

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

IN RE HEARTWARE INTERNATIONAL, INC.
SECURITIES LITIGATION

No. 1:16-cv-00520-RA

**MEMORANDUM IN SUPPORT OF LEAD PLAINTIFF'S
MOTION FOR APPROVAL OF DISTRIBUTION PLAN**

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Dated: April 3, 2020

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Lead Plaintiff, St. Paul Teachers' Retirement Fund Association ("Lead Plaintiff"), respectfully moves for entry of the proposed Order Approving Distribution Plan (the "Class Distribution Order") for the Net Settlement Fund in the above-captioned action (the "Action"). The Distribution Plan is included in the accompanying Declaration of Richard Simmons in Support of Lead Plaintiff's Motion for Approval of Distribution Plan (the "Simmons Declaration" or "Simmons Decl."), submitted on behalf of the Court-approved Claims Administrator, Analytics Consulting, LLC ("Analytics").¹

If entered by the Court, the Class Distribution Order would, among other things, (i) approve Analytics' administrative recommendations accepting and rejecting Claims submitted in the Action; (ii) direct the Initial Distribution of the Net Settlement Fund to Claimants whose Claims are accepted by Analytics as valid and approved by the Court, while maintaining a Reserve to address any tax liability and claims administration-related contingencies that may arise; and (iii) approve Analytics' fees and expenses incurred and estimated to be incurred in the administration of the Settlement.

I. BACKGROUND

The Court has approved the Stipulation entered into by Lead Plaintiff, on behalf of itself and the other members of the Class, and the Defendants in the Action. The Stipulation sets forth the terms of the settlement (the "Settlement"), which represents a complete resolution of this Action in return for a payment of \$54.5 million, which Defendants have caused to be paid for the benefit of Class Members.

In accordance with the Order Preliminarily Approving Settlement and Authorizing Dissemination of Settlement Notice (ECF No. 74) (the "Preliminary Approval Order") entered by

¹ Unless otherwise indicated in this memorandum, all terms with initial capitalization shall have the meanings ascribed to them in the Simmons Declaration or the Stipulation and Agreement of Settlement dated November 13, 2018, previously filed with the Court (ECF No. 69-1) (the "Stipulation").

the Court, Analytics has mailed the Notice of (I) Pendency of Class Action and Proposed Settlement; (II) Settlement Fairness Hearing; and (III) Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses (the "Notice") and the Proof of Claim and Release Form (the "Proof of Claim" or "Claim" and, together with the Notice, the "Notice Packet") to potential Class Members, brokers, and other nominees. Simmons Decl. ¶ 4. As stated in the Simmons Declaration, Analytics has disseminated over 19,600 Notice Packets to potential Class Members and nominees. *Id.* The Notice informed Class Members that if they wished to be eligible to participate in the distribution of the Net Settlement Fund, they were required to submit a properly executed Claim so that it would be received or postmarked no later than May 14, 2019. *Id.* ¶ 7.

On April 12, 2019, the Court granted final approval of the Settlement and entered the final Judgment Approving Class Action Settlement (ECF No. 87) (the "Judgment"). Also, pursuant to its Order Approving Plan of Allocation of Net Settlement Fund (ECF No. 86), the Court approved the proposed plan of allocation for the proceeds of the Settlement set forth in the Notice (the "Plan of Allocation."). The Effective Date of the Settlement has occurred, and the Claims submitted by Class Members have been processed. Accordingly, the Net Settlement Fund may be distributed to Authorized Claimants. In accordance with paragraph 28 of the Stipulation, Lead Plaintiff respectfully asks the Court to enter the Class Distribution Order approving the Distribution Plan.

II. CLAIMS ADMINISTRATION

Analytics received and processed 6,511 Claims through March 9, 2020. Simmons Decl. ¶ 7. All Claims received through March 9, 2020, have been fully processed in accordance with the Stipulation and the Court-approved Plan of Allocation included in the Notice (*id.*), and Analytics has worked with Claimants to help them perfect their Claims (*see id.* ¶¶ 19-27). As shown in the Simmons Declaration, of the 6,511 Claims that are the subject of this motion, Analytics has determined that 4,364 are acceptable in whole or in part, and that 2,147 (including the Disputed

Claims discussed below) should be wholly rejected because they are ineligible for payment from the Net Settlement Fund. *Id.* ¶¶ 41-45. Lead Plaintiff respectfully requests that the Court approve Analytics' administrative determinations accepting and rejecting Claims as stated in the Simmons Declaration.

