

# SUMMONS (CITACION JUDICIAL)

FOR COURT USE ONLY  
(SOLO PARA USO DE LA CORTE)

**NOTICE TO DEFENDANT:**  
**(AVISO AL DEMANDADO):**  
(See Attachment to Summons)

**YOU ARE BEING SUED BY PLAINTIFF:**  
**(LO ESTÁ DEMANDANDO EL DEMANDANTE):**  
AAMER LATIF, an individual

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center ([www.courtinfo.ca.gov/selfhelp](http://www.courtinfo.ca.gov/selfhelp)), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site ([www.lawhelpcalifornia.org](http://www.lawhelpcalifornia.org)), the California Courts Online Self-Help Center ([www.courtinfo.ca.gov/selfhelp](http://www.courtinfo.ca.gov/selfhelp)), or by contacting your local court or county bar association.

*Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California ([www.courtinfo.ca.gov/selfhelp/espanol/](http://www.courtinfo.ca.gov/selfhelp/espanol/)), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.*

*Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, ([www.lawhelpcalifornia.org](http://www.lawhelpcalifornia.org)), en el Centro de Ayuda de las Cortes de California, ([www.courtinfo.ca.gov/selfhelp/espanol/](http://www.courtinfo.ca.gov/selfhelp/espanol/)) o poniéndose en contacto con la corte o el colegio de abogados locales.*

The name and address of the court is:

(El nombre y dirección de la corte es):

The Superior Court of California, County of Santa Clara  
191 North First Street, San Jose, CA 95113

CASE NUMBER:  
(Número del Caso):

1-03-CV-004939

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

Rony Sagy, Sagy Law Associates LLP

930 Montgomery Street, Suite 600, San Francisco, CA 94133. Phone: 415-986-0900

DATE:

(Fecha)

Clerk, by \_\_\_\_\_

(Secretario)

, Deputy  
(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)

(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

[SEAL]

**NOTICE TO THE PERSON SERVED: You are served**

1. ☒ as an individual defendant.
2. ☐ as the person sued under the fictitious name of (specify):
3. ☒ on behalf of (specify):
 

under: <input checked="" type="checkbox"/> CCP 416.10 (corporation)	<input type="checkbox"/> CCP 416.60 (minor)
<input type="checkbox"/> CCP 416.20 (defunct corporation)	<input type="checkbox"/> CCP 416.70 (conservatee)
<input type="checkbox"/> CCP 416.40 (association or partnership)	<input type="checkbox"/> CCP 416.90 (authorized person)
<input type="checkbox"/> other (specify):	
4. ☐ by personal delivery on (date):

## **Attachment to Summons**

Defendants:

NISHAN SYSTEMS, INC., A California Corporation, LIGHTSPEED VENTURE PARTNERS, A California Partnership, COMVENTURES, A California Partnership, CREDIT SUISSE FIRST BOSTON LLC (CSFB), a Delaware Corporation, MCDATA, a Delaware Corporation, GILL COGAN, an Individual, ROLAND VAN DER MEER, an Individual, ROBERT RUSSO, an Individual, JOHN MCGRAW , an Individual and DOES 1 through 50.

1 RONY SAGY (Bar No. 112219)  
BARBARA L. GATELY (Bar No. 76497)  
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SAGY LAW ASSOCIATES LLP  
3 930 Montgomery Street, Suite 600  
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4 Tel: 415-986-0900  
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5

6 Attorneys for Plaintiff Aamer Latif  
7  
8

9  
10 SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA  
11

12 AAMER LATIF, an individual

13 Plaintiff,

14 v.

15 NISHAN SYSTEMS, INC., A California  
Corporation, LIGHTSPEED VENTURE  
16 PARTNERS, A California Partnership,  
COMVENTURES, A California  
Partnership, CREDIT SUISSE FIRST  
BOSTON LLC (CSFB), a Delaware  
17 Corporation, MCDATA, a Delaware  
Corporation, GILL COGAN, an Individual,  
18 ROLAND VAN DER MEER, an  
Individual, ROBERT RUSSO, an  
Individual, JOHN MCGRAW , an  
Individual and DOES 1 through 50,  
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20 Defendants.  
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CASE NO. 1-03-CV 004939

**FOURTH AMENDED COMPLAINT FOR  
DAMAGES AND DEMAND FOR JURY  
TRIAL**

1 Plaintiff Aamer Latif (“Latif”) hereby alleges as follows:

2 **NATURE OF THE ACTION**

3 Plaintiff, a founder and shareholder of Defendant Nishan Systems, Inc. (“Nishan”), brings  
4 this action against Nishan, its financial advisor Credit Suisse First Boston LLC (“CSFB”), certain  
5 Nishan investors, officers and directors, and McDATA Corporation, the entity that acquired  
6 Nishan. Defendants individually, and in combination, defrauded Plaintiff and other shareholders  
7 in several ways. First, prior to the merger between Nishan and McDATA (“Merger”), Defendants  
8 concealed profound conflicts of interest and engaged in multiple acts of self-dealing. Among  
9 other betrayals of the Nishan shareholders’ trust, certain director Defendants offered a series of  
10 short-term, risk-averse bridge loans to Nishan on behalf of the controlling shareholder  
11 Defendants, then accepted their unconscionable 300% repayment terms on behalf of Nishan.  
12 Second, to ensure the approval of a Merger that disproportionately disadvantaged the common  
13 share class, Defendants secured the common shareholders’ “consent” in two ways— they  
14 fraudulently concealed material information from the shareholders and offered cash incentives to  
15 selected shareholders whose illegally voted shares were counted in achieving a majority vote in  
16 favor of the Merger. And, third, after the Merger was consummated, Defendants continued the  
17 pattern of self-dealing and fraud by financing their defense costs in this litigation, without  
18 authority to do so and without the knowledge or consent of the shareholders, out of an escrow  
19 account funded by Plaintiff’s and the other Nishan shareholders’ merger proceeds.

20 **PARTIES TO THE ACTION**

21 1. Plaintiff Aamer Latif is an individual and is now, and at all times mentioned in this  
22 complaint was, a resident of Santa Clara County, California. Latif was a founder, and holds  
23 7,310,250 common shares, of Defendant Nishan Systems, Inc. (“Nishan” or the “Company”) and  
24 has served as a member of Nishan’s board of directors (“Board”) since its inception.

25 2. Defendant Nishan was a corporation organized and existing under the laws of the  
26 State of California. Nishan was engaged in the business of storage networking products, with its  
27 principal executive office located at 3850 North First Street, San Jose, California 95134. Plaintiff  
28

1 is informed and believes that Nishan's principal executive office is now located at 380  
2 Interlocken Crescent, Suite 600, Broomfield, Colorado 80021.

3       3. Defendant Lightspeed Venture Partners ("Lightspeed") is a partnership organized  
4 and existing under the laws of the State of California. Lightspeed has invested in the Company  
5 via rounds of financing A1, B, and C, and has designated Mr. Gill Cogan to serve on Nishan's  
6 Board. Lightspeed's principal executive office is located at 2200 Sand Hill Road, Menlo Park,  
7 California 94025.

8       4. Defendant ComVentures ("ComVentures") is a partnership organized and existing  
9 under the laws of the State of California. ComVentures has invested in Nishan via rounds of  
10 financing A1, B, and C, and has designated Mr. Roland Van der Meer to serve on Nishan's  
11 Board. ComVentures' principal executive office is located at 305 Lytton Ave, Palo Alto,  
12 California 94301.

13       5. Defendant Credit Suisse First Boston LLC ("CSFB") is a limited liability  
14 company, organized and existing under the laws of the State of Delaware and doing business in  
15 the State of California. CSFB advised Nishan and actively participated in the negotiations  
16 leading to the merger between Nishan and Defendant McDATA Corporation. CSFB is engaged  
17 in the business of investment banking, with its principal executive office located at Eleven  
18 Madison Ave, New York, New York 10010.

19       6. Defendant Gill Cogan ("Cogan") is an individual residing at 2200 Sand Hill Road,  
20 Menlo Park, California 94025. Cogan has served on Nishan's Board since January 2002, when  
21 Lightspeed designated him to replace another Board representative it had had since June 1999.  
22 Cogan has at all times herein acted both in his individual capacity and in his capacity as  
23 Lightspeed's designee and actual agent.

24       7. Defendant Roland Van der Meer ("Van der Meer") is an individual residing at 433  
25 Crescent Avenue, San Mateo, California 94402. Van der Meer has served on Nishan's Board  
26 since June 1999, when ComVentures invested money in the Company and designated him to  
27 serve as its Board representative. Van der Meer has at all times herein acted both in his  
28 individual capacity and in his capacity as ComVentures's designee and actual agent.

8. Defendant Robert Russo (“Russo”) is an individual residing at 1926 Clover Court, Pleasanton, California 94588. Russo has acted as Nishan’s Chief Executive Officer, and has served as an independent member of its Board, since November 26, 2002.

9. Defendant McDATA Corporation (“McDATA”) is a corporation organized and existing under the laws of the State of Delaware and doing business in the State of California. McDATA has entered into an Agreement and Plan of Merger (“Merger”) with Nishan. McDATA’s principal executive office is located at 380 Interlocken Crescent, Suite 600, Broomfield, Colorado 80021 and, as such, is Nishan’s successor in interest.

10. Defendant John McGraw (“McGraw”) is an individual residing at 2254 Green Street, San Francisco, California 94123. McGraw acted as Nishan’s Interim CEO from May through November 2002. In December 2002, McGraw was introduced to Nishan’s Board as an “independent storage or networking industry executive” and has served as such on its Board. In January 2003, McGraw was appointed to serve as Chairman of the Board. McGraw is currently a venture partner at Lightspeed and has at all times herein acted both in his individual capacity and in his capacity as a representative of Lightspeed’s interests.

11. Plaintiff is unaware of the true names, status, capacities, whether individual, corporate, associate, or otherwise, of Defendants sued herein as Does 1 through 50, inclusive, and therefore sues these Defendants by such fictitious names. Plaintiff will amend the Complaint to allege the true names and capacities when ascertained. Plaintiff is informed and believes that at all times herein mentioned, each of the fictitiously named Defendants was in some manner responsible for Plaintiff's damages and injuries alleged herein.

## BACKGROUND AND SUMMARY

12. Defendant Nishan has been in the business of storage networking products since 1998. As a development-stage, privately-held company with a sound business plan, Nishan had the potential to become an integral and profitable force in the burgeoning area of networked data storage. From the beginning, however, the interests of the Company and its common shareholders have been compromised by its controlling shareholders.

13. In or around June 1999, Defendants Lightspeed and ComVentures (the

1 “Controlling Shareholders”) made their first capital investments in Nishan and participated in two  
2 more rounds of financing (Rounds A1, B and C).

3 14. Both ComVentures and Lightspeed installed representatives on the Nishan Board:  
4 Defendant Van der Meer has represented ComVentures’s interests on the Board since June 1999,  
5 and Defendant Cogan has represented Lightspeed’s interests since January 2002,

6 15. ComVentures and Lightspeed, working in concert through their designees on the  
7 Board, succeeded in installing Defendant John McGraw as Nishan’s interim CEO in May 2002  
8 **without disclosing his affiliation with Defendant Lightspeed.** In late 2002 they succeeded in  
9 appointing McGraw as Nishan’s Chairman of the Board, and hired Russo as the permanent CEO  
10 to replace McGraw. They then installed Russo on the Board in January 2003. These carefully  
11 orchestrated moves cemented a close alliance between Van der Meer, Cogan, McGraw and Russo  
12 (the “Lead Directors” or “Individual Defendants.”). Lightspeed and Comventures through their  
13 combined stake in the Company and their now secure alliance with McGraw and Russo amassed  
14 control over Nishan’s destiny well beyond their statutory and contractual rights.

15 16. Lightspeed, ComVentures, Nishan and the Individual Defendants worked together  
16 to advance their financial interests at the considerable expense of Plaintiff and certain other  
17 shareholders.

18 17. Defendants worked together to structure the Merger with Defendant McDATA so  
19 as to allocate less than \$4 million of the \$83 million Merger proceeds to the common  
20 shareholders. Defendants were able to secure a bare majority vote (55%) in favor of the Merger  
21 by concealing material information from certain common shareholders, and by soliciting and  
22 counting shares illegally voted in favor of the Merger. Specifically, Defendants offered cash  
23 incentives to key shareholders and employees, including the payment of at least \$1.1 million to  
24 Defendant Russo to vote his 15% share of the outstanding common shares in favor of the Merger.

25 18. Throughout the timeframe in which the challenged events unfolded, the Lead  
26 Directors made a concerted effort to delay and/or withhold material information from Plaintiff so  
27 as to blunt his efficacy as a Board member and to avert, whenever possible, his informed inquiries  
28 into their self-serving agenda. In particular, Defendants invariably withheld from Plaintiff (and at

1 times from other Board members) financial and other information until shortly before or at the  
2 time the votes were taken thereby depriving Plaintiff of an opportunity to study the data and cast  
3 an informed vote. Throughout the Board deliberations, Plaintiff was unaware that the Lead  
4 Defendants were performing their fiduciary tasks under disabling conflicts of interest.

#### 5 **DEFENDANTS' DISABLING CONFLICTS OF INTEREST**

##### 6 **a. The Selection and Appointment of McGraw as an "Independent Industry** 7 **Representative" to Nishan's Board**

8 19. As of May 2002 the following individuals served on Nishan's Board: Dr. James  
9 Gibbons, representing the common shareholders; Cogan, representing Lightspeed, Van der Meer,  
10 representing ComVentures, Arnold Silverman, representing Discovery Ventures, Atiq Raza,  
11 representing Raza Ventures, and Latif, representing the common shareholders.

12 20. Plaintiff is informed and believes that in May 2002, Cogan, representing  
13 Lightspeed's interests, and Van der Meer, representing ComVentures's interests, selected  
14 McGraw to serve as Nishan's interim CEO. Plaintiff is further informed and believes that Cogan  
15 and Van der Meer secured the Board's subsequent approval of McGraw's nomination and  
16 compensation package without disclosing to the Board that McGraw, and his wholly owned  
17 consulting company, had a special and close working relationship with Lightspeed. Plaintiff is  
18 informed and believes that at all relevant times McGraw was and remains a venture partner at  
19 Lightspeed. McGraw's undisclosed relationship with Lightspeed created an immediate potential  
20 conflict that later became a fully actualized conflict of interest.

