

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

DAVID GIROUX, Derivatively on Behalf  
of ACER THERAPEUTICS, INC.,

Plaintiff,

v.

JASON AMELLO, STEVE ASELAGI,  
HUBERT BIRNER, JOHN M. DUNN,  
MICHELLE GRIFFIN, LUC MARENGERE,  
HARRY PALMIN, and CHRIS SCHELLING,

Defendants,

and

ACER THERAPEUTICS, INC.,

Nominal Defendant.

Case No. 1:20-cv-10537

**STIPULATION OF SETTLEMENT**

**Hon. George A. O'Toole, Jr.**

This Stipulation of Settlement, dated December 29, 2020 (the "Stipulation"), is made and entered into by and among the following Settling Parties (as defined below), each by and through their respective counsel: (i) David Giroux ("Giroux"), plaintiff in the above-captioned shareholder derivative action (the "Massachusetts Action"), Matthew Gress ("Gress"), Kyle McNeil ("McNeil"), and Jose Luis Gonzalez Diaz ("Diaz"), plaintiffs in the consolidated derivative action in the U.S. District Court for the District of Delaware captioned *In re Acer Therapeutics, Inc. Derivative Litigation*, Lead Case No. 1:19-cv-01505-MN (the "Delaware Action"), and Stephen King ("King"), plaintiff in the derivative action in the U.S. District Court for the Southern District of New York captioned *King v. Schelling, et al.*, Case No. 1:20-cv-04779-GHW (the "New York Action" and together with the Massachusetts Action and the Delaware Action, the "Actions," and

the plaintiffs to the Actions are collectively referred to herein as the “Plaintiffs”),<sup>1</sup> individually and derivatively on behalf of Acer Therapeutics Inc. (“Acer” or the “Company”); (ii) nominal defendant Acer; and (iii) defendants Jason Amello, Steve Aselage, Hubert Birner, John M. Dunn, Michelle Griffin, Luc Marengere, Harry Palmin, and Chris Schelling (the “Individual Defendants” and together with Acer, the “Defendants”).

This Stipulation, subject to the approval of the U.S. District Court for the District of Massachusetts (the “Court”), is intended by the Settling Parties to fully, finally, and forever compromise, resolve, discharge, and settle the Released Claims (as defined below) and to result in the complete dismissal of the Actions with prejudice, upon the terms and subject to the conditions set forth herein, and without any admission or concession as to the merits of any of the Settling Parties’ claims or defenses.

## **I. BACKGROUND**

### **A. Factual Background**

Acer is a Delaware corporation with principal executive offices located in Newton, Massachusetts. The Company is focused on the acquisition, development, and commercialization of therapies for serious rare and life-threatening diseases with significant unmet medical needs. Acer’s pipeline includes three clinical-stage candidates: EDSIVO™ (“EDSIVO” or “celiprolol”) for the treatment of vascular Ehlers-Danlos syndrome (“vEDS”) in patients with a confirmed type III collagen (“COL3A1”) mutation; ACER-001—a fully tastemasked, immediate release formulation of sodium phenylbutyrate—for the treatment of various inborn errors of metabolism, including urea cycle disorders and Maple Syrup Urine Disease; and osanetant for the treatment of induced Vasomotor Symptoms where Hormone Replacement Therapy is likely contraindicated.

---

<sup>1</sup> Although filed only in the Massachusetts Action, this Stipulation and Settlement also resolves the Delaware Action and the New York Action.

Acer conducted public common stock offerings in December 2017 and August 2018, raising \$12.56 million and \$46 million, respectively, to fund its operations (the “Offerings”). In connection with the two Offerings, Acer made certain representations in filings with the U.S. Securities and Exchange Commission (the “SEC”).

In 2019, a putative securities class action was filed alleging that Acer and certain of its directors and officers violated Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the “Exchange Act”) for certain alleged misrepresentations or omissions made from September 25, 2017 through June 24, 2019 (the “Relevant Period”). Following the appointment of a lead plaintiff under the Private Securities Litigation Reform Act of 1995 (the “PSLRA”), that action is now captioned *Skiadas v. Acer Therapeutics Inc.*, Case No. 1:19-cv-06137-GHW (S.D.N.Y.) (the “Securities Class Action”).

## **B. Procedural Background**

Plaintiffs in the Actions all allege, among other things, that the Individual Defendants breached their fiduciary duties to Acer by intentionally and/or recklessly causing Acer to make materially false and/or misleading statements and/or fail to disclose that: (1) the Company lacked sufficient data to support filing EDSIVO’s NDA with the FDA for the treatment of vEDS; (2) the Ong Trial was an inadequate and ill-controlled clinical study by FDA standards, and was comprised of an insufficiently small group size to support EDSIVO’s NDA; (3) consequently, the FDA would likely reject EDSIVO’s NDA; and (4) as a result, the Company’s public statements were materially false and misleading at all relevant times.

### **1. The Massachusetts Action**

On March 17, 2020, Giroux filed in this Court the above-captioned Massachusetts Action, purportedly in the right, and for the benefit, of Acer against the Individual Defendants seeking to

remedy the Individual Defendants' alleged breach of fiduciary duties, unjust enrichment, and violations of Section 14(a) of the Exchange Act.

On April 7, 2020, Giroux and Defendants entered into a Stipulation and Order, which proposed to stay the Massachusetts Action pending a decision on the motion to dismiss in the Securities Class Action. The Court so ordered the stipulation on April 21, 2020.

On September 10, 2020, Giroux filed a Verified Amended Stockholder Derivative Complaint, reiterating his original allegations and asserting new allegations in support of his claims against the Individual Defendants on behalf of Acer for breach of fiduciary duty, unjust enrichment claims, and violations of Section 14(a) of the Exchange Act.

## **2. The Delaware Action**

On August 12, 2019, Gress and McNeil filed a Verified Stockholder Derivative Complaint in the District of Delaware, purportedly in the right, and for the benefit, of Acer against the Individual Defendants seeking to remedy the Individual Defendants' alleged breach of fiduciary duties, unjust enrichment, and violations of Section 14(a) of the Exchange Act (the "*Gress Action*").

On March 4, 2020, Gress, McNeil, and Defendants entered into a Stipulation and Order, which proposed to stay the *Gress Action* pending a decision on the motion to dismiss in the Securities Class Action. The District of Delaware so ordered the stipulation on March 10, 2020.

