

Court File No. 09-CL-7950

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C.  
1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF  
NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL  
NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL  
CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION

APPLICATION UNDER PART IV OF THE COMPANIES' CREDITORS ARRANGEMENT  
ACT, R.S.C. 1985, c. C-36, AS AMENDED.

— and —

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re

NORTEL NETWORKS INC., *et al.*,

Debtors.

Chapter 11  
Case No. 09-10138 (KG)  
(Jointly Administered)

**POST-TRIAL REPLY BRIEF OF THE US INTERESTS**

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## PRELIMINARY STATEMENT<sup>1</sup>

The MRDA granted all economic rights to NN Technology – the equitable and beneficial ownership of that NN Technology – to the Licensed Participants in their Exclusive Territories. This is what the MRDA provides and what it needed to provide for transfer pricing purposes, to accurately reflect Nortel’s business practices and to avoid NNL from having permanent establishment status in the US, a prospect that “mortified” NNL’s tax professionals. All MRDA Participants engaged in substantial R&D, working together to create Nortel’s intellectual property, with the Licensed Participants collectively spending more than NNL on R&D during the MRDA years prior to the insolvency filings and NNI alone directly spending \$6.5 billion. In consideration for the vesting of legal title to NN Technology in NNL, no matter where that intellectual property was created, the Licensed Participants were granted all economic rights to NN Technology in their Exclusive Territories, including the exclusive right to exclude all others from using NN Technology, the right to sublicense without restriction and the right to practice (use) the NN Technology. This is a key bargain that the parties crafted in the MRDA to meet the arm’s length standard.

The Canadian Interests contend that the Licensed Participants *only* had the right to “make, use or sell” Nortel products using NN Technology. This interpretation requires the reader to delete key provisions of the MRDA. Article 4(e) grants the Licensed Participant the unqualified right to exclude others from exploiting NN Technology in their Exclusive

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<sup>1</sup> Capitalized terms used herein but not otherwise defined shall have the meaning set forth in the Post-Trial Brief of the US Interests and/or the Proposed Findings of Fact and Conclusions of Law of the US Interests. Citations to each party’s pretrial brief (“Pretrial Br.”), post-trial brief (“Post-Trial Br.”), proposed findings of fact (“PFOF”) and/or proposed conclusions of law (“PCOL”) include both the relevant party (e.g., “US” for the US Interests, “EMEA” for the EMEA Debtors, and “Monitor” for the Monitor and Canadian Debtors) and relevant document (e.g., “CCC Post-Trial Br.” or “US PFOF”). Citations to specific sections, pages or paragraphs of the US Interests’ pretrial brief, post-trial brief, proposed findings of fact or proposed conclusions of law incorporate all citations included therein. To avoid repetition, the US Interests’ citations to the evidentiary record and proposed legal conclusions will generally refer to the US PFOF, PCOL, post-trial brief and/or pretrial brief.

Territories; the word “Products,” upon which the Canadian Interests’ interpretations depend, does not appear in Article 4(e). This exclusion right is critical, because the right to exclude confers on the holder all of the valuable rights in a patent. With this right, NNI could exclude anyone else from using any NN Technology in the US. Accordingly, only NNI, through relinquishment of this right, had the ability and right to convey to Rockstar or the Business Line purchasers anything of value with respect to NN Technology in the US. Article 5(a) also grants NNI the right to sublicense and the last clause of Article 5(a) grants, among other things, all rights in patents in the US. Consistent with this, the MRDA explicitly confirms the Participants’ ownership of NN Technology in their respective Exclusive Territories. The Canadian Interests’ reading also cannot be reconciled with several other MRDA provisions, such as the Licensed Participants’ right to disclose confidential information to their sublicensees and the Licensed Participants’ unqualified obligation to indemnify NNL for any claims arising in their respective Exclusive Territories with respect to NN Technology, even if those claims do not relate to the Licensed Participants’ making, using or selling of Nortel products.

The Canadian Interests’ construction also flies in the face of the entire record in this case, including the factual circumstances surrounding the creation and execution of the MRDA – the factual matrix that the Supreme Court of Canada has held must be considered in interpreting even an unambiguous contract. Acceptance of the Canadian Interests’ construction would mean that the parties drafted the MRDA in a way that unambiguously *fails* to reflect what all the parties understood, intended and needed their agreement to mean. When Nortel was still operating, NNL never took the position the Canadian Interests now advocate. By the same token, were Nortel still operating, NNL would never take the position the Canadian Interests now advocate because it would lead to serious adverse tax consequences around the world and

undermine the central goal of the MRDA.

The Canadian Interests' experts' allocation theories and calculations must be rejected because they rely entirely on this flawed construction of the MRDA. Green, Berenblut, Cox and Britven allocate to NNL all \$4.5 billion in proceeds from the sale of the Patent Portfolio with no economic analysis or calculation. Instead, each relies solely on the incorrect assumption that NNI and the EMEA Debtors had no rights whatsoever in that portfolio and their licenses were worthless at the time of the Patent Portfolio Sale.

The Canadian Interests rely on the same flawed interpretation of the MRDA for their Business Line Sales allocation. They compound the problem with another incorrect premise: that NNL's interests were freely transferable whereas those of NNI and the EMEA Debtors were not. Green conceded on cross examination that his Business Lines calculation allocates for all debtors except NNL based on so-called "value in use," then allocates the entire artificially created \$1 billion remainder to NNL. When asked to explain why he used different approaches for the sellers, Green testified that it was because NNL's interests were freely transferrable whereas those of NNI and the EMEA Debtors were not, based on his reading of Article 14(a) of the MRDA. The Canadian Interests now seek to distance themselves from their non-transferability argument and their prior interpretation of Article 14(a) – referring to their own theory as a "red herring" – because it was proven false at trial. However, this backpedalling does not mask the fact that this non-transferability argument is fundamental to Green's calculation and is the only basis upon which he treats the parties differently.

By contrast, the US Interests' expert, Kinrich, applied well-settled income-based methodologies to calculate what portion of the purchase prices paid was due to the surrender or transfer of assets (including rights) by each selling debtor. The Canadian Interests' criticisms of

Kinrich's analysis were shown at trial to be without any basis. Notably, the Canadian Interests do not deny that absent their meritless construction of the MRDA and flawed value in use analysis, NNI is entitled to a substantial portion of the sale proceeds in allocation.

The EMEA Debtors' contribution approach, in turn, does not value what each of the selling Debtors transferred or relinquished in the Sales – the question all parties agree this case is meant to resolve. However, to the extent the Courts nonetheless elect to adopt the EMEA Debtors' approach, Malackowski's calculations must be adjusted for a significant error that was made clear by the testimony of the EMEA Debtors' transfer pricing expert, Cooper. Cooper provided the theoretical underpinning for the EMEA Debtors' contribution theory; Malackowski was supposed to take that theory and perform the calculations. Cooper testified that “whoever pays for the R&D, regardless of whether they do it or not, would have the economic ownership for the resulting IP proportionate to the amount it paid.”<sup>2</sup> It is undisputed that in the CSA period, as Cooper further acknowledged, transfer pricing payments *were* payments of R&D costs and therefore must be considered in calculating contribution. Malackowski failed to include these payments in his calculations, and this was a clear error that must be corrected if the Courts adopt the contribution theory.

## POINT I

### THE CANADIAN INTERESTS PROFFER AN UNREASONABLE INTERPRETATION OF THE MRDA

In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, the Supreme Court of Canada recently confirmed the principles under which a court must interpret a contract:

- The overriding goal is to determine “the intent of the parties and the scope of their understanding.”<sup>3</sup>

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<sup>2</sup> Trial Tr. 2810:5-9 (Cooper).

<sup>3</sup> *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 47 (internal citation omitted). Delaware law on

- A court “must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.” The “surrounding circumstances” of a contract – called the “factual matrix” – must be considered because “words do not have immutable or absolute meaning” and “[n]o contracts are made in a vacuum.”<sup>4</sup>
- Factual matrix evidence may include “absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man” if it “was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting.”<sup>5</sup>
- Thus, the factual matrix evidence includes the “commercial purpose of the contract;” the “background, the context, [and] the market in which the parties are operating;” and the “nature of the relationship created by the agreement.”<sup>6</sup>

The Canadian Interests’ arguments fail to adhere to these principles. While claiming to rely on the unambiguous terms of the MRDA, the Canadian Interests read words into the MRDA that are not there and ignore terms that are there. For example, they claim the MRDA grants>NNL “ownership” of NN Technology, when the MRDA actually grants>NNL “legal title.” The word “ownership” does appear in the MRDA, but only to describe *each* Participant’s equitable and beneficial ownership of NN Technology. The Canadian Interests urge the Courts to ignore these words because they supposedly lead down a “rabbit hole” of contradictory meanings depending on the context in which they are used, a context that the Canadian Interests seek to have the Courts ignore.<sup>7</sup> In fact, the words of the MRDA and the rights granted to the Participants are clear and support the US Interests’ allocation position, which is further confirmed when the requisite factual matrix is considered.

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contractual interpretation is not materially different from Ontario law. See US Post-Trial Br. at 21-23 & nn.38, 40-41, 44.

<sup>4</sup> *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras.46- 47 (internal citation omitted); see also *id.* at para. 50 (“Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.”).

<sup>5</sup> *Id.* at para. 58 (internal citation omitted).

<sup>6</sup> *Id.* at paras. 47-48 (internal citations omitted).

<sup>7</sup> Trial Tr. 455:7-458:8 (Monitor Opening Statement).



The Canadian Interests' effort to escape the enormous weight of the factual evidence fails. This evidence is admissible because it is relevant to the commercial "circumstances known to the parties at the time of formation" of the MRDA, including its amendments, and "would have affected the way in which the language of the [MRDA] would have been understood by a reasonable man," precisely the type of evidence that must be considered in interpreting a contract.<sup>8</sup> The evidence establishes that all parties, including NNL, understood that the MRDA needed to reflect and "contractualize" the parties' actual business practices, comport with transfer pricing regulations and be consistent with the parties' representations to tax authorities.<sup>9</sup> Further, to avoid NNL being deemed to have a "permanent establishment" in the US, it was necessary that the MRDA ensure that NNL would not do business in the US except through its subsidiary, NNI.<sup>10</sup> All of these factual circumstances required that each Licensed Participant own all economic rights to NN Technology in its Exclusive Territory, and that was the express, shared intent of NNL, NNI and the EMEA Debtors in drafting the MRDA.

All business persons involved in the process of creating the MRDA and its amendments testified that the circumstances surrounding the creation of the MRDA led the parties to provide the Licensed Participants with all economic rights to NN Technology in their Exclusive Territories, amounting to beneficial ownership.<sup>11</sup> The principal external legal counsel draftsman of the MRDA agreed.<sup>12</sup> Even E&Y, having gained knowledge of Nortel's operations from years of advising Nortel in its APA process, acknowledged this ownership in transfer pricing reports that it helped to prepare for tax authorities after it became the Monitor but

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<sup>8</sup> See *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 47, 58.

<sup>9</sup> See US Post-Trial Br. Point II.C.1; US PFOF §§ III.B, III.D.

<sup>10</sup> US Post-Trial Br. at 56-58; US PFOF ¶¶ 243-49 (discussing that Nortel's tax experts "seemed mortified at the prospect of creating a taxable entity in the USA called NNL").

<sup>11</sup> US Post-Trial Br. at 41-44; US PFOF ¶¶ 171-79, 252-74.

<sup>12</sup> US Post-Trial Br. at 43-44; US PFOF ¶ 256.

before it invented its current litigation position.<sup>13</sup>

#### **A. NNI Held All Valuable Economic Rights in NN Technology in the United States**

A patent includes a bundle of economic rights.<sup>14</sup> The most fundamental right, and the essence of a patent right, is the right to exclude others from using the patented invention.<sup>15</sup> It is from this right that all other economic rights with respect to a patent flow. The related economic rights with respect to a patent are the rights to practice the patent (to use the patented invention) and to allow others to practice it (through a license or sublicense). It is also clear that the legal title holder of a patent can transfer all economic rights in the patent technology to another party through a license.<sup>16</sup>

<sup>13</sup> US Post-Trial Br. at 54-55; US PFOF ¶¶ 266, 269.

<sup>14</sup> See US PCOL § II.B (“The Valuable ‘Bundle of Rights’ that a Patent Affords”).

<sup>15</sup> See *id.* ¶¶ 28-29; US Pretrial Br. at 26-28; 35 U.S.C. § 154(a)(1) (providing that a US patent grants “the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States”); *Patent Act*, R.S.C., 1985, c. P-4, s. 42; see also Stephen J. Perry & T. Andrew Currier, *Canadian Patent Law* § 3.21 (2d ed. 2014) (“The exclusive right granted by a patent has historically been treated as a property right and, more specifically, as a chose in action, which is a right to exclude others from the property defined by the patent”); *Schenck v. Nortron Corp.*, 713 F.2d 782, 786 n.3 (Fed. Cir. 1983) (“The patent right is but the right to exclude others, the very definition of ‘property.’”); *Cornell v. Sears, Roebuck & Co.*, 722 F.2d 1542, 1548 (Fed. Cir. 1983) (“[A] patent is a form of property right, and the right to exclude recognized in a patent is but the essence of the concept of property.”); *H.H. Robertson, Co. v. United Steel Deck, Inc.*, 820 F.2d 384, 390 (Fed. Cir. 1987) *abrogated on other grounds*, *Markman v. Westview Instruments, Inc.*, 52 F.3d 967 (Fed. Cir. 1995) (“[T]he principal value of a patent is its statutory right to exclude.”).

<sup>16</sup> See US PCOL ¶ 32; Green Dep. 57:4-59:19; see also Raymond T. Nimmer & Jeff C. Dodd, *Modern Licensing Law* § 5:33 (2013) (“[T]he bundle of rights conveyed to an exclusive licensee [of a patent] may be so broad as to be a transfer of ownership in commercial effect.”); 5 John Gladstone Mills III et al., *Patent Law Fundamentals* § 19:6 (2d ed. 2014) (“A patent owner may transfer all substantial rights in the patents-in-suit, in which case the transfer is tantamount to an assignment of those patents to the exclusive licensee, conferring standing to sue solely on the licensee.”).

The CCC is wrong to suggest that *Euro-Excellence v. Kraft Canada Inc.*, [2007] 3 S.C.R. 20 at para. 16, stands for the proposition that an exclusive license can never convey “the full panoply of rights and interests” in a patent. The majority of the judges on that panel disagreed with Judge Rothstein (whom the CCC quotes) on this point. See *id.* at para. 75 (Bastarache, J.); *id.* at paras. 113-28 (Abella, J., dissenting). In any event, this case addresses standing to sue under Canada’s Copyright Act, and Judge Rothstein’s reasoning was limited to the scope of a licensee’s rights under that act only. *Id.* at para 26. In Canada, patents are governed by Canada’s Patent Act, which – unlike the Copyright Act – does not speak in terms of “owners” of the relevant intellectual property. See, e.g., *Copyright Act*, R.S.C., 1985, c. C-42, s. 13(1); *Patent Act*, R.S.C., 1985, c. P-4, s. 42. And under governing US law, NNI unquestionably had standing to sue infringers with respect to US patents. See *infra* § I.A.1; US Post-Trial Br. at 27-28.

### 1. NNI Had the Exclusive Right to Exclude in the United States

Article 4(e) unambiguously provides NNI with the right to exclude others from infringing or misappropriating any and all NN Technology in the US. To prevail, the Canadian Interests would have to establish that the MRDA unambiguously did *not* provide this right to NNI. This is because in the event the Courts find ambiguity, all of the evidence the Canadian Interests mischaracterize as parol evidence would unquestionably be admissible and defeat the Canadian Interests' case.

Article 4(e) could not be clearer. It states in full:

Licensed Participants have the right to assert actions and recover damages or other remedies in their respective Territories for infringement or misappropriation of NN Technology by others.

“NN Technology” is defined broadly to include “any and all intangible assets, including but not limited to patents.”<sup>17</sup> There is no “Products” or other limitation of any kind on NNI’s enforcement right in the US. The Monitor’s sole response is that the enforcement right “must relate to matters within the scope of the license.”<sup>18</sup> This proves the US Interests’ point. The fact that the enforcement right unambiguously extends to *all* NN Technology is only consistent with the fact NNI had all economic rights to and beneficial ownership of all NN Technology in the US. The Canadian Interests’ attempt to rewrite Article 4(e) and to inject words into that clause that are not present renders meaningless the unrestricted grant of a right to exclude in the MRDA. Indeed, the Canadian Interests fail even to explain what third parties, if any, the Licensed Participants could ever sue under their revision of Article 4(e), and under what circumstances.<sup>19</sup>

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<sup>17</sup> TR21003 (MRDA) at 3 (Art. 1(f)).

<sup>18</sup> Monitor Post-Trial Br. ¶ 328.

<sup>19</sup> The CCC’s expert Britven testified that under the Canadian Interests’ construction of the MRDA, even an NNI supplier that was simultaneously running a second assembly line manufacturing unauthorized phones using Nortel

As an exclusive licensee, NNI also had an unqualified right to exclude in the US under black letter US law.<sup>20</sup> As the holder of “all substantial rights” to Nortel’s US patents, NNI had the right to bring enforcement actions on its own, without NNL’s participation. And even if (contrary to fact) the MRDA’s license did not convey “all substantial rights” to the US patents, NNI’s status as exclusive licensee entitled it to bring enforcement suits against infringers.<sup>21</sup> The Monitor ignores governing US law. The CCC concedes that US law governs standing to enforce a US patent but asserts that the contractual grant of the right to enforce a patent by itself does not convey the right to enforce.<sup>22</sup> This misses the point because NNI was unquestionably an exclusive licensee, which itself provides NNI with standing to sue. Moreover, under US law, the express provision of a right to sue is a “particularly dispositive” factor in assessing whether “all substantial rights” in a patent have been conveyed to an exclusive licensee.<sup>23</sup>

The factual matrix confirms the broad scope of NNI’s enforcement rights. Without objection from NNL, NNI sued infringers of Nortel patents, even when the infringing product was not then being made or sold by Nortel.<sup>24</sup> The MRDA was intended to reflect this consistent

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technology in the US would not have been subject to suit by NNI. Britven Dep. 328:5-329:13. This construction flies in the face of the language of Article 4(e).

<sup>20</sup> US Post-Trial Br. at 27-28 (citing *Morrow v. Microsoft Corp.*, 499 F.3d 1332, 1336-37 (Fed. Cir. 2007); *Vaupel Textilmaschinen KG v. Meccanica Euro Italia SPA*, 944 F.2d 870, 873-76 (Fed. Cir. 1991)); US PCOL ¶¶ 51-58.

<sup>21</sup> US Pretrial Br. at 94-97; US Post-Trial Br. at 27-28; US PCOL ¶¶ 51-58. The only difference is that an exclusive licensee with less than all substantial rights would be required to join the licensor as a plaintiff. This is not a practical bar to enforcement because if the licensor refuses to join the suit, the exclusive licensee can force it to join as an involuntary plaintiff. US PCOL ¶ 56 n.41. Further, if the licensor attempted to trespass upon the licensee’s exclusive rights by making or selling products covered by the licensed patents, the licensee could sue the licensor for infringement. *See, e.g., Research Frontiers Inc. v. Marks Polarized Corp.*, 290 F. Supp. 725, 726 (E.D.N.Y. 1968).

<sup>22</sup> CCC Post-Trial Br. ¶ 53 n.39, ¶ 76.

<sup>23</sup> *Vaupel Textilmaschinen KG v. Meccanica Euro Italia SPA*, 944 F.2d 870, 875 (Fed. Cir. 1991).

<sup>24</sup> US Post-Trial Br. at 60; US PFOF ¶¶ 276-81. That NNI sued third parties for infringement on the very same patents that were later sold to Rockstar – including patents that the Canadian Interests claim were “not used” in Products – demonstrates that the Canadian Interests’ position that NNI had no rights at all in those patents is wrong. *See, e.g., CCC Post-Trial Br. ¶ 79* (discussing the enforcement provision of Article 4(e), the CCC wrongly asserts that “the Licensed Participants had no rights, let alone exclusive rights, regarding the 59-66% of the Residual IP”).

business practice, as it had to do.<sup>25</sup> The grant of a full and unqualified right to exclude with respect to anyone infringing or misappropriating NN Technology also made commercial sense; a more limited license and enforcement grant would have created uncertainty as to which Nortel entity had the right to sue, injecting factual defences that an alleged infringer could have used to its advantage in a lawsuit and undermining the Nortel Group's common interest to protect its intellectual property rights.<sup>26</sup>

## **2. NNI Had the Exclusive Right to Sublicense in the United States**

The Canadian Interests also would have to establish that the MRDA unambiguously did *not* provide a sublicense right to NNI. They cannot establish this either because the MRDA plainly does include a sublicense right. The Monitor appears to assert that the MRDA provided NNI with the right only to have a third party make products for NNI using NN Technology, commonly referred to as a “have made” right.<sup>27</sup> Once again, although claiming to rely upon the language of the MRDA, the Monitor diverges from its text. Article 5(a) separately delineates NNI's right to sublicense and its “have made” right, which are distinct rights under both Canadian and US law.<sup>28</sup> The “have made” right enables NNI to hire a third party to make products for subsequent sale by NNI, and the sublicense right enables NNI to sublicense to third parties the right to do what NNI can do – that is, to develop, design, make and sell products using NN Technology for themselves. Contrary to the Monitor's suggestion that this entails

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<sup>25</sup> US Post-Trial Br. at 41-42, 44; US PFOF ¶¶ 147, 252, 272.

<sup>26</sup> The uncontroverted evidence also establishes that to the extent NNL also joined these lawsuits as a plaintiff, this was done solely out of an abundance of caution, not because either NNI or NNL thought NNL was a necessary party. US PFOF ¶ 276. The Canadian Interests' submissions also ignore that even in suits where both NNI and NNL were named plaintiffs, Nortel's pleadings identified NNI as “the exclusive licensee of the [at issue] patent” (or “patents”), without qualification. *See id.*; *see also* TR22084 (Foundry Networks Complaint) ¶¶ 8, 14, 20, 26, 32, 38; TR40777 (Extreme Networks Complaint) ¶¶ 8, 14, 20, 26, 32, 38; TR40788 (Kyocera Wireless Complaint) ¶ 11; TR50518 (Vonage Complaint) at 6.

<sup>27</sup> *See* Monitor Post-Trial Br. ¶¶ 327-28.

<sup>28</sup> *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 at paras. 75-76; *CoreBrace LLC v. Star Seismic LLC*, 566 F.3d 1069, 1073 (Fed. Cir. 2009).

sublicensing rights greater than NNI's license rights, it simply entails sublicensing the same rights that NNI holds – which is exactly what a sublicense means.<sup>29</sup> The only logical conclusion to be drawn from NNI's distinct sublicense right is that NNI's own rights are broader than the Monitor contends.

The Monitor seeks to dismiss as “clumsy” drafting the redundancy created by its reading of the MRDA, which would have the Courts conclude that the parties in the MRDA granted the Licensed Participants a “have made” right twice in Article 5(a), once explicitly and a second time by calling it a right to sublicense (although under its construction, it is not a sublicense right at all).<sup>30</sup> The Monitor presents no evidence that this language – which it simultaneously claims is clear and unambiguous – was the result of clumsiness or a mistake. To the contrary, the relevant factual matrix confirms that the grant of two separate rights was deliberate and the parties meant what they wrote in the MRDA.

First, in the 1996 APA, NNL and NNI represented to and agreed with the IRS and CRA that NNI enjoyed all benefits with respect to NN Technology in the US, explicitly including the exclusive right to sublicense. There was no limitation on the scope of this right to sublicense NN Technology in the 1996 APA. The parties further represented in the 1996 APA that NNI received income from sublicensing, which would not be the case if NNI's only rights were limited “have made” rights to permit contract manufacturers to make products for NNI, as the Monitor contends.<sup>31</sup> The 1992 R&D CSA, drafted after the 1996 APA in order to comply with

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<sup>29</sup> See, e.g., *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 at para. 48 (observing that by granting a sublicense “the licensee in effect transfers or licenses some or all of his or her rights to the sublicensee, which means that the sublicense has similar incidents to the primary licence, including the right to exercise *independently* certain rights enjoyed by the licensee pursuant to its licence.”) (emphasis added); see also US Post-Trial Br. at 29-30.

<sup>30</sup> See Monitor Post-Trial Br. ¶¶ 208-12, 327-28.

<sup>31</sup> US Post-Trial Br. at 48-49, 61; US PFOF ¶¶ 173-75. To the contrary, NNI would have to pay a contract manufacturer.

its terms, was required to and did adhere to this agreement with the tax authorities.<sup>32</sup> Further, transfer pricing regulations enacted not long after the 1992 R&D CSA was drafted also expressly *required* that NNI have economic ownership of NN Technology in the US, and the 1992 R&D CSA was entirely consistent with these provisions.<sup>33</sup> When the parties were later creating the MRDA, they decided to continue equitable and beneficial ownership granted under the 1992 R&D CSA to avoid expensive buy-outs.<sup>34</sup>

Second, and consistent with the above, after the 1996 APA – including during the RPSM years but before the MRDA was signed – NNL and NNI represented to tax authorities that NNI engaged in sublicensing in the US and received royalties.<sup>35</sup>

Third, NNI was, in fact, the sublicensor in the US in dozens of sublicensing agreements.<sup>36</sup> This was the parties’ consistent practice at Nortel, including from January 1, 2001 (the effective date of the MRDA) to 2005 (when the first iteration of the MRDA was signed), and it was imperative that the MRDA reflect the parties’ actual commercial practices. Thus, in Nortel’s worldwide licensing agreements, the parties stated that the sublicense was not just provided by NNL, but on behalf of NNL and its subsidiaries. Unrebutted factual matrix evidence establishes that this language was used because it was “broad enough so that NNL will be viewed as licensing the Canadian rights, NNI the U.S. rights, . . . etc.,” since each Participant had “the exclusive rights to license NNL’s IPR within their respective regions” and this structure

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<sup>32</sup> US Post-Trial Br. at 48; US PFOF ¶ 156. The CCC’s suggestion that RPSM payments were a “royalty in substance if not in name,” CCC Post-Trial Br. ¶ 87(b), not only contradicts the plain language of Article 5(a) of the MRDA (granting NNI “an exclusive, royalty-free license”), but it would have had the very significant adverse tax consequences that the MRDA was designed to avoid. *See, e.g.*, TR00062 (Eden Report) ¶ 120.

<sup>33</sup> US Post-Trial Br. at 49-50; US PFOF ¶¶ 176-77 (citing, *inter alia*, TR40713 (1997 OECD Guidelines) and TR50295 (IC 87-2R)).

<sup>34</sup> US Post-Trial Br. at 51; US PFOF ¶ 250.

<sup>35</sup> US Post-Trial Br. at 61-62; US PFOF ¶ 282.

