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.	X : : : : : : : : : : : : : : : : X	Index No. 653084/2013 **CLASS ACTION** Motion Seq. # 003

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Other Authorities

I. NATURE AND STAGE OF THE PROCEEDINGS

Plaintiff Natalie Gordon ("Plaintiff") respectfully submits this memorandum of law in opposition to the Motion For Summary Judgment Dismissing The Complaint And If Necessary For Leave To Intervene filed by Gerald Walpin ("Objector Walpin"), a nonparty Verizon stockholder whose sole goal is to end this action to allegedly "prevent additional expense being imposed through this litigation on Verizon shareholders." Affirmation Of Gerald Walpin In Support Of Summary Judgment Dismissing Plaintiff's Complaint And, If Necessary, Motion To Intervene ("Walpin Aff.") at ¶ 12 (Doc. #76).[1] Objector Walpin has already been provided with ample opportunity to object to Plaintiff's counsels' fee request, and the instant motion is a misguided and disingenuous attempt to derail this litigation and impede Plaintiff's ability to protect the Class.[2]

On September 3, 2013, Verizon Communications, Inc. ("Verizon") publicly announced that it had entered into a definitive agreement (the "Stock Purchase Agreement") with Vodafone Group Plc and Vodafone 4 Limited (collectively, "Vodafone") to acquire Vodafone's subsidiaries holdings as their principal assets of 45% interest in Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless") for a purchase price of approximately $130 billion, consisting primarily of cash and Verizon shares (the "Transaction").

Plaintiff brought this litigation as a class action (the "Action") on behalf of all Verizon stockholders, except Defendants and their affiliates, seeking injunctive and other relief on the grounds that Verizon's directors breached their fiduciary duties to Verizon's stockholders in connection with the Transaction by, among other things, causing Verizon to pay an excessive

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

[2] Ironically, Objector Walpin has reserved his right to be awarded attorneys' fees if he is able to terminate this Action. *See* Reply Memorandum Of Shareholder-Objector Gerald Walpin at 2 n.3 (Doc. #62).

and dilutive price in the Transaction and issuing a false and misleading Preliminary Proxy Statement which failed to disclose information that was material and necessary for Verizon stockholders to make a fully informed decision on whether to approve the Transaction.

As a result of the prosecution of this Action, the parties executed a Memorandum of Understanding (the "MOU") setting forth the principal terms of the settlement on December 6, 2013 (the "Settlement"). As part of the Settlement, the Verizon board of directors agreed to certain corporate governance reforms which would require a fairness opinion from an independent financial advisor in conjunction with any transaction regarding assets of Verizon Wireless having a book value of in excess of $14.4 billion (*i.e.*, approximately 5% of the book value of Verizon Wireless). In addition, Defendants agreed to include supplemental disclosures in a definitive proxy statement filed on December 10, 2013 and provided to stockholders to solicit their vote in favor of the Transaction.

Subsequently, pursuant to the MOU, Plaintiff's counsel conducted confirmatory discovery and deposed John Fitzgerald, Verizon's Vice President of Corporate Development, and Robert T. Friedsam, Managing Director at Morgan Stanley & Co. LLC, on February 14, 2014 and February 18, 2014, respectively.

The Transaction closed on February 21, 2014. Thereafter, the parties engaged in arm's-length negotiations to reach agreement on the final terms of the Stipulation And Agreement Of Compromise, Settlement, And Release ("Stipulation") (Doc. #11). On July 31, 2014, Plaintiff filed the Stipulation and briefing in support of preliminary approval of the Settlement with the Court.

On October 6, 2014, the Court entered a Scheduling Order that found the Settlement was preliminarily fair, reasonable, adequate and in the best interests of the Settlement Class. The

Court also ordered that the Notice Of Pendency Of Class Action, Proposed Settlement Of Class Action, Settlement Hearing, And Right To Appear ("Notice") (Doc. #28) be mailed by first class mail to all record stockholders of Verizon. The Notice was sent to approximately 2.3 million Verizon stockholders, and not one single objection was received to the terms of the Settlement itself.[3] Further, less than 250 stockholders, representing 0.0063% of the outstanding shares for the Settlement Class, requested to opt-out of the Settlement.[4]

On November 14, 2014, Plaintiff filed a Motion For Class Certification, Final Approval Of Settlement And For An Award Of Attorneys' Fees And Expenses ("Final Approval Motion") (Doc. #29).

