

2018

Joint Law-Business Case Study Competition Program

Canada-United States Law Institute

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CANADA-UNITED STATES LAW INSTITUTE JOINT LAW-BUSINESS CASE STUDY COMPETITION PROGRAM

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I. CASE COMPETITION DESCRIPTION

A. Statement of Purpose

Following the termination of the Niagara International Moot Court Competition in 2015 due to declining interest, a Joint Law-Business Case Study Competition was inaugurated in 2016. This project provides the Canada-United States Law Institute (“CUSLI”) and its supporting institutions with a unique student competition experience that allows for continued student exchange and participation, as well as the growth of interdisciplinary learning. Hosting the competition in conjunction with the CUSLI Annual Conference also increases CUSLI’s academic presence to its many practitioner constituents, which is beneficial both to CUSLI Conference attendees (who consistently request greater student involvement) and students from participating schools (who are often underrepresented and benefit from its networking opportunity). As the centerpiece of the competition the students are our participants and partners; we hope that they will learn from this innovative program and contribute to its current and future success.

B. Competition Summary

Concept: This is an interdisciplinary case study competition that will bring together students from graduate law and business faculties to jointly problem-solve a given real-world issue.

Case: The case presents two companies (one American, one Canadian) looking to achieve a mutually beneficial business transaction.

Teams: Each company will be represented by interdisciplinary teams of four (4), consisting of two (2) Law and two (2) Business graduate students.

Format: The competition will have three general phases: negotiation preparation, negotiation practice, and negotiation agreement submission.

Assessment: Teams will be measured according to their ability to successfully navigate the complexities of a transactional situation. This will require advocating for their company's priorities while at the same time acknowledging the need for compromise with their negotiation counterparts to create an agreement acceptable to both parties.

Prize: The team that is found to have most successfully accomplished the above goals will be awarded a prize valued at \$400 (shared equally among the team's four participants).

C. Competition Background

General Concept: This project was proposed by Dean Ken Jones of Ryerson University School of Business at CUSLI's 2015 Executive Committee meeting. He proposed that CUSLI launch a law-business case study competition that will bring together students from graduate law and business faculties at participating schools to jointly problem-solve a given real-world issue. The problem will be a transactional situation requiring negotiation teams to move forward a proposed business deal.

Case Competition Model: The case format is not new since it has been used for many years in business schools, analogous to the way that Moot Court competitions function in the law school setting. In the business case model, students are placed in teams of two to four students and are given a fact pattern to consider. After discussion and planning, the teams then present their findings and recommendations to a panel of experts in the given field. The experts then rank teams based on their work product and presentation, and give constructive feedback.

Joint Law-Business Case Competition: While the case model is common in business schools, a joint case model bringing together Law and Business graduate students responding to both business and law cases is a new concept. The case competition model will be modified in this instance to incorporate some elements of the law school Moot Court model, specifically the team vs. team aspect. However, unlike the traditionally adversarial Moot Court model, this case competition will recreate a transactional situation, with both sides trying to "win" by creating a mutually valuable agreement, rather than "win" through legal argumentation. Importantly, this exercise will require Business and Law students to work together as partners to build an information picture, define priorities, and

come up with workable strategies that are sound from both a business and legal perspective.

D. Competition Details

The CUSLI Joint Law-Business Case Competition will coincide with the opening of 2017's 41st Anniversary CUSLI Conference on April 6th. *The participating Law and Business graduate students are the centerpiece of this process.* The competition will feature teams of graduate Law and Business students from Case Western Reserve University ("CWRU") and Western Law. The following are the core pieces of the competition's form and substance.

