**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF TENNESSEE**
**NASHVILLE DIVISION**

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| **IN RE NORTEL NETWORKS CORP. "ERISA" LITIGATION** | ) ) ) ) ) ) ) ) | **MDL Docket No. 3:03-MD-1537**<br><br>This Document Relates to:<br>All Cases |

# SECOND AMENDED CONSOLIDATED CLASS ACTION COMPLAINT

## I. NATURE OF THE ACTION

1. This is an action for breach of fiduciary duty against the fiduciaries of the Long-Term Investment Plan) (the "Plan"), a 401(k) plan sponsored by Nortel Networks Inc. ("Nortel U.S.") pursuant to the federal statute that comprehensively regulates such plans, the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

2. Plaintiffs are current and former Nortel U.S. employees who are or were participants in the Plan. Defendants are Nortel U.S. and its Canadian parent, Nortel Networks Corporation ("Nortel Corp." or the "Company"), and Nortel Networks Limited ("Nortel Ltd."), all of which bore fiduciary duties to the Plan and its participants. This Complaint also names as defendants the individual fiduciaries who were responsible for managing the Plan – many of whom were corporate insiders at Nortel Corp.

3. The various defendant fiduciaries were intimately familiar with the Company's ailing finances over the past five years, yet they facilitated (and in some cases encouraged) Plan participants to invest their retirement savings in Nortel Corp. common stock despite the unsuitable nature of such an investment.

4. The defendant fiduciaries breached their duties in various ways with respect to the Plan's investments in Nortel Corp. common stock ("Company Stock"). The fiduciaries offered Company Stock as a Plan investment option through the Nortel Networks Stock Fund (the "Nortel Stock Fund"), a "fund" consisting almost entirely of Company Stock. The fiduciaries breached their duties by offering (and by continuing to offer) the Nortel Stock Fund as a retirement investment when it was plainly unsuitable for these purposes and grew only more so with time. They also misrepresented or omitted important facts about Company finances and the use of Company Stock as a retirement investment vehicle.

5. During the Class Period, Nortel Corp. has experienced – and continues to experience -- a dramatic contraction in its stock price, as a result of widespread corporate wrongdoing that occurred over the course of the past five years or more. The fiduciary defendants knew or should have known that Company Stock was an imprudent investment alternative for the Plans due to the rampant business improprieties occurring at the Company. Upon information and belief, certain of the defendants engaged in the business improprieties described in this Complaint in order to inflate artificially the value of Company Stock and to improve their own compensation during the Class Period. There is no indication that the Company's turbulence has subsided, yet despite the corporate upheaval, the Plan fiduciaries continued to "push" the Nortel Stock Fund upon Plan participants, failing to discourage retirement investment in Company Stock, even as the Company has become the target of criminal investigations in two countries.

6. The defendant Plan fiduciaries also breached their duties to inform participants about the risks of Company Stock as a retirement investment vehicle, and about the particular risks of over-concentrating retirement investment in Company Stock, and they failed to address, let alone resolve, their conflict of interest as Nortel Corp. insiders on the one hand and Plan fiduciaries on the other.

7. Plaintiffs bring this action under ERISA on behalf of the Plan itself. Plaintiffs seek to bring this case as a class action, which is an available procedural vehicle for an ERISA breach of fiduciary duty case. In particular, Plaintiffs seek to have the Court certify a class of participants and beneficiaries of the Plan (the "Class") during the period March 7, 2000 through the present (the "Class Period"). Plaintiffs seek, among other things, to have the breaching fiduciaries make good to the Plan the losses it suffered as a result of their breaches.

## II. Jurisdiction and Venue

8. **Subject Matter Jurisdiction.** This is a civil enforcement action for breach of fiduciary duty brought pursuant to ERISA § 502(a), 29 U.S.C. § 1132(a). This Court has original, exclusive subject matter jurisdiction over this action pursuant to the specific jurisdictional statute for claims of this type, ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1). In addition, this Court has subject matter jurisdiction pursuant to the general jurisdictional statute for "civil actions arising under the . . . laws . . . of the United States." 28 U.S.C. § 1331.

9. **Personal Jurisdiction.** ERISA provides for nationwide service of process, ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), and as a consequence, this Court has personal jurisdiction over all Defendants because they are subject to service within the United States. This Court also has personal jurisdiction over all Defendants pursuant to Fed. R. Civ. P.

4(k)(1)(A) because they would be subject to the jurisdiction of a court of general jurisdiction in the State of Tennessee.

10. **Venue.** Venue is properly laid in this district pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), because the Plan was administered in this district, some or all of the fiduciary breaches for which relief is sought occurred in this district, and one or more of the Defendants may be found in this district. Venue is also proper in this district under 28 U.S.C. § 1391(b) & (c) because some of the Defendants, including Nortel U.S., reside in this district, Nortel U.S.'s principal executive offices are located in this district, and Nortel U.S. systematically and continuously does business in this district. In addition, the Judicial Panel on Multi-District Litigation has twice directed that this action proceed in this district.

## III. PARTIES

### A. Plaintiffs

11. Michael Zafarano, Jr., is a natural person, a resident of Georgia, and a participant in the Plan within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7), whose retirement savings in the Plan included funds allocated to the Nortel Stock Fund.

12. Carol Felts is a natural person, a resident of Tennessee, and a participant in the Plan within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7), whose retirement savings in the Plan included funds allocated to the Nortel Stock Fund.

13. James Kauffmann is a natural person, a resident of Texas, and a participant in the Plan within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7), whose retirement savings in the Plan included funds allocated to the Nortel Stock Fund.

## B. Defendants

14. Defendant **Nortel Networks Inc.** ("Nortel U.S.") is a corporation organized under the laws of the State of Delaware with its principal place of business in Nashville, Tennessee. Nortel U.S. necessarily acted through its Board of Directors, officers and employees. Nortel U.S. is a wholly-owned subsidiary of Nortel Corp.

15. Upon information and belief and based on the publicly available securities filings of Nortel Corp., and the consolidated financial statements of Nortel Corp. (which include Nortel U.S.), Nortel U.S. is the operating company of Nortel Corp. in the United States.

16. Defendant **Nortel Networks Corp. ("Nortel Corp.")** is a Canadian corporation with its principal place of business in Brampton, Ontario. Nortel Corp. stock is listed and traded on the New York Stock Exchange in the United States and on the Toronto Stock Exchange in Canada. Nortel Corp. necessarily acts through its Board of Directors, officers and employees.

17. Defendant **Nortel Networks, Ltd**. ("Nortel Ltd."), organized under Canadian law, is a wholly-owned subsidiary of Nortel Corp. Nortel Ltd. is the direct operating subsidiary of Nortel Corp. Nortel Corp. and Nortel Ltd. have identical Boards of Directors.

18. Nortel U.S., Nortel Corp., and Nortel Ltd. are suppliers of networking services that support voice, data and video transmission over wireless and wireline technologies. Their business consists of the design, development, assembly, manufacture, marketing, sale, financing, installation, servicing and support of networking solutions and services for service provider and carrier customers, and enterprise customers. Their services are used by customers to support the

Internet and other public and private voice, data, and video networks. Collectively, Nortel U.S., Nortel Corp. and Nortel Ltd. are referred to as the "Nortel Defendants."

19. **Director Defendants.** Upon information and belief, the Boards of Directors for the Nortel Defendants have ultimate fiduciary oversight over the Plan. The members of the Nortel Defendants' Boards of Directors are entrusted with the authority to appoint and monitor the members of the Investment Committee (described below) and any other appointed Plan fiduciaries. The director-fiduciaries act on behalf of the Nortel Defendants. As such, the members of the Nortel Defendants' Boards of Directors are fiduciaries of the Plan within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), in that they exercise discretionary authority or control with respect to the management of the Plan, the management and disposition of Plan assets and/or the administration of the Plan.

a. The following individuals are or were members of the Boards of Directors of Nortel Corp. and Nortel Ltd. during the Class Period:

(i) Defendant Dr. Manfred Bischoff, Jr., has been a director from 2004 through the present. Defendant Bischoff also served on the Pension Fund Policy Committee ("PFPC"), which exercised decision-making authority or control regarding the appointment of Plan fiduciaries and the management of the Plan's assets, possessed discretionary authority or responsibility in the administration of the Plan, and exercised authority or control with respect to the management of the Plan assets. Both Nortel Ltd. and Nortel Corp. acted through the PFPC in carrying out their Plan-related fiduciary duties and responsibilities, and thus members of the PFPC were Plan fiduciaries.

(ii) Defendant Hon. James J. Blanchard has been a director from 2000 through the present. Defendant Blanchard also served on the PFPC.

(iii) Defendant John Edward Cleghorn has been a director from 2001 through the present. Defendant Cleghorn also served on the PFPC.

(iv) Defendant Frank Andrew Dunn has been a director from 2000 through 2004, when he was terminated from Nortel Corp. for cause.

(v) Defendant Robert Ellis has been a director from 2004 through the present.

(vi) Defendant L. Yves Fortier has been a director from 2000 through the present.

(vii) Defendant Robert Alexander Ingram has been a director from 2000 through the present.

(viii) Defendant Hon. John P. Manley has been a director from 2004 through the present.

(ix) Defendant Richard David McCormick has been a director from 2005 through the present.

(x) Defendant William Arthur Owens has been a director from 2002 through the present. Defendant Owens also served on the PFPC.

(xi) Defendant Harry Jonathan Pearce has been a director from 2005 through the present.

(xii) Defendant John Andrew Roth has been a director from 2000 through 2001.

(xiii) Defendant Guylaine Saucier has been a director from 2000 through the present. Defendant Saucier also served on the PFPC.

(xiv) Defendant Sherwood Hubbard Smith, Jr., has been a director from 2000 through 2005. Defendant Smith also served on the PFPC.

(xv) Defendant Lynton Ronald Wilson has been a director from 2000 through the present.

b. Subject to the dominion and control of Nortel Corp., Nortel U.S.'s parent, the Nortel U.S. Board of Directors is the governing body of Nortel U.S. pursuant to Nortel U.S.'s charter and relevant corporate law. During the Class Period the following persons were Nortel U.S. directors:

(i) Defendant Mary Cross was a director of Nortel U.S. during at least a portion of the relevant time period. As of 2002, Mary was the President of Nortel U.S. and President of Alteon Websystems, Inc., a subsidiary of Nortel Corp.

(ii) Defendant William Kerr ("Kerr") was a director of Nortel U.S. during at least a portion of the relevant time period. From 1994-2001, Kerr also held various senior financial positions with Nortel Corp. including Controller, Treasurer and Senior Vice President of Business Development (Mergers and Acquisitions). Kerr was CFO of Nortel Corp. until April 2004, when he resigned.

(iii) Defendant Katharine B. Stevenson was a director of Nortel U.S. during at least a portion of the relevant time period. (She also held other positions, as described below).

(iv) Defendants John/Jane Does 1-10 (the "Doe Directors") are additional persons who served on the Board of Nortel U.S. during the Class Period. The identities of these Directors are now unknown to Plaintiffs; once their identities are discovered, Plaintiffs will seek to amend to join them under their true names.

