IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BILL KASPERS, on behalf of himself and all other similarly-situated citizens, owners or co-owners of residences, and residents of the Derby Hills residential subdivision in Sandy Springs, Fulton County, Georgia,	)	CLASS ACTION
Plaintiffs,	)	CIVIL ACTION NO. 1:20-cv-02142-LMM
vs.	)	
VERIZON WIRELESS SERVICES, LLC,	)	
Defendant.	)	

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND BRIEF IN SUPPORT

Comes now Plaintiff BILL KASPERS, on behalf of himself and the putative class, and files this Response to the motion to dismiss and brief in support filed by Defendant Verizon Wireless Services, LLC (hereinafter "Verizon") on July 6, 2020 within the time allowed.

I. Introduction

The justice system in this country is based upon the expectation and the requirement that, even though parties to a lawsuit are adversarial, they are nevertheless expected and required to disclose all of the facts and controlling legal authority which they believe are material to the issue(s) presented and therefore

necessary to bring to the Court's attention in order to obtain an appropriate resolution of the issues presented.

Verizon's motion to dismiss and accompanying brief in support not only violate the procedural rules of this Court,[1] but also, and more importantly, this Court's substantive rules as well. Verizon misdescribes and thus misleads this Court regarding several of the factual allegations in Plaintiff's Complaint, but also, and more importantly, completely ignores both factual allegations as well as constitutional, statutory and case authority which are directly on point and thus material, relevant and necessary for this Court to consider in the evaluation of Plaintiff's claims. Verizon's July 6 filings present only half of the story--the half which Verizon believes supports its motion to dismiss. Verizon's July 6 filings unfortunately resemble Verizon's presentations to the Plaintiff, the Plaintiff's class and the public as well as to federal, state and local agencies regarding 5G technology—by extolling the technological virtues while totally ignoring the health, safety and environmental risks and resulting material property devaluations

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[1] Verizon's statement that "Plaintiff is likely aware that…." (*see* doc. 16-1 at 23, n.2; *see, also, id.* at 26, n.3) is not the proper way to bring a factual allegation which is neither already part of the record nor accessible for the Court to take judicial notice online to the Court's attention. *See* Fed.R.Civ.P. 12(d). Nor is it appropriate for Verizon to cite case authority relating to such a factual allegation (such as *Webster v. Snapping Shoals Elec. Membership Corp.,* 176 335 S.E.2d 637, 639 (Ga. Ct. App. 1985), cited on p. 24 of Verizon's brief) without also bringing to the Court's attention that the *Webster* case was decided in connection with a motion for summary judgment, and not a motion to dismiss.

which accompany the installation of such technology. In this Response, Plaintiff and the putative class not only address material misrepresentations and omissions in Verizon's brief, but also the other half of the story—i.e., the material facts and controlling legal authority which Verizon "conveniently" omitted from its July 6 filings but which this Court must consider in order to properly evaluate Plaintiff's Complaint and Verizon's motion to dismiss same.

II. The Facts

Verizon presents the following description of Plaintiff's Complaint: "This case challenges the planned installation of a telephone pole which will hold an antenna used to provide 5G wireless phone service, i.e., a 5G base station." *See* doc. 16-1 at 8-9. Verizon repeats a dozen more different times this description of Plaintiff's case--the implantation of a single pole to which a single wireless service facility will be installed,[2] in the hope that if Verizon repeats this description enough times, this Court will believe that this case is as narrow in breadth and scope as Verizon apparently wants this Court to believe. Verizon totally ignores the fact that Plaintiff complains nine different times in his Complaint, Plaintiff complains

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[2] *See* doc. 16-1 at 8-9. *See, also, id.* at 7 ("**a telephone pole**"), 14 ("**the** base station at issue"), 20 ("The Complaint plainly alleges that installing **the** base station", 22 ("the installation of **a** 5G base station in Plaintiff's yard"), 23 n. 2 ("**a**…utility pole…"), 26 n. 3 ("…install **the pole**…install **the pole**"), 27 ("to the extent Plaintiff's theory is that if **a telephone pole** were installed…in his yard…the installation of **this wireless service facility" [singular],** and 29 "*if* **the telephone pole** were installed…the…installation of **a telephone pole**…to install **the** pole."

