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

NATALIE GORDON, On Behalf of Herself and Others Similar 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.

JONATHAN M. CRIST,

Nonparty Respondent.

Index No. 653084/2013

CLASS ACTION

Motion Seq. #006

JONATHAN M. CRIST'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S RENEWED MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES

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INTRODUCTION

Plaintiff's renewed motion for an award of attorneys' fees and expenses (Doc. 123) is premised on an inflated view of the benefits of the settlement that is not supported by the Appellate Division's order and has already been flatly rejected by this Court. While the Appellate Division found that there were minimal settlement benefits that were sufficient to *approve* the settlement, the court did not find that the benefits warranted the excessive $2 million in fees and expenses sought by class counsel. Instead, the Appellate Division noted that fees should be commensurate with the benefit achieved, with minimal benefit resulting in minimal fees. The Appellate Division remanded so that this Court could exercise its discretion to award attorneys' fees in the first instance.

Because the settlement benefit is nominal, the fees should be nominal. New York courts adhere to the principle that the degree of a plaintiff's success is the most important factor in determining the amount of an attorneys' fee award. As this Court is aware, it has a particularly important obligation to examine a fee request critically in the class-action context, where there is an "incentive [for] class counsel, in complicity with the defendant's counsel, to sell out the class by agreeing with the defendant to recommend that the judge approve a settlement involving a meager recovery for the class but generous compensation for the lawyers—the deal that promotes the self-interest of both class counsel and the defendant and is therefore optimal from the standpoint of their private interests." *Gordon v. Verizon Comms., Inc.*, No. 653084/13, 2014 N.Y. Slip Op. 33367 (Sup. Ct. Dec. 19, 2014) (quoting *Creative Montessori Learning Centers v. Ashford Gear LLC*, 662 F.3d 913, 918 (7th Cir. 2011)).

The Court already has made factual findings regarding the insignificant value provided to shareholders by the supplemental disclosures and fairness opinion required by the settlement. Those findings were made following plaintiff's initial motion for settlement approval and attorneys' fees and the objections filed by shareholders, including Jonathan M. Crist. The Court's finding of minimal benefit were not overturned but rather reinforced by the Appellate Division, which simply found them sufficient to warrant settlement approval under the particular circumstances of this case. Plaintiff has

not presented any new evidence that alters the Court's analysis. Accordingly, the findings this Court has already made should serve as the guidepost for this Court to sharply reduce the attorneys' fee award.

A $2 million fee award in a case where the only litigation was whether and how much the attorneys would get to extract from the shareholders they purport to represent would undermine public confidence in the judicial system and the value of legitimate shareholder actions. It would incentivize plaintiffs' attorneys further to threaten to hold up legitimate transactions absent payment of a ransom of attorneys' fees, along with the provision of meaningless supplemental disclosures to shareholders, a practice that serves no interests other than their own. To counter such incentives, Jonathan M. Crist respectfully asks this Court to award attorneys' fees of $1 or to otherwise significantly reduce the fees awarded to plaintiff's counsel from the request.

Mr. Crist relies upon this filing; and the supplemental declaration of Sean Griffith filed with this opposition as Exhibit 1 to the Affirmation of Avi Szenberg. In addition to these arguments, Crist adopts and incorporates by reference his amended objection to plaintiff's initial attorneys' fee motion and the evidence previously submitted to this Court, his opposition to plaintiff's motion to reargue and renew; and his arguments at the final approval hearing held on December 2, 2014, all of which are attached to the contemporaneously filed Affirmation of Avi Szenberg as Exhibits 2-6.

STATEMENT OF FACTS

On May 1, 2017, plaintiff filed (i) a motion seeking approval of a class action settlement filed on behalf of public shareholders of Verizon Communications, Inc. ("Verizon") to challenge a stock purchase agreement between Verizon and Vodafone, and (ii) a motion seeking an award of attorneys' fees and expenses totaling $2 million. This is the second round of such motions by the plaintiff. In the initial round in 2014, plaintiff similarly sought class-action settlement approval and fees and expenses of $2 million. (Doc. 29.) As this Court then observed, this suit follows in the ignoble tradition of the "over ninety seven percent" of public-company acquisitions that attract at least one shareholder lawsuit but rarely provide pecuniary relief to shareholders. *Gordon v. Verizon Comms., Inc.*, No.

653084/2013, 2014 N.Y. Slip Op. 33367 (U) (Sup. Ct. N.Y. County Dec. 19, 2014) (Doc. 72).

