CITATION: Fanshawe College v. LG Philips LCD Co., Ltd., 2016 ONSC 3958
COURT FILE NO.: 54054CP
DATE: 2016/07/29

ONTARIO

SUPERIOR COURT OF JUSTICE

Proceeding under the *Class Proceedings Act, 1992*

B E T W E E N:	
The Fanshawe College of Applied Arts and Technology	*Charles Wright and Linda Visser*, for the Plaintiff
Plaintiff	
- and -	
LG Philips LCD Co., Ltd., L.G. Philips LCD America, Inc., Samsung Electronics Co. Ltd., Samsung Electronics Canada Inc., Hitachi Ltd., Hitachi Displays, Ltd., Hitachi Canada, Ltd., Hitachi America Ltd., Hitachi Electronics Devices (USA) Inc., Sharp Corporation, Sharp Electronics Corporation, Sharp Electronics of Canada Ltd., Toshiba Corporation, Toshiba Matsushita Display Technology Co., Ltd., Toshiba America Corporation, Toshiba of Canada Limited, AU Optronics Corporation America, Innolux Corporation, Chi Mei Optoelectronics USA, Inc., Chi Mei Optoelectronics Japan Co., Ltd. and Chunghwa Picture Tubes, Ltd.	*Katherine Kay and Eliot Kolers*, for the Defendants, LG Philips LCD Co., Ltd. and LG Philips LCD America, Inc. *D. Michael Brown and Andrew McCoomb*, for the Defendants, Sharp Corporation, Sharp Electronics Corporation and Sharp Electronics of Canada Ltd. *Laura Cooper and Vera Toppings*, for the Defendants, Toshiba of Canada Limited, Toshiba Corporation, Toshiba America Corporation and Toshiba Matsushita Display Technology Co., Ltd. *J. Kenneth McEwan*, for the Defendant, AU Optronics Corporation America.
Defendants	
	HEARD: April 4, 2014 and May 11, 2016

Grace J.

A. Introduction

[1] It is alleged in this action that the defendants conspired to and did fix prices for certain liquid display panels ("LCD Panels")[1] and televisions, computer monitors and laptops containing LCD Panels ("LCD Products"). Several causes of action are alleged and various remedies sought.

[2] On May 26, 2011, Tausendfreund J. released his reasons for certifying this action as a class proceeding.

[3] As certified, the class comprises persons in Canada who purchased LCD Panels and LCD Products directly from a defendant, an entity related to a defendant, a named original equipment manufacturer ("OEM") or a named distributor between January 1, 1998 and December 11, 2006.

[4] The defendants appealed the certification order with leave. On December 24, 2015, the Divisional Court dismissed the appeal.

[5] The Fanshawe College of Applied Arts and Technology ("Fanshawe") is the representative plaintiff. It seeks to amend the class definition to include all persons who purchased LCD Panels and LCD Products in Canada from any source during the relevant period.

[6] If the court is unwilling to make that order, Fanshawe seeks more modest relief. Its alternative request is to amend the class definition to expand the list of named OEM's and distributors.

[7] The defendants oppose the motion.

B. The Procedural History

[8] Given the passage of time, additional details concerning the procedural history of this matter is required.

[9] This action has been ongoing for years. It was commenced pursuant to the *Class Proceedings Act, 1992,* S.O. 1992, c. 6 ("*CPA*") on May 2, 2007. At that

time the representative plaintiff was Michael Harris. He alleged he had purchased a Compaq personal home computer with a liquid crystal display monitor. Para. 3 of the statement of claim read:

> This action is brought on behalf of the plaintiff and all persons resident in Canada, except residents of British Columbia and residents of Quebec, who purchased liquid crystal display or products which contained liquid crystal display (collectively "LCD") from January 1, 1998, through to the present (the "Relevant Period") or such other class definition or Relevant Period as the court may ultimately decide on the motion for certification.

[10] Mr. Harris was given leave to serve and file a fresh as amended statement of claim on September 10, 2008. Fanshawe was added as a plaintiff. It was alleged that institution had purchased LCD Products for use in its classrooms, computer laboratories and administration. The fresh pleading stated the action was brought on behalf of the plaintiffs and other persons in Canada who were similarly situated.

