UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE CAPACITORS ANTITRUST LITIGATION	MDL Case No. 17-md-02801-JD Case No. 14-cv-03264-JD **SPECIAL MASTER'S SUPPLEMENTAL REPORT AND RECOMMENDATION** MDL Dkt. Nos. 902, 930

Introduction

This supplemental report and recommendation addresses objections raised by two members of the Direct Purchaser Plaintiffs ("DPPs") class, Cisco Systems, Inc. ("Cisco") and Aptiv Services US, LLC fka Delphi Automotive LLP ("Aptiv") (collectively "Objecting Members") to the Special Master's Report and Recommendation filed July 31, 2019 ("the Report"), MDL Dkt. No. 821. The Court referred these objections to the Special Master by order dated September 25, 2019. MDL Dkt. No. 981. Following an October 4, 2019 hearing to resolve the dispute, the parties attempted to reach an informal resolution. The parties advised the Special Master on October 14, 2019, however, that they could not reach agreement and therefore requested that he issue this Supplemental Report and Recommendation. This report follows, and recommends the following resolution of the objections raised.

Background and Objections

The full details of the original dispute addressed in the Report need not be repeated here. In brief, the parties' dispute concerned whether claims for certain capacitors purchased by the Objecting Members in finished goods from outside the United States (i.e., "incorporated capacitors") qualified for settlement funds. The Report concluded that these claims were covered by the settlement and release at issue, were legally viable, and eligible for compensation. Both parties accept that portion of the Report. In this further proceeding, Objecting Members challenge an additional aspect of the Report. The Report recommended that -- to assist Class Counsel in determining the scope and strength of the Objecting Members' incorporated capacitor

claims for allocation purposes -- Objecting Members should provide any information showing how many incorporated capacitors the Settling Defendants[1] either knowingly directed toward United States purchasers or reasonably should have foreseen being purchased in the United States in finished products sold to these plaintiffs. Objecting Members contend that this requirement is not legally justified and would be unduly burdensome. They contend that the number of incorporated capacitors that the Settling Defendants either knew or reasonably should have known were ultimately destined for the U.S. is legally irrelevant to their recovery under their Sherman Act claims. Specifically, they argue that under the Ninth Circuit's decision in *United States v. Hui Hsiung*, 778 F.3d 738 (2014) ("*Hui Hsiung*"), they would not need to prove that the Settling Defendants were aware that capacitors could or would be sold into the United States to prevail under a Sherman Act theory. They further maintain that Class Counsel may not adjust the relative rate of recovery of incorporated capacitor claims based on any perceived additional litigation risk associated with those claims compared to claims for raw capacitor purchases. Accordingly, the Objecting Members request that the Report be amended to authorize immediate payment of all incorporated capacitor purchases at a pro rata rate equal to the rate for raw capacitors.

This Supplemental Report and Recommendation addresses these points in turn.

Relevance of Settling Defendants' State of Knowledge in Settlement Allocation of Incorporated Capacitor Claims

The Objecting Members argue that for purposes of measuring damages, it is irrelevant whether the Settling Defendants knew or should have known that incorporated capacitors were being imported into the United States, let alone the likely amount. Specifically, they contend that the Ninth Circuit's decision in *Hui Hsiung* establishes that a plaintiff need not show that a defendant in a Sherman Act case "targeted' sales to the United States, because the court states that targeting is not a legal element of import commerce. Objection to Special Master's Report and Recommendation, MDL Dkt. No. 902 ("Objection") at 5, citing *Hui Hsiung*, 778 F.3d at 756. Objecting members acknowledge that it would be a different case if they were relying exclusively upon the Foreign Trade Antitrust Improvements Act ("FTAIA"). As they acknowledge, the FTAIA concerns non-import commerce, and finds that such commerce is actionable only if there is a direct, substantial, and reasonably foreseeable effect on domestic commerce. *Id.* Objecting Members state that since they are proceeding on alternative theories, their claim under the Sherman Act (i.e., that the shipments were import commerce) is sufficient without having to show knowledge (actual or constructive) on the Settling Defendants' part.

Objecting Members further contend that it would be unduly burdensome in the settlement context to require them to produce information about the Settling Defendants' intent for purposes of supporting either a Sherman Act or FTAIA claim. They note that the act of settling

[1] The Settling Defendants refers to Hitachi Chemical Co., Ltd., Hitachi AIC, Inc., and Hitachi Chemical Co. America, Ltd. ("Hitachi Chemical defendants" or "Hitachi"); and Soshin Electic Co., Ltd. and Soshin Electronics of America, Inc. ("Soshin defendants" or "Soshin") (collectively, "Settling Defendants").

necessarily truncated all discovery and left them without access to information from the Settling Defendants that would bolster their case.

