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

DECLARATION OF THOMAS J. McKENNA IN SUPPORT OF PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT, AN AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES, AND A CASE CONTRIBUTION AWARD

I, Thomas J. McKenna declare as follows:

1. I, Thomas J. McKenna, am a partner at Gainey McKenna & Egleston ("GM&E"), Class Counsel[1] for Class Representative in the above-captioned matter (the "Action"). I have been admitted *pro hac vice* to practice in this case. (D.I. 36).

2. This Declaration is submitted in support of the accompanying Motion for Final Approval of Class Action Settlement and the accompanying

[1] Unless otherwise defined herein, all defined terms shall have the meanings as set forth in the Stipulation of Settlement ("Stipulation" or "Stip."). D.I. 38-1.

Motion for an Award of Attorneys' Fees and Reimbursement of Expenses, and a Case Contribution Award, submitted herewith.

3. I have overseen all material aspects of the litigation of this Action. In addition, I was involved in the negotiation of the terms of the Settlement. Accordingly, I have personal knowledge of the facts and if called upon to testify, I could and would testify competently thereto.

4. We have been preliminarily appointed as Class Counsel by this Court in its Order Granting Preliminary Approval of Class Action Settlement, Preliminarily Certifying A Class for Settlement Purposes, Approving Form and Manner of Class Notice, Preliminarily Approving Plan of Allocation and Scheduling a Date for a Final Approval Hearing (the "Preliminary Approval Order," D.I. 56), at ¶ 3.

5. The Preliminary Approval Order also provided that Plaintiff Bret Kukard ("Plaintiff") is preliminarily appointed as Settlement Class Representative. *Id.* In addition, the Preliminary Approval Order also preliminarily certified the following proposed 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 "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.

Preliminary Approval Order at ¶ 1.

6. In brief, Class Counsel engaged in extensive investigation and other litigation, mediation and settlement efforts for over six (6) years during the pendency of the Action, as set forth below.

7. After extensive arm's length negotiations, including a mediation presided over by Greg Lindstrom of Phillips ADR (the "Mediator"), and subsequent continued negotiations, the Parties reached an agreement to settle the Action for the amount of $850,000.

8. The Parties then documented the terms of the Settlement in a formal Stipulation of Settlement. (D.I. 38-1).

9. I can state as of record that there was no collusion of any kind between Class Counsel and Defendants' counsel and that all negotiations culminating in the proposed Settlement were at arm's-length and hard fought.

I. FACTS

10. 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 Company common stock pursuant to Symantec's Employee Stock Purchase Plan ("ESPP" or "Plan") between May 22, 2015 and May 10, 2018. D.I. 1.

11. Plaintiff claims that Defendants[2] are liable under Section 11 of the Securities Act by reason of material misrepresentations and omissions in documents incorporated by reference in the Plan's Registration Statement.

12. The Plan incorporated by reference the Company's (i) "Annual Report on Form 10-K for the fiscal year ended March 29, 2013"; (ii) "[a]ll other reports filed pursuant to Section 13(a) or 15(d) of the Securities Exchange Act of 1934"; (iii) "[t]he description of the [Company's] Common Stock contained in the [Company's] Registration Statement"; and (iv) "[a]ll documents subsequently filed by the [Company] pursuant to Sections 13(a), 13(c), 14 or 15(d) of the Exchange Act." D.I. 1, ¶ 13. Participants in the ESPP were also entitled to purchase Company stock at a 15% discount to the market price.

13. 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 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.

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

14. 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 and appointed my firm as Interim Lead Counsel 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.

15. Following the filing of the Company's Annual Report, the Parties met and conferred 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 further developments in the Federal Securities Action, beginning July 12, 2019 continuing thereafter. *See* D.I. 12–17, 19, 24–28.

16. 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. In connection with the mediation, the Parties exchanged insurance information, factual materials, mediation briefs, settlement demands and counteroffers, and the Company also produced 10,807 pages of confidential documents for Plaintiff to review.

17. Although a resolution was not reached 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. Following that, the Parties worked together to finalize, *inter alia*, the Stipulation, plan of allocation, and Class List. Then, on July 10, 2024, after finalizing the Stipulation and its exhibits, Plaintiff submitted his Motion for Preliminary Approval of the Settlement. D.I. 37.