[11] The representative plaintiffs filed a certification motion the following month. The class definition proposed in the notice of motion comprised persons in Canada who had purchased LCD Panels or LCD Products directly from a defendant, an affiliate, named OEM or named Distributor "between January 1, 1998 and present." It seems to be common ground that the newly proposed class definition excluded end consumers.

[12] On June 16, 2009, the representative plaintiffs were given leave to serve and file a second fresh as amended statement of claim. Mr. Harris ceased to be a representative plaintiff. In a June 11, 2009 affidavit, lawyer Linda Visser explained why that request was made. She said Mr. Harris "does not fit within the class definition put forth in the Plaintiffs' certification record." The second fresh claim also included a December 11, 2006 end date for the allegedly wrongful conduct.

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[1] The claim relates to panels measuring 10 inches or more diagonally.

[13] Fanshawe filed an amended factum shortly before argument of the certification motion. At para. 82, Fanshawe explained "the proposed class definition is intended to simplify the quantification of damages and measurement of pass-through". Although its notice of motion on the certification motion had not been amended, Fanshawe added:

> The Plaintiff is of the view that the court could also certify a broader class which is closer to the definitions which were certified in *Irving*[2] and *Infineon*,[3] namely:
>
> > All persons in Canada (excluding defendants and their respective parents, employees, subsidiaries, affiliates, officers and directors) who purchased LCD Panels or LCD Products in Canada between January 1, 1998 and December 11, 2006.

[14] I pause to note that is the amended definition Fanshawe seeks at first instance on this motion.

[15] The defendants responded. Paras. 95 and 96 of their factum bear repeating. In part they said:

> ...it is not open to this court at the certification hearing to certify a broader class in the alternative to the current class definition. The Plaintiff overstates the court's jurisdiction to modify the class definition in the absence of further evidence from the Plaintiff and responding evidence from the Defendants. The Supreme Court of Canada, in confirming the possibility of courts certifying an action on the condition that the class definition be amended, limited the possibility to a class being defined more narrowly. [Footnote omitted]
>
> In any event, the purported alternative exacerbates, rather than cures, the numerous defects in the Plaintiff's case. The evidence filed by the parties is based on the class definition as framed. None of the evidence currently before the court speaks to how liability could be a common issue for such a vastly expanded class; in particular, the Plaintiff has provided no evidence of a methodology to determine the

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[2] *Irving Paper Ltd. v. Atofina Chemicals Inc.* [2009] O.J. No. 4021 (S.C.J.), leave to appeal denied [2010] O.J. No. 2472 (S.C.J.).

[3] *Pro-Sys Consultants ltd. v. Infineon Technologies AG*, [2009] B.C.J. No. 2239 (C.A.), leave to appeal denied [2010] SCCA No. 32.

> existence or extent of class-wide harm with respect to the proposed amended class.

[16] The debate continued in the reply factum Fanshawe filed on the certification motion. With respect to the broader class definition proposed as an alternative, Fanshawe said at para. 38:

> Although it is the Plaintiff's position that [the] proposed class is appropriate, and it does not seek to amend the proposed class definition, should the court determine that the proposed class is under-inclusive, it has authority to amend the class to accord with the *Class Proceedings Act, 1992.* In its factum, the Plaintiff set out an alternative class definition that includes all levels of purchasers of LCD Panels and LCD Products.

[17] Fanshawe also advised the certification judge of its intention to propose an amended class definition once it was in a position to identify "all relevant OEMs and Distributors, including those to whom the Defendants sold LCD Panels and/or LCD Products."

[18] The certification motion was argued over a period of six days in January, 2011 before Tausendfreund J. He granted the certification motion for reasons released on May 26, 2011. In accepting the class definition proposed in the notice of motion that had been filed in October, 2008, Tausendfreund J. wrote at para. 28:

> Absent the limitation to the class, as advanced by the plaintiff, the proposed class would have included all purchasers of LCD Panels and Products in Canada and might, for that reason, have become unmanageable...The decision to limit the class for purposes of certification, in this instance, is a legitimate exercise of counsel's discretion.

