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Case No. N18C-07-117 VLM CCLD

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

BRET KUKARD, Derivatively on Behalf of the Symantec Corporation Employee Stock Purchase Plan, Plaintiff, v. SYMANTEC CORPORATION, FRANK E. DANGEARD, GERALDINE B. LAYBOURNE, DAVID L. MAHONEY, ROBERT S. MILLER, SUZANNE M. VAUTRINOT and V. PAUL UNRUH, Defendants.	C.A. No. N18C-07-117-VLM-CCLD

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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I. INTRODUCTION

This is a putative securities class action brought by Plaintiff Bret Kukard ("Plaintiff" or "Class Representative") in connection with the Symantec Corporation Employee Stock Purchase Plan ("ESPP" or "Plan")[1] on behalf of all persons who purchased or otherwise acquired Symantec common stock between May 22, 2015 and May 10, 2018 ("Relevant Period") in the Plan. Plaintiff alleges violations under Section 11 of the Securities Act of 1933 ("Securities Act") related to the Company's disclosures concerning its internal controls over financial reporting against Defendants (defined below).

Plaintiff submits this Motion and Memorandum of Law in support of the settlement of this litigation, as proposed in the Stipulation of Settlement ("Stipulation" or "Stip.") attached as Exhibit 1 to D.I. 38. This Court previously granted preliminary approval of the proposed Settlement and ordered notice to the proposed Class to be disseminated in its August 5, 2024 Order (the "Preliminary Approval Order," D.I. 56). Plaintiff now moves this Court to enter the Final Approval Order and Judgment, attached as Exhibit C to the Declaration of Thomas J. McKenna ("McKenna Decl."), that grants final approval of the Settlement, certifies the Class for settlement purposes, appoints Plaintiff as Settlement Class

[1] Unless otherwise noted, all capitalized terms shall have the same definition as set forth in the Stipulation.

Representative, appoints the law firm Gainey McKenna & Egleston as Class Counsel, grants attorneys' fees and expenses, and grants a case contribution award to Plaintiff.

II. FACTUAL BACKGROUND

Plaintiff claims that Defendants[2] are liable under Section 11 of the Securities Act by reason of material misrepresentations and omissions in documents incorporated by reference in the Plan's Registration Statement relating to the Company's allegedly deficient internal controls over financial reporting and the Company's alleged improper reporting of certain Non-GAAP measures. McKenna Decl. ¶ 13. The Plan incorporated by reference the Company's (i) "Annual Report on Form 10-K for the fiscal year ended March 29, 2013"; (ii) "[a]ll other reports filed pursuant to Section 13(a) or 15(d) of the Securities Exchange Act of 1934"; (iii) "[t]he description of the [Company's] Common Stock contained in the [Company's] Registration Statement"; and (iv) "[a]ll documents subsequently filed by the Company pursuant to Sections 13(a), 13(c), 14 or 15(d) of the Exchange Act." D.I. 1, ¶ 13. Participants in the ESPP were also entitled to purchase Symantec stock at a 15% discount on the market price. McKenna Decl. ¶ 12.

[2] "Defendants" are Gen Digital Inc., f/k/a Symantec Corporation ("Gen Digital," "Symantec" or the "Company"), and Frank E. Dangeard, Geraldine B. Laybourne, David L. Mahoney, Robert S. Miller, Suzanne M. Vautrinot and V. Paul Unruh.

Defendants have denied and continue to deny each and all of the claims and contentions alleged by Plaintiff in this Action. Defendants expressly have denied and continue to deny all charges of wrongdoing or liability against them arising out of any of the conduct, statements, acts or omissions alleged, or that could have been alleged, in this Action. Defendants also have denied and continue to deny, *inter alia*, the allegations that Plaintiff or members of the Class have suffered damage or were otherwise harmed by the conduct alleged in this Action. Defendants have asserted and continue to assert that the Registration Statement contained no material misstatements or omissions. Defendants have asserted and continue to assert, among other things, that they acted at all times in good faith and in a manner reasonably believed to be in accordance with all applicable rules, regulations, and laws. In addition, Defendants maintain that they have meritorious defenses to all claims alleged in the Action. Stip. at § III.