- *The Teams:* The competition is looking for four (4) teams of four (4) students (two (2) law and two (2) business students), two (2) from CWRU and two (2) from Western Law.
- *The Case:* The case presents two companies (one American, one Canadian) looking to achieve a mutually beneficial business transaction. Each team, representing one company, will receive a fact pattern detailing each business, negotiation instructions describing the proposed deal's background and requirements from company leadership, and a template agreement for teams to use as a model for their final product.
- *Competition Format*
 - *Negotiation Preparation:* Teams will receive their materials approximately one month before the competition. Students will be expected to carry out background legal and business research to inform their negotiation positions, and meet to discuss proposed strategy. Each team, representing one company as its negotiation team, must determine the company's desired outcomes and negotiation strategy. Preparation is estimated to require eight to ten hours.
 - *Negotiation Practice:* Teams will then be assigned a negotiation counterpart, with whom they will engage in negotiations to hopefully come to an agreement. Students will be given an allotted time on April 6th, of no more than one hour and a half, to negotiate and come up with a proposed agreement.
 - *Agreement Draft/Recommendation:* Out of the negotiations, teams will create a proposed agreement, along with recommendations to corporate leadership as to whether the proposed agreement is acceptable, and if not, what further changes may be possible to make it so. Importantly, it is not an absolute necessity to come to an agreement; if there are insurmountable business and legal hurdles for a particular party, it is the team's responsibility to identify and communicate this to company leadership.
- *Assessment:* Teams will be measured according to their ability to successfully navigate the complexities of the transactional situation, advocating for their company's priorities while at the same time acknowledging the need for compromise with their negotiation counterparts to create an agreement acceptable to both parties. Teams will NOT be

Prospective Business Partner – Network Masters, Inc.*B. United States Entity*

Business Name – Network Masters, Inc. (“NMI”), based in Austin, Texas.

Business Operations – NMI is a large, industry leading computer software and hardware manufacturer and servicer.

Market Participation – Currently, NMI has strong product placement in industrial, business, and government sectors. NMI anticipates growth area in mobile devices, particularly through the expansion of multi-device systems including wearable tech and virtual reality options.

Business Profile – NMI is currently expanding to gain a foothold in the mobile device market and challenge sector giants such as Samsung, Apple, and Microsoft. NMI has top-notch device design personnel, as well as strong relationship marketing connections with corporate partners.

- *Size*: NMI is a large company with an annual revenue of \$1.8 billion (US)
- *Employees*: approx. 1,000
- *Capital Investment*: NMI’s operations are somewhat capital intensive, however, production costs remain suppressed, with outsourced device manufacturing for many components.
- *Assets*: \$1 billion (US)
- *Net Income*: \$25 million (US)
- *Leadership/Ownership*: NMI is a publicly traded company. There is no majority shareholder.

Prospective Business Partner: DGAds Corporation

III. EVALUATOR MATERIALS

General Evaluation Approach: As evaluators, we would ask that you keep the following points in mind when measuring each team’s performance.

In designing the problem, we worked to create a situation requiring the participating teams to address two fundamental issues:

1. Identify points of synergy between the two companies; and
2. Compromise on sticking points wherever possible.

In addressing the above two issues, teams will need to balance the following priorities:

- The need to realize maximum value for their company (given their priorities) while allowing the same for their prospective partner; and

measured solely on their ability to extract “wins” on every desired business/legal goal, nor will they be measured by the mere existence or absence of a proposed agreement at the conclusion of negotiations. The team that is found to have most successfully accomplished the above goals will be awarded a prize valued at \$400 (shared equally among the team’s four participants).

II. CASE FRAMEWORK BUSINESS BACKGROUND

A. Canadian Entity

Business Name – DGAds Corporation (“DGA”), based in Waterloo, Ontario.

Business Overview – A quickly growing Canadian tech startup, DGA is an innovative mobile device software and programmatic marketing company.

Market Participation – Started as a digital marketing company, DGA currently creates and places ad content for multiple small and mid-sized device and software companies, as well as other tech sector clients. DGA has also recently expanded into mobile software, developing software for interfacing mobile devices and emerging accessories like wearable tech.