On June 16, 2020, the court in the Securities Class Action entered an order denying in part the defendants' motion to dismiss under FRCP 12(b)(6). On July 21, 2020, the court in the Securities Class Action denied the defendants' motion to reconsider the court's prior order denying the motion to dismiss.

On August 12, 2019, Diaz filed a Verified Stockholder Derivative Complaint in the District of Delaware, purportedly in the right, and for the benefit, of Acer against the Individual Defendants

seeking to remedy the Individual Defendants' alleged breach of fiduciary duties, unjust enrichment, and violations of Section 14(a) of the Exchange Act (the "*Diaz* Action").

On July 22, 2020, Gress and McNeil filed their Verified Shareholder Derivative Amended Complaint in the *Gress* Action, reiterating their original allegations and asserting new allegations in support of their claims against the Individual Defendants on behalf of Acer for breach of fiduciary duty, unjust enrichment claims, and violations of Section 14(a) of the Exchange Act.

On August 6, 2020, Gress, McNeil, Diaz, and Defendants entered into a Stipulation and [Proposed] Order consolidating the *Diaz* Action and the *Gress* Action under a consolidated caption, *In re Acer Therapeutics, Inc. Derivative Litigation*, Lead Case No. 1:19-cv-01505-MN, and appointing Gainey McKenna & Egleston ("GME") and Shuman, Glenn & Stecker ("SGS") as Co-Lead Counsel and O'Kelly & Ernst, LLC as Liaison Counsel in the Delaware Action. The District of Delaware granted the parties' stipulation on August 7, 2020.

### **3. The New York Action**

On June 22, 2020, King filed a Verified Stockholder Derivative Complaint in the Southern District of New York, purportedly in the right, and for the benefit, of Acer against the Individual Defendants seeking to remedy the Individual Defendants' alleged breach of fiduciary duties, unjust enrichment, abuse of control, waste of corporate assets, and violations of Section 14(a) of the Exchange Act (the "*King* Action").

### **4. Coordination of Actions and Settlement Negotiations with Defendants**

In September 2020, plaintiffs Giroux, Gress, McNeil, and Diaz discussed the possibility of coordinating their efforts in prosecuting the Massachusetts Action and Delaware Action. Plaintiffs Giroux, Gress, McNeil, and Diaz thereafter agreed to work together both to maximize the effectiveness and efficiency of their efforts in pursuing the Actions on behalf of Acer against the Individual Defendants.

Around this same time, the Settling Parties began discussing a potential resolution of the Actions.

On October 21, 2020, plaintiffs Giroux, Gress, McNeil, and Diaz sent a written demand to Defendants for therapeutic relief that directly addressed the alleged misconduct giving rise to the Actions, as well as the Securities Class Action. Plaintiff King separately made a settlement demand upon Defendants.

Over the next several weeks, the Settling Parties engaged in extensive back-and-forth negotiations regarding a series of corporate governance enhancements that would be adopted and implemented at Acer.

On November 23, 2020, following settlement discussions and approval by Acer's Board of Directors (the "Board") in an exercise of its independent business judgment, the Settling Parties reached an agreement regarding a series of corporate governance reforms to be undertaken at Acer, the terms of which are fully set forth in Exhibit A attached hereto (the "Corporate Governance Reforms"). After reaching agreement on the Corporate Governance Reforms, the Settling Parties engaged in arm's-length negotiations concerning a potential award of attorneys' fees and expenses to be paid to Plaintiffs' counsel, after which Defendants agreed, following Board approval in exercise of its independent business judgment, to cause Acer's insurance carriers to pay Plaintiffs' counsel \$500,000 (the "Fee and Expense Award"), which includes incentive awards of \$1,000 to each of Plaintiffs (the "Incentive Awards"), subject to approval by the Court.

## **II. PLAINTIFFS' COUNSEL'S INVESTIGATION AND RESEARCH, PLAINTIFFS' CLAIMS, AND THE SUBSTANTIAL BENEFIT OF SETTLEMENT**

Plaintiffs' Counsel conducted an investigation relating to the claims and the underlying events alleged in the Actions, including, but not limited to: (1) reviewing and analyzing the Company's public filings with the SEC, press releases, announcements, transcripts of investor

conference calls, and news articles; (2) reviewing and analyzing the allegations contained in filings made in other litigation; (3) researching and drafting the complaints and amended complaints filed in the Actions; (4) researching the applicable law with respect to the claims in the Actions and the potential defenses thereto; (5) researching corporate governance issues; (6) preparing an extensive settlement demand that included a corporate governance reforms proposal; and (7) engaging in extensive settlement discussions with Defendants' Counsel.

Plaintiffs' Counsel believe that the claims asserted in the Actions have merit and that their investigation supports the claims asserted. Without conceding the merit of any of Defendants' defenses or the lack of merit of any of Plaintiffs' allegations, and in light of the substantial benefit Plaintiffs' Counsel believe the Settlement confers on Acer, as well as to avoid the potentially protracted time, expense, and uncertainty associated with continued litigation, including potential trials and appeals, Plaintiffs' Counsel have concluded that it is desirable that the Actions be fully and finally settled in the manner, and upon the terms and conditions, set forth in this Stipulation. Plaintiffs and Plaintiffs' Counsel recognize the significant risk, expense, and length of continued proceedings necessary to prosecute the Actions against the Defendants through trials and possible appeals. Plaintiffs' Counsel also have taken into account the uncertain outcome and the risk of any litigation, especially complex litigation such as the Actions, as well as the difficulties and delays inherent in such litigation. Based on their evaluation, Acer's financial situation as a small pharmaceutical company with only 20 employees and a total market capitalization of approximately \$30 million, and in light of the substantial benefit conferred upon the Company and its stockholders as a result of the Settlement, Plaintiffs and Plaintiffs' Counsel have determined that the Settlement is in the best interests of Acer and Current Acer Stockholders (as defined

below), and have agreed to settle the Actions upon the terms, and subject to the conditions, set forth herein.

