Infineon settlement amount of $4.5 million is paid.

[10] Notice of the hearing of the applications was published on July 31, 2014 and August 5, 2014. No objections have been submitted by settlement class members in relation to the Settlement Agreements, including in relation to the fees Class Counsel are now seeking.

[11] I will deal with each application in the same order as above.

III. Approval of Settlement with Infineon, Mitsubishi and Winbond.

[12] The present Settlement Agreements follow several other settlements that have been previously approved by the courts in all three jurisdictions. They are as follows:

Defendant Group:	Date of Agreement	Settlement Amount	Date of Approval
Elpida	November 15, 2011	$5,750,000.00	BC: June 18, 2012 ON: June 27, 2012 QC: June 27, 2012
Nanya	July 24, 2012	$325,000.00	BC: January 24, 2013 ON: February 6, 2013 QC: March 14, 2013
Micron	October 16, 2012	$17,500,000.00	BC: January 24, 2013 ON: February 6, 2013 QC: March 14, 2013
NEC	November 28, 2012	$2,750,000.00	BC: January 24, 2013 ON: February 6, 2013

Defendant Group:	Date of Agreement	Settlement Amount	Date of Approval
			QC: March 14, 2013
Hitachi	December 18, 2012	$2,750,000.00	BC: January 24, 2013 ON: February 6, 2013 QC: March 14, 2013
Samsung	April 5, 2013	$22,600,000.00	BC: June 27, 2013 ON: July 16, 2013 QC: July 5, 2013
Hynix	April 30, 2013	$15,600,000.00	BC: June 27, 2013 ON: July 16, 2013 QC: July 5, 2013
TOTAL		**$67,275,000.00**	

[13] The settlements with Infineon, Toshiba, Mitsubishi and Winbond total $12.195 million. Respectively, each will pay $9 million, $1.495 million, $1.250 million, and $450,000.

[14] Notices of the settlement approval hearing were duly published. There have been no objections to the Settlement Agreements.

[15] Court approval of settlements is required under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50. A non-exhaustive list of factors to consider were identified and set out by Groberman J. (as he then was) in *Jeffrey v. Nortel Networks Corp*., 2007 BCSC 69. He distilled the factors into four broad questions for consideration. They are:

> (a) Has counsel of sufficient experience and ability undertaken sufficient investigations to satisfy the court that the settlement is based on a proper analysis of the claim?
>
> (b) Is there any reason to believe that collusion or extraneous considerations have influenced negotiations such that an inappropriate settlement may have been reached?
>
> (c) On a cost/benefit analysis, are the plaintiffs well-served by accepting the settlement rather than proceeding with the litigation? and

(d) Has sufficient information been provided to the members of the class represented by representative plaintiffs, and, if so, are they generally favourably disposed to the settlement?

[16] As case management judge, having reviewed the materials, conducted a multitude of hearings and conferences in this case, observed the contentiousness between the opposing sides, noted the complex legal issues at stake and risk inherent in the case, recognized the expertise of counsel in the case, observed the need by counsel to seek relief at appellate levels, noted the approximate market share of the various defendants, observed the size of the settlements in the U.S., and having reviewed and approved settlements with other defendants in this action, the answers to the above questions can be answered yes, no, yes, and yes, respectively. I find that the Settlement Agreements are fair and reasonable. The settlement amounts fall within a zone of reasonableness based on the available DRAM market information. They are in reasonable harmony with the market share of each of the Settling Defendants and in respect to the total settlements achieved.

[17] The Settlement Agreements are approved, including the bar order and waiver of solidarity.

IV. Distribution Protocol and Claims Administrator

[18] As settlements arose in this litigation, Class Counsel advised that they were turning their attention to distribution. They recognized that there were issues relating to the extent of any overcharge from price fixing reaching the different levels of distribution and that there were constituencies within the class; some were more organized and capable of advancing their claims against the settlement fund. To reflect fairness plaintiff's counsel proactively undertook various actions, which included:

(a) initiating public consultation and outreach with class members in the Proceedings respecting the Distribution Protocol;

(b) retaining a senior economist, Dr. Tom Ross to provide an independent and objective opinion as to the distribution of loss

as a result of the overcharge and in particular where the overcharge came to rest in the chain of distribution and on the economic reasonableness of the Distribution Protocol;