20. **The Nortel Networks Investment Committee of Nortel Corp. and/or Nortel Ltd. ("Investment Committee")**. The Investment Committee, which is composed primarily of members who hold executive level positions with Nortel Corp., is charged with fiduciary responsibility for investments offered in Plan. The individuals who served on the Investment Committee were Plan fiduciaries because they exercised decision-making authority regarding the appointment of Plan fiduciaries and the management of the Plans' assets during the Class Period. The Investment Committee members were and are charged with fiduciary responsibility for Plan investments, including but not limited to investigating and ultimately approving the various investment options offered to the Plan and Plan participants, evaluating and approving the appointment/termination of the Plan Trustee, and discharging other fiduciary functions. Nortel U.S. and Nortel Corp. acted through the Investment Committee in carrying out their Plan-related fiduciary duties and responsibilities, and thus members of the Investment Committee were fiduciaries. The individuals who served on the Investment Committee and acted as fiduciaries with respect to the Plan during the Class Period are as follows:

a. Defendant Katharine B. Stevenson has been at relevant times the Chairman of the Investment Committee. At all relevant times, Stevenson served as the Treasurer of Nortel Corp., Nortel Networks Limited ("Nortel Ltd."), and Nortel Networks U.S. Finance Inc. ("Nortel Finance"). Due to Stevenson's intimate knowledge of the financial condition of Nortel Corp., acquired through her positions at Nortel Corp. or its affiliates, Stevenson had first hand knowledge of, or at least access to internal documents revealing, the financial problems and accounting irregularities that to date have necessitated two restatements of Nortel Corp.'s financial statements.

b. Defendant Douglas Beatty was a member of the Investment Committee during the relevant period. Upon information and belief, Beatty has been removed from his position on the Investment Committee. Beatty was fired from his position as CFO of Nortel Corp. in the wake of the latest accounting scandal at Nortel. As CFO of Nortel Corp., Beatty had first hand knowledge of, or at least access to internal documents revealing, Nortel Corp.'s financial problems and accounting irregularities that have necessitated the two restatements to date.

c. Defendant David L. Burn was a member of the Investment Committee during the relevant period. Burn served in a senior corporate taxation position at Nortel Corp. during the relevant period, and thus, had knowledge of Nortel Corp.'s financial situation.

d. Defendant Oswald L. D'Mello is/was a member of the Investment Committee and the recording secretary. D'Mello was the director of pension funds at Nortel Corp. until his retirement.

e. Defendant Nicholas DeRoma has been a member of the Investment Committee throughout the relevant time period. DeRoma has been the Chief Legal Officer ("CLO") of Nortel Corp. since 2000. Due to his position as CLO, DeRoma has had first hand knowledge of, or at least access to internal documents revealing, Nortel Corp.'s financial problems and accounting irregularities that have necessitated the two restatements to date.

f. Defendant William J. Donovan has been a member of the Investment Committee throughout the relevant time period. Donovan has been Nortel Corp.'s Senior Vice President of Global Human Resources since 2000. Due to his position, Donovan has had first hand knowledge of, or at least access to internal documents revealing, Nortel Corp.'s financial problems and accounting irregularities that have necessitated the two restatements to date.

g. Defendant John M. Doolittle has been a member of the Investment Committee throughout the relevant time period. Doolittle has been a Vice President of Nortel Corp.'s tax department. Due to his position, Doolittle has had first hand knowledge of, or at least access to internal documents revealing, Nortel Corp.'s financial problems and accounting irregularities that have necessitated the two restatements to date.

h. Defendant Frank Dunn was a member of the Investment Committee during the relevant period. Upon information and belief, Dunn has been removed from his position on the Investment Committee. Dunn was fired from his position as CEO of Nortel Corp. in the wake of the latest accounting scandal at Nortel Corp; the Company has filed suit against him seeking the return of millions of dollars of corporate bonus payments made to him in 2003. As CEO of Nortel Corp., Dunn had first hand knowledge of, or at least access to internal documents revealing, Nortel Corp.'s financial problems and accounting irregularities that have necessitated the two restatements to date.

i. Defendant Michael Gollogly was a member of the Investment Committee during the relevant period. Upon information and belief, Gollogly has been removed from his position on the Investment Committee. Gollogly was fired from his position as Controller of Nortel Corp. in the wake of the latest accounting scandal at Nortel Corp; the Company has filed suit against him seeking the return of millions of dollars of corporate bonus payments made to him in 2003. As the Controller of Nortel Corp., Gollogly had first hand knowledge of, or at least access to internal documents revealing, Nortel Corp.'s financial problems and accounting irregularities that have necessitated the two restatements to date.

j. Defendant William Kerr was a member of the Investment Committee during the relevant period. Upon information and belief, Kerr has been removed from his position on the Investment Committee. Kerr joined Nortel Corp. 1994 as Controller and left the Company in 2001. Kerr rejoined Nortel Corp. as Chief Financial Officer ("CFO") in 2004 following the discovery of one of the accounting scandals that plagued Nortel Corp in recent years. Kerr resigned from his position as CFO in January 2005. As Controller and CFO of Nortel Corp., Kerr had first hand knowledge of, or at least access to internal documents revealing, Nortel Corp.'s financial problems and accounting irregularities that have necessitated the two restatements to date.

k. Defendant MaryAnne Pahapill was a member of the Investment Committee during the relevant period. Since joining Nortel Corp. in 1999, Pahapill, a chartered accountant, has held a number of senior financial positions in the Company's Finance organization, including Assistant Controller and Assistant Treasurer; Pahapill was appointed Controller in March 2004. As a result of her positions, Pahapill had first hand knowledge of, or at least access to internal documents revealing, Nortel Corp.'s financial problems and accounting irregularities that have necessitated the two restatements to date.

l. Defendant Tracey L. Vickruck was a member of the Investment Committee during the relevant period. Vickruck currently serves as Nortel Corp.'s Assistant Treasurer. As a result of her position, Vickruck had first hand knowledge of, or at least access to internal documents revealing, Nortel Corp.'s financial problems and accounting irregularities that have necessitated the two restatements to date.

21. **Defendants John/Jane Does 11-50 (the "Doe Committee Defendants")** are additional persons who served on any Nortel U.S. and/or Nortel Corp. committee or organization charged with (or actually performing) fiduciary responsibilities for Plan investments, including but not limited to investigating and ultimately approving the various investment options offered to the Plan and Plan participants, evaluating and approving the appointment/termination of the Trustee, and discharging other fiduciary functions. Through discovery, Plaintiffs will attempt to ascertain the true name and identity of any additional Plan fiduciaries and will seek to amend and join them under their true names.

## IV. THE PLAN

### A. The Nature of the Plan

22. Nortel established the Plan as a benefit for its employees, and is the "sponsor" of the Plan within the meaning of ERISA § 3(16)(B), 29 U.S.C. § 1002(16)(B). At all relevant

times, the Employer Identification Number (EIN) for the Plan was 04-2486332, and the Plan Number was 003.

23. The Plan is an "employee pension benefit plan" within the meaning of ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A), an eligible individual account plan within the meaning of ERISA § 407(d)(3), 29 U.S.C. § 1107(d)(3), and a qualified cash or deferred arrangement within the meaning of section 401(k) of the Internal Revenue Code, 26 U.S.C. § 401(k). Certain ERISA plans are designed to invest primarily in employer securities pursuant to ERISA § 407(d)(6), 29 U.S.C. § 1107(d)(6). This Plan was not so designed.

24. The Plan is a legal entity they can sue or be sued. ERISA § 502(d)(1), 29 U.S.C. § 1132(d)(1). However, in a breach of fiduciary duty action such as this, the Plan is neither a plaintiff nor a defendant. Rather, pursuant to ERISA § 409, 29 U.S.C. § 1109, and the case law interpreting it, the relief requested in this action is for the benefit of the Plan.

**B. Plan Documentation**

25. **Plan Document.** Pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), a plan must be established and maintained pursuant to a written instrument. The written instrument at issue here is entitled the "Nortel Networks Long-Term Investment Plan, Effective July 1, 1979." During the period relevant to this action there were three amended and restated versions of this instrument, one as of January 1, 2000 (the "1/1/00 Plan Document," copy attached as Ex. 1) and one as of May 1, 2000 (the "5/1/00 Plan Document," copy attached as Ex. 2), one as of August 15, 2002, (the "8/15/02 Plan Document," copy attached as Ex. 3). In most cases, the provisions of written instruments are identical and they are referred to without distinction as the "Plan Document."

26. **Trust Agreement.** ERISA requires that the assets of an employee benefit pension plan be held in trust. ERISA § 403, 29 U.S.C. §1103. In this case the assets were held in trust by Bankers Trust Company (the "Trustee"), pursuant to the Master Savings Plan Trust Agreement, dated February 16, 1996 (the "Trust Agreement," copy attached as Ex. 4). Under the terms of the Plan Document and the Trust Agreement, the contributions to the Plan by and on behalf of the participants are held in trust by the Trustee and invested by the Trustee in the investment options offered by the Plan.

27. **Summary Plan Description.** ERISA also requires that a plan sponsor prepare and deliver to participants a Summary Plan Description ("SPD") containing basic information about the plan. The SPD must be "written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." ERISA § 102(a), 29 U.S.C. § 1022(a). Upon information and belief the last version of the SPD for the Plan before the beginning of the Class Period, as defined below, is the SPD dated August 2, 2002 and modified October 21, 2002 (the "SPD," copy attached as Ex. 5).

28. **Summary of Material Modifications.** ERISA also requires that any material modification of a plan must be documented in a Summary of Material Modifications ("SMM"). ERISA § 102(a), 29 U.S.C. § 1022(a). Like an SPD, an SMM must "be written in a manner calculated to be understood by the average plan participant," and be delivered to participants. Upon information and belief, in February 2000 Nortel delivered to participants various documents summarizing various changes made to the Plan effective May 1, 2000. Further, upon information and belief, these documents, collectively entitled "U.S. Guide for Balanced and

Investor Programs: Capital Accumulation and Retirement" (the "Guide," copy attached as Ex. 6) were an SMM within the meaning of section 102(a).

## C. Purpose of the Plan

According to the Plan Document the "primary purpose of the Plan is to provide encouragement to employees to accumulate personal savings so that they may enjoy a higher standard of living at retirement. . . . The secondary purpose of the Plan is to provide the capability to accept Rollover Contributions." Plan Document § 1.1. 401(k) plans, such as the Plan, are by their nature designed to further tax-advantaged retirement savings for employees. ERISA, the statute regulating such plans, is, as its name states, designed to further "employee retirement income security."

## D. The Operation of the Plan

29. At all relevant times, participants' accounts included their "Employee Elected Company Contributions" (or "Participant Contributions") and the "Company Contributions." Plan Document §§ 1.2(j) & (s), 4.1 & 4.2. Participants could contribute from 1% to 15% of their eligible earnings, subject to certain restriction, as their Participant Contributions. Id. § 4.1(1). Nortel matched these contributions, at rates ranging from 50% to 100% based on the particular benefit package selected by the employee. Both the Participant Contributions and the Company Contributions vested immediately.

30. Until May 1, 2000 the Company Contribution was 60% of the Participant Contribution, subject to certain qualifications. As of May 1, 2000 Nortel reorganized the structure of its overall benefits program to provide employees three "programs" through which they could participate in the Plan. New employees were required to elect between the "Balanced

Program" and the "Investor Program." (Continuing employees could elect the "Traditional Program.") While each of these programs offered employees the option of participating in the Plan, the Investor Program offered employees greater matching contributions (100% of Elected Contributions) but fewer traditional benefits (e.g., retiree medical and life insurance) than the other programs. The Balanced Program offered a 50% match, and the Traditional Program the pre-existing 60% match. Employees were required to elect which program they would participate in by March 31, 2000, or, for employees hired after that date, soon after they were hired. Under the August 15, 2002 restatement of the Plan, Plan participants may elect one of three benefit options. Company Contributions vary depending on the participant's elected option. Nortel may contribute to the Plan 50%, 60% or 100% of the participant's contributions that do not exceed 6% of the participant's eligible earnings.

31. On information and belief, a purpose and effect of the May 1, 2000 reorganization was to encourage further investment in Company Stock, particularly in view of the fact that recently some Plan participants had markedly increased their Plan investments in Company Stock.

32. Both the Participant Contributions and the Company Contributions, subject to certain immaterial restrictions, were invested in one or more of the "Investment Options," Plan Document § 4.1(a)(2), made available to participants. Nortel U.S., as the Plan Administrator, had "sole discretion" for determining which Investment Options would be "made available to Participants" to invest their Participant Contributions and Company Contributions in the Plan. Plan Document §§ 4.1(a)(2), 4.2(a)(1). Therefore, Nortel U.S. undertook and was responsible

for such determinations solely or, if others performed such determinations, it was responsible as a co-fiduciary.

33. At all relevant times, one of the Investment Options offered to Plan participants as suitable for their retirement contributions was the Nortel Networks Stock Fund. The Nortel Stock Fund was not a "fund" in the ordinary sense; it consisted almost exclusively of the common stock of Nortel Corp.

**E. Concentration of the Plan in Company Stock**

34. At the end of 1999, just before the beginning of the Class Period, Plan assets were highly concentrated in Nortel Corp. common stock. At that time, over 52% of the Plan assets were invested in Nortel Corp. common stock. Over time, the number of shares of Nortel Corp. stock in the Plan steadily increased, from approximately 17 million shares at the end of 1999 to over 80 million shares by the end of 2002.

35. The Plan's 2003 Form 11-K filed with the Securities and Exchange Commission (the most recent one June 17, 2005June 17, 2005June 17, 2005filed) indicates that investment in the Nortel Stock Fund remains significant – and actually increased over the course of 2003, even after the Plan had experienced losses in the Nortel Stock Fund in 2001-02. At the end of December 2003, investment in the Nortel Stock Fund was more than $424 million or approximately 22% of Plan assets. Investment in the Nortel Stock Fund more than doubled by year-end 2003 compared to year-end 2002.