<sup>36</sup> A number of these agreements are listed in Appendix A to this reply brief.

“avoid[ed] any cross-border IPR transfers which may trigger tax liability.”<sup>37</sup> NNL’s Director of Intellectual Property acknowledged during his deposition that each Licensed Participant had the exclusive right in its Exclusive Territory to grant “a licence where the [third party] is already making *their own product* and is seeking a licence from [the Licensed Participant] so that they will not be infringing.”<sup>38</sup>

Fourth, having NNI engage in sublicensing of NN Technology in the US was consistent with NNL’s need to avoid a permanent establishment for itself in the US and subjecting itself to taxation there.

Fifth, it would have been impractical and economically unfeasible to settle infringement suits if NNI did not have the right to sublicense; thus, even the Monitor’s experts Green and Reichert acknowledged that NNI did have this right.<sup>39</sup> Similarly, the CCC disagrees with the Monitor and expressly acknowledges that the sublicense right was not a “have made” right and that the Licensed Participants could grant a third party the right to make products using NN Technology “for itself.”<sup>40</sup>

While the Monitor denies that NNI had a sublicense right, it carefully avoids expressly

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<sup>37</sup> US Post-Trial Br. at 61 (citing TR22154 at 1); *see also* TR22080 at 2 (“[M]ost licenses are granted by ‘Nortel Networks Limited acting on its own behalf and on behalf of its subsidiaries (collectively ‘Nortel Networks’)’. The theory is that *in each of the relevant jurisdictions, the licenses were being granted by the subsidiary which is the exclusive licensee for that jurisdiction*. This has been the method of licensing used in Nortel for many years, and Tax appears to be comfortable with it.”) (emphasis added); *id.* at 1 (email from NNL tax employee Karina O “agree[ing] with everything” in the preceding quotation).

<sup>38</sup> T. Collins Dep. 219:25-220:10 (emphasis added); *see also id.* 219:8-12 (acknowledging that “the regional subsidiaries who [we]re licensees of NNL ha[d] the exclusive rights to licence NNL’s IPR within their regions”).

<sup>39</sup> Trial Tr. 3190:24-3192:1 (Green); Reichert Dep. 50:23-52:7.

<sup>40</sup> CCC Post-Trial Br. ¶ 86 n.85. While correctly rejecting the Monitor’s attempt to eliminate the sublicense right entirely, the CCC appears to be arguing that NNI could sublicense a third party to use NN Technology only if NNI was already using or proposing to use the NN Technology for itself. But this purported limitation is not only inconsistent with the language of the MRDA and the factual matrix, it is no limitation at all because NNI held the right to propose to use NN Technology in a new product or service “at any time,” and accordingly held the full right to sublicense even under the CCC’s flawed reading. It also makes no commercial sense that NNI could only sublicense NN Technology to third parties to *compete* with NNI on products it was making or proposing to make but could not sublicense NN Technology where the sublicensee would not be competing with NNI.



saying that *NNL* could license NN Technology to others in the US. *NNL* plainly could not do so. *NNL* itself had no rights to exploit NN Technology in the US.<sup>41</sup> If *NNL* had sought to make, use or sell any product using or embodying NN Technology in the US (including any US patent), it would have breached the MRDA and infringed on the exclusive rights that *NNI* held under its Exclusive License. And *NNL* could not, of course, grant a third party any rights greater than what it possessed, because “[p]atent owners cannot transfer an interest greater than what they possess, so assignees ‘take[] a patent subject to the legal encumbrances thereon.’”<sup>42</sup>

Thus, if any other party – including *NNL* or any assignee or licensee of its interests – tried to make, use or sell a product using or embodying a Nortel patent in the US at any time, it would be trespassing on turf reserved exclusively for *NNI*. *NNL* had no ability to terminate *NNI*’s exclusive right, and it could not effectively negate *NNI*’s exclusive right by purporting to license other parties to make and sell products using NN Technology in the US.

Not only would licensing activity by *NNL* in the US be completely inconsistent with the grant of an *exclusive* license to *NNI* there, but, as noted, it would be inconsistent with *NNL*’s need to avoid conducting business in the US lest it trigger tax consequences. Under the Monitor’s reading of the MRDA, therefore, no Nortel entity would have had a right to license to third parties in the US, a commercially nonsensical result.

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<sup>41</sup> See Trial Tr. 3193:9-3195:3 (Green) (acknowledging that *NNL* “couldn’t make and sell products in the US” nor “give any third party the right to make or sell products in the United States as long as *NNI*’s exclusive license was in existence”).

<sup>42</sup> *Innovus Prime, LLC v. Panasonic Corp.*, Case No. C-12-00660-RMW, 2013 WL 3354390, at \*5 (N.D. Cal. July 2, 2013) (quoting *Datatrust Corp. v. Wells Fargo & Co.*, 522 F.3d 1368, 1372 (Fed. Cir. 2008)). In other words, “one cannot convey what one does not own.” *TransCore LLC v. Elec. Transaction Consultants Corp.*, 563 F.3d 1271, 1275 (Fed. Cir. 2009). Canadian law is the same. See, e.g., *Rite Manufacturing Ltd. v. Ever-Tite Coupling Co.* (1976), 27 C.P.R. (2d) 257 at para. 20 (Can. Registrar of Trade Marks) (citing *National Carbonising Co. Ltd. v. British Coal Distillation Ltd.* (1937), 54 R.P.C. 41 at 56-57 (Eng. C.A.)) (holding that the assignment of a patent cannot defeat the rights of a licensee under a license).

### 3. NNI Had the Exclusive Right to Practice the Patents in the United States

The Canadian Interests do acknowledge that NNI held an exclusive license, in perpetuity, to “make, use and sell” Products in the US embodying NN Technology. In fact, in addition to the exclusion and sublicensing rights described above, NNI had the exclusive right to “make, have made, use, lease, license, offer to sell, and sell Products using or embodying NN Technology” in the US.<sup>43</sup> The definition of Products includes “all products, software and services designed, developed, manufactured or marketed, or proposed to be designed, developed, manufactured or marketed, *at any time*, by, or for, any of the Participants.”<sup>44</sup> This is not limited to any type of product. It is a broad definition, and it provided NNI with the exclusive right to practice the patents in the US.

Before the closing of the Patent Portfolio Sale, NNI not only continued to have the right to propose new products and services utilizing the Patent Portfolio “at any time,” but in fact all of the patents *were already* being used or proposed for use in a Product because the Participants had proposed IPCo, which as a licensing business fits comfortably within the “service” definition of Products. This argument was raised in the US Interests’ pretrial brief and at trial, and the Monitor makes no effort to answer it in its post-trial brief.

The CCC acknowledges this point, but fails to rebut it. First, the CCC contends that in order to fit within the Products definition, a service must be “capable of having ‘components, parts, sub-assemblies, features, software . . . and . . . improvements, upgrades, updates [and] enhancements.’”<sup>45</sup> But that is not what the MRDA says, and the relevant definition actually reads:

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<sup>43</sup> TR21003 (MRDA) at 21 (Art. 5(a)).

<sup>44</sup> *Id.* at 4 (Art. 1(g)) (emphasis added).

<sup>45</sup> CCC Post-Trial Br. ¶ 103(a).

“Products” shall mean all products, software and services designed, developed, manufactured or marketed, or proposed to be designed, developed, manufactured or marketed, at any time by, or for, any of the Participants, *and all* components, parts, sub-assemblies, features, software associated with or incorporated in any of the foregoing, and all improvements, upgrades, updates, enhancements or other derivatives associated with or incorporated in any of the foregoing.<sup>46</sup>

The CCC’s reading deletes the words “and all” and inserts “capable of having” before “components, parts, sub-assemblies.” Only by that device does the CCC endeavour to turn those terms into a limit on the Products definition, rather than allow the terms their natural expansive meaning.

The CCC also suggests that for IPCo to have qualified as a service, it must have been “designed, developed, manufactured or marketed,” and that “[t]he act of licensing IP does not fall within the meaning of any of those terms, including the term ‘marketed.’”<sup>47</sup> This argument ignores that IPCo was, at a minimum, “proposed to be developed,” which is also part of the definition. There is a wealth of evidence in the record regarding the development of the IPCo model with the assistance of external advisors.<sup>48</sup>

The Canadian Interests further argue that the words “by, or for, any of the Participants” in the Products definition limited the Licensed Participants’ rights. Their entire case is based on these words, and it is much ado about nothing. That NNI was entitled to make, use or sell any products for itself is not a limitation; it is the definition of an unrestricted right to practice the patent. But, the natural corollary to this must be the right to exclude others from using the intellectual property, which is what Article 4(e) provides to NNI. Otherwise, the grant would be a non-exclusive license, not an exclusive license.

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<sup>46</sup> TR21003 at 4 (Art. 1(g)) (emphasis added).

<sup>47</sup> CCC Post-Trial Br. ¶ 103(b).

<sup>48</sup> US PFOF ¶¶ 356-58, 367-430, 442-67.

Indeed, the phrase “by, or for, any of the Participants” is an expanding, not a limiting, term. These words make clear that if *any* MRDA Participant developed or even proposed to develop a Product (or if anyone proposed it for a Participant), at any time, all other Participants had the right to “make, have made, use, lease, license, offer to sell and sell” that Product in their respective Exclusive Territories.<sup>49</sup> In other words, NNL could never develop or propose to develop a single Product and somehow retain any associated rights to the NN Technology in the US.

The Monitor seeks to justify the commercial reasonableness of its reading by claiming it makes “perfect sense” because “[t]he MRDA was about an operating relationship,” so no rights other than rights to make, use and sell Products using NN Technology needed to be conveyed.<sup>50</sup> This ignores the fact that the parties entered into the MRDA for transfer pricing and tax purposes; indeed, the impetus for completing the MRDA was that they needed the written agreement to better position the company in the event of a tax audit regarding its transfer pricing arrangements.<sup>51</sup> These tax and transfer pricing purposes drove the parties to grant economic ownership of all NN Technology to the Licensed Participants in their respective territories. The Nortel Group did not otherwise need an “operating agreement,” and in any event an agreement of the kind the Canadian Interests describe would have had negative consequences for Nortel as an operating business for the reasons discussed above and by Tucker.

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<sup>49</sup> See US Post-Trial Br. at 35-36, 106-07.

<sup>50</sup> Monitor Post-Trial Br. ¶ 326.

<sup>51</sup> See, e.g., Trial Tr. 1848:12-17 (Weisz) (noting that “it was important to contractualize the arrangement” in the MRDA because certain Participants “could be subject to audit at any time”); *id.* 1718:2-9 (Stephens) (“[T]he impetus for creating” the MRDA was that “[NNSA], the French entity, had been advised it was about to undergo a tax audit. And the advice was that before the auditors arrived, there better be a written agreement covering the transfer pricing arrangements.”); TR31101 (Dec. 2004 email from M. Weisz to G. Sparagna) at 2 (noting that “an audit started a few days ago in France” and that the MRDA therefore needed to be finalized and executed).

#### **4. The Canadian Interests' Reading of the "All Rights to Patents" Clause Produces Redundancy**

The final clause of Article 5(a) is a catch-all provision making it clear that NNI and the other Licensed Participants held in their Exclusive Territories "all rights to patents, industrial designs (or equivalent) and copyrights, and applications therefor, and technical know-how as necessary or appropriate in connection therewith."<sup>52</sup> The Canadian Interests contend that the words "in connection therewith" unambiguously do not refer to the immediately preceding clause "technical know-how" (as is the most natural reading) but instead link the entire "all rights" clause to the "Products" clause to create a right to "use certain Nortel IP as necessary or appropriate in connection with the making, using or selling of 'Products.'"<sup>53</sup> This would be entirely duplicative. Under the Canadian Interests' reading, Article 5(a) first provides that NNI had the right to make, use and sell products using NN Technology and then unambiguously does nothing more than repeat itself to provide the right to use NN Technology in connection with making, using and selling of products. The Monitor claims that this redundancy is of no moment.<sup>54</sup> But, the Canadian Interests' reading negates the last clause of Article 5(a) in its entirety.

The Monitor also asserts that the US Interests' interpretation of the last clause of Article 5(a) likewise leads to a redundancy because it renders the "Products" clause unnecessary. Of

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<sup>52</sup> US Post-Trial Br. at 24-25, 34-35.

<sup>53</sup> Monitor Post-Trial Br. ¶ 324; *see also* CCC Post-Trial Br. ¶¶ 73-74.

<sup>54</sup> Monitor Post-Trial Br. ¶¶ 344-45. The Monitor cites two cases for the proposition that courts sometimes are compelled to accept some redundancy in construing an agreement, *id.*, but this cannot derogate from the rule that where one construction of an agreement "gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective," that reading prevails. *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205 at para. 24; *see Bridgewood Building Corp. (Riverfield) v. Lombard General Insurance Co. of Canada*, [2006] O.J. No. 1288 at para. 12 (Ont. C.A.) (rejecting construction that required conclusion that a contractual provision was redundant and the result of "sloppy drafting"). This latter rule is so basic that it has aptly been described as a "well-known" principle of contract interpretation. G. R. Hall, *Canadian Contractual Interpretation*, 15 (2d ed. 2012); *see also Geoffrey L. Moore Realty Inc. v. Manitoba Motor League (c.o.b. CAA Manitoba)*, [2003] M.J. No. 191, [2003] 9 W.W.R. 385 at para. 12 (Man. C.A.) (citing *National Trust Co. v. Mead*, [1990] S.C.J. No. 76, [1990] 2 S.C.R. 410 (S.C.C.)).

course, were there really unexplained redundancies in all parties' proffered constructions, it would reflect unclear drafting that requires resort to parol evidence (defeating the Monitor's attempt to exclude admissible factual matrix evidence based on its mischaracterization of that evidence as parol). In fact, there is no redundancy with respect to the Products clause under the US Interests' position. As set forth above, the Products definition provides additional rights to the Licensed Participants, namely the right to another Participant's development ideas not yet embodied in a specific invention or product. This grants more than the economic rights to the patents, so the Products clause is neither redundant nor unnecessary under the US Interests' reading, which gives meaning to all of the MRDA's terms.

The Canadian Interests are also wrong when they argue that the US Interests' construction would mean the territorial restriction and perpetuity term only relate to a portion of the Exclusive License. They again fail to read the MRDA as a whole. The territorial restriction is made clear, multiple times, throughout the MRDA (which no party disputes given that the entire structure of the MRDA is based on this territorial concept),<sup>55</sup> and the MRDA also makes clear that the Exclusive Licenses (and not just the sublicense right) are perpetual and survive termination of the MRDA.<sup>56</sup>

### **5. The Canadian Interests Misstate the Significance of NNL's Legal Title and Ignore the Licensed Participants' Beneficial and Equitable Ownership**

The Canadian Interests place unfounded significance upon Article 4(a)'s provision that NNL was vested with "legal title" to NN Technology. Their briefs repeatedly refer to NNL's

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<sup>55</sup> See, e.g., TR21003 (MRDA) at 2 (reciting that each Licensed Participant enjoys "equitable and beneficial ownership" of NN Technology in its Territory); *id.* at 4 (Art. 2(a)) (referring to the requirements of Nortel's business by reference to each Participant's Territory); *id.* at 6 (Art. 4(e)) (defining Licensed Participants' enforcement rights by reference to their Territories); *id.* at 8 (Art. 7(b)) (defining each Licensed Participant's indemnification obligations by reference to its Territory).

<sup>56</sup> *Id.* at 9 (Art. 9(b)).

legal title as conferring “ownership” of Nortel’s IP.<sup>57</sup> The parties, however, chose “legal title” rather than “ownership” in Article 4(a) to describe NNL’s interest. They did use the word “ownership” elsewhere in the MRDA, but only to describe the rights held by *each* of the Participants in its respective Exclusive Territory.<sup>58</sup>

The Monitor attempts to distort the various recitals to the MRDA which describe the Participants as having “ownership” of NN Technology. With respect to the second recital of the MRDA – which states that the Licensed Participants enjoyed “equitable and beneficial ownership of certain exclusive rights under NT Technology” under the final R&D CSAs and that this status would “continue” under the MRDA – the Monitor offers no more than its *ipse dixit* that the only reasonable construction of equitable and beneficial ownership is a limited make-use license, and that no other meaning is reasonable.<sup>59</sup> However, the Monitor’s argument ignores that the recital reflected a clear intent to continue the structure from the 1992 R&D CSA, which under the 1996 APA was required to, and did, provide NNI all benefits from NT Technology in the US. A CRA Information Circular and OECD guidelines issued not long after the 1992 R&D CSA was drafted in 1996 similarly confirmed that NNI had to be “entitled to exploit its interest in the [CSA] separately as an effective owner thereof and not as a licensee” and “must enjoy substantially similar rights, benefits and privileges as a legal owner (effective or beneficial ownership).”<sup>60</sup>

The Monitor cannot make even that argument with respect to the first recital of the

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<sup>57</sup> See, e.g., Monitor Post-Trial Br. ¶¶ 49, 50, 120, 130, 176, 196, 197-204, 220, 268, 290, 294, 295, 297, 298, 299, 301, 303, 305-307, 310, 312, 314-317, 350, 359, 368, 370, 385, 402, 413, 452, 464, 470, 479, 481, 514, 531, 542, 620-622, 625, 627, 630, 646, Schedule C, & nn.51, 306; CCC Post-Trial Br. ¶¶ 2, 7, 8, 12, 23, 37, 40, 41, 42, 43, 45, 46, 47, 48, 49, 54(g), 60, 63, 84, 93, 98.

<sup>58</sup> US Post-Trial Br. at 9, 24-26.

<sup>59</sup> Monitor Post-Trial Br. ¶ 368.

<sup>60</sup> See US Post-Trial Br. at 49-50 (quoting TR40713 (1997 OECD Guidelines) and TR50295 (CRA Information Circular 87-2R)).

Second Addendum to the MRDA, which states: “each Participant holds and enjoys equitable and beneficial ownership of NN Technology as defined in the [MRDA].”<sup>61</sup> Thus here the Monitor argues that “the words ‘as defined in the [MRDA]’ make it clear that the parties did not intend in any way to change the rights set out in the MRDA.”<sup>62</sup> This circularity avoids the issue. What the Monitor describes is not equitable and beneficial ownership in any sense of the phrase. The only reasonable implication from this recital in the Second Addendum is that the MRDA, from the start, granted equitable and beneficial ownership of NN Technology to *all* of the Participants in their Exclusive Territories.<sup>63</sup>

Finally, the Monitor argues that “[t]he words in a recital may not expand upon prescribed license rights.”<sup>64</sup> However, the plain language of these recitals is entirely consistent with the US Interests’ reading of the Exclusive Licenses. Only the Canadian Interests’ proposed interpretation of the MRDA creates a conflict with the recitals. As Justice Newbould has previously held, recitals are important and provide guidance as to the parties’ intentions under the contract.<sup>65</sup>

While seeking to disregard the explicit references to NNI’s equitable and beneficial ownership of NN Technology in the US, the Monitor contends that NNL had “ownership” of NN Technology throughout the world because “legal title” and “ownership” are “legally equivalent

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<sup>61</sup> TR21003 (MRDA) at 27 (2d Add. Whereas Clauses).

<sup>62</sup> Monitor Post-Trial Br. ¶ 372.

<sup>63</sup> The CCC attempts to avoid this language in two additional ways. First, it asserts that where the Second Addendum states that “*each Participant* holds and enjoys equitable and beneficial ownership of NN Technology,” the use of the word “Participant” somehow means only NNL, ignoring what the MRDA actually says. Second, the CCC claims that the Second Addendum should be ignored because it is “excluded from the MRDA by the entire agreement clause in Article 14(d),” but cites no law for the obviously wrong proposition that an entire agreement clause requires courts to ignore amendments to a contract. *See* CCC Post-Trial Br. ¶ 52 n.35.

<sup>64</sup> Monitor Post-Trial Br. ¶¶ 216, 369.

<sup>65</sup> US Post-Trial Br. at 25 (citing, *inter alia*, *Sistem v. Kyrgyz Republic*, 2012 ONSC 4983 (Newbould, J.) at paras. 25-26 (referring to recital to find that a party had an equitable interest in the property at issue)).



concepts.”<sup>66</sup> This cannot be reconciled with the fact that Scott Wilkie from the Oslers firm, NNL’s outside legal counsel and the only outside Canadian counsel who worked on the creation of the MRDA, advised deleting the word “ownership” from an earlier draft of the MRDA because he concluded that “ownership” would overstate NNL’s rights; thereafter the parties did delete that reference.<sup>67</sup>

The Monitor looks to *Black’s Law Dictionary* and the definitions therein of “title” and “ownership” to support its position.<sup>68</sup> The Monitor has cited the wrong definitions, however, because what the MRDA gave to NNL was not “title,” unqualified, but “legal title,” which has a different definition. *Black’s* defines “legal title” as “[a] title that evidences apparent ownership *but does not necessarily signify full and complete title or beneficial interest.*”<sup>69</sup> Particularly when used in an agreement that also addresses equitable and beneficial ownership, as the MRDA expressly does, “legal title” has a specific meaning, namely that equitable and beneficial ownership has been separated from legal title and that these distinct rights to property are held by different parties.<sup>70</sup>

Justice Newbould recognized the well-established distinction between legal and beneficial ownership rights in *Computershare Trust Company of Canada v. Crystallex International Corporation* in determining whether a change in the ownership of a mining project had occurred:

The word “beneficially” is an adverb to distinguish the concept of “beneficially own” from the concept of “legally own.” Its purpose is to make clear that there would not be a Project Change of

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<sup>66</sup> Monitor Post-Trial Br. ¶¶ 291-93.

<sup>67</sup> US Post-Trial Br. at 46.

<sup>68</sup> Monitor Post-Trial Br. ¶¶ 197-98, 291-92.

<sup>69</sup> See TR21003 (MRDA) at 41 (Art. 4(a)); *Black’s Law Dictionary* 1713 (10th ed. 2014).

<sup>70</sup> See 9101-2310 *Quebec Inc. c. R.*, 2013 FCA 241 at para. 46 (noting that ownership “consist[s] of two elements, legal title and beneficial ownership, which confer very distinct rights”).

Control if the transaction in question resulted in a change of the legal title to the asset in question, i.e. the CVG contractual rights, but not the beneficial or equitable title to that asset.<sup>71</sup>

Contrary to the Monitor's assertions, it is the beneficial owner of property that is "the real owner of property even though it is in [the legal owner's] name."<sup>72</sup> The US Interests do not add the word "bare" to the MRDA as the Monitor accuses; legal title *is* bare where, as here, it is separated from beneficial ownership.

In a further effort to elevate NNL's legal title above all else, the Monitor introduces Article 4(a) in its brief with a materially incomplete quotation, implying that NNL was the original owner of all of the Nortel Group's IP and that the licenses in the MRDA were the result of a unilateral grant. The Monitor claims at paragraph 288 that Article 4(a) of the MRDA states:

Except as otherwise specifically agreed, legal title to any and all NN Technology whether now in existence or hereafter acquired or developed pursuant to the terms of this Agreement shall be vested in NNL.

In fact, Article 4(a), has a second sentence:

In consideration therefor, NNL agrees to enter into an Exclusive License and a Non-Exclusive License with each of the Licensed Participants as set forth in Article 5.<sup>73</sup>

What the full text of Article 4(a) – and the rest of the MRDA – makes clear is that all rights to Nortel's IP did not devolve originally from NNL, as the Monitor would have it, but rather that

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<sup>71</sup> *Computershare Trust Company of Canada v. Crystallex International Corporation*, 2009 CanLII 71007 at para. 32 (Ont. S.C.).

<sup>72</sup> *Csak v. Aumon*, [1990] O.J. No. 534 at para. 10 (Ont. Sup. Ct.) (cited with approval in *Pecore v. Pecore*, 2007 SCC 17 at para. 4). The CCC cites *Re Canada 3000 Inc.*, [2006] 1 S.C.R. 865 in its brief to for the proposition that "the ordinary and grammatical meaning of 'owner' would include the legal titleholder." CCC Post-Trial Br. ¶ 42. But the CCC fails to quote the entire sentence and disregards the actual holding of the case, in which the Supreme Court of Canada in fact stated that "[i]f [the relevant statutory section] were read in isolation, the ordinary and grammatical meaning of 'owner' would include the legal titleholder" and then held that the word owner *did not* encompass the legal titleholder in that case. See *Re Canada 3000 Inc.*, [2006] 1 S.C.R. 865 at paras. 44, 53 (emphasis added). Moreover, at most the statement that the term owner could "include a legal titleholder" in some circumstances connotes that legal title is a *subset* of ownership, not that legal title necessarily conveys all rights of ownership. As in *Re Canada 3000*, here both the full text of the MRDA and the factual matrix establish that NNL's legal title was not the equivalent of complete ownership.

<sup>73</sup> TR21003 (MRDA) at 41 (Art. 4(a)).

NNL and the Licensed Participants agreed to vest legal title in NNL to all intellectual property that they had jointly created in simultaneous exchange for the Exclusive Licenses giving the Licensed Participants exclusive rights to all Nortel Group IP in their respective Exclusive Territories.<sup>74</sup> It avails the Canadian Interests nothing to suggest that at some hypothetical moment in this exchange, NNL must have held complete ownership of the IP in order to grant the Exclusive Licenses to each of the other Participants. By using “legal title” for NNL’s rights in contrast to the “economic and beneficial ownership” used to describe all the Participants’ rights in their respective Exclusive Territories, the parties expressed their intent that NNL not retain any economic ownership interest in the territories where the Exclusive Licenses had been granted.

The Monitor’s “ownership” theory also is based on a fallacious argument that ownership interests can only be separated in circumstances where a trust is created and that no such relationship existed under the MRDA. That is wrong. Parties are free to separate interests in property through contract, and do so in a range of commercial contexts, including legal mortgages, share ownership and conditional sales and in title retention clauses.<sup>75</sup> In none of these examples does the separation of legal title from equitable and beneficial ownership necessarily give rise to a trust.

Once again, the factual matrix confirms that the Canadian Interests’ ownership theory is incorrect, including the OECD Guidelines, Information Circular 87-2R and Nortel’s and its advisors’ representation to tax authorities that the Licensed Participants “own[ed]” all

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<sup>74</sup> Reichert, whom the Monitor put forth as an expert at trial in interpreting the MRDA, asserted at his deposition that the word “therefor” in the phrase “in consideration therefor” must have been a typographical error. Reichert Dep. 113:12-115:25. He offered no evidentiary support for this suggestion.