The Parties have agreed to settle the Action after considering, *inter alia*, the substantial benefits of the Settlement to Plaintiff and the Class, and the risks and costs of continued litigation. Accordingly, the Parties determined that it was desirable and beneficial to have the Action settled in the manner and upon the terms set forth in the Stipulation. *Id*.

III. PROCEDURAL HISTORY

The following is a brief background to this Action. A full recitation of the procedural history can be found in the McKenna Decl. ¶¶ 10-18.

On July 13, 2018, Plaintiff filed the complaint ("Complaint"), C.A. No. N18C-07-117-VLM-CCLD, in this Court, on behalf of all persons who purchased or otherwise acquired Symantec common stock pursuant to the ESPP between May 22, 2015 and May 10, 2018 for violations of Section 11 of the Securities Act. D.I. 1.

While the Action was stayed, the Parties engaged in settlement negotiations, including a mediation presided over by Greg Lindstrom of Phillips ADR on May 3, 2022. *See* D.I. 19, 24–28. The Parties exchanged insurance information, factual materials, settlement demands and counteroffers, and the Company also produced 10,807 pages of confidential documents which Class Counsel reviewed. McKenna Decl. ¶ 16. Although a resolution was not reached immediately at the mediation, the Parties continued to engage in arms-length negotiations and eventually reached an agreement in principle to settle the Action. Then, on July 10, 2024, after finalizing the Stipulation and its exhibits, Plaintiff submitted his Motion for Preliminary Approval of the Settlement. D.I. 37.

On August 5, 2024, this Court granted preliminary approval of the Settlement and further Ordered the Parties to confer and schedule dates for the Final Approval Hearing and ancillary deadlines. D.I. 56. Pursuant to this Court's Order, the Parties conferred and submitted a schedule requesting that the Final Approval Hearing be

held on December 4, 2024, which was so ordered by this Court on August 8, 2024. *See* D.I. 59.

IV. CLASS NOTICE AND REACTION

The Claims Administrator, Strategic Claims Services ("SCS" or "Claims Administrator") successfully completed the Notice plan as contemplated by the Settlement and as approved by the Court. *See* Declaration of Cornelia Vieira, a Project Manager for SCS (D.I. 60, "Notice Decl."). On September 4, 2024, the Claims Administrator caused the Summary Notice to be sent via U.S. mail, first-class postage prepaid, to the 12,156 names, email addresses, and mailing addresses in the Class List. *Id*., ¶ 5. Of all 12,156 total Notices that were mailed to the Class, only 662 were returned as undeliverable. *Id*., ¶ 7. Of those undeliverable, the U.S. Postal Service provided forwarding addresses for two, and SCS immediately re-mailed the Summary Notices to those updated addresses. *Id*. As to the remaining 660 Summary Notices, SCS performed skip-tracing to obtain updated addresses and were able to re-send 559 Summary Notices to updated addresses. *Id.*

Also, on September 4, 2024, as a secondary method of notice, the Claims Administrator attempted to send the Summary Notice via email to the email addresses on the Class List. *Id.*, ¶ 6. However, of the emails sent on September 4, 2024, SCS found that a majority of addresses were invalid causing the emails to bounce back. *Id.* As such, SCS halted its emailing process after sending 3,569

emails. *Id.*; McKenna Decl. ¶ 21. Following this, SCS conferred with Defendants' Counsel and determined that it would resume sending emails only to the 4,230 email addresses that Defendants' Counsel identified as still operational. *Id.* The Claims Administrator sent a total of 6,548 emails. *Id.* As of September 10, 2024, 5,378 emails had bounced back, meaning 1,170 emails were successfully sent. *Id.*

That same day, the Claims Administrator also caused the Settlement Website to go live at www.strategicclaims.net/esppsettlement, which contained (i) the Stipulation (including all of its exhibits); (ii) the Detailed Notice; (iii) the Preliminary Approval Motion and Preliminary Approval Order; (iv) the toll-free phone number applicable to the Settlement; (v) the dates and locations of relevant Court proceedings, including the Final Approval Hearing; and (vi) other relevant Court filings pertaining to the Settlement. *Id.*, ¶ 10. As of October 17, 2024, the Settlement Website had received 2,038 unique visitors and 3,158 total page views. *Id.* That same day, SCS also caused the Detailed Notice to be transmitted via *GlobeNewswire* and established a toll-free phone line for callers to obtain information regarding the Settlement and request a copy of the Detailed Notice. *Id.*, ¶¶ 8-9.