18. On August 5, 2024, this Court granted preliminary approval of the Settlement, and approved class certification for settlement purposes, the form and manner of the Class Notice, and the plan of allocation, and further Ordered the Parties to confer and schedule dates for the Final Approval Hearing and ancillary deadlines. D.I. 56. The Parties conferred and promptly submitted a schedule requesting that the Final Approval Hearing be set for December 4, 2024, which was so ordered by this Court on August 8, 2024. *See* D.I. 59.

II. CLASS NOTICE

19. As averred in the Declaration of Cornelia Vieira, a Project Manager for the Claims Administrator, Strategic Claims Service ("SCS"), filed on October 4, 2024 (D.I. 60), the Claims Administrator successfully completed the Notice plan as contemplated by the Settlement and as approved by the Court.

20. To begin with, SCS arranged for the printing and mailing of the Summary Notice to the Class Members. *Id.*, at ¶ 4. On August 12, 2024,

Defendants' Counsel provided SCS with the Class List which contained the names, physical addresses and email addresses for each of the 12,156 Class Members. *Id.*, at ¶ 5. On September 4, 2024, SCS caused the Summary Notice to be mailed by first class mail to the 12,156 Class Members. *Id.*

21. Also on September 4, 2024, as a secondary method of notice, SCS attempted the email the Summary Notice to the email addresses that had been provided in the Class List. *Id.*, at ¶ 6. However, a majority of those emails were to addresses that were invalid and bounced back, causing SCS to halt its emailing of the Summary Notice after sending 3,569 emails and notify my firm along with Defendants' Counsel. *Id.* After conferring with Defendants' Counsel, SCS continued to email the Summary Notice only to 4,230 email addresses that Defendants' Counsel identified as likely operational. *Id.*

22. That same day, pursuant to the Preliminary Approval Order, SCS also caused the Detailed Notice to be published via *GlobeNewswire*. *Id.*, at ¶ 8. In addition, SCS established a toll-free phone line for Class Members to obtain information regarding the Settlement and to request that the Detailed Notice be mailed to them. *Id.*, at ¶ 9. Also on that same day, SCS established a Settlement Website which contains the current status of the case, important case deadlines, and copies of important case documents, including, among other things, the Stipulation and its exhibits, Detailed Notice, and Preliminary Approval Order. *Id.*, at ¶ 10.

23. To date, zero objections to the Settlement have been received by Class Counsel, Defendants' Counsel, or filed on the Court's docket. SCS also reports that it received zero objections. *Id.*, at ¶ 11.

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

III. CLASS CERTIFICATION

25. In this Court's Preliminary Approval Order, the Court preliminarily found that the Settlement Class satisfied the four requirements of Del. Super. Ct. Civ. Rule 23(a).[3] *See* D.I. 56, at ¶ 2(a)-(d).

26. The Court found that for settlement purposes, "the Class is so numerous that joinder of all members is impractical," "there are one or more questions of law and/or fact common to the class," "the claims of the Plaintiff are typical of the claims of the Class," and "Plaintiff will fairly and adequately protect the interests of the Class in that: (i) the interests of the Plaintiff and the nature of the alleged claims are consistent with those of the Class Members; and (ii) there appear to be no conflicts between or among the Plaintiff and the Class." *Id.*

27. The Court further found in its Preliminary Approval Order that "the prosecution of separate actions by or against individual members of the class

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

would create a risk of: (A) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests[,]" thus satisfying Rule 23(b)(1). D.I. 56, at ¶ 2(e).

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

Superior Court Rule 23(a) is Satisfied

Numerosity

29. 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).

30. Here, the proposed Settlement Class has approximately 12,156 Class Members who participated in the ESPP. Accordingly, Rule 23(a)'s numerosity requirement is easily satisfied.

Commonality

31. 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. Commonality is satisfied where common questions are capable of generating common answers apt to drive the resolution of the litigation.

32. 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.

33. The factual and legal issues in this case are common for all members of the proposed Class. Among others, the issues include (i) whether the federal securities laws were violated by Defendants' acts; (ii) whether statements made by Defendants during the Relevant Period misrepresented material facts about the financial condition, business, operations, and management of the Company; (iii) whether Defendants' public statements during the Relevant Period omitted material facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading; (iv) whether Defendants caused the Company to issue false and misleading SEC filings and public statements during the Relevant Period; (v) whether the prices of the Company's common stock during the Relevant Period were affected because of Defendants' conduct; and (vi) whether the members of the Class have sustained damage in light of the 15% discount they paid for Company common stock in the

ESPP versus the market price and, if so, what is the proper measure of damages. D.I. 1, at ¶ 30.

