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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 PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AGREEMENT AND OTHER RELIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND RULES

I. INTRODUCTION

This is a putative securities class action brought by Plaintiff Bret Kukard ("Plaintiff") 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 the Declaration of Thomas J. McKenna ("McKenna Decl.").[2] Plaintiff moves this Court under Super. Ct. Civ. R. 23 for an order: (1) preliminarily approving the Settlement; (2) approving of the Parties' Notice plan; (3) provisionally certifying, for purposes of the Settlement only, the following Settlement Class:

> All Persons who purchased or otherwise acquired the publicly traded common stock of Symantec pursuant to the Company's ESPP during the time period between May 22, 2015 and May 10, 2018 (the

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

[2] As set forth in the Stipulation, Defendants do not admit any factual allegations, or any liability related to the claims asserted in this action. Defendants do not oppose the present Motion.

> "Relevant Period"). Excluded from the Class are Defendants and their respective successors and assigns; past and current executive officers and directors of Defendants; members of the immediate families of Defendants; the legal representatives, heirs, successors, or assigns of Defendants; and any entity in which any of the above excluded persons have or had a majority ownership interest.

(4) preliminarily appointing Plaintiff as Settlement Class Representative; (5) preliminarily appointing the law firm of Gainey McKenna & Egleston as Class Counsel to act on behalf of the Settlement Class with respect to the Settlement; (6) approving the Parties' proposed settlement procedure, including approving the Parties' selection of Strategic Claims Services as Claims Administrator and approving the proposed schedule; and (7) setting a Final Approval Hearing.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

Plaintiff claims that Defendants[3] 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. Specifically, Plaintiff alleges that the Registration Statement, along with other documents it incorporated by reference, failed to disclose that: (i) the Company's internal controls over financial reporting were materially weak and deficient; (ii) the Company's later disclosed "reporting of certain Non-GAAP measures

[3] "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.

including those that could impact executive compensation programs" would lead to heightened regulatory scrutiny by the SEC; and (iii) as a result, certain of the Company's public statements were materially false and misleading. Stip. at § I.

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 on Plaintiff and the Class, and the risks and costs of continued litigation. Accordingly, the Parties have determined that it is desirable and beneficial to have the Action settled in the manner and upon the terms set forth in the Stipulation. *Id.*

B. <u>The Company's Plan</u>

The Form S-8, dated October 24, 2013 states in relevant part:

Item 3. Incorporation of Documents by Reference.

The following documents, which have been filed by Symantec Corporation (the "Registrant") with the Securities and Exchange Commission (the "Commission"), are hereby incorporated by reference in this Registration Statement:

(a) Registrant's Annual Report on Form 10-K for the fiscal year ended March 29, 2013, filed with the Commission on May 17, 2013;

(b) All other reports filed pursuant to Section 13(a) or 15(d) of the Securities Exchange Act of 1934, as amended ("Exchange Act") since the end of the fiscal year covered by the Registrant's Annual Report referred to in (a) above; and

(c) The description of the Registrant's Common Stock contained in the Registrant's Registration Statement on Form 8-A filed with the Commission on May 24, 1989 (including any amendment or report filed for the purpose of updating such description).

All documents subsequently filed by the Registrant pursuant to Sections 13(a), 13(c), 14 or 15(d) of the Exchange Act, prior to the filing of a post-effective amendment to this Registration Statement which indicates that all securities offered hereby have been sold or which deregisters all securities remaining unsold, *shall be deemed to be incorporated by reference in this Registration Statement and to be a part hereof from the date of filing of such documents*. ¶ 13.[4]

C. <u>Procedural History and Settlement Negotiations</u>

[4] Unless otherwise noted, all references to "¶ __" or "¶¶ __," shall refer to the paragraphs in the Complaint. D.I. 1.

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. The Complaint alleged violations of Section 11 of the Securities Act against the Defendants, related to the Company's alleged false and misleading disclosures concerning its internal controls over financial reporting. D.I. 1; Stip. at § I.

On August 2, 2018, by mutual agreement, the Parties agreed to stay the Action pending the filing of the Company's Annual Report on Form 10-K for the fiscal year ended March 30, 2018. D.I. 7. The Court granted the Stay on August 9, 2018. D.I. 8. The Company subsequently filed its Annual Report for the fiscal year ended March 30, 2018 on October 26, 2018. Stip. at § I.