To date, zero objections to the Settlement have been received by Class Counsel, Defendants' Counsel, or filed on the Court's docket. SCS also reports that it has received zero objections. *Id.*, ¶ 11. The Objection Deadline is set for November

13, 2024. Accordingly, pursuant to the Stipulation and Order Scheduling Final Approval Hearing (D.I. 59), Class Counsel will file a Reply brief on or before November 27, 2024 to address any objections, or lack thereof.

V. ARGUMENT

A. The Court Should Certify the Settlement Class

Certification of a class action requires a two-step analysis. *Crowhorn v. Nationwide Mut. Ins. Co.*, 836 A.2d 558, 561–62 (Del. Super. 2003). The first step requires that the action satisfy all four prerequisites mandated by Del. Super. Ct. Civ. Rule 23(a).[3] *Id.* "The prerequisites are: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation." *Id.* If all of the prerequisites are satisfied, then the Court moves to the second step, which is to determine if the requirements of Superior Court Rule 23(b) are satisfied. *Id*.

In this Court's August 5, 2024 Preliminary Approval Order at ¶ 2(a)-(d), the Court preliminarily found that the Settlement Class satisfied the four requirements of Superior Court Rule 23(a). The Court further found that for settlement purposes, "the Class is so numerous that joinder of all members is impractical," "there are one or more questions of law and/or fact common to the class," "the claims of the Plaintiff are typical of the claims of the Class," and "Plaintiff will fairly and

[3] Hereinafter, all references to "Superior Court Rule 23" and its subparts refers to Super. Ct. Civ. R. 23.

adequately protect the interests of the Class in that: (i) the interests of the Plaintiff and the nature of the alleged claims are consistent with those of the Class Members; and (ii) there appear to be no conflicts between or among the Plaintiff and the Class." *See* D.I. 56.

The Court further found in its Preliminary Approval Order that "the prosecution of separate actions by or against individual members of the class would create a risk of: (A) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests[,]" thus satisfying Superior Court Rule 23(b)(1). Preliminary Approval Order at ¶ 2(e).

To date, there is no party or class member who has come forward to oppose the Settlement, nor has anyone alleged that the requirements of Superior Court Rule 23 have not been met. Plaintiff therefore requests that this Court conclude that the requirements of Superior Court Rule 23 continue to be met and thus certify the Settlement Class. To review, Plaintiff addresses the elements of Superior Court Rule 23 below:

(1) Superior Court Rule 23(a) is Satisfied

(a) Numerosity

First, a class must be "so numerous that joinder of all members is impracticable" in order to meet the numerosity requirement. Del. Super. Ct. Civ. Rule 23(a). "Although there is no numerical cutoff under the numerosity requirement, numbers in the proposed class in excess of forty, and particularly in excess of one hundred, have sustained the numerosity requirement." *Smith v. Hercules, Inc*., 2003 Del. Super. LEXIS 38, at *13 (Del. Super. Jan. 31, 2003). "Courts look to the "litigational inconvenience" of bringing separate actions versus a class action to assess impracticability. *Id.*

Here, the proposed Settlement Class has approximately 12,156 Class Members who participated in the Company's ESPP. McKenna Decl. ¶ 30. Accordingly, Superior Court Rule 23(a)'s numerosity requirement is easily satisfied. *See, e.g.*, *Leon N. Weiner & Assocs. v. Krapf,* 584 A.2d 1220, 1225 (Del. 1991) (citations omitted); *accord Dubroff v. Wren Holdings, LLC*, 2010 Del. Ch. LEXIS 178, at *15 (Del. Ch. Aug. 20, 2010) ("Numbers in a proposed class in excess of forty have sustained the numerosity requirement, and classes with as few as twenty-three members have been upheld.") (citations omitted).

