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., LOWELL C. MCADAM, RICHARD L. CARRIÓN REXACH, MELANIE L. HEALEY, MARTHA FRANCES KEETH, ROBERT W. LANE, M.D., SANDRA O. MOOSE, M.D., JOSEPH NEUBAUER, DONALD T. NICOLAISEN, CLARENCE OTIS, JR., HUGH B. PRICE, RODNEY EARL SLATER, KATHRYN A. TESIJA, and GREGORY D. WASSON, Defendants.	Index No. 653084/2013 **CLASS ACTION** Motion Seq. #004

PLAINTIFF'S MEMORANDUM OF LAW IN REPLY TO MEMORANDUMS IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO RENEW AND REARGUE HER MOTION FOR CLASS CERTIFICATION, FINAL APPROVAL OF SETTLEMENT AND FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES AND IN OPPOSITION TO OBJECTOR GERALD WALPIN'S CROSS-MOTION FOR AN AWARD OF ATTORNEYS' FEES AND/OR SANCTIONS

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I. INTRODUCTION

Plaintiff Natalie Gordon ("Plaintiff") submits this memorandum of law: (i) in reply to the memorandums (respectively the "Crist Memo." and "Walpin Memo.") (Doc. #93, 94)[1] submitted by Objectors Jonathan Crist ("Objector Crist") and Gerald Walpin ("Objector Walpin" and together with Objector Crist, the "Objectors") in opposition to Plaintiff's Motion For Leave To Renew And Reargue Her Motion For Class Certification, Final Approval Of Settlement And For An Award Of Attorneys' Fees And Expenses (the "Motion"); and (ii) in opposition to Objector Walpin's cross-motion for an award of attorneys' fees and/or sanctions (Doc. #95).

As detailed in Plaintiff's moving papers, Plaintiff and her counsel obtained a Settlement[2] of this action which provided material and substantial benefits to Verizon Communications, Inc. ("Verizon" or the "Company") stockholders. Just eleven calendar days and five court days[3] prior to the final approval hearing (the "Hearing"), Objector Crist filed an objection to an award of attorneys' fees, supported by a 15 page expert affidavit from Professor Sean Griffith ("Griffith Affidavit"), along with over 400 pages of exhibits. In both the Griffith Affidavit and at the Hearing, Professor Griffith erroneously concluded that neither the Supplemental Disclosures nor the Fairness Opinion Requirement provided a material benefit to Verizon stockholders. Professor Griffith addressed the Court without being sworn-in as a witness, and Plaintiff's counsel was not afforded an opportunity to cross examine him. Even though Objector Crist only objected to the award of attorneys' fees, when the Court issued its order denying final approval

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1 All references to "Doc. #__" refer to the eCourts document number.

2 All capitalized terms not otherwise defined shall have the same meaning as in the Opening Memorandum (defined below).

3 Objector Crist makes hay about Plaintiff's counsels' description of the date on which they received the Griffith Affidavit as "five court days" prior to the hearing, which amounts to eleven calendar days. *See* Crist Memo. at 2-3, 7-8. The terminology is irrelevant – it was impossible for Plaintiff to find and retain an expert and submit their finished affidavit even accounting for the Holidays and weekend days between November 21, 2014 and December 2, 2014.

of the Settlement on December 19, 2014 ("Final Approval Order" Doc. #72), it was clear that Professor Griffith's opinions and conclusions unduly influenced the Court's reasoning and conclusions, particularly with respect to the significance of the Fairness Opinion Requirement. Indeed, in its Final Approval Order the Court referenced part of Professor Griffith's Affidavit in support of its conclusion that the Fairness Opinion Requirement represented an "additional layer of unnecessary cost incurred for no value." Final Approval Order at 13.

Plaintiff did not have the opportunity to retain an expert to rebut Professor Griffith's conclusions prior to the Hearing. Given adequate time, Plaintiff has retained Professor Stephen J. Lubben ("Prof. Lubben"), the Harvey Washington Wiley Chair in Corporate Governance & Business Ethics at Seton Hall University School of Law, to provide an expert affidavit ("Lubben Aff.") containing analysis explaining the value the Fairness Opinion Requirement provides to stockholders, and rebutting Professor Griffith's erroneous conclusions. Plaintiff's Motion seeking leave to renew should be granted because Plaintiff was prejudiced by the unsworn testimony offered by Professor Griffith, which was incorrect on numerous points and which Plaintiff was never given sufficient time or opportunity to rebut.

