No. 13-10752

FILED UNDER TEMPORARY SEAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. Bank National Association, Litigation Trustee
of the Idearc, Inc., et al., Litigation Trust,
Plaintiff–Appellant,

v.

Verizon Communications, Incorporated; GTE Corporation;
John W. Diercksen; Verizon Financial Services, L.L.C.,
Defendants–Appellees.

Appeal from the United States District Court
For the Northern District of Texas, Dallas Division
USDC No. 3:10-cv-1842-G

BRIEF OF APPELLANT

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as Litigation Trustee on Behalf of the Idearc Inc., et al., Litigation Trust

CERTIFICATE OF INTERESTED PERSONS

Case No.: 13-10752

Case Style: U.S. Bank, National Association, Litigation Trustee of the Idearc, Inc., et al., Litigation Trust v. Verizon Communications, Incorporated; GTE Corporation; John W. Diercksen; Verizon Financial Services, L.L.C.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

I. APPELLANT

1. Trustee.

U.S. Bank National Association,
Litigation Trustee of the Idearc Inc. et al. Litigation Trust
("Trustee," the "Trust," or the "Litigation Trust.)"

2. Litigation Trust.

The Litigation Trust has no parent company. Only MatlinPatterson Global Opportunities Partners III LP and MatlinPatterson Global Opportunities (Cayman) III LP may own 10% or more of its beneficial interest. There is no stock in the Trust.

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II. APPELLEES

A. Verizon Communications, Inc., Verizon Financial Services, LLC, GTE Corporation (referred to collectively as the "Verizon entities").

1. **Verizon Communications, Inc. ("Verizon" or "VCI").** VCI has no parent corporation and no publicly held corporation owns 10% or more of its stock.

2. **Verizon Financial Services, LLC ("VFS").** VFS is wholly owned by VCI.

3. **GTE Corporation ("GTE").** GTE is a subsidiary of VCI, and VCI is the only entity that owns 10% or more of GTE's stock.

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STATEMENT REGARDING ORAL ARGUMENT

Trustee requests oral argument. Though error is clear, the underlying transaction and procedural history of the case are complex. The appeal also raises issues of constitutional import that will benefit from oral argument.

This appeal presents this important issue: when multiple claims are brought against multiple parties and a Seventh Amendment jury trial right attaches to any claim against any party, must a jury trial be had? The appeal also raises a conflict between judges of the Northern and Western Districts of Texas on an identical issue: the jury rights of a litigation trustee for a trust created in a confirmed bankruptcy reorganization plan. Although unnecessary to reach the issue before recognizing Trustee's right to a jury, the appeal implicates an issue not yet resolved by the Court: whether *Stern* requires that an Article III court hear fraudulent transfer claims. The district court also used a show cause procedure to dispose of Trustee's claims after a bench trial on a single, nondispositive issue. That procedure raises fundamental procedural and substantive issues under Delaware, Texas and federal law.

In short, oral argument would assist the Court in understanding how the erroneous jury strike came to pass, how the underlying transaction suffered from fatal deficiencies that subject the defendants to liability, and how the district court's unprecedented show cause procedure denied Trustee due process.

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ABBREVIATIONS AND REFERENCES

ABBREVIATIONS

CEO	Chief Executive Officer
CFO	Chief Financial Officer
CPA	Certified Public Accountant
EBITDA	Earnings Before Interest Tax Depreciation Amortization
IRS	Internal Revenue Service
NYSE	New York Stock Exchange
PLR	Private Letter Ruling
SEC	Securities and Exchange Commission
TUFTA	Texas Uniform Fraudulent Transfer Act

RECORD REFERENCES

ROA.####.	Record on Appeal.[page number].
SROA.####.	Sealed Record on Appeal.[page number].
DX#### at ##.	Defendants' Exhibit Number at [page number].
PX#### at ##.	Plaintiff's Exhibit Number at [page number].
RE##/ROA.##.	Record Excerpt.Number/[Record reference].

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1332 and 1334. The district court entered final judgment on June 18, 2013. Trustee filed its notice of appeal on July 15, 2013. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

1. Did the district court improperly deny Trustee its constitutional right to a trial by jury?

2. Did the district court improperly enter judgment against Trustee based on a "value" fact finding that was not dispositive of all of Trustee's claims and in a manner that denied Trustee a trial and due process of law, particularly when undisputed evidence established Trustee's right to relief?

3. Is the district court's "value" fact finding clearly erroneous?

4. Did the district court make erroneous evidentiary rulings?

5. Did the district court err in partially granting motions to dismiss and for summary judgment?

STATEMENT OF THE CASE

This case arises from a spinoff where Verizon put its obsolete yellow pages business into a new company, Idearc, and loaded it up with more than $9 billion of debt, most of which Verizon restricted Idearc from refinancing for seven years. Verizon and its lawyers and investment bankers represented both sides of the transaction. Not only were Idearc's interests not protected, Verizon failed to properly constitute Idearc's board or to become a valid Idearc shareholder—key pieces to effectuating a valid, tax-free spin. Verizon nevertheless kept the $9 billion in loan proceeds and sent Idearc on a direct path to bankruptcy. Idearc's confirmed bankruptcy reorganization plan transferred litigation rights to a litigation trust. Litigation Trustee brings the claims here to benefit the creditors that have been left holding approximately $6 billion in unpaid debt.

A. Verizon's print directory revenues decline annually.

Verizon's yellow pages operations, led by Kathy Harless, failed year after year to meet internal revenue targets. PX27 at 21. The internet, particularly Google and Yahoo search engines, was the death knell for print directories. PX27 at 4-17. Verizon responded with an online directory, but revenues were a small fraction of historic print revenues ($230 *million* for online compared to $2.978 *billion* for print in 2006) and generated much lower profit margins. ROA.10927-28, ROA.17796-97; SROA.49791-92, SROA.22030. Revenues were in steep decline—down $153

million between 2005 and 2006. PX233(a); ROA.1975; SROA.29061. Verizon needed a solution for this obsolete business.

B. Verizon decides to spin off its declining directory business into Idearc, netting it $9.5 billion tax free.

The solution came from Verizon's investment advisors (JP Morgan and Bear Stearns) who devised a plan to spin off the directory business and net Verizon billions tax free (and themselves $100 million in fees). PX267. Verizon chose Defendant John Diercksen, head of Verizon's strategic planning and former head of Verizon-predecessor Bell Atlantic's yellow pages business, to lead the spin for Verizon *and* serve as a pre-spin director for Idearc. ROA.16337-38, ROA.16349, SROA.26842 at 80-81, SROA.26854 at 129:6-11.

1. Verizon forms Idearc to hold its directory business without giving it independent counsel or directors or a second required board member.

On June 20, 2006, Verizon's lawyer, Greg Feldman, filed articles of incorporation in Delaware to form Verizon Directories Disposition Corporation ("VDDC," later known as Idearc) to hold Verizon's directory business. PX421; ROA.14697; SROA.32108-09. Feldman adopted bylaws, which required a two-person board and authorized 100 shares of common stock. ROA.14703, ROA.14714, ROA.14733. Although the bylaws required a two-member board for a quorum, Feldman appointed only Diercksen to the board. ROA.14733. No second

director was elected. Consequently, the Idearc "board" was never formed and none of the resolutions subsequently signed by Diercksen were valid.

On June 22, 2006, Diercksen purported to act unilaterally as Idearc's board, electing Harless as the putative President of Idearc and authorizing the issuance of one share of Idearc common stock to Verizon on receipt of full payment. RE414/PX427. Diercksen did not set a price for the share, RE414/PX427; nor did Verizon ever pay for it. Diercksen also later "appointed" Andrew Coticchio as putative CFO and Bill Mundy as putative Secretary of Idearc. RE432/PX2018 at 43.

One of Verizon's lawyers explained not giving Idearc ***independent directors***:

> Since we basically decided not give [Idearc] eyes, ears, limbs and advisors until close to closing, I am ***not sure why we would to give it a brain***.

PX528 (emphasis added). Another lawyer explained why Verizon chose not to give Idearc ***independent counsel***:

> **[**Idearc] will eventually have its own counsel, but ***Verizon wants to begin nailing down the terms of everything before that happens***.

DX155 (emphasis added).

2. The terms of the spinoff emerge.

Under contracts prepared by Verizon, Idearc would receive Verizon's print and online domestic directory business in the proposed spinoff. In exchange, Idearc

would issue ***145,851,861 shares*** of Idearc's common stock to be distributed to Verizon shareholders. ROA.4072. Verizon also would receive from Idearc—

- ***$2.4 billion in cash,*** consisting of $1.9 billion in loans and over $500 million cash on hand, PX893 at 2-3; PX1062 at 8, and
- $2.85 billion in unsecured notes (the "Unsecured Notes") and $4.265 billion in secured loans ("Verizon Tranche B"), PX1048 at 2, SROA.30594, collectively the "Spinoff."

Verizon would receive ***$7.1 billion in value*** by exchanging the Idearc Unsecured Notes and Verizon Tranche B for its own short-term debt held by JP Morgan and Bear Stearns—essentially paying off its own debt with Idearc debt. PX1048 at 2.

3. Verizon and its advisors pitch the spin transactions to the IRS, rating agencies and lenders.

To market the transactions as tax free, Verizon secured a private letter ruling ("PLR") from the IRS regarding the spin's tax treatment. PX569 at 4, PX659. For the spin to qualify for tax-free status, Verizon needed to own at least 50% of Idearc's common stock, and the spin needed legitimate business reasons. JP Morgan and Bear Stearns had to qualify as bona fide creditors, so the Verizon debt they held could be paid off with Idearc debt. Idearc debt had to be long-term ("securities") and could not be presold. 26 U.S.C. § 355.

The IRS did no independent investigation in issuing the PLR but relied instead on information Verizon provided. PX659 at 5. Among other things,

Verizon told the IRS that it received "all of the shares" of Idearc "in exchange for a nominal cash contribution." PX659 at 6. Verizon also made Idearc sign a "Tax Sharing Agreement" that would restrict Idearc from restructuring $7.1 billion of its "debt securities" for at least seven years to protect Verizon from taxes on the spin. PX893 at 1-3, 8-16, PX1062; SROA.34491-508.

Verizon had to make the lending and investing market believe that Idearc was a growth company. But Verizon knew that the yellow pages business had undergone a "secular" change because of the internet and that it had no "secret elixir." PX121; ROA.16888; SROA.43827, SROA.43843-44. Verizon internally described the directory business as a "gloomy story" with a turnaround nowhere in sight and anticipated problems marketing Idearc's debt. RE411-12/PX243. Yet Verizon prepped its yellow pages' employees not to "focus too much on the negatives" in upcoming roadshows to ratings agencies and lenders and instructed them to remove conflicting numbers in "the old business model" from the data room when lenders requested access to it. RE413/PX313, PX333.