21 21. Plaintiff is informed and believes that pursuant to the recommendations of  
22 Defendants Lightspeed and Cogan, and with the knowledge of Defendants ComVentures and Van  
23 der Meer, McGraw was appointed in November 2002 to Nishan's Board as an independent  
24 industry representative. McGraw's affiliation with Lightspeed, which was not disclosed to the  
25 entire Board, enhanced Defendant Lightspeed's representation on the Board and effectively  
26 provided it with an additional vote. McGraw did not satisfy the criteria of the Nishan investors'  
27 voting agreement that reserved the Board seat occupied by McGraw for an independent,  
28 recognized storage or networking industry executive.

22. The Board agreed to a compensation package of Nishan stock options for McGraw's service as interim CEO for a period of about six (6) months. McGraw later demanded, and the Board at Lightspeed's and ComVentures's urging accepted, compensation consisting of three percent (3%) of the proceeds of any future acquisition of the Company for \$80,000,000 or more. Without knowledge of McGraw's special relationship with Lightspeed, the Board ratified McGraw's compensation as demanded.

23. The contingent nature of McGraw's compensation package served as a strong financial incentive for him to vote in favor of any Merger that carried a price tag of \$80 million or more. The \$83 million acquisition price paid by McDATA translated into a payment of at least \$1.1 million to McGraw out of the Merger proceeds.

**b. The Formation of the Four Lead Directors' Alliance on Nishan's Eight Member Board**

24. In November 2002, Defendants Lightspeed, ComVentures, Cogan and Van der Meer unilaterally, and without seeking or obtaining the approval of the remaining members of the Board, hired Russo to serve as the Company's CEO. In or around January 2003, Russo became a member of the Nishan Board. From the date Russo joined the Board through on or about September 19, 2003, the date the Merger was consummated, the Board consisted of eight directors. Throughout his tenure as CEO, a period of about 9 months, Russo worked closely and almost exclusively with Lightspeed's Board representatives, Cogan and McGraw, and ComVentures's representative, Defendant Van der Meer. Russo's hiring and consequent appointment to the Board had the effect of increasing Lightspeed's and ComVentures's representation on the Board from 3 out of 7 Board members to 4 out of 8. Though not a majority, the four Board members now representing the Controlling Shareholders were to become the Board's Lead Directors.

**c. The Lead Directors Usurp Control of The Board**

25. In mid-2003, the Lead Directors effectively usurped control of the Board by conducting the business affairs of the Company without seeking the requisite Board approval and/or by securing the vote of the Board while concealing material information essential to an

1 informed vote. The Lead Directors' efforts to deprive Plaintiff and the other Board members of  
2 access to critical information include, but are not limited to, the following:

3 a. Offering Bridge Loan financing to the Board on behalf of the Controlling  
4 Shareholders at a 6% interest rate while secretly memorializing their unconscionable 300%  
5 repayment terms;

6 b. Effecting key management decisions through the exchange of e-mails, and  
7 other forms of communication, that were not copied to Plaintiff and the other Board members;

8 c. Agreeing to exclude Plaintiff from the interview schedule of Nishan CEO  
9 candidates;

10 d. Failing to communicate to the remaining members of the Board that Nishan's  
11 Controller (who was subsequently promoted to VP of Finance) interviewed Russo, and reached  
12 the conclusion that Russo was "not qualified" for the position of CEO. Her conclusion, which  
13 was communicated to the three Lead Directors, McGraw, Van der Meer and Cogan, was ignored.  
14 McGraw wrote on November 7, 2002 to Cogan and Van der Meer: "I do not think her (Nishan's  
15 VP of Finance) comments are show stoppers (similar to comments from others), since they are  
16 positive on Bob as a person, but negative only on his hardware business experience. In the  
17 medium [sic] term their concerns would be resolved, but we would have to be thoughtful on how  
18 to get short term positive feelings towards Bob." This communication was never shared with the  
19 remaining Board members;

20 e. Never informing Plaintiff and the other Board members that McDATA had  
21 offered bridge financing on far more favorable terms than those unilaterally imposed by  
22 Lightspeed and ComVentures, the Controlling Shareholders;

23 f. Agreeing with Nishan's Vice President of Finance that any conversations  
24 regarding the Bridge Loans would be treated with the "utmost confidentiality" and would not be  
25 shared with the remaining Board members;

26 g. Failing to disclose to the other Board members that Defendant Russo was the  
27 subject of a sexual harassment claim during the time he negotiated the Bridge Loans and Merger  
28 transactions on behalf of Nishan.

**d. The Bridge Loans**

26. On May 28, 2003, June 24, 2003, July 29, 2003, and again on August 1, 2003, Defendants Cogan and Van der Meer presented offers to Nishan **on behalf of the Controlling Shareholders** and Board members Silverman and Raza, to provide a total of \$5.5 million in Bridge Loan financing (more particularly defined below) to meet Nishan's immediate need for cash. Without informing the other Board members or obtaining their consent, Defendants Cogan and Van der Meer first memorialized the terms of the Bridge Loan financing as including an unconscionable 300% return on principal, plus interest, in the event a merger or other financing event did *not* occur. On August 1, 2003, when the Merger with McData was assured, Van der Meer changed the repayment terms to guarantee a 300% return on principal in the event that a merger *did* occur.

27. As of May 28, 2003, at least two commercial lenders had offered short-term financing at 6% interest. As of August 1, 2003, and contrary to Russo's representations to the Board that no other alternative financing existed, McDATA was willing to provide bridge financing to Nishan on commercially competitive terms.

**e. The Sexual Harassment Claim Against Russo**

28. Plaintiff is informed and believes that, in or about mid-June 2003, a sexual harassment claim was filed against Russo by a Nishan employee. Plaintiff is further informed and believes that the other Lead Directors, Cogan, Van der Meer and McGraw, and certain Nishan officers were aware of the claim at or around the time it was initiated but withheld this information from the remaining Board members during the time votes regarding the Bridge Loans and other significant matters took place. Plaintiff is further informed and believes that Van der Meer instructed at least two officers of Nishan to conceal the pendency of the claim from the other Board members.

29. Plaintiff is informed and believes that the Lead Directors Cogan, Van der Meer and McGraw concealed the sexual harassment claim against Russo from the remaining Board members so that they could exploit Russo's vulnerability and secure his full loyalties and vote in support of the financial interests of the Controlling Shareholders, Lightspeed and ComVentures.

1 All four Lead Directors advocated and voted for all three Bridge Loan transactions without  
2 disclosing the sexual harassment claim or the pledge of secrecy in exchange for Russo's  
3 representations endorsing and pressing for the acceptance of the Bridge Loan terms.

4 30. On August 15, 2003, McGraw finally apprised the remaining Board members of  
5 the sexual harassment claim against Russo. McGraw informed the Board that the law firm  
6 commissioned to investigate the claim had concluded that there had been inappropriate conduct  
7 on Russo's part. McGraw recommended that Russo be fined and placed on probation.

8 31. Plaintiff's repeated requests to obtain more information about the investigation  
9 into the sexual harassment claim against Russo were stonewalled. During an August 25, 2003  
10 Board meeting, Van Der Meer instructed the Board, Nishan's officers and Nishan's counsel not to  
11 provide any information to Latif. Plaintiff received no information in response to his information  
12 requests on this subject.

13 **f. CSFB's Success Fee and Undisclosed Alignment with McDATA**

14 32. Plaintiff is informed and believes that Defendant Russo retained CSFB, at Van der  
15 Meer's behest, to advise Nishan in its search for an appropriate merger or acquisition partner. At  
16 the time it retained CSFB, Nishan was already engaged in initial discussions with McDATA and  
17 Brocade Communications Systems, Inc. regarding a potential merger or acquisition.

18 33. CSFB negotiated a \$2 million fee from Nishan that was contingent on the  
19 successful consummation of a merger or sale. CSFB accordingly had an outsized incentive to see  
20 that Nishan was either acquired by or merged with another entity.

21 34. Plaintiff is informed and believes that CSFB was in fact paid \$2.5 million out of  
22 the Merger proceeds. This information was not provided to Plaintiff or the other Nishan  
23 shareholders when their votes were solicited in favor of the Merger.

24 35. Plaintiff did not learn until after the Merger was consummated that CSFB was  
25 contractually entitled to a fee from McDATA for its services on behalf of Nishan in connection  
26 with the Merger. Plaintiff remains unaware of the precise nature of the contractual relationship  
27 between McDATA and CSFB that predated Nishan's retention of CSFB.

28

36. Plaintiff is informed and believes that CSFB had a financial incentive in advancing McDATA as the most suitable merger target for Nishan and therefore either neglected to pursue, or actively discouraged, interest from Brocade and possibly other available partners. CSFB never disclosed its disabling conflict to the Board or to Nishan's shareholders when they voted on the Merger.

## PROPOSED ROUND D FINANCING

37. In March 2003, Nishan was under a pressing need to raise additional cash. The Controlling Shareholders through Cogan and Van der Meer proposed a means of financing that impermissibly benefited Lightspeed and ComVentures, at the expense of the Company and the remaining preferred and common shareholders. The terms of the proposed investment included a 3X liquidation preference comparable to the terms later offered and accepted on behalf of Nishan for the Bridge Loan financing.

38. Although the Board approved the proposed terms of the Series “D” round of financing, the company was unable to obtain the necessary shareholders’ vote to approve it.

39. Plaintiff is informed and believes that when Nishan was struggling unsuccessfully to obtain support for the Round “D” financing, and while Nishan was in desperate need for cash, Brocade was interested in pursuing a potential merger with Nishan and had serious discussions regarding an acquisition. Plaintiff believes that Russo, at the direction of the Lead Directors and without the knowledge of the remaining directors, rejected Brocade’s April offer falsely representing that he was doing so on Nishan’s behalf.

40. Plaintiff is informed and believes that the Lead Directors instructed Russo to reject Brocade's advances in order to enhance the chances of obtaining approval of round "D" financing on their proposed terms.

**DEFENDANTS NEGOTIATED AGAINST  
THE INTERESTS OF COMMON SHAREHOLDERS**

41. On June 20, 2003, without Latif's prior knowledge, Defendant Russo retained CSFB, purportedly on the Company's behalf, to represent Nishan in its negotiations for a merger or acquisition transaction. In retaining CSFB, Russo acted in coordination with the other Lead

1 Directors (Van der Meer, in particular, who Plaintiff is informed and believes had a pre-existing  
2 business relationship with CSFB) and the Controlling Shareholders Lightspeed and  
3 ComVentures, but did not obtain the full Board's prior approval.

4 42. Although Plaintiff was a Board member at that time, he was not invited to  
5 participate in any meeting during which a Board approval of CSFB was sought or granted.  
6 Plaintiff believes that there are Board meeting minutes reflecting purported discussions regarding  
7 the retention of CSFB. Plaintiff further believes that such minutes were created after the Board  
8 approved the Merger transaction on August 25, 2003, and were doctored to retroactively validate,  
9 among other things, the defective hiring process of CSFB.

10 43. Plaintiff is informed and believes that the Board's retroactive ratification of  
11 CSFB's retention was obtained, if at all, without the Board's informed consent regarding CSFB's  
12 pre-existing relationship with McDATA and the contingent nature of CSFB's fee. On July 17,  
13 2003, McDATA submitted a term sheet to Nishan which provided that \$5 million of the Merger  
14 consideration would be distributed to the common shareholders. Nishan responded with an  
15 annotated July 21, 2003 term sheet that included the redline notations of CSFB's representative,  
16 Mr. Jason Greenberg, deleting all references to Merger consideration for the common  
17 shareholders.

18 44. Nishan ultimately succeeded in negotiating an increase in the total consideration  
19 paid by McDATA from \$80 million to \$83 million, but reduced the consideration payable to the  
20 common shareholders to \$4 million.

21 45. Defendants further negotiated Merger terms that failed to treat equally  
22 shareholders of the same class with respect to the distribution of cash in violation of Corporations  
23 Code, section 1101 (d) (e).

24 46. McDATA's initial term sheet, as a "principal condition to closing," called for a  
25 fairness opinion by Nishan's financial advisor, CSFB, to be delivered to Nishan's Board  
26 "determining that the Merger Consideration to be received by [Nishan] is fair to all [Nishan]  
27 shareholders." Although in its engagement agreement CSFB agreed to provide an opinion "as to  
28 the fairness from a financial point of view of the consideration to be received by the company's

1 stockholders,” Defendants’ responsive term sheet reflects CSFB’s representative, Mr. Jason  
2 Greenberg’s, deletion of that requirement.

3 47. Plaintiff is informed and believes that CSFB knew that the terms of the Merger  
4 transaction as applied to Plaintiff were unfair and therefore concealed and refrained from  
5 providing such information to Plaintiff despite his repeated requests.

6 48. On or about July 29, 2003, CSFB informed the Board that Brocade was interested  
7 in acquiring Nishan but that it was not willing to offer “\$95 million.” Plaintiff is informed and  
8 believes that CSFB demanded an unreasonably high purchase price from Brocade so that it would  
9 be discouraged from competing with McDATA—the entity with which CSFB had an ongoing  
10 financial relationship. CSFB did not further pursue Brocade as a potential merger partner.  
11 Plaintiff is further informed and believes that CSFB was not instructed by Nishan’s Board to  
12 discourage Brocade or any other potential parties from further pursuit of Nishan.

13 49. Plaintiff is further informed and believes that, on or about August 25, 2003, CSFB  
14 stated verbally to the Board that the Merger transaction was fair. CSFB also issued a written  
15 opinion stating that the consideration received in the **aggregate** (rather than the consideration  
16 allocated to the shareholders) from the Merger was fair. CSFB issued its written fairness opinion  
17 knowing that the Company would and did transmit its conclusion (but not its written opinion) to  
18 the common shareholders that the transaction was fair. Plaintiff is informed and believes that in  
19 so proceeding CSFB intended to influence the shareholders’ vote on the Merger without  
20 discussing or disclosing whether the Merger terms were fair to the shareholders.

21 50. On or about July 24, 2003, the Board voted in favor of accepting McDATA’s  
22 proposed Merger term sheet. Plaintiff expressed his grave concern that the proposed Merger  
23 terms unfairly benefited the Controlling Shareholders, the Lead Directors, and those shareholders  
24 who participated in the Bridge Loans, including Messrs. Raza, and Silverman, at the expense of  
25 certain common shareholders. In an attempt to prevent Plaintiff from pursuing any action that  
26 might interfere with the Merger as proposed and accepted by the Board on July 29, Defendants,  
27 and each of them, concealed from Plaintiff material information regarding the specific terms of  
28

1 the negotiated Merger and the allocation of the Merger proceeds. On July 30, 2003, Nishan  
2 signed the Merger term sheet with McDATA.

