SURTECO

Hauptversammlung SURTECO GROUP SE am 7. Juni 2023

Joint report by the Supervisory Board and Management Board on Agenda Item 4 – Consent to a settlement agreement with Dr.-Ing. Herbert Müller

The settlement agreement submitted to the Annual General Agreement for purposes of consent under Agenda Item 4 represents the proposal of SURTECO GROUP SE ("Company") directed towards bringing the legal dispute between the Company and its longstanding Member of the Management Board and Chairman Dr.-Ing. Herbert Müller currently before the District Court (Landgericht) Augsburg to a mutually acceptable conclusion.

Background

Up until 30 September 2019, Dr. Müller was a Member of the Management Board and from 1 July 2015 also Chairman of the Company.

On the basis of the contract concluding his activity as a Member of the Management Board and the corresponding determination of the Supervisory Board, Dr. Müller was entitled to variable remuneration for the business year 2019, which after deduction of payments already made amounted to EUR 468,078.08. Furthermore, he was also entitled to receive payment of the partial amounts of his variable remuneration from previous years retained by the Company under the contract amounting to EUR 143,650.00. The total claim of Dr. Müller against the Company to payment of bonuses therefore amounted to EUR 611,728.08 (gross).

Out of this total amount, a partial amount of EUR 38,650.00 was paid to Dr. Müller on 29 July 2021. In the amount of the difference of EUR 573,078.08, the Company asserted the right to make counterclaims arising from § 93 Section (2) Stock Corporation Act (Aktiengesetz, AktG) for purposes of offsetting and further asserted a breach of obligations arising from his contract of service. The counterclaims asserted for purposes of offsetting are based on the breaches of obligations of Dr. Müller in connection with remuneration commitments which Dr. Müller concluded with Mr. Schulte, Mr. Betzler and Mr. Bruns in the years 2018 and 2019 without the necessary approval of the Supervisory Board. At the time, these three gentlemen were employed as Managing Directors and Directors respectively of SURTECO Group companies. The intention was for them to take up functions in SURTECO GmbH in the context of agreed restructuring of the German Group companies.

Prior to claiming the right of offsetting, the Supervisory Board commissioned external consultants in order to assess whether the Company was entitled to make claims for losses against Dr. Müller on account of the compensation commitments. The review came to the conclusion that it was extremely probable that claims for losses existed against Dr. Müller. The report stated that Dr. Müller had breached his duties of care to the Company pursuant to § 93 Section (1) Sentence 1 Stock Corporation Act (Aktiengesetz, AktG) by concluding compensation agreements without the approval of the Supervisory Board. It was further stated that the breach had arisen from the fact that Dr. Müller as Chairman of the Management Board with sole power of representation should not have concluded transactions which according to the Rules of Procedure for the Management Board were subject to approval by the Supervisory Board (§ 82 Section (2) Stock Corporation Act (Aktiengesetz, AktG)). As a consequence of the compensation commitments concluded by Dr. Müller, the Company was compelled to make payments to the relevant

recipients and had as a result sustained losses. The Supervisory Board was therefore under an obligation to assert claims for losses against Dr. Müller.

The Supervisory Board initially asserted the resulting claims against Dr. Müller in writing and asked him to state his views on the matter. The statement by Dr. Müller was reviewed by the legal advisors to the Company. However, none of the aspects addressed in the statement gave any indication that could have persuaded the Supervisory Board to refrain from pursuing the claims for compensation. The Supervisory Board then asserted the offsetting with bonus claims, as described above.

The Supervisory Board then examined whether the other Members of the Management Board who were in office at the time were in breach of their duties in connection with the compensation commitments made by Dr. Müller. However, this was not found to be the case according to the result of the audit by the external consultants and the Supervisory Board.

The Company has explained the claims made by the Company against Dr. Müller in the prelitigation correspondence and in the court proceedings:

The correspondence states that Dr. Müller had made a commitment to Mr. Schulte for a fixed remuneration in the amount of EUR 350,000.00 for his future activity as Managing Director of SURTECO GmbH for 2018, whereas the Supervisory Board at the time had only been presented with a proposal for variable remuneration (with an advance payment to be offset as fixed remuneration in the amount of EUR 200,000.00) for approval and this payment had been approved by the Supervisory Board at its 50th meeting held on 28 June 2018. In the case of Mr. Betzler, following approval of key points for compensation as a future Managing Director of SURTECO GmbH by the Supervisory Board at its 50th meeting, Dr. Müller had committed to further substantial additional benefits for Mr. Betzler which the Supervisory Board was not aware of. It is further stated, that Dr. Müller had granted a supplementary compensation for the former's activity at the Probos Group which the Supervisory Board was also not aware of. The agreements reached by Dr. Müller had to be fulfilled by the Company so that to this extent losses were also sustained. In the case of Mr. Schulte, this related to the part of the remuneration of EUR 150,000.00 that extends beyond the advance payment/fixed remuneration, which would not have had to be paid through variable remuneration in 2018 owing to the economic development in the relevant business year. In the case of Mr. Betzler, the losses amounted to the payments of EUR 208,306.59 which were made to Mr. Betzler. An additional amount of EUR 105,000.00 had been paid to Mr. Bruns on the basis of the agreement made by Dr. Müller. In addition, the Company also incurred consultancy expenses (lawyer's costs) for the review and assertion of the claims in the amount of EUR 37,771.49.

Dr. Müller has disputed the breaches of duty alleged by the Company in connection with the commitments made in relation to compensation. He has further disputed that the Company incurred losses as a result of this. Dr. Müller therefore filed a claim before the District Court (Landgericht) Augsburg for payment of his bonuses in the amount of most recently EUR 573,078.08 (after deduction of the payments already made) with additional payment of interest. The claim was delivered to the Company on 25 October 2021.

In its defence statement, the Company made submissions in relation to the breaches of duty and the counterclaims in relation to offsetting made by the Company, and repeated and confirmed the aforesaid offsetting arrangements. Dr. Müller essentially responded as follows: In the case of Mr. Schulte, he claimed that he had kept within the framework of the budget that was presented to the Supervisory Board at its 50th meeting for compensation of the Managing Directors

within a framework of up to around EUR 350,000.00 p.a. He emphasized that at the time he was confronted with the challenge of having to offer the previous Managing Directors new contracts of service when the operating companies were merged to form SURTECO GmbH in which some of the conditions would have been below the conditions defined in the existing conditions. This would have been particularly the case for Mr. Betzler but also for Mr. Schulte, who the Supervisory Board had wanted to retain within the Company at the time. Irrespective of this, he asserted that no losses were caused to the Company. If Dr. Müller had not made the concessions, the Managing Directors would not have been willing to continue their activity at SURTECO GmbH. The Company would then have sustained expenses for recruiting new Managing Directors which should be offset against the losses. Furthermore, the Managing Directors would then have continued to work in their respective Group companies at the previous higher conditions, which should also be offset. The consulting costs were claimed not to be significantly substantiated by the Company.

The Company has opposed the submission presented by Dr. Müller. It has stated that Dr. Müller had not obtained the necessary consent of the Supervisory Board in all three cases and ultimately did not dispute this fact. Economic conditions in the context of the restructuring of the SURTECO Group would not be a substitute for approval by the Supervisory Board for the compensation agreements, which is required under the Rules of Procedure for the Management Board. In relation to the losses, Dr. Müller was invoking an alternative loss causation process for which he would need to make representations and provide evidence. The Federal Court of Justice (Bundesgerichtshof) defines high requirements for representations and evidence involving breaches of the burden of consent. The submission by Dr. Miller had not satisfied these requirements to date. Mr. Schulte and Mr. Bruns had left the Company shortly after Dr. Müller stepped down from the Management Board. No new appointments had been made to their positions, without this having exerted a negative impact on the Company's results.

The District Court (Landgericht) Augsburg referred the legal dispute to a mediator with the consent of both parties. The mediator held a mediator hearing on 16 March 2023. At the mediator hearing, alongside the legal counsels of the parties, Dr. Müller took part in person and Mr. Tim Fiedler in his role as Deputy Chairman of the Supervisory Board on behalf of the Company. At the mediator hearing, the parties deliberated on the facts, their perspectives and the personal and business backgrounds of the case. As is customarily the case in negotiations of this nature, a confidentiality agreement was reached in relation to the contents of the mediation hearing. At the conclusion of the mediation hearing, each of the parties approved the content of the settlement agreement.

The Supervisory Board approved the conclusion of the mediation agreement at its meeting held on 13 April 2023.