On November 24, 2014, Objector Walpin filed an Objection To Plaintiff's Attorneys' Application For Attorneys' Fees And Expenses ("Walpin Objection") (Doc. #58). Objector Walpin specifically stated that he was not objecting to whether the Settlement is fair, reasonable, adequate, and in the best interests of the Class; rather, Objector Walpin's sole objection was to the payment of legal fees to Plaintiff's counsel. *See* Walpin Objection, at 3-4 (Doc. #58).

On December 2, 2014 the Court held a hearing on Plaintiff's Final Approval Motion. Objector Walpin was provided with an opportunity to present his arguments at length.

On December 19, 2014 the Court issued an order denying Plaintiff's Final Approval Motion (the "Final Approval Order") (Doc. #72). The Court's analysis focused solely on, and thus its findings were limited to, whether the Settlement was "fair, adequate, reasonable and in the best interest of class members." Final Approval Order at 3, 12-13.

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[3] Three objectors, including Objector Walpin, objected solely to the payment of Plaintiff's counsels' fees.

[4] 189 stockholders sought to opt-out by the deadline and an additional 34 stockholders sought to opt-out past the opt-out deadline. In addition, 30 stockholders who originally sought to opt-out rescinded their opt-out request after discussing the Settlement with Plaintiff's counsel.

Plaintiff believes the Court erred in denying the Final Approval Motion and will move for reargument of the Court's Final Approval Order, and has preserved the record for an appeal.[5]

On January 6, 2015, Objector Walpin filed the instant motion seeking summary judgment dismissing Plaintiff's complaint or in the alternative to intervene in this Action.

II. ARGUMENT

A. Objector Walpin Lacks Standing To Move For Summary Judgment

First, Objector Walpin's motion for summary judgment must be denied because he lacks standing to bring the motion. N.Y. C.P.L.R. § 3212 provides that only a party may move for summary judgment. *See* N.Y. C.P.L.R. § 3212(a) ("**Any party** may move for summary judgment in any action, after issue has been joined;") (emphasis added). The Court must give effect to the plain meaning of the words used in the statute. *Commonwealth of the N. Mariana Islands v. Canadian Imperial Bank of Commerce*, 21 N.Y.3d 55, 60, 990 N.E.2d 114, 117, 967 N.Y.S.2d 876, 879 (2013). Doing just that in an analogous case, the Second Department denied a motion for summary judgment brought by a nonparty who sought to intervene in an action, holding that "**[a]s only a party to an action may move for summary judgment, [movant's] cross motion for summary judgment was properly denied for lack of standing.**" *Spota v. Cnty. of Suffolk*, 110 A.D.3d 785, 787, 973 N.Y.S.2d 657, 660 (2d Dep't 2013) (emphasis added). The same outcome is warranted here, and Objector Walpin's motion for summary judgment must be denied for lack of standing.[6]

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[5] Plaintiff has filed her Notice Of Appeal concurrently with her opposition to Objector Walpin's motion.

[6] The only case Objector Walpin cites in support of his standing to move for summary judgment is a completely irrelevant opinion from the Third Circuit, *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 779 (3d Cir. 1995). Walpin Aff. at ¶ 13. That case had absolutely nothing to do with standing to move for summary judgment under N.Y. C.P.L.R. § 3212, which is plainly limited to a "party." In fact, the case supports Plaintiff's argument that Objector Walpin's motion to intervene should be denied. In a later

