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

Youlu Zheng and Donald J. Hillenmeyer on behalf of themselves and all others similarly situated	)	Justice Charles E. Ramos
Plaintiffs,	)	
v.	)	Index No. 650499/2010
CARL C. ICAHN, CARL J. GRIVNER, ADAM DELL, FREDRIK GRADIN, VINCENT J. INTRIERI, KEITH MEISTER, ROBERT KNAUSS, DAVID S. SCHECHTER, PETER SHEA, HAROLD FIRST, DANIEL A. NINIVAGGI, ACF INDUSTRIES HOLDINGS, INC., ARNOS CORPORATION, HIGH RIVER LIMITED PARTNERSHIP, STARFIRE HOLDING CORP., ARNOS SUB CORP., XO MERGER CORP., BARBERRY CORP. and XO HOLDINGS, INC.	)	
Defendants.	)	

SIXTH AMENDED AND SUPPLEMENTAL
CLASS ACTION COMPLAINT

Plaintiffs Dr. Youlu Zheng and Donald J. Hillenmeyer, by their attorneys, for their complaint against Defendants, allege upon personal knowledge with respect to their own acts and upon information and belief and based on the discovery taken thus far in this action as to all other allegations herein, as follows:

SUMMARY OF ACTION

1. This action is brought as a class action by Plaintiffs Zheng and Hillenmeyer on behalf of themselves and the public stockholders of XO Holdings, Inc. (formerly known as XO Communications, Inc.) ("XO" or the "Company"). XO's minority public shareholders have suffered enormous losses and their interests have been massively diluted due to Defendants'

systematic and repeated manipulation of XO stock and warrants through schemes spanning several years hatched by defendant Carl C. Icahn ("Icahn"), the Chairman of the Board and controlling shareholder of XO. Icahn, exerting his power through affiliated entities, has made recurring attempts to acquire that portion of XO that he does not already own for inadequate consideration. With each effort, whether successful or not, he has permanently depressed XO's stock price and further deprived the minority public shareholders of the true value of their stock.

2. As a result of Icahn's manipulation, XO's stock, that commenced trading in 2003 and reached a high of $8.33 per share on July 9, 2003 and traded as low as $0.12 per share in 2008, has traded below $0.75 per share for the past three years up until and including July 11, 2011. XO's stock traded at these depressed values despite the fact that XO's business has been relatively stable with annual revenue of roughly $1.5 billion for the past six years. Using his power over the XO Board, Icahn has deliberately depressed XO's stock price and otherwise manipulated the course and outcome of various transactions complained of herein in order to gain access to XO's billions of dollars of valuable net operating losses ("NOLs") to reap hundreds of millions (if not billions) of dollars of tax shelters for his own benefit.

3. At all times relevant to this action, Icahn, through entities he owns and/or controls, has owned a majority of the common and preferred stock and debt of XO. Icahn employed his control of XO to carry out a series of self-dealing transactions designed to benefit himself at the expense of plaintiffs and XO's other minority shareholders. The challenged transactions involved self-dealing by Icahn, and are subject to judicial scrutiny under Delaware's entire fairness standard. The recent waiver of the attorney-client privilege by certain individual defendants comprising a special committee of the XO board of directors has resulted in the production of documents previously withheld on privilege grounds. These documents make clear

that entire fairness is the standard against which all of the transactions challenged herein must be measured. *See, e.g.*, Exhibit A comprising a July 14, 2008 memorandum from the Special Committee's counsel to the Special Committee entitled "Fiduciary Duties in the Context of a Proposed Preferred Stock Issuance To The Majority Shareholder and Amendment of Tax Sharing Agreement." Despite this clear advice from counsel, the Individual Defendants complied with Icahn's demands, acquiesced in his schemes and breached their fiduciary duties to XO's shareholders. Their conduct could never satisfy the entire fairness standard as required by Delaware law.

4. Upon XO's emergence from bankruptcy in 2003, Icahn was XO's controlling shareholder holding more than 80% of XO's equity. Icahn appointed himself Chairman of XO's Board and filled the Board with individuals beholden to him. In 2003, by virtue of his ownership of more than 80% of XO's value and voting power, Icahn was able to consolidate XO with his affiliates for tax reporting purposes. This consolidation gave him access to XO's billions of dollars of NOLs to reduce the tax burden on his affiliated companies. During the first year of the consolidation, Icahn's affiliates used $450 million of XO's NOLs to offset tax obligations and incurred no current obligation to XO for such use.

5. In January 2004, Icahn's equity ownership and voting power unexpectedly declined below 80% as a result of an oversubscribed common stock rights offering. As a result, Icahn lost the ability to use XO's NOLs, the primary, if not only, reason for his investments in XO. Since then and until July 2008, Icahn's sole mission has been to re-gain 80% ownership and voting power of XO to gain access to XO's billions of dollars of NOLs solely for his benefit and the benefit of enterprises he controls. The 2008 Transaction complained of herein was structured to ensure that Icahn would reach the 80% threshold and never again go below it.

Following the 2008 Transaction, Icahn repeatedly acted to ensure that he would never again lose access to the NOLs. These actions have harmed XO's shareholders.

6. From the fall of 2005 through 2007, during a period when attractive financing terms were readily and easily available to XO for its incremental capital needs, Icahn intentionally blocked XO from obtaining refinancing leaving XO dependent on expensive debt owned by Ichan. Icahn encouraged XO to spend freely on capital expenditures without any concrete plan for funding XO's business plan. The Individual Defendants failed to challenge this course of action and acquiesced in it. When in the latter part of 2007 and 2008 the capital markets virtually closed to even the highest-quality borrowers, XO, at Icahn's direction, determined to pursue financing purportedly to avoid a substantial deterioration of its business.

7. In September 2007, the XO Board appointed a committee comprised of three Icahn-controlled directors to consider proposals received by XO from Icahn and others (the "Special Committee"). At the outset, the Special Committee's mandate permitted it to consider transaction proposals *it received* from Icahn and from "any other person whatsoever." The Special Committee retained an investment banker for the express purposes of considering financing transactions *or sale transactions*. Though the Special Committee's mandate expanded during the course of the Special Committee's 2007-08 incarnation giving it broad powers, the Special Committee failed to comprehend the scope of that mandate or intentionally declined to exercise the authority granted to it and repeatedly permitted itself to be manipulated by Icahn. Worse, yet, it allowed itself to go down the most dangerous path for anyone dealing with a controlling shareholder, that of believing that its only option was to do a deal with the controlling shareholder. That belief became a self-fulfilling prophecy: at the end the Special Committee, in

derogation of the advice of its bankers, permitted Icahn to perpetrate the 2008 Transaction to the detriment of XO's minority shareholders.

8. While the Special Committee was exploring financing transactions with Icahn in mid-2008, XO and/or the Special Committee received three unsolicited bids to buy all or part of XO. The Special Committee, dominated and out-maneuvered by Icahn and paying mere lip service to its mandate, failed to fully and fairly explore those bids and thus to appropriately inform itself of the value of XO's assets to a third party Instead, Icahn demanded, and the Special Committee ultimately approved, a suffocating and highly dilutive $780 million private placement permitting Icahn, who insisted on receiving convertible preferred stock (the "2008 Transaction"), to increase his ownership over the 80% threshold permitting Icahn to gain access to XO's NOLs. The 2008 Transaction – a unique transaction largely without comparable precedent – was intentionally structured to get Icahn 80% of the XO vote and permit him to once again access XO's NOLs. Despite repeated advice from its banker that XO's minority shareholders would not be able to participate in such a transaction and thus would have their equity interests severely diluted without any offsetting benefit, the Special Committee acceded to the demands of Icahn and agreed to a supersized preferred stock private placement. The Amended Tax Allocation Agreement entered into by XO and Icahn's affiliates was an integral part of the 2008 Transaction It failed to adequately protect XO's minority shareholders, providing Icahn with 100% access to XO's (non-SRLY) NOLs for promised payment of only 30% of the tax savings. The Special Committee failed to adequately inform itself of the value of the Amended Tax Allocation Agreement because it failed to press Icahn for information necessary to determine the tax benefit to Icahn of the use of the NOLs.

9. By July 2008, Icahn succeeded in persuading the Special Committee that a return to bankruptcy proceedings was the only alternative available to the 2008 Transaction. Rather than acting, as required by Delaware law, as an effective agent for XO's minority stockholders by using as leverage in its negotiations with Icahn the offers from third parties to buy XO or its assets or to participate in the refinancing, the Special Committee approved the 2008 Transaction on terms highly favorable to Icahn and extraordinarily onerous to the minority shareholders, and granted Icahn the voting power necessary for him to access the NOLs.

10. The 2008 Transaction is subject to the entire fairness standard. The Special Committee's counsel expressly advised that a reviewing court would examine whether the price and process were entirely fair. *See* Exhibit A. That the 2008 Transaction cannot pass muster under the entire fairness standard is apparent from its flawed process (described below) and from the very limited "fairness opinions" obtained by the Special Committee from its bankers. Those opinions were insufficient in light of clear Delaware authority: despite its mandate to protect the minority shareholders, the Special Committee failed to *ask* its bankers for opinions as to the fairness of the 2008 Transaction to those minority holders. The opinions failed to opine that the two preferred stock issues (either together or standing alone) were fair to the minority shareholders. The opinions failed to address those provisions of the preferred stock that extracted voting and economic power from minority shareholders and conferred extraordinary voting power to Icahn to permit him to go from just over 50% of the vote to over 80% of XO's voting power; and the opinions failed completely to address the Amended Tax Allocation Agreement, an integral component of the 2008 Transaction. Despite the Special Committee's request, the bankers refused to address the size of the 2008 Transaction. The "fairness opinions" purported to address the 2008 Transaction from the perspective of XO as a whole, but did not

address fairness to the minority shareholders. Given the obvious conflicting interests between Icahn and the minority shareholders the Special Committee was appointed to protect, the absence of such an evaluation violated Delaware law.

11. Securing the necessary votes to reach the 80% threshold was only one part of a two-part plan. Icahn also had to ensure that the *value* of his XO holdings reached and exceeded the 80% threshold. This he did by intentionally depressing the price of XO's common stock. That Icahn and XO's management including XO's then CEO, defendant Grivner, planned to and did engage in actions to depress XO's stock price is clear from defendant Grivner's own words in an August 8, 2008 email to defendant Shea, then one of Icahn's designees as a director on XO's board:

> *If you read the Preferred* [Stock] *Agreement and understand the tax issues, there is a significant reason for keeping the stock below $2 for as long as possible. So while in most companies, all the value that's being created could be reflected in the stock price such is not the case here. Another reason is the stock is not widely held, is offered on the pink sheets and neither of those is likely to change.* (emphasis added)

XO's then CFO Freiberg wrote to defendant Shea, explaining Grivner's "significant reason for keeping [XO] stock below $2 for as long as possible":

> I put this model together to *show the impact of the XO stock price going up against the % Value Voting that Icahn affiliates have in XO. The key point here is for Icahn to maintain at least 80% in order to keep the ability to consolidate NOLs....*
>
> *Below $1.55 per share, Icahn is at 80% or more. If the XO stock price goes above that, then potentially you lose the ability to consolidate the NOLs.* (emphasis added)

12. Since 2008, Icahn has continued to scheme and plan to depress and cap XO's stock price in order to ensure that he and his affiliates retained control of the NOLs obtained in the 2008 Transaction and ultimately eliminated XO's minority shareholders and secured access

to another $2.5 billion of XO's NOL's (the "SRLY NOLs"). In order to access the SRLY NOLs, Icahn had to eliminate the minority shareholders. Only 100% ownership of XO could unlock the value of the SRLY NOLs to Icahn. Towards that end, Icahn announced a series of transactions that had the effect of capping the price of XO stock, depriving and diluting minority shareholders of their valuable interest in XO and its assets and operations. Icahn's plan culminated in the 2011 Merger effected in August 2011 in which minority shareholders were cashed out at $1.40 per share.

13. In 2009, Icahn staged an attempt to buy out the minority shareholders followed in 2010 by the announcement of still yet another rights offering and a reverse stock split. Neither of the foregoing transactions was consummated although they had the desired effect of keeping XO's stock price at depressed levels. XO, at Icahn's direction, set these plans aside when, on January 19, 2011, Icahn made still another low ball offer at $0.70 per share to acquire the minority shares he did not own (the "2011 Proposed Buyout"). On January 19, 2011, immediately prior to the public disclosure of the $0.70 offer, XO stock traded at $0.73 per share.

14. On July 12, 2011, pursuant to a merger agreement dated July 11, 2011 (the "2011 Merger Agreement"), Icahn and XO announced that Icahn would cash out minority shareholders for $1.40 per share in cash and a non-transferable, uncertificated contract right (the "contract right") to receive a pro rata share of certain proceeds received by Icahn and his affiliates in the event that XO were sold to a third party within the next year, by July 12, 2012 (the "Merger Consideration"). Following an unsuccessful motion to enjoin the closing of that transaction and/or to require additional disclosure, the Merger closed on August 18, 2011 eliminating XO's minority shareholders without any vote or tender by them.

15. The 2011 Merger Consideration was inadequate and unfair for a number of reasons: First, it failed to take into account the value of the claims asserted in this class and derivative action challenging the 2008 Transaction, which class claims survive the closing of the 2011 Merger. Second, it failed to take into account the inherent value of XO's underlying fiber optic assets, the value of which assets is exploding because of increased data transmission and the attendant need for bandwidth capacity. Finally, and perhaps most critically, it fails to take into account the value of in excess of $2.5 billion in SRLY NOLs which the Special Committee handed to Icahn for no consideration.

16. XO advised its minority shareholders that they had no right to vote or tender shares in favor of or against the 2011 Merger. XO further advised plaintiffs and other minority shareholders that they had only one avenue of recourse, appraisal under Delaware General Corporation Law Section 253. Defendants have misrepresented the true nature of the minority shareholders' rights here. Like the 2008 Transaction, the 2011 Merger is subject to the entire fairness standard, a fact that the Special Committee and its counsel have conceded. Moreover, a standstill provision in the 2008 Transaction – Section 6.4 of the Stock Purchase Agreement entered into on July 25, 2008 – precluded Icahn from consummating any transaction which took him over the 90% ownership mark for the common stock absent approval of a committee of disinterested directors. As alleged in detail below, this most recent incarnation of the Special Committee cannot demonstrate that it has met the entire fairness standard applicable to self-dealing transactions.

THE PARTIES

17. Plaintiff Dr. Youlu Zheng, an individual residing in California, was at all relevant times an owner of XO common stock and certain XO warrants which expired on January 16, 2010. The Court has granted plaintiff Zheng's motion for class certification and has certified him and his counsel respectively as the class representative and counsel for the Class.

18. Plaintiff Donald J. Hillenmeyer, Jr., an individual residing in Tennessee, was at all relevant times an owner of shares of the common stock of the Company. With the closing of the 2011 Merger on August 18, 2011, the derivative claims are mooted and plaintiff Hillenmeyer's claims are now being asserted directly on his behalf.

19. Defendant XO is a corporation duly organized and existing under the laws of the State of Delaware with its principal executive offices located in Herndon, Virginia. XO, together with its consolidated subsidiaries, is a 'leading nationwide facilities-based, competitive telecommunications services provider that delivers a comprehensive array of telecommunications solutions to business customers, government agencies, telecommunications carriers and service and internet content providers. As of May 11, 2011, XO had 182,075,165 shares of common stock outstanding that once traded on the NASDAQ but by 2011 traded only on OTC Bulletin Boards; each share was entitled to a single vote. XO also had 780,000 shares of preferred stock outstanding which as of May 2011 were entitled to 639 million common stock votes. Effective August 18, 2011, the 2011 Merger was effectuated and XO shares ceased trading.

20. Defendant Icahn, an individual residing in New York, directly and through his affiliates controls and dominates XO. Icahn is ranked #25 on the 2011 Forbes List of the 400 Richest People In America with a net worth of approximately $13 billion. Defendant Icahn is,

and at all times relevant hereto has been, Chairman of the XO board and a director of XO. Defendant Icahn is a member of the executive committee of the board, the principal function of which is to execute all the authority and power of the full board in management and operation of the Company and to act on behalf of the board between its regular meetings. As of June 2008, Icahn owned or controlled 91 million shares or just over 50% of XO's common stock and over 90% of XO's outstanding debt. As of mid-2011, through affiliated entities that he owned and controlled, Icahn owned 752,411,903 shares or 91.65% of XO (consisting of 113 million shares or 62% of XO common stock and all 780,000 shares of XO's preferred stock issued in the 2008 Transaction). At all times relevant, Icahn had the power to appoint and, in fact, has appointed, every member of XO's Board of Directors. Icahn owns or controls defendants ACF Industries Holding Corp. ("ACF"), Arnos Corporation ("Arnos Corp."), High River Limited Partnership ("High River"), Arnos Sub Corp. ("Arnos Sub"), Barberry Corp. ("Barberry"), XO Merger Corp., and Starfire Holding Corp. ("Starfire") (collectively, the "Icahn Entities" or "Icahn Affiliates).

21. Defendants ACF, Arnos Corp., Arnos Sub, Barberry Corp., and XO Merger Corp. are corporations organized and existing under the laws of the state of Delaware and High River is a limited partnership organized and existing under the laws of the state of Delaware. ACF has its principal place of business in White Plains, New York. Each of ACF, Arnos Corp. and High River is an affiliate of Defendant Icahn that purchased XO preferred stock in the 2008 Transaction. In the 2011 Merger, these defendants were ACF, Arnos Corp., Arnos Sub, High River and Barberry.

22. Defendant Starfire is a corporation organized and existing under the laws of the state of Delaware and is wholly owned by Icahn. As an integral part of the 2008 Transaction,

Starfire and XO entered into an amended tax allocation agreement. Starfire was a party to the 2003 tax allocation agreement with XO.

23. Defendant Carl J. Grivner ("Grivner"), served as XO's Chief Executive Officer and President and as a member of the XO Board from May 2003 until his resignation on April 8, 2011. In 2006-2010, Grivner received an annual base salary of $700,000 plus a cash bonus based on the Company's performance. In 2007, 2008 and 2009, that bonus equaled $744,095, $770,000 and $709,895, respectively. According to the Company's Form DEF 14A dated April 29, 2011, Grivner's equity interest comprised (i) 15,000 shares of XO common stock acquired by Grivner in May 2004, and (ii) 2 million shares of XO common stock issuable to Grivner upon the exercise of nonqualified stock options, which options were granted to Grivner pursuant to the Company's 2002 Stock Incentive Plan. Grivner never exercised these options as the options were "out of the money" during most of the time that Grivner held them; upon his 2011 departure from XO, the options were terminated. Throughout his tenure, Defendant Grivner's compensation was determined by and subject to XO's Compensation Committee, a committee consisting of solely Icahn's designees on the XO Board.

24. Defendant Adam Dell ("Dell") became a member of the XO Board in January 2003. Dell resigned from the XO Board in March 2010. In 2007, 2008 and 2009, Dell earned $80,000, $150,000 and $125,000 as compensation for his service as director of XO including his service on the Special Committee. During Icahn's 2008 proxy fight with Yahoo! Inc., Icahn included Dell on his slate of proposed directors. Dell also served on a Special Committee in 2005-06. As a result of that committee's work, Dell was named as a defendant in lawsuits challenging related party transactions engineered by Icahn.

25. Defendant Fredrik Gradin ("Gradin") has been a member of the XO Board since August 2004. Gradin has been friends with Icahn for approximately 20 years, during which time the two have had numerous social engagements together. In 2007, 2008, 2009 and 2011, Gradin earned $80,000, $150,000, $125,000 and $150,000 as compensation for his service as director of XO including his service on the Special Committee. Gradin also served on a Special Committee in 2005-06. As a result of that committee's work, Gradin was named as a defendant in lawsuits challenging related party transactions engineered by Icahn.

26. Defendant Vincent Intrieri ("Intrieri"), has been a member of the XO Board since January 2003. At all relevant times, Intrieri served as a member of and/or the chair of XO's Compensation Committee. In that capacity, defendant Intrieri and other Icahn designees on the XO Board set compensation for all of XO's officers and employees including defendant Grivner. Since July 2006, Intrieri had been a director of Icahn Enterprises G.P. Inc., the general partner of Icahn Enterprises L.P., a diversified holding company engaged in a variety of businesses. Intrieri is also Senior Managing Director of Icahn Capital LP, the entity through which Icahn manages third party private investment funds. Since January 1, 2005, Intrieri has been Senior Managing Director of Icahn affiliates Associates Corp. and High River Limited Partnership. Since April 2005, Intrieri has been the President and Chief Executive Officer of Icahn affiliates Philip Services Corporation ("Philip Services") and American Railcar Industries. Since April 2003, Intrieri has been Chairman of the Board of Directors and a director of Icahn affiliate Viskase Companies, Inc. From November 2006 to November 2008, Intrieri also served on the Board of Directors of Lear Corporation as Icahn's designee. From August 2008 to September 2009, Intrieri was a Director of WCI Communities, Inc. Mr. Intrieri also serves on the Boards of Directors of the following companies: Motorola Solutions, Inc., National Energy Group, Inc.,

WestPoint International, Inc., and Federal-Mogul Corporation. As per XO's April 29, 2011 DEF 14A filed with the SEC, with respect to each company mentioned above, Icahn, directly or indirectly, either (i) controls such company or (ii) has an interest in such company through the ownership of securities. Because of his employment relationship with Icahn, Intrieri is beholden to Icahn and owes his position as a director of XO to Icahn.

27. Defendant Robert Knauss ("Knauss"), an individual residing in the state of Texas, has been a member of the XO Board since August 2004. Knauss is a director of Icahn affiliate West Point International, Inc. Knauss served on the board of directors of Philip Services from August 1997 through May 2001 and from April 2002 through 2003, and as Chairman of the Philip Services Board from April 2000 to May 2001 and again from April 2002 until 2003. In 2003, Philip Services voluntarily sought bankruptcy protection and subsequently received debtor-in-possession financing from Icahn. Icahn then gained control of Philip Services through the bankruptcy process -- all while Knauss served as Chairman of Philip Services' Board of Directors. In 2006, 2007, 2008, 2009 and 2011, Knauss earned \$80,000, \$80,000, \$150,000, \$125,000 and \$150,000, respectively, as compensation for his service as director of XO including his service on various Special Committees. Together with other compensation earned from serving on the board of Icahn-affiliate West Point, Knauss earned roughly one-third of his income in each of 2006, 2007, 2008 and 2009 from Icahn. Knauss also owns 153,000 shares of the Company's stock 3,000 of which he acquired in August 2004 for approximately \$5 per share and 150,000 of which shares he acquired in November 2008 for roughly \$0.16 per share. Knauss also served on XO's Executive Committee with defendant Icahn; the Executive Committee's principal function is to execute all the authority and power of the full board in the management and operation of XO and to act on behalf of the XO Board between regular board meetings. In

2005-2006, Knauss also served on a "special committee" of the XO Board with defendant Icahn to evaluate financing options for XO. As a result of the outcome of that committee's work, Knauss was named as a defendant in suits challenging related party transactions engineered by defendant Icahn.

