

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

**IN RE NORTEL NETWORKS CORP.  
SECURITIES LITIGATION**

**: NO. 01 CIV. 1855 (RMB)**

**THIS DOCUMENT RELATES TO:  
ALL ACTIONS**

**LEAD PLAINTIFF'S MEMORANDUM OF LAW  
IN SUPPORT OF FINAL APPROVAL  
OF THE PROPOSED NORTEL I CLASS ACTION SETTLEMENT  
AND PROPOSED PLAN OF ALLOCATION**

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**LEAD PLAINTIFF'S MEMORANDUM OF LAW  
IN SUPPORT OF FINAL APPROVAL  
OF THE PROPOSED NORTEL I CLASS ACTION SETTLEMENT  
AND PROPOSED PLAN OF ALLOCATION**

Lead plaintiff, the Ontario Public Service Employees' Union Pension Plan Trust Fund ("Lead Plaintiff"), respectfully requests, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, that this Court grant final approval of the proposed settlement (the "Nortel I Settlement") of this certified class action pursuant to the terms of a Stipulation and Agreement of Settlement dated June 20, 2006 (the "Stipulation") entered between Lead Plaintiff, on behalf of itself and the Class, and defendant Nortel Networks Corporation ("Nortel"). The Class, as certified herein pursuant to this Court's September 5, 2003 Decision and Order on Class Certification, includes "all persons and entities who, during the period October 24, 2000 and continuing through and including February 15, 2001 [(the "Nortel I Class Period")] purchased Nortel common stock or call options or sold Nortel put options, and who suffered damages thereby, including but not limited, to those persons who traded in Nortel securities on the New York Stock Exchange and/or the Toronto Stock Exchange." *In re Nortel Networks Corp. Sec. Litig. ("Nortel I")*, No. 01-1855, 2003 U.S. Dist. LEXIS 15702, at \*2-4 (S.D.N.Y. Sept. 5, 2003). The Nortel I Settlement will provide the Class with a cash settlement fund in the initial amount<sup>1</sup> of \$438,667,428 (US\$) and 314,333,875 shares of Nortel common stock. As of June 30, 2006<sup>2</sup>

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<sup>1</sup> The cash portion of the settlement has been deposited in escrow and is already earning interest for the benefit of the Class.

<sup>2</sup> As of June 30, 2006 Nortel common stock had a NYSE closing price of \$2.24 making the value of the Settlement Shares approximately \$704 million.

the total value of the cash and stock being provided by the proposed Nortel I Settlement was some \$1.142 billion (US\$).<sup>3</sup>

Simultaneously herewith, Nortel is also settling a separate federal securities law action (the “Nortel II Action”) relating to a separate and later class period, April 24, 2003 through April 27, 2004 (the “Nortel II Class Period”). The Nortel I Settlement is conditioned upon approval of the settlements of both the Nortel I Action and the Nortel II Action in the Southern District of New York, as well as certain actions pending in courts in Ontario, Quebec and British Columbia (the “Canadian Actions”). The Canadian Actions involve allegations similar to those contained in the Nortel I Action or the Nortel II Action but with respect to Classes limited to persons resident in Canadian jurisdictions. Unless waived by Nortel, the Settlements must be approved by all such courts because a judgment adverse to Nortel in either the Nortel I Action or the Nortel II Action could potentially devastate Nortel. The Classes in the Canadian actions are essentially subclasses of either the Nortel I Class or the Nortel II Class. Members of the Nortel I Canadian Classes<sup>4</sup> may participate in the Settlement on exactly the same basis as all other Nortel I Class Members.<sup>5</sup>

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<sup>3</sup> The terms of the Nortel I Settlement also require Nortel to adopt substantial corporate governance reforms, and to contribute to the Nortel I Class 25% of any recovery it obtains from Nortel’s ongoing lawsuit against certain Nortel executives who were terminated for cause in 2004.

<sup>4</sup> The definitions of the Classes certified for settlement purposes in the Canadian Actions do not include the limitation “and suffered damages thereby.” Thus the Canadian Classes may include persons who were not damaged by their purchase of Nortel securities. Nevertheless, the Plan of Allocation provides that only class members who have suffered damages will have a Recognized Claim and be entitled to share in the Settlement’s proceeds.