When the yellow pages managers and investment advisers hit the road to pitch Idearc's debt, their marketing materials depicted just the opposite of Verizon's internal gloomy assessment of its yellow pages business:

Verizon Internal Assessment *March 24, 2006* (PX243)	**External Marketing Presentations** *September/October 2006* (PX569, PX620, PX716, PX768, PX769)
• "[T]he **underlying stories are gloomy.**"	• "Attractive markets and room to grow. … **Very high business growth and very high opportunity** to add customers in independent markets." PX620 at 17.
• "I would say the **'turnaround' seems nowhere in sight**."	• "Directory industry is **large and growing** … Incumbent print is large, highly profitable and presents opportunity for revenue growth." PX620 at 23.
• "Ferency [a Bear Stearns investment banker] … made an early comment of **how 'grim' the picture seems**."	• "Rapid *industry* evolution provides **significant growth opportunity**." PX620 at 40.
• "[H]ardly any surprise at all, other than the **EXTENT of fall-off of EBITDA from '05-'06**…."	• "We are **successfully defending our markets**." PX620 at 27.
• "Out of the 100+ pages of charts, you **couldn't find any rising or even flat bars**."	• "Recurring revenue from diverse and loyal customer base…. **Consistently high renewal rates**." RE416/PX620 at 18.
• "What is particularly disturbing is the '06 year-to-date…nearly every region shows **meaningful decline, double digit declines are commonplace**…."	• "Strong financial position. Highly profitable. … **Robust growth initiatives**." RE417/PX620 at 19.
• "It'd be **very difficult to convince debt guys and rating agencies that the business is *turning around*** when **EBITDA in 06 will nosedive**	• "**Strategy shift**. Reinvestment in sales team Reinvestment in print product Investment in advertising

by $140MM…and **revenue will fall** by $100MM just like in '05."

Responsible investment in growth initiatives" PX620 at 20.

October 27, 2006 (PX869)

- Verizon officers becoming Idearc officers were "individuals that **reduced the value of the [directory] unit by $5+ billion**…."
- With incentive plan, "[s]eems like we are feeding the rising tide of **incompetence**" of Idearc management.
- "**Solid management team** with competitive industry experience." PX620 at 12.
- "**Highly experienced** management team." PX620 at 65.

The misleading roadshows worked—Verizon secured favorable debt ratings for Idearc, PX1913 at 50, and the investment advisors presold both the Unsecured Notes and Tranche B debt facility to a syndicate of lenders, DX383. The favorable debt ratings in turn inspired exuberant stock prices. SROA.51435.

4. With tax-free treatment, the validity of the transactions and issuance of shares in jeopardy days before closing, Verizon looks for quick (but ineffective) fixes to save the spin.

On October 18, 2006, without a board quorum, Diercksen signed a resolution to authorize the transactions necessary to spin off Verizon's directory business. PX893. Idearc shares began to trade on a when-issued basis on the NYSE on November 6, 2006, in advance of the scheduled November 17 closing. DX611 at 2, DX1629.

Verizon needed legal opinions for the NYSE and stock transfer agent that the Idearc shares were being lawfully authorized and issued. ROA.4282;

SROA.52749-50. Verizon secured counsel for Idearc at the last minute: Fulbright began its due diligence for an Idearc opinion just nine days before the spin. ROA.14955, ROA.14957, ROA.15250. Unable to locate a minute book, Fulbright began "drafting a number of documents (resolutions, secretary's certificates, lost securities affidavits and stock certificates) that [would] need to be signed by various Verizon/Idearc individuals." PX1017; ROA.15211-13. The later-received minute book confirmed that Verizon had not purchased any Idearc common stock as represented to the IRS and a second required board member had not been appointed as required by the charter. PX2018 at 93-96. Fulbright never provided a NYSE opinion.

The spin was at risk of imploding. Verizon's failure to purchase Idearc stock would invalidate the PLR, subjecting Verizon to billions in taxes and potential claims from lenders and others. PX659 at 5. Without a properly constituted Idearc board, the transactions set to close were not authorized. *See infra* III.B.I. Without validly issued Idearc stock, the needed legal opinion would not issue and the when-issued Idearc stock (already trading on the market) would not be delivered. *See id*.

Verizon scrambled to cover its tracks. Idearc's Harless and Mundy—who did not become Idearc's putative Secretary until ***October 13, 2006***—signed a VDDC stock backdated to the same date as Diercksen had originally authorized the issuance of one share of VDDC stock to Verizon, ***June 22, 2006***. RE414/PX427,

RE423/PX1944,[1] RE432/PX2018 at 43, RE436/PX2018 at 54; ROA.15211-13. Mundy also certified that Verizon held 100% of Idearc's outstanding stock, one share dated October 18, 2006 (the date of the VDDC/Idearc name change and presumably in exchange for the VDDC share). PX799; RE433-35/PX2018 at 48-50; ROA.15307, ROA.15330. Mundy did not certify that Idearc received payment for the stock. PX2018 at 5-6, 48-50. Verizon later claimed in this suit that it purchased the stock for "services," not cash as it had told the IRS to get the PLR. ROA.15286. Yet there is no resolution in which Idearc's board (with or without a quorum) agreed to sell stock for services; no resolution to value the services; and no evidence of services rendered by June 22. Verizon's head of investor relations agreed that there were no certificated shares of Idearc before the spin. ROA.16808-10.

On November 15, 2006, Donald Reed and Thomas Rogers, selected by Verizon, signed an Idearc board "consent" document that purported to ratify Diercksen's resolutions authorizing the spin transactions. SROA.36643-56. The next day, without a required quorum, Diercksen purported to elect Reed, Rogers, Harless and two others as Idearc's New Board. SROA.36899. Diercksen also signed, on behalf of Verizon, a distribution agreement that set out the spin's terms,

[1] PX1944 was excluded at trial on objection that it did not relate to Phase I but without objection to its authenticity.

and Coticchio signed putatively for Idearc, purporting to obligate Idearc to the $9.5 billion Spinoff. PX985 at 35.

On November 17, 2006, Verizon's lawyers opined to the NYSE that the 148 million shares of Idearc stock would be lawfully issued. PX1092. Diercksen resigned as a director of Idearc "effective as of November 16, 2006, following the execution of consents in [his] capacity as sole director of Idearc at the time of execution." PX1048 at 5, PX1051. The Spinoff closed, ROA.16458, and Idearc's balance sheet after the distributions to Verizon reflected no surplus and a negative net worth on December 31, 2006:

Assets:	$1,318,000,000
Liabilities:	$10,164,000,000
Shareholder's Equity:	($8,846,000,000)

PX1148.

C. Idearc's New Board refuses to ratify Verizon's spin transactions.

The New Board refused to ratify Diercksen's conduct as a director of Idearc. PX953. They did purport to ratify the authority of Idearc's putative officers to sign the spin documents by having three of the five New Board members sign on November 17 the same consent that Reed and Rogers had signed before (but never after) being elected to the board. PX1047 at 1, 3, 5. The district court held this Idearc resolution void as a matter of law. SROA.45762.

D. Dissension arises, leading to departures of Idearc officers put in place by Verizon, and Idearc files for bankruptcy.

After the spin, yellow pages' management reportedly withheld material information from the market and the New Board. RE422/PX1313. Harless was also reportedly "at war" with Coticchio. RE422/PX1313. On November 2, 2007, Diercksen said he had "seen this movie before"—sales falling dramatically, not hitting revenue targets and management relationships at a low. RE422/PX1313. Yet just the day before, Harless and Coticchio had painted a rosy performance picture for investors. PX1306a. Verizon's head of investor relations agreed that the picture being painted during the investor call was different than the report Diercksen received. ROA.17931-39.

Putative CFO Coticchio left Idearc in November 2007. ROA.17941-43. Idearc's stock price had started to decline. DX0611. Abrupt departures of key executives, particularly the CFO, often signals ongoing financial difficulties. *See, e.g.,* Joseph D. Beams, Hua-Wei Huang & Yun-Chia Yan, *Top Management Resignation and Firms' Subsequent Bankruptcy,* 13 ACCT. & THE PUB. INT. 39 (2013), *available at* http://papers.ssrn.com/abstract=1967703. When the stock price declined in February 2008 to almost one-third of its price on the date of the spin, Harless departed as well. DX611; ROA.17941-43.

New Board member Reed approached Verizon, seeking relief from the Tax Sharing Agreement to refinance the debt and stave off bankruptcy. ROA.15218.

Verizon did not grant Idearc the requested relief, and Idearc and substantially all of its subsidiaries (the "Debtors") filed petitions for bankruptcy on March 31, 2009, only 28 months after the Spinoff. SROA.27374. Idearc's lawyers told the bankruptcy court that "when this spin occurred two and a half years ago [Idearc] was saddled with too much debt." ROA.5712.

Idearc's confirmed bankruptcy plan (the "Plan") valued reorganized Idearc at roughly $4 billion. PX1664 at 16. The Plan also created the Litigation Trust, which received the "Litigation Trust Rights." PX1664 at 12.

E. This lawsuit ensued.

Trustee brought claims against:

- Verizon, VFS, and GTE for fraudulent transfers based on the $2.4 billion cash transfer to Verizon, the $7.1 billion debt exchange, Idearc's assumption of certain contractual obligations, other distributions, and post-spin interest payments;
- Verizon, VFS and Diercksen for breach of fiduciary duty and aiding and abetting breach of fiduciary duty based on Diercksen's violation of his duties as a director of Idearc;
- Verizon and Diercksen for unlawful dividends and promoter liability based on, among other things, distributions made without a properly constituted board or stock ownership, without revaluing the assets, and for participating in fiduciary duty breaches by Verizon's outside counsel; and
- Verizon for unjust enrichment and alter ego based on receipt of $9.5 billion without proper authorization, without being a shareholder of Idearc, and through the domination, control and misuse of Idearc.

SROA.22673.

The district court denied motions to dismiss, except dismissing a punitive damage remedy and parts of the fraudulent transfer and unjust enrichment counts. ROA.4071, RE198/ROA.12358, RE235/ROA.12526. The district court granted a motion to strike the jury. RE171/ROA.9087. The court also partially granted summary judgment on some claims. RE252/ROA.12677. The court then *sua sponte* ordered a bifurcated bench trial, but set only Phase I to decide one (and no other) issue, "What was Idearc's value at the time it was spun off from Verizon in November of 2006?" RE397-99/ROA.12636-38.

