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Exhibit 1

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CONFIDENTIAL

REPORT OF THE DEMAND REVIEW COMMITTEE OF THE PEGASYSTEMS BOARD OF DIRECTORS

ON ITS

INVESTIGATION OF CONFIDENTIAL DEMAND LETTERS

Christopher Lafond
Dianne Ledingham
Sharon Rowlands

October 7, 2024

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I. Executive Summary

Since March 2023, the board of directors (the "Board") of Pegasystems Inc. ("Pegasystems," "Pega," or the "Company") has received seven confidential demands (the "Demands") from purported Pegasystems shareholders requesting that the Board investigate and potentially initiate legal action against certain directors and officers of the Company for alleged violations of federal and state law. Shortly after receiving the first such demand, and pursuant to longstanding and well-settled Massachusetts law, the Board appointed three independent and disinterested directors (Christopher Lafond, Dianne Ledingham, and Sharon Rowlands) to comprise a demand review committee (the "DRC") to investigate the allegations set forth in, and the relief sought through, the Demands. The Board delegated to the DRC the ***full authority*** of the Board to take any actions that the DRC deemed necessary to develop the relevant facts and to take any steps, including any remedial actions, which the DRC believed to be in the best interests of the Company.

This is the Report of the DRC (the "Report").

The Demands principally focus on alleged misconduct relating to the claims asserted in, and events arising from, the litigation captioned *Appian Corp. v. Pegasystems Inc.*, No. 2020-07216 (Va. Cir. Ct. Fairfax Cnty.) (the "Appian Litigation"). As alleged in the Demands, beginning in 2012, Pegasystems and certain of its senior executives and employees purportedly created a scheme to profit from trade secrets allegedly misappropriated from Appian Corp. ("Appian"). More specifically, the Demands allege that Pegasystems engaged a third-party consultant, who had access to Appian's software and documentation and shared Appian's trade secrets with Pegasystems by, among other things, secretly downloading Appian's confidential information, recording videos and taking screenshots of Appian's platform, and showing Pegasystems how to use the platform. The Demands claim that Pegasystems used Appian's trade

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secrets to improve the Company's own software and competitive position. Separately, the Demands allege that, beginning in 2019, certain Company personnel began using false identities to access Appian's free trial platform and to further access Appian's trade secrets. The Demands allege that both purported schemes were orchestrated by senior management.

In May 2020, Appian commenced the Appian Litigation, alleging that Pegasystems misappropriated Appian's purported trade secrets through its third-party consultant and violated the Virginia Computer Crimes Act when Pegasystems personnel accessed Appian's free trial instances under false pretenses. Appian's original complaint claimed damages of up to $90 million; but, in February 2022, nearly two years later and just shortly before trial, Appian increased its prayer for damages to more than $3 billion. The Demands allege, among other things, that Pegasystems improperly delayed disclosing the Appian Litigation. The Company first disclosed the Appian Litigation in its Form 10-K for fiscal year 2021, filed in February 2022 (the "2021 10-K"), after Appian increased its damages sought to $3 billion. In that and subsequent disclosures, the Company made statements that the Demands allege were misleading, including statements that the Appian Litigation's claims lacked merit, that the Company had strong defenses to those claims, and that the damages Appian sought were not the result of misappropriation or use of the purported trade secrets.

In May 2022, after a seven-week trial, a jury returned a verdict in Appian's favor and awarded damages of $2.04 billion against the Company.

Pegasystems appealed the verdict (captioned *Pegasystems Inc. v. Appian Corp.*, No. 1399-22-4 (Va. Ct. App.) (the "Appian Appeal")). Oral argument on the Appian Appeal was held on November 15, 2023. On July 30, 2024, a ***unanimous*** panel of the Virginia Court of Appeals vacated the judgment and ordered a new trial. *See Pegasystems Inc. v. Appian Corp.*, 81 Va. App.

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433 (Va. Ct. App. 2024) (the "Virginia Appellate Decision"). The Virginia Court of Appeals determined that the "the trial court committed a series of errors" that deprived Pegasystems of a fair trial, including, among other things, wrongly excluding relevant evidence that supported the Company's arguments that the information at issue did not constitute trade secrets and was, in any event, not used to improve its product, wrongly depriving the Company of the ability to introduce key evidence to disprove damages, and wrongly imposing on the Company (rather than Appian) the burden to prove damages. *Id.* at 448, 476-507. Appian has appealed this decision to the Supreme Court of Virginia. *See Appian Corp. v. Pegasystems Inc.*, No. 240736 (Va.).

The Demands requested that the Board investigate, address, remedy, and commence proceedings against (i) the independent directors of the Board (*i.e.*, Peter Gyenes, Richard Jones, Christopher Lafond, Dianne Ledingham, Sharon Rowlands, and Larry Weber (collectively, the "Independent Directors")); and (ii) certain officers of the Company, including Kerim Akgonul (Chief Product Officer), Don Schuerman (Chief Technology Officer and Vice President, Marketing and Technology Strategy), Alan Trefler (Chief Executive Officer and a member of the Board) ("Mr. Trefler"), Leon Trefler (Chief of Clients and Markets), and Kenneth Stillwell (Chief Financial Officer) (collectively, and together with the Independent Directors, the "Fiduciaries")[1]—for allegedly violating (a) certain Massachusetts state laws, including for breach of fiduciary duty, aiding and abetting breaches of fiduciary duty, corporate waste, and unjust enrichment, (b) Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), and Rule 10b-5 thereunder, and/or (c) any other applicable law, rule, or regulation related to the alleged wrongdoing.

[1] For purposes of this Report, the DRC identified Mr. Akgonul, Mr. Schuerman, Mr. Trefler, Mr. Leon Trefler, and Mr. Stillwell as "officers" of the Company, as defined in Pegasystems' bylaws, based on their designation as officers by the Board and/or in the Company's SEC filings, and/or their compensation being set by the Board. Certain of the Demands erroneously allege that Benjamin Baril (Director of the Office of the Chief Technology Officer) is a Pegasystems "officer." Mr. Baril is not; the Board does not set his compensation and the Company has not otherwise designated him an officer.

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As described throughout this Report, since its formation in April 2023, the DRC has extensively investigated the allegations in the Demands in order to determine whether it is in the Company's best interests to pursue litigation or take other corrective action. The DRC promptly retained independent legal counsel, Fried, Frank, Harris, Shriver & Jacobson LLP ("Fried Frank"), to assist and advise it in its investigation and work. The DRC and its counsel met regularly, collected over 180,000 non-public documents (to which they applied search terms), manually reviewed nearly 35,000 documents (nearly all of which were non-public), interviewed 17 witnesses, and immersed themselves in the relevant law and governing corporate principles. In February 2024, the DRC also engaged in a confidential mediation with the shareholders who had then sent their Demands, which mediation was not successful.

On October 7, 2024, the DRC unanimously determined that it would ***not*** be in the Company's best interests to pursue litigation against any of the challenged directors and officers with respect to the matters raised in the Demands and that there are no valid claims against them.

First, the DRC determined that the Fiduciaries did not breach their fiduciary duties in connection with the alleged misappropriation of competitors' trade secrets. As contemplated by the Demands, this cause of action is based on allegations that some or all of the Fiduciaries orchestrated and oversaw a purported "scheme" by which Pegasystems employees engaged consultants and used false identities to access Appian's platform. The DRC's investigation showed that the conduct at issue was initiated and executed by lower-level employees, and, as to the engagement of consultants, was principally overseen by a former Company employee who was terminated for unrelated reasons, later hired by Appian, and later proceeded to report the alleged misconduct to Appian, which then resulted in the Appian Litigation. The DRC did not identify any red flags that should have put the Fiduciaries on notice that employees were engaging in

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potentially unlawful or impermissible behavior. Indeed, *none* of the Independent Directors were aware of the conduct at issue before the Appian Litigation. The DRC found that the Fiduciaries who *were* aware of the alleged misconduct all genuinely, reasonably, and in good faith believed that the Appian information accessed by the third-party consultant or lower-level Pegasystems employees (*i.e.*, Appian's developer interface and free trial environment) did not constitute trade secrets or otherwise confidential material and, with respect to the consultant, was accessed pursuant to an appropriate agreement that disclaimed any intent by the consultant to disclose confidential material. The DRC concluded that the information obtained did not constitute trade secrets and that, in any event, Pegasystems did not profit from or otherwise change its business practices and strategy based on any such information. Thus, the DRC's investigation did not find adequate support for a claim that the Fiduciaries engaged in intentional misconduct, acted in bad faith, or behaved unreasonably.

Second, the DRC's investigation showed that the Company's disclosure decisions were reasonable and fully compliant with the federal securities laws. The Independent Directors, Mr. Stillwell, and Mr. Trefler sincerely and reasonably believed that, based on the information available at the time, the challenged public disclosures were accurate and complete when they were made. The record evidence revealed that, prior to the Company's initial disclosure of the Appian Litigation in February 2022, based on appropriate consideration of the facts available to them (including the views of those most directly handling the Appian Litigation), the Independent Directors, Mr. Stillwell, and Mr. Trefler reasonably believed the Appian Litigation (which at that point sought $90 million in damages) was immaterial and that Appian's claims for damages had substantive flaws. The record further revealed that, when Appian increased its damages sought to $3 billion, the Independent Directors, Mr. Stillwell, and Mr. Trefler promptly agreed that the

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Company should disclose the Appian Litigation, and worked closely with in-house legal counsel, the Appian Litigation trial team, and outside disclosure counsel to ensure appropriate and timely disclosure. The Virginia Court of Appeals has since determined that the multi-billion-dollar verdict resulted from significant legal errors by the trial court and therefore vacated the verdict. And the Securities & Exchange Commission ("SEC") has since determined that it would not pursue any enforcement action related to the same disclosure decisions. Perhaps most importantly, the DRC did not identify evidence to support any viable claim that the Independent Directors, Mr. Stillwell, or Mr. Trefler acted intentionally or recklessly in drafting or approving the Company's challenged public disclosures, as required to prove a securities law violation.

Third, the DRC concluded that there is not sufficient evidence that the Fiduciaries caused Pegasystems to incur expenses related to the Appian Litigation or approved repurchases of the Company's stock in bad faith, irrationally, or antithetically to the Company's best interests. Legal expenses incurred in connection with defending against Appian's claims in the Appian Litigation were rational and made in furtherance of the Company's interest in protecting itself from liability, and the DRC did not identify evidence of bad faith or unreasonable conduct by the Fiduciaries either in approving those expenses or by causing the now-vacated damages award. Additionally, Pegasystems' stock repurchases have been made pursuant to a consistent and systematic program in place since 2004, and there is no evidence to suggest the Fiduciaries authorized that program knowing or believing the Company's stock price to be inflated or the repurchase of that stock to not be in the Company's best interest.

Fourth, the DRC did not identify evidence to support an unjust enrichment claim arising from the Fiduciaries receiving renumeration based on an artificial valuation of Pegasystems' stock or that was otherwise unjust in light of bad faith conduct. The Demands are premised on

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allegations that the underlying misconduct amounted to bad faith, but the DRC did not identify evidence to support a Section 10(b) claim, breaches of fiduciary duty, or a claim of waste. As such, because the Fiduciaries did not act in bad faith, they could not have known that they were being compensated in exchange for purported misconduct. Any compensation received by the Fiduciaries was ordinary salaries, benefits, and/or bonuses that were reviewed in the normal course and approved by the Compensation Committee of the Board (the "Compensation Committee"), who themselves neither perpetrated nor were aware of the alleged misconduct.

Given the lack of factual support for the Demands' claimed wrongdoing, the DRC unanimously determined not to initiate legal action against any of the Fiduciaries. In so concluding, the DRC not only considered the evidence developed, but also considered the significant out of pocket expenses such litigation would entail, the strength of defenses likely to be raised, the rights of exculpation under applicable corporate articles and bylaws, the indemnity liability to be incurred, and the cost in diversion of management and employee time and resources. The DRC also considered the remedial and deterrent effects of measures the Company has already undertaken to ensure the Company's competitive intelligence practices are professional, ethical, and legal. The DRC also identified certain additional enhancements, as set forth and directed herein, which will further strengthen the Company's compliance and governance framework. For all these reasons, the DRC's business judgment is to decline to initiate the litigation proposed by the Demands.

The DRC's work on this Report was nearly complete when the Virginia Court of Appeals decided the Appian Appeal and vacated the $2.04 billion jury verdict. The analysis set forth in the Virginia Appellate Decision is consistent with and reinforced the DRC's reasoning and conclusions. The DRC notes that, in light of Appian's decision to appeal the Virginia Appellate

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Decision to the Supreme Court of Virginia prior to any retrial, final resolution of the Appian Litigation is potentially still years away. It therefore is not practicable for the DRC to wait until the Appian Litigation is completed to issue this Report. However, the DRC has concluded that it will remain in place through the conclusion of the Appian Litigation to consider the impact of potential future factual or legal developments arising from the Appian Appeal and/or further proceedings in the Appian Litigation.

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II. Shareholder Demands on the Board

A. The Shareholder Demand Letters and Related Derivative Actions

To date, the Board has received seven demands from purported Pegasystems shareholders (collectively, the "Demand Shareholders"), pursuant to Section 7.42 of the Massachusetts Business Corporation Act (the "Act" or "MBCA"), as outlined below. Exs. 1 (Brenner Letter), 2 (Larkin Letter), 3 (Sagfors Letter), 4 (Garfield Letter), 5 (Birch Letter), 6 (Dwyer Letter), and 7 (Gerber Letter).

	Demanding Shareholder	Date of Demand	Related Derivative Action[2]
1.	**George Fielding Brenner** *Counsel: Levi & Korsinsky, LLP*	March 24, 2023	N/A
2.	**Mary Larkin** *Counsel: Rigrodsky Law, P.A.*	March 24, 2023	*Larkin v. Gyenes, et al.*, No. 22-cv-11985 (D. Mass. Nov. 21, 2022)
3.	**Dag Sagfors** *Counsel: Bragar Eagel & Squire, P.C.*	May 5, 2023	*Sagfors v. Gyenes, et al*., No. 23-cv-10933 (D. Mass. Apr. 28, 2023)
4.	**Robert Garfield** *Counsel: Shuman, Glenn & Stecker*	May 17, 2023	N/A
5.	**Jayne Birch** *Counsel: Cohen Milstein Sellers & Toll PLLC*	August 3, 2023	N/A
6.	**John Dwyer** *Counsel: Bernstein Litowitz Berger & Grossmann LLP & Bottini & Bottini, Inc.*	March 25, 2024	*Dwyer et al. v. Trefler et al.*, No. 2484CV01734 (Mass. Super. June 28, 2024).
7.	**Ray Gerber** *Counsel: Bernstein Litowitz Berger & Grossmann LLP & Bottini & Bottini, Inc.*	March 26, 2024	*Dwyer et al. v. Trefler et al.*, No. 2484CV01734 (Mass. Super. June 28, 2024).

[2] Ms. Larkin and Mr. Sagfors filed premature derivative actions in violation of the Act, which "requires that demand be made in *all* derivative suits filed on behalf of Massachusetts corporations," as discussed *infra*. *Johnston v. Box*, 453 Mass. 569, 578 n.15 (2009) (emphasis in original).

Mr. Dwyer and Mr. Gerber sent their two Demands on March 25 and 26, 2024---i.e., over a year *after* the initial Demands were made on the Board. Counsel to the DRC promptly advised their counsel of all of the pending Demands, the formation of the DRC, the status of the DRC's work, and that the DRC, at the time, expected to issue this Report on June 30, 2024. Nonetheless, on *June 28, 2024*, Mr. Dwyer and Mr. Gerber jointly filed a derivative action, claiming that the Board had rejected their Demands because the Board had not responded within the default 90 day period set forth in the MBCA. Notably, Mr. Dwyer and Mr. Gerber did not mention in their complaint the existence of the DRC, the DRC's correspondence with them, or the anticipated timing for the issuance of this Report. Although the MBCA sets 90 days from the date a demand was made as a "reasonable minimum time[]" before which a derivative proceeding may be commenced, the MBCA notes that "[i]n some instances a longer period may be required." G. L. c. 156D, § 7.42(2) & cmt. 3. And Massachusetts courts routinely recognize that that default time period should be extended where, as here, cases involving complicated facts and circumstances. *See infra* at 19.

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The Demands request that the Board investigate potential breaches of fiduciary duties, securities law violations, and/or other wrongdoing relating to purported misconduct by Pegasystems senior employees, officers, and directors and act to remedy harm to the Company.

1. Factual Allegations Set Forth in the Demands

The Demands principally focus on alleged misconduct relating to the claims asserted in, and events arising from, the Appian Litigation. Although there are modest variations between and among the Demands, they generally allege the same misconduct and potential legal claims. According to the Demands, in early 2012, Pegasystems and its senior executives and employees allegedly devised a scheme to misappropriate and profit from Appian's confidential information and trade secrets. As alleged, the Company commenced an illicit scheme against Appian called "Project Crush," an operation that involved recruiting an Appian developer who would be willing to misappropriate Appian's trade secrets for the Company. To that end, Pegasystems hired KForce Inc. ("KForce"), a technology, finance, and accounting-solutions firm, to identify candidates, indicating to KForce that the candidate could not be loyal to Appian.

The Demands allege that, in February 2012, KForce introduced the Company to Youyong Zou, who worked for U.S. government contractors using Appian's platform to build software applications. Pegasystems engaged Mr. Zou (indirectly, through K-Force) as a consultant, and he provided Pegasystems with access to Appian's software and information. Between February 2012 and September 2014, Mr. Zou—who had been given the pseudonyms "Matt" and "spy" by Pegasystems' then-Director of Product Marketing—purportedly used his Appian credentials to access Appian's alleged trade secrets and sell them to Pegasystems, with the Company paying Mr. Zou through KForce. According to the Demands, Mr. Zou purportedly secretly downloaded Appian's confidential information, recorded videos of Appian's platform, showed Pegasystems

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how to use Appian's platform, and provided the Company with insight into Appian's software. Additionally, Mr. Zou allegedly met with and collaborated with Pegasystems' officers, senior executives, engineers, and managers.

The Demands further allege that the Company used Appian's trade secrets and confidential information to, among other things, train the Company's sales employees to compete with Appian, develop sales materials, improve the Company's software, and acquire customers and deals. Pegasystems allegedly distributed Appian's confidential information to hundreds of Company employees, stressed its importance, and utilized the information it obtained through Mr. Zou until at least 2020. Separate from the foregoing, beginning in approximately 2019, multiple Pegasystems employees also allegedly began using false names and companies to "infiltrate" Appian's platform through free trial instances and gain further access to Appian's purported trade secrets.

As alleged, in early 2020, two former Pegasystems employees (including the Company's former Director of Product Marketing referenced above) began working for Appian. After joining Appian, they notified Appian of Pegasystems' supposed misconduct and, in May 2020, Appian filed the Appian Litigation. On February 16, 2022, Pegasystems disclosed the existence of the Appian Litigation for the first time in the 2021 10-K. The case proceeded to trial and, according to the Demands, the jury was ultimately presented evidence that (i) the Company paid Mr. Zou to provide copies of Appian's confidential software and documentation in violation of restrictions that barred Mr. Zou from sharing Appian's trade secrets, (ii) Pegasystems disseminated Appian's misappropriated information to hundreds of Company employees, and (iii) the Company's Chief Executive Officer personally directed a "teardown" of Appian's software, which prompted the Company to begin using fake names and entities to gain access to Appian's software. Appian

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presented evidence that it purportedly lost 201 customers because of Pegasystems' acts and Appian's experts estimated the damages to be $3 billion, a number that reflects all of Pegasystems' revenues from the fourth quarter of 2013 through the third quarter of 2021.

On May 9, 2022, after a seven-week trial, a jury decided in Appian's favor and awarded damages of $2.04 billion against the Company (which award has now been vacated by the Virginia Court of Appeals). The jury also found that the Company acted willfully and maliciously, which entitled Appian to seek tens of millions of dollars in attorneys' fees and costs. On May 18, 2022, during a call with analysts, Pegasystems' Chief Financial Officer stated that the verdict was "ridiculous," and that there were no "facts of any wrongdoing," and "certainly no damages that would ever suggest a dollar amount." Ex. 2, at 3.

According to the Demands, the Appian Litigation also revealed that Pegasystems had used consultants like Mr. Zou to target the trade secrets of competitors other than Appian. Ex. 1, at 13. The Demands also claim that evidence from the Appian Litigation trial shows that "[m]any of the same Pegasystems employees who utilized (or condoned the use of) fake names and fake companies to access Appian's platform also secretly accessed (or condoned Pegasystems' access to) Salesforce and ServiceNow's platforms." *Id.*

2. Alleged Legal Violations Set Forth in the Demands

Taken together, the Demands direct Pegasystems' Board to investigate, address, remedy, and commence proceedings against certain of the Company's current and former officers and directors for breach of fiduciary duties, aiding and abetting breaches of fiduciary duties, waste of corporate assets, unjust enrichment, and violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and all other applicable laws, rules, and regulations related to the alleged wrongdoing.

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First, certain of the Demands allege that the Fiduciaries breached their fiduciary duties under Massachusetts law by (i) causing or permitting the Company to perpetrate a scheme whereby third parties were paid to steal trade secrets from Appian, (ii) causing or permitting the Company to perpetrate a scheme whereby Pegasystems employees created false personas to infiltrate and/or access Appian's platform for the purpose of misappropriating Appian trade secrets, (iii) violating the Company's Code of Conduct by engaging in an illegal scheme to misappropriate Appian's trade secrets, and (iv) failing to ensure that the Company's senior officers, directors, and employees were acting in compliance with the law.

Second, according to the Demands, the Independent Directors, Mr. Trefler, and Mr. Stillwell allegedly made false and misleading public statements, as well as omitted material information from such statements, in violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. The Demands focus on the following four categories of alleged misstatements and omissions in Pegasystems' public filings.

- ***Pegasystems' Competitors***. Certain of the Demands allege that (i) statements such as the Company "shows very well competitively" and "competes favorably due to its expertise" failed to disclose that the Company owed its competitive success to its scheme and materials it gathered by misappropriating Appian's confidential information and trade secrets, (ii) statements in Pegasystems' Form 10-Ks filed with the SEC highlighting the Company's competitive advantage in the industry failed to disclose that the Company's "broad range of marketing programs and marketing efforts" included its use of consultants to access competitors' platforms and other dishonest practices to learn Appian's confidential information and trade secrets, and (iii) the Company listed "dozens of competitive factors" and even named some competitors, but the competitor list did not include Appian.

- ***Pegasystems' Sales and Marketing Practices***. Certain of the Demands allege that (i) representations that the Company was "best-in-class" and "credible" failed to disclose that the Company engaged in a malicious and willful scheme to misappropriate Appian's trade secrets, (ii) statements touting the Company's "wins" with public sector agencies, including the U.S. Census Bureau, failed to disclose that the Company engaged in the aforementioned scheme, and (iii) statements touting the Company's success and "credibility" with government agencies were misleading because the Company concealed

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its misconduct from the government and packed its sales team with employees that were involved in the trade secret misappropriation scheme.

- ***Pegasystems' Intellectual Property***. Certain of the Demands allege that (i) statements that the Company "may be subject to intellectual property rights claims," "may in the future receive notices that claim [Pegasystems] misappropriated, misused, or infringed other parties' intellectual property rights," that "[t]here can be no assurance that third parties...will not claim infringement by [Pegasystems]," and that "software product developers will increasingly be subject to infringement claims" failed to disclose that the Company engaged in the willful and malicious misappropriation of Appian's confidential information and trade secrets, was involved in the ongoing, costly Appian Litigation, and already faced meritorious claims that Mr. Trefler and other Company officers orchestrated and condoned its scheme, (ii) statements that "intellectual property rights claims…could limit [Pegasystems'] ability to use certain technologies" misleadingly concealed the fact that, up until November 2021, Appian threatened injunctive relief arising from the Company's undisclosed scheme, which would have prevented the Company from selling tainted software or relying on tainted sales processes, and (iii) the Company failed to disclose that it had engaged in similar misconduct against other companies, including IBM, Salesforce, and ServiceNow.

- ***Appian Litigation***. The Demands allege that certain of Pegasystems' public filings were materially false and misleading because they failed to disclose the Company's misconduct and potential loss exposure as a result of the Appian Litigation. In addition, the Demands claim that when the 2021 10-K disclosed the existence of the Appian Litigation, the Company falsely stated that: Appian's claims were "without merit," the Company had "strong defenses to the[] claims," and "any alleged damages claimed by Appian [were] not supported by the necessary legal standard." Further, on April 28, 2022, the Company filed a Form 10-Q for the first quarter of 2022 (the "1Q22 10-Q") that stated, among other things, "The Company continues to believe that its sales of the products at issue were not caused by, or the result of, the alleged misappropriation of trade secrets, and is submitting evidence to the jury to that effect."

Third, certain of the Demands allege Massachusetts state law claims premised on corporate waste and unjust enrichment. The Demands allege that the Fiduciaries "wasted" corporate assets by paying and collecting excessive compensation and bonuses and incurring legal liability and/or legal costs, including the judgment in the Appian Litigation and defending against the related securities class action, *City of Fort Lauderdale Police and Firefighters' Retirement System v. Pegasystems Inc.*, No. 22-cv-11220 (D. Mass.) (the "Securities Class Action"), and by authorizing the Company to repurchase its common stock at artificially inflated prices. The Demands allege

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that Pegasystems was unjustly enriched through software sales that were boosted by the alleged misappropriation of Appian's trade secrets and, separately, that the Fiduciaries were unjustly enriched by receiving compensation and stock sales despite purportedly knowing misconduct was occurring at the Company.

Fourth, certain of the Demands allege that the Independent Directors, Mr. Trefler, Mr. Stillwell, Mr. Kouninis, Mr. Akgonul, Mr. Leon Trefler, Douglas Kra, and Michael Pyle engaged in insider trading during the pendency of the Appian Litigation and/or during the time period in which the alleged misconduct occurred.

B. Massachusetts Law Concerning Shareholder Demands and Derivative Claims

1. Universal Demand Requirement

The MBCA directs, as a bedrock principal of Massachusetts corporate governance, that "[a]ll corporate power shall be exercised by or under the authority of, and the business and affairs of the corporation shall be managed under the direction of, its board of directors." G. L. c. 156D, § 8.01(b).[3] A derivative proceeding is a civil suit brought on behalf of the corporation (*i.e.*, where the corporation is the plaintiff) and is an asset *belonging to the corporation*. *Id.* §§ 7.40 - 7.47. Under Massachusetts law, a corporation's board of directors controls the decision of whether to commence a derivative lawsuit. *See Halebian v. Berv*, 457 Mass. 620, 625 (2010) (citing Mass. G. L. c. 156D, § 7.42).

The MBCA imposes what is commonly referred to as a "universal demand" requirement—namely that "no shareholder may commence a derivative proceeding" without first making a demand on the board of directors and receiving a response to that demand. G. L. c. 156D, § 7.42; *see also Johnston*, 453 Mass. at 578 n.15 (noting requirement that "demand be made in *all*

[3] Unless otherwise noted, all internal quotation marks and citations are omitted.

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derivative [proceedings] filed on behalf of Massachusetts corporations") (emphasis in original); *Halebian*, 457 Mass. at 625 ("Before a shareholder may file a derivative proceeding in court, the shareholder first must make a written demand on the corporation to take suitable action.").

2. Decisions with Respect to a Demand Must be Made in Good Faith by Independent Directors After Conducting a Reasonable Inquiry

A Massachusetts board of directors that receives a shareholder demand must decide whether to accept the demand (and initiate legal proceedings) or reject the demand. If a derivative proceeding is commenced ***by a shareholder*** (either before or after a demand is rejected), then a corporation can compel dismissal of such action if (1) a majority of a committee of independent directors, (2) after conducting a reasonable inquiry, (3) determined or determines that the maintenance of the derivative proceeding is not in the corporation's best interests. *See* G. L. c. 156D, §§ 7.44(a) & (b)(2); *see also Houle v. Low*, 407 Mass. 810, 821 (1990) ("[A] [special litigation] committee [has] the ability and expertise to decide whether a given derivative suit is in the corporation's best interest."); *Cerundulo v. 222 Friends, Inc.*, 2023 Mass. Super. LEXIS 26, at *2-3 (Mass. Super. Apr. 21, 2023) (same).

Where, as here, a committee of independent directors determines not to pursue litigation, the decision to reject the demand will be presumed valid on the basis of the business judgment doctrine. G. L. c. 156D, § 7.44, cmt. 2. In general, "the business judgment doctrine protects directors and officers from liability for conduct they have undertaken in good faith, with the care that a person in a like position would reasonably believe appropriate in similar circumstances, and in a manner the director or officer reasonably believes to be in the best interests of the corporation." *Halebian*, 457 Mass. at 627 n.11. In a derivative proceeding, the business judgment doctrine

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respects a corporation's decision that prosecution of a shareholder's demanded claim is not in the corporation's best interests. *Id.*

The burden thus is on the derivative shareholders to plead and prove that (i) the directors making the determination were not independent and/or (ii) such directors did not act in good faith after reasonable inquiry. *See Averbuch v. Arch*, 2013 Mass. Super. LEXIS 108, at *11 (Mass. Super. Aug. 27, 2013). Otherwise, a court may not second-guess the judgment of a demand review committee concerning whether to accept or reject a derivative demand.

Independent Decisionmakers. Under Massachusetts law, the committee evaluating a shareholder demand must consist of two or more independent directors. *See* G. L. c. 156D, § 7.44(b)(2); *see also Blake v. Friendly Ice Cream Corp.*, 2006 Mass. Super. LEXIS 241, at *36 (Mass. Super. May 24, 2006), *reconsideration denied*, 2006 Mass. Super. LEXIS 496 (Mass. Super. Aug. 24, 2006). The MBCA makes clear that none of the following factors shall cause a director to be considered not independent: (i) the director's nomination or election by "a defendant in the derivative proceeding or against whom action is demanded," (ii) "the naming of the director as a defendant in the derivative proceeding or as a person against whom action is demanded," and (iii) "the approval by the director of the act being challenged in the derivative proceeding or demand if the act resulted in no personal benefit to the director." G. L. c. 156D, § 7.44(c); *see also Pinchuck v. State St. Corp.*, 2011 Mass. Super. LEXIS 11, at *32 (Mass. Super. Jan. 19, 2011) ("[M]erely being named as a defendant in the derivative proceeding is insufficient to negate…independence."); *Operative Plasterers' & Cement Masons' Loc. Union Officers' & Emps.' Pension Fund v. Hooley*, 2013 WL 5442366, at *4 (D. Mass. Sept. 30, 2013) (similar), *appeal dismissed*, 2015 WL 13926885 (1st Cir. 2015). Independence also requires a director to be "disinterested," meaning that the director does not have a personal interest in the conduct being

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challenged. *Pinchuck*, 2011 Mass. Super. LEXIS 11, at *29; *see also* G. L. c. 156D, § 7.44, cmt. 1; *Friendly*, 2006 Mass. Super. LEXIS 241, at *42-43.

Courts apply a totality of the circumstances test to determine whether a committee of directors was independent and disinterested. *Friendly*, 2006 Mass. Super. LEXIS 241, at *46. Relevant factors include: (1) a committee member's status as a defendant and the nature and scope of the potential liability, (2) "whether the [committee] member's participation in or approval of the alleged wrongdoing was substantial or the result of innocent or pro forma involvement or affiliations," (3) a committee "member's past or present business dealings with the corporation," (4) a committee "member's past or present business or social dealings with individual defendants," (5) "the number of directors on the [committee], such that with [more] directors, less weight may be accorded to any disabling interest affecting only one director," and (6) any structural bias of the committee, including assessment of the manner in which the committee was appointed. *Id.*

Reasonable Inquiry. The corporation must have conducted a "reasonable inquiry." G. L. c., § 7.44(a). Whether a "reasonable inquiry" was conducted is a fact-specific analysis focused on, among other things, (i) whether independent outside counsel was retained to conduct the investigation; (ii) the materials reviewed during the course of the investigation; (iii) the witnesses interviewed; and (iv) the committee's involvement in the investigation. *See, e.g.*, *Hooley*, 2013 WL 5442366, at *6 (reasonable inquiry presumed because, in response to "three demands, the committee met twenty-two times," outside "counsel billed nearly 1,000 hours for investigating the demand and advising the committee," and "the committee conducted interviews, reviewed contracts, considered thousands of pages of documents, analyzed the investment portfolio, …investigated public disclosures[,]" and "evaluated the legal theories that could possibly be pursued and the prospects of eventual recovery"); *Halebian v. Berv*, 869 F. Supp. 2d 420, 455

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(S.D.N.Y. 2012) (reasonable inquiry presumed because the committee was "actively involved in the investigation through multiple meetings," outside counsel "conducted numerous interviews" with the defendant directors and others, and outside counsel "reviewed thousands of pages of relevant documents"), *aff'd*, 548 F. App'x 641 (2d Cir. 2013) (summary order).

As noted above, although the MBCA sets 90 days from the date a demand is made as a "reasonable minimum time[]" before which a derivative proceeding may be commenced, the MBCA notes that "[i]n some instances a longer period may be required." G. L. c. 156D, § 7.42(2) & cmt. 3. And Massachusetts courts routinely recognize that that default time period should be extended where, as here, cases involve complicated facts and circumstances. *See, e.g.*, *Acuna v. Alsop*, No. SUCV-2007-01937 (Mass. Super.) (staying derivative action for more than a year while special litigation committee conducted demand investigation); *Cutler v. State Street*, No. 1784-CV-2359 (Mass. Super.) (staying derivative action for more than two years during special committee investigation into shareholder demand); *see also Halebian v. Berv*, 631 F. Supp. 2d 284, 295 (S.D.N.Y. 2007) (rejecting plaintiff's argument that defendants were not entitled to dismissal of derivative lawsuit after they failed to respond to plaintiff's demand within 90 days of receipt, because Section 7.42 of the MBCA "was worded to accommodate situations in which a board would need more than ninety days to evaluate a shareholder's demand before determining whether to pursue the litigation"), *aff'd in relevant part by* 644 F.3d 122 (2d. Cir. 2011) (relying on certified question to and answer from the Massachusetts Supreme Judicial Court in *Halebian v. Berv*, 457 Mass. 620 (2010)); *Averbuch*, 2013 Mass. Super. LEXIS 108, at *5, 8 (upholding report of special committee following 10-month long investigation).

This is unsurprising, as it would be impossible for a committee to satisfy its obligation to undertake a "reasonable inquiry" within 90 calendar days in complicated matters.

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III. Formation of the DRC in Response to the Demands

At the time the first Demand was received, the Board consisted of (and continues to consist of) seven members: Mr. Trefler, Mr. Gyenes, Mr. Jones, Mr. Lafond, Ms. Ledingham, Ms. Rowlands, and Mr. Weber. Mr. Trefler is the only member of the Board who also serves in a management capacity (as the Company's Chief Executive Officer).

A. Appointment of the DRC

1. Board Resolutions Authorize Creation of a DRC

Following receipt of Ms. Larkin's and Mr. Brenner's demands, the non-management members of the Board discussed the potential formation of a committee to respond to them. On April 12, 2023, the Board (without Mr. Trefler, who recused himself) held a meeting to discuss the two demands received to date (the "April 12, 2023 BOD Meeting"). Pursuant to Section 8.25 of the MBCA and Article II, Section 17 of the Amended and Restated Bylaws of Pegasystems, the Board adopted resolutions (the "DRC Resolutions") creating the DRC—"a committee that is independent of the Company's current management and employees." Ex. 8 (BOD Resolutions), at 1.

The Resolutions authorized the DRC to, among other things:

> [R]eview, analyze and investigate the matters raised in the Demand Letters and the matters set forth therein, and…have the exclusive authority (*with the full authority of the Board*) to determine in good faith what actions (if any) are reasonably believed to be appropriate under similar circumstances and reasonably believed to be in the best interests of the Corporation in response to the Demand Letters.

Id. (emphasis added). The Resolutions further provide that the DRC has the authority to (i) "incur expenses on behalf of the [Company] in connection with [its] activities," (ii) "conduct interviews with any employee, officer, director, agent, or advisor of the [Company], or any other person, as the [DRC] may determine to be appropriate," (iii) "have access to all information and documents

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of the Company (including confidential information and documents) that the DRC believes would assist it in its work," and (iv) "communicate, either directly or through legal counsel, on behalf of the [Company] with each shareholder who sent a demand letter or the shareholder's respective agents or representatives, or with any other shareholder (or its agents or representatives) who may send a similar demand…to [Pegasystems], from time to time as the [DRC] may deem appropriate." *Id.* at 2.

The Resolutions further provide that the DRC, "and each member thereof, is authorized and empowered to do all acts as may be necessary or appropriate in its, his, or her judgement to carry out the duties of the [DRC] contemplated by [the] Resolutions." *Id.*

2. Selection of the DRC Members

The Board selected Mr. Lafond, Ms. Ledingham, and Ms. Rowlands to serve on the DRC, after determining that each was independent and disinterested. *Id.* at 1. The DRC, in turn, selected Mr. Lafond as its chairperson.

Christopher Lafond. Mr. Lafond has served on the Board since April 2019. He currently serves as the Chair of Pegasystems' Audit Committee of the Board (the "Audit Committee"). Mr. Lafond is also currently the Chief Executive Officer and a board member for Insurity LLC ("Insurity"), a property and casualty insurance technology and services provider. Prior to becoming Chief Executive Officer of Insurity in 2019, Mr. Lafond served as the Chief Financial Officer of Insurity since 2017. He was previously the Executive Vice President and Chief Financial Officer of Intralinks Holdings, Inc., a global leader in secure content collaboration software-as-a-service solutions, from June 2015 to June 2017. Prior to that, he held leadership positions at Gartner, Inc. from March 1995 to June 2014, including Chief Financial Officer. He was previously a board member for SiriusDecisions, Inc. from August 2017 to January 2019. Mr.

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Lafond holds a Bachelor of Arts in Economics from the University of Connecticut and a Master of Business Administration ("MBA") from the Columbia University Graduate School of Business.

Dianne Ledingham. Ms. Ledingham has served on the Board since September 2016. She currently serves on the Compensation Committee. Ms. Ledingham is also currently a director at Bain & Company ("Bain"), a management consulting firm, and a senior partner in Bain's Telecom, Media and Technology practice. Ms. Ledingham was the founding global leader for Sales and Channel Effectiveness within Bain's Customer Strategy and Marketing practice and led that group for eight years. In addition, Ms. Ledingham has had several governance roles at Bain including past service on Bain's Board of Directors and Bain's Global Compensation and Promotion Committee, including as elected Chair, and current service on Bain's Global Nominating Committee. Ms. Ledingham earned an MBA from Harvard Business School with distinction. She is a graduate of Brown University, where she received a Bachelor of Science degree in Electrical Engineering with honors.

Sharon Rowlands. Ms. Rowlands has served on the Board since April 2016. She currently serves as the Chair of the Compensation Committee. She also currently serves as the Chief Executive Officer of Newfold Digital, a leading web technology company whose portfolio of brands includes Bluehost, CrazyDomains, Network Solutions, Register.com, and Web.com, among others. Ms. Rowlands is a current member of the Board of Directors of Everbridge, Inc., a critical event management and enterprise safety applications company. Previously, Ms. Rowlands was the Chief Executive Officer of ReachLocal, Inc. ("ReachLocal") a public digital marketing company, leading it through a strategic transformation and the 2016 sale to Gannett Co., Inc. ("Gannett"). At Gannett, Ms. Rowlands served as President of the USA Today Network Marketing Solutions business while continuing to serve as Chief Executive Officer of ReachLocal. Ms.

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Rowlands was previously a member of the Board of Directors of Constant Contact, Inc., Automatic Data Processing, Inc., and Local Search Association. Ms. Rowlands received her Postgraduate Certificate of Education from Goldsmiths, University of London and her Bachelor of Arts in History from the University of Newcastle, Newcastle-Upon-Tyne.

3. The DRC's Retention of Independent Counsel

The DRC retained as its independent counsel Fried Frank, a firm with extensive experience and expertise in connection with internal investigations, demand review committee investigations, securities litigation, and derivative litigation. The DRC concluded that Fried Frank was independent and disinterested and was not involved in any conduct challenged in the Demands.

The Fried Frank team was led by partners Scott B. Luftglass and Ilan T. Graff.

Scott B. Luftglass. Mr. Luftglass is the Vice Chairman of Fried Frank. He is a litigation partner and the Co-Head of the Securities and Shareholder Litigation Practice. Mr. Luftglass' practice focuses on representing corporations, boards of directors, special committees, financial advisors, senior management, and private equity funds in connection with securities litigation, shareholder and derivative litigation, corporate governance matters, and crisis management. Mr. Luftglass serves on the Board of Advisors for the NYU Law Institute for Corporate Governance & Finance and on the Board of Advisors for the Penn Law Institute for Law & Economics. Mr. Luftglass is a Fellow of the American College of Governance Counsel. He is a frequent author and speaker at conferences and panels focused on corporate governance. He has also been a guest lecturer at various law schools, including Yale Law School and the University of Pennsylvania Law School.

Ilan T. Graff. Mr. Graff is a litigation partner who counsels corporations, financial advisors, and global investment banks, among other entities, in complex commercial litigation, regulatory and internal investigations, and white-collar matters. Prior to joining Fried Frank,

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Mr. Graff served for ten years in the United States Attorney's Office for the Southern District of New York, most recently as the Deputy United States Attorney, overseeing the litigation of all criminal and civil cases brought on behalf of the United States in the Southern District and supervising more than 400 lawyers, paralegals, investigators, and staff members. He clerked for then-Chief Judge Sandra L. Lynch on the First Circuit and has been admitted to practice in Massachusetts for almost fifteen years.

4. Confirming the Independence of the DRC Members

At the outset of its engagement, Fried Frank met separately with Mr. Lafond, Ms. Ledingham, and Ms. Rowlands to confirm whether, as the Board had previously determined, they were independent and disinterested. During these meetings, the participants discussed the meaning of and need for each individual member's independence and disinterestedness under Massachusetts law and reviewed a checklist of questions to ascertain whether there were any personal or professional relationships that may undermine such independence and disinterestedness. The DRC and its counsel concluded that all three members are independent and disinterested for purposes of investigating and analyzing the matters raised in the Demands.

IV. The DRC's Investigation

The DRC and its counsel developed and executed a four-step investigative plan: (1) reviewing the trial transcripts and all related filings and exhibits in the Appian Litigation; (2) collecting and reviewing relevant documentary evidence, including non-public documents and communications; (3) conducting confidential witness interviews; and (4) developing the factual record and analyzing potential legal claims based on that record. The DRC members were personally involved in every step of the investigation, closely supervised counsel's activities, and, together with counsel, devoted substantial time to the investigation, keeping open minds as to the outcome.

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A. DRC Meetings and Communications

The DRC held meetings with its independent outside counsel throughout the course of the investigation and communicated between meetings to discuss the investigation and issues raised in it. To date, the DRC has formally met twelve times. In addition to formal meetings, the DRC discussed Committee matters with each other and Fried Frank by telephone and videoconference.

Fried Frank attorneys worked over 2,000 lawyer hours on this matter.

B. Review of the Factual Record

Over the course of the investigation, the DRC and Fried Frank collected and searched over 180,000 documents (the overwhelming majority of which are non-public) and, with the assistance of targeted search terms, manually reviewed nearly 35,000 documents. The DRC sent multiple rounds of written document requests to the Company and trial counsel, and the DRC's counsel worked with Company counsel to develop appropriate search terms and parameters for electronic searches of communications involving key witnesses.

These materials collected and reviewed include the following categories:

- Evidence relating to the Appian Litigation (including, but not limited to, filings in the Appian Litigation and the Appian Appeal), the Company's parameters for identifying materials during discovery, the Company's document productions to Appian (including video evidence), all documents withheld from production by Pegasystems in discovery on the basis of privilege, and internal Company documents concerning disciplinary action in connection with the alleged misconduct;

- Board materials for the period May 2020 to May 2022 (including, but not limited to, Board packages, minutes, draft filings, and communications with the members of the Board) and any communications with the Board during the period February 2012 through May 2022 relating to the alleged misconduct, actual or purported insider trading, or the Appian Litigation;

- Evidence relating to Pegasystems' public disclosures (including, but not limited to, communications relating to the Company's disclosures, or decision to not disclose, information concerning to the Appian Litigation, communications regarding accounting treatment with respect to the Appian Litigation, and documents produced by the Company in the investigation initiated by the SEC); and

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- Evidence relating to potential insider trading (including, but not limited to, trading plans, trading policies, trade authorization requests, and communications regarding trading in the Company's securities).

The DRC members personally reviewed priority interest documents identified during the course of Fried Frank's review.

C. Witness Interviews

The DRC and its counsel interviewed the following 17 witnesses. At least one member of the DRC personally and actively participated in *each* interview.

Pegasystems Executive Personnel

- **Kerim Akgonul** (Chief Product Officer, Pegasystems). Mr. Akgonul joined Pegasystems in 1992 and served as Senior Vice President of Engineering from 2014 to 2021. In April 2021, Mr. Akgonul was promoted to Chief Product Officer. Mr. Akgonul has almost 30 years of software development and managerial experience over his tenure at the Company.

- **Matthew Cushing** (Vice President, Chief Commercial Officer & General Counsel, Pegasystems). Mr. Cushing joined Pegasystems in March 2017 with more than 20 years of legal experience in the technology sector. Previous roles include General Counsel at energy management technology firm EnerNOC Inc. and General Counsel at Acme Packet prior to its acquisition by Oracle Corporation. He was previously a partner at Bingham McCutchen LLP, a global, Boston-based law firm where he provided legal and business counsel to publicly traded companies in the technology space.

- **Efstathios Kouninis** (Chief Accounting Officer, Vice President of Finance, and Treasurer, Pegasystems). Mr. Kouninis joined Pegasystems in April 2008 as Vice President of Finance. The Board appointed Mr. Kouninis as the Company's Chief Accounting Officer in May 2008 and Treasurer in January 2014. On April 1, 2024, Mr. Kouninis was promoted to Senior Vice President of Finance in addition to his roles as Chief Accounting Officer and Treasurer. From February 2006 to April 2008, Mr. Kouninis served as Chief Financial Officer and Treasurer of Tasker Products Corporation, a publicly-traded manufacturer of antimicrobial chemicals. From November 2004 to February 2006, Mr. Kouninis served on the Staff of the SEC's Division of Corporation Finance.

- **Don Schuerman** (Chief Technology Officer and Vice President, Marketing and Technology Strategy, Pegasystems). Mr. Schuerman has 20 years of experience at Pegasystems delivering enterprise software solutions for Fortune 500 organizations, with a focus on digital transformation, mobility, analytics, business process management, cloud and customer relationship management. He has led enterprise software implementations and provided technology and architecture consulting to senior business and technology executives from organizations including American Express, Citibank, JP Morgan Chase, and BP.

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- **Kenneth Stillwell** (Chief Operating Officer and Chief Financial Officer, Pegasystems). Mr. Stillwell joined Pegasystems in July 2016 as Senior Vice President, Chief Financial Officer, and Chief Administrative Officer. In April 2021, Mr. Stillwell was promoted to Chief Operating Officer in addition to his role as Chief Financial Officer. Mr. Stillwell previously served as Senior Vice President and Chief Financial Officer of Dynatrace, Inc., a leader in digital performance management solutions, and Executive Vice President and Chief Financial Officer of Sovos Compliance, LLC ("Sovos"), a financial compliance SaaS provider. Prior to Sovos, Mr. Stillwell was at PTC Inc., a publicly-traded software provider, where he served as Division CFO. Mr. Stillwell is a Certified Public Accountant.

- **Alan Trefler** (Chief Executive Officer, and Chairman of the Board, Pegasystems). Mr. Trefler founded Pegasystems and has served as Chairman of the Board of Directors and Chief Executive Officer since the Company was organized in 1983. Prior to 1983, he managed an electronic funds transfer product for TMI Systems Corporation, a software and services company.

- **Leon Trefler** (Chief of Clients and Markets, Pegasystems). Mr. Leon Trefler joined Pegasystems in April 1998 as an Account Executive for Strategic Business Development. Since then, he has held various senior sales management positions across the Company and in Channel Sales. In 2002, he launched the commercialization of the PegaRULES Process Commander, the predecessor to the Pegasystems Platform. From April 2007 to January 2010, Mr. Leon Trefler served as Vice President of Sales, North America, and in January 2010, Mr. Leon Trefler was promoted to Senior Vice President of Sales. In July 2014, the Company re-organized its sales and consulting services functions along geographic regions, and Mr. Leon Trefler served as Senior Vice President of Global Customer Success for the Americas until April 1, 2021, when he was appointed Senior Vice President of Global Customer Success.

Independent Directors

- **Christopher Lafond**. Biography set forth *supra* at 21-22.

- **Dianne Ledingham**. Biography set forth *supra* at 22.

- **Sharon Rowlands**. Biography set forth *supra* at 22-23.

- **Peter Gyenes**. Mr. Gyenes has been a member of the Board since March 2009. He has served as a member of the Audit Committee and of the Nominating and Corporate Governance Committee of the Board (the "Nominating and Corporate Governance Committee") since July 2009. Mr. Gyenes has over four decades of experience in global technical, sales, marketing, and general management positions within the software and computer systems industries. He previously served as Chairman and Chief Executive Officer of Ascential Software, as well as of its predecessor companies VMark Software, Ardent Software, and Informix, and led its growth into the data integration market leader from 1996 until it was acquired by IBM in 2005. Mr. Gyenes also previously served as President and Chief Executive Officer of Racal InterLan, Inc., and in executive positions at Data General Corporation, Encore Computer Corporation, and Prime Computer, Inc.

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Mr. Gyenes previously served as a board member for RealPage, Inc., Sophos plc, Information Builders, Inc., Carbonite, Inc., IntraLinks, Inc., Epicor, EnerNOC Inc., Appfluent Technologies, and Cimpress NV.

- **Richard Jones**. Mr. Jones joined Pegasystems in October 1999, serving as President and Chief Operating Officer until September 2002. Mr. Jones was a part-time employee of Pegasystems from July 2002 to July 2007. Mr. Jones was elected as a member of the Board in November 2000, and served as Vice Chairman from September 2002 to July 2007. He has served as a member of the Compensation Committee and the Nominating and Corporate Governance Committee since July 2011. Mr. Jones has served on the Board of Directors of Resonantia, Inc. and KaliVir Immunotherapeutics, Inc. (formerly Western Oncolytics Ltd.), a private company developing novel therapies for cancer, and as Chairman of Jones Boys Ventures, a retailer. From 1995 to 1997, Mr. Jones served as a Chief Asset Management Executive and member of the Operating Committee at Barnett Banks, Inc. From 1991 to 1995, he served as Chief Executive Officer of Fleet Investment Services, a brokerage and wealth management organization. His prior experience also includes serving as Executive Vice President with Fidelity Investments, an international provider of financial services and investment resources, and as a principal with the consulting firm of Booz, Allen & Hamilton. Mr. Jones previously served as a board member for Buyers Access, LLC and Colo5, LLC.

- **Larry Weber**. Mr. Weber has been a member of the Board since August 2012. He has served as a member of the Compensation Committee and the Nominating and Corporate Governance Committee since May 2013, and as a member of the Audit Committee since June 2021. Since January 2015, he has also served as the Chair of the Nominating and Corporate Governance Committee. Mr. Weber has served as the Chief Executive Officer and Chairman of the Board of Racepoint Global, Inc., a digital marketing services ecosystem of marketing service companies organized to help chief marketing officers in their role as builders of communities and content aggregators, since he founded the company in September 2004. In 2001, Mr. Weber founded Weber Shandwick, one of the largest public relations agencies in the world. Mr. Weber previously served on the Board of Directors as well as the Nominating and Corporate Governance Committee of RMG Networks Holding Corporation, a digital signage provider for most of the Fortune 100, and was a board member for Avectra, a provider of web-based association management software and social customer relationship management software. Mr. Weber is also Co-Founder and Chairman of the Board of the Massachusetts Innovation & Technology Exchange, one of the largest interactive advocacy organizations in the world.

Outside Legal Counsel to Pegasystems

- **Robert S. Frank, Jr.** (Former Managing Partner and Chairman of Choate, Hall & Stewart LLP ("Choate")). Mr. Frank was the Company's lead trial lawyer in the Appian Litigation. He has more than 50 years of experience representing clients through all phases of litigation, as lead trial and appellate counsel. He is nationally recognized for helping technology and life sciences companies handle business disputes, particularly those involving patent infringement and trade secrets. His clients have included Hewlett-

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Packard, General Electric, Cisco Systems, and Eastman Kodak. He is a Fellow of the American College of Trial Lawyers.

- **John Pitfield** (Co-Chair Business & Technology Group, Choate Hall & Stewart LLP). Mr. Pitfield helps private equity and growth equity clients to maximize the value of their transactions and strategic initiatives. He regularly advises public companies on a range of disclosure, governance, and board-level matters. Mr. Pitfield's clients include a range of investors and operating companies—particularly in the health services, life sciences, and technology, media, and telecom sectors—including Bain, Candescent Partners, Summit Partners, Haemonetics, Pegasystems, and Forrester Research. He became the Company's principal outside corporate governance and disclosure counsel in 2018.

- **Monica Monday** (Chairperson, Appeals and Critical Issues, Gentry Locke). Ms. Monday represents the Company in the Appian Appeal, serving as co-counsel with expertise in Virginia appellate practice. Ms. Monday was also present for the duration of the Appian Litigation trial, having been engaged to consider appellate strategy in the event of an unfavorable ruling. Ms. Monday is the Chairperson of Gentry Locke's Executive Board and heads the firm's Appellate practice. Ms. Monday served as Managing Partner of Gentry Locke from 2013-2022. Ms. Monday represents her clients in Virginia's state and federal appellate courts across a wide variety of cases. She is a Fellow of the American Academy of Appellate Lawyers.

- **Joshua Rosenkranz** (Department Head, Supreme Court & Appellate Practice, Orrick, Herrington, Sutcliffe LLP). Mr. Rosenkranz represents the Company in the Appian Appeal, serving as co-counsel with expertise in appeals involving intellectual property claims. Mr. Rosenkranz has argued some of the country's most significant intellectual property appeals, including five before the U.S. Supreme Court. He's successfully represented numerous high-profile clients, including Microsoft, DISH Network, and Facebook, and has secured billions in settlements and verdicts. Mr. Rosenkranz is a former law clerk to U.S. Supreme Court Justice William J. Brennan Jr. and then-Judge Antonin Scalia on the D.C. Circuit. He has personally argued more than 200 appeals in state and federal appellate courts across the nation, including 20 cases before the U.S. Supreme Court.

D. Communications with Demand Shareholders

Following receipt of each Demand, the DRC sent a letter, through Fried Frank, (i) notifying each shareholder that the Board had formed a committee comprised of Mr. Lafond, Ms. Ledingham, and Ms. Rowlands to review and analyze the respective demand and take whatever action (if any) they in good faith deem appropriate; (ii) inviting the shareholder to provide any information to the DRC that they believed could help the committee evaluate the demand; and (iii)

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stating that the DRC, through its counsel, would be pleased to meet with the shareholder and their counsel.

In the months following receipt of the Demands, Fried Frank provided verbal status updates on the investigation to counsel who requested such updates. The DRC's investigative work and analysis was substantially complete as of December 2023. However, the DRC waited to complete its work and issue this Report pending (i) potential further developments of the facts in, and the mediation of, the Securities Class Action in late February / early March 2024; and (ii) the parallel mediation of the Demands (received as of that time) and the two pending derivative suits. With respect to (i), the DRC was actively monitoring the Securities Class Action, and, at that time, that litigation was proceeding through discovery and expecting imminent deposition testimony (from many of the same witnesses the DRC had interviewed). The DRC wanted to ensure that any of the testimony given, or evidence developed, was not inconsistent with what it had seen and learned from the same witnesses who had been interviewed by the DRC.

In January 2024, Fried Frank provided written notification to the Demand Shareholders of its understanding that the Securities Class Action plaintiffs and Pegasystems had agreed to have a mediation of that litigation in late February 2024 and invited the Demand Shareholders to attend. On February 27, 2024, mediator John Van Winkle held a mediation with the parties to the Securities Class Action; Fried Frank and counsel for the Demand Shareholders also attended.

Following the mediation, in March 2024, the parties to the Securities Class Action reached an agreement to settle that lawsuit for $35 million, which settlement was approved by the court on September 19, 2024. The DRC and the Demand Shareholders did not reach an agreement on a potential settlement of the Demands.

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On April 22 and July 1, 2024, the DRC sent letters, through Fried Frank, to the Demand Shareholders updating them on the DRC's work and anticipated timing for the completion of its work and issuance of this Report. Counsel to the DRC also participated in several calls with counsel to the Demand Shareholders updating them on status and timing.

V. The Factual Record Developed by the DRC

A. Background re: Relationship Between Pegasystems and Appian

Pegasystems is a Cambridge, Massachusetts-based customer relationship management software development company founded by Mr. Trefler in 1983.[4] Pegasystems develops, markets, licenses, hosts, and supports enterprise software applications that help organizations transform how they engage with customers and process work. The Company's cloud-architected portfolio of customer engagement and digital process automation applications leverages artificial intelligence, case management, and robotic automation technology, empowering businesses to quickly design, extend, and scale their enterprise applications to meet strategic business needs. Pegasystems' core product is the "Pega Platform," which allows clients to develop applications in a low-code environment (that is, one which requires little or no coding) to improve employee productivity and deliver rapid, personalized service to customers.

Pegasystems focuses its business primarily in two markets: (i) business process management ("BPM") and case management, and (ii) customer relationship management ("CRM"). Since at least 2012, top industry analysts, including both Gartner and Forrester, have identified Pegasystems as an industry leader within the BPM and case management market.[5]

[4] As of January 2020, Mr. Trefler beneficially owned 50.11% of Pegasystems' securities. Pegasystems, Schedule 14A Information (filed Apr. 29, 2020). As of January 2024, Mr. Trefler beneficially owns 48.0% of Pegasystems' securities. Pegasystems, Schedule 14A Information (filed Apr. 26, 2024).

[5] *See, e.g.*, Jim Sinur et. al., *Magic Quadrant for Intelligent Business Process Management Suites*, Gartner, September 27, 2012, pp. 3, 7, 13 ("Recent strides in adaptive case management and applying predictive analytics promise to keep Pegasystems a thought and market leader."); Craig Le Clair & Derek Miers, *The Forrester*

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BPM software is aimed at managing and optimizing business processes, which include people, systems, and information. For example, in customer service, BPM can be used to manage customer inquiries and complaints more efficiently, creating a better customer experience.[6] Case management is a software-based approach to help people accomplish daily work and automating work from end-to-end. For example, case management helps streamline operations, such as submitting insurance claims, maintaining patient records, or compiling loan applications, to help employees be more productive and deliver experiences customers demand.

According to Appian's public filings and Appian's court submissions in the Appian Litigation, Appian was founded in 1999 and is a software company that automates business processes and operationalizes artificial intelligence with low-code design. Appian's BPM software platform enables customers to design, automate, and optimize business processes, as well as develop new digital solutions using a low-code approach to create applications and workflows tailored to their business requirements. Per market analyst reports, Appian participates in the BPM and case management software industry with its BPM software application program.

Pegasystems only competes with Appian in the BPM and case management market, as Appian does not have a competing CRM product. At various times, both Pegasystems and Appian have described the other as a competitor in their respective public filings. The Company described Appian as a competitor in its annual report filed during fiscal years 2012 to 2015. For example, in its Form 10-K for fiscal year 2012, the Company noted that the markets it competes in, including

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Wave™: Dynamic Case Management, Q1 2014, Forrester, March 28, 2014, p. 13 (Pegasystems has "become the dominant DCM [dynamic case management] provider."); Rob Dunie & Janelle B. Hill, *Magic Quadrant for BPM-Platform-Based Case Management Frameworks*, Gartner, October 24, 2016, p. 17 ("Pegasystems is a market leader in iBPMS, and its BPM platform gives it great strength for adaptive case handling."). As early as 2006, Gartner was calling Pegasystems a leader for Intelligent BPM and BPM Suites. *See, e.g.*, Janelle B. Hill & Jim Sinur, *Magic Quadrant for Business Process Management Suites, 2006*, Gartner, June 28, 2006, pp. 4, 16.

[6] Pegasystems, *Business Process Management*, https://www.pega.com/business-process-management (Frequently Asked Questions: What are examples of business process management?).

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the BPM market, are "intensely competitive," "rapidly changing," and "highly fragmented," and noted that the Company encounters competition from Appian, among others companies. *See* Pegasystems Form 10-K (filed Feb. 20, 2013), at 7; *see also* Pegasystems Form 10-K (filed Feb. 25, 2014), at 5 (same); Pegasystems Form 10-K (filed Feb. 26, 2015), at 6 (same); Pegasystems Form 10-K (filed Feb. 25, 2016), at 8 (same).[7] In Pegasystems' Form 10-K for fiscal year 2016 (filed Feb. 24, 2017) ("2016 10-K"), the Company revised its disclosure concerning competition and did not list *any* BPM competitor by name. *See* 2016 10-K, at 9. Instead, the Company more broadly listed a few competitors by name, without delineating the markets in which Pegasystems competed with those businesses; Appian was not included in this list. *Id.* at 9-10. Similar disclosures concerning the Company's competitors, without specifically identifying Appian, are included in the Company's annual reports for fiscal years 2017 to 2022.

After Appian went public in May 2017, Appian filed its first annual report for the period ending December 31, 2017, which noted that it competes with "providers of business process management and case management software, such as IBM, OpenText, Oracle Corp. ('Oracle'), Pegasystems, and SAP." Appian Form 10-K (filed Feb. 23, 2018), at 13, 18. Appian made similar disclosures including Pegasystems in a list of competitors in its annual reports for years 2018 through 2022. *See* Appian Form 10-K (filed Feb. 21, 2019), at 7, 12; Appian Form 10-K (filed Feb. 20, 2020), at 10, 15; Appian Form 10-K (filed Feb. 18, 2021), at 16, 21; Appian Form 10-K (filed Feb. 17, 2022), at 17, 23; Appian Form 10-K (filed Feb. 16, 2023), at 9, 15.

While aspects of Pegasystems' and Appian's markets superficially overlap (*i.e.*, both companies operate in the low code or workflow automation, BPM space), Company witnesses

[7] The Brenner Demand Letter incorrectly alleges that "[a] keyword search of 'Appian' on SEC.gov/edgar… revealed that 'Appian' was not included in any of the Company's filings prior to February 16, 2022." Ex. 1, at 3.

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expressed to the DRC that they did not consider Appian to be one of Pegasystems' principal competitors. Witnesses noted that Appian only competes against a subset of Pegasystems' business. Mr. Akgonul, for instance, told the DRC that, while Appian was, and continues to be, a part of Pegasystems' competitive landscape, the Company never viewed them as one of their principal competitors, and analysts only tend to compare them because they are two of the only "independents" left in the market (*i.e.*, they have not been acquired by larger, conglomerate software companies). Further, Mr. Schuerman and Mr. Trefler reported that, historically IBM, and more recently Salesforce, ServiceNow, and customers building their own systems from scratch, pose more direct competition to Pegasystems.

B. Pegasystems' Engagement of Consultants for Competitive Intelligence

1. Engagement of Youyong Zou

Engaging consultants to aid with competitive intelligence is quite common, particularly in the technology space. Between February 2012 and September 2014, Pegasystems periodically worked with Youyong Zou, an independent consultant (engaged indirectly through K-Force), to conduct competitive intelligence on Appian. The Company's relationship with Mr. Zou was initiated and supervised by John Petronio, the Company's then-Director of Product Marketing, who was responsible for, among other things, competitive intelligence. In January 2012, Mr. Petronio used KForce, a consulting staffing agency, to identify a consultant with Appian experience who was not "loyal" to Appian. One of the candidates introduced by KForce was Mr. Zou, who at the time was working for Serco Group Plc ("Serco"), a government contractor, which licensed Appian.

Mr. Petronio, on behalf of the Company, hired Mr. Zou pursuant to the terms of a pre-existing consulting contract that Pegasystems had with KForce (the "KForce Contract"). The KForce Contract warranted that the services KForce was to provide Pegasystems "do not violate

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any applicable law, rule, or regulation; any contracts with third parties; or any third party in any patent, copyright, trade secret or similar intellectual property right."

Once engaged, Mr. Zou did not work pursuant to a pre-determined or consistent schedule. Instead, Mr. Petronio utilized Mr. Zou's services on an as-needed basis. In total, Mr. Zou provided around 200 hours of services to Pegasystems over more than 2.5 years. As reflected in contemporaneous documents and videos, Mr. Zou's work for Pegasystems primarily consisted of (i) identifying the strengths and limitations of Appian's software environment, and resolving inquiries regarding Appian's capabilities and user experience; (ii) assisting Mr. Petronio in preparing strategy for sales pitches and sales consultant trainings; (iii) providing demonstrations of and documentation related to Appian's end-user environment and various functionalities; and (iv) attending public Appian events, including Appian's annual Appian World event, and sharing his impressions and takeaways.

Though Mr. Petronio was his primary point of contact at Pegasystems, Mr. Zou occasionally, at Mr. Petronio's direction, met or communicated with others at the Company. For instance, on a few occasions, Mr. Zou participated in live, remote demonstrations or webinars with Pegasystems personnel during which he showed aspects of Appian's end-user experience or answered questions about its functionalities. As an example, the DRC reviewed email correspondence, which reflected Mr. Petronio's efforts to persuade Mr. Akgonul to meet with Mr. Zou, and Mr. Akgonul told the DRC that he met Mr. Zou virtually on one occasion in December 2012, during which meeting Mr. Zou demonstrated several aspects of the Appian developer experience.

At times, during videos or webinars with Pegasystems personnel, Mr. Petronio asked Mr. Zou to not share his name and, on other occasions, Mr. Petronio, on his own volition, referred

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to Mr. Zou using aliases, such as "the other Matt" or "Spy," and blurred his username on screenshots. Many Company witnesses, including Mr. Akgonul, Mr. Schuerman, and Mr. Leon Trefler, told the DRC that they did not understand Mr. Petronio to be seriously engaging in an effort to hide or conceal anything related to Mr. Zou.[8] Rather, consistent with Mr. Petronio's behavior in other contexts, they understood Mr. Petronio's use of these terms as an attempt to generate mystique, buzz, and excitement around Mr. Petronio's work to pique and sustain Pegasystems employees' interest. Put simply, Mr. Petronio was trying to get his colleagues' attention.

The DRC identified two occasions during which Mr. Zou met with Pegasystems employees in-person. In January 2013, Mr. Zou visited Pegasystems' headquarters and, with Mr. Petronio, presented to members of Pegasystems' Product Management and Product Marketing teams on Appian's mobile capabilities and the process of building an application in Appian. Mr. Schuerman recounted to the DRC that he briefly met Mr. Zou during this visit. Mr. Akgonul, Mr. Leon Trefler, and Mr. Trefler were invited to attend a demonstration by Mr. Zou, and there is some contemporaneous email traffic that could be read to suggest that Mr. Trefler and Mr. Leon Trefler may have participated in some part of a meeting with him. However, there is no evidence that Mr. Trefler engaged substantively with Mr. Zou, and neither Mr. Trefler nor Mr. Leon Trefler specifically recalled ever interacting with Mr. Zou.[9] Indeed, during the Appian Litigation trial, Mr. Zou was asked explicitly whether he met with Mr. Trefler and testified that he did ***not*** recall doing so. Mr. Zou visited Pegasystems' headquarters again in February 2014 and demonstrated

[8] The DRC did not identify evidence to suggest that Mr. Trefler was ever contemporaneously aware of or involved in efforts to conceal or protect Mr. Zou's identity.

[9] Mr. Akgonul told the DRC that he had no recollection of ever meeting Mr. Zou in-person, and only recalls interacting with him during the December 2012 virtual demonstration, discussed *supra*.

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the building of an application on the Appian platform to Mr. Petronio and Mr. Baril, then a Pegasystems' Solutions Engineering Manager. The DRC's review of the record, consistent with witness accounts, suggests that Mr. Trefler, Mr. Akgnoul, Mr. Schuerman, and Mr. Leon Trefler (collectively, the "Management Witnesses") were not present for this demonstration.

Aside from these rare meetings, however, the vast majority of Mr. Zou's touchpoints with Pegasystems occurred through Mr. Petronio, primarily via email, and his exposure to the Fiduciaries was very limited or non-existent. Notably, the documentary record and witness testimony reflect that ***none*** of the Independent Directors, nor Mr. Stillwell, were contemporaneously aware of Mr. Zou's engagement. Indeed, Mr. Stillwell, Mr. Lafond, Ms. Rowlands, and Ms. Ledingham did not join Pegasystems until ***after*** Mr. Zou stopped working with Pegasystems, and thus could not have been contemporaneously aware of his engagement. The Independent Directors and Mr. Stillwell did not learn of Mr. Zou's work for Pegasystems until the Appian Litigation was filed. Witnesses uniformly reported that, aside from general competitive landscape overviews periodically presented to the Board, the Independent Directors generally were not kept abreast of the Company's specific competitive intelligence undertakings.

As to the Management Witnesses, these individuals all acknowledged in interviews that they had some contemporaneous awareness that Mr. Zou was working with Mr. Petronio to gather competitive intelligence on Appian. Their witness accounts, consistent with the documentary record, reflect that Mr. Petronio informed them of Mr. Zou's engagement and periodically shared with them information that was provided by Mr. Zou, asked them to review materials or trainings prepared in consultation with Mr. Zou, or requested that they approve funding for Mr. Zou.[10]

[10] As reflected in the record, the Management Witnesses also occasionally requested research from the competitive intelligence team without specifying how that research should be conducted, for which Mr. Petronio ultimately chose to solicit Mr. Zou's help. The final product for such requests would sometimes include information that resulted from Mr. Zou's work, even if not apparent on the face of the work product.

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Beyond these limited interactions, however, evidence reflects that the Management Witnesses did not work closely with Mr. Zou, let alone direct him to provide the Company with Appian's proprietary information. Instead, as recounted in witness interviews, they relied on Mr. Petronio, as the leader of Pegasystems' competitive intelligence efforts, to navigate Mr. Zou's engagement, including ensuring he had access to Appian-related information through permissible channels and was acting in compliance with all applicable laws and regulations.

The Management Witnesses also uniformly conveyed to the DRC that, both based on their understanding in real time and what they know now, they strongly believe that nothing Mr. Zou provided Pegasystems constituted Appian trade secrets. They noted that the platform Mr. Zou used could be accessed (and ***was*** accessed) by thousands of Appian developers, and that the same information he shared was publicly available online through Appian's website, YouTube, and public webinars, among other sources. The DRC's review of the documentary record and the facts developed during the Appian Litigation substantiates these observations. Moreover, evidence reviewed by the DRC, including video recordings of and made by Mr. Zou, does not suggest, nor has anyone alleged, that Mr. Zou shared Appian's source code or other Appian information that was not generally available to consumers of its product.

The Management Witnesses also conveyed their understanding that nothing provided by Mr. Zou was ultimately used to improve Pegasystems' offerings. In particular, Mr. Akgonul, who, as discussed *supra*, has held various senior engineering and product management positions at Pegasystems, shared his view that no Appian capabilities or functionalities learned from Mr. Zou were incorporated into Pegasystems' own product. As reflected in the Appian Litigation record, the Company had evidence, which it was erroneously precluded from showing to the jury, that some of the allegedly "stolen" features had been part of Pegasystems' software before Mr. Zou's

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engagement.[11] The Management Witnesses generally reported that they did not find Mr. Zou's information to be particularly helpful or interesting and stated that, if anything, it only reinforced their pre-existing views of Appian's product.

In September 2014, Mr. Zou ended his engagement with Pegasystems after informing Mr. Petronio that his role at Serco changed such that he would no longer have access to Appian's user interface.[12] On January 30, 2015, Pegasystems terminated Mr. Petronio, after having first placed him on a performance improvement plan on January 8, 2015. Mr. Trefler, Mr. Akgonul, Mr. Schuerman, and Mr. Leon Trefler reported to the DRC that they had been dissatisfied with Mr. Petronio's performance throughout his tenure. Mr. Petronio began consulting for Appian in February 2016 and, in April 2019, started working for them full time. He ultimately provided information that served as the basis for Appian's complaint in the Appian Litigation.

2. Retention of Other Competitive Intelligence Consultants

Documentary evidence reflects that Pegasystems has at times engaged, or considered engaging, consultants to develop competitive intelligence on competitors other than Appian.[13] A

[11] At trial, Pegasystems sought to introduce earlier versions of its software "to illustrate that many of the features Appian claimed [Pegasystems] had 'stolen' pre-existed [the Company's] contact with Zou or were developed wholly independently of his demonstrations." Virginia Appellate Decision at 459. However, the trial judge held that this evidence was inadmissible at trial unless Pegasystems "used the exact same laptop on which it transmitted a copy of the software to Appian during discovery." *Id.* at 460. The Virginia Court of Appeals found that this ruling was an abuse of discretion that "significantly hampered [Pegasystems'] liability defense." *Id.* at 501.

