UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE HEARTWARE INTERNATIONAL, INC. SECURITIES LITIGATION	No. 1:16-cv-00520-RA

MEMORANDUM OF LAW IN SUPPORT OF LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND LITIGATION EXPENSES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND OTHER AUTHORITIES

Court-appointed Lead Counsel, Bernstein Litowitz Berger & Grossmann LLP ("Lead Counsel"), respectfully submits this memorandum of law in support of its motion, pursuant to Rule 23(h) of the Federal Rules of Civil Procedure, for an award of attorneys' fees in the amount of 24% of the Settlement Fund.[1] Lead Counsel also seeks payment of $262,522.35 for litigation expenses that were reasonably and necessarily incurred in prosecuting and resolving the Action, and $2,840 for costs incurred by Lead Plaintiff directly related to its representation of the Class.

PRELIMINARY STATEMENT

The proposed Settlement, which provides for the payment of $54.5 million in cash to resolve the Action, is an excellent result for the Class. The Settlement represents a substantial percentage of the likely recoverable damages in this case. In undertaking this litigation, counsel faced numerous challenges to proving both liability and damages that posed the serious risk of no recovery, or a substantially lesser recovery than the Settlement, for the Class. The significant monetary recovery was achieved through the skill, tenacity and effective advocacy of Lead Counsel, which litigated this Action on a fully contingent fee basis against highly skilled defense counsel. The Settlement was reached only after more than two and a half years of litigation, including substantial document discovery, which required Lead Counsel to dedicate a significant amount of time and resources to the Action.

[1] Unless otherwise noted, capitalized terms have the meanings ascribed to them in the Stipulation and Agreement of Settlement dated November 13, 2018 (ECF No. 69-1) (the "Stipulation") or in the Declaration of John Rizio-Hamilton in Support of (I) Lead Plaintiff's Motion for Final Approval of Settlement and Plan of Allocation, and (II) Lead Counsel's Motion for an Award of Attorneys' Fees and Litigation Expenses (the "Rizio-Hamilton Declaration" or "Rizio-Hamilton Decl."), filed herewith. In this memorandum, citations to "¶ __" refer to paragraphs in the Rizio-Hamilton Declaration and citations to "Ex. __" refer to exhibits to the Rizio-Hamilton Declaration.

As detailed in the accompanying Rizio-Hamilton Declaration,[2] Lead Counsel vigorously pursued this litigation from its outset by, among other things: (i) conducting an extensive investigation into the alleged fraud, which included a thorough review of public information such as SEC filings, analyst reports, conference call transcripts, and news articles, consultation with experts, and interviews with 91 former employees of HeartWare or other potential witnesses; (ii) drafting an initial complaint and a detailed amended complaint based on this investigation; (iii) successfully opposing Defendants' motion to dismiss; (iv) successfully moving for class certification; (v) engaging in substantial fact discovery efforts, which included serving 27 document subpoenas on third parties, including the FDA, obtaining and reviewing more than 450,000 pages of documents produced by Defendants and third parties, and producing over 7,500 pages of Lead Plaintiff's documents to Defendants in response to their requests; (vi) participating in two mediation sessions overseen by an experienced class action mediator; and (vii) negotiating the Settlement with Defendants.

The Settlement achieved through Lead Counsel's efforts is a particularly favorable result when considered in light of the significant risks of proving the Defendants' liability and establishing loss causation and damages. These risks are set forth in detail in the Rizio-Hamilton Declaration at paragraphs 48 to 75, and are summarized in the memorandum of law supporting the Settlement. As detailed in those submissions, these risks posed a real possibility that Lead

[2] The Rizio-Hamilton Declaration is an integral part of this submission and, for the sake of brevity in this memorandum, the Court is respectfully referred to it for a detailed description of, *inter alia*: the history of the Action (¶¶ 15-47); the nature of the claims asserted (¶ 21); the negotiations leading to the Settlement (¶¶ 42-45); the risks and uncertainties of continued litigation (¶¶ 48-75); and a description of the services Lead Counsel provided for the benefit of the Class (¶¶ 15-47).

Plaintiff and the Class would not be able to recover or would have recovered a lesser amount if the Action proceeded through summary judgment, trial, and appeals.

As compensation for their efforts on behalf of the Class and the risks of non-payment they faced in bringing the Action on a contingent basis, Lead Counsel seeks attorneys' fee in the amount of 24% of the Settlement Fund. The requested fee is well within the range of fees that courts in this Circuit have awarded in securities class actions with comparable recoveries on a percentage basis. The requested fee also represents a multiplier of 2.18 of Lead Counsel's lodestar, which is on the lower end of the range of multipliers typically awarded in class actions with significant contingency risks such as this one.

Moreover, the fee is requested pursuant to a written fee agreement entered into between Lead Counsel and Lead Plaintiff St. Paul Teachers' Retirement Fund Association ("Lead Plaintiff" or "St. Paul Teachers"), at the outset of the litigation. *See* Declaration of Jill E. Schurtz ("Schurtz Decl.") (Ex. 2), at ¶ 6. Lead Plaintiff is a sophisticated institutional investor that actively supervised the Action and has endorsed the requested fee as consistent with its agreement and as fair and reasonable in light of the quality of the result obtained, the work counsel performed, and the risks of the litigation. *Id*. ¶¶ 4, 6.