The settlement at issue provided Verizon shareholders with four "main" supplemental disclosures going to valuation of the transaction with Vodafone, while the others were "trivial or obviously redundant." *Id.* These "main" supplemental disclosures: (1) stated that the Omnitel valuation was the product of a negotiation between Verizon and Vodafone; (2) concerned the financial advisor's comparable companies analysis; (3) provided further detail of the financial advisor's comparable transactions analysis; and (4) provided a tabular presentation of valuation ranges for Verizon based on FV/EBITDA multiples. The settlement also requires the Verizon board to obtain a fairness opinion in the event of a transaction in which the company disposes of 5% (equal to $14.4 billion) of its assets through a sale or spin-off up to three years in the future. *Id.*

Objector Jonathan M. Crist, a shareholder member of the class then and now (Szenberg Aff. Ex. 3, Doc. 53), filed an objection to plaintiff's motion for preliminary approval of settlement and attorneys' fees in which he argued that no attorneys' fees should be awarded because no corporate benefit was created by the settlement. (Szenberg Aff. Ex. 2, Doc. 57.) He presented expert evidence (Szenberg Aff. Ex. 4, Doc. 55) that the promise to obtain a fairness opinion was not a material benefit to shareholders because the settlement created no obligation for Verizon to *disclose* any such fairness opinion to shareholders; that it was unlikely the provision would ever be triggered in a situation where the directors would not have asked for a fairness opinion anyway; that the provision could hurt shareholders by imposing unnecessary delay in a good-faith transaction; and that the supplemental disclosures provided no additional material benefit.

This Court agreed that the settlement disclosures provided "no legally cognizable benefit to the shareholder class, and cannot support a determination that the Settlement is fair, adequate, reasonable, and in the best interests of the class members." *Gordon*, 2014 N.Y. Slip. Op. 33367, at 13. Were it to approve the settlement, the Court found, "it would be an enabler of an unwarranted divestiture of shareholder rights by virtue of plaintiff's release, as well as a misuse of corporate assets were plaintiff's legal fees to be awarded." *Id.* at 15. The Court made this determination because the supplemental disclosures "individually and collectively fail to materially enhance the shareholders'

knowledge about the merger" but instead "are unnecessary surplusage added to a disclosure document already filled with much that is detail for the sake of detail … [and] provide no legally cognizable benefit to the shareholder class." *Id.* at 11. For its part, the fairness opinion requirement served to curtail the Verizon directors' flexibility and ability to employ their collective business experience in connection with minimal asset dispositions and imposed "an additional layer of cost without any assurance that real value will be obtained for the expenditure." *Id.* at 13.

Plaintiff appealed the Court's order. On February 2, 2017, the Appellate Division, First Department reversed the denial of settlement approval and remanded for a determination of the appropriate amount of attorneys' fees to be awarded, "in an amount commensurate with the degree of benefit obtained by the class as a result of the litigation." *Gordon v. Verizon Comms., Inc.*, No. 653084/13, 2017 N.Y. Slip. Op. 00742, at 34 (1st Dept. Feb. 2, 2017) (Doc. 138). The Appellate Division found that the disclosures (i) that the valuation of the Omnitel interest was performed by investment advisors, (ii) pertaining to the comparable companies analysis, and (iii) providing further detail as to the financial advisor's use of operating and financial metrics in the comparable transactions analysis were of "some benefit" to Verizon shareholders and the disclosure providing a tabular presentation of premiums paid in precedent minority buy-in transactions provided a benefit "minimal in nature." *Id.* at 21-22; *see also id.* at 28. Even with respect to the settlement's fairness opinion requirement, which the Appellate Division described as "[t]he most beneficial aspect of the proposed settlement," the benefit was only "contingent," *i.e.*, not certain to result in an actual benefit to shareholders. The Court nevertheless found the benefit to be "sufficient" "to warrant approval of the proposed settlement in this case, under the circumstances presented." *Id.* at 23-25.

Plaintiff's current motions follow from the Appellate Division's order. The memo in support of fees (Doc. 124) somehow omits the Appellate Division's description of the benefit as "minimal." Crist files this renewed objection to plaintiff's renewed motion seeking attorneys' fees and expenses.

ARGUMENT

I. The Court has a fiduciary duty to the class to reduce excessive fee requests.

"When reviewing a fee application in a class action, the court acts as a fiduciary and must protect the rights of absent class members." *Flemming v. Barnwell Nursing Home & Health Facilities, Inc.*, 56 A.D.3d 162, 165 (3d Dept. 2008). *See also In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 819-20 (3d Cir. 1995) (requiring "a thorough judicial review of fee applications … in all class action settlements").[1] Judicial involvement is singularly important since it can be expected that class members with small individual stakes in the outcome will not file objections. *Id.* at 812. At the same time, a defendant has an incentive to settle quickly for a broad release regardless of the benefit to the class, while plaintiffs' attorneys readily collect six-figure fees, leaving the court without the benefit of an adversarial process and the class without an advocate for its interests. *See In re Trulia S'holder Litig.*, 129 A.3d 884 (Del. Ch. 2016) (describing disclosure-only class action settlement dynamics). As a result of these dynamics, deal litigation has "'explode[d] in the United States beyond the realm of reason.'" *In re Walgreen Co. S'holder Litig.*, 832 F.3d 718, 725 (7th Cir. 2017) (quoting *Trulia*, 129 A.3d at 894). As a fiduciary for the class, the Court thus maintains a duty of keen oversight of all settlement proceedings, especially fee awards.