Typicality

34. Typicality is satisfied if the representative's interests are consistent with those of the Class members. 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.

35. The claims of the proposed Class Representative are typical of the claims of the Class, as each Class member, like the proposed Class Representative, was a current or former employee of Symantec and participated in the Plan by purchasing Company stock at the 15% discount to market price.

Adequacy of Representation

36. This fourth prerequisite determines whether the proposed Class Representative is competent to represent the entire class. 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." *Smith v. Hercules, Inc.*, 2003 Del. Super. LEXIS 38, at *33 (Del. Super. Jan. 31, 2003).

37. 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.

38. The Class Representative has no conflicts with other Class members. Indeed, his interests as a former employee of the Company and participant in the Plan are typical and coincide with the interests of the Class.

39. Further, Class Counsel are experienced in class actions and other complex litigation (*see* D.I. 38-2) and have been diligently working on this case for several years. Plaintiff's counsel has adequately represented the interests of the Class.

Superior Court Rule 23(b) is Satisfied

40. Once the prerequisites of Superior Court Rule 23(a) are satisfied, a class action may be certified if any of Superior Court Rule 23(b) 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 Superior Court Rule 23(b)(1), as is also stipulated to by the Parties. Stip. at ¶ 7.1.

Superior Court Rule 23(b)(1)

41. This Court preliminarily found in its August 5, 2024 Preliminary Approval Order at ¶ 2(e), for purposes of settlement only, that certification under Superior Court Rule 23(b)(1) was appropriate. *See* D.I. 56.

42. Here, Defendants' relationship was the same with all Symantec employee stockholders in the Plan and, thus, members of the proposed Class. Therefore, Defendants were obliged by law to treat them alike. Certification under Superior Court Rule 23(b)(1) is appropriate because Plaintiff challenges a

course of conduct that affected all employee stockholders in the Plan in the same manner. There is no legitimate basis on which Defendants might be found liable to some members of the Class and not others.

43. Further, Superior Court Rule 23(b)(1)(A) and (B) are satisfied because if separate actions were commenced by members of the Class, Defendants and stockholders in the Plan would be subject to the risk of inconsistent or varying adjudications that would establish incompatible standards of conduct and would, as a practical matter, be dispositive of the interests of other Class members. Thus, Superior Court Rule 23(b)(1) certification is appropriate because multiple lawsuits could follow if certification were denied, which would be prejudicial to non-parties and inefficient.

IV. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

44. Pursuant to Superior Court Rule 23, the Court engages in a two-step process when determining whether to approve a class action settlement. *Doe v. Bradley*, 64 A.3d 379, 394 (Del. Super. 2012).

45. 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. This first step is complete. The Court found in its August 5, 2024 Preliminary Approval Order that the Settlement resulted from arm's-length negotiations through mediation and direct discussion,

and in authorizing class notice, that the Court would likely be able to approve the Settlement under Rule 23. *See* D.I. 56, at ¶ 5.

46. Second, to make the "fairness" determination, the Court should consider several factors, including, *inter alia:* (1) the advantages of the proposed settlement versus the probable outcome of a trial on the merits; (2) the probable duration and cost (here both financial and emotional) of a trial; (3) the extent of participation in the settlement negotiations by class representatives and by a judge or special master (including a retired judge); (4) the number and force of the objections by class members; (5) the effect of the settlement on other pending (or future) actions; (6) the fairness and reasonableness of the claims administration process for individual claims; (7) the apparent intrinsic fairness of the settlement terms; and (8) the extent to which only the class representatives are to receive monetary relief.

The Advantages of Settlement

47. The Settlement would mark an end to the civil litigation arising from Defendants' alleged wrongdoing and would provide guaranteed substantial monetary benefits for the Class.

48. Here, Plaintiff and the Class, in exchange for the "get," are releasing the claims Plaintiff and the Class have against Defendants. In analyzing this "give," Delaware Courts typically analyze the value of the Released Claims, taking into account the likelihood a plaintiff could prevail and the benefits of that victory.