Likewise, Plaintiff's Motion seeking leave to reargue should be granted because the Court (i) overlooked all but one of the factors that must be analyzed in determining whether a class action settlement should be approved; (ii) overlooked or misapprehended directly on point case law regarding the materiality of the Supplemental Disclosures and benefit of the Fairness Opinion Requirement; and (iii) overlooked or misapprehended principles of corporate governance and facts concerning the value that the Fairness Opinion Requirement and Supplemental Disclosures provide to stockholders.

For the following reasons, Plaintiff's Motion should be granted, and upon reconsideration, the Court should reverse the Final Approval Order and grant Plaintiff's previously filed motion for Class Certification, Final Approval of Settlement and for an Award of Attorneys' Fees and Expenses ("Final Approval Motion," Doc. #29) in its entirety.

II. ARGUMENT

A. Plaintiff's Motion To Reargue Should Be Granted

"'It is well settled that a motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and is properly granted upon a showing that the court overlooked or misapprehended the facts and/or the law or mistakenly arrived at its earlier decision.'" *Loris v. S & W Realty Corp.*, 16 A.D.3d 729, 730, 790 N.Y.S.2d 579 (3d Dep't 2005) (quoting *Peak v. Northway Travel Trailers*, 260 A.D.2d 840, 842, 688 N.Y.S.2d 738, 740 (3d Dep't 1999)). "Additionally, even in situations where the criteria for granting a reconsideration motion are not technically met, courts retain flexibility to grant such a motion when it is deemed appropriate." *Loris,* 16 A.D. 3d at 730, 790 N.Y.S.2d at 580.

1. The Court Overlooked Or Misapprehended Matters Of Law

a. The Court Failed To Consider The Appropriate Factors For Determining Whether To Approve A Class Action Settlement

As an initial matter, and contrary to the Objectors' contentions that "[t]he Court made no error of law in its Order," Crist Memo. at 15, the Court failed to consider almost all of the appropriate factors when deciding whether to grant final approval. "While CPLR 908 does not prescribe specific guidelines for a court to follow in determining the merits of a proposed class action settlement 'case law suggests the components which should be considered in reviewing a settlement: the likelihood of success, the extent of support from the parties, the judgment of

counsel, the presence of bargaining in good faith, and the nature of the issues of law and fact[.]'" *In re Colt Indus. S'holder Litig.*, 155 A.D.2d 154, 160, 553 N.Y.S.2d 138, 141 (1st Dep't 1990); *Klurfeld v. Equity Enters., Inc.*, 79 A.D.2d 124, 133, 436 N.Y.S.2d 303, 308 (2d Dep't 1981) (same). Here, the Court failed to consider the first four of these factors anywhere in its Final Approval Order, each of which weigh in favor of approving the Settlement. *See W. Palm Beach Police Pension Fund v. Gottdiener*, No. 650144/2013, 2014 N.Y. Misc. LEXIS 4686, at *7-8 (N.Y. Sup. Ct. N.Y. Cnty. Oct. 22, 2014) (holding that these factors weighed in support of approving disclosure-only settlement). Plaintiff's Motion should be granted on this basis alone.

b. The Court Overlooked Or Misapprehended Law Concerning The Sufficiency Of Corporate Governance Reforms For Purposes Of Granting Final Approval

Further, the Court misapprehended the "nature of the issues of law and fact" which it did consider. *Colt*, 155 A.D.2d at 160, 553 N.Y.S.2d at 141. First, the Court overlooked or misapprehended precedent from both the U.S. Supreme Court and the First Department concerning the sufficiency of corporate governance reforms for purposes of granting final approval of a class action settlement. *See Conolly v. Universal Am. Fin. Corp.*, 21 Misc. 3d 1109(A), 873 N.Y.S.2d 232, 2008 N.Y. Misc. LEXIS 5862, at *22-23 (N.Y. Sup. Ct. Westchester Cnty. 2008) (citing *Mills v. Electric Auto-Lite Co*. 396 U.S. 375, 396-97 (1970); *Seinfeld v. Robinson*, 246 A.D.2d 291, 298, 676 N.Y.S.2d 579, 583-84 (1st Dep't 1998)).