Following the filing of the Company's Annual Report, the Parties met and conferred on October 31, 2018 and agreed that the stay should remain in effect pending the outcome of a related securities class action captioned *SEB Investment Management AB v. Symantec Corporation, et al.*, Case No. 3:18-cv-02902-WHA (N.D. Cal.) ("Federal Securities Action"). *See* D.I. 11. Following a successful motion to dismiss and subsequent filing of an amended complaint in the Federal Securities Action, the Parties agreed again to stay the Action pending the outcome of the Federal Securities Action, beginning July 12, 2019 continuing through the present. *See* D.I. 12–17, 19, 24–28; Stip. at § I.

While the Action was stayed, in an effort to conserve judicial resources and attempt to settle the Action, the Parties engaged in settlement negotiations, including mediation with Greg Lindstrom of Phillips ADR on May 3, 2022. *See* D.I. 19, 24–28; Stip. at § I. In connection with the mediation, the Parties exchanged insurance information, factual materials, settlement demands and counteroffers, and the Company also produced 10,807 pages of confidential documents for Plaintiff to review. McKenna Decl., at ¶ 5.

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, subject to the negotiation of a Stipulation of Settlement and approval by the Court. Since then, the Parties have been working together to finalize, *inter alia*, the Stipulation, claims process, plan of allocation, and Class List. This Stipulation (together with the exhibits hereto) reflects the final and binding agreement between the Parties. Stip. at § I.

D. Plaintiff's Investigation and the Benefits of Settlement

Plaintiff's Counsel represents that it has conducted an extensive investigation of the claims alleged in this Action. Among other things, Plaintiff's Counsel has analyzed public filings, records, documents, and other materials concerning Defendants, including a voluminous production of over 10,000 pages of documents from the Federal Securities Action, and researched the applicable law with respect to the claims of Plaintiff and the Class, as defined below, against Defendants and the potential defenses thereto. Stip. at § II. While Plaintiff

considers his claim to be meritorious, it was accepted that it was not without its challenges which included, *inter alia*: (i) prevailing on questions as to whether Defendants violated the federal securities laws in a novel claim asserted on behalf of an ESPP and its participants; (ii) overcoming any jurisdictional challenges that Defendants likely would have asserted, including the relevant statute of limitations and statute of repose; (iii) overcoming any factual defenses that Defendants would have raised; (iv) proving damages where the stock in the ESPP was offered to participants at a 15% discount to the market price; (v) being able to certify a class; and (vi) the costs associated therewith. McKenna Decl., at ¶ 7.

Thus, based on their investigation and review, Plaintiff and Plaintiff's Counsel have concluded that the terms and conditions of the Settlement are fair, reasonable, and adequate to the Class and in its best interests, and have agreed to settle the claims raised in the Action pursuant to the terms and provisions of the Stipulation, after considering: (a) the substantial benefits that Plaintiff and the Class will receive from settlement of the Action; (b) the risks, costs, and uncertainties of ongoing litigation; (c) the desirability of permitting the Settlement to be consummated as provided by the terms of the Stipulation; and (d) Plaintiff's Counsel's experience in the prosecution of similar actions. Stip. at § II.

III. THE PROPOSED TERMS OF THE SETTLEMENT

A. Scope and Effect of Settlement

The obligations incurred pursuant to the Settlement, subject to Court approval, shall be in full and final disposition of: (i) this Action against Defendants; (ii) any and all Released Claims as against all Released Persons; and (iii) any and all Released Defendants' Claim. Stip. at ¶ 2.1.

B. Settlement Class Definition

Plaintiff's proposed class definition is as follows:

> All Persons who purchased or otherwise acquired the publicly traded common stock of Symantec pursuant to the Company's ESPP during the time period between May 22, 2015 and May 10, 2018 (the "Relevant Period"). Excluded from the Class are Defendants and their respective successors and assigns; past and current executive officers and directors of Defendants; members of the immediate families of Defendants; the legal representatives, heirs, successors, or assigns of Defendants; and any entity in which any of the above excluded persons have or had a majority ownership interest.

Stip. at ¶ 1.2.

C. Monetary Relief

A Settlement Fund of $850,000 plus any interest earned, less expenses, shall be paid by Defendants and distributed to Settlement Class Members based on each Class Member's recognized loss for each share purchased, in accordance with the Plan of Allocation, attached to the Stipulation as Exhibit C. *See* Stip. at ¶ 4.1.

