

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

IN RE: SUNEDISON, INC. SECURITIES
LITIGATION

This Document Relates To:

Horowitz et al. v. SunEdison, Inc. et al.,
1:16-cv-07917-PKC

Civil Action No. 1:16-md-2742-PKC

MDL Docket No. 2742

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

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Lead Plaintiff Municipal Employees' Retirement System of Michigan ("MERS") and Named Plaintiff Arkansas Teacher Retirement System ("ATRS," and together with MERS, "Plaintiffs"), on behalf of themselves and the Class, respectfully move for entry of the proposed Order Approving Distribution Plan (the "Class Distribution Order"), which will approve the proposed plan for distribution of the Net Settlement Fund¹ to Authorized Claimants (the "Distribution Plan") in the above-captioned action (the "Action"). The Distribution Plan is included in the accompanying Declaration of Richard W. Simmons in Support of Plaintiffs' Unopposed Motion for Approval of Distribution Plan (the "Simmons Declaration" or "Simmons Decl."),² submitted on behalf of the Court-approved Claims Administrator, Analytics Consulting, LLC. ("Analytics").

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 Fund³ to Claimants whose Claims are

¹ The "Net Settlement Fund" is "the Settlement Fund less (a) all federal, state and/or local taxes on any income earned by the Settlement Fund and the reasonable costs incurred in connection with determining the amount of and paying taxes owed by the Settlement Fund (including reasonable expenses of tax attorneys and accountants); (b) the costs and expenses incurred in connection with providing notice to Class Members and administering the Settlement on behalf of Class Members; (c) any attorneys' fees and Litigation Expenses awarded by the Court; and (d) any other costs or fees approved by the Court." Settlement Notice ¶ 74.

² 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 July 11, 2019 (ECF 631-1) (the "Stipulation").

³ The Net Settlement Fund is divided into two separate funds for purposes of making allocations to Authorized Claimants: a) The Exchange Act Claim Fund will compensate members of the Exchange Act Subclass – persons and entities who or which purchased or otherwise acquired shares of SunEdison common stock from after the close of trading on September 2, 2015, through the close of trading on April 3, 2016 (the "Exchange Act Class Period"), and were damaged thereby. Plaintiffs allege that members of the Exchange Act Subclass purchased or acquired SunEdison common stock at prices that were artificially inflated as a result of a materially false statement made by SunEdison's former CEO after the close of trading on September 2, 2015, and were allegedly damaged when the alleged misstatement was revealed and the price of SunEdison common stock declined; and b) The Securities Act Claim Fund will compensate members of the Securities Act Subclass – persons and entities who or which purchased or otherwise acquired shares of SunEdison preferred stock from August 18, 2015, through November 9, 2015, inclusive (the "Securities Act Class Period"), and were damaged thereby. Plaintiffs allege that the offering documents for SunEdison's offering of preferred stock on August 18, 2015, contained material omissions and misrepresentations such that members of the Securities Act Subclass who purchased SunEdison preferred stock pursuant to or traceable to the offering through and including November 9, 2015, and who sold or held their shares for a loss were allegedly damaged. *See* Settlement Notice ¶ 86.

accepted by Analytics 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 payment of Analytics' fees and expenses incurred and estimated to be incurred in the administration of the Settlement. There are no disputed Claims requiring Court review by any Class Member. As such, the motion is ripe for determination.

Pursuant to 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 ¶¶ 25, 27. Accordingly, they have no interest in the relief requested in this motion.

I. BACKGROUND

The Court has approved the Stipulation entered into by Plaintiffs, on behalf of themselves and the other members of the Class, and the Defendants in the Action. The Stipulation set forth the terms of the Settlement (the "Settlement"), which represents a complete resolution of this Action in return for a payment of \$74 million, plus a contingent Supplemental Payment of up to \$2 million more, which Defendants have caused to be paid or will cause to be paid for the benefit of Class Members.⁴

