

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

DAVID PINE, Individually and On Behalf )	)	CIVIL ACTION NO.
of All Others Similarly Situated, )	)	
	)	
Plaintiff, )	)	
	)	
v. )	)	CLASS ACTION COMPLAINT
	)	
AVAYA INC., DONALD K. PETERSON, )	)	
and GARRY K. MCGUIRE, )	)	<u>JURY TRIAL DEMANDED</u>
	)	
Defendants. )	)	
_____ )	)	

Plaintiff, by his undersigned attorneys, by way of this Complaint, alleges the following upon personal knowledge as to himself and his acts and as to all other matters upon information and belief, based upon, *inter alia*, the investigation made by and through his attorneys, including a review of the public filings of Avaya, Inc. (“Avaya” or “the Company”) with the United States Securities & Exchange Commission (“SEC”), as well as certain published reports and news articles.

**PARTIES.**

1. Plaintiff, David Pine (“Plaintiff” or “Pine”), as set forth in his attached Certification, which is incorporated herein by reference, is a resident of Alameda County, California, purchased shares of Avaya common stock in the open market between October 5, 2004 and April 19, 2005, inclusive (the “Class Period”), and suffered damages as a result of those purchases.
  
2. Defendant, Avaya, is a Delaware corporation with its principal executive offices and headquarters located at 211 Mount Airy Road, Basking Ridge, New Jersey.
  
3. Defendant, Donald K. Peterson (“Peterson”), at all times relevant hereto, was the

Company's Chief Executive Officer ("CEO") and Chairman of the Board of Directors ("the Board").

4. Defendant, Garry K. McGuire ("McGuire"), at all times relevant hereto, was the Company's Chief Financial Officer ("CFO") and Senior Vice President, Corporate Development.

5. Defendants, Peterson and McGuire, are referred to collectively herein as the "Individual Defendants."

### **JURISDICTION AND VENUE.**

6. This Court has jurisdiction over the subject matter of this action under the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78aa, and 28 U.S.C. § 1331. The claims asserted herein arise under Sections 10(b) and 20(a) of the Exchange Act, 15 U.S.C. §§ 78j(b) and 78t(a), as well as Rule 10b-5, 17 C.F.R. § 240.10b-5, as promulgated by the SEC.

7. Venue is proper in this district pursuant to the provisions of the Exchange Act and 28 U.S.C. § 1391(b). As alleged herein, a substantial part of the events or omissions giving rise to the claims asserted occurred within this district. In addition, Avaya maintains its principal corporate offices in this district.

8. In connection with the acts, conduct and violations of law detailed in this Complaint, Defendants, at all relevant times, directly and indirectly, utilized the means and instrumentalities of interstate commerce, including the mails, telephone communications and the facilities of the national securities exchanges.

### **BACKGROUND.**

9. This is a securities class action brought on behalf of all persons, other than the Defendants and related parties, who purchased or otherwise acquired shares of Avaya common stock and other securities in the open market during the Class Period (the "Class").

10. The Company was initially incorporated in February, 2000, as a wholly owned subsidiary of Lucent Technologies Inc (“Lucent”). On or about June 27, 2000, the Company changed its name to Avaya, and was spun-off from Lucent on or about September 30, 2000.

11. According to the Company, Avaya designs, builds and manages communications networks for more than one million businesses worldwide, including more than 90 percent of the FORTUNE 500®. As described in its annual report for the fiscal year ended September 30, 2004, filed with the SEC on Form 10-K on December 13, 2004 (the “2004 10-K”), Avaya is a “leading provider of communications systems, applications and services.” The Company’s stated goal is “to leverage our substantial experience and expertise in traditional voice communications systems to capitalize on the transition of these traditional voice systems to IP [Internet Protocol] telephony systems.” The Company’s business was organized into three segments: enterprise communications group, small and medium business solutions, and services. However, beginning in the first quarter of fiscal 2005 (which ended on December 31, 2004), the Company’s business operated through two segments – Products and Applications (which combined enterprise communications and small and medium business solutions) and Services.