### **III. DEFENDANTS' DENIALS OF WRONGDOING AND LIABILITY**

Defendants have denied, and continue to deny, each and every claim and contention alleged by Plaintiffs in the Actions and affirm that they have acted properly, lawfully, and in full accord with their fiduciary duties, at all times. Further, Defendants have denied expressly, and continue to deny, all allegations of wrongdoing, fault, liability, or damage against them arising out of any of the conduct, statements, acts or omissions alleged, or that could have been alleged, in the Actions and deny that they have ever committed or attempted to commit any violations of law, any breach of fiduciary duty owed to Acer or its stockholders, or any wrongdoing whatsoever. Defendants have also denied and continue to believe that Plaintiffs lack standing to assert claims on Acer's behalf. Had the terms of this Stipulation not been reached, Defendants would have continued to contest Plaintiffs' allegations vigorously, and Defendants maintain that they had and have meritorious defenses to all claims alleged in the Actions. Nevertheless, Defendants acknowledge that continuation of the Action would be lengthy and expensive, and recognize that it is desirable that the Action be fully and finally settled in the manner and upon the terms and conditions set forth in this Stipulation. Defendants acknowledge and agree that the Corporate Governance Reforms confer a substantial benefit to Acer and its stockholders. Without admitting the validity of any of the claims that Plaintiffs have asserted in the Actions, or any liability with respect thereto, Defendants have concluded that it is desirable that the claims be fully and finally settled on the terms and subject to the conditions set forth herein.

### **IV. TERMS OF STIPULATION AND AGREEMENT OF SETTLEMENT**

Plaintiffs, derivatively on behalf of Acer, and Defendants, by and through their respective counsel or attorneys of record, hereby stipulate and agree that, subject to Court approval, in



consideration of the substantial benefit flowing to the Settling Parties, the Actions and all of the Released Claims shall be fully, finally, and forever satisfied, compromised, settled, released, discharged, and dismissed with prejudice, upon the terms and subject to the conditions set forth herein as follows:

**1. Definitions**

As used in this Stipulation, the following terms have the meanings specified below. In the event of any inconsistency between any definition set forth below and any definition set forth in any document attached as an exhibit to this Stipulation, the definitions set forth below shall control.

1.1 “Claims” means, collectively, any and all claims, rights, demands, causes of action or liabilities of any kind, nature and character (including but not limited to claims for damages, interest, attorneys’ fees, expert or consulting fees, and any and all other costs, expenses or liabilities whatsoever), whether based on federal, state, local, statutory or common law or any other law, rule or regulation, whether foreign or domestic, whether fixed or contingent, accrued or unaccrued, liquidated or unliquidated, at law or in equity, matured or unmatured, known or Unknown, that were or could have been asserted in the Actions.

1.2 “Current Acer Stockholders” means, for purposes of this Stipulation, any Persons who own Acer common stock as of the date of this Stipulation and who continue to hold their Acer common stock as of the date of the Settlement Hearing, excluding the Defendants, the officers and directors of Acer, and members of their immediate families, and their legal representatives, heirs, successors, or assigns, or any entity in which Defendants have or had a controlling interest.

1.3 “Defendants’ Counsel” means Morrison Foerster LLP, 250 West 55th Street, New York, NY 10019-9601

1.1 “Defendants’ Released Claims” means all Claims that could be asserted in any forum by any of the Released Persons against Plaintiffs, Plaintiffs’ Counsel, Acer, and all Current Acer Stockholders (solely in their capacity as Acer stockholders) (including known and Unknown Claims brought directly), arising out of, relating to, or in connection with the institution, prosecution, assertion, settlement, or resolution of the Actions or the Released Claims; provided, however, that nothing herein shall in any way release, waive, impair, or restrict the rights of any Party to enforce the terms of this Settlement.

1.2 “Effective Date” means the first date by which all of the events and conditions specified in Section IV, ¶ 6.1 herein have been met and have occurred.

1.3 “Final,” with respect to a court order, means the later of: (i) if there is an appeal from a court order, the date of final affirmance on appeal and the expiration of the time for any further judicial review whether by appeal, reconsideration or a petition for a *writ of certiorari* and, if *certiorari* is granted, the date of final affirmance of the order following review pursuant to the grant; or (ii) the date of final dismissal of any appeal from the order or the final dismissal of any proceeding on *certiorari* to review the order; or (iii) the expiration of the time for the filing or noticing of any appeal or petition for *certiorari* from the order (or, if the date for taking an appeal or seeking review of the order shall be extended beyond this time by order of the issuing court, by operation of law or otherwise, or if such extension is requested, the date of expiration of any extension if any appeal or review is not sought), without any such filing or noticing being made. However, any appeal or proceeding seeking subsequent judicial review pertaining solely to this Court’s award of attorneys’ fees or expenses, shall not in any way delay or affect the time set forth above for the Judgment to become Final or otherwise preclude the Judgment from becoming Final.

1.4 “Judgment” means the final order and judgment to be rendered by this Court, substantially in the form attached hereto as Exhibit D.

1.5 “Notice” means the Notice of Proposed Settlement of Derivative Action to Current Acer Stockholders of the Settlement, which, subject to this Court’s approval, shall be substantially in the form of Exhibit B attached hereto.

1.6 “Person(s)” means an individual, corporation, limited liability company, professional corporation, partnership, limited partnership, limited liability partnership, association, joint stock company, estate, legal representative, trust, unincorporated association, government or any political subdivision or agency thereof, and any business or legal entity, and their spouses, heirs, predecessors, successors, administrators, parents, subsidiaries, affiliates, representatives, or assignees.

1.7 “Plaintiffs’ Counsel” means Bragar Egel & Squire, P.C., 855 Third Avenue, Suite 3040, New York, New York, 10022; Gainey McKenna & Egleston, 501 Fifth Avenue, 19th Floor, New York, New York, 10017; Shuman, Glenn & Stecker, 326 W. Lancaster Avenue, Ardmore, Pennsylvania 19003; Pomerantz LLP, 600 Third Avenue New York, New York, 10016; and The Brown Law Firm, P.C., 240 Townsend Square, Oyster Bay, New York 11771.

1.8 “Preliminary Approval Order” means the Order Preliminarily Approving Derivative Settlement and Providing for Notice to be entered by this Court, substantially in the form of Exhibit C attached hereto.

