| **Gordon v Verizon Communications, Inc.** |
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| 2014 NY Slip Op 33367(U) |
| December 19, 2014 |
| Supreme Court, New York County |
| Docket Number: 653084/13 |
| Judge: Melvin L. Schweitzer |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

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| NATALIE GORDON, on behalf of Herself and Others Similarly Situated,<br><br>Plaintiffs,<br><br>-against-<br><br>VERIZON COMMUNICATIONS, INC., LOWELL C. McADAM, RICHARD L. CARRION 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,<br><br>Defendants. | Index No. 653084/13<br><br>DECISION AND ORDER<br><br>Motion Sequence No. 001 |

**MELVIN L. SCHWEITZER, J.:**

**Background**

This is a putative class action litigation centered on an acquisition by Verizon Communications, Inc. (the Company) of a substantial minority interest in a wireless carrier. Plaintiff requests that the court grant final approval of a settlement set forth in the Stipulation and Agreement of Compromise, Settlement, and Release, dated July 31, 2014 (Settlement).

Plaintiff and plaintiff's counsel believe that the Settlement is in the best interests of the proposed Class.

On September 2, 2013, the Company publicly announced that it had entered into a definitive Stock Purchase Agreement with Vodafone Group Plc (Vodafone) to acquire Vodafone subsidiaries holding as their principal assets 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 Company common stock (Transaction).

On September 5, 2013, plaintiff filed an action (Action) challenging the Transaction. The core of the Action was the allegation that the Company's board of directors breached its fiduciary duty to its shareholders in connection with the Transaction causing the Company to pay an allegedly excessive and dilutive price in the Transaction.

On October 8, 2013, the Company filed with the Securities and Exchange Commission (the SEC) a Preliminary Proxy Statement on Schedule 14A (Preliminary Proxy) detailing the terms and background of the Transaction and certain analyses performed by JPMorgan Securities LLC (JPMorgan) in connection with the Transaction.

On October 22, 2013, plaintiff filed an 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.

In November and December 2013, the parties engaged in negotiations in an effort to reach a resolution of the Action. On December 6, 2013, counsel reached an agreement-in-principle to settle the Action wherein defendants would (1) agree to disseminate to the Company's shareholders certain additional disclosures and (2) agree for a period of three (3) years thereafter, in the event 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 of in excess of $14.4 billion (i.e. approximately 5% of $288.9 billion, the implied equity value of 100% of Verizon Wireless referenced under the heading "Transaction Overview" on page 38 of the Preliminary Proxy Statement), that the Company 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). Plaintiff had decided that the strength and weaknesses of the claims, balanced against the benefits of the Settlement, favored settlement.

On December 10, 2013, the Company filed a definitive Proxy Statement on Schedule 14A with the SEC (Definitive Proxy) to solicit shareholders to vote in favor of the Transaction and scheduled a shareholder vote for January 28, 2014. The Definitive Proxy included a number of additional disclosures not contained in the Preliminary Proxy (the Supplemental Disclosures). The Company's shareholders then voted to approve the issuance of shares for the Company to acquire Vodafone's 45% interest in Verizon Wireless on January 28, 2014.

On October 6, 2014, the court issued a Scheduling Order which (i) preliminarily certified the Action as a class action, (ii) preliminarily approved the Settlement and (iii) scheduled a hearing to determine whether the Settlement should receive the final approval of the court as being fair, reasonable, adequate and in the best interests of the class.

The hearing was held on December 2, 2014. Two objectors appeared and spoke, as well as Professor Sean Griffith, T.J. Maloney Professor of Law at Fordham University School of Law, who spoke on behalf of one of the objectors.

The strong opposition to the proposed settlement voiced by the objectors at the fairness hearing and in their submissions has moved the court to take a second look at the terms of the proposed settlement and more closely scrutinize it as part of the court's final determination of whether it truly is fair, adequate, reasonable and in the best interest of class members. *Klein v Roberts American Gourmet Food, Inc.*, 28 AD3d 63 (2d Dept 2006).