B. Objector Walpin's Motion For Summary Judgment Is Premature And Must Be Denied

Objector Walpin's motion for summary judgment must also be denied as premature. The Court of Appeals has specifically held that "[a] motion for summary judgment may not be made before issue is joined and the requirement is strictly adhered to." *City of Rochester v. Chiarella*, 65 N.Y.2d 92, 101, 479 N.E.2d 810, 815, 490 N.Y.S. 174, 179 (1985) (citation omitted); *Sonny Boy Realty, Inc. v. City of N.Y.*, 8 A.D.3d 171, 172, 780 N.Y.S.2d 123, 125 (1st Dep't 2004) (same). "A judgment…on the merits must at least await the filing of an answer." *Yoda, LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 50 A.D.3d 492, 492, 858 N.Y.S.2d 14, 15 (1st Dep't 2008). Here, issue has not been joined, as Defendants have not filed an answer or responsive pleading in light of the Settlement. If the Settlement is not ultimately approved, Plaintiff will proceed to litigate this case, at which time issue will be joined. Accordingly, Objector Walpin's motion must also be denied as premature.[7] *Id.*

C. Objector Walpin's Motion For Summary Judgment Also Fails On The Merits

Even if the Court were to consider the merits of Objector Walpin's motion, which, for the reasons discussed *supra*, it need not, the motion fails to make the necessary showing to grant

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appeal in the same case, the Third Circuit affirmed the denial of a motion to intervene as untimely because it was not brought until two months after notice had been sent to the class and nine days before the fairness hearing. *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133, 140 n.1 (3d Cir. 1998); *see also infra* § II.D.1.

[7] Objector Walpin's motion for summary judgment is also premature because Plaintiff has filed a Notice of Appeal of the Court's Final Approval Order, and the Action should remain in its current posture while Plaintiff perfects her appeal. *See* N.Y. C.P.L.R. § 5519(c) (providing that the Court may stay all proceedings to enforce an order appealed from pending an appeal). Furthermore, Objector Walpin's motion for summary judgment is also procedurally improper because he has failed to attach a copy of the pleadings to his motion papers. His motion may be denied on this basis as well. *See Ayer v. Sky Club, Inc.*, 70 A.D.2d 863, 864, 418 N.Y.S.2d 57, 58 (1st Dep't 1979) ("the pleadings are a requisite part of the record of a CPLR § 3212 motion and omission of same mandates denial of summary judgment relief."); *Wider v. Heller*, 24 A.D.3d 433, 434, 805 N.Y.S.2d 130, 130 (2d Dep't 2005) (same).

summary judgment and should be denied.

"To be entitled to summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winter v. Black*, 95 A.D.3d 1208, 1208, 943 N.Y.S.2d 909, 910 (2d Dep't 2012). "Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Id.* "On a motion for summary judgment, a 'bare affirmation of an attorney, who demonstrates no personal knowledge of the matter, is unavailing and without evidentiary value.'" *Id.* Where, as here, a motion for summary judgment is supported solely by the affirmation of an attorney who has no personal knowledge of the facts or discovery, the moving party fails to make a prima facie showing of entitlement to judgment as a matter of law and their motion must be denied. *Id.*; *Currie v. Wilhouski*, 93 A.D.3d 816, 817-18, 941 N.Y.S.2d 218, 220 (2d Dep't 2012) (same).

1. The Law Of The Case Doctrine Is Inapplicable And The Court's Final Approval Order Is Insufficient To Grant Summary Judgment

First, Objector Walpin lacks any personal knowledge of the facts of this case and the discovery conducted to date. His argument in support of summary judgment rests almost entirely on his erroneous assertion that the Court's Final Approval Order constitutes a finding that "Plaintiff's complaint is without merit," and that the Order is now the "the law of the case" and "thus meets the criteria for granting summary judgment[.]" Walpin Aff. at ¶ 9. However, the law of the case doctrine is inapplicable here, and the Court's Final Approval Order therefore does not provide a basis for granting summary judgment.