After finding "the value of Idearc on November 17, 2006, was worth at least $12 billion," RE305-06/ROA.14594-95, the district court ordered Trustee to show cause why a final judgment should not be entered against it. RE371/ROA.14660. Specifically, the court's order stated: "The plaintiff shall respond to this order with a brief that (1) explains why any (or all) of its legal claims are viable in light of the court's finding on Idearc's value, and (2) identifies any disputed fact issues that remain for resolution in a second phase of trial." RE372/ROA.14661. Trustee responded, identifying numerous unresolved fact issues and also moved for judgment on certain undisputed facts. ROA.14663, ROA.14810, ROA.15432. The district court denied Trustee's motion, RE374/ROA.15677, and entered a take-nothing judgment in favor of all defendants. RE396/ROA.15699.

SUMMARY OF ARGUMENT

This case raises issues of constitutional import, where the district court improperly struck a jury demand on claims for which the Seventh Amendment undeniably protects the right to trial by jury and then denied Trustee due process.

Trustee's right to a jury trial on its unlawful dividend and breach of fiduciary duty claims against Diercksen is so clear that no contrary position is colorable. The legal money-damage claims carry a Seventh Amendment right to a jury. That ends the inquiry; a jury trial is required. Even if the claims against Verizon were not legal money-damage claims entitled to a jury, which they are, a jury trial is still required because those claims rest on issues common with the claims against Diercksen—like the value issue tried in Phase I. Indeed, a jury trial is required on all claims against all parties, and the erroneous jury strike alone requires reversal.

The judgment here also cannot stand because it is based on a single fact finding by the district court that does not dispose of Trustee's claims. Instead of a jury trial, or even a full bench trial, the district court ordered a bifurcated bench trial on the value of Idearc on the day it was spun off by Verizon. After finding the value of Idearc was more than its spin debt, the district court ordered Trustee to show cause why a final judgment should not be entered. When Trustee pointed out fact issues remained to be tried and requested judgment on stipulated facts, the district court made additional findings on classic fact issues like intent, causation

and reasonableness that were never tried, implicitly recognizing that value was not dispositive of some (and certainly not all) of Trustee's claims. The district court nevertheless entered judgment against Trustee on all claims without trial—contrary to Federal Rule of Civil Procedure 52(c) ***and*** Trustee's right to due process.

Moreover, the district court clearly erred in basing its value finding on the market price of Idearc's stock at the time of the spin: (1) not taking into account Idearc's fatal corporate defects, (2) discarding contemporaneous spin evidence demonstrating material information that would affect market price, (3) discarding the value opinion of Trustee's "expert, whom the district court agreed was highly qualified," while crediting rebuttal testimony of an unqualified expert who offered no value opinion, and (4) refusing to admit (or consider) Trustee's evidence on, among other things, the fatal corporate defect issues. The district court also erred in its pretrial rulings on motions to dismiss and for summary judgment.

Finally, having no lawfully appointed Idearc board to contract for debt, and with $9.5 billion distributed from Idearc without valid authorization to nonshareholder Verizon, Trustee is entitled to recover against Verizon as a matter of law on its unlawful dividend and promoter liability claims. The district court refused to consider Idearc's fatal corporate formation defects, casually dismissing them as mere technicalities. But "certainty and precision" are the hallmarks of Delaware corporate law, and technicalities "are vital in transactions that affect the

corporate form." *MBKS Co. v. Reddy*, 924 A.2d 965, 975-76 (Del. Ch. 2007). Indeed, if compliance with corporate requirements is not required even in a nine billion dollar transaction, why do corporate requirements exist? Ignoring corporate formality requirements guts their very purposes, including certainty of ownership. At a minimum, the consequences of Verizon's undisputedly bungled corporate formation of Idearc warrant review by this Court or remand for trial.

ARGUMENT AND AUTHORITIES

I. Standards of review and applicable law.

Questions of law are reviewed *de novo*, including conclusions of law, constitutional questions, reconsideration of legal questions, rule, statutory and contract construction, dismissal for failure to state a claim, and summary judgment. The admission or exclusion of evidence, including expert testimony, is reviewed under an abuse of discretion standard. Judicial fact findings are reviewed for clear error.

Under the internal affairs doctrine, Delaware law governs Trustee's breach of fiduciary duty, aiding and abetting, promoter liability, and unlawful dividends claims because Idearc was incorporated in Delaware. *Hollis v. Hill*, 232 F.3d 460, 465 (5th Cir. 2000). Texas law applies to unjust enrichment under the "most significant relationship" test. *See Casa Orlando Apartments. v. Fed. Nat'l Mortg. Assoc.*, 624 F.3d 185, 190-94 (5th Cir. 2010). Texas and federal law govern the fraudulent transfer claims. TEX. BUS. & COM. CODE ANN. §§ 24.005-.008 (West 2009); 11 U.S.C. §§ 548, 550.

II. The district court improperly denied Trustee its constitutional right to a trial by jury.

The district court struck the jury based on its erroneous analysis of how ***Verizon's*** proofs of claim in Idearc's closed bankruptcy proceeding affected Trustee's right to a jury trial on the fraudulent transfer claims against Verizon (and a misunderstanding of jury demand practice). RE174-84/ROA.9090-100. The proof of claim analysis had nothing to do with Diercksen, who never filed a proof of claim and was not sued for fraudulent transfer. Even when asked to consider the Diercksen claims separately, the district court refused to reinstate the jury demand. Yet the claims against Diercksen indisputably require a jury trial. That ends the inquiry. But Trustee was also entitled to a jury trial on the Verizon claims. Based upon its erroneous substantive analysis and a deeply flawed procedural process, the district court improperly struck the jury on all claims against all defendants.

A. Trustee was entitled to a jury trial.

"Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). A two-step analysis determines Seventh Amendment rights: (1) "compare the statutory [or other] action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity"; and (2) "examine the remedy sought and determine whether it is

legal or equitable in nature." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989) (citation omitted). The more important second prong "requires consideration of the general types of relief provided by courts of law and equity." *Chauffers, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 571 n.8 (1990). Using that test, the district court's refusal to conduct a jury trial cannot withstand any scrutiny—it is constitutionally infirm *and* procedurally unsound.

1. The claims against Diercksen require a jury trial.

a. Unlawful dividend is a legal money-damage claim.

A statutory claim for unlawful payment of dividends is legal in nature and seeks legal relief in the form of money damages DEL. CODE ANN. tit. 8, §§ 170, 173, 174 (2013); *see Curtis v. Loether*, 415 U.S. 189, 194 (1974) (recognizing jury trial right if statute "creates legal rights and remedies"); *Pereira v. Farace*, 413 F.3d 330, 335, 339-41 (2d Cir. 2005) (recognizing jury right for Delaware statutory dividend claim); *Mirant Corp. v. S. Co.*, 337 B.R. 107, 119-21 (N.D. Tex. 2006). Indeed, state-law money-damage claims, like an unlawful dividend claim, brought in federal court can be heard only in an Article III court and hence carry a Seventh Amendment jury right. *Granfinanciera*, 492 U.S. at 53; *N. Am. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 76, 84 (1982). Moreover, the Seventh Amendment assigns decisions on disputed issues of fact to the jury in cases to

which a jury right attaches. *See, e.g., Byrd v. Blue Ridge Rural Elec. Co-op, Inc.*, 356 U.S. 525, 537-38 (1958).

Like in *Pereira,* the compensatory damages that Trustee seeks from Diercksen in its unlawful dividend claim result not from money passing through Diercksen's hands, but from distributions he improperly authorized Idearc to pay to Verizon—a classic legal money-damage claim that requires a jury. The district court disposed of the claim based on its own value fact finding, but the value issue should have been determined by a jury. Although not dispositive, the value issue was certainly relevant to the unlawful dividend claim, and the district court agreed. For example, if Idearc was worth less than the spin debt, there was not adequate surplus with which to lawfully declare a dividend. A jury trial was required on ***all*** fact issues related to the unlawful dividend claim, including the disputed value issue.

Based on its own research (because the defendants never moved to strike the unlawful dividend claim on Seventh Amendment grounds), the district court concluded that "a suit in equity is the proper remedy ***to compel stockholders*** to return unlawful dividends," quoting L.L. Briggs, *Stockholders' Liability for Unlawful Dividends*, 8 TEMP. L. Q. 145, 167 (1934) ("Briggs"), ROA.9090 (emphasis added). That discussion begins earlier:

> ***Apart from statutory provisions***, there is much diversity of opinion as to the question of jurisdiction when an attempt is made ***to recover*** unlawful dividends ***from stockholders***.

Briggs at 166-67 (emphasis added). But the claim here is a ***statutory*** one that seeks legal remedies based on legal obligations owed by Diercksen as Idearc's ***director***, not as stockholder. Trustee's claim carries a right to a trial by jury. *Curtis*, 415 U.S. at 194; *Pereira*, 413 F.3d at 335, 339-41. Reversal is required on this basis alone.

b. Breach of fiduciary duty and promoter liability are legal money-damage claims.

Because Trustee seeks compensatory damages for its fiduciary-duty-based and promoter liability claims against Diercksen, those claims are protected by the Seventh Amendment. *In re Jensen*, 946 F.2d 369, 372-73 (5th Cir. 1991), *overruled on other grounds as recognized in In re El Paso Elec. Co.*, 77 F.3d 793, 794-95 (5th Cir. 1996); *see also Pereira*, 413 F.3d at 340-41; *Soley v. Wasserman*, No. 08 Civ. 9262(KMW)(FM), 2013 WL 1655989, at *1-2 (S.D.N.Y. Apr. 17, 2013); *Sergent v. McKinstry*, 472 B.R. 387, 410-15 (E.D. Ky. 2012). Although the disputed value and other fact issues required a jury, *see Byrd*, 356 U.S. at 537-38, the district court improperly disposed of those claims without a jury.

The district court in a footnote cited two cases (proffered by the defendants in a footnote of their motion to strike) to conclude that the breach of fiduciary claim is "not entitled to a jury trial" and the promoter liability claims "appear to be

equitable as well"—not analyzing Diercksen separately and without citing to the two-prong *Granfinanciera* test. ROA.9090. But the claims in those cases sought equitable relief, not legal relief as here. *Cantor v. Perelman*, No. Civ.A. 97-586-KAJ, 2006 WL 318666, at *9 (D. Del. Feb. 10, 2006); *In re Hechinger Inv. Co. of Del., Inc.*, 327 B.R. 537, 544 (D. Del. 2005), *aff'd*, 278 F. App'x 125 (3d Cir. 2008). Again, reversal is required on this basis alone.