<sup>75</sup> US Post-Trial Br. at 37 n. 85. See, e.g., J. Falconbridge & W. Traub, *Falconbridge on Mortgages*, 5th ed., looseleaf (Aurora: Canada Law Book, 2003) at para. 22:10; *Canada Business Corporations Act*, R.S.C. 1985 c. C-44, s. 2(1) (“‘beneficial ownership’ includes ownership through any trustee, legal representative, agent or mandatary, or other intermediary”) (emphasis added).

economically valuable rights to NN Technology in their Exclusive Territories.<sup>76</sup> The Canadian Interests' argument that this representation referred to the Exclusive Licenses misses the point. Of course it referred to the Exclusive Licenses. It is those licenses which provided all of the economically valuable rights in a patent – the rights to exclude, practice and sublicense – that amounted to beneficial and equitable ownership in NN Technology. Legal title in NN Technology by itself had no economic value.

## 6. Other Terms of the MRDA Confirm the US Interests' Reading

The Canadian Interests either misconstrue or avoid any discussion of other provisions of the MRDA that defeat their arguments:

- Carve-outs to the confidentiality provisions of Article 6 – which include the right to disclose to *sublicensees* distinct from customers and suppliers (the latter being the only “sublicensees” of NNI who exist according to the Monitor). The Monitor ignores the carve-outs, while the CCC acknowledges Article 6(d)(i) (giving Participants the right to communicate confidential information to suppliers making Products) but not Article 6(d)(iii) (giving Participants the right to communicate confidential information to third parties for sublicensing purposes, with no mention of Products).<sup>77</sup>
- Article 7(b) requires the Licensed Participants to assume all legal risk (and indemnify NNL) for NN Technology in their respective Exclusive Territories, a provision that is commercially nonsensical if NNL had the right to exploit the technology in those territories. The Monitor fails to address this provision, while the CCC suggests without explanation that the assumption of liability by NNI and the other Licensed Participants demonstrates NNL's rights.<sup>78</sup> No arm's length agreement would have NNI indemnify NNL for NNL's unilateral actions.
- The insolvency and MRDA termination exit mechanisms of Articles 9(b) and 11(d), respectively, conferred a “fully paid up license” permitting NNI to continue to exercise all of its MRDA rights – including its enforcement right – in the event of the MRDA's termination, and required payment of “fair market value” for NNI's license in the event of exit due to insolvency. The Monitor notes Article 9(c)'s provision that NNL's legal title would survive termination, but fails to mention Article 9(b)'s confirmation that the Exclusive Licenses would as well.<sup>79</sup> The CCC dismisses 9(b) as

<sup>76</sup> See US PFOF ¶¶ 171-79, 264-74; see also *id.* ¶¶ 243-63.

<sup>77</sup> Monitor Post-Trial Br. ¶¶ 308(c); CCC Post-Trial Br. ¶ 70.

<sup>78</sup> CCC Post-Trial Br. ¶ 45(g).

<sup>79</sup> Monitor Post-Trial Br. ¶ 289.

providing “only a license,” and misquotes Article 9(c) as providing for the survival of NNL’s “ownership rights,” when the words “Legal Title” are actually used.<sup>80</sup> The Monitor also refers to Article 11(d), but fails to mention NNL’s obligation to pay fair market value for licenses in the event a Licensed Participant exits the MRDA due to insolvency.<sup>81</sup>

The Canadian Interests instead cite Article 4(d), but this provision merely provides NNL with the discretion to file and prosecute copyright and patent applications. Those applications, as set out in the final clause of Article 5(a), are subject to the rights of NNI and the other Licensed Participants, and accordingly NNL would have been subject to a duty of good faith and obligated to file and prosecute patent applications in a manner that did not undermine the bargain struck when the Licensed Participants agreed to vest “legal title” in NNL.<sup>82</sup> Article 4(d) thus is part of NNL’s role to “administer” the MRDA.<sup>83</sup> Notably, not one of the many expert witnesses put forth by the Canadian Interests referred to Article 4(d) as a source of value for NNL.

Article 13’s provision that the MRDA does not create a joint venture or partnership likewise does not show that the Licensed Participants did not hold beneficial and economic

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<sup>80</sup> CCC Post-Trial Br. ¶ 54(g).

<sup>81</sup> Monitor Post-Trial Br. ¶ 294(c).

<sup>82</sup> See *Transamerica Life Canada Inc. v. ING Canada Inc.*, [2003] O.J. No. 46563 at para. 53 (Ont. C.A.) (“[C]ourts have implied a duty of good faith with a view to securing the performance and enforcement of the contract made by the parties, or as it is sometimes put, to ensure that parties do not act in a way that eviscerates or defeats the objectives of the agreement that they have entered into.”); *Greenberg v. Meffert*, [1985] O.J. No. 2539 at para. 26 (Ont. C.A.) (Discretion must be “exercised honestly and in good faith. That proposition is so fundamental as to require no elaboration.”); *Imperial Oil Ltd. v. Young*, [1998] N.J. No. 248, 167 Nfld. & P.E.I.R. 280) at para. 161 (Nfld. C.A.) (holding that “even where the language of an agreement appears to give an unfettered discretion to one party to act with reference solely to his or her own interests, such a discretion may be circumscribed by obligations of good faith once the language is construed in the context of the relationship of the parties”); accord *Anderson v. Wachovia Mortg. Corp.*, 621 F.3d 261, 283 (3d Cir. 2010) (“Under Delaware law, a party breaches the implied covenant of good faith and fair dealing by engaging in ‘arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain,’ or by ‘frustrat[ing] the overarching purpose of the contract by taking advantage of [its] position to control implementation of the agreement’s terms.’” (quoting *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005))); *Bentley Sys., Inc. v. Intergraph Corp.*, No. CIV. A. 98-3489, 1998 WL 800344, at \*6 (E.D. Pa. Nov. 16, 1998) (“[U]nder Delaware law, the implied covenant of good faith and fair dealing exists in every contract. The purpose of this implied covenant is to protect the reasonable expectations of parties to a contract.” (internal citation omitted)).

<sup>83</sup> TR21003 (MRDA) at 5 (Art. 3(d)).

ownership of the NN Technology in their respective Exclusive Territories.<sup>84</sup> To the contrary, this provision is consistent with the US Interests' position, as it was intended to avoid the inference that NNL had a permanent establishment in the US.

Nor does Article 10(b), which provides that new Participants would receive licenses granted by NNL, in any way show that NNL retained economically valuable rights in the Licensed Participants' Exclusive Territories.<sup>85</sup> The CCC fails to cite Article 10(a), which provides for the unanimous consent of all Participants before any new Participant can be admitted and granted rights under the MRDA.

**B. The Canadian Interests Fail to Rebut the US Interests' Factual Matrix Evidence or Show that It Is Inadmissible**

Confronted with the overwhelming factual matrix evidence favouring the US Interests' interpretation of the MRDA, the Canadian Interests argue that most of that evidence is inadmissible or irrelevant, and that other facts favour their purported construction of the contract. These arguments are without merit.

**1. The Canadian Interests Are Incorrect that Certain Categories of Factual Matrix Evidence Are Inadmissible or Irrelevant**

The scope of the factual matrix is broad, including "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" if it "was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting."<sup>86</sup> The factual matrix thus includes, for example, "the genesis of the agreement, its purpose, and the commercial context in which the agreement was made," and courts will interpret a contract to accord with the custom of the industry, "sound

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<sup>84</sup> See Monitor Post-Trial Br. ¶¶ 293, 309; CCC ¶ 54(a).

<sup>85</sup> See CCC Post-Tr. Br. ¶ 45(e).

<sup>86</sup> *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 58 (citations omitted).

commercial principles and good business sense.”<sup>87</sup> As the Ontario Court of Appeal agreed in *The Canada Trust Co. v. Browne*, [2012] ONCA 862, the factual matrix includes communications with tax authorities or tax authority rulings that inform the meaning of a contract, as well as communications among counsel and with financial advisors.<sup>88</sup>

The limit to factual matrix evidence is the parol evidence rule, which with respect to an unambiguous contract excludes evidence “that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing.”<sup>89</sup> None of the factual matrix evidence proffered by the US Interests would have this effect. The Supreme Court of Canada has stated that the purpose of excluding parol evidence is “to achieve finality and certainty in contractual obligations” and “to hamper a party’s ability to use fabricated or unreliable evidence to attack a written contract.”<sup>90</sup> No such concerns are implicated here. The MRDA was not negotiated through conventional arm’s-length bargaining by adverse parties with potentially divergent and competing records (and undisclosed intent) as to the genesis, background and context of the agreement. To the contrary, the parties to the MRDA were affiliates with mutual and shared interests, working together to draft, amend and implement the MRDA until the eve of Nortel’s insolvency. That every business person involved in this process, including senior NNL officers, testified to the correctness of the US Interests’ interpretation of the MRDA is not inadmissible parol evidence but instead compelling evidence further establishing the parties’ common intent.

The Canadian Interests raise several generalized objections. First, they mischaracterize

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<sup>87</sup> *Dumbrell v. Regional Group of Cos.*, [2007] O.J. No. 298 at para. 55 (Can. Ont. C.A.) (citing *Kentucky Fried Chicken Canada v. Scott’s Food Services Inc.*, [1998] O.J. No. 4368 at para. 25 (Can. Ont. C.A.)); *Downey v. Ecore International Inc.*, 2012 ONCA 480 at para. 38 (quoting *Salah v. Timothy’s Coffees of the World Inc.*, 2010 ONCA 673 at para. 16); *Kentucky Fried Chicken Canada v. Scott’s Food Services Inc.*, [1998] O.J. No. 4368 at para. 24 (Can. Ont. C.A.).

<sup>88</sup> *The Canada Trust Co. v. Browne*, [2012] ONCA 862 at paras. 20-31, 67-70, 78-79, 83-90.

<sup>89</sup> *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 59 (citations omitted).

<sup>90</sup> *Id.* (citations omitted).

the testimony confirming the Licensed Participants' beneficial and economic ownership of NN Technology under transfer pricing principles as reflecting merely "subjective understandings" of the meaning of the MRDA.<sup>91</sup> However, this testimony and other evidence established the tax and transfer pricing context of the MRDA, including the Participants' similar functions, assets and risks with the Nortel Group; the parties' equitable and beneficial ownership over Nortel IP under transfer pricing rules; and the MRDA's purpose of contractualizing the rights that had been exercised by the parties – for years – before the MRDA was first signed and while it was being amended and restated.<sup>92</sup> These are objective facts that were known to all parties, not evidence of a unilateral subjective intent. It is fundamental to the interpretive exercise to consider that the MRDA was intended to achieve specific tax and transfer pricing-related purposes, because the rights to Nortel's intellectual property memorialized in the MRDA were driven by these objectives. As noted above, courts have routinely considered similar factual matrix evidence under similar circumstances.<sup>93</sup> Thus, for example, because the factual matrix demonstrates that the Nortel Group sought to "contractualize" in the MRDA how its businesses operated, it is most definitely part of the factual matrix when NNL's signatory, John Doolittle, testified that the Nortel Group operated in a manner completely contrary to the Monitor's proffered construction of the MRDA.<sup>94</sup>

Second, the Monitor argues that the statements of Nortel tax personnel to tax authorities

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<sup>91</sup> See, e.g., Monitor Post-Trial Br. ¶¶ 351-53; CCC Post-Trial Br. ¶¶ 55, 58.

<sup>92</sup> See US Post-Trial Br. Point II.C.1.a ("A Principal Purpose of the MRDA Was to Memorialize the Licensed Participants' Economic Ownership of Nortel IP in the Exclusive Territories").

<sup>93</sup> In *The Canada Trust Company v. Browne*, 2012 ONCA 862, at paras. 18-19, 21-24, 79-90, the Ontario Court of Appeal relied on, among other evidence, a CRA tax ruling, correspondence with the CRA, correspondence between the parties' counsel and an affidavit from a representative of the trustee explaining the genesis and purpose of a trust variation. The Court of Appeal found that this evidence was all relevant, admissible factual matrix evidence that should be considered in order for the agreement to be interpreted.

<sup>94</sup> US Post-Trial Br. at 42-43; US PFOF ¶¶ 253-55.



are irrelevant because that evidence cannot “change the meaning of the MRDA.”<sup>95</sup> However, this evidence is not being offered to “change the meaning” of the MRDA; this evidence instead illuminates the parties’ intent and confirms the text of that document.<sup>96</sup> The Monitor further contends Nortel’s use of terms such as “beneficial ownership” may have one meaning when Nortel’s transfer pricing agreements were presented to tax authorities, but another meaning when the same agreements are presented to a court adjudicating the Participants’ rights.<sup>97</sup> This is not an admissibility argument. It is also an incorrect statement, and not supported by any evidence. All witnesses who testified on this subject made it clear that the Licensed Participants’ beneficial ownership had to conform to economic and commercial reality.<sup>98</sup> And even if the Monitor were correct, its argument that these terms were “a rabbit hole of different views expressed in different contexts” would establish ambiguity rendering all purportedly parol evidence admissible, not

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<sup>95</sup> Monitor Post-Trial Br. ¶ 375. The Monitor refers to “the use by *NNI* tax department employees of the words ‘beneficial ownership’[] in the context of discussions with tax authorities.” *Id.* ¶ 374 (emphasis added). It was not only NNI employees that made these representations, but NNL itself, as well as outside advisors retained by NNL. At the outset, the MRDA itself refers to “beneficial ownership” and that was submitted to tax authorities. Further, the Horst Frisch report, which referred to the Licensed Participants’ ownership of NN Technology in their Exclusive Territories, was prepared by economic advisors retained by the entire Group and was submitted by NNI, NNUK and NNL to the tax authorities. *See* US PFOF ¶¶ 200-01, 264. Likewise, other tax submissions containing representations that Licensed Participants “economically” or “beneficially” owned Nortel IP were prepared by Nortel’s tax department as a whole and approved by NNL personnel. *See, e.g.*, TR22078 (2008 Joint APA Request) at App. A, p. 4 (“Each IE maintains an economic ownership in the IP”). And NNL and EMEA tax employees – as well as counsel retained by the entire Nortel Group – testified that the Licensed Participants enjoyed “beneficial ownership” of NN Technology. *See, e.g.*, US PFOF ¶¶ 254-56, 260.

<sup>96</sup> The Monitor also criticizes the US Interests’ statement that Nortel tax employees’ testimony was “consistent with” the language of the MRDA, arguing that “extrinsic evidence serves no purpose” if it is consistent with the unambiguous language of a contract. Monitor Post-Trial Br. ¶ 354. But, as already explained, courts *must* consider the factual matrix, even when the relevant contract is unambiguous, and Canadian courts – including the Supreme Court – routinely consider whether the factual matrix would be “consistent with” or “inconsistent with” their interpretation of the contract. *See, e.g.*, *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 118; *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust*, [2007] O.J. No. 908 (Ont. S.C.J.), *aff’d* 2007 ONCA 205, at para. 39; *Unique Broadband Systems, Inc. (Re)* 2014 ONCA 538 at paras. 99, 104. Under the Monitor’s view, the factual matrix would never be considered, as it is inevitably either going to be consistent or inconsistent with the language of the agreement.

<sup>97</sup> *See, e.g.*, Trial Tr. 453:5-9, 454:2-6 (arguing that “transfer pricing has its own language, it has its own terminology” and that the “terminology the transfer pricing world is using” is not “helpful to either [Court]”).

<sup>98</sup> *See, e.g.*, PFOF ¶¶ 147, 252, 272; US Post-Trial Br. at 41-42, 44.

inadmissible.<sup>99</sup>

Third, the Monitor argues that some of the US Interests' factual matrix evidence is prohibited because it was not "known to the parties at or before the date of the agreement."<sup>100</sup> According to the Monitor, this would prohibit introduction of Nortel's 2008 bilateral APA request and 2009 Transfer Pricing Reports, as well as any "infringement proceedings that post-dated the MRDA."<sup>101</sup> But the parties repeatedly amended the MRDA up until the eve of the Nortel Group's insolvency in 2009: Article 5(a), Article 4(e) and Schedule A were all revised *and restated* in the Third Addendum to the MRDA, which was executed between December 2008 and January 2009.<sup>102</sup> Thus, there can be no dispute that the 2008 APA request and infringement suits involve facts "known to the parties at or before the date of the agreement."<sup>103</sup> Moreover, the 2009 Transfer Pricing Reports contained virtually identical representations (and "Functional Activity Charts") as the 2008 APA request, so any contention that the parties did not know this information when amending the MRDA is spurious.<sup>104</sup> The Monitor helped to prepare and approved this report and, therefore, it is also admissible under the estoppel theories discussed below.

Fourth, the Monitor argues that patent infringement proceedings "that *predated* the MRDA do not fall within the scope of factual matrix, because they do not form part of the

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<sup>99</sup> Trial Tr. 456:14-19 (Monitor Opening Statement).

<sup>100</sup> Monitor Post-Trial Br. ¶¶ 255, 358.

<sup>101</sup> *Id.*

<sup>102</sup> TR21003 (MRDA) at 41-42, 48 (3d add. arts. 4(a), 4(e), 5(a), Sched. A), 42-47 (Signature pages for 3d add.).

<sup>103</sup> See US Post-Trial Br. at 60 n.192 (describing Vonage suit); PFOF ¶¶ 279-81 (same). Indeed, the Monitor implicitly acknowledges this by repeatedly citing to documents from the 2005-2009 period in support of its arguments regarding the MRDA. See, e.g., Monitor Post-Trial Br. ¶ 298 (citing TR45736 (Feb. 2006 Agreement Relating to Intellectual Property and Confidentiality)); *id.* ¶ 360 (citing TR11158 (Apr. 2006 Claim for patent infringement) and TR40632 (Dec. 2007 Answer and Counterclaims)); *id.* ¶ 388 (citing TR31300 (Sep. 2006 Nortel Corporate Procedure No. 601.01)).

<sup>104</sup> See US Post-Trial Br. at 54-55.

‘background of the contract,’” the “genesis of the agreement” or its “commercial context.”<sup>105</sup>

This is simply incorrect. The parties’ business practices, including patent infringement proceedings, are plainly part of the background of the contract, the genesis of the contract and its commercial context because the parties were trying to “contractualize” their existing business practices in the MRDA and to reflect the parties’ functions, assets and risks, as they were required to do under transfer pricing regulations. The MRDA was a constantly evolving document that was originally executed in 2004 and 2005 but had an *effective* date of January 1, 2001, and the MRDA expressly states that it was intended to “confirm[] and formaliz[e] the operating arrangements of the Participants” from that effective date.<sup>106</sup> Therefore, NNI’s exercise of its enforcement rights to NN Technology in the 2001 to 2004 period (and thereafter while the MRDA was being amended) is certainly a part of the “background,” “genesis” and “commercial context” for the MRDA. The parties’ practices during the years that the 1992 R&D CSA was in effect are also relevant because the parties wanted to continue the basic structure from that time period whereby the Licensed Participants held beneficial ownership of the intellectual property in their territories.

Fifth, the Monitor seeks to exclude much of the evidence establishing the commercial unreasonableness of its reading of the MRDA because it asserts that the requirement that a contract be interpreted to reach a commercially reasonable result “will only be applied where the interpretation would create a true absurdity” and that “it does not assist the U.S. and EMEA Debtors to argue that the provisions of the MRDA result in an allocation that is more advantageous to>NNL than to them.”<sup>107</sup> The Monitor misstates the relevant legal principle. As

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<sup>105</sup> Monitor Post-Trial Br. ¶ 215 (emphasis added); *see also id.* ¶ 358.

<sup>106</sup> TR21003 (MRDA) at 1 (Opening paragraph).

<sup>107</sup> Monitor Post-Trial Br. ¶¶ 264-65.

even the CCC agrees, under Ontario law, courts should interpret a contract “*so as to accord with sound commercial principles and good business sense, and avoid commercial absurdity.*”<sup>108</sup>

Thus, the legal standard does look to the commercial reasonableness of the contract.

In any event, this argument is a straw man. The Monitor does not cite any instance in which the US Interests have argued that the Canadian Interests’ interpretation of the MRDA is inappropriate merely because “in some situations” it would “work advantageously” to NNL. It is the CCC – who offers purported evidence of creditor recoveries to influence allocation – who seeks relief from the MRDA terms based on a claimed disadvantageous result. As for the US Interests, they have explained that the Monitor’s proposed interpretation of the MRDA would (under *any* circumstance) force all the parties to bear losses to develop IP but grant the proceeds from the sale of that IP (the gains) exclusively to one party, NNL. The flaw in this is not that it is a bad deal in hindsight but, as Eden, Tucker, Cooper and Felgran all have testified, that arm’s-length parties would never have negotiated such an agreement in the first place (the requisite measurement), demonstrating that the Canadian Interests’ interpretation of the MRDA is contrary to “sound commercial principles and good business sense” and, most assuredly, commercially unreasonable.<sup>109</sup>

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<sup>108</sup> *Downey v. Ecore International Inc.*, 2012 ONCA 480 at para. 38 (quoting *Salah v. Timothy’s Coffees of the World Inc.*, 2010 ONCA 673 at para. 16) (emphasis added); see also *Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.*, [1980] 1 S.C.R. 888 at para. 26 (a contract should not be interpreted to “bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere”); CCC Post-Trial Br. ¶ 6 (noting “[t]here is no dispute” that the MRDA must be interpreted “in a fashion that accords with sound commercial principles and good business sense”).

<sup>109</sup> The CCC also argues that “[i]t would make no commercial sense for the MRDA to grant the Licensed Participants Licenses that extended beyond Products,” since “[t]he purpose of the License grant within the overall scheme of the MRDA was to incentivize the Licensed Participants to carry out ‘R&D Activity,’” which the CCC defines as “research and development performed by or for any Nortel ‘Participant’ with respect to ‘Nortel Products’ for the benefit of the ‘Nortel Networks business.’” CCC Post-Trial Br. ¶ 69. But the MRDA’s definition of “R&D Activity” includes “*all* research and development activity . . . performed by, or for, any Participant *including, without limitation*, development of Products . . .” TR21003 (MRDA) at 4 (Art. 1(h)) (emphasis added). Moreover, the CCC does not provide any factual support for its proposition, only citing Reichert’s testimony that his “reading of what’s going on in the license arrangement” was the Participants shared “a hundred percent of the residual profit,” which was “the full incentive to invest in R&D . . .” CCC Post-Trial Br. ¶ 69 (citing Trial Tr. 3874:20-

For the first time in its post-trial brief, the Monitor argues that Tucker impermissibly provided “opinion evidence on the interpretation of a contract.”<sup>110</sup> However, like Eden, Cooper and Felgran, Tucker’s testimony addresses the commercial context of the MRDA, and thus falls well within the factual matrix.<sup>111</sup> The Monitor further seeks to minimize part of Tucker’s testimony by arguing that “there is no basis” for her statement “that the MRDA was intended to create incentives for the Participants to make forward-looking innovations.”<sup>112</sup> Yet as Tucker made clear, her analysis of economic incentives was premised upon the assumption that the MRDA was a transfer pricing document and, as such, was required to comply with the arm’s length principle. She thus addressed the economics of “an arm’s length relationship” in the high-technology industry.<sup>113</sup> The MRDA would not have complied with transfer pricing principles if it did not properly incentivize the Licensed Participants.

Finally, the Monitor attempts to exclude the testimony of Daniel Bereskin by characterizing his report as a “legal opinion.” Ironically, the Monitor then criticizes Bereskin’s report for failing to “cite any case law” or otherwise to “set out the relevant foreign law” for the US Court, underscoring Bereskin’s position that he is *not* providing a legal opinion.<sup>114</sup>

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3875:17 (Reichert)). Reichert’s “reading” of the MRDA is irrelevant, as the Monitor conceded that he assumed the Monitor’s interpretation of the MRDA for the purposes of this analysis. Monitor Mot. to Strike Expert Reports and Testimony of Bereskin and Stratton ¶ 13, Apr. 11, 2014, ECF No. 13317. In any event, Reichert’s report is contradicted by his own published writings outside of this litigation. In his report, he asserts that as long as the Licensed Participants at least earned back their cost of capital (such that they were “net present value zero,” or “NPV=0”), then it was economically rational for them to invest billions in R&D solely in exchange for a “make/sell” right. See TR00049 (Reichert Report) at 6, 38-39. In a December 2007 policy paper, however, Reichert wrote that “the average R&D investment must have an expected return that is greater than NPV=0 – and possibly by a substantial margin,” and in his experience, arm’s length parties “will not even fund an R&D project if the expected returns are not *at least* two times the cost.” TR21598 at 9-10 (emphasis in original); see also Reichert Dep. 101:5-102:16, 103:8-15.

<sup>110</sup> Monitor Post-Trial Br. ¶¶ 386-88. Ironically, this is precisely what Green and Reichert do. In any event, the Monitor did not object to Tucker’s expert report and made no objection during her testimony. It is too late now for it to raise admissibility arguments.

<sup>111</sup> US Post-Trial Br. at 64-66 (describing Tucker’s testimony on the economics of the Nortel enterprise).

<sup>112</sup> Monitor Post-Trial Br. ¶ 388.

<sup>113</sup> See, e.g., Trial Tr. 4654:25-4655:3, 4692:8-20 (Tucker); TR00056 (Tucker Rebuttal) ¶¶ 9, 47.

<sup>114</sup> Monitor Post-Trial Br. ¶ 424.

Bereskin's opinion concerns the manner in which an experienced practitioner in the intellectual property field would understand the MRDA as a matter of custom and practice, which is evidence that falls well within the factual matrix of the contract.<sup>115</sup>

The Monitor argues that if Bereskin's report is considered, the evidence of their expert Burshtein is to be preferred. But Burshtein did not provide an opinion based on custom and practice, and instead purported to interpret the MRDA.<sup>116</sup> His opinion is undeniably inadmissible in the Canadian Court,<sup>117</sup> and provides no help to the US Court for several reasons. As Burshtein himself has acknowledged, he is unaware of much of the MRDA's factual matrix, and ignores its underlying purpose and commercial context, in contradiction of clear Ontario law regarding interpretation of contracts.<sup>118</sup> Burshtein's legal opinion on the scope of the Exclusive Licenses is not even based on any Ontario legal principles regarding contractual interpretation, which he ignores, but rather solely on his reading of what he claims is "the plain language of the MRDA."<sup>119</sup> An expert who does nothing more than read the plain language of a contract is of no assistance to the US Court.

## **2. The Canadian Interests' Vague Admissibility Objections To Unidentified Evidence Are Invalid**

In addition to mischaracterizing admissible factual matrix evidence as parol evidence, the Canadian Interests' evidentiary objections are also procedurally improper. After asserting

<sup>115</sup> See, e.g., *Stetson Oil & Gas Ltd.*, 2013 ONSC 1300, at paras. 61-62, 97, 101-07, 111-17 (Newbould, J.); *Kentucky Fried Chicken Canada v. Scott's Food Services Inc.*, [1998] O.J. No. 4368 at paras. 24-25 (Ont. C.A.); *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80 at para. 72; US PCOL ¶ 85.

<sup>116</sup> Burshtein Dep. 199:19-20, 199:24-25; Monitor Post-Trial Br. ¶¶ 430-32.

