

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

IN RE COMMVAULT SYSTEMS, INC.
SECURITIES LITIGATION

Civil Action No. 14-5628 (PGS)(LHG)

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

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Lead Plaintiff, Arkansas Teacher Retirement System (“Lead Plaintiff”), respectfully moves for entry of the proposed Order Approving Distribution Plan (the “Class Distribution Order”) so that the proceeds of the Settlement in the above-captioned action (the “Action”) can be sent to those Settlement Class Members who filed claims. The Distribution Plan is included in the accompanying Declaration of Stephanie Amin-Giwner in Support of Lead Plaintiff’s Motion for Approval of Distribution Plan (the “Amin-Giwner Declaration” or “Amin-Giwner Decl.”),¹ submitted on behalf of the Court-approved Claims Administrator, Garden City Group, LLC (“GCG”).

If entered by the Court, the Class Distribution Order would, among other things, (i) approve GCG’s 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 GCG as valid and approved by the Court, while maintaining a Reserve for any tax liability and claims administration-related contingencies that may arise; and (iii) approve GCG’s fees and expenses incurred and estimated to be incurred in the administration of the Settlement.

¹ Unless otherwise indicated in this memorandum, all terms with initial capitalization shall have the meanings ascribed to them in the Amin-Giwner Declaration or the Stipulation and Agreement of Settlement dated November 30, 2017 (ECF No. 117-1) (the “Stipulation”).

I. BACKGROUND

The Court has approved the Stipulation entered into by Lead Plaintiff, on behalf of itself and the other members of the Settlement 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 \$12,500,000, which Commvault will pay or cause to be paid for the benefit of Settlement Class Members.

In accordance with the Order Preliminarily Approving Settlement and Providing for Notice (the “Preliminary Approval Order”) entered by the Court, GCG 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 Form” or “Claim Form” and, together with the Notice, the “Notice Packet”) to potential Settlement Class Members, brokers, and other nominees. Amin-Giwner Decl. ¶ 2. As stated in the Amin-Giwner Declaration, GCG has disseminated 38,321 Notice Packets to potential Settlement Class Members and nominees. *Id.* ¶ 4. The Notice informed Settlement 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 June 20, 2018. *Id.* ¶ 8. Beginning on

May 25, 2019, GCG also disseminated the Postcard Notice to approximately 20,000 potential Settlement Class Members who had not yet filed a claim. *Id.* ¶ 7.

On May 21, 2018, the Court granted final approval in its Order Approving Plan of Allocation of Net Settlement Fund (ECF No. 134) and on May 14, 2018, entered the Judgment Approving Class Action Settlement (ECF No. 130) (the “Judgment”). The Effective Date of the Settlement has occurred. 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.²

II. CLAIMS ADMINISTRATION

As detailed in the accompanying Amin-Giwner Declaration, through November 6, 2019, GCG received and processed 12,299 Claims. Amin-Giwner Decl. ¶ 8. All Claims received through November 6, 2019, have been fully processed in accordance with the Stipulation and the Court-approved Plan of Allocation included in the Notice (*id.*), and GCG has worked with Claimants to help them perfect their Claims (*see id.* ¶¶ 20-27).

As discussed in the Amin-Giwner Declaration, many of the Claims submitted in the Settlement were initially deficient or ineligible for one or more reasons,

² The Court retained continuing and exclusive jurisdiction over, among other things, implementing the Settlement, including the disposition of the Settlement Fund and any motion to approve the Class Distribution Order. *See* Judgment ¶ 13.

including being incomplete, not signed, not properly documented, or otherwise deficient, which required substantial follow-up work by GCG. *Id.* ¶¶ 20, 23.

If GCG 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 GCG 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.* ¶¶ 21, 23. 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 Deficiency Notice, or GCG would recommend the Claim for rejection to the extent the deficiency or condition of ineligibility was not cured. *Id.* ¶¶ 21, 24. Examples of the Deficiency Notices are attached as Exhibits A and B to the Amin-Giwner Declaration.

A. Disputed Claims

GCG carefully reviewed Claimants’ and filers’ responses to the Deficiency Notices and worked with them to resolve deficiencies where possible. Amin-Giwner Decl. ¶¶ 22, 27. Consistent with paragraph 26(e) of the Stipulation, the Deficiency Notices specifically advised the Claimant or filer of the right, within 20 days from the date of the Deficiency Notice, to contest the rejection of the Claim and request

Court review of the administrative determination of the Claim. Amin-Giwner Decl. ¶¶ 21, 24, and Exhibits A and B.