It is well settled that where a court's prior order does not definitively determine issues relevant to summary judgment, the prior order does not establish the law of the case for purposes of a summary judgment motion. *See Grullon v. City of N.Y.*, 297 A.D.2d 261, 265, 747 N.Y.S.2d

426, 430 (1st Dep't 2002) (law of the case doctrine "'applies only to legal determinations that were necessarily resolved on the merits in the prior decision'") (quoting *Baldasano v. Bank of N.Y.*, 199 A.D.2d 184, 185, 605 N.Y.S.2d 293, 294 (1st Dep't 1993)); *In re the Dissolution of El-roh Realty Corp.*, 74 A.D.3d 1796, 1798, 902 N.Y.S.2d 727, (4th Dep't 2010) ("The doctrine applies, however, 'only to issues that have been judicially determined' and, here, none of the court's prior rulings specifically addressed petitioner's present contention.") (citation omitted); *Baskin & Sears, P. C. v. Lyons*, 188 A.D.2d 307, 308, 590 N.Y.S.2d 475, 476 (1st Dep't 1992) (law of case doctrine inapplicable where court's prior order "did not address the question of whether defendants demonstrated that a bona fide issue of fact existed which necessitated a trial.").

Here, the Court's Final Approval Order only addressed the sufficiency of the Settlement as presented to the Court, and did not address either the adequacy of Plaintiff's complaint or resolve any issues of material fact. *See* Final Approval Order at 3, 12-13 (noting that the Court's analysis was limited to whether the Settlement was "fair, adequate, reasonable and in the best interest of class members."). In other words, the Court's "holding in relation to the prior motion…was based on the facts and law presented by the parties in that procedural posture, and no more." *191 Chrystie LLC v. Ledoux*, 82 A.D.3d 681, 682, 920 N.Y.S.2d 324, 325 (1st Dep't 2011). Accordingly, Objector Walpin's invocation of the law of the case doctrine is misplaced, and the Court's Final Approval Order does not constitute "proof" that Plaintiff's causes of action lack merit and that judgment in Defendants' favor should be entered as a matter of law. *See id*. Without such proof, Objector Walpin's summary judgment motion must be denied. *See Winter*, 95 A.D.3d at 1208, 943 N.Y.S.2d at 910.

2. Objector Walpin Offers No Other Evidence In Support Of Summary Judgment

Absent citing to this Court's Final Approval Order and erroneously invoking the law of the case doctrine, Objector Walpin offers absolutely no evidence whatsoever in support of his motion for summary judgment. As to Plaintiff's cause of action concerning inadequate price, Objector Walpin contends that "[t]he evidence establishes that Plaintiff dropped…its first cause of action dealing with supposed insufficient consideration to Verizon on the transaction." Walpin Aff. at ¶ 5. However, the only "evidence" Objector Walpin cites in support of this argument is the Settlement itself and the fact that a report prepared by a financial advisor retained by Plaintiff (the "Keath Report") did not discuss the consideration issue. Walpin Aff. at ¶¶ 5-6. Plaintiff's decision to enter into the Settlement does not constitute a waiver of her cause of action concerning Verizon's decision to pay an excessive and dilutive price for Vodafone in the event the Settlement is not approved. And the fact that the Keath Report does not reference the insufficient consideration cause of action also fails to establish that Plaintiff has waived her right to subsequently pursue this claim. Plaintiff has not "dropped" this claim, and maintains her right to seek appropriate relief in the event the parties are unable to finalize the Settlement as currently structured. Accordingly, Objector Walpin has failed to offer any evidence in support of his motion for summary judgment, and it must therefore be denied.

D. Objector Walpin's Motion To Intervene Must Also Be Denied

Recognizing that he lacks standing to move for summary judgment, Objector Walpin also asks the Court to allow him to intervene in this action pursuant to N.Y. C.P.L.R. § 1012. Walpin Aff. at ¶¶ 1, 14. The statute provides that a person may intervene as of right "[u]pon timely motion…when the presentation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment." N.Y. C.P.L.R. § 1012(a)(2). In analyzing

a motion to intervene under N.Y. C.P.L.R. § 1012, the Court may rely upon federal cases applying the similarly worded provision of Fed. R. Civ. P. 24(a). *See Persichilli v. Metro. Paper Recycling Inc.*, 30 Misc. 3d 1227(A), 926 N.Y.S.2d 346, 2010 N.Y. Misc. LEXIS 6414, at *9 (N.Y. Sup. Ct., Nassau Cnty. 2010); *In re Unitarian Universalist Church*, 64 Misc. 2d 851, 853, 315 N.Y.S.2d 506, 510 (N.Y. Sup. Ct., Nassau Cnty. 1970); *see also* Weinstein, Korn & Miller, New York Civil Practice § 1012.03 ("The CPLR intervention statutes...were patterned after Rule 24 of the Federal Rules of Civil Procedure.").

