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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

In re MCAFEE, INC. DERIVATIVE LITIGATION This Document Relates To: ALL ACTIONS.	Master File No. 5:06-cv-03484-JF NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF DERIVATIVE SETTLEMENT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF DATE: October 3, 2008 TIME: 9:00 a.m. COURTROOM: The Honorable Jeremy Fogel

TABLE OF CONTENTS

		Page
I.	PRELIMINARY STATEMENT	1
II.	THE LITIGATION	3
	A. Initiation of the Federal Action	3
	B. Initiation of the State Action	5
	C. The Settlement Negotiations	6
III.	THE SETTLEMENT TERMS	7
IV.	THE STANDARDS FOR PRELIMINARY APPROVAL OF A DERIVATIVE SETTLEMENT	18
V.	THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED AND ULTIMATELY FINALLY APPROVED AFTER NOTICE TO MCAFEE SHAREHOLDERS	19
VI.	PROPOSED SCHEDULE OF EVENTS	24
VII.	CONCLUSION	25

TABLE OF AUTHORITIES

Page

CASES

Alaska Hotel & Rest. Employees Pension Trust Fund v. Sehat Sutardja,
No. C-06-03894-RMW, slip op. (N.D. Cal. Aug. 17, 2006) 23

City of Pontiac Gen. Employees' Ret. Sys. v. Langone,
No. 2006-cv-122302, slip op. (Fulton County Ga. June 10, 2008) 24

Cohn v. Nelson,
375 F. Supp. 2d 844 (E.D. Mo. 2005) 18, 21

Ellis v. Naval Air Rework Facility,
87 F.R.D. 15 (N.D. Cal. 1980), *aff'd*, 661 F.2d 939 (9th Cir. 1981) 19

Esther Sadowsky Testamentary Trust v. Brendsel,
No. MDL 1584, slip op. (S.D.N.Y. Jan. 8, 2007) 24

Hensley v. Eckerhart,
461 U.S. 424, 103 S. Ct. 1933 (1983) 23

In re Activision, Inc. S'holder Derivative Litig.,
No. CV-06-04771-MRP, slip op. (C.D. Cal. July 21, 2008) 20, 23, 24

In re Activision, Inc. S'holder Derivative Litig.,
No. CV-06-04771-MRP(JTLx), slip op. (C.D. Cal. May 13, 2008) 25

In re Apollo Group, Inc. Sec. Litig.,
No. CV 04-2147-PHX-JAT, 2008 U.S. Dist. LEXIS 61995
(D. Ariz. Aug. 4, 2008) 22

In re Apple Computer, Inc., Derivative Litig.,
No. CV-06-04128-JF, slip op. (N.D. Cal. Nov. 2, 2006) 23

In re Apple Inc. Derivative Litig.,
No. C-06-04128-JF, slip op. (N.D. Cal. Sept. 8, 2008) 25

In re BP P.L.C. Derivative Litig.,
No. 3AN-06-11929CL, slip op.
(3d Judicial Dist. Anchorage Alaska May 7, 2008) 24

In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.,
55 F.3d 768 (3d Cir. 1995) 18

In re Jiffy Lube Sec. Litig.,
927 F.2d 155 (4th Cir. 1991) 21

Page

In re Juniper Networks Derivative Litig.,
No. 5:06-cv-03396-JW, slip op. (N.D. Cal. Sept. 8, 2008) 20, 23, 25

In re Pac. Enters. Sec. Litig.,
47 F.3d 373 (9th Cir. 1995) 22

Ingram v. Coca-Cola Co.,
200 F.R.D. 685 (N.D. Ga. 2001) 24

Officers for Justice v. Civil Serv. Comm'n,
688 F.2d 615 (9th Cir. 1982) 19, 22, 23

Torrisi v. Tucson Elec. Power Co.,
8 F.3d 1370 (9th Cir. 1993) 19

Wiener v. Roth,
791 F.2d 661 (8th Cir. 1986) 18

Zapata Corp. v. Maldonado,
430 A.2d 779 (Del. 1981) 21

STATUTES, RULES AND REGULATIONS

15 U.S.C.
§78j(b) 3
§78n(a) 3
§78t(a) 3

California Corporations Code
§25402 3
§25502.5 3

Federal Rules of Civil Procedure
Rule 9(b) 4
Rule 23(e) 20
Rule 23.1 18
Rule 23.1(c) 18

SECONDARY AUTHORITIES

Manual for Complex Litigation
§30.41 (3d ed. 1995) 20

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that on October 3, 2008, at 9:00 a.m., or as soon thereafter as counsel may be heard, Federal Plaintiffs, Heavy & General Laborers' Locals 472 & 172 Pension & Annuity Funds and Kenneth Dossett, will move before the Honorable Jeremy Fogel, United States District Court Judge, to grant preliminary approval of the Settlement set forth in the Stipulation of Settlement ("Stipulation"),[1] and submitted herewith. Federal Plaintiffs' motion is based on the attached memorandum of points and authorities in support of motion for preliminary approval of derivative settlement, the Stipulation, and such additional evidence or argument as may be required by the Court.

MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

This memorandum is submitted by Federal Plaintiffs in support of approval of the settlement ("Settlement") of the derivative claims brought on behalf of McAfee, Inc. ("McAfee" or the "Company") against certain of its current and former officers and directors. The terms of the Settlement are set forth in the Stipulation, submitted herewith. The Settlement resolves the derivative claims pending in this Court as well as in a consolidated derivative action pending in the Santa Clara Superior Court, *In re McAfee, Inc. Derivative Litigation*, No. 1:06-CV-064854 ("State Action") (together, the "Actions"). With approximately $30 million in financial benefits to the Company, this Settlement represents an excellent result. This Settlement is the result of extensive, arm's-length negotiations between the parties overseen by retired United States District Judge Layn R. Phillips ("Mediator"), and is unquestionably fair, reasonable and adequate, and deserves preliminary approval.

