

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

IN RE HEARTWARE INTERNATIONAL,
INC. SECURITIES LITIGATION

No. 1:16-cv-00520-RA

**REPLY MEMORANDUM OF LAW IN FURTHER 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**

**BERNSTEIN LITOWITZ BERGER
& GROSSMANN LLP**

John Rizio-Hamilton
Abe Alexander
Julia Tebor
1251 Avenue of the Americas
New York, New York 10020
Tel: (212) 554-1400

*Counsel for Lead Plaintiff and
Lead Counsel for the Class*

Dated: April 5, 2019

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

ARGUMENT 2

 THE REACTION OF THE CLASS SUPPORTS APPROVAL OF THE
 SETTLEMENT, THE PLAN OF ALLOCATION AND THE REQUESTED
 ATTORNEYS’ FEES AND LITIGATION EXPENSES..... 2

CONCLUSION..... 5

TABLE OF AUTHORITIES

CASES	Page(s)
<i>In re Advanced Battery Techs., Inc. Sec. Litig.</i> , 298 F.R.D. 171 (S.D.N.Y. 2014)	3
<i>In re AOL Time Warner, Inc. Sec. & “ERISA” Litig.</i> , 2006 WL 903236 (S.D.N.Y. Apr. 6, 2006).....	4
<i>Asare v. Change Grp. of New York, Inc.</i> , 2013 WL 6144764 (S.D.N.Y. Nov. 18, 2013).....	5
<i>In re AT&T Corp. Sec. Litig.</i> , 2005 WL 6716404 (D.N.J. Apr. 25, 2005)	4
<i>In re Bisys Sec. Litig.</i> , 2007 WL 2049726 (S.D.N.Y. July 16, 2007)	5
<i>In re Citigroup Inc. Sec. Litig.</i> , 965 F. Supp. 2d 369 (S.D.N.Y. 2013).....	4
<i>Fleisher v. Phoenix Life Ins. Co.</i> , 2015 WL 10847814 (S.D.N.Y. Sept. 9, 2015).....	3
<i>In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.</i> , 986 F. Supp. 2d 207 (E.D.N.Y. 2013)	4
<i>In re Rite Aid Corp. Sec. Litig.</i> , 396 F.3d 294 (3d Cir. 2005).....	5
<i>Vaccaro v. New Source Energy Partners L.P.</i> , 2017 WL 6398636 (S.D.N.Y. Dec. 14, 2017)	4
<i>In re Veeco Instruments Inc. Sec. Litig.</i> , 2007 WL 4115808 (S.D.N.Y. Nov. 7, 2007).....	5
<i>In re Veeco Instruments Inc. Sec. Litig.</i> , 2007 WL 4115809 (S.D.N.Y. Nov. 7, 2007).....	4
<i>In re Virtus Inv. Partners, Inc. Sec. Litig.</i> , 2018 WL 6333657 (S.D.N.Y. Dec. 4, 2018)	3
<i>Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.</i> , 396 F.3d 96 (2d Cir. 2005).....	3

Lead Plaintiff St. Paul Teachers' Retirement Fund Association ("Lead Plaintiff"), on behalf of itself and the Class, and Lead Counsel respectfully submit this memorandum of law in further support of (i) Lead Plaintiff's motion for final approval of the proposed Settlement and approval of the proposed Plan of Allocation, and (ii) Lead Counsel's motion for an award of attorneys' fees and Litigation Expenses.¹

PRELIMINARY STATEMENT

The proposed Settlement resolves this litigation in its entirety in exchange for a cash payment of \$54,500,000. As detailed in Lead Plaintiff's and Lead Counsel's opening papers (ECF Nos. 75-79), the Settlement is the product of hard-fought litigation and extended arm's-length settlement negotiations. The Settlement represents an excellent result for the Class in comparison to the recovery that could be reasonably be expected to be obtained through trial, the substantial challenges that Lead Plaintiff would have faced in proving liability and establishing loss causation and damages, and the costs and delays of continued litigation.

