

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

ARKANSAS TEACHER RETIREMENT  
SYSTEM, THE CITY OF BRISTOL PENSION  
FUND, and THE CITY OF OMAHA POLICE  
AND FIRE RETIREMENT SYSTEM, on  
behalf of themselves and all others similarly  
situated,

Plaintiffs,

v.

INSULET CORPORATION, DUANE  
DESISTO, PATRICK J. SULLIVAN,  
ALLISON DORVAL, and BRIAN ROBERTS

Defendants.

Civ. A. No. 15-12345-MLW

CLASS ACTION

ECF CASE

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

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Lead Plaintiffs Arkansas Teacher Retirement System, the City of Bristol Pension Fund, and the City of Omaha Police and Fire Retirement System (collectively, “Lead Plaintiffs”), respectfully submit this motion for entry of the proposed Order Approving Distribution Plan (the “Distribution Order”) that would, among other things, provide for the distribution of proceeds of the Settlement in the above-captioned action (the “Action”) to Authorized Claimants upon the occurrence of the Effective Date of the Settlement.<sup>1</sup>

### **INTRODUCTION**

Following a hearing on August 2, 2018, the Court entered an order on August 6, 2018, granting Lead Plaintiffs’ motion for final approval of the \$19.5 million Settlement of this securities class action and approval of the Plan of Allocation. *See* ECF No. 138, at ¶ 1. Lead Counsel’s Motion for an Award of Attorneys’ Fees and Reimbursement of Litigation Expenses (ECF No. 127) (the “Fee and Expense Application”) remains pending before the Court. *See id.* at ¶ 2. The Court has also not yet entered the proposed Final Judgment Approving Class Action Settlement and Order of Dismissal with Prejudice (ECF No. 130-1) (the “Judgment”).

The deadline for submitting Claim Forms to participate in the Settlement was September 4, 2018. The Court-approved Claims Administrator, Analytics Consulting, LLC (“Analytics”), has completed contacting Claimants that initially submitted deficient Claims (allowing them to cure any deficiencies) and has processed all Claims that have been received through March 14, 2019.

Lead Plaintiffs now respectfully request entry of the [proposed] Distribution Order, as provided under paragraph 4.5(d) of the Stipulation, that would direct the Initial Distribution of the Settlement Fund to Authorized Claimants upon the Effective Date of the Settlement.

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<sup>1</sup> Unless otherwise stated herein, all terms with initial capitalization have the meanings given them in the Kopperud Declaration or in the Stipulation of Settlement (ECF No. 110) (the “Stipulation”).

Under the Settlement, the distribution of the Settlement Fund to Authorized Claimants may only occur after the Effective Date of the Settlement. *See* Stipulation ¶ 4.5(d) (“No funds from the Net Settlement Fund shall be distributed to Authorized Claimants until the Effective Date.”); *see also id.* ¶ 2.5 (“Other than amounts disbursed for Notice and Administration Expenses, Taxes, the Fee and Expense Award, and Lead Plaintiffs’ Cost and Expense Award, the Settlement Fund shall not be distributed until the Effective Date of the Settlement . . .”). As set forth in the Stipulation, the “Effective Date” does not occur until after both (a) the Court has entered the Judgment (or an “Alternative Judgment” that neither Lead Plaintiffs nor Defendants object to) and (b) such Judgment (or Alternative Judgment) has become “Final.” Stipulation ¶ 6.1(d); *see also id.* ¶ 1.14 (a judgment becomes “Final” when the time prescribed for bringing an appeal has expired without an appeal or upon the final resolution of any appeal actually brought).<sup>2</sup>

Thus, distribution of funds to Authorized Claimants cannot occur until after both the Judgment (or an Alternative Judgment) is entered and becomes Final and a proposed Distribution Order (or comparable order) is entered. To avoid delaying the Initial Distribution, Lead Plaintiffs therefore respectfully request that the Court enter both (a) the proposed Distribution Order and (b) the previously submitted Judgment (ECF No. 130-1) at its earliest convenience.

The Court need not rule on the pending Fee and Expense Application motion (which includes the request to reimburse each Lead Plaintiff for the time their employees spent prosecuting this action) before an Initial Distribution can occur.<sup>3</sup> Instead, as provided in the proposed Distribution Order and discussed below, to avoid delay in conducting an Initial

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<sup>2</sup> Note that the pendency of Lead Counsel’s Fee and Expense Application does not in any way delay or preclude the Judgment from becoming Final. *See* Stipulation ¶¶ 1.14, 5.3.