In addition, while the deadline set by the Court for Class Members to object to the requested attorneys' fees and expenses has not yet passed, to date, no objections to the requests for fees and expenses have been received. ¶¶ 112, 123. Pursuant to the Preliminary Approval Order, 19,644 copies of the Notice have been mailed to potential Class Members and their nominees through March 8, 2019, and the Summary Notice was published in *The Wall Street Journal* and transmitted over the *PR Newswire*. *See* Declaration of Michelle Kopperud Regarding (A) Mailing of Notice and Claim Form; (B) Publication of the Summary Notice; and

(C) Report on Requests for Exclusion Received to Date ("Kopperud Decl.") (Ex. 1), at ¶¶ 7-8. The Notice advised potential Class Members that Lead Counsel would apply for an award of attorneys' fees in amount not to exceed 24% of the Settlement Fund and for reimbursement of litigation expenses (including the reasonable costs and expenses of Lead Plaintiff) in an amount not to exceed $400,000. *See* Kopperud Decl. Ex. A, at ¶¶ 5, 72. The fees and expenses sought by Lead Counsel are within the amounts set forth in the Notice.[3]

In light of the recovery obtained, the time and effort devoted by Lead Counsel, the work performed, the skill and expertise required, and the risks that counsel undertook, Lead Counsel submits that the requested fee award is reasonable. In addition, the litigation expenses for which Lead Counsel seeks payment were reasonable and necessary for the successful prosecution of the Action.

ARGUMENT

I. LEAD COUNSEL IS ENTITLED TO AN AWARD OF ATTORNEYS' FEES FROM THE COMMON FUND

The Supreme Court has long recognized that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000). Courts recognize that awards of fair attorneys' fees from a common fund "serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons," and therefore "to discourage future misconduct of a similar nature." *In re FLAG Telecom Holdings,*

[3] The deadline for the submission of objections is March 22, 2019. Should any objections be received, Lead Counsel will address them in reply papers, which will be filed with the Court on or before April 5, 2019.

Ltd. Sec. Litig., 2010 WL 4537550, at *23 (S.D.N.Y. Nov. 8, 2010) (citation omitted); *see In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115808, at *2 (S.D.N.Y. Nov. 7, 2007) (same).

The Supreme Court has emphasized that private securities actions, such as the instant Action, are "an essential supplement to criminal prosecutions and civil enforcement actions" brought by the SEC. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). Compensating plaintiffs' counsel for the risks they take in bringing these actions is essential, because "[s]uch actions could not be sustained if plaintiffs' counsel were not to receive remuneration from the settlement fund for their efforts on behalf of the class." *Hicks v. Morgan Stanley*, 2005 WL 2757792, at *9 (S.D.N.Y. Oct. 24, 2005).

II. THE COURT SHOULD AWARD A REASONABLE PERCENTAGE OF THE COMMON FUND

Lead Counsel respectfully submits that the Court should award a fee based on a percentage of the common fund obtained. The Second Circuit has expressly approved the percentage method, recognizing that "the lodestar method proved vexing" and had resulted in "an inevitable waste of judicial resources." *Goldberger*, 209 F.3d at 48-50 (holding that either the percentage of fund method or lodestar method may be used to determine appropriate attorneys' fees); *Savoie v. Merchs. Bank*, 166 F.3d 456, 460 (2d Cir. 1999) (stating that the "percentage-of-the-fund method has been deemed a solution to certain problems that may arise when the lodestar method is used in common fund cases"). More recently, the Second Circuit has reiterated its approval of the percentage method, stating that it "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation," and has noted that the "trend in this Circuit is toward the percentage method." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (citations omitted); *see also In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 343 F. Supp. 3d 394, 416

(S.D.N.Y. 2018); *In re Comverse Tech., Inc. Sec. Litig.*, 2010 WL 2653354, at *2 (E.D.N.Y. June 24, 2010).

III. THE REQUESTED ATTORNEYS' FEES ARE REASONABLE UNDER EITHER THE PERCENTAGE-OF-THE-FUND METHOD OR THE LODESTAR METHOD

A. The Requested Attorneys' Fees Are Reasonable Under the Percentage-of-the-Fund Method

The Supreme Court has recognized that an appropriate court-awarded fee is intended to approximate what counsel would receive if they were bargaining for the services in the marketplace. *See Missouri v. Jenkins*, 491 U.S. 274, 285-86 (1989). If this were a non-representative action, the customary fee arrangement would be contingent, on a percentage basis, and typically in the range of 30% to 33% of the recovery. *See Blum v. Stenson*, 465 U.S. 886, 903 (1984) ("In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery.") (Brennan, J., concurring).