(b) Commonality

The second requirement, commonality, will be met "where the question of law linking the class members is substantially related to the resolution of the

litigation even though the individuals are not identically situated." *Leon*, 584 A.2d at 1224. Commonality is satisfied where common questions are capable of generating common answers apt to drive the resolution of the litigation. *First State Orthopaedics, P.A. v. Liberty Mut. Ins. Co.*, 2020 Del. Super. LEXIS 88, at *11 (Del. Super. Feb. 13, 2020) (citing *Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)). Thus, if Plaintiff shares at least one question of law or fact with the grievances of the prospective class this requirement will be met. *Smith,* 2003 Del. Super. LEXIS 38, at *27-28.

There are common questions of law and fact in this action which can be certified and resolved on behalf of the class. In particular, Plaintiff asserts that Defendants' conduct presents numerous common questions which could be resolved on a class-wide basis. McKenna Decl. ¶ 32. The factual and legal issues in this case are common for all members of the proposed Class. Among others, the issues include (i) whether the federal securities laws were violated by Defendants' acts; (ii) whether statements made by Defendants during the Relevant Period misrepresented material facts about the financial condition, business, operations, and management of the Company; (iii) whether Defendants' public statements during the Relevant Period omitted material facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading; (iv) whether Defendants caused the Company to issue false and misleading SEC filings and

public statements during the Relevant Period; (v) whether the prices of Symantec's common stock during the Relevant Period were affected because of Defendants' conduct; and (vi) whether the members of the Class have sustained damage in light of the 15% discount they paid for Company common stock in the ESPP versus the market price and, if so, what is the proper measure of damages. D.I. 1, ¶ 30; *see* McKenna Decl. ¶ 33.

(c) Typicality

The "typicality" requirement is satisfied if the representative's interests are consistent with those of the Class members. *Leon*, 584 A.2d at 1225-26. Typicality will be found despite factual differences if a representative's claim "arises from the same event or course of conduct that gives rise to the claims … of other class members and is based on the same legal theory." *Id.*, at 1226 (internal quotations omitted). The claims of the proposed Class Representative are typical of the claims of the Class, as each Class member, like the proposed Class Representative, was a current or former employee of Symantec and participated in the Plan by purchasing Company stock at the 15% discount to market prices. McKenna Decl. ¶ 35.

(d) Adequacy of Representation

The fourth prerequisite determines whether the proposed Class Representative is competent to represent the entire class. *Smith*, 2003 Del. Super. LEXIS 38, at *33. This requirement is comprised of two elements: "(a) that the interests of the

representative party must coincide with those of the class; and (b) that the representative party and his attorney can be expected to prosecute the action vigorously." *Id*.

In determining whether the interests of a representative coincide with those of the class, the Court looks to see if any conflict exists between named parties and the class they seek to represent. *Id.*, at *9. "[O]nly a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." *Id*. The Class Representative has no conflicts with other Class members. As set forth above, his interests as a former employee of the Company and participant in the Plan are typical and coincide with the interests of the Class. Further, Class Counsel are experienced in securities class actions and other complex litigation (*see* D.I. 38, Exs. 2 and 3) and have been diligently working on this case for several years. Plaintiff's counsel has adequately represented the interests of the Class. McKenna Decl. ¶¶ 37-39.

(2) Superior Court Rule 23(b) is Satisfied

Once the prerequisites of Superior Court Rule 23(a) are satisfied, a class action may be certified if any of Superior Court Rule 23(b)'s conditions are met. This Action challenges the uniform conduct of certain officers of the Company in connection with the Company's allegedly false and misleading Registration

Statement and, therefore, is properly certifiable under Superior Court Rule 23(b)(1), as is also stipulated to by the Parties. Stip. at ¶ 7.1.

a. Certification Under Superior Court Rule 23(b)(1) is Appropriate

Superior Court Rule 23(b)(1) provides for class certification where:

> (1) The prosecution of separate actions by or against individual members of the class would create a risk of:
>
> (A) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; […][4]

This Court preliminarily found in its August 5, 2024 Preliminary Approval Order at ¶ 2(e), for purposes of settlement only, that certification under Superior Court Rule 23(b)(1) was appropriate. *See* D.I. 56. Superior Court Rule 23(b)(1) "clearly embraces cases in which the party is obliged by law to treat the class members alike[.]" *Turner v. Bernstein*, 768 A.2d 24, 32 (Del. Ch. 2000). Furthermore, certification is appropriate under Superior Court Rule 23(b)(1) because "any damages to which class members would be entitled would be based solely upon

[4] Del. Super. Ct. Civ. R. 23(b)(1).

the number of [shares of Symantec stock] that they own." *Allen v. El Paso Pipeline GP Co., L.L.C.*, 90 A.3d 1097, 2014 WL 2086371, at *2 (Del. Ch. 2014) (citing *Noerr v. Greenwood*, 2002 WL 31720734, at *6 (Del. Ch. Nov. 22, 2002)).