[12] The Management Witnesses told the DRC that following Mr. Zou's separation, any efforts to engage a new Appian consultant never advanced beyond preliminary ideas or conversations. The DRC's investigation identified one other instance in which the Company considered engaging a consultant to provide competitive intelligence on Appian. In 2019, the Company participated in discussions with BP3 Global, Inc. ("BP3"), a Pegasystems partner, about conducting a secret shopper exercise, pursuant to which BP3 would (i) take Pegasystems' and Appian's trainings, (ii) purchase access to both Pegasystems' and Appian's platforms, (iii) compare the experiences, and (iv) help Pegasystems update its competitive materials based on what they learned. Pegasystems reviewed a draft statement of work in November 2019, and had an introductory meeting with BP3 representatives in January 2020, but Mr. Leon Trefler and Mr. Schuerman confirmed to the DRC that, beyond these preliminary steps, Pegasystems did not move forward with engaging BP3.

[13] Outside of the consultants discussed in this section, documentary evidence suggests various Company personnel, on a few occasions between 2012 and 2022, contemplated or proposed engaging consultants

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few such consultants (the "Other Consultants") appear to have been have been engaged by Mr. Petronio through KForce during roughly the same time period that he engaged Mr. Zou. Mr. Petronio seems to have used the Other Consultants less frequently than he used Mr. Zou, and they appear to have had even fewer (if any) interactions with personnel other than Mr. Petronio.

Some Management Witnesses, including Mr. Leon Trefler and Mr. Schuerman, had a general recollection that Pegasystems had engaged consultants besides Mr. Zou. However, none recalled meeting the Other Consultants, knew their identities, or could recall the purpose for which they had been engaged. Their lack of knowledge is consistent with the documentary record, which reflects that none of the Management Witnesses worked closely with or were other than minimally informed about the Other Consultants. Contemporaneous email traffic indicates that, on a handful of occasions, Mr. Petronio mentioned one or more of the Other Consultants in communications sent to the Management Witnesses and, on a single occasion, invited Mr. Akgonul and Mr. Schuerman to a meeting with one.

The Independent Directors and Mr. Stillwell all conveyed to the DRC that they had no contemporaneous knowledge regarding the Company's use of the Other Consultants for competitive intelligence purposes and that they did not learn about Pegasystems' engagement of such consultants until at least the midst of the Appian Litigation (and, in many cases, until such conduct was alleged in the Demands).

No witness reported awareness of any inappropriate conduct with or by the Other Consultants and the DRC has not identified documentary evidence to the contrary.

for other competitors. No witness reported to the DRC, nor did the DRC identify evidence suggesting that, the Company ever ultimately engaged such consultants.

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C. Use of Aliases to Access Appian's Information

1. Appian Free Trial Instances

The DRC's investigation confirmed that, at various times between 2012 and 2021, certain Pegasystems employees, in order to conduct research on Appian's products, personally accessed Appian's user interface by signing up for free trials. These free trials were (and remain) generally available to the public. To access these free trials, the Company employees used their personal (rather than Pegasystems) email addresses and, in some cases, fictitious personas, or used login credentials belonging to others.

Through contemporaneous documentary evidence, witness accounts, and interrogatory responses submitted by Pegasystems in the Appian Litigation, the DRC identified ten full-time Pegasystems employees (collectively, the "Free Trial Users") who accessed some version of Appian's platform from 2012 until March 2022, including Mr. Baril.[14] As reflected in documents and Appian Litigation trial transcripts reviewed by the DRC, the Free Trial Users accessed Appian's platform in order to learn more about Appian's offerings, including strengths and weaknesses. Certain of the Free Trial Users captured screenshots or recorded videos of Appian's free trial environment, which they sometimes shared internally at Pegasystems. The DRC also found that, on a few occasions, certain of the Free Trial Users offered to give live demonstrations of Appian's free trial experience to their colleagues. Using information gleaned from exploring Appian's platform, the Free Trial Users drafted materials for internal use that discussed Appian's capabilities and/or strategy.[15]

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[14] During the Appian Litigation, Pegasystems did not dispute that certain Company employees misrepresented their identities in connection with accessing versions of Appian's platform.

[15] The DRC's review of documentary evidence and trial and deposition testimony from the Appian Litigation indicate that certain of the Free Trial Users also accessed other competitors' free trial environments. None of the witnesses interviewed by the DRC reported being aware of such conduct, and the DRC did not identify

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Both the documentary record and witness accounts reflect that the Fiduciaries were not directly involved in this practice. To the contrary, the Independent Directors, Mr. Stillwell, and Mr. Akgonul[16] all reported to the DRC, and the documentary record supports, that they had no contemporaneous awareness that any of the Free Trial Users had registered for Appian trial instances or otherwise accessed Appian's platform, and they did not learn of such conduct until it later became a focal point in the Appian Litigation. As to the remaining Management Witnesses, the record suggests that, through their relationship with Mr. Baril, these individuals were informed of or made contemporaneously aware that at least one of the Free Trial Users had accessed Appian's platform.

As reflected in the record, Mr. Baril periodically communicated with Mr. Schuerman, Mr. Trefler, and Mr. Leon Trefler regarding research projects that he was working on and, on occasion, these individuals requested specific competitive intelligence work product from him. The DRC determined that, on a few occasions in 2019 and 2020, during the course of conversations with Mr. Schuerman, Mr. Trefler, and/or Mr. Leon Trefler pertaining to his competitive intelligence activities, Mr. Baril acknowledged that he had access to Appian and/or that he had recorded videos within Appian's platform. Further, the DRC identified two references Mr. Baril made to Mr. Schuerman and/or Mr. Trefler during that same timeframe suggesting that access to Appian was difficult to come by. Mr. Schuerman, Mr. Trefler, and Mr. Leon Trefler all reported to the DRC that they did not contemporaneously understand that Mr. Baril had acquired such access through the use of an alias. In fact, all of the Management Witnesses, consistent with the

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evidence to either contradict these witnesses' accounts or suggest that any of the Free Trial Users used fake identities to access other competitors' free trials.

[16] In his interview with the DRC, Mr. Akgonul shared that he did not recall learning any Pegasystems employee was involved in accessing Appian's platform until he was presented with evidence while giving a deposition in connection with the Appian Litigation. The DRC did not identify documentary evidence inconsistent with Mr. Akgonul's recollection.

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Company's legal position in the Appian Litigation and the Appian Appeal, conveyed their understanding that nothing in Appian's free trial environment was non-public, confidential, or trade secret information, because millions of individuals were eligible to access that environment without restriction (and thousands did).[17] Instead, these witnesses opined that Appian's free trials were marketing tools, intended to be used by as many people as possible, and that they understood accessing those trials to be akin to test-driving a car.

Despite their belief that the practice was legal, each of the Management Witnesses recognized that, in hindsight, the Free Trial Users should not have used aliases to access those trials because such behavior can be misleading and risks the appearance of misconduct. The view expressed by the Management Witnesses that the Free Trial Users should not have used aliases is consistent with their conduct, as both witness accounts and the documentary record reflect that, when asked directly by employees whether to provide their Pegasystems or different information in connection with registering for competitors' products and/or events, they counseled in favor of using their Pegasystems information.

Once the Fiduciaries learned through the Appian Litigation that certain Pegasystems' employees had used aliases in connection with accessing Appian's trial environment, they ensured that the Company took a variety of steps to address the issue (as described in greater detail below).

2. Appian Marketing Materials

Mr. Trefler reported that, to keep abreast of what competitors are doing, he has periodically signed up for Appian news alerts. Mr. Trefler told the DRC that, when registering for such materials, he sometimes used his personal email address. The DRC also identified evidence that

[17] The DRC reviewed documentary evidence depicting users that registered for Appian's free trials, which showed that Appian approved numerous applications for free-trials containing clearly fake or missing information, including names and email addresses.

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confirmed that his personal email address was used to sign up for Appian Insight alerts and an Appian marketing webinar. Although the Demands allege that Mr. Trefler created and employed aliases, including "Albert Skii," "Paul Foon," and "A. Ewe" in order to access Appian's information, Mr. Trefler reported to the DRC that he had no recollection of using, and did not think he would have used, such personas to register for Appian websites or programs. The DRC did not identify evidence to the contrary. When asked about this practice, witnesses, including Mr. Schuerman, Mr. Akgonul, Mr. Cushing, and Mr. Frank, stated that, based on their extensive industry knowledge, experience, and expertise, using one's personal email address to register for competitors' marketing materials is not improper competitive intelligence gathering and does not implicate trade secret or otherwise confidential information.[18] Mr. Schuerman and Mr. Akgonul, for instance, conveyed their understanding that a company's news alerts are marketing materials explicitly designed to be public and reach as large of an audience as possible, and that it is extremely common both in the software industry and in general to use a dedicated email or hide one's name when accessing those materials in order to avoid sales calls or spam.

3. Remedial Efforts Undertaken by the Company to Date

The DRC identified four primary efforts undertaken by Pegasystems in recent years to support better monitoring and oversight of the Company's competitive intelligence activities.

First, Pegasystems' legal team, together with Mr. Trefler and the Independent Directors, considered whether the Free Trial Users should be reprimanded for violating Pegasystems' Code of Conduct, which requires an employee of the Company "[t]o never use illegal or questionable means to acquire a competitor's trade secrets or other confidential information, such as trespassing, burglary, wiretapping, bribery, stealing, seeking confidential information from a new employee

[18] During the Appian Litigation, Appian did not claim its marketing materials contained confidential information or trade secrets, and alleged no cause of action in connection with Mr. Trefler accessing such materials.

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who recently worked for a competitor, or misrepresenting [their] identity in hopes of obtaining confidential information." Consistent with Pegasystems' legal position in the Appian Litigation (and later the Appian Appeal), the Management Witnesses' view, with which the Independent Directors concurred, was that employees that accessed Appian's platform did not access Appian trade secrets or otherwise confidential information, since the information at issue was broadly accessible to millions of members of the public eligible to access Appian's free trial environment. As such, the Company determined that such conduct did not technically violate its Code of Conduct. However, in an effort to reinforce that Pegasystems' employees should always use best practices when researching competitors, the Free Trial Users that still worked for the Company were issued formal reprimand letters in March 2022, which went in the employees' files for a sunset period.[19] These letters stated, in part, that:

> As discussed, it is our understanding that you accessed a free trial of Appian software without identifying yourself as a Pega employee…This should not have happened and must not occur again. If one of our competitors states that Pega employees should not access its free trials or certain of its information, we should honor that competitor's position regardless of whether Pega is willing to make similar information or free trials available to the competitor's employees.

In addition to sending these letters, Pegasystems' Human Resources team spoke with these individuals regarding proper forms of competitive intelligence.

Second, the Company developed a supplemental and extensive training for Pegasystems employees on competitive intelligence and appropriate techniques. In his interview with the DRC, Mr. Trefler stated that he had personally taken this training and that he had found it effective.

Third, the Company instituted quarterly meetings between Pegasystems' legal team and employees conducting competitive intelligence. Witnesses relayed to the DRC that this provides

[19] One of the Free Trial Users stopped working for Pegasystems in 2015, for unrelated reasons.

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a forum for open discussion about the Company's competitive intelligence efforts and for these employees to ask questions about best practices, and is reflective of the Company's efforts to shift employees' focus away from what competitors are doing and toward what makes Pegasystems products valuable.

Finally, the Company implemented a hard-technical website block to preclude anyone on Pegasystems' premises or using a Pegasystems laptop from being able to access Appian's login page. If someone at the Company tries to access certain pages within Appian's website, including but not limited to Appian's free trial login page, an alert pops up notifying the individual that such webpage has been blocked by Pegasystems because third parties may claim its contents to be confidential or protected information, and instead the information should be viewed using publicly available resources.

D. Chronology of Events Concerning the Appian Litigation and Related Public Disclosures

1. History of Litigation Between Appian and Pegasystems Prior to the Appian Litigation

The contentious history between Appian and Pegasystems predates the Appian Litigation. Witnesses reported to the DRC that, since at least 2008, Appian often hired ex-Pegasystems employees, including high-level executives, in what Pegasystems believed to be an effort to access the Company's proprietary information. In response, in 2011 and 2015, Pegasystems brought two lawsuits against Appian, challenging Appian's hiring of certain former Pegasystems employees, alleging that such hiring violated non-competition provisions in these employees' separation agreements with Pegasystems, Appian engaged in tortious interference, and/or false and deceptive practices to obtain Pegasystems' trade secrets and other confidential information. *See Pegasystems Inc. v. Appian Corp. & Bruce Maxwell*, No. SUCV2015-01229 (Mass. Super. Apr. 27, 2015);

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Pegasystems Inc. v. Appian Corp., Jamie Friedman, & *Robert Loren*, No. SUCV2011-04196 (Mass. Super. Nov. 17, 2011). Neither case was ultimately litigated to resolution.

Later, on July 3, 2019, Pegasystems filed a lawsuit in Massachusetts federal court (the "Massachusetts Litigation") against Appian and Business Process Management, Inc. ("BPM Inc.") relating to a BPM Inc. report titled "Market Report: Analysis of Process Automation Investments and Total Cost of Ownership" that Appian was using to promote itself against Pegasystems (the "BPM Report"). *See Pegasystems Inc. v. Appian Corp. & BPM Inc.*, 19-cv-11461 (D. Mass. 2019). The complaint alleged that the BPM Report, and Appian's marketing of it, included false and misleading statements about Pegasystems, and the Company sought damages for false advertising, deceptive business practices, and commercial disparagement, as well as judicial action to stop Appian and BPM Inc. from using the document and compel them to take corrective steps. The complaint alleged in particular that while the BPM Report represented that its analysis was based on market research that BPM Inc. conducted through the use of customer surveys, BPM Inc. in fact manipulated its selection of responses to those surveys in order to create a sample favorable to Appian and detrimental to Pegasystems. Once BPM Inc. published the BPM Report, Appian allegedly publicly distributed it as part of its marketing and advertising materials, despite being aware that its findings were inaccurate. Appian subsequently agreed to stop using the BPM Report.[20]

As the Massachusetts Litigation progressed, on December 17, 2019, Appian asserted counterclaims against the Company seeking unspecified monetary damages and alleging certain of the Company's past marketing materials included false and misleading statements, one of the

[20] In December 2019, Appian removed and modified certain language on its website about the BPM Report. Subsequently, according to the Company, Appian agreed to stop using the BPM Report, although no court order required it, and Appian reneged on its promise.

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marketing reports failed to disclose that the report's author was paid by the Company, and that the Company defamed Appian in a LinkedIn post.

On May 22, 2020—*just a week before Appian filed its complaint in the Appian Litigation*—the court granted Pegasystems' motion to dismiss Appian's counterclaim with respect to certain of the Company's past marketing materials Appian alleged to be false and misleading.[21]

2. Appian Litigation is Filed

On May 29, 2020, Appian initiated the Appian Litigation by filing an original complaint that named both Pegasystems and Mr. Zou as defendants and asserted the following six causes of action (the "Complaint"). Ex. 9 (the Complaint).

- **Count 1**: Misappropriation of Trade Secrets in Violation of Virginia's Uniform Trade Secrets Act (Against Pegasystems and Mr. Zou)
- **Count 2**: Computer Fraud in Violation of the Virginia Computer Crimes Act (Against Pegasystems and Mr. Zou)
- **Count 3**: Tortious Interference with Appian's Serco Contract (Against Pegasystems)
- **Count 4**: Tortious Interference with Appian's Business Expectancy (Against Pegasystems)
- **Count 5**: Statutory Business Conspiracy (Against Pegasystems and Mr. Zou)
- **Count 6**: Common Law Conspiracy (Against Pegasystems and Mr. Zou)

As described above, the Complaint was primarily premised on allegations that Pegasystems "engaged in an unlawful campaign of corporate espionage against Appian" and is principally focused on Pegasystems' engagement of Mr. Zou. *Id.* at ¶¶ 1, 3. The Complaint alleged that "[Mr.] Zou…illegally provided copies of Appian's software and documents," which the Company then used "to conduct detailed technical analyses of Appian's product to determine precisely how

[21] On June 17, 2021, Appian asserted additional counterclaims against the Company seeking unspecified monetary damages and alleging that certain additional marketing materials used by the Company contained false or misleading statements. After proceeding through discovery, Pegasystems and Appian entered into a confidential settlement agreement in November 2022, and the court entered into a stipulation of dismissal with prejudice as to the Massachusetts Litigation.

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it was constructed and how it worked so that they could compare it to Pegasystems' product at a level not possible without the benefit of Appian's stolen trade secrets." *Id*. at ¶ 2. As a result of this alleged misconduct, Appian purportedly suffered "substantial monetary damages" and included an *ad damnum* clause for $90 million in damages.[22] *Id*. at ¶ 94. The Complaint also requested injunctive relief, including, among other things, that Pegasystems be enjoined from "developing, marketing, selling, licensing, or using any product that, in any respect or to any degree, is based on, derived from, modified in response to, or incorporates any of Appian's confidential information or trade secrets." *Id*. at ¶¶ 101-103.

Management Witnesses consistently testified that, upon an initial reading of the Complaint, they believed that Appian filed the lawsuit as retaliation for Pegasystems having filed the Massachusetts Litigation, and that the Complaint reflected posturing from Appian.

Within a few days of receiving the Complaint, Pegasystems retained Mr. Frank of Choate to defend the Company in the Appian Litigation. Management Witnesses reported that the Company retained Mr. Frank because he was known as one of the country's premiere intellectual property lawyers and Pegasystems has had a relationship with Choate for over 20 years, with Choate primarily serving as the Company's corporate governance counsel and legal advisor on SEC filings.

The Appian Litigation was not on an expedited schedule, and it did not occupy a significant amount of near-term bandwidth for Pegasystems or the Choate team.

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[22] The $90 million damages claim represented the maximum amount of damages Appian could recover under Virginia law under the initial version of the complaint. *See Powell v. Sears, Roebuck & Co*., 231 Va. 464, 470 (1986) (In Virginia, "a plaintiff cannot recover more damages than he demands, although he [can recover] less."); *Solentus, Inc. v. Lam*, 2017 WL 9833483, at *4 (Va. Cir. Ct. May 4, 2017) ("[Th]e *ad damnum* sets a cap on the amount recoverable by the plaintiff.") (quoting *EER Sys. Corp. v. Armfield*, 51 Va. Cir. 84 (1999)); *see generally* Va. R. Sup. Ct. 3:2(c)(ii).

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On July 8, 2020, the Board held its first meeting following the filing of the Appian Litigation and, as part of Mr. Cushing's regular Board litigation update, was informed of the Appian Litigation and the Company's intent to defend the matter. In the normal course, the Board received a written litigation update in advance of Board meetings and, at meetings, Mr. Cushing delivered a verbal update. The Board received written and verbal litigation updates, which included an Appian Litigation update, during at least 10 Board meetings between July 2020 and May 2022.

On July 13, 2020, the Company's independent outside auditor Deloitte & Touche LLP ("Deloitte") was provided with a similar update in an audit response letter from Mr. Cushing. Mr. Cushing included updates and representations concerning the Appian Litigation to Deloitte in audit letters for each quarter during the period July 2020 through July 2022. Pegasystems' openness and transparency with Deloitte belies any suggestion that its management team sought to conceal a material litigation.

During this same time period, senior Pegasystems executives in legal, finance, and accounting began to consider the Appian Litigation's impact on the Company's public disclosures and financial statements. Mr. Stillwell, Mr. Cushing, and Mr. Kouninis reported that, when the Appian Litigation was filed, they had no prior familiarity with factual allegations contained in the Complaint. Management Witnesses consistently reported substantially similar initial reactions, including that: (i) Appian had likely filed the Complaint in retaliation for the Massachusetts Litigation, which several Management Witnesses noted would not be unusual in the context of Appian and Pegasystems' historically contentious relationship; and (ii) Appian's claims for damages lacked supporting evidence and could not plausibly allege material harms.

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Following consultation with in-house and outside counsel, including Mr. Pitfield and Michael Gass (Chair of Choate's Complex Trial and Appellate Group), the Company determined that the Appian Litigation (which, at the time, sought a maximum of $90 million in damages) did not qualify as a material legal proceeding triggering a required disclosure under Item 103 of Regulation S-K ("Item 103").[23] Mr. Stillwell and Mr. Kouninis reported that, pursuant to similar reasoning, finance and accounting personnel, in consultation with Pegasystems' in-house attorneys, determined that the Appian Litigation did not pose probable or estimable damages within the meaning of Financial Accounting Standards Board Accounting Standards Codification 450 ("ASC 450") and thus, the Company was not required to accrue a litigation contingency for the Appian Litigation.[24] Management reviewed this decision with Deloitte. On July 28, 2020, the Company filed its Form 10-Q for the quarterly period ending June 30, 2020 (the "2Q20 10-Q"), which did not contain express references to or a litigation contingency accrued in connection with the Appian Litigation.[25] The 2Q20 10-Q was reviewed and approved by the Board and Audit Committee prior to filing.

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[23] Item 103 requires a registrant to briefly describe any "material pending legal proceedings," other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is subject. 17 C.F.R. § 229.103(a). A disclosure is not required under Item 103, however, if the claim of damages does not exceed 10% of the Company's and its subsidiaries' current assets on a consolidated basis. *Id.* at § 229.103(b)(2).

[24] For each quarterly period from 2Q20 to 2Q22, accounting personnel, in consultation with finance and legal, considered whether the claims asserted by Appian presented damages that were either probable or estimable and documented their decision not to accrue and the related reasoning. These memoranda were provided to Deloitte and reviewed by the DRC as part of its investigation.

[25] Similarly, for quarterly and annual filings by Pegasystems during the period 2Q20 to 3Q21, the Company did not include express references to the Appian Litigation. However, the Company included disclosures concerning litigation-related risks and uncertainties, such as that the Company "may be subject to intellectual property rights claims," which may be "extremely costly to defend, could require [the Company] to pay significant damages, and could limit [the Company's] ability to use certain technologies" and that [the Company has] received, and may in the future receive, notices that claim [Pegasystems has] misappropriated, misused, or infringed other parties' intellectual property rights." *See, e.g.*, Pegasystems Form 10-K for Fiscal Year 2020 (filed Feb. 17, 2021), at 19. The Company also warned investors that "litigation can have a material adverse effect on [the Company] because of defense and settlement costs, diversion of management resources, and other factors." *Id.* at 22.

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3. Mediation of Pending Litigations Between Appian and Pegasystems

On March 4, 2021, Pegasystems and Appian engaged in a joint mediation in connection with the Appian Litigation and the separately pending Massachusetts Litigation. As witnesses recounted and the documentary record reflects, at the time, Pegasystems anticipated that *Pegasystems* (and *not* Appian) would receive net consideration for the settlement of both matters. Witnesses who did not directly participate in the mediation also relayed their expectation that Appian would take a similar position, *i.e.* that it should receive a net financial benefit from the litigations' resolution. The record reflects that ultimately, neither the Appian Litigation nor the Massachusetts Litigation was resolved during the mediation. Witnesses reported that, despite the lack of resolution, Pegasystems continued to believe that both matters could be resolved for no consideration or a payment from Pegasystems to Appian in an amount well below the Appian Litigation's $90 million damages claim.

Pegasystems filed its answer to the Complaint in February 2021, and the Appian Litigation continued to proceed through fact and expert discovery. Choate provided routine updates on the litigation to Mr. Cushing and Chris Roche (Deputy General Counsel, Pegasystems) in the ordinary course. Outside counsel also shared documents and information, throughout the discovery process, with Mr. Trefler, Mr. Cushing, and Mr. Stillwell to help them assess the strengths and weaknesses of Appian's claims and Pegasystems' defenses. Management Witnesses consistently reported that, during this time, and based on consultation with the Choate trial team and Appian's claimed damages being limited to $90 million, they continued to believe that the Appian Litigation was not material and remained ordinary course litigation, which the Company was defending on a good faith basis and on which they expected to prevail.

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4. Appian's First Amended Complaint and Expert Reports Exchanged

On October 21, 2021, 17 months after initiating the Appian Litigation, Appian filed a motion for leave to amend its complaint to include additional allegations, while retaining its *ad damnum* clause of $90 million in damages (the "First Amended Complaint"). While the Complaint had focused on the 2012 to 2014 time period, the First Amended Complaint now alleged that Pegasystems' unlawful use of Appian's trade secrets continued for years after 2014, including through at least 2018. Ex. 10 (the First Amended Complaint), at ¶ 40. The First Amended Complaint also added new allegations including that (i) in 2019, Pegasystems employees accessed free Appian product trials under false pretenses and (ii) Pegasystems used Appian's trade secrets to determine how its platform could be "improved" relative to Appian's platform. On November 3, 2021, the court granted Appian's motion for leave to file the First Amended Complaint.

On November 24, 2021, Appian served the report of its damages expert, James E. Malackowski (the "Malackowski Report"), who was retained to determine the measures and amounts of monetary recovery due to Appian in the event the alleged trade secrets were found to have been misappropriated by Pegasystems and Mr. Zou. The Malackowski Report concluded that Pegasystems realized gross profits totaling more than $5.6 billion between 2013 and 3Q21 in connection with the alleged trade secret misappropriation based on the purported fact that (i) Pegasystems made more than $1 billion in gross profit from 1Q13 to 3Q21 from sales made to customers for whom Appian and Pegasystems had competed against for a sales opportunity at least once, regardless of whether the revenues were attained through the actual use of Appian's alleged trade secrets, and (ii) Pegasystems made more than $4.6 billion in gross profit for 4Q13 through 3Q21 derived from the sale of all Pegasystems products to all customers on the theory that

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Pegasystems' products incorporated the purported trade secrets regardless of whether the alleged trade secret had any causal relationship to those sales.[26]

On November 29, 2021, Pegasystems filed an answer to the First Amended Complaint, asserting various affirmative defenses, including laches, failure to mitigate damages, unclean hands, and *in pari delicto*. That same day, Pegasystems also filed demurrer, plea in bar, and various motions, collectively seeking to (i) dismiss Counts 2 through 5 for failure to state a claim, (ii) dismiss Counts 1 through 5, in full or part, as time barred under applicable statutes of limitations, and (iii) compel Appian to file a bill of particulars specifying any non-Pegasystems parties that Pegasystems and Mr. Zou allegedly conspired with and any specific customers in relation to which Pegasystems allegedly interfered with Appian's business expectancies.

On December 13, 2021, the Board received an update from Mr. Cushing on the status of the Appian Litigation, including, among other things, the First Amended Complaint, the Malackowski Report, recent court hearings, the plea in bar hearing, facts identified through discovery, and anticipated defense themes at trial. Mr. Trefler participated in the update and provided his views.[27]

On January 13, 2022, the court granted in part Pegasystems' demurrer and motion for bill of particulars, denying Pegasystems' demurrer as to Counts 2 (violation of the Virginia Computer Crimes Act) and 3 (tortious interference with Appian's business expectancy), ordered Appian to file a bill of particulars as to Count 3 regarding the specific customers with which Pegasystems

[26] On December 24, 2021, Pegasystems served the report of its damages expert, D.J. Platt, who opined that, assuming liability, Pegasystems was unjustly enriched by approximately $31.4 million.

[27] Witnesses uniformly reported that Mr. Trelfer becomes highly engaged in matters which he believes are important to Pegasystems and/or its business. Witnesses reported that Mr. Trefler's description of relevant facts reflected his own sense that the Appian Litigation was meritless. They also consistently noted that, from their perspective, Mr. Trefler never concealed information of which he was aware or sought to override the judgment of Pegasystems' outside counsel defending the Appian Litigation.

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allegedly interfered, and granted Pegasystems' demurrer as to Counts 4 (statutory business conspiracy) and 5 (common law conspiracy), dismissing those counts with prejudice.

5. Second Amended Complaint Filed

On January 28, 2022, nearly 20 months after commencing the Appian Litigation, Appian filed a motion for leave to amend the *ad damnum* clause in the First Amended Complaint to increase its damages claim from $90 million to $3 billion, seeking revenues from all of Pegasystems' products and services in the period from 4Q13 through 3Q21 (the "Second Amended Complaint"). On January 31, 2022, the plea in bar hearing commenced, and on February 10, 2022, the court granted in part Pegasystems' requested relief, thereby dismissing Count 2 (violation of the Virginia Computer Crimes Act) with prejudice as to acts occurring before May 29, 2015. The court declined to dismiss Count 1 (trade secrets misappropriation). On February 11, 2022, the court granted Appian's motion for leave to file the Second Amended Complaint and thereby increase Appian's damages claim from $90 million to $3 billion.

Mr. Trefler, Mr. Stillwell, and Mr. Cushing, among others, reported that, as a result of Appian increasing its damages by thirty-fold to $3 billion, in combination with the previously described, failed settlement attempts,[28] and a looming trial, the Appian Litigation became a more prominent focus among Pegasystems senior leadership and in-house legal counsel. Mr. Trefler reported, and other witness accounts corroborated, that he became more heavily involved in the Company's defense by meeting more frequently with trial counsel, more regularly receiving priority interest documents identified in discovery, participating in strategy discussions, and otherwise contributing to trial preparation. In addition, Mr. Trefler and Mr. Stillwell both signed

[28] In December 2021, Mr. Cushing reported that he initiated discussions with Appian's General Counsel, Christopher Winters, to explore potential settlement. As the record reflects, Mr. Winters ultimately informed Mr. Cushing that Appian wanted to have their "case heard" and rejected a request from Mr. Trefler for a teleconference with Appian's Chief Executive Officer, Matt Calkins, to try and resolve the Appian Litigation.

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the protective order filed in the Appian Litigation, which allowed them to review confidential filings, including the expert reports.

6. Appian Litigation Expressly Disclosed in 2021 10-K

During that same period (throughout January and the first half of February 2022), the Company was preparing to file its 10-K Annual Report for 2021. In the weeks leading up to the filing, at least five formal meetings were held with key Company stakeholders from legal, finance, and accounting, as well as Mr. Pitfield. As reported by witnesses who participated in those meetings and reflected in contemporaneous email correspondence, these stakeholders determined that, in light of Appian's increased damages claim, the court denying portions of Pegasystems' requested relief at the plea in bar hearing, and the case likely proceeding to trial, the Company should now disclose the Appian Litigation as a material pending legal proceeding pursuant to Item 103. Following that determination, in-house and outside counsel evaluated precedent disclosures and worked to draft, review, and revise an Appian Litigation disclosure. The Audit Committee likewise discussed and approved the proposed disclosure.

In addition, Mr. Stillwell and Mr. Kouninis reported that, consistent with the Company's practice in every quarter since May 2020, they also reevaluated whether the Company should accrue a litigation contingency for the Appian Litigation. Mr. Kouninis recounted several discussions with in-house and outside counsel, as well as Deloitte, in which they reflected on the developments in the Appian Litigation. These conversations included repeated consideration of authorities and interpretative accounting guidance (including Deloitte's Roadmap: Contingencies, Loss Recoveries, and Guarantees (the "Deloitte Roadmap")), as well as precedent disclosures from other public companies. Mr. Kouninis recalled Deloitte being actively involved, pressure testing the variables, and consulting with experts on loss contingencies at Deloitte's national office. Mr. Stillwell and Mr. Kouninis reported that, having undertaken an extensive analysis with the

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appropriate stakeholders, the Company concluded that a loss in connection with the Appian Litigation was only "reasonably possible," as opposed to "probable," and not "reasonably estimable" under applicable accounting rules (as discussed further *infra*). Pegasystems reasoned in particular that: (i) the likelihood of an adverse verdict in the Appian Litigation was not probable, (ii) the Company continued to believe that Appian's claims were without merit, and (iii) even if Pegasystems were to be held liable at trial, the Company believed that the alleged damages were not supported by the necessary legal standard of proximate cause.[29] As such, the Company determined that it did not have an obligation to accrue a contingency in connection with the Appian Litigation. The Audit Committee and Deloitte, both of which engaged with management on their accrual assessment and reviewed drafts of the 2021 10-K filing, viewed management's decision as reasonable.

On February 16, 2022, the Company's 2021 10-K was filed and included an Appian Litigation disclosure, which provided a factual overview, the alleged violations of law, the procedural history, and the Company's position on the merits of Appian's claims and Pegasystems' defenses, among other things. It reads, in part,

> On May 29, 2020, Appian sued the Company and an individual, Youyong Zou, in the Circuit Court of Fairfax County, Virginia in a matter titled Appian Corp. v. Pegasystems Inc. & Youyong Zou, No. 2020-07216 (Fairfax Cty. Ct.). The complaint filed by Appian on May 29, 2020 (the "2020 Complaint") alleges that Mr. Zou was an employee of an Appian business partner, Serco Inc. ("Serco"); that, as a result, Mr. Zou had access to Appian trade secrets which Mr. Zou was required to keep confidential; and that in approximately 2013, while Mr. Zou was employed by Serco, the Company engaged Mr. Zou through an intermediary to provide the Company with Appian trade secrets and confidential information, which the Company is then claimed to have used to compete against Appian.

[29] As the Virginia Court of Appeals re-affirmed when vacating the jury's verdict against the Company, Virginia law requires that the plaintiff establish that any alleged use of purported trade secrets proximately caused their damages. *See* Virginia Appellate Decision at 479-83; *see also* Va. Code. § 59.1-338(A); *Saks Fifth Ave., Inc. v. James, Ltd.*, 272 Va. 177, 190 (2006).

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The 2020 Complaint sets forth claims for misappropriation of trade secrets under the Virginia Uniform Trade Secrets Act, violation of the Virginia Computer Crimes Act, tortious interference with contract and business expectancy, and statutory and common law conspiracy. On July 24, 2020, the Company filed a plea in bar, seeking to have the claims asserted against the Company in the 2020 Complaint barred, in whole or in part, by the applicable statutes of limitations. Before the original plea in bar could be heard, Appian filed an amended complaint which the court allowed on November 4, 2021 (the "2021 Amended Complaint"), alleging that, in the 2019 time frame, employees of the Company accessed free Appian product trials under false pretenses. The 2021 Amended Complaint withdrew the claim for tortious interference with contract. After Appian filed the 2021 Amended Complaint, the Company successfully moved to dismiss Appian's conspiracy claims, which are no longer a part of the case. The Company also re-filed a plea in bar on November 29, 2021 seeking to have the claims asserted against the Company in the 2021 Amended Complaint barred, in whole or in part, by the applicable statutes of limitations. A jury hearing on the plea in bar commenced on January 31, 2022. On February 9, 2022, the judge determined that he could decide the plea in bar without the jury and, on February 10, 2022, the judge entered a verdict granting the relief sought by the Company's plea in bar motion with respect to the Virginia Computer Crimes Act, meaning the allegations asserted against the Company in the 2021 Amended Complaint with respect to the Virginia Computer Crimes Act are barred by the applicable statutes of limitations for conduct on or prior to May 29, 2015, while the claims made with respect to misappropriation of trade secrets under the Virginia Uniform Trade Secrets Act are not similarly barred. Appian's claim for tortious interference with business expectancy was not a subject of the plea in bar. On February 11, 2022, the court allowed Appian's motion to further amend the 2021 Amended Complaint to assert a damages claim of approximately $3 billion, seeking all of the Company's revenues less estimated direct costs from the sale of all of the Company's products and services in the period from the fourth quarter of 2013 through the third quarter of 2021. Virginia law requires that the plaintiff establish proximate cause between any alleged use of the alleged trade secrets and damages incurred by the plaintiff, and also requires plaintiffs seeking damages to allege a specific damages amount, prohibiting recovery beyond that amount. In addition to disputing the validity of Appian's claims against the Company, the Company believes that any alleged damages claimed by Appian are not supported by the necessary legal standard of proximate cause.

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> In addition, following the February 10, 2022 ruling on the Company's plea in bar, the ongoing claim under the Virginia Computer Crimes Act is time limited to acts occurring after May 29, 2015. A jury trial with respect to the merits of the dispute is scheduled to begin on March 21, 2022. The Company believes the claims brought by Appian against the Company are without merit, that the Company has strong defenses to these claims and that, among other things, even were the jury to find that the Company misappropriated Appian's alleged trade secrets, any alleged damages claimed by Appian are not supported by the necessary legal standard of proximate cause. The Company is unable to reasonably estimate possible damages or a range of possible damages given the Company's belief that the damages claimed by Appian fail to satisfy the required legal standard and due to the uncertainty as to how a jury may rule.

2021 10-K, at 23. It also stated that "[a]s of December 31, 2021, the Company has not accrued a loss with respect to any litigation matter." *Id.* at 63.

7. Further Settlement Exploration and Trial

In late February 2022, lead trial counsel for both Pegasystems and Appian, Mr. Frank and Adeel Mangi of Patterson Belknap Webb & Tyler LLP, preliminarily explored potential settlement of the Appian Litigation. Mr. Frank reported to the DRC that while Mr. Mangi entertained the concept of potential settlement, his perception was that Appian was not receptive to engaging in serious settlement discussions. After consultation with Mr. Trefler and others, but without Board authorization to settle, Mr. Frank floated the possibility of a modest settlement amount in an effort to test Appian's appetite for pre-trial resolution. Mr. Frank did not expect Appian would agree to such a modest settlement amount, and Mr. Mangi subsequently rejected the proposal and declined to make a counterproposal. On or around March 10, 2022, after consulting with Mr. Trefler, Mr. Frank reported that he approached Mr. Mangi with an exploratory proposal, again without either Board authorization or any expectation it would be accepted but rather in an effort to elicit a counterproposal that might advance settlement conversations. However, Appian terminated

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settlement discussions without the conversation having progressed beyond Mr. Frank's exploratory effort.

On March 21, 2022, the Appian Litigation trial began. Mr. Trefler was present as the corporate representative for the duration of the trial. On the first day, the court ruled that evidence concerning the number of users with access to Appian's platform was not relevant to any issue in the case and could not be presented to the jury, thereby severely undercutting Pegasystems' ability to challenge Appian's characterization of its purported trade secrets and mitigate damages.[30]

During these initial days of the trial, Mr. Frank and Mr. Mangi briefly resumed the exploration of a potential settlement, though the parties remained far apart and the discussions never meaningfully progressed. On March 27, 2022, the Board received an update regarding, among other things, the status of the Appian Litigation, including then-recent exploratory discussions about the prospect of settlement and potential outcomes. The Board witnesses unanimously recounted that no settlement amount was approved by the Board. As reflected in contemporaneous email traffic, the exploratory settlement-related discussions with Appian ended later that day.[31] As documented in a March 31, 2022 memorandum prepared by Pegasystems accounting personnel, no accrual was taken in connection with settlement-related talks because the discussions held between counsel for the Company and Appian were not undertaken by the

[30] As discussed below, that ruling was one of multiple key trial court decisions that the Virginia Court of Appeals has since deemed erroneous. *See* Virginia Appellate Decision at 507; *see also id*. at 508 ("[T]he trial court also abused its discretion by refusing to permit Pega to attempt to authenticate its software evidence and, as a consequence, by excluding Pega's software—a principal means of demonstrating it did not steal secrets through Zou—on the basis that it was on a different laptop than provided in discovery.").

[31] In April 2022, Mr. Trefler, Mr. Stillwell, and Mr. Kouninis, in their management representation to Deloitte in connection with its review of certain financial statements for the period ending March 31, 2022, informed Deloitte that (i) discussions between counsel for Pegasystems and Appian regarding settlement exploration were not undertaken by the Company with a reasonable belief that it would lead to a settlement of the Appian Litigation and (ii) any potential settlement would need to be approved by the Board, and no such approval had been given. This management representation letter was reviewed by the Audit Committee. Subsequently, Mr. Kouninis reported that discussion ensued with Deloitte on what constitutes a "settlement offer" for purposes of a required accounting accrual. Deloitte viewed management's decision not to accrue under these circumstances as reasonable.

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Company with a reasonable belief that they would lead to a settlement of the matters, any monetary amounts exchanged were not substantive offers but a conduit to explore Appian's legal strategy, and the Board never approved a settlement amount. In reaching this conclusion, management consulted the Deloitte Roadmap, among other accounting guidance, and discussed the analysis with Deloitte, who viewed management's decision as reasonable.

On April 13, 2022, the court ruled that if the jury were to find that Pegasystems misappropriated Appian information that constituted trade secrets and that Pegasystems incorporated those trade secrets into the Company's products or marketing materials, the burden then would shift to Pegasystems to prove that the sales Appian was seeking as damages were not the result of the alleged misappropriation and use of the alleged trade secrets. Pegasystems believed that this ruling was a significant error of law, as the standard articulated by the trial court was contrary to the plain language of the Virginia Uniform Trade Secrets Act and was unprecedented in Virginia law. The Board met again on April 21 and April 26, 2022 to discuss certain of the court's rulings and potential outcomes of the case, including the strength of Pegasystems' defense.

On May 5, 2022, the court charged the jury. The court's instructions included the following: (1) "The number of users of the Appian Platform and Appian Forum licensees are not relevant to any issue in this case, and any evidence as to those numbers should be disregarded," and (2) "[f]or unjust enrichment, Appian is entitled to recover Pegasystems' net profits[;] Appian has the burden of establishing by the greater weight of the evidence Pegasystems' sales[; and] Pegasystems has the burden of establishing by the greater weight of the evidence any portion of

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the sales not attributable to the trade secret or trade secrets and any expenses to be deducted in determining net profits."[32] Tr. at 8014-15, Appian Litigation.

The jury reached its verdict on May 9, 2022. With respect to Count 1 (misappropriation of trade secrets), the jury found in favor of Appian against both Pegasystems and Mr. Zou, including that there was willful and malicious misappropriation by Pegasystems, and awarded damages against Pegasystems in the amount of $2,036,860,045. In regards to Count 2 (computer fraud in violation of the Virginia Computer Crimes Act), the jury found in favor of Appian against Pegasystems and awarded Appian damages in the amount of $1.

On the day of the verdict, the Board held a meeting during which Mr. Frank, along with Mr. Trefler, provided an update on the trial outcome and next steps. Management Witnesses and the Independent Directors uniformly reported genuine shock and surprise at both the verdict and the damages amount. Although certain Independent Directors reported that they learned some particulars of the trial evidence after the verdict and in hindsight would have preferred more contemporaneous information throughout the Appian Litigation, no witness reported feeling that Choate, Mr. Trefler, or anyone else had ever concealed material information about the Appian Litigation from the Board. The Independent Directors were uniformly of the view that management exercised reasonable and appropriate judgment when determining information that needed to be shared with the Board.

Later that day, the Company filed a Form 8-K disclosing the verdict and the Company's anticipated next steps. As reported by all witnesses interviewed, and consistent with the

[32] As discussed *infra* at 66-67, the Virginia Appellate Court has since cited these erroneous instructions among the errors necessitating retrial. *See* Virginia Appellate Decision at 487-88, 507 (holding that, by instructing the jury that the number of Appian product users is not relevant, "the trial court improperly removed a relevant factor from the jury's consideration" and that the trial court's burden-shifting instruction "contravenes Virginia case law, [the Virginia Uniform Trade Secrets Act's] express language, and the Restatement's own burden-shifting framework").

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Company's subsequent public disclosures and briefing in the Appian Appeal, the Company believed that the trial court, among other erroneous rulings, incorrectly (i) permitted the jury to base its misappropriation verdict on features of Appian's product that were not trade secrets, (ii) construed the legal standard for establishing causation and requiring Pegasystems to prove damages, and (iii) excluded highly relevant evidence (including evidence that would show thousands of people had access to Appian's purported trade secrets and that the Company had many of the alleged stolen features embedded in its product prior to Mr. Zou's engagement). Consistent with this view, the Company disclosed, "We strongly disagree with the claims and the verdict, and believe the verdict is not supported by the facts of the case or the law, and is the result of significant error. The Company plans to pursue its post-trial remedies to have the verdict set aside[,]…believes it has meritorious defenses[,] and will vigorously pursue appeal of the trial court's findings…." Pegasystems Form 8-K (filed May 9, 2022), at 2.

In light of the verdict, the Company also again revisited its determination whether to accrue a litigation contingency in its upcoming quarterly filing. Ms. Monday provided a written, privileged and confidential analysis on the strength of Pegasystems' appeal to the Company's accounting team. Mr. Kouninis also worked with the Company's audit partner at Deloitte to review applicable accounting guidelines, including the Deloitte Roadmap, which states, "The rendering of an adverse legal judgment against an entity does not automatically trigger recognition of a liability for a loss contingency since the entity may be successful in overturning all or part of the original judgment on appeal." Internal accounting memoranda reflect that based on accounting precedent and the strength of its appeal, management assessed that it was not probable that a contingent loss had been incurred and was unable to reasonably estimate possible damages. As such, in the Company's Form 10-Q filed on July 27, 2022 (the "2Q22 10-Q"), the Company stated

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that it was "unable to reasonably estimate possible damages" because of, among other things, "uncertainty as to the outcome of post-trial motions, any appellate proceedings, and/or any potential new trial resulting from the post-trial motions or the appellate proceedings."[33] 2Q22 10-Q, at 18. As with prior quarterly filings, the Board and Audit Committee reviewed and approved the 2Q22 10-Q (and the Audit Committee additionally reviewed accounting's written analysis on why an accrual was not required). Deloitte viewed management's determination as reasonable.

8. Post-Trial Events

On September 16, 2022, the Company filed a Form 8-K announcing that, on September 15, 2022, the "court took its final step in the trial portion of the case with formal entry of judgment in the amount of $2,060,479,287 [consisting of the $2,036,860,045 in damages previously determined by the jury] plus attorney's fees and costs, and which the court held is subject to post-judgment interest at a rate of 6.0% per annum." Pegasystems Form 8-K (filed Sept. 16, 2022), at 2. The 8-K further noted that the Company filed the Appian Appeal on September 15, 2022 and reiterated that it "strongly disagree[d]" with the claims and trial outcome, and that it continued to believe it has "strong grounds to overturn [the] results." *Id.*

On April 26, 2023, the Company disclosed that in March 2023, the SEC requested "certain information relating to, among other things, the accounting treatment of the [Appian Litigation]" and noted that the Company was "fully cooperating" with these requests. Pegasystems Form 10-Q (filed April 26, 2023), at 19. On September 9, 2024, the SEC staff formally notified the

[33] The 2Q22 10-Q also included disclosures concerning the Appian Litigation similar to those in the May 9, 2022 Form 8-K. In advance of this filing, the Company again assessed the disclosure of the Appian Litigation and what information to include. In the course of this, in-house counsel, Choate, and Ms. Monday, along with Mr. Stillwell, evaluated disclosures of public companies in similar litigation postures, including disclosures made by Oracle in connection with the litigation captioned *Oracle America, Inc. v. Hewlett Packard Enterprise Co.*, 16-cv-01393 (N.D. Cal.).

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Company that they had concluded their investigation and did *not* intend to recommend an enforcement action against Pegasystems. Pegasystems Form 8-K (filed Sept. 10, 2024).

9. Securities Class Action

On May 19, 2022, a shareholder filed the Securities Class Action, on behalf of all persons and entities that purchased Pegasystems stock between May 29, 2020 and May 9, 2022, against the Company, Mr. Trefler, and Mr. Stillwell alleging unspecified damages for violations of Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder, and Section 20(a) of the Exchange Act. The complaint alleged that the defendants made materially false and/or misleading statements and failed to disclose material adverse facts about the Company's competition and intellectual property by not disclosing the underlying conduct in the Appian Litigation and, with respect to the Appian Litigation, failing to disclose the lawsuit prior to February 2022, falsely reassuring investors that the claims were without merit once the lawsuit was disclosed, and failing to accrue a litigation loss contingency. On October 18, 2022, a consolidated amended complaint was filed that revised the class period to June 16, 2020 through May 9, 2022.

The Company moved to dismiss the consolidated amended complaint on December 19, 2022. On May 17, 2023, following a hearing on the Company's motion to dismiss, the district court denied the motion from the bench. On July 24, 2023, the Court issued its written opinion denying the motion to dismiss as to the Company and Mr. Trefler but granting the motion without prejudice as to Mr. Stillwell. *See City of Fort Lauderdale Police & Firefighters' Ret. Sys. v. Pegasystems Inc.*, 683 F.Supp.3d 120, 128-29, 137 (D. Mass. 2023); *see also id.* at 129 (noting that when evaluating a motion to dismiss, the applicable pleading standard requires that "[c]ourts draw every reasonable inference in favor of the plaintiff").

On April 23, 2024, the parties filed a stipulation of settlement notifying the court and seeking approval of a proposed settlement to resolve the Securities Class Action, under which the

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Defendants would pay $35 million in exchange for the class members' release of certain claims against the Defendants. The court preliminarily approved the settlement on May 15, 2024 and officially approved it in a final settlement conference held on September 19, 2024.

10. Virginia Court of Appeals Vacates the Verdict and Orders New Trial

On July 30, 2024, a unanimous panel of the Virginia Court of Appeals vacated the jury's verdict as to Count 1 and remanded the case for retrial.[34] The Court of Appeals identified three separate, serious errors by the trial judge, each of which independently warranted a new trial:

- ***First***, "[i]n a technical case where a multi-billion-dollar claim turned on whether and how [Pegasystems] copied Appian's functions, the trial court prevented [Pegasystems] from displaying its software and any demonstrative images taken from it," which "deprived [Pegasystems] of evidence that could show that functions it was accused of stealing actually pre-dated Zou or differed from Appian's." Virginia Appellate Decision at 496.

- ***Second***, the trial judge wrongly "preclud[ed Pegasystems] from presenting evidence, or conducting cross-examination, to demonstrate that much of [Pegasystems'] total sales revenue was attributable to products with which Appian did not compete and that had 'nothing to do with' the misappropriation." *Id.* at 488; *see also id.* at 492 (noting that the erroneous exclusion of this evidence, together with the flawed damages instruction "exponentially increased the likelihood of a runaway damages verdict that had no correlation to proximate cause").

- ***Third***, regarding causation and damages, the trial judge gave the jury a legal instruction on damages that "was impermissible on multiple levels" and "relieved Appian of its burden of proving that the alleged misappropriation *caused* [Pegasystems] to win any sale." *Id.* at 477; *see also id.* at 487 n.20 ("[C]haos would ensue in commercial litigation settings if [courts] adopted [the instruction's] premise that the burden for a plaintiff seeking unjust enrichment for any misappropriation of a trade secret in Virginia is simply showing all sales made by the defendant.").

The Court of Appeals also identified a fourth error to be corrected at the new trial: namely, that the trial court had wrongly excluded evidence related to the Appian platform's widespread availability and instructed the jury that the number of users of Appian's platform was irrelevant, which "denied [Pegasystems] the opportunity to effectively argue that Appian forfeited its trade

[34] Pegasystems had not appealed the jury's $1 damages award on Count 2.

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secret protection by broadly sharing the information with thousands." *Id.* at 506. The Court ordered that no such instruction be provided on retrial. *Id.*

On August 20, 2024, Appian appealed the Virginia Appellate Decision to the Supreme Court of Virginia. *Appian Corp. v. Pegasystems Inc.*, No. 240736 (Va.).

E. Trading Activity of Certain Pegasystems Directors and Officers

The DRC reviewed Pegasystems' internal controls and procedures, which the Company has implemented to ensure directors, officers, and other personnel trade in compliance with the law when buying or selling Pegasystems' securities. In 2002, Pegasystems implemented a written policy governing permissible trading in the Company's securities, which was most recently revised in 2018 and reviewed in 2022 (the "Trading Policy"). This Trading Policy, which applies to all Company directors, officers, employees, and contractors, including certain family members, among others, strictly prohibits (i) trading when aware of material, non-public information ("MNPI"), (ii) trading during blackout periods, (iii) short sales and other hedging activities, (iv) the tipping or misappropriation of MNPI, and (v) improper trading in the securities of other companies based on MNPI learned during the course of work. Under the policy, MNPI means information that is considered "material" if a reasonable investor would consider that information important in deciding to buy, hold, or sell securities. The Trading Policy notes that violations of the policy or securities law is grounds for immediate disciplinary action, up to and including termination of employment, disgorgement of profits, and/or other actions deemed appropriate by the Company.

The Trading Policy imposes specific requirements on Pegasystems' officers and directors. All directors and officers must obtain pre-clearance on any transaction involving Pegasystems securities and must report the transaction to the SEC in the applicable filing. The policy directs the pre-clearance request to be made to the Chief Compliance Officer, or a designated person, and

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requires the requestor to describe fully any circumstances in which the requestor may be aware of MNPI. The Trading Policy further notes that directors and officers, among others, may enter into stock trading plans complying with SEC Rule 10b-5 and that trading in accordance with such plans is not considered to be a violation of the Trading Policy.

The DRC observed that, throughout the pendency of the Appian Litigation, the Company implemented its normal course trading blackout periods. As a general rule, Pegasystems' regular trading prohibition begins on the 14th day before the end of the last month of the quarter, and it ends once one full trading day has elapsed after a formal earnings announcement has been released. The record reflects that, in addition to these normal course prohibitions, the Company considered whether to institute a special blackout period in connection with the Appian Litigation at multiple points. As reflected in email correspondence, management consulted internal and outside counsel, engaged in robust discussion, and ultimately determined that additional trading prohibitions were not necessary.

The DRC evaluated the trading activity of the Independent Directors, Mr. Trefler, Mr. Stillwell, Mr. Kouninis, Mr. Kra, Mr. Pyle, and Mr. Leon Trefler (the "Stock Traders") focusing on the time period around the Appian Litigation. Based on the DRC's review of the record and witness interviews, the DRC observed that, with respect to the foregoing individuals (other than Mr. Trefler), reported sales of the Company's securities during the pendency of the Appian Litigation were pursuant to approved 10b-5 trading plans, pre-cleared by the Company, and/or executed by individuals who were not privy to Appian Litigation-related MNPI.

Mr. Trefler has not traded in Pegasystems' securities during the pendency of the Appian Litigation.[35]

[35] As reflected in SEC filings, Mr. Trefler did not personally sell securities of Pegasystems during the period 2012 to 2022. Mr. Trefler reported to the DRC that, while the Trefler Family Foundation has holdings in

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F. Pegasystems' Stock Repurchase Program

Since 2004, Pegasystems has had a stock repurchase program. *See, e.g.*, Pegasystems Form 10-K (filed Feb. 26, 2018), at 36 ("Since 2004, our Board of Directors has approved stock repurchase programs that have authorized the repurchase, in the aggregate, of up to $195M of our common stock."). The Board has re-authorized this repurchase program on a roughly annual basis, and Pegasystems has consistently disclosed it in its annual and quarterly filings. *See, e.g.*, 2Q20 10-Q, at 22; 1Q22 10-Q, at 28.

Following the Appian Litigation verdict on May 9, 2022, the Board reevaluated whether to continue to authorize Pegasystems' stock repurchase program in a Board meeting held on May 31, 2022. Prior to this meeting, Mr. Pitfield prepared, and circulated to the Board, a memorandum analyzing considerations in making this determination. Further, the documentary record reflects that Mr. Kouninis presented to the Board regarding whether to re-authorize the stock repurchase program. After discussion, the Board unanimously agreed to extend the program through June 30, 2023 and increased the remaining stock repurchase authority to $60 million. *See* Pegasystems Form 10-Q (filed Oct. 26, 2022), at 26. Since May 2022, the Board has continued to reassess the share repurchase program every few months at regular Board meetings.

VI. Legal Analysis on Whether to Bring the Requested Action

Having reviewed tens of thousands of non-public documents and interviewed 17 witnesses, thereby building the factual record, the DRC, assisted by Fried Frank, then evaluated whether that factual record would support the pursuit of any legal claims against the Fiduciaries. The DRC directed Fried Frank to conduct legal research on the various legal claims and theories set forth in

Pegasystems' securities, he personally has no pecuniary interest in shares held by that foundation and is not involved in investment decisions, which are handled by an external financial broker who can only sell shares of Pegasystems outside blackout trading windows.

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the Demands, among others, and then analyzed the relative strengths and weaknesses of those claims given the record.

A. Breach of Fiduciary Duties

The Demands request that the Board investigate, and bring claims on behalf of Pegasystems for, breaches of fiduciary duties by the Fiduciaries.[36] In assessing whether the Fiduciaries engaged in conduct that could support viable claims against them for breaching their fiduciary duties, the DRC considered the three elements that Massachusetts law requires be met in order to establish such a breach: (i) the existence of a fiduciary relationship, (ii) breach of the duties requisite to that relationship by one party, and (iii) resulting damage to the other party. *See Keros v. Mass. Mut. Life. Ins. Co.*, 958 F. Supp. 2d 306, 310 (D. Mass. 2013).

Massachusetts law makes clear that corporate directors and officers "stand in a fiduciary relationship" with their corporations and "have a duty to protect [the corporation's] interests above every other obligation." *Squeri v. Mount Ida Coll.*, 954 F.3d 56, 67 (1st Cir. 2020) (quoting *Est. of Moulton v. Puopolo*, 467 Mass. 478, 492 (2014)); *see also Blackstone v. Cashman*, 448 Mass. 255, 266-67 (2007) (directors are corporate fiduciaries); *Geller v. Allied-Lyons PLC*, 42 Mass. App. Ct. 120, 122 (1997) (senior executives are corporate fiduciaries).

As fiduciaries, there are two primary duties with which corporate directors and officers must act in accordance under Massachusetts law: the duties of care and loyalty.

The fiduciary duty of care generally mandates that corporate directors and officers exercise ordinary care in executing their responsibilities. In Massachusetts, the duty of care is codified in

[36] Certain of the Demands allege breach of fiduciary duty claims against Mr. Baril. As a non-officer employee, *see supra* n.1, even assuming that Mr. Baril "occupi[es] a position of trust and confidence," Mr. Baril would only owe Pegasystems a duty of loyalty and not a duty of care. *See Chelsea Indus., Inc. v. Gaffney*, 389 Mass. 1, 11 (1983) (holding that "trusted executives composing virtually all of [a company's] management" owed the company a duty of loyalty despite not being officers or directors of the company). As discussed *infra* Section VI.A.2, apart from insider trading allegations, the Demands' allegations do not implicate the duty of loyalty and none of the Demands allege that Mr. Baril engaged in insider trading.

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the MBCA and requires corporate directors and officers to discharge their duties "(1) in good faith; (2) with the care that a person in a like position would reasonably believe appropriate under similar circumstances; and (3) in a manner [they] reasonably believe[] to be in the best interests of the corporation." G. L. c. 156D, §§ 8.30, 8.42. Decisions by directors and officers should be evaluated on the basis of the information known to them at the time without the benefit of hindsight. G. L. c. 156D, § 8.30 cmt. 1(3); *see also id.* § 8.42 cmt. ("The Comment to § 8.30 is generally applicable to nondirector officers as well as to directors."). Directors and officers "should not be expected to anticipate the problems which the corporation may face except in those circumstances where something has occurred to make it obvious to the director that the corporation should be addressing a particular problem."[37] G. L. c. 156D, § 8.30 cmt. 1(3); *see also id.* § 8.42 cmt. Also relevant in evaluating compliance with the standard of care is the special background, qualification, and management responsibilities of a particular director or officer. G. L. c. 156D, § 8.30 cmt. 1(3); *see also id.* § 8.42 cmt. Massachusetts law also recognizes that corporate fiduciaries are "entitled to rely on information, opinions, reports, or statements … if prepared or presented by[,]" *inter alia*, "one or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent with respect to the information [and] opinions." G. L. c. 156D, §§ 8.30(b)(1) & § 8.42(b)(1).

Several additional factors heighten the difficulty of establishing that corporate officers or directors breached their duty of care. Most critically, Massachusetts courts embrace the business judgment doctrine, under which corporate fiduciaries are presumed "in making a decision, [to

[37] Furthermore, the fact that an officer or director's action, in hindsight, turned out to be an ill-advised business decision does not mean that such action constituted a breach of that officer or director's fiduciary duties, as long as they acted in good faith, with ordinary care, and in what they believed to be the best interests of the corporation. *See id.* § 8.30 cmt.

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have] acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000); *Harhen v. Brown*, 431 Mass. 838, 844-45 (2000) (adopting a Delaware-like business judgment rule in Massachusetts), *superseded by statute on other grounds*, G. L. c. 156D, § 7.42. This presumption can only be overcome by "facts that establish bad faith, unreasonableness, or lack of investigation." *In re PHC, Inc. S'holder Litig.*, 2012 U.S. Dist. LEXIS 44616, at *8 (D. Mass. Mar. 30, 2012). In addition, Massachusetts law permits corporations to eliminate directors' personal liability for breaches of the duty of care.[38] G. L. c. 156D, § 2.02(b)(4). And the Company has done just that—Pegasystems' Articles of Organization provide, in relevant part:

> No director of the Corporation shall be liable to the Corporation or its shareholders for monetary damages for breach of fiduciary duty as a director, except for liability (i) for any breach of the director's duty of loyalty to the Corporation or its shareholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law…or (iv) for any transaction in which the director derived an improper personal benefit.

Pegasystems Inc. Restated Articles of Organization, Art. VI (June 2, 2005).[39]

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[38] The MBCA permits Massachusetts corporations to include in their articles of organization "a provision eliminating or limiting the personal liability of a director to the corporation for monetary damages for breach of fiduciary duty as a director notwithstanding any provision of law imposing such liability; but the provision shall not eliminate or limit the liability of a director (i) for any breach of the director's duty of loyalty to the corporation or its shareholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) for improper distributions under section 6.40, or (iv) for any transaction from which the director derived an improper personal benefit." G. L. c. 156D, § 2.02(b)(4).

[39] Massachusetts law does not authorize corporations to include a similar provision limiting the liability of officers in their articles of organization. The MBCA does permit corporations to "indemnify and advance expenses…to an officer of the corporation who is a party to a proceeding…except for liability arising out of acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law." G. L. c. 156D, § 8.56(a)(2). Pegasystems' bylaws, however, provide indemnification for "[e]ach Director, officer, employee and other agent of the Corporation…against any cost, expense (including attorneys' fees), judgment, liability and/or amount paid in settlement reasonably incurred by or imposed upon him, in connection with any action, suit or proceeding…by reason of his being, or related to his status as, a Director, officer, employee or other agent of the Corporation…unless such indemnification is prohibited by the MBCA." Amended and Restated Bylaws of Pegasystems Inc., Art. VII (eff. June 12, 2020).

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In light of the business judgment rule, as well as the protection afforded to directors under Pegasystems' exculpation provision, Pegasystems' directors and officers can *only* be held liable for breaching their duty of *care* for intentional, bad faith conduct. Under Massachusetts law, bad faith "imports a dishonest purpose or some moral obliquity, implying a conscious doing of wrong. It means a breach of a known duty through some motive of interest or ill will, and it partakes the nature of fraud." *Astra USA, Inc. v. Bildman*, 2005 WL 1477747, at *4 (Mass. Super. May 4, 2005) (confirming finding of bad faith where employee "defrauded the company, converted company funds, wasted company assets…engaged in sexual harassment, violated the company's sexual harassment policy, and retaliated against company employees who complained about the sexual harassment") (citing *Spiegel v. Beacon Participations, Inc.*, 297 Mass. 398, 416-17 (1937)), *aff'd in part, rev'd in part*, 455 Mass. 116 (2009).

The fiduciary duty of loyalty requires corporate fiduciaries to "act with absolute fidelity and…place their duties to the corporation above every other financial or business obligation." *Demoulas v. Demoulas Super Mkts., Inc.*, 424 Mass. 501, 528 (1997).[40] Typically, the duty of loyalty is implicated when corporate fiduciaries are alleged to have prioritized their own interests ahead of their corporation's interests, *e.g.*, by engaging in self-dealing, usurping for themselves a business opportunity that their corporation could reasonably be expected to be interested in, competing with their corporation, or setting their own compensation. *See Blake v. Smith*, Mass. Super. LEXIS 668, at *20 (Mass. Super. Dec. 11, 2006); *see also* Thomas S. Fitzpatrick et. al., Organizing, Financing, and Advising a Massachusetts Business, §§ 3.5.2 - 3.5.5 (Michael A. Mooney ed., 2022). Insider trading also can constitute a breach of the duty of loyalty if it can "be

[40] The duty of loyalty is primarily derived from common law, and, unlike the duty of care, there is no direct statutory counterpart under Massachusetts law.

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shown that each sale by each individual defendant was entered into and completed on the basis of, and because of, adverse [MNPI]." *In re Polymedica Corp. S'holder Deriv. Litig.*, 2002 Mass. Super. LEXIS 271, at *42 (Mass. Super. July 16, 2002).

Unlike with the duty of care, the business judgment rule does not apply to the duty of loyalty, and Massachusetts corporations are not permitted to limit director liability for breaches of the duty of loyalty. *See* G. L. c. 156D, § 2.02(b)(4).

Implicit in the duty of loyalty is a duty for corporate directors and officers to act in good faith. *See Smith*, Mass. Super. LEXIS 668, at *21 (noting that the duty to act in good faith "has been described as just another permutation of the fiduciary's duty of loyalty"). The implied duty of good faith is breached when a fiduciary's "conduct is motivated by subjective bad faith, which is an actual intent to do harm, or where the director has engaged in an intentional dereliction of duty or a conscious disregard for his or her responsibilities." *Id.*

1. No Viable Fiduciary Duty of Care Claims

The Demands ask that the Board investigate and bring breach of fiduciary duty claims against the Fiduciaries. After careful consideration, the DRC concluded that there is no evidence to establish that any of these individuals breached their duty of care under Massachusetts law.

(a) *Purported Misappropriation of Competitor Trade Secrets*

The Demands allege that the Fiduciaries orchestrated or permitted a scheme whereby (i) third-party consultants were paid to steal Appian's trade secrets, and (ii) Pegasystems personnel created fake personas to infiltrate Appian's trial environment and access trade secrets and other confidential information contained therein. Certain Demands also claim that the Fiduciaries engaged in efforts to misappropriate other competitors' trade secrets using similar means.

As discussed in detail *supra*, the DRC's investigation found that, between 2012 and 2014, at Mr. Petronio's initiative, Pegasystems periodically worked with a consultant, Mr. Zou, to learn

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about his impressions of Appian's capabilities, strengths, and weaknesses based on his experience using Appian's developer interface. Around that same timeframe, and also at Mr. Petronio's initiative, the Company engaged three other competitive intelligence consultants to learn about other competitors, though the documentary record and witness accounts reflect that these consultants' work may have been more limited than Mr. Zou's. Finally, the DRC found that, between 2012 and 2021, ten full-time Pegasystems employees accessed Appian's free trial platform by misrepresenting their identities and/or purposes, and that Mr. Trefler registered for Appian marketing materials using a personal email address that did not disclose his name.

The DRC has not identified evidence warranting a conclusion that the Fiduciaries engaged in any misconduct that breached their fiduciary duty of care.

With respect to the Independent Directors and Mr. Stillwell, the DRC identified no evidence that these individuals were even aware (or should have been aware) that Pegasystems personnel had engaged Mr. Zou or other third-party competitive intelligence consultants or were accessing Appian's trial environment until these activities were alleged in the Appian Litigation—much less that they were directing such conduct.

With respect to the Management Witnesses themselves, although they had some contemporaneous knowledge that Pegasystems had engaged consultants to develop competitive intelligence and/or that select Company employees accessed Appian's free trial platform, the record does not support a finding that they knowingly engaged in misconduct, much less engaged in "conscious doing of wrong" or acted with a "dishonest purpose or some moral obliquity." *Spiegel*, 297 Mass. at 416-17.

First, as a threshold manner, the Demands assume that the underlying conduct giving rise to purported breach of fiduciary duty claims was necessarily illegal or improper. But every witness

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with whom the DRC discussed this conduct, including Mr. Trefler, Mr. Schuerman, Mr. Akgonul, Mr. Leon Trefler, Mr. Cushing, Mr. Frank, Ms. Monday, and Mr. Rosenkranz, shared their view that nothing contained in Appian's developer interface utilized by Mr. Zou or in Appian's free trials accessed by the Free Trial Users constituted trade secrets or was misappropriated by Pegasystems. As the principal basis for their view, witnesses noted that the Appian information purportedly viewed by Mr. Zou and any Company employee could be accessed by thousands or even millions of members of the public—a fact that the Virginia Court of Appeals' reversal of the verdict recognized typically would undercut a trade secret misappropriation claim. Virginia Appellate Decision at 505 ("[W]hile the number of people with access to information is not, in isolation, determinative of the information's trade secret status . . . who is given access to such information, and in what numbers, are among the most important factors in assessing both whether the information was generally available and the reasonableness of efforts to maintain its secrecy."); *see also, e.g., Allstate Ins. Co. v. Fougere*, 79 F.4th 172, 189 (1st Cir. 2023) ("The publicly accessible nature of certain portions of the [material at issue] certainly informs our trade secret analysis."); *SI Handling Sys., Inc. v. Heisley*, 753 F.2d 1244, 1256 (3d Cir. 1985) ("[T]he extent to which the information is known outside of [one's] business" is a "factor[] to be considered in determining whether given information is one's trade secrets.").

Indeed, evidence identified in the Appian Litigation and reviewed by the DRC showed that thousands of Appian developers, in addition to a number of Appian resellers so large that Appian could not identify all of them, had access to the same user platform Mr. Zou utilized to provide demonstrations of Appian to Pegasystems' personnel. The Appian platform and its documentation also were available to other audiences. Evidence identified by Pegasystems during the Appian Litigation showed that Appian's agreements with its business partners, including Serco, authorized

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them to "market, promote and demonstrate the Appian software to prospective customers." Appian did not require business partners to obtain non-disclosure agreements from potential customers before conducting demonstrations, and those potential customers could then share videos or screenshots of what they had seen. Appian also did not limit the number of people to whom Appian representatives could show product demonstrations or documentation.

Further, Pegasystems offered evidence that, between 2012 and 2014, over 6,000 unidentified users had access to a database of Appian documentation Mr. Zou used in connection with his consulting work with Pegasystems during that period, and that over 44,000 unidentified users had access to the same database between 2012 and 2021, with those numbers potentially being underinclusive because Appian could not estimate, let alone identify, the total number of people who obtained access by all available means. Notably, evidence of this database's widespread availability was erroneously precluded during the Appian Litigation trial, and the trial judge wrongly instructed the jury that evidence of the number of users of Appian's platform was not relevant to any issue in the case.[41] The DRC understands that, with limited exceptions, Appian's free trial platform is also widely accessible to members of the public.[42] Pegasystems offered, but was similarly improperly precluded from presenting to the jury, evidence reflecting that approximately 12,000 users accessed Appian's free trial instances between 2017 and 2021.

[41] The Virginia Court of Appeals' deferential review of the record in the light most favorable to the jury's verdict allowed for the possibility that the information at issue constituted trade secrets. Virginia Appellate Decision at 476. However, the Court of Appeals held that the trial judge's exclusion of evidence of Appian's platform's widespread availability and failure to correctly instruct the jury on the relevance of such access "denied [Pegasystems] the opportunity to effectively argue that Appian forfeited its trade secret protection by broadly sharing the information with thousands." *Id.* at 507; *see also id.* at 455-57 (discussing facts supporting the availability and wide dissemination of the material at issue). As reflected above, the DRC's consideration of the general availability of the information at issue, among other things, contributed to its conclusion that that information did not constitute trade secrets.

[42] In this regard, the DRC further notes that during the Appian Litigation, Appian itself did not assert a cause of action or show that Pegasystems' employees misappropriated trade secrets through these free trials.

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The Management Witnesses reported that they did not and do not have reason to believe that Mr. Petronio, Mr. Zou, or any Pegasystems employee who accessed an Appian free trial were accessing information that was not otherwise available to a wider audience. The DRC credits that their accounts reflect their genuine, good faith beliefs. Second, the DRC considered but was ultimately unpersuaded by facts to which the Demands point as evidence that the Management Witnesses knew misconduct was occurring but acted in bad faith or unreasonably in failing to prevent it. With respect to Pegasystems' engagement of Mr. Zou, the Demands suggest that the Management Witnesses knew, or should have known, that this conduct was wrong because they participated in or were otherwise made aware of efforts to refer to Mr. Zou as a spy and/or hide his personal information. As discussed *supra*, however, the record reflects that the Management Witnesses did not participate in such efforts. Thus, even if the Company's engagement of Mr. Zou had involved the misappropriation of trade secrets, these individuals' limited visibility into the practices did not raise red flags to put them on notice that the underlying conduct needed to be prevented or otherwise investigated. Even when considered in light of Mr. Petronio's efforts to "conceal" Mr. Zou's identity, at least as understood by the Management Witnesses, the DRC does not believe that these were serious efforts to hide Mr. Zou's identity by Mr. Petronio, but rather were aimed at generating interest in his work product. The DRC finds such understanding to be reasonable in light of Mr. Petronio's reputation and behavior in other contexts. The DRC further notes that, as discussed *supra* at 34-35, the KForce Contract warranted that the services KForce was to provide Pegasystems "do not violate any applicable law, rule, or regulation; any contracts with third parties; or any third party in any patent, copyright, trade secret or similar intellectual property right."