36. Upon information and belief, a significant portion of Plan participants nearing retirement age increased their investments in the risky Nortel Stock Fund. Upon information and belief, the defendant fiduciaries were aware of this "constant flow" into the Nortel Stock Fund in

2003 and beyond, yet they did nothing to fulfill their fiduciary responsibilities to the Plan given these responsibilities.

37. As a result, Plan assets declined precipitously during various times during the Class Period. For instance, the Plan experienced a 6.1% decline from June 2003 to June 2004 as Nortel Corp.'s stock continued its ignominious declining performance during that time period.

**F. The Plan Is Not a 404(c) Plan**

38. The Plan is not and never has been an "ERISA § 404(c) plan," *i.e.*, a plan that complies with regulations promulgated by the Department of Labor under ERISA § 404(c), 29 U.S.C. § 1104(c), and purports to relieve the Plan's fiduciaries of liability for the results of participants' exercise of control over their investment decisions. In order to qualify as a 404(c) plan, a plan must comply with all of the "regulations of the Secretary" as set forth in 29 C.F.R. § 2550.404c-1. In the present case, the Plan does not -- and never did -- satisfy those requirements, for the following reasons, *inter alia*:

- 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(1)(i) – Failure to Provide 404(c) Disclosures: Neither the Plan, nor any of the Defendants, provided the participants with "an explanation that the Plan is intended to constitute a plan described in section 404(c)" and related information.

- 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(1)(ii) – Defective Description of Nortel Stock Fund: Neither the Plan, nor any of the Defendants, provided "a general description of the investment objectives and risk and return characteristics" of the Nortel Stock Fund. Instead, as alleged below, the disclosures of the risk and return characteristics of Company Stock generally and of the financial condition of Nortel Corp. specifically were inadequate.

- 29 C.F.R. § 2550.404c-1(c)(2)(i) – Improper Influence: The participants were "subjected to improper influence by a Plan fiduciary or the Plan sponsor" on numerous occasions and in a variety of ways, as alleged below.

- 29 C.F.R. § 2550.404c-1(c)(2)(ii) – Concealing Material Information: As alleged below, material public and non-public information regarding the Nortel Stock Fund was withheld from the Plan participants.

- 29 C.F.R. § 2550.404(d)(2)(E)(4)(ix) – No Independent Fiduciary: No independent fiduciary was ever appointed to address the "potential for undue employer influence upon participants and beneficiaries with regard to the direct or indirect exercise of shareholder rights."

39. The failure of the Plan to qualify as a 404(c) plan means, as alleged below, that the protection otherwise available to Plan fiduciaries under section 404(c)((1)(B) is not applicable. Instead, because each participant did not "exercise control over the assets in his account" as defined by the statute, the fiduciaries themselves remain liable for investment losses.

## V. ERISA's Civil Enforcement Provisions

40. Plaintiffs seek relief for breach of fiduciary duty under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), against all Defendants. ERISA § 502(a)(2) authorizes a plan participant to bring a civil action for appropriate relief under ERISA § 409, 29 U.S.C. § 1109. ERISA § 409 requires "any person who is a fiduciary who breaches any of the duties imposed upon fiduciaries to make good to such plan any losses to the plan." ERISA § 409 also authorizes "such other equitable or remedial relief as the court may deem appropriate."

41. Plaintiffs also seek relief, as an additional basis of liability, under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), which authorizes a plan participant to bring a civil action for breach of fiduciary duty against fiduciaries and certain non-fiduciaries for appropriate equitable relief.

## VI. ERISA's Fiduciary Duties

42. **The Statutory Requirements.** ERISA imposes strict fiduciary duties upon plan fiduciaries. ERISA § 404(a), 29 U.S.C. § 1104(a), states, in relevant part, that:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and --
>
> (A) for the exclusive purpose of:
>
> (i) providing benefit to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims;
>
> (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so;
>
> (D) and in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title . . . .

43. **The Duty of Loyalty.** ERISA imposes on a plan fiduciary the duty of loyalty--that is, the duty to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries . . . ."

44. The duty of loyalty entails a duty to avoid conflicts of interest and to resolve them promptly when they occur. A fiduciary must always administer a plan with an "eye single" to the interests of the participants and beneficiaries, regardless of the interests of the fiduciaries themselves or the plan sponsor.

45. **The Duty of Prudence.** Section 404(a)(1)(B) also imposes on a plan fiduciary the duty of prudence--that is, the duty "to discharge his duties with respect to a plan solely in the

interest of the participants and beneficiaries and . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man, acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims . . . ."

46. **The Duty to Inform.** The duties of loyalty and prudence include the duty to disclose and inform. These duties entail: 1) a duty not to misinform; 2) an affirmative duty to inform when the fiduciary knows or should know that silence might be harmful; and 3) a duty to convey complete and accurate information material to the circumstances of participants and beneficiaries. These duties to disclose and inform (and not misinform) recognize the disparity that may exist, and in this case did exist, between the training and knowledge of the fiduciaries, on the one hand, and the participants and beneficiaries, on the other.

47. In the context of a large 401(k) plan with substantial holdings of company stock, a fiduciary whose responsibility includes the duty to inform has a duty to know certain basic facts about the characteristics and behavior of participants, characteristics well-recognized in the 401(k) literature and the trade press, concerning investment in company stock, including that:

- Out of loyalty, employees tend to invest in company stock;
- Employees tend to over-extrapolate from recent returns, expecting high returns to continue or increase going forward;
- Employees tend not to change their investment option allocations in the plan once made;
- No qualified retirement professional would advise rank and file employees to invest more than a modest amount of retirement savings in company stock, and many retirement professionals would advise employees to avoid investment in company stock entirely;

- Lower income employees tend to invest more heavily in company stock than more affluent workers, though they are at greater risk; and

- Even for risk-tolerant investors, the risks inherent to company stock are not commensurate with its rewards.

48. The duty to inform must also be discharged in compliance with the regulatory requirements of the mandatory communications, the SPD and the SMM:

> The format of the summary plan description must not have the effect of misleading, misinforming or failing to inform participants and beneficiaries. Any description of exceptions, limitations, reductions, and other restrictions of plan benefits shall not be minimized, rendered obscure or otherwise made to appear unimportant. Such exceptions, limitations, reductions, or restrictions of plan benefits shall be described or summarized in a manner not less prominent than the style, captions, printing type, and prominence used to describe or summarize plan benefits. The advantages and disadvantages of the plan shall be presented without either exaggerating the benefits or minimizing the limitations. The description or summary of restrictive plan provisions need not be disclosed in the summary plan description in close conjunction with the description or summary of benefits, provided that adjacent to the benefit description the page on which the restrictions are described is noted.

29 C.F.R. § 2520.102-2(b).

49. **The Duty to Investigate and Monitor Investment Alternatives.** With respect to a pension plan such as the Plan at issue here, the duties of loyalty and prudence also entail a duty to conduct an independent investigation into, and continually to monitor, the merits of the investment alternatives in the plan, including employer securities, to ensure that each investment is a suitable option for the plan.

50. **The Duty to Monitor Appointed Fiduciaries.** Fiduciaries who have the responsibility for appointing other fiduciaries have the further duty to monitor the fiduciaries thus appointed. The duty to monitor entails both giving information to and reviewing the actions

of the appointed fiduciaries. In a 401(k) plan such as the Nortel Plan, the monitoring fiduciaries must therefore ensure that the appointed fiduciaries:

- possess the needed credentials and experience, or use qualified advisors and service providers to fulfill their duties;
- are knowledgeable about the operations of the plan, the goals of the plan, and the behavior of plan participants;
- are provided with adequate financial resources to do their job;
- have adequate information to do their job of overseeing the plan investments, especially with respect to the largest single asset in the plan, Company stock;
- have access to outside, impartial advisors when needed;
- maintain adequate records of the information on which they base their decisions and analysis with respect to plan investment options; and
- report regularly to the monitoring fiduciaries.

The monitoring fiduciaries must then review, understand, and approve the conduct of the hands-on fiduciaries.

51. **The Duty Sometimes to Disregard Plan Documents.** A fiduciary may not avoid his fiduciary responsibilities by relying solely on the language of the plan documents. While the basic structure of a plan may be specified, within limits, by the plan sponsor, the fiduciary may not blindly follow the plan document if to do so leads to an imprudent result. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

52. **Co-Fiduciary Liability.** A fiduciary is liable not only for fiduciary breaches within the sphere of his own responsibility, but also as a co-fiduciary in certain circumstances. ERISA § 405(a), 29 U.S.C. § 1105(a), states, in relevant part, that:

> In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following

circumstances:

> (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach; or
>
> (2) if, by his failure to comply with section 404(a)(1) in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or
>
> (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

53. **Non-Fiduciary Liability.** Non-fiduciaries who knowingly participate in a fiduciary breach may themselves be liable for certain relief under ERISA § 502(a)(3), 29 U.S.C. § 1332(a)(3).

## VII. NORTEL U.S. BREACHED ITS FIDUCIARY DUTIES

54. **Fiduciary Status.** During the Class Period, Nortel U.S., the operating arm of Nortel Corp. in the United States, was a named fiduciary of the Plan. The Plan Document (§ 1.2(ii)) identifies Nortel U.S. as the Plan Administrator. Thus, Nortel U.S. is an ERISA fiduciary pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1).

55. Nortel U.S. is also a fiduciary pursuant to ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i), in that it exercised discretionary authority and control respecting the administration and management of the Plan and the disposition of its assets.

56. Nortel U.S. was well aware of, or at the very least had access to information about, the financial status of Nortel Corp. during the Class Period. Members of Nortel U.S.'s executive ranks and of its Board of Directors attended Board of Directors meetings of its corporate parent, Nortel Corp., and Nortel Ltd. In addition, senior management of Nortel Corp. participated in Nortel U.S. decisions concerning the Plan.

57. **Scope of Fiduciary Responsibility.** As Plan Administrator, Nortel U.S. was ultimately responsible for all aspects of the administration of the Plan. It had the authority to select the investments eligible for inclusion in the Investment Options, the authority to freeze, terminate or modify any Investment Option, and the responsibility to continually monitor the performance and suitability of its selections. In addition, Nortel U.S. was responsible for informing participants of the nature of and risks associated with the various Investment Options, including the Nortel Stock Fund. Trust Agreement § 5.2l; Plan Document § 11.3.1. Nortel U.S., acting through its Director Defendants, could remove any member of the Employee Benefits Committee ("EBC"), a Plan fiduciary committee, at any time, with or without cause, and fill the resulting vacancy. Plan Document § 11.4(a)(2). Nortel U.S. either exercised such authority and is liable or shared such authority and is liable as a co-fiduciary.

58. **Vicarious Liability for Other Fiduciaries.** Because Nortel U.S. necessarily acted through its Board, as well as its directors, officers and employees, the actions and knowledge of these individuals are properly imputed and attributed to Nortel U.S. Therefore, the Nortel U.S. Director Defendants' participation in and knowledge of Nortel U.S.'s breaches of fiduciary duty are imputed and attributed to Nortel U.S. The Nortel U.S. Board is a committee of Nortel U.S. itself. The Nortel U.S. Board was comprised of Nortel U.S.'s own employees, officers and directors. These individuals acted in the ordinary course and scope of their employment or agency with Nortel U.S. They acted on behalf of Nortel U.S. as any other employee or agent of Nortel U.S. acted on behalf of Nortel U.S. in executing his or her responsibilities. Ordinary principles of vicarious liability, *respondeat superior*, and agency impose on Nortel U.S. responsibility for its Board's actions and inactions, and Nortel U.S. is

charged with the knowledge its Board members acquired in connection with their employment or agency.

59. **Breach of the Duty to Disclose Condition of Nortel Corp.** As a named fiduciary, Nortel U.S. was well aware of its responsibility to provide accurate information to Plan Participants concerning Nortel Corp. stock, of which the Plan held tens of millions of shares; was well aware that Plan participants are concerned about Company Stock and desire information regarding it; and was well aware that for fiduciaries, the most fundamental disclosure is of the health of the primary determinant of Plan value, here, Nortel Corp. stock. Nortel U.S. breached its duties of disclosure.