**MATERIALLY FALSE AND MISLEADING STATEMENTS  
DURING THE CLASS PERIOD.**

12. The Class Period begins on October 5, 2004, with the Company’s announcement of its plan to acquire Tenovis GmbH & Co. KG (“Tenovis”), a European communications company. In a press release entitled, “Avaya to Purchase Tenovis, A Major European Provider of Enterprise Communications Systems and Services,” the Company stated in relevant part as follows:

Avaya Inc., (NYSE:AV) a leading global provider of business communications software, systems and services, today said it has signed a definitive agreement to acquire Tenovis GmbH & Co.

KG, a major European provider of enterprise communications systems and services, from affiliates of Kohlberg Kravis Roberts & Co.

Under the terms of the agreement, Avaya will pay approximately \$370 million in cash, as well as assume about \$265 million in debt. The company noted that net of Tenovis' expected cash position at closing of \$115 million, Avaya's cash outlay will be about \$255 million. Avaya said the transaction is subject to customary regulatory approvals and closing conditions.

Avaya said after the acquisition is completed, it expects international revenues will account for about 40 percent of its total revenues, up from 25 percent today. The company's European revenues would nearly triple, growing from about 12 percent to about 30 percent of Avaya's global business. When fully integrated, Avaya expects Tenovis will add about one billion dollars in annual revenues to Avaya.

"The acquisition of Tenovis significantly enhances Avaya's size and scale in Europe, and is a major step in Avaya's plan to grow its business globally," said Don Peterson, chairman and CEO, Avaya. "Tenovis brings Avaya an integrated sales and services organization and an extensive customer base in Europe. We have complementary businesses and strategies including a common understanding of the unique communications needs of the enterprise customer. We have a shared commitment to provide customers with a strong services capability as well as delivering to them the wide range of business benefits inherent in IP telephony solutions and applications."

\* \* \*

The company said the acquisition is expected to be accretive by \$0.07 per share in fiscal year 2006, the first full year of combined results. Excluding non-recurring costs and start-up expenses of \$0.05 per share, the acquisition is expected to be dilutive by \$0.03 per share in fiscal year 2005. The transaction's impact on fiscal year 2005 results will include approximately nine months of Tenovis results; if a full year's results were included then the transaction would be breakeven in fiscal year 2005 excluding the non-recurring costs and start up expenses.

"Consistent with our corporate development framework, Tenovis is expected to have a positive financial impact within a short period of time, and we will continue to maintain our financial strength and

flexibility,” said Garry K. McGuire, chief financial officer, Avaya.

McGuire noted at the end of the third fiscal quarter, Avaya’s cash position was \$1.5 billion and its net cash\*\* position was \$939 million, while operating cash flow through the first nine months was \$350 million. He said Avaya intends to continue its de-leveraging strategy so that after the acquisition closes, its total debt would be at or below its debt levels today.

13. The Company issued a press release on October 12, 2004, announcing its fourth quarter and fiscal year 2004 financial results. Therein, Avaya stated, in relevant part, as follows:

Avaya Inc., (NYSE:AV) a leading global provider of business communications software, systems and services, reported net income of \$100 million or earnings of 21 cents per diluted share in the fourth fiscal quarter.

In the same quarter last year, Avaya reported income from continuing operations of \$55 million or 13 cents per diluted share, and, including income from discontinued operations\*, the company reported net income in the year ago quarter of \$66 million or 15 cents per diluted share.

\* \* \*

“Avaya’s results this quarter cap a year of substantial accomplishment and progress,” said Don Peterson, chairman and CEO, Avaya. “We capitalized on our market leadership in IP telephony and delivered accelerating product sales growth through the year. The U.S. continues to lead the transition to IP telephony and in the fourth quarter we had double-digit product growth in this key market, both sequentially and compared to last year.

\* \* \*

#### **Full Fiscal Year 2004 Results**

Revenues for fiscal year 2004 were \$4.069 billion, an increase of seven percent compared to revenues of \$3.796 billion for fiscal year 2003. Avaya earned \$291 million or 63 cents per diluted share from continuing operations for fiscal 2004, compared to a loss from continuing operations of \$128 million or a loss of 34 cents per diluted share in fiscal 2003.

