SUPERIOR COURT OF JUSTICE
COUR SUPÉRIEURE DE JUSTICE

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Date: 31 March 2010

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FROM: Laurie Pietras, Secretary to The Honourable Mr. Justice Strathy

TOTAL PAGES (INCLUDING COVER PAGE): 12

MESSAGE:

Re: Michael Cannon v. Funds for Canada Foundation, et al

Please find attached the Endorsement and Directions in this matter released today by Mr. Justice Strathy.

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CITATION: Cannon v. Funds for Canada Foundation, 2010 ONSC 1885
COURT FILE NO.: CV-08-362807CP
DATE: 20100331

ONTARIO SUPERIOR COURT OF JUSTICE

RE: **Michael Cannon,** Plaintiff/Moving Party

Funds for Canada Foundation, et al., Defendants/Respondents

BEFORE: G.R. Strathy J.

COUNSEL: *Samuel S. Marr*, for the Plaintiff

John P. Brown, for the Defendants Parklane Financial et al.

John F. Rook , Q.C., for the Defendants Patterson Law and Edwin Harris

Deborah Berlach, for the Defendants Funds for Canada Foundation, Sam Albanese, Ken Ford, Riyad Mohammed, David Raby and Greg Wade

K. Bingham, for Donations Canada

DATE HEARD: March 8, 2010 and by written submissions

ENDORSEMENT AND DIRECTIONS

(Various Matters)

[1] This endorsement deals with several issues that were the subject of a motion before me on March 8, 2010 and gives directions with respect to case management of this action.

[2] The nature of this action is set out in my endorsement dated November 20, 2009: *Cannon v. Funds for Canada Foundation,* [2009] O.J. No. 4986. The plaintiff was an investor in the Donations Canada Charitable Donation program (the "Program"), a tax shelter. He claims that he and other investors suffered losses when Revenue Canada disallowed tax credits that they had claimed. He claims that the primary purpose of the Program was to benefit the defendants and that most of the money paid by members of the proposed class was received by the defendants, rather than by the charities.

[3] In an endorsement dated November 20, 2009, *Cannon v. Funds for Canada Foundation*, [2009] O.J. No. 4968, I approved a partial settlement between the plaintiff and some of the parties represented by Mr. Brown, which resulted in a dismissal of the action against a number of individual and corporate parties. As part of that settlement, the remaining defendants represented by Mr. Brown undertook "not to bring any motions prior to the certification motion," provided that they would be entitled to bring a motion under rule 20 or rule 21 of the *Rules of Civil Procedure,* R.R.O. 1990, reg. 194 at the time of the certification motion. They also undertook not to take any position on motions that other defendants might seek to bring prior to certification, subject to their right to defend any motion that might impact their rights. I assume that these terms were important to the plaintiff in smoothing the procedural path to certification.

[4] In another ruling, *Cannon v. Funds for Canada Foundation*, [2010] O.J. No. 314, 2010 ONSC 146, I held that a motion under rule 21.01(1)(b) (no reasonable cause of action) and rule 21.01(3)(d) (frivolous, vexatious or abuse of process), that Ms. Berlach wished to bring on behalf of the defendants Albanese, Ford, Mohammed, Raby and Wade, should be brought at the time of the certification motion and not before. I found that this procedure would promote efficiency and economy in the management of this class action and that any prejudice to these defendants could be compensated in costs, if necessary.

[5] I will set out in sequence each of the issues raised on the motion and my disposition.

Motion to dismiss action against Mr. Freedman

[6] The plaintiff has made an agreement with Mr. Stephen Freedman that is similar to the agreement I approved on November 20, 2009. Mr. Freedman has confirmed that he had limited involvement in the matters at issue. In exchange for his cooperation, including production of documents in his possession and his agreement to an interview with plaintiff's counsel, the plaintiff has agreed to dismiss the action against him. For the reasons set out in my previous endorsement, I am satisfied that the dismissal, which is not opposed by any party, is reasonable and will not prejudice the members of the proposed class. An order will be granted accordingly.

Motion for Production of Insurance Policies

[7] The plaintiff moved for production of insurance policies covering Mr. Rook's clients and some of Ms. Berlach's clients. I have been informed that this issue has been resolved.

