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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

_____, Individually and on Behalf of
All Others Similarly Situated,

Plaintiff,

v.

NETAPP, INC., GEORGE KURIAN, and
RONALD J. PASEK,

Defendants.

Case No. DRAFT

**CLASS ACTION COMPLAINT FOR
VIOLATIONS OF THE FEDERAL
SECURITIES LAWS**

Law Offices of Howard G. Smith

1 Plaintiff _____ (“Plaintiff”), individually and on behalf of all others similarly
2 situated, by and through his attorneys, alleges the following upon information and belief, except as
3 to those allegations concerning Plaintiff, which are alleged upon personal knowledge. Plaintiff’s
4 information and belief is based upon, among other things, his counsel’s investigation, which
5 includes without limitation: (a) review and analysis of regulatory filings made by NetApp, Inc.
6 (“NetApp” or the “Company”) with the United States (“U.S.”) Securities and Exchange
7 Commission (“SEC”); (b) review and analysis of press releases and media reports issued by and
8 disseminated by NetApp; and (c) review of other publicly available information concerning
9 NetApp.

10 **NATURE OF THE ACTION AND OVERVIEW**

11 1. This is a class action on behalf of persons and entities that purchased or otherwise
12 acquired NetApp securities between May 22, 2019 and August 1, 2019, inclusive (the “Class
13 Period”), seeking to pursue remedies under the Securities Exchange Act of 1934 (the “Exchange
14 Act”).

15 2. NetApp provides a range of hybrid cloud data services that simplify management
16 of applications and data across cloud and on-premises environments to accelerate digital
17 transformation.

18 3. On August 1, 2019, after the market closed, the Company reported preliminary first
19 quarter 2019 adjusted earnings per share of \$0.55 to \$0.60, below the average estimate of \$0.83,
20 and net revenue of \$1.22 billion to \$1.23 billion, below the average estimate of \$1.39 billion.
21 Additionally, the Company lowered its 2020 outlook and expected net revenue to decline between
22 5% and 10% year-over-year.

23 4. On this news, the Company’s share price fell as much as \$11.67, or over 20%, to
24 close at \$46.04 per share on August 2, 2019, on unusually heavy trading volume.

25 5. Throughout the Class Period, Defendants made materially false and/or misleading
26 statements, as well as failed to disclose material adverse facts about the Company’s business,
27 operations, and prospects. Specifically, Defendants failed to disclose to investors: (1) that the
28 Company was unable to close large deals within the quarter and that the deals were pushed out to

1 subsequent quarters or downsized; (2) that, as a result, the Company's revenue would be
2 materially impacted; and (3) that, as a result of the foregoing, Defendants' positive statements
3 about the Company's business, operations, and prospects were materially misleading and/or
4 lacked a reasonable basis.

5 6. As a result of Defendants' wrongful acts and omissions, and the precipitous decline
6 in the market value of the Company's securities, Plaintiff and other Class members have suffered
7 significant losses and damages.

8 **JURISDICTION AND VENUE**

9 7. The claims asserted herein arise under Sections 10(b) and 20(a) of the Exchange
10 Act (15 U.S.C. §§ 78j(b) and 78t(a)) and Rule 10b-5 promulgated thereunder by the SEC (17
11 C.F.R. § 240.10b-5).

12 8. This Court has jurisdiction over the subject matter of this action pursuant to 28
13 U.S.C. § 1331 and Section 27 of the Exchange Act (15 U.S.C. § 78aa).

14 9. Venue is proper in this Judicial District pursuant to 28 U.S.C. § 1391(b) and
15 Section 27 of the Exchange Act (15 U.S.C. § 78aa(c)). Substantial acts in furtherance of the
16 alleged fraud or the effects of the fraud have occurred in this Judicial District. Many of the acts
17 charged herein, including the dissemination of materially false and/or misleading information,
18 occurred in substantial part in this Judicial District. In addition, the Company's principal
19 executive offices are located in this district.

20 10. In connection with the acts, transactions, and conduct alleged herein, Defendants
21 directly and indirectly used the means and instrumentalities of interstate commerce, including the
22 United States mail, interstate telephone communications, and the facilities of a national securities
23 exchange.

24 **PARTIES**

25 11. Plaintiff _____, as set forth in the accompanying certification,
26 incorporated by reference herein, purchased NetApp securities during the Class Period, and
27 suffered damages as a result of the federal securities law violations and false and/or misleading
28 statements and/or material omissions alleged herein.

