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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE BROCADE COMMUNICATIONS SYSTEMS, INC. DERIVATIVE LITIGATION This Document Relates to: ALL ACTIONS.	CASE NO.: C05-02233 CRB (Derivative Action) **OBJECTION TO PROPOSED STIPULATION OF SETTLEMENT** Dept.: Courtroom 8, 19th Floor Before: Hon. Charles R. Breyer Date: April 27, 2007 Time: 10:00 a.m.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

ARKANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM'S AND PUERTO RICO GOVERNMENT EMPLOYEES RETIREMENT SYSTEM'S OBJECTION TO PROPOSED SETTLEMENT IN DERIVATIVE LITIGATION

On June 1, 2005, the first of several shareholder derivative actions was filed in the United States District Court for the Northern District of California on behalf of nominal defendant Brocade Communications Systems, Inc. ("Brocade"). On August 22, 2006, the Court consolidated four of these actions under the caption *In re Brocade Communications Systems, Inc. Derivative Litigation*, Case No. C05-02233 CRB (N.D. Cal.) (the "Derivative Litigation"). After one previous failed attempt to obtain Court-approval of a proposed settlement, and without conducting any discovery whatsoever (either adversarial or confirmatory), the plaintiffs and certain defendants in the Derivative Litigation entered into a Stipulation of Settlement and are seeking final approval thereof (the "Proposed Settlement").[1]

Now comes the Arkansas Public Employees Retirement System ("APERS")[2, 3] and the Puerto Rico Government Employees Retirement System ("PRGERS") (collectively "Institutional Shareholders")[4], both current shareholders in Brocade, and file this their Objection to the Proposed Settlement in the present matter, and in support thereof would show as follows:

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[1] The "Proposed Settlement" refers to the "Amended Stipulation of Settlement" dated October 8, 2006, Docket No. 107, and any subsequent modifications or amendments thereto.

[2] As this Court is likely aware, APERS is the Lead Plaintiff in the consolidated securities fraud litigation pending in this Court captioned *Prena Smajlaj v. Brocade Communications Systems, Inc., et al*, Consolidated Case No.: 3:05-CV-02042-CRB. APERS respectfully incorporates the allegations set forth in its Amended Consolidated Complaint by reference as if set forth fully herein. *See* Docket No. 248, filed Jan. 2, 2007. All references and citations to the "Amended Complaint" herein are to APERS' Complaint.

[3] APERS previously filed an objection to the Proposed Stipulation and Settlement insofar as the definition of "Released Claims" was overbroad, vague and ambiguous as to whether it excluded claims at issue in the Securities Litigation. After the October 6, 2006 hearing on this objection, the parties in the Derivative Litigation agreed to modify the definition of "Released Claims" to expressly exclude claims at issue in the Securities Litigation. *See* October 26, 2006 Letter Agreement submitted to the Court. APERS respectfully requests that, in the event the Court does grant the motion for final approval, any final judgment contain the language agreed to by the Derivative Litigation parties as set forth in the October 26, 2006 Letter Agreement.

[4] *See* Exhibits A and B (copies of APERS' and PRGERS' respective account statements reflecting current Brocade position and purchase data) attached hereto.

I. INTRODUCTION

The Proposed Settlement is a classic example of the fox guarding the hen house. Indeed, the Proposed Settlement leaves the Company and its shareholders in a worse position than if the Derivative Litigation had never been brought or was dismissed. The parties to the litigation have given up virtually any right the Company has to assert claims regarding the underlying conduct in exchange for no money and a release for many of the people who placed Brocade in the crosshairs of multiple investigations and formal civil actions. Those individuals not only negotiated the Proposed Settlement in order to get themselves off scot-free but, even worse, they left the shareholders of the Company to pick up the tab for the costs of their dirty work. In the end, the lawyers on both sides get paid, potentially culpable parties receive a broad release, and shareholders are left with nothing—except a bar order precluding them from ever demanding that the Company seek redress and/or indemnification from numerous parties against whom the Company may have a viable claim.

