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

NATALIE GORDON, On Behalf Of Herself and Others Similarly Situated,

Plaintiff,

vs.

VERIZON COMMUNICATIONS, INC., *et al*,

Defendants.

Index No. 653084/2013

CLASS ACTION

Motion Seq. # 3

**REPLY MEMORANDUM OF LAW IN SUPPORT OF OBJECTOR GERALD WALPIN'S MOTION FOR SUMMARY JUDGMENT & TO INTERVENE**

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Plaintiff's opposition to the Objection of Shareholder Gerald Walpin ('Objector") is a potpourri of many and varied assertions and arguments, none of which has any merit, with many in conflict with undisputable facts and the reality of this lawsuit.

Relevant Facts and Chronology

On or about November 10, 2014, Objector first received notice of the proposed settlement in the "Notice of Pendency …," which stated that it was sent "BY ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY." The Notice, among other contents, advised of the substance of the settlement: "a number of additional disclosures not contained in the Preliminary Proxy," plus Verizon's commitment to "obtain a fairness opinion from an independent financial advisor" on any "sale to a third party purchaser or spin-off of

assets … having a book value of in excess" of about 5% of Verizon's assets. Thus, Objector was informed that was the full supposed "benefit" Verizon and its shareholders would receive under the settlement. The Notice continued to disclose that the parties had agreed that Plaintiff's attorneys would apply for up to $2 million "for attorneys' fees and expenses" – thus notifying shareholders that, while the settlement provided for no money to be paid to shareholders, the settlement would result in a net loss to shareholders as their shareholder equity would be reduced by the amount paid to Plaintiff's attorneys, plus the amount of legal expenses incurred by Verizon.

The Notice also advised that shareholders "have the right to seek exclusion from the settlement ONLY as to those Settled Claims relating to a claim for monetary damages arising out of the Transaction" (emphasis added). Under the reality of this lawsuit, this was an academic, impractical, option provided to shareholders: there were no monetary damages agreed to in the settlement; and to the extent that Objector believed the lawsuit claim was meritless (the position of all Objectors), no Objector could reconcile his objection with seeking exclusion from the Class – only invoked when the Objector wished to press an individual claim for monetary damages, here non-existent in the eyes of Objectors.[1]

Objector Walpin's Objection was limited to opposing any award of legal fees to Plaintiff's attorney. But the Objection expressly declared that the lawsuit was without any merit: "All relevant facts demonstrate this lawsuit should never have

[1] Plaintiff (p. 15) makes the frivolous argument that Objector should be bound by whatever Plaintiff and Defendant agree "because he affirmatively decided to remain in the Class rather than exercise his right to opt-out." If that were the law, there would be no right to be an Objector.

been commenced, as it had no merit." The Objection continued that "given that Plaintiff's attorney did commence this lawsuit, it is in the best interests of Verizon and its shareholders (including me) to end this lawsuit, without any liability for expenditure of any further of Verizon's [and therefore Objectors'] assets," through the approval of what the Objection described as "window dressing" provided to "plaintiff's counsel" as "a crutch on which to lean their attorneys' fee demand, and therefore "meaningless wall-papering to an extreme."

Thus, the essence of the Walpin Objection was the need to end this lawsuit and the continued expenditure by Verizon of money and time on a meritless lawsuit, by allowing the settlement to be consummated, but denying any expenditure of Verizon funds for legal fees to Plaintiff's lawyers.

This Court, in its December 19th decision, understandably found the settlement agreement, which would have terminated this lawsuit, to be totally unfair, inadequate, unreasonable, and therefore not in the best interest of the shareholders, and rejected any award of attorneys' fees to Plaintiff's attorneys. As it was apparent that neither Plaintiff nor Verizon – both signers and proponents of the settlement – would defend the Court's decision, Objector Walpin moved for summary judgment dismissing the complaint, on the basis of the Court's rejection of merit to the settlement terms in language that found no merit to the assertions in the Complaint. And Objector Walpin also, in the alternative (if found to be necessary), moved to intervene as a party in order to defend the Court's decision, as it is clear that both Plaintiff and Verizon will not do so.

