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

OBJECTOR WALPIN'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION TO RENEW AND REARGUE AND IN SUPPORT OF OBJECTOR'S CROSS-MOTION FOR AN AWARD OF ATTORNEY'S FEES AND/OR SANCTIONS

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IN OPPOSITION TO PLAINTIFF'S MOTION TO RENEW AND REARGUE
AND
IN SUPPORT OF OBJECTOR'S CROSS-MOTION FOR
AN AWARD OF ATTORNEY'S FEES AND/OR SANCTIONS

Objector Gerald Walpin submits this memorandum of law (i) in opposition to Plaintiff's motion to renew and reargue the Court's decision denying approval of the proposed settlement and denying an award of attorneys' fees, and (ii) in support of this Objector's cross-motion, pursuant to the Courts' Administrative Rules § 130-1.1, for an award of reasonable attorney's fees and/or sanctions, for Plaintiff's making this frivolous motion.

INTRODUCTION

On December 19, 2014, this Court rendered its 15-page decision denying Plaintiff's motion for approval of Plaintiff's proposed settlement of this class action, and denying any award of attorneys' fees to Plaintiff's attorneys.

On January 21, 2015, Plaintiff noticed her appeal from that decision. Yet, on February 3, 2015, Plaintiff also filed this motion for renewal and reargument, forcing Objector to expend substantial time in responding to, as shown below, a frivolous, totally meritless, motion.

This Court, in its carefully considered opinion, in addition to and after analyzing and considering all facets of Plaintiff's motion and determining that Plaintiff's motion had no merit, recognized the overriding problem created by the misuse of the Class Action litigation device. This Court first noted the "increasing body of commentary [that] has decried the tsunami of litigation, and attendant suspect disclosure-only settlements, associated with public acquisitions today." It then recognized that this "body of law meant to protect shareholder interests from the absence of due care by the corporation's managers has been turned on its head to diminish shareholder value by [*inter alia*] imposing additional gratuitous costs, i.e., attorneys' fees on the corporation." The Court quoted with approval a Seventh Circuit Court of Appeals opinion, recognizing "the incentive of class counsel, in complicity with the defendant's counsel, to sell out the class … 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 both class counsel and the defendant …." Following that predicate, this Court concluded that approval of the settlement here "would be an enabler of an unwarranted divestiture of shareholder rights by virtue of plaintiff's release, as well as a misuse of corporate assets were plaintiff's legal fees to be awarded."

Significantly, Plaintiff's memorandum in support of her motion relies on an opinion that not only recognized the same cancer in the class action device, but itself relied on another opinion that discussed this cancer in detail. In *West Palm Beach Police Pension Fund v. Gottdiener*, 2014 N.Y. Misc. LEXIS 4686 (No. 650144/2013 Sup Ct. N.Y. Cnty. Oct. 22, 2014)(Pl. Mem. pp. 3, 20), the court quoted with approval the acknowledgement, in *Minard v. Warburg Pincus Private Equity IX LP*, No 4894-VCS, at 17 (Del. Ch. May 26, 2010)(Strine, Vice-Chancellor), that "if you continue to have suit after suit where there is no material change in the economic terms of deals and simply some additional disclosures, it really will be a drag on investors' returns."

The *West Palm Beach* court cited with approval the opinion of the Court of Appeals for the Second Circuit, in *Goldberger v. Integrated Resources, Inc.,* 209 F.3d 43 (2d Cir. 2000), that recognized this cancer, even in a Class action settlement providing over $54 million dollars for class members. That Court (¶ 47) first noted that "'there appears to be no appreciable risk of non-recovery' in securities class actions, because 'virtually all cases are settled'."[1] Further dwelling on this issue, the Court continued, "the adversary system is typically diluted – indeed, suspended – during fee proceedings … creat[ing] incentives for collusion – the temptation for the lawyers to agree to a less than optimal settlement 'in exchange for red carpet treatment on fees'."[2] It ends its recitation of this Class Action problem by citing Second Circuit Judge Ralph K. Winter, for the Court's conclusion that "plaintiffs in