Legal framework conditions of the proposal submission to the Annual General Meeting

Pursuant to § 93 Section (4) Sentence 3 Stock Corporation Act (Aktiengesetz, AktG) in conjunction with Art. 52 SE Regulation, the Company can only waive claims for compensation against Members of the Management Board (also former members) or reach a settlement in relation to such claims if three years have elapsed since the claim was asserted, the Annual General Meeting is in agreement and a minority whose shares make up 10% of the capital stock do not declare an objection to the minutes. The three-year term since the claims for compensation asserted by the Company against Dr. Müller had already lapsed by the date on which the settlement agreement was concluded. The origin of the claim, which arises when the first loss is incurred, determines the commencement of the deadline. The actual occurrence of the loss is sufficient.

When the settlement agreement was concluded, this date was already more than three years previously, since it was clear at the latest with establishment of the respective obligations of the Company in relation to the Managing Directors in 2018, which benefits the Company would have to provide for the Managing Directors on the basis of the compensation agreements which were binding for it. The Annual General Meeting is therefore now able to vote on the conclusion of the settlement agreement.

Wording of the settlement agreement

The wording of the settlement agreement is provided in full under item 4 of the agenda for the Annual General Meeting.

Material content of the settlement agreement

The settlement agreement has the following material content:

Section 1 of the settlement agreement provides a brief summary of the facts of the case and submission in the proceedings. The settlement refers to the undisputed bonus claims of Dr. Müller and the disputed counterclaims asserted by the Company for offsetting purposes. Section 2 refers to the mediator hearing, which the District Court (Landgericht) Augsburg had initiated with the agreement of both parties and which was held in Augsburg on 16 March 2023.

Section 3 of the settlement agreement contains the actual settlement arrangement to end the dispute. The Company undertakes to make a one-off payment totalling EUR 286,500.00 gross to Dr. Müller in respect of his bonus claim. This amounts to nearly 50 % of the amount of the bonuses claimed by Dr. Müller in the litigation. The payment will be made within two weeks after the Annual General Meeting has agreed to this arrangement and subject to the provision that shareholders who account for 10% of the capital stock, have not declared an objection to the minutes. The costs of the legal dispute before the District Court (Landgericht) shall be set off against each other, in other words there shall be no mutual reimbursement of costs. Each party shall themselves bear responsibility for their own costs and the costs of their legal advisors. Finally, Section 3 of the settlement agreement includes the undertaking that the Company will advocate that Dr. Müller be discharged in relation to his activity in the business year 2019, in relation to which the Annual General Meeting has to pass a resolution.

In return for the payment of the amount referred to in Section 3, Section 4 of the agreement states that when the settlement agreement comes into effect and payment of the aforementioned amount is carried out, all claims which form the subject of the legal dispute will be deemed to have been subject to full and final settlement. This affects firstly the bonus claims plus interest asserted by Dr. Müller, to the extent that these claims exceed the amount of EUR 286,500.00, and secondly the claims in respect of compensation for losses made by the Company and asserted for offsetting which arose from the alleged breaches of duty by Dr. Müller in conjunction with granting of compensation packages to Mr. Schulte, Mr. Betzler and Mr. Bruns. In the interest of a full and final settlement – as is customary in settlements of this nature – the parties also waive any objection or plea in respect of the effectiveness of this settlement agreement to the extent that this is legally possible. For purposes of clarity, at the request of Dr. Müller it was hereby stated that claims by Dr. Müller relating to company pension provision are not affected by the settlement – which would anyway be the case because claims of this nature do not form the subject of the court proceedings.

Section 5 includes the legal conditions necessary for the effectiveness of the settlement agreement in the form of approval by the Supervisory Board and the Annual General Meeting. Furthermore, shareholders whose shares make up 10% of the capital stock must not declare an objection to the minutes.

Section 6 of the settlement agreement sets out the effects on the legal dispute. In this respect, an initial agreement is reached that the proceedings will be suspended until the Annual General Meeting has reached a decision on approval. The District Court (Landgericht) Augsburg has accordingly ordered the suspension of the proceedings according to this arrangement in a decision handed down on 27 March 2023. The Company will inform Dr. Müller and the court about the approval of the Annual General Meeting and any objections to the minutes. If approval is refused of if shareholders holding shares amounting to 10% of the capital stock declare objections to the minutes, the legal dispute must be continued. If the Annual General Meeting grants approval and no objection as outlined above is registered, the court case can then be ended with the settlement agreement then being effective.

Section 7 of the settlement agreement includes the usual final clauses for such agreements (place of jurisdiction, form for any amendments) and a safeguard clause that upholds the effectiveness of the agreement even if individual provisions are ineffective. Finally, there is a provision that each party, their legal counsels and the court shall each receive signed copies of the settlement.