<sup>5</sup> The settlement of the Canadian Actions in exchange for their class members’ right to share in the settlement proceeds in the Nortel I or Nortel II Settlement is subject to the approval of the courts where the Canadian Actions are pending, which Canadian courts may award fees to

Lead Plaintiff respectfully submits that the proposed Nortel I Settlement is an outstanding result for the Class herein and merits final approval. The reasons to approve the Settlement are set forth herein and in the accompanying: Joint Declaration of Lead Counsel in Support of Proposed Settlement and Motion for an Award of Attorneys' Fees and Reimbursement of Expenses<sup>6</sup> (the "Joint Declaration"); Declaration of Heather Gavin, Chief Administrative Officer and Plan Manager of the Ontario Public Service Employees' Union Pension Plan Trust Fund, in Support of Final Approval of Settlement and Award of Attorneys' Fees and Reimbursement of Expenses (the "Gavin Declaration"); the Joint Declaration of David C. Light, Managing Director of Duff & Phelps LLC, and Joseph E. Mullin, Assistant Vice President of WL Ross & Co. LLC in Support of Final Approval of Settlement and Award of Attorneys' Fees and Reimbursement of Expenses (the "Investment Bankers Declaration"); the Declaration of Jane D. Nettesheim in Support of Approval of Proposed Plan of Allocation for Proceeds of Settlement of Nortel I Action (the "Nettesheim Declaration"); and the Affidavit of Neil Zola Regarding the Mailing of the Nortel I Settlement Notice and Proof of Claim Form (the "Zola Affidavit of Mailing"); filed concurrently herewith.

### **PRELIMINARY STATEMENT**

Defendant Nortel was a leading global supplier of networking solutions and services that support the Internet and other public and private data, voice, and video networks using wireless

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Canadian Plaintiffs' Counsel, which fees will be payable out of the proceeds of the Nortel I and/or Nortel II Settlements.

<sup>6</sup> The petition for attorneys' fees and reimbursement of expenses is addressed in the accompanying Memorandum of Law in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Expenses (the "Fee Memorandum") and in the Compendium of Affidavits or Declarations of Plaintiff Counsel in Support of Lead Plaintiff's Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Expenses (the "Compendium").

and wireline technologies. Defendant Roth was Nortel's Chief Executive Officer ("CEO"), President, and a Director of Nortel; Defendant Chandran was the Chief Operating Officer ("COO") of Nortel; and Defendant Dunn was the Chief Financial Officer ("CFO") of Nortel.

The operative Complaint alleges that, during the Class Period, Defendants knowingly or recklessly issued a series of materially false and misleading statements and engaged in a variety of accounting manipulations in violation of generally accepted accounting principles ("GAAP") that: (i) overstated Nortel's reported third quarter and year-end 2000 revenues and earnings; and (ii) falsely represented and reassured the investing public that, despite a massive contraction and retrenchment of the Internet and telecommunications sectors in the United States, Nortel's strong growth, revenues and earnings trends would continue through 2001 without any significant interruption. Joint Declaration ¶¶ 11 - 26.

The Complaint further alleges that, as a result of the misstatements and omissions, the price of Nortel's common stock traded at artificially inflated prices during the Nortel I Class Period, until after the close of trading on February 15, 2001, when Defendants issued a press release over the *Business Wire*, dramatically lowering the Company's guidance for the first quarter and fiscal year 2001. Following the press release, Nortel's stock price dropped dramatically. The Complaint alleges that Class Members who purchased at the artificially inflated prices suffered damages by reason of Defendants' conduct and that Defendants are liable to the Lead Plaintiff and the Nortel I Class under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 promulgated thereunder. Joint Declaration ¶ 27.

The history of the litigation proceedings, including Defendants' unsuccessful motion to dismiss the Complaint, Lead Plaintiff's successful motion for Class certification, Lead Plaintiff's successful efforts to obtain document and deposition discovery in the United States and Canada,

including Lead Plaintiff's successful efforts before the Ontario Superior Court and the Ontario Court of Appeal to enforce Letters Rogatory on Deloitte Canada, the review and analysis of almost 2 million pages of discovered documents, and the extended and complicated negotiations with respect to the Settlement, is described at some length in the accompanying Joint Declaration and will not be further repeated here. Joint Declaration ¶¶ 28 - 76.

Prior to entering the Nortel I Settlement, Lead Plaintiff – who was opposed throughout by able and pre-eminent defense counsel (Shearman & Sterling LLP) – had a solid understanding of the risks and critical issues involved in this litigation prior to entering into serious settlement discussions with Defendants. While Lead Plaintiff was confident of the merits of its claims, it recognized that there were serious risks to establishing liability and damages, and that these issues would be vigorously disputed and would be the subject of a “battle of experts” at trial or on a Defendants’ motion for summary judgment. Lead Plaintiff further realized that, even if it prevailed at trial, additional risks lurked in potential post-trial motions and likely appeals. Success at trial, moreover, offered no guarantee of any larger ultimate recovery given Defendants’ limited ability to pay and the competing claims of the Nortel II Class.