not only about Verizon's threat to install poles and 5G high frequency radiowave transmitters not only in Plaintiff's front yard but in at least "four[3] other locations [elsewhere] around [and throughout] the Derby Hills residential subdivision" as well (*see* doc. 1 at 13, *17* (twice), *18, 19, 20* (twice), and *22*). The case style and class action allegations on pages 18-22 of the Complaint also show the inappropriateness of Verizon's attempt to minimize the factual scope of this case. While Plaintiff is obviously concerned about Verizon's threat to dig a hole, plant a 50 foot pole, and install and operate a 5G transmitter "in Plaintiff's front yard" (doc. 1 at 13) transmitting RadioFrequency (hereinafter "RF") radiation at the same height (50 feet above the ground) and "approximately 100 feet from the bedrooms of Plaintiff's Derby Hills residence" (*id.* at 20), Verizon's attempt to mislead this Court into believing that case is nothing more than Plaintiff's attempt to make a mountain out of a pole hole materially and improperly misrepresents the breadth, scope and seriousness of this case. Both the facts and the issues at stake are much broader and more serious than Verizon would like this Court to believe.

Verizon also apparently wants this Court to believe that the 5G high frequency radiowave transmitters which Verizon wants to install throughout

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[3] Since filing this lawsuit on May 19, 2020, Plaintiff has learned that Verizon intends to install at least eight (8) telephone poles, and as many as twelve (12) 5G RF radiation transmitters throughout and either in or immediately adjacent to Plaintiff's Derby Hills residential neighborhood so as to be able to transmit the 5G RF radiation throughout Plaintiff's Derby Hills residential neighborhood.

Plaintiff's residential neighborhood will be used exclusively for cellphone transmission and communication purposes. *See* 16-1 at 8-9 ("This case challenges the planned installation of a telephone pole which will hold an antenna used to provide 5G wireless **phone** service")[emphasis added]. Verizon thus wants this Court to believe that the 5G transmitters which Verizon wants to install throughout Plaintiff's residential neighborhood are analogous to "[a] cellphone…transmitting ...the phone's low-powered radio" waves (*see* doc. 16-1 at 8).[4] While Verizon's attempt to analogize 5G technology to cellphones arguably makes most of the cases cited in Verizon's brief, which address cellphones and their use appear relevant to the issues presented in Plaintiff's Complaint, this is just another improper attempt by Verizon to mislead this Court and its analysis of this case. This Court can take judicial notice of the facts that Verizon advertises 5G online as (1) "more than 25x faster than today's 4G networks in the US", and (2) because of its speed and "massive capacity," Verizon's 5G Ultra Wideband has the power to be used not only for cellphone transmission purposes, but also for "ultra-fast" home and business internet purposes. *See* www.verizon.com/5g.

More serious than Verizon's attempts to minimize the scope of Verizon's threat to install 5G transmitters throughout Plaintiff's residential neighborhood and

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[4] Verizon's repeated (and unannotated) references to a "base station" (*see* doc. 16-1 at 2, 3, 7 and 13) are similarly references to terminology which was invented in the 1980's, when cell and mobile phones were invented and first used. References to "base stations" do not appear in any of Verizon's online advertisements for 5G.

to equate 5G technology with cellphone technology which was developed more than two decades ago are Verizon's material factual omissions regarding legal developments relating to 5G technology which have occurred since the federal Court of Appeals for the District of Columbia issued its August 9, 2019 decision in *United Keetoowah Band of Cherokee Indians in Oklahoma v. Federal Communications Commission,* 933 F.3d 728, 2019 WL 3756373 (C.A.D.C. Aug. 9, 2019)-- the only case and decision cited in Plaintiff's Complaint (*see* doc. 1 at 15-16). Verizon's reference to this Aug. 9, 2019 decision is so fleeting (*see* doc. 16-1 at 24) that it is neither cited in the body of Verizon's brief nor included in Verizon's "Table of Authorities."

Verizon instead cites (at pp. 9-10 and n. 1 of doc. 16-1) an order issued by the FCC four months after the D.C. Circuit's August 9, 2019 decision. In an order issued on December 4, 2019 in FCC 19-126, the FCC basically readopted the same regulatory standards and analysis which the D.C. Circuit had found "arbitrary and capricious" four months earlier, while continuing to avoid consideration of the health, safety, and environmental risks of 5G technology before authorizing its use. The FCC's December 4, 2019 Order can be found at 34 FCC Rcd 11687.