1. Objector Walpin's Motion Is Untimely

N.Y. C.P.L.R. § 1012(a) requires that a motion to intervene be "timely." N.Y. C.P.L.R. § 1012(a); *see also Rectory Realty Assoc. v. Town of Southampton*, 151 A.D.2d 737, 737, 543 N.Y.S.2d 128, 129 (2d Dep't 1989) (N.Y. C.P.L.R. § 1012 "require[s] that a 'timely motion' be made."). Where an individual fails to move for intervention in a timely manner, they waive their right to intervene and their motion should be denied. *See In re Estate of Joan Marie Fotiades*, 21 A.D.3d 898, 800 N.Y.S.2d 748 (2d Dep't 2005) (right waived when putative intervenor had three months' notice but failed to move prior to hearing); *Glass v. UBS Fin. Servs., Inc.*, 331 F. App'x 452, 457 (9th Cir. 2009) ("One month after the deadline to opt out of the settlement, [movant] sought to intervene in the suit as a matter of right... [t]he district court properly denied [movant's] motion to intervene as of right because [movant's] motion was untimely."); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 84 (2d Cir. 2001) (finding untimely a motion to intervene filed "more than a year after the complaint was filed, approximately three months following the district court's order that notice be sent to class members, and three days prior to the Fairness Hearing"); *Horton v. Metro. Life Ins. Co.*, No. 93-1849-CIV-T-23A, 1994 U.S. Dist. LEXIS 21394, at *19 (M.D. Fla. Oct. 25, 1994) (decision "to defer attempted intervention until after the parties had executed the Settlement Agreement, obtained preliminary approval from this Court

and sent notice to the settlement class suggests unexcusable delay and is sufficient reason to deny intervention.").

Here, Objector Walpin waited until more than two months after receiving the Settlement Notice, and two months after the deadline to opt out, to move to intervene. Accordingly, his motion to intervene is untimely and should be denied.

2. If Objector Walpin's Interests Align With The Overwhelming Majority Of Verizon's Stockholders, They Are Adequately Protected

Objector Walpin cites "the non-adversarial relationship between the Plaintiff and the Verizon Corporation on this settlement" as the basis for his conclusion that "neither party adequately represents [his] interests." Walpin Aff. at ¶ 14. And while Objector Walpin fails to clearly articulate exactly what his "interests" are, it is clear that his ultimate goal is to derail this litigation and prevent Plaintiff and the Class from receiving any benefit whatsoever. Objector Walpin, simply put, is a zealot who has a fundamental problem with the work of plaintiffs' class action lawyers.[8] And while he is entitled to his opinion, he should not be allowed to hijack this litigation for the sole purpose of advancing his personal beliefs at the expense of the Class that Plaintiff has more than adequately represented.

Objector Walpin appears to view all stockholder litigation in which there is no monetary recovery for the class as worthless. However, his opinion is in stark contrast to the plethora of case law that has consistently recognized the substantial benefit stockholders receive in settlements providing for the disclosure of additional information or an improvement in corporate governance practices. *See, e.g., Seinfeld v. Robinson*, 246 A.D.2d 291,298, 300, 676 N.Y.S.2d 579, 584, 585 (1st Dep't 1998) (holding that a settlement that instituted changes to

[8] Indeed, he refers to Plaintiffs' attorneys being compensated for their work as an "extortion of legal fees…" Walpin Aff. at 5 n.2, and in his objection papers, Objector Walpin specifically stated that he was not objecting to the fairness of the Settlement; rather, his sole objection was to Plaintiff's counsels' request for fees. *See* Walpin Objection, at 3-4 (Doc. #58).