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With respect to Pegasystems personnel accessing Appian free trials, the Demands allege that the Management Witnesses knew, or were at least put on notice, that employees were using aliases to sign up for Appian free trials. The record indicates that Mr. Trefler, Mr. Schuerman, and Mr. Leon Trefler were contemporaneously informed that Mr. Baril had access to Appian's platform in 2019. However, they all credibly reported that they did not realize the means by which Mr. Baril had acquired that access, *i.e.*, using aliases, until the Appian Litigation. In assessing the reasonableness of that understanding, the DRC looked for, but did not identify, any contemporaneous communication in which Mr. Baril or any other Pegasystems employee clearly acknowledged to the Management Witnesses using a fake identity to register for Appian's free trials. The DRC is similarly unaware of any other evidence to suggest that Management Witnesses willfully turned a blind eye or acted with a "dishonest purpose." *Spiegel*, 297 Mass. at 416. Moreover, given that, with limited exception, anyone could sign up for Appian's free trials, the DRC does not believe that the information gleaned from such free trials could constitute trade secrets or could otherwise have caused any cognizable damage to Appian.

Third, the record reflects that the Management Witnesses relied in good faith on those responsible for Pegasystems' competitive intelligence gathering, primarily Mr. Petronio and Mr. Baril, to determine how to best access information about competitors. In so doing, these senior officers reasonably trusted these employees, who, as the leaders of Pegasystems' competitive intelligence function, were expected to apply informed judgment to ensure they were engaging in appropriate competitive intelligence gathering through permissible channels and acting in compliance with all applicable laws and regulations. *See* G. L c. 156D, § 8.42(b), (c).

Fourth, the record reflects that, after the Management Witnesses were put on notice by the Appian Litigation that certain of Pegasystems' competitive intelligence gathering techniques could

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be perceived as even potentially problematic, they, in coordination with the Independent Directors, promptly implemented several remedial and/or preventative measures to stop any similar conduct from recurring, which provides further evidence that these individuals acted in good faith. In particular, the Company (i) formally reprimanded those employees who used false identities to access Appian's free trials, (ii) developed and implemented a new training program on appropriate means of competitive intelligence gathering, (iii) instituted quarterly meetings to provide space for employees to approach Pegasystems' legal team with questions about conduct with respect to Pegasystems' competitors, and (iv) implemented a hard, technical block on Appian's free trial login page.

Finally, certain of the Management Witnesses candidly acknowledged, both in interviews with the DRC and during the Appian Litigation, that, in hindsight, they wished that they inquired deeper into, and ultimately prevented, the engagement of Mr. Zou and accessing of Appian using false identities by the Free Trial Users. They similarly recognized that, regardless of the legality of this behavior, it was imprudent and had adverse implications for Pegasystems. However, this retrospective view does not support a finding that they breached their duty of care. Under Massachusetts law, business decisions that are unwise in hindsight do not constitute breaches of the duty of care as long as, in making those business decisions, the officers and directors of the corporation acted in good faith, with ordinary care, and in what they "believe[d] to be the best interests of the corporation." *See* G. L. c. 156D § 8.30(a)(3) & cmt.; *see also Spiegel*, 297 Mass. at 416 ("[B]ad judgment" does not amount to bad faith.). Here, for the foregoing reasons, the DRC finds that the Management Witnesses acted in good faith and reasonably believed, based on what they knew in real time, that Company employees were doing nothing illegal. That the conduct at

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issue ultimately exposed the Company to litigation is not enough to support a finding that they breached their duty of care.

Taking the above factors into consideration, coupled with the high burden needed to overcome the business judgment presumption, the DRC did not identify evidence to support any viable claim against the Fiduciaries for breaching their fiduciary duty of care in connection with their purported involvement in efforts to misappropriate competitors' trade secrets.

(b) *Handling of the Appian Litigation*

In addition to the aforementioned allegations, the Demands ask the DRC to explore other ways in which Pegasystems' officers and directors may have breached their fiduciary duties based on facts discovered during the course of the DRC's investigation. As such, the DRC investigated whether the Fiduciaries breached their duty of care in how they responded to Appian's lawsuit. The DRC did not identify evidence that the Fiduciaries acted either in bad faith or unreasonably in connection with the Appian Litigation, which would be required to prove a breach of the duty of care claim in light of the business judgement rule and, with respect to the directors, applicable exculpation provisions.

To the contrary, several factors that emerged in witness testimony and contemporaneous documentation showed that the Fiduciaries were diligent and took appropriate care in responding to Appian's claims.

First, shortly after the Appian Litigation was filed, Pegasystems' legal team engaged Choate to prepare Pegasystems' defense. Choate's team was led by Mr. Frank, who is widely recognized as one of the leading intellectual property litigators in the country and one of Massachusetts' most outstanding and experienced trial lawyers. In interviews with the DRC, witnesses did not report concerns about Choate's conduct, judgment, or litigation strategy that would suggest the firm's engagement was unreasonable or in bad faith.

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Second, the Independent Directors, Mr. Trefler, Mr. Stillwell, and Mr. Cushing, among others, were regularly updated on the Appian Litigation's status, allowing them to appropriately oversee the Company's defense. Mr. Cushing routinely presented on the Company's pending litigation at Board meetings, in addition to circulating written updates in advance. Further, both Mr. Trefler and Mr. Stillwell requested and received updates from Choate on legal strategy and case developments. The nature and frequency with which Pegasystems' directors and certain officers were debriefed on the Appian Litigation changed as the case progressed. For instance, towards the end of 2021 and beginning of 2022, around the time Appian produced the Malackowski Report, which assessed Appian's damages at more than $4 billion, and amended its complaint to increase the damages it sought from $90 million to $3 billion, Pegasystems' directors and certain officers became more substantially involved. For instance, Mr. Trefler and Mr. Stillwell began working closely with Pegasystems' internal lawyers and Choate to assist in the development of trial strategy and help prepare the Company's defense. Around this time, other Pegasystems officers, including Mr. Akgonul, Mr. Schuerman, and Mr. Leon Trefler, were also enlisted to assist with depositions and other trial preparations. Finally, the Board began receiving more substantive and frequent updates from Mr. Cushing on Appian's claims and Pegasystems' defenses, as well as factual and legal developments in the case. The DRC did not identify instances in which information was withheld from the Independent Directors intentionally or in bad faith. Among witnesses interviewed by the DRC, there was a general consensus that, in real time, the Independent Directors did not have concerns about transparency or candor from management or the level of detail provided to them on litigation developments, and the DRC did not identify any documentary evidence to the contrary. The DRC finds it both reasonable and appropriate that the

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extent to which the Fiduciaries were involved in, and informed about, the Appian Litigation changed based on the amount of material risk it was understood to pose to the Company.

Third, the DRC did not uncover evidence to suggest that that the exploratory discussions between the Company and Appian ever progressed to a point at which settlement was remotely possible. As discussed *supra*, there were two primary junctures during which Pegasystems explored settling the Appian Litigation: first, in March 2021, when Pegasystems and Appian engaged in a mediation regarding both the Appian Litigation and the Massachusetts Litigation, and again in February and March 2022, around the beginning of the trial in the Appian Litigation. The Independent Directors were informed about these settlement attempts. However, as both management and Board witnesses clearly and consistently reported, Pegasystems and Appian's settlement expectations were so widely divergent that conversations never advanced beyond preliminary discussions and settlement was never realistic or expected.

Moreover, the Company, in consultation with their legal advisors and in good faith, believed (and continues to believe) that Pegasystems had strong defenses to Appian's claims, thereby providing a reasonable strategic basis to continue litigating the case. *See supra* at 52. As the record establishes that Pegasystems' defenses were not only repeatedly pressure tested by in-house and outside Company lawyers and supported by detailed factual and legal analysis, but also validated in many important respects by the Virginia Court of Appeals' determination that the jury's verdict resulted from several, independently significant legal errors by the trial judge, the DRC finds these views to be reasonable.

In light of all of the above, the DRC did not identify evidence to support any viable claim that the Fiduciaries breached their duty of care in connection with their defense of the Appian Litigation.

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2. No Viable Fiduciary Duty of Loyalty Claims

The Brenner and Sagfors Demands also explicitly allege that the Fiduciaries breached their fiduciary duty of loyalty to the Company. Generally speaking, the only conduct alleged by the Demands that could possibly implicate the duty of loyalty is purported insider trading in connection with the Appian Litigation. Aside from that, the Demands contain no allegations that the Fiduciaries engaged in conduct that involved ***personal benefit at Pegasystems' expense***, such as self-dealing, usurping a Pegasystems' business opportunity, or setting their own compensation. With respect to insider trading, the DRC investigated the Stock Traders' trading activities. The DRC concluded that any sales of Pegasystems stock made by these individuals during the course of the Appian Litigation were pursuant to an existing 10b-5 trading plan, received pre-authorization by Pegasystems, and/or were not made on the basis of the individual possessing MNPI. As such, the DRC concludes that there is not sufficient evidence to support a viable insider trading claim, and thus, a claim for breach of the duty of loyalty, against any of the Fiduciaries. *See In re Polymedica*, 2002 Mass. Super. LEXIS at *41.

B. Aiding and Abetting Breach of Fiduciary Duties

Ms. Larkin and Mr. Sagfors also allege that the Fiduciaries aided and abetted each other's breaches of fiduciary duties. Under Massachusetts law, a successful claim that someone aided and abetted a breach of fiduciary duty must be substantiated with proof that "(1) there [was] a breach of fiduciary duty, (2) the defendant [knew] of the breach, and (3) the defendant…actively participate[ed] or substantially assist[ed] in or encourage[ed] the breach to the degree that he or she could not reasonably be held to have acted in good faith." *Arcidi v. Nat'l Ass'n Gov't Emps., Inc.*, 447 Mass. 616, 623-24 (2006). Because, as discussed *supra*, the DRC concluded that there is not sufficient evidence to support a breach of fiduciary duty claim against the Fiduciaries, the

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first element of an aiding and abetting claim is not satisfied. Therefore, the DRC finds that this claim is not viable.

C. Section 10(b) of the Exchange Act and Rule 10b-5

The Demands allege that the Independent Directors, Mr. Stillwell, and Mr. Trefler violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder by making false and misleading statements about the Appian Litigation and Pegasystems' competitors, sales and marketing practices, and intellectual property, as well as false and misleading financial statements and related disclosures concerning a loss contingency in connection with the Appian Litigation. Section 10(b) of the Exchange Act, in combination with Rule 10b-5, prohibits any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

When assessing whether to bring a Section 10(b) and 10b-5 claim, the DRC must consider whether the Independent Directors, Mr. Stillwell, or Mr. Trefler (i) directly or indirectly, employed a device, scheme, or artifice to defraud, made an untrue statement of material fact or omitted to state a material fact which made what was said, under the circumstances, misleading, or engaged in a fraudulent act, practice, or course of business; (ii) acted with scienter, *i.e.*, a mental state embracing intent to deceive, manipulate, or defraud; (iii) engaged in misconduct in connection with the purchase or sale of a security; and (iv) used, or caused to be used, means and instrumentalities of interstate commerce. *See, e.g.*, *Ponsa-Rabell v. Santander Sec. LLC*, 35 F.4th 26, 32 (1st Cir. 2022); *In re Biogen Inc. Sec. Litig.*, 857 F.3d 34, 41 (1st Cir. 2017). All four elements must be met for a Section 10(b) and 10b-5 claim to prevail.

The DRC has concluded that the record does not support a viable Section 10(b) and 10b-5 claim against the Independent Directors, Mr. Stillwell, or Mr. Trefler. The DRC notes, at the outset, that it considered the fact that, in the above-referenced July 2023 opinion, the court denied,

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in the main, defendants' motions to dismiss the operative complaint in the Securities Class Action, which asserts many (if not all) of the same claims against the same defendants. However, the DRC also notes that this was a pleadings stage decision, prior to discovery, and, in light of the voluminous non-public materials the DRC reviewed as part of its investigation, believes that the factual picture would have looked substantially different had that litigation proceeded to summary judgment or trial. That question, of course, is moot given that, as described above, the Securities Class Action has officially settled.

The potential Section 10(b) and 10b-5 claims are not viable for many reasons, the most significant being that a plaintiff (whether the DRC or shareholders) likely would be unable to establish (a) any material statement or omission or (b) that the Independent Directors, Mr. Stillwell, or Mr. Trefler acted with the requisite scienter.

Materiality assesses the significance of an alleged omitted or misrepresented fact to a reasonable investor. *TSC Indus., Inc. v. Northway*, 426 U.S. 438, 445 (1976); *Milton v. Van Dorn Co.*, 961 F.2d 965, 969 (1st Cir. 1992). Materiality, an objective analysis, evaluates whether there is a "substantial likelihood that a reasonable shareholder would consider [the alleged omitted or misrepresented fact] important" such that it would have "significantly altered the total mix of information made available to current and potential investors." *TSC Indus.*, 426 U.S. at 449; *see also City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Waters Corp.*, 632 F.3d 751, 756-57 (1st Cir. 2011) (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988)). "A statement can be false or incomplete but not actionable if the misrepresented or omitted fact is otherwise insignificant." *Waters Corp.*, 632 F.3d at 756-57. Stated differently, "not every piece of relevant information will be deemed material." *Gay v. Axline*, 1994 U.S. App. LEXIS 8989, at *16 (1st

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Cir. Apr. 26, 1994); *see also Milton*, 961 F.2d at 969 ("The mere fact that an investor might find information interesting or desirable is not sufficient to satisfy the materiality requirement.").

Scienter "requires specific facts giving rise to a strong inference … of intentional or willful conduct designed to deceive or defraud investors" or alternatively, "a high degree of recklessness." *In re Biogen*, 857 F.3d at 41; *see also Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). Recklessness is "not merely simple, or even inexcusable, negligence, but an extreme departure from the standards of ordinary care, and [] presents a danger of misleading buyers and sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *Mehta v. Ocular Therapeutix, Inc.*, 955 F.3d 194, 206 (1st Cir. 2020).

Moreover, there must be a "strong inference" of scienter with respect to *each* alleged wrongdoer. *See Toussaint v. Care.com Inc.*, 490 F. Supp. 3d 341, 351-52 (D. Mass. 2020). To qualify as "strong," an inference of scienter "must be more than merely plausible or reasonable[,] it must be cogent and *at least as compelling as any opposing inference of nonfraudulent intent*." *ACA Fin. Guar. Corp. v. Advest, Inc.*, 512 F.3d 46, 59 (1st Cir. 2008) (emphasis in original); *Tharp v. Acacia Commc'ns, Inc.*, 321 F. Supp. 3d 206, 227 (D. Mass. 2018) (same). This standard is satisfied only when the preponderance of the evidence shows "clear" allegations of admissions, internal records, or witnessed discussions suggesting that, at the time the statements were made, the defendant "[was] aware that they were withholding vital information or at least were warned by others." *Tharp*, 321 F. Supp. 3d at 227. Potential evidence relevant to the inquiry includes: (i) "insider trading in conjunction with false or misleading statements;" (ii) "a divergence between internal reports and public statements;" (iii) inconsistent disclosures issued "shortly after a fraudulent statement or omission;" (iv) "bribery by top company officials;" (v) "accounting

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shenanigans;" and (vi) "evidence of actions taken solely out of self-interest." *See Geffon v. Micrion Corp.*, 249 F.3d 29, 36 (1st Cir. 2001).

The Demands allege Section 10b-5 claims against the Independent Directors, Mr. Stillwell, and Mr. Trefler based on their having signed annual and quarterly reports filed with the SEC that purportedly contained false and/or misleading information. The Demands also attribute certain false and/or misleading statements to Mr. Stillwell and Mr. Trefler. However, the record developed by the DRC did not support evidence of material misrepresentations or omissions. Similarly, the Demands are largely silent on allegations giving rise to scienter, and the DRC's investigation did not identify evidence to plausibly support any such intentional misconduct. Notably, on September 9, 2024, the SEC informed the Company that it was not recommending that the Commission pursue an enforcement action relating to the disclosures or accounting decisions challenged in the Demands.

1. Challenged Statements and Alleged Omissions

(a) *Statements and Omissions Concerning the Appian Litigation*

With respect to the Demands' challenges to statements and omissions concerning the Appian Litigation, the Demands allege that (i) the Company misleadingly delayed its disclosure of the Appian Litigation, and (ii) when Pegasystems did disclose the Appian Litigation, its statements were false and misleading, because the Company assured the market that Appian's claims had no merit, the Company had strong defenses, and the alleged damages were not supported by the appropriate legal standard, among other things. [43]

With respect to the non-disclosure of the Appian Litigation prior to the 2021 10-K, as described above, the DRC believes that the Company reached a reasonable and legally sound

[43] The Sagfors Demand alleges that certain officers and directors violated securities laws by signing false and misleading Sarbanes-Oxley ("SOX") certifications. The DRC understands that some courts have

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decision that the litigation was, at that time, not material. Following consultation with in-house and outside counsel, the Company determined that the Appian Litigation—which, at the time, sought a maximum of $90 million in damages, and arose in the context of ongoing litigation between the Company and Appian (*see supra* at 46-48)—did not qualify as a material legal proceeding triggering a required disclosure under Item 103. Item 103 requires a registrant to briefly describe any "material pending legal proceedings," other than ordinary routine litigation incidental to the business. 17 C.F.R. § 229.103(a). Determining whether to disclose pending litigation pursuant to Item 103 requires "a considered judgment about what disclosures regarding litigation would be material to investors." *Wright v. Medtronic, Inc.*, 2010 U.S. Dist. LEXIS 24748, *35 (D. Minn. Mar. 17, 2010). A disclosure is not required under Item 103, however, if the claim of damages does not exceed 10% of a company's and its subsidiaries' current assets on a consolidated basis. 17 C.F.R. § 229.103(b)(2).

Up until Appian amended its prayer for relief in February 2022, it had limited itself, in its pleadings, to a prayer for damages of $90 million. For the period 2Q20 through 2Q21, Pegasystems was not required to disclose the Appian Litigation because Appian's damages claim did not exceed 10% of the Company's current assets. *See id.* (exempting from disclosure claims involving less than 10% of current assets). It was only as of 3Q21 that Appian's damages claim modestly exceeded this threshold—by 0.86%. For this quarter, management assessed whether the Appian Litigation nevertheless qualified as a "material" legal proceeding, which required

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recognized that false SOX certifications can serve as the basis for individual, civil liability in a securities suit (*see Stiegele v. Bailey*, 2007 U.S. Dist. LEXIS 86469, at *22-23 (D. Mass. Aug. 23, 2007)). However, the DRC concluded that the challenged SOX certifications here are not false or misleading for omitting the Appian Litigation as a material pending legal proceeding because for the period 2Q20 to 3Q21, the Appian Litigation was not understood to be "material" by the certifiers, thereby not requiring disclosure on the SOX certifications, and, with respect to the 2021 10-K, the SOX certifications were required to be filled out no later than February 4, 2022, which was prior to the court approving the Second Amended Complaint and damages being formally increased to $3 billion. In any event, the Appian Litigation was disclosed in the 2021 10-K.

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disclosure under Item 103. *See id.*; *see also City of Phila. v. Fleming Cos.*, 264 F.3d 1245, 1268 (10th Cir. 2001) ("Because damages claims are often inflated by plaintiffs overestimating their chances of success at trial or hoping to force a settlement, we cannot find [d]efendants liable…for failing to anticipate the full extent of their potential [litigation] exposure.").

Consistent with the preceding quarters, for the period 3Q21, management continued to conclude that disclosure of the Appian Litigation was not required in light of their view that this was ordinary course litigation, excepted from disclosure under Item 103. *See, e.g.*, *Greenberg v. Sunrun Inc.*, 233 F. Supp. 3d 764, 775 (N.D. Cal. 2017) (finding no plausibly alleged violation of Item 103 where omitted lawsuits were "ordinary routine litigation"). The documentary record and witness accounts all substantiate that the Independent Directors, Mr. Stillwell, and Mr. Trefler perceived the Appian Litigation—from the time the lawsuit was originally filed (just one week after a decision in the Massachusetts Litigation, which was favorable to Pegasystems) until Appian increased its damages claim in February 2022—as a largely retaliatory, normal course litigation, which was consistent with the view of in-house counsel, outside trial counsel, and management. *See Fleming Cos.*, 264 F.3d at 1263-64 (mere fact that the officers held senior positions, knew of the litigation, and were aware of a "general obligation to disclose pending material litigation" was not sufficient to imply knowledge of materiality). The DRC identified no evidence to suggest contrary viewpoints or that the Independent Directors, Mr. Stillwell, or Mr. Trefler prevented the Company from disclosing the Appian Litigation. The record was entirely consistent on these points.

When, in February 2022 and just after Appian amended its damages claim from $90 million to $3 billion, the Company promptly disclosed the Appian Litigation in the 2021 10-K (and in the following quarters in which it repeated similar disclosures). There are no allegations—and the

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DRC did not observe any evidence—that the Independent Directors, Mr. Stillwell, or Mr. Trefler were privy to information that would contradict the Company's public statements concerning the Appian Litigation. To the contrary, and as described *supra* at 56-59, the evidence reflects that the Company followed its robust, ordinary course earnings procedures and controls to ensure the accuracy of its disclosures. Moreover, the Independent Directors, Mr. Stillwell, and Mr. Trefler were actively involved in the earnings process through which those disclosures were vetted and the DRC did not observe any red flags or warning signs putting these individuals on notice that the disclosures were inaccurate or misleading.[44]

More specifically, with respect to Pegasystems' process for disclosing the Appian Litigation in the 2021 10-K, Mr. Stillwell and/or Mr. Trefler participated in at least five formal meetings with counsel and other relevant stakeholders to draft the Company's disclosure, which included (i) evaluating public disclosures of similarly situated companies, (ii) the Audit Committee reviewing and discussing with Mr. Stillwell different disclosure possibilities, and (iii) the full Board, including Mr. Trefler, receiving draft iterations of the filing for their review and approval. In addition, the Company sought and received advice from lead trial counsel, who was best positioned to assess the Company's substantive disclosures on the Appian Litigation, including the merits of Appian's claims and Pegasystems' defenses.

Following the 2021 10-K, the Company filed an 8-K announcing the jury verdict, its view of that verdict, and its preliminary perspective on an appeal, and repeated similar disclosures in

[44] As reflected in the 2021 10-K, the Company's disclosure concerning the Appian Litigation also expressly noted that there was "uncertainty as to how a jury may rule." 2021 10-K, at 23, 63. Attempts to provide investors with warnings of risks generally weaken the inference of scienter. *Fire & Police Pension Ass'n of Colo. v. Abiomed, Inc.*, 778 F.3d 228, 243 (1st Cir. 2015) (quoting *City of Dearborn Heights Act 345 Policy & Fire Ret. Sys. v. Waters Corp.*, 632 F.3d 751, 760 (1st Cir. 2011)).

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subsequent quarterly and annual public filings.[45] These disclosures likewise underwent the same rigorous vetting process. They also benefited from additional review by appellate counsel, who were well positioned to analyze the Company's public filings in the context of the anticipated appeal's strengths and weaknesses.

The Virginia Court of Appeals' reversal of the trial judgment on multiple grounds further supports the appropriateness and accuracy of Pegasystems' post-trial disclosures. The litany of relevant evidence that the appellate panel found that the trial court either had wrongly excluded or mischaracterized in its jury instructions also undercuts any argument that earlier assertions of strong defenses were either inaccurate or made in bad faith. Further, the SEC's determination, following its own independent investigation, not to pursue an enforcement action related to Pegasystems' disclosure and accounting decisions concerning the Appian Litigation, lends additional support for the reasonableness of those decisions.

Witness accounts reflect that the Company's attorneys seriously evaluated the strengths of the Company's legal strategy, ensured the Company's position was in good faith and reasonable, and took a hard look the Company's draft disclosures to ensure the Appian Litigation and the Company's position were appropriately described. The DRC did not identify red flags that would plausibly have signaled to the Independent Directors, Mr. Stillwell, or Mr. Trefler that the Company's legal position, and the related disclosures, were not otherwise in good faith or reasonable in light of Virginia law. *See Paraflon Invs., Ltd. v. Fullbridge, Inc.*, 2019 U.S. Dist. LEXIS 134851, at *23-24 (D. Mass. Aug. 9, 2019) ("Good faith…is a defense to scienter because defendants cannot intend to deceive if they acted in good faith.") (citing *Backman v. Polaroid*

[45] The Company also publicly filed the Complaint in the Massachusetts Litigation and did not seek to seal such materials, further undercutting any argument that the Company tried to conceal the Appian Litigation from shareholders.

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Corp., 839 F.2d 1405, 1418 (1st Cir. 1990)), *aff'd*, 960 F.3d 17 (1st Cir. 2020). Nor did the DRC identify any evidence whatsoever of the Independent Directors, Mr. Stillwell, or Mr. Trefler having pressured stakeholders to downplay the Appian Litigation's seriousness or distort the Company's view on the strength of its appeal.

(b) *Statements Concerning Competitors*

Certain of the Demands take issue with Pegasystems' failure to list Appian as a competitor in the Company's public disclosures. As a preliminary matter, it is difficult to understand how a decision to list or not list a particular company as a competitor would be material under the securities laws; and a securities claim likely would (and should) fail on that basis alone. But, focusing on scienter, there simply is no support in the record to suggest that the Independent Directors, Mr. Stillwell, or Mr. Trefler purposefully or recklessly withheld material information on how Pegasystems' competes with Appian. The DRC did not identify any evidence from the documentary record or witness accounts to suggest that Pegasystems' transition from explicitly naming its primary BPM competitors, including Appian, in its public filings was intended to downplay competition with Appian or any other competitor. Instead, many witnesses clearly and consistently explained that only a subset of Pegasystems' business competes against Appian's business, which is consistent with both the public and confidential materials the DRC reviewed. Management witnesses, such as Mr. Akgonul and Mr. Schuerman, recounted that while Appian was, and continues to be, part of Pegasystems' competitive landscape, the Company never viewed them as one of their direct competitors. Mr. Trefler reported that, historically, Pegasystems viewed IBM as a more direct, comparable competitor. In light of the forgoing, it is unsurprising that the DRC identified no evidence suggesting the Independent Directors, Mr. Stillwell, or Mr. Trefler had information that would have supported their challenging the Company's decision concerning public disclosures about Pegasystems' competitors. *See* G. L c. 156D, § 8.30(b)(1) (directors are

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entitled to rely on "officers or employees of the corporation whom the director reasonably believes to be reliable and competent with respect to the information … presented"); *see id.* § 8.42(b)(1) (same for officers).

(c) *Statements Concerning Sales and Marketing Practices and Intellectual Property*

With respect to the Demands' challenges to statements concerning Pegasystems' sales and marketing practices and intellectual property, the Demands allege that those statements were false and/or misleading in light of Pegasystems' failure to disclose its "illegal" competitive intelligence practices, including the Company's engagement of Mr. Zou.

As described elsewhere in this Report, the DRC does not believe that the Company misappropriated any of Appian's trade secrets or that any information gleaned from Appian was used in a material way to change the Company's approach or to benefit the Company financially. But even setting aside challenges to the legality of the underlying competitive intelligence practices, the DRC identified no evidence reflecting—and the Demands do not suggest—that the Independent Directors or Mr. Stillwell knew of such practices when the Company made the challenged disclosures. Nor is there any evidence that these competitive intelligence practices were raised to the Independent Directors or Mr. Stillwell and disregarded.

With respect to Mr. Trefler, the Demands allege that when the Company made the challenged statements, Mr. Trefler knew, or should have known, that employees engaged in illegal competitive intelligence practices. The DRC concludes otherwise. Although Mr. Trefler was included on limited correspondence and a small subset of meeting invites with or related to Mr. Zou, he does not appear to have met substantively with Mr. Zou, discussed the particulars of his engagement with Mr. Petronio, or been advised by Mr. Petronio or anyone else of the specific contours of Mr. Zou's consulting work. The DRC also credits Mr. Trefler's statements in his

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interview that he did not believe the conduct represented in the correspondence he received about Mr. Zou reflected the misappropriation of trade secrets, a view that is consistent with the Company's legal position, as expressed both at trial and in the Appian Appeal, and the DRC's own analysis. *See In re Credit Suisse First Boston Corp. (Agilent Techs., Inc.) Analyst Rep. Sec. Litig.*, 431 F.3d 36, 48 (1st Cir. 2005) ("[T]he scienter element focuses on the speaker's subjective intent.").

Mr. Trefler recounted that, at all times, he reasonably believed that the Company's disclosures were appropriate, especially in light of the Company's extensive internal controls around the earnings process and involvement of legal counsel, and the DRC did not identify evidence to undercut Mr. Trefler's assertion. For example, the DRC identified no contemporaneous internal Company documents that suggest Mr. Trefler possessed information at odds with the Company's public statements, and there is no evidence of Mr. Trefler acting out of self-interest. *See Geffon*, 249 F.3d at 36. To the contrary, Mr. Trefler is the largest beneficial owner of Pegasystems' securities (with roughly 50% economic ownership) and thus has every incentive to ensure the Company is acting in good faith, taking reasonable legal positions, and appropriately communicating with the market. Mr. Trefler is strongly aligned in interest with the public shareholders.

(d) *Insider Trading Allegations*

The Demands allege that the Independent Directors, Mr. Stillwell, and Mr. Trefler engaged in insider trading. Although "[i]nsider trading cannot establish scienter on its own," *Mississippi Public Employees' Retirement System v. Boston Scientific Corp.*, 649 F.3d 5, 29 (1st Cir. 2011), contemporaneous insider trading can contribute to a finding of scienter, *see New Jersey Carpenters Pension & Annuity Funds v. Biogen IDEC, Inc.*, 537 F.3d 35, 55 (1st Cir. 2008). For corporate officials' stock sales to support an inference of scienter, the trading must be, "at a minimum, …

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unusual, well beyond" those individuals' normal trading patterns. *Abiomed, Inc.*, 778 F.3d at 246. Use of prescheduled 10b5-1 trading plans will negate an inference of scienter. *In re Bos. Sci. Corp. Sec. Litig.*, 646 F. Sup. 3d 249, 286 (D. Mass. 2022).

The Demands allege that the Independent Directors, Mr. Trefler, and Mr. Stillwell traded on the basis of MNPI during the pendency of the Appian Litigation. Mr. Trefler did not trade during the period in question. With respect to the Independent Directors and Mr. Stillwell, the DRC considered all of the trades at issue in the context of three relevant time periods: (i) the May 2020 filing of the Appian Litigation through the November 2021 production of Appian's expert damages report (that is, the Malackowski Report); (ii) the November 2021 Malackowski Report release through the December 20, 2021 commencement of the Company's routine trading blackout; and (iii) December 21, 2021 through the May 9, 2022 Appian verdict. With regard to the period between the filing of the Complaint and the Malackowski Report's production, the DRC found that the Company very reasonably did not view the litigation as material and the Independent Directors and Mr. Stillwell only received high level, routine updates. As such, any challenged trades during this period could not plausibly have been on the basis of Appian Litigation-related MNPI. Between the Malackowski Report's production in late November 2021 through December 20, 2021, even assuming that the Independent Directors and Mr. Stillwell were privy to Appian's expert report estimating more than $4 billion in damages (and the DRC's investigation reflects that many of them were not), all trades by those individuals were executed pursuant to 10b-5 plans and could not have been on the basis of Appian Litigation-related MNPI. Finally, between December 20, 2021 and the Appian Litigation verdict, only Mr. Stillwell sold Pegasystems securities and those sales were pursuant to a 10b-5 plan. Thus, "[w]hile there were stock trades during th[e]

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[pendency of the Appian Litigation], they [do] not suggest there was trading based on insider information." *Bos. Sci, Corp.*, 649 F.3d at 29.

2. Alleged Failure to Accrue and Disclose a Loss Contingency

The Demands allege that the Independent Directors, Mr. Stillwell, and Mr. Trefler violated Section 10(b) and Rule 10b-5 because the Company's publicly filed financial statements for the period May 2020 through the dates of the Demands were false and misleading in that the Company did not accrue and disclose a loss contingency in connection with the Appian Litigation. In determining whether a company needs to accrue and/or disclose a loss contingency, courts generally will look to the Generally Accepted Accounting Principles ("GAAP"). Under GAAP, a loss contingency is "[a]n existing condition, situation, or set of circumstances involving uncertainty as to possible loss to an entity that will ultimately be resolved when one or more future events occur or fail to occur." ASC 450-20-20. Loss contingencies are taken when they are deemed both "probable" and estimable. *Id.* Courts consistently have held that GAAP rules like ASC 450 "tolerate a range of 'reasonable' treatments, leaving the choice among alternatives to management." *Thor Power Tool Co. v. C.I.R.*, 439 U.S. 522, 544 (1979); *see also Greebel v. FTP Software, Inc.*, 194 F.3d 185, 205 (1st Cir. 1999); *In re Segue Software, Inc. Sec. Litig.*, 106 F. Supp. 2d 161, 170 (D. Mass. 2000). Moreover, courts appreciate that "it is difficult [for management] to predict even the minimum amount for which a company may be liable." *Salim v. Mobile Telesystems PJSC*, 2021 WL 796088, at *8 (E.D.N.Y. Mar. 1, 2021), *aff'd*, 2022 WL 966903 (2d Cir. Mar. 31, 2022) (summary order); *Menaldi v. Och-Ziff Cap. Mgmt. Grp. LLC*, 277 F. Supp. 3d 500, 516 (S.D.N.Y. 2017) ("ASC 450 is not a reasonably simple and straightforward accounting rule…. The rule requires many judgment calls in deciding how to respond to contingencies."). The Virginia Court of Appeals' reversal of the damages award underscores the

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inherent complexity of contested litigation and further supports the reasonableness of the Company's accrual decision making.

The DRC also noted that the SEC conducted its own investigation of Pegasystems' accounting treatment related to the Appian Litigation and elected not to pursue enforcement action against the Company.

The DRC further considered that to bring a Section 10(b) and 10b-5 claim on the basis of an accounting irregularity, there must also be a strong inference of scienter. Even if the facts and circumstances were to suggest there should have been a different accounting outcome (*e.g.*, an accrual of a litigation contingency)—and here they do not—a derivative plaintiff would still need to plead facts evidencing scienter to adequately prove a securities fraud claim premised on ASC 450. *See Lloyd v. CVB Fin. Corp.*, 811 F.3d 1200, 1207 (9th Cir. 2016) ("[T]he mere publication of inaccurate accounting figures…without more, does not establish scienter."); *see also Lenartz v. Am. Superconductor Corp.*, 879 F. Supp. 2d 167, 184-85 (D. Mass. 2012). Scienter requires facts showing the alleged wrongdoers "knowingly and recklessly engaged in an improper accounting practice." *Lloyd*, 811 F.3d at 1207.

In light of the extensive efforts diligently undertaken by the key stakeholders charged with assessing whether a litigation contingency was necessary (as described below), including Mr. Stillwell, Mr. Kouninis, and the Audit Committee, the DRC has not identified any evidence that the Independent Directors, Mr. Stillwell, or Mr. Trefler exhibited "reckless disregard for a known or obvious duty." *Menaldi*, 277 F. Supp. 3d at 516. For example, there are "no allegations that [the] company's external auditor[] counseled against a[n] [accounting] practice or that the Company's CFO was aware that the [accounting] practice was improper." *Lloyd*, 811 F.3d at 1207. Nor did the DRC identify that any of the Independent Directors, Mr. Stillwell, or Mr. Trefler

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were aware of accounting inaccuracies and turned a blind eye, failed to investigate suspicious discrepancies, or circumvented internal controls to achieve a desired accounting result.

(a) *Management Reasonably Concluded No Litigation Contingency Required in Connection with Anticipated Damages Arising from the Appian Litigation*

The Demands allege that the Company should have accrued a loss contingency in connection with the Appian Litigation, though they are silent as to when and in what amount the contingency should have been accrued. Generally speaking, a company must accrue a loss contingency when, based on available information, it is both (i) "probable that a liability has been incurred" and (ii) the amount of that liability can be reasonably estimated. *See Godinez v. Alere Inc.*, 272 F. Supp. 3d 201, 215 (D. Mass. 2017) (citing ASC 450-20-25-2). A future event is "probable" when it is "likely to occur." ASC 450-20-20. In assessing whether a loss is "reasonably estima[ble,]" when it is probable that a liability has been incurred and there is information available that indicates the estimated loss falls within a range of amounts, then "some amount of loss has occurred and can be reasonably estimated." ASC 450-20-25-5. Additionally, a company must *disclose* a loss contingency if it is "reasonably possibl[e]," meaning "the likelihood that a loss will occur is more than remote but less than likely." *Godinez*, 272 F. Supp. 3d at 215; *see also* ASC 450-20-50-3. Disclosure of reasonably possible losses must include "the nature of the contingency" and an "estimate of the loss or range of loss." ASC 450-20-50-4. If a loss cannot be estimated, an entity must state that an "estimate cannot be made." *Id.* at -3 & -4.

In the context of litigation, accounting guidance specifically directs a company named as a defendant to assess whether it needs to accrue and/or disclose a loss contingency. ASC 450-20-55-10. When determining whether accrual and/or disclosure is required with respect to pending litigation, a company should consider (i) when the cause of action arose, (ii) the degree of probability of an unfavorable outcome, and (iii) the ability to reasonably estimate loss. *See id.*;

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see also Axar Master Fund, Ltd. v. Bedford, 308 F. Supp. 3d 743, 758 n.88 (S.D.N.Y. 2018), *aff'd*, 806 F. App'x 35 (2d Cir. 2020) (summary order).

The DRC's review of the applicable evidence reflects that for the period 2Q20 through the date of the Demands, Company management, in consultation with accounting personnel, including Mr. Stillwell and Mr. Kouninis, and Deloitte, with oversight of the Audit Committee, applied reasonable judgment when assessing whether the Company needed to accrue a loss contingency in connection with the Appian Litigation.

During the period 2Q20 to 4Q21 (*i.e.*, when the Appian Litigation was filed through the quarter before the Second Amended Complaint was filed), management's informed perception was that the Appian Litigation was a normal course business litigation and, given the early stage of the litigation, management understood there to be substantive issues around Appian's alleged damages. In light of the inherent uncertainty associated with the litigation, and in appropriate consultation with legal, finance, and accounting, management determined that any potential claim by Appian was neither probable nor estimable.

Following the filing of the Second Amended Complaint, in preparation for the 202110-K, the record reflects that management carefully reevaluated whether the Company needed to accrue a loss contingency in light of Appian increasing its damages to $3 billion. At that time, despite Appian increasing its damages, Pegasystems, based on inputs that included updates from outside counsel and the trial team, believed that the Company still had strong legal arguments heading into the trial scheduled for that spring. Based on Virginia law, the Company believed that none of the purported secrets at issue amounted to legal trade secrets, which would have been a complete bar to recovery. Moreover, that same month, Pegasystems had successfully achieved certain favorable rulings at the plea in bar, including the dismissal of a claim, which was a further data point in

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support of the strength of the Company's legal position. Accounting and legal personnel also evaluated the approach taken by other companies similarly faced with the uncertainty of litigation.

Factoring in all this information, management determined, in consultation with the relevant stakeholders, that the Company could still not reasonably estimate possible damages or a range of possible damages in light of the uncertainty as to how a jury may rule and any existing grounds for appeal. Accordingly, and since an unfavorable verdict was only "reasonably possible," the conditions of ASC 450 were not met. *See* ASC 450-20-55-31. In theory, given this uncertainty, anticipated damages could range anywhere from $0 to the $3 billion Appian claimed. "Such an expansive loss range is unreasonable and requiring that [Pegasystems'] disclose it would render [ASC 450]… meaningless." *In re Bank of Am. AIG Disclosure Sec. Litig.*, 980 F. Supp. 2d 564, 583-84 (S.D.N.Y. 2013), *aff'd*, 566 F. App'x 93 (2d Cir. 2014) (summary order). When assessing the viability of accrual related claims, the DRC observed that Pegasystems' decision not to accrue under these circumstances is not an outlier, as other similarly situated public companies have not accrued losses for ongoing litigation prior to an adverse judgment. *See, e.g.*, Oracle Form 10-Q (filed Sept. 13, 2021), at 21.

Management again reevaluated whether a litigation contingency was necessary following the Appian Litigation verdict in May 2022. Pegasystems had a $2.04 billion claim rendered against it (which, of course, was a matter of public record). However, the Company believed the trial court committed significant legal errors and that the verdict could be (and likely would be) overturned, in whole or in part, based on the arguments that were thereafter raised in the Appian Appeal. The Company's judgment in that regard proved to be entirely correct. Management was also guided by accounting precedent that advised an adverse legal judgment does not automatically

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trigger the accrual of a loss contingency.[46] *See also, e.g.*, *Luna v. Marvell Tech Grp. Ltd.*, 2016 WL 5930655, at *5 (N.D. Cal. Oct. 12, 2016) ("[T]he existence of an adverse judgment alone does not imply that a litigation loss is 'probable.'"). In light of all these factors, management determined that the likelihood that a liability had been incurred was below the "probable" threshold outlined in ASC 450. The DRC observed that management's decision to forgo an accrual in light of the verdict is in line with that of other similarly situated public companies. For example, following a $3 billion verdict against Oracle in the *Oracle v. HP* litigation, Oracle made no accrual for a loss while its appeal remained ongoing because Oracle continued to believe it had meritorious defenses against HP's claims and as such, Oracle could not estimate a reasonable possibility of loss due to the complexities and uncertainty surrounding the process and nature of the claims.[47]

Throughout the pendency of the Appian Litigation and following the verdict, because the Company was unable to reasonably estimate possible damages or a range of possible damages, the Company informed investors in each of its quarterly and annual filings that it was unable to provide an estimate of loss for the Appian Litigation. *See, e.g.*, 2021 10-K, at 63; 2Q22 10-Q, at 18. *See In re Bank of Am. AIG*, 980 F. Supp. 2d at 584 ("[P]laintiffs fail to allege a violation of ASC 450 because [the defendant] adequately disclosed the nature of the contingency at issue…and stated

[46] *Cf.* ASC 450-20-55-23 (noting that following an unfavorable verdict, accrual is necessary when the party ascertains that the damages amount will be for not less than a certain amount).

[47] Similarly, the DRC observed that despite a $4.7 billion adverse jury verdict rendered against Johnson & Johnson ("J&J") in *Ingham v. Johnson & Johnson*, No. 1522-CC10417-01 (Mo. Cir. Ct. Dec. 19, 2018), J&J did not accrue a loss either before the verdict or while the appeals process was ongoing. J&J only recorded a loss in connection with the litigation after the verdict against it was reduced to $2.1 billion on appeal and the highest state court announced its decision not to hear J&J's further appeal. *See also* NETGEAR, Inc. Response to SEC Regarding FY 2021 Form 10-K (May 6, 2022), https://www.sec.gov/Archives/edgar/data/1122904/000156459022018593/filename1.htm (explaining that in determining whether to accrue a loss contingency, the company considered, among other things, the "uncertainty as to the outcome of pending appeals, motions or settlements"); Dow Chemical Co. Response to SEC Regarding FY 2013 Form 10-K (May 16, 2013), https://www.sec.gov/Archives/edgar/data/29915/000002991514000022/filename1.htm (explaining a decision not to accrue a loss for a $1.06 billion antitrust verdict in light of the company's position that based on applicable law, the class certification and verdict were likely to be overturned on appeal).

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that it could not estimate losses for the…suit [at issue.]"); *see also Luna*, 2016 WL 5930655, at *8 ("[A]ny inference that defendants intended to deceive investors is negated by [the company's] full disclosure of the [litigation] judgment and the company's decision not [to] accrue a reserve.").

Of course, each of these investors had *complete information*, as they were well aware of the widely reported and publicly disclosed $2.04 billion verdict levied against the Company.

The DRC recognizes that many factors contribute to a decision regarding whether or not to accrue, which require complex judgments about future events and projected outcomes. That the Virginia Court of Appeals ultimately vacated the jury's damages award further illustrates the uncertainty of contested litigation and the accuracy of the Company's assessment that, even after the verdict was rendered, damages were neither probable nor estimable. The DRC's review of the record reflects that management was appropriately engaged in evaluating the different factors proffered by the accounting guidance, consulted with the relevant stakeholders, and applied reasonable judgment when determining whether an accrual was required. For example, the record is clear that every quarter, the decision on whether to accrue was the subject of repeated discussion and analysis by Mr. Kouninis and Mr. Stillwell, among others in accounting and finance, in-house and outside counsel, and the company's outside auditor, with oversight by the Audit Committee. Witnesses told the DRC that the question of whether to accrue was the topic of healthy discussion, but nobody, including Deloitte, viewed management's decision as anything other than reasonable. The SEC investigated Pegasystems' accounting treatment related to the Appian Litigation and opted not to pursue enforcement action against the Company. In short, the DRC is not aware of evidence leading it to conclude that management's decision was outside the range of reasonable alternative disclosures, especially in light of similarly situated public companies not accruing under similar circumstances.

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(b) *Management Reasonably Concluded No Litigation Contingency Required in Connection with Exploratory Settlement Discussions*

The DRC also considered whether the Company was obligated to accrue and disclose a loss contingency in connection with Pegasystems' settlement-related discussions with Appian during the pendency of the Appian Litigation. The Company preliminarily explored settlement with Appian during two primary time periods: (i) the March 2021 mediation and (ii) immediately before and during trial.

With respect to the March 2021 mediation, as witnesses consistently reported, the parties' positions were so far apart that management did not believe any settlement amount was probable or estimable. The witnesses' accounts are entirely consistent with and corroborated by the fact that the mediation was terminated quickly in light of, among other things, Pegasystems' view that Appian should pay to resolve both the Appian Litigation and Massachusetts Litigation and Appian's contrary position.

With respect to the informal, settlement-related discussion that occurred in advance of and during the Appian Litigation trial, based on witness accounts and contemporaneous communications, the DRC found that the Company never had a realistic expectation of settlement, because the parties' positions remained too far apart, with no discernible progress toward bridging the gap. While exploratory discussions were underway in early 2022, management consulted accounting literature to assess whether an accrual was necessary. Such accounting literature directs companies to distinguish between a formal offer and exploratory settlement amounts, with only the former requiring an accrual. Deloitte Roadmap, at 2.4.1 (Offer to Settle Litigation). In determining whether a formal offer has been made, such guidance directs the company to consider whether approval from additional members of management or the board of directors is required. *Id.* Email correspondence and witness accounts make clear that management understood that the

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Board had to authorize any concrete settlement offer made by Pegasystems, and at no point throughout the Appian Litigation did the Board authorize any settlement amount. Taking these factors together, management assessed that these exploratory settlement communications between Pegasystems and Appian neither made it probable that a liability had been incurred under ASC 450 nor established a low-end range of any potential settlement for purposes of triggering the accrual of a loss contingency. These settlement-related discussions were timely reported to Deloitte.

In light of the gulf separating the parties' respective potential settlement numbers, the Board never authorizing a settlement amount, and management's transparency with outside auditors, the DRC credits management's determination that the exchanges between Pegasystems and Appian did not amount to formal settlement offers and therefore, an accrual was not required. The DRC observed that management's assessment is consistent with approaches adopted by other public companies who have explored settlement in ongoing litigations but did not accrue a contingency.[48] The DRC also considered the SEC's post-investigation determination not to seek enforcement action against the Company for its accounting treatment relating to the Appian Litigation. Taking the evidence together, the DRC cannot conclude that management's decision was outside the range of reasonable alternative approaches.

D. Waste of Corporate Assets

The Larkin, Sagfors, and Birch Demands allege that the Fiduciaries wasted corporate assets (i) in connection with the Appian Litigation and related actions, including the Securities Class

[48] *See, e.g.*, Marvell Tech. Grp. Ltd., Response to SEC Regarding FY 2013 Form 10-K (May 24, 2013), https://www.sec.gov/Archives/edgar/data/1058057/000119312513236059/filename1.htm ("although required mediations have occurred…our positions and those of [the opposing party] are so far apart that we do not believe any settlement amount is probable or estimable at this time"); Autoliv, Inc. Response to SEC regarding FY 2014 Form 10-K (May 12, 2015), https://www.sec.gov/Archives/edgar/data/1034670/000119312515184136/filename1.htm (noting no litigation accrual because "there existed a significant difference in the parties' respective positions regarding a potential settlement").

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Action, by causing the Company to incur legal liability, pay excessive legal fees in defending itself, and compromise future financing for the Company, and (ii) by approving the Pegasystems' repurchase of stock at purportedly inflated prices.

In Massachusetts, "[a]n officer o[r] director of a corporation is liable for waste of corporate assets when that person removes or diverts corporate assets for which the corporation receives no benefit." *Dusel v. Factory Mut. Ins. Co.*, 2021 U.S. Dist. LEXIS 131269, at *21 (D. Mass July 14, 2021); *see also Henderson v. Axiam*, 1999 Mass. Super. LEXIS 580, at *53 (Mass. Super. June 22, 1999) ("The essence of a claim of waste of corporate assets is the diversion of corporate assets for improper or unnecessary purposes."), *aff'd*, 59 Mass. App. Ct. 1107 (2003). Liability for corporate waste requires more than "ordinary inattention and/or inadvertence [that] does not exceed gross negligence." *Smith*, Mass. Super. LEXIS 668 at *29. Instead, a successful claimant must prove "the directors' decision [regarding the use of corporate assets] was so egregious or irrational that it could not have been based on a valid assessment of the corporation's best interests." *Id.* at *28. As such, in determining whether an officer or director wasted corporate assets, Massachusetts courts look for evidence that such person was "motivated by bad faith or…received improper benefits." *Id.* at *29.

As requested by the Demands, the DRC diligently investigated whether there is evidence that the Fiduciaries wasted corporate assets in connection with the Company's expenditures related to the Appian Litigation or stock repurchase program. The DRC concludes that there is not a valid basis to support a claim for waste of corporate assets against the Fiduciaries.

With respect to the costs associated with the Appian Litigation and related actions,[49] any theory of waste is premised on the Fiduciaries engaging in the misconduct set forth in the

[49] The costs associated with the Appian Litigation include any ultimate damages award, which is subject to the outcome of further appellate litigation and any retrial, as well as associated costs, such as potential

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Demands, which, as discussed *supra*, the DRC has not found evidence to support.[50] Even putting this aside, the DRC has not identified evidence that the Fiduciaries caused the Company to incur expenses related to such litigations in bad faith or such that they "could not have been based on a valid assessment of the corporation's best interests." *Smith*, Mass. Super. LEXIS 668 at *28.

With respect to legal fees incurred in connection with the Appian Litigation, the record reflects that these were not incurred in bad faith or unreasonably. The record evidences that the Fiduciaries acted reasonably in responding to the Appian Litigation, as discussed *supra*, and, given that the Company ultimately faced up to $3 billion in damages, the DRC believes that it was in the Company's best interest to secure highly qualified legal counsel to defend against Appian's claims. Nor does the DRC find evidence to support a viable waste claim based on an alleged failure to settle the Appian Litigation prior to the verdict. Rather, the record reflects that at no point were Appian and Pegasystems sufficiently aligned such that settlement was reasonably possible and witnesses with whom the DRC spoke unanimously believed, and continue to believe, that Pegasystems had strong defenses to Appian's claims--a belief that was only reinforced by the Virginia Court of Appeals' determination that the jury's verdict and damages award resulted from a series of serious legal errors.

With respect to Pegasystems' stock repurchases, the DRC has not identified evidence that Pegasystems' directors, who were responsible for approving the Company's stock repurchase

impact to Pegasystems' ability to secure financing. With respect to the latter, the DRC notes that it did not observe any evidence that Pegasystems' ability to secure financing was affected before the Virginia Court of Appeals vacated the initial damages award, and any future hypothetical impact is necessarily highly speculative.

[50] Moreover, any potential claim for waste would be premature, as the Appian Litigation is still on appeal. *In re Symbol Tech. Sec. Litig.*, 762 F. Supp. 510, 516-17 (E.D.N.Y. 1991) ("Unless plaintiff alleges and proves the[] violations, defendants cannot be held liable for costs of defending a potentially baseless suit….[Where] no judgement has been rendered, nor a settlement reached…no injury has been sustained which [a] plaintiff may sue to recover."); *see also In re Isolagen Inc. Sec. & Derivative Litig.*, 2007 WL 110127 (E.D. Pa. Apr. 10, 2007) ("Derivative shareholder suits are consistently foreclosed when they merely allege damages based on the potential costs of investigating, defending, or satisfying a judgement or settlement for what might be unlawful conduct.").

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program, acted in bad faith or against the Company's best interests when causing Pegasystems to repurchase purportedly inflated stock. As a preliminary matter, both the documentary record and witness accounts reflect that Pegasystems' directors genuinely believed that the Company had strong defenses to Appian's claims and, thus, did not believe that the Company's stock was inflated at any point before it disclosed the Appian Litigation to the market. Nor did the DRC identify evidence that any purported inflation in Pegasystems' stock price influenced the Board's decision to authorize stock repurchases. Quite the contrary, the record reflects that Pegasystems, since 2004, has had a systematic and robust stock repurchase program, which the Board has continued to reassess, and reauthorize, on a roughly annual basis. During the course of the Appian Litigation, when the Board in good faith believed that Pegasystems had a strong basis to prevail, the stock repurchase program continued as usual. Shortly after the verdict came down in Appian's favor, the Board reassessed this decision and after considering the impact of the Appian Litigation on Pegasystems' future financial performance, and getting advice from Pegasystems' governance counsel and finance team, the Board, in good faith, resolved to ratify its existing authorization of the share repurchase program. Because the Board diligently considered Pegasystems' best interests in connection with approving the share repurchase program, and the DRC identified no evidence suggesting this decision "could not have been based on a valid assessment of the corporation's best interests," it concludes that the Board did not waste corporate assets in authorizing this program. *Smith*, Mass. Super. LEXIS 668, at *28.

E. Unjust Enrichment

Certain of the Demands allege that the Fiduciaries were unjustly enriched because they either benefitted financially from the improper conduct, received bonuses, stock options, or similar compensation from Pegasystems that was tied to the performance or artificially inflated valuation of Pegasystems' stock, or received compensation that was unjust in light of their "bad faith"

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conduct. Unjust enrichment is a claim based in equity premised on the principle that a person who has been provided a benefit at the expense of another is required to make restitution to the defrauded party. *See Massachusetts v. Mylan Labs.*, 357 F. Supp. 2d 314, 323 (D. Mass. 2005); *see also Lawton v. Nyman*, 327 F.3d 30, 45-46 (1st Cir. 2003). Restitution means that the defrauded party is restored to the position they formerly occupied either by the return of something they formerly had or by the receipt of its equivalent in money. *Mylan Labs.*, 357 F. Supp. 2d at 323. To obtain restitution on the basis of an unjust enrichment claim, there must be (1) "[a] benefit conferred upon the defendant by the plaintiff;" (2) "[a]n appreciation or knowledge by the defendant of the benefit;" and (3) "[t]he acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value." *Patel v. Emerald P'ship, Ltd.*, 2009 WL 1058356, at *24 (Mass. Super. Apr. 9, 2009). An unjust enrichment theory is often asserted as a corollary to a breach of fiduciary duty claim. *See id.* When there is no evidence of a breach of fiduciary duty claim, courts will typically dismiss an unjust enrichment claim, as ordinary salaries, benefits, and bonuses paid to directors and officers is insufficient to allege an unjust enrichment claim. *See id.*; *see also In re Pfizer Inc. S'holder Deriv. Litig.*, 722 F. Supp. 2d 453, 465-66 (S.D.N.Y. 2010).

The DRC's investigation did not yield evidence to support a valid claim for unjust enrichment. The Demands' allegations of unjust enrichment are premised on underlying improper misconduct but, as discussed *supra*, the DRC did not identify violations of Section 10(b), Rule 10b-5, or breaches of fiduciary duties. "[E]ven assuming…that wrongdoing occurred…this is not sufficient to state a claim for unjust enrichment against the [Fiduciaries]," because there is no "relationship between the [purported] enrichment…and impoverishment of [Pegasystems]." *In re Cap. One Deriv. S'holder Litig.*, 952 F. Supp. 2d 770, 783 (E.D. Va. 2013). For example, there is

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no evidence that the "compensation received by each [of them] was paid without justification." *Taylor v. Kissner*, 893 F. Supp. 2d 659, 674 (D. Del. 2012).

Nor did the DRC identify that the Fiduciaries received any monetary compensation that was not authorized or of "extraordinary magnitude." *See In re Pfizer*, 722 F. Supp. 2d at 465-66. To the contrary, the Compensation Committee approved the salaries of senior executives, including those challenged in the Demands, through their normal course processes. For example, as reflected in Compensation Committee meeting minutes, on an annual basis, the committee reviewed each executive officer's elements of compensation together with market data and analysis, and determined the appropriate level of compensation. Specific to Mr. Trefler, in March 2020 and March 2021, the Compensation Committee set his salary, despite his annual base salary continuing to fall below the market standard. Since the Compensation Committee was "[un]aware of wrongful activity," there are no facts "giving rise to a reasonable doubt that the decision to pay allegedly wrongdoing officers was [anything other than] a valid exercise of business judgment." *In re Bank of N.Y. Mellon Corp. Forex Transactions Litig.*, 991 F. Supp. 2d 457, 464 (S.D.N.Y. 2013).

In the absence of underlying wrongdoing, the DRC concludes that there is not evidence to support a successful claim that the Fiduciaries were unjustly enriched.

VII. Other Factors Relevant as to Whether to Bring an Action

Although, for all of the reasons set forth in this Report, the DRC unanimously believes that the Company does not have meritorious claims against the Fiduciaries, the DRC also has considered other relevant factors that could weigh for or against pursuing the legal claims discussed herein. The DRC's consideration of those other factors reinforces its view that it would not be in the best interest of the Company to pursue the claims alleged in the Demands.

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- **Lack of Bad Faith**. The fact that the DRC found no evidence to suggest that any of the Fiduciaries acted in bad faith, received an improper personal benefit at the Company's expense, or were otherwise driven by self-interest, played a significant part in the DRC's analysis and ultimate conclusions. Several witnesses expressed to the DRC that, in hindsight, they might have made different choices or tried to guide or scrutinize certain activity more carefully to avoid even the appearance of misconduct. However, the evidence leaves the DRC confident that the Fiduciaries were acting in what they reasonably believed to be the Company's best interests.

- **Reputational Harm**. The DRC believes that entangling the Company in additional, long-term litigation and further emphasizing actions taken in connection with Appian and Mr. Zou could inflict reputational harm on the Company and, by extension, could damage its shareholders. Rather than pursuing the claims requested by the Demands, which the DRC believes lack factual and legal merit, the DRC concludes that both Pegasystems' and its shareholders' interests would be better served by focusing on Pegasystems' leadership and innovation in the BPM and CRM space.

- **Cost**. The DRC has also considered the potential costs to Pegasystems if the Company were to pursue the causes of action alleged in the Demands. As discussed *supra*, Pegasystems' bylaws contain a provision indemnifying its directors and officers for liability arising out of their employment, to the extent permitted by Massachusetts law. Thus, except for liability arising out of bad faith, intentional misconduct, or a knowing violation of the law, Pegasystems must indemnify its officers and directors "against any cost, expense (including attorneys' fees), judgment, liability and/or amount paid in settlement." Amended and Restated Bylaws of Pegasystems Inc., Art. VII (eff. June 12, 2020); *see also* G. L. c. 156D, § 8.56. Because, as detailed *supra*, the DRC's investigation did not identify evidence that the Fiduciaries acted in bad faith, purposefully engaged in wrong or illegal conduct, or acted in their own self-interest, it is very likely that the Company would indemnify these individuals against any costs associated with the Company bringing claims against them, including their attorney fees, which could be substantial. In light of the DRC's belief that the probability of claims requested by the Demands ultimately being successful is quite low, the DRC believes that the potential costs of bringing claims against the Fiduciaries outweigh the benefits.

- **Distraction to Management**. The DRC considered the time commitment further litigation around the conduct alleged in the Demands would require from Pegasystems' management, and concluded that, if the Company were to pursue the claims requested by the Demands, it would divert management's attention away from their primary obligation, *i.e.*, growing profits and, by extension, increasing shareholder value. Such acute and long-term distraction from Pegasystems' management's core mission is not prudent, particularly in service of claims on which the Company is unlikely to prevail.

- **Remediation and Deterrence**. As detailed *supra*, since the conduct alleged in the Demands was brought to the Fiduciaries' attention during the course of the Appian Litigation, the Company has implemented a series of remedial measures to clarify the Company's competitive intelligence process and procedures in order to ensure there is

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proper oversight and avoid even the appearance of impropriety. Also, as discussed *infra*, the DRC is directing certain additional measures to further enhance the Company's existing compliance and governance procedures and protocols. In light of the proactive efforts already taken and the additional measures the Company will take, the DRC is confident that the type of conduct giving rise to the types of claims made in the Appian Litigation is unlikely to occur again and, thus, bringing the claims requested by the Demands is unlikely to have any substantial additional remedial or deterrent effect.

VIII. Enhancements and Other Measures the DRC Directs the Company to Implement

The DRC recognizes that, as detailed *supra*, since the Appian Litigation was filed, the Company already has undertaken various steps to improve its oversight of the Company's competitive intelligence practices to ensure that such work always is professional and ethical. These steps include having created a new training program on competitive intelligence practices, implemented quarterly meetings between employees and the in-house legal team to review competitive intelligence initiatives, and precluded access to Appian's login page from a Pegasystems premises or laptop to prevent employees from accessing information deemed by Appian to be confidential.

The DRC has concluded that the Company would benefit further from taking the following additional measures to enhance its compliance and risk framework:

- **Creation of a Risk Sub-Committee of the Audit Committee**. The DRC focused on the fact that even activity that participants genuinely understand to be lawful can yield unpredictable and potentially costly corporate liabilities. In order to further mitigate this risk moving forward, the DRC directs the Board to create a two-member sub-committee of the Audit Committee to focus on compliance and risk.
    - The Risk Sub-Committee will be responsible for (a) reviewing the risk management policies and procedures of the Company; (b) overseeing and monitoring the operation of the Company's risk management framework; and (c) identifying material risks relating to the Company's compliance with all applicable regulations, including those concerning trade secret protection and intellectual property compliance.
    - The Risk Sub-Committee will receive and review quarterly reports from the Chief Compliance Officer, or more often as necessary, concerning (a) the Company's risk management framework and policies; (b) the Company's material compliance with applicable laws and regulations, including those

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concerning trade secrets and intellectual property; and (c) any recommendations regarding the foregoing.

- The Risk Sub-Committee will serve as the primary vehicle for Board and Audit Committee oversight of the execution of the Enterprise Risk Management program at the Company.

- The Risk Sub-Committee will provide an update to the full Board at least once per financial quarter on its work and observations. The Risk Sub-Committee will include in its report its view regarding the contribution of senior management to the Company's culture of ethics and compliance and their effectiveness and dedication to ensuring the Company's material compliance with applicable laws, rules, and regulations.

- The Risk Sub-Committee will promptly report to the Audit Committee any material compliance issues or risks that may have significant financial implications or that are sufficiently material to trigger a disclosure obligation.

- The Risk Sub-Committee will have free access to management and Company employees for the purpose of doing its work. The Risk Sub-Committee will have the authority to retain separate and independent advisors or counsel to aid in fulfilling its responsibilities under its charter, which will be at the Company's expense.

- The Audit Committee will receive and review quarterly reports from the Chief Compliance Officer and the management-level disclosure committee concerning the Company's compliance with public reporting requirements, as well as internal risk assessment and internal reporting, and its oversight of the Company's compliance with applicable laws and regulations, including those relating to public disclosures about the Company's business affairs, financial reporting, and risk exposure.

- **Enhancements to the existing Management-Level Compliance and Risk Governing Committee**. For the same reasons that the DRC believes enhancing Board attention to risk is prudent, the DRC believes certain enhancements to the management-level compliance and risk committee's work are appropriate. As such, the charter of the Management-Level Complaint and Risk Governing Committee will be updated to reflect that such management-level committee will provide written updates to the Risk Sub-Committee and to the full Board on a quarterly basis. The committee's charter will be updated to reflect that such reports will include (a) the Company's material compliance with applicable laws and regulations, including those concerning trade secret protection and intellectual property compliance; (b) material changes to the Company's business, strategy, and compliance risk; (c) the risks and benefits assessment for any planned material changes thereto; and (d) the impact of any material changes to the Company's business and/or its business strategy.

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- **Enhancements to Insider Trading Policy**. The DRC believes that modest amendments to the Company's insider trading policy will facilitate more efficient record-keeping and promote continued compliance. The DRC directs the Company to amend its Trading Policy so it explicitly requires all pre-clearances be documented in writing.

- **Enhancements to Compliance Training**. Since the verdict in the Appian Litigation, the Company has increased the frequency of its compliance training. To ensure that the Company is appropriately systematizing its effort to maintain best practices with respect to competitive intelligence gathering, the DRC directs the Company to ensure the frequency of its compliance training is codified such that it holds at least (a) one annual training on the importance of compliance generally and (b) one annual training on intellectual property and trade secrets.

- **Director Education**. The DRC believes that the Board would benefit from access to additional training to help them navigate future unpredictable risks of the sort presented here. In furtherance of this effort, each director shall receive a budget of $25,000 to attend or participate in director training and continuing education. At least once every three years, directors must attend a National Association of Corporate Directors certified program or similar program. If a director has attended such a program through their service on another public company board of directors, they shall provide the Chief Compliance Officer with a certification of attendance, which will satisfy this obligation. All directors shall attend a mandatory training, conducted by the Chief Compliance Officer, concerning trade secret protection and the legal implications of misappropriation.

IX. Role of the DRC Going Forward in Light of the Appian Appeal

As noted above, the Virginia Court of Appeals recently vacated the $2.04 billion verdict in the Appian Litigation and remanded the case for a new trial. Appian has since appealed that decision to the Supreme Court of Virginia. As a result, final resolution of the Appian Litigation (whether through further appeal, retrial, or appeal of a retrial), absent settlement, likely remains years away.

It is therefore impracticable for the DRC to wait until the Appian Litigation is fully and finally resolved to finish its work and issue its Report. It is also unnecessary, in some respects, because the evaluation of potential claims against the Fiduciaries is a distinct exercise from a jury's evaluation of the civil claims by Appian against the Company. Put differently, it would be possible

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for a Virginia jury to find the Company liable to Appian while the DRC (or a court) finds no viable claims against the Fiduciaries. And the converse is true as well—it would be possible for a Virginia jury to find that the Company is not liable to Appian while the DRC (or a court) finds there to be viable claims against the Fiduciaries.

The key, for the DRC, is for the DRC to have developed a complete factual record upon which to make its own independent business judgments. To that end, the greatest importance of the Appian Litigation to the DRC's work is whether any new facts or testimony are developed through the proceedings in that litigation. With that in mind, the DRC has concluded that it will remain constituted, through the completion of the Appian Litigation, to monitor those proceedings and consider any new evidence, facts, or testimony that are developed (even though, at this advanced stage of fact development in the Appian Litigation, that seems highly unlikely).

X. Conclusion

Based on the comprehensive investigation described in this Report, the DRC has concluded that, under the applicable standards and law, no actionable misconduct occurred on the part of the Fiduciaries. The DRC did not identify evidence to support a viable claim that any director, officer, or senior executive of focus breached their fiduciary duties, violated the federal securities laws, caused corporate waste, or were unjustly enriched. Nor did the DRC identify evidence to suggest the Fiduciaries caused harm or damage to the Company in dereliction of their legal obligations. To the contrary, the record establishes that the Fiduciaries undertook and performed their duties in accordance with applicable standards under federal and Massachusetts law. Accordingly, any such claim would be without basis in fact, legally insufficient, and not actionable by Pegasystems. Moreover, in light of the expense, disruption, burden, and distraction that pursuing such claims would cause Pegasystems, its management, and its shareholders, and in light of the DRC's determination that there are not acts or omissions for which there are reasonable grounds to find

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that any of the Fiduciaries would be liable to Pegasystems, it is not in the Company's best interests to bring or pursue any litigation or other actions based on the Demands.

Therefore, the DRC unanimously rejects the Demands that the Company commence legal proceedings against any of the Fiduciaries or undertake different or additional corrective action as set forth in the Demands. Nevertheless, the DRC will ensure that measures outlined in the preceding section are implemented, and the DRC will remain constituted to monitor the proceedings in the Appian Litigation.

Dated: October 7, 2024

/s/ Christopher Lafond
Christopher Lafond, Chairman

/s/ Dianne Ledingham
Dianne Ledingham

/s/ Sharon Rowlands
Sharon Rowlands

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Exhibit 1 to DRC Report

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March 24, 2023

VIA FEDEX AND EMAIL

Board of Directors
Pegasystems Inc.
c/o Michael T. Gass, Esq.
Choate, Hall & Stewart LLP
Two International Place
Boston, MA 02110
Mgass@choate.com

Re: Confidential Demand for the Board of Pegasystems Inc. to Initiate Legal Action, and Take Necessary and Appropriate Remedial Measures

Dear Counsel:

We write on behalf of George Fielding Brenner, a stockholder of Pegasystems Inc. ("Pegasystems" or the "Company"). **If you do not represent the Company for purposes of this demand, please advise us immediately and we will forward it to the Company's Corporate Secretary for action. If we do not hear from you to the contrary by the close of business on March 29, 2023, we will treat your firm as representing the Company for the purposes set forth in this letter.** For the reasons below, Mr. Brenner hereby demands, pursuant to Mass. Gen. Laws Ch. 156D, § 7.42, that the Company's Board of Directors (the "Board") take immediate legal action to redress harm inflicted upon the Company and its shareholders from the concerted malfeasance and illegality perpetrated by stock certain officers and directors of the Company.

Standing of Mr. Brenner

Mr. Brenner is a current owner of the Company's common stock and has held such stock since April 1, 2020. Attached hereto as Exhibit A is a true and correct copy of Mr. Brenner's recent brokerage account statement documenting his continued ownership of the Company's stock.

On November 16, 2022, Mr. Brenner, pursuant to his common law rights as a stockholder of the Company and Mass. Gen. Laws Ch. 156D, § 16.02, demanded that the Company allow him via his counsel to inspect the books, records, and documents detailed in that correspondence (the "Demand"). *See Rule v. Mass. Mut. Life Ins. Co.*, 89 Mass. App. Ct. 1121 (2016) ("[S]tockholders of a corporation have a common-law right to inspect the corporation's books and records."), citing *Varney v. Baker,* 194 Mass. 239, 240-41 (1907) (setting forth the equitable basis for and history of a stockholder's common law right of inspection); *Chitwood v. Vertex Pharmaceuticals, Inc.*, 476 Mass. 667, 671 (2017) (noting that "[t]he right of inspection

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under § 16.02 is an independent right of inspection [and] is not intended to substitute for or diminish any rights of inspection that may exist under…the common law") (quotation and citation omitted).

Prior Correspondence and Relief Demanded

On or about March 17, 2023, the Company produced certain books and records it deemed responsive to Mr. Brenner's Demand. Mr. Brenner takes no position at this time concerning whether the production was completely responsive to his Demand. He, however, believes that the materials produced along with the information and documents already in the public record provide him with ample grounds to pursue this demand pursuant to Mass. Gen. Laws Ch. 156D, § 7.42, that the Board take immediate legal action to redress harm inflicted upon the Company and its shareholders due to the systematic and concerted scheme orchestrated by the Company's senior officer and directors to misappropriate and wrongfully profit from Appian Corporation's ("Appian") trade secrets, a non-exculpated breach of the fiduciary duty of loyalty if not explicit violations of various penal codes. Also, there is ample evidence supporting the position that certain officers and directors sold shares of Company stock while in possession of material nonpublic information.

Substantive Allegations

Pegasystems develops customer relationship management ("CRM") software. The Company automates customer interactions across transaction-intensive enterprises and provides its products to customers in the banking, mutual funds and securities, mortgage services, card services, insurance, healthcare management, and telecommunications industries. The CRM software industry is extremely competitive.

The Board currently consists of Peter Gynes ("Gynes"), Richard Jones ("Jones"), Christopher Lafond ("Lafond"), Dianne Ledingham ("Ledingham"), Sharon Rowlands ("Rowlands"), Alan Trefler ("Trefler"), and Larry Weber ("Weber").

Trefler founded the Company and has served as CEO and Chairman of the Board since Pegasystems was organized in 1983. Kenneth Stillwell ("Stillwell") has served as the Company's Chief Financial Officer ("CFO") since 2016 and as Chief Operating Officer since April 2021.

On May 29, 2020, a competitor of Pegasystems, Appian, sued Pegasystems and Youyong Zou ("Zou"), whom Pegasystems insiders referred to as "Matt" or their "spy" inside Appian, in the Circuit Court of Fairfax County, Virginia for stealing its trade secrets and violating Virginia's computer crime law (the "Fairfax County Litigation"). Appian also alleged violations of the Virginia Computer Crimes Act, tortious interference, and statutory business and common law conspiracy.

Appian's complaint alleged efforts by Pegasystems to obtain and use Appian trade secrets through Zou, who worked on a federal program as an employee of Serco, Inc. ("Serco") and had access to Appian's software and documentation in order to work on Serco projects involving the federal government. The complaint further alleged that the Company's own employees represented themselves as potential customers of Appian partners, rather than Pegasystems employees, to improperly gain access

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to Appian's trial software.