28. Defendant Keith Meister ("Meister"), served as a member of the XO Board from January 2003 until his resignation on August 4, 2010. At all relevant times, Meister served as a member of XO's Compensation Committee. Beginning in June 2002, Meister was a senior investment analyst of High River Limited Partnership, an Icahn affiliate. Meister also served as a Senior Investment Analyst of Icahn Partners LP and Icahn Partners Master Fund LP, private investment funds controlled by Icahn. He also served as a director of Icahn Fund, Ltd., a "feeder fund" to Icahn Partners Limited Partnership and Master Fund LP; as the President and Chief Executive Officer of American Property Investors, Inc., the general partner of American Real Estate Partners LP, a public limited partnership controlled by Icahn; and as a director of Icahn affiliates Trans Texas Gas Corp., American Entertainment Properties, Corp., American Casino & Entertainment Properties Finance Corp., and Scientia Corp. During Icahn's 2008 proxy fight with Yahoo!, Icahn included Meister on his slate of proposed directors. Because of his employment relationship with Icahn, Defendant Meister is beholden to Icahn and owes his position as a director of XO to Icahn.

29. Defendant Peter Shea ("Shea") was a member of the XO Board from December 2006 to March 2009. Since December 2006, he has also been head of portfolio company operations at Icahn affiliate American Real Estate Holdings Limited Partnership, president of American Property Investors, Inc., and a director of Icahn affiliates American Railcar Industries, Inc., WestPoint International, Inc., and Viskase Companies, Inc. Because of his employment

relationship with Icahn, and because Icahn controls the majority of XO's outstanding common stock, Defendant Shea is beholden to Icahn and owes his position as a director of XO to Icahn.

30. Defendant David S. Schechter ("Schechter"), has been a director of XO Holdings since March 2009. Schechter is currently a member of XO's compensation committee. Schechter currently is responsible for co-executing a small/mid cap investment strategy across all industries as a Portfolio Manager of the Sargon Portfolio for Icahn Capital LP, the entity through which Icahn manages investment funds. Prior to April 2010, Schechter served as a Managing Director for Icahn Capital LP and in a variety of investment advisory roles for Icahn since 2004, providing investment and strategic advice across multiple industries, asset classes, and geographies. Schechter also serves on the boards of directors of Icahn affiliates The Hain Celestial Group, Inc., West Point International, Inc. and Federal-Mogul Corporation. Because of his employment relationship with Icahn, Defendant Schechter is beholden to Icahn and owes his position as a director of XO to Icahn.

31. Defendant Harold First ("First") was appointed to the XO board of directors on April 29, 2010. First is or was a director of Icahn affiliate American Railcar Industries, Inc., West Point International, Inc., and GB Holdings, Inc. From December 1990 through January 1993, First served as Chief Financial Officer of Icahn affiliate Icahn Holding Corp.. First owns 2,097 shares of XO common stock. On January 21, 2011, the Company announced that it formed a Special Committee of its Board of Directors to consider, review, and evaluate the January 2011 offer by Icahn to buy out XO's minority shares at $0.70 per share. The Special Committee initially was comprised of defendants Knauss, Gradin, and First. On April 7, 2011, the Company disclosed that First had resigned from the Special Committee.

32. Defendant Daniel A. Ninivaggi ("Ninivaggi"), was appointed to the XO board of directors on August 12, 2010. Ninivaggi was also named to XO's Compensation Committee. Ninivaggi has served as President of Icahn Enterprises L.P. and its general partner, Icahn Enterprises G.P. Inc., since April 1, 2010, and as its Principal Executive Officer since August 4, 2010. Ninivaggi also serves as a director of Icahn affiliates CIT Group Inc. and Federal-Mogul Corp. Because of his employment relationship with Icahn, Defendant Ninivaggi is beholden to Icahn and owes his position as a director of XO to Icahn.

33. Defendants Grivner, Schechter, Dell, Gradin, Intrieri, Knauss, Shea, Meister, First and Ninivaggi are sometimes collectively referred to herein as the "Individual Defendants."

34. Between 2008 through 2011, each of the directors who are not also officers of the Company received four quarterly payments of $10,000 per year for serving on the board. Each member of the Audit Committee received 4 quarterly payments of $2,500 for serving on that committee. In 2007, 2008, 2009 and 2011, each member of the Special Committee received additional compensation for serving on that committee.

35. Between 2008 through 2011, a majority of the XO Board was dominated by Icahn. Because of their various ties to Icahn, including their employment and long-term friendships, each and every Individual Defendant lacked and continues to lack independence with respect to the transactions, events and circumstances described herein, and other strategic transactions and decisions involving Icahn.

CLASS ACTION ALLEGATIONS

36. On July 27, 2011, this Court granted Plaintiff Zheng's motion for class certification and conditionally certified this action pursuant to CPLR Article 9, Sections 901 and 902, on behalf of:

Class A: All persons and entities who were holders of XO common stock on July 25, 2008 other than Defendants and any person, firm, trust, corporation or other entity related to or affiliated with any of the Defendants;

Class B: All persons and entities who were holders of XO common stock as of the date of execution of any agreed-upon merger or going private transaction between XO and any affiliate of defendant Carl C. Icahn as of the date of any said merger agreement.

37. This action is properly maintainable as a class action because:

a. The Class is so numerous that joinder of all members is impracticable. There are hundreds of XO stockholders and warrant holders who are located throughout the United States; as of July 2008, they owned approximately 90 million XO common shares and approximately 13 million XO warrants; as of mid 2011, Class members owned approximately 68 million shares of XO common stock. According to the Company's November 17, 2010 Form S-1 filed with the SEC, as of November 16, 2010, there were 132 stockholders of record of XO's common stock;

b. Questions of law and fact exist that are common to the Class, including: whether Icahn has acted and/or is continuing to act in a manner calculated to benefit himself at the expense of XO's minority stockholders; whether the Individual Defendants have breached their fiduciary duties to XO's minority shareholders; and whether Plaintiffs and the other Class members would be irreparably damaged if Defendants are not enjoined as described below;

c. Plaintiff Zheng is committed to prosecuting this action and has retained competent counsel experienced in litigation of this nature. The claims of Plaintiff Zheng are typical of the claims of the other members of the Class. Accordingly, Zheng is an adequate representative of the Class and will fairly and adequately protect the interests of the Class;

d. The prosecution of separate actions by individual members of the Class would create the risk of inconsistent or varying adjudications with respect to individual members

of the Class that would establish incompatible standards of conduct for defendants, or adjudications with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; and

e. Icahn has acted, or refused to act, on grounds generally applicable to, and causing injury to, the Class.

BACKGROUND

XO's Business and the Company's Emergence from Bankruptcy

38. XO is a leading facilities-based, competitive telecommunications services provider that delivers an array of telecommunications services to the telecommunications provider, business and government markets. Founded as NextLink in 1994, XO is a nationwide competitive access provider, which built out and/or acquired a $6 billion nationwide network of fiber optics cable to enable carriers and large customers to circumvent incumbent local exchange carrier ("ILEC") networks. XO evolved into a nationwide wireline business during the 1990s.

39. Between 2000 and mid-2001, XO was negatively impacted by overexpansion, the bursting of the Internet bubble, and a general decline in the capital markets. As a result, in June 2002, XO filed for protection under Chapter 11 of the United States Bankruptcy Code; XO's Plan of Reorganization was confirmed in November 2002. As a result of that plan, Icahn converted pre-petition debt acquired during XO's bankruptcy proceedings into 83% of XO's new equity securities and 85% of XO's new debt.

40. In January 2003, when XO emerged from bankruptcy, Icahn appointed all of the members of XO's new Board of Directors including Defendants Dell, Intrieri, and Meister and elected himself to the position of Chairman of the Board.

41. As part of the bankruptcy reorganization, on January 16, 2003, XO entered into a Tax Allocation Agreement (the "TAA") with Defendant Starfire. Under the Internal Revenue Code, entities under common ownership (defined to mean entities sharing a common stockholder with 80% or greater ownership interest measured in terms of value and voting power) are permitted to file consolidated tax returns. Upon emergence from bankruptcy, XO was consolidated with Starfire and other Icahn affiliates for tax reporting purposes. The TAA permitted Icahn (via Starfire) to use the substantial NOLs incurred by XO to offset income generated by Icahn-controlled entities. Neither Icahn nor Starfire was required to compensate XO for their use of the NOLs until XO itself became a taxpayer with the ability to use the NOLs. In 2003-04, Icahn, via Starfire, used $450 million of XO's NOLs to reduce Icahn's tax liability.

Icahn Loses Access to XO's NOL's and Unsuccessfully Tries to Regain Them

42. In or about January 2004, the Company conducted a rights offering. Icahn miscalculated the interest of others in the rights offering. The rights offering was oversubscribed and Icahn's share of XO's equity and shareholder vote fell from approximately 83% to approximately 61%. As a result, XO was deconsolidated from the Starfire group, preventing Icahn from using XO's NOLs to reduce his affiliates' tax liability.

43. The Internal Revenue Code imposes a 5 year waiting period on entities seeking to reconsolidate for tax reporting purposes. Thus, regardless of when Icahn regained his 80% interest in XO, he would not be able to gain access to the Company's NOLs until January 2009.

44. In the interval after the January 2004 deconsolidation, Icahn nevertheless attempted a series of transactions with XO to retrieve the NOLs.

45. In April 2005, the Icahn-dominated Board -- assisted by a Special Committee composed of defendants Knauss, Gradin and Dell charged with refinancing XO's debt --

concluded that "XO should begin a process of seeking to sell its CLEC assets;" the CLEC assets comprised XO's Wireline Business and effectively constituted XO's only revenue generating business. Icahn immediately expressed an interest in bidding for XO's CLEC assets. XO and Icahn signed an equity purchase agreement in November 2005 that would have resulted in the sale of the Wireline Business to Icahn for an inadequate $700 million. Icahn's purchase of the Wireline Business would have given him access to XO's NOLs.

46. After the proposed Wireline Sale with Icahn was announced, shareholders (including plaintiff Hillenmeyer) filed suit in Delaware to enjoin the transaction, alleging that it was a blatant breach of fiduciary duty. After a court hearing in March 2006, Icahn abandoned the Wireline Sale.

47. The termination of the Wireline Sale did not stop Icahn. On May 24, 2006, through a misleading preliminary proxy issued in connection with XO's 2006 annual meeting, XO stockholders were asked to approve amendments to XO, LLC's limited liability company agreement that sought to eliminate minority shareholder approval of certain transactions.

48. The proposed amendments were designed to facilitate transactions in which XO, without a vote by or prior notice to its minority stockholders, might dispose of the Wireline business and assets or engage in a restructuring or recapitalization transaction with Icahn and his affiliates. These consequences were not disclosed or discussed in the preliminary proxy. Following the commencement of litigation seeking injunctive relief challenging the proxy filing, Icahn and the XO Board abandoned this attempt as well.

SUBSTANTIVE ALLEGATIONS

49. As of year end 2006, Icahn affiliates owned approximately 51.5% of XO's common stock, roughly 80% of XO's Class A preferred shares and more than 90% of XO's debt

maturing on July 15, 2009.

50. In late 2006, XO was facing increased competition. In order to compete more aggressively with its competitors, the XO Board asked management to look into the potential benefits of additional capital expenditures. That task was initially delegated to a very "special" committee composed of Icahn and Knauss – during which time XO did not obtain financing.

51. During a December 21, 2006 meeting of the XO Board of Directors, Grivner requested that an "independent" Special Committee be charged with evaluating financing options. The Board voted to approve resolutions with respect to the formation of a Special Committee composed of Knauss, Dell, and Gradin (the "Special Committee"). Pursuant to the resolutions, the Special Committee was authorized and empowered to "review strategic and other plans for financing, refinancing and growth that may involve a transaction or a series of transactions with affiliates of Mr. Icahn which hold a majority of the Company's senior debt, preferred stock and/or common stock (all such plans or proposals whether proposed by Mr. Icahn, or one of his affiliates, or by any other person whatsoever)." Despite its mandate and though XO, with the encouragement of defendant Icahn, was burning through its cash, the Special Committee sat on its hands for several months and did nothing.

52. In March 2007, XO received unsolicited expressions of interest from two potential bidders. The bidders expressed interest in purchasing some or all of XO's Wireline Business. In April 2007, XO engaged in extended conversations with "Bidder 1", a telecommunications company, which offered $1.3 billion for XO's Wireline Business. The Special Committee was asked to review the transaction. Although XO management thought that pursuing the transaction made sense from various perspectives, that transaction never materialized because the Icahn-dominated Board determined that it was not interested in selling

the Wireline Business. Or as defendant Icahn reportedly stated, he "believed that the Company and the Board [were] tired of engaging in repeated sales processes."

53. By June 2007, XO management and the Board determined to increase XO's capital expenditures to fund growth. During a June 12, 2007 meeting of the Board, Gregory Freiberg, then XO's Chief Financial Officer, focused the Board's attention on XO's cash outlook. The Board discussed the increased need for capital expenditures and the pressure that would put on XO's cash position. Freiberg told the Board that by March 2008, if not sooner, XO would encounter a cash shortage and potentially going-concern issues. Despite the cash concerns, the Icahn-dominated Board, at Icahn's behest, determined to continue to invest in the business and to "monitor the situation." The Icahn-dominated Board acted at Icahn's direction; Icahn stated that XO "should not steer away from investing in the business to create value" because Icahn "was willing to provide funds to the Company for such purposes."

54. Although the Special Committee had been charged with finding financing alternatives in 2005 and again in December 2006, by September 2007, little had been accomplished. In September 2007 as credit (cheap or otherwise) dried up, XO continued to increase its capital investment without finding funding to support its expenditures. Liquidity concerns grew: XO management was informed by its auditor KPMG that it would receive a "Going Concern" qualification if XO did not announce fundraising in its third quarter 2008 10-Q SEC Filing.

55. As a result of XO's cash burn and possible going-concern issues, on September 28, 2007, the XO Board discussed the need to "re-charge" the Special Committee to pursue financing. The Board approved resolutions charging the Special Committee with a mandate to explore a wide range of transactions *not limited to financing*. The September 28, 2007

resolutions expressly charged the Special Committee with the power and authority to express its view as to the fairness of any transaction with Icahn to XO's stockholders. The Special Committee was appointed expressly to protect XO's minority shareholders.

56. Soon after it was "re-charged" with its duties, on October 2, 2007, the Special Committee met to discuss possible financing alternatives which included a possible rights offering, an offering of convertible preferred stock and a modification of the existing credit facility. At the suggestion of XO CFO Freiberg -- an XO employee who served at Icahn's pleasure and whose compensation was controlled by Icahn -- the Special Committee discussed the possibility that Icahn would be willing to increase his equity investment so that he would own more than 80% of XO's common stock. Though not articulated by the Special Committee, permitting Icahn to reach 80% would permit him to reconsolidate XO with Starfire and gain access to XO's NOLs. The Special Committee also determined to hire Cowen and Company, LLC ("Cowen") as its financial adviser.

57. Knauss, on behalf of the Special Committee, and Cowen executed an engagement letter on October 16, 2007. The Special Committee engaged Cowen to act as its financial adviser in connection with a possible financing transaction *and a possible transaction involving the sale of a majority of XO's stock or its assets.*

58. Icahn dictated with an iron hand the Special Committee's efforts. On October 18, 2007, despite its clear mandate, the Special Committee "determined that a process would be implemented [to discuss financing alternatives], but that the Committee would first approach Mr. Icahn to determine whether he would support and cooperate with the refinancing process."

59. On November 5, 2007, during a meeting of the XO Board, Boston Consulting Group ("BCG") presented a report which focused on a "transformation approach" for XO. That

plan entailed increased capital expenditures at the front end to drive future revenues and growth over the amount then provided for in its business plan. Defendant Grivner noted concerns that, absent a bridge loan of some sort, XO's cash balance could drop to approximately $25 million by the first or second quarter of 2008 which would trigger numerous operational and accounting issues and a cash covenant under its credit facility. The Board approved XO's pursuit of interim financing. The Board also discussed the potential need for cash conservation measures in the event that interim financing was not successful, but took no action at that time or ever to conserve XO's cash.

60. Later in November 2007, the Special Committee solicited bids from five investment banks on how to raise funds for XO. One bank recommended against a rights offering entirely. Three banks recommended rights offerings that would raise from $150 million to $350 million, with Icahn "backstopping" the offering by agreeing to buy whatever rights remained unsold to other investors. The final bank suggested an offering of up to $500 million. All of the Banks recommended doing the smallest possible offering and noted the need for a commitment from Icahn to support the refinancing.

61. On November 27, 2007, the Special Committee met to discuss financing alternatives and the banks' proposals. During the meeting and despite the five banks' recommendations to the contrary, XO CFO Freiberg (who served and was compensated at Icahn's pleasure) informed the Special Committee that "management recommended a super-sized offering [of $500 million] to raise cash to redeem preferred stock and fund growth, as well as a refinancing of the existing debt." He also noted that XO's management intended to meet with Icahn "to obtain clarity regarding his support for such a refinancing."

62. On December 4, 2007, the Special Committee met and received a presentation from Cowen as to how XO management's proposal differed from the proposals received from the five banks. The Special Committee also discussed Icahn's proposal that significant minority shareholders be contacted for their input in the financing process of the Company. That meeting with select minority shareholders occurred on December 14, 2007. Like the five investment banks, the minority shareholders advocated the smallest capital-raising possible.

63. On December 20, 2007 and again on January 22, 2008, the Special Committee was advised by Cowen that the minority shareholders were concerned about the size of any debt offering and favored the smallest transaction possible to address XO's liquidity needs. On January 22, 2008, the Special Committee again discussed the possibility of a "going concern" qualification from XO's auditors and whether the Company should look into various strategies for cash conservation if financing were delayed. The Special Committee again failed to act to recommend cash conservation measures to the XO Board. By continuing to permit spending without any concrete plan for financing in place (after three years of looking for such financing), Defendants facilitated Icahn's painting XO into a corner so that the only alternative available to XO was a deal with Icahn that would serve his ends at the expense of minority shareholders. Cowen further advised the Special Committee that XO management's proposal for a supersized offering "needed to be supported by *firm evidence* that it was feasible from an execution standpoint." (emphasis added). The Special Committee failed to obtain that evidence or to obtain confirmation that XO's actual cash needs justified what would ultimately turn out to be a $780 million financing transaction.

64. At a January 24, 2008 XO Board meeting, the Special Committee reported that it examined a rights offering in the range of $200 to $250 million. The Special Committee also

discussed the possibility of a larger rights offering to refinance XO's debt that was to become due in 2009. Because of concerns over a "going concern qualification," the Special Committee was also in the process of pursuing a $75 million bridge loan or revolver from Icahn's affiliates. XO anticipated that its auditor would begin its going concern analysis the first week of February 2008. Despite the difficulty and delay XO confronted in obtaining financing, the Icahn-dominated Board approved the 2008 business plan and the "proportionately heavier cash spend anticipated for the first quarter of 2008." Though no financing was in place and though XO expected to burn through all of its cash by year end 2008, defendants failed to put cash conservation measures into place.

65. On January 30, 2008, Morgan Stanley ("Morgan"), XO's banker, provided management with a presentation concerning a possible rights offering. Morgan Stanley advised: "Considering XO's current equity market capitalization of under $400 million, we favor sizing a rights offering between $200-$300 million to cover the Company's growth funding requirements, but do not recommend a larger rights offering to fund a repayment of existing credit facilities." Morgan noted that absent minority participation in the proposed rights offering, Icahn's ownership would "accrete to 70.6% for a $200 million offering and 75.6% for a $300 million offering." This of course meant that a smaller financing would impede Icahn from reaching the 80% threshold and getting the NOLs. By contrast, the bigger the offering and the greater Icahn's participation, the more likely Icahn would reach or exceed the 80% threshold.

66. On February 6, 2008, the Company retained Morgan to act as its financial advisor in connection with a rights offering.

67. The Special Committee held a telephonic meeting with Icahn on February 13, 2008 to ask Icahn to commit to providing the Company with (1) a bridge loan of up to $75 million; and (2) participate in a rights offering with a backstop commitment.

68. On March 5, 2008, BCG provided XO with the final numbers for its plan (the "Transformation Plan"). At a March 6, 2008 XO Board meeting, Icahn recommended that XO continue to invest and proceed with its business plan consistent with the recommendations made by BCG to increase cash expenditures. The Icahn-dominated Board continued to approve plans to spend despite the fact that XO still had no permanent financing in place and was burning through its cash. At the March 6, 2008 XO Board meeting, the Special Committee recommended that the Board enter into the $75 million loan with Arnos Corp., an Icahn affiliate.

69. On March 13, 2008, XO entered into a note purchase agreement with Arnos, pursuant to which Arnos purchased a promissory note in the aggregate principal amount of $75 million. The promissory note ranked *pari passu* in right of payment with the debt outstanding under the outstanding credit facility.

XO Received Multiple Unsolicited Offers From Third Parties
<u>That Were Superior To Self-Dealing Transactions With Icahn</u>

70. Concurrent with the Special Committee's discussions of refinancing by means of a rights offering with Icahn, XO received offers to purchase from multiple suitors for approximately $1 billion. Defendants failed to disclose such offers to XO's minority shareholders or to the market. More critically, as described below, despite the Special Committee's limited leverage in any negotiations with Icahn, it failed to marshall the expressions of third party interest in a way that would inform its consideration of alternatives or that would arm it to engage in negotiations with Icahn. Instead, third party bidders were given the run around.

71. On March 7, 2008, Bidder 1, which had engaged in unsuccessful negotiations with XO the prior year, submitted a letter to the Special Committee including an unsolicited offer to purchase XO for $1 billion. Knowing that XO needed to move quickly because of its cash problems, Bidder 1 noted that it had received strong preliminary support for the proposed transaction from a number of investment banks and informed XO it could sign a definitive agreement within 45 days.

72. Bidder 1 had expressed its interest to the Special Committee as early as February 15, 2008 after being directed to speak to the Committee by defendant Ichan. Notwithstanding the breadth of the Special Committee's mandate and its engagement of Cowen to explore a possible sale of the Company, on March 8, 2008, Knauss told Grivner and others that the Special Committee had been charged with looking at financing alternatives only and had not been charged to explore a possible sale. On March 13, 2008, the Special Committee's lawyer wrote to Bidder 1 informing it that the Special Committee was authorized only to review financings and therefore the subject matter of Bidder 1's letter did not come within the purview of the Special Committee and would be forwarded to XO management.