The 24% attorney fee requested by Lead Counsel pursuant to its fee agreement with Lead Plaintiff is well within the range of percentage fees that have been awarded in the Second Circuit in securities class actions and other similar litigation with comparable recoveries. *See, e.g.*, *Freudenberg v. E*Trade Fin. Corp.*, No. 07 Civ. 8538 (JPO) (MHD), slip op. at 6 (S.D.N.Y. Oct. 20, 2012), ECF No. 154 (awarding 28% of $79 million settlement) (Ex. 6); *In re Amaranth Natural Gas Commodities Litig.*, 2012 WL 2149094, at *2 (S.D.N.Y. June 11, 2012) (awarding 30% of $77.1 million settlement); *Cornwell v. Credit Suisse Grp.*, 2011 WL 13263367, at *1-2 (S.D.N.Y. July 18, 2011) (awarding 27.5% of $70 million settlement); *In re Merrill Lynch & Co. Sec., Derivative & ERISA Litig.*, No. 07-cv-9633 (JSR)(DFE), slip op. at 6 (S.D.N.Y. Aug. 21, 2009), ECF No. 272 (awarding 25% of $75 million settlement) (Ex. 7); *In re Xerox Corp. ERISA*

Litig., No. 02-CV-1138 (AWT), slip op. at 3 (D. Conn. Apr. 14, 2009), ECF No. 354 (awarding 29.9% of $51 million settlement) (Ex. 8); *In re Priceline.com, Inc. Sec. Litig.*, 2007 WL 2115592, at *5 (D. Conn. July 20, 2007) (awarding 30% of $80 million settlement); *In re Am. Express Fin. Advisors Sec. Litig.*, No. 04 Civ. 1773 (DAB), slip op. at 8 (S.D.N.Y. July 18, 2007), ECF No. 170 (awarding 27% of $100 million settlement) (Ex. 9); *In re Philip Servs. Corp. Sec. Litig.*, 2007 WL 959299, at *1, *3 (S.D.N.Y. March 28, 2007) (awarding 26% of $79.75 million settlement); *see also Cen. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC*, 504 F.3d 229, 249 (2d Cir. 2007) (affirming district court's award of 30% of $42.5 million settlement fund).[4]

The requested fee is also consistent with fee awards in similarly sized securities class actions in other circuits. *See, e.g.*, *In re Regions Morgan Keegan Closed-End Fund Litig.,* 2016 WL 8290089, at *11 (W.D. Tenn. Aug. 2, 2016) (awarding 30% of $62 million settlement); *City of Sterling Heights Gen. Emps.' Ret. Sys. v. Hospira, Inc.*, 2014 WL 12767763, at *1 (N.D. Ill. Aug. 5, 2014) (awarding 30% of $60 million settlement); *Minneapolis Firefighters Relief Ass'n v. Medtronic, Inc.*, 2012 WL 12903758, at *1 (D. Minn. Nov. 8, 2012) (awarding 25% of $85 million settlement); *Billitteri v. Secs. Am., Inc.*, 2011 WL 3585983, at *9 (N.D. Tex. Aug. 4, 2011) (awarding 25% of $80 million settlement); *Central Laborers' Pension Fund v. Sirva*, 2017

[4] Indeed, percentage fees of this amount and higher have often been awarded in much larger settlements in the Second Circuit. *See, e.g., In re Pfizer Inc. Sec. Litig.,* No. 04-cv-09866 (LTS) (HBP), slip op. at 2 (S.D.N.Y. Dec. 21, 2016), ECF No. 727 (awarding 28% of $486 million settlement) (Ex. 10); *In re Bank of New York Mellon Corp. Forex Transactions Litig.*, 148 F. Supp. 3d 303, 305 (S.D.N.Y. 2015) (awarding 25% of $180 million settlement); *Bd. of Trustees of the AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.*, 2012 WL 2064907, at *3 (S.D.N.Y. June 7, 2012) (awarding 25% of $150 million settlement); *Comverse*, 2010 WL 2653354, at *6 (awarding 25% of $225 million settlement); *In re Deutsche Telekom AG Sec. Litig.*, 2005 WL 7984326, at *4 (S.D.N.Y. June 9, 2005) (awarding 28% of $120 million settlement); *In re Oxford Health Plans, Inc. Sec. Litig.*, MDL No. 1222, 2003 U.S. Dist. LEXIS 26795, at *13 (S.D.N.Y. June 12, 2003) (awarding 28% of $300 million settlement).

U.S. Dist. LEXIS 105097, at *18-19 (N.D. Ill. Oct. 31, 2007) (awarding 29.85% of $53.3 million settlement).

In sum, the fee requested here is well within the range of fees awarded on a percentage basis in comparable actions.

B. The Requested Attorneys' Fees Are Reasonable Under the Lodestar Method

To ensure the reasonableness of a fee awarded under the percentage-of-the-fund method, district courts may cross-check the proposed award against counsel's lodestar. *See Goldberger*, 209 F.3d at 50.

Here, Lead Counsel spent a total of 13,252 hours of attorney and other professional support time prosecuting the Action for the benefit of the Class. ¶ 101. Lead Counsel's lodestar, derived by multiplying the hours spent by each attorney and paraprofessional by their current hourly rates, is $6,001,215.00.[5] *See id*. The requested fee of $13,080,000 (before interest), therefore represents a multiplier of 2.18 of the total lodestar.