As discussed in the Simmons Declaration, many of the Claims submitted in the Settlement were initially deficient or ineligible for one or more reasons, including being incomplete, not signed, or not properly documented, which required substantial follow-up work by Analytics. *Id.* ¶¶ 19, 22. If Analytics determined a Claim to be defective or ineligible, a letter (if the Claimant filed a paper Claim), or an email (if the Claimant filed an electronic Claim), was sent by Analytics to the Claimant or filer, as applicable, describing the defect(s) or condition(s) of ineligibility in the Claim and what was necessary to cure any curable defect(s) in the Claim ("Deficiency Notices"). *Id.* ¶¶ 20, 22. The Deficiency Notices advised the Claimant or filer that the appropriate information or documentary evidence to complete the Claim had to be sent within 20 days from the date of the letter or email, or Analytics would recommend the Claim for rejection to the extent the deficiency or condition of ineligibility was not cured. *Id.* ¶¶ 20, 23. Examples of the Deficiency Notices are attached as Exhibit A to the Simmons Declaration.

A. Disputed Claims

Analytics carefully reviewed Claimants' and filers' responses to the Deficiency Notices and worked with them to resolve deficiencies where possible. Simmons Decl. ¶¶ 21, 26. Consistent with paragraph 26(e) of the Stipulation, the Deficiency Notices specifically advised Claimants and filers of their right, within 20 days after the mailing or emailing of the Deficiency Notice, to contest the rejection of the Claim and request Court review of the administrative determination of the Claim. Simmons Decl. ¶¶ 20, 23 and Exhibit A.

With respect to the fully processed Claims, Analytics received two (2) requests for review by the Court of its administrative determinations. *Id.* ¶¶ 29, 31. To resolve the disputes without necessitating the Court’s intervention, Analytics contacted the Claimants requesting Court review, both by certified mail and email, fully explained the basis for Analytics’ determination, offered to answer all their questions regarding the determination, and provided an opportunity for the Claimants to withdraw the requests for review. *Id.* ¶ 31. Analytics confirmed that both the certified mail and emails were delivered, but neither Claimant has responded to the final letter, no requests for Court review have been cured, and no requests for Court review have been retracted. *Id.*

Exhibit B of the Simmons Declaration contains copies of the Disputed Claims and supporting documentation submitted by the two (2) Disputing Claimants related to each Disputed Claim and a chart (the “Disputed Claims Chart”) setting forth the reasons for the rejection of each Disputed Claim.² *Id.* ¶ 29. Analytics recommends both Disputed Claim 1012831 and Disputed Claim 1012435 for rejection as Questionable Claims due to (a) the inability to validate the documentation supporting each Claim; and (b) the inability to validate the identity of each Claimant. *Id.* ¶ 32. The Simmons Declaration lists and explains in detail the numerous indicators that led Analytics to conclude that both Disputed Claims were suspect, not properly documented, and should not be paid. *Id.* ¶¶ 33-38. In addition, Analytics’ additional due diligence failed to validate the identities of the Disputing Claimants. *Id.* ¶¶ 35, 38. Lead Counsel has reviewed the Disputed Claims and Analytics’

² For privacy reasons, the documents included in Exhibit B have been redacted to remove all personal information such as street addresses, email addresses, telephone numbers, account numbers, Taxpayer ID, Social Security, or Social Insurance Numbers, and all financial and transaction information not related to the Claimants’ transactions in HeartWare common stock, unless the financial or transaction information serves as a basis for the dispute or as a basis for the Claim’s rejection.

determinations and believes that the Disputed Claims should be rejected for the reasons set forth in the Disputed Claims Chart.

B. Late Claims – and Final Cut-Off Date

The 6,511 Claims received through March 9, 2020, include 247 that were postmarked or received after the Court-approved Claim-filing deadline of May 14, 2019, but that were received on or before March 9, 2020. Simmons Decl. ¶¶ 39, 43. Those late Claims have been fully processed, and 40 of them are, but for the late submission, otherwise eligible. *Id.* Although these 40 Claims were late, they were received while the processing of timely Claims was ongoing. Due to the amount of time needed to process the timely Claims received, the processing of these late Claims did not delay the completion of the Claims administration process or the distribution of the Net Settlement Fund. The Court has discretion to accept Claims received after the filing deadline.³ Lead Plaintiff respectfully submits that, when the equities are balanced, it would be unfair to prevent an otherwise eligible Claim from participating in the Net Settlement Fund solely because it was received after the Court-approved Claim-filing deadline, if it was submitted while timely Claims were still being processed.

To facilitate the efficient distribution of the Net Settlement Fund, however, there must be a final cut-off date after which no other Claims may be accepted. Accordingly, Lead Plaintiff respectfully requests that this Court order that any new Claims and any adjustments to previously filed Claims that would result in an increased Recognized Claim amount received after March 9,

³ See Preliminary Approval Order ¶ 7 (“*Unless the Court orders otherwise*, all Claim Forms must be postmarked no later than one hundred twenty (120) calendar days after Notice Date [May 14, 2019]. Notwithstanding the foregoing, Lead Counsel may, at its discretion, accept for processing late Claims provided such acceptance does not delay the distribution of the Net Settlement Fund to the Class.”) (emphasis added).