## Argument

### A. Standing

Plaintiff argues that an Objector has no standing to move for summary judgment, relying on the CPLR § 3212 provision that reads that it is a "party" that can move for summary judgment. Plaintiff thereby ignores that the Class Action rule automatically gives all members of the class, who have not excluded themselves from the class, the standing to be heard and appear on the settlement. Throughout this proceeding before this Court (until now), Plaintiff respected the standing of each Objector who appeared to object to approval of the settlement or solely to any award of attorneys' fees. Plaintiff does not explain any legal basis to limit that standing to permit making the objection but not to defend the Court decision on that objection through subsequent appeals and/or a motion to fully implement the Court's decision. Neither reason nor law warrants such an irrational conclusion.[2]

Plaintiff relies on an excerpt, out of context, from *Spota v. County of Suffolk,* 110 A.D. 3d 785, 973 N.Y.S.2d 657, 660 (2d Dep't 2013), that "only a party to an action may move for summary judgment." That begs the question because it leaves open the meaning of the word "party" (with a small "p").[3] It is certainly true that, in most contexts, one has to be a party in order to argue on a motion in court. Yet, not even Plaintiff disputed Objectors' right to be heard on the motion to approve the Settlement Agreement. Plaintiff's semantic reasoning was given short shrift in *In re*

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[2] Plaintiff (p. 4) asserts that she will move for re-argument of this Court's decision, but has already served a notice of appeal, thereby precluding such motion.

[3] CPLR 2214, governing Motions, specifies that each "party shall furnish to the court all papers served by him" -- an obligation that Plaintiff, the Court, and the Clerk of the Court all recognized applied to Objectors in this case.

*General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.,* 1996 WL 683785 at *3 (3d Cir. Feb. 14, 1998) (cited in our Moving Aff. ¶ 13). The motion made in *General Motors* was pursuant to Fed. R. App. Proc. 21(a) that likewise, in its words, is limited to a "party," which, the Third Circuit held, entitled an Objector to make the motion.[4]

B. Timeliness of Motion For Summary Judgment

Plaintiff again ignores reality in favor of semantic limitation. The reality is that the issue has been joined – Plaintiff's (p. 5) own words as to when a motion for summary judgment may be made. That phrase means agreement by the parties on the remaining issues to be litigated. Here, Plaintiff and Defendants have agreed that there are no further issues to be litigated, as they have agreed to the terms of a settlement. That the Court disapproved the settlement does not alter that the parties agreed that no further issues should be litigated. If the parties had agreed to a stipulation of fact that would warrant summary judgment, there would be no need to wait for formal pleadings in order to consider summary judgment. The settlement stipulation places the case in the same status; the only difference is that the determinative facts are, Objector asserts, in the Court's opinion denying merit to the complaint.

C. Summary Judgment Merits

Plaintiff first frivolously asserts that summary judgment must be denied because it is supported solely by "a bare affirmation of an attorney." That is untrue:

[4] Plaintiff erroneously sought (p. 4 n.6) to claim this point was erroneous by asserting that a totally different decision (a 1995 decision) in that case did not support Objector's reliance on that 1996 decision.

the affirmation is not "bare," but relies on this Court's opinion that is part of the Court record in this case, and other facts already contained in this Court's file. Indeed, *Currie v. Wilhouski,* 93 A.D.3d 816, 817-18, 941 N.Y.S.2d 218, 220 (2d Dep't 2012), cited by Plaintiff (p. 6), specifically considered court documents cited in an attorney's affirmation to decide whether those documents established the right to summary judgment. Clearly, this Court's decision is in the Court file and is binding unless and until reversed.

It is difficult to understand Plaintiff's assertion (p. 6) that "the law of the case doctrine is inapplicable here." Even the case Plaintiff cites (pp. 6-7), *Grullion v. City of N.Y.,* 297 A.D.2d 261, 265, 747 N.Y.S.2d 426, 430 (1st Dep't 2002), expressly declares that "a prior judicial determination in an action is binding as law of the case … on a court of co-ordinate jurisdiction" – *i.e.*, certainly the same court.

The determinative issue is whether this Court's decision makes findings that precludes a grant of judgment for Plaintiff. CPLR 3212 sets forth the burden on a party opposing a motion for summary judgment: "the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." Significantly, Plaintiff offers no facts to establish that her complaint has any merit, following the Court's decision.

The Complaint has two theories of action: (i) non-disclosure of material facts; and (ii) insufficient consideration on the transaction.

