UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE NORTEL NETWORKS CORP. SECURITIES LITIGATION --- *This Document Relates To*: ALL ACTIONS

Master File No. 05 MD 1659 (LAP)

ECF Filed

LEAD PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF FINAL APPROVAL OF SETTLEMENT AND PLAN OF ALLOCATION AND CERTIFICATION OF THE CLASS FOR SETTLEMENT PURPOSES

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Table of Contents

Page

Table of Authorities

Page(s)

DOCKETED CASES

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, Lead Plaintiffs, the Ontario Teachers' Pension Plan Board ("Ontario Teachers") and the Department of the Treasury of the State of New Jersey and its Division of Investment's ("New Jersey"; together with Ontario Teachers, "Lead Plaintiffs") respectfully submit this memorandum of law in support of their motion for: (a) final approval of the proposed settlement between the Class (as defined in Section III. C. herein) and Defendants (the "Settlement"); (b) final approval of the proposed plan of allocation (the "Plan of Allocation"); and (c) certification of the Class for Settlement purposes.

As set forth in further detail below and in the accompanying Declaration of John P. Coffey (the "Coffey Decl."), and the Joint Declaration of Michael Padfield and C. Judson Hamlin (the "Lead Plaintiffs' Decl."), through their substantial efforts over the past two years, Lead Plaintiffs have achieved what they respectfully submit is an extraordinary recovery for the Class. The background of the Settlement and the reasons that Lead Plaintiffs entered into it were described in detail in the Notice of Pendency and Certifications of Class Actions and Proposed Settlements, Motion for Attorneys' Fees and Settlement Fairness Hearings (the "Notice"), which was mailed to Class Members beginning on July 21, 2006. Under the standards articulated by the Second Circuit in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), the Settlement is fair, reasonable and adequate, and warrants the Court's approval.

I. PRELIMINARY STATEMENT

After more than two-and-a-half years of litigation, Lead Counsel, with the active participation, oversight and consent of Lead Plaintiffs, and with the substantial assistance of the Court-authorized mediator, United States District Judge Robert W. Sweet, reached a Settlement of historic proportions: Valued at $1.32 billion in cash and Nortel shares on February 7, 2006, the date the terms were reached, the Settlement is the fifth largest settlement ever of a securities

class action.[1] The outstanding nature of the Settlement is not truly appreciated until it is measured against the Class's estimated recoverable damages, and, even more tellingly, in consideration of Nortel's precarious and deteriorating financial condition. The Settlement constitutes a remarkable 28% of the $3.7 billion of damages estimated by Lead Plaintiffs' damages expert, and 70% of the $1.5 billion of the damages estimated under a typical "defendant style" damage approach, assuming Defendants conceded that the Class suffered any compensable damages at all. *See* Affidavit of Candace L. Preston ("Preston Aff."), Exhibit 7 to the Coffey Declaration, ¶¶ 20-21.

Also compelling is that, as part of a global settlement (the "Global Settlement") of this Action plus the previously filed federal securities class action against Nortel and certain of its former officers and directors ("Nortel I"), Lead Plaintiffs obtained from Nortel, among other things, (a) $580 million in cash, which, according to Lead Plaintiffs' investment banking experts, constitutes a substantial amount of Nortel's available financial resources; (b) 628,667,750 freely-tradable shares of Nortel common stock, which represents an unprecedented 14.5% of the Company's outstanding shares; and (c) far-reaching corporate governance improvements designed to enhance the value of the equity received in the Settlement and to protect Nortel shareholders against a recurrence of the fraudulent behavior alleged against Nortel.

Another touchstone for evaluating the outstanding results obtained here is the Class's allocation of the Global Settlement. Even though the damages in the more procedurally advanced Nortel I Action were substantially greater than those estimated in Nortel II, and even

[1] The value of the Settlement as announced was based on the $3.02 per share market price of Nortel common stock on February 7, 2006. In the Notice, the Class was advised, based on the $2.24 per share market price of Nortel common stock on June 29, 2006, the date the Preliminary Approval Order was entered, that the value of the Settlement was $1.074 billion. Using the September 1, 2006 $2.14 per share market price, the Settlement is valued at $1.043 billion.

though the insurance available to cover the claims in Nortel II was presumed to be substantially less that the insurance covering the claims in Nortel I (indeed, of the $265 million in insurance for both cases, only one $15 million policy covered Nortel II), the Class obtained 50% of the cash and common stock paid by Nortel, and $66,495,000 of the insurance presumed earmarked for Nortel I. Thus, the Settlement provides to the Class a total of $370 million in cash (plus interest), plus over 314 million shares of Nortel common stock (representing 7.25% of the Company's equity), worth approximately $672.7 million as of September 1, 2006.

Achieving this result required Lead Plaintiffs and Lead Counsel, the law firm of Bernstein Litowitz Berger & Grossmann LLP ("BLB&G"), to overcome significant risks in prosecuting the Action and collecting anything from Nortel.[2] In particular, Lead Plaintiffs, from the inception of this Action, faced the significant risk that Nortel's financial condition would make it impossible to recover the Class's damages, and that the successful prosecution of this Action and a multi-billion dollar judgment might result in the Company's bankruptcy, which would frustrate any recovery by the Class. Indeed, a significant risk existed that, even if Lead Plaintiffs succeeded at trial, the resulting damage award would not be realizable. This risk was heightened by the fact that Lead Plaintiffs and the Class were competing with the plaintiffs in Nortel I for the limited pool of assets and insurance available to fund a recovery in both cases.

Lead Plaintiffs also faced the risk that the Court would find that it lacked subject matter jurisdiction over the claims of non-U.S. citizens who transacted in Nortel securities on the Toronto Stock Exchange; this risk was substantial, given that Nortel was one of the most widely held companies in Canada. In addition, the fact that several Defendants and key non-party

[2] With the approval of Lead Plaintiffs, Lowenstein Sandler P.C. ("Lowenstein"), one of New Jersey's outside securities counsel, has worked jointly with, and under the direction of, BLB&G throughout the prosecution, mediation and settlement of this Action.

witnesses were foreigners presented substantial hurdles to Lead Counsel's ability to conduct discovery to obtain the evidence necessary to prove the Class's claims.

These risks, on top of the hurdles to alleging and proving liability and damages under the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), posed daunting challenges to Lead Plaintiffs and Lead Counsel when they undertook the prosecution of this Action. For example, even assuming Lead Plaintiffs were successful in establishing Defendants' scienter, the issues of causation and damages would be hotly contested at trial; indeed, Defendants would have argued that the Class did not suffer any compensable damages or that those damages were a fraction of the damages estimated by Lead Plaintiffs. The adequacy and reasonableness of the recovery achieved for the Class – which is among the largest ever obtained under the PSLRA – is supported by the challenges inherent in the continued prosecution of this Action.

Moreover, the Settlement was achieved only after Lead Counsel conducted extensive legal and factual investigations into the events and circumstances underlying the claims asserted in the Action; thoroughly researched the law pertinent to the claims against Defendants and potential defenses thereto; consulted with experts on auditing and forensic accounting, on Nortel's financial wherewithal, on the telecommunications industry, and on the Class's damages; interviewed dozens of witnesses; and engaged in extensive document discovery with Defendants and non-parties, including formulating document requests, serving subpoenas and issuing letters rogatory, and the targeted review and analysis of approximately ten million pages of documents. Coffey Decl. ¶ 9. Thus, the Settlement was reached only after Lead Counsel and Lead Plaintiffs had attained – through Lead Counsel's aggressive and comprehensive prosecution efforts – a thorough understanding of the strengths and weaknesses of the claims against Defendants, and, thus, were in an optimal position to negotiate and judge the terms of the proposed Settlement.

