

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), 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), the California Courts Online Self-Help Center (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/), 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), en el Centro de Ayuda de las Cortes de California, (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):

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: _____ Clerk, by _____, Deputy
(Fecha) *(Secretario)* *(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: CCP 416.10 (corporation) CCP 416.60 (minor)
 CCP 416.20 (defunct corporation) CCP 416.70 (conservatee)
 CCP 416.40 (association or partnership) CCP 416.90 (authorized person)
 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)
2 LIORA HOVAV (Bar No. 203637)
DAVID RUDOLPH (Bar No. 233457)
3 SAGY LAW ASSOCIATES LLP
930 Montgomery Street, Suite 600
4 San Francisco, CA 94133
Tel: 415-986-0900
5 Fax: 415-956-3950

6 Attorneys for Plaintiff Aamer Latif

7

8

SUPERIOR COURT OF CALIFORNIA

9

COUNTY OF SANTA CLARA

10

11 AAMER LATIF, an individual

CASE NO.

12 Plaintiff,

**COMPLAINT FOR DECLARATORY
RELIEF, FOR RESTITUTION, REQUEST
FOR AN ACCOUNTING, FOR DAMAGES
AND A DEMAND FOR JURY TRIAL**

13 v.

14 NISHAN SYSTEMS, INC., A California
Corporation, LIGHTSPEED VENTURE
15 PARTNERS, A California Partnership,
COMVENTURES, A California
16 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
19 Individual, JOHN MCGRAW, an
Individual and DOES 1 through 50,

20

Defendants.

21

22

23

24

25

26

27

28

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

3 **NATURE OF THE ACTION**

4 Plaintiff, a founder and shareholder of Defendant Nishan Systems, Inc. (“Nishan”), brings
5 this action against Nishan, its financial advisor Credit Suisse First Boston LLC (“CSFB”), certain
6 Nishan investors, officers and directors, and McDATA Corporation, the entity that acquired
7 Nishan. In another action pending in this Court, Plaintiff charges Defendants with concealing
8 profound conflicts of interest and engaging in multiple acts of self-dealing prior to, and
9 embarking on a fraudulent vote-buying scheme to ensure a majority vote in favor of, the merger
10 between Nishan and McDATA which disproportionately favored the interests of these Defendants
11 (“Pending Action”). The Court granted Defendants’ motion to strike certain claims in the
12 Pending Action relating to the merger’s creation of an Escrow Fund as alleging facts that
13 occurred after the Pending Action was filed.

14 Plaintiff accordingly brings this separate action alleging, among other things, that
15 Defendants, knowing that Plaintiff intended to bring suit challenging their fraudulent conduct,
16 conceptualized and implemented a plan to immunize themselves from the consequences of their
17 wrongdoing. Specifically, Defendants added a provision to the Merger Agreement calling for the
18 creation of a \$13 million Escrow Fund, to be financed by withholding a portion of Plaintiff’s and
19 the other Nishan shareholders’ entitlement to the merger proceeds, to indemnify McDATA and
20 other Defendants against lawsuits related to the merger, and specifically Plaintiff’s impending
21 lawsuit. Defendants obtained the shareholders’ “consent” to the Escrow Fund by informing them
22 that their irrevocable proxies in favor of the merger constituted approval of the undisclosed terms
23 of the Escrow Agreement and the appointment of Roland Van der Meer to represent their interests
24 in administering the Escrow Fund.

25 At the time the shareholders cast their irrevocable proxies in favor of the merger, and
26 purportedly consented to the Escrow Agreement (“Agreement”) and to Van der Meer’s
27 appointment, Defendants knew but did not advise the shareholders: that Plaintiff had threatened
28 litigation against Defendants for the very claims embraced by, and in fact ultimately filed, the

1 7,310,250 common shares, of Defendant Nishan Systems, Inc. (“Nishan” or the “Company”) and
2 has served as a member of Nishan’s board of directors (“Board”) since its inception.

3 2. Defendant Nishan was a corporation organized and existing under the laws of the
4 State of California. Nishan was engaged in the business of storage networking products and,
5 since its September 19, 2003 merger with McDATA, maintains its principal executive office at
6 380 Interlocken Crescent, Suite 600, Broomfield, Colorado 80021.

7 3. Defendant Lightspeed Venture Partners (“Lightspeed”) is a partnership organized
8 and existing under the laws of the State of California. Lightspeed, a preferred shareholder of
9 Nishan, invested in the Company via rounds of financing A1, B, and C, and had designated Mr.
10 Gill Cogan to serve on Nishan’s Board. Lightspeed’s principal executive office is located at 2200
11 Sand Hill Road, Menlo Park, California 94025.

12 4. Defendant ComVentures (“ComVentures”) is a partnership organized and existing
13 under the laws of the State of California. ComVentures, a preferred shareholder of Nishan,
14 invested in Nishan via rounds of financing A1, B, and C, and had designated Mr. Roland Van der
15 Meer to serve on Nishan’s Board. ComVentures’ principal executive office is located at 305
16 Lytton Ave, Palo Alto, California 94301.

17 5. Defendant Credit Suisse First Boston LLC (“CSFB”) is a limited liability
18 company, organized and existing under the laws of the State of Delaware and doing business in
19 the State of California. CSFB advised Nishan and actively participated in the negotiations
20 leading to the merger between Nishan and Defendant McDATA Corporation and was involved in
21 the creation and administration of the Escrow Fund. CSFB is engaged in the business of
22 investment banking, with its principal executive office located at Eleven Madison Ave, New
23 York, New York 10010.

24 6. Defendant Gill Cogan (“Cogan”) is an individual residing at 2200 Sand Hill Road,
25 Menlo Park, California 94025. Cogan has served on Nishan’s Board since January 2002. Cogan
26 has at all times herein acted both in his individual capacity and in his capacity as Lightspeed’s
27 designee and actual agent.

28

1 shareholders have been compromised by its controlling shareholders.

2 13. Plaintiff is informed and believes that on June 20, 2003, Defendant Russo retained
3 CSFB, at Defendant Van der Meer's behest, to serve as Nishan's financial advisor in connection
4 with its Merger negotiations. Without Plaintiff's knowledge, and without informing or obtaining
5 the Nishan Board's consent, Nishan agreed in its engagement letter to indemnify CSFB for any
6 claims in connection with this engagement.

7 14. On August 25, 2003, McDATA and Nishan entered into a Merger Agreement
8 ("Merger"). The Merger was consummated on September 19, 2003.