The bases for the Institutional Shareholders' objections are quite simple. First, because the law firm of Wilson Sonsini Goodrich & Rosati, P.C. ("WSGR") simultaneously acted as counsel for itself, Brocade and all but two of the Settling Individual Defendants,[5] including WSGR named partner Larry Sonsini ("Sonsini"), an incurable conflict of interest exists that taints the entire settlement process. *See In re Oracle*, 829 F. Supp. 1176, 1185-89 (N.D. Cal. 1993) (refusing to approve settlement where Company and Board employed the same counsel). Remarkably, the list of Settling Defendants includes Sonsini, and others, who were not even named as Individual Defendants in the Derivative Litigation. Despite these obvious conflicts, none of the parties to this litigation even ***mention*** this issue, let alone present a record that could justify a settlement or even allow for a meaningful evaluation of the Proposed Settlement.

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[5] According to the Proposed Settlement, the "Settling Individual Defendants" represented by WSGR are: Michael Klayko, Deth D. Neiman ("Neiman"), Neal Dempsey ("Dempsey"), Christopher B. Paisley, David L. House, Nicholas G. Moore, L. William Krause, Sanjay Vaswani, Robert R. Walker, Mark Leslie, Paul Bonderson, Larry Sonsini, William K. O'Brien.

Far from being an "arm's length" process as the parties claim, the Proposed Settlement contains numerous terms that are clearly the by-product of WSGR's conflicted role, as it gives a free-pass to many of the wrongdoers involved in the improper option backdating or who benefited from the misconduct at the expense of Brocade and its shareholders. For example, the settlement precludes Brocade from pursuing any type of action against **Sonsini personally or WSGR** for their potential involvement in the underlying conduct at issue. This preclusion is particularly troubling given that: (1) WSGR advised Brocade throughout the relevant time period; (2) Greg Reyes ("Reyes") has said that he relied upon Sonsini for legal advice regarding stock options; (3) WSGR's investment partnership made over $18 million in profits from selling Brocade shares received in lieu of cash for legal fees; (4) WSGR made over $7 million in legal fees representing Brocade (part of which was paid to WSGR for its involvement in issuing opinion letters for Brocade's registration statements filed with the Securities and Exchange Commission ("SEC") regarding stock options); and (5) WSGR helped Reyes in his efforts to lobby against proposed changes to the accounting rules, which would have required Brocade to include option grants as compensation expenses in its financial statements. *See* Section II.A.2, *infra*. WSGR's inherent conflict is exacerbated by its having negotiated a settlement that releases any claims Brocade could ever have against any WSGR partner, employee, partnership or related entity.

Second, the Proposed Settlement blesses the Indemnity Agreements that Reyes, Sonsini, Neiman and Dempsey awarded themselves to immunize them from liability for improper conduct. Brocade is actually paying for Reyes' enormous legal costs and fees in the Department of Justice's Criminal Action, the SEC's Civil Action, the Derivative Litigation and the Securities Litigation. *See* Brocade's Mem. In Support of Proposed Settlement at 14-15 & Exh. 5. Similarly, Sonsini, Neiman and Dempsey are not paying their legal costs and fees, and are not required to satisfy any judgments against them. *Id*.

When providing these Indemnity Agreements to themselves, Sonsini, Neiman, Dempsey and Reyes each acknowledged that Brocade's insurance policies covering the precise type of conduct at issue here were inadequate. *Id*. Rather than purchase more comprehensive policies, however, these three men obtained agreements that effectively gave them blanket immunity. Nevertheless, the

Proposed Settlement: (1) does not require Sonsini, Dempsey, Neiman or Reyes to pay the Company's costs associated with defending them in this litigation or the Securities Litigation; (2) bars the Company from pursuing legal action to recover such money from all but Reyes; (3) does not require the Company to take legal action against Reyes to stop such payments, declare his Indemnity Agreement invalid or seek reimbursement; and (4) does not preclude use of such indemnity agreements in the future.

Third, the Proposed Settlement does not preclude culpable parties (or parties later found to be culpable) from continuing to serve (or serving again) on Brocade's Board or as officers of the Company, nor does it require any such parties to return any ill-gotten gains back to the Company. Instead, no matter what happens in the future, the Company is barred from ever taking any action against anyone released under the Proposed Settlement regarding the conduct at issue.