The requested 2.18 multiplier is on the lower end of the range of multipliers commonly awarded in securities class actions and other comparable litigation. In cases of this nature, fees representing multiples above the lodestar are regularly awarded to reflect the contingency fee risk and other relevant factors. *See FLAG Telecom*, 2010 WL 4537550, at *26 ("a positive multiplier is typically applied to the lodestar in recognition of the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and

[5] The Supreme Court and courts in this Circuit have approved the use of current hourly rates to calculate the base lodestar figure as a means of compensating for the delay in receiving payment, inflation, and the loss of interest. *See Missouri v. Jenkins*, 491 U.S. at 284; *In re Hi-Crush Partners L.P. Sec. Litig.*, 2014 WL 7323417, at *15 (S.D.N.Y. Dec. 19, 2014) ("the use of current rates to calculate the lodestar figure has been endorsed repeatedly by the Supreme Court, the Second Circuit and district courts within the Second Circuit as a means of accounting for the delay in payment inherent in class actions and for inflation").

other factors"); *Comverse*, 2010 WL 2653354, at *5 ("Where, as here, counsel has litigated a complex case under a contingency fee arrangement, they are entitled to a fee in excess of the lodestar").

In complex contingent litigation, lodestar multipliers between 2 and 5 are commonly awarded. *See, e.g.*, *Wal-Mart*, 396 F.3d at 123 (upholding multiplier of 3.5 as reasonable on appeal); *Woburn Ret. Sys. v. Salix Pharm., Ltd.,* 2017 WL 3579892, at *6 (S.D.N.Y. Aug. 18, 2017) (awarding fee representing a 3.1 multiplier); *Comverse*, 2010 WL 2653354, at *5 (2.78 multiplier); *Deutsche Telekom*, 2005 WL 7984326, at *4 (3.96 multiplier); *Cornwell*, 2011 WL 13263367, at *2 (4.7 multiplier); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002) (awarding fee equal to a 4.65 multiplier, which was "well within the range awarded by courts in this Circuit and courts throughout the country").

In sum, Lead Counsel's requested fee award is well within the range of what courts in this Circuit regularly award in class actions such as this one, whether calculated as a percentage of the fund or in relation to Lead Counsel's lodestar. Moreover, as discussed below, each of the factors established for the review of attorneys' fee awards by the Second Circuit in *Goldberger* also strongly supports a finding that the requested fee is reasonable.

IV. THE FEE REQUEST IS ENTITLED TO A PRESUMPTION OF REASONABLENESS BECAUSE IT IS BASED ON A FEE AGREEMENT ENTERED INTO WITH LEAD PLAINTIFF AT THE OUTSET OF THE LITIGATION

The requested fee should be afforded a presumption of reasonableness because it is based on an agreement Lead Counsel entered into with a sophisticated institutional Lead Plaintiff at the outset of the litigation. *See* Schurtz Decl. ¶ 6. Even if a formal presumption of reasonableness is not afforded to the fee based on the pre-litigation agreement, the existence of the agreement and

the approval of the requested fee by Lead Plaintiff, which was actively involved in the prosecution and settlement of the Action, strongly support approval of the fee.

The PSLRA was intended to encourage institutional investors like the St. Paul Teachers to assume control of securities class actions in order to "increase the likelihood that parties with significant holdings in issuers, whose interests are more strongly aligned with the class of shareholders, will participate in the litigation and exercise control over the selection and actions of plaintiff's counsel." H.R. Conf. Rep. No. 104-369, at *32 (1995), reprinted in 1995 U.S.C.C.A.N. 730, 731. Congress believed that these institutions would be in the best position to monitor the ongoing prosecution of the litigation and assess the reasonableness of counsel's fee request.

A number of courts have found, in light of Congress's intent to empower lead plaintiffs under the PSLRA to select and supervise attorneys on behalf of the class, that a fee agreement entered into by a PSLRA lead plaintiff and its counsel at the outset of the litigation should be considered presumptively reasonable. *See In re Cendant Corp. Litig.*, 264 F.3d 201, 282 (3d Cir. 2001) (*ex ante* fee agreements in securities class actions enjoy "a presumption of reasonableness"); *In re Marsh & McLennan Cos. Sec. Litig.*, 2009 WL 5178546, at *15 (S.D.N.Y. Dec. 23, 2009) ("Since the passage of the PSLRA, courts have found such an agreement between fully informed lead plaintiffs and their counsel to be presumptively reasonable"). While the Second Circuit has not directly ruled on whether a formal presumption of reasonableness should be afforded to a fee agreement entered into between counsel and a lead plaintiff appointed under the PSLRA, *see In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133-34 (2d Cir. 2008) ("We leave open the question of how much weight should be given to fees agreed upon by PSLRA Lead Plaintiffs"); *DeValerio v. Olinski*, 673 F. App'x 87, 91 (2d Cir.