1.9 “Related Persons” means each and all of a Person’s past, present, or future family members, spouses, domestic partners, parents, associates, affiliates, subsidiaries, officers, directors, stockholders, owners, members, representatives, employees, attorneys, financial or investment advisors, consultants, underwriters, investment banks or bankers, commercial bankers,

insurers, reinsurers, excess insurers, co-insurers, advisors, employees, principals, agents, heirs, executors, trustees, estates, beneficiaries, distributees, predecessors, successors, affiliates, subsidiaries, divisions, entities, investment vehicles, retirement accounts, foundations, general or limited partners or partnerships, joint ventures, personal or legal representatives, administrators, or any other person or entity acting or purporting to act for or on behalf of any Person, and each of their respective predecessors, successors, and assigns.

1.10 “Released Claims” means all Claims, including known and Unknown Claims, against any of the Released Persons that (i) were asserted or could have been asserted derivatively on behalf of the Company, directly by Plaintiffs, or by the Company concerning, arising from or relating to the underlying facts, conduct, events, occurrences, transactions, or allegations set forth, made or referred to in the Actions; (ii) would have been barred by *res judicata* had the Actions been fully litigated to final judgment; or (iii) could have been, or could in the future be, asserted in any forum or proceeding or otherwise against any of the Released Persons that (a) concern or arise out of or relate to any of the subject matters, allegations, transactions, facts, occurrences, representations, statements, or omissions alleged, involved, set forth, or referred to in any complaint or demand letter in the Actions including, but not limited to, claims for breach of fiduciary duty, unjust enrichment, and violations of Section 14(a) of the Securities Exchange Act of 1934, contribution and indemnification, money damages, disgorgement, any and all demands, actions, damages, claims, rights or causes of action, or liabilities whatsoever; provided, however, that nothing herein shall in any way release, waive, impair, or restrict the rights of any Party to enforce the terms of this Settlement. Released Claims do not include the claims asserted in the Securities Class Action.

1.11 “Released Person(s)” means, collectively, each and all of the Defendants and their Related Persons.

1.12 “Settlement” means the settlement of the Actions as documented in this Stipulation.

1.13 “Settlement Hearing” means the hearing by this Court to review the adequacy, fairness, and reasonableness of the Settlement set forth in this Stipulation and to determine: (i) whether to enter the Judgment; and (ii) all other matters properly before this Court.

1.14 “Settling Parties” means, collectively, Plaintiffs (individually and derivatively on behalf of Acer), Acer and the Defendants.

1.15 “Unknown Claims” means any Claims that any Party or any Current Acer Stockholder (claiming in the right of, or on behalf of, the Company) does not know or suspect to exist in his, her, or its favor at the time of the release of the Released Claims and Defendants’ Released Claims that, if known by him, her, or it, might have affected his, her, or its settlement with and release of the Released Claims and Defendants’ Released Claims, or might have affected his, her, or its decision not to object to this Settlement. Unknown Claims include those Claims in which some or all of the facts comprising the Claim may be unsuspected, or even undisclosed or hidden. With respect to any and all Released Claims and Defendants’ Released Claims, including Unknown Claims, the Settling Parties stipulate and agree that, upon the Effective Date, they shall expressly waive, and every Current Acer Stockholder shall be deemed to have, and by operation of the Judgment shall have, expressly waived the provisions, rights, and benefits of California Civil Code § 1542, which provides:

**A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.**

The Settling Parties shall expressly waive, and every Current Acer Stockholder who is not a Defendant shall be deemed to have, and by operation of the Judgment shall have, expressly waived any and all provisions, rights, and benefits conferred by any law of any state or territory of the United States, or principle of common law or foreign law, which is similar, comparable or equivalent in effect to California Civil Code § 1542. The Settling Parties may hereafter discover facts in addition to or different from those which he, she, or it now knows or believes to be true with respect to the subject matter of the Released Claims or Defendants' Released Claims, but the Settling Parties shall expressly have, and every Current Acer Stockholder shall be deemed to have, and by operation of the Judgment shall have, fully, finally, and forever settled and released any and all Released Claims and Defendants' Released Claims, known or unknown, suspected or unsuspected, contingent or non-contingent, accrued or unaccrued, whether or not concealed or hidden, which now exist, or heretofore have existed, upon any theory of law or equity now existing, including, but not limited to, conduct which is negligent, reckless, intentional, with or without malice, or a breach of any duty, law or rule, without regard to the subsequent discovery or existence of such different or additional facts. The Settling Parties acknowledge, and every Current Acer Stockholder who is not a Defendant shall be deemed by operation of the Judgment to have acknowledged, that the foregoing waivers were separately bargained for and a key element of the Settlement of which this release is a material and essential part.

## **2. Terms of the Settlement**

2.1 In consideration for the full and final release, settlement and discharge of any and all claims that were or could have been asserted by Plaintiffs, individually and derivatively on behalf of Acer, against Defendants in the Actions and the other terms and conditions of this Stipulation, the Settling Parties have agreed to the following:

2.2 Acer shall implement the Corporate Governance Reforms set forth in Exhibit A, pursuant to the terms set forth in Exhibit A and shall maintain them pursuant to the terms set forth in Exhibit A. Acer and its Board acknowledge that the filing, prosecution, and resolution of the Actions were the primary cause of the Board's decision to implement the Corporate Governance Reforms. Acer and the Board further agree and affirm that the Corporate Governance Reforms have conferred and will confer a substantial benefit upon the Company and its shareholders. Within ten (10) calendar days of the Court's entry of the Judgment, the parties to the Actions shall file a stipulation dismissing the Actions with prejudice.

### **3. Procedure for Implementing the Settlement**

3.1 Promptly after execution of this Stipulation, the Plaintiffs shall submit this Stipulation, together with its exhibits, to this Court and apply for entry of the Preliminary Approval Order, substantially in the form of Exhibit C attached hereto, which, *inter alia*: (i) preliminarily approves the Settlement; (ii) approves the method of providing notice of the proposed Settlement to Current Acer Stockholders; (iii) approves the form of notice of the Settlement substantially in the form of Exhibit B attached hereto (the "Notice"); and (iv) sets a date for the Settlement Hearing.