<sup>117</sup> The Monitor concedes as much in its post-trial brief, stating that Burshtein's report may be admissible "[t]o the extent that the U.S. Court determines that expert evidence on the interpretation of the license grant would be of assistance to the Court." Monitor Post-Trial Br. ¶ 430 (emphasis added).

<sup>118</sup> See, e.g., Burshtein Dep. 40:22-46:2, 51:2-52:5, 293:21-294:5. Burshtein had little familiarity with the leading cases on applying the factual matrix. See *id.* 35:19-36:6; 37:9-22; 47:13-50. This is not surprising as he does not purport to be an expert on Canadian principles of contractual interpretation.

<sup>119</sup> TR11445 (Burshtein Report) ¶ 60. In the section of his report where he reads the Exclusive License grant in the MRDA, Burshtein includes only one citation to a Canadian case – a case that stands solely for the uncontroversial proposition that a licensee *may* have fewer rights than a licensor. *Id.* ¶¶ 62-96.

literally thousands of objections in the pre-trial period, the Canadian Interests explicitly withdrew all objections other than 48 that were listed for the Courts on May 15. In their post-trial briefs, however, the Canadian Interests appear to have attempted to return to blunderbuss objecting, but this time without even identifying a single piece of evidence they contend is inadmissible. Instead of specifying affidavits or portions of affidavits, trial testimony, exhibits or deposition testimony, the Canadian Interests resort to vague and generalized references that leave it to the Courts to determine for themselves which specific items of evidence from the voluminous trial record the Canadian Interests seek to have stricken. Vague assertions of inadmissibility lack the specificity required of proper objections.<sup>120</sup>

In any event, the express withdrawal of all but 48 objections on May 15 moots their post-trial assertion of a potentially larger group of unidentified objections. As stated on the record by counsel for the US Debtors, “the Canadian allocation group have narrowed theirs to 48 deposition and exhibit objections that they have given us.”<sup>121</sup> In response, counsel for the Monitor agreed that “[w]e have some remaining objections [referring to the remaining 48], *there aren’t that many*, and they are all of a similar type.”<sup>122</sup>

Accordingly, to the extent the vague references to “inadmissible” evidence throughout

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<sup>120</sup> A proper objection “must do more than state the ground of the objection; it must also ‘specify the evidence to which the objection is directed.’” 21 Charles Alan Wright et al., *Fed. Prac. & Proc. Evid.* § 5036.1 (2d ed.); *see also McCormick on Evidence* § 52 (“It is not the judge’s responsibility to sever the bad parts if some are good. That is the opponent’s burden.”); *United States v. Abou-Saada*, 785 F.2d 1, 8-9 (1st Cir. 1986), cert. denied, 477 U.S. 908 (1986) (objection that neither identifies testimony nor indicates specific grounds for objection is inadequate); *United States v. Sandini*, 803 F.2d 123, 126 (3d Cir. 1986) (“[G]eneral objections, such as the characterization of the offending evidence as irrelevant, will not suffice.”); Gordon D. Cudmore, *Civil Evidence Handbook*, looseleaf, vol. 1 (Toronto: Thomson Reuters Canada Limited, 1994) at p. 1-12.28 (stating that “counsel should specify the basis upon which evidence is objectionable”); *Commerce & Industry Insurance Company Canada, Inc. v. Singleton Associated Engineering Ltd.*, 2005 ABQB 500 at para. 20 (declining to rule on objection where “[t]he specific grounds for the objection were not articulated and are not in evidence”).

<sup>121</sup> Trial Tr. 807:8-10.

<sup>122</sup> *Id.* 807:25-808:2 (emphasis added). The Courts declared that they wished to address these reserved admissibility objections in post-trial briefing, but never suggested that this would permit parties post-trial to raise new objections for the first time (contrary to the objection procedures in the Trial Protocol, *see* Joint Tr. Protocol, Jan. 24, 2014, ECF No. 12863-1 at §§ 1.C, V.E.5) or re-assert objections they explicitly withdrew.

the Canadian Interests' briefs are to anything other than the 48 specific objections that they reserved, such objections were explicitly waived at trial and the evidence has already been admitted.<sup>123</sup> This includes all affidavit and live trial testimony to which no objections were raised at trial.<sup>124</sup> With respect to the 48 objections that were reserved, while the Canadian Interests have elected to offer no individualized discussion of any of them (or even identification in their post-trial briefs), they appear predicated upon the Canadian Interests' misconception of factual matrix evidence. Because the MRDA (and its amendments and restatements through 2008) was intended to "contractualize" Nortel's business operations over a period of years, evidence of how Nortel conducted its business and the understanding of those running it and representing Nortel's operations to tax authorities is all admissible factual matrix evidence and not improper opinion, subjective intent or any other misguided objection that the Canadian Interests have asserted.

### **3. The Limited Factual Matrix Evidence Cited by the Canadian Interests Does Not Support Their Proposed Interpretation of the MRDA**

The Monitor proffers a handful of its own evidence, none of which assists it. In its initial discussion of its own factual matrix evidence, the Monitor notes only that: (i) rights to Nortel inventions were assigned to NNL through documents "providing that the entire right, title and interest in and to the invention was assigned to NNL," and (ii) "NNL was named as the patentee

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<sup>123</sup> See *United States v. Gibbs*, 739 F.2d 838, 849 (3d Cir. 1984) (noting that "the appropriate time for raising an objection is as soon as the ground for objection is known" and holding that where evidentiary objection was raised "not when the evidence was offered," but instead after the close of all evidence, the testimony being objected to "w[as] already in evidence"); *Naeem v. McKesson Drug Co.*, 444 F.3d 593, 609-10 (7th Cir. 2006) (objection waived where defendants did not raise the objection "in either their motion in limine or during the testimony itself"); see also *McCormick on Evidence* § 55 ("As a general proposition, the party's failure to assert an objection promptly and specifically effects a waiver."); Kevin P. McGuinness & Linda S. Abrams, *The Practitioner's Evidence Law Sourcebook* (1st ed. 2011) at 183 ("A failure to raise a timely objection may be construed as consent to admission."); *R. v. Gundy*, 2008 ONCA 284 at para. 23 (holding that trial judge erred in permitting objection first raised "at the completion of the trial" because the late objection prejudiced the opponent's ability to offer alternative evidence).

<sup>124</sup> The Canadian Interests certainly understood the requirement that objections to live testimony be raised at the time of such testimony. See, e.g., Trial Tr. 1458:2-4 (objection by counsel for the Monitor and Canadian Debtors); *id.* 1722:22-1724:10 (objection by the Monitor); *id.* 1741:12-22 (same).



on virtually all patents. . . .”<sup>125</sup> But there is no dispute that patents for Nortel employees’ inventions were assigned to the entity that employed them, and by operation of the MRDA, legal title was ultimately assigned to NNL “in consideration” for NNL agreeing to the Exclusive Licenses, as Article 4(a) plainly provides.<sup>126</sup> The relevant question is the scope of those Exclusive Licenses, and the two facts cited by the Monitor do not address that question.

Elsewhere in its brief, the Monitor cites to the testimony of Clive Allen to suggest that NNL’s ownership rights in the Licensed Participants’ Exclusive Territories were not limited to legal title.<sup>127</sup> But Allen is not a competent witness on this issue – he left Nortel before the RPSM and MRDA were even contemplated, and was only directly involved in the preparation and negotiation of the original CSAs in the 1970s.<sup>128</sup> As Allen acknowledged and the table below shows, the 1978 CSA about which he was familiar later “evolved” over successive CSAs to the MRDA to grant the Licensed Participants ever broader rights reflective of their enhanced functions, assets and risks:<sup>129</sup>

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<sup>125</sup> Monitor Post-Trial Br. ¶ 298.

<sup>126</sup> See PFOF ¶¶ 126-27.

<sup>127</sup> Monitor Post-Trial Br. ¶¶ 315-16.

<sup>128</sup> US Post-Trial Br. at 59-60. Similarly lacking in any knowledge with respect to the MRDA or its transfer pricing purposes are Angela Anderson and Angela deWilton; accordingly, their testimony, like that of Allen, is irrelevant. The Monitor did not bring any witnesses knowledgeable about the MRDA to trial.

<sup>129</sup> Trial Tr. 614:17-615:9 (Allen); US Post-Trial Br. at 59.

	1978 CSA (TR46882)	MRDA (TR21003)
<b>NNL's Interest</b>	Technology is "the property" of NNL. Art. 4.	NNL has "legal title" to technology. Art. 4(a).
<b>Non-Exclusive vs. Exclusive License</b>	Non-exclusive. Art. 4.	Exclusive. Art. 5(a).
<b>Practice Rights</b>	NNI has right to manufacture, use, lease and sell Products "in accordance with practices and procedures promulgated by" NNL. Art. 4.	NNI has "rights to make, have made, use, lease, license, offer to sell, and sell Products using or embodying NN Technology." Art. 5(a). No limitation with respect to practices and procedures promulgated by NNL.
<b>Products Definition</b>	Clear field of use restriction with a specific list of limited products. Art. 1(a).	"[A]ll products, software and services designed, developed, manufactured or marketed, or proposed to be designed, developed, manufactured or marketed, at any time . . . ." Art. 1(g).
<b>Sublicense Rights</b>	NNI cannot sublicense except with NNL's "written consent." Art. 4.	Full sublicense rights. Art. 5(a).
<b>Enforcement Rights</b>	No enforcement rights.	Full enforcement rights in US. Art 4(e).
<b>Duration of NNI's Rights</b>	Five years. Art. 4.	Perpetuity. Art. 5(a); Art. 9(b).
<b>NNI's Rights Upon Termination</b>	NNI must "discontinue the exercise of the rights granted" and use of the technology. Art. 9.	NNI receives "a fully paid up license permitting it to continue to exercise" all rights. Art. 9(b).
<b>Indemnification</b>	NNI must indemnify NNL for liabilities arising out of (i) NNI's use of technology in a manner that infringes other persons' rights and (ii) any faulty Product manufactured by NNL. Art. 7.	NNI must indemnify NNL for "any and all claims and liabilities" arising in the US "with respect to" the technology. Art. 7(b).
<b>Confidentiality</b>	NNI cannot disclose information to licensees unless "approved in writing" by NNL. Art. 6.	NNI has right to disclose information to licensees without NNL's consent. Art. 6(d)(iii).

This evolution was consistent with transfer pricing principles, which require that controlled entities enjoy rights that reflect their *current* functions, assets and risks, not their historical activities.<sup>130</sup> The Canadian Interests' arguments that "*historically* NNL developed, acquired and owned the IP," in the 1970's and before, are irrelevant.<sup>131</sup> Nortel's business

<sup>130</sup> See, e.g., TR00063 (Eden Rebuttal) at 43 (noting that tax authorities require the use of contemporaneous comparables for transfer pricing methodologies); Trial Tr. 5007:11-14 (Eden) ("APAs are designed for ongoing businesses for a period of time when the facts and circumstances are not expected to have material changes.").

<sup>131</sup> Monitor Post-Trial Br. ¶ 315(c) (citing TR00002 (Allen Aff.) ¶¶ 26, 29) (emphasis added); see also CCC Post-Trial Br. ¶ 49 (citing Allen for the proposition that "[a]t the time that the initial CSAs were entered into [in the 1970s], NNL's predecessor owned IP that was the product of nearly 100 years of Nortel's Canadian manufacturing

evolved such that by the time the MRDA was signed, NNI and the EMEA Debtors' direct R&D spending together had long overtaken that of NNL, with NNI by itself directly incurring approximately \$6.5 billion for Nortel's R&D from 2001-2008.<sup>132</sup>

Finally, the Canadian Interests suggest that "[n]umerous witnesses stated that the MRDA gave NNL ownership of the IP."<sup>133</sup> But those same witnesses made clear what they meant by such testimony: NNL's ownership was in the form of legal title encumbered by licenses that granted beneficial ownership of the IP to the Licensed Participants in their respective Exclusive Territories. As Doolittle, one of the former NNL employees cited by the Monitor for this proposition, testified, the MRDA was designed to provide "each of the RPS participants *beneficial ownership but not legal ownership* to the technology," and that beneficial ownership included the right of each IE "to exploit the Nortel technology in its territory."<sup>134</sup> There were no "exceptions to the exclusive right of the [IEs] to the economic and beneficial ownership of Nortel technology within their respective territories."<sup>135</sup>

### **C. The Monitor Is Estopped from Advancing Its Litigation Position**

In response to the US Interests' and EMEA Interests' estoppel arguments, the Monitor devotes much attention to its assertion that under the IFSA and the Allocation Protocol, "no

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experience").

The Monitor also cites Allen for the proposition that NNL "control[led]" and managed Nortel's IP. Monitor Post-Trial Br. ¶ 315(a) (citing TR00002 (Allen Aff.) ¶¶ 27, 35). However, the entire point of transfer pricing – which the MRDA was designed to reflect – is that controlled entities within a multinational enterprise must hold the rights they would have enjoyed if they were at "arm's length." Therefore, any control that NNL exerted over the other Participants cannot determine its rights to NN Technology.

<sup>132</sup> See US PFOF ¶¶ 159-61, 225; *see also* TR00019 (Orlando Decl.) ¶ 40, Fig. 1. The Monitor cites various fact witness testimony for the proposition that a parent company's ownership of IP "was a matter of 'best practice' that was done at other major companies." Monitor Post-Trial Br. ¶¶ 312-13, 315. Yet *none* of the witnesses cited by the Monitor testified that it was "best practice" for a parent company to own all economic rights – rather than just legal title – to the corporate group's intellectual property. In any event, the anecdotal testimony of former Nortel employees who were not involved in drafting the MRDA regarding their generalized impression of "best practices" at other corporations is not relevant evidence.

<sup>133</sup> CCC Post-Trial Br. ¶ 60; *see also* Monitor Post-Trial Br. ¶ 627.

<sup>134</sup> Doolittle Dep. 94:24-95:3, 95:14-17 (emphasis added).

<sup>135</sup> *Id.* 110:4-9; 110:11-12.

estate was required to disclose its litigation position on allocation until May 2013 and, when the position was ultimately disclosed, it was to be subject to no restriction.”<sup>136</sup>

This argument misses the point. While no estate was *required* under the IFSA or the Allocation Protocol to disclose its litigation position before the pleadings in this case, there are restrictions imposed on parties by legal doctrines: they may not advance positions in bad faith, misrepresent their positions in court, or sit silently when they have a duty of candour and know that other parties or a court is relying upon their conduct and representations.<sup>137</sup>

The Monitor includes a 43-page appendix in its post-trial brief purporting to summarize its prior representations to the Courts. Nothing in that appendix dispels or minimizes the following representations by the Monitor, all of which are flatly inconsistent with its current litigation position: (a) eighteen publicly-filed reports stating that NNL’s legal title to NN Technology was encumbered by the Licensed Participants’ Exclusive Licenses, several of which were filed after the Business Line Sales were completed,<sup>138</sup> (b) NNC’s SEC filings (during the period it was controlled by the Monitor) describing NNI’s Exclusive License,<sup>139</sup> (c) the Canadian Debtors’ lead counsel’s testimony before a committee of the House of Commons that “while Nortel Canada owns those patents, licenses have been granted worldwide to the other Nortel entities, and so Nortel is not in a position to simply deal with these patents. . . . in complete

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<sup>136</sup> Monitor Post-Trial Br. ¶ 606.

<sup>137</sup> See *Confederation Treasury Services Ltd., Re*, (1995), 37 C.B.R. (3d) 237 (Ont. Ct. J. (Gen. Div.), In Bank.) at para. 8 (citing Lloyd W. Houlden & Carl H. Morawetz, *Houlden and Morawetz, Bankruptcy Law in Canada* (3d ed. 1995) at pp. 1-61/2 on the principles underlying the role of trustees, which principles are also applicable to Monitors); *Re T. Eaton Co.* (1999), 14 C.B.R. (4th) 298 (Can. Ont. S.C.J. [Commercial List]) at para. 2; see also Trial Tr. 943:3-7, 950:11-19, 959:1-960:6 (Hamilton) (the Monitor has a “duty of candour and transparency” and “has to act fairly;” the Monitor’s role is to “provide advice that balances the interests of all stakeholders” in order to “come to the best and reasonable solution for those stakeholders;” the Monitor “had an obligation to be honest and straightforward with the US court”).

<sup>138</sup> See US PFOF § IV.F.

<sup>139</sup> See *id.*

disregard of the insolvency processes going on in the rest of the world,”<sup>140</sup> (d) the Monitor’s preparation of a post-petition transfer pricing report required by law describing the Participants’ (including NNL’s and NNI’s) “intellectual property ownership” in their local territories,<sup>141</sup> and (e) the Monitor’s silence on July 11, 2011 when the US Court – relying on the Monitor’s Seventy-First Report that had been submitted to the US Court to support approval of the Patent Portfolio Sale – approved that sale.<sup>142</sup>

The Monitor tries to justify its 180-degree reversal by stating that the “Monitor’s allocation position should also not come as a surprise to the U.S. Debtors.”<sup>143</sup> The weight of evidence does not support this assertion.<sup>144</sup> The Monitor asserts that in a May 2010 “without prejudice” settlement meeting, the Monitor’s senior representative, Murray McDonald, advised the US Debtors that the Monitor could take the position that NNL “owned all of Nortel’s IP and should therefore get all the proceeds from its sale.”<sup>145</sup> However, John Ray, who was present at that meeting, testified at trial that this conversation did not take place.<sup>146</sup> McDonald chose not to testify at trial, even though he was in the courtroom during several trial days. McDonald was deposed, however, and his sworn deposition testimony is inconsistent with what the Monitor now asserts. During his deposition, McDonald acknowledged that the Monitor did not come up

<sup>140</sup> TR12004 (Aug. 7, 2009 Minutes of Standing Committee on Industry, Science and Technology) at 21.

<sup>141</sup> TR48622.02 (2009 NNL Transfer Pricing Report) at 39; TR47221.02 (2009 NNI Transfer Pricing Report) at 37.

<sup>142</sup> TR21509 (July 11, 2011 Hearing Transcript) 110:5-111:11; *see also* TR50196 (Order Approving Rockstar Sale) at 13 (finding that the sale “constitutes a good and sufficient exercise by the [US] Debtors of their sound business judgment, and [that] such acts are in the best interests of the [US] Debtors, their estates and creditors”).

<sup>143</sup> Monitor Post-Trial Br. ¶ 624.

<sup>144</sup> Notably, the Monitor is unable to cite any evidence in support of this assertion aside from the testimony of its own representatives. *See id.* ¶¶ 624-28.

<sup>145</sup> *Id.* ¶ 625. It is ironic that the Monitor cites to a without prejudice meeting held for settlement purposes while wrongly accusing the US Interests of revealing discussions that occurred during the without prejudice mediations.

<sup>146</sup> *See* TR00020 (Ray Decl.) ¶ 72 (“At no point in the meeting did Mr. McDonald or anyone else there on behalf of the Monitor or the Canadian Debtors ever assert that position [that NNL owns the intellectual property and is entitled to one-hundred percent of the sale proceeds], nor did he ever assert that there were any limitations whatsoever on the exclusive license granted to NNI by the MRDA.”); Trial Tr. 1373:14-1374:7 (Ray) (“I distinctly remember that meeting, very vivid recollection of that meeting, and those words were not spoken. No recollection of that at all.”).

with its current view that the exclusive licenses had no value at the time of the Rockstar sale until May 2013. It is, therefore, implausible that McDonald staked out the position that NNL could claim 100% of the sale proceeds in May 2010, three years before he had even thought of any basis for such position. As McDonald testified:

Q. And at some point in time you reached the conclusion that's reflected in your allocation position that those intercompany licenses had no value at the time of the Rockstar sale, correct?

A. Correct.

Q. When did you first reach that conclusion?

A. Probably after the unsuccessful third mediation.

...

Q. Prior to the conclusion of the unsuccessful third mediation, did the Monitor have any view on the value of the intercompany licenses?

A. I think we thought about that after the failure of mediation number three.

Q. And you had no view on the value of the intercompany licenses before then; is that fair to say?

A. Yes.<sup>147</sup>

Several well-recognized legal doctrines apply to the Monitor's conduct. First, as set forth in the US Debtors' post-trial brief, estoppel by convention is directly on point: "estoppel by convention provides that if the parties to a contract have based their dealings on a shared assumption as to the proper interpretation of their contract and one party has relied upon that interpretation to its detriment, the other party will not be allowed to resile from the common

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<sup>147</sup> McDonald Dep. 145:17-146:2, 146:9-17. Moreover, even had the Monitor's litigation position been previously disclosed to the US Debtors, the Monitor makes no effort to claim that it ever advised the EMEA Debtors, whose representatives testified that they were "astonish[ed]" to learn of it in May 2013 and would not have sought and obtained the necessary French court approvals for the Patent Portfolio Sale had the Monitor's position been disclosed at the time. Bloom Dep. 95:6-96:22; Rogeau Dep. 81:12-15, 81:17-21, 81:25-82:23. This alone warrants estoppel.

assumption and seek enforcement of another meaning of the contract.”<sup>148</sup>

The doctrine of estoppel by convention has two applications here. First, independent of the other bases for admission of the evidence supporting the US Debtors’ construction of the MRDA, all of the evidence proffered by the US Debtors – both pre- and post-execution of the MRDA – about the parties’ “shared assumption” with regard to the scope of the exclusive licenses is admissible with respect to the claim of estoppel by convention. In addition to the evidence of the Monitor’s representations discussed above, additional evidence of the parties’ shared assumption includes the following:

- Following the insolvency filings, the estates jointly retained Lazard and Global IP, and the estates, their advisors, and their creditor constituencies worked together to determine the best way to monetize their assets, including the Nortel patents and other NN Technology, in a way that would be in the best economic interests of each estate’s creditors.<sup>149</sup>
- As part of the Patent Portfolio Sale, and consistent with the IFSA, each of the Licensed Participants terminated their Exclusive Licenses, and both the License Termination Agreements and Asset Sale Agreement specified that the Licensed Participants were Sellers who were entitled to an allocation of a portion of the sales proceeds as a result of those terminations.<sup>150</sup>
- As the Monitor’s witnesses acknowledged, prior to the Patent Portfolio Sale, the Monitor never informed either the US Debtors or the EMEA Debtors that Nortel’s patents were not subject to licenses.<sup>151</sup>

Second, if the Courts conclude from this evidence that the parties did have a common understanding that the exclusive licenses were not meaningless at the time of the Patent Portfolio Sale (an issue on which the evidence is uncontroverted), estoppel by convention bars the Monitor

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<sup>148</sup> G. R. Hall, *Canadian Contractual Interpretation* (2d ed. 2012) at 172-73; *see also Alberta Oil Sands Pipeline Ltd. v. Canadian Oil Sands Ltd.*, 2012 ABQB 524 at paras. 75-77; *Adtronics Signs Ltd. v. Sicon Group*, [2004] B.C.J. No. 1885 at paras. 151-53.

<sup>149</sup> *See* US PFOF §§ IV.C.3-4.

<sup>150</sup> *See id.* §§ IV.D.1-2.

<sup>151</sup> *See id.* §§ IV.C.7, IV.F.

from “seek[ing] enforcement of another meaning of the contract.”<sup>152</sup>

Judicial estoppel also applies to bar the Monitor’s new litigation position, which is inconsistent with the position it took before the US Court when seeking approval of the Patent Portfolio Sale, and upon which the US Court relied in approving the Sale. Judicial estoppel may be imposed if (i) the party to be estopped has “taken two positions that are irreconcilably inconsistent;” (ii) the party “changed his or her position ‘in bad faith, i.e., with an intent to play fast and loose with the court;’” and (iii) the use of judicial estoppel is “‘tailored to address the harm identified’ and no lesser sanction would adequately remedy the damage done by the litigant’s misconduct.”<sup>153</sup>

The Monitor makes light of its representations to the Courts in connection with the Patent Portfolio Sale approval, arguing that “[j]udicial estoppel is ‘not intended to eliminate all inconsistencies no matter how slight or inadvertent.’”<sup>154</sup> But the Monitor’s representations were hardly “slight or inadvertent;” they were material to the approval process. The Monitor’s defence is that (i) “it had already publically asserted NNL’s ownership of the IP,” (ii) the parties “agreed, in the IFSA, to defer questions of allocation” and (iii) “[i]t did not expressly or implicitly suggest that the U.S. Debtors and EMEA Debtors were entitled to a *substantial* allocation of the Residual IP proceeds.”<sup>155</sup> None of this excuses the Monitor’s conduct. The salient fact is not that the Monitor publicly asserted “NNL’s ownership of IP,” but rather that each and every time it referred to NNL’s ownership, it acknowledged that it was “subject to” the Exclusive Licenses, a habitual disclaimer that makes no sense in light of the Monitor’s current

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<sup>152</sup> G. R. Hall, *Canadian Contractual Interpretation* (2d ed. 2012) at 172-73.

<sup>153</sup> *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors Corp.*, 337 F.3d 314, 319 (3d Cir. 2003) (emphasis omitted); see also *Substantial Developments Ltd. v. Hitchcox*, [1973] O.J. No. 113 at para. 3 (Ont. Sup. Ct. - H.C.J.); *Re Carlson*, 2010 ABQB 701 at para. 18, rev’d on other grounds *Re Carlson*, 2012 ABCA 173.

<sup>154</sup> Monitor Post-Trial Br. ¶ 644.

<sup>155</sup> *Id.* ¶ 646 (emphasis added).



assertion that these licenses are worthless. The non-waiver language in the IFSA did not permit the Monitor to make misrepresentations or material omissions to the Courts and the other debtors in these proceedings. Further, the Monitor's assertion that it never suggested that NNI and the EMEA Debtors would receive a "substantial" allocation concedes that it did suggest – to NNI, the EMEA Debtors and the Courts – that they would receive *an* allocation from the Patent Portfolio Sale, not that the debtors were relinquishing valuable licenses to \$4.5 billion worth of patents for nothing.

The Monitor's final defence is its assertion that "the Canadian Court was not advised by the U.S. Debtors during the sales approval process that they would later take the position that they were entitled to the vast majority of sales proceeds."<sup>156</sup> The Monitor has chosen its language carefully. It cannot deny that *it* was well aware of the US Debtors' position, but this assertion in any event misses the point.<sup>157</sup> Judicial estoppel is not applicable because of any party's position as to the *amount* each estate should be allocated, but rather because contrary to its prior representations to the Courts, the Monitor now contends that NNI and the EMEA Debtors simply had no interest whatsoever in the property sold in the Patent Portfolio Sale and that NNL's legal title to the patents, rather than being subject to the exclusive licenses as the Monitor repeatedly represented, were in fact not subject to the licenses at all.

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<sup>156</sup> *Id.* ¶ 646; *see also id.* ¶ 175.

