

BY ORDER OF JUSTICE RAMOS, THESE MOTION PAPERS MAY NOT BE TAKEN APART OR OTHERWISE TAMPERED WITH.SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORKYoulu Zheng and Donald J. Hillenmeyer on behalf of themselves
and all others similarly situated,

Plaintiffs,

-against-

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

Defendants.

Index No. 650499/10
(Hon. Charles E. Ramos)**MEMORANDUM OF LAW
IN SUPPORT OF CLASS
PLAINTIFFS' MOTION FOR
APPROVAL OF PLAN FOR
CLASS NOTICE****Motion Sequence No. 8**

Plaintiffs Dr. Youlu Zheng and Donald J. Hillenmeyer, on behalf of themselves and all others similarly situated ("Class Plaintiffs") respectfully move this Court for the entry of an order pursuant to CPLR § 904, approving Class Plaintiffs' proposed plan for dissemination of the notice of pendency in this case, including approval of the forms of the proposed Notice of Pendency of Class Action (the "Long Form Notice") and Summary Notice of Class Action (the "Publication Notice"). Defendants have advised that they have no objection to Class Plaintiffs' notice plan.

PRELIMINARY STATEMENT

The Court is familiar with the factual and legal background of this litigation. On November 15, 2010, Class Plaintiffs moved for class certification. After briefing and argument class certification was granted and on July 27, 2011, the Court issued its order certifying the following two classes pursuant to

CPLR Article 9, Sections 901 and 902:

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.

Thereafter, a merger was announced and consummated and the parties agreed to modify the Class B definition as follows: “All persons and entities who were holders of XO common stock on July 11, 2011, which is the date of the execution of the Agreement and Plan of Merger between the Company, ACF, Arnos, Arnos Sub., High River, Barberry and XO Merger Corp.” Excluded from both Classes are Defendants and any person, firm, trust, corporation or other entity related to or affiliated with any of the Defendants. Since the class certification order was issued by this Court, the parties have completed fact discovery and trial is now imminent. This motion is thus ripe for consideration and approval.

ARGUMENT

I. LEGAL STANDARD

The proposed plan is designed to provide notice of the pendency of this class action in a manner consistent with constitutional due process and the requirements of CPLR § 904. “The law requires that the parties provide the best notice practicable under the circumstances to class members.” *Drizin v. Sprint Corp.*, No. 101707/02, 2005 WL 1035823, at *1 (Sup. Ct. N.Y. County Feb. 25, 2005) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974)); *In re Colt Indus. Shareholder Litig.*, 155 A.D.2d 154, 160 (1st Dep’t 1990) (a class action notice “informs all class members of the pending class action, the composition of the class, the issues between the parties...”). Under CPLR § 904(b)

and (c), “reasonable notice of the commencement of a class action shall be given to the class in such manner as the court directs” and “[t]he content of the notice shall be subject to court approval.”

II. THE COURT SHOULD APPOINT STRATEGIC CLAIMS SERVICES TO PROVIDE NOTICE AND CLAIMS ADMINISTRATION SERVICES

Class Plaintiffs request that the Court approve the appointment of Strategic Claims Services (“SCS”) for providing notice and claims administration. SCS is one of the leading notice and settlement administrators in the country and has extensive experience in devising class action notice plans. *See* the Affidavit of Paul Mulholland, President of Strategic Claims Services, dated May 20, 2014, submitted herewith (the “Mulholland Aff.”) at ¶2 and Exhibit A thereto. The Mulholland Affidavit describes the proposed notice plan in detail.

III. THE COURT SHOULD APPROVE CLASS PLAINTIFFS’ NOTICE PLAN

Class Plaintiffs are submitting two forms of notice, the first to be disseminated by mail, and the second a summary notice to be disseminated by publication. *See* Spanier Aff. Exhibits A and B. Plaintiffs respectfully submit that their proposed notices are appropriate, in that they are impartial and neutral and adequately notify class members of their rights with respect to this litigation without significant expense. Defendants have consented to the two forms of notice.