Motion for Production of Partnership Information

[8] The plaintiff moved for production of information concerning the law firms with which the defendant Harris was associated at various times and the names and addresses of the partners of Patterson Law. I have been informed that this issue has also been resolved.

Validating Service on Bermuda Long Tail Trust

[9] As a result of the examination of some of the individuals who have now been released from the litigation, the plaintiff learned of a trust known as Bermuda Long Tail Trust ("BLTT"), allegedly operated by a Bermuda company called Appleby Services (Bermuda) Ltd.

("Appleby"). The Further Fresh as Amended Statement of Claim proposes to add BLTT as a defendant. It pleads that BLTT is a Bermuda trust, which was involved in the promotion and marketing of the Program, along with some of the other defendants. The notice of motion requesting the order was served on Appleby in Bermuda. The plaintiff seeks an order "validating service of the Notice of Motion" upon BLTT by way of service upon Appleby.

[10] Mr. Bradley Berg appeared on the motion for the purposes of making submissions on the propriety of hearing the motion relating to BLTT prior to the hearing of a motion by BLTT to challenge the jurisdiction of this court. Mr. Berg submitted that his client should be entitled to bring a motion to challenge the court's jurisdiction prior to the hearing of the motion to add his client as a defendant. Mr. Berg made it clear that his client does not accept that this court has jurisdiction over it and that in instructing him to speak to the issue his client was not attorning to the jurisdiction.

[11] It was pointed out that both rule 17.06 of the *Rules of Civil Procedure* R.R.O. 1990, reg. 194 and rule 21.03(3)(a) contemplate that such a motion can only be brought by someone who is a party to the action. Rules 17.06(1) and (4) provide:

> 17.06 (1) A <u>party</u> who has been served with an originating process outside Ontario may move, before delivering a defence, notice of intent to defend or notice of appearance,
>
> (a) for an order setting aside the service and any order that authorized the service; or
>
> (b) for an order staying the proceeding.
>
> ...
>
> (4) The making of a motion under subrule (1) is not in itself a submission to the jurisdiction of the court over the moving party.
>
> [emphasis added].

[12] The rule is clearly restricted to a "party". It does not contemplate that someone, apprehending that they may be made a party, has any standing to bring a motion forestalling that eventuality. The rule protects the proposed party by providing that appearance for the purpose of contesting jurisdiction is not an attornment to the jurisdiction.

[13] Similarly, rule 21.01(3) provides:

> (3) A <u>defendant</u> may move before a judge to have an action stayed or dismissed on the ground that
>
> (a) the court has no jurisdiction over the subject matter of the action ...

[14] A "defendant" is obviously someone who is named as a defendant in an action, not someone who may be named.

[15] Mr. Berg acknowledges that on their face these rules imply that the plaintiff's motion to add BLTT should be brought first, followed by a jurisdictional challenge by the added defendant. He submits, however, that there is precedent for making these rules available to someone who is not a party. He refers to *Montaseri v. General Dynamics*, [2008] O.J. No. 2637 (S.C.J.) and *Petals, Inc. v. Winners Apparel Ltd.* (2005), 78 O.R. (3d) 453, [2005] O.J. No. 4439 (S.C.J.).

[16] I do not think that *Montaseri v. General Dynamics* assists Mr. Berg. In that case, an action had been commenced against General Dynamics Corporation ("GDC"), which was located outside Ontario. The action was based on the complaint that GDC and one of its affiliates, (referred to as "GDC4S") had engaged in discriminatory employment practices contrary to the Ontario *Human Rights Code*, R.S.O. 1990, c. H. 19. After having been served with the statement of claim, GDC brought a motion, under rules 17 and 21.01(3), to dismiss or stay the action on jurisdictional or *forum non conveniens* grounds. The plaintiff sought leave pursuant to rule 26 to amend the statement of claim to add GDC4S as a defendant. That motion was adjourned pending the outcome of GDC's motion. The record does not indicate that GDC4S appeared on the motion to support GDC's jurisdictional challenge.

[17] My colleague Allen J., applied the test established by the Court of Appeal in *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20, [2002] O.J. No. 2128[1], and found that there was no jurisdiction over GDC. She therefore concluded that the motion to amend the statement of claim to add GDC4S was "rendered moot," presumably because if jurisdiction could not be established in relation to the one corporation it could not be established in relation to its affiliate. The case is obviously distinguishable from the case at bar because the jurisdictional issue was initially decided in connection with an existing defendant. Moreover, there was no suggestion that the proposed defendant would itself bring a motion prior to being added.