<sup>157</sup> The Monitor cannot both insinuate that the US Debtors were equally culpable of concealing their position at the time of the Patent Portfolio Sale and claim that mediation confidentiality forbids disclosure of the fact that the Monitor was aware of the US Debtors' precise position. *See id.* ¶¶ 595, 612-18. By suggesting that the US Debtors might have concealed their current litigation position, the Monitor has put the US Debtors' representations in issue and opened the door to contrary evidence, even though that evidence might otherwise have been inadmissible. *See* 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 1:12 (4th ed.) ("[E]vidence that might affect the outcome should not be immune from challenge. . . . [A]dmitting [evidence] may open the door to counterproof that would otherwise be excludable . . . . The doctrines that are most often overcome by the party offering counterproof are those limits on relevancy in Rule[s] 403 to 415 . . . ."); *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 at paras. 12, 19 (settlement privilege subject to exceptions "when the justice of the case requires it," such as when there are "allegations of misrepresentation"). Indeed, the Monitor cites only its purported statements at a "without prejudice" meeting to support its claim of disclosure.

For the same reasons, equitable estoppel – referred to as estoppel by representation in Canada – also bars the Monitor and Canadian Debtors from taking the position that the NN Technology in the Patent Portfolio Sale was not subject to NNI’s exclusive licenses. The *Alberta Oil* court described the doctrine as follows:

Where one has either by words or conduct made to another a representation of fact, either with knowledge of its falsehood, or with the intention that it should be acted upon, or has so conducted himself that another would, as a reasonable man, understand that a certain representation of fact was intended to be acted on, and that the other has acted on the representation and thereby altered his position to his prejudice, an estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be.<sup>158</sup>

The doctrine is “not limited to positive representations,” and “includes representations by conduct,” and can also be imposed due to silence where a party is under a duty to speak, as the Monitor was here.<sup>159</sup> Likewise, under Delaware law, equitable estoppel applies “when a party by his conduct intentionally or unintentionally leads another, in reliance upon that conduct, to change position to his detriment.”<sup>160</sup> To establish equitable estoppel, a party must show that (1) it “lacked knowledge of the truth of the facts in question;” (2) “relied on the conduct of the party against whom estoppel is claimed,” which reliance must be “reasonable and justified under the circumstances;” and (3) “suffered a prejudicial change of position as a result of his reliance.”<sup>161</sup>

Equitable estoppel applies to the Monitor’s litigation position here. As demonstrated at trial, IPCo was a viable option available to NNI.<sup>162</sup> Although the Monitor has sought to argue that IPCo was not viable, the Monitor can only point to the self-serving statements of its own

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<sup>158</sup> *Alberta Oil Sands Pipeline Ltd. v. Canadian Oil Sands Ltd.*, 2012 ABQB 524, at para. 70.

<sup>159</sup> *Id.* at para. 72-73.

<sup>160</sup> *U.S. Bank Nat’l v. Swanson*, 918 A.2d 339, at \*2 (Del. 2006) (Table).

<sup>161</sup> *Id.*; see also *Gen. Elec. Capital Corp. v. Armadora*, 37 F.3d 41 (2d Cir. 1994) (holding that defendant’s “silence in the face” of plaintiff’s expressed interpretation of the disputed contract equitably estopped defendant from advancing a contrary interpretation for the “first time” after plaintiff released valuable rights under the contract).

<sup>162</sup> See US PFOF § IV.C.6.

representatives to support this argument, despite the extensive discovery in this case, which includes thousands of post-petition e-mails and numerous depositions of people involved in IPCo who testified to the contrary.<sup>163</sup> Had the Monitor not represented that the NN Technology in the Patent Portfolio was subject to NNI's Exclusive Licenses, NNI would not have consented to its sale.<sup>164</sup> The US Interests reasonably relied upon the Monitor's representations to the US Debtors and to the Courts, and the Monitor should not now be permitted to change its position to the detriment of the US Interests.

For the reasons set forth above, the Canadian Interests' interpretation of the scope of the Exclusive Licenses should be rejected.

## POINT II

### **THE MONITOR'S RECYCLED CRITICISMS OF KINRICH WERE DISPROVEN AT TRIAL**

The Monitor's post-trial brief regurgitates its pre-trial criticisms of Kinrich, failing to account for the fact that those criticisms did not withstand scrutiny at trial.<sup>165</sup> Indeed, paragraphs 140-146 of the Monitor's pretrial brief are copied virtually verbatim into the Monitor's post-trial brief.<sup>166</sup>

As discussed more fully in Point III of the US Interests' post-trial brief, Kinrich applied principled valuation methods to the transactions that occurred (in contrast to the hypothetical alternatives used by the Monitor's experts), which Kinrich tested against several metrics to

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<sup>163</sup> *See id.*

<sup>164</sup> Trial Tr. 1374:17-1376:5 (Ray); TR00020 (Ray Decl.) ¶¶ 18, 67-68, 70-71; US PFOF at App. D. Representatives of the other Licensed Participants, including NNUK and NNSA, similarly testified that they would not have consented to the Patent Portfolio Sale if they had known that the Monitor would take the position that only NNL was entitled to the sale proceeds. *See* US Post-Trial Brief at 72-73.

<sup>165</sup> The CCC's criticisms of Kinrich are largely repetitive of the Monitor's. Thus, while this text focuses on the Monitor, it equally applies to the CCC and citation references are made to the CCC's post-trial brief where applicable.

<sup>166</sup> *See* Monitor Post-Trial Br. ¶¶ 504-508, 515-516.

confirm the reliability of the results. In light of Kinrich's careful valuation and detailed analysis, the Monitor's refrain that Kinrich conducted no valuation is without basis.

**A. Kinrich's Income-Based Valuation Determined the Value Each Debtor Entity Surrendered in the Business Line Sales**

The Monitor asserts that Kinrich did not perform a valuation with respect to the Business Line Sales.<sup>167</sup> This is simply wrong. Kinrich testified at length at trial about the income-based valuation he set forth in his report, the theory and economic literature supporting his choice of that method of valuation and the various metrics that he used to test the accuracy of his valuation.<sup>168</sup>

**1. Kinrich's Use of a Revenue Multiple-Based Income Approach Is Appropriate for the Particular Circumstances of the Business Line Sales**

In critiquing Kinrich's allocation with respect to the Business Line Sales, the Monitor faults Kinrich for using a revenue multiple-based income approach, rather than a cash flow multiple-based income approach.<sup>169</sup> The Monitor implies that the discounted cash flow ("DCF") approach is the only acceptable income-based approach. However, as Kinrich explained, and as the Monitor's own experts agree, several types of income valuation methodologies exist and "each of them is appropriate in certain circumstances. . . . [T]he choice of which to use is dependent on the facts and circumstances and what makes sense for the problem at hand."<sup>170</sup>

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<sup>167</sup> Monitor Post-Trial Br. ¶ 515; *see also* CCC Post-Trial Br. ¶¶ 114, 122.

<sup>168</sup> *See generally* Trial Tr. 4171:23-4195:5.

<sup>169</sup> *See* Monitor Post-Trial Br. ¶¶ 515, 518. In purported support of its critique, the Monitor asserts that Kinrich "concedes that a discounted cash flow analysis, that is, a projection of future cash flow (revenue less costs) discounted to the present value at a discount rate is the preferred method, but he does not carry out such a calculation." *Id.* ¶ 515. The Monitor cites to Kinrich's report at paragraphs 89-90, but this is a selective citation to a portion of Kinrich's report that is focused on his valuation of the Patent Portfolio (in which he was able to do a DCF) and ignores the evidence adduced at trial showing that a DCF analysis is inappropriate for determining the value of the rights relinquished in the Business Line Sales. *See* Trial Tr. 4179:24-4180:11 (Kinrich).

<sup>170</sup> *Id.* 4174:2-14 (Kinrich); *see also* TR00042 (Green Report) at 42-44 ("ASC 820 however does not prescribe the type of analysis that is required for any particular type of asset. Rather the choice of methodology depends on the facts and circumstances of the valuation" and "[a]gain, these reference the market, cost and income approaches but

Kinrich could not do a DCF analysis for the Business Line Sales because reliable cash flow forecasts breaking out revenues geographically did not exist.<sup>171</sup> Notably, Green had to create his own cash flow forecasts, which for reasons established by Kinrich at trial, were materially flawed.<sup>172</sup> Ironically, in creating those projections, particularly to break out revenue by geography, Green looked to Nortel's actual 2009 carve out financials, the same source Kinrich used for his valuation. In any event, the revenue multiple methodology, which is the economic equivalent of a DCF because it too is an income-based method,<sup>173</sup> is particularly well suited to Nortel's facts and circumstances as set forth in the economic literature, discussed below.<sup>174</sup>

The Monitor cannot and does not attempt to dispute that a well-known and authoritative treatise by Aswath Damodaran, *Investment Valuation, Tools and Techniques for Determining the Value of Any Asset*, explicitly endorses the use of revenues multiples for troubled firms.<sup>175</sup> And

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do not specify one particular methodology as being preferable over the others. Rather, the choice of methodology will depend upon the particular intangible asset being valued.”); Trial Tr. 3647:13-3648:19 (Berenblut) (testifying that there are a number of different methodologies that a valuator can choose to apply depending on the facts and circumstances of a particular case).

<sup>171</sup> See Trial Tr. 4179:24-4180:11 (Kinrich).

<sup>172</sup> Green claimed to use something he called “Retained by Nortel” projections, which he asserts, without basis, meant that this was Nortel's management forecast for the business lines had Nortel continued to operate them and not sold them. Notably, with only one exception, none of the projections that Green used were contemporaneous management forecasts labeled “Retained by Nortel.” Instead, Green either chose the most pessimistic projections he could find among several different management projections or he took already pessimistic projections and lowered the forecasts. See *id.* 4199:5-4201:14 (Kinrich); TR00052 (Kinrich Rebuttal) ¶ 36; see also TR00042 (Green Report) App'x A at 6-12, App'x B at 6-10, App'x C at 4-8, App'x D at 5-8; App'x E at 7-10. The reason Green downwardly adjusts or otherwise uses the lowest forecasts available is because, through his value in use analysis, this is how he creates the largest “residual” which he then gifts to>NNL. More importantly, Green's purported effort to use “Retained by Nortel” projections makes no sense. He should have used Nortel's management forecasts that even he acknowledges valued the Business Lines as if they were sold to a third party, i.e., the transactions that occurred. As Kinrich showed, had Green used Nortel's own projections closest in time to each of the Business Line Sales and applied his value in use methodology consistently across the estates, the \$1 billion “residual” amount that Green arbitrarily gifted to the Canadian Debtors disappears. See TR00052 (Kinrich Rebuttal) at Tables 1, 3.

<sup>173</sup> Trial Tr. 4329:9-14 (Kinrich reiterating upon cross-examination that “as I described this morning, what I did is the economic equivalent of [a DCF]”).

<sup>174</sup> See DEM00019 (Kinrich Demonstratives) at 27-28 (“Revenue-Based Approach Appropriate Here”).

<sup>175</sup> *Id.* at 28 (“Revenue-Based Approach Appropriate Here”) (citing TR50216 (Damodaran, *Investment Valuation*) at 543 (“Unlike earnings and book value ratios, which can become negative for many firms and thus not meaningful, revenue multiples are available even for the most troubled firms and for very young firms. . . . revenue multiples are not as volatile as earnings multiples, and hence are less likely to be affected by year-to-year swings in the firm's fortune.”)). The CCC faults Kinrich for citing *Investment Valuation* as it contains cautionary language that a

while the Monitor fixates on the words “Small Businesses” in the title *Valuing Small Businesses and Professional Practices*,<sup>176</sup> it is in fact an authoritative, general valuation treatise by three well-respected economists that is frequently relied upon by valuation professionals – including the Monitor’s own experts. Indeed, Green cited and relied upon this treatise three separate times in his initial report<sup>177</sup> and three separate times in his rebuttal report.<sup>178</sup> Kinrich commented that this treatise supports the use of a revenue multiple method here<sup>179</sup> in direct response to Green’s earlier misleading and selective citation to the treatise in his rebuttal report to suggest otherwise.<sup>180</sup> Like the Damodaran treatise discussed above, Pratt, Reilly and Schweihs explain that use of revenue multiples (as opposed to other valuation methodologies) is particularly useful “for companies with losses or erratic earnings,” a fact the Monitor does not dispute.<sup>181</sup> Indeed, because Nortel had been experiencing losses, the revenue multiple approach was particularly appropriate for the valuation of the Business Lines.<sup>182</sup>

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valuator’s “failure to control for differences across firms in costs and profit margins can lead to misleading valuations.” CCC Post-Trial Br. ¶ 121 n.153. Of course, Kinrich heeded this warning and used the best comparables possible – the actual sold businesses. See Trial Tr. 4177:8-19 (Kinrich).

<sup>176</sup> Monitor Post-Trial Br. ¶¶ 521-23; see also CCC Post-Trial Br. ¶ 121 n.153.

<sup>177</sup> See TR00042 (Green Report) at 15 n.44, 45 n.192, 46 n.197.

<sup>178</sup> See TR00043 (Green Rebuttal) at 12 nn.16-18.

<sup>179</sup> Trial Tr. 4175:2-11; DEM00019 (Kinrich Demonstratives) at 27 (“Revenue-Based Approach Appropriate Here”). The Monitor points to language in the treatise and implies that it says that a revenue multiple must be used exclusively for one of three objectives. The Monitor fails to cite the treatise’s text that “gross revenue pricing multiples *may be useful* with regard to those objectives” and that this was a “broad generalization.” TR50451 (Pratt, Reilly and Schweihs, *Valuing Small Businesses and Professional Practices*) at 340 (emphasis added).

<sup>180</sup> See TR00043 (Green Rebuttal) at 12.

<sup>181</sup> TR50451 at 341 (Pratt, Reilly, and Schweihs, *Valuing Small Businesses and Professional Practices*). The Monitor’s claim that “[t]he text went on to explain that a revenue approach would *require* the comparable businesses to have a fairly standard cost structure,” Monitor Post-Trial Br. ¶ 523 (emphasis added), is flatly false. The text does not require this scenario but identifies it as one instance – among many – in which revenue multiples might be useful.

<sup>182</sup> See TR50451 (Pratt, Reilly and Schweihs, *Valuing Small Businesses and Professional Practices*) at 340-41 (“Gross Revenue Multiples May Be Useful . . . For Companies with Losses or Erratic Earnings”); TR50216 (Damodaran, *Investment Valuation*) at 543 (“revenue multiples are available even for the most troubled firms” and “revenue multiples are not as volatile as earnings multiples, and hence are less likely to be affected by year-to-year swings in the firm’s fortune”).

Thus, the Monitor's criticism that Kinrich did not use a DCF for the Business Line Sales should be rejected.

**2. Kinrich's Use of Revenues to Value Each Entity's Rights in the Business Line Sales Proceeds Fairly Captured the Applicable Costs**

The Monitor faults Kinrich for using a revenue multiple based on 2009 revenues while not accounting for the costs incurred in creating such revenue. In particular, the Monitor asserts that "the futility of Kinrich's approach is illustrated by his inexplicable contention that, by allocating amounts to the U.S. Debtors based on revenue earned as a result of Canada's R&D, he was 'charging' the U.S. Debtors with the cost of that R&D."<sup>183</sup> This too misconstrues Kinrich's valuation. As Kinrich explained at trial, a revenue multiple method examines the most appropriate revenue data (here 2009) and then examines if it is a fair projection of the revenues that can be expected going forward. Under this method, the 2009 historic revenue is used not as a measure of prior results but as the most reliable projection of *future* value. The revenue multiple method associates that future revenue with the proportionate future costs of earning the revenue – so if an entity is projected to receive 70% of the future revenue, it is also projected to assume 70% of the future costs.<sup>184</sup> The Monitor's complaint that Kinrich's approach is inappropriate to the extent it does not adjust for Nortel's historical costs by each affiliate is therefore misplaced as historical expenditures are irrelevant to the analysis. Moreover, as Kinrich explained, his adherence to the proper methodology benefits NNL's allocation because the future expenditures the model accrues to Canada are proportionately less than the historical costs it had incurred. All costs associated with Kinrich's projected revenue are properly

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<sup>183</sup> Monitor Post-Trial Br. ¶ 529.

<sup>184</sup> See, e.g., Trial Tr. 4177:20-4178:20, 4317:3-4318:15, 4363:13-4364:7 (Kinrich).

accounted for in his allocation opinion.<sup>185</sup>

### **3. Kinrich's Business Line Valuation Captured the Value of the Assets Operating Together**

The Monitor also faults Kinrich for not conducting a separate valuation of each category of assets.<sup>186</sup> This critique must be rejected; the income-based valuation method that Kinrich used “captures the value of all of the individual assets operating together” such that the assets “are included in the value of the business as a whole.”<sup>187</sup> An asset-based approach would not capture the value of the synergies that come from the assets operating together.<sup>188</sup> It is undisputed that these Business Lines were sold as going concerns and continued to be operated by the buyers after the sales, such that it was most appropriate to value them as a going concern to capture the value of the assets working together. Ironically, notwithstanding this criticism of Kinrich, Green does not actually perform a separate valuation of each category of assets. Rather, he purports to value tangible assets (based on book value alone) and the workforce. Beyond that, he simply assumes, with no analysis, that all other assets fall into intellectual property and customer relationships with no goodwill, which he then lumps together and applies a (faulty) income-based analysis.

### **4. The RPSM Does Not Apply to the Business Line Sales Proceeds**

Finally, the Monitor claims that Kinrich should have applied the RPSM to his valuation results. According to the Monitor, Kinrich “assumed that the U.S. and EMEA Debtors’ rights under the Nortel IP would persist into the future (if the sales had not taken place).”<sup>189</sup> This too is

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<sup>185</sup> Ironically, despite arguing vociferously against the contribution methodology, Canada’s argument that its allocation must be raised because of the sunk cost of its past expenses is no different.

<sup>186</sup> Monitor Post-Trial Br. ¶ 442; *see also* CCC Post-Trial Br. ¶¶ 116-17.

<sup>187</sup> Trial Tr. 4113:9-13 (Kinrich).

<sup>188</sup> *Id.* 4110:24-4111:11, 4113:14-25 (Kinrich).

<sup>189</sup> Monitor Post-Trial Br. ¶ 525.



wrong.<sup>190</sup> In fact, that is what Green did, except that in his preferred Business Line allocation he applies the RPSM only to NNI and the EMEA Debtors as if the sales had not taken place, but does not apply the RPSM to NNL's allocation.

Unlike Green, Kinrich does not ignore the sales that actually occurred. He used a revenue multiple as the input to value what each debtor entity had relinquished to the buyers of the Business Lines. Upon making this calculation, Kinrich did not suspend reality and build a valuation around the hypothetical scenario that Nortel had continued operating the Business Lines. Rather, he recognized that the businesses were sold, the sales generated proceeds and the RPSM does not apply to proceeds from the sale of a business. The Monitor agrees, as it has argued throughout these proceedings that the RPSM does not apply to proceeds from the sale of a business and does so again in its post-trial brief.<sup>191</sup> The EMEA Debtors likewise acknowledge this.<sup>192</sup>

**B. The Monitor's Largely Repetitive Criticisms of Kinrich's Patent Portfolio Valuation Should Be Rejected**

Setting aside the Monitor's repetitive complaints about the scope of the licenses and its RPSM-related arguments, the Monitor's principal critiques of Kinrich's Patent Portfolio valuation focus upon his use of the IPCo cash flows and the discount rate that Kinrich applies. The Monitor's criticisms are without merit.

**1. The IPCo Projected Cash Flows Provide a Reliable Basis for Kinrich's Patent Portfolio Valuation**

To value each debtor's relative relinquishment of value in the Patent Portfolio Sale,

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<sup>190</sup> Trial Tr. 4302:16-4303:5 (Kinrich).

<sup>191</sup> See Monitor Post-Trial Br. ¶ 65.

<sup>192</sup> EMEA Post-Trial Br. ¶ 406 ("[T]he MRDA by its own terms applies only to the operating arrangements of Nortel, and so does not even purport to address proceeds of a sale, much less a sale on the bankruptcy of the whole group. This is confirmed by the Third Addendum to the MRDA, which expressly excluded the gain on the sale of the business from the profit split under Schedule A of the MRDA.").

Kinrich conducted a DCF analysis using Nortel's IPCo cash flows, which projected the licensing revenue Nortel could expect to receive from the patents eventually sold in the Patent Portfolio Sale.<sup>193</sup> Kinrich used a DCF analysis here, rather than an income-based revenue model, because he had reliable cash flow projections. As discussed more fully in Point IV of the US Debtors' proposed findings of fact, the cash flows developed in the IPCo business plan were the result of a collaborative effort on the part of Nortel IP employees, outside financial advisors (Lazard and Global IP) and representatives of each of the estates. The developers of the IPCo Model, experts in the field of patent licensing and valuation employed jointly by all the Debtors, had every incentive to build the Model in such a way as to accurately and realistically forecast from where Nortel could expect to receive licensing revenue.<sup>194</sup>

The Monitor criticizes Kinrich for "proceed[ing] on the assumption that the amount paid by Rockstar for the IP Portfolio is based upon the revenues that could be earned from running a licensing business described in the IP Co. projections."<sup>195</sup> As Kinrich testified and as Green agreed, Nortel could have received the exact same \$4.5 billion had it chosen not to sell the Patent Portfolio but instead had IPCo grant Rockstar an exclusive license to the patents.<sup>196</sup> Moreover, the Monitor has put forward no evidence at all to suggest that the consortium of companies that purchased the Patent Portfolio, the very same patents upon which the IPCo Model is based, and which is being run by John Veschi, former NNI employee and Chief Intellectual Property Officer at Nortel, would expect to receive licensing revenue in materially different amounts or from

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<sup>193</sup> See US Post-Trial Br. at 86-93.

<sup>194</sup> Given the extensive contemporaneous development of these cash flow projections under the supervision of experienced outside advisors and all three estates discussed herein and in the US Interests' PFOF, these cash flow projections should be relied upon rather than post-hoc self-serving projections created by Malackowski in order to inflate value attributable to the rest of the world, for which EMEA receives 3/5 of the value. As demonstrated at trial, Malackowski's approach is significantly flawed. The value derived in the Patent Portfolio Sale did not come from the far flung jurisdictions that Malackowski considered.

<sup>195</sup> Monitor Post-Trial Br. ¶ 532.

<sup>196</sup> Trial Tr. 4169:23-4170:7 (Kinrich); Green Dep. 257:22-259:16.

different territories than reflected in the model. Patents are inherently territorial, and Nortel's Patent Portfolio was predominately a US portfolio. The Canadian Interests do not dispute that 97% of all Nortel Technologies were patented in the US (with 73% patented *only* in the US) and over 99% of all high and highest interest Technologies were patented in the US (with 77% patented *only* in the US), and that the US market is over three times larger than the markets of the other IEs combined.<sup>197</sup>

Before conducting his valuation, Kinrich specifically considered “whether the IPCo model was a reasonable basis on which to base [his] valuation.”<sup>198</sup> In examining the reliability of the various inputs within the IPCo Model, Kinrich applied his expertise in reviewing “thousands” of royalty rates over the course of his career and determined that the IPCo royalty rates were reasonable.<sup>199</sup> Kinrich examined the reputable sources that Lazard and Global IP had used to build the IPCo Model as well as outside sources before concluding that the IPCo Model accurately estimated the size of a telecommunications market in a given territory.<sup>200</sup> Kinrich reviewed the target vendors included within the IPCo Model and determined that they represented 80-95% of the vendors in each market.<sup>201</sup> He even consulted with an expert in patent brokerage, Raymond Zenkich, to ensure that the end markets specified for the patents in the IPCo Model were reasonable. Zenkich's team individually analysed over 3,500 patents to reach the conclusion that they were.<sup>202</sup> The IPCo projected cash flows thus provided Kinrich with a very reliable basis from which to understand where the buyer expected to receive value. Given

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<sup>197</sup> TR00051 (Kinrich Report) at Ex. 21-22; *id.* at Table 11; DEM00019 (Kinrich Demonstratives) at 14-16. Rockstar has also sued several companies that were proposed IPCo targets. *See* PFOF § IV.C.6 (“IPCo Was a Viable Option”).

<sup>198</sup> Trial Tr. 4127:1-3.

<sup>199</sup> *Id.* 4133:3-20.

<sup>200</sup> *Id.* 4133:21-4134:3.

<sup>201</sup> *Id.* 4134:4-8.

<sup>202</sup> *See* TR00054 (Zenkich Report) ¶¶ 41-42.

that the majority of patents were registered – and thus protected – in the US, it is not surprising that the majority of the value comes from the US market, the market exclusively licensed to NNL.

The Monitor’s attempts to paint the IPCo cash flows as “largely guesswork” and “speculative” fail. The Monitor relies almost entirely on the testimony of Sharon Hamilton and cites no testimony from any other fact witness (either by deposition or at trial) to support its position.<sup>203</sup> The contemporaneous documents do not support Hamilton’s testimony. The evidence shows that IPCo projected cash flows were fully vetted by the Monitor, the US Debtors and the Joint Administrators, with the assistance of expert outside advisors. Internal presentations not made for a litigation purpose and presented to, among others, Hamilton describe the IPCo business as “viable” and “actionable.”<sup>204</sup> The IPCo Model was the subject of numerous presentations to NNL’s Board of Directors and creditors and representatives of each of the estates.<sup>205</sup> It was developed over the course of more than a year and included multiple iterations incorporating feedback given by its main stakeholders.<sup>206</sup> Hamilton’s after-the-fact testimony is contradicted by contemporaneous documents and not supported by any other fact witness. It should be rejected.

The Monitor also relies on Green’s assertion that IPCo was “too speculative.”<sup>207</sup> Neither Green nor the Monitor presents any analysis to support his assertion. Green performed no tests

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<sup>203</sup> See Monitor Post-Trial Br. ¶ 149 n.172. Other than Hamilton, at least the following fact witnesses involved in IPCo provided deposition or trial testimony in this case: John Doolittle, Gillian McColgan, John Ray, George Riedel, John Veschi. The Monitor does not cite to any testimony from any of these witnesses to support Hamilton’s view that IPCo was speculative.

<sup>204</sup> See, e.g., TR50795.01 and TR50795.02 (March 30, 2010 Email to S. Hamilton attaching presentation titled “Project Iceberg: Work Plan for Plan A, B & C”) at slide 8 (“The IPCo. (Plan C) business plan developed over the last several months represents *a viable and actionable alternative to a sale* and serves as a reference case for comparing the proposals received in the sales process” (emphasis added)).

<sup>205</sup> See, e.g., TR43655 (Jan. 29, 2010 Presentation titled “Patent Portfolio Analysis Phase One: Board of Directors Presentation”); TR22098 (Mar. 17, 2010 Presentation titled “IP Co. Update to Creditor Committees”); TR43861 (Apr. 27, 2010 Presentation titled “IP Co. Update to Nortel Leadership Team”).