In accordance with the Order Preliminarily Approving Settlement and Providing for Settlement Notice (ECF No. 636) (the "Preliminary Approval Order") entered by the Court, Analytics has mailed the Notice of (I) Proposed Settlement and Plan of Allocation; (II) Settlement Hearing; and (III) Motion for Attorneys' Fees and of Litigation Expenses (the "Settlement Notice") and the Proof of Claim and Release Form (the "Claim Form" or "Proof of Claim Form" and, together with the Settlement Notice, the "Settlement Notice Packet") to potential Class Members,

⁴ *See* Settlement Notice ¶ 2.

brokers, and other nominees. Simmons Decl. ¶ 2. As stated in the Simmons Declaration, Analytics has disseminated 287,600 Settlement Notice Packets to potential Class Members and nominees. *Id.* ¶ 4. The Settlement 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 Form postmarked no later than November 27, 2019. *Id.* ¶ 7.

On October 25, 2019, the Court granted final approval in its Order Approving Plan of Allocation of Net Settlement Fund (ECF 673) and entered its Judgment Approving Class Action Settlement (ECF No. 671) (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 30 of the Stipulation, Plaintiffs respectfully ask the Court to enter the Class Distribution Order approving the Distribution Plan.⁵

II. CLAIMS ADMINISTRATION

As detailed in the accompanying Simmons Declaration, through June 29, 2020, Analytics received and processed 26,685 Claims. Simmons Decl. ¶ 7. All Claims received through June 29, 2020, have been fully processed in accordance with the Stipulation and the Court-approved Plan of Allocation included in the Settlement Notice (*id.*), and Analytics has worked with Claimants to help them perfect their Claims (*see id.* ¶¶ 19-26).⁶

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,

⁵ The Court retained continuing and exclusive jurisdiction over, among other things, implementation of the Settlement, disposition of the Settlement Fund, and any motion to approve the Class Distribution Order. *See* Judgment ¶ 11.

⁶ In order to allow a proportional allocation of the Net Settlement Fund, and so that a distribution to eligible Claimants would not be delayed, Claims received after June 29, 2020, have not been processed. *See* Simmons Decl. ¶ 30. However, any such Claims, as well as any previously received Claims for which an adjustment was received after the submission of this motion, may be eligible for a future distribution after all distributions to Authorized Claimants are completed. *See* Simmons Decl. ¶ 39(f).

not properly documented, or otherwise deficient, which required substantial follow-up work by Analytics. *Id.* ¶¶ 19, 22.

If Analytics determined a Claim to be defective or ineligible, a Deficiency Notice (if the Claimant filed a paper Claim) or a Deficient Claims Email (if the Claimant filed an electronic Claim) was sent by Analytics to the Claimant or E-Claim 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. *Id.* ¶¶ 20, 22. The Deficiency Notice or Deficient Claims Email advised the Claimant or E-Claim 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 Deficient Claims Email, or Analytics would recommend the Claim for rejection to the extent the deficiency or condition of ineligibility was not cured. *Id.* ¶¶ 20, 23. No Claim was rejected solely for failure to submit the appropriate information or documentary evidence to complete the Claim within the 20 days required by the date of the Deficiency Notice or Deficient Claims Email. *Id.* ¶¶ 21, 26. Examples of a Deficiency Notice and Deficient Claims Email are attached to the Simmons Declaration as Exhibit A and Exhibit B, respectively.

As shown in the Simmons Declaration, of the 26,685 Claims that are the subject of this motion, Analytics has determined that 15,442 are acceptable in whole or in part, and that 11,243 should be wholly rejected because they are ineligible for payment from the Net Settlement Fund. Simmons Decl. ¶¶ 33-36. Plaintiffs respectfully request that the Court approve Analytics' administrative determinations accepting and rejecting Claims as stated in the Simmons Declaration.

A. No Disputed Claims

Analytics carefully reviewed Claimants' and E-Claim Filers' responses to the Deficiency Notices and Deficient Claims Emails and worked with them to resolve deficiencies where possible. Simmons Decl. ¶¶ 21, 26. Consistent with paragraph 28(e) of the Stipulation, the Deficiency Notices

and Deficient Claims Emails specifically advised the Claimant or E-Claim Filer of the right, within 20 days from the date of notification, to contest the rejection of the Claim and request Court review of Analytics' administrative determination of the Claim. Simmons Decl. ¶¶ 20, 23 and Exhibits A and B attached thereto.