The Settlement is comprised of several elements, each of which is a substantial benefit to McAfee, on whose behalf these Actions were brought. First, McAfee shall adopt a series of significant industry-leading corporate governance enhancements. These changes are not only

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[1] All capitalized terms not herein defined shall have the same meaning as set forth in the Stipulation.

specifically designed to address the governance shortcomings that contributed to the climate that gave rise to the option backdating alleged in the Actions, but also significantly strengthen McAfee's corporate practices and internal controls generally, which provide substantial and lasting value to McAfee and its shareholders. For example, the Settlement establishes proper procedures for the granting of stock options (which are directly responsive to the allegations of backdating at McAfee) and measures designed to ensure that such conduct does not happen again. Also, the Settlement calls for the implementation of enhanced internal controls and increased levels of independent oversight including shareholder participation in the nomination process of independent directors to the Board; a Company-sponsored resolution calling for declassification of the McAfee Board; the adoption of majority voting for directors; new directors stock ownership guidelines and education requirements; a policy regarding forfeiture of bonuses and profits from stock sales (a compensation "clawback" provision); enhanced director independence standards; and improved insider trading controls.

In addition, the Settlement includes a direct financial benefit to McAfee with an intrinsic value of approximately $30 million, based on the freeze and cancellation of approximately 1,729,792 vested, in-the-money options held by certain defendants. The Settlement further provides for the assignment to McAfee of claims against defendants George Samenuk ("Samenuk"), Kent Roberts ("Roberts") and Kevin M. Weiss ("Weiss") which will not be released and may be pursued by McAfee, and thus may yield further value for the Company.

In sum, the Settlement confers substantial benefits upon McAfee and its shareholders and is an excellent resolution for McAfee of a case of substantial complexity. As a result of the comprehensive benefits obtained in the Settlement, McAfee and its shareholders are positioned to reap the long-term benefits of strong corporate governance by virtue of these new robust processes, and the Company has recouped substantial monetary value to compensate the Company for the loss of value caused by the manipulation of historical stock option grants to McAfee insiders.

After negotiation of the material terms of the Settlement, Plaintiffs and McAfee, with the assistance of Judge Phillips negotiated the amount of attorneys' fees that McAfee would pay Plaintiffs' Counsel. As a result of those arm's-length negotiations, McAfee, via its Board of

Directors, has agreed to pay a total of $13.75 million to Plaintiffs' Counsel in both Actions in recognition of the substantial benefits conferred upon by the Company by Plaintiffs' Counsel.

Federal Plaintiffs ask the Court to enter the [Proposed] Order Preliminarily Approving Derivative Settlement and Providing for Notice, which provides for: (a) granting preliminary approval of the Settlement, (b) directing that notice be given to McAfee shareholders, and (c) scheduling a hearing at which the Court will consider final approval of the Settlement, including the agreed-to amount of Plaintiffs' Counsel's attorneys' fees and expenses. In determining whether preliminary approval is warranted, the issue before the Court is whether the proposed Settlement is within a range of what might be found to be fair, reasonable, and adequate, such that notice of the proposed Settlement should be provided to McAfee shareholders and that a hearing be scheduled for final settlement approval. As discussed in detail herein, the Settlement easily meets this standard and therefore the Court should preliminarily approve the Settlement.

II. THE LITIGATION

A. Initiation of the Federal Action

On May 31, 2006 and thereafter, several shareholder derivative actions were filed in or transferred to this Court on behalf of McAfee (the "Federal Action"). The actions were consolidated, and lead plaintiffs and co-lead counsel were appointed pursuant to an order dated July 13, 2006.

Federal Plaintiffs asserted claims on behalf of McAfee against several current and former directors, officers and employees of the Company, claiming, against some or all defendants: violations of §§10(b) and 20(a) of the Securities Exchange Act of 1934 ("Exchange Act"); §14(a) of the Exchange Act; breach of fiduciary duties and aiding and abetting breach of fiduciary duty; corporate waste, gross mismanagement; unjust enrichment, abuse of control; insider trading and misappropriation of information; violation of California Corporations Code §§25402 and 25502.5; rescission and for an accounting. The Federal Plaintiffs alleged that McAfee's top insiders caused the Company to issue false and misleading financial results and other Securities and Exchange Commission ("SEC") reports which omitted the fact that they were granting themselves and others excessive, unlawful compensation via the grant of in-the-money stock option awards, in violation of

the Company's shareholder-approved stock option plans. The Federal Plaintiffs further alleged that this misconduct caused severe harm to McAfee, including government investigations, potential civil penalties and/or criminal prosecution.

On July 27, 2006, McAfee announced results of the internal review conducted by a Special Committee of the Board ("Special Committee") into the Company's historical stock option granting practices, admitting that stock options had been backdated. McAfee not only announced that it would restate the Company's previously reported financial results, but that the Company's financial statements should no longer be relied upon. McAfee further announced that it would be required to restate its financial statements on Forms 10-K for fiscal years 2002-2005 and for the first quarter of fiscal 2006. On December 21, 2007, the Company filed its Form 10-K for 2006 announcing the results of the Special Committee's investigation and $137.4 million non-cash restatement.

On September 28, 2006, the Federal Plaintiffs filed their First Amended Consolidated Verified Shareholder Derivative Complaint (the "Complaint"). Subsequently, the Complaint asserted 14 claims for violations of the federal securities and state corporation laws, alleging violations between 1996 and 2006 that damaged McAfee. It identified allegedly backdated stock option awards and numerous false and misleading financial statements and proxy statements issued by defendants and detailed each defendant's role in the granting of backdating options, including the Compensation Committee members' knowledge of the backdating at McAfee.

On January 22, 2007, McAfee filed a motion to dismiss the Complaint. The motions argued that dismissal was proper because, among other things, the Federal Plaintiffs had failed to properly plead that a pre-suit demand on McAfee's Board of Directors would have been futile and was, therefore, excused.