<sup>206</sup> See US PFOF § IV.C (“Nortel Considers Options for Monetizing Its Patent Portfolio”).

<sup>207</sup> See Monitor Post-Trial Br. ¶ 492

on the robustness of IPCo's projected cash flows and offered no alternative cash flow projections. To the contrary, in his Appendix P rebuttal analysis, Green himself used the IPCo cash flows – without making any adjustments to them whatsoever.<sup>208</sup> This is significant. The Canadian Interests fail to present *any* alternative to the IPCo cash flow projections for the Patent Portfolio, all the while maintaining that a DCF analysis is the appropriate method to use for allocation.

## **2. Kinrich's Discount Rates Are Reasonable**

The Monitor faults Kinrich for not applying the discount rates that Global IP and Lazard “used,”<sup>209</sup> omitting the uncontroverted fact that Global IP and Lazard proposed their rates for the “illustrative” purposes of modelling if IPCo was run by Nortel, not what they would be for a sale of the Patent Portfolio.<sup>210</sup> Global IP and Lazard did not have, and could not have had, the additional knowledge that Kinrich, the parties and the Courts now have: the fair market value of the Patent Portfolio that was obtained in an auction, from which it is now possible to calculate, with precision, the appropriate discount rate based on the marketplace. Moreover, the discount rates confirmed by the sale price and which Kinrich used were objectively reasonable based on other market tests, as explained in the US Interests' prior briefing and by Kinrich in his testimony.<sup>211</sup>

Further, even using the higher discount rates suggested by Malackowski's methodology makes no material difference in the ultimate allocations.<sup>212</sup>

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<sup>208</sup> See TR00043 (Green Rebuttal) at App. P.

<sup>209</sup> See Monitor Post-Trial Br. ¶ 535; see also CCC Post-Trial Br. ¶ 125.

<sup>210</sup> See, e.g., TR43712 (Presentation titled “Model 3.0 Preliminary Valuations (October 21)”).

<sup>211</sup> See US Post-Trial Br. at 90-92. The CCC's claim that “Kinrich's only stated justification for his discount rate is a reference to the weighted-average cost of capital for ‘communications equipment manufacturers’” is untrue, as both Kinrich's trial testimony and demonstratives attest. See Trial Tr. 4143:15-4146:15; DEM00019 (Kinrich Demonstratives) at 20 (“Discount Rate Consistent with Relevant Market Data”).

<sup>212</sup> See US Post-Trial Br. at 92.

### 3. The RPSM Does Not Apply to the Patent Portfolio Sale Proceeds

Finally, as with the Business Line Sales, the RPSM does not apply to the sale of the Patent Portfolio. Again, Kinrich is not assuming continued operation of IPCo as a licensing business – notwithstanding the Monitor’s persistent mischaracterization<sup>213</sup> – but instead uses the cash flows from IPCo to determine the relative value of the assets that each entity sold or relinquished in the Patent Portfolio Sale. Because the Patent Portfolio was sold, Kinrich appropriately recognized that his task was to determine the allocation of the sale proceeds. As noted, the Monitor and the EMEA Debtors recognize that the RPSM does not apply in this context.<sup>214</sup>

## POINT III

### THE CANADIAN INTERESTS’ PROPOSED ALLOCATION IMPROPERLY ALLOCATES TO NNL FUNDS OBTAINED IN THE SALES DUE TO THE RIGHTS AND ASSETS RELINQUISHED BY NNI

The Monitor agrees that the valuation question before the Courts is what portion of the proceeds realized in each of the sale transactions was *due to* the transfer of, or surrender by, the estates of their respective interests in the assets that were sold.<sup>215</sup> Put more simply, the issue is what did Rockstar and the other purchasers pay for each estate’s assets. It is textbook economics that a purchaser buys assets with the expectation of extracting value in the future, and the undisputed evidence establishes that most of Nortel’s value existed and was expected to continue to exist in the US – the largest and most profitable market with the most valuable customers for Nortel’s business lines, and where the vast majority of Nortel’s patents were filed.<sup>216</sup> That value belonged exclusively to NNI.

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<sup>213</sup> See Monitor Post-Trial Br. ¶ 538.

<sup>214</sup> See *id.* ¶ 65.

<sup>215</sup> *Id.* ¶ 434.

<sup>216</sup> See US PFOF § ILC (“NNI’s Role in the Nortel Group”).

As even the Monitor's principal allocation expert Green admitted at trial, "NNI had the exclusive right to make and sell products in the United States [] using NN Technology," and "NNL [] couldn't make and sell products in the US," nor "give any third party the right to make or sell products in the United States as long as NNI's exclusive license was in existence."<sup>217</sup> Without the right to make or sell products in the US using NN Technology – which even Green acknowledged NNL could not convey to Rockstar – Rockstar could not have excluded anyone from exploiting NN Technology (as it would have neither an exclusive license nor all substantial rights in the patents) and likewise could not have sublicensed rights it did not have. In other words, even given NNI's make/sell right alone, NNL could not have independently transferred anything of value to Rockstar with respect to the US market. Thus, as the Monitor's other valuation expert Cox acknowledged, if NNI's rights (and the EMEA Debtors' rights) had not been relinquished, Rockstar "would pay a relatively small amount, certainly a lot less than what was paid in the Rockstar transaction, *possibly nothing*."<sup>218</sup> This alone defeats the Canadian Interests' allocation theories.

In any event, NNI's rights were not limited only to a make, use or sell right, as explained in Point I. The Monitor's proposed allocation largely consists of an attempt to expropriate for itself proceeds derived from the US estates' assets. As set forth in the US Debtors' post-trial

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<sup>217</sup> Trial Tr. 3193:9- 3195:3. Having proffered the testimony of both of its testifying allocation experts as to the meaning and significance of terms in the MRDA, the Monitor should not be heard to now claim that Green's understanding should be ignored, not least of which because Green testified repeatedly that his understanding of the terms of the MRDA, and reliance on them, came from the Monitor's counsel, who improperly invoked privilege to block any further exploration of those communications. See Green Dep. 26:13-22; 30:15-31:9; 114:9-20; 145:22-146:10; 147:8-21; 153:11-158:3.

<sup>218</sup> Cox Dep. 156:25-157:17 (emphasis added). The Monitor's attempt to whitewash Cox's admission, see Monitor Post-Trial Br. ¶ 497, is unpersuasive. First, if the Monitor had believed Cox's statement needed any clarification it could and should have attempted to clarify it through questioning at his deposition or testimony at trial. Second, contrary to the Monitor's assertion, the question did not compel Cox to assume NNI's and the EMEA Debtors' licenses had any particular value, but rather simply asked him to assume termination of the licenses would not be compelled and then asked him to consider what "a buyer would have paid to NNL to take all of NNL's rights under the patent portfolio subject to *whatever* NNI's and the EMEA Debtors' exclusive licenses were." Cox Dep. 156:25-157:5 (emphasis added).

brief,<sup>219</sup> the Monitor attempts to do so by first asking its experts to premise their allocation of the Patent Portfolio Sale on the erroneous assumption that all rights to Nortel's Patent Portfolio belong exclusively to NNL, from which the Monitor's experts conclude without any economic analysis that all of the \$4.5 billion in proceeds belongs to NNL. The Monitor also asked its experts to make the baseless assumption that NNI and the EMEA Debtors' rights in NN Technology were non-transferable and that NNL's were freely transferable. From this erroneous premise, the Monitor's experts opine that the value that NNI and the EMEA Debtors contributed to the Sales should be limited to a hypothetical value they purportedly could have earned had they continued to run Nortel's Business Lines (the very decision they did not make), leaving NNL to capture the entire remaining sale proceeds. The reality is that the MRDA does not grant all rights to the Patent Portfolio to NNL, there was no restriction on NNI and the EMEA Debtors surrendering and transferring their rights in these consensual sale transactions and NNL's legal title to the patents is irrelevant to capturing the value of the patents in the US because NNI held all economic rights there.

Without repeating the US Debtors' criticisms of the Monitor's allocation position set forth in their post-trial brief, the following arguments focus on the Monitor's improper attempts in its post-trial brief to abandon some of its failed positions, in favour of an alternative, erroneous allocation position that fares no better.

**A. The Monitor's Revised Explanation of its Patent Portfolio Allocation Is No More Defensible than the Version It Presented at Trial**

The Monitor's "analysis" for its proposed allocation of the Patent Portfolio proceeds constitutes little more than Green assuming the Monitor's erroneous interpretation of the MRDA and then summarily concluding based only on that assumption that the Monitor should be

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<sup>219</sup> See US Post-Trial Br., Point IV.



allocated almost the entirety of the \$4.5 billion Rockstar paid for the Patent Portfolio. Green's testimony is clear:

Q. And I think you said – so with regard to just those patents, could you describe your methodology for me for determining that the U.S. – that there was – the U.S. and EMEA had no rights to those patents and that there was no value to the U.S. and EMEA from those patents?

A. So if we look on page 64 of my report, in the last full paragraph from the bottom, I say that:

“It is my understanding that the U.S. and EMEA Debtors' licenses did not include rights to patents not used in any of their . . .” meaning the sole businesses, “. . . under the MRDA. Put another way, the rights would have no value. Therefore, when license termination agreements were signed for the Rockstar transaction, no rights of value were surrendered relating to the residual patents, as the only rights surrendered related to IP not used by Nortel in its operating business, or rights to patents already licensed to the purchasers of the businesses and therefore . . .” there was no value.

So I didn't have to go any further than that.

Q. Did you do anything else that's not in here?

A: Not with respect to my analysis of these rights under the MRDA at the time of the report, no.<sup>220</sup>

Presumably recognizing that this is not an economic analysis, but rather an impermissible legal opinion, the Monitor now attempts to dress up Green's opinion by claiming it is the same “basic methodology” as Green used in his Business Line Sales analysis. There simply is no economic analysis here.<sup>221</sup>

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<sup>220</sup> Green Dep. 209:8-210:18.

<sup>221</sup> As Kinrich explained at trial, if Green conducted an economic analysis assuming the Monitor's interpretation of the MRDA, the analysis could yield the same allocation as calculated by Kinrich. See Trial Tr. 4164:4-4168:5; DEM00019 (Kinrich Demonstratives) at 23 (“Results Using Canada's Interpretation of License Rights”); TR00052 (Kinrich Rebuttal) ¶¶ 89-91.

First, the Monitor implies that Green used an asset-based valuation methodology, but that claim rings hollow. Pursuant to Green's alleged analysis, there were no tangible assets and less than \$500,000 associated with the in-place workforce, leaving \$4.45 billion of the \$4.5 billion to be allocated. Green allocates the remaining \$4.45 billion based solely on the Monitor's interpretation of the MRDA. This is not an asset-based analysis. It is not a valuation or economic analysis at all.

Second, the Monitor claims that "Green considered whether there was any evidence that the U.S. and EMEA Debtors had any prospect of generating earnings through the exercise of their license rights in connection with those patents."<sup>222</sup> But there is no indication anywhere in Green's expert report that he performed any such economic analysis of the earning potential of those license rights.<sup>223</sup> Rather all Green did was "conclude[] that they did not because the U.S. and EMEA Debtors' license rights were limited to the right to make Products."<sup>224</sup>

Third, the Monitor claims that "[t]he licenses had value only if there were expected cash

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<sup>222</sup> Monitor Post-Trial Br. ¶ 484.

<sup>223</sup> An expert must set forth all opinions and the bases for those opinions in his expert report. Failure to do so can render an opinion inadmissible. *See* Fed. R. Civ. P. 26(a)(2)(B)(i) (requiring expert reports to contain a "a complete statement of all opinions the witness will express and the basis and reasons for them"); Fed. R. Civ. P. 37(c)(1) (providing that a party may be precluded from using information it failed to provide as required by Rule 26(a)); *accord Johnson v. Vanguard Mfg., Inc.*, 34 F. App'x 858, 859 (3d Cir. 2002) ("A party that fails to disclose evidence required by Rule 26(a) will not be allowed to use that evidence unless the failure to disclose the evidence is harmless."); Rules of Civil Procedure, R.R.O. 1990, Reg. 194, R. 53.03(2.1) (requiring that an expert's report contain, inter alia, "[t]he expert's opinion respecting each issue" and "the expert's reasons for his or her opinion."). *Champion Iron Mines Ltd., Re*, 2014 ONSC 1988 at paras. 17-18 (finding a report that does not contain such information "devoid of analysis" and therefore inadmissible).

<sup>224</sup> Monitor Post-Trial Br. ¶ 484. That Green was relying solely on the Monitor's interpretation of the MRDA is clearly reflected in the portion of the report the Monitor cites in alleged support of its statement:

As for those Residual Patents that were not used in any of Nortel's operating businesses, they have no value allocable to the U.S. or EMEA Debtors since, *based on the assumptions I have been asked to make*, their license rights were limited to using NN Technology to sell Products and generate operating profits in their respective territories. It is my understanding the US and EMEA Debtors' licenses did not include did not include rights to patents not used in any of their operating businesses under the MRDA.

TR00042 (Green Report) at 64 (emphasis added).

flows associated with the licenses” and that Green “looked for such value, but found none.”<sup>225</sup> In alleged support for this statement, the Monitor suggests Green considered the following “facts”: “(a) the patents in question were not used in any Nortel business; (b) there were no Products – nor was there any prospect of Products – that embodied or used the patented technology; and (c) there were no business plans or documents suggesting any potential use of the Residual IP by the U.S. or EMEA Debtors.”<sup>226</sup> At the outset, even if all of these assertions were true – and, to the contrary, each is demonstrably false as set forth below – this does not change the dispositive fact that NNI had exclusive *rights* that Rockstar needed to extract any value from the Patent Portfolio in the US, whether or not NNI was exercising those rights or had business plans to do so. None of these purported “facts” in any way undermines the reality that Rockstar would have paid very little or “possibly nothing” for NNL’s rights alone or that NNI conveyed the most valuable rights to Rockstar.

There is, moreover, nothing factual about any of these assertions.

The Monitor mischaracterizes the trial record when it asserts that the Patent Portfolio was not already used in a Product and could not have been proposed to be so used. As shown at trial, the Patent Portfolio included patents that unquestionably *had* already been used or proposed to be used by Nortel; indeed, all R&D at Nortel was performed with the intention of developing products.<sup>227</sup> Nortel also developed the IPCo business plan, a plan that was based entirely on monetizing all patents in the portfolio.<sup>228</sup> Thus, all patents were already being used or proposed to be used in Products (which includes the IPCo service).<sup>229</sup> Further, under the definition of

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<sup>225</sup> Monitor Post-Trial Br. ¶¶ 485, 486.

<sup>226</sup> *Id.* ¶ 484.

<sup>227</sup> See US PFOF § II.D.1 (“All Nortel R&D Was Intended to Produce Products and Sustain Innovation”); *id.* § IV.C.1 (“Patent Segmentation Process”).

<sup>228</sup> Trial Tr. 3154:12-23 (Green).

<sup>229</sup> Unlike the Monitor, the CCC attempts to argue that IPCo is not a service and thus not a product (*see* CCC Post-

Products in the MRDA, any of the patents could have been proposed to be used in other Products at “any time.” US expert McGarty examined the Patent Portfolio – the only expert to do so for this purpose – and determined there to be myriad potential Products that could have been created from it.<sup>230</sup>

The reality is Green simply treated a \$4.5 billion asset as though it had *no* potential to generate *any* licensing cash flows for Nortel.<sup>231</sup> On its face, this is absurd. It is not only defeated by the facts above, but also by Green’s acknowledgement that rather than selling the Patent Portfolio to Rockstar, Nortel could have achieved the same \$4.5 billion by providing Rockstar a worldwide exclusive license to NN Technology.<sup>232</sup> Green asserts that IPCo had not started generating cash flows and then inexplicably values its prospects for doing so at zero.<sup>233</sup> This is not supportable as a matter of fact or economics. As noted, IPCo and its operating model were well vetted by a major investment bank, IP experts and all of the estates.<sup>234</sup> Moreover, it is common to project cash flows and a valuation for a startup business and it would have been particularly easy for Green to do so here as he was dealing with assets for which the fair market

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Trial Br. ¶ 103) but as explained above, there is no support for their assertion. *See* Point I.A.3, *supra*.

<sup>230</sup> McGarty Rebuttal § VII (“NNI Could Have Created Products Using Patents Comprising a Significant Portion of the Patent Portfolio”). While the Monitor levies unsupported criticisms of McGarty’s analysis as being speculative and for failing to allocate NNI’s potential share of potential earning, what the Monitor does not say is most telling. Nowhere in the Monitor’s critique does it dispute that if McGarty is correct that any of the potential new products were viable (an analysis none of the Monitor’s experts endeavoured to consider) then: (a) NNI could have continued to make Nortel Products even under the Monitor’s MRDA interpretation; (b) NNI would have been entitled to revenue for its efforts; and (c) if NNI used the allegedly unused patents, then NNI would have a license to those patents under the Monitor’s definition and would have to be compensated for them in any sale. It is also worth noting that one of the principal bases upon which the Monitor claims that McGarty’s opinion is speculative is that it assumes NNI had \$500 million in cash to fund the project while NNI was a wholly owned subsidiary of NNL. But that NNI had \$500 million in cash is a matter of record evidence, and in bankruptcy the fact that NNL was the parent of NNI is irrelevant, as NNL could not direct or control NNI’s use of its cash in its restructuring merely because of NNL’s equity ownership.

<sup>231</sup> *See* Green Dep. 257:22-259:16.

<sup>232</sup> *Id.* 257:22-259:16.

<sup>233</sup> Trial Tr. 3257:1-3258:19.

<sup>234</sup> *See* US PFOF § IV.C (“Nortel Considers Options for Monetizing Its Patent Portfolio”). Green does not offer any critique of the IPCo business model or its viability as a business beyond his observation that expected cash flows could not be estimated with 100% certainty, a “critique” that can be levelled by definition at all business models and projections.

value was already known. Green has no basis for his conclusion that patents worth \$4.5 billion had zero value to Nortel had they not been sold.

With regard specifically to the patents in the Patent Portfolio that had been used in multiple Business Lines, Green acknowledges that the Licensed Participants had to be compensated but then fails to allocate anything even with respect to those patents in the Patent Portfolio Sale.<sup>235</sup> As noted in the US Interests' post-trial brief, the buyers in the Business Line Sales were given only limited non-exclusive licenses to use the patents that remained with Nortel. Accordingly, NNI and the EMEA Debtors retained rights to these patents and could have extracted value from these patents. Green acknowledged this on cross-examination at trial, admitting that NNI and the EMEA Debtors are entitled to the licensing and enforcement cash flows from the retained patents, as the Business Line purchases had received only non-exclusive limited scope licenses.<sup>236</sup>

Faced with Green's testimony, the Monitor now claims that the "value of the U.S. and EMEA Debtors' licenses with respect to those patents [ ] has already been determined (and allocated) as part of Mr. Green's allocation of the Business Line sale proceeds" because "the cash flows associated with their rights to sue and sublicense [the Patents licensed in the Business Line Sales] were accounted for in Mr. Green's valuation and to the extent that sublicensing or

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<sup>235</sup> See, e.g., TR00042 (Green Report) at 4 ("[T]he value of the surrendered licenses must be taken into account and allocated"); *id.* at 15 ("The value of the license rights must be calculated and allocated to the US Estate and the EMEA Estate."); *id.* at 54 ("If there had been no license rights under the MRDA, all of the proceeds related to the transfer of intellectual property from the Business Sales would be allocated to the Canadian Debtors. However the termination of the license rights requires consideration of the value of the rights that were surrendered by the US Debtors and the EMEA Debtors to facilitate the Business Sales. Thus, the value allocated to the Canadian Debtors related to the IP transferred should be reduced by the value of the licenses surrendered by the US and EMEA Debtors."). That these were mostly non-exclusive licenses and thus capable of being licensed to other third parties exposes why the CCC's argument that the patents used in multiple Business Lines were "licensed" and thus incapable of providing NNI and the EMEA Debtors with future cash flows is false. CCC Post-Trial Br. ¶¶ 101-02. As Green acknowledged, that would only be true if the purchasers of the Business Lines had been granted exclusive licenses, which is not the case.

<sup>236</sup> See Trial Tr. 3200:7-10 ("To the extent, as you're saying, [the US and EMEA] didn't actually terminate their rights in the shared technology, I guess in theory they could have licensed it out; sure.").

litigation had resulted in revenues, those revenues were included in Mr. Green's valuation."<sup>237</sup>

At the outset, this is a clear recognition that the Licensed Participants did have sublicensing and enforcement rights, and not only the right to make, sell, and use Nortel Products embodying NN Technology. In any event, the Monitor's assertion that this cash flow was included in Green's Business Line allocation is incorrect. Green's Business Line allocation is based on Business Line cash flow projections that did not include all sublicensing (enforcement) revenue. That revenue was instead included in the IPCo cash flow projections.

In short, even as to the patents in the portfolio that the Monitor and Green acknowledge that the Licensed Participants must be compensated for, they fail to account for that value.<sup>238</sup>

**B. The Monitor's Abandonment of its Flawed Non-Transferability Assumption Cannot Save its Business Line Allocation**

The Monitor's Business Line allocation position is based on the value in use analysis that Green set forth in his opening report. That value in use analysis presumed that the value contributed by NNI and the EMEA Debtors to the Business Line Sales (but not>NNL) should be strictly limited to what they supposedly could have earned had the Business Lines not been sold and Nortel instead continued to operate its business. After calculating>NNI's and the EMEA Debtors' "value in use" (using faulty cash flow projections), Green then simply allocates to>NNL all of the remaining Sales proceeds, regardless of what>NNL could have earned had the business not been sold. This is how Green allocates the vast majority of the proceeds to the Canadian

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<sup>237</sup> Monitor Post-Trial Br. ¶¶ 483, 458.

<sup>238</sup> The Monitor also seemingly misunderstands the point of Tucker's analysis when it points out that the projections Green considered presumed forward-looking innovation. *Id.* ¶ 491. Tucker testified that to assume Nortel structured its IP business such that>NNI and EMEA would only get the benefit of R&D that was in a Product, as the Monitor's MRDA analysis presumes, would disincentivize the exact type of critical forward looking research a technology company most needs to perform. *See* Trial Tr. 4680:20-4681:5. That Nortel's projections assumed that>NNI and EMEA would be doing that work is only further evidence that the Monitor's litigation-based interpretation of the MRDA has nothing to do with how Nortel operated.

estates.<sup>239</sup>

The basis Green and Cox and Berenblut offered for this disparate treatment of the estates was that NNI and the EMEA Debtors' licenses were non-transferable pursuant to Article 14(a) of the MRDA. As Green testified at trial:

Q: Now, you say in your report the reason you use this value-in-use analysis for the business sales – right? – is because the licenses by their terms were not transferable; right? That's what you say in your report?

A: That's right.

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Q: Sure. [14(a) is] the provision you relied on to say on Page 4 that because the licenses by their terms were not transferable, the appropriate method is the value-in-use method?

A: Right.<sup>240</sup>

But, as was brought out on the cross-examination of both Green and Berenblut, and explained in detail by Kinrich, there is no such restriction on transferability for the consensual sales that happened, and thus no basis to limit artificially the value attributable to what NNI and the EMEA Debtors contributed to the Sales and no residual \$1 billion for the Monitor to allocate to NNL.<sup>241</sup> Green's testimony on cross-examination could not have been clearer: if the Business Line Sales were consensual, which they surely were, then an allocation based on his value in use methodology would be improper:

Q: So when you say in the absence of consent, I think this value-in-use analysis is the way to go, if there's consent, you don't

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<sup>239</sup> The Monitor tacitly acknowledges that NNL's exclusive rights to the Canadian market have little to do with its massive allocation to NNL when it admits that "the remaining sale proceeds are attributable to the transfer of NNL's ownership of IP and, *to a lesser extent*, to the transfer of any Canadian-owned customer-related intangibles." Monitor Post-Trial Br. ¶ 470 (emphasis added).

<sup>240</sup> Trial Tr. 3208:20-25; 3214:14-18.

<sup>241</sup> *See id.* 3219:24-3220:8 (Green) (testifying that his selection of value in use for NNI and the EMEA Debtors would be erroneous if Article 14(a) did not prohibit the Debtors from transferring their rights in NN Technology in the Sales); *id.* 3700:17-25 (Berenblut) (same); *see also* US Post-Trial Br. at 113-16.

treat NNI and EMEA any differently than you treat>NNL;  
right?

A: Well, no. If there were consent – if this is the key different understanding – the most that would ever be allocable would be the maximum allocation that’s on page 62 of my report. That would be the other end of the spectrum, which then allocates based on MRDA splits.

Q: All right. So if there was consent, we’re in what you call your maximum allocation of business sale proceeds on page 62; right?

A: That’s right.<sup>242</sup>

Similarly, Berenblut twice conceded on cross-examination that if the assumption of non-transferability the Monitor asked him to make were wrong he would have to reconsider his opinion.<sup>243</sup>

With its experts having effectively conceded that there is no basis for an allocation based on a value in use analysis (the Monitor does not contest that these were consensual transactions), the Monitor now attempts to abandon the untenable non-transferability assumption it asked its experts to make, claiming that its own theory was a “red herring.”<sup>244</sup> Putting aside the impropriety of causing the Courts and the parties to expend considerable resources on a theory the Monitor put forth as a red herring, that is the theory upon which the Monitor’s experts opined in their reports and it is thus the only one on which they can now argue.<sup>245</sup> The Monitor may not

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<sup>242</sup> Trial Tr. 3219:24-3220:15.

<sup>243</sup> Berenblut Dep. 36:12-37:20; Trial Tr. 3700:2-25.

<sup>244</sup> Monitor Post-Trial Br. ¶ 464. Green’s and Cox and Berenblut’s reference to non-transferability as the basis for their allocation analysis are *passim*. See TR00042 (Green Report) at 4; *id.* at 15; *id.* at 16; *id.* at 49; *id.* at 54; *id.* at 59; *id.* at 61; TR00043 (Green Rebuttal) at 8; Trial Tr. 3208:20-25 (Green); TR00047 (Cox-Berenblut Report) ¶ 21; *id.* ¶ 62; *id.* ¶ 74; TR00048 (Cox-Berenblut Rebuttal) ¶ 46; *id.* ¶ 75; Cox Dep. 68:13-25; Berenblut Dep. 36:12- 25; Trial Tr. 3614:15-3616:9 (Berenblut); *id.* at 3630:3-16.

<sup>245</sup> See Fed. R. Civ. P. 37(c)(1) (providing that a party may be precluded from using information it failed to provide through its expert reports as required by Rule 26(a)); accord *Astrazeneca AB v. Mutual Pharm. Co., Inc.*, 278 F.Supp.2d 491, 504, 509 (E.D.Pa. 2003) (“Preclusion can also result if . . . an important contention or theory, for which expert testimony is needed, is omitted from expert reports. . . . Allowing Defendant to assert an entirely new basis of invalidity at the very end of the process is simply not fair to Plaintiffs.” (citing *Stein v. Foamex Int’l, Inc.*,



now substitute its “by or for the Participants” theory, words Green never uttered when asked at trial for the basis of his value in use methodology, to try to preserve Green’s lopsided Business Line allocation.