The Settlement negotiations were vigorous and protracted, and were complicated by the need to deal with the competing claims of the Nortel II Class and the pendency of actions in Canadian Jurisdictions purporting to cover parts of the Class certified herein. The Settlement negotiations benefited from the guidance of the Honorable Robert W. Sweet of the United States District Court for the Southern District of New York, who acted as a mediator throughout allocation and settlement negotiations.

The proposed Settlement is an extraordinary recovery for the Nortel I Class, representing one of the largest recoveries ever achieved in a securities class action. As described in the

Investment Bankers Declaration, the Nortel I and Nortel II Settlements recover from Nortel a substantial portion of its potential ability to pay. The Settlements also include payment to the Classes of essentially all of the insurance that Nortel had during the Nortel I and Nortel II Class Periods.

Accordingly, for all of the reasons set forth below and in the accompanying documents referenced above, Lead Plaintiff respectfully submits that the Nortel I Settlement warrants final approval.

### ARGUMENT

#### **I. THE COURT SHOULD ENTER AN ORDER GRANTING FINAL APPROVAL TO THE PROPOSED NORTEL I SETTLEMENT**

The terms of the proposed Nortel I Settlement were negotiated at arm's-length by experienced Lead Counsel with the active participation of the Lead Plaintiff, which is a sophisticated investor with a large claim, and with the guidance of Senior District Court Judge Robert W. Sweet, who acted as a mediator. The terms of the Settlement itself reflect a superior result in the face of significant challenges and litigation risks and the limited ability of the Defendants to pay. As such, the settlement is fair, reasonable and adequate, and should be approved by the Court.

##### **A. The Proposed Settlement is Fair, Reasonable and Adequate**

In determining whether to grant final approval to a class action settlement, the Court must decide whether a proposed settlement, taken as a whole, is fair, reasonable and adequate.

*D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (citing *Joel A. v. Giuliani*, 218 F.3d 132, 138 (2d Cir. 2000)); *In re Ivan F. Boesky Sec. Litig.*, 948 F.2d 1358, 1368 (2d Cir. 1991); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 360 (S.D.N.Y. 2002) *see also Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir.), *cert denied*, 125 S. Ct. 2277 (2005).

In making its fairness determination, the Court compares “the terms of the compromise with the likely rewards of litigation.” *In re Warner Commc’ns Sec. Litig.*, 618 F. Supp. 735, 740 (S.D.N.Y. 1985), *aff’d*, 798 F.2d 35 (2d Cir. 1986); *see also Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974) (“The court is only called upon to consider and weigh the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable.”) (citation omitted). The Court must therefore ascertain sufficient facts about the settlement to render “an intelligent and objective opinion” about the likelihood of success if a claim is litigated, while simultaneously taking care to avoid conducting a trial on the settlement’s merits. *See Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982) (citations omitted); *Grinnell*, 495 F.2d at 462 (“[t]he Court must eschew any rubber stamp approval in favor of an independent evaluation, yet, at the same time, it must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case”); *In re Paine Webber Ltd. P’ships Litig.*, 171 F.R.D. 104, 124 (S.D.N.Y. 1997) (approval of a settlement is within the Court’s discretion).

Further, courts should be “mindful of the ‘strong judicial policy in favor of settlements, particularly in the class action context.’” *Wal-Mart*, 396 F.3d at 116 (quoting *In re PaineWebber Ltd. P’ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998)). As the Second Circuit has long recognized, there “are weighty justifications, such as the reduction of litigation and related expenses, for the general policy favoring the settlement of litigation.” *Weinberger*, 698 F.2d at 73 (citation omitted). Pursuant to the PSLRA, moreover, a settlement reached under the supervision of an appropriately selected Lead Plaintiff is entitled to an even greater presumption of reasonableness. As stated in the Senate Committee Report issued in support of the PSLRA, as cited in *Greebel v. FTP Software, Inc.*, 939 F. Supp. 57, 63-64 (D. Mass. 1996) *aff’d*, 194 F.3d

185 (1st Cir. Mass. 1999): “Institutions with large stakes in class actions share much the same interests as the plaintiff class generally; thus, courts could be more confident settlements negotiated under the supervision of institutional plaintiffs were ‘fair and reasonable’....” (citation omitted).