In *Conolly*, the Court approved a settlement which provided that "the Company would give increased scrutiny to certain types of transactions by amending its By-Laws," to include a requirement that independent directors approve certain transactions and "**to identify circumstances under which the Company would have to use its best efforts to obtain an opinion as to the fairness of the transaction**…" 21 Misc. 3d 1109(A), 873 N.Y.S.2d 232, 2008

N.Y. Misc. LEXIS 5862, at *5 (emphasis added).[4] The *Conolly* Court cited to both the U.S. Supreme Court's opinion in *Mills* and the First Department's opinion in *Seinfeld* in support of the proposition that "'[c]orporate therapeutics' procedures which will prevent the same ills from recurring are a benefit to shareholders" sufficient to warrant approval of a settlement. *Id*. at *22-23. Unlike the *Conolly* Court, here the Court failed to properly apply the applicable holdings from both *Seinfeld* and *Mills*, and did not recognize that "closer scrutiny of the corporation's activities, particularly those with significant economic risk, may ward off the making of mistakes and misjudgments that result in losses…" *Id*. And while the Court concluded that the Fairness Opinion Requirement would "curtail the Company's directors flexibility and ability to employ their collective business experience …" and would "undermine best practices relating to corporate governance," Final Approval Order at 13, the Court failed to recognize that a restraint of the board's business judgment is almost always the outcome in stockholder derivate actions, and is nonetheless viewed as a benefit to stockholders because "[m]easures which dilute management's influence on the board and which promote the independence of the board serve the long-term interests of shareholders." *Conolly*, 21 Misc. 3d 1109(A), 873 N.Y.S.2d 232, 2008 N.Y. Misc. LEXIS 5862, at *25.

c. The Court Overlooked Or Misapprehended Law Concerning The Materiality Of The Supplemental Disclosures And Their Sufficiency For Purposes Of Granting Final Approval

Second, the Court overlooked or misapprehended caselaw concerning the materiality of the Supplemental Disclosures and their sufficiency for granting final approval of the Settlement.

[4] While the *Conolly* Court deferred ruling on plaintiff's counsels' $800,000 fee request, it subsequently approved the fee in full. *Conolly v. Universal Am. Fin. Corp.*, No. 07-13422 (N.Y. Sup. Ct. Westchester Cnty. Dec. 11, 2008) (Order and Final Judgment) attached as Ex. 1 to the Affirmation of Juan E. Monteverde in Further Support of the Motion.

Specifically, the Court applied an overly narrow definition of the term "materiality" in determining whether the Supplemental Disclosures provided a material benefit to stockholders, and incorrectly concluded that only disclosures which "uncover conflicts and correct material misstatements" are sufficiently material for purposes of approving a settlement. Final Approval Order at 4, 10, 11. The Court's definition of materiality is inconsistent with the abundance of Delaware cases which have held that: "[w]hen a document ventures into certain subjects, it must do so in a manner that is materially complete and unbiased by the omission of material facts," *In re Pure Res., Inc. S'holders Litig.*, 808 A.2d 421, 448 (Del. Ch. 2002); "key inputs" underlying a banker's valuation methods must be disclosed when stockholders are asked to rely on the banker's analyses, *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 203-04 (Del. Ch. 2007); and that "disclosures must provide a 'balanced,' 'truthful,' and 'materially complete' account of all matters they address." *Id.* at 199-200.

Contrary to the Court's definition of "materiality," both this Court and the Delaware Court of Chancery have previously held that disclosure of the types of information Plaintiff obtained via the Settlement are both material and sufficient to grant final approval. For example, while the Court concluded that information that "allow[ed] shareholders to assess whether AT&T was correctly excluded from the comparable companies analysis" was immaterial, Final Approval Order at 8, Judge Marcy Friedman of this Court recently found the disclosure of "factors considered by the financial advisor in including or excluding companies in the Selected Companies Analysis," to be one of a few significant disclosures that warranted granting final approval in a disclosure-only settlement. *See W. Palm Beach Police Pension Fund*, 2014 N.Y. Misc. LEXIS 4686, at *5.

