

1 JOSEPH W. COTCHETT (#36324)
 2 jcotchett@cpmlegal.com
 3 MARK C. MOLUMPBY (#168009)
 4 mmolumphy@cpmlegal.com
 5 COTCHETT, PITRE & McCARTHY
 840 Malcolm Road, Suite 200
 6 Burlingame, CA 94010
 Telephone: (650) 697-6000
 Fax: (650) 697-0577

6 *Attorneys for Plaintiffs and Proposed Class*

8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA

12 LARRY McINTOSH, YANGJIE CHENG,)
 13 PING CHEN, STEVE HAEFFELE, LEBIN)
 14 CHENG, VATSAL SONECHA, and)
 15 JONATHAN WONG, individually and on)
 behalf of all those similarly situated,)
 Plaintiffs,)
 16 v.)
 17 McAFEE, INC.,)
 18 Defendant.)

Case No. C06-07694 JW

**DECLARATION OF MARK C.
 MOLUMPBY IN SUPPORT OF
 PLAINTIFFS' MOTION FOR REPORT
 AND RECOMMENDATION TO AWARD
 ATTORNEYS FEES AND COSTS TO
 PLAINTIFFS**

Date: December 16, 2008
 Time: 10:00 a.m.
 Courtroom: 2
 Honorable Howard R. Lloyd

1 I, MARK C. MOLUMPBY, declare:

2 1. I am an attorney at law duly licensed to practice in the State of California and
3 before this Court, and am a partner with the firm of Cotchett, Pitre & McCarthy (“Cotchett
4 Pitre”), counsel for plaintiffs and the proposed Class. I have personal knowledge of the matters
5 stated herein and if called as a witness, I could and would competently testify to the following.

6 2. I make this declaration in support of Plaintiffs’ Motion for Report and
7 Recommendation to Award Attorneys Fees and Costs to Plaintiffs.

8 **Overview of Dispute**

9 3. This is a class action brought by former employees of McAfee. On July 27, 2006,
10 following an investigation into possible stock option backdating, McAfee notified the SEC that it
11 was unable to timely file its quarterly results and ceased issuing new shares under the Company’s
12 stock option plans pending the filing of corrected financials. This unilateral freeze, commonly
13 referred to as a “blackout,” effectively prevented McAfee employees from exercising their earned
14 and vested stock options as of July 28, 2006.

15 4. Plaintiffs allege that, under McAfee’s stock option agreements, former employees
16 were entitled to have 90 days following their termination to exercise their vested stock options.
17 Plaintiffs allege that McAfee breached the agreements by not giving former employees 90 days to
18 exercise their options and, instead, running the 90 day exercise period during the blackout – even
19 though former employees could not exercise their options.

20 **Plaintiffs Tried To Resolve Their Dispute Before Filing This Lawsuit**

21 5. Before retaining legal counsel, and incurring the expense of filing a lawsuit,
22 plaintiffs repeatedly tried to resolve their dispute with McAfee, asking for either (1) the
23 opportunity to exercise their vested options immediately or (2) in the alternative, to defer the 90
24 day exercise period until after McAfee lifted its blackout. Unfortunately, McAfee rejected all of
25 plaintiffs’ requests and took the uniform position that the 90 day period to exercise options
26 would continue to run during the blackout, even if that meant that plaintiffs would lose their
27 options without an opportunity to exercise.

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1 **After Plaintiffs File Lawsuit, McAfee Changes Its Policy**

2 6. On December 15, 2006, after McAfee confirmed that it would not allow former
3 employees to exercise their options, plaintiffs filed a class action complaint. Plaintiffs sued for
4 breach of contract on behalf of a Class of McAfee’s former employees who were unable to
5 exercise their stock options due to the blackout imposed by McAfee as of July 28, 2006 (the
6 “Class”). Plaintiffs also brought fraud claims for class members who left McAfee in reliance on
7 McAfee’s written representations that the exercise period would commence when the blackout
8 was lifted.

9 7. On January 8, 2007, just three weeks after plaintiffs filed their complaint,
10 McAfee announced that its Board would “amend” the stock option agreements to extend the
11 exercise period for former employees until after the blackout was lifted. However, McAfee set a
12 deadline of December 31, 2007, such that options still expired if the blackout was not lifted.
13 Further, the exercise option was not offered to former employees whose options had already
14 expired who were instead promised an undefined “cash” consideration. Finally, the amendment
15 was not binding as a judgment, allowing the Board to change its mind yet again before any relief
16 was provided.

17 8. On February 6, 2007, McAfee filed a motion to dismiss, asserting that (1)
18 plaintiffs’ claims were preempted by federal securities law and (2) plaintiffs had no injury giving
19 them standing based on McAfee’s proposed remedial measures announced on January 8, 2007.

20 9. On September 28, 2007, the Court entered an order on McAfee’s motion to
21 dismiss. While the Court held that the class claims for fraud were preempted, the breach of
22 contract claim survived. The Court also rejected defendants’ standing argument, holding that the
23 application of McAfee’s remedial actions to former employees’ options failed to establish that
24 plaintiffs lacked standing.

1 10. On October 26, 2007, plaintiffs filed a First Amended Complaint against McAfee
2 asserting a breach of contract claim on behalf of the class of former McAfee employees, and
3 fraud claims on behalf of themselves individually. The class was defined as follows:

4 All persons who were employed at McAfee and who received stock options but
5 were unable to exercise them due to the blackout imposed by McAfee as of July
28, 2006 (the “Class”).

6 11. On November 15, 2007, the Court entered its pre-trial Scheduling Order and
7 ordered that all discovery be completed by June 16, 2008. Plaintiffs subsequently served their
8 initial disclosure pursuant to Rule 26. McAfee never served its initial disclosure.

9 12. On November 27, 2007, McAfee filed its Answer to the First Amended
10 Complaint. Notably, McAfee denied every allegation related to the breach of contract cause of
11 action asserted by the Class.

12 **McAfee Offers Relief To Named Plaintiffs, But Refuses To Discuss Absent Class Members**

13 13. On December 21, 2007, McAfee announced that it had filed restated financial
14 statements and amended reports with the SEC. At the same time, the named plaintiffs received
15 letters from McAfee indicating that the blackout period would soon be lifted and that they would
16 either receive a cash payment for their expired options or a 90 day extension to exercise their
17 options.

18 14. McAfee’s announcement was a very positive development. If all class members
19 were entitled to the relief sought by this action, the case could be dismissed. Accordingly, I
20 contacted McAfee’s counsel to determine whether McAfee intended to provide the same relief
21 that it was offering to the seven named plaintiffs to all other class members and, if not, the basis
22 for any exceptions. I even proposed that, if McAfee was willing to sign a declaration confirming
23 that all class members were entitled to relief, formal discovery would not be required.

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1 **Request for Award Of Attorneys' Fees And Expenses**

2 22. Several attorneys and other support staff worked on this case during the relevant
3 period, including myself, Joseph W. Cotchett, Sean E. Ponist, Kelly L. Sommerfeld, Barbara L.
4 Lyons, Nirav Engineer, Donald D. Thornton, Sheilah Buack, Michelle L. Cooper, Patrick
5 Skahan, and Kevin Allen. Attached hereto as Exhibit D is a resume and list of complex cases
6 handled by Cotchett Pitre.

7 23. I am a partner with the firm and have practiced as an attorney since 1993. I
8 specialize in civil litigation with an emphasis on complex business disputes, securities, and class
9 actions. I served as the lead partner on the case from inception on November 29, 2006, to
10 present. I spent 417.80 hours on this case from inception to January 11, 2008. During the time I
11 spent on this case, I coordinated all case activity, communications with clients and opposing
12 counsel, and decisions relating to the strategy and direction of the case. I conferred with clients
13 regarding the validity of the case and case management. I researched and drafted the initial
14 complaint and the amended complaint. I researched case law and procedure regarding discovery
15 motions and class certification. I spent a significant amount of time researching McAfee's
16 historical practices and communications with employees regarding stock option exercise. I
17 frequently conferred with opposing counsel regarding discovery, settlement communications, and
18 efficient resolution to the case. I spent a significant amount of time reviewing, researching and
19 drafting the opposition to defendants' motion to dismiss.

20 24. Joseph Cotchett, the founder and a partner of Cotchett Pitre, has been a practicing
21 attorney since 1965. During his 40-year legal career, he has tried more than 100 cases, and
22 successfully headed hundreds of millions of dollars in antitrust, securities and major fraud cases.
23 Mr. Cotchett worked on this case in December of 2006. Mr. Cotchett spent 2.60 hours on the
24 investigation and drafting of the complaint and case strategy. Mr. Cotchett reviewed the
25 complaint, and made edits and revisions to the applicable case law and causes of action. Mr.
26 Cotchett was involved in the management of the case as well as the strategy and direction of the
27 case.

1 25. Barbara Lyons was an associate of the Cotchett firm. She was admitted to the
2 California State Bar in 1994, and has practiced extensive securities litigation in the last 14 years.
3 Ms. Lyons worked on the current matter in February of 2007. Ms. Lyons spent 3.10 hours
4 performing legal research regarding jurisdictional and damages issues, and researching theories
5 of recovery pursuant to the catalyst theory. Ms. Lyons identified the catalyst theory as
6 appropriate in our case. Ms. Lyons reviewed case law applicable to recover fees under the
7 catalyst theory and related such case law to the current matter.

8 26. Sean Ponist is an associate at Cotchett Pitre where he focuses on antitrust,
9 securities, environmental and real estate litigation. Mr. Ponist has been a member of the bar
10 since 1999. Mr. Ponist performed 42 hours on this case from February 16, 2007, to November
11 27, 2007. During that time, Mr. Ponist helped to research, draft review and finalize pleading
12 papers throughout the life of the case. Mr. Ponist conferred with co-counsel regarding applicable
13 issues and the necessary law and motion to effectively resolve this action. Mr. Ponist researched
14 case law on, drafted, and finalized the opposition to Defendant's Motion to Dismiss. Mr. Ponist
15 also drafted Plaintiffs' Case Management Conference Statements and performed research on
16 McAfee's opposing arguments and relevant issues for the Rule 26 hearing.

17 27. Kelly Sommerfeld was admitted to the State Bar in 2004. As an associate at the
18 Cotchett Pitre, Sommerfeld had worked on numerous shareholder class actions. Ms. Sommerfeld
19 dedicated 64 hours to this matter in February of 2007. Ms. Sommerfeld reviewed and analyzed
20 defendant's motion to dismiss, and researched issues raised in McAfee's motion. Ms.
21 Sommerfeld shepardized applicable case law, researched SLUSA requirements, and drafted
22 Plaintiffs' Opposition to McAfee's Motion to Dismiss. Ms. Sommerfeld conferred with clients
23 and all parties regarding the Alternative Dispute Resolution (ADR) Stipulation, and coordinated
24 the ADR certifications.

25 28. Sheilah Buack was a paralegal on the antitrust and securities team at Cotchett
26 Pitre for about two years. She performed 20.20 hours of valuable work as the initial lead
27 paralegal on the case in December of 2006. Ms. Buack's tasks included meeting with potential
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1 clients regarding the case, investigating documentary evidence regarding stock option practices
2 and dealings with plaintiffs, performing fact research related to McAfee's filings with the SEC
3 and representations made to McAfee employees and prior blackout practices, and organizing the
4 case file.

5 30. Patrick Skahan is a paralegal on the antitrust and securities litigation team at
6 Cotchett Pitre. Mr. Skahan has worked almost exclusively on securities and antitrust litigations
7 since April of 2007. In May of 2007, Mr. Skahan spent .5 hours on case management and case
8 status updates.