2020, be barred, subject to the provisions of paragraph 47(f) of the Simmons Declaration.⁴ Paragraph 47(f) applies to any Claims received or modified after March 9, 2020, that would have been eligible for payment or additional payment under the Court-approved Plan of Allocation if timely received. At the time when Lead Counsel, in consultation with Analytics, determines that a further distribution is not cost-effective as provided in paragraph 47(e) of the Simmons Declaration, the post-March 9, 2020 Claimants (after payment of fees and expenses as provided in paragraph 47(f) of the Simmons Declaration, at the discretion of Lead Counsel, and to the extent possible) may be paid the distribution amounts or additional distribution amounts on a *pro rata* basis that would bring them into parity with other Authorized Claimants who have cashed all their prior distribution checks.

III. FEES AND EXPENSES OF CLAIMS ADMINISTRATOR

In accordance with Analytics' agreement with Lead Counsel to act as the Claims Administrator for the Settlement, Analytics was responsible for, among other things, disseminating notice of the Settlement to the Class, creating and maintaining a website and toll-free telephone helpline, processing Claims, and allocating and distributing the Net Settlement Fund to Authorized Claimants. Simmons Decl. ¶ 2. As stated in the accompanying Simmons Declaration, Analytics' fees and expenses for its work performed through March 12, 2020 are \$106,735.32 and estimated to be performed on behalf of the Class in connection with the initial distribution are \$5,534.00.⁵ Simmons Decl. ¶ 46. To date, Analytics has not received any payment for its fees and expenses. *Id.* Accordingly, there is an outstanding balance of \$112,269.32 payable to Analytics, which amount

⁴ Should an adjustment be received that results in a lower Recognized Claim amount, that adjustment will be made, and the Recognized Claim amount will be reduced accordingly prior to a distribution to that Claimant. Simmons Decl. ¶ 40.

⁵ Should the estimate of fees and expenses to conduct the Initial Distribution of the Net Settlement Fund exceed the actual cost to conduct the distribution, the excess will be returned to the Net Settlement Fund and will be available for subsequent distribution to Authorized Claimants. Simmons Decl. ¶ 46 n.4.

includes the estimated fees and expenses to be incurred by Analytics in connection with the initial distribution. *Id.* Lead Counsel reviewed Analytics' invoices and respectfully requests on behalf of Lead Plaintiff that the Court approve all of Analytics' fees and expenses.

IV. DISTRIBUTION PLAN FOR THE NET SETTLEMENT FUND

A. Distribution of the Net Settlement Fund

Under the proposed Distribution Plan, Analytics will distribute approximately 95% of the Net Settlement Fund, after deducting all payments previously allowed and the payments approved by the Court on this motion, and after deducting payment of any taxes or estimated taxes, the costs of preparing appropriate tax returns, and any escrow fees (the "Initial Distribution"). In the Initial Distribution, Analytics will calculate award amounts for all Authorized Claimants as if the entire Net Settlement Fund were to be distributed now. Analytics will first determine each Authorized Claimant's *pro rata* share of the total Net Settlement Fund based on the Claimant's Recognized Claim in comparison to the total Recognized Claims of all Authorized Claimants. *See* Simmons Decl. ¶ 47(a)(1). In accordance with the Court-approved Plan of Allocation, Analytics will eliminate from the Initial Distribution any Authorized Claimant whose *pro rata* share calculates to less than \$10.00. These Claimants will not receive any payment from the Net Settlement Fund and will be so notified by Analytics. *Id.* ¶ 47(a)(2). Analytics will then recalculate the *pro rata* share of the Net Settlement Fund for Authorized Claimants who would have received \$10.00 or more (the "Distribution Amount"). *Id.* ¶ 47(a)(3). Authorized Claimants whose Distribution Amount calculates to less than \$100.00 under subparagraph 47(a)(3) of the Simmons Declaration will be paid their full Distribution Amount in the Initial Distribution ("Claims Paid in Full"). *Id.* ¶ 47(a)(4). These Authorized Claimants will get no additional funds in subsequent distributions. *Id.* After deducting the payments to the Claims Paid in Full, 95% of the remaining balance of the Net Settlement Fund will be distributed *pro rata* to Authorized Claimants whose Distribution Amount calculates to