[1] Citing and quoting from Janet Cooper Alexander, *Do The Merits Matter? A Study Of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497, 578 (1991).
[2] The Second Circuit there quotes from *Weinberger v. Great N. Nekoosa Corp*, 925 F.2d 518, 514 (1st Cir. 1991), which itself cited John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff As Monitor in Shareholder Litigation*, 48 Law & Contemp. Probs. 5, 2633 (1985).

common fund cases are mere 'figureheads,' and that the real reason for bringing such actions is 'the quest for attorney's fees'."[3]

The cancer in the improper use of the class action device has metastasized in this case, given that Plaintiff's attorney himself spotlighted the invalidity of the heart of Plaintiff's complaint, which is alleged to be that "Verizon has overpaid for Verizon Wireless pursuant [to] the Stock Purchase Agreement" (Amended Complaint ¶ 41; see also ¶ 38). Yet, Mr. Monteverde himself agreed on "the weakness of [his] case" (Transcript of December 2, 2014 hearing (hereinafter "transcript"), p. 7), that "overpayments can be okay, because premium for control of an entire entity deserve some premium, we call it overpayment, but it deserves some premium," with "the issue" being "how much of a premium" (*id.* p. 6). Plaintiff has totally failed, both through her expert and her lawyers' submissions, including on this motion, to present any basis to conclude that a premium here, assuming it existed, was beyond the exercise of business judgment by Verizon's Board of Directors – conceded by Plaintiff's attorney to be "an informed Board" (*id*. at p. 8).

This Court's decision in this case is obviously correct, given its analysis of no material benefit to the Class from the settlement. The Second Circuit felt sufficiently strong about the existence of this cancer in the Class Action device to highlight that problem even in a class action providing a recover of over $54 million to class members. *A fortiori*, it is unacceptable here, where the settlement provides *no* recovery for the class; in fact, it provides a net loss to the class due to the expenses already incurred in defending against this lawsuit. Any award of attorneys fees

[3] Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising The Cost Of Capital In America,* 42 Duke L. J. 945, 984 (1993)

would further add to the shareholders' loss. This reality and the discussion below demonstrates that, not only is Plaintiffs motion without merit, but it is frivolous.

Point I

PLAINTIFF'S MOTION TO RENEW SHOULD BE DENIED FOR FAILURE TO PRESENT ANY NEW FACTS OR REASONABLE JUSTIFICATION FOR BELATED SUBMISSION OF OPINIONS NOW PRESENTED

CPLR 2221(e) specifies that, for a motion for leave to renew to be validly made, it must "be based upon *new facts* not offered on the prior motion," and, if "*new facts"* are offered, the motion must "contain reasonable justification for the failure to present such *facts* on the prior motion" (emphasis added). Plaintiff's motion is frivolous because it is not based on any new *facts*, but on opinions provided by a new supposed expert witness, and even as to that witness, plaintiff fails to provide a semblance of reasonable justification for that belated proffer, as that requirement has been defined by New York Courts.

Plaintiff summarizes, on pages 12-14 of her Memorandum of Law in support of this motion, what she asserts meets the requirements of CPLR 2221. First, as she argues, her motion to renew is limited to the fairness opinion requirement, and does not involve the value of the additional disclosure; the proffered opinion of Prof. Lubben, on which she relies, is totally silent on the additional disclosure.

But, even as to the Fairness Opinion requirement, Plaintiff never specifies any "new facts;" rather she correctly describes what she offers by, more than ten times in that short space, using the words "opinion," "opinions," "opines," and "opined." The word "fact" is never found in Plaintiff's recitation of what she offers as a basis for her motion to renew. Indeed, Plaintiff admits (p. 12) that she is not

offering any *facts* to alter or add to any facts in the record, but "to refute [Objector-presented] Prof. Griffith's expert opinions." An expert witness' opinion "must rest on facts in evidence." *People v. Jones,* 73 N.Y.2d 427, 430 (1989). The only exception, as that court held, are facts "*personally* known and testified to by the expert" (*id.;* emphasis added) – thus precluding consideration of the Lubben afidavit which limits itself to his opinion and recitation of other sources, including case law and articles.[4]

Adding to the frivolity of this motion is Plaintiff's failure also to meet the requirement of "reasonable justification for the failure to present [what she now seeks to present] on the prior motion." Plaintiff asserts reasonableness of her belated offer of Mr. Lubben on three claims: (i) being "unable to retain an expert to refute Prof. Griffith's expert opinion on … short notice," having received "Prof. Griffith's expert opinion … just five court days prior to the … hearing;"[5] (ii) "the Court, on its own initiative, questioned Prof. Griffith with respect to his opinions;" and (iii) Plaintiff "was not given the opportunity to cross-examine Prof. Griffith at the … hearing." (Pl. Mem. p. 12). None of these claims meets the test of reasonableness.