[19] The motion judge did not otherwise address the alternative class definition Fanshawe had proposed in its amended factum.

[20] The certification order was signed and entered on October 21, 2011 (the "certification order").[4] The defendants offered this summary of the class definition that order contained at para. 23 of their factum:

> The Certification Class excludes the substantial majority of end consumers of LCD Products. For example, a consumer who purchased an LCD television, computer monitor or laptop from a major retailer such as Best Buy or The Future Shop is not included in the Certification Class.

[21] On November 21, 2011, Rady J. granted the defendants leave to appeal to the Divisional Court. At para. 3, my colleague noted:

> The class, as certified, includes some direct purchasers but is largely composed of indirect purchasers of LCD panels and LCD products.

[22] However and as Rady J. explained, "the law respecting whether indirect purchasers have a cause of action is in a state of uncertainty."

[23] On April 18, 2012, Fanshawe served a motion seeking to amend the class definition to name additional OEMs and distributors within the class definition. The parties agreed to adjourn the motion until after they participated in mediation in October, 2012.

[24] An amended motion record was served on March 8, 2013 seeking the even more expanded class definition Fanshawe now seeks.

[25] In February, 2013 the appeal of the certification order was adjourned to await the outcome of a trilogy of cases in the Supreme Court of Canada concerning the indirect purchaser issue Rady J. had mentioned. The parties agreed this motion should await the result of those cases too.

[26] On October 31, 2013, the Supreme Court of Canada released its decisions in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 ("*Microsoft*"), *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 and *Option Consommateurs v. Infineon Technologies AG*, 2013 SCC 59. The Court

[4] The certification order is erroneously dated October 21, rather than May 26, 2011.

concluded indirect purchasers may assert a claim against persons responsible for overcharges alleged to have been passed on to them.

[27] The appeal from the certification decision to the Divisional Court was subsequently scheduled.

[28] The appeal had not been argued when this motion came on for hearing on April 4, 2014. By that time, Tausendfreund J. had become unavailable to continue to hear motions involving this matter having been transferred to another Region in 2012. Any further motions had been assigned to me by the regional senior judge as contemplated by s. 34(2) of the *CPA*.

[29] In a June 6, 2014 endorsement I explained why I was of the view a decision on the merits of the motion would have to await the outcome of the appeal of the certification order to the Divisional Court.

[30] The Divisional Court was unable to hear the appeal until November 18, 2015. It was dismissed on December 24, 2015.

[31] A May 11, 2016 teleconference followed after an exchange of correspondence. At that time, the lawyers for the parties still participating advised they did not wish to make further oral or written submissions on this motion.

[32] Both before and after certification there have been settlements with some of the defendants.[5] Orders granted on those occasions have defined the class for settlement purposes. Non-settling defendants remain.

[33] At last, I turn to the merits of Fanshawe's motion to amend the class definition in the certification order.

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[5] Before certification, Fanshawe reached a resolution with Chunghwa Picture Tubes Ltd. Post-certification and prior to argument of this motion, settlements were reached with Epson Imaging Devices Corporation in August, 2011, Samsung Electronics Co., Ltd. and Samsung Electronics Canada Inc. in April, 2013, Innolux Corporation (formerly Chi Mei Optoelectronics Corporation) in September, 2013 and in that same month, Japan Display Inc. (formerly Hitachi Displays, Ltd.). In May, 2016 and subject to court approval, Fanshawe entered into settlements with Toshiba Corporation, Toshiba Mobile Display Inc., Toshiba America Inc., Toshiba of Canada Limited and separately, AU Optronics Corporation America.

C. The Scope of the Proposed Amendment

[34] As noted, the class is defined in the certification order to comprise persons in Canada who purchased LCD Panels and LCD Products directly from a defendant, an entity related to a defendant, a named OEM or a named distributor between January 1, 1998 and December 11, 2006.

[35] Fanshawe seeks to amend the class definition so that it will include all persons in Canada who purchased LCD Panels and LCD Products in this country during that period of time. The word "directly" has been deleted. So, too, have all references to a seller (the "all purchasers' amendment").