prevent future misconduct but did not produce a monetary judgment was a "substantial result" for stockholders); *W. Palm Beach Police Pension Fund v. Gottdiener*, No. 650144/2013, 2014 N.Y. Misc. LEXIS 4686, at *5, *8 (N.Y. Sup. Ct., N.Y. Cnty. Oct. 22, 2014) ("the proposed settlement is fair, adequate and in the best interests of the class...the supplemental disclosures provide benefit to the shareholders."); *Zimmerman v. Bell,* 800 F.2d 386, 391 (4th Cir. 1986) ("Influencing the future conduct of management may serve the interests of the corporation as fully as a recovery for past misconduct, and a settlement may be accepted 'even though no direct monetary benefits are paid by the defendants'[.]").

While Objector Walpin fails to explain why or how his interests are not adequately represented by Plaintiff, to the extent his interests align with those of the clear majority of Verizon stockholders, he is mistaken. The Settlement received overwhelming support from Verizon stockholders. Plaintiff's counsel issued notice to approximately 2.3 million Verizon stockholders informing them about the terms of the Settlement and their right to object; in response, Plaintiff's counsel did not receive one single objection to the Settlement itself. These numbers paint a clear picture – a significant majority of Verizon stockholders were satisfied with the Settlement, and therefore obviously felt that Plaintiff and Plaintiff's counsel have adequately represented their interests. *See Zimmerman*, 800 F.2d at 391 ("[objector] is one of only two objectors, out of tens of thousands of shareholders. It would be rare for such minimal dissent to derail settlement of a derivative suit on grounds that the settlement afforded insufficient relief."). If Objector Walpin disliked the Settlement, he, like all other stockholders, was advised of his right to opt out. Rather than doing so, he chose to object only to Plaintiff's attorneys' request to be compensated for their work, and now seeks to derail this litigation at the expense of Plaintiff and the Class for the sole purpose of advancing his personal agenda.

Accordingly, if Objector Walpin actually shares the same interests as the Class, his interests are adequately represented by Plaintiff; and if, as seems likely, his sole interest is in preventing Plaintiff's counsel from being paid for their work, then he has already protected his interest by objecting. *See Horton*, 1994 U.S. Dist. LEXIS 21394, at *24 ("As settlement class members, [movants] already had the right to opt out of the settlement class or appear through counsel. Thus, denial of the intervention motion would in no way prevent them from protecting their rights."); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 334 (N.D. Ga. 1993) (denying intervention by class members because "objectors' participation in the objection process will adequately protect their class interests."). Allowing Objector Walpin to commandeer this litigation and impede the Class's ability to obtain final relief would represent an injustice, warranting denial of his motion to intervene.

3. Objector Walpin's Interest In Ending This Litigation To Purportedly Prevent Additional Expense To Verizon's Stockholders Is Not Cognizable And May Not Be Achieved By Intervening In This Action

"It has been consistently held that intervention should be permitted [only] where the proposed intervenor has a **real and substantial interest** in the outcome of the proceeding." *Vantage Petroleum v. Bd. of Assessment Review of the Town of Babylon*, 91 A.D.2d 1037, 1037, 458 N.Y.S.2d 632, 633 (2d Dep't 1983) (emphasis added). A "real and substantial interest" has been found to mean "a direct financial interest in the outcome of the proceeding…" *id.*, or "a property interest or some duty or right devolving upon or belonging to the person seeking the right to intervene." *State ex rel. Field v. Cronshaw*, 139 Misc. 2d 470, 473, 527 N.Y.S.2d 165, 167 (N.Y. Sup. Ct., Nassau Cnty. 1988).[9] "Even where a third party may be bound by a