In response, Federal Plaintiffs commenced preparation of a detailed opposition to the motion to dismiss. Based on the applicable law, Federal Plaintiffs intended to show that a pre-suit demand on the McAfee Board was futile; the Complaint pleaded backdating with sufficient particularity; and stated facts sufficient to overcome the business judgment rule. Moreover, Federal Plaintiffs intended to demonstrate that their federal and state claims were actionable, timely and not time-barred, and that the Company had suffered damages as a result of the alleged misconduct. However, before

filing the opposition, and to facilitate the parties' ongoing settlement discussions, the parties to the Federal Action requested that that Court continue the deadline for filing Federal Plaintiffs' opposition to and continuing the hearing on McAfee's motion to dismiss. The Court agreed to continue the briefing and hearing from time-to-time thereafter, and ultimately on October 9, 2007, stayed the Federal Action pending a mediation scheduled for December 11, 2007, before the Honorable Layn R. Phillips, a retired United States District Judge with substantial experience in mediating complex cases.

B. Initiation of the State Action

On June 2, 2006 and thereafter, three shareholder derivative actions were filed in the Superior Court of the State of California, County of Santa Clara (the "State Court") on behalf of McAfee against certain of its directors and officers asserting claims under California and Delaware law for alleged backdating of stock options and granting of options in violation of shareholder approved stock option plans (the "State Action").

On September 18, 2006, the State Court consolidated all three of the state derivative actions as *In re McAfee, Inc. Derivative Litigation*, No. 1:06-CV-064854, appointed Fred Greenberg and Natalie Gordon as lead plaintiffs and appointed Robbins Umeda & Fink LLP, Gardy & Notis LLP and Faruqi and Faruqi LLP as co-lead counsel for the State Plaintiffs.

On December 8, 2006, the State Plaintiffs filed a First Amended Consolidated Verified Derivative Shareholder Derivative Complaint (the "State Complaint"). The State Complaint alleged a pattern of backdating stock option grants at McAfee, that the McAfee Board breached its fiduciary duties by issuing stock options with exercise prices contrary to the operative stock option plans in effect at the time of the issuance as well as McAfee's violations of Generally Accepted Accounting Principles, SEC rules and regulations, and claims against the individual defendants for insider trading.

On June 26, 2006, McAfee filed a motion to dismiss the State Action based on the pendency of the first-filed Federal Action. On January 9, 2007, the State Plaintiffs submitted a substantive opposition to the motion. Following oral argument, on September 18, 2006, the State Court, the

Honorable James P. Kleinberg presiding, denied the motion to dismiss but stayed the State Action in favor of the Federal Action.

C. The Settlement Negotiations

Beginning in early 2007, the parties to the Federal Action agreed to commence formal settlement negotiations. Between February 2007 and December 2007, counsel for Federal Plaintiffs and McAfee engaged in extensive arm's-length negotiations over the terms of a resolution, including corporate governance reform measures to be adopted by the Company as part of any resolution of the Federal Action. Counsel for Federal Plaintiffs, McAfee and the Special Committee also engaged in extensive discussions concerning the findings of the Special Committee's investigation. Moreover, in furtherance of their settlement negotiations, Plaintiffs, McAfee and the Special Committee engaged in the exchange of certain information necessary to evaluate the parties' respective claims and defenses.

The parties engaged in extensive negotiations over several months regarding a potential settlement of the Actions. These negotiations included, among other things, the amount of financial contributions by certain individual defendants, as well as numerous corporate governance reforms, including, among other things, procedures for consideration of shareholder-nominated director candidates; board compositions, structure and practices; new director stock ownership and education requirements; executive compensation policies and procedures; insider trading controls; and proper stock option granting procedures.

On December 11, 2007, the parties to the Actions conducted confidential mediation sessions before the Judge Phillips. Attending the mediation session were counsel for Plaintiffs in the Actions, defendants Samenuk, Roberts, Weiss and certain other defendants, McAfee, and the Special Committee. In the course of those confidential settlement discussions, counsel for McAfee continued the discussion with Plaintiffs' Counsel of the Special Committee's investigation and its findings and conclusions pursuant thereto. Plaintiffs' Counsel also obtained from McAfee documents relevant to the parties' dispute.

III. THE SETTLEMENT TERMS

The Settlement obtained by Plaintiffs in the Actions is an excellent result, reached after extensive, arm's-length negotiations overseen by Judge Phillips. Pursuant to the Settlement, McAfee will obtain a direct financial benefit of approximately $30 million as a result of the freeze and cancellation of approximately 1,729,792 vested, in-the-money McAfee stock options held by certain defendants. *See* Stipulation, ¶3.1. In addition, and just as significant, Plaintiffs successfully negotiated numerous reforms targeted not only at restructuring the Company's option granting practices to address many of the root causes which led to the issues alleged in the Actions, but also at implementing significant measures to strengthen McAfee's corporate governance generally, which will yield positive changes in many areas of McAfee's operations and will have long-lasting effects on McAfee that go far beyond its executive compensation practices.[2] In sum, the reforms detailed below and in the Stipulation confer a substantial benefit on McAfee and its shareholders by: (1) eliminating the possibility that stock options will be backdated in the future; and (2) even more importantly, making McAfee's Board members more effective representatives of shareholders.[3]

A. Compensation Practices

1. Policies and Procedures

(a) The Board of Directors ("Board") or the Compensation Committee of the Board shall maintain a reasonable and responsible set of assumptions, policies and procedures for determining Section 16 executive officer compensation (*e.g.*, Company compensation levels should be compared to similar-sized businesses in similar industries or with similar operating profiles).

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[2] In addition, Plaintiffs have assigned to McAfee claims against defendant Samenuk, Roberts and Weiss, which will not be released and may be pursed by McAfee in accordance with ¶3.1(d) of the Stipulation.

[3] While not detailed below, the Settlement provides for corporate governance reforms related to McAfee's accounting practices and procedures, corporate ethics and legal compliance, as well as a requirement that the Company's CFO provide financial reports at each Board meeting. *See* Stipulation ¶3.1(e)(I), (J), (L) and (O).

(b) Transparent, objective measures for Section 16 executive officer compensation shall be maintained for all cash variable and non-cash variable compensation, including bonuses, stock options, restricted share grants and benefits.