Business Profile – Started in 2014, DGA has built an emerging reputation based on its advanced analytics, using complex algorithms based on accurate marketing analysis to deliver effective product placement for digital advertising. Its strength is its personnel and proprietary marketing data analysis. Those two assets underpin its advanced analytics that allow it to better place digital advertising. DGA also has been developing innovative mobile software, anticipating a boom in new opportunities in the wearable and virtual reality tech markets.

- *Size*: DGA is a small company with estimated annual revenue of \$55 million (CAN).
- *Employees*: approx. 165
- *Assets*: unknown
- *Capital Investment*: Has received approximately \$30 million (CAN) in venture capital since its founding in 2014. Business footprint is negligible other than personnel and some hardware costs. Not a capital-intensive business operation.
- *Ownership*: privately owned corporation
- *Issues*: DGA had prior issues with processing fraudulent ad solicitations, making it appear that its product placement was higher than actual. This issue, experienced by many other providers as well, received significant press in tech industry media coverage. DGA implemented filters that now set the industry standard, apparently resulting in improved performance.

- Protecting the team's company assets while offering tangible benefits to the other party.
- *Clarifications*: It is also important to note what we are NOT expecting the teams to achieve in this exercise, given the limited time, resources, and expertise.
- *Efficiency*: Team success should not be measured solely by the number of items covered in the allotted time. For example, a negotiation outcome that only produces one major point of agreement is not necessarily a failure, so long as the teams effectively managed the above issues and priorities.
- *Detail*: This exercise is not asking teams to determine discrete product orders, merger timelines, employee compensation, or other contract deliverables. Rather, it is asking the teams to agree on a set of a half-dozen general principles that will underpin the proposed collaboration (see below for a model agreement).
- *Disagreement and Final Outcome*: If there are aspects that prove more difficult for the teams to problem solve at this juncture, it is acceptable for teams to bookmark those items and move on to other important pieces of the proposed collaboration, so long as both sides agree and commit to further discussion at a later date.

Negotiation Goals: The teams have been asked to negotiate general terms on the topics below.

- *Technology*: What technology assets or capabilities will the two parties be transacting in some fashion?
- *Format*: What form will the proposed collaboration take? For example, a merger, joint venture, licensing agreement, product/system sale, etc.
- *Funding*: What sources will be used to fund any capital investment in the collaboration, if applicable? For example, stock issuance, capital contribution from partner company, etc.
- *Risk Allocation*: What arrangements will be made for covering financial and legal risks that might arise from the proposed collaboration? In terms of financial risks, this could include operating losses; for legal risks, it could be product liability, among others.
- *Follow-On Services*: How will later installation, service, and repair of possible new systems produced by the collaboration be addressed, if applicable?
- *Exclusivity*: What is the company's ability to market related products and systems outside of the proposed agreement?

Specific Evaluation Criteria: Based on the above two issues and priorities, meshed with the assigned negotiation points, the following criteria should prove useful in assessing each team's performance. As the competition only features two teams, evaluation of each point can be made on a binary

comparison; as otherwise stated, which team more effectively dealt with the above defined issues, balanced the competing priorities, and achieved a beneficial outcome for their company?

Business Students:

1. Ability to Determine Synergies: Which team was more effective at identifying ways to create opportunities with existing technologies and needs?
2. Ability to Identify Formats Advantageous to Company Needs: Which team advocated for a resolution that would most fully fulfill their company's goals?
3. Funding: Which team was best able to identify an advantageous funding arrangement?
4. Risk: Which team was best able to identify methods to protect their proposed investment?
5. Services: Which team was able to identify a more advantageous follow-up arrangement?
6. Exclusivity: Which team was able to preserve a more advantageous freedom to market outside the agreement?

Law Students:

1. Ability to identify legal issues that affect each major negotiation goal (technology, format, etc.).
2. Ability to communicate those issues to their business partners and incorporate preferred legal positions into the negotiation.

Both Law and Business Students:

1. Ability to advocate for their position in a measured and reasonable way.
2. Ability to incorporate both legal and business principles into negotiation approach.
3. Ability to compromise when needed, yet leverage compromise to gain other concessions.
4. Ability to be flexible and think creatively.