9 15. The Merger Agreement provided for the creation of an escrow fund to be financed
10 by withholding \$13,045,000, which represents 20% of the merger proceeds allocated to the
11 Nishan shareholders, otherwise payable to Plaintiff and the other Nishan shareholders ("Escrow
12 Fund"). The resulting fund was to indemnify "Indemnified Persons" against "Damages" arising
13 from a "Third Party Claim." The Merger Agreement provided that McDATA, the Shareholder
14 Representative and the Escrow Agent were to execute and deliver an Escrow Agreement on or
15 before the consummation of the Merger.

16 16. Plaintiff is informed and believes that in or around August 2003, McDATA and
17 Nishan, without seeking the consent of, or first informing the Board or Nishan's shareholders,
18 appointed Defendant Van Der Meer as the "Shareholder Representative" to negotiate and execute
19 the Escrow Agreement and monitor disbursements from the Escrow Fund on behalf of Plaintiff
20 and the other Nishan shareholders.

21 17. Plaintiff is informed and believes that beginning in August 2003, shareholders cast
22 their irrevocable proxies in favor of the merger by signing a "written consent" which included in
23 pertinent part:

24 "RESOLVED, that the shareholders of the Corporation hereby approve and adopt
25 the terms and provisions of the Escrow Agreement, by and among McDATA,
26 Roland Van der Meer as "Shareholder Representative" and Wells Fargo Bank
27 Minnesota, National Association, a national banking association ("Escrow
28 Agent"), pursuant to which, among other things, any indemnification claims of

1 McDATA against the Corporation or its shareholders shall be handled;
2 “RESOLVED FURTHER, that the shareholders of the Corporation hereby appoint
3 Roland Van der Meer as their agent and attorney in fact to be their “Shareholder
4 Representative” and to act on their behalf pursuant to the provisions of the Merger
5 Agreement and the Escrow Agreement with respect to the escrow and
6 indemnification matters under the Merger Agreement and the Escrow Agreement,
7 including, but not limited to full power and authority to represent and take binding
8 actions on behalf of the shareholders of the Corporation and their successors and
9 assigns with respect to all matters arising under the Merger Agreement and
10 Escrow Agreement, including, without limitation, the negotiation and settlement of
11 any disputes under the Escrow Agreement; and

12 “RESOLVED FURTHER, that the shareholders hereby agree that the Shareholder
13 Representative will incur no liability for all actions taken by him in his capacity as
14 Shareholder Representative under the Merger Agreement and the Escrow Agreement in
15 the absence of willful misconduct or gross negligence;”

16 18. Those shareholders who cast their irrevocable proxies in advance of September 15,
17 2003, were not provided with a copy of the Escrow Agreement and were not advised: that
18 Plaintiff had threatened litigation against Defendants for multiple acts of self-dealing and
19 orchestrating a fraudulent vote-buying scheme to secure a vote in favor of the Merger; that Van
20 der Meer had negotiated and executed the Escrow Agreement “on behalf of” Plaintiff and the
21 other Nishan shareholders knowing that it was specifically crafted to indemnify himself and the
22 other Defendants against the claims stated in the Pending Action; that the Escrow Agreement
23 provided the shareholders with the right to remove Van der Meer as their representative; or that
24 the Escrow Agreement vitiated the authority of the Shareholder Representative to challenge any
25 indemnification payments out of the Escrow Fund for claims in connection with the Pending
26 Action.

27 19. On September 11, 2003, Plaintiff filed the Pending Action, which charges
28 Defendants, among other things, with structuring a merger that unconscionably favored the

1 interests of the Defendants at the expense of Plaintiff and certain other minority shareholders and
2 with fraudulent vote-buying to ensure a majority vote in favor of the Merger.

3 20. On or about September 15, 2003, Defendants circulated what they characterized as
4 a summary of the Merger Agreement and the Escrow Agreement, entitled "Nishan Systems Inc.
5 Information Statement," to the Nishan shareholders ("Information Statement"). The shareholders
6 learned for the first time that Plaintiff had threatened litigation against Nishan, its management
7 and directors for "inappropriate conduct," including allegations that severance and retention
8 payments were made in exchange for certain employees' votes in favor of the merger, and that the
9 costs of defense in connection with this litigation might be financed out of the Escrow Fund. The
10 Information Statement cautioned: **"As a result of the escrow provisions and indemnification
11 obligations contained in the Merger Agreement, the shareholders may not receive the full
12 amount of consideration for which their shares of capital stock of Nishan are exchangeable
13 in the Merger."**

14 21. Although the Information Statement directed the shareholders' attention to the
15 Escrow Agreement "for a more detailed explanation of the escrow fund" a copy of the Escrow
16 Agreement was not included in the package delivered to the shareholders.

17 22. Although the Information Statement was circulated four days after Plaintiff had
18 filed the Pending Action, it did not disclose the pendency of the action or Mr. Van der Meer's
19 status as a Defendant in the Pending Action.

20 23. Defendants never disclosed in advance of the final vote in connection with the
21 Merger, and the majority of shareholders who cast their votes in favor of the Merger and thereby
22 "consented" to the Escrow Agreement and the appointment of Van der Meer as their Shareholder
23 Representative, never knew:

24 a. That Mr. Van der Meer was a named Defendant in the Pending Action and, as
25 such, a potential benefactor of the Escrow Fund's indemnification promise;

26 b. That the shareholders had a right to remove Mr. Van der Meer as their
27 Shareholder Representative; or

28 c. That Mr. Van der Meer had negotiated and executed the Escrow Agreement on

1 28. Section 8.4 provides that the Company Shareholders “shall indemnify Parent, the
2 Surviving Corporation and their respective directors, officers, employees, agents or advisors, or
3 any of their respective successors and assigns, in respect of, and hold each of them harmless
4 against, any and all demands, claims, debts, actions, assessments, judgments, settlements,
5 sanctions, obligations and other liabilities (whether absolute, accrued, contingent, fixed or
6 otherwise, known or unknown, due or to become due or otherwise), monetary damages, fines,
7 taxes, fees, penalties, interest obligations, deficiencies, losses, costs and expenses (including,
8 without limitation, amounts paid in settlement, interest, court costs, costs of investigators,
9 reasonable fees and expenses of attorneys, accountants, financial advisors and other experts, and
10 other expenses of litigation as incurred (*‘Damages’*), *provided, however*, that Damages shall not
11 include any consequential, speculative or punitive damages incurred by an Indemnified Person
12 unless actually paid to a third party as a result of a third party claim, incurred or suffered by them
13 (i) resulting from, relating to, arising out of or constituting any breach of any representation or
14 warranty or failure or to perform any covenant or agreement of Company or the Company
15 Shareholders contained, or referred to, in the Transaction Agreements or in any certificate,
16 agreement, letter or document delivered hereby or thereby, or in connection with any lawsuit or
17 claim brought against Company related to actions taken by Company prior to the Closing . . .
18 (ii) resulting from Excess Payments . . . , (iii) resulting from any ‘transfer premium recapture
19 provisions’ , , , (iv) resulting from, relating to or arising out of any breach or alleged breach prior
20 to the Effective Time, and whether brought directly or as a derivative claim, of fiduciary duties by
21 Company, the Company Shareholders or the officers or directors of Company, including any
22 obligations for indemnification or advancement of expenses to the Company Shareholders or
23 Company directors (*‘Fiduciary Claims.’*);”