9 31. Michelle Cooper was a paralegal on the antitrust and securities team at Cotchett
10 Pitre. She worked almost exclusively on securities and antitrust litigations during the time she
11 worked at the Cotchett firm. From January 16, 2007, through April 18, 2007, Ms. Cooper spent
12 4.7 hours corresponding with clients regarding the case, preparing the required Alternative
13 Dispute Resolution (ADR) certifications, creating case management tools, and case status
14 updates.

15 32. Kevin Allen was a law clerk with Cotchett Pitre through the winter of 2007.
16 During that time, Mr. Allen almost exclusively assisted the securities and antitrust litigation
17 team. From October 17, 2007, to November 20, 2007, Mr. Allen spent 16.10 hours performing
18 legal research related to McAfee's motion to dismiss, including motions to reconsider or clarify,
19 as well as relating to damages. Mr. Allen shepardized relevant case law, evaluating case merit as
20 it related to the motion to dismiss, and researched a stay in discovery as it would relate to a
21 motion to dismiss.

22 33. Nirav Engineer has been a senior paralegal with Cotchett Pitre since March of
23 2005. Mr. Engineer has assisted on hundreds of cases conducting fact investigation and initiating
24 actions. In December of 2006, Mr. Engineer spent 4.5 hours completing factual investigations
25 relating to the McAfee's conduct and service requirements.

26 34. Don Thornton, was a senior paralegal and investigator with Cotchett Pitre for 13
27 years. In December of 2006, Mr Thornton spent 72.90 hours on this case coordinating all factual
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1 investigation relating to the complaint and potential defendants and their roles at McAfee. Mr.
2 Thornton located the defendants in this matter, researched the background of clients and potential
3 class members, and researched factual provisions applied to the initiation of the case.

4
5 41. In sum, the attorneys and support staff working on this case have extensive
6 experience in consumer class actions and public interest litigation. In prosecuting this action, my
7 firm diligently represented the interests both of the seven named plaintiffs and the approximately
8 690 other proposed Class members. Based on the chronology of events, in which McAfee
9 uniformly rejected every pre-lawsuit demand to allow former employees to exercise their vested
10 options, and only agreed to provide the requested relief after a class action suit was filed, the
11 lawsuit was plainly a catalyst for the relief provided.

12 42. Plaintiffs' counsel respectfully request approval of an award of attorneys' fees in
13 the amount of \$686,122.50. The requested amount represents my firm's "lodestar" (hours
14 multiplied by customary hourly rate) of \$228,707.50 for all time spent in this litigation from the
15 inception of the case to January 15, 2008, the last date by which members of the putative class
16 received relief, with a multiplier of three. A detailed lodestar report for all employees at my firm
17 is provided below:

18 **LODESTAR REPORT**

19 **(From Inception through January 15, 2008)**

20

| 21 NAME | 22 POSITION | 23 TOTAL HOURS | 24 HOURLY RATE | 25 TOTAL FEES |
|---------------------------|---------------|----------------|----------------|----------------------|
| 26 Cotchett, Joseph W. | 27 Partner | 2.60 | \$550.00 | \$1,430.00 |
| 28 Molumphy, Mark C. | Partner | 417.80 | \$425.00 | \$177,565.00 |
| SUB-TOTAL PARTNERS | | 420.40 | | \$ 178,995.00 |
| | | | | |
| Lyons, Barbara L. | Sr. Associate | 3.10 | \$350.00 | \$1,085.00 |
| Ponist, Sean E. | Sr. Associate | 42.00 | \$350.00 | \$14,700.00 |
| Sommerfield, Kelly L. | Associate | 64.00 | \$250.00 | \$16,000.00 |

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**DECLARATION OF MARK C. MOLUMPHY IN SUPPORT OF PLAINTIFFS' MOTION FOR REPORT AND
RECOMMENDATION TO AWARD ATTORNEYS FEES AND COSTS TO PLAINTIFFS**

| | | | | | |
|----|---------------------|---------------|---------------|----------|---------------------|
| 1 | SUB-TOTAL | | 109.10 | | \$31,785.00 |
| 2 | ASSOCIATES | | | | |
| 3 | | | | | |
| 4 | Engineer, Nirav | Sr. Paralegal | 4.50 | \$175.00 | \$787.50 |
| 5 | Thornton, Donald D. | Sr. Paralegal | 72.90 | \$175.00 | \$12,757.50 |
| 6 | Buack, Sheilah | Paralegal | 20.20 | \$125.00 | \$2,525.00 |
| 7 | Cooper, Michelle L. | Paralegal | 4.70 | \$125.00 | \$587.50 |
| 8 | Skahan, Patrick | Paralegal | 0.50 | \$125.00 | \$62.50 |
| 9 | Allen, Kevin | Law Clerk | 16.10 | \$75.00 | \$1,207.50 |
| 10 | SUB-TOTAL | | 118.90 | | \$17,927.50 |
| 11 | ASSISTANTS | | | | |
| 12 | GRAND TOTAL | | 648.40 | | \$228,707.50 |

43. The requested lodestar multiplier of three is reasonable and consistent with the factors considered under California law, including the novelty and difficulty of the issues involved, the skill displayed in resolving them, the fact that litigation precluded other employment, the contingent nature of the fee arrangements, and the results achieved. Before filing the case, McAfee refused to permit former employees to exercise their options or to extend their exercise period. McAfee changed its position in response to this class action suit. Even then, it continued to litigate the case, refused to confirm whether class members would receive the same relief, and moved to dismiss the claims based on SLUSA preemption and standing arguments, requiring additional legal analysis and briefing. My firm devoted substantial time and resources to litigating the case, which precluded time spent on other cases and other employment. Further, my firm represented the plaintiffs and class on a contingent basis, advancing all time and costs, without any assurance of payment from a favorable outcome. Finally, the result achieved – relief worth an estimated \$23.5 million to approximately 700 class members, as discussed below – was substantial, particularly given McAfee’s refusal to provide anything to its former employees before the case was filed.

1 **COST REPORT**

2 **(From Inception through January 15, 2008)**

3

| CATEGORY | TOTAL COSTS |
|---|-------------------|
| 4 Attorney Service | \$1,346.00 |
| 5 Court Costs | \$350.00 |
| 6 Federal Express; California Overnight | \$139.78 |
| 7 LEXIS/Westlaw | \$3,160.45 |
| 8 In-house Photocopies | \$434.20 |
| 9 Outside Photocopies | \$306.23 |
| 10 Postage | \$75.42 |
| 11 Telephone / Fax | \$39.36 |
| TOTALS: | \$5,851.44 |

12

13 I declare under penalty of perjury under the laws of the United States of America

14 that the foregoing is true and correct. Executed October __, 2008 at Burlingame,

15 California.

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20 MARK C. MOLUMPY

EXHIBIT A

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United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Larry McIntosh, et al.,

NO. C 06-07694 JW

Plaintiffs,

v.

McAfee, Inc.,

Defendant.

**ORDER GRANTING PLAINTIFFS’
MOTION TO DISMISS; DENYING
DEFENDANT’S MOTIONS FOR
SUMMARY JUDGMENT; GRANTING
PLAINTIFFS’ MOTION FOR
ATTORNEY FEES AND COSTS**

I. INTRODUCTION

Plaintiffs¹ bring this putative class action against their former employer, Defendant McAfee Inc. (“McAfee”), alleging breach of contract.² Plaintiffs claim that McAfee violated the parties’ stock option agreements by suspending issuance of McAfee common stock during the pendency of an Security and Exchange Commission (“SEC”) investigation. The Court has jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d).

Presently before the Court are (1) Plaintiffs’ Motion to Award Attorneys Fees and Plaintiff’s Motion for Dismissal of Action (hereafter, “Plaintiffs’ Motion,” Docket Item No. 71); and (2) Defendant’s Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment (hereafter, “Defendant’s Motion,” Docket Item No. 62.) The Court conducted a hearing on

¹ Larry McIntosh, Yangjie Cheng, Ping Chen, Steve Haeffele, Lebin Cheng, Vatsal Sonecha, and Jonathan Wong (collectively, “Plaintiffs”).

² Plaintiffs also allege fraud and negligent misrepresentation, *inter alia*, in their capacity as individual Plaintiffs.

1 September 22, 2008. Based on the papers submitted to date and oral argument, the Court GRANTS
2 Plaintiffs' Motion to Dismiss, GRANTS Plaintiffs' Motion for Attorney Fees, and DENIES
3 Defendant's Motion for Summary Judgment.

4 **II. BACKGROUND**

5 **A. Factual Allegations**

6 In an Amended Complaint, Plaintiffs allege as follows:

7 Defendant McAfee, Inc. is a Delaware corporation with its principal executive offices
8 located in Santa Clara, California. (Amended Complaint ¶ 17, hereafter, "Complaint,"
9 Docket Item No. 54.) McAfee develops computer security solutions for both enterprises and
10 individual consumers. Id.

11 Plaintiffs are former employees of McAfee, Inc. (Id. ¶¶ 10-16.) In connection with
12 their employment, Plaintiffs were each granted stock options under employee incentive
13 option plans adopted by the McAfee Board of Directors. (Id. ¶¶ 25- 30.) Each of these
14 grants was evidenced by a Stock Option Agreement between McAfee and the employee
15 which specified the terms of the option. Id. Among other terms, the Stock Option
16 Agreements specified that options would expire ten years after the date of grant, or, where
17 the employee left the company, ninety days after termination of employment. (Id. ¶ 29.)

18 On July 27, 2006, in connection with an investigation of possible options backdating,
19 McAfee filed a form 8-K that stated it would be unable to timely file its quarterly report and
20 that previous financial statements should not be relied upon. (Id. ¶¶ 2, 41.) McAfee then
21 imposed a "blackout," effective July 28, 2006, during which there could be no issuance of
22 new shares under the company's stock option plans pending the filing of corrected financials.
23 (Id.)

24 During previous blackouts, employees who terminated their employment
25 during the blackout were allowed to exercise their options for a period of 90 days after the
26 blackout was lifted. (Id. ¶¶ 31-35.) For several days following the commencement of the
27

1 July 2006 blackout, various officers of McAfee represented that a similar policy would be
2 followed. (Id. ¶¶ 43-45.) By October, however, McAfee changed its position. Employees
3 would have no additional time to exercise options that expired during the blackout. (Id. ¶¶
4 50-55.) The blackout currently remains in effect. (Id. ¶ 57.)

5 On the basis of these allegations, Plaintiffs allege five causes of action: (1) breach of
6 contract; (2) breach of the covenant of good faith and fair dealing; (3) fraud and deceit; (4) negligent
7 misrepresentation; and (5) unjust enrichment. (Complaint at 16-20.) Cause of action (1) is alleged
8 as a class action, while causes of action (2)-(5) are alleged in Plaintiffs' individual capacities. (Id.)

9 **B. Procedural History and Factual Developments**

10 Plaintiffs filed their Initial Complaint on December 15, 2006. (Docket Item No. 1.) On
11 January 8, 2007, Defendant's Board of Directors voted to extend the exercise period for former
12 employees until the blackout was lifted. (Declaration of Mark Molumphy in Support of Plaintiffs'
13 Motion to Dismiss and Motion for Attorney Fees ¶ 7, Ex. A, hereafter, "Molumphy Decl.," Docket
14 Item No. 71.) Former employees whose options had expired were promised cash consideration.
15 (Id.) In December 2007, Defendant sent Plaintiffs letters indicating that the blackout would soon be
16 lifted and that Plaintiffs would either be given a 90-day extension to exercise their options or a cash
17 payment for expired options. (Id.) Subsequently, beginning in early 2008, Defendants granted
18 named Plaintiffs' desired relief.