The proposed Long Form Notice contains, among other things, a concise description of the nature, history, and status of the litigation; it sets forth the definition of the two classes; it states the fundamental class claims and issues; it discloses the legal rights of class members to exclude themselves from the classes and sets forth the deadline and procedure for doing so; and it warns of the binding effect of the action on class members who stay in the class(es). It also identifies Class Counsel, contact addresses and a toll-free telephone line for obtaining further information, and gives the internet address for the litigation website. It is presented in an easy-to-read design using clear, concise, and plain language. The Long Form Notice satisfies applicable requirements and should be approved.

The proposed Publication Notice is an abbreviated but informative version of the Long Form Notice. It provides a summary of the case and states class members' rights and options, including the right to opt out. The Publication Notice is designed to attract the attention of class members. It informs them how to obtain more information by contacting Class Counsel or on the internet. The Publication Notice satisfies applicable requirements and should be approved.

As set forth in the Mulholland Affidavit (¶¶3-6), the notice plan consists of multiple components: (a) distribution of the Long Form Notice by direct mail encompassing both a robust nominee mailing and notice directly to identified class members; (b) publication of the Publication Notice in the *Investor's Business Daily* and *Globe Newswire*; and (c) a litigation website.

(a) Long Form Notice by Direct Mail

In order to provide actual notice to those persons and entities who were holders of XO Holdings, Inc. ("XO") common stock on July 25, 2008 and July 11, 2011, SCS will mail, by first class mail, the Long Form Notice approved by the Court to all individuals and organizations identified on the records of XO's transfer agent. Mulholland Aff. ¶4. These records will reflect persons and entities that owned common stock of XO for their own account or for their clients' account(s) on July 25, 2008 and July 11, 2011. *Id.* In addition, SCS will mail Long Form Notices to all brokerage companies, banks and trust companies contained on its master mailing list. *Id.* This master list consists of the 1,087 largest banks and brokerage companies ("Nominee Account Holders"), and 726 mutual funds, insurance companies, pension funds, and money managers ("Institutional Groups"), which may have held XO's common stock in their clients' or their own accounts on July 25, 2008 and July 11, 2011. *Id.*

(b) Publication Notice

As a supplement to the direct mail notice program, Class Plaintiffs propose publication of the Publication Notice once in the *Investor's Business Daily* and *Globe Newswire*. Mulholland Aff. ¶6.

(c) **Notice Website**

SCS will establish and monitor a litigation website containing the Sixth Amended and Supplemental Class Action Complaint, Long Form Notice, Publication Notice, Court Order(s) and any other pertinent information to assist Class Members in this matter. Mulholland Aff. ¶5. The website's address will be listed on all notice materials. *Id.* Additionally, a link to the litigation website will be placed on Class Counsel's and SCS's website. *Id.*

IV. THE COURT SHOULD APPROVE CLASS PLAINTIFFS' PROPOSED SCHEDULE FOR COMPLETING THE NOTICE AND EXCLUSION PROCESS

Class Plaintiffs propose the following schedule for completing the notice and exclusion process:

(a) Dissemination of the Long Form Notice to the Class by mail within 20 days of the Court's Order approving the proposed notices;

(b) Publication Notice to be published once in the *Investor's Business Daily* and *Globe Newswire* within 20 days of the Court's Order approving the proposed notices; and

(c) Deadline for opting out of one or both classes - 60 days from the date of mailing of the Long Form Notice.

CONCLUSION

Based on the foregoing, Class Plaintiffs respectfully request an order approving the plan as described herein and in the Mulholland Affidavit, including approval of the proposed Long Form Notice and Publication Notice, as the best notice practicable under the circumstances of this action in accordance with CPLR § 904 and the requirements of due process.

Dated: May 20, 2014
New York, New York

ABBHEY SPANIER, LLP



Arthur N. Abbey
Judith L. Spanier
212 East 39th Street
New York, NY 10016
Telephone: (212) 889-3700
Facsimile: (212) 684-5191

Counsel for the Certified Classes