Such is the case here where Defendants' relationship was the same with all Symantec employee stockholders in the Plan and, thus, members of the proposed Class. Therefore, Defendants were obliged by law to treat them alike. Certification under Superior Court Rule 23(b)(1) is therefore appropriate because Plaintiff challenges a course of conduct that affected all employee stockholders in the Plan in the same manner. There is no legitimate basis on which Defendants might be found liable to some members of the Class and not others.

Further, Superior Court Rule 23(b)(1)(A) and (B) are satisfied because if separate actions were commenced by members of the Class, Defendants and stockholders in the Plan would be subject to the risk of inconsistent or varying adjudications that would establish incompatible standards of conduct and would, as a practical matter, be dispositive of the interests of other Class members. Thus, Superior Court Rule 23(b)(1) certification is appropriate because multiple lawsuits could follow if certification were denied, which would be prejudicial to non-parties and inefficient. *In re Best Lock Corp. S'holder Litig.*, 845 A.2d 1057, 1095 (Del. Ch. 2001). Certification pursuant to Superior Court Rule 23(b)(1) is, therefore,

appropriate. *See Allen*, 90 A.3d at 1111-12 (certifying a class of common unitholders under Superior Court Rule 23(b)(1) and (b)(2)).

B. The Settlement is Fair, Reasonable, and Adequate and Warrants Final Approval

With Class Certification established, and pursuant to Superior Court Rule 23, the Court engages in a two-step process when determining whether to approve a class action settlement. *Doe v. Bradley*, 64 A.3d 379, 394 (Del. Super. 2012) (citing *Crowhorn*, 836 A.2d at 562). First, the Court conducts a preliminary review of the proposed settlement to determine if there are patent grounds to question the fairness of the settlement. If not, the Court will preliminarily approve the settlement and schedule a so-called "fairness hearing." *Id.* This first step is complete. The Court found in its August 5, 2024 Preliminary Approval Order that the Settlement "resulted from serious, informed, extensive and arm's-length negotiations between the Parties and their counsel with the assistance of a Mediator." D.I. 56, ¶ 5. Accordingly, the Court found that "the proposed Settlement is in the best interest of Plaintiff and the Settlement Class" and further directed Notice to be given to the Class. *Id.*

Second, to make the "fairness" determination, the Court should consider several factors, including, *inter alia:* (1) the advantages of the proposed settlement versus the probable outcome of a trial on the merits; (2) the probable duration and cost of a trial; (3) the extent of participation in the settlement negotiations by class representatives and by a judge or special master; (4) the number and force of the

objections by Class members; (5) the effect of the settlement on other pending (or future) actions; (6) the fairness and reasonableness of the claims administration process for individual claims; (7) the apparent intrinsic fairness of the settlement terms; and (8) the extent to which only the class representatives are to receive monetary relief." *Bradley*, 64 A.3d at 394.

In addition, "[t]here is a presumption in favor of the settlement when there has been arms-length bargaining among the parties" after adequate development of the factual record and legal theories." *Id.* (citing *Wellman v. Dickinson*, 497 F. Supp. 824, 830 (S.D.N.Y. 1980); *Prezant v. DeAngelis*, 636 A.2d 915, 921 (Del. 1994) ("As a general proposition, Delaware law favors settlements.")).

