

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT DEPARTMENT  
BUSINESS LITIGATION SESSION

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JAMES MAGIDSON and CHRISTOPHER )  
MILLSON, Individually and on Behalf of All )  
Others Similarly Situated, )  
Plaintiffs, )  
v. )  
HEARTWARE, INC., HEARTWARE )  
INTERNATIONAL, INC., SETH HARRISON, )  
DAVID MCINTYRE, ROBERT THOMAS, )  
DENIS WADE, CHRISTINE BENNETT, )  
ROBERT STOCKMAN, C. RAYMOND )  
LARKIN, JR., TIMOTHY J. BARBERICH, and )  
DOUGLAS GODSHALL, )  
Defendants. )

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Civil Action No. 11-2398-BLS2

**STIPULATION OF SETTLEMENT**

This Stipulation of Settlement (the "Stipulation"), dated as of March 22, 2012, is made and entered into, by, and among (i) plaintiffs James Magidson and Christopher Millson, on behalf of themselves and the putative class ("Plaintiffs"); and (ii) individual defendants Seth Harrison, Robert Stockman, Timothy J. Barberich, Douglas Godshall, David McIntyre, Robert Thomas, Denis Wade, Christine Bennett, and C. Raymond Larkin, Jr. (together, the "Individual Defendants"),<sup>1</sup> and defendants HeartWare, Inc. ("HeartWare Inc."), HeartWare International,

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<sup>1</sup> Plaintiffs have not yet effectuated service of process on David McIntyre, Robert Thomas, Denis Wade, Christine Bennett, and C. Raymond Larkin, Jr. By their inclusion in this Stipulation and the settlement contemplated herein, defendants David McIntyre, Robert Thomas, Denis Wade, Christine Bennett, and C. Raymond Larkin, Jr. are not making appearances in this action and are not waiving any rights or defenses regarding service of process and/or personal jurisdiction.

Inc. (“HeartWare, Int’l”), and Apple Tree Partners I, L.P. (“Apple Tree”) (Individual Defendants, HeartWare Inc., HeartWare Int’l, and Apple Tree are referred to collectively herein as “Defendants”), by and through their respective counsel of record in this action. The parties to this Stipulation shall collectively be referred to as the “Parties”. This Stipulation is intended by the Parties to fully, finally and forever resolve, discharge and settle the Released Claims (as the term is defined below), upon and subject to the terms and conditions hereof, and subject to the approval of the Court.

## **I. THE LITIGATION**

### **A. Procedural History Of The Litigation**

The complaint in the above-captioned action (the “Litigation” or “Action”) was filed on June 27, 2011 (the “Complaint”). By their Complaint, Plaintiffs alleged that Defendants had breached their fiduciary duties as well as their contractual duties in connection with certain HeartWare, Inc. preferred shares held by Plaintiffs and the Class.

On September 12, 2011, defendants HeartWare, Inc., HeartWare, Int’l, Seth Harrison, Timothy J. Barberich, Robert Stockman, Douglas Godshall, and Apple Tree served on Plaintiffs a motion to dismiss (the “Motion to Dismiss”) pursuant to Massachusetts Rule of Civil Procedure 12(b)(6), claiming, among other things, that Plaintiffs’ claims were time-barred by the applicable statute of limitations and that the Individual Defendants did not owe Plaintiffs a fiduciary duty.

The Parties fully briefed the Motion to Dismiss, with Plaintiffs serving their opposition papers on October 27, 2011, and Defendants serving their reply papers on November 28, 2011. On November 28, 2011, Defendants filed the Motion to Dismiss papers with the Court, and subsequently, a hearing on the Motion to Dismiss was set for January 31, 2012.

In and around the beginning of December 2011, the Parties began engaging in discussions to explore the possibility of resolving the Litigation through good faith, arm's length settlement negotiations. Counsel for the Parties met in-person on December 7, 2011 and engaged in a multitude of discussions throughout December 2011 and January 2012 in negotiating a potential settlement of the Litigation. As a result of these good faith, arm's length negotiations, on or about January 30, 2012, the Parties reached an agreement in principle to settle the Litigation for the sum of \$1,125,000 as to a class of persons or entities (including Plaintiffs) who own HeartWare, Inc. Series A-1 Preferred Stock ("Series A-1 Stock") and/or Series A-2 Preferred Stock ("Series A-2 Stock") (the "Settlement Class"). Excluded from the Settlement Class are Defendants and their affiliates. The Parties will request the Court to certify the Settlement Class for purposes of this settlement only. On or about February 3, 2012, the Parties executed a Memorandum of Understanding ("MOU") reflecting the principal terms of the Settlement. Pursuant to the terms of the MOU, Plaintiffs, on behalf of the Settlement Class, and Defendants have agreed to file this Stipulation of Settlement and all other documents necessary to obtain preliminary and final approval of the Settlement.

Plaintiffs and their counsel believe that they have conducted a thorough investigation of the claims asserted in the Litigation. This investigation included, among other things: (1) detailed reviews of the public filings, annual reports, certificates of incorporation, press releases, and/or other public statements of HeartWare Int'l, HeartWare Inc., and HeartWare Ltd.; (2) review of articles in the financial press relating to the HeartWare entities; (3) interviewing former employees and others with knowledge of the claims asserted in the Litigation; (4) research of the applicable law with respect to the claims asserted in the Complaint filed in the Litigation, and the potential defenses thereto; and (5) review and analysis of confirmatory discovery requested of and provided by Defendants as a condition to the Settlement. Defendants

and their counsel also believe they have undertaken a thorough investigation.

**B. Defendants' Denials Of Wrongdoing And Liability**

Defendants have denied and continue to deny each and all of the claims and contentions alleged by Plaintiffs in the Action. Defendants expressly deny all charges of wrongdoing or liability against them arising out of the conduct, statements, or acts alleged, or that could have been alleged in the Action. Defendants also have denied, among other things, that Plaintiffs' claims were timely per the applicable statute of limitations; and that the Individual Defendants owed Plaintiffs any fiduciary duties. Defendants maintain that they have meritorious defenses to all claims alleged in the Action.

Nonetheless, taking into account the uncertainty and risks inherent in any litigation, Defendants have concluded that further litigation of the Action would be protracted, burdensome, and expensive, and that it is desirable and beneficial to them that the Action be fully and finally settled and terminated in the manner and upon the terms and conditions set forth in this Stipulation.

This Stipulation, and all related documents, shall not be construed as or deemed to be evidence of or an admission or concession on the part of any Defendant, or any of Defendants' Corresponding Released Parties (defined below), with respect to any claim of any fault or liability or wrongdoing or damage whatsoever. The Parties, and each of them, shall not assert or pursue any action, claim or rights that any party hereto violated any provision of Rule 11 of the Massachusetts Rules of Civil Procedure. Further, the Parties, and each of them, will not deny in any statement made to any media representative that the Action is being settled voluntarily after consultation with competent counsel. The Parties, and each of them, and their counsel agree that the Action was resolved in good faith, following arm's length bargaining, confers substantial

benefits upon the Settlement Class and, based upon their evaluation, is in the best interests of the Defendants as well as Plaintiffs and the Settlement Class.

**C. Plaintiffs' Claims And The Benefits Of Settlement**

Plaintiffs believe that the claims asserted in the Action have merit and that the evidence of the underlying events and transactions alleged in the Complaint, developed through their investigation to date, supports the claims. Additionally, Plaintiffs' Counsel have researched the applicable law with respect to Plaintiffs' claims and believe they could successfully refute any defenses to their claims raised by Defendants. Nonetheless, Plaintiffs and their counsel recognize and acknowledge the expense and length of continued prosecution of the Action against Defendants through trial and any subsequent appeals. Plaintiffs and their counsel also have taken into account the uncertain outcome and risks of any litigation, especially in complex actions, as well as the difficulties and delays inherent in such litigation. In particular, Plaintiffs and their counsel have taken into account the risk of dismissal of the Action on Defendants' Motion to Dismiss. Plaintiffs and their counsel are mindful of the inherent problems of proof of and possible defenses to the claims asserted in the Action, including, but not limited to, the defense that Plaintiffs' claims are time barred by the applicable statute of limitations. Plaintiffs believe that it is desirable that the Released Claims be fully and finally compromised, settled and resolved with prejudice, and barred pursuant to the terms set forth herein. Therefore, Plaintiffs believe that the Settlement set forth in this Stipulation confers substantial benefits upon the Settlement Class. Based on their evaluation, Plaintiffs and their counsel have concluded that the terms and conditions of this Stipulation are fair, reasonable, and adequate to the Settlement Class, and that it is in the best interests of the Settlement Class to settle the claims raised in the Action pursuant to the terms and provisions of this Stipulation.

## II. TERMS OF STIPULATION AND AGREEMENT OF SETTLEMENT

### A. Introduction

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and among Plaintiffs on behalf of themselves and the Settlement Class, and each of them, and Defendants, and each of them, by and through their respective undersigned counsel or attorneys of record that, subject to approval of the Court pursuant to Rule 23(c) of the Massachusetts Rules of Civil Procedure, in consideration of the benefits flowing to the Parties from the Settlement set forth herein, the Litigation and the Released Claims shall be finally and fully compromised, settled, and released, and the Action shall be dismissed with prejudice, as to all Parties, upon and subject to the terms and conditions of this Stipulation.

### B. Definitions

As used in this Stipulation, the following terms have the meanings specified below:

1.1 “Authorized Claimant” means any member of the Settlement Class who is a claimant as defined below and whose claim for recovery has been allowed pursuant to the terms of this Stipulation.

1.2 “Claimant” means any Settlement Class Member (as defined below) who files a Proof of Claim in such form and manner, and within such time, as the Court shall prescribe.

1.3 “Claims Administrator” means the firm of Strategic Claims Services, which shall administer the Settlement.

1.4 “Court” means the Superior Court for the Commonwealth of Massachusetts, Suffolk County, Business Litigation Session.

1.5 “Defendants” means Individual Defendants, HeartWare Int’l, HeartWare Inc., and

Apple Tree.

1.6 “Defendants’ Counsel” means the law firms of Shearman & Sterling LLP and Proskauer Rose LLP.

1.7 “Effective Date of Settlement” or “Effective Date” means the first date by which all of the events and conditions specified in ¶7.1 of this Stipulation have been met and have occurred.

1.8 “Escrow Agent” means jointly Strategic Claims Services, or its successor, and Plaintiffs’ Counsel.

1.9 “Final” means one business day following the later of the following events: (i) the date upon which the time expires for filing or noticing any appeal of the Court’s Final Judgment and Order of Dismissal With Prejudice, approving the Settlement substantially in the form of Exhibit B hereto -- *i.e.*, thirty (30) days after entry of the Final Judgment, other than an appeal solely with respect to attorneys’ fees and reimbursement of expenses; or (ii) if there is an appeal or appeals, other than an appeal or appeals solely with respect to attorneys’ fees and reimbursement of expenses, the date of completion, in a manner that finally affirms and leaves in place the Final Judgment and Order of Dismissal With Prejudice without any material modification, of all proceedings arising out of the appeal or appeals (including, but not limited to, the expiration of all deadlines for motions for reconsideration or petitions for certiorari, all proceedings ordered on remand, and all proceedings arising out of any subsequent appeal or appeals following decisions on remand).

1.10 “Final Judgment and Order of Dismissal With Prejudice” means the proposed final order and judgment to be entered by the Court approving the Settlement, substantially in the form attached hereto as Exhibit B.

1.11 "Plaintiffs' Counsel" means: (1) the law firm of Glancy Binkow & Goldberg LLP; and (2) Pastor Law Office, LLP.

1.12 "Notice" means the Notice of Pendency and Proposed Settlement of Class Action and Settlement Hearing Thereon, which is to be sent to members of the Settlement Class substantially in the form attached hereto as Exhibit 1 to Exhibit A.

1.13 "Order for Notice and Hearing" means the proposed order preliminarily approving the Settlement and directing notice thereof to the Settlement Class substantially in the form attached hereto as Exhibit A.

1.14 "Person" means an individual, corporation, partnership, limited partnership, association, joint stock company, estate, legal representative, trust, unincorporated association, government or any political subdivision or agency thereof, and any business or legal entity and their spouses, heirs, predecessors, successors, representatives, or assigns.

1.15 "Plan of Allocation" means a plan or formula for allocating the Settlement Fund to Authorized Claimants after payment of expenses of notice and administration of the Settlement, Taxes and Tax Expenses, and such attorneys' fees, costs, expenses and interest as may be awarded by the Court. Any Plan of Allocation is not part of this Stipulation and Defendants shall have no responsibility or liability with respect thereto.

1.16 "Proof of Claim" means the Proof of Claim and Release to be submitted by Claimants, substantially in the form attached as Exhibit 2 to Exhibit A.

1.17 "Publication Notice" means the Summary Notice of Pendency and Proposed Settlement of Action and Settlement Hearing Thereon to be published in Investor's Business Daily, substantially in the form attached as Exhibit 3 to Exhibit A.



1.18 "Released Parties" means the Plaintiffs, Defendants, and each of the Plaintiffs' and Defendants' respective Corresponding Released Parties. "Defendants' Corresponding Released Parties" shall mean each and every past and current Defendant, each Defendant's past or present directors, officers, employees, partners, member firms or affiliates, principals, agents, predecessors, successors, parents, subsidiaries, divisions, joint ventures, attorneys, investment bankers, commercial bankers, underwriters, financial or investment advisors, consultants, accountants, insurers, reinsurers, assigns, spouses, heirs, associates, related or affiliated entities, or any members of their immediate families, or any trusts for which any of them are trustees, settlers, or beneficiaries. "Plaintiffs' Corresponding Released Parties" shall mean any and all of Plaintiffs' respective present or past, and/or their respective families, parent entities, associates, affiliates or subsidiaries, and each and all of their respective past, present or future officers, directors, stockholders, agents, representatives, employees, attorneys, financial or investment advisors, advisors, consultants, accountants, investment bankers, commercial bankers, trustees, engineers, agents, insurers, co-insurers and reinsurers, heirs, executors, trustees, general or limited partners or partnerships, limited liability companies, members, personal or legal representatives, estates, administrators, predecessors, successors and assigns or other individuals or entities in which any Plaintiff has a controlling interest or which is related to or affiliated with Plaintiffs and any other representatives of any of these Persons or entities whether or not any such Released Parties were named, served with process, or appeared in the Action.