60. **Breach of the Duty to Disclose Condition of Nortel Corp. During the Period March 7, 2001 through March 31, 2002**. The Summary Plan Descriptions that were provided to all Plan participants, as required by law, to explain the Plan's terms and benefits, incorporated by reference all SEC filings by Nortel Corp. From 2000 to the present, these SEC filings, which were incorporated by reference in official communications from the Plan fiduciaries to Plan participants and beneficiaries, contained numerous statements and omissions which were in breach of the duty to inform described above, including but not limited to the facts set forth below. Nortel U.S. knew, should have known, and/or had the duty to know these facts, because the Plan's SPD incorporated by reference Nortel Corp.'s SEC filings. This placed on Nortel U.S. a duty to assure itself of the accuracy and completeness of those SEC filings. In addition, during the Class Period, senior members of Nortel U.S.'s management, including Defendant Stevenson, associated with senior members of Nortel Corp.'s management at Investment Committee

meetings and otherwise, thereby gaining access to material information with respect to the performance, prospects and financial condition of Nortel Corp.

- On or about March 7, 2000, Nortel Corp. issued its 1999 Form 10-K Report. This SEC filing failed to fairly disclose the risks the Company faced. The 10-K mentioned "the impact of increased provision of customer financing by Nortel Networks" and the Company's "exposure to credit risk from customers," but it failed to disclose that customer financing had become increasingly risky. Many of these customers, often start-up operations, depended upon financing that could be obtained only if the stock market sustained its dramatic increases, particularly in the high technology and telecommunications sectors, in order to meet their obligations to Nortel Corp. and others. By the time this 10-K was issued, stock market instability had already endangered the financial stability of many of these customers. Stock market volatility and mounting uncertainties in the telecommunications industry threatened the ability of these customers to pay their bills.

- With respect to vendor financing, the 1999 10-K characterized an increase in selling, general and administrative expense ("SG&A"), as "modest" and "due to increased customer financing activities, which resulted in higher levels of customer specific provisioning consistent with the Corporation's accounting practice." The 1999 10-K misleadingly reassured readers that the Company "is focused on bringing SG&A expense, as a percentage of revenues, back down to the more traditional levels of 1997 and 1998." These statements, along with the others in the 1999 10-K, failed to disclose that sales to uncreditworthy customers and/or customer financing had become a major risk factor no later than March 2000 and that it was highly unlikely that expenses related to customer financing activities would actually decline.

- The notes to the consolidated financial statements in the 1999 10-K also failed to disclose material information with respect to the Company's exposure to credit risk from customers. The Company stated that a "large number of diverse customers . . . minimizes concentrations of credit risk" and that "Nortel Networks limits its financing credit risk by utilizing an internal credit committee that actively monitors the credit exposure of the Corporation." The notes minimized the risks the Company faced.

- The notes to the consolidated financial statements in the 1999 10-K stated that "Nortel Networks provides extended payment terms on certain software contracts, and may sell these receivables to third parties . . . [and reassured that] fees on these contracts are considered fixed or determinable based on Nortel Networks' standard business practice of using these types of contracts" and its history of successful collection "under the original payment terms without making concessions." The 10-K and notes thereto failed to disclose that these extended payment terms involved material risks of non-payment and, in addition, that the sale of receivables to third parties entailed additional risks, including risks arising from recourse on the part of third parties in the event of non-payment by customers.

- Specifically, and not by way of limitation, Nortel Corp.'s sales and customer financing practices led to the recording of sales in violation of Generally Accepted Accounting Principles ("GAAP") and Nortel Corp.'s own revenue recognition policies, when the Company, as seller, had no reasonable expectation of payment in view of the questionable financial and business condition of the customers. To the extent Nortel Corp.'s sales to vendor-financed customers included software, those sales also led to improper recognition of revenue, in violation of AICPA's Statement of Position 97-2 (Software Revenue Recognition), insofar as collectability was not probable and, due to the existence of extended payment terms, the fee was not fixed and determinable. In addition, Nortel Corp.'s customer financing practices created undisclosed material risks that defaults with respect to particular accounts receivable would exceed the amount of available reserves. Nortel knew or had reason to know of these improprieties.

- With respect to the first quarter of 2000, ending March 2000, Nortel Corp.'s Form 10-Q, filed May 15, 2000, discussed "extended payment terms on certain software contracts," but again emphasized "Nortel Network's history of successfully collecting under the original payment terms without making concessions." Similarly, the Company's first quarter Form 10-Q discussed an increase in customer financing, but again emphasized expectations that third parties would acquire the obligations. These statements failed to disclose the increasing risk with respect to non-payment, particularly as a result of the declining stock prices and/or financial condition, beginning not later than March-April 2000, of many high technology companies, including some of the customers to whom the Company had extended financing. For instance, at the January 20, 2000 Credit Committee meeting, the Committee unanimously approved the request of a potential customer, Cannect, for a $125 million (Canadian) term loan and a payment of $7.5 million (Canadian) in preferred Equity. Cannect proposed to build a facilities-based network in the major cities in Canada, although it had raised only $9.5 million (U.S.) and was operating only in Toronto and Vancouver. One Committee member rated the transaction at D-. Cannect was in default on its loan by the fourth quarter of 2000.

- In addition, the Company's first quarter 2000 10-Q failed to disclose that sales were slowing. By no later than this time, Nortel U.S., as well as all other Defendants, knew, should have known and/or had a duty to know that Nortel

Corp.'s sales projections, released to the public and to Plan participants, lacked a reasonable basis.

- With respect to the second quarter, ending June 2000, Nortel Corp.'s Form 10-Q again failed to disclose the Company's continuing risks arising from vendor financing extended to customers who lacked the resources to pay. In fact, by the time the second quarter Form 10-Q was filed, the solvency of several of Nortel's vendor-financed customers was seriously in question.

- In Nortel Corp.'s Form 10-Q with respect to the September 30, 2000 quarter, filed with the SEC on or about November 7, 2000, Nortel Corp. stated:

  > The timing of customers' orders, which may be impacted by factors such as customers' inventory levels and deployment schedules, may have an adverse effect on the business, results of operations and financial condition of Nortel Networks.

- Nortel Corp. concealed from the investing public, and Nortel U.S. concealed from the Plan and participants, serious problems of "product non-availability." In an e-mail of September 12, 2000, a Nortel employee complained that Nortel was about to incur penalties for finishing projects late, because Nortel components were not available or the "equipment [was] being prioritized based on immediate revenue opportunities." A reply e-mail blamed faulty forecasting. Likewise, on September 7, 2000, several Nortel employees discussed problems with delivery of Nortel Corp. product to Verizon, because of inaccurate forecasts.

- In addition, Nortel Corp.'s September 2000 Form 10-Q set forth some of the risks associated with its highly speculative customer financing, such as:

  > Should customers fail to meet their obligations, losses could be incurred and such losses may have a material adverse effect on the business, results of operations and financial condition of Nortel Networks. Nortel Networks has various programs in place to monitor and mitigate customer credit risk; however, there can be no assurance that such measures will reduce Nortel Networks' exposure to its customers' credit risk.

- However, Nortel Corp.'s September 2000 Form 10-Q still failed to disclose many material risks, including but not limited to, anticipated and actual defaults by customers to whom Nortel Corp. had extended credit, cancelled and/or reduced orders for new products due to deteriorating business, and returns of – or delayed payment for – products that Nortel Corp. already had shipped. For instance, Nortel's customer, Net-tel, failed to make a $1.1 million interest payment no August 31st and a $148,000 fee payment due after the end of September. Likewise, Pathnet did not pay a commitment fee of almost $300,000 due September 29. In addition, Nortel Corp. failed to disclose its improper recognition of revenue, including but not limited to, revenue recognized with respect to uncreditworthy, vendor-financed customers.

- On or about October 13, 2000, Defendant Frank Dunn, the CFO of Nortel Corp., told executives, in a nonpublic communication, that from that time on only standard loans to customers would be allowed (for example, loans backed by collateral or security, to customers with fully funded business plans). Dunn warned that customer loans in default were one of the reasons Lucent's stock was so low and Nortel's stock price was threatened. Defendant Dunn did not disclose this information to the Plan participants. Further, in comments to the press, Nortel Corp. Chief Executive Officer John Roth blamed a shortage of engineers for the weakness in revenue, which crimped Nortel Corp.'s efforts to ramp up its optical business. None of the Plan fiduciaries disclosed the additional information that would have been necessary to correct this misrepresentation, such as the fact that Nortel Corp. faced real and significant risks with respect to customer financing, as evidenced by the fact that by year-end Nortel had written off $73 million on Net-tel, which had gone into bankruptcy.

- On November 26, 2000, a Nortel Corp. employee, speaking about the bankruptcy of Insatel, a Company to which Nortel had supplied working capital, wrote in an internal memorandum:

  > We really do not want to be airing our dirty laundry to the public. . . Insatel is also very ugly from Nortel's prospective. The less people know the better!. . . We are working on several cases (workouts) like Insatel which certainly do not paint a pretty picture for Nortel (Nettel [sic], UB Networks, LOA). I really think the less people know, the better.

- On December 2, 2000, a senior financial officer of Nortel Corp. wrote to another executive about the struggle to meet targets in the 4th quarter of 2000. He wrote "the customer financing balance is the biggest risk."

- As Nortel Corp. struggled to meet sales goals for the December 2000 quarter, Nortel Corp. and Nortel U.S. deceived Plan participants by Nortel Corp.'s recognition of revenue even though shipments were not made to customers but instead to Nortel Corp.'s own warehouses or to warehouses under the control of Nortel Corp. By this method, which violated GAAP, Nortel Corp. recognized material amounts of revenue in the December 2000 quarter, despite the fact that the sales process was not yet complete, from "sales" to at least a dozen significant customers.

- In 2000, Nortel Corp. resorted to additional fraudulent means to boost reported revenue, including improperly recognizing revenue based on letters of intent instead of purchase orders; under-reserving for doubtful accounts receivable; and overvaluing returned or repossessed products, which had declined in value since the time of shipment. In addition, Nortel Corp. failed to take charges for overvalued assets, including with respect to goodwill associated with recent acquisitions of telecommunications companies.

61. On February 15, 2001, Nortel Corp. announced that first quarter 2001 results would be far worse than the Company had led the public--and Nortel U.S. and the other Defendants had led Plan participants-- to expect. As reported by Reuters on February 15, 2001:

> Nortel [Corp.] said it now expects first-quarter revenues of $6.3 billion and a loss of 4 cents a share on a diluted basis amid an expected 20 percent decline in the U.S. market, led by a slowdown in optical equipment sales.
>
> . . .
>
> Based on the new estimates, Nortel [Corp.] will report 2001 revenues of about $34.8 billion and earnings of about 81 cents a share. Analysts polled by First Call/Thomson Financial had previously forecast earnings of 96 cents a share on revenues of $39.1 billion. Brampton, Ontario-based Nortel [Corp.] also said it would now eliminate a total of 10,000 jobs to boost profitability, raising the number of cutbacks from 4,000 announced in early January. The Company said it has, in fact, trimmed 6,000 jobs since its January announcement. The staff reductions will help trim costs in line with the second quarter of 2000.
>
> "I was not expecting them to announce a loss in the first quarter," said Brian Piccioni, analyst at BMO Nesbitt Burns.
>
> "Given that they had reiterated on numerous occasions the first-quarter outlook, including a few weeks ago, I figured that must be in the bag. And certainly the reduction of 10,000 employees is a bit of a shock."

62. In response to the February 15, 2001 disclosure, the price of Nortel Corp. stock declined over $10.00 per share, or more than 34%. Even then, none of the Plan fiduciaries disclosed the true extent of the risks associated with existing or future investment in Company Stock, and none took any action to warn Plan participants or to limit or remove Company Stock

as a retirement investment, despite the fact that, as indicated below, grave undisclosed risks continued to exist with respect to investing in Company Stock:

- In the process of planning earnings targets for 2001, one Nortel Corp. executive who received unrealistic "targets" for Company performance, wrote "someone is on drugs . . .  There is no way we can even think about getting to these targets."

- By the end of January 2001, Nortel Corp. told its managers that its indicators of customer loyalty for 2000 were well below target and below 1999. The response to that e-mail was to warn the sender to be alert to the customer loyalty information "getting outside Nortel Networks."

- At the end of 2000, in confidential materials, Nortel Corp. listed six different local phone companies to which Nortel Corp. had committed almost $500 million in loans. Nortel Corp. had not been able to follow its customary practice of selling these receivables to third parties. Nortel Corp. also listed seven different non-performing loans on which customers owed a total of $149.7 million to Nortel Corp. By the end of 2000, Nortel Corp. had <u>increased</u> its loan or equity commitment to customers by $1.4 billion, despite what Nortel Corp. described as "capital market deterioration."