Verizon has failed to inform this Court that the FCC's December 4, 2019 Order has been challenged both by the Environmental Health Trust (in a petition filed with the federal Court of Appeals for the District of Columbia on January 31,

2020 (*see* USCA Case #20-1025)), as well as by the Children's Health Defense (in a petition filed with the federal Court of Appeals for the Ninth Circuit on February 2, 2020 (*see* USCA Case #20-1138). Plaintiff pointed out to Verizon's attorney Elder during a June 3, 2020 telephone conference that in a February 18, 2020 filing in the Ninth Circuit case challenging the FCC's December 4, 2019 order on February 18, 2020, the Children's Health Defense requested that the appellate court require the FCC to comply with the requirements of the APA by publishing the FCC's December 4, 2019 Order regarding the application of cellphone regulations and standards to 5G technology in the Federal Register (as the FCC had done more than twenty (20) years earlier when the FCC published in the Federal Register the standards which the FCC proposed applying to cellphone technology), thereby making the December 4, 2019 Order available for public comments, followed by FCC review and evaluation of those comments, all of which as required by the Administrative Procedures Act (hereinafter "the APA"). As the U.S. Supreme Court noted in *Department of Homeland Security v. Regents of the University of California,* 140 S.Ct. 1891, 1905 (June 18, 2020), "The APA…requires [federal] agencies to engage in 'reasoned decisionmaking [citation omitted], and directs that agency actions be 'set aside' if they are 'arbitrary' or 'capricious.' 5 U.S.C. § 706(2)(A)." In another even more recent decision, the U.S. Supreme Court noted that "[u]nless a statutory exception applies, the APA

requires agencies to publish a notice of proposed rulemaking in the Federal Register **before** promulgating a rule that has legal force. *See* 5 U.S.C. § 553(b)." *See Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania,* 140 S.Ct. 2367, 2384 (July 8, 2020)[emphasis added]. Citing its earlier decision in *Perez v. Mortgage Bankers Assn,* 575 US. 92, 96 (2015), the Supreme Court, in its *Little Sisters* decision, went on to note that "the notice and comment rulemaking process prescribed by the APA is often required **before an agency's regulation can 'have the force and effect of law.'**"[5] [emphasis added]

In response to the Children's Health Defense's February 18, 2020 motion, on April 1, 2020, the FCC published its December 4, 2019 Order in the Federal Register, thus opening the door to public comments and subsequent review and evaluation of those comments by the FCC, pursuant to the requirements of the

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[5] As the U.S. Supreme Court additionally noted in its *Little Sisters* decision, "the APA mandates that agencies 'give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments,' § 553(c); states that the final rules must include 'a concise general statement of their basis and purpose,' *ibid.;* and requires that final rules must be published 30 days **before they become effective**, § 553". *See Little Sisters, supra* at 2386 [emphasis added]. The Supreme Court elaborated: "the basic requirements of the rulemaking process [prescribed in the APA]…require final rules to 'articulate a satisfactory explanation for [the] action including rational connection between the facts found and the choice made'" (quoting from the Court's earlier decision in *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29 (1983)). This requirement allows courts to [then] assess whether the agency has promulgated an arbitrary and capricious rule by 'entirely fail[ing] to consider an important aspect of the problem [or] offer[ing] an explanation for its decision that runs counter to the evidence before [it].' *Ibid.*" *See Liberty Sisters, supra* at 2383.

APA. *See* 85 Fed. Reg. 18131. By publishing its December 4, 2019 Order in the Federal Register on April 1, 2020, the FCC effectively conceded that its December 4, 2019 Order and its attempt to regulate 5G technology without considering the safety, health and environmental risks of that technology had not been properly promulgated, and that the December 4, 2019 Order was not, therefore, currently lawful or effective.[6]

It took the FCC roughly a year (from 1996 to 1997) to review and evaluate the public comments that the FCC received following its publication in the Federal Register of the FCC's proposed radiowave frequency standards for cellphones in 1996. Because of the various health, safety and related risks which have already been identified regarding 5G technology (*see* note 9, *supra*), and the widespread

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[6] After the FCC finally decided to publish its December 4, 2019 Order in the Federal Register on April Fool's Day, 2019, both the Children's Health Defense and the Environmental Health Trust filed supplemental petitions with the Ninth and D.C. Circuits (on April 2 and April 9, 2020, respectively). On April 30, 2020, those two cases challenging the FCC's December 4, 2019 Order were consolidated before the D.C. Circuit. On July 29, 2020, Petitioners Environmental Health Trust and the Children's Health Defense, along with others, filed a Joint Opening Brief (doc. #1854148 in USCA Case #20-1025) in which the Petitioners described not only the FCC's failure to comply with the APA with respect to the Dec. 4, 2019 Order, but also the various health, safety and environmental risks and diseases which are associated with 5G technology and/or earlier radiowave transmission (e.g., cellphone) technology—including cancer, reproductive issues, neurological issues, prenatal and perinatal complications, and radiation sickness. *See* 7/29/20 joint brief at 36-44. As the Petitioners stated on page 51 of their 7/29/20 filing, "**Although small cells may use less power than big cell towers, they are closer to people. Radiation exposure is therefore exponentially higher.**" [Citations omitted; emphasis added.]