3.2 Acer shall undertake the administrative responsibility for giving notice of the Settlement to Current Acer Stockholders in the manner set forth in this paragraph. Acer shall be solely responsible for paying the costs and expenses related to providing such notice or any notice that is required by this Court. Within ten (10) calendar days after this Court's entry of the Preliminary Approval Order, Acer shall (1) issue the notice of the Settlement substantially in the form of Exhibit B attached hereto ("Notice") via a generally recognized wire service, (2) file with the SEC (a) the Notice and (b) the Stipulation with its exhibits (collectively "Stipulation"), as exhibits to a Form 8-K, and (3) post the Notice together with the Stipulation on the Investor

Relations/Press Releases page of Acer's corporate website, or per the means required by this Court. The Notice will contain a link to the page on the Investors page of Acer's corporate website where the Notice and Stipulation will be posted, which posting will be maintained through the date of the Court's Settlement Hearing. The Settling Parties believe the content of the Notice and the manner of the notice procedures set forth in this paragraph constitute adequate and reasonable notice to Current Acer Stockholders pursuant to applicable law and due process.

3.3 Plaintiffs shall request that this Court hold the Settlement Hearing to approve the Settlement, the Fee and Expense Award, and the Incentive Awards at least forty-five (45) calendar days after entry of the Preliminary Approval Order, either in-person, telephonically or by video.

3.4 Pending this Court's determination as to final approval of the Settlement, Plaintiffs and Plaintiffs' Counsel, and any Current Acer Stockholders, derivatively on behalf of Acer, are barred and enjoined from commencing, prosecuting, instigating, or in any way participating in the commencement or prosecution of any action asserting any Released Claims against any of the Released Persons in any court or tribunal.

#### **4. Releases**

4.1 Upon the Effective Date, Acer, Plaintiffs (individually and on behalf of Acer), and each Current Acer Stockholder shall be deemed to have, and by operation of the Judgment shall have, fully, finally, and forever released, relinquished, and discharged the Released Claims, including claims against the Released Persons. Acer, Plaintiffs, and each Current Acer Stockholder shall be deemed to have, and by operation of the Judgment shall have, covenanted not to sue any Released Person with respect to any Released Claims, and shall be permanently barred and enjoined from instituting, commencing or prosecuting the Released Claims against the Released



Persons except to enforce the releases and other terms and conditions contained in this Stipulation and/or the Judgment entered pursuant thereto.

4.2 Upon the Effective Date, each of the Released Persons shall be deemed to have, and by operation of the Judgment shall have, fully, finally, and forever released, relinquished and discharged each and all of Plaintiffs and their Related Persons, Plaintiffs' Counsel and their Related Persons, Acer, and all Current Acer Stockholders (solely in their capacity as Acer stockholders) from Defendants' Released Claims. The Released Persons shall be deemed to have, and by operation of the Judgment shall have, covenanted not to sue Plaintiffs or their Related Persons, Plaintiffs' Counsel or their Related Persons, Acer, or any Current Acer Stockholders (solely in their capacity as Acer stockholders) with respect to any of Defendants' Released Claims, and shall be permanently barred and enjoined from instituting, commencing or prosecuting Defendants' Released Claims against Plaintiff and their Related Persons, Plaintiffs' Counsel and their Related Persons, Acer, and all Current Acer Stockholders (solely in their capacity as Acer stockholders) except to enforce the releases and other terms and conditions contained in this Stipulation and/or the Judgment entered pursuant thereto.

4.3 Nothing herein shall in any way release, waive, impair, or restrict the rights of any of the Settling Parties to enforce the terms of the Stipulation. In addition, nothing in this Stipulation shall limit, waive or otherwise affect the rights or claims of any of the Defendants relating to insurance coverage, indemnification, or advancement of legal expenses, including fees, arising from or under the Company's charter or by-laws, applicable law and/or statute, or any existing written agreements.

**5. Plaintiffs' Counsel's Attorneys' Fees and Expenses**

5.1 As a result of arm's-length negotiations between Acer and Plaintiffs, Defendants agreed, following Board approval in exercise of its independent business judgment, to cause Acer and/or Acer's insurance carriers to pay the Fee and Expense Award in the total amount of five hundred thousand dollars (\$500,000) as attorneys' fees and expenses to Plaintiffs' Counsel, inclusive of Incentive Awards of \$1,000 to each Plaintiff, subject to approval by this Court. The Settling Parties agree that the Fee and Expense Award and the Incentive Awards are fair and reasonable in light of the substantial benefit conferred upon Acer and Current Acer Stockholders by the Settlement.

5.2 To the extent awarded by the Court, Acer and/or Acer's insurers shall pay, or cause to be paid, by check or wire transfer, to be held in escrow, the Fee and Expense Award within twenty (20) calendar days of the latest of (a) entry of the Preliminary Approval Order; and (b) provision of complete and accurate payment instructions and Forms W-9 and EFT Authorization by Plaintiffs' Counsel to Defendants' Counsel. The Fee and Expense Award shall be paid into an interest-bearing escrow account (the "Escrow Account") to be established and maintained by Bragar Eigel & Squire, P.C. (the "Bragar Firm"), and shall be released to the Bragar Firm for distribution to all Plaintiffs' Counsel from the Escrow Account only after the Judgment approving the Settlement of the Actions has become Final. Defendants and Defendants' Counsel shall have no responsibility for, nor bear any risk or liability with respect to, the Escrow Account, its operation, and any taxes or expenses incurred in connection with the Escrow Account. Plaintiffs' Counsel shall be solely responsible for any administrative costs associated with the Escrow Account as well as the filing of all informational and other tax returns with the Internal Revenue Service, or any other state or local taxing authority, as may be necessary or appropriate.

5.3 The Fee and Expense Award and Incentive Awards shall remain in Plaintiffs' Counsel's Escrow Account until the entry of the Judgment, at which time the Fee and Expense Award and Incentive Awards shall be immediately releasable to Plaintiffs' Counsel and Plaintiffs, notwithstanding the existence of any timely-filed objections thereto or potential for appeal therefrom, or collateral attack on the Settlement or any part thereof. Should this Court order the payment of attorneys' fees and expenses to Plaintiffs' Counsel in an amount less than the agreed Fee and Expense Award prior to, or at the time of, entry of the Judgment, then only the Court-approved amount shall be released to Plaintiffs' Counsel. Any amounts remaining in Plaintiffs' Counsel's Escrow Account shall be returned to the paying party—Acer and/or Acer's insurers, depending on the amount of any refund—within ten (10) business days.

