

LAWLINE CLE: INTELLECTUAL PROPERTY CONSIDERATIONS IN M&A TRANSACTIONS

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Program Description

M&A transactions often live or die on the basis of well thought out and executed legal due diligence. Indeed, due diligence often shapes core deal terms, transaction structure, and whether the deal itself even moves forward. For traditional businesses with physical assets, due diligence may come with reasonably obvious do's and don'ts. However, in M&A deals where intellectual property ("IP") is the key or sole asset, due diligence becomes even more critical yet far less obvious in terms of best practices.

In such deals, often unique and powerful transaction structure and drafting considerations come into play that are unfortunately overlooked as practitioners often make unwarranted assumptions regarding IP ownership and/or curing defects. Moreover, there are often misconceptions about the applicability of ordinary representations, warranties, and other M&A provisions to IP as a "one-size-fits-all" solution to the often unique array of defects and other "wrinkles" attached to the IP. In these cases, valuing and structuring the transaction can be adversely affected, the post transaction operations of the target business can be compromised, and the rights of both purchaser and seller can be significantly undermined.

This course, presented by Kaiser Wahab, partner in the law firm of Riveles Wahab LLP, which is dedicated to M&A transactions in the private equity space for IP driven early-stage/mature companies, is designed to arm the practitioner with the vocabulary, skill set, and overall understanding of best practices in IP driven M&A transactions.

Learning Objectives:

- Learn how to best approach M&A transaction structures and process, where there is significant IP at play
- Examine how to best approach the M&A due diligence process, where there is significant IP at play
- Understand unique M&A representations, warranties and indemnities, where there is significant IP at play
- Identify unique M&A covenants, where there is significant IP at play
- Comprehend the deployment and function of various ancillary agreements, where there is significant IP at play
- Explore the unique issues driving finance transactions, including secured lending transactions in M&A transactions, where there is significant IP at play



Goal of Program

- The goal of this program is to provide general practitioners with an overview of the undertakings, issues, and goals in an M&A transaction where the target company holds valuable, mission-critical intellectual property.
- Corporate or general counsel may not fully understand the ins and outs of intellectual property ownership and protection, and intellectual property counsel may not understand how the nuances M&A transaction structure may impact IP ownership.
- By better understanding the categories of IP that typically drive any operation as well as their unique pitfalls, a general practitioner that is advising a client undergoing or contemplating an M&A will be better equipped to assist the client interface with IP counsel and M&A counsel, as well as to assist the client undertake the necessary steps to prepare for the process.



Types of Intellectual Property

- **COPYRIGHT:** An original, creative work that is “fixed in a tangible medium of expression”
- **TRADEMARK:** A name, logo, slogan, or other expression used “in commerce” which identifies products or services of a particular source from those of others
- **TRADE SECRET:** Confidential information that is used continuously by a business and is not generally known within the industry
- **PATENT:**
 - Utility Patent: any new and useful process, machine, article of manufacture, or composition of matter, or any new and useful improvement thereof
 - Design Patent: a new, original, and ornamental design for an article of manufacture
 - Plant Patent: the discovery and asexual reproduction of any distinct and new variety of plant



Types of Intellectual Property

- **CONSUMER/EMPLOYEE DATA:** unfortunately, this program is too short to delve in detail into another increasingly common category of quasi-intellectual property (data). Many target companies now have rich repositories of data that have economic value both in the short and long-term. While this data does not conform to classic intellectual property definitions, they do have their own body of law, best practices, and hot button concerns that should make counsel tread carefully.



Typical IP Considerations-COPYRIGHT

ARE THERE COPYRIGHTS?

Company literature
Company copy
Company photos
Company audio
visual content
imagery and logos
Company software

HOW DO THEY WORK?

Prevent infringement of
infringing works that
“are substantially
similar” to the
copyrighted work

Allows for rich and finely
tailored licensing
schemes

FOR HOW LONG?

Theoretically
copyright is affixed at
time work is created
and fixed

Registration with
Copyright Office is,
as a practical matter,
necessary for rights
protection

FLASHPOINTS AND FLAGS:

Who owns it, are there
licenses?

Were there
transfers/assignments?

Are there currently any
disputes ongoing or
brewing?



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Typical IP Considerations-TRADEMARK

ARE THERE TRADEMARKS?

Company Title/Brand
Product Name/Brand
Visual Logos
Trade Dress
Sounds
Colors
Domain Names

HOW DO THEY WORK?

Prevents infringers from creating a “likelihood of confusion”

Confusion is measured by multi prong test and is not a simplistic look-alike or sound alike comparison.

FOR HOW LONG?

Potentially perpetual, but generally for as long as the mark is “in use in commerce”

Registration with USPTO is highly recommended but NOT required.

FLASHPOINTS AND FLAGS:

Who owns it, are there licenses?

Were there transfers/assignments?

Are there currently any disputes ongoing or brewing?



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Typical IP Considerations- PATENT

ARE THERE PATENTS?

Inventions
(mechanical,
chemical, software,
etc.)
Methodologies
Recipes
Formulas

HOW DO THEY WORK?

Provides a 20 year
“monopoly” on patented
work, but thereafter
protection ends

Registration is necessary
for protection

FOR HOW LONG?

Unlike other IP’s
patent is term
limited by design

But patent can
provide powerful
tools for barring
competitive use,
importation and sale

FLASHPOINTS AND FLAGS:

Who owns it, are there
licenses?

Were there
transfers/assignments?

Are there currently any
disputes ongoing or
brewing?



Typical IP Considerations- TRADE SECRET

ARE THERE TRADE SECRETS?

Source Code
Customer Lists
Recipes
Formulas

HOW DO THEY WORK?

Provides protection through use of NDA's policies and secrecy

FOR HOW LONG?

Potentially, permanent, depending on scope, consistency, and viability of secrecy protection. Famous examples of company trade secrets: KFC / Coca-Cola.

FLASHPOINTS AND FLAGS:

Sufficient security?

Were there any breaches?


Are there currently any disputes ongoing or brewing?