73. On March 18, 2008, more than a month after Bidder 1 contacted Icahn and the Special Committee, the XO Board met and discussed Bidder 1's March 7, 2008 letter. On March 18, 2008, the XO board resolved "to charge the Special Committee to evaluate [Bidder 1's] letter with its advisers...and to assess if it is in the best interest of the Company and its stockholders to further pursue the proposal." On March 20, 2008, the Special Committee began an initial review of Bidder 1's offer. On that same day, another telecommunications company, "Bidder 2," contacted the Company about potentially acquiring part or all of the Company.

74. On March 31, 2008, the Special Committee's counsel advised it that among the fundamental considerations it had to address as to Bidders 1 and 2 was to "define Icahn's interest (and NOL related issues)." The Special Committee's counsel further advised that Cowen's advice and analysis was necessary as to how to proceed regarding among other things. "NOLs - value to Company; how to realize value." The Special Committee never sought or obtained advise from Cowen regarding the NOLs nor did Cowen ever opine on the NOLs or the effect of the 2008 Transaction on the NOLs' value.

75. A little more than a week later, on April 1, 2008, the Special Committee met to discuss the two expressions of interest and decided to flatly reject Bidder 1's offer without any negotiations whatsoever. XO management, dominated and controlled by Icahn, attended the April 1, 2008 Special Committee meeting and urged the Special Committee to consider the potential negative effects that a sale process would have on XO's business. Without exploring the reasons for the repeated failure of any third party interest or bids, the Special Committee rationalized that it did not want to negotiate again with Bidder 1 after the failed process a year earlier and noted that Bidder 1's initial expression of interest contained a proviso with the risk that financing might not be obtained. The Special Committee determined that, unlike Bidder 1, Bidder 2's inquiry was a general indication of interest. Instead of considering Bidder 2's inquiry, the Special Committee punted and forwarded the inquiry to the Icahn-dominated Board for consideration. Six weeks passed before Bidder 2 was finally invited to conduct due diligence.

76. On April 4, 2008, three days after the Special Committee rejected Bidder 1's potential bid, XO began receiving advice from its financial advisors as to how to value potential acquisitions. Morgan made a presentation to the Special Committee identifying Bidder 1 as one

of a number of strategic buyers who might be interested in acquiring XO. Morgan explained that a cash offer of $1.0 billion, the exact size of Bidder 1's offer, translated to a value of $2.25 per share compared to XO's then-current $1.27 per share price. Morgan's analysis showed that minority shareholders would receive a substantial premium from a $1.0 billion sale. Morgan recommended using a competitive process to get the best available bona fide offer. The Special Committee and XO disregarded Morgan's advice.

77. Concurrent with its receipt of significant and unsolicited expressions of interest from third parties, the Special Committee was advised about the pitfalls of the financing alternative, a large rights offering, it was pursuing at Icahn's direction. Morgan's April 4, 2008 Board presentation separately reviewed financing alternatives and strategic alternatives. Morgan identified the two primary financing alternatives as: (1) a $100-$125 million rights offering (to fund a scaled back business plan) or (2) a $200 million rights offering (to fund the current business plan through 2009). Morgan did not identify a larger rights offering as a reasonable alternative for the Company.

78. On April 14, 2008, Cowen informed the Special Committee that Bidder 2 was very interested in making an offer to purchase XO and had asked "what the process" was and when it would hear back from XO or the Special Committee. Despite the Special Committee mandate and the scope of the Cowen engagement, Cowen, at the Special Committee's direction, informed Bidder 2 that there was "no process" and XO was "not for sale".

79. On April 16, 2008, the Special Committee met again for a presentation by Grivner addressing BCG's Transformation Plan and the additional $150 million of capital expenditures being recommended as part of that plan. Morgan also made a presentation. By then, XO's share price had dropped to $0.79 per share. Morgan again compared a $1 billion offer to various

alternative scenarios that assumed XO eliminated its senior secured debt and added different amounts of equity up to $577 million (well below the amount ultimately raised in the 2008 Transaction). Morgan's calculations showed that XO would have to trade at a price far above its historic or current price to achieve the same value for minority shareholders as a $1 billion sale price. Morgan also advised that few minority investors would be willing to participate in a rights offering without an extension of the maturity of the senior debt as well as possibly the preferred equity currently outstanding. Cowen concurred with Morgan's opinion that it was unlikely that minority shareholders would participate in a rights offering without an extension of the existing debt and noted that even then minority participation would still not be guaranteed.

80. Cowen also provided an analysis to the Special Committee at the April 16, 2008 meeting, on the value to XO of $1 billion offer for the Company. Cowen concluded that, as of March 31, 2008 (when XO's stock had closed at $1.30 per share) a $1 billion offer provided minority shareholders with $206.3 million of value. Cowen's analysis showed that the Company's value would need to increase by more than double the amount of equity added in a rights offering to create the same value for minority shareholders as a $1 billion sale price. As with Morgan's analysis, the greater the size of the rights offering, the more remote the possibility that a rights offering could achieve the same value for shareholders as a $1 billion sale. During the April 16, 2008 Special Committee meeting, Cowen advised that, absent minority participation in a rights offering of $175 to $200 million, Icahn would have nearly 80% of XO's equity. Cowen also expressed concern regarding management's increased capital expenditure plans noting, for example, that the planned $133 million in capital expenditures to grow Next Link over the next three years would likely produce an asset worth only $154 to $315 million.

81. At the April 16, 2008 meeting, Cowen advised that a potential investor, Potential Investor 1, had approached Cowen to propose an investment in XO of $150-$200 million in exchange for a new preferred stock in the Wireline Business. Potential Investor 1's proposal was based on selling the wireless business and the NOLs to Icahn in exchange for reduction of the debt of the Wireline Business, replacing the debt the Wireline Business owed to Icahn with public debt, and creating a path for Icahn to sell down his equity position in the Wireline Business. This proposal, had the Special Committee seriously considered it, would have given XO management and the Board an opportunity to build XO out of Icahn's shadow. Under the proposal, the minority shareholders would have received value for the NOLs, eliminated the nonperforming wireless business and improved XO's equity structure. But it would have forced Icahn to pay a reasonable price for the NOLs that he wanted to take for nothing. The Special Committee rejected Potential Investor 1's interest out of hand under the pretext that it would be "very difficult to consummate." The Special Committee failed to adequately inform itself as to the details of Potential Investor 1's proposal, information that likely would have provided it with data points regarding XO's value and some leverage in its negotiations with Icahn.

82. On April 17, 2008, the Special Committee met with Icahn and asked if he would consider restructuring the Company's senior debt. Icahn told the Special Committee that he had no interest in extending the Company's senior debt maturities. Extending the existing non-convertible debt would not have enabled Icahn to reach the required 80% of the vote so as to capture the NOLs for himself.

The Special Committee is "Recharged" to Explore
a Sale of XO But Squanders Its Opportunities

83. On April 19, 2008, the Special Committee, although already charged with a broad mandate that permitted it to explore a financing or sale transaction, went back to the Icahn-

dominated Board. Incredibly, though it already had authority, the Special Committee unnecessarily *asked* the Icahn-dominated Board for permission to commence a parallel processes: (1) to develop an equity financing proposal, and (2) to explore strategic opportunities that may result in a sale of the Company. The Special Committee also asked the Board for permission for authorize its financial and legal advisors "to prepare a proposal to conduct an equity rights offering at a level sufficient to retire the Company's senior debt and leave a cushion to meet the Company's capital expenditure requirements." Knauss understood the value of the NOLs and noted that a rights offering should be conditioned on capping Icahn's equity ownership at 75% so that XO would retain the value of its NOLs:

> In order to preserve the embedded value of the Company's net operating losses from a tax perspective, the Special Committee intends to recommend that a rights offering be conducted only if Icahn agrees to a standstill agreement (or other comparable arrangement) that would limit his equity ownership, after any offering, to not greater than 75%.

84. On April 21, 2008, seven weeks after the Special Committee began receiving third party bids or expressions of interest, the Board gave the Special Committee the authority it requested. The Company's Form 10-Q filed with the SEC on May 12, 2008 stated that, "On April 21, 2008, our board of directors recharged the special committee with broad authority to pursue, examine and evaluate equity or debt financing transactions and other available alternative strategic alternatives (including, but not limited to, any transaction or series of transactions with affiliates of our Chairman)." Despite the absence of a financing plan, the Icahn-dominated Board also approved the expenditure of $22 million to pre-fund the BCG Transformation Plan.

85. Despite the numerous unsolicited expressions of interest XO had received, Morgan's recommendation that XO employ a competitive bidding process and the Special

Committee's "renewed" authority to explore a sale, the Special Committee never created a process that would lead to a third party offer let alone the highest offer. It did not ask its financial advisor Cowen to solicit potential acquirers (even though Morgan had provided a list) nor did it create a timeline for a process. Instead, in disregard of its fiduciary duties, the Special Committee repeatedly found reasons to defer action and suppress the unsolicited offers that it or XO received. Despite, having received unsolicited offers showing the viability of XO to third parties, the Special Committee refused to commence a process to solicit offers.

86. On May 7, 2008, counsel for the Special Committee again advised it that, in the context of a rights offering, the Special Committee needed to address the NOLs to determine "to what degree of certainty or uncertainty they may be used if 80% ownership is again achieved [by Icahn]" and whether some or all of the NOLs could be sold to a third party. Counsel further advised the Special Committee that only after it reviewed its "recommended approach" with the Special Committee would Cowen come "into the picture" so the Committee could gets Cowen's "reaction and advice."

87. On May 12, 2008, the Special Committee was approached by Potential Investor 2 to express its interest in becoming a minority investor. Bidder 2 offered to provide up to $50 million of equity that could be used to reduce debt. The Special Committee appears to have ignored this overture as well.

88. In the midst of XO receiving unsolicited interest from Bidders 1, 2 and 3, on May 15, 2008, Cowen provided the Special Committee with two alternative proposals for an equity rights offering. One proposal involved a $508 million rights offering backstopped by Icahn but limiting Icahn to a maximum ownership of 79%. Icahn would receive a backstop fee in cash of 1% of the proposed offering (or about $5 million). Cowen's second proposal contemplated

finding a third party to backstop a $338 million rights offering and limiting Icahn to a 50.5% participation. Both proposals had a serious flaw from Icahn's view: Icahn would be limited to less than 80% ownership of the Company following the offering and thus would not be able to use the NOLs.

89. The Special Committee rejected the two equity financing proposals recommended by Cowen. Instead, the purportedly independent Special Committee came up with its own proposals for giving the NOLs to Icahn. During a Special Committee meeting on May 16, 2008, defendant Gradin proposed that XO give the NOLs to Icahn in exchange for his "equity commitment" and ask Icahn to backstop the entire offering. Dell demonstrated his confusion regarding the Special Committee's mandate by noting "that he wanted to minimize risk relating to the rights offering since the Committee's charge was to refinance the Company." Dell's statement as to the Committee's mandate went uncontested by any other Special Committee member or its bankers or lawyers. Dell and other Special Committee members had fallen into the very trap identified by the Delaware Chancery Court in *In re Loral Space & Communications, Inc. Consol. Litig.*, C.A. Nos. 2808-VCS, 3022-VCS, 2008 Del. Ch. LEXIS 136 (Del. Ch. Sept. 19, 2008): they believed that the Special Committee's only option was to do a deal with the controlling shareholder. In fact, the Special Committee was empowered to consider either a refinancing or a sale.

90. On May 16, 2008, a managing director at Jeffries & Co. called Grivner to inform him that a group of private equity firms were interested in backing Bidder 3 in a bid to acquire part or all of XO. This information was conveyed to Cowen and the Special Committee.

91. By mid-May 2008, six weeks after rejecting Bidder 1's bid, the Special Committee directed its financial advisor to return to Bidder 1 and ask for more details on the

financing of its offer. Bidder 1 responded that it needed more information on the Company's 2008 plans before it could secure financing. Presumably because of the Special Committee's long delay in responding, Bidder 1 sought assurance that the Special Committee would support a transaction with Bidder 1 if it made an acceptable offer. The Special Committee never provided Bidder 1 with the assurances and information it needed to continue discussions. The Special Committee also finally arranged for Bidder 2, the potential acquirer that had expressed interest in the Company in March, to begin its due diligence in early June. As Cowen explained to the Company's management, Bidder 2 took this diligence "very seriously."

92. The Special Committee met again on May 21, 2008 to discuss the rights offering proposal process. At that time, the Special Committee identified the leverage it had over Icahn: Icahn would not likely put the Company in bankruptcy particularly since Icahn held approximately $185 million in equity and $77.6 million in unsecured debt and would face a serious risk of losing control of XO in a bankruptcy through equitable subordination and thus losing the NOLs. In addition, the Special Committee discussed its desire for Icahn to backstop the entire offering (thus permitting minority shareholders to participate in XO's future growth and profits and to avoid dilution). The Special Committee discussed the usual size of backstop fees (1% to 3% of the deal) and that giving away the value of the $3.5 billion in NOLs to Icahn would far exceed any reasonable or usual backstop fee. Despite identifying its leverage, the Special Committee found no way to use it. Worse yet, though the Special Committee had been clearly charged and re-charged with the dual task of seeking financing *and* a potential sale, Gradin requested that the Special Committee go back to the Icahn-dominated Board to clarify its role and authority. The Special Committee's uncertainty regarding the scope of its mandate and its apparent inability to determine understand how much cash XO actually needed infected all of

its actions and the process itself and impeded the Special Committee from acting as an effective and independent agent on behalf of the minority shareholders.

93. At the May 21, 2008 meeting, counsel for the Special Committee provided further advice to the Special Committee regarding its fiduciary duties. Counsel expressly advised that, under Delaware law, directors have a fiduciary obligation to obtain a fair and adequate price in a sale of the corporation's assets and that NOLs are traditionally viewed as assets of the corporation that owns them. Again, counsel advised the Special Committee that its actions in the event of a transaction involving "a related party on the other side" would be judged under the entire fairness standard and that, as an initial matter, the directors would bear the burden of demonstrating entire fairness at trial. Counsel advised the Special Committee that recent Delaware cases have "suggested that a Special Committee of independent directors must play an active role in negotiating the challenged transaction, and must interpose itself in a timely and vigorous manner..." Counsel noted that was especially true where "(1) the interested director/shareholder in question is well known to the Chancery Court, and (2) the Chancery Court has already expressed disapproval of an earlier proposed transaction involving the same interested director/shareholder." Counsel went on to advise the Special Committee that, as to any transfer of the NOLs, the Special Committee had to be informed as to when XO would anticipate using the NOLs and "....when and in what quantity would the majority shareholder contemplate utilizing the NOLs to shelter taxable income...". In 2008 (and as discussed below in 2011), the Special Committee breached its fiduciary duties by failing to adequately inform itself of the value of the NOLs to Icahn.

94. On May 22, 2008, Cowen informed the Special Committee that it had received a call from Bidder 3 and that Bidder 3 was interested in potentially making a bid to buy XO.

95. On or about May 22, 2008, the Special Committee met with Icahn and presented him with its common stock rights offering proposal. The Special Committee proposed a $568 million offering – almost three times the size of the offering the Special Committee had initially proposed in February 2008. The new proposal had a key change from the two proposals Cowen made on May 15, 2008: Icahn would provide a full backstop and be permitted to increase his share of the Company's equity beyond 80%, thereby securing the NOLs for his use (if, as Cowen and Morgan advised, minority shareholders and third parties did not participate in sufficient numbers). If only Icahn participated, as expected, Icahn would receive payment on his $450 million debt (including $77.6 million in unsecured debt) and would get the opportunity to get up to 92% ownership and right to use XO's NOLs. According to Cowen's calculations, minority shareholders would gain only $39 million in value under the proposal, far less than they would receive under any of the third party proposals the Special Committee or XO had received. The Special Committee also explained that it would want Icahn to enter into a new tax sharing agreement to address the possibility that he might acquire more than 80% of the Company's equity in the rights offering. The Special Committee did not specify the terms it wanted in the new tax allocation agreement.

96. Icahn rejected the Special Committee's common stock proposal and the backstop provision. Icahn's refusal to backstop an offering that would permit or encourage minority shareholder participation and his unfettered access to XO's inside information (including information gleaned by Icahn in routine midyear briefings provided by XO management to Icahn alone) suggest that he believed that XO had positive growth and profit opportunities that he did not wish to share with the minority shareholders. Icahn was willing to invest a large amount of capital in XO. He presumably wished to do so in order to make money. The Special Committee

never seemed to grasp this fact. If XO's prospects were so fraught with danger, it would have been reasonable for Icahn to agree to backstop the offering, thereby permitting other shareholders to invest and thus spread the risk. Icahn's desire to take on the entire financing was an effort to advantage himself to the detriment of minority shareholders. The Special Committee did nothing to prevent this unfair, one-sided outcome. Clearly, Icahn's interest in and plan for XO conflicted with the interests of XO's minority shareholders. Instead of aspiring to operate XO as a profit making enterprise, Icahn was motivated to operate XO at a continuing loss in order to generate tax shelters for the Starfire group to avoid tax payments in the future. See February 19, 2008 IP-Telephony article entitled "XO Communications: Hobbled by Owner?" that concluded with the following observation: "Despite XO's obviously better operating performance, it remains one of a handful [of companies] that arguably have not been able to take financial steps that better position it in the present market. It would be one of the more unusual stories to emerge out of the telecom boom and bust if one of the survivors was intentionally operated as a loss generator." Icahn's plan was twofold: generate tax losses that only his affiliates could use and invest in XO's capital assets, the fiber optic cable network. In the end, with the unfair elimination of XO's minority shareholders, Icahn would be left with twin prizes: billions of dollars of XO's NOLs and an increasingly valuable fiber optic cable network that he could sell to anyone of the bidders lining up to buy it as early as 2006.

97. Indeed, Icahn's support of XO was for it to incur capital expenditures not operating expenditures. Capital expenditures benefit shareholders only over the long run. Unlike capital expenditures, operating expenditures benefit shareholders in the period expensed. Icahn's ultimate plan was to cash out the minority shareholders at as low a price as possible leaving

Icahn with ownership of 100% of XO and the plant and equipment funded by capital expenditures.

98. Icahn instead insisted on a supersized offering of convertible preferred stock. Icahn expressed his willingness to agree to a conversion price as high as $1.25 and an offering of $750 million. Of course, the larger the offering and the higher the conversion price, the more likely minority shareholders would decline to participate and Icahn would reach and exceed the 80% threshold and gain access to XO's NOLs. Minority investors' interests were not aligned with Icahn because they were interested in the profitability of the Company. In contrast, Icahn was intent on securing XO's NOLs, an asset with great value to Icahn and little or no value to others. XO's possession of the NOLs gave the Special Committee real leverage in its negotiations with Icahn, but the Special Committee repeatedly squandered that leverage.

99. On May 28, 2008, counsel for the Special Committee reported to defendant Knauss counsel's conversation with the head banker on the Cowen team. Counsel reported to Knauss that Cowen "continues to recommend against doing a rights offering with convertible preferred. [The Cowen banker] strongly advocates a common stock offering. Counsel further advised Knauss that, in the event that a rights offering nevertheless were done with convertible preferred, Cowen's securities desk recommended "as a maximum, a conversion 20% above current market." Cowen reiterated its advice to the Special Committee and its counsel over the course of the next day and noted "its strong advice to go with a straight common equity rights offering" which Cowen believed was the "equitable security to issue through rights".

100. On May 30, 2008, the Special Committee met again and discussed Icahn's convertible preferred stock offering proposal. The Special Committee was again told by Morgan and Cowen that minority holders likely would not participate in a preferred rights offering.

Notably, the transaction proposed by Icahn was an unusual one that was impossible to compare with confidence to other arm's length transactions. Cowen explained that some of the minority investors were not permitted to hold convertible securities and would therefore be prevented from taking part. Critically, Cowen determined that Icahn's proposed transaction had no real comparables: similar convertible offerings in the recent past were sized substantially below the 800% of current market cap size that Icahn was demanding from the Special Committee. The obvious and clear consequence of proceeding with such an offering would be to hand Icahn the NOLs without extracting appropriate consideration for them. Disregarding these concerns, the Special Committee determined to pursue negotiations with Icahn as soon as possible on a convertible preferred stock offering and to deliver to Icahn exactly what he wanted and on terms decided by him and highly detrimental to the public shareholders.

101. Although the Special Committee was determined to move forward, throughout the process, the Special Committee and its advisors were unable to get a handle on how much funding XO actually needed. Neither the Special Committee nor its advisors could obtain any comfort that the funding "needs" being advanced by XO management (who served and were compensated at Icahn's pleasure) were accurate. As one of the Special Committee's counsel put the problem in a June 5, 2008 email to XO management: "So long story short, could we get whatever Greg [Freiberg] thinks is "state of art" (to avoid endless discussion that none of us want!) on the management model [of XO projections]?" Apparently the difficulty with XO's projections was the fact that capital expenditures were a moving target. The uncertainty surrounding XO's projections complicated any effort by the Special Committee to value XO's NOLs. Increasing the amount of capital expenditures had the effect of decreasing free cash flow and delaying the time when XO might be a taxpayer, thus rendering XO's NOLs less valuable

and otherwise resulting in a need for an enormous recapitalization, one that would ensure that Icahn's interests would exceed 80% or even 90% threshold to ensure access to the NOLs.

102. The Special Committee met again on June 6, 2008. Cowen again explained the numerous problems with Icahn's proposed convertible preferred rights offering: their rarity in the United States especially at the high premium to market price contemplated; that certain minority shareholders could not hold convertible preferred; their lack of marketability; and the cap on stock price they would create. After Cowen's presentation, Gradin admitted he was not comfortable with a convertible preferred instrument. Defendant Knauss urged that XO retain 100% of any tax savings on the NOLs enjoyed by Icahn and that any backstop fee to Icahn be eliminated entirely. The discussion among the Special Committee members at the June 6, 2008 meeting revealed disarray and a total lack of negotiating strategy. By June 6, 2008, the Special Committee was confronting an implicit or explicit threat by Icahn to put XO into bankruptcy unless he got his way. Although purportedly confronting a "bankruptcy" threat, the XO Board had approved a business plan that ironically was totally at odds with a company considering bankruptcy; one that consisted of an injection of new capital into a business orchestrated in a way that would facilitate the majority shareholder's plan to capture the NOLs and the entire company at a valuation far less then the true worth of either the NOLs or the underlying business and assets. As evidenced by the June 6, 2008 minutes, Icahn through his control of the financing process, had created the appearance that XO had two choices: Icahn's transaction or bankruptcy. Of course by this time, the Special Committee stopped considering a third party transaction that would be beneficial to the minority shareholders and only considered a transaction that would hurt the minority and unfairly enrich Icahn.