49. Plaintiff asserts a claim for a violation of Section 11 of the Securities Act, alleging that Defendants made a series of false and misleading statements regarding its business, operations, prospects, and legal compliance that allegedly adversely affected the value of the common stock purchased inside the ESPP at the 15% discount. Plaintiff contends that his claims are valid, particularly given the court's rulings in a related Federal Securities Action permitting certain claims under Section 10(b), 20(a) and 20A of the Securities Exchange Act of 1934 to go forward (though dismissing other claims and defendants), a contested motion for class certification, and an eventual settlement for the public market purchasers of Company common stock, even though there was no finding of liability against the defendants in that action. Among the court's rulings in the Federal Securities Action, the court noted that the plaintiff had sufficiently alleged at the pleadings stage that the defendants hid misclassifications of ordinary operating expenses in its public financial disclosures and improperly deferred revenue in violation of GAAP, thus supporting Plaintiff's claims here. Further, as Plaintiff is not required to plead the existence of scienter and loss causation to state a Section 11 claim, Plaintiff would have fewer obstacles to overcome in proving liability in this Action.

50. 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. If Plaintiff prevailed on the foregoing, he would face challenges in certifying a class and in proving damages given the 15% discount from the market price of Symantec stock afforded to the ESPP Class Members. Furthermore, Plaintiff would face the continued risk of prosecuting or defending any appeals that may follow.

51. In return for their "give," Plaintiff and the Class will receive guaranteed monetary compensation for the Recognized Loss[4] for each share they purchased at allegedly artificially inflated prices during the Class Period. In addition, Plaintiff and the Class will 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.

52. Thus, in the face of the uncertainty, cost, and challenges of continued class litigation, the Settlement achieved here is unquestionably fair, particularly

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

when balancing the "give" and the "get. Thus, Plaintiff and Defendants believe that Settlement of this Action, which has already been pending for a number of years and provides guaranteed benefits to the Class, is a fair, reasonable, and adequate resolution of the Action.

Probable Complexities and Duration of Continued Litigation

53. This Action presents unique issues as to liability and damages. All of these issues would have to be resolved in Plaintiff's favor to achieve a victory at trial and sustain it on appeal.

54. 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.

55. 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 to Plaintiff of over 10,800 pages of discovery materials from the Defendants in advance of mediation, together with insurance policies, and ESPP documents.

56. Continued litigation would require additional discovery to take place which would be costly, intrusive, and time consuming, as well as dispositive motion practice, and lengthy and complex trial practice, as well as any possible

appeals which would have added time to this litigation and burden upon the Parties and the Court

57. Thus, based on their evaluation of the foregoing challenges and the benefits of Settlement, the Parties believe that Settlement of this Action, provides guaranteed benefits to the Class and is a fair, reasonable, and adequate resolution of the Action.

Participation of Representatives and Neutrals

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

59. 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 reach a resolution at the mediation, the groundwork was laid as they exchanged documents, mediation briefs, demands, and counter-offers. 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.

60. Accordingly, the participation of Plaintiff and the use of a neutral mediator supports a finding that the Settlement is fair, reasonable, and adequate.

Number and Force of Objections

61. There are over 12,100 Class Members who have been provided Notice of the Settlement through direct mail, email, via press release, and/or via the Settlement Website. D.I. 60, at ¶¶ 5, 6, 10.

62. To date, zero objections have been received by Class Counsel, Defendants' Counsel, or filed on the Court's docket regarding the Settlement.

63. The deadline for any Class Member(s) to file an objection to the Settlement is November 13, 2024. D.I. 59, at ¶ 4. Therefore, Class Counsel shall file a further brief addressing any objections, or lack thereof, by November 27, 2024. *See* D.I. 59, at ¶ 5.

64. In any event, with no objections having been raised at this stage, there is a presumption in favor of the Settlement.

Effect of Settlement on Other Actions

65. To my knowledge, there are no other pending actions against Defendants for the same or similar underlying claims concerning the ESPP, as alleged in the Action. If the Settlement is approved, there will be no future actions either.

66. As a result, this Settlement provides Defendants complete peace that would include a release to the broadest extent possible.

Fairness of the Allocation Process

67. The Plan of Allocation contemplates a fair process for allocation of the proceeds of this Settlement. The relief will be administered through a comprehensive claims process to share the fruits of the efforts with all class members after evaluating each class members' damages.

68. Specifically, the Claims Administrator shall compute each Class Member's approximate Recognized Loss for all shares each Class Member purchased in the ESPP during the Relevant Period. The Recognized Losses of the Class Members will be totalled to yield the loss of the Plan as a whole over the Relevant Period (the "Plan's Loss"). The Claims Administrator shall then calculate each Class Member's "Preliminary Fractional Share" of the Plan's Loss by dividing each Class Member's Recognized Loss by the Plan's Loss. The Claims Administrator shall then calculate each Class Member's "Preliminary Dollar Recovery" of the Net Settlement Fund by multiplying the Class Member's Preliminary Fractional Share by the Net Settlement Fund. *See* Stip., Ex. C.