<sup>3</sup> That motion is fully submitted (*see* ECF Nos. 127-31 & 139-40), including supplemental filings made at the Court’s request after the August 2, 2018 Final Approval Hearing. *See* Letter from James A. Harrod (ECF No. 140) and Supplemental Affidavit of Rod Graves (ECF No. 139).

Distribution of Settlement proceeds to Authorized Claimants, Lead Plaintiffs propose that the total amount of fees and expenses sought in Lead Counsel's Fee and Expense Application continue to be held in escrow under the jurisdiction of the Court, but that the remaining bulk of the Settlement Fund (after deducting taxes, escrow fees, and approved Claims Administrator fees and expenses) be distributed to Authorized Claimants promptly after the Effective Date occurs (which will occur as soon as the Court enters the Judgment (or Alternative Judgment) and that Judgment becomes Final). If the Court ultimately awards attorneys' fees and expenses in an amount less than that requested in counsel's Fee and Expense Application, the difference can be distributed to Authorized Claimants in a Second Distribution that will occur approximately nine months after the Initial Distribution. Indeed, the Court-approved Stipulation of Settlement and Plan of Allocation already provide for making a Second Distribution, *see* ECF No.110 at ¶ 4.5(d) and ECF No. 129-1 at p. 22, as there are almost always sufficient uncashed or undeliverable checks from initial distributions to justify making a Second Distribution in cases of this size.

The proposed Distribution Order will also, among other things, (i) approve Analytics' administrative recommendations accepting and rejecting Claims submitted in the Action; (ii) approve Analytics' fees and expenses incurred and estimated to be incurred in the administration of the Settlement; (iii) approve the recommended plan for distributing any funds remaining after the Initial Distribution; and (iv) release claims related to the administration process.

### **BACKGROUND**

On February 8, 2018, Lead Plaintiffs (on behalf of themselves and the Settlement Class) and Defendants entered into the Stipulation, which resolves all claims in the Action in exchange for an all-cash recovery of \$19,500,000 for benefit of the Settlement Class.

Following preliminary approval, Analytics 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"), plus a Proof of Claim and Release Form (the "Claim Form" and, together with the Notice, the "Notice Packet"), to 44,551 potential Settlement Class Members and nominees. Kopperud Decl. ¶ 4. The Notice informed Settlement Class Members that if they wanted to participate in the distribution from the Settlement, they had to submit a properly executed Claim Form by September 4, 2018. *Id.* ¶ 7.

On August 6, 2018, the Court entered an Order granting Lead Plaintiffs' Motion for Final Approval of Class Action Settlement and Plan of Allocation. ECF No. 138. However, no form of Judgment has yet been entered.

### **CLAIMS ADMINISTRATION**

As detailed in the accompanying Kopperud Declaration, through March 14, 2019 Analytics has received and processed 13,560 Claims. Kopperud Decl. ¶ 7. All Claims received through March 14, 2019, 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 remedy any curable deficiencies in their Claims (*see id.* ¶¶ 19-26).

As discussed in the Kopperud Declaration, many of the initial Claims submitted were deficient or ineligible because, for example, they were incomplete, not signed, not properly documented, or otherwise deficient, thereby requiring substantial follow-up work by Analytics. *Id.* ¶¶ 19, 22. Specifically, if Analytics determined that a Claim was defective or ineligible, Analytics wrote to the Claimant or filer, as applicable, describing both (a) the Claim's defect(s) or other ineligibility condition(s) and (b) what was necessary to cure (if curable) any defect(s) in the Claim ("Deficiency Notices"). *Id.* ¶¶ 20, 22. These Deficiency Notices also advised that the information or evidence needed to complete the Claim had to be sent within 14 days from the date of Deficiency Notice, 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 Exhibits A and B to the Kopperud Declaration.