(c) Stock option grants, restricted share grants and other forms of equity incentives made to Section 16 executive officers shall be disclosed as required by the rules and regulations promulgated under the Securities Exchange Act of 1934, as amended.

(d) Repricing of stock options to Section 16 executives shall be prohibited, absent prior specific shareholder approval unless necessary to correct any incorrectly dated grants or in connection with any tender offer for mispriced options.

(e) The Compensation Committee shall set, in writing, annual performance goals for each Section 16 executive officer of the Company in collaboration with the CEO. The Compensation Committee shall, in collaboration with the CEO (except with respect to the CEO), at least annually evaluate each executive officer's performance against such goals and recommend compensation (including cash bonuses, stock options, restricted shares, performance shares, or other performance-based compensation) in view of whether the goals have been achieved.

(f) At least once per year for the next three years the Compensation Committee shall select and retain an independent compensation consultant to conduct a comparative study of the Company's Section 16 executive officer compensation policies, practices, and procedures relative to other public companies and prepare and submit a report to the Compensation Committee.

(g) Unless otherwise necessary to appropriately staff board committees, no more than two directors who serve on the Compensation Committee shall simultaneously serve on the Audit Committee.

(h) No director shall serve on the Compensation Committee for more than five consecutive years (commencing in 2007 and counting forward).

Stock Option Plans and Agreements

(a) All stock option agreements shall clearly define the exercise price, the grant date and the exercise price of option grants. Except for the Company's employee stock purchase plan, in no event shall the exercise price of a stock option be determined by reference to the fair

market value of the Company's stock on a day other than the grant date of the award. The fair market value of the Company's stock on an option grant date shall be the closing price for a share of the Company's common stock on such day as reported on the New York Stock Exchange ("NYSE") (or any such other nationally recognized exchange on which the Company's common stock may be listed). If a grant is made on a date the NYSE (or such other exchange) is closed, then the closing price of the last trading day will be used.

(b) The Compensation Committee shall maintain a policy to the effect that, and all subsequent stock option plans shall include the following phrase, whether subject to stockholder approval or not: "The date of grant of an option shall, for all purposes, be the date on which the Board or Compensation Committee makes the determination granting such option or, in the event that the Compensation Committee meeting takes place during a period in which the trading window is closed, on such future date as the Board specifies at that time (*e.g.*, three days after the Company's next public earnings announcement). Notice of the determination shall be given to each individual to whom an option is so granted promptly but in no event more than three weeks after the date of such grant. Determination shall be defined as including at a minimum, the number of options granted to each individual and the terms of such options."

(c) The Company's stock option plans (excluding any employee stock purchase plan awards or any stock options granted pursuant to an agreed-to exchange ratio in an acquisition transaction) shall not permit the granting of stock options at below fair market value on the date of grant.

(d) The Company shall maintain appropriate documentation for proper disclosure and accounting, and shall comply with applicable legal requirements for accounting and disclosure of equity incentive compensation.

B. Granting of Stock Option Awards

(a) Authority to grant stock option awards shall be limited to the full Board or the Compensation Committee and shall not be delegated to any other person or body.

(i) Both the full Board and the Compensation Committee shall be comprised of an independent majority meeting the independence standards as required by the Securities and Exchange Commission ("SEC") and the NYSE, as applicable.

(ii) To the extent that the rules of the NYSE (or such other exchange, if applicable) require specific expertise for Compensation Committee members, the Company shall comply with such rules.

(b) All grants shall be made only at a meeting of the Compensation Committee or the Company's Board and not by unanimous written consent. Corporate counsel shall attend any and all meetings where options are granted and shall promptly prepare minutes of the meeting.

(c) periodically, and at least once annually, the independent members of the Board of Directors shall review the actions of the Compensation Committee to monitor compliance with this Corporate Governance reform.

(d) The body authorized to grant stock options shall be specified in the Compensation Committee Charter and any new or subsequent equity incentive plan, whether subject to stockholder approval or not.

(e) Written documentation identifying grantees, amounts, and prices of all stock options and equity awards granted on a particular date shall be complete on the date of grant and recorded in minutes of the Compensation Committee prepared by counsel promptly following the date of grant and shall be transmitted to the Company's legal and accounting departments as soon thereafter as is reasonably practicable (but, in any case, within three weeks of the Compensation Committee action).

(f) The Company shall comply with the SEC's requirements for specific disclosure of grants of equity incentives to Section 16 executive officers.

(g) The Company shall maintain all records relating to all stock option grants until at least six years after the expiration of the pertinent stock options.

C. Timing of Option Grants

(a) Stock options granted to all officers, directors, consultants and employees shall be granted only on regularly scheduled dates, which shall be set by the Compensation Committee.

(b) The Compensation Committee shall maintain an equity incentive policy pursuant to which the Compensation Committee shall generally make grants quarterly at meetings of the Compensation Committee, with such grants to become effective on the date of the meeting or promptly upon the opening of trading windows in the event that the Compensation Committee meeting occurs during a period in which the trading window is closed.

(c) Exceptions to Sections IV.C(a) and IV.C(b) above shall be stock options awarded in connection with the hiring of a new employee and instances in which the Board or Compensation Committee determines that it is in the best interests of the Company to grant an equity award outside of a regularly scheduled meeting (*e.g.*, equity awards that the Board or Compensation Committee believes are necessary for employee retention; equity awards in connection with acquisitions or similar transactions).

(d) The grant date shall be the same date the Board or the Compensation Committee takes action to grant the option or, in the event that the Compensation Committee meeting occurs during a period in which the trading window is closed, on such future date as the Board specifies at that time (*e.g.*, three days after the Company's next public earnings announcement).

(e) Section 16 executive officers shall be prohibited from determining the grant date of any stock option award.

Shareholder-Nominated Director

D. Nomination Procedures

(a) The Board shall establish a procedure, to be conducted by the Governance and Nominations Committee of the Board, to elicit, receive and consider nominations for the Board from each individual or entity holding more than five percent of the Company's common stock.