With respect to the burden of proof, the parties proposing the settlement must show that it is fair and reasonable. Likewise, the burden is on the plaintiff to demonstrate the appropriateness of the requested attorney's fee award. *See, e.g.*, *Rodriguez v. Joseph Eletto Transfer, Inc.*, No. 5431/16, 2016 N.Y. Slip Op. 32592 (Sup. Ct. Nassau County Dec. 12, 2016) ("The burden of showing the reasonableness of the fee lies with the claimant." (quoting *Klein v. Robert's Am. Gourmet Food, Inc.*, 28 A.D.3d 63 (2d Dept. 2006))). While a settlement must be fair, adequate, reasonable, and in the best interests of the

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[1] The Appellate Division held that New York governed its review of the settlement, with Delaware courts "provid[ing] some guidance on the issues." Under New York law, "[i]t is well established that our state courts look to Rule 23 of the Federal Rules of Civil Procedure to inform New York's class action law." *Vasquez v. Nat'l Secs. Corp.*, 48 Misc.3d 597, 600 (Sup. Ct. N.Y. County 2015), *aff'd* 139 A.D.3d 503 (1st Dept 2016).

class members to be approved, attorneys' fees are awarded only in an amount commensurate with the benefit conferred on the class. *See Gordon*, 2017 N.Y. Slip Op. 00742, at 34. Plaintiff falls far short of meeting her burden for the $2 million request here.

II. Settlement benefit is the most important factor when awarding attorneys' fees.

In exercising its discretion to award attorneys' fees, a court is to consider a number of "well-established factors." The most important principle is that a court award "fees in an amount commensurate with the degree of benefit obtained by the class as a result of the litigation." *Gordon*, 2017 N.Y. Slip. Op. 742, at 34; *see also In re Allied Healthcare S'holder Litig.*, No. 652188/2011, 2015 N.Y. Misc. LEXIS 3810, at *4 (Sup. Ct. N.Y. County Oct. 23, 2015) ("the degree of a plaintiff's success is the most critical factor in determining the reasonableness of the fee award"). This reflects the principle that "[a]n attorney who works incredibly hard, but obtains nothing for the class, is not entitled to fees calculated by any method. For although class counsel's hard work on an action is presumably a necessary condition to obtaining attorney's fees, it is never a sufficient condition. Plaintiffs attorneys don't get paid simply for working; they get paid for obtaining results." *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1182 (9th Cir. 2013). Otherwise, "th[e] practice of compensating class counsel no matter how meaningless the result is, creates the impression with most objective observers that these actions are brought merely for the purpose of generating legal fees." *Allied Healthcare*, 2015 N.Y. Misc. LEXIS 3810, at *5. Where the "only concrete interest suggested by [a] litigation is an interest in attorneys fees," class counsel "can't be trusted to represent the interests of the class." *Walgreen*, 832 F.3d at 726. Denying a fee award or reducing the award to a nominal amount is altogether proper in such instances because it incentivizes plaintiffs' attorneys not to bring societally wasteful litigation that imposes a "deal tax" on corporations and releases class members' claims solely for their own personal gain.

Modest settlement benefits warrant only modest fees. As the Appellate Division noted, courts that award fees where the benefits of litigation are "scant," "slight," "modest," or "minimal" have a long-established practice of "largely reduc[ing those fee awards] from the sums demanded." *Gordon*, 2017 N.Y. Slip. Op. 742, at 33 (internal quotation marks omitted); *see Seinfeld v. Robinson*, 246 A.D.2d

291, 297 (1st Dept. 1998), citing *Weissman v. Alliance Capital Mgmt. Corp.*, 650 F. Supp. 101, 105 & n.2 (S.D.N.Y. 1986) (effective reduction in fees to $48,836.66 from requested $100,000 was "appropriate because the settlement represented only a marginal success"); *United Operating Co. v. Kansas*, 482 F. Supp. 1029 (S.D.N.Y. 1980) (reducing fees to $40,000 from requested $125,000); and *Lewis v. Anderson*, 81 F.R.D. 436 (S.D.N.Y. 1979) (awarding only $5000 of $200,000 requested due to "limited, minimal benefit"). *See also Matakov v. Kel-Tech Constr. Inc.*, 84 A.D.3d 677, 678 (1st Dept. 2011) (remanding a lodestar based fee award "in light of the fact that the fee far exceeded plaintiffs' recovery"); *In re Magazine Antitrust Litig.*, 00 Civ. 4889 (RCC), 2004 U.S. Dist. LEXIS 1845, at *12 (S.D.N.Y. Feb. 5, 2004) (denying fee entirely based on lack of value of non-monetary class relief).