3 **THE CONCEALMENT IN CONNECTION WITH THE**  
4 **UNCONSCIONABLE BRIDGE LOANS**

5 51. On May 28, 2003, the Board considered bridge financing for Nishan in the amount  
6 of \$2 million. Upon the Lead Directors' offer to have their respective principals, Lightspeed and  
7 ComVentures, provide a bridge loan on terms better than those offered by the Silicon Valley  
8 Bank and Cupertino National Bank (both at 6% interest), the entire Board agreed to accept such  
9 bridge loans from the Controlling Shareholders. Plaintiff, in reasonable reliance on Defendants'  
10 representations, voted to approve the May Loan. Plaintiff does not believe that any paperwork  
11 memorializing the loan terms was ever distributed to the Board as a whole.

12 52. Plaintiff is now informed and believes that Lightspeed, ComVentures and possibly  
13 others that participated in the May Bridge Loans executed a \$2 million bridge loan agreement,  
14 dated June 6, 2003, that reflected a 300% return on the loan's principal if permanent financing did  
15 not close by June 30. The terms and existence of the June 6, 2003 loan agreement were  
16 concealed from Plaintiff until Defendants' August 19, 2004 production of certain documents.

17 53. On June 24 and July 28, 2004, the Board, including Latif, approved extensions of  
18 and additions to the Bridge Loans offered by Lightspeed and ComVentures (and Raza and  
19 Silverman who were to share in the loan) bringing the total to \$5.5 million. Latif believed at the  
20 time that the Bridge Loans were offered at the competitive rate of 6% interest.

21 54. In reasonable reliance on the Lead Directors' representations, Plaintiff voted in  
22 favor of the May, June and July Bridge Loans (as did the Lead Directors who offered the loans on  
23 behalf of the Controlling Shareholders and then accepted them on behalf of Nishan). Van der  
24 Meer informed the Board that ComVentures and Lightspeed would provide the necessary  
25 funding. The existence of a claim of sexual harassment against Russo was not disclosed to or  
26 discussed with the Board.

27 55. Latif is now informed and believes that between July 30 and July 31, Russo made  
28 a deal with Van der Meer and Cogan. On July 30, 2003, when McDATA's commitment came

1 through, Defendant Van Der Meer wrote to Julie Shepard (Nishan's CFO), Defendants Gill  
2 Cogan and Robert Russo, Arnold Silverman (a Board member), Atiq Raza (a Board member),  
3 Nishan's attorneys and other individuals who were not Board members as follows: "Gentlemen. I  
4 will forward another extension of this note with different terms. Please standby. My best,  
5 Roland." In exchange for Russo's agreement to champion the change in the Bridge Loan terms,  
6 so that the Bridge Loans would now be repaid at 300% in the event a merger occurred rather than  
7 the original provision for payment of 300% only if a merger did not occur, Russo was promised  
8 continued job security and leniency in resolving the sexual harassment claim against him.

9       56. In a Board meeting after Nishan received the Merger proposal from McDATA, on  
10 August 1, 2003, the Controlling Shareholders (as well as Messrs. Silverman and Raza whose  
11 respective principal firms were to share in the loan and benefit from its favorable repayment  
12 terms) and a strictly limited and carefully selected group of shareholder investors announced that  
13 the Bridge Loan discussed at the July 29 Board meeting would be provided on modified terms, as  
14 formulated by Defendant Van der Meer. The unilaterally dictated terms now included a 300%  
15 return on principal in the event a merger closed within 60 days, plus 6% interest. Russo  
16 represented to the Board that no other financing options were available to Nishan and that the  
17 loan was essential to the continued survival of the Company and would have to be approved  
18 immediately and by a unanimous vote.

19       57. In reasonable reliance on Russo's representations, believing the approval of the  
20 loan would save the company from closure, Plaintiff cast his vote in favor of the Bridge Loans.  
21 Plaintiff did so without knowledge of the many material matters that Defendants continued to  
22 conceal from him, including the Board's profound conflicts as more fully detailed above, and the  
23 existence of other available bridge financing at commercially competitive rates from McDATA  
24 and other sources.

25       58. Plaintiff is informed and believes that the Controlling Shareholders, Lightspeed  
26 and ComVentures, directly participated in at least \$4.1 million of the \$5.5 million in total Bridge  
27 Loans. Defendants have resisted, and continue to resist, providing any information to Plaintiff  
28

1 regarding the specifics of the Controlling Shareholders' participation in the Bridge Loans and  
2 Plaintiff remains unaware of the specific terms.

3         59. Plaintiff is informed and believes that by August 1, 2003, the risk to the  
4 participants in the Bridge Loans, if it had existed at all, was effectively nonexistent as the Board  
5 had, on July 29th, approved McDATA's revised terms sheet. Under the terms of the parties'  
6 agreement, McDATA was contractually obligated to pay \$3 million to Nishan for bridge  
7 financing in the event the merger was not consummated. There was therefore no business  
8 justification for Nishan's Board to either offer or accept a repayment term as egregious as a 300%  
9 return on principal for a three-month loan.

10                                   **THE SHAREHOLDERS WERE**

11                                   **DEPRIVED OF A FAIR VOTE (VOTE BUYING)**

12         60. Drawing on the lessons of the Series "D" failure, Plaintiff is informed and believes  
13 that on or about August 17, 2003, McDATA communicated to CSFB its refusal to sign the  
14 Merger Agreement without obtaining from Nishan the prior written consent of a majority of the  
15 common shareholders. Plaintiff is further informed and believes that McDATA demanded, and  
16 the Lead Directors, the Controlling Shareholders and CSFB agreed, that the proxy votes of a  
17 majority of the common shareholders would be secured before providing the shareholders with  
18 full disclosure of the Merger's terms.

19         61. Plaintiff is informed and believes that Defendants worked to ensure that the  
20 conditions that McDATA imposed as a prerequisite to signing the Merger Agreement — the  
21 consent of a majority of the common shareholders prior to the disclosure of the Merger terms —  
22 would be met. To that end, Plaintiff is informed and believes that McDATA demanded the Lead  
23 Directors, the Controlling Shareholders and CSFB agree to work together to influence through  
24 financial incentives various "friendly" common shareholders. Defendants offered such  
25 shareholders significant stock ownership so as to encourage their votes in favor of the Merger.  
26 Such side deals had the effect of disenfranchising the common shareholders' natural majority and  
27 rendering the influenced votes illegal.

1           62. Plaintiff is further informed and believes that Defendants agreed to work together  
2 to withhold the common shareholders' access to information material to an informed vote on the  
3 Merger so as to obtain their uninformed proxy in favor of the Merger. Nishan's Information  
4 Statement, which contained information current to August 29, 2003, discloses a number of the  
5 Merger's challenged terms not previously known to the shareholders. Plaintiff is informed and  
6 believes that this Information Statement was received by many of the shareholders on or about  
7 September 15, 2003—well after a critical mass of common shareholders had cast their irrevocable  
8 proxies in favor of the Merger. The Information Statement, in any event, fails to disclose a  
9 number of material facts, including the existence or details of the fraudulent vote-buying scheme  
10 on which Defendants embarked in advance of its distribution.

11           63. Defendants used four principal cash incentives to impermissibly influence the  
12 vote. First, Defendants targeted Russo as the holder of 15% of not yet vested options to purchase  
13 common shares. Second, Defendants sought to influence key management personnel through  
14 inflated severance and other financial benefits. Third, Defendants obtained the votes of certain  
15 employees through retention bonuses that correlated to the size of the respective  
16 employee/shareholders' equity holdings in the Company. And, finally, Defendants offered  
17 certain preferred shareholders participation in the unconscionable Bridge Loans — an investment  
18 virtually guaranteeing a short-term 300% return – in consideration for their unconditional support  
19 of the Merger. Plaintiff remains unaware of the full details and scope of Defendants' vote-buying  
20 activities but can knowledgeably allege the following based on recent discovery.

21           64. On August 6, 2003, Van der Meer requested CSFB's assistance in creating a table  
22 showing what percentage of preferred shares each preferred shareholder would have to convert to  
23 common in order to ensure a majority vote in favor of the Merger. CSFB provided the results of  
24 its analysis to Van der Meer only.

25           65. On August 9, 2003, CSFB developed a spreadsheet for allocating \$7 million to  
26 Nishan's employees. A key element of the allocation was the size of the employee's common  
27 stockholdings: "one point worth noting – I [CSFB's Jeff Laborde] went ahead and put some  
28 weight on the stock ownership (about 15%) once I saw how little Bob [Russo] was getting."

1 Plaintiff is informed and believes that this spreadsheet was provided to and used by Nishan to  
2 allocate \$7 million to certain Nishan employees in exchange for their votes in favor of the  
3 Merger.

4         66. On August 11, 2003, CSFB inquired how Nishan's Board of Directors was going  
5 to take care of those employees who could be instrumental in approving the deal due to their  
6 significant shareholding, but were unlikely to be retained by McDATA following the Merger.

7         67. On or about August 17, 2003, CSFB and Banc of America Securities exchanged a  
8 number of e-mails memorializing the need to ensure Russo's votes. On August 18, CSFB's  
9 representative recommended increasing the monetary compensation to persons with a higher  
10 equity stake, who could then cast more votes in favor of the Merger.

11         68. On August 18, 2003, CSFB sent an email titled "Common Vote Analysis,"  
12 requesting a meeting with Nishan to discuss the number of common shares presently targeted as  
13 voting in favor of the Merger. CSFB sought to discuss "more importantly, potential ways or  
14 approaches to increase this number."

15         69. On August 21, 2003, CSFB sent an email titled "Inside Votes" to McDATA,  
16 through their agent Banc of America Securities, listing a number of employees and their common  
17 stock holdings, totaling over 22% of Nishan's common shares. CSFB requested "additional  
18 economic terms of their employment namely new options" while informing McDATA that their  
19 team will "of course take care of the allocation component for these employees listed." Plaintiff  
20 is informed and believes that Defendants subsequently requested that these employees attend an  
21 August 23, 2003 meeting at which they were promised "economic terms" in addition to their  
22 proportionate share allocations. The "economic terms" were offered to encourage the employees'  
23 immediate, irrevocable and uninformed vote in favor of the Merger.

24         70. On August 21, 2003, McDATA, Nishan, Cogan, Van der Meer and CSFB struck a  
25 deal with Russo. Russo was asked to accelerate the exercise of his as yet unvested options to  
26 purchase 4.1 million common shares, and cast them in favor of the Merger. In return for  
27 irrevocable proxies of his 4,100,000 common shares in favor of the Merger, Russo would receive  
28 a minimum of \$1.1 million (over 10X his contractual severance entitlement) plus about \$400,000

1 upon redeeming his optioned shares. In addition, Russo was offered a \$600,000 limited post-  
2 Merger "consulting agreement" by McDATA. McDATA amended the Merger Agreement to  
3 state that Russo's irrevocable proxies in favor of the Merger were a condition to McDATA's  
4 acceptance of the definitive Merger Agreement. The Board was never informed of, nor did it  
5 approve, the agreements with Russo or the change in the Merger Agreement. Russo voted all 4.1  
6 million of his common shares in favor of the Merger in exchange for these unlawful payments  
7 rendering his votes illegal and not properly included in the final calculation of votes cast in favor  
8 of the merger.

9       71. Plaintiff is informed and believes that in addition to the \$2 million in extra-  
10 contractual benefits paid to Russo, Defendants offered cash incentives to other management  
11 employees in exchange for their votes in favor of the Merger, including: Mark Hicks who  
12 received \$800,000 and a post-Merger consulting contract with McDATA of unknown value; Julie  
13 Shepard who received \$400,000; Walt Blomquist who received \$500,000; and Mike Bailey who  
14 received \$275,000. Plaintiff is informed and believes that each of these Nishan employees cast  
15 their votes in favor of the Merger in exchange for these unlawful payments rendering their votes  
16 illegal and not properly included in the final calculation of votes cast in favor of the Merger.

17       72. On August 22, 2003, during a Nishan Board meeting, Latif asked Jason Greenberg  
18 if CSFB or McDATA were involved in influencing the outcome of the common vote by  
19 providing financial incentives to selective shareholders. Jason Greenberg denied that CSFB knew  
20 of, or was involved in, any activities to influence the common shares. Having learned for the first  
21 time through documents produced by Defendants in the course of this litigation, Plaintiff is  
22 informed and believes that CSFB misrepresented its involvement in the vote buying campaign.  
23 Plaintiff is informed and believes that CSFB had:

24           a. Developed and supplied to Nishan an allocation method that considered  
25 common stock holding a key factor in allocating \$7 million to Nishan employees;

26           b. Only a day before denying its involvement, on August 21, 2003, CSFB  
27 sent an email to McDATA requesting the provision of additional economic incentives for  
28 employees who held 22% of the common stock;

1 c. Only a day before denying its involvement, on August 21, 2003, CSFB  
2 sent an email to McDATA stating that employee allocation amounts would be used as an  
3 incentive for getting insider votes totaling 22% of the common stock;

4 d. Only a day before denying its involvement, on August 21, 2003, CSFB  
5 assisted in negotiating an approximately \$2 million payment to Russo in return for irrevocable  
6 proxies of his shares in favor of the Merger, representing 15% of the common stock.

7 73. On August 23, 2003, during a Nishan Board meeting, Latif asked Russo if the  
8 common share holdings of employees were considered in determining the employee allocation  
9 amount. Russo, Van der Meer and Cogan vehemently but falsely denied that the employees'  
10 common share holdings played a part in considering the amounts of money allocated to them.  
11 Jason Greenberg of CSFB, who had provided the model that included employee stock holdings as  
12 a factor and who was present when Russo, Van der Meer and Cogan denied the calculations, did  
13 not dispute their false representations.

14 74. At an August 24, 2003 Board meeting, and by an earlier email, Latif expressed his  
15 concerns regarding possible vote-buying. Van der Meer instructed the other Board members not  
16 to respond to Latif's inquiries.

