SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

NINETEEN EIGHTY-NINE, LLC, Plaintiff, - against - ICAHN ENTERPRISES L.P., ICAHN ENTERPRISES FINANCE CORP., CHELONIAN SUBSIDIARY, LLC, AND CARL C. ICAHN, Defendants.	New York County Clerk's Index No. 600056/10 **NOTICE OF ENTRY**

TAKE NOTICE that the within is a true copy of a decision and order that was entered in the office of the clerk of the above-named Court on October 16, 2012.

Dated: New York, New York
October 16, 2012

ZEICHNER ELLMAN & KRAUSE LLP

By:
Yoav M. Griver
575 Lexington Avenue
New York, New York 10022
(212) 223-0400

ROSS & ORENSTEIN LLC
Jeffrey I. Ross
John B. Orenstein
222 South Ninth Street, Suite 470
Minneapolis, MN 55402
(612) 436-9800
Attorneys for Plaintiff

TO: Robert R. Viducich, Esq.
Law Office of Robert R. Vidicich
Attorneys for Defendants
110 Wall Street, 11th Floor
New York, New York 10005-3817

Gonzalez, P.J., Sweeny, Acosta, Renwick, Manzanet-Daniels, JJ.

8290-
8291 Nineteen Eighty-Nine, LLC, Index 600056/10
Plaintiff-Respondent, 150040/10

-against-

Icahn Enterprises L.P., et al.,
Defendants-Appellants.

- - - - -

Carl C. Icahn, et al.,
Plaintiffs-Appellants,

-against-

Geoffrey Raynor, et al.,
Defendants-Respondents.

Herbert Beigel & Associates LLC, Tucson, AZ (Herbert Beigel of the bar of the State of Arizona, admitted pro hac vice, of counsel), and Robert R. Viducich, New York, for appellants.

Zeichner Ellman & Krause LLP, New York (Jeff I. Ross of counsel), for respondents.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered January 6, 2012, which, upon reargument of defendants Icahn Enterprises L.P., Icahn Enterprises Finance Corp., Chelonian Subsidiary, LLC and Carl C. Icahn's (Icahn defendants) motion to dismiss, adhered to its prior order, entered June 2, 2011, which, inter alia, denied dismissal of plaintiff Nineteen Eighty-Nine, LLC's (1989) remaining two causes of action for breach of contract, unanimously affirmed, with costs. Order, same court and Justice, entered June 23, 2011, which granted the

motion of defendants Geoffrey Raynor; R2 Investments, LDC; Nineteen Eighty-Nine, LLC; Amalgamated Gadget, LP; Sceptor Holdings, Inc.; Q Funding, LP; Acme Widget, LP and Brandon Teague (Raynor defendants) to dismiss the complaint of Carl C. Icahn, Icahn Enterprises, LP, Icahn Enterprises Finance Corp. and Icahn Enterprises Holdings, LP (Icahn plaintiffs), and denied the Icahn plaintiffs' request for leave to amend, unanimously affirmed, with costs.

1989's allegations that the Icahn defendants breached the parties' LLC and Side Letter Agreements by transferring shares of Federal Mogul Corporation to an Icahn affiliate and causing that affiliate to institute a bond offering without disclosing 1989's interest in the shares to potential investors, thereby encumbering the shares and endangering 1989's interest, were sufficient to withstand the Icahn defendants' motion to dismiss (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010], *Jericho Group, Ltd. v Midtown Dev., L.P.*, 32 AD3d 294, 298 [1st Dept 2006]).

The Icahn plaintiffs offer no support for their assertion that 1989's filing of a Schedule 13D with the SEC in 2010 is not entitled to protection under the Noerr-Pennington doctrine because the document was simply a "disclosure document." The 13D was filed *because* the 2010 litigation was commenced, and thus, it

was incidental to that litigation and falls squarely within the protection of the Noerr-Pennington doctrine (*see Aircapital Cablevision, Inc. v Starlink Communication Group, Inc.*, 634 F Supp 316, 323-324 [D Kan 1986] [finding publicity that was "[c]learly . . . bully-type conduct" that undoubtedly hurt defendant's business to be "incidental to the lawsuit"]). Here, as in *Aircapital*, the filing of the Schedule 13D amendment was incidental to the lawsuit, and thus protected, even if, as the Icahn plaintiffs argue, the 13D was only a glorified press release meant to frighten away investors, and even if the Raynor defendants would have been "better advised to have refrained from [so filing]" (*Aircapital Cablevision, Inc.*, 634 F Supp at 324). As such, the court properly dismissed both the tortious interference and prima facie tort claims as precluded by Noerr-Pennington (*see Concourse Nursing Home v Engelstein*, 278 AD2d 35 [1st Dept 2000] [dismissing tortious interference and prima facie tort claims as precluded by Noerr-Pennington]). Because these claims are precluded by Noerr-Pennington, this court need not consider whether they were otherwise well pled.