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[4] Another defect in Plaintiff's motion is that Plaintiff's new "expert" does not appear to have the qualifications to be accepted as an expert for this purpose. He is simply a professor of law, teaching legal matters, with his "expert" role limited to "advis[ing] government officials and international agencies on potential legislative reforms" (Lubben aff. p. 2). His articles do not have any relevance to the issues here. His CV, attached to his affidavit, lists "Courses Taught," none of which suggests expertise in the opinions he offers here, as they all appear to be law-based.

[5] Plaintiff disingenuously uses "five court days," thereby attempting to conceal the reality that she received Prof. Griffith's opinion eleven days before the hearing date. Plaintiff's counsel does not suggest that he never works on weekends and holidays to prepare for a hearing.

Plaintiff's claim of little time to "retain an expert to refute Prof. Griffith's expert opinion" ignores that Plaintiff already had retained and used an expert on the single subject on which Prof. Griffith opined: the value of the fairness opinion requirement. Plaintiff's expert M. Travis Keath covered this subject (as well as additional disclosures) in his affidavit dated September 29, 2014 – months before Plaintiff received Professor Griffith's opinion. Plaintiff was thus able to call upon an already retained expert who was fully-knowledgeable on the facts and issues -- who, unlike Prof. Lubben, specifically lists "fairness opinions" as part of his experience (Keath affidavit Attachment A, 2d ¶). Hence, the reality is that Plaintiff, through Mr. Keath, had already set forth his views on this subject (as well as the disclosure issue). Indeed, Plaintiff's counsel expressly confirmed that Mr. Keath was, on the date of the hearing, "my expert" (Transcript p. 54), who, in Plaintiff's counsel's words, was "a renowned expert in mergers and acquisitions," and was retained as "the expert to assess the settlement" (*id.*), which encompassed at least "transaction terms, valuation, and disclosure issues" (Keath Affidavit ¶ 7). And Plaintiff, in her memorandum in support of this motion, actually relies many times on the opinion submitted by Prof. Keath (*e.g.*, Pl. Mem. p. 5 & n.4). That Plaintiff, for whatever undisclosed reason, did not want to use Mr. Keath to answer Prof. Griffith, and, instead, wanted to add a second expert for that purpose, does not alter that Plaintiff had more than sufficient time to call upon her already retained expert to respond to Prof. Griffith.

Plaintiff's reliance on the fact that this Court posed certain questions to Prof. Griffith is clearly an attempt to invoke cases that hold that a belated motion to

renew may be allowed "where the additional information was raised by the judge" (Pl. Mem. p. 11). Those cases have no application here. For example, in *Scannell v. Mt. Sinai Med. Ctr.,* 256 A.D.2d 214, 683 N.Y.S.2d 18 (1st Dep't 1998)(Pl. Mem. p. 11), a motion to renew was held appropriate only where "the additional information addressed an issue raised *sua sponte* by the court in the *original decision*" (emphasis added to last two words). Here, the asserted new information came as answers to questions in the presence of Plaintiff's attorney. They were questions arising from arguments and submissions previously made in the case – the opposite of *sua sponte* raising by the Judge – and most telling, first arose at a hearing, attended by Plaintiff's attorneys, thus allowing, if he wished, his rebuttal – all *before* the Court's preparation of his decision.