69. The Claims Administrator shall then identify all Class Members whose Preliminary Dollar Recovery is less than five dollars ($5.00) (the "Minimum Amount"). After noting all Class Members' whose Preliminary Dollar Recovery is less than the Minimum Amount, the Claims Administrator shall recalculate the Preliminary Fractional Shares and the Preliminary Dollar Recoveries so as to arrive at the "Final Fractional Share" and the "Final Dollar Recovery" for each Class Member entitled to a Preliminary Dollar Recovery above the Minimum Amount. *Id*.

70. 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.

71. 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.

Apparent Intrinsic Fairness of the Settlement

72. 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.

73. There are a number of challenges that would arise with continued litigation, such as establishing liability and the amount of damages, among other things. This Settlement eliminates those uncertainties and provides real, tangible, and guaranteed benefits to the Class and is therefore fair, adequate, and reasonable, particularly when balancing the "give" and the "get" from this Settlement.

Extent to Which Only the Class Will Receive Monetary Relief

74. Only the members of the Class shall receive the Settlement Fund.

75. Aside from the Court-ordered attorneys' fees and expenses and Plaintiff case contribution award, the Net Settlement Fund will be distributed to

all eligible Class Members until exhausted. No funds shall revert back to Defendants.

76. Accordingly, taking into account each of the above factors, the Settlement is clearly fair, adequate, and reasonable.

V. AWARD OF ATTORNEYS' FEES

77. It is well-settled in Delaware that an attorney who prosecutes a lawsuit that results in the creation of a common fund or benefit may be awarded fees. Indeed, the common fund doctrine permits a successful plaintiff's attorney to request an award of attorneys' fees from the common fund.

78. Class counsel seeks an award using the percentage approach plus expenses, which is the method Delaware courts apply for an award of attorneys' fees. Delaware courts generally follow a multiple factor approach to determine attorneys' fee awards in class actions, in order for a Court to reach an equitable award of attorneys' fees.

79. Here, Class Counsel informed the Class that the maximum fee requested would be no more than one-third of the common fund. Class Counsel, however, restricts our fee request to twenty-five percent (25%) of the common fund, namely $212,500, an amount that is reasonable, compensates Class Counsel for their time and effort in prosecuting the Action, and is similar to other awards in Delaware given the effort expended and the results achieved in this novel action.

80. Delaware law requires the review of a fee application based on five factors often called the "*Sugarland*" factors: (i) the benefits achieved; (ii) the time and effort of counsel; (iii) the relative complexities of the litigation; (iv) any contingency factor; and (v) the standing and ability of counsel involved. An analysis of the *Sugarland* factors here concludes that Class Counsel's fee request is appropriate, well-reasoned, and results in an equitable award. If the benefit achieved is quantifiable, then it is typical for Delaware courts to apply a percentage-of-the-benefit approach to reach an equitable fee award.

The Benefits Achieved

81. The benefit achieved is the most important of the *Sugarland* factors. The measure of the benefit achieved includes both considerations of ultimate recovery and the value added by class counsel.

82. Here, the Settlement will provide the Class Members with real and certain recovery for the damages that they have sustained. Indeed, the achievement of an $850,000 common fund which will be distributed according to each Class Members' Recognized Loss for each share purchased is an excellent result for the Class in this novel action which was achieved through the efforts of Class Counsel.

83. Furthermore, Class Counsel informed the Class Members in the Notice of their intent to apply for an award of attorneys' fees not exceeding one-third which, to date, has received no objections from the Class, thus supporting this factor.

84. Accordingly, the creation of the common fund here is an excellent resolution which will provide great benefits to the harmed Plan participants and, in light of these benefits, Class Counsel's request for just $212,500 is reasonable.

The Time and Effort of Counsel

85. While "the hourly rate represented by a fee award is a secondary consideration, the first issue being the size of the benefit created," *In re AXA Fin., Inc., S'holders Litig*., 2002 WL 1283674, at *7 (Del. Ch. May 22, 2002), Delaware courts look to attorney lodestar as a "backstop check" when assessing reasonableness.