1.19 "Released Claims" means all claims (including "Unknown Claims" as defined below), demands, rights, actions or causes of action, liabilities, damages, losses, obligations, judgments, suits, fees, expenses, costs, matters and issues of any kind or nature whatsoever, that were alleged in the Action, or that could have been alleged in the Action, or that could have been alleged or could in the future be alleged in any other past, present, or future proceeding

(including, but not limited to, any claims arising under federal, state, or common law) relating to any right or claimed right to receive a payment on HeartWare Inc. Series A-1 Stock and/or Series A-2 Stock upon any Liquidation Event and/or any Deemed Liquidation Event, as such terms are used and defined in the Complaint or otherwise herein, alleged breach of fiduciary duty, or breach of contract, by Plaintiffs against Defendants, whether individual, derivative, representative, legal, or any other type, that Plaintiffs ever had, or hereafter can, shall, or may have, by reason of, arising out of, relating to, or in connection with the subject matter of the Action, including without limitation the allegations, facts, events, transactions, acts, occurrences, statements, representations, misrepresentations, omissions, or any other matter, thing, or cause whatsoever, or any series thereof, embraced, involved, set forth, or otherwise related, directly or indirectly, to the Action, that have arisen, could have arisen, arises now, or arises or may arise in the future.

1.20 “Released Defendants’ Claims” means all claims (including “Unknown Claims” as defined below), demands, rights, liabilities or causes of action, in law or in equity, accrued or unaccrued, fixed or contingent, direct, individual or representative, of every nature and description whatsoever, whether based on federal, state, local, statutory or common law or any other law, rule or regulation, including the law of any jurisdiction outside the United States, against Plaintiffs and their Corresponding Released Parties, arising out of the instituting, prosecution, settlement or resolution of the Action, provided however, that Defendants and their Corresponding Released Parties shall retain the right to enforce in the Court the terms of the Stipulation or the MOU, belonging to Defendants and their present or past heirs, executors, estates, administrators, predecessors, successors, assigns, parents, subsidiaries, associates, affiliates, employers, employees, agents, consultants, insurers, directors, managing directors, officers, partners, principals, members, attorneys, accountants, financial and other advisors,

investment bankers, underwriters, lenders, and any other representatives of any of these Persons and entities (including, without limitation, any claims, whether direct, derivative, representative or in any other capacity, arising under federal, state, local, statutory or common law or any other law, rule or regulation, including the law of any jurisdiction outside of the United States).

1.21 “Settled Claims” means all of the Released Claims against the Defendants and their Corresponding Released Parties, and all Released Defendants’ Claims against the Plaintiffs and their Corresponding Released Parties.

1.22 “Settlement” means the settlement contemplated by this Stipulation.

1.23 “Settlement Class” means all Persons who own Series A-1 Preferred Stock and/or Series A-2 Preferred Stock issued by HeartWare, Inc. (or by “Perpetual Medical, Inc.,” the prior legal entity name for HeartWare, Inc.). Excluded from the Settlement Class are Defendants; the members of Individual Defendants’ immediate families; all individuals who, at any time from July 2003 through the present, have served as officers and/or directors of HeartWare Int’l, HeartWare Inc., Apple Tree, and/or HeartWare Ltd., or any of their parents, subsidiaries, predecessors, or successors; any person, firm, trust, corporation, or entity for which any Individual Defendant was a director, officer, and/or partner; any person, firm, trust, corporation, or entity in which any Defendant has a controlling interest or any entity which is related to or affiliated with any Defendant; any insider or affiliate as defined in the Disclosure Statement referenced in the Complaint at ¶35; and the legal representatives, agents, affiliates, heirs, successors and assigns of any such excluded persons.

1.24 “Settlement Class Member” means a Person who falls within the definition of the Settlement Class as set forth in ¶1.23.

1.25 “Settlement Fund” means the principal amount of One Million One Hundred

Twenty-Five Thousand dollars (\$1,125,000.00) in cash. Defendants shall cause Fifty Thousand dollars (\$50,000.00) of the Settlement Fund to be deposited into an account designated by the Escrow Agent, in accordance with the terms of this Stipulation, within five (5) business days of the Court granting preliminary approval of the Settlement and authorizing notice dissemination. Within five (5) business days of the Effective Date, as defined at ¶1.7, Defendants shall cause the remainder of the Settlement Fund, \$1,075,000.00, to be deposited into the account designated by the Escrow Agent in accordance with the terms of this Stipulation.

1.26 “Unknown Claims” shall collectively mean all claims, demands, rights, liabilities, and causes of action of every nature and description which Plaintiffs or any Settlement Class Member does not know or suspect to exist in his, her, or its favor at the time of the release of the Released Parties which, if known by him, her or it, might have affected his, her or its settlement with and release of the Released Parties, or might have affected his, her or its decision not to object to this Settlement. With respect to any and all Released Claims, the Parties stipulate and agree that, upon the Effective Date, Plaintiffs shall expressly waive, and each of the Settlement Class Members shall be deemed to have waived, and by operation of the Final Judgment and Order of Dismissal With Prejudice shall have waived, the provisions, rights and benefits of California Civil Code §1542, which provides:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

Plaintiffs shall expressly and each of the Settlement Class Members shall be deemed to have, and by operation of the Final Judgment and Order of Dismissal With Prejudice shall have, expressly waived any and all provisions, rights and benefits conferred by any law of any state or territory

of the United States, or principle of common law, which is similar, comparable, or equivalent to California Civil Code §1542. Plaintiffs and Settlement Class Members may hereafter discover facts in addition to or different from those that he, she, or it now knows or believes to be true with respect to the subject matter of the Released Claims, but Plaintiffs shall expressly fully, finally and forever settle and release, and each Settlement Class Member, upon the Effective Date, shall be deemed to have, and by operation of the Final Judgment and Order of Dismissal With Prejudice shall have, fully, finally, and forever settled and released, any and all Released Claims, known or unknown, suspected or unsuspected, contingent or non-contingent, whether or not concealed or hidden, which now exist, or heretofore have existed, upon any theory of law or equity now existing or coming into existence in the future, including, but not limited to, conduct which is negligent, intentional, with or without malice, or a breach of any duty, law or rule, without regard to the subsequent discovery or existence of such different or additional facts. Plaintiffs acknowledge, and the Settlement Class Members shall be deemed by operation of the Final Judgment and Order of Dismissal With Prejudice to have acknowledged, that the foregoing waiver was separately bargained for and a key element of the Settlement of which this release is a part.

1.27 "Liquidation Event" means any liquidation, dissolution, or winding up of HeartWare, Inc., upon which, *inter alia*, the holders of HeartWare, Inc. Series A-1 Preferred Stock and/or Series A-2 Preferred Stock shall be entitled to be paid an amount of cash equal to \$10.00 per share of Series A-1 Preferred Stock and \$21.00 per share of Series A-2 Preferred Stock, as set forth in HeartWare, Inc.'s Second Amended and Restated Certificate of Incorporation at Article 4, paragraph A(3)(a)(i-iv).

1.28 "Deemed Liquidation Event" means any merger or consolidation of HeartWare, Inc. into or with another corporation (except one in which the holders of capital stock of

HeartWare, Inc. immediately prior to such merger or consolidation continue to hold at least a majority of the voting power of the capital stock of the surviving corporation), any sale of all or substantially all of the assets of HeartWare, Inc. in a single transaction or series of related transactions, or any other transaction or series of related transactions pursuant to or as a result of which a single person (or group of affiliated persons) acquires or holds capital stock of HeartWare, Inc. representing a majority of HeartWare, Inc.'s outstanding voting power, as set forth in HeartWare, Inc.'s Second Amended and Restated Certificate of Incorporation at Article 4, paragraph A(3)(a)(v); a Deemed Liquidation Event shall be treated as if a Liquidation Event (as defined in ¶1.27) unless voted to be treated otherwise by the holders of a majority in voting power of the HeartWare, Inc. Series B Convertible Preferred Stock and Series C Preferred Stock.

**C. The Settlement**

**The Settlement Consideration**

2.1 In consideration of the full and final settlement of all Released Claims, Defendants shall cause the cash sum of one million one hundred twenty-five thousand dollars (\$1,125,000.00) (the "Settlement Fund" as defined above at ¶1.25) to be paid as follows:

(a) Within five (5) business days of the Court granting preliminary approval of the settlement and authorizing notice dissemination, payment of \$50,000.00 shall be made by Defendants or their designees into an interest-bearing escrow account at a financial institution designated by Plaintiffs' Counsel, under the control of the Escrow Agent (the "Escrow Account"), from which funds may be used to pay the reasonable costs and expenses associated with the administration and notice of the settlement; and

(b) Within five (5) business days of the Effective Date, as defined at ¶1.7, payment of the remainder of the Settlement Fund, \$1,075,000.00, shall be made by Defendants

or their designees into the Escrow Account.

The Settlement Fund and any interest earned thereon shall be the “Gross Settlement Fund.”

### **Handling And Disbursement Of Funds By The Escrow Agent**

2.2 No monies will be disbursed from the Settlement Fund until after the Effective Date except:

- (i) As provided in ¶2.7 below;
- (ii) To pay Taxes and Tax Expenses (as defined in ¶2.8 below) on the income earned by the Settlement Fund. Taxes and Tax Expenses shall be paid out of the Settlement Fund, shall be considered to be a cost of administration of the Settlement, and shall be timely paid by the Escrow Agent without prior Order of Court; or
- (iii) To pay attorneys fees/expenses as ordered by the court and pursuant to ¶5.2(iii) and ¶6.1 below.

2.3 The Escrow Agent shall invest any funds deposited in the Escrow Account in excess of \$100,000.00 in short term United States Agency or Treasury Securities, backed by the full faith and credit of the United States Government or fully insured by the United States Government or agency thereof, and shall reinvest the proceeds of these instruments as they mature in similar instruments at their then-current market rates. Any funds held in escrow in an amount of \$100,000.00 or less may be held in an interest-bearing account insured by the FDIC. The Escrow Agent shall bear all risks related to the investment of the Settlement Fund.

2.4 The Escrow Agent shall not disburse the Settlement Fund except as provided in this Stipulation, by an order of the Court, or with the written agreement of Defendants’ Counsel

and Plaintiffs' Counsel.

2.5 Subject to further order and/or direction as may be made by the Court, the Escrow Agent is authorized to execute such transactions on behalf of the Settlement Class as are consistent with the terms of this Stipulation.

2.6 All funds held by the Escrow Agent shall be deemed and considered to be in *custodia legis* of the Court, and shall remain subject to the jurisdiction of the Court, until such time as such funds shall be distributed or returned to the parties who deposited such funds pursuant to this Stipulation and/or further order(s) of the Court.

2.7 Immediately after entry of the Court's order preliminarily approving the Settlement and upon receipt of \$50,000.00 into the Escrow Account (as set forth in ¶2.1 above), the Escrow Agent may, without further approval from Defendants or the Court, disburse at the direction of Plaintiffs' Counsel up to \$50,000.00 from the Gross Settlement Fund to pay the reasonable costs and expenses associated with the administration and notice of the Settlement (the "Class Notice and Administration Fund"), including, without limitation: the cost of identifying and locating members of the Settlement Class; mailing Notice and Proof of Claim and publishing the Publication Notice (such amounts shall include, without limitation, the actual costs of publication, printing and mailing the Notice, reimbursement to nominee owners for forwarding notice to their beneficial owners); soliciting Settlement Class claims; assisting with the filing of claims, administering and distributing the Net Settlement Fund (as defined below) to Authorized Claimants, processing Proof of Claim and Release forms, and paying escrow fees and costs, if any; and the administrative expenses incurred and fees charged by the Claims Administrator in connection with providing notice and processing the submitted claims. Defendants shall have no responsibility or liability for the allocation of the Settlement Fund



among the Settlement Class Members or the allocation of any awards of Plaintiffs' attorneys' fees, costs, and expenses. Any such awards shall be paid solely by the Settlement Fund.

### **Taxes**

2.8 (i) The Parties and the Escrow Agent agree to treat the Settlement Fund as being at all times a "qualified settlement fund" within the meaning of Treasury Regulation §1.468B-1. In addition, the Escrow Agent shall timely make such elections as necessary or advisable to carry out the provisions of this ¶2.8, including the "relation-back election" (as defined in Treasury Regulation §1.46813-1) back to the earliest permitted date. Such elections shall be made in compliance with the procedures and requirements contained in such regulations. It shall be the responsibility of the Escrow Agent to timely and properly prepare and deliver the necessary documentation for signature by all necessary parties, and thereafter to cause the appropriate filing to occur.

(ii) For purposes of §468B of the Internal Revenue Code of 1986, as amended, and Treasury Regulation §1.468B-2(k)(3) promulgated thereunder, the "administrator" shall be the Escrow Agent. The Escrow Agent shall timely and properly file all informational and other tax returns necessary or advisable with respect to the Settlement Fund (including without limitation the returns described in Treasury Regulation §1.468B-2(k)). Such returns (as well as the election described in 2.8(i)) shall be consistent with this ¶2.8 and in all events shall reflect that all Taxes (including any estimated Taxes, interest or penalties) on the income earned by the Settlement Fund shall be paid out of the Settlement Fund as provided in ¶2.8(iii) hereof.

(iii) All Taxes (including any estimated Taxes, interest or penalties) arising with respect to the income earned by the Settlement Fund, including any Taxes or tax detriments that may be imposed upon Defendants and their Corresponding Released Parties with respect to

any income earned by the Settlement Fund for any period during which the Settlement Fund does not qualify as a “qualified settlement fund” for federal or state income tax purposes (“Taxes”), and expenses and costs incurred in connection with the operation and implementation of this ¶2.8 (including, without limitation, expenses of tax attorneys and/or accountants and mailing and distribution costs and expenses or penalties relating to filing (or failing to file) the returns described in this ¶2.8) (“Tax Expenses”), shall be paid out of the Settlement Fund. Defendants and their Corresponding Released Parties shall have no liability or responsibility for the Taxes or the Tax Expenses. Taxes and Tax Expenses shall be treated as, and considered to be a cost of administration of the Settlement and shall be timely paid by the Escrow Agent out of the Settlement Fund without prior order from the Court. The Escrow Agent shall indemnify and hold each of the Defendants and their Corresponding Released Parties harmless for Taxes and Tax Expenses (including, without limitation, Taxes payable by reason of any such indemnification). The Escrow Agent shall be obligated (notwithstanding anything herein to the contrary) to withhold from distribution to Authorized Claimants any funds necessary to pay such amounts, including the establishment of adequate reserves for any Taxes and Tax Expenses (as well as any amounts that may be required to be withheld under Treasury Regulation §1.468B-2(1)(2)). Neither Defendants nor their Corresponding Released Parties are responsible therefor nor shall they have any liability with respect thereto. The parties hereto agree to cooperate with the Escrow Agent, each other, and their tax attorneys and accountants to the extent reasonably necessary to carry out the provisions of this ¶2.8. Defendants’ Counsel agree to promptly provide the Escrow Agent with the statement described in Treasury Regulation §1.468B-3(e).