- 1 • **Net Revenues:** \$6.15 billion, increased 4% year-over-year from \$5.92 billion in
2 fiscal 2018
- 3 • **Net Income:** GAAP net income of \$1.17 billion, compared to GAAP net
4 income of \$116 million** in fiscal 2018; non-GAAP net income of \$1.17
5 billion, compared to non-GAAP net income of \$983 million in fiscal 2018
- 6 • **Earnings per Share:** GAAP net income per share of \$4.51, compared to
7 GAAP net income per share of \$0.42** in fiscal 2018; non-GAAP net income
8 per share of \$4.52, compared to non-GAAP net income per share of \$3.56 in
9 fiscal 2018
- 10 • **Cash from Operations:** \$1.34 billion, compared to \$1.48 billion in fiscal year
11 2018
- 12 • **Share Repurchase and Dividend:** Returned \$2.5 billion to shareholders
13 through share repurchases and cash dividends

14 18. On June 18, 2019, the Company filed its annual report on Form 10-K for the period
15 ended April 26, 2019 (the “2019 10-K”), affirming the previously reported financial results.
16 Moreover, as to risks impacting the business, the Company stated, in relevant part:

17 *A portion of our revenues is generated by large, recurring purchases from*
18 *various customers, resellers and distributors. A loss, cancellation or delay in*
19 *purchases by any of these parties has negatively affected our revenues in the*
20 *past, and could negatively affect our revenues in the future.*

21 A significant portion of our net revenues are generated through sales to a limited
22 number of customers and distributors. We generally do not enter into binding
23 purchase commitments with our customers, resellers and distributors for extended
24 periods of time, and thus there is no guarantee we will continue to receive large,
25 recurring orders from these customers, resellers or distributors. For example, our
26 reseller agreements generally do not require minimum purchases, and our
27 customers, resellers and distributors can stop purchasing and marketing our
28 products at any time. In addition, unfavorable economic conditions may negatively
impact the solvency of our customers, resellers and distributors or the ability of
such customers, resellers and distributors to obtain credit to finance purchases of
our products. If any of our key customers, resellers or distributors changes its
pricing practices, reduces the size or frequency of its orders for our products, or
stops purchasing our products altogether, our operating results and financial
condition could be materially adversely impacted.

19. The above statements identified in ¶¶17-18 were materially false and/or misleading,
and failed to disclose material adverse facts about the Company’s business, operations, and
prospects. Specifically, Defendants failed to disclose to investors: (1) that the Company was
unable to close large deals within the quarter and that the deals were pushed out to subsequent

1 quarters or downsized; (2) that, as a result, the Company's revenue would be materially impacted;
2 and (3) that, as a result of the foregoing, Defendants' positive statements about the Company's
3 business, operations, and prospects were materially misleading and/or lacked a reasonable basis.

4 **Disclosures at the End of the Class Period**

5 20. On August 1, 2019, after the market closed, the Company reported preliminary first
6 quarter 2020 net revenue between \$1.22 and \$1.23 billion, below previous guidance between
7 \$1.315 to \$1.465 billion, and earnings per share between \$0.30 and \$0.35, below previous
8 guidance between \$0.56 to \$0.64. Additionally, the Company lowered its 2020 outlook and
9 expected net revenue to decline between 5% and 10% year-over-year.

10 21. On a conference call held the same day, Defendant Kurian elaborated:

11 We were largely on track to meet our guidance until the second half of the quarter.
12 We then saw a deterioration in our close rates against the pipeline with deals both
13 getting pushed out or downsized, especially in our largest global customers and the
14 Americas. While we believe it is taking longer than anticipated for our largest
15 customers to absorb capacity buys from last year, it's also increasingly clear that the
16 macro outlook at enterprises geared to the global economy has taken a negative
17 turn.

18 22. On this news, the Company's share price fell as much as \$11.67, or over 20%, to
19 close at \$46.04 per share on August 2, 2019, on unusually heavy trading volume.

20 **DEFENDANTS KURIAN AND PASEK SUSPICIOUS STOCK SALES SUPPORT**
21 **SCIENTER**

22 23. Defendants Kurian and Pasek took advantage of the artificially inflated price of
23 NetApp stock resulting from the false statements by selling a significant amount of his personally
24 held shares in the days and weeks following May 22, 2019 disclosures of the Company's financial
25 results.

26 24. Defendant Kurian made the following stock sales during the Class Period:

Date	Shares Sold	Price	Total Proceeds
06/01/19	29,139	\$59.20	\$1,725,029

1 29. Plaintiff's claims are typical of the claims of the members of the Class as all
2 members of the Class are similarly affected by Defendants' wrongful conduct in violation of
3 federal law that is complained of herein.

