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 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

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I. INTRODUCTION

Plaintiff respectfully submits this brief in support of her motion for leave to renew and reargue her previously filed motion for Class Certification, Final Approval of Settlement and for an Award of Attorneys' Fees and Expenses ("Final Approval Motion," Doc. #29).[1] On December 19, 2014, this Court issued an order denying final approval ("Final Approval Order," Doc. #72) of the proposed settlement (the "Settlement") embodied in the Stipulation and Agreement of Compromise, Settlement, and Release between the parties (the "Stipulation") (Doc. #11). Plaintiff brings this combined motion for leave to reargue and leave to renew pursuant to N.Y. C.P.L.R. 2221(f). The portion of the motion for leave to renew is governed by N.Y. C.P.L.R. 2221(e) and based upon new facts that could not have reasonably been offered on the prior motion which would change the prior determination. The portion of the motion for leave to reargue is governed by N.Y. C.P.L.R. 2221(d) and brought on the grounds that there were matters of fact and law overlooked or misapprehended by the Court in determining the prior motion.

The Settlement in this action provided two categories of material benefits to Verizon stockholders. First, for a period of three years, Verizon Communications, Inc. ("Verizon" or the "Company") agreed to obtain a fairness opinion from an independent financial advisor if the Company engages in a transaction involving the sale to a third party purchaser or spin-off of assets of Verizon Wireless having a book value in excess of $14.4 billion (*i.e.*, approximately 5% of the $288.9 billion implied equity value of Verizon Wireless) ("Fairness Opinion Requirement"). Second, the Settlement required Verizon to disseminate Supplemental Disclosures (defined below) to Verizon stockholders which were included in the Form

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

PRER14A filed with the U.S. Securities and Exchange Commission ("SEC") on December 10, 2013 (the "Definitive Proxy") and attached as Exhibit A to the Stipulation dated July 31, 2014. These Supplemental Disclosures provided stockholders with material information that had been omitted from the Preliminary Proxy and allowed stockholders to cast an informed vote on this highly complex Transaction.

In the Final Approval Order, the Court specifically found that neither the Fairness Opinion Requirement nor the Supplemental Disclosures provided a material benefit to Verizon stockholders. Final Approval Order at 5, 13. In reaching this result, however, the Court relied upon the expert opinion of Professor Sean J. Griffith ("Prof. Griffith"), in the form of a written affidavit he submitted just five court days before the final approval hearing and oral testimony he gave at the hearing, without providing Plaintiff the opportunity to retain an expert to rebut Prof. Griffith's conclusions or conduct cross-examination. Indeed, on its own initiative, the Court asked questions and elicited testimony from Prof. Griffith at the final approval hearing. Plaintiff, given adequate opportunity, 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 evaluate Prof. Griffith's opinion and the Court's Final Approval Order. Contrary to Prof. Griffith's opinion, Prof. Lubben has submitted an affidavit ("Lubben Aff.")[2] which rebuts the previously relied upon opinion of Prof. Griffith and explains that the Fairness Opinion Requirement provides a twofold material benefit by making "shareholder protection mandatory" and by providing "broader valuation information" to Verizon's independent directors upon which they can make a fully informed decision. Ex. 1, Lubben Aff.,

[2] Attached as Exhibit 1 to the Affirmation of Juan E. Monteverde in Support of 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 filed concurrently herewith.

¶¶ IV.16, IV.26. Thus, the Court should grant Plaintiff leave to renew the Final Approval Motion to consider Prof. Lubben's expert testimony and cure undue prejudice to Plaintiff, as Prof. Lubben's testimony was not and could not have reasonably been obtained by the time of the final approval hearing.