Further, the Settlement is the product of adversarial arm's-length negotiations that took place over a ten-month period with the intensive involvement of Lead Plaintiffs and their damages and investment banking experts, and the substantial assistance of Judge Sweet. Coffey Decl. ¶¶ 48-56. Those settlement discussions were arduous and protracted. *Id.* The initial discussions with Nortel were not fruitful, and quickly focused on Nortel's inability to independently fund an adequate cash settlement, and the need to achieve a global settlement that included Nortel I and several related class actions pending against Nortel in Canada. *Id*. at ¶ 50. Lead Plaintiffs and Lead Counsel then engaged in multi-faceted negotiations with counsel for Defendants, counsel for Defendants' insurance carriers and counsel for the Nortel I class. *Id.* at ¶ 48. Indeed, Lead Counsel and Lead Plaintiffs participated or were involved in eight substantive mediation sessions with Judge Sweet, and four substantive mediation sessions with Nortel and the parties' investment banking experts regarding Nortel's ability to contribute cash and securities to the Settlement. *Id.* ¶¶ 48, 53. At the same time, Lead Counsel vigorously pursued the Class's claims, both in Court and through the discovery process. *Id*. ¶ 48. Indeed, it was Lead Counsel's stated intent to seek leave to file a motion for summary judgment, based on their targeted review of the documents obtained through discovery, that provided the needed impetus to conclude the negotiations on terms highly favorable to the Class. *Id.* ¶¶ 46-47.

Significantly, Lead Plaintiffs actively participated both in the prosecution of this Action and the settlement negotiations; indeed, Lead Plaintiffs regularly consulted with counsel on all substantive matters, reviewed all pleadings and substantive correspondence, and actively participated in the mediation and related sessions. *See* Lead Plaintiffs' Decl. ¶¶ 11-15. The PSLRA was enacted in part to ensure that sophisticated institutional investors such as Ontario Teachers and New Jersey participate in and control securities litigation. The fact that

representatives of these institutions, who were actively involved in all aspects of the prosecution and mediation of this Action, approve the Settlement, *see id.* ¶ 16, further demonstrates that the Settlement is fair, adequate and reasonable.

The Class's favorable reaction to the Settlement also supports its reasonableness and adequacy. Pursuant to the Preliminary Approval Order, the Notice was mailed to 851,945 potential Class members or their nominees. *See* Affidavit of Neil L Zola, attached to the Coffey Declaration as Exhibit 3, ¶ 33. The Notice (attached as Exhibit A to the Zola Affidavit) advised Class members of the proposed Settlement, the proposed Plan of Allocation and the request for an award of attorneys' fees and reimbursement of expenses. The Notice further advised Class members of their right to object or seek exclusion from the Class. Additionally, the Notice of Pendency of Class Action, Hearing on Proposed Settlement and Attorneys' Fee Petition and Right to Share in Net Settlement Fund (the "Summary Notice") was published in the U.S. and, in accordance with the Court-approved notice plan, in a variety of Canadian business and other publications, periodicals and magazines, as well as in banners on the internet. *Id.* ¶ 2. Information regarding the Settlement, including downloadable copies of the Notice and Claim Form, was posted on www.nortelsecuritieslitigation.com, the website dedicated to the Global Settlement, *id.* ¶¶ 19-23, and was available through the Claims Administrator's website, www.gardencitygroup.com, and Lead Counsel's website, www.blbglaw.com, Coffey Decl. ¶ 61. Although the September 19, 2006 deadline for Class members to file objections to the Settlement, Plan of Allocation or the Fee and Expense Application has not yet expired, to date no Class members have filed an objection to the proposed Settlement, the Plan of Allocation, or the fee application, and only 45 valid exclusion requests have been received. *See* Coffey Decl. ¶ 12.

In sum, given the immediacy of the recovery provided by the Settlement, particularly in light of (i) the significant amount recovered for the Class now; (ii) the pendency of Nortel I, and the fact that the Nortel I class was competing for the same assets and insurance proceeds; (iii) the risk that, as a result of Nortel's precarious and deteriorating financial condition, the Class would be unable to recover a greater amount even if it prevailed at trial; (iv) the likely appeals and subsequent proceedings necessary if the Class did prevail at trial; and (v) Lead Plaintiffs' and Lead Counsel's informed assessment of the strengths and weaknesses of the claims and defenses asserted, Lead Plaintiffs believe that the Settlement is a superior result and strongly urge the Court to grant its approval.

II. BACKGROUND OF THE ACTION

This Action was originally brought against Nortel, the members of the Audit Committee of Nortel's Board of Directors (the "Audit Committee Defendants"), and individual defendants Frank Dunn, Douglas Beatty and Michael Gollogly, (the "Officer Defendants") for violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act") and SEC Rule 10b-5 promulgated thereunder. Coffey Decl. ¶ 31. The filing of this Action was precipitated by a series of disclosures by Nortel, beginning on March 10, 2004, which announced, among other things, that the Company was "re-examining the establishment, timing of, support for and release to income of certain accruals and provisions in prior periods" and that Company's previously-filed financial results for 2003 would be restated. *Id.* ¶¶ 20-22. In response to that and subsequent disclosures, the price of Nortel stock fell from $6.88 on March 10 to $4.05 on April 28, 2004. *Id.* at ¶ 24.

On June 30, 2004, this Court consolidated the twenty-seven actions that had been filed and appointed Ontario Teachers and New Jersey as Lead Plaintiffs and BLB&G as Lead Counsel. Coffey Decl. ¶ 27. Thereafter, Lead Counsel launched an extensive investigation that

included consultations with experts, interviews with over thirty witnesses out of approximately one hundred who were identified, and a review of Nortel's public statements and SEC filings. *Id*. at ¶¶ 28-43. This investigation resulted in the filing on September 10, 2004 of Lead Plaintiffs' First Amended Complaint. *Id.* at ¶¶ 31-33.

The First Amended Complaint focused on the fraud that Defendants allegedly perpetrated by improperly accounting for the Company's reserve accounts, which created the false appearance that Nortel had returned to profitability. Coffey Decl. ¶ 31. Lead Plaintiffs also moved to have the Court lift the discovery stay imposed under the PSLRA. *Id.* Defendants moved to dismiss the First Amended Complaint, arguing, among other things, that the market was aware of the massive fraud at Nortel such that Lead Plaintiffs could not establish loss causation, and that the Audit Committee Defendants did not act with the requisite scienter required to plead liability for securities fraud. *Id.* ¶ 32. While briefing Defendants' motions, the parties agreed that Defendants would withdraw them, and that Lead Plaintiffs would dismiss without prejudice their claims against the Audit Committee Defendants and withdraw their previously filed motion to lift the discovery stay imposed by the PSLRA. *Id.* ¶¶ 33, 38.

Lead Plaintiffs then embarked upon extensive document discovery of Defendants and non-parties. *Id*. at ¶¶ 34-43. Specifically, Lead Counsel served document requests Defendants Nortel, Dunn and Gollogly; issued subpoenas to Wilmer Cutler Pickering Hale and Dorr LLP ("Wilmer Cutler"), which was retained by Nortel's Audit Committee to conduct the internal investigation; Huron Consulting Services LLC, which was retained by Wilmer Cutler; and Deloitte & Touche LLP, the U.S. affiliate of the Canadian firm of Deloitte & Touche ("D&T"), which performed certain audit-related services in the U.S., and issued and served letters rogatory in Canada on D&T, Nortel's auditor. *Id.* ¶¶ 39-41. Lead Counsel then conducted a targeted

review of this discovery – including a review of approximately ten million pages out of the roughly twenty million pages of documents produced by Nortel alone. *Id.* ¶ 43. Through this review, Lead Plaintiffs uncovered evidence that they believed supported their allegations that the Audit Committee Defendants were more intimately involved in the fraud and in approving certain of Nortel's false and misleading statements than Lead Plaintiffs had previously known when preparing the First Amended Complaint. *Id.* at ¶¶ 35, 43.