[9] However, even a significant economic stake in the outcome of the litigation, by itself, is not enough to constitute a "real and substantial interest" warranting intervention. *Moore v. Verizon Commc'ns Inc.*, No. C 09-1823 SBA, 2013 U.S. Dist. LEXIS 15609, at *40 (N.D. Cal. Feb. 5, 2013). The significant economic interest must nonetheless be "'concrete and related to

judgment and their representation is inadequate, intervention will not be permitted unless the movant has an interest which he seeks to protect sufficient to provide the necessary standing." *Id*.; *see also Chevron Corp. v. Donziger*, No. 11 Civ. 0691 (LAK), 2011 U.S. Dist. LEXIS 57573, at *9 (S.D.N.Y. May 31, 2011) (noting that the interest "'must be significantly protectable and direct as opposed to remote or contingent.'"). "The fact that the proposed interveners may, in some manner, be affected by the outcome of this proceeding, is insufficient to form the basis for intervention." *In re the Arbitration between Ralston, Ralston, et al.*, No. 105295/07, 2008 N.Y. Misc. LEXIS 9125, at *10 (N.Y. Sup. Ct., N.Y. Cnty. July 29, 2008).

Here, Objector Walpin cannot satisfy the "real and substantial interest" requirement because his only interest is ending this litigation to prevent Verizon from incurring additional legal expenses. *See* Walpin Aff. at ¶ 12. As an initial matter, Objector Walpin fails to provide any support for his assertion that Verizon has not and will not continue to adequately advance this interest. Indeed, as the one footing the bill for legal costs, Verizon had a significant incentive to ensure that its legal expenses, including the attorneys' fees it agreed to pay to settle this Action, were fair and reasonable. *See Moore*, 2013 U.S. Dist. LEXIS 15609, at *50-52 (finding that movant seeking to intervene failed to demonstrate that its interest in keeping attorneys' fees low was not adequately advanced by defendant, particularly in light of fact that movant "did not participate in the litigation of this action or meaningfully participate in the settlement negotiations.").

Further, Objector Walpin' s interest in ending this litigation to prevent Verizon from incurring further litigation expenses is not a legally protectable interest that belongs to him. *See Zara Contracting Co. v. City of Glen Cove*, 22 Misc. 2d 279, 280, 197 N.Y.S.2d 940, 940 (N.Y.

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the underlying subject matter of the action'" to warrant intervention. *Id.* (quoting *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004)).

Sup. Ct., Nassau Cnty. 1960) (denying motion to intervene brought by taxpayer because he differed with municipality over how litigation should be handled, holding that "petitioner may not interfere with [government officials'] prerogative to manage the affairs of the city duly intrusted [sic] to them by the voters…"); *see also Floyd v. City of N.Y.*, 302 F.R.D. 69, 101 (S.D.N.Y. 2014) ("It is uncontroverted that the interest Rule 24(a) requires 'must be based on a right which belongs to the proposed intervenor…'"). And general concern and interest in the outcome of a case is also insufficient to warrant intervention because "'[a]ny other rule could result in allowing each [class member] to intervene and voice his views which would lead to a most chaotic situation.'" *Spota v. Cnty. of Suffolk*, No. 04268/2012, 2012 N.Y. Misc. LEXIS 4633, at *20 (N.Y. Sup. Ct., Suffolk Cnty. Sept. 25, 2012) (quoting *Zara Contracting Co.*, 22 Misc. 2d at 280, 197 N.Y.S.2d at 940). Similar to the movants whose intervention motions were denied in *Spota* and *Zara Contracting Co.*, here Objector Walpin has no cognizable interest in deciding how Verizon's duly elected directors handle this litigation.

Additionally, Verizon's litigation costs associated with this Action are being assumed directly by Verizon or its insurance carrier, not Objector Walpin. Thus, no "direct and substantial" personal financial interest of Objector Walpin will be advanced by saving Verizon money on its legal bill; to the extent such legal costs are indirectly absorbed by Verizon stockholders, any infinitesimal financial impact such a cost would have on Objector Walpin individually is clearly insufficient to constitute a "real and substantial interest." *See Chevron*, 2011 U.S. Dist. LEXIS 57573, at *9 (movant's financial interest in recovering on fee agreement "which at best gives [movant] a right to collect from his clients a share of any proceeds of the Judgment that eventually may be collected on their behalf…" did not constitute a sufficient interest to warrant intervention*); see also Palmer v. Readers' Digest Ass'n*, No. 84 Civ. 8397