The factors that courts in this Circuit typically consider when evaluating settlements (the “*Grinnell* factors”) include:

1. the complexity, expense and likely duration of the litigation;
2. the reaction of the class to the settlement;
3. the stage of the proceedings and the amount of discovery completed;
4. the risks of establishing liability;
5. the risks of establishing damages;
6. the risks of maintaining the class action through the trial;
7. the ability of the defendants to withstand a greater judgment;
8. the range of reasonableness of the settlement fund in light of the best possible recovery; [and]
9. the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

*Wal-Mart*, 396 F.3d at 117 (quoting *Grinnell*, 495 F.2d at 463); *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 61 (S.D.N.Y. 2003). As discussed below, when assessed in light of the applicable criteria, the Nortel I Settlement is plainly fair, reasonable and adequate, and should be granted final approval.

**1. The Complexity, Expense and Likely Duration of the Litigation**

Due to its notorious complexity, securities class action litigation is often resolved by settlement, which circumvents the difficulty and uncertainty inherent in long, costly trials. See, e.g., *Hicks v. Stanley*, No. 01-10071 2005 WL 2757792, at \*6 (S.D.N.Y. Oct. 24, 2005); *In re*

*Am. Bank Note Holographics, Inc. Sec. Litig.*, 127 F.Supp. 2d 418, 424 (S.D.N.Y. 2001); *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 281 (S.D.N.Y. 1999). As described more fully in the accompanying Joint Declaration, this action involved numerous complex and difficult issues with regard to jurisdiction, liability, causation and proof of damages. Among other challenges, Plaintiffs would have to prove that Nortel's forward guidance and accounting were materially false and misleading (which would, in turn, have depended heavily on the complexities of competing expert accountant testimony and the interpretation of various provisions of GAAP), and that Nortel and the Individual Defendants acted with *scienter* (i.e. knowingly or with conscious recklessness) in issuing false guidance and violating GAAP (i.e. rather than as a result of mere corporate mismanagement, erroneous business judgment, or good faith misapplication of relevant accounting standards). See Joint Declaration ¶¶ 89-93.

In addition to the complex issues of fact involved in this case, the legal requirements for recovery under the securities laws presented considerable challenges, particularly with respect to loss causation. See e.g. *Dura Pharm., Inc. v. Broudo.*, 544 U.S. 336 (2005); *Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161, 173 (2d Cir. 2005). As detailed in the Joint Declaration, the difficulties and complexities of issues relating to proof of loss causation and damages were very real in this case. See Joint Declaration at ¶¶ 94-97.

Moreover, the expense of continuing the litigation against Nortel would be substantial. Even leaving aside the enormous cost of completing discovery in this case, Nortel inevitably would have filed a motion for summary judgment. Plaintiffs' response to that motion would have entailed further substantial expenditure of time and effort and in particular expensive expert evidence. Assuming Plaintiffs' claims survived such a motion for summary judgment, trial preparation would have required many additional hours of effort, at great additional expense.

The trial of liability issues alone would have involved substantial attorney and expert time, the introduction of voluminous documentary and deposition evidence, vigorously contested motions, and the considerable expenditure of judicial resources. The “normal” costs of litigation, including copying, travel, depositions, computer support services, and other necessary expenses, are high in any case. In complex class action litigation like the case at bar, those expenses would have imposed a significant burden on any recovery obtained for the Class by Lead Plaintiff’s success, which was by no means assured. See Joint Declaration at ¶¶ 100-102.

Regardless of the outcome of any eventual trial, the case would inevitably have been appealed to the Second Circuit and perhaps even to the U.S. Supreme Court. All of the foregoing would have delayed the ability of the Class to recover for years – assuming arguendo that those courts even affirmed Lead Plaintiff’s and the Class’s entitlement to recovery. Settlement at this juncture plainly results in a substantial and tangible present recovery for the Class, without the attendant risk of delay of continued litigation through foreign discovery, summary judgment, a complex trial, and post-trial proceedings. See Joint Declaration at ¶¶ 102; *Cf. In re Blech Sec. Litig.*, No. 94-7696 (RWS), 2002 U.S. Dist. LEXIS 23170, at \*4 (S.D.N.Y. Nov. 27, 2002) (“It is clear that the complexity, expense and duration of the litigation weigh in favor of the settlement.”).

As such, the “complexity, expense and likely duration of litigation” factor strongly favors approving the Nortel I Settlement.