On September 16, 2005, on the basis of this additional evidence, Lead Plaintiffs filed their Second Amended Complaint. *Id.* ¶ 36.[3] The Second Amended Complaint added new substantive allegations against the Audit Committee Defendants, including that those Defendants repeatedly reviewed and approved SEC filings and press releases that were contrary to specific facts within their knowledge, were aware of but failed to disclose material weaknesses in Nortel's internal controls, and misled the public regarding Nortel's internal investigation into the Company's improper reserve accounting. *Id.* Lead Plaintiffs then negotiated with Nortel to waive its right to move to dismiss the Second Amended Complaint and, in light of the settlement negotiations, Lead Plaintiffs then agreed to provide the Officer Defendants additional time to answer or move against the Second Amended Complaint. *Id.* ¶ 37.

In addition to filing the Second Amended Complaint, Lead Plaintiffs further capitalized on the evidence obtained through document discovery by preparing to file a motion that placed significant pressure on Defendants' and their insurance carriers. Specifically, on September 22, 2005, Lead Plaintiffs informed the Court that they were prepared to move for summary judgment on Count One of the Second Amended Complaint (the Section 10(b) claim against Nortel) and

[3] Prior to filing the Second Amended Complaint, Lead Plaintiffs had moved to certify the Class. Coffey Decl. ¶ 44. Briefing of that motion was extended by stipulation in light of the settlement negotiations and the motion was eventually withdrawn. *Id.* As part of the Settlement, Defendants have stipulated to certification of the Class for settlement purposes. *Id.* ¶ 45.

requested a pre-motion conference to discuss that motion. Coffey Decl. ¶ 46. While Defendants opposed that request (*id.*), Lead Plaintiffs' stated intent to move forward with a motion for summary judgment provided needed impetus to the settlement negotiations in this Action, both with respect to the Global Settlement of Nortel II and Nortel I, and the allocation of that Global Settlement, which had a substantial beneficial impact on the Class. *Id.* ¶ 47.

III. ARGUMENT

A. The Proposed Settlement Is Fair, Reasonable And Adequate And Should Be Approved

1. Standards for Approval of a Class Action Settlement

"Settlement approval is within the Court's discretion, which 'should be exercised in light of the general judicial policy favoring settlement.'" *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 280 (S.D.N.Y. 1999) (citation omitted). In evaluating a proposed settlement under Rule 23(e) of the Federal Rules of Civil Procedure, the Court must determine whether the settlement, taken as a whole, is fair, reasonable and adequate. *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1995); *see also In re WorldCom Sec. Litig.*, No. 02 Civ. 3288 (DLC), 2004 WL 2591402 (S.D.N.Y. Nov. 12, 2004). As noted by courts generally, "[t]he arm's-length compromise of a disputed claim has long been favored by the courts." *E.g.*, *Sumitomo*, 189 F.R.D. at 280 (and cases cited therein); *see also Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981). This is particularly true of class actions. *Sumitomo*, 189 F.R.D. at 280; *In re Union Carbide Corp. Consumer Prod. Bus. Sec. Litig.*, 718 F. Supp. 1099, 1103 (S.D.N.Y. 1989). As the court in *WorldCom* summarized:

> In brief, the district court must carefully scrutinize the settlement to ensure its fairness, adequacy and reasonableness, and that it was not the product of collusion. A district court determines a settlement's fairness by examining the negotiating process leading up to the settlement as well as the settlement's substantive terms.

2004 WL 2591402 at *10 (quotations and citations omitted); *see also Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116-17 (3d Cir.), *cert. denied sub nom, Leonardo's Pizza by the Slice, Inc. v. Wal-Mart Stores, Inc.*, 544 U.S. 1044 (2005).

A proposed class action settlement enjoys a strong presumption that it is fair, reasonable and adequate if, as is the case here, it was the product of arm's-length negotiations conducted by capable counsel, well-experienced in class action litigation arising under the federal securities laws. *See, e.g.*, *Sumitomo*, 189 F.R.D. at 280; *New York & Maryland v. Nintendo of Am., Inc.*, 775 F. Supp. 676, 680-81 (S.D.N.Y. 1991). Moreover, under the PSLRA, a settlement reached under the supervision of appropriately selected lead plaintiffs is entitled to an even greater presumption of reasonableness. As stated in the Senate Committee Report issued in support of the PSLRA, cited in *Greebel v. FTP Software, Inc.*, 939 F. Supp. 57, 63-64 (D. Mass. 1996): "Institutions with large stakes in class action 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.'" Absent fraud or collusion, the court should be hesitant to substitute its judgment for that of the parties who negotiated the settlement.

The standards governing approval of class action settlements are well-established in this Circuit. In *City of Detroit v. Grinnell Corp.*, the Court of Appeals held that the following were factors to be considered in evaluating a class action settlement:

> (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.

495 F.2d 448, 463 (2d Cir. 1974) (citations omitted); *see also County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1323-24 (2d Cir. 1990); *Sumitomo*, 189 F.R.D. at 281; *WorldCom*, 2004 WL 2591402 at *10. In applying these factors, a court neither substitutes its judgment for that of the parties who negotiated the settlement nor conducts a mini-trial of the merits of the action. *Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982); *In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 46, 53 (S.D.N.Y. 1993). As the Second Circuit stated in *Newman v. Stein*:

> [T]he role of a court in passing upon the propriety of the settlement of a . . . class action is a delicate one . . . . [W]e [recognize] that since "'the very purpose of a compromise is to avoid the trial of sharply disputed issues and to dispense with wasteful litigation,' the court must not turn the settlement hearing 'into a trial or a rehearsal for the trial.'"

464 F.2d 689, 691-92 (2d Cir. 1972).

In short, the Court is now asked to determine whether the Settlement is within a range that reasonable and experienced attorneys, and sophisticated institutional Lead Plaintiffs, could accept, considering all relevant risks, facts and circumstances. *See Weinberger*, 698 F.2d at 74; *Grinnell*, 495 F.2d at 455. The range, as defined by Judge Friendly, "recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Newman*, 464 F.2d at 693.

Lead Plaintiffs respectfully submit that the proposed Settlement, which was achieved with the substantial assistance of Judge Sweet, is eminently fair, reasonable and adequate when measured under the foregoing criteria, represents an excellent result for the Class, and should be approved by this Court.

2. Application of the *Grinnell* Factors Supports Approval of the Settlement

As demonstrated below, the Settlement satisfies the criteria for approval of class action settlements articulated by the Second Circuit in *Grinnell*.

a) The Complexity, Expense and Likely Duration of the Litigation

The "complexity, expense and likely duration of the litigation" are factors that the Court should consider in evaluating a proposed settlement for approval. *Grinnell*, 495 F.2d at 463; *In re Drexel Burnham Lambert Group Inc.*, 130 B.R. 910, 927 (S.D.N.Y. 1991). "In evaluating the settlement of a ***securities*** class action, federal courts, including this Court, have long recognized that such litigation is notably difficult and notoriously uncertain." *Sumitomo*, 189 F.R.D. at 281 (citations omitted; emphasis added). That statement is certainly true with respect to the claims asserted against Defendants.

As reflected in the Coffey Declaration, this prosecution involved complex legal and factual issues, and involved massive document discovery. Coffey Decl. at ¶¶ 34-43. Indeed, prior to reaching agreement on the terms of the Settlement, Lead Counsel conducted a targeted review of ten million pages of documents produced by Defendants, with more than that number still to be reviewed if no settlement had been reached. *Id.* at ¶ 42-43. Continued prosecution and trial of this case would have required Lead Counsel to take the depositions of dozens of witnesses in several countries. In addition, all parties would have relied on a number of experts to produce reports and testify on highly complex issues including accounting and damages calculations; the successful prosecution of this Action would have depended upon extensive discovery of those experts.

Absent the Settlement, there would have been significant additional resources and costs expended to prosecute the claims against the Defendants through trial and the inevitable appeals of any judgments. *See In re Prudential Ins. Co. Am. Sales Practice Litig.*, 148 F.3d 283, 318 (3d Cir. 1998) (settlement favored where "trial of this class action would be a long, arduous process requiring great expenditures of time and money on behalf of both the parties and the court").

