SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CHARLES E. RAMOS

Justice

PART 53

Index Number : 601296/2009

R2 INVESTMENTS, LDC,

vs.

ICAHN, CARL C.

SEQUENCE NUMBER : 007

SUMMARY JUDGEMENT

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

T s motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: □ Yes □ No

Upon the foregoing papers, it is ordered that this motion

Motion is decided in accordance with accompanying Memorandum Decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 1/29/13

J.S.C.

HON. CHARLES E. RAMOS

Check one: □ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: □ DO NOT POST □ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

--X

YOULU ZHENG and DONALD J. HILLENMEYER
on behalf of themselves and all others
similarly situated,

Plaintiffs,

-against-

Index No. 650499/10
Motion Sequence 006

CARL C. ICAHN, CARL J. GRIVNER, ADAM DELL, FREDRIK GRADIN, VINCENT INTRIERI, KEITH MEISTER, ROBERT KNAUSS, DAVID S. SCHECTER, PETER SHEA, HAROLD FIRST, DANIEL A. NINIVAGGI, ACF INDUSTRIES HOLDING CORPORATION, ARNOS CORPORATION, HIGH RIVER LIMITED PARTNERSHIP, STARFIRE HOLDING CORPORATION, ARNOS SUB CORP., XO MERGER CORP., BARBERRY CORPORATION, and XO HOLDINGS, INC.,

Defendants.

--X

R^2 INVESTMENTS, LDC,

Plaintiff,

-against-

Index No. 601296/09
Motion Sequence 007,
008, and 012

CARL C. ICAHN, CARL J. GRIVNER, ADAM DELL, FREDRIK GRADIN, VINCENT INTRIERI, KEITH MEISTER, ROBERT KNAUSS, DAVID S. SCHECTER, PETER SHEA, HAROLD FIRST, DANIEL A. NINIVAGGI, ACF INDUSTRIES HOLDING CORPORATION, ARNOS CORPORATION, HIGH RIVER LIMITED PARTNERSHIP, STARFIRE HOLDING CORPORATION, ARNOS SUB CORP., XO MERGER CORP., BARBERRY CORPORATION, and XO HOLDINGS, INC.,

Defendants.

--X

Charles E. Ramos, J.S.C.:

Motion sequences 007, 008, and 012 in the action bearing index number 601296/2009 (the "R2 Action") and motion sequence 006 in the action bearing index number 650499/2010 (the "Zheng Action") are herein consolidated for disposition.

In motion sequence 007 and 008 of the R2 Action, the defendants Carl C. Icahn, Carl J. Grivner, Adam Dell, Fredrik Gradin, Vincent Intrieri, Keith Meister, Robert Knauss, David S. Schecter, Peter Shea, Harold First, Daniel A. Ninivaggi, ACF Industries Holding Corporation ("ACF"), Arnos Corporation ("Arnos"), High River Limited Partnership ("HRLP"), Starfire Holding Corporation ("Starfire"), Arnos Sub Corp. ("ASC"), XO Merger Corp. ("XOM"), Barberry Corporation ("Barberry"), and XO Holdings, Inc. ("XO", collectively, the "Defendants") move for summary judgment dismissing the amended complaint (the "R2 Complaint") of the plaintiff R^2 Investments, LDC ("R2").

In motion sequence 012 of the R2 action and motion sequence 006 of the Zheng Action, the Defendants move pursuant to CPLR 3211(a)(1), (3), and (7) to dismiss the sixth amended and supplemental class action complaint (the "Zheng Complaint", together with the "R2 Complaint", the "Complaints") of the class-plaintiffs Youlu Zheng and Donald J. Hillenmeyer, on behalf of themselves and all others similarly situated (collectively, "Zheng", with R2, the "Plaintiffs") .

This action arises out of two transactions that ultimately permitted Icahn to acquire 100% of XO's shares and the use of its net operating losses (the "NOLs") and separate return limitation year net operating losses (the SRLY-NOLs, collectively, with the "NOLs", the "XO NOLs") for allegedly inadequate consideration.

The Parties

The Plaintiffs, at all relevant times, were minority shareholders of XO.