The *Scannell* court cites and relies on *Bevona v. Super Maintenance Co.,* 204 A.D.2d 136, 138, 611 N.Y.S.2d 193, 195 (1st Dep't 1994), which epitomizes the very limited, and inapplicable here, exception to the general limitation on a motion to renew. In *Bevona,* the Appellate Division reversed the trial court's denial of the defendant's motion to renew its denied motion to vacate an arbitration award, entered on default due to defendant's failure to assert that an adjournment request had been delivered to the arbitrator, even though the plaintiff "had not contested" that it was in fact delivered (204 A.D. 2d at 138). Plaintiff had not sought entry of the default award, knowing that it had been advised of the adjournment request, but the court, not knowing that fact, *sua sponte* relied on its mistaken understanding in its opinion. These decisions thus have no application to the facts of this case.

Plaintiff does not specify any additional information that was elicited by the Court's questions that was not already in Prof. Griffith's written opinion or in his testimony without Court questions. But even more incredible, Plaintiff's counsel suggests that Court's questions, posed to question and test Prof. Griffith's opinions, somehow added something to the record that was so different and unique as to require this belated application. A judge, listening to a lawyer or a party's expert is not expected to be a cipher, sitting silently, barred from asking questions he may have on the presentation. Ironically, some of the Court's questions appeared to be an attempt to see whether there were "cracks" in Prof. Griffith's testimony that would support Plaintiff's position: *e.g.,* Whether Prof. Griffith was a "professional" expert for objectors (transcript p. 51). Other questions seek to understand the opinion Prof. Griffith had provided (*e.g.*, pp. 51-52). None asked for anything that was removed from Prof. Griffith's testimony.

Plaintiff's final assertion that he was not given the opportunity to cross-examine Prof. Griffith is similarly meritless. When Prof. Griffith concluded his testimony, this Court turned to Plaintiff's counsel for their response to the preceding presentation, including that by Prof. Griffith. The Court called upon "Mr. Faruqi, it's your motion" (Transcript p. 53). Mr. Faruqi responded that "Mr. Monteverde will answer" (*id.)*. Mr. Monteverde then stated that "I'll address the issues, what I hear and it's been like an hour and change" (*id.).* And that is exactly what Mr. Monteverde did for about eleven pages of the transcript, never limited or prevented by the Court from making any point or request. Plaintiff's counsel never sought to cross-examine Prof. Griffith, although, from this Court's obvious practice, if

requested, that opportunity would have been granted to Plaintiff's counsel. Further, Plaintiff's attorney, in his long closing statement, after hearing Prof. Griffith's statements, never asked for leave to submit another expert's opinion. Having thus doubly failed to take advantage of the opportunity available at the hearing, Plaintiff is not entitled to any reopening.

The record suggests why Plaintiff's counsel asked neither to cross-examine Prof. Griffith nor for time to present another expert opinion. At the end of the hearing, Plaintiff's counsel handed up a form of judgment, providing for the relief that Plaintiff sought (Transcript pp. 63-64). Plaintiff's counsel thus appeared confident that, on the record made, Plaintiff would receive a decision that approved the settlement and granted some amount of fee award. That Plaintiff misread the tea leaves, and thus opted not to seek to cross-examine Prof. Griffith, nor to seek time for an additional expert, does not support a motion to renew.

Point II

PLAINTIFF'S MOTION TO REARGUE SHOULD BE DENIED FOR FAILURE TO DEMONSTRATE ANY FACT OR LAW OVERLOOKED OR MISAPPREHENDED BY THE COURT

Plaintiff specifies no fact or law overlooked by the Court in its decision – the prerequisites for a motion to reargue. Instead, Plaintiff specifies a number of the Court's findings and conclusion with which Plaintiff disagrees. But that the Court disagrees with the Plaintiff does not equate to having overlooked or misapprehended the facts or law; rather, it means that having considered Plaintiff's contentions on those items – the opposite of having overlooked them – the Court

disagrees with Plaintiff. That disagreement allows Plaintiff to appeal to the Appellate Division, but not to validate this motion to reargue.