III. The Appellate Division did not overturn or otherwise disagree with this Court's finding of minimal settlement benefit.

In 2014, this Court analyzed the settlement's supplemental disclosures and fairness opinion requirement in detail. The Court concluded that any benefit provided to shareholders was nominal to the point that settlement approval should be denied. *Gordon*, 2014 N.Y. Slip Op. 33367. While the Appellate Division reached a different legal conclusion regarding whether such minimal benefit warranted settlement approval, the Appellate Division did not suggest the benefit was substantial or otherwise supported an attorneys' fee anywhere close to the requested seven-figure fee or 2.11 multiplier of lodestar. Not only did the Appellate Division fail to praise the benefits of the settlement; instead, its view echoed that of this Court: The settlement benefits are "minimal" and "contingent" in nature. *Gordon*, 2017 N.Y. Slip Op. 742, at 22, 24-25. The court further observed that where a settlement achieves minimal benefit, minimal fees should be awarded and signaled that such was the case here. *Id.* at 33.

Examining the court's findings more closely, the Appellate Division found that the disclosures (i) that the valuation of the Omnitel interest was performed by investment advisors, (ii) pertaining to the comparable companies analysis, and (iii) providing further detail as to the financial advisor's use of operating and financial metrics in the comparable transactions analysis were only of "some benefit"

to Verizon shareholders, while (iv) the disclosure providing a tabular presentation of premiums paid in precedent minority buy-in transactions provided a benefit only "minimal in nature." *Id.* at 21-22; *see also id.* at 28.[2]

First, with respect to the Omnitel valuation, the only benefit the Appellate Division noted was the "eliminat[ion of] any speculation by shareholders as to the source of the valuation analysis, i.e., whether the valuation analysis was performed by investment advisors or was the result of a self-serving valuation by Verizon management." *Gordon*, 2017 N.Y. Slip Op. 742, at 21. This benefit necessarily was scant because any reader of the Definitive Proxy Statement was "repeatedly told that the principal financial advisors had no part in providing a value for Omnitel" and had available "nearly twenty pages of description of the work done by the financial advisors." *Gordon*, 2014 N.Y. Slip Op. 33367, at 7-8.

Second, with respect to the comparable companies analysis, the Appellate Division did not find that the disclosure itself created value to the class; rather, it found that the information "allowed the Verizon shareholders to assess whether ATT's exclusion from that analysis provided some benefit to [them]." *Gordon*, 2017 N.Y. Slip Op. 742, at 22. In any event, an ability to assess whether AT&T was correctly excluded from the analysis—or to "quibble[] with investment bankers' judgments" about comparable metrics where the AT&T metric showed a multiple only one-tenth lower than that of another company included in the analysis (5.5)—is a nominal benefit at best, and the Appellate Division did not find otherwise.

Third, with respect to the provision of further detail of the financial advisor's use of operating and financial metrics in its comparable transactions analysis, the Appellate Division found there was "some benefit" provided to shareholders but did not identify what that benefit might be. Even

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[2] These same four supplemental disclosures are the ones plaintiff focused on as the "greatest hits" at the final approval hearing and the ones addressed by this Court and the Appellate Division. *See* Transcript of Proceedings, Szenberg Aff. Ex. 6, Doc. 90, at 7:24-8:6. Plaintiff does not suggest that there are other supplemental disclosures that are not, as this Court found previously in an assessment with which the Appellate Division did not disagree, "so trivial or obviously redundant as to add nothing of material value from a disclosure standpoint." *See Gordon*, 2014 N.Y. Slip Op. 33367, at 5.

plaintiff's expert defended this disclosure on grounds that have been rejected by courts as inconsequential, *i.e.*, as "granular analysis" that "may provide for a more meaningful perspective on valuation," though, as this Court observed, all of the information was "publicly available elsewhere." *See Gordon*, 2014 N.Y. Slip Op. 33367, at 9-10. There is no reason to believe the Appellate Division found this supplemental disclosure provided a substantial benefit to the class.

Finally, with respect to the tabular presentation of premiums paid in precedent minority buy-in transactions, the Appellate Division found only that this provided a "more accessible format" to shareholders, a benefit that was "minimal in nature." *Gordon*, 2017 N.Y. Slip Op. 742, at 22-23.