Additionally, the Court overlooked or misapprehended matters of fact and law which demonstrate the significance of both the Fairness Opinion Requirement and the Supplemental Disclosures. Specifically, the Court overlooked and failed to apprehend that the true value of the Fairness Opinion Requirement does not lie in the ultimate conclusion reached by an independent financial advisor, as the "real informative value of the banker's work is not in its bottom-line conclusion, but in the valuation analysis that buttresses that result." *In re Pure Res., Inc. S'holders Litig.*, 808 A.2d 421, 449 (Del. Ch. 2002). Additionally, the Court overlooked or misapprehended the value of the Supplemental Disclosures, which must be considered in the proper context to accurately evaluate how they altered the "total mix" of information available to stockholders. *Abrons v. Maree*, 911 A.2d 805, 816 (Del. Ch. 2006) (recognizing that "[certain] 'key assumptions' may be material" depending upon the circumstances). Thus, as detailed below, either the Fairness Opinion Requirement or the Supplemental Disclosures standing alone conferred a material benefit to Verizon and its stockholders sufficient to justify approval of the Settlement, as well as an award of attorneys' fees. *See In re Pfizer Inc. S'holder Derivative Litig.*, 780 F. Supp. 2d 336, 342 (S.D.N.Y. 2011) (corporate governance reforms "provide considerable corporate benefits to [the company] and its shareholders, in the form of a significantly improved institutional structure for detecting and rectifying the types of wrongdoing that have [. . .] caused extensive harm to the company"); *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."); *Brody v. Catell*, 16 Misc. 3d 1105(A), 841 N.Y.S. 2d 825, 2007 N.Y. Misc. LEXIS 4647, at *23 (N.Y. Sup. Ct. Kings Cnty. June 27, 2007) ("The value to shareholders of obtaining additional disclosure of information is well-recognized.") (citing *Rosenfeld v. Bear Stearns*, 237 A.D.2d 199, 655 N.Y.S.2d 473 (1st Dep't 1997)). Consequently, the Court should grant Plaintiff leave to reargue the Final Approval Motion to consider these matters of fact and law which were overlooked or misapprehended by the Court.

II. FACTUAL BACKGROUND

A. The Transaction

On September 2, 2013, Verizon publicly announced that it had entered into a definitive stock purchase agreement with Vodafone Group Plc and Vodafone 4 Limited (collectively, "Vodafone" or "VODA") to acquire Vodafone's subsidiaries holding as their principal assets of a 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").

Even though the Transaction was a purchase of a minority interest in Verizon's wireless business, it was far more complex than most corporate transactions. It was the third-largest acquisition of any type (including purchases of entire corporations) in history. The consideration paid consisted of approximately $59 billion in cash, $60 billion in Verizon stock (subject to a collar arrangement), $5 billion in notes payable to VODA, a 23.1% stake in Vodafone Omnitel N.V. ("Omnitel Interest," with an agreed-upon value of $3.5 billion) and other consideration

estimated at approximately $2.5 billion. ¶ 2;[3] Keath Aff. ¶ 7.[4] Verizon financed the cash portion of the offer through the largest corporate bond issuance on record. Keath Aff. ¶ 7. As a result of this Transaction, Verizon more than doubled its long term debt from $41.8 billion to $107.6 billion, increasing its debt to asset ratio from 23 at the end 2012 to 48 by the close of the Transaction. Luben Aff. ¶¶ IV.3, IV.5. Notably from a disclosure standpoint, the interest purchased was not a minority interest in a separately traded public company, but rather was a non-public business unit lacking a stand-alone trading price to serve as a barometer of its corporate value. Keath Aff. ¶ 7.

The unusual complexity of the Transaction made it difficult for Plaintiff and other Verizon stockholders to properly evaluate. One of the analytical complexities resulted from the fact that the Transaction implicitly valued Verizon's ownership interest in Verizon Wireless alone at a higher value than Verizon as a whole, despite the fact that Verizon holds other assets in addition to its majority interest in Verizon Wireless. In other words, this valuation resulted in a ***negative valuation for all of Verizon's other assets, including its corporate and wireline assets***. Keath Aff. ¶ 9.

B. Background of the Litigation

Plaintiff brought the Action as a class 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 allegedly excessive and dilutive

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[3] Unless otherwise noted, all "¶ __" references refer to the Amended Class Action Complaint, filed October 22, 2013 (Doc. #2).

[4] The Affidavit of M. Travis Keath in Support of the Final Approval Motion, filed September 30, 2014 (Doc. #25) is referred to as the "Keath Aff."

price in the Transaction in order to acquire the Vodafone subsidiaries and by issuing a false and misleading Preliminary Proxy Statement ("Preliminary Proxy") 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.