As to the first theory, this Court's decision rejects the materiality of each of the non-disclosures on which Plaintiff relies. First, this Court (p. 5) holds that "[m]erely providing additional information … does not constitute material

disclosure." The Court analyzed all of "the Supplemental Disclosures that are included in the Settlement here,"[5] and expressly finds that "a number are so trivial or obviously redundant as to add nothing of material value from a disclosure standpoint" (p. 5). The Court then carefully examined each of the Plaintiff's other claimed non-disclosures, and makes the following findings: "sets forth a trivial piece of information that provides no incremental value" (p. 7); "the [not-expressly disclosed] statement that the parties chose the value themselves is plainly immaterial" (p. 8); "disclosure [of a table that "lists actual metrics in tabular form"] adds no value for shareholders" (p. 8); the proposed "additional disclosure, at best, provokes a 'quibble' …. It does not alter the valuation range. …. [and does] not materially alter the total mix of information" (pp. 8-9); as to insertion "of a table containing publicly available information, … there is no added value here … [and] provides no new information and no material disclosure enhancement" (pp. 9-10); "insertion of a table showing the particular data for Verizon Corporate and Wireline … adds more unnecessary detail, without materially changing the textual presentation, … and as such cannot be recognized as a material disclosure enhancement" (pp. 10-11).

[5] Plaintiff never expressly argues, but implies that the Complaint encompasses more non-disclosures than specified in the settlement. But that is contrary to the permissible inference that Plaintiff, with her duty to protect the class, would have insisted that a settlement include disclosure of any material omissions. The summary judgment motion is based on the alleged non-disclosures that Plaintiff found material enough to insist on being included in the Settlement Agreement, but which were found by the Court to be non-material. Hence, Plaintiff, if she based her opposition to summary judgment on other non-disclosures, was required to present those assertions, with facts supporting their materiality, in her opposing papers. She did not. Instead, she argues that she is entitled in the future to establish that there were other material non-disclosures. That is not permitted as a basis for opposing summary judgment.

This Court then summarized its findings:

> "these Supplemental Disclosures individually and collectively fail to materially enhance the shareholders' knowledge about the merger. They are unnecessary surplusage added to a disclosure document already filled with much that is detail for the sake of detail. They provide no legally cognizable benefit to the shareholder class …."

These are binding findings by the Court that reject any merit to the Complaint's theory based on non-disclosure. Plaintiff, in opposing this summary judgment motion, has not offered any new facts to support her non-disclosure theory. Hence, Objector is entitled to summary judgment dismissing the non-disclosure claim in the complaint.

As to the second theory in the Complaint, of "excessive and dilutive price for Vodafone" (p. 8) on the transaction, Plaintiff disingenuously plays with the Court, in representing that "Plaintiff has not 'dropped' this claim" (p. 8). Plaintiff well knows that such a claim requires an expert opinion, which she does not represent exists, and thus does not provide to meet her burden to present "facts" warranting a trial. The evidence in the record (which we hereby submit by reference), in fact, contradicts both this "excessive and dilutive" consideration claim. First, as Plaintiff represented in counsel's application for an award of attorneys' fees and expense, the only expert retained by Plaintiff was M. Travis Keath, who, Plaintiff now concedes "did not discuss the consideration issue" (p. 8).

In addition, my Objection contained facts – never rebutted by Plaintiff – that refute the claim of "excessive and dilutive" consideration: In the Complaint, Plaintiff set forth a stock price chart (Complaint ¶ 32; Amended Complaint ¶ 37), asserting that it supports the conclusion that "Verizon shareholders are getting shortchanged

and not getting adequate consideration for the purchase." The Objection pointed out that the Plaintiff-submitted chart "carefully limits its reporting of stock prices to only three days following the announcement of the Vodafone stock purchase agreement," and in "fact, the value of Verizon stock returned intra-day trading on September 5th, three days after the transaction was announced, to the stock price immediately preceding the announcement of this transaction. And most relevant, the shareholders' stock value has actually been increased almost 6% in the little over a year since immediately before the announcement of the Stock Purchase Agreement" (Objection p. 9).[6] That evidence remains unrebutted and thus conclusively refutes Plaintiff's only "evidence" in the record for her "excessive and dilutive price" claim.

This Court also made a finding on this subject in the Court's decision (p. 7). Referring to the "work done by the [Verizon] financial advisors," the Court found that "[i]t forms the basis that it has appropriately priced the acquisition."

Thus, Objector supports the motion for summary judgment with facts demonstrating the lack of merit to Plaintiff's complaint. Plaintiff has not met her burden of showing "facts sufficient to require a trial of any issue of fact" – the burden imposed on Plaintiff by CPLR 3212. Indeed, Plaintiff has limited her opposition to factually unsupported and conclusory arguments, which are insufficient to defeat this summary judgment motion.