(c) retaining the Honourable Ian Binnie, C.C., Q.C., on an independent basis to provide opinion, reporting on the process and a level of oversight;

(d) attending and making submissions at public hearings held by Mr. Binnie for class members respecting the Distribution Protocol;

(e) different members of class counsel being assigned a class group and adopting an adversarial role representing different levels of the DRAM distribution chain, to ensure that the interests of all categories of class members were represented; and

(f) reviewing the expert evidence and the plan of allocation approved in the parallel US DRAM action for indirect purchasers, *In Re Dynamic Random Access Memory (Anti-Trust) Litigation*, MDL No. 1486 (the "US Action" and the "US DRAM Allocation", respectively).

[19] The result of the process has led to a plan of distribution (the "Distribution Protocol" attached as Appendix A). Counsel submits that this plan attempts to provide a fair and reasonable allocation of the amounts achieved in the Proceedings. The amount for distribution to the class will be the total of all Settlement Funds received in the Proceedings, plus accrued interest, less class counsel's approved fees and disbursements and approved administration costs and budget for notice.

[20] The Distribution Protocol divides the net Settlement Funds into three Funds:

1. the End Consumer Fund: 50% of net Settlement Funds;

2. the EMS (Electronic Manufacturing Services) Fund: 30% of net Settlement Funds; and

3. the Other DRAM Purchaser Fund: 20% of net Settlement Funds

(collectively, the "Funds").

[21] The End Consumer Fund applies to class members who purchased DRAM for their own use and not for resale in the same or modified form. This category includes a wide range of consumers from individuals, through small and medium-sized businesses, all the way up to the largest Canadian businesses and Canadian governmental entities at the municipal, provincial and federal levels (collectively, the "End Consumers").

[22] The EMS Fund applies to claims by a class member for purchases of DRAM "in support of the manufacturing or assembly" of particular electronics products "by contract manufacturers or electronics manufacturing services firms pursuant to contracts with computer and/or non-computer original equipment manufacturers and/or other computer parts manufacturers for commercial resale in a modified form". Claims for the purchase of DRAM to construct or assemble DRAM modules for commercial resale to End Consumers are excluded from claims on the EMS Fund.

[23] The Other DRAM Purchaser Fund addresses claims by any class members which do not fall into the End Consumer or EMS Funds. The class members whose purchases fall within the Other DRAM Purchaser Fund are a varied group including resellers, contract manufacturers who are not EMS manufacturers, and many others. Because the purchases of class members that fall in this category will vary substantially, three sub-categories have been created in the Other DRAM Purchaser Fund:

(a) high absorption claims are claims for purchases of DRAM and/or DRAM Products in support of manufacture or assembly

of computer DRAM Products for commercial resale in modified form to government/education entities;

(b) medium absorption claims are claims for purchases of DRAM and/or DRAM Products in support of manufacture or assembly of computer DRAM Products for commercial resale in a modified form:

(i) directly by the class member; and/or

(ii) to non-government/education entities; and

(c) low absorption claims are claims for purchases of DRAM or DRAM Products for:

(iii) distribution for commercial resale without modification by the class member; and/or

(iv) manufacture or assembly of non-computer DRAM Products for commercial resale in a modified form.

[24] A class member may claim in any Fund for which they have purchases of DRAM which qualify, and may claim in more than one Fund. For example, an electronics retailer may claim in the Other DRAM Purchaser Fund for its purchases of DRAM Products for commercial resale, and in the End Consumer Fund for purchases of DRAM Products, such as point of sale terminals, for its own use. Class members' claims on each Fund will be paid out of the monies in that Fund.

[25] The Funds are designed to be self-contained, unless there is an unjust result after all claims are submitted. That is, absent an unjust result, even if one Fund is undersubscribed and another oversubscribed, the monies in the undersubscribed Fund will not be used to compensate the class members in the oversubscribed Fund. If any Fund is oversubscribed, the payouts to class members will be pro-rated down to the total amount in that Fund.