Plaintiff's claim for reargument of the Court's holding that the mandatory fairness provision of the settlement "cannot provide a basis that the Settlement is fair, adequate, reasonable, and in the best interest of the class members" (Opinion p. 13), rests on disagreement with the Court's decision. Certainly, the Court did not overlook the issue, which it fully discussed on pages 12-13 of its opinion.[6]

As to Plaintiff's assertion of misapprehension of the law, it is Plaintiff, not the Court, who misapprehends the relevant law. Plaintiff relies (Pl. Mem. p. 16) on *In re Pure Resources, Inc., Shareholders Litigation*, 808 A.2d 421 (Del. Ch. 2002), for the claim that it is "imperative that the Board be required to obtain independent financial advice in connection with the future sale of" any 5% of its assets (Pl. Mem. p. 16). But the Court in *Pure* expressly recognized that the Delaware Supreme Court, in *Skeen v. Jo-Ann Stores, Inc.,* 750 A.2d 1170 (Del. 2000), as described in *Pure* (880

[6] In an apparent attempt to provide an appearance of case-law support, Plaintiff (Pl. Mem. pp. 3-4, 10-11) cites cases in which the court purportedly found value in corporate governance reforms. *E.g.*, *Brody v. Catell,* 16 Misc.3d 1105(A), 814 N.Y.S.2d 825 (Sup. Ct. Kings, June 27, 2007), for the proposition that "[t]he value of shareholders of obtaining additional disclosure of information is well-recognized." Such citations are as meaningless as citing a jury verdict for a plaintiff in one accident case as authority for setting aside a different jury verdict for the defendant in an entirely different accident case. Plaintiff makes no attempt even to claim that the same "governance reforms" – if what is involved here can even deserve that label – or "additional disclosure" in those cases are at all similar to those involved here. For example, in *Pfizar Inc. Shareholder Litig.,* 780 F. Supp.2d 336 (S.D.N.Y. 2011)(Pl. Mem. pp. 3, 10), the corporation's management had allowed the corporation to engage in illegal activity, resulting in its payment of $2.3 Billion in fines and penalties, and the structural changes there approved were described as "considerable benefits … for detecting and rectifying the types of wrongdoing that have caused extensive harm to the company (780 F. Supp.2d at 341-42) – obviously nothing comparable is involved here.

A.2d at 449), held that "a summary of the bankers' analyses and conclusion were not material to the stockholders' decision." Plaintiff, clearly not able to rely on *Skeen*, is relying on the *Pure* citation of *McMullin v. Beran*, 765 A.2d 910 (Del. 2000), which, the *Pure* court wrote, "implied that information about the analytical work of the Board's banker could well be material *in analogous circumstances*" (emphasis added). The limited "analogous circumstances," in which such fairness opinion summaries might be material is where, as in both *Skeen* and *McMullin*, there is the "specific context of evaluating a proposal for the sale of the entire corporation to a third party at the behest of the majority shareholder," leaving minority shareholders no decisional authority other than "whether to accept the tender offer … or to seek an appraisal value of their shares in the ensuing merger" (765 A.2d at 919). That is obviously not the situation that exists here.

That the *McMullin* ruling does not apply here is made clear in that court opinion that limited its ruling to that single context and wrote that, otherwise, there is "'no single blueprint' that directors of Delaware corporations must follow;" rather, whether such disclosure is to be made is to be determined by "the board's exercise of its business judgment" (765 A.2d at 918). Indeed, Plaintiff's counsel confirmed the defect in imposing on a corporation the requirement of additional conditions for the Board to make its decision to sell 5% of Verizon's assets: he called the 5% sale requirement "a low threshold," recognizing that "five percent is nothing" (Transcript p. 11). Plaintiff thereby concedes that this fairness opinion requirement would require Verizon to ignore its Board's business judgment in favor of incurring the cost of a required procedure in connection with an asset sale that is "nothing" in the

context of that company.[7] Significantly, Prof. Lubben quotes Verizon's attorney as confirming "that boards [Verizon Board of Directors] would not feel they needed to … go through the extra effort of retaining an investment bank and … getting an opinion" on a "transaction involving a five percent disposition of assets" (Lubben Aff. ¶ 11) – an exercise of business judgment. And Prof. Lubben appears to agree that whether to obtain a fairness opinion on a 5% transaction is determined solely by the Board's exercise of business judgment, by asserting that not obtaining such an opinion "is not apt to be challenged in litigation" (Lubben Aff. ¶ 12).[8] Yet, Plaintiff asserts that the Court erred in determining it best to leave such decision to the Board. Thus, it is Plaintiff who misconstrues the applicable law, not the Court.