Fourth, despite WSGR's incurable conflict, the Derivative Plaintiffs apparently did no discovery into their claims (other than reviewing publicly available information) before agreeing to the broad relief in the Proposed Settlement. *See* October 6, 2006 Preliminary Approval Hearing Transcript ("THE COURT: Have you reviewed all of these - - these investigations that have been done by -- MR. GONNELLI: We have reviewed everything that is public; THE COURT: But they have come in, at least in your papers you say 'We have had all of these investigations'; you are telling me you haven't reviewed those? MR. GONNELLI: Well, we haven't--"). Even if formal adversarial discovery was not allowed, the parties could have conducted non-adversarial confirmatory discovery to ensure that the facts support the terms of the Proposed Settlement. Confirmatory discovery is routine in cases such as this and occurs for the very purpose to ensure that the settlement is fair, reasonable and adequate in full light of the alleged misconduct. Like the egregious terms of the Proposed Settlement, the Derivative Plaintiffs' failure to fully investigate its claim prior to agreeing to such broad releases provides no evidence that the Proposed Settlement was the product of an arm's length process that warrants the Court's approval.

Fifth, despite the patent conflicts of interest at issue here, the Proposed Settlement does not bar lawyers (and their law firms) from simultaneously serving as legal counsel to the Company and acting as an officer or director of the Company.

The result of these irreconcilable conflicts of interest and related problems is a settlement that is not procedurally or substantively fair, reasonable or adequate. To the contrary, this Proposed Settlement leaves the Company and its shareholders in a far worse position than if no case had been brought and no settlement was ever obtained, whereupon, the Company would have been free to pursue any of its claims. Instead, the Proposed Settlement requires the Company to give up substantial rights, make no changes other than what it had already decided to make on its own, and primarily helps the persons at fault.

Such a result is neither fair, reasonable nor adequate.

II. INSTITUTIONAL SHAREHOLDERS' INTEREST IN THE DERIVATIVE LITIGATION

Although the Securities Litigation and Derivative Litigation are different cases seeking different relief, they are largely based upon the same underlying conduct. As a result, APERS, PSGERS, and all affected shareholders have a significant interest in the Derivative Litigation. Shareholders who lost money as a result of the underlying conduct have an interest in recovering as much money as legally allowed under the federal securities laws in the Securities Litigation. However, due in no small part to Sonsini's, Reyes' and Dempsey's decision to secure sweetheart Indemnity Agreements for themselves in lieu of buying adequate insurance, Brocade's insurance coverage is not sufficient to cover a judgment in the Securities Litigation.

Further, what little insurance is available to Brocade is in the form of a wasting policy and has been, or shortly will be, depleted due to the cost of Reyes' civil and criminal defenses alone. As such, it is in the best interests of APERS, PRGERS and all current or former shareholders for Brocade to seek other avenues of redress or recovery from persons or entities responsible for the alleged misconduct, including without limitation, seeking to void their Indemnity Agreements. The more rights the Company has to pursue actions to recover money from culpable persons, or to limit its own exposure and expenses in related litigation, the better off the Company's current shareholders will be. Finally, it is in Brocade's, APERS', PRGERS' and all shareholders interests for this Company to take fair, reasonable and adequate steps to ensure proper corporate governance

going forward. Such steps will help the Company put this scandal behind it and achieve greater success in the future. The Proposed Settlement fails to achieve either purpose.

III. APERS' AND PRGERS' OBJECTION TO THE PROPOSED SETTLEMENT AGREEMENT

It is well-established, as the derivative parties concede, *see, e.g.*, Der. Plfs.' Motion Seeking Preliminary Approval (Docket Entry 100-1) at p. 4 (hereinafter "Der. Plfs.' Mot."), that the parties must establish that the settlement negotiation process and the settlement's substantive terms are fair, reasonable and adequate. *See, e.g.*, *In re AOL Time Warner Shareholder Deriv. Litig.*, No. 02CIV6302, 2006 U.S. Dist. LEXIS 63260, *8 (S.D.N.Y. Sept. 6, 2006). Here, the record before the Court is utterly devoid of any support whatsoever that either the settlement process or its substantive terms are fair, reasonable and adequate. In fact, as demonstrated below, the Institutional Shareholders specific objections demonstrate that the reason the record is devoid of such evidence is that there is no such evidence.

A. WSGR's Role As Counsel for itself, Brocade And Most of the Settling Individual Defendants Creates An Incurable Conflict of Interest.