The court is dealing here with a settlement relating to a negotiated acquisition involving remedial disclosure (known as a disclosure-only settlement), accompanied by a substantive undertaking with respect to future asset sales. The disclosure-only settlement is a procedural device used to conclude litigation that invariably accompanies acquisitions of publicly traded corporations. In fact, over ninety seven percent of such transactions attract at least one shareholder lawsuit, and many attract several such suits, often filed in multiple jurisdictions.[1] Most of this litigation settles, but pecuniary relief is rare. Settlements typically are based on a package of supplemental disclosures or, somewhat less frequently, a minor amendment to the acquisition agreement.[2]

Enhanced or corrected disclosure, to be adequate to support a settlement, must be a material improvement over what had previously been disclosed. The class is being divested of valuable rights in the form of a broad release of claims executed by the plaintiff. Such action cannot be justified by trivial disclosure adjustments, but rather only if "the additional disclosures materially enhance[d] the [shareholders] knowledge about the merger." *In re Copano Energy, LLC Shareholder Litigation*, No. 8284-VCN at 32 (Del Ch 2013). *In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A3d 1116, 1127 (Del Ch 2011). Basically, material disclosures uncover conflicts and correct material misstatements. For examples of material corrections and undisclosed conflicts, see *Sauer-Danfoss*, at 1129, 1133-35 (holding that a supplemental disclosure was material when it corrected a valuation estimate and demonstrating, in appendices

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[1] Jill Fisch, Sean Griffin and Steven Solomon, Confronting the Peppercorn, 93 Texas Law Rev. (forthcoming 2014).

[2] R. Daines & O. Koumrian, Shareholder Litigation (Feb. 2013) at 6.

analyzing prior cases involving supplemental disclosures, that material disclosures tended to focus on "previously withheld projections or undisclosed conflicts faced by fiduciaries or their advisors"). *See also In re PAETEC Holding Corp. Shareholders Litigation*, CA No. 6761-VCG (Mar. 19, 2013) (emphasizing importance of disclosing previously unreported conflicts).

Merely providing additional information – unless the additional information offers a contrary perspective on what has previously been disclosed – does not constitute material disclosure. For examples of additional details failing to rise to the standard of materiality, *see Abrons v Maree*, 911 A2d 805, 813 (Del Ch 2006) ("Consistent and redundant facts do not alter the total mix of information, nor are insignificant details and reasonable assumptions material."); *Smith v Curagen Corp. CA*, No. 4670-VCS, at 21 (Del Ch Nov 9, 2009) (TS) (court "reluctant to . . . reward settlements simply because there's more information disclosed which gives people a reason to vote in accordance with the board's original recommendation."). Even when the additional information goes to the sensitive details of a financial advisor's fairness analysis, the information becomes material only when it corrects a valuation parameter or uncovers a conflict. *In re Amylin Pharmaceuticals S'holders Litig.*, C.A. 7673-CS, at 9 (Transcript, February 5, 2013) ("You don't have to disclose details. You have to disclose the material information relevant to understanding the banker's thing.")

**Discussion**

With regard to the Supplemental Disclosures that are included in the Settlement here, a number are so trivial or obviously redundant as to add nothing of material value from a disclosure standpoint. They need not be dealt with in this decision which seeks to grapple with the essence of the Settlement. In this regard, there really are four main Supplemental Disclosures

that, because they go to valuation, could potentially materially enhance the disclosure contained in the Preliminary Proxy, and the court chooses to focus on these four as the predicate for the Supplemental Disclosures portion of its opinion. These are (1) the disclosure on page 30 of the Definitive Proxy stating that the Omnitel valuation was the product of a negotiation between the Company and Vodafone, (2) the disclosure on page 40 of the Definitive Proxy of details concerning the financial advisor's comparable companies analysis, (3) further detail, on page 42 of the Definitive Proxy, of the financial advisor's comparable transactions analysis, and (4) the tabular presentation, on page 45 of the Definitive Proxy, of valuation ranges for Verizon Corporate and Wireline based on FV/EBITDA multiples. All but the first are contained in the section of the Definitive Proxy titled "Opinions of Verizon's Financial Advisors."

The court now examines these disclosures as potentially providing enhanced or corrected disclosure.

Omnitel Valuation

Included in the package of consideration being paid by Verizon to Vodafone was Verizon's interest in Omnitel. Page 30 of the Definitive Proxy contains a new sentence.

