AMERICAN ARBITRATION ASSOCIATION
CLASS ACTION ARBITRATION, COMMERCIAL TRIBUNAL

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MOHAWK GAMING ENTERPRISES LLC d/b/a Akwesasne Mohawk Casino Resort, on Behalf of Itself and All Others Similarly Situated,

Claimant,

vs.

Case No.
01-20-0015-6196

LIGHT & WONDER, INC., and L&W GAMING, INC.,

Respondents.

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CLASS DETERMINATION AWARD

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with an Arbitration Agreement entered into on March 13, 2015 and having been duly sworn; and Claimant having been represented by the law firms Cohen Milstein Sellers & Toll PLLC and Freedman Boyd Hollander Goldberg Urias & Ward PA; and Respondents having been represented by the law firm Cravath Swaine & Moore, LLP; and having heard the proofs and allegations of the parties, do hereby issue the following Class Determination Award:

I
BACKGROUND FACTS

Claimant Mohawk Gaming Enterprises LLC d/b/a Akwesasne Mohawk Casino Resort ("Mohawk") is a casino located in Hogansburg, New York. Respondents manufacture automatic card shufflers which they sell and lease to casinos.

On March 13, 2015, Claimant Mohawk entered an agreement whereby Respondent-related entities licensed and leased to Mohawk certain automatic card shufflers, among other things (the "License and Lease Agreement"). Automatic card shufflers play an important role in casinos because they produce reliably random

shuffles without human assistance or interference, thereby contributing to fairness, increased game speed, profitability and security.

In this arbitration, Claimant asserts that Respondents have illegally monopolized the market of automatic card shufflers in violation of Sections 2 and 3 of the Sherman Act (15 U.S.C., Secs. 2 and 3). More particularly, the claim is that Respondents achieved market dominance by fraudulently procuring patents and by repeatedly and illegally using those patents as the basis for sham claims of patent infringement against potential competitors and new entrants, thus driving such entities from the market. According to Claimant, this practice left Respondents free to set inflated prices for automatic card shufflers without concern of being undercut by others or losing market share.[1]

II
CLASS ARBITRATION—PROPOSED CLASS

Mohawk seeks to bring its above-described antitrust claims on behalf of a class consisting of:

> All persons and entities that directly purchased or leased automatic card shufflers within the United States, its territories and the District of Columbia from any Respondent or any predecessor, subsidiary or affiliate thereof, at any time between April 2, 2009 and December 31, 2022, and that agreed in writing to arbitrate disputes arising from such purchases or leases under the rules of the American Arbitration Association. ("Mohawk Arbitration Clause").

[1] At this point, the Arbitrator has of course not reached any conclusions or even considered the accuracy of any contested factual allegations in papers submitted by the parties.

III
CLASS CERTIFICATION

The AAA's Supplementary Rules for Class Arbitration ("AAA Class Rules") set forth with specificity the considerations an arbitrator must take into account when determining whether an action may proceed as a class arbitration. More particularly, Rules 4(a) and 4(b) of the AAA Class Rules provide as follows in this regard:

> 4(a) Prerequisites to a Class Action
>
> If the arbitrator is satisfied that the arbitration clause permits the arbitration to proceed as a class action, as provided in Rule 3, . . . the arbitrator shall determine whether the arbitration should proceed as a class arbitration. For that purpose, the arbitrator shall consider the criteria enumerated in this Rule 4 and any law or agreement of the parties the arbitrator determines shall apply to the arbitration. In doing so, the arbitrator shall determine whether one or more members of a class may act in the arbitration as representative parties on behalf of all members of the class described. The arbitrator shall permit a representative to do so only if each of the following conditions is met.
>
> (1) the class is so numerous that joinder of separate arbitrations on behalf of all members is impracticable.
>
> (2) there are questions of law or fact common to the class.
>
> (3) the claims or defenses of the representative parties are
>
> Typical of the claims or defenses of the class.
>
> (4) the representative parties will fairly and accurately protect the interests of the class.
>
> (5) counsel selected to represent the class will fairly and adequately protect the interests of the class; and
>
> (6) each class member has entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class representative(s) and each of the other class members. (AAA Class Rule 4(a).
>
> * * *

> 4(b) Class Arbitrations Maintainable
>
> An arbitration may be maintained as a class arbitration if the prerequisites of subdivision (a) are satisfied and in addition, the arbitrator finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class arbitration is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:
>
> (1) the interest of members of the class in individually controlling the prosecution or defense of separate arbitrations;
>
> (2) the extent and nature of any other proceedings concerning the controversy already commenced by or against members of the class;
>
> (3) the desirability or undesirability of concentrating the determination of the claims in a single arbitral forum; and
>
> (4) the difficulties likely to be encountered in the management of a class arbitration.