[18] *Petals, Inc. v. Winners Apparel Ltd.* is a decision of Low J. of this court. The plaintiff had brought an action in Ontario, which was dismissed, with costs being awarded to the defendant. The defendant was unsuccessful in recovering the costs, assessed at about $135,000, and served the president of the plaintiff company, one Robinton, with a notice of motion seeking to recover the costs from him personally. There was evidence that Robinton had continued to prosecute the action in the name of the plaintiff, in spite of his knowledge that the plaintiff's interest in the cause of action had been transmitted to another party as a result of a foreclosure. After having been served, out of the jurisdiction, with the notice of motion that he be required to pay the costs of the action, Robinton moved under rules 17.06 and 21.01(3) to set aside service. The defendants then sought leave, *nunc pro tunc*, if necessary, to serve *ex juris* to add Robinton as a party plaintiff and to vary the trial judgment requiring him to pay costs.

[19] Low J. considered whether Rule 17, dealing with service out of the jurisdiction, applied to the document served on Robinton, which was a notice of motion that he be required to pay the

[1] Now modified and re-stated by the Court of Appeal in *Van Breda v. Village Resorts Ltd.*, 2010 ONCA 84, [2010] O.J. No. 402.

costs of the action. She concluded that, although the notice of motion was not technically an originating process, it was functionally a new proceeding vis-à-vis Robinton. She found, at paras. 17 and 18:

> Ostensibly, the notice of motion is a notice of a proceeding in the within action. As such, it is not an originating process. That, however, does not resolve the issue because Robinton is not a party to this action. The notice of motion challenged here is the first notice to Robinton that a claim for relief is being asserted against him. Notwithstanding that the motion appears facially to be interlocutory, it is, vis-à-vis Robinton, in substance and function a new proceeding against a person not hitherto a party; the notice of motion therefore serves the same purposes as an originating process as defined in the Rules.
>
> As there is no rule that governs the situation before me, I would proceed by analogy and apply the Rule 17 criteria to determine whether service ex juris was available without leave.

[20] Low J. then concluded that the claim against Robinton, although "unorthodox," could fall within rule 17.02(g) or (h) and that service out of the jurisdiction was available without leave. She then proceeded to find, on a *Muscutt v. Courcelles* analysis, that there was jurisdiction in Ontario and that Ontario was the *forum conveniens.*

[21] It seems to me that this decision is actually against Mr. Berg's submission, as Low J. expressly found, at para. 17, that the notice of motion is "in substance and function a new proceeding against a person not hitherto a party; the notice of motion therefore serves the same purpose as an originating process as defined in the rules." Keeping in mind that the notice of motion was against a non-party, asking that he be made liable for costs awarded against another party, this observation of Low J., and her conclusion are, respectfully, entirely apt.

[22] The decision in *Petals, Inc. v. Winners Apparel Ltd.* is best regarded as *sui generis*. I am not aware that it has ever been cited or followed, perhaps because it was a unique set of facts. In my respectful view, it does not stand for the proposition that a foreign party, who may be added as a defendant in an Ontario action, has standing to appear in court before the fact and challenge the court's jurisdiction.

[23] Mr. Berg also submits that the procedure that the plaintiff wishes to follow puts his client at a disadvantage in comparison to a domestic party sought to be added, because that party could appear to make submissions on the merits of the motion whereas the foreign defendant cannot. He also submits that it is an inefficient process, because the existing defendants will have an opportunity to challenge the proposed amended pleading at this time, whereas his client's objections will have to be heard on another day, risking inconsistent results and inefficiency.

[24] I do not see that BLTT will be prejudiced in any way by following the standard and routine practice of permitting it to challenge jurisdiction after, not before, it has been served with the statement of claim. It should not be able to challenge the pleading itself until it is properly a

party before the court. If its jurisdictional challenge is successful, the challenge to the pleading is irrelevant. If its challenge is unsuccessful, it will have an opportunity to bring whatever other motions it sees fit in connection with the statement of claim.