Indeed, given the complex issues at the heart of Lead Plaintiffs' allegations, this was a challenging case to present to a jury, and even if liability of Defendants had been established, there were significant issues relating to the damages that a jury might have awarded in this case, and the ability of Defendants to pay a judgment. In contrast, the Settlement offers the opportunity to provide definite and substantial recompense to the Class now, rather than await the uncertain outcome prompted by the effort and time devoted to trial and likely appeals.

b) The Response of the Class

As the cases report, a positive reaction of the Class to the proposed Settlement is a further factor favoring its approval by the Court. *See Grinnell*, 495 F.2d at 462 (approving settlement where only twenty objectors appeared from group of 14,156 claimants); *RMED International, Inc. v. Sloan's Supermarkets, Inc.*, No. 94 Civ. 5587, 2003 WL 21136726, at *1 (S.D.N.Y. May 15, 2003). While the deadline for filing objections to the Settlement is September 19, 2006, to date no Class Members have objected to the Settlement, and only forty-five have opted out. Coffey Decl. ¶ 12.[4] The reaction of the Class to date supports approval of the Settlement.

c) The Stage of the Proceedings and Amount of Discovery Completed

"[T]he stage of the proceedings and the amount of discovery completed" are other *Grinnell* factors to be considered in determining the fairness, reasonableness and adequacy of a settlement. *Grinnell*, 495 F.2d at 463. These criteria are easily met here. Lead Plaintiffs had

[4] Rule 23(c)(2) requires "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974). The Notice, as approved by the Court, was sent to all identifiable potential Class Members. *See* Zola Aff. ¶¶ 13-18, 23, 26. In addition, the Summary Notice appeared in several U.S. publications and, in compliance with the notice plan approved by the Court, in a variety of Canadian publications and online. *Id.* ¶ 2. The Notice contained all information required by § 21D(vi)(7) of the PSLRA, and is more than adequate to meet the requirements of due process and Rule 23(c)(2) and (e).

conducted extensive discovery and, in fact, were prepared to move for summary judgment against Nortel when the Settlement was reached. Coffey Decl. ¶¶ 29-43, 46-47. Lead Counsel had obtained over twenty million pages of documents from Defendants and non-parties, and had conducted an expedited, targeted review of approximately half of those documents. *Id.* ¶¶ 42-43. Lead Plaintiffs had also moved for class certification, and had submitted evidentiary and expert documentation in support of that motion. *Id.* ¶ 44.

Of course, well before the Settlement was reached, Lead Counsel had extensively analyzed and investigated the events and transactions alleged in the First and Second Amended Complaints, having reviewed and analyzed Defendants' public statements and SEC filings, interviewed over thirty fact witnesses, and retained and consulted with expert witnesses and consultants in numerous fields, including the telecommunications industry, damages, forensic accounting, and investment banking. *See* Coffey Decl. ¶¶ 29-43, 51-52. In short, Lead Plaintiffs and Lead Counsel engaged in sufficient document discovery and discussions about the merits of the Action to evaluate fully the merits of the claims and the obstacles to success. *In re Medical X-Ray Film Antitrust Litig.*, No. CV-93-5904, 1998 WL 661515, at *4 (E.D.N.Y. Aug. 7, 1998); *see also In re Gulf Oil/Cities Serv. Tender Offer Litig.*, 142 F.R.D. 588, 591 (S.D.N.Y. 1992) ("The compromise reached by class counsel has been neither arbitrary nor premature, but formed after careful investigation and weighing of facts."). In an analogous situation, the court in *In re Global Crossing Sec. and ERISA Litig.* found that the lead plaintiffs and lead counsel were able to gauge adequately the strengths and weaknesses of their claims after having conducted an extensive investigation prior to filing their complaint, conducting informal interviews of numerous fact witnesses and reviewing documents produced by defendants in discovery. 225 F.R.D. 436, 458 (S.D.N.Y. 2004) ("Plaintiffs' counsel appear to have scrutinized the facts of the

Actions from the earliest stages of the litigation and developed an informed basis from which to negotiate a reasonable compromise.").

In this case, it may be said that the parties "have a clear view of the strengths and weaknesses of their cases." *In re Warner Comm. Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985) *aff'd*, 798 F.2d 35 (2d Cir. 1986). Lead Plaintiffs were able to make an informed decision of the merits of the Settlement, which was mediated by Judge Sweet, *see* Lead Plaintiffs' Decl. ¶¶ 12-16, and the Court should give great weight to this consideration.

d) Risks Involved in Establishing Liability and Damages, and in Maintaining the Class Action Through Trial

Grinnell holds that, in assessing the fairness, reasonableness and adequacy of a settlement, courts should consider such factors as the "risks of establishing liability," "the risks of establishing damages," and "the risks of maintaining the class action through the trial." 495 F.2d at 463 (citations omitted). These factors also support approval of the Settlement.

There are certain unassailable facts and risks that had to be considered by Lead Plaintiffs as factors in assessing the sufficiency of the Settlement. As in any securities class action under the PSLRA, Lead Plaintiffs faced a high burden in demonstrating that Defendants acted with scienter, or intent to defraud. Indeed, while Lead Plaintiffs believed that they could meet that standard, Defendants, in their letter to the Court opposing Lead Plaintiffs' request for leave to move for summary judgment, vigorously argued that neither Nortel's public statements nor the documents produced in discovery demonstrated that Defendants had acted with scienter. Coffey Decl. ¶ 46. At trial, Lead Plaintiffs expected Defendants to argue that the Class could not establish scienter because they had no knowledge of, and did not participate in, the alleged fraud at Nortel. While Lead Plaintiffs believe that they could establish these Defendants' scienter (or, with respect to the Officer Defendants against whom only Section 20(a) claims were asserted,

that they did not satisfy their good faith defense to control person liability), Lead Plaintiffs could not dismiss the possibility that a reasonable jury could conclude that Defendants did not act with intent to defraud.

In addition, while Defendants have stipulated to the certification of the Class for purposes of the Settlement, there would have been no such stipulation had Lead Plaintiffs prosecuted the Action to trial. Defendants would have vigorously challenged Lead Plaintiffs' pending motion for class certification, and any reduction in the size of the Class would have affected the claims and damages at issue in the litigation. For example, Defendants could have, and, as they did in Nortel I, likely would have challenged the inclusion in the Class of those foreign investors who purchased Nortel securities outside of the U.S., claiming that the Court lacked subject matter jurisdiction over those claims. The result of this fact-specific determination, which depends upon the nature of Defendants' allegedly fraudulent conduct within the U.S. and whether that conduct caused the losses, *see Cromer Finance Ltd. v. Berger*, 137 F. Supp. 2d 452, 480 (S.D.N.Y. 2001) ("A federal court has subject matter jurisdiction under the conduct test 'if (1) the defendant's activities in the United States were more than "merely preparatory" to a securities fraud conducted elsewhere, and (2) these activities or culpable failures to act within the United States "directly caused" the claimed losses."), was anything but assured, *see, e.g., Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (S.D.N.Y. 1975) (directing district court to "eliminate from the class action all purchasers other than persons who were residents or citizens of the United States"). They also could have challenged the inclusion in the Class of investors who sold Nortel securities prior to the first disclosure of the fraud, or who sold after partial disclosures before the end of the Class Period, and could have argued that the claims of purchasers and sellers of options should not be included in the Class. *See, generally, e.g., In re*

AOL Time Warner, Inc. Sec. & "ERISA" Litig., No. MDL 1500, 02 Civ. 5575(SWK), 2006 WL 903236, at *12 (S.D.N.Y. Apr. 6, 2006) (risk of succeeding in certifying class supported approval of settlement); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. at 460 (same). Indeed, the success of any of these arguments would have splintered the Class.

> [N]ot only does the aggregation of the claims enlarge the value of the suit, but often the combination of the individual cases also pools litigation resources and may facilitate proof on the merits. Thus, the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the action.