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Types of Intellectual Property

	Copyright	Trademark	Patent	Trade Secret
Protects:	Creative works	Brand identifiers	Inventions	Confidential business information
Protection Begins:	Upon fixation	Upon use in commerce	Upon registration	Upon creation
Length of Protection:	Life + 70 years (WFH: 90/120 years)	For as long as in use	20 years (14 for designs)	For as long as kept secret
Registration:	Gives extra protection	Gives extra protection	Required	None
Example:	Books, paintings, recorded music	“Coca-Cola” 	Incandescent light bulb, Coca-Cola bottle shape	KFC’s 11 herbs and spices



Types of M&A Transaction Structures

- **Stock Purchase** – the buyer purchases a controlling interest in the target company, taking control of its management
 - Ask: What IP of the target does the buyer wish to directly acquire?
- **Merger** – two companies combine into one surviving entity
 - Ask: Which entity will be the surviving entity?
 - Ask: What IP does the disappearing entity own?
- **Carve-Out Transaction** – the buyer purchases a separate business from a larger enterprise, which may be separately organized as a subsidiary
 - Ask: What IP is owned by the target and what IP is owned by affiliates of the target not being acquired?
 - Ask: What IP is used by the target that is owned by its (soon to be former) affiliates?



Phases of Inquiry

Generally speaking, the following breakdown of phases for any IP driven M&A deal generally apply:

1. Assessing the scope of the on tangible and intellectual property portions of the Transaction, I.e., do we worry about IP, data, etc.?
2. Planning and Executing Due Diligence
3. Papering and Negotiating the Transaction
4. Closing and Monitoring the Transaction



General Planning

In addition to the prior questions that deal with the lifespan of the transaction, counsel should always ask very basic overall questions regarding the specific transaction, players, deal terms, and most importantly what the nature of the intellectual property is relative to what the business does:

1. What is the Nature of Business
2. What are the Deal Drivers?
3. What are the Client Goal?



Initial Inquiries

Request a schedule of all registered and unregistered IP owned or licensed by the target.

- Identify what IP is critical to the target's business
- Identify what IP is critical to the buyer's future plans
- Identify what IP is owned by the target, both registered and unregistered
- Identify pending applications for registration, upcoming maintenance filings, and abandoned applications/registrations
- Identify what IP is owned by third parties and licensed or otherwise used by the target
- Identify current and future potential IP disputes (threatened and actual lawsuits, USPTO office actions, TTAB proceedings, UDRP arbitrations, government investigations, etc.)



Due Diligence Documents

Request:

- All agreements with directors, officers, advisors, employees, contractors, consultants, interns, and other service providers who may generate IP, including:
 - Employment and Independent Contractor Agreements
 - Work-for-Hire Agreements
 - Non-Disclosure and Confidentiality Agreements
 - Shareholder Agreement and Stock Purchase Agreements
- All registrations and pending applications with the United States Patent and Trademark Office (“USPTO”), Copyright Office, and international equivalents
- All assignment and license agreements for IP (for both the target company IP and third party IP)
- All collaboration or joint venture agreements involving IP



Chain of Title

- The “chain of title” for all target IP should be identified and confirmed prior to the transaction closing
- To confirm the chain of title, identify who created the IP and trace the paper trail from the creator to the target company
- Check that all assignments and/or name changes for registered IP have been filed with the USPTO, Copyright Office, or foreign equivalent
- Target company should be required to remedy gaps and inconsistencies in the chain of title (both in the agreement paper trail and registrations) prior to closing



Security Interests

- Identify any security interests/liens existing and/or recorded against the target's copyrights, trademarks, and patents
- Security interests against IP may be filed with the Copyright Office and the USPTO
- Security interests are “perfected” under the Uniform Commercial Code (“UCC”) by filing a UCC-1 with the state
 - Perfection gives the lender priority over others who may claim a security interest in the IP
- Require the target company to record a security interest release with the Copyright Office or USPTO, as appropriate, where a security interest that is no longer active has been recorded prior to the transaction's closing



Other Common IP Issues

- **Failure to Timely Register Copyrights** – statutory damages, attorneys’ fees, and other benefits are available in an infringement action if copyrights are timely registered
- **Reversion Rights** – copyright assignments (not WFH) may be terminated by the author 35 years after the grant (56 years for pre-1978 grants)
- **Intent-to-Use (“ITU”) Trademark Applications** – ITU applications cannot be assigned until proof of use in commerce has been filed with the USPTO, unless assigned to a successor of the business
- **Non-Use and/or Inappropriate Use of Trademarks** – trademarks must be used continuously in commerce and in a consistent manner to maintain trademark rights
- **Registered Under the Wrong Name** – copyrights, trademarks, patents, and domain names might be registered under the name of a founder, employee, or contractor instead of the target company



Other Common IP Issues

- **Open Source IP** – use of open source code may subject the target’s IP to restrictions or cause it to lose IP protections
- **No Work for Hire Agreement** – works created by employees are generally works-made-for-hire (“WFH”), but contractors must have a written agreement for copyrightable works to be WFH or assigned
- **Limited NDAs** – trade secrets may lose protection if confidentiality obligations are limited in time or scope
- **Trademark Coexistence Agreements** – may limit the ability of the company to expand into new businesses under a certain brand name
- **Exclusive Licenses** – if IP has been licensed to a third party on an exclusive basis, the target may have relinquished or restricted its right to use it



Other Common IP Issues

- **Jointly-Owned IP** – IP that is shared with third parties may be subject to certain restrictions or accounting obligations
- **Assignment Restrictions** – critical IP license agreements may prohibit or restrict the assignment of the agreement or a “change in control” of the target company, creating the need to obtain the assignor/licensor’s consent prior to transferring the rights to the buyer
- **License of Affiliate IP** – a license or other agreement may license the IP of the target “and its affiliates”, thereby potentially including the buyer’s IP in the license after the transaction closes
- **Termination Rights** – critical IP license agreements may allow the licensor to terminate without cause, resulting in lost value
- **Group/Enterprise Licenses** – in a carve-out transaction, the target may lose licenses made on a group or enterprise basis to the target’s parent company



The Disclosure Schedule

- All registered IP and material unregistered IP and license agreements will typically be listed on a Disclosure Schedule attached to the transaction agreement
- Confidentiality of trade secrets should be maintained, either by omitting them from the Disclosure Schedule or including a confidentiality clause
- The target company may seek to limit its warranties and/or indemnification obligations to only IP listed in the Disclosure Schedule
- Exceptions to the target's warranties should be included in the Disclosure schedule (such as threatened/pending litigation) and conform to the buyer's due diligence findings
- The buyer may demand stronger warranties/indemnifications if due diligence finds IP ownership has been poorly maintained



Target Covenants

The buyer may require the target to warrant and represent that:

- It owns or has the right to all IP used in its business/on the Disclosure Schedule, free of all liens
- All IP assets are valid and no claims challenging their validity exist
- The IP does not infringe any third party's rights, and to target's knowledge no third parties are infringing on the IP
- All IP agreements are valid and in full force and effect, and target is not in breach of any IP agreement
- No lien on or license of the buyer's IP will be created as a result of the closing of the transaction
- The target has the right to use the IP assets it uses in its business
- The rights to the IP used in the target's business will survive the closing of the transaction
- (In a carve-out transaction) all transferred IP and licenses are sufficient to operate the target's business in the same manner as prior to the closing