4 30. Plaintiff will fairly and adequately protect the interests of the members of the Class
5 and has retained counsel competent and experienced in class and securities litigation.

6 31. Common questions of law and fact exist as to all members of the Class and
7 predominate over any questions solely affecting individual members of the Class. Among the
8 questions of law and fact common to the Class are:

9 (a) whether the federal securities laws were violated by Defendants' acts as alleged
10 herein;

11 (b) whether statements made by Defendants to the investing public during the Class
12 Period omitted and/or misrepresented material facts about the business, operations, and prospects
13 of NetApp; and

14 (c) to what extent the members of the Class have sustained damages and the proper
15 measure of damages.

16 32. A class action is superior to all other available methods for the fair and efficient
17 adjudication of this controversy since joinder of all members is impracticable. Furthermore, as the
18 damages suffered by individual Class members may be relatively small, the expense and burden of
19 individual litigation makes it impossible for members of the Class to individually redress the
20 wrongs done to them. There will be no difficulty in the management of this action as a class
21 action.

22 **UNDISCLOSED ADVERSE FACTS**

23 33. The market for NetApp's securities was open, well-developed and efficient at all
24 relevant times. As a result of these materially false and/or misleading statements, and/or failures
25 to disclose, NetApp's securities traded at artificially inflated prices during the Class Period.
26 Plaintiff and other members of the Class purchased or otherwise acquired NetApp's securities
27 relying upon the integrity of the market price of the Company's securities and market information
28 relating to NetApp, and have been damaged thereby.

1 materially false and/or misleading; knew that such statements or documents would be issued or
2 disseminated to the investing public; and knowingly and substantially participated or acquiesced
3 in the issuance or dissemination of such statements or documents as primary violations of the
4 federal securities laws. As set forth elsewhere herein in detail, the Individual Defendants, by
5 virtue of their receipt of information reflecting the true facts regarding NetApp, their control over,
6 and/or receipt and/or modification of NetApp's allegedly materially misleading misstatements
7 and/or their associations with the Company which made them privy to confidential proprietary
8 information concerning NetApp, participated in the fraudulent scheme alleged herein.

9 **APPLICABILITY OF PRESUMPTION OF RELIANCE**

10 **(FRAUD-ON-THE-MARKET DOCTRINE)**

11 39. The market for NetApp's securities was open, well-developed and efficient at all
12 relevant times. As a result of the materially false and/or misleading statements and/or failures to
13 disclose, NetApp's securities traded at artificially inflated prices during the Class Period. On May
14 22, 2019, the Company's share price closed at a Class Period high of \$67.10 per share. Plaintiff
15 and other members of the Class purchased or otherwise acquired the Company's securities relying
16 upon the integrity of the market price of NetApp's securities and market information relating to
17 NetApp, and have been damaged thereby.

18 40. During the Class Period, the artificial inflation of NetApp's shares was caused by
19 the material misrepresentations and/or omissions particularized in this Complaint causing the
20 damages sustained by Plaintiff and other members of the Class. As described herein, during the
21 Class Period, Defendants made or caused to be made a series of materially false and/or misleading
22 statements about NetApp's business, prospects, and operations. These material misstatements
23 and/or omissions created an unrealistically positive assessment of NetApp and its business,
24 operations, and prospects, thus causing the price of the Company's securities to be artificially
25 inflated at all relevant times, and when disclosed, negatively affected the value of the Company
26 shares. Defendants' materially false and/or misleading statements during the Class Period resulted
27 in Plaintiff and other members of the Class purchasing the Company's securities at such
28 artificially inflated prices, and each of them has been damaged as a result.

1 41. At all relevant times, the market for NetApp’s securities was an efficient market for
2 the following reasons, among others:

3 (a) NetApp shares met the requirements for listing, and was listed and actively traded
4 on the NASDAQ, a highly efficient and automated market;

5 (b) As a regulated issuer, NetApp filed periodic public reports with the SEC and/or the
6 NASDAQ;

7 (c) NetApp regularly communicated with public investors via established market
8 communication mechanisms, including through regular dissemination of press releases on the
9 national circuits of major newswire services and through other wide-ranging public disclosures,
10 such as communications with the financial press and other similar reporting services; and/or

11 (d) NetApp was followed by securities analysts employed by brokerage firms who
12 wrote reports about the Company, and these reports were distributed to the sales force and certain
13 customers of their respective brokerage firms. Each of these reports was publicly available and
14 entered the public marketplace.