19 In April 2008, Defendant's SEC filings revealed that approximately 690 former employees
20 received either a cash payout or a 90-day extended period to exercise their options. (Id. ¶¶ 14-19.)
21 As the SEC filing revealed, former employees received at least \$23.5 million as a result of the relief
22 provided by Defendant in early 2008. (Id.) The parties do not now dispute that Plaintiffs have been
23 given the relief they sought through this litigation. (Plaintiff's Motion at 19; Defendant's Motion at
24 13.)

1 **III. DISCUSSION**

2 The remaining issues in this case concern (1) whether this case should be dismissed with
3 prejudice or whether summary judgment should be granted in favor of Defendant; and (2) whether
4 Plaintiffs are entitled to an award of attorney fees under California Code of Civil Procedure Section
5 1021.5.

6 **A. Plaintiffs' Motion to Dismiss**

7 Plaintiffs ask the Court to dismiss this case with prejudice under Federal Rule of Civil
8 Procedure 41(a)(2).

9 Where a plaintiff cannot voluntarily dismiss an action under Rule 41(a) because the opposing
10 party has served an answer or a motion for summary judgment, a plaintiff may motion the Court to
11 dismiss under terms the Court considers proper. Fed. R. Civ. P. 41(a)(1-2).

12 Since Defendant has filed an Answer in this case, Plaintiffs now make a Motion to Dismiss
13 under Rule 41(a)(2). (Plaintiff's Motion at 19-20). Plaintiffs base their request on the relief that
14 Defendant provided to Plaintiffs and members of the putative class. (*Id.* at 19.) Given Plaintiffs'
15 request, along with the nature and extent of Plaintiffs' relief, the Court is satisfied that this case
16 should be dismissed.

17 Accordingly, the Court GRANTS Plaintiff's Motion to Dismiss with prejudice.

18 **B. Defendant's Motions for Summary Judgment**

19 In light of the Court's finding that this case shall be dismissed with prejudice, Defendant's
20 Motions for Summary Judgment are DENIED as moot.

21 **C. Plaintiffs' Motion for Attorney Fees**

22 Plaintiffs contend that, because they successfully obtained relief from Defendant as a
23 consequence of this litigation, they are entitled to an award of attorney fees under California's
24 Private Attorney General Doctrine. C.C.P. § 1021.5.

25 Under California law, an exception to the general rule that each party bears its own attorney
26 fees provides that:

1 a court may award attorneys' fees to a successful party against one or more
2 opposing parties in any action which has resulted in the enforcement of an
3 important right affecting the public interest if: (a) a significant benefit, whether
4 pecuniary or nonpecuniary, has been conferred on the general public or a large
5 class of persons, (b) the necessity and financial burden of private enforcement,
6 or of enforcement by one public entity against another public entity, are such as
7 to make the award appropriate, and (c) such fees should not in the interest of
8 justice be paid out of the recovery, if any.

9 Id.

10 Where a plaintiff has not been "successful" as a result of a favorable judgment, a plaintiff may
11 still be entitled to attorney fees if the litigation was a "catalyst" in bringing about the desired relief.

12 Graham v. DaimlerChrysler, 34 Cal. 4th 553, 567 (2005). The application of the catalyst theory of
13 success requires demonstration of three factors: (1) the lawsuit must have been the catalyst in
14 motivating the defendant to provide the primary relief sought; (2) the lawsuit must have had merit
15 and achieved its catalytic effect by threat of victory, not by dint of nuisance and threat of expense;
16 and (3) the plaintiffs must have reasonably attempted to settle the litigation prior to filing the lawsuit.

17 Id. at 594.

18 Once a plaintiff demonstrates success, either through a judgment on the merits or through
19 application of the catalyst theory, a plaintiff must then demonstrate the remaining requirements of §
20 1021.5.

21 **1. Whether Plaintiffs Were Successful Under the Catalyst Theory**

22 Plaintiffs contend that, since they were not successful as a result of a favorable judgment, they
23 are entitled to attorney fees on the ground that this litigation was the catalyst in bringing about the
24 desired relief. (Plaintiffs' Motion at 8.)

25 **a. Catalysis of Provision of the Primary Relief Sought**

26 Plaintiffs contend that this action catalyzed motivating Defendant to allow Plaintiffs to
27 exercise their stock options, which was the primary relief sought by Plaintiffs. (Plaintiffs' Motion at
28 8.)

In order to qualify for an award of attorney fees under § 1021, a plaintiff "must demonstrate a
causal connection between his action and the relief achieved." Californians for Responsible Toxics

1 Management v. Kizer, 211 Cal. App. 3d 961, 966 (1989). The “critical fact,” however, “is the impact
2 of the action, not the manner of its resolution.” Id. at 967. The necessary causal connection can thus
3 be found if the plaintiff’s lawsuit induced the defendant’s response, or was a material factor or
4 contributed in a material way to the result achieved. Id. The question of causal linkage is one of fact.
5 Id. Although it can be difficult, as a factual matter, to prove causation under the catalyst theory,
6 “[w]hen an action is taken by the defendant after plaintiff’s lawsuit is filed the chronology of events
7 may permit the inference that the two events are causally related.” Id. at 968.

8 In this case, Plaintiffs proffer abundant evidence of a conflict over the exercise of the disputed
9 stock options between Plaintiffs and Defendant throughout the fall of 2006.³ Part of this evidence
10 documents Defendant’s consistent rejection of Plaintiffs’ demands to exercise their options. (See,
11 e.g., Declaration of Haeffele in Support of Plaintiffs’ Motion, Ex. I, hereafter, “Haeffele Decl.,”
12 Docket Item No. 71 (November 30, 2006 email from McAfee to Plaintiff Haeffele, declining to
13 “consider [Haeffele’s] request for payment of the value . . . attributed to [his] vested options.”).) In
14 response to Defendant’s continued rejection of their position, Plaintiffs filed this action on December
15 15, 2006. On January 8, 2007, Defendant’s Board voted to amend the stock option agreements to
16 extend former employees’ exercise periods until after the blackout period ended. (Molumphy Decl. ¶
17 7.)

18 The Court finds that, from this sequence of events, it can infer that the filing of the lawsuit
19 and the January 8 resolution were causally related. Kizer, 211 Cal. App. 3d at 968. Despite
20 consistently rejecting Plaintiffs’ demands throughout the fall of 2006, Defendant changed its position
21 just three weeks after Plaintiffs filed this action. Defendant proffers no evidence to rebut any
22 inference of a causal relationship between this lawsuit and the Board’s January 8 resolution.
23 Accordingly, the Court finds that Plaintiffs have successfully shown that this action catalyzed the
24 motivation of Defendant to provide the primary relief sought by Plaintiffs.

25 _____
26 ³ All seven named Plaintiffs filed declarations, which document their demands that
27 Defendant honor the disputed stock options and the responses in which Defendant uniformly denied
28 Plaintiffs’ demands. (See Attachments to Plaintiff’s Motion, Docket Item No. 71.)

1 **b. The Merits of This Action**

2 Plaintiff contends that this action had sufficient merit, such that it achieved its catalytic effect
3 by threat of victory and not by mere dint of nuisance and threat of expense. (Plaintiffs' Motion at
4 10.)

5 Sufficient merit can be found under the Graham formulation where " the lawsuit was not
6 frivolous, unreasonable, or groundless." Graham, 34 Cal. 4th at 575.

7 In this case, Defendants' decision to prevent Plaintiffs from exercising their options following
8 the blackout allegedly caused Plaintiffs millions of dollars in injury. Furthermore, the injury was
9 alleged to flow from a breach of contract by Defendant. Specifically at issue was Defendant's
10 interpretation of Plaintiffs' option agreements, and Defendant's decision to apply the "90-day
11 exercise" provision in a manner that resulted in the expiration of Plaintiffs' options during the 2006-
12 07 blackout.

13 Accordingly, the Court finds that Plaintiffs' action has sufficient merit under Graham and was
14 not "frivolous, unreasonable, or groundless." Id.

15 **c. Reasonable Pre-Litigation Attempts at Settlement**

16 Plaintiffs contend that they made reasonable attempts at settlement with Defendant prior to
17 initiating this action. (Plaintiffs' Motion at 11.)

18 In order to qualify for attorney fees under § 1021.5, "lengthy prelitigation negotiations are not
19 required, nor is it necessary that the settlement demand be made by counsel, but a plaintiff must at
20 least notify the defendant of its grievances and proposed remedies and give the defendant the
21 opportunity to meet its demands within a reasonable time." Graham, 34 Cal. 4th at 577.

22 In this case, Plaintiff document numerous demands made to Defendant in the fall of 2006,
23 requesting that Defendant honor the disputed stock options. (See, e.g., Haeffele Decl., Exs. C, G;
24 Plaintiffs' Reply in Support of Motion at 5-8 and Declarations cited therein, hereafter, "Plaintiffs'
25 Reply," Docket Item No. 92.) For example, on October 30, 2006, Steve Haeffele emailed Defendant
26 with respect to "the assurances that the vested options" he had at the time of his departure from
27

1 McAfee “would continue until the blackout period was lifted.” (Haeffele Decl., Ex. C.) Haeffele
2 noted that if Defendant’s alleged assurances were inaccurate, Defendant “[could] expect to hear from
3 [Haeffele’s] attorney.” Id.

4 Plaintiffs thus expressed their grievances to Defendant from late October through November
5 of 2006, along with their demands for relief. After their demands were continually rebuffed by
6 Defendant, Plaintiffs filed this action in mid-December, nearly two months after Defendant’s initial
7 announcement that it would permit the disputed options to expire during the blackout period.

8 Accordingly, the Court finds that Plaintiffs made sufficiently reasonable pre-litigation efforts
9 at settlement to satisfy the Graham standard.

10 **2. Enforcement of an Important Right Affecting the Public Interest**

11 Plaintiffs contend that this action resulted in an enforcement of an important right affecting
12 the public interest. (Plaintiffs’ Motion at 12.)

13 Whether an important public interest is at stake requires “an examination of the subject matter
14 of the action - i.e., whether the right involved was of sufficient societal importance.” Beasley v.
15 Wells Fargo Bank, 235 Cal. App. 3d 1407, 1417-18 (1991). California courts have permitted
16 awarding attorney fees in numerous employment cases involving compensation and benefits. See,
17 e.g., American Federation of Labor v. Employment Dev. Dept., 88 Cal. App. 3d 811, 822 (1979);
18 Wilkerson v. City of Placentia, 118 Cal. App. 3d 435, 445 (1981); Estrada v. FedEx Ground Package
19 System, Inc., 154 Cal. App. 4th 1 (2007). In Estrada, the court upheld an award of attorney fees
20 under § 1021.5, where a class of FedEx drivers sued for reimbursement of work-related expenses.
21 The court found that the named plaintiff had “pursued this public interest class action . . . on behalf of
22 a class comprised of FedEx’s past and present drivers and ultimately obtained awards for 209
23 drivers.” Estrada, 154 Cal. App. 4th at 16-17. Without further discussion, the court held that the
24 “public interest’ requirement of § 1021.5 had been met. Id. at 17.