17 75. Plaintiff is informed and believes that McDATA and CSFB worked to ensure that  
18 the conditions that McDATA imposed as a prerequisite to signing the Merger Agreement — the  
19 consent of a majority of the common shareholders prior to the disclosure of the Merger terms —  
20 would be met. To that end, Plaintiff is informed and believes that McDATA demanded that the  
21 Lead Directors, the Controlling Shareholders and CSFB work together to influence and obtain  
22 side deals with various common shareholders so as to encourage their vote in favor of the Merger.  
23 Such side deals had the effect of soliciting illegal votes in favor of the Merger and  
24 disenfranchising the common shareholders' natural majority. Plaintiff is informed and believes  
25 that McDATA was at all times fully informed of the activities undertaken by the Lead Directors,  
26 the Controlling Shareholders and CSFB in soliciting the illegal votes of the Nishan common  
27 shareholders and counting their illegally voted shares as votes in support of the Merger.

1           76.     On August 24, 2003, McGraw and Russo cast their votes illegally as Nishan Board  
2 members in favor of the Merger despite, and without disclosing to Plaintiff and other Board  
3 members, their patently conflicting financial interests in the Merger transaction. CSFB's  
4 representative, Jason Greenberg, knew of Russo's and McGraw's conflicts of interests but failed  
5 to disclose them to Plaintiff and the other Board members. CSFB also failed to advise the Nishan  
6 shareholders, whose interests it represented in negotiating the Merger and issuing its fairness  
7 opinion, that the Merger terms were unfair to the common shareholders. CSFB, whose fee was  
8 contingent on a successful Merger, had an equally compelling and conflicting financial interest in  
9 minimizing any interference with the Merger approval under the negotiated terms.

10           77.     Plaintiff is informed and believes that the Defendants, and each of them,  
11 participated in drafting the Nishan employees' Retention Bonus Plan ("Retention Plan"). The  
12 Retention Plan provides for the distribution of retention bonuses to certain employees in the event  
13 of a successful common share vote and Merger. Plaintiff is informed and believes that many of  
14 the retention bonuses and their amounts were calculated based upon the size of each employees'  
15 equity holdings in the Company and without regard to their anticipated retention by the surviving  
16 entity. Plaintiff believes such retention bonuses were offered for the sole purpose of securing the  
17 illegal votes of the bonus-receiving employees in support of the Merger. Plaintiff is informed and  
18 believes that, on August 23, 2003, Defendants McDATA, CSFB and Nishan demanded that  
19 Nishan employee-founders, and other employees who were promised disproportionately high  
20 retention bonuses, sign an irrevocable proxy for their advance votes in favor of the Merger, the  
21 terms of which were not fully disclosed to them. Such request was made before Nishan circulated  
22 its Information Statement to the shareholders. Designees of Nishan and CSFB informed these  
23 employees, as they were asked to sign their consent to the Merger, of the amount of money they  
24 would receive from the Merger if approved.

25           78.     An Excel sheet circulated by McDATA's investment bankers, Banc of America  
26 Securities, to McDATA, CSFB and selective Nishan representatives on August 24, 2003 shows  
27 the tabulation of the votes in favor of the Merger as of August 24. The tabulation shows that 43%  
28 of the common shares were then pledged in favor of the Merger including 16% from management

1 votes purchased by Defendants (Russo, Shepard and Hicks) and 17% from five employee-founder  
2 votes purchased by Defendants.

3         79. Having full knowledge that a majority of the common shares voted in favor of the  
4 Merger by the August 24 votes analysis were not legally voted, Russo and his designees advised  
5 Nishan's employees on September 4, 2003, that they were required to submit their common share  
6 votes in favor of the Merger by the following day. When Defendants failed to secure employees'  
7 legal votes in sufficient numbers to approve the Merger without counting the illegal votes by  
8 September 5, Defendants renewed the pressure on the employees on September 9th to cast their  
9 votes by the following day, the 10<sup>th</sup> of September.

10         80. By the end of business on September 9, 2003, Nishan representatives circulated  
11 the actual vote tabulation as of 5:25 pm that day. Even including Russo's and the remaining  
12 management personnel's illegal votes, the total common share vote in favor of the Merger was  
13 only 49.691%. Defendants needed to obtain a few more votes to obviate the need to convert their  
14 preferred shares to common and achieve the requisite common shareholder approval.

15         81. On September 15, Plaintiff and other shareholders received the Information  
16 Statement, which includes information current as of August 29. According to the Information  
17 Statement, 38% of the common shareholders had cast their votes in favor of the Merger. Plaintiff  
18 is informed and believes that the final tally of votes in favor of the Merger, including the illegally  
19 cast votes, was approximately 55%.

20         82. The extra-contractual severance payments in the aggregate amount of at least  
21 \$3.075 million to departing management personnel and the disproportionately high retention  
22 bonuses all came directly out of the Merger proceeds—money that would have otherwise been  
23 available for fair distribution to Plaintiff and the remaining common shareholders.

24         83. California law requires a Merger to be approved by a majority of each class of  
25 shareholders. Nishan's common shareholders were entitled to have their natural majority vote in  
26 favor or against the Merger. The additional payments made to certain common shareholders and  
27 the bestowing of further economic benefits on other common shareholders disenfranchised the  
28 common shareholders as a class from their right to have their natural majority determine the fate

1 of the Merger. These discriminatory payments and economic benefits were in derogation of  
2 Corporations Code section 1101 which requires that each share of the same class “be treated  
3 equally with respect to any distribution of cash . . . .”

4 84. The Information Statement, even if it had been received by the shareholders in  
5 time to inform their votes on the Merger, did not disclose the vote-buying activities detailed  
6 above nor did it disclose the following material information:

- 7 a. That McGraw was a Venture Partner at Lightspeed Ventures;
- 8 b. That Russo, who negotiated the Merger with McDATA, was vulnerable  
9 and subject to pressure due to a sexual harassment claim initiated against him in June 2003 and  
10 under investigation as the Merger negotiations proceeded;
- 11 c. Any details concerning the extortionate terms, or beneficiaries, of the  
12 Bridge Loans;
- 13 d. That CSFB was to be paid a contingency fee of \$2.5 million for their  
14 services only if the Merger was approved;
- 15 e. That CSFB and McDATA had entered into an agreement that allowed  
16 CSFB to act as an exclusive financial advisor for McDATA and that such an Agreement was still  
17 in place while CSFB was negotiating on behalf of Nishan against McDATA;

18 **THE MERGER AGREEMENT AND THE**  
19 **BOARD’S FLAWED APPROVAL THEREOF**

20 85. Plaintiff is informed and believes that the vote of the Board, purporting to approve  
21 the Merger Agreement, took place on August 24, 2003. The Merger Agreement was executed by  
22 the parties on or about August 25, 2003 and the Merger was consummated on or about September  
23 19, 2003.

24 86. Russo, McGraw, Van der Meer, Cogan, Raza, and Silverman voted in favor of the  
25 Merger Agreement, notwithstanding the strong financial interest they had in the Merger’s  
26 approval—irreconcilable conflicts of interest that, at a minimum, required disclosure and proof  
27 that the Merger was just and reasonable. Defendants did not disclose the conflict nor did they  
28 sustain their burden under Corporations Code section 310(a).

1           87.     Material facts concerning the Merger and the conflicting interests of the Lead  
2 Directors were not fully disclosed to or known by Latif or the other Board members and  
3 shareholders. On August 24, 2004, during a Nishan Board meeting, Latif inquired about the  
4 sexual harassment claim against Russo. As McGraw began to address the question, Van der Meer  
5 instructed the Board not to answer any of Latif's questions. Based on Van der Meer's  
6 instructions, on August 24, 2004, Nishan's Board did not discuss any of the issues raised by  
7 Latif—the sexual harassment claim against Russo, the payment of approximately \$2 million to  
8 Russo, financial benefits offered to influence shareholders' votes, and other important issues.

9           88.     Arnold Silverman, another Board member complained repeatedly of lack of  
10 information necessary to make informed Board voting decision. On August 19, 2003 Mr.  
11 Silverman wrote: "I have asked for a summary of who gets what many times during the last  
12 month and I have been stiff armed." On August 24, 2003 Mr. Silverman wrote: "I have no  
13 information on this stock conversion . . . I have not received the final merger agreement . . . I  
14 have no final documents to review."

15           89.     On August 26, 2003, Nishan Board member Arnold Silverman, a venture capitalist  
16 who had voted in favor of the Merger, protested the process leading up to the vote and requested  
17 that his protest be recorded in the Board minutes. Subsequently, on August 27, 2004, Mr.  
18 Silverman resigned from the Board.

19                               **THE COMMON SHAREHOLDERS WERE**  
20                               **DEPRIVED OF A FAIR APPRAISAL PROCESS**

21           90.     Plaintiff is informed and believes that McGraw was informed of the statutory  
22 appraisal procedure for dissenting shareholders. In purported compliance with the statutory  
23 requirements, Russo worked with the Lead Directors and CSFB to set a "fair market price" for  
24 the common shares that was significantly lower than the price per share offered common  
25 shareholders in exchange for their vote in favor of the Merger. While common shares voting in  
26 favor of the Merger were entitled to receive \$0.14 per share, Defendants set the fair market value  
27 of dissenters' common shares at only \$0.05. Plaintiff is informed and believes that the depressed  
28

1 valuation price for dissenters' common shares was intended to, and did, discourage common  
2 shareholders from availing themselves of their statutory rights.

3 91. On September 12, 2003, a day after Plaintiff filed this action, Nishan sent out a  
4 Notice of Approval and Dissenters' Rights to all shareholders.

5 **DEFENDANTS FLOUTED PLAINTIFF'S**  
6 **RIGHT TO INFORMATION UNDER SECTION 1602**

7 92. In May 2003, at or around the time the Board was considering the propriety of the  
8 Series "D" round of financing, the Bridge Loans and the proposed Merger, and while serving as a  
9 Nishan Board member, Plaintiff sought to enforce his absolute right under Section 1602 of the  
10 California Corporations Code to receive the information consistently concealed from him.

11 93. Following the initiation of his 1602 petition in May 2003, at which time he was a  
12 member of the Nishan Board, Latif reiterated his requests for information to Nishan on numerous  
13 occasions but received only a small fraction of meaningless information, depriving him of the  
14 crucial information necessary for Plaintiff to perform his duties as a Nishan Board member.

15 94. Most of Latif's inquiries regarding the specific terms of the Merger allocation, the  
16 financial interest of each of the Defendants in the Bridge Loans, the Merger, and the beneficiaries  
17 of the Merger proceeds, remain unanswered.

18 **PLAINTIFF'S FUTILE EFFORTS TO CAUSE DEFENDANTS TO REFRAIN FROM**  
19 **BREACHING THEIR DUTIES AND VIOLATING PLAINTIFF'S RIGHTS**

20 95. Between July 17, 2003 and the time the Merger was consummated, and as to the  
21 extent he was able to obtain information regarding the proposed Merger, Plaintiff repeatedly  
22 demanded action from the Board to revise the terms of the proposed Merger so as to: eliminate  
23 the unfair repayment terms of the Bridge Loans; eliminate the improper compensation offered to  
24 certain officers, directors and employees in exchange for their votes in favor of the Merger; and  
25 allocate a more equitable percentage of the Merger proceeds to the entire class of common  
26 shareholders.

27 96. On August 26, 2003, Plaintiff's counsel directed a letter by facsimile transmission  
28 to John Kelley, McDATA's CEO, on Plaintiff's behalf. On that same date, Plaintiff provided all

1 Board members with copies of his letter to Mr. Kelley. In his August 26th letter, Plaintiff recited  
2 what he perceived as the unfair terms of the Merger and the suspected side deals with various  
3 common shareholders. Plaintiff's counsel solicited Defendants' response to Plaintiff's stated  
4 suspicions.

5 97. In his August 29, 2003 response to Plaintiff's counsel's August 26 letter, Nishan  
6 and McDATA's former counsel stated that "Nishan strenuously disagrees with each of the  
7 allegations of misconduct or wrongdoing. . ." The letter provides no substantive response to the  
8 specific concerns voiced in Plaintiff's counsel's August 26 letter.

9 98. On September 4, 2003, Plaintiff circulated to the Board members a statement  
10 reiterating his suspicions concerning Defendants' misconduct in connection with the Bridge  
11 Loans, the vote buying and the expected unfair merger proceeds allocation. Plaintiff stated that  
12 he wished to circulate the statement to Nishan's shareholders. Plaintiff believed that he, as well  
13 as the other common shareholders, were entitled to have access to all facts that were relevant and  
14 material to the Merger and to the specific areas identified in Plaintiff's statement, so that any  
15 majority vote, which would be binding on Plaintiff, would reflect the true will of the common  
16 shareholders' natural majority.

17 99. In response to Plaintiff's expressed desire to circulate his disclosure letter to the  
18 shareholders at large, Defendants' former counsel wrote on September 5, 2003: "[A]s Mr. Latif  
19 very well knows, the document which he sent to the company yesterday is full of inaccuracies and  
20 distortions. . . . If Mr. Latif elects to publish a document with these defects, Nishan reserves its  
21 rights under the law. Nishan has no intention of 'editing' Mr. Latif's communications."

22 100. In refusing to advise Latif, a Nishan Board member, of the ways in which his  
23 understanding of the Merger terms were inaccurate and distorted, and threatening legal action if  
24 Latif communicated these terms to the Nishan shareholders, Defendants effectively prevented  
25 Latif from advising the shareholders of *any* unfair Merger terms, at least as Plaintiff understood  
26 them at the time. As a result, Plaintiff did not send the draft, or any other, letter to the Nishan  
27 Shareholders and did not disclose to them his understanding as to the unfair terms of the Merger,  
28 or the fraudulent vote buying scheme undertaken to ensure the Merger's approval.

101. Plaintiff is informed and believes that the common shareholders as a group were not informed of facts material to their vote regarding the Merger. The majority vote of the common shareholders was binding on Plaintiff.

102. By his August 26, 2003 letter to McData, Plaintiff demanded that Defendants take immediate action to remedy the perceived wrongs detailed in the letter by fully disclosing the terms of the Merger to the Nishan Board and shareholders and take immediate action to eliminate the unconscionable Bridge Loan payments and reallocate the Merger proceeds in a fair manner.

103. Neither McDATA nor the Nishan's Board took, or has ever taken, any action responsive to Plaintiff's demands.

104. Defendants Cogan, Russo, Van der Meer and McGraw constituted a majority of the Board at the time Plaintiff made his many demands for action consistent with his claims herein. It was against each of these Defendants' self-interest to respond positively to Plaintiff's demands.