[26] If a Fund is undersubscribed, Class Counsel may implement a pro-rata increase in the compensation payable to claimants entitled to compensation from

that Fund, unless a pro-rata increase is determined to be inappropriate. As an example, a pro-rata increase would notably be inappropriate if it resulted in the overcompensation of claimants. If a pro-rata increase is inappropriate, Class Counsel will prepare a proposal for the Courts in respect of any excess monies remaining in an undersubscribed Fund prior to payouts on that Fund occurring. In such a case, excess monies may be employed to implement a pro-rata increase up to a level at which it is appropriate, or may be distributed *cy près*, or may be used in part for each of those purposes.

[27] Because DRAM is used in a wide variety of electronics, claims are based on a common unit of measure, the "Computer Equivalency Unit" ("CEU"). A CEU grid is attached to the Distribution Protocol. The use of the CEU as a unit of measure is based on the work of Jonathan Schwartz for the US DRAM Allocation. Mr. Schwartz is a principal economist at Nathan Associates Inc. with many years of experience providing economic analysis in US antitrust class actions. One CEU is equivalent to the average amount of DRAM in a computer during the class period. Other products containing DRAM are then assigned a CEU value based on their average DRAM content as compared to DRAM content of an average computer. For class members who purchased raw DRAM or DRAM in large quantities, there is an additional grid for assigning a CEU value to those purchases in a straightforward manner.

[28] Each of the Funds also has a dollar value assigned to it for each CEU. For End Consumers, each CEU is valued at $5. For EMS and Other DRAM Purchasers, each CEU is valued at $1.25. Among Other DRAM Purchasers, this value will be further weighted according to whether the purchases are low-, medium- or high-absorption.

[29] Claims will therefore largely be calculated by multiplying the CEU value (for the product purchased by the class member) by the class member's volume of purchases (of that product) and the dollar value per CEU assigned to the appropriate Fund. End Consumers will receive a minimum payment of $20.

[30] Because Class Counsel's primary goal is to directly compensate real class members, Class Counsel is not currently proposing any *cy près* distribution. If there

are excess monies remaining in one or more of the Funds after the claims process has concluded and if Class Counsel determines that a pro-rata increase of the compensation payable is inappropriate, Class Counsel will prepare a proposal in respect of any excess money and will move to the Courts for approval of it prior to the distribution of the Fund. In preparing a proposal in respect of how to distribute any excess monies, Class Counsel will consider all relevant factors including the utility and efficacy of a *cy près* distribution. If a *cy près* distribution is necessary, Class Counsel will work to create a distribution of high utility which will provide benefits to class members by alternative processes.

[31] Class Counsel state that they are committed to achieving the highest take-up rate possible. Class Counsel advise that they are determined to implement a robust and effective notice program to provide information about the claims process to class members and to encourage them to make claims.

[32] In this regard, instead of the usual application for court approval of forms of notice and a plan of dissemination, Class Counsel are working with Brad, a marketing and public relations agency with its head office in Quebec, to develop a set of principles and a guideline plan for notice (the "Notice Principles and Plan"), along with a budget for notice. This will permit Class Counsel and the Claims Administrator to adjust the Notice Principles and Plan if it is not achieving the desired reach. Class Counsel have requested that Brad provide four marketing proposals for the Courts' consideration, with budgets of $1 million, $2 million, $3 million and $4 million.

[33] In my view, given the nature of the class, the class period, and the size of the Settlement Funds, the approach of counsel is commendable and the initiative with Brad is a worthy one. Once a recommendation on this is formulated, Class Counsel should bring forth an application.

[34] The approach of Canadian courts is to examine whether a proposed distribution is reasonable, fair, economical, and practical on the facts of each particular case.

[35] Counsel cited the following cases: *Markson v. MBNA Canada Bank*, 2012 ONSC 5891, at para. 39 (a distribution that avoided a "prohibitively expensive" search for certain class members was "fair and reasonable"); *Ontario Hospital Association v. Summers*, 2010 ONSC 4497, at para. 31 (a distribution which was "consistent" with the underlying facts was "equitable"); *Abdulrahim v. Air France*, (2009) 184 A.C.W.S. (3d) 30 (Ont. SC), at para. 26 (distribution was anticipated to achieve "a fair distribution of the settlement funds, efficiently and economically"); and *Main v. Cadbury Schweppes plc* (19 March 2013), Vancouver Registry No. S078807 (BCSC) (Memorandum to counsel), (the plan of distribution was "fair, reasonable, and in the best interests of the class as a whole").