On October 8, 2013, Verizon filed a 94 page (without exhibits) Preliminary Proxy with the SEC seeking stockholder approval of the Transaction, which provided details of the terms and background of the Transaction and certain analyses performed by JPMorgan and Morgan Stanley in support of the Transaction. ¶ 7. After carefully reviewing the Preliminary Proxy and consulting with a financial expert, Plaintiff determined that Defendants failed to disclose material information in the Preliminary Proxy necessary for Verizon stockholders to cast an informed vote. Keath Aff. ¶¶ 4-5. As a result, on October 22, 2013, Plaintiff filed the Amended Class Action Complaint and asserted additional claims for breaches of fiduciary duty resulting from Defendants' failure to disclose material information concerning the Transaction in the Preliminary Proxy. Monteverde Aff. ¶ 9.[5] Plaintiff's complaint pointed to several material omissions in the Preliminary Proxy which made it false and misleading. These misrepresentations and omissions centered on: (1) the background of the Transaction; (2) the underlying methodologies, key inputs, assumptions, and multiples relied upon and observed by JP Morgan and Morgan Stanley in evaluating the fairness of the Transaction; and (3) the financial projections set forth in the Preliminary Proxy. *See* ¶¶ 44-72; Monteverde Aff. ¶¶ 41-43.

Following document discovery, two depositions, extensive consultation with experts, and adversarial negotiations, Defendants agreed to provide supplemental disclosures in a Definitive

[5] The Affirmation of Juan E. Monteverde in Support of Class Certification, Final Approval of Settlement and for an Award of Attorneys' Fees and Expenses, filed November 14, 2014 (Doc. #31) is referred to as the "Monteverde Aff."

Proxy containing specific information Plaintiff sought to have disclosed during the prosecution of the Action ("Supplemental Disclosures"). In addition, the Verizon board of directors (the "Board") agreed to certain corporate governance reforms in the form of the Fairness Opinion Requirement, which would require it to obtain a fairness opinion from an independent financial advisor in conjunction with any transaction involving assets of Verizon Wireless having a book value in excess of $14.4 billion (*i.e.*, approximately 5% of the implied equity value of Verizon Wireless). The parties executed a Memorandum of Understanding (the "MOU") setting forth the principal terms of the Settlement on December 6, 2013. Stipulation at 3-4; Monteverde Aff. ¶ 13.

Subsequently, pursuant to the MOU, Verizon filed its Definitive Proxy statement on Schedule 14A with the SEC on December 10, 2013 (the "Definitive Proxy") containing the Supplemental Disclosures. Verizon stockholders then voted to approve the issuance of shares for the Company to acquire Vodafone's 45% interest in Verizon Wireless on January 28, 2014, and the Transaction closed on February 21, 2014.

Plaintiff and her counsel ("Plaintiff's Counsel"), after consultation with their financial experts, determined that the Settlement of the Action on the terms reflected in the Stipulation is fair, reasonable, adequate and in the best interests of Verizon's stockholders. Counsel for the parties thereafter negotiated the terms of the Stipulation, and Defendants agreed not to oppose any fee application not exceeding $2 million for Plaintiff's Counsel. This amount was negotiated at arm's length with Defendants only after agreement was reached by the parties concerning all other terms. On July 31, 2014, the parties to the Action filed the Stipulation with the Court.

The Settlement embodied in the Stipulation recognizes the substantial and valuable benefits provided to Verizon stockholders as a result of the vigorous prosecution of this Action, which warranted approval of the Settlement as fair, reasonable and adequate.

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. Doc. #27. The Court also ordered that the Notice of Pendency of Class Action, Proposed Settlement of Class Action, Fairness Hearing, and Right to Appear ("Notice") be mailed by first class mail to all record stockholders of Verizon. The Notice was sent to approximately 2.3 million Verizon stockholders, and three stockholders, Jonathan Crist ("Crist), Gerald Walpin ("Walpin") and James King ("King") filed objections to the requested award of attorneys' fees, but not one single objection was received to the terms of the Settlement itself.[6] Further, less than 250 stockholders, representing 0.0063% of the outstanding shares for the Settlement Class, requested to opt-out of the Settlement.[7]

On November 14, 2014, Plaintiff filed her Final Approval Motion. Doc. #29.

On November 21, 2014 – just five court days before the final approval hearing, stockholder Crist filed his objection to the award of attorneys' fees. Doc. #57. In support of this objection, Crist filed the fifteen page Declaration of Prof. Griffith ("Griffith Decl."), offering his opinion that the Fairness Opinion Requirement and the Supplemental Disclosures did not confer

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[6] One of the bases for objecting to the fees by each of the stockholders was their contention that the Settlement did not confer a benefit on the Class.