86. Since my firm started its investigation into this Action, we have devoted over 307.35 hours of professional and paraprofessional time to the successful pursuit of this matter. My firm's dedication to this matter and expenditure of substantial time, effort, and resources, together with our co-counsel and local counsel, has brought this complex litigation to a successful resolution. Below is a lodestar report of the attorneys, paralegals and staff that worked on the case at our firm, as of August 8, 2024:

GM&E Timekeeper	Rate	Hours	Total
Thomas J. McKenna (P)	$895.00	167.9	$150,270.50
Gregory M. Egleston (P)	$875.00	58.95	$51,581.25
Christopher M. Brain (A)	$550.00	31.1	$17,105.00
Noemi Rivera (SPL)	$295.00	18.4	$5,428.00
Elaine Rosa (PL)	$340.00	0.4	$136.00
Michael Frieri (PL)	$200.00	26.3	$5,260.00
Rebecca Ramotar (PL)	$150.00	4.3	$645.00

TOTAL:		**307.35**	**$230,425.75**

(P) = Partner
(A) = Associate
(SPL) = Senior Paralegal
(PL) = Paralegal

87. The chart below summarizes Plaintiffs' Counsel's collective lodestar:

FIRM	HOURS	LODESTAR
Gainey McKenna & Egleston	307.35	$230,425.75
Bielli & Klauder, LLC	25.5	$11,776.50
TOTALS	**332.85**	**$242,202.25**

88. Through my practice, I have become familiar with the non-contingent market rates charged by attorneys in New York, New Jersey, and elsewhere across the country, including in Delaware (my firm's offices are in New York City and New Jersey). This familiarity has been obtained in several ways: (1) by litigating attorneys' fee applications in state and federal courts across the country; (2) by discussing fees with other attorneys; (3) by obtaining declarations regarding prevailing market rates filed by other attorneys seeking fees; and (4) by reviewing attorneys' fee applications and awards in other cases, as well as surveys and articles on attorney's fees in the legal newspapers and treatises. The information I have gathered shows that my firm's rates are in line with the non-contingent market rates charged by attorneys of reasonably comparable experience, skill, and reputation for reasonably comparable class action work.

89. Given my firm's unique experience and track record of success, my hourly rate is set at $895. My firm's rates have been deemed reasonable by Courts across the country, including in New York, California, Illinois, and Ohio for example:

a. *In re Columbia University Tuition Refund Action*, Case No. 20-cv-03208-JMF (S.D.N.Y. 2022) (final approval awarding the full requested fee amount).

b. *Kincheloe v. University of Chicago*, *et al*., No. 20-cv-03015 (N.D. Ill. 2024) (final approval awarding the full requested fee amount).

c. *Flatscher v. The Manhattan School Of Music*, Case No. 20-cv-4496 (S.D.N.Y. 2022) (final approval awarding the full requested fee amount).

d. *In re Stock Exchs. Options Trading Antitrust Litig.*, 2006 U.S. Dist. LEXIS 87825, at *34 (S.D.N.Y. 2006) ("the Court is satisfied that the rates enumerated in the affidavits are reasonable.").

e. *Dudenhoeffer v. Fifth Third Bancorp*, 2016 U.S. Dist. LEXIS 187039 (S.D. Ohio 2016) (final approval awarding the full requested fee amount as "fair and reasonable.").

f. *In re NetSol Techs., Inc. Sec. Litig.*, 2016 U.S. Dist. LEXIS 193924 (C.D. Cal. 2016) (final approval awarding the full requested fee amount).

90. Accordingly, using current rates, Class Counsel's collective base lodestar is $242,202.25 resulting in a multiplier of approximately 0.88 which is within the range of approval in Delaware and thus supports the reasonableness of Class Counsel's requested fee award.

91. My firm has devoted substantial time, effort, and resources to this matter throughout the years of litigation. Among other things, we have: (1) investigated the underlying facts and claims; (2) drafted a detailed complaint; (3) researched the applicable law with respect to the claims in the Action and the potential defenses thereto; (4) reviewed and analyzed over 10,800 pages of confidentially produced documents; (5) reviewed the documents produced by Defendants concerning the ESPP and the Company's insurance policies; (6) engaged an expert to conduct a damages analysis; (7) engaged in extensive settlement discussions with Defendants' Counsel; (8) prepared for and attended a mediation of the Action, including drafting a mediation brief, reviewing Defendants' mediation brief, and exchanging settlement demands and counter demands, and subsequently negotiated the substantive terms of the Settlement; (9) negotiated and drafted the Stipulation of Settlement and its supporting exhibits; (10) worked with the Claims Administrator to develop a fair and robust Plan of Allocation and Notice program; (11) researched, reviewed, and drafted motion papers in support of the preliminary approval of the Settlement; and (12) communicated throughout the litigation and settlement process with Plaintiff.