25 In American Federation, the court upheld the trial court’s award of attorney fees under §
26 1021.5, where an uncertified class had sued to recover earned unemployment benefits under the
27

1 Social Security Act. The court found that “the upholding of unemployed workers’ right to prompt
2 payments under the Social Security Act is a significant benefit to both unemployed workers and the
3 public at large.” American Federation, 88 Cal. App. 4th at 822. Similarly, in Wilkerson, attorney
4 fees were permitted under § 1021.5, where a public employee had brought a constitutional wrongful
5 termination action against a city employer. 118 Cal. App. 3d at 445.

6 Unlike in the majority of cases dealing with employment and compensation issues under §
7 1021.5, this case does not involve back wages or employment-related rights that are grounded in
8 statutory or constitutional law. Rather, this case involves an alleged breach of contract and a form of
9 compensation, stock options, that has not yet been addressed in the § 1021.5 case law. Nonetheless,
10 the Court finds little practical distinction between this case and those employment cases where “the
11 right involved was of sufficient societal importance” to permit an award of attorney fees under §
12 1021.5. Beasley, 235 Cal. App. 3d at 1417-18. This case involves an increasingly common form of
13 employment compensation, which courts have interpreted to be earnings. See, e.g., McAfee v.
14 Metro. Life Ins. Co., 2006 U.S. Dist. LEXIS 33070 at *14 (E.D. Cal. May 23, 2006) (holding that
15 stock options were wages, even though their value may fluctuate over time). Given the importance of
16 this form of employee compensation, upon which Plaintiffs’ financial plans and security may have
17 rested, the Court finds that this case presents matters of no less societal importance than, for example,
18 the work-related expenses in cases like Estrada.

19 Although the Court recognizes that Plaintiffs’ claims are grounded in breach of contract,
20 rather than in a statutory scheme like the Social Security Act or the Fair Labor Standards Act, the
21 Court does not find that enforcement of a statute-based right is a necessary predicate for finding
22 “sufficient societal importance” under § 1021.5. Indeed, the Estrada case simply involved a claim for
23 reimbursement of expenses. The court in that case did not ground its holding on any specified
24 statutory right of the plaintiffs that had been violated. Instead, the court must focus its inquiry on “an
25 examination of the subject matter of the action.” Beasley, 235 Cal. App. 3d at 1417-18. The fact that
26 the legislature has not specifically created a cause of action for employees to enforce stock option
27
28

1 contracts does not mean that enforcement of such contracts is not of sufficient societal importance to
2 justify attorney fees under the Private Attorney General Doctrine.

3 Accordingly, the Court finds that the contract-based right to exercise stock options, as a form
4 of employee compensation, is of sufficient societal importance to warrant a grant of attorney fees
5 under § 1021.5.

6 **3. Significant Benefit to a Large Class of Persons**

7 Plaintiffs contend that they satisfy the requirement that the action confer significant benefit on
8 a large class of persons because, pursuant to this action Defendant provided over \$23 million in relief
9 to a class of roughly 700 individuals. (Plaintiff's Motion at 13-14.)

10 Courts have routinely found that classes of similar size satisfy the requirement that "the
11 litigation has had a beneficial impact . . . on a group of private parties which is sufficiently large to
12 justify a fee award." Beasley, 235 Cal. App. 4th at 1417-18. For example, in Estrada, a class of 209
13 individuals was sufficient under § 1021.5. 154 Cal. App. 4th at *17; see also Parks v. Eastwood Ins.
14 Servs., Inc., 2005 U.S. Dist. LEXIS 46115 at *12 (C.D. Cal. June 28, 2005), aff'd in part, rev'd in
15 part Parks v. Eastwood Ins. Servs., Inc., 2007 U.S. App. LEXIS 11253 (9th Cir. 2007) (recovery of
16 fees under catalyst theory for class of under 200 plaintiffs).

17 In this case, Plaintiffs provide evidence that nearly 700 individuals received approximately
18 \$23 million in recovery as a result of Defendant's provision of Plaintiffs' desired relief in early 2008.
19 (Molumphy Decl., Ex. E.)

20 Accordingly, the Court finds that this litigation had a beneficial impact on a sufficiently large
21 group of private parties to justify a fee award under § 1021.5.

22 **4. The Financial Burden of this Action**

23 Plaintiffs contend that the necessity and financial burden of private enforcement in this case,
24 as well as the interests of justice, make an award of attorney fees appropriate. (Plaintiffs' Motion at
25 14-15.)

1 The final two prongs of the standard under § 1021.5 require that (1) the necessity and
2 financial burden of private enforcement is such as to make an award appropriate, and (2) such fees
3 should not in the interest of justice be paid out of any recovery obtained by the plaintiffs. C.C.P. §
4 1021.5.

5 In this case, Plaintiffs demonstrate that they made ample efforts to resolve the conflict with
6 Defendant prior to instituting this action. In the wake of Defendant's continued refusals to change its
7 position with respect to the exercise periods for the disputed options, Plaintiffs filed this case as a
8 class action. Plaintiffs therefore had little choice but to pursue litigation in order to enforce their
9 alleged rights under the relevant stock option contracts. During the pendency of this action, however,
10 and before a full class was certified, Defendant provided the relief requested by Plaintiffs. According
11 to Defendant's SEC filing, relief was provided to roughly 690 individuals, which is the size of the
12 putative class in this litigation. (Molumphy Decl. ¶ 24, Ex. E.)

13 Given that class certification has not occurred, and that Defendant did not provide this relief
14 pursuant to a adverse judgment of the Court or a formal settlement proceeding, the seven named
15 Plaintiffs are now faced with the prospect of bearing the entire burden of attorney fees, despite the
16 fact that nearly 700 additional former McAfee employees received a benefit as a consequence of this
17 litigation. The Court finds that it would be contrary to the interests of justice to require the named
18 Plaintiffs, who undertook the burden of bringing this litigation to enforce the rights of a much larger
19 class of individuals, to be solely responsible for the financial burden of this litigation. Given that
20 named Plaintiffs' recovery was approximately \$1.6 million out of a total recovery of \$23 million for
21 the putative class, and that Defendant's means of informal resolution prevents distribution of fees on
22 a class-wide basis, the interests of justice make an award of attorney fees appropriate in this case.

23 In sum, the Court finds that, because Plaintiffs have sufficiently demonstrated each of the
24 relevant factors under § 1021.5, an award of attorney fees is appropriate in this case. The Court
25 further finds that Plaintiffs are entitled recover fees incurred until the point at which Defendant
26 provided full relief to all former employees that are members of the putative class. The evidence
27
28

1 before the Court insufficiently demonstrates the exact date on which Defendant completed its
2 provision of relief, other than that Defendant's February 27, 2008 SEC Form 10-K filing indicated
3 that relief had been provided.

4 Accordingly, the Court GRANTS Plaintiffs' Motion for Attorney Fees, and refers the parties
5 to Magistrate Judge Lloyd for a report and recommendation of:

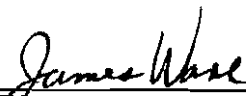
- 6 (1) The exact date on which Defendant completed provision of relief to former employees
7 who are members of the putative class; and
8 (2) The fees incurred by Plaintiffs' counsel under applicable California law.

9 **IV. CONCLUSION**

10 The Court GRANTS Plaintiffs' Motion to Dismiss with prejudice. The Court DENIES
11 Defendant's Motions for Summary Judgment. The Court GRANTS Plaintiffs' Motion for Attorney
12 Fees, subject to fee determination by the Magistrate Judge.

13 In light of this Order, the Court VACATES the Preliminary Pretrial Conference currently set
14 for October 20, 2008.

15
16 Dated: October 17, 2008



JAMES WARE
United States District Judge

1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

- 2 Benjamin B. Au bau@kvn.com
Carter Winford Ott carter.ott@dlapiper.com
3 David Allen Priebe david.priebe@dlapiper.com
David Allen Priebe david.priebe@dlapiper.com
4 Elliot Remsen Peters epeters@kvn.com
Emily L. Maxwell emaxwell@graycary.com
5 John Robert Shuman bob.shuman@dlapiper.com
John Robert Shuman bob.shuman@dlapiper.com
6 Joseph W. Cotchett jcotchett@cpmlegal.com
Kelly L. Sommerfeld ksommerfeld@cpsmlaw.com
7 Luanne R. Sacks luanne.sacks@dlapiper.com
Luanne R. Sacks luanne.sacks@dlapiper.com
8 Mark Cotten Molumphy mmolumphy@cpmlegal.com
Matthew Dake Metzger mmetzger@cpmlegal.com
9 Robert James Slaughter rjs@kvn.com

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Dated: October 17, 2008

Richard W. Wieking, Clerk

By: /s/ JW Chambers
Elizabeth Garcia
Courtroom Deputy

EXHIBIT B

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4888 CREEKWOOD DRIVE
FREMONT, CA US 94555

8384-1-140

Union Bank
89 Almaden Blvd.
San Jose, CA 95113

11-49
1210

W. B.
Yangjie Cheng

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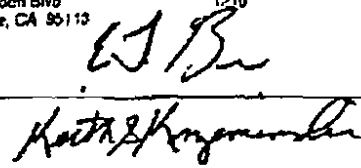
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SANTA CLARA, CA US 95051

9394-1-138

Union Bank
89 Almaden Blvd
San Jose, CA 95113

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571 OLIVE AVE
FREMONT, CA US 94539

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85 Almaden Blvd.
San Jose, CA 95113

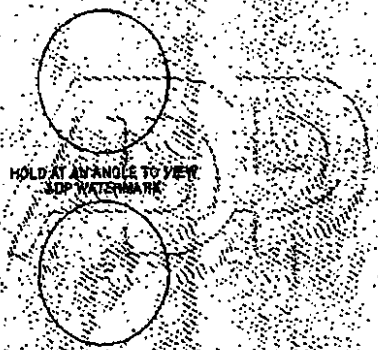
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PALMETTO, FL US 34221

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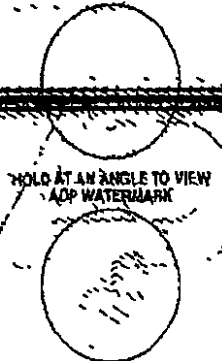
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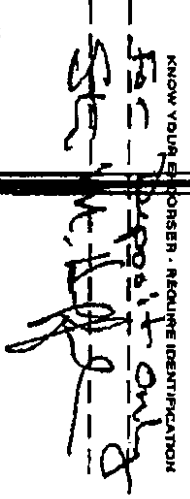


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EXHIBIT C

Gerald S. Ohn

From: Ott, Carter [Carter.Ott@dlapiper.com]
Sent: Wednesday, October 22, 2008 3:05 PM
To: Mark Molumphy
Cc: Gerald S. Ohn
Subject: RE: mcafee

Mark,
I'm not clear on your email below regarding the quid pro quo. Are you refusing to provide us with invoices regarding the fees you seek, notwithstanding your obligation to do so under Local Rule 54-6? If so, we will likely need to propound written discovery for this information.

Thank you,
Carter



Carter W. Ott
Associate

DLA Piper LLP (US)
153 Townsend Street, Suite 800
San Francisco, California 94107

T 415-836-2538
F 415-659-7338
M 415-336-9408
carter.ott@dlapiper.com
www.dlapiper.com

From: Mark Molumphy [mailto:mmolumphy@cpmllegal.com]
Sent: Wednesday, October 22, 2008 2:36 PM
To: Ott, Carter
Cc: Gerald S. Ohn
Subject: RE: mcafee

Carter, we already know the date the blackout was lifted and when trading began, which is public information. Of course, you already knew that. What we don't know is the date that McAfee completed the relief -- the date raised by the Court. Putting aside that there no legal or logical basis to require some quid pro quo before providing us with this information, particularly one inconsistent with California or federal law for fee requests, I'll agree to narrow my request to this one question: did McAfee send any checks after it sent the checks to my clients on January 15, 2008 (and if so, what was the last date)?