As explained further below, directors Jones and Weber, along with executive officers Stillwell, Efstathios Kouninis ("Kouninis"), Michael Pyle ("Pyle"), Kerim Akgonul ("Akgonul"), Leon Trefler, and Douglas Kra ("Kra," and collectively with Jones, Weber, Stillwell, Kouninis, Pyle, Akgonul, and Leon Trefler, the "Insiders"), sold shares of Pegasystems stock on the basis of MNPI, to the benefit of themselves and to the detriment of the Company and its stockholders.[1]

Pegasystems Disseminates Materially False and Misleading Statements Regarding Trade Secrets

On February 17, 2021, the Company filed Form 10-K for the fiscal year ended December 31, 2020 (the "2020 10-K"), which included a section in the risk factors portion of the report discussing the Company's competitive industry, titled "***The market for our offerings is intensely and increasingly competitive, rapidly changing, and fragmented.***" (Emphasis in original). The Company listed dozens of competitive factors and even named some competitors, including Salesforce.com, Microsoft Corporation, Oracle Corporation, SAP SE, ServiceNow, and IBM. The list did not include Appian, which is not mentioned anywhere in the 2020 10-K.

The 2020 10-K further stated that the Company's Code of Conduct[2] "applies to our Board of Directors and employees, including our principal executive officer, principal financial officer, principal accounting officer, and persons performing similar functions." The Code of Conduct stated that the Company is committed to: "***Never use illegal or questionable means to acquire a competitor's trade secrets or other confidential information***, such as trespassing, burglary, wiretapping, bribery, ***stealing, seeking confidential information from a new employee who recently worked for a competitor, or misrepresenting your identity in hopes of obtaining confidential information***[.]"[3]

A keyword search of "Appian" on SEC.gov/edgar, where the Company's public filings are made, revealed that "Appian" was not included in any of the Company's filings prior to February 16, 2022.

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[1] Kouninis joined Pegasystems in April 2008 as Vice President of Finance. The Board appointed Kouninis as the Company's Chief Accounting Officer in May 2008 and Treasurer in January 2014. Pyle joined Pegasystems in 1985 and has served as Senior Vice President of Engineering since August 2000. On April 1, 2021, Pyle was appointed to serve as Pegasystems' Chief Technology Strategist. Akgonul joined Pegasystems in 1992 and has served as Senior Vice President of Engineering since January 2014. On April 1, 2021, Akgonul was named Chief Product Officer. Leon Trefler, Alan Trefler's brother, joined Pegasystems in April 1998 as an Account Executive for Strategic Business Development. Since then, he has held various senior sales management positions across the Company and in Channel Sales. From April 2007 to January 2010, Leon Trefler served as Vice President of Sales, North America, and in January 2010, was promoted to Senior Vice President of Sales. He served as Senior Vice President of Global Customer Success for the Americas until April 1, 2021, when he was appointed Senior Vice President of Global Customer Success. In February 2022, Leon Trefler was named Chief of Clients and Markets. Kra served as Senior Vice President, Global Client Success until March 31, 2022.

[2] *See* Pegasystems' Code of Conduct: https://www.pega.com/about/leadership/governance/code-conduct.

[3] Unless otherwise noted, all emphasis in quotations has been added.

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The Company Falsely State that the Fairfax County Litigation is Without Merit

On February 16, 2022, the Company filed Form 10-K for the fiscal year ended December 31, 2021 (the "2021 10-K"), which falsely reassured the public that the claims in the Fairfax County Litigation were "without merit[.]" The 2021 10-K further stated that:

> ***the Company has strong defenses*** to these claims and that, among other things, even were the jury to find that the Company misappropriated Appian's alleged trade secrets, ***any alleged damages claimed by Appian are not supported by the necessary legal standard of proximate cause***. The Company is unable to reasonably estimate possible damages or a range of possible damages given ***the Company's belief that the damages claimed by Appian fail to satisfy the required legal standard*** and due to the uncertainty as to how a jury may rule.

On April 28, 2022, the Company filed Form 10-Q for the quarter ended March 31, 2022 (the "2022 Q1 10-Q"), which continued to falsely reassure investors that the claims in the Fairfax County Litigation were "without merit" and that the Company "continues to believe that its sales of the products at issue were not caused by, or the result of, the alleged misappropriation of trade secrets, and is submitting evidence to the jury to that effect." The 2022 Q1 10-Q further stated that the Company was "unable to reasonably estimate possible damages[.]"

As a result of issuing the false and misleading statements noted above, among others, the Company is now embroiled in a federal securities class action in the Eastern District of Virginia styled *City of Fort Lauderdale Police and Firefighters' Retirement System et al. v. Pegasystems Inc. et al.*, Case No. 1:22cv11220 (the "Federal Securities Class Action"). The Federal Securities Class Action names Trefler and Stillwell as defendants.

Insiders Sell Stock Before Adverse MNPI is Released

Before the adverse MNPI described below was publicly disclosed, the Insiders collectively reaped ***over $18.1 million*** in total proceeds from sales of the Company's stock and collectively avoided approximately ***$11 million*** in losses. The loss calculations are based on a post-disclosure stock price of $48.07 per share on May 11, 2022, the second consecutive trading day after all MNPI was disclosed to the public.

Jones made the following sales of stock before adverse MNPI regarding the Company's trade secret misappropriations was disclosed to the public:[4]

Date	Shares Sold	Average Price	Proceeds	Value at $48.07 per share	Losses Avoided
May 29, 2020	5,000	$93.62	$468,100	$240,350	$227,750

[4] Proceeds, post-disclosure value and Losses Avoided are rounded to the nearest dollar.

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Nov. 12, 2020	4,016	$124.00	$497,984	$193,049	$304,935
Nov. 17, 2020	984	$124.00	$122,016	$47,301	$74,715
		Total:	**$1,088,100**		**$607,400.00**

Weber sold 750 shares at an average price of $97.52 per share on June 9, 2020, yielding proceeds of $73,140 and avoiding losses of $37,087 before adverse MNPI regarding the Company's trade secret misappropriations was disclosed to the public.

Kra made the following sales of stock before adverse MNPI regarding the Company's trade secret misappropriations was disclosed to the public:

Date	Shares Sold	Average Price	Proceeds	Value at $48.07 per share	Losses Avoided
Aug. 11, 2020	11,930	$113.59	$1,355,128	$573,475	$781,653
Nov. 17, 2020	14,102	$123.50	$1,741,597	$677,883	$1,063,713
Mar. 1, 2021	14,932	$135.00	$2,015,820	$717,781	$1,298,039
		Total:	**$5,112,545**		**$3,143,406**

Stillwell made the following sales of stock before adverse MNPI regarding the Company's trade secret misappropriations was disclosed to the public:

Date	Shares Sold	Average Price	Proceeds	Value at $48.07 per share	Losses Avoided
June 1, 2020	1,000	$94.76	$94,760	$48,070	$46,690
July 1, 2020	1,000	$101.36	$101,360	$48,070	$53,290
July 30, 2020	3,000	$114.58	$343,740	$144,210	$199,530
August 3, 2020	3,000	$117.61	$352,580	$144,210	$208,370
Sept. 1, 2020	1,000	$130.86	$130,833	$48,070	$82,763
Sept. 2, 2020	2,000	$133.37	$266,740	$96,140	$170,600
Oct. 1, 2020	1,000	$123.25	$123,221	$48,070	$75,151
Nov. 2, 2020	5,505	$117.07	$648,255	$264,625	$383,630
Dec. 1, 2020	1,000	$130.63	$130,630	$48,070	$82,560
Jan. 4, 2021	1,000	$132.24	$132,286	$48,070	$84,216
Feb. 1, 2021	1,000	$128.99	$129,064	$48,070	$80,994
Feb. 19, 2021	5,757	$143.72	$827,396	$276,738	$550,657
Mar. 1, 2021	1,000	$133.52	$133,520	$48,070	$85,450
Mar. 8, 2021	908	$117.33	$106,535	$43,647	$62,888
Apr. 1, 2021	1000	$118.24	$118,153	$48,070	$70,083
May 3, 2021	5,582	$124.41	$695,558	$268,326	$427,231
June 1, 2021	1,000	$118.21	$118,005	$48,070	$69,935
June 9, 2021	992	$129.06	$128,027	$47,685	$80,342

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July 1, 2021	1,000	$138.77	$138,441	$48,070	$90,371
Aug. 2, 2021	1,000	$127.25	$127,158	$48,070	$79,088
Aug. 6, 2021	1,090	$128.33	$139,879	$52,396	$87,483
Aug. 24, 2021	1,101	$133.10	$146,543	$52,925	$93,618
Sept. 1, 2021	1,000	$140.21	$139,976	$48,070	$91,906
Oct. 1, 2021	1,000	$127.19	$127,409	$48,070	$79,339
Nov. 1, 2021	1,000	$118.66	$118,660	$48,070	$70,590
Dec. 1, 2021	1,000	$112.50	$112,500	$48,070	$64,430
Jan. 3, 2022	1,000	$111.73	$111,730	$48,070	$63,660
Feb. 1, 2022	1,000	$100.38	$100,758	$48,070	$52,688
		Total:	**$5,843,724**		**$3,587,558**

Kouninis made the following sales of stock before adverse MNPI regarding the Company's trade secret misappropriations was disclosed to the public:

Date	Shares Sold	Average Price	Proceeds	Value at $48.07 per share	Losses Avoided
June 3, 2020	500	$98.00	$49,000	$24,035	$24,965
June 5, 2020	120	$100.00	$12,000	$5,768	$6,232
June 16, 2020	613	$96.99	$59,742	$29,466	$30,274
July 30, 2020	809	$115.05	$93,063	$38,888	$54,174
Aug. 3, 2020	441	$118.00	$52,038	$21,199	$30,839
Aug. 13, 2020	280	$118.00	$33,040	$13,460	$19,580
Aug. 17, 2020	442	$118.50	$52,377	$21,247	$31,130
Aug. 25, 2020	453	$123.50	$55,946	$21,776	$34,170
Sept. 1, 2020	467	$131.00	$61,177	$22,449	$38,728
Nov. 23, 2020	442	$131.00	$57,902	$21,247	$36,655
Dec. 16, 2020	137	$127.00	$17,399	$6,586	$10,813
Dec. 17, 2020	387	$130.50	$50,673	$18,603	$32,069
Feb. 22, 2021	533	$147.00	$78,351	$25,621	$52,730
June 16, 2021	293	$132.89	$38,937	$14,085	$24,852
Aug. 26, 2021	673	$135.00	$90,855	$32,351	$58,503
Sept. 16, 2021	500	$132.50	$66,250	$24,035	$42,215
Dec. 8, 2021	181	$115.00	$20,815	$8,701	$12,114
Dec. 13, 2021	250	$116.00	$29,000	$12,018	$16,983
Dec. 17, 2021	500	$106.00	$53,000	$24,035	$28,965
		Total:	**$971,564**		**$585,995**

Pyle made the following sales of stock before adverse MNPI regarding the Company's trade secret misappropriations was disclosed to the public:

Date	Shares Sold	Average Price	Proceeds	Value at $48.07 per share	Losses Avoided
Aug. 3, 2020	7,500	$117.60	$883,387	$360,525	$522,862
Sept. 1, 2020	7,500	$130.78	$982,894	$360,525	$622,369
June 1, 2021	1,000	$118.26	$117,987	$48,070	$69,917
July 1, 2021	1,000	$138.80	$138,504	$48,070	$90,434
Aug. 2, 2021	1,000	$127.26	$127,180	$48,070	$79,110
Sept. 1, 2021	1,000	$140.21	$139,942	$48,070	$91,872
Oct. 1, 2021	1,000	$127.15	$127,389	$48,070	$79,319
Nov. 1, 2021	1,000	$118.66	$118,660	$48,070	$70,590
Dec. 1, 2021	1,000	$112.64	$113,182	$48,070	$65,112
		Total:	**$2,749,127**		**$1,691,587**

Akgonul made the following sales of stock before adverse MNPI regarding the Company's trade secret misappropriations was disclosed to the public:

Date	Shares Sold	Average Price	Proceeds	Value at $48.07 per share	Losses Avoided
June 9, 2021	2,470	$127.72	$315,468	$118,732	$196,735
Sept. 1, 2021	2,010	$140.81	$283,028	$96,620	$186,407
		Total:	**$598,496**		**$383,142**

Leon Trefler made the following sales of stock before adverse MNPI regarding the Company's trade secret misappropriations was disclosed to the public:

Date	Shares Sold	Average Price	Proceeds	Value at $48.07 per share	Losses Avoided
June 1, 2020	2740	$97.11	$265,730	$131,711	$134,018
July 1, 2020	2,627	$102.68	$269,488	$126,279	$143,208
Aug. 3, 2020	655	$117.52	$76,975	$31,485	$45,489
Sept. 1, 2020	661	$130.88	$86,511	$31,774	$54,737
Oct. 1, 2020	658	$122.43	$80,558	$31,630	$48,928
Nov. 2, 2020	654	$116.17	$75,975	$31,437	$44,537
Dec. 2, 2020	1,759	$127.92	$225,011	$84,555	$140,456
Jan. 4, 2021	1,260	$133.46	$167,652	$60,568	$107,084
Jan. 20, 2021	90	$140.00	$12,600	$4,326	$8,273
Feb. 1, 2021	1,307	$129.55	$168,794	$62,827	$105,966

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Feb. 5, 2021	180	$140.00	$25,200	$8,652	$16,547
Mar. 1, 2021	1,312	$133.80	$175,862	$63,067	$112,795
Apr. 1, 2021	968	$118.52	$114,727	$46,531	$68,195
		Total:	**$1,745,089**		**$1,030,240**

The Fairfax County Litigation Reveals Pegasystems' Corporate Espionage

On May 9, 2022, after the market closed, the Company filed Form 8-K, which disclosed that a jury in the Fairfax County Litigation found that Pegasystems had willfully and maliciously misappropriated Appian's trade secrets and violated the Virginia Computer Crimes Act, awarding Appian more than $2 billion in damages.

As set forth during the trial, Pegasystems' misconduct took place from 2012 through 2020 when Appian filed its lawsuit. The Company hired Zou, an employee of a government contractor and former developer for Appian. The jury was presented evidence that the Company paid Zou to provide the Company with copies of Appian's confidential software and documentation in violation of restrictions that barred him from sharing Appian's trade secrets. Appian's experts estimated the damages to be $3 billion, seeking all of the Company's revenues from the fourth quarter 2013 through the third quarter 2021. Appian presented evidence that it had lost 201 customers because of Pegasystems' acts. During the seven-week jury trial, Appian presented evidence that insiders referred to the corporate espionage as "Project Crush" and referred to Zou as a "spy." Further, Zou even supplied Pegasystems with video recordings of Appian's development environment. Among the materials Pegasystems amassed were dozens of hours of video footage of Zou accessing and working within Appian's platform.[5]

It was revealed that Pegasystems also hired the outside third party KForce Inc. ("KForce") to identify candidates for the Company to recruit, emphasizing that potential candidates could not be "loyal" to Appian. PLT 4.[6] KForce introduced Pegasystems to Zou, whom Pegasystems paid through KForce. Pegasystems also gave Zou the pseudonym "Matt (so that he isn't 'outed' as our spy)."[7] PLT 377. Pegasystems disseminated Appian's misappropriated information to hundreds of Company employees, extolling its importance and promising that – with the benefit of Zou's information – Pegasystems "will win EVERYTIME" and "***should never lose against Appian!***" PLT 721; PLT 196. The Company used the highly valuable information it obtained from Zou for many years – up until at least 2020. Alan Trefler met with Zou at the Company's headquarters and reviewed information from Zou regarding how to intervene in Appian's deals. PLT 227. According to the Federal Securities Class Action, Akgonul, Kra, and Leon Trefler also participated in Project Crush. As one of the two whistleblowers who alerted Appian to Pegasystems' scheme in 2020 later testified, "Alan Trefler [and] all of these people obviously knew we were doing this." 9/20/21 Bearden Depo. Tr. at 246.

[5] Pegasystems ultimately amassed around 90 videos based on Zou's access to Appian's platform.

[6] References to "PLT," "PLTD," "Depo. Tr.," and "Trial Tr." herein are to exhibits and/or transcripts in the Fairfax County Litigation.

[7] Pegasystems coined Zou's pseudonym – "Matt" or "'the other Matt'" – after Matt Calkins, Appian's founder and CEO.

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The Fairfax County Litigation further revealed that Alan Trefler personally directed another "teardown" of Appian's software by directing the Company to carry out an array of subterfuge and illicit tactics. The Company began using fake names and fake entities to gain access to Appian software. One employee concocted multiple "personas," including ones named "Andrew Powers" and "Emily Gold," and a fake consulting firm ("Andrew Powers Consulting"), to infiltrate Appian's platform. Other employees falsely posed to Appian as "customers," using their spouses' businesses as corporate fronts to obtain access to Appian's software. Pegasystems persisted in its scheme despite explicit concerns internally over the "legality" of Pegasystems' actions. PLT 643-A. Alan Trefler himself created fake identities when he employed several aliases (including "Albert Scii," "A. Ewe," and "Paul Foon") to access Appian's information.

The Fairfax County Litigation revealed in detail the illegal tactics the Company used to steal Appian's prospective customers. Pegasystems' "war chest of materials" (PLT 248) also included sales and marketing aids for Pegasystems' "Solutions Consultants"[8] and other members of Pegasystems' salesforce, training materials, screenshots of Appian's platform, "technical briefs," "competitive briefs," "battle cards," PowerPoint presentations, and "kill points" for competing against Appian. Malcolm Ross ("Ross"), Appian's Vice President of Product Strategy and Deputy CTO, testified about one such "technical brief" – the "Understanding Appian" brief that Pegasystems developed using Zou's information – at the 2022 trial:

> Q. Did your review of the videos that were prepared by Mr. Zou for Pegasystems and the other Pegasystems videos help you better understand the meaning of the statements that appeared in this Pegasystems sales document that we've marked Defendants' Exhibit 688 ["Understanding Appian" document dated Jul. 2, 2013, or what Mr. Petronio referred to as the Appian technical brief] and where the information was derived from?
>
> A Yes, I've described this as a derivative of their knowledge. And this was after reviewing the videos, it was very clear exactly how that went from Mr. Zou into this derivative content from the preceding Appian documents.[9]

Pegasystems personnel also admitted that its materials, including Pegasystems' "12 Challenges" document, incorporated Zou's information:

> Q. Mr. Schuerman [Pegasystems CTO], you're not denying to the jury, sir, that that 12 challenges document, a document that your company prepared and you helped edit and you continued to use from 2012 from many years later, that that document contains information provided by Mr. Zou that was not previously available to

[8] Solutions Consultants worked with account executives at Pegasystems on sales opportunities, and their responsibilities included communicating with, and demonstrating Pegasystems' software to, prospective customers.

[9] 4/27/22 Trial Tr. at 6130:8-21.

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Pegasystems, correct?

A. Correct, I'm not.[10]

Ben Baril ("Baril") (Director, Office of the CTO) helped hire Zou in 2012 and worked closely with Zou as part of Project Crush. Baril also developed several internal documents using Zou's information, created hours of video footage featuring Appian's trade secrets, and collaborated with Zou on multiple occasions. For instance, Baril "spent two days with [Zou]" at Pegasystems' headquarters, "watching [Zou]" navigate the Appian platform, "asking [Zou] questions throughout the process and taking a ScreenCam [video recording] for review at a later date." PLT 775. Baril circulated to colleagues the footage he and Zou captured within Appian's platform. Baril also co-wrote Pegasystems' formal Project Crush memorandum in 2014. Baril admitted on October 4, 2019 that Alan Trefler was intent on eliminating Appian as a competitive threat: "Alan [Trefler] and [his brother] Leon [Trefler] are very focused on destroying Appian. Like making it go away for good." PLT 649.

Alan Trefler admitted that Pegasystems hiring Zou was not appropriate, and that Baril's use of "personas" to misappropriate Appian's trade secrets was also "[n]ot appropriate":

Q. And was it appropriate?

A. ***I don't think it was appropriate for him to hire Zou***.

Q. Now, you do know now, Mr. Trefler, what Mr. Baril was doing to gather information for you; correct?

A. I do now, and ***it was not appropriate***.

Q. Not appropriate?

A. ***He shouldn't have done it.***

***

Q. Accessing Appian as a competitor of Appian is precisely what Baril, Fine and Le were doing; correct?

A. Yes.

Q. Masking your identity, which is prohibited here, is precisely what Baril, Fine and Le were doing; correct?

A. ***Yes, and they shouldn't have done it.***

[10] 4/27/22 Trial Tr. at 6378:2-11.

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2/1/22 Trial Tr. at 1047:9-14, 1095:2-9.

Baril also questioned the "legality" of Pegasystems' conduct in October 2019. Appian confronted Chief Technology Officer Don Schuerman ("Schuerman") about his October 2019 response to Baril's "legality" concerns:

> Q. Let's go to Line 135, sir. He writes here: ***Who can I ping about the legality of using the system?*** Right?
>
> A. Yes.
>
> Q. You were his direct supervisor at this time, right?
>
> A. Correct.
>
> Q. You were the chief technology officer of the company at that time, weren't you?
>
> A. Correct.
>
> Q. You didn't tell him to stop doing everything he was doing, did you?
>
> A. No.
>
> Q. ***You didn't tell him to seek help from the company's chief compliance officer, did you?***
>
> A. ***No***.
>
> Q. You didn't tell him that he can call the ethics hotline and get guidance, did you?
>
> A. No.
>
> Q. Instead let's look at Line 137. Let's take a look at what you told him. Please read that out to the members of the jury, please, your response at Line 137?
>
> A. ***How much more do you need to do/capture?***
>
> Q. And then he tells you: I'm halfway through. Right?
>
> A. Yes.[11]

[11] 4/28/22 Trial Tr. at 6437:16-6438:25.

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In early 2020, Appian learned of Pegasystems' scheme from two whistleblowers, both former Pegasystems employees. On May 29, 2020, shortly after discovering Pegasystems' scheme, Appian filed suit against the Company. Nevertheless, Pegasystems continued its scheme against Appian even after Appian sued Pegasystems for this very conduct. On or about May 28, 2020, Baril spoke with Aaron Fromm (a Pegasystems Solutions Consulting Manager) about gaining access to an Appian trial in order to "create a side-by-side comparison of the Appian flow versus Pegasystems flow." 1/10/22 Baril Depo. Tr. at 73.

Testimony and depositions taken during the Fairfax County Litigation only further revealed the truth behind executive involvement in the corporate espionage. Akgonul admitted during his January 25, 2022 deposition that none of the India-based employees who had accessed Appian's platform using others' credentials had been disciplined. Alan Trefler's testimony further revealed that none of the senior Pegasystems executives involved in Pegasystems' scheme received "any formal disciplinary consequences," leaving Pegasystems' employees free to build on their scheme:

> Q. Now, have you considered firing Benjamin Baril?
>
> A. No.
>
> ***
>
> Q. Have you considered in connection with issues that have come up in this lawsuit firing any other Pegasystems executives or employees?
>
> A. No.

Pegasystems also saved materials containing Appian's trade secrets on shared directories accessible to employees, including "Sales Hub" and "Box."[12] For example, during a WebEx meeting with other Pegasystems employees on or about September 11, 2019, Baril helped create an hour-long recording within Appian's platform, which was then saved to a shared folder at Pegasystems. One of the WebEx attendees, a Pegasystems employee, then circulated the video to various colleagues, cautioning them in a September 11, 2019 email: "[T]he situation between u[s] and Appian is apparently a bit sensitive right now, so please be judicial in sharing this." PLT 624. Pegasystems' employees also shared Appian's trade secrets via internal message "posts" and shared hyperlinks to documents saved on Pegasystems' system.

During the jury trial in the Fairfax County Litigation, Pegasystems' own expert even admitted that Pegasystems was unjustly enriched to some degree.[13] Pegasystems' expert simply "accept[ed] the

[12] Pegasystems' worldwide sales team had access to Sales Hub.

[13] Counsel for Appian: "So to be clear, your opinion for this jury, assuming liability, is that instead of awarding the $479 million in unjust enrichment damages that Mr. Malackowski [Appian's expert] calculates, ***they should instead award Appian $187 million in unjust enrichment damages, right***?" Pegasystems' Expert: "***As I said, no more than that*** . . . ." 5/4/22 Trial Tr. at 7581-82.

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premise" that eight years of software sales had been tainted by misappropriation.[14]

In Appian's press release announcing the jury verdict,[15] Appian's general counsel made the following statement:

> 'We are very grateful that the jury held Pegasystems accountable for its wrongful conduct,' stated Christopher Winters, General Counsel at Appian. 'We put forward strong evidence that Appian trade secrets were misappropriated by Pegasystems. The award of substantial damages to Appian is entirely appropriate given the nature and extent of what Pegasystems did.'

The Fairfax County Litigation also revealed what Pegasystems has done with other competitors. According to a February 2, 2013 email to Pegasystems' CTO, Leon Trefler likened Pegasystems' scheme involving Zou to what Pegasystems "did with IBM": "Just like we did with IBM/Lombardi a few months ago, we recently hired an Appian expert [Zou] to build us out a sample application so that we could see what Appian was actually like."[16] PLT 734. Many of the same Pegasystems employees who utilized (or condoned the use of) fake names and fake companies to access Appian's platform also secretly accessed (or condoned Pegasystems' access to) Salesforce and ServiceNow's platforms. For instance, in 2019, Pegasystems' CTO discussed in an email to Alan Trefler and others a "teardown project for ServiceNow." 1/10/22 Baril Depo. Tr. at 294. Meanwhile, Baril – who concocted fakes names and a fake consulting firm to access Appian – admitted he also accessed Salesforce and ServiceNow's platforms, confessing his conduct with respect to Appian was "in line with other exercises I have done with ServiceNow and Salesforce." *Id*. at 29. Akgonul also took steps to spy on Salesforce, including directing a Company employee to "obtain screenshots of the Appian and Salesforce security process." 1/5/22 Akgonul Depo. Tr. at 559.

Prior to the Company's disclosure of the verdict in the Fairfax County Litigation on May 9, 2022, the Company's stock price closed at $65.93. On May 10, 2022, the Company's stock price plummeted to $52.25 and continued to fall the following day to $48.07 per share, a 27% decrease from the Company's trading price before the verdict.

Then, on September 15, 2022, Fairfax Circuit Court Judge Richard E. Gardiner rejected a motion to overturn the jury verdict and said in an order that the judgment is subject to 6% interest and includes $23.6 million in attorneys' fees because Pegasystems acted willfully and maliciously. According to the jury instructions delivered in the Fairfax County Litigation: "Willful conduct occurs when a party acts without regards for the rights of another, knowing injury will probably follow. Malicious conduct occurs

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[14] Pegasystems' damages expert testified that, for purposes of his damages analysis, Pegasystems employees he spoke with included several executives, including Stillwell.

[15] *See* Press Release, *Appian Awarded $2.036 Billion in Damages Against Pegasystems Inc.* (May 10, 2022), https://appian.com/resources/newsroom/press-releases/2022/appian-awarded--2-036-billion-in-damages-against-pegasystems-inc.html.

[16] IBM acquired BPM vendor Lombardi Software in 2010.

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when a party acts with ill will or spite."

Appian's press release regarding the $23 million attorneys' fees award stated that "As a result of the jury's finding of willful and malicious misappropriation of Appian's trade secrets, the Court also ordered Pegasystems to pay Appian $23.6 million in attorneys' fees associated with the case. Finally, the Court ordered Pegasystems to pay Appian statutory post-judgment interest on the judgment at an annual rate of 6%, or approximately $122 million per year."[17] The award of $2 billion may be the largest damages award in Virginia history. The Appian press release reiterated that:

> During the proceedings, Alan Trefler, Pegasystems' Founder and CEO, admitted that it was 'inappropriate' for Pegasystems employees to have hired [Zou], and that [Zou] 'apparently did things for which he was not entitled.'
>
> [Zou], referred to as a 'spy' internally at Pegasystems, helped Pegasystems generate dozens of video recordings of the Appian development environment for use by Pegasystems in compiling competitive materials and evaluating improvements to its platform. Appian also submitted that Pegasystems' product development team reviewed the materials provided by the Contractor and changed the course of Pegasystems' product engineering to take advantage of the Appian technology they saw. Specifically, Appian put forward documents and testimony that Pegasystems made use of the trade secrets gleaned from the Contractor to make improvements with respect to, among other things, ease of use, and social and mobile capabilities in the Pegasystems platform.

* * *

The adverse verdict in the Fairfax County Litigation is the result of a finding of fact that the Company was caused to engage in misconduct. Mr. Brenner makes this demand because of the wrongdoing and mismanagement that occurred at Pegasystems with respect to the trade secret misappropriations and the Insiders' sales of the Company's stock while in possession of adverse MNPI regarding the trade secret misappropriations. The Fairfax County Litigation makes clear that Trefler (and likely many other Company executives) put in motion and maintained Project Crush for years while materially misleading the public regarding the Company's competitive practices.

The 2020 10-K was signed by Insiders Stillwell, Kouninis, Jones, and Weber. Therefore, the material misstatements therein were personally made by the Insiders as they sold tens of millions of dollars of Company stock at artificially inflated prices while also subjecting the Company to billions of dollars in liability. Alan Trefler's brother, Leon Trefler, also made over $1.7 million in sales while he and his brother were involved in corporate espionage.

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[17] *See* Appian Press Release, Judge Rejects Pegasystems Motion to Overturn $2 Billion Jury Verdict September 16, 2022, https://appian.com/resources/newsroom/press-releases/2022/judge-rejects-pegasystems-motion-to-overturn--2-billion-jury-ver.html.

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The documents produced pursuant to Mr. Brenner's Demand are not exculpatory. Instead, they reflect the actions of an inattentive and supine board. We will not burden this demand with a review of the entirety of the production but will draw attention to certain documents of particular interest. For instance, the Company's Audit Committee met on February 24, 2022, and discussed the Company's forthcoming Form 10-K filing. The Appian situation, however, was not addressed by the members of the committee. *See* PEGABD-0000001-5.[18]

Similarly, on December 13, 2021, Matthew J. Cushing, the Company's General Counsel, updated the Board concerning the pending Appian litigation in a wholly cursory manner and there is no indication that members of the Board asked any questions or directed management to take any action. PEGABD-0000016-21. We note that the letter sent to Deloitte on February 16, 2022, however, falsely asserted that the Appian claims were without merit. This letter was delivered to Deloitte in the context of the annual audit. PEGABD-0000059-71.

We also note a curious Board minute dated March 7, 2022. First, management delivered what it considered an update on the Appian litigation, but the minutes fail to report was actually related. Next, the minutes admit that certain Company employees wrongfully obtained free trials of Appian products. Specifically, the Board discussed the "forthcoming reprimand for company employees who accessed a free trial of Appian without identifying themselves as a Pega employee." PEGABD-0000026. Despite secretly obtaining a competitor's product, the Board determined that the "employees would receive written reprimand [sic] that the actions allowed access that they could not otherwise have had, that it should not have happened and would not occur again." The Board stated the employees would receive "[a]dditional training" and "Compliance [will] meet regularly with the staff working in Competitive Intelligence to facilitate a good understanding of preferred competitive intelligence practices."

It is clear that the Board tried to cover its tracks by sheepishly saying that, although the free trials were wrongfully obtained through subterfuge, there was a not a technical violation of the Company's purported Code of Conduct because the stolen information was purportedly available to others. There is no indication in the minutes, however, that the information was in the public domain. All that can be determined from this is that the Company operates an in house "Competitive Intelligence" unit that engages in "competitive intelligence practices" – also known as corporate espionage. PEGABD-0000027.

Demand for Legal Action

Based on the facts set forth above, it appears that the management of the Company engaged in myriad illegal business practices from the c-suite to line employees that was centered around corporate espionage. Making matters worse, during the commission of this illegal conduct, certain insiders engaged in insider trading on the basis of MNPI in violation of the law and the Company's own corporate policies.

Accordingly, Mr. Brenner demands that the Company initiate legal action against the Insiders, and other relevant officers and directors, for breaching their fiduciary duty of loyalty and insider trading and

[18] Citations to "PEGABD-_____" refer to documents produced in response to Mr. Brenner's Demand.

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causing the Company to engage in illegal and unsustainable business practices that have exposed it to billion in damages.

Failure to address the forgoing will only expose the Company to additional liability and embarrassment.

Very Truly Yours,

LEVI & KORSINSKY, LLP

/s/ *Gregory M. Nespole*
Gregory M. Nespole

Encl.

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EXHIBIT A

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Superior Court - Suffolk
Docket Number 2484CV01734

Morgan Stanley

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George F Brenner
[redacted]

Account Summary
Statement Period: 24-Mar-2022 to 24-Mar-2023
Company: Pegasystems Inc

Price History Over Statement Period

	24-Mar-2022	24-Mar-2023	% Change
PEGA - NASDAQ	$79.61	$44.55	-44%

All currencies are in US Dollars unless specified.

Account Summary

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Exhibit 2 to DRC Report

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March 24, 2023

VIA E-MAIL

Daniel W. Halston, Esquire c/o
Mr. Alan Trefler
Chairman of the Board of Directors
Pegasystems, Inc.
1 Main Street
Cambridge, MA 02142

Re: *Stockholder Litigation Demand*

Dear Mr. Tefler:

I write on behalf of Mary Larkin (the "Stockholder"), an owner of Pegasystems, Inc. ("Pegasystems" or the "Company") common stock and the plaintiff in the action captioned *Larkin v. Gyenes*, Case No. 1:22-cv-11985 (D. Mass.) (the "Derivative Action"). Ms. Larkin hereby demands pursuant to Mass. Gen. Laws ch. 156D, § 7.42(1) that Pegasystems' Board of Directors (the "Board") investigate, address, remedy, and commence proceedings against certain of the Company's current and former officers and directors for violation of Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 promulgated thereunder, breach of fiduciary duty, aiding and abetting thereof, waste of corporate assets, and violations of all other applicable laws, rules, and regulations related to the wrongdoing alleged in this Demand and the Verified Shareholder Derivative Complaint filed in the Derivative Action.

From at least 2012 through September 16, 2022 (the "Relevant Period"), Pegasystems and its top executives orchestrated and engaged in a willful and malicious scheme to misappropriate the trade secrets and confidential information of one of its main competitors and disseminated or approved materially false and misleading statements and omissions related to the Company's competition practices and to litigation that arose in connection with that scheme.

The Misappropriation

As early as 2012, Pegasystems began misappropriating the confidential information and trade secrets of one of its main competitors, Appian Corporation ("Apian"), which it used to train its sales employees, develop sales materials, and improve its software. To accomplish this, Pegasystems hired KForce, Inc. ("KForce") to recruit an experienced Appian developer willing to misappropriate Appian's trade secrets for the Company. In February 2012, KForce introduced the

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Company to Youyong Zou ("Zou"), who worked for United States government contractors utilizing Appian's platform to build software applications. Zou's employment provided him with access to Appian's software and information.

Between February 2012 and September 2014, Zou used his Appian credentials to access Appian's trade secrets and sell them to Pegasystems, with the Company funneling payments to Zou through KForce.[1] Among other things, Zou secretly downloaded Appian's confidential information, recorded videos and took screenshots of Appian's platform, showed Pegasystems how to use Appian's platform, and provided the Company with insight into Appian's software. During this time, Zou met and collaborated with Pegasystems' officers, senior executives, engineers, and managers, visiting Pegasystems' headquarters several times. For example, on January 29, 2013, Zou met with you, Leon Trefler (the Company's Chief of Clients and Markets), Don Schuerman ("Schuerman") (the Company's Chief Technology Officer) and other Company employees at the Pegasystems' headquarters. During the meeting, Zou accessed Appian's platform and demonstrated it for the Company, and Pegasystems and Zou collaborated regarding how to utilize Appian's trade secrets against it.

In addition to meeting with Zou directly, several Company executives received and reviewed materials that were created with the information provided by Zou. For instance, in February 2014, you and other Company executives received over two hundred presentation slides including information on Appian that the Company had obtained from Zou. Appian's misappropriated information was utilized throughout the organization until at least 2020 and was distributed to more than two hundred Company executives and employees.

Moreover, starting around 2019, the Company began using false names and companies to infiltrate Appian's platform and gain further access to its trade secrets. This new scheme was implemented by and/or at the direction of Pegasystems executives, including you, Leon Trefler, Schuerman, Ben Baril ("Baril") (Director of the Office of the Chief Technology Officer) and others. In 2019, Baril created a number of false names as well as a fictitious consulting firm that he used to gain access to Appian's platform. Additionally, several Company employees obtained trials of Appian's software by falsely representing themselves to Appian as potential customers and shared the credentials with other Company employees to use to further the scheme. During this time, the Company was awarding its employees compensation for obtaining and sharing Appian's information.

In January and February of 2020, two former Pegasystems employees disclosed the Company's misconduct to Appian. Shortly thereafter, in May 2020, Appian filed an action against the Company (the "Appian Action"), seeking, among other things, actual losses, unjust enrichment damages, punitive damages, treble damages, and attorneys' fees and costs for the above-referenced conduct. The Company did not disclose the existence of the Appian Action until nearly two years later, on a form 10-K filed with the SEC on February 16, 2022. Even then, the 10-K falsely stated that Appian's claims were "without merit," that the Company had "strong defenses to the claims," and that "any alleged damages claimed by Appian are not supported by the necessary legal

[1] Pegasystems took steps to conceal its scheme, including giving Zou the pseudonym "Matt."

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standard." The Company also continued to conceal evidence of their scheme to misappropriate Appian's trade secret in that filing. Similar to the February 16, 2022 Form 10-K, the Company's Form 10-Q filed with the SEC on April 28, 2022 omitted material facts regarding the scheme. On May 9, 2022, following a seven-week trial, a jury in the Appian Action rendered a unanimous verdict in Appian's favor, concluding that the Company and Zou misappropriated Appian's trade secrets and awarding compensatory damages of $2,036,860,045 before interest against the Company. The jury also found that the Company acted willfully and maliciously in misappropriating Appian's trade secrets, which entitled Appian to later seek approximately $26.8 million in attorneys' fees and costs. On May 18, 2022, during a call with analysts, Kenneth Stillwell ("Stillwell"), the Company's Chief Financial Officer ("CFO") and Chief Operating Officer ("COO"), stated that the verdict was "ridiculous," and that there were no "facts of any wrongdoing," and "certainly no damages that would ever suggest a dollar amount."

Throughout the Relevant Period, the Company issued false and misleading statements and omissions, including statements: (i) touting the Company's competition and sales and marketing practices, while failing to disclose that it was relying on the above-referenced scheme to gain a competitive advantage; (ii) concerning the Company's competitors' intellectual property rights and that infringement claims by unnamed competitors could arise at some unspecified point, while concealing the existence of the Appian Action and evidence of the Company's scheme to misappropriate Appian's trade secrets; (iii) that Appian's claims lacked merit and any damages were not supported, while failing to disclose that Appian's liability and damages claims were well-supported; (iv) regarding the Company's Code of Conduct and ethical practices, which failed to disclose the Company's scheme and violations of its own guidelines; and (v) concerning The Company's compliance with the federal securities laws, which failed to disclose that the Company's Forms 10-K and 10-Q were materially misleading and contained false financial statements. Some of these false and misleading statements are detailed below.

First, the Company and its representatives made false and misleading statements concerning Pegasystems' competition and sales and marketing practices. On June 16, 2020, the Company held a conference call with investors and analysts. When one analyst asked about "the competitive landscape" and how the Company "differentiate[d]" itself from "competitors," Stillwell responded:

> *Our key is to sell our differentiator to help our clients augment their environments and to make sure we operate well with all of the different application providers that are out there.* We don't – we believe in open environments so that all of us can kind of work together is actually much better for our clients, because at the end of the day, nobody's going to buy just one application across their entire infrastructure. And I think that, that's important for all of us to continue to work together. *Even though we do compete fiercely, we also need to stop and help our clients when they need to integrate us with each other.*

(Emphasis added).

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When asked "how you were able to win [the business of the U.S. Census Bureau] versus some of your competitors in the RFP," Stillwell referenced the Company's "best-in-class" reputation, while concealing that Pegasystems' scheme and information obtained through Zou was the actual cause:

> Sure. So as you can imagine, most of these larger campaigns really try to do a proof of concept or a benchmark on the technology against the problem. And so I think that *the fact that we won that against 29 vendors and we actually got down selected down to us and another vendor* and we actually had to compete against the internal development inside of the agency, as you can imagine, that's a fairly competitive environment. *So I think the fact that we won that and also our recent win with the IRS really kind of highlights the fact that we're really viewed as a solution that has – that is best-in-class that can actually drive very significant transformations*.

(Emphasis added).

On July 28, 2020 during the Company's second quarter 2020 earnings call, you commented on the Company's ability to "show very well competitively" in winning business:

> *Sure. So look, we're working in a highly competitive world. So every piece of business we're winning, somebody else is losing. So that's just the way it goes. And we show very well competitively*, particularly in the sweet spots, which I think our view on low-code goes all the way back to our original vision of being a model-driven platform.

(Emphasis added).

During the same call, Stillwell highlighted the Company's "credib[ility]" with customers in the public sector, including the United States government:

> So I think that, that's what's exciting is we have so much opportunity with our existing installed base, or our existing client base. *And then we have these verticals, like a federal vertical, that's just one country*. It's just one buyer really, within that country. And I think there's just a tremendous amount of opportunity. Our wins at defenses, our wins at IRS, *really just demonstrating how credible we are in that space, even with being relatively – that being a relatively less mature vertical in terms of the growth rate.*

(Emphasis added).

On August 13, 2020, the Fortieth Annual Canaccord Genuity Growth Conference was held. In response to a question concerning the U.S. Census Bureau and other government customers that the Company had secured, Stillwell again highlighted the Company's "credibility" with the United States government:

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> David E. Hynes Canaccord Genuity Corp., Research Division – Analyst: Yes. Yes, makes sense. Public sector, I think, has been an exciting part of the business. *You guys won an IRS deal, I think, that followed a U.S. Census win*. Maybe just talk about what you're seeing in the public sector. Q3 is typically a seasonally important quarter there. *Why are you guys winning in the public sector?*
>
> Kenneth R. Stillwell Pegasystems Inc. – Senior VP, Chief Administrative Officer & CFO: . . . *I think that the thing with public sector really becomes as soon as you get credibility of winning a handful of larger agencies, really there's a lot of kind of momentum that comes from that. And I think that our census win really just opened our eyes and quite frankly, the market size on, wow, like this is a great opportunity for Pega*, and governments are going through digital transformation at a much faster clip actually than even commercial is.

(Emphasis added).

On December 10, 2020, the Barclays Global Technology, Media, and Telecommunications Conference was held. During the conference, the Company discussed with investors and analysts its product portfolio and positioning in the business process management ("BPM") market. An analyst asked the Company how it "differentiate[d]" itself in the BPM market:

> So we have also seen that BPM market evolve a bit. So it was BPM, and now we hear low-code a whole lot more. And then you – your portfolio acquisition business, digital process automation certified offering. So help us understand how you're positioned in that market? Obviously, you were one of the pioneers in BPM. But given the market evolution, how you're positioned now and what differentiates in that market?

While failing to disclose the Appian Action or the fact that the Company had misappropriated Appian's trade secrets and used that information to its benefit, Stillwell highlighted Appian in response to the analyst:

> *Appian is a company that we've competed with in some verticals that has low-code. Pega has low-code*. There are other low-code providers that are – I would call it more the technology of low-code. So there are some other companies that have built very, very simple tools to be able to build simple workflows, like something like I want to check the badge of an employee when they check-in. That application isn't going to expand into something more than that, but you can build it really fast and you can do it with nondevelopers. That's what I would call the low-code, the product.

(Emphasis added).

On February 17, 2021, the Company filed a Form 10-K with the SEC. The Form 10-K highlighted the Company's competitive differentiators and sales and marketing tactics, but

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misleadingly failed to disclose the Appian Action or the Company's misappropriation of Appian's confidential information that it used to gain a competitive advantage. For example, the Form 10-K stated as follows in describing what "competitively differentiated [Pegasystems] from [its] competitors" and how the Company "compete[d] favorably" against companies such as Appian:

> Competition:
>
> T*he markets for our offerings are intensely competitive*, rapidly changing, and highly fragmented, as current competitors expand their product offerings and new companies enter the market. . . .
>
> We have been most successful in competing for clients whose businesses are characterized by a high degree of change, complexity, or regulation.
>
> *We believe we are competitively differentiated from our competitors* because our unified Pega Platform is designed to allow client business and IT staff, using a single, intuitive user interface, to build and evolve enterprise applications in a fraction of the time it would take with disjointed architectures and tools offered by many of our competitors. . . . *We believe we compete favorably due to our expertise in our target industries and our long-standing client relationships*.

(Emphasis added).

The Form 10-K also included the following to describe the Company's "Sales and Marketing" techniques, but failed to disclose that the Company's "efforts" included its scheme to use its competitors' trade secrets to its advantage:

> To support our sales efforts, we conduct a broad range of marketing programs, including awareness advertising, client and industry-targeted solution campaigns, trade shows, including our PegaWorld iNspire user conference, solution seminars and webinars, industry analyst and press relations, web and digital marketing, community development, social media presence, and *other direct and indirect marketing efforts*.

(Emphasis added).

On September 15, 2021, the Company held a conference call with investors and analysts. During the conference call, an analyst asked: "[I]s [Hayden Stafford, the Company's new President of Global Client Engagement,] driving new playbooks as well, or is he using some of the same playbooks that you've historically had and he's just refining some of those?" Stillwell responded as follows:

> *So we've done a lot of work on the playbooks over the last 3 or 4 years. I would say – I would characterize it as more refining the plays that we run and making sure that we have the right profile of the salesperson, the right level of enablement, and*

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> *that we're targeting the right organizations with the right message, right?*
>
> Those – if you have really good salespeople that don't get enabled, that's a failure. If you have really good salespeople that are enabled, but they're on the wrong organizations that they want to buy your product, that's a failure. So it's a connection between those 3 pieces.

(Emphasis added).

In reality: (i) the Company was not competing fairly and instead engaged in a malicious and willful scheme to misappropriate Appian's trade secrets; (ii) the Company's sales and marketing practices included the use of paid agents, fictitious names, and/or fictitious companies to infiltrate Appian's software platforms, misappropriate its trade secrets, and use them to the Company's advantage; (iii) the statements that the Company "shows very well competitively" and "compete[s] favorably due to [its] expertise" failed to disclose that the Company owed its competitive success to its scheme and materials it gathered by misappropriating Appian's confidential information and trade secrets; (iv) representations that the Company was "best-in-class" and "credible" failed to disclose that the Company engaged in a malicious and willful scheme to misappropriate Appian's trade secrets; (v) statements touting the Company's "wins" with public sector agencies including the U.S. Census Bureau failed to disclose that the Company engaged in the aforementioned scheme; (vi) statements touting the Company's success and "credibility" with the U.S. Census Bureau and other government agencies were misleading because the Company concealed its misconduct from the government, including its collaboration with Zou, and packed its sales team with employees that were involved in the scheme; (vii) the Company paid its employees compensation in exchange for helping the Company obtain Appian's confidential information; (viii) statements in the Form 10-K highlighting the Company's competitive advantage in the industry failed to disclose that the Company's "broad range of marketing programs . . . [and] marketing efforts" included its use of spies and other dishonest practices to learn Appian's confidential information and trade secrets; and (ix) the Company failed to disclose the Appian Action and corresponding potential loss exposure.

The Company and its representatives also made false and misleading statements concerning the Company's and Appian's intellectual property. For instance, on July 28, 2020 and October 28, 2020, the Company filed Forms 10-Q with the SEC, which were both signed by Stillwell. The Forms 10-Q failed to disclose the Appian Action or the Company's misappropriation of Appian's confidential information. Rather, the Forms 10- Q referred to statements in the Company's 2019 Form 10-K, misrepresenting to investors that "intellectual property rights claims" against the Company "could" occur. The filing further failed to disclose that the Company had engaged in the scheme to misappropriate Appian's intellectual property, was sued by Appian in the Appian Action, and, thus, faced substantial financial and reputational risk. The statements incorporated by reference into the Forms 10-Q included the following:

> • "We *may* be subject to intellectual property rights claims by third parties, which are extremely costly to defend, could require us to pay significant damages, and *could* limit our ability to use certain technologies."

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> • "There can be *no assurance that third parties, including clients, will not claim infringement* by us with respect to current or future products."
>
> • "*We expect* that software product developers *will increasingly be subject to infringement claims* as the number of products and competitors in our industry segment grows and the functionality of products in different industry segments overlaps. *Any such claims*, with or without merit, *could* be time-consuming, result in costly litigation, cause product shipment and delivery delays, require us to enter into royalty or licensing agreements, or be precluded from making and selling the infringing software, if such proprietary rights are found to be valid. These claims could also subject us to significant liability for damages, *potentially* including treble damages if we are found to have willfully infringed patents or copyrights."
>
> • "We have received, and may in the future receive, *notices* that claim we have misappropriated, misused, or infringed other parties' intellectual property rights, and, to the extent we gain greater market visibility, *we face a higher risk of being the subject of intellectual property infringement claims."*

(Emphasis added).

On February 17, 2021, the Company filed its 2020 Form 10-K with the SEC.[2] By that time, the Appian Action was pending for nearly nine months. However, the Form 10-K repeated the same materially false and misleading statements as 2019's Form 10-K:

> • "We *may* be subject to intellectual property rights claims by third parties, which are extremely costly to defend, *could* require us to pay significant damages, and *could* limit our ability to use certain technologies."
>
> • "There can be *no assurance that third parties*, including clients, *will not claim infringement* by us with respect to current or future products."
>
> • "*We expect* that software product developers *will increasingly be subject to infringement claims* as the number of products and competitors in our industry segment grows and the functionality of products in different industry segments overlaps. Any such claims, with or without merit, *could* be time-consuming, result in costly litigation, cause product shipment and delivery delays, require us to enter into royalty or licensing agreements, or be precluded from making and selling the infringing software, if such proprietary rights are found to be valid. These claims *could* also subject us to significant liability for damages, *potentially* including treble damages if we are found to have willfully infringed patents or copyrights."
>
> • "We have received, and may in the future receive, *notices* that claim we have misappropriated, misused, or infringed other parties' intellectual property rights,

[2] The 2020 Form 10-K was signed by you, Kenneth Stillwell, Efstathios Kouninis, Peter Gyenes, Ronald Hovsepian, Richard Jones, Christopher Lafond, Dianne Ledingham, Sharon Rowlands, and Larry Weber.

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> and, to the extent we gain greater market visibility, *we face a higher risk of being the subject of intellectual property infringement claims*."

(Emphasis added).

On April 28, July 28, and October 27, 2021, the Company filed Forms 10-Q with the SEC for the first, second, and third fiscal quarters of 2021, respectively, which were signed by Stillwell. These filings continued to conceal the Appian Action and the Company's scheme, and the Forms 10-Q incorporated by reference the same materially false and misleading statements from the Company's 2020 Form 10-K.

In reality: (i) The statements that the Company "may be subject to intellectual property rights claims," "may in the future receive notices that claim we have misappropriated, misused, or infringed other parties' intellectual property rights," that "[t]here can be no assurance that third parties . . . will not claim infringement by [Pegasystems]," and that "software product developers will increasingly be subject to infringement claims" failed to disclose that the Company engaged in the willful and malicious misappropriation of Appian's confidential information and trade secrets, was involved in the ongoing, costly Appian Action, and already faced meritorious claims that you and other Company officers orchestrated and condoned the scheme; (ii) the statements that "intellectual property rights claims . . . could limit our ability to use certain technologies" misleadingly concealed the fact that, up until November 2021, Appian threatened injunctive relief arising from the Company's undisclosed scheme, which would have prevented the Company from selling tainted software or relying on tainted sales processes; and (iii) the Company failed to disclose that it had engaged in similar misconduct against other companies, including IBM, Salesforce, and ServiceNow.

Finally, the Company and its representatives made false and misleading statements concerning the Appian Action. The Company's Forms 10-K and 10-Q filed between July 28, 2020 and October 27, 2021 were materially false and misleading as they failed to disclose the Company's misconduct and potential loss exposure as a result of the Appian Action. On February 16, 2022, the Company filed its 2021 Form 10-K, signed by both you and Stillwell, which belatedly disclosed the existence of the Appian Action, while falsely stating that Appian's claims were "without merit," that the Company had "strong defenses to the[] claims," and that "any alleged damages claimed by Appian [were] not supported by the necessary legal standard." Specifically, the Form 10-K stated:

> ITEM 3. LEGAL PROCEEDINGS
>
> In addition to the matters below, the Company is, or may become, involved in a variety of claims, demands, suits, investigations, and proceedings that arise from time to time relating to matters incidental to the ordinary course of the Company's business, including actions with respect to contracts, intellectual property, employment, benefits, and securities matters. Regardless of the outcome, legal disputes can have a material effect on the Company because of defense and settlement costs, diversion of management resources, and other factors. . . .

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Appian Corp. v. Pegasystems Inc. & Youyong Zou

On May 29, 2020, Appian sued the Company and an individual, Youyong Zou, in the Circuit Court of Fairfax County, Virginia in a matter titled *Appian Corp. v. Pegasystems Inc. & Youyong Zou*, No. 2020-07216 (Fairfax Cty. Ct.). The complaint filed by Appian on May 29, 2020 (the "2020 Complaint") alleges that Mr. Zou was an employee of an Appian business partner, Serco Inc. ("Serco"); that, as a result, Mr. Zou had access to Appian trade secrets which Mr. Zou was required to keep confidential; and that in approximately 2013, while Mr. Zou was employed by Serco, the Company engaged Mr. Zou through an intermediary to provide the Company with Appian trade secrets and confidential information, which the Company is then claimed to have used to compete against Appian. The 2020 Complaint sets forth claims for misappropriation of trade secrets under the Virginia Uniform Trade Secrets Act, violation of the Virginia Computer Crimes Act, tortious interference with contract and business expectancy, and statutory and common law conspiracy. On July 24, 2020, the Company filed a plea in bar, seeking to have the claims asserted against the Company in the 2020 Complaint barred, in whole or in part, by the applicable statutes of limitations. Before the original plea in bar could be heard, Appian filed an amended complaint which the court allowed on November 4, 2021 (the "2021 Amended Complaint"), alleging that, in the 2019 time frame, employees of the Company accessed free Appian product trials under false pretenses. The 2021 Amended Complaint withdrew the claim for tortious interference with contract. After Appian filed the 2021 Amended Complaint, the Company successfully moved to dismiss Appian's conspiracy claims, which are no longer a part of the case. The Company also re-filed a plea in bar on November 29, 2021 seeking to have the claims asserted against the Company in the 2021 Amended Complaint barred, in whole or in part, by the applicable statutes of limitations. A jury hearing on the plea in bar commenced on January 31, 2022. On February 9, 2022, the judge determined that he could decide the plea in bar without the jury and, on February 10, 2022, the judge entered a verdict granting the relief sought by the Company's plea in bar motion with respect to the Virginia Computer Crimes Act, meaning the allegations asserted against the Company in the 2021 Amended Complaint with respect to the Virginia Computer Crimes Act are barred by the applicable statutes of limitations for conduct on or prior to May 29, 2015, while the claims made with respect to misappropriation of trade secrets under the Virginia Uniform Trade Secrets Act are not similarly barred. Appian's claim for tortious interference with business expectancy was not a subject of the plea in bar. On February 11, 2022, the court allowed Appian's motion to further amend the 2021 Amended Complaint to assert a damages claim of approximately $3 billion, seeking all of the Company's revenues less estimated direct costs from the sale of all of the Company's products and services in the period from the fourth quarter of 2013 through the third quarter of 2021. Virginia law requires that the plaintiff establish proximate cause between any alleged use of the alleged trade secrets and damages incurred by the plaintiff, and also requires plaintiffs seeking damages to allege a specific damages amount, prohibiting recovery beyond that amount.

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> *In addition to disputing the validity of Appian's claims against the Company, the Company believes that any alleged damages claimed by Appian are not supported by the necessary legal standard of proximate cause*. In addition, following the February 10, 2022 ruling on the Company's plea in bar, the ongoing claim under the Virginia Computer Crimes Act is time limited to acts occurring after May 29, 2015. A jury trial with respect to the merits of the dispute is scheduled to begin on March 21, 2022. *The Company believes the claims brought by Appian against the Company are without merit, that the Company has strong defenses to these claims and that, among other things, even were the jury to find that the Company misappropriated Appian's alleged trade secrets, any alleged damages claimed by Appian are not supported by the necessary legal standard of proximate cause*. The Company is unable to reasonably estimate possible damages or a range of possible damages given the Company's belief that the damages claimed by Appian fail to satisfy the required legal standard and due to the uncertainty as to how a jury may rule.

(Emphasis added).

On April 28, 2022, the Company filed a Form 10-Q for the first quarter of 2022, which was signed by Stillwell. The Form 10-Q provided:

> As previously reported, the Company is a defendant in litigation brought by Appian that is currently being tried in Virginia (the "Court") titled *Appian Corp. v. Pegasystems Inc. & Youyong Zou*, No. 2020-07216 (Fairfax Cty. Ct.). The jury trial began on March 21, 2022. On April 13, 2022, Appian withdrew its claim against the Company for tortious interference with business expectancy. On that same day, in the course of making determinations on various motions, the Court stated that if the jury finds that the Company misappropriated information that constituted Appian trade secrets and finds that the Company incorporated those trade secrets into the Company's products or the Company's marketing materials, the burden will then shift to the Company to prove that the sales Appian seeks as damages were not the result of the alleged misappropriation and use of the alleged trade secrets. This legal standard has not previously been adopted by the Virginia courts. *The Company continues to believe that its sales of the products at issue were not caused by, or the result of, the alleged misappropriation of trade secrets, and is submitting evidence to the jury to that effect*. The Company is unable to reasonably estimate possible damages because, among other things, of the uncertainty as to how a jury may decide and the parties' existing grounds for appeal based on rulings to date in the proceeding.

(Emphasis added).

As a direct and proximate result of the misconduct alleged herein, the Company has suffered substantial harm, not only monetarily, but also to its corporate image and goodwill. Such damage includes, among other things, costs incurred in defending itself in the Appian Action as

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well as in a securities fraud class action filed against the Company, you, and Kenneth Stillwell, captioned *City of Fort Lauderdale Police & Firefighters' Ret. Sys. v. Pegasystems Inc.*, Case No. 1:22-cv-11220-WGY (D. Mass.) (the "Securities Class Action"), exposing the Company to billions of dollars in damages in the Appian Action, exposing the Company to millions of dollars in potential class-wide damages in the Securities Class Action, and damage to the share price of the Company's stock, resulting in an increased cost of capital, and reputational harm.

STOCKHOLDER DEMAND

Ms. Larkin hereby demands that the Board take "suitable action" pursuant to Mass. Gen. Laws ch. 156D, § 7.42(1). Specifically, Ms. Larkin demands that the Board initiate and complete an investigation into breaches of fiduciary duties based under Massachusetts law, waste of corporate assets, unjust enrichment, and violations of all other federal and state laws, regulations, and rules by members of the Board and Pegasystems' executives and employees with respect to the misappropriation of Appian's confidential information and trade secrets and the false and misleading statements made regarding the Company's competition and sales and marketing practices, the Company's and Appian's intellectual property, and the Appian Action. Such investigation must cover not only the facts cited herein but any other credible indication of misconduct by the Board and Pegasystems' executives and employees concerning false and misleading statements made during the Relevant Period. This investigation must be conducted by independent and disinterested Board members with the assistance of independent outside legal counsel and other advisors, as needed.

Ms. Larkin demands that the Company commence legal proceedings against each party identified as being responsible for the misconduct identified by the independent investigation. Such legal proceedings must seek to have each wrongdoer jointly and severally reimburse the Company for the harm they have caused Pegasystems. The legal proceedings shall also seek to recover the salaries, bonuses, director remuneration, and other compensation paid to the responsible individuals. All such litigation must be commenced timely and within applicable statutes of limitations.

Pursuant to the Company's Compensation Programs, the Board has discretion to seek cancellation, forfeiture, and clawback, to the fullest extent permitted by law, of all equity awards and shares obtained pursuant to equity awards for employee misconduct, in consideration of the best interests of the Company and its shareholders.[3] Ms. Larkin demands that the Company seek all reimbursements and recovery available under this policy.

The above-described events also demonstrate the need for significant corporate governance and operational policy changes to ensure compliance with applicable laws and regulations. These reforms should address not only the Company's competition practices and disclosure practices, but also compliance with laws and regulations generally applicable to companies like Pegasystems, such as the securities laws. I am happy to meet with the Board and its counsel to discuss specific governance reform proposals.

[3] The Company's Compensation Programs are detailed in the Company's proxy statement filed on April 29, 2022.

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RIGRODSKY LAW P.A.

Ms. Larkin demands a response to this letter in accordance with Massachusetts law and reserves all rights regarding this demand and the subject matter thereof. If a timely response is not provided, Ms. Larkin is prepared to commence litigation.

Very truly yours,

/s/ Seth D. Rigrodsky

Seth D. Rigrodsky, Esq.

cc: Scott Luftglass, Esq. (*via* email)

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BRAGAR EAGEL & SQUIRE, P.C.

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humphries@bespc.com

May 5, 2023

VIA EMAIL

Mr. Alan Trefler
Chairman of the Board
Pegasystems Inc.
1 Main Street
Cambridge, Massachusetts 02142

Re: *Pegasystems Inc. Stockholder Litigation Demand*

Dear Mr. Trefler:

We represent Dag Sagfors (the "Stockholder"), holder of Pegasystems Inc. ("Pegasystems" or the "Company") common stock.

I write on behalf of the Stockholder to demand that the Company's Board of Directors (the "Board") prosecute the Company's claims against the following individuals: Peter Gyenes ("Gyenes"),[1] Richard Jones ("Jones"),[2] Christopher Lafond ("Lafond"),[3] Dianne Ledingham ("Ledingham"),[4] Sharon Rowland ("Rowland"),[5] Kenneth Stillwell ("Stillwell"),[6] Alan Trefler ("Trefler"),[7] and Larry Weber ("Weber")[8] (collectively, the "Officers and Directors"). As you are

[1] Gyenes has served as a member of the Board since March 2009 and has been a member of the Audit and Nominating and Corporate Governance ("Governance Committee") Committees since 2009.

[2] Jones has served as a member of the Board since November 2000 and served as Vice Chairman from September 2002 to July 2007. He has been a member of Governance Committee since 2011.

[3] Lafond has served as a member of the Board since April 2019 and has been a member of the Audit Committee since 2019, serving as its Chair since 2020. He has also served as member of the Governance Committee since 2019.

[4] Ledingham has served as a member of the Board since September 2016 and has been a member of the Governance Committee since 2017.

[5] Rowlands has served as a member of the Board since April 2016, serving as a member of the Governance Committee since 2017.

[6] Stillwell has served as Chief Financial Officer ("CFO") and as Chief Operating Officer ("COO") of the Company since 2016.

[7] Trefler is the founder and CEO of the Company and has served as the Chairman of the Board since 1983.

[8] Weber has served member of the Board since August 2012 and has been a member of the Audit Committee since 2021. He has also served as member of the Governance Committee since 2013, serving as Chair since 2015.

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aware, by reason of their positions as officers and/or directors of the Company and because of their ability to control the business and corporate affairs of Pegasystems, the Officers and Directors of the Company owe Pegasystems and its stockholders the fiduciary obligations of loyalty, good faith, and due care.

Stockholder has filed a complaint against Gyenes, Jones, Lafond, Ledingham, Rowlands, Stillwell, Trefler, and Weber in the United States District Court for the District of Massachusetts, Case No. 1:23-cv-10933 (the "Complaint"). The statements in this letter are based upon and merely summarize the allegations in that Complaint, and accordingly, they are based on Stockholder's personal knowledge as to those allegations concerning Stockholder and upon information and belief with respect to all other statements. The statements below are also based upon the allegations in Lead Plaintiff's Consolidated Amended Complaint for Violations of Federal Securities Laws filed in the case of *City Fort Lauderdale Police and Firefighters' Retirement System v. Pegasystems et al.*, Case No. 1:22-cv-11220-EGY, pending in the United States District Court for the District of Massachusetts (the "Securities Class Action") and the facts alleged and evidence submitted in *Appian Corp. v. Pegasystems Inc. et al.*, Case No. 2020-07216, in the Circuit Court of Fairfax County, Virginia (the "Appian Action").

I. THE WRONGDOING

A. Pegasystems Background

Pegasystems provides software for customer relationship management ("CRM") and business process management ("BPM"). The Company advertises itself as "a low-code platform for AI-powered decisioning and workflow automation." Its main platform, the Pega Platform, makes it simpler for enterprises to work smarter, unify experiences, and adapt instantly.

The CRM and BPM industry is highly competitive. Accordingly, Pegasystems consistently warned in its Securities and Exchange Commission ("SEC") filings that the "market for our offerings is intensely competitive, rapidly changing, and highly fragmented" and that the Company was subject to "significant competition." One of the Company's biggest competitors has been Appian Corporation ("Appian").

B. The Officers and Directors Allegedly Orchestrate or Permit a Scheme to Steal Trade Secrets and Other Confidential Information from a Primary Competitor

Starting as early as 2012, Pegasystems and its senior executives and employees allegedly constructed a scheme to misappropriate and profit from Appian's trade secrets and other confidential information. The scheme purportedly involved recruiting an Appian developer who would spy on Appian, appropriate its proprietary information, and sell the same to the Company.

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The Company is alleged to have hired Kforce, Inc. ("Kforce"), a technology, finance, and accounting-solutions firm, to recruit an experienced developer that would not pledge its loyalty to Appian. In February 2012, Kforce allegedly referred Youyong Zou ("Zou") to Pegasystems. Zou purportedly had access to Appian's software and information because he worked for United States government contractors utilizing Appian's platform to build software applications. Allegedly, the Company hired Zoe, and between February 2012 and September 2014, he used his Appian credentials to trade Appian confidential and trade secret information in exchange for money. Pegasystems allegedly used Kforce to funnel payments to Zou, and in furtherance of the scheme remaining concealed, the Company gave Zou the pseudonym "Matt."

Allegedly, during this period and in collaboration with Pegasystems' officers, senior executives, engineers, and managers, Zou provided the Company with unlawfully appropriated information, and Pegasystems used it for competitive advantage over Appian through at least 2020. As asserted in the Complaint, beginning in or about 2019, the Company further developed its scheme by using false names and companies to break into Appian's platform and gain more access to its trade secrets.

In 2020, two former Pegasystems employees apparently alerted Appian to the Company's misconduct. Consequently, on May 29, 2020, Appian filed the Appian Action against the Company. The Appian Action alleged that Pegasystems engaged in unlawful schemes to steal Appian's trade secret and confidential information to tarnish Appian's business and reputation and to steal its customers and potential customers. The Appian Action further stated that the scheme involved an array of senior officers, including Pegasystems' founder and current Chief Executive Officer Tefler as well as other Pegasystems executives.

C. The Officers and Directors Allegedly Cause the Company to Issue False and Misleading Statements

From May 29, 2020 and September 15, 2022 (the "Relevant Period"), the Officers and Directors allegedly caused the Company to make public statements that Pegasystems prohibited the exact tactics it used against Appian and tell investors that the Company could be subject to legal proceedings when, in effect, the Company was subject to a serious civil lawsuit.

Throughout the Relevant Period, Defendants allegedly made materially false and misleading statements and failed to disclose material adverse facts about the Company's business, operations, and prospects. Specifically, Defendants are alleged to have misrepresented the following to investors: (i) that the Company was blatantly violating Pegasystems' Code of Conduct and ethical practices; (ii) that the Company's competition, sales, and marketing practices were based on unlawfully obtained confidential information and trade secrets from one of the Company's biggest competitors to gain competitive advantage; (iii) that the Appian Action even existed and its potential effects on the Company; (iv) the merits of the case after Pegasystems announced the Appian Action two years after Appian commenced it; (v) the Company's fault and

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the damages caused to Appian as a result of the Company's espionage on Appian; (vi) that, as a result of the Company's wrongdoing, a jury could potentially find Pegasystems liable for over $2 billion in damages caused to Appian plus over $25 million in attorneys' fees and costs; and (vii) that, as a result, Defendants' positive statements about the Company's business, operations, and prospects were materially false, misleading, and lacked a reasonable basis.

During the Relevant Period, the Officers and Directors allegedly caused the Company to withhold all information about the Appian Action to investors, including its existence, as well as Pegasystems' alleged misappropriation of Appian's intellectual property in its Forms 10-Q from the second quarter of 2020 through 2021 and its 2020 Form 10-K filed with the Securities and Exchange Commission (the "SEC")on February 17, 2021. On February 16, 2022, Pegasystems filed its 10-K Form for the year 2021 ("10K2021") with the SEC, announcing for the first time the existence of the Appian Action. Therein, the Company assured investors that the action was meritless and that Pegasystems had strong defenses to its claims. More importantly, the 10K21 indicated that the Company faced no exposure in the litigation and that the damages sought by Appian were "not the result of the alleged misappropriation and use of the alleged trade secrets."

Also, during the Relevant Period, the Officers and Defendants allegedly made or permitted to be made false and misleading statements about Pegasystems' sales and marketing practices in the BPM market, the Company's and its competitors' intellectual property, the Appian Action and Appian's claims against Pegasystems, and its code of conduct and compliance with ethical and legal guidelines, and certain of the Officers and Directors also signed false and misleading Sarbanes-Oxley certifications. These purportedly false and misleading statements are set forth in the Securities Class Action and incorporated herein by this reference.

D. The Truth Emerges

On May 9, 2022, a jury awarded Appian over $2 billion in damages, plus attorneys' fees and costs, against Pegasystems for the willful and malicious appropriation of Appian's trade secrets. On this news, Pegasystems stock dropped $2.61 or 4% to close on May 9, 2022 at $65.93. On May 11, the Company's stock fell an additional eight percent when analysts cut their price targets for Pegasystems. On September 16, 2022, the Company announced that the court entered a final judgment in the Appian Action affirming the jury verdict. It further ordered the Company to pay Appian over $23.6 million in attorneys' fees and costs and post-judgment interest at an annual rate of 6%. Following this news, the Company's stock price fell nearly six percent on both September 16 and September 19, 2022.

E. The Officers' and Directors' Alleged Misconduct Directly and Proximately Causes Substantial Damages to the Company

As a direct and proximate result of the misconduct of the Officers and Directors alleged in the Complaint and restated herein, Pegasystems has sustained significant damages. As a result of

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the Officers' and Directors' alleged misconduct, Pegasystems apparently disseminated false and misleading public statements concerning Pegasystems's operations, prospects, and internal controls. This purported misconduct has devastated Pegasystems's credibility and resulted in Pegasystems, Trefler, and Stillwell's being named as defendants in the Securities Class Action. As a direct and proximate result of the Individual Defendants' alleged actions, Pegasystems has expended, and will continue to expend, significant sums of money defending and paying any settlement in the Securities Class Action. As alleged, the Officers' and Directors' conduct as described above directly and proximately resulted in significant damage to Pegasystems's market capitalization, which lost millions of dollars in value.

Lastly, the alleged actions of the Officers and Directors have irreparably damaged Pegasystems's corporate image and goodwill. For at least the foreseeable future, Pegasystems will suffer from what is known as the "liar's discount," a term applied to the stocks of companies that have been implicated in illegal behavior and have misled the investing public, such that Pegasystems' ability to raise equity capital or debt on favorable terms in the future is now impaired.

* * *

On behalf of the Stockholder, I hereby demand that the Board take action against the Officers and Directors to recover the damages described herein for the benefit of the Company and to correct the deficiencies in the Company's internal controls that allowed the misconduct to occur. If the Company does not commence appropriate action within the applicable statutory time period (§ 7.42. Demand, MA ST 156D § 7.42), the Stockholder will amend his Complaint against the Officers and Directors or commence a new stockholder derivative action on behalf of the Company to obtain appropriate relief. This stockholder demand also should put all affected entities and individuals identified above on notice of their document preservation and collection responsibilities.

Sincerely,



Badge Humphries

BH/dg

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600 17th Street, Ste. 2800 South
Denver, CO 80202

Philadelphia · San Francisco

May 17, 2023

Via Electronic Mail

Alan Trefler, Chairman
The Board of Directors
Pegasystems Inc.
One Main Street
Cambridge, MA 02142-1531

c/o: Michael T. Glass
Choate Hall & Stewart LLP
mgass@choate.com

Re: Demand for Action Pursuant to ALM GL ch. 156D, § 7.42

Dear Mr. Trefler:

I write on behalf of Robert Garfield (the "Stockholder"), an owner of the common stock of Pegasystems Inc., a Massachusetts corporation ("Pega" or the "Company"),[1] to demand that the Company's Board of Directors (the "Board") commence an independent investigation into potential wrongdoing by certain current and former officers and directors of Pega pursuant to ALM GL ch. 156D, § 7.42 (the "Litigation Demand").