## THIS LITIGATION

105. Plaintiff did not vote in favor of the Merger nor did he dissent from the Merger or cash in his shares. He instead filed the Complaint in this action on September 11, 2003, eight days before the Merger was consummated. At the time he filed the Complaint, and up to and including the date the Merger was consummated on September 19, 2003, Plaintiff did not know:

a. That Defendants had engaged in a massive campaign of impermissible vote-buying that had the effect of disenfranchising the natural majority of the common shareholders;

b. That Russo and Hicks were each promised consulting agreements with McDATA in exchange for their votes in favor of the Merger;

c. That CSFB had a pre-existing financial relationship with McDATA at the time it agreed to represent Nishan in its merger negotiations with McDATA;

d. That McDATA was willing to finance bridge loans at commercially competitive rates at a time when Defendants represented to Plaintiff and the other Board members that there was no financing available other than the 300% return on principal financing “offered”

1 by Lightspeed, ComVentures, Raza and Silverman, among others;

2 e. That McDATA insisted that irrevocable proxies in favor of the Merger be  
3 obtained from the common shareholders before disclosures contained in the Information  
4 Statement were circulated to the shareholders;

5 f. That CSFB demanded \$95 million from Brocade at a time when it knew  
6 that McDATA was offering only \$80 million;

7 g. The exact terms and beneficiaries of the Bridge Loans;

8 h. The extent and viability of other Merger prospects available to Nishan in  
9 2003.

10 106. Plaintiff cannot know the extent of what he “does not know” because Defendants  
11 have successfully resisted the production of discovery that is essential to Plaintiff’s understanding  
12 of the full range of potential charges in this action. Defendants have thus far refused to produce  
13 *any* drafts of the Merger and Bridge Loan agreements, *any* information regarding the Round “D”  
14 financing, *any* information regarding the sexual harassment claim against Russo, or *any*  
15 information concerning the Escrow Account. Indeed, Defendants moved to quash the subpoena  
16 Plaintiff issued to the Escrow Agent. Not only have Defendants frustrated Plaintiff’s ability to  
17 state and prove his claims by restricting the scope of production from each of the Defendants,  
18 certain Defendants have refused and continue to refuse to produce any documents whatsoever.  
19 Though the Lead Directors consented to a global discovery agreement on March 31, 2004, they  
20 repudiated the agreement a week later and now refuse to respond to discovery Plaintiff  
21 propounded on them almost nine months ago.

#### 22 THE ESCROW FUND AND AGREEMENT

23 107. The Merger Agreement provided for the creation of an Escrow Fund to be  
24 financed by withholding 20% of the Plaintiff’s and the other Nishan shareholders’ Merger  
25 proceeds. Any Escrowed Property remaining in the Escrow Fund at the conclusion of a one-year  
26 period following the consummation of the Merger, or shortly after September 20, 2004, were to  
27 be distributed to Plaintiff and the other Nishan shareholders.

28 108. Both the Merger Agreement and the Escrow Instructions provide that the funds are

1 available to indemnify McDATA for specifically enumerated claims which Plaintiff is informed  
2 and believes do not include fraud. .

3 109. Concurrently with the execution of the Merger Agreement, McDATA, Roland Van  
4 der Meer “on behalf of the Nishan Shareholders” and Wells Fargo Bank as the Escrow Agent  
5 executed an Escrow Agreement. Pursuant to the Agreement, Mr. Van der Meer was charged with  
6 protecting the proprietary interests of all of the Nishan shareholders, including Plaintiff and the  
7 other minority shareholders, in and to the Escrow Fund. .

### 8 **FIRST CAUSE OF ACTION**

#### 9 **(FRAUD IN CONNECTION WITH THE BRIDGE LOANS)**

10 **Against Defendants Nishan, Lightspeed, ComVentures, Cogan,**

11 **Van der Meer, McGraw, Russo and CSFB**

12 110. Plaintiff hereby restates each and every allegation contained in paragraphs 1  
13 through 109 of this Fourth Amended Complaint, and fully incorporates them by this reference.

14 111. The Controlling Shareholders, Defendants Lightspeed and ComVentures, the Lead  
15 Directors, Cogan, Van der Meer, McGraw and Russo, Nishan and CSFB, and each of them, had a  
16 duty to disclose to Plaintiff and to all members of Nishan’s Board all information within their  
17 knowledge that would materially affect Plaintiff’s and the other Board members’ consideration  
18 of, and vote on, the Bridge Loans.

19 112. Defendants, and each of them, had knowledge of the following matters and knew  
20 that these matters would be material to Plaintiff’s and any reasonable Board member’s  
21 consideration of, and vote on, the Bridge Loans:

22 a. The self dealing by the Controlling Shareholders and the existence of the Lead  
23 Directors’ conflicts of interests;

24 b. The unconscionable terms of the Bridge Loans;

25 c. The low risk to the lenders offering the Bridge Loans;

26 d. The availability to Nishan of financing options other than the Bridge Loans  
27 from the Controlling Shareholders;

28 e. The availability to Nishan of financing options other than the Bridge Loans as

1 of August 1, 2003, including a contractual agreement by McDATA to reimburse Defendants for  
2 the Bridge Loans at the successful completion of the Merger or, in the event of a failure to  
3 consummate the Merger, immediately provide bridge financing of \$3 million.

4 f. The pendency of a sexual harassment claim against Defendant Russo, which  
5 further compromised Russo's ability to perform his duties independent of and without the  
6 influence of the remaining Lead Directors, Van der Meer, Cogan and McGraw;

7 113. Plaintiff and other Board members were not aware of the concealed facts when  
8 they voted to approve the Bridge Loans.

9 114. In concealing these material facts from Plaintiff and the other Board members,  
10 Defendants, and each of them, intended to deceive and in fact deceived a majority of the  
11 disinterested Board members who reasonably relied on Defendants' deception and concealment  
12 and voted in favor of the Bridge Loans.

13 115. On May 28, 2003, Defendant Russo with the knowledge and consent of the  
14 remaining Lead Directors, Cogan, McGraw and Van der Meer, represented to the Board that the  
15 Controlling Shareholders, Defendants Lightspeed and ComVentures, were offering Nishan Bridge  
16 Loans on more favorable repayment terms than outside lenders.

17 116. Plaintiff believes that at the time Defendant Russo made these representations to  
18 the Board, he and Cogan, McGraw and Van der Meer knew them to be false as they knew that the  
19 repayment terms of the Bridge Loans were, in fact, grossly less favorable than those offered by  
20 outside lenders at the time. Defendant Russo made those representations pursuant to the  
21 instructions of the remaining Lead Directors, Van der Meer, Cogan and McGraw, or any of them,  
22 with the intent of inducing the entire Board, including all disinterested directors, to vote in favor  
23 of the Bridge Loans.

24 117. In reasonable reliance on Defendants' false representations regarding the favorable  
25 nature of the Bridge Loan terms, Plaintiff and the entire Board voted unanimously in favor of  
26 approving the May 28, 2003 Bridge Loans.

27 118. On June 6, 2003, unknown to Plaintiff, Defendants signed a promissory note in  
28 connection with the May Bridge Loan that included a 300% repayment term in the event no

1 financing was obtained by June 30, 2003;

2 119. On June 24, 2003, Defendant Russo with the knowledge and consent of the  
3 remaining Lead Directors, Van der Meer, Cogan and McGraw, represented to the Board that the  
4 Controlling Shareholders Lightspeed and ComVentures (and possibly others) were offering  
5 Nishan an extension and increase of the amount of the May 28 bridge loan on favorable  
6 repayment terms.

7 120. Plaintiff believes that at the time Defendant Russo made these representations to  
8 the Board, he and the remaining Lead Directors Van der Meer, Cogan and McGraw knew them to  
9 be false as they knew that the repayment terms of the Bridge Loans were, in fact, unconscionable  
10 and not commercially competitive. Plaintiff believes that Defendant Russo made those  
11 representations pursuant to the instructions of the remaining Lead Directors, or any of them, with  
12 the intent of inducing the Board, including the disinterested directors, to vote in favor of the  
13 Bridge Loans.

14 121. In reasonable reliance on Defendants' false representations regarding the favorable  
15 nature of the Bridge Loan terms, Plaintiff and the entire Board voted unanimously in favor of  
16 approving the June 24, 2003 Bridge Loan.

17 122. On July 29, 2003, Defendant Russo with the knowledge and consent of the  
18 remaining Lead Directors, Van der Meer, Cogan and McGraw represented to the Board that the  
19 Controlling Shareholders, Defendants Lightspeed and ComVentures (and possibly others) were  
20 offering Nishan an extension and increase of the amount of the May 28 and June 24 Bridge Loans  
21 on favorable repayment terms.

22 123. Plaintiff believes that at the time Defendant Russo made these representations to  
23 the Board, he and the remaining Lead Directors, Van der Meer, Cogan and McGraw, knew them  
24 to be false as they knew that the repayment terms of the Bridge Loans they secretly negotiated  
25 with Russo on behalf of the Controlling Shareholders were, in fact, unconscionable and not  
26 commercially competitive. Plaintiff believes that Defendant Russo made those representations  
27 pursuant to the instructions of the remaining Lead Directors, Van der Meer, Cogan and McGraw,  
28 and any/or all of them, with the intent of inducing the disinterested Board members to vote in

1 favor of the Bridge Loans.

2       124. In reasonable reliance on Defendants' false representations regarding the favorable  
3 nature of the Bridge Loan terms, Plaintiff and the entire Board voted unanimously in favor of  
4 approving the July 29, 2003 Bridge Loans.

5       125. On August 1, 2003, after McDATA extended its signed term sheet to merge with  
6 Nishan for \$80 million, Russo announced to the Board that the Bridge Loans' repayment terms  
7 were now: a 300% return on principal, plus 6% interest in the event that the Merger closed within  
8 60 days. Russo further stated that unless the proffered terms were approved, Nishan would no  
9 longer be financially viable and would have to close its doors. Defendants also demanded that the  
10 Board vote unanimously in favor of a retroactive change of the Bridge Loans' repayment terms,  
11 stating that a unanimous vote was legally required. Plaintiff believes that Defendant Russo made  
12 those representations pursuant to instructions from the remaining Lead Directors, Van der Meer,  
13 Cogan and McGraw, and/or any of them, with the intent of inducing the Board to vote in favor of  
14 the Bridge Loans.

15       126. In reasonable reliance on Defendants' false representations regarding the  
16 consequence of refusing to approve a retroactive change of the Bridge Loans repayment terms to  
17 300%, and the need to have a unanimous vote to approve it, Plaintiff and the entire Board voted  
18 unanimously (the interested as well as the disinterested board members) in favor of approving the  
19 change of the Bridge Loans repayment terms to 300% plus interest.

20       127. Plaintiff believes that CSFB, with full knowledge of the Bridge Loan scheme of  
21 the Controlling Shareholders and the Lead Directors, assisted the Controlling Shareholders in  
22 obtaining the necessary approval of the Bridge Loan terms, as well as additional preferred  
23 shareholders' participation in the favorable loans.

24       128. As a direct and proximate result of Defendants' fraudulent misrepresentations and  
25 concealment, the Board approved Bridge Loans that unlawfully incurred a corporate debt of over  
26 \$11 million in unconscionable loan repayments which sums should have been distributed to  
27 Plaintiff and the Nishan shareholders.

28       129. The actions of CSFB and Nishan, and those of the Controlling Shareholders,

1 Lightspeed and ComVentures, and the Lead Directors, Russo, Van der Meer, Cogan and  
2 McGraw, were fraudulent, oppressive and malicious and were undertaken to vex, harass and  
3 annoy Plaintiff. Plaintiff is consequently entitled to recover punitive damages against these  
4 Defendants.

5 **SECOND CAUSE OF ACTION**

6 **(BREACH OF CORPORATIONS CODE §310(a))**

7 **Against Defendants Cogan, Van der Meer, McGraw and Russo**

8 130. Plaintiff hereby restates each and every allegation contained in paragraphs 1  
9 through 129 of this Fourth Amended Complaint, and fully incorporates them by this reference.

10 131. The Lead Directors, Defendants Cogan, Van der Meer, McGraw and Russo, and  
11 each of them, had a duty under California Corporations Code section 310(a) to disclose to  
12 Plaintiff and to all members of the Board their respective financial or other interests in the  
13 Merger.

14 132. Plaintiff is informed and believes that Defendants Cogan and Van der Meer had a  
15 financial or other interest in the Merger and the Bridge Loans as, among other things, the  
16 representative of their respective principal firms, the Controlling Shareholders Lightspeed and  
17 ComVentures.

18 133. Plaintiff is informed and believes that Defendants McGraw and Russo had a  
19 financial or other interest in the Merger as, among other things, the beneficiaries of Defendants'  
20 fraudulent vote-buying scheme as more fully detailed above and below,

21 134. Plaintiff is informed and believes that Board members Atiq Raza and Arnold  
22 Silverman had a financial or other interest in the Merger as, among other things, investors in the  
23 Bridge Loans which had a repayment term of 300% in an event the Merger closed.

24 135. Neither the Lead Directors nor Board members Raza or Silverman disclosed to  
25 Plaintiff and the other Board members their respective financial or other interests in the Merger.

26 136. Of the seven Board members' votes cast in favor of the Merger, six were cast by  
27 interested Board members who did not disclose their respective financial or other interests in the  
28 Merger. Of the two disinterested Board members, only one voted in favor of the Merger. There

1 was therefore no disinterested majority vote in favor of the Merger.

2 137. As a direct and proximate result of the Lead Directors' failure to disclose their  
3 respective financial or other interests in the Merger, an interested majority of the Board voted in  
4 favor of a Merger that was not just and was not reasonable to Plaintiff, to the Company or the  
5 remaining shareholders. Plaintiff has sustained at a minimum damages in an amount of \$11.5  
6 million as a direct and proximate result of the Lead Directors' breach of Corporations Code  
7 section 310(a).

8 **THIRD CAUSE OF ACTION**  
9 **(FRAUD IN CONNECTION WITH THE MERGER)**

10 **Against All Defendants**

11 138. Plaintiff hereby restates each and every allegation contained in paragraphs 1  
12 through 137 of this Fourth Amended Complaint, and fully incorporates them by this reference.