The Court also concluded that the *Illustrative Minority Buy-In Precedents* table Plaintiff obtained was immaterial to stockholders even though "[**t]he Preliminary Proxy said the bankers had reviewed these [figures] – it just did not give the numbers**." Final Approval Order at 9 (emphasis added).[5] However, this conclusion is directly at odds with the Delaware Court of Chancery's opinion in *In re Netsmart Techs., Inc. S'holders Litig.*, in which the court held:

> when a banker's endorsement of the fairness of a transaction is touted to shareholders, the valuation methods used to arrive at that opinion **as well as the key inputs** and range of ultimate values generated by those analyses must also be fairly disclosed. **Only providing some of that information is insufficient to fulfill the duty of providing a "fair summary of the substantive work performed by the investment bankers upon whose advice the recommendations of the[] board as to how to vote . . . rely."**

924 A.2d at 203-04 (emphasis added).

Similarly inconsistent with the Delaware and New York cases cited above was the Court's conclusion that the Supplemental Disclosure of a table listing "the operating and financial metrics [the bankers] used to compare Verizon Wireless to three companies" was immaterial because the information did not "contradict or otherwise alter the substance of [the comparable companies] analysis." Final Approval Order at 8. The Proxy specifically states that

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[5] The Court's conclusion rested on the fact that the "financial advisors noted that the buy-in premium precedents were presented for reference only, and were not relied on for valuation purposes." Final Approval Order at 9. However, using such language does not take away from the fact that immediately before this sentence purportedly disclaiming the "value of the exercise," the Proxy specifically stated that "Based on the review of these precedents, J.P. Morgan and Morgan Stanley… arrived at an estimated range of equity values for Vodafone's indirect 45% stake in Verizon Wireless of approximately $106 billion to $151 billion." Proxy at 42 (attached as Exhibit A to the Stipulation and Agreement of Compromise, Settlement and Release, Doc. #11). In other words, while the bankers may not have technically relied upon this analysis for "valuation purposes," they nonetheless derived a value for Vodafone's stake which was touted to stockholders. Stockholders thus had a right to see the key inputs underlying this analysis.

these metrics were relied upon by the bankers in concluding "that Verizon Wireless is a premium asset with substantially stronger operating and financial characteristics than the Wireless Pure Play companies." Proxy at 40. Without the detailed information contained in this Supplemental Disclosure, the bankers' characterization of Verizon Wireless as a "premium asset" was simply a bald assertion which stockholders had no basis to either confirm or refute. The underlying metrics were thus clearly necessary for stockholders to have a "balanced, truthful, and materially complete account" of this analysis. *See In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d at 199-200 (internal quotation marks omitted).

In sum, in denying Plaintiff's Final Approval Motion, the Court failed to consider most of the necessary factors, and overlooked or misapprehended both controlling authority and directly on point persuasive authority in finding that the Fairness Opinion Requirement and Supplemental Disclosures did not provide a benefit sufficient to warrant granting final approval.[6] *See Seinfeld*, 246 A.D. 2d at 299, 676 A.D.32d at 584 (reversing trial court's denial of final approval of settlement in derivative action which provided for "the corporation adopt[ing] procedures not previously in place" concerning the retention of outside investigators and which were aimed at preventing the type of harm that spurred the litigation); *Rosenfeld v. Bear Stearns & Co.*, 237 A.D.2d 199, 199, 655 N.Y.S.2d 473, 473 (1st Dep't 1997) (affirming approval of settlement that "required defendants to disclose to their customers that they received compensation from

[6] Indeed, while both Plaintiff and Professor Lubben believe that the Fairness Opinion Requirement alone confers a "substantial benefit" on Verizon stockholders, the First Department has recognized that even a "benefit obtained on the corporation's behalf [that] was not very substantial," may warrant final approval of a settlement and an award of attorneys' fees. *Seinfeld v. Robinson*, 300 A.D.2d 208, 209, 755 N.Y.S.2d 69, 70 (1st Dep't 2002); *see also Seinfeld v. Robinson*, 246 A.D.2d 291, 297, 676 N.Y.S.2d 579, 583 (1st Dep't 1998) (noting that the court may rely on equitable considerations, rather than a strict adherence to the definition of the word "substantial").

borrowing and lending securities in their customers' margin accounts, but did not provide any cash benefits to the class members," after applying all the necessary factors which the Court failed to consider).

2. The Court Overlooked Or Misapprehended Matters Of Fact Concerning The Value Of The Fairness Opinion Requirement

Objectors also contend that Plaintiff's motion to reargue should be denied because the Court did not overlook the true value of the Fairness Opinion Requirement. Crist Memo. at 13-14; Walpin Memo. at 15. Objectors are wrong.