## **2. The Reaction of the Class to the Settlement**

The deadline for objections to the Settlement is not until September 19, 2006, making it premature to say what the reaction of the Class will be. After that deadline, Lead Plaintiff will report on the reaction of the Class.

### 3. The Stage of Proceedings and the Amount of Discovery Completed

The stage of proceedings and the amount of discovery completed at the time of settlement is relevant to “the parties’ knowledge of the strengths and weaknesses of the various claims in the case, and consequently affects the determination of the settlement’s fairness.” *PaineWebber*, 171 F.R.D. at 126. The further the progress of the case, the better counsel is able to assess its merits. *Warner*, 618 F.Supp. at 745 (“Discovery is fairly advanced and the parties certainly have a clear view of the strengths and weaknesses of their cases.”). The parties, however, need not “have engaged in extensive discovery” as long as they “have engaged in sufficient investigation of the facts to enable the Court to ‘intelligently to make .... an appraisal’ of the Settlement.” *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 176 (S.D.N.Y. 2000) (quoting *Plummer v. Chem. Bank*, 668 F.2d 654, 660 (2d. Cir. 1982)); see also *Am. Bank Note*, 127 F. Supp. 2d at 425-26.

Here, as described more fully in the Joint Declaration, there is no doubt that Lead Plaintiff and Defendants both had gained a solid understanding of the strengths and weaknesses of their respective cases prior to entering into the Stipulation of Settlement. The Nortel I Action has been litigated for over five years. The Complaint has been tested by Defendants’ motion to dismiss and found adequate. Joint Declaration ¶¶ 34 - 40. Lead Plaintiff’s motion for class certification was granted by this Court over Defendants’ vigorous objections. Joint Declaration ¶¶ 41 - 45. Lead Counsel have reviewed almost 2 million pages of documents, and deposed 12 parties and non-parties. Lead Plaintiff has also been deposed and produced its documents to Defendants. Joint Declaration ¶¶ 48 - 64, 103.

The foregoing substantial discovery also adds significant credibility to Lead Plaintiff’s assessment and the assessment of Lead Counsel that the Settlement is fair. *PaineWebber*, 171

F.R.D. at 126 (“Class Counsel has had sufficient information to act intelligently on behalf of the class”) (citations and internal quotations omitted); *In re Lloyd’s Am. Trust Fund Litig.*, No. 96-1262 (RWS), 2002 U.S. Dist. LEXIS 22663, at \*44 (S.D.N.Y. Nov. 26, 2002) (“[g]iven the stage of this case and the extensive discovery conducted. . . Plaintiffs’ counsel is well-positioned to assess the fairness of the proposed settlement.”). Accordingly, this factor also strongly supports approval of the Settlement.

#### 4. Risks of Establishing Liability

One of the Court’s central inquiries when appraising a settlement is the likelihood that the class would prevail at trial in the face of the risks presented by further litigation. *Grinnel* specifically advises courts to consider the risks of establishing liability. 495 F.2d at 463. This inquiry requires courts to consider legal theories and factual situations without the benefit of a fully trial-developed record, thus courts must heed the Supreme Court’s admonition not to “decide the merits of the case or resolve unsettled legal questions.” *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981). Rather, “the Court need only assess the risks of litigation against the certainty of recovery under the proposed settlement.” *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. 2004) (citing *In re Holocaust*, 80 F. Supp. 2d at 177).

As suggested previously, securities litigations typically present highly complex and difficult issues of law and fact. The Nortel I Action certainly is no exception to this general rule. To succeed on its claims under the Securities Exchange Act of 1934 (the “1934 Act”), Lead Plaintiff must establish, among other things, that each Defendant was responsible for an omission or misstatement, that was material, on which plaintiff relied, and that caused damage to the Class, and that Defendants acted with *scienter*. See *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438 (1976); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976); *Am. Bank Note*, 127 F. Supp. 2d at 426 (recognizing substantial risk in proving *scienter*). While Lead Plaintiff

remains confident of its ability to prove its claims and to effectively rebut Nortel's contentions, Lead Plaintiff also recognizes that proving liability was far from certain. *See* Joint Declaration at ¶¶ 90, 101-102, 118.

The "risks of establishing liability" factor thus offers further strong support for approval of the Nortel I Settlement.

### 5. Risks of Establishing Damages

The risk of establishing damages is another risk supporting approval of the Nortel I Settlement. *Grinnel* specifically advises courts to consider the risks of establishing damages. 495 F.2d at 463. While Lead Plaintiff has obtained expert advice on the potential damages in the Nortel I Action (*see* Nettesheim Declaration) and is confident that it could make a strong prima facie case for damages, it is clearly an area of complex proof requiring expert presentations where a jury could easily be distracted by the inevitable "battle of the experts" at trial.