(b) The procedure for identifying and nominating these directors shall be as detailed below:

(i) The Company's website will provide information regarding how each individual or entity holding more than five percent of the Company's common stock may contact the Secretary of the Company, who, after qualifying the communication, shall promptly forward the name(s) of candidates for the Board from such shareholder(s) to the Governance and Nominations Committee.

(ii) The Governance and Nominations Committee will annually contact shareholders which own greater than five percent of the Company's outstanding common stock (as evidenced by Schedule 13D or 13G filings as of a date certain prior to the commencement of the annual process of eliciting and/or receiving shareholder recommendations for candidates for the Board). The Nominations and Governance Committee shall consult with the Plaintiffs or their representatives in connection with the initial preparation and description of this process.

(iii) An appropriate review, including background information and interviews of prospective candidates, will be conducted and qualified candidates will be sent to the Governance and Nominations Committee for review.

(iv) The Governance and Nominations Committee shall consider in good faith any potential director recommended pursuant to the foregoing procedure.

(c) At least annually, the Nominations and Governance Committee will discuss, with five percent or greater shareholders which recommended candidates, the nomination process and why recommended candidates were included or not included in the Company's slate of nominated directors.

(d) At the Company's annual meeting for 2009, the Company shall submit a proposal to its shareholders requesting approval of an amendment to the Company's certificate of incorporation to gradually eliminate the current staggered Board of Directors, such that the Board of Directors shall be declassified over three years.

(e) Prior to the Company's annual meeting for 2009, the Company shall amend its bylaws to provide that all director nominees must receive the affirmative vote of a majority of votes cast in order to be elected or re-elected.

Directors

E. Director Independence

At least three quarters of the members of the Board shall be "independent directors," as defined below.

(a) No director shall qualify as "independent" unless the Board affirmatively determines that the director has no material relationship with the Company (either directly or as a partner, shareholder or officer of an organization that has a relationship with the Company). The Company must identify which directors are independent and disclose the basis for that determination.

(b) A director is not independent if:

(i) The director is, or has been within the last three years, an employee of the Company, or an immediate family member (as defined by NYSE or other applicable exchange rules) is, or has been within the last three years, an executive officer of the Company.

(ii) The director has received, or has an immediate family member who has received, during any twelve-month period within the last three years, more than $100,000 in direct compensation from the Company, other than director and committee compensation (*e.g.*, fees and equity awards) and pension or other forms of deferred compensation for prior service.

(iii) (A) The director or an immediate family member is a current partner of a firm that is the Company's internal or external auditor; (B) the director is a current employee of such a firm; (C) the director has an immediate family member who is a current employee of such a firm and who participates in the firm's audit, assurance or tax compliance (but not tax planning) practice; or (D) the director or an immediate family member was within the last three years (but is no longer) a partner or employee of such a firm and personally worked on the Company's audit within that time.

(iv) The director or an immediate family member is, or has been within the last three years, employed as an executive officer of another company where any of the Company's present executive officers at the same time serves or served on that company's compensation committee.

(v) The director is a current employee, or an immediate family member is a current executive officer, of a company that has made payments to, or received payments from, the Company or property or services in an amount which, in any of the last three fiscal years, exceeds the greater of $1 million, or 2% of such other company's consolidated gross revenues.

(c) Independent directors shall be limited to serving on the boards of no more than five public companies, including the Company, unless the other independent directors consent.

F. Director Stock Ownership

The Company shall retain a compensation consultant to advise the Board as to best practices regarding share ownership guidelines for its directors that are designed to align the interests of the Board with those of shareholders, taking into account share ownership guidelines to ensure that Board members have a sufficient stake in the Company to share in the financial fortunes of shareholders, while also considering the appropriate financial planning and needs of individual directors. The Board shall reassess the Company's share ownership guidelines periodically.

G. Meetings in Executive Session

At each meeting of the Board, the Board shall hold an executive session at which employee directors are not present.

H. Lead Independent Director

In the event that the Company does not have a non-Executive Chairman of the Board, the independent members of the Board shall elect an independent director by secret ballot to act in a lead capacity to coordinate the other independent directors, as described below. The holder of the Lead Director position shall rotate at least once every five (5) years (with that period beginning as of the Effective Date of this agreement). The Lead Director shall be responsible for coordinating the activities of the independent directors. In addition to the duties of all Board members (which shall not be limited or diminished by the Lead Director's role), the specific responsibilities of the Lead

Director are to advise the Chairman of the Board to undertake, or otherwise undertake, the following:

(a) determine an appropriate schedule of Board meetings, seeking to ensure that the independent directors can perform their duties responsibly while not interfering with the flow of the Company's operations;

(b) prepare agendas for the Board and Committee meetings, and request Committee Chairpersons similarly prepare agendas for their Committee meetings;

(c) assess the quality, quantity, and timeliness of the flow of information from the Company's management that is necessary for the independent directors to effectively and responsibly perform their duties, including, as appropriate, specific requests of the Company's management for the inclusion of certain materials for the Board;

(d) review the retention of consultants who report directly to the Board;

(e) ensure that the Governance and Nominations Committee oversees compliance with and implementation of the Company's corporate governance policies and ensures that the Chairman of the Governance and Nominations Committee oversees the process to recommend revisions to the Company's corporate governance policies;

(f) ensure that the Audit Committee oversees compliance with an implementation of the Company's Accounting, Internal Audit and Independent Audit policies and procedures and ensures that the Audit Committee chair is qualified to, and properly discharges his or her duties with respect thereto;

(g) coordinate, develop the agenda for, and moderate executive sessions of the Board's independent directors, and act as principal liaison between the independent directors and the Chairman of the Board and/or Chief Executive Officer on sensitive issues;

(h) evaluate, along with the members of the Compensation Committee and the full Board, the Chief Executive Officer's performance and meet with the Chief Executive Officer to discuss the Board's evaluation; and

(i) the Lead Director shall have the authority to retain such counsel or consultants as the Lead Director deems necessary to perform his or her responsibilities.