In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig., 55 F.3d 768, 817 (3d Cir. 1995); *see also Lucent, In re Lucent Technologies, Inc., Sec. Litig.*, 307 F. Supp. 2d 633, 646 (D.N.J. 2004) ("Class certification influences the value of a class action.").

Even if the Class could be certified, and Defendants' scienter could be proven and liability established, Lead Plaintiffs faced the burden of proving both the extent of the damages incurred by the Class and that those damages were caused by Defendants' conduct. Lead Plaintiffs faced serious risks in connection with their Section 10(b) claims with respect to establishing loss causation and damages. Specifically, Lead Plaintiffs would need to establish that the alleged misrepresentations and omissions resulted in actual damages, and quantify the damages suffered by the Class. Lead Plaintiffs would have to establish that the price that each Class member paid for shares of Nortel stock was artificially inflated on the date of purchase and, pursuant to last year's Supreme Court decision in *Dura Pharmaceuticals Inc. v. Broudo*, 544 U.S. 336, 344-45 (2005), that such inflation was confirmed by post-purchase stock movements tied to disclosures related to the fraud. To do so, Lead Plaintiffs retained a damages expert, who opined on what the "true value" of Nortel shares would have been during the Class Period had there been no fraud and who, at trial, would have explained how stock movements in response to subsequent disclosures confirmed, per *Dura Pharmaceuticals*, the extent of fraud-

induced price inflation. Lead Plaintiffs' expert concluded that damages suffered by the Class were in excess of $3.7 billion. *See* Preston Aff. ¶ 20. While the theories behind and validity of Lead Plaintiffs' expert's conclusions are supported by economic and legal theory, and could withstand scrutiny, Defendants would have presented their own damages experts, with conflicting conclusions and theories on such issues as: (i) whether and to what extent the alleged false and misleading statements influenced (if at all) the trading price of Nortel common stock at various times during the Class Period; (ii) the appropriate economic model for determining the amount by which Nortel's common stock was allegedly inflated (if at all) during the Class Period; (iii) whether, pursuant to *Dura Pharmaceuticals*, the disclosures that dissipated the artificial inflation were in fact tied to the alleged fraud; and (iv) whether the statements made or facts allegedly omitted were false, material or otherwise actionable under the federal securities laws. *See* Preston Aff. ¶¶ 21-25 (setting forth the types of challenges anticipated, and estimating damages under a typical "defendant style" analysis at $1.5 billion). Ultimately, proving damages would come down to "a battle of the experts," and it is impossible to predict which expert and theory of damages the jury would accept. *See In re American Bank Note Holographics, Inc. Sec. Litig.*, 127 F. Supp. 2d 418, 426-27 (S.D.N.Y. 2001) ("[i]n such a battle, Plaintiffs' Counsel recognize the possibility that a jury could be swayed by experts for Defendants, who could minimize or eliminate the amount of Plaintiffs' losses"); *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 129 (S.D.N.Y. 1997) ("damages are a matter for the jury, whose determinations can never be predicted with certainty"), *aff'd*, 117 F.3d 721 (2d Cir. 1997).

e) Collectability and the Ability of Defendants to Withstand a Greater Judgment

Nortel's precarious and deteriorating financial condition and the consequent threat of non-collectibility posed the most significant risk to Lead Plaintiffs' continued prosecution of this

Action. Coffey Decl. ¶¶ 52-53; *see also* Light/Mullin Decl. ¶¶ 11-35. From the outset, Lead Plaintiffs recognized this risk. Lead Plaintiffs' Decl. ¶¶ 5, 8. Indeed, given the extent of the damages calculated by Lead Plaintiffs' expert, any judgment for a substantial portion of the Class's damages, to say nothing of the even greater damages asserted in Nortel I, would likely have resulted in the Company's bankruptcy. The risk that a successful prosecution will result in the bankruptcy of the defendant strongly weighs in favor of approval of a settlement. *See Grinnell*, 356 F. Supp. at 1389 (the "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"); *In re Warner Comm'ns Sec. Litig.*, 618 F. Supp. 735, 746 (S.D.N.Y. 1985) (where defendant cited to risk of bankruptcy, "certainty of payment of the settlement is advantageous to the class"); *see also In re Ravisent Tech's, Inc. Sec. Litig.*, No. 00-CV-1014, 2005 WL 906361 at *9 (E.D. Pa. April 18, 2005) (defendant's precarious financial condition, which called into doubt ability to withstand judgment greater than settlement amount, weighed in favor of approval of settlement); *In re Global Crossing*, 225 F.R.D. 436, at 460 (S.D.N.Y. 2004) ("without the proposed settlement, class members might well receive far less than the settlement would provide to them, even if they could prevail on their claims").

Lucent is directly on point. In *Lucent*, a defendant company in precarious financial condition facing a number of lawsuits insisted on a global settlement, and all parties recognized from the start of settlement negotiations that the company's ability to pay was the primary hurdle to structuring an adequate settlement. 307 F. Supp. 2d at 638-39, 646-47. The parties retained experts to analyze Lucent's ability to pay, and then crafted a settlement that included both cash and securities, and – for the benefit of both the company and the class members who were to receive a significant interest in Lucent as a result of the settlement – preserved Lucent as a going

concern. *Id.* The court found that these considerations weighed heavily in support of approving the settlement:

> In sum, while Lucent could not fund a cash settlement and could have filed bankruptcy at any moment during the litigation, the efforts and ingenuity of Lead Plaintiffs and Lead Counsel resulted in an extremely valuable Settlement for the benefit of the Class. No doubt, this factor strongly supports the Settlement.

Id. at 647.

As noted above, Lead Plaintiffs understood in the earliest negotiations that Nortel's inability to fund a significant cash settlement posed the greatest hurdle to the resolution of the Action. Coffey Decl. ¶ 2.[5] Lead Plaintiffs and Lead Counsel therefore devoted significant efforts to analyzing Nortel's present and projected financial condition, as well as the amount of available insurance, and to working to maximize the recovery that could be obtained for the Class. *Id*. ¶¶ 51-54. Lead Plaintiffs and Lead Counsel consulted with Financial Markets Analysis, LLC ("FMA"), the experts retained to quantify the damages suffered by the Class, and also retained telecommunications experts, CXO, LLC, to advise them on Nortel and the telecommunications industry general in connection with the Settlement, so that Lead Counsel and Lead Plaintiffs could better understand Nortel's market positioning and relative strengths and weaknesses. *Id.* ¶ 57. These analyses assisted Lead Plaintiffs and Lead Counsel in evaluating Nortel's settlement offers in order to ensure that the Settlement offered the maximum value for the Class. *Id.*

[5] Lead Counsel, with Lead Plaintiffs present in person or available by telephone, participated, together with the three investment banking experts retained by Lead Plaintiffs, by the Nortel I lead plaintiff, and by the Company, in four formal mediation sessions and in extensive informal negotiations and conferences. Coffey Decl. ¶¶ 52-53. A detailed description of the "ability to pay" considerations and the efforts undertaken to address them, which are summarized herein, is set forth in the Light/Mullin Declaration.

In addition, because the damages determined by Lead Plaintiffs' damages expert far exceeded Nortel's financial resources, Lead Counsel retained top investment banking and valuation experts, Duff & Phelps, LLC ("D&P"), to (a) analyze Nortel's financial wherewithal; (b) advise Lead Counsel and Lead Plaintiffs concerning Nortel's business condition; and (c) advise Lead Counsel and Lead Plaintiffs concerning the issues related to accepting securities as a substantial component of the Global Settlement, and the type of securities that would be most beneficial for the Class to obtain. Coffey Decl. ¶¶ 52-53. Lead Counsel, often together with Lead Plaintiffs either in person or by telephone, consulted closely with D&P to ensure that a negotiated settlement would confer a substantial benefit to the Class. *Id.* ¶53. Once the terms of allocating a Global Settlement were reached, D&P worked together with WL Ross & Co. LLC ("WL Ross"), the investment banking experts retained by the Nortel I lead plaintiff. *Id.* ¶52.