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[7] Plaintiff's attorney admitted that the fairness opinion requirement locks in management to get a fairness opinion. This Court asked Mr. Monteverde whether that wasn't the effect of this fairness opinion requirement. Mr. Monteverde accepted that was the result, but sought to explain its value by asserting that the directors lacked knowledge to exercise business judgment because "most of them are not in the day to day operation of the company – by itself an incomprehensible irrelevant response to the knowledge of the value of assets being sold. Then, Mr. Monteverde added a reason: this withdrawal of the directors' ability to exercise their business judgment would provide them with "adequate protections and mechanisms" and "sav[e] the directors from future actions," so they would "not get sued" (Transcript pp. 13-15). We cannot argue with Mr. Monteverde's proposition that preventing the Directors from being able to exercise their business judgment – making them meaningless – would likely reduce the chance they would be sued for making decisions. But that explanation of why this fairness opinion requirement benefits shareholders is obviously ludicrous and frivolous.

[8] Plaintiff (Mem. p. 14) and Prof. Lubben (¶¶ 28-29) turn on its head his support for leaving such decisions to the Board by claiming to rely on the Board's business judgment in agreeing to this 5% Fairness Opinion requirement as part of the settlement. Thus, according to them, the Board's exercise of business judgment against needing such a requirement should be ignored in favor of the extorted Board's exercise of its business judgment that halting the hemorrhaging of money and time on this lawsuit was better than insisting on what its business judgment believed was better.

Nor did the Court overlook or misapprehend Plaintiff's assertion of "the fact that a disposition of over $14 billion in assets can never be considered 'minimal'," as the Court described it in this context. By definition, "minimal" is properly used whether in amount or degree,[9] the latter meaning in relation to the total. Here, 5% is only one-twentieth of the total, making it certainly minimal as compared to the total assets. And "minimal" denotes something more than "nothing," which, as noted above, was Plaintiff's attorney's description of 5% in the Verizon context, thereby contradicting his attack on the Court's finding of "minimal" for being too low. Again, Plaintiff may disagree with the Court, but disagreement is not a basis for a motion to reargue.

On the alleged discover deficiencies, the Court's opinion makes clear that it did not overlook any part of that issue, in expressly stating that it considered all "supplemental Disclosures that are included in the Settlement here" (opinion p. 5). Noting that "a number are so trivial or obviously redundant as to add nothing of material value from a disclosure point of view" (*id.)* – the opposite of overlooking those items – it discussed in detail the remaining "four main Supplemental Disclosures."

What Plaintiff misapprehends – actually ignores, since it is set forth in one of the cases cited by Plaintiff (Pl. Mem. p. 17) – is the rule that whether a certain type of disclosure must be made depends on the circumstances of the case. *Aarons v. Maree,* 911 A.2d 805, 815-16 (Del. Ch. 2006). Plaintiff offers no basis to hold, under the circumstances of this transaction, that the asserted undisclosed details were

[9] thefreedictionary.com visited on February 8, 2014.

material. And certainly, she has offered no valid refutation of this Court's explanation that they were not material. Nor does Plaintiff establish that the Court misapprehended any fact or law. As to most of the disclosure items, Plaintiff repeats arguments she originally made, with which the Court disagreed. At best, Plaintiff has done some rephrasing and introduced some different arguments or theories as to the relevance of the disclosure. Where, as here, this is the reality of the Plaintiff's motion for reargument, the motion must be denied. Indeed, our Appellate Division has reversed a motion court's grant of reargument in such circumstances, holding that "reargument is not available where the movant seeks only to argue 'a new theory … not previously advanced'." *Desoignies v. Cornasesk House Tenants Corp.*, 21 A.D.2d 715, 718, 800 NYS2d 679 (1st Dep't 2005). *Accord: Pryor v. Commonwealth Land Title Ins. Co.*, 17 A.D.2d 434 (2d Dep't 2005)(reversed grant of motion to reargue because "the motion does not offer an unsuccessful party … successive opportunities to present arguments not previously advanced).[10]