With respect to the fully-processed Claims, just one (1) Claim remains disputed and is being submitted to the Court for resolution (the “Disputed Claim”). *Id.* ¶ 30. Exhibit D of the Amin-Giwner Declaration contains a copy of the Disputed Claim and supporting documentation submitted by a joint Disputing Claimant and other documents related to the Disputed Claim.³ *Id.*

GCG recommends the rejection of the Disputed Claim because it does not result in a loss that would be compensable under Lead Plaintiff’s allegations because the investor sold all the shares prior to any disclosure of the truth concerning Defendants’ alleged fraud – the first disclosure of which occurred on January 29, 2014. As such, this Claimant did not suffer any damages. More specifically, the Claim does not calculate to a Recognized Claim under the provisions of the Court-approved Plan of Allocation. The Claim Form and documentation submitted reflect that the Disputing Claimant purchased 45 shares of Commvault common stock on

³ For privacy reasons, the documents included in Exhibit D 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 joint Claimant’s transactions in Commvault common stock, unless the financial or transaction information serves as a basis for the dispute or as a basis for the Claim’s rejection.

August 5, 2013, for \$87.19 a share and sold those shares on November 5, 2013, for \$76.84 a share. The Recognized Loss Amount was calculated using ¶ 58(a)(i) of the Notice's Plan of Allocation which states that for each share "[s]old prior to the close of trading on January 28, 2014, the Recognized Loss Amount shall be \$0.00." As all shares were sold before January 28, 2014, the shares did not result in a Recognized Claim. Amin-Giwner Decl. ¶ 31.

A GCG representative answered all the Disputing Claimant's questions and fully explained GCG's determination of the Claim's status. However, the Disputing Claimant has indicated its desire to maintain the request for Court review. *Id.* ¶ 32.

As shown in the Amin-Giwner Declaration, of the 12,299 Claims that are the subject of this motion, GCG has determined that 6,042 are acceptable in whole or in part, and that 6,257 (including the Disputed Claim discussed above) should be wholly rejected because they are ineligible for payment from the Net Settlement Fund. Amin-Giwner Decl. ¶¶ 37-40. The basis for ineligibility of Claims falls in the following categories: 58% of Claims Did Not Fit the Definition of the Settlement Class; 26% of Claims Did Not Result in a Recognized Claim; 1% of Claims were Duplicates; and 15% of Claims Had Uncured Conditions of Ineligibility. *Id.*

Lead Plaintiff respectfully requests that the Court approve GCG's administrative determinations accepting and rejecting Claims as stated in the Amin-Giwner Declaration.

B. Late Claims – and Final Cut-Off Date

The 12,299 Claims received through November 6, 2019, include 2,002 that were postmarked or received after the Court-approved Claim-filing deadline of June 20, 2018, but that were received before November 6, 2019. Amin-Giwner Decl. ¶¶ 33, 39. Those late Claims have been fully processed, and 911 of them are, but for the late submission, otherwise eligible. *Id.* Although these 911 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.⁴ 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.

⁴ See Preliminary Approval Order ¶ 11 (“*Unless the Court orders otherwise, all Claim Forms must be postmarked no later than one hundred twenty (120) calendar days after the Notice Date. 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.*”) (emphasis added).

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 November 6, 2019, be barred, subject to the provisions of paragraph 43(f) of the Amin-Giwner Declaration.⁵ Paragraph 43(f) applies to any Claims received or modified after November 6, 2019, 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 GCG, determines that a further distribution is not cost-effective as provided in paragraph 43(e) of the Amin-Giwner Declaration, the post-November 6, 2019 Claimants (after payment of fees and expenses as provided in paragraph 43(f) of the Amin-Giwner 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.

⁵ 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. Amin-Giwner Decl. ¶ 34.