dissemination and discussion of concerns regarding those risks on the internet, it is reasonable to assume that it will take the FCC at least a year, and probably longer, following its April 1, 2020 publication of its December 4, 2019 Order in the Federal Register to review and evaluate the comments which the FCC has received following its April 1, 2020 publication of its December 4, 2019 Order in the Federal Register. In the interim, because of the speed with which the FCC attempted to approve standards for 5G technology while disregarding the requirements of the APA which the FCC had previously followed when it adopted standards applicable for cellphone use more than two decades earlier, currently there are no valid and lawful federal standards or regulations applicable to 5G technology which have been presented to, "vetted" by the public and then the FCC, and then adopted, as the APA requires in order for such standards and regulations to be lawful and enforceable.

By mentioning the December 4, 2019 Order, while failing to mention any of the above-described post-December 4, 2019 legal developments, Verizon has come before this Court and presented the modern day equivalent of a Trojan Horse by requesting that this Court defer to a federal agency, the FCC, which has yet to comply with the requirements of the APA with respect to the rollout and installation of 5G technology. Verizon wants this Court to defer to the FCC anyway—just as Verizon told the City of Sandy Springs that it must defer to the

FCC and Verizon, while failing to inform the City of Sandy Springs that the FCC has yet to adopt lawful regulations and standards relating to the rollout of 5G technology. *See* doc. 1 at 15. The end result of the FCC's and Verizon's actions and inactions is that no agency at the federal, state or local level has exercised its authority to consider and take the appropriate measures to protect the health and safety of Plaintiff and the other residents of Plaintiff's residential neighborhood. The analogy to governmental inaction in response to the covid-19 pandemic is obvious. Plaintiff and the Plaintiff's class have come to this Court to obtain the consideration and relief that no other governmental body at any level has been willing to provide.

III. The Law

A. Verizon's federal preemption arguments are contrary to both federal and state constitutional, statutory and case authority as well as by Verizon's own admissions in its brief in support.

The right of all citizens of this City, State and Country to the peaceful enjoyment and use of their home is firmly established in both federal and state constitutional and statutory law, as well as in case law interpreting and enforcing those constitutional and statutory rights. Two of the fundamental rights which the framers of the federal Constitution expressly sought to guarantee are stated in the preamble to the Constitution as the underlying purposes of that foundational instrument—to "insure domestic tranquility" and to "promote the general welfare"

of all of this country's citizens. The Fourth Amendment to the federal Constitution expressly recognizes "the right of the people to be secure in their persons [and] houses." The Fifth and Fourteenth Amendments to the Constitution expressly state that "[n]o person shall…be deprived of life, liberty or property without due process of law."[7] As the U.S. Supreme Court has repeatedly recognized, "[t]he hallmark of a protected property interest is the right to exclude others. That is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 666, 673 (1999), *citing Kaiser Aetna v. U.S.,* 444 U.S. 164, 176 (1979).

Verizon only cites and relies exclusively upon clause 2 of Article VI of the federal Constitution a/k/a "the supremacy clause" (*see* doc. 16-1 at 11)—a boilerplate citation whenever a federal preemption argument is presented. Verizon conveniently fails to mention that the federal Constitution also has a Tenth Amendment (often referred to as the "savings clause" vis-à-vis "the supremacy clause"), which states that all "powers not delegated to the United States by the

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[7] The Fifth Amendment additionally provides: "nor shall private property be taken for public use, without just compensation," and the Fourteenth Amendment additionally provides that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States…nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution, nor prohibited by it to the states, are reserved to the states…or to the people."