[36] I note the comment of Mr. Binnie that the process which Class Counsel engaged in to develop the Distribution Protocol was "thorough" and that Class Counsel took great care to apprise themselves of the merits of all claims, and to design a distribution which was fair and reasonable in light of that information. I agree as well that the Distribution Protocol "aims strongly to promote the distribution of funds to the people who suffered actual loss" and that the *cy près* distribution, if any, is left to be determined after the claims process is complete.

[37] Class Counsel are to be commended for their approach to developing a plan of distribution. Given the characteristics of this case, the work undertaken in developing the Distribution Protocol was warranted and important.

[38] In my view, the Distribution Protocol, which is the product of an innovative process in which class members were provided legal and economic expertise and information to negotiate in an informed way, is fair, reasonable and adequate; accordingly it is approved.

V. Administration of Claims Protocol

[39] Approval is also sought in respect to the Administration Protocol, the appointment of NPT RicePoint as Claims Administrator and Laura Bruneau as referee under the Administration Protocol.

[40] I accept Class Counsel's submission that a balance is required in the administration of claims in the structure of the claims process, between a fixed structure for the claims process, which provides certainty for class members, and flexibility, which permits the Claims Administrator to adjust during the claims process if the reality of the claims experience is different from expectations; and in the delivery of claims administration, between economic proportionality to the size of claims, which places limits on the resources a Claims Administrator should commit, and the desire to provide the easiest and most claimant-friendly claims process possible.

[41] The Administration Protocol establishes the administrative rules for the claims process. Because the Proceedings are national in scope, the claims process will be bilingual in all respects.

[42] The Administration Protocol contemplates two claims processes: a simplified process for End Consumers who elect to claim the $20 minimum, and a more in-depth process for all other claimants and for End Consumers who purchased sufficient amounts of DRAM to claim more than $20. In both instances, claims will be filed via an online claims portal unless a class member does not have Internet access.

[43] The Administration Protocol deliberately does not set a claims form or list what will be accepted as proof, but rather provides principles for the submission of claims. This provides the Claims Administrator with the flexibility to adjust the claims forms if it becomes apparent that class members are having difficulty, and to accept differing forms of proof as appropriate.

[44] An End Consumer who completes a simplified claim will not be required to provide any proof of their purchases beyond a declaration that they purchased at least one product containing DRAM during the class period.

[45] All other claimants will be required to provide some information about their purchases of DRAM during the class period, and class members claiming more than the $20 base claim for End Consumers will be required to provide some proof of

their purchases. Because fifteen years have elapsed since the commencement of the class period, Class Counsel will direct the Claims Administrator to be flexible in what it accepts as proof. For instance, while some class members may be able to provide purchase records or receipts, others may only be able to swear declarations with an estimate of the volume of their DRAM purchases.

[46] Class Counsel have also received information from some of the Settlement Defendants regarding their sales to specific direct purchasers in Canada. Where that information has been provided, that information may be used as proof of the class member's claim.

[47] Class Counsel propose that the claims period be 120 days, with flexibility for Class Counsel and the Claims Administrator to extend the claims period if they consider the extension to be necessary and reasonable for the fair administration of the Distribution Protocol.

[48] The Administration Protocol also provides for the appointment of a referee to hear appeals from the Claims Administrator's decisions. Class Counsel propose that Laura Bruneau be appointed as referee. Ms. Bruneau is a skilled claims administrator with experience both as a referee for appeals from claims administrators and in the administration of claims. She is also fully bilingual.

[49] I am satisfied that the Administration Protocol is fair and reasonable (except any extension of the claims period is to be approved by court order in advance); and that Ms. Bruneau and NPT RicePoint are qualified to carry out the tasks described.

[50] Accordingly, the Administration Protocol (with the stipulation above), Ms. Bruneau as referee, and NPT RicePoint as Claims Administrator are approved.

VI. Class Counsel Fee and Disbursements

[51] Class Counsel seek a fee calculated at 30% of the total Settlement Funds (except for the Second Infineon Payment which will be applied for on the same basis in early 2015) including accrued interest to August 15, 2014, less previous fee awards. The fee amount for approval in this application is $16,851,367.64, plus

applicable taxes. The total fee approved in this litigation would be $22,666,367.64. To date the fees approved and paid out on an interim basis from settlements have been $1,753,750 and $4,061,250 which respectively relate to the Elpida Settlement and the Micron, Nanya, NEC and Hitachi Settlements.