ACF, Arnos, HRLP, Starfire, ASC, XOM, and Barberry (collectively, the "Affiliates") are all corporations either owned or controlled by Icahn.

Icahn is, and at all relevant times has been, the Chairman of the XO Board of Directors (the "XO Board") and a director of XO. Since June 2008, Icahn has held at least 50% of XO's equity and voting power, either directly or through the Affiliates. It is undisputed that Icahn possessed and exercised the authority to appoint each member of the XO Board.

In 2008, Icahn, along with the individual defendants Grivner, Intrieri, Shea, Dell, Gradin, Knauss, Meister were all members of the XO Board. In 2011, First, Ninivaggi, Schechter, Gradin, and Knauss were members of the XO Board.

XO was a competitive telecommunications services provider that delivered an array telecommunications services to the telecommunications provider, business, and government markets. A majority of XO's clients connected to XO's national network through its fiber optic network, known as Wireline.

Background

This Court will recite only the allegations from the Complaints that are relevant to the instant motions.

Central to this action are Icahn's acquisition of the XO NOLs, which under certain circumstances, could be used to offset his tax liability arising from his ownership interests in other companies. Pursuant to the Internal Revenue Code, usage of the NOLs required that Icahn hold at least 80% of XO's equity and voting power and the usage of the SRLY-NOLs required that Icahn hold 100% of XO's equity and voting power.

The Plaintiffs allege that Icahn, the Affiliates, and the Special Committees breached their fiduciary duty to the minority shareholders in consummating two self-dealing transactions, a 2008 super-sized preferred rights offering (the "2008 Recapitalization") and a 2011 cash-out merger (the "2011 Merger", together with the "2008 Recapitalization", the "Challenged Transactions"). According to the Plaintiffs, the ultimate goal of the Challenged Transactions was to acquire the use of the XO

NOLs for minimal consideration, to enable Icahn to offset his tax liability from his other companies.

Icahn acquires use of the NOLs

In June 2002, due to various factors not at issue in these motions, XO filed for Chapter 11 protection under the United States Bankruptcy Code, and its Plan of Reorganization was confirmed in November 2002. As a result, Icahn converted debt acquired during the bankruptcy proceedings into 83% of XO's new equity and 85% of XO's new debt.

After emerging from bankruptcy, Icahn appointed all members of the XO Board and elected himself Chairman of the XO Board. As a result of XO's bankruptcy, Icahn was able to obtain the use of the NOLs. As a part of the bankruptcy reorganization, on January 16, 2003, XO and Starfire were consolidated for tax purposes and executed a Tax Allocation Agreement that provided that Icahn, through Starfire, could use the NOLs to offset his tax liability from his other companies. Icahn and Starfire were required to compensate XO for the NOLs only if XO was able to use the NOLs itself, but XO was unable to use the NOLs because it had no taxable income to offset.

In 2003 and 2004, Icahn used approximately $450 million of the NOLs to offset his tax liability from his other companies (Zheng Complaint, ¶ 41).

Icahn loses use of the NOLs

In January 2004, as a result of an unexpected oversubscribed XO rights offering, Icahn's equity and voting power in XO fell from 83% to 61%. Consequently, Starfire and XO were unconsolidated for tax purposes and Icahn lost the ability to use the NOLs. Icahn would not be able to reconsolidate Starfire and XO until January 2009 because of a 5 year waiting period imposed by the Internal Revenue Code.

The Plaintiffs allege that after the oversubscribed XO rights offering, Icahn attempted a sale of XO's Wireline asset and proposed amendments to XO's operating agreement in an effort to reacquire 80% of XO's equity and voting power and thus, again enjoy the use of the NOLs (Zheng Complaint, ¶¶ 44-48). Both transactions were enjoined by minority shareholders and eventually abandoned by Icahn (*id.*).

By the end of 2006, Icahn and the Affiliates owned 51.5% of XO's common stock, approximately 80% of XO's Class A preferred shares, and over 90% of XO's debt maturing July 2009.

Concurrently, the XO Board formed a special committee consisting of Knauss, Gradin, and Dell (the "2008 Special Committee") to discuss possible financing alternatives to fund XO's expenditures. The 2008 Special Committee first retained

Cowen and Company LLC ("Cowen") and later retained Morgan Stanley ("Morgan") as its financial advisers.