(1) The Advantages of the Settlement

The Settlement would "mark an end to the civil litigation" arising from the Defendants' alleged wrongdoing and would provide guaranteed substantial monetary benefits for the Class. *See Bradley*, 64 A.3d, at 395. In determining the fairness of a proposed settlement, Delaware Courts look at the "'give' and the 'get' of the proposed settlement." *In re AMC Ent. Holdings, Inc. S'holder Litig*., Consol. C.A. No. 2023-0215-MTZ, 2023 Del. Ch. LEXIS 329, at *34 (Del. Ch. Aug. 11, 2023) (internal citations omitted) (citing *In re Phila. Stock Exch.*, 945 A.2d 1123, 1148 n.54 (Del. 2008) (discussing how the court must "assure" the "class members will receive fair consideration for their release of th[eir] claims.")).

Here, Plaintiff and the Class, in exchange for the "get," are releasing the claims Plaintiff and the Class have against the Defendants. In analyzing this "give," Delaware Courts typically analyze the "value of the [R]eleased [C]laims, taking into account the likelihood a plaintiff could prevail and the benefits … of that victory." *Id.*, at *36.

Plaintiff asserts a claim for a violation of Section 11 of the Securities Act, alleging that Defendants made a series of false and misleading statements regarding its business, operations, prospects, and legal compliance that allegedly adversely affected the value of the Common stock purchased pursuant to the ESPP. Plaintiff contends that his claims are valid, particularly given the court's rulings in a related Federal Securities Action permitting certain claims under Section 10(b), 20(a) and 20A of the Securities Exchange Act of 1934 to go forward (though dismissing other claims and defendants), a contested motion for class certification, and an eventual settlement for the public market purchasers of Company common stock, even though there was no finding of liability against the defendants in that action. Among the court's rulings on preliminary motions in the Federal Securities Action, the court noted that the plaintiff had sufficiently alleged at the pleadings stage that the defendants hid misclassifications of ordinary operating expenses in its public financial disclosures and improperly deferred revenue in violation of GAAP, thus supporting Plaintiff's claims here. *See* Federal Securities Action, Dkt. No. 421, pp.

2-4. Further, as Plaintiff is not required to plead the existence of scienter and loss causation to state a Section 11 claim, Plaintiff would have fewer obstacles to overcome in proving liability in this Action. *See In re Suprema Specialties, Inc. Sec. Litig.*, 438 F.3d 256, 269 (3d Cir. 2006) ("Section 11 … does not require plaintiffs to allege that defendants possessed any scienter"); *see also In re Merck & Co. Sec. Litig.*, 432 F.3d 261, 274 (3d Cir. 2005) ("Section 11 plaintiffs do not have to plead loss causation.").

Importantly, however, Plaintiff asserted novel claims for violations of the federal securities laws on behalf of an ESPP and its participants. Thus, in order to succeed on his claims, Plaintiff would first have to overcome the jurisdictional challenges that Defendants would raise, including whether the claims were barred under the applicable statute of limitations or statute of repose. If Plaintiff succeeded on the jurisdictional challenges, then he would have to navigate the factual and legal complexities in this Action, which include pleading and proving that Defendants made materially false and misleading statements in the Registration Statement. If Plaintiff prevailed on the foregoing, he would face challenges in certifying a class and in proving damages given the 15% discount from the market price of Symantec stock afforded to the ESPP Class Members. Furthermore, Plaintiff would face the continued risk of prosecuting or defending any appeals that may follow. McKenna Decl. ¶ 50.

In return for their "give," Plaintiff and the Class will receive guaranteed monetary compensation for the recognized loss for each share they purchased at allegedly artificially inflated prices during the Relevant Period. In addition, Plaintiff and the Class get to avoid the challenges and uncertainties that would have arisen with continued litigation, as detailed herein. Indeed, Defendants would have undoubtedly mounted a strong defense to each of Plaintiff's claims, running the risk that after years of continued litigation Plaintiff may have achieved no benefit whatsoever for the Class. McKenna Decl. ¶ 51.

Thus, in the face of the uncertainty, cost, and challenges of continued class litigation, the Settlement achieved here is unquestionably fair, particularly when balancing the "give" and the "get. Thus, Plaintiff and Defendants believe that Settlement of this Action, which has already been pending for a number of years and provides guaranteed benefits to the Class, is a fair, reasonable, and adequate resolution of the Action.