(iv) For the purpose of this ¶2.8, references to the Settlement Fund shall include both the Settlement Fund and Class Notice and Administration Fund, and shall also include any earnings thereon.

### **Termination of Settlement**

2.9 Plaintiffs, on behalf of the Settlement Class, or Defendants, and any of them, shall have the right to terminate the Settlement and this Stipulation by providing written notice of their election to do so ("Termination Notice") to all other Parties hereto within thirty (30) days of: (i) the Court's declining to enter the Order for Notice and Hearing in any material respect with prejudice; (ii) the Court's refusal to approve this Stipulation or any material part of it with prejudice; (iii) the Court's declining to enter, with prejudice, the Final Judgment and Order of Dismissal with Prejudice in any material respect; (iv) the date upon which the Final Judgment and Order of Dismissal with Prejudice is modified or reversed in any material respect by the Appeals Court or the Supreme Judicial Court; or (v) the date upon which an Alternative Judgment (defined in ¶7.1(iv) below) is modified or reversed in any material respect by the Appeals Court or the Supreme Judicial Court.

2.10 If a case is commenced in respect of any Defendant under Title 11 of the United States Code or a trustee, receiver or conservator is appointed under any similar law, and in the event of the entry of a final order of a court of competent jurisdiction determining the transfer of money to the Escrow Account of any portion thereof on behalf of such Defendant to be a preference, voidable transfer, fraudulent transfer or similar transaction and any portion thereof is thus required to be returned, and such amount is not promptly deposited to the Gross Settlement Fund by other Defendants, then, at the election of Plaintiffs' Counsel, the Parties shall jointly move the Court to vacate and set aside the Releases given and Final Judgment and Order of Dismissal with Prejudice dismissing the Action entered pursuant to this Stipulation and Settlement, which releases and Final Judgment Order of Dismissal with Prejudice shall be null and void, and the Parties shall be restored to their respective positions in the Action as of January

1, 2012, and any cash amounts in the Escrow Account shall be returned in the manner set forth in ¶7.5.

**D. Order For Notice Of Settlement Hearing**

3.1 Promptly after execution of this Stipulation, Plaintiffs' Counsel and Defendants' Counsel shall jointly submit this Stipulation together with its Exhibits to the Court and shall apply for preliminary approval of the Settlement set forth in this Stipulation, entry of an Order for Notice and Hearing, approval for the mailing and publication of the Notice and Publication Notice, substantially in the form of Exhibits A-1 and A-3 hereto, which shall include the general terms of the Settlement set forth in this Stipulation, the proposed Plan of Allocation, the general terms of the Fee and Expense Application as defined in ¶6.1 below and the date of the Settlement Hearing as defined below.

3.2 At the time of the joint submission described in ¶3.1, Plaintiffs' Counsel and Defendants' Counsel shall also jointly request that, after Notice is given, the Court hold a hearing (the "Settlement Hearing") and approve the Settlement of the Action as set forth herein. At or after the Settlement Hearing, Plaintiffs' Counsel also will request that the Court approve the proposed Plan of Allocation and the Fee and Expense Application.

**E. Releases**

4.1 The obligations incurred pursuant to this Stipulation shall be a full and final disposition of the Action, any and all Released Claims, and any and all Released Defendants' Claims, as against all Released Parties and their Corresponding Released Parties.

4.2 Upon the Effective Date, as defined in ¶1.7, Plaintiffs, and each of them, on behalf of themselves, their Corresponding Released Parties and all Settlement Class Members, shall be deemed to have, and by operation of the Final Judgment and Order of Dismissal with

Prejudice shall have, fully, finally, and forever released, relinquished and discharged all Released Claims against Defendants, and each of them, and any and all of their Corresponding Released Parties, whether or not any individual Settlement Class Member executes and delivers the Proof of Claim.

4.3 Upon the Effective Date, as defined in ¶1.7, Defendants, and each of them, on behalf of themselves and their Corresponding Released Parties shall be deemed to have, and by operation of the Final Judgment and Order of Dismissal with Prejudice shall have, fully, finally, and forever released, relinquished and discharged all Released Defendants' Claims against Plaintiffs, and each of them, and any and all of those parties' Corresponding Released Parties including, but not limited to, Plaintiffs' Counsel.

4.4 Only those Settlement Class Members filing valid and timely Proof of Claim and Release forms shall be entitled to participate in the Settlement and receive a distribution from the Settlement Fund. The Proof of Claim and Release to be executed by Settlement Class Members shall release all Released Claims against the Released Parties, and shall be substantially in the form contained in Exhibit A-2 attached hereto. All Settlement Class Members shall be bound by the releases set forth in this Section E, whether or not they submit a valid and timely Proof of Claim and Release.

**F. Administration And Calculation Of Claims, Final Awards And Supervision And Distribution Of The Settlement Fund**

5.1 Under the supervision of Plaintiffs' Counsel, acting on behalf of the Settlement Class, and subject to such supervision and direction of the Court as may be necessary or as circumstances may require, the Claims Administrator shall administer and calculate the claims submitted by Settlement Class Members and shall oversee distribution of the Net Settlement

Fund (defined below) to Authorized Claimants.

5.2 The Gross Settlement Fund shall be applied as follows:

(i) To pay the Taxes and Tax Expenses described in ¶2.8 above;

(ii) To pay all the costs and expenses reasonably and actually incurred in connection with settlement administration, including, but not limited to, locating members of the Settlement Class, providing Notice, soliciting Settlement Class claims, assisting with the filing of claims, processing Proof of Claim forms, making administrative determinations concerning the acceptance or rejection of submitted claims, administering and distributing the Settlement Fund to Authorized Claimants, paying escrow fees and costs, if any, and paying the fees and expenses of the Claims Administrator;

(iii) To pay Plaintiffs' Counsel's attorneys' fees and expenses with interest thereon, as provided in ¶6.1 (the "Fee and Expense Award"), to the extent allowed by the Court. Plaintiffs may request the Court to authorize the payment of reasonable out-of-pocket expenses incurred in the investigation of the subject matter underlying the Litigation, the fruits of which benefited Settlement Class; and

(iv) To distribute the balance of the Settlement Fund, that is, the Gross Settlement fund less the items set forth in ¶5.2(i), (ii), and (iii) (the "Net Settlement Fund"), and, thereafter, to the Authorized Claimants as allowed by this Stipulation, the Plan of Allocation, or the Court.

5.3 Upon the Effective Date and thereafter, and in accordance with the terms of the Plan of Allocation, or such further approval and further order(s) of the Court as may be necessary or as circumstances may require, the Net Settlement Fund shall be distributed to Authorized Claimants subject to and in accordance with the following:

(i) By thirty (30) days after the Settlement Hearing, or such other time as may be set by the Court (the "Bar Date"), each Settlement Class Member claiming to be an Authorized Claimant shall be required to submit to the Claims Administrator a completed Proof of Claim, substantially in the form of Exhibit A-2 hereto, signed under penalty of perjury and supported by such documents as specified in the Proof of Claim or such other documents or proof, as are reasonably available to the Authorized Claimant, as Plaintiffs' Counsel, in their discretion, may deem acceptable;

(ii) Except as otherwise ordered by the Court, all Settlement Class Members who fail to timely submit a Proof of Claim and Release by the Bar Date, or such other period as may be ordered by the Court, or otherwise allowed, or who file a Proof of Claim that is rejected, shall be forever barred from receiving any payments pursuant to this Stipulation and Settlement, but will in all other respects be subject to and bound by the provisions of this Stipulation, the releases contained herein, and the Final Judgment and Order of Dismissal with Prejudice and will be barred and enjoined from bringing any action against the Released Parties concerning the Settled Claims.

5.4 No Person shall have any claim against Plaintiffs' Counsel, the Claims Administrator, or any other agent designated by Plaintiffs' Counsel based on distribution determinations or claim rejections made substantially in accordance with this Stipulation and the Settlement contained therein, the Plan of Allocation, or further orders of the Court. The Net Settlement Fund shall be distributed to the Authorized Claimants substantially in accordance with a Plan of Allocation to be described in the Notice and approved by the Court. However, with respect to any balance remaining in the Net Settlement Fund after six (6) months from the date of distribution of the Net Settlement Fund (whether by reason of tax refunds, uncashed

checks or otherwise), Plaintiffs' Counsel shall, if feasible, reallocate such balance among Authorized Claimants in an equitable and economic fashion. Thereafter, any balance which still remains in the Net Settlement Fund shall be donated to such charity as the Court may direct and approve, per Rule 23(d) of the Massachusetts Rules of Civil Procedure. This is not a claims-made settlement and, if all conditions of the Stipulation are satisfied and the Settlement becomes final, no portion of the Settlement Fund will be returned to the Defendants or their designees. Defendants and their Corresponding Released Parties shall have no responsibility for, interest in, or liability whatsoever with respect to the distribution of the Net Settlement Fund, the Plan of Allocation, the determination, administration, or calculation of claims, the payment or withholding of Taxes or Tax Expenses, or any losses incurred in connection therewith.

5.5 It is understood and agreed by the Parties that any proposed Plan of Allocation of the Net Settlement Fund including, but not limited to, any adjustments to an Authorized Claimant's claim set forth therein, is not a part of this Stipulation and is to be considered by the Court separately from the Court's consideration of the fairness, reasonableness and adequacy of the Settlement set forth in this Stipulation, and any order or proceedings relating to the Plan of Allocation shall not operate to terminate or cancel this Stipulation or affect the finality of the Court's Final Judgment and Order of Dismissal with Prejudice approving this Stipulation and the Settlement set forth therein, or any other orders entered pursuant to this Stipulation.

5.6 After notice is given, Plaintiffs' Counsel will request that the Court approve the proposed Plan of Allocation and the Fee and Expense Application, and the Parties shall request and obtain from the Court a Final Judgment and Order of Dismissal with Prejudice substantially in the form attached to this Agreement as Exhibit B.

**G. Plaintiffs' Counsel's Attorneys' Fees And Reimbursement Of Expenses**



6.1 Plaintiffs' Counsel may submit an application or applications (the "Fee and Expense Application") for distributions to Plaintiffs' Counsel from the Gross Settlement Fund for: (a) an award of attorneys' fees not to exceed 30% of the Gross Settlement Fund; plus (b) reimbursement of actual costs and expenses incurred in connection with prosecuting the Action (including costs of notice and settlement administration), plus any interest on such attorneys' fees, costs and expenses at the same rate and for the same periods as earned by the Gross Settlement Fund (until paid) as may be awarded by the Court. Defendants will not oppose the Fee and Expense Application, so long as it is in accordance with this Stipulation. Plaintiffs' Counsel reserves the right to make additional applications for fees and expenses incurred, if necessary.

6.2 The attorneys' fees and expenses shall be paid to Plaintiffs' Counsel from the Settlement Fund, as ordered, immediately after the Court executes an order awarding such fees and expenses and Defendants or their designees have made payment pursuant to ¶2.1(b) above. In the event that the Effective Date does not occur, Plaintiffs' Counsel and/or Plaintiffs shall within ten (10) business days from receiving notice from Defendants' Counsel or from a court of appropriate jurisdiction, refund to the Settlement Fund any fees and expenses previously paid to either or both of them from the Settlement Fund plus interest thereon at the same rate as earned on the cash portion of the Settlement Fund in an amount consistent with such reversal or modification, and Plaintiffs' Counsel shall bear joint and several obligation to pay back such fees and expenses.

6.3 The procedure for and allowance or disallowance by the Court of any application by Plaintiffs' Counsel for attorneys' fees and expenses, to be paid out of the Settlement Fund, are not part of the Settlement set forth in this Stipulation and are to be considered by the Court

separately from the Court's consideration of the fairness, reasonableness, and adequacy of the Settlement set forth in this Stipulation, and any order or proceedings relating to the Fee and Expense Application, or any appeal from any order relating thereto or reversal or modification thereof, shall not operate to modify, terminate or cancel this Stipulation, or affect or delay the finality of the Final Judgment and Order of Dismissal with Prejudice approving this Stipulation and the Settlement of the Litigation.

6.4 Except as set forth in ¶2.1 herein, Defendants and their Corresponding Released Parties shall have no responsibility for, and no liability whatsoever with respect to, any payment to Plaintiffs' Counsel and/or any other Person who receives payment from the Settlement Fund.

6.5 Defendants and their Corresponding Released Parties shall have no responsibility for, and no liability whatsoever with respect to, the allocation among Plaintiffs' Counsel and/or any other Person who may assert some claim thereto, of any Fee and Expense Award that the Court may make in the Action.

#### **H. Conditions Of Settlement, Effect Of Disapproval, Cancellation Or Termination**

7.1 The Effective Date of this Stipulation shall not occur unless and until each of the following events occurs and shall be the date upon which the last (in time) of the following events occurs:

- (i) Plaintiffs or Defendants have not exercised the right to terminate the Settlement as provided in ¶2.9 above.
- (ii) The Court has entered the Order for Notice and Hearing, substantially in the form attached hereto as Exhibit A;
- (iii) The Court has approved the Settlement, following notice to the Class and

a hearing, as provided in Rule 23 of the Massachusetts Rules of Civil Procedure, and has entered the Final Judgment and Order of Dismissal with Prejudice, or judgments substantially in the form of Exhibit B; and

(iv) The Final Judgment and Order of Dismissal with Prejudice has become Final, as defined in ¶1.9, above, or, in the event that the Court enters orders and final judgments in a form other than that provided above (“Alternative Judgment”) and which has the consent of the Parties, such Alternative Judgment becomes Final.

7.2 Upon the occurrence of all of the events referenced in ¶7.1 above, any and all interest or right of Defendants in or to the Settlement Fund, if any, shall be absolutely and forever extinguished, except as set forth in this Stipulation. At that time, *i.e.*, the occurrence of the Effective Date, the Escrow Agent shall transfer the Gross Settlement Fund to the Claims Administrator to be distributed in accordance with ¶5.2 hereof.