Even with respect to the settlement's fairness opinion requirement, which the Appellate Division described as "[t]he most beneficial aspect of the proposed settlement," the court noted it was only a contingent benefit—meaning that it was not certain to result in an actual benefit to shareholders unless Verizon engaged in a transaction involving the sale of Verizon Wireless assets valued in excess of $14.4 billion and which would not benefit the shareholder-class members unless the board undervalued the asset that was being sold and those class members continued to be shareholders at the time of the sale.

"[U]nder the circumstances presented" here—where it was in the company's best interest to end the costly litigation and proceed with the merger—the Appellate Division found that such minimal benefits were "sufficient" "to warrant approval of the proposed settlement in this case." *Id.* at 25-26. When the Appellate Division turned to the issue of fees, however, it was careful to point out that litigation that results in benefits that are scant, light, modest, or even minimal results in "fees largely reduced from the sums demanded." *Id.* at 33 (quoting *Seinfeld*, 246 A.D.2d at 297). Such a fee reduction is in line with the established principle that a court should award "attorney's fees in an amount commensurate with the degree of benefit obtained by the class as a result of the litigation." *Id.* The Appellate Division left the determination of that amount to this Court's discretion.

In response to plaintiff's renewed motion seeking fees, then, this Court should rely on its assessment of minimal settlement benefit—an assessment supported by the Appellate Division decision—to greatly reduce the fees requested by plaintiff. Neither the Appellate Division's order nor

plaintiff's renewed motion provide any basis for the Court to alter its initial determination that the class received little benefit from this settlement. From this, the legal implication for fees clear: Minimal settlement benefit warrants minimal attorneys' fees.

IV. Plaintiff has failed to meet her burden of showing the settlement benefit supports the excessive fee award.

A. The evidence filed by plaintiff does not support the excessive fee award.

Plaintiff submits a number of exhibits in support of her renewed motion for attorneys' fees and expenses. The overwhelming bulk of these materials was considered by the Court in its initial evaluation of the settlement. With respect to the substantive attachments, for example, the affidavit from Mr. Keath previously was submitted in support of plaintiff's motion for settlement approval and attorneys' fees in 2014. *Compare* Doc. 127 *with* Doc. 38. This Court did not find Mr. Keath's identical opinion persuasive then, and there is no reason for it to reverse course now. Indeed, plaintiff herself makes virtually no effort to convince this Court that Mr. Keath's three-year-old opinion now justifies fees of $2 million.

The affidavit from Professor Lubben also was previously submitted to the Court. Plaintiff submitted an identical affidavit in connection with her motion to renew and reargue this Court's order denying settlement approval, *compare* Doc. 126 *with* Doc. 89, and Crist rebutted Professor Lubben's assertion that the fairness opinion provides a substantial benefit to the class in his opposition to plaintiffs' motion, *see* Doc. 93 at 16-18. As he noted there, and as further elaborated in the Affirmation of Professor Sean Griffith filed contemporaneously herewith as Exhibit 1 to the Szenberg Affirmation, Professor Lubben offers very little support for his opinion that the requirement of a fairness opinion creates value.[3] In fact, he concedes that Verizon might well seek a fairness opinion

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[3] Before plaintiff filed the Lubben affirmation, the Court already concluded based on plaintiff's other evidence that the fairness opinion did not provide any substantial benefit to the class and instead may serve to "lock[] in an additional layer of cost" without a correspondence assurance of value. 2014 *Gordon*, N.Y. Slip. Op. 33367. Accordingly, Crist does not repeat the arguments he previously made regarding the lack of benefit provided by the settlement's fairness opinion requirement in response to

regardless of any requirement imposed by the settlement. Lubben Aff. at 11. To support his claim that the requirement creates value, he cites to a single academic study that compares stock price reactions to fairness opinions in public merger transactions.[4] But the authors of that study expressly disclaim plaintiff's core assertion that fairness opinions provide valuation information that is useful to boards of directors.[5] As importantly, the study's authors expressly state that their findings do not support the conclusion that fairness opinions are worth their cost.[6] Not only does the one study Professor Lubben cites not say what he relies on it to say in an effort to add unwarranted legitimacy to his opinion, the vast academic literature on fairness opinions that he fails to cite or even acknowledge directly contradicts plaintiff's assertions about the value of fairness opinions.[7]

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that evidence. *See* Szenberg Aff. Ex. 2, Doc. 57 at 17-21.

[4] Matthew D. Cain & David J. Denis, Information Produced by Investment Banks: Evidence from Fairness Opinions, 56 J. L. & Econ. 245 (2013) (cited by Lubben Aff. at 11, n.22).

[5] *Id.* at 248 ("While this result supports the notion that target-sought fairness opinions can inform directors as to how *shareholders* will react to a merger announcement, it does not allow us to infer whether fairness opinions contain information that is incrementally informative to directors or shareholders.").