\$100.00 or more under subparagraph 47(a)(3) of the Simmons Declaration. *Id.* ¶ 47(a)(5). The remaining 5% of the Net Settlement Fund will be held in reserve (the “Reserve”) to address any tax liability and claims administration-related contingencies that may arise. To the extent the Reserve is not depleted, the remainder will be distributed in the “Second Distribution” described in paragraph 47(d) of the Simmons Declaration. *Id.*

In order to encourage Authorized Claimants to cash their checks promptly, Lead Plaintiff proposes that the distribution checks bear the notation: “CASH PROMPTLY. VOID AND SUBJECT TO REDISTRIBUTION IF NOT CASHED BY [DATE 90 DAYS AFTER ISSUE DATE].” *Id.* ¶ 47(b). Authorized Claimants who do not cash their checks within the time allotted or on the conditions stated in paragraph 47(b) footnote 8 of the Simmons Declaration will irrevocably forfeit all recovery from the Settlement, and the funds allocated to all of these stale-dated checks will be available to be redistributed to other Authorized Claimants in any subsequent distribution, as described below. *Id.* ¶ 47(c).

B. Additional Distribution(s) of the Net Settlement Fund

After Analytics has made reasonable and diligent efforts to have Authorized Claimants cash their Initial Distribution checks, but not earlier than seven (7) months after the Initial Distribution, Analytics will conduct a second distribution of the Net Settlement Fund (the “Second Distribution”). In the Second Distribution, any amount remaining in the Net Settlement Fund after the Initial Distribution (including from the Reserve and the funds for all void stale-dated checks), after deducting Analytics’ fees and expenses incurred in connection with administering the Settlement for which it has not yet been paid (including the estimated costs of the Second Distribution), and after deducting payment of any taxes or estimated taxes, the costs of preparing appropriate tax returns, and any escrow fees, will be distributed to all Authorized Claimants in the Initial Distribution who

cash their Initial Distribution checks and would receive at least \$10.00 from the Second Distribution based on their *pro rata* share of the remaining funds. Simmons Decl. ¶ 47(d). If, after the Second Distribution, any funds remain in the Net Settlement Fund because of uncashed checks or otherwise, then after Analytics has made reasonable and diligent efforts to have Authorized Claimants cash their distribution checks, and if cost-effective, subsequent distributions of the funds remaining in the Net Settlement Fund, after deduction of costs and expenses as described above and subject to the same conditions, will take place at six-month intervals thereafter. *Id.* When Lead Counsel, in consultation with Analytics, determines that further distribution is not cost-effective, if sufficient funds remain to warrant the processing of Claims received after March 9, 2020, Analytics will process those Claims. Any of these Claims that are otherwise valid, as well as any earlier received Claims for which an adjustment was received after March 9, 2020, and resulted in an increased Recognized Claim, may be paid in accordance with paragraph 47(f) of the Simmons Declaration. Simmons Decl. ¶ 47(e). If any funds remain in the Net Settlement Fund after payment of these late or late-adjusted Claims, the remaining balance of the Net Settlement Fund, after payment of any unpaid fees or expenses incurred in administering the Net Settlement Fund and after the payment of any taxes or estimated taxes, the costs of preparing appropriate tax returns, and any escrow fees, will be contributed to non-sectarian, not-for-profit 501(c)(3) organization(s) to be recommended by Lead Counsel and approved by the Court. *Id.*

V. RELEASE OF CLAIMS

In order to allow the full and final distribution of the Net Settlement Fund, it is necessary to bar any further claims against the Net Settlement Fund beyond the amounts allocated to Authorized Claimants, and to provide that all persons involved in the review, verification, calculation, tabulation, or any other aspect of the processing of the Claims submitted in connection with the Settlement, or who are otherwise involved in the administration or taxation of the Settlement Fund or

the Net Settlement Fund, be released and discharged from all claims arising out of that involvement. Accordingly, Lead Plaintiff respectfully requests that the Court release and discharge all persons involved in the review, verification, calculation, tabulation, or any other aspect of the processing of the Claims submitted in connection with the Settlement, or who are otherwise involved in the administration or taxation of the Settlement Fund or the Net Settlement Fund, from all claims arising out of that involvement, and bar all Class Members and other Claimants, whether or not they receive payment from the Net Settlement Fund, from making any further claims against the Net Settlement Fund, Lead Plaintiff, Lead Counsel, the Claims Administrator, the Escrow Agent or any other agent retained by Lead Plaintiff or Lead Counsel in connection with the administration or taxation of the Settlement Fund or the Net Settlement Fund, or any other person released under the Settlement beyond the amounts allocated to Authorized Claimants.

VI. CONCLUSION

For the foregoing reasons, Lead Plaintiff respectfully submits that Lead Plaintiff's Motion for Approval of Distribution Plan should be granted, and the [Proposed] Order Approving Distribution Plan should be entered.

Dated: April 3, 2020

Respectfully submitted,
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