- In January 2001, Nortel Corp. instituted a Watch List and a Workout List, and hired a new head of Credit. The Watch List reflected customer finance accounts where the customer's financial position or liquidity was weak, threatening sizeable exposure to Nortel Corp. The Workout List was for customers "in dire straits, usually in bankruptcy, or on the way to it." These lists were designed to give the shipping and credit departments a warning to take extra precautions. The institution of these lists demonstrated the acute awareness at Nortel Corp. of the specific risks posed by customer financing in a declining economy. The initial Watch List contained twelve customers, representing a balance of about $700 million of credit in jeopardy; the Workout List contained six customers.

63. Only later, with the issuance of Nortel's Corp.'s Form 10-K for the year ending December 31, 2000, filed on or about March 13, 2001 (which was incorporated by reference in the SPD), was it disclosed that, as a result in part of "increased customer financing provisions," Nortel Corp.'s Service Provider and Carrier segment experienced higher selling, general and administrative expense in 2000 than it had in 1999. In addition, the 2000 Form 10-K disclosed

some of what Nortel Corp. had previously hidden or misrepresented with regard to customer financing. According to the Form 10-K:

> [S]pecific risks associated with customer financing, including the risks associated with new technologies, new network construction, market demand and competition, customer business plan viability and funding risks associated with 3G wireless operators, may require us to hold certain customer financing obligation over a longer term. As well, recently, certain competitive local exchange carriers have experienced financial difficulties. Should customers fail to meet their customer financing obligations to us, we could incur losses in excess of our provisions. In addition to acting selectively in providing customer financing, we have various programs in place to monitor and mitigate customer credit risk. However, there can be no assurance that such measures will reduce or eliminate our exposure to customers' credit risk. Any unexpected developments in our customer financing arrangements could have a material adverse effect on our business, results of operation and financial condition.

64. The 2000 Form 10-K continued to misrepresent and mislead Plaintiffs and Plan participants as to the precarious financial condition of Nortel Corp. For example, the generic warning about customers' potential failures to meet obligations did not disclose specific, undisclosed adverse conditions then existing. Similarly, the slide in reported revenues was not the result of any "unexpected developments in [its] customer financing arrangements," but instead the expected and easily anticipated result of Nortel's imprudent customer financing practices. These misstatements and omissions were not corrected in the SPD or in any other communication to Plan participants.

65. On or about March 28, 2001, Nortel Corp. abandoned the forecasts it had made in February 2001 and disclosed an even wider first-quarter loss and lower sales than it had publicly projected. Moreover, Nortel Corp. said in a statement that it could not "provide meaningful guidance" for 2001 profit or sales. Relative to that disclosure, on or about February 11, 2002,

Nortel Corp. announced that it had fired Chief Financial Officer Terry Hungle. Hungle had transferred $78,500 from the Nortel Stock Fund just prior to Nortel Corp.'s March 2001 announcement of a wider than expected quarterly loss. This transfer occurred during a "blackout period" when such trading in Nortel Corp. stock by senior officers was prohibited.

66. **Breach of the Duty to Disclose the Condition of Nortel Corp. During the Period April 1, 2001 through the Present.** Following the partial disclosures of early 2001, Nortel Corp. and its top corporate officers, including those who served on the Investment Committee, continued to engage in widespread accounting and financial improprieties, and Nortel U.S. and the other defendants continued to mislead Plan participants. The SPD that was provided to all Plan participants, as required by law, incorporated by reference misleading SEC filings by Nortel Corp. from 2000 to at least 2003. These SEC filings contained numerous misstatements and omissions, placing Nortel U.S. and all defendants in breach of their duties to inform Plan Participants concerning Nortel Corp.'s true financial health.

67. In November 2001, Nortel Corp.'s Board of Directors purged a number of the Company's most senior officers and elevated other long-time employees to top corporate positions. Defendant Dunn became CEO of the Company, replacing John Roth. (Dunn had previously served as Nortel Corp.'s CFO from March 2000 through November 2001.) Beginning in February 2002, Dunn served as both CFO and CEO. In July 2002, defendant Beatty was promoted from the Controller to the CFO position. In late 2002, defendant Gollogly was appointed Controller.

68. Beginning in late 2001, officers of Nortel Corp. began a radical restructuring. During this period, Nortel Corp. slashed 60,000 jobs among other measures. In a January 17,

2002 press release, CEO Dunn stated that these measures would ensure a "return to profitability" in the fourth quarter of 2002. Dunn later pushed back the date by which he expected "profitability" to return, stating in press releases during 2002 that Nortel would become profitable by June 2003.

69. At the same time that Dunn and other Nortel Corp. officers were promising to return the Company to a profitable state, they were lobbying Nortel Corp.'s Board of Directors for a financial bonus structure that would enrich them. In July 2002, Nortel Corp.'s Board of Directors amended Nortel Corp.'s bonus plan to allow for discretionary cash bonuses for senior Nortel Corp. executives if certain financial goals were reached by the end of 2003. This created fresh incentives for Nortel Corp.'s executives to cook the books.

70. Nortel Corp.'s senior management engaged in a classic form of accounting fraud: creating "cookie jar" reserves they could rob to bolster reported income in later periods when the Company was failing short of investor expectations. Nortel Corp. used these reserves to artificially inflate its revenues during 2003 to make it look as though the Company had returned to profitability. In 2002 alone, Nortel Corp. booked $1.6 billion in reserves (in addition to the $3.5 billion in reserves that the Company was already carrying on its balance sheets since 2001). Upon information and belief, at least $370 million of these "cookie jar" reserves were reversed into income in 2003 for the sole purpose of inflating Nortel Corp.'s earnings. Only as a result of these financial machinations was the Company able to report a profit in the first quarter of fiscal 2003.

71. On April 24, 2003, Nortel Corp. surprised the investing public by announcing that it had become profitable ahead of its prior guidance and ahead of investors' expectations. On that date, the Company reported revenues of $2.4 billion for the first quarter of 2003.

72. On May 9, 2003, Nortel Corp. filed its Form 10-Q with the SEC for the first quarter ending March 31, 2003, which was signed by defendants Beatty and Gollogly. This 10-Q confirmed and reiterated the consolidated financial results Nortel Corp. reported on April 24, 2003. Beatty and Gollogly attested that the Company's financial statements were prepared in accordance with GAAP.

73. Thereafter, Nortel Corp. continued to issue press releases and to make SEC filings that materially misrepresented the Company's results.

74. Suddenly, on October 23, 2003, Nortel Corp. announced that it would restate its consolidated financial statements for the years ended December 31, 2000, 2001 and 2002, and the fiscal quarters ended March 31, 2003 and June 30, 2003, as a result of a "comprehensive asset and liability review and other related reviews," which "are still ongoing." Nortel Corp. stated that preliminary findings indicated that approximately $952 million in liabilities (including accruals and provisions) carried on its previously reported balance sheet as of June 30, 2003 needed to be released to income in prior periods. In certain cases, costs had been incorrectly charged to operations rather than to the appropriate provisions. Nortel Corp. also announced that it would initiate an "independent review to examine the facts and circumstances leading to the need to restate" and to consider appropriate improvements to its processes and procedures.

75. In the October 23, 2003 press release, commenting on the comprehensive review and the planned restatements of the Nortel Corp.'s financial results, Nortel Corp.'s then CFO,

defendant Beatty, stated that, "the comprehensive review has been undertaken across all of our businesses and geographic regions. We remain committed to completing this work so that our restated results can be finalized at the earliest possible time." In the press release, Nortel Corp.'s then CEO, defendant Dunn stated: "The challenges that faced Nortel Networks and our industry over the past few years were unprecedented. It is clear now that in such a volatile environment, errors were made. I want to assure Nortel Networks stakeholders that we are committed to working to identify the causes of the mistakes and to implement the appropriate measures to ensure that the problems do not recur in the future."

76. On November 13, 2003, Nortel Corp. announced that it planned to file its Form 10-Q for the third quarter of 2003 with the SEC by November 19, 2003, five days later than originally planned.

76. On November 19, 2003, Nortel Corp. filed its Form 10-Q for the quarterly period ended September 30, 2003, in which it stated that, as part of the Audit Committee's independent review to examine the facts and circumstances leading to the need to restate its financials, it had retained the law firm Wilmer, Cutler & Pickering, which would report to the Audit Committee.

77. On December 23, 2003, Nortel Corp. issued a press release announcing that it had filed with the SEC an amended Annual Report on Form 10-K/A for the year ended December 31, 2002, an amended Quarterly Report on Form 10-Q/A for the period ended March 31, 2003, and an amended Quarterly Report on Form 10-Q/A for the period ended June 30, 2003, including "certain restated financial results" for certain previously reported periods.

78. On January 29, 2004, the Company reported its unaudited results for the fourth quarter of 2003 and for the full-year 2003:

> **Fourth Quarter 2003 Results**
>
> Revenues were US $2.83 billion for the fourth quarter of 2003 compared to US $2.53 billion for the fourth quarter of 2002 and US $2.27 billion for the third quarter of 2003. *Nortel Networks reported net earnings in the fourth quarter of 2003 of US $499 million, or US $0.11 per common share on a diluted basis,* compared to a net loss of US $168 million, or US $0.04 per common share, in the fourth quarter of 2002 and net earnings of US $185 million, or US $0.04 per common share on a diluted basis, in the third quarter of 2003.
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> * * *
>
> Commenting on Nortel Networks financial performance, Frank Dunn, president and chief executive officer, Nortel Networks, said: "With the challenges that we faced in 2003, *the Company had a tremendous year, truly marking a turning point for Nortel Networks.* I am extremely proud of the dedication, passion and commitment of the entire employee team that delivered the performance not only in the fourth quarter, but throughout the year.
>
> **Year 2003 Results**
>
> For the year 2003, revenues were US $9.81 billion compared to US $10.57 billion for the year 2002. *Nortel Networks reported net earnings of US $732 million or US $0.17 per common share on a diluted basis for the year 2003,* compared to a net loss of US $3.27 billion, or US $0.85 per common share, for the year 2002.

79. Defendants' statements concerning Nortel Corp.'s financial performance in 2003, referenced above, were inaccurate and misleading. Nortel Corp.'s reported earnings, net income, gross margins, and operating margins were materially overstated and inflated, because they were not prepared in accordance with GAAP.

80. On January 29, 2004, defendants Dunn and Beatty hosted a conference call with analysts. During the call, Dunn and Beatty touted Nortel Corp.'s fourth quarter results and Nortel Corp.'s "first" showing of a "profit on a full year basis" in six years. Dunn stated that "Nortel [Corp.] has had a tremendous fourth quarter" and an "extremely strong full year," and

Beatty stated that "we have made sequential progress in strengthening our financial position," and that the Company had "exceeded expectations" with respect to reporting high gross margins in its last two quarters. During the conference call, analysts congratulated the Company on its reported strong financials and return to profitability. The statements by defendants to analysts in the conference call were not true.

81. On March 10, 2004, the Company suddenly announced that it would "need to delay" the filing of the 2003 Form 10-K. The Company further stated that, as it had previously announced, its "Audit Committee is undertaking an independent review of the circumstances leading to the restatement of Nortel Networks [Corp.] financial statements which was announced in October 2003." Nortel Corp. said that, in addition, it believed it would have to restate 2003 results and results for one or more earlier periods.

82. In addition, the March 10, 2004 press release warned that the delay in filing the 2003 Form 10-K would have "potential impacts" on Nortel Corp. because it could lead Nortel Corp. and subsidiaries to fall out of compliance with debt covenants covering the Company's approximately $4 billion in debt. The potential adverse impacts included the possibility that the lenders could give notice and subsequently accelerate Nortel Corp.'s loans.

83. On March 15, 2004, Nortel Corp. announced that, "effective immediately," Nortel Corp. was placing defendant Beatty (then CFO and member of the Investment Committee), and defendant Gollogly (then Controller) on "paid leave of absence pending the completion of the independent review being undertaken by the Nortel Networks Audit Committee." Nortel Corp. did not then disclose the reasons for these actions.

