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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

**SECURITIES AND EXCHANGE
COMMISSION,** :
 :
 :
 Plaintiff, :
 :
 v. :
 :
 McAFEE, INC. (f/k/a Network Associates, Inc.), :
 :
 Defendant. :

C-06-0009 (PJH)

**MOTION TO AMEND THE DISTRIBUTION PLAN
FOR A SECONDARY DISTRIBUTION FROM THE MCAFEE FAIR FUND**

Jeffrey Plotkin, the Court-appointed Distribution Agent in the above-captioned case, respectfully requests that the Court enter an Order amending the present Plan of Distribution for the McAfee Fair Fund to permit a secondary distribution of funds to eligible claimants in an estimated amount of approximately \$1.9 million as set forth below. Counsel for Plaintiff Securities and Exchange Commission (the "Commission") concurs with this request.

BACKGROUND

On January 4, 2006, the Commission filed a Complaint in this action alleging that McAfee, Inc. formerly known as Network Associates, Inc. ("McAfee") defrauded investors by engaging in a scheme to overstate its revenues and earnings in violation of the federal securities laws. On February 9, 2006, this Court entered final judgment against McAfee (the "Final Judgment"), as to which McAfee consented without admitting or denying the allegations in the Complaint. The Final Judgment ordered McAfee to pay disgorgement of \$1 and a civil penalty of \$50 million. Accordingly, on February 13, 2006, McAfee paid a total of \$50,000,001 to the Clerk of the Court.

On August 7, 2008, pursuant to the Commission's motion, this Court entered an Order Authorizing the Creation of a Fair Fund and Appointing a Distribution Agent. Pursuant to the Order, the Fair Fund included the funds paid by McAfee and deposited in the Court Registry Investment System ("CRIS") and accrued interest. The Order also appointed Jeffrey Plotkin as Distribution Agent to perform, in consultation with the Commission, all functions required to design and implement a plan to distribute the proceeds of the McAfee Fair Fund.

On March 3, 2009, pursuant to the Commission's motion, the Court approved a Distribution Plan ("Distribution Plan") for the McAfee Fair Fund. The Distribution Plan set out, *inter alia*, procedures for the allocation of the Fair Fund among eligible claimants and for the administration of the claims procedure. The Distribution Plan provided that, if the funds available for distribution were insufficient to meet the aggregate loss amounts of all Eligible Claimants,¹ the Distribution Agent would distribute funds *pro rata* based on "the ratio of the Eligible Loss Amount for each such Eligible Claimant to the aggregate Eligible Loss Amount for

¹ Capitalized terms have the same meanings ascribed to them in the Distribution Plan.

all Eligible Claimants.” (Distribution Plan (“Plan”) at ¶ 2.6.) The Plan provided that, following the distribution to Eligible Claimants, if “funds remain in the Fair Fund in addition to tax reserves, those funds shall be paid to the Commission for transfer to the United States Treasury.” (Plan, ¶ 2.7.)

On May 15, 2009, the Court granted the Commission’s motion to transfer an additional \$15 million to the Fair Fund in connection with settled proceedings brought by the Commission against Ingram Micro Inc. for its alleged role in McAfee’s alleged financial fraud. Similarly, on January 13, 2010, the Court granted the Commission’s motion to transfer an additional \$1,347,563 to the Fair Fund in connection with the resolution of civil actions brought by the Commission against former McAfee officers for their alleged roles in the alleged fraud.

On November 24, 2009, the Distribution Agent filed an unopposed motion to amend the Distribution Plan to remove provisions contemplating a minimum level or amount of distributions to Eligible Claimants. In particular, the original Distribution Plan permitted the Distribution Agent to set a Minimum Distribution Amount, or “specified dollar amount that an Approved Claim must equal or exceed in order for a distribution to be made to an Eligible Claimant.” (Plan, ¶ 1.21.) As set forth in the Distribution Agent’s motion to amend, the purpose of the provision was to enhance the cost efficiency of the distribution process by eliminating the need to expend a disproportionate amount per claim on the processing of *de minimus* claims. As also set forth in the Motion to Amend, it was later determined that, for purposes of the primary distribution of funds, applying a Minimum Distribution Amount of less than \$50 would not have yielded measurable processing and administrative cost savings. On November 25, 2009, the Court entered an Order amending the Distribution Plan in accordance with the Distribution Agent’s motion to amend.

On January 22, 2010, the Distribution Agent filed a motion seeking authority to distribute from the Fair Fund the sum of \$67,230,000 to a total of 16,183 Eligible Claimants on a *pro rata* basis pursuant to the Distribution Plan. On January 29, 2010, the Court granted the motion. Accordingly, in February 2010, at the direction of the Distribution Agent, the Claims Administrator for the Fair Fund, The Garden City Group, Inc., mailed or otherwise initially distributed \$67,230,000 in payments to Eligible Claimants.