[25] I might add that in following the usual practice, challenging jurisdiction after service of the originating process out of the jurisdiction, BLTT will have the protection of rule 17.06(4) and its challenge will not be treated as a submission to jurisdiction. I am not at all sure that this protection would be available if BLTT were to bring a motion challenging the court's jurisdiction before being served.

[26] For these reasons, leave will be granted to add BLTT as a defendant. Service of the motion record on Appleby will be validated. The Further Fresh as Amended Statement of Claim may be served on Appleby by ordinary mail. Alternatively, counsel for BLTT may accept service of the pleading without thereby attorning to the jurisdiction and without prejudice to his client's right to bring a motion under rule 17.06.

Amendment of the Statement of Claim

[27] Since the Further Fresh as Amended Statement of Claim (a revised version of which was provided to me at the hearing of the motion) adds new parties to the action, leave of the court is required under Rule 26.02(c).

[28] The new pleading removes all reference to the former defendants against whom the action has been dismissed, including Mr. Freedman. It also adds new parties, namely Mary-Lou Gleeson, Matt Gleeson, Martin P. Gleeson and Gleeson Management Associates Inc. and includes new allegations against them. These proposed added parties were served with the motion record and did not appear at the motion or oppose the relief sought. The amendments relating to these added parties are approved.

[29] The Further Fresh as Amended Statement of Claim changes the names of some of the law firms and makes some other changes in relation to the claim against the lawyers. These amendments are not opposed, reserving all rights of defence. The amendments are approved, as regards the lawyers.

[30] The plaintiff's motion to amend the statement of claim has been met with objections by Mr. Brown on behalf of the Parklane and Trafalgar defendants and by Ms. Berlach on behalf of the Funds for Canada defendants. They complain that while there are some technical failings in the pleading that might be cured by particulars or further amendment, there are some fundamental flaws in the pleading that should not be allowed.

[31] Mr. Brown refers to a number of authorities in support of the proposition that, notwithstanding the mandatory language of rule 26.01 ("the court shall grant leave to amend a pleading on such terms as are just unless prejudice would result that could not be compensated for by costs or an adjournment"), the court has the obligation to ensure that any proposed amendment is legally tenable and conforms to the general rules of pleading: *National Trust Co. v. Furbacher*, [1994] O.J. No. 2385; *Vaiman et al. v. Yates* (1987), 60 O.R. (2d) 696, [1987] O.J. No. 2248 (H.C.J.); *Kenebar Inc. v. Midland (Town)* (1994), 16 O.R. (3d) 753, [1994] O.J. No.

366 (Gen. Div.); *Mastercraft Group Inc. v. Confederation Trust Co.* (1997), 15 C.P.C. (4th) 48, [1997] O.J. No. 3451 (Gen. Div.); *Plante v. Industrial Alliance Insurance Co.* (2003), 66 O.R. (3d) 74, [2003] O.J. No. 3034. These authorities suggest that an amendment should not be allowed where:

- it constitutes an abuse of process;
- it is untenable in law on its face, is not "legally sound", fails to disclose a reasonable cause of action or contains a "fatal flaw";
- it is unintelligible or embarrassing;
- it is frivolous or vexatious; or
- it fails to conform with the rules of pleading, including the requirements of rule 25.06 and 25.07.

[32] I will set out below the specific objections raised by Mr. Brown and Ms. Berlach on behalf of their clients, the plaintiff's answer to them, and my conclusions. I will mention, however, some general observations made by Mr. Marr on behalf of the plaintiff. First, he submits that the amendment of the pleading does not require leave of the court, except as regards new parties, since pleadings have not been noted closed. He is entitled to amend the pleading as of right pursuant to Rule 26.02, and in any event rule 26.01 mandates that leave <u>shall</u> be granted "on such terms as are just" unless prejudice would result that could not be compensated by costs. I accept this as a general proposition.

[33] Second, the plaintiff says that this is not an evidentiary motion and that it is not for me to weigh the evidence: *Atlantic Steel Industries, Inc. v. CIGNA Insurance Co. of Canada* (1997), 33 O.R. (3d) 12, [1997] O.J. No. 1278 (S.C.J.); *Anderson Consulting Ltd. v. Canada (Attorney General)*, [2001] O.J. No. 3576, 13 C.P.C. (5th) 251 (C.A.) at para. 35. I accept that proposition as well. As Lax J. noted in the former case at para. 6, on a motion to amend a statement of claim, the court is concerned with the "legal validity of the claim and not with screening spurious claims which will not survive trial."