5.4 Payment of the Fee and Expense Award in the amount approved by this Court shall constitute final and complete payment for Plaintiffs' Counsel's attorneys' fees and expenses that have been incurred or will be incurred in connection with the filing and prosecution of the Actions and the resolution of the claims alleged therein. Defendants and Defendants' Counsel shall have no responsibility for the allocation or distribution of the Fee and Expense Award amongst Plaintiffs' Counsel. Defendants shall have no obligation to make any payment to any Plaintiffs' Counsel other than the payment to Plaintiffs' Counsel's Escrow Account provided in Section IV, ¶¶ 5.1-5.2 herein.

5.5 If for any reason any condition in Section IV, ¶ 6.1 is not met and the Effective Date of the Stipulation does not occur, if the Stipulation is in any way cancelled or terminated, or if the Judgment is reversed on appeal, then Plaintiffs' Counsel and their successors and Plaintiffs shall be obligated to repay to the paying party—Acer and/or its insurers, depending on the amount of any refund—within ten (10) business days after written notification of such an event, the amount

of the Fee and Expense Award and Incentive Awards paid by Acer that they received, and any amounts remaining in Plaintiffs' Counsel's Escrow Account shall be returned to Acer. In the event of any failure to obtain final approval of the full amount of the Fee and Expense Award, or upon any appeal and/or further proceedings on remand, or successful collateral attack, which results in the Judgment or the Fee and Expense Award being overturned or substantially modified, each of Plaintiffs' Counsel and their successors shall be obligated to repay to Acer, within ten (10) business days, the portion of the Fee and Expense Award paid by Acer that they received and that was ultimately not awarded to Plaintiffs' Counsel, and any amounts remaining in Plaintiffs' Counsel's Escrow Account shall be returned to Acer.

5.6 Except as otherwise provided in this Stipulation, each of the Settling Parties shall bear his, her, or its own costs and attorneys' fees.

**6. Conditions of Settlement, Effect of Disapproval, Cancellation, or Termination**

6.1 The Effective Date of the Stipulation shall be conditioned on the occurrence of all the following events:

- (i) the entry of the Preliminary Approval Order;
- (ii) this Court's entry of the Judgment;
- (iii) the payment of the Fee and Expense Award and Incentive Awards into Plaintiffs' Counsel's Escrow Account in accordance with Section 5, ¶¶ 5.1-5.2 herein;
- (iv) the Judgment has become Final; and
- (v) all Actions have been dismissed with prejudice.

6.2 If any of the conditions specified in Section IV, ¶ 6.1 are not met, then the Stipulation shall be cancelled and terminated subject to Section IV, ¶ 6.4, and Plaintiffs and

Defendants shall be restored to their respective positions in the Actions as of the date immediately preceding the date of this Stipulation, unless Plaintiffs' Counsel and Defendants' Counsel, on behalf of their respective clients, mutually agree in writing to proceed with the Stipulation.

6.3 Each of the Settling Parties shall have the right to terminate the Settlement by providing written notice of their election to do so to all other Settling Parties within twenty (20) calendar days of the date on which: (i) the Court refuses to approve this Stipulation, or the terms contained herein, in any material respect; (ii) the Preliminary Approval Order is not entered in substantially the form attached as Exhibit C hereto; (iii) the Judgment is not entered in substantially the form attached as Exhibit D hereto; (iv) the Judgment is reversed or substantially modified on appeal, reconsideration, or otherwise; (v) the Effective Date of the Settlement cannot otherwise occur; except that such termination shall not be effective unless and until the terminating Settling Party has, within twenty (20) calendar days of the date on which notice of the termination event has been provided to all other Settling Parties and attempted in good faith to confer with the other Settling Parties and/or to participate in a mediation session with a mediator appointed by the Settling Parties to attempt to remedy the issue. Any order or proceeding relating to the Fee and Expense Award, or any appeal from any order relating thereto or reversal or modification thereof, shall not operate to cancel the Stipulation, allow for the termination of the Settlement, or affect or delay the finality of the Judgment approving the Settlement.

6.4 In the event that the Stipulation is not approved by this Court, or the Settlement is terminated for any reason, including pursuant to Section IV, ¶ 6.3 above, Plaintiffs and Defendants shall be restored to their respective positions as of November 23, 2020, and all negotiations, proceedings, documents prepared, and statements made in connection herewith shall be without prejudice to the Settling Parties, shall not be deemed or construed to be an admission by any of the

Settling Parties of any act, matter, or proposition, and shall not be used in any manner for any purpose in any subsequent proceeding in the Actions or in any other action or proceeding. In such event, the terms and provisions of the Stipulation, with the exception of Section IV, ¶¶ 1.1-1.15, 5.5, 6.4, 7.6-7.19 herein, shall have no further force and effect with respect to the Settling Parties and shall not be used in the Actions or in any other proceeding for any purpose, and any judgment or orders entered by the Court in accordance with the terms of the Stipulation shall be treated as vacated, *nunc pro tunc*.

**7. Miscellaneous Provisions**

7.1 The Settling Parties: (i) acknowledge that it is their intent to consummate this Stipulation; and (ii) agree to cooperate to the extent reasonably necessary to effectuate and implement all terms and conditions of the Stipulation and to exercise their best efforts to accomplish the foregoing terms and conditions of the Stipulation. To the extent the Settling Parties are unable to reach an agreement concerning such best efforts, any Settling Party may refer the matter to a mediator appointed by the Settling Parties for a mediated resolution, subject to Court approval, with the fees and expenses of the mediator to be divided equally between Plaintiffs on the one hand and Defendants on the other.

7.2 The Settling Parties agree that the terms of the Settlement were negotiated in good faith and at arm's length by the Settling Parties and reflect a settlement that was reached voluntarily based upon adequate information and after consultation with competent legal counsel. The Settling Parties agree that each has complied fully with the applicable requirements of good faith litigation under the Securities Exchange Act of 1934 and the Federal Rules of Civil Procedure. The Settling Parties shall not take the position that the litigation was brought or defended in bad faith or in violation of Rule 11 of the Federal Rules of Civil Procedure.

7.3 While maintaining their positions that the claims and defenses asserted in the Actions are meritorious, Plaintiffs and Plaintiffs' Counsel, on the one hand, and Defendants and Defendants' Counsel, on the other, shall not make any public statements or statements to the media (whether or not for attribution) that disparage the other's business, conduct, or reputation, or that of their counsel, based on the subject matter of the Actions. Notwithstanding the foregoing, each of the Settling Parties reserves their right to rebut, in a manner that such party determines to be reasonable and appropriate, any contention made in any public forum that the Actions were brought or defended in bad faith or without a reasonable basis.