In its Final Approval Order, the Court erroneously concluded that the Fairness Opinion Requirement "may be said to undermine best practices relating to corporate governance" and does not benefit stockholders because "[i]t locks in an additional layer of cost without any assurance that real value will be obtained for the expenditure." Final Approval Order at 13.[7] In order to reach these conclusions, the Court clearly overlooked or misapprehended the very real and specific benefits the Fairness Opinion Requirement provides, particularly in light of the unfamiliar position the Verizon Board finds itself in given the significant debt the Company took on to acquire Vodafone.[8] As explained by Professor Lubben, the Court's conclusion concerning

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[7] Further, at the Hearing, the Court suggested that "the people with the most knowledge of the valuation of their businesses would be the directors and management of the company…" and that the Fairness Opinion Requirement is "superfluous and a waste of corporate money because no banker would be able to understand when dealing with a small portion for the business…" Final Approval Tr. of Hr'ng ("Tr.") 13:9-13:19, Dec. 2, 2014, Doc. #90. In reaching these conclusions, the Court overlooked or misapprehended crucial matters of fact concerning both the value fairness opinions provide and corporate governance best practices, as discussed by Professor Lubben.

[8] Despite the significant value Plaintiff's counsel placed on obtaining the Fairness Opinion Requirement as a part of the Settlement, Tr. at 17:17-18:9, Doc. #90, the Court devoted only 2 pages of its 15 page Final Approval Order to discussing it, and failed to cite to any authority or reference (legal or business) in support of its conclusion that the Fairness Opinion Requirement undermines best practices relating to corporate governance. The Court's conclusion is actually

the value of the Fairness Opinion Requirement was simply wrong.[9] Specifically, as both the Final Approval Order and Judge Schweitzer's questioning at the Hearing indicate, the Court misapprehended or overlooked the fact that:

(i) Verizon is likely to attempt to reduce the significant debt it took on in connection with its acquisition of Vodafone by selling off certain non-core assets in coming years, Lubben Aff. at § IV ¶¶ 1-10;

(ii) The Fairness Opinion Requirement requires "the Verizon board to double-check its work for three years, in a manner that seems likely to increase shareholder value[,]" *id*. at § IV ¶ 13;

(iii) The Fairness Opinion Requirement assures shareholders that good valuation information will be available to Verizon's independent directors, *id*. at § IV ¶ 15; and

(iv) "[T]he Fairness Opinion Requirement has real value in that it has made a shareholder protection mandatory that would otherwise be optional, especially in the context of the plaintiff's legitimate concern that the sudden increase in Verizon's debt load might place unfamiliar pressure on the Verizon board." *Id*. at § IV ¶ 26.

Accordingly, the Court clearly overlooked or misapprehended the value the Fairness Opinion Requirement provides to stockholders, and Plaintiff's motion to reargue should be

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refuted by the opinion of a recognized expert on corporate governance matters, Professor Lubben.

[9] Plaintiff retained Professor Lubben because he is a recognized expert in corporate governance matters and corporate behavior when companies take on debt. However, the Court may consider the underlying facts and corporate governance principles discussed by Professor Lubben even without directly relying upon his affidavit.

granted. Objector Crist's critiques of Professor Lubben's conclusions, as well as his corresponding argument that it is Plaintiff's burden to prove that the mandate to obtain a fairness opinion "necessarily creates value" is also misplaced. Crist Memo. at 17.[10] This argument is contrary to First Department precedent, as well as the plethora of case law that has recognized the speculative nature of the value created by all settlements that provide solely for corporate governance reforms. *See, e.g.*, *Seinfeld*, 246 A.D.2d at 297-98, 676 N.Y.S.2d at 583 (embracing Second Circuit's reasoning that even a "contingent benefit" which merely "deter[s] future misconduct by management" is sufficient to approve settlement and award attorneys' fees); *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1311 (3d Cir. 1993) (affirming approval of settlement despite fact that "it is difficult to measure the value of the benefit (structural relief). The settlement agreement mandates structural changes in [corporation's] corporate governance."); *Granada Invs., Inc. v. DWG Corp.*, 962 F.2d 1203, 1206 (6th Cir. 1992) (acknowledging that "the fairness of a settlement is more difficult to determine when nonpecuniary benefits are provided to the corporation," but nonetheless affirming final approval of settlement providing for "changes in corporate governance" adding new directors to board); *Zimmerman v. Bell*, 800 F.2d 386, 391 (4th Cir. 1986) (affirming approval of settlement that provided for adoption of policy providing