In consultation with the Commission, the Distribution Agent and Claims Administrator then made extensive efforts to complete the distribution of the Fair Fund to Eligible Claimants, including, among other things, the oversight and status of the distribution, the initiation of an outreach campaign to reduce the number of undeliverable and uncashed checks, the reissuance of checks as warranted, communications with and responses to inquiries from Eligible Claimants, extensions of stale check dates as warranted, review of telephone hotline and website information for use by Eligible Claimants, communications with the Clerk's Office and Escrow Agent regarding the transfer of funds to and from the CRIS and Escrow Account, preparation of periodic Fair Fund reporting and other matters respecting the administration of the Fair Fund. By October 2010, the Distribution Agent and Claims Administrator had successfully distributed in excess of \$65,700,000 to Eligible Claimants and otherwise had exhausted all reasonable efforts to complete the primary distribution of the Fair Fund.

As these efforts culminated, the Claims Administrator reported that there remained uncashed, returned and refunded payments to Eligible Claimants in the aggregate amount of approximately \$1.5 million.² Based on its extensive experience in effectuating other

² In addition to uncashed and returned payments, the Claims Administrator also received several refunded payments, which represented instances in which claimants initially cashed payments and later refunded those monies to the Fair Fund.

distributions, the Claims Administrator further noted that a small number of Eligible Claimants might still make requests for the reissuance of payments in the coming months. In addition to remaining funds from uncashed, returned and refunded payments, there are also available funds as a result of recent tax refunds in excess of \$400,000 deposited in the CRIS by the Tax Administrator, Damasco & Associates, LLP.

PROPOSED SECONDARY DISTRIBUTION

In light of the availability of remaining funds following the exhaustion of reasonable efforts to complete distributions to Eligible Claimants, the Distribution Agent requests approval to amend the Distribution Plan to permit a secondary distribution to Eligible Claimants who successfully received a distribution during the primary distribution of funds from the McAfee Fair Fund as set forth below.

As of October 31, 2010, the Fair Fund Escrow Account maintained at Signature Bank had a balance of \$1,504,232.³ As of October 31, 2010, the CRIS had a balance, including the recent tax refunds in excess of \$400,000, of \$583,475. As of October 31, 2010, the aggregate funds available in the McAfee Fair Fund were \$2,087,707. Taking into account the possibility of additional requests for reissued payments to Eligible Claimants, and the costs and expenses associated with the ongoing administration of the Fair Fund, sufficient funds still remain to effect a meaningful secondary distribution in an estimated amount of approximately \$1.9 million.⁴

Consistent with the primary distribution in this matter as well as plans for secondary distributions in other Fair Fund matters, the proposed secondary distribution would proceed on a

³ Figures herein are rounded to the nearest dollar.

⁴ The final amount of the proposed secondary distribution will be determined based upon any approved requests for the reissuance of payments by Eligible Claimants through the date of the Court's Order on this Motion and any approved disbursements for costs and expenses through the date of the Court's Order on this Motion.

pro rata basis to Eligible Claimants who successfully received a distribution in the primary distribution from the McAfee Fair Fund. As set forth above, the original Distribution Plan provided that, if the funds available for distribution were insufficient to meet the aggregate loss amounts of all Eligible Claimants, the Distribution Agent would distribute funds on a *pro rata* basis. (Plan, at ¶ 2.6.)

In addition, publicly-available plans for possible secondary distributions in other Fair Fund matters permit secondary distributions to be made on a *pro rata* basis to eligible funds or other applicable claimants that previously received distributions. *See, e.g.*, Final Plan of Distribution, at ¶ 9 in *In re: Morgan Stanley & Co. Inc.*, SEC Admin. Proc. File No. 3-12907 (Apr. 7, 2010) (“Such a secondary distribution shall be on a *pro rata* basis to each eligible Affected Fund that previously received a distribution.”), available at <http://www.sec.gov/litigation/admin/2010/34-61882-fdp.pdf>; Final Plan of Distribution, at ¶ 13 in *In re: Zurich Capital Markets Inc.*, SEC Admin. Proc. File No. 3-12628 (approved June 30, 2010) (“Such a secondary distribution shall be on a *pro rata* basis to each Affected Mutual Fund that previously received a distribution that was successfully completed.”), available at: <http://www.sec.gov/litigation/admin/2010/34-62217-dp.pdf>; Plan of Distribution, at ¶ 13 in *In re: Veras Capital Master Fund*, SEC Admin. Proc. File No. 3-12133 (June 21, 2006) (“Such a secondary distribution shall be on a *pro rata* basis to each Affected Mutual Fund that previously received a distribution.”), available at: <http://www.sec.gov/litigation/admin/2006/34-54299-pdp.pdf>; *see also* Distribution Plan, at 5 in *SEC v. American Int’l Group, Inc.*, No. 06 Civ. 1000 (March 20, 2008) (Distribution Agent “will seek an order of the Court for approval of either a secondary distribution to Eligible Claimants on a *pro rata* basis in proportion to their Eligible Loss . . . or a distribution of the remaining funds to the United States Treasury.”), available at:

<https://www.aigsettlementadministration.com/Documents/SIGNED%20DISTRIBUTION%20PLAN%203.20.08.pdf>.