The Plaintiffs allege that the 2008 Special Committee failed to protect minority shareholders and allowed Icahn to reacquire use of the NOLs for minimal consideration. Between December 2006 and July 2008, the 2008 Special Committee ignored the recommendations of five investment banks to conduct the smallest rights offering possible (Zheng Complaint, ¶¶ 58-65). In addition, it failed to implement cash conservation measures in light of XO's lack of permanent financing (*id.* at ¶ 68), and failed to explore offers from third party bidders and "repeatedly found reasons to defer action and suppress the unsolicited offers that it or XO received" (*id.* at ¶¶ 68-85). Lastly, it failed to inform itself of the actual amount of financing that XO required and the actual value of the NOLs (*id.* at ¶¶ 101-102).

Around May 2008, Icahn proposed a super-sized preferred rights offering as an alternative to a sale of XO (*id.* at ¶ 98). The 2008 Special Committee began considering Icahn's proposal, ignoring the advice of Cowen and Morgan to consummate a smaller, common stock rights offering.

In June 2008, with multiple potential purchasers for some or all of XO, the Icahn-dominated XO Board decided that it was too distracting to consider the potential sale and Icahn's proposal simultaneously and voted to discontinue the sales process so that XO could focus on its negotiations with Icahn.

Cowen issued a limited fairness opinion on the 2008 Recapitalization, and specifically did not opine on the value of the NOLs or the fairness of the transaction with respect to the minority shareholders (*id.* at ¶ 144). Nonetheless, the XO Board approved the transaction proposed by Icahn.

Icahn reacquires the use of the NOLs

On July 25, 2008, with the approval of the 2008 Special Committee, XO consummated the 2008 Recapitalization. Pursuant to the terms of the 2008 Recapitalization, XO issued $780 million in two new preferred classes of stock, Class B convertible preferred stock (the "Class B Stock") and Class C perpetual preferred stock (the "Class C Stock") that Icahn purchased in exchange for the retirement of XO's Icahn owned debt. Icahn's equity interest in XO increased from just over 50% to approximately 85% (on a fully diluted basis). As a result of the increased equity interest, Icahn obtained use of the NOLs subject to the Amended Tax Allocation Agreement (the "ATAA").

The ATAA provided that Icahn's obligations to pay for the $450 million in NOLs already used by Icahn remain unchanged. For the next $900 million of NOLs, Icahn would have to pay to XO 30% of the tax benefits obtained, and for anything above $900 million, Icahn would only have to repay XO when it had taxable income and could have used the NOLs itself.

Furthermore, both the Class B Stock and Class C Stock were senior to XO's common stock and contained pay-in-kind dividends. Thus, in December 2008, the Class B Stock conferred 381 million votes for 381 million shares and the Class C stock conferred 150 million votes for 225,000 shares. In March 2011, as a result of the pay-in-kind dividends, the Class B Stock and Class C stock increased to 445 million votes and 193 million votes, respectively.

The Plaintiffs allege that the 2008 Recapitalization "was designed to transform Icahn from a debt holder with no voting rights to a shareholder with super voting rights" (*id.* at, ¶ 153). It "diluted the minority shareholders by means of the issuance of excessive numbers of preferred shares with excessive voting power, depriving the minority shareholders of their voting power in XO" (*id.*). The Plaintiffs argue that the issuance of the preferred stock "constituted an overpayment by XO to Icahn of economic value and voting power, improperly extracting that economic value and voting power from the" minority shareholders and transferring it to Icahn (*id.*). That extraction was crucial to Icahn obtaining use of the NOLs.

Icahn acquires use of the SRLY NOLS

The Plaintiffs allege that, as early as 2007 and continuing after the 2008 Recapitalization, Icahn intentionally depressed XO's stock price with the goal of enabling him to acquire 100% of XO's equity and voting power, and thus to obtain the use of the SRLY-NOLs. In 2009 and 2010, Icahn attempted to structure additional improper transactions to accomplish this goal (*id.* at, ¶¶ 162-176), which were challenged by minority shareholders and were, ultimately, unsuccessful.