7.4 Whether or not the Settlement is approved by this Court, and whether or not the Settlement is consummated, the fact and terms of this Stipulation, including any exhibits attached hereto, all proceedings in connection with the Settlement, and any act performed or document executed pursuant to or in furtherance of the Stipulation or the Settlement:

(a) shall not be offered, or used in any way against the Settling Parties as evidence of, or be deemed to be evidence of, a presumption, concession, or admission by any of the Settling Parties with respect to the truth of any fact alleged by Plaintiffs or the validity, or lack thereof, of any claim that has been or could have been asserted in the Actions or in any litigation, or the deficiency, infirmity, or validity of any defense that has been or could have been asserted in the Actions or in any litigation, or of any fault, wrongdoing, negligence, or liability of any of the Released Persons;

(b) shall not be offered, received, or used in any way against any of the Released Persons as evidence of, or be deemed to be evidence of, a presumption, concession, or admission of any fault, misrepresentation or omission with respect to any statement or written document approved, issued, or made by any Released Person;

(c) shall not be offered or used in any way against any of the Released Persons as evidence of, or be deemed to be evidence of, a presumption, concession, or admission of any liability, fault, negligence, omission or wrongdoing, or in any way referred to for any other reason as against the Released Persons, in any arbitration proceeding or other civil, criminal, or administrative action or proceeding in any court, administrative agency, or other tribunal; and

(d) shall not be offered or used in any way against Plaintiffs or Plaintiffs' Counsel as evidence of, or be deemed to be evidence of, a presumption, concession, or admission that any of Plaintiffs' claims are without merit or that Plaintiffs would not have been able to prevail on their claims at trial.

7.5 Neither this Stipulation nor the Settlement, nor any act performed or document executed pursuant to or in furtherance of this Stipulation, or the Settlement, shall be admissible in any proceeding for any purpose except to enforce the terms of the Settlement; provided, however, that the Released Persons may refer to the Settlement, and file the Stipulation and/or the Judgment, in any action that may be brought against them to effectuate the liability protections granted them hereunder, including, without limitation, to support a defense or claim based on principles of *res judicata*, collateral estoppel, full faith and credit, release, standing, good faith settlement, judgment bar or reduction or any other theory of claim preclusion or issue preclusion or similar defense or claim under U.S. federal or state law or foreign law.

7.6 The exhibits to the Stipulation are material and integral parts hereof and are fully incorporated herein by this reference.

7.7 The Stipulation may be amended or modified only by a written instrument signed by or on behalf of all the Settling Parties or their respective successors-in-interest. After prior notice to the Court, but without further order of the Court, the Settling Parties may agree to



reasonable extensions of time to carry out any provisions of this Stipulation.

7.8 This Stipulation and the exhibits attached hereto represent the complete and final resolution of all disputes among the Settling Parties with respect to the Actions, constitute the entire agreement among the Settling Parties, and supersede any and all prior negotiations, discussions, agreements, or undertakings, whether oral or written, with respect to such matters.

7.9 The waiver by one party of any breach of the Settlement by any other party shall not be deemed a waiver of any other prior or subsequent breach of the Settlement. The provisions of the Settlement may not be waived except by a writing signed by the affected party, or counsel for that party.

7.10 The headings in the Stipulation and its exhibits are used for the purpose of convenience only and are not meant to have legal effect.

7.11 The Stipulation and the Settlement shall be binding upon, and inure to the benefit of, the successors and assigns of the Settling Parties and the Released Persons. The Settling Parties agree that this Stipulation will run to their respective successors-in-interest, and they further agree that any planned, proposed, or actual sale, merger, or change-in-control of Acer shall not void this Stipulation, and that in the event of a planned, proposed, or actual sale, merger, or change-in-control of Acer they will continue to seek final approval of this Stipulation expeditiously, including, but not limited to, the Settlement terms reflected in this Stipulation and the Fee and Expense Award.

7.12 The Stipulation and the exhibits attached hereto shall be considered to have been negotiated, executed, and delivered, and to be wholly performed, in the Commonwealth of Massachusetts and the rights and obligations of the Settling Parties to the Stipulation shall be construed and enforced in accordance with, and governed by, the internal, substantive laws of the

Commonwealth of Massachusetts without giving effect to that State's choice of law principles. No representations, warranties, or inducements have been made to any party concerning the Stipulation or its exhibits other than the representations, warranties, and covenants contained and memorialized in such documents.

7.13 This Stipulation shall not be construed more strictly against one Settling Party than another merely by virtue of the fact that it, or any part of it, may have been prepared by counsel for one of the Settling Parties, it being recognized that it is the result of arm's-length negotiations among the Settling Parties, and all Settling Parties have contributed substantially and materially to the preparation of this Stipulation.

7.14 All agreements made and orders entered during the course of the Actions relating to the confidentiality of information and documents shall survive this Stipulation.

7.15 Nothing in this Stipulation, or the negotiations or proceedings relating to the Settlement, is intended to or shall be deemed to constitute a waiver of any applicable privilege or immunity, including, without limitation, the attorney-client privilege, the joint defense privilege, the accountants' privilege, or work product immunity; further, all information and documents transmitted between Plaintiffs' Counsel and Defendants' Counsel in connection with the Settlement shall be kept confidential and shall be inadmissible in any proceeding in any U.S. federal or state court or other tribunal or otherwise, in accordance with Federal Rule of Evidence 408 as if such Rule applied in all respects in any such proceeding or forum.

7.16 The Settling Parties intend that this Court retain jurisdiction for the purpose of effectuating and enforcing the terms of the Settlement.

7.17 Each counsel or other Person executing the Stipulation or its exhibits on behalf of any of the Settling Parties hereby warrants that such Person has the full authority to do so.

7.18 Plaintiffs hereby warrant that, as of the Effective Date, each of them has standing to pursue derivative claims against the Individual Defendants pursuant to Federal Rule of Civil Procedure 23.1.

7.19 Any notice required by this Stipulation shall be submitted by overnight mail and e-mail to each of the signatories below.