[10] Plaintiff's reliance (Pl. Mem. p. 20) on *West Palm Beach Pension Fund v. Gottdiener*, No. 650144/2013, 2014 N.Y. Misc. LEXIS 4686 (N.Y. Sup. Ct. N.Y. Cnty. Oct. 22, 2014), is misplaced for several reasons. While Plaintiff recognizes (*e.g.*, Pl. Mem. pp. 17, 18) under New York law that whether a disclosure must be made depends on whether it is determined to be "material," the *West Palm Beach* court unexplainedly looked to "Delaware law, although not applicable to this case," to hold that "disclosures need not be 'material'" and that only some "benefit" to the shareholders is required (p. 5). What is relevant in that decision, is that Court's agreement with this Court, in spotlighting (p. 8) "the ubiquity of settlements in shareholder … actions challenging mergers based on insufficient disclosures," and that "if you continue to have suit after suit where there is no material change in the economic terms of deals and simply some additional disclosures, it really will be a drag on investors' returns." Fifteen years later, as this criticized practice has not only continued but increased in quantity, this Court has correctly decide that, in this case, the Court would put a stop to this criticized practice.

The holding of another case, cited by Plaintiff, *Tan v. Liang*, No. 13456/2011, 2013 N.Y. Misc. LEXIS 4621 (Sup. Ct. Queens, Sept. 24, 2013)(Pl. Mem. p. 15), aptly applies here:

> "Moving [plaintiff] fails to set forth any relevant facts that this Court overlooked or misapprehended, or any controlling principles of law that this Court misapplied. A 'motion to reargue is not an opportunity to present new facts or arguments not previously offered, nor is it designed for litigants to present the same arguments already considered by the court' …."

Plaintiff's motion for reargument should be denied as without merit and frivolous.

Point III

OBJECTOR WALPIN'S CROSS-MOTION FOR AWARD AGAINST PLAINTIFF'S ATTORNEYS FOR FRIVOLOUS CONDUCT SHOULD BE GRANTED

Rule 130-1.1(a) grants this Court the authority to

> "award … any … attorney in any civil action or proceeding before the court … costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any … attorney in a civil action or proceeding who engages in frivolous conduct."

Subpart (c) of that Rule, defines "frivolous conduct," as relevant here:

> "conduct is frivolous if
>
> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; [or]
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another."

The discussion above, in Points I and II of this memorandum, demonstrates that Plaintiff's motion for renewal and reargument is completely without merit in

law and fact, and is not supported by any reasonable argument for altering the existing law in this case set forth in this Court's December 19th decision.

Plaintiff's motion is thus frivolous under the Rule's first alternate definition of that term. The record also establishes that Plaintiff's conduct is also frivolous under the Rule's second definition of "frivolous."

As the record establishes, Plaintiff already, on January 21, 2015, filed a notice of appeal of this Court's decision. Plaintiff certainly had the right to seek that appeal (although Objector Walpin believes it too is meritless). For no valid reason, Plaintiff, about two weeks later, filed this motion for renewal or reargument. Given the careful analysis in this Court's opinion, and the absence of even a semblance of meeting the requirements of each of the renewal and reargument requirements, the only possible motive must be to "harass or maliciously injure another" – Objector Walpin (and the other Objector). Plaintiff's attorneys, with a staff of associates and partners,[11] already on payroll and presumably in their office whether or not gainfully employed on any client matter, are not burdened with the task of preparing such an extra, meritless, motion as this one. But they are fully aware of the vastly different effect of this motion on an individual Objector, with no supporting legal or paralegal staff: it is an extreme burden to have to research and respond to an unnecessary additional motion – one that Plaintiff's attorneys could not realistically believe had any chance of success with this Court that had so

[11] See Affirmation of Juan E. Monteverde "In Support Of Class Certification … and For An Award of Attorneys' Fees And Expense," dated November 14, 2014, ¶ 77, identifying three partners, three non-partner lawyers, and four paralegals working on this matter.

carefully considered all of the Plaintiff's contentions – particularly as they are appealing to a different court to seek a different result.

CONCLUSION

Plaintiff's motion to renew and reargue this Court's decision denying approval of the proposed settlement and denying an award of attorneys' fees should be denied. Objector Walpin's cross-motion for an award of reasonable attorneys' fees and/or sanctions, for Plaintiff's making the frivolous motion to renew and reargue, should be granted.

Dated: February 13, 2015

Respectfully submitted,

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