92. In addition, my firm has also prepared simultaneously hereto motion papers in support of final approval of the proposed Settlement, and will attend the Fairness Hearing, and oversee the future distribution of the Settlement Fund. Furthermore, notwithstanding the opposition by first-rate defense counsel, we were able to develop the case and persuade Defendants to settle on terms favorable to the Class.

The Relative Complexity of the Case

93. The issues involved in this Action were complicated and vigorously contested. Initially, the case presented a question that required a detailed understanding of federal securities laws and the mechanics of the ESPP itself.

94. Further, the case required a thorough understanding of the complex accounting issues giving rise to this litigation, namely whether Defendants hid misclassifications of ordinary operating expenses in its public financial disclosures and improperly deferred revenue in violation of GAAP, or otherwise made false and misleading statements in its Registration Statement that impacted the value of the common stock purchased pursuant to the ESPP at the 15% discount.

95. As a result, Class Counsel spent considerable time researching the claims and legal theories in order to fully and properly prosecute this Action and in reviewing the voluminous document production made by Defendants. The Action was relatively complex which supports Class Counsel's requested fee award.

Contingency Factor

96. Another secondary *Sugarland* factor is the degree of contingency risk that counsel undertook. Some contingency risk is a prerequisite for a risk-based award.

97. My firm faced legitimate contingency risk. Indeed, we did not enter the case with a ready-made exit or settlement opportunity and we faced determined adversaries who believed in the validity of the Company's defenses.

98. We took on this Action on a wholly contingent basis and advanced all out-of-pocket expenses without any guarantee of recovery.

99. At the time of taking on this case, we knew that securities class actions are inherently uncertain and could fail at any stage, including on a motion to dismiss, class certification, trial, or at any subsequent appeal. This was especially true in this case which raised numerous legal and factual challenges and where damages were uncertain given the 15% discount Class Members paid for their shares purchased pursuant to the ESPP. Despite this, we continued to pursue this Action over multiple years to achieve the proposed Settlement for the benefit of the Class.

Standing and Ability of Counsel

100. My firm, as well as our Liaison Counsel, Bielli & Klauder, LLC, both have a breadth of experience with class action and shareholder litigation both in Delaware and across the United States, as demonstrated by our firm résumés, attached as Exhibits 2 and 3 to D.I. 38.

101. My firm has also been recognized by courts across the country for their experience and ability. *See e.g.*, *Harris v. Amgen Inc.*, 2017 U.S. Dist. LEXIS, at *14 (C.D. Cal. Apr. 4, 2017) ("Here, [Gainey McKenna & Egleston] have extensive experience in class action litigation … and have litigated a number of noteworthy … class actions."); *Casper v. Song Jinan*, 2012 U.S. Dist. LEXIS 127821, at *10 (S.D.N.Y. 2012) ("We find that [Gainey McKenna & Egleston] has the experience and resources necessary to adequately litigate this case."); *Kux-Kardos v. VimpelCom Ltd*., 151 F.Supp.3d 471, 479 (S.D.N.Y. 2016) ("Gainey McKenna & Egleston […] is qualified, experienced and generally able to conduct the litigation.").

102. As such, this factor supports the requested fee award here.

25% of the Benefit is Reasonable

103. In total, my firm has expended significant time and effort in prosecuting this novel and complex Action to obtain the benefit for the Class. My firm has done so while facing the very real risks that this Action may ultimately be unsuccessful, thereby securing no recovery for the Class at all.

104. There were real challenges and risks that this Action presented which could have precluded any recovery for the Class. Nevertheless, my firm took on those risks and, among other things, thoroughly investigated the underlying facts and claims of this novel and complex Action, reviewed and analyzed the substantial discovery obtained from Defendants, and vigorously

prosecuted the Action before engaging in hard fought and arm's-length settlement negotiations to secure this benefit for the Class.

105. As such, the requested fee award of 25% of the Settlement Fund is fair, adequate, and reasonable, and well within the types of awards that Delaware courts typically award to compensate counsel for their hard work in securing a benefit for a class despite the challenges of the litigation and the consequential risk of non-payment.