7.20 The Stipulation may be executed in one or more counterparts, including by signature transmitted via facsimile, or by a .pdf/.tif image of the signature transmitted via e-mail. All executed counterparts and each of them shall be deemed to be one and the same instrument. A complete set of executed counterparts shall be filed with this Court.

IN WITNESS WHEREOF, the Settling Parties hereto have caused the Stipulation to be executed, by their duly authorized attorneys, dated as of December 29, 2020.

**GAINNEY MCKENNA & EGLESTON**

By: Thomas J. McKenna  
Thomas J. McKenna  
501 Fifth Avenue, 19th Floor  
New York, NY 10017  
Tel: (212) 983-1300  
Email:

*Counsel for Plaintiffs Matthew Gress  
and Kyle McNeil*

**SHUMAN, GLENN & STECKER**

By: \_\_\_\_\_  
Brett D. Stecker  
326 W. Lancaster Avenue  
Ardmore, PA 19003  
Tel: (303) 861-3003  
Email:

**POMERANTZ LLP**

By: \_\_\_\_\_  
Gustavo F. Bruckner

**BRAGAR EAGEL & SQUIRE, P.C.**

By: \_\_\_\_\_  
W. Scott Holleman  
810 Seventh Avenue, Suite 620  
New York, NY 10019  
Tel: (646) 860-9449  
Email:

*Counsel for Plaintiff David Giroux*

7.18 Plaintiffs hereby warrant that, as of the Effective Date, each of them has standing to pursue derivative claims against the Individual Defendants pursuant to Federal Rule of Civil Procedure 23.1.

7.19 Any notice required by this Stipulation shall be submitted by overnight mail and e-mail to each of the signatories below.

7.20 The Stipulation may be executed in one or more counterparts, including by signature transmitted via facsimile, or by a .pdf/.tif image of the signature transmitted via e-mail. All executed counterparts and each of them shall be deemed to be one and the same instrument. A complete set of executed counterparts shall be filed with this Court.

IN WITNESS WHEREOF, the Settling Parties hereto have caused the Stipulation to be executed, by their duly authorized attorneys, dated as of December 29, 2020.

**GAINEY McKENNA & EGGLESTON**

By: \_\_\_\_\_  
Thomas J. McKenna  
501 Fifth Avenue, 19th Floor  
New York, NY 10017  
Tel: (212) 983-1300  
Email: [tjmckenna@gme-law.com](mailto:tjmckenna@gme-law.com)


*Counsel for Plaintiffs Matthew Gress  
and Kyle McNeil*

**BRAGAR EAGEL & SQUIRE, P.C.**

By: \_\_\_\_\_  
W. Scott Holleman  
810 Seventh Avenue, Suite 620  
New York, NY 10019  
Tel: (646) 860-9449  
Email: [holleman@bespc.com](mailto:holleman@bespc.com)

*Counsel for Plaintiff David Giroux*

**SHUMAN, GLENN & STECKER**

By:  \_\_\_\_\_  
Brett D. Stecker  
326 W. Lancaster Avenue  
Ardmore, PA 19003  
Tel: (303) 861-3003  
Email: [brett@shumanlawfirm.com](mailto:brett@shumanlawfirm.com)

**POMERANTZ LLP**

By: \_\_\_\_\_  
Gustavo F. Bruckner

7.18 Plaintiffs hereby warrant that, as of the Effective Date, each of them has standing to pursue derivative claims against the Individual Defendants pursuant to Federal Rule of Civil Procedure 23.1.

7.19 Any notice required by this Stipulation shall be submitted by overnight mail and e-mail to each of the signatories below.

7.20 The Stipulation may be executed in one or more counterparts, including by signature transmitted via facsimile, or by a .pdf/.tif image of the signature transmitted via e-mail. All executed counterparts and each of them shall be deemed to be one and the same instrument. A complete set of executed counterparts shall be filed with this Court.

IN WITNESS WHEREOF, the Settling Parties hereto have caused the Stipulation to be executed, by their duly authorized attorneys, dated as of December 29, 2020.

**GAINEY McKENNA & EGLESTON**

By: \_\_\_\_\_  
Thomas J. McKenna  
501 Fifth Avenue, 19th Floor  
New York, NY 10017  
Tel: (212) 983-1300  
Email: [timckenna@gme-law.com](mailto:timckenna@gme-law.com)

*Counsel for Plaintiffs Matthew Gress  
and Kyle McNeil*

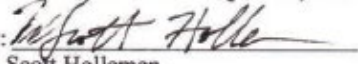
**SHUMAN, GLENN & STECKER**

By: \_\_\_\_\_  
Brett D. Stecker  
326 W. Lancaster Avenue  
Ardmore, PA 19003  
Tel: (303) 861-3003  
Email: [brett@shumanlawfirm.com](mailto:brett@shumanlawfirm.com)

**POMERANTZ LLP**

By: \_\_\_\_\_  
Gustavo F. Bruckner

**BRAGAR EAGEL & SQUIRE, P.C.**

By:   
W. Scott Holleman  
810 Seventh Avenue, Suite 620  
New York, NY 10019  
Tel: (646) 860-9449  
Email: [holleman@bespc.com](mailto:holleman@bespc.com)

*Counsel for Plaintiff David Giroux*

600 Third Avenue, 20th Floor  
New York, NY 10016  
Tel: (212) 661-1100  
Email: [gbruckner@pomlaw.com](mailto:gbruckner@pomlaw.com)

*Counsel for Plaintiff Jose Luis Gonzalez Diaz*

**THE BROWN LAW FIRM, P.C.**

By: *Timothy Brown / with permission*  
Timothy Brown  
240 Townsend Square  
Oyster Bay, NY 11771  
Telephone: (516) 922-5427  
Facsimile: (516) 344-6204  
Email: [tbrown@thebrownlawfirm.net](mailto:tbrown@thebrownlawfirm.net)

*Counsel for Plaintiff Stephen King*

**MORRISON & FOERSTER LLP**



By: \_\_\_\_\_  
Jamie A. Levitt  
Jordan Eth  
250 West 55<sup>th</sup> Street  
New York, NY 10019  
Tel.: (212) 468-8203  
Email: [jlevitt@mof.com](mailto:jlevitt@mof.com)  
[jeth@mof.com](mailto:jeth@mof.com)

*Counsel for Defendants*