

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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	:	No. 10-CV-4572 (ERK) (CLP)
WILLIAM BURNS and THERESA BLACK,	:	
Individually and on Behalf of All Others Similarly	:	
Situated,	:	
	:	
Plaintiff,	:	
	:	
-against-	:	
	:	
FALCONSTOR SOFTWARE, INC.; ESTATE OF	:	
REIJANE HUAI; SHUWEN HUAI, as	:	
Executor/Fiduciary of the ESTATE OF REIJANE	:	
HUAI; and JAMES WEBER	:	
	:	
Defendants.	:	
-----X	:	

**LEAD PLAINTIFF’S NOTICE OF MOTION AND MOTION FOR:  
(1) FINAL APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT; AND  
(2) AWARD OF COUNSEL FEES, REIMBURSEMENT OF EXPENSES, AND  
AWARD TO LEAD PLAINTIFF**

PLEASE TAKE NOTICE that on March 3, 2014, at 2:00 a.m. in Courtroom 8A of the United States District Court for the Eastern District of New York, located at 225 Cadman Plaza East, Brooklyn, New York 11201, plaintiffs will and hereby do move the Court, the Honorable Edward R. Korman, for final approval of the proposed class action settlement and an award of counsel fees, reimbursement of expenses, and award to Lead Plaintiff.

This motion is based upon this notice of motion and motion, the accompanying memorandum of law, the accompanying declaration of Phillip Kim in support of the motion, the exhibits attached thereto, and such argument and additional papers as may be submitted to the Court before and at the hearing on this motion.

Dated: January 27, 2014

Respectfully submitted,

**THE ROSEN LAW FIRM, P.A.**

/s/ Phillip Kim

\_\_\_\_\_  
Laurence M. Rosen, Esq. (LR 5733)

Phillip Kim, Esq. (PK 9384)

275 Madison Avenue, 34<sup>th</sup> Floor

New York, New York 10016

Telephone: 212-686-1060

Facsimile: 212-202-3827

**CERTIFICATE OF SERVICE**

I hereby certify that on this on the 27th day of January, 2014, a true and correct copy of the foregoing document was served by CM/ECF to the parties registered to the Court's CM/ECF system.

/s/ Phillip Kim

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**[PROPOSED] ORDER AND JUDGMENT**

On the \_\_\_\_ day of \_\_\_\_\_, 2013, a hearing having been held before this Court to determine: (i) whether the proposed Settlement should be approved as fair, reasonable and adequate; (ii) whether all Settled Claims should be dismissed with prejudice; (iii) whether an order approving the Settlement should be entered for all claims asserted by the Class (defined below) against FalconStor Software, Inc. (“FalconStor”); James Weber; the Estate of ReiJane Huai; and ShuWen Huai as Executor/Fiduciary of the Estate (collectively, the “Defendants”); (iv) whether the allocation of the Gross Settlement Fund should be approved; and (v) whether the application for an award of Attorneys’ Fees and Expenses should be approved;

The Court having considered all matters submitted to it at the hearing and otherwise; and

It appearing that a notice of the Settlement Hearing substantially in the form approved by the Court in the Court’s Order of Preliminary Approval of Settlement (“Preliminary Approval Order”) was mailed to all persons and entities reasonably identifiable who purchased FalconStor

common stock that is the subject of the Litigation, during the Class Period, except those persons and entities excluded from the definition of the Class; and

It appearing that the Summary Notice of Pendency and Settlement of Class Action substantially in the form approved by the Court in the Preliminary Approval Order was published in accordance with the Preliminary Approval Order and the specifications of the Court;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED  
THAT:

1. The Court has jurisdiction over the subject matter of the Litigation, Plaintiffs, all Class Members and the Defendants.

2. All capitalized terms used herein have the same meanings as set forth and defined in the Stipulation.

3. The District Court finds that the prerequisites for a class action under Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure have been satisfied in that: (a) the number of 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 Lead Plaintiff are typical of the claims of the Class he seek to represents; (d) Lead Plaintiff fairly and adequately represents 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.

4. Pursuant to Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure and for purposes of the Settlement only, the Court hereby certifies the following action as a class action: all persons who purchased or otherwise acquired the common stock of FalconStor during the

period from March 12, 2008 and September 29, 2010, inclusive. The “Class” and “Class Members” mean, for purposes of this Settlement, all Persons who purchased FalconStor common stock during the Class Period. Excluded from the Class are Defendants, the officers and directors of FalconStor during the Class Period, members of their immediate families and their legal representatives, heirs, successors, and assigns and any entity in which any Defendant has or had a controlling interest. Also excluded from the Class are those Persons who filed valid and timely requests for exclusion in accordance with the Court’s Preliminary Approval Order. A list of such excluded parties is attached hereto as Exhibit A.

5. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, and for purposes of the Settlement only, Lead Plaintiff is certified as the class representative and Lead Plaintiff’s Counsel previously selected by Lead Plaintiff and appointed by the Court is hereby appointed as Lead Counsel for the Class.

6. The Stipulation is approved as fair, reasonable and adequate, and in the best interests of the Class. Lead Plaintiff and FalconStor Defendants are directed to consummate the Settlement in accordance with the terms and provisions of the Stipulation.

7. The Litigation is hereby dismissed on the merits with prejudice and without costs.

8. The obligations incurred pursuant to the Settlement and this Judgment are in full and final disposition of the Litigation and any and all Settled Claims; any and all Settled FalconStor Defendants’ Claims as against Lead Plaintiff, Class Members, or their attorneys; and FalconStor Defendants or their attorneys, as well as the Released Huai Estate’s Claims.

9. Lead Plaintiff and Class Members on behalf of themselves, each of their current and former heirs, executors, administrators, successors, attorneys, insurers, and assigns, and any Person they represent, with respect to each and every Settled Claim, release and forever

relinquish and discharge, and are forever enjoined from prosecuting, all Settled Claims against any of the Released Parties. The Released Parties' liability to Lead Plaintiff and to the Class expressly is extinguished under the Settlement.

10. Each of the FalconStor Defendants, on behalf of themselves and their successors and assigns, release and forever discharge each and every one of Settled FalconStor Defendants' Claims, and are forever enjoined from prosecuting Settled FalconStor Defendants' Claims as against any of Lead Plaintiff, Class Members, or their attorneys, any other FalconStor Defendant or their attorneys, including, but not limited to, claims for malicious prosecution or sanctions, except as detailed below as to Reserved Defendants' Claims.

11. The Huai Estate, on behalf of itself and any successors and assigns, shall release and forever discharge each and every one of Released Huai Estate's Claims, and shall forever be enjoined from prosecuting Released Huai Estate's Claims as against any FalconStor Defendant or its attorneys. Nothing in this Judgment or the Settlement otherwise purports to affect any of the Huai Estate's claims.

12. All Persons are barred from bringing any claim against the Released Parties arising out of or related to the Settled Claims, except that this paragraph shall not apply to: (i) the Reserved Defendants' Claims; or (ii) any claims by the Huai Estate except those within the scope of the Released Huai Estate's Claims.

13. FalconStor Defendants are barred from bringing any claim arising out of or related to the Settled Claims against any such Persons, except that this paragraph shall not apply to the Reserved Defendants' Claims. As separately bargained for and material elements of the Settlement, the Reserved Defendants' Claims are excluded from the scope of this Judgment and the Settlement, such that: (i) the Settlement shall fully "extinguish" the Huai Estate's liability to

the Class, as defined in 15 U.S.C. § 78u-4(f)(7)(A)(ii), in exchange for and consideration of the Settlement Amount paid by FalconStor (which may include funds that FalconStor has received or will receive from its insurers); and (ii) no contribution bar pursuant to the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4(f)(7), shall apply to claims or potential claims by FalconStor Defendants against the Huai Estate.

14. The Huai Estate is barred from bringing any contribution claim arising out of or related to the Litigation against any of the Settling Parties, consistent with 15 U.S.C. § 78u-4(f)(7)(i) and the releases provided herein.

15. Any Defendant against whom a judgment is rendered in the Litigation will be entitled (collectively) to a judgment credit pursuant to 15 U.S.C. §78u-4(f)(7)(B).

16. The Court finds that all parties and their counsel have complied with each requirement of Rule 11 of the Federal Rules of Civil Procedure as to all proceedings herein.