24 **The Escrow Agreement**

25 29. The September 19, 2003 Escrow Agreement was executed by Defendant Van der
26 Meer as the Shareholder Representative. Paragraph 4.1 (b) of the Agreement provides: “**The**
27 **Shareholder Representative**, or any successor hereafter appointed, may resign or **may be**
28 **removed by the Shareholders** who have the right to receive in the aggregate at least a majority

1 of the Escrowed Property upon written notice. In such event, the Shareholder Representative
2 shall be discharged of his duties hereunder upon receipt of such notice. In case of such
3 resignation or removal, or in the event of the death or inability to act of the Shareholder
4 Representative, a successor shall be promptly named by the Company Shareholders who have the
5 right to receive in the aggregate at least a majority of the Escrowed Property.” A true and correct
6 copy of the Escrow Agreement is attached as **Exhibit A** and by this reference made a part of this
7 Complaint.

8 30. Schedule A of the Escrow Agreement sets out the “Instructions” for implementing
9 its terms. Pursuant to its rights under Section 8.4 of the Merger Agreement, Parent may notify the
10 Escrow Agent in writing of “indemnifiable Damages” by an Indemnification Notice to be signed
11 by an officer of Parent “**and shall certify that Damages have been incurred by Parent**”
12 The Escrow Agent is instructed to provide the Shareholder Representative with a copy of the
13 Indemnification Notice who then has ten business days within which to dispute “in good faith”
14 Parent’s right to all or a part of the amount requested; “**provided, however, that the**
15 **Shareholder Representative shall not have a right to issue a Dispute Notice with respect to**
16 **an Indemnification Notice regarding Damages resulting from a Fiduciary Claim (‘Fiduciary**
17 **Damages’).**” ¶1, Escrow Agreement.

18 31. Paragraph 3 of the Escrow Agreement’s Schedule A provides: “**On or promptly**
19 **after September 20, 2004, the Escrow Agent shall disburse any remaining Escrowed**
20 **Property held by the Escrow Agent to the Company Shareholders**, less the Holdback Funds
21 (the ‘Disbursement’). ‘Holdback Funds’ means the aggregate of (i) any Disputed Funds, which
22 shall be disbursed as provided in Section 2 above, (ii) any amounts set forth as indemnifiable
23 Damages in any Indemnification Notice that the Escrow Agent received no more than ten
24 business days prior to such disbursement, which amounts shall be disbursed as provided in
25 Section 1 above and, if applicable, section 2 above, and (iii) any amounts payable to the
26 Shareholder Representative in accordance with the provisions of Section 4.1(a) of the
27 Agreement.”

28

1 **DISBURSEMENTS FROM THE ESCROW FUND**

2 32. Plaintiff learned for the first time in August 2004, that at least certain of the
3 Defendants' legal fees in the Pending Action were being funded out of the Escrow Fund.

4 33. On September 19, 2003, the same day the Escrow Agreement was executed and
5 eight days after the Pending Action was filed, Joint Disbursement Instructions were issued by
6 McDATA and Van Der Meer to the Escrow Agent. The Escrow Agent was directed to disburse
7 monies from the Escrow Fund to satisfy legal fees incurred by four law firms in connection with
8 the Pending Action. Plaintiff is informed and believes that at least one of these law firms was
9 representing Van Der Meer as a Defendant in the Pending Action. The September 19, 2003
10 Instructions state that the claims of the Pending Action are "Fiduciary Claims" within the
11 meaning of the Escrow Agreement and Merger Agreement and for which McDATA and others
12 are entitled to indemnification.

13 34. Plaintiff is informed and believes that Defendant Van der Meer has authorized the
14 payment of his own legal fees, as well as those of the other Defendants in the Pending Action,
15 including CSFB, "on behalf of" Plaintiff and the other Nishan shareholders. Plaintiff is informed
16 and believes that Van der Meer has never exercised his contractual right of dissent under the
17 Escrow Agreement to challenge any of the disbursements from the Escrow Fund

18 35. In contravention of the Escrow Agreement's directive that the Escrow Agent
19 disburse all Escrowed Property remaining in the Escrow Fund "on or promptly after September
20 20, 2004," the Escrow Agent failed to disburse the remaining funds to Plaintiff or any of the other
21 Nishan shareholders for their proportionate share of the withheld Merger proceeds. Plaintiff is
22 informed and believes that Defendants directed the Escrow Agent to refrain from disbursing the
23 remaining escrow funds so that they could continue to fund their costs of defense in the Pending
24 Action.

25 36. Plaintiff is informed and believes that Defendant Van der Meer continues to
26 authorize the payment of all defense costs incurred in connection with the Pending Action out of
27 the Escrow Fund at a time when Defendants, and each of them, have resisted, and continue to
28 resist, Plaintiff's efforts to gain access to the escrow records.

1 **FIRST CAUSE OF ACTION**

2 **(REQUEST FOR DECLARATORY RELIEF AND RESTITUTION)**

3 **Against all Defendants**

4 37. Plaintiff hereby restates each and every allegation contained in paragraphs 1
5 through 36 of this Complaint, and fully incorporates them by this reference.