IP Transfer Checklist

- Agreement assigning IP to buyer
 - Target represent and warrants that it owns the IP free of all security interests/liens (subject to the schedule of exceptions)
 - Target represents and warrants that the IP does not infringe on any third-party right
 - Target indemnifies buyer against third-party claims of infringement
- Record Assignment Agreement with Copyright Office or USPTO
- Remedy any remaining chain-of-title gaps or unreleased security interests
- Calendar upcoming application and registration deadlines with the Copyright Office and USPTO
- Assign or obtain new license agreements for critical IP owned by third parties (including affiliates of the target in a carve-out transaction)



Drafting Considerations

Of particular importance in M&A transactions involving IP, are tailored, robust, well thought out representations, warranties, definitional sections, and indemnification sections. Depending on the nature of the business, the outcome of due diligence, and a variety of the other planning activities outlined above, drafting should take those factors into account to protect the parties from unintended consequences.



Ownership

(a) The Company owns or has a valid license or right to use all Intellectual Property listed in the Disclosure Schedule necessary for the operation of its business, free and clear of all liens, except as otherwise provided in the Disclosure Schedule. Except as otherwise provided in the Disclosure Schedule, each item of Intellectual Property listed in the Disclosure Schedule owned or used by the Company immediately prior to the Closing will be owned or available for use by such entity on substantially similar terms and conditions immediately after the Closing. The Intellectual Property listed in the Disclosure Schedule is not subject to any outstanding order, decree, judgment, stipulation, award, past due payment, decision, or injunction. No legal or administrative proceeding is pending or, to the knowledge of the Company, threatened, that challenges the legality, validity, enforceability of, or the Company's ownership of or license or right to use or otherwise exploit, any item of Intellectual Property listed in the Disclosure Schedule and currently used by the Company and each such item of such Intellectual Property is presently pending or in force in accordance with its terms.



Infringement

(b) Except as otherwise provided in the Disclosure Schedule, to the knowledge of the Company, the Company has not interfered with, infringed upon, misappropriated, or otherwise come into conflict with any other person or entity's Intellectual Property rights, and the Company has ever received any written notice alleging any such interference, infringement, misappropriation, or violation (including any claim that the Company must license or refrain from using any other person or entity's Intellectual Property rights). To the knowledge of the Company, no other person or entity has interfered with, infringed upon, misappropriated, or otherwise come into conflict with any Intellectual Property rights of the Company. There are no pending or, to the knowledge of the Company, threatened claims against the Company or its employees or independent contractors alleging that the Company's Intellectual Property infringes on or conflicts with the rights of any other person or entity.



Exhibit A- Software Driven M&A Language

The attached excerpt from a publicly available repository of an asset purchase agreement between Research In Motion (better known across the Canadian border as "Blackberry"), contains an "industrial grade" suite of representations, indemnification provisions, and warranties specifically aimed at various suites of proprietary, third-party, open-source, and other software. Software is a particularly difficult aspect of IP in M&A transactions.

In 2010, Blackberry bought the full IP portfolio for what was considered the "great hope" for its mobile OS aspirations, QNX and clearly counsel was very much concerned with the above difficulties.



SHARE PURCHASE AGREEMENT
BY AND AMONG
RESEARCH IN MOTION CORPORATION
2236008 ONTARIO INC.
RESEARCH IN MOTION LIMITED
AND
HARMAN INTERNATIONAL INDUSTRIES, INCORPORATED
HARMAN HOLDING GMBH & CO. KG
DATED APRIL 9, 2010

<https://www.sec.gov/Archives/edgar/data/800459/000119312510082662/dex101.htm>

Material Contracts

3.22 (a) Except for the agreements, contracts, plans, leases, arrangements or commitments set out in Schedule 3.22 of the Disclosure Letter (the “**Material Contracts**”), true and complete copies in all material respects of which have been made available to the Buyers, none of the QNX Entities is a party to or subject to:

- (i) any Lease providing for annual rentals in excess of \$50,000;
- (ii) any contract (excluding (A) all purchase orders, sales orders, delivery orders and similar contracts, (B) contracts with accountants, legal advisors and payroll providers and (C) invoices for taxes, utilities and credit card charges) for the purchase of materials, supplies, goods, services, equipment or other assets providing for annual payments by any QNX Entity in excess of \$100,000;

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- (iii) any written agreement (excluding (A) any purchase orders, sales orders, delivery orders and similar agreements dating prior to July 1, 2008 and (B) any purchase orders, sales orders, delivery orders and similar agreements dated after July 1, 2008 that are for aggregate amounts not in excess of \$250,000) between any QNX Entity and (I) a Material Customer or (II) a Seller or any of its Affiliates (other than a QNX Entity);
 - (iv) any license agreement, support agreement, consulting agreement or engineering services agreement providing for annual payments to any of the QNX Entities in excess of \$500,000;
 - (v) any partnership, joint venture or other similar contract, arrangement or agreement;
 - (vi) any contract relating to indebtedness for borrowed money or the deferred purchase price of real property (whether incurred, assumed, guaranteed or secured by any asset);
 - (vii) any contract with publishers, distributors, resellers or localization or translation partners providing for annual payments to any of the QNX Entities in excess of \$50,000; or
 - (viii) any contract not otherwise covered above in this Section 3.22 that, if such contract were terminated, would have a Material Adverse Effect.
- (b) Each Material Contract is a valid and binding agreement of each QNX Entity that is a party thereto, and is in full force and effect, and none of the QNX Entities, nor, to the knowledge of the Sellers,

any other party thereto, is in breach or default in any material respect under the terms of any Material Contract.

- (c) No party to any Material Contract has provided any written or, to the knowledge of Sellers, oral notice to terminate such Material Contract.
- 3.23 Except as set out in Schedule 3.23 of the Disclosure Letter, there are no provisions in any Material Contract under which any of the QNX Entities is restricted in any material respect from selling, licensing or otherwise distributing any of its products to any class of customers, in any geographic area, during any period of time or in any market or market segment.
- 3.24 Except as set out in Schedule 3.23 of the Disclosure Letter, there are no provisions for exclusive contracting with respect to goods and services or similar such provisions in any Material Contract.
- 3.25 Except as set out in Schedule 3.25 of the Disclosure Letter, there are no “most favoured nations” or similar such favourable pricing or commercial terms in any Material Contract.