[52] As noted earlier, no objections have been submitted in regard to the current applications by class members.

[53] It is also noted that the fee sought is less than that permitted under the B.C. Fee Agreement (33 1/3%) and consistent with the terms of the Ontario and Quebec Fee Agreements (30%). The representative plaintiff approves the fee sought.

[54] Fees charged to the class must be fair and reasonable. The considerations in approving fees should recognize not only meritorious effort in achieving a positive result but also encourage counsel to take on difficult and risky class action litigation: *Bodnar v. The Cash Store Inc*., 2010 BCSC 145, at paras. 23-26; *Abdulrahim v. Air France*, 2011 ONSC 512; *Fakhri et al. v. Alfalfa's Canada, Inc. cba Capers*, 2005 BCSC 1123, at para. 21; *Jeffery*, at paras. 71-73; and *Main v. Cadbury Schweppes plc*, 2010 BCSC 1302, at para. 8.

[55] Fairly designed contingency fee arrangements align with the objectives set out in class action legislation — judicial economy, access to justice and behaviour modification.

[56] The courts have reviewed the range of contingency fees awarded to Class Counsel under the *Class Proceedings Act* and approved percentage contingency fees in British Columbia and Ontario have generally ranged from 15% to 33%.

[57] Various factors to consider in assessing the reasonableness of Class Counsel fees have been identified in the cases; they include: the time expended by the solicitor; the legal complexity of the matters to be dealt with; the degree of responsibility assumed by the solicitor; the monetary value of the matters in issue; the importance of the matter to the client; the degree of skill and competence demonstrated by the solicitor; the results achieved; the ability of the client to pay; the

client's expectations as to the amount of the fee; the risk undertaken by counsel, including the risk that the action might not be certified; and the position of any objectors. See for example: *Jeffery*, at para. 70; *Catalyst Paper Corporation v. Atofina Chemicals Inc.*, 2009 BCSC 1659, at para. 65; and *Serwaczek v. Medical Engineering Corp*. (1996), 13 OTC. 63, at para. 17.

[58] Class counsel submits that the key relevant factors for this case are: time spent, complexity, result achieved, litigation risk assumed, conduct of Class Counsel, the clients' expectation and appropriateness of fees sought.

[59] I conclude that this case: is at the high end of size, complexity and risk (certification was denied at first instance in B.C. and Quebec); involved significant time and energy of counsel over close to a decade(total docketed time by Class Counsel to August 15, 2014 amounts to $7,858,832); was seriously litigated against sophisticated well-resourced defendants; had a multitude of contested court conferences and hearings (a significant number before me); had a high risk profile which became reality at least on two occasions and had to be overcome; involved a number of separate adversarial settlement negotiations; resulted in creative agreements which provided leverage in obtaining settlement with other defendants; resulted in substantial settlement amounts, invoked an innovative process (which simulated a quasi-adversarial environment) in achieving a distribution protocol involving disparate claimants to the settlement funds; and involves a creative initiative to enhance instead of simply relying upon a *cy-pres* recommendation.

[60] During the course of the hearing I asked Mr. Camp for submissions with respect to the recent decision of *Mide-Wilson v. Hungerford Tomyn Lawrenson and Nichols*, 2013 BCCA 559, from our court of appeal. Mr. Camp provided a detailed response demonstrating the clear distinction from that case to the instant.

[61] I agree that there are clear distinctions which remove the present case from the concerns identified in the *Hungerford* case. The most significant differences include: the plaintiff/client supports the fee; this case is a class action and with it comes a much larger access to justice and public interest/benefit element; the complexity, risk, and length of the litigation; the resource investment (including the

ratio of docketed time to settlement funds); and the post settlement requirements upon counsel. These put this case a far distance from the *Hungerford* case and obviate the need for intervention by the court.

[62] In my view, the fee sought has been justified as fair and reasonable.

[63] In approving the fee, given the considerable work that has yet to be completed in alerting claimants, administering the claims, and finding ways to build uptake, I order a hold back of $1 million pending substantial completion of the distribution of the Settlement Funds at which time, upon application, the amount plus accrued interest will be released to Class Counsel. This aligns compensation with completion and is not a negative comment on performance of counsel. If an earlier payment is required, counsel have liberty to apply.