[34] Third, the plaintiff says that Mr. Brown's clients have agreed to bring no further motions prior to certification and that by opposing the amendments his clients are really attempting to do indirectly something that they have agreed not to do directly. I do not accept this submission. The settlement agreement reserved the right to oppose motions affecting the defendants' rights.

[35] Fourth, the plaintiff says that a ruling has already been made on the proposal of Ms. Berlach's clients to bring a rule 21 motion and the issue should not be re-argued. I do not consider the defendants' submission to be a re-argument, but as I observed in my previous ruling, [2010] O.J. No. 314 at para. 17:

> ... the test on the motion under Rule 21.01(1)(b) is the same as, and can most conveniently be dealt with, under the "reasonable cause of action"

test in section 5(1)(a) of the *C.P.A.* Dealing with the matter at one time, for all parties, at the certification hearing will promote efficiency and judicial economy.

[36] As this case is working its way towards a certification hearing, in which the cause of action test will be considered in the context of its connection with the factors in s. 5(1)(b), (c) and (d) of the *Class Proceedings Act, 1992,* S.O. 1992, c. 6, I think it is desirable that the consideration of this issue, as well as any rule 21 motions, be deferred to the certification hearing.

[37] Finally, Mr. Marr submits that the proposed amendments are to be "read generously with allowance for deficiencies in drafting": *Plante v. Industrial Alliance Insurance Co.*, above, at para. 21(b). I would point out that in that case Master MacLeod was referring to the question of whether the cause of action was "legally tenable" – i.e., whether it disclosed a cause of action. He was not referring to the other rules of pleading.

[38] I will now deal with the defendants' objections, the plaintiff's response, and my conclusions.

(a) Consumer protection legislation

[39] Mr. Brown says that there is a failure to properly plead particulars of the consumer protection legislation in Ontario and other provinces that the defendants are alleged to have breached. Mr. Brown agrees with the plaintiff that this is a deficiency that is capable of correction by providing particulars of the legislation.

[40] Mr. Marr submits that the pleading of consumer protection legislation in other provinces is not the result of an amendment and it is made in the existing pleading. In any event, he says that the plaintiff will only know what legislation is applicable once he knows the provinces in which the Program was marketed by the defendants and this is unknown at this time.

[41] I accept this submission. To the extent the plaintiff relies on legislation in other jurisdictions, particulars can be provided prior to the certification hearing.

(b) Breach of contract

[42] The defendants assert that the pleadings of breach of contract with respect to the Trafalgar defendants are untenable because they fail to plead material facts, as required by rule 25.06(1), to establish the existence of a contract.

[43] Mr. Marr submits that the cause of action based on breach of contract is already in the pleading and is not asserted as a new cause of action in the amended pleading. I agree. The pleading is substantially the same.

(c) Inconsistent pleadings

[44] The defendants say that the pleading of damages and rescission are inconsistent, and violate rule 25.06(4), because they fail to make it clear that they are claimed in the alternative. As well, the plaintiff seeks damage for breach of contract and on the basis of *quantum meruit*, which is not a contractual claim. Again, it is conceded that this deficiency can be corrected simply by a pleading in the alternative.

[45] I am not convinced that a claim for rescission under the *Consumer Protection Act, 2002*[2] precludes a claim for damages. In any event, the plaintiff is prepared to plead rescission as an alternative claim. If so advised, he may plead damages in addition to, or as an alternative to, rescission and may plead breach of contract as an alternative to *quantum meruit*.

(d) The conspiracy claim

[46] The defendants argue that the plaintiff's allegations of conspiracy are deficient and violate rule 25.06(9)(a), which requires a pleading of the damages in respect of each claim, because the plaintiff fails to plead that he suffered damages arising from the alleged conspiracy that are distinct and separate from the underlying torts of which he complains: see *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.* (2008), 89 O.R. (3d) 252, [2008] O.J. No. 833 (S.C.J.), at para. 90. They say that the conspiracy pleadings are basically identical to the claim in negligence.