[6] *Id.* at 248 ("[O]ur data do not permit us to evaluation whether the cost of obtaining fairness opinions (in advisory fees, diversion of managerial effort, or delayed bids) outweighs the benefits of doing so.").

[7] *See, e.g.*, Jonathan M. Barnett, *Certification Drag: The Opinion Puzzle and Other Transnational Curiosities*, 33 J. Corp. L. 95, 97 (2007) (critiquing fairness opinions as an example of "certification drag"—that is, "certification instruments cost *something* but often appear to say *almost nothing* (or more precisely, almost nothing *new*)" (emphasis in original)); Lucian A. Bebchuk & Marcel Kahan, *Fairness Opinions: How Fair Are They and What Can Be Done About Them?*, 1989 Duke L. J. 27 (1989) (questioning value of fairness opinions by demonstrating that "investment banks possess substantial discretion in determining what prices are 'fair' to shareholders" because of which "investment banks can arrive at wildly differing estimates of 'fair price,' all of which would be reasonable and none of which could be shown to be 'wrong' (or unfair) under objective criteria"); William W. Bratton & Michael L. Wachter, *Bankers and Chancellors*, 93 Tex. L. Rev. 1, 14 (2014) (noting that a fairness opinion "confirms only that the price lies within a range of intrinsic values, any of which could be fair. Accordingly, a fair price is not necessarily a best or even a good price." (citations omitted)); William J. Carney, *Fairness Opinions: How Fair Are They and Why We Should Do Nothing About It*, 70 Wash. U. L.Q. 523, 528 (1992) ("These

As a result, plaintiff has shown only that the fairness opinion requirement makes something that would be discretionary (whether to obtain a fairness opinion in 5% divestitures) into something that is now mandatory for three years. Plaintiff has not met her burden of proving that this mandate creates any more than a nominal, "contingent" value that does little to burden the shareholder class. And how could she? The weight of academic literature is decidedly against the proposition—even in the highly unlikely event that Verizon will undertake a transaction that meets the threshold $14.4 billion value in the next three years and, if it does, that the same group of shareholders who are members of the class will continue to be shareholders and benefit thereby. *See* Szenberg Aff. Ex. 2, Doc. 57 at 17-18 & n. 8 (describing research showing just two asset sale transactions valued at $10 billion or more per year, how the board could avoid the requirement even if it did decide to dispose of such a large amount of assets, and the likelihood the board would commission a fairness opinion even in the absence of a requirement they do so); Supplemental Declaration of Sean Griffith. So even while the fairness opinion requirement may be "sufficient" to warrant settlement approval "under the circumstances presented" in this particular case, *i.e.*, where "by agreeing to the settlement, Verizon avoided having to incur the additional legal fees and expenses of a trial," plaintiff failed to show that it is warrants anything other than a nominal fee award. *Gordon*, 2017 N.Y. Slip Op. 742, at 25-26.

It is notable that Crist previously raised these deficiencies in Lubben's opinion the first time

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opinions provide less information than they do protection. And the protection is not for shareholders, bur for the directors themselves, and for their decision. The investment banker's fairness opinion thus becomes another costly tax that legal rules impose on business transactions."); Steven M. Davidoff, *Fairness Opinions*, 55 Am. U. L. Rev. 1557, 1562 (2006) ("[C]urrent fairness opinion practice is still deeply flawed. Fairness opinions, and their underlying valuation analyses, are prone to subjectivity and are frequently prepared utilizing methodologies that simply do not jibe with best practices. These defects are exacerbated by the recurring problem of investment banks who are conflicted in their provision of fairness opinions." (citations omitted)); Charles M. Elson, *Fairness Opinions: Are They Fair or Should We Care? "Mirror, Mirror on the Wall, Who Is the Fairest of Them All?*", 53 Ohio St. L.J. 951, 1002 (1992) (stating that a fairness opinion is "as necessary to valuation analysis as is the appendix to the human digestive system"); Daniel Fischel, *The Business Judgment Rule and the Trans Union Case*, 40 Bus. L. 1437, 1453 (1985) (dismissing fairness opinions as a "judicially imposed tax on fundamental corporate changes").

plaintiff filed it with the Court (*see* Szenberg Aff. Ex. 5, Doc. 93 at 16-18), and, in a virtual concession, plaintiff has made no effort to rebut or otherwise address them now. The Supplemental Declaration of Sean Griffith demonstrates further than Lubben's conclusions are not supported by the academic literature or even the court cases he cites.

It is further notable that Professor Lubben was unwilling to express *any* opinion on the value of the supplemental disclosures. Plaintiff thus has submitted *no* new evidence to support her assertion that those disclosures warrant any fee, much less $2 million. Crist previously provided his detailed analysis of why each supplemental disclosure failed to benefit the shareholder class, and this Court likewise analyzed the supplemental disclosures to find they created minimal value. *See* Szenberg Ex. 2, Doc. 57 and Ex. 5, Doc. 90 at 41-44, 47-50. The Appellate Division disagreed as to the legal effect of that minimal benefit with respect to settlement approval but did not dispute the particulars of this Court's findings, and plaintiff provides no reason for the Court to alter its findings now.