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- 3.26 None of the QNX Entities is a party to any agreement that by its terms explicitly entitles any distributor, reseller or agent to any payment in excess of \$50,000 on termination, expiration or failure to renew such agreement by any contract.
 - 3.27 Except as set out in Schedule 3.27 of the Disclosure Letter, none of the QNX Entities is subject to any agreement which immediately following the Closing Time would restrict or limit any QNX Entity’s right to incur, assume or guarantee any indebtedness for borrowed money or to sell, lease or transfer (by dividend or otherwise) any equity ownership interests of any of the QNX Entities.
 - 3.28 Schedule 3.28 of the Disclosure Letter sets out a list of all insurance policies and fidelity bonds placed by any of the QNX Entities or any of the Sellers covering any of the assets, business, equipment, properties, operations, Employees, officers and directors of the QNX Entities. As of the date hereof, there is no claim by any of the QNX Entities or any of the Sellers pending under any of such policies or bonds as to which coverage has been questioned, denied or disputed by the underwriters of such policies or bonds. All premiums payable under all such policies and bonds necessary to maintain such policies and bonds in full force and effect to the limits of such policies and bonds have been paid, and each of the QNX Entities and the Sellers, as the case may be, is otherwise in compliance in all material respects with the terms and conditions of all such policies and bonds, except where the failure to comply would not result in loss of coverage or otherwise impair the ability of the QNX Entities to collect the full amount of the coverage under such policies. Unless otherwise set forth in Schedule 3.28 of the Disclosure Letter, such policies of insurance and bonds (or other policies and bonds providing substantially similar insurance coverage) have been in effect since April 9, 2007 and as of the date hereof are in full force and effect. To the knowledge of the Sellers, as of the date hereof no written notice has been received threatening termination of, or a material premium increase with respect to, any of such policies or bonds.
 - 3.29 Except as set out in Schedule 3.29 of the Disclosure Letter, each of the QNX Entities holds all licenses, permits, registrations or approvals issued by a Governmental Authority necessary for the conduct of the Business as currently conducted and the ownership and occupancy of its property and assets, except such licenses, permits, registrations or approvals the absence of which has not had or would not reasonably be expected to have a Material Adverse Effect (collectively, “Permits”). Except for such failures to be valid and in full force and effect as have not had or would not reasonably be expected to have a Material Adverse Effect, each Permit is valid and in full force and effect and no Permit will be terminated or become terminable as a result of the transactions contemplated hereby.
 - 3.30 None of the QNX Entities is in default in any material respect under (i) any mortgage, loan agreement, indenture or evidence of indebtedness for borrowed money to which any QNX Entity is a party, or (ii) any judgment, order or injunction of any court, arbitrator or governmental body, agency, official or other Governmental Authority.
 - 3.31 Except for Goldman, Sachs & Co., there is no investment banker, broker, finder or other intermediary which has been retained by or is authorized to act on behalf of any of the

Sellers or any of the QNX Entities who might be entitled to any fee or commission from any of the Buyers or any of the QNX Entities or any of their respective Affiliates upon consummation of the transactions contemplated by this Agreement, and any such fee or commission will be paid for solely by the Sellers.

- 3.32 Except as disclosed in Schedule 3.32 of the Disclosure Letter, there are no loans, leases or royalty agreements between any of the QNX Entities and any of the Sellers or any Affiliate of any of the Sellers (other than another QNX Entity).
- 3.33 To the knowledge of Sellers (in the case of clauses (a) and (b) only), as of the date hereof none of the current officers or directors of any of the QNX Entities: (a) has any material direct or indirect interest in any entity that does business with any of the QNX Entities; (b) has any direct or indirect interest in any material property, asset or right which is material and is used by any of the QNX Entities in the conduct of the Business; or (c) has any contractual relationship with any of the QNX Entities other than such relationships which occur from being an officer or director of any of the QNX Entities.
- 3.34 Since the date that is 180 days prior to the date of this Agreement (a) no Material Customer or Material Supplier has ceased to do business with the QNX Entities and (b) to the knowledge of the Sellers, no Material Customer or Material Supplier has threatened to terminate its relationship with the QNX Entities, which threat would reasonably be expected to result in such a termination.

Intellectual Property Rights

- 3.35 Schedule 3.35 of the Disclosure Letter sets forth a true and accurate description, in all material respects of: (i) all the patents, filed patent applications and draft patent applications (including provisional patent applications, utility patents, divisional patents, continuations, continuations in part, reissue, reexamination, and all similar patents and applications) throughout the world that relate to the Owned Software or other Technology that the QNX Entities own the Intellectual Property Rights to; (ii) registered trademarks, registered trade names, registered service marks and registered copyrights and any pending applications therefor, and domain names (including any pending applications) owned by any QNX Entity; (iii) the QNX Product Suite; and (iv) the Licensed IP other than Open Source Materials and COTS Software, provided that the QNX Entities shall not be required to list any trade secrets. The Sellers have made available to the Buyers true, correct and complete copies in all material respects of all available invention disclosure forms of the QNX Entities that relate to the Owned IP.
- 3.36 Except as set forth in Schedule 3.36 of the Disclosure Letter, the QNX Entities (either jointly, or any QNX Entity severally) exclusively hold all rights, title and interest in and to the Owned IP (excluding moral rights therein) with good and marketable title thereto free and clear of all third party rights, interests or other Liens, whether contingent or otherwise, and as to the moral rights in the QNX 6 generation of the QNX Software, waivers in favour of the QNX Entities, its successors and assigns, have been provided to the QNX Entities from all relevant third Persons other than employees of contractors.

3.37 Except as set forth in Schedule 3.37 of the Disclosure Letter:

- (a) the Owned IP and, to the knowledge of the Sellers, the Licensed IP, includes all of the Intellectual Property Rights necessary in order to enable the Business to be conducted substantially in the manner in which the Business is conducted on the date hereof;
- (b) Section 1.6 of Schedule 3.35 of the Disclosure Letter sets forth a description, in all material respects, of the Licensed IP, other than licenses of Open Source Materials and other than licenses of COTS Software. The licenses listed in Section 1.6 of Schedule 3.35 of the Disclosure Letter are in full force and effect, no QNX Entity is in material default under any such licenses, and, to the knowledge of the Sellers, no party to any of such licenses has exercised any termination rights with respect thereto;
- (c) to the knowledge of the Sellers, as of the date hereof, no QNX Entity is the subject of any pending or threatened action, suit, judgment, investigation, allegation or proceeding, and no QNX Entity has

received any written notice in the past two (2) years in the case of trademarks, service marks, trade names, indicia, logos, and domain names, and since November 30, 2004 in the case of any other Intellectual Property Rights, in each case, that involves a claim of infringement, unauthorized use, or violation of any Intellectual Property Rights of any third Person, against any QNX Entity or that challenges the ownership or use rights by a QNX Entity of, or the validity or enforceability of, any Intellectual Property Right, whether Owned IP or Licensed IP, in connection with the Business;

- (d) in the past two (2) years in the case of trademarks, service marks, trade names, indicia, logos, and domain names, and since November 30, 2004 in the case of any other Intellectual Property Rights, no QNX Entity has made any written assertion or claim or is involved in any pending or, to the knowledge of the Sellers, threatened action, suit, judgment, investigation or proceeding alleging that any Person has infringed, violated, misused or misappropriated any Owned IP; and
- (e) all of each QNX Entity's rights in respect of all of the Owned IP consisting of patents and copyrights are valid and enforceable.