6 38. A real and actual controversy exists between Plaintiff and Defendants in that
7 Plaintiff is informed and believes that Defendants, and each of them, have made, and continue to
8 make, indemnification claims against the Escrow Fund for litigation expenses incurred in
9 connection with the Pending Action and that the Escrow Agent has disbursed funds, and
10 continues to disburse funds, in satisfaction of those claims. Plaintiff contends that all
11 disbursements from the Fund are unlawful in that:

12 a. The Escrow Agreement is void as Defendant Van der Meer lacked authority to
13 execute it on Plaintiff's and the other Nishan shareholders' "behalf;" and/or

14 b. The Escrow Agreement is void as the shareholders' consent to Van der Meer's
15 appointment as the Shareholder Representative was obtained by fraud and concealment and was
16 therefore not informed; and/or

17 c. The Escrow Agreement is void as Defendant Van der Meer executed it on
18 behalf of Plaintiff and the other Nishan shareholders without disclosing to them that he had a
19 financial interest in it; and/or

20 d. The Escrow Agreement is void because it is entirely lacking in consideration
21 for Plaintiff and the other Nishan shareholders who financed the Escrow Fund as the Shareholder
22 Representative lacks any effective authority to challenge disbursements from the Fund; and/or

23 e. The Escrow Agreement is void as against public policy having as its object the
24 indemnification of claims for fraud; and/or

25 f. The Escrow Agreement is void as fatally uncertain and ambiguous as there is
26 no comprehensible definition of "Indemnified Persons," "Third Party Claim" or "Damages;"
27 and/or

28 g. None of the Defendants is an "Indemnified Person" within the meaning of the

1 Escrow Agreement; and/or

2 h. The Pending Action is not a “Third Party Claim” as defined by Paragraph 8.6
3 nor does it give rise to indemnifiable “Damages” as defined by Paragraph 8.4 of the Merger
4 Agreement as the Merger Agreement is at best ambiguous as to its coverage for fraud and
5 consequently must be construed as denying indemnification rights for fraud claims; and/or

6 i. Defendants were not entitled to make any claims whatsoever against the
7 Escrow Fund on or after September 20, 2004. The remaining Escrowed Property was not
8 disbursed “on or promptly after September 20, 2004” and Plaintiff is informed and believes that
9 at no time between September 6, 2004 and September 20, 2004 did the Escrow Agent receive
10 from Defendants, or any of them, an Indemnification Notice setting forth indemnifiable Damages
11 that equaled or exceeded the Escrowed Property remaining in the Escrow Fund “on or shortly
12 after September 20, 2004.”

13 WHEREFORE , plaintiff demands declaratory judgment as set forth below.

14 **SECOND CAUSE OF ACTION**

15 **(REQUEST FOR RESTITUTION AFTER UNILATERAL RESCISSION)**

16 **Against All Defendants**

17 39. Plaintiff hereby restates each and every factual allegation contained in paragraphs
18 1 through 38 of this Complaint, and fully incorporates them by this reference.

19 40. By service of the summons and pleading in this action on Defendants, and each of
20 them, Plaintiff gives notice that he rescinds the Escrow Agreement and requests restitution of all
21 payments made to Defendants under the Agreement. Plaintiff has received no benefits under the
22 Escrow Agreement to which Defendants are entitled to restoration.

23 41. Plaintiff is entitled to rescission of the Escrow Agreement, or at a minimum
24 rescission of the Escrow Agreement as it applies to his beneficial interest in the Escrow Fund,
25 because:

26 a. Plaintiff’s and the other Nishan shareholders’ “consent” to the Escrow
27 Agreement was obtained through fraud as more particularly set forth in the Sixth Cause of Action
28 (Civ. Code §1689(b)(1)); and/or

1 interest in the remaining assets of the Escrow Fund without an accounting of all deposits into and
2 disbursements from the Escrow Fund.

3 47. Defendant has repeatedly and consistently refused to provide such an accounting.

4 48. Plaintiff accordingly seeks an order of this Court that Defendant Van der Meer
5 provide an accounting of all deposits into and disbursements from the Escrow Fund so that
6 Plaintiff and the Court might determine Plaintiff's precise interest in the remaining assets of the
7 Escrow Fund.

8 **FOURTH CAUSE OF ACTION**

9 **(UNJUST ENRICHMENT)**

10 **Against All Defendants**

11 49. Plaintiff hereby restates each and every factual allegation contained in paragraphs
12 1 through 48 of this Complaint, and fully incorporates them by this reference.

13 50. Defendants acted together to ensure coverage of their legal expenses in the
14 Pending Action. The Escrow Fund is being disbursed to ineligible parties and in unreasonable
15 amounts.

16 51. Defendants' legal expenses continue to be financed out of the Escrow Fund,
17 although the fund should have been disbursed to all Nishan Shareholders on or promptly after
18 September 20, 2004 in accordance with Schedule A of the Escrow Agreement.

19 52. But for the fraudulent, unconscionable and biased actions of each and every
20 Defendant, the Escrow Fund would have been distributed to Plaintiff and the other Nishan
21 common shareholders. As a direct and proximate result of Defendants' actions, Defendants were
22 unjustly enriched, and Plaintiff suffered and continues to suffer losses in excess of the
23 jurisdictional minimum of this Court.

24 **FIFTH CAUSE OF ACTION**

25 **(BREACH OF FIDUCIARY DUTY)**

26 **Against Defendant Ronald Van der Meer**

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

1 through 52 of this Complaint and fully incorporates them by this reference.

2 54. Defendant Van der Meer, as the Shareholder Representative under the September
3 19, 2003 Escrow Agreement, owed a fiduciary duty to Plaintiff and the other Nishan shareholders
4 to exercise his powers in the best interests of the shareholders and without regard to his own
5 personal interests.

6 55. In exercising his powers as the Shareholder Representative so as to promote his
7 own financial benefit at the expense, and to the detriment, of the shareholders, Van der Meer
8 breached his fiduciary obligations to Plaintiff and the other Nishan shareholders.

9 56. Plaintiff is informed and believes that Van der Meer exercised his powers as the
10 Shareholder Representative to negotiate and execute, "on behalf of" Plaintiff and the other Nishan
11 shareholders, an Escrow Agreement that contemplated the payment of his own costs of defense in
12 connection with the Pending Action out of the Escrow Fund.

13 57. Plaintiff is informed and believes that Van der Meer exercised his powers as the
14 Shareholder Representative to negotiate and execute, "on behalf of" Plaintiff and the other Nishan
15 shareholders, an Escrow Agreement that was specifically conceptualized and drafted to indemnify
16 himself and the other Defendants against the claims asserted in the Pending Action but that
17 deprived the Shareholder Representative of any authority to challenge indemnification payments
18 in connection with the Pending Action.

19 58. Plaintiff is informed and believes that Van der Meer exercised his powers as the
20 Shareholder Representative to approve, "on behalf of" Plaintiff and the other Nishan
21 shareholders, the payment of his own costs of defense in connection with the Pending Action out
22 of the Escrow Fund.