B. Plaintiff cannot show the requested fee is justified under a percentage-of-recovery or lodestar approach.

A court has discretion to determine a reasonable attorneys' fee award using the percentage-of-recovery, lodestar, or other approach. *Fiala v. Metro Life Ins. Co.*, 27 Misc.3d 599, 610 (Sup. Ct. N.Y. County 2010). But regardless of the approach used, "the degree of plaintiff's success is the most critical factor in determining the reasonableness of the fee award." *Allied Healthcare*, 2015 N.Y. Misc. LEXIS 3810, at *4. This reflects the principle that "[a]n attorney who works incredibly hard, but obtains nothing for the class, is not entitled to fees calculated by any method. For although class counsel's hard work on an action is presumably a necessary condition to obtaining attorney's fees, it is never a sufficient condition. Plaintiffs attorneys don't get paid simply for working; they get paid for obtaining results." *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1182 (9th Cir. 2013). Otherwise, "the practice of compensating class counsel no matter how meaningless the result is, creates the impression with most objective observers that these actions are brought merely for the purpose of generating legal fees." *Allied Healthcare*, 2015 N.Y. Misc. LEXIS, at *4-*5.

"[T]he determination of what constitutes a reasonable fee involves extensive consideration of the nature and value of the services rendered by the plaintiffs' attorneys." *Klein*, 28 A.D.3d at 75 (internal quotation marks omitted). By failing to provide evidence from which the Court could make this evaluation, plaintiff has failed to meet her "burden of showing the reasonableness of the fee." *Id.* She has not shown that the settlement benefit is anything more than minimal such that it could justify a percentage-of-recovery analysis or warrant a lodestar-based award.

Given the low value of the settlement benefits to the class, *see* Sections III, use of the percentage-of-recovery method would result in a sharp reduction to the fee request, no matter what percentage the court determines is appropriate. Using the 25% benchmark (which would be excessive in a case with such limited success), plaintiff would have to show that the supplemental disclosures and fairness opinion requirement are worth $6 million to shareholders. She provides no evidence that could support such a valuation.

Under a lodestar analysis, plaintiff fares no better. As plaintiff notes, the remaining factors the Appellate Division identified as relevant to a fee award "are largely built into the traditional lodestar/multiplier analysis that courts routinely employ to award fees in class action litigation that has produced a substantial nonpecuniary benefit to shareholders." Pl. Mem. ISO Renewed Mot. For Award of Attorneys' Fees and Expenses, Doc. 124 at 5-6 (citing, *e.g.*, *Jiannaras v. Alfant*, No. 21262/09, 2012 N.Y. Misc. LEXIS 6692 (Sup. Ct. Queens County Jan. 10, 2012) (after receiving additional disclosure, shareholders rejected proposed acquisition and acquirer then increased offer by $20 million)). Even plaintiff concedes that a lodestar/multiplier analysis is appropriate only where attorneys have produced a *substantial* benefit for their clients. Given plaintiff's failure to establish that she obtained a substantial benefit for the class, then, it is undisputed that class counsel is not entitled to a cash award based on a multiple of their lodestar.

Appropriate use of the lodestar calibrates the award downward, not upward, where the degree of success achieved is disproportionately small. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942-44 (9th Cir. 2011) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 434-36 (1983)); *Cruz v. Nieves*, 2015 N.Y. Slip. Op. 51829 (Sup. Ct. Bronx County 2015) (reducing lodestar by 50% where "the degree

of success achieved was modest when compared to the pre-trial settlement demand"); *cf. Purdue v. Kenny A.*, 130 S. Ct. 1662 (2010) (lodestar multiplier should be applied only in cases with extraordinary results). The cases cited by plaintiff are not to the contrary.[8] *See Rahmey v. Blum*, 95 A.D.2d 294, 304 (2nd Dept. 1983) (when considering lodestar adjustment in case with "'only limited success,'" the fee award should be "'reasonable in relation to the results obtained'" (quoting *Hensley*, 461 U.S. at 440)); *Willson v. N.Y. Life Ins. Co.*, No. 94/127804, 1995 N.Y. Misc. LEXIS 652, at *93 (Sup. Ct. N.Y. County Nov. 8, 1995) (fee was less than 7% of minimum class recovery). Even a modest fee request relative to lodestar cannot justify a misallocated settlement. *See In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 180 n.14 (3d Cir. 2013) (lodestar multiplier of .37 is not "outcome determinative"); *HP Inkjet*, 716 F.3d at 1177 (same with multiplier of .32); *cf. also Matakov*, 84 A.D.3d at 678 (remanding fee that amounted to 51% of accrued lodestar "in light of the fact that the fee far exceeded plaintiffs' recovery").