7.3 If some or all of the conditions specified in ¶7.1 are not met, or in the event that this Stipulation is not approved by the Court, or the Settlement set forth in the Stipulation is terminated or fails to become effective in accordance with its terms, then this Stipulation shall be canceled and terminated subject to ¶7.5 unless those contributing to the Settlement Fund, Plaintiffs’ Counsel, and Defendants’ Counsel mutually agree in writing to proceed with this Stipulation. None of the Parties, or any of them, shall have any obligation whatsoever to proceed under any terms other than provided for and agreed herein. If any Party engages in a material breach of the terms hereof, any other Party, provided that it is in substantial compliance with the terms of this Stipulation, may terminate this Stipulation on notice to all of the Parties.

7.4 If this Stipulation is terminated or fails to become effective for any reason set forth in ¶7.1 or ¶7.3 above, the Parties and those contributing to the Settlement Fund shall be

restored to their respective positions in the Action as of January 1, 2012. Unless otherwise ordered by the Court, in the event the Stipulation shall terminate, or be canceled, or shall not become effective for any reason, within forty-five (45) calendar days after the occurrence of such event, the Settlement Fund (including accrued interest), plus any amount then remaining in the Class Notice and Administration Fund (including accrued interest), less taxes, expenses and any costs which have either been disbursed pursuant to ¶¶2.7 or 2.8 hereof or are determined to be chargeable to the Class Notice and Administration Fund (but in no event exceeding the sum of \$50,000), shall be refunded by the Escrow Agent to the Defendants or their designees, pursuant to written instructions from Defendants' Counsel. At the request of Defendants', the Escrow Agent or its designee shall apply for any tax refund owed on the Settlement Fund and pay the proceeds, after deduction of any fees or expenses incurred in connection with such application(s) for refund, pursuant to written direction from Defendants' Counsel. In the event that the Stipulation is not approved by the Court or the Settlement set forth in this Stipulation is terminated or fails to become effective in accordance with its terms, the terms and provisions of this Stipulation, with the exception of ¶¶1.1-1.26, 2.7, 2.8, 7.3-7.5, and 8.3 hereof, shall have no further force and effect with respect to the settling Parties and shall not be used in this Action or in any other proceeding for any purpose, and any judgment or order entered by the Court in accordance with the terms of this Stipulation shall be treated as vacated, *nunc pro tunc*. No order of the Court or modification or reversal on appeal of any order of the Court concerning the Plan of Allocation or the amount of any attorneys' fees, costs, expenses and interest awarded by the Court to Plaintiffs' Counsel shall constitute grounds for cancellation or termination of the Stipulation.

7.5 If the Effective Date does not occur, or if the Stipulation is terminated pursuant to its terms, neither Plaintiffs nor Plaintiffs' Counsel shall have any obligation to repay any

amounts actually and properly disbursed from the Class Notice and Administration Fund. In addition, any expenses already incurred and properly chargeable to the Class Notice and Administration Fund pursuant to ¶2.7 hereof at the time of such termination or cancellation, but which have not been paid, shall be paid by the Escrow Agent in accordance with the terms of the Stipulation prior to the balance being refunded in accordance with ¶7.4 hereof.

#### **I. Miscellaneous Provisions**

8.1 The settling Parties (a) acknowledge that it is their intent to consummate this agreement; and (b) agree, subject to their fiduciary and other legal obligations, to cooperate to the extent reasonably necessary to effectuate and implement all terms and conditions of this Stipulation and to exercise their reasonable best efforts to accomplish the foregoing terms and conditions of this Stipulation. Plaintiffs' Counsel and Defendants' Counsel agree to cooperate with one another in seeking Court approval of the Order for Notice of Hearing, the Stipulation, and the Settlement, and to promptly agree upon and execute all such other documentation as may be reasonably required to obtain final approval of the Settlement.

8.2 The Parties intend this Stipulation to be a final and complete resolution of all Settled Claims, including without limitation all disputes between them with respect to the Action as well as any disputes that could have been raised in the Action or that could be raised in any future action with respect to a Liquidation Event of a Deemed Liquidation Event by the Plaintiffs, the Settlement Class, and their Corresponding Released Parties, and each or any of them, against Defendants and their Corresponding Released Parties, Defendants' Counsel, and each or any of them, on the one hand, and by Defendants and their Corresponding Released Parties, and each or any of them, against the Plaintiffs, the Settlement Class, their Corresponding Released Parties, or other plaintiffs' counsel, and each or any of them, on the other hand.

Additionally, as among and between Defendants and their Corresponding Released Parties, and each or any of them, Defendants intend this Stipulation to be a final and complete resolution of all disputes between them with respect to the Action as well as any disputes which could have been raised in the Action, except as expressly excluded in ¶1.20. Accordingly, the Parties agree not to assert in any forum that the Action was brought by Plaintiffs, or each or any of them, or defended by any Defendants, or each or any of them, in bad faith or without a reasonable basis. The Parties further agree that the amount paid to the Settlement Fund and the other terms of the Settlement were negotiated at arm's length and in good faith by the Parties, and reflect a settlement that was reached voluntarily after consultation with competent legal counsel.

8.3 Whether or not the Effective Date occurs or this Stipulation is terminated, neither this Stipulation nor the Settlement contained herein, nor any act performed or document executed pursuant to or in furtherance of this Stipulation or the Settlement:

(i) may be deemed, or shall be used, offered or received against Defendants or Defendants' Corresponding Released Parties, or each or any of them, as an admission, concession or evidence of, the validity of any Released Claims, the truth of any fact alleged by the Plaintiffs, the deficiency of any defense that has been or could have been asserted in the litigation, or of any alleged wrongdoing, liability, negligence, or fault of the Defendants and their Corresponding Released Parties, or any of them;

(ii) may be deemed, or shall be used, offered or received against Defendants, or each or any of them, as an admission, concession or evidence of, any fault, misrepresentation or omission with respect to any statement or written document approved or made by any Defendant and their Corresponding Released Parties, or any of them;

(iii) may be deemed, or shall be used, offered or received against Plaintiffs,

the Settlement Class, Plaintiffs' Corresponding Released Parties, or each or any of them, as an admission, concession or evidence of, the validity or invalidity of any of Released Defendants' Claims, the infirmity or strength of any claims raised in the Action, the truth or falsity of any fact alleged by Defendants, or the availability or lack of availability of meritorious defenses to the claims raised in the Action;

(iv) may be deemed, or shall be used, offered or received against the Plaintiffs, the Settlement Class, and Plaintiffs' Corresponding Released Parties, or each or any of them, or against Defendants, Defendants' Corresponding Released Parties, or each or any of them, as an admission or concession with respect to any liability, fault or wrongdoing as against any Parties to the Stipulation, in any civil, criminal or administrative proceeding in any court, administrative agency or other tribunal. However, the Settlement, this Stipulation, and any acts performed and/or documents executed in furtherance of or pursuant to this Stipulation and/or Settlement may be used in any proceedings as may be necessary to effectuate the provisions of this Stipulation. However, if this Stipulation is approved by the Court, any party or any of the Corresponding Released Parties may file this Stipulation and/or the Final Order and Judgment in any action that may be brought against such party or parties in order to support a defense or counterclaim based on principles of res judicata, collateral estoppel, release, good faith settlement, judgment bar or reduction or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim;

(v) may be deemed, or shall be construed against the Plaintiffs, the Settlement Class, and Plaintiffs' Corresponding Released Parties, or each or any of them, or against Defendants, Defendants' Corresponding Released Parties, or each or any of them, as an admission or concession that the consideration to be given hereunder represents an amount equal

to, less than or greater than that amount which could have or would have been recovered after trial; and

(vi) may be deemed, or shall be construed as or received in evidence as an admission or concession against Plaintiffs, the Settlement Class, and Plaintiffs' Corresponding Released Parties, or each and any of them, or against Defendants, Defendants' Corresponding Released Parties, or each or any of them, that any of their claims are with or without merit or that damages recoverable under the Complaint would have exceeded or would have been less than the Settlement Fund.

8.4 The headings used herein are used for the purpose of convenience only and are not meant to have legal effect.

8.5 The waiver by one party of any breach of this Stipulation by any other party shall not be deemed as a waiver of any other prior or subsequent breaches of this Stipulation.

8.6 All of the Exhibits to this Stipulation are material and integral parts hereof and are fully incorporated herein by this reference.

8.7 This Stipulation may be amended or modified only by a written instrument signed by or on behalf of all Parties or their respective successors-in-interest.

8.8 This Stipulation and the Exhibits attached hereto constitute the entire agreement among the parties hereto and no representations, warranties or inducements have been made to any party concerning this Stipulation or its Exhibits other than the representations, warranties and covenants contained and memorialized in such documents. Except as otherwise provided herein, each Party shall bear its own costs.

8.9 Each counsel or other Person executing this Stipulation, any of its Exhibits, or any



related settlement documents on behalf of any party hereto hereby warrants and represents that such Person has the full authority to do so and that they have the authority to take appropriate action required or permitted to be taken pursuant to the Stipulation to effectuate its terms.

8.10 This Stipulation may be executed in one or more counterparts. All executed counterparts and each of them shall be deemed to be one and the same instrument.

8.11 This Stipulation shall be binding upon, and inure to the benefit of, the successors and assigns of the parties hereto and their Corresponding Released Parties.

8.12 The Court shall retain jurisdiction with respect to implementation and enforcement of the terms of this Stipulation, and all parties hereto submit to the jurisdiction of the Court for purposes of implementing and enforcing the Settlement embodied in this Stipulation.

8.13 This Stipulation and the Exhibits thereto shall be considered to have been negotiated, executed and delivered, and to be wholly performed, in the State of Massachusetts and the rights and obligations of the parties to this Stipulation shall be construed and enforced in accordance with, and governed by, the internal, substantive laws of the State of Massachusetts without giving effect to that State's choice of law principles.

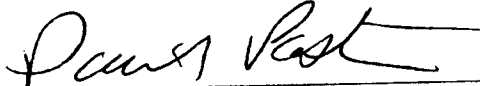
8.14 This Stipulation is deemed to have been prepared by counsel for all parties, as a result of arm's length negotiations among the parties. Whereas all parties have contributed substantially and materially to the preparation of this Stipulation, it shall not be construed more strictly against one party than another.

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8.15 The Parties agree that this Stipulation supercedes the MOU.

Dated: March 22, 2012

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Of Counsel:

Stuart J. Baskin  
William J.F. Roll, III

8.15 The Parties agree that this Stipulation supercedes the MOU.

Dated: March 22, 2012

**PASTOR LAW OFFICE, LLP**

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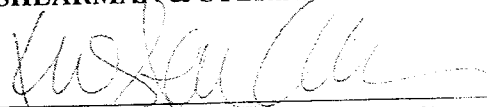
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*Attorneys for Defendant Apple Tree Partners I, L.P.*

# **EXHIBIT A**

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT DEPARTMENT  
BUSINESS LITIGATION SESSION

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JAMES MAGIDSON and CHRISTOPHER )  
MILLSON, Individually and on Behalf of All )  
Others Similarly Situated, )  
Plaintiffs, )  
v. )  
HEARTWARE, INC., HEARTWARE )  
INTERNATIONAL, INC., SETH HARRISON, )  
DAVID MCINTYRE, ROBERT THOMAS, )  
DENIS WADE, CHRISTINE BENNETT, )  
ROBERT STOCKMAN, C. RAYMOND )  
LARKIN, JR., TIMOTHY J. BARBERICH, and )  
DOUGLAS GODSHALL, )  
Defendants. )

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Civil Action No. 11-2398-BLS2

**[PROPOSED] ORDER PRELIMINARILY APPROVING SETTLEMENT AND PROVIDING NOTICE**

WHEREAS, a proposed class action is pending before the Court entitled *Magidson, et al. v. HeartWare, Inc., et al.*, Civil Action No. 11-2398-BLS2 (the "Litigation"); and

WHEREAS, the Court has received the Stipulation of Settlement dated as of March 22, 2012 (the "Stipulation"), that has been entered into by the Plaintiffs and the Defendants, and the Court has reviewed the Stipulation and its attached Exhibits; and

WHEREAS, the parties having made application, pursuant to Rule 23 of the Massachusetts Rules of Civil Procedure, for an order preliminarily approving the settlement of

this Litigation, in accordance with the Stipulation which, together with the Exhibits annexed thereto, sets forth the terms and conditions for the proposed settlement of the Litigation and for dismissal of the Litigation with prejudice upon the terms and conditions set forth therein; and

WHEREAS, all defined terms contained herein shall have the same meanings as set forth in the Stipulation;

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. Pursuant to Rule 23 of the Massachusetts Rules of Civil Procedure, the Court hereby preliminarily certifies, for purposes of settlement only, this Action as a class action on behalf of the Settlement Class (as defined in the Stipulation at ¶1.23) consisting of all persons who own Series A-1 Preferred Stock and/or Series A-2 Preferred Stock issued by HeartWare, Inc. (or by Perpetual Medical, Inc., the prior legal entity name for HeartWare, Inc.). Excluded from the Settlement Class are Defendants<sup>1</sup>; the members of Individual Defendants' immediate families; all individuals who, at any time from July 2003 through the present, have served as officers and/or directors of HeartWare Int'l, HeartWare Inc., Apple Tree, and/or HeartWare Ltd., or any of their parents, subsidiaries, predecessors, or successors; any person, firm, trust, corporation, or entity for which any Individual Defendant was a director, officer, and/or partner; any person, firm, trust, corporation, or entity in which any Defendant has a controlling interest or any entity which is related to or affiliated with any Defendant; any insider or affiliate as defined in the Disclosure Statement referenced in the Complaint at ¶35; and the legal representatives, agents, affiliates, heirs, successors and assigns of any such excluded persons. For purposes of this preliminary class certification only, Plaintiffs are provisionally certified as the Settlement Class representatives, and their counsel as Settlement Class counsel.

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<sup>1</sup> As defined in the Stipulation, "Defendants" mean the defendants named in this Action, consisting of: HeartWare, Inc., HeartWare International, Inc., Apple Tree Partners I, L.P. ("Apple Tree"), Seth Harrison, Robert Stockman, Timothy J. Barberich, Douglas Godshall, David McIntyre, Robert Thomas, Denis Wade, Christine Bennett, and C. Raymond Larkin, Jr.