As noted previously, securities litigations are notoriously complex and the difficulty of establishing damages is another serious hurdle in such cases. To succeed on claims under the 1934 Act, Lead Plaintiff must also establish that Defendants' conduct caused damage to the Class. *See TSC Indus.*, 426 U.S. 438; *Ernst & Ernst*, 425 U.S. at 198 n.18; *Am. Bank Note*, 127 F. Supp. 2d at 426-427.

Lead Plaintiff confronted significant obstacles in demonstrating damages. *See generally Dura*, 544 U.S. 336; *Lentell*, 396 F.3d at 173; Joint Declaration at ¶¶ 93-95. "Calculation of damages is a 'complicated and uncertain process, typically involving conflicting expert opinion' about the difference between the purchase price and the stock's 'true' value absent the alleged fraud." *Global Crossing*, 225 F.R.D. at 459 (citation omitted). The jury's verdict as to damages would depend on jurors' unpredictable reactions to the complex testimony of experts. *See Lloyd's*, 2002 U.S. Dist. LEXIS 22663, at \*61 ("The determination of damages . . . is a

complicated and uncertain process, typically involving conflicting expert opinions. The reaction of a jury to such complex expert testimony is highly unpredictable.”); *Maley*, 186 F. Supp. 2d at 365 (same); *Warner*, 618 F. Supp. at 744-45 (“In this ‘battle of experts,’ it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable, rather than the myriad nonactionable factors such as general market conditions.”)

The “risks of establishing damages” factor thus offers strong additional support for approval of the Nortel I Settlement.

#### **6. Risks of Maintaining Class Action Through Trial**

This Court granted Lead Plaintiff’s motion for class certification only after an extremely hard-fought motion involving opinions submitted by no less than five experts, in such areas as market efficiency and legal jurisdiction. Notice of the Pendency of this action as a class action was disseminated to the members of the Class in April 2004. Thus the appropriateness of class treatment for all purposes herein has a strong and established basis. Nevertheless, class certification is always subject to the Court’s review, and the Court could re-examine the Class certification at any time, potentially jeopardizing the Class members’ potential for recovery. *See In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 476-77 (S.D.N.Y. 1998) (decertification can occur if management problems arise during litigation; decertification or reversal of certification would deprive class of any recovery). Defendants’ arguments on the class certification motion regarding complicated market efficiency and jurisdictional issues would naturally be re-visited on summary judgment and this factor remains a risk to Lead Plaintiff. Indeed, this Court signaled its willingness to re-examine such issues by reserving the authority to redefine the class as the litigation progressed. Joint Declaration ¶ 97; *Nortel I*, 2003

U.S. Dist. LEXIS 15702, at \*24 (citing *Langner v. Brown*, No. 95-1981, 1996 U.S. Dist. LEXIS 18256, at \*10 (S.D.N.Y. Dec. 10, 1996)).

Accordingly, this factor also supports approving the Settlement.

#### **7. The Ability of Defendants to Withstand a Greater Judgment**

As the accompanying Investment Bankers' Declaration establishes, Defendants have only very limited ability to pay an amount greater than is being provided by the Settlements in Nortel I and II. This factor weighs heavily in favor of approval since settlement is strongly preferred where a greater judgment could put the defendant at risk of bankruptcy or other severe economic hardship. *See e.g. Warner*, 618 F.Supp. at 746. There is no question here that Nortel could not withstand a judgment of the magnitude of this Action together with that of the Nortel II litigation. *See* Investment Bankers' Declaration ¶¶ 32, 45-49; Nettlesheim Declaration ¶¶ 14-18; Joint Declaration ¶¶ 66, 71. Indeed a judgment based purely on damages allegedly caused by Defendants' conduct (i.e., without reference to Nortel's ability to pay) could easily have reached many billions of dollars in Nortel I alone. *See* Nettlesheim Declaration at ¶¶ 14-18. The risk here is compounded by Nortel's simultaneous exposure to a potential multi-billion dollar liability to the Nortel II Class. Nortel simply could not be expected to satisfy a multi-billion dollar judgment and undoubtedly would have been forced to file for bankruptcy. Such a move would have effectively prevented Plaintiffs from realizing any recovery whatsoever. *See PaineWebber*, 171 F.R.D. at 129 (“[T]he ‘prospect of a bankrupt judgment debtor down at the end of the road does not satisfy anyone involved in the use of class action procedures.’”) (citation omitted). Plaintiffs in Nortel I and Nortel II would likely fare quite poorly in a bankruptcy situation as their claims would presumably be subordinated under Bankruptcy Act Section 510(b) to the bottom level of equity claims.