D&P and WL Ross, both of which had direct access to Nortel management and to the Company's own external advisors, obtained extensive confidential information concerning Nortel's financial condition. Light/Mullin Decl. ¶¶ 12-30. On the basis of that information, D&P and WL Ross created several models to forecast Nortel's future performance and financial conditions under varying scenarios. *Id.* They continued to receive additional information from the Company and to modify and update their analyses, based on Nortel's financial performance, throughout the course of the negotiations. *Id.* Based on their analyses, D&P and WL Ross advised Lead Plaintiffs and Lead Counsel as to the amount of cash that Nortel could contribute to the Global Settlement. *Id.*

Based on the extensive analysis conducted by their experts, Lead Plaintiffs and Lead Counsel determined that the cash and equity contribution being made by the Company to the Global Settlement represented the maximum contribution Nortel could make while preserving its

ability to continue as a going concern in order to maximize the value of the securities the Class would receive as a component of the Settlement. Lead Plaintiffs' Decl. ¶¶ 14, 16; Coffey Decl. ¶ 53. That analysis demonstrated to Lead Plaintiffs and Lead Counsel that Nortel could not satisfy a judgment substantially in excess of the recovery obtained through the Settlement. Lead Plaintiffs' Decl. ¶¶ 14, 16; Coffey Decl. ¶ 53.[6]

Lead Plaintiffs' virtually certain inability to secure a greater recovery for the Class by obtaining a judgment at trial also weighs heavily in favor of approving the excellent recovery obtained through the Settlement. Indeed, in light of the significant equity component of the Settlement and the division of the available insurance between the Class in this Action and the Nortel I class, there can be little question that the recovery obtained through the Settlement ***exceeds*** any possible judgment that could be obtained and satisfied by Defendants.

f) The Range of Reasonableness of the Settlement Amount in Light of the Best Possible Recovery and in Light of All Risks of Litigation

In order to calculate the "best possible" recovery, the Court must assume complete victory on both liability and damages as to all class members on every claim asserted against each defendant in the Action. Courts agree that the determination of a "reasonable" settlement "is not susceptible of a single mathematical equation yielding a particularized sum." *In re PaineWebber*, 171 F.R.D. at 130 (citation omitted); *In re Union Carbide*, 718 F. Supp. at 1103. Rather, "in any case there is a range of reasonableness with respect to a settlement." *Newman v.*

[6] Indeed, events occurring after Lead Plaintiffs' experts completed their analysis suggest that Nortel may be in even worse financial condition than Lead Plaintiffs and Lead Counsel believed. Specifically, Nortel's disclosure of its need to further restate past earnings and revenues, and the impact of that restatement on the Company's debt covenants, suggest that the Company's financial condition was less robust than Lead Plaintiffs' experts believed. *See* Light/Mullin Decl. at ¶¶ 36-49. Indeed, the market price of Nortel common stock has dropped 29% since the deal was reached in February.

Stein 464 F.2d at 693; *Zerkle v. Cleveland-Cliffs Iron Co.*, 52 F.R.D. 151, 159 (S.D.N.Y. 1971). As the Second Circuit has stated "[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Grinnell*, 495 F.2d at 455. The Second Circuit further explained that, "[i]n fact there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Id.* at 455 n.2.

Despite the obstacles facing Lead Plaintiffs on the issues of liability and damages, Lead Plaintiffs believe that they would be able to prove their claims and obtain a verdict for substantial damages for the members of the Class. However, that verdict would likely be a pyrrhic victory. Lead Plaintiffs' investment banking experts concluded that Nortel simply could not satisfy such a judgment, and continued litigation likely would have wasted the limited insurance applicable to this Action. Lead Plaintiffs were only able to secure a recovery from the far more significant insurance policies applicable to the Nortel I litigation through negotiation and settlement. When the benefits of the guaranteed recoveries from Defendants were weighed against the risks of continued litigation, it is clear that approval of the Settlement is warranted. *See In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1396, 1405 (E.D.N.Y. 1985) ("much of the value of a settlement lies in the ability to make funds available promptly"), *modified on other grounds*, 818 F.2d 179 (2d Cir. 1987).

Given the obstacles and uncertainties attendant to this complex litigation, Lead Plaintiffs submit that the Settlement achieved in this Action, which is among the largest recoveries ever obtained under the PSLRA, is well within the range of reasonableness, and better for the Class than the other possibilities — which could have been little or no recovery at all.

Indeed, the Settlement yields a significant recovery for the Class both in its absolute terms and as a percentage of the amounts that Lead Plaintiffs estimated to be the damages in the case. Specifically, Lead Plaintiffs' expert estimated that, assuming the jury agreed with all of her data and assumptions, the maximum aggregate damages were approximately $3.7 billion. *See* Preston Aff. ¶ 20. Thus, the recovery from the proposed Settlement represents (based on Nortel's September 1, 2006 share price) 28% of the maximum damages that Lead Plaintiffs could have recovered from Defendants, which would have been vigorously disputed at trial. Lead Plaintiffs' expert also concluded that Defendants' experts would tell the jury that the Class did not suffer any compensable damages at all or, even if the Class did, those damages amounted to just $1.5 billion. *Id.* at ¶ 21. The proposed Settlement thus represents a recovery of 70% of the damages that Defendants would likely argue were incurred by the Class.

Finally, as shown above, the Settlement Amount is based primarily on Nortel's financial capabilities, available insurance, and the Company's ability to issue securities without having an overly dilutive effect on the value of those securities.

Accordingly, each of the *Grinnell* factors discussed above supports approval of the Settlement by this Court.

3. The Proposed Settlement Is the Product of Informed Arm's-Length Negotiations and Is Presumptively Fair

"In appraising the fairness of a proposed settlement, the view of experienced counsel favoring the settlement is 'entitled to great weight'. . . There is thus a strong initial presumption that the compromise as negotiated herein under the [c]ourt's supervision is fair and reasonable." *In re Michael Milken*, 150 F.R.D. at 54 ; *see also In re Union Carbide*, 718 F. Supp. at 1103. As the court noted in approving the settlement in *In re Sumitomo Copper Litig.*:

> So long as the integrity of the arm's-length negotiation process is preserved . . . ***a strong initial presumption of fairness attaches to the proposed settlement***.' *In re*

> *PaineWebber*, 171 F.R.D. at 125. As likewise stated by the *Manual for Complex Litigation*, a ***'presumption of fairness, adequacy and reasonableness*** may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery**.'** *Manual for Complex Litigation*, Third ¶ 30.42 (1995).

189 F.R.D. at 280-81 (emphasis in original). As in *Sumitomo*, the parties to the Settlement negotiated it at arm's-length. Thus, the presumption of fairness "clearly attaches here."

As discussed above and as set forth in detail in the Coffey Declaration, the Settlement was negotiated at arm's-length among Lead Counsel, Lead Plaintiffs, lead counsel in Nortel I, counsel for Defendants, and counsel for Nortel's insurance carriers. *See generally* Coffey Decl. ¶¶ 48-56. Lead Plaintiffs, the Nortel I lead plaintiff, Defendants and Nortel's insurance carriers participated in a total of eight mediation sessions with Judge Sweet over a six-month period. *Id.* ¶ 49. Lead Plaintiffs and Lead Counsel also conducted four additional mediation sessions with Nortel and the parties' respective investment banking experts. *Id.* ¶ 53. Because Defendants insisted on a global settlement of Nortel II together with Nortel I, Lead Plaintiffs and Lead Counsel negotiated with the Nortel I lead counsel and lead plaintiff to reach agreement as to the allocation of any global settlement obtained. *Id.* ¶ 58. Lead Plaintiffs and Lead Counsel obtained for the Nortel II Class an allocation of 50% of all settlement proceeds in cash or common stock contributed by Nortel, and an allocation formula regarding insurance proceeds that, based on the amount Nortel later agreed to contribute, resulted in Nortel II receiving $66,495,000 of the $215 million of insurance covering the claims in Nortel I (of the $250 million in policies net of defense costs). *Id.* ¶¶ 50, 54. Having reached agreement with the representatives of the Nortel I class, Lead Plaintiffs and Lead Counsel began negotiating a settlement with Defendants and their insurance carriers. *Id.* ¶ 51.