Pursuant to the Court's Order Preliminary Approving Settlement and Authorizing Dissemination of Settlement Notice (ECF No. 74) (the "Preliminary Approval Order"), the Claims Administrator, under the supervision of Lead Counsel, conducted an extensive notice program, including mailing the Notice to over 19,600 potential Class Members and nominees. In response to this notice program, *no Class Member has objected* to the Settlement, the Plan of Allocation, or Lead Counsel's motion for an award of attorneys' fees and reimbursement of expenses. In particular, although institutional investors held virtually all of HeartWare common stock during

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) or 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 (ECF No. 79).

the Class Period, no institutional investor has objected to the Settlement or fee request. Further, no Class Member – institutional or otherwise – has submitted a request for exclusion. As explained further below, this reaction of the Class further demonstrates that the proposed Settlement, the Plan of Allocation, and the request for attorneys’ fees and reimbursement of expenses are fair and reasonable, and should be approved.

ARGUMENT

THE REACTION OF THE CLASS SUPPORTS APPROVAL OF THE SETTLEMENT, THE PLAN OF ALLOCATION AND THE REQUESTED ATTORNEYS’ FEES AND LITIGATION EXPENSES

Lead Plaintiff and Lead Counsel respectfully submit that their opening papers demonstrate that approval of the motions is warranted. Now that the time for objecting or requesting exclusion from the Class has passed, the lack of any objections and any requests for exclusion by Class Members provides additional support for approval of the motions.

Pursuant to the Court’s Preliminary Approval Order, more than 19,600 copies of the Notice and Claim Form have been mailed to potential Class Members and their nominees. *See* Supplemental Declaration of Michelle Kopperud Regarding (A) Mailing of Notice and Claim Form and (B) Report on Requests for Exclusion Received (“Supp. Kopperud Decl.”) at ¶ 2. The Notice informed Class Members of the terms of the proposed Settlement and Plan of Allocation, and that Lead Counsel would apply for an award of attorneys’ fees in an amount not to exceed 24% of the Settlement Fund and reimbursement of Litigation Expenses in an amount not to exceed \$400,000. *See* Notice ¶¶ 5, 72. The Notice also apprised Class Members of their right to object to the proposed Settlement, the Plan of Allocation and/or the request for attorneys’ fees, and expenses, their right to exclude themselves from the Class, and the March 22, 2019 deadline for

filing objections and for receipt of requests for exclusion. *See* Notice at p. 2 and ¶¶ 73-85.²

As noted above, following this notice program, no Class Member objected to the Settlement, the Plan of Allocation, or Lead Counsel’s application for fees and expenses. In addition, only one request for exclusion was received and that request indicated that the person requesting exclusion had not purchased any HeartWare common stock during the Class Period (and, thus, was never included in the Class). *See* Supp. Kopperud Decl. ¶ 4 & Ex. 1.

The absence of any objections or requests for exclusion from Class Members supports a finding that the Settlement is fair, reasonable, and adequate. Indeed, “the favorable reaction of the overwhelming majority of class members to the Settlement is perhaps the most significant factor in [the] *Grinnell* inquiry.” *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 119 (2d Cir. 2005); *see also In re Virtus Inv. Partners, Inc. Sec. Litig.*, 2018 WL 6333657, at *2 (S.D.N.Y. Dec. 4, 2018) (“the absence of objections by the class is extraordinarily positive and weighs in favor of settlement”);³ *Fleisher v. Phoenix Life Ins. Co.*, 2015 WL 10847814, at *6 (S.D.N.Y. Sept. 9, 2015) (“the absence of objections may itself be taken as evidencing the fairness of a settlement”); *In re Advanced Battery Techs., Inc. Sec. Litig.*, 298 F.R.D. 171, 176 (S.D.N.Y. 2014) (“The absence of . . . objections and minimal investors electing to opt out of the Settlement provides evidence of Class members’ approval of the terms of the Settlement.”).

It is significant that no institutional investors – which held virtually all of HeartWare’s publicly traded common stock during the Class Period – have objected to the Settlement.

