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

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| **SECURITIES AND EXCHANGE COMMISSION,** | : | |
| **Plaintiff,** | : | |
| **v.** | : | **C-06-0009 (PJH)** |
| **McAFEE, INC. (f/k/a Network Associates, Inc.),** | : | |
| **Defendant.** | : | |

**DECLARATION OF JEFFREY PLOTKIN**

JEFFREY PLOTKIN, hereby affirms upon penalty of perjury as follows:

1. I am the Court-appointed Distribution Agent in this action. I submit this Declaration in support of the motion of the Securities and Exchange Commission ("Commission") for Approval of the Distribution Plan. In particular, I submit this Declaration to explain the "Recognized Loss Per Share" amount of $7.25 set forth in Section 1.25 of the proposed Distribution Plan.

2. The Declaration is based on my review of the public record, including the record in this case and information contained on the NASDAQ.com website.

Background

3. The Commission's Complaint in this matter alleged that McAfee, Inc.'s predecessor, Network Associates, Inc., commencing on or about the date it issued its Form 10-Q for the second quarter of 1998 (August 14, 1998), engaged in a scheme to manipulate its financial results to overstate its revenues and income. McAfee, without admitting or denying the

allegations, consented to a Judgment by this Court that, *inter alia*, ordered McAfee to pay $1 in disgorgement and a $50,000,000 civil penalty. Pursuant to the Final Judgment, the Clerk deposited the funds in an interest-bearing account with the Court Registry Investment System. The Final Judgment provided that the Commission may by motion propose a plan to distribute the funds subject to the Court's approval, and that such plan may provide that the funds be distributed pursuant to the Fair Fund provisions of Section 308(a) of the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7246(a).

4. On August 5, 2008, the Commission submitted its Motion for Creation of a Fair Fund and Appointment of a Distribution Agent, pursuant to the Fair Fund provisions of Section 308(a) of the Sarbanes-Oxley Act of 2002. On August 7, 2008, this Court entered its Order Authorizing the Creation of a Fair Fund and Appointing a Distribution Agent. In the Order, the Court authorized the Commission to establish a Fair Fund in accordance with Section 308(a) of the Sarbanes-Oxley Act, so that the $50,000,000 civil penalty imposed by the Court in this matter may be added to and become part of the $1 disgorgement fund "for the benefit of investors harmed by the violations alleged in the Commission's Complaint."

5. The Order also appointed me as the Distribution Agent to design and implement a plan of distribution for the Fair Fund, so that the monies in the fund, minus appropriate expenses, would be distributed to "victims of the violations alleged in the Complaint in the case."

6. In drafting the proposed Distribution Plan, the Distribution Agent, in consultation with the Commission's staff, attempted to establish a uniform measure of harm to each victimized investor that resulted from the misrepresentations and omissions alleged in the Commission's Complaint. That uniform measure of harm is referenced in the Distribution Plan as the "Recognized Loss Per Share." As discussed further below, the Recognized Loss Per Share

in the Distribution Plan is a number that represents the decline in the closing price of McAfee common stock from December 26, 2000 to December 27, 2000, *i.e.*, $7.25. Under the Distribution Plan, this "Recognized Los Per Share" is multiplied by the number of shares of McAfee common stock purchased and retained by an Eligible Claimant during the recovery period (August 18, 1998 through December 26, 2000) to arrive at the Eligible Claimant's "Eligible Loss Amount." *See* Sections 1.17 and 2.3 of the Distribution Plan.[1]

Calculation of Recognized Loss Per Share

7. To my knowledge, no statute, rule, case law, or interpretive release addresses the appropriate manner in which to calculate harm to victims of a securities fraud for purposes of a Distribution Plan in an SEC Fair Fund proceeding.

8. To establish the appropriate measure of harm to investors here, the Distribution Agent, in consultation with the Commission's staff, took guidance from jurisprudence arising from private securities class actions and Commission enforcement cases.