2016) (declining to consider the issue because it had been waived), it has indicated that the Court should, at least, give "serious consideration" to such agreements, *see Nortel*, 539 F.3d at 133-34.

Even if no formal presumption of reasonableness is adopted, Lead Counsel respectfully submits that the fact that the fee is based on the *ex ante* agreement with Lead Plaintiff should be given substantial weight when evaluating the reasonableness of Lead Counsel's fee request. For example, the Second Circuit has stated that:

> We expect . . . that district courts will give serious consideration to negotiated fees because PSLRA Lead Plaintiffs often have a significant financial stake in the settlement, providing a powerful incentive to ensure that any fees resulting from that settlement are reasonable. In many cases, the agreed-upon fee will offer the best indication of a market rate, thus providing a good starting position for a district court's fee analysis.

Nortel, 539 F.3d at 133-34; *see also Comverse*, 2010 WL 2653354, at *4 ("an *ex ante* fee agreement is the best indication of the actual market value of counsel's services").

Here, Lead Plaintiff is a classic example of the type of sophisticated and financially interested investor that Congress envisioned serving as a fiduciary for the class when it enacted the PSLRA. Lead Plaintiff took a very active role in the litigation and closely supervised the work of Lead Counsel. *See* Schurtz Decl. ¶ 4. Accordingly, the endorsement of the fee as reasonable by Lead Plaintiff supports approval of the fee. *See Veeco*, 2007 WL 4115808, at *8 ("public policy considerations support the award in this case because the Lead Plaintiff . . . – a large public pension fund – conscientiously supervised the work of lead counsel and has approved the fee request").

V. OTHER FACTORS CONSIDERED BY COURTS IN THE SECOND CIRCUIT CONFIRM THAT THE REQUESTED FEE IS FAIR AND REASONABLE

The Second Circuit has set forth the following criteria that courts should consider when reviewing a request for attorneys' fees in a common fund case:

> (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.

Goldberger, 209 F.3d at 50 (internal quotes and citation omitted). Consideration of these factors, together with the analyses above, demonstrates that the fee requested by Lead Counsel is reasonable.

A. The Time and Labor Expended Support the Requested Fee

The substantial time and effort expended by Lead Counsel in prosecuting the Action and achieving the Settlement also support the requested fee. The Rizio-Hamilton Declaration details the efforts of Lead Counsel in prosecuting Lead Plaintiff's claims over the course of the multi-year litigation. As set forth in greater detail in the Rizio-Hamilton Declaration, Lead Counsel, among other things:

- conducted an extensive investigation into Defendants' alleged misstatements, including a thorough review of SEC filings, analyst reports, conference call transcripts, press releases, company presentations, media reports and other public information, consultation with experts, and interviews with numerous former employees of HeartWare and other potential witnesses (¶¶ 18-20);
- researched and drafted an initial complaint and detailed amended complaint based on this investigation (¶¶ 15, 21);
- successfully defeated Defendants' motion to dismiss the Complaint (¶¶ 22-26);
- engaged in substantial fact discovery efforts, which included serving initial disclosures and requests for production of documents and interrogatories on Defendants, serving 27 document subpoenas on non-parties, including the FDA, applying for letters rogatory, and obtaining and reviewing more than 450,000 pages of documents produced by Defendants and non-parties (¶¶ 28-35);
- produced over 7,500 pages of documents to Defendants in response to their requests; (¶ 36);
- moved for class certification, which included submitting an expert report on market efficiency and classwide damages. (¶¶ 38-39);
- consulted extensively with experts concerning bioengineering, cardiovascular medicine, statistics, regulatory compliance, loss causation and damages. (¶¶ 40-41); and

- engaged in extensive settlement negotiations with Defendants' Counsel, including participating in two mediation sessions overseen by an experienced class action mediator (¶¶ 42-45).

As noted above, Lead Counsel expended 13,252 hours prosecuting this Action with a lodestar value of over $6 million. ¶ 101. Throughout the litigation, Lead Counsel staffed the matter efficiently and avoided any unnecessary duplication of effort. ¶ 104. The time and effort devoted to this case by Lead Counsel was critical in obtaining the favorable result achieved by the Settlement, and confirms that the fee request here is reasonable.

B. The Risks of the Litigation Support the Requested Fee

The risk of the litigation is one of the most important *Goldberger* factors. *See Goldberger*, 209 F.3d at 54; *Comverse*, 2010 WL 2653354, at *5. The Second Circuit has recognized that the risks associated with a case undertaken on a contingent fee basis is an important factor in determining an appropriate fee award:

> No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 470 (2d Cir. 1974) (citation omitted). "Little about litigation is risk-free, and class actions confront even more substantial risks than other forms of litigation." *Comverse*, 2010 WL 2653354, at *5 (citation omitted); *see also In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 433 (S.D.N.Y. 2001) (it is "appropriate to take this [contingent-fee] risk into account in determining the appropriate fee to award").

While Lead Counsel believes that the claims of Lead Plaintiff are meritorious, Lead Counsel recognized that there were a number of substantial risks in the litigation from the outset

and that Lead Plaintiff's ability to succeed at trial and obtain a substantial judgment was far from certain.