3.38 Except as listed in Schedule 3.38 of the Disclosure Letter:

- (a) the Owned Software does not include and is not a derivative work of any third Persons' Technology, other than Open Source Materials, except (i) for inclusions or derivative works that have been licensed to the QNX Entities for such use by such third Persons under their Intellectual Property Rights, or (ii) where the Intellectual Property Rights for such inclusions or derivative works have been assigned to the QNX Entities.

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- (b) the unregistered Names that are Owned IP and currently used by the QNX Entities in the Business are not, to the knowledge of the Sellers, owned or registered in the name of, and the other Owned IP is not owned by or registered in the name of, any current owner other than a QNX Entity, or in the name of any former owner or current or former shareholder, partner, director, executive, officer, employee, salesman, agent, customer, representative or contractor of any QNX Entity or other party, nor does any such person have any interest therein or right thereto, including but not limited to the right to royalty payments;
 - (c) none of the Owned Software, the Owned IP (other than unregistered Names) or, to the knowledge of the Sellers, the conduct of the Business or the use of unregistered Names by the QNX Entities in the Business that are Owned IP materially infringes, misuses, misappropriates or otherwise violates the Intellectual Property Rights of any Person;
 - (d) to the knowledge of the Sellers, the Licensed IP does not infringe, misuse, misappropriate or otherwise violate the Intellectual Property Rights of any Person;
 - (e) each of the QNX Entities has the right to transfer, convey or assign to any Person without any consent of, waiver from or payment to any Person whatsoever, the full right, title and interest of such QNX Entity in the Owned IP (other than, with respect to enforcement rights in such Owned IP, as limited by Applicable Law) including the right to assign to any Person such QNX Entity's right to transfer, convey or assign the Owned IP to another Person;
 - (f) each QNX Entity has the exclusive right (subject to all formerly-granted and continuing non-exclusive rights granted to third Persons), and, to the extent permitted by Applicable Law, has the right to grant to others such exclusive or non-exclusive right, to use, modify, create derivative works of, publish, distribute, sublicense, and otherwise fully exploit the Owned Software and the Owned IP (other than unregistered Names) and, to the knowledge of the Sellers, to use, modify, create derivative works of, publish, distribute, sublicense, and otherwise fully exploit the unregistered Names that are Owned IP and are currently used by the QNX Entities in the Business in order to enable the Business to be conducted substantially in the manner in which the Business is conducted on the date hereof and to obtain and defend all Intellectual Property Rights therein; and
 - (g) none of the QNX Entities is a party to any contract or commitment or is under any obligation to pay any royalty, license or other fee with respect to the use of Owned Software or the Owned IP.

- 3.39 The granting by the QNX Entities of the right or consent to author, create and own derivative works of the Owned Software or the Owned IP in the ordinary course of business has not had and would not reasonably be expected to have a Material Adverse Effect.

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- 3.40 Except as listed in Schedule 3.40 of the Disclosure Letter, to the knowledge of the Sellers, there is no reason to believe that the QNX Entities would be unable to obtain issued patents for the pending patent applications listed in Schedule 3.35 of the Disclosure Letter. Except as described in Schedule 3.40 of the Disclosure Letter, or otherwise in the normal conduct of the Business, since November 30, 2004, none of the QNX Entities has taken or failed to take any action which would prejudice any registration, issuance or maintenance of the Owned IP, other than unregistered Names, including a failure to renew or to pay all necessary or required fees.
- 3.41 Except as listed in Schedule 3.41 of the Disclosure Letter, to the knowledge of the Sellers, each of the QNX Entities has the right to use, sublicense, Commercialize, register, and otherwise fully exploit the registered trademarks listed in Schedule 3.35 of the Disclosure Letter in the operation of the Business substantially in the manner in which such trademarks are used in the Business as conducted on the date hereof.
- 3.42 Except as listed in Schedule 3.42 of the Disclosure Letter, the QNX Entities have the full right and authority to Commercialize the Owned Software, the Owned IP (other than unregistered Names) and, to the knowledge of the Sellers, the Licensed IP and the unregistered Names that are Owned IP and used by the QNX Entities in the Business, substantially in the manner in which the Owned Software, Owned IP and Licensed IP are used in the Business as conducted on the date hereof, and the transactions contemplated by this Agreement, including the direct or indirect change of control of each of the QNX Entities, will not result in the termination of any QNX Entity's rights, trigger any additional obligations or liabilities of any QNX Entity or otherwise adversely impact the QNX Entities' full right and authority to Commercialize the Owned Software, the Owned IP (other than unregistered Names) and, to the knowledge of the Sellers, the Licensed IP and the unregistered Names that are Owned IP and used by the QNX Entities in the Business (including future development of the Owned Software) substantially in the manner in which the Owned Software, Owned IP and Licensed IP are used in the Business as conducted on the date hereof or violate the rights of any third party (including any Intellectual Property Rights or contractual rights, including any rights of exclusivity) by Commercializing the Owned Software or the Owned IP (other than unregistered Names) or, to the knowledge of the Sellers, by Commercializing the Licensed IP or the unregistered Names that are Owned IP and used by the QNX Entities in the Business, substantially in the manner in which the Owned Software, Owned IP and Licensed IP are used in the Business as conducted on the date hereof.
- 3.43 Except as listed in Schedule 3.43 of the Disclosure Letter, the Owned Software and, to the knowledge of the Sellers, the Licensed IP and the use, copying, development, publication, Commercialization, or other exploitation of the Owned Software, the Owned IP and, to the knowledge of the Sellers, the Licensed IP by the QNX Entities in the operation of the Business as conducted on the date hereof do not materially violate or infringe or constitute a misappropriation or misuse of the Intellectual Property Rights of any Person.
- 3.44 Except as listed in Schedule 3.44 of the Disclosure Letter, to the knowledge of the Sellers, the QNX Entities do not use, incorporate, include, or reference any registered

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third party trademarks, trade-names, indicia, logos, designs, service marks, and/or slogans in connection with the operation of the QNX Software or the Commercialization of the Company IP in the operation of the Business as conducted on the date hereof, in a manner that materially violates or infringes or constitutes a material misappropriation, misuse or dilution of the Intellectual Property Rights of any Person.