23 59. Plaintiff is informed and believes that Van der Meer never exercised his
24 contractual right and obligation to dispute any of the Indemnification Notices submitted by
25 McDATA on behalf of itself and the other Defendants, including CSFB, for defense costs that
26 have arisen in connection with the Pending Action and their subsequent satisfaction out of the
27 Escrow Fund. Plaintiff is informed and believes that Van der Meer instead abandoned his
28 oversight functions on behalf of Plaintiff and the other Nishan shareholders and permitted the

- 1 2. For a declaration of this Court directing Defendants to restore all monies illegally
2 received under the void Agreement to Plaintiff and the other Nishan shareholders;
3 3. For a determination that the Escrow Agreement has been rescinded;
4 4. For an order of restitution to Plaintiff and the other Nishan shareholders in a sum to be
5 determined pursuant to an accounting;
6 5. For an order of this Court that an accounting be taken of all deposits into and
7 disbursements from the Escrow Fund and of each and every payment each Defendant has
8 received from the Fund;
9 6. For compensatory damages in an amount according to proof at trial;
10 7. For punitive and exemplary damages according to proof at trial;
11 8. For all remedies provided under Civil Code §§3426.3 and 3426.4;
12 9. For attorneys' fees and costs; and
13 10. For all other relief that the Court deems just and proper.

14
15 Dated: Dec. 30. 2004

SAGY LAW ASSOCIATES LLP

16
17
18
19 By: _____

Rony SAGY
RONY SAGY
Attorney for Plaintiff

Exhibit A

ESCROW AGREEMENT

This Escrow Agreement (the "Agreement") dated September 19, 2003 is by and among McDATA Corporation, a Delaware corporation ("Parent"), Roland van der Meer, as the representative of the Company Shareholders of Nishan Systems, Inc. (the "Shareholder Representative", and, together with Parent, the "Parties"), and Wells Fargo Bank Minnesota, National Association, a national banking association (the "Escrow Agent"). All capitalized terms not otherwise defined herein shall have the meaning ascribed to such terms in the Merger Agreement (as hereinafter defined).

RECITALS

WHEREAS, Parent, Nice Acquisition, Inc., a Delaware corporation and a wholly-owned subsidiary of Parent ("Merger Sub"), and the Company have entered into that certain Agreement and Plan of Merger dated as of August 25, 2003 (the "Merger Agreement") pursuant to which Merger Sub will be merged with and into the Company, with the Company becoming a wholly-owned subsidiary of Parent (the "Merger");

WHEREAS, the Company Shareholders elected Roland van der Meer as their representative to take certain actions as described herein; and

WHEREAS, pursuant to Sections 1.8(b) and 8.2 of the Merger Agreement, at the Effective Time, the Parent and the Company Shareholders are placing THIRTEEN MILLION FORTY FIVE THOUSAND DOLLARS (\$13,045,000) of the Merger Consideration in escrow and the Escrow Agent is willing to hold and distribute such funds in accordance with the instructions of the Parties, the Escrow Agent and the Parties agree as follows:

AGREEMENT

ARTICLE 1: Directions

1.1 Appointment of Escrow Agent; Escrowed Property: The Parties hereby appoint Escrow Agent to act as agent on their behalf pursuant to this Agreement, and Escrow Agent hereby consents to its appointment in such capacity on the terms and conditions set forth in this Agreement. Parent and the Company Shareholders will deposit with the Escrow Agent THIRTEEN MILLION FORTY FIVE THOUSAND DOLLARS (\$13,045,000) (the "Escrowed Property").

1.2 Instructions: The Escrow Agent shall hold, invest, if applicable, and disburse the Escrowed Property pursuant to this Agreement and the instructions set forth in the attached Schedule A.

1.3 Investments: The Escrow Agent is not responsible or liable for any diminution of principal or any interest penalty on the Escrowed Property, whatsoever, for any reason.

1.4 **Assignment of Interest:** The assignment, transfer, conveyance or hypothecation of any right, title or interest in and to the Escrowed Property (referred to under this Section 1.4 as the "Assignment") shall be binding upon the Escrow Agent upon delivery of notice to the Escrow Agent of the Assignment and payment to the Escrow Agent of all of its fees in connection with the Assignment; provided that the Escrow Agent has given its written consent to the Assignment, which shall not be unreasonably withheld.

ARTICLE 2: Compensation of the Escrow Agent

Parent and the Shareholder Representative, on behalf of the Company Shareholders, agree, jointly and severally, to pay the Escrow Agent:

- a. Its fees, charges, and expenses for all reasonable and necessary services rendered by it in the performance of its obligations under this Agreement as set forth in the attached Schedule C; and
- b. With the prior written approval of the Parties, which shall not be unreasonably withheld, reasonable compensation for services rendered in connection with this Agreement but not expressly provided for in this Agreement and reimbursement for those reasonable expenses incurred by the Escrow Agent in rendering such services, including but not limited to court costs and reasonable attorneys' fees incurred in the event of any dispute among the parties to this Agreement.

The Escrow Agent shall have first and prior lien upon the Escrowed Property to secure the payments described under paragraphs (a) and (b) of this Article 2. If any such payment is not timely received by the Escrow Agent from the appropriate party or parties, the Parties authorize the Escrow Agent to deduct such payment from the Escrowed Property.

ARTICLE 3: Provisions Concerning Escrow Agent

3.1 **Authority of Parties:** The Escrow Agent shall be under no duty or obligation to ascertain the identity, authority and/or rights of the Parties or their agents.

3.2 **Other Agreements:** The Escrow Agent is not a party to, or bound by, any agreement between the Parties other than this Agreement, whether or not a copy and/or original of such agreement is held as Escrowed Property. Accordingly, the Escrow Agent shall have no duty to know or determine the performance or nonperformance of any provision of any such agreement between the Parties.