84. An article in *The New York Times* published on March 16, 2004, quoted several Wall Street analysts who commented that Nortel Corp.'s decision to put Beatty and Gollogly on leave "raised serious red flags, and suggested that the reasons for the delay in the audit might be more troubling than investors were led to believe." The article quoted Paul Sagawa, an analyst with Sanford C. Bernstein, who described the decision as "not standard practice," and who expressed concern that the suspensions raised several other more troubling possibilities: that the suspended executives were themselves involved in some problematic accounting, that they had obstructed the auditing effort, or that they were too inexperienced to do the job in a timely manner. Sagawa was further quoted as saying that the fact the Company put the executives on leave, "suggests the scope of what went wrong was pretty large." The article also quoted Gina Sockolow, an analyst with Buckingham Research, as stating that she believed that the accounting problems might stretch back to the Internet bubble period. She added that Nortel Corp., like other companies, gave no-interest loans to its customers, and that the Company might not have properly accounted for that practice. She added that if that were so, the problem could be traced back to then-Nortel CEO Dunn, who was also CFO in 2001, and warned that the troubles could force out Dunn.

85. Reuters reported on March 16, 2004, in *The Los Angeles Times*, that: "Initially viewed by many as a housekeeping exercise, analysts are now wondering whether the review has uncovered deeper and more worrying issues with Nortel's accounting." The article quoted J.P. Morgan analyst Ehud Gelblum, who stated: "We believe today's announcement [suspending the two executives] is an indication that accounting problems could be more serious than we had

thought." Gelblum downgraded Nortel Corp. to "neutral" from "overweight," citing uncertainty in the stock.

86. On April 5, 2004, Nortel Corp. announced that the SEC had "issued a formal order of investigation" into the Company's accounting problems. Previously, Nortel Corp. had stated that the SEC made informal "inquiries."

87. Also on April 6, 2004, *The New York Times*, reported that announcement of the formal SEC inquiry compounded "recent uncertainty over the Company," causing Nortel Corp.'s shares to fall sharply in heavy trading on the Toronto and New York exchanges. As the article explained: "When SEC commissioners upgrade an inquiry into a formal investigation, the commission then has the power to subpoena documents and request that witnesses testify under oath." The article quoted Nortel Corp. spokeswoman, Christina Warren, as stating that Nortel Corp. would not provide details of the SEC's concerns "at this time," while admitting that Nortel Corp. had been in contact with the SEC since October 2003 and was cooperating fully with the SEC. While stating that Nortel Corp. is "committed to filing our financial statements with the SEC as soon as possible," Ms. Warren declined to be more specific on the timing.

88. On April 28, 2004, Nortel Corp. announced that it "will need to restate the financial results reported in each of its quarterly periods of 2003 and for earlier periods including 2002 and 2001," which would reduce by about 50% previously announced net earnings for 2003. The restatements would also report a net loss for the first half of 2003, compared to the previously announced net earnings for that period. Before the market opened on that date, Nortel Corp. stated in a press release:

> As previously announced, the Nortel Networks Audit Committee has been undertaking an independent review of the circumstances leading to the

restatement of Nortel Networks financial statements for 2000, 2001 and 2002 and the first and second quarters of 2003. As noted below, the independent review is ongoing. In that connection, the boards of directors of Nortel Networks Corporation and Nortel Networks Limited, the Company's principal operating subsidiary ("NNL"), today announced the following senior management changes, effective immediately:

William Owens has been appointed president and chief executive officer of the Company and NNL. *Owens replaces Frank Dunn who has been terminated for cause.*

* * *

> The appointments of William Kerr as chief financial officer and MaryAnne Pahapill as controller have been made permanent. These appointments had been made on an interim basis on March 15, 2004. Kerr, a chartered accountant, originally joined Nortel Networks in 1994 as controller. Before leaving Nortel Networks in 2001, he held a number of senior positions in the Company's Finance organization including senior vice-president, finance and treasurer and senior vice-president, corporate business development. Since joining Nortel Networks in 1999, Pahapill, a chartered accountant, has held a number of positions in the Company's Finance organization including assistant controller and, most recently, assistant treasurer.
>
> *Former chief financial officer, Douglas Beatty, and former controller, Michael Gollogly, both of whom had been placed on paid leave of absence by Nortel Networks on March 15, 2004, have been terminated for cause.*

In addition, the boards of directors of the Company and NNL announced that four individuals who were senior line of business finance executives of Nortel Networks during the periods under review have been placed on paid leave of absence pending further progress of the independent review.

"The Board of Directors believes that the actions announced today are about accountability for our financial reporting and are in the best interests of the Company and all of its stakeholders, including our investors, customers and employees," said Lynton (Red) Wilson, chairman of the board, Nortel Networks. "These actions are an important step in the process of restoring confidence in the Company's leadership and financial reporting."

89. On May 14, 2004, Nortel Corp. announced that it had received a Federal Grand Jury Subpoena for the production of certain documents, including financial statements and corporate, personnel and accounting records prepared during the period January 1, 2000 to date. Nortel Corp. had been advised that the materials sought were pertinent to an ongoing criminal investigation being conducted by the U.S. Attorneys' Office for the Northern District of Texas, Dallas Division.

90. After the markets closed on May 17th, Canadian regulators barred senior executives at Nortel Corp. from trading in Company Stock. The move came just days after U.S. prosecutors had opened a criminal probe and Canadian securities regulators had ordered 161 former and current Nortel Corp. officers and directors to refrain from trading any Company Stock for 15 days because Nortel Corp. had not filed required statements. A hearing on whether to make the order permanent was set for May 31. Former CEO and member of the Investment Committee defendant Dunn, former CFO and member of the Investment Committee defendant Beatty, and former Controller defendant Gollogly were included in the cease-trade order. A permanent cease trade order was to remain in place until two business days after the regulators received all filings required to conform with Ontario securities laws. Nortel Corp. was in default of rules because it had filed financial statements with "significant" deficiencies.

91. On July 13, 2004, Nortel Corp. announced that the restatement of 2003 results would impact the Company's continuing operations, resulting in the elimination of substantially all of its earnings from continuing operations for 2003.

92. In mid-August, 2004, Nortel Corp. revealed that the Integrated Market Enforcement Team of the Royal Canadian Mounted Police had elevated their informal review to

a full-blown criminal investigation. In late August, the Company disclosed that it had terminated seven senior executives for cause. Nortel Corp. announced that it would seek to recoup $10M in bonus payments from these individuals.

93. In January 2005, Nortel Corp. issued a long-delayed annual report for 2003. The 2003 Annual Report reflected the restatement of the financial statements for the years ending 2001 and 2002 and the revision of previously announced results for 2003. It also reported that a dozen senior executives would repay $8.6 million in bonuses and five board members would resign.

94. On June 1, 2005, Nortel Corp. posted a first quarter 2005 loss of U.S. $49 million, including U.S. $21 million in restructuring charges. The Company stated that the quarterly report marked a "turning point", because it had caught up with financial reporting requirements after restating financial results dating back to 2001.

95. Nortel Corp.'s problems are far from over. Just last week, Nortel Corp.'s President Gary Daichendt and its Chief Technology Officer, Gary Kunis, abruptly resigned after short tenures with Nortel Corp.

96. **Breach of Duty to Disclose Risks of Company Stock.** Quite aside from its breaches of the duty to inform described above, Nortel U.S. breached its duties to participants by consistently failing to disclose the nature and magnitude of the risk of a single stock as a retirement investment. As Plan Administrator, Nortel U.S. was well aware that the concentration of Plan assets in Company Stock was significantly higher than was prudent, that undiversified single stock assets are extraordinarily volatile, and that the danger of such lack of diversification increases when both employment income and retirement savings are dependent upon the same

entity. Nortel U.S. breached its fiduciary duties to Plan participants by failing to inform them that this lack of diversification exposed them to an unreasonable risk of loss and by failing to take steps to ameliorate the over-concentration.

97. Instead, Nortel U.S. did exactly the opposite, reassuring participants with bland statements as to the risks of Company Stock. For example in the Guide, attached as Ex. 6, Nortel U.S. stated: "The chart below shows how the Nortel Networks investment plan funds compare—from lower volatility risk and return potential to higher volatility risk and return potential. Investors willing to accept short-term volatility have historically been rewarded with greater long-term rewards." These statements, generally true for diversified investments, are not true of the single stock investment in Company Stock offered to participants. The chart referred to portrays the Nortel Stock Fund as being only slightly more volatile than the "Baron Asset Fund," which is only slightly more volatile than the "MAS Small Cap Value Fund," and so on. Such a characterization is false. Company Stock was not a "fund" in the sense that the other Investment Options were. It, unlike them, was subject to industry specific, Company specific, and employer specific risk. This communication also inaccurately states that for a single stock investment "holding investments for the long term helps to reduce this risk." Additionally, while the risk potential is certainly higher for a single stock fund, the return potential is not, though the chart places the Nortel Stock Fund in the position of highest potential return of all the available investments. In short, Nortel U.S. did nothing to discharge its obligation to inform the participants of the true risk and reward characteristics of Company Stock, even though those characteristics are well known to professional fiduciaries.

98. In addition to failing to disclose complete and accurate information in the SPD, the Guide, or any other source, Nortel U.S. made available additional information concerning Company Stock to its employees through an employee-only web site, which trumpeted the performance of Company Stock and offered glowing reports of Nortel Corp.'s prospects. These internal communications utterly failed to disclose the true condition of Nortel Corp. and the true risks of Company Stock as a retirement investment.

99. **Breach of Duty of Prudence in Offering Company Stock.** Quite aside from these communications about Company Stock generally and Nortel Corp. specifically, the true condition of Nortel Corp., as detailed above, made it an unsuitable and imprudent investment offering for a retirement plan at least by the beginning of the Class Period.

100. **Breach of Duty of Prudence Concerning Concentration.** In addition, the high concentration of the Plan in highly risky Company Stock required Nortel U.S. to take appropriate fiduciary steps to deal with that problem. Holding employer securities in excess of 10% of plan assets is permitted in an individual account plan such as the Plan without an automatic violation of the duty to diversify under ERISA § 404. However, a high concentration, to say nothing of the significant concentration presented here, which presents a grave risk to the Plan and its participants, implicates the fiduciaries' duty of prudence. Nortel U.S.'s failure to take any steps either to fairly inform participants or to correct such over-concentration violates not only its duty to operate the Plan solely in the interest of the participants and beneficiaries, but also violates the express purpose of the Plan. The Plan document establishes that this is not a Plan created for the purpose of investing in employer stock or one created to establish an equity ownership by the employees, but is a Plan solely created to enable employees to "accumulate personal savings so

that they may enjoy a higher standard of living at retirement." Nortel U.S.'s failures violate both duties imposed by the law and duties imposed by Plan documents.

101. Instead of discharging those duties, Nortel took steps to increase the concentration of the Plan in Company Stock by restructuring the Plan in May 2000 to encourage employees to give up significant employment benefits in return for a larger Company Contribution. Knowing that a great many participants were already vastly over-concentrated in Company Stock, Nortel U.S., as a fiduciary, was obliged to take steps to ensure that any such restructuring did not have the consequence of exacerbating the pre-existing excessive concentration. It took no such steps and, in fact, the number of Company Stock shares in the Plan increased markedly – a fact of which Nortel U.S. was well aware.

102. **Breach of Duty of Loyalty.** Although ERISA permits the plan sponsor to serve as a fiduciary, the sponsor must still, when acting as a fiduciary, act solely in the interests of participants. Here, at least by the beginning of the Class Period, Nortel U.S.'s corporate interest in maintaining a high level of investment in Company Stock was not compatible with its fiduciary duty to address the issues raised by the financial condition of Nortel Corp., to provide adequate communications concerning that condition and Company Stock generally, and to resolve the over-concentration of Company Stock in the Plan. Instead of engaging an independent fiduciary, or obtaining independent advice concerning Company Stock, Nortel U.S. did nothing, and thereby breached its duty to avoid and resolve conflicts of interest.

103. In view of all this, Nortel U.S. breached its fiduciary duty to the Plan and its participants/beneficiaries in several inter-related ways: (a) offering and continuing to offer Company Stock as a retirement investment, when Nortel U.S. knew or had reason to know that

that Company Stock was not a prudent investment; (b) failing to remove Company Stock as a Plan Investment Option when Nortel U.S. knew or had reason to know that that Company Stock was not a prudent investment; (c) failing to limit the Plan's over-concentration in Company Stock, and individual participants' concentration in Company Stock, when Nortel U.S. knew or had reason to know that that Company Stock was not a prudent investment; (d) failing to properly exercise its discretionary authority to appoint, monitor the performance of, and timely remove (if and when appropriate) other Plan fiduciaries; (e) failing to provide complete and accurate information to other Plan fiduciaries, including the Director Defendants and the Doe Defendants concerning investment in Company Stock; (f) failing to provide complete and accurate communications to Plan participants that disclosed material facts concerning investment in Company Stock; (g) failing to make fiduciary decisions for the exclusive benefit of the Plan and its participants and beneficiaries; and (h) failing to engage an independent fiduciary in situations presenting potential conflicts of interest.