(CSH), 1989 U.S. Dist. LEXIS 10882, at *3 (S.D.N.Y. Sept. 13, 1989) (finding financial interest that was "contingent upon a future recovery" did not constitute a "significant" interest for purposes of intervention). Indeed, in a case directly on point, the Court in *Moore v. Verizon Communications, Inc.* denied a motion for intervention brought by a company that was required to indemnify Verizon for the attorneys' fees Verizon agreed to pay to settle a class action lawsuit. 2013 U.S. Dist. LEXIS 15609, at *41-42. The movant sought to intervene for the purpose of objecting to Class Counsels' fee application. *Id.* at *13. The court denied the motion, reasoning that the movant did not have "a significant protectable interest in the amount of attorneys' fees and costs that the Court approves as part of the settlement." *Id*. at *41-42. If a movant that was on the hook for upwards of $7.5 million in attorneys' fees lacked a "significant protectable interest" warranting intervention, Objector Walpin clearly lacks such an interest here. Accordingly, because Objector Walpin has failed to demonstrate that the interest he seeks to protect is "real and substantial," his motion to intervene must be denied.

4. Objector Walpin Affirmatively Decided To Be Bound By Any Judgment In This Action And Should Not Now Be Allowed To Intervene

N.Y. C.P.L.R. § 1012(a)(2) also requires that a person seeking to intervene "is or may be bound by the judgment[.]" Here, the only reason that Objector Walpin will be bound by any judgment approving the Settlement is because he affirmatively decided to remain in the Class rather than exercise his right to opt-out. Objector Walpin should not be allowed to invoke the protection afforded by N.Y. C.P.L.R. § 1012(a) when he previously declined to exercise his right to avoid being bound by any judgment in this Action. *See Horton*, 1994 U.S. Dist. LEXIS 21394, at *23. In *Horton*, the court denied a motion to intervene brought by individuals who were settlement class members and held that because they had been provided with the opportunity "to opt out of the settlement class …[they] cannot claim that the disposition of this

action would unduly impede or impair their interests if intervention were denied." *Id*.; *see also Roberts v. Heim*, No. C-84-8069 TEH, 1989 U.S. Dist. LEXIS 19086, at *6 (N.D. Cal. Mar. 30, 1989) (noting that prosecution of action would not destroy proposed intevenors' rights where "[t]he proposed intervenors can exercise their right to opt out of the litigation and thereby avoid being bound by the judgment."); *Alaniz v. Cal. Processors, Inc.*, 73 F.R.D. 269, 289 (N.D. Cal. 1976) (same). "As [a] settlement class member[], [Objector Walpin] already had the right to opt out of the settlement class or appear through counsel. Thus, denial of the intervention motion would in no way prevent [him] from protecting [his] rights." *Horton*, 1994 U.S. Dist. LEXIS 21394, at *24; *see also Officers for Justice v. Civil Serv. Comm'n*, 473 F. Supp. 801, 829-30 (N.D. Cal. 1979) (finding necessity for intervention was not compelling where individuals seeking intervention had "already been permitted to present their objections to the court at the fairness hearing, and the court has given them serious consideration…").

In sum, Objector Walpin has failed to satisfy any of the requirements for intervention under N.Y. C.P.L.R. § 1012(a), and his motion must be denied.

III. CONCLUSION

Despite having already been afforded with ample opportunity to object to the Settlement of this Action, Objector Walpin now burdens the Court and the parties with baseless motion practice. Objector Walpin plainly lacks standing to move for summary judgment pursuant to N.Y. C.P.L.R. § 3212, *Spota,* 110 A.D.3d at 787, 973 N.Y.S.2d at 660, and even if he had standing, his motion is premature as issue has not been joined. *See Rochester,* 65 N.Y.2d at 101, 479 N.E.2d at 815, 490 N.Y.S. at 179. Objector Walpin's summary judgment motion also fails on the merits, as he has failed to introduce any evidence whatsoever to eliminate material issues of fact from the case. *See supra* § II.C. Objector Walpin has also failed to satisfy any of the

requirements for intervention pursuant to N.Y. C.P.L.R. § 1012. *See supra* § II.D. Accordingly, the instant motion should be denied in its entirety with prejudice.

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Respectfully submitted,

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