(2) The Probable Complexities and Duration of Continued Litigation

As noted above, the Action presents unique issues as to liability and damages. All of these issues would have to be resolved in Plaintiff's favor to achieve a victory at trial and sustain it on appeal. As reflected in the Stipulation, Defendants continue to deny all charges of wrongdoing or liability against them arising out of any of the conduct, statements, acts, or omissions alleged, or that could have been alleged, in

this Action. Defendants also have denied and continue to deny, *inter alia*, the allegations that Plaintiff or members of the Class have suffered damage or were otherwise harmed by the conduct alleged in this Action. Stip. at § III. Accordingly, there are "real risks to the [C]lass posed by continued litigation" and the Settlement thus "presents a significantly superior means by which to resolve the [C]lass claims." *Bradley*, 64 A.3d, at 395.

Moreover, any continued litigation would come with significant costs and possible delays. Since the filing of the Complaint (D.I. 1), there has been careful investigation and production of over 10,800 pages of discovery materials to Class Counsel. McKenna Decl. ¶ 55. Continued litigation would also require additional discovery which would be "costly, intrusive, and time consuming," as well as dispositive motion practice, and lengthy and complex trial practice, as well as any possible appeals which would have added time to this litigation and burden upon the Parties and the Court. Instead, "[t]his [S]ettlement allows the [P]arties to avoid lengthy […] and costly litigation in favor of a fair and final resolution now." *Bradley*, 64 A.3d, at 395; *Cuppels v. Mountaire Corp.*, 2021 Del. Super. LEXIS 292, at *20-21 (Del. Super. Apr. 12, 2021) (noting the fact that "[t]he length and expense of trial and potential appeals are enormous" to support settlement approval).

Thus, based on Plaintiff's evaluation of the foregoing challenges and the benefits of Settlement, Plaintiff believes that Settlement of this Action, which has

already been ongoing for a number of years, provides guaranteed benefits to the Class and is a fair, reasonable, and adequate resolution of the Action.

(3) The Participation of Representatives and Neutrals

The Class Representative has been active in this litigation having spent significant time and effort representing the Class to date, including, *inter alia*, time assisting counsel, providing information regarding the Plan, reviewing and approving the complaint before filing, accepting the risks of public litigation, consulting with counsel during the litigation, and overseeing extensive mediation and settlement negotiations. The Class Representative has been informed of and supports the terms of the Settlement Agreement. McKenna Decl. ¶ 58; Declaration of Bret Kukard ("Kukard Decl.") ¶ 17.

Additionally, the Parties were aided in reaching resolution of this matter by the assistance of an experienced and skilled mediator: Greg Lindstrom of Phillips ADR. While the Parties did not immediately reach a resolution at the mediation, the groundwork was laid. The Parties continued to engage in arms-length negotiations and eventually reached an agreement in principle to settle the Action, subject to the negotiation of a Stipulation of Settlement and approval by the Court. McKenna Decl. ¶ 59. Accordingly, the participation of Plaintiff and the use of a neutral mediator supports a finding that the Settlement is fair, reasonable, and adequate. *Forsythe v. Esc Fund Mgmt. Co. (U.S.)*, 2012 Del. Ch. LEXIS 98, at *9 (Del. Ch. May 9, 2012)

("Several significant factors support the reasonableness of the settlement and weigh in favor of approval. The parties negotiated at arm's-length with the benefit of an experienced and respected mediator. […]").

(4) Number and Force of Objections

As noted above, there are over 12,100 Class Members who have been provided Notice of the Settlement through direct mail or email and/or via the Settlement Website. Notice Decl. ¶¶ 6, 7; McKenna Decl. ¶ 61. To date, zero objections have been received by Class Counsel, Defendants' Counsel, or filed on the Court's docket regarding the Settlement. McKenna Decl. ¶ 62. The deadline for any Class Member(s) to file an objection to the Settlement is November 13, 2024. D.I. 59, ¶ 4. Therefore, Class Counsel shall file a further brief addressing any objections, or lack thereof, by November 27, 2024. *See* D.I. 59, ¶ 5.

Nevertheless, there is a presumption in favor of the settlement when, among other criteria, "only a few members of the class object and their relative interest is small." *Crowhorn*, 836 A.2d at 563 (citing *Wellman*, 497 F. Supp. 824 at *830). Accordingly, this presumption applies here as there have been no objections to date, thus further supporting the reasonableness of the Settlement.