103. Later in the evening on June 6, 2008, the Special Committee's lawyers transmitted a single page rights offering term sheet ($750 million offering amount) contemplating the issuance of one class of preferred and a tax allocation agreement (the "Amended Tax Allocation Agreement" or "ATAA") to Icahn's representatives. The term sheet contemplated a $750 million offering despite the fact that the Special Committee and its advisors were still uncertain about XO's actual cash needs. The ATAA proposed by the Special Committee provided that Icahn would pay XO 100% of any tax savings resulting from the use of XO's NOLs and that such payments would be made on a current basis, 30 days following the use of the NOLs.

104. While the Special Committee was capitulating to Icahn's demands, on June 6, 2008, Bidder 3 offered $900 million to $1 billion in cash to purchase the Wireline Business. The offer presented a low financing risk as both of Bidder 3's lead financial advisors provided letters confirming their high confidence that financing could be obtained. In addition, the offer fit within the Company's timing needs, as Bidder 3 said it could achieve a definitive agreement within six weeks. Indeed, Bidder 3 had a proven track record of rapid negotiations and acquisitions, having acquired seven entities in the prior eighteen months. The next day, Bidder 3 signed a non-disclosure agreement. Bidder 3 also arranged for 20 people to attend a due diligence session at the Company on June 10, 2008.

105. The next day, on June 7, 2008, Bidder 3 informed Cowen that by July 3, 2008 it would provide a bona fide, fully-financed offer without financing contingencies. Bidder 3 requested a draft contract so that the parties could agree to terms as quickly as possible. Bidder 3 also asked Cowen whether it should bid for the Wireline Business only or for the whole company (*i.e.*, including the Wireless Business). Cowen, which was aware of the value of the NOLs, told

the Special Committee that Bidder 3's question raised the issue of: "(1) the NOLs and whether a transaction can be structured that leaves a significant amount of the NOL behind with NextLink (in a sale of the CLEC only), and (2) the cash received for a sale of the CLEC only, after debt & preferred pay down, should that cash be distributed to shareholders and if so how." The Special Committee failed to consider that question and missed still yet another opportunity to extract value for the minority shareholders. Despite the Special Committee's broad mandate, on June 11, 2008, defendant Knauss instructed his counsel to tell Cowen that the Special Committee "cannot take the step" of providing a draft purchase agreement to Bidder 3 until it "was authorized by the Board of Directors." Though time was clearly of the essence, Knauss advised his counsel that Bidder 3's draft purchase agreement could await the meeting of the Icahn dominated board scheduled for June 24th and that "it is reasonable that Special Committee recommendations be on the agenda [for that meeting]."

106. The direction from the Special Committee and its counsel to Cowen to defer on transmitting a draft purchase agreement to Bidder 3 was yet another deliberately missed opportunity. The Special Committee had clearly been authorized to proceed with third party transactions. XO had disclosed in its 1st quarter 10Q (filed on May 12, 2008) that the XO board had "recharged the special committee with broad authority to pursue...financing transactions *and other available alternative strategic alternatives...*" (emphasis added). The Special Committee's counsel in a June 12, 2008 email addressed to the Special Committee conceded the breadth of the Committee's authority but inexplicably stated that the Committee was declining to exercise the authority delegated to it to protect the interests of the minority shareholders:

> The current authorizing resolutions for the Committee are broad. The Committee, however, has chosen to limit the exercise of its authority and, at present, is evaluating strategic alternatives for the Company, specifically an M&A

> transaction and a recapitalization of the Company through an equity rights offering.

On June 13, 2008, defendant Knauss once again asked the Special Committee's counsel for its advice as to the scope of the Committee's mandate: "Are you [Dechert] in agreement that under the current board Resolution that we need to go back to the full Board before undertaking a process to market and sell the company?" The Special Committee's counsel responded clearly: "The authorizing resolutions were intentionally broad in scope and authorization. We don't think you need to go back to the full board for further authorization." The Special Committee's counsel nevertheless urged that it would be more "prudent" to do so. Inexplicably, the Special Committee failed to act on the authority granted to it and in this flawed process harmed the interests of the minority shareholders it was charged with protecting. The Special Committee's motive was clear -- to help Icahn hurt the minority.

107. On June 12, 2008, with interested third parties waiting impatiently in the wings, the Special Committee sent Icahn a revised draft of the ATAA that still provided for the Company to retain 100% of any tax savings enjoyed by Icahn and for the payment of 100% of such savings on a current basis.

108. That the Special Committee, its process and its advisors were in complete disarray is apparent from email exchanges between the Committee and its counsel. On June 15, 2008, more than a week after the Special Committee had submitted a term sheet to Icahn and as it was about to send a new draft term sheet to Committee members, counsel for the Special Committee wrote to defendant Knauss:

> The Committee needs to ask [the Cowen banker] point blank whether he is prepared to advise the Committee on the appropriate size of an equity offering. If he refuses, I would like you and the Committee to consider engaging another financial advisor to advise on any equity raising, with the clear understanding that the advice the Committee is seeking relates to offering size and possible ranges,

> with commentary supporting that firm's recommendations. The Committee needs that expert support and we can't waste any more time with Cowen telling us why they can't/won't provide it.
> We will still turn to Cowen for a fairness opinion.
> Separately, [another Dechert lawyer] will be sending you specific questions relating to financial advice (which generally get to the offering size question) that I hope you will then forward to [the Cowen banker]. If he cannot, or is unwilling to, provide that advice, we should add it to the request mentioned above.

Notably, at the end of the day, Cowen was the sole banker on the 2008 Transaction and it never offered any fairness opinion concerning the size of the 2008 Transaction, a transaction that dwarfed all supposed comparable transactions in terms of the size of the financing in relation to the capitalization of the issuer. That it did not render a fairness opinion to the minority on the size of the refinancing supports the inference that Cowen was unable to render such an independent opinion. And, such opinion where a public company is doing a transaction with its controlling shareholder is a necessary ingredient to even come close to meeting the entire fairness standard applicable here.

109. On June 16, 2008, Cowen provided the Special Committee's lawyers with its analysis of a potential $700 million preferred stock offering and the impact on Icahn's ownership and tax consolidation. Cowen looked at XO's then current market capitalization (based on $0.75 stock price) and estimated net debt as of June 30, 2008. At the time, Icahn's ownership included 51.9% of XO's convertible preferred stock ($130.8 million) and 50.5% of the common stock ($68.9 million) for a total ownership interest of 51.4% across all classes of outstanding stock ($199.8 million). Cowen assumed that, if XO did a straight preferred offering of $700 million that was fully subscribed by Icahn alone, Icahn would obtain 82.6% stock ownership across all classes of outstanding stock ($899.8 million). Without minority participation in the offering, Icahn would reach the 80% threshold permitting him to reconsolidate XO with his affiliates so that Icahn could use XO's $3.5 billion of NOLs. Cowen went one step further. Assuming the

stock price of XO benefited from the proposed "de-leveraging" and increased to $1.50 from $0.75, Icahn's blended ownership across all classes of stock would decline to 79.1% preventing tax reconsolidation by virtue of share price enhancement. Based on its analysis, Cowen advised the Special Committee that any share price greater than $1.29 post the proposed rights offering would result in Icahn's blended ownership remaining or declining below the 80% threshold.

110. On June 16, 2008, the Special Committee met and decided to go down a path that was not recommended by either Morgan or Cowen. Nine months after being appointed to represent the interests of minority shareholders, Knauss advocated a private placement with Icahn rather than a rights offering for the purpose of getting a deal done quickly. In a private placement, XO would sell shares directly to Icahn in a private transaction, thereby guaranteeing Icahn's receipt of the shares he needed to go to 80%. According to its own minutes, this was the first time the Special Committee had even considered a private placement, and its lawyer expressed concerns with this new approach. Nevertheless, the Special Committee once again ignored its advisors' concerns. Despite the Special Committee's broad mandate, and evidencing the ongoing confusion of the Special Committee, the Special Committee "determined to go back to the board for their authorization to pursue such a proposal." Since Icahn dominated the board, there was no question as to whether the board would approve such a proposal if Icahn favored it. At the same meeting, the Special Committee determined to stall Bidder 3's effort to get information.

111. The Special Committee then sent Icahn a one-page term sheet for a private placement of preferred stock. The June 16, 2008 transmittal email from the Special Committee's counsel to Icahn's counsel explained just where the Special Committee stood; it was uninformed and it was acting without advice from its financial advisor (emphasis added):

> In order to expedite discussions, the Special Committee has asked us to forward you the attached draft term sheet for a private placement of preferred stock. *The Committee has not received financial information from the Company's management, which the Committee's financial advisor would need to review and comment on, to permit the Committee to set a size for the placement, so a wide range is indicated on the term sheets...*

112. The June 16, 2008 term sheet identified the size of the offering as $500 million to $750 million based on XO's purported cash needs, and a dividend rate of 8% per annum. The Special Committee's decision to send a term sheet to Icahn without narrowing this wide range while at the same time purporting to go back to the Board – read here Icahn – to seek authority, demonstrates that the Special Committee was ineffectual and that a self-dealing transaction acceptable to Icahn was a foregone conclusion. The Special Committee was unconcerned with, and the term sheet was silent as to, how such a transaction was fair to minority shareholders. Its sole concern was to satisfy Icahn's need to get control of the NOLs for little or no consideration and to pave the way for Icahn to get to own 100% of XO at a bargain price.

113. On June 17 and 18, 2008, Bidder 3's financial advisors attended due diligence meetings held by XO.

114. On June 21, 2008, Bidder 3 wrote to Cowen about the nearly-completed due diligence process. Bidder 3 confirmed that it would make a revised offer based on its findings and be ready to finalize documents by July 3, 2008 or whatever date the Special Committee wanted. Cowen forwarded this message to the Special Committee members and added its own explanation of the significance of Bidder 3's efforts:

> The email below speaks for itself in terms of the seriousness of the prospective buyer, the expertise that has been brought to bear on their analysis of XO and this process, the amount of work done by all, and the fact that whatever indication Bidder 3 makes [to] the Special Committee after their diligence is complete will reflect a "market" value data point from an independent third party that should be helpful to the Special Committee in determining what course to consider recommending.

In other words, Bidder 3's offer reflected an important indicator of XO's intrinsic and market value. Bidder 3's imminent offer to the Special Committee charged with a dual process – to consider financing and sale transactions – was one that, according to the Special Committee's own advisors – demanded serious consideration. The Special Committee failed to seriously consider Bidder 3's offer.

115. On June 23, 2008, Bidder 3 presented its revised proposal to the Special Committee offering $940 million cash for the Wireline Business alone, leaving XO with the wireless business and the billions of dollars in NOLs. Bidder 3's proposal had no financing contingency and Bidder 3 advised it would be able to sign final transaction documents by early July 2008. Bidder 3 was also prepared to make an offer for the entire Company if the Special Committee indicated it would entertain the proposal. Bidder 3's offer would provide far greater value to the Company's minority shareholders than the virtually unprecedented preferred stock private placement Icahn was insisting on.

116. Meanwhile, Bidder 2 deferred making a bid on June 23, 2008. Bidder 2's main reason for declining to bid was that it needed clarification on what it described as XO's "incoherent" process, including the role of the Special Committee and Icahn in that process.

Icahn Terminates The Special Committee's Mandate to Consider A Sale

117. On June 24, 2008, the XO Board met at Icahn's offices. XO's stock was then trading at $0.50 cents per share. With an almost completed sales process as an alternative or as important negotiating leverage against Icahn, the Special Committee inexplicably reported to the Board that it had reached an agreement in principle with Icahn on a $680 million preferred stock private placement that could be rolled out within weeks. Incredibly, the Special Committee then "sought authorization from the Board" to continue pursuing the private placement to the total

exclusion of any other possible transaction. Since Icahn effectively was the Board, this authorization was quickly granted.

118. The Special Committee also reported on Bidder 3's firm offer for the Wireline Business, deliberately misleadingly characterizing it as a "preliminary indication of interest." The Special Committee advised that Bidder 3's offer for the Wireline Business was valued at $1.52 per share, three times XO's then-current share price for all its assets. The Special Committee also misleadingly reported that Bidder 3 anticipated that it would need an additional couple of weeks of due diligence. In fact, the Special Committee knew that Bidder 3 was ready to sign a definitive agreement within nine days, if not sooner. The Special Committee also falsely reported that Bidder 2 had dropped out due to XO's "timing needs" which was not among the reasons Bidder 2 cited for not making an offer. Thus, the Special Committee knew there was a qualified buyer ready, willing and able to purchase the XO assets for at least $1.52 in cash and, since such transaction did not include the NOLs, that there would be even more value available to the minority shareholders through a sale to Icahn of the NOLs.

119. Immediately following the Special Committee's presentation on the sale process, "Icahn expressed concern about continuing a dual process [of exploring both financing and a sale] while implementing the proposed financing" proposal with Icahn. Icahn-dominated management discussed the "distractions and strain" on XO of pursuing a dual process. Despite the Special Committee's half-hearted protest that it had a fiduciary duty to explore all options, and its concededly broad mandate, the Special Committee asked the Board – in other words, it asked Icahn – to make "a formal decision whether or not to stop pursuing strategic alternatives pending financing." The Icahn-dominated Board voted, at Icahn's direction, to put the pursuit of the sale process "on hold" while XO negotiated a sweetheart private placement with Icahn. The

XO Board acted – and the Special Committee acquiesced – despite Icahn's statement that he would consider matching any offer made to acquire XO. In pulling the plug on the sale process, the Special Committee gave up the negotiating leverage it had, deprived the minority shareholders of their ability to get fair value for their share of XO and delivered to Icahn exactly what he wanted to the great detriment of XO's minority shareholders.

120. The full Board's vote to strip the Special Committee of authority (which had already been granted to it twice) to continue considering an alternative to Icahn's self-dealing transaction - despite the Special Committee's invocation of its fiduciary duties - demonstrates that the Special Committee either never had real authority to take any action not approved by Icahn or that the Special Committee never intended to exercise such authority because they were always in Icahn's pocket. The Special Committee existed solely to create the appearance of an independent process, but Icahn dictated the Special Committee's path and XO's fate at all times.

121. As per the Board's instructions, on June 25, 2008, XO cut off Bidders 2 and 3 from access to the data room where they were conducting due diligence. Cowen wrote to Bidders 2 and 3:

> [Cowen has] been instructed to send you the following notice. Unfortunately at this time I cannot say much more:
>
> The Special Committee is reviewing one strategic alternative, and has decided to suspend your access to the data room and other due diligence with the Company, including interviews with Company personnel, until the review is completed, which the Committee believes will be within the next two weeks.

122. Bidder 3 was shocked by the Special Committee's decision to slam the door on its offer. Bidder 3 e-mailed Cowen noting that, "By leaving only one option available over the next two weeks, the Company has left itself with limited negotiating leverage and no alternatives." Nevertheless, during the next several days, Bidder 3 remained extremely interested in acquiring

XO or the Wireline Business, writing repeatedly to the Special Committee and Cowen to emphasize the value its bid offered to minority shareholders. Pursuant to instructions, Cowen informed Bidder 3 on June 27, 2008 that the Special Committee had decided to suspend the sale process. In reality, Icahn, not the Special Committee, had made that decision.

123. Later that same day, Bidder 3 made a new proposal that would provide additional tax benefits to XO. Bidder 3 calculated that the total potential incremental value to shareholders from those tax benefits added $8.24 per share to the $1.52 in cash Bidder 3 was offering.

124. As of June 25, 2008, the Special Committee – the very persons charged with protecting the interests of minority shareholders – had only three open items to negotiate with Icahn. Two of those open issues concerned ensuring that Icahn reached the 80% threshold necessary to access the NOLs and that Icahn never again lose that status. Thus, rather than focusing its attention on how best to protect minority shareholders from Icahn, the Special Committee was focused on "setting the voting on the preferred, and creating a mechanism for the majority stockholder, once consolidating the Company again into the majority stockholder's consolidated group for tax purposes, can retain status." As of this date, Icahn was pressing for more convertible preferred ($300 million instead of $200 million) to "facilitate the majority stockholder acquiring more common shares, at a conversion price considerably out of the money at present, which if exercised may contribute to the tax consolidation concern." Over the next several weeks, Icahn would continue to press for, and the Special Committee would continue to acquiesce to, preferred stock terms that would give Icahn ever greater insurance on his ability to access the NOLs and that would unfairly extract voting and economic power from the minority shareholders for Icahn's benefit.

125. On June 26, 2008, Cowen presented its first summary of Icahn's newly proposed private placement. Cowen's projections implied a $0.55 per share stock price as of June 30, 2008 (assuming the proposed rights offering went ahead), approximately one-third of what shareholders would have received from Bidder 3 while still retaining the wireless business and the NOLs, which Bidder 3 valued at approximately $8.24 per share.

126. On June 30, 2008, Bidder 3 wrote again, noting that XO's stock price had plummeted another 20% and was down to $0.41 cents per share. Bidder 3 questioned why the Special Committee was acting completely counter to its purpose of maximizing shareholder value. Bidder 3 made clear that the Special Committee's actions might make it impossible for Bidder 3 to reach a deal with XO. Bidder 3 asked that the Special Committee get the process back on track.

127. The Special Committee convened (without Cowen) on June 30, 2008 to discuss XO management's concerns about XO's need for liquidity as well as the 2009 debt maturity deadline. The Special Committee received an update from its lawyers as to negotiations with Icahn. Icahn demanded the private placement be increased, this time to $780 million, comprised of two new classes of preferred stock, one convertible and the other non-convertible or perpetual. Icahn was also prepared to agree to a placement with certain minority shareholders in proportion to their relative ownership of XO common stock as compared with Icahn. Thus, for example, assume that Starfire owned 50% of the common stock (which it did as of this time), a 5% owner of common would be able to purchase up to $78 million of the preferred. The Special Committee and its counsel remained focused on Icahn's desire for tax consolidation and ensuring that such status was maintained.

128. Raising $780 million would not only cover XO's capital expenditures and debt payments, but it would also provide XO with idle cash that it did not need for business operation for several years. The size of the transaction Icahn sought far exceeded XO's actual needs. The Special Committee never investigated XO's real cash needs and instead repeatedly accepted representations on that topic from Icahn-dominated management. Nor did the Special Committee use the leverage afforded it by XO's possession of the NOLs. The true purpose of the oversized private placement was to ensure that Icahn could acquire enough shares to hit the 80% threshold and remain there thus gaining and retaining access to the coveted NOLs. Icahn was not willing to risk the possibility that XO could be consolidated for tax purposes and then, as in 2004, deconsolidated because Icahn's interests declined below the 80% threshold thus triggering a new 5 year waiting period for using the NOLs. The high PIK coupon attached to the convertible preferred accreted at a greater rate than XO's ability to increase EBITDA thus ensuring that the common equity would not grow in value and that, at the end of the day, Icahn would thus be able to acquire the minority shares at an unfair price.

129. On July 1, 2008, still another potential buyer, Bidder 4, made an unsolicited call to Cowen to express interest in purchasing XO. Cowen discouraged this interest; it also informed Bidder 3 that XO "was not formally for sale and that the Special Committee was tasked primarily with reviewing financing alternatives as publicly disclosed." Bidder 3 also wrote again that evening to reiterate the value it was offering.

130. On July 7, 2008, the Special Committee determined that it should hire Navigant Capital Advisors ("Navigant") as a bankruptcy advisor to enable the Special Committee to compare the value to minority shareholders from a sale, a refinancing or a bankruptcy process. Navigant was formally retained on July 10, 2008. The Special Committee also determined that

the exploration of a sale transaction could continue, but the refinancing seemed the best option for the minority shareholders. Though it retained a bankruptcy advisor, the Special Committee neglected to ask critical questions and thus never understood that Icahn's interests and ability to keep the NOLs would be negatively affected by a bankruptcy filing. Though the Special Committee had leverage it could have used, it simply failed to adequately inform itself as to how to negotiate with Icahn.

131. Cowen recognized that the Bidder 3's offer presented far greater value to XO's shareholders than a self-dealing transaction with Icahn. Cowen took the extraordinary step of trying to resurrect the Bidder 3 sale process even though Icahn and the Board had shut it down. On July 7, 2008, Cowen suggested Bidder 3 make a revised bid for the Wireline Business of $1.3 billion, a 50% increase over Bidder 3's previous offer. The next day - July 8, 2008 - Bidder 3 responded that it was prepared to increase its offer. However, in light of the fact that the responses and directions it had received from XO were confusing and, at times, contradictory, it requested a face-to-face meeting with appropriate decision makers.

132. On July 8, 2008, a Cowen representative and a Bidder 3 representative spoke. As Bidder 3 later explained, it was left "perplexed." Cowen said it "had heard back from two of the three members" of the Special Committee that the Special Committee had not responded formally to Cowen and that Bidder 3 should not expect to hear a formal reply from either Cowen or the Special Committee. Cowen also told Bidder 3 that XO would meet with Bidder 3 only if it resubmitted its mark-up of the purchase agreement Bidder 3 had previously submitted (to which XO had never responded) with a $1.3 billion purchase price and a $25 million reverse break-up fee if Bidder 3 backed out of the deal. Cowen informed Bidder 3 that the Special Committee had set the value of the Wireline business at $1.3 billion because of the enormous investment XO had

made in metro markets and long-haul networks. Moreover, Cowen told Bidder 3 that the Special Committee believes "substantial additional value (over and above the $1.3B for the Wireline business) is associated with the NOLs and the wireless business." Instead of extracting the value of the NOLs for the minority shareholders in a sale to Bidder 3, the Special Committee chose to give them away to Icahn.

133. On July 10, 2008, Bidder 3 responded to Cowen. Bidder 3 volunteered to propose a purchase price "materially higher" than its prior $940 million offer - notwithstanding that the Special Committee described the value of its prior offer as $1.52 per share, a substantial premium over the Company's July 10, 2008 stock price of $0.35 cents per share. In addition, Bidder 3 said it did not object to a reverse break-up fee but wanted to see the Company's mark-up of the draft purchase agreement Bidder 3 had provided weeks earlier. Bidder 3 again requested a face to face meeting with an actual decision-maker for the Company.

134. That same day, Cowen forwarded Bidder 3's response to the Special Committee. Special Committee member Dell instructed Cowen to tell Bidder 3 that a mark-up of the draft purchase agreement "is not something the Special Committee is authorized to do."