Class Counsel responds that Objecting Members simply misapprehend the Report's resolution of their Sherman Act claim. The Report does not draw a final legal conclusion that Objecting Members would prevail on either a Sherman Act or FTAIA theory. The basis for allocating settlement funds is simply *viability* -- the potential that the claims might prevail. Accordingly, the overall value of the claim depends on litigation risk associated with both theories (import trade under the Sherman Act or non-import commerce with domestic effects under the FTAIA) relative to other types of claims filed by DPPs. Accordingly, providing the requested information would, at the very least, bolster Objecting Members' alternative theory under the FTAIA. Class Counsel further contends that Objecting Members have read *Hui Hsiung* selectively and incorrectly in that they ignore distinctions relating to that case being a criminal conspiracy proceeding in which ample evidence had been provided of targeted and direct importation of price-fixed goods into the United States. Finally, Class Counsel asserts that there is no undue burden in asking Objecting Members to provide available information suggesting the Settling Defendants' knowledge of the scale of their capacitor sales into the United States, because the same information has been requested and provided by all other DPPs for raw capacitor sales.

The Special Master generally agrees with the arguments of Class Counsel. First, Class Counsel is correct that the decision to recommend compensation for incorporated capacitors claims was not based on a finding that Objecting Members had fully proved a Sherman Act claim. Rather, the Report finds only that a Sherman Act claim and/or an alternative FTAIA claim is sufficiently viable to justify compensation. The value of such a claim is still subject to litigation risk which may or may not be higher than claims based on raw capacitor purchases. Second, Objecting Members are not required by the Report to supply any particular type of information; rather, they were afforded this opportunity to supply information about what the Settling Defendants knew or reasonably should have known to strengthen their case for recovery. As noted in the Report, Objecting Members may be able to make a fair argument based on existing evidence contained in their submission that -- given the massive volume of capacitor purchases for eventual delivery into the United States presented here -- it was reasonably foreseeable that some percentage of sales were destined to the U.S. At the hearing on their motion before the Special Master, in fact, Objecting Members had argued that the Settling Defendants who were in the capacitors business and Cisco's business partners who interacted with them would certainly know what's in the public record about the percentage of Cisco's business that comes into the United States. Transcript of May 31, 2019 Hearing before the Special Master ("Transcript" or "Tr."), at 67-68. Indeed, counsel for Cisco noted that -- if necessary -- Cisco could make such a further showing. *Id.* at 68 ("I don't believe the summary judgment standard is what is applicable to have a claim approved in this case. But if it is, that burden can certainly be met.").

Finally, the Special Master agrees that Objecting Members place too much reliance on certain language in the *Hui Hsiung* case. In that matter, the criminal defendants claimed on appeal that there was insufficent evidence to show that they had deliberately targeted sales to the United States. The court states "[t]argeting is not a legal element for import trade under the Sherman Act." However, the court immediately follows this statement by acknowledging that it is dicta.

Specifically, the Ninth Circuit notes that targeting *was* included in the jury instruction at those defendants' insistence and there was more than ample evidence to support the finding of targeting. *Hui Hsiung*, 778 F. 3d at 756. More fundamentally, though, *Hui Hsiung's* discussion of "targeting" does not suggest the Sherman Act has no *mens rea* requirement with regard to criminal violations, let alone the scope of civil liability for a civil defendant. If anything, in affirming the Sherman Act conviction, the Court noted that "the conspiracy's intent, as alleged, was to 'suppress and eliminate competition' by fixing the prices . . . sold to manufacturers 'in the United States and elsewhere.'" *Hui Hsiung*, 778 F.3d at 755. It also separately explained that the conduct at issue "always was linked . . . to targeting for sale in the United States" and that this "'targeting' language subsumed intentionality." *Hui Hsiung*, 778 F.3d at 748.

Thus, for all of the foregoing reasons, the Special Master believes that the Report's recommendation should stand that Objecting Members provide any additional information helpful to establishing the scope of Settling Members' awareness (actual or constructive) of incorporated capacitors being shipped to the United States to support their damages claim.