17. Neither this Order or Judgment, the Stipulation, nor the fact of the settlement, is an admission or concession by any Defendant of any liability or wrongdoing whatsoever. This Order and Judgment is not a finding of the validity or invalidity of any claims in the Litigation or of any wrongdoing by any of Defendants. Accordingly, this Order and Judgment, the Stipulation, the fact of settlement, the settlement discussions, the settlement proceedings, any statements or documents relating to the settlement, and/or any settlement terms, shall in no event be used or construed as, or deemed to be evidence of, an admission of any fault, liability, or wrongdoing by any Person, including with respect to any fact or matter alleged in the Litigation, or any claim, fault, liability, wrongdoing, or damage whatsoever, or any infirmity in any claim or defense that has been or could have been asserted. Further, this Judgment, the Stipulation, the fact of settlement, the settlement discussions, the settlement proceedings, any statements or



documents relating to the settlement, and/or any settlement terms, shall in no event be offered or received in evidence as an admission, concession, presumption, or inference against any party in any action or proceeding of any nature or otherwise referred to or used in any manner in any court or other tribunal, except in such proceeding as may be necessary to consummate or enforce the Settlement.

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

19. 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.

20. There is no just reason for delay in the entry of this Order and Judgment and immediate entry by the Clerk of the Court is directed pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

21. The finality of this Order and Judgment shall not be affected, in any manner, by rulings that the Court may make on Lead Plaintiff's Counsel's application for an award of attorneys' fees and reimbursement of expenses.

22. The Court hereby finds that the proposed Plan of Allocation is a fair and reasonable method to allocate the settlement proceeds among members of the Class.

23. The Court hereby finds that the notice provided to the Class provided the best notice practicable under the circumstances. Said notice provided due and adequate notice of these proceedings and the matters set forth herein, including the Settlement and Plan of

Allocation, to all persons entitled to such notice, and said notice fully satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure and the requirements of due process. A full opportunity has been offered to the Class Members to object to the proposed Settlement and to participate in the hearing thereon. Thus, it is hereby determined that all members of the Class are bound by this Order and Judgment except those persons set forth on Exhibit A to this Order and Judgment.

24. In the event that the Settlement does not become final and effective in accordance with the terms and conditions set forth in the Stipulation, then this Order and Judgment shall be rendered null and void and be vacated and the Settlement and all orders entered in connection therewith shall be rendered null and void (except as provided in paragraphs C.3-5, E.1-5., G, L.5-7., and M.12, 14-15, 17 in the Stipulation), and the parties shall be returned to their respective positions immediately before the execution of the Stipulation.

Dated: \_\_\_\_\_, 2013

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HON. EDWARD R. KORMAN  
UNITED STATES DISTRICT JUDGE

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Defendants.	:	
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**[PROPOSED] ORDER AWARDING LEAD COUNSEL’S ATTORNEYS’ FEES,  
REIMBURSEMENT OF EXPENSES, AND AWARD TO LEAD PLAINTIFF**

WHEREAS, the Court has granted final approval to the Settlement of the above-referenced class action;

WHEREAS, Lead Counsel, The Rosen Law Firm, P.A., for the purposes of the Settlement and have petitioned the Court for the award of attorneys’ fees in compensation for the services provided to Lead Plaintiffs and the Class along with reimbursement of expenses incurred in connection with the prosecution of this action, and a nominal award to Lead Plaintiff, to be paid out of the Settlement Fund established pursuant to the Settlement;

WHEREAS, capitalized terms used herein having the meanings defined in the Stipulation and Agreement of Settlement filed with the Court on June14, 2013 (“Settlement Stipulation”); and

WHEREAS, the Court has reviewed the fee application and the supporting materials filed therewith, and has heard the presentation made by Lead Counsel during the final approval hearing on the 3<sup>rd</sup> day of March, 2014, and due consideration having been had thereon.

NOW, THEREFORE, it is hereby ordered:

1. The Rosen Law Firm P.A. is awarded one-third of the Settlement Fund, or \$1,666,666 as attorneys' fees in this action, together with a proportionate share of the interest earned on the fund, at the same rate earned by the balance of the fund, from the date of the establishment of the fund to the date of payment.

2. Lead Counsel shall be reimbursed out of the Settlement Fund in the amount of \$20,271.28 for its expenses and costs.

3. Lead Plaintiff shall be awarded \$1,000 as an incentive fee award and reimbursement for his lost time in connection with his prosecution of this action.

4. Except as otherwise provided herein, the attorneys' fees, reimbursement of expenses, and award to Lead Plaintiff shall be paid in the manner and procedure provided for in the Settlement and Agreement of Settlement, dkt. #66.

Dated: \_\_\_\_\_, 2014

SO ORDERED:

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HON. EDWARD R. KORMAN  
UNITED STATES DISTRICT JUDGE