The court also properly dismissed the remainder of the Icahn plaintiffs' claims.

The Icahn plaintiffs attempt to exclude from absolute immunity to claims of injurious falsehood, certain statements

made by the Raynor defendants specifically in the Schedule 13D. As found by the lower court, however, the absolute privilege applies "even in quasi-judicial hearings and administrative hearings, and the privilege 'attaches not only to the hearing stage, but to every step of the proceeding even if it is preliminary and/or investigatory, and irrespective of whether formal charges are ever presented'" (quoting *Cicconi v McGinn, Smith & Co., Inc.*, 27 AD3d 59, 62 [1st Dept 2005], *appeal dismissed* 6 NY3d 807 [2006]). Here, the Raynor defendants filed the Schedule 13D amendment as part of the broad regulatory scheme required by the SEC and kicked into gear by the Icahn plaintiffs' commencement of the bond offering process. The Icahn plaintiffs, thus, offer no basis to deny absolute privilege to the statements made in the Schedule 13D amendment, and the injurious falsehood claim was appropriately dismissed.

The gravamen of the Icahn plaintiffs' abuse of process claim is that the Raynor defendants abused the legal process by filing the 2010 lawsuit with malicious intent. This fact is borne out by review of the actual language of the cause of action, which states that "the conduct in the filing of the Lawsuit" - not the filing of the Schedule 13D - was the abuse of process. Such a claim cannot stand (*see I.G. Second Generation Partners, L.P. v Duane Reade*, 17 AD3d 206, 207 [1st Dept 2005]).

Finally, the court properly denied the Icahn plaintiffs' motion to amend, as any amendment would be "palpably insufficient or clearly devoid of merit" (*Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498 [1st Dept 2011]), given that three of the claims at issue are barred by immunity doctrines and that no amendment can alter the fact that the filing of a complaint, alone, is not an abuse of process.

We have considered the parties' remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 16, 2012

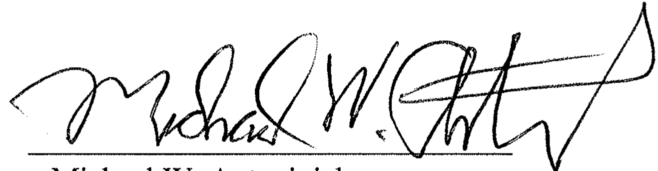
CLERK

STATE OF NEW YORK,
COUNTY OF NEW YORK.

AFFIDAVIT OF SERVICE
BY FIRST CLASS MAIL

Michael W. Antonivich, being duly sworn, says: that I am over the age of eighteen years, am not a party herein, and reside in Nassau County, New York and that on the 16th day of October, 2012, I served a true copy of the within **NOTICE OF ENTRY AND DECISION AND ORDER OF THE APPELLATE DIVISION, FIRST DEPARTMENT ENTERED ON OCTOBER 16, 2012** upon the attorneys below by depositing the same, properly enclosed in a post-paid, properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office Department within the City and State of New York, directed to said attorneys at their last known address given below:

Robert R. Viducich, Esq.
Law Office of Robert R. Vidicich
Attorneys for Defendants
110 Wall Street, 11th Floor
New York, New York 10005-3817



Michael W. Antonivich

Sworn to before me on this
16th day of October, 2012

NOTARY PUBLIC

ANTHONY ROSARIO
Notary Public, State of New York
No. 01RO6212071
Qualified in Bronx County
Commission Expires 10/05/2013

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ZEICHNER ELLMAN & KRAUSE LLP
575 LEXINGTON AVENUE
NEW YORK, NEW YORK 10022
TEL: (212) 223-0400
FAX: (212) 753-0396
www.zeklaw.com