Further, in accordance with the Distribution Agent's imperative to enhance the cost efficiency of the distribution process, the proposed secondary distribution would proceed with a minimum distribution amount of \$10.00. As set forth above, the original Distribution Plan permitted the Distribution Agent to set a Minimum Distribution Amount in order to eliminate the need to expend a disproportionate amount per claim on the processing of *de minimus* claims. In connection with the primary distribution of \$67,230,000, it was determined that applying a Minimum Distribution Amount would not have yielded measurable processing and cost savings. Here, the proposed secondary distribution will be less than \$2 million and the payments to individual Eligible Claimants will be correspondingly more modest. In this context, the Claims Administrator has estimated that, in the absence of any minimum distribution amount, over 5,000 checks could be issued with a face value equal to or less than \$4.00, while claims administrative costs per check would equal \$4.00. In other words, the administrative costs per check would exceed the face value of thousands of checks. Under these circumstances, a Minimum Distribution Amount of \$10.00 is both prudent and advisable to enhance the cost efficiencies of the proposed secondary distribution. Moreover, even with a Minimum Distribution Amount, the proposed secondary distribution would confer unexpected additional benefits on a large group of claimants.⁵

⁵ The original Distribution Plan also provided for an independent test of validated claims by an outside accounting firm, which was completed in connection with the primary distribution. (Plan, ¶ 3.11.) In light of the validation already undertaken of claims for the same Eligible Claimants who may share in the secondary distribution, the much smaller size of the proposed secondary distribution, the disproportionate costs required for an independent test in light of the smaller size of the secondary distribution and the reduced complexity of the secondary

In keeping with all of these considerations, the Distribution Agent now moves the Court to amend the Distribution Plan and approve a secondary distribution on a *pro rata* basis with the parameters set forth below.

1. The Distribution Plan provision which provides that, following the primary distribution from the McAfee Fair Fund, if “funds remain in the Fair Fund in addition to tax reserves, those funds shall be paid to the Commission for transfer to the United States Treasury” (Plan, ¶ 2.7), shall be deleted.

2. The Distribution Plan shall be amended as follows:

(a) To the extent that the Distribution Agent receives any requests to reissue payments from the primary distribution of the McAfee Fair Fund from Eligible Claimants after the entry of this Court’s Order on the present Motion, the Distribution Agent shall not honor such requests, but may exercise his discretion to honor any such request received prior to the entry of the Court’s Order on this Motion;

(b) To the extent that any checks issued in the primary distribution of the McAfee Fair Fund remain uncashed after the entry of the Court’s Order on this Motion, any such checks shall be voided;

(c) Following entry of the Court’s Order, the remaining balance of the CRIS shall be transferred to the Escrow Account for purposes of the secondary distribution of the McAfee Fair Fund, with the exception of a reserve for the reasonable costs of continued administration of the Fair Fund including reasonable fees and expenses of the Distribution Agent, Claims Administrator and Tax Administrator and any appropriate tax reserves;

distribution, the Distribution Agent does not believe the expense of a second round of independent testing is necessary or advisable.

(d) Following the transfer from the CRIS set forth in 2(c), the funds available in the McAfee Fair Fund shall be distributed on a *pro rata* basis to Eligible Claimants who successfully received a distribution in the primary distribution of funds from the Fair Fund and whose *pro rata* share in the secondary distribution would result in a payment equal to or in excess of a Minimum Distribution Amount of \$10.00;

(e) The checks issued in the secondary distribution of the McAfee Fair Fund shall bear a stale date of ninety (90) days after issuance and shall be voided thereafter;

(f) To the extent there remain undisbursed funds in the McAfee Fair Fund following the completion of the secondary distribution, such funds may be applied to any remaining reasonable costs of the administration of the Fair Fund and any remaining tax reserves, and then shall be transferred to the Commission to be transferred to the United States Treasury or the Commission's Investor Protection Fund, if applicable;⁶ and

(g) All other provisions of the Distribution Plan consistent with the foregoing amendments shall remain in effect.

CONCLUSION

For the foregoing reasons, the Distribution Agent, with the consent of the Commission, respectfully moves the Court to enter the attached Proposed Order amending the Plan of Distribution to permit a secondary distribution from the McAfee Fair Fund, and grant such other relief as the Court deems appropriate.

⁶ Pursuant to HR 4173-470, the Dodd-Frank Wall Street Reform and Consumer Protection Act, these funds will be deposited into the Commission's Investor Protection Fund established at the United States Treasury unless the balance of the fund exceeds \$300,000,000 at the time the payment is made.

Dated: December 15, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion was filed electronically on December 15, 2010.

Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's ECF System.

/s/ Helen Harris
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