Accordingly, the “ability of defendants to withstand a greater judgment” factor alone virtually compels approval of the Nortel I Settlement.

**8. The Range of Reasonableness of the Settlement Funds in Light of the Best Possible Recovery**

In assessing the range of reasonableness of the settlement fund in light of the best possible recovery, courts typically inquire what the best possible recovery would be under the circumstances. As indicated in the Nettesheim Declaration, the Nortel I Class’s damages could potentially be measured as high as \$10 billion. Nettesheim Declaration at ¶¶ 14-18. Given, however, the aforementioned limitations on Defendants ability to pay, it is entirely likely that no such recovery would be “possible” at all. As indicated in the Investment Bankers Declaration, the Nortel I and II Settlements represent “over 70% of the maximum possible shares that could be issued without an affirmative shareholder vote.” Investment Bankers Declaration ¶ 48.

It would appear, therefore, that the Nortel I Settlement closely approaches the “best possible recovery” and that the “range of reasonableness of the settlement fund in light of the best possible recovery” factor also very strongly supports approval of the Nortel I Settlement.

**9. The Range of Reasonableness of the Settlement Fund to a Possible Recovery in Light of All the Attendant Risks of Litigation**

This final factor weighs the Settlement proceeds against a possible recovery discounted by the risks of litigation. As detailed in Parts I.A. 4-6 above, the risks of continued litigation were substantial. And, as discussed in Part I.A. 8 above, the Nortel I Settlement weighs very favorably against the *non*-discounted “best possible recovery.” Comparing the proposed Settlement’s recovery to a “best possible recovery” *discounted for the attendant risks of litigation* logically must even more strongly confirm, and indeed compel, the conclusion that approval of the Settlement is strongly supported by this factor.

\* \* \* \* \*

In sum, all of the *Grinnell* factors known at this time (pending expiration of the period for Class Member objections on September 19, 2006) support approval of the Nortel I Settlement.

**B. The Settlement Negotiations Were Procedurally Fair**

In assessing whether a settlement is fair, reasonable and adequate, courts often examine the “negotiating process by which the settlement was reached” to determine whether the settlement was the result of “arm’s-length negotiations” between counsel with “the experience and ability . . . necessary to effective representation of the class’s interests.” *Weinberger*, 698 F.2d at 74 (citation omitted). A proposed class action settlement enjoys a strong presumption that it is fair, reasonable, and adequate where, as here, it was the product of arm’s-length negotiations conducted by capable counsel experienced in class action litigation arising under the federal securities laws, and if it occurred after meaningful investigation into the facts relating to plaintiffs’ claims. *See, e.g., Strougo v. Bassini*, 258 F. Supp. 2d 254, 257 (S.D.N.Y.2003); *PaineWebber*, 171 F.R.D. at 124; *New York v. Nintendo of Am., Inc.*, 775 F. Supp. 676, 680-81 (S.D.N.Y. 1991); *In re Sterling Foster & Co., Sec. Litig.*, 238 F. Supp. 2d 480, 484 (E.D.N.Y. 2002) (“[a] strong presumption of fairness attaches to proposed settlements that have been negotiated at arm’s-length”); *Chatelain v. Prudential-Bache Sec., Inc.*, 805 F. Supp. 209, 212 (S.D.N.Y. 1992) (“A strong initial presumption of fairness attaches to the proposed settlement when it is shown to be the result of this type of a negotiating process and when the number of objectors is small.”); *Manual for Complex Litigation, Fourth* § 21.612 (2004) (“Extended litigation between or among adversaries might bolster confidence that the settlement negotiations were at arm’s length.”). Indeed, “absent evidence of fraud or overreaching, [courts] consistently have refused to act as Monday morning quarterbacks in evaluating the judgment of counsel.” *Trief v. Dun & Bradstreet Corp.*, 840 F. Supp. 277, 281 (S.D.N.Y. 1993) (citation omitted).