Reasons for concluding the settlement agreement

Claims pursuant to § 93 Section (2) Stock Corporation Act (Aktiengesetz, AktG) (and in parallel a breach of the duties arising from the contract of service) are based on (i) a breach of duty by the Member of the Management Board, (ii) a fault and (iii) an adequate causal loss, which is to be determined pursuant to §§ 249 ff. German Civil Code (Bürgerliches Gesetzbuch, BGB). According to the recent case law of the Federal Court of Justice (Bundesgerichtshof), the Member of the Management Board can object that the loss would have occurred anyway even if the course of events had been different. However, in order to prove this the Board Member has a burden of presenting the facts and sufficient proof.

On the basis of the facts presented so far, the Company assumes that even if legal proceedings are pursued, Dr. Müller is unlikely to be successful in disputing that the necessary approvals of the Supervisory Board concerning the compensation packages granted by him were not obtained and breaches of duty have therefore taken place. Dr. Müller may have subjectively acted in the interest of the Company because he was implementing the adopted restructuring of the SURTECO Group with associated changes in human resources and he wanted to retain the three managing directors within the SURTECO Group. This did not however release him from the duty to have the compensation packages approved by the Supervisory Board. As far as the cases of Betzler and Bruns are concerned, it is obvious that the necessary approval by the Supervisory Board was lacking. In the case of Mr. Schulte, Dr Müller based his actions on a budget presented to the Supervisory Board, but this was only intended to be interpreted as a forecast based on unchanged business development and did not make provision for any fixed remuneration for a managing director. The Supervisory Board and its external advisors are therefore of the opinion that there are breaches of duty. The same applies to the additional element of culpability, owing to the fact that § 93 Section (2) Sentence 2 Stock Corporation Act (Aktiengesetz, AktG) situates discharge within the sphere of the Member of the Management Board. Up to now, Dr. Müller has not put forward any facts that could exclude culpability.

The situation is somewhat different when the issue is about proving a loss and an alternative causal course that may have to be taken into account. In the view of the Supervisory Board and its external advisors, legal and factual uncertainties would come into play if the legal dispute were to be continued, in particular with respect to the amount of loss incurred and the outcome of any submission of evidence by witnesses or experts. A continuation of the court proceedings would therefore also be associated with significant litigation risk for the Company. This particularly affects the issue as to whether the costs that would have been incurred by the companies if the Managing Directors had continued in their previous positions without any change already impact on the amount of the loss or whether they should perhaps be taken into account as an alternative loss scenario. The Company believes that an alternative loss scenario of this nature is less likely in the cases of Schulte and Bruns. However, matters could be different in the case of Betzler, who was previously active in Australia and there earned a significantly higher salary than that offered to him for his future activity at SURTECO GmbH in Germany. Mr. Betzler would likely have remained in Australia if there had not been an agreement about his conditions. At least the Company is not aware of any other indications to the contrary. He would then have continued to earn the significantly higher Australian salary. Although Dr. Müller has not yet provided details in his submission on the amount of loss and any alternative causal progression, he could supply these as the proceedings move forward and present evidence, e.g. from expert witnesses. The court could then order evidence to be taken where the outcome would be open and fraught with risks for the Company.

Against this background, a continuation of the legal dispute is not in the best interest of the Company. This is already evident from the fact that a continuation of the legal dispute would involve significant time and expenditure. It would result in a series of court cases in which many of the previously unresolved issues would have to be decided. There is no way of predicting the decisions a court might reach on these issues. In particular, the result of any evidence taken, notably in the case of expert evidence, is by no means foreseeable. It should be taken into account here that Dr. Müller disputes both the existence of any breach of duty and the amount of loss, and furthermore that he would be able to make additional submissions of the facts, in particular in relation to the amount of the loss and to possible alternative courses of the events. Against this background, a continuation of the proceedings would likely be associated with significant procedural risks, high costs and potentially also enhanced media interest with the risk of reputational damage in the public domain. Furthermore, a continuation of the proceedings would entail personnel and financial resources of the Company being tied up for a considerable period of time that could be more effectively deployed on other matters. This applies on the one hand to the costs for external legal advisors, who generally charge on the basis of time in cases of corporate litigation of this nature, and the costs incurred would only be reimbursable in the amount of remuneration pursuant to legislation relating to legal fees even if the outcome of the proceedings were positive in our favour. Moreover, this also applies to the employees of the Company who would have to take part in assembling the facts of the case in relation to any further submission of evidence and future hearings. If the proceedings were continued, additional court costs would be incurred along with the costs of any expert witnesses. These costs would account for a significant proportion of the amount realized through offsetting in order to settle the claim.