[7] 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.

a benefit on Verizon stockholders sufficient to support an award of attorneys' fees. Doc. #55 ¶ 29.

On December 2, 2014 the Court held a hearing on Plaintiff's Final Approval Motion. Objectors Walpin and Crist were provided with an opportunity to present their arguments at length. Moreover, Prof. Griffith was permitted to provide further expert opinion and was questioned by the Court, but Plaintiff was not given the opportunity to cross-examine him. Final Approval Tr. of Hr'ng 44:19-53:7, Dec. 2, 2014.[8] Indeed, on its own initiative, the Court questioned Prof. Griffith regarding his expert opinion on the Settlement, but did not provide an opportunity for Plaintiff to cross-examine Prof. Griffith. *Id.*

On December 19, 2014 the Court issued the Final Approval Order. Plaintiff was served written notice of entry of the Final Approval Order on January 5, 2015. Doc. #73. The Court's analysis in the Final Approval Order 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. Since the date of the hearing and the issuance of the Final Approval Order, Plaintiff has had the opportunity to retain Prof. Lubben, who reviewed Prof. Griffith's expert opinions and prepared an affidavit offering his expert opinion regarding the benefit conferred on Verizon stockholders by the Fairness Opinion Requirement, and refuting the opinions and testimony offered by Prof. Griffith. *See generally* Ex. 1, Lubben Aff.

C. The Settlement Conferred Material Benefits on Verizon Stockholders

First, the Settlement provided that for three years, if Verizon engages in a transaction involving the sale to a third party purchaser or spin-off of assets of Verizon Wireless having a

[8] Attached as Exhibit 2 to the Affirmation of Juan E. Monteverde in Support of 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 filed concurrently herewith.

book value of in excess of $14.4 billion,[9] Verizon shall obtain a fairness opinion from an independent financial advisor (or in the case of a spin-off, financial advice from an independent financial advisor). The choice of the independent financial advisor shall be approved or ratified by a majority of the independent directors on the Board, and such approval and/or ratification shall be duly reflected in the minutes of the corporation. Stipulation at 8-9.

Second, the Settlement required Verizon to disseminate the Supplemental Disclosures to Verizon stockholders via the Definitive Proxy filed with the SEC on December 10, 2013. Monteverde Aff. ¶ 13. This allowed stockholders to cast an informed vote on this highly complex Transaction. As detailed below and in the Keath Affidavit, these disclosures contained, *inter alia*, "the key inputs and range of ultimate values generated by [the] analyses" performed by Verizon's financial advisors, which Courts have recognized "must also be fairly disclosed." *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 203-04 (Del. Ch. 2007).

Both the Fairness Opinion Requirement and the Supplemental Disclosures constituted material benefits to Verizon and its stockholders which justify approval of the Settlement, as well as an award of attorneys' fees. *See In re Pfizer Inc. S'holder Derivative Litig.*, 780 F. Supp. 2d 336, 342 (S.D.N.Y. 2011) (corporate governance reforms "provide considerable corporate benefits to [the company] and its shareholders, in the form of a significantly improved institutional structure for detecting and rectifying the types of wrongdoing that have [. . .] caused extensive harm to the company"); *In re Compellent Techs., Inc. S'holder Litig.*, No. 6084-VCL, 2011 Del. Ch. LEXIS 190, at *79-80 (Del. Ch. Dec. 9, 2011) (modification of deal provisions

[9] Representing approximately 5% of $288.9 billion, which is the implied equity value of 100% of Verizon Wireless that is referenced under the heading "Transaction Overview" on page 38 of the Definitive Proxy.

and supplemental disclosure justified approval of settlement and an award of $2.3 million in attorneys' fees).

III. ARGUMENT

A. The Court Should Grant Plaintiff Leave to Renew Her Final Approval Motion

N.Y. C.P.L.R. 2221(e) provides the standards applicable to motions for leave to renew, as follows:

> (e) A motion for leave to renew:
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> 1. shall be identified specifically as such;
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> 2. 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; and
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> 3. shall contain reasonable justification for the failure to present such facts on the prior motion.