2. The claims against the Verizon entities require a jury trial.

The Diercksen claims require a jury and so do the claims against Verizon.

a. Aiding/abetting, promoter liability, unlawful dividend and alter ego claims are legal money-damage claims.

The claims against the Verizon entities for aiding and abetting Diercksen's breaches of fiduciary duty, promoter liability jointly with Diercksen, and issuance of unlawful dividends jointly with Diercksen are also money-damage claims that require a jury upon demand for the same reasons that apply to the claims against Diercksen. *Jensen*, 946 F.2d at 372; *Pereira*, 413 F.3d at 335, 339-41. Alter ego here is likewise a claim for compensatory damages that requires a jury. *See infra* III.F.

The district court characterized the aiding and abetting claim as equitable in nature because "the plaintiff is seeking to have Idearc's money, in the form of cash and debt obligations, returned by Verizon." RE193-95/ROA.12328-30. But the unlawful dividends claim seeks ***only*** money damages, not restitution, and the

promoter and aiding and abetting claims seek either (1) money damages *and* the return or forfeiture of property ***or*** (2) money damages. SROA.22686, SROA.22691, SROA.22698. Because Trustee seeks monetary damages on these claims, each is a legal claim that requires a jury on the disputed value and all other fact issues.

Moreover, the joinder of equitable claims with legal claims does not eliminate a right to a jury trial on legal claims. *Curtis,* 415 U.S. at 196 n.11; *Allison v Citgo Petroleum Corp.*, 151 F.3d 402, 422-23 (5th Cir. 1998); *Jensen*, 946 F.2d at 372. To protect the trial by jury right, all fact issues on legal claims must be tried before any equitable determinations. *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 550 (1990); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472-73 (1962); *Beacon Theatres v. Westover*, 359 U.S. 500, 510-11 (1959). Fact issues common between legal and equitable claims also must be tried to a jury. *Beacon,* 359 U.S. at 510-11; *Jensen*, 946 F.2d at 372.

Here, the district court used the value fact finding to dispose of claims against Diercksen ***and*** Verizon. One claim against Verizon is aiding and abetting Diercksen, and the other two claims are jointly against Diercksen and Verizon. As such, even if the claims against Verizon were equitable, which they are not, the fact issues common to those claims against Diercksen and those against Verizon would require a jury trial before any equitable determinations. *Lytle*, 494 U.S. at

550; *Dairy Queen,* 369 U.S. at 472-73; *Beacon,* 359 U.S. at 510-11; *Jensen*, 946 F.2d at 372-73.

b. Fraudulent transfer is a legal money-damage claim.

A fraudulent transfer action involves a private, not public, legal right that must be tried to an Article III court and hence carries a Seventh Amendment right regardless of proofs of claim. *Stern v. Marshall*, 131 S. Ct. 2594, 2608, 2614, 2620 (2011); *Granfinanciera*, 492 U.S. at 53-54; *see also In re Bellingham Ins. Agency*, 702 F.3d 553, 561-63 (9th Cir. 2012), *cert. granted*, 133 S. Ct. 2880 (2013). That means a jury was required based on Trustee's fraudulent transfer claims—without regard to the other legal money-damage claims that also required a jury.

The district court held, based on *Langenkamp v. Culp*, 498 U.S. 42 (1991), that Verizon's proof of claim extinguished the jury rights of not only Verizon, the creditor, but also of Idearc, the debtor. RE174-78/ROA.9090-94. Because the court concluded that a litigation trustee "stands in the shoes of" and "has no greater or lesser right to a jury trial than the original debtor" in the bankruptcy proceeding, it decided the Litigation Trustee also had no right to a jury. RE182/ROA.9098.

As recognized by Western District of Texas Judge Sparks (who expressly rejected Judge Fish's reasoning), *Langenkamp* did not involve a litigation trustee created by a confirmed plan to act as a post-bankruptcy vehicle. *Crescent Res. Litig. Trust v. Duke Energy Corp.*, No. A-12-CV-009-SS, 2013 WL 1865450, at

*3-6 (W.D. Tex. May 2, 2013). A litigation trustee does not stand in the shoes or act as the agent of the debtor but instead acts only for its beneficiaries. Fraudulent transfer claims brought in district court by a litigation trustee who now owns the claims are not part of the bankruptcy claims allowance process, the reordering of creditors' claims, or the bankruptcy regulatory scheme. *Picard v. Katz*, 825 F. Supp. 2d 484, 486-87 (S.D.N.Y. 2011).

Moreover, the proofs of claim here are irrelevant to Trustee's jury rights. Only if a plaintiff's claim would necessarily be resolved in the claims allowance process could a proof of claim possibly extinguish a jury right. *See Stern,* 131 S. Ct. at 2611; *Langenkamp*, 498 U.S. at 44-45; *Granfinanciera*, 498 U.S. at 58-59. "Where the legal action need not necessarily have been resolved in the course of allowing or disallowing the claims against the … estate … the claim belonged in an Article III court." *In re BP RE, L.P.* No. 12-51270, 12-51279, 2013 WL 5975030, at *6 (5th Cir. Nov. 11, 2013) (citation omitted); *see also In re Frazin*, 732 F.3d 313, 319 (5th Cir. 2013); *In re Spillman Dev. Grp.*, 710 F.3d 299, 306 (5th Cir. 2013); *Technical Automation Servs. Corp. v. Liberty Surplus Ins. Corp.*, 673 F.3d 399, 405-07 (5th Cir. 2012).

The claims here would not be resolved in the course of the claims allowance process. Verizon's only remaining proof of claim in Idearc's bankruptcy proceeding related to an extremely limited indemnification in a distribution

agreement for misrepresentations in specified financing and registration documents, SROA.21995-98, SROA.27043-47. Resolution of whether there was a misrepresentation in those documents (not the basis for the claims here) would not resolve Trustee's fraudulent transfer or other claims. Trustee did not file an objection to the Verizon claim, and Verizon offered no evidence that the fraudulent transfer claims would implicate the claims resolution process. *In re Dornier Aviation (N. Am.), Inc.*, 320 B.R. 831, 833-37 (E.D. Va. 2005); *In re Gulf Coast Glass & Erection Co.*, 484 B.R. 685, 692-96 (Bankr. S.D. Tex. 2013).

Verizon's proof of claim is also moot because it does not entitle Verizon to any further distributions from Idearc (n/k/a Supermedia). In addition, Idearc/Supermedia exited a second bankruptcy in 2013 that discharged any remaining obligation under the Verizon proof of claim. *In re Supermedia Inc.*, No. 13-10545, 2013 Bankr. LEXIS 4240 (Bankr. D. Del. Oct. 9, 2013). Any judgment in this case will be against Verizon in favor of Trustee, not the reorganized Idearc/Supermedia. Idearc waived the right, and has no standing to assert, a § 502(d) objection. That section can only be asserted by the owner of the avoidance claims, and Idearc does ***not*** own the fraudulent transfer claims against Verizon that it transferred to Trustee. *See, e.g., In re Magnolia Gas Co.*, 255 B.R. 900, 914-15 (Bankr. W.D. Okla. 2000); *In re Odom Antennaes, Inc.*, 340 F.3d 705,

708-09 (8th Cir. 2003); *In re Bernard L. Madoff Inv. Sec., LLC*, 445 B.R. 206, 239 (Bankr. S.D.N.Y. 2011).

Finally, even if a legal fraudulent transfer claim could be "transformed into an equitable issue" based on the irrelevant proof of claim, as the district court erroneously held, a jury trial was still required. The district court used the value finding to dispose of other legal claims. As such, that value finding and other common issues on those legal claims must be tried to a jury even if the fraudulent transfer claims could ever be equitable in nature. *Beacon,* 359 U.S. at 510-11; *Jensen*, 946 F.2d at 372. In short, a jury trial is mandated on Trustee's private-right fraudulent transfer claims against the Verizon entities. U.S. CONST. amend. VII; *Stern*, 131 S. Ct. at 2611.

B. The district court erred in its substantive analysis of Trustee's jury rights based on fatally flawed procedures.

The district court's defense of its decision to strike the jury when asked to reconsider is troubling. A court should not ignore a Seventh Amendment jury trial right that is "preserved to the parties inviolate," FED. R. CIV. P. 38, and should instead "jealously guard" jury rights, *Jacob v. New York City*, 315 U.S. 752, 752-53 (1942). Nor should a court chastise litigants for respectfully asking the court to correct an erroneous jury strike—particularly when errors in the court's substantive analysis resulted from the movant not raising grounds at all and resisting

reconsideration on faulty premises. But that is what happened here. The district court allowed deeply flawed procedures to strip Trustee of its jury rights.

1. There was no finding that Trustee did not have a jury right under federal law on any of its claims.

Trustee demanded a jury in its original and amended complaint. ROA.84; SROA.22673; FED. R. CIV. P. 38(b). "When a jury trial has been demanded … the action *must be* designated on the docket as a jury action" unless the parties stipulate to a nonjury trial or the court finds "there is no federal right to a jury trial." FED. R. CIV. P. 39 (emphasis added). Rule 39 gives the district court no discretion to do otherwise.

Here, the district court's footnote ruling on the breach of fiduciary duty, promoter liability and unlawful dividend claims did not discuss federal jury rights or address the important second prong of the *Granfinanciera* test—whether the claims seek legal relief. ROA.9089-90. Indeed, on the unlawful dividend claim, the district court relied on an article discussing the law of various states on unlawful dividend claims. The court's reference to the article is not a finding on federal jury rights and is irrelevant to the federal constitutional analysis here. *Simler v. Conner*, 372 U.S. 221, 222 (1963) (right to jury in federal court determined under federal law). There is neither a stipulation to a nonjury trial nor a finding that Trustee was not entitled to a jury on ***any*** of its claims against ***any*** defendant under federal law. Thus, a jury trial was required. FED. R. CIV. P. 39.

2. The district court granted relief on grounds never raised.

The defendants' motion to strike the jury demand raised Seventh Amendment grounds on only ***two of three claims*** in the Original Complaint (fraudulent transfer in the body and breach of fiduciary duty in a footnote, but not unlawful dividend) and ***none of the three added claims*** in the Amended Complaint (promoter liability, alter ego and unjust enrichment). ROA.84, ROA.1857, ROA.1864, ROA.1866-69; SROA.22673.[2] The district court mistakenly believed that Trustee had not responded to the breach of fiduciary duty footnote but did expressly recognize that the defendants ***never argued*** the unaddressed claims were equitable in nature. RE173-74/ROA.9089-90. The court nevertheless granted the motion to strike. RE184/ROA.9100.