If the proceedings were to be continued, a decision by the District Court (Landgericht) Augsburg would be unlikely to be handed down before 2024. If, on the other hand, an appeal were to be lodged with the Higher District Court (Oberlandesgericht) in Munich, the proceedings would be further extended until a legally binding judgement was given. This matter could not be concluded in the short term. The discharge of Dr. Müller for the last year of his activity in the Company would

then once again have to be postponed in the Annual General Meetings to be held in the coming years until a legally binding judgement was handed down to bring the proceedings to a conclusion. This would be accompanied by recurring explanations and deliberations at the Annual General Meeting.

The amount agreed in the settlement agreement with Dr. Müller is almost equal to half of the sum claimed by him in the lawsuit. Nevertheless, when set against the background of the risks, costs and duration of the legal proceedings set out above with an uncertain outcome, this conclusion to the matter appears to be justifiable in commercial terms. This is particularly the case since a substantial proportion of the risk lies in the higher salary earned by Mr. Betzler in Australia, which might conceivably be taken into account to reduce the loss if proceedings were to be continued. Even if the amount claimed were to be divided equally, Dr. Müller would not only participate symbolically but also substantially with his private assets in the risks of a continuation of the proceedings and in losses to the Company. The amount of the bonus which Dr. Müller is relinquishing with the settlement agreement significantly exceeds the amount of the mandatory excess (deductible) for D&O insurance policies (10% of the loss) defined in § 93 Section (2) Sentence 3 Stock Corporation Act (Aktiengesetz, AktG). Any impression that the Company is willing to accept breaches of duty on the part of its Board Members without any form of sanction is therefore counteracted from the outset.

Dr. Müller was a Member of the Management Board of the Company and its predecessor companies for an uninterrupted period from 2001 to 2019. He was discharged by the Annual General Meeting in each business year prior to 2019. Bearing the loss in almost equal half shares seems to be reasonable and appropriate also against the background of his longstanding, loyal service for the Company.

D&O insurance

The Company has informed the D&O insurer about the lawsuit and the facts of the case. The D&O insurer has not yet made a statement on its position. The Company assumes that submitting any claim for compensation from the insurance policy would be subject to considerable uncertainties. On the one hand, the insurer might well make a benefit dependent on following through with the court proceedings and withhold its agreement to a settlement. As a result of this, the purpose of the settlement directed towards bringing about an end to the legal dispute in short order would not be achieved. The legal dispute would then have to be continued with the risks and disadvantages outlined above. Moreover, the insurer could possibly raise the objection that the breaches of duty by Dr. Müller were knowingly carried out in good faith because Dr. Müller was aware of the burden of consent for the Management Board (and had obtained consent in other comparable cases). This would exclude any liability under the D&O insurance on the basis of the terms and conditions of the insurance policy. Even if the situation were viewed from a different perspective, any claims made against the insurer would in the first instance have to be asserted – this might in turn involve court action, with lengthy proceedings, procedural risks, costs and an uncertain result. The Company believes that the advantage of a rapid, cost-effective end to the proceedings therefore outweighs disadvantages of continuing the legal proceedings, even if no benefits under the D&O policy are claimed.

Summary and recommendation

The Supervisory Board and the Management Board are of the opinion that the conclusion of the settlement agreement is in the interest of the Company. The settlement agreement enables a full

and final settlement of the legal dispute against payment of the aforementioned amount short term. If the legal dispute were to be continued, there would by contrast be considerable litigation risks. The Company would be exposed to a lengthy legal dispute entailing an uncertain outcome. It would be burdened with substantial further costs. It is uncertain whether the D&O insurance would be triggered and this matter would similarly very likely only be clarified after a lengthy legal dispute that would be fraught with uncertainty and would involve additional costs. After weighing up all the opportunities and risks, the Supervisory Board and Management Board are therefore of the opinion that the settlement agreement concluded represents the most favourable solution for the Company in view of all the economic considerations.

The Supervisory Board and the Management Board propose that the Annual General Meeting therefore pass a resolution indicating their agreement to the settlement agreement.