Avaya noted, including results from discontinued operations, it earned \$296 million or 64 cents per diluted share in fiscal 2004 compared to a net loss of \$88 million or a net loss of 23 cents per

diluted share in fiscal 2003.

“Avaya completed the fiscal year having delivered on commitments in several key areas,” said Garry K. McGuire, chief financial officer and senior vice president, corporate development, Avaya. “All three business segments were profitable for the year and contributed to the seven percent increase in year-over-year revenues. We generated \$479 million in operating cash flow for the year. Our cash increased by \$425 million or 36 percent compared to last year to \$1.6 billion [sic]. Net cash\*\* increased to \$1.024 billion at the end of the fiscal year. We reduced debt from \$953 million to \$593 million, a decrease of 38 percent from last year. Our results this year also are reflected in improved credit ratings. We have entered the new year well positioned to translate our ongoing success in the marketplace into enhanced shareholder value.”

14. The Company issued another press release later that month, on October 29, 2004, in which it provided an outlook for fiscal years 2005 and 2006. Therein, Avaya stated, in relevant part, as follows:

Avaya said its operating margin goal for fiscal year 2005 is between 8.5 percent and 9 percent on fiscal 2005 revenues that are expected to grow by between 25 percent to 27 percent compared to fiscal year 2004 revenues of \$4.055 billion\*. Operating margin for fiscal year 2004 was 7.6 percent.\* Avaya said the expected growth in fiscal 2005 revenues will come from its existing businesses and the impact of its acquisition of Spectel, its majority interest in Avaya GlobalConnect (formerly Tata Telecom), and assuming a Jan. 1, 2005 close of its pending acquisition of Tenovis.

For fiscal year 2006 the company has an operating margin goal of between 10 percent and 12 percent.

Avaya reiterated its existing balance sheet goals of maintaining a strong net cash position and keeping debt at a level no higher than its debt level prior to the planned acquisition of Tenovis. The company also said its longer-term goals of improving its credit rating to investment grade, opportunistically deleveraging its balance sheet and maintaining a cash position of approximately one billion dollars remain.

15. Avaya announced the completion of its acquisition of Tenovis Germany on

November 18, 2004. In a press release issued that day, the Company stated, in relevant part, that “[w]ith the acquisition, [it added] more than 5,400 employees to its operations across Austria, Belgium, France, Germany, Italy, Spain, Switzerland and The Netherlands [and that the] acquisition significantly increases the company’s European customer base, market share and presence.”

16. The Company filed the 2004 10-K with the SEC on December 13, 2004. The 2004 10-K was signed by the Individual Defendants and reaffirmed Avaya’s previously announced financial results.

17. Avaya announced its financial results for the first quarter of fiscal year 2005 in a press release issued on January 25, 2005. Therein, the Company stated, in relevant part, as follows:

Avaya Inc., (NYSE:AV) a leading global provider of business communications software, systems and services, reported income from continuing operations of \$33 million or seven cents per diluted share in the first fiscal quarter of 2005.

In the same quarter last year the company reported income from continuing operations of \$30 million or seven cents per diluted share.

Avaya said first quarter income from continuing operations of \$33 million included a loss associated with its senior secured notes tender, as well as integration costs and write-offs of in-process research and development related to the acquisitions of Spectel and Tenovis. These items had a negative impact of 11 cents per diluted share in the first fiscal quarter. In addition, the acquisitions contributed an operational loss in the quarter. The combined impact of all these charges and losses was a reduction in earnings per share of 13 cents.

Avaya’s first fiscal quarter 2005 revenues increased 18 percent to \$1.148 billion compared to revenue of \$971 million in the first fiscal quarter of 2004. The revenue increase largely reflected the impact of recent acquisitions and favorable currency rates. Excluding these two items, revenues grew at double-digit rates in

all regions except the United States where sales were essentially unchanged versus the year ago period.