- 3.45 Except as listed in Schedule 3.45 of the Disclosure Letter, to the knowledge of the Sellers there is no claim, allegation, notice, demand, or statement of claim, or any other proceeding, dispute or action related to any revenues owing to any of the QNX Entities or related to the Commercialization of any Company IP by the QNX Entities that, individually or in the aggregate, would reasonably be expected to have a Material Adverse Effect.

- 3.46 Except as listed in Schedule 3.46 of the Disclosure Letter, since November 30, 2004 none of the QNX Entities has received any offers or invitations from a third party to obtain a license to such third party's Intellectual Property Rights, other than Intellectual Property Rights in trademarks, trade names, indicia, logos or domain names, for use in or with the Owned Software, in which such offer or invitation the third party claims that the absence of such license will violate its Intellectual Property Rights.
- 3.47 Except as set forth in Schedule 3.47 of the Disclosure Letter, to the knowledge of the Sellers, in the past three (3) years in the case of trademarks, service marks, trade names, indicia, logos, and domain names, and since November 30, 2004 for all other Intellectual Property Rights, no Person has materially infringed, misused or misappropriated Owned IP, and no Person is materially infringing, misusing or misappropriating Owned IP.
- 3.48 Except as listed in Schedule 3.48 of the Disclosure Letter, none of the QNX Entities is obligated to provide, and has not entered into any other agreements or transactions that are conditional upon providing, future enhancements, features not presently available on, or other enhancements in respect of its Software or other product of the QNX Entities in each case with a value in excess of \$500,000.
- 3.49 The QNX Entities have made available to the Buyers copies of (i) all current design plans that have received at least Gate 0 approval, and (ii) all current error logs with respect to the current release of the QNX 6 generation of the QNX Software.
- 3.50 Except as listed in Schedule 3.50 of the Disclosure Letter, each Developer who became an employee of any QNX Entity after November 30, 2004, and each employer of Developers who are not QNX Employees who has entered into an agreement with any QNX Entity after November 30, 2004 (a) has executed an agreement containing non-disclosure and confidentiality obligations prior to providing services to any of the QNX Entities and has, in the case of any Developer who is an employee of any QNX Entity, irrevocably waived in writing his or her respective moral rights in and to the Owned Software and, in the case of any employer of Developers who are not QNX employees, has agreed to obtain such waivers of its employees' respective moral rights in and to the Owned Software; and (b) was either (i) a full-time employee of a QNX Entity employed as a software programmer and was not employed by any third party, who did not

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incorporate any previously existing work product or other materials proprietary to the Developers or any third party (except pursuant to a license with a QNX Entity permitting same) and who validly assigned his or her Intellectual Property Rights (and assigned or waived all related rights) in the Owned Software to the QNX Entities pursuant to a written and signed agreement, or (ii) a contractor who assigned its Intellectual Property Rights in the Owned Software to the QNX Entities pursuant to a written agreement, and to the knowledge of the Sellers no further consent, assignment or other action is required for the employees' or contractors' Intellectual Property Rights to be assigned to, transferred to, or otherwise fully vested in the QNX Entities.

- 3.51 The Disclosure Letter accurately describes in:
- (a) Schedule 3.51(a), all QNX Software that the QNX Entities have decided to, and have been authorized to, distribute and license for business reasons as Open Source Materials; and
 - (b) Schedule 3.51(b), all Open Source Materials incorporated into, integrated or combined with, or distributed in conjunction or for use with, the QNX 6 generation of the QNX Software;
- and for each such use of Open Source Materials sets forth: (x) the applicable component of the QNX Software; (y) the name of the applicable license, which may be incorporated by reference using an Internet link where applicable; and (z) to the extent known by the QNX Entities, the copyright notice of the Open Source Materials.
- 3.52 To the knowledge of the Sellers, all use, modification, distribution and licensing by the QNX Entities of Open Source Materials has been done in all material respects accordance with the terms of the applicable license(s) for such Open Source Materials, and, except as disclosed on Schedule 3.52 of the Disclosure Letter, no such use, modification, distribution or licensing will make the Owned Software or the Owned IP (or any material portion thereof) subject to a license for Open Source Materials (including claims of infringement in connection with such license), or subject to Reciprocal Requirements, or otherwise result in a material loss or impairment of any of the QNX Entities' rights to Commercialize the Owned Software or the Owned IP in substantially the

manner in which the Owned Software and the Owned IP are used in the Business as conducted on the date hereof.

3.53 Except as listed in Schedule 3.53 of the Disclosure Letter:

- (a) Except to the extent derived from the Licensed IP as duly authorized pursuant to a relevant and valid license relating to the Licensed IP, the QNX Software neither contains nor embodies nor uses any third party Technology (including development tools and utilities) or Licensed IP in a manner that would materially infringe any third Person's Intellectual Property Rights; and
- (b) the Owned Software and, to the knowledge of the Sellers, the Software licensed as Licensed IP contain all material Technology, other than Open Source Materials and COTS Software, necessary to continue to Commercialize and maintain the QNX Software in order to enable the Business to be conducted substantially in the manner in which the Business is conducted on the date hereof.

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3.54 Except as disclosed in Schedule 3.54 of the Disclosure Letter, to the knowledge of the Sellers none of the Licensed IP or Open Source Materials create any obligations that would require the Owned IP or the Owned Software to be licensed to or licensed back to any third party in a manner that would materially detract from the Commercialization of the Owned Software or the Owned IP.

3.55 Except as disclosed in Schedule 3.55 of the Disclosure Letter, object code versions of the QNX Software have been provided by the QNX Entities to customers only pursuant to written license agreements with the QNX Entities.

3.56 Since November 30, 2004, except as listed in Schedule 3.56 of the Disclosure Letter: (a) all customers of the QNX Entities with installed QNX Software and, to the knowledge of the Sellers, all commercial end user customers of the QNX Entities with installed QNX Software, have accepted and have not rejected such Software; and (b) there are no outstanding or disputed claims against any QNX Entity by any customer of the QNX Entities with installed QNX Software or, to the knowledge of the Sellers, by any end user with installed QNX Software.