To avoid reconsideration, the defendants erroneously asserted that the court could not reconsider without new issues, SROA.29494-95,[3] and mistakenly told the court that "the parties had exhaustively briefed whether Plaintiff is entitled to a jury on its state law claims (unjust enrichment, alter ego, unlawful dividend, breach

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[2] The motion focused almost exclusively on contractual jury waivers that Verizon had inserted in the Idearc transaction documents before Idearc had its own counsel. ROA.1857-66. Never reaching whether the contractual provisions involved a knowing, voluntary jury waiver by Idearc or applied to all of the defendants, the district court based its order granting the motion to strike on the Seventh Amendment. RE171-84/ROA.9087-100.

[3] "[T]he trial court is free to reconsider and reverse its decision [on interlocutory orders] for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of the substantive law." *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 185 (5th Cir. 1990), *abrogated on other grounds* by *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 n.14 (5th Cir. 1994).

of fiduciary duty, aiding and abetting breach of fiduciary duty, and promoter liability)"—including the very claims that the defendants had never addressed on Seventh Amendment grounds. SROA.29503 (emphasis added). Trustee, to no avail, reminded the district court that the defendants never moved on those claims on Seventh Amendment grounds such that ***neither*** party had briefed the jury right on those claims. ROA.10496-97; SROA.26939.

In refusing to reconsider, the district court identified disgorgement and restitution as remedies sounding in equity. ROA.10492; RE194/ROA.12329, SROA.26939. The court recognized that, unlike disgorgement or restitution, Diercksen held "nothing to be returned," and the lack of jury-trial right as to Diercksen "is not as clear"—implicitly acknowledging that a jury trial was constitutionally required on, at least, the breach of fiduciary duty claim against Diercksen. RE195/ROA.12330. Indeed, the district court did not find that there was no federal right to a jury on the Diercksen claims; it simply "declined the invitation to reconsider." RE195-97/ROA.12330-32.

Ignoring Rules 38 and 39 and turning Rule 7 on its head, the district court refused to reconsider by chastising Trustee for responding to the defendants' footnote on the right to a jury on breach of fiduciary duty claims with a like footnote and ignoring that the defendants never raised Seventh Amendment grounds at all on other claims. RE195/ROA.12330. The district court then refused

to reconsider at all its striking of the jury on claims that were addressed for the first time in the footnote of its own opinion because ***nonmovant*** "plaintiff did not argue that these claims entitled it to a jury trial in the initial briefing." RE196/ROA.12331.

Trustee only had to demand a jury to be entitled to it; nothing else was (or could be) required. Fed. R. Civ. P. 38, 39; *see, e.g., Pradier v. Elespuru*, 641 F.2d 808, 811 (9th Cir. 1981). Trustee did not have to raise grounds for the movant, brief grounds never raised, or otherwise provide a brief in support of its jury demand. The court's grant of relief on grounds never raised without notice and opportunity to be heard violated the very rules designed to protect Seventh Amendment and due process rights. U.S. Const. amend. V, VII; Fed. R. Civ. P. 7(b), 38, 39; *see, e.g., Registration Control Sys., Inc. v. Compusystems*, *Inc.*, 922 F.2d 805, 808-09 (Fed. Cir. 1990).

III. Even assuming the district court properly tried the value issue, that single finding was not dispositive of Trustee's claims.

A. The district court disposed of Trustee's claims without trial in violation of procedural and due process protections.

The district court's denial of a jury trial was followed by an extraordinary procedural process during which the district court made a single, non-dispositive fact finding that it used to enter judgment against Trustee without further trial.

Following Phase I, the district court instructed Trustee to "show cause" explaining why the court's single fact determination—that the value of Idearc on November 16, 2006 was at least $12 billion—was not dispositive of all of Trustee's claims. RE372/ROA.14661. Specifically, the court requested that Trustee file a brief that "(1) explains why any (or all) of its legal claims are viable in light of the court's finding on Idearc's value, and (2) identifies any disputed fact issues that remain for resolution in a second phase of trial." RE372/ROA.14661. ***The district court did not request that Trustee marshal its proof***. Trustee complied with the show cause order by filing a brief that identified numerous fact issues that remained to be tried and explaining why solvency, receipt of reasonably equivalent value, and the extent of Idearc's surplus were not outcome dispositive. ROA.14663.

The district court nevertheless entered judgment against Trustee on all remaining claims pursuant to Rule 52(c) because, among other things, Trustee's

claims lack "specific direct evidence." RE375/ROA.15678, RE378-79/ROA.15681-82. ***This ruling implicitly acknowledged that certain fact issues were not resolved in the Phase I trial***. But instead of setting a Phase II trial, the district court simply resolved outstanding fact issues against Trustee, or ignored them entirely:

- dismissing the actual fraudulent transfer claim because Trustee "has not presented specific direct evidence of the defendants' fraudulent ***intent***," RE378/ROA.15681 (emphasis added);
- dismissing the breach of fiduciary duty claim because defendants' "unsavory conduct" did not "***cause***[] Idearc to be unable to meet legal obligations," RE381-82/ROA.15684-85 (emphasis added);
- dismissing the promoter liability claim because Idearc's bankruptcy did not result from the defendants' wrongful conduct but rather was ***caused*** by "[s]ubsequent events—including the Great Recession," RE393/ROA.15696 (emphasis added);
- dismissing the ***unlawful dividend*** claim after recognizing but refusing to address crucial ***fact issues***: whether Idearc's "board" revalued Idearc's assets, whether the payment was authorized, and what Idearc's board would have determined had it ever independently considered whether Idearc had adequate surplus to pay a dividend on

the date it was declared, RE383-89/ROA.15686-92 (emphasis added); and

- dismissing the breach of fiduciary duty and promoter liability claims relying on incorrect *dicta* in an order denying summary judgment that Idearc was Verizon's wholly-owned subsidiary. RE380/ROA.15683, RE389/ROA.15692; *see infra* III.B.1.

This district court's judgment was not authorized by Rule 52(c), which permits entry of judgment only after "a party has been fully heard on an issue during a nonjury trial." FED. R. CIV. P. 52(c); *CMS Software Design Sys., Inc. v. Info Designs Sys., Inc.*, 785 F.2d 1246, 1248-49 (5th Cir. 1986); FED. R. CIV. P. 52(c) advisory committee note (1991 amendment) (dismissal under Rule 52(c) "is made after the court has heard all the evidence bearing on the crucial issue of fact"). Trustee was not fully heard on a number of fact issues in the strict confines of the Phase I trial and the district court's unusual show cause procedure.

By dismissing Trustee's claims based on fact issues not resolved in the Phase I trial, in a procedure not disclosed to Trustee in the show cause order, and upon which no trial occurred, the district court's judgment constitutes a denial of due process of law that every litigant is guaranteed under the Fifth Amendment of the United States Constitution. U.S. CONST. amend. V; *CMS,* 785 F.2d at 1248-49;

Carroll v. Fort James Corp., 470 F.3d 1171, 1177 (5th Cir. 2006); *Knapp v. McFarland*, 457 F.2d 881, 886-88 (2d Cir. 1972).

B. The value finding did not resolve Trustee's promoter liability or breach of fiduciary duty claims.

The district court recognized that the value finding did not resolve Trustee's promoter liability and breach of fiduciary duty claims against Verizon, but nevertheless dismissed these claims based on its ruling that the fiduciary duties owed to Idearc by Verizon as a promoter vanished when Verizon installed an "independent" board and purchased the shares of Idearc. This ruling is factually and legally wrong.

1. The district court's dismissal was factually wrong because Idearc never became a wholly-owned subsidiary of Verizon.

Verizon never validly owned stock in Idearc for two reasons: (1) Idearc never had a quorum of its board to transact business, and (2) Verizon never actually purchased stock in Idearc.

First, Verizon failed to properly form Idearc in accordance with its bylaws, which require that the board be comprised of ***two directors***; a quorum also required ***two directors***. SROA.48944-45, at 2.02 and 2.06. It is undisputed that Verizon's chosen incorporator appointed only one director, Diercksen, a Verizon officer. Without a second board member, it was impossible for Idearc to function (without

a "brain," as Verizon's lawyer said) because there was no quorum of the board to transact business. PX528; SROA.48944-45.

Recognizing its error, Verizon argued below that Diercksen could act unilaterally as Idearc's board because "unfilled seats do not count" for purposes of determining a quorum. ROA.15284 This argument ignores Idearc's bylaws, which define a quorum as "the presence of a majority of the total ***authorized*** number of directors." SROA.48945 (emphasis added). Here, the "authorized number of directors" is two and a majority of two is two. Even without such clear language in the bylaws, Delaware courts have universally construed language that defines a quorum to be "a majority of directors" as referring to authorized directorships, not directors actually in office. *See, e.g., Crown Emak Partners*, *LLC v. Kurz*, 992 A.2d 377, 400 (Del. 2010).

Because there was never a properly-formed board, much less a quorum of a board, the unilateral acts undertaken by Diercksen were illegal and void. In particular, issuance of stock by less than a quorum of the board renders the stock void. *See, Bowen v. Imperial Theatres, Inc.*, 115 A. 918, 920-21 (Del. Ch. 1922); *Blish v. Thompson Automatic Arms Corp.*, 64 A.2d 581, 601-03 (Del. 1948); *see also Staar Surgical Co. v. Waggoner*, 588 A.2d 1130, 1136 (Del. 1991). Because the issuance of Idearc stock to Verizon was void, Idearc never became a wholly-owned subsidiary of Verizon.

Second, Verizon never validly owned Idearc stock because Diercksen's resolution purporting to issue one share of VDDC stock and to authorize Kathy Harless to sell it to Verizon did not set a price.[4] Consequently, Verizon did not pay for the stock as required by Delaware law and the resolution (which required Idearc receive "full payment" for the stock to issue). RE431/PX2018 at 42. Stock issued without (1) proper consideration having been first fixed by a quorum of the board of directors or (2) full payment by the purchaser is void. DEL. CODE ANN. tit. 8, §§ 152 and 153(a) (2013) (requiring board to specify the consideration (cash or services) and set a price for stock); *MBKS*, 924 A.2d at 975-76 ("The modern trend of the law is that 'an issuance of stock without receipt by the company of valid consideration is void.'")