D. Administration

The Claims Administrator shall administer and calculate the claims and oversee distribution of the Settlement Fund subject to such supervision of Plaintiff's Counsel and/or the Court as the circumstances may require. The

Claims Administrator agrees to be subject to the jurisdiction of the Court with respect to the administration of the Settlement and the distribution of the Settlement Fund pursuant to the terms of the Stipulation. Prior to disbursement of the Net Settlement Fund to the Plan, Defendants shall provide the Claims Administrator and Plan Administrator with the data in their possession which will assist the Claims Administrator in determining the amount of the Net Settlement Fund to be distributed to each Class Member in accordance with the Plan of Allocation. Defendants shall require the Plan Administrator to assist the Claims Administrator in providing information and the assistance needed to make payment to Class Members who suffered a Recognized Loss pursuant to the Plan of Allocation. The Claims Administrator will not make any distributions to Class Members from the Net Settlement Fund until the Judgment becomes Final and the Effective Date has occurred. Stip. at ¶ 4.1; *see* Stip. at ¶ 10.1.

E. Fee and Expense Application

Plaintiff's Counsel will seek an award of its reasonable out-of-pocket case expenses and a fee of no more than one-third of the Settlement Fund, as well as a case contribution award for Plaintiff of no more than $10,000, to be paid out of the Settlement Fund, for his efforts in helping to achieve the settlement. Stip. at ¶ 5.1.

F. Distribution to the Class

The Claims Administrator shall determine each Class Member's share of the Net Settlement Fund based upon that Class Member's Recognized Loss for

each share purchased, as defined in the Plan of Allocation annexed to the Stipulation as Exhibit C and as described in the Detailed Notice annexed to the Stipulation as Exhibit A-1, or in such other plan of allocation as the Court approves. Stip. at ¶ 4.1; Exs. A-1, C.

G. Stipulation to Class Certification of the Settlement Class and Administration of the Settlement

The Parties stipulate and agree that for settlement purposes only this Action shall proceed as a non-opt out class action pursuant to Super. Ct. Civ. R. 23(a)(1)-(4) and (b)(1), with Plaintiff's Counsel as Lead Counsel for the Class and with a Class as defined, *supra*. Stip. at ¶ 7.1.

H. No Admission of Wrongdoing

Defendants deny that they have committed any act or omission giving rise to any liability and/or violation of law, and state that they are entering into this Settlement to eliminate the burden and expense of further litigation. Stip. at ¶ 11.1.

IV. ARGUMENT

A. Legal Standards

(1) Class Certification

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 Rule 23(a).[5]

[5] All references to "Rule 23" and its subparts refers to Super. Ct. Civ. R. 23.

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 Rule 23(b) are satisfied. *Id.*

(2) Preliminary Approval of Settlement

Once it has been determined that class certification is appropriate, the Court may then assess whether the settlement may receive preliminary approval. Under Super. Ct. Civ. R. 23, the Court engages in a two-step process when determining whether to approve a class action settlement. 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" at which the Court will receive evidence in support of, and/or in opposition to, the settlement in order to determine whether the settlement is fair, reasonable, and adequate. *Jane Doe 30's Mother v. Bradley*, 64 A.3d 379, 394 (Del. Super. 2012).

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;[6] (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." *See id.*

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.")).

B. Class Certification Is Appropriate Under Rule 23

(1) Rule 23(a) Is Satisfied

Plaintiff asserts that the proposed Settlement Class meets the criteria for certification under Del. Super. Ct. Civ. Rule 23(a) for purposes of settlement for the reasons set forth herein.

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

[6] As the Settlement has not yet been preliminarily approved and Notice not yet distributed, the number of objections cannot be considered at this stage and will instead be addressed in Plaintiff's subsequent filings, as contemplated by the [proposed] Preliminary Approval Order. *See* McKenna Decl., Ex. A.

requirement, numbers in the proposed class in excess of forty, and particularly in excess of one hundred, have sustained the numerosity requirement []" and courts look to the "litigational inconvenience" of bringing separate actions versus a class action to assess impracticability. *Smith v. Hercules, Inc*., 2003 Del. Super. LEXIS 38, at *13–14 (Del. Super. Jan. 31, 2003).

Here, the proposed Settlement Class has an estimated number of 12,156 Class Members. Accordingly, 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*

Second, 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. *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.

The factual and legal issues in this case are common for all members of the proposed Class. Among others, the common 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 the Company's common stock during the Relevant Period were artificially inflated because of Defendants' conduct; and (vi) whether the members of the Class have sustained damage in light of the 15% discount they paid for Symantec common stock versus the market price and, if so, what is the proper measure of damages. ¶ 30.

c. *Typicality*

The "typicality" requirement is satisfied if the proposed Class Representative's (*i.e.*, Plaintiff'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 (quoting *Zeffiro v. First Pa. Banking & Trust Co.*, 96 F.R.D. 567, 569 (E.D. Pa. 1983)). 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 Symantec common stock.