104. Nortel U.S. is liable as a co-fiduciary of the other defendants because it participated in their acts or omissions knowing such acts or omissions were breaches of fiduciary duty; because its failure to comply with ERISA § 404(a)(1) enabled the other defendants to commit a breach; and because it had knowledge of breaches by the other defendants and failed to make reasonable efforts under the circumstances to remedy said breaches.

## VIII. The Investment Committee and Doe Committee Defendants Breached Their Fiduciary Duties

105. **Fiduciary Status.** During the Class Period, the Investment Committee exercised discretionary authority and control over the administration of the Plan and authority and control over Plan assets, and thereby acted as a fiduciary of the Plan. Among its responsibilities relative

to Plan assets, the Investment Committee was charged with the selection, approval and review of investment classes for the Plan and reviewed the performance of investments and reviewed investment documents and disclosure materials. It is not clear whether there was another committee or entity that also exercised discretionary authority and control over the administration of the Plan and/or exercised authority or control over Plan assets and thereby acted as a fiduciary of the Plan. The identity of the Doe Committee Members is not publicly available information, may have changed during the Class period, and will have to be obtained through discovery.

106. **Scope of Fiduciary Responsibility.** While it is impossible to determine solely from the publicly available documents the manner in which the Doe Committee (if any) operated the Plan Document allowed for the delegation of broad authority to an administrative committee.

107. The Plan Investment Policy adopted by the Plan fiduciaries grants the Investment Committee broad fiduciary responsibility for approval and review of all Plan investments, including the Nortel Stock Fund. Thus, the members of the Investment Committee were well aware, or certainly should have been aware, of the Plan's over-concentration in Nortel Corp. stock and the danger this over-concentration posed to the health of the Plan. Moreover, as alleged herein, named members of the Investment Committee held executive level positions with Nortel Corp. Through those positions and/or working relationships, members were aware of the adverse non-public information relating to Nortel Corp.'s finances, markets and present and future business prospects that jeopardized the value of the Plan. This information was obtained from internal corporate documents, conversations and connections with other corporate officers

and employees, attendance at Board of Directors' meetings and committees thereof and via reports and other information provided in connection therewith.

108. **Fiduciary Breach.** Given the apparently plenary scope of the Investment Committee's (and Doe Committee's, if any) powers to approve, disapprove and remove investments options, the Investment Committee and Doe Committee Defendants breached their fiduciary duties to the Plan and its participants/beneficiaries in the same ways and to the same extent as did Nortel U.S., with the exception that the Investment Committee and Doe Defendants as appointed fiduciaries, did not breach the monitoring duties applicable to those who appointed them and had the power to remove them. Thus, the Investment Committee and Doe Committee Defendants breached their duties in several inter-related ways: (a) offering and continuing to offer Company Stock as a retirement investment, when they knew or had reason to know that that Company Stock was not a prudent investment; (b) failing to remove Company Stock as a Plan Investment Option when they knew or had reason to know that that Company Stock was not a prudent investment; (c) failing to limit the Plan's over-concentration in Company Stock, and individual participants' concentration in Company Stock, when they knew or had reason to know that that Company Stock was not a prudent investment; (d) failing to provide complete and accurate information to other Plan fiduciaries, including the Nortel entities and the Director Defendants, concerning investment in Company Stock; (e) failing to provide complete and accurate communications to Plan participants that disclosed material facts concerning investment in Company Stock; (f) failing to make fiduciary decisions for the exclusive benefit of the Plan and its participants and beneficiaries; and (g) failing to engage an independent fiduciary in situations presenting potential conflicts of interest. Like Nortel U.S. itself, the Investment and

Doe Committee Defendants were well aware of their responsibilities to provide accurate information to Plan Participants concerning Nortel Corp. stock, of which the Plan held tens of millions of shares; were well aware that Plan Participants are concerned about Company Stock and desire information regarding it; and were well aware that for fiduciaries, the most fundamental disclosure is of the health of the primary determinant of plan value, here, Nortel Corp. stock.

109. The Investment and Doe Committee Defendants are liable as co-fiduciaries of the other Defendants because they participated in the acts or omissions of the other Defendants knowing such acts or omissions were breaches of fiduciary duty; because their failure to comply with ERISA § 404(a)(1) enabled the other Defendants to commit a breach; and because they had knowledge of breaches by the other Defendants and failed to make reasonable efforts under the circumstances to remedy said breaches.

## IX. THE NORTEL U.S. DIRECTOR DEFENDANTS BREACHED THEIR FIDUCIARY DUTIES

110. **Fiduciary Status.** During the Class Period, the Nortel U.S. Director Defendants exercised authority and/or control over management of the Plan's assets and exercised discretionary authority, control and/or responsibility for the administration of the Plan, thereby making them ERISA fiduciaries pursuant to ERISA § 3(21)(A)(i), 29 U.S.C. § 1102(21)(A)(i).

111. **Scope of Fiduciary Responsibility.** The Nortel U.S. Director Defendants had the power to appoint and to remove individual members of the EBC, a Plan fiduciary Committee. Plan Document § 11.4(a)(2). The Nortel U.S. Board also exercised authority to select, monitor, retain and/or remove other Plan fiduciaries, including the Trustee. This authority made the Nortel U.S. Board itself a fiduciary, and necessarily, also elevated the members of the Nortel U.S.

Board to fiduciary status. The Nortel U.S. Director Defendants also may have had additional fiduciary powers or undertaken fiduciary actions relative to the Investment and Doe Committees. The identity of the Nortel U.S. Directors is not publicly available information, may have changed during the Class Period, and will have to be obtained through discovery. Likewise, discovery is necessary to clarify the relationship between the Director Defendants and the Investment Committee.

112. As alleged herein, named members of the Nortel U.S. Board of Directors and perhaps yet to be named ones, held executive level positions with Nortel Corp. Through those positions and/or working relationships with those holding such positions, Nortel U.S. Directors were or should have been aware of the Plan's extensive holdings in Nortel Corp. stock and the risk associated with a non-diversified investment, as well as the adverse non-public information relating to Nortel Corp.'s finances, markets and present and future business prospects that jeopardized the value of the Plan. This information was obtained from internal corporate documents, conversations and connections with other corporate officers and employees, attendance at Board of Directors' meetings and committees thereof and via reports and other information provided in connection therewith.

113. **Fiduciary Breach.** Given their authority to appoint fiduciary committees and Doe Committee members, their relationship to the Investment and Doe Committees, and their governing authority over Nortel U.S., the Nortel U.S. Director Defendants breached their fiduciary duties to the Plan and its participants/beneficiaries in the same ways and to the same extent as did Nortel U.S., that is by: (a) offering and continuing to offer Company Stock as a retirement investment, when they knew or had reason to know that that Company Stock was not

a prudent investment; (b) failing to remove Company Stock as a Plan Investment Option when they knew or had reason to know that that Company Stock was not a prudent investment; (c) failing to limit the Plan's over-concentration in Company Stock, and individual participants' concentration in Company Stock, when they knew or had reason to know that that Company Stock was not a prudent investment; (d) failing to properly exercise its discretionary authority to appoint, monitor the performance of, and timely remove (if and when appropriate) other Plan fiduciaries; (e) failing to provide complete and accurate information to other Plan fiduciaries concerning investment in Company Stock; (f) failing to provide complete and accurate communications to Plan participants that disclosed material facts concerning investment in Company Stock; (g) failing to make fiduciary decisions for the exclusive benefit of the Plan and its participants and beneficiaries; and (h) failing to engage an independent fiduciary in situations presenting potential conflicts of interest.

114. The Director Defendants are liable as co-fiduciaries of the other Defendants because they participated in the acts or omissions of the other Defendants knowing such acts or omissions were breaches of fiduciary duty; because their failure to comply with ERISA § 404(a)(1) enabled the other Defendants to commit a breach; and because they had knowledge of breaches by the other Defendants and failed to make reasonable efforts under the circumstances to remedy said breaches.

## X. THE NORTEL CORP. AND NORTEL LTD. BOARDS OF DIRECTORS BREACHED THEIR FIDUCIARY DUTIES

115. At all relevant times, the Nortel Corp. and Nortel Ltd. Director Defendants were fiduciaries within the meaning of ERISA § 3(21)(A)(1), 29 U.S.C. § 1002(21)(A)(I) and were bound by the fiduciary duties of loyalty, exclusive purpose and prudence.

116. At all relevant times, Nortel Corp. and Nortel Ltd. Director Defendants had the fiduciary responsibility to appoint, remove and thus monitor the performance of the Investment and Doe Committees.

117. Under ERISA, a monitoring fiduciary must ensure that the monitored fiduciaries are performing their fiduciary obligations, including those with respect to the investment and holding of plan assets, and must take prompt and effective action to protect the plan and participants when they are not.

118. The monitoring duty further requires that the appointing fiduciaries have procedures in place so that on an ongoing basis they may review and evaluate whether investment fiduciaries are doing an adequate job. In the absence of a sensible process for monitoring their appointees, the appointing fiduciaries would have no basis for prudently concluding that their appointees were faithfully and effectively performing their obligations to plan participants or for deciding when to retain or remove them.

119. Furthermore, the monitoring fiduciaries must provide the monitored fiduciaries with complete and accurate information in their possession that they know or reasonably should know that the monitored fiduciaries must have in order to prudently manage the plan and the plan's assets.

120. The monitoring defendants breached their fiduciary duties by, among other things (a) failing to monitor their appointees, to evaluate their performance, or to have any system in place for doing so; (b) failing to ensure that the monitored fiduciaries appreciated the true extent of Nortel Corp.'s highly misleading financial reporting practices; (c) failing to remove any appointee whose performance was inadequate; and (d) failing to remove any appointee whose other positions or duties created an unresolved conflict of interest.

121. The Nortel Corp. and Nortel Ltd. Director Defendants' failure properly to monitor other Plan fiduciaries caused the Plan to suffer significant losses. The impact was felt Plan-wide, and impacted all Plan participants the same in that none of the participants received crucial, material, information regarding the prudence of Nortel Corp. stock as a Plan investment option.

122. Pursuant to ERISA §§ 409 and 402(a)(2) and (a)(3), 29 U.S.C. §§ 1109(a) and 1132(a)(2) and (a)(3), the Nortel Corp. and Nortel Ltd. Director Defendants are liable to restore the losses to the Plan caused by their breaches of fiduciary duties.

## XI. NORTEL CORP. AND NORTEL LTD. BREACHED THEIR FIDUCIARY DUTIES

123. **Fiduciary Status.** During the Class Period, Nortel Corp. and Nortel Ltd. exercised discretionary authority or discretionary control respecting management of the Plan and/or authority or control over management or disposition of its assets, thereby making it an ERISA fiduciary pursuant to ERISA § 3(21)(a)(1), 29 U.S.C. § 1102(21)(A)(i). Nortel Corp.'s and Nortel Ltd. fiduciary status are evident for at least three reasons.

124. First, Nortel Corp. is and was at all material times the sole owner of Nortel U.S. Nortel Corp. exercised complete control of Nortel U.S., electing each member of the Nortel U.S. Board of Directors and authorizing or appointing its directors and/or officers to serve on the

Investment Committee. In its relationship with the employees of Nortel U.S., Nortel Corp. acted entirely as though those employees were simply the U.S. employees of Nortel Corp. Indeed, in this very case, the Senior Benefits Counsel of Nortel U.S. has stated that Nortel U.S. employees are merely the "U.S. resident employees" of Nortel Corp. Likewise, Nortel Corp. officers, such as CEO John Roth, communicated with Nortel U.S. employees about the Company's business without any distinction between Nortel Corp. and Nortel U.S. Thus, Nortel Corp., by virtue of its control of Nortel U.S., also controlled Nortel U.S.'s fiduciary functions concerning the Plan, and especially the fiduciary functions concerning the Plan's holding of Company Stock.