> "The $3.5 billion valuation of Verizon's Omnitel interest was determined based on the parties' respective financial analyses and represented a negotiated compromise by each party in connection with the overall negotiations between Verizon and Vodafone."

Plaintiff asserts that disclosure of the fact that the value was negotiated by the transacting parties rather than estimated by the financial advisors adds value because it introduces a reason to be skeptical about the financial advisors' valuation decisions. The court does not accept this

hypothesis at all. It does not provide any reason to be skeptical about anything. It merely sets forth a trivial piece of information that provides no incremental value.

Who could possibly be concerned with whether the transaction was valued by the parties alone, or only after consultation with their financial advisors. What truly matters is the agreed upon price which was determined at the end of the day by the parties, as were all the other terms of the transaction. Yet, the plaintiff sees value in that this disclosure somehow obliquely alerts the reader to be skeptical of the financial advisors. The Definitive Proxy Statement contains nearly twenty pages of description of the work done by the financial advisors. It forms the basis for management's conclusion that it has appropriately priced the acquisition. The Definitive Proxy Statement contains the formal fairness opinions of the financial advisors, reference to which is to be made by the shareholders in deciding how to vote. The Settlement is based on the disclosure related to the financial advisors' work. The court is of the view that plaintiff's lawyers brief for skepticism is ill founded.

Also, the additional disclosure adds nothing to the information that was already plainly available elsewhere in the proxy, which expressly states that neither principal financial advisor was asked to value Omnitel. For example, on page 33 of the Preliminary Proxy, the reader is told that "J.P.Morgan was not requested to provide its opinion with respect to, and its opinion does not address, the fairness from a financial point of view of the Omnitel transaction." The same information is repeated with respect to Morgan Stanley at page 36 of the Original Proxy. This information is also available in the full text fairness opinions filed as exhibits to the Original Proxy to which the reader is regularly referred (as, for example, on page 4 of the Preliminary Proxy). Because the reader is repeatedly told that the principal financial advisors had no part in

providing a value for Omnitel, the statement that the parties chose the value themselves is plainly immaterial. Where else would the value have come from?

Verizon Wireless Public Trading Benchmarks

The Definitive Proxy discloses that the financial advisors compared selected financial data of Verizon Wireless with three other publicly traded companies, which did not include AT&T. Going on, it lists the operating and financial metrics it used to compare Verizon Wireless to the three companies. These included firm value, EBITDA, churn rate, postpaid subscribers and revenue estimates. It then lists the actual metrics in tabular form. The Preliminary Proxy did not include this table. The plaintiff's expert asserts that this disclosure "puts quantitative detail" to the financial advisors' conclusion that Verizon Wireless is a "premium asset." While these details do provide more information concerning the financial advisor's comparable companies analysis, they fail in any way to contradict or otherwise alter the substance of that analysis. The court is of the view that this disclosure adds no value for shareholders. If inserting tables to complement every bit of analysis by financial advisors was considered valuable and material, there would surely be an SEC rule mandating just that. Its absence from disclosure regulations demonstrates a degree of administrative mercy on analysts and shareholders who comb disclosure documents for items of merit.

Plaintiff's expert also asserts that the information might have been valuable to allow shareholders to assess whether AT&T was correctly excluded from the comparable companies analysis. But the fact that AT&T was excluded was expressly stated in the Preliminary Proxy. The additional disclosure, at best, provokes a "quibble" with a financial analyst's judgment – that is, the decision to exclude AT&T. It does not alter the valuation range. Nor does it contradict a

prior assertion or uncover a hidden conflict. Precedent is clear that mere quibbles with investment bankers' judgments do not materially alter the total mix of information. *In re JCC Hldg. Co.*, 843 A2d 713, 721 (Del Ch 2003) (holding that a disclosure suggesting "mistakes in subjective judgment, even though those judgments were disclosed to the . . . stockholders" represents a "quibble with the substance of a banker's opinion [and] does not constitute a disclosure claim").