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 proposed 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, Plaintiff's Counsel are experienced in securities class actions and other complex litigation, as evidenced by their firm résumés, attached to the McKenna Decl. as Exhibits 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.

(2) Rule 23(b) Is Satisfied

Once the prerequisites of Rule 23(a) are satisfied, a class action may be certified if any of Rule 23(b) conditions are met. This Action challenges the 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 Rule 23(b)(1), as is also stipulated by the Parties. Stip. at ¶ 7.1.

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

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 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.

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 Rule 23(b)(1) because "any damages to which class members would be entitled would be based solely upon the number of shares that they own." *Noerr v. Greenwood*, 2002 WL 31720734, at *6 (Del. Ch. Nov. 22, 2002).

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

Further, Rule 23(b)(1)(A) and (B) are satisfied because if separate actions were commenced by members of the Class, Defendants and Company employee 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, 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 Rule 23(b)(1) is, therefore, appropriate. *See Allen v. El Paso Pipeline GP Co. L.L.C.*, 90 A.3d 1097, 1111-12 (Del. Ch. 2014) (certifying a class of common unitholders under Rule 23(b)(1) and (b)(2)).

C. The Settlement is Fair, Reasonable, and Adequate and Warrants Preliminary Approval

Taking into account the above-identified factors, Plaintiff submits that there are no patent grounds to question the fairness of the Settlement and that the Settlement should therefore be preliminarily approved for the following reasons.

(1) The Advantages of the Proposed 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*., 2023 Del. Ch. LEXIS 329, at *34 (Del. Ch. Aug. 11, 2023) (internal citations omitted).

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 claims for violations of Section 11 of the Securities Act, alleging that the 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 of Symantec purchased inside

the ESPP at the 15% discount. Plaintiff contends that his claims are valid, particularly given the court's rulings in a Federal Securities Action on two motions to dismiss, a contested motion for class certification, and an eventual settlement for the public market purchasers of Company common stock. Among the court's rulings in the Federal Securities Action, the court noted that Plaintiff had sufficiently alleged 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. *See* Federal Securities Action, Dkt. No. 421, pp. 2-4. Further, as both scienter and loss causation are not elements of a Section 11 claim, Plaintiff would have fewer obstacles to overcome in proving liability in this Action. *See In re Stac Elecs. Litig.*, 89 F.3d 1399, 1403–04 (9th Cir. 1999) ("No scienter is required for liability under § 11"); *see also In re Giant Interactive Grp., Inc. Secs. Litig*., 643 F.Supp.2d 562, 571 (S.D.N.Y. 2009) ("[L]oss causation is not an element of a claim under either Section 11 or 12.").

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 proving that

Defendants made materially false and misleading statements in the Registration Statement at both the motion to dismiss and summary judgment stages. If Plaintiff prevailed on the foregoing, he would face challenges in certifying a class and proving damages, as well as defending against any appeals that may follow.

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 Class 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.

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."

(2) The Probable Complexities and Duration of Continued Litigation

As noted above, the Action presents unique issues as to liability and damages, all of which would have to be resolved in Plaintiff's favor for a victory at trial and on appeal to be achieved. 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 discovery materials from the Federal Securities Action, but limited substantive litigation. Thus, continued litigation would require additional discovery to take place which would be "costly, intrusive, and time consuming," as well as the probable filing of an amended complaint, 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 (Super. Ct. 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 their evaluation of the foregoing challenges and the benefits of Settlement, the Parties believe 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 proposed 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 and his employment with the Company, reviewing and approving the complaint before filing, accepting the risks of public litigation, and consulting with counsel during the litigation, and extensive settlement negotiations. The proposed Class Representative has been informed of and supports the terms of the Settlement.

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, they 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. Accordingly, the active 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) The Effect of the Settlement on Other Actions

There are no other pending actions against the Defendants for the alleged material misrepresentations and omissions in documents incorporated by reference in the Plan's Registration Statement. 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." *Bradley*, 64 A.3d, at 397. "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." *Id.*

(5) The Fairness of the Allocation Process and Settlement

Plaintiff's Counsel represents that the Plan of Allocation attached as Exhibit C to the Stipulation, 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.[7] Indeed, this settlement will provide guaranteed monetary relief to Class Members based on their Recognized Loss, thereby achieving an equitable result for all affected Class Members.

Accordingly, in evaluating the advantages of the Settlement, the likely cost and duration of continued litigation, the participation of Plaintiff, a mediator, and the existence of arm's-length negotiations, the fairness of the allocation process, the intrinsic fairness of the terms of the Settlement, and the monetary relief available to Class Members, the Settlement is clearly fair, reasonable, and adequate and there are no patent grounds to question the fairness of the Settlement. *See Bradley*, 64 A.3d, at 394.