VII. Disbursements

[64] In terms of disbursements, the present application seeks the payment of $178,245.64. Previous disbursements approved and paid out from earlier settlements amounts to $1,041,348.89.

[65] Class Counsel have provided a list of the expenses and have provided a description of the guidelines they employed in the litigation. I am satisfied that the expenditures are reasonable. Accordingly, the disbursements are approved for recovery from the Settlement Funds.

VIII. Conclusion

[66] The Settlement Agreements are approved.

[67] The Distribution Protocol is approved.

[68] The Administration Protocol (except any extension to the claims period is to be approved by court order in advance), the appointment of NPT RicePoint as Claims Administrator, and Laura Bruneau as referee are approved.

[69] The Class Counsel fee of $16,851,367.64, and the total of $22,666,368 is approved, plus applicable taxes, with $1 million held back pending substantial distribution of the Settlement Funds.

[70] Disbursements of $178,245.64 are approved.

"The Honourable Mr. Justice Masuhara"

Appendix "A"

Canadian DRAM National Class Actions

Distribution Protocol

Allocation of Net Proceeds:

1)	**END CONSUMERS FUND**	**50%**
2)	**EMS FUND**	**30%**
3)	**OTHER DRAM PURCHASERS FUND**	**20%**

Rules for Distribution:

1. The net proceeds of all settlements and judgments in the Canadian DRAM national class actions will be distributed according to a claims-made process to compensate Class Members for DRAM and/or DRAM Products they purchased between April 1, 1999 and June 30, 2002 (the "Class Period"). Compensation is only available for new product purchases and not used product purchases.

2. Class Members may not recover in relation to DRAM or DRAM Products compensated or released as part of U.S. Proceedings or a private settlement.

3. Three funds will be created: 1) the End Consumers Fund; 2) the EMS Fund; and 3) the Other DRAM Purchasers Fund.

4. Class Members will be entitled to advance claims in the following categories: 1) End Consumers Claims; 2) EMS Claims; and 3) Other DRAM Purchasers Claims. Class Members may advance claims in respect of more than one category, provided those claims are in compliance with rules applicable to each category. The claims process will be designed in accordance with the provisions of an Administration Protocol to assist Class Members to easily and efficiently advance their claims in all applicable categories.

5. All valid claims made will be converted to a common unit of measure ("CEU") by the Claims Administrator based on the computer equivalent unit grid ("CEU Grid") attached as Schedule A and compensation will be calculated by the Claims Administrator based on the rules set out in the claims categories below.

6. Compensation payable to Quebec Class Members will be subject to deduction in respect of the amounts payable to the Fonds d'aide aux recours collectifs.

7. Additional rules applicable to each claims category are as follows:

End Consumers Claims:

8. An "End Consumers Claim" means a claim in respect of DRAM and/or DRAM Products purchased by a Class Member in the Class Period for the Class Member's own use and not for commercial resale in the same or modified form.

9. End Consumers Claims will be advanced by Class Members against the End Consumers Fund.

10. The End Consumers Fund will be allocated 50% of the net proceeds.

11. The "End Consumers CEU Value" will be fixed at $5 per CEU.

12. The end consumer DRAM and/or DRAM Product purchases of family members residing in the same household must be pooled together and filed as a single End Consumer Claim. Persons under the age of eighteen (18) at the time of filing will not be permitted to file a claim except as part of a household claim. Compensation payable in respect of a household claim will be issued to the person filing the claim on behalf of the household.

13. The Claims Administrator will convert the reported DRAM and/or DRAM Product purchases for each valid End Consumers Claim received into CEUs based upon the CEU Grid.

14. The compensation payable for each valid End Consumers Claim will be calculated by the Claims Administrator by accepting the Class Member's election of $20 in compensation or by multiplying the number of CEUs determined times the End Consumers CEU Value.

15. Each valid End Consumers Claim will be paid the greater of $20 or the compensation as calculated in the preceding paragraph out of the End Consumers Fund; subject to such pro-ration as may be required should there be insufficient monies in the End Consumers Fund to pay all valid End Consumers Claims.