VI. REIMBURSEMENT OF LITIGATION EXPENSES

106. My firm requests the reimbursement of reasonably incurred litigation expenses in the amount of $6,873.26.

107. In notifying class members of the proposed settlement, we informed Class Members that my firm would seek repayment of such litigation expenses. Due to the real risk that they might never be recovered, my firm sought to keep expenses to a minimum.

108. These expenses include, among other things, the costs of an expert, mediation, travel, and necessary administrative expenses such as filing fees and conference calls.

109. My firm's request for reimbursement of the expenses devoted to pursuing claims on behalf of the Class Representative and other Class Members is reasonable and reflect expenses typically incurred in prosecuting complex actions such as this.

110. Below is a chart listing the out-of-pocket case expenses of GM&E:

Category	**Amount**
Telephone Conference calls and Facsimile	$24.67
Press Release	$187.27
Computer Research/Services	$210.36
Photocopying/Reproduction	$184.80
Expert Fee	$2,482.00
Mediation Fee	$3,006.25
Travel/Parking/Miscellaneous	$777.91
TOTAL:	**$6,873.26**

111. Set forth below is a second chart showing the case related expenses of all Plaintiffs' Counsel expended to produce the instant settlement:

FIRM	**EXPENSES**
Gainey McKenna & Egleston	$6,873.26
Bielli & Klauder	$940.54
TOTALS	**$7,813.80**

112. Accordingly, Class Counsel spent $7,813.80 in out-of-pocket expenses, which were reasonably necessary to advance the interests of the Class and achieve the favorable result.

113. Moreover, these expenses represent a mere 0.92% of the common fund and are therefore reasonable, fair, and appropriate, and warrant reimbursement.

114. Further supporting this, Class Members were informed in the notice that Class Counsel would seek reimbursement of litigation-related expenses of not more than $10,000. To date, the Class has not objected, and the requested reimbursement here is 21.86% lower than the $10,000.

VII. PLAINTIFF'S CASE CONTRIBUTION AWARD

115. Plaintiff requests that the Court approve a modest case contribution award of $2,500 for the Class Representative.

116. The Delaware Supreme Court has recognized that a class representative can receive an incentive fee based on (i) the time, effort and expertise expended by the class representative, and (ii) the benefit to the class.

117. Serving as class representative is not an easy task. "In the current litigation environment, a stockholder who files plenary litigation faces the very real possibility of having their computer and other electronic devices imaged and searched, sitting for a deposition—perhaps more than one if they also institute [Section] 220 litigation—and then perhaps testify at trial." *In re Dell Technologies Inc. Class V S'holders Litig.*, 300 A.3d 685, 733 (Del. Ch. Jul. 31, 2023).

118. Paying a case contribution award to a class representative is customary and recognizes that without a successful recovery, the class representative is not entitled to an award, just as class counsel is not entitled to a fee.

119. Here, the Class Representative devoted substantial time and effort in prosecuting this Action with Class Counsel. *See* Declaration of Bret Kukard, filed herewith. Among other things, the Class Representative actively assisted Class Counsel, advised Class Counsel, read and approved pleadings, searched for and gathered documents to aid Class Counsel in their investigation and prosecution of the case, was kept up to date on the progress of the case, and consulted with

Class Counsel as to the settlement negotiations. The Class Representative was never promised any additional compensation for leading the case and participating in the case against the Company. The Class Representative, however, devoted his time and efforts to address Defendants' alleged misconduct, and without him, the Class would have received no recovery.

120. In light of the foregoing, Class Counsel submits that the Court should grant the requested Case Contribution Award in the amount of $2,500 for the Class Representative to compensate him for his extensive efforts in achieving the substantial and meaningful result on behalf of all Class Members despite the risks facing him in vigorously prosecuting this Action.

EXHIBITS

121. Attached hereto as **Exhibit A** is a true and correct copy of the firm résumé of Gainey McKenna & Egleston.

122. Attached hereto as **Exhibit B** is a true and correct copy of the Declaration of Ryan M. Ernst in Further Support of Plaintiff's Motion for Final Approval of Class Action Settlement.

123. Attached hereto as **Exhibit C** is a true and correct copy of the Affirmation of Bret Kukard in Support of Final Approval of Class Action Settlement.

124. Attached hereto as **Exhibit D** is a true and correct copy of the [Proposed] Final Approval Order and Judgment, which Plaintiff requests this Court enter.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 30th day of October 2024 in New York, New York.

/s/Thomas J. McKenna
Thomas J. McKenna