(6) 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 whether

[7] *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 reduce the number of class members who receive a settlement payment.").

the Plan sustained any 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 in balancing the "give" and the "get" from this Settlement. *See* § IV.C.1, *supra*.

(7) 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 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. No funds shall revert back to Defendants. 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).

V. NOTICE SATISFIES RULE 23(C)(2)

This Settlement provides the following Notice plan, which the Parties believe constitutes "the best practicable notice under the circumstances, and [is] reasonably calculated to apprise Class Members of the facts of this litigation and their rights with respect to the Settlement Agreement," in satisfaction of Del.

Super. Ct. R. 23(c)(2). *Hernandez v. Baird Mandalas Brockstedt & Federico, LLC*, 2024 Del. Super. LEXIS 387, at *8 (Super. Ct. May 13, 2024)

Within thirty days following entry of the Preliminary Approval Order (McKenna Decl., Ex. A), Plaintiff's counsel will cause the Detailed Notice (McKenna Decl., Ex. A-1) to be posted on the dedicated website created by the Claims Administrator, along with the Stipulation and supporting exhibits. At the same time, Plaintiff's counsel will cause the Detailed Notice to be published via a press release for national distribution in the United States and cause the Summary Notice (McKenna Decl., Ex. A-2) to be sent to the email and mailing addresses that the Company has on file for the Class Members.

Further, the Detailed and Summary Notices fairly and adequately: (a) describe the terms and effects of the Settlement Agreement, the Settlement, and the Plan of Allocation; (b) notify the Class that Class Counsel will seek attorneys' fees and litigation costs from the Settlement Fund, payment of the costs of administering the Settlement out of the Settlement Fund, and for a case contribution award to Plaintiff for his service in such capacity; (c) give notice to the Class of the time and place of the Final Approval Hearing; and (d) describe how the recipients of the class Notice may object to any of the relief requested. *See* McKenna Decl., Exs. A-1, A-2.

Accordingly, the proposed form and plan of Notice warrant this Court's approval because they constitute the best notice practicable under the circumstances and satisfy the requirements of Rule 23(c)(2), due process, and any

other applicable law, and are similar to the Notice provided in other securities class actions across the country. *See Cuppels*, 2021 Del. Super. 292, at *17 (mailing notice to class members and providing publication notice through "newsprint advertisements and an internet site"); *In re AMC*, 2023 Del. Ch. LEXIS 329, at *3 ("comprehensive electronic notice, coupled with supplemental but imperfect postcard notice, was adequate notice under Delaware law.").

VI. PROPOSED TIMEFRAME

Plaintiff proposes the following schedule for the Notice and approval process:

EVENT	TIME
Notice published by Class Counsel via press release for national distribution in the United States.	Within thirty (30) days of Preliminary Approval Order.
Detailed notice published by Class Counsel on the dedicated website created by the Claims Administrator to provide details of the Settlement found at www.strategicclaims.net/ESPPSettlement/.	Within thirty (30) days of Preliminary Approval Order.
Summary Notice to be provided by Class Counsel via first-class mail.	Within thirty (30) days of Preliminary Approval Order.
Filing of Proof of Notice distribution by Plaintiff.	No later than forty-five (45) days before the Settlement Fairness Hearing.
Deadline for objections to the Settlement.	At least twenty-one (21) days before the Settlement Fairness Hearing.
Filing petition by Class Counsel for attorney's fees, litigation costs and case contribution award.	At least twenty-eight (28) days before the Settlement Fairness Hearing.

EVENT	TIME
Filing of reply papers in support of the Settlement and/or in response to any objections.	At least seven (7) days before the Settlement Fairness Hearing.

VII. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court enter the [Proposed] Order attached to the Stipulation as Exhibit A, which includes the following relief: (1) the Court's preliminary approval of the Settlement; (2) Court approval of the Parties' Notice plan; (3) provisionally certifying, for purposes of the Settlement only, the Settlement Class as defined, *supra*; (4) preliminarily appointing Plaintiff as Settlement Class Representative; (5) preliminarily appointing the law firm of Gainey McKenna & Egleston as Class Counsel to act on behalf of the Settlement Class with respect to the Settlement; (6) approving the Parties' proposed settlement procedure, including approving the Parties' selection of Strategic Claims Services as Claims Administrator and approving the proposed schedule; and (7) the setting of a Final Approval Hearing.

Dated: July 10, 2024

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