[36] Fanshawe described the effect of the all purchasers' amendment in these terms at para. 22 of its factum:

> The proposed amended class definition includes additional indirect purchasers, largely consumers not previously included in the certified class.

[37] If the court is unwilling to make that order, Fanshawe seeks more modest relief. Its alternative request is to amend the class definition to expand the list of named OEM's and distributors. Otherwise the class definition would be unchanged (the "alternative amendment").

D. The Position of the Parties

[38] Fanshawe argues the class definition should be amended because post-certification the Supreme Court of Canada decided that indirect purchasers do, indeed, have a cause of action. Fanshawe submits the evidence compiled for the certification motion, supplemented by a March 7, 2013 affidavit of Dr. Russell Lamb, provides a sufficient basis for the order it seeks.

[39] The defendants disagree. They advance three reasons why the motion should be dismissed. First, they submit Fanshawe is seeking a "do-over" by attempting to re-litigate issues previously determined by the certification judge. For that reason they maintain this motion is an abuse of process. Second, the defendants submit that by expanding the class, Fanshawe is attempting to assert

claims on behalf of persons who are time-barred because they were not included in the class definition contained in the certification order.[6] Third, they argue the proposed amendment must but does not, satisfy all of the criteria s. 5 of the *CPA* establishes.

E. Analysis and Decision

[40] Section 8(3) of the *CPA* gives the court jurisdiction to amend a certification order on motion. That subsection has been the basis upon which post-certification amendments to the class definition have been sought and, on occasion, granted: see, for example, *Dhillon v. Hamilton (City)*, 2008 CarswellOnt 7981 (S.C.J.) at para. 33; *LeFrancois v. Guidant Corp.*, 2009 CarswellOnt 3415 (S.C.J.) at paras. 10 and 46; *Sauer v. Canada (Attorney General)*, 2010 CarswellOnt 5814 (S.C.J.) at para. 22; *Smith Estate v. National Money Mart Co.*, 2010 CarswellOnt 1238 (S.C.J.) at para. 48; *Silver v. IMAX Corp.*, 2013 CarswellOnt 3302 (S.C.J.) at para. 60; *Endean v. Canadian Red Cross Society*, [1998] B.C.J. No. 1542 (S.C.).

[41] Further, s. 12 of the *CPA* allows the court to make orders it considers appropriate to ensure the fair and expeditious determination of a class proceeding.

[42] Sections 8(3) and 12 of the *CPA* are permissive.

[43] For the reasons that follow, I am of the view Fanshawe's all purchasers' amendment should not be permitted because Fanshawe is attempting to resuscitate an issue it abandoned and then re-litigate it on the merits.

[44] As mentioned, a broad class definition was proposed in the statement of claim. It was narrowed significantly in October, 2008 by the notice of motion seeking certification. In June, 2009, Mr. Harris, a consumer, was removed as a representative plaintiff because he no longer fit within the proposed class definition.

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[6] The parties entered into a tolling agreement dated April 29, 2013.

[45] As the dates for the certification motion approached, evidence was assembled and filed by the parties based on the recast pleading and the notice of motion as filed.

[46] The notice of motion seeking certification was not amended. No changes were made to the second fresh as amended statement of claim.

[47] Nonetheless, in its amended factum Fanshawe addressed the possibility the court would not approve the definition proposed in the notice of motion seeking certification. In that event, Fanshawe asked the court to return to the class definition it had earlier abandoned. That request was the subject of further written and oral argument.

[48] As mentioned, the certification judge expressed concern that the inclusion of all purchasers would be "unmanageable". He approved the wording proposed in the notice of motion subject, only, to amending the period of the alleged conspiracy to accord with Fanshawe's second fresh as amended statement of claim. As noted, Tausendfreund J. observed:

> The decision to limit the class for purposes of certification, in this instance, is a legitimate exercise of counsel's discretion.

[49] That is a decision which should bind Fanshawe going forward: *Ward v. Dana G. Colson Management Ltd.* (1994), 24 C.P.C. (3d) 211 (Gen. Div.) at 218, aff'd [1994] O.J. No. 2792 (C.A.); *Kendall v. Sirard*, 2007 ONCA 468.