The parties recognize that the rules of procedural fairness forbid derivative settlements that are not the result of arms' length negotiations. Der. Plfs.' Mot. at 4. This requirement exists because a court "must pay close attention to the ***negotiation process***, to ensure that the settlement resulted from arms' length negotiations and that plaintiffs' counsel have engaged in the discovery necessary to effective representation of the class's interests." *AOL Time Warner*, 2006 U.S. Dist. LEXIS 63260 at *8 (emphasis added). Conversely, a court cannot approve a proposed settlement of a derivative action when there are inherent conflicts of interest between the corporation, the settling officers and directors, and/or counsel negotiating the settlement. *In Re Oracle*, 829 F. Supp. at 1185-89.

This very fact pattern presented itself in *In re Oracle*, wherein Judge Walker denied approval of a derivative settlement due to a conflict where—as here—the same law firm represented both the corporation and certain settling officers and directors. *Id.* More specifically, Judge Walker found that there was an irreconcilable conflict that prevented discernment as to whether the

settlement was really in the best interests of the corporation (and its shareholders) or, on the other hand, the officers and directors who were being released without paying any money. *Id.*[6] The conflicts of interest in *Oracle* pale in comparison to the conflicts of interest in this case.

First, just as in *Oracle*, defense counsel represents the corporation and certain of the Individual Defendants. However, in this case, defense counsel goes a step further. Indeed, WSGR not only represents the corporation and certain of the Individual Defendants, but also its founding partner, Larry Sonsini. Even worse, although Sonsini was not named as a defendant in the Derivative Action, he is nevertheless included among the Settling Individual Defendants.[7] These conflicts alone preclude approval of the Proposed Settlement. As Judge Walker reasoned in *Oracle*:

> Dual representation is impermissible, particularly at the settlement stage, because: If the same counsel represents both the corporation and the director and officer defendants, the interests of the corporation are likely to receive insufficient protection. An increased recovery for the corporation is wholly incompatible with the goal of limiting the defendants' liability. Defendants' counsel is thus placed in an untenable position, and more often than not he will succumb to the pressure to approve any settlement between the shareholder and his individual clients.

Id.

Here, just as in *Oracle*, the fact that the Company was not represented by independent counsel "reeks of collusion." *Id*. at 1189. This problem is exacerbated by the fact that the law firm purportedly advising the Company is simultaneously negotiating on its own behalf as explained

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[6] *Id*. at 1187 (*citing Cannon v US Acoustics Corp*, 398 F. Supp. 209 (ND Ill 1975), *aff'd in part, rev'd in part*, 532 F.2d 1118 (7th Cir 1976); *Lewis v Shaffer Stores Co.*, 218 F. Supp. 238 (SDNY 1963); *Messing v FDI, Inc*., 439 F. Supp. 776 (D. NJ 1977); *Murphy v Washington American League Base Ball Club, Inc.*, 116 U.S. App. D.C. 362, 324 F.2d 394 (DC Cir. 1963); *Garlen v Green Mansions, Inc.*, 9 A.D.2d 760, 193 N.Y.S.2d 116 (1959); *Dukas v Davis Aircraft Products Co., Inc*., 129 Misc. 2d 846, 494 N.Y.S.2d 632 (Sup. 1985); *Essential Enterprises Corp. v Dorsey Corp*., 40 Del. Ch. 343, 182 A.2d 647 (1962)).

[7] Notably, Sonsini also is a named defendant in the Securities Litigation. *See* Amd. Consol. Compl. at ¶¶217-254 (setting forth particularized allegations regarding Sonsini's role in the conduct at issue, including his anointment of Greg Reyes as a "Committee of One" for stock option grants and the millions of dollars Sonsini's firm made off of Brocade during the relevant time period). WSGR negotiated, agreed to, and advocates for the approval of the Proposed Settlement on behalf of defendant Sonsini.

below. In the face of such conflicts, the Proposed Settlement cannot satisfy the independence and good faith requirements necessary for judicial approval. *Id*.

1. *WSGR negotiated a release of any claims Brocade has against WSGR.*

Like someone reading Homer's *Odyssey*, an investor striving to understand the Proposed Settlement must complete a long and confusing journey to uncover the final conflict. Buried in the fine print is a conflict like no other: while acting as counsel for nominal defendant Brocade, WSGR also acted as counsel for itself. In that dual role, WSGR negotiated a compromise of any claims Brocade has, or could ever assert, against any WSGR partner, employee, or related partnership. Like Polyphemus, WSGR will probably claim that "nobody" is hurting the Company by virtue of this conflict. But, such a claim would be deceiving.