As noted, the settlement process as a whole, and several of the mediation sessions in particular, were overseen by Judge Sweet. Coffey Decl. at ¶ 48. The active involvement of an

experienced and independent mediator in the negotiation of the Settlement adds support to the presumption of reasonableness. *See In re Independent Energy Holdings PLC Sec. Litig.*, No. 00 Civ. 6689 (SAS), 2003 WL 22244676, at *4 (S.D.N.Y. Sept. 29, 2003) ("Finally, the fact that the Settlement was reached after exhaustive arm's-length negotiations, with the assistance of a private mediator experienced in complex litigation, is further proof that it is fair and reasonable."); *see also In re WorldCom, Inc, Sec. Litig.*, 388 F. Supp. 2d 319, 329, 332 (S.D.N.Y. 2005) ("The Underwriters' Settlements, and almost all settlements in the class action litigation, were achieved with significant involvement by the Honorable Robert W. Sweet, U.S. District Judge for the Southern District of New York, and the Honorable Michael H. Dolinger, U.S. Magistrate Judge of the Southern District of New York."); *In re WorldCom, Inc. Sec. Litig.*, No. 02 CIV 3288 (DLC), 2004 WL 2591402, at *5-6 (S.D.N.Y. Nov. 12, 2004) (same, for separate settlements); *Bryant v. Universal Services, Inc.*, No. CIV. A. 99-2944, 2000 WL 680258, at *3 (E.D. La. May 24, 2000) (finding no collusion because, *inter alia*, "[t]he parties reached the settlement here after mediation led by an impartial third party").

As Judge Sweet noted in another context, where, "[t]he process by which the parties reached the Proposed Settlement[] was arm's-length and hard fought by skilled advocates," the Settlement is deserving of the Court's approval. *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 474 (S.D.N.Y. 1998). Accordingly, Lead Plaintiffs and Lead Counsel recommend that the Settlement be approved by this Court.

B. The Plan Of Allocation Is Fair And Reasonable

"To warrant approval, the plan of allocation must also meet the standards by which the settlement was scrutinized-namely, it must be fair and adequate." *WorldCom*, 388 F. Supp. 2d at 344 (quoting *Maley v. Del Global Technologies Corp.*, 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002). As numerous courts have held, a plan of allocation need not be perfect. *RMED Int'l.*,

Inc. v. Sloan's Supermarkets, Inc., No. 94 Civ. 5587 (PKL RLE), 2000 WL 420548, at *2 (S.D.N.Y. Apr. 18, 2000) ("aggregate damages in securities fraud cases are generally incapable of mathematical precision") (citing *In re Oracle Sec. Litig.*, 829 F. Supp. 1176, 1182 (N.D. Cal. 1993)); *see also In re Computron Software, Inc. Sec. Litig.*, 6 F. at 320; *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1284-85 (9th Cir. 1992). Indeed, "[a]n allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel." *WorldCom*, 388 F. Supp. 2d at 344 (quoting *Maley*, 186 F. Supp. 2d at 367); *accord In re NASDAQ*, 2000 WL 37992 at *2.

In determining whether a plan of allocation is fair, courts look primarily to the opinion of counsel. *See Paine Webber*, 171 F.R.D. at 133 ("[T]he 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."); *see also In re Lloyd's American Trust Fund Litig.*, No. 96.1262 RWS 2002 WL 31663577, *18 (S.D.N.Y. Nov. 26, 2002); *White v. NFL*, 822 F. Supp. 1389, 1420 (D. Minn. 1993) (stating that "[t]he court . . . affords considerable weight to the opinion of experienced and competent counsel that is based on their informed understanding of the legal and factual issues involved" in approving distribution of settlement proceeds). Here, the Plan of Allocation fully complies with these standards.

Courts also consider the reaction of a class to a plan of allocation. *See Paine Webber*, 171 F.R.D. at 126; *Maywalt v. Parker & Parsley Petroleum Co.*, No. 92 Civ. 1152 (RWS), 1997 U.S. Dist. LEXIS 97, at *11-12 (S.D.N.Y. Jan. 9, 1997), *aff'd sub nom. Olick v. Parker & Parsley Petroleum Co.*, 145 F.3d 513 (2d Cir. 1998). The Notice described the proposed Plan of Allocation in detail, and indicated that the deadline for objecting to the Plan of Allocation was

September 19, 2006. No objections to the Plan of Allocation have yet been received. Accordingly, the Plan of Allocation should be approved as fair, reasonable and adequate.

Working with their damages expert, Lead Counsel has developed a Plan of Allocation that reflects in a simple and straightforward manner their damages theory of the case based upon their extensive investigation and the discovery process. *See* Preston Aff. ¶¶ 26-27. The Plan of Allocation accounts for the degree of inflation of Nortel common stock caused by Defendants' alleged misconduct at various points throughout the Class Period, and accounts for the extent to which that inflation was relieved by each of the partial disclosures of the Company's true condition made prior to the end of the Class Period. As a result, the Plan of Allocation establishes a basis for calculating the "Recognized Claim" of each Class Member whose overall transactions in Nortel securities during the Class Period resulted in a loss.

The Plan of Allocation limits the Recognized Claims arising from "in-and-out" transactions to the lessor of 10% of the inflation at the time or purchase or 10% of the difference between the purchase and sale price of the stock. An "in-and-out" transaction is one in which Nortel common stock was both purchased and sold prior to a partial corrective disclosure (*i.e.*, purchased and sold prior to March 10, 2004, the date of the first partial disclosure of the Company's true condition, or purchased after March 11, 2004 and sold prior to March 15, 2004). This 10% cap on such claims reflects the strong defense that would be asserted against claims arising from "in-and-out" transactions, based on the argument (bolstered by *Dura Pharmaceuticals*) that any losses incurred on such transactions were not caused by Defendants' alleged misconduct.

The Plan of Allocation also provides for claims based on the purchase of call options and the sale of put options. Such options are derivative securities tied to the value of Nortel common

stock. Accordingly, the analysis conducted by Lead Plaintiffs' expert on the factors influencing the value of Nortel stock during the Class Period formed the basis for an analogous analysis of Nortel put and call options. *See* Preston Aff. ¶¶ 17-18. To reflect the derivative and speculative nature of those securities, claims arising from the purchase of call options or the sale of put options will be limited to a total of 5% of the Settlement Fund. In addition, Recognized Claims arising from purchases of call options are discounted to reflect the fact that the price of such options includes the payment of a time premium.

Accordingly, the Plan of Allocation reasonably and fairly compensates all members of the Class, and should also be approved.

C. Certification of the Class for Settlement Purposes Is Proper and Necessary

For settlement purposes only, Lead Plaintiffs request that the Court certify the Class, which, with certain exceptions as set forth in ¶3 of the Order and Final Judgment, consists of all persons and entities who purchased Nortel common stock or call options on Nortel common stock or wrote (sold) put options on Nortel common stock during the period between April 24, 2003 through April 27, 2004, inclusive, and who suffered damages thereby.[7] In the settlement context, class certification criteria are easily met because the class is unified by a common interest in a reasonable recovery. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). Although class action requirements must be met when certifying a settlement class, the settlement must be taken into account. *Id*.