[50] As Arbour J. wrote in *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77 at para. 36:

> ...Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel...are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.

[51] That principle should not be applied too rigidly, particularly in class proceedings. In *Silver v. IMAX Corp.*, *supra* at para. 69, van Rensburg J. (as she then was) wrote in part:

> ...a certification order can be amended, including by redefinition of the certified class, in order to respond to changed circumstances.

[52] On the other hand, the nature of a certification motion bears serious consideration too. As Gray J. said in *Risorto v. State Farm Mutual Automobile Insurance Co.* (2009), 70 C.P.C. (6th) 390 (Ont. Div. Ct.) at para. 41:

> Parties involved in this sort of litigation understand well the significance of an order granting or refusing certification. Both parties will usually devote substantial amounts of time and resources on the motion. Typically, the magnitude of cost requested, and often awarded, vastly exceeds anything awarded on an ordinary interlocutory motion. Indeed, it is difficult to conceive of an interlocutory proceeding in which the parties would better understand the need to put their best foot forward. In my view, the interests in preventing litigation by instalments; requiring parties to put their best foot forward; and finality; are just as compelling in certification proceedings as they are in any other proceedings.[7]

[53] Fanshawe should not be permitted to revisit, recast and reprioritize the arguments it made in January, 2011. In this case, factual circumstances have not changed.

[54] This motion pre-dated the trilogy of decisions to which I have referred in both its original and amended form. Months later the law became more certain but the state of the law was fully known when tactical decisions were made by the representative plaintiff and its counsel. Fanshawe should not be permitted to reverse earlier choices made along the long procedural road this case has already travelled.

[55] I do not agree with Fanshawe's submission that this motion is analogous to a recasting of a class definition on appeal to address an unfavourable result in the

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[7] See, too, *Ghaeninizadeh v. Bennett Jones LLP*, 2014 ONCA 267 at paras. 21–26.

court below.[8] In this case, the Divisional Court upheld the certification order, including the class definition it contains.

[56] This motion is an abuse of process to the extent it seeks the all purchasers' amendment. Even if it does not reach that level, I decline to exercise the discretion ss. 8(3) and 12 of the *CPA* confer in the manner Fanshawe seeks. Given that conclusion, it is unnecessary for me to consider the other grounds of opposition the defendants raised with respect to the all purchasers' amendment.

[57] I turn to the alternative amendment.

[58] A revision to the listing of OEMs and distributors contained in the certification order was specifically contemplated by the certification judge. At para. 26, Tausendfreund J. addressed the topic as follows:

> ...the plaintiff states it was forced to rely solely on publicly available information. It intends to amend this list, once written interrogatories and discoveries have been completed. In my view, this is a practical solution to the concern raised by the defendants.

[59] For that reason alone a motion seeking the alternative amendment is not an abuse of process.

[60] Nonetheless, the defendants submit the alternative amendment cannot be made because "the claims of the purchasers to be added to the Certification Class...are time barred."[9] I disagree.

[61] Fanshawe asserts common law tort claims and a statutory claim under the *Competition Act*, R.S.C. 1985, c. C-34. I will address them in turn. For the purposes of the analysis I have assumed, without necessarily agreeing, that I am in a position to address the limitation issue in a motion of this kind.[10]

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[8] A recasting of the class definition was permitted on appeal in *Keatley Surveying Ltd. v. Teranet Inc.*, 2015 ONCA 248. There are many other examples.

[9] The excerpt is taken from the defendants' factum at para. 78.

[10] See *Lipson v. Cassels Brock & Blackwell LLP*, 2013 ONCA 165 at paras. 84–90; *Crosslink Technology v. BASF Canada*, [2014] O.J. No. 1080 (S.C.J.) at paras. 84–86. After reading ss. 8(3), 15 of the *CPA*

[62] The common law claims are subject to the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B.

[63] The alternative amendment seeks to enlarge the list of OEMs and distributors contained in the certification order by eight and twelve respectively. Fanshawe wishes to add those companies because it believes they sold substantial quantities of LCD Panels and/or LCD Products in Canada during the relevant period.