[6] All of this stock price information is part of this Court's file. Even if it were not, this Court, as fact finder on a motion for summary judgment, may take judicial notice of such publicly-available information.

D. Motion To Intervene

Two facts are unassailable: (i) Objector, as a shareholder, will be bound by any judgment; and (ii) both Plaintiff and Defendants are in agreement to support the Settlement Agreement, diametrically contrary to Objector's position. Those facts require the conclusion that Objector meets the qualifications for intervention. Plaintiff's frivolous argument that Objector should be precluded from intervention because "Plaintiff has more than adequately represented" the class of shareholders (p. 10), of course, is an issue on which Plaintiff and each of the Objectors disagree – and an issue on which the Court, in its decision, has effectively decided against Plaintiff.[7]

Plaintiff (p. 11) insults this Court and counsel by asserting that the fact that "a significant majority of Verizon shareholders were satisfied with the Settlement," because there were so few objections, warrants the conclusion "that Plaintiff and Plaintiff's counsel have adequately represented their interests." This Court may take judicial notice of the reality that, unless the notice of settlement of a class action

[7] Plaintiff asserts (p. 12) that Objector is motivated to "commandeer this litigation and impede the Class's ability to obtain final relief." That is somewhat laughable, given that Plaintiff makes that assertion in her opposition to my motion for summary judgment which, if granted, would quickly allow for the final relief for the Class from any further diminution of their stock equity from this lawsuit, in which they can receive no money. However, Plaintiff is correct in noting that Objector's Original Objection was not addressed to the Settlement Agreement itself, but only to any award of attorneys' fees, because Objector was interested in the quickest path to ending this lawsuit without any further expenditure of shareholder assets and company time. Unlike an Objector, Judge Schweitzer had an obligation not to make a finding for which he concluded there was no basis – the obligation of any conscientious honest judge. Judge Schweitzer decided that the facts would not allow him to approve the settlement as "fair, adequate, reasonable, and in the best interest of class members" (p. 3). As an officer of the Court, Objector believes that he now has the obligation to support and implement a Court decision that he believe to be correct, even though he had not sought that relief.

contains a meaningful amount to be paid to each member of the class, the tendency is to place the notice in the trash basket and almost all shareholders see no reason to respond, because they are not required to do anything.[8] But, if Plaintiff's reasoning is to be accepted, it is more aptly applied to the overwhelming shareholder vote in favor of the transaction – part of this Court's record -- in a vote in which shareholders had to affirmatively vote if they wished to show support for the transaction – an affirmative action that refutes the claim that Plaintiff adequately represents that overwhelming percentage of shareholders in Plaintiff's lawsuit that attacks that shareholder vote.

Another frivolous argument Plaintiff makes (p. 11) is that Objectors, instead of filing an Objection, should have sought to exercise their right to opt-out of the Class. While such opt-outs would have insulated Plaintiff from the filing of Objections against the Settlement Agreement, it would have gained nothing for shareholders who opted out. Those shareholders would have remained liable for their share of any legal fee award; and, particularly because Objectors here believed that there was no merit to Plaintiff's lawsuit, they had no reason to commence their own law suit for the same, but better, relief – the ordinary reason for someone to opt out of a Plaintiff class.

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[8] Judge Becker, in his well-received opinion in *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.,* 55 F.3d 768, 812-13 (3d Cir. 1955), declared that "the inference of approval drawn from silence may be unwarranted," a fact that "has led a number of courts to be considerably more cautious about inferring support from a small number of objectors to a sophisticated settlement." Significantly, that was written about a class action settlement in which each member of the class would receive something of value, albeit a $1,000 salable coupon; the statement is even more applicable here where the settlement provides nothing for class members.

On the subject of intervention, Plaintiff also argues (pp. 9-10) that the motion is "untimely." Objector filed a timely Objection, only nine days after receiving the Notice of Court consideration of the settlement. Certainly that was timely. Given the rights of an Objector, to be heard on the Settlement, there was no need at that time to intervene. Either procedure allowed the shareholder to have his say, thereby precluding the need to invoke both. *Glass v. UBS Fin. Servs., Inc.,* 331 F. App'x 452, 457 (9th Cir. 2009), cited by Plaintiff (p. 9), expressly holds that either one is sufficient to allow the shareholder to be a party to the court proceeding: "In order to challenge the fairness of the settlement or the reasonableness of class counsel's fees, [the member of the class] must either submit a timely objection to the settlement or be granted leave to intervene."