From: Ott, Carter [mailto:Carter.Ott@dlapiper.com]

10/29/2008

Sent: Wednesday, October 22, 2008 12:49 PM
To: Mark Molumphy
Cc: Gerald S. Ohn; Sacks, Luanne; Priebe, David
Subject: RE: mcafee

Mark,
We will provide you with the dates on which the blackout lifted and when, pursuant to the January 2007 resolution, trading began and the last check was issued provided that you agree to submit to Magistrate Judge Lloyd detailed billing records showing daily entries by all billers and provide us with versions of these records, with any work product redacted, that indicate what tasks these billers were performing.

Thank you,
Carter



Carter W. Ott
Associate

DLA Piper LLP (US)
153 Townsend Street, Suite 800
San Francisco, California 94107

T 415-836-2538
F 415-659-7338
M 415-336-9408
carter.ott@dlapiper.com
www.dlapiper.com

From: Mark Molumphy [mailto:mmolumphy@cpmlegal.com]
Sent: Saturday, October 18, 2008 3:39 PM
To: Ott, Carter
Cc: Gerald S. Ohn
Subject: mcafee

Carter, as you know, the Court granted our motion and denied McAfee's motion. Given the Court's order, we would like to expeditiously resolve the two remaining issues identified by the Court and submit the issue to Magistrate Judge Lloyd by next week.

Please let us know the "exact date on which Defendant completed provision of relief to former employees who are members of the putative class." To this end, please let us know: (1) the date the last class member received a check, to extent he or she had expired options (we know that certain of our clients received payments in January) and (2) the date the exercise period officially expired for those whose options did not expire. With this information, we will then be able to provide the fees that we are seeking.

It is our hope (and I'm sure the Court's intent) for the parties to exchange this information informally and expeditiously. Of course, the information should be readily available to McAfee. Please let me know by Monday whether McAfee will agree to provide this information.

Mark

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Thank you.

EXHIBIT D

**UNITED STATES SECURITIES AND EXCHANGE
COMMISSION**

Washington, D.C. 20549

Form 10-Q

- QUARTERLY REPORT PURSUANT TO SECTION 13 OR 15(d)
OF THE SECURITIES EXCHANGE ACT OF 1934**

For the quarterly period ended June 30, 2008

or

- TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d)
OF THE SECURITIES EXCHANGE ACT OF 1934**

For the transition period from to

Commission file number: 001-31216

McAfee, Inc.

(Exact name of registrant as specified in its charter)

Delaware

*(State or other jurisdiction of
incorporation or organization)*

**3965 Freedom Circle
Santa Clara, California**

(Address of principal executive offices)

77-0316593

*(I.R.S. Employer
Identification Number)*

95054

(Zip Code)

Registrant's telephone number, including area code:

(408) 988-3832

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes No

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See definitions of "large accelerated filer," "accelerated filer" and "smaller reporting company" in Rule 12b-2 of the Exchange Act. (Check one):

Large accelerated filer Accelerated filer Non-accelerated filer Smaller reporting company
(Do not check if a smaller reporting company)

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act). Yes No

As of July 31, 2008, 151,288,497 shares of the registrant's common stock, \$0.01 par value, were outstanding.

3. Employee Stock Benefit Plans

We record compensation expense for stock-based awards issued to employees and outside directors in exchange for services provided based on the estimated fair value of the awards on their grant dates. Compensation expense is recognized over the required service or performance period of the awards. Our stock-based awards include stock options, restricted stock awards (“RSAs”), restricted stock units (“RSUs”), restricted stock units with performance-based vesting (“PSUs”) and our Employee Stock Purchase Plan (“ESPP”).

The following table summarizes stock-based compensation expense (in thousands):

| | Three Months Ended | | Six Months Ended | |
|---|--------------------|-----------------|------------------|-----------------|
| | June 30, | | June 30, | |
| | 2008 | 2007 | 2008 | 2007 |
| Amortization of fair value of options | \$ 5,800 | \$ 4,214 | \$11,377 | \$ 9,272 |
| Extension of post-termination exercise period | — | 340 | — | 11,078 |
| Expense (benefit) related to cash settlement of options | — | 1,959 | (382) | 2,190 |
| Restricted stock awards and units | 6,482 | 5,236 | 12,307 | 10,147 |
| Restricted stock units with performance-based vesting | 6,894 | — | 7,149 | — |
| Tender offer | — | — | 601 | — |
| Employee Stock Purchase Plan | 500 | — | 500 | — |
| Total stock-based compensation expense | <u>\$19,676</u> | <u>\$11,749</u> | <u>\$31,552</u> | <u>\$32,687</u> |

Amortization of fair value of options. We recognize the fair value of stock options issued to employees and outside directors as stock-based compensation expense over the vesting period of the awards. As we adopted SFAS No. 123(R), “Share-Based Payment” (“SFAS 123(R)”) using the modified prospective method, these charges include compensation expense for stock options granted prior to January 1, 2006 but not yet vested as of January 1, 2006, based on the grant date fair value estimated in accordance with the pro forma provisions of SFAS 123, and compensation expense for stock options granted subsequent to January 1, 2006 based on the grant date fair value estimated in accordance with the provisions of SFAS 123(R).

Extension of post-termination exercise period. From July 2006, when we announced that we might have to restate our historical financial statements as a result of our ongoing stock option granting practices investigation, through December 21, 2007, the date we became current on our reporting obligations under the Securities Exchange Act of 1934, as amended, (“blackout period”), we imposed restrictions on our ability to issue any shares, including those pursuant to stock option exercises. In January 2007, we extended the post-termination exercise period for vested options held by 640 former employees and outside directors that would expire during the blackout period. As a result of this modification, we recognized \$0.3 million of stock-based compensation expense in the three months ended June 30, 2007, and \$11.1 million in the six months ended June 30, 2007, based on the fair value of the modified options. The expense was calculated in accordance with the guidance in SFAS 123(R). The options were deemed to have no value prior to the extension of the life beyond the blackout period.

Based on the guidance in SFAS 123(R) and related FSPs, after the January 2007 modification, stock options held by former employees and outside directors that terminated prior to such modification became subject to the provisions of EITF 00-19, “Accounting for Derivative Financial Instruments Indexed to, and Potentially Settled in, a Company’s Own Stock,” (“EITF 00-19”). As a result, in January 2007, these options were reclassified as liability awards within current liabilities. Accordingly, at the end of each reporting period, we determined the fair value of these options utilizing the Black-Scholes valuation model and recognized any change in fair value of the options in our condensed consolidated statements of income and comprehensive income in the period of change.

In November 2007, due to a delay in our becoming current in our reporting obligations, we extended the post-termination exercise period for options held by 690 former employees and outside directors whose service to us terminated subsequent to the January 2007 modification and those previously modified in January 2007 as discussed above, until the earlier of (i) the ninetieth (90th) calendar day after December 21, 2007, the date we became current in our reporting obligations under the Securities Exchange Act of 1934, as amended, (ii) the

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expiration of the contractual terms of the options, or (iii) December 31, 2008. Based on the guidance in SFAS 123(R) and related FSPs, after the November 2007 modification, stock options held by the former employees and outside directors that terminated subsequent to the January 2007 modification and prior to November 2007 became subject to the provisions of EITF 00-19. As a result, in November 2007, these options were reclassified as liability awards within current liabilities. Accordingly, at the end of each reporting period, we determined the fair value of these options utilizing the Black-Scholes valuation model and recognized any change in fair value of the options in our condensed consolidated statements of income and comprehensive income in the period of change.

As of March 31, 2008, the January 2007 and November 2007 modified options had been exercised or had expired. The fair values of the options that had been exercised during the first quarter of 2008 were remeasured on the respective date of exercise and recorded as an increase to additional paid-in capital. The options that expired were remeasured to have no fair value. We recognized no expense in the three months ended June 30, 2008 and a benefit of \$5.5 million in the six months ended June 30, 2008 related to the change in fair value of these options. We recognized \$1.9 million of expense related to the change in fair value of these options in the three and six months ended June 30, 2007. Such amounts are included in general and administrative expense in our condensed consolidated statements of income and comprehensive income, and are not reflected as stock-based compensation expense. We will not recognize any further expense related to these extensions of post-termination exercise period.

Cash settlement of options. Certain stock options held by terminated employees expired during the blackout period as they could not be exercised during the 90-day period subsequent to termination. In January 2007, we determined that we would settle these options in cash. In the three and six months ended June 30, 2007, we recognized expense of approximately \$2.0 million and \$2.2 million, respectively, based on the change in the liability we recorded for the intrinsic value of these options. As of December 31, 2007, we recorded a liability of \$5.7 million based on the intrinsic value of these options using our December 31, 2007 closing stock price. We paid \$5.2 million in January 2008 to settle these options based on the average closing price of our common stock subsequent to December 21, 2007, the date we became current on our reporting obligations under the Securities Exchange Act of 1934, as amended. We recognized no expense in the three months ended June 30, 2008 and recognized a \$0.4 million benefit for the difference between the December 31, 2007 liability and the amount paid in the six months ended June 30, 2008. All of these options were cash settled by March 31, 2008, and we will not recognize any further expense related to these options.

Restricted stock awards and units. We recognize stock-based compensation expense for the fair value of RSAs and RSUs. Fair value is determined as the difference between the closing price of our common stock on the grant date and the purchase price of the RSAs and RSUs. The fair value of these awards is recognized to expense over the requisite service period of the awards.

Restricted stock units with performance-based vesting. We recognize stock-based compensation expense for the fair value of PSUs. These awards vest as follows: 50% vest only if performance criteria are met ("performance component") and 50% cliff vest four years from the date of grant, with accelerated vesting if performance criteria are met ("service component"). Certain executive grants have only the performance component. The performance component will vest one-third each year from the date of grant, provided that the performance criteria are met for each respective year. If the performance criteria are not met in any one year, then the options that would have vested in that year are forfeited. The performance component is being recognized as expense one-third each year provided we determine it is probable that the performance criteria will be met. For certain of the PSUs, we have not communicated the performance criteria to the employees. For these awards, the accounting grant date will not occur until it is known whether the performance criteria are met, and such achievement or non-achievement is communicated to the employees. These awards will be marked-to-market at the end of each reporting period through the accounting grant date, and recognized over the expected vesting period. For the awards for which the performance criteria have been communicated, stock-based compensation expense has been measured on the grant date, and is being recognized over the expected vesting period.

The service component will cliff vest four years from the grant date, with an acceleration provision based on the same performance criteria as the performance component. Each of the three tranches is being accounted for as a separate award. If the performance criteria are met for each respective year, the awards will vest one-third each year

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from the grant date. The accounting grant date is deemed to have occurred and stock-based compensation has been measured on the grant date, and will be recognized over the expected vesting period.

Tender offer. In January 2008, after we became current with our reporting obligations under the Securities Exchange Act of 1934, as amended, we filed a Tender Offer Statement on Schedule TO with the SEC. The tender offer extended an offer by us to holders of certain outstanding stock options to amend the exercise price on certain of their outstanding options. The purpose of the tender offer was to amend the exercise price on options to have the same price as the fair market value on the revised measurement dates that were identified during the investigation of our historical stock option grant practices. As part of this tender offer, we will pay a cash bonus of \$1.7 million, of which \$0.4 million was paid to Canadian employees in the six months ended June 30, 2008, and \$1.3 million will be paid to U.S. employees in 2009, to reimburse optionees who elected to participate in the tender offer for any increase in the exercise price of their options resulting from the amendment. The impact of the cash bonus, as recorded during the six months ended June 30, 2008, resulted in stock-based compensation expense of \$0.6 million and a decrease to additional paid-in capital of \$1.1 million. We will not recognize any further expense related to the tender offer.