[64] According to the March 8, 2013 affidavit of Kerry McGladdery Dent, those entities was identified after a review of customer lists provided by the defendants. That occurred in or about February, 2012.[11]

[65] If the alternative amendment has the effect of enlarging the claim,[12] as the defendants submit, I am unable to conclude same was discovered earlier than February, 2012. The second anniversary of that date had not been reached when the parties entered into a tolling agreement on April 29, 2013.

[66] Fanshawe's statutory claim under the *Competition Act* is subject to a different provision. Section 36(4)(a) prohibits the bringing of an action by a person who has suffered loss or damage as a result of conduct of the kind complained of in this proceeding "after two years from...a day on which the conduct was engaged in".

[67] A number of cases stand for the proposition the discoverability principle does not apply to that time limitation: see, for example, *Fairview Donut Inc. v. The TDL*

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and rule 12.03(1) of the *Rules of Civil Procedure* it seems clear to me a class member is not a party before or after certification.

[11] This was set forth in the March 7, 2014 affidavit of Christine Kilby at para. 64.

[12] In *Keatley Surveying Ltd. v. Teranet Inc.*, 2014 ONSC 1677 (Div. Ct.) the certification motion had failed. On appeal the plaintiff sought to change the class definition and common issues. In addressing the plaintiff's ability to do so Sachs J. wrote, at para. 36:

> ...changes to proposed common issues or class definitions are not as substantial as they seem. These modifications are not equivalent to *Scarborough* (argument on the basis of a new statute not raised at trial). Nor are they equivalent to a party adding a new cause of action, or raising a completely new issue.

While an appeal to the Court of Appeal was dismissed, it is open to interpretation whether the Court of Appeal's reasons at 2015 ONCA 248 go that far.

Group Corp., 2012 ONSC 1252 (S.C.J.); *Garford Pty Ltd. v. Dywidag Systems International*, 2010 FC 996.

[68] While I may have wandered into the wilderness, I expressed a different view in *Fanshawe College v. AU Optronics*, 2015 ONSC 2046 (S.C.J.). I believe the issue is now or soon will be under consideration by the Court of Appeal. If discoverability features, the statutory and common law claims stand on the same footing.

[69] After considering the evidence filed on this motion I do not agree the alternative amendment raises a claim that is time-barred.

[70] I have not addressed the defendants' submission Fanshawe failed to meet the common issues requirement set forth in s. 5(1)(c) of the *CPA* because the argument focused on the all purchasers' amendment only.

F. Conclusion

[71] For the reasons given, the motion for leave to replace the certification order's class definition with the all purchasers' amendment is denied. The fallback request for leave to substitute the alternative amendment is granted.

[72] The parties are asked to review Schedule 2 to the amended amended notice of motion to ensure that it is in proper form given the passage of more than two years since that document was filed. If the parties identify but cannot resolve an issue concerning its terms, they may arrange an 8 a.m. teleconference through the trial coordinator.

[73] If the parties are unable to agree on costs, short written submissions may be made by Fanshawe and the defendants on or before August 19 and September 9, 2016 respectively.

A. D. Grace J.

Justice A. D. Grace

Released: July 29, 2016

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BETWEEN:

The Fanshawe College of Applied Arts and Technology

Plaintiff

- and -

LG Philips LCD Co., Ltd., L.G. Philips LCD America, Inc., Samsung Electronics Co. Ltd., Samsung Electronics Canada Inc., Hitachi Ltd., Hitachi Displays, Ltd., Hitachi Canada, Ltd., Hitachi America Ltd., Hitachi Electronics Devices (USA) Inc., Sharp Corporation, Sharp Electronics Corporation, Sharp Electronics of Canada Ltd., Toshiba Corporation, Toshiba Matsushita Display Technology Co., Ltd., Toshiba America Corporation, Toshiba of Canada Limited, AU Optronics Corporation America, Innolux Corporation, Chi Mei Optoelectronics USA, Inc., Chi Mei Optoelectronics Japan Co., Ltd. and Chunghwa Picture Tubes, Ltd.

Defendants

REASONS FOR DECISION

Grace J.

Released: July 29, 2016