2. The Court preliminarily finds and concludes, for purposes of settlement only, that the requirements of Rule 23 of the Massachusetts Rules of Civil Procedure have been met:

- (a) The members of the Settlement Class are so numerous that separate joinder of each member is impracticable;
- (b) Plaintiffs' claims raise questions of law or fact common to the questions of law or fact raised by the claims of each member of the Settlement Class;
- (c) Plaintiffs' claims are typical of the claims of each member of the Settlement Class;
- (d) Plaintiffs can fairly and adequately protect and represent the interests of each member of the Settlement Class;
- (e) Questions of law or fact common to the members of the Settlement Class predominate over any questions affecting only individual members, including whether Defendants owed fiduciary duties to the Settlement Class, whether Defendants breached any such fiduciary duties to the Settlement Class, whether such breach caused the Settlement Class losses, and whether Defendants' common conduct constituted breaches of contract;
- (f) A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

3. The Court hereby preliminarily approves the Stipulation and the settlement set forth therein as fair, reasonable, and adequate, subject to further consideration at the Settlement Fairness Hearing described below.

4. A hearing shall be held before this Court on \_\_\_\_\_, 2012, at \_\_\_\_\_ .m., in Courtroom 1017 at 3 Pemberton Square, Boston, Massachusetts, to determine (a) whether the proposed settlement of the Litigation on the terms and conditions provided for in the Stipulation is fair, reasonable, and adequate to the Settlement Class and should be approved by the Court; (b) whether a Final Judgment and Order of Dismissal with Prejudice as provided in the Stipulation should be entered herein; (c) whether the proposed Plan of Allocation should be



approved; and (d) the amount of fees and expenses that should be awarded to Plaintiffs' Counsel to be paid out of the Settlement Fund defined in the Stipulation at ¶1.25 (the "Settlement Hearing").

5. The Court approves, as to form and content, the Notice of Pendency and Proposed Settlement of Class Action (the "Notice"), the Proof of Claim and Release form (the "Proof of Claim"), and the Summary Notice of Pendency and Proposed Settlement of Class Action and Settlement Thereon for publication (the "Summary Notice") annexed as Exhibits A-1, A-2 and A-3 hereto, and finds that the mailing and distribution of the Notice and publishing of the Summary Notice substantially in the manner and form set forth in ¶6 of this Order meet the requirements of Massachusetts Rule of Civil Procedure 23 and due process, and is the best notice practicable under the circumstances and shall constitute due and sufficient notice to all Persons entitled thereto.

6. The firm Strategic Claims Services (the "Claims Administrator") is hereby appointed to supervise and administer the notice procedure, as well as the processing of claims as more fully set forth below:

(a) Plaintiffs' Counsel shall make reasonable efforts to identify all Persons who are Members of the Settlement Class, and not later than fourteen (14) calendar days after the date of this Order, Plaintiffs' Counsel shall cause a copy of the Notice and the Proof of Claim, substantially in the forms annexed as Exhibits A-1 and A-2 hereto, to be mailed by first-class mail to all Settlement Class Members who can be identified with reasonable effort;

(b) Not later than twenty-one (21) calendar days after the date of this Order, Plaintiffs' Counsel shall cause the Summary Notice to be published once in *Investor's Business Daily*; and

(c) At least seven (7) calendar days prior to the Settlement Hearing, Plaintiffs' Counsel shall cause to be served on Defendants' Counsel and filed with the Court proof, by affidavit or declaration, of such mailing and publishing.

7. Settlement Class Members who wish to participate in the Settlement shall complete and submit Proof of Claim forms in accordance with the instructions contained therein. Unless the Court orders otherwise, all Proof of Claim forms must be postmarked no later than thirty calendar days (30) after the Settlement Hearing. Any Settlement Class Member who does not submit a Proof of Claim within the time provided for, shall be barred from sharing in the distribution of the proceeds of the Settlement Fund, unless otherwise ordered by the Court. Notwithstanding the foregoing, Plaintiffs' Counsel shall have the discretion to accept late-submitted claims for processing by the Claims Administrator so long as the distribution of the Net Settlement Fund is not materially delayed thereby.

8. Any Member of the Settlement Class may enter an appearance in the Litigation, at their own expense, individually or through counsel of their own choice, in which case such counsel must file with the Civil Clerk of the Court and deliver to Plaintiffs' Counsel and Defendants' Counsel a notice of such appearance. If they do not enter an appearance, they will be represented by Plaintiffs' Counsel.

9. Any Member of the Settlement Class may appear in person or by counsel and show cause, if he, she or it has any, why the proposed settlement of the Litigation should or should not be approved as fair, reasonable and adequate, why a judgment should or should not be entered thereon, why the Plan of Allocation should or should not be approved, or why attorneys' fees and expenses should or should not be awarded to counsel for the plaintiffs, provided, however, that no Settlement Class Member or any other Person shall be heard or entitled to contest such matters, unless that Settlement Class Member has delivered by hand or sent by first-class mail written objections and copies of any papers and briefs such that they are received at least (14) calendar days prior to the Settlement Hearing, by (a) Glancy Binkow & Goldberg LLP, Attn: Andy Sohrn, 1925 Century Park East, Suite 2100, Los Angeles, CA 90067; (b) Pastor Law Office LLP, Attn: David Pastor, 63 Atlantic Avenue, 3rd Floor, Boston, Massachusetts, 02110; (c) Shearman & Sterling LLP, Attn: Kirsten Nelson Cunha, Stuart J. Baskin & William J.F. Roll,

III, 599 Lexington Avenue, New York, NY 10022; and (d) Proskauer Rose LLP, Attn: Daniel B. Winslow & Justin J. Daniels, One International Place, Boston, Massachusetts, 02110, and filed said objections, papers and briefs with the Civil Clerk's Office for the Suffolk County Superior Court, on or before fourteen (14) calendar days prior to the Settlement Hearing. Any Member of the Settlement Class who does not make his, her, or its objection in the manner provided shall be deemed to have waived such objection and shall forever be foreclosed from making any objection to the fairness or adequacy of the proposed settlement as set forth in the Stipulation, to the Plan of Allocation, or to the award of attorneys' fees and expenses to counsel for the plaintiffs, unless otherwise ordered by the Court.

10. The passage of title and ownership of the Settlement Fund to the Escrow Agent in accordance with the terms and obligations of the Stipulation is approved. No Person that is not a member of the Settlement Class, Plaintiffs, or Plaintiffs' Counsel shall have any right to any portion of, or in the distribution of, the Settlement Fund unless otherwise ordered by the Court or otherwise provided in the Stipulation.

11. All funds held by the Escrow Agent shall be deemed and considered to be in *custodia legis* of the Court, and shall remain subject to the jurisdiction of the Court, until such time as such funds shall be distributed pursuant to the Stipulation and/or further order(s) of the Court.

12. All papers in final support of the settlement and the Plan of Allocation shall be filed and served on or before seven (7) calendar days prior to the Settlement Hearing.

13. Any application by counsel for the plaintiffs for attorneys' fees or reimbursement of expenses or by Plaintiffs for reimbursement of their expenses shall be filed and served twenty-eight (28) calendar days prior to the Settlement Hearing.

14. Defendants, their Corresponding Released Parties, and Defendants' Counsel shall have no responsibility for the Plan of Allocation or any application for attorneys' fees or reimbursement of expenses submitted by Plaintiffs' Counsel or Plaintiffs, and such matters will

be considered separately from the fairness, reasonableness, and adequacy of the settlement.

15. At or after the Settlement Hearing, the Court shall determine whether the Plan of Allocation proposed by Plaintiffs' Counsel, and the proper amount to award on any application for attorneys' fees or reimbursement of expenses shall be approved.

16. All reasonable expenses incurred in identifying and notifying Settlement Class Members, as well as administering the Settlement Fund, shall be paid as set forth in the Stipulation. In the event the Settlement is not approved by the Court, or otherwise fails to become effective, neither Plaintiffs nor any of its counsel shall have any obligation to repay any amounts incurred and properly disbursed pursuant to ¶7.5 of the Stipulation.

17. Neither the Stipulation, nor any of its terms or provisions, nor any of the negotiations or proceedings connected with it, shall be construed as: (1) an admission or concession by Defendants of the truth of any of the allegations in the Litigation, or of any liability, fault, or wrongdoing of any kind; or (2) an admission or concession by Plaintiffs and/or the Settlement Class of any infirmity in the claims asserted in the Litigation.

18. Pending final determination of whether the Settlement should be approved, Plaintiffs, all Settlement Class Members, and each of them, and anyone who acts or purports to act on their behalf, shall not institute, commence or prosecute any action that asserts Released Claims against any Released Party.

19. Pending final determination of whether the Settlement should be approved, or further order of the Court, all proceedings and all discovery are stayed.

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20. The Court reserves the right to adjourn the date of the Settlement Hearing without further notice to the Members of the Settlement Class, and retains jurisdiction to consider all further applications arising out of or connected with the proposed settlement. The Court may approve the Settlement, with such modifications as may be agreed to by the settling Parties, if appropriate, without further notice to the Settlement Class.

IT IS SO ORDERED.

Dated: \_\_\_\_\_, 2012

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JUSTICE OF THE SUFFOLK COUNTY  
SUPERIOR COURT

# **EXHIBIT A-1**

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT DEPARTMENT  
BUSINESS LITIGATION SESSION

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JAMES MAGIDSON and CHRISTOPHER )  
MILLSON, Individually and on Behalf of All )  
Others Similarly Situated, )

Plaintiffs, )

v. )

HEARTWARE, INC., HEARTWARE )  
INTERNATIONAL, INC., SETH HARRISON, )  
DAVID MCINTYRE, ROBERT THOMAS, )  
DENIS WADE, CHRISTINE BENNETT, )  
ROBERT STOCKMAN, C. RAYMOND )  
LARKIN, JR., TIMOTHY J. BARBERICH, and )  
DOUGLAS GODSHALL, )

Defendants. )

Civil Action No. 11-2398-BLS2

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**NOTICE OF PENDENCY AND PROPOSED SETTLEMENT OF CLASS ACTION  
AND SETTLEMENT HEARING THEREON**

**TO: ALL PERSONS WHO OWN SERIES A-1 PREFERRED STOCK AND/OR  
SERIES A-2 PREFERRED STOCK ISSUED BY HEARTWARE, INC. (OR BY  
PERPETUAL MEDICAL, INC., ITS PRIOR LEGAL ENTITY NAME). PLEASE  
READ THIS NOTICE CAREFULLY AND IN ITS ENTIRETY. YOUR RIGHTS  
WILL BE AFFECTED BY THE LEGAL PROCEEDINGS IN THIS LAWSUIT.**

The Superior Court of the Commonwealth of Massachusetts, Business Litigation Section,  
for Suffolk County (the "Court") authorized this Notice to be sent to you. This is not a  
solicitation.

**Securities at Issue:** Currently owned Series A-1 Preferred Stock and Series A-2 Preferred Stock issued by HeartWare, Inc. (or by “Perpetual Medical, Inc.,” the prior legal entity name for HeartWare, Inc.).

**Settlement Fund:** \$1,125,000.00 in cash. Your recovery will depend on the amount of shares you own and which of the two types of shares you own. It will also depend on the number of eligible shares that participate in the settlement.

**Reasons for Settlement:** Provides for a substantial dollar recovery while avoiding the costs and risks associated with continued litigation, including danger of no recovery.

**If the Case Had Not Settled:** Continuing with the case could have resulted in dismissal or loss at trial. The two sides do not agree on the amount of money that could have been won even if Plaintiffs prevailed at trial. The parties disagree about: (1) whether any claim for payment on HeartWare Inc. (or Perpetual Medical, Inc.) Series A-1 Preferred Stock or Series A-2 Preferred Stock is timely or could be timely; (2) whether there was any basis to toll any applicable statute of limitations with respect to claims regarding the preferred stock; (3) whether the defendants owed owners of such preferred stock any fiduciary duties; and (4) whether the owners of such preferred stock are owed, or could be owed, payment for a liquidation event or deemed liquidation event.

**Fees and Expenses:** Plaintiffs’ Counsel have not received any payment for their work investigating the facts, conducting this litigation, and negotiating the settlement on behalf of the Plaintiffs and the Settlement Class. Plaintiffs’ Counsel will ask the court for attorneys’ fees not to exceed 30% of the Settlement Fund and reimbursement of out-of-pocket expenses not to exceed \$10,000 to be paid from the Settlement Fund.



**Deadlines:**

Submit Claim: \_\_\_\_\_, 2012

File Objection: \_\_\_\_\_, 2012

**Court Hearing on Fairness of Settlement:** \_\_\_\_\_, 2012

**More Information:**

**Claims Administrator:**

**HEARTWARE LITIGATION SETTLEMENT FUND**

c/o Strategic Claims Services  
600 North Jackson Street, Suite 3  
Media, PA 19063  
info@strategicclaims.net

**Plaintiffs' Counsel:**

GLANCY BINKOW & GOLDBERG LLP  
ATTN: ANDY SOHRN  
1925 Century Park East, Suite 2100  
Los Angeles, CA 90067

PASTOR LAW OFFICE, LLP  
ATTN: DAVID PASTOR  
63 Atlantic Avenue, 3rd Floor  
Boston, MA 02110

**Your legal rights are affected whether you act or do not act.**

**Read this Notice carefully.**

**YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT:**

- SUBMIT A CLAIM FORM**      The only way to get a payment from this Settlement.
- OBJECT**      You may write to the Court if you do not like this settlement.

**GO TO A HEARING**

You may ask to speak in Court about the fairness of this settlement.

**DO NOTHING**

Get no payment; forfeit right to sue in another action.

These rights and options - **and the deadlines to exercise them** - are explained in this Notice.

The Court in charge of this case must decide whether to approve the settlement. Payments will be made if the Court approves the settlement and, if there are any appeals, after appeals are resolved. Please be patient.

**BASIC INFORMATION**

**1. Why Did I Get This Notice Package?**

You or someone in your family may own or may have owned shares of Series A-1 Preferred Stock and/or Series A-2 Preferred Stock issued by HeartWare, Inc. (or by Perpetual Medical, Inc., the prior legal entity name for HeartWare, Inc.).

The Court sent you this Notice because you have a right to know about a proposed settlement of a class action lawsuit, and about all of your options, before the Court decides whether to approve the settlement. If the Court approves it and after any objections or appeals are resolved, the Claims Administrator appointed by the Court will make the payments that the settlement allows.

This package explains the lawsuit, the settlement, your legal rights, what benefits are available, who is eligible for them, and how to get them.