Set forth below is a discussion of each of the above-listed considerations, as applied to the specific context of this case.

A. Numerosity

As required by AAA Class Rule 4(a), the proposed class in this case is so numerous that joinder of separate arbitrations on behalf of all members is impracticable. More particularly, there are roughly 112 members of the proposed class in this arbitration. This is far in excess of what is required since Second Circuit courts have held that numerosity is presumed for classes larger than 40 members. Pennsylvania Public School Employees'

Retirement System, 772 F.3d 111, 120 (2d Cir. 2014);[2] Consol. Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir. 1995) ("Because numerosity is presumed at a level of 40 members . . . the number of defendants vastly exceeds this threshold. Numerosity is therefore satisfied."

B. Common Questions

AAA Class Rule 4(a)(2) requires that "there are questions of law or fact common to the class," and AAA Class Rule 4(b) mandates that these common questions "predominate over any questions affecting only individual members." See In re Digit. Music Antitrust Litigation, 321 F.R.D. 64, 86 (S.D.N.Y. 2017) (court found commonality, stating: ". . . it is clear that Plaintiffs' alleged injuries derive from a uniform course of conduct by the Defendants.") Marisol A. v. Giuliani, 126 F.3d 372, 377 (2d Cir. 1977) (". . . the actions or inactions of defendants are not isolated or discrete instances but, rather, form a pattern of behavior that commonly affects all of the proposed class.")

Here, the dominant issue at the heart of the case is whether Respondents illegally monopolized the market of automatic card shufflers in violation of Sections 2 and 3 of the Sherman Act. This question hinges on common proof of all class members and, standing alone, is sufficient to establish that questions common to the class predominate. As the Supreme Court and the Second Circuit both recognize: "[p]redominance is a test readily met in certain cases alleging . . . violations of the antitrust laws." Amchen Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997); see also In re Am. Int'l Grp., Inc. Sec. Litig., 689 F.3d 229, 240 (2d Cir. 2012). This is because "the

[2] The Pennsylvania Public School court additionally stated that: "the numerosity requirement is not strictly mathematical" and that other surrounding factors are also pertinent on the issue of class certification. In this regard, it is noted that all relevant considerations set forth in Rule 4 of the AAA Class Rules are specifically considered in this Class Determination Award.

central issue . . . is whether [defendants] engaged in anti-competitive conduct proscribed by [Sections 1 or 2] of the Sherman Act. Resolution of this issue 'will not vary among class members.'" Meredith Corp. v. SESAC, LLC, 87 F. Supp. 3d 650, 661 (S.D.N.Y. 2014).

C. Typicality

AAA Class Rule 4(a)(3) requires that "claims or defenses of the representative parties are **typical** of the claims or defenses of the class." (emphasis added.). Typicality is satisfied when "each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." Robidoux v. Celani, 97 F.2d 931, 936 (2d Cir. 1993).

Courts have "liberally construed" the typicality requirement (Digit. Music, 321 F.R.D. at 87), and recognize that "it "is not demanding." Villella v. Chem. & Mining Co. of Chile Inc., 333 F.R.D. 39, 55 (S.D.N.Y. 2019) (quoting MF Glob. Holdings, 310 F.R.D. 230, 236).