3.3 **Investment of Escrowed Property:** The Escrowed Property shall be credited by Escrow Agent and recorded in an escrow account. Escrow Agent shall be permitted, and is hereby authorized to deposit, transfer, hold and invest all funds received in this escrow, including principal and interest, in the Wells Fargo Treasury Plus Money Market, a money market fund available through the Escrow Agent or in another money-market fund bearing comparable interest and risk, during the period of this escrow in accordance with such instructions and directions as may from time to time be provided to Escrow Agent in writing and signed by the Parties. Any interest received by Escrow Agent with respect to the Escrowed Property, including

reinvested interest shall become part of the Escrowed Property; provided, however, that, subject to Section 4.1(a), such interest shall be for the sole and exclusive benefit of Parent if and only to the extent that such interest is earned or accrued with respect to any amounts which are (a) claimed under an Indemnification Notice (defined below in Schedule A) and for which no Dispute Notice (defined below in Schedule A) is given (calculated from the date specified in the applicable Indemnification Notice as the date on which the claim set forth therein arose), or (b) Disputed Funds (as defined below in Schedule A) awarded to the Parent pursuant to written instructions jointly executed by the Parties or receipt of a final non-appealable order of any court directing the disbursement of the Disputed Funds to Parent (calculated from the date specified in the applicable Indemnification Notice as the date on which the claim set forth therein arose).

3.4 Deposited Instruments and/or Funds: The Escrow Agent assumes no responsibility for the validity or sufficiency of any instrument held as Escrowed Property, except as expressly and specifically set forth in this Agreement.

3.5 Late Payment or Performance: The Escrow Agent may accept any payment or performance called for under this Agreement after the date such payment or performance is due, unless subsequent to such date, but prior to the actual date of payment or performance, the Escrow Agent is instructed in writing by the Parties not to accept such payment or performance.

3.6 Escheat: The Parties are aware that Escrowed Property which is abandoned may escheat to the state. The Escrow Agent shall have no liability to the Parties, their respective heirs, legal representatives, successors and assigns should any of the Escrowed Property become escheatable or escheat by operation of law.

3.7 Non-Liability: The Escrow Agent shall not be liable for any act it may do or omit to do as Escrow Agent while acting in good faith and in the exercise of its reasonable and prudent judgment. Any act done or omitted by the Escrow Agent pursuant to the advice of its attorneys shall be conclusive evidence of such good faith. The Escrow Agent shall have the right to consult with counsel at the reasonable expense of the Parties whenever any question arises concerning this Agreement and shall incur no liability for any delay reasonably required to obtain such advice of counsel. The Escrow Agent shall not be liable for the outlawing of any right permitted or given under the instructions set forth in Schedule A and/or in any document deposited under this Agreement pursuant to any statute of limitations or by reason of laches. The Escrow Agent shall have no further responsibility to any or all of the Parties following a complete distribution of the Escrowed Property pursuant to this Agreement. The Escrow Agent shall not incur any liability with respect to any action taken or omitted to be taken in reliance upon any document received by Escrow Agent pursuant to the terms hereof, including any written notice or instructions provided for in this Agreement. In performing its obligations hereunder, the Escrow Agent shall be entitled to presume, without inquiry, the due execution and validity and effectiveness of all documents it receives.

3.8 Indemnification: Parent and the Shareholder Representative, on behalf of the Company Shareholders, agree, jointly and severally, to indemnify and hold harmless the Escrow Agent from any liability, or reasonable costs or expenses, including but not limited to reasonable attorneys' fees, incurred by reason of accepting this Agreement and/or the Escrowed Property.

3.9 **Disagreements:** If any disagreement or dispute arises between the parties to this Agreement concerning the meaning or validity of any provision under this Agreement or concerning any other matter relating to this Agreement, the Escrow Agent:

- a. Shall be under no obligation to act, except under process or order of court, or until it has been adequately indemnified to its full satisfaction, and shall sustain no liability for its failure to act pending such process or court order or indemnification; and
- b. May deposit, in its sole and absolute discretion, the Escrowed Property or that portion of the Escrowed Property it then holds with a court of competent jurisdiction, and to interplead the Parties. Upon such deposit and filing of interpleader, the Escrow Agent shall be relieved of all liability as to the Escrowed Property and shall be entitled to recover from the Escrowed Property its reasonable attorneys' fees and other reasonable costs incurred in commencing and maintaining such action. The Parties by signing this Agreement submit themselves to the jurisdiction of such court. In no event shall the institution of such interpleader action impair the rights of the Escrow Agent described in Section 3.7 of this Agreement.

ARTICLE 4: Concerning the Shareholder Representative

4.1 Shareholder Representative:

- a. Appointment and Duties. The Shareholders have initially consented to the appointment of Roland van der Meer as the representative of the Shareholder, as attorney-in-fact for and on behalf of each such Shareholder, and the taking by the Shareholder Representative of any and all actions and the making of any decisions required or permitted to be taken by him under this Agreement, including the exercise of the power to (i) execute and deliver this Agreement, (ii) authorize delivery to Parent of the Escrowed Property, or any portion thereof, in satisfaction of any indemnifiable Damages, (iii) agree to, negotiate, enter into settlements and compromises of and comply with orders of courts and awards of arbitrators with respect to any Disputed Funds (as defined in Schedule A hereto) and (iv) take all actions necessary in the judgment of the Shareholder Representative for the accomplishment of the foregoing and all of the other terms, conditions and limitations of the Merger Agreement and this Agreement. Accordingly, subject to Section 4.1(b) hereof, the Shareholder Representative has unlimited authority and power to act on behalf of each Shareholder with respect to Article VIII of the Merger Agreement, this Agreement and the disposition, settlement or other handling of all claims for Damages, rights or obligations arising from and taken pursuant to Article VIII of the Merger Agreement and this Agreement. The Shareholders will be bound by all actions taken by the Shareholder Representative in connection with this Agreement, and Parent and the Escrow Agent shall be entitled to rely in good faith on any action or decision of the Shareholder Representative. The Shareholder Representative will incur no liability with respect to any action taken or suffered by him in reliance upon any notice,

direction, instruction, consent, statement or other document believed by him in good faith to be genuine and to have been signed by the proper person (and shall have no responsibility to determine the authenticity thereof), nor for any other action or inaction, except his own willful misconduct or gross negligence. In all questions arising under this Agreement, the Shareholder Representative may rely on the advice of counsel, and the Shareholder Representative will not be liable to anyone for anything done, omitted or suffered in good faith by the Shareholder Representative based on such advice. The Shareholder Representative will not be required to take any action involving any expense unless the payment of such expense is made or provided for in a manner satisfactory to him; provided, that the Shareholder Representative shall be entitled to recover any expenses incurred by the Shareholder Representative arising out of or in connection with the acceptance or administration of the Shareholder Representative's duties hereunder, including reasonable fees and expenses of any legal counsel retained by the Shareholder Representative (the "Shareholder Representative Expenses") from the interest earned on and deposited into Escrowed Property pursuant to Section 3.3 hereof; provided, further, that to the extent the amount of any Shareholder Representative Expenses exceeds the interest earned and deposited into Escrowed Property pursuant to Section 3.3 hereof, the Shareholder Representative shall be entitled to recover such Shareholder Representative Expenses from the Escrowed Property remaining available for disbursement to the Company Shareholders following the settlement of all claims by Parent for indemnification pursuant to its rights under Section 8.4 of the Merger Agreement.