Article 1, Chapter 1 of the Georgia Constitution similarly provides that "no person shall be deprived of life, liberty or property except by due process of law." For more than a century, Georgia courts have held that the right of privacy guaranteed by the Georgia Constitution is more extensive than that protected by the U.S. Constitution. As the Georgia Supreme Court held in *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 213-214, 50 S.E. 68, 78 (1905):

> The right of privacy, or the right of the individual to be let alone, is a personal right, which is not without judicial recognition. It is the complement of the right to the immunity of one's person. The individual has always been entitled to be protected in the exclusive use and enjoyment of that which is his own. The common law regarded his **person and property** as inviolate, and he has the absolute right to be let alone. [Citation omitted] The principle is fundamental, and essential in organized society, that every one, **in exercising a personal right and in the use of his property**, shall respect the rights and properties of others….When…there is an alleged invasion of some personal right or privilege, the absence of exact precedent, and the fact that early commentators upon the common law have no discussion upon the subject, are of no material importance in awarding equitable relief. That the exercise of the preventive power of a court of equity is demanded in a novel case is not a fatal objection. [emphasis added.]

Federal statutory and case law expressly recognizes and preserves the Constitutional right of citizens of this country to the peaceful enjoyment and use of their private property. Both the Federal Communication Act of 1934 and the Telecommunication Act of 1996 contain a "savings clause" which expressly states that "**Nothing** in this chapter contained **shall in any way abridge or alter the**

remedies now existing at common law or by statute, but **the provisions of this chapter are in addition to such remedies.**" 47 U.S.C. § 414 [emphasis added.] The Telecommunication Act of 1996 additionally provides: "This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law **unless expressly so provided in such Act or amendments**." 47 U.S.C. § 332(c)(7)(B)(iv) [emphasis added]. As the federal Court of Appeals for the Third Circuit expressly recognized in *Farina v. Nokia, Inc.*, "[t]he presence of [such] a savings provision is fundamentally incompatible with complete field preemption", and expressly noted that both Congress and the FCC "hesitat[ed] to override all state law…within the field of radio frequency emission." 625 F.3d 97, 121 (3d Cir. 2010).

While Verizon describes the savings clause in the Telecommunications Act of 1996 as "generally" preserving the traditional authority of state and local governments to regulate the location, construction and modification of wireless communication facilities such as cellphone towers (*see* doc. 16-1 at 12), Section 332(c)(7)(B)(iv) of the Telecommunications Act of 1996 is not only more specific than Verizon would like this Court to believe, but also contains a qualification which Verizon has failed to bring to this Court's attention: "No State or local government or instrumentality thereof may regulate the placement, construction and modification of personal wireless services on the basis of the environmental

effects of radio frequency emissions **to the extent that such facilities comply with the Commission's regulations concerning such emissions."** 47 U.S.C. § 332(c)(7)(B)(iv) [emphasis added].[8]

As already discussed above, there currently are no valid or lawfully enforceable FCC regulations or standards regarding the use of 5G technology. Because of the FCC's delay in publishing the regulations which FCC proposes applying to 5G technology in the Federal Register until April 1, 2020, the process prescribed by the APA for public comment regarding those proposed regulations and standards followed by the FCC's review, evaluation and analysis of those comments is currently a "work in progress." As a result, today, there are no FCC regulations concerning the use of 5G transmitters which would stand in the way of state or local regulation or judicial consideration and oversight regarding the placement of 5G in Plaintiff's front yard and throughout the rest of Plaintiff's residential neighborhood.

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[8] In addition, 47 USC § 332(c)(7)(A) expressly preserves state and local zoning authority over the siting of wireless facilities by providing: "Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." While 47 USC § 332(c)(7)(B)(iii) provides: "Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record," neither of these statutory provisions supports Verizon's claim that the Telecommunications Act of 1996 "definitively" provides for express or implied exclusive federal preemption (doc. 16-1 at 7 and 9)

Contradicting its argument for express or implicit exclusive federal preemption, Verizon admits in note 2 of its brief that both the State of Georgia, via OCGA §66-C-6, and the City of Sandy Springs, via its Municipal Code Section 50-153, have become involved in regulating the location of 5G transmitters. *See* doc. 16-1 at 23. As the Georgia Supreme Court held in *City of Thomasville v. Shank,* 263 Ga. 624, 624-25, 437 SE 2d 306 (1993), "a municipal corporation cannot, under the guise of performing a governmental function, create a nuisance dangerous to life and health or take or damage private property for public purpose without just and adequate compensation being first paid." *See, also, Duffield v. DeKalb County,* 242 Ga. 432, 433-434 (2)(1978), where the Georgia Supreme Court allowed a lawsuit with claims of nuisance[9] and inverse condemnation to proceed where private property was allegedly rendered unmarketable due to noise, odor and pollution which resulted from a plant that was built too close to the plant's neighbors. At the appropriate time in this litigation, Plaintiff and the Plaintiff's class will elaborate upon their allegation that Verizon told the City of Sandy Springs to defer to the FCC by showing the Court that Verizon told the City of Sandy Springs that it had "absolutely no say" in Verizon's rollout of 5G high