² The Summary Notice, which informed readers of the proposed Settlement, how to obtain copies of the Notice and Claim Form, and the deadlines for the submission of Claim Forms, objections, and requests for exclusion, was published in *The Wall Street Journal* and released over the *PR Newswire* on January 22, 2019. *See* Declaration of Michelle Kopperud Regarding (A) Mailing of Notice and Claim Form; (B) Publication of Summary Notice; and (C) Report on Requests for Exclusion Received to Date (ECF No. 79-1) at ¶ 8.

³ Unless otherwise noted, all internal quotation marks and citations are omitted.

Institutional investors are often sophisticated, and possess the incentive and ability to object. The absence of objections by these sophisticated class members is further evidence of the fairness of the Settlement. *See In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 382 (S.D.N.Y. 2013) (the reaction of the class supported the settlement where “not a single objection was received from any of the institutional investors that hold the majority of Citigroup stock”); *In re AOL Time Warner, Inc. Sec. & “ERISA” Litig.*, 2006 WL 903236, at *10 (S.D.N.Y. Apr. 6, 2006) (the lack of objections from institutional investors supported approval of settlement); *In re AT&T Corp. Sec. Litig.*, 2005 WL 6716404, at *4 (D.N.J. Apr. 25, 2005) (the reaction of the class “weigh[ed] heavily in favor of approval” where “no objections were filed by any institutional investors who had great financial incentive to object”).

The lack of objections from Class Members also supports approval of the Plan of Allocation. *See, e.g., In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207, 240 (E.D.N.Y. 2013) (conclusion that the proposed plan of allocation was fair and reasonable was “buttressed by the . . . absence of objections from class members”); *In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115809, at *14 (S.D.N.Y. Nov. 7, 2007) (“not one class member has objected to the Plan of Allocation which was fully explained in the Notice of Settlement sent to all Class Members. This favorable reaction of the Class supports approval of the Plan of Allocation.”).

Finally, the positive reaction of the Class should also be considered with respect to Lead Counsel’s motion for an award of attorneys’ fees and reimbursement of Litigation Expenses. The absence of any objections to the requested fee supports a finding that the fee and expense request is fair and reasonable. *See, e.g., Vaccaro v. New Source Energy Partners L.P.*, 2017 WL 6398636, at *8 (S.D.N.Y. Dec. 14, 2017) (“The fact that no class members have explicitly objected to these

attorneys' fees supports their award."); *Asare v. Change Grp. of New York, Inc.*, 2013 WL 6144764, at *16 (S.D.N.Y. Nov. 18, 2013) ("not one potential class member has made an objection, a factor held by courts as supporting approval of an attorneys' fees award"); *In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115808, at *10 (S.D.N.Y. Nov. 7, 2007) (the reaction of class members to a fee and expense request "is entitled to great weight by the Court" and the absence of any objection "suggests that the fee request is fair and reasonable").

The lack of objections by institutional investors particularly supports approval of the fee request. *See In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005) (the fact that "a significant number of investors in the class were 'sophisticated' institutional investors that had considerable financial incentive to object had they believed the requested fees were excessive" and did not do so, supported approval of the fee request); *In re Bisys Sec. Litig.*, 2007 WL 2049726, at *1 (S.D.N.Y. July 16, 2007) (lack of objections from institutional investors supported the approval of fee request because "the class included numerous institutional investors who presumably had the means, the motive, and the sophistication to raise objections if they thought the [requested] fee was excessive").

CONCLUSION

For the foregoing reasons and the reasons set forth in Lead Plaintiff's and Lead Counsel's opening papers, they respectfully request that the Court approve the Settlement, the Plan of Allocation, and the request for attorneys' fees and litigation expenses. Copies of the (i) proposed Judgment, (ii) proposed Order Approving Plan of Allocation of Net Settlement Fund, and (iii) proposed Order Awarding Attorneys' Fees and Reimbursement of Litigation Expenses are being filed herewith.

Dated: April 5, 2019

Respectfully submitted,

**BERNSTEIN LITOWITZ BERGER
& GROSSMANN LLP**

/s/ John Rizio-Hamilton

John Rizio-Hamilton

Abe Alexander

Julia Tebor

1251 Avenue of the Americas, 44th Floor

New York, NY 10020

Tel: (212) 554-1400

*Counsel for Lead Plaintiff and
Lead Counsel the Class*