- b. Appointment of Successor to Shareholder Representative. The Shareholder Representative, or any successor hereafter appointed, may resign or may be removed by the Shareholders who have the right to receive in the aggregate at least a majority of the Escrowed Property upon written notice. In such event, the Shareholder Representative shall be discharged of his duties hereunder upon receipt of such notice. In case of such resignation or removal, or in the event of the death or inability to act of the Shareholder Representative, a successor shall be promptly named by the Company Shareholders who have the right to receive in the aggregate at least a majority of the Escrowed Property. Each such successor Shareholder Representative shall have all the power, authority, rights and privileges hereby conferred upon the original Shareholder Representative, and the term "Shareholder Representative" as used herein shall be deemed to include each such successor Shareholder Representative. In the event there is no Shareholder Representative, any action or decision required of the Shareholder Representative hereunder, may be taken by the written consent of the Company Shareholders who have the right to receive in the aggregate at least a majority of the Escrowed Property.
- c. Authorization of Shareholder Representative. The Shareholder Representative is authorized to take the actions set forth in this Agreement on behalf of the Company Shareholders, and Parent and Escrow Agent shall have no liability to the Company Shareholders for any act or failure to act of the Shareholder Representative. Parent and the Escrow Agent shall be entitled to rely upon any

act of the Shareholder Representative as an act of the Shareholders pursuant to this Agreement.

ARTICLE 5: General Terms and Conditions

5.1 Extension of Benefits: All of the terms of this Agreement shall be binding upon, and inure to the benefit of, and be enforceable by, the respective heirs, legal representatives, successors and assigns of all of the parties to this Agreement.

5.2 Governing Law: This Agreement shall be construed and enforced in accordance with the laws of the State of California without regard to the law of conflicts thereof.

5.3 Notices: All notices, requests, demands and other communications required under this Agreement shall be in writing and shall be deemed to have been duly given if delivered personally, the next business day if delivered by commercial delivery service or by reputable overnight courier, the third business day if mailed by registered or certified mail (return receipt requested), or the day of transmission if a business day or, if not, the next business day thereafter, if sent via facsimile (with confirmation of receipt) to the parties to this Agreement at the addresses set forth below the signature blocks on the signature pages of this Agreement; provided, however, that all notices, requests, demands and other communications required under this Agreement to be given to any Company Shareholder shall be given to the Shareholder Representative at the address set forth below the signature block for the Shareholder Representative on the signature pages of this Agreement. It shall be the responsibility of the Parties to notify each other and the Escrow Agent in writing of any name or address changes. This Section 5.3 shall govern this Agreement except as otherwise provided in Section 1 of Schedule A to this Agreement.

5.4 Entire Agreement: This Agreement (including the schedules attached hereto) with the Merger Agreement sets forth the entire agreement and understanding of the parties to this Agreement with respect to the subject matter hereof. If any provision of this Agreement (or any schedule attached hereto) is deemed to be in conflict with any provision(s) of the Merger Agreement, the provisions of the Merger Agreement shall govern.

5.5 Amendment: This Agreement may be amended, modified, superseded, rescinded or canceled only by a written instrument executed by Parent, the Shareholder Representative and the Escrow Agent.

5.6 Waivers: The failure of any party to this Agreement at any time or times to require performance of any provision under this Agreement shall in no manner affect the right at a later time to enforce the same performance. A waiver by any party to this Agreement of any such condition or breach of any term, covenant, representation or warranty contained in this Agreement, in any one or more instances, shall neither be construed as a further or continuing waiver of any such condition or breach nor a waiver of any other condition or breach of any other term, covenant, representation or warranty contained in this Agreement.

5.7 Headings: The headings of the sections of this Agreement have been inserted for convenience of reference only and shall in no way restrict or otherwise modify any of the terms or provisions of this Agreement.

5.8 Counterparts: This Agreement may be executed in one or more counterparts, each of which when executed shall be deemed to be an original, and such counterparts shall together constitute one and the same instrument.

5.9 Resignation or Removal of Escrow Agent: The Escrow Agent may resign at any time by furnishing prior written notice of its resignation to the Parties and thereafter delivering the Escrowed Property to any other escrow agent mutually agreed upon the Parties, as notified to the Escrow Agent in writing, and if no such escrow agent shall be designated by the Parties within ninety (90) calendar days of such written notice, then the Escrow Agent may do so by delivering the Escrowed Property either (a) to any bank or trust company located in the United States which is willing to act as escrow agent hereunder in its place or (b) if no such bank or trust company can be retained within a reasonable period after such ninety (90) calendar day period after the delivery by the Escrow Agent of its written notice, then the Escrow Agent shall seek the appointment of its successor as prescribed by the clerk or other proper officer of a court of competent jurisdiction located within the United States to the extent permitted by law (any such successor to the Escrow Agent, whether designated by the Parties or pursuant to clause (a) or (b) above or otherwise, is hereinafter referred to as the "Successor Agent"). The Parties may, at any time after the date hereof, remove the Escrow Agent at any time by furnishing to the Escrow Agent a joint written notice of its removal, effective upon delivery of a written notice to Escrow Agent, whereupon the Escrow Agent shall deliver the Escrowed Property to the Successor Agent so designated by the Parties in such notice. The fees of any Successor Agent shall paid out of the Escrowed Property. Upon delivery of the Escrowed Property to the Successor Agent, (i) the Escrow Agent shall be discharged from any and all responsibility or liability with respect to the Escrowed Property (except as otherwise provided herein) and (ii) all references herein to the "Escrow Agent" shall, where applicable, be deemed to include such Successor Agent and such Successor Agent shall thereafter become the Escrow Agent for all purposes of this Agreement.

5.10 Termination: This Agreement shall terminate upon the mutual written consent of the Parties. In any event, this Agreement shall terminate when all of the Escrowed Property has been delivered according to the terms of this Agreement.

* * * * *

IN WITNESS WHEREOF, the parties to this Agreement have each caused this Agreement to be duly executed and delivered as of the date first written above.