[9] OCGA § 41-1-1 defines a nuisance as "anything that causes hurt, inconvenience, or damage to another and the fact that the act done may otherwise be lawful shall not keep it from being a nuisance. The inconvenience complained of…shall be such as would affect an ordinary reasonable man." OCGA § 41-1-2 defines a private nuisance as "one limited in its injurious effects to one or a few individuals."

frequency radiowave transmitters or the location or placement of 5G transmitters in residential neighborhoods at the same height and as close as 100 feet away from bedrooms in the residences of those neighborhoods. In *T-Mobile Northeast Ne. LLC v. Town of Ramapo,* 701 F.Supp.2d 446 (S.D.N.Y. 2009)(cited by Verizon at 12 of doc. 16-1), another telecommunication provider negotiated with the town's government for almost two years to address local concerns and arrive at an agreement that a proposed cellphone tower that was 100 feet high would be at least 200 feet from any residence.

In *U.S. v. Causby,* 328 U.S. 256 (1946), the U.S. Supreme Court held that government-authorized non-physical intrusion of airport noise which interfered with a property owner's enjoyment and use of his property was a compensable taking under the Fourth Amendment to the U.S. Constitution. And, in *Kyllo v. U.S.,* 533 U.S. 27, 32 (2001), the U.S Supreme Court similarly recognized that the direction of thermal energy toward a citizen's home was covered by the Fourth Amendment to the U.S. Constitution because the energy waves intruded on the citizen's property.

Georgia statutory and case law similarly gives citizens of this State the right to the peaceful enjoyment and use of their private property without interference. OCGA § 51-9-1 expressly states: "The right of enjoyment of private property being an absolute right of every citizen, every act of another which unlawfully

interferes with such enjoyment is a tort for which an action shall lie." In *City of Thomasville v. Shank,* 263 Ga. 624, 624-25, 437 S.E.2d 306 (1993), the Georgia Supreme Court held that a municipal corporation cannot, under the guise of performing a governmental function, create a …danger…to life and health or take or damage private property for public purpose without just and adequate compensation being first paid." *See, also, Ga. Dept. of Natural Resources v. Center for a Sustainable Coast, Inc.,* 294 Ga. 593, 600, 755 S.E.2d 184 (2014) ("the government may not…damage private property for public purposes without just and adequate compensation").

Other federal courts have held that federal preemption is neither express nor implied regarding the location, placement or construction of wireless service facilities. In *T-Mobile S., LLC v. City of Roswell, GA,* 574 U.S. 293 (2015), *Cellular Telephone Co. v. Town of Oyster Bay,* 166 F.3d 490, 494-495 (2nd Cir. 1999) and *Omnipoint Communications, Inc. v. City of White Plains,* 430 F.3d 529, 533-535 (2nd Cir. 2005), both the U.S. Supreme Court and several lower federal courts found that states and local governments do, indeed, have decision-making authority with respect to the installation of radiofrequency transmission units, and that both the aesthetic considerations of self-interested neighbors as well as the projected decline in the marketability of homes in the affected neighborhood were valid bases for a local government to decide not to allow the installation of a

cellphone tower. Verizon similarly appears to acknowledge that in both the Third Circuit's decision in *Farina v. Nokia Inc.,* 625 F.3d 97 (3rd Cir. 2010) and the Fourth Circuit's decision in *Pinney v. Nokia,* 402 F.3d 430 (4th Cir. 2005), the state and local governments' decisions regarding the physical infrastructure of the wireless network and facilities were analogous to the way that state and local governments exercise their non-preempted authority over zoning and land use decisions. *See* doc. 16-1 at 13. While Verizon contends that the Sixth Circuit's decision in *Robbins v. New Cingular Wireless PCS, LLC,* 854 F.3d 315 (6th Cir. 2017) supports Verizon's federal preemption argument, the Circuit Court in *Robbins,* like the New York State court's 2012 decision in *Stanley v. Amalithone Realty, Inc.,* 94 A.D.3d 140 (2012), discussed the federal agency's authority to arrive at the proper balance between protecting the health and safety of the public from the detrimental effects of radiofrequency emissions exposure and promoting a robust telecommunications infrastructure. The problem with Verizon's contention is that, as shown above, the FCC has to date completely abrogated its responsibility to review and evaluate the various health, safety and environmental risks associated with transmitting 5G RF radiation throughout a residential neighborhood. In so doing, the FCC has failed to conduct the proper and required **balancing** of public health and safety issues versus the industry's interests in expanding telecommunication services. And, with Verizon then telling state and

local governments, as it has told this Court, that federal preemption is either expressly or impliedly exclusive, no one is left to protect the safety and health of Plaintiff and the other residents of Derby Hills but this Court.