125. Second, Nortel Corp. caused its stock to be offered through the Plan as a "qualifying employer security" under ERISA § 407(d)(1) & (7), 29 U.S.C. § 1107(d)(1) & (7). This allows the Plan to offer and hold Company Stock that would otherwise be prohibited as a Plan investment under ERISA § 407(a), 29 U.S.C. § 1107(a). Nortel Corp. accomplished these ends, in part, through its wholly-owned subsidiary, Nortel U.S. Nortel U.S. could not have accomplished this on its own, because it is a privately-held corporation and has no publicly-held stock of its own. Nortel Corp. benefited from the ERISA exception allowing it to offer Company stock to "its" United States-resident employees as a retirement investment. With respect to matters bearing on the offering of Nortel Corp. stock in the Plan, Nortel Corp. was the ultimate decisionmaker. Nortel Corp.'s corporate goals were served by insuring that a large block of stock was in friendly hands and Nortel Corp. enjoyed, through its subsidiary Nortel U.S., the various tax and other advantages that flow to companies that use Company stock in their ERISA plans. Having invoked coverage under ERISA, Nortel Corp. is subject to the constraints of that law, and is accountable under ERISA for its breaches thereunder and for the breaches of

fiduciary duty to the Plan and its participants and beneficiaries by its instrument, Nortel U.S.

126. Third, Nortel Corp. prepared, reviewed, signed and/or caused to be filed SEC disclosures (including, but not limited to, prospectuses and Forms S-8, 10-Q and 10-K), which Nortel Corp. knew or had reason to know would be incorporated by reference into the SPD of the Plan with the intent that they be transmitted to Plan participants. Nortel Corp. officers, such as CEO John Roth, communicated directly with Nortel U.S. employees about the Company's business and prospects. Nortel Corp. also made available additional information concerning Company Stock to its employees through the employee-only web site which trumpeted the performance of Company Stock and offered glowing reports of Nortel U.S.'s and Nortel Corp.'s prospects. By interjecting itself into Plan communications in these ways, Nortel Corp. assumed fiduciary status.

127. **Scope of Fiduciary Responsibility.** Nortel Corp.'s area of fiduciary responsibility was co-extensive with that of Nortel U.S., by virtue of its ownership and control of Nortel U.S.; therefore, all the allegations herein as to Nortel U.S. are also made as to Nortel Corp. In addition, with respect to Company Stock, Nortel Corp. exercised fiduciary responsibility for determining the prudence of its own stock as a retirement investment for its U.S. employees and regarding communicating information to them about its financial condition.

128. **Fiduciary Breach.** Given its effectively complete control over Nortel U.S., Nortel Corp. breached its fiduciary duty to the Plan and its participants/beneficiaries in the same ways and to the same extent as did Nortel U.S., that is by: (a) offering and continuing to offer Company Stock as a retirement investment, when it knew or had reason to know that that Company Stock was not a prudent investment; (b) failing to remove Company Stock as a Plan

Investment Option when it knew or had reason to know that Company Stock was not a prudent investment; (c) failing to limit the Plan's over-concentration in Company Stock, and individual participants' concentration in Company Stock, when it knew or had reason to know that that Company Stock was not a prudent investment; (d) failing to properly exercise its discretionary authority to appoint, monitor the performance of, and timely remove (if and when appropriate) other Plan fiduciaries; (e) failing to provide complete and accurate information to other Plan fiduciaries, including Nortel U.S., the Director Defendants, and the Doe Committee Defendants concerning investment in Company Stock; (f) failing to provide complete and accurate communications to Plan participants that disclosed material facts concerning investment in Company Stock; (g) failing to make fiduciary decisions for the exclusive benefit of the Plan and its participants and beneficiaries; (h) failing to engage an independent fiduciary in situations presenting potential conflicts of interest; and (i) failing to monitor the individuals appointed to the Investment Committee.

129. Nortel Corp. and/or Nortel Ltd. are also liable as co-fiduciaries of Nortel U.S., the Director Defendants, and the Investment and Doe Committee Defendants because they participated in the acts or omissions of each fiduciary knowing such acts or omissions were breaches of fiduciary duty; because its failure to comply with ERISA § 404(a)(1) enabled the other Defendants to commit a breach; and because it had knowledge of breaches by the other Defendants and failed to make reasonable efforts under the circumstances to remedy said breaches.

## XI. THE DEFENDANTS' BREACHES OF FIDUCIARY DUTY CAUSED LOSSES TO THE PLAN

130. The Plan suffered a loss, and Plaintiffs and Class members suffered losses, because substantial assets in the Plan were invested in and maintained in Company Stock during the Class Period in violation of Defendants' fiduciary duties. If Defendants had fulfilled their fiduciary duties, losses by the Plan could have been averted in several ways: (a) Company Stock could have been withdrawn as a retirement investment option; (b) investments in Company Stock could have been "mapped over" to a prudent retirement investment; (c) the Plan's over-concentration in Company Stock, and individual participants' over-concentration in Company Stock, could have been restricted; (d) Nortel U.S. and Nortel Corp. could have diligently fulfilled their duty to appoint, monitor the performance of, and timely remove (if and when appropriate) other Plan fiduciaries, including the Director Defendants, the Investment and Doe Committee Defendants; (e) the Director Defendants could have diligently fulfilled their duty to appoint, monitor the performance of, and timely remove (if and when appropriate) other Plan fiduciaries, including the Investment and Doe Committee Defendants; (f) Defendants could have provided complete and accurate information to other Plan fiduciaries and to Plan participants concerning Company Stock; (g) Defendants could have made fiduciary decisions for the exclusive benefit of the Plan and its participants and beneficiaries; and (h) Defendants could have engaged an independent fiduciary in situations presenting potential conflicts of interest.

131. Instead of taking the necessary steps to ensure effective participant control by complete and accurate disclosure and regulatory compliance, Defendants did the opposite. As a consequence, participants in the Plan did not exercise actual control of the Plan's assets and Defendants remained entirely responsible for losses associated with such investments.

## XIII. Class Action Allegations

132. Plaintiffs bring this action as a class action pursuant to Fed. R. Civ. P. 23(a), (b)(1) and (b)(2). The Class is defined as:

> All participants and beneficiaries of the Long-Term Investment Plan (formerly known as the Northern Telecom Inc. Long-Term Investment Plan) sponsored by Nortel Networks Inc. who held shares of the Nortel Networks Stock Fund during the period from March 7, 2000 through the present

133. The exact number of Class members is known only to Defendants and their agents. On information and belief, the Class numbers in the thousands, is geographically dispersed across the United States, and thus is so numerous that joinder is impracticable. The number of Class members can readily be determined by appropriate discovery.

134. There is a well-defined community of interest in the questions of law and fact involved in this case. Questions of law and fact common to the members of the Class which predominate over questions which may affect individual Class members include, but are not limited to:

a. Whether Defendants discharged their duties with respect to the Plans solely in the interest of the Plans' participants;

b. Whether Defendants discharged their duties with the care, skill, prudence, and diligence under these circumstances;

c. Whether Defendants recklessly or negligently failed both in their duty to affirmatively disclose information to the Plans' participants when they knew or should have known that silence might be harmful, and in their duty to convey complete and accurate information material to the circumstances of the Plans' participants and beneficiaries;

d. Whether Defendants failed in their duty to monitor appointed fiduciaries and provide them sufficient information and oversight to ensure their compliance with fiduciary duties; and

e. Whether Defendants bear liability as co-fiduciaries by aiding, enabling, concealing, or recklessly or negligently failing to remedy a breach of fiduciary duty by another fiduciary.

135. Plaintiffs' claims are typical of the claims of the Class.

136. Plaintiffs will fairly and adequately protect the interests of the Class. They have no interests that are antagonistic to or in conflict with the interests of the Class as a whole, and they have engaged competent counsel experienced in ERISA class actions concerning employer securities in 401(k) plans, as well as in other class and complex litigation, to ensure protection of the interests of the Class as a whole.

137. This action is maintainable as a class action under each of the following provisions of Rule 23(b):

**Rule 23(b)(1)(A).** The prosecution of separate actions by the members of the Class would create a risk of inconsistent or varying adjudications with respect to the individual members of the Class, which would establish incompatible standards of conduct for Defendants.

**Rule 23(b)(1)(B).** As an ERISA breach of fiduciary duty action for plan-wide relief, this is a classic Rule 23(b)(1)(B) class action. The prosecution of separate actions by the members of the Class would create a risk of adjudications with respect to individual members of the Class that would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

**Rule 23(b)(2).** Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive, declaratory, or other appropriate equitable relief with respect to the Class as a whole.

## COUNT I

## BREACH OF FIDUCIARY DUTY BY NORTEL U.S.

138. Plaintiffs incorporate the allegations contained in the previous paragraphs of this Complaint as if set forth fully herein.

139. Nortel U.S. breached its fiduciary duty to the Plan and its participants and beneficiaries. It is liable under ERISA § 502(a)(2) to make the Plan whole for its attendant losses. It is also liable as a co-fiduciary under ERISA § 405, 29 U.S.C. § 1105.

## COUNT II

## BREACH OF FIDUCIARY DUTY BY DIRECTOR DEFENDANTS

140. Plaintiffs incorporate the allegations contained in the previous paragraphs of this Complaint as if set forth fully herein.

141. The Director Defendants breached their fiduciary duties to the Plan and its participants and beneficiaries. They are liable under ERISA § 502(a)(2) to make the Plan whole for its attendant losses. They are also liable as co-fiduciaries under ERISA § 405, 29 U.S.C. § 1105.

## COUNT III

### BREACH OF FIDUCIARY DUTY BY INVESTMENT AND DOE COMMITTEE DEFENDANTS

142. Plaintiffs incorporate the allegations contained in the previous paragraphs of this Complaint as if set forth fully herein.

143. The Investment and Doe Committee Defendants breached their fiduciary duties owed to the Plan and its participants and beneficiaries. The Investment and Doe Committee Defendants are liable under ERISA § 502(a)(2) to make the Plan whole for its attendant losses. The Investment and Doe Committee Defendants are also liable as co-fiduciaries under ERISA § 405, 29 U.S.C. § 1105.

## COUNT IV

### BREACH OF FIDUCIARY DUTY BY NORTEL CORP. AND/OR NORTEL LTD.

144. Plaintiffs incorporate the allegations contained in the previous paragraphs of this Complaint as if set forth fully herein.

145. Nortel Corp. and/or Nortel Ltd. breached their fiduciary duty to the Plan and its participants and beneficiaries. Nortel Corp. and/or Nortel Ltd. are liable under ERISA § 502(a)(2) to make the Plan whole for its attendant losses. Nortel Corp. and/or Nortel Ltd. are also liable as a co-fiduciaries under ERISA § 405, 29 U.S.C. § 1105.

## COUNT V

## ADDITIONAL THEORY OF LIABILITY AGAINST ALL DEFENDANTS

146. Plaintiffs incorporate the allegations contained in the previous paragraphs of this Complaint as if set forth fully herein.

147. If, contrary to Plaintiffs' allegations above, some of the Defendants are held not to be Plan fiduciaries, Plaintiffs allege in the alternative that said Defendants are liable as non-fiduciaries who knowingly participated in the fiduciary breaches of the other Plan fiduciaries described herein, for which said Defendants are liable pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

## PRAYER

WHEREFORE, Plaintiffs pray for relief as follows:

A. That this Court certify this action as a class action under Fed. R. Civ. P. 23(a), (b)(1) and (b)(2);

B. That this Court order that Defendants make good to the Plan its losses as a result of their breaches of their fiduciary duties;

C. That this Court order declaratory and injunctive relief as necessary and appropriate, including restoring all losses to the Plan caused by the Defendants' breaches of fiduciary duty;

D. That this Court order that each of the Defendants is liable for equitable relief in the form of money paid to the Plan and its participants and beneficiaries for violating their duties as fiduciaries and co-fiduciaries;

E. That this Court enjoin the Defendants from further violating the duties, responsibilities, and obligations imposed upon them as fiduciaries by ERISA and the Plan documents with respect to the Plan;

F. That this Court award to Plaintiffs reasonable costs and attorneys' fees as provided by the common fund doctrine, ERISA § 502(g), 29 U.S.C. § 1132(g), and other applicable law; and

G. That this Court grant such other relief as may be just and proper, including taxable costs and interest, as provided by law.

Dated: June 17, 2005

Respectfully submitted,

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## CERTIFICATE OF SERVICE

It is hereby certified that on this 17th day of June, 2005, a copy of the foregoing Second Amended Consolidated Class Action Complaint has been mailed by United States First Class Mail to the following:

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