135. On July 12, 2008, Cowen stopped all discussions with Bidder 3.

136. On July 13, 2008, counsel to the Special Committee circulated draft transaction documents. The Special Committee's counsel amended prior drafts to allow for minority shareholders to collectively obtain one share of each of the new classes of preferred stock for every two shares obtained by Icahn. Thus, Icahn would get $555 million in convertible preferred shares, while minority shareholders could get up to an additional $277.5 million, and Icahn would get $225 million in perpetual preferred shares while minority shareholders would get up to an additional $112.5 million. If a sufficient number of minority shareholders participated,

despite all expectations to the contrary, Icahn would not attain the 80% threshold. Icahn could not risk the possibility that he would not attain the 80% threshold and, as described below, the 2008 Transaction was engineered to ensure that Icahn got his wish: in the final deal, the minority shareholders' possible participation decreased from 50% of what Icahn took to 5% of that amount. Once again, the Special Committee acted in the best interests of Icahn and not in the interests of the minority shareholders.

137. On July 14, 2008, the Special Committee circulated a new draft of the ATAA. It reflected Icahn's almost complete rejection of the Special Committee's demand for changes to the original Tax Allocation Agreement. First, Icahn's obligations to pay for tax benefits on the first $450 million in NOLs used by Icahn affiliates during 2003-04 remained unchanged; XO would receive nothing until it became a taxpayer and could have used such NOLs. Second, Icahn would now pay XO on a current basis only 30% of any Icahn affiliate tax savings, and such payments would be limited to tax benefits obtained from using the next $900 million of XO's NOLs. Third, any tax benefits Icahn received from the use of NOLs above $900 million would be payable to XO only when it became a taxpayer. Whether the Amended Tax Allocation Agreement produced any value to XO at all was dependent on the timing of the use of the NOLs by XO and by Icahn's affiliates. Since the NOLs were good for 20 years, Icahn did not have to use the NOLs at a time when any or all of the tax benefit would flow back to XO and its minority shareholders. The Special Committee and its counsel were hampered in their efforts to value the NOLs and any benefit to XO from the ATAA because XO's projections provided by Icahn dominated management were a constantly moving target. The Special Committee was completely dependent upon XO management projections to determine the "reasonableness" of the Special Committee's assumptions regarding the ATAA. Apart from its total dependence on

XO management for projections, the Special Committee also failed to inquire of Icahn and its affiliates when the NOLs likely would be used by Icahn's affiliates or to obtain any historical information with regard to the Starfire group's use of NOLs. In fact, following the 2008 Transaction and the January 2009 reconsolidation of XO with Icahn's tax reporting group, Icahn/Starfire used none of XO's NOLs in either 2009 or 2010. Since Icahn/Starfire did not have a tax benefit, XO received nothing in 2009 or 2010 as a result of the ATAA. The ATAA thus had no value to XO or the minority shareholders in the 2008 Transaction.

138. Also on July 14, 2008, Navigant presented to the Special Committee its preliminary findings on the impact of a bankruptcy filing.

139. On July 15, 2008, Cowen also made a presentation to the Special Committee on the proposed private placement. Cowen's presentation materials showed the plan to offer minority shareholders the opportunity to purchase 50% of what Icahn was buying in the private placement. Cowen's presentation revealed that Cowen had found no comparables or even anything remotely similar. Cowen was able to identify only 27 perpetual convertible preferred stock offerings greater than $100 million since the beginning of 2007. The deal value as a percentage of the issuer's market value typically was no greater than 40% and there were only two offerings that even exceeded 51%. By contrast, XO's proposed convertible stock placement would be 897% of its then market value. With regard to the non-convertible preferred stock, Cowen found eleven such offerings since the beginning of 2007 with an average deal value of up to 10% of the issuer's market value and the highest percentage of deal value going back to 2005 only 40%. Icahn's proposal, by contrast, was 363% of XO's market value. The proposed yield on XO's perpetual preferred stock also was out of line with precedent. Cowen identified 8.5% as the top of the illustrative range for annual yields on cumulative preferred offerings, with 7.50%

as the average yield. Icahn demanded and received 9.5%, a substantial premium over the typical yield. The high yield insured that the dividends would more than consume any growth in EBITDA and such a result insured that the common equity owned by the minority shareholders would remain depressed.

140. The dilution to the minority shareholders was further magnified because Icahn was demanding both convertible and non-convertible preferred stock at values substantially in excess of precedent transactions. Not one of the prior offerings on Cowen's lists involved contemporaneous convertible and non-convertible offerings by the same issuer.

Icahn's Sweetheart Deal Is Approved With a Limited Fairness Opinion

141. On July 17, 2008, the Special Committee met again to discuss the only option it determined to make available to shareholders - the sweetheart deal with Icahn. The basic terms remained the ones Icahn had demanded - the placement of 555,000 shares of Class B 7% convertible preferred stock at an exercise price of $1.50, 225,000 shares of Class C 9.5% perpetual preferred stock, and a new tax allocation agreement that gave away XO's NOLs to Icahn for 30% current payment on the tax benefits earned by Icahn's first $900 million in NOLs and no current payment on any of the tax benefits on the remaining NOLs.

142. The terms for the minority shareholders, however, had changed significantly in the two day period from July 15 to July 17, 2008. Remembering his failure to anticipate demand for the 2004 offering, Icahn did not want to make the same mistake twice. Rather than offering minority shareholders one share for every two shares Icahn received, as previously proposed, on July 16, 2008, Icahn (or his representatives) edited the transaction documents so that minority shareholders would receive one share for every *twenty* Icahn received. Now, minority shareholders could receive up to $27.75 million of the convertible preferred stock (instead of

$277.5 million) and up to $11.25 million of the perpetual preferred stock (instead of $112.5 million). As a result, Icahn guaranteed that he would dilute minority shareholders' ownership from just under 50% to less than 20% and guaranteed himself over 80% of the total voting power of the Company regardless of what minority shareholders did. This extraordinary change was not the subject of any negotiating by the Special Committee. Icahn demanded it and received it without any quid pro quo again demonstrating the woeful lack of independence of the Special Committee.

143. Cowen made a presentation to the Special Committee on the proposed stock offerings. Notably, Cowen's presentation did not address the ATAA. Cowen's presentation identified the Company's current total enterprise value (absent the NOLs) as $635.9 million - or nearly $300 million less than Bidder 3's firm offer for only the Wireline Business that the Special Committee had turned down at the direction of Icahn.

144. At the July 17, 2008 meeting, Cowen presented the Special Committee with separate fairness opinions for the convertible preferred stock and the perpetual preferred stock. Cowen did not identify the offer from Bidder 3 as a factor in its fairness opinions, and specifically limited its opinions to the fairness to *the Company* of the financial consideration XO would receive for the preferred stock. It did not address the fairness to minority shareholders as to the form of the preferred stock, nor did it address the unusual size of the offering or the excessive voting rights that would permit Icahn to reach and exceed the 80% threshold. Nor did Cowen provide fairness opinions on the ATAA. The failure of the Special Committee to have any fairness opinion protecting the minority shareholders in a non-voting transaction with the controlling shareholder is a total failure by the Special Committee to satisfy the entire fairness

standard applicable under Delaware law. Instead, Cowen offered the following prominent disclaimers in its two fairness opinions:

> We express no view as to any other aspect or implication of the Transaction or any other agreement, arrangement or understanding entered into in connection with the Transaction or otherwise. Furthermore, *we express no view on that certain Tax Allocation Agreement by and among Starfire Holding Corporation and the Company nor are we expressing any opinion or making any judgment, evaluation or determination with respect to the value, characteristics, ability of any party to utilize or other attributes of the Company's tax position or of any net operating losses*. In addition, you have not asked us to address, and our Opinion does not address, *the fairness to the holders of any class of securities*, creditors or other constituencies of the Company.

At that meeting, the Special Committee also received advice from its counsel on its fiduciary duties in relation to the 2008 Transaction. The Special Committee's counsel advised that, "entire fairness would be the standard they should expect to be applied to any review of the proposed transaction as it was between the Company and a majority shareholder." The Special Committee was also instructed by its counsel that, "the relevant considerations in such an analysis were fair price and fair dealing and that the purpose of the special committee in such situations was to act as a disinterested group in negotiating the transaction with the majority shareholder for the benefit of minority shareholders."

145. The Special Committee – having failed over a three year period to timely secure financing from a third party, having failed to implement cash conservation measures, having failed in exercising the concededly broad authority afforded to it, and then having permitted Icahn to strip it of the power it had refrained from using to consider or negotiate any alternative transactions with third party bidders – recommended the only option on the table other than bankruptcy, a sweetheart deal with Icahn. The Special Committee failed to consider the effects that the new preferred stock issues would have on the minority shareholders. Apart from the immediate and extreme dilution of the minority interests, the PIK (Pay in kind) provisions of the

new preferred issues ultimately gave Icahn a complete stranglehold on XO and continued to quickly dilute the interests of minority shareholders over the course of the next several years. The Special Committee and its advisors deliberately blinded themselves to the harmful effect that the PIK provisions would have on the minority shareholders. Instead, the Special Committee knowingly and purposefully turned away immediate and certain value being offered by third parties and permitted Icahn to dominate XO's operations and to continue to dilute the interests of the minority shareholders.

146. On July 17, 2008, the private placement was put to a vote at the XO board meeting. The outcome was foreordained. Defendants Knauss, Dell and Grivner voted in favor of the private placement; Meister and Shea abstained; Gradin and Icahn and his other designees did not attend the meeting at all. Because Icahn stripped the Special Committee of authority to consider a sale transaction or even to use offers from third parties as leverage in its negotiations with him and because Icahn permitted XO to burn through its available cash without adopting any cash conservation measures during the Special Committee's ten month long existence, only two alternatives remained: a return to the protections of the bankruptcy court or the private placement Icahn was demanding. The members of the Special Committee deliberately left themselves with no alternatives; they inexplicably squandered their broad mandate and deliberately and repeatedly failed to exercise the leverage they had by virtue of XO's possession of NOLs that were of value to Icahn.

147. The July 17, 2008 vote was not the end of the story however, Immediately following the July 17th board meeting, Starfire contacted the Special Committee's counsel to press its ongoing concerns about tax consolidation. As counsel for the Special Committee put it: "Starfire raised with us their concern as to whether, strictly from a tax valuation perspective, the

preferred securities would afford Starfire sufficient value in order to permit Starfire to include XO in its consolidated group for tax reporting purposes." Following days of discussion between XO management, Starfire and the Special Committee's counsel, a resolution was reached that in the Special Committee's counsel's view would "maintain the integrity of the Committee's process and not disturb[] the fairness opinions and other analyses already a part of the Committee's record." Instead of trying to obtain some benefit or protections for the minority shareholders, the Special Committee squandered its final opportunity and agreed for no consideration to changes to the convertible preferred that addressed Starfire's concerns.

148. To accommodate Icahn's wish for complete certainty on his access to XO's NOLs, the Special Committee acquiesced to this final demand by email. The Special Committee then met again on July 24, 2008 and Cowen provided updated fairness opinions that still failed to take into account the offer from Bidder 3, the size of the offering, the fairness to minority shareholders, or the ATAA. On July 24, 2008, the XO board of directors met one more time and voted in favor of the 2008 Transaction; this time Knauss, Dell, Gradin and Grivner voted to approve, Shea abstained and Icahn and his other designees did not attend. None of The Special Committee or Board minutes reflecting the July 24, 2008 meetings accurately set forth the reasons for these last minute changes to the terms of the 2008 Transaction.

149. On July 25, 2008, the Company issued $780 million of preferred shares in two new series of preferred stock (Class B convertible preferred stock (the "Class B stock") and Class C Perpetual Preferred Stock (the "Class C stock")) to Icahn and his affiliates in order to retire all of XO's outstanding debt. The Form 8-K disclosing the 2008 Transaction failed to disclose that Cowen had delivered four fairness opinions, instead glossing over the changes to the terms of the convertible preferred in the week between July 17 and 24, 2008. The Form 8-K

also failed to disclose the Special Committee's retention of Navigant. On December 31, 2007, XO's long-term debt consisted of $373.5 million in principal and $3.7 million of accrued interest. On December 31, 2007, the annualized weighted average interest rate applicable to all of XO's outstanding borrowings under the 2003 Credit Agreement was 11.9%.

150. As of its issuance, the Class B stock, with respect to rights to participate in distributions or payments in the event of any liquidation, dissolution or winding up of the Company, ranked on par with the Class C stock and was senior to the common stock, the Class A preferred stock and every other class of the Company's capital stock outstanding. Dividends on the Class B stock accreted on a quarterly basis at a rate of 1.75% of the liquidation preference, which is initially $1,000 per share (the "Dividend Payment"), thus increasing the liquidation preference of the shares unless paid in cash at the option of the XO Board of Directors. As of December 31, 2008, the holders of the Class B stock were entitled to 381 million shares of common stock with 381 million votes, and a liquidation and redemption value of $572.2 million, consisting of the face value and accreted dividends. By March 31, 2011, the Class B preferred shareholders – Icahn and his affiliates – were entitled to 445 million votes and, upon the conversion of the Class B preferred, 445 million shares of common stock.

151. As of its issuance, the Class C stock, with respect to rights to participate in distributions or payments in the event of any liquidation, dissolution or winding up of the Company, ranked on par with the Class B stock and senior to the common stock, the Class A preferred stock and each other class of the Company's capital stock outstanding. Dividends on the Class C stock accreted on a quarterly basis at a rate of 2.375% of the liquidation preference, which is initially $1,000 per share (the "Dividend Payment"). As of December 31, 2008, the redemption value of the Class C stock was $234.5 million, consisting of the face value and

accreted dividends; the Class C preferred had roughly 150 million votes. As of March 31, 2011, the Class C preferred shareholders – Icahn and his affiliates – were entitled to 193 million votes for their 225,000 shares of Class C preferred.

152. As Cowen and Morgan predicted, no minority shareholder participated in the private placement. In the interval following the July 2008 private placement, XO's common stock trading as low as $0.14 per share thus insuring that Icahn would not only get the NOLs but would be able to buy the minority shares at a price depressed by him and the Special Committee. Defendant Knauss purchased 150,000 shares of XO common stock near its low at $0.16 per share.

153. The $780 million purchase price paid by Icahn and his affiliates for the Company's preferred stock (i.e. the Class B stock and Class C stock) was grossly unfair and too low because Icahn and his affiliates received much more than just the preferred shares for their investment. In fact, the 2008 Transaction was a bargain for Icahn and his affiliates because in truth they got far more than they paid for and far more than they had. Prior to the 2008 Transaction, Icahn affiliates owned approximately 51.5% of XO's common stock, roughly 80% of XO's Class A preferred shares and more than 90% of XO's debt. Critically, XO's debt had no voting rights attached to it. By virtue of that position, Icahn had no access to XO's valuable NOLs. The 2008 Transaction was designed to transform Icahn from a debtholder with no voting rights to a shareholder with super voting rights. The 2008 Transaction 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. The preferred stock issued in the 2008 transaction constituted an overpayment by XO to Icahn of economic value and voting power, improperly expropriating or extracting such value and voting power

from the public shareholders and redistributing it to Icahn, the majority and controlling shareholder. That voting power and share ownership extracted from the minority shareholders was the magical key which permitted Icahn to access XO's NOLs, a valuable XO asset for which Icahn underpaid (if he paid anything at all)

154. That the 2008 Transaction raised far more cash than XO needed for capital expenditures was apparent only two weeks following the closing. On August 13, 2008, the XO board met to discuss the establishment of an investment committee to invest XO's available cash in "undervalued CLEC debt and equity securities." The investment committee, composed of defendants Icahn, Intrieri and Grivner, was given authorization to invest up to a total of $125 million or 16% of the face amount of the preferred stock issued.

Icahn's Motivation for Depressing The Price Of XO's Stock

155. That Icahn has long been acting intentionally to depress XO's stock price is apparent. As one minority shareholder writing to the Special Committee's banker in April 2008 summed it up:

> We remain troubled by the Company's management and oversight as reflected in the missed opportunities to sell the Company at multiples of the current share price or refinance the capital structure during 2006-2007. Further, minority shareholders are absorbing most of the relative impact of poor execution, planning and management, while the Company's largest shareholder continues to redirect his alignment away from the equity.
>
> The short fuse on the Company's debt to Mr. Icahn suggests a "heads I win, tails I win" strategy to eviscerate equity value. This has been compounded by a "spend first, finance later" approach to the business that reflects either contempt or ignorance with respect to the equity value. With the frequent legal activity at XOHO, typically aimed at getting corporate governance to a bare minimum acceptable standard, it seems the Company's largest shareholder and the Board has elected to take a spiteful approach to minority investors/corporate governance. While many small companies would be grateful to have a band of motivated, enthusiastic investors, XOHO treats its minority investors as a nuisance.

> Management appears to be a tool in this exercise as their equity incentive compensation is disconnected from the share price, which begs the question "What are they playing for?" They seem to be operating under a set of incentives not aligned with the common equity. To the extent that isn't the case, one must ask why current management still has a job.
>
> While much was made of the Company's new investor relations strategy during the financing process, we have yet to see it bear any fruit with respect to either conference calls, management roadshows or conference presentations. ...
>
> It is hard to argue this Company would not be in a better position to succeed in the hands of another industry participant and under new management. There are tremendous network and SG&A synergies to be had. We would encourage the Board and management not to ignore these possibilities over the next 12 months. Any restructuring in 2009 that dilutes equity further will not be a credible effort to maximize shareholder returns in this context. The market appears to be factoring in a restructuring of the Company in 2009 to the detriment of the common equity as a foregone conclusion. Given the short tenure of the notes and the credit facility and the Company's sordid history with respect to minority shareholders, those odds seem good, although such an outcome is entirely unnecessary unless it has already been predetermined by the Company's largest shareholder and the Board.

156. Defendants' own words confirm that Icahn was motivated to depress XO's stock price in order to get his hands on XO's valuable NOLs and to ensure that once he secured them for his own use he did not ever lose them again (as he had done in 2004). In an email dated August 8, 2008 following on the heels of the 2008 Transaction, defendant Grivner, XO's then CEO, and defendant Shea, then an Icahn employee and an XO director, discussed changes to the management compensation plan in order to incentivize XO management. While most corporations use equity as a component of incentive compensation for management in an effort to align the interests of management with the interests of shareholders, XO's incentive compensation plans eliminated equity as a component of compensation starting in 2006 because XO's stock options had an exercise price of $5 per share and the stock had not traded above the exercise price since 2004. Grivner, responding to Shea's new equity compensation proposal,

addressed Shea's proposed changes to the stock option plan explaining that XO was "not like most companies:"

> First the stock option plan is not going to work. *If you read the Preferred Agreement and understand the tax issues, there is a significant reason for keeping the stock below $2 for as long as possible. So while in most companies, all the value that's being created could be reflected in the stock price such is not the case here.* Another reason is the stock is not widely held, is offered on the pink sheets and neither of those is likely to change. So we either cash out the current plan in recognition of the last 5 years, convert it so there's minimal upside or leave as is (which I described is worthless). *Your advisors need to look at the complexity of the overall situation and not simple option based modeling that most public companies use.*

(emphasis added). Shea responded within the hour: "I don't know what your [sic] alluding to with the Preferred."

157. An hour later, Freiberg, XO's then CFO, emailed Shea in response to a request by Grivner. The subject matter of Freiberg's email, "Value Voting Percentage" is a shorthand reference to the two-pronged test for determining when affiliated entities are permitted by the tax laws to be consolidated for reporting purposes. Freiberg wrote:

> Carl [Grivner] asked me to sent [sic] this model to you.
>
> *I put this model together to show the impact of the XO stock price going up against the % Value Voting that Icahn affiliates have in XO. The key point here is for Icahn to maintain at least 80% in order to keep the ability to consolidate NOLs.*
>
> If [sic] cell B20 you can plug in a stock price for XO, and in cell B42 you can see the Icahn Value Voting %.
>
> *Below $1.55 per share, Icahn is at 80% or more. If the XO stock price goes above that, then potentially you lose the ability to consolidate the NOLs.*

(emphasis added).

158. These documents explain and evidence Icahn's ongoing motivation for depressing the price of the XO common stock. In negotiating and recommending the 2008 Transaction, the

Special Committee gave Icahn everything he wanted, failed to secure appropriate consideration for the voting and economic power or the NOLs Icahn extracted and failed to obtain adequate protections for the minority shareholders to ensure that they would ever receive a fair price for their shares, either in the marketplace or in a going private transaction.

159. Having permitted Icahn to attain the 80% stake necessary to achieve tax consolidation and the ability to use the Company's NOLs, the Special Committee in 2008 effectively capped the price and value for the minority holders' shares. It is obvious that Icahn would never offer a price for those shares that would take him below 80% and he would never permit any third party to make such an offer for the same reason.

160. Effective January 17, 2009, XO once again became a member of an affiliated group of corporations that filed a consolidated return with Starfire. Thereafter, and as part of his ongoing plan to ensure that the Icahn affiliates retained the valuable NOLs for Icahn's use and benefit over the course of the NOLs' 20 year lives, Icahn continued to act to ensure that XO stock would remain depressed and to ensure that his interest in XO never went below the 80% threshold necessary to keep XO as part of his affiliated group for tax reporting purposes. Each of the actions described below, though unsuccessful in attaining its seeming end, had the effect of depressing and capping XO's stock price and ensuring Icahn would stay above 80% of XO's vote and value. Icahn relentlessly signaled the market and minority shareholders that, regardless of XO's inherent value and despite the value that continued to be created in XO post-July 2008, Icahn would never give minority shareholders their fair share of XO's value.

161. That Icahn was deeply concerned about never losing the consolidation and the NOLs is apparent from the manner in which he caused XO to redeem the Class A preferred. Although the 2008 Transaction provided XO with sufficient funds to promptly redeem all of the

Class A preferred, more than half of which shares were owned by Icahn and his affiliates, Icahn caused XO to delay the redemption of his shares until mid 2010. The effect of this delay was twofold. First, so long as his shares of the Class A preferred were outstanding, Icahn maintained the voting power associated with those shares and the 6% PIK coupon continued to accrete for Icahn's benefit. Second, and concurrent with the benefits accruing to Icahn from owning the Class A preferred, Icahn had the benefit of the voting power and PIK coupon on the Class B and C preferreds. In other words, though XO had funds that would have enabled it to end its obligation to pay Icahn interest on the Class A preferred, it did not promptly redeem the Class A preferred and instead paid interest to Icahn in the form of preferred stock and attendant voting rights on all of the three outstanding issues of preferred.

Icahn's 2009 Unfair Buyout Offer

162. On July 10, 2009, XO announced in a Form SC 13D/A filed with the SEC that on July 9, 2009, ACF Holding and its affiliates (all of which are owned and/or controlled by Icahn) had made a non-binding proposal to acquire all of the outstanding shares of XO that they did not own for $0.55 per share in cash (the "2009 Buyout Proposal"). As of that date, XO's shares were trading at $0.28 per share.