The first definition included in the Amended Stipulation of Settlement defines the term "Settling Individual Defendants." Amd. Stip. of Settlement at 3 ¶III.A.1. Larry Sonsini, though not a named defendant in this litigation, is included in the definition of "Settling Individual Defendants." WSGR is not included in this definition. *Id*. at 3 ¶III.A.1. Three pages and nine definitions later, the Amended Stipulation of Settlement defines "Related Persons" as including each Settling Defendant's (defined as Brocade, KPMG, LLP and the Settling Individual Defendants) "partners, limited partners … agents … any entity in which any of the Settlement Defendants has a majority or greater ownership interest, attorneys … associates . . . or any trust which is for the benefit of any of the Settling Defendants." *Id*. at p. 5 ¶III.A.9. This definition clearly encompasses WSGR as a "Related Person."

The next paragraph defines all "Released Claims" as all claims Brocade has or could ever have "relating to negligence, professional negligence, malpractice, breach of duty of care, misrepresentation . . . ." *Id*. at ¶III.A.10. Nowhere does the phrase "Released Claims" reveal that such claims release "Related Persons." *Id*. Nor does the phrase "Released Claims" mention "Individual Settling Defendants"; it only mentions "Released Persons." *Id*.

So, like Odysseus, a shareholder must continue his odyssey to find out what this all means. To do that, he must journey yet another two pages, three paragraphs, and five sub-paragraphs to read about these "Released Persons." There, and only there, is it revealed that "Released Persons"

are not the same as the "Settling Defendants." Instead, Released Persons are defined to include "each and all of the Settling Defendants" and "**each and all of their respective Related Persons.**" *Id*. at p. 6 ¶12 (emphasis added).

What does this all mean? It means that WSGR—acting as counsel for Brocade—negotiated a settlement for Brocade whereby Brocade released any and all claims it could possibly have against WSGR. How so? Because the defined term "Released Persons" includes all "Related Persons," and "Related Persons" includes all of Sonsini's current and former partners, limited partners, associates and agents, as well as any investment trust or partnerships in which he held an interest. Thus, the Proposed Settlement releases all claims Brocade could assert against Sonsini, all of his WSGR's partners, associates and agents, and WSGR's partnership investment fund.

Clever? Maybe. Fair, reasonable and arms-length? No way.

2. *WSGR negotiated a release for itself whereby Brocade gave up potentially viable monetary claims against Sonsini and his WSGR partners, associates and investment funds.*

At its core, this derivative case is about corporate governance. And, as one commentator put it: "Sonsini is a symptom of an incestuous governance culture, everybody in bed with each other. It clashes very much with the Sarbanes-Oxley environment." Peter Burrow, *Sonsini Under Scrutiny*, BUSINESS WEEK, Oct. 2 2006 (quoting Ralph D. Ward, Editor, BOARDROOM INSIDER). That contention has never been more clear than here.

APERS believes that its Amended Consolidated Complaint states a claim that Sonsini is directly liable for securities fraud as a result of the same conduct at issue in this litigation. *See* APERS' Amd. Compl. at ¶¶217-254. Sonsini disputes the sufficiency of APERS' allegations in the Securities Litigation. Putting aside whether the Amended Complaint states a securities fraud claim against Sonsini in the Securities Litigation, one thing is clear: APERS' allegations certainly demonstrate that Brocade ***may*** have a claim against Sonsini and others at WSGR in the Derivative Litigation sounding in negligence, misrepresentation and/or professional malpractice.

Yet, the record before the Court is silent regarding whether Brocade or the derivative plaintiffs: (1) ever investigated whether WSGR, any WSGR partners, or Sonsini are liable to Brocade; (2) ever conducted any adversarial or confirmatory discovery, (3) were ever apprised of

the conflict of interest presented by WSGR's representation of Sonsini, WSGR and Brocade; and/or (4) ever even recognized that the Proposed Settlement waives any and all claims Brocade may have against any of Sonsini's partners for such conduct. [8]

There are considerable facts and allegations demonstrating that Brocade should at least consider whether it has a claim against WSGR, Sonsini and/or Sonsini's WSGR partners. For example, no one has ever disputed Reyes' claim that it was Sonsini that persuaded Reyes to act as a "Committee of One" in granting stock options. Now, a recent article quotes Reyes' counsel as expanding upon Sonsini's and WSGR's role in the conduct at issue here:

> "Greg Reyes came to rely on Mr. Sonsini for advice on a wide variety of issues including corporate governance issues relating to stock options."