Specifically, the Board must undertake and independent, good-faith investigation into whether you ("A. Trefler"), Peter Gyenes, Richard Jones, Steven Kaplan, James O'Halloran, William Wyman, Christopher Lafond, Dianne Ledingham, Sharon Rowlands, Larry Weber, Pega's Chief Product Officer ("CPO") Kerim Akgonul ("Akgonul"), Chief Technology Officer ("CTO") Don Schuerman ("Schuerman"), and A. Trefler's brother Leon Trefler ("L. Trefler"), Head of Product Marketing Douglas Kim ("Kim"), John Petronino, Pega's former Director of Product Marketing, Ben Baril, Pega's Director, Office of the CTO, and Chief Administrative Officer Kenneth Stillwell ("Stillwell") (together the "Pega Insiders" or "Management") breached their fiduciary duties by: (i) causing or permitting the Company to perpetrate a scheme whereby third parties were paid to steal trade secrets from a competitor, Appian Corporation ("Appian"); (ii) causing or permitting the Company to perpetrate a scheme whereby Pega employees created false personas to infiltrate and/or access Appian's platform for the purpose of misappropriating Appian trade secrets; (iii) violating the Company's Code of Conduct by engaging in an illegal

[1] As used herein, the terms "Pega" and the "Company" include all Pega employees and directors, as well as all affiliates, joint ventures, and subsidiaries.

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scheme to misappropriate trade secrets from Appian; (iv) failing to ensure that the Company's senior officers and/or employees and/or directors were acting in compliance with state and federal laws; and (v) causing the Company to issue a series of materially false and misleading public statements concerning Pega's purported compliance with state and federal laws.

Should the Board's investigation conclude that any or all of the Pega Insiders breached their fiduciary duties, the Stockholder demands that the Board institute litigation against such individuals to recover the damages their misconduct has caused the Company. In addition, the Board must investigate whether any stock sales made by any of the Pega Insiders between approximately February 2012 and the present were made while in possession of material, non-public, adverse information regarding the foregoing in violation of Massachusetts and federal law. If so, the Board must file suit against those individuals to reclaim their unjust profits for the benefit of the Company. Finally, the Stockholder believes that the Company's legal claims for relief against A. Trefler, Akgonul, Scheurman, Kim, and L. Trefler are ripe for filing right now based on testimony presented under oath in the Virginia Action (discussed herein below). These Pega Insiders have been found to have plausibly committed fraud, and thus the Company should immediately file suit to recover the damages their misconduct has caused Pega.

I. The Stockholder Is A Current Owner Of Pega Stock

The Stockholder is a current Pega stockholder with a right to demand the relief requested herein. The Stockholder previously made a demand for inspection of Pega books and records pursuant to G. L. ch. 156D, § 16.02 dated April 18, 2023 (the "Inspection Demand").[2] In connection with the Inspection Demand, the Stockholder provided the Company with a Declaration attesting to the Stockholder's ownership of Pega stock and evidence of that ownership since May 31, 2016. These documents should still be in the Company's possession.

II. Overview of the Pega Insiders' Alleged Misconduct

A. Pega, "Project Crush" and Appian

According to its public SEC filings, Pega operates in the intensely competitive Business Process Management ("BPM") industry, providing a "low-code" development platform that allows customers to build customized workflow-based applications for their business needs. According to Pega, "low-code" software allows customers to "configure and evolve" customized business applications without having to "write code." Analyst J.P. Morgan has similarly described "[l]ow-code (no-code) platforms" as "allow[ing] business users with minimal coding experience (citizen developers) to easily create workflow-based process-centric applications."

According to Pega's SEC filings, the Company's "target clients are Global 3000 organizations and government agencies," including companies in the financial services, life

[2] The Stockholder received the materials produced by the Board in response to the Inspection Demand on May 11, 2023.

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sciences, healthcare, communications and media, insurance, manufacturing, high tech, and consumer services industries.

Appian operates in the same industry as Pega and is one of the Company's primary competitors. Founded in 1999, Appian competes in the same BPM industry as Pega, providing a low-code development platform for customers to quickly develop business applications. As analyst J.P. Morgan stated in August 2020, Appian's "strength lies in its low-code application development platform." Appian generates revenue by licensing its software to customers and business partners. An Appian license permits the licensee to develop custom, low-code applications using Appian's development environment and run them on Appian's platform. An Appian license also permits the licensee to access Appian's documentation, which describes the technical features of Appian's software platform, and techniques that can be used to build applications on Appian's platform.

Management viewed Appian as a serious competitive threat and one of Pega's top competitors. Management commenced an illicit scheme against Appian in early 2012 with "Project Crush," an operation that involved recruiting an experienced Appian developer who was willing to misappropriate Appian's trade secrets for Pega. Management hired outside third party KForce Inc. ("KForce") to identify candidates for Pega to recruit, emphasizing to KForce that the potential candidate could not be "loyal" to Appian. In February 2012, KForce introduced Management to Youyong Zou ("Zou"). For years, Zou worked for U.S. government contractors utilizing Appian's platform to build software applications. Zou's employment with government contractors provided Zou with access to the Appian software and documentation that Management coveted.

From approximately February 2012 to September 2014, Zou collaborated extensively with Management, by using his Appian credentials to access Appian's trade secrets and sell them to Pega. Management in turn funneled payments to Zou through KForce, the middleman entity. Management also employed several measures to conceal the improper operation, including assigning Zou the pseudonym "Matt (so that he isn't 'outed' as our spy)."[3]

Zou's undertaking for Management included creating extensive video footage of Appian's platform, covertly downloading for Management large volumes of Appian's confidential documentation, showcasing for Management the functionality of the Appian platform, providing Management with valuable insight into Appian's software, showing Management how to use and navigate Appian's platform, and answering Management's detailed technical questions about Appian's software. Zou also met and collaborated with several of Pega's officers, senior executives, engineers, and managers as part of Project Crush, including A. Trefler, Akgonul, Scheurman, Kim, and L. Trefler.

Armed with Appian's misappropriated trade secrets and confidential information, Management used this information to, *inter alia*, develop invaluable sales and intelligence materials, train Pega's salesforce to effectively compete against Appian, win customers and deals

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[3] PLT 377. References to "PLT," "PLTD," "Depo. Tr.," and "Trial Tr." herein are to exhibits and/or transcripts in the Virginia Action, which is defined below. Emphasis is added throughout.

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over which Pega and Appian directly competed, and make improvements to Pega's own software. Management disseminated Appian's misappropriated information to hundreds of Pega employees, extolling its importance and promising that – with the benefit of Zou's information – Pega "will win EVERYTIME" and "should never lose against Appian!"[4] Management used the highly valuable information obtained from Zou for many years – up until at least 2020.

Pega's top executives were also in on this illicit scheme. A. Trefler – Pega's Chief Executive Officer ("CEO"), founder, and Chairman of the Board – personally met with Zou at Pega's corporate headquarters, reviewed information Zou had misappropriated for Pega, and employed that information to "blow…up" Appian's deals.[5] As one of the two whistleblowers who alerted Appian to Pega's scheme in 2020 later testified, "Alan Trefler [and] all of these people obviously knew we were doing this."[6]

For years before whistleblowers eventually "outed" the scheme in 2020, Project Crush was a raging success, and Management's appetite for Appian's trade secrets proved insatiable. Accordingly, by 2019, Management was already charting a course for another "teardown" of Appian's software. A. Trefler allegedly personally directed this latest "teardown," which Pega employees carried out through an array of subterfuge and illicit tactics. Instead of recruiting another Appian developer, under Management's direction, Pega used fake names and fake or front companies to illicitly gain access to Appian's trade secrets. One employee concocted multiple "personas," including ones named "Andrew Powers" and "Emily Gold," and a fake consulting firm ("Andrew Powers Consulting"), to infiltrate Appian's platform. Other employees falsely posed to Appian as "customers," using their spouses' businesses as corporate fronts to obtain access to Appian's software.

Management persisted in this scheme despite explicit concerns internally over the "legality" of Pega's actions.[7] A. Trefler even apparently misrepresented his own identity in his mission to "make[] [Appian] go away for good",[8] employing several aliases including "Albert Scii," "A. Ewe," and "Paul Foon") to access Appian's information.

In early 2020, Appian caught wind of Management's scheme from two whistleblowers, both of whom were former Pega employees. Shortly after discovering Management's scheme, Appian filed a lawsuit against Pega in the Circuit Court of Fairfax County, Virginia (the "Virginia

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4 PLT 721; PLT 196

5 PLT 227.

6 9/20/21 Bearden Depo. Tr. at 246.

7 PLT 643-A.

8 1/10/22 Baril Depo. Tr. at 238

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Court"). *See Appian Corporation v. Pegasystem Inc., et al.,* Civil Action No. 2020-07216 (the "Virginia Action").

The Virginia Action featured damning allegations against the Company and Zou. According to Appian's May 2020 complaint in the Virginia Action, "as recently as [2019]," the defendants had engaged in "unlawful schemes . . . [that] involved stealing Appian's trade secrets and confidential information and then using them to damage Appian's business and reputation, and to steal Appian's customers and potential customers." Appian alleged that the scheme "[i]nvolv[ed] personnel at Pegasystems up to and including Pegasystems' CEO and Founder, Alan Trefler, and other high-ranking Pegasystems executives."

Appian's six-count complaint sought various relief against Pega, including actual losses, unjust enrichment including a disgorgement of Pega's profits, attorneys' fees, costs, punitive damages, treble damages, and sweeping injunctive relief. Despite Appian's well-supported allegations that Pega, A. Trefler, and other senior officers had coordinated a multi-year, illicit espionage operation against Appian, and the astounding financial and reputational damage Pega faced in connection with the Virginia Action, Management failed to disclose to stockholders the existence of the Virginia Action for approximately ***18 months***. During that time, Management misleadingly assured stockholders that litigation from unnamed competitors ***could*** arise at some indeterminate point in the future. Management also falsely indicated to stockholders that Pega prohibited the very tactics which had been knowingly and secretly employed against Appian, including, *inter alia*, using "illegal or questionable means to acquire a competitor's trade secrets or other confidential information, such as . . . misrepresenting your identity in hopes of obtaining confidential information." Management also misleadingly reassured stockholders regarding A. Trefler's responsibilities in providing "guidance as to the propriety" of Pega employees' actions.

Yet at the time Management made these misstatements, unbeknownst to stockholders, Management had already employed "questionable" tactics for years, and Pega was already ensnared in potentially ruinous litigation as a result. Moreover, Management failed to disclose that A. Trefler – Pega's purported moral compass – was himself an active participant in, and was perhaps the mastermind of, the very misconduct that flouted Pega's ethics code and allegedly violated the law.

While concealing the Virginia Action and the underlying misconduct from stockholders, Management rushed to eliminate the Virginia Action as quickly and quietly as possible. Management's tactics included concealing evidence of misconduct, filing motions to stay or restrict discovery, filing motions to compel non-public arbitration, verifying misleading interrogatory responses, falsely testifying during depositions, and altering Pega's internal documents. The Virginia Court, however, did not countenance these maneuvers; Pega's losses piled up and Management's desperate efforts to dispel the Virginia Action proved unsuccessful.

On February 16, 2022, nearly two years after the Virginia Action was filed and with a merits trial around the corner, Management finally publicly disclosed the existence of the Virginia Action to stockholders in a Company SEC filing, including that Appian was seeking up to $3 billion in damages (representing all of Pega's revenue, less its direct costs, from the fourth quarter

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of 2013 ("4Q13") to the third quarter of 2021 ("3Q21")), and that Pega faced liability under the Virginia Uniform Trade Secrets Act ("VUTSA") and the Virginia Computer Crimes Act ("VCCA").

The February 16, 2022 disclosure, however, concealed material details of Management's egregious scheme, while misleadingly assuring stockholders that Appian's claims were "without merit," that the Company had "strong defenses to these claims," and that "any alleged damages claimed by Appian are not supported." In truth, Appian's claims were strong and meritorious: as Management knew, for years Management had engaged in willful and malicious conduct aimed at misappropriating Appian's information and using it to benefit Pega. A. Trefler's cadre of executives were themselves participants in the long-running illicit scheme, and had fully supported A. Trefler's mission to "destroy[] Appian."[9]

Meanwhile, Management's purportedly "strong defenses" were proven hollow as the Virginia Action steadily marched towards trial. Appian's damages claims were also well-supported by extensive factual evidence and testimony, including by Pega's own internal documents. In fact, when presented with the overwhelming evidence that Appian's trade secrets were used to improve Pega's software, although the Company was potentially facing having to pay $3 billion in damages, Pega's own expert "accept[ed] the premise that all of [Pega's] sales [from 4Q13 to 3Q21]" were tainted by misappropriation.[10] Pega's expert also conceded that Appian's damages from the 201 opportunities for which Appian and Pega directly competed from 4Q13 to 3Q21 were upwards of $187 million if Pega was found liable for misappropriation.

On May 9, 2022, following a seven-week jury trial before the Virginia Court, the jury unanimously decided in favor of Appian, finding that Pega and Zou had misappropriated Appian's trade secrets in violation of the VUTSA, and awarding compensatory damages in the amount of ***$2,036,860,045*** as against Pega (before interest, which itself reached into the hundreds of millions of dollars, as discussed below), and the amount of $5,000 as against Zou.

The jury in the Virginia Action also found that Pega acted willfully and maliciously in misappropriating Appian's information, entitling Appian to seek tens of millions of dollars in attorneys' fees and costs. According to the jury instructions delivered in the Virginia Action: "Willful conduct occurs when a party acts without regards for the rights of another, knowing injury will probably follow. Malicious conduct occurs when a party acts with ill will or spite." Finally, the jury found that Pega violated the VCCA.

Pega's stock price sank by 20.75% ($13.68 per share) on May 10, 2022, as news of the verdict in the Virginia Action began to ripple through the market. One analyst acknowledged the verdict's "reputational harm to Pegasystems," which could cause customers to "shift[] PEGA resources over to Appian's platform." Another analyst remarked that the verdict "will be a blot on

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9 1/10/22 Baril Depo. Tr. at 238-39.

10 5/3/22 Trial Tr. at 7508.

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Pega's record when dealing with federal contracts as the company will likely have to disclose its violation of the [VCCA]."

Pega's stock price dropped by another 8% ($4.18 per share) on May 11, 2022, as analysts slashed their price targets of Pega in the wake of the Virginia Action verdict. Morgan Stanley cited "the damage to Pegasystems' record," while Morningstar noted "the heightened risk" to Pega's business. Another analyst reduced its price target due to "potential ACV [Annual Contract Value] growth headwinds as a result of the lawsuit decision" and Appian's "edge versus Pegasystems for future government contracts." Meanwhile, Management publicly chastised the verdict as "ridiculous" and assured stockholders there were absolutely no "facts of any wrongdoing", claiming the "facts of the case" did not support any damages, "let alone [a] ridiculous" amount in excess of $2 billion.

On September 16, 2022, Management and Appian each separately disclosed that a final judgment had been entered in the Virginia Action, affirming the jury's verdict, including its award of $2,036,860,045 in damages for Pega's violations of the VUTSA, its finding that Pega had violated the VCCA, and its determination that Pega acted willfully and maliciously. It was also disclosed that the Virginia Court had ordered Pega to pay Appian over $23.6 million in attorneys' fees and costs, as well as post-judgment interest at an annual rate of 6%, or around ***$122 million per year***. Pega's stock price swiftly dropped by nearly 6% ($2.39 per share) on September 16, 2022, and by nearly 6% ($2.27 per share) again on September 19, 2022, as the market reacted to the news that the jury's May 9, 2022 verdict (including its findings on liability and damages) had been affirmed, and as analyst estimates were slashed further over "uncertainty stemming from the lawsuit," "clients[']deci[sions] to re-evaluate their Pega investments," and the ruling's "impact . . . [on] [Pega's] federal business."

B. The Securities Action is Filed

On June 19, 2022, Pega investor City of Fort Lauderdale Police and Firefighters' Retirement System filed a purported securities fraud class action lawsuit against Pega, A. Trefler, and Stillwell for alleged violations of sections 10(b) and 20(a) of the Securities Exchange Act of 1934. *See City of Fort Lauderdale Police and Firefighters' Ret. Sys. v. Pegasystems Inc., et al.*, Case No. 1:22-cv-11220-WGY (D. Mass.) (the "Securities Action"). The Securities Action, which remains pending, alleges that the named defendants committed securities fraud from June 16, 2020 through May 9, 2022 by engaging in the illicit Project Crush scheme and then misleading stockholders by covering up the scheme in SEC filings.

III. Conclusion

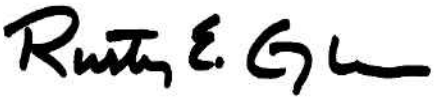
The Board must independently investigate these events and allegations in good faith, determine whether any or all of the Pega Insiders breached their fiduciary duties to Pega and its stockholders, and if so, hold any such individuals to account for the damages their fiduciary failures caused the Company. Furthermore, the Board must immediately implement new, robust corporate governance policies and procedures designed to remedy the misconduct and fiduciary failures alleged to have occurred herein. The members of the Board must ensure that they are

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equipped with the necessary information to effectively oversee the Company so as to prevent a recurrence of the events which have harmed Pega. To the extent the Board may decide that it is not willing to immediately commence an investigation regarding the misconduct alleged herein and that such an investigation is to be deferred, the Stockholder demands that the Board obtain agreements from each Pega Insider tolling any and all applicable statute of limitations and provide such agreements to the Stockholder as soon as they are reached.

Sincerely,

SHUMAN GLENN & STECKER



Rusty E. Glenn

cc: Robert Garfield
Marty Lacoff, Greenwich Legal Associates, LLC

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Exhibit 5 to DRC Report

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COHENMILSTEIN

Richard Speirs
(212) 220-2912
(212) 838-7745
rspeirs@cohenmilstein.com

August 3, 2023

Board of Directors
Pegasystems, Inc.
c/o Michael T. Gass, Esq.
CHOATE, HALL & STEWART LLP
Two International Place
Boston, MA. 02110

Re: ***Demand on Pegasystems, Inc. Pursuant to Mass. G.L. c. 156D, §742***

Dear Board of Directors:

I write pursuant to Mass. G.L. c. 156D, §742 on behalf of Ms. Jayne Birch ("Ms. Birch" or "Stockholder"), a current holder of Pegasystems, Inc. ("Pegasystems" or the "Company") common stock, to demand that the Board of Directors of Pegasystems ("Board")[1] undertake an independent investigation and take action to remedy harm incurred by the Company due to the misconduct of its Chief Executive officer, Alan Trefler ("Trefler"), and the Company's officers, employees and directors, in connection with a judgment exceeding $2 billion obtained by Appian Corporation ("Appian") for, among other things, the theft of Appian's trade secrets (the "Demand"). This Demand follows an earlier request for books and records made to Pegasystems by Ms. Birch pursuant to Mass. G.L. c. 156D, § 1602 on February 6, 2023 (the "Books and Records Request").[2]

---

[1] The current members of Pegasystems' Board are Peter Gyenes, Richard Jones, Christopher Lafond, Dianne Ledingham, Sharon Rowlands, Alan Trefler and Larry Weber.

[2] As evidence of the Stockholder's continued beneficial ownership of Pegasystems common stock, we have enclosed with this letter documentation (in the form of an account statements) reflecting her current and continued ownership of Pegasystems common stock at all relevant times. See Exhibit 1. Ms. Birch intends to continue to hold shares at least through the conclusion of the proceedings contemplated in this Demand.

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On May 9, 2022, a unanimous jury found that Pegasystems had misappropriated trade secrets from its competitor, Appian, and awarded Appian more than $2 billion in compensatory damages ("Appian Litigation"). The jury further found that Pegasystems acted willfully and maliciously by misappropriating Appian's trade secrets. Among the facts supporting the verdict included: (1) Pegasystems hiring a "spy" (i.e., contractor) to gain access to Appian's trade secrets; (2) Pegasystems' CEO, Trefler and others, purportedly admitting to using fake identities to improperly gain access to Appian's software and other confidential information; (3) Trefler participating in a meeting during which Trefler received Appian's trade secrets supplied by that "spy"; and (4) Trefler admitting that Pegasystems should not have hired that contractor. On September 16, 2022, the court entered a judgment in favor of Appian ordering Pegasystems to pay over $2 billion in damages, more than $23 million in attorneys' fees and costs, and post-judgment interest of approximately $122 million per year.

Pegasystems did not disclose either the existence of the Appian Litigation or the underlying scheme and the associated risks for years. Pegasystems finally disclosed the litigation and the risk of a substantial judgment just weeks before the trial commenced.

Subsequently, following entry of the Appian judgment, purchasers of Pegasystems' common stock filed a securities fraud class action against the Company, Trefler, and its CFO Kenneth Stillwell ("Stillwell") in the District Court of Massachusetts for issuing materially false and misleading statements concerning the conspiracy to misappropriate Appian's trade secrets. In a Memorandum and Order, dated July 24, 2023 ("Order"), Judge William Young sustained the claims against Pegasystems and Trefler. Although he dismissed the claims against Stillwell based on insufficient allegations of scienter, Judge Young did so without prejudice. That case will now proceed to discovery on the merits.

We write to formally request, on behalf of Ms. Birch, that Pegasystems fully investigate and take appropriate action as more fully described below concerning, among other things: (i) possible breaches of fiduciary duty by members of Pegasystems' directors and officers (including all of the Board's committees) in connection with, among other things, Pegasystems' alleged scheme to misappropriate Appian's confidential information and violate trade secret laws; (ii) the Company's issuance of materially false and misleading statements in its SEC filings and public statements designed to conceal its illicit business practices; (iii) the Board's failure to oversee and investigate the Company's business practices including violations of the Company's code of conduct by its CEO, senior executives and management; (iv) failure of the Audit Committee to assure the issuance of financial statements and SEC filings that complied with Generally Accepted Accounting Principles ("GAAP") and SEC laws and regulations; (v) improper payments to employees that encouraged illegal and unethical behavior; (vi) payment of compensation to executives, management and the Board based on financial results inflated by the misappropriation of Appian's trade secrets; (vii) corporate waste in connection with the Company's repurchases of its stock at inflated prices; (viii) insider trading by Company officers and directors; and (ix) indemnification for the Company's liability in the securities fraud class action and Appian Litigation. Ms. Birch further demands that the Company initiate litigation against Mr. Trefler and

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others on the Company's behalf and clawback all compensation improperly paid to employees, officers and directors, including for sales of Pegasystems stock while in possession of material non-public information.

RELEVANT BACKGROUND[3]

Pegasystems operates in the highly competitive Business Process Management ("BPM") industry, providing a "low-code" development platform that allows customers to build customized workflow-based applications for their business needs. The Company automates customer interactions across transaction-intensive enterprises and provides customer relationship management ("CRM") software. It sells its products to customers in the banking, mutual funds and securities, mortgage services, card services, insurance, healthcare management, and telecommunications industries. Appian is one of Pegasystems main competitors.

Beginning as early as 2012, Pegasystems, its senior executives, and employees engaged in a scheme to misappropriate Appian's trade secrets and confidential information. For years, Company officials concealed their scheme, as well as the Appian Litigation that was filed in May 2020 ("May 2020 Complaint") based on Pegasystems' misconduct. Pegasystems commenced its scheme in early 2012 with "Project Crush," by recruiting an Appian developer who was willing to misappropriate Appian's trade secrets for Pegasystems. Pegasystems specifically sought to recruit (through a third party) KForce Inc. ("KForce"), a candidate willing to compromise Appian's trade secrets. KForce introduced Pegasystems to Youyong Zou ("Zou") who had access to the Appian software and documentation that Pegasystems coveted.

From approximately February 2012 to September 2014, Zou collaborated extensively with Pegasystems by using his Appian credentials to access Appian's trade secrets and sell them to Pegasystems. Pegasystems in turn funneled payments to Zou through KForce, the middleman entity. Pegasystems concealed its illicit scheme by assigning Zou the pseudonym "Matt (so that he isn't 'outed' as our spy)." Zou compiled video footage, secretly downloaded Appian's confidential documents and collaborated with Pegasystems officers and personnel to provide them with the misappropriated trade secret information. Pegasystems then used the misappropriated information to develop sales materials, train its salesforce to effectively compete against Appian and make improvements to Pegasystems' own software. Pegasystems disseminated Appian's misappropriated information to hundreds of Pegasystems employees, extolling its importance and promising that—with the benefit of Zou's information—Pegasystems "will win EVERYTIME" and "should never lose against Appian!" The illicit scheme continued until at least 2020.

Evidence has shown that senior executives at Pegasystems were closely involved in the scheme up to the highest level including Trefler, as indicated in testimony from a whistleblower. Among the executives who participated in the scheme were Pegasystems' Chief Product Officer

[3] Much of the Relevant Background has been taken from the trial record in the Appian Litigation.

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("CPO") (Kerim Akgonul), Chief Technology Officer ("CTO") (Don Schuerman), Chief of Clients and Markets ("CMM") (Leon Trefler, Trefler's brother), and Head of Product Marketing (Douglas Kim).

In 2019, Pegasystems, under the direction of Trefler, continued its scheme to misappropriate Appian's trade secrets with a renewed plan known internally at Pegasystems as "Teardown". Efforts were made using fake names, or fake companies to gain access to Appian's trade secrets. Trefler himself misrepresented his identity in an effort to access Appian's proprietary information. These efforts continued even as concerns were expressed about the legality of the Company's actions. In early 2020, Appian discovered the scheme when two whistleblowers stepped forward.

APPIAN TRADE SECRET LITIGATION

On May 29, 2020, Appian filed a complaint against Pegasystems and Zou, in the Circuit Court for Fairfax County, Virginia, asserting claims for trade secret misappropriation, violation of the Virginia Computer Crimes Act, tortious interference and statutory business and common law conspiracy. Appian alleged, among other things, that from 2012 to 2014, Pegasystems had retained Zou, who had access to Appian's software and documentation, to misappropriate Appian's trade secrets and provide them to Pegasystems. The Appian litigation further alleged that "***as recently as [2019***]," Pegasystems had engaged in "unlawful schemes . . . [that] involved stealing Appian's trade secrets and confidential information and then using them to damage Appian's business and reputation, and to steal Appian's customers and potential customers" and that it involved "personnel at Pegasystems . . . including Pegasystems' CEO and Founder, Alan Trefler, and other high-ranking Pegasystems executives." Appian initially sought damages of $90 million, plus punitive damages, treble damages and injunctive relief.

Pegasystems prohibited the very tactics it secretly employed against Appian, including, *inter alia*, using "illegal or questionable means to acquire a competitor's trade secrets or other confidential information, such as . . . misrepresenting your identity in hopes of obtaining confidential information." The Company also misleadingly reassured stockholders of Trefler's responsibilities in providing "guidance as to the propriety" of his employees' actions.

Despite the fact that Appian had filed its complaint against Pegasystems more than eight months earlier, the Company's 2020 Form 10-K (approved and signed by the Board) included only misleading generic risk disclosures regarding *potential* intellectual property matters. Seemingly reflecting the Board's knowledge of Appian's charges that Pegasystems violated its trade secrets, the 2020 Form 10-K noted that the Company had in the past, "*received . . . notices that claim that we have misappropriated, misused or infringed other parties' intellectual property rights . . . .*" Pegasystems, Inc., Annual Report (Form 10-K), 19 (Feb. 17, 2021) (emphasis added).

The Company merely issued a generic cautionary statement in its 2020 Form 10-K (which the Board approved and signed) that "*[f]rom time to time, we may be subject to legal proceedings*

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and civil and regulatory claims that arise in the ordinary course of our business activities." *Id.* at 22 (emphasis added).

Further, the 2020 Form 10-K, also included a misleading boilerplate risk disclosure warning shareholders that Pegasystems "*may be subject to intellectual property rights claims by third parties, which are extremely costly to defend,*" which "*could require* [Pegasystems] *to pay significant damages and could limit* [its] *ability to use certain technologies.*" *Id.* at 19. Instead, it should have noted that it was, in fact, currently subject to such claims and that the risk of being required to pay significant damages was likely.

Although the Company's top officer and other senior executives participated in the scheme, the Company and the Board failed to disclose, among other things, the pendency of the Appian Litigation until they issued its 2021 Form 10-K, almost two years after Appian filed its complaint against Pegasystems and less than five weeks before the case reached trial, despite its potential to materially affect Pegasystems' financials if there was an adverse outcome. Pegasystems asserted that (i) Appian's claims "are without merit," (ii) Pegasystems has "strong defenses to these claims," and (iii) "any alleged damages claimed by Appian are not supported . . . ." Pegasystems, Inc., Annual Report (Form 10-K), 23 (Feb. 16, 2022). Pegasystems continued to hide the underlying years long conspiracy to steal Appian's trade secrets and the magnitude of potential damages inflicted by its misconduct.

In its first quarter Form 10-Q filed on April 28, 2022, near the conclusion of the trial, the Company once again reassured investors that:

> The Company continues to believe that its sales of the products at issue were not caused by, or the result of, the alleged misappropriation of trade secrets, and is submitting evidence to the jury to that effect. The Company is unable to reasonably estimate possible damages because, among other things, of the uncertainty as to how a jury may decide and the parties' existing grounds for appeal based on rulings to date in the proceeding.

Pegasystems Inc., Quarterly Report (Form 10-Q), 18 (Apr. 28, 2022).

Likewise, the Company misleadingly touted Pegasystems' strict Code of Conduct that expressly prohibited precisely the type of illicit behavior that was used to steal Appian's trade secrets and illegally gain access to Appian's software and data.

During the trial, the jury was presented with substantial evidence supporting Appian's claims, including videos, emails, and text messages. It was also revealed that Defendant Trefler had knowledge of and personally participated in the illegal scheme, and he testified under oath that he knew it was inappropriate to hire Zou and knew that Zou had engaged in improper activities. According to an Appian news release,

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> During the seven-week trial, Appian presented evidence that Pegasystems hired an employee of a government contractor (the "Contractor"), to provide Pegasystems with access to Appian's software as a part of an effort to learn how to better compete against Appian. In hiring the Contractor, Pegasystems instructed its third-party contracting service to recruit someone who was not "loyal" to Appian. Appian provided evidence that the Contractor, who worked as a developer in the Appian software under a government contract, violated his employer's code of conduct and his employer's agreement with Appian by providing access to an Appian competitor.
>
> . . . .
>
> Appian also submitted that Pegasystems' product development team reviewed the materials provided by the Contractor and changed the course of Pegasystems' product engineering to take advantage of the Appian technology they saw. Specifically, Appian put forward documents and testimony that Pegasystems made use of the trade secrets gleaned from the Contractor to make improvements with respect to, among other things, ease of use, and social and mobile capabilities in the Pegasystems platform.
>
> In addition, Appian presented undisputed evidence that Pegasystems employees used false identities to obtain access to Appian information and trial versions of Appian's software, which were then used for competitive purposes. Mr. Trefler himself admitted to using an alias, "Albert Skii" to obtain access to Appian information. One Pegasystems employee admitted to creating a fake persona and a company to fool Appian into providing him with access to Appian's software platform. Other Pegasystems employees obtained access to Appian's software through Pegasystems partners in India, using credentials provided to those partners under license.

News Release, Appian, Appian Corp. (May 10, 2022) (on file with author).

On May 9, 2022, following a seven-week jury trial, the jury unanimously decided in *favor of Appian, finding Pegasystems and Zou had misappropriated Appian's trade secrets* in violation of the Virginia Uniform Trades Secret Act and awarding compensatory damages of $2,036,860,045 as against Pegasystems (before interest). The jury concluded that Pegasystems had willfully and maliciously misappropriated Appian's trade secrets, causing Appian to lose more 201 customers and unjustly enriching Pegasystems to the tune of $479 million. Pegasystems shares plunged from $65.93 to $52.95 on May 10, 2022, erasing more than $1 billion in market capitalization in a single day and causing enormous reputational harm. The stock price fell another $4.18 on May 11, 2021.

On September 16, 2022, it was disclosed that the Virginia court ordered Pegasystems to pay Appian over $23.6 million in attorneys' fees and costs, and post-judgment interest of approximately $122 million per year. The stock price continued to fall significantly on this news.

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SECURITIES FRAUD CLASS ACTION LITIGTION

As a result of the disclosure of the fraud and precipitous decline in the trading price of the Company's common stock, a securities fraud class action was commenced on May 19, 2022, on behalf of purchasers of the Company's securities between June 16, 2020, and May 9, 2022, against Pegasystems, Trefler and Stillwell. The Class Action Amended Complaint ("Complaint") alleges claims under Sections 10(b) and 20(a), and Rule 10b-5 of the Securities Exchange Act.

The Complaint explains in graphic detail the efforts at Pegasystems to misappropriate Appian's trade secrets. References to internal meetings, emails, and strategy, paint a sordid picture of Pegasystems illicit efforts including the involvement of top officers of the Company, employees, a network of "spies" and the use of multiple aliases. These activities were in blatant disregard of the Company's Code of Ethics which was reviewed and adopted by the Board. Pegasystems' efforts continued into 2020 with the class plaintiffs alleging that Pegasystems continued its illegal conduct even after the Company was sued by Appian.

Class Plaintiffs allege Pegasystems and Trefler made a series of misleading statements to investors in SEC filings, conference calls and other public statements concerning its sales and marketing efforts and competitive successes. However, those statements concealed that Pegasystems' success was largely fueled by misappropriating Appian's trade secrets that were used to enhance its products and that it was using illicit tactics and unethical methods to achieve advantages over its competitors, particularly Appian. Pegasystems is also alleged to have misrepresented information concerning intellectual property, risks of possible claims from its competitors and the status of legal proceedings, while concealing both the scheme to misappropriate Appian's intellectual property and the Appian Litigation itself. Class Plaintiffs further allege that Pegasystems made material misstatements and omissions concerning the Company's internal code of conduct applicable to all employees, consultants and members of the Board which prohibited the activities embodied by the scheme to misappropriate Appian's trade secrets.

The Class Complaint also alleges that Pegasystems and the individual defendants filed false and misleading Sarbanes-Oxley Certifications, and that the Company's financial statements violated GAAP and SEC disclosure rules with respect to its representations regarding legal proceedings and loss contingencies. Among other items, Pegasystems failed to disclose the Appian Litigation, which was a material legal proceeding outside "ordinary routine litigation incidental to [the Company's] business" in violation of Item 303 of SEC Rules. 17 C.F.R. § 229.103(a) (2020). Particularly significant is the fact that Appian's potential damages included up to eight years of sales that had been "tainted by misappropriation" indicating a potential damage number greater than $3 billion. It is further alleged that Pegasystems violated GAAP regarding its failure to disclose a loss contingency associated with the Appian Litigation in violation of ASC 450.

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As reflected in the Class Complaint, the use of various surreptitious methods designed to conceal the years-long scheme from the public and Appian, together with the misleading statements to investors, evidenced a knowing intent on the part of Pegasystems to deceive investors and stockholders.

On July 24, 2023, Judge Young issued an Order in the class action litigation finding that "[b]ased on the factual allegations in the complaint, the most compelling inference is that Trefler was aware of, participated in, and directed Pega's corporate espionage against Appian...In addition, Pega did not discipline the authors of the conspiracy . . . [r]ather it encouraged and rewarded their actions with cash bonuses." Order 2. Judge Young found that Pegasystems deceived investors in multiple ways including its assurances that it would "[n]ever use questionable means to acquire a competitor's trade secrets or confidential information" and reassuring investors in February 2022 that "Appian's claims against Pega were 'without merit.'" *Id.* Judge Young concluded that the facts alleged support a strong inference of that Pegasystems and Trefler acted with scienter finding that "Trefler knew or was reckless in not knowing that his and Pega's statements posed a substantial danger to mislead investors." *Id.* at 19.

In finding that allegations of Pegasystems' statements concerning its code of conduct were materially false and misleading, the Court stated "in short, Pega's most senior executives orchestrated and directed the conspiracy while fostering a corporate culture that promoted and harbored precisely the kind of behavior that Pega promised investors it would prohibit." *Id.* at 26. Further, Trefler and Pegasystems misled investors by categorically denying that Appian's claims had any merit "despite possessing substantial information about the viability of those claims." *Id.* at 30.

ROLE OF MANAGEMENT AND THE BOARD

Stockholder believes Pegasystems' scheme to misappropriate Appian's trade secrets and its subsequent concealment of Appian litigation by issuing materially false and misleading statements were part and parcel of the Company's efforts to engage in illicit business practices in violation of various laws and the Company's Code of Conduct. These practices were apparently known to and countenanced at the highest levels of the Company (including its CEO Trefler) and, through Trefler (and possibly others), by the Board and its various Committees responsible for overseeing risk, financial and disclosure matters, compensation practices and compliance with the Company's corporate governance policies and guidelines as embodied in its committee charters, Code of Conduct and Company policies.

Thus, during the relevant period, the Directors, in breach of their fiduciary duties owed to Pegasystems, willfully or recklessly made and/or caused the Company to materially misrepresent and overstate the business, operations, competitive position and prospects of Pegasystems. Further, the Company failed to maintain adequate internal controls and risk management systems. As a result of the foregoing, Pegasystems' public statements, SEC filings and financial statements were materially false and misleading at all relevant times. The aforementioned misleading

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statements and omissions painted a false image of the Company which artificially inflated Pegasystems' stock price which resulted in the pending class action securities litigation.

Moreover, documents produced to Stockholder in connection with a previous books and records request from Pegasystems pursuant to Mass. G.L. c. 156D, § 1602, suggest the Board and senior officers breached their fiduciary duties with respect to these matters. Pursuant to that request, Pegasystems produced certain documents purportedly relevant to the Appian Litigation and the Board's role in connection with that litigation, as well as documents related to the Company's Code of Conduct. The documents produced appear to further support a claim for breach of fiduciary duty against the Pegasystems officers and directors. In short, they reflect the absence of any internal controls or reporting system at the Board level designed to address potential or existing violations of the Company's Code of Conduct, anticompetitive practices, or violations of SEC disclosure requirements and accounting rules. The documents reflect that the Board and Audit Committee only belatedly considered the Appian Litigation in February 2022 and endorsed the misleading statements in the Form 10-K and subsequent 10-Q. The Board also ostensibly reviewed the Company's Code of Conduct in December 2020 and December 2021, apparently without considering whether there was any non-compliance and without establishing any procedure to review such violations such as the Appian trade secret conspiracy. None of the documents reflect the Board's consideration (in any way) of the Appian Litigation or its risk to Pegasystems' business until just weeks before the trial.

In addition, during the relevant period certain officers and directors at Pegasystems, including Trefler, sold shares of Pegasystems common stock at artificially inflated prices, ostensibly while in possession of material inside information regarding the illicit scheme to misappropriate Appian's trade secrets as described above. Also during the relevant period, the Board also authorized the Company to repurchase its common stock at artificially inflated prices which constituted waste.

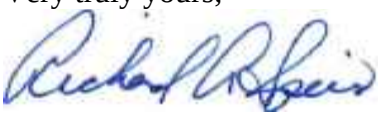
Finally, the Company's actions, including the Board, the Audit Committee and management have caused the SEC to commence an investigation into the Company's accounting practices subjecting it to costs associated with the investigation and possible sanctions.

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CONCLUSION

Based on the overwhelming evidence of illegal conduct and a conspiracy at the highest levels of the Company, including its CEO and Chairman of the Board, and the Company's exposure to a massive judgment and possible liability in the securities class action, Ms. Birch demands that the Company investigate all parties involved in the misconduct, including the Board and its committees for their malfeasance and take appropriate steps to remedy the harm caused to Pegasystems.

Very truly yours,



Richard A. Speirs

cc: Ms. Jayne Birch
Peretz Bronstein, Esq.

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Exhibit 6 to DRC Report

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Jeroen van Kwawegen
(212) 554-1472
Jeroen@blbglaw.com

March 25, 2024

VIA FEDERAL EXPRESS

Board of Directors
Pegasystems Inc.
One Main Street
Cambridge, MA 02142

VIA HAND-DELIVERY

Corporation Service Company
251 Little Falls Drive
Wilmington, DE 19808

Re: Demand for the Board of Directors to Take Action Pursuant to M.G.L. ch. 156D § 7.42

Dear Members of the Board of Directors of Pegasystems Inc.:

We represent John Dwyer (the "Stockholder"), the beneficial owner of shares of Pegasystems Inc. ("Pega" or the "Company") common stock. Stockholder has held Pega stock continuously since at least August 2023. Verified documentary evidence of Stockholder's beneficial ownership of common stock is attached hereto as **Exhibit 1**, and such documentary evidence is a true and correct copy of what it purports to be. A power of attorney appointing Bernstein Litowitz Berger & Grossmann LLP and Bottini & Bottini, Inc. (together, the "Firms") to act on behalf of Stockholder is attached hereto as **Exhibit 2**.

This letter is a demand ("Demand"), pursuant to M.G.L. ch. 156D § 7.42 that Pega's board of directors (the "Board") cause Pega to take suitable action in response to the misconduct set forth below. Stockholder does not concede the independence of the Board and, in fact, strongly believes that the Board breached its fiduciary duties and is conflicted and incapable of giving disinterested consideration to this Demand. Stockholder makes this Demand solely because Massachusetts is a universal demand state. If the Board does not cause the Company to take suitable action, Stockholder will file a stockholder derivative action.

The Demand arises from breaches of fiduciary duty by Pega's directors and officers with respect to the substantial financial and reputational liabilities Pega faces from lawsuits[1] related to the Company's corporate espionage scheme targeting Appian Corporation ("Appian").

[1] These lawsuits include: (a) *Appian Corporation v. Pegasystems Inc.*, et al., Civil Action No. 2020-07216 (Circuit Court of Fairfax County, Virginia) (the "Virginia Action"); and (b) *City of Fort Lauderdale Police and Firefighters' Retirement System v. Pegasystems Inc., et al.*. Civil Action No. 1:22-cv-11220-WGY (D. Mass.) (the "Securities Action").

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Stockholder demands that the Board act to correct Pega's fraudulent corporate espionage practices and hold the responsible directors and officers accountable for the harm they caused to Pega, as described below.

PEGA'S ILLEGAL CORPORATE ESPIONAGE SCHEME

I. Company Background

According to Pega, the Company's business is to: "develop, market, license, host, and support enterprise software that helps organizations build agility into their business so they can adapt to change."[2] The Company states that its "powerful low-code platform for workflow automation and artificial intelligence-powered decisioning enables the world's leading brands and government agencies to hyper-personalize customer experiences, streamline customer service, and automate mission-critical business processes and workflows" and that "clients can leverage our intelligent technology and scalable architecture to accelerate their digital transformation. In addition, our client success teams, world-class partners, and clients leverage our Pega Express methodology to design and deploy mission-critical applications quickly and collaboratively."[3]

The Company is incorporated in Massachusetts and maintains its principal executive offices in Cambridge, Massachusetts. The Company's stock trades on the Nasdaq Stock Market under the ticker "PEGA."

II. Pega Executed an Illegal Espionage Scheme to Gather Information on Its Competitor Appian

a. Beginning in 2012, Pega Used a Corporate Spy to Steal Information from Appian in a Scheme Called "Project Crush"

Pega's executives engaged in an illegal, near decade-long corporate espionage scheme targeting the Company's chief rival, Appian. All the while, Pega's Board was either asleep at the switch or complicit in this spying campaign, which has now exposed the Company to ***billions of dollars in damages***.

Pega develops customer relationship management ("CRM") and business process management ("BPM") software for major global companies and government agencies. The Company's "low-code" software allows companies to create customized business applications. J.P. Morgan has described "[l]ow-code (no-code) platforms" as "allow[ing] business users with minimal coding experience (citizen developers) to easily create workflow-based process-centric

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[2] Pegasystems, Inc., Annual Report, (Form 10-K) (Feb. 15, 2023) at 4.

[3] *Id.*

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applications." Pega's customers include companies across the life sciences, healthcare, communications, media, insurance, manufacturing, tech, and consumer services sectors.

Appian is one of Pega's rivals in the competitive CRM and BPM industry. According to J.P. Morgan, Appian's strength is in its low-code application development software platform. Appian licenses its software to its customers, which allows them to develop applications and run them using Appian's software platform. This license also allows the licensee to access the technical features of Appian's software platform.

The Company's founder, Chairman, Chief Executive Officer, and controlling stockholder Alan Trefler ("A. Trefler") spearheaded a sprawling corporate espionage scheme that involved enlisting corporate spies, creating aliases and fake companies, and using Company resources to steal confidential and proprietary intelligence and trade secrets from Appian. This scheme allowed the Company to illegally gain a competitive advantage when pursuing the same clients as Appian and to improve Pega's own software platform.

A Pega employee stated that A. Trefler and his brother, Leon Trefler ("L. Trefler"), were "very focused on destroying Appian. Like making it go away for good."[4] In order to accomplish this goal, in early 2012, Pega initiated a corporate espionage scheme to steal Appian trade secrets and confidential information. Pega called the scheme "Project Crush" and it was administered by the Company's top executives. A. Trefler, Don Schuerman (("Schuerman") Chief Technology Officer), L. Trefler (Chief of Clients and Markets), Kerim Akgonul (("Akgonul"), Chief Product Officer), and Benjamin Baril (("Baril"), Director, Office of the CTO) were all intimately involved in the execution of Project Crush. Pega's goal was to use the stolen information to give the Company's salesforce an advantage, to create opposition research on Appian that would provide a leg up in direct competitions for contracts, and to bolster Pega's own software.

Appian employed numerous defensive measures to protect its trade secrets. This meant that Appian was highly selective about what companies could access its software on a trial basis, and it excluded competitors from accessing the Appian platform. A number of Pega employees testified in the Virginia Action that Appian made it very difficult to access its software for a free trial. Thus, Pega determined that it would need a corporate spy that could bypass Appian's safeguards, gain access to Appian's software, and funnel that information to Pega.

Pega enlisted KForce Inc. ("KForce") in February 2012 to recruit an Appian developer with several years of experience and access to Appian's systems. Pega outsourced this task to KForce so that it could maintain some distance from the recruitment of the prospective corporate spy. Pega explicitly told KForce that the developer "should not have worked directly with Appian" and could not be "loyal' to Appian because Pega did not want the spying to lead back to Pega.[5]

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[4] Trial. Tr., *Appian Corporation v. Pegasystems Inc., et al.*, Civil Action No. 2020-07216 (Circuit Court of Fairfax County, Virginia) 3/22/22 at 70 [hereinafter Trial Tr.].

[5] Trial. Tr., 3/22/22 at 52-53.

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KForce connected Pega to Youyong Zou ("Zou"), who had worked with U.S. government contractors that utilized Appian's software platform. Through Zou, Pega would have access to proprietary Appian software and trade secrets.

Zou became a key asset in Project Crush. Starting in February 2012, Zou made videos of himself accessing Appian's software platform, downloaded Appian's software documentation, demonstrated to Pega the features of Appian's software platform and supplied information about the software's uses and strengths and weaknesses, and answered Pega's technical questions about Appian's software platform. In short, Zou provided Pega with all manner of key, confidential information about Appian.

Zou also worked directly in person with Pega executives, visiting the Pega corporate headquarters in Cambridge, Massachusetts several times. Zou spoke directly with Pega executives and other employees and provided them with information he had obtained from Appian. In fact, John Petronio ("Petronio"), the director of product marketing at the time, informed A. Trefler, L. Trefler, and Schuerman, among others, that on January 29, 2013, Zou would be visiting Pega's offices and would provide "demonstrations of building an application in Appian 7."[6] During the January 29, 2013 meeting, A. Trefler, Schuerman, and L. Trefler met with Zou and they, along with other Pega employees, strategized on ways to use Appian's trade secrets for Pega's advantage. After the meeting, Petronio emailed A. Trefler to inform him that Pega would update the Appian competition whitepaper based on the meeting. Pega attempted to conceal these dealings with Zou. The Company paid Zou through a middleman and only a few employees knew his real name—the rest of the Company referred to him by the pseudonym: "Matt."

Zou's insight into Appian was hugely beneficial to Pega. A whistleblower testified that Zou provided Pega information that it did not have before and gave Pega access to the "black box."[7] L. Trefler stated that the stolen information was "useful" and agreed that it assisted Pega in its marketing efforts to compete against Appian.[8] L. Trefler worked on developing Pega's strategies to use Appian's stolen information. The stolen Appian information was widely circulated and utilized across Pega's organization by over 200 executives, salespersons, engineers, product developers, and other employees. The work product created from Zou's spying included: (a) marketing aids; (b) training materials; (c) screenshots of Appian's software platform; and (d) memos and briefs for strategies to compete against Appian. These materials included memos called "Understanding Appian" and "12 Challenges"—which included Zou's stolen information—that were created for the stated goal to beat Appian in head-to-head interaction.[9] Pega used the stolen information to torpedo Appian on multiple fronts, including: (a) a competition with Appian to secure the U.S. Census Bureau's contract for the 2020 Census; (b) a competition with Appian

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[6] Trial. Tr., 3/24/22 at 764-65.

[7] Trial. Tr., 5/5/22 at 8110.

[8] Trial. Tr., 5/5/22 at 8110-12.

[9] Trial. Tr., 5/5/22 at 8077-78.

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to acquire Rabobank as a customer; and (c) to share Appian's trade secrets with Pega's customers. In fact, in February 2013, A. Trefler himself requested that a competitive brief on Appian be given to Rabobank that was filled with negative information about Appian derived from Appian's trade secrets. Additionally, Pega used Appian's trade secrets to improve Pega software. Akgonul and Head of Social Product, Agya Garg, had meetings with Zou to analyze Appian's software's capabilities and implemented certain Appian features in Pega's products. Akgonul requested that Zou provide information on specific features of Appian's software and was particularly interested in using this information to give Pega a competitive advantage. Confidential Company memorandums also document that Pega planned to integrate Appian technology into Pega's software. And, on February 26, 2014, A. Trefler and other executives received over 200 presentation slides with information about Appian that included screenshots collected by Zou.

Finally, in September 2014, Pega ended its deal with Zou after he switched roles with his employer and no longer had access to Appian's software platform. Baril co-wrote a memorandum documenting Project Crush in 2014 which included action items on how to utilize the stolen information going forward. Thereafter, Pega used Zou's stolen information for years.

b. In 2019, Pega Began a Second Project to Steal Appian Technology Called the "Teardown"

In 2019, Pega executives decided to expand on the perceived success of the Project Crush. A. Trefler, Schuerman, L. Trefler, Baril and other Pega executives contemplated a new effort to steal Appian data that would be even more ambitious. They called the new project the Teardown. In February 2019, Pega executives—including A. Trefler, Schuerman, L. Trefler, Akgonul, and Baril—decided to try and find an outside contractor that could obtain a free trial of Appian's software platform or purchase the software to share with Pega. Pega wanted to learn more details about Appian's methodology and potential software weaknesses.[10] However, when no outside contractor was willing to do so, Pega decided to use its own employees to misappropriate the free trial.

Baril was in charge of doing a deep dive on the technical details of Appian's software.[11] Baril regularly communicated with Schuerman on this project, and Pega officers directed Baril to "work on a critical CI [competitive intelligence] Brief for Alan [Trefler] due 8/30/19."[12] Around August 2019, Baril used multiple fake names and created a fake consulting firm called "Andrew Powers Consulting" to gain access to Appian's software platform. Additionally, in order to accomplish A. Trefler's goal, Baril enlisted the help of numerous employees to serve as "spies." By August 17, 2019, Baril had secured access to Appian's software platform. Baril recruited Pega employees Nguyen Le and Michael Fine to illicitly obtain 15-day trials of the Appian software by

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[10] Trial Tr. 3/28/22 at 1125.

[11] Trial Tr. 3/29/22 at 1354-55.

[12] Trial Tr. 4/28/22 at 6421-22.

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posing as potential Appian customers. They were both successful. Baril also recruited Pega employee Peter Bessman to utilize the 15-day trial that Michael Fine had acquired to create videos of himself building an application using Appian software. Additionally, Baril enlisted Pega's India-based employees to use various login credentials to access Appian's software platform.

On September 8, 2019, Baril sent L. Trefler a draft of the Teardown memo that Baril, Schuerman, and others were putting together. On September 21, 2019, A. Trefler said that he was "thrilled to have" Baril in this role.[13] A. Trefler's goal was to have a write up on Appian's "compelling weaknesses to form a more targeted and damning attack" and he also asked Baril for an hour-long demonstration of Appian's platform.[14] On September 27, 2019, Baril told certain Pega employees, including Schuerman, that his "spies" had secured a 15-day Appian trial.[15] Schuerman responded: "Awesome. So we have some stuff we can show Alan [Trefler] . . ."[16] In October 2019, Baril told a senior Pega employee that the Teardown's "overall goal is to steal four deals from Appian in Q4 [2019] and Q1 2020."[17] On October 4, 2019, Baril admitted to Pega's Director of Solutions Consulting that "Alan [Trefler] and Leon [Trefler] are very focused on destroying Appian. Like making it go away for good."[18] On October 5, 2019, Baril updated L. Trefler and Schuerman, among others, on the status of the Teardown, and L. Trefler responded that he wanted Baril "to think aggressively" and that he would devote "more resources" to the Teardown because Baril's "mission is urgent" and Baril was "understaffed."[19]

A. Trefler met with Baril at least twice in late 2019 (once in October 2019 and another time in December 2019) to discuss the Teardown. A. Trefler and Baril discussed the information that Pega had acquired from the project, and A. Trefler provided Baril with directions on what to focus on with the spying efforts. Pega's corporate espionage efforts continued into 2020 and 2021, even after Appian sued Pega for the espionage scheme in May 2020. For example, Baril used a fake name to access an Appian conference on May 12, 2020. Additionally, Baril asked a Pega employee to gain access to an Appian free trial on May 28, 2020 and other employees were gaining access to free trials throughout 2021. In fact, these efforts continued even after former Pega employees blew the whistle on Pega's scheme.

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[13] Trial Tr., 3/28/22 at 1111.

[14] Trial Tr., 3/28/22 at 1125, 1112.

[15] Trial Tr., 4/28/22 at 6426; Trial Tr., 3/28/22 at 1115-16.

[16] Trial Tr., 4/28/22 at 6428; Trial Tr., 3/28/22 at 1116-17.

[17] Trial Tr., 3/28/22 at 1130.

[18] Trial Tr., 3/22/22 at 70.

[19] Trial Tr., 3/28/22 at 1129.

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III. The Company's Illegal Espionage Practices Have Harmed Pega Because Pega is Liable for Over $2 Billion in Damages and Counting and Has Suffered Tremendous Reputational Damage

In early 2020, two former Pega employees blew the whistle on Pega's espionage and alerted Appian. Petronio, whom Pega fired in 2015, joined Appian in early 2019 and disclosed the Pega espionage scheme to Appian in January 2020. Shawn Bearden, who worked on Project Crush but was fired by Pega in 2020, disclosed the espionage scheme to Appian in February 2020.

Nonetheless, Pega's officers and directors continued to deny the truth—concealing their past misconduct from investors and engaging in new misconduct by making false statements in SEC filings. As late as February 2022, management still maintained in the Company's public filings that "[t]he claims brought by Appian against the Company are without merit" and that "the Company ha[d] strong defenses to these claims."[20] As Judge Young later found in denying Pega's and Trefler's motion to dismiss in the Securities Action, "there is little doubt that Trefler knew or was reckless in not knowing" that he was making false statements in "reassuring investors that Appian's ... claim against Pega had no merit[.]"[21]

Ultimately, investors learned the truth. On May 9, 2022, following a seven-week trial, the jury in the Virginia Action unanimously found in favor of Appian, finding that Pega had misappropriated Appian's trade secrets in violation of the Virginia Uniform Trade Secrets Act and violated the Virginia Computer Crimes Act, and awarded Appian compensatory damages of ***$2,036,860,045*** (before interest, which is over $122 million per year). The jury also found that Pega acted willfully and maliciously in misappropriating Appian's information, entitling Appian to seek $22.6 million in attorney's fees and $4.2 million in costs. The Virginia court denied Pega's motion to set aside the verdict.

Pega faces additional financial liabilities. The Securities Action against Pega and A. Trefler in the U.S. District Court for the District of Massachusetts, survived a motion to dismiss and was proceeding to trial. However, in March 2024, Pega agreed to settle the case with the Securities Action plaintiffs. The settlement value is not yet public information, but this adds to the severe financial penalties the Company has already suffered.

Also, in March 2023, the Securities and Exchange Commission requested certain information from the Company relating to Pega's accounting treatment of the Company's litigation with Appian. This investigation is ongoing and could lead to further financial penalties against the Company.[22]

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[20] *See, e.g.*, Pegasystems, Inc., Annual Report (Form 10-K) (Feb. 16, 2022) at 23.

[21] *City of Fort Lauderdale Police & Firefighters' Ret. Sys. v. Pegasystems Inc.*, 2023 WL 4706741, at *4 (D. Mass. July 24, 2023).

[22] Pegasystems, Inc., Annual Report (Form 10-K) (Feb. 14, 2024) at 66.

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Moreover, Pega also faces significant reputational harm. The Virginia Action made public the extent of Pega's illicit corporate espionage schemes. Barclays Research stated that it expected investors would have a "negative reaction for Pega."[23] The trial record makes clear that Pega's internal organization was dominated by bad actors. Worse still, the trial and the espionage scheme are evidence that Pega could not keep up with competitors without resorting to fraudulent tactics. CFRA Research stated that after the Virginia Action was decided that "recent events have rekindled fears surrounding [Pega's] competitive positioning and a general inability to distinguish itself from peers.[24] The jury's findings could also harm Pega's ability to secure additional contracts and retain current customers.

DEMANDS

The Company has been, and continues to be, significantly harmed by the conduct described above. As such, Stockholder demands that the Company's Board take immediate action to ensure the Company take action against those responsible for the harm they have caused the Company to date. Specifically, Stockholder demands that the Board:

- file lawsuits for breaches of fiduciary duty and any other claims the Company might have against any current or former officer or director who directed, encouraged, or was otherwise aware of (or should have been aware of) the illegal corporate espionage practices described herein to recover damages for the harm caused to the Company as described above;

- publicly disclose for each director and officer, details of any lack of independence from A. Trefler as a result of social, personal, or business relationships;

- terminate each officer and employee who breached their fiduciary duty and/or engaged in corporate espionage;

- clawback improperly awarded compensation and bonuses;

- establish fully funded new board committee(s) empowered to hire fully independent advisors to investigate the Company's corporate espionage schemes and oversee the Company's business ethics practices;

- publicly disclose all findings of the investigation and remedial actions taken; and

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[23] Raimo Lenschow & Vinod Srinivasaraghavan, *Appian Corporation / Pegasystems, Inc.* BARCLAYS EQUITY RESEARCH (Sept. 16, 2022) at 1.

[24] David Holt, *Stock Report Pegasystems*, CFRA (July 23, 2022) at 1.

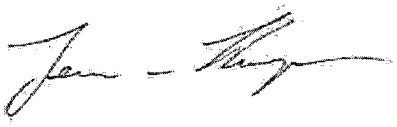
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- establish new Board and management policies, practices, and procedures regarding business ethics and competition with business rivals.

We believe that this Demand complies with the provisions of M.G.L. ch. 156D § 7.42 in all material respects. If the Company believes this letter is deficient in any respect, we request that you inform the undersigned (Jeroen van Kwawegen; Telephone: 212-554-1472) immediately.

As stated above, this letter serves as the Stockholder's demand to the Board pursuant to M.G.L. ch. 156D § 7.42. If the Stockholder's demands are not met within ninety days, it will have no choice but to commence a derivative lawsuit. We look forward to your prompt response.

Very truly yours,



Jeroen van Kwawegen

/s/ Francis A. Bottini, Jr.
Francis A. Bottini, Jr.

Encl.

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EXHIBIT 1

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Docket Number 2484CV01734

STATEMENT UNDER OATH

I, the undersigned, hereby depose and state under oath that:

(a) I have read the demand letter made pursuant to M.G.L. Ch. 156D § 7.42 addressed to Pegasystems, Inc., and the statement of purpose and any other statements contained therein are true and correct under penalty of perjury.

(b) I am the beneficial owner of Pegasystems, Inc., common stock. The beneficial ownership of these shares is demonstrated by documentary evidence set forth in the exhibit to this Statement. This documentary evidence is true and correct, to the best of my knowledge based on the information provided to me.

By Mr. John Dwyer
John Dwyer

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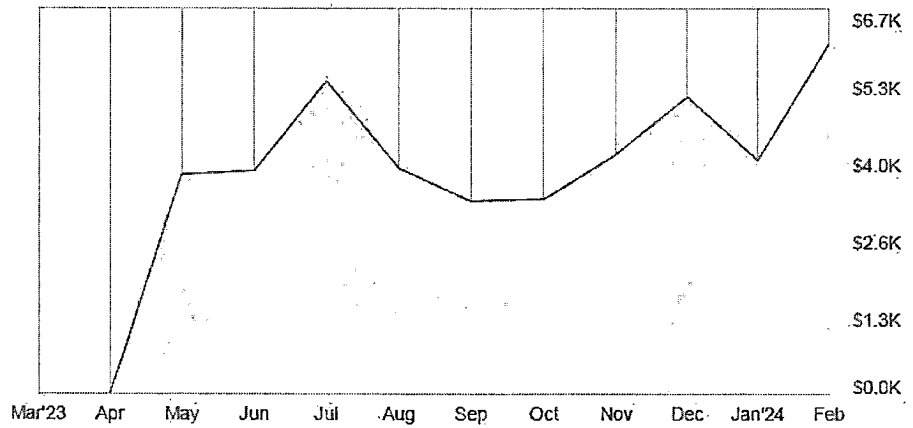
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Account Number [redacted]

Statement Period
February 1-29, 2024

Account Summary

Ending Account Value as of 02/29	Beginning Account Value as of 02/01	Total Value Change ($)
[redacted]	[redacted]	[redacted]



	This Statement	Previous Statement	Change
Beginning Value	[redacted]	[redacted]	[redacted]
Deposits	[redacted]	[redacted]	[redacted]
Withdrawals	[redacted]	[redacted]	[redacted]
Dividends and Interest	[redacted]	[redacted]	[redacted]
Transfer of Securities	[redacted]	[redacted]	[redacted]
Market Value Change	[redacted]	[redacted]	[redacted]
Fees	[redacted]	[redacted]	[redacted]
Ending Value	[redacted]	[redacted]	[redacted]

Account Ending Value reflects the market value of your cash and investments. It does not include pending transactions, unpriced securities or assets held outside Schwab's custody.

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Statement Period
February 1-29, 2024

Asset Allocation

Investment Objective: Growth	This Period	Current Allocation
Cash and Cash Investments	[redacted]	[redacted]
Equities	[redacted]	[redacted]
Total	[redacted]	[redacted]

Top Account Holdings This Period

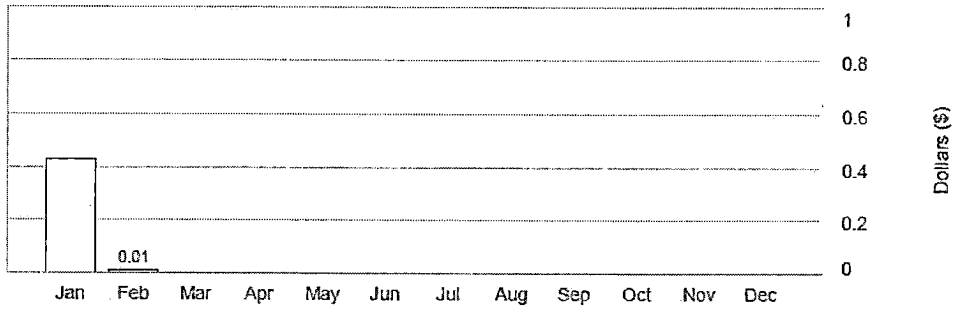
SYMBOL CUSIP	Description	Market Value	% of Accounts
[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
PEGA	PEGASYSTEMS INC	910.56	15%
[redacted]	[redacted]	[redacted]	[redacted]

Gain or (Loss) Summary

	Short-Term (ST)			Long-Term (LT)		
	Gain	(Loss)	Net	Gain	(Loss)	Net
This Period	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
YTD	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Unrealized						[redacted]

Values may not reflect all of your gains/losses; Schwab has provided accurate gain and loss information wherever possible for most investments. Cost basis may be incomplete or unavailable for some of your holdings and may change or be adjusted in certain cases. Please login to your account at Schwab.com for real-time gain/loss information. Statement information should not be used for tax preparation, instead refer to official tax documents. For additional information refer to Terms and Conditions.

Income Summary



	This Period		YTD	
Federal Tax Status	Tax-Exempt	Taxable	Tax-Exempt	Taxable
Bank Sweep Interest	[redacted]	[redacted]	[redacted]	[redacted]
Cash Dividends	[redacted]	[redacted]	[redacted]	[redacted]
Total Income	[redacted]	[redacted]	[redacted]	[redacted]

Margin Loan Information

Opening Margin Loan Balance	Closing Margin Loan Balance	Funds Available to Withdraw *	Securities Buying Power *
[redacted]	[redacted]	[redacted]	[redacted]

Margin Loan Rates Vary by Balance [redacted]

* Values include any cash plus the amount available using margin borrowing.
For more information about the margin feature, please visit schwab.com/margin.

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Positions - Summary

Beginning Value as of 02/01	+	Transfer of Securities(In/Out)	+	Dividends Reinvested	+	Cash Activity	+	Change in Market Value	=	Ending Value as of 02/29	Cost Basis	Unrealized Gain/(Loss)
[redacted]		[redacted]		[redacted]		[redacted]		[redacted]		[redacted]	[redacted]	[redacted]

Values may not reflect all of your gains/losses; Schwab has provided accurate gain and loss information wherever possible for most investments. Cost basis may be incomplete or unavailable for some of your holdings and may change or be adjusted in certain cases. Statement information should not be used for tax preparation; instead refer to official tax documents. For additional information refer to Terms and Conditions.

Cash and Cash Investments

Type	Symbol	Description	Quantity	Price($)	Beginning Balance($)	Ending Balance($)	Change in Period Balance($)	Pending/Unsettled Cash($)	Interest/ Yield Rate	% of Acct
Bank Sweep		[redacted]			[redacted]	[redacted]	[redacted]		[redacted]	[redacted]
Total Cash and Cash Investments					[redacted]	[redacted]	[redacted]			[redacted]

Positions - Equities

Symbol	Description	Quantity	Price($)	Market Value($)	Cost Basis($)	Unrealized Gain/(Loss)($)	Est. Yield	Est. Annual Income($)	% of Acct
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
PEGA	PEGASYSTEMS INC (M)	14.0000	65.04000	910.56	1,788.22	(877.66)	0.18%	1.68	15%
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Total Equities				[redacted]	[redacted]	[redacted]		[redacted]	[redacted]

Estimated Annual Income ("EAI") and Estimated Yield ("EY") calculations are for informational purposes only. The actual income and yield might be lower or higher than the estimated amounts. EY is based upon EAI and the current price of the security and will fluctuate. For certain types of securities, the calculations could include a return of principal or capital gains in which case EAI and EY would be overstated. EY and EAI are not promptly updated to reflect when an issuer has missed a regular payment or announced changes to future payments, in which case EAI and EY will continue to display at a prior rate.

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Statement Period
February 1-29, 2024

Transactions - Summary

Beginning Cash* as of 02/01	+ Deposits	+ Withdrawals	+ Purchases	+ Sales/Redemptions	+ Dividends/Interest	+ Fees	= Ending Cash* as of 02/29
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

Other Activity [redacted]

Other activity includes transactions which don't affect the cash balance such as stock transfers, splits, etc.

*Cash (includes any cash debit balance) held in your account plus the value of any cash invested in a sweep money fund.

Transaction Details

Date	Category	Action	Symbol/ CUSIP	Description	Quantity	Price/Rate per Share($)	Charges/ Interest($)	Amount($)	Realized Gain/(Loss)($)
02/16	Interest	[redacted]		[redacted]				[redacted]	
02/28	Sale		[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
	Purchase		[redacted]	[redacted]	[redacted]	[redacted]		[redacted]	
	Purchase		[redacted]	[redacted]	[redacted]	[redacted]		[redacted]	
Total Transactions								[redacted]	[redacted]

Date column represents the Settlement/Process date for each transaction.

Bank Sweep Activity

Date	Description	Amount
02/01	**Beginning Balance** X,Z	[redacted]
02/15	[redacted]	[redacted]
02/28	[redacted]	[redacted]

Date	Description	Amount
02/29	**Ending Balance** X,Z	[redacted]
02/29	**Interest Rate** * Z	[redacted]

* Your interest period was 01/16/24 - 02/15/24. Z

Endnotes For Your Account

(M) Denotes a security that is marginable. Some mutual fund or ETF investments may not be immediately marginable.

X Bank Sweep deposits are held at FDIC-insured Program Banks, which are listed in the Cash Features Disclosure Statement.

Z For the Bank Sweep and Bank Sweep for Benefit Plans features, interest is paid for a period that differs from the Statement Period. Balances include interest paid as indicated on your statement by Schwab or one or more of its Program Banks. These balances do not include interest that may have accrued during the Statement Period after interest is paid. The interest paid may include interest that accrued in the prior Statement Period.

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Terms and Conditions

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This information has been provided on this statement at the request of your Advisor, if applicable. This information is not a solicitation or a recommendation to buy or sell. **Schwab does not provide tax advice and encourages you to consult with your tax professional. Please view the Cost Basis Disclosure Statement for additional information on how gain (or loss) is calculated and how Schwab reports adjusted cost basis information to the IRS. Interest**: For the Schwab One Interest, Bank Sweep, and Bank Sweep for Benefit Plans features, interest is paid for a period that may differ from the Statement Period. Balances include interest paid as indicated on your statement by Schwab or one or more of its Program Banks. These balances do not include interest that may have accrued during the Statement Period after interest is paid. The interest paid may include interest that accrued in the prior Statement Period. For the Schwab One Interest feature, interest accrues daily from the second-to-last business day of the prior month and is posted on the second-to-last business day of the current month. For the Bank Sweep and Bank Sweep for Benefit Plans features, interest accrues daily from the 16th day of the prior month and is credited/posted on the first business day after the 15th of the current month. If, on any given day, the interest that Schwab calculates for the Free Credit Balances in the Schwab One Interest feature in your brokerage Account is less than $.005, you will not accrue any interest on that day. 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Terms and Conditions (continued)

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EXHIBIT 2

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POWER OF ATTORNEY

KNOW ALL PERSONS BY THESE PRESENTS, that John Dwyer (the "Stockholder"), being the owner and holder of shares of Pegasystems, Inc., (the "Company"), does hereby make, constitute and appoint Jeroen van Kwawegen of Bernstein Litowitz Berger & Grossmann LLP and Francis A. Bottini, Jr. of Bottini & Bottini, Inc. and any person designated by them to act as true and lawful attorney in fact for the Stockholder, in its name, place and stead, jointly and severally, in all matters regarding the demand that the Company's board of directors cause the Company to take suitable action in response to the misconduct set forth in the demand letter, including, but not limited to: (i) making specific demands for the Company's board of directors to take immediate action to ensure the Company takes action against those responsible for the harm they have caused the Company to date; (ii) demanding inspection of books and records of the Company on its behalf as a stockholder of the Company as said attorneys deem appropriate, (iii) reviewing and/or copying any documents received in connection with any such books and records demand made on its behalf as a stockholder of the Company, and (iv) giving and granting unto said attorneys full power and attorney to perform all and every act and thing whatsoever requisite, necessary, and proper to be done in and without the premises, as fully, to all intents and purposes as they might or could do, with full power of substitution and revocation, hereby ratifying and confirming all that its attorneys or the substitute shall lawfully do or cause to be done.

The rights, powers, and authority of said attorneys shall remain in full force and effect until I tender a written notice of termination.

IN WITNESS WHEREOF, I have hereunto set my hand as of 3/24/2024 | 1:44 PM PDT.

By Mr. John Dwyer
John Dwyer

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Exhibit 7 to DRC Report

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Jeroen van Kwawegen
(212) 554-1472
Jeroen@blbglaw.com

March 26, 2024

VIA FEDERAL EXPRESS

Board of Directors
Pegasystems Inc.
One Main Street
Cambridge, MA 02142

VIA HAND-DELIVERY

Corporation Service Company
251 Little Falls Drive
Wilmington, DE 19808

Re: Demand for the Board of Directors to Take Action Pursuant to M.G.L. ch. 156D § 7.42

Dear Members of the Board of Directors of Pegasystems Inc.:

We represent Ray Gerber (the "Stockholder"), the beneficial owner of shares of Pegasystems Inc. ("Pega" or the "Company") common stock. Stockholder has held Pega stock continuously since at least May 2020. Verified documentary evidence of Stockholder's beneficial ownership of common stock is attached hereto as **Exhibit 1**, and such documentary evidence is a true and correct copy of what it purports to be. A power of attorney appointing Bernstein Litowitz Berger & Grossmann LLP and Bottini & Bottini, Inc. (together, the "Firms") to act on behalf of Stockholder is attached hereto as **Exhibit 2**.

This letter is a demand ("Demand"), pursuant to M.G.L. ch. 156D § 7.42 that Pega's board of directors (the "Board") cause Pega to take suitable action in response to the misconduct set forth below. Stockholder does not concede the independence of the Board and, in fact, strongly believes that the Board breached its fiduciary duties and is conflicted and incapable of giving disinterested consideration to this Demand. Stockholder makes this Demand solely because Massachusetts is a universal demand state. If the Board does not cause the Company to take suitable action, Stockholder will file a stockholder derivative action.