Illustrative Minority Buy-In Precedents

Again, plaintiff and its expert ascribe great value to the insertion, at their insistence, of a table containing publicly available information with respect to premiums paid in minority buy-ins consummated since 2005 which the financial advisors had reviewed. The court is of the view that there is no added value here. The Preliminary Proxy said the bankers had reviewed these – it just did not give the numbers. All the table lists are public companies in a wide range of unrelated businesses – entertainment, copper, financial services and food retail. The table gives rudimentary information such as deal value, consideration, percentage ownership, and premium. By itself this information simply does not inform a shareholder with respect to an investment decision. No complementary information with respect to the financial condition or business of the companies is provided. Nothing is said about their competitive position. Surely, these factors are necessary to evaluate a percentage premium or to give it any meaning. Additionally, the Definitive Proxy itself disparages the value of the exercise of presenting and analyzing premiums paid in minority buy-ins. The financial advisors noted that the buy-in premium precedents were presented for reference only, and were not relied on for valuation purposes.

Undaunted, the plaintiffs' expert defends the disclosure even though the financial advisors find it useless. He argues that "granular analysis" of this type may provide for a more meaningful perspective on valuation. Precedent unambiguously rejects the addition of granular detail as a basis of materiality. *In re Theragenics Corp. Stockholders' Litigation*, C.A. No. 8790-VCL, tr. ruling, at 22 (Del Ch May 5, 2014) rejecting supplemental disclosures that "add nothing more than further granular detail"). There is no conflict or contradiction here. Moreover, all of this information (along with the further detail on the comparable companies analysis discussed above) is publicly available elsewhere. Preliminary Proxy at 38-39, 41-42 (noting public availability elsewhere). Because an investor easily could have constructed the table himself from public data sources (should he have nothing of consequence to do with his time), reproducing it in the Definitive Proxy clearly provides no new information and no material disclosure enhancement.

Verizon Corporate and Wireline Public Trading Benchmarks

On page 44 of the Definitive Proxy, it is disclosed that the financial advisors, using certain mathematical analysis, compared selected financial data of Verizon Corporate and Wireline with similar data for selected publicly-traded companies in the same line of business. The Definitive Proxy goes on to explain the advisors methodology in great detail. Plaintiff asserts it added value by insisting on the insertion of a table showing the particular data for Verizon Corporate and Wireline, not just the bottom line implied equity values. The table is stark in its lack of consequence because it merely adds more unnecessary detail, without materially changing the textual presentation that had previously appeared in the Preliminary Proxy. Preliminary Proxy, at 43. Indeed, exactly the same valuation methodology (without

tabular presentation) is used to value Verizon Wireless, and plaintiff has not objected either to the methodology or to the lack of tabular presentation. Preliminary Proxy at 39. If plaintiff finds this methodology and presentation unobjectionable for Verizon Wireless -- which, as the asset being sold, is clearly the most important valuation in the transaction as whole -- then, it should be equally unobjectionable for Verizon Corporate and Wireline. The additional information uncovers no contradiction and no conflict. In the court's view it simply provides another tabular presentation of material covered by the text and, as such, cannot be recognized as a material disclosure enhancement.

Even more compelling in showing the lack of materiality of this section, with or without the table, is the financial advisors' disclaimer:

> No company in the above analysis is identical to Verizon's Corporate and Wireline business. In evaluating the peer group, J.P.Morgan and Morgan Stanley made judgments and assumptions with regard to industry performance, general business, economic, market and financial conditions and other matters, many of which are beyond the control of Verizon, such as the impact of competition on Verizon's business or the industry generally, industry growth and the absence of any material change in the financial condition and prospects of Verizon or the industry or in the financial markets in general. Mathematical analysis, such as determining the average or median, is not in itself a meaningful method of using peer group data.

Which leads the court to wonder why this section, being admittedly not meaningful, found its way into the Definitive Proxy Statement at all.

In sum, these Supplemental Disclosures individually and collectively fail to materially enhance the shareholders' knowledge about the merger. They are unnecessary surplusage added to a disclosure document already filled with much that is detail for the sake of detail. They

provide 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.