163. In its July 9, 2009 offer, ACF Holding noted that neither ACF Holding nor its affiliates were prepared to be sellers of their shares in any transaction with a third party or vote in favor of a transaction that involved the sale or transfer of their shares to a third party.

164. The purpose of the 2009 Buyout Proposal was to enable Icahn, through ACF Holding and its affiliates, to acquire one hundred percent ownership of the Company and its valuable assets (including the SRLY NOLs) for his own benefit at the expense of the Company's public stockholders or to signal to the investment world he would pursue acquiring all of XO's

stock at bargain basement prices thus keeping XO's stock depressed and impaired. Icahn engineered and timed the offer as part of his long running scheme to suppress the Company's true value and to freeze out XO's minority shareholders at an unfair price.

165. Shortly after the 2009 Buyout Proposal, on July 21, 2009, Plaintiff Hillenmeyer filed a class action and derivative complaint in Delaware against XO's Board of Directors and ACF Holding. The complaint challenged the 2008 Transaction and the 2009 Buyout Proposal.

166. On October 23, 2009, ACF Holding increased its proposal to $0.80 per share in cash. The Special Committee composed of defendants Gradin, Knauss and Dell – perhaps fearful of their exposure to liability on the pending lawsuits challenging the 2008 Transaction and aware of a $1.50 offer from Bidder A for less than all of XO's assets – rejected this offer. On November 9, 2009, Icahn and ACF Holding publicly announced the termination of ACF Holding's offer. The Special Committee was disbanded and its advisors dismissed eliminating any opportunity to explore Bidder A's offer or to disclose its existence to the market and the minority shareholders. The 2009 Buyout Proposal, though unsuccessful, had the desired effect. XO's common stock price remained depressed. As of mid-November, 2009, XO's common stock traded below $0.55 per share.

167. In consequence of the termination of the 2009 Buyout Proposal, plaintiff Hillenmeyer dismissed his class claim challenging the 2009 Buyout. His remaining derivative claim was dismissed without prejudice in May, 2010. With plaintiff Zheng, he then refiled his claims as part of this action.

The October 2010 Proposed Rights Offering

168. On October 12, 2010, the Company issued a press release announcing plans to issue up to $200 million of non-convertible preferred stock in a rights offering to all XO

stockholders. The ostensible purpose of the offering was to raise funds to continue to implement XO's transformation plan, to take advantage of opportunities to enhance its competitive position, for general corporate purposes and to repay any outstanding debt. To effect the offering, XO would distribute to each common stockholder of record transferable subscription rights that would enable such stockholders to purchase one share of non-convertible Class D preferred stock for each share of common stock held by such stockholder, at a price to be determined. The shares of Class D preferred stock would accrue a payable-in-kind quarterly dividend at a rate yet to be determined and have a maturity date also to be determined. The proposed rights offering was to be consummated in the early part of 2011. XO's stock price did not move up in response to this announcement.

169. Although the Proposed Rights Offering was to be offered to all XO shareholders, defendant Icahn and the Individual Defendants knew that, as before, it was unlikely that any minority shareholder would participate. In reality, and as was the case in the 2008 Transaction, it was more likely that the Proposed Rights Offering would be entirely subscribed by defendant Icahn and his affiliates.

170. Because Defendants knew that Icahn was likely to be the sole subscriber to the Proposed Rights Offering, it was in essence a related party transaction. Defendants never disclosed whether any directors were appointed by the Board to determine whether such a transaction would be fair to minority shareholders or whether any procedural safeguards were used to protect minority shareholders from still yet more overreaching by Icahn. Defendants never disclosed whether any Special Committee was appointed to assist XO with evaluating the Proposed Rights Offering; whether anyone considered the impact of the Proposed Rights Offering on minority shareholders; whether a fairness opinion was obtained; and whether XO or

a Special Committee investigated any alternatives to the Proposed Rights Offering.

Icahn Proposes A Reverse Stock Split To Further
<u>Depress the Value of the Company's Stock</u>

171. Following the announcement of the Proposed Rights Offering in October 2010, Icahn continued to manipulate XO's stock price in order to allow him to acquire the portion of XO that he did not already own for inadequate consideration.

172. On November 30, 2010, the Company filed a Form DEF 14C with the SEC concerning an upcoming amendment to XO's Certificate of Incorporation to effect a one for twenty reverse stock split to XO's common stock. According to a letter from defendant Grivner included in the filing, "the primary purpose of the amendment to the Certificate of Incorporation effecting the reverse stock split is to combine the issued and outstanding shares of the Company's common stock into a smaller number of shares so that the shares of the Company's common stock may trade at a higher price per share than the recent trading prices. The intent is to have the Company's common stock trade above the required $4.00 per share minimum bid price necessary to apply for listing on the Nasdaq Global Market." XO purportedly intended to implement the Proposed Rights Offering regardless of whether the listing on the Nasdaq Global Market was obtained.

173. According to the DEF 14C, on November 17, 2010, the Icahn dominated XO Board adopted a resolution setting forth the proposed amendment to the Certificate of Incorporation, declaring it as advisable and directing that it be considered by the stockholders. That same day, Icahn affiliates collectively owning more than 50% of the total voting power of XO's outstanding stock, approved the amendment to XO's Certificate of Incorporation effective as of November 23, 2010. Under Delaware law and the terms of the Company's Certificate of Incorporation and Bylaws, the consent of these stockholders was sufficient to approve the

amendment and therefore the minority stockholders were not permitted to vote on the amendment.

174. The reverse stock split would have further negatively affected minority shareholders. Though XO claimed numerous purported advantages of implementing a reverse stock split, in truth a listing on the NASDAQ would not have raised the stock price or provided additional liquidity because the market for XO stock was permanently impaired by Icahn's actions described above that have enabled him to secure ownership of approximately 92% of XO. Icahn was trying to use the reverse stock split to benefit himself as its effect would likely have reduced XO's market capitalization and lowered its stock price still further.

175. Following the announcement of XO's Proposed Rights Offering and reverse stock split, on December 21, 2010, plaintiffs moved for leave to file a Third Amended and Supplemental Class Acton and Derivative Complaint (the "TAC"). On January 20, 2011, Defendants represented that they would not oppose Plaintiffs' motion.

Icahn Offers to Buy the Remaining Shares of XO That He Does Not Already Own

176. On January 21, 2011, XO filed its Form SC 13D/A with the SEC. The filing disclosed that Icahn, through ACF, had made an offer on January 19, 2011 to buy the remaining shares of XO that he did not already own for $0.70 (the "2011 Proposed Buyout"). ACF requested that XO initiate a process for reviewing and considering its proposal. ACF noted that in no event would it or its affiliates sell its shares in any transaction with a third party or vote in favor of a transaction with a third party.

177. On January 21, 2011, XO announced that it had formed a Special Committee to consider, review, and evaluate the 2011 Proposed Buyout. The Special Committee initially consisted of defendants Knauss, Gradin and First. XO also announced that the Board had

delayed further action on pending financing activities (including the Proposed Rights Offering and the reverse stock split) to permit the Special Committee to begin its review process.

178. On January 31, 2011, Plaintiffs withdrew their motion for leave to file a TAC and moved for leave to file a Fourth Amended and Supplemental Class Action and Derivative Complaint (the "FAC") to challenge the newly announced transactions. On February 4, 2011, Defendants informed Plaintiffs that they would not oppose Plaintiffs' motion for leave to file the FAC. The FAC was filed with the Court on March 14, 2011.

179. On April 7, 2011, XO disclosed that defendant First had resigned from the Special Committee but did not offer an explanation for his resignation. .

180. On April 12, 2011, counsel for Plaintiffs wrote defendants Knauss and Gradin challenging their ability to fairly review the 2011 Proposed Buyout and to protect the minority shareholders. A copy of that letter is annexed hereto as Exhibit B. In that letter, plaintiffs pointed out to the Special Committee that Icahn and other defendants were deliberately depressing XO's stock price and attached the email chain among defendants Grivner and Shea and then CFO Freiberg described in ¶¶ 12, and 143-144 of this Complaint. Plaintiffs expressly warned the Special Committee that, because of defendants' actions depressing XO's stock price, no fair comparisons could be made to market price for purposes of demonstrating that any price ultimately offered by Icahn was a fair price to minority shareholders. Not surprisingly, Knauss and Gradin have failed to respond to Plaintiffs' letter. Moreover, despite plaintiffs' letter and the admonitions in it, XO in its July 12, 2011 press release announcing the 2011 Merger and in the 14C tout the $1.40 per share price accepted by the Special Committee as a premium to market.

XO, Acting On the Special Committee Recommendation, Announces A Cash-Out Merger

181. On July 12, 2011, XO announced that it had signed an Agreement and Plan of Merger, dated as of July 11, 2011 (the "Merger Agreement") between the Company, Icahn's affiliates (ACF, Arnos, Arnos Sub Corp., High River, Barberry collectively, the "Parent Group"), and XO Merger Corp., a direct wholly-owned subsidiary of Parent Group ("Merger Sub").. Each member of Parent Group and Merger Sub are affiliates of Icahn. As of that time, Icahn, was the beneficial owner of approximately 91.76% of the combined voting power of the Company's outstanding shares of capital stock consisting of his beneficial ownership of 113,410,769 shares of the 182,075,165 outstanding shares of the Company's common stock, par value $0.01 (the "Company Common Stock") and 100% of the outstanding shares of the Class B and Class C preferred stock, with their substantial PIK accretions since July 2008.

182. On July 12, 2011, pursuant to the 2011 Merger Agreement, Icahn and XO announced that Icahn would cash out minority shareholders. The 2011 Merger Consideration is $1.40 per share in cash and the contract right, a non-transferable, uncertificated right to receive a pro rata share of certain proceeds received by Icahn and his affiliates in the event that XO is sold to a third party within the next year, by July 12, 2012. The XO Board, acting upon the unanimous recommendation of Special Committee members Knauss and Gradin, and the vote of defendant First, determined that the 2011 Merger Agreement and the Merger are in the best interests of XO and the stockholders of the Company.

183. The 2011 Proposed Buyout is the final step in a deliberate course of action taken during the Class Period by Icahn to obtain the entire Company for himself at the lowest price possible and avoid liability for wrongs committed against the Company, including the class claims and derivative claims originally alleged in this action. The 2011 Merger Consideration is

grossly inadequate and unfair to minority shareholders for a number of reasons. The offer to buy the Company for $1.40 per share in cash is less than the price offered by Bidder 3 in 2008 for XO's Wireline Business standing alone. The Merger Consideration fails to take into account the value of the claims asserted in this action challenging the 2008 Transaction, which class claims will survive the closing of the 2011 Merger. The Merger Consideration also fails to take into account the value to Icahn of the $2.5 billion in SRLY NOLs that Icahn's affiliates will now be able to use. The Merger Consideration, and in particular the $1.40 per share cash component, can not meaningfully be described as a premium to XO's market price because, as described at length herein, defendants have for years been engaged in a successful plan to depress XO's stock price.

184. Central to Icahn's pursuit of 100% of XO was a single XO asset, the SRLY NOLs. By 2011, XO's NOLs totaled over $3 billion composed of roughly $900 million of non-SRLY NOLs and over $2 billion in SRLY NOLs. Icahn Affiliates were able to use the non-SRLY NOLs under the terms of the ATAA. But the non-SRLY NOLs were "chump change" compared to the SRLY NOLs. And unless and until Icahn owned 100% of XO, Icahn could not access the ultimate prize – the over $2 billion in SRLY NOLs, an XO asset. The XO minority shares were the key to unlocking the value to Icahn in the SRLY NOLs.

185. A tax shield is only valuable to an entity with taxable income. The value of the SRLY NOLs (as well as the non-SRLY NOLs) to XO was limited by the fact that XO, according to the projections prepared by XO's management , would not soon become a taxpayer able to use the NOLs as a tax shield. In contrast, and as defendants concede, the XO NOLs had "significant" value to Icahn. In 2011, the Special Committee and its advisors gave away this valuable asset -- the over $2 billion of SRLY NOLs -- to Icahn without any notion as to the value

those NOLs would have to Icahn. Though Icahn was in possession of every scrap of information about XO, the Special Committee and its advisor were operating in the dark about Icahn and his affiliates because they did not have Icahn's tax information. In response to the Special Committee's advisor's request for the very information necessary to value the NOLs to Icahn, Icahn again just said no and refused to provide the information. And so despite not being able to obtain information with respect to Icahn Affiliates' tax position, historical or future or taxable income and other inputs necessary for calculating appropriate discount rates, the Special Committee handed Icahn this valuable XO asset.

186. The Merger Consideration also fails to take into account the inherent value of XO's underlying fiber optic assets which assets are growing more valuable by the day. Telecom traffic continues to explode via consumer use of streaming video, music and file sharing. The increased demand for bandwidth will undoubtedly increase the value of XO's fiber optic assets. At all times relevant, Icahn had unique knowledge of the Company and access to information denied or unavailable to other potential bidders or to certain of the Individual Defendants. For example, XO management who were beholden to Icahn for their jobs and their compensation, routinely provided Icahn with a "midyear" briefing. In consequence of his unfettered access to XO, Icahn timed and structured this cash-out merger unfairly. It is designed and intended to eliminate the Class from continued equity participation in XO at a price per share that Defendants know or should know is unfair and inadequate. Moreover, XO has continued to perform remarkably well despite the fact that equities valuations continue to be temporarily depressed due to global economic conditions. In fact, XO stands poised to continue its significant growth. On May 16, 2011, XO announced its first quarter 2011 financial and operational results. Total revenue for the first quarter of 2011 was $383.4 million, an increase of

4% compared to the same period last year. Adjusted EBITDA (a non-GAAP financial measure) was $35.7 million in the first quarter of 2011, compared to $30.6 million in the same period last year, an increase of 17%. Net loss for the first quarter 2011 was $12.6 million compared to $16.6 million for the year-ago period, a 24% improvement.

187. The Merger Consideration is also unfair because the contract right has no value and is illusory. Not surprisingly, the Special Committee granted its investment banker "permission" not to value the contract right. All that Icahn needs to do is to wait one year and one day and he can sell XO and pocket 100% of the proceeds for himself. Even if he were to sell within a year, the calculation of the "Contract Value Right Distribution Amount" in the 2011 Merger Agreement leaves virtually entirely to Icahn's discretion the amounts that might be available to the minority shareholders. That the contract right was not worth the paper it was written on is apparent from the fact that, almost until the 2011 Merger closed, XO stock continued to trade below the $1.40 per share cash component of the 2011 Merger Consideration; the market for XO common stock, though concededly inefficient, gave the contract right no credence.

188. The Merger Consideration is also inadequate to XO's shareholders because it represents a significant discount to XO's actual value in the marketplace. The $1.40 per share cash-out price corresponds to an EBITDA multiple of approximately 5.0X. This is far below the current public EBITDA multiples of some of XO's competitors (*i.e.*, Cogent (11.0X); Level 3 (10.9X); AboveNet (8.2X); and TW Telecom (8.1X)). The $1.40 is also far less then the consideration received in a recent merger transaction in the telecom industry. On April 11, 2011, Level 3 Communications, Inc. ("Level 3") and Global Crossing Limited ("Global Crossing"), two of XO's major competitors, announced that they had entered into a definitive agreement

under which Level 3 will acquire Global Crossing in a tax-free, stock-for-stock transaction. According to the terms of the agreement, Global Crossing shareholders will receive 16 shares of Level 3 common stock for each share of Global Crossing common stock or preferred stock that is owned at the closing of the transaction. Based on Level 3's closing stock price on April 8, 2011, the transaction was valued at $23.04 per Global Crossing common or preferred share, or approximately $3.0 billion.

189. XO touted the 2011 Merger Agreement as representing a substantial premium over XO's trading price. When plaintiffs wrote to defendants Knauss and Gradin in April 2011 (Exhibit B hereto), they expressly advised Knauss and Gradin that, because defendants had been depressing the stock price, XO's trading price could not be used as a "benchmark in any valuation process to justify acceptance of Icahn's low-ball offers." That warning went unheeded. Defendant Grivner stated the other reasons why the market price was not a fair indicator of value: "If you read the Preferred [Stock] Agreement and understand the tax issues, there is a significant reason for keeping the stock below $2 for as long as possible. So while in most companies, all the value that's being created could be reflected in the stock price such is not the case here. Another reason is the stock is not widely held, is offered on the pink sheets and neither of those is likely to change." The 14C discloses the materials reviewed by the Special Committee's investment banker, JP Morgan. JP Morgan did not review plaintiffs' letter, the emails of XO's CEO and CFO attesting to defendants' plan to depress the stock price to permit Icahn to gain full access to the NOLs or any of the pleadings in this and the coordinated lawsuit by one of XO's largest shareholders. Despite defendant Grivner's statement that "there is a significant reason for keeping [XO] stock below $2 for as long as possible" and then CFO Frieberg's confirmation that "if the XO stock price goes above [$1.55], then potentially [Icahn]

loses the ability to consolidate the NOLs", XO touted the difference between its $1.40 cash offer and the depressed market price as a basis for claiming fairness. This claim by defendants cannot be countenanced.

190. Minority shareholders had no right to vote or tender shares in favor of or against the 2011 Merger. The Standstill Provision in the 2008 Transaction was designed to prevent Icahn from completing a short form merger and should have impeded Icahn's ability to cash out the minority at an unfair price. The Standstill was ultimately ineffective to protect minority shareholders for a variety of reasons. First, the Special Committee had given away too much to Icahn in 2008. The supersize private placement immediately put Icahn at or over the 80% value and voting threshold. The relentless accretion of the PIK dividend on this oversized offering -- approved by the Special Committee without consideration of its effect on minority shareholders -- gave Icahn a stranglehold on XO, rapidly increasing his percentage ownership at the expense of the minority shareholders regardless of XO's performance. Second, as discussed below, the Special Committee never insisted that a majority of the minority vote -- contemplated by the Standstill -- be used. Icahn was opposed to it and so that protection for the minority shareholders was not insisted on. Instead, the minority shareholders were left to rely upon the Special Committee and, as usual, they were disappointed. Defendants Gradin and Knauss again failed the minority shareholders, as they had on numerous occasions before.

191. XO advised plaintiffs and other minority shareholders that they had only one avenue of recourse, appraisal under Delaware General Corporation Law Section 253. Defendants misrepresented the true nature of the minority shareholders' rights here. Despite Icahn's stake in XO, Icahn could not consummate the 2011 Merger unless Icahn, his affiliates and the rest of the XO Board of Directors demonstrated that the 2011 Merger was entirely fair –

in terms of fair price and fair process – to XO's minority shareholders. That is because a standstill provision in the 2008 Transaction – Section 6.4 of the Stock Purchase Agreement entered into on July 25, 2008 – precluded Icahn from consummating any transaction taking him over the 90% ownership mark for the common stock absent traditional indicia of fairness – either a tender by the majority of the minority or approval of a committee of disinterested directors. During the course of the negotiations of the 2011 Merger Agreement, Icahn and his affiliates "consistently articulated resistance" to permitting a majority of the minority to vote on the 2011 Merger. Knauss and Gradin cannot demonstrate that the Special Committee's process met the entire fairness standard that they admit is applicable to self-dealing transactions.

192. In light of XO's future prospects, XO's Board has no valid or pressing reason to sell XO at the value contemplated in the 2011 Merger, particularly in the current depressed economic and valuation atmosphere.

193. At the very least, once the 2011 Proposed Buyout was made by Icahn, the XO Board should have encouraged an open "go-shop" sales process. Icahn was contacted by Bidder A and its bankers but failed to advise the Special Committee or the minority shareholders of that contact. Recently, Icahn, who beneficially owns 9.4% of the outstanding shares of The Clorox Company ("Clorox") common stock made a bid to purchase Clorox for $76.50 per share in cash in a deal valued at $12.6 billion. The Icahn Clorox bid, like the offer made by Bidder 3 in 2008, is backed by a "highly confident" letter from the investment bank Jeffries & Company which confirmed that it will be able to arrange $7.8 billion in financing for the deal, which would come in addition to equity contributed by Icahn's affiliates. Unlike the 2011 Proposed Buyout, in his July 14, 2011 offer letter to the Chairman and CEO of Clorox, Icahn encouraged Clorox to "hold an open and friendly 'go-shop' sale process where all the synergistic buyers are offered due

diligence and invited to bid. If the Company does so, we are confident the process will result in numerous superior bids for this company."

194. Given Icahn's control of the Company, his possession of XO's confidential information and the fact that Icahn and the entities he controls have publicly stated their refusal to sell their shares, no third party, as a practical matter, could attempt any competing bid for XO, because without Icahn's shares they would be unable to obtain control of the Company. Thus, Icahn had the power and exercised his power to enable him to acquire the Company's public shares and dictate terms that are contrary to the best interests of XO and its public shareholders and do not reflect the fair value of XO's stock and businesses.

195. As a consequence, XO and its minority shareholders will suffer permanent and irreparable injury absent injunctive relief to preserve their right to be free of unfair dealing by XO and the Individual Defendants. Plaintiffs sought injunctive relief by motion argued to this Court on August 16, 2011. That motion was denied from the bench.