Whether Class Counsel Has Discretion to Apply a Different Recovery Rate for Different Types of Claims in Allocating Settlement Proceeds in the Best Interest of the Class

The Special Master also considers arguments by Objecting Members that – once the incorporated capacitors claims are deemed viable -- Class Counsel may not consider whether to weight those claims differently than raw capacitor claims.[2] Objecting Members maintain that this would be unfair double-discounting.

The Court appointed Class Counsel in this complex Multi-District Litigation (MDL) proceeding to promote efficiency, economy, and fairness in the process. To that end, Class Counsel is charged with acting in the best interest of all class members, including in settling claims. The Manual for Complex Litigation (4th Edition) (MCL) specifically contemplates that lead class counsel will play a role in the allocation of settlement proceeds for the benefit of all class members. MCL at 21.312. Thus, in both this proceeding and in an earlier settlement round of settlement allocation, Class Counsel has performed the initial work of recommending an equitable distribution of settlement funds. That recommendation is, of course, not final. In both instances, Objecting Members were entitled to, and did, object to Class Counsel's conclusions about whether particular claims were viable or adequately documented. Ultimately it is for the Court to approve or disapprove the final allocation.

Class Counsel is entitled to consider the litigation risk associated with different types of settled claims, particularly where some claims rest on unsettled questions of law and are "riskier" than

[2] The Special Master notes that this issue could prove to be purely academic. Class Counsel has yet to submit an updated settlement allocation, and could propose a "peanut butter spread" where all claims by all claimants receive the exact same pro rata share. The issue is addressed in this Supplemental Report and Recommendation, however, to guide Class Counsel in determining the scope of its discretion in submitting a new settlement allocation that includes incorporated capacitor claims.

others.[3] Not all claims are created equal, and the settlement here poses inevitable trade-offs. There are far fewer settlement funds available to pay the claimants than the maximum value that all DPPs collectively claim. Thus, any increase in the allocation of one claimant would reduce the allocation of all other claimants. The Settling Defendants agreed to pay $66.9 million to all DPPs in exchange for a release of their civil claims. After deducting attorneys' fees and costs, the total amount available for distribution at the time of Objecting Members' motions was $43,485,000 plus accrued interest for allocation. MDL Dkt. No. 381 at 6. The claims presented by the Objecting Members for incorporated capacitor claims alone are over $150 million (specifically, Cisco claims $104,361,586.01 for incorporated capacitor losses; Aptiv claims $48,567,508.65 for incorporated capacitor losses). Under any allocation system, paying these incorporated capacitor claims will substantially increase Objecting Members' share of the proceeds and correspondingly diminish the share received by all other DPPs. Based on relevant differences between incorporated and raw capacitor claims, Class Counsel is entitled to consider the possibility of discounting the relative value of incorporated capacitor claims in the interest of fairness to the entire DPP class.

Class Counsel should thus make its best effort to ensure that funds are distributed fairly, and to flag for the Court why and how any distinctions were drawn among particular claims. Class Counsel has a duty as well not to favor claims held by clients they represent absent an objective basis for distinguishing those claims. This discretion, of course, is not unlimited or unchecked. Objecting Members are understandably concerned that Class Counsel's original skepticism about incorporated capacitors might unconsciously influence their assessment now. Ultimately, however, Objecting Members can rely on the Court to ensure this is not the case as part of approving any final settlement allocation. To that end, both parties have requested that the Special Master review and potentially recommend revisions to any proposed allocation before it is submitted to the Court. The Special Master is amenable to performing this role, but again, this is ultimately a question for the Court to approve in this proceeding.

Conclusion

The Special Master recommends that Objecting Members provide to Class Counsel any additional information they possess regarding information Settling Defendants were, or reasonably should have been, aware of regarding the number of capacitors that they sold that were likely to be shipped in finished products to the United States. This information should be considered by Class Counsel in attempting to make sure Objecting Members are fairly compensated for these claims. In discharging its duty to all DPPs, Class Counsel has discretion to evaluate claims in a manner that recognizes that some categories of claims have higher or lower litigation risk than others, and to recommend that they be treated accordingly. Pursuant to

[3] Indeed, in the related *Flextronics* proceedings, the Court recognized how difficult the evidentiary burden is for a plaintiff to "get through the eye of that needle" to establish an incorporated capacitor claim. Order re Phase I of Summary Judgment on Foreign Transactions ("FTAIA I Order"), Master File No. 3:14-cv-03264, ECF 1302 at 11.

the parties' agreement, and subject to the Court's approval, any such differentiation would be subject to review by the Special Master for a final recommendation to the Court.

Dated: 10/28/19

JEFFREY L. BLEICH
Special Master