Fairness Opinions

Boards of directors and officers of public companies were historically ambivalent with respect to the need for an investment banker's fairness opinion as a condition to closing a merger. Investment bankers provided value by the expertise they brought to executing transactions, a business corporate officers and directors knew little about. As to the company's value, many directors believed investment bankers, being strangers to the company's business, added little to the equation. Additionally, some prominent investment banking houses resisted issuing fairness opinions except to longstanding clients. This atmosphere changed significantly with the Delaware Supreme Court's decision in *Smith v van Gorkom*, 488 A2d 858 (Del 1985). There, one of the numerous factors taken into account in the court's holding that the directors of the acquired corporation had violated their duty of care was the absence of a fairness opinion. No court has since held that obtaining a fairness opinion in connection with a merger is required in order to satisfy the directors' duty of care, although courts have viewed it favorably in scrutinizing directors behavior.

For obvious reasons, since *van Gorkom*, fairness opinions have been routinely obtained in merger transactions. They are not, however, seen with the same frequency in transactions in which a company divests assets, and certainly not when the divestiture constitutes a small percentage of a company's assets. Whether or not to obtain one is still viewed as an appropriate area for exercise of the directors' business judgment. Fairness opinions are expensive and, in a situation where the board of directors is comfortable with respect to the value of the disposed

assets, can represent an additional layer of unnecessary cost incurred for no value. In fact, the plaintiff asserts that 5% is not a customary triggering threshold for obtaining a fairness opinion, and an objector's submission notes that only 6 of 18 asset divestitures valued at over $10 billion (the approximate value of 5% of the Company's assets) in the last 10 years are reported to have been opined upon by an investment banker.

After considerable reflection, it is the court's judgment that the proposed feature of the Settlement relating to mandatory fairness opinions may actually operate to curtail the Company's directors' flexibility and ability to employ their collective business experience in connection with minimal (5%) asset dispositions. It locks in an additional layer of cost without any assurance that real value will be obtained for the expenditure. It seems to be based on a misreading of *van Gorkem*. That decision never said fairness opinions were uniformly beneficial or required in mergers, let alone in connection with dispositions of as little as 5% of a company's assets. Indeed, the fairness opinion feature of the Settlement may be said to undermine best practices relating to corporate governance. In the court's view, then, it, too, cannot provide a basis for a determination that the Settlement is fair, adequate, reasonable, and in the best interest of the class members.

**Conclusion**

An increasing body of commentary has decried the tsunami of litigation, and attendant suspect disclosure-only settlements, associated with public acquisitions today. Anyone objectively analyzing this phenomenon will find its root cause in the judicial precedents of the

last twenty-five years dealing with corporate governance in connection with mergers.[3] A body of law meant to protect shareholder interests from the absence of due care by the corporation's managers has been turned on its head to diminish shareholder value by divesting them of valuable rights via the broad releases that plaintiffs have fashioned at the demand of concerned defendants and their counsel and imposing additional gratuitous costs, i.e. attorneys' legal fees[4] on the corporation.

Also in this connection, the remarkable parade of the most experienced, highly regarded corporate merger lawyers who ostensibly are failing to draft merger disclosure documents which do not require enhancement or correction strikes the court as implausible. Corporate lawyers drafting complex disclosure documents in connection with the sale of securities in public capital markets experience no such problem. They do not need litigation lawyers to teach them how to correctly craft disclosure documents. Why do merger lawyers?

The totality of the situation here is captured by the court in *Creative Montessori Learning Centers v Ashford Gear LLC*, 662 F3d 913, 918 (7th Cir 2011):

> "[W]e and other courts have often remarked the incentive of 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."

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[3] *Unocal Corp v Mesa Petroleum Co.*, 493 A2d 946 (Del 1985); *Revlon v MacAndrews & Forbes Holdings, Inc.*, 506 A2d 173 (Del 1986); and *Paramount Communications Inc. v QVC*, 637 A2d 34 (Del 1993).

[4] Sean J. Griffith, Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees, 56 B.C.L. Rev. 1 (forthcoming 2015) available at www.ssrn.com/author=332766.

It is the court's judgment here, after further study and reflection, that were it to approve the Settlement based on either of its components discussed above, 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. Accordingly, the court simply cannot, and thus does not, approve this Settlement.

ORDERED that the motion for a final Approval of Settlement of Class Action is denied.

Dated: December 19, 2014

ENTER:

J.S.C.

MELVIN L. SCHWEITZER