As discussed in greater detail in the Rizio-Hamilton Declaration and in the memorandum of law in support of the Settlement, there were substantial risks here with respect to establishing both liability and damages. ¶¶ 48-75. Lead Plaintiff would have faced substantial challenges in proving that Defendants' statements were materially false and misleading when made. For example, Defendants contended that the majority, if not all, of their statements concerning the progress of remediation efforts were too vague and indefinite to support a fraud claim, or were unactionable statements of corporate optimism or puffery, and that all of the sufficiently definite and verifiable statements they made were accurate because HeartWare had engaged in extensive efforts and spent more than $10 million on remediation efforts during the Class Period. ¶ 51. With respect to statements about MVAD's safety profile, Defendants would contend that their statements on this topic were supported by the data that the Company had at the time the statements were made, and could point to cautionary statements they made warning that they may not have foreseen all potential problems with MVAD and the clinical trial could be delayed or terminated if adverse events occurred. ¶ 52. Defendants would also argue that their statement that the adverse events observed in the MVAD clinical trial were "typical" of adverse events observed in similar trials were not false because the adverse events – "thrombotic events" – were typical in trials of such devices. ¶ 53.

Lead Plaintiff would also have faced additional challenges in proving that Defendants made the alleged false statements with the intent to mislead. Defendants would have argued that their statements concerned experimental medical technology, which is inherently unpredictable and risky by nature, and that if any of their statements were false when they were made, the

misstatements were innocent. ¶¶ 54-55. Defendants would contend that Lead Plaintiff could not show any motive for Defendants to mislead the public. For example, Defendants would argue that they had no incentive to overstate the extent of HeartWare's remediation efforts because the public would be able to independently verify whether HeartWare had remediated the issues by monitoring whether the FDA had closed out the Warning Letter. ¶ 56. They would also have asserted that they had no incentive to rush MVAD into trials and misrepresent its safety profile, because they knew that successful completion of clinical trials was imperative to any commercial prospects for the device, and the results of the trial would ultimately have to be disclosed. *Id*. Further, Defendants would argue that Defendant Godshall did not engage in insider trading during the Class Period, and thus had no financial incentive to inflate the price of HeartWare stock. ¶ 57. Defendants also would point to the fact that the SEC never brought an enforcement action relating to the claims in this case as evidence that no fraud occurred. ¶ 58.

Even if Lead Plaintiff established falsity and scienter, Lead Plaintiff would have faced significant hurdles in establishing "loss causation" – that the alleged misstatements were the cause of investors' losses – and in proving damages. Defendants would argue that declines in HeartWare's stock price were not caused by the alleged misstatements because the disclosures that caused these declines did not directly reveal that the alleged misstatements were false. ¶¶ 62-63. Defendants would contend that the disclosure of the proposed Valtech transaction on September 1, 2015 did not correct any alleged misstatements about the Company's remediation efforts or the MVAD's prospects, and that the decline in the stock price following that announcement was, instead, related to the dilutive nature of the proposed transaction. ¶¶ 66-70. Similarly, Defendants would contend that the disclosures of adverse events in the MVAD clinical trial did not correct any of the alleged misstatements, but simply reflected new

information. ¶¶ 71-72. Defendants would have further argued that, at bottom, the disclosure of the failed trial was not corrective because it merely reflected a risk that investors already knew – namely, that initial trials of experimental and complex medical devices can fail. ¶ 72.

In the face of the many uncertainties regarding the outcome of the case, Lead Counsel undertook this case on a wholly contingent basis, knowing that the litigation could last for years and would require the devotion of a substantial amount of time and a significant expenditure of litigation expenses with no guarantee of compensation. ¶¶ 107-109.

Lead Counsel's assumption of this contingency fee risk strongly supports the reasonableness of the requested fee. *See FLAG Telecom*, 2010 WL 4537550, at *27 ("Courts in the Second Circuit have recognized that the risk associated with a case undertaken on a contingent fee basis is an important factor in determining an appropriate fee award."); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 148 (S.D.N.Y. 2010) ("There was significant risk of non-payment in this case, and Plaintiffs' Counsel should be rewarded for having borne and successfully overcome that risk.").

C. The Magnitude and Complexity of the Action Support the Requested Fee

The magnitude and complexity of the Action also support the requested fee. Courts have recognized that securities class action litigation is "notably difficult and notoriously uncertain." *FLAG Telecom*, 2010 WL 4537550, at *27. This case was no exception. As noted above and in the Rizio-Hamilton Declaration, the litigation raised a number of complex questions concerning liability and loss causation that would have required extensive efforts by Lead Counsel and consultation with experts to bring to resolution. Proving the claims in the Action would have turned on complicated issues such as HeartWare's compliance with complex FDA regulations governing the manufacture of medical devices, the design of experimental VAD technology, and the interpretation of safety data from animal and bench testing and the early results of the first

human implantations. To build the case, Lead Counsel had to dedicate a substantial amount of time to understanding these complex matters, conducting an extensive factual investigation, obtaining discovery, and working extensively with experts to analyze the claims and the evidence obtained. Accordingly, the magnitude and complexity of the Action supports the conclusion that the requested fee is fair and reasonable.