“We continue to improve our profitability with operating income rising 70 percent year-over-year,” said Don Peterson, chairman and CEO, Avaya. “We completed the Tenovis acquisition, shipped our five millionth IP telephony line and substantially reduced our debt. Our first quarter results position us to meet our goals for the year.”

\* \* \*

As a result of the Tenovis acquisition, which has a significant rental and managed services business, Avaya made changes and enhancements to its financial reporting:

On a consolidated basis, the company now breaks out revenue into three line items -- products, rental and managed services, and services -- and provide costs for each of these three.

On a segment level, the company groups businesses into two reporting units -- Global Communications Solutions and Avaya Global Services -- and provides a breakout of major revenue line items within each.

The company also is providing more information on the geographic breakout of revenue and product revenue by channel.

18. The statements contained in ¶¶ 12-17 were materially false and misleading when made because Defendants failed to disclose or indicate, *inter alia*, that: (1) the costs of the Tenovis merger was greater than represented, and therefore, it would not be accretive on Avaya’s earnings in fiscal year 2005; (2) due to the problems with the Tenovis merger, management had limited visibility into Avaya’s channels of revenue; and (3) the implementation of Avaya’s new go-to-market model in the United States was disrupting the Company’s direct and indirect sales channels. As a result of the foregoing undisclosed facts, Avaya’s projections about revenue growth of 25-27% of fiscal year 2005 lacked any reasonable basis.

**THE TRUTH BEGINS TO EMERGE.**

19. Avaya announced its financial results for the second quarter of fiscal year 2005 in

a press release issued on April 19, 2005. Therein, the Company stated, in relevant part, as follows:

Avaya Inc., (NYSE:AV) a leading global provider of business communications software, systems and services, today reported income from continuing operations of \$36 million or seven cents per diluted share in the second fiscal quarter of 2005. These results include six cents of dilution related to the results of operations from the Tenovis acquisition. (See table for details.)

In the same quarter last year the company reported income from continuing operations of \$103 million or 22 cents per diluted share. Included in the \$103 million were one-time items that had a net favorable impact of \$63 million or 13 cents per diluted share. (See table for details.)

Avaya's second fiscal quarter 2005 revenues increased 21 percent to \$1.222 billion compared to revenue of \$1.006 billion in the second fiscal quarter of 2004. The revenue increase reflected the impact of recent acquisitions and revenue growth outside of the United States. The company said U.S. product and services revenues declined year-over-year. Avaya's overall IP product sales rose nearly 30 percent year-over-year. Outside of the United States, IP product sales rose more than 50 percent compared to the year ago period.

"Although our performance this quarter was not up to our expectations, we're confident in the opportunity in IP telephony and our competitive advantage," said Don Peterson, chairman and CEO, Avaya. "Three key factors affected our overall performance: our implementation of a new go-to-market model in the United States, which has created some disruption affecting U. S. sales, the impact of the Tenovis integration and early signs of potential softness in the U.S. technology market. We will take actions to manage our business, including a tighter focus on cost control, to meet these challenges, improve our performance in the United States and build on our strength in other markets."

#### Year-To-Date Results

Revenues for the first six months of fiscal 2005 were \$2.370 billion, an increase of 20 percent compared to revenues of \$1.977 billion for the first six months of fiscal 2004. Avaya earned \$69 million or 15 cents per diluted share from continuing operations in

the first six months of fiscal 2005, compared to income from continuing operations of \$133 million or 30 cents per diluted share in the first six months of 2004.

#### Outlook For The Year

Avaya said it expects its performance in the second half will improve with sequential increases in the third fiscal quarter in revenues and profitability and with revenue growth and profitability accelerating in the fourth fiscal quarter. However, the company believes it will not meet its previously stated goals for growing revenues, operating income and operating margin in fiscal 2005.

20. News of this shocked the market. On April 20, 2005, following disclosure of the foregoing news, shares of Avaya fell \$2.68 per share (over 25 percent) to close at \$8.01 per share.