Model Agreement: The model agreement below is an illustration of a possible arrangement in a similar situation.

- *Technology/Product Basis:* Company *A* has product *X* and technology *Y* that have promising applications for Company *B*. *B* proposes that product *X* could be incorporated directly into their supply chain as-is, with significant cost reduction to *B*. *A* proposes that technology *Y*, while not a plug-and-play asset for *B* at this time, could be a key component to a new product similar to those already produced by *B*.
- *Format of Proposed Collaboration:* Regarding product *X*, Company *B* plans to buy product *X* from Company *A* for incorporation into its supply chain. Regarding technology *Y*, *B* plans to license technology *Y* from *A* to create a new product based on existing *B* products.

- Legal: Within this proposed collaboration, there are several legal principles that may inform the parties' approaches. These principles then also implicate business priorities as well.
- Intellectual Property Rights: What rights will A and B have in the new product created by B using A's tech?
- Management Structure: Will A have any quality control oversight of B's use of its technology Y? Will A have recourse if standards are not maintained?
- *Funding/Capital investment*: Etc.

IV. NEGOTIATION PREPARATION

The following information will serve as a tool for student teams in forming their approaches to negotiation. The concepts and guidelines are not mandatory requirements for team preparation, but serve as useful starting points in conducting adequate planning and preparation for a successful negotiation.

A. Planning For Your Negotiation

Type of Negotiation: Before entering a negotiation, your team must determine the type of negotiation with which you are engaging.

- **Distributive Negotiation:** Also known as “claiming value,” “zero-sum,” or “win-lose” bargaining, this is a competitive negotiation strategy used in deciding how to distribute a fixed resource.
- **Integrative Negotiation:** Also known as “interest-based” bargaining, or “win-win” bargaining, this is a negotiation strategy that emphasizes collaboration to maximize beneficial outcomes for both parties.
- **Subordinative Negotiation**

Goals: Your team must also determine your company's specific goals, as well as anticipate the goals of the other party.

- **Your Goals:** Determine your party's short term and long term goals, and how they fit into your negotiation strategy. Determine which goals are most significant to the success of the overall negotiation.
 - **Ideal Outcome:** Once you have determined your overall goals, consider the ideal outcome for your company.
- **Other Party's Goals:** Determine what you anticipate to be the other party's short and long term goals, and how you might be able to work with/around those points to create synergies.

Agreement Thresholds: With your negotiation goals in mind, you must determine a bottom line threshold of what you are willing to compromise. This allows your team to anticipate situations that could kill a possible deal.

- **Your Threshold:** Determine the minimum value that is acceptable for a deal (type and value of goals achieved, for example).

- **Other Party's Threshold:** You should also forecast what possible minimum value is acceptable for a deal from the other party's perspective.

Negotiation Strategy: You should have prepared tools to help you achieve your goals defined above. These may take many forms, including those based on your strengths, and those that appeal to the other party's needs.

- **Opening Offers:** Have a defined and specific proposal that will set the framework of the discussions around your interests and goals. It is generally useful to reach an agreement quickly on low-hanging fruit before moving on to more difficult or complex issues.
- **Possible Counter-Offers:** Anticipate and prepare possible proposals in response to the other party's opening positions, if they will likely be substantially different from your own.
- **Possible Compromises:** Identify areas where your company is willing to compromise if needed in order to reach an agreement on more pressing issues.

Negotiation Agenda: Draft a document incorporating the above information, forming it into a roadmap that will help guide your team's discussions during the session. This document will also likely prove to be a helpful basis for your final negotiation outline.

B. Conducting the Negotiation

Please keep in mind the following while you conduct the actual negotiation exercise.

Evaluation and Measuring Success: The primary factors on which you will be evaluated are those that demonstrate your team's ability to identify points of synergy between the two companies and compromise on sticking points.