9. Among the required elements of a private securities fraud action is "loss causation." *See* 15 U.S.C. § 78u-4(b)(4); *In re Daou Sys. Inc.*, 411 F.3d 1006, 1014 (9th Cir. 2005). In order to establish loss causation, "the plaintiff must demonstrate a causal connection between the deceptive acts that form the basis for the claim of securities fraud and the injury suffered by the plaintiff." *In re Gilead Sciences Securities Litigation*, 536 F.3d 1049, 1055-56 (9th Cir. 2008) (citation and internal quotation marks omitted). That causation may be established by showing that the defendant's share price fell significantly after the truth became

[1] Per the Distribution Plan, if the aggregate Eligible Loss Amount for all Eligible Claimants exceeds the Available Distribution, the Distribution Agent shall distribute the Available Distribution *pro rata* to Eligible Claimants, based upon the ratio of the Eligible Loss Amount for each such Eligible Claimant to the aggregate Eligible Loss Amount for All Eligible Claimants (subject to the minimum distribution amount provisions of the Distribution Plan). *See* Section 2.1 *et seq.* of the proposed Distribution Plan).

known, and that such drop in the stock price was causally related to the defendant's financial misstatements. *See Metzler Investment GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1062-63 (9th Cir. 2008). On the other hand, any drop in the stock price that took place before the misconduct was revealed is not causally related to the misconduct revealed. *See Daou*, 411 F.3d at 1027.

10. As alleged in the Commission's Complaint, McAfee materially overstated its revenues and income in its public filings for over two years through December 26, 2000, and omitted to disclose such scheme to its investors during that entire period. During this entire period, the price of McAfee stock fluctuated up and down considerably. On December 26, 2000, McAfee's common stock closed at a price of $11.75 per share.

11. After the close of trading on December 26, 2000, McAfee issued a press release announcing that its sales for the fourth quarter of 2000 would be only $55 million, 78% less than the $245 million in sales that it had projected publicly only two months earlier. McAfee also announced, without explanation, the resignations of its Chief Executive Officer, Chief Financial Officer, and President. *See* Commission's Complaint at ¶ 4. These disclosures were the first in a series of corrective disclosures concerning McAfee's prior fraudulent scheme. *See* Commission's Complaint at ¶¶ 6-7.

12. On December 27, 2000, the first full trading day after the announcement, McAfee's common stock closed at $4.50 per share, down $7.25 per share for the day (62%), on extraordinary volume of 75,618,100 shares.

13. The Distribution Agent, in consultation with the Commission's staff, concluded that the information contained in the December 26, 2000 press release was fully absorbed by the

market by the end of trading on December 27, 2000, *i.e.*, the information was fully impacted in the price of McAfee common stock at the end of trading on December 27, 2000.[2]

14. It is reasonable to infer that McAfee's misconduct outlined in the Commission's Complaint caused losses to McAfee investors who purchased and held the stock during the recovery period in the amount of the decline in the market price of McAfee common stock on December 27, 2000, because the price decline occurred immediately after McAfee issued its first corrective disclosure in the December 26, 2000 press release concerning the misconduct. *See In re Gilead Sciences Securities Litigation*, 536 F.3d at 1058; *Richardson v. TVIA, Inc.*, 2007 WL 1129344, at *5-6 (N.D. Cal. Apr. 16, 2007). No extrinsic factors have been identified that may have independently caused or contributed to the price decline in McAfee stock on December 27, 2000.[3] *See Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 343, 125 S. Ct. 1627 (2005) (in determining loss causation in private securities class actions, courts should take into consideration whether outside market factors unrelated to the fraud accounted for some or all of the decline in value of a stock after a public announcement revealing the fraud).

15. Therefore, the Distribution Agent, in consultation with the Commission's staff, submits that the $7.25 price decline on the first trading day after the December 26, 2000 press release should serve as the "Recognized Loss Per Share" for purposes of the Distribution Plan.

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[2] In Commission insider trading cases involving the sale of an actively traded stock prior to a negative public announcement, the courts generally have ruled that the negative announcement is fully absorbed by the market by the end of the following business day, and the closing price of the stock on the first full trading day after the announcement, in the absence of any other ascertainable market factors, is indicative of the proper amount of "loss avoided" by the inside trader. *See, e.g., SEC v. Patel*, 61 F.3d 137, 139-40 (2d Cir. 1995) (disgorgement calculation for insider trading violation predicated on closing price of the stock the next day after the press release).

[3] For instance, on December 27, 2000, the NASDAQ Computer Index (symbol "IXCO"), a market index containing a diversified mix of hundreds of computer-related stocks traded on various exchanges, including the stock of software companies such as McAfee, closed up 1% from the previous day's close, indicating that general market conditions did not cause or exacerbate the McAfee price decline that same day.

## CONCLUSION

16. For the reasons set forth above, and in the Commission's accompanying Motion for Approval of Distribution Plan, the Distribution Agent respectfully requests that this Court approve the Distribution Plan.

Dated: New York, New York
February 3, 2009

JEFFREY PLOTKIN
(N.Y. Bar# 2122430)