#### **PLAINTIFF'S CLASS ACTION ALLEGATIONS.**

21. Plaintiff brings this class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, on behalf of himself and all other persons who purchased or otherwise acquired Avaya common stock and/or other securities during the Class Period (*i.e.*, between October 5, 2004 and April 19, 2005, inclusive). Excluded from the Class are Avaya, its subsidiaries and affiliates, the Individual Defendants, members of the immediate families of each of the Individual Defendants, any entities in which any of the Defendants have a controlling interest, and the legal representatives, heirs, successors, predecessors in interest, affiliates or assigns of any of the Defendants.

22. This action may properly be maintained as a class action as a result of the following facts:

a. During the Class Period, hundreds of thousands of shares of Avaya's

common stock were issued and outstanding and were actively traded on the New York Stock Exchange (“NYSE”), a liquid, efficient and impersonal trading market. The members of the Class for whose benefit this action is brought are located throughout the United States, and are so numerous that joinder of all members of the putative Class is impracticable. Hundreds of thousands of Avaya shares were publicly traded during the Class Period and, upon information and belief, there are hundreds or thousands of members of the Class;

b. Plaintiff’s claims are typical of the claims of the other members of the Class, and Plaintiff and all members of the Class sustained damages as a result of the Defendants’ wrongful conduct complained of herein;

c. Plaintiff is a representative party who will fairly and adequately protect the interests of the other members of the Class, and has retained counsel competent and experienced in class action securities litigation. Plaintiff has no interests antagonistic to, or in conflict with, the Class he seeks to represent;

d. A class action is superior to all other available methods for the fair and efficient adjudication of the claims asserted herein, because joinder of all members is impracticable. Furthermore, because the damages suffered by the individual Class members may be relatively small, the expense and burden of individual litigation make it virtually impossible for the Class members to separately redress the wrongs done to them. The likelihood of individual Class members prosecuting separate claims is remote;

e. Plaintiff anticipates no unusual difficulties in the management of this action as a class action; and

f. The questions of law and fact common to the members of the Class

predominate over any questions affecting any individual members of the Class.

23. The questions of law and fact which are common to the Class include, among others:

a. Whether the federal securities laws were violated by the Defendants' acts as alleged in this Complaint;

b. Whether the documents, press releases, reports and/or statements disseminated to the investing public and Avaya shareholders during the Class Period omitted or misrepresented material facts about the financial condition, business prospects, and revenue expectations of Avaya;

c. Whether Defendants failed to correct previously issued statements that they knew to be false or they recklessly disregarded the truth or falsity of such statements;

d. Whether Defendants failed to disclose material, adverse information at a time when they were in possession of such information;

e. Whether Defendants acted with knowledge or reckless disregard for the truth in misrepresenting and omitting material facts;

f. Whether, during the Class Period, the market price of Avaya common stock and other securities was artificially inflated due to the material misrepresentations and omissions complained of herein;

g. Whether Defendants participated in and pursued the common course of conduct complained of herein; and

h. Whether the members of the Class have sustained damages and, if so, what is the proper measure thereof.

### **FRAUD-ON-THE-MARKET DOCTRINE.**

24. Plaintiff relies, in part, upon the presumption of reliance established by the fraud-on-market doctrine. The market for Avaya common stock was, at all pertinent times, a liquid and efficient market for, *inter alia*, the following reasons:

- a. Avaya met the requirements for listing, and was listed on the NYSE, a highly efficient and liquid market;
- b. As a regulated issuer, Avaya filed periodic public reports with the SEC;
- c. Avaya's securities trading volume was substantial during the Class Period;
- d. Avaya was covered by various securities analysts, who wrote reports which were available through various automated data retrieval services;
- e. Avaya disseminated information on a market-wide basis through various electronic media services, and participated in open conference calls with stock analysts and investors; and
- f. The market price of Avaya securities reacted rapidly to new information entering the market.

25. The facts identified above reflect the existence of an efficient market for trading of Avaya securities and make applicable the fraud-on-the-market doctrine. Similarly, Plaintiff and the other members of the Class are entitled to a presumption of reliance with respect to the misstatements and omissions alleged in this Complaint.