The Demand arises from breaches of fiduciary duty by Pega's directors and officers with respect to the substantial financial and reputational liabilities Pega faces from lawsuits[1] related to the Company's corporate espionage scheme targeting Appian Corporation ("Appian").

[1] These lawsuits include: (a) *Appian Corporation v. Pegasystems Inc.*, et al., Civil Action No. 2020-07216 (Circuit Court of Fairfax County, Virginia) (the "Virginia Action"); and (b) *City of Fort Lauderdale Police and Firefighters' Retirement System v. Pegasystems Inc., et al.*. Civil Action No. 1:22-cv-11220-WGY (D. Mass.) (the "Securities Action").

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Stockholder demands that the Board act to correct Pega's fraudulent corporate espionage practices and hold the responsible directors and officers accountable for the harm they caused to Pega, as described below.

PEGA'S ILLEGAL CORPORATE ESPIONAGE SCHEME

I. Company Background

According to Pega, the Company's business is to: "develop, market, license, host, and support enterprise software that helps organizations build agility into their business so they can adapt to change."[2] The Company states that its "powerful low-code platform for workflow automation and artificial intelligence-powered decisioning enables the world's leading brands and government agencies to hyper-personalize customer experiences, streamline customer service, and automate mission-critical business processes and workflows" and that "clients can leverage our intelligent technology and scalable architecture to accelerate their digital transformation. In addition, our client success teams, world-class partners, and clients leverage our Pega Express methodology to design and deploy mission-critical applications quickly and collaboratively."[3]

The Company is incorporated in Massachusetts and maintains its principal executive offices in Cambridge, Massachusetts. The Company's stock trades on the Nasdaq Stock Market under the ticker "PEGA."

II. Pega Executed an Illegal Espionage Scheme to Gather Information on Its Competitor Appian

a. Beginning in 2012, Pega Used a Corporate Spy to Steal Information from Appian in a Scheme Called "Project Crush"

Pega's executives engaged in an illegal, near decade-long corporate espionage scheme targeting the Company's chief rival, Appian. All the while, Pega's Board was either asleep at the switch or complicit in this spying campaign, which has now exposed the Company to ***billions of dollars in damages***.

Pega develops customer relationship management ("CRM") and business process management ("BPM") software for major global companies and government agencies. The Company's "low-code" software allows companies to create customized business applications. J.P. Morgan has described "[l]ow-code (no-code) platforms" as "allow[ing] business users with minimal coding experience (citizen developers) to easily create workflow-based process-centric

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[2] Pegasystems, Inc., Annual Report, (Form 10-K) (Feb. 15, 2023) at 4.

[3] *Id.*

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applications." Pega's customers include companies across the life sciences, healthcare, communications, media, insurance, manufacturing, tech, and consumer services sectors.

Appian is one of Pega's rivals in the competitive CRM and BPM industry. According to J.P. Morgan, Appian's strength is in its low-code application development software platform. Appian licenses its software to its customers, which allows them to develop applications and run them using Appian's software platform. This license also allows the licensee to access the technical features of Appian's software platform.

The Company's founder, Chairman, Chief Executive Officer, and controlling stockholder Alan Trefler ("A. Trefler") spearheaded a sprawling corporate espionage scheme that involved enlisting corporate spies, creating aliases and fake companies, and using Company resources to steal confidential and proprietary intelligence and trade secrets from Appian. This scheme allowed the Company to illegally gain a competitive advantage when pursuing the same clients as Appian and to improve Pega's own software platform.

A Pega employee stated that A. Trefler and his brother, Leon Trefler ("L. Trefler"), were "very focused on destroying Appian. Like making it go away for good."[4] In order to accomplish this goal, in early 2012, Pega initiated a corporate espionage scheme to steal Appian trade secrets and confidential information. Pega called the scheme "Project Crush" and it was administered by the Company's top executives. A. Trefler, Don Schuerman (("Schuerman") Chief Technology Officer), L. Trefler (Chief of Clients and Markets), Kerim Akgonul (("Akgonul"), Chief Product Officer), and Benjamin Baril (("Baril"), Director, Office of the CTO) were all intimately involved in the execution of Project Crush. Pega's goal was to use the stolen information to give the Company's salesforce an advantage, to create opposition research on Appian that would provide a leg up in direct competitions for contracts, and to bolster Pega's own software.

Appian employed numerous defensive measures to protect its trade secrets. This meant that Appian was highly selective about what companies could access its software on a trial basis, and it excluded competitors from accessing the Appian platform. A number of Pega employees testified in the Virginia Action that Appian made it very difficult to access its software for a free trial. Thus, Pega determined that it would need a corporate spy that could bypass Appian's safeguards, gain access to Appian's software, and funnel that information to Pega.

Pega enlisted KForce Inc. ("KForce") in February 2012 to recruit an Appian developer with several years of experience and access to Appian's systems. Pega outsourced this task to KForce so that it could maintain some distance from the recruitment of the prospective corporate spy. Pega explicitly told KForce that the developer "should not have worked directly with Appian" and could not be "loyal' to Appian because Pega did not want the spying to lead back to Pega.[5]

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[4] Trial. Tr., *Appian Corporation v. Pegasystems Inc., et al.*, Civil Action No. 2020-07216 (Circuit Court of Fairfax County, Virginia) 3/22/22 at 70 [hereinafter Trial Tr.].

[5] Trial. Tr., 3/22/22 at 52-53.

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KForce connected Pega to Youyong Zou ("Zou"), who had worked with U.S. government contractors that utilized Appian's software platform. Through Zou, Pega would have access to proprietary Appian software and trade secrets.

Zou became a key asset in Project Crush. Starting in February 2012, Zou made videos of himself accessing Appian's software platform, downloaded Appian's software documentation, demonstrated to Pega the features of Appian's software platform and supplied information about the software's uses and strengths and weaknesses, and answered Pega's technical questions about Appian's software platform. In short, Zou provided Pega with all manner of key, confidential information about Appian.

Zou also worked directly in person with Pega executives, visiting the Pega corporate headquarters in Cambridge, Massachusetts several times. Zou spoke directly with Pega executives and other employees and provided them with information he had obtained from Appian. In fact, John Petronio ("Petronio"), the director of product marketing at the time, informed A. Trefler, L. Trefler, and Schuerman, among others, that on January 29, 2013, Zou would be visiting Pega's offices and would provide "demonstrations of building an application in Appian 7."[6] During the January 29, 2013 meeting, A. Trefler, Schuerman, and L. Trefler met with Zou and they, along with other Pega employees, strategized on ways to use Appian's trade secrets for Pega's advantage. After the meeting, Petronio emailed A. Trefler to inform him that Pega would update the Appian competition whitepaper based on the meeting. Pega attempted to conceal these dealings with Zou. The Company paid Zou through a middleman and only a few employees knew his real name—the rest of the Company referred to him by the pseudonym: "Matt."

Zou's insight into Appian was hugely beneficial to Pega. A whistleblower testified that Zou provided Pega information that it did not have before and gave Pega access to the "black box."[7] L. Trefler stated that the stolen information was "useful" and agreed that it assisted Pega in its marketing efforts to compete against Appian.[8] L. Trefler worked on developing Pega's strategies to use Appian's stolen information. The stolen Appian information was widely circulated and utilized across Pega's organization by over 200 executives, salespersons, engineers, product developers, and other employees. The work product created from Zou's spying included: (a) marketing aids; (b) training materials; (c) screenshots of Appian's software platform; and (d) memos and briefs for strategies to compete against Appian. These materials included memos called "Understanding Appian" and "12 Challenges"—which included Zou's stolen information—that were created for the stated goal to beat Appian in head-to-head interaction.[9] Pega used the stolen information to torpedo Appian on multiple fronts, including: (a) a competition with Appian to secure the U.S. Census Bureau's contract for the 2020 Census; (b) a competition with Appian

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[6] Trial. Tr., 3/24/22 at 764-65.

[7] Trial. Tr., 5/5/22 at 8110.

[8] Trial. Tr., 5/5/22 at 8110-12.

[9] Trial. Tr., 5/5/22 at 8077-78.

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to acquire Rabobank as a customer; and (c) to share Appian's trade secrets with Pega's customers. In fact, in February 2013, A. Trefler himself requested that a competitive brief on Appian be given to Rabobank that was filled with negative information about Appian derived from Appian's trade secrets. Additionally, Pega used Appian's trade secrets to improve Pega software. Akgonul and Head of Social Product, Agya Garg, had meetings with Zou to analyze Appian's software's capabilities and implemented certain Appian features in Pega's products. Akgonul requested that Zou provide information on specific features of Appian's software and was particularly interested in using this information to give Pega a competitive advantage. Confidential Company memorandums also document that Pega planned to integrate Appian technology into Pega's software. And, on February 26, 2014, A. Trefler and other executives received over 200 presentation slides with information about Appian that included screenshots collected by Zou.

Finally, in September 2014, Pega ended its deal with Zou after he switched roles with his employer and no longer had access to Appian's software platform. Baril co-wrote a memorandum documenting Project Crush in 2014 which included action items on how to utilize the stolen information going forward. Thereafter, Pega used Zou's stolen information for years.

b. In 2019, Pega Began a Second Project to Steal Appian Technology Called the "Teardown"

In 2019, Pega executives decided to expand on the perceived success of the Project Crush. A. Trefler, Schuerman, L. Trefler, Baril and other Pega executives contemplated a new effort to steal Appian data that would be even more ambitious. They called the new project the Teardown. In February 2019, Pega executives—including A. Trefler, Schuerman, L. Trefler, Akgonul, and Baril—decided to try and find an outside contractor that could obtain a free trial of Appian's software platform or purchase the software to share with Pega. Pega wanted to learn more details about Appian's methodology and potential software weaknesses.[10] However, when no outside contractor was willing to do so, Pega decided to use its own employees to misappropriate the free trial.

Baril was in charge of doing a deep dive on the technical details of Appian's software.[11] Baril regularly communicated with Schuerman on this project, and Pega officers directed Baril to "work on a critical CI [competitive intelligence] Brief for Alan [Trefler] due 8/30/19."[12] Around August 2019, Baril used multiple fake names and created a fake consulting firm called "Andrew Powers Consulting" to gain access to Appian's software platform. Additionally, in order to accomplish A. Trefler's goal, Baril enlisted the help of numerous employees to serve as "spies." By August 17, 2019, Baril had secured access to Appian's software platform. Baril recruited Pega employees Nguyen Le and Michael Fine to illicitly obtain 15-day trials of the Appian software by

[10] Trial Tr. 3/28/22 at 1125.

[11] Trial Tr. 3/29/22 at 1354-55.

[12] Trial Tr. 4/28/22 at 6421-22.

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posing as potential Appian customers. They were both successful. Baril also recruited Pega employee Peter Bessman to utilize the 15-day trial that Michael Fine had acquired to create videos of himself building an application using Appian software. Additionally, Baril enlisted Pega's India-based employees to use various login credentials to access Appian's software platform.

On September 8, 2019, Baril sent L. Trefler a draft of the Teardown memo that Baril, Schuerman, and others were putting together. On September 21, 2019, A. Trefler said that he was "thrilled to have" Baril in this role.[13] A. Trefler's goal was to have a write up on Appian's "compelling weaknesses to form a more targeted and damning attack" and he also asked Baril for an hour-long demonstration of Appian's platform.[14] On September 27, 2019, Baril told certain Pega employees, including Schuerman, that his "spies" had secured a 15-day Appian trial.[15] Schuerman responded: "Awesome. So we have some stuff we can show Alan [Trefler] . . ."[16] In October 2019, Baril told a senior Pega employee that the Teardown's "overall goal is to steal four deals from Appian in Q4 [2019] and Q1 2020."[17] On October 4, 2019, Baril admitted to Pega's Director of Solutions Consulting that "Alan [Trefler] and Leon [Trefler] are very focused on destroying Appian. Like making it go away for good."[18] On October 5, 2019, Baril updated L. Trefler and Schuerman, among others, on the status of the Teardown, and L. Trefler responded that he wanted Baril "to think aggressively" and that he would devote "more resources" to the Teardown because Baril's "mission is urgent" and Baril was "understaffed."[19]

A. Trefler met with Baril at least twice in late 2019 (once in October 2019 and another time in December 2019) to discuss the Teardown. A. Trefler and Baril discussed the information that Pega had acquired from the project, and A. Trefler provided Baril with directions on what to focus on with the spying efforts. Pega's corporate espionage efforts continued into 2020 and 2021, even after Appian sued Pega for the espionage scheme in May 2020. For example, Baril used a fake name to access an Appian conference on May 12, 2020. Additionally, Baril asked a Pega employee to gain access to an Appian free trial on May 28, 2020 and other employees were gaining access to free trials throughout 2021. In fact, these efforts continued even after former Pega employees blew the whistle on Pega's scheme.

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[13] Trial Tr., 3/28/22 at 1111.

[14] Trial Tr., 3/28/22 at 1125, 1112.

[15] Trial Tr., 4/28/22 at 6426; Trial Tr., 3/28/22 at 1115-16.

[16] Trial Tr., 4/28/22 at 6428; Trial Tr., 3/28/22 at 1116-17.

[17] Trial Tr., 3/28/22 at 1130.

[18] Trial Tr., 3/22/22 at 70.

[19] Trial Tr., 3/28/22 at 1129.

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III. The Company's Illegal Espionage Practices Have Harmed Pega Because Pega is Liable for Over $2 Billion in Damages and Counting and Has Suffered Tremendous Reputational Damage

In early 2020, two former Pega employees blew the whistle on Pega's espionage and alerted Appian. Petronio, whom Pega fired in 2015, joined Appian in early 2019 and disclosed the Pega espionage scheme to Appian in January 2020. Shawn Bearden, who worked on Project Crush but was fired by Pega in 2020, disclosed the espionage scheme to Appian in February 2020.

Nonetheless, Pega's officers and directors continued to deny the truth—concealing their past misconduct from investors and engaging in new misconduct by making false statements in SEC filings. As late as February 2022, management still maintained in the Company's public filings that "[t]he claims brought by Appian against the Company are without merit" and that "the Company ha[d] strong defenses to these claims."[20] As Judge Young later found in denying Pega's and Trefler's motion to dismiss in the Securities Action, "there is little doubt that Trefler knew or was reckless in not knowing" that he was making false statements in "reassuring investors that Appian's ... claim against Pega had no merit[.]"[21]

Ultimately, investors learned the truth. On May 9, 2022, following a seven-week trial, the jury in the Virginia Action unanimously found in favor of Appian, finding that Pega had misappropriated Appian's trade secrets in violation of the Virginia Uniform Trade Secrets Act and violated the Virginia Computer Crimes Act, and awarded Appian compensatory damages of ***$2,036,860,045*** (before interest, which is over $122 million per year). The jury also found that Pega acted willfully and maliciously in misappropriating Appian's information, entitling Appian to seek $22.6 million in attorney's fees and $4.2 million in costs. The Virginia court denied Pega's motion to set aside the verdict.

Pega faces additional financial liabilities. The Securities Action against Pega and A. Trefler in the U.S. District Court for the District of Massachusetts, survived a motion to dismiss and was proceeding to trial. However, in March 2024, Pega agreed to settle the case with the Securities Action plaintiffs. The settlement value is not yet public information, but this adds to the severe financial penalties the Company has already suffered.

Also, in March 2023, the Securities and Exchange Commission requested certain information from the Company relating to Pega's accounting treatment of the Company's litigation with Appian. This investigation is ongoing and could lead to further financial penalties against the Company.[22]

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[20] *See, e.g.*, Pegasystems, Inc., Annual Report (Form 10-K) (Feb. 16, 2022) at 23.

[21] *City of Fort Lauderdale Police & Firefighters' Ret. Sys. v. Pegasystems Inc.*, 2023 WL 4706741, at *4 (D. Mass. July 24, 2023).

[22] Pegasystems, Inc., Annual Report (Form 10-K) (Feb. 14, 2024) at 66.

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Moreover, Pega also faces significant reputational harm. The Virginia Action made public the extent of Pega's illicit corporate espionage schemes. Barclays Research stated that it expected investors would have a "negative reaction for Pega."[23] The trial record makes clear that Pega's internal organization was dominated by bad actors. Worse still, the trial and the espionage scheme are evidence that Pega could not keep up with competitors without resorting to fraudulent tactics. CFRA Research stated that after the Virginia Action was decided that "recent events have rekindled fears surrounding [Pega's] competitive positioning and a general inability to distinguish itself from peers.[24] The jury's findings could also harm Pega's ability to secure additional contracts and retain current customers.

DEMANDS

The Company has been, and continues to be, significantly harmed by the conduct described above. As such, Stockholder demands that the Company's Board take immediate action to ensure the Company take action against those responsible for the harm they have caused the Company to date. Specifically, Stockholder demands that the Board:

- file lawsuits for breaches of fiduciary duty and any other claims the Company might have against any current or former officer or director who directed, encouraged, or was otherwise aware of (or should have been aware of) the illegal corporate espionage practices described herein to recover damages for the harm caused to the Company as described above;

- publicly disclose for each director and officer, details of any lack of independence from A. Trefler as a result of social, personal, or business relationships;

- terminate each officer and employee who breached their fiduciary duty and/or engaged in corporate espionage;

- clawback improperly awarded compensation and bonuses;

- establish fully funded new board committee(s) empowered to hire fully independent advisors to investigate the Company's corporate espionage schemes and oversee the Company's business ethics practices;

- publicly disclose all findings of the investigation and remedial actions taken; and

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[23] Raimo Lenschow & Vinod Srinivasaraghavan, *Appian Corporation / Pegasystems, Inc.* BARCLAYS EQUITY RESEARCH (Sept. 16, 2022) at 1.

[24] David Holt, *Stock Report Pegasystems*, CFRA (July 23, 2022) at 1.

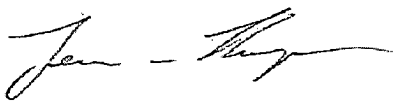
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- establish new Board and management policies, practices, and procedures regarding business ethics and competition with business rivals.

We believe that this Demand complies with the provisions of M.G.L. ch. 156D § 7.42 in all material respects. If the Company believes this letter is deficient in any respect, we request that you inform the undersigned (Jeroen van Kwawegen; Telephone: 212-554-1472) immediately.

As stated above, this letter serves as the Stockholder's demand to the Board pursuant to M.G.L. ch. 156D § 7.42. If the Stockholder's demands are not met within ninety days, it will have no choice but to commence a derivative lawsuit. We look forward to your prompt response.

Very truly yours,



Jeroen van Kwawegen

/s/ Francis A. Bottini, Jr.
Francis A. Bottini, Jr.

Encl.

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EXHIBIT 1

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STATEMENT UNDER OATH

I, the undersigned, hereby depose and state under oath that:

(a) I have read the demand letter made pursuant to M.G.L. Ch. 156D § 7.42 addressed to Pegasystems, Inc., and the statement of purpose and any other statements contained therein are true and correct under penalty of perjury.

(b) I am the beneficial owner of Pegasystems, Inc., common stock. The beneficial ownership of these shares is demonstrated by documentary evidence set forth in the exhibit to this Statement. This documentary evidence is true and correct, to the best of my knowledge based on the information provided to me.

By 

Ray Gerber

Fidelity INVESTMENTS

INVESTMENT REPORT
February 1, 2024 - February 29, 2024

Account # X96-340142
RAYMOND GERBER - INDIVIDUAL - TOD

Realized Gains and Losses from Sales
(May not reflect all gains and losses due to incomplete cost basis)

[redacted]

Holdings

Core Account

Description	Beginning Market Value Feb 1, 2024	Quantity Feb 29, 2024	Price Per Unit Feb 29, 2024	Ending Market Value Feb 29, 2024	Total Cost Basis	Unrealized Gain/Loss Feb 29, 2024	EAI ($) / EY (%)
FIDELITY GOVERNMENT MONEY MARKET (SPAXX) -- 7-day yield: 4.96%	[redacted]						
Total Core Account (1% of account holdings)	[redacted]						

Stocks

Description	Beginning Market Value Feb 1, 2024	Quantity Feb 29, 2024	Price Per Unit Feb 29, 2024	Ending Market Value Feb 29, 2024	Total Cost Basis	Unrealized Gain/Loss Feb 29, 2024	EAI ($) / EY (%)
Common Stock	[redacted]						
PEGASYSTEMS INC COM USD0.01 (PEGA)	38,309.64	786.000	[redacted]	51,121.44	54,941.10	[redacted]	

MR_CE_BPZXMHBBDKNT_BBBBB 20240229

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Docket Number 2484CV01734

EXHIBIT 2

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POWER OF ATTORNEY

KNOW ALL PERSONS BY THESE PRESENTS, that Ray Gerber (the "Stockholder"), being the owner and holder of shares of Pegasystems, Inc., (the "Company"), does hereby make, constitute and appoint Jeroen van Kwawegen of Bernstein Litowitz Berger & Grossmann LLP and Francis A. Bottini, Jr. of Bottini & Bottini, Inc. and any person designated by them to act as true and lawful attorney in fact for the Stockholder, in its name, place and stead, jointly and severally, in all matters regarding the demand that the Company's board of directors cause the Company to take suitable action in response to the misconduct set forth in the demand letter, including, but not limited to: (i) making specific demands for the Company's board of directors to take immediate action to ensure the Company takes action against those responsible for the harm they have caused the Company to date; (ii) demanding inspection of books and records of the Company on its behalf as a stockholder of the Company as said attorneys deem appropriate, (iii) reviewing and/or copying any documents received in connection with any such books and records demand made on its behalf as a stockholder of the Company, and (iv) giving and granting unto said attorneys full power and attorney to perform all and every act and thing whatsoever requisite, necessary, and proper to be done in and without the premises, as fully, to all intents and purposes as they might or could do, with full power of substitution and revocation, hereby ratifying and confirming all that its attorneys or the substitute shall lawfully do or cause to be done.

The rights, powers, and authority of said attorneys shall remain in full force and effect until I tender a written notice of termination.

IN WITNESS WHEREOF, I have hereunto set my hand as of 3/22/2024 | 4:12 PM PDT.

By _____
Ray Gerber

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Exhibit 8 to DRC Report

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Exhibit A

Establishment of Demand Review Committee

WHEREAS, the business and affairs of Pegasystems Inc., a Massachusetts corporation (the "**Corporation**"), are managed by or under the direction of the Board of Directors of the Corporation (the "**Board**").

WHEREAS, by letter, dated March 24, 2023 (the "**Brenner Demand Letter**"), George Fielding Brenner, a purported shareholder of the Corporation, made a demand that the Board take certain actions as set forth in the Brenner Demand Letter;

WHEREAS, by letter, dated March 24, 2023 (the "**Larkin Demand Letter**"), Mary Larkin, a purported shareholder of the Corporation, made a demand that the Board take certain actions as set forth in the Larkin Demand Letter;

WHEREAS, pursuant to Section 8.25 of the Massachusetts Business Corporation Act (the "**MBCA**") and Article II, Section 17 of the Amended and Restated Bylaws of the Corporation, the Board may establish one or more other committees, which shall have and may exercise such powers and authority as the Board may determine; and

WHEREAS, the Board has determined that it is advisable and in the best interests of the Corporation and its shareholders to form a new committee of the Board (the "**Demand Review Committee**" or the "**Committee**"), which committee is independent of the Corporation's current management and employees, and to authorize the Committee to review, analyze, and investigate the matters raised in the Brenner Demand Letter, the Larkin Demand Letter, and any subsequently received demand letter(s) raising substantially similar issues (collectively, the "**Demand Letters**"), and to determine in good faith what actions (if any) are reasonably believed to be appropriate under similar circumstances and reasonably believed to be in the best interests of the Corporation in response to the Demand Letters.

NOW, THEREFORE, BE IT:

RESOLVED, that pursuant to Section 8.25 of the Massachusetts Business Corporation Act (the "**MBCA**") and Article II, Section 17 of the Amended and Restated Bylaws of the Corporation, the Board hereby designates and establishes a Demand Review Committee to be comprised of Christopher Lafond, Dianne Ledingham, and Sharon Rowlands (each a "**Member**"), each of whom the Board hereby determines to be independent and disinterested, and authorizes the Committee to select a chairperson thereof;

FURTHER RESOLVED, that upon the death or resignation of a Member, the size of the Committee shall automatically be reduced by such number unless the Board determines otherwise, and the remaining Members shall constitute the entire Demand Review Committee unless the Board determines to appoint one or more additional independent and disinterested directors to serve;

FURTHER RESOLVED, that the Board delegates to the Committee the following authority: the Committee shall review, analyze, and investigate the matters raised in the Demand Letters and the matters set forth therein, and shall have the exclusive authority (with the full authority of the Board) to determine in good faith what actions (if any) are reasonably believed to be appropriate under similar circumstances and reasonably believed to be in the best interests of the Corporation in response to the Demand Letters. The Committee may receive and rely upon such information and documents as it deems appropriate and necessary in order to evaluate the Demand Letters, including but not limited to documents and reports prepared by Corporation personnel;

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FURTHER RESOLVED, that, without limiting the foregoing, the Committee shall have the authority to: (1) incur expenses on behalf of the Corporation in connection with the Committee's activities; (2) conduct interviews with any employee, officer, director, agent, or advisor of the Corporation, or any other person, as the Committee may determine to be appropriate; (3) have access to all information and documents of the Corporation (including confidential information and documents) that the Committee believes would assist it in its work; and (4) communicate, either directly or through legal counsel, on behalf of the Corporation with each shareholder who sent a Demand Letter or the shareholder's respective agents or representatives, or with any other shareholder (or its agents or representatives) who may send a similar demand letter to the Corporation, from time to time as the Committee may deem appropriate.

FURTHER RESOLVED, that the officers, employees, and agents of the Corporation shall cooperate fully with the Demand Review Committee and its advisors in all respects related to the actions of the Committee, and are hereby directed to provide the Committee and its advisors such information regarding the Corporation and such assistance as the Committee or its advisors may request;

FURTHER RESOLVED, that, without limiting any rights of any Member under applicable law, under the Corporation's Restated Articles of Organization or the Corporation's Amended and Restated Bylaws or under any indemnification agreement or other agreement to which any such Member is a party or under which any such Member has any rights, the Corporation (and its successors and assigns) shall indemnify and hold harmless each Member (to the fullest extent permitted by applicable law) in connection with any action or failure to act on the part of such Member in furtherance of or relating to the Demand Letters or otherwise in connection with his or her role or service as a Member;

FURTHER RESOLVED, that the Committee is hereby authorized and empowered to select, retain and consult with independent legal counsel and such other advisors, consultants and agents on such terms as the Committee deems appropriate in connection with fulfilling its duties as delegated by the Board;

FURTHER RESOLVED, that the Committee is hereby authorized and empowered to enter into such agreements providing for the retention, compensation, reimbursement of expenses and indemnification of such legal counsel and any other advisors, consultants and agents as the Committee may deem necessary or appropriate, and that the Corporation is hereby authorized and directed to pay all fees, expenses, and disbursements of such legal counsel and any other advisors, consultants and agents retained by the Committee on presentation of statements approved by the Committee, and that the Corporation shall pay all fees, expenses, and disbursements of such legal counsel, advisors, consultants and agents, and shall carry out, or cause to be carried out, all other contractual obligations of the Corporation under such agreements;

FURTHER RESOLVED, that the Committee shall meet, in person or by telephone or remotely as necessary to carry out its responsibilities. A majority of the Members shall represent a quorum. The Committee may take action by vote of a majority of the Members present at a meeting at which a quorum is present. Any action required or permitted to be taken at a meeting of the Committee may be taken without a meeting if a written consent thereto is signed by all of the Members;

FURTHER RESOLVED, that the Committee shall report as it deems appropriate to the Board on the status of its activities; and

FURTHER RESOLVED, that the Committee, and each Member thereof, is hereby authorized and empowered to do all acts as may be necessary or appropriate in its, his, or her judgment to carry out the duties of the Committee contemplated by these resolutions.

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Exhibit 9 to DRC Report

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FAIRFAX CIRCUIT COURT
CIVIL CASE COVERSHEET 2020 07216

FILED
CIVIL INTAKE
2020 MAY 29 PM 12:00
JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

Parties:

Plaintiffs	Defendants
1. APPIAN CORPORATION	1. PEGASYSTEMS INC.
2.	2. YOUYONG ZOU
3.	3.

***Plaintiff proceeding without Counsel – Address and Daytime Phone Number required on Complaint**

Plaintiff Attorney:

Name: Ellen D. Marcus Bar ID: 44314
Firm: HOLMES COSTIN & MARCUS PLLC
Street: 301 N. FAIRFAX STREET, Suite 202
City: Alexandria State: VA Zip: 22314
Phone Number: 703-260-6401 Fax Number: 703-439-1873
E-mail Address: emarcus@hcmlawva.com

Nature of Complaint (Check only one) *** Cases in the Civil Tracking Program**

☐ Administrative Appeal	☐ Defamation *	☐ Malpractice – Medical *
☐ Affirmation of Marriage	☐ Delinquent Taxes *	☐ Mechanics/Vendors Lien *
☐ Aid & Guidance	☐ Eminent Domain	☐ Partition *
☐ Appeal Decision of Board of Zoning	☐ Encumber/Sell Real Estate	☐ Personal Injury – Assault *
☐ Appeal of Process/Judicial Appeal	☐ Erroneous Assessments	☐ Personal Injury – Auto *
☐ Appointment Church/Organization Trustees	☐ Expungement	☐ Personal Injury – Emotional *
☐ Arbitration	☐ False Arrest/Imprisonment*	☐ Personal Injury – Premises Liability*
☐ Attachment	☐ Fiduciary/Estate Complaint	☐ Property Damage*
☐ Complaint – Equity *	☐ Garnishment–Federal–180 days	☐ Products Liability*
☑ Complaint – Legal Cause of Action *	☐ Garnishment–Wage–180 days	☐ Quiet Title *
☐ Compromise Settlement	☐ Garnishment–Other – 90 days	☐ Real Estate *
☐ Condemnation*	☐ Guardian/Conservator Adult	☐ Restoration of Driving Privilege
☐ Confession of Judgment	☐ Guardianship/Minor	☐ Vital Record Correction
☐ Construction *	☐ Injunction	☐ Writ Habeas Corpus
☐ Contract *	☐ Interpleader	☐ Writ Mandamus
☐ Conversion*	☐ Insurance *	☐ Wrongful Death*
☐ Court Satisfaction of Judgment	☐ Judicial Review	☐ Wrongful Discharge *
☐ Declare Death	☐ Malicious Prosecution *	☐ **OTHER:**
☐ Declaratory Judgment *	☐ Malpractice – Legal *	

Damages in the amount of $ 90,000,000.00 **are claimed.**

Requested Service: ☐ Sheriff ☐ Private Process Server ☐ DMV ☐ Secretary of Commonwealth ☐ State Corporation Commission ☐ Publication ☐ No Service at this time ☑

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FILED
CIVIL INTAKE
2020 MAY 29 PM 12:09
JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

APPIAN CORPORATION
7950 Jones Branch Drive
Tysons, Virginia 22102,

Plaintiff,

v.

PEGASYSTEMS INC.
SERVE AT: Corporation Service Company
100 Shockoe Slip Fl 2
Richmond, Virginia 23291-4100,

and

YOUYONG ZOU
12867 Parapet Way
Herndon, Virginia 20171,

Defendants.

Civil Action No. 2020 07216

COMPLAINT

Plaintiff Appian Corporation ("Appian"), by the undersigned counsel, files this Complaint against defendants Pegasystems Inc. ("Pegasystems") and Youyong Zou ("Zou") seeking damages and other relief.

NATURE OF THE ACTION

1. Over the course of many years, Pegasystems has engaged in an unlawful campaign of corporate espionage against Appian, Pegasystems' smaller yet technologically advanced competitor in the business process management industry. Involving personnel at Pegasystems up to and including Pegasystems' CEO and Founder, Alan Trefler, and other high-ranking

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Pegasystems executives, and assisted at least by Zou, Pegasystems' unlawful schemes have involved stealing Appian's trade secrets and confidential information and then using them to damage Appian's business and reputation, and to steal Appian's customers and potential customers.

2. Among other things, Pegasystems enlisted Zou who illegally provided copies of Appian's software and documentation, which were proprietary confidential information and trade secrets. Zou worked for an Appian business partner and therefore had access to Appian's software and documentation, subject to duties to maintain their secrecy. In exchange for payment by Pegasystems, Zou breached those duties by secretly copying Appian's software and documentation. Pegasystems and Zou then used the illicit copies to conduct detailed technical analyses of Appian's product to determine precisely how it was constructed and how it worked so that they could compare it to Pegasystems' product at a level not possible without the benefit of Appian's stolen trade secrets. Pegasystems employees then created marketing materials and training materials for Pegasystems' sales force, which were used in repeated attempts to deprive Appian of business, often successfully. They could not have created these materials without access to the trade secrets and confidential information they took from Appian.

3. Pegasystems worked willfully and deliberately to ensure that its misappropriation of Appian's trade secrets, as well as the surrounding conspiracy and Pegasystems' and Zou's involvement in it, would evade detection. Among other things, Pegasystems did not enlist an Appian employee, or seek a license directly from Appian, for its scheme. Instead, Pegasystems enlisted Zou, who was not an Appian employee but worked for an Appian business partner, and therefore had access to Appian's trade secrets and confidential information, subject to a duty to maintain their secrecy. Then, rather than hiring Zou directly to misappropriate Appian's trade

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secrets, Pegasystems funneled payment through a middleman company with whom it contracted to recruit and hire Zou to assist with Pegasystems' misappropriation.

4. As a result of Pegasystems' concealment efforts, Appian only recently discovered defendants' trade secrets misappropriation, theft of confidential information and the surrounding conspiracy through the exercise of extraordinary diligence, along with happenstance. Pegasystems' efforts to compete with Appian in the 2014 timeframe became an issue in an unrelated litigation. To learn more about Pegasystems's conduct with respect to Appian, Appian interviewed former Pegasystems employees who are now working for Appian to determine whether Pegasystems had engaged in unlawful competitive activities with respect to Appian. These interviews took place over the course of several months in 2020, and Appian took great pains not to learn any of Pegasystems' own trade secrets or confidential information in the process. These employees were reluctant to talk about Pegasystems' wrongdoing, reasonably fearing retaliation by Pegasystems, which has a reputation for dealing harshly with employees and former employees whom it deems disloyal. Eventually, however, the employees began to reveal information about Pegasystems' wrongdoing.

5. Meanwhile, unrelated to Appian's interviews of the former Pegasystems employees, in early 2020, an individual who does not work for Appian with knowledge of Pegasystems happened to reach out to Appian to advise it of that individual's direct knowledge of some of Pegasystems' unlawful conduct with respect to Appian.

6. Had these individuals not revealed these facts to Appian, Appian likely would never have learned of Pegasystems' or Zou's wrongdoing. Now aware of it, Appian has filed this suit to seek legal and equitable redress.

7. As a result of defendants' unlawful scheme, Appian has suffered substantial

damages, including lost customers and profits and damage to its reputation in the industry. In addition, defendants have been unjustly enriched. Since embarking on its unlawful scheme, Pegasystems' revenues from government and other contracts have steadily increased, much of which would have flowed to Appian absent defendants' unlawful conduct.

THE PARTIES

8. Plaintiff Appian Corporation is a corporation organized and existing under the laws of the state of Delaware, with its principal place of business in the Commonwealth of Virginia, at 7950 Jones Branch Drive, Tysons, Virginia.

9. Defendant Pegasystems Inc. is a corporation organized and existing under the laws of the Commonwealth of Massachusetts, with its principal place of business in Massachusetts, at 1 Rogers Street, Cambridge, Massachusetts. Pegasystems regularly does and solicits business and derives substantial revenue from services rendered in the Commonwealth of Virginia.

10. Defendant Youyong Zou is an individual residing and working in the Commonwealth of Virginia.

JURISDICTION AND VENUE

11. Pegasystems is subject to personal jurisdiction in this Court. It regularly does and solicits business and derives substantial revenue from services rendered in Virginia. The causes of action alleged in this Complaint arise from Pegasystems' transacting business in Virginia, and its causing tortious injury in Virginia, where Appian is.

12. Zou is subject to personal jurisdiction in this Court because he resides and works in Virginia. The causes of action alleged in this Complaint arise from Zou's transacting business in Virginia, and his causing tortious injury in Virginia, where Appian is.

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13. Venue is proper in this Court because Appian is in Fairfax County, Zou resides in Fairfax County, Fairfax County is where the causes of action alleged in the Complaint arose, and a number of fact witnesses (including Zou and Appian employees) and other evidence to the action are in Fairfax County.

FACTS

14. Appian is a recognized global leader in the Business Process Management ("BPM") software market, providing a low-code development platform that allows its customers to quickly develop high-impact business applications. Of Appian's approximately 1,300 employees worldwide, more than 700 are employed in its Tysons, Virginia headquarters.

15. Appian generates revenue by licensing its software, on a non-exclusive basis, to customers and business partners, such as service providers. A license to Appian's software permits the licensee to develop custom, low-code applications using Appian's development environment and run them on Appian's platform. A license also permits the licensee to access Appian's documentation, which describes the technical features of Appian's software platform, as well as techniques that can be used to build applications on Appian's platform.

16. Appian is the sole owner of its software development platform and documentation, which were trade secrets during the time period relevant to this action.

17. During the relevant time period, Appian did not permit usage of its software development platform or documentation absent a license from Appian.

18. Pegasystems competes in the same industry as Appian, providing a BPM software platform to customers that participate in similar industries and are of similar sizes to Appian's customers.

19. Rather than compete lawfully and fairly with Appian in the marketplace,

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Pegasystems developed a scheme to unlawfully obtain copies of Appian's software and documentation – which are proprietary trade secrets – and to then use them to design sales and marketing materials to create the illusion for customers and potential customers that Pegasystems' product is better than Appian's product, thereby taking that business and those revenues away from Appian, and unjustly enriching itself.

20. Pegasystems refrained from contracting directly with individuals who had access to Appian's software and documentation. Instead, Pegasystems used a middleman company to identify individuals having access to Appian's software. By using the middleman company, Pegasystems was able to better conceal its wrongdoing.

21. KForce Inc. ("KForce") is a middleman company Pegasystems used to identify an individual having access to Appian's software.

22. At Pegasystems' direction, KForce identified Zou as a person having access to Appian's software.

23. Zou had access to Appian's software and documentation because he worked for an Appian business partner named Serco Inc. ("Serco"). Serco is a contractor that provides services to the U.S. Government. Serco entered into a business partnership agreement with Appian that allows Serco and its employees (such as Zou) access to Appian's trade secrets and confidential information, but expressly prohibits disclosure of the trade secrets or confidential information to unauthorized third parties.

24. Specifically, the Value Added Service Provider agreement (the "VASP") entered into between Serco and Appian expressly prohibits Serco and its employees from reverse engineering or otherwise attempting to derive or obtain any structure, algorithms, process, technique, technology, know how or ideas underlying or contained in Appian's software platform,

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as well as from allowing, assisting, or permitting a third party to do any of the foregoing activities. The VASP specifically identifies Appian's software platform and Appian's documentation of the software platform as confidential information. The VASP also restricts Serco from providing access to Appian's software platform to any Serco employee unless that employee first executes a written agreement with Serco to protect the confidentiality of Appian's software platform in a manner no less restrictive than the provisions in the VASP protecting Appian's trade secrets and confidential information. Thus, as an employee of Serco with access to Appian's software platform and documentation, Zou was contractually bound to protect their confidentiality and expressly prohibited from reverse engineering Appian's software or allowing, assisting or permitting others to do the same.

25. Upon information and belief, Pegasystems entered into a contract with KForce under which it paid KForce for the unlawful services that Zou agreed to provide Pegasystems, so that KForce could then pay Zou. These services included Zou using Appian's trade secrets and confidential information to teach Pegasystems precisely how Appian's software worked. As Zou knew and Pegasystems knew or had reason to know, the services that Zou agreed to provide were in violation of contractual and other duties Zou had to maintain the secrecy of Appian's trade secrets and the confidentiality of Appian's confidential information.

26. Pegasystems' objectives for its unlawful conduct included identifying secret processes and know how involved in using Appian's software platform that ultimately would allow Pegasystems – through marketing materials and sale techniques – to make its own platform seem better than Appian's. To do this, beginning in January 2013, and possibly earlier, Pegasystems devised a plan to obtain, and – with the assistance of Zou – did obtain, non-public details regarding Appian's architecture, as well as Appian's documentation of its software platform.

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27. In furtherance of defendants' unlawful scheme, Pegasystems paid Zou (through KForce) to travel from Virginia to Pegasystems' Massachusetts headquarters to meet with Pegasystems executives and employees for the purpose of answering detailed technical questions related to Appian's software platform. These were Appian's trade secrets and confidential information. Zou had access to them because he worked for Appian's business partner, Serco. As Pegasystems knew or had reason to know, he was legally and contractually bound to prevent their disclosure to third parties by virtue of his employment with Serco. In violation of these duties, in return for payment, Zou disclosed Appian's trade secrets and confidential information to Pegasystems.

28. In furtherance of this unlawful scheme, and using access granted to him as an employee of an Appian business partner, in violation of his legal and contractual duties to maintain the secrecy and confidentiality of Appian's trade secrets and confidential information, Zou downloaded confidential Appian documentation from Appian's password-protected site, for turnover to Pegasystems. Much of Zou's downloading of documentation occurred outside of work hours. He also checked Appian's documentation site repeatedly, downloading updated versions when available.

29. Zou had access to other trade secrets and confidential information of Appian besides its software and documentation. As an employee of Serco, he developed Appian applications for Appian customers. He therefore received customer feedback – including specific areas where Appian customers sought improved functionality from Appian's platform, such as administrative capabilities and scalability of the platform. This information was Appian's confidential information, and, as Pegasystems knew or had reason to know, Zou had contractual and legal duties to maintain its confidentiality. In violation of these duties, in return for payment,

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Zou disclosed the information to Appian's major competitor Pegasystems.

30. Also at the direction of Pegasystems and for its use, in return for payment, Zou created videos demonstrating the operation of Appian's software platform, including detailed demonstrations of building applications on it. As Zou knew and Pegasystems knew or had reason to know, this was in violation of Zou's contractual and legal duties to maintain the secrecy and confidentiality of Appian's trade secrets and confidential information.

31. Also in furtherance of defendants' unlawful scheme, Pegasystems had Zou compare Appian's and Pegasystems' platforms to determine the platform on which certain application development operations were faster. This allowed Pegasystems to identify features it could emphasize in sales processes as it competed against Appian for the same customers.

32. Pegasystems featured still shots and excerpts from the videos that Zou created of Appian's trade secrets and confidential information in training materials for use by Pegasystems' sales force. These training materials effectively slowed down the videos that Zou created to show in painstaking, screen-by-screen, detail precisely how applications were built on Appian's software platform. Pegasystems could never have made these training materials without misappropriating Appian's trade secrets or stealing its confidential information.

33. Many of Pegasystems' senior-most executives were aware of and condoned the illicit training materials, which were reviewed during meetings including Alan Trefler (Pegasystems' CEO), Kerim Akgonul (Pegasystems' Senior Vice President of Products), Stephen Bixby (Pegasystems' Vice President of Product Development), and Don Schuerman (Pegasystems' current Chief Technology Officer).

34. Pegasystems also created technical briefs favorably comparing Pegasystems to Appian that were based on Appian's trade secrets and confidential information provided by Zou.

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35. Pegasystems also used the trade secrets and confidential information defendants unlawfully obtained from Appian to develop a presentation for its sales force to use highlighting differences between Pegasystems' and Appian's products to make Pegasystems' product seem better than Appian's.

36. Pegasystems also used Appian's trade secrets and confidential information provided by Zou to create a set of "kill points" to emphasize points on which it thought it competed very favorably against Appian.

37. On at least one occasion when Pegasystems and Appian were in head-to-head competition for the same contract with a prospective customer, Pegasystems expected Appian to win the competition. In an effort to defeat Appian, Pegasystems delivered the presentation derived from Appian's trade secrets and confidential information to the prospective customer. As a result of this unlawful conduct, Pegasystems won the contract over Appian, damaged Appian's reputation and business and unjustly enriched itself.

38. In at least one instance, Zou logged into Appian's password-protected documentation website from an IP address associated with Pegasystems. While at that IP address, Zou downloaded Appian's Reference Application, a "best practices" guide for development of software applications on Appian's platform. At that time, this was confidential and trade secret information belonging to Appian. On information and belief, Zou conducted this illegal access and downloading while physically on site at Pegasystems' headquarters.

39. Pegasystems sought to obtain and did obtain and use at least the following information from Zou in violation of contractual and other legal duties to maintain the secrecy and confidentiality of Appian's trade secrets and confidential information, which Pegasystems then used to its own benefit at Appian's expense:

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a. How to develop and change applications on Appian's software platform;

b. The types of application development operations that could be completed more quickly on either platform;

c. The types of application challenges Appian's software platform would have trouble with;

d. The architecture of Appian's software platform;

e. Details regarding the ability of Appian's platform to scale to accommodate different types of use;

f. The number of developers who could simultaneously work on processes in Appian's software platform;

g. The capabilities of Appian's platform for conducting parallel work-related Appian applications;

h. How Appian was using its proprietary database to store data for applications developed on Appian's software platform;

i. Any risks of data loss using Appian's product;

j. Any scalability issues with Appian's software platform;

k. The content of Appian's documentation;

l. How Pegasystems' platform could be better positioned relative to Appian's in a head-to-head sales competition.

40. Upon information and belief, Pegasystems has conspired with others besides Zou to misappropriate Appian's trade secrets, and has done so as recently as last year.

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COUNT I: MISAPPROPRIATION OF TRADE SECRETS IN VIOLATION OF VIRGINIA'S UNIFORM TRADE SECRETS ACT (AGAINST BOTH DEFENDANTS)

41. Appian incorporates by reference the allegations contained in paragraphs 1-40 of the Complaint as if fully set forth herein.

42. Appian's software platform, including the technical details of how its various components can be combined and used to develop applications and the functionality of the platform, the steps by which Appian's applications are developed, and Appian's documentation, are trade secrets under the Virginia Uniform Trade Secrets Act ("VUTSA"). They are information that derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and they are information that is the subject of efforts that are reasonable under the circumstances to maintain their secrecy.

43. Reasonable efforts that Appian undertakes to maintain the secrecy of its trade secrets include requiring its business partners (including Serco) and the employees of its business partners (including Zou) to comply with non-disclosure and confidentiality obligations protecting Appian's trade secrets, and to agree in writing to comply with those obligations.

44. As an employee of Appian's business partner Serco, Zou had a duty to maintain the secrecy of Appian's trade secrets, which he breached. Pegasystems knew or had reason to know that Zou had that duty, and conspired with him, induced him and paid him to breach it.

45. Defendants misappropriated Appian's trade secrets by acquiring them, while knowing or having reason to know that the trade secrets were acquired by improper means.

46. Defendants also misappropriated Appian's trade secrets by disclosing or using them without Appian's express or implied consent, having used improper means to acquire knowledge of the trade secret.

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47. Defendants also misappropriated Appian's trade secrets by disclosing them or using them without Appian's express or implied consent, where, at the time of their disclosure or use, defendants knew or had reason to know that their knowledge of the trade secrets was (a) derived from or through a person who had used improper means to acquire them, (b) acquired under circumstances giving rise to a duty to maintain their secrecy or limit their use, (c) derived from or through a person who owed a duty Appian to maintain their secrecy or limit their use, and/or (d) acquired by accident or mistake.

48. The improper means by which Appian's trade secrets were acquired included theft, use of a computer or computer network without authority, breach of a duty or inducement of breach of a duty to maintain secrecy, and espionage through electronic or other means.

49. Zou's breach of his duty to maintain the secrecy of Appian's trade secrets was improper means.

50. Pegasystems' inducement of the breach by Zou of his duty to maintain the secrecy of Appian's trade secrets was improper means.

51. Among other things, Zou misappropriated Appian's trade secrets by acquiring, disclosing and using Appian's software development platform, including the technical details of how its various components can be combined and used to develop applications and the functionality of the platform, the steps by which Appian's applications are developed, and Appian's documentation.

52. Among other things, Pegasystems misappropriated Appian's trade secrets by acquiring, disclosing and using Appian's software development platform, including the technical details of how its various components can be combined and used to develop applications and the

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functionality of the platform, the steps by which Appian's applications are developed, and Appian's documentation.

53. Appian has suffered damages as a result of Zou's and Pegasystems' misappropriation of its trade secrets. As a result of the violations, among other things, Pegasystems used the trade secrets as part of its sales process and marketing materials to take business away from Appian. Lost sales to Appian from existing and potential customers, and damage to Appian's goodwill in the industry, followed as a result.

54. As a direct and proximate result of defendants' misappropriation of Appian's trade secrets, Appian has suffered and will suffer substantial monetary damages in an amount that will exceed $90 million.

55. In addition to the actual losses caused Appian by Zou's and Pegasystems' misappropriation, defendants have been unjustly enriched by the misappropriation. Appian is entitled to an award of damages for the misappropriation, including for both the actual loss caused by the misappropriation and the unjust enrichment caused by the misappropriation.

56. The commercial advantage derived by Pegasystems through the misappropriation continues, and some of the harm caused by it to Appian is ongoing and irreparable.

57. Pegasystems' misappropriation of Appian's trade secrets was willful and malicious, entitling Appian to an award of reasonable attorneys' fees and punitive damages against Pegasystems.

COUNT II: COMPUTER FRAUD IN VIOLATION OF THE VIRGINIA COMPUTER CRIMES ACT
(AGAINST BOTH DEFENDANTS)

58. Appian incorporates by reference the allegations contained in paragraphs 1-40 of the Complaint as if fully set forth herein.

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59. Appian's software platform is "property" protected by the Virginia Computer Crimes Act ("VCCA").

60. Appian's documentation is also property protected by the VCCA.

61. Appian is the sole owner of its software platform and documentation.

62. Appian does not permit usage of its software platform or documentation absent a license from Appian.

63. Pegasystems, Appian's competitor, does not have a license from Appian to use Appian's software platform or documentation. Appian has never authorized Pegasystems to use Appian's software platform or documentation.

64. As an employee of Appian's business partner Serco, Zou had limited authority to use Appian's software platform or documentation. Appian has never authorized Zou to disclose its software platform or documentation to Pegasystems.

65. In violation of the VCCA, defendants used a computer or computer network without authority with the intent to convert Appian's property, and converted Appian's property, causing Appian damages, including lost profits.

66. Defendants converted Appian's property by exercising control over Appian's software platform, and by using it, examining it and analyzing it.

67. Defendants converted Appian's documentation by viewing it and making copies of it.

68. Appian is entitled to an award for the damages it has sustained from Pegasystems' VCCA violations, including for lost profits, in an amount that exceeds $90 million. Appian is also entitled to the costs of suit.

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COUNT III: TORTIOUS INTERFERENCE WITH APPIAN'S SERCO CONTRACT (AGAINST DEFENDANT PEGASYSTEMS)

69. Appian incorporates by reference the allegations contained in paragraphs 1-40 of the Complaint as if fully set forth herein.

70. Appian had a valid contract with Serco. Under the contract, Serco and its employees (including Zou) were prohibited from disclosing to third parties the operation of Appian's platform, including technical details regarding the development of applications, and whether and how performance of the platform could be improved. Under the contract, Serco and Zou were also prohibited from disclosing Appian's documentation to third parties.

71. Pegasystems knew that Zou was an employee of Serco, and that Serco was an Appian business partner that provided services on Appian's behalf.

72. As a competitor in the same industry, Pegasystems knew, or should have known, that Appian's business partners (including Serco), and their employees (including Zou), were prohibited by contract from disclosing to third parties Appian's platform, including technical details regarding the development of applications, and where performance could be improved. In addition, Pegasystems knew or should have known that Appian's business partners and their employees were contractually prohibited from disclosing Appian's documentation to third parties.

73. Pegasystems intentionally interfered with Appian's contractual relationship with Serco and Zou, inducing or causing a breach of the contract. Among other things, Pegasystems induced or caused Zou and Serco, in violation of the contract with Appian, to disclose to Pegasystems (a third party) analyses of Appian's software platform and videos of Appian's development operations, as well as the technical details of Appian's platform.

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74. As a result of Zou's and Serco's breach of the contract, Appian has been damaged. Among other things, using Appian's confidential information that Zou disclosed to Pegasystems in violation of the contract, Appian lost revenues from potential and existing customers.

75. As a direct and proximate result of Pegasystems' tortious interference with contract, Appian has suffered and will suffer substantial monetary damages in an amount that will exceed $90 million.

76. Appian is entitled to an award for the damages it has sustained from Pegasystems' tortious interference with contract.

COUNT IV: TORTIOUS INTERFERENCE WITH APPIAN'S BUSINESS EXPECTANCY (AGAINST DEFENDANT PEGASYSTEMS)

77. Appian incorporates by reference the allegations contained in paragraphs 1-40 of the Complaint as if fully set forth herein.

78. Appian routinely enters into license agreements with prospective customers who desire to license to Appian's platform, resulting in licensing revenue to Appian.

79. Appian had a business expectancy with a certain prospective customer.

80. Upon information and belief, Pegasystems knew of that business expectancy.

81. Pegasystems intentionally interfered with that business expectancy, causing a termination of the expectancy, and resultant damage to Appian. Upon information and belief, during a competitive bidding process with the prospective customer, Pegasystems provided the slideshow that Pegasystems developed using Appian's misappropriated trade secrets. The prospective customer subsequently entered into a licensing agreement with Pegasystems, not Appian.

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82. Upon information and belief, but for Pegasystems' intentional interference with the business expectancy, Appian would have entered into new license agreements with the prospective customer, as well as with other prospective customers. Appian has lost profits as a result.

83. As a direct and proximate result of Pegasystems' tortious interference with business expectancy, Appian has suffered and will suffer substantial monetary damages in an amount exceeding $100,000.

84. Appian is entitled to an award for the damages it has sustained from Pegasystems' tortious interference with business expectancy.

COUNT V: STATUTORY BUSINESS CONSPIRACY
(AGAINST BOTH DEFENDANTS)

85. Appian incorporates by reference the allegations contained in paragraphs 1-40 of the Complaint as if fully set forth herein.

86. In violation of Va. Code § 18.2-499, *et seq*., Pegasystems and Zou combined, associated, agreed, mutually undertook or concerted together for the purposes of willfully and maliciously injuring Appian in its trade, business or profession. Among other things, they agreed and combined to injure Appian's business by: (1) misappropriating Appian's trade secrets and confidential information; (2) breaching the VASP agreement between Appian and Serco; (3) breaching Zou's contractual and legal duties to maintain the secrecy of Appian's trade secrets and the confidentiality of Appian's confidential information; (4) tortiously interfering with Appian's relationships with its existing customers; and (5) tortiously interfering with Appian's business expectancies. In doing so, Pegasystems and Zou acted intentionally, purposefully and without lawful justification.

87. As a result of Pegasystems' and Zou's violations, Appian has suffered damages, including lost profits.

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88. As a direct and proximate result of defendants' unlawful conspiracy, Appian has suffered and will suffer substantial monetary damages in an amount that will exceed $90 million.

89. Appian is entitled to an award of treble damages for Pegasystems' and Zou's violations.

90. Appian is also entitled to an award of the costs of suit, including reasonable attorneys' fees.

COUNT VI: COMMON LAW CONSPIRACY
(AGAINST BOTH DEFENDANTS)

91. Appian incorporates by reference the allegations contained in paragraphs 1-40 of the Complaint as if fully set forth herein.

92. Pegasystems and Zou combined to accomplish, by some concerted action, some criminal or unlawful purpose by a criminal or unlawful means. Among other things, they combined to: (1) misappropriate Appian's trade secrets and confidential information; (2) breach the VASP agreement between Appian and Serco; (3) breach Zou's contractual and legal duties to maintain the secrecy of Appian's trade secrets and the confidentiality of Appian's confidential information; (4) tortiously interfere with Appian's relationships with its existing customers; and (5) tortiously interfere with Appian's business expectancies.

93. As a result of Pegasystems' and Zou's unlawful conspiracy, Appian has suffered damages, including lost profits.

94. As a direct and proximate result of defendants' unlawful conspiracy, Appian has suffered and will suffer substantial monetary damages in an amount that will exceed $90 million.

95. Appian is entitled to an award of damages for Pegasystems' and Zou's violations.

96. Appian is also entitled to an award of punitive damages.

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REQUEST FOR RELIEF

WHEREFORE, Appian requests relief as follows:

97. Enter judgment in favor of Appian on all counts;

98. Award compensatory damages Appian proves at trial either in the form of actual damages, unjust enrichment including a disgorgement of all profits, or both;

99. Award punitive damages against Pegasystems to the maximum amount allowed by law;

100. Award Appian treble its compensatory damages against Pegasystems;

101. Enjoin Pegasystems from developing, marketing, selling, licensing, or using any product that, in any respect or to any degree, is based on, derived from, modified in response to, or incorporates any of Appian's confidential information or trade secrets;

102. Enjoin Pegasystems from relying in any sales process on any information developed as a result of examining, testing, analyzing, viewing, or otherwise derived from Appian's unlawfully obtained platform or documentation;

103. Enjoin the defendants from engaging in future activities that would result in the misappropriation of Appian's trade secrets or confidential information;

104. Award Appian its costs, including reasonable attorney's fees, incurred in connection with this action; and

105. Grant such other and further relief as is just and proper.

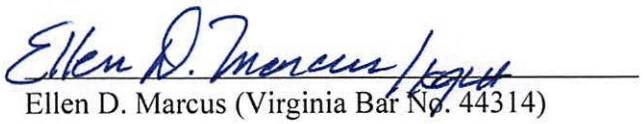
JURY DEMAND

Appian demands a trial by jury.

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Dated: May 29, 2020

Respectfully submitted,



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Exhibit 10 to DRC Report

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VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

APPIAN CORPORATION 7950 Jones Branch Drive Tysons, Virginia 22102, **Plaintiff,** **v.** **PEGASYSTEMS INC.** SERVE AT: Corporation Service Company 100 Shockoe Slip Fl 2 Richmond, Virginia 23291-4100, **and** **YOUYONG ZOU** 12867 Parapet Way Herndon, Virginia 20171, **Defendants.**	)	**Civil Action No. 2020 07216**

FIRST AMENDED COMPLAINT

Plaintiff Appian Corporation ("Appian"), by the undersigned counsel, files this First Amended Complaint against defendants Pegasystems Inc. ("Pegasystems") and Youyong Zou ("Zou") seeking damages and other relief.

NATURE OF THE ACTION

1. Over the course of many years, Pegasystems has engaged in an unlawful campaign of corporate espionage against Appian, Pegasystems' smaller yet technologically advanced competitor in the business process management industry. Involving personnel at Pegasystems up to and including Pegasystems' CEO and Founder, Alan Trefler, and other high-ranking

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Pegasystems executives, and assisted at least by Zou, Pegasystems' unlawful schemes have involved stealing Appian's trade secrets and confidential information and then using them to damage Appian's business and reputation, and to steal Appian's customers and potential customers.

2. Among other things, Pegasystems enlisted Zou who illegally provided copies of Appian's software and documentation, which were proprietary confidential information and trade secrets. Zou worked for an Appian business partner and therefore had access to Appian's software and documentation, subject to duties to maintain their secrecy. In exchange for payment by Pegasystems, Zou breached those duties by secretly copying Appian's software and documentation. Pegasystems and Zou then used the illicit copies to conduct detailed technical analyses of Appian's product to determine precisely how it was constructed and how it worked so that they could compare it to Pegasystems' product at a level not possible without the benefit of Appian's stolen trade secrets. Pegasystems employees then created marketing materials and training materials for Pegasystems' sales force, which were used in repeated attempts to deprive Appian of business, often successfully. They could not have created these materials without access to the trade secrets and confidential information they took from Appian.

3. Pegasystems worked willfully and deliberately to ensure that its misappropriation of Appian's trade secrets, as well as the surrounding conspiracy and Pegasystems' and Zou's involvement in it, would evade detection. Among other things, Pegasystems did not enlist an Appian employee, or seek a license directly from Appian, for its scheme. Instead, Pegasystems enlisted Zou, who was not an Appian employee but worked for an Appian business partner, and therefore had access to Appian's trade secrets and confidential information, subject to a duty to maintain their secrecy. Then, rather than hiring Zou directly to misappropriate Appian's trade

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secrets, Pegasystems funneled payment through a middleman company with whom it contracted to recruit and hire Zou to assist with Pegasystems' misappropriation.

4. As a result of Pegasystems' concealment efforts, Appian only recently discovered defendants' trade secrets misappropriation, theft of confidential information and the surrounding conspiracy through the exercise of extraordinary diligence, along with happenstance. Pegasystems' efforts to compete with Appian, including in the 2014 timeframe, became an issue in an unrelated litigation. To learn more about Pegasystems's conduct with respect to Appian, Appian interviewed former Pegasystems employees who are now working for Appian to determine whether Pegasystems had engaged in unlawful competitive activities with respect to Appian. These interviews took place over the course of several months in 2020, and Appian took great pains not to learn any of Pegasystems' own trade secrets or confidential information in the process. These employees were reluctant to talk about Pegasystems' wrongdoing, reasonably fearing retaliation by Pegasystems, which has a reputation for dealing harshly with employees and former employees whom it deems disloyal. Eventually, however, the employees began to reveal information about Pegasystems' wrongdoing.

5. Meanwhile, unrelated to Appian's interviews of the former Pegasystems employees, in early 2020, an individual who does not work for Appian with knowledge of Pegasystems happened to reach out to Appian to advise it of that individual's direct knowledge of some of Pegasystems' unlawful conduct with respect to Appian.

6. Had these individuals not revealed these facts to Appian, Appian likely would never have learned of Pegasystems' or Zou's wrongdoing. Now aware of it, Appian has filed this suit to seek legal redress.

7. As a result of defendants' unlawful scheme, Appian has suffered substantial

damages, including lost customers and profits and damage to its reputation in the industry. In addition, defendants have been unjustly enriched. Since embarking on its unlawful scheme, Pegasystems' revenues from government and other contracts have steadily increased, much of which would have flowed to Appian absent defendants' unlawful conduct.

THE PARTIES

8. Plaintiff Appian Corporation is a corporation organized and existing under the laws of the state of Delaware, with its principal place of business in the Commonwealth of Virginia, at 7950 Jones Branch Drive, Tysons, Virginia.

9. Defendant Pegasystems Inc. is a corporation organized and existing under the laws of the Commonwealth of Massachusetts, with its principal place of business in Massachusetts, at 1 Rogers Street, Cambridge, Massachusetts. Pegasystems regularly does and solicits business and derives substantial revenue from services rendered in the Commonwealth of Virginia.

10. Defendant Youyong Zou is an individual residing and working in the Commonwealth of Virginia.

JURISDICTION AND VENUE

11. Pegasystems is subject to personal jurisdiction in this Court. It regularly does and solicits business and derives substantial revenue from services rendered in Virginia. The causes of action alleged in this Complaint arise from Pegasystems' transacting business in Virginia, and its causing tortious injury in Virginia, where Appian is.

12. Zou is subject to personal jurisdiction in this Court because he resides and works in Virginia. The causes of action alleged in this Complaint arise from Zou's transacting business in Virginia, and his causing tortious injury in Virginia, where Appian is.

13. Venue is proper in this Court because Appian is in Fairfax County, Zou resides in Fairfax County, Fairfax County is where the causes of action alleged in the Complaint arose, and a number of fact witnesses (including Zou and Appian employees) and other evidence to the action are in Fairfax County.

FACTS

14. Appian is a recognized global leader in the Business Process Management ("BPM") software market, providing a low-code development platform that allows its customers to quickly develop high-impact business applications. Of Appian's approximately 1,300 employees worldwide, more than 700 are employed in its Tysons, Virginia headquarters.

15. Appian generates revenue by licensing its software, on a non-exclusive basis, to customers and business partners, such as service providers. A license to Appian's software permits the licensee to develop custom, low-code applications using Appian's development environment and run them on Appian's platform. A license also permits the licensee to access Appian's documentation, which describes the technical features of Appian's software platform, as well as techniques that can be used to build applications on Appian's platform.

16. Appian is the sole owner of its software development platform and documentation, which were trade secrets during the time period relevant to this action.

17. During the relevant time period, Appian did not permit usage of its software development platform or documentation absent a license from Appian.

18. Pegasystems competes in the same industry as Appian, providing a BPM software platform to customers that participate in similar industries and are of similar sizes to Appian's customers.

19. Rather than compete lawfully and fairly with Appian in the marketplace,

Pegasystems developed a scheme to unlawfully obtain copies of Appian's software and documentation – which are proprietary trade secrets – and to then use them to design sales and marketing materials to create the illusion for customers and potential customers that Pegasystems' product is better than Appian's product, thereby taking that business and those revenues away from Appian, and unjustly enriching itself.

20. Pegasystems refrained from contracting directly with individuals who had access to Appian's software and documentation. Instead, Pegasystems used a middleman company to identify individuals having access to Appian's software. By using the middleman company, Pegasystems was able to better conceal its wrongdoing.

21. KForce Inc. ("KForce") is a middleman company Pegasystems used to identify an individual having access to Appian's software.

22. At Pegasystems' direction, KForce identified Zou as a person having access to Appian's software.

23. Zou had access to Appian's software and documentation because he worked for Appian business partners, including Serco Inc. ("Serco"). Serco is a contractor that provides services to the U.S. Government. Serco is bound by terms of certain agreements that allowed Serco and certain of its licensed user employees (such as Zou) to access Appian's trade secrets and confidential information, but expressly prohibited disclosure of the trade secrets or confidential information to unauthorized third parties, and expressly limited use of the software to authorized business purposes, which did not include misappropriating Appian's trade secrets or sharing its software with Appian's competitors. Relevant agreements included a February 2012 Subcontract as well as a federal supply contract (bearing the number GS-35F-0511T) and purchase orders issued pursuant thereto.

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24. Additionally, Zou was contractually bound by his employment agreement with Serco and under Serco policies to protect the confidentiality of the information made available to him for his work for Serco, including Appian's trade secrets and confidential information.

25. Pegasystems entered into a contract with KForce under which it paid KForce for the unlawful services that Zou agreed to provide Pegasystems, so that KForce could then pay Zou. These services included Zou using Appian's trade secrets and confidential information to teach Pegasystems precisely how Appian's software worked. As Zou knew and Pegasystems knew or had reason to know, the services that Zou agreed to provide were in violation of contractual and other duties Zou had to maintain the secrecy of Appian's trade secrets and the confidentiality of Appian's confidential information.

26. Pegasystems' objectives for its unlawful conduct included identifying secret processes and know how involved in using Appian's software platform that ultimately would allow Pegasystems – through marketing materials and sale techniques – to make its own platform seem better than Appian's. To do this, beginning in 2012, and possibly earlier, Pegasystems devised a plan to obtain, and – with the assistance of Zou – did obtain, non-public details regarding Appian's architecture, as well as Appian's documentation of its software platform.

27. In furtherance of defendants' unlawful scheme, Pegasystems paid Zou (through KForce) to travel from Virginia to Pegasystems' Massachusetts headquarters to meet with Pegasystems executives and employees for the purpose of answering detailed technical questions related to Appian's software platform. These were Appian's trade secrets and confidential information. Zou had access to them because he worked for Appian's business partner, Serco. As Pegasystems knew or had reason to know, he was legally and contractually bound to prevent their disclosure to third parties by virtue of his employment with Serco. In violation of these duties, in

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return for payment, Zou disclosed Appian's trade secrets and confidential information to Pegasystems.

28. In furtherance of this unlawful scheme, and using access granted to him as an employee of an Appian business partner, in violation of his legal and contractual duties to maintain the secrecy and confidentiality of Appian's trade secrets and confidential information, Zou downloaded confidential Appian documentation from Appian's password-protected site, for turnover to Pegasystems. Much of Zou's downloading of documentation occurred outside of work hours. He also checked Appian's documentation site repeatedly, downloading updated versions when available.

29. Zou had access to other trade secrets and confidential information of Appian besides its software and documentation. As an employee of Serco, he developed Appian applications for Appian customers. He therefore received customer feedback – including specific areas where Appian customers sought improved functionality from Appian's platform, such as administrative capabilities and scalability of the platform. This information was Appian's confidential information, and, as Pegasystems knew or had reason to know, Zou had contractual and legal duties to maintain its confidentiality. In violation of these duties, in return for payment, Zou disclosed the information to Appian's major competitor Pegasystems.

30. Also at the direction of Pegasystems and for its use, in return for payment, Zou created videos demonstrating the operation of Appian's software platform, including detailed demonstrations of building applications on it. As Zou knew and Pegasystems knew or had reason to know, this was in violation of Zou's contractual and legal duties to maintain the secrecy and confidentiality of Appian's trade secrets and confidential information.

31. Also in furtherance of defendants' unlawful scheme, Pegasystems had Zou

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compare Appian's and Pegasystems' platforms to determine the platform on which certain application development operations were faster. This allowed Pegasystems to identify features it could emphasize in sales processes as it competed against Appian for the same customers.

32. Pegasystems featured still shots and excerpts from the videos that Zou created of Appian's trade secrets and confidential information in training materials for use by Pegasystems' sales force. These training materials effectively slowed down the videos that Zou created to show in painstaking, screen-by-screen, detail precisely how applications were built on Appian's software platform. Pegasystems could never have made these training materials without misappropriating Appian's trade secrets or stealing its confidential information.

33. Many of Pegasystems' senior-most executives were aware of and condoned the illicit training materials, which were reviewed during meetings including Alan Trefler (Pegasystems' CEO), Kerim Akgonul (Pegasystems' Senior Vice President of Products), Stephen Bixby (Pegasystems' Vice President of Product Development), and Don Schuerman (Pegasystems' current Chief Technology Officer).

34. Pegasystems also created technical briefs favorably comparing Pegasystems to Appian that were based on Appian's trade secrets and confidential information provided by Zou.

35. Pegasystems also used the trade secrets and confidential information defendants unlawfully obtained from Appian to develop a presentation for its sales force to use highlighting differences between Pegasystems' and Appian's products to make Pegasystems' product seem better than Appian's.

36. Pegasystems also used Appian's trade secrets and confidential information provided by Zou to create a set of "kill points" to emphasize points on which it thought it competed very favorably against Appian.

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37. When Pegasystems and Appian were in head-to-head competition for the same contracts with prospective customers, Pegasystems provided documents or utilized information that Pegasystems developed using Appian's misappropriated trade secrets and confidential information. As a result of this unlawful conduct, Pegasystems won the contracts over Appian, damaged Appian's reputation and business and unjustly enriched itself.

38. In at least one instance, Zou logged into Appian's password-protected documentation website from an IP address associated with Pegasystems. While at that IP address, Zou downloaded Appian's Reference Application, a "best practices" guide for development of software applications on Appian's platform. At that time, this was confidential and trade secret information belonging to Appian. On information and belief, Zou conducted this illegal access and downloading while physically on site at Pegasystems' headquarters.

39. Pegasystems sought to obtain and did obtain and use at least the following information from Zou in violation of contractual and other legal duties to maintain the secrecy and confidentiality of Appian's trade secrets and confidential information, which Pegasystems then used to its own benefit at Appian's expense:

a. How to develop and change applications on Appian's software platform;

b. The types of application development operations that could be completed more quickly on either platform;

c. The types of application challenges Appian's software platform would have trouble with;

d. The architecture of Appian's software platform;

e. Details regarding the ability of Appian's platform to scale to accommodate different types of use;

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f. The number of developers who could simultaneously work on processes in Appian's software platform;

g. The capabilities of Appian's platform for conducting parallel work-related Appian applications;

h. How Appian was using its proprietary database to store data for applications developed on Appian's software platform;

i. Any risks of data loss using Appian's product;

j. Any scalability issues with Appian's software platform;

k. The content of Appian's documentation;

l. How Pegasystems' platform could be better positioned and improved relative to Appian's.

40. Pegasystems' unlawful use of the Appian trade secrets acquired for it by Zou continued for years after 2014, including through at least 2018 and potentially beyond. Pegasystems has also conspired with others besides Zou to misappropriate and unlawfully access Appian's trade secrets, or misappropriated and unlawfully accessed Appian trade secrets through its own employees accessing Appian's software and its network under false identities and by hiding their affiliation with Pegasystems, including in 2019.

COUNT I: MISAPPROPRIATION OF TRADE SECRETS IN VIOLATION OF VIRGINIA'S UNIFORM TRADE SECRETS ACT (AGAINST BOTH DEFENDANTS)

41. Appian incorporates by reference the allegations contained in paragraphs 1-40 of the Complaint as if fully set forth herein.

42. Appian's software platform, including the technical details of how its various components can be combined and used to develop applications and the functionality of the platform, the steps by which Appian's applications are developed, and Appian's documentation,

are trade secrets under the Virginia Uniform Trade Secrets Act ("VUTSA"). They are information that derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and they are information that is the subject of efforts that are reasonable under the circumstances to maintain their secrecy.