Analytics received no requests for review by the Court of its administrative determinations. *Id.* ¶ 28. There are no disputed Claims requiring Court review by any Class Member.

B. Late Claims – and Final Cut-Off Date

The 26,685 Claims received through June 29, 2020, include 364 that were postmarked or received after the Court-approved Claim submission deadline of November 27, 2019, but were received before June 29, 2020. Simmons Decl. ¶¶ 29, 35. Those late Claims have been fully processed, and 219 of them are, but for their late submission, otherwise eligible to participate in the Settlement. *Id.* Although these 219 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 submission deadline.⁷ Plaintiffs respectfully submit that, when the equities are balanced, it would be unfair to prevent an otherwise eligible Claim from participating in the distribution of the Net Settlement Fund solely because it was received after the Court-approved Claim submission 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, Plaintiffs respectfully

⁷ See Preliminary Approval Order ¶ 8 (“*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 Settlement proceeds to Class Members.”) (emphasis added).

request that the Court order that no new Claims may be accepted after June 29, 2020, and no further adjustments made to previously received Claims, subject to the provisions of paragraph 39(f) of the Simmons Declaration.⁸ Paragraph 39(f) applies to any Claims received after June 29, 2020, or adjusted after the filing of this motion, 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 39(e) of the Simmons Declaration, the post-June 29, 2020, Claims and late-adjusted Claims, after payment of fees and expenses as provided in paragraph 39(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 the initial distribution are \$499,435.13. Simmons Decl. 38. To date, Analytics has received \$442,606.38 in payment for its fees and expenses. *Id.* Accordingly, there is an outstanding balance of \$56,828.75 payable to Analytics, which amount includes the estimated fees and expenses to be incurred by Analytics in connection with the Initial

⁸ Should an adjustment to a processed Claim be received that results in a lower Exchange Act Recognized Claim or lower Securities Act Recognized Claim, that adjustment will be made, and the Exchange Act Recognized Claim amount or Securities Act Recognized Claim amount will be reduced accordingly prior to a distribution to that Claimant. Simmons Decl. ¶ 30.

Distribution.⁹ *Id.* Lead Counsel reviewed Analytics' invoices, which are attached as Exhibit G to the Simmons Declaration, and respectfully requests on behalf of Plaintiffs that the Court approve all of Analytics' outstanding fees and expenses so that they may be paid before the Initial Distribution is conducted.

IV. DISTRIBUTION PLAN FOR THE NET SETTLEMENT FUND

The Net Settlement Fund is ready to be distributed. Plaintiffs respectfully move the Court for entry of an order approving Analytics' determinations concerning acceptance and rejection of the Claims and approving the proposed Distribution Plan as stated in the Simmons Declaration.

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 estimated taxes, the costs of preparing appropriate tax returns, and any escrow fees (the "Initial Distribution"). For purposes of executing the Distribution Plan for the Net Settlement Fund, Analytics has developed a proprietary "calculation module" that would calculate an Exchange Act Recognized Claim or a Securities Act Recognized Claim (together Claimant's "Recognized Claims") pursuant to the Court-approved Plan of Allocation of the Net Settlement Fund stated in the Settlement Notice. *See* Simmons Decl. ¶ 8.

To conduct the Initial Distribution, Analytics will first determine each Authorized Claimant's *pro rata* share of the total Net Settlement Fund based on the Claimant's Recognized Claims¹⁰,

⁹ This estimate will be set aside before the Initial Distribution is conducted so that Analytics can calculate Authorized Claimants' *pro rata* distribution amounts. 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. ¶ 38 n.3.