On January 21, 2011, XO disclosed that Icahn, through his affiliate, ACF, made an offer to purchase the remaining shares of XO that he did not own for $0.70 per share. ACF requested that XO initiate a process for reviewing the proposed buyout, but also indicated that, in no event, would it or any of the Affiliates sell the shares to a third party or vote for a transaction involving a third party. The XO Board formed a special committee consisting of Knauss, Gradin, and First to review the proposed buyout (the "2011 Special Committee, together with "2008 Special Committee", the "Special Committees").

On July 12, 2011, despite objections from the minority shareholders, XO consummated the 2011 Merger by announcing that it had executed an Agreement and Plan of Merger with Icahn (the "2011 Merger Agreement), the Affiliates, and XOM. The terms of the 2011 Merger Agreement provided that minority shareholders would be cashed out at $1.40 per share in cash and receive an uncertificated, non-transferable, contract right to receive a pro rata distribution of certain proceeds in the event that XO was sold to a third party on or before July 12, 2012.

Icahn's acquisition of 100% of XO through the 2011 Merger accomplished his ultimate goal of obtaining the use of over $2 billion of XO's SRLY-NOLs. Icahn previously obtained the use of the NOLs when he reached an 80% equity and voting interest in XO, but he could not use the SRLY-NOLs unless he owned 100% equity and voting interest in XO.

The Plaintiffs allege that the consideration for the 2011 Merger is grossly inadequate and unfair to minority shareholders because the price of $1.40 per share is less than what was offered in 2008. Furthermore, XO's share price cannot be properly evaluated due to Icahn's scheme to depress the XO shares, which negatively impacted XO's share price in the market.

The 2011 Special Committee also failed to consider the value of the SRLY-NOLs to Icahn and the value of the Plaintiffs' causes of action with respect to the 2008 Recapitalization. Moreover, the Plaintiffs allege that the value of the right to receive a pro rata distribution upon the sale of XO is illusory because Icahn merely has to wait one day after July 12, 2012 to sell XO in order to completely avoid making the distribution to the Plaintiffs.

Discussion

Applicable Law

XO is duly organized and existing under the laws of Delaware, therefore, Delaware law is the applicable law governing this dispute (*Hart v Gen. Motors Corp.*, 129 AD2d 179, 185 [1st Dept 1987] *appeal denied* 20 NY2d 608 [1987]).

Standing

As a preliminary matter, the Defendants assert that the Plaintiffs do not have standing to challenge the 2008 Refinancing because they are no longer shareholders of XO after the 2011 Merger. The Plaintiffs lack standing to assert derivative claims if they were not shareholders at the time of the complained-of conduct and throughout the litigation (*Lewis v Anderson*, 477 A2d 1040, 1049 [Del 1984]).

The Plaintiffs counter that they do have the proper standing to bring these claims against the Defendants under Delaware law because the causes of action are direct and not derivative.

The Plaintiffs rely on *Gentile v. Rossette*, wherein the Delaware Supreme Court reversed a ruling of the Court of Chancery that held that corporate overpayment claims do not give rise to a direct claim for shareholders (*Gentile v. Rossette* 906 A2d 91, 100 [Del 2006]).

The *Gentile* court held that minority shareholders have standing to assert direct claims arising out of overpayment transactions that involve a shareholder with a majority or effective control, which in turn, causes the company to issue "excessive" shares of its stock in exchange for assets of lesser value owned by the controlling shareholder, and the exchange results in an increase in ownership percentage of outstanding shares owned by the controlling shareholder, and a corresponding decrease in ownership of shares by the minority shareholders (*id.*).

Due to the fact that the changes in ownership resulted from an "overpayment (or over-issuance) of shares to the controlling stockholder, the corporation is harmed and has a [derivative] claim to compel the restoration of the value of the overpayment" (*id.* [internal quotations omitted]).

Nonetheless, the Court concluded that "[b]ecause the shares representing the overpayment embody both economic value and voting power, the end result of this type of transaction is an improper transfer-or expropriation-of economic value and voting power from the minority [shareholders] to the majority or controlling [shareholder]" (*id.* [internal quotations omitted]).