[10] Objector Crist also claims that "the vast academic literature on fairness opinions…directly contradicts the Plaintiff's assertions about the value of fairness opinions." Crist Memo. at 17. However, the fact that there is a debate amongst experts concerning the value of fairness opinions does not mean that the Fairness Opinion Requirement is insufficient to warrant final approval of the Settlement. *See Seinfeld*, 246 A.D.2d at 297, 676 N.Y.S.2d at 583 (noting the existence of a "significant number of cases where courts have termed the benefits of the derivative litigation before them to be 'scant,' 'slight,' 'modest,' or even 'minimal,'" but nonetheless granting final approval and awarding attorneys' fees). Indeed, as the U.S. Court of Appeals for the Seventh Circuit noted in discussing the debate amongst experts concerning the value of fairness opinions, "[s]till others have concluded that, whether or not *Trans Union* was wise, competitive forces have shaped the terms and conditions under which fairness opinions are prepared **so that they are today valuable to investors.**" *HA2003 Liquidating Trust v. Credit Suisse Sec. (USA) LLC*, 517 F.3d 454, 457 (7th Cir. 2008) (emphasis added).

guidelines for board to "consider in the event of future unsolicited tenders offers"). Such uncertainty concerning whether or not the benefits corporate reforms stand to provide ever actually materialize does not prevent their achievement alone from being deemed sufficient to grant final approval of a settlement. *See id*.

3. The Court Overlooked Or Misapprehended Matters Of Fact Concerning The Materiality Of The Supplemental Disclosures

In addition to overlooking matters of law concerning the sufficiency of the Supplemental Disclosures for purposes of approving the Settlement, the Court also overlooked or misapprehended the specific factual context in which each of the disclosures was offered. However, because Plaintiff already elaborated on this point at length in her opening Memorandum Of Law In Support Of Motion For Leave To Renew And Reargue Her Motion For Class Certification, Final Approval Of Settlement And For An Award Of Attorneys' Fees And Expenses (Doc. #87) ("Opening Memo."), she will not reiterate those arguments here, and instead incorporates them by reference. *See* Opening Memo. at 17-21.

B. Plaintiff's Motion To Renew Should Be Granted

1. Professor Lubben's Affidavit Offers "New Facts" That Should Change The Court's Prior Determination

"CPLR 2221 (e) provides that a motion for leave to renew 'shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination.'" *1212 Ocean Ave. Hous. Dev. Corp. v. Brunatti*, No. 436/05, 2007 N.Y. Misc. LEXIS 4188, at *11 (N.Y. Sup. Ct. Kings Cnty. May 9, 2007). "[T]he rule is not inflexible and the court, in its discretion, may grant renewal, in the interest of justice, upon facts known to the movant at the time of the original motion." *Rancho Santa Fe Ass'n v. Dolan-King*, 36 A.D.3d 460, 461, 829 N.Y.S.2d 39,

40 (1st Dep't 2007). "[E]ven if the rigorous requirements for renewal are not satisfied, such relief may still be granted so as not to defeat substantive fairness." *Id.*, 829 N.Y.S.2d at 40-41.

Here, Plaintiff offers the affidavit of Professor Lubben and the expert analysis contained therein as the "new facts" upon which her motion to renew is based. Objectors incorrectly assert that the Lubben Affidavit and the opinions and analysis contained therein do not constitute "new facts" and that "New York courts do not accept additional expert analysis as a basis to renew." Crist Memo. at 6-7; Walpin Memo. at 9-10. Contrary to Objectors' argument "[t]he court in its discretionary power may rely upon the affidavit of plaintiff's expert in granting renewal" even if the affidavit "was not submitted by plaintiff in the original [] motion." *Brunatti*, 2007 N.Y. Misc. LEXIS 4188, at *12; *Nutting v. Assocs. in Obstetrics & Gynecology, P.C.*, 130 A.D.2d 870, 871, 515 N.Y.S.2d 926, 927 (3d Dep't 1987) (affirming order granting motion to renew premised upon professional opinion offered via new doctor's affidavit); *J.D. Structures, Inc. v. Waldbaum*, 282 A.D.2d 434, 436, 723 N.Y.S.2d 205, 207 (2d Dep't 2001) (holding that trial court should have granted motion for renewal premised upon new affidavit). Accordingly, the analysis and conclusions set forth in the Lubben Affidavit constitute "new facts" upon which Plaintiff's motion to renew should be granted.