[47] The plaintiff acknowledges that the pleading of conspiracy is a new one, but relies on rule 26.02(a), in support of the submission that leave of the court is not required since pleadings are not closed. The plaintiff also relies on *Dean v. Mister Transmission (International) Ltd.*, [2008] O.J. No. 4372, 66 C.P.C. (6th) 287 (S.C.J.) and *Hunt v. Carey*, [1990] 2 S.C.R. 959 at para. 54 in support of the proposition that this issue should be left to another day. I accept both submissions, although I do not rule out the possibility that the plaintiff may find itself in difficulty on certification in meeting the "cause of action" test under s. 5(1)(a) of the *C.P.A.* if the constituent elements of a cause of action have not been properly pleaded.

(e) Fraud and misrepresentation

[48] The defendants say that the plaintiff's allegations of fraud and fraudulent misrepresentation violate rule 25.06(8) as the plaintiff as failed to plead material facts demonstrating:

(i) that each defendant engaged in specific acts or made specific misrepresentations with the intent to deceive the plaintiff;

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[2] Section 18(1) of that statute provides: "Any agreement, whether written, oral or implied, entered into by a consumer after or while a person has engaged in an unfair practice may be rescinded by the consumer and the consumer is entitled to any remedy that is available in law, including damages." [emphasis added]

(ii) that each defendant intended that its act or misrepresentation would be relied upon by the plaintiff; and

(iii) that the plaintiff was deceived by and relied upon the alleged act or misrepresentation: *Balanyk v. University of Toronto* (1990), 1 C.P.R. (4th) 300, [1999] O.J. No. 2162 (S,C,J,) at para. 102.

[49] The plaintiff acknowledges that this is a new pleading but contends that leave is not required for the reasons mentioned earlier. Mr. Marr submits that proof of reliance is not required in the case of fraud, which is a separate cause of action from fraudulent misrepresentation: *Ontario Realty Corporation v. P. Gabriele & Sons*, [2009] O.J. No. 286, 2009 CanLII 1807 (S.C.J.); *Harlan v. Fancsali* (1993), 13 O.R. (3d) 103, [1993] O.J. No. 961 (Gen. Div.); *Bank of Montreal v. Woldegabriel*, [2007] O.J. No. 1305 (S.C.J.). He also submits that it is an "unsettled question" in the case law as to whether direct reliance is required in a misrepresentation claim, relying on *Silver v. Imax Corp.*, [2009] O.J. 5585 (S.C.J.); compare *McKenna v. Gammon Gold Inc.*, [2010] O.J. No. 1057, 2010 ONSC 15[illegible] (S.C.J.). For the purposes of the present motion, I accept these propositions. For the reasons mentioned in connection with the conspiracy pleading, however, the plaintiff stands forewarned that the pleading may face challenges when it comes to s. 5(1)(a) of the *C.P.A.*

(f) Claim against Funds for Canada

[50] Ms. Berlach joins in Mr. Brown's submissions with respect to the pleadings of fraud and conspiracy. She also says that the plaintiff's own evidence shows that Funds for Canada had no existence in 2005 and therefore it cannot have been a party to a contract made at that time or have participated in a conspiracy at that time.

[51] I accept the plaintiff's submission that I should not consider evidentiary issues on this motion.

[52] These conclusions are without prejudice to the defendants' right to challenge the pleading's adequacy for the purpose of the test in s. 5(1)(a) at the time of certification.

Timetable

[53] I encourage counsel to agree on a realistic timetable leading to the certification hearing. My assistant may be contacted to schedule a case conference within the next two weeks to discuss that timetable. Any other matters that require discussion can be put on the agenda. If BLTT wishes to bring a motion pursuant to rule 17.06 or rule 21.01(3), it should be scheduled as soon as possible.

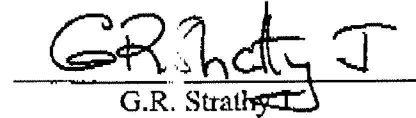
Costs

[54] I have advised counsel that the costs with respect to the motion concerning the scheduling of the directors' rule 21 motion will be reserved to the hearing of that motion.

[55] I would suggest that the same disposition be made with respect to this motion, but if any party has a contrary view, written submissions may be made.

Order

[56] An order will issue incorporating the foregoing. Plaintiff's counsel shall prepare and circulate a draft order for submission to me.



G.R. Strathy J.

DATE: March 31, 2010