“A court reviewing a proposed settlement must pay close attention to the negotiating process, to ensure that the settlement resulted from ‘arm’s-length negotiations and that plaintiffs’ counsel have possessed the experience and ability, and have engaged in the discovery, necessary to effective representation of the class’s interests.” *D’Amato*, 236 F.3d at 85 (quoting *Weinberger*, 698 F.2d at 74). Courts in this District have also commented on the procedural safeguards inherent in cases subject to the PSLRA, whereby the lawyers are not “mere entrepreneurs acting on behalf of purely nominal plaintiffs,” but are “selected by court-appointed Lead Plaintiffs who are substantial and sophisticated institutional investors with access to independent legal and financial specialists and a huge stake in the litigation.” *Global Crossing*, 225 F.R.D. at 462.

There is not even a hint of collusion with respect to this Settlement. As described in the Joint Declaration, the parties fought hard over the multi-year course of the litigation, conducted formal discovery on both Plaintiffs’ and Defendants’ sides, argued and extensively briefed motions to dismiss, for class certification and to compel discovery in Canada through Letters Rogatory, and held extensive settlement negotiations including many with the assistance of Judge Sweet. The settlement negotiations themselves were hard-fought and conducted at arm’s-length between experienced and skilled attorneys with the assistance of economic experts that analyzed Defendants ability to pay - all with the able mediation assistance of Judge Sweet. See Joint Declaration ¶¶ 65-76. Qualified and experienced counsel for both sides, who are intimately familiar with all facets of this case, recommend final approval of the Settlement. The Settlement is thus clearly entitled to a presumption of fairness based on the negotiations.

## II. **THE PROPOSED PLAN OF ALLOCATION IS FAIR, REASONABLE AND ADEQUATE AND SHOULD BE APPROVED**

A Plan of Allocation is fair, reasonable and adequate as long as it has a “reasonable, rational basis.” *Maley*, 186 F. Supp. 2d at 367. This is particularly true if the allocation formula is “recommended by ‘experienced and competent’ class counsel.” *Id.* Because it is impossible and impracticable in a large class to calculate each member’s claim with mathematical precision, courts recognize that “the adequacy of an allocation plan turns on whether counsel has properly apprised itself of the merits of all claims, and whether the proposed apportionment is fair and reasonable in light of that information.” *PaineWebber*, 171 F.R.D. at 133.

In this case, the Plan of Allocation was extensively reviewed by Lead Plaintiff’s damages expert, who approved its terms. See Joint Declaration at ¶¶ 108; Nettesheim Declaration at ¶¶ 6, 24-31. The Plan of Allocation provides for the distribution of the net cash settlement fund and net settlement shares on a *pro rata* basis, based on a formula tied to liability and damages. See Joint Declaration at ¶¶ 108-112. “Allocation formulas, including certain discounts for certain securities, are recognized as an appropriate means to reflect the comparative strengths and values of different categories of the claim.” *Am. Bank Note*, 127 F. Supp. 2d at 429. For example, Class members who bought Nortel common stock at different prices per share would have incurred different amounts of damages per share and will be allocated claims according to their potential damages. Class members who also sold during the Class period would face additional defenses, which is why their claims are discounted. Class members who purchased Nortel call options or put options would have different damages than from purchases of common stock, so their claims are recognized under a different formula that reflects their potential damage claims and the defenses to such damage claims. Joint Declaration at ¶¶ 108-112. “[T]here is no rule that settlements benefit all class members equally . . .” *PaineWebber*, 171 F.R.D. at 131 (citation

omitted). Instead, an allocation formula need only have a reasonable and rational basis, particularly if recommended by experienced and competent class counsel. *Am. Bank Note*, 127 F. Supp. 2d at 429-30. Lead Counsel's conclusion that the Plan of Allocation is fair and reasonable is entitled to great weight. *See id.* at 430 (approving allocation plan and according counsel's opinion "considerable weight" because there were "detailed assessments of the strengths and weaknesses of the claims asserted, the applicable damages, and the likelihood of recovery").

Accordingly, for all of the reasons set forth above, the Plan of Allocation is fair, reasonable and adequate, and should be approved.

#### **CONCLUSION**

For the foregoing reasons, Lead Plaintiff respectfully request that the Court grant final approval of the Settlement and the Plan of Allocation.

DATED: September 5, 2006

Respectfully submitted,  
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**CERTIFICATE OF SERVICE**

I, Julie B. Rubenstein, hereby certify that on September 5, 2006, I caused a true and correct copy of the foregoing LEAD PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF FINAL APPROVAL OF THE PROPOSED NORTEL I CLASS ACTION SETTLEMENT AND PROPOSED PLAN OF ALLOCATION to be served via first class mail to all counsel listed on the attached service list.



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