13 139. Defendants, and each of them, had a duty to disclose to Plaintiff and to all  
14 members of Nishan's Board all information within their knowledge that would materially affect  
15 Plaintiff's and the Board's consideration of, and vote on, the Merger and its specific terms.

16 140. Defendants, and each of them, had a duty to disclose to Plaintiff and to each of the  
17 common shareholders all information within their knowledge that would materially affect  
18 Plaintiff's and the other common shareholders' consideration of, and vote on, the Merger.

19 141. Defendants, and each of them, had knowledge of the following matters and knew  
20 that these matters would be material to Plaintiff's and any reasonable Board member's  
21 consideration of, and vote on, the Merger:

22 a. The self-dealing of the Lead Directors and the existence of the irreconcilable  
23 conflicts of interest that rendered the Lead Directors and directors Raza and Silverman  
24 financially interested in the Merger transaction;

25 b. The existence of the Controlling Shareholders, Defendants Lightspeed's and  
26 ComVentures's, irreconcilable conflicts of interest;

27 c. The existence of CSFB's undisclosed financial relationship with McDATA;

28 d. The existence of another, undisclosed competitively attractive merger offer

1 from Brocade Communication Systems;

2 e. The compensation and post-Merger consulting contract to be paid to Russo in  
3 exchange for his voted shares in favor of the Merger;

4 f. The compensation and post-Merger consulting contract to be paid to Mark  
5 Hicks in exchange for his voted shares in favor of the Merger;

6 g. The compensation to be paid to Julie Shepard in exchange for her voted shares  
7 in favor of the Merger;

8 h. The compensation to be paid to Mike Baily and Walt Blomquist in exchange  
9 for their voted shares in favor of the Merger;

10 i. The promised payments to certain common shareholder/employees in exchange  
11 for their voted shares in favor of the Merger;

12 j. The inclusion of selected preferred shareholders as lenders of the Bridge Loan,  
13 and including them as beneficiaries of the extremely favorable 300% repayment terms, in  
14 exchange for their voted shares in favor of the Merger;

15 k. The contingent nature of the \$2.5 million fee to be paid to CSFB;

16 l. The pendency of a sexual harassment claim made by a Company employee  
17 against Russo, the Company representative who therefore negotiated the terms of the Merger  
18 from a point of personal vulnerability;

19 m. McDATA's demand and the remaining Defendants' agreement to obtain  
20 irrevocable proxies exceeding 50% of the common shareholders' vote before McDATA signed  
21 and announced the definitive Merger Agreement;

22 n. McDATA's demand and the remaining Defendants' agreement to obtain  
23 irrevocable proxies exceeding 50% of the common shareholders' vote without providing such  
24 shareholders with the legally mandated disclosure materials.

25 142. Defendants, and each of them, had knowledge of the following matters and knew  
26 that these matters would be material to Plaintiff's and any reasonable common shareholder's  
27 consideration of, and vote on, the Merger:

28 a. The self-dealing of the Lead Directors and the existence of the irreconcilable

1 conflicts of interest that rendered the Lead Directors and directors Raza and Silverman  
2 financially interested in the Merger transaction;

3 b. The existence of the Controlling Shareholders, Defendants Lightspeed's and  
4 ComVentures's, irreconcilable conflicts of interest;

5 c. The existence of CSFB's undisclosed financial relationship with McDATA;

6 d. The existence of another, undisclosed competitively attractive merger offer  
7 from Brocade Communications;

8 e. The compensation and post-Merger consulting contract to be paid to Russo in  
9 exchange for his voted shares in favor of the Merger;

10 f. The compensation and post-Merger consulting contract to be paid to Mark  
11 Hicks in exchange for his voted shares in favor of the Merger;

12 g. The compensation to be paid to Julie Shepard in exchange for her voted shares  
13 in favor of the Merger;

14 h. The compensation to be paid to Mike Baily and Walt Blomquist in exchange  
15 for their voted shares in favor of the Merger;

16 i. The promised payments to certain common shareholder/employees in exchange  
17 for their voted shares in favor of the Merger;

18 j. The inclusion of selected preferred shareholders as lenders of the Bridge Loan,  
19 and including them as beneficiaries of the extremely favorable 300% repayment terms in  
20 exchange for their voted shares in favor of the Merger;

21 k. The contingent nature of the \$2.5 million fee to be paid to CSFB;

22 l. The pendency of a sexual harassment claim made by a Company  
23 employee against Russo, the Company representative who therefore negotiated the terms of the  
24 Merger from a point of personal vulnerability;

25 m. McDATA's demand and the remaining Defendants' agreement to obtain  
26 irrevocable proxies exceeding 50% of the common shareholders' vote before McDATA signed  
27 and announce the definitive Merger Agreement;

28 n. McDATA's demand and the remaining Defendants to obtain irrevocable

proxies exceeding 50% of the common shareholders' vote without providing such shareholders with the legally mandated disclosure materials.

143. Neither Plaintiff nor a disinterested voting majority of the common shareholders was aware of the concealed facts.

144. Neither Plaintiff nor a disinterested voting majority of the Board was aware of the concealed facts.

145. In concealing these material facts from Plaintiff and the Board, Defendants, and each of them, intended to deceive and in fact deceived one of the two disinterested members of the Board who reasonably relied on Defendants' deception to vote in favor of the Merger.

146. In concealing these material facts from Plaintiff and the other common shareholders, Defendants, and each of them, intended to deceive and in fact deceived a majority of the common shareholders who reasonably relied on Defendants' deception to vote in favor of the Merger, a vote that was binding on Latif as a common shareholder.

147. As a direct and proximate result of Defendants' fraud and concealment, both the Board and the common shareholders approved a Merger that was approved by counting shares that were illegally voted and unlawfully diverted over \$4 million in impermissible vote-buying compensation, which sums should have been distributed to Plaintiff and the other shareholders;. Plaintiff has sustained damages in the minimum sum of \$11.5 million as a direct and proximate result of Defendants' fraud and concealment.

148. The actions of the Controlling Shareholders, Lightspeed and ComVentures, through their respective Board representatives Cogan, Van der Meer and McGraw, and those of Russo, CSFB, Nishan and McDATA were fraudulent, oppressive and malicious and were undertaken to vex, harass and annoy Plaintiff. Plaintiff is consequently entitled to recover punitive damages against these Defendants.

#### **FOURTH CAUSE OF ACTION**

#### **(CSFB's FRAUD IN CONNECTION WITH THE MERGER)**

#### **Against Defendant CSFB**

149. Plaintiff hereby restates each and every allegation contained in paragraphs 1

1 through 148 of this Fourth Amended Complaint, and fully incorporates them by this reference.

2       150. Defendant CSFB had a duty to disclose to Plaintiff and to all members of Nishan's  
3 Board all information within its knowledge that would materially affect Plaintiff's and the other  
4 Board members' consideration of, and vote on, the Merger.

5       151. Defendant CSFB had a duty to disclose to Plaintiff and to each of the common  
6 shareholders all information within its knowledge that would materially affect Plaintiff's and the  
7 other common shareholders' consideration of, and vote on, the Merger.

8       152. Plaintiff is informed and believes that CSFB had knowledge of the following  
9 matters and knew that these matters would be material to Plaintiff's and any reasonable Board  
10 member's consideration of, and vote on, the Merger:

11               a. That CSFB had an ongoing financial relationship with McDATA at the time  
12 that it was retained to represent Nishan's interests in connection with its negotiations with  
13 McDATA and any other potential merger or acquisition partner;

14               b. That CSFB waived its entitlement to a fee from McDATA for its services  
15 rendered to Nishan in connection with the Merger;

16               c. That CSFB, on its own initiative and without the direction or approval of the  
17 Board, had intervened in the ongoing merger discussions between Nishan and Brocade and  
18 demanded a minimum acquisition price of \$95 million at a time when McDATA's acquisition  
19 proffer for Nishan was \$83 million; and

20               d. That Brocade thereafter terminated the merger negotiations with Nishan  
21 because it was unwilling to meet the threshold \$95 million proffer for Nishan demanded by  
22 CSFB.

23       153. CSFB had knowledge of the following matters and knew that these matters would  
24 be material to Plaintiff's and any reasonable common shareholder's consideration of, and vote on,  
25 the Merger:

26               a. That CSFB had an ongoing financial relationship with McDATA at the time  
27 that it was retained to represent Nishan's interests in connection with its negotiations with  
28 McDATA and any other potential merger or acquisition partner;

1           b. That CSFB waived its entitlement to a fee from McDATA for its services in  
2 connection with the Merger;

3           c. That CSFB, on its own initiative and without the direction or approval of the  
4 Board, had intervened in the ongoing merger discussions between Nishan and Brocade and  
5 demanded a minimum acquisition price of \$95 million at a time when McDATA's acquisition  
6 proffer for Nishan was \$83 million; and

7           d. That Brocade thereafter terminated the merger negotiations with Nishan  
8 because it was unwilling to meet the threshold \$95 million proffer for Nishan demanded by  
9 CSFB.

10          154. Neither Plaintiff nor a disinterested voting majority of the common shareholders  
11 was aware of the concealed facts.

12          155. Neither Plaintiff nor a disinterested voting majority of the Board was aware of the  
13 concealed facts.

14          156. In concealing these material facts from Plaintiff and the Board, CSFB intended to  
15 deceive and in fact deceived a majority of the Board who reasonably relied on Defendant's  
16 deception to vote in favor of the Merger, votes that were binding on Latif as a member of the  
17 Board.

18          157. In concealing these material facts from Plaintiff and the other common  
19 shareholders, CSFB intended to deceive and in fact deceived a majority of the common  
20 shareholders who reasonably relied on Defendant's deception to vote in favor of the Merger, a  
21 vote that was binding on Latif as a common shareholder.

22          158. On or about August 25, 2003, defendant CSFB, by and through the Managing  
23 Director of its 650 California Street, San Francisco, CA office, issued its written opinion to the  
24 Board in which it concluded that the Merger was fair from a financial point of view, of the  
25 aggregate consideration received by the holders of the Company, knowing that the Board  
26 intended to, and did, refer to CSFB's conclusion regarding the fairness of the Merger to the  
27 common shareholders in its Information Statement sent to the shareholders, and with the intent of  
28 influencing, the shareholders' vote on the Merger.

159. At the time it issued its written opinion that the Merger was fair, from a financial point of view, of the aggregate consideration received by the shareholders of Nishan, CSFB knew that its representations were misleading, and that the terms of the Merger were, in fact, unfair to certain of the common shareholders, including Plaintiff. CSFB made these representations with the intent of inducing a majority of the common shareholders to vote in favor of the Merger.

160. In reasonable reliance on CSFB's false representations regarding the fairness of the Merger, a majority of the common shareholders voted in favor of the Merger, a vote which was binding on Plaintiff.

161. As a direct and proximate result of Defendant's fraudulent misrepresentations and concealment, both the Board and the common shareholders approved a Merger that unlawfully diverted over \$4 million in impermissible vote-buying compensation, which sums should have been distributed to Plaintiff and the other shareholders. Plaintiff has sustained damages in the minimum sum of \$11.5 million as a direct and proximate result of Defendants' fraud and concealment.

### FIFTH CAUSE OF ACTION

**(CONSTRUCTIVE FRAUD IN CONNECTION WITH THE BRIDGE LOANS)**

**Against Defendants Lightspeed, ComVentures, Cogan,**

Van der Meer, McGraw, Russo and CSFB

162. Plaintiff hereby restates each and every allegation contained in paragraphs 1 through 161 of this Fourth Amended Complaint, and fully incorporates them by this reference.

163. The Lead Directors, Defendants Cogan, Van der Meer, Russo and McGraw owed fiduciary duties of care and loyalty to the Company and its shareholders to act only in the best interests of the Company and its shareholders, and to at all times place the interests of the shareholders ahead of their own.

164. The Controlling Shareholders, Defendants Lightspeed and ComVentures, owed a fiduciary duty to the minority shareholders to exercise their power in the best interests of the minority shareholders and without regard to their own personal interests.

165. CSFB, as the financial advisor retained by the Company to negotiate the terms of,

1 and investigate and offer its opinion as to the fairness of, the Merger, owed a fiduciary duty to the  
2 Company and to its shareholders to exercise its power in the best interests of the Company and its  
3 shareholders and to at all times place the interests of the Company and its shareholders ahead of  
4 its own.

5 166. In concealing the material facts detailed in the First Cause of Action, Defendants  
6 Lightspeed, ComVentures, Cogan, Van der Meer, McGraw, Russo and CSFB, and each of them,  
7 knew or should have known that they would be material to Plaintiff's and any reasonable Board  
8 member's consideration of, and vote on, the Bridge Loans.

9 167. In concealing the material facts detailed in the First Cause of Action, Defendants  
10 Lightspeed, ComVentures, Cogan, Van der Meer, McGraw, Russo and CSFB, and each of them,  
11 intended to deceive and in fact deceived a majority of the Board who reasonably relied on  
12 Defendants' deceptions to vote in favor of the Bridge Loans.

13 168. As a direct and proximate result of Defendants' constructive fraud and  
14 concealment, the Board approved Bridge Loans that unlawfully incurred a corporate debt of over  
15 \$11.5 million in unconscionable loan repayments which sums should have been distributed to  
16 Plaintiff and the other Nishan shareholders.

17 169. The actions of Lightspeed and ComVentures, through their respective Board  
18 representatives Cogan and Van der Meer, and those of Russo, McGraw and CSFB were  
19 fraudulent, oppressive and malicious and were undertaken to vex, harass and annoy Plaintiff.  
20 Plaintiff is consequently entitled to recover punitive damages against Lightspeed, ComVentures,  
21 Cogan, Van der Meer, Russo, McGraw and CSFB.

## 22 **SIXTH CAUSE OF ACTION**

### 23 **(CONSTRUCTIVE FRAUD IN CONNECTION WITH THE MERGER)**

24 **Against Defendants CSFB, Lightspeed, ComVentures, Cogan,**

25 **Van der Meer, McGraw, and Russo**

26 170. Plaintiff hereby restates each and every allegation contained in paragraphs 1  
27 through 169 of this Fourth Amended Complaint, and fully incorporates them by this reference.

28 171. The Lead Directors, Defendants Cogan, Van der Meer, Russo and McGraw owed

1 fiduciary duties of care and loyalty to the Company and its shareholders to act only in the best  
2 interests of the Company and its shareholders, and to at all times place the interests of the  
3 shareholders ahead of their own.