- In general, your team should be balancing the following priorities in achieving your goals:
 - realizing maximum value for your company while allowing the same for your prospective partner; and
 - protecting your company's assets while offering tangible benefit to the other party.
- Your success will not be measured solely by the number of items you can cover in the time that you have. Rather, you will be evaluated on your ability to identify synergies and create solutions by balancing the above priorities, even if your negotiation only produces such a result on a single aspect of the proposed collaboration.
- **Detail:** This exercise is not asking teams to determine discrete product orders, merger timelines, employee compensation, or other contract deliverables. Rather, it is asking the teams to agree on a set of a half-dozen or so general principles that will underpin the proposed collaboration. A model agreement might mimic the following:

Technology/Product Basis: Company A has product X and technology Y that have promising applications for Company B. Company B proposes that product X could be incorporated directly into their supply chain as-is, with significant cost reduction to Company B. Company A proposes that technology Y, while not a plug-and-play asset for Company B at this time, could be a key component to a new product similar to those already produced by Company B.

Format of Proposed Collaboration: Company B plans to buy product X from Company A to incorporate into its supply chain. Regarding technology Y, Company B plans to license technology Y from Company A to create a new product based on existing Company B products.

- Legal: within this proposed collaboration, there are several legal principles that may respectively inform the parties' approaches. These principles then also implicate business priorities.
 - Intellectual Property Rights: What rights will A and B hold in the new product created by B using A's technology?
 - Liability: What liability will A and B have in the new product?
 - Management Structure: Will A have any quality control oversight of B's use of A's technology? Will A have recourse if standards are not maintained?

Funding/Capital investment: Etc.

Disagreement and Final Outcome: If there are any aspects that prove more difficult to problem-solve at this juncture, it is acceptable to bookmark those items and move on to other important pieces of the proposed collaboration, so long as both sides agree and commit to further discussion at a later date.

V. NEGOTIATION INSTRUCTIONS

A. DGAds Corporation: Confidential Materials

You as DGAds' ("DGA") lead negotiation team, have come to learn that:

- a. DGAds Corporation's Owner and CEO has identified two major needs for the company's continued expansion – actualization of DGA's innovative mobile device software and expansion of DGA's client base for its digital marketing division;
- b. these needs arise because DGA wishes to launch an IPO of stock within two years, and therefore needs growth to underpin its initial valuation, and to that end,
 1. rapid expansion of the digital marketing arm is likely to be able to contribute to a high valuation; and,

2. the development of DGA's innovative mobile device software will require further development to present a viable growth area.
- c. DGA currently has IP and top-notch personnel underpinning mobile device software innovation, but has not begun to implement any of its test software outside of the trial phase involving limited device availability;
- d. DGA also currently has exclusive contracts with several small and mid-sized device and software companies to place digital marketing; and,
- e. DGA is seeking a large tech industry partner to grow its revenue and market footprint.

As you keep in close contact with your colleagues in Operations, you are aware that:

- a. In the Marketing Division, DGA possesses several capabilities that can form the basis for any new expansion to achieve the CEO's goal, including that DGA has:
 1. industry leading analytics to best place programmatic digital advertising;
 2. highly qualified marketing and analytics personnel that constantly track and update DGA's algorithms and inputs;
 3. a proven track record of targeted placement of digital advertising for tech company partners; and,
 4. product placement in core services of banner, video, and mobile ads on average 25% more effective than the industry average, and on par with the most reputable and established large digital advertising firms.
- b. The marketing division has also instituted internal remedies to industry-wide issue of fraudulent digital advertising placement, most importantly that:
 1. implemented filters that now set the industry standard, practically guaranteeing top-tier product placement across digital platforms,¹
 2. has vastly improved the effectiveness of DGA ad impressions (also equating to a rise in price given higher reliability).
- c. In the Mobile Device Software Division, DGA possesses several capabilities that can form the basis for new ventures, in that its various software platforms and systems are designed to:
 1. support touch-less screen technology that allows users to interact with device content with above-screen movements and verbal commands;

¹ Many programmatic digital advertising firms have not instituted stringent fraud filters.