43. Reasonable efforts that Appian undertakes to maintain the secrecy of its trade secrets include requiring its business partners (including Serco) and the employees of its business partners (including Zou) to comply with non-disclosure and confidentiality obligations protecting Appian's trade secrets, and to agree in writing to comply with those obligations.

44. As an employee of Appian's business partner Serco, Zou had a duty to maintain the secrecy of Appian's trade secrets, which he breached. Pegasystems knew or had reason to know that Zou had that duty, and conspired with him, induced him and paid him to breach it.

45. Defendants misappropriated Appian's trade secrets by acquiring them, while knowing or having reason to know that the trade secrets were acquired by improper means.

46. Defendants also misappropriated Appian's trade secrets by disclosing or using them without Appian's express or implied consent, having used improper means to acquire knowledge of the trade secret.

47. Defendants also misappropriated Appian's trade secrets by disclosing them or using them without Appian's express or implied consent, where, at the time of their disclosure or use, defendants knew or had reason to know that their knowledge of the trade secrets was (a) derived from or through a person who had used improper means to acquire them, (b) acquired under circumstances giving rise to a duty to maintain their secrecy or limit their use, (c) derived from or

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through a person who owed a duty Appian to maintain their secrecy or limit their use, and/or (d) acquired by accident or mistake.

48. The improper means by which Appian's trade secrets were acquired included theft, use of a computer or computer network without authority, breach of a duty or inducement of breach of a duty to maintain secrecy, and espionage through electronic or other means.

49. Zou's breach of his duty to maintain the secrecy of Appian's trade secrets was improper means.

50. Pegasystems' inducement of the breach by Zou of his duty to maintain the secrecy of Appian's trade secrets was improper means.

51. Among other things, Zou misappropriated Appian's trade secrets by acquiring, disclosing and using Appian's software development platform, including the technical details of how its various components can be combined and used to develop applications and the functionality of the platform, the steps by which Appian's applications are developed, and Appian's documentation.

52. Among other things, Pegasystems misappropriated Appian's trade secrets by acquiring, disclosing and using Appian's software development platform, including the technical details of how its various components can be combined and used to develop applications and the functionality of the platform, the steps by which Appian's applications are developed, and Appian's documentation.

53. Appian has suffered damages as a result of Zou's and Pegasystems' misappropriation of its trade secrets. As a result of the violations, among other things, Pegasystems used the trade secrets as part of its sales process and marketing materials to take business away

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from Appian. Lost sales to Appian from existing and potential customers, and damage to Appian's goodwill in the industry, followed as a result.

54. As a direct and proximate result of defendants' misappropriation of Appian's trade secrets, Appian has suffered and will suffer substantial monetary damages in an amount that will exceed $90 million.

55. In addition to the actual losses caused Appian by Zou's and Pegasystems' misappropriation, defendants have been unjustly enriched by the misappropriation. Appian is entitled to an award of damages for the misappropriation, including for both the actual loss caused by the misappropriation and the unjust enrichment caused by the misappropriation.

56. The commercial advantage derived by Pegasystems through the misappropriation continues, and some of the harm caused by it to Appian is ongoing.

57. Pegasystems' misappropriation of Appian's trade secrets was willful and malicious, entitling Appian to an award of reasonable attorneys' fees and punitive damages against Pegasystems.

COUNT II: COMPUTER FRAUD IN VIOLATION OF THE VIRGINIA COMPUTER CRIMES ACT
(AGAINST PEGASYSTEMS ONLY)

58. Appian incorporates by reference the allegations contained in paragraphs 1-40 of the Complaint as if fully set forth herein.

59. Appian's software platform is "property" protected by the Virginia Computer Crimes Act ("VCCA").

60. Appian's documentation is also property protected by the VCCA.

61. Appian is the sole owner of its software platform and documentation.

62. Appian does not permit usage of its software platform or documentation absent a license from Appian.

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63. Pegasystems, Appian's competitor, does not have a license from Appian to use Appian's software platform or documentation. Appian has never authorized Pegasystems to use Appian's software platform or documentation.

64. In violation of the VCCA, Pegasystems used a computer or computer network without authority with the intent to convert Appian's property, and converted Appian's property, causing Appian damages, including lost profits.

65. Pegasystems converted Appian's property by exercising control over Appian's software platform, and by using it, examining it and analyzing it.

66. Pegasystems converted Appian's documentation by viewing it and making copies of it.

67. Appian is entitled to an award for the damages it has sustained from Pegasystems' VCCA violations, including for lost profits, in an amount that exceeds $90 million. Appian is also entitled to the costs of suit.

COUNT III: TORTIOUS INTERFERENCE WITH APPIAN'S BUSINESS EXPECTANCY (AGAINST DEFENDANT PEGASYSTEMS)

68. Appian incorporates by reference the allegations contained in paragraphs 1-40 of the Complaint as if fully set forth herein.

69. Appian routinely enters into license and related agreements with prospective customers who desire to license to Appian's platform, resulting in revenue to Appian.

70. Appian had a business expectancy with prospective customers.

71. Upon information and belief, Pegasystems knew of those business expectancies.

72. Pegasystems intentionally interfered with those business expectancies, causing a termination of the expectancies, and resultant damage to Appian. Upon information and belief,

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during competitive bidding processes with the prospective customers, Pegasystems provided documents or utilized information that Pegasystems developed using Appian's misappropriated trade secrets. The prospective customers subsequently entered into agreements with Pegasystems, not Appian.

73. Upon information and belief, but for Pegasystems' intentional interference with business expectancies, Appian would have entered into new agreements with the prospective customers. Appian has lost profits as a result.

74. As a direct and proximate result of Pegasystems' tortious interference with business expectancy, Appian has suffered and will suffer substantial monetary damages.

75. Appian is entitled to an award for the damages it has sustained from Pegasystems' tortious interference with business expectancy. Appian pursues relief pursuant to this Count only with regard to agreements that the prospective customers entered into with Pegasystems on or after May 29, 2015.

COUNT IV: STATUTORY BUSINESS CONSPIRACY
(AGAINST BOTH DEFENDANTS)

76. Appian incorporates by reference the allegations contained in paragraphs 1-40 of the Complaint as if fully set forth herein.

77. In violation of Va. Code § 18.2-499, *et seq*., Pegasystems with other parties, or Pegasystems and Zou, combined, associated, agreed, mutually undertook or concerted together for the purposes of willfully and maliciously injuring Appian in its trade, business or profession. Among other things, they agreed and combined to injure Appian's business by: (1) misappropriating Appian's trade secrets and confidential information; (2) breaching Zou's contractual and legal duties to maintain the secrecy of Appian's trade secrets and the confidentiality of Appian's confidential information; (3) tortiously interfering with Appian's

business expectancies. In doing so, Pegasystems, or Pegasystems and Zou, acted intentionally, purposefully and without lawful justification.

78. As a result of Pegasystems' and Zou's violations, Appian has suffered damages, including lost profits.

79. As a direct and proximate result of defendants' unlawful conspiracy, Appian has suffered and will suffer substantial monetary damages in an amount that will exceed $90 million.

80. Appian is entitled to an award of treble damages for Pegasystems' and Zou's violations.

81. Appian is also entitled to an award of the costs of suit, including reasonable attorneys' fees.

COUNT V: COMMON LAW CONSPIRACY
(AGAINST BOTH DEFENDANTS)

82. Appian incorporates by reference the allegations contained in paragraphs 1-40 of the Complaint as if fully set forth herein.

83. Pegasystems and Zou combined to accomplish, by some concerted action, some criminal or unlawful purpose by a criminal or unlawful means. Among other things, they combined to: (1) misappropriate Appian's trade secrets and confidential information; (2) breach Zou's contractual and legal duties to maintain the secrecy of Appian's trade secrets and the confidentiality of Appian's confidential information; (3) tortiously interfere with Appian's business expectancies.

84. As a result of Pegasystems' and Zou's unlawful conspiracy, Appian has suffered damages, including lost profits.

85. As a direct and proximate result of defendants' unlawful conspiracy, Appian has suffered and will suffer substantial monetary damages in an amount that will exceed $90 million.

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86. Appian is entitled to an award of damages for Pegasystems' and Zou's violations.

87. Appian is also entitled to an award of punitive damages.

REQUEST FOR RELIEF

WHEREFORE, Appian requests relief as follows:

88. Enter judgment in favor of Appian on all counts;

89. Award damages including both the actual loss and the unjust enrichment, as provided by Va. Code § 59.1-338, and/or all other remedies available under the causes of action pled herein;

90. Award punitive damages against Pegasystems to the maximum amount allowed by law;

91. Award Appian treble its compensatory damages against Pegasystems; and

92. Award Appian its costs, including reasonable attorney's fees pursuant to Va. Code § 59.1-338.1 (VUTSA) and Va. Code §18.2-500 (business conspiracy) incurred in connection with this action; and

93. Grant such other and further relief as is just and proper.

JURY DEMAND

Appian demands a trial by jury.

Dated: October 21, 2021

Respectfully submitted,



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Exhibit 11 to DRC Report

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VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

APPIAN CORPORATION 7950 Jones Branch Drive Tysons, Virginia 22102**,** **Plaintiff,** **v.** **PEGASYSTEMS INC.** SERVE AT: Corporation Service Company 100 Shockoe Slip Fl 2 Richmond, Virginia 23291-4100**,** **and** **YOUYONG ZOU** 12867 Parapet Way Herndon, Virginia 20171**,** **Defendants.**	)	**Civil Action No. 2020 07216**

SECOND AMENDED COMPLAINT[1]

Plaintiff Appian Corporation ("Appian"), by the undersigned counsel, files this Second Amended Complaint against defendants Pegasystems Inc. ("Pegasystems") and Youyong Zou ("Zou") seeking damages and other relief.

NATURE OF THE ACTION

1. Over the course of many years, Pegasystems has engaged in an unlawful campaign of corporate espionage against Appian, Pegasystems' smaller yet technologically advanced

[1] By Order dated January 13, 2022, the Court dismissed with prejudice Count IV (Statutory Business Conspiracy Against Both Defendants) and Count V (Common Law Conspiracy Against Both Defendants). Appian reserves all appellate rights with respect to those claims.

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competitor in the business process management industry. Involving personnel at Pegasystems up to and including Pegasystems' CEO and Founder, Alan Trefler, and other high-ranking Pegasystems executives, and assisted at least by Zou, Pegasystems' unlawful schemes have involved stealing Appian's trade secrets and confidential information and then using them to damage Appian's business and reputation, and to steal Appian's customers and potential customers.

2. Among other things, Pegasystems enlisted Zou who illegally provided copies of Appian's software and documentation, which were proprietary confidential information and trade secrets. Zou worked for an Appian business partner and therefore had access to Appian's software and documentation, subject to duties to maintain their secrecy. In exchange for payment by Pegasystems, Zou breached those duties by secretly copying Appian's software and documentation. Pegasystems and Zou then used the illicit copies to conduct detailed technical analyses of Appian's product to determine precisely how it was constructed and how it worked so that they could compare it to Pegasystems' product at a level not possible without the benefit of Appian's stolen trade secrets. Pegasystems employees then created marketing materials and training materials for Pegasystems' sales force, which were used in repeated attempts to deprive Appian of business, often successfully. They could not have created these materials without access to the trade secrets and confidential information they took from Appian.

3. Pegasystems worked willfully and deliberately to ensure that its misappropriation of Appian's trade secrets, as well as the surrounding conspiracy and Pegasystems' and Zou's involvement in it, would evade detection. Among other things, Pegasystems did not enlist an Appian employee, or seek a license directly from Appian, for its scheme. Instead, Pegasystems enlisted Zou, who was not an Appian employee but worked for an Appian business partner, and

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therefore had access to Appian's trade secrets and confidential information, subject to a duty to maintain their secrecy. Then, rather than hiring Zou directly to misappropriate Appian's trade secrets, Pegasystems funneled payment through a middleman company with whom it contracted to recruit and hire Zou to assist with Pegasystems' misappropriation.

4. As a result of Pegasystems' concealment efforts, Appian only recently discovered defendants' trade secrets misappropriation, theft of confidential information and the surrounding conspiracy through the exercise of extraordinary diligence, along with happenstance. Pegasystems' efforts to compete with Appian, including in the 2014 timeframe, became an issue in an unrelated litigation. To learn more about Pegasystems's conduct with respect to Appian, Appian interviewed former Pegasystems employees who are now working for Appian to determine whether Pegasystems had engaged in unlawful competitive activities with respect to Appian. These interviews took place over the course of several months in 2020, and Appian took great pains not to learn any of Pegasystems' own trade secrets or confidential information in the process. These employees were reluctant to talk about Pegasystems' wrongdoing, reasonably fearing retaliation by Pegasystems, which has a reputation for dealing harshly with employees and former employees whom it deems disloyal. Eventually, however, the employees began to reveal information about Pegasystems' wrongdoing.

5. Meanwhile, unrelated to Appian's interviews of the former Pegasystems employees, in early 2020, an individual who does not work for Appian with knowledge of Pegasystems happened to reach out to Appian to advise it of that individual's direct knowledge of some of Pegasystems' unlawful conduct with respect to Appian.

6. Had these individuals not revealed these facts to Appian, Appian likely would never have learned of Pegasystems' or Zou's wrongdoing. Now aware of it, Appian has filed this suit to

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seek legal redress.

7. As a result of defendants' unlawful scheme, Appian has suffered substantial damages, including lost customers and profits and damage to its reputation in the industry. In addition, defendants have been unjustly enriched. Since embarking on its unlawful scheme, Pegasystems' revenues from government and other contracts have steadily increased, much of which would have flowed to Appian absent defendants' unlawful conduct.

THE PARTIES

8. Plaintiff Appian Corporation is a corporation organized and existing under the laws of the state of Delaware, with its principal place of business in the Commonwealth of Virginia, at 7950 Jones Branch Drive, Tysons, Virginia.

9. Defendant Pegasystems Inc. is a corporation organized and existing under the laws of the Commonwealth of Massachusetts, with its principal place of business in Massachusetts, at 1 Rogers Street, Cambridge, Massachusetts. Pegasystems regularly does and solicits business and derives substantial revenue from services rendered in the Commonwealth of Virginia.

10. Defendant Youyong Zou is an individual residing and working in the Commonwealth of Virginia.

JURISDICTION AND VENUE

11. Pegasystems is subject to personal jurisdiction in this Court. It regularly does and solicits business and derives substantial revenue from services rendered in Virginia. The causes of action alleged in this Complaint arise from Pegasystems' transacting business in Virginia, and its causing tortious injury in Virginia, where Appian is.

12. Zou is subject to personal jurisdiction in this Court because he resides and works in Virginia. The causes of action alleged in this Complaint arise from Zou's transacting business

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in Virginia, and his causing tortious injury in Virginia, where Appian is.

13. Venue is proper in this Court because Appian is in Fairfax County, Zou resides in Fairfax County, Fairfax County is where the causes of action alleged in the Complaint arose, and a number of fact witnesses (including Zou and Appian employees) and other evidence to the action are in Fairfax County.

FACTS

14. Appian is a recognized global leader in the Business Process Management ("BPM") software market, providing a low-code development platform that allows its customers to quickly develop high-impact business applications. Of Appian's approximately 1,300 employees worldwide, more than 700 are employed in its Tysons, Virginia headquarters.

15. Appian generates revenue by licensing its software, on a non-exclusive basis, to customers and business partners, such as service providers. A license to Appian's software permits the licensee to develop custom, low-code applications using Appian's development environment and run them on Appian's platform. A license also permits the licensee to access Appian's documentation, which describes the technical features of Appian's software platform, as well as techniques that can be used to build applications on Appian's platform.

16. Appian is the sole owner of its software development platform and documentation, which were trade secrets during the time period relevant to this action.

17. During the relevant time period, Appian did not permit usage of its software development platform or documentation absent a license from Appian.

18. Pegasystems competes in the same industry as Appian, providing a BPM software platform to customers that participate in similar industries and are of similar sizes to Appian's customers.

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19. Rather than compete lawfully and fairly with Appian in the marketplace, Pegasystems developed a scheme to unlawfully obtain copies of Appian's software and documentation – which are proprietary trade secrets – and to then use them to design sales and marketing materials to create the illusion for customers and potential customers that Pegasystems' product is better than Appian's product, thereby taking that business and those revenues away from Appian, and unjustly enriching itself.

20. Pegasystems refrained from contracting directly with individuals who had access to Appian's software and documentation. Instead, Pegasystems used a middleman company to identify individuals having access to Appian's software. By using the middleman company, Pegasystems was able to better conceal its wrongdoing.

21. KForce Inc. ("KForce") is a middleman company Pegasystems used to identify an individual having access to Appian's software.

22. At Pegasystems' direction, KForce identified Zou as a person having access to Appian's software.

23. Zou had access to Appian's software and documentation because he worked for Appian business partners, including Serco Inc. ("Serco"). Serco is a contractor that provides services to the U.S. Government. Serco is bound by terms of certain agreements that allowed Serco and certain of its licensed user employees (such as Zou) to access Appian's trade secrets and confidential information, but expressly prohibited disclosure of the trade secrets or confidential information to unauthorized third parties, and expressly limited use of the software to authorized business purposes, which did not include misappropriating Appian's trade secrets or sharing its software with Appian's competitors. Relevant agreements included a February 2012 Subcontract as well as a federal supply contract (bearing the number GS-35F-0511T) and purchase orders

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issued pursuant thereto.

24. Additionally, Zou was contractually bound by his employment agreement with Serco and under Serco policies to protect the confidentiality of the information made available to him for his work for Serco, including Appian's trade secrets and confidential information.

25. Pegasystems entered into a contract with KForce under which it paid KForce for the unlawful services that Zou agreed to provide Pegasystems, so that KForce could then pay Zou. These services included Zou using Appian's trade secrets and confidential information to teach Pegasystems precisely how Appian's software worked. As Zou knew and Pegasystems knew or had reason to know, the services that Zou agreed to provide were in violation of contractual and other duties Zou had to maintain the secrecy of Appian's trade secrets and the confidentiality of Appian's confidential information.

26. Pegasystems' objectives for its unlawful conduct included identifying secret processes and know how involved in using Appian's software platform that ultimately would allow Pegasystems – through marketing materials and sale techniques – to make its own platform seem better than Appian's. To do this, beginning in 2012, and possibly earlier, Pegasystems devised a plan to obtain, and – with the assistance of Zou – did obtain, non-public details regarding Appian's architecture, as well as Appian's documentation of its software platform.

27. In furtherance of defendants' unlawful scheme, Pegasystems paid Zou (through KForce) to travel from Virginia to Pegasystems' Massachusetts headquarters to meet with Pegasystems executives and employees for the purpose of answering detailed technical questions related to Appian's software platform. These were Appian's trade secrets and confidential information. Zou had access to them because he worked for Appian's business partner, Serco. As Pegasystems knew or had reason to know, he was legally and contractually bound to prevent their

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disclosure to third parties by virtue of his employment with Serco. In violation of these duties, in return for payment, Zou disclosed Appian's trade secrets and confidential information to Pegasystems.

28. In furtherance of this unlawful scheme, and using access granted to him as an employee of an Appian business partner, in violation of his legal and contractual duties to maintain the secrecy and confidentiality of Appian's trade secrets and confidential information, Zou downloaded confidential Appian documentation from Appian's password-protected site, for turnover to Pegasystems. Much of Zou's downloading of documentation occurred outside of work hours. He also checked Appian's documentation site repeatedly, downloading updated versions when available.

29. Zou had access to other trade secrets and confidential information of Appian besides its software and documentation. As an employee of Serco, he developed Appian applications for Appian customers. He therefore received customer feedback – including specific areas where Appian customers sought improved functionality from Appian's platform, such as administrative capabilities and scalability of the platform. This information was Appian's confidential information, and, as Pegasystems knew or had reason to know, Zou had contractual and legal duties to maintain its confidentiality. In violation of these duties, in return for payment, Zou disclosed the information to Appian's major competitor Pegasystems.

30. Also at the direction of Pegasystems and for its use, in return for payment, Zou created videos demonstrating the operation of Appian's software platform, including detailed demonstrations of building applications on it. As Zou knew and Pegasystems knew or had reason to know, this was in violation of Zou's contractual and legal duties to maintain the secrecy and confidentiality of Appian's trade secrets and confidential information.

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31. Also in furtherance of defendants' unlawful scheme, Pegasystems had Zou compare Appian's and Pegasystems' platforms to determine the platform on which certain application development operations were faster. This allowed Pegasystems to identify features it could emphasize in sales processes as it competed against Appian for the same customers.

32. Pegasystems featured still shots and excerpts from the videos that Zou created of Appian's trade secrets and confidential information in training materials for use by Pegasystems' sales force. These training materials effectively slowed down the videos that Zou created to show in painstaking, screen-by-screen, detail precisely how applications were built on Appian's software platform. Pegasystems could never have made these training materials without misappropriating Appian's trade secrets or stealing its confidential information.

33. Many of Pegasystems' senior-most executives were aware of and condoned the illicit training materials, which were reviewed during meetings including Alan Trefler (Pegasystems' CEO), Kerim Akgonul (Pegasystems' Senior Vice President of Products), Stephen Bixby (Pegasystems' Vice President of Product Development), and Don Schuerman (Pegasystems' current Chief Technology Officer).

34. Pegasystems also created technical briefs favorably comparing Pegasystems to Appian that were based on Appian's trade secrets and confidential information provided by Zou.

35. Pegasystems also used the trade secrets and confidential information defendants unlawfully obtained from Appian to develop a presentation for its sales force to use highlighting differences between Pegasystems' and Appian's products to make Pegasystems' product seem better than Appian's.

36. Pegasystems also used Appian's trade secrets and confidential information provided by Zou to create a set of "kill points" to emphasize points on which it thought it competed

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very favorably against Appian.

37. When Pegasystems and Appian were in head-to-head competition for the same contracts with prospective customers, Pegasystems provided documents or utilized information that Pegasystems developed using Appian's misappropriated trade secrets and confidential information. As a result of this unlawful conduct, Pegasystems won the contracts over Appian, damaged Appian's reputation and business and unjustly enriched itself.

38. In at least one instance, Zou logged into Appian's password-protected documentation website from an IP address associated with Pegasystems. While at that IP address, Zou downloaded Appian's Reference Application, a "best practices" guide for development of software applications on Appian's platform. At that time, this was confidential and trade secret information belonging to Appian. On information and belief, Zou conducted this illegal access and downloading while physically on site at Pegasystems' headquarters.

39. Pegasystems sought to obtain and did obtain and use at least the following information from Zou in violation of contractual and other legal duties to maintain the secrecy and confidentiality of Appian's trade secrets and confidential information, which Pegasystems then used to its own benefit at Appian's expense:

a. How to develop and change applications on Appian's software platform;

b. The types of application development operations that could be completed more quickly on either platform;

c. The types of application challenges Appian's software platform would have trouble with;

d. The architecture of Appian's software platform;

e. Details regarding the ability of Appian's platform to scale to accommodate

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different types of use;

f. The number of developers who could simultaneously work on processes in Appian's software platform;

g. The capabilities of Appian's platform for conducting parallel work-related Appian applications;

h. How Appian was using its proprietary database to store data for applications developed on Appian's software platform;

i. Any risks of data loss using Appian's product;

j. Any scalability issues with Appian's software platform;

k. The content of Appian's documentation;

l. How Pegasystems' platform could be better positioned and improved relative to Appian's.

40. Pegasystems' unlawful use of the Appian trade secrets acquired for it by Zou continued for years after 2014, including through at least 2018 and potentially beyond. Pegasystems has also conspired with others besides Zou to misappropriate and unlawfully access Appian's trade secrets, or misappropriated and unlawfully accessed Appian trade secrets through its own employees accessing Appian's software and its network under false identities and by hiding their affiliation with Pegasystems, including in 2019.

COUNT I: MISAPPROPRIATION OF TRADE SECRETS IN VIOLATION OF VIRGINIA'S UNIFORM TRADE SECRETS ACT (AGAINST BOTH DEFENDANTS)

41. Appian incorporates by reference the allegations contained in paragraphs 1-40 of the Complaint as if fully set forth herein.

42. Appian's software platform, including the technical details of how its various components can be combined and used to develop applications and the functionality of the

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platform, the steps by which Appian's applications are developed, and Appian's documentation, are trade secrets under the Virginia Uniform Trade Secrets Act ("VUTSA"). They are information that derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and they are information that is the subject of efforts that are reasonable under the circumstances to maintain their secrecy.

43. Reasonable efforts that Appian undertakes to maintain the secrecy of its trade secrets include requiring its business partners (including Serco) and the employees of its business partners (including Zou) to comply with non-disclosure and confidentiality obligations protecting Appian's trade secrets, and to agree in writing to comply with those obligations.

44. As an employee of Appian's business partner Serco, Zou had a duty to maintain the secrecy of Appian's trade secrets, which he breached. Pegasystems knew or had reason to know that Zou had that duty, and conspired with him, induced him and paid him to breach it.

45. Defendants misappropriated Appian's trade secrets by acquiring them, while knowing or having reason to know that the trade secrets were acquired by improper means.

46. Defendants also misappropriated Appian's trade secrets by disclosing or using them without Appian's express or implied consent, having used improper means to acquire knowledge of the trade secret.

47. Defendants also misappropriated Appian's trade secrets by disclosing them or using them without Appian's express or implied consent, where, at the time of their disclosure or use, defendants knew or had reason to know that their knowledge of the trade secrets was (a) derived from or through a person who had used improper means to acquire them, (b) acquired under circumstances giving rise to a duty to maintain their secrecy or limit their use, (c) derived from or

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through a person who owed a duty Appian to maintain their secrecy or limit their use, and/or (d) acquired by accident or mistake.

48. The improper means by which Appian's trade secrets were acquired included theft, use of a computer or computer network without authority, breach of a duty or inducement of breach of a duty to maintain secrecy, and espionage through electronic or other means.

49. Zou's breach of his duty to maintain the secrecy of Appian's trade secrets was improper means.

50. Pegasystems' inducement of the breach by Zou of his duty to maintain the secrecy of Appian's trade secrets was improper means.

51. Among other things, Zou misappropriated Appian's trade secrets by acquiring, disclosing and using Appian's software development platform, including the technical details of how its various components can be combined and used to develop applications and the functionality of the platform, the steps by which Appian's applications are developed, and Appian's documentation.

52. Among other things, Pegasystems misappropriated Appian's trade secrets by acquiring, disclosing and using Appian's software development platform, including the technical details of how its various components can be combined and used to develop applications and the functionality of the platform, the steps by which Appian's applications are developed, and Appian's documentation.

53. Appian has suffered damages as a result of Zou's and Pegasystems' misappropriation of its trade secrets. As a result of the violations, among other things, Pegasystems used the trade secrets as part of its sales process and marketing materials to take business away

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from Appian. Lost sales to Appian from existing and potential customers, and damage to Appian's goodwill in the industry, followed as a result.

54. As a direct and proximate result of defendants' misappropriation of Appian's trade secrets, Appian has suffered and will suffer substantial monetary damages.

55. In addition to the actual losses caused Appian by Zou's and Pegasystems' misappropriation, defendants have been unjustly enriched by the misappropriation. Appian is entitled to an award of damages for the misappropriation, including for both the actual loss caused by the misappropriation and the unjust enrichment caused by the misappropriation.

56. The commercial advantage derived by Pegasystems through the misappropriation continues, and some of the harm caused by it to Appian is ongoing.

57. Pegasystems' misappropriation of Appian's trade secrets was willful and malicious, entitling Appian to an award of reasonable attorneys' fees and punitive damages against Pegasystems.

COUNT II: COMPUTER FRAUD IN VIOLATION OF THE VIRGINIA COMPUTER CRIMES ACT
(AGAINST PEGASYSTEMS ONLY)

58. Appian incorporates by reference the allegations contained in paragraphs 1-40 of the Complaint as if fully set forth herein.

59. Appian's software platform is "property" protected by the Virginia Computer Crimes Act ("VCCA").

60. Appian's documentation is also property protected by the VCCA.

61. Appian is the sole owner of its software platform and documentation.

62. Appian does not permit usage of its software platform or documentation absent a license from Appian.

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63. Pegasystems, Appian's competitor, does not have a license from Appian to use Appian's software platform or documentation. Appian has never authorized Pegasystems to use Appian's software platform or documentation.

64. In violation of the VCCA, Pegasystems used a computer or computer network without authority with the intent to convert Appian's property, and converted Appian's property, causing Appian damages, including lost profits.

65. Pegasystems converted Appian's property by exercising control over Appian's software platform, and by using it, examining it and analyzing it.

66. Pegasystems converted Appian's documentation by viewing it and making copies of it.

67. Appian is entitled to an award for the damages it has sustained from Pegasystems' VCCA violations. Appian is also entitled to the costs of suit.

COUNT III: TORTIOUS INTERFERENCE WITH APPIAN'S BUSINESS EXPECTANCY (AGAINST DEFENDANT PEGASYSTEMS)

68. Appian incorporates by reference the allegations contained in paragraphs 1-40 of the Complaint as if fully set forth herein.

69. Appian routinely enters into license and related agreements with prospective customers who desire to license to Appian's platform, resulting in revenue to Appian.

70. Appian had a business expectancy with prospective customers.

71. Upon information and belief, Pegasystems knew of those business expectancies.

72. Pegasystems intentionally interfered with those business expectancies, causing a termination of the expectancies, and resultant damage to Appian. Upon information and belief, during competitive bidding processes with the prospective customers, Pegasystems provided

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documents or utilized information that Pegasystems developed using Appian's misappropriated trade secrets. The prospective customers subsequently entered into agreements with Pegasystems, not Appian.

73. Upon information and belief, but for Pegasystems' intentional interference with business expectancies, Appian would have entered into new agreements with the prospective customers. Appian has lost profits as a result.

74. As a direct and proximate result of Pegasystems' tortious interference with business expectancy, Appian has suffered and will suffer substantial monetary damages.

75. Appian is entitled to an award for the damages it has sustained from Pegasystems' tortious interference with business expectancy. Appian pursues relief pursuant to this Count only with regard to agreements that the prospective customers entered into with Pegasystems on or after May 29, 2015.

COUNT IV: STATUTORY BUSINESS CONSPIRACY
(AGAINST BOTH DEFENDANTS)

76. Appian incorporates by reference the allegations contained in paragraphs 1-40 of the Complaint as if fully set forth herein.

77. In violation of Va. Code § 18.2-499, *et seq*., Pegasystems with other parties, or Pegasystems and Zou, combined, associated, agreed, mutually undertook or concerted together for the purposes of willfully and maliciously injuring Appian in its trade, business or profession. Among other things, they agreed and combined to injure Appian's business by: (1) misappropriating Appian's trade secrets and confidential information; (2) breaching Zou's contractual and legal duties to maintain the secrecy of Appian's trade secrets and the confidentiality of Appian's confidential information; (3) tortiously interfering with Appian's

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business expectancies. In doing so, Pegasystems, or Pegasystems and Zou, acted intentionally, purposefully and without lawful justification.

78. As a result of Pegasystems' and Zou's violations, Appian has suffered damages, including lost profits.

79. As a direct and proximate result of defendants' unlawful conspiracy, Appian has suffered and will suffer substantial monetary damages in an amount that will exceed $90 million.

80. Appian is entitled to an award of treble damages for Pegasystems' and Zou's violations.

81. Appian is also entitled to an award of the costs of suit, including reasonable attorneys' fees.

COUNT V: COMMON LAW CONSPIRACY
(AGAINST BOTH DEFENDANTS)

82. Appian incorporates by reference the allegations contained in paragraphs 1-40 of the Complaint as if fully set forth herein.

83. Pegasystems and Zou combined to accomplish, by some concerted action, some criminal or unlawful purpose by a criminal or unlawful means. Among other things, they combined to: (1) misappropriate Appian's trade secrets and confidential information; (2) breach Zou's contractual and legal duties to maintain the secrecy of Appian's trade secrets and the confidentiality of Appian's confidential information; (3) tortiously interfere with Appian's business expectancies.

84. As a result of Pegasystems' and Zou's unlawful conspiracy, Appian has suffered damages, including lost profits.

85. As a direct and proximate result of defendants' unlawful conspiracy, Appian has suffered and will suffer substantial monetary damages in an amount that will exceed $90 million.

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86. Appian is entitled to an award of damages for Pegasystems' and Zou's violations.

87. Appian is also entitled to an award of punitive damages.

REQUEST FOR RELIEF

WHEREFORE, Appian requests relief as follows:

88. Enter judgment in favor of Appian on all counts;

89. Award damages including both the actual loss and the unjust enrichment, a reasonable royalty as provided by Va. Code § 59.1-338, and/or all other remedies available under the causes of action pled herein, in an amount not to exceed $3,032,847,000 (exclusive of attorneys' fees, pre- and post-judgment interest, and any other amounts awarded by the Court);

90. Award punitive damages against Pegasystems to the maximum amount allowed by law;

91. Award Appian treble its compensatory damages against Pegasystems; and

92. Award Appian its costs, including reasonable attorney's fees pursuant to Va. Code § 59.1-338.1 (VUTSA) and Va. Code §18.2-500 (business conspiracy) incurred in connection with this action; and

93. Grant such other and further relief as is just and proper.

JURY DEMAND

Appian demands a trial by jury.

Dated: January __, 2022

Respectfully submitted,



Ellen D. Marcus (Virginia Bar No. 44314)
Sheila M. Costin (Virginia Bar No. 31452)

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Exhibit 2

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NOTICE 49

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NOS. 2484CV01734-BLS-1
2484CV03076-BLS-1

JOHN DWYER & another[1]

vs.

ALAN TREFLER & others[2]
PEGASYSTEMS, INC., nominal defendant
(and a consolidated case[3]).

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTIONS TO DISMISS

The plaintiffs of these consolidated actions are shareholders of nominal defendant Pegasystems, Inc. ("Pegasystems"). They bring derivative actions against several Pegasystems officers and directors, alleging breaches of fiduciary duty in relation to the company's competitive intelligence efforts. They also allege failures related to the disclosure of trade secret litigation filed by competitor Appian Corporation ("Appian"), in which Appian seeks significant damages ("Appian Case"). In October 2024, a Pegasystems demand review committee ("DRC") unanimously rejected Plaintiffs' shareholder demands that Pegasystems commence legal action against the named officers and directors. The matter is before the court on Defendants' motions to dismiss pursuant to G.L. c. 156D, § 7.44, citing the DRC's investigation and report

[1] Ray Gerber.
[2] Peter Gyenes, Richard Jones, Christopher Lafond, Dianne Ledingham, Sharon Rowlands, Larry Weber, Leon Trefler, Don Shuerman, Kerim Akgonul, and Benjamin Baril.
[3] Jayne Birch and Robert Garfield, derivatively on behalf of Pegasystems, Inc. v. Alan Trefler, Peter Gyenes, Richard Jones, Christopher Lafond, Dianne Ledingham, Sharon Rowlands, Larry Weber, Kerim Akgonul, Don Shuerman, Leon Trefler, Douglas Kim, John Petronio, Benjamin Baril, and Kenneth Stillwell.

("Report").[4] After a hearing on September 4, 2025, and consideration of the parties' submissions, the motion is **allowed**.

BACKGROUND

The Verified Consolidated Stockholder Derivative Complaint ("Complaint"), exhibits filed in connection with the motions to dismiss, including the DRC Report, and matters of public record, set forth the following facts. Further facts are reserved for later discussion.

Pegasystems is a Massachusetts-based software company that specializes in customer relations management software and business process management ("BPM") software, which it sells to major global companies and government agencies. Defendant Alan Trefler ("Trefler") founded Pegasystems in 1983, and remains its CEO and controlling shareholder. Appian is a Virginia-based company that also specializes in the BPM software industry, and is a competitor of Pegasystems in that sphere. Both Pegasystems and Appian BPM software is "low-code," which means that clients can use the product "platform" to develop and customize applications to meet their business needs with little to no computer coding required.[5] The two companies have been competitors since at least 2012.

In 2012, Pegasystems's director of product marketing, John Petronio ("Petronio"), hired a consultant, Youyong Zou ("Zou"), to conduct competitive intelligence on Appian. Zou was hired through an independent consulting staffing agency with which Pegasystems had a preexisting contract. Zou was familiar with the Appian platform through his work for a government contractor that licensed Appian software.

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[4] Defendants Christopher Lafond, Dianne Ledingham, and Sharon Rowlands, as members of the DRC, move to dismiss on behalf of nominal defendant Pegasystems. The remaining individual officer and director defendants join in the DRC's motion.

[5] For example, BPM software could be used to manage customer inquiries and complaints, or streamline insurance claim submissions.

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Over the next two and a half years, Zou provided Petronio with information and videos identifying the strengths and weaknesses of the Appian platform and demonstrating Appian's product, which were shared within the company. Zou assisted Petronio with sales strategies and answered questions about Appian's capabilities and user experience, in addition to interacting at times with other Pegasystems employees. In 2015, Petronio left Pegasystems's employment. In 2016, Petronio began consulting for Appian; in 2019 he became a full-time Appian employee.

Between 2012 and 2021, certain Pegasystems employees also conducted competitive research on Appian by obtaining free trials of Appian products. These employees obtained the free trials by using their personal email addresses, and, in some cases, by using fictitious names or aliases. Trefler also used aliases to register for an Appian free trial and/or receive Appian marketing materials.

In 2020, based on information it had learned from Petronio and another former Pegasystems employee, Appian filed the Appian Case against Pegasystems in Virginia Circuit Court. Citing Pegasystems's employment of Zou, and its misuse of free trials, Appian alleged that Pegasystems misappropriated its trade secrets, including aspects of its user-friendly customer interface, and sought damages of $90 million. In January 2022, Appian amended its complaint, and increased the damages claimed to $3 billion. This amendment prompted the Pegasystems Board to disclose the Appian Case to shareholders for the first time in February 2022. The disclosure occurred through Pegasystems's 2021 10-K Securities and Exchange Commission ("SEC") filing, which stated that Pegasystems disputed the validity of Appian's claims, and that it believed that "any alleged damages claimed by Appian are not supported by the necessary legal standard of proximate cause." The disclosure further provided that, for this

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reason, Pegasystems was unable to reasonably estimate possible damages. Efforts to settle the Appian Case in early 2022 were exploratory and not successful.

In March 2022, trial began in the Appian Case. As the case progressed, the trial judge made several evidentiary rulings that were adverse to Pegasystems. On May 9, 2022, the jury reached a verdict in Appian's favor, with damages in the amount of over $2 billion. Pegasystems appealed the verdict.

In 2023, the Board began to receive confidential demands from shareholders, including Plaintiffs, requesting that the Board investigate the "corporate espionage scheme targeting Appian" that began in 2012, and remedy the harm caused by the verdict in the Appian Case, including the Board's failure to disclose the litigation sooner. Ex. 7 to Report. Thereafter, the Board, absent Trefler who recused himself, appointed directors Christopher Lafond ("Lafond"), Dianne Ledingham ("Ledingham"), and Sharon Rowlands ("Rowlands") to form the DRC, which, in turn, hired legal counsel to assist in its investigation. The DRC was empowered with "exclusive authority . . . to determine in good faith what actions (if any) are reasonably believed to be appropriate under similar circumstances and reasonably believed to be in the bests interests of the Corporation in response to the Demand Letters." Def. Ex. P. 216.

In July 2024, while the DRC was conducting its investigation, the Virginia Court of Appeals vacated the verdict in the Appian Case, concluding that several prejudicial evidentiary rulings had been made, and that the jury had been erroneously instructed on the issue of causation in determining damages in a trade secret misappropriation case. See *Pegasystems Inc.* v. *Appian Corp.*, 81 Va. App. 433 (2024). Appian appealed the Court of Appeals decision, and the case is presently pending before the Virginia Supreme Court.

The DRC's 116-page Report, dated October 7, 2024, concludes that Pegasystems officers and directors engaged in no actionable misconduct—with respect to either Pegasystems's competitive intelligence conduct or disclosure of the litigation, and that legal action against Pegasystems is not in the company's best interest. Based on the facts gathered and relevant legal standards, the Report discusses why Pegasystems officers and directors had a reasonable basis to believe that its competitive intelligence efforts, although perhaps imprudent in hindsight, were not illegal and therefore did not require earlier disclosure of the Appian Case. In the Report, the DRC nevertheless directs Pegasystems to put into place several measures to enhance the Board's monitoring of the company's risk and its competitive intelligence efforts.

Meanwhile, in June and November 2024, Plaintiffs commenced their consolidated derivative actions. The four-count Complaint asserts claims for breach of fiduciary duty against the defendant officers, directors, and the DRC directors. Defendants' motions to dismiss followed in July and August 2025.[6]

DISCUSSION

"Under the Massachusetts Business Corporations Act (Act), G.L. c. 156D, derivative proceedings are governed by statute." *Halebian* v. *Berv*, 457 Mass. 620, 623 (2010), citing G.L. c. 156D, §§ 7.40-7.47. Under the Act, if a shareholder seeks redress of alleged wrongdoing by the corporation's directors and officers, it may commence a derivative action on behalf of the corporation after making a written demand on its board of directors to take suitable action. G.L. c. 156D, § 7.42. The corporation then may move to dismiss the lawsuit if its directors determine

[6] In 2022, Pegasystems's shareholders also filed a securities class action against Pegasystems, Trefler, and Pegasystems's CFO in the United States District Court for the District of Massachusetts, based largely on the same facts alleged here, and following the entry of the $2 billion verdict in the Appian Case. See *Fort Lauderdale Police and Firefighters' Retirement System v. Pegasystems, Inc., et al.*, Civil Action No. 22-11220-WGY. That case settled for $35 million in April 2024, following the denial of Pegasystems's motion to dismiss. 683 F.Supp.3d 120 (2023). The resolution of the securities case at that juncture does not impact the court's analysis under G.L. c. 156D, § 7.44.

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that maintenance of the action is not in the corporation's best interest. It does so by way of a written filing with the Court setting forth facts to show that: 1) a majority of independent directors made the determination, and 2) that they acted "in good faith and after conducting a reasonable inquiry." G.L. c. 156D, § 7.44(a) and (d). If the corporation meets this burden, the Court "shall dismiss the suit unless the plaintiff has alleged with particularity facts rebutting the corporation's filing in the plaintiff's own written submission." G.L. c. 156D, § 7.44(d). See *Averbuch* v. *Arch*, 2013 WL 5531396, at *3 (Mass. Super. 2013); *Pinchuk* v. *State Street Corp.*, 28 Mass. L. Reptr. 37, 2011 WL 477315, *11 (Super. Ct. 2011); *Blake* v. *Friendly Ice Cream Corp.*, 21 Mass. L. Reptr. 131, 2006 WL 1579596, at *10-*11 (Super. Ct. 2006).

As set forth below, Pegasystems has made the requisite showing, which Plaintiffs have failed to rebut.

I. Independence

"A director is 'independent' within the meaning of § 7.44 if he is 'disinterested' 'in the sense of not having a personal interest in the transaction being challenged' and 'independent' 'in the sense of not being influenced in favor of the defendants by reason of personal or other relationships.'" *Operative Plasterers' & Cement Masons' Local Union Officers' & Employees' Pension Fund* v. *Hooley*, 2013 WL 5442366, at *3 (D. Mass. 2013) ("*Hooley*"), quoting G.L. c. 156D, § 7.44 cmt. 1. Relevant to these determinations is the extent to which the director: 1) participated in or approved the alleged wrongdoing; 2) had past or present business dealings with the corporation; and (3) had past or present business or social dealings with individual defendants. See *Blake*, 2006 WL 1579596, at *13, citing *In re Oracle Securities Litigation*, 852 F. Supp. 1437, 1441 (N.D. Cal. 1994); *Johnson v. Hui*, 811 F. Supp. 479, 486 (N.D. Cal. 1991); *Einhorn v. Culea*, 612 N.W.2d 78, 90 (Wis. 2000). The total number of directors at issue, and

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the manner in which they are appointed also may be relevant, as is the role of any independent counsel hired to assist the investigation. See *id.*

However, the Act further provides that a director will not be found to lack independence simply because of "(1) the nomination or election of the director by a person who is a defendant in the derivative proceeding or against whom action is demanded; (2) the naming of the director as defendant in the derivative proceeding or as a person against whom an action is demanded; [or] (3) the approval by the director of the act being challenged in the derivative proceeding or demand if the act resulted in no personal benefit to the director." G.L. c. 156D, § 7.44(c)(1)-(3).

"A presumption of propriety must be the starting point in the absence of clear allegations to the contrary." *Hooley*, 2013 WL 5442366 at *3, quoting *In re Sonus Networks, Inc. Derivative Litigation*, 2004 WL 2341395, at *4 (Mass. Super. Ct. 2004). Independence is determined based on a "totality of the circumstances" analysis. *Blake* v. *Friendly Ice Cream Corp.*, 2006 WL 2714976, at *1 (Mass. Super. 2006) (on reconsideration) ("*Blake II*").

The Board, minus Trefler, appointed Lafond, Ledingham, and Rowlands to the DRC. Each have extensive prior executive and board experience. Lafond became a Pegasystems director in 2019, while Ledingham and Rowlands joined the Board in 2016. After their appointment to the DRC, they retained the law firm of Fried Frank as independent counsel, after determining that it had not been involved in any of the alleged failures or wrongdoing. The Fried Frank investigation team was led by two partners in the firm. The Report states that Fried Frank interviewed Lafond, Rowlands, and Ledingham, and, with the aid of a checklist of questions, determined that they were disinterested and independent for purposes of the matters raised in the demands. Although Lafond, Rowlands, and Ledingham are named defendants in this action, and

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were nominated to the Board by Trefler, as set forth in § 7.44(c), these facts alone are not disqualifying to their independence.

Plaintiffs raise two primary challenges to the appointing directors' and DRC directors' independence. First, they assert that they were interested in the outcome of the investigation because they face substantial liability as directors that were on the Board during at least some period of time when the alleged failures and conduct occurred. Second, they argue that the DRC directors' substantial compensation from Pegasystems, and Trefler's unilateral ability to remove directors, compromised their independence. Plaintiffs also challenge the Report's failure to adequately explain why Fried Frank believed the DRC directors to be independent, noting that the results of the questionnaire used were not included in the Report. Under § 7.44 and the legal framework set forth *supra*, the arguments are unavailing.

On the first issue, as Plaintiffs acknowledge, for the threat of liability to cause a director to become interested in the outcome of a demand investigation, the threat must be "substantial." *Hooley*, 2013 WL 5442366, at *4, citing *Caviness* v. *Evans*, 229 F.R.D. 354, 359 (D. Mass. 2005). Where the DRC and its appointing directors did not participate in any of the alleged competitive intelligence efforts, the only viable theory of liability is from a failure in oversight, which requires proof of bad faith. *Hooley*, 2013 WL 5442366, at *5, citing *In re Citigroup Inc. Shareholder Derivative Litigation*, 964 A.2d 106, 123 (Del. Ch. 2009). Bad faith in this regard can be established if "the directors knew they were not discharging their fiduciary obligations or that the directors demonstrated a conscious disregard for their responsibilities such as by failing to act in the face of a known duty to act." *In re Citigroup Inc.*, 964 A.2d at 123. The Pegasystems directors are also exculpated from personal liability for breaches of the ordinary duty of care in the Pegasystems Articles of Organization; liability for acts or omissions in the

performance of their duties must be a result of bad faith. Report at 72. The provision mirrors exculpatory language expressly permitted under the Act. See G.L. c. 156D, § 2.02(b)(4); *MAZ Partners LP* v. *Shear*, 204 F. Supp. 3d 365, 372-373 (D. Mass. 2016).

There is no evidence before the court that the DRC directors, or the directors that appointed them, acted in bad faith in conjunction to their oversight roles so as to expose them to a substantial threat of liability. Nothing in the Plaintiffs' materials alleges or establishes that a corporate board in this industry must have an oversight program specific to the company's competitive intelligence programs, or receive management updates specific to this issue. Thus, that the DRC or its appointing members failed to have such specific programs in place during the relevant time period is not evidence of bad faith. Moreover, nothing in the pleadings or exhibits alleges facts to support a serious argument that Pegasystems directors were generally asleep at the wheel of the company, much less to the degree required to establish bad faith.[7]

Plaintiffs also fail to rebut the reasonable conclusion in the Report that Pegasystems management and its advisors reasonably believed they were not stealing Appian trade secrets, where the versions of the Appian platform Pegasystems accessed were widely available, or free trials that Appian gave away. Report p. 38, 76-78. Litigation strategy in the Appian Case was based on this understanding, along with the reasonable view that the Appian Case was filed in retaliation for other litigation between the parties. *Id.* at 50. Thus, a reasonable view of the evidence is that there was no "red flag" of illegal corporate espionage that these directors failed to discover, consciously turned a blind eye to, or failed to disclose to shareholders in bad faith.[8]

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[7] The case here is unlike *Blake*, where a director was found to lack independence. In that case, the director at issue had blind loyalty to management and *consciously* shirked his duties of investigation, despite multiple red flags warranting his attention. 2006 WL 1579596, at *17; *Blake II*, 2006 WL 2714976, at *2-*5. No analogous facts are present here.

[8] That the DRC had a reasonable basis to reach these conclusions does not mean that Plaintiffs have pleaded *no* evidence of possible wrongdoing in Pegasystems's collecting of competitive intelligence. As the Complaint sets

On the second issue of compensation, corporate directorships are typically paid positions. *City Pension Fund for Firefighters & Police Officers in Miami* v. *The Trade Desk, Inc.*, 2022 WL 3009959, at *13 (Del. Ch. 2022). Plaintiffs make no particularized allegation that the compensation the DRC directors received from Pegasystems was outside of the normal range, or was "material" to each of them, which is the relevant standard, particularly given each of their other corporate roles and employment separate from Pegasystems. See *id.* at *12 (materiality standard requires facts particularized to each director, and stating that "court is hesitant to infer materiality of compensation absent well-pleaded facts"). Finally, that Defendants did not include in its filing all of the evidence relied upon and cited in the Report is not the equivalent of a rebuttal with particularized evidence. Neither is such a record required under the Act.

For all of these reasons, I conclude that the DRC were independent under § 7.44. See *Averbuch,* 2013 WL 5531396, at *4 (plaintiffs failed to rebut independence of special litigation committee); *Hooley*, 2013 WL 5442366, at *5 (plaintiff failed to "set forth particularized allegations that support a conclusion that there is a 'substantial likelihood' of liability on the part of the directors" based on oversight failures [citation omitted]).[9]

II. Good Faith

When the court determines that the directors of a special litigation committee (or DRC) are independent, as is the case here, "the business judgment rule applies to the board's decision

---

forth, based on evidence admitted in the Appian Case, Appian guarded its trade secrets and made it difficult to obtain free trials, Pegasystems had no license to use its software, and Pegasystems referred to its competitive intelligence program in terms of "spying." Rather, where the matter is reasonably disputed, no "substantial likelihood of liability" exists. *Hooley*, 2013 WL 5442366, at *4 (citation omitted). See *Pegasystems Inc.*, 81 Va. App. at 469 (question whether Appian took reasonable steps to protect its trade secrets is jury issue).

[9] Plaintiffs' argument that there was a structural bias among the appointing and DRC members fails where it relies on nothing more than the existence of parallel litigation in the Appian Case and speculation that the DRC was results-driven. That a different Fried Frank partner represented Rowlands in an unrelated matter involving a different company, without more, is also insufficient to demonstrate a lack of independence.

to reject the plaintiff's demand and the burden falls to the plaintiff to prove that the directors did not make their determination in good faith after a reasonable inquiry." *Hooley*, WL 5442366 at *6, citing G.L. c. 156D, § 7.44 Cmt. 2; *Pinchuck*, 2011 WL 477315 at *14. "The business judgment rule affords protection to the business decisions of directors, including the decision to institute litigation, because directors are presumed to act in the best interests of the corporation." *Harhen* v. *Brown*, 431 Mass. 838, 845 (2000).

Here, Plaintiffs have failed to rebut the presumption that the DRC's decision to reject the shareholders' demands was made in good faith, after a reasonable inquiry. The Report is logical, detailed, and based on an extensive review of documents and witness interviews. Its conclusion is based on a reasonable view of the facts and legal standards — *i.e.*: 1) that Pegasystems had valid defenses to the Appian Case, which supported the chronology of the disclosure decisions, and 2) that where the competitive intelligence against Appian was effectively within industry norms and did not include trade secret thefts or misappropriation, Pegasystems officers, management, and directors did not engage in a bad faith breach of their fiduciary duties in either permitting such conduct, or failing to properly surveille it or discover it. That the DRC directed Pegasystems to enhance its surveillance and training related to competitive intelligence is not evidence of the DRC's lack of good faith.

Plaintiffs' filings rely heavily on the Appian Case, the testimony presented therein, and its $2 billion verdict, to support their premise that an illegal "corporate espionage scheme" occurred. However, the verdict has little persuasive or rebuttal value following the Appeals Court decision vacating it. In light of the court's extensive discussion about key evidence Pegasystems was wrongly prevented from introducing, and the erroneous jury instruction given on causation, there is valid reason to doubt that Appian will recover anything close to the

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magnitude of damages in the vacated jury verdict, if it prevails upon any retrial. See Report at 66, citing *Pegasystems Inc.*, 81 Va. App. at 477, 487-488, 492, 496-497. That the case is presently pending before the Virginia Supreme Court adds additional uncertainty. Also, in 2024, the SEC chose not to recommend an enforcement action against Pegasystems, after having gathered information about how it handled its accounting for the Appian Case. In this posture, the facts Plaintiffs draw from the Appian case highlight only that a legal dispute exists — they do not overcome the presumption that the DRC acted in good faith on their reasonable view of the law and facts. See note 8.

The arguments Plaintiffs raise can be addressed summarily. The DRC's choice not to interview Petronio, or another individual involved in the gathering of the competitive intelligence, was reasonable given the trial testimony available from the Appian Case. Plaintiffs also fail to explain how this additional testimony would have changed the results of the investigation so as to serve as a rebuttal to the DRC's good faith demand refusal. The same is true as to the DRC's citation to unsworn testimony.

In sum, where the DRC reasonably viewed the underlying facts about the competitive intelligence gathered as not establishing misconduct or oversight failures, particularly to the degree required to establish bad faith, the DRC's demand refusals were reasonable and supported, and fell within the discretion afforded to it under the business judgment rule. The motion to dismiss therefore must be allowed.[10]

[10] The standard of review for a motion under § 7.44 is unusual for a judge, and no doubt frustrating for plaintiffs, because the typical adversary process is displaced by a different process—namely: a subset of defendants evaluates the plaintiffs' claims to determine whether bringing the claims is in the corporation's best interests, and *their* determination is reviewed by the court, not *de novo* or on "the merits," but through the lens of whether the decision-makers were independent and acted in good faith. Unusual or not, the Legislature's decision is rooted in the derivative nature of the claims that plaintiff shareholders seek to bring—claims on behalf of the corporation. Although it may be rare (or unimaginable) for a special committee of directors to recommend derivative litigation brought by outsiders, the court's review of independence and good faith safeguards against a corporation's unbridled ability to avoid derivative litigation.

ORDER

For the foregoing reasons, Defendants' motions to dismiss are **ALLOWED**.

So ordered.

Christopher K. Barry-Smith
Associate Justice, Superior Court

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Exhibit 3

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PEGA

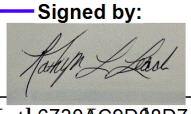
ASSISTANT SECRETARY'S CERTIFICATE

The undersigned, being the duly elected, qualified and acting Assistant Secretary of Pegasystems Inc., a corporation organized under the laws of the Commonwealth of Massachusetts (the "Company"), hereby certifies that the following directors constitute all of the members of the Risk Subcommittee of the Company's Audit Committee as of the date of this Certificate:

- Rohit Ghai (Chair)
- Christopher Lafond
- Larry Weber

Executed on April 6, 2026.

Signed by:



Kathryn Leach
Assistant Secretary and Senior Corporate Counsel

Build for Change

Pegasystems Inc.
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Waltham, MA
02451 USA

Phone 617.374.9600 Fax 617.374.9620 Pega.com

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Exhibit 4

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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE GOOGLE INC. CLASS C SHAREHOLDER LITIGATION : Consolidated : C.A. No. 7469-CS

- - -

Chancery Courtroom No. 12A
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Monday, October 28, 2013
10:01 a.m.

- - -

BEFORE: HON. LEO E. STRINE, JR., Chancellor.

- - -

SETTLEMENT HEARING and RULINGS OF THE COURT

- - -

CHANCERY COURT REPORTERS
New Castle County Courthouse
500 North King Street - Suite 11400
Wilmington, Delaware 19801
(302) 255-0524

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(Continued) ....

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MR. GOLDBERG: Good morning, Your Honor.

THE COURT: Good morning, everyone.

MR. GOLDBERG: Your Honor, Robert Goldberg on behalf of the plaintiffs in this matter.

I don't know if you want to go through introductions. We got an awful lot of people here.

THE COURT: It's -- it's really your choice.

MR. LAFFERTY: Your Honor, we'll reserve the introductions until we see if I have to speak at all, and then we'll go from there. We'll just get started.

MR. GOLDBERG: On behalf of plaintiffs, Your Honor, we have colead counsel at the table here, Jeffrey Block of the law firm of Block & Leviton; Laurence Paskowitz of The Paskowitz Law Firm; Nicholas Porritt of the Levi & Korsinsky law firm. I also have with me today Whitney Street, who is of the Block & Leviton firm.

Mr. Block has been admitted pro hac vice and will be making the presentation on behalf of plaintiffs, Your Honor.

MR. BLOCK: Thank you, Your Honor.

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Good morning, Your Honor. Jeffrey Block on behalf of the plaintiffs from the Block & Leviton firm.

Your Honor, we appreciate your sending us the e-mail over the weekend so we can address your concerns. And I'll start off by hopefully clearly answering the questions you posed, and then I will give you the explanations and the reasons behind what we've achieved here.

I think your first question is asking whether Mr. Page and Mr. Brin will share in any potential payment. And the answer to that is yes, they will.

I think the second question you asked is: What is the math? The math is that the current Class A shareholders have 83 percent of the economic ownership of Google. Page and Brin have approximately 15 percent. And the other Class B shareholders, like Mr. Schmidt, Mr. Doerr, et cetera, have 2 percent.

So if there's any payout that is made under the payment ladder, everybody would share in it pro rata. So 83 percent would go to the As; 15 percent, assuming that's what they still own, would go to Page and Brin; 2 percent would go to the others.

THE COURT: Wait a minute. Go through

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that again.

MR. BLOCK: Certainly, Your Honor.

THE COURT: There -- so -- so the founders, with their high-vote stock, they're going to get C shares, too?

MR. BLOCK: Exactly, Your Honor. The way -- the way the recapitalization is going to work is every shareholder who has an A and a B share will be issued one Class C share. So for Mr. Page, for example, right now, according to the 2013 proxy, he owns 24.9 million Class B shares. He will, after the split, have 29. -- 24.9 million Bs, 24.9 million Cs. Same thing for Mr. Brin. He has 24.3. Same.

So if I'm a Class A shareholder and I have a hundred shares of A shares, after the split I'll have a hundred As and a hundred Cs. And that will be the same for every shareholder in the company.

If the company elects to -- if there is a payment made -- and I'm going to assume it's going to be the payment --

THE COURT: So what you're telling me here in terms of the settlement is that the founders who wish to retain voting control but not by continuing to purchase shares with an economic

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interest and preserving that voting control that way, they're not taking any haircut in this. For example, I mean, you know, I don't know why everyone -- I mean, maybe it's set up this way -- why everyone had to get the nonvoting stock, because nonvoting stock doesn't affect control. That's the whole point of this exercise.

So if the two founders wanted to continue to exercise -- you know, they wanted to have the -- swing the bat that Ruth used to swing -- you can see a bunch of them in the Orioles museum in Baltimore. And they're pretty formidable things. Because people forget his first team was actually the Baltimore Orioles. It was a minor league team at the time. But they could have done that without getting any of these shares; right?

MR. BLOCK: The -- well, yes, Your Honor, they could have gone into the market. But if --

THE COURT: No, no, no. Is there any reason why, when the company structured this, the founders' class had to get a dividend? Did you have to do a dividend on -- do you have to do a dividend on all, on all classes? I don't know.

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MR. BLOCK: I don't know, Your Honor. I know the way that the plan was presented -- and perhaps this is more of a corporate question. But the way the plan was presented and approved by the board and to the stockholders was every single share was going to get the dividend.

THE COURT: Oh, I understand. This was a litigation about stopping the plan.

MR. BLOCK: Right. Right. And --

THE COURT: And so litigations about stopping plans can also have an effect on the shape of those plans.

MR. BLOCK: Yes.

THE COURT: And all I'm saying is, observationally, what you're telling me is there's actually no gain sharing in terms of sacrifice by the founders who wish to retain control. There's no economic sacrifice; and that all of the price support payments that anyone else and the class receives, the nonclass member founders who caused all this hoo-ha --

MR. BLOCK: Well --

THE COURT: I mean, it's a tribute to yourself. I mean I understand. These folks have had -- they're very creative people. They've had a

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huge beneficial effect on people who have invested in the company because the company has grown. You know, they created a verb.

MR. BLOCK: Uh-huh.

THE COURT: I mean, not everybody can create a verb. So I'm not being critical. I'm just trying to grasp this.

This wasn't a situation, for example -- it would be much easier for me to understand the very large benefit you're claiming for the settlement if the two founders --

MR. BLOCK: Okay.

THE COURT: -- even with their 17 percent ownership, if essentially they were funding 17 percent of the payment --

MR. BLOCK: Uh-huh.

THE COURT: -- to the class, you got to think that is a better -- that's a kind of bigger contribution than you're telling me that essentially this is all just a support payment to prop up something, that that's something that does not need to be propped up absent this plan going forward.

This plan was suggested by the founders because they wished to retain control over

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the company, while having an asymmetry between -- an even more profound potential asymmetry between their economic share of the firm and their voting control; right?

MR. BLOCK: Yes, Your Honor. I think I understand what you're saying. Let me see if I can explain it this way:

The reason why the founders, also the B shares, were also receiving C shares is because the effect of the split would be to have the share price in the market. So instead of having 270 million shares trading at a thousand dollars a share, you're now going to have $540 million a share -- and this would have been a dispute in litigation -- let's say each trading at 500.

So if you -- if the founders don't get the C shares, their economic ownership of the company is now cut in half. So that's why they also received the C shares, because by -- by creating --

THE COURT: They just had to take it.

MR. BLOCK: I'm sorry, Your Honor?

THE COURT: I'm not sure every member of the class would look at it that way, was that this was a measure of sacrifice on their behalf, that they

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would have to receive more.

MR. BLOCK: I'm not saying --

THE COURT: Is the payout to the class in cash?

MR. BLOCK: The payout is going to be the election --

THE COURT: Is the true-up in cash or in shares?

MR. BLOCK: It's going to be at the election of the board at the time, either cash or shares, and everybody in that regard will be treated the same.

What --

THE COURT: And why would they -- do they have to, as a matter of corporate law, even though it's a litigation settlement?

MR. BLOCK: Do they have to make the election?

THE COURT: Do the founders -- would it, as a matter of law, be the case that in a settlement of litigation, was there a reason why the two founders needed to be getting a true-up when they suggest that there will be no discount, when, again, you know, you could potentially -- there are limits on

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the true-up. If the founders were excluded from the -- from the potential of receiving the true-up, presumably the limits could be expanded a little bit to the benefit of the members of the actual class. Was that explored in the negotiation of this?

MR. BLOCK: Absolutely it was, Your Honor.

THE COURT: And it was objected by the defendants.

MR. BLOCK: Yes, Your Honor.

THE COURT: Because the two founders wished to also get the true-up for themselves.

MR. BLOCK: Correct, Your Honor. And when we tried to weigh those benefits versus what the founders received in some of the payout versus what we think we achieved for the class, at the end of the day, we felt that the risk balanced so that the settlement was -- was valuable and worth it versus allowing, you know, a small payment to go to the founders. If --

THE COURT: Did you explore negotiating that the founders would pay the transaction costs that the company incurred for the pursuit of this initiative?

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MR. BLOCK: No, we did not, Your Honor. Our understanding is that -- and perhaps defendants can address this better; but the legal fees incurred in this were, I believe, subject to payments by insurance companies, but I'm not sure on that.

THE COURT: I mean, that also -- that has effect on the future, as you know. Which, I mean -- unless I miss my guess, there's no insurance company in the world who does not take into account past claims experience in setting future rates.

MR. BLOCK: Well --

THE COURT: And I cannot imagine that this was on any front, including the prelitigation front, an inexpensive process in terms of advisor fees.

MR. BLOCK: We did not explore the amount of the fees, Your Honor. What we were focused on were the -- what we thought were the major harms in this deal, one which would be a potential trading discount, which we think will exist. And we wanted to mitigate that.

THE COURT: But the trading discount -- I mean, my only concern -- I mean, I'm not saying you haven't mitigated the trading discount

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risk.

And I'm just going to preview for the objectors. I get their point, but I think they somehow misunderstand how settlements work and they misunderstand class actions in terms of Delaware.

MR. BLOCK: Uh-huh.

THE COURT: Which is as I -- I get the point that -- the reality is -- the point is that this -- these kinds of things run with the shares.

MR. BLOCK: Uh-huh.

THE COURT: And that, for example, if you -- if there's a price support aspect to the C shares, then you're able to sell them to somebody and that -- at a higher price than you would otherwise because then when they receive the shares and there's the potential for the true-up that comes with that guarantee. So I get all that.

MR. BLOCK: Okay.

THE COURT: What I think is a more fundamentally important point in assessing what you've actually achieved is that if I'm sitting here as a stockholder right now at Google, I don't need any price support. All the stuff around price support is something that I presumably need, because you're going

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to give me something that I did not ask for and that at the polls -- because I understand your own point -- at the polls, when the disinterested electorate got to express their views, they overwhelmingly said, "I don't really need this. Turning my, you know, publicly traded share into two publicly traded shares, one of which is now nonvoting, might be nifty for the two founders; but my own view is they, frankly, have a lot of reasons to stay fairly interested in the business and I'm not really interested in going down this route."

Using their own voting power, they have a different view.

What you're telling me now, though, that the principal economic benefit of this is to provide price support for these C shares which nobody in the class actually wanted, or very few people; right?

MR. BLOCK: Yes. Yes.

THE COURT: And that rather than the founders funding any of it or even the transactional cost of negotiating this thing, it's essentially everybody treated pro rata, except it's not really pro rata, because the only ones who actually get something

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different than they already have out of it are the founders whose ability to retain voting control in the future is perpetuated. The public investors are in exactly the same place except that they get some price support that they don't need in the absence of the transaction.

MR. BLOCK: Let me -- let me address that point, Your Honor. I think what you're -- you're hitting the nail on the head of this question, is does this transaction perpetuate the founders' control. And I understand that --

THE COURT: Well, what I mean by "perpetuate" is --

MR. BLOCK: Yes.

THE COURT: -- there's a very obvious reason why the founders came with this.

MR. BLOCK: Uh-huh.

THE COURT: Which is Google is the type of company -- and most companies need to use a lot of equity for other sorts of things. They use it for acquisitions and they use it to provide incentives to their employees.

MR. BLOCK: Right.

THE COURT: If Google, in the normal

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course of things, continues to do those things, then the pressure will be on the founders to either, frankly, step up to the plate and buy more actual normal equity in which the voting rights are aligned with the cash flows that are available to the public investors, the cash flow sharing --

MR. BLOCK: Uh-huh.

THE COURT: -- dividend rights -- so to step up and actually have more of their personal wealth locked up in Google -- or to do what they've done, which is to create a situation where Google can give out stock to people that has no voting rights, thereby allow the founders to continue to exercise voting control over Google. Not normal order of things.

And I think it was your argument -- your friend's and your argument in the beginning was -- this is kind of unusual because the only party -- what you're telling us, it's like, you know, if President Obama or President Bush at the end of his term or President Reagan said, "Really what's great for everybody is just that I stay. And what we need to do is to give out nonvoting," you know -- "we need to create a class of nonvoting citizens in which I can

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be assured that no changes in the demographics will threaten my control because it's just really good for the USA for me to stay in office. I can't really muster" -- you know, it's an odd kind of concept.

MR. BLOCK: It is, Your Honor. It's an odd concept. And when we, I guess, dug into the case, what we saw -- and let me give you the numbers which hopefully will bear it out. We don't think this plan, just the issuance of the nonvoting stock by themselves, really affects Page and Brin's ability to continue to have control in this company. They have 56 percent voting control together. They're going to have that voting control as long as they want it, whether this plan goes forward or not. They each -- with their stock ownership they each have about -- I think it's about 28 percent of the voting control.

So just -- just to put the numbers on it --

THE COURT: Wait a minute.

MR. BLOCK: -- right now --

THE COURT: Again, I assume smart people, including people smart as this, even have a good eye for islands -- I saw one of the founders' islands. I got to tool by it in a boat. It's kind of

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a cool place. It's right next to Richard Branson's island, although Richard Branson bought another island. So there's an island-buying competition going on. So these are very smart people.

MR. BLOCK: Yes.

THE COURT: There's a purpose for this plan.

MR. BLOCK: And that's what I'm getting to.

THE COURT: Well, no. The purpose is exactly what we're talking about. Now you're telling me that the plan has no purpose, in which case everybody could just rescind it and we could avoid all this stuff.

MR. BLOCK: No.

THE COURT: The purpose is -- they're at 56 now. If they wish to do things like take some of their wealth and diversify it, that puts at issue their voting control, or if the company, in order to do the two things that I just mentioned, which are normal things, make acquisitions using your stock as currency or, even probably more important in the case of a company like Google, provide equity-based incentives to the employees, 56 is a lot cooler than

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46, but it's still -- there was something on their mind where there's a certain amount of dilution, particularly because, as the point was made in your papers -- and I get it -- that there are two founders. They're friends, but, you know, they're not -- nobody says that they have to be aligned forever.

MR. BLOCK: Right.

THE COURT: Even families like the Koch brothers have had disputes over the years. They get along, but they've had disputes. People and families have disputes, and I get all that.

MR. BLOCK: Uh-huh. Uh-huh.

THE COURT: But what I'm just trying to say, really, economically the only reason why you're trying to get support arrangements is because of a plan that was proposed by these founders in order to lengthen the period of time over which they could exercise voting control of this company. Right?

MR. BLOCK: Correct. Correct. And --

THE COURT: And there is no gain sharing by them in the sense of them stepping up even with transaction costs in the settlement; right?

MR. BLOCK: Right.

THE COURT: There is no gain sharing

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by them, the settlement being structured in a way where they don't get the support payment.

MR. BLOCK: Correct.

If I may, Your Honor, what we --

THE COURT: How can I get a benefit to the class, then? Because I don't understand a benefit to a class -- I don't understand this as a derivative benefit and now I don't understand it as an economic benefit to the class, because you would say that the economic benefit to the class is in the price support; right?

MR. BLOCK: Yes.

THE COURT: The problem with that is typically you would say "Okay, let's look at the benefit to the class." And if what you're saying is the company is paying for it, then what we would look at is some differential from a group of people who have been defined outside of the class who would be providing a contribution so that you could say that the class, in comparison to the people being sued, is comparatively better off after the settlement --

MR. BLOCK: Uh-huh.

THE COURT: -- than they are before.

What I'm now understanding, which the

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papers didn't really illuminate, is that as between a member of the class and the defendants who have been excluded from the class, there is no economic distinction.

MR. BLOCK: Under the payment plan, that is correct, Your Honor. What -- what we think is -- is the real issue here in terms of the benefit of this plan to Page and Brin is what may happen down the road, which is if they want to divest -- if they want to achieve liquidity, if they want to divest nonvoting stock but still continue --

THE COURT: I understand that; but you have a pretty sizable fee request which is built, in large measure, not on the increases in the limitations in the future on their ability to make transfers, for example, between themselves.

MR. BLOCK: Uh-huh.

THE COURT: The ability to waive the -- the --

MR. BLOCK: TRA.

THE COURT: -- the TRA, which, look, I understand now you've ratched up with that committee and essentially unanimous independent director approval. I get that.

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MR. BLOCK: Uh-huh. Uh-huh.

THE COURT: But an expert who's done well in this Court, you know, has wielded around figures of a billion.

MR. BLOCK: Uh-huh.

THE COURT: But that's -- there's pro rata treatment for the two founders in that; right?

MR. BLOCK: Right. What --

THE COURT: And so all I'm saying is, observationally, that is a whole transfer payment that does not have to exist if this plan simply goes away. And because the two founders are treated pro rata and Mr. Doerr is treated pro rata, they might as well just be defined as members of the class for the purposes of that economic benefit.

MR. BLOCK: Well, I think --

THE COURT: And, in fact, that one -- can argue is actually -- I would think most economists would say it's pretty observationally true that if the only point of an expenditure like that is to actually avoid economic harm that you're creating by your own actions, plus you're going to rack up tremendous transaction costs because there will be advisor fees, there will be other things to determine whether it's

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stock or cash, there will be, then, SEC communications about the implications to the receiving people about the consequences of receiving stock or cash, that I think most people from Chicago, even those who just eat Chicago-style hot dogs or those who were at the school at Hyde Park, would say, "Just stop where you are. Do not do that which is going to cause you to just to incur costs in a year." If the only reason you're going to incur, make a billion-dollar payout, have to spend millions of dollars on lawyers, have to have people have tax consequences when they wouldn't otherwise -- because that's the other thing. Is some of this potentially taxable?