Employee Stock Purchase Plan. We recognize stock-based compensation expense for the fair value of employee stock purchase rights issued pursuant to our ESPP. The estimated fair value of employee stock purchase rights is based on the Black-Scholes model. Expense is recognized ratably based on contributions and the total fair value of the employee stock purchase rights estimated to be issued.

The following table summarizes pre-tax stock-based compensation expense recorded in our condensed consolidated statements of income and comprehensive income by line item in the three and six months ended June 30, 2008 and 2007 (in thousands):

| | Three Months Ended June 30, | | Six Months Ended June 30, | |
|--|--------------------------------|-----------------|------------------------------|-----------------|
| | 2008 | 2007 | 2008 | 2007 |
| Cost of net revenue — service and support | \$ 526 | \$ 356 | \$ 728 | \$ 955 |
| Cost of net revenue — subscription | 219 | 185 | 317 | 543 |
| Cost of net revenue — product | 281 | 199 | 425 | 457 |
| Stock-based compensation expense included in cost of net revenue | 1,026 | 740 | 1,470 | 1,955 |
| Research and development | 4,445 | 3,293 | 8,066 | 8,265 |
| Marketing and sales | 9,115 | 4,812 | 12,863 | 13,325 |
| General and administrative | 5,090 | 2,904 | 9,153 | 9,142 |
| Stock-based compensation expense included in operating costs | 18,650 | 11,009 | 30,082 | 30,732 |
| Total stock-based compensation expense | 19,676 | 11,749 | 31,552 | 32,687 |
| Deferred tax benefit | (5,737) | (2,903) | (8,944) | (9,688) |
| Total stock-based compensation expense, net of tax | <u>\$13,939</u> | <u>\$ 8,846</u> | <u>\$22,608</u> | <u>\$22,999</u> |

We had no stock-based compensation costs capitalized as part of the cost of an asset.

At June 30, 2008, the estimated fair value of all unvested stock options, RSUs, PSUs, RSAs and ESPP grants that have not yet been recognized as compensation expense was \$104.2 million, net of expected forfeitures. We expect to recognize this amount over a weighted-average period of 2.3 years. This amount does not reflect compensation expense relating to 0.7 million PSUs for which the performance criteria have not been set.

EXHIBIT E

COTCHETT, PITRE & McCARTHY

Cotchett, Pitre & McCarthy, based on the San Francisco Peninsula for over 40 years, engages *exclusively* in litigation. The firm's dedication to prosecuting or defending socially just actions has earned it both a national and statewide reputation. With offices in Burlingame, Los Angeles, New York and the Washington D.C. area, the core of the firm is its people and their dedication to principles of law, their work ethic and commitment to justice.

Examples of Consumer Litigation Experience

In re Ameritrust Cases

Judicial Council Coordinated Proceeding No. 4162
San Mateo County Superior Court
"Bait and Switch" class action on behalf of mortgage borrowers. Class certified for all purposes in 2003. Settlement finally approved in 2005.

Banks v. Northern Trust Bank of California N.A.

Case No. BC295997
Los Angeles County Superior Court
Class action on behalf of beneficiaries of fixed-fee trusts charged excess trustee fees over a 21 year period. Class certification for settlement purposes and final approval of settlement, 2005.

In re Household Lending Litigation

Case No. C02-1240 CW (N.D. Cal.)
Nationwide class action on behalf of predatory lending victims. Class certification for all purposes, 2003. Final approval of settlement, 2004.

United States v. Fairbanks Capital Corp.; Curry v. Fairbanks Capital Corp.

Civil Action Nos. 03-12219-DPW & 03-10895 (D. Mass.)
Nationwide class action against mortgage loan servicing company for charging various improper fees, costs and charges. Class certification for settlement purposes and final approval of settlement, 2004.

In re Citigroup Loan Cases

Judicial Council Coordination Proceeding No. 4197
San Francisco County Superior Court
Consolidated class action on behalf of mortgage "packing" and "flipping" victims. Nationwide class certification for settlement purposes, and final approval of settlement, 2003.

Old Republic Consumer Fraud Litigation

Wisper v. Old Republic Title Co.
San Francisco Superior Court No. 996705
Verges v. Old Republic Title Co.
San Francisco Superior Court No. 996929
Lead and liaison counsel in consolidated consumer class actions against title company for unfair business practices regarding fee overcharges and "cost avoidance" relationships with banks. Class certified for all purposes. Verdict of \$14 million in 2001.

Dupell v. Massachusetts General Life Ins. Co.

Santa Clara County Superior No. CV768991
"Vanishing premium" class action on behalf of life insurance policyholders. Class certified for all purposes, 1999.

In re Louisiana-Pacific Corp. Inner-Seal OSB Trade Practices Litigation

MDL No. 1114
Agius v. Louisiana-Pacific Corp.
No. C95-3178 VRW (N.D. Cal.)
Nationwide product defect/Lanham Act class action on behalf of owners and operators of buildings and homes with defective and improperly certified oriented strand board wood sheathing. (Class certified and settlement finally approved, 1998)

Taylor Tire Co. v. Goodyear Tire & Rubber Co.

No. 94-1050 (S.D. Cal.)
Class action by franchisees for unfair business practices. (Settled 1996)

In re First Capital Holdings Litigation

Master File No. 2609
San Diego County Superior Court
Class action on behalf of policyholders of failed insurance company. (Settled 1992/93)

Hubbard v. Fidelity Federal Bank

824 F.Supp. 909 (C.D. Cal. 1993)
91 F.3d 75 (9th Cir. 1996)
Class action on behalf of adjustable rate mortgage borrowers.

In re Diet Drug Litigation

Coordination Master File No. 4032
Los Angeles County Superior Court
In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Products Liability Litigation
E.D. Pa. MDL No. 1203
Consumer fraud and product liability individual actions on behalf of approximately 100 individuals.

Prop. 103 Litigation

Calfarm Ins. Co. v. Deukmejian
48 Cal.3d 805 (1989)
Litigation regarding Proposition 103 (rate controls on insurance carriers) on behalf of Ralph Nader and his organizations.

In re Swine Flu Immunization Products Liability Litigation

89 F.R.D. 695 (D.D.C. 1980)
Adleson v. United States
523 F.Supp. 459 (N.D.Cal. 1981)
MDL actions for product liability.

Slavsky v. Stewart Title Co. of California

Consolidated Action No. 357357
San Mateo County Superior Court
Represented 115 individual plaintiffs in 81 consolidated cases arising from pyramid scheme fraud relating to fractionalized deeds of trust.

In re Executive Life Litigation

Coordination Master File No. 2632
Los Angeles County Superior Court
Action by insurance commissioner on behalf of failed insurance company (Filed April 1991); also filed as a class action. (Settled 1994/95)

Examples of Litigation on Behalf of Public Entities

San Francisco Unified School District

Sacramento County Superior Court,
Case No. 02AS03314
Consumer fraud and negligence case against a Fortune 250 energy company in a scheme to defraud the district in connection with an energy contract to upgrade schools and help the district save in energy costs.
(Settled in June of 2004 for \$43.1 million)

In Re Natural Gas Anti-Trust Cases I, II, III, & IV

Coordinated Proceedings 4221, 4224, 4226, 4228
City of Los Angeles v. Reliant, et al.
Los Angeles Superior Court No. BC-309392
County of Santa Clara v. Sempra, et al.
San Diego Superior Court No. GIC-832538
City and County of San Francisco v. Sempra, et al.
San Diego Superior Court No. GIC-832539
County of Alameda v. Sempra, et al.
Alameda Superior Court No. RG04-182878
County of San Diego v. Sempra, et al.
San Diego Superior Court No. GIC-833371
City of San Diego v. Sempra, et al.
San Diego Superior Court No. GIC-839407
County of San Mateo v. Sempra, et al.
San Mateo Superior Court No. CIV-443882
UC Regents v. Reliant, et al.
Alameda Superior Court No. RG04-183086
Association of Bay Area Governments v. Sempra, et al.
Alameda Superior Court No. RG04-186098
Sacramento Municipal Utilities District v. Reliant, et al.
Sacramento Superior Court No. 04AS-04689
School Project for Utility Rate Reduction v. Sempra, et al.
Alameda Superior Court No. RG04-180958
Nurserymen's Exchange, Inc. v. Sempra, et al.
San Mateo Superior Court No. CIV-442605
Owens-Brockway Glass Containers, Inc. v. Sempra, et al.
Alameda Superior Court No. RG04-192046
TAMCO Steel, et al. v. Dynegy, et al.
San Diego Superior Court No. GIC-840587
Antitrust litigation on behalf of eleven public entities and others for the reporting of false information by non-core natural gas retailers to published price indices to manipulate the natural gas market during the California energy crisis.

San Francisco Employees' Retirement System v. American International Group, Inc.

In re American International Group, Inc. Securities Litigations
USDC Southern District of New York
No. 05-CV-4720
Securities fraud class action on behalf of SFERS against AIG arising out of defendants false and misleading statements concerning AIG's financial condition and accounting practices.

San Mateo County Public Guardian v. Commonwealth Life Ins. Co.

Alameda County Superior Court, No. 768916-3
Consumer fraud class action against provider of reverse mortgages to elderly consumers.
(Class Certified and settlement finally approved, 1998)

San Mateo Public Guardian v. Transamerica HomeFirst, Inc.

69 Cal. App. 4th 577 (1999)
Coordinated Proceeding No. 4061
San Mateo County Superior Court No. 405495
Consumer fraud class action against provider of reverse mortgages to elderly consumers. Class certified on Business and Professional Code Violations for all purposes.

In re Commercial Tissue Products Public Entity Indirect Purchaser Antitrust Litigation

Coordinated Proceedings 4027
County of San Mateo v. Kimberly-Clark Corp.
San Francisco County Superior Court No. 989138
Antitrust class action on behalf of class of public entity consumers of commercial sanitary paper products against alleged price-fixing conspiracy among producers. (Appointed co-lead counsel for public entity class, 1998)

NASD Dispute Resolution and NY Stock Exchange v. Judicial Council of California

US District Court, Northern District of California
Case No. C-02-3486 WHA
Successfully defended the Chief Justice of the State of California and the Judicial Council of California in an action brought by the National Association of Securities Dealers (NASD) to invalidate California's Ethics Standards for Neutral Arbitrators by demonstrating that the 11th Amendment bars federal actions against these state actors.

Federal Energy Regulatory Commission (FERC) Litigation

United States Court of Appeals, 9th Circuit
Case No. 01-70812
Represented the California State Senate, the California State Assembly, and the City of Oakland in an action against FERC. Petitioned the Court to issue a writ of mandamus to compel FERC to take action to ensure just and reasonable rates for energy in California and all the western states.

Central Sprinkler Product Defect Litigation

County of Santa Clara v. Central Sprinkler Corp.
Santa Clara County Superior Court No. 771019
Hart v. Central Sprinkler Corp.
Los Angeles County Superior Ct. No. BC176727
Consumer class action against manufacturer of automatic fire suppression sprinklers for product defects and consumer fraud. (Class certified and settlement finally approved, 1999)

Examples of Securities Litigation Experience

Apple Derivative Litigation

In re Apple Computer Inc. Derivative Litigation
USDC Northern District California No. 06-4128
Co-Lead Counsel in derivative action on behalf of Apple relating to backdating of stock options granted to various executives. The action alleges violations of federal and California state securities statutes.