As a result, the minority shareholders "also have a separate, and direct, claim arising out of the same transaction" because the minority shareholders are effectively "harmed, uniquely and individually, to the same extent that the controlling shareholder is (correspondingly) benefitted" (*id.*). The court held that the minority shareholders were "entitled to recover the value represented by the overpayment" as a direct claim, without regard to any derivative claims that may be asserted (*id.*).

Here, the Plaintiffs have alleged that, in executing the Challenged Transactions, Icahn caused XO to exchange the XO NOLs for inadequate consideration, and as a result of the exchange, the Plaintiffs' equity interest and voting power were improperly diluted.

The Defendants' argument that the Challenged Transactions are distinguishable from the transaction in *Gentile*, on the basis that it was the Special Committees, and not Icahn, himself, that approved them is unpersuasive. The Plaintiffs have sufficiently alleged that the Special Committees were not independent, and acting under the influence and direction of Icahn, as discussed below.

Pursuant to Delaware law and specifically, the holding in *Gentile*, this Court finds that Plaintiffs clearly have the proper standing to challenge the transactions.

Illegal Gift

In contrast, the Plaintiffs' cause of action for violations of 8 Del. C. § 122 must be dismissed. Plaintiffs have failed to submit any authority that would permit this Court to classify this cause of action as direct. Therefore, the third and sixth causes of action in the Zheng Complaint and the third cause of action in the R2 Complaint are dismissed.

The Applicable Fairness Standard

The Defendants argue that the proper standard to be applied in analyzing the Challenged Transactions is the business judgment rule. However, Delaware law clearly provides that "[w]hen a transaction involving self-dealing by a controlling shareholder is challenged, the applicable standard of judicial review is entire fairness, with the defendants having the burden of persuasion" (*Americas Mining Corp. v. Theriault*, 51 A3d 1213, 1239 [Del 2012]).

"[W]hen entire fairness applies, the defendants may shift the burden of persuasion by one of two means: first they may show that the transaction was approved by a well-functioning committee of independent directors; or second, they may show that the transaction was approved by an informed vote of a majority of the minority shareholders" (*id.* at 1240). "Nevertheless, even when an interested cash-out merger transaction received the informed approval of a majority of minority stockholders or a well-functioning committee of independent directors, an entire fairness analysis is the only proper standard of review" (*id.*).

The court held that "[t]o obtain the benefit of a burden shifting, the controlling shareholder must do more than establish a perfunctory special committee of outside directors" (*id.*). Rather, the special committee must "function in a manner which indicates that the controlling shareholder did not dictate the terms of the transaction and that the committee exercised real bargaining power an arms-length" (*id.* [internal quotations omitted]).

"Regardless of where the burden lies, when a controlling shareholder stands on both sides of the transaction the conduct of the parties will be viewed under the more exacting standard of entire fairness as opposed to the more deferential business judgment standard" (*Kahn v Tremont Corp.*, 694 A2d 422, 428 [Del 1997]).

Burden of Persuasion

The Defendants argue that the Special Committee was independent, and therefore, R2 bears the burden of persuasion with respect to the unfairness of the Challenged Transactions.

This Court disagrees. Initially, R2 argued that discovery was required to demonstrate that Knauss was not an independent board member and that he was beholden to Icahn because of past and present business relationships. On that basis, R2's motions for summary judgment (MS 007, 008) were held in abeyance pending the completion of discovery on the issue of Knauss' independence.

Upon the completion of discovery, it was revealed that Knauss is currently a board member of another company owned by Icahn and/or his affiliates, and that he never engaged in a personal financial transaction with Icahn or the Affiliates, other than his compensation as a board member. Furthermore, it was revealed that the compensation he received from Icahn was equivalent to 26% of his total income between 2004 and 2009. (Ross Aff., Ex. 66, ¶¶ 3, 5, 10).

The facts revealed in discovery are insufficient to overcome the presumption that Knauss is independent. The Plaintiffs fail to submit evidence that could lead the Court to conclude that Knauss would be more willing to risk his reputation than risk his relationship with Icahn (*Beam ex rel. Martha Stewart Living Omnimedia, Inc. v Stewart*, 845 A2d 1040, 1052 [Del 2004]). However, Knauss' purported independence, standing alone, is not enough to shift the burden of persuasion to the Plaintiffs.