**A. No Disputed Claims**

Analytics carefully reviewed Claimants' and filers' responses to the Deficiency Notices and worked with them to resolve deficiencies where possible. Kopperud Decl. ¶¶ 21, 26. Consistent with ¶ 4.5(b) of the Stipulation, the Deficiency Notices advised each Claimant or filer that he, she, or it had the right, within 14 days after the date of the Deficiency Notice, to contest the rejection of the Claim and request Court review of Analytics' administrative determination of the Claim. Kopperud Decl. ¶¶ 20, 23, and Exhibits A & B. Lead Counsel are happy to report that there no requests for Court review have been submitted by any Claimants. *Id.* ¶ 27.

Of the 13,560 Claims received and processed, Analytics has determined that 5,730 are acceptable in whole or in part, and that 7,830 should be wholly rejected because they are ineligible for payment from the Net Settlement Fund. Kopperud Decl. ¶¶ 32-35. The total Recognized Claim amount of the timely submitted and valid claims is over \$228 million. *Id.* ¶ 33. Lead Plaintiffs now respectfully request that the Court approve Analytics' administrative determinations accepting and rejecting Claims, as set forth in the Kopperud Declaration.

**B. Late Claims – and Setting a Final Cut-Off Date**

The 13,560 Claims received through March 14, 2019, include 42 that were postmarked or received after the Court-established Claim-filing deadline of September 4, 2018. Kopperud Decl. ¶¶ 28, 34. Those late Claims have been fully processed and 21 of them are, but for their late submission, otherwise eligible. *Id.* Although these 21 Claims were late, they were received while the processing of timely Claims was ongoing. Given the time needed to process the timely Claims, the processing of these late Claims did not delay the completion of the Claims administration

process. The Court has discretion to accept Claims received after the filing deadline.<sup>4</sup> Lead Plaintiffs respectfully submit that, when the equities are balanced, it would be unfair to prevent an otherwise eligible Claim from participating in the Settlement solely because it was received after the original filing deadline, if it was submitted while timely Claims were still being processed.

However, to facilitate the efficient distribution of the Net Settlement Fund, there must be a final cut-off date after which no further Claims may be accepted. Accordingly, Lead Plaintiffs request that the 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 14, 2019, be barred, subject to the provisions of ¶ 38(f) of the Kopperud Declaration.<sup>5</sup> That paragraph provides that if any Claims are received or modified after March 14, 2019, that would have been eligible for payment or additional payment under the Court-approved Plan of Allocation if timely received, then, at such time as Lead Counsel (in consultation with Analytics) determine that a further distribution is not cost-effective under ¶ 38(e) of the Kopperud Declaration, these Claimants (after payment of fees and expenses as provided in ¶ 38(f) of the Kopperud Declaration), at the discretion of Lead Counsel, may be paid their distribution amounts or additional distribution amounts on a *pro rata* basis that would bring them into parity (to the extent possible) with other Authorized Claimants who have cashed all their prior distribution checks.

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<sup>4</sup> See Notice (p. 15) (“*Unless the Court otherwise orders, any Settlement Class Member who fails to submit a Claim Form postmarked on or before September 4, 2018 shall be fully and forever barred from receiving payments pursuant to the Settlement . . .*”) (emphasis added). See also Notice Order ¶ 11 (“Unless the Court orders otherwise, all Claim Forms must be postmarked no later than [September 4, 2018]. 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 Settlement Class.”).

<sup>5</sup> 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 before a distribution to that Claimant. Kopperud Decl. ¶ 29.



**FEES AND EXPENSES OF THE CLAIMS ADMINISTRATOR**

In accordance with Analytics’ contract to act as Claims Administrator, it has, among other things, disseminating the Notice Packet to the Settlement Class, creating and maintaining a website and toll-free telephone helpline, and processing Claims, and remains responsible for distributing funds to Authorized Claimants. Kopperud Decl. ¶ 2. As stated in the Kopperud Declaration, Analytics’ fees and expenses for its work performed through March 15, 2019 -- and estimated to be performed on behalf of the Settlement Class in connection with the Initial Distribution – totals \$151,801.08.<sup>6</sup> Kopperud Decl. ¶ 37. To date, Analytics has received no payment for its fees and expenses. *Id.* Lead Counsel has reviewed Analytics’ invoices including its estimated costs of actually making the contemplated Initial Distribution, and respectfully request on behalf of Lead Plaintiffs that the Court approve in full Analytics’ fees and expense request of \$151,801.08.