16. If there are more monies allocated to the End Consumers Fund than are required to make payment of compensation for all valid End Consumer Claims made against it, Class Counsel may implement a pro-rata increase in the compensation payable for End Consumer Claims. If a pro-rata increase is determined to be inappropriate, Class Counsel will prepare a proposal in respect of any excess money and will move to the Courts for approval of it prior to the distribution of the End Consumers Fund. In preparing a proposal in respect of how to distribute any excess monies, Class Counsel will consider all relevant factors including the utility and efficacy of a *cy près* distribution, if appropriate.

EMS Claims:

17. An "EMS Claim" means a claim made in respect of DRAM purchased by a Class Member during the Class Period in support of the manufacturing or assembly of electronics products such as circuit boards, electronic assemblies, subassemblies, systems and subsystems by contract manufacturers or electronics manufacturing services firms pursuant to contracts with computer

and/or non-computer original equipment manufacturers and/or other computer parts manufacturers for commercial resale in a modified form. EMS Claims do not include claims in respect of DRAM purchased in support of the construction or assembly of DRAM modules for commercial resale to end consumers in a modified form.

18. EMS Claims will be advanced by Class Members against the EMS Fund.

19. The EMS Fund will be allocated 30% of the net proceeds.

20. The Claims Administrator will convert the reported DRAM purchases for each valid EMS Claim received into CEUs based on the CEU Grid.

21. The "EMS CEU Value" will be fixed at $1.25 per CEU.

22. The compensation payable for each valid EMS Claim will be calculated by the Claims Administrator by multiplying the number of CEUs times the EMS CEU Value subject to such pro-ration as may be required should there be insufficient monies in the EMS Fund to pay all valid EMS Claims.

23. If there are more monies allocated to the EMS Fund than are required to make payment of compensation for all valid EMS Claims made against it, Class Counsel may implement a pro-rata increase in the compensation payable for EMS Claims. If a pro-rata increase is determined to be inappropriate, Class Counsel will prepare a proposal in respect of any excess money and will move to the Courts for approval of it prior to the distribution of the EMS Fund. In preparing a proposal in respect of how to distribute any excess monies, Class Counsel will consider all relevant factors, including the utility and efficacy of a cy près distribution, if appropriate.

24. Each valid EMS Claim will be paid the compensation calculated in accordance with the preceding paragraphs out of the EMS Fund.

Other DRAM Purchasers Claims:

25. An "Other DRAM Purchasers Claim" means a claim, other than an EMS Claim, in respect of DRAM and/or DRAM Products purchased by a Class Member during the Class Period for commercial resale in the same or modified form.

26. Other DRAM Purchasers Claims will be advanced by Class Members against the Other DRAM Purchasers Fund.

27. The Other DRAM Purchasers Fund will be allocated 20% of the net proceeds.

28. The "Other DRAM Purchasers CEU Value" will be fixed at $1.25 per CEU.

29. The Claims Administrator will convert the reported DRAM and/or DRAM Product purchases for each valid Other DRAM Purchasers Claim received into CEUs based on the CEU Grid.

30. All Other DRAM Purchasers Claims shall be categorized by the Claims Administrator as follows:

a. high absorption claims mean claims in respect of DRAM and/or DRAM Products purchased in support of manufacture or assembly of computer DRAM Products for commercial resale in modified form to government/education entities;

b. medium absorption claims mean claims in respect of DRAM and/or DRAM Products purchased in support of manufacture or assembly of computer DRAM Products for commercial resale in a modified form:

    i. directly by the Class Member; and/or

    ii. to non-government/education entities;

c. low absorption claims mean claims in respect of:

    i. DRAM and/or DRAM Products (computer and/or non-computer) purchased and distributed for commercial resale without modification; and/or

    ii. DRAM and/or DRAM Products purchased in support of manufacture or assembly of non-computer DRAM Products for commercial resale in a modified form; and

d. stranded DRAM inventory claims mean claims in respect of DRAM purchased from a manufacturer or a reseller in raw or module form for commercial resale and which could not be resold.