III. FEES AND EXPENSES OF CLAIMS ADMINISTRATOR

In accordance with the terms of GCG's retention to act as the Claims Administrator, GCG was responsible for, among other things, disseminating notice of the Settlement to the Settlement Class, creating and maintaining a website and toll-free telephone helpline, processing Claims, and allocating and distributing the Net Settlement Fund to Authorized Claimants. Amin-Giwner Decl. ¶ 2. As stated in the accompanying Amin-Giwner Declaration, GCG's fees and expenses for its work performed on this project through the initial distribution is estimated to be \$273,653.66.⁶ Amin-Giwner Decl. ¶ 42. GCG received almost 50% more Claims than originally projected and the duration of the administration has lasted approximately twelve (12) months more than anticipated, resulting in increased monthly charges exceeding GCG's original estimate. *Id.* To date, GCG has received payment in the amount of \$156,044.97 for its fees and expenses. *Id.* Accordingly, there is an outstanding balance of \$117,608.69 payable to GCG, which amount includes the estimated fees and expenses to be incurred by GCG in connection with the initial distribution. *Id.* Lead Counsel reviewed GCG's invoices and respectfully

⁶ 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. Amin-Giwner Decl. ¶ 42 n.4.

request on behalf of Lead Plaintiff that the Court approve all of GCG's fees and expenses.

IV. DISTRIBUTION PLAN FOR THE NET SETTLEMENT FUND

The Net Settlement Fund is ready to be distributed. Lead Plaintiff respectfully moves the Court for entry of an order approving GCG's determinations concerning acceptance and rejection of the Claims that are included in the present motion and approving the proposed plan for the distribution of the Net Settlement Fund as stated in the Amin-Giwner Declaration (the "Distribution Plan").⁷

A. Distribution of the Net Settlement Fund

Under the proposed Distribution Plan, GCG will distribute approximately 95% of the Net Settlement Fund, after deducting all payments previously allowed and the payments approved by the Court in this motion, and after deducting payment of any estimated taxes, the costs of preparing appropriate tax returns, and any escrow fees (the "Initial Distribution"). In the Initial Distribution, GCG will calculate award amounts for all Authorized Claimants as if the entire Net Settlement Fund were to be distributed now. GCG will first determine each Authorized Claimant's *pro rata* share of the total Net Settlement Fund based on the Claimant's Recognized Claim

⁷ 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 ¶¶ 19, 23.

in comparison to the total Recognized Claims of all Authorized Claimants. *See* Amin-Giwner Decl. ¶ 43(a)(1). In accordance with the Court-approved Plan of Allocation, GCG will eliminate from the Distribution any Authorized Claimant whose *pro rata* share calculates to less than \$10.00, as these Claimants will not receive any payment from the Net Settlement Fund and will be so notified by GCG. *Id.* ¶ 43(a)(2). GCG 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.* ¶ 43(a)(3). Authorized Claimants whose Distribution Amount calculates to less than \$100.00 under subparagraph 43(a)(4) of the Amin-Giwner Declaration will be paid their full Distribution Amount in the Initial Distribution (“Claims Paid in Full”). These Authorized Claimants will get no additional funds in subsequent distributions. *Id.* ¶ 43(a)(4). 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 eligible to recover from the respective funds whose Distribution Amount calculates to \$100.00 or more under subparagraph 43(a)(5) of the Amin-Giwner Declaration. 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 subparagraph 43(d) of the Amin-Giwner Declaration. *Id.* ¶ 43(a)(5).

In order to encourage Authorized Claimants to promptly cash their checks, 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.* ¶ 43(b). Authorized Claimants who do not cash their checks within the time allotted or on the conditions stated in paragraph 43(b) footnote 5 of the Amin-Giwner 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.* ¶ 43(c).

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

After GCG 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, GCG will, after consulting with Lead Counsel, conduct a second distribution of the Net Settlement Fund (the “Second Distribution”). In the Second Distribution, any amounts 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 GCG’s 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 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 cashed 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. Amin-Giwner Decl. ¶ 43(d). If, after the Second Distribution, any funds remain in the Net Settlement Fund because of uncashed checks or otherwise, then after GCG 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 GCG, determines that further distribution is not cost-effective, if sufficient funds remain to warrant the processing of Claims received after November 6, 2019, GCG 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 November 6, 2019, which resulted in an increased Recognized Claim, may be paid in accordance with paragraph 43(f) of the Amin-Giwner Declaration. 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 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.* ¶ 43(e).

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 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 Settlement 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: November 22, 2019

Respectfully submitted,

/s/James E. Cecchi

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of November 2019, I electronically filed a copy of the foregoing with the Clerk of the Court using the CM/ECF system, which will then send a notification of the filing to the registered participants as identified on the Notice of Electronic Filing.

/s/ James E. Cecchi
James E. Cecchi