PARENT:

McDATA CORPORATION

By: 

Name: *Thomas O. McGimpsey*
Title: *Vice President*

Address:

McDATA Corporation
380 Interlocken Crescent, Suite 600
Broomfield, Colorado 80021
Attention: Thomas O. McGimpsey, Esq.
Vice President, General Counsel and
Secretary
Facsimile No.: (720) 558-4747

with a copy to:

Hensley & Kim, LLC
600 17th Street
Suite 2800 South
Denver, Colorado 80202
Attention: Darren R. Hensley, Esq.
Facsimile No.: (303) 634-2284

SHAREHOLDER
REPRESENTATIVE:



Roland van der Meer

c/o ComVentures
305 Lytton Avenue
Palo Alto, California 94301
Facsimile No.: 650-325-9608

The Escrow Agent, by affixing its signature below, hereby acknowledges receipt of the Escrowed Property and agrees to hold, administer, and dispose of the Escrowed Property in accordance with the terms, conditions, and instructions of this Agreement, including those set forth in Schedule A.

ESCROW AGENT:

WELLS FARGO BANK MINNESOTA,
NATIONAL ASSOCIATION, as
Escrow Agent

By: _____
Title: _____

Wells Fargo Bank Minnesota, N.A.
Attn: Corporate Trust Services
213 Court Street, Suite 703
Middletown, CT 06457
Telephone: (860)-704-6216
Fax: (860) 704-6219

SHAREHOLDER REPRESENTATIVE:

Roland van der Meer

c/o ComVentures
305 Lytton Avenue
Palo Alto, California 94301
Facsimile No.: 650-325-9608

The Escrow Agent, by affixing its signature below, hereby acknowledges receipt of the Escrowed Property and agrees to hold, administer, and dispose of the Escrowed Property in accordance with the terms, conditions, and instructions of this Agreement, including those set forth in Schedule A.

ESCROW AGENT:

**WELLS FARGO BANK MINNESOTA,
NATIONAL ASSOCIATION, as Escrow Agent**


By: JOSEPH P. O'DONNELL
Title: Corporate Trust Officer

Wells Fargo Bank Minnesota, N.A.
Attn: Corporate Trust Services
213 Court Street, Suite 703
Middletown, CT 06457
Telephone: (860)-704-6216
Fax: (860) 704-6219

Schedule A

Instructions

1. If Parent in good faith requests indemnification pursuant to its rights under Section 8.4 of the Merger Agreement, then Parent shall notify in writing the Escrow Agent in writing of such request, the dollar amount of indemnifiable Damages and disbursement instructions ("Indemnification Notice"). The Indemnification Notice shall be signed by an officer of Parent and shall certify that Damages have been incurred by Parent (stating whether such Damages are indemnifiable under the terms of the Merger Agreement and whether such Damages include Fiduciary Damages (as defined below)), specify in reasonable detail and in good faith the nature of such Damages and the events giving rise to indemnification and, if such Damages relate to a Third Party Claim, shall describe the Third Party Claim in as much detail as reasonably possible. The Escrow Agent shall, within five business days of receipt of an Indemnification Notice, provide a copy of such Indemnification Notice to the Shareholder Representative, and, ten business days after the Shareholder Representative is deemed pursuant to Section 5.3 of this Agreement to have received such Indemnification Notice from the Escrow Agent, disburse to Parent from the Escrowed Property the amount requested by Parent in such Indemnification Notice, unless prior to the date of disbursement the Escrow Agent receives written notice from the Shareholder Representative disputing in good faith ("Dispute Notice") Parent's right to all or part of the amount requested by Parent as set forth in the Indemnification Notice (the "Disputed Funds"); provided, however, that the Shareholder Representative shall not have a right to issue a Dispute Notice with respect to an Indemnification Notice regarding Damages resulting from a Fiduciary Claim ("Fiduciary Damages"). If the Escrowed Property is not sufficient to pay in full any amounts payable to Parent under Section 1 or 2 of these instructions, subject to the provisions of Section 4.1(a), Escrow Agent shall pay to Parent such Escrowed Property as is available. Delivery of any Escrowed Property to Parent pursuant to this Agreement shall be borne by the Stockholders *pro rata* to their respective interests in the Escrowed Property as specified in Schedule B hereof.

2. If the Shareholder Representative issues a Dispute Notice pursuant to Section 1 above, then (a) the Escrow Agent shall continue to hold all Disputed Funds until receipt of written instructions jointly executed by Parent and the Shareholder Representative or receipt of a final non-appealable order of any court directing the disbursement of the Disputed Funds, and shall disburse the Disputed Funds in accordance with such joint instructions or court order and (b) Parent and the Stockholder Representative shall promptly use their reasonable best efforts to resolve the issues underlying such dispute in good faith.

3. On or promptly after September 20, 2004, the Escrow Agent shall disburse any remaining Escrowed Property held by the Escrow Agent to the Company Shareholders, less the Holdback Funds (the "Disbursement"). "Holdback Funds" means the aggregate of (i) any Disputed Funds, which shall be disbursed as provided in Section 2 above, (ii) any amounts set forth as indemnifiable Damages in any Indemnification Notice that the Escrow Agent received no more than ten business days prior to such disbursement, which amounts shall be disbursed as provided in Section 1 above and, if applicable, Section 2 above, and (iii) any amounts payable to

the Shareholder Representative in accordance with the provisions of Section 4.1(a) of the Agreement, which amounts shall be disbursed as provided in Section 4.1(a) of the Agreement. Each Company Shareholder shall receive their portion of the Disbursement, which shall be equal to the amount determined by multiplying the Disbursement by such Company Shareholder's Disbursement Ratio; provided, however, that no fractional cents shall be disbursed for any Company Shareholder pursuant to this Section 3 and the Escrow Agent shall make such adjustments as are necessary to the disbursement of only whole cents of the Escrowed Property to any Company Shareholder.

4. Notwithstanding the provisions of Sections 1, 2 or 3, if Parent and the Shareholder Representative jointly execute a written notice to the Escrow Agent providing the Escrow Agent with disbursement instructions for all or part of the Escrowed Property, the Escrow Agent shall disburse the portion of the Escrowed Property referred to in such notice in accordance with the instructions contained in such notice.

5. The Escrow Agent shall not, and is not authorized to convey, transfer or distribute the Escrowed Property except as set forth in this Schedule A to the Agreement.

6. The Parties agree that Parent shall be entitled to issue an Indemnification Notice for Damages incurred by Parent in enforcing the terms of this Agreement.

Schedule C

Escrow Agent Fees

Administration Fee - \$4500