Moreover, even if the Courts were to allow this after-the-fact rationalization, which the Courts should not, for the reasons set out above, the “by or for the Participants” language does not mean what the Monitor suggests and thus is no restriction for allocation purposes. Further, regardless of how narrowly the licenses are read (without conceding that the licenses are limited in any way), it still remains that unless NNI and the EMEA Debtors terminated those licenses, Nortel could not have sold the rights for the Business Lines to operate in the US, England, France and Ireland, and NNL would have received a fraction of what it received for the Business Lines, if it could have found a willing buyer and received anything at all.

Further inaccuracies in Green’s implementation of his value in use analysis were set forth in Appendix C to the US Debtors’ pretrial brief and were described by Kinrich at trial, and thus will not be repeated here; however, the Monitor’s misleading statements with regard to goodwill bear mention. As will be recalled, after creating a \$1 billion residual based on his one-sided application of a value in use methodology, Green concludes this residual all belongs to NNL because he claims, without analysis, that it represents the value of NNL’s legal title to NN Technology. If that \$1 billion residual is attributable to something other than IP, such as

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No. Civ.A. 00–2356, 2001 WL 936566, at \*6 (E.D.Pa. Aug. 15, 2001) (precluding affidavit filed by plaintiff where plaintiff had neglected to supplement expert opinions formally, because plaintiff “would have the Court allow him to file preliminary expert reports and then freely supplement them with information and opinions that should have been disclosed in the initial report. That result would effectively circumvent the requirement for the disclosure of a timely and complete expert report”)); Rules of Civil Procedure, R.R.O. 1990, Reg. 194, R. 53.03(3) (providing a mechanism to supplement an expert report); *Hunter v. Ellenberger*, [1988] O.J. No. 49 at para. 7 (Ont. Sup. Ct., H.C.J.) (permitting untimely expert evidence only if the Court is “satisfied that the prejudice to justice involved in receiving the evidence exceeds the prejudice to justice involved in excluding it.”) The CCC in its brief continues to base its Business Line allocation on Article 14(a)’s purported prohibition on transferring; while at least consistent with the argument it has advanced to date, it fares no better in the CCC’s brief than it did at trial. *See* CCC Post-Trial Br. ¶ 98.

goodwill, then Green's analysis fails from the start.

The Monitor implies that there was no goodwill conveyed in the Business Line Sales as "there were no indications of goodwill attributable to Nortel's businesses that were sold in the Business Sales" and "[i]n fact, all of Nortel's goodwill was written-off in 2008."<sup>246</sup> However, as Green acknowledged, the way to determine if there is goodwill is to first value all identifiable assets, not to look for "indications" of goodwill value. As a straightforward accounting matter, the difference between the value of the identifiable assets and the value paid by the buyer *is* the goodwill.<sup>247</sup> Had Green simply valued NNL in the same manner as he did NNI and the EMEA Debtors, he could have known if there was goodwill and would have seen there likely was significant goodwill, which could not, even under Green's theories, simply be allocated to NNL as he does. This is another fatal flaw in Green's analysis.<sup>248</sup>

The Canadian Interests also tout the fact that Green and Britven arrive at similar results using supposedly different methodologies.<sup>249</sup> This is untrue as they use essentially the same approach. Britven allocates virtually all of the \$4.5 billion from the Patent Portfolio Sale based on the same flawed interpretation of the MRDA Green uses and applies a similar value in use methodology for the Business Line Sales based on non-transferability.

### **C. The Monitor's Afterthought Alternative Allocation Positions Are Not Defensible**

The Monitor devotes only one paragraph to explaining its Appendix P alternative Patent

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<sup>246</sup> Monitor Post-Trial Br. ¶ 449.

<sup>247</sup> See Green Dep. 307:17-20 ("goodwill is an accounting term and it is the difference between the amount of a purchase price paid and the identifiable tangible and intangible assets").

<sup>248</sup> The notion that there were no indications of goodwill is unsupportable; there was both over \$1 billion of residual funds beyond a value in use calculation of all the entities using Green's projections, and the buyers stated that there was \$850 million in goodwill. Trial Tr. 4204:17- 4205:5 (Kinrich); TR00045 (Britven Report) ¶¶ 6.46-6.48; *see also, e.g.*, TR43864 (Ericsson 2010 Form 20-F), at 145 (note C26), 137; TR40273 (Avaya 2010 Form 10-K) at 91. That Nortel wrote off the goodwill on its books from past transactions is inapposite, as this fails to account for the purchase price paid for the businesses.

<sup>249</sup> Monitor Post-Trial Br. ¶ 503 (footnote 487).

Portfolio allocation.<sup>250</sup> The Monitor completely fails to address any of Kinrich's detailed explanations of Appendix P's myriad flaws.<sup>251</sup> Accordingly, the US Debtors simply note that in addition to other flaws referenced in the US Interests' post-trial brief,<sup>252</sup> Green's Appendix P theory, like the Business Line value in use methodology, is premised upon non-transferability and thus equally unsupportable.

With regard to Green's Alternative Maximum allocation theory that he offers for the Business Line Sales, which was addressed in the US post-trial brief,<sup>253</sup> it bears repeating that allocating based upon the RPSM is not a position that *any* of the parties think is appropriate, much less Green's "simplifying" version that has the effect of allocating to NNI and the EMEA Debtors even less than their allocation if the RPSM were applied correctly. Moreover, as was shown at trial, the RPS percentages were far lower than the routine returns, and contrary to the Monitor's misleading suggestion, had been so not just in the Q1 2010 data upon which Green relied, but for years leading up to that.<sup>254</sup>

#### POINT IV

#### **THE EMEA DEBTORS' CONTRIBUTION APPROACH DOES NOT REFLECT THE ASSETS SURRENDERED BY EACH SELLER**

The contribution method proposed by the EMEA Debtors is not a valuation method by which the Courts can determine the fair market value of the assets relinquished by each party in the Sales. Instead, they propose an equitable approach that even they concede is not supported

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<sup>250</sup> See *id.* ¶ 499.

<sup>251</sup> See Trial Tr. 4168:6-4171:10; see also US Post-Trial Br. at 107-12.

<sup>252</sup> See US Post-Trial Br. at 107-13.

<sup>253</sup> *Id.* at 116-17.

<sup>254</sup> See TR00051 (Kinrich Report) at Table 6 ("Nortel Q1 2010 Routine Return Shares and Residual Profit Split Shares"); TR49192 (2001 TPA Worksheets); TR49187 (2002 TPA Worksheets); TR49188 (2003 TPA Worksheets); TR49194 (2004 TPA Worksheets); TR49190 (2005 TPA Worksheets); TR49191 (2006 TPA Worksheets); TR49193 (2007 TPA Worksheets); TR49189 (2008 TPA Worksheets); TR49389 (2009 TPA Worksheets); cf. TR00037 (Felgran Report) at Tables C-4, C-7.

by the facts or law. Should the Courts choose to adopt a contribution approach, however, the EMEA Debtors' own expert acknowledges that any such allocation must account for the total amount of R&D funded by each of the estates.

**A. The Contribution Approach Is Not a Proper Valuation or Allocation Methodology**

The contribution approach fails to answer the basic question that the estates agree is before the Courts in this litigation: what portion of the sale proceeds realized was due to the transfer or surrender by the selling US Debtors, Canadian Debtors or EMEA Debtors of the assets that were the subject of the sale transactions.<sup>255</sup> As the EMEA Debtors' experts, Huffard and Malackowski, acknowledged, the contribution approach is an equitable methodology that does not value the assets transferred in the Sales.<sup>256</sup>

The EMEA Debtors rightly recognize that each IE held a valuable interest in Nortel's IP,<sup>257</sup> but their contribution approach incorrectly treats that interest as an ownership stake proportional to their R&D spend rather than the economic ownership stake each IE held pursuant to the rights set out in the MRDA. In Section V of the EMEA Debtors' post-trial brief, the EMEA Debtors purport to discuss the "record from the MRDA period [that] confirms that the proceeds from exploiting IP were shared according to the RPEs' relative contributions to creating the IP."<sup>258</sup> While establishing their equitable and beneficial ownership, none of this "confirms" ownership in accordance with relative contributions. Thus, for example, the 2009

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<sup>255</sup> See TR50223 (US Allocation Position) at 1, TR21283 (Monitor Allocation Position) at 2-3, TR40731 (EMEA Allocation Position) at 2. Likewise, under US and Canadian law, allocation should be based on the fair market value of the assets relinquished by each party. See US Post-Trial Br. Points I.A-B.

<sup>256</sup> Trial Tr. 2050:8-13 (Huffard) ("Q. Whereas in the contribution approach you're not valuing any rights that were contributed to the sale; you're doing an analysis based on somebody's sense of what is an equitable way to allocate the proceeds once received? A. I think that's fair."); Trial Tr. 2569:2-21 (Malackowski) (explaining that his license approach values the assets and rights conveyed in the Sales, whereas the contribution approach does not).

<sup>257</sup> See EMEA Post-Trial Br. § III.A.2.

<sup>258</sup> *Id.* § V.

NNL Transfer Pricing Report states that all of the IEs, not just NNL, “are the primary owners of intangibles developed by the Nortel Group and bear the risk of development,” but contains no endorsement whatsoever of the EMEA Debtors’ contribution theory.<sup>259</sup> Similarly, the 2008 NNL-NNI Joint APA request refers to each IE “maintain[ing] an economic ownership in the IP,” but nowhere says that such ownership is in proportion to the IE’s “contribution.”<sup>260</sup>

The EMEA Debtors also rely on a 2002 draft Q&A prepared by Doolittle. There is no evidence this document was ever presented to or discussed with any tax authorities. Perhaps the strongest evidence that the Nortel Group did not consider this to be their final position – in addition to the MRDA subsequently referring to exclusive territorial ownership rather than contribution-based ownership – is that when the parties adopted an allocation in connection with the Alcatel sale, it was done after consideration of several potential alternatives and not once during this consideration did any Nortel executive or advisor suggest that contribution should (or had to be) adopted because that is what was previously decided or represented to tax authorities.

The EMEA Debtors’ contribution method ignores the estates’ contractually agreed upon interests in NN Technology and, accordingly, should be rejected.

**B. If Adopted by the Courts, The Contribution Approach Must Account for the Total R&D Spending by Each Estate**

If the Courts nonetheless apply a contribution-based methodology to allocate the proceeds, the method must account for the actual contributions made by each estate to the development of Nortel’s R&D, as measured by the total funding of R&D by each estate, and by

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<sup>259</sup> TR48622.02 (NNL Transfer Pricing Report for the Taxation Year Ended Dec. 31, 2009) at 1.

<sup>260</sup> TR22078 (NNL-NNI Joint APA Request) at App. A, p. 4. The EMEA Debtors’ post-trial brief does not refer to the Exclusive or Non-Exclusive Licenses a single time in its discussion of their primary theory. EMEA Post-Trial Br. ¶ 93. Tellingly, the EMEA Debtors are silent regarding the Exclusive and Non-Exclusive Licenses despite claiming that “the terms of the MRDA . . . confirm the RPEs’ beneficial ownership of IP.” EMEA Post-Trial Br. ¶ 124. Huffard and Malackowski proffer an alternative allocation based on these Exclusive Licenses through their license approach (albeit in a flawed manner designed to transfer value to the EMEA Debtors, as shown at trial).

including the entire relevant R&D period with respect to the Patent Portfolio sold to Rockstar rather than an artificial five-year lookback period that fails to account for the useful life of virtually all of the patents actually sold.

**1. The EMEA Debtors Fail to Fully Account for NNI's Contribution to R&D During the CSA Period**

Under the guiding principles described by the EMEA Debtors' own expert, Cooper, the purported contribution allocation arrived at by their other expert, Malackowski, fails to properly reward each IE's contribution to R&D during the period of the R&D CSAs, when most of the patents sold to Rockstar were created. As Cooper explained, under the R&D CSAs, each party's transfer pricing payments constituted direct payments of the other parties' R&D expenses.<sup>261</sup> Accordingly, for a CSA period, the EMEA Debtors' contribution theory stipulates that "whoever pays for the R&D, regardless of whether they do it or not, would have the economic ownership for the resulting IP proportionate to the amount it paid."<sup>262</sup> Rather than looking at the total amounts spent by each CSA party on R&D – including covering the costs of other parties – Malackowski only measured R&D spend by territory, both during the MRDA period *and* during the R&D CSA period.<sup>263</sup>

While the EMEA Debtors (as well as the Canadian Interests) devote considerable energy to contesting adjustments to R&D spend for the MRDA period, they have *not expressed a single criticism* of the US Interests' calculations of each IE's funding of R&D during the CSA period, whether during cross examination, in the reports of other experts, or in any post-trial brief. Nor

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<sup>261</sup> Trial Tr. 2807:3-16 (Cooper). Nortel's economist, Horst Frisch, provided the tax authorities with R&D capital stock calculations that conform with this approach. TR11055B (Horst Frisch Report) at Table D-2 n.1 (explaining that the chart reflects R&D spending "post R&D CSA adjustments" through 1999). This approach also is consistent with the approach set forth in the expert report of Laureen Ryan.

<sup>262</sup> Trial Tr. 2810:5-9 (Cooper).

<sup>263</sup> Malackowski's explanation for this – that the contribution method merely uses spending as a proxy for who invented the technology, *id.* 2336:13-2337:12 – is completely at odds with Cooper's opinion.

can there credibly be any criticism. In contrast to the MRDA period, transfer pricing payments during the CSA period were explicitly attributable to research and development costs and carefully calculated in transfer pricing worksheets introduced into evidence.<sup>264</sup> Based on the adjustments to the CSA period alone, the proper contribution calculations are as follows:

	EMEAs' Calculation		Corrected for CSA Period <sup>265</sup>	
<b>Canada</b>	\$ 2,318	31.8%	\$1,821	25.0%
<b>US</b>	3,637	50.0%	4,436	60.9%
<b>EMEA</b>	1,325	18.2%	1,022	14.0%
<b>Total</b>	\$7,280	100.0%	7,280	100.0%

Pursuant to these uncontested calculations, under a contribution theory, NNI would be entitled to a minimum allocation of 60.9% of the total Business Line Sales and Patent Portfolio Sale proceeds, even if no adjustments are made for the later MRDA period.

## **2. A Contribution Method Must Account for the Entire Period and Total Amount of R&D Spend Used to Create the Assets Sold**

The Monitor makes clear that it does not advocate a contribution approach.<sup>266</sup> If the contribution approach is adopted, however, the Monitor proposes to adjust the EMEA Debtors' calculations through the use of a five-year lookback period of R&D spend from 2005 to 2009. This proposed adjustment, however, is entirely inconsistent with the evidence and the principles underlying a contribution approach.<sup>267</sup>

Nortel's use of a five-year lookback period to allocate certain operating profits and losses under the RPSM prior to the bankruptcy has nothing to do with the division of sale proceeds.

<sup>264</sup> See generally *id.* 4512:23-4513:24 (Ryan) (explaining her calculations for adjustments to only the CSA Period); DEM00022 (Ryan Demonstratives) at 9.

<sup>265</sup> Trial Tr. 4512:23-4513:24 (Ryan) (explaining her calculations for adjustments to only the CSA Period); DEM00022 (Ryan Demonstratives) at 9.

<sup>266</sup> Monitor Post-Trial Br. ¶ 549.

<sup>267</sup> See *id.* ¶ 564 (setting forth contribution percentages based on unadjusted five-year lookback from 2005 through 2009). This is similar to Green's alternative maximum approach, addressed *supra* Point III.C.

The parties unanimously agree that the RPSM methodology does not govern allocation. Moreover, Nortel adopted an aggressive five-year period as part of the RPSM under the MRDA (because a short useful life conferred tax advantages) based on a position regarding the useful life of products utilizing a patent, not the useful life of the patent itself.<sup>268</sup> As NNC made clear in submissions to tax authorities, products may have a relatively short useful life, but the patents underlying those products have a far longer useful life.<sup>269</sup> The Monitor's expert, Reichert, acknowledged this concept in an article that "commercial transferability is the most objective of the three definitions of economic life."<sup>270</sup>

Here, the useful life of the patents sold, including the "high interest" and thus most valuable patents sold, was obviously far longer than five years, as demonstrated by the fact that they were created well more than five years before the Rockstar transaction.<sup>271</sup> Indeed, many of the patents sold – and the vast majority of the high-interest patents sold in the Patent Portfolio Sale – were developed in the 1990s and early 2000s.<sup>272</sup> Of the high-interest patents sold in the Patent Portfolio Sale, 99% were created before the end of 2005 and 80% were created in the late 1990s to early 2000s.<sup>273</sup> In fact, given the lag between performing R&D and filing patents, a five-year lookback period measures the R&D spending that led to only a handful of Nortel's high-interest patents sold.<sup>274</sup> Accordingly, any adjustments to shorten the timeframe used by Malackowski would not capture most of the assets actually sold and must be rejected.

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<sup>268</sup> See EMEA Post-Trial Br. § VI.F.1; *see also* US PFOF § II.D.2.d.

<sup>269</sup> See EMEA Post-Trial Br. § VI.F.1.

<sup>270</sup> TR40710 (Reichert, "The Meaning of Economic Life") at 6-7.

<sup>271</sup> TR00033 (Malackowski Report) § 11.1.3 at Fig. 1).

<sup>272</sup> See US PFOF § II.D.2.d.

<sup>273</sup> See *id.*; US Pretrial Br. at 128.

<sup>274</sup> See DEM00011 (Malackowski Demonstrative) at 22 ("Invention Date of High-Interest Patents").



## POINT V

### THE PRO RATA DISTRIBUTION THEORY SHOULD BE REJECTED

The UKPC argues for implementation of a pro rata distribution theory, which would effect the global substantive consolidation of the Nortel estates. The CCC proposes pro rata as an “alternative” theory, albeit in a different manner than it advocated in its opening statement at trial. Previously recognizing the inconsistency of arguing that allocation among the separate estates is most appropriate and feasible if the lion’s share of the sales proceeds are allocated to the Canadian Debtors but there was “one indivisible Nortel” if the Canadian Debtors do not receive most of the allocation, the CCC initially argued that pro rata was an alternative only if the Courts could not endorse *any* of the estates’ allocation theories. In its opening statement, the CCC argued:

- “If at the end of the day you are not persuaded that *any* of those theories, ownership, revenue contribution which are the shorthands for those theories, provide an adequate basis for an allocation, there is really only one alternative left, and *that is why* we put forward as an alternative pro rata.”<sup>275</sup>
- “I’m talking about an alternative where you have decided that listening to those experts you don’t opt for *any* one of the theories that have been put before the court.”<sup>276</sup>

The CCC has since abandoned that position and now presents the pro rata distribution theory as an alternative only to the Monitor’s position.<sup>277</sup> The CCC argues: (1) if the Courts are willing to allocate 79% of the sales proceeds to the Canadian Debtors, then estate-by-estate allocation is fairest, most reasonable and feasible but (2) if the percentage to the Canadian Debtors is lower, then it is impossible to “unscramble the eggs” because there was only “one Nortel.”<sup>278</sup>

However, it simply cannot be that there is “one Nortel” only if the Monitor’s position – which is

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<sup>275</sup> Trial Tr. 483:11-16 (CCC Opening Statement) (emphasis added).

<sup>276</sup> *Id.* 484:15-18 (CCC Opening Statement) (emphasis added).

<sup>277</sup> *See, e.g.*, CCC Post-Trial Br. ¶¶ 2, 25, 156, 171.

<sup>278</sup> *Id.* ¶¶ 156, 162.

predicated on there being separate Nortel entities – is rejected. By adopting first the Monitor’s position, the CCC concedes that there is not “one Nortel.”<sup>279</sup>

Putting this aside, there is no legal or factual justification for a pro rata allocation.

**A. Implementation of the Pro Rata Distribution Theory Would Effect Global Substantive Consolidation, for Which There Is No Legal or Factual Basis**

Understanding that they cannot meet the legal or factual requirements for an unprecedented global substantive consolidation, the CCC and UKPC contend that the pro rata distribution methodology “neither provides for, requires, nor effects substantive consolidation globally or otherwise.”<sup>280</sup> Although the UKPC offers no further explanation, the CCC contends that a pro rata distribution would not effect a substantive consolidation because it would not “merge the Nortel Debtors into a single survivor” or “erase Intercompany Claims.”<sup>281</sup>

The CCC’s simplistic argument has been explicitly rejected. Although actual substantive consolidation “treats separate legal entities *as if* they were merged into a single survivor left with all the cumulative assets and liabilities (save for inter-entity liabilities, which are erased),”<sup>282</sup> not only are such merger and erasure not required, but they are not even “meaningful grounds” for

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<sup>279</sup> See, e.g., *Amer. Int’l Adjustment Co. v. Galvin*, 86 F.3d 1455, 1461 (7th Cir. 1996) (“[A] pleader may assert contradictory statements of fact only when legitimately in doubt about the facts in question.”); *Liberty Ins. Corp. v. Bowles*, -- F. Supp. 2d --, No. 13-13784, 2014 WL 3748623, at \*3 (E.D. Mich. July 30, 2014) (describing a party as “intellectually dishonest” when it asserted “wholly inconsistent sets of alternative facts”); *Emkey v. Secretary of Health & Human Servs.*, No. 08-160V, 2009 WL 3683390, at \*15 (Fed. Cl. Oct. 20, 2009) (collecting cases); *Guergis v. Novak*, 2013 ONCA 449 at paras. 80-81 (rejecting alternative pleadings when they did “not clearly set out the facts on which the case [wa]s asserted” and “serve[d] to confuse rather than clarify” ).

To the extent the CCC asserts that the Monitor’s theory to allocate virtually all of the Patent Portfolio Sale proceeds to the Canadian Debtors does not touch upon the legal integration or separateness of the members of the Nortel Group, it bears noting that the CCC takes the same position with respect to the Business Line Sale proceeds – detailed separation of the estates’ ownership interests is possible if NNL receives most of the proceeds but the Courts cannot unscramble the eggs otherwise.

<sup>280</sup> CCC Post-Trial Br. ¶ 172; see also UKPC Post-Trial Br. ¶ 131 (arguing that “[a] pro rata distribution of the Lockbox Funds does not equate to a global substantive consolidation of the Estates”).

<sup>281</sup> CCC Post-Trial Br. ¶ 173.

<sup>282</sup> *In re Owens Corning*, 419 F.3d 195, 205 (3d Cir. 2005) (internal quotations omitted) (emphasis added).

determining whether an order has effected substantive consolidation.<sup>283</sup> Rather, the relevant inquiry is whether “creditors face increased competition for a consolidated pool of assets and a re-valued claim,”<sup>284</sup> exactly what the CCC and UKPC acknowledge their proposal seeks – pooling the estates’ assets and extinguishing corporate boundaries for purposes of creditor recoveries.<sup>285</sup> As a result, “instead of looking to assets of the subsidiary with whom they dealt,” the creditors of each Nortel estate would be forced to “share those assets with all creditors of all consolidated entities, raising the spect[re] for some of a significant distribution diminution.”<sup>286</sup> Because this is precisely “the ‘rough justice’ against which *Owens Corning* warns,” the CCC and UKPC must establish – at the least – that the requirements for domestic substantive consolidation are met.<sup>287</sup> For the reasons set forth in Section VII of the US Interests’ post-trial brief, the CCC and UKPC do not come close to satisfying this burden.

Even were international substantive consolidation a theoretical possibility, there is no factual basis for its application here.<sup>288</sup> Referencing Nortel’s “globe” logo and a single CCC witness who did not testify at trial,<sup>289</sup> the UKPC asserts that Nortel’s “customer and suppliers were concerned with the reliability of Nortel as a whole, rather than the reliability of any one

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<sup>283</sup> See *Schroeder v. New Century Liquidating Trust (In re New Century TRS Holdings, Inc.)*, 407 B.R. 576, 591-92 (D. Del. 2009) (finding that a plan effected a substantive consolidation even though it did “not call for the typical case of substantive consolidation where multiple separate entities are merged into a single entity and inter-entity liabilities are erased”); see also *In re M. Fabrikant & Sons, Inc.*, No. 06-12737 (SMB), 2009 WL 3806683, at \*10 (S.D.N.Y. Nov. 10, 2009) (finding that a “plan effected a *de facto* substantive consolidation” where “separately classified” creditors of two different entities “received identical treatment” and “both were to be paid from a common fund consisting of the assets of both debtors”).

<sup>284</sup> See *Schroeder v. New Century Liquidating Trust (In re New Century TRS Holdings, Inc.)*, 407 B.R. 576, 591 (D. Del. 2009); see also *Official Comm. of Unsecured Creditors v. UMB Bank, N.A. (In re Residential Capital, LLC)*, 501 B.R. 549, 598 (Bankr. S.D.N.Y. 2013) (“[A]bsent substantive consolidation, a court will not pool the assets of multiple debtors to satisfy their liabilities.”).

<sup>285</sup> See, e.g., CCC Post-Trial Br. ¶ 201 (acknowledging that implementation of the pro rata theory would require the pooling of each estate’s residual cash); UKPC Post-Trial Br. ¶ 83 (same).

<sup>286</sup> *In re Owens Corning*, 419 F.3d 195, 206 (3d Cir. 2005).

<sup>287</sup> *Schroeder v. New Century Liquidating Trust (In re New Century TRS Holdings, Inc.)*, 407 B.R. 576, 591 (D. Del. 2009).

<sup>288</sup> See US Post-Trial Br. 132-36; US PFOF ¶¶ 29-47.

<sup>289</sup> UKPC Post-Trial Br. ¶ 13.

particular geographic or legal entity,” and “[c]onsideration for which legal entity contracted with the supplier was seen as merely a formality.”<sup>290</sup> Tellingly, the UKPC does not cite a single example of creditor, customer or supplier confusion. Similarly, when asked in binding discovery interrogatories to identify someone knowledgeable about the reliance of any creditor on the Nortel Group as a single economic unit, the CCC could identify no one.<sup>291</sup> After more than 100 depositions, that response never changed. And having negotiated guarantees, the UKPC was plainly never confused about Nortel’s corporate structure.<sup>292</sup>

### **B. The Courts’ Equitable Powers Do Not Provide an Avenue for Implementation of the Pro Rata Distribution Model**

Without a legal basis for their request, the CCC and UKPC suggest that section 105(a) of the Bankruptcy Code and section 11 of the CCAA authorize the Courts to adopt the pro rata distribution theory.<sup>293</sup> However, the authority in both jurisdictions – including the very cases upon which the CCC and UKPC rely – provide otherwise.