### **DEFENDANTS' DUTIES AND MISCONDUCT.**

26. As officers, directors and/or controlling persons of a publicly-held company whose common stock is registered with the SEC under the Exchange Act, traded on the NYSE at

all relevant times, and governed by the provisions of the Exchange Act, the Individual Defendants had a duty to disseminate accurate and truthful information in a timely manner with respect to Avaya's operations, finances, financial condition, revenues, income, earnings and present and future business prospects, to correct any previously issued statements from any source that had become untrue, and to disclose any trends that would materially affect earnings and the present and future financial operating results of Avaya, so that the market price of the Company's publicly-traded securities would be based upon truthful and accurate information.

27. During the Class Period, each of the Individual Defendants was a senior executive and/or director of the Company and was privy to confidential and proprietary information concerning Avaya, its operations, finances, financial condition, revenues, income, earnings and present and future business prospects and regularly received reports regarding the same. As a result of their possession of such information, each of the Individual Defendants knew or recklessly disregarded the fact that Avaya had materially overstated the quality of its financial condition during the Class Period and had not disclosed critical information to the investing public which would have revealed that the Company's prior statements were materially misleading and false. As a result of their Board memberships and/or executive and managerial positions with Avaya, each of the Individual Defendants had access to adverse non-public information about the Company's operations, finances, financial condition, products, revenues, expenses and earnings via access to internal corporate documents, conversations and connections with other corporate officers and employees, and via reports and other information provided to them in connection with the performance of their duties. In light of their possession of such information, each of the Individual Defendants knew or recklessly disregarded the fact that the

reported and expected financial results of Avaya were materially overstated during the Class Period.

28. The Individual Defendants, as a result of their positions of control and authority as officers and/or directors of the Company, were able to and did control the contents of the various quarterly reports, SEC filings, press releases and presentations to securities analysts pertaining to the Company. Each of the Individual Defendants was provided with copies of Avaya's management reports, press releases and SEC filings alleged in this Complaint to be misleading prior to, or shortly after, their issuance, and had the ability and opportunity to prevent their issuance or cause them to be corrected. As a result, each of the Individual Defendants is responsible for the accuracy of the challenged public reports and releases as "group published" information and is, therefore, responsible and liable for the representations contained in those statements.

29. Each of the Individual Defendants is liable as a direct participant in, and a co-conspirator with respect to, the wrongs complained of in this Complaint. In addition, the Individual Defendants, by reason of their status as officers and/or directors of Avaya, had access to material, non-public information, were "controlling persons" within the meaning of Section 20 of the Exchange Act, and had the power and influence to cause the Company to engage in the unlawful conduct complained of in this Complaint. As a result of their positions of control, each of the Individual Defendants were able to, and did, directly or indirectly, control the conduct of Avaya's business, the information contained in its filings with the SEC and public statements about its business.

30. During the Class Period, Defendants, individually and in concert, directly and

indirectly, engaged and participated in a continuous course of conduct to misrepresent the results of Avaya's operations, and to conceal adverse material information regarding the financial condition and results Avaya's operations as specified in this Complaint. Defendants employed devices, schemes, and artifices to defraud, and engaged in acts, practices, and the course of conduct described herein in an effort to increase and maintain an artificially high market price for Avaya common stock and other securities. This included the formulation, making and/or participation in the making of untrue statements of material facts, and the failure to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, which operated as a fraud and deceit upon Plaintiff and the other members of the Class.

31. During the Class Period and with Avaya's securities trading at artificially-inflated prices, the Company completed a new \$400 million, five-year unsecured revolving credit facility. Additionally, the Company's insiders sold 1,946,716 shares for gross proceeds of \$27,573,097, as evidenced by the following chart:

Individual	Date	# of Shares / Price	Proceeds
Donald K. Peterson	11/01/2004	50,000 @ \$14.200	\$710,000.00
	02/04/2005	50,000 @ \$14.129	\$706,450.00
Garry K. McGuire	11/01/2004	20,000 @ \$14.450	\$289,000.00
	11/03/2004	111,760 @ \$14.500	\$1,620,520.00
	12/15/2004	30,000 @ \$16.600	\$498,000.00
	01/03/2005	30,000 @ \$16.930	\$507,900.00
	02/01/2005	30,000 @ \$14.300	\$429,000.00
	03/01/2005	30,000 @ \$14.000	\$420,000.00