"Options Morass Deepens at Wilson Sonsini," Justin Scheck, THE RECORDER, March 29, 2007 (emphasis added).

Documents recently filed in this Court by the SEC demonstrate that Sonsini and WSGR were intimately familiar with Reyes' awareness of—and concerns regarding—the devastating impact upon Brocade if it were forced to account for stock option grants as an expense against earnings in its consolidated financial statements. *See* Exhibit 11 to Murphy Decl. in Support of SEC's Motion to Continue, Case No. 3:06-CV-04425-CRB, Docket No. 165. On February 18, 2002, BARRON'S published an article stating that Brocade's bottom line in 2002 would drop from a modest gain to a massive loss of over $500 million if it were forced to account for stock options as a compensation expense. *Id.* Reyes immediately contacted Sonsini and WSGR to help him lobby against legislation that would force Brocade to account for stock option grants as an expense. *Id.*

Reyes expressed concern to Sonsini about such a requirement and wanted Sonsini and WSGR to lobby the Bush administration to make sure this never happened. *Id.* Two hours later, Sonsini sent an email from his WSGR email account. *Id.* Sonsini specifically advised Reyes: "We're trying to think through the lobbying moves" and "[w]ill keep you posted." *Id.* One can

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[8] Indeed, the record is silent on which law firm drafted the part of the Proposed Settlement releasing Sonsini and all of his WSGR partners and related partnerships.

only imagine who "we're" refers to if not WSGR. Ultimately, the very thing that Reyes told Sonsini he was worried about—being forced to expense options as compensation in the Company's financial statements—occurred. And, a massive restatement was the result.

Further, a news report surfaced last week stating that Sonsini held 100,000 shares of Brocade pre-initial public offering options priced at $5. Jessie Seyfer, "Wilson Sonsini Has Millions in Troubled Clients," THE RECORDER, March 29, 2007. On August 20, 1999, Sonsini gave those options to WS Investment Co, WSGR's partnership investment fund, when Brocade's stock price was at $171.75 per share. *Id*. On paper, these shares alone were worth $18.7 million for WS Investment Co. According to this article, Sonsini also received 60,000 options in April 2001—options which the SEC and APERS allege were backdated. *Id*.; Amd. Compl. at ¶¶169, 194-96.

But, there is more, as APERS' Complaint alleges:

> WSGR acted as Brocade's counsel throughout the relevant time period;
>
> During this period, WSGR made over $7.6 million in legal fees for services provided to Brocade;
>
> WSGR signed off on opinion statements for registration statements filed with the SEC regarding Brocade's option plan;
>
> Sonsini signed off on most of the Financial Statements restated by Brocade;
>
> Reyes alleges that Sonsini is the person who empowered Reyes to act as a "Committee of One" when doling out stock options;
>
> WSGR partners, including Sonsini, made mandatory contributions to WS Investments, a WSGR partnership vehicle, which invested in WSGR clients, including Brocade;
>
> Some of WS Investments' stock ownership was obtained through legal fees paid in the form of stock options;
>
> Sonsini received distributions from WS Investment's sales of Brocade stock;
>
> Sonsini wore multiple hats in negotiations between Brocade and Cisco, which broke down in part because of Cisco's concern regarding the conduct at issue here, acting as advisor to both Reyes and Brocade and seeking a personal "success fee" if the deal was completed;

> Analysts state that WSGR and/or WSGR partners were counsel to nearly a third of all companies under investigation for improperly backdating options;
>
> Sonsini served on the board of at least six companies under investigations for improperly backdating stock options.

See, e.g., Amd. Compl. at ¶¶217-254.

And last, but not least, just last week, numerous news reports surfaced regarding emails between WSGR partners regarding their client KLA-Tencor in which the lawyers referred to KLA-Tencor as "using the time machine to pick low prices" in reference to the company's stock option backdating procedure. *See, e.g.*, "Wilson Sonsini & the "Time Machine" Email," WALL STREET JOURNAL *Online*, March 29, 2007. While that email involved another WSGR client, it certainly begs the question: was WSGR aware of similar conduct at Brocade while it provided legal services directly related to its stock option plans?