4 172. The Controlling Shareholders, Defendants Lightspeed and ComVentures owed a  
5 fiduciary duty to the minority shareholders to exercise their power in the best interests of the  
6 minority shareholders and without regard to their own personal interests. CSFB, as the financial  
7 advisor retained by the Company to negotiate the terms of, and investigate and offer its opinion as  
8 to the fairness of, the Merger, owed a fiduciary duty to the Company and to its shareholders to  
9 exercise its power in the best interests of the Company and its shareholders and to at all times  
10 place the interests of the Company and its shareholders ahead of its own.

11 173. In concealing the material facts detailed in the Third Cause of Action, Defendants  
12 Lightspeed, ComVentures, Cogan, Van der Meer, McGraw, and Russo, and each of them, knew  
13 or should have known that they would be material to Plaintiff's and any reasonable Board  
14 member's consideration of, and vote in connection with, the Merger Agreement.

15 174. In concealing the material facts detailed in the Third Cause of Action, Defendants  
16 Lightspeed, ComVentures, Cogan, Van der Meer, McGraw, and Russo, and each of them, knew  
17 or should have known that they would be material to Plaintiff's and any reasonable common  
18 shareholders' consideration of, and vote in connection with, the Merger Agreement.

19 175. In concealing the material facts detailed in the Third Cause of Action, Defendants  
20 Lightspeed, ComVentures, Cogan, Van der Meer, McGraw, and Russo, and each of them,  
21 intended to deceive and in fact deceived one of the two disinterested members of the Board who  
22 reasonably relied on Defendants' deceptions to vote in favor of the Merger.

23 176. In concealing the material facts detailed in the Third Cause of Action, Defendants  
24 Lightspeed, ComVentures, Cogan, Van der Meer, McGraw, and Russo, and each of them,  
25 intended to deceive and in fact deceived a majority of the common shareholders who reasonably  
26 relied on Defendants' deceptions to vote in favor of the Merger, a vote that was binding on  
27 Plaintiff as a common shareholder

28 177. As a direct and proximate result of Defendants' constructive fraud and

1 concealment, both the Board and the common shareholders approved a Merger that unlawfully  
2 diverted over \$4 million in impermissible vote-buying compensation, which sums should have  
3 been distributed to Plaintiff and the other shareholders.. Plaintiff has sustained damages in the  
4 minimum sum of \$11.5 million as a direct and proximate result of Defendants' constructive fraud  
5 and concealment.

6 178. The actions of Lightspeed and ComVentures, through their respective Board  
7 representatives Cogan and Van der Meer, and those of Russo, McGraw and CSFB were  
8 fraudulent, oppressive and malicious and were undertaken to vex, harass and annoy Plaintiff.  
9 Plaintiff is consequently entitled to recover punitive damages against Lightspeed, ComVentures,  
10 Cogan, Van der Meer, Russo, McGraw and CSFB.

11 **SEVENTH CAUSE OF ACTION**

12 **(CSFB'S CONSTRUCTIVE FRAUD IN CONNECTION WITH THE MERGER)**

13 **Against Defendant CSFB**

14 179. Plaintiff hereby restates each and every allegation contained in paragraphs 1  
15 through 178 of this Fourth Amended Complaint, and fully incorporates them by this reference.

16 180. CSFB, as the financial advisor retained by the Company to negotiate the terms of,  
17 and investigate and offer its opinion as to the fairness of, the Merger, owed a fiduciary duty to the  
18 Company and to its shareholders to exercise its power in the best interests of the Company and its  
19 shareholders and to at all times place the interests of the Company and its shareholders ahead of  
20 its own.

21 181. In concealing the material facts detailed in the Fourth Cause of Action, Defendant  
22 CSFB knew or should have known that they would be material to Plaintiff's and any reasonable  
23 Board member's consideration of, and vote on, the terms of the Merger.

24 182. In concealing the material facts detailed in the Fourth Cause of Action, Defendant  
25 CSFB knew or should have known that they would be material to Plaintiff's and any reasonable  
26 common shareholders' consideration of, and vote on, the terms of the Merger.

27 183. In concealing the material facts detailed in the Fourth Cause of Action, Defendant  
28 CSFB intended to deceive and in fact deceived a majority of the Board who reasonably relied on

1 Defendant's deceptions to vote in favor of the Merger, votes that were binding on Plaintiff as a  
2 member of the Board.

3 184. In concealing the material facts detailed in the Fourth Cause of Action, Defendant  
4 CSFB intended to deceive and in fact deceived a majority of the common shareholders who  
5 reasonably relied on Defendant's deceptions to vote in favor of the Merger, a vote that was  
6 binding on Plaintiff as a common shareholder

7 185. In making its representations regarding the fairness of the Merger, CSFB knew or  
8 should have known that the representations were false and that the terms of the Merger were  
9 unfair to Plaintiff and certain other common shareholders.

10 186. As a direct and proximate result of CSFB's constructive fraud and concealment,  
11 both the Board and the common shareholders approved a Merger that: unlawfully diverted over  
12 \$4 million in impermissible vote-buying compensation, which sums should have been distributed  
13 to Plaintiff and the other shareholders; Plaintiff has sustained damages in the minimum sum of  
14 \$11.5 million as a direct and proximate result of Defendants' constructive fraud and concealment.

15 187. The actions of CSFB were fraudulent, oppressive and malicious and were  
16 undertaken to vex, harass and annoy Plaintiff. Plaintiff is consequently entitled to recover  
17 punitive damages against Lightspeed, ComVentures, Cogan, Van der Meer, Russo, McGraw and  
18 CSFB.

## 19 EIGHTH CAUSE OF ACTION

### 20 (DIRECTORS' BREACH OF DUTY OF CARE AND LOYALTY)

#### 21 Against Defendants Cogan, Van der Meer, McGraw and Russo

22 188. Plaintiff hereby restates each and every allegation contained in paragraphs 1  
23 through 187 of this Fourth Amended Complaint, and fully incorporates them by this reference.

24 189. Cogan, Van der Meer, Russo and McGraw, directors of Nishan, owe fiduciary  
25 duties of care and loyalty to the Company and its shareholders, to act only in the best interests of  
26 the Company and its shareholders, and to at all times place the interests of the shareholders ahead  
27 of their own.

28 190. In their actions as members of the Board, Cogan, Van der Meer, Russo and

1 McGraw repeatedly breached their fiduciary obligations by pursuing their own financial self-  
2 interests at the direct expense, and to the detriment, of the best interests of Plaintiff and the  
3 Company's shareholders.

4 191. The Lead Directors, Defendants Cogan, Van der Meer, Russo and McGraw acted  
5 with reckless disregard of their fiduciary obligations to the shareholders by entering into side  
6 deals with certain shareholders, under which Defendants promised those shareholders sizeable  
7 sums of money in exchange for their votes in support of the Merger. In so acting, Cogan, Van der  
8 Meer, Russo and McGraw knew that their actions posed an imminent risk of serious injury to  
9 Latif and other shareholders of the Company.

10 192. The actions of Cogan, Van der Meer, Russo and McGraw in pursuing their own  
11 financial interests were irreconcilably in conflict with the best interests of Plaintiff and those of  
12 other shareholders. In voting on transactions from which they stood to personally profit, Cogan,  
13 Van der Meer, Russo and McGraw failed to disclose the existence or nature of the conflict and/or  
14 failed to secure a fully informed waiver of such conflict from the other Board members.

15 193. Defendants Cogan, Van der Meer, Russo and McGraw acted in their capacity as  
16 members of the Board so as to manipulate the vote of the common shareholders in order to  
17 achieve a majority vote in support of the Merger, from which they were to gain financially.

18 194. In their actions as members of the Board, Cogan, Van der Meer, Russo and  
19 McGraw repeatedly breached their fiduciary obligations by concealing material information from  
20 Latif at the direct expense, and to the detriment, of Latif.

21 195. As a direct and proximate result of Defendants' breach of their fiduciary duties,  
22 Plaintiff and certain other shareholders have suffered and continue to suffer losses in excess of the  
23 jurisdictional minimum of this Court. Plaintiff is presently unable to calculate the amount of  
24 damages he has sustained as a consequence of Defendants' breach of their fiduciary duties and  
25 will amend as and when he obtains information sufficient to do so.

26 196. The actions of Cogan, Van der Meer, Russo and McGraw were oppressive and  
27 malicious. Plaintiff is consequently entitled to recover punitive damages against Lightspeed,  
28 ComVentures, Cogan, Van der Meer, Russo and McGraw.

**NINTH CAUSE OF ACTION**  
**(SHAREHOLDERS' BREACH OF FIDUCIARY DUTY)**  
**Against Defendants Lightspeed and ComVentures**

197. Plaintiff hereby restates each and every allegation contained in paragraphs 1 through 196 of this Fourth Amended Complaint, and fully incorporates them by this reference.

198. The Controlling Shareholders, Lightspeed and ComVentures owed a fiduciary duty to the minority shareholders, to exercise their power in the best interests of the minority shareholders and without regard to their own personal interests.

199. In exercising their powers as controlling shareholders so as to promote their own financial benefit at the expense, and to the detriment, of the remaining shareholders, Lightspeed and ComVentures breached their fiduciary obligations to Latif and other minority shareholders.

200. Lightspeed and ComVentures voted their shares in support of the Merger knowing that its terms discriminated against, and were unconscionably unfair to, the interests of the remaining shareholders. In so acting, Lightspeed and ComVentures considered only their own best financial interests at the expense, and to the detriment, of the remaining shareholders.

201. In their actions as controlling shareholders, Lightspeed and ComVentures repeatedly breached their fiduciary obligations to Latif and other shareholders by withholding material information with the intention of preventing Latif from challenging the terms of the Merger and its related transactions. Such concealment of material information indeed prevented Latif from challenging the Merger proceeds allocation terms.

202. As a direct and proximate result of Defendants' breach of their fiduciary duties, Plaintiff and other shareholders have suffered and continue to suffer losses in excess of the jurisdictional minimum of this Court. Plaintiff is presently unable to calculate the amount of damages he has sustained as a consequence of Defendants' breach of their fiduciary duties and will amend the Complaint as and when he obtains information sufficient to do so.

203. The actions of Lightspeed and ComVentures were oppressive and malicious. Plaintiff is consequently entitled to recover punitive damages against Lightspeed and ComVentures.

**TENTH CAUSE OF ACTION**  
**(NEGLIGENT MISREPRESENTATION)**

**Against Defendant CSFB**

204. Plaintiff hereby restates each and every allegation contained in paragraphs 1 through 203 of this Fourth Amended Complaint, and fully incorporates them by this reference.

205. CSFB agreed, on behalf of Nishan and its shareholders, to negotiate the terms of the Merger with McDATA and to provide a written opinion "as to the fairness from a financial point of view of the consideration to be received by the company's stockholders."

206. In undertaking these tasks, CSFB was obligated to assess the risks and benefits of the proposed Merger and owed a duty to Nishan and its shareholders, including the limited class of common shareholders to which Plaintiff belonged, to exercise reasonable care.

207. On or about August 25, 2003, defendant CSFB, by and through the Managing Director of its 650 California Street, San Francisco, CA office, issued its written opinion to the Board in which it concluded that the Merger was fair, knowing that the Board intended to, and did, convey CSFB's conclusion regarding the fairness of the Merger to the common shareholders in advance of, and with the intent of influencing, the shareholders' vote on the Merger.

208. In making the representation, as conveyed to the common shareholders, that the Merger was fair, CSFB had no reasonable ground for believing it to be true.

209. CSFB's representation that the Merger was fair was, in fact, untrue as allocation of the Merger proceeds was unfair to Plaintiff and other common shareholders.

210. In making the representation, as conveyed to the common shareholders, that the Merger was fair, CSFB intended to induce reliance on the representation by a majority of the common shareholders so as to achieve a favorable vote on the Merger.

211. A majority of the common shareholders who voted in favor of the Merger were ignorant as to the fairness of the proposed Merger and, in justifiable reliance on CSFB's representations, cast their votes in favor of the Merger.

212. As a direct and proximate result of Defendants' fraud and concealment, both the Board and the common shareholders approved a Merger that unlawfully diverted over \$19 million

1 in unconscionable loan repayments and impermissible vote-buying compensation, which sums  
2 should have been distributed to the common shareholders. Plaintiff has sustained damages in the  
3 minimum sum of \$11.5 million as a direct and proximate result of Defendant's negligent  
4 misrepresentation.

5 213. The actions of CSFB were oppressive and malicious. Plaintiff is consequently  
6 entitled to recover punitive damages against CSFB.

## 7 **ELEVENTH CAUSE OF ACTION**

### 8 **(VOTE BUYING)**

#### 9 **Against All Defendants**

10 214. Plaintiff hereby restates each and every allegation contained in paragraphs 1  
11 through 213 of this Fourth Amended Complaint, and fully incorporates them by this reference.

12 215. McDATA demanded and CSFB, Nishan, McGraw, Russo, Cogan, Van der Meer,  
13 Lightspeed, and ComVentures agreed to work together to obtain side deals with various common  
14 shareholders so as to bypass the need to involve the natural majority of Nishan's common  
15 shareholders in voting on the proposed Merger.

16 216. Defendants agreed to, and did, pay Russo \$1.1 million in severance, a \$400,000  
17 bonus and awarded him a \$600,000 post-Merger consulting contract with McDATA in exchange  
18 for Russo's agreement to exercise his options to purchase 4.1 million common shares and to  
19 illegally vote all of those shares in favor of the proposed Merger.

20 217. Defendants agreed to, and did, pay other Nishan employees substantial amounts of  
21 money in the form of bonuses, retention and severance payments in order to secure their illegal  
22 votes in support of the Merger.

23 218. Defendants agreed to, and did, pay certain of Nishan's departing management  
24 team unusually high severance payments, totaling over \$3.1 million, which were paid out of the  
25 Merger proceeds. Such payments were made with the only apparent goal of obtaining Nishan's  
26 departing management employees' illegal votes in favor of the Merger.

27 219. Defendants agreed to, and did, pay significant retention bonuses, in addition to any  
28 severance payments, to Nishan employees who were soon to be terminated but who could, and

1 actually committed to, illegally vote their common shares in support of the Merger.

2       220. Defendants ensured that all those employees who were granted a  
3 disproportionately high retention bonus were asked to sign proxies for their illegal votes in favor  
4 of the Merger.