196. Defendants have failed to make full and fair disclosure to XO's minority shareholders concerning the 2011 Merger. The 2011 Merger was unfair as to price and process and the 14C was deficient in at least the following respects:

a. In the Background of the Merger, defendants fail to disclose how the actions of Icahn described above enabled him to obtain access to XO's NOLs in 2008 and the effect of the 2008 Transaction and other actions complained of herein on the outcome of the 2011 Merger Agreement.

b. The primary purpose of the 2011 Merger was to give Icahn access to the SRLY NOLs which he could not utilize unless he owned 100% of XO. Yet, a reasonable investor reading the Information Statement from start to finish would have no idea that, through

the 2011 Merger, defendant Icahn would gain access to an additional over $2 billion in NOLs, none of which were subject to the Tax Sharing Agreement or otherwise available to Icahn. The Information Statement states only that XO provided J.P. Morgan "with certain information with respect to the Company's federal net operating losses" and provides a summary table of XO's federal NOLs. While stating that Icahn has the "unique ability" to use the NOLs without limitations that would apply to other entities, nowhere does the Information Statement explain the value to defendant Icahn of owning 100% of XO and therefore being able to utilize an additional over $2 billion in NOLs generated and to be generated prior to the close of the 2011 Merger.

c. The Special Committee hired JP Morgan, in part, because of its tax expertise, yet the Information Statement contains no meaningful disclosure regarding the incremental value of the SRLY NOLs to defendant Icahn. JP Morgan was expressly directed by the Special Committee, for the purpose of its fairness opinion, not to "consider any additional value" that Icahn and his affiliates will be able to realize on the NOLs other than the value that XO might realize in the event that it becomes a taxpayer. The Special Committee failed to inform itself of the value of XO to a potential acquirer or the value to Icahn of the acquisition of all of XO's SRLY NOLs.

d. The Information Statement expressly states that the provision of one CVR per share of common stock was a "potentially positive factor" considered by the Special Committee in determining that the 2011 Merger is fair and in the best interest of XO's minority shareholders. Further, in the description of the Background of the Merger, the Information Statement provides that the members of the Special Committee were considering different offer prices depending on the term of the accompanying CVR, thereby suggesting that the CVR had

value. The CVR was without any value. First, JP Morgan itself never assigned any value to the CVR. The Special Committee permitted JP Morgan not to ascribe a value to the CVR, and neither JP Morgan nor the Special Committee did any actual analysis of the value of the CVR. To the contrary, discovery shows that "[w]ith the Special Committee's permission, JP Morgan did not assign any value to the CVR as Icahn has indicated that he has no intention to sell XO within the CVR effective period." JP Morgan's representative also testified that Icahn was not selling the Company within the next year. Second, defendant Icahn would have complete control over the value of the CVR and could simply sell the Company one day after the CVR term expired.

e. The Information Statement, in several places, provides information regarding the trading price of XO's common stock and statistics regarding the percentage premium of the Merger Consideration to XO's historical trading prices. Specifically, for example, the Information Statement includes as a potentially positive factor considered by the Special Committee the fact that the $1.40 per share price represented a premium over XO's historical trading prices as measured at various points. This disclosure is materially misleading. JP Morgan testified that XO's stock price is not reflective of its value and that they so advised the Special Committee. Defendant Grivner expressed the same view in 2008. Thus, the "premium" of the Merger Consideration to XO's share price is meaningless as the share price is not a proxy for value and to tout that premium as a factor weighing in favor of the deal is misleading.

f. Defendants fail to disclose the April 12, 2011 letter written by Plaintiffs' counsel to the Special Committee attaching the emails among Grivner, Shea and Frieberg regarding the plan to depress XO's stock price below $1.55 or $2 per share in order to ensure

that Icahn did not go below 80% of voting/value and lose access to XO's valuable NOLs. Given the content of the Grivner and Frieberg emails and their express statements about the need to depress XO's stock to accommodate Icahn's need to stay above 80% value and voting and the Special Committee's failure to investigate or even review the emails at the time it received the letter, all of the statements made in the Information Statement concerning the deal premium over market price are materially false and misleading.

g. The Information Statement fails to disclose important facts regarding the process employed by the Special Committee to consider, negotiate and respond to Icahn's offer to buy out the minority shareholders of XO. Though Icahn and his affiliates made it impossible for any third party to bid for XO, in 2008, XO received bids and expressions of interest for its wireline business alone at $1.52 per share, a price that exceeds that $1.40 in cash consideration now being foisted on XO's minority shareholders.

h. Defendants' statement in the Information Statement that there was "no meaningful purpose to be served in contacting prospectively interested third parties that might otherwise consider an acquisition of the Company" is materially false and misleading. Such contacts with third parties by a properly motivated Special Committee would have informed the Special Committee and minority shareholders of the true value of XO's assets and NOLs that Icahn had spent the last seven years trying to obtain for himself to the detriment of the minority shareholders. In 2009, such third party contacts motivated Icahn to increase his bid from $0.55 to $0.80 per share. Such third party contacts would have provided negotiating leverage to the Special Committee and would have provided an independent assessment of XO's value from persons or entities not beholden to Icahn for any reason. The Special Committee and its financial advisers testified that even a limited market check would have provided them with

necessary information and leverage yet they failed to pursue it. This decision not to pursue unsolicited indications of interest should have been disclosed in the Information Statement.

i. The Information Statement provides that a potentially negative factor in the Special Committee's consideration was the absence of a majority of the minority approval condition. Specifically, the Information Statement provides that the Special Committee weighed the absence of such a provision "in light of Mr. Icahn, ACF and their affiliates' consistently articulated resistance to this condition during the negotiations in connection with the 2011 ACF proposal, based on the potential execution risk to the consummation of the merger represented by such a provision, and the adequacy of dissenters' appraisal rights in lieu thereof." This statement is false and misleading for several reasons. First, defendant Icahn testified that he did not "consistently articulate a resistance to the majority of the minority provision in 2011." Second, it does not appear that the Special Committee even attempted to negotiate for such a provision, leaving the negotiation to JP Morgan and failing to monitor JP Morgan's efforts in that regard. Third, the Information Statement falsely suggests that the Special Committee somehow bargained for appraisal rights "in lieu of" a majority of the minority provision, when appraisal rights were a statutory remedy already available to XO's minority shareholders under the circumstances presented.

j. Defendants fail to disclose the value to Icahn and his affiliates of XO's NOLs and the elimination of any obligation by Icahn and his affiliates to pay for their use of either the $450 million in NOLs used in 2003-04 or the billions of dollars of NOLs that Icahn and his affiliates will use in the future without any consideration for such NOLs flowing to the minority shareholders. Indeed, JP Morgan was never given access to Icahn/Starfire financial

information that would have made it possible for JP Morgan to provide any meaningful valuation of the NOLs to Icahn and his affiliates.

k. Defendants fail to disclose why the Special Committee directed JP Morgan, for the purposes of its fairness opinion, not to "consider any additional value" that Icahn and his affiliates will be able to realize on the NOLs other than the value that XO might realize in the event that it becomes a taxpayer. The Special Committee's direction is inexplicable and demonstrates the flaws in its process given that its own counsel repeatedly instructed the Committee on the importance of valuing the NOL assets based on Starfire's ability to use them.

l. Defendants fail to disclose the circumstances of the execution of the 2008 Amended Tax Allocation Agreement which JP Morgan reviewed in connection with the issuance of its fairness opinion or the fact that when the original fairness opinions on the 2008 Transaction were issued by Cowen, there was an express exclusion for the Amended Tax Allocation Agreement.

m. Defendants fail to disclose that though Icahn and his affiliates made it impossible for any third party to bid for XO, in 2008 and 2009 XO received bids and expressions of interest for its Wireline Business alone at $1.52 per share, a price that exceeds the $1.40 in cash consideration received by minority shareholders and that the Special Committee refused to fully explore those offers. If anything, XO is in much better financial shape in 2011 than it was in 2008 and the value of its fiber optic assets has increased dramatically. Yet the $1.40 price received by XO's minority shareholders is lower than a price offered in 2008 for only part of XO's business and assets.

n. Defendants' reliance on the fact that XO's "independent directors had, at various time over the preceding three years, considered alternatives for maximizing shareholder

value" renders the 14C materially misleading. As discussed in detail above, the XO directors who sat on the various Special Committees convened by the XO board for the past three years and longer repeatedly failed to act to protect the rights of minority shareholders by engaging in a true exploration of the alternatives available to XO.

o. Defendants fail to disclose that the persons responsible for preparing the projections on which JP Morgan's work is based are all beholden to Icahn as they currently serve and in the future will serve as XO officers and/or employees solely at Icahn's pleasure and their compensation has been and in the future will be directed by Icahn.

197. On July 19, 2011, Plaintiffs moved for leave to file a Fifth Amended and Supplemental Class Action and Derivative Complaint (the "Fifth AC") to challenge the Merger. The Court granted Plaintiffs' request on August 19, 2011. The Fifth AC was never filed with the Court. With the closing of the 2011 Merger on August 18, 2011, the derivative claims in this case were mooted and this Sixth Amended and Supplemental Class Action Complaint is now the operative complaint in this action.

COUNT I

Breach of Fiduciary Duty By Icahn and the Icahn Entities Asserted On Behalf Of All Other Similarly Situated Shareholders In Connection With the 2008 Transaction

198. Plaintiffs Zheng and Hillenmeyer incorporate by reference herein each and every allegation in this Sixth Amended and Supplemental Class Action Complaint as if set forth fully herein.

199. Defendants Icahn and the Icahn Entities, as controlling stockholders of XO, owe fiduciary duties of care and loyalty and the obligation to act in good faith to XO's minority shareholders.

200. As XO's controlling stockholder, Icahn's financial interests are directly adverse to the financial interests of XO's minority shareholders. Because Icahn is the controlling stockholder of XO and stands on both sides of the 2008 Transaction and the 2011 Merger Agreement, Icahn has no protection from the business judgment rule. The Special Committee's 2011 waiver of the attorney client privilege and the documents produced in consequence of that waiver demonstrate that the Special Committee was repeatedly advised that Icahn's sef-interested transactions with XO would be subject to entire fairness review, the highest level of scrutiny under Delaware law. Thus, all of the transactions challenged herein are subject to the entire fairness standard. Under this standard, defendants must (but cannot) establish that the 2008 Transaction and the 2011 Merger Agreement are the result of a fair process and produced a fair price to the minority. Here, as alleged throughout the Complaint, the Special Committee process has not met the required entire fairness standard. Defendants cannot bear their burden of proving either that the 2008 Transaction or the 2011 Merger Agreement is entirely fair to XO's minority shareholders with respect to process and price.

201. Beginning in September 2007 and continuing through to the present, Icahn and the Icahn Entities violated their fiduciary duties to XO's minority shareholders by placing Icahn's own interests above the interests of XO and its minority stockholders. These breaches include, among other things, embarking on a scheme to depress the Company's stock price and forcing the Company to enter into the 2008 Transaction, and the 2011 Merger Agreement on terms most favorable to Icahn at the expense of XO and its minority shareholders and failing to pursue more advantageous alternatives. Icahn and Icahn affiliates engaged in a deliberate course of action to depress the value of XO's stock and warrants and deprive XO's minority shareholders of economic and voting power and of their fair share of XO's true value, in order

ultimately to obtain the entire Company for Icahn at the lowest price possible, including the total value of the NOLs, and avoid liability for wrongs committed against XO and the minority shareholders as alleged herein.

202. Because Icahn and his affiliates dominate and control the XO Board, the business and corporate affairs of XO and are in possession of private corporate information concerning XO's assets, business and future prospects, there exists an imbalance and disparity of knowledge and economic power between Icahn and XO's minority shareholders that makes it inherently unfair for him to have effectuated transactions wherein he gained access to XO's NOLs and otherwise reaped benefits in the form of economic and voting power disproportionate to those enjoyed by XO's minority shareholders. Icahn's actions, including the 2008 Transaction and the 2011 Merger Agreement, have the effect of precluding XO's minority shareholders from receiving fair value for their investment through a fair process. Through their actions, Icahn and his affiliates extracted and appropriated the voting power and economic power of plaintiffs and the Class by diluting their interest in XO and depriving them of the benefits of XO's NOLs and the future value of the Company.

203. Given Icahn's control over XO's affairs, the Board and the Special Committee and the breaches of fiduciary duty that occurred in the 2008 Transaction, neither the 2008 Transaction nor the 2011 Merger Agreement can survive entire fairness review.

COUNT II

Breach of Fiduciary Duty Against the Individual Defendants Asserted Individually And On Behalf Of All Others Similarly Situated In Connection With the 2008 Transaction

204. Plaintiffs Zheng and Hillenmeyer incorporate by reference herein each and every allegation in this Sixth Amended and Supplemental Class Action Complaint as if set forth fully herein.

205. As directors and/or officers of XO, the Individual Defendants owe to XO and its minority stockholders a fiduciary duty of loyalty. Their fiduciary duty of loyalty required the Individual Defendants to place the interests of XO and its stockholders above their own interests and/or the interests of Icahn and the Icahn entities when making decisions on behalf of XO.

206. By their acts, failures to act, transactions and courses of conduct alleged herein, each of the Individual Defendants, acting individually and as a part of a common plan, is attempting to unfairly deprive Plaintiffs Zheng, Hillenmeyer and other members of the Class of the true and fair value of their investment in XO.

207. The Individual Defendants have violated and breached their fiduciary duties owed to Plaintiffs Zheng, Hillenmeyer and the Class by failing to act loyally, in good faith, in a manner reasonably believed to be in the best interests of the Company, and with the care an ordinarily prudent person in a like position would use under similar circumstances.

208. Through their actions, the Individual Defendants extracted and appropriated the voting power and economic power of Plaintiffs Zheng, Hillenmeyer and the Class by diluting their interest in XO and depriving them of the benefits of XO's NOLs and XO's inherent and future value.

209. Beginning in 2003 and continuing through the 2011 Merger Agreement, the Individual Defendants breached their duty of loyalty by placing the interests of defendant Icahn above the interests of XO and its minority stockholders by, among other things, allowing Icahn to embark on a plan to depress XO's stock price, failing to refinance XO's debt at favorable terms to the Company and instead entering into the 2008 Transaction with Icahn, and failing to sufficiently consider offers to purchase all or some of the Company's assets. These actions have given Icahn unfettered control over XO enabling him in 2011 to propose to cash out the minority shareholders for an inadequate $1.40 per share.

210. As a result of the actions of the Individual Defendants, plaintiffs and the Class will suffer irreparable injury by being prevented from obtaining a fair price for their common stock.

COUNT III

Violation of 8 Del. Ch. §122 Against the Individual Defendants In Connection With the 2008 Transaction

211. Plaintiffs Zheng and Hillenmeyer incorporate by reference herein each and every allegation in this Sixth Amended and Supplemental Class Action Complaint as if set forth fully herein.

212. Under Section 122 of the Delaware General Corporation Law, a Delaware corporation may make corporate gifts for public welfare, charitable, scientific or educational purposes or in aid of the country in time of war or other national emergency. A Delaware corporation must receive unanimous shareholder approval to make a gift for any other purpose. The Defendants violated Section 122 of the Delaware General Corporation Law by providing a gift of the NOLs to Icahn without unanimous shareholder approval.

213. In exchange for billions of dollars of NOLs gifted to Icahn, XO received nothing for its NOLs. The Amended Tax Allocation Agreement, which was an integral part of the 2008 Transaction, effectively handed Icahn the NOLs for nothing. Since XO's reconsolidation with Starfire, XO has received not a single dime for the use of the NOLs. The 2011 Merger permits Icahn to take the NOLs forever and terminate any future obligation he might have had under the terms of the Amended Tax Allocation Agreement to pay for this valuable asset that is likely to have a value to him of $1 billion in the future. The absence of consideration to XO renders the Amended Tax Allocation Agreement a gift of corporate assets to Icahn.

214. By approving in, engaging in and closing the 2008 Transaction, the Individual Defendants violated 8 Del. C. §122.

215. Defendants' gift of NOLs to Icahn damaged XO and its minority shareholders in the amounts of professional fees and expenses and Special Committee compensation and expenses incurred in connection with the 2008 Transaction and in an amount in excess of $2 billion reflecting the likely value of the NOLs to Icahn.

COUNT IV

Breach of Fiduciary Duty By Icahn and the Icahn Entities Asserted On Behalf Of All Other Similarly Situated Shareholders In Connection With the 2011 Merger

216. Plaintiffs Zheng and Hillenmeyer incorporate by reference herein each and every allegation in this Sixth Amended and Supplemental Class Action Complaint as if set forth fully herein.

217. Defendants Icahn and the Icahn Entities, as controlling stockholders of XO, owe fiduciary duties of care and loyalty and the obligation to act in good faith to XO's minority shareholders.

218. As XO's controlling stockholder, Icahn's financial interests are directly adverse to the financial interests of XO's minority shareholders. Because Icahn is the controlling stockholder of XO and stands on both sides of the 2008 Transaction and the 2011 Merger Agreement, Icahn has no protection from the business judgment rule. The Special Committee's 2011 waiver of the attorney client privilege and the documents produced in consequence of that waiver demonstrate that the Special Committee was repeatedly advised that Icahn's sef-interested transactions with XO would be subject to entire fairness review, the highest level of scrutiny under Delaware law. Thus, all of the transactions challenged herein are subject to the entire fairness standard. Under this standard, defendants must (but cannot) establish that the 2008 Transaction and the 2011 Merger Agreement are the result of a fair process and produced a fair price to the minority. Here, as alleged throughout the Complaint, the Special Committee process has not met the required entire fairness standard. Defendants cannot bear their burden of proving either that the 2008 Transaction or the 2011 Merger Agreement is entirely fair to XO's minority shareholders with respect to process and price.

219. Beginning in September 2007 and continuing through to the present, Icahn and the Icahn Entities violated their fiduciary duties to XO's minority shareholders by placing Icahn's own interests above the interests of XO and its minority stockholders. These breaches include, among other things, embarking on a scheme to depress the Company's stock price and forcing the Company to enter into the 2008 Transaction, and the 2011 Merger Agreement on terms most favorable to Icahn at the expense of XO and its minority shareholders and failing to pursue more advantageous alternatives. Icahn and Icahn affiliates engaged in a deliberate course of action to depress the value of XO's stock and warrants and deprive XO's minority shareholders of economic and voting power and of their fair share of XO's true value, in order

ultimately to obtain the entire Company for Icahn at the lowest price possible, including the total value of the NOLs, and avoid liability for wrongs committed against XO and the minority shareholders as alleged herein.

220. Because Icahn and his affiliates dominate and control the XO Board, the business and corporate affairs of XO and are in possession of private corporate information concerning XO's assets, business and future prospects, there exists an imbalance and disparity of knowledge and economic power between Icahn and XO's minority shareholders that makes it inherently unfair for him to have effectuated transactions wherein he gained access to XO's NOLs and otherwise reaped benefits in the form of economic and voting power disproportionate to those enjoyed by XO's minority shareholders. Icahn's actions, including the 2008 Transaction and the 2011 Merger Agreement, have the effect of precluding XO's minority shareholders from receiving fair value for their investment through a fair process. Through their actions, Icahn and his affiliates extracted and appropriated the voting power and economic power of plaintiffs and the Class by diluting their interest in XO and depriving them of the benefits of XO's NOLs and the future value of the Company.

221. Given Icahn's control over XO's affairs, the Board and the Special Committee and the breaches of fiduciary duty that occurred in the 2008 Transaction, neither the 2008 Transaction nor the 2011 Merger Agreement can survive entire fairness review.

COUNT V

Breach of Fiduciary Duty Against the Individual Defendants Asserted Individually And On Behalf Of All Others Similarly Situated In Connection With the 2011 Merger

222. Plaintiffs Zheng and Hillenmeyer incorporate by reference herein each and every allegation in this Sixth Amended and Supplemental Class Action Complaint as if set forth fully herein.

223. As directors and/or officers of XO, the Individual Defendants owe to XO and its minority stockholders a fiduciary duty of loyalty. Their fiduciary duty of loyalty required the Individual Defendants to place the interests of XO and its stockholders above their own interests and/or the interests of Icahn and the Icahn entities when making decisions on behalf of XO.

224. By their acts, failures to act, transactions and courses of conduct alleged herein, each of the Individual Defendants, acting individually and as a part of a common plan, is attempting to unfairly deprive Plaintiffs Zheng, Hillenmeyer and other members of the Class of the true and fair value of their investment in XO.

225. The Individual Defendants have violated and breached their fiduciary duties owed to Plaintiffs Zheng, Hillenmeyer and the Class by failing to act loyally, in good faith, in a manner reasonably believed to be in the best interests of the Company, and with the care an ordinarily prudent person in a like position would use under similar circumstances.

226. Through their actions, the Individual Defendants extracted and appropriated the voting power and economic power of Plaintiffs Zheng, Hillenmeyer and the Class by diluting their interest in XO and depriving them of the benefits of XO's NOLs and XO's inherent and future value.

227. Beginning in 2003 and continuing through the 2011 Merger Agreement, the Individual Defendants breached their duty of loyalty by placing the interests of defendant Icahn above the interests of XO and its minority stockholders by, among other things, allowing Icahn to embark on a plan to depress XO's stock price, failing to refinance XO's debt at favorable terms to the Company and instead entering into the 2008 Transaction with Icahn, and failing to sufficiently consider offers to purchase all or some of the Company's assets. These actions have given Icahn unfettered control over XO enabling him in 2011 to propose to cash out the minority shareholders for an inadequate $1.40 per share.

228. As a result of the actions of the Individual Defendants, plaintiffs and the Class will suffer irreparable injury by being prevented from obtaining a fair price for their common stock.

COUNT VI

Violation of 8 Del. Ch. §122 Against the Individual Defendants In Connection With the 2011 Merger

229. Plaintiffs Zheng and Hillenmeyer incorporate by reference herein each and every allegation in this Sixth Amended and Supplemental Class Action Complaint as if set forth fully herein.

230. Under Section 122 of the Delaware General Corporation Law, a Delaware corporation may make corporate gifts for public welfare, charitable, scientific or educational purposes or in aid of the country in time of war or other national emergency. A Delaware corporation must receive unanimous shareholder approval to make a gift for any other purpose. The Defendants violated Section 122 of the Delaware General Corporation Law by providing a gift of the NOLs to Icahn without unanimous shareholder approval.

231. In exchange for billions of dollars of NOLs gifted to Icahn, XO received nothing for its NOLs. The Amended Tax Allocation Agreement, which was an integral part of the 2008 Transaction, effectively handed Icahn the NOLs for nothing. Since XO's reconsolidation with Starfire, XO has received not a single dime for the use of the NOLs. The 2011 Merger permits Icahn to take the NOLs forever and terminate any future obligation he might have had under the terms of the Amended Tax Allocation Agreement to pay for this valuable asset that is likely to have a value to him of $1 billion in the future. The absence of consideration to XO renders the Amended Tax Allocation Agreement a gift of corporate assets to Icahn.

232. By approving in, engaging in and closing the 2008 Transaction, the Individual Defendants violated 8 Del. C. §122.

233. Defendants' gift of NOLs to Icahn damaged XO and its minority shareholders in the amounts of professional fees and expenses and Special Committee compensation and expenses incurred in connection with the 2008 Transaction and in an amount in excess of $2 billion reflecting the likely value of the NOLs to Icahn.

WHEREFORE, Plaintiffs demand judgment as follows:

A. Declaring that the claims alleged on behalf of the class in this action should be pursued on a classwide basis and certifying Plaintiff Zheng as the Class representative;

B. Awarding Plaintiffs and the Class compensatory and/or rescissory damages, and interest against each of the Defendants;

C. Awarding Plaintiffs and the Class their expenses and costs, including attorneys' fees;

D. Imposing a constructive trust upon benefits improperly received by Defendants as a result of their wrongful conduct; and

E. Granting such other and further relief as the Court deems appropriate.

Dated: October 10, 2011
New York, New York

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Attorneys for Plaintiffs and the Class

EXHIBIT A

ATTORNEY-CLIENT COMMUNICATION
PRIVILEGED AND CONFIDENTIAL

DATE:	July 14, 2008
TO:	Robert Knauss, Adam Dell and Fredrik Gradin, Members Special Committee of the Board of Directors of XO Holdings, Inc.
FROM:	Dechert LLP Bouchard Margules & Friedlander, P.A.
RE:	Fiduciary Duties in the Context of a Proposed Preferred Stock Issuance to the Majority Shareholder and Amendment of Tax Sharing Agreement

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We understand that the special committee (the "Special Committee") of the board of directors (the "Board") of XO Holdings, Inc. (the "Company") is considering the issuance of preferred stock (the "Preferred Stock") to its majority shareholder (including affiliates, the "Majority Shareholder") as well considering the possible amendment of the Company's existing tax sharing agreement with the Majority Shareholder (the "Tax Sharing Agreement"). This memorandum discusses the fiduciary duties potentially implicated by the proposed issuance and amendment that the members of the Special Committee should consider.