Market Timing Litigation

In re Janus, et al., Civ. No. 04-md-15863.
USDC District Maryland MDL-1586
Lead Counsel in securities class action lawsuit filed against Janus mutual funds for allowing select investors to make substantial profits at the expense of other investors. The suits were filed in September 2003 and accuse the funds of allowing "market timing" and "late trading" by its largest customers resulting in millions of dollars of losses to other shareholders.

AOL Time Warner

California State Teachers' Retirement System v. AOL Time Warner Inc., et al.
San Francisco County Superior
Case No. CGC-03-422609
Securities action on behalf of CALSTRS for a loss in excess of \$200 million. The complaint charges certain AOL Time Warner executives and directors, its accountants, and banks with violations of state securities laws and alleges that the scheme involved, among other things, improperly recognizing revenue and engaging in fraudulent transactions to create the appearance of revenues where none existed.

Qwest

California State Teachers' Retirement System v. Qwest Communications International Inc., et al.
San Francisco County Superior No. CV 415546
Securities action on behalf of CALSTRS for a loss in excess of \$100 million. The complaint charges certain Qwest executives and directors, its accountants, and banks with violations of state securities laws and alleges that defendants made false and misleading statements about Qwest's financial condition.

WorldCom

The Regents of the University of California v. Salomon Smith Barney, Inc., et al.
San Francisco County Superior No. CGC-03-41730
Securities action, on behalf of The Regents of the University of California, for a loss of more than \$350 million. Defendants are alleged to have issued false and misleading analyst reports and ratings regarding the business operations, of WorldCom, and price targets for WorldCom common stock

Homestore

In re: Homestore.com, Inc. Securities Litigation
USDC - Central District of CA
Master File No. 01-CV-11115 RSWL
Lead Counsel for CalSTRS in a securities fraud class action against Homestore.com, Inc., its senior officers and directors, its auditors, and other companies who engaged in fraudulent "roundtripping" transactions, increasing revenues by false accounting methods.

Global Crossings

In re: Global Crossing Ltd. Securities & "ERISA" Litigation
USDC Southern District of New York
No. 02-CV-7481; MDL No. 1472
Securities fraud class action on behalf of large investors against Global Crossing, Ltd. for misrepresentation and artificially inflating its financial results through 2001.

Enron (Silvercreek)

Silvercreek Management Inc., et al. v. Salomon Smith Barney, Inc., et al. USDC Southern District of Texas
Master Case No. 01-CV-3624
Securities action on behalf of the plaintiff investment fund for a \$125 million bond loss. The complaint charges certain Enron executives and directors, its accountants, and banks with violations of the federal securities laws and alleges that defendants engaged in massive insider trading while making false and misleading statements about Enron's financial performance.

WorldCom (Hallisey)

In re: Salomon Analyst
USDC Southern District of New York
Master Case No. 02-CV-3687
Securities class action against Salomon Smith Barney, Inc. and Salomon's lead telecommunications analyst Jack Grubman related to their scheme to defraud investors by perpetuating the myth of financial viability of WorldCom. Defendants are alleged to have issued false and misleading analyst reports and ratings regarding the business operations and price targets of WorldCom common stock.

In re American Continental Corp./Lincoln Savings & Loan Securities Litigation

794 F.Supp. 1424 (D. Ariz. 1992)
Aetna Cas. & Sur. Co. v. Dannenfeldt
778 F.Supp. 484 (D. Ariz. 1991)
Securities class action on behalf of shareholder and bondholder victims of Charles Keating, and related insurance coverage litigation, including lengthy jury trial. (Largest jury verdict against an individual defendant in American history.)

Orange County Securities Litigation

Smith v. Merrill Lynch
Orange County Superior Court, No. 753411
Securities class action on behalf of the debt securities holders of Orange County and its investment pool participants. (Settled 1997)

Acclaim Securities Litigation

Campbell v. Petermeier, et al.
Alameda County Superior No. 760717-4
Campbell v. Acclaim Entertainment, Inc., et al.
No. 96 Civ. 5099 TCP (E.D.N.Y.)
Securities class action arising from stock swap merger. (Settled 1997)

In re Pilgrim Securities Litigation

Master File No. CV-94-8491 KN (C.D. Cal.)
Mutual fund fraud class action. (Settled 1997)

In re Oak Technologies Securities Litigation

Santa Clara County Superior No. CV958510
Securities class action for insider trading and abuse of control. (Appointed co-lead counsel, 1996)

In re HomeFed Securities Litigation

S.D. Cal. No. 90-799-T (CGA)
Represented bankrupt S&L as plaintiff in action against former S&L officers, directors and accountants for mismanagement and breach of fiduciary duty.

Giorgetti v. BankAmerica Corp.

San Francisco Superior No. 998949
Shareholder class action for failure to pay control premium in connection with merger.

West Valley Litigation

Knigh v. Rayden
Santa Clara County Superior No. 732332
Real estate limited partnership investors class action. (Settled 1995/96)

Central Bank Litigation

Almeida v. Peat Marwick Mitchell & Co.
Alameda County Superior Court, Consolidated
Master File No. 668436-9
Shareholder class actions. (Settled 1993)

In re Ursula Borelli d.b.a. Pyramid Realty

Dickinson v. Duck
132 B.R. 648 (N.D. Cal. 1991)
Class action investment fraud litigation.

Harmsen v. Smith

693 F.2d 932 (9th Cir. 1982)
586 F.2d 156 (9th Cir. 1978)
542 F.2d 496 (9th Cir. 1976)
Securities class action on behalf of shareholders of United States National Bank against C. Arnholt Smith and other officers, directors, and insiders. Multi-million dollar jury verdicts upheld on appeal. The first securities class action tried on both liability and damages to a jury.

In re Informix Derivative Litigation

Master File No. 401818
Smurthwaite v. White
San Mateo County Superior Court, No. 401818
Lead derivative counsel in consolidated shareholder derivative actions against corporate officers, directors and accountants relating to accounting fraud.

In re Sybase Derivative Litigation

Master File No. 793459-9
Krim v. Kertzman
Alameda County Superior Court, No. 793459-9
Lead derivative counsel in consolidated shareholder derivative actions against corporate officers and directors.

Bily v. Arthur Young & Co.

3 Cal.4th 370 (1992)
Professional negligence action on behalf of shareholder for materially misleading financial statements.

J. David Dominelli Litigation

Rogers & Wells v. Superior Court
175 Cal.App.3d 545 (1986)
Investor fraud litigation on behalf of hundreds of clients in San Diego County Superior Court, including lengthy jury trial.

In re Technical Equities Litigation

Coordination Master File No. 1991
Santa Clara County Superior Court
Abelson v. National Union
28 Cal.App.4th 776 (1994)
McLaughlin v. National Union
21 Cal.App.4th 486 (1994)
Chatton v. National Union
10 Cal.App.4th 846 (1992)
Helfand v. National Union
10 Cal.App.4th 869 (1992)
National Union v. Aaronson
163 B.R. 350 (N.D. Cal. 1993)
Industrial Indemnity v. Superior Court
214 Cal.App.3d 259 (1989)
Investor fraud litigation, and subsequent insurance coverage and insurance bad faith litigation, on behalf of hundreds of individual plaintiffs, including three lengthy jury trials, and three court trials. (Largest verdict in California for 1991.)

Durrett v. McCabe

San Mateo County Case No. 406767
Derivative litigation by holder of American Depository Shares against officers and directors of CBT Group PLC for accounting fraud and insider trading.

Examples of Antitrust Litigation Experience

In re: Hydrogen Peroxide Antitrust Litigation

US District Court, Northern District of California
Case No: C-05-1284 MHP, MDL No. 1682
Antitrust class action for conspiracy to fix prices of hydrogen peroxide manufactured and sold by defendants who were engaged in an alleged price-fixing conspiracy.
(Directs' final settlement was approved with certain Defendants. Directs were certified.)

In re: Foundry Resins Antitrust Litigation

US District Court, Southern District of Ohio
MDL No. 1638 and Master File No. 2:04-md-1638
Antitrust class action for conspiracy to fix prices of resins manufactured by Ashland Inc., Ashland Specialty Chemical Company, Borden Chemical Inc., Delta HA, Inc., HA International LLC.

Automotive Paint Antitrust Litigation

Alameda County Superior Court
J.C.C.P. No. 4199
Antitrust class action for conspiracy to fix the price of auto paint by manufacturers engaged in an alleged price-fixing conspiracy.
(Settlement Approved 2007, Class Certified 2004, Appointed Co-Liaison Counsel, 2002)

In re: Dynamic Random Access Memory (DRAM) Antitrust Litigation

US District Court, Northern District of California
MDL No. 1486 and Master File No. M-02-1486PJH
Antitrust class action for a price-fixing conspiracy amongst DRAM manufacturers. (Appointed Co-Discovery Chair 2002, Class Certified, Case Settled for \$325,997,000.00)

In re Methionine Antitrust Litigation

MDL No. 1311 and Master File No. C99-3491 CRB (N.D. Cal.)
Antitrust class action against Novus International, Mitsui & Co, Nippon Soda, Rhone-Poulenc, Dcussa-Huls and others for conspiracy to fix prices and restrain trade. (Appointed eo-lead counsel for Class, class certified, 2000; settlement finally approved, 2002)

Kopies, Inc. et al. v. Eastman Kodak Co.

Civ. No. C94-0524 JLQ (N.D. Cal.)
Antitrust class action by copier service firms against parts manufacturer for illegal tying of products and services. (Class certified, 1994; settlement finally approved, 1999)

In re Citric Acid Antitrust Litigation

MDL No. 1092 and Master File No. C95-2963 FMS (N.D. Cal.)
Antitrust class action against Archer-Daniels Midland Co. and others for conspiracy to fix prices and restrain trade. (Class certified, 1996, settled in part, 1998)

In re Beer Antitrust Litigation

No. 97-20644 SW (N.D. Cal.)
Antitrust class action on behalf of specialty beer brewers against Anheuser-Busch, Inc. for attempt to monopolize U.S. beer industry by denying access to distribution channels.

In re Sodium Gluconate Antitrust Litigation

MDL 1226
Chemical Distribution, Inc. v. AKZO Nobel Chemicals, BV
No. 97-4142 CW (N.D. Cal.)
Chemical Distribution, Inc. v. Roquette Freres
No. 98-00070 (N.D. Cal.)
Antitrust class actions for price fixing of sodium gluconate, an industrial cleaning agent. (Class certified, 1998; settlement finally approved, 1999)

Livingston v. Toyota Motor Sales USA, Inc.

No. C94-1377 MHP (N.D. Cal.)
Antitrust class action under Sherman Act by purchasers of Toyota vehicles for secret rebates. (Settled 1997)

Truta v. Avis Rent A Car System, Inc.

193 Cal.App.3d 802 (1987)
Class action for antitrust and unfair business practices.

Examples of Environmental Litigation Experience

Avila Beach Environmental Litigation

Poist v. Unocal Corp.

San Luis Obispo Superior Court No. 081289
Environmental toxic class action on behalf owners of interest in timeshares in coast-side town for nuisance arising out of petroleum contamination and remediation efforts. (Settlement preliminarily approved, 1998)

In re Burbank Environmental Litigation

C.D. Cal. Master File No. 96-5584 MRP
Actions on behalf of homeowners for nuisance arising from environmental remediation efforts at site of massive toxic contamination.