¹⁰ *See* Notice ¶¶ 99, 100 ("Calculation of Claimant's 'Exchange Act Recognized Claim': A Claimant's 'Exchange Act Recognized Claim' will be the sum of his, her, or its Exchange Act Recognized Loss Amounts as calculated above with respect to all purchases or acquisitions of SunEdison common stock during the Exchange Act Class Period [and]

calculating award amounts for all Authorized Claimants as if the entire Net Settlement Fund was to be distributed now. In accordance with the Court-approved Plan of Allocation, Analytics will calculate each Authorized Claimant's: (a) *pro rata* share of the Exchange Act Claim Fund based on the amount of the Authorized Claimant's Exchange Act Recognized Claim in comparison to the total Exchange Act Recognized Claims of all Authorized Claimants; and (b) the *pro rata* shares of the Securities Act Claim Fund based on the amount of the Authorized Claimant's Securities Act Recognized Claim in comparison to the total Securities Act Recognized Claims of all Authorized Claimants.¹¹ *Id.* ¶ 39(a)(1). In accordance with the Court-approved Plan of Allocation and given the costs of making payments, Analytics will then eliminate from the Initial Distribution any Authorized Claimant whose Recognized Claims (i.e., the combined *pro rata* shares of the Exchange Act Claim Fund and Securities Act Claim Fund) calculate to less than \$10.00, as these Claimants will not receive any payment from the Net Settlement Fund and will be so notified by Analytics. *Id.* ¶ 39(a)(2). After eliminating Claimants who would have received less than \$10.00, Analytics will recalculate the *pro rata* shares of the Exchange Act Claim Fund and Securities Act Claim Fund for all Authorized Claimants who would have received \$10.00 or more pursuant to the calculations described in subparagraph ¶ 39(a)(1) of the Simmons Declaration. This sum of those *pro rata* shares is the Authorized Claimant's "Distribution Amount." *Id.* ¶ 39(a)(3). Authorized Claimants whose Distribution Amount calculates to less than \$100.00 under subparagraph 39(a)(4) of the Simmons 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.* ¶

Calculation of Claimant's 'Securities Act Recognized Claim': A Claimant's 'Securities Act Recognized Claim' will be the sum of his, her, or its Securities Act Recognized Loss Amounts as calculated above with respect to all purchases or acquisitions of SunEdison preferred stock during the Securities Act Class Period.").

¹¹ *Id.*, ¶¶ 87-88 (allocating the Net Settlement Fund between the Exchange Act Claim Fund and Securities Act Claim Fund on a *pro rata* basis).

39(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 whose Distribution Amount calculates to \$100.00 or more under subparagraph 39(a)(5) of the Simmons 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 39(d) of the Simmons Declaration. *Id.* ¶ 39(a)(5).

In order to encourage Authorized Claimants to cash their checks promptly, the distribution checks will bear the notation, “CASH PROMPTLY. VOID AND SUBJECT TO REDISTRIBUTION IF NOT CASHED BY [DATE 90 DAYS AFTER ISSUE DATE].” *Id.* ¶ 39(b). Authorized Claimants who do not cash their checks within the time allotted or on the conditions stated in paragraph 39(b) footnote 7 of the Simmons Declaration will irrevocably forfeit all recovery from the Settlement, and the funds allocated to these stale-dated checks will be available to be redistributed to other Authorized Claimants in any subsequent distribution, as described below. *Id.* ¶ 39(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 amounts remaining in the Net Settlement Fund after the Initial Distribution (including from the Reserve and the funds allocated for all void, stale-dated checks), after deducting Analytics’ unpaid fees and expenses incurred in connection with administering the Settlement, 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. Simmons Decl. ¶ 39(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 seven-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 June 29, 2020, and adjustments to Claims received after the filing of this motion, such Claims and adjustments will be processed, and any such Claims that are otherwise valid will be paid in accordance with paragraph 39(f) of the Simmons Declaration. Simmons Decl. ¶ 39(e). If any funds still remain in the Net Settlement Fund after payment of these late or late-adjusted Claims, the remaining unclaimed 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 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, be released and discharged from all claims arising out of that involvement. Accordingly, Plaintiffs respectfully request that the Court enter the Class Distribution Order, which will release and discharge all such claims.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that Plaintiffs' Unopposed Motion for Approval of Distribution Plan should be granted, and the [Proposed] Order Approving Distribution Plan should be entered.

Dated: August 20, 2020

Respectfully submitted,

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