We believe that the Board must be prepared to defend the issuance of the Preferred Stock and amendment of the Tax Sharing Agreement under the entire fairness standard of judicial review, which is the strictest test applied by the Delaware courts. There is some question whether all transactions between a corporation and a controlling shareholder invoke entire fairness scrutiny. If the sole consideration for applying entire fairness review is whether a controlling stockholder stands on both sides of the transaction, then the issuance of Preferred Stock to the Majority Shareholder and amendment of the Tax Sharing Agreement would trigger entire fairness review. A question exists whether some form of "self-dealing" is also required in order to trigger entire fairness review. The purchase of Preferred Stock by the Majority Shareholder as well as the amendment of the Tax Sharing Agreement may itself be sufficient to constitute self-dealing, especially if all stockholders are not afforded the right to purchase Preferred Stock on the same terms in the case of the securities issuance.

The Delaware Supreme Court has stated that the entire fairness standard applies to a challenged transaction "involving self-dealing by a controlling shareholder." *Kahn v. Tremont*, 694 A.2d 422, 428 (Del. 1997). *Kahn* continues that "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." *Id.* The challenged transaction in *Kahn v. Tremont* was the purchase by Tremont Corporation from Valhi, Inc. of a block of common stock in NL Industries, Inc., and the Court of Chancery had found that Harold Simmons controlled all three companies. *Id.* at 423-24, 428 n.3. The *Kahn* Court explained that application of the entire fairness standard "reflects the reality that in a transaction such as the one considered in this appeal, the controlling shareholder will continue to

dominate the company regardless of the outcome of the transaction. The risk is thus created that those who pass upon the propriety of the transaction might perceive that disapproval may result in retaliation by the controlling shareholder." *Id.* at 428 (citation omitted).

In *In re Primedia Inc. Derivative Litigation*, 910 A.2d 248 (Del. Ch. 2006), the Court of Chancery addressed the following question: "outside of the squeeze-out merger context, what standard of review should a court employ where a parent entity or controlling stockholder causes the controlled corporation to enter into a transaction that harms the controlled corporation, but, at the same time, confers a unique benefit upon the parent or controlling stockholder?" *Id.* at 259-60. The Court did not cite *Kahn v. Tremont.* Instead, the Court of Chancery applied a standard set forth in *Sinclair Oil Corp. v. Levien*, 280 A.2d 717 (Del. 1971), which it described as holding that "in certain circumstances, when a controlling entity or stockholder causes a corporation to enter into a self-dealing transaction and controls the terms of the transaction, the business judgment rule is inapplicable." 910 A.2d at 260. *Sinclair Oil* defined self-dealing as follows: "Self-dealing occurs when the parent, by virtue of its domination of the subsidiary, causes the subsidiary to act in such a way that the parent receives something from the subsidiary to the exclusion of, and detriment to, the minority stockholders of the subsidiary." 280 A.2d at 720.

Primedia concerned allegations that the controlling stockholder, KKR, caused Primedia to call prematurely preferred stock that was owned by KKR. The Court of Chancery determined the business judgment rule was inapplicable and that "some higher level of scrutiny, such as entire fairness, may be appropriate." *Id.* at 259. The Court ruled that the plaintiffs stated a claim under *Sinclair Oil*, explaining:

> Through its domination of Primedia's board, KKR caused the company to redeem hundreds of millions of dollars worth of preferred stock. This was done without the intermediation of any independent bargaining or decision-making agent designed to assure the fairness of the deal. As a result, KKR, through its ownership and control positions in ABRA and in KKR Fund, received an exclusive benefit—a windfall profit from its stake in the preferred stock issues.... [T]he other shareholders of Primedia did not share in this payout. Unlike the plaintiffs in *Sinclair Oil*, the other common stockholders of Primedia did not share in this payout. But, as was the case in *Sinclair Oil*, the alleged facts suggest that the plaintiffs did suffer a detriment because of KKR's self-interested actions, namely the harm resultant from Primedia's premature payment of an excessive price to redeem the preferred stock.

910 A.2d 260-61.

Here, the Special Committee was created as an independent decision-making agent to explore alternatives and negotiate the Preferred Stock issuance on terms that are fair. Nonetheless, the structure of the transaction as an issuance of Preferred Stock as well as amendment of the Tax Sharing Agreement that confers certain benefits on the Majority Shareholder, and not to all shareholders equally, may itself be sufficient to trigger entire fairness review.

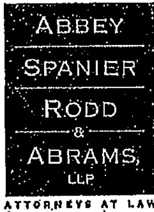
We note that the Delaware Supreme Court has recently stated that "independent directors may cleanse conflict of transactions," explaining that "Section 144(a) of the DGCL provides a safe harbor for interested transactions if they are approved by disinterested directors." *Schoon v. Smith*, 2008 Del. LEXIS 67, *28 (Del. Feb. 12, 2008). *Schoon* cited *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 906 A.2d 114 (Del. 2006), in which an issuance of preferred stock to an interested party (not a controlling stockholder) was evaluated under the business judgment rule because "the disinterested directors possessed all the material information on Abdo's interest in the Transaction, and their approval . . . satisfies § 144(a)(1)." 906 A.2d at 121.

Assuming that entire fairness will apply to the issuance of Preferred Stock to the Majority Shareholder as well as the amendment of the Tax Sharing Agreement, the burden of proof will shift from the defendants to the plaintiff if a court finds that there existed a "well functioning committee of independent directors." Kahn, 694 A.2d at 428. "To obtain the benefit of burden shifting, the controlling shareholder must do more than establish a perfunctory special committee of outside directors. Rather, the 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 at an arms-length." *Id.* at 429 (internal quotation and citations omitted).

"[T]he test of fairness has two aspects: fair price and fair dealing. The element of 'fair dealing' focuses upon the conduct of the corporate fiduciaries in effectuating the transaction. These concerns include how the purchase was initiated, negotiated structured and the manner in which director approval was obtained. The price element relates to the economic and financial considerations relied upon when valuing the proposed purchase, including: assets, market values, future prospects, earnings, and other factors which effect the intrinsic value of the transaction." *Id.* at 430-31 (citations omitted).

Given that the Majority Shareholder owns shares representing approximately 51.6% of the voting power of the Company, we do not believe that either the issuance of the Preferred Stock to the Majority Stockholder or the amendment of the Tax Sharing Agreement would trigger so-called *Revlon* duties (*i.e.*, the obligation of acting to seek the transaction offering the best value reasonably available to the stockholders). *See Paramount Communications v. QVC Network*, 637 A.2d 34, 47 (Del. 1993) ("[W]hen a corporation undertakes a transaction which will cause: (a) a change in corporate control; **or** (b) a breakup of the corporate entity , the directors' obligation is to seek the best value reasonably available to the stockholders."). "*Revlon* does not apply where the plaintiffs cannot allege that a sale or change of control has taken place or necessarily will take place such that the public shareholders of a corporation have been or will be deprived of a control premium." *In re Paxson Communications Corp. S'holders Litig.*, 2001 Del. Ch. LEXIS 95, *22 (July 10, 2001). *See also In re Best Lock Corp. S'holder Litig.*, 845 A.2d 1057, 1091 n.193 (Del. Ch. 2001) ("Put simply, directors have no duty to engage in a *Revlon*-style auction when a majority stockholder can block the proposed transaction.").

EXHIBIT B



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April 12, 2011

By E-Mail and Regular Mail

Mr. Robert Knauss
Mr. Fredrik Gradin
Special Committee of the Board of Directors
XO Holdings, Inc.
c/o Chris Gadoury, Esq.
David Berg, Esq.
Berg & Androphy
3704 Travis Street
Houston, Texas 77002

Re: Zheng, et al. v. Carl C. Icahn et al., Supreme Court, County of New York
Index No. 650499/10

Dear Messrs. Knauss and Gradin:

My firm represents plaintiffs in the above-referenced action. As you and your counsel are aware, we recently filed a fourth amended complaint in which we continue to challenge the 2008 transactions surrounding the refinancing and net operating tax losses and have asserted a challenge to the $0.70 offer made on January 19, 2011 by ACF Industries Holding Corp., an affiliate of Mr. Icahn, for all shares of XO Holdings not held by ACF and its affiliates. We understand that you have been appointed to a Special Committee constituted on January 21, 2011 to review and evaluate the proposal and that recently you have retained counsel and a banker to assist you in that assignment. We trust that you understand that, like the 2008 transactions, any offer by Mr. Icahn will be reviewed under the "entire fairness" standard. [1]

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[1] Contrary to positions asserted by you and others in the above-referenced litigation, the entire fairness standard applies where, as here, a majority of the board is interested or lacks independence from the interested party. *See, e.g., Rales v. Blasband,*

In considering the fairness of the pending offer or any other offer by ACF and its affiliates, we would like to bring to your attention certain pertinent facts bearing on the unfairness of the offer and the likely futility of the process on which you are now embarking. While these are by no means the only facts of which you should be aware, we believe that these facts illustrate the harm that ACF and its affiliates have caused to XO Holdings and its shareholders in the past several years as well as the impossibility of using the trading price of XO's common stock as any indicator or measure of fairness. For the reasons discussed below, ACF and Mr. Icahn should not be permitted to drive the price of XO down and then benefit from that wrong by using the depressed stock price as a factor to justify depriving the minority shareholders of a fair price for their XO shares.

As Vice-Chancellor Strine observed in *In re Oracle Corp. Deriv. Litig.*, 867 A.2d 904, 930 and n. 115, 116 (Del. Ch. 2004), sophisticated commentators believe that it is a good idea that corporate insiders own company stock because "having…'skin in the game' will tend to align their interests with those of the public stockholders." At the time of its emergence from bankruptcy, XO management had a compensation plan that aligned their interests with those of the public shareholders. *See, e.g.*, XO's April 2005 proxy statement, Report of the Compensation Committee on Executive Compensation (noting the importance of a compensation plan including equity awards to align the interests of management with the Company's effort to meet it long and short term goals). The Compensation Committee was composed then of Messrs. Intrieri and Meister, both designees of Mr. Icahn on the XO Board of Directors.[2]

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634 A.2d 927, 936 (Del. 1993); *Aronson v. Lewis*, 473 A.2d 805, 815 (Del. 1984); *see also* R. Franklin Balotti & Jesse A. Finkelstein, The Delaware Law of Corporations & Business Organizations §4.16[A](2008). We also refer you to V.C. Strine's opinion in *In re Loral Space and Communications Inc. Consolidated Litigation*, 2008 WL 4293781 (September 19, 2008), in which the entire fairness standard applied and in which the Vice Chancellor articulated the applicable test in a case involving a controlling shareholder's financing transaction with a controlled company. The parallels to this case are striking.

[2] Mr. Icahn continues to this day to dominate and control the Compensation Committee and Mr. Intrieri remains its chair. We note that Mr. Icahn's control and domination of the compensation of XO's management raise serious questions regarding

Over time, however, the philosophy of the Compensation Committee apparently changed. In 2006, the Compensation Committee determined that XO's executive officers had a sufficient equity stake in XO. *See* XO's April 2007 proxy statement. Since that time, there have been no additional equity awards. *See, e.g.*, XO's April 2010 proxy statement, Compensation Committee Report (noting absence of any new performance equity awards to XO's executive officers).

The Compensation Committee's determination not to award equity was not surprising. It is difficult to imagine how XO's management could be "incentivized" with the promise of equity given the facts that (i) the existing 135,000 options awarded under the compensation plan had exercise prices of $5.00 and greater (and any newly awarded options would have similar exercise prices) and (ii) XO common stock has traded below $1 per share since May 2008 and has been trading below the option exercise price since July 2007.

Documents produced in the above-referenced litigation demonstrate Mr. Icahn's motivation for depressing the XO stock price and keeping it depressed. From September 27, 2007 through July 24, 2008, the Special Committee (then composed of you and Mr. Dell) was engaged in a process that culminated in the July 24, 2008 preferred rights offering. In consequence of that transaction, Mr. Icahn's share of XO increased from 51% of the equity to over 80% of the equity. That transaction (which is the subject of the above-referenced litigation) enabled Mr. Icahn to once again consolidate his affiliates with XO for purposes of permitting him to use the NOLs.

In a series of emails dated August 8, 2008 following on the heels of the July 24, 2008 rights offer, Carl Grivner, XO's then Chief Executive Officer, and Peter Shea, then an Icahn designee on the XO board of directors, discuss the subject of "Long Term

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their ability to negotiate with him at arm's length in any related party transaction including the ones that are the subject of the above-referenced litigation. The Special Committee's habit of delegating its duties to members of management who are beholden to Mr. Icahn has undermined the entire fairness of any process undertaken by the Special Committee in its various iterations over the past several years.

Compensation." *See* Exhibit A hereto (DI0008114-DI0008117).[3] Mr. Grivner, responding to Mr. Shea's compensation proposal, notes his dissatisfaction with changes Mr. Shea proposed to the stock option plan:

> First the stock option plan is not going to work. *If you read the Preferred Agreement and understand the tax issues, there is a significant reason for keeping the stock below $2 for as long as possible. So while in most companies, all the value that's being created could be reflected in the stock price such is not the case here.* Another reason is the stock is not widely held, is offered on the pink sheets and neither of those is likely to change. So we either cash out the current plan in recognition of the last 5 years, convert it so there's minimal upside or leave as is (which I described is worthless). *Your advisors need to look at the complexity of the overall situation and not simple option based modeling that most public companies use.*

DI0008114 (emphasis added). Mr. Shea responds within the hour: "I don't know what your [sic] alluding to with the Preferred." DI0008115.

An hour later, Mr. Freiberg, XO's then Chief Financial Officer, emails a model to Mr. Shea in response to a request by Mr. Grivner. The subject matter of Mr. Freiberg's email, "Value Voting Percentage" is a shorthand reference to the two-pronged test for determining when affiliated entities are permitted by the tax laws to be consolidated for reporting purposes. As you must be aware, Mr. Icahn sought such consolidation for tax purposes following the 2004 rights offering (when his interests in XO ceased to satisfy the "Value Voting Percentage" test) in order to permit him to use XO's billions of dollars of net operating losses (the "NOLs"). Mr. Freiberg wrote:

> Carl asked me to sent [sic] this model to you.
>
> *I put this model together to show the impact of the XO stock price going up against the % Value Voting that Icahn affiliates have in XO. The key point here is for Icahn to maintain at least 80% in order to keep the ability to consolidate NOLs.*
>
> If [sic] cell B20 you can plug in a stock price for XO, and in cell B42 you can see the Icahn Value Voting %.

---

[3] We note that the attached documents were part of a production made in the above-referenced litigation and are subject to a confidentiality stipulation.

> *Below $1.55 per share, Icahn is at 80% or more. If the XO stock price goes above that, then potentially you lose the ability to consolidate the NOLs.*

DI0008117 (emphasis added).

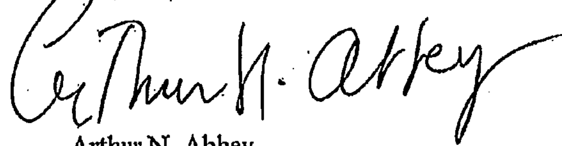
We trust that the significance of the foregoing exchanges is apparent to you. We believe that these documents explain and evidence Mr. Icahn's ongoing motivation for depressing the price of the XO common stock. In negotiating and recommending the July 24, 2008 Rights Offering, the then Special Committee (you and Mr. Dell) gave Mr. Icahn everything he wanted and failed to secure appropriate consideration or protections for the minority shareholders to ensure that they would ever receive a fair price for their shares, either in the marketplace or in a going private transaction. These documents begin to explain why, regardless of the huge capital expenditures and the improvements in XO's operating businesses, "all of the value that's being created" (to use Mr. Grivner's own words) is not reflected in the stock price of XO's common stock and the stock price remains artificially depressed. The repeated rebuffing by the XO board of directors and the Special Committee of any third party offers now becomes comprehensible. An offer for all of the shares at a price that might take Mr. Icahn below 80% was to be avoided at all costs. Similarly, any increase in the market price to a level that would take Mr. Icahn below 80% was also to be avoided. Mr. Icahn's repeated offers for the XO shares he did not own at $0.55 per share, at $0.80 per share and now at $0.70 per share ensured that the market price would remain depressed.

Having permitted Mr. Icahn to attain the 80% stake necessary to achieve consolidation, the Special Committee in 2008 effectively capped the price and value for the minority holders' shares. It is obvious that Mr. Icahn would never offer a price for those shares that would take him below 80% and he would never permit any third party to make such an offer for the same reason.

In light of the foregoing, the Special Committee and its advisors cannot use the trading price of XO's common stock as a benchmark in any valuation process to justify acceptance of Mr. Icahn's low-ball offers. Moreover, in light of the failure to protect the

minority shareholders in the 2008 transaction, we believe that there is little or nothing that the Special Committee can do to protect the interests of the minority shareholders going forward. It appears clear that the Special Committee has not functioned and can not function now as an "effective proxy for arm's length bargaining" or in a manner that "indicates that the controlling shareholder did not dictate the terms of the transaction and that the committee exercised real bargaining power 'at an arms-length.'" *Kahn v. Tremont,* 694 A.2d 422, 429 (Del. 1997). Given the infirmities of the Special Committee's process up to now, we believe that the Special Committee is in no position to proceed with any evaluation or negotiation of the current offer and that negotiations, if any were to proceed, should be with plaintiffs in this litigation. We are available to discuss this matter further.

Very truly yours,



Arthur N. Abbey

ANA:lk
Enclosures

cc: Herbert Beigel, Esq. (by email/w/enclosures)

From:	Grivner, Carl J [carl.grivner@xo.com]
Sent:	Friday, August 08, 2008 4:15 PM
To:	Peter Shea
Subject:	RE: Long Term Compensation

quite a few changes from our discussion.
First the stock option plan is not going to work. If you read the Preferred Agreement and understand the tax issues, there is a significant reason for keeping the stock below $2 for as long as possible. So while in most companies, all the value that's being created could be reflected in the stock price such is not the case here. Another reason is the stock is not widely held, is offered on the pink sheets and neither of those is likely to change. So we either cash out the current plan in recognition for the last 5 years, convert it so there's minimal upside or leave as is (which as I described is worthless). Your advisors need to look at the complexity of the overall situation and not simple option based modeling that most public companies use.

The 3 year plan vs the 2 doesn't look competitive. That's something we can check out. So we need to verify.

"Self funded transformation bonus plan" meaning additive to the existing EBITDA or part of?? If additive then another $40M in EBITDA over those 3 years? That would take what everyone admits are already challenging targets and raise them even more. So not sure what is meant?

Tuesday I am in NYC at customer lunch from 12-2, and then headed to airport so around 2 works better for call.

As you know we need to resolve quickly.

From: Peter Shea [mailto:PShea@ielp.com]
Sent: Friday, August 08, 2008 2:53 PM
To: Grivner, Carl J
Subject: Long Term Compensation

Have changed a few things since our discussion after further thought. Please see attached and call me, Tuesday between 12 and 2 is best if you can.

DI0008114

From: Grivner, Carl J [carl.grivner@xo.com]
Sent: Friday, August 08, 2008 5:59 PM
To: Peter Shea
Subject: RE: Long Term Compensation

We are too far part to waste our time on the below action items.
I am not going to go any further on email on the options and performance, it's straightforward.

I cannot take this back to the leadership team. We have been at this for several months and we're back to square one. We are on 'spin cycle'.

If this is as good as it gets, I would like to know that.

From: Peter Shea [mailto:PShea@ielp.com]
Sent: Friday, August 08, 2008 5:06 PM
To: Grivner, Carl J
Subject: RE: Long Term Compensation

Not sure how justify paying for options without performance. Your shares, if you buy into the transformation plan, should have quite a bit of value. I don't know what your alluding to with the Preferred.
3 year LTIP plan would mirror vesting of many option plans. The way this is designed there would be potential for payouts in each year.
'Self funded' I believe is how your annual bonus plan is set up now.
40 mil payout represents 4% of ebitda.
As I indicated the other day, I need from you,

1) a good idea of who is in the 2 pools, LTIP and Transform, and
2) what annual comp looks like for the top people at XO, given the comp plans we're discussing.

From: Grivner, Carl J [mailto:carl.grivner@xo.com]
Sent: Friday, August 08, 2008 4:15 PM
To: Peter Shea
Subject: RE: Long Term Compensation

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From: Peter Shea [mailto:PShea@ielp.com]
Sent: Friday, August 08, 2008 2:53 PM
To: Grivner, Carl J
Subject: Long Term Compensation

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From:	Grivner, Carl J [carl.grivner@xo.com]
Sent:	Friday, August 08, 2008 7:49 PM
To:	Peter Shea
Subject:	RE: Value Voting Percentage

go to the comp committee with what? two different proposals...one that management does not support.
I would think Keith and Vince have better things to do than referee disagreements.
Unless you're saying they approve your proposal? If that's the case, let Terri know and she'll roll it out.

From: Peter Shea [mailto:PShea@ielp.com]
Sent: Friday, August 08, 2008 6:43 PM
To: Grivner, Carl J
Subject: Fw: Value Voting Percentage

Let me know when want to go to comp com

From: Freiberg, Gregory W
To: Peter Shea
Sent: Fri Aug 08 18:34:20 2008
Subject: Value Voting Percentage

Peter,
Carl asked me to sent this model to you.

I put this model together to show the impact of the XO stock price going up against the % Value Voting that Icahn affiliates have in XO. The key point here is for Icahn to maintain at least 80% in order to keep the ability to consolidate NOLs.

If cell B20 you can plug in a stock price for XO, and in cell B42 you can see the Icahn Value Voting %.

Below $1.55 per share, Icahn is at 80% or more. If the XO stock price goes above that, then potentially you lose the ability to consolidate the NOLs.

I have not shown this model to Jordan, but I believe it to be accurate. Pls let me know if you'd like to have a call to discuss.

<<XO CS PS sensitive to Icahn Value Voting v2.xls>>
Greg

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