5       221. These disproportionately high payments to McGraw, Russo, the management team  
6 and other employees came directly out of the Merger proceeds that would otherwise be available  
7 for distribution to Plaintiff and the remaining common shareholders.

8       222. In making the payments to Russo, the management team and other employees,  
9 Defendants intended to and did disenfranchise the natural majority of the common shareholders,  
10 including Plaintiff, from considering and voting on the proposed Merger.

11       223. In making the payments to Russo, the management team and other employees,  
12 Defendants intended to and did treat certain shares of the common shareholder class more  
13 favorably than other shares of the same class.

14       224. In making the payments to Russo, the management team and other employees,  
15 Defendants undertook no measures protective of the common shareholder franchise.

16       225. In making the payments to Russo, the management team and other employees,  
17 Defendants solicited the casting of illegal votes which illegal votes were counted as if they had  
18 been legally voted in favor of the Merger. Had the illegal votes been discarded from the final  
19 calculation of the common shareholders' votes in connection with the Merger, there would not  
20 have been a majority common shareholder vote in favor of the Merger.

21       226. Even if Defendants' purpose in purchasing the votes of Russo, the management  
22 team and other employees had not been to disenfranchise or defraud the natural majority of the  
23 common shareholders, the effect of the vote-buying scheme was inherently unfair to the  
24 Company and its shareholders.

25       227. The vote-buying scheme resulted in a manipulated majority vote of illegally voted  
26 shares to determine the approval of the Merger, a determination by which Plaintiff was bound as a  
27 holder of shares of the same class.

28       228. The vote-buying scheme effectuated an allocation of the Merger proceeds from

1 which the Company gained no benefit. Only Defendants, and certain other employees and  
2 management, gained from the allocation.

3 229. As a direct and proximate result of the payments to Russo, the management team  
4 and other employees, Defendants bypassed the natural majority of the common shareholders and  
5 secured a majority vote of the common shareholders in favor of the Merger.

6 230. As a direct and proximate result of Defendants' actions in disenfranchising the  
7 natural majority of the common shareholders, the common shareholders approved a Merger that  
8 unlawfully diverted over \$19 million in unconscionable loan repayments and impermissible vote-  
9 buying compensation, which sums should have been distributed to common shareholders.  
10 Plaintiff has sustained damages in the minimum sum of \$11.5 million as a direct and proximate  
11 result of Defendants' vote buying.

12 231. Defendants' improper purchase of these shareholders' votes, using corporate  
13 assets, was malicious and entitles Plaintiff to recover punitive damages.

14 **TWELFTH CAUSE OF ACTION**  
15 **(CONSPIRACY TO COMMIT VOTE BUYING)**

16 **Against All Defendants**

17 232. Plaintiff hereby restates each and every allegation contained in paragraphs 1  
18 through 231 of this Fourth Amended Complaint, and fully incorporates them by this reference.

19 233. Defendants Nishan, McDATA, CSFB, Lightspeed, ComVentures, McGraw,  
20 Russo, Cogan and Van der Meer entered into an agreement to conspire to buy the votes of the  
21 common shareholders so as to disenfranchise the natural voting majority of Nishan's common  
22 shareholders. Plaintiff asserts on information and belief that Defendants entered into this  
23 conspiracy to buy votes so as to allow the Merger to proceed under terms that would maximize  
24 their own personal financial benefits, while concomitantly depriving Plaintiff and other  
25 shareholders of their legal share of the Merger proceeds.

26 234. Defendants acted in furtherance of their conspiracy agreement by offering  
27 substantial amounts of money, to be paid out of the Merger proceeds, to those they believed could  
28 be thus persuaded to vote their common shares in support of the Merger.

1           235. As a direct and proximate result of the conspiracy of Defendants Nishan,  
2 McDATA, CSFB, Lightspeed, ComVentures, McGraw, Russo, Cogan and Van der Meer to buy  
3 votes, Defendants disenfranchised the natural majority of the common shareholders and secured a  
4 vote in favor of a Merger that unlawfully diverted approximately \$19 million in unconscionable  
5 loan repayments and impermissible vote-buying compensation, which sums should have been  
6 distributed to the common shareholders. Plaintiff has sustained damages in the minimum sum of  
7 \$11.5 million as a direct and proximate result of Defendants' conspiracy to commit vote buying.

8           236. Defendants' improper purchase of these shareholders' votes, using corporate  
9 assets, was malicious and entitles Plaintiff to recover punitive damages.

10                                   **THIRTEENTH CAUSE OF ACTION**

11                                   **(UNJUST ENRICHMENT)**

12                                   **Against All Defendants**

13           237. Plaintiff hereby restates each and every factual allegation contained in paragraphs  
14 1 through 236 of this Fourth Amended Complaint, and fully incorporates them by this reference.

15           238. Defendants acted together to promote their own financial benefit at the expense of  
16 the minority shareholders. The Merger proceeds are to be distributed in an unfair and uneven  
17 fashion, with Defendants getting 95% of these proceeds and the common shareholders left with  
18 less than 5%.

19           239. But for the fraudulent, unconscionable and biased actions of each and every  
20 Defendant, the Merger proceeds would have been distributed in an even and fair way, and  
21 Plaintiff and other common shareholders would have received a bigger piece of these proceeds.

22           240. As a direct and proximate result of Defendants' actions, Defendants were unjustly  
23 enriched, and Plaintiff suffered and continues to suffer losses in excess of the jurisdictional  
24 minimum of this Court.

25                                   **FOURTEENTH CAUSE OF ACTION**

26                                   **(AIDING AND ABETTING BREACH OF FIDUCIARY DUTY)**

27                                   **Against Defendant CSFB and McDATA**

28           241. Plaintiff hereby restates each and every allegation contained in paragraphs 1

1 through 240 of this Fourth Amended Complaint, and fully incorporates them by this reference.

2       242. CSFB and McDATA were aware of the actions of Defendants Cogan, Van der  
3 Meer, McGraw, Russo, Lightspeed and ComVentures, as detailed in the Eighth and Ninth Causes  
4 of Action, above, and knew that they were in breach of these Defendants' fiduciary obligations to  
5 the Company and its shareholders, including Plaintiff.

6       243. CSFB and McDATA nonetheless offered substantial assistance and  
7 encouragement to these Defendants in so acting.

8       244. As a direct and proximate result of CSFB's and McDATA's actions in aiding and  
9 abetting these Defendants' breach of their fiduciary obligations, Plaintiff and certain other  
10 minority shareholders have suffered and continue to suffer losses in excess of the jurisdictional  
11 minimum of this Court. Plaintiff is presently unable to calculate the amount of damages he has  
12 sustained as a consequence of CSFB's and McDATA's actions in aiding and abetting Defendants'  
13 fiduciary breaches and will amend the Complaint as and when he obtains information sufficient to  
14 do so.

15       245. The actions of CSFB and McDATA were oppressive and malicious. Plaintiff is  
16 consequently entitled to recover punitive damages against CSFB.

17                                   **FIFTEENTH CAUSE OF ACTION**

18                                   **(AIDING AND ABETTING FRAUD)**

19                                   **Against CSFB and McDATA**

20       246. Plaintiff hereby restates each and every allegation contained in paragraphs 1  
21 through 245 of this Fourth Amended Complaint, and fully incorporates them by this reference.

22       247. CSFB and McDATA were aware of the actions of Defendants Cogan, Van der  
23 Meer, McGraw, Russo, Lightspeed and ComVentures, as detailed in the First and Third Causes of  
24 Action, above, and knew that they were in breach of these Defendants' duties to the Company  
25 and its shareholders, including Plaintiff.

26       248. CSFB and McDATA nonetheless offered substantial assistance and  
27 encouragement to these Defendants in so acting.

28       249. As a direct and proximate result of CSFB's and McDATA's actions in aiding and

1 abetting these Defendants' fraudulent activities, the common shareholders approved a Merger that  
2 unlawfully diverted over \$19 million in unconscionable loan repayments and impermissible vote-  
3 buying compensation, which sums should have been distributed to the common shareholders.  
4 Plaintiff has sustained damages in the minimum sum of \$11.5 million as a direct and proximate  
5 result of Defendants' aiding and abetting.

6 250. The actions of CSFB and McDATA were oppressive and malicious. Plaintiff is  
7 consequently entitled to recover punitive damages against CSFB and McDATA.

8 **SIXTEENTH CAUSE OF ACTION**  
9 **(AIDING AND ABETTING VOTE-BUYING)**

10 **Against CSFB and McDATA**

11 251. Plaintiff hereby restates each and every allegation contained in paragraphs 1  
12 through 250 of this Fourth Amended Complaint, and fully incorporates them by this reference.

13 252. CSFB and McDATA were aware of the actions of defendants Nishan, McDATA,  
14 Lightspeed, ComVentures, Cogan, Van der Meer, Russo and McGraw as detailed in the Eleventh  
15 Cause of Action, above, and knew that they were in breach of each Defendant's duty not to  
16 impermissibly interfere with the shareholder franchise.

17 253. CSFB and McDATA nonetheless offered substantial assistance and  
18 encouragement to these Defendants in so acting.

19 254. As a direct and proximate result of CSFB's and McDATA's actions in aiding and  
20 abetting these Defendants' breach of their duty not to impermissibly interfere with the  
21 shareholder franchise, the common shareholders approved a Merger that unlawfully diverted over  
22 \$19 million in unconscionable loan repayments and impermissible vote-buying compensation,  
23 which sums should have been distributed to the common shareholders. Plaintiff has sustained  
24 damages in the minimum sum of \$11.5 million as a direct and proximate result of Defendants'  
25 aiding and abetting vote buying.

26 255. The actions of CSFB and McDATA were oppressive and malicious. Plaintiff is  
27 consequently entitled to recover punitive damages against CSFB and McDATA.

28

**SEVENTEENTH CAUSE OF ACTION**  
**(BREACH OF FIDUCIARY DUTY)**  
**Against CSFB**

256. Plaintiff hereby restates each and every allegation contained in paragraphs 1 through 255 of this Fourth Amended Complaint, and fully incorporates them by this reference.

257. CSFB, as the financial advisor retained by the Company to negotiate the terms of, and investigate and offer its opinion as to the fairness of, the Merger, owed a fiduciary duty to the Company and to its shareholders to exercise its power in the best interests of the Company and its shareholders and to, at all times, place the interests of the Company and its shareholders ahead of its own.

258. CSFB breached its fiduciary obligations when it: entered into an agreement with Nishan to represent it in its merger negotiations with McData while it had an existing agreement with McData to act as McData's exclusive financial advisor; negotiated a \$2.5 million fee that was contingent on the approval of the very Merger it had been retained to objectively analyze; rejected an offer for acquisition made by Brocade without obtaining the Board's approval, and negotiated against the common shareholders' interests by first rejecting McDATA's proposed \$5 million distribution to the common shareholders altogether, then reducing the sum by 20%.

259. CSFB acted with reckless disregard of its fiduciary obligations by facilitating and negotiating side deals with individual shareholders, under which the shareholders were promised sizeable sums of money in exchange for their votes in support of the Merger. In so acting, CSFB knew that its actions posed an imminent risk of serious injury to Latif and other Company shareholders.

260. In its capacity as a financial advisor to Nishan and its shareholders, CSFB repeatedly breached its fiduciary obligations by concealing material information from Latif and other Company shareholders at the direct expense, and to the detriment, of Latif.

261. As a direct and proximate result of CSFB's breach of its fiduciary duties, Plaintiff and certain other common shareholders have suffered and continue to suffer losses in excess of the jurisdictional minimum of this Court. Plaintiff is presently unable to calculate the amount of

1 damages he has sustained as a consequence of Defendant's breach of its fiduciary duties and will  
2 amend the Complaint as and when he obtains information sufficient to do so.

3 262. CSFB's actions were oppressive and malicious. Plaintiff is consequently entitled  
4 to recover punitive damages from CSFB.

5 **EIGHTEENTH CAUSE OF ACTION**  
6 **(BREACH OF SECTION 1602 OF THE CALIFORNIA CORPORATIONS CODE)**

7 **Against Nishan**

8 263. Plaintiff hereby restates each and every allegation contained in paragraphs 1  
9 through 262 of this Fourth Amended Complaint, and fully incorporates them by this reference.

10 264. Pursuant to California Corporations Code §§1602 and 1603, a director of a  
11 corporation has an absolute right to inspect the books and records of the corporation, and also has  
12 the right to request that a document inspection be made on his or her behalf by agents of the  
13 director's choice.

14 265. Plaintiff, at a time when he was still a director of Nishan, exercised his absolute  
15 right to review corporate documents pursuant to §§1602 and 1603 and directed his detailed  
16 request to Nishan. The Company never committed to produce all the requested documents by a  
17 certain date, and to date has provided Plaintiff with only a fraction of the materials so requested  
18 and to which he is legally entitled.

19 266. As a direct and proximate result of the Company's breach of its statutory  
20 obligations, Plaintiff has been deprived of materials essential to his informed judgment on matters  
21 before the Board, to the presently incalculable detriment of Plaintiff, the Company and its  
22 shareholders.

23 **NINETEENTH CAUSE OF ACTION**  
24 **(BREACH OF §17200 OF THE CALIFORNIA BUSINESS AND PROFESSIONS CODE)**

25 **Against all Defendants**

26 267. Plaintiff hereby restates each and every allegation contained in paragraphs 1  
27 through 266 of this Fourth Amended Complaint, and fully incorporates them by this reference.

268. Defendants' fraudulent, unfair and deceptive conduct, including but not limited to the above-alleged acts of vote-buying, self-dealing, and concealment of material facts, constitute acts of unfair competition as defined by Business and Professions Code section 17200.

269. As a direct and proximate result of Defendants' unfair business practices, defendants acquired money in which Plaintiff had a vested interest as Nishan's largest minority shareholder.

## PRA YER

Plaintiff prays for relief as follows:

1. For compensatory damages in or around the sum of \$11.5 million.
2. For restitution to Plaintiff of all funds acquired by means of any act or practice declared by the Court to be an unlawful, fraudulent or unfair business practice;
3. For disgorgement of all illegally gotten moneys;
4. For punitive and exemplary damages according to proof at trial.
5. For all remedies provided under Civil Code §§3426.3 and 3426.4.
6. For all remedies provided under corporation code section 310.
7. For attorneys' fees and costs.
8. For all other relief that the Court deems just and proper.

Dated: December 27, 2004

SAGY LAW ASSOCIATES LLP

By:

RONY SAGY  
Attorney for Plaintiff