Under these standards, a Court "has broad discretion on a motion to renew and the fact that the additional evidence was available at the time of the original motion is not dispositive." *Scannell v. Mt. Sinai Med. Ctr.*, 256 A.D.2d 214, 214, 683 N.Y.S.2d 18, 19 (1st Dep't 1998). This is particularly true where the additional information was raised by the judge. *Id.*; *see also Joseph v. Bd. of Educ. of the City of N.Y.*, 91 A.D.3d 528, 529, 938 N.Y.S.2d 3, 4 (1st Dep't 2012). "In such circumstances, it is error for the court not to consider the additional information." *Scannell*, 256 A.D.2d at 214, 683 N.Y.S.2d at 20 (citing *Bevona v. Super. Maintenance, Co.*, 204 A.D.2d 136, 138, 611 N.Y.S.2d 193, 195 (1st Dep't 1994). Thus, a motion to renew should be granted "even where the newly submitted facts were known at the time of the original motion, provided that the movant has a reasonable excuse for failing to submit the material originally." *Telep v. Republic Elevator Corp.*, 267 A.D.2d 57, 58, 699 N.Y.S.2d 380, 382 (1st Dep't 1999).

As set forth above, objector Crist submitted the Griffith Declaration just five court days prior to the final approval hearing, which offered Prof. Griffith's expert opinion on the merits of the Fairness Opinion Requirement. Griffith Decl. ¶¶ 13-20. Then, Prof. Griffith was not only permitted to offer his expert opinion at the final approval hearing, but the Court, on its own initiative, questioned Prof. Griffith with respect to his opinions. Ex. 2, Final Approval Tr. of Hr'ng 44:19-53:7, Dec. 2, 2014. As a result, Plaintiff was unable to retain an expert to refute Prof. Griffith's expert opinions on such short notice, and was not given the opportunity to cross-examine Prof. Griffith at the final approval hearing. Under such circumstances, Plaintiff was reasonably justified in not previously offering the affidavit of Prof. Lubben.

The expert opinion of Prof. Lubben specifically refutes both Prof. Griffith's opinions and the Court's reasoning in the Final Approval Order. Therefore, consideration of Prof. Lubben's expert opinion and analysis would change the prior determination. Specifically, Prof. Griffith opined that: the Verizon Board would have likely obtained a fairness opinion, regardless of the Fairness Opinion Requirement (Griffith Decl. ¶¶ 14-15); and a transaction of sufficient magnitude to trigger the Fairness Opinion Requirement was highly unlikely (i*d.* ¶ 17), and would increase costs without providing any benefit. (*id.* ¶¶ 18-19). Following Prof. Griffith's reasoning, the Court held that the Fairness Opinion Requirement "locks in an additional layer of cost without any assurance that real value will be obtained for expenditure." Final Approval Order at 13. The Court further stated that the Fairness Opinion Requirement "may actually operate to curtail the Company's directors' flexibility and ability to exercise their collective business experience in connection with minimal (5%) asset dispositions." *Id.*

The opinion of Prof. Lubben specifically rebuts each of these erroneous points. First, Prof. Lubben demonstrates that as a result of the Transaction Verizon more than doubled its long

term debt from $41.8 billion to $107.6 billion, increased its debt to asset ratio from 23 to 48 and suffered a down grade to its credit rating. Luben Aff. ¶¶ IV.3-5. Moreover, Prof. Lubben demonstrates that Verizon's ten most recent bond offerings were callable, and Verizon conducted an issuance of callable preferred shares paying a 5.9% dividend rate, effectively giving the Board the option to liquidate assets and reduce debt. *Id.* ¶¶ IV.7-9. Consequently, Prof. Lubben opined that "the possibility that certain non-core assets might be sold off in the coming years appears quite real."[10] *Id.* ¶ IV.9. Prof. Lubben further opined, consistent with Verizon's own counsel, that "[s]mall---scale asset dispositions do not routinely utilize outside valuation professionals." *Id.* ¶ IV.11. In fact, Prof. Lubben opined that Prof. Griffith's hypothesis to the contrary is "pure speculation." *Id.* ¶ IV.22.