2. Plaintiff Has Provided Reasonable Justification For Failure to Present The Lubben Affidavit In Support Of Her Final Approval Motion

Reasonable justification for the failure to include the affidavit and information contained therein in support of the original motion exists where the moving party reasonably believes that their original motion was legally sufficient to obtain the relief sought. *See Nutting*, 130 A.D.2d at 871, 515 N.Y.S.2d at 927 (3d Dep't 1987) ("The excuse proffered for not originally submitting [the expert affidavit] was that defendants reasonably believed that plaintiffs' failure to

provide any affidavit of merits from a medical expert would… preclude [plaintiffs] from successfully vacating the default. We conclude that Supreme Court's acceptance of this excuse and granting of the motion to renew was not an abuse of discretion."); *J.D. Structures*, 282 A.D.2d at 436, 723 N.Y.S.2d at 207 (holding supreme court erred in denying motion to renew based upon newly submitted affidavit which counsel did not include with original motion because counsel "thought he had made a prima facie showing" sufficient to obtain relief sought).

A motion to renew premised upon a new expert affidavit may also be granted where the failure to submit the affidavit was inadvertent and the opposing party will not be prejudiced. *See Garner v. Latimer*, 306 A.D.2d 209, 210, 761 N.Y.S.2d 657, 658 (1st Dep't 2003). The First Department has further held that "even if the vigorous requirements for renewal are not met, such relief may still be properly granted so as not to 'defeat substantive fairness.'" *Id.*, 761 N.Y.S.2d at 658. And "where the additional facts presented relate to an issue 'which had not previously been raised by the parties but, rather, had been raised *sua sponte* by the court in its memorandum it [is] error for the court not to consider these additional facts.'" *Bevona v. Super. Maintenance, Co*., 204 A.D.2d 136, 138, 611 N.Y.S.2d 193, 195 (1st Dep't 1994).

Here, Plaintiff did not receive the Griffith Affidavit until eleven calendar days prior to the Hearing, including two weekends and the Thanksgiving holiday. Plaintiff had not previously retained a corporate governance expert to explain the material benefit provided by the Fairness Opinion Requirement because she reasonably believed that the arguments and jurisprudence referenced in support of her Final Approval Motion were sufficient to convey the benefit provided by the Fairness Opinion Requirement to the Court. However, it is now clear that the Court was unduly influenced by Professor Griffith's opinions concerning the Fairness Opinion Requirement, as the Court specifically questioned Professor Griffith on the topic and cited to the

Griffith Affidavit in its Final Approval Order.[11] Furthermore, in its Final Approval Order the Court also stated that the Fairness Opinion Requirement "may actually operate to curtail the Company's directors' flexibility and ability to employ their collective business experience…" and "may be said to undermine best practices relating to corporate governance." Final Approval Order at 13. Such conclusions went beyond what Professor Griffith argued in his affidavit.[12]

Accordingly, Plaintiff's Motion to renew should be granted so that the Court may consider the analysis and conclusions of Professor Lubben, a recognized expert in corporate governance whom Plaintiff could not have retained to refute Professor Griffith prior to the Hearing given the short time period. Under the circumstances, Plaintiff has provided

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[11] Objector Crist contends that Plaintiff has waived her right to introduce the Lubben Affidavit because of her counsel's decision: not to object to the Court's decision to permit Professor Griffith to speak at the Hearing; not to specifically ask to cross-examine Professor Griffith; and not to seek permission to submit a second expert affidavit earlier. Crist Memo. at 10. However, none of the cases cited by Objector Crist in support of this argument are on point, as they each deal with whether a new issue may be considered for the first time on appeal or in granting summary judgment. Rather, the cases cited by Plaintiff which have specifically held that a party may offer, and the court may consider, a new expert affidavit submitted for the first time in connection with a motion to renew or reargue, are directly on point and should control on this issue. *See supra* at 13-15.

[12] In his affidavit, Professor Griffith only argued that: i) the Verizon board would likely obtain a fairness opinion in connection with a major divestiture anyway (Griffith Aff. at ¶¶14, 15); ii) Verizon may not have to disclose the advisor's underlying opinions to shareholders (*id*. at ¶16); iii) Verizon was unlikely to undergo a transaction that would trigger the Requirement (*id*. at ¶17); and iv) the Requirement only adds value if the Company were to undervalue its assets (*id*. at ¶18). Nowhere in his affidavit did Professor Griffith specifically address whether or not the Fairness Opinion Requirement would unreasonably impede the Board's exercise of its business judgment, or would "undermine best practices relating to corporate governance." Final Approval Order at 13. Thus, the Court's Final Approval Order *sua sponte* raised the issue of best corporate governance practices, and Plaintiff's motion to renew should be granted. *See Wilder v. May Dep't Stores Co.*, 23 A.D.3d 646, 648, 804 N.Y.S.2d 423, 425 (2d Dep't 2005) (holding it was error for trial court to deny motion to renew where the court had made *sua sponte* determination).