Here, even as a starting point for a significant downward adjustment, plaintiff's lodestar is overstated and unsupported. The Court requested detailed time records at the final approval hearing held on December 2, 2014 (Szenberg Aff. Ex. 6, Doc. 90 at 22:5-6), and Crist also requested access to those records (Doc. 71). Crist has not received copies of those records, and it is unclear whether plaintiff provided those records to the Court. Crist renews his request for detailed time records now and reserves his right to supplement his objection to plaintiff's fee request based on those records.

[8] Many of the cases cited by plaintiff that purportedly justify a lodestar calculation involved fees awarded on a percentage-of-recovery basis for large settlement funds where the lodestar served only as a cross-check and thus do not serve a guide to appropriate multipliers here. (Pl. Mem., Doc. 124 at 9). *See, e.g.*, *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358 (S.D.N.Y. 2002) (awarding percentage of settlement fund); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 485 (S.D.N.Y. 1998) ("Class Counsel has requested a fee of 17.5 percent of the common fund."); *In re RJR Nabisco Sec. Litig.*, No. 88 Civ. 7905, 1992 U.S. Dist. LEXIS 12702, at *18 (S.D.N.Y. Aug. 24, 1992) (awarding fee as a percentage-of-the-fund because the approach was "consistent with the better and increasingly prevailing view in [common fund] cases"); *Willson v. N.Y. Life Ins. Co.*, No. 94/127804, 1995 N.Y. Misc. LEXIS 652, at *90-*92 (awarding 7% of recovery in line with trend towards using percentage of recovery approach); *Beckman v. KeyBank, N.A.*, 293 F.R.D. 467, 477 (S.D.N.Y. 2013) (using percentage-of-the-fund approach because judicial trends and "public policy favor[] a common fund attorneys' fee award").

For "[a]lthough [class counsel] is not required to tender contemporaneously-maintained time records, the court will usually, and especially in a matter involving a large fee, be presented with an objective and detailed breakdown by the attorney of the time and labor expended, together with other factors he or she feels supports the fee requested." *Klein*, 28 A.D.3d at 75 (internal quotation marks omitted). Thus, "the valuation process requires definite information, not only as to the way in which the time was spent (discovery, oral argument, negotiation, etc.), but also as to the experience and standing of the various lawyers performing each task (senior partner, junior partner, associate, etc.)." *Id.* (internal quotation marks and alterations omitted). Consequently, *Klein* rebuffed a fee award based upon "brief affirmations" containing "only brief and general descriptions of the work performed by the firm as a whole." *Id.* Here, class counsel have not met their burden. They have not provided adequate evidence of the number of hours the attorneys billed working on discrete tasks in the litigation for the Court and class members to evaluate.

Even without those records, it is clear that the purported lodestar is inflated. Plaintiff initiated her suit in early September 2013, just three days after Verizon issued a press release announcing the transaction and before Verizon filed the Preliminary Proxy with the U.S. Securities & Exchange Commission. *See Gordon*, 2017 N.Y. Slip Op. 742, at 4-5. Any pre-complaint investigation necessarily was limited in nature. The parties began settlement negotiations just one month later and reached an agreement just two months later, in December 2013. Pursuant to that agreement, on December 10, 2013, Verizon filed with the SEC a definitive proxy statement with the agreed-upon supplemental disclosures to solicit shareholder votes in favor of the transaction and scheduled the vote for January 28, 2014. *See id.* at 33. The parties then finalized a stipulation of settlement, which they filed with the Court on July 21, 2014. *Id.*

As this history makes clear, the number of hours that actually contributed to the settlement, agreed in principle within two months after the transaction was announced, were necessarily minimal. For class counsel to have billed over 1100 hours before filing plaintiff's motion for final approval of the settlement in 2014 implies an unduly excessive amount of overbilling between the agreement in principle and the filing of the settlement. *See* Affirmation of Nadeem Faruqi, Doc. 128. The purported

2.11 multiplier sought is likely much higher, and plaintiff's lodestar should not be credited by the Court in the absence of detailed documentation from class counsel.

V. Conclusion

For the foregoing reasons, the Court should award $1.00 or another significantly reduced amount of attorneys' fees to plaintiff.

Dated: New York, NY
May 16, 2017

Respectfully submitted,

/s/ Avi Szenberg

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CERTIFICATE OF SERVICE

I hereby certify that on this day I filed the foregoing with the Clerk of the Court via NYSCEF thus effectuating service on all counsel who are registered as electronic filers in this case.

DATED: May 16, 2017

/s/ Avi Szenberg
Avi Szenberg