The district court refused to consider this undisputed evidence of Idearc's void issuance of stock, choosing instead to rely on (and refuse to "reconsider") *dicta* from its order denying Diercksen's motion for summary judgment on breach of fiduciary duty. RE391-92/ROA.15694-95. The district court stated that Idearc must have been a subsidiary of Verizon because Idearc's minute book shows that the "board" authorized the issuance of a share, Harless signed a share certificate, and there was no evidence that "any other entity owned Idearc." RE276-

[4] A stock's "par value" is only the minimum amount for which a corporation's stock can be sold, not the actual price that the board determines to sell the stock. *See* 11 FLETCHER CYC. CORP. § 5080.60 (West 2013) (citing DEL. CODE ANN. tit. 8, § 153(a)).

77/ROA.12701-02. This statement did not take into account the evidence that Idearc never validly issued shares, Harless backdated the certificate, no price was set for Idearc shares, and Verizon did not pay for Idearc shares. It is also legally incorrect because there is no requirement that a corporation have shareholders. DEL. CODE ANN. tit. 8, § 106 (2013) (corporation exists upon filing a certificate of incorporation); *see also Big Valley Assocs. v. Diantonio,* C.A. No. 94-C-05-089, 1995 Del. Super. LEXIS 214, at *3 (Del. Super. Ct. May 10, 1995). Further, the district court did not establish its purported "finding" in a Rule 56(g) order. *See CIVIX-DDI, LLC v. Hotels.com, L.P.*, No. 05 C 6869, 2012 WL 6591684, at *9 (N.D. Ill. Dec. 18, 2012).

2. The district court's dismissal was legally wrong because *Anadarko* does not extinguish Verizon's fiduciary duties to Idearc as a promoter.

The district court acknowledged that Verizon was a promoter of Idearc. RE225-28/ROA.12385-88, RE300/ROA.12725. A promoter is one who forms a corporation and provides, or arranges for, the corporation to have the instrumentalities and capital with which to conduct business. RE225-26/ROA.12385-86, RE300/ROA.12725. A promoter is "something similar to an agent" of the corporation for the limited purposes of filing the charter, adopting the bylaws, and appointing an initial board. 1A FLETCHER CYC. CORP. § 192.10 (West 2013). Promoters owe fiduciary duties to the corporations they form, at least until

the corporation's business affairs have been turned over to a disinterested board of directors. RE225-26/ROA.12385-86 *(citing Gladstone v. Bennett,* 153 A.2d 577, 582 (Del. 1959)); *Bailes v. Colonial Press, Inc.*, 444 F.2d 1241, 1244 (5th Cir. 1971); RE300/ROA.12725. Establishment of a board of directors that is not truly independent will not suffice to terminate the promoter's fiduciary duty. *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 89 N.E. 193, 201, 221 (Mass. 1909), *aff'd,* 225 U.S. 111 (1912).

The district court held that Verizon's fiduciary duty to Idearc as a promoter vanished once it purchased Idearc stock, relying on *Anadarko Petroleum Corp. v. Panhandle E. Corp.*, 545 A.2d 1171 (Del. 1988). *Anadarko* holds that, after a parent declares its intention to spin off a subsisting subsidiary, the directors of that subsidiary "are obligated only to manage the affairs of the subsidiary in the best interests of the parent and its shareholders." *Id.* at 1174. *Anadarko* does not hold that a subsidiary can be defectively formed without a functioning board and looted by its promoter under the guise that the interests of the "parent" are being served.

Anadarko is inapposite and, as the opinion itself cautioned, should be "confined to its specific facts." *Id.* at 1177. First, Idearc never became a subsidiary of Verizon. *See supra* III.B.I. Second, *Anadarko* involved the spinoff of a subsisting subsidiary with its own seven-member board and separate counsel, not the promotion of a new company with no board or counsel. *Anadarko* in no way

abrogates Verizon's duties as a promoter. "Even when a subsidiary is wholly-owned, ***a parent corporation may owe fiduciary duties as a promoter*** when it is engaged in a plan or scheme of promotion, until the scheme has been concluded." RE226/ROA.12386, RE300/ROA.12725 (emphasis added) (citing *Bailes*, 444 F.2d at 1241). Here, Verizon never established an independent board of Idearc. Finally, *Anadarko* does not extinguish Diercksen's fiduciary duties to Idearc, as an Idearc director. *See, e.g., First Am. Corp. v. Al–Nahyan*, 17 F. Supp. 2d 10, 26 (D.D.C.1998); *Wooley v. Lucksinger*, 61 So. 3d 507, 588-92 (La. 2011).

3. At a minimum, Trustee is entitled to its day in court on its promoter liability claims.

The economic reality of the spin is that, through the unlawful actions of Verizon's officer, Diercksen, purporting to act as Idearc's "board," Verizon helped itself to $2.5 billion in cash and got the full benefit of the $7.1 billion in Idearc debt. While it was papered to appear to the outside world as if the dividend was paid to a shareholder pursuant to a valid board resolution, in reality the payment was authorized solely by Verizon as a promoter without any Idearc board action. The unlawful Idearc New Board also paid illegal and unauthorized "dividends" of $250 million between the date of the spin and the bankruptcy to the purported post-spin Idearc shareholders. *See* ROA.10930, ROA.17940.

A promoter is liable for any secret profit that is not disclosed to the corporation's independent board. *Gladstone*, 153 A.2d at 582. Idearc had no board,

much less an independent one, making disclosure to and assent by Idearc impossible. These facts entitle Trustee to judgment as a matter of law. At a minimum, a remand is required to determine any remaining fact issues, including damages caused by Verizon's unlawful conduct as a promoter and secret profits.

C. The value finding did not resolve Trustee's unlawful dividend claim.

The district court's value finding does not cure numerous fundamental errors in Idearc's issuance of dividends. RE299/ROA.12724, RE383-89/ROA.15686-92. First, it is illegal for a company to pay dividends without valid board authorization, and there was no Idearc "board."[5] Further, even assuming Idearc had a validly constituted board, no Idearc board determined if there was a surplus from which to declare a dividend and, on the date the dividend was declared, there was no surplus. These undisputed facts authorize judgment as a matter of law for, or at least a trial on, Trustee's unlawful dividend claim.

Directors of a company can neither declare nor pay a dividend that impairs a company's capital. DEL. CODE ANN. tit. 8, §§ 170, 173 (2013). A transaction impairs capital if the amount of the distribution exceeds the amount of the corporation's surplus. *Klang v. Smith's Food & Drug Ctrs., Inc.*, 702 A.2d 150, 153 (Del. 1997). A corporation must possess either sufficient surplus or net profits

[5] *See Pereira v. Cogan*, 294 B.R. 449, 539 (S.D.N.Y. 2003) ("It is [ ] illegal for a company to pay dividends that are not declared by the Board in accordance with Section 170 of the Delaware General Corporation Law."), *vacated and remanded on other grounds*, 413 F.3d 330 (2d Cir.).

for payment of a dividend on ***both*** the date the dividend is declared and the date the dividend is paid. DEL. CODE ANN. tit. 8, § 170; *see also Vogtman v. Merchants' Mtg. & Credit Co.*, 178 A. 99, 102-03 (Del. Ch. 1935).

Diercksen, the sole director on the Idearc "board," undisputedly never determined if there was a surplus from which to declare a dividend. SROA.27687. When Idearc purportedly declared the dividend, on October 31, 2006, Idearc had no assets, much less a surplus. At the time the dividend was paid, Idearc had less than $1.5 billion in total assets and a negative net worth of nearly $9 billion. SROA.28078. The only way that Idearc could have validly declared or paid a dividend was if its board had "revalued" the book value of its assets to set values high enough to establish the requisite surplus. *See Feldman v. Cutaia*, Civ. A. No. 1656-N, 2006 WL 920420, at *7-8 (Del. Ch. Apr. 5, 2006); *Farland v. Wills*, No. 4914, 1975 WL 1960, at *6 (Del. Ch. Nov. 12, 1975); *Morris v. Standard Gas & Elec. Co.*, 63 A.2d 577, 579-81 (Del. Ch. 1949).

The district court acknowledged that Diercksen did not revalue Idearc's assets but concluded that "perfection in the process" is not required. ROA.15690-91 (citing *Klang*, 702 A.2d at 152). Yet *Klang*, the primary case relied on by the district court, does not support excusing Diercksen's violation of section 170. In *Klang*, the board actually determined that a surplus existed but made an error documenting the surplus amount. *Klang*, 702 A.2d at 155-56. Further, *Klang*

involved a corporation's redemption of stock under section 160 of the Delaware Code, which unlike section 170, does not require board action. *Id.* at 156. Here, Diercksen undisputedly never attempted any calculation at all. Delaware law does not support the district court's casual dismissal of statutory requirements and disregard of required corporate actions.

Further, the district court ignored the requirement of a surplus on the date the dividend was declared by misreading *Vogtman*, claiming it did not "discuss the value of the corporation's net assets on the date the dividend was declared." ROA.15689. To the contrary, *Vogtman* made clear that December 31, 1932, was the date the board ***declared*** the dividend, and that there was no surplus on that date. *Id.* at 103. Because no surplus existed on the date Diercksen declared the dividend, the dividend was unlawful as a matter of law.

By wholly disregarding Delaware corporate law, Diercksen willfully or negligently violated section 173 of the Delaware Code. Such a violation makes both Diercksen, as the director who allowed the unlawful dividend to be paid, and Verizon, the recipient of the unlawful dividend, liable for the full amount of the unlawfully paid dividend under Delaware law. *See* DEL. CODE ANN. tit. 8, §§ 173, 174(a); *In re Sheffield Steel Corp.*, 320 B.R. 405, 413-15 (N.D. Okla. 2004) (applying Delaware law); *In re Magnesium Corp. of Am.*, 399 B.R. 722,

777-78 (Bankr. S.D.N.Y. 2009). Nothing in the Phase I value finding resolved this statutory liability underlying Trustee's unlawful dividend claim.

D. The value finding did not resolve Trustee's breach of fiduciary duty claim against Diercksen or its aiding and abetting claim against Verizon.

Anadarko does not relieve Diercksen of his fiduciary duties to Idearc. *See supra* III.B.2. And the solvency finding does not excuse Diercksen's breach of those duties because a transaction can be unfair to a corporation even if it does not render the company insolvent. Whether the transaction was entirely fair to Idearc, a key inquiry in Trustee's breach of fiduciary duty claim against Diercksen, should be tried before a jury.