Based upon these facts alone, that WSGR advised Brocade to sign off on a settlement releasing Sonsini and all of his WSGR partners past and present from any liability for any conduct whatsoever—all without any discovery ever being done on this issue—is startling. Such a deal "reeks of collusion." *Oracle*, 829 F. Supp. at 1189. And it conclusively demonstrates that the Proposed Settlement could not have been reached at arms' length in a manner that is fair, adequate or reasonable for Brocade and its true owners—the shareholders.

3. *The Proposed Settlement Fails to Ban Sweetheart Indemnity Agreements for Officers and Directors and Precludes Brocade from Seeking to Rescind Sonsini's and Dempsey's Indemnity Agreements.*

Despite their enormous wealth, Reyes, Sonsini, Neiman and Dempsey gave themselves sweetheart Indemnity Agreements while serving as officers and directors at Brocade. *See* Brocade's Mem. of Law in Support of Settlement at 14-15 & Exh. 5. These agreements expressly acknowledge that Brocade did not have adequate insurance to cover the legal costs and potential judgments that could arise if they engaged in improper conduct while acting as officers and directors. *Id*. Rather than increase Brocade's or their own insurance coverage, these Officers and Directors simply left Brocade shareholders holding the bag.

As a result, Brocade has paid, and will continue to pay, all legal costs, fees and potential judgments associated with the multiple private and public actions arising from the conduct at issue.[9] What little insurance Brocade has is wasting away and will never be enough to even cover Reyes' own civil and criminal defense lawyers, much less a judgment. This means that if these Indemnity Agreements remain unchallenged and are allowed to stand, Brocade, not Reyes, not Sonsini, not Neiman and not Dempsey, will have to pay for each officer and director's legal costs, fees, and judgments.

Nevertheless, the Proposed Settlement does not even: (1) address the existence of these Indemnity Agreements; (2) bar the Company from entering into such agreements in the future; (3) require the Company to file an action seeking to void Reyes' Indemnity Agreement; or (4) allow Brocade to seek reimbursement for the money it has and will continue to spend defending Reyes. And, if approved, the Proposed Settlement will forever bar Brocade from seeking to void Sonsini's, Neiman's and Dempsey's Indemnity Agreements or obtain reimbursement for legal fees, costs or any potential judgment against them.

On its face, any settlement that (1) allows such agreements in the future, (2) prohibits reimbursement or declaratory actions against current officers and directors who benefit from such agreements (one of which was on the board that approved the settlement and/or (3) does not mandate that the Company file a declaratory action or reimbursement action against Reyes, is not fair, reasonable and adequate.

4. *The Proposed Settlement does not bar dual service as legal counsel and an officer/director.*

Sonsini's dual role as outside director and outside legal counsel created enormous conflicts of interest and related problems for Brocade. Yet, the Proposed Settlement does not even mention such conflicts of interest, much less take action to preclude officers and directors from serving dual roles as legal counsel in the future.

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[9] This of course begs the question: who advised Brocade that it should agree to such Indemnity Agreements?

5. *The Proposed Settlement does not bar Sonsini, Dempsey, Neiman or Reyes from serving as an officer or director of the Company in the future.*

The Proposed Settlement takes no action to prevent Sonsini, Dempsey, Neiman or Reyes from acting as an officer or director in the future or, more specifically, from overseeing compensation or stock option grants.

B. The Derivative Plaintiffs' Failure To Engage In Any Meaningful Discovery Provides Further Evidence That The Proposed Settlement Was Not Reached at Arms' Length

The record is devoid of any evidence that the parties engaged in any discovery. Even if formal adversarial discovery was not allowed, there was nothing to prevent the parties from engaging in limited confirmatory discovery in order to allow the plaintiffs to determine whether the Proposed Settlement was in fact fair, reasonable and adequate. Because they did no such discovery, the record is void of any facts demonstrating that the Proposed Settlement is procedurally or substantively fair, reasonable and adequate.

IV. RELIEF REQUESTED

The Institutional Shareholders respectfully request that the Court reject approval of the Proposed Settlement.

DATED: April 4, 2007

Respectfully Submitted,

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