Obtaining a burden shift requires a deeper analysis into "the substance, and efficacy, of the special committee's negotiations, rather than just a look at the composition and mandate of the special committee" (*Americas* at 1241).

In analyzing the burden shifting mechanism, the *Americas* court reasoned that the benefit of having clarity at trial outweighed the "modest" benefit of the burden shift because the plaintiff would only have to demonstrate unfairness under preponderance of the evidence standard. Furthermore, "[t]he failure to shift the burden is not outcome determinative under the entire fairness standard of review" (*Americas* at 1243).

As a result, Delaware Courts have held that "if the record does not permit a pretrial determination that the defendants are entitled to a burden shift, the burden of persuasion will remain with the defendants throughout the trial to demonstrate the entire fairness of the interested transaction" (*id.*).

Nonetheless, at this phase of the litigation, this Court cannot determine that the Special Committees were well-functioning, as a matter of law. The Plaintiffs have alleged numerous incidents where the Special Committees capitulated to or were limited by Icahn's demands, including, *inter alia*, failing to pursue alternative transactions or use those alternatives as leverage in negotiations with Icahn, ignoring the advice of its financial advisers, and allowing Icahn to withhold his financial information from the Special Committees, and consequently, undermine the valuation of the XO NOLs.

The resolution of these issues require a trial and testimony from experts and cannot be decided on a motion for summary judgment. Consequently, the burden of persuasion remains with the Defendants with respect to the unfairness of the Challenged Transactions.

Entire Fairness of the Challenged Transactions

The "entire fairness standard requires the court to consider two factors: fair dealing and fair price" (*In re Loral Space and Communications Inc.*, 2008 WL 4293781 [Del Ch Sept. 19, 2008]). "Although the entire fairness standard has two components, the entire fairness analysis is not a bifurcated one as between fair dealing and fair price. All aspects of the issue must be examined as a whole since the question is one of entire fairness" (*Americas* at 1244 [internal quotations omitted]).

Fair process "embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained" *(Weinberger v UOP, Inc.*, 457 A2d 701, 711 [Del 1983]). "Initiation by the seller, standing alone, is not incompatible with the concept of fair dealing so long as the controlling shareholder does not gain financial advantage at the expense of the controlled company" (*Kahn* at 431).

"In a non-fraudulent transaction, price may be the preponderant consideration outweighing other features of the merger. Evidence of fair dealing has significant probative value to demonstrate the fairness of the price obtained. The paramount consideration, however, is whether the price was a fair one" (*Americas* at 1244 [internal quotations omitted]).

Fair price "relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock" (*Weinberger* at 711).

The Plaintiffs' allegations raise numerous triable issues of fact with respect to the conduct of the Special Committees, and as to the fairness of the terms of the Challenged Transactions.

Based upon the record, the Defendants have not demonstrated that: (1) either of the Special Committees "acted as an effective proxy for arms-length bargaining," (2) Icahn did not exert pressure on the Special Committees during the fulfillment of its mandate, (3) an extensive market check was performed before and after the Challenged Transactions, (4) the price did in fact constitute a premium when considering XO's liquidation value and market price (*see In re Cysive, Inc., S'holder Litig.*, 836 A2d 531, 534 [Del 2003][factors supporting a finding of entire fairness]).

As a result, this Court is unable to conclude, as a matter of law that the Challenged Transactions satisfy the entire fairness standard. Therefore, the motions for summary judgment are denied and the overlapping factual issues must await resolution at trial.

Accordingly, it is

ORDERED that the Defendants' motions to dismiss (Index #601296/2009 MS 012 and Index #650499/10 MS 006) are granted in part, thereby dismissing the third and sixth causes of action in the Zheng Complaint and the third cause of action in the R2 Complaint for violations of 8. Del. C. § 122, and denied in all other respects, and it is further

ORDERED that the Defendants' motions for summary judgment (Index #601296/2009 MS 007 and MS 008) are denied in their entirety, and it is further

ORDERED that the parties are to schedule a pretrial conference with the Clerk of Part 53 to be held no later than February 14, 2013.

This constitutes the decision and order of this Court.

Dated: January 29, 2013

ENTER:

J.S.C.

CHARLES E. RAMOS