I. Internal Audit Function

The Company shall continue to maintain an internal audit function or outsource an internal audit function. The Internal Auditor Director, who shall be appointed by the Board or the Audit Committee and who will report to the Audit Committee at least quarterly, shall monitor the Company's compliance with the internal control environment, and have such other responsibilities as directed by the Audit Committee. The Internal Auditor Director shall be responsible for devising an Internal Audit Plan for each fiscal year which will be presented to and approved by the Audit Committee of the Board. The Internal Audit Plan shall include assessment of the internal control environment in order to ensure that appropriate financial reporting procedures are in place and being followed by the Company's employees. Appropriate Company operations, as dictated by the Internal Audit Plan, shall be subject to an internal audit review each year. A written report shall be prepared for each internal audit performed describing the internal audit's findings, opinions and recommendations, if any. As appropriate, after review and comment from potentially impacted operational departments, these written reports (together with any response from potentially affected departments) shall be directed to the Audit Committee.

Responsible Corporate Practices

J. Insider Trading Controls

The General Counsel of the Company shall be appointed as the Insider Trading Compliance Officer, responsible for ensuring compliance with the Company's insider trading and confidentiality policy. The Company has adopted, and the Insider Trading Compliance Officer (or a committee consisting of two of the Company's Chief Financial Officer, the Company's General Counsel and outside counsel) shall be responsible for monitoring and updating (with Board involvement and approval), a comprehensive program (the "Trading Compliance Program") designed to ensure compliance with the Company's trading policies. The Insider Trading Compliance Officer will be responsible for direct oversight of the Trading Compliance Program and members of the Board will have direct access to the Insider Trading Compliance Officer, including the opportunity to meet with such officer outside the presence of any other member of management. In addition to the above:

(a) The Insider Trading Compliance Officer shall be responsible for pre-clearing all transactions by the Company's directors or those employees subject to Section 16 of the Securities Exchange Act (other than transactions pursuant to pre-approved 10b5-1 plans).

(b) The Company will take reasonable steps to ensure that all directors and officers timely file all trading forms required by the SEC to be filed by them concerning trading by directors, officers, and executive employees of the Company.

(c) Failure to comply with the Company's trading policy will result in appropriate sanctions, including potential disgorgement by the individual to the Company of all profits from the transaction, termination, or other appropriate disciplinary action as determined by the Board.

(d) The Company's trading policy shall prohibit any corporate officer or director from, directly or indirectly, "short-selling" the Company's stock, purchasing a put option on the Company's stock or selling a call option on the Company's stock.

(e) The Company's trading policy shall contain a trading window provision that prohibits directors, officers and certain other employees from engaging in transactions involving the Company's stock from the period beginning on the 15th day of the last month of each fiscal quarter and ending two trading days following the date of public disclosure of the financial results for that quarter.

K. Policy Regarding Forfeiture of Bonuses and Profits from Stock Sales

The Board shall implement a policy requiring the Company to seek disgorgement to the Company certain bonus payments and profits under the following circumstances:

(a) If the Company is required to prepare an accounting restatement on an interim or annual financial statement included in a report on Form 10-Q or Form 10-K, and there is a finding by a majority of the members of the Board at the time of the Restatement that restatement was due to gross recklessness or intentional misconduct of a responsible Chief Executive Officer or Chief Financial Officer causing material noncompliance with any financial reporting requirement under the federal securities laws; and

(b) Upon a finding by a majority of the members of the Board described in Section K(a) above, the Company shall seek disgorgement of any portion of the bonus or other

incentive-based or equity-based compensation related to such accounting restatement received by the responsible Chief Executive Officer or Chief Financial Officer from the Company during the 12-month period following the first public issuance or filing with the SEC (whichever first occurs) of the financial document embodying such error due to the gross recklessness or intentional misconduct of the responsible executive officer.

L. Corporate Ethics, Honesty and Legal Compliance

The Company shall maintain its Ethics First policy and otherwise comply with the corporate ethics requirements of the NYSE (or such other nationally recognized exchange, if applicable) and rules and regulations promulgated by the SEC.

M. Shareholder Proposals

The Company shall comply with applicable federal proxy rules and the laws of the State of Delaware regarding shareholder proposals.

N. Attendance at Shareholder Meetings

Each member of the Board shall be encouraged to attend each annual shareholder meeting in person.

IV. THE STANDARDS FOR PRELIMINARY APPROVAL OF A DERIVATIVE SETTLEMENT

There is a strong policy favoring compromises that resolve litigation, "particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation." *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995). The "'[s]ettlements of shareholder derivative actions are particularly favored because such litigation "is notoriously difficult and unpredictable."'" *Cohn v. Nelson*, 375 F. Supp. 2d 844, 852 (E.D. Mo. 2005) (citations omitted).

Federal Rule of Civil Procedure 23.1 governs a district court's analysis of the fairness of a settlement of a shareholder derivative action. *Wiener v. Roth*, 791 F.2d 661 (8th Cir. 1986). Under Rule 23.1, a derivative action "may be settled, voluntarily dismissed, or compromised only with the court's approval. Notice of a proposed settlement, voluntary dismissal, or compromise must be given to shareholders or members in the manner that the court orders." Fed. R. Civ. P. 23.1(c).

The Ninth Circuit has provided factors which may be considered in evaluating the fairness of a class action settlement:

> The district court's ultimate determination will necessarily involve a balancing of several factors which may include, among others, some or all of the following: the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

Officers for Justice v. Civil Serv. Comm'n, 688 F.2d 615, 625 (9th Cir. 1982) (citations omitted). *Accord Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993).

The district court must exercise "sound discretion" in approving a settlement. *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff'd*, 661 F.2d 939 (9th Cir. 1981); *Torrisi*, 8 F.3d at 1375. Therefore, in exercising its discretion, "the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Officers for Justice*, 688 F.2d at 625. The Ninth Circuit defines the limits of the inquiry to be made by the court in the following manner:

> Therefore, the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits. Neither the trial court nor this court is to reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements. The proposed settlement is not to be judged against a hypothetical or speculative measure of what ***might*** have been achieved by the negotiators.

Id. (emphasis in original).

V. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED AND ULTIMATELY FINALLY APPROVED AFTER NOTICE TO MCAFEE SHAREHOLDERS

At the Settlement Hearing, the Court will have before it detailed papers submitted in support of the proposed Settlement and will be asked to make a determination as to whether the Settlement is fair, reasonable and adequate and in the best interest of those whose claims will be extinguished. At this juncture, however, the parties request only that the Court grant preliminary approval of the Settlement. To grant preliminary approval, the Court need only conclude that a settlement of the

claims against the Settling Defendants on the agreed upon terms is within the range of possible approval in order to preliminarily approve the Settlement for the purposes of providing notice and holding a future fairness hearing.[4] Federal Plaintiffs respectfully submit that this Court may easily find that the Settlement is "within the range of possible approval." *See In re Juniper Networks Derivative Litig.*, No. 5:06-cv-03396-JW, slip op. (N.D. Cal. Sept. 8, 2008) (granting preliminary approval of $22.6 million settlement consisting of stock option repricing and cancellation and corporate governance); *see also In re Activision, Inc. S'holder Derivative Litig.*, No. CV-06-04771-MRP, slip op. (C.D. Cal. July 21, 2008) (granting final approval of $24.3 million settlement consisting of stock option repricings and cancellations and corporate governance enhancements). *See* Exs. A and B to Declaration of Jeffrey D. Light in Support of Motion for Preliminary Approval of Derivative Settlement ("Light Decl."), submitted herewith.

Here, the Settlement was reached after extensive arm's-length negotiations between and among counsel for the Plaintiffs in Actions, the individual defendants (other than Samenuk, Roberts and Weiss), McAfee, and the Special Committee, provides substantial benefits to the Company and its shareholders while eliminating the expense, risk and delay inherent in such complex litigation, including the very real risk of no recovery. *See* Declaration of Charles J. Robel In Support of Motion to Approve Settlement ("Robel Decl."), at ¶¶5-6, 12-13.

The McAfee Board of Directors approved the Settlement, concluding the settlement of the Actions under the terms set forth in the Stipulation is in the best interest of the Company, and

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[4] As the *Manual for Complex Litigation* explains:

> If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval, the court should direct that notice under Rule 23(e) be given to the class members of a formal fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement.

Manual for Complex Litigation §30.41, at 237 (3d ed. 1995).

confers a substantial benefit to McAfee. *See* Robel Decl., ¶6 ("The Board agrees that the Settlement and each of its terms are in best interests of McAfee.").[5]

Federal Plaintiffs respectfully submit that the Settlement is an excellent result for McAfee and its shareholders. In connection with the settlement of the Actions, McAfee shall adopt a series of significant industry-leading corporate governance enhancements specifically designed to address the governance shortcomings that Plaintiffs alleged contributed to the climate that gave rise to the option backdating alleged in the Actions. In addition, the Settlement includes a direct financial benefit to McAfee with an intrinsic value of approximately $30 million, based on the cancellation of over 1.7 million options held by certain defendants whom Plaintiffs alleged granted and/or received backdated stock option awards. The Settlement further provides for the assignment to McAfee of claims against defendants Samenuk, Roberts and Weiss which will not be released and may be pursued by McAfee, and thus may yield further value for the Company.

McAfee acknowledge that the Plaintiffs and their counsel were a material factor in obtaining substantial benefits for the Company that are described above and in the Stipulation, ¶3.1. As corporate debacles such as Enron, Tyco and WorldCom demonstrate, strong corporate governance is fundamental to a corporation's economic well-being and success. Indeed, "Courts have recognized that corporate governance reforms such as those achieved here provide valuable benefits to public companies." *Cohn*, 375 F. Supp. 2d at 853 (citing cases).

Moreover, reference to some of the factors considered by courts in granting final approval of derivative and class action settlements lends support to the parties' belief that the proposed Settlement is within the range of possible approval. In determining whether a settlement is fair, courts focus on whether the settlement was reached as a result of good faith bargaining at arm's length without collision. *See In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 159 (4th Cir. 1991). As discussed above, the Settlement was extensively negotiated between experienced counsel with a firm

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[5] In the absence of a disabling conflict of interest and/or good faith, exercise of business judgment by directors traditionally are afforded significant deference by the court. *See Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981).

understanding of the strengths and weaknesses of the claims and defenses asserted, is the product of significant give and take by the settling parties, and was only reached after extensive negotiations between counsel for the Plaintiffs, the individual defendants, McAfee and the Special Committee with the substantial assistance of Judge Phillips.

An evaluation of the benefits of settlement must also be tempered by a recognition that any compromise involves concessions on the part of all of the settling parties. Indeed, "the very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" *Officers for Justice*, 688 F.2d at 624 (citations omitted). Although Federal Plaintiffs believe that the claims asserted in the litigation were meritorious, liability was by no means a foregone conclusion. Had Federal Plaintiffs continued to litigate, there was a risk that they would not have been successful on defendants' attacks on the pleadings, a potential motion to terminate by a Special Litigation Committee, and other pre-trial motions designed to eliminate or curtail Federal Plaintiffs' claims.

Even if Federal Plaintiffs were successful and survived defendants' attacks, continued litigation would be extremely complex, costly and of substantial duration. Document discovery would need to be completed, depositions would need to be taken, experts would need to be designated and expert discovery conducted, defendants' expected motions for summary judgment would have to be briefed and argued and a trial would have to be held. Indeed, significant risks remained in getting past defendants' motions for summary judgment and obtaining a favorable judgment after trial. Even if liability was established, the amount of recoverable damages would still have posed significant issues and would have been subject to further litigation. The Settlement eliminates these and other risks of continued litigation, including the very real risk of no recovery after several more years of litigation, while providing McAfee and its shareholders substantial benefits. *See Officers for Justice*, 688 F.2d at 625. Indeed, the Ninth Circuit in affirming the district court's approval of settlement of a derivative action noted that the "odds of winning [a] derivative lawsuit [are] extremely small" because "derivative lawsuits are rarely successful." *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995).