"reasonable justification" for her failure to present a corporate governance expert affidavit in support of her Final Approval Motion.[13]

C. Objector Walpin's Cross-Motion For An Award Of Attorney's Fees And/Or Sanctions Must Be Denied

Objector Walpin once again burdens this Court with unnecessary motion practice which lacks any basis in fact or law, this time cross-moving for an award of attorneys' fees and/or sanctions based upon what he inaccurately describes as Plaintiff's "frivolous" Motion. For the reasons set forth above, Plaintiff's Motion is clearly not "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law," and therefore Objector Walpin's cross-motion must be denied. *See Kimmel v. State*, 38 A.D.3d 1155, 1157, 831 N.Y.S.2d 629, 631 (4th Dep't 2007) ("Although the court properly denied the motion insofar as it sought leave to reargue…that part of the motion was not completely without merit in law inasmuch as plaintiffs asserted that the court had overlooked or misapprehended the factual and legal basis for including McMahon in the default judgment"); *Kremen v. Benedict P. Morelli & Assocs., P.C.,* 80 A.D.3d 521, 523, 916 N.Y.S.2d 44, 46 (1st Dep't 2011) (holding that even a "somewhat colorable" argument for motion to renew and reargue did not warrant sanctions).

Objector Walpin also appears to suggest, without any legal support, that because Plaintiff filed a notice of appeal of the Court's Final Approval Order on January 21, 2015, the instant Motion is somehow automatically frivolous or malicious and/or that Plaintiff is now precluded from seeking leave to renew and reargue. *See* Walpin Memo. at 21-22. This argument lacks

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[13] Objector Crist erroneously argues that Plaintiff could have relied upon her previously retained expert, M. Travis Keath, to counter the Griffith Affidavit. Crist Memo at 8-9. However, Mr. Keath is not a legal expert on corporate governance matters, but rather a financial expert on merger transaction terms, valuation and disclosure issues. Keath Affidavit at ¶ 2-3.

merit, as the filing of a notice of appeal, rather than prohibiting a motion to renew or reargue, actually extends the time a party has to seek such relief. *See Dugas v. Bernstein*, 5 Misc. 3d 818, 827, 786 N.Y.S.2d 708, 715 (N.Y. Sup. Ct. N.Y. Cnty. 2004) ("a motion for leave to reargue, untimely under CPLR 2221 (d) (3), may be considered where a timely taken yet unsubmitted appeal is pending[.]").

Also ironic is Objector Walpin's complaint about the hardship he faces in having to respond to Plaintiff's Motion as "an individual Objector, with no supporting legal or paralegal staff." Walpin Memo. at 21. Objector Walpin continues to needlessly interject himself into this litigation to an unprecedented extent based upon Plaintiff's counsel's 25 years of dealing with class action objectors. Indeed, Objector Walpin has already been provided with ample opportunity to object to the Settlement of this Action. Any hardship he faces as a result of his decision to continue to involve himself in motion practice before this Court has been self-inflicted, and he cannot reasonably complain about it nor use it as a basis to seek attorneys' fees.[14]

III. CONCLUSION

For the foregoing reasons, Plaintiff has established that her Motion should be granted, and upon reconsideration, the Court should alter its prior determination by granting the Final Approval Motion in its entirety. *See* N.Y. C.P.L.R. 2221(f) ("If a motion for leave to reargue or leave to renew is granted, the court may…alter [its prior] determination."); *see also McMahan Sec. Co. L.P. v. Kleinberg, Kaplan, Wolff & Cohen, P.C.*, No. 111952/2008, 2011 N.Y. Misc. LEXIS 7046, at *9-10 (N.Y. Sup. Ct. N.Y. Cnty. Nov. 4, 2011) (upon granting motion for leave

[14] Indeed, given that Objector Walpin raises nearly identical arguments to Objector Crist, he simply could have coordinated with Objector Crist and submitted one joint memorandum of law in opposition to Plaintiff's Motion.

to reargue simultaneously vacating the court's prior order and granting the relief previously sought).

Dated: February 19, 2015

Respectfully submitted,

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