Pamela F. Craven, Senior V.P., General Counsel & Secretary	11/01/2004	20,000 @ \$14.450	\$289,000.00
	12/01/2004	46,620 @ \$16.030	\$747,318.60
	01/03/2005	20,000 @ \$17.200	\$344,000.00
	02/01/2005	20,000 @ \$14.300	\$286,000.00
Louis J. D'Ambrosio, Group V.P., Avaya Global Sales, Channels and Marketing	11/01/2004	20,000 @ \$14.450	\$289,000.00
	12/01/2004	50,000 @ \$16.030	\$801,500.00
	01/03/2005	11,805 @ \$17.364	\$204,982.00
	02/01/2005	20,000 @ \$14.300	\$286,000.00
	03/01/2005	50,000 @ \$13.950	\$697,000.00
	04/01/2005	20,000 @ \$11.680	\$233,600.00
Maryanne DiMarzo, Senior V.P., Human Resources	11/01/2004	11,805 @ \$14.450	\$170,582.00
	11/15/2004	300,000 @ \$16.500	\$4,950,000.00
	11/17/2004	382,800 @ \$17.000	\$6,507,600.00
	12/01/2004	38,425 @ \$16.030	\$615,952.75
	12/16/2004	67,200 @ \$14.838	\$997,113.00
	01/03/2005	11,805 @ \$17.364	\$204,982.00
	02/01/2005	11,805 @ \$14.300	\$168,811.50
	03/01/2005	11,805 @ \$13.950	\$164,679.00
	04/01/2005	8,333 @ \$11.680	\$97,329.00
	04/06/2005	3,472 @ \$12.000	\$41,664.00
David P. Johnson, Group V.P., Small & Medium Business Solutions	11/05/2004	31,000 @ \$15.180	\$470,580.00
	11/15/2004	4,496 @ \$16.280	\$73,194.88
	11/17/2004	13,000 @ \$17.000	\$221,000.00
	12/15/2004	49,656 @ \$16.600	\$824,289.00
	12/16/2004	26,000 @ \$17.000	\$442,000.00
	02/01/2005	29,000 @ \$14.300	\$414,700.00
	03/01/2005	25,000 @ 13.950	\$348,750.00
Thomas A. Lesica, Group V.P., Global IT & Business Operations	11/12/2004	50,000 @ \$16.210	\$810,500.00
Michael Thurk, Group V.P., Enterprise Communications Group	11/01/2004	70,833 @ \$14.256	\$1,009,795.20

**NO SAFE HARBOR.**

32. The statutory safe harbor provided for forward-looking statements under certain circumstances does not apply to any of the allegedly false statements pleaded in this Complaint. Many of the specific statements pleaded herein were not identified as “forward-looking statements” when made. To the extent there were any forward-looking statements, there were no meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the purportedly forward-looking statements. Alternatively, to the extent that the statutory safe harbor does apply to any forward-looking statements pleaded herein, Defendants are liable for those false forward-looking statements because at the time each was made, the particular speaker knew that the particular forward-looking statement was false, and/or the particular forward-looking statement was authorized and/or approved by an executive officer of Avaya who knew that those statements were false when made.

**COUNT I  
VIOLATION OF SECTION 10(b) OF THE  
SECURITIES EXCHANGE ACT AND RULE 10b-5 THEREUNDER**

33. Plaintiff incorporates by reference the foregoing paragraphs of this Complaint as if set forth herein at length.

34. Throughout the Class Period, Defendants, singly and in concert, directly or indirectly, engaged in a common plan, scheme and course of conduct described herein, pursuant to which they knowingly or recklessly engaged in acts, transactions, practices and a course of conduct which operated as a fraud upon Plaintiff and the other members of the Class; made various false statements of material facts and omitted material facts to make the statements made not misleading to Plaintiff and the other members of the Class, and employed manipulative or

deceptive devices and contrivances in connection with the purchase and sale of Avaya common stock and other securities.