The Court in charge of the case is the Superior Court of the Commonwealth of

Massachusetts, Business Litigation Section, for Suffolk County, and the case is known as *Magidson, et al. v. HeartWare, Inc., et al.*, Civil Action No. 11-2398-BLS2. The Persons who sued are called Plaintiffs, and the companies and the individuals the Plaintiffs sued – HeartWare, Inc., HeartWare International, Inc., Apple Tree Partners I, L.P. (“Apple Tree”), Seth Harrison, Robert Stockman, Timothy J. Barberich, Douglas Godshall, David McIntyre, Robert Thomas, Denis Wade, Christine Bennett, and C. Raymond Larkin, Jr. – are called the Defendants.

## **2. What Is This Lawsuit About?**

The Complaint in this Litigation was filed on June 27, 2011. The Complaint, filed as a class action, alleges claims of breach of fiduciary duty, aiding and abetting breach of fiduciary duty, breach of contract, declaratory relief, and accounting, on behalf of a class of persons who own HeartWare Inc. (or Perpetual Medical, Inc.) Series A-1 Preferred Stock and/or Series A-2 Preferred Stock. The Complaint alleges centrally that Defendants have failed to make deemed liquidation payment to owners of HeartWare Inc. (or Perpetual Medical, Inc.) Series A-1 Preferred Stock and Series A-2 Preferred Stock. For a full description of the terms and conditions of the Settlement, including the releases described herein and the claims alleged in the Complaint, please refer to the Stipulation of Settlement by visiting the Claims Administrator’s website at [www.strategicclaims.net](http://www.strategicclaims.net).

Defendants assert that the allegations of the complaint are without merit. All Defendants deny that they did anything wrong, and contend that if the case were to proceed to trial, they would prevail.

## **3. Why Is This a Class Action?**

In a class action, one or more people called class representatives, in this case the proposed class representative-Plaintiffs James Magidson and Christopher Millson ("Plaintiffs"), sue on behalf of people who have similar claims. Here, all these people, together, are called a Settlement Class or Settlement Class Members. In a class action, one court resolves the issues for all Class Members at the same time, except for those who voluntarily exclude themselves from the Settlement Class. Session 2 of the Business Litigation Session of the Suffolk County Superior Court is in charge of this class action.

#### **4. Why Is There a Settlement?**

The Court did not decide in favor of Plaintiffs or Defendants. Instead, both sides agreed to a settlement based on a compromise of the claims and defenses. That way, they avoid the cost and risk of a trial, and eligible Settlement Class Members who make a valid claim will get compensation.

The settlement was arrived at through arm's length negotiations conducted in good faith. Plaintiffs and Plaintiffs' Counsel agreed to the settlement terms after considering the results of their factual and legal investigation of the Settlement Class' claims.

Based on their investigation and discovery of the claims, the experience that the Plaintiffs' attorneys have in litigating similar complex actions, the procedural protections provided by the settlement terms, and the valuable consideration that the Settlement Class can obtain from the settlement, Plaintiffs and their attorneys believe that the settlement is best for all Settlement Class Members.

### **WHO IS IN THE SETTLEMENT**

To see if you will get money from this settlement, you first have to determine if you are a

Settlement Class Member.

**5. How Do I Know If I Am Part of the Settlement?**

The Settlement Class includes all persons who own **Series A-1 Preferred Stock and/or Series A-2 Preferred Stock issued by HeartWare, Inc. (or by Perpetual Medical, Inc., the prior legal entity name for HeartWare, Inc.), except those persons and entities that are excluded, as described below.**

**6. What Are The Exceptions to Being Included?**

You are not a Settlement Class Member if: you are a Defendant; you are a member of the immediate family of one of the individual defendants listed in question 1; you, at any time from July 2003 through the present, have served as an officer and/or director of HeartWare International, Inc., HeartWare, Inc., Apple Tree, and/or HeartWare Ltd., or any of their parents, subsidiaries, predecessors, or successors; you are a person, firm, trust, corporation, or entity for which any individual defendant listed in question 1 was a director, officer, and/or partner; you are a person, firm, trust, corporation, or entity in which any Defendant has a controlling interest or any entity which is related to or affiliated with any Defendant; you are an insider or affiliate as defined in the Disclosure Statement referenced in the Complaint at ¶35; or you are the legal representatives, agents, affiliates, heirs, successors and assigns of any such excluded persons listed above.

You are a Settlement Class Member only if you CURRENTLY own shares of Series A-1 Preferred Stock and/or Series A-2 Preferred Stock issued by HeartWare, Inc. (or Perpetual Medical, Inc.).

**7. I'm Still Not Sure if I Am Included.**

If you are still not sure whether you are included, you can ask for free help. You can call the claims administrator, Strategic Claims Services, at (866) 274-4004, for more information. Or you can fill out and return the claim form described in question 10, to see if you qualify.

**THE SETTLEMENT BENEFITS - WHAT YOU GET**

**8. What Does the Settlement Provide?**

Defendants have agreed to pay \$1.125 million (\$1,125,000.00) in cash in settlement of this case. These funds will be distributed to eligible Settlement Class Members who send in valid claim forms, after payment of court-approved legal fees and expenses and the costs of claims administration, including the costs of printing and mailing this Notice and the cost of publishing newspaper notice.

**9. How Much Will My Payment Be?**

Your share of the funds will depend on (a) the number of valid claim forms that Settlement Class Members send in (the fewer the number of Settlement Class members who choose to participate in the Settlement, the larger will be the recovery for each participating Settlement Class Member) and (b) how many shares of HeartWare Inc. (or Perpetual Medical, Inc.) Series A-1 Preferred Stock and Series A-2 Preferred Stock you own.

The Plan of Allocation shall be as follows. An Authorized Claimant's recognized loss ("Recognized Loss") is determined by the quantities owned of Series A-1 Preferred Stock and Series A-2 Preferred Stock issued by HeartWare, Inc. (or Perpetual Medical, Inc.), and the corresponding liquidation preference of each of those shares, as set forth below:

- A. For each unique share of HeartWare, Inc. (or Perpetual Medical, Inc.) Series A-1 Preferred Stock owned, the Recognized Loss is \$10 per share.
- B. For each unique share of HeartWare, Inc. (or Perpetual Medical, Inc.) Series A-2 Preferred Stock owned, the Recognized Loss is \$21 per share.

The payment you get will reflect your pro rata share of the amount in the relevant settlement fund (as a fraction, your recognized loss divided by the total of all recognized losses for the relevant fund) after deduction of court-approved fees and expenses. The number of claimants who send in claims varies widely from case to case. And because the payment you get will depend on the number of eligible shares that participate in the settlement, you could get more or less money per share than described above.

#### **HOW YOU GET A PAYMENT - SUBMITTING A CLAIM FORM**

##### **10. How Will I Get a Payment?**

To qualify for payment, you must be an eligible Settlement Class Member and you must send in a claim form. A claim form is enclosed with this Notice. Read the instructions carefully, fill out the form, include all the documents the form asks for, sign it, and mail it in the enclosed envelope postmarked no later than \_\_\_\_\_, 2012.

##### **11. When Will I Get My Payment?**

The Court will hold a hearing on \_\_\_\_\_, 2012, to decide whether to approve the settlement. If the Court approves the settlement, there may be appeals. It is always uncertain whether these appeals can be resolved, and resolving them can take time, perhaps several years. Everyone who sends in a claim form will be informed of the determination with respect to their

claim. Please be patient.

**12. What Am I Giving Up as Part of the Settlement?**

As part of the settlement, you are agreeing that you cannot sue, continue to sue, or be part of any other lawsuit against the Defendants about the same legal and factual issues in this case. It also means that all of the Court's orders will apply to you and legally bind you and, in return for your participation in the Settlement, you will release your claims in this case against the Defendants. The terms of the release are included in the claim form that is enclosed. You cannot exclude yourself, or opt out, of this settlement.

**THE LAWYERS REPRESENTING YOU**

**13. Do I Have a Lawyer in This Case?**

The Court appointed the law firms of Glancy Binkow & Goldberg LLP and Pastor Law Office, LLP to represent you and other Settlement Class Members.

These lawyers are called Plaintiffs' Counsel. You will not be charged for these lawyers' work. If you want to be represented by your own lawyer, you may hire one at your own expense.

**14. How Will the Lawyers Be Paid?**

Plaintiffs' Counsel will ask the Court for attorneys' fees not to exceed 30% of the Settlement Fund and for reimbursement of out-of-pocket expenses up to \$10,000 which were advanced in connection with the Litigation. Such sums as may be approved by the Court will be paid from the Settlement Fund. Settlement Class Members are not personally liable for any such fees or expenses.

The attorneys' fees and expenses requested, to the extent they are awarded by the Court, will be the only payment to Plaintiffs' Counsel for their efforts in achieving this settlement and



for their risk in undertaking this representation on a wholly contingent basis. To date, Plaintiffs' Counsel have not been paid for their services for conducting this litigation on behalf of Plaintiffs and the Settlement Class or for their out-of-pocket expenses. The fee requested, if awarded, will compensate Plaintiffs' Counsel for their work and risk in achieving the settlement and is well within the range of fees awarded to class counsel under similar circumstances in other cases of this type. The Court may award less than this amount.

### **OBJECTING TO THE SETTLEMENT**

You can tell the Court that you don't agree with the settlement or some part of it.

#### **15. How Do I Tell the Court that I Don't Like the Settlement?**

If you are a Settlement Class Member, you can object to the settlement if you don't like any part of it. You can give reasons why you think the Court should not approve it. The Court will consider your views. To object, you must send a letter saying that you object to the settlement in *Magidson, et al. v. HeartWare, Inc., et al.*, Civil Action No. 11-2398-BLS2. Be sure to include your name, address, telephone number, your signature, the number of shares of HeartWare Series A-1 Preferred Stock and Series A-2 Preferred Stock you own, and the reasons you object to the settlement. Any objection to the settlement must be mailed or delivered such that it is received by each of the following no later than \_\_\_\_\_ (fourteen (14) calendar days prior to the Settlement Hearing):

**(1) The Court, addressed to:**  
CIVIL CLERK'S OFFICE  
Suffolk Superior Court  
County Courthouse, 12th Floor  
Three Pemberton Square  
Boston, MA 02108

**(2) Plaintiffs' Counsel, addressed to:**  
GLANCY BINKOW & GOLDBERG LLP  
Attn: Andy Sohrn  
1925 Century Park East, Suite 2100  
Los Angeles, CA 90067

PASTOR LAW OFFICE, LLP  
Attn: David Pastor  
63 Atlantic Avenue, 3rd Floor  
Boston, MA 02110

-and-

**(3) Defendants' Counsel, addressed to:**  
SHEARMAN & STERLING LLP  
Attn: Kirsten Nelson Cunha  
Stuart J. Baskin  
William J.F. Roll, III  
599 Lexington Avenue  
New York, NY 10022

PROSKAUER ROSE LLP  
Attn: Daniel B. Winslow  
Justin J. Daniels  
One International Place  
Boston, MA 02110

### THE COURT'S FAIRNESS HEARING

The Court will hold a hearing to decide whether to approve the settlement. You may attend and you may ask to speak, but you don't have to.

**16. When and Where Will the Court Decide Whether to Approve the Settlement?**

The Court will hold a fairness hearing at \_\_\_\_\_ a.m./p.m., on \_\_\_\_\_, 2012, at 3 Pemberton Square, Boston, Massachusetts in Courtroom 1017. At this hearing the Court will consider whether the settlement is fair, reasonable, and adequate. If there are objections, the

Court will consider them. The Court will listen to people who have asked to speak at the hearing. The Court will also consider how much to pay to Plaintiffs' Counsel and the extent to which counsel will be reimbursed for their costs and expenses. The Court may decide these issues at the hearing or take them under consideration and decide them at a later time. We do not know how long these decisions will take.

**17. Do I Have to Come to the Hearing?**

No. Plaintiffs' Counsel will answer questions the Court may have. But, you are welcome to come at your own expense. If you send an objection, you don't have to come to Court to talk about it. As long as you mailed your written objection on time, the Court will consider it. You may also pay your own lawyer to attend, but it is not necessary.

**18. May I Speak at the Hearing?**

You may ask the Court for permission to speak at the hearing. To do so, you must send a letter saying that it is your intention to appear in *Magidson, et al. v. HeartWare, Inc., et al.*, Civil Action No. 11-2398-BLS2. Be sure to include your name, address, telephone number, your signature, and the number of shares of HeartWare, Inc. (or Perpetual Medical, Inc.) Series A-1 Preferred Stock and HeartWare Series A-2 Preferred Stock you own. Your notice of intention to appear must be received no later than \_\_\_\_\_ (fourteen (14) calendar days prior to the hearing date), and be sent to the Civil Clerk of the Court, Plaintiffs' Counsel, and Defendants' counsel, at the addresses listed in question 15.

**IF YOU DO NOTHING**

**19. What Happens if I Do Nothing at All?**

If you do nothing, you will get no money from this settlement. In addition, you won't be able to start a lawsuit, continue with a lawsuit, or be part of any other lawsuit against the Defendants about the same legal or factual issues in this case.

### **GETTING MORE INFORMATION**

**20. Are There More Details About the Settlement?**

This Notice summarizes the proposed settlement. More details are in the Stipulation of Settlement dated as of March 22, 2012. You can get a copy of the Stipulation of Settlement from the Civil Clerk's Office at the Suffolk Superior Court County Courthouse, 12th Floor, Three Pemberton Square, Boston, MA 02108, during regular business hours.

**25. How Do I Get More Information?**

For further information regarding this Settlement you may contact: Andy Sohrn, Glancy Binkow & Goldberg LLP, 1925 Century Park East, Suite 2100, Los Angeles, California 90067, telephone: (310) 201-9150. Please do not call any representative of Defendants.

**PLEASE DO NOT TELEPHONE THE COURT REGARDING THIS NOTICE**

DATED: \_\_\_\_\_, 2012

BY ORDER OF THE SUPERIOR COURT  
FOR SUFFOLK COUNTY,  
MASSACHUSETTS

# **EXHIBIT A-2**

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT DEPARTMENT  
BUSINESS LITIGATION SESSION

JAMES MAGIDSON and CHRISTOPHER  
MILLSON, Individually and on Behalf of All  
Others Similarly Situated,

Plaintiffs,

v.

HEARTWARE, INC., HEARTWARE  
INTERNATIONAL, INC., SETH HARRISON,  
DAVID MCINTYRE, ROBERT THOMAS,  
DENIS WADE, CHRISTINE BENNETT,  
ROBERT STOCKMAN, C. RAYMOND  
LARKIN, JR., TIMOTHY J. BARBERICH, and  
DOUGLAS GODSHALL,

Defendants.