Prof. Lubben then explained that the disposition of as little as 5% of the Company's assets is not likely to be subject to either stockholder approval or judicial scrutiny. *Id.* ¶¶ IV.12, IV.14. Consequently, Prof. Lubben opines that Verizon stockholders will benefit from the Fairness Opinion Requirement "from the knowledge that small transactions, which they might not otherwise even hear about, will be tested and shareholder value maximized." *Id.* ¶ IV.14. Moreover, Prof. Lubben explains that this benefit consists of two components. First, it assures

[10] Indeed, just this week Verizon announced that it is finalizing a deal to sell more than $15 billion in assets, including cellphone towers and parts of its wireline business. Thomas Gryta & Ryan Knutson, *Verizon Near Deals to Sell $15 Billion in Assets*, The Wall Street Journal, February 2, 2015, http://www.wsj.com/articles/verizon-near-deals-to-sell-over-10-billion-in-assets-1422904953. Verizon CEO Lowell McAdam specifically noted that "[d]ivesting assets could help Verizon repurchase some shares it issued after it announced the Vodafone deal," and it has been reported that "[t]he company has been exploring steps to speed up its debt repayment in recent months." *Verizon close to deal to sell over $10 billion in assets: WSJ*, Reuters, February 2, 2015, http://www.reuters.com/article/2015/02/02/us-verizon-comms-divestiture-idUSKBN0L622920150202. Such a transaction, or similar ones that are anticipated to occur in the near future, will likely trigger the Fairness Opinion Requirement, providing shareholders with the substantial benefits identified by Prof. Lubben and Plaintiff's Counsel.

stockholders that the independent directors will be fully informed before agreeing to an asset sale. *Id.* ¶¶ IV.15-16. Second, it makes "shareholder protection mandatory." *Id.* ¶ IV.26. Finally, Prof. Lubben refutes the Court's prior conclusion that the Fairness Opinion Requirement restricts the Board's ability to exercise its business judgment. Indeed, he notes that the adoption of the Fairness Opinion Requirement – which has already occurred – was an informed business judgment of the Board which should not be scrutinized by the Court. *Id.* ¶¶ IV.27-29. In short, Prof. Lubben opines that the 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.* ¶ IV.26. These opinions are directly contrary to the opinions offered by Prof. Griffith and relied upon by the Court, which if considered "would change the prior determination." N.Y. C.P.L.R. 2221(e)(2). Consequently, the Court should grant Plaintiff leave to renew her Final Approval Motion, and 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.").

B. The Court Should Grant Plaintiff Leave to Reargue her Motion for Final Approval

N.Y. C.P.L.R. 2221(d) provides the standards applicable to motions for leave to reargue, as follows:

> (d) A motion for leave to reargue:
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> 1. shall be identified specifically as such;
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> 2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and

> 3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals.

Additionally, where a motion to reargue is combined with a motion to renew, N.Y. C.P.L.R. 2221(f) provides:

> (f) A combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought. The court, in determining a combined motion for leave to reargue and leave to renew, shall decide each part of the motion as if it were separately made. If a motion for leave to reargue or leave to renew is granted, the court may adhere to the determination on the original motion or may alter that determination.

Under these standards, a "motion for reargument is addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision." *Long v. Long*, 251 A.D.2d 631, 631 (2d Dep't 1998) (citing *Rodney v. N.Y. Pyrotechnic Prods., Co.*, 112 A.D.2d 410, 411, 492 N.Y.S.2d 69, 70 (2d Dep't 1985)); *see also Tan v. Liang*, No. 13456/11, 2013 N.Y. Misc. LEXIS 4621 (N.Y. Sup. Ct. Queens Cnty. Sept. 24, 2013).

In the present case, Plaintiff timely filed this motion which identifies how the Court overlooked or misapprehended the benefits conferred on Verizon stockholders by the Settlement. Therefore, the Court should exercise its discretion and grant Plaintiff leave to reargue her Final Approval Motion, and 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.").

1. The Court Overlooked or Misapprehended Matters of Law and Fact Regarding the Benefits Conferred by the Fairness Opinion Requirement.

Specifically, the Court held that the requirement for a fairness opinion "may actually operate to curtail the Company's directors' flexibility and ability to exercise their collective business experience in connection with minimal (5%) asset dispositions." Final Approval Order at 13. This holding misapprehends and overlooks the fact that a disposition of over ***$14 billion*** in assets can never be considered "minimal." Moreover, the Court overlooked the fact that the corporate and wireline assets most likely to be sold to reduce debt and improve Verizon's credit rating had an implied ***negative value*** in the Transaction. It is therefore imperative that the Board be required to obtain independent financial advice in connection with the future sale of such assets, which management had previously implicitly valued as less than worthless. The Fairness Opinion Requirement achieves this important protection for Verizon stockholders, and thereby confers a significant benefit to the Class. Ex. 1, Lubben Aff. ¶¶ 13-17.