**THE DISTRIBUTION PLAN**

Analytics has completed processing of all claims received through March 14, 2019, and the proceeds of the Settlement are ready to be distributed to Eligible Claimants upon the Effective Date of the Settlement. Lead Plaintiffs therefore respectfully move the Court for entry of an order (a) approving Analytics’ determinations concerning the acceptance or rejection of the Claims that are included in this motion and (b) approving the proposed plan for the distribution of the Net Settlement Fund as stated in the Kopperud Declaration (the “Distribution Plan”).<sup>7</sup>

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<sup>6</sup> Should the estimate of administrative fees and expenses payable to Analytics to conduct the Initial Distribution exceed the actual cost to conduct the distribution, the excess will be available for subsequent distribution to Authorized Claimants. Kopperud Decl. ¶ 37 n.2.

<sup>7</sup> Under the Stipulation, Defendants have no role in or responsibility for the administration of the Settlement Fund or processing of Claims, including determinations as to the validity of Claims or the distribution of the Net Settlement Fund. *See* Stipulation ¶¶ 4.1, 4.6, 5.4.

**A. The Initial Distribution**

Consistent with the requirements of the Stipulation, the Distribution Order provides that the distribution of funds to Authorized Claimants shall occur when the Effective Date of the Settlement occurs. As discussed above, the Effective Date will occur when (a) the Judgment (in the form attached to the Stipulation and previously submitted to the Court at ECF No. 130-1) is entered, or an Alternative Judgment is entered (and the neither Lead Plaintiffs or Defendants elect to terminate the Settlement based on any different language in the Alternative Judgment), and (b) the Judgment (or Alternative Judgment) becomes Final. *See* Stipulation ¶ 6.1(d).

The proposed Distribution Order directs that the amount to be distributed in the Initial Distribution will be the full Settlement Amount plus all interest accrued thereon (the “Settlement Fund”) *less* (a) the amount of Analytics’ fees and expenses incurred and estimated to be incurred in the administration of the Settlement as approved by the Court; (b) the amount of any taxes and estimated taxes paid or to be paid, the costs of preparing appropriate tax returns, and any escrow fees; and (c) the total amount of attorneys’ fees and expenses (plus Lead Plaintiffs’ service awards) requested in Lead Counsel’s pending Fee and Expense Application (ECF No. 127), *which amount shall remain in escrow until the Court’s resolution of that Application.*<sup>8</sup>

As part of the contemplated Initial Distribution, Analytics will determine each Authorized Claimant’s *pro rata* share of the funds available for distribution based on each Claimant’s Recognized Claim Amount in comparison to the total of all Recognized Claim Amounts of all Authorized Claimants. *See* Kopperud Decl. ¶ 38(a)(1). In accordance with the Court-approved

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<sup>8</sup> The total amount to be retained in escrow for attorneys’ fees and expenses would be \$5,358,045.93, consisting of (a) requested attorneys’ fees of \$4,961,171.38 (or 25% of the Settlement Fund, which as of April 19, 2019, is now worth \$19,844,685.53 with accrued interest); (b) \$362,954.28 in litigation expenses; and (c) a total of \$33,920.27, to the three Lead Plaintiffs for the employee time they spent on behalf of the Class.

Plan of Allocation, Analytics will then eliminate from the distribution any Authorized Claimant whose *pro rata* share calculates to less than \$10.00, and these Claimants will not receive any payment from the Settlement and will be so notified by Analytics. *Id.* ¶ 38(a)(2). Analytics will then recalculate the *pro rata* shares for Authorized Claimants who would have received \$10.00 or more, and those amounts will be distributed in the Initial Distribution. *Id.* ¶ 38(a)(3).

To the extent that the amount of attorneys' fees and litigation expenses ultimately awarded by the Court is less than that sought in Lead Counsel's Fee and Expense Application, the difference, together with any funds that may remain available as a result of uncashed, returned, or undeliverable checks, will be distributed in the Authorized Claimants in a Second Distribution.

To encourage Authorized Claimants to cash their checks promptly, it is proposed that distribution checks bear the notation "CASH PROMPTLY. VOID AND SUBJECT TO REDISTRIBUTION IF NOT CASHED BY [DATE 90 DAYS AFTER ISSUE DATE]." *Id.* ¶ 38(b). Authorized Claimants who do not cash their checks within 90 days or as otherwise stated in ¶ 38(b) footnote 4 of the Kopperud Declaration will irrevocably forfeit all recovery from the Settlement, and the funds allocated to such stale-dated checks will be available to be redistributed to other Authorized Claimants in any subsequent distribution, as described below. *Id.* ¶ 38(c).