The key legal principle here is that: "In the antitrust context, plaintiffs and all class members alleging the same antitrust violations by defendants will establish typicality." Digit Music, 321 F.R.D. at 87 ("[T]ypicality in the antitrust context will be established by plaintiffs and all class members alleging the same antitrust violations by the defendants.") (quoting from In re Playmobil Antitrust Litig., 35 F. Supp.2d 231, 241 (E.D.N.Y. 1998). Here, all class members have the same antitrust claims against Respondents—specifically that Respondents violated Sections 2 and 3 of the Sherman Act by wllfully and wrongly acquiring and using monopoly power in the market for

automatic shufflers. That being so, the typicality requirement of AAA Class Rule 4 (a)(3) has been satisfied.

D. Adequacy of Class Representative

Rule 4(a)(4) of the AAA Class Rules requires that the "representative parties will fairly and adequately protect the interests of the class." This rule is not commonly invoked to deny class certification. See Haw. Structural Ironworkers Pension Tr. Fund, Inc. v. AMC Ent. Holdings, Inc., 338 F.R.D. 205, 212 (S.D.N.Y. 2021):

> However, denial of class certification on the grounds of inadequacy should only occur in the most extreme instances. 'Courts rarely deny class certification on the basis of the inadequacy of class representatives,' and will do so 'only in flagrant cases, where the putative class representatives display an alarming unfamiliarity with the suit, display an unwillingness to learn about the facts underlying their claims, or are so lacking in credibility that they are likely to harm their case.' [3]

Here, class representative Mohawk has already demonstrated its commitment to vigorously pursuing the class claims. Thus, for example, it has provided multiple employees to sit for depositions; it has produced documents; and it has preserved its records since the inception of this arbitration in 2020. Further, Mohawk is well positioned to speak for the class—it asserts, for example, the same causes of action, raises the same liability issues and seeks the same relief as all class members and is subject to the same AAA rules as all class members. Thus, there is no interest of Mohawk that is antagonistic to that of the class—much less, is there the kind of

[3] The Hawaii Structural case was quoting from In re Pfizer Inc. Sec. Litig., 282 F.R.D. 38, 51 (S.D.N.Y. 2012).

fundamental conflict which might call class certification into question. See In re Literary Works in Elec. Databases Copyright Litig., 654 F3d 242, 249 (2d Cir. 2011).

E. Adequacy of Class Counsel

AAA Class Rule 4(a)(5) requires that "counsel selected to represent the class will fairly and adequately protect the interests of the class." Here, proposed class counsel is Cohen, Milstein, Sellers & Toll PLLC ("Cohen Firm"). The Cohen Firm is one of the largest, oldest and most prestigious firms devoted to class action work in the U.S. It has aggressively and skillfully represented the proposed class in this arbitration since inception of the case in 2020. There is no question that the Cohen Firm would more than adequately represent the proposed class in this arbitration.

F. Similar Arbitration Clauses

Class Rule 4(a)(6) requires that "each class member has entered into an agreement containing an arbitration clause which is **substantially similar** to that signed by the class representative(s) and each of the other class members." (emphasis added.)

At the outset, it is important to note that Class Rule 4(a)(6) does not require that the Mohawk Arbitration Clause be identical to the arbitration clauses of the class members but, rather, that the Mohawk clause and all of the class arbitration clauses simply be "similar"—a word that is oft-equated to "resemble." This is a much-reduced requirement from "identical" and is even further diluted in Rule 4(a)(6) by the added modification that the clauses need only be "substantially similar." The added word "substantially" represents a significant step down from the already weak word "similar" and gives rise to a standard which Mohawk has met for the reasons set forth below:

FIRST, As required by the definition of the class (see pg. 2, supra), each class member has agreed to adopt the AAA Arbitration Rules, thus consenting to AAA-administered arbitration.

SECOND, The arbitration clauses signed by all proposed class members encompass the claims in Mohawk's Arbitration Demand.

THIRD, The Mohawk clause and all of the class clauses cover the period between April 2, 2009 and December 31, 2022), and

FOURTH, There has been nothing brought to the Arbitrator's attention suggesting that anything in any of the class clauses directly precludes class arbitration.