Civil Action No. 11-2398-BLS2

**I. GENERAL INSTRUCTIONS**

1. To recover as a Member of the Class based on your claims in the action entitled *Magidson, et al. v. HeartWare, Inc., et al.*, Civil Action No. 11-2398-BLS2 (the "Litigation"), you must complete and, on page \_\_\_ hereof, sign this Proof of Claim and Release. If you fail to timely file a properly addressed (as set forth in paragraph 3 below) Proof of Claim and Release, your claim may be rejected and you may be precluded from any recovery from the Settlement Fund created in connection with the proposed settlement of the Litigation.

2. Submission of this Proof of Claim and Release, however, does not assure that you will share in the proceeds of settlement in the Litigation.

3. **YOU MUST MAIL YOUR COMPLETED AND SIGNED PROOF OF CLAIM AND RELEASE POSTMARKED ON OR BEFORE \_\_\_\_\_, 2012, ADDRESSED AS FOLLOWS:**

HeartWare Litigation Settlement Fund  
c/o Strategic Claims Services  
600 North Jackson Street – Suite 3  
Media, PA 19063

The toll free number for the Claims Administrator is (866) 274-4004.  
If you are NOT a Member of the Settlement Class (as defined in the "Notice of Pendency and

Proposed Settlement of Class Action”) DO NOT submit a Proof of Claim and Release form.

4. If you are a Member of the Class, you are bound by the terms of any judgment entered in the Litigation, WHETHER OR NOT YOU SUBMIT A PROOF OF CLAIM AND RELEASE.

## **II. DEFINITIONS**

Terms as defined in the Notice of Pendency and Proposed Settlement of Class Action and Settlement Hearing Thereon shall also apply herein.

## **III. CLAIMANT IDENTIFICATION**

1. Use Part I of the form entitled “Claimant Identification” to identify each owner of HeartWare Inc. Series A-1 Preferred Stock and Series A-2 Preferred Stock, which forms the basis of this claim. THIS CLAIM MUST BE FILED BY THE ACTUAL OWNER, OR THE LEGAL REPRESENTATIVE OF SUCH OWNER, OF THE SHARES OF HEARTWARE INC. SERIES A-1 PREFERRED STOCK AND SERIES A-2 PREFERRED STOCK UPON WHICH THIS CLAIM IS BASED.

2. All joint owners must sign this claim. Executors, administrators, guardians, conservators and trustees must complete and sign this claim on behalf of Persons represented by them and their authority must accompany this claim and their titles or capacities must be stated. The Social Security (or taxpayer identification) number and telephone number of the beneficial owner may be used in verifying the claim. Failure to provide the foregoing information could delay verification of your claim or result in rejection of the claim.

## **IV. CLAIM FORM**

1. Use Part II of the form entitled “Schedule of HeartWare Series A-1 and A-2 Preferred Stock” to supply the details of your ownership in HeartWare Series A-1 Preferred Stock and Series A-2 Preferred Stock.

2. Documentation of your ownership in HeartWare Series A-1 Preferred Stock and Series A-2 Preferred Stock must be attached to your claim. Failure to provide this documentation could delay verification of your claim or result in rejection of your claim.

Superior Court of the Commonwealth of Massachusetts  
 Suffolk County, Business Litigation Session, Session 2

*Magidson, et al. v. HeartWare, Inc., et al.*

Civil Action No. 11-2398-BLS2

**PROOF OF CLAIM AND RELEASE**

Must be Postmarked on or Before:  
 \_\_\_\_\_, 2012

Please Type or Print

PART I: CLAIMANT IDENTIFICATION		
Owner's Name (First, Middle, Last)		
Street Address		
City	State or Province	Zip Code or Postal Code
Country		
Social Security Number or Taxpayer Identification Number	_____	Individual
	_____	Corporation
	_____	UGMA Custodian
	_____	IRA
	_____	Partnership
	_____	Estate
	_____	Trust
	_____	Other:
Area Code	Telephone Number (work)	
Area Code	Telephone Number (home)	
Area Code	Telephone Number (fax)	
Email Address		



PART II: SCHEDULE OF HEARTWARE INC. (OR PERPETUAL MEDICAL, INC.) SERIES A-1 AND A-2 PREFERRED STOCK		
A. Number of shares of HeartWare, Inc. (or Perpetual Medical, Inc.) Series A-1 Preferred Stock Owned as of Today: _____		
B. Number of shares of HeartWare, Inc. (or Perpetual Medical, Inc.) Series A-2 Preferred Stock Owned as of Today: _____		
Number of Shares	Stock Certificate Number	Type of Share: A-1 or A-2
1.		
2.		
3.		
4.		
5.		
6.		
7.		
8.		
If you require additional space, attach extra schedules in the same format as above. Sign and print your name on each additional page.		
YOU MUST READ THE RELEASE AND SIGN ON PAGE _____.		

## V. SUBMISSION TO JURISDICTION OF COURT AND ACKNOWLEDGMENTS

I (We) submit this Proof of Claim and Release under the terms of the Stipulation of Settlement described in the Notice. I (We) also submit to the jurisdiction of the Superior Court of the Commonwealth of Massachusetts, Suffolk County, with respect to my (our) claim as a Class Member and for purposes of enforcing the release set forth herein. I (We) further acknowledge that I am (we are) bound by and subject to the terms of any Judgment that may be entered in the Litigation. I (We) agree to furnish additional information such as transactions in HeartWare Inc. (or Perpetual Medical, Inc.) preferred stock to the Claims Administrator to support this claim if required to do so. I (We) have not submitted any other claim covering the same ownership of HeartWare Inc. (or Perpetual Medical, Inc.) Series A-1 Preferred Stock and/or Series A-2 Preferred Stock and know of no other Person having done so on my (our) behalf.

## VI. RELEASE

1. I (we) hereby acknowledge full and complete satisfaction of, and do hereby fully, finally and forever settle, release and discharge from the Released Claims each and all of the Released Parties and each and all of their "Corresponding Released Parties," defined as each and every past and current Defendant,<sup>1</sup> each Defendant's past or present directors, officers, employees, partners, member firms or affiliates, principals, agents, predecessors, successors, parents, subsidiaries, divisions, joint ventures, attorneys, investment bankers, commercial bankers, underwriters, financial or investment advisors, consultants, accountants, insurers, reinsurers, assigns, spouses, heirs, associates, related or affiliated entities, or any members of their immediate families, or any trusts for which any of them are trustees, settlers, or beneficiaries.
2. "Released Claims" shall mean all claims (including "Unknown Claims" as defined below in paragraph 3), demands, rights, actions or causes of action, liabilities, damages, losses, obligations, judgments, suits, fees, expenses, costs, matters and issues of any kind or nature whatsoever, that were alleged in the Action, or that could have been alleged in the Action, or any other proceeding (including, but not limited to, any claims arising under federal, state, or common law) relating to any right to receive a payment on HeartWare Inc. Series A-1 Stock and/or Series A-2 Stock upon any liquidation event and/or any deemed liquidation event that have arisen, could have arisen, arise now, or may arise in the future.
3. "Unknown Claims" shall collectively mean all claims, demands, rights, liabilities, and causes of action of every nature and description which Plaintiffs or any Settlement Class Member does not know or suspect to exist in his, her, or its favor at the time of the release of the Released Parties which, if known by him, her or it, might have affected his, her or its settlement with and release of the Released Parties, or might have affected his, her or its decision not to object to this Settlement. With respect to any and all Released Claims, the Parties stipulate and agree that, upon the Effective Date, Plaintiffs shall expressly waive, and each of the Settlement Class Members shall be deemed to have waived, and by operation of the Final Judgment and

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<sup>1</sup> As defined in the Stipulation, "Defendants" mean the defendants named in this Action, consisting of: HeartWare, Inc., HeartWare International, Inc., Apple Tree Partners I, L.P., Seth Harrison, Robert Stockman, Timothy J. Barberich, Douglas Godshall, David McIntyre, Robert Thomas, Denis Wade, Christine Bennett, and C. Raymond Larkin, Jr.

Order of Dismissal With Prejudice shall have waived, the provisions, rights and benefits of California Civil Code §1542, which provides:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

Plaintiffs shall expressly and each of the Settlement Class Members shall be deemed to have, and by operation of the Final Judgment and Order of Dismissal With Prejudice shall have, expressly waived any and all provisions, rights and benefits conferred by any law of any state or territory of the United States, or principle of common law, which is similar, comparable, or equivalent to California Civil Code §1542. Plaintiffs and Settlement Class Members may hereafter discover facts in addition to or different from those which he, she, or it now knows or believes to be true with respect to the subject matter of the Released Claims, but Plaintiffs shall expressly fully, finally and forever settle and release, and each Settlement Class Member, upon the Effective Date, shall be deemed to have, and by operation of the Final Judgment and Order of Dismissal With Prejudice shall have, fully, finally, and forever settled and released, any and all Released Claims, known or unknown, suspected or unsuspected, contingent or non-contingent, whether or not concealed or hidden, which now exist, or heretofore have existed, upon any theory of law or equity now existing or coming into existence in the future. including, but not limited to, conduct which is negligent, intentional, with or without malice, or a breach of any duty, law or rule, without regard to the subsequent discovery or existence of such different or additional facts. Plaintiffs acknowledge, and the Settlement Class Members shall be deemed by operation of the Final Judgment and Order of Dismissal With Prejudice to have acknowledged, that the foregoing waiver was separately bargained for and a key element of the Settlement of which this release is a part.

4. This release shall only be in force when the Court approves the Stipulation of Settlement and the Stipulation (which contains releases made by Defendants in favor of the Settlement Class Members) becomes effective on the Effective Date (as defined in the Stipulation).

5. I (We) hereby warrant and represent that I (we) have not assigned or transferred or purported to assign or transfer, voluntarily or involuntarily, any matter released pursuant to this release or any other part or portion thereof.

I (We) have read the foregoing Proof of Claim and Release and declare under penalty of perjury under the laws of the United States of America that all of the information contained herein, and in the documents attached hereto, is true, correct and complete to the best of our knowledge, information and belief and that this form was executed on the \_\_\_\_ day of \_\_\_\_\_, 2012 in \_\_\_\_\_.

(City) (State) (Country)

\_\_\_\_\_  
Signature of Claimant

\_\_\_\_\_  
(Print Your Name Here)

\_\_\_\_\_  
Signature of Joint Claimant, If Any

\_\_\_\_\_  
(Print Your Name Here)

\_\_\_\_\_  
Signature of person signing on behalf of Claimant

\_\_\_\_\_  
(Print Your Name Here)

\_\_\_\_\_  
Capacity of person signing on behalf of Claimant

THIS PROOF OF CLAIM MUST BE MAILED TO THE CLAIMS ADMINISTRATOR BY  
FIRST-CLASS MAIL, POSTAGE PREPAID, **POSTMARKED BY** \_\_\_\_\_,  
ADDRESSED AS FOLLOWS:

HeartWare Litigation Settlement Fund  
c/o Strategic Claims Services  
600 N. Jackson Street, Suite 3  
Media, PA 19063

**ACCURATE CLAIMS PROCESSING TAKES A  
SIGNIFICANT AMOUNT OF TIME.  
THANK YOU FOR YOUR PATIENCE.**

Reminder Checklist:

1. Please sign the above release and declaration.
2. Remember to attach supporting documentation.
3. Keep a copy of your claim form for your records.
4. If you desire an acknowledgment of receipt of your claim form, please send it Certified Mail, Return Receipt Requested.
5. If you move, please send us your new address.

# **EXHIBIT A-3**

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT DEPARTMENT  
BUSINESS LITIGATION SESSION

JAMES MAGIDSON and CHRISTOPHER )  
MILLSON, Individually and on Behalf of All )  
Others Similarly Situated, )

Plaintiffs, )

v. )

HEARTWARE, INC., HEARTWARE )  
INTERNATIONAL, INC., SETH HARRISON, )  
DAVID MCINTYRE, ROBERT THOMAS, )  
DENIS WADE, CHRISTINE BENNETT, )  
ROBERT STOCKMAN, C. RAYMOND )  
LARKIN, JR., TIMOTHY J. BARBERICH, and )  
DOUGLAS GODSHALL, )

Defendants. )

Civil Action No. 11-2398-BLS2

**SUMMARY NOTICE OF PENDENCY AND PROPOSED SETTLEMENT OF ACTION  
AND SETTLEMENT HEARING THEREON**

**TO: ALL PERSONS WHO OWN SERIES A-1 PREFERRED STOCK AND/OR  
SERIES A-2 PREFERRED STOCK ISSUED BY HEARTWARE, INC. (OR  
ISSUED BY PERPETUAL MEDICAL, INC., THE PRIOR LEGAL ENTITY  
NAME FOR HEARTWARE, INC.).**

YOU ARE HEREBY NOTIFIED, pursuant to Rule 23 of the Massachusetts Rules of Civil Procedure and an Order of the Superior Court of the Commonwealth of Massachusetts, Suffolk County, that a hearing will be held on \_\_\_\_\_, 2012, at \_\_\_\_\_m., before the Court in Courtroom 1017 at 3 Pemberton Square, Boston, Massachusetts, for the purpose of determining (1) whether the proposed settlement of the claims in the above-referenced litigation (the "Litigation") for the principal amount of \$1,125,000.00, plus accrued interest, should be approved by the Court as fair, reasonable, and adequate; (2) whether a Final Judgment and Order of Dismissal with Prejudice should be entered by the Court dismissing the Litigation with prejudice; (3) whether the Plan of Allocation is fair, reasonable, and adequate and therefore should be approved; and (4) whether the application of Plaintiffs' Counsel for the payment of attorneys' fees and reimbursement of expenses incurred in connection in this Litigation should be approved. The Defendants in this Action are HeartWare, Inc., HeartWare International, Inc., Apple Tree Partners I, L.P., Seth Harrison, Robert Stockman, Timothy J. Barberich, Douglas Godshall, David McIntyre, Robert Thomas, Denis Wade, Christine Bennett, and C. Raymond Larkin, Jr.