**B. Provisions for Making a Second Distribution 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 nine (9) months after the Initial Distribution, Analytics anticipates conducting a Second Distribution. In this *Second* Distribution, all amounts remaining after the Initial Distribution (*i.e.*, the funds for all voided, stale-dated checks, plus any portion of the amount being reserved in escrow for attorneys' fees and litigation expenses that may ultimately not be awarded by the Court) – less any additional costs of Claims Administration (including the estimated costs of a Second Distribution, Tax payments, and tax

preparation costs), can then be distributed (as part of the Second Distribution) to all Authorized Claimants who cashed their Initial Distribution checks and would receive at least \$10.00 from a Second Distribution based on their *pro rata* share of the remaining funds. Kopperud Decl. ¶ 38(d).

As discussed in Kopperud Declaration, in all likelihood a Second Distribution will be conducted in this case, even if the amount of attorneys' fees and expenses had already been decided, because in securities cases approximately 5% of the amounts initially distributed are typically available for re-distribution as a result of uncashed, returned, or undeliverable checks. *See* Kopperud Decl. ¶ 39. Given the size of the Settlement Fund, the amount likely to be available for re-distribution as a result of uncashed, returned, or undeliverable checks (roughly \$700,000) would be more than sufficient to make a Second Distribution to Authorized Claimants worthwhile. *Id.*<sup>9</sup>

If, after a Second Distribution, to the extent funds still remain in the Net Settlement Fund because of uncashed checks or otherwise—and after Analytics has made reasonable and diligent efforts to have Authorized Claimants cash their distribution checks—additional distributions from 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 until Lead Counsel (in consultation with Analytics) determine that further distributions to Authorized Claimants are no longer cost-effective. Kopperud Decl. ¶ 38(d). At that point, any residual funds still remaining in the Net Settlement Fund will be contributed to one or more § 501(c)(3) organization(s) recommended by Lead Counsel and approved by the Court in accordance with the Stipulation at ¶ 4.5(d).

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<sup>9</sup> As provided in the Stipulation at ¶ 2.3, unclaimed funds do not revert to Defendants. Nor would unclaimed funds ever be paid to Plaintiffs' Counsel, as they are entitled only to what the Court awards them in connection with the pending Fee and Expense Application. *Id.* ¶ 5.1.

### **RELEASE OF CLAIMS**

To allow the distribution of the Settlement Fund, it is also necessary and appropriate 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 distribution of the Settlement Fund, be released and discharged from all claims arising out of distributions of the Settlement Fund made in accordance with the Court's orders. Accordingly, Lead Plaintiffs respectfully request that the Court release and discharge Lead Plaintiffs, Plaintiffs' Counsel, the Claims Administrator, and the Escrow Agent related to their involvement 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 distribution of the Settlement Fund, from all claims arising out of any distributions of the Settlement Fund that are made in accordance with the Court's Orders (including the Distribution Order), and that the Court further bar all Settlement Class Members and Claimants, whether or not they receive payment from the Settlement Fund, from making any further claims against the Settlement Fund beyond the amounts allocated to Authorized Claimants pursuant to Distribution Order. Lead Plaintiffs also respectfully request that the Court release Defendants, Released Defendant Persons, and Defendants' Counsel, who have no responsibility or liability for the administration or distribution of the Settlement Fund, from all claims related to the administration or distribution of the Settlement Fund.

### **CONCLUSION**

For the foregoing reasons, Lead Plaintiffs respectfully request that the Court enter both (a) the previously submitted Judgment in the form submitted at ECF 130-1 (so as to allow the Effective Date of the Settlement to occur and permit the distribution of funds to take place) and (b) the [Proposed] Order Approving Distribution Plan.

DATED: April 22, 2019

Respectfully submitted,

**BERNSTEIN LITOWITZ BERGER  
& GROSSMANN LLP**

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 22, 2019, I caused the foregoing Memorandum in Support of Lead Plaintiffs' Motion for Approval of Distribution Plan to be filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email address of the registered participants as identified on the Notice of Electronic Filing.

/s/ James A. Harrod  
James A. Harrod