* * * *

L&W makes two arguments as to why class certification is precluded by the "substantial similarity" requirement of AAA Class Rule 4(a)(6). Each of these contentions is separately discussed below.[4]

(i) Lamps Plus

Notwithstanding the considerations listed above, L&W claims that Lamps Plus v. Varela, 587 U.S. 176 (2019) requires denial of the proposed class on the ground that Mohawk has not proven that the specific language of each of the class arbitration clauses reflects an agreement of each class member to permit class arbitration. In Lamps Plus, the U.S. Supreme Court held that the putative class representative could not arbitrate his claims on behalf of a class of 1,300 employees because **his arbitration agreement** did not permit class arbitration. This holding related to the **class**

[4] With regard to class certification, L&W argues only that the arbitration clauses of absent class members are not "substantially similar" to the class representative's clause. Thus, L&W concedes that all of the other class certification requirements of numerosity, typicality, adequacy, commonality, predominance and superiority have been satisfied. (see Sections 4(a)(1)-(5) and 4(b) of the AAA's Rules.)

representative and his arbitration agreement—it had nothing to do with **absent class members.**

L&W asserts that: (i) "[n]othing in the law remotely suggests" that Lamp Plus's holding "is any less important for absent class members than it is for putative class representatives," and (ii) a party seeking class arbitration should "present the Arbitrator with an analysis of each arbitration clause [of each class member] and explain why each clause's particular language demonstrated an 'affirmative contractual basis' to arbitrate as a class." (L&W's Memorandum in Opposition to Class Certification, pgs. 3, 5). In fact, however, this contention is based on nothing. No case law supports this argument, and L&W has not identified even one AAA class arbitration that applies Lamps Plus to the arbitration agreements of absent class members. In fact, an AAA class certification award post-dating Lamps Plus did not mention Lamps Plus at all. Thus, in Romney v. Franciscan Metal Group, no. 01-18-0001-4763, at *12 (AAA Mar. 31, 2021), the arbitrator certified a class after finding that it satisfied the AAA Class Rule 4(a) and 4(b) factors, without a single citation to Lamps Plus or the analysis it purportedly requires. See also Bagpeddler v. U.S. Bancorp, No. 11-118-00322-04, at *16 (AAA, May 4, 2007), where the arbitrator certified a class whose members "execut[ed] agreements providing for arbitration pursuant to the rules of the American Arbitration Association." Bagpeddler thus provides direct precedent for certifying Mohawk's proposed class of casinos that agreed to adopt the AAA Rules.

There is good reason why Lamps Plus pertains only to arbitration clauses of class representatives and not those of class members. Thus, for example, absent class members are in a different position and have certain unique safeguards the class

representative and respondent do not. Specifically, “an absent class-action plaintiff is not required to do anything” and “there are safeguards provided for his protection” including an “opportunity to ‘opt-out’ of the class[.]” Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810-11 (1985). Further, if one were to turn long-accepted doctrine on its head and require analysis, for example, of 100,000 arbitration contracts of absent class members, that would either grind the process to a complete halt or would render it so unwieldy and expensive as to be completely ineffective. This, of course, would fly in the face of public policy favoring prompt and effective implementation of arbitration.

(ii) Particular Differences in Clauses

L&W points to particular provisions in arbitration clauses of certain absent class members that differ in narrow respects from the arbitration clause of the class representative. Thus, for example, certain of the absent class members’ contracts provide for one or more of the following: (i) mediation before arbitration; (ii) a panel of three arbitrators; (iii) differing qualifications of arbitrators; (iv) required arbitrator licenses in different specified states; and (v) experience of the arbitrator in tribal law.[5]

Narrow differences such as these provide no basis for decertifying the class. Often, the absent class members are fine with adopting the language of the majority and, if not, they are fully protected by the option to opt out of the class. In Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810-11 (1985), the U.S. Supreme Court held that, given the significant advantages afforded to absent class members, an opt-out option provides them with sufficient protection:

> [A]n absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course,

[5] L&W also claims that certain putative class members did not agree to arbitration. If that be so, however, the simple answer is that such entities are not part of the class.

> content in knowing that there are safeguards provided for his protection. In most class actions an absent plaintiff is provided at least with an opportunity to 'opt out' of the class, and if he takes advantage of that opportunity he is removed from the litigation entirely.