15 42. As a result of the foregoing, the market for NetApp’s securities promptly digested
16 current information regarding NetApp from all publicly available sources and reflected such
17 information in NetApp’s share price. Under these circumstances, all purchasers of NetApp’s
18 securities during the Class Period suffered similar injury through their purchase of NetApp’s
19 securities at artificially inflated prices and a presumption of reliance applies.

20 43. A Class-wide presumption of reliance is also appropriate in this action under the
21 Supreme Court’s holding in *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972),
22 because the Class’s claims are, in large part, grounded on Defendants’ material misstatements
23 and/or omissions. Because this action involves Defendants’ failure to disclose material adverse
24 information regarding the Company’s business operations and financial prospects—information
25 that Defendants were obligated to disclose—positive proof of reliance is not a prerequisite to
26 recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable
27 investor might have considered them important in making investment decisions. Given the
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1 importance of the Class Period material misstatements and omissions set forth above, that
2 requirement is satisfied here.

3 **NO SAFE HARBOR**

4 44. The statutory safe harbor provided for forward-looking statements under certain
5 circumstances does not apply to any of the allegedly false statements pleaded in this Complaint.
6 The statements alleged to be false and misleading herein all relate to then-existing facts and
7 conditions. In addition, to the extent certain of the statements alleged to be false may be
8 characterized as forward looking, they were not identified as “forward-looking statements” when
9 made and there were no meaningful cautionary statements identifying important factors that could
10 cause actual results to differ materially from those in the purportedly forward-looking statements.
11 In the alternative, to the extent that the statutory safe harbor is determined to apply to any forward-
12 looking statements pleaded herein, Defendants are liable for those false forward-looking
13 statements because at the time each of those forward-looking statements was made, the speaker
14 had actual knowledge that the forward-looking statement was materially false or misleading,
15 and/or the forward-looking statement was authorized or approved by an executive officer of
16 NetApp who knew that the statement was false when made.

17 **FIRST CLAIM**

18 **Violation of Section 10(b) of The Exchange Act and**
19 **Rule 10b-5 Promulgated Thereunder**
20 **Against All Defendants**

21 45. Plaintiff repeats and re-alleges each and every allegation contained above as if fully
22 set forth herein.

23 46. During the Class Period, Defendants carried out a plan, scheme and course of
24 conduct which was intended to and, throughout the Class Period, did: (i) deceive the investing
25 public, including Plaintiff and other Class members, as alleged herein; and (ii) cause Plaintiff and
26 other members of the Class to purchase NetApp’s securities at artificially inflated prices. In
27 furtherance of this unlawful scheme, plan and course of conduct, Defendants, and each defendant,
28 took the actions set forth herein.

1 47. Defendants (i) employed devices, schemes, and artifices to defraud; (ii) made
2 untrue statements of material fact and/or omitted to state material facts necessary to make the
3 statements not misleading; and (iii) engaged in acts, practices, and a course of business which
4 operated as a fraud and deceit upon the purchasers of the Company's securities in an effort to
5 maintain artificially high market prices for NetApp's securities in violation of Section 10(b) of the
6 Exchange Act and Rule 10b-5. All Defendants are sued either as primary participants in the
7 wrongful and illegal conduct charged herein or as controlling persons as alleged below.

8 48. Defendants, individually and in concert, directly and indirectly, by the use, means
9 or instrumentalities of interstate commerce and/or of the mails, engaged and participated in a
10 continuous course of conduct to conceal adverse material information about NetApp's financial
11 well-being and prospects, as specified herein.

12 49. Defendants employed devices, schemes and artifices to defraud, while in
13 possession of material adverse non-public information and engaged in acts, practices, and a course
14 of conduct as alleged herein in an effort to assure investors of NetApp's value and performance
15 and continued substantial growth, which included the making of, or the participation in the making
16 of, untrue statements of material facts and/or omitting to state material facts necessary in order to
17 make the statements made about NetApp and its business operations and future prospects in light
18 of the circumstances under which they were made, not misleading, as set forth more particularly
19 herein, and engaged in transactions, practices and a course of business which operated as a fraud
20 and deceit upon the purchasers of the Company's securities during the Class Period.