2. support VR technology, particularly wearable vision and tactile devices; and,
 3. support interfaces between mobile devices and wearable medical devices.
- d. The Mobile Device Software division has achieved the following:
1. written source code for the above interfaces; and,
 2. tested the software on existing third-party devices bought on the open market, loaned to DGA by device designers, as well a handful of prototype hardware pieces assembled by DGAs fledgling mobile device design lab;

This design lab could play a role in DGA's long term growth, but is not a key piece of its initial approach to its IPO valuation, and could be spun off.

Prototypes for wearable tech created so far have patents pending.

As you have been informed by the CEO, ultimately, it is DGA's goal to use the above capabilities to create business partnerships with robust growth that will provide short-term gains for DGA.

Based on your prior work and collaboration with DGA's upper management, you know that:

- a. DGA's leadership, with your help, has identified three potential partners for DGA in the tech sector;
- b. you have conducted exploratory talks with the three potential partners, and have identified NMI as an ideal partner, given NMI's desire to vastly expand its mobile device business and with it, NMI's need for mobile device platform and digital advertising needs;
- c. DGA's leadership desires a business arrangement with NMI to create growth for DGA's services in the mobile device software market and programmatic marketing environment; and,
- d. you have been tasked to conduct follow-up negotiations with NMI's team to develop an outline of what a proposed deal will look like.

In order to prepare for this stage of negotiations, your team has been asked to:

- a. research the current and future state of the relevant markets;²
- b. research the legal principles that affect the core pieces of the proposed agreement; and,
- c. prepare a negotiation strategy for achieving your desired goals, including forecasting projected goals of the other negotiating party.

² As primers, see Michael Johnston, *What Are Average CPM Rates in 2016?*, MonetizePros (last modified March 20, 2016), <http://monetizepros.com/display-advertising/average-cpm-rates/>, and Jeanne Grunert, *What Is a Typical CPM?*, Chron (last visited January 8, 2018), <http://smallbusiness.chron.com/typical-cpm-74763.html>.

In approaching this particular stage of the negotiation, your team has been given the following directives. Any proposed deal *must* seek to:

- a. in the device and software area,
 1. create a development/implementation opportunity for DGA's mobile software;
 2. keep control over existing DGA IP as DGA is *not* interested in transferring existing IP;

This implicates two types of IP, copyright of existing code, and patents on software where applicable with DGA's in-house prop type mobile accessories

- b. and in the marketing area,
 1. make DGA the exclusive programmatic marketing provider for NMI and in the process,
 2. procure above market average prices for DGA's services;
 3. sell as many of DGA's advertising services as possible;
 4. allow DGA to provide programmatic marketing to other parties outside of any agreement; and,
 5. gain access to user data from purchasers of NMI's new mobile devices to inform DGA's marketing analytics;
 6. keep DGA's marketing units intact since DGA is not interested in selling any portion of its marketing business;
- c. and above all, put DGA in a position to strengthen its valuation in the lead-up to its planned IPO.

At the same time, the DGA executive suite has left open the following points to be dealt with at your discretion:

- a. the format of any expansion program (merger, joint venture, product/system sale, licensing agreement, etc.);
- b. funding of/capital investment in any expansion program, if applicable;
- c. risk allocation, both in terms of capital and legal risks;
- d. what exact marketing tools and strategies will be contracted for;
- e. the format of any marketing agreement (joint venture, services agreement, etc.);
- f. the duration and cost of any marketing agreement proposed; and,
- g. NMI's ability to engage in other forms of marketing not involving programmatic placement.

At this juncture, your negotiations, and the product lines that you hope to create based on those negotiations, will be:

- a. a major part of DGA's business development plan for rapid growth;
- b. used to determine if working with NMI is viable from a services and revenue standpoint; and
- c. the basis for DGA's negotiation strategy to reach a final agreement.