Diercksen's conflicting obligations as both a Verizon officer and Idearc director, and his self-interest to maintain his $4.9 million salary from Verizon, rendered him incapable of objectively considering whether the Spinoff was in Idearc's best interests. SROA.43683-84. Thus, he is not entitled to the protections of the business judgment rule. *See, e.g., Hollinger Int'l, Inc. v. Hollinger, Inc.*, No. 04 C 0698, 2005 WL 589000, at *27-29 (N.D. Ill. Mar. 11, 2005); *Orman v. Cullman*, 794 A.2d 5, 22-24, 29-31 (Del. Ch. 2002). Instead, Diercksen had the burden to establish the "entire fairness" of the Spinoff to Idearc.

The district court never considered, let alone determined, whether Diercksen acted with the utmost good faith and the most scrupulous inherent fairness to

Idearc during the Spinoff. *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983). In particular, the district court never considered whether the Tax Sharing Agreement and the unlawful dividend were entirely fair to Idearc. Trustee is entitled to its day in court on its breach of fiduciary duty and aiding and abetting claims.

E. The value finding did not resolve Trustee's actual fraudulent transfer claim.

The district court implicitly acknowledged that Idearc's value and solvency is not dispositive of whether the defendants acted "with actual intent to hinder, delay, or defraud any creditor" of Idearc under Section 24.005(a)(1) of the Texas Business and Commerce Code. RE378/ROA.15681; *see Smith v. Am. Founders Fin., Corp.*, 365 B.R. 647, 680 (S.D. Tex. 2007). Instead, the court waded into factual disputes outside the scope of Phase I by making a *sua sponte* determination that there was no "specific direct evidence" that the defendants acted with actual intent to hinder, delay or defraud creditors. ROA.15681. The district court then concluded with the *non-sequitur* that its resolution of the factual dispute over whether the defendants acted with the requisite actual intent means that "the court's valuation findings are dispositive with respect to the plaintiff's actual fraudulent transfer claims." RE380/ROA.15683. The factual dispute regarding the defendants' intent is for a jury to decide, and should be tried in Phase II.

F. The value finding did not resolve Trustee's alter ego claim.

The district court dismissed Trustee's alternative claim of alter ego because "alter ego is not a claim or independent cause of action—it is a remedy to enforce a claimed substantive right." RE394/ROA.15697, RE232/ROA.12392 (citing *W. Oil and Gas JV, Inc. v. Griffiths*, 91 F. App'x 901, 903–04 (5th Cir. 2003)). Regardless of whether alter ego is a "claim" or a "remedy," the district court's dismissal was improper in a bankruptcy context. Trustee is empowered to sue Verizon on an alter ego theory based on the underlying claims of the creditors and, if proven, Verizon is liable for the debts of Idearc. *See In re Schimmelpenninck*, 183 F.3d 347, 352-61 (5th Cir. 1999). Whether Idearc is the alter ego of Verizon was not determined in Phase I, is not dependent on the value of Idearc at the time of the Spinoff, and should be tried if not established as a matter of law.

IV. The district court's value finding is clearly erroneous.

The district court also clearly erred in its finding on value—which should have been a jury issue—that the total enterprise value of Idearc on November 17, 2006, was at least $12 billion. *See* RE370/ROA.14659. These errors require reversal.

A. The district court valued Idearc without the clouds on its value.

The district court valued a yellow pages business that, unlike Idearc, had no clouds on its assets and stock. If a seller has questionable ownership of an asset, or questionable ability to convey the asset, as here, those clouds are material and impact what a buyer is willing to pay for the asset. *See, e.g.*, *Comm'r v. Marshman*, 279 F.2d 27, 33-34 (6th Cir. 1960); *Saltzman v. U.S.*, 750 F. Supp. 61, 65 n.9 (E.D.N.Y. 1988) (opinion later corrected on different basis); *Estonian State Cargo and Passenger S.S. Line v. U.S.*, 139 F. Supp. 762, 766 (Ct. Cl. 1956); *see also SEC v. Netelkos*, 592 F. Supp. 906, 919-20 (S.D.N.Y. 1984) (failure to disclose that stock was unauthorized was material to an investment decision under the securities laws). Yet neither of the defendants' experts, nor the court, accounted for the corporate irregularities in their opinions of value. PX1913; ROA.10548, RE305-70/ROA.14594-659; SROA.48648-681, SROA.48814-889; *see Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1056-57 (8th Cir. 2000) (expert opinions not accounting for all relevant facts held inadmissible speculation).

B. The district court's reliance on Idearc's stock price at the date of the spin was flawed.

The district court's value finding erroneously relied on Idearc's stock price on the day of the spin. But market value from a misinformed market is unreliable and irrelevant. *See, e.g.*, *VFB LLC v. Campbell Soup Co.*, 482 F.3d 624, 629, 632 (3d Cir. 2007). Here, Trustee's expert Carlyn Taylor explained that Idearc's post-spin stock price could not be trusted because the market was unaware of, or even misled about, a number of true facts directly relevant to value. ROA.17746-50. To discard or ignore those facts, the district court relied on a parade of interested witnesses trying to explain away the damaging evidence. *See, e.g.*, RE338-40/ ROA.14627-29, RE342-45/ROA.14631-34, RE363-69/ROA.14652-58. Material facts about which the market was misled or uninformed include—

Financial information. At Verizon's direction, the banks were given altered data during the due diligence process. RE413/PX313. Other missing or misleading market information included: (1) forecasts provided to the market that were false, *see, e.g.*, RE318/ROA.14607; (2) Verizon management's candid opinions on the dismal future of yellow pages that were undisclosed, *see, e.g.*, RE422/PX1313; RE340/ROA.14629, RE350-54/ROA.14639-43, RE358-62/ROA.14647-51; and (3) a huge discrepancy between profit margins in print and internet that was seriously understated, *see* RE348-50/ROA.14637-39. The district court also ignored Idearc's uncontroverted spin-date book value of a negative net worth of

almost $9 billion and the forced bankruptcy just over two years later. SROA.28078.

Poor credit quality. Diercksen knew, before the spin, that bad debt was "rampant" and customers simply canceled their contracts and never paid. RE411-12/PX243; RE422/PX1313. Yet the spin was sold as Idearc having improved its bad debt. *See, e.g.*, PX620. The district court ignored this evidence. RE362/ROA.14651.

The tax-free PLR. The ratings agencies and lender syndicate relied on the tax-free treatment opinion in the PLR without knowing that the facts on which the IRS relied were inaccurate. PX659; SROA.41440-52. The IRS issued the PLR based on Verizon's representations about its shareholder status in VDDC/Idearc. PX659. But Verizon never became a shareholder.

Management competence. The quality of Idearc's management was critical to valuing Idearc as a standalone company. ROA.18342. Diercksen, who knew the yellow pages business, described Harless and her entire management team as "incompetent." RE419-21/PX869. The court dismissed the "(admittedly) strongly negative views of one individual," Diercksen, as immaterial. RE367/ROA.14656. Yet, as Idearc's stock price started on its decline, putative CFO Coticchio left Idearc in November 2007. ROA.17941-43. When the stock price declined to

almost one-third of its price on the date of the spin in February 2008, Harless departed as well. DX611; ROA.17941-43.

C. The district court improperly ignored the value opinion of Trustee's highly qualified expert.

Expert testimony is relevant to valuation. *See, e.g.*, *LaSalle Nat'l Bank Ass'n v. Paloian*, 406 B.R. 299, 351-52 (N.D.Ill. 2009), *vacated and remanded on other grounds*, 619 F.3d 688 (7th Cir. 2010). Yet the district court discarded the value opinion of the very expert it found to be "highly qualified" to give an opinion on value. RE326/ROA.14615.

Trustee's expert Taylor, a CPA, holds numerous certifications and licenses in insolvency, restructuring, and business valuation with specialties in media and telecom, having been involved in up to 500 deals (primarily outside of litigation), including eleven yellow pages' engagements. ROA.17724-25, ROA.17837; SROA.49722, SROA.49746-759. She followed three "standard" valuation methods, appropriately weighting each given the specifics of this case, to arrive at Idearc's value on the spin date of $8.15 billion. ROA.14320-33, ROA.17834, ROA.17920.

Mark Hopkins, the defendants' expert who solicited his own engagement, offered no valuation of his own, but earned over $5 million for proffering reasons to challenge Taylor's opinion. ROA.17029-17030, ROA.18415-16. Hopkins had a Master of Arts in Chemistry and had previously headed global shipping at Bank of

America. ROA.14607. Hopkins had never done a yellow pages valuation at any time and only had experience with two telecom, non-valuation engagements. RE318-19/ROA.14607-08, ROA.17024-27, ROA.18463-64. Hopkins's criticisms were mainly that Taylor was too conservative in assigning discounts, in weighting the three standard valuation approaches and in crediting cash flow projections (incorrectly calling this "double counting"). ROA.18411-13. Taylor's caution was simply prudent and, in the hindsight of Idearc's bankruptcy, arguably not cautious enough.[6]

Hopkins was not qualified to criticize Taylor's opinions, and his unqualified testimony did not support the value finding or discarding Taylor's opinions. *See Anderson v. City of McComb*, No. 12-60401, 2013 WL 4431077, at *3 (5th Cir. Aug. 20, 2013) (affirming strike of unqualified witness's testimony).

[6] Among the criticisms from Hopkins was Taylor's reliance on "stress test" projections done at the time of the spin, which of course accounted for an economic downturn such as the one the district court now blames for all of Idearc's troubles. ROA.18404-05 Apparently the only projections a valuation expert is allowed to consider are optimistic ones, at least according to Hopkins. *See* RE319-22/ROA.14608-11.

V. The district court erred in its evidentiary rulings.

The district court erroneously admitted hundreds of irrelevant documents *en masse* in the Phase I trial,[7] but refused to admit relevant evidence regarding Idearc's fatal corporate deficiencies. The erroneous exclusion of corporate formality evidence was particularly harmful and egregious given that Trustee explained before Phase I the relevance of the evidence. ROA.13627-37; SROA.49308-17.

The district court refused to allow Trustee to elicit testimony from witnesses that no board of Idearc was ever appointed and its opinion to the NYSE concerning the issuance of Idearc stock was false. ROA.17221-24, ROA.17228-29. The court also refused to admit proffered evidence that Idearc never properly issued any stock and that, as a result, it was not a wholly owned subsidiary of Verizon, the Spinoff did not qualify as a tax-free transaction, and Idearc's market value failed to reflect these issues. ROA.16810-11, ROA.16812-13, ROA.16972-73. The court also rejected proof that Idearc's corporate records had been backdated, including a stock certificate reflecting a purchase of Idearc (VDDC) stock on June 22, 2006, that never occurred. ROA.16810-11; RE423/PX1944; *see* RE436/PX2018 at 54.