Accord: LA Wholesale Drug Co. v. Sanofi-Aventis, 2008 WL 11399716, at *2 (S.D.N.Y. Apr.10, 2008) (finding named plaintiff adequate in antitrust class action where any purchaser class member "that wishes to opt out will be given an opportunity to do so.")

G. Fairness and Efficiency

AAA Class Rule 4(b) provides that: " . . . a class arbitration [must be] superior to other available methods for the fair and efficient adjudication of the controversy."

In this case, class arbitration is by far the fairest and most efficient method for resolving the antitrust claims of proposed class members. The only alternative (resolving the case individually as to each proposed class member) would require separate and potentially different discovery for each individual case; duplicative and disruptive hearings that could well lead to conflicting final results; possible inconsistent results on legal and evidentiary issues; and unnecessary expense and exponentially inflated costs and attorneys' fees, among many other things. Such an approach would violate the AAA's basic rule of offering a cost-effective proceeding and would in no way be justified by "individual issues" recited by Respondents, which could be easily addressed in a class action context.

* * * *

AAA Class Rule 4 lists four specific considerations which are pertinent to whether class arbitration is superior to other "available methods for the fair and efficient adjudication of the controversy." Each of these is discussed separately and briefly below.

(i) **Interest in Individual Control**

AAA Class Rule 4(b)(i) provides that the Arbitrator should consider whether "members of the class [have an interest] in individually controlling the prosecution or defense of separate arbitrations." Here, no such interest has been brought to the Arbitrator's attention. Further, the lack of any such interest by members of the proposed class is apparent from the fact that no proposed class members have filed individual arbitrations against Respondents claiming antitrust violations. See Iowa Pub. Employees Ret. Sys. v. Bank of Am. Corp., 2022 WL 2829880, at *27-28 ("the absence of any pending individual actions in fact shows that there is little interest in class members bringing their own actions."); Dial Corp., 314 F.R.D. at 121. Further, if any member of the proposed class would prefer to prosecute their antitrust claims individually, they can simply opt out of the class and are completely free to do so. AAA Class Rule 6(b)5.

(ii) **Other Proceedings**

AAA Class Rule 4(b)(2) requires that the Arbitrator focus on "the extent and nature of any other proceedings concerning the controversy already commenced by or against members of the class." As previously stated, no proposed class members have filed individual arbitrations against Respondents claiming antitrust violations. See Sec. 4(b)(i) above.

(iii) **Desirability of a Single Forum**

AAA Class Rule 4(b)(iii) mandates inquiry into "the desirability or undesirability of concentrating the determination of the claims in a single arbitral forum." This subject matter is covered in Section III G, above.

(iv) **Difficulties in Managing Class Arbitration**

AAA Class Rule 4(b)(4) requires that the Arbitrator consider "the difficulties likely to be encountered in the management of a class arbitration." Any known potential difficulties have been referenced and discussed in this Class Determination Award. Neither individually nor collectively do they provide sufficient reason to deny certification of the class.

IV
CONCLUSION

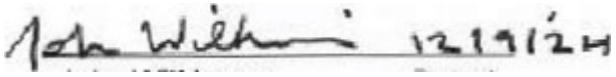
For all the reasons set forth herein, the following class is hereby certified:

> All persons and entities that directly purchased or leased automatic card shufflers within the United States, its territories and the District of Columbia from any Respondent or any predecessor, subsidiary or affiliate thereof, at any time between April 2, 2009 and December 31, 2022, and that agreed in writing to arbitrate disputes arising from such purchases or leases under the rules of the American Arbitration Association.

These proceedings are stayed for 30 days following issuance of this Class Determination Award to permit any party to move a court of competent jurisdiction to confirm or to vacate this Class Determination Award. Once all parties inform the Arbitrator in writing during the period of the stay that they do not intend to seek judicial review of this Class Determination Award, or the requisite time period expires without

any party having informed the arbitrator that it has done so, the Arbitrator may proceed with the arbitration on the basis stated in the Class Determination Award.[6]

So Ordered



John Wilkinson Dated

I, John Wilkinson, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed thig instrument which is my Class Determination Award.

[6] The parties have stipulated that notwithstanding AAA Class Rule 5(b), this Arbitrator "does not need to address proposed notice in connection with his decision as to whether or not to certify a class."