B. Network Masters, Inc.: Confidential Materials

You, as Network Masters, Inc.'s ("NMI") lead negotiation team, have come to learn that:

- a. NMI's CEO has identified a diversification away from existing NMI markets as an urgent business priority;
- b. this need is driven by the recent decline in manufacturing and medical buyers for the company's larger IT systems and supporting software, the backbone of the company's business;
- c. these market pressures are driving NMI to look at alternative markets; and,
- d. to address this need, NMI's CEO desires to increase NMI's ability to create new product lines in mobile devices and software, particularly in the emerging markets of wearable tech and virtual reality accessories.

As you keep in close contact with your colleagues in Operations, you are aware that:

- a. NMI has begun to develop a suite of prototype wearable tech that should be able to challenge market giants in the mobile device software market; and
- b. NMI currently possesses production capabilities for small and medium-sized tech devices, with emphasis on devices for the manufacturing and medical industries. These capabilities can be expanded and adapted for mobile devices, though investment is needed to fully scale production of consumer electronics.

As you have been informed by the CEO, ultimately, it is NMI's goal to use the above capabilities to create a strong business line with growth potential that will quickly bring returns.

Based on your prior work and collaboration with NMI's upper management, you know that:

- a. NMI's leadership, with your help, has identified three potential partners to develop new product lines in the mobile device sector;
- b. you have conducted exploratory talks with the three potential partners, and have identified DGA as a possible expansion opportunity, given their expertise in developing mobile software and marketing tech devices;
- c. NMI's leadership desires a business expansion involving DGA to enhance NMI's ability to create and market the new line and build up the brand, ideally by bringing expertise in-house in both device software and marketing through an acquisition if possible; and,

- d. you have been tasked to conduct follow-up negotiations with NMI's team to come up with an outline of what a proposed deal will look like.

In order to prepare for this stage of negotiations, your team has been asked to:

- a. research the current state of the mobile device and digital advertising market;³
- b. research the legal principles that affect the core pieces of the proposed agreement; and,
- c. prepare a negotiation strategy for achieving the desired goals, including forecasting projected goals of the other negotiating party.

In approaching this particular stage of the negotiation, your team has been given the following directives. Any proposed deal *must* seek to:

- a. create in-house capacity to support design and production, as well as marketing, of new mobile devices and software;
- b. keep rights to any newly-created IP related to new devices, software, and marketing plan;
- c. create avenues to bring in additional capital to help finance the expansion into mobile devices;
- d. take advantage of existing, proven data-driven marketing tools and strategies;
- e. deliver measurable marketing services for competitive rates;
- f. project actionable timelines for agreement implementation; and,
- g. ensure that digital marketing services, if agreed upon, are not being diluted by fraudulent transactions.⁴

At the same time, the executive suite has left open the following points to be dealt with at your discretion:

- a. the exact form of any agreement to design and produce mobile devices, as well as market those product lines (acquisition, joint venture, services agreement);
- b. funding of/capital investment in any expansion program, if applicable;
- c. what exact marketing tools and strategies will be used;
- d. risk allocation, both in terms of capital and legal risks;
- e. the duration and cost of any marketing agreement proposed; and,
- f. NMI's ability to design, produce, and market other products and systems outside of the proposed agreement.

³ Johnston, *supra*, note 2; Grunert, *supra*, note 2.

⁴ See Jessica Davies, *After filtering for fraud, AppNexus transactions fell by 65 percent*, Digiday (September 15, 2015), <https://digiday.com/uk/appnexus-filters-65-percent-impressions-fraudulent/>.

At this juncture, your negotiations, and the agreement that you hope to create based on those negotiations, will be:

- a. a major part of NMI's marketing plan for the new product line;
 - b. used to determine if working with DGA is viable from a cost and capability standpoint; and,
 - c. the basis for NMI's negotiation strategy to reach a final agreement.⁵
-