D. The Quality of Lead Counsel's Representation Supports the Requested Fee

The quality of the representation by Lead Counsel is another important factor that supports the reasonableness of the requested fee. Lead Counsel submits that the quality of its representation is best evidenced by the quality of the result achieved. *See, e.g.*, *Veeco*, 2007 WL 4115808, at *7; *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 467 (S.D.N.Y. 2004). Here, the Settlement provides a very favorable result for the Class in light of the serious risks of continued litigation, and represents a substantial portion of likely recoverable damages. *See* ¶¶ 76-78. Lead Counsel respectfully submits that the quality of its efforts in the litigation to date, together with its substantial experience in securities class actions and its commitment to this litigation, provided it with the leverage necessary to negotiate the Settlement.

Courts have repeatedly recognized that the quality of the opposition faced by plaintiffs' counsel should also be taken into consideration in assessing the quality of the counsel's performance. *See, e.g.*, *Veeco*, 2007 WL 4115808, at *7 (among factors supporting 30% award of attorneys' fees was that defendants were represented by "one of the country's largest law firms"); *In re Adelphia Commc'ns Corp. Sec. & Derivative Litig.*, 2006 WL 3378705, at *3 (S.D.N.Y. Nov. 16, 2006) ("The fact that the settlements were obtained from defendants represented by 'formidable opposing counsel from some of the best defense firms in the country' also evidences the high quality of lead counsels' work") (citation omitted), *aff'd*, 272 F. App'x 9 (2d Cir. 2008). Here, Defendants were represented by able counsel from Shearman & Sterling

LLP and Wilmer Cutler Pickering Hale and Dorr LLP, who zealously represented their clients throughout this Action. *See* ¶ 106. Notwithstanding this capable opposition, Lead Counsel's thorough investigation, ability to present a strong case, successful opposition of Defendants' motion to dismiss, and demonstrated willingness to vigorously prosecute the Action enabled it to achieve the favorable Settlement.

E. The Requested Fee in Relation to the Settlement

Courts have interpreted this factor as requiring the review of the fee requested in terms of the percentage it represents of the total recovery. "When determining whether a fee request is reasonable in relation to a settlement amount, 'the court compares the fee application to fees awarded in similar securities class-action settlements of comparable value.'" *Comverse*, 2010 WL 2653354, at *3 (citation omitted). As discussed in detail in Part III above, the requested fee is well within the range of percentage fees that courts in the Second Circuit have awarded in comparable cases.

F. Public Policy Considerations Support the Requested Fee

A strong public policy concern exists for rewarding firms for bringing successful securities litigation. *See FLAG Telecom*, 2010 WL 4537550, at *29 (if the "important public policy [of enforcing the securities laws] is to be carried out, the courts should award fees which will adequately compensate Lead Counsel for the value of their efforts, taking into account the enormous risks they undertook"); *Maley*, 186 F. Supp. 2d at 373 ("In considering an award of attorney's fees, the public policy of vigorously enforcing the federal securities laws must be considered."); *Hicks*, 2005 WL 2757792, at *9 ("To make certain that the public is represented by talented and experienced trial counsel, the remuneration should be both fair and rewarding.") (citation omitted). Accordingly, public policy favors granting Lead Counsel's fee and expense application here.

G. The Reaction of the Class to Date Supports the Requested Fee

The reaction of the Class to date also supports the requested fee. Through March 8, 2019, Analytics has disseminated the Notice to 19,644 potential Class Members and nominees informing them, among other things, that Lead Counsel intended to apply to the Court for an award of attorneys' fees in an amount not to exceed 24% of the Settlement Fund and up to $400,000 in expenses. *See* Kopperud Decl. ¶ 7 and Ex. A thereto. While the time to object to the Fee and Expense Application does not expire until March 22, 2019, to date, no objections have been received. ¶ 112. Should any objections be received, Lead Counsel will address them in its reply papers.

VI. LEAD COUNSEL'S EXPENSES ARE REASONABLE AND WERE NECESSARILY INCURRED TO ACHIEVE THE BENEFIT OBTAINED

Lead Counsel's fee application includes a request for payment of the litigation expenses that Lead Counsel paid or incurred, which were reasonable in amount and necessary to the prosecution of the Action. *See* ¶¶ 114-121. These expenses are properly recovered by counsel. *See Facebook IPO*, 343 F. Supp. 3d at 418 (in a class action, attorneys should be compensated "for reasonable out-of-pocket expenses incurred and customarily charged to their clients, as long as they were incidental and necessary to the representation") (citation omitted); *In re China Sunergy Sec. Litig.*, 2011 WL 1899715, at *6 (S.D.N.Y. May 13, 2011) (same); *FLAG Telecom*, 2010 WL 4537550, at *30 ("It is well accepted that counsel who create a common fund are entitled to the reimbursement of expenses that they advanced to a class"). As set forth in detail in the Rizio-Hamilton Declaration, Lead Counsel incurred $262,522.35 in litigation expenses in the prosecution of the Action. ¶ 114.