31. The compensation payable for each valid Other DRAM Purchasers Claim will be calculated by the Claims Administrator as follows:

(a) high absorption claims will be valued at 1.0 times the number of CEUs times the Other DRAM Purchasers CEU Value;

(b) medium absorption claims will be valued at 0.50 times the number of CEUs times the Other DRAM Purchasers CEU Value;

(c) low absorption claims will be valued at 0.33 times the number of CEUs times the Other DRAM Purchasers CEU Value; and

(d) stranded DRAM inventory claims will be valued at 2.0 times the number of CEU's times the Other DRAM Purchasers CEU Value;

provided however that the Claims Administrator has discretion to move a Class Member between subparagraphs (a), (b), (c) or (d) if the Class Member demonstrates to the Claims Administrator that its purchases of DRAM and/or DRAM Products are more analogous to the factual conditions of purchase and sale as those of the Class Members in another subparagraph. Each valid Other DRAM Purchasers Claim will be paid the compensation as calculated in this paragraph out of the Other DRAM Purchasers Fund subject to such pro-ration as may be

required should there be insufficient monies in the Other DRAM Purchasers Fund to pay all valid Other DRAM Purchasers Claims.

32. If there are more monies allocated to the Other DRAM Purchasers Fund than are required to make payment of compensation for all valid Other DRAM Purchaser Claims made against it, Class Counsel may implement a pro-rata increase in the compensation payable for Other DRAM Purchaser Claims. If a pro-rata increase is determined to be inappropriate, Class Counsel will prepare a proposal in respect of any excess money and will move to the Courts for approval of it prior to the distribution of the Other DRAM Purchasers Fund. In preparing a proposal in respect of how to distribute any excess monies, Class Counsel will consider all relevant factors, including the utility and efficacy of a *cy près* distribution, if appropriate.

Residual Discretion for the Management of the Distribution Protocol:

33. Notwithstanding the foregoing, if, following the claims process and the calculation of compensation in accordance with this Distribution Protocol, Class Counsel have concerns that the claims process and/or Distribution Protocol has produced an unjust result on the whole or to any segment of the Class Members, they shall first determine whether the flexibility afforded by the rules of this Distribution Protocol can be applied in order to resolve any such issue. Failing that, Class Counsel may move to the Courts for approval of a reasonable modification to this Distribution Protocol to remedy any unjust result or for further directions with respect to the distribution of the net proceeds.

34. In arriving at a proposal pursuant to paragraphs 16, 23 and 32 or a determination that an unjust result has occurred, a modification is required or a decision to seek directions pursuant to paragraph 33, Class Counsel shall seek a consensus among themselves, failing which they may move to the Courts for a determination of any such issue.

Residual Discretion for the Management of the CEU Grid:

35. Class Counsel, in consultation with the Claims Administrator, may set CEU conversion rates for DRAM Products not provided for in Schedule A and/or formulate additional methods of calculating CEU counts in unusual circumstances should they arise during the claims process to facilitate the valuation of claims made and for the reasonable and fair administration of this Distribution Protocol.

Schedule A

As the first step to computing the value of a claim, DRAM and DRAM Products purchased will be converted based on Computer Equivalent Units ("CEUs"). One CEU represents the average of the amount of DRAM commonly installed in a computer for any year of the Class Period. Other DRAM Products, which contain on average differing amounts of DRAM than a computer, will be converted to CEUs on the following basis:

Table A: Computer Equivalent Units of Qualifying Products	
Category	**Computer Equivalent Units**
Computers – Laptops or Desktops	1.00
Printers	0.05
Memory Modules	0.74
Graphics Cards	0.33
Video Game Consoles	0.10
DVD Players	0.05
Personal Digital Assistants (PDAs)	0.10
MP3 Players	0.10
TiVo/Digital Video Recorders	0.33
Servers	1.00 CEU per $3,400 CDN spent[1]
Point of Sale Systems	1.00

The Megabytes ("MBs") of DRAM or DRAM Products purchased will have to be reported by year if Class Members are claiming:

- DRAM Products not listed in Table A;
- purchases of more than 10,000 DRAM memory modules; or,
- purchases of raw DRAM.

Claims for purchases reported in MBs per year will be converted to CEUs as follows:

Table B: MBs of DRAM per CEU (1999-2002)		
Year		**MBs of DRAM**
April – December	1999	68
January – December	2000	73
January – December	2001	153
January - June	2002	321

[1] Because the amount of DRAM in servers varies significantly according to the cost of the server, claims for servers must be reported in dollars spent during the period April 1, 1999 to June 30, 2002.