The Second Circuit and the district courts within it have adopted a liberal construction of Rule 23 in shareholder suits seeking class action certification. *See, e.g., Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 179 (2d Cir. 1990) ("In light

[7] Lead Plaintiffs incorporate herein the extensive material they submitted on May 13, 2005 in support of their motion for class certification. (*See* Dkt. Nos. 12-17).

of the importance of the class action device in securities fraud suits, [the Rule 23] factors are to be construed liberally."); *Green v. Wolf Corp.*, 406 F.2d 291, 298 (2d Cir. 1968); *Eckert v. Equitable Life Assurance Soc'y of the United States*, 227 F.R.D. 60, 62 (E.D.N.Y. 2005); *In re Initial Pub. Offering Sec. Litig.*, 227 F.R.D. 65, 90 (S.D.N.Y. 2004) (hereinafter "*IPO Litig.*"). Certification of the Class will further the interests of the Class Members and Defendants; Defendants have stipulated to certification for settlement purposes only. For settlement purposes, the parties agree this action meets the requirements of Rule 23 of the Federal Rules of Civil Procedure. Class certification for settlement purposes is appropriate here because the four prerequisites of Rule 23(a) are met and the requirement of subdivision of Rule 23(b) is satisfied.

Rule 23(a)(1) requires that the class be so numerous that joinder of all members is impracticable. Within the Second Circuit "[n]umerosity is presumed when a class consists of forty or more members." *In re Worldcom, Inc. Sec. Litig.*, 219 F.R.D. 267, 279 (S.D.N.Y. 2003). Moreover, "[i]n securities fraud class actions relating to publicly owned and nationally listed corporations, the numerosity requirement may be satisfied by a showing that a large number of shares were outstanding and traded during the relevant period." *Teachers Ret. Sys. of Louisiana v. ACLN Ltd.*, No. 01-CV-11814 (LAP), 2004 WL 2997957, at *3 (S.D.N.Y. Dec. 27, 2004) (internal quotation marks omitted). The numerosity requirement is easily satisfied here: Nortel had hundreds of millions of shares traded during the Class Period. The proposed Class of investors who purchased Nortel common stock, purchased call options or sold put options during the Class Period contains many thousands of persons.

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." In securities fraud litigation, the commonality requirement is applied permissively. *See ACLN*, 2004 WL 2997957, at *4; *see also IPO Litig.*, 227 F.R.D. at 87 ("In general, where putative class

members have been injured by similar material misrepresentations and omissions, the commonality requirement is satisfied."). Not every question of law or fact must be common to every class member. *See, e.g., ACLN*, 2004 WL 2997957, at *4. Rather, "[f]actual variations among class members' claims will not defeat the commonality requirement so long as the claims arise from a common nucleus of operative facts." *Id*. This case presents ***several*** common issues of law and fact, including:

- whether the statements Defendants disseminated during the Class Period misrepresented or omitted material facts about Nortel's financial results;
- whether Defendants acted knowingly, or with recklessness, in misrepresenting or omitting those material facts;
- whether the market prices of Nortel securities were artificially inflated during the Class Period due to the alleged false and misleading statements and omissions; and
- whether members of the Class suffered economic loss as a result of Defendants' misstatements and omissions, and if so, the appropriate measure thereof.

Such conduct constitutes a "common course of fraudulent conduct" that has "allegedly caused all members of the Class to suffer damages." *Id*.; *see also Green v. Wolf Corp*., 406 F.2d 291, 300 (2d Cir. 1968) (the question whether defendants "engaged in a common course of conduct designed to continually manipulate the market price of [the issuer's] stock" satisfied the commonality requirement); *In re Oxford Health Plans*, 191 F.R.D. 369, 374 (S.D.N.Y. 2000) ("Common questions may predominate where there exists a common course of conduct even though there is not a complete identity of facts."). Defendants' material misrepresentations and omissions artificially inflated the market price of Nortel common stock, and when those misstatements and omissions were disclosed, Class members suffered economic harm, thereby injuring each Class member who purchased that stock in the same way.

Rule 23(a)(3) requires that plaintiffs' claims be typical of the class' claims. Courts in this Circuit have emphasized that the typicality requirement is not demanding, and that "'typical' is

not identical." *IPO Litig.*, 227 F.R.D. at 87. Here, the claims asserted by the Lead Plaintiffs are typical, if not identical, to the claims of the other Class members. Lead Plaintiffs allege that Defendants violated Sections 10(b) and 20(a) of the Exchange Act, as well as Rule 10b-5 promulgated thereunder, by issuing public statements and documents that misrepresented or omitted material facts. Moreover, Lead Plaintiffs allege that they and the Class paid artificially inflated prices for Nortel common stock as a result of Defendants' material misrepresentations and omissions. Those claims, and the claims of the absent Class members, are thus based upon precisely the same theories and will be proven by precisely the same evidence. Accordingly, Lead Plaintiffs satisfy typicality under Rule 23(a)(3).

Rule 23(a)(4) requires that plaintiffs fairly and adequately protect the interests of the class. This requirement is comprised of two factors: (1) that the class representatives' attorneys are qualified, experienced and generally able to conduct the litigation; and (2) that the suit is not collusive, and plaintiffs' interests are not antagonistic to those of the other members of the class. *See, e.g.*, *ACLN*, 2004 WL 2997957, at *4. BLB&G was previously approved as Lead Counsel by the Court. The most active of the other Plaintiffs' Counsel, Lowenstein, is one of lead plaintiff New Jersey's principal outside securities litigation counsel. Together with Lowenstein and the other Plaintiffs' Counsel, Lead Counsel are qualified and able to conduct the litigation, based on their extensive experience in securities class action litigation and successful prosecution of many of the most significant class actions under the PSLRA. In addition, there is no antagonism between the Lead Plaintiffs and the Class. Lead Plaintiffs and all Class Members have suffered losses as a result of their transactions in Nortel securities during the Class Period.

A class action also must satisfy one of the subdivisions of Rule 23(b). Here, the Class satisfies the requirements of Rule 23(b)(3), which provides that a class action may be maintained

"if the prerequisites of subdivision (a) are satisfied, and in addition . . . the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Here, common questions of law or fact predominate over any question affecting only individual Class Members. Where, as here, Lead Plaintiffs allege that Defendants engaged in misrepresentations causing inflation in the price of stock, which is alleged to violate the federal securities laws, the issues of law and fact which flow from these activities predominate over any individual issue in a class action. *See Amchem*, 521 U.S. at 625 ("[p]redominance is a test readily met . . . [in] cases alleging . . . securities fraud"); *Cromer Fin. Ltd. v. Berger*, 205 F.R.D. 113, 127 (S.D.N.Y. 2001) (same).

A class action also is superior to other methods of adjudication, and is particularly appropriate for addressing claims of violations of the securities laws. Most violations of the federal securities laws, such as those alleged here, inflict economic injury on large numbers of geographically dispersed persons to such an extent that the cost of pursuing individual litigation to seek recovery against well-financed, multiple adversaries is not feasible. *See ACLN*, 2004 WL 2997957, at *9 ("'[S]ecurities suits such as this easily satisfy the superiority requirement of Rule 23 . . . Multiple lawsuits would be costly and inefficient, and the exclusion of class members who cannot afford separate representation would neither be 'fair' nor an adjudication of their claims.'") (quoting *Blech Sec. Litig.*, 187 F.R.D. at 107)).

The four factors specified in Rule 23(b)(3) favor class certification. ***First***, there is no indication that members of the Class would prefer to individually control the prosecution of their claims; any who do have the opportunity to opt out or be represented by counsel of their own choice. ***Second***, Lead Plaintiffs are unaware of any other class action litigation (other than the

Canadian Actions, which are being settled as part of the Global Settlement) concerning the false statements and omissions alleged here against Defendants. ***Third***, it is clearly desirable to concentrate the litigation in one forum in order to avoid inconsistent adjudications and thus promote fairness and efficient use of the judicial system. ***Fourth***, this case presents no unusual difficulties in management of the Class action or notice to the Class. Lead Counsel and the courts have handled numerous similar actions; in fact, settlement sets up a very efficient and workable means of administering claims to resolve this action.

IV. CONCLUSION

For the foregoing reasons, Lead Plaintiffs respectfully request that this Court approve the Settlement and the Plan of Allocation as fair, reasonable and adequate to all Class Members, and certify the Class for settlement purposes.

Dated: New York, New York
September 5, 2006

Respectfully Submitted,

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