B. Verizon's alternative motion to dismiss Plaintiff's trespass claim (count one) ignores Georgia's statutory definition of an unlawful trespass.

Verizon admits that Georgia's anti-trespass law, OCGA § 51-9-1, "codifies common law trespass, **an *unlawful* interference with the enjoyment of private property**…[--] the central element of a[n unlawful] trespass." *See* doc. 16-1 at 22 [embolding added]. Verizon cites allegations in Plaintiff's Complaint regarding the "devastatingly adverse and potentially deadly effect on the health [and] well-being" of Plaintiff and his neighbors, that "radiation from a 5G cell unit can cause cancer and other serious and potentially permanently debilitating health conditions," and will cause Plaintiff and the Plaintiff's class "to live in constant fear and dread regarding when and how seriously they will contract…serious and potentially fatal health conditions and problems. *See id.* at 20-21. These allegations provide Verizon with more than sufficient notice of Plaintiff's claim that the installation of 5G high frequency radiowave transmitters 100 feet from Plaintiff's bedroom as well as elsewhere throughout Plaintiff's residential neighborhood are enough to constitute "an unlawful interference with the enjoyment of private property." The facts that no federal regulations applicable to 5G have been run through and completed the procedures mandated by the APA

and that, as a result, there are no currently valid and legally enforceable federal regulations applicable to 5G installation and use, Verizon's citation to the excerpt from the decision in *Pope v Pulte Home,* 539 S.E.2d 842, 843-44 (Ga. Ct. App. 2000)("A person commits trespass when he knowingly and **without authority** enters the land of another after having received prior notice that such entry is forbidden")(*see* doc. 16-1 at 23 [emphasis added) actually supports Plaintiff's count one to the extent that Verizon has relied upon and is proceeding on the presumption that the FCC has already validly promulgated regulations applicable to 5G—which the FCC has not. Verizon's claim to the contrary is nothing more than Verizon's Trojan Horse. As the Georgia Supreme Court held in *Duffield v. DeKalb County, supra* at 434, "no physical invasion damaging the property need be shown; only an unlawful interference with the right of the owner to enjoy his possession."

C. Verizon's alternative motion to dismiss Plaintiff's claim for Verizon's unlawful violation of Plaintiff's civil rights "under color of law" is also unfounded.

Verizon has already misled the City of Sandy Springs, Plaintiff and the Plaintiff's class, and now this Court by claiming that the FCC has promulgated valid and legally enforceable regulations relating to the rollout and use of 5G technology, when, in fact, the FCCs decision not to consider or evaluate the health and safety risks associated with 5G technology, thereby abrogating its

responsibility to balance those risks against the claimed telecommunication benefits of 5G, has already resulted in the August 9, 2019 "arbitrary and capricious" holding by the D.C. Circuit, followed by the FCC's recent (April 1, 2020) publication of its proposed 5G regulations in the Federal Register, thereby effectively admitting that it has not processed its proposed 5G regulations through the procedures mandated by the APA in order to make those them valid and legally enforceable. n addition to entering Plaintiff's residential neighborhood on an alleged Trojan Horse which had neither been approved nor legally validated in accordance with the requirements of the APA, Verizon brought with it on the morning of March 30, 2020, "a uniformed officer from the Fulton County Sheriff's Department, presumably to provide the appearance that…Verizon…was in…Derby Hills…under the color of the law." (*see* doc. 1 at 9, ¶ 7). Verizon's actions violated the Constitutional and statutory rights of Plaintiff and the Plaintiff's class delineated in Section A above. It should be noted that the court, in *Oyster Bay, supra,* did not dismiss the Section 1983 claim in that case, but instead allowed that claim to proceed. Conversely, Verizon has cited neither statutory nor case authority to support a dismissal of Plaintiff's counts two or four.

D. Verizon's alternative motion to dismiss Plaintiff's fraud claim ignores long-established case law in Georgia recognizing a cause of action for fraud by omission.