The Court further overlooked or misapprehended that Delaware courts have held the "real informative value of the banker's work is not in its bottom-line conclusion, but in the valuation analysis that buttresses that result." *Pure Res.*, 808 A.2d at 449. In other words, the Fairness Opinion Requirement does not restrict the independent directors' flexibility, but rather assures that the Board will be provided with independent valuation information, rather than being forced to rely on management, which may be more concerned with overall indebtedness. Ex. 1, Lubben Aff. ¶¶ 15-16.

The true value of the Fairness Opinion Requirement, which was overlooked or misapprehended by the Court, is illustrated by the way in which Verizon management valued the Omnitel Interest in the Transaction underlying this Action. As discussed in more detail below, in

the Definitive Proxy, Defendants disclosed for the first time that the Board had not obtained a fairness opinion with regards to the value of the Omnitel Interest which Verizon management valued at $4 billion. Rather than having a fairness opinion or valuation done by one of its three investment banks, in order to get the deal done, Verizon management agreed to a compromise valuation of $3.5 billion, resulting in a 12.5% or $500 million discount. A similar 12.5% reduction in the sale of assets covered by the Fairness Opinion Requirement would result in the loss of over $1.75 billion in stockholder value. Whether such a discount is reasonable should be determined by the Board only after it is fully informed by independent financial advisors.

2. The Court Overlooked or Misapprehended Matters of Law and Fact Regarding the Material Benefits Conferred by the Supplemental Disclosures

Plaintiff also obtained the Supplemental Disclosures in the Settlement which provided stockholders with material information they needed to cast a fully informed vote on the Transaction. In analyzing the materiality of the Supplemental Disclosures, the Court overlooked or misapprehended the context in which the Supplemental Disclosures were made. A fact is material where there is a "'substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.'" *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)). Whether a fact "alters the total mix of information" can only be evaluated by assessing the additional disclosures in their proper context. *See Raul v. Astoria Fin. Corp.*, No. 9169-VCG, 2014 Del. Ch. LEXIS 103, at *24 (Del. Ch. June 20, 2014); *Abrons v. Maree*, 911 A.2d 805, 816 (Del. Ch. 2006) (recognizing key assumptions may be material "in some circumstances," while holding they were not material in an all cash tender offer).

In this case, the complexity of the Transaction presented stockholders with inherent difficulties in reviewing the financial advisors' fairness opinion. Specifically, the valuation of the Transaction implicitly resulted in a negative valuation for all of Verizon's other assets, including its corporate and wireline assets. Additionally, the Transaction resulted in the purchase of a minority interest in a non-publicly traded entity and was financed through four disparate types of consideration. It is in this context that the Supplemental Disclosures must be evaluated for materiality. Furthermore, the Court overlooked or failed to recognize that the work Plaintiff's Counsel and their financial experts conducted to independently vet the merits and fairness of this complex Transaction provided a "sufficient and meaningful" benefit to shareholders. *See Brody*, 16 Misc. 3d 1105(A), 841 N.Y.S. 2d 825, 2007 N.Y. Misc. LEXIS 4647, at *22-23 ("The Settlement does not afford a monetary return to the plaintiff class. However, through the efforts of plaintiffs' counsel, the merits of the proposed merger have been independently vetted and revealed to the class members, who have determined that it is desirable and provides a favorable return on their investment. Such benefit is both sufficient and meaningful.").

In denying approval of the Settlement, the Court focused solely on four categories of disclosures: the valuation of the Omnitel Interest; the comparable companies analysis; the comparable transactions analysis; and the tabular presentation of valuation ranges. Final Approval Order at 5-11. This analysis ignored other Supplemental Disclosures made to stockholders to enable them to cast an informed vote on the Merger. Nevertheless, the Court overlooked or misapprehended the significance of even these four categories of Supplemental Disclosures, which standing alone provided a material benefit to stockholders sufficient to support final approval of the Settlement.