21 50. Each of the Individual Defendants' primary liability and controlling person liability
22 arises from the following facts: (i) the Individual Defendants were high-level executives and/or
23 directors at the Company during the Class Period and members of the Company's management
24 team or had control thereof; (ii) each of these defendants, by virtue of their responsibilities and
25 activities as a senior officer and/or director of the Company, was privy to and participated in the
26 creation, development and reporting of the Company's internal budgets, plans, projections and/or
27 reports; (iii) each of these defendants enjoyed significant personal contact and familiarity with the
28 other defendants and was advised of, and had access to, other members of the Company's

1 management team, internal reports and other data and information about the Company's finances,
2 operations, and sales at all relevant times; and (iv) each of these defendants was aware of the
3 Company's dissemination of information to the investing public which they knew and/or
4 recklessly disregarded was materially false and misleading.

5 51. Defendants had actual knowledge of the misrepresentations and/or omissions of
6 material facts set forth herein, or acted with reckless disregard for the truth in that they failed to
7 ascertain and to disclose such facts, even though such facts were available to them. Such
8 defendants' material misrepresentations and/or omissions were done knowingly or recklessly and
9 for the purpose and effect of concealing NetApp's financial well-being and prospects from the
10 investing public and supporting the artificially inflated price of its securities. As demonstrated by
11 Defendants' overstatements and/or misstatements of the Company's business, operations, financial
12 well-being, and prospects throughout the Class Period, Defendants, if they did not have actual
13 knowledge of the misrepresentations and/or omissions alleged, were reckless in failing to obtain
14 such knowledge by deliberately refraining from taking those steps necessary to discover whether
15 those statements were false or misleading.

16 52. As a result of the dissemination of the materially false and/or misleading
17 information and/or failure to disclose material facts, as set forth above, the market price of
18 NetApp's securities was artificially inflated during the Class Period. In ignorance of the fact that
19 market prices of the Company's securities were artificially inflated, and relying directly or
20 indirectly on the false and misleading statements made by Defendants, or upon the integrity of the
21 market in which the securities trades, and/or in the absence of material adverse information that
22 was known to or recklessly disregarded by Defendants, but not disclosed in public statements by
23 Defendants during the Class Period, Plaintiff and the other members of the Class acquired
24 NetApp's securities during the Class Period at artificially high prices and were damaged thereby.

25 53. At the time of said misrepresentations and/or omissions, Plaintiff and other
26 members of the Class were ignorant of their falsity, and believed them to be true. Had Plaintiff
27 and the other members of the Class and the marketplace known the truth regarding the problems
28 that NetApp was experiencing, which were not disclosed by Defendants, Plaintiff and other

1 members of the Class would not have purchased or otherwise acquired their NetApp securities, or,
2 if they had acquired such securities during the Class Period, they would not have done so at the
3 artificially inflated prices which they paid.

4 54. By virtue of the foregoing, Defendants violated Section 10(b) of the Exchange Act
5 and Rule 10b-5 promulgated thereunder.

6 55. As a direct and proximate result of Defendants' wrongful conduct, Plaintiff and the
7 other members of the Class suffered damages in connection with their respective purchases and
8 sales of the Company's securities during the Class Period.

9 **SECOND CLAIM**

10 **Violation of Section 20(a) of The Exchange Act**
11 **Against the Individual Defendants**

12 56. Plaintiff repeats and re-alleges each and every allegation contained above as if fully
13 set forth herein.

14 57. Individual Defendants acted as controlling persons of NetApp within the meaning
15 of Section 20(a) of the Exchange Act as alleged herein. By virtue of their high-level positions and
16 their ownership and contractual rights, participation in, and/or awareness of the Company's
17 operations and intimate knowledge of the false financial statements filed by the Company with the
18 SEC and disseminated to the investing public, Individual Defendants had the power to influence
19 and control and influence and control, directly or indirectly, the decision-making of the
20 Company, including the content and dissemination of the various statements which Plaintiff
21 contends are false and misleading. Individual Defendants were provided with or had unlimited
22 access to copies of the Company's reports, press releases, public filings, and other statements
23 alleged by Plaintiff to be misleading prior to and/or shortly after these statements were issued and
24 had the ability to prevent the issuance of the statements or cause the statements to be corrected.

25 58. In particular, Individual Defendants had direct and supervisory involvement in the
26 day-to-day operations of the Company and, therefore, had the power to control or influence the
27 particular transactions giving rise to the securities violations as alleged herein, and exercised the
28 same.

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JURY TRIAL DEMANDED

Plaintiff hereby demands a trial by jury.

DATED: _____, 2019 **GLANCY PRONGAY & MURRAY LLP**

By: DRAFT

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