Californians for Native Salmon

221 Cal.App.3d 1419 (1990)
Representative action regarding approval of timber harvest plans.

Examples of Qui Tam Litigation Experience

California ex rel. Richardson v. Ischemia Research & Education Foundation

San Francisco Superior Court No. 964656
Qui tam California False Claims Act case against research foundation for failure to pay direct and overhead costs in clinical drug studies to its host university. (Settled, 1997)

United States v. Columbia HCA

USDC – Northern District of CA C-97-2943 THE
Qui Tam False Claims Act litigation against healthcare provider for false billing.

Examples of Complex Personal Injury Litigation Experience

Malhotra v. Nathan

San Francisco Superior No. 976634
Represented 13 victims of personal injuries and wrongful death arising out of Franklin Street balcony collapse in 1996.

In re MGM Grand Hotel Fire Litigation

570 F.Supp. 913 (D.Nev. 1983)
MDL consolidated litigation by personal injury victims.

McCasey V. United States Department of the Navy, et al.

N.D. Cal. No. C 00 2063 JL (ARB), (Consolidated with Case No. C-00 20204 PVT (ARB))
Wrongful death case based upon electrocution.

Zakoyan V. Poma Distributing Company, Inc. et al.

Orange County Superior No.817726 [Consolidated with Case No. 818443 (*Thompson v. State of California*) and Case No. 00CC03040 (*Branch v. State of California*)]
Wrongful death case based upon highway design.

Examples of First Amendment Litigation Experience

Isuzu Motors Ltd. v. Consumers Union of the United States, Inc.

C.D. Cal. No. 97 5685 RAP
Represented defendant publisher of Consumer Reports in defamation/product disparagement litigation brought by auto manufacturer against non-profit consumer testing organization.

Suzuki v. Consumers Union

Suzuki Motor Corp. Japan v. Consumers Union of the United States, Inc.
C.D. Cal. No. SA CV 96-340 AHS
Represented defendant publisher of Consumer Reports in defamation/product disparagement litigation brought by auto manufacturer against non-profit consumer testing organization.

Kendall-Jackson Winery v. E&J Gallo Winery

N.D.Cal. No. 97-16185
150 F.3d 1042 (9th Cir. 1998)
Represented defendant in trade dress and unfair business practice litigation. (Judgment and verdict for defendant after jury trial.)

**In re Cable News Network and Time
Magazine "Operation Tailwind" Litigation**

MDL No. 1257

Sheppard v. Cable News Network, Inc.

Case No. C-98 20946 JF (N.D. Cal.)

Action against Time and CNN on behalf of Vietnam
veterans falsely reported to have committed war
crimes in Laos.

EXHIBIT F



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Joseph W. Cotchett

Joseph W. Cotchett

Managing Partner

Cotchett, Pitre & McCarthy
 San Francisco Airport Office Center, 840 Malcolm Road, Suite 200
 Burlingame, California 94010
 (San Mateo Co.)

Telephone: 650-697-6000
 Fax: 650-697-0577
<http://www.cpmlegal.com>

Visibility Rankings ⁱ

#2 out of 203 lawyers in **Burlingame, California**

#3,285 out of 886,124 total lawyers **Overall**

AV Peer Review Rated

Experience & Credentials

Other Offices

Peer Review Rating

AV Rated. What's this?

Education

Hastings College of Law, University of California, LL.B., 1964, California State Polytechnic College, B.S., Engineering, 1960

Admitted

1965, California; 1972, U.S. Supreme Court; 1980, District of Columbia; 2006, New York

Memberships

San Mateo County (Member, Board of Directors, 1970-1972) and American (Member, Antitrust Section; Vice-Chair, Committee on Commercial Torts, Section of Tort and Insurance Practice, 1989-1990) Bar Associations; The State Bar of California (Member, Board of Governors, 1972-1975; Vice President, 1974-1975); San Francisco Lawyers Club; San Mateo County Trial Lawyers Association (President, 1969); California Trial Lawyers Association (Member, Board of Governors, 1969-1972; Vice President, 1972); Consumer Attorneys of California; (Presidential Award of Merit, 2000); Association of Business Trial Lawyers; American Association for Justice (Secretary, Commercial Tort Litigation Section, 1971; Chairman: Consumer Protection Committee, 1971; Chairman, Federal Courts Committee, 1978-1982; Member, Board of Governors, 1983-1986); Public Justice (President, 1986-1987; Member, Board of Governors, 1982-); American Board of Trial Advocates (Advocate, 1981-; National Board of Directors, 1999); California State Park and Recreation Commission, appointed by Governor Gray Davis (2000; Chair, 2001-2002); Roscoe Pound-American Trial Lawyers Foundation (1999).

Military

Col., JAGC, USAR, 1960-1990, active duty, 1960-1961

Born

Chicago, Illinois, January 6, 1939

Biography

Author: "Discovery of Experts Work," California Trial Lawyers Association Journal, Spring, 1967; "Experimental Evidence in Products Liability," California State Bar Journal, November, 1969; "The Class Action-The Coming Tool," American Trial Lawyers Association, February, 1971; "Judicial Salaries: Inflation vs. Justice," Trial Magazine, July, 1980; "Shield or Sword: The Fifth Amendment Privilege In Commercial Cases," Trial Magazine, May, 1982; "Lawyer and Accountant Liability in Business Litigation," CTLA Forum, 1985; "Liability of Accountants and Lawyers," Trial Magazine, April, 1987; "Punitive Damages: They Belong to the Public," International Society of Barristers Quarterly, Vol. 28, No. 4 (1994). Co-author: *California Products Liability Actions*, Matthew-Bender, 1970; *California Courtroom Evidence*, Parker & Son,

1972; *Federal Courtroom Evidence*, Parker & Son, 1976; *The Ethics Gap*, Parker & Son, 1991; *California Courtroom Evidence Foundations*, Parker Publications, 1993; *Persuasive Opening Statements and Closing Arguments*, California Continuing Education of the Bar, 1988; "Effective Opening Statements," *California Litigation*, Journal of the Litigation Section, State Bar of California, 1991; "Jury Trial Tips: Witnesses," *California Litigation*, Journal of the Litigation Section, California State Bar, 1991; "Winning Through A More Effective Direct Examination," *California Litigation*, Journal of the Litigation Section, California State Bar, 1991; "Jury Trial Tips: High Tech Tools," *California Litigation*, Journal of the Litigation Section, California State Bar, 1992; "Arguing Punitive Damages," *Civil Litigation Reporter*, California Continuing Education of the Bar, 1990; "Punitive Damages: How Much Is Enough?" *Civil Litigation Reporter*, California Continuing Education of the Bar, 1998. Contributing Author: *Class Action Primer*, Law Journal Press, 1973; *Objections to Evidence and Preserving the Record*, California Civil Procedure During Trial, CEB, 1982; *Winning Strategies and Techniques For Civil Litigators*, Practising Law Institute, 1992. Lecturer: Antitrust Actions, The National College of Advocacy, Harvard Law School, 1974; Class Actions; University of Southern California, 1975; Multidistrict Procedure, 1977 and Federal Evidence, 1979, University of Nevada; Securities Litigation, Georgetown University, 1978; Trial Practice, Hastings Center for Advocacy, 1985; CEB, Federal Practice Institute, 1985-1997; CEB Annual Federal Trial Practice Institute, 1985-1997; CEB, Advanced Course of Study: Federal Practice, 1998; State Bar of California, Litigation Section, Champions of the Courtroom, 1998 Annual Trial Symposium. Special Counsel to Governor Edmund G. Brown, Jr., 1975. Co-Chairman, Governor's Task Force On Agricultural Labor Relations Law, 1976. Member, Judicial Council of the State of California, 1977-1978. Member, Judicial Council Commission on the Future of The Courts, appointed by Chief Justice Malcolm Lucas, 1991-1993. Member: Select Committee on Judicial Retirement, 1993-1994, Appointed by Chief Justice Malcom Lucas. Member, Judicial Council Task Force on Complex Civil Litigation, appointed by Chief Justice Ronald George, 1997-1999. Member, California Commission for Impartial Courts (2007 -). Special Assistant Attorney General, State of South Dakota, 1978-1984. Member, California Commission on Judicial Performance, 1985-1989. Member: Board of Directors, Hastings College of the Law, University of California, 1981-1993; Hastings Blue Ribbon Committee, 2002—. Member, Board of Directors, Disability Rights Advocates, 1995-2002. Member, Board of Directors, Witkin Legal Institute, 1996-2005. Member, National Panel of Arbitrators, American Arbitration Association. Member, Board of Directors, Bay Meadows Charitable Foundation (1995—). Member, Board of Directors, Public Citizen Foundation (1996—). Member, Board of Directors, California Works Foundation, (2000—). Member, Animal Legal Defense Fund (1999—). Member, Federal Judicial Advisory Committee, Central District of California. Member, Board of Advisors, Army War College (2000-2006). Member, Board of Directors, U.S. District Court, Northern District of California Historical Society (1995—). Member, California Blue Ribbon Commission on Children in Foster Care (2006—). Chair, Board of Directors, Leo T. McCarthy Center for Public Service and The Common Good (2003—). Member, Board of Directors, Earthjustice, 2003. Member, Lawyers' Committee for Civil Rights of San Francisco Bay Area, 2004—. Member, Board of Directors, California Polytechnic State University Foundation, 2005-2006. Fellow: American College of Trial Lawyers; American Bar Foundation; International Academy of Law and Science; International Academy of Trial Lawyers (Member, Board of Directors, 1997—); International Society of Barristers.(Certified as a Civil Trial Advocate, National Board of Trial Advocacy) (Also at New York, New York Office)

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Mark C. Molumphy

Mark C. Molumphy

Member

Cotchett, Pitre & McCarthy
 San Francisco Airport Office Center, 840 Malcolm Road, Suite 200
 Burlingame, California 94010
 (San Mateo Co.)

Telephone: 650-697-6000
 Fax: 650-697-0577
<http://www.cpmlegal.com>

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#2 out of 203 lawyers in **Burlingame, California**
 #12,311 out of 886,124 total lawyers **Overall**

Experience & Credentials

| | |
|--------------------|---|
| Education | University of San Francisco, J.D., 1993, University of California at Berkeley, B.A., 1989; Edinburgh University |
| Admitted | 1993, California; 2001, U.S. Supreme Court |
| Memberships | San Mateo County (Member, Business and Litigation Section; Executive Committee, 1995-1999; Chair, 1996) and American Bar Associations; State Bar of California; San Mateo County Barristers (Director, 1993-1999; Treasurer, 1996; Secretary, 1997; Vice President, 1998; President, 1999); Association of Business Trial Lawyers; University of San Francisco American Inn of Court (Barrister); San Mateo Superior Complex Litigation Committee; San Mateo County Legal Aid Society (Member, Board of Directors, 1998-2004); Consumer Attorney of California; American Association for Justice; Fellows of the American Foundation; National Association of Consumer Advocates; National Association of Public Pension Attorneys; Public Justice; San Mateo County Trial Lawyers Association. |
| Born | San Mateo, California, September 28, 1966 |
| Biography | Law Clerk, San Francisco County Superior Court, 1992. Co-author: "Punitive Damages: How Much Is Enough?" <i>Civil Litigation Reporter</i> , California Continuing Education of the Bar, 1998. Panelist, "Strategic Tips For Successfully Propounding & Opposing Written Discovery," California Continuing Education of the Bar, 1999; "Punitive Damages: Maximizing Your Client's Success or Minimizing Your Client's Exposure," California Continuing Education of the Bar, 2001; "Class Action Litigation in California," Bridgeport Continuing Education, 2005. |
| ISLN | 900603493 |

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