(5) The Effect of the Settlement on Other Actions

There are no other pending actions against Defendants for the same or similar underlying claims concerning the ESPP, as alleged in the Action. McKenna Decl. ¶

65. If the Settlement is approved, there will be no future actions either. As a result, this Settlement provides Defendants "complete peace that would include a release to the broadest extent possible." *In re Phila. Stock Exch., Inc.*, 945 A.2d at 1137. "The [C]lass will receive a substantial benefit from this limited fund settlement that likely would be lost in the absence of a settlement. It is, in this instance, fair and reasonable to forfeit the right of individual [C]lass [M]embers to opt out of the settlement." *Bradley*, 64 A.3d, at 397.

(6) The Fairness of the Allocation Process

Class Counsel represents that the Plan of Allocation, attached as Exhibit C to the Stipulation (D.I. 38-1, Ex. C), contemplates a fair process for allocation of the proceeds of this Settlement. The relief will be administered through a comprehensive administrative process to "share the fruits of the efforts with all class members after evaluating each class members' damages." *See Cuppels*, 2021 Del. Super. LEXIS 292, at *21. Moreover, Class Members do not have to submit a claim form or apply for their share of the Net Settlement Fund, meaning that there are fewer barriers for Class Members to reap the benefits of this Settlement, which has been a concern for courts across the country.[5] Indeed, this settlement will provide guaranteed monetary

[5] *See*, *e.g.*, *Deatrick v. Securitas Security Servs. USA, Inc.*, 2016 WL 729622, at *8 (N.D. Cal. Feb. 24, 2016) (Denying preliminary approval where the court did not see "that claim forms are necessary to the administration of the settlement."); *Rubio-Delgado v. Aerotek, Inc.*, 2015 WL 3623627, at *6 (N.D. Cal. Jun. 10, 2015) (Denying preliminary approval, noting that a claim form "is likely to significantly

relief to Class Members based on their Recognized Loss,[6] thereby achieving an equitable result for all affected Class Members. McKenna Decl. ¶¶ 67-71. As such, the Plan of Allocation further underscores the fairness, reasonableness, and adequacy of this Settlement.

(7) The Apparent Intrinsic Fairness of the Settlement

"This is not a class action settlement where class members will receive nebulous forms of non-monetary compensation. The monetary compensation proposed here, […], is real, substantial money that can do much good" for the Class. *Id.* at 400. As discussed, *supra*, there are a number of challenges that would arise with continued litigation, such as establishing liability and the amount of damages, among other things. This Settlement eliminates those uncertainties and provides real, tangible, and guaranteed benefits to the Class and is therefore fair, adequate, and reasonable, particularly when balancing the "give" and the "get" from this Settlement. McKenna Decl. ¶ 73.

(8) Extent to Which Only the Class Will Receive Monetary Relief

As clearly set out in the Stipulation, only the members of the Class shall receive the Settlement Fund. Stip. at ¶¶ 6.1–6.4. Aside from the Court-ordered

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reduce the number of class members who receive a settlement payment.").

[6] "Recognized Loss" means the total price paid by each Class Member (purchase price per share multiplied by number of shares purchased) for shares purchased in the ESPP during the Relevant Period.

attorneys' fees and expenses and Plaintiff's case contribution award, the Net Settlement Fund will be distributed to all eligible Class Members until exhausted through a Second Distribution as needed, with the remaining amount (if any, and only if it is not cost effective to make further distributions) going to the Combined Campaign for Justice, with Court approval, as a *cy pres* contribution. Stip. ¶ 6.4. No funds shall revert back to Defendants. McKenna Decl. ¶ 75. Accordingly, the Settlement is fair, adequate, and reasonable. *See Bradley*, 64 A.3d, at 400 (finding a settlement fair, adequate, and reasonable where only the members of the class receive the settlement funds).

VI. CONCLUSION

For the foregoing reasons, Plaintiff respectfully submits that the Court should enter the Final Approval Order and Judgment, attached to the McKenna Decl. as Exhibit C which would grant final approval of the class action Settlement, certify the Class for settlement purposes, appoint Plaintiff as Settlement Class Representative, and appoint the law firm Gainey McKenna & Egleston as Class Counsel.

Dated: October 30, 2024

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