The expenses for which payment are sought are the types of expenses that are necessarily incurred in litigation and routinely charged to clients billed by the hour. These expenses include,

among others, expert fees, document management costs, on-line research, court reporting and transcripts, photocopying, travel costs, and telephone and postage expenses. The largest expense is for retention of Lead Plaintiff's experts, in the amount of $109,359.93, or 42% of the total litigation expenses. ¶ 117. Another significant category of expenses was for document management and litigation support, which included the cost of retaining the electronic discovery vendor which managed the database of documents received, which came to $70,335.06, or 27% of the total amount of expenses. ¶ 118. The combined costs for on-line legal and factual research, in the amount of $22,248.04, represent 8.5% of the total amount of expenses. *Id*. A complete breakdown by category of the expenses incurred by Lead Counsel is set forth in Exhibit 5 to the Rizio-Hamilton Declaration.

The Notice informed potential Class Members that Lead Counsel would apply for reimbursement of litigation expenses in an amount not to exceed $400,000 which might include the reasonable costs and expenses of Lead Plaintiff directly related to its representation of the Class. The total amount of expenses requested by Lead Counsel is $265,362.35, which includes $262,522.35 for litigation expenses incurred by Lead Counsel and $2,840.00 in reimbursement of costs and expenses directly incurred by Lead Plaintiff, an amount well below the amount listed in the Notice. To date, there has been no objection to the request for expenses.

VII. LEAD PLAINTIFF SHOULD BE AWARDED ITS REASONABLE COSTS AND EXPENSES UNDER 15 U.S.C. §78u-4(a)(4)

In connection with its request for reimbursement of Litigation Expenses, Lead Counsel also seeks reimbursement of $2,840 in costs and expenses incurred by Lead Plaintiff directly related to its representation of the Class. The PSLRA specifically provides that an "award of reasonable costs and expenses (including lost wages) directly relating to the representation of the

class" may be made to "any representative party serving on behalf of a class." 15 U.S.C. § 78u-4(a)(4).

Here, St. Paul Teachers seeks reimbursement for the value of the time spent by its Executive Director, Jill E. Schurtz, and other employees who dedicated time to the Action by reviewing significant pleadings and briefs, communicating regularly with Lead Counsel, searching for and gathering their internal documents for production in response to Defendants' document requests, and monitoring the progress of settlement negotiations. *See* Schurtz Decl. ¶¶ 4, 10. Ms. Schurtz and the other employees devoted a total of at least 46 hours to assisting in the prosecution of this Action, which was time that they otherwise would have expected to spend on other work for St. Paul Teachers and, thus, represented a cost to St. Paul Teachers. *Id*. ¶ 10. Based on the reasonable hourly value of their time of $40 or $80 per hour, Lead Plaintiff seeks reimbursement of $2,840. *Id*.

Numerous courts have approved reasonable awards to compensate lead plaintiffs for the time their employees have spent supervising and participating in the litigation on behalf of the class. In *Marsh & McLennan*, the court awarded $144,657 to the New Jersey Attorney General's Office and $70,000 to certain Ohio pension funds, to compensate them "for their reasonable costs and expenses incurred in managing this litigation and representing the Class." 2009 WL 5178546, at *21. As the court noted, their efforts in communicating with lead counsel, reviewing submissions to the court, responding to discovery requests, providing deposition testimony and participating in settlement discussions were "precisely the types of activities that support awarding reimbursement of expenses to class representatives." *Id*.; *see also In re Bank of Am. Corp. Sec., Derivative, & Employee Ret. Income Sec. Act (ERISA) Litig*., 772 F.3d 125, 133 (2d Cir. 2014) (affirming award of over $450,000 to representative plaintiffs for time spent

by their employees on the action); *FLAG Telecom*, 2010 WL 4537550, at *31 (approving award of $100,000 to Lead Plaintiff for time spent on the litigation); *Veeco*, 2007 WL 4115808, at *12 (awarding institutional lead plaintiff $15,900 for time spent supervising litigation, and characterizing such awards as "routine" in this Circuit); *In re Gilat Satellite Networks, Ltd.,* 2007 WL 2743675, at *19 (E.D.N.Y. Sept. 18, 2007) (granting PSLRA awards where, as here, "the tasks undertaken by employees of Lead Plaintiffs reduced the amount of time those employees would have spent on other work and these tasks and rates appear reasonable to the furtherance of the litigation").

The award sought by Lead Plaintiff is reasonable and justified under the PSLRA.

CONCLUSION

For the foregoing reasons, Lead Counsel respectfully requests that the Court award attorneys' fees in the amount of 24% of the Settlement Fund; award $262,522.35 for the reasonable litigation expenses that Lead Counsel incurred in connection with the prosecution of the Action; and award $2,840 in reimbursement of Lead Plaintiff's costs and expenses.

Dated: March 8, 2019

Respectfully submitted,

/s/ John Rizio-Hamilton

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