3.57 Schedule 3.57 of the Disclosure Letter sets forth a description of all Published Source Code that is true and complete in all material respects. Except as listed in Schedule 3.57 of the Disclosure Letter, none of the Unpublished Source Code for any QNX Software has been delivered or made available to any Person other than a Related Party and the QNX Entities have not agreed to or undertaken to or in any other way promised to provide such Unpublished Source Code to any such Person. Each Person identified in Schedule 3.57 of the Disclosure Letter, including any subcontractor of any QNX Entity, is subject to non-disclosure and confidentiality obligations that will not be affected by any direct or indirect change of control of any of the QNX Entities.

3.58 Except as listed in Schedule 3.58 of the Disclosure Letter, there are no customers, distributors or any other Persons: (a) entitled to be or that have been enrolled as a beneficiary under a technology escrow or other similar arrangement with respect to the Source Code versions of any QNX Software; or (b) except pursuant to the terms of use posted on the Internet website <http://www.foundry27.com>, a true and correct copy of which is included in Schedule 3.58 of the Disclosure Letter, or to a license agreement consistent with industry standards in the embedded software marketplace for the distribution of proprietary software with a QNX Entity with respect to Published Source Code only, entitled to receive or have received more than an insignificant amount of the Source Code versions of any QNX Software or any material benefits or entitlements of any kind or nature in respect thereof or related thereto (including receiving such Source Code versions of any QNX Software as a result of an event (including a direct or indirect change of control of any of the QNX Entities, bankruptcy of any of the QNX Entities, failure to provide support or maintenance, or fulfillment of other conditions), upon request or otherwise) under an escrow arrangement.

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3.59 Except as set out in Schedule 3.59 of the Disclosure Letter, no third Person shall become entitled to any portion of the Unpublished Source Code or any additional Intellectual Property Rights of any of the QNX Entities solely as a result of this Agreement or the other transactions contemplated by this Agreement.

- 3.60 Except as listed in Schedule 3.60 of the Disclosure Letter, no distributors, sales agents, representatives or other persons, including any VAR or OEM resellers identified in Schedule 3.61 of the Disclosure Letter: (a) have the right to use, market, sublicense or support any QNX Software on an exclusive basis, or (b) are entitled to any payment on termination, expiration or failure to renew such agreement pursuant to any contract.
- 3.61 Schedule 3.61 of the Disclosure Letter lists all material licenses and reseller, distribution, maintenance, support, development and services agreements and all other agreements, in each case to the extent executed in writing or in standard form (in the case of standard-form contracts that do not permit negotiation), between any of the QNX Entities and users of QNX Software, copies of each of which have been made available to the Buyers.
- 3.62 None of the QNX Entities is in material breach of any of its obligations under the agreements listed in Schedule 3.61 of the Disclosure Letter.
- 3.63 Schedule 3.63 of the Disclosure Letter is a complete, true and accurate list of all the critical issues relating to the current release of the QNX 6 generation of the QNX Software as of the date hereof in the reasonable judgment of the persons listed on such Schedule. Except as indicated in Schedule 3.63 of the Disclosure Letter, the QNX Entities have fully resolved all such critical issues in all material respects.
- 3.64 Since November 30, 2004 no material custom Software code developed for any third party, pursuant to a services engagement or installation of Software, has been incorporated into the QNX Software, except in cases where the Intellectual Property Rights for such custom Software code have been retained by or assigned to the QNX Entities and where any underlying background Intellectual Property Rights in the Technology have been licensed to the QNX Entities for such use.
- 3.65 With respect to the QNX 6 generation of the QNX Software (and, in the case of clause (c) below, solely with respect to the current release of the QNX 6 generation of the QNX Software):
- (a) the QNX Entities maintain machine readable master-reproducible copies, Source Materials, technical documentation and user manuals for the most current releases or versions of such Software and for all earlier releases or versions of such Software currently being supported by the QNX Entities;
 - (b) in each case, the machine-readable copy of such Software identified in Exhibit 4(A) of Schedule 3.35 of the Disclosure Letter compiles from the corresponding Source Code; and
 - (c) Except as set forth in error logs made available to Buyers, including the critical issues list in Schedule 3.63 of the Disclosure Letter, such Software, when used in

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accordance with the associated documentation (including but not limited to developer documentation, applicable reference specifications, read-me files, installation notes, release notes and customer bulletins) on a "Reference Platform" identified in Exhibit 4(C) of Schedule 3.35, operates substantially in accordance with such documentation without material operating defects.

- 3.66 Since November 30, 2004, except as listed in Schedule 3.66 of the Disclosure Letter, all current and former customers and end users of the QNX Entities have received the QNX Software pursuant to end user license terms consistent with industry standards in the embedded software marketplace for the distribution of proprietary software applicable to such Owned Software substantially the same as set forth in Schedule 3.66 of the Disclosure Letter (the "EULA").
- 3.67 All United States government customers and all end users of the QNX Entities listed in Schedule 3.67 of the Disclosure Letter since November 30, 2004, have been provided notice that the QNX Software is a "commercial item," as that term is defined in 48 C.F.R. 2.101 (Oct. 1995), consisting of "commercial computer software" and "commercial computer software documentation," as such terms are used in 48 C.F.R. 12.212 (Sept. 1995), and is subject to the restrictions of United States Federal Acquisition Regulations ("FAR") 12.212(a) (1995), 52.227-19 and 52.227-14 (ALT III) and Defense Federal Acquisition Regulation Supplement ("DFARS") 227.7202-1(a) and 227.7202-3(a) (1995) and 252.227-7013(c)(1)(ii) (OCT 1988), as applicable, or notice of similar effect.

- 3.68 Each of the QNX Entities has in all material respects adequately maintained all trade secret rights in, and has adequately maintained the confidentiality of, the Unpublished Source Code.
- 3.69 None of the QNX Entities has materially breached any non-disclosure or confidentiality agreement with respect to Intellectual Property Rights between any of the QNX Entities and any third Person and, to the knowledge of the Sellers, no third Person has breached any non-disclosure or confidentiality agreement with respect to Intellectual Property Rights between any of the QNX Entities and any third Person.
- 3.70 Except as set out in Schedule 3.70 of the Disclosure Letter, no (a) government funding or (b) facilities of a university, college, other educational institution, or research center were used in the development of the Owned Software or the Owned IP.
- 3.71 None of the QNX Entities has taken any action or made any omission in material violation of any Applicable Laws governing imports into or exports from Canada or the United States, or relating to economic sanctions or embargoes, including the *Customs Act* (Canada), the *Customs Tariff Act* (Canada), the *Export and Import Permits Act* (Canada), the *United Nations Act* (Canada), the *Special Economic Measures Act* (Canada), the *United States Export Administration Regulations* and the *Arms Export Control Act* (United States) or any regulation, order, ruling, decision, judgment, injunction or decree of any Canadian or U.S. Governmental Authority issued pursuant thereto. Except as set forth in Schedule 3.71 of the Disclosure Letter, to the knowledge of the Sellers, none of the QNX Entities has taken any action or made any omission in material violation of any

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Applicable Laws governing imports into or exports from any country other than Canada or the United States, or relating to economic sanctions or embargoes under the Laws of any country other than Canada or the United States, or any regulation, order, ruling, decision, judgment, injunction or decree of any Governmental Authority issued pursuant thereto.