First, the Court claimed that the additional disclosure that the $3.5 billion valuation of the Omnitel Interest was the result of a compromise between Verizon and Vodaphone was "trivial." Final Approval Order at 7. The Court further found that since JP Morgan and Morgan Stanley stated in their fairness opinions that they did not value the Omintel Interest, investors should have known the parties valued the Interest themselves, "[since] [w]here else could the value have come from?" Final Approval Order at 8. The Court's statement by itself demonstrates the misleading nature of the Preliminary Proxy. Verizon was not only advised by JP Morgan and Morgan Stanley, but also by Guggenheim Securities. The Preliminary Proxy, however, was silent regarding whether this interest was valued by Guggenheim Securities. ¶ 36. As a result of this Supplemental Disclosure, stockholders were no longer required to infer or speculate whether the $500 million difference in valuation of the Omnitel Interest was the product of the analysis of any one of the three investment advisors, or merely the result of an arbitrary decision and valuation made solely by management. And while the Court questioned why anyone would be concerned "with whether the transaction was valued by the parties alone, or only after consultation with their financial advisors," Final Approval Order at 7, it failed to recognize that because Verizon stockholders were specifically asked to rely upon the expertise of the bankers and their analyses in deciding how to vote on the Transaction, it was imperative that stockholders were clearly informed that Omnitel's valuation figure came directly from the companies themselves and not from any of Verizon's three financial advisors. In other words, the source of this critical valuation metric was significant in this case.

Similarly, the Court found that the disclosure of information that allowed stockholders to assess whether AT&T was correctly excluded from the comparable companies analysis was immaterial. Final Approval Order at 8. This holding, however, completely disregards the fact

that the Transaction implied a negative equity value for Verizon's wireline segment. Since AT&T is one of the largest participants in the wireline telecom market, this additional detail takes on great significance, and alters the total mix of information for stockholders, both in assessing the value ascribed to Verizon Wireless and the Verizon stock issued as a part of the consideration in the Transaction. *See* Keath Aff. ¶ 9(c). Indeed, this court just recently approved a settlement in a stockholder class action based solely on the disclosure of additional information, specifically finding that the disclosure of "factors considered by the financial advisor in including or excluding companies in the Selected Companies Analysis," provided a material benefit to the class. *W. Palm Beach Police Pension Fund*, 2014 N.Y. Misc. LEXIS 4686, at *5.

The Court also found that the disclosure of operating and financial metrics used to compare Verizon Wireless to three other publicly traded companies, including EBITDA, firm value, and revenue estimates, was of no value to stockholders. Final Approval Order at 8. However, the Court's opinion was once again contrary to the conclusion reached by Judge Marcy Friedman of this court in another recent case, in which she found that such information was material to stockholders and warranted final approval of a settlement. *See W. Palm Beach Police Pension Fund*, 2014 N.Y. Misc. LEXIS 4686, at *5 (finding information as to the basis for financial advisor's calculation of EBITDA and range of discount rates used in determining range of implied value per share to be material to stockholders).

Likewise, due to the complexity of the Transaction, the additional detailed data regarding premiums paid in precedent minority buy-in transactions provided stockholders with quantifiable data from which they could for the first time observe, amongst other things, that (a) the most recent minority buy-in transaction took place at the highest premium in the sample, and (b) the

initial ownership interest percentage of the majority holder seems to have little impact on the premium ultimately paid for the minority interest. The Court found this to be "rudimentary information…available elsewhere." Final Approval Order at 9-10. The reading of a proxy on a $130 billion Transaction, however, should never be transformed into a "scavenger hunt to cull necessary information." *Eliasen v. Hamilton*, No. 81 C 123, 1987 U.S. Dist. LEXIS 1826, at *17 (N.D. Ill. Mar. 6, 1987) (citing *Gerstle v. Gamble-Skogomo, Inc.*, 478 F.2d 1281 (2d Cir. 1973)). By providing such information in tabular fashion regarding this highly complex Transaction, this Supplemental Disclosure provided a material benefit to stockholders.

Likewise, the Court overlooked Supplemental Disclosures which corrected inaccurate and misleading language pertaining to sellside analysts' estimates of the value for Voda's 45% stake in Verizon Wireless. Definitive Proxy at 42. The Preliminary Proxy indicated that such value indications "were not discounted back to the valuation date," implying that the "present value" of such indications would be lower than the stated amounts. Preliminary Proxy at 42. This language was misleading, however, because the amounts referenced already reflected present values, not future values, and therefore warranted no present value adjustment. Keath Aff. ¶ 11(b).

In sum, the Court misapprehended the materiality of the four categories of disclosures that it examined.

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court grant Plaintiff leave to renew and reargue her Final Approval Motion, and 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 to reargue simultaneously vacating the court's prior order and granting the relief previously sought).

Dated: February 3, 2015

Respectfully submitted,

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