If you own HeartWare, Inc. (or Perpetual Medical, Inc.) Series A-1 Preferred Stock and/or Series A-2 Preferred Stock, your rights may be affected by the settlement of this Litigation. If you have not received a detailed Notice of Pendency and Proposed Settlement of Class Action and Settlement Hearing Thereon ("Notice") and a copy of the Proof of Claim and Release, you may obtain copies by writing to HeartWare Litigation Settlement Fund, c/o Strategic Claims Services, 600 North Jackson Street – Suite 3, Media, PA, 19063 or by visiting the website of the Claims Administrator at [www.strategicclaims.net](http://www.strategicclaims.net). If you are a Settlement Class Member, in order to share in the distribution of the Net Settlement Fund, you must submit a Proof of Claim and Release postmarked no later than \_\_\_\_\_, 2012, establishing that you are entitled to recovery.

If you are a member of the Settlement Class and would like to object to any part of the settlement, any objection to the settlement must be in the manner and form explained in the detailed Notice and mailed such that they are received by \_\_\_\_\_, 2012, by the following:

**(1) The Court, addressed to:**

CIVIL CLERK'S OFFICE  
Suffolk Superior Court  
County Courthouse, 12th Floor  
Three Pemberton Square  
Boston, MA 02108

**(2) Plaintiffs' Counsel, addressed to:**

GLANCY BINKOW & GOLDBERG LLP  
Attn: Andy Sohrn  
1925 Century Park East, Suite 2100  
Los Angeles, CA 90067

PASTOR LAW OFFICE LLP

Attn: David Pastor  
63 Atlantic Avenue, 3rd Floor  
Boston, MA 02110

-and-

**(3) Defendants' Counsel, addressed to:**

SHEARMAN & STERLING LLP  
Attn: Kirsten Nelson Cunha  
Stuart J. Baskin  
William J.F. Roll, III  
599 Lexington Avenue  
New York, NY 10022

PROSKAUER ROSE LLP

Attn: Daniel B. Winslow  
Justin J. Daniels  
One International Place



Boston, MA 02110

**PLEASE DO NOT CONTACT THE COURT OR THE CLERK'S OFFICE REGARDING THIS NOTICE.** If you have any questions about the settlement, you may contact Plaintiffs' Counsel at the addresses listed above.

Dated: \_\_\_\_\_, 2012

BY ORDER OF THE SUPERIOR COURT  
FOR SUFFOLK COUNTY,  
MASSACHUSETTS

# EXHIBIT B

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT DEPARTMENT  
BUSINESS LITIGATION SESSION

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JAMES MAGIDSON and CHRISTOPHER )  
MILLSON, Individually and on Behalf of All )  
Others Similarly Situated, )  
Plaintiffs, )  
v. )  
HEARTWARE, INC., HEARTWARE )  
INTERNATIONAL, INC., SETH HARRISON, )  
DAVID MCINTYRE, ROBERT THOMAS, )  
DENIS WADE, CHRISTINE BENNETT, )  
ROBERT STOCKMAN, C. RAYMOND )  
LARKIN, JR., TIMOTHY J. BARBERICH, and )  
DOUGLAS GODSHALL, )  
Defendants. )

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Civil Action No. 11-2398-BLS2

**[PROPOSED] FINAL JUDGMENT AND ORDER  
OF DISMISSAL WITH PREJUDICE**

On the \_\_\_\_\_ day of \_\_\_\_\_, 2012, a hearing having been held before this Court to determine: (1) whether the terms and conditions of the Stipulation of Settlement dated March 22, 2012 (the “Stipulation”) are fair, reasonable, and adequate for the settlement of all claims asserted by the Settlement Class against the Defendants<sup>1</sup> in the Complaint now pending in this Court under the above caption, including the release of the Defendants and the Released

<sup>1</sup> As defined in the Stipulation, “Defendants” mean the defendants named in this Action, consisting of: HeartWare, Inc., HeartWare International, Inc., Apple Tree Partners I, L.P. (“Apple Tree”), Seth Harrison, Robert Stockman, Timothy J. Barberich, Douglas Godshall, David McIntyre, Robert Thomas, Denis Wade, Christine Bennett, and C. Raymond Larkin, Jr.

Parties, and should be approved; (2) whether judgment should be entered dismissing the Complaint on the merits and with prejudice in favor of the Defendants and as against all persons or entities who are members of the Settlement Class herein; (3) whether to approve the Plan of Allocation as a fair and reasonable method to allocate the settlement proceeds among the members of the Settlement Class; and (4) whether and in what amount to award Plaintiffs' Counsel fees and reimbursement of expenses. The Court having considered all matters submitted to it at the hearing and otherwise; and it appearing that a notice of the hearing substantially in the form approved by the Court was mailed to all persons or entities reasonably identifiable who own HeartWare Inc. (or Perpetual Medical, Inc.) Series A-1 Preferred Stock and/or Series A-2 Preferred Stock, except those persons or entities excluded from the definition of the Settlement Class, and that a summary notice of the hearing substantially in the form approved by the Court was published in the *Investor's Business Daily* pursuant to the specifications of the Court; and the Court having considered and determined the fairness and reasonableness of the award of attorneys' fees and expenses requested; and all capitalized terms used herein having the meanings as set forth and defined in the Stipulation.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. This Judgment incorporates by reference the definitions in the Stipulation, and all terms used herein shall have the same meanings as set forth in the Stipulation. The Court has jurisdiction over the subject matter of the Action, the Plaintiffs, all Settlement Class Members, and the Defendants.

2. The Court finds that the prerequisites for a class action under Federal Rules of Civil Procedure 23 (a) and (b)(3) have been satisfied in that: (a) the number of Settlement Class

Members is so numerous that joinder of all members thereof is impracticable; (b) there are questions of law and fact common to the Class; (c) the claims of the Class Representative is typical of the claims of the Class it seek to represent; (d) the Class Representative and Plaintiffs' Counsel have and will fairly and adequately represent the interests of the Class; (e) the questions of law and fact common to the members of the Class predominate over any questions affecting only individual members of the Class; and (f) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

3. For the purposes of this Settlement only, the Action is hereby finally certified as a class action under Rule 23(a) and (b) of the Massachusetts Rules of Civil Procedure, on behalf of a plaintiff class (the "Settlement Class") consisting of all Persons (including Plaintiffs) who own Series A-1 Preferred Stock and/or Series A-2 Preferred Stock issued by HeartWare, Inc. (or issued by Perpetual Medical, Inc., the prior legal entity name for HeartWare, Inc.). Excluded from the Settlement Class are Defendants; the members of Individual Defendants' immediate families; all individuals who, at any time from July 2003 through the present, have served as officers and/or directors of HeartWare Int'l, HeartWare Inc., Apple Tree, and/or HeartWare Ltd., or any of their parents, subsidiaries, predecessors, or successors; any person, firm, trust, corporation, or entity for which any Individual Defendant was a director, officer, and/or partner; any person, firm, trust, corporation, or entity in which any Defendant has a controlling interest or any entity which is related to or affiliated with any Defendant; any insider or affiliate as defined in the Disclosure Statement referenced in the Complaint at ¶35; and the legal representatives, agents, affiliates, heirs, successors and assigns of any such excluded persons.

4. Notice of the pendency of this Action as a class action and of the proposed Settlement was given to all Settlement Class Members who could be identified with reasonable effort. The form and method of notifying the Class of the pendency of the action as a class action and of the terms and conditions of the Settlement met the requirements of Rule 23(c) of the Massachusetts Rules of Civil Procedure, due process, and any other applicable law, constituted the best notice practicable under the circumstances, and constituted due and sufficient notice to all persons and entities entitled thereto.

5. The Settlement is approved as fair, reasonable, and adequate, and the Settlement Class Members and the Parties are directed to consummate the Settlement in accordance with the terms and provisions of the Stipulation.

6. The Complaint is hereby dismissed with prejudice and without costs, except as provided in the Stipulation, as against the Defendants.

7. Plaintiffs and all Settlement Class Members, on behalf of themselves and on behalf of the other Corresponding Released Parties, are hereby permanently barred and enjoined from asserting or maintaining against, each and every past and current Defendant, each Defendant's past or present directors, officers, employees, partners, member firms or affiliates, principals, agents, predecessors, successors, parents, subsidiaries, divisions, joint ventures, attorneys, investment bankers, commercial bankers, underwriters, financial or investment advisors, consultants, accountants, insurers, reinsurers, assigns, spouses, heirs, associates, related or affiliated entities, or any members of their immediate families, or any trusts for which any of them are trustees, settlors, or beneficiaries, all claims (including "Unknown Claims" as defined

below), demands, rights, actions or causes of action, liabilities, damages, losses, obligations, judgments, suits, fees, expenses, costs, matters and issues of any kind or nature whatsoever, that were alleged in the Action, or that could have been alleged in the Action, or any other proceeding (including, but not limited to, any claims arising under federal, state, or common law) relating to any right to receive a payment on HeartWare Inc. (or Perpetual Medical, Inc.) Series A-1 Preferred Stock and/or Series A-2 Preferred Stock upon any Liquidation Event and/or any Deemed Liquidation Event, as such terms are used and defined in the Complaint or otherwise herein, alleged breach of fiduciary duty, or breach of contract, by Plaintiffs against Defendants, whether individual, derivative, representative, legal, or any other type, that Plaintiffs ever had, or hereafter can, shall, or may have, by reason of, arising out of, relating to, or in connection with the subject matter of the Action, including without limitation the allegations, facts, events, transactions, acts, occurrences, statements, representations, misrepresentations, omissions, or any other matter, thing, or cause whatsoever, or any series thereof, embraced, involved, set forth, or otherwise related, directly or indirectly, to the Action, that have arisen, could have arisen, arises now, or arises or may arise in the future (collectively, the “Released Claims” as also defined in the Stipulation at ¶1.19). The Released Claims are hereby compromised, settled, released, discharged and dismissed as against the Released Parties on the merits and with prejudice by virtue of the proceedings herein and this Final Judgment and Order of Dismissal.

8. Defendants, on behalf of themselves and on behalf of the other Corresponding Released Parties, shall be deemed to have, and by operation of this Final Judgment and Order of Dismissal shall have, fully, finally, and forever released, relinquished and discharged Plaintiffs, and each of them, and/or their respective families, parent entities, associates, affiliates or

subsidiaries, and each and all of their respective past, present or future officers, directors, stockholders, agents, representatives, employees, attorneys, financial or investment advisors, advisors, consultants, accountants, investment bankers, commercial bankers, trustees, engineers, agents, insurers, co-insurers and reinsurers, heirs, executors, trustees, general or limited partners or partnerships, limited liability companies, members, personal or legal representatives, estates, administrators, predecessors, successors and assigns or other individuals or entities in which any Plaintiff has a controlling interest or which is related to or affiliated with Plaintiffs and any other representatives of any of these Persons or entities whether or not any such Released Parties were named, served with process, or appeared in the Action, from all claims (including "Unknown Claims"), demands, rights, liabilities or causes of action, in law or in equity, accrued or unaccrued, fixed or contingent, direct, individual or representative, of every nature and description whatsoever, whether based on federal, state, local, statutory or common law or any other law, rule or regulation, including the law of any jurisdiction outside the United States, against Plaintiffs and their Corresponding Released Parties, arising out of the instituting, prosecution, settlement or resolution of the Action, provided however, that Defendants and their Corresponding Released Parties shall retain the right to enforce in the Court the terms of the Stipulation or the MOU, belonging to Defendants and their present or past heirs, executors, estates, administrators, predecessors, successors, assigns, parents, subsidiaries, associates, affiliates, employers, employees, agents, consultants, insurers, directors, managing directors, officers, partners, principals, members, attorneys, accountants, financial and other advisors, investment bankers, underwriters, lenders, and any other representatives of any of these Persons and entities (including, without limitation, any claims, whether direct, derivative, representative



or in any other capacity, arising under federal, state, local, statutory or common law or any other law, rule or regulation, including the law of any jurisdiction outside of the United States).

9. Neither this Final Judgment and Order of Dismissal, the Stipulation, nor any of its terms and provisions, nor any of the negotiations or proceedings connected with it, nor any of the documents or statements referred to therein shall be:

(a) offered or received against the Defendants as evidence of or construed as or deemed to be evidence of any presumption, concession, or admission by any of the Defendants with respect to the truth of any fact alleged by any of the Plaintiffs or the validity of any claim that has been or could have been asserted in the Action or in any litigation, or the deficiency of any defense that has been or could have been asserted in the Action or in any litigation, or of any liability, negligence, fault, or wrongdoing of the Defendants;

(b) offered or received against the Defendants as evidence of a presumption, concession or admission with respect to any liability, negligence, fault or wrongdoing, or in any way referred to for any other reason as against any of the Defendants, in any other civil, criminal or administrative action or proceeding, other than such proceedings as may be necessary to effectuate the provisions of the Stipulation; provided, however, that Defendants may refer to it to effectuate the liability protection granted them hereunder;

(c) construed against the Defendants as an admission or concession that the consideration to be given hereunder represents the amount which could be or would have been recovered after trial; or

(d) construed as or received in evidence as an admission, concession, or presumption against Plaintiffs or any of the Settlement Class Members that any of their claims are without merit, or that any defenses asserted by the Defendants have any merit, or that damages recoverable under the Complaint would not have exceeded the Gross Settlement Fund.

10. The Plan of Allocation is approved as fair and reasonable, and Plaintiffs' Counsel and the Claims Administrator are directed to administer the Stipulation in accordance with its terms and provisions.

11. Plaintiffs' Counsel are hereby awarded \_\_\_\_\_% of the Gross Settlement Fund in fees, which sum the Court finds to be fair and reasonable, and \$\_\_\_\_\_ in reimbursement of expenses, which amounts shall be paid to Plaintiffs' Counsel from the Settlement Fund with interest from the date such Settlement Fund was funded to the date of payment at the same net rate that the Settlement Fund earns. The award of attorneys' fees shall be allocated among Plaintiffs' Counsel in a fashion which, in the opinion of Glancy Binkow & Goldberg LLP, fairly compensates Plaintiffs' Counsel for their respective contributions in the prosecution of the Action.

12. Exclusive jurisdiction is hereby retained over the parties and the Class Members for all matters relating to this Action, including the administration, interpretation, effectuation or enforcement of the Stipulation and this Final Judgment and Order of Dismissal, and including any application for fees and expenses incurred in connection with administering and distributing the settlement proceeds to the members of the Class.

13. Without further order of the Court, the Parties may agree to reasonable extensions of time to carry out any of the provisions of the Stipulation.

14. There is no just reason for delay in the entry of this Final Judgment and Order of Dismissal and immediate entry by the Clerk of the Court is expressly directed.

Dated: Boston, Massachusetts  
\_\_\_\_\_, 2012

\_\_\_\_\_  
JUSTICE OF THE SUFFOLK COUNTY  
SUPERIOR COURT