Verizon's contention that Plaintiff's fraud claim is deficient because it fails to allege the time, place, substance of the alleged fraud, when it occurred, and who engaged in it (*see* doc. 16-1 at 25) is ludicrous in a case in which Plaintiff has alleged fraud by omission. In paragraphs 8 and 13 of the Complaint, Plaintiff alleges that Verizon stated "absolutely nothing" about "the serious, toxic and potentially deadly health risks which necessarily follow the installation and subsequent use of 5G cell units in a populated area." Doc. 1 at 11 and 16. Verizon's citation to OCGA § 23-2-53, which expressly states that the "[s]uppression of a material fact which a party is under an obligation to communicate constitutes fraud" (*see* doc. 16-1 at 26) actually supports Plaintiff's fraud by omission claim, as does all of the case law both in this State and by this Court which recognize fraud by omission as an actionable cause of action under Georgia law—all of which Verizon has conveniently failed to bring to this Court's attention. *See Dixon v. Branch Banking & Trust Co.,* 349 Ga. App. 768, 824 S.E.2d 7600 (Ga. Ct. Apps. 2019); *Apex Bank v. Ameris Bank, Inc.,* 2017 WL 7660399 (N.D. Ga., Atl. Div. 2017)(J. Cohen); *McCabe v. Daimler, AG,* 160 F.Supp.3d 1337, 2015 WL 10091635 (N.D. Ga., Atl. Div. 2015)(J. Cohen); *Harris v. FDIC,* 2014 WL 4925689 (N.D. Ga., Atl. Div. 2014)(J. Story); *Purchasing Power, LLC v. Bluestem Brands, Inc.,* 2012 WL 3065419 (N.D. Ga., Atl. Div. 2012)(J. Story).

E. Verizon's motion to dismiss Plaintiff's intentional infliction of emotional distress claim should also be denied.

If we have learned anything from the on-going covid-19 pandemic, it is to pay attention to the scientists when looking for answers to scientific questions. As alleged in Plaintiff's Complaint, Verizon has been less than forthcoming both to the public and to this Court regarding the health and safety risks associated with 5G technology. In *Speaker v. U.S. Dept. of Health &Human Svcs.,* 623 F.3d 1371, 1379 (11th Cir. 2010), the appellate court held that if a proffered document is central to the Plaintiff's claim and its contents are not disputed by the opposing party, the Court may consider the document in the context of a motion to dismiss. Plaintiff and the Plaintiff's class respectfully refer this Court to the Joint Brief which the Petitioners filed with the D.C. Circuit Court on July 29, 2020 in the consolidated actions against the FCC cited in note 6 above. That Joint Brief contains both a description and a reference to scientific evidence regarding the health and safety risks of 5G technology.

At the appropriate time, Plaintiff intends to show this Court that both Plaintiff's mother and Plaintiff's maternal grandmother died from Alzheimer's, that Plaintiff's 22-months older sister is already demonstrating signs of early-stage Alzheimer's, and that some of Plaintiff's Derby Hills neighbors already have medical conditions such as cancer, lupus, arterial fibrilation, and pregnancy. It is only reasonable to presume that Verizon's threat to transmit 5G RF radiation

toward Plaintiff with his genetic neurological predisposition from 100 feet away and toward Plaintiff's neighbors, a number of whom already have serious medical conditions, has already inflicted severe emotional distress on Plaintiff and a number of Plaintiff's residential neighbors. Hence, Plaintiff's and the Plaintiff's class's request for injunctive and/or declaratory relief,[10] plus damages.

IV. Conclusion

For all of the reasons set forth above (i.e., the other half of the story), Defendant Verizon's motion to dismiss should be DENIED. If the Court has any doubt about this, Plaintiff requests a hearing to be conducted via Zoom technology so as to protect the parties, the Court, and the Court's staff from the risk of contracting covid-19. Plaintiff additionally requests that the Court remind Verizon of its obligation to be candid with the Court on a going-forward basis.

Respectfully submitted, this 10th day of August, 2020.

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[10] In response to Verizon's suggestion that the 5G transmitters which Verizon plans to install throughout Plaintiff's neighborhood haven't been built yet (*see* 16-1 at 22), the federal Declaratory Judgment Act, which "permits actual controversies to be settled before they ripen into violations of law" (*see* 10B C. Wright & A.Miller, *Federal Practice & Procedure,* Civil 3d Sect. 2751 (2004)), permits a federal court, in its discretion, to "declare the rights and other legal relations of any interested party seeking such a declaration." 28 U.S.C. §2201(a).

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