As set forth in the motion for summary judgment, Objector believed that his status as an Objector continued to be sufficient, but, as part of the motion, sought to intervene, if the Court believed it necessary to consider the summary judgment motion. Thus, Objector's motion, made only 18 days after this Court's decision, is obviously timely.[9]

Plaintiff's reliance (p. 14) on *Spota v. County of Suffolk*, 110 A.D.3d 785, 787, 973 N.Y.S.2d 657, 660 (2d Dep't 2013), provides no support of her opposition to the motion to intervene. First, an automatic right for any citizen to intervene to defend

[9] Plaintiff has only recently filed a notice of appeal from this Court's decision on the settlement and attorneys' fees, on which, significantly, she limited the respondents to the Defendants, thus excluding all Objectors as respondents on the appeal. An Objector has filed a notice in the Appellate Division to correct this attempt to eliminate Objectors from being heard on the appeal, consistent with this Objector's view that the Objector status provides standing to make this summary judgment motion.

a statute – the issue in *Spota*, but not involved here -- is never recognized. Further, no statutory right existed there giving the proposed intervenor the right to be heard to object, as here. Moreover, the Court in *Spota* did not find that "any interest" the person seeking to intervene "did have would not be adequately represented by the defendant" county government. Here, there is no dispute that defendants joined with the Plaintiff in signing and supporting the settlement to which Objectors object. Thus, without the Objectors' standing to continue to object to the settlement, no adequate – indeed, none at all – representation of Objectors' position would be present: certainly neither of the two parties would seek to sustain the Court's decision. Hence, the undisputed relevant facts here meet the requirement for the right of intervention in CPLR 1012(a)(2): "the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment."

Plaintiff's assertion (p. 12) that a shareholder does not have a "real and substantial interest in the outcome of the proceeding," that is a condition to intervene, ignores the reality, that even Plaintiff recognizes: a shareholder meets that condition by being authorized to be heard as an Objector. If a shareholder is statutorily held to have that interest, thereby authorized to be an Objector, there is no reason to deny that the same shareholder has the same interest as an intervener. See *Glass v. UBS, supra,* cited by Plaintiff, holding equivalent on standing whether an intervener or an Objector. Further ludicrous is Plaintiff's assertion (p. 13) that Verizon, as a party defendant, will adequately advance Objector's interest in eliminating further legal expenses that are charged to shareholders: Verizon is a

party to the agreement not to oppose Plaintiff's counsel's request for up to $2 million for legal fees.[10]

Conclusion

Plaintiff opposes Objector's motion for summary judgment without providing a single bit of evidence to establish that there is an evidentiary basis for any claimed outstanding issue. Essentially, Plaintiff's defense is simply "Trust me, there is an evidentiary basis to support conclusory allegations in my complaint, but I will not provide it to the Court on this motion." Summary judgment dismissing the complaint should thus be granted.

Similarly, Plaintiff's objection to Objector's intervention motion is that it is unnecessary because Objector should trust Defendant Verizon and Plaintiff's counsel to protect Objector's interests, even though Verizon has stipulated agreement with Plaintiff to support the provisions of the settlement agreement to which Objector objects. The purpose of the Objector status – established by law – is to allow any shareholder to object to such a settlement, and thus not to leave decisions in the class action case simply to Plaintiff's and Defendants' attorneys. As this Court (p. 14) quoted with approval,

> "courts have often remarked the incentive of class counsel, to sell out the class by agreeing with the defendant to recommend that the judge approve a settlement involving a meager recovery for the class but generous compensation for the lawyers – the deal that promotes the self-interest of

[10] Plaintiff's reliance on *Zara Contracting Co. v. City of Glen Cove,* 22 Misc.2d 279, 280, 197 N.Y.S.2d 940 (Nassau Cty 1960), is misplaced, again for the reason that a taxpayer is never granted the automatic right to be heard on how a governmental agency is handling a lawsuit, while, under state law, all shareholders must be given the opportunity to be heard as to how the corporation is handling the lawsuit. Other cases cited by Plaintiff similarly do no concern a intervener who is afforded by statute the guaranteed right to be heard on the handling of the lawsuit.

both class counsel and the defendant and is therefore optimal from the standpoint of their private interests."[11]

Objector's motions for summary judgment and, if necessary, for intervention should be granted.

Dated: January 24, 2015

Respectfully submitted,

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[11] Quoting from *Creative Montessori Learning Centers v. Ashford Gear LLC,* 662 F.3d 913, 918 (7th Cir. 2011).