In the United States, the equitable nature of a bankruptcy proceeding “does not give the judge a free-floating discretion to redistribute rights in accordance with his or her personal views of justice and fairness, however enlightened those views may be.”<sup>294</sup> A bankruptcy court cannot use its equitable powers to ignore agreements such as the IFSA,<sup>295</sup> to create substantive rights

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<sup>290</sup> *Id.* ¶ 15.

<sup>291</sup> See TR50415 (Response to Interrogatory No. 54).

<sup>292</sup> See US Post-Trial Br. at 134.

<sup>293</sup> See CCC Post-Trial Br. ¶¶ 163-71; UKPC Post-Trial Br. ¶ 57 & n.111.

<sup>294</sup> *United States v. Pepperman*, 976 F.2d 123, 131 (3d Cir. 1992) (internal quotations and alterations omitted).

<sup>295</sup> *In re Tel. Warehouse, Inc.*, 124 Fed. App’x 724, 728 (3d Cir. 2005). Although the UKPC argues that the IFSA “placed no constraints on the Courts’ adoption of an allocation metric,” see UKPC Post-Trial Br. ¶ 53, the IFSA mandates an allocation of the sale proceeds to *Selling Debtors* in accordance with value of the assets and rights each relinquished, see TR12032 (IFSA) § 11(d). Because the sole goal of the pro rata distribution theory is to ensure a ratable distribution among *creditors*, it wholly ignores the value of the assets and rights each Selling Debtor relinquished.

that are not otherwise available under prevailing insolvency law,<sup>296</sup> or to contravene explicit mandates of the Bankruptcy Code,<sup>297</sup> including for example, the absolute priority rule.<sup>298</sup> Even the cases cited by the CCC and UKPC confirm these basic principles.<sup>299</sup>

In Canada, before resorting to equitable or inherent jurisdiction, a CCAA court must first rely on the authority provided by the terms of the CCAA itself.<sup>300</sup> Although the CCC maintains that section 11 of the CCAA broadly empowers courts to consolidate “estates and claims in Canadian insolvencies,”<sup>301</sup> the CCC cannot cite any relevant authority for that proposition. In *A&F Baillargeon Express Inc.*, the court ordered the consolidation of the bankrupt estates only where no creditor objected and even then, left open the possibility that it would rescind, modify

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<sup>296</sup> *In re Morristown & Erie R. Co.*, 885 F.2d 98, 100 (3d Cir. 1989); *see also In re Argose, Inc.*, 377 B.R. 148, 150 (Bankr. D. Del. 2007) (“Equitable remedies under section 105(a) are limited, however, and should be used only to further the substantive provisions of the Code.” (citing *In re Joubert*, 411 F.3d 452, 455 (3d Cir. 2005))).

<sup>297</sup> *Law v. Siegel*, 134 S. Ct. 1188, 1194 (2014).

<sup>298</sup> *See, e.g., Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206-07 (1988) (ruling that judges should not use equitable powers to violate the absolute priority rule); *In re Armstrong World Indus., Inc.*, 320 B.R. 523, 540 (D. Del. 2005) (holding that “counsel’s incantation to general notions of equity” did not justify a proposed reorganization plan that violated the absolute priority rule).

<sup>299</sup> *See In re Combustion Eng’g, Inc.*, 391 F.3d 190, 236-38 (3d Cir. 2004) (section 105(a) did not empower the bankruptcy court to extend an injunction to include non-derivative claims against non-debtors where such an injunction would violate the Code); *Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548, 568-69 (3d Cir. 2003) (the bankruptcy court’s equitable powers permitted it to confer derivative standing upon creditors’ committees where, *inter alia*, there was a “lengthy history of bankruptcy courts conferring derivative standing in analogous situations” and *the Bankruptcy Code did “not foreclose” such relief* (emphasis added)); *In re Chicago, Milwaukee, St. Paul & Pac. Ry. Co.*, 791 F.2d 524, 528 (7th Cir. 1986) (equitable powers do “not give the judge a free-floating discretion” to deny accelerated repayment of principle to bondholders: “the task for the bankruptcy court is simply to enforce creditors’ rights according to the tenor of the contracts that created those rights”); *In re Terry Ltd. P’ship*, 169 B.R. 182, 186 (Bankr. N.D. Ind. 1993) (rejecting the contention that principles of equity prohibited an oversecured second mortgagee from collecting postpetition interest at the default interest rate: “[t]here is nothing equitable . . . in diminishing one creditor’s bargained for rights in order to augment the rights bargained for by a second creditor”); *In re Tucson Yellow Cab Co., Inc.*, 789 F.2d 701, 704 (9th Cir. 1986) (“principles of equity may not be invoked in a freewheeling fashion,” “must be directed to the care and preservation of the estate” and “necessarily operate within the boundaries set by statute”); *In re NWFx, Inc.*, 864 F.2d 588, 590 (8th Cir. 1988) (“Equitable principles must be directed toward the care and preservation of the estate.”). The only other case cited by either the CCC or UKPC – *Young v. United States*, 535 U.S. 43 (2002) – simply mentions in passing that bankruptcy courts “apply the principles and rules of equity jurisprudence,” without any reference to a court’s powers under Section 105. *Id.* at 50 (internal quotations and alterations omitted).

<sup>300</sup> *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60 at para. 65; *see also Portus Alternative Asset Management Inc., Re* (2007), 88 O.R. (3d) 313 at paras. 22-23 (Ont. S.C.J.); *Re Stelco Inc.*, [2005] O.J. No. 1171 at para. 44 (Ont. C.A.).

<sup>301</sup> CCC Post-Trial Br. ¶ 170.

or revise its order if it was later determined that the order “unjustly prejudiced” any creditor.<sup>302</sup> In *Ashley v. Marlow Group Private Portfolio Management Inc.* – which was not even decided under the CCAA<sup>303</sup> – the court dismissed a motion for substantive consolidation and noted that this remedy should not be granted “at the expense or possible prejudice of any particular creditor.”<sup>304</sup>

### C. The UKPC’s New Legal Theories Have No Basis

Seeking some legal hook, the UKPC argues for the application of the doctrines of equitable receivership and unjust enrichment.<sup>305</sup> Neither applies here. As the UKPC has previously acknowledged,<sup>306</sup> the cited authorities on equitable receivership consider how to allocate a defrauder’s assets to victims of a fraud, such as Ponzi schemes,<sup>307</sup> and have nothing to do with substantive consolidation, pro rata allocation or anything similar.<sup>308</sup>

Unjust enrichment is likewise inapplicable. The UKPC vaguely asserts that the Court’s adoption of “the allocation positions proposed by either the Canadian or US Interests” would

<sup>302</sup> *A & F Baillargeon Express Inc. (Trustee of), Re*, [1993] Q.J. No. 884 (S.C.) at paras. 26-27.

<sup>303</sup> *Ashley v. Marlow Group Private Portfolio Management Inc.*, [2006] O.J. No. 1195 (Ont. S.C.J. (Commercial List)) at para. 71 (noting that “the court has the authority” to grant an order for substantive consolidation “under its equitable jurisdiction under section 183” of the Bankruptcy and Insolvency Act).

<sup>304</sup> *Id.* at para. 75. The remaining cases relied upon by the CCC or UKPC do not involve substantive consolidation or any other similar relief. *See Re Canadian Red Cross Society*, [1998] O.J. No. 3306 (Ont. Ct. J., Gen. Div. (Commercial List)); *80 Wellesley St East Ltd v. Fundy Bay Builders Ltd. et al.*, [1972] 2 O.R. 280 (Ont. C.A.); *Crystallex Re*, 2012 ONCA 404.

<sup>305</sup> *See* UKPC Post-Trial Br. ¶¶ 69-77. The UKPC also relies on joint venture law as support for an “equal distribution of assets” to creditors. *Id.* ¶¶ 61-68. However, even the UKPC admits that Nortel was not a joint venture. *See id.* ¶ 61, n.112.

<sup>306</sup> *See* UKPC Allocation Position ¶ 59(b).

<sup>307</sup> *See Cunningham v. Brown*, 265 U.S. 1 (1924) (victims of a Ponzi scheme); *United States Sec. & Exch. Comm’n v. Infinity Grp., Co.*, 226 Fed. App’x 217 (3d Cir. 2007) (same); *Sec. & Exch. Comm’n v. Sunwest Mgmt., Inc.*, No. 09-6056-HO, 2009 WL 3245879 (D. Or. Oct. 2, 2009) (same); *United States v. Durham*, 86 F.3d 70 (5th Cir. 1996) (victims of a fraudulent advance fee loan financing business); *United States Sec. & Exch. Comm’n v. Forex Asset Mgmt. LLC*, 242 F.3d 325 (5th Cir. 2001) (victims of a fraudulent foreign currency investment scheme); *Commodity Futures Trading Comm’n v. Eustace*, No. 05-2973, 2008 WL 471574 (E.D. Pa. Feb. 19, 2008) (victims of a “massive fraud” in commodity futures trading).

<sup>308</sup> *See, e.g., Commodity Futures Trading Comm’n v. Eustace*, No. 05-2973, 2008 WL 471574, at \*6 (E.D. Pa. Feb. 19, 2008) (stating that “substantive consolidation is not at issue in this case”).

result in unjust enrichment.<sup>309</sup> But unjust enrichment requires the “retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience.”<sup>310</sup> The UKPC does not attempt to meet this standard.<sup>311</sup> Moreover, the doctrine of unjust enrichment does not apply where the obligations of the parties are governed by contract.<sup>312</sup> There is no question that the US Interests’ allocation position is based upon its ownership interests under the MRDA and, accordingly, it cannot effect unjust enrichment to grant the US Debtors their entitled allocation pursuant to their rights under that contract.<sup>313</sup>

The UKPC argues that the UNCITRAL Model Law and its principles of “modified universalism” support adoption of the pro rata distribution theory.<sup>314</sup> Neither is applicable here, as the Nortel bankruptcy cases in the US and Canada that were commenced under Chapter 15 of

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<sup>309</sup> UKPC Post-Trial Br. ¶ 69.

<sup>310</sup> *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 891 (Del. Ch. 2009) (quoting *Schock v. Nash*, 732 A.2d 217, 232 (Del. 1999)) (internal quotations omitted); *accord Kerr v. Baranow*, 2011 SCC 10 at para. 32 (stating that the doctrine of unjust enrichment “permits recovery whenever the plaintiff can establish three elements: an enrichment of or benefit to the defendant, a corresponding deprivation of the plaintiff, and the absence of a juristic reason for the enrichment”).

<sup>311</sup> In any event, the UKPC’s assertion is misguided. For years, the US Debtors made billions of dollars in transfer pricing payments to other members of the Nortel Group, an amount just in the MRDA years that exceeds its *total* allocation here. *See* TR00055 (Ryan Rebuttal) at Ex. D.2 (showing that NNI made approximately \$6.7 billion in transfer pricing adjustments between 2001 and 2008).

<sup>312</sup> *See, e.g., Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 891 (Del. Ch. 2009) (“A claim for unjust enrichment is not available if there is a contract that governs the relationship between the parties that gives rise to the unjust enrichment claim.”); *accord Kerr v. Baranow*, 2011 SCC 10 at paras. 40-41 (“[J]uristic reasons to deny recovery [on a claim for unjust enrichment] may be the intention to make a gift (referred to as a ‘donative intent’), a contract, or a disposition of law.” (emphasis added)); *Jacobs v. Yehia*, 2014 BCSC 845 at para. 341 (“[T]he existence of a contract may amount to a juristic reason to deny recovery for unjust enrichment. This is true in part because the plaintiff may have a contractual remedy for the defendant’s unjustifiable gain and, therefore, equitable principles need not be applied.”).

<sup>313</sup> The CCC’s irrelevant assertion that Nortel’s Canadian pensioners will receive recoveries of only 10.6% under the US Interests’ allocation theory is not correct. *See* Trial Tr. 488:1-6 (CCC Opening Statement); *see also* CCC Pretrial Br. ¶ 327; CCC Mem. Opposing the US Interests’ Mot. to Strike Expert Reports Advocating for a “Pro Rata Distribution” to Creditors 3, Apr. 28, 2014, ECF No. 13411. Britven’s calculations are riddled with mathematical errors and unjustified assumptions. *See* US Post-Trial Br. at 138 & n.484. Also, nearly all of the Canadian pensioners are already receiving at least 70 to 75% of their pension benefits, *see* TR00008 (Sproule Aff.) ¶¶ 29-30; TR50892 (Morneau Shepell Website) at 2, 6, even without *any* allocation of sale proceeds to the Canadian estates, *see* TR50892 (Morneau Shepell Website) at 3.

<sup>314</sup> UKPC Post-Trial Br. ¶¶ 108-24.

the Code and section 18.6 of the CCAA, respectively, are not proceeding under the Model Law cited by the UKPC.<sup>315</sup> As the UKPC and its expert, former bankruptcy Judge Clark, acknowledge, the Model Law and modified universalism are aspirational and not binding on any court.<sup>316</sup>

Finally, the UKPC references the “hotchpot rule” but concedes that it “is invoked in cases where claims are asserted by a creditor in multiple, concurrent insolvency proceedings *against the same debtor* where assets and proceeds available for distribution are separate and distinct in each jurisdiction.”<sup>317</sup> That is simply inapplicable here, where creditors have separate claims against separate debtors.

#### **D. Pro Rata Allocation Is Unadministrable**

In addition to the reasons set forth in the US Interests’ post-trial brief,<sup>318</sup> the pro rata distribution theory is also unadministrable due to uncertainty regarding the treatment of claims, timing of distribution and ultimate creditor recoveries. The pro rata distribution theory provides each estate an interest – perhaps a fiduciary duty to its creditors – in challenging inflated claims of creditors of other debtors. Notwithstanding the US Debtors’ settlement with the UKPC, the US Debtors should not be required to accept the UKPC’s \$3 billion claim against the EMEA Debtors – which has not been accepted by any debtor or any court – if it would be drawn from the “common pool” and would drastically reduce US creditor recoveries. There are many complex administrative, procedural and jurisdictional issues the UKPC does not seek to address, such as where challenges to large claims like the UKPC’s against the “common pool” would be

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<sup>315</sup> See 11 U.S.C. §§ 1501-1532; Companies’ Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 18.6.

<sup>316</sup> See UKPC Post-Trial Br. ¶ 114 (acknowledging that the Model Law is “not binding”); *see also id.* ¶ 123 (conceding that the substantive application of Modified Universalism “lacks express statutory support” and at best “lays the foundation for future legislative reform”); Clark Dep. Tr. 121:17-122:6, 123:17-124:11.

<sup>317</sup> UKPC Post-Trial Br. ¶ 127 (emphasis added).

<sup>318</sup> See US Post-Trial Br. § VII.D.



litigated and the standing of all debtors whose assets make up the “common pool” (and creditors whose claims would be subject to dilution) to participate in such litigation.

Further, the pro rata allocation theory renders ineffective intercompany settlements and settlements with creditors who have claims against multiple estates. As the UKPC admits, in order to adhere to a pro rata allocation, an intercompany claim “washes out of the model because it is both an asset and a debt.”<sup>319</sup> The CCC asserts that “Court approved Intercompany Claims are recognized” but then articulates what it means by “recognized:” such claims “are factored into the common dividend calculation” so as to ensure that a recipient of a court-approved intercompany claim has the full value of that claim deducted from its allocation.<sup>320</sup> In other words, intercompany claims are “recognized” only in a negative way – as a *deduction* from the allocation an estate would otherwise be entitled to; the higher an estate’s intercompany claim, the lower its allocation.

Acknowledging that “the final global pro rata ratio to be received by all creditors cannot be calculated until all the worldwide claims are determined in each jurisdiction,”<sup>321</sup> the UKPC suggests interim distributions and posits the “illustrative example” of \$9 billion in allowed claims and \$1 billion in “uncertain” claims. But this proposal assumes – without any evidentiary basis – that the percentage of allowed claims worldwide dwarves the percentage of contested claims. That is not true today and when or whether it will turn out to be true will not be known for quite some time given that the UKPC’s \$3 billion claim is presently subject to challenge, the

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<sup>319</sup> UKPC Post-Trial Br. ¶ 86. Alternatively, the UKPC argues that intercompany claims could be respected by simply not distributing the sale proceeds pro rata but giving the amount of an allowed intercompany claim as a “surplus” distribution to one debtor’s creditors. *Id.* ¶ 85. But that abandons pro rata.

<sup>320</sup> CCC Post-Trial Br. ¶ 203.

<sup>321</sup> UKPC Post-Trial Br. ¶ 88; *see also* Trial Tr. 3037:9-25; 3038:5-9; 3038:23-3039:2 (Bazelon acknowledging that distributions under the pro rata theory cannot occur for an indeterminate amount of time). The CCC similarly admitted that it can only provide an “estimated” pro rata percentage to guide the Courts because “complete allocation to the Debtor Estates from the Sale Proceeds will require completion of the administration of the Debtor Estates’ claims processes.” CCC Post-Trial Br. ¶¶ 205-06; *see also* TR00045 (Britven Report) ¶¶ 8.6-8.7.

EMEA Debtors have not even set their bar dates and the Monitor has yet to resolve the vast majority of the Canadian Debtors' claims.<sup>322</sup> Under this scenario, even if the US estate can resolve its outstanding claims imminently, the interim distribution its creditors may receive could be minimal for years to come as it awaits the conclusions of litigation over large, disputed claims against other Nortel debtors.

Finally, the UKPC and CCC gloss over a fundamental falsehood of their pro rata theory: no creditor would actually receive a pro rata recovery. Their theory does not provide for equal recoveries among creditors due to, among other things, the effect of guarantees, intercompany claims, cash on hand in the debtor estates and "double dipping" as a result of individual legal regimes (*e.g.*, FSD contribution claims) that would cause entities to receive unequal distributions.<sup>323</sup>

#### **E. The Pro Rata Distribution Theory Is Economically Irrational**

As the UKPC's own expert acknowledged, the pro rata distribution theory is economically irrational because it eliminates bargained-for contractual rights, including guarantees.<sup>324</sup> The UKPC and CCC rely on selective testimony from former CFO Pavi Binning that NNI guarantees were somehow "weak,"<sup>325</sup> but the evidence presented at trial belies this claim. John McConnell – a finance professor and bond trading expert – and other Nortel senior finance executives testified that Nortel creditors valued guarantees. Specifically, McConnell's pricing data – which eliminated other variables that the UKPC's spreads data did not – demonstrates that Nortel creditors considered bonds with NNI guarantees to be more valuable

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<sup>322</sup> According to the most recent Monitor Report on the subject, approximately 78% (\$9.7 billion) of the claims against NNC remained unresolved, and 65% (\$8.9 billion) of the claims against NNL were unresolved. *See* TR00012 (Mar. 14, 2014 One Hundred and Fourth Report of the Monitor) at App. D.

<sup>323</sup> Trial Tr. 3039:3-3044:21; 3055:3-3057:11; 3060:17-3071:23 (Bazelon).

<sup>324</sup> *Id.* 3076:5-3078:17 (Bazelon).

<sup>325</sup> *See* CCC Post-Trial Br. ¶ 190; UKPC Post-Trial Br. ¶¶ 98-99.

than bonds without guarantees.<sup>326</sup> Similarly, former CFO, Peter Currie; Director of Corporate Finance, John Williams; and Assistant Treasurer, Michael McCorkle, all testified that NNI-specific guarantees were a critical term of the Nortel bonds.<sup>327</sup> This bond financing was essential to Nortel's ability to operate and would not have been possible without the NNI guarantees.<sup>328</sup> The UKPC and CCC do not offer any testimony to rebut this evidence.

## CONCLUSION

For the reasons presented at trial and as set forth herein and in the Post-Trial Brief and Proposed Findings of Fact and Conclusions of Law of the US Interests, the US Interests respectfully submit that both Courts should enter orders allocating the proceeds from the Business Line Sales and the Patent Portfolio Sale in accordance with the chart set forth on page 2 of the Post-Trial Brief of the US Interests.

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<sup>326</sup> TR00057 (McConnell Rebuttal) ¶¶ 53-56, Ex. 2, 3; Trial Tr. 4790:15-4795:21; 4801:2-4802:16 (McConnell); DEM00024 (US McConnell Demonstratives) at 5.

<sup>327</sup> TR00001 (Currie Aff.) ¶ 90; Trial Tr. 548:3-550:2 (Currie); Williams Dep. 197:22-200:2; Trial Tr. 1057:12-25 (Binning); *id.* 820:24-821:15 (McCorkle); *see also id.* 1056:20-1057:11, 1070:21-1071:8 (Binning) (testifying that creditors dealt with specific Nortel entities).

<sup>328</sup> Trial Tr. 546:13-550:2 (Currie); Williams Dep. 197:22-200:2.

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**APPENDIX A**  
**Sublicenses Involving NNI**

<b><u>Exhibit</u></b>	<b><u>Date</u></b>	<b><u>Licensor</u></b>	<b><u>Licensee</u></b>
TR48892	9/3/1985	NNL and NNI	[REDACTED]
TR48902	3/1/1995	NNL and its Affiliates	[REDACTED]
TR48843	1/1/1996	NNL and NNI	[REDACTED]
TR48859	11/1/1996	NNL and NNI	[REDACTED]
TR48857	6/1/1997	NNL and NNI	[REDACTED]
TR48911	6/1/1997	NNL and NNI	[REDACTED]
TR48919	7/1/1997	NNL and NNI	[REDACTED]
TR48860	9/1/1997	NNL and NNI	[REDACTED]
TR48862	10/1/1997	NNL and NNI	[REDACTED]
TR48894	11/1/1997	NNL and NNI	[REDACTED]
TR48842	12/1/1997	NNL and NNI	[REDACTED]
TR48844	1/1/1998	NNL and NNI	[REDACTED]
TR48883	5/1/1998	NNL, on behalf of itself and its Subsidiaries	[REDACTED]
TR48841	7/1/1998	NNL and NNI	[REDACTED]
TR48858	7/1/1998	NNL and NNI	[REDACTED]
TR48925	9/25/1998	NNL, on its behalf and on behalf of its Subsidiaries	[REDACTED]

<u>Exhibit</u>	<u>Date</u>	<u>Licensor</u>	<u>Licensee</u>
TR48913	10/14/1998	NNL , for itself and its Subsidiaries	[REDACTED]
TR48915	12/21/1998	NNL and NNI	[REDACTED]
TR48916	4/9/1999	NNL, on its behalf and on behalf of its Subsidiaries	[REDACTED]
TR48851	6/1/1999	NNC and NNI	[REDACTED]
TR48890	6/3/1999	NNC, on behalf of itself and its Subsidiaries	[REDACTED]
TR48846	7/1/1999	NNL and NNI	[REDACTED]
TR48853	7/1/1999	NNC and NNI	[REDACTED]
TR48863	7/1/1999	NNC, on behalf of itself and all of its Subsidiaries	[REDACTED]
TR48848	12/1/1999	NNC and NNI	[REDACTED]
TR48866	12/20/1999	NNC, for itself and its Subsidiaries	[REDACTED]
TR48847	1/1/2000	NNC and NNI	[REDACTED]
TR48852	4/1/2000	NNL and NNI	[REDACTED]
TR48901	4/5/2000	NNC, on behalf of itself and its Subsidiaries	[REDACTED]
TR48854	5/1/2000	NNL and NNI	[REDACTED]

<u>Exhibit</u>	<u>Date</u>	<u>Licensor</u>	<u>Licensee</u>
TR48884	6/16/2000	NNL, on behalf of itself and its Subsidiaries	[REDACTED]
TR48856	1/1/2001	NNL and NNI	[REDACTED]
TR48903	1/1/2001	NNL and NNI	[REDACTED]
TR48671	1/1/2001	NNC, on behalf of itself and its Subsidiaries	[REDACTED]
TR48850	10/1/2001	NNL and NNI	[REDACTED]
TR48917	10/1/2001	NNL and NNI	[REDACTED]
TR48923	2/1/2002	NNL, on its behalf and on behalf of its wholly owned subsidiaries	[REDACTED]
TR48885	2/28/2002	NNL, its Subsidiaries and its Affiliates	[REDACTED]
TR48893	2/28/2002	NNL, its Subsidiaries and its Affiliates	[REDACTED]
TR48928	4/22/2002	NNL, on behalf of itself and its Subsidiaries	[REDACTED]
TR48927	6/30/2002	NNL and NNI	[REDACTED]
TR48918	9/2002	NNL , on behalf of itself and its Subsidiaries including its U.S. Subsidiary, NNI	[REDACTED]
TR48868	10/1/2002	NNL, on behalf of itself and its Subsidiaries	[REDACTED]
TR48869	11/8/2002	NNC, on its behalf and on behalf of its Affiliates	[REDACTED]
TR48838	4/18/2003	NNL, on behalf of itself and its Subsidiaries including NNI	[REDACTED]



<u>Exhibit</u>	<u>Date</u>	<u>Licensor</u>	<u>Licensee</u>
TR48839	12/9/2003	NNL, on behalf of itself and Subsidiaries	[REDACTED]
TR48914	12/23/2003	NNL, on its behalf and on behalf of its wholly owned subsidiaries	[REDACTED]
TR48898	3/11/2004	NNL, on behalf of itself and Subsidiaries	[REDACTED]
TR48845	3/12/2004	NNL, on behalf of itself and its Subsidiaries other than NNI, and NNI	[REDACTED]
TR48899	5/1/2004	NNL on behalf of itself and Subsidiaries	[REDACTED]
TR48864	7/28/2004	NNL, on behalf of itself and its Subsidiaries	[REDACTED]
TR48889	11/1/2004	NNL, on behalf of itself and Subsidiaries	[REDACTED]
TR48840	1/1/2005	NNL, on behalf of itself and its Subsidiaries	[REDACTED]
TR48861	2/1/2005	NNL, on behalf of itself and its Subsidiaries other than NNI, and NNI	[REDACTED]
TR48670	12/20/2005	Nortel, on behalf of itself and its Subsidiaries	[REDACTED]
TR48926	1/1/2006	Nortel, on behalf of itself and its Subsidiaries	[REDACTED]
TR48865	2/10/2006	NNL, on behalf of itself and its Affiliates	[REDACTED]
TR48676	7/17/2006	NNC, on behalf of itself and its Subsidiaries	[REDACTED]
TR48677	10/12/2006	Nortel, on behalf of itself and its Subsidiaries other than NNI, and NNI	[REDACTED]

<u>Exhibit</u>	<u>Date</u>	<u>Licensor</u>	<u>Licensee</u>
TR47003	12/27/2006	Nortel, on behalf of itself and its Subsidiaries	[REDACTED]
TR48849	8/23/2007	NNL, on behalf of itself and its Subsidiaries other than NNI, and NNI	[REDACTED]
TR48871	1/1/2008	Nortel on behalf of itself and its Affiliates	[REDACTED]
TR45472	3/31/2009	NNL, on its behalf and on behalf of its Affiliates	[REDACTED]