MR. BLOCK: That's a good question, Your Honor. I --

THE COURT: Well, it is kind of a good question because as a investor, I'm not sure I want a true-up payment when I already have one -- I have one voting share right now of Google. You've turned it into two securities. You're now telling me that there's going to be some sort of discount true-up in a year. I'm going to get mailed either a piece of cash or a stock dividend. I'm going to have to figure out the tax consequences of that, which may already be a

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headache for me --

MR. BLOCK: I --

THE COURT: -- all over this? when the only reason we're doing this is because the two founders want to perpetuate their voting control?

MR. BLOCK: Well, I understand that, Your Honor. And, obviously, but for -- if Your Honor ruled in our favor at trial, this plan goes forward because it was approved by the board, shareholders voted to approve it. Obviously that's why we filed the lawsuit to stop it.

And in litigating the case, we identified -- what we didn't identify was a -- a direct concrete valuable benefit that we could quantify today that would go to the founders based on what we see the numbers are. Right now -- if I can -- if I can just give you the numbers, maybe you'll understand where we are coming from.

Right now Page and Brin have 493 million votes based on their shares. The Class A shareholders have 270 million votes based on their shares. At the time of the transaction, Google would have to issue 220 million Class A shares or about $125 billion worth of stock before the Class A would

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ever get to be equal to Page and Brin in terms of voting rights. Today it's $220 billion.

The company on average issues around 3 1/2 million shares for employee compensation. So at the old prices it would take forever for --

THE COURT: And for the plan -- if one founder sold to the other their high-vote shares, were there any restrictions?

MR. BLOCK: Selling, no. So, for example, Mr. Page could just buy Mr. Brin's voting shares with cash and they stay as the supervoting shares. So there's no restrictions.

So we think what this plan obviously did is it now creates this currency for Page and Brin to sell nonvoting shares, get this liquidity but keep their voting control, and it also allowed for this founder-to-founder transfer. So if --

THE COURT: No. But what I'm saying is before the plan --

MR. BLOCK: Right.

THE COURT: -- a founder who wished to sell to his friend who said, you know, "My interest in the business, I'm kind of," you know -- "I've moved on to other things" --

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MR. BLOCK: Uh-huh.

THE COURT: -- could sell his shares to his friend and fellow founder, and that friend and fellow founder could continue, you know, to reap the voting control.

MR. BLOCK: Correct, Your Honor. Under the charter, if Mr. Page sold to Mr. Brin or Mr. Brin sold to Mr. Page, those shares continued to stay as supervoting shares.

THE COURT: Right. It's only if they sell to someone else.

MR. BLOCK: Exactly. Exactly. So, you know, they're -- they've had two 10b5-1 plans. They sold, I think it was about 20 percent of their holdings. So obviously when they sell, their voting power goes down. This plan, we think that the wealth transfer potential here is if in the future they want to sell their nonvoting stock or they want to do this founder-to-founder transfer, we think the real effect on their control would be if one founder decided to leave and the other founder said, "I'm going to be left with what would work out to be 37 percent control. I no longer will have the control. We need to do something about that."

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And that's why we think that the TRA modifications are pretty critical here and we think -- we think the special committee recognized these potential liquidity benefits. They took steps to try to reign them in, but we don't think they went far enough because, as we pointed out in the papers, you know, you've got approval by a majority of the board prior to the settlement. With the settlement, it is now, as Your Honor knows, the special committee, notice to the shareholders, no objection to an entire fairness review, which in the future --

THE COURT: Yeah, I'm trying to figure out what -- you know, whichever of my fellow judges I victimize by assigning that litigation so that he or she has to think about what does it mean for the entire fairness standard to apply in that circumstance.

MR. BLOCK: Well, the intent --

THE COURT: Because I want to hear from the defendants about that, which is does that mean that despite the fact that when it's approved in the future, there will be a special committee with advisors?

MR. BLOCK: Yes.

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THE COURT: There will be unanimous approval by the independent directors.

MR. BLOCK: Yes.

THE COURT: That irrespective of any cause law which would give any kind of consequence to that in relieving the defendants of the burden of actually proving substantive fairness, the defendants would bear that and the Court would put aside procedure and the defendants would have to essentially prove the -- to the Court in an evidentiary hearing that what was done was substantively fair.

MR. BLOCK: That was our intent behind that provision. So if there is this potential wealth transfer down the road, we felt that it really -- that is where you get the wealth transfer to Page and Brin. And that's where they potentially would --

THE COURT: So there's no nonlitigation option with a procedural protection to even shift the burden of persuasion on fairness.

MR. BLOCK: Well, I don't think at the time we negotiated the settlement we had the benefit of Your Honor's ruling, that if it's --

THE COURT: It's not really -- I mean, you don't need -- I assume you're going to go to a

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case involving initials or something like that.

MR. BLOCK: Yes.

THE COURT: But it's not really even a question of whether that's the case. If you think about Kahn v Lynch, if you think about just what's in the agreement itself --

MR. BLOCK: Uh-huh.

THE COURT: -- traditionally if you had a diligent and well-motivated special committee with qualified advisors who was given the ability to say no --

MR. BLOCK: Uh-huh.

THE COURT: -- and they chose to say yes, that has burden-shifting effect, which rather than the -- the defendants having to prove that the thing is fair, the plaintiffs have the burden of persuasion on fairness.

MR. BLOCK: Right.

THE COURT: I'm trying to get a sense, because I think it's important, when you put in place in a settlement like that, whether people understand what they mean.

As I understand what folks are sort of saying here is, you know, the old-time religion entire

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fairness standard applies, which means the defendants have to prove entire fairness. If what you mean is something that you don't -- that you actually don't each understand what you mean, I suppose there's also a kind of thing that's not sort of answered by the text itself, which is what if the board puts it up to a disinterested vote of the stockholders other than the founders and, upon full information, gets those? I just would like to know, you know, for the -- on that one --

MR. BLOCK: Right.

THE COURT: -- what it is that the parties actually mean, because what you're saying -- you know, I mean, we're getting into alternative entity land --

MR. BLOCK: Uh-huh.

THE COURT: -- which --

MR. BLOCK: What -- what we, on our side, meant was that in that scenario, where you had a waiver of the TRA, you went through the whole process, that the defendants, the company, or the board, would still have the burden. We did not at that time contemplate whether there would be a further mechanism allowed for a vote of the disinterested --

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disinterested shareholders based on full disclosure. So that -- that never came up in the negotiations, I will -- I will say that.

But, again, that's why we think the TRA modifications -- because that's where we think you get --

THE COURT: But it was understood that the defendants would have the burden on --

MR. LAFFERTY: Yes, Your Honor.

MR. BLOCK: Yes.

THE COURT: What about for a stockholder vote?

MR. LAFFERTY: We did not discuss that issue, and, you know, that -- that's not something that's been the subject of any discussion between the parties, nor have I discussed it even with my colleagues.

THE COURT: Should it be?

MR. LAFFERTY: I -- I mean ... look, Your Honor, I think the understanding was that the defendants were going to bear the burden of fairness in this setting. But we really did not get to the level of talking about what we would do, because I honestly don't think anyone thought it was a likely

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option that was going to be used.

THE COURT: Okay. I'm just -- you know, I think it's incumbent upon me, in terms of discharging my obligations towards this Court and its members, particularly because I'm not sure I'd be the victim.

MR. LAFFERTY: Understood.

THE COURT: I might victimize myself with the case, but in a weak moment I might victimize someone else to actually reflect -- to have inquired into this.

MR. LAFFERTY: Understood.

MR. BLOCK: If I can go back for a moment, Your Honor, to the -- to the benefits. You talked about the fee and what benefits would support that. I think even if you wanted to just completely set aside the support payment, I think what Mr. Clarke explains, which would be just the trading benefits, when people who are getting C shares that obviously the A shareholders do not want. They voted against it. It's no question about that --

THE COURT: But, see, again, you're missing my point.

MR. BLOCK: Okay.

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THE COURT: That economic benefit is only a benefit --

MR. BLOCK: Right.

THE COURT: -- in the sense that people who do not want something --

MR. BLOCK: Right.

THE COURT: -- are now receiving on pro rata terms with the people who proposed it and who are not -- who are defined out of the class. The same economic support is being provided to the founders; right?

MR. BLOCK: If they sell, yes, that is correct.

THE COURT: If they sell or not.

MR. BLOCK: Right.

THE COURT: People -- you know, rich people -- one of the things that they do is they have assets against which they can borrow, they can do all kinds of things --

MR. BLOCK: Right.

THE COURT: -- and hire those valuations of those assets. You know, that tends to be a good thing for everybody; right?

MR. BLOCK: Yes. I mean, I don't

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think there would be a way to structure the support payment to eliminate their ability to sell C shares without getting the potential support, if they sell in the market. I understand the point on the actual payment by the company. But as we said, we think just the effect of the --

THE COURT: Oh, no. There's certainly ways to structure things in litigation settlements unless I hear differently, for example, that they have a lockup for a year of their C, that there won't be any payment to them because the payment is a litigation settlement. Frankly, I think sometimes there are tax benefits to getting a payment. I've heard in past cases people come to me with structures and say, "We want to structure them this way because if we structure the payment" --

MR. BLOCK: Uh-huh.

THE COURT: -- "as litigation damages, that has some favorable" --

MR. BLOCK: Uh-huh.

THE COURT: -- "tax treatment compared to something that's structured as a dividend."

MR. BLOCK: Uh-huh.

THE COURT: So I'm just saying I don't

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believe it's a distinct -- I mean, their pro rata on the price support is their pro rata on the payout; right?

MR. BLOCK: Yes.

THE COURT: And they're not locked up any more than anybody else; right?

MR. BLOCK: They are not locked up. Again, Your Honor, that was a point of the negotiations. And at the end, obviously we balanced our risk of prevailing in front of Your Honor and -- and winning the case and getting our injunction versus what we thought those risks were versus what we thought we achieved for the shareholders, balanced against letting the founders share in this -- this potential benefit, which, just to put it in context, if the price support payment is paid at the levels Clarke estimates, it would be a little over a hundred thousand shares of C stock or A stock to each of the two founders.

And when we looked at that, we looked at what we got -- and yes, people don't want this; but absent -- if we had lost, it goes through without any of these protections, without anything else. Hopefully, if we had won --

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THE COURT: I'm not -- just, again --
MR. BLOCK: Yes.
THE COURT: -- it's not a question -- this is very helpful to me. I'm just trying to understand --
MR. BLOCK: Right.
THE COURT: -- you know, this is a very different -- there is essentially no economic gain to the class that's not shared in by the founders and Mr. Doerr; right?
MR. BLOCK: That is correct. And we -- we struggled with, you know, this latter point of excluding Page and Brin from sharing in this, notwithstanding the negotiating points, along with a thought that do we want to have their economic interest completely aligned with everybody else with all the C shareholders so that, you know, in the first year, if they're not sharing in that, does that create now a disincentive or different interest between their interest and the class?
And that's one of the factors that we weighed, and we did go round and round on our side on that. And we felt, at the end of the day, the small amount that they would share would be offset by

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probably the benefit of having their interest completely aligned with everybody else because, I mean, they have done well as a company. And since Mr. Page has taken over as CEO, the stock's done well.

So when we looked at that -- and we did weigh it and we did balance it, and we ultimately decided that what we got was better off for the class and will do more to protect the A shareholders than if we had lost at trial, because if we had lost at trial, we'd have none of these protections and none of these what we think are benefits.

And that's why we did that balancing act, and that's why we weighed it, and that's why we came down on the side that we did. So that's where we ended up.

And, again, as far as the benefits, I mean, I think just the trading benefits. I understand your point on the circularity of the support payment.

THE COURT: And did you try to get them to pay the advisor cost, or was the argument that it was just absorbed by -- by D and O insurance?

MR. BLOCK: Well, I think -- I think the advisor costs in terms of --

THE COURT: And I'm trying to figure

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out how D and O insurance paid for the committee process or the financial advisors.

MR. BLOCK: I'm sorry. I must have misspoke, Your Honor. I wasn't suggesting D and O was paying for those costs.

THE COURT: But that was fairly considerable; right? Bankers are -- I mean, unless something has changed, bankers tend to be paid more than members of our profession. I will say I'm unapologetic --

MR. BLOCK: Uh-huh.

THE COURT: -- ally a fan of our profession. So I don't think that's fair in terms of the contributions people provide to the process, but the market tends to have a different perspective.

MR. BLOCK: I do know, Your Honor -- I feel a little constrained by giving out the numbers of the bankers, what they got here. But it was not very high. It was -- it was -- I was surprised it was pretty much on the low side.

THE COURT: Low side being millions?

MR. BLOCK: Under a couple million.

THE COURT: Under a couple million?

MR. BLOCK: Yes. As I recall.

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THE COURT: Okay.

MR. BLOCK: Yes.

THE COURT: Yeah, I won't mention any bankers' names because they --

MR. BLOCK: I won't do that. I -- we don't know what the costs were to pay the attorneys advising the special committee or outside counsel to the company. That I don't know.

THE COURT: No. I mean, you assume -- we would not expect the D and O insurer to pay for that process.

MR. BLOCK: Right. And so I'm sure what you will hear from the company they view this as a valid corporate purpose and it perpetuates, you know, the corporate goal of the corporate governance structure which they would have paraded all the directors in here who would have testified and, you know, that we disagree with them.

THE COURT: Oh, no. Look, I get it.

MR. BLOCK: Yeah.

THE COURT: I get it. I think we all get the concept.

MR. BLOCK: Right.

THE COURT: I think what you would say

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is if everybody else in society gets the concept, then there's very little danger that these folks are going to be thrown out. If they reach a different stage of founderdom --

MR. BLOCK: Uh-huh.

THE COURT: -- and people do reach different stages of founderdom where it's less productive --

MR. BLOCK: Uh-huh.

THE COURT: -- cousins and retainers and other people start coming on the payroll or wine sellers get, you know, compensation packages, start getting weird -- I'm not saying this is happening here --

MR. BLOCK: Right.

THE COURT: -- that that's when the stockholders would --

MR. BLOCK: Yes.

THE COURT: -- might take a different view and might rightly take a different view. If it's these two really smart committed folks who, to their credit, I believe, right, they've already promised if they sell the company, they're not taking a premium; right?

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MR. BLOCK: Correct.

THE COURT: They've already done some things. You know, they're the kind of -- look, you want -- if you're an investor and you can coinvest it along with very smart founders or private equity and then in the event of a liquidity event, you know, have a contractual promise to pro rata treatment that's honored, that's really, frankly, a very good thing as an investor. And I think sometimes people forget that.

MR. BLOCK: Yes.

THE COURT: So I'm not being critical of anyone here. I'm just saying it's a little odd to create a process --

MR. BLOCK: Yes.

THE COURT: -- where what I think you're saying on behalf of the class is "We kind of get that. And if these two guys are actually -- why would we want to throw them out of control unless they start doing different things? And, frankly, if they start doing different kind of vanity things or -- it's 25 years down the line and they're really not -- you know, there's a new generation and they're kind of -- you know, they're talking about Katy Perry and people

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look at Katy Perry as one of the sister acts who were in the movies with Bing Crosby and saying "You guys might have been cool a long time ago," but nobody has heard of these people -- you know, Katy Perry, what are you listening to? And, you know, Bruno Mars, "Come on, we want something new" --

MR. BLOCK: Right. Right.

THE COURT: -- then here at that point Rosemary Clooney might still be in command because of this transaction.

MR. BLOCK: That's very true, Your Honor. And that's -- I don't want to repeat what we put in the papers, but I will to some degree. And that's why what Professor Yadav, I think, put his finger on, which is having both of them in equal control kind of is that balance you're talking about, buying the wine sellers or, you know, spending hundred dollars of millions --

THE COURT: Because they're a check on each other.

MR. BLOCK: Exactly right. And if you get to the future and one wants to leave and the other one says, "Hey, I'll just stay in control," that's where you start getting into those horizontal agency

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costs.

And that's why we wanted a strong TRA with the burden on the defendants so that we don't get into that. And maybe if that happens in the future, the tradeoff is "Okay, you'll have control, but we want to have the outside shareholders now start electing a majority of the board," which would be the check. I mean, I don't know. That's obviously for the future, but that's what we were trying to get at.

And one of the arguments you would have heard is any claim that there's a waiver of the TRA is premature, it hasn't happened. We don't know if it's ever going to happen. That's what we're trying to address, exactly what Your Honor said. That's what we foresaw, and that's one of the things we wanted to do in the settlement.

THE COURT: Thank you. Shall we hear from the objector next, maybe? And then if the defendants -- you want to object to the objectors' point?

MR. BLOCK: Thank you, Your Honor.

MR. PENTZ: Thank you, Your Honor. John Pentz on behalf of Howard Essner and Mike MacMurdy and Ms. Rosenzweig.

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In light of your comments about our objection, I'd like to pretty much take up where you just left off with your questioning of Mr. Block.

And I think that your questions really put your finger on the fundamental circularity of this settlement whereby because the founders are not being asked to subsidize any amount of this true-up payment, there's really no net economic gain for the class here.

The true-up payment does help to ameliorate, to a certain extent, the damage the class is going to suffer by the creation of these C shares and the dilution of the value of their A shares; but the net costs of this entire process are going to leave the company with less equity, which is, in fact, the thing that they use to acquire companies and incentivize employees. That's the whole point of the C shares. And -- so this settlement is going to leave the company and the A Class A shareholders worse off. And that was the fundamental point of our -- our objection.

I think if you look at --

THE COURT: Well, in terms of your objection, though, your clients did not step up and

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try to block this transaction. So to the extent that the world was just one in which your clients did whatever they did, the transaction would be occurring.

MR. PENTZ: That's correct, yes.

THE COURT: Wouldn't you concede -- I think your objection does concede -- that on the corporate governance side of this, the plaintiffs have achieved some substantial tightening which is going to make it much more difficult in the future for these folks to do anything similar and relax these protections; right?

MR. PENTZ: Yes, yes.

THE COURT: I think what you're just saying the point I engaged in with Mr. Block is, "Wait a minute. Don't tell us that this is like a payment to the class that's funded by the two founders, or even, like, it's a payment to the -- that 17 percent of the payment to the class is funded by the founder and the rest by Google. There's essentially no distinction between the class members and the founders in this; and, therefore, we got to look at this really as a corporate governance settlement and not a damage case like a Southern Peru or an AIG or AT&T Wireless kind of case.

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MR. PENTZ: Yes, exactly. That's exactly it. There's no shifting of -- of value between two different classes of shareholders, as you might find in certain derivative settlements.

THE COURT: Well, and certainly those, usually it's between the interested parties who have been the fiduciary who propose certain action who then have to engage, either not share in the benefits and, therefore, if you are a -- you know, would even say these fellows necessarily had to go out-of-pocket; but, therefore, because of their ownership of Google, there would be a subsidy to the class of some percent -- you know, 17 percent --

MR. PENTZ: Right.

THE COURT: -- could be a sizable contribution. What you're saying is their percentage contribution is nothing.

MR. PENTZ: Right. That contribution -- the consideration for that contribution would be the benefits they're going to get from these C shares --

THE COURT: Right.

MR. PENTZ: -- to preserve their control of the company and not dilute that in any way

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by issuing C shares. So I agree with your analysis.

THE COURT: The point of your -- you're not saying these folks shouldn't be rewarded; but the idea of awarding them something like 3 1/2 times lodestar is excess when you consider that economic factor.

MR. PENTZ: Well, yeah. Moving to attorneys' fees, yes, our point is that we don't believe this is really a case that's appropriate for a percentage-of-the-fund fee award.

THE COURT: I get what you're saying. I don't need you to repeat the --

MR. PENTZ: Right.

THE COURT: -- I think I get your point and the basis for it.

MR. PENTZ: In looking at -- so then you move to, you know, what's the lodestar and what kind of multiplier has been earned here. And I think if you look -- one thing that jumped out at me -- two things, really, is the average hourly rate in this case is $608 an hour, which is very high for a class action where you usually find, say, 60 percent or more of the hours generated by associates and, therefore, you'd have an average hourly rate that's less than

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500.

Here we have a very partner-heavy lodestar. And in my quick calculations based on the affidavits, about --

THE COURT: But look at the team you're having to tangle with here.

MR. PENTZ: True. Well, that may be, but 75 --

THE COURT: I was scared to even walk in the room.

(Laughter)

MR. PENTZ: In any event, my calculations come with about 7500 partner hours for the class counsel here, which is well over 50 percent and at rates up to $900 an hour. I guess that's for Mr. Porritt of Levi & Korsinsky. Mr. Paskowitz had 1800 hours, which just -- you know, that jumped out at me. That's an associate billing target. That's full-time work, 40 hours a week for a year. It may be that Mr. Paskowitz worked on nothing else for a year, but I'd question whether all of those hours were necessary.

In going through the declaration of class counsel, in terms of the tasks that were

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performed, you know, there are things that might require a partner, consulting with the client, discussions with Google's attorneys, certainly the discovery requests, drafting the complaint --

THE COURT: I mean, some of us have worked at places where, you know, 40 hours is like a day and a half.

MR. PENTZ: We should all be that lucky.

THE COURT: Where you say, like, you can say you worked 10 years someplace but you were actually there only five chronological years, but it --

MR. PENTZ: Yeah, right.

THE COURT: -- actually grew. And so --

MR. PENTZ: Well, yeah. But that's not usually a partner's work schedule, Your Honor. It's usually an associate.

THE COURT: Well ...

MR. PENTZ: In any event, I think that should be taken into consideration, the high number of hours billed by partners, the high rates. And we're not arguing against a reasonable multiplier. But what

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we think in this case, maybe, you know, 1.5 or something less than 2, would be more appropriate. I don't -- I would suggest that if Your Honor is going to use lodestar as the basis for a fee here, you may want a little more detail than provided in these summary affidavits.

THE COURT: Yeah. I'm -- I'm going to probably try to muddle through without that.

MR. PENTZ: Okay. Then I would just say that the -- the record --

THE COURT: But I get your point, yeah.

MR. PENTZ: The evidence in the record --

THE COURT: We do apply a sort of gumption factor to these lodestars, realizing that as I think our friends in the plaintiffs' bar recognize, that they're not quite the market-tested lodestars that some other people in the room necessarily have.

MR. PENTZ: Well, that pretty much concludes my points about --

THE COURT: Thank you.

MR. PENTZ: -- about the value of the fees.

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Thank you.

THE COURT: Would the defendants like to speak at all or --

MR. LAFFERTY: Your Honor, I guess I would like to add a few things. And I guess I will briefly introduce everybody on our side.

THE COURT: Sure.

MR. LAFFERTY: I think Your Honor knows everyone in the courtroom. Boris Feldman from Wilson Sonsini, Bill Barry from Google, George Garvey from Munger Tolles. He's here on behalf of the founders, and Mr. Lamb from Paul Weiss, also on behalf of the founders. And then back here we've got Mr. Berger and Mr. Chandler, also from Wilson Sonsini.

THE COURT: Welcome.

MR. LAFFERTY: And then Mr. Bouchard is here on behalf of Mr. Schmidt, and then Mr. Coen from my office. Sorry to inundate you with all those.

I just wanted to share, Your Honor, from the perspective of the defendants --

THE COURT: If you could do a quick lodestar, like just an average multiple -- I would just like to see how the hourly fee works out.

MR. LAFFERTY: Any math, I've given

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that off to Mr. Garvey today.

THE COURT: We'll let the plaintiffs' lawyers confirm the math because they're better at that. But if you guys could just write down the hourly number, and then they'll do the multiplication and division.

MR. LAFFERTY: We -- we wanted to briefly address --

THE COURT: See, I'm not good at math. So it's not even actually multiplication. It would just be, I believe. addition, then division. I defer to Mr. Lamb, who's pretty good at that stuff, but ...

MR. LAFFERTY: Your Honor, we wanted to add a few points, you know, from our perspective, why we believe the settlement ought to be approved here.

THE COURT: Could you just -- just before you do that, I take it you don't disagree there's essentially pro rata treatment of the founders and the nonclass stockholders of Google, such that there really isn't a transfer payment in any way from the founders or others to the class members?

MR. LAFFERTY: That is correct.

THE COURT: So it can't really be

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conceived of as a damages.

MR. LAFFERTY: That is correct, also. And, indeed, we never thought of this as a damages situation.

THE COURT: Right.

MR. LAFFERTY: It was clear from our negotiations of the settlement and the terms of the settlement themselves that it really is a therapeutic settlement --

THE COURT: Right.

MR. LAFFERTY: -- both in the amendments to the TRA and the other nonadjustment payment issues.

THE COURT: And the defendant -- I mean, the plaintiffs pressed on those issues, but the defendants did not relent.

MR. LAFFERTY: That is absolutely true.

THE COURT: Okay.

MR. LAFFERTY: That is absolutely true. And, indeed, if -- if they would have insisted upon a wealth transfer, there would not have been a settlement. That I can say with -- with definite -- definiteness.

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Your Honor, Your Honor's well aware that what -- what's required in a settlement hearing is not necessarily a decision on the merits --

THE COURT: Right.

MR. LAFFERTY: -- of the underlying claims. It's a balancing. And here we believe that the balance tilts in favor of approving the settlement.

From our perspective, this transaction would have been -- we had very strong defenses to this case. We believed that the business judgment rule would have applied under Williams versus Geier. We also had statutory authority for doing the amendment to create the class of nonvoting stock under 242.

The purpose, as Your Honor, I think, has delved into, although I think Your Honor takes maybe a slightly different view of the purpose, the purpose here was to give the company additional flexibility to manage this voting dilution problem. The board unanimously viewed that it was in the best interests of the company and all the stockholders to continue the current structure for the long term and to allow the company to continue to prosper as it has done.

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It has been wildly successful under anyone's viewpoint. And that has been a benefit to everyone. And rather than the company just continuing to potentially use cash -- because it could have managed this voting dilution problem a different way. It could have simply used more cash for compensation or cash for acquisitions.

THE COURT: But that might potentially be suboptimal for everybody.

MR. LAFFERTY: Absolutely, because the company believes that reinvesting that cash is, again, beneficial for the long term for the company. And having this Class C -- the dividend in and of itself doesn't -- doesn't affect the mix of control. It -- what it does is it gives the board an additional arrow in the quiver later on when it -- when it wants to do an acquisition. It doesn't have to use voting stock. And the same is true for compensation --

THE COURT: No, no. What I'm saying -- everybody -- and, again, part of the reason why I think the plaintiffs face a difficult challenge, even the defendants, that this is a fairly novel situation because, very straightforwardly, what people -- this is about these founders' voting

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control, and it's about ... The reality is if you used voting stock for these sorts of things in the future, then even with the high vote/low equity stock that they have, at some point in time, you know, I mean, you make a few major acquisitions, a billion here, a billion there -- and, frankly, you know, Google's also in the type of business where you hire talented people and where equity grants are a regular part of it, that you get to the point where the founder is voting, absolute voting control is there and that creates psychological effects on them. It creates economic incentive effects on them. It makes them feel vulnerable.

So I get -- I'm not being critical. I'm saying it is unusual. I mean, I think we have to concede this is unusual, because it really is motivated only by -- no public company with a CEO had 4.9 percent would do this. He just wouldn't. You wouldn't need to. This is about their voting control and about the ability for them to have voting control while allowing the company to grant equity. And the solution to that is that the equity will have no voting rights. That's just an observation. It's not -- I mean, that was what the lawsuit was going to

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be about, whether that was okay or not, well-motivated. And you obviously had a special committee of independent directors whose independence and good faith you were going to defend vigorously.

MR. LAFFERTY: Absolutely. But the plaintiffs' principal challenge here was that that this was a benefit, a unique benefit to the founders and that it was going to potentially give them liquidity and other things that somehow was not available to the A holders. And obviously we believe Williams versus Geier involved the exact same circumstance. We still think it would have been business judgment; but even if not, even if fairness had been the test here, we believe we would have met that burden.

The special committee here --

THE COURT: And I'm trying to put aside, by the way, that one of the benefits of the settlement for me is that I would not have to go back and read Williams v Geier, like, five times because --

MR. LAFFERTY: We would just make you read the --

THE COURT: Incredibly, that is not one of the -- it doesn't flow like a clear mountain

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stream.

(Laughter)

MR. LAFFERTY: Your Honor, you may remember from -- from the trial briefs that we submitted, the mound of paper -- I'm sure you've committed them to memory; but this -- this committee process was not just some sort of short "We got this proposal from the founder, we're going to roll over and" -- "and be done with it." The committee engaged independent advisors. It had Latham & Watkins and Richards Layton as its counsel. It engaged Wasserstein Perella -- or Perella Weinberg I guess it is now -- as its financial advisor. And it proceeded to deliberate and negotiate over this -- over this Class C stock issuance and to consider it and what to do for 15 months. And the committee was fully empowered. It had the power to say no. And it negotiated hard over all of the provisions and protections that it got through the transfer restriction agreement, among other things, the equal treatment provision which wasn't in the existing charter, as well as the stapling provisions which prevent the founders from selling their C shares without selling equal number of their voting shares.

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These were -- these were significant negotiations. We believe that that -- that we would have proven here that the process and the substance of this were fair.

So let me just turn, I think, briefly to the terms of the settlement. I think one thing that one has to keep in mind -- and I think I -- I've kept in mind -- this was never a damages case. This was always they were seeking an injunction to prevent us from going through with this.

We actually agreed -- they sought an injunction initially. We didn't think it made sense to present this case on a record that was paper. We thought the issues were important. We agreed to a trial. And we -- we agreed to hold off issuing the C shares until -- until that trial was going to happen. So this was always about an injunction. It wasn't a damages case.

And the benefits of the -- of the settlement, as I mentioned, were they're really all therapeutic. The modifications -- some of them haven't really been focused on here -- the modifications to the transfer restriction agreement; the agreement that independent directors will review

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issuances of over 10 million Class C in any acquisition and the consideration to afford Class C voting rights in the future. These all have value in addition to the adjustment payment mechanism that you spent more time focusing on.

The amendments to the TRA I think that I would just highlight -- again, I think we've touched on them a little bit. But the concerns that the plaintiffs had throughout this case were that the TRA could just be blithely waived by the board after it was put in place and that the benefits of liquidity and other things that were achieved -- that would be achieved by the founder, somehow to the detriment of the Class As, we never really believed that; but, nonetheless, to address these concerns, we agreed to this heightened oversight procedure.

And I guess there are three or four prongs to it. One is that any -- any waiver has to be considered and approved by an independent committee advised by independent advisors and all.

Second, the committee then makes a recommendation to the full board, and there has to be unanimous approval.

Third, we also agreed to give advance

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notice, if you will, of at least 30 days of the decision to allow time for a stockholder challenge.

And then as Your Honor already hit on, we've also said that we would not object to the application of the entire fairness standard and that we would, in essence, bear the burden.

THE COURT: Would you be open to clarifying language that made clear that that meant that in the event of a litigation challenge, the defendants would bear the burden of proving the substantive economic fairness of the transaction?

MR. LAFFERTY: The answer is yes, Your Honor, we would.

THE COURT: I just think it would be helpful. I really do feel an obligation for us all to all of our successors, whether we're counsel -- every lawyer in the room on the defense side at least has known the joy of stepping into a situation created by a distinguished predecessor's ambiguous drafting efforts. And so to the extent we can spot one now and at least be clear and everybody know what they're getting into, I think that's to the betterment of everybody.

MR. LAFFERTY: And we're happy to

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either have that on the record or to work out some other clarifying language is fine.

THE COURT: I think I'd prefer to have it in the stipulation.

MR. LAFFERTY: Your Honor, I could touch on -- the other two areas that -- that -- that didn't get much airplay were the large issuance restrictions --

THE COURT: Yeah. Will you talk about that one? because the one question I had about that one is is there any potential to game it with incremental smaller ones?

MR. LAFFERTY: Well --

THE COURT: If you know what I mean.

MR. LAFFERTY: So the plaintiffs had expressed concerns that the recap had created the threat that this new class of nonvoting stock could be used in a manner that would cause unnecessary dilution or -- or economic harm. And to address this, we agreed to provide for greater scrutiny, if you will, of large issuances of C shares in the future. And so for a period of three years following the issuance of the C shares, in the event that we consider issuing in excess of 10 million shares for an acquisition, the

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independent directors will consider the effects of any such acquisition on the Class A holders and the company.

Now, you know, that -- that gives a separate, I guess -- I think the board would have done its job, in any event, in one of those issuance. So don't get me wrong. I -- but what it -- what it gets is a guarantee that the independent directors will be tasked with looking at that --

THE COURT: And they will focus on the Class A.

MR. LAFFERTY: Correct.

THE COURT: How about -- wasn't there something on there about issuances to the founders? Or no? Maybe I misread that.

MR. LAFFERTY: Well, there's a -- so the other area was that the plaintiffs have expressed concern about the possibility that the founders -- that once the founders no longer had voting control, a party acquiring less than 25 percent of Google's shares could be in a position to get voting control of the company.

THE COURT: Right.

MR. LAFFERTY: And in order to address

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that issue, the settlement provides that once the founders' aggregate voting control goes below 15 percent, the board will take steps to cause the Class C shares to convert to Class A shares if the board determines in good faith that it is no longer in the best interests of Google to have the nonvoting stock.

And, again, this is a prophylactic, therapeutic --

THE COURT: Their aggregate voting power goes down to 15 percent?

MR. LAFFERTY: Correct. So, again, it's a therapeutic settlement on the -- on the -- you know, on the forward-looking side.

THE COURT: What was this 34 percent threshold and if you go beneath 34 percent, the TRA goes away?

MR. LAFFERTY: So that's -- that's the combined voting power of -- of the founders.

THE COURT: If it goes down to 33 1/2 on one day and then goes up to 35 within a week, is the TRA gone forever? I mean, I remember -- I understood that -- you know, I get the point -- look, we're all dealing with --

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MR. LAFFERTY: Right.

THE COURT: -- future eventualities that may never happen. But I just saw that that one wasn't -- for example -- I mean, I can -- by analogy to the support payment, right, the support payment thing was measured in some way against a range of trading prices or values.

And the only thing that caught my eye was, again -- you know, things happen. People do liquidity events, they do other things. And, you know, this -- this was a little flip -- you know, if you went to 34. -- you went to 33.99 percent on one day, this thing went way, not that you went below it for some period of time, where you were really sure that they had done that. And I just -- I'm not saying it blows the deal. I just want to understand that if on a day they go to 33.99 percent, the TRA goes away.

MR. LAFFERTY: Your Honor, let me just ask my colleagues about that. I'm not sure whether there's a mechanism in the TRA itself that specifies how you measure the 34 percent. I believe there might be something that addresses that in the TRA itself, but I don't have that at my fingertips.

(Pause in the proceedings)

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MR. GARVEY: Your Honor, I'm looking at the proxy statement description of the TRA, and it doesn't answer Your Honor's question. I don't know whether the underlying contract itself does.

THE COURT: Well, maybe your friends, the plaintiffs, can -- I mean, I read it as just a flat out you go to -- and I'm not saying -- again, I'm asking questions. It's not -- I don't want anybody to lose physical or emotional control over the issue.

MR. LAFFERTY: And I apologize, Your Honor. I don't know the absence as I stand here, but we'll try to get that answer -- we'll try to get that answer for you -- for you pronto.

MR. GARVEY: Your Honor, Mr. Bouchard had the contract language here. And it does appear from the contract language that once it drops below 34, it's -- it's terminated, although we're having a hard time envisioning a real-world circumstance under which it would go back up again, since the whole context -- the whole significance of the transfer restrictions in the first place would be how to deal with attempts by founders to liquidate shares and they'd have to buy shares back to get back up.

THE COURT: It's just that has

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happened with founders -- the reality is people, even rich people, have liquidity situations or, you know, they have obligations they have to meet. And sometimes they take some of their equity and they meet that and then they top up later. And, you know -- but I get it. I mean, again, I was just asking -- I wanted to make sure my understanding is correct, which is when they go -- you know, if they go buy it on any day, then it's over --

MR. GARVEY: Right.

THE COURT: -- even if they go back up after that. And I think you would also say if they go back up after that, it would be because they bought voting stock that is aligned with economic interest and that they're not able -- you know, once you essentially get out of that high vote/low equity stock, you're out of that high vote/low equity stock, and if you're buying back up, you're in a way that's much more aligned with the normal investor.

MR. GARVEY: Exactly, Your Honor.

MR. LAFFERTY: That's right.

Your Honor, I know we've already touched on the adjustment payment mechanism, but I want to -- I want to just sort of focus it again

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because the -- the point of disagreement in the case was that it was always that the plaintiffs' position was the new C was going to trade as a discount to the As. Our view was to the contrary.

Our view was that there wasn't going to be a material discount and that even if there was this so-called discount, that that's just another way of saying that the A was trading at a premium to the Cs. And we thought that --

THE COURT: Which is another way of saying --

MR. LAFFERTY: The enterprise --

THE COURT: -- that it's -- right now I have a certain percentage contractual expectancy if Google pays out dividends, and then I have a certain kind of noncontractual market-based assumption about how people look at the equity of the company.

MR. LAFFERTY: Right.

THE COURT: You've now taken my same interest and just divided it in half, and that what you're saying is if the A got a premium to the C, A plus C equals your preexisting ...

MR. LAFFERTY: That's correct. That's correct. And that was our view -- and this was --

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THE COURT: And that's why I'm just analyzing it, and that's why what we've talked about in terms of analyzing whether there's really -- this is like a damages case or any gain sharing for the founders is also true for the founders, because everybody's -- the price support to the C goes equally to everybody.

MR. LAFFERTY: That's correct. And this was going to be the subject of a lot of expert testimony. And the plaintiffs had Professor Clarke or Mr. Clarke and -- and Professor Fischel was going to come in and testify on behalf of the defendants and that would have gotten sorted out here.

But the settlement, the payment mechanism, the adjustment payment mechanism, you know, provides for these payments after calculating potential trading discounts that might occur in the one year after the C begins to trade. And, you know, from our perspective, this was not intended to be a payment per se. I mean, it was -- it was not intended to be a wealth transfer as we talked about. It was done as a mechanism to help support or to lessen the impact if there was going to be a discount. It was intended as a -- I guess as a price support mechanism,

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if you will, and nothing more, nothing -- nothing less. And in that sense, again --

THE COURT: Well, I assume you'd have --

MR. LAFFERTY: -- it could be viewed as therapeutic.

THE COURT: -- it could have -- whether ... Look, I mean, I don't know how anybody knows for sure. I mean, I can easily envision down the road there being a disparity that emerges between these classes of shares, particularly in an eventuality where the founders wind out. I mean, if the founders wind out of their high vote/low equity, then you can easily imagine situations where particular buyers in the market would be far more interested in the shares that could vote and influence the company, for all the reasons why they were talking about somebody being able to buy control with a 25 percent, you know ...

MR. LAFFERTY: Yeah. Your Honor, I guess I --

THE COURT: But that's why you have the trigger in there to try to turn the C into voting stock at some point in the future.

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MR. LAFFERTY: That's true. And I think the one-year period gives the class members the opportunity, if they --

THE COURT: There's --

MR. LAFFERTY: -- there's a likely scenario to sell.

THE COURT: There's a little bit in plaintiffs' brief of a punt on what would be required to give them the vote. Wouldn't the A have to vote to give them -- would the A have to vote to give the C the vote? I would think --

MR. LAFFERTY: About whether a separate Class A vote was required to provide voting rights to the C.

THE COURT: Yeah. I mean, there was a kind of a punt in that. There was something like "a vote, if required."

MR. LAFFERTY: Right.

THE COURT: I kind of want to know whether it would be required and whether the A at the time -- it's not just the board of directors snapping their fingers and deciding they want to turn a broadly traded class of nonvoting securities into voting securities. Oftentimes there are things in

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certificates of designation which protect the interest of stockholders, and would the A have to vote at the time as a class -- well, because -- or even if they don't, who would be voting? Because the non -- you wouldn't have a vote of the nonvoting. So at the time that the C would be turned into a voting security, the voting classes would be the A and the B; right?

MR. LAFFERTY: Right.

THE COURT: But do you need to have a class vote of the A?

MR. LAFFERTY: I -- again, I don't know, but I don't think so. I think it would be a, I think, a combined vote of the A and the B. But I -- again, we'd have to -- we'd have to confer, I think, to make sure that we're right about that.

THE COURT: Which is by no means certain that, you know, to the extent -- it's a huge company now, as one -- unfortunately, we've seen huge companies' market caps become less prodigious at times -- it's not necessarily certain that the voting class, people owning the voting securities are going to be all that hep, getting everybody else to vote; right?

MR. LAFFERTY: I agree with that, although as I stand here now, I'm not sure that the A

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would have a separate class vote, but --

THE COURT: No. I'm just saying --

MR. LAFFERTY: -- I don't believe they would, but --

THE COURT: -- this is a scenario where I believe the A -- or the B is the high vote.

MR. LAFFERTY: The B is the high vote.

THE COURT: The scenario where this kicks in is the B's proportion of the voting power has shrunk to --

MR. LAFFERTY: Yes.

THE COURT: -- being fewer than -- fewer than -- less than 15 percent; right?

MR. LAFFERTY: Right.

THE COURT: So that the bulk of the voting, even if it's a combined Class A and Class B, 85 percent of the electorate who would vote on the amendment would be the Class A. And the -- the stark point that would be put to them is "Do you wish, without compensation to yourself of any kind, to give other people voting rights?"

MR. LAFFERTY: Right. That is correct. That is correct.

THE COURT: And no. And I've learned

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to live as a judge on this Court. I've lived to learn to understand that even if somebody -- if you have a contractual right that's -- to consent to something and that the party proposing that you consent to is that you give them $10, that they'll usually ask for a dollar just for the consent right, in order to receive the 10.

MR. LAFFERTY: Right.

THE COURT: "Well, you mean you're going to give me 10? But I have a right to consent to it, Mr. Lafferty. I'd really like 11."

MR. LAFFERTY: Your Honor, the bottom line is, I guess where we come out, from our perspective, we -- we -- we litigated this case hard. We believe we had strong defenses. We believe we would have prevailed. We -- we've agreed to a settlement that was negotiated.

THE COURT: And would you confirm -- I mean, there was one affidavit that was not something I'd ever actually seen before.

MR. LAFFERTY: Yeah, I -- I was getting to that, Your Honor. And I -- so my -- my -- my wrap-up on the settlement itself was simply to say look, we negotiated -- we litigated hard. The

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plaintiffs litigated the case hard. We were prepared to go to trial. We settled on the eve of trial, literally on the eve of trial. We agreed to the terms that are presented. I think it ought to be approved.

THE COURT: I think I remember the e-mail.

MR. LAFFERTY: Say that again, Your Honor?

THE COURT: I think I got an e-mail.

MR. LAFFERTY: I believe you were in Brazil.

THE COURT: It was interesting that it came from your Yahoo! account. That's not actually true.

MR. LAFFERTY: That's not true.

Your Honor, we would ask that the settlement be approved.

I did want to just briefly -- and I know we haven't gone to the fee issue, but maybe you'll stop me from having to stand up again, is to simply say this: There's a suggestion, at least in one of the objections, that the settlement was collusive because we agreed not to oppose a fee application of up to $25 million.

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And that is categorically not true. The parties never talked about a fee until -- not just after we signed the MOU, but until after we signed the settlement stipulation which was submitted to the Court on August 2nd. So for the period from June until August 2nd, when we signed that final settlement agreement, we did not even talk about the concept of what the magnitude of a fee would be or what their request would be. And it wasn't until after that that we began those discussions and we involved Judge -- retired Judge Phillips as a mediator.

THE COURT: As I say, I've never -- I'm not sure -- I may have. Look, memories are faulty and I may have seen such a document before, but I don't recall it. Is -- but is his affidavit correct?

MR. LAFFERTY: In -- in some specific request, Your Honor? But yes --

THE COURT: I believe I have an affidavit from the mediator saying that he gave the number, which I -- again, I'm assuming that that affidavit was --

MR. LAFFERTY: It is -- it is accurate.

THE COURT: -- I'm assuming it was

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procured with consent --

MR. LAFFERTY: Correct.

THE COURT: -- of all parties --

MR. LAFFERTY: It was.

THE COURT: -- to the mediation. Okay.

MR. LAFFERTY: It was, and it is accurate. And the parties had negotiated over it. They had, obviously, diametrically opposed views about the number --

THE COURT: But you were aware that the plaintiffs were requesting affidavits?

MR. LAFFERTY: Yes, we were.

THE COURT: Okay.

MR. LAFFERTY: And we saw it before it was submitted.

THE COURT: And you gave them permission to --

MR. LAFFERTY: We did.

THE COURT: Okay.

MR. LAFFERTY: Yes.

So, Your Honor, that's all I have to say about it. I -- the notion that it was somehow collusive is just false.

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Thank you.

MR. BLOCK: Thank you, Your Honor. Just a few points. I'll try to be somewhat brief.

Just to follow up on what Mr. Lafferty said, yes, this -- any suggestion this is collusive is just flat-out wrong. The number we got to was a recommendation that was made by Retired Judge Phillips. So that's how we got to that number.

THE COURT: I take it you had a much higher number?

MR. BLOCK: We did, Your Honor.

If I can address the last point you made about the Cs getting vote rights and the founders wanting out.

And I think that -- that, along with a lot of the other issues, highlights that this was not just your average run-of-the-mill kind of a case. There were a lot of complexities to this case. And we did our best to try to address them in the settlement.

And that was an issue. And we identified that issue down the road as well, what happens when the founders leave? You've got probably less than half the economic ownership in the As and more than half in the Cs without voting rights, and we

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tried to create a mechanism so this could be addressed. And the reason why our understanding that the board has to recommend it is because it would require an amendment to the charter.

THE COURT: Oh, no, no. I understand why the board has to recommend it.

MR. BLOCK: Yeah.

THE COURT: Just a question of --

MR. BLOCK: Yeah.

THE COURT: -- as -- unlike the situation here, right --

MR. BLOCK: Right.

THE COURT: -- in this situation, if there weren't the founder voting power, we wouldn't have a case; right?

MR. BLOCK: Correct.

THE COURT: The circumstances where we're positing where the high vote/low equity stock falls to less than 15 percent of the total voting power --

MR. BLOCK: Right.

THE COURT: -- the idea of being able to give the Cs -- if the idea -- if the concern there, for example, is that, you know -- you're at a point in

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time where people can buy influential blocks of voting securities in Google because the founder voting -- the high vote/low equity stock now is only 15 percent thing, the idea that when the board of directors now says "Let's go out and give the C voting rights," that it's -- you know, that that's just the easy slam dunk, especially because I do expect that over time, given the market cap of Google, that the identity of interests that will exist the nanosecond after the C goes out and before the high-velocity traders have gotten their portion of it, you know, or are into it, that that asymmetry will grow, and such that for years down the line there's no necessarily -- you know, there's not going to be it necessary where everybody has sort of equal shares of A and C.

MR. BLOCK: Right.

THE COURT: Right. And there can be entire classes of -- for example, if the C becomes the primary -- and you can see this, especially if there's not a discount. I mean, one of the issues for the discount, the support for the discount issue, the argument would be that, you know, you have to give more of it to employees if there's a discount.

MR. BLOCK: Right.

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THE COURT: But at some point -- there could be a very different block of stockholders who own the B and the C and since the -- I mean not the B -- the A and the C.

MR. BLOCK: Yes, right.

THE COURT: The A would then be voting on giving the C voting rights. It's not clear that they're just going to do that.

MR. BLOCK: I agree, Your Honor. Obviously that 15 percent number I will tell you was a point of negotiation. And we certainly hope -- what we've seen so far from the company is the two times Page and Brin sold stock, it's pursuant to 10b5-1 plans.

THE COURT: Right.

MR. BLOCK: And we certainly hope that will plan for the eventuality that when they decide to leave, that even before they get to 10 percent, that they will undertake the vote with Page and Brin voting to give the Cs voting rights.

So exactly what they -- one of the reasons why they say they want this plan is to prevent, you know, a corporate raider from coming in, that they'll address that in the future so it won't

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happen after they leave.

THE COURT: Well, again, there's a lot of practical reasons why --

MR. BLOCK: Yeah.

THE COURT: -- their exit, you know, it's not an easy total exit --

MR. BLOCK: Right.

THE COURT: -- you know, without some sort of big transaction or something like that.

MR. BLOCK: Right.

And as far as the -- the 34 percent trigger number in the TRA that you were asking about, you know, our understanding is that yes, once they go below 34, they go to 33.99, that TRA falls away. But at that point in time, if they're going to go out and buy in to get over the 34 percent, they're going to be buying As. As a practical matter, they wouldn't do it to game the system. It doesn't make any sense to us.

As far as what we're considering the economic benefits in this case -- and you heard from Mr. Lafferty exactly that. They never viewed this as a damages case. And had we won, we would have gotten an injunction; that would have been it. But if you want to just look at what we'll call the trading

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benefits -- and I know what Your Honor said is that Page and Brin get to share in those -- pursuant to their 10b5-1 plans, they can sell collectively another 2 million of shares. So presumably they'll sell their 2 million C shares. Mr. Clarke estimates, based on prior trading, that there will be 46 million shares sold. He said, "I went back and looked at the last two years" -- and I think one year -- "and the turnaround in the institutions from the 13Fs," and it shows that 46 million shares were turned over.

So if we just take that number -- and we think that's a low number because we think more people will sell Cs than previously sold As -- and you back out this trading benefit that would go to Page and Brin, it's still $310 million of trading benefits that go just to the A shareholders without including Page and Brin.

Did that make sense or should I --

THE COURT: No, it doesn't.

MR. BLOCK: What -- what --

THE COURT: It's either pro rata or it's not, and you've conceded it's pro rata. And I don't know -- you know, I don't know Mr. Brin and Mr. Page. And if I knew them well enough that they

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share with me their anticipated plans under -- you know, for selling over the next year, I would recuse. And I have no affidavit in that. So I don't know and, you know, I'm not sure, you know -- I'm not sure the normal Burton Malchiel rules about the past not necessarily being prologue doesn't apply also to this situation.

MR. BLOCK: I understand, Your Honor. I'm just going by their -- I'm just trying to explain --

THE COURT: Again, let's not argue the inarguable. It's either pro rata or it's not. What -- you did not get at the bargaining table any subsidy from the founders or from Mr. Doerr to this, such that there's a transfer payment from the nonclass stockholders of Google to them. You got -- you did get things from the founders that restricted their future flexibility, and that's the things we've been talking about in terms of the TRA. They gave up things like having to now have every single board member in the future approve any amendment. They gave up other sorts of things which I, you know, recognize as potentially valuable and important; but here, you're just -- I think we're just at a point where

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you're kind of imagining situations where they won't sell as many shares, so the price support won't be as beneficial to them as it would be to others; right?

MR. BLOCK: No. That's not the point I was trying to make. Obviously I didn't do it very well.

The point I was trying to make was that if you just assume what Mr. Clarke does in his report, that of the current Class A shareholders, when they receive those C shares, they will sell 46 million of those C shares, that the trading benefit to them as a result of this plan will be $326 million, irrespective of what may go to the founders.

I guess our view is that even if the founders sold more than what's in their 10b5-1 plan, it's not going to affect the amount that's going to go to the Class A shareholders. So even if you just look at those selling benefits that are paid by new C shareholders, it still creates $326 million.

THE COURT: The selling benefits are all paid for by Google.

MR. BLOCK: No, Your Honor.

THE COURT: Yes, they are.

MR. BLOCK: No.

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THE COURT: Yes, they are, because the selling benefit that Mr. Clarke aptly points to as plausible is that people who purchase the C will purchase at a higher valuation than they otherwise would because of the contractual promise of Google to deal with any discount to the extent provided for in the stipulation of settlement. Thus, any trading benefit is paid for by Google.

MR. BLOCK: But that -- what -- I think what we're suggesting or what we're saying is, what Mr. Clarke is saying, the $3,626,000,000 that he's pointed to is new money that --

THE COURT: I think Google has been really good, but now we're getting into alchemy. The $326 million of trading benefits is precisely in Mr. Clarke's, I think, fully rational affidavit. Again, I think the -- I don't even know that Professor Fischel and Mr. Clarke would have an argument about the logic behind Mr. Clarke's thing. I think they have an argument primarily about whether there will be a discount at all.

MR. BLOCK: Yes.

THE COURT: Mr. Clarke's point is as follows: To a purchaser of the C who's going to pay

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money for the C, if that purchaser knows that along with the C share comes a contractual right at the end of the year, that if there is a trading discount that meets the --

MR. BLOCK: Right.

THE COURT: -- formula in the thing, that you'll get a true-up of some amount, then that essentially affects the security, because what you're buying is the Class C plus the contractual expectancy as a result of that promise you'll pay a higher valuation than you otherwise would. It's not distinct from, in fact, from the true-up. I guess you could argue that it has some complex interaction with the true-up being made because in a weirdly but weird thing, the possibility of the true-up being made minimizes arguably the probability that the discount will arise, that actually would result in the true-up.

And it's early and most of us haven't been fully caffeinated and it's Monday. So I don't -- you know, it's hurting my head to even think through this, and I know it's hurting your heads. But I don't really view -- I don't think you're arguing a distinct thing, because it's still the contractual promise of Google to make the payment at the end of the year,

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which results in both the payment itself and any trading benefit to those who sell. That promise is -- is equally beneficial to the nonmembers of the class who are Google stockholders, including the two founders and Mr. Doerr, and they're all pro rata; right?

MR. BLOCK: Uh-huh. Uh-huh. I guess the only way we looked at it, Your Honor, is those -- the trading benefits -- I understand your point.

THE COURT: I think I -- I know how you've --

MR. BLOCK: Yes, okay.

THE COURT: Look, I understand the powerful incentives that you have to look at it the way that you have.

MR. BLOCK: Okay.

THE COURT: Just understand that I have a professional duty to look at it in a way that's different from either side of the --

MR. BLOCK: Understood, Your Honor.

Just if I can just address the points that were made about the lodestar and --

THE COURT: Yes. That is pretty hefty, don't you think?

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MR. BLOCK: It is and it's not. This -- we litigated the case on a compressed time frame. We filed this case in April and we originally had an October trial date. So we really had to gear up very quickly and put --

THE COURT: No, no. I get that. I'm talking about the 600 -- what was the average?

MR. BLOCK: 608 I think is what Mr. Lafferty said.

THE COURT: Right.

MR. BLOCK: This is a case which actually required a lot of partner time because of the complexities of the case. I mean, we spent an enormous amount of time with our experts trying to figure out and understand the effects of the trading discount, what the potential benefits could be to Page and Brin out of this. There were 17,000 documents produced here. So it wasn't like it was a heavy document-intensive case where we had to have -- you know, most of the hours were put into reviewing documents.

The heavy hours in this case were preparing for and taking the depositions, putting together the theory of the case, understanding the --

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the economics of the case and the potential value of the case, the settlement negotiations.

We then went back to the discovery and trial prep. Most of that is not the kind of thing that we were going to have a, you know, first- or second-year associate do. The document review, yes, we tried to have -- our associates did document review. I can assure you I didn't do any first-level document review in this case. I got what we were told were the hot documents, and then we went from there to prepare our documents.

THE COURT: Hot documents?

MR. BLOCK: Well, that's what we call them. But --

THE COURT: You know, some of us learned early in our career to never create a RedWeld containing the words "hot documents" on it.

MR. BLOCK: Well, I will pass it on to the rest of the plaintiffs' bar.

So that's what you see the high hourly rate, just because of the complexities --

THE COURT: You could have somebody, like, with -- who had bifocals, look over them, or, like, had the reading glasses, look over you and

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instruct you never to do that again.

MR. BLOCK: I will take that to heart, Your Honor.

THE COURT: I think there are two of us in the room who have experienced that very precisely at one point in time.

MR. BLOCK: Okay, Your Honor. Thank you.

So that's why the lodestar is where it is, and that's why you have the high hourly rate, because of the nature of the case and the work we put in. And, you know, we then put in a lot of work to get ready for trial.

THE COURT: I just -- I understand -- I mean, you know -- I just think we all have to recognize -- I mean, your lodestars are not market-tested rates; right? What I'm saying is --

MR. BLOCK: Not -- not -- yes, not in the traditional sense in that we have -- I mean, I have some clients who pay me by the hour at those rates, but certainly I can't say all my clients.

THE COURT: Right.

MR. BLOCK: Most of the cases are contingency.

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THE COURT: Right. I'm just -- you know, I mean, that's --

MR. BLOCK: Yes.

THE COURT: -- you know, senior associates don't bill out at 600, do they? Or do they?

MR. BLOCK: In my firm, they do not. We -- those aren't our rates.

THE COURT: Okay.

MR. BLOCK: But that's why we got to the lodestar that we did. And, you know, that's -- unless Your Honor has any other questions.

THE COURT: By the way, one good idea in discovery is to always ask in document requests for -- "Produce all files labeled 'Hot Documents.'"

(Laughter)

MR. BLOCK: We'll start doing that. We will.

Okay. Thank you, Your Honor.

THE COURT: Thank you.

MR. PASKOWITZ: Excuse me, Your Honor. A personal privilege, if I may.

THE COURT: Uh-huh.

MR. PASKOWITZ: Mr. Pentz expressed

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some doubt whether I devoted as many hours as I put in my affidavit. At this stage of my career -- Your Honor knows me -- I take on very few cases. In the past year or two -- maybe I filed one case in the past year in addition to Google. This is the case I devoted my time to in the past year. My colleagues can attest to my e-mails at 2:00 and 3:00 in the morning. This case aggravated my long-standing insomnia. But between briefing, discovery, trial, and so forth, I may have filed two cases, maybe one case in the past year. This is the case to which I devoted my practice.

Thank you, Your Honor.

THE COURT: Do we have all three things to do?

MR. BLOCK: I believe so, Your Honor.

THE COURT: Class certification?

MR. BLOCK: Yes, Your Honor.

THE COURT: This is -- as is traditional, we have the three things to do. First is whether this should be a class certification.

Corporate actions of this kind are the quintessential examples of when you need to have a single answer to a problem. The only variation

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between class members is the amount of shares they own as -- as a -- in this class, the proposal is essentially the certified class, excluding the founders and Mr. Doerr in their capacity. And you cannot have opt-outs in these kinds of cases. And you just cannot. And that's in keeping with long-standing Delaware tradition. And the proposed order makes the requisite findings, and class certification is in order.

With regard to the settlement, this is a complicated and difficult and novel case. Williams versus Geier would be strong precedent on the side of the defendants. You could argue that the logic of cases like Blasius would be on the other side and that just like when people say that, you know -- when people are negotiating deals, a preemptive price is its own deal protection, then a wonderful reputation as a founder is your own ballot box protection.

The reality is that was going to be a big part of what the trial was about. Williams v Geier would weigh heavily in favor of the defendants. I think there are some tensions in our law, because it's never been the case that interested voting power gets a pass simply because it has voting power. That

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would be greatly inconsistent with Schnell. And there are some tensions in the law that -- when you suggest an interested voting power can somehow have a cleansing effect.

I think the stronger argument on behalf of the defendants is that they were well-motivated independent directors who they would have presented at trial who believed that this was the right thing for Google's public stockholders and that from the beginning, everyone has been clear with the people who lined up in hoards, as if they were young teenagers trying to go to a One Direction concert, to buy Google stock, with the understanding that these founders were going public but with no attention -- intention to relinquish voting control over the company that they founded and loved, and that when you invested in Google, that was sort of your understanding.

Now, I understand the plaintiff and the class' point is that the understanding is the understanding at the time of their instruments. And we're at a new dawn in terms of the company perhaps being at a stage when it needs to issue additional equity. That puts tension on the voting control

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mechanism which was put in place at the IPO stage. But that's what the trial was going to be about.

And I don't think -- I was -- you know, you get to a stage in your judicial career, which some of our distinguished colleagues in the room can identify with, when you've really had enough interesting cases, so that even if you have a really interesting one, you cannot fairly say that the disappointment factor of it going away actually outweighs the psychic impersonal benefits of simply being able to turn to your other workload. I can't say that this was sufficiently interesting that that -- that I wanted the trial to go forward. But it was interesting and novel. And it was a kind of unique situation. So I think it would be hazardous for anyone to predict how it would have come out.

And I think the plaintiffs would have also had to confront the reality that while they had reasoned arguments, that what the committee negotiated was not adequate, that there was clearly a lot of negotiation and there were protections that were put in place that were designed to address any abuses that might emerge as a result of that. And the plaintiffs would have had to overcome that. And very talented

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and skillful defense counsel, who were -- this was a situation where, you know, you could imagine situations where a founder or a controlling family, where the idea that it would be laughable that it would be beneficial to others to give more of an opportunity for them to retain voting control, where that would just be kind of met with obvious guffaws.

That's not the case here. I mean, the reality is this is a rather astonishing market success. These are two folks who actually created a company that is, in fact, a verb. They arguably created a company where many Americans spend more time with their invention than the people to whom they owe the most important family and friendship obligations. And that's been hugely beneficial to investors.

So there's a plausibility here in this odd context to this that there wouldn't be in other situations. And that's been proved out by business experience.

So all of that -- for all those reasons, given the novelty of the legal dynamic; given the sort of novelty of the business dynamic; and given, as I said, Williams v Geier, which I take seriously -- and I didn't mean to be critical of it.

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I think that was a case that also dealt with an unusual factual situation, and sometimes judicial decisions dealing with those have all the complexity in them of the context. And every time I read it, I have to relearn the facts of the underlying transaction, because they were pretty complicated.

But for all those reasons, I think the settlement should be approved, because when I look at the gains that were achieved by the plaintiffs, I -- I think that they justify the giving of the release.

I believe that the primary gains are in the strengthening of the TRA and in the corporate governance protections that kick in when the founders' percentage interest goes down. I give less weight, as I said, to the -- I think it's nifty to think of converting the C into voting stock. I'm a little less optimistic that that can be done. I think that a very strong antiwaiver aspect of the settlement has considerable value, especially in this day and age, being the reality is that there is a high degree of scrutiny of independent directors. There are network effects that we all know about that come into play with independent directors who often, you know, frankly, do serve as professional directors and who

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like to stay in the network of independent directors; that when they take action at one of the companies in which they sit, can have an effect on their ability and popularity at other boards of directors and where other nominating committees may not necessarily wish to be on their slate in the future if they draw adverse attention.

So by requiring essentially every independent director of Google to approve a waiver of the TRA, that gives a lot of assurance to the public shareholders that, frankly, you know, it may be improbable that you'll get any amendment, or, at the very least, the negotiating power of the independent directors will be so substantial that if there is an amendment, there's an ability to actually get concessions from the founders that fully justify in the public investors' mind the amendment. Also, these things which give increased leverage to the independent directors to the extent of big issuances are of value.

I am not saying that the support -- economic support provisions of this are not potentially beneficial to Google. I think, though, we have to be mindful of the fact that there really -- I

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don't want to put harm -- I would say cost mitigation factors, which is absent the creation of the C, you wouldn't need anything like this. They're not -- this is not like getting an extra dividend at the expense of the founders. This is essentially a transaction cost to going forward with this transaction.

The plaintiffs have presented a well -- I actually don't -- you know, to the extent that Professor Fischel's opinion is that there will be no discount or market anomaly at all between the A and the C, I find that a little unusual, to be honest. I do. I mean, I'm not saying that there will be a 25 percent thing; but the idea that there isn't even in this context some utility to having the vote in the future, especially when you get pricing anomalies -- I mean, we're talking about something -- I believe that the defendants -- that there will be no discount at all. The market's wacky enough that to imagine that they just trade one for one, I mean, that seems to be mathematically improbable, but maybe they will.

But all I'm saying is I give some weight to Mr. Clarke's idea that there could be -- and he looked at some other situations -- that there could be a disparity of some account -- of the thing.

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That's why I was asking the question I did coming into this, which is it would be one thing if the plaintiffs extracted from -- and one can imagine litigation settlements are powerful and normal things like you have to treat everybody equally. Well, no, you don't have to in a settlement; in a situation where the true-up was only available to the members of the class; where the founders were locked up for a year, could not share in the one-time payment. Well, then, there would be some form of transfer payment between -- from the defendants to the class, and you could figure out the economics of that, and that would be a subsidy economically between -- by the founders, not just Google itself, to the class.

That's not this. This is not one of the damages cases that the plaintiffs have cited where the Court has looked at a damages payment that went to the class and that was not shared in by the defendants. It's not this.

I'm not saying that -- again, I want to be clear about that. I'm not being negative about it. I'm being observational. But it's important, as we look at this, to be clear about what it is.

I'm also not saying it isn't

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necessarily beneficial to Google sort of as a whole, which is, you know, if you're going to use this C, this nonvoting currency for employee compensation purposes, if you're going to use it for acquisition purposes, then one hopes that Professor Fischel's opinion is actually -- comes to be true, because to the extent -- let's imagine a year from now the C trades at a 25 percent discount to the A and you wish to do a stock-for-stock merger with a company that we would all think is sizable because it's got a market cap of $3 billion. Google, you know, thinks that's cafeteria rounding error after foie gras Thursday, or something like that, you know, a motivational event for -- or if you had employees like me, it would be a motivational event -- is you make a $3 billion acquisition, and you want to do it by giving the stockholders of the $3 billion corporation, you want to give them C shares. If the C shares are trading at a discount to the A shares, that's not going to be particular -- you're going to have to give them more of it. And so there's some interest.

But, again, that's not -- this is not -- I think that's more of a corporate therapeutic. And where I have a problem -- and I will say this in

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terms of approving the settlement but also when I get to the fee: Look, this is in some ways initiated by the founders. Not in some ways. It was initiated by the founders. The board thought it was a good idea, but the costs of all that are being borne by the Google stockholders as a whole on a pro rata basis. And that kind of subsidy to the C shares in order to prop them up and the benefit to being -- using -- is really all a matter of doing this transaction to begin with, because if you were giving out voting shares, you wouldn't have to do any of this. You would simply be giving people voting shares. They would obviously have to assess that in relationship to the founders' voting control, but there would be none of the oddments of what happens down the road if the founders get this and whether -- you know, you'd be getting traditional stock with at least the voting rights that the existing public stockholders already have.

So when I approve the settlement, I give credit to this for, again, really, this currency -- in some ways I actually view it as more beneficial to Google in terms of being able to use the C stock for the corporate purposes that people are talking about than I do to the members of the class,

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because from the members of the class, this is simply -- I don't even know what it is. It is simply -- I don't really view it as a net gain. I view it as cost or harm mitigation that comes in connection with a complicated corporate transaction; and that, as I said, if you looked at it on a -- if you looked at it simply alone and you took Professor Fischel's view -- he's the defendant -- I think he would say, "Wait a minute. You own A right now. Splitting it into" -- "you own A and B. Let's split it into A, B, plus you get C. Because we split it into something that is nonvoting, there's the potential for an anomaly to come to pass because the C that we give you doesn't have voting rights. So we're going to make a transfer payment from ourselves in a year which has unknown or complicated tax things that we'll have to invest by people who have to advise people about. We'll have to pay investors." I think they would say "Don't go forward with the transaction; just leave everybody where they are."

If you're going to go forward with the transaction, I do think that there are some -- the benefits I've mentioned in terms of the corporate objectives, but I don't think that they can be

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translated into a billion-dollar benefit economically to the class, nor -- I mean the trading benefit -- it's -- again, I just -- I'm not saying that those things aren't really numbers in some sense. I just don't think that they're -- they're real in the sense that the plaintiffs would have me adopt.

But overall, I think given the difficulties that the plaintiffs faced, the precedent like Williams v Geier, and this -- the meaningful benefits achieved by the corporate governance provisions, I'm going to approve the settlement.

When it comes to the fee, I think our Supreme Court has been very helpful in making clear that whether -- that -- whether something is quantum meruit or whether something is in the aptly named Sugarland basket, the key is really looking -- the Court trying to make a principled assessment of the benefit to the class and to provide a reasonable fee that takes into account the risk of litigation, the complexities of it, the quality of counsel's effort, and to provide a reasonable fee that recognizes that you need to incentivize people to take on these kind of cases because they take on many cases where they don't get anything.

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And with all those factors taken into account, I would say I can't -- again, I'm not looking at this in the same way that the plaintiffs are. I give credit that the mediator was involved. My sense is that he looked at this in the way that the plaintiffs did. I really don't know what to make of the affidavit. I'm comforted that everybody saw it. It gives me comfort, although I really didn't have much doubt in this situation that it was negotiated in good faith, because the principal terms of the settlement had already been established; but I can't get to the 25 million box because, again, the mediator may -- and I respect that a mediator was involved. I think the only way you get there is to actually look at this as if it was some sort of damages case.

And I think the problem with it is all the things that I've said before, which is then this is a damages case in which the principal defendants who are the ones who are the interested party -- and I don't say that in a pejorative sense; but the arguably interested party, which would be the two founders whose voting control was the subject of this, received the same economic benefits as the members of the class. That's not -- I don't really get that. And

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even recognizing that there are derivative cases where people say, "Well, wait a minute. You shouldn't measure the fee because I own 35 percent of it. You should really deduct my 35 percent," well, that's a derivative case and -- and this isn't in -- in some ways it's not a derivative case.

Also, there's no money going into Google. This is not like there's money going into Google and the defendants are arguing, "Well, wait a minute. There should an offset for the 17 percent that really is ours." We're not even there. You're talking about pro rata treatment for the class -- all the stockholders of Google, including the defendants.

So I think giving credit to the mediator, "I'm going to give credit when I get my fee," I can't get anywhere close to 25 million. And it makes me feel not as bad as the people on Wheel of Fortune who did that devastating thing to that young man who clearly got a word right and then they penalized him for mispronunciation and took away a million dollars. I don't feel as bad as they should. And that's a normative statement that I make, but -- and I admit that that's a contestable proposition, and defenders of Pat Sajak may -- I note their objection.

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I will get to a substantial fee, and the fee I get to is $8 1/2 million. And I'll explain that.

The lodestar is 7. Is that right?

MR. BLOCK: Yes, Your Honor.

THE COURT: And the lodestar does not include the fees and expenses -- I mean the expenses?

MR. BLOCK: No, it doesn't, Your Honor.

THE COURT: Okay. I'm going to get to 8 1/2, plus I will give you the expenses. So -- and the way I get to that is the following: I think this is largely a corporate governance settlement. I think the benefits are substantial. I don't think it's a home run. It's somewhere between a solid single and a double.

What I mean by that -- and I asked some questions about that -- is would I feel differently that this was a more substantial settlement if the dividend -- the true-up was not available to the founders? Yes, I would. That wasn't achieved. Would I feel differently even if, frankly, the advisor cost of this were paid from the founders? I would. Now, that sounds small, but even if D and O

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insurers paid for are this, there's no free situation like this. It's priced. And I'm not saying that, in the scope of Google, that's market moving, but this is litigation. And what the plaintiffs are asking me to do is to size a benefit. I didn't see any of those benefits. What I saw is the corporate governance things.

I think when you look at the lodestar, I think, one, I do credit the objector. I think the lodestar is healthy, you know. I think it's, you know, had a really hearty breakfast. And I don't quibble with the hours or anything like that. I think everybody did work probably very hard to settle on the eve of trial, and I give credit to the fact the plaintiffs took it to the eve of trial.

But I think a million and a half on top of a lodestar, which is essentially what it is, I think that is a pretty good incentive premium. And I'm going to give my former -- you know, our former member of the judicial club, I'm crediting a full half million of that to Judge Phillips in the sense I probably would have only given a million-dollar premium, but a mediator was involved. And that gives me some comfort, and, you know, you can credit him

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with a half million. I can't get -- the delta on the other one, I think he and I may be just looking at the case in a different way totally economically. I think given the substantial expenses you put in -- and I know those are real out-of-pockets -- I'm going to award that on top of what I did. So it would be 8 1/2 plus the expenses that you submitted.

If you could scriven with the defendants the entire fairness language, I would consider that a meaningful contribution of us all, to future Google stockholders, future Google advisors, future plaintiffs' lawyers, and future members of the Court of Chancery and the Delaware Supreme Court and current ones because you never know how quickly these things move.

But I appreciate everybody being to the point. I appreciate the objector being to the point.

Do we need to do anything else today rather than just get the settlement scrivened and an order filled in? I prefer to see the -- I think for fairness to everybody, I'd prefer to give you the chance to scriven it and then to enter the final order that reflects the little clarification. And that's

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all it really is, I think, is a clarification.

MR. LAFFERTY: That makes sense to us, Your Honor.

MR. BLOCK: Yes. Same with us, Your Honor.

THE COURT: Okay. Well, I'll look for that. And, again, thank you all for coming in on Monday morning.

(Court adjourned at 12:05 p.m.)

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CERTIFICATE

I, NEITH D. ECKER, Chief Realtime Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify that the foregoing pages numbered 4 through 112 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Chancellor of the State of Delaware.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 8th day of November 2013.

/s/ Neith D. Ecker

Chief Realtime Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Delaware Notary Public