35. The Individual Defendants, as executive officers and/or directors of Avaya, had actual knowledge of the falsity of the material statements set forth above, and intended to deceive Plaintiff and the other members of the Class, or, in the alternative, acted with reckless disregard for the truth by failing to ascertain and disclose the true facts in the statements made by them or other Avaya personnel to the SEC and the investing public, including Plaintiff and other members of the Class.

36. The facts alleged herein compel a strong inference that the Defendants made material false and misleading statements to the investing public with scienter, in that the Defendants knew that the public statements issued or disseminated in the name of the Company were materially false and misleading; knew or recklessly disregarded that such statements would be issued or disseminated to the investing public; and knowingly and substantially participated or acquiesced in the issuance or dissemination of such statements as primary violations of the federal securities laws.

37. As a result of the foregoing, the market price of Avaya securities was artificially inflated during the Class Period. In ignorance of the falsity of the reports and statements, and the deceptive and manipulative devices and contrivances employed by the Defendants, Plaintiff and the other members of the Class reasonably relied, to their detriment, on the reports and statements described above and/or the integrity of the market price of Avaya securities during the Class Period when purchasing the Company's securities at prices which were artificially inflated as a result of the Defendants' false and misleading statements.

38. Had Plaintiff and the other members of the Class known of the material adverse information which the Defendants failed to disclose and/or misrepresented, they would not have purchased Avaya securities at the artificially inflated prices that they did.

39. Defendants' dissemination of this false and misleading material information, and their failure to disclose material information that rendered their other statements false and misleading, served only to harm Plaintiff and the other members of the Class who purchased Avaya securities, in ignorance of the financial risk to them as a result of such false and misleading information.

40. As a direct and proximate result of the wrongful conduct alleged herein, Plaintiff and other members of the Class have suffered damages in an amount to be established at trial.

41. By reason of the foregoing, Defendants have violated Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder and are liable to Plaintiff and the other members of the Class for the substantial damages which they suffered in connection with their purchase of Avaya securities during the Class Period.

**COUNT II**  
**VIOLATION OF SECTION 20(a)**  
**OF THE SECURITIES EXCHANGE ACT**

42. Plaintiff incorporates by reference the foregoing paragraphs of this Complaint as if set forth herein at length.

43. During the Class Period, each of the Individual Defendants, by virtue of his office and/or directorship of Avaya and his specific acts, was a controlling person of the Company within the meaning of Section 20(a) of the Exchange Act.

44. Each of the Individual Defendants' positions made them privy to, and provided

them with actual knowledge of, the material facts that Avaya misrepresented and/or concealed from Plaintiff and the other members of the Class during the Class Period.

45. Each of the Individual Defendants had the power and influence, and exercised the same, to cause Avaya to engage in the unlawful conduct and practices complained of herein by causing the Company to disseminate the false and misleading information identified above.

46. By virtue of the foregoing, the Individual Defendants have violated Section 20(a) of the Exchange Act.

47. By virtue of the conduct described above, the Individual Defendants are liable to Plaintiff and the other members of the Class for the substantial damages that they have suffered in connection with their purchase of Avaya common stock and other securities during the Class Period.

WHEREFORE, Plaintiff, on behalf of himself and the other members of the Class, demands judgment against Defendants as follows:

- a. Determining that this action is properly maintainable as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure;
- b. Certifying Plaintiff as the Class Representative and his counsel as Counsel for the Class;
- c. Declaring and determining that the Defendants violated the federal securities laws by reason of their conduct as alleged herein;
- d. Awarding monetary damages against all of the Defendants;
- e. Awarding Plaintiff the costs, expenses, and disbursements incurred in prosecuting this action, including reasonable attorneys' fees and other recoverable expenses of

litigation; and

f. Awarding Plaintiff and the other members of the Class such other and further relief as the Court may deem appropriate and just under all of the circumstances.

**JURY DEMAND**

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff demands a trial by jury in this action for all claims against all Defendants.

Dated: May 9, 2005

Respectfully submitted,

**SHEPHERD, FINKELMAN, MILLER &  
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