It is also clear that even a victory at trial is no guarantee that the judgment would ultimately be sustained on appeal or by the trial court. For example, recently in *In re Apollo Group, Inc. Sec.*

Litig., No. CV 04-2147-PHX-JAT, 2008 U.S. Dist. LEXIS 61995 (D. Ariz. Aug. 4, 2008), the court on a motion for judgment as matter of law, overturned a jury verdict of $277 million in favor of shareholders based on insufficient evidence presented at trial to establish loss causation. Add to these post-trial and appellate risks, the difficulty and unpredictability of a lengthy and complex trial – where witnesses could suddenly become unavailable or the fact finder could react to the evidence in unforeseen ways – and the benefits of the Settlement become all the more apparent.

Finally, significant weight should be attributed to the belief of experienced counsel that settlement is in the best interest of those affected by the settlement. *Officers for Justice*, 688 F.2d at 625. McAfee, Plaintiffs, and the counsel for each, have independently considered the Settlement and all agree that it is in the best interests of McAfee and its stockholders. Robel Decl., ¶¶6, 13. Here, counsel for Federal Plaintiffs not only have extensive experience in the area of shareholder representative litigation, but have been at the forefront of investigating stock option abuses and are involved in the prosecution of numerous actions on behalf of shareholders alleging stock option abuses in courts nationwide. *See, e.g.*, *Juniper Networks*, slip op; *Activision*, slip op.; *In re Apple Computer, Inc., Derivative Litig.*, No. CV-06-04128-JF, slip op. (N.D. Cal. Nov. 2, 2006); *Alaska Hotel & Rest. Employees Pension Trust Fund v. Sehat Sutardja*, No. C-06-03894-RMW, slip op. (N.D. Cal. Aug. 17, 2006). Light Decl., Exs. A-D. As a result of counsel's unparalleled experience in these types of cases, counsel for Federal Plaintiffs have a unique insight into the legal and factual issues presented. Here, counsel used that expertise and experience to effectively and efficiently prosecute the Actions and reach an excellent result for McAfee and its shareholders. Finally, the assistance of a neutral, well respected mediator, Judge Phillips, also assured a sound result for McAfee and its shareholders.

Moreover, the agreed-to amount of attorneys' fees to be paid to Plaintiffs' Counsel by McAfee is reasonable. In recognition of the substantial benefits bestowed upon McAfee as a result of Plaintiffs' Counsel's efforts, McAfee, acting through its Board of Directors, has agreed to pay and counsel have agreed to accept $13.75 million in attorneys' fees and expenses to Plaintiffs' Counsel. The United States Supreme Court has endorsed this type of consensual resolution of attorneys' fees issues in these kinds of cases as the ideal toward which litigants should strive. *Hensley v. Eckerhart*,

461 U.S. 424, 437, 103 S. Ct. 1933, 1941 (1983) ("A request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee."). Moreover, where there is no evidence of collusion and no detriment to the parties, the court should give "substantial weight to a negotiated fee amount." *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 695 (N.D. Ga. 2001).

Here, Plaintiffs' Counsel and McAfee agreed to an attorneys' fee to be paid to Plaintiffs' Counsel after the principal terms of the Settlement were agreed upon. Moreover, Judge Phillips oversaw these arm's-length negotiations, which resulted in an expense provision that is within the range of agreed fees paid in other derivative cases.[6]

VI. PROPOSED SCHEDULE OF EVENTS

In connection with preliminary approval of the Settlement, the parties are requesting the Court to establish dates by which notice of the Settlement will be distributed to McAfee shareholders, dates by which McAfee shareholders may comment on the Settlement, and a Settlement Hearing. As set forth in the [Proposed] Order Preliminarily Approving Derivative Settlement and Providing for Notice ("Notice Order"), submitted herewith, the parties propose the following:

Summary Notice published in *Investor's Business Daily* ("Notice Date")	10 days after Court enters order preliminarily approving Settlement ("Notice Date")
Filing of Notice of Proposed Settlement via a Form 8-K with the SEC	10 days after Notice Date
Last day for McAfee shareholders to comment on the Settlement	14 days prior to the Settlement Hearing

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[6] *See, e.g.*, *Esther Sadowsky Testamentary Trust v. Brendsel*, No. MDL 1584, slip op. (S.D.N.Y. Jan. 8, 2007) (awarding fees of $15.25); *City of Pontiac Gen. Employees' Ret. Sys. v. Langone*, No. 2006-cv-122302, slip op. at ¶16 (Fulton County Ga. June 10, 2008) (awarding $14.5 million in fees in connection with settlement of options backdating allegations); *In re BP P.L.C. Derivative Litig.*, No. 3AN-06-11929CL, slip op. (3d Judicial Dist. Anchorage Alaska May 7, 2008) (awarding $12.19 million in fees); *Activision*, slip op. (awarding $10.75 million fee in connection with settlement of options backdating allegations). Light Decl., Exs. E-G, B.

In addition, the parties propose that the Settlement Hearing be scheduled 45 days after the Notice Date. The Settlement Hearing date can be inserted in ¶2 of the Notice Order by the Court. This schedule is similar to those used in numerous derivative and class action settlements and provides due process to McAfee shareholders with respect to their rights concerning the Settlement. *See, e.g.*, *Juniper Networks*, slip op. at 3; *In re Activision, Inc. S'holder Derivative Litig.*, No. CV-06-04771-MRP(JTLx), slip op. at 2 (C.D. Cal. May 13, 2008); *In re Apple Inc. Derivative Litig.*, No. C-06-04128-JF, slip op. at 2 (N.D. Cal. Sept. 8, 2008). Light Decl., Exs. A, H-I.

VII. CONCLUSION

The Settlement achieved is an excellent result in light of the risks and delays inherent in the litigation and the complexity and expense if the case proceeded to trial, and in fact constitutes one of the strongest and most comprehensive settlements of its kind to date. Accordingly, Federal Plaintiffs and their counsel respectfully submit that the Settlement is fair, reasonable and adequate and should be preliminarily approved.

DATED: October 1, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on October 1, 2008.

s/ Jeffrey D. Light
JEFFREY D. LIGHT

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