- 3.72 Except as set forth in Schedule 3.72 of the Disclosure Letter, all permits, exemptions, or licenses required of the QNX Entities to import, use and distribute the QNX Software have been obtained for Canada and the United States and, to the knowledge of the Sellers, for all other countries to or in which any of the QNX Entities currently sells or distributes such Software.
- 3.73 None of the QNX Software constitutes U.S.-origin technology pursuant to the Export Administration Regulations of the United States of America.

Taxes

- 3.74 Except as would not have or reasonably be expected to have a Material Adverse Effect, and except as disclosed in Schedule 3.74 of the Disclosure Letter, each of the QNX Entities has duly filed in a timely manner all Tax Returns with the appropriate Tax Authority with which it is required to file under any Applicable Laws and has duly completed and has correctly reported all income and other amounts and information required to be reported thereon and all such Tax Returns are complete and correct and have been prepared in compliance with all Applicable Laws.
- 3.75 Except as would not have or reasonably be expected to have a Material Adverse Effect, and except as disclosed in Schedule 3.75 of the Disclosure Letter, each of the QNX Entities has duly and timely paid all Taxes due and owing by it (whether or not such Taxes are shown or required to be shown on a Tax Return) including all installments or estimated payments on account of Taxes for the current year that are due and payable by it and has duly and timely withheld from any amount paid or credited by it to or for the account or benefit of any Person, including any employee, shareholder, creditor, non-resident person or other third party, the amount of all Taxes required by any Applicable Laws to be withheld from any such amount and has duly and timely remitted the same to the appropriate Governmental Authority.
- 3.76 Except as would not have or reasonably be expected to have a Material Adverse Effect, none of the QNX Entities has requested or entered into any agreement or other arrangement or executed any waiver providing for any extension of time: (a) within which to file any Tax Return covering any Taxes for which it may be liable; (b) to file any elections, designations or similar filings relating to Taxes for which it is or may be liable; (c) within which such QNX Entity is required to pay or remit any Taxes or amounts on account of Taxes; or

(d) within which any Tax Authority may assess or collect Taxes for which such QNX Entity is or may be liable.

- 3.77 Except as disclosed in Schedule 3.77 of the Disclosure Letter, and except as would not have or reasonably be expected to have a Material Adverse Effect, there are no actions,

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suits, proceedings, investigations, audits or claims now pending or threatened in writing, against any of the QNX Entities in respect of any Taxes and there are no matters under discussion, audit or appeal with any Tax Authority relating to Taxes.

- 3.78 Except as would not have or reasonably be expected to have a Material Adverse Effect, no claim has been made in the past three (3) years by a Tax Authority in a jurisdiction where the QNX Entities did not file Tax Returns that any QNX Entity is or may be subject to Taxes assessed by such jurisdiction or a filing requirement in that jurisdiction.
- 3.79 Except as would not have or reasonably be expected to have a Material Adverse Effect, none of the QNX Entities is a party to or bound by any Tax allocation or Tax sharing agreement that will survive, with respect to such QNX Entity, the Closing.
- 3.80 Except as would not have or reasonably be expected to have a Material Adverse Effect, there are no Liens for Taxes (other than Permitted Liens) upon the assets of any of the QNX Entities.
- 3.81 Except as disclosed in Schedule 3.81 of the Disclosure Letter, all material transactions between each QNX Entity that is a tax resident of the United States, Canada, Germany or Japan and any non-resident person resident in the United States, Canada, Germany, or Japan with whom it was not dealing at arm's length were conducted at arm's length prices under the Applicable Laws of the United States, Canada, Germany or Japan, as the case may be, and each QNX Entity has made or obtained records or documents supporting these prices sufficient to meet all Applicable Laws of the United States, Canada, Germany or Japan, as the case may be.
- 3.82 Except as would not have or reasonably be expected to have a Material Adverse Effect, none of the QNX Entities has any Liability for Taxes of another person (other than any Liability for Taxes of Parent or any of its subsidiaries (including the QNX Entities) under Treasury Regulations Section 1.1502-6 or any comparable rule of State, local or foreign law) (a) as a successor or transferee or (b) under any contract or indemnity.
- 3.83 Except as listed in Schedule 3.83 of the Disclosure Letter, and except as would not have or reasonably be expected to have a Material Adverse Effect, each of the QNX Entities has charged, collected and remitted on a timely basis all Taxes as required under applicable legislation to be charged, collected or remitted by it, on any sale, supply or delivery whatsoever, made by such QNX Entity.
- 3.84 Except as would not have or reasonably be expected to have a Material Adverse Effect, none of Sections 78, 80, 80.01, 80.02, 80.03 or 80.04 of the *Tax Act*, or any equivalent provision of the Tax legislation of any Canadian province, have applied or will apply with respect to any of the QNX Entities at any time up to and including the Closing Date.
- 3.85 At no time during the period that ends at the Closing Time and begins 60 months prior to the Closing Date have either the QSSC Shares or the Wavemaker Shares (or any shares of any predecessor companies) derived (nor will they derive between the date hereof and the Closing Date) more than 50% of their fair market value directly or indirectly from one or any combination of: (a) real or immovable property situated in Canada,

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(b) Canadian resource properties, (c) timber resource properties, and (d) options in respect of, or interests in, or, for civil law purposes, rights in, property described in any of clauses (a) to (c) of this Section 3.85, whether or not the property exists, (all within the meaning of and for purposes of the *Tax Act*).

- 3.86 Notwithstanding any other provision, it is agreed and understood that (a) the only representations and warranties of the Sellers relating to Taxes are the representations and warranties contained in Sections 3.74 to 3.85 (the "**Tax Representations**") and (b) Sellers do not make any representations and warranties as to the amount, quality or nature of Tax basis, net operating loss, credits, earnings and profits or other Tax Assets or

benefits that may exist at any time in or with respect to the QNX Entities, and shall not be required under any provision of this Agreement to be responsible for, pay or cause to be paid in respect of, indemnify for or hold any person harmless against the absence or loss thereof.