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[7] Trustee deleted exhibits from its trial exhibit list based on the court's clarification to include only exhibits relevant to Phase I because it would admit for all purposes all listed exhibits. ROA.13233, ROA.13718, ROA.13751, ROA.13794, ROA.13755, ROA.16333-35. When the defendants objected to the deletion as tactical, the court erroneously admitted the deleted exhibits—even if unrelated to Phase I. Admission of evidence as punishment for good faith compliance with court orders is improper. *See, e.g., U.S. v. Wecht*, 484 F.3d 194, 216-17 (3d Cir. 2007); *U.S. v. Ramos-Caraballo*, 375 F.3d 797, 803-04 (8th Cir. 2004).

The court also excluded Plaintiff's Exhibit 1944, Fulbright memo entitled, "Corporate Steps Required to be Taken for Idearc Entities." RE423/PX1944; ROA.16811-13. The memo demonstrates that the backdated stock certificates and secretary certificates regarding Verizon's 100% ownership of Idearc stock were not sent to Harless and Mundy for signature until November 14, 2006—long after the PLR issued. RE423/PX1944.

These errors not only affected the court's value finding where the evidence should have been considered, it affected its rulings on the show cause order where it purported to decide Idearc's subsidiary status without a trial. The court dispensed with Trustee's breach of fiduciary duty claims premised on its erroneous assumption that Idearc "was a wholly owned subsidiary of Verizon prior to the November 17, 2006 spin-off." RE308/ROA.14597. It believed that Verizon had to own Idearc's stock because no one else did. RE277-78/ROA.12702-03. That is legally and factually incorrect. *See supra* III.B.I.

VI. The district court erred by granting in part the defendants' motions to dismiss and for summary judgment.

After striking the jury and before trying "value" to the bench, the district court made several rulings on motions that disposed of parts of Trustee's claims. Given space constraints, Trustee does not address each of those rulings here. Several of the more egregious rulings, however, require review prior to remand.

A. The district court improperly dismissed Trustee's unjust enrichment count.

The district court erred in dismissing the unjust enrichment count based on a two-year statute of limitations when a four-year statute applied to the breach of fiduciary duty and fraudulent transfer claims for which unjust enrichment may be a remedy. TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a)(5) (West 2013); TEX. BUS. & COM. CODE ANN. § 24.010(a) (West 2009); *Vortt Exploration Co. v. Chevron U.S.A., Inc*., 787 S.W.2d 942, 944 (Tex. 1990); *see also Luckenbach S.S. Co. v. United States*, 312 F.2d 545, 548 & n.2 (2d Cir. 1963); ROA.5879-80, ROA.5471-72, ROA.12390-91.

Trustee was not required to plead an adverse domination tolling doctrine in response to a limitations affirmative defense, and dismissal on the sufficiency of the complaint as to that doctrine was improper. FED. R. CIV. P. 7(a)(7); *FDIC v. Henderson*, 61 F.3d 421, 423-27 (5th Cir. 1995); *FDIC v. Dawson*, 4 F.3d 1303, 1308 (5th Cir. 1993). The complaint nevertheless gave fair notice of sufficient

facts to state a plausible claim, urging, among other things, that the Idearc board of directors, who were dominated by and complicit with Verizon, remained tainted after the Spinoff by their Verizon business dealings. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56, 570 (2007); *Henderson*, 61 F.3d at 426; *Lease Resolution Corp. v. Larney*, 719 N.E.2d 165, 172 (Ill. App. Ct. 1999); *see also* FED. R. CIV. P. 8; ROA.5879-80, ROA.12390-91; SROA.22696-22701. Dismissal was erroneous.

B. The district court improperly granted summary judgment limiting Trustee's recovery on its breach of fiduciary duty claim.

The district court erred in concluding that Trustee's breach of fiduciary duty claim should be limited to available insurance unless Diercksen engaged in willful misconduct or gross neglect. RE279-80/ROA.12704-05; SROA.31555.

The definition of "Litigation Trust Rights" in Idearc's 2009 bankruptcy plan includes all claims owned by Debtor relating to the spin, including those "(ii) belonging to the Debtors … against the Debtors' officers or directors, but only to the extent insurance exists for such claims." SROA.23768. That limitation does not include former or past directors. The qualified release also only applies to "any of the directors, officers, or employees of any of the Debtors … serving during the pendency of the Chapter 11 Case (but only to the extent in excess of insurance coverage)." SROA.23797. Diercksen is indisputably a ***former*** Idearc director, resigning in November 2006 concurrently with the Spinoff. PX1051.

The Plan also provided "[n]otwithstanding anything contained herein, the Plan does not release the claims of any Person against Verizon." PX1664 at 41-42. "Verizon" includes its "officers." SROA.23773. Use of the term "notwithstanding" trumps any other release in the Plan, even assuming, *arguendo*, that the release applied to ***former*** directors of Idearc. *Cleere Drilling Co. v. Dominion Exploration & Prod., Inc.*, 351 F.3d 642, 649 n.13 (5th Cir. 2003). ROA.16337; ROA.26843. Any release of Diercksen as an Idearc director was undone because he was also Verizon's officer. ROA.16337-38; SROA.26843.

C. The district court improperly dismissed Trustee's claims for fraudulent transfer regarding the Unsecured Notes and the Tranche B debt.

TUFTA defines "transfer" to include every mode, direct or indirect, of departing with an interest in an asset. TEX. BUS. & COM. CODE ANN. § 24.002 (West 2009). TUFTA also provides for obligation avoidance ***or*** "any other relief the circumstances may require." TEX. BUS. & COM. CODE ANN. § 24.008. The remedy is not limited to avoidance of the obligation and does not distinguish between fraudulent transfers and fraudulent obligations. *Id.* The district court ignored this alternative remedy, erroneously concluded that the Unsecured Notes and Tranche B debt could only be avoided, and did not consider "any other relief," such as a money judgment against Verizon. RE205-09/ROA.12365-69.

When a company sells its stock, bonds or notes (securities), the company transfers an interest in an asset to the buyer. *See, e.g.*, *Global Crossing Estate Representative v Winnick*, No. 04 Civ. 2558, 2006 U.S. Dist. LEXIS 53785, at *27-32 (S.D.N.Y. Aug. 3, 2006) (stock); *In re Verestar, Inc.* 343 B.R. 444, 469-70 (Bankr. S.D.N.Y. 2006) (notes). The Unsecured Notes and Tranche B were required to be securities for the Spinoff to be tax free. 26 U.S.C. § 355; PX1922 at 4. Verizon referred to the transactions, which were issued in a private placement pursuant to Rule 144A and Regulation S of the Securities Act of 1933, as "exempt from registration under the Securities Act"—that is, securities needing exemption. ROA.5527; *see* 15 U.S.C. § 77d. The district court's holding that the debt and notes were only obligations ignored the possibility of "any other remedy" (*e.g.*, a money judgment) and that Verizon received $7.1 billion of real value. But § 550 of the Bankruptcy Code and sections 24.008 and 24.009 of TUFTA specifically authorize the recovery of a money judgment against Verizon. *In re Supplement Spot, LLC*, 409 B.R. 187, 202-03 (Bankr. S.D. Tex. 2009).

Under the district court's reasoning, an initial intentional bad faith transferee who later resells notes would be protected (if obligation avoidance is the only remedy) but not innocent third party note holders in due course whose notes would be avoided. Courts, however, look to the collapsed effect of a series of transactions in an integrated scheme to determine whether a fraudulent transfer occurred. *See,*

e.g., *Orr v. Kinderhill Corp.*, 991 F.2d 31, 35-36 (2d Cir. 1993); *United States v. Tabor Court Realty Corp.*, 803 F.2d 1288, 1302-03 (3d Cir. 1986); *HBE Leasing Corp. v. Frank*, 48 F.3d 623, 635 (2d Cir. 1995). Here, if Idearc had borrowed the $7.1 billion directly from the bondholders and the lenders and then paid that $7.1 billion to Verizon, Trustee clearly could recover the fraudulent transfer of the $7.1 billion from Verizon. The collapsed effect of the Spinoff transaction achieved exactly the same result.

Moreover, both TUFTA and the Bankruptcy Code specifically state that "transfer" includes creation of a lien. 11 U.S.C. § 101(54); TEX. BUS. & COM. CODE § 24.002; *see also Johnson v. Home State Bank*, 501 U.S. 78, 82-85 (1991); *Smith v. FDIC*, 61 F.3d 1552, 1561 (11th Cir. 1995). The issuance of the Tranche B, a secured debt, created liens on the assets of Idearc by granting liens to Verizon. *See* ROA.5504. The district court nevertheless erroneously concluded that creation of a lien does not constitute a transfer of an interest in property by citing § 101(54)(D)(i)-(ii), RE209-16/ROA.12369-76, while ignoring the ***or*** separating § 101(54)(A) from § 101(54)(D) and the fact that a lien ***does*** create an interest of the lender in property (the collateral).

D. The district court improperly granted summary judgment on Trustee's fraudulent transfer and unlawful dividend claims based on the cash transfer.

Section 546(e) requires either a settlement payment or a securities contract, each of which require two or more parties. 11 U.S.C. § 546(e). The economic reality was that Verizon was on all sides of the Spinoff.[8] It is impossible to have a settlement payment or a securities contract with yourself. The Idearc Spinoff was an Internal Revenue Code § 355 corporate reorganization, ***not*** the settlement of a securities transaction between two arms-length parties. *See In re Mervyn's Holdings, LLC*, 426 B.R. 488, 500 (Bankr. D. Del. 2010); *In re Crown Vantage, Inc.*, No. C-02-3838 MMC, 2006 U.S. Dist. LEXIS 61089, *16-18 (N.D. Cal. Aug. 11, 2006); *In re Integra Realty Res., Inc.*, 198 B.R. 352, 359-60 (Bankr. D. Colo. 1996); *see* SROA.40823, SROA.40826-29. Because the transactions were never properly authorized by a duly constituted board, a legitimate securities transaction never took place. *See In re Enron Corp.*, 323 B.R. 857, 879 (Bankr. S.D.N.Y. 2005).

The district court should have, but did not, apply the step doctrine to collapse the Spinoff, which was an integrated transaction. *See Mervyn's Holdings*, 426 B.R. at 497-98; *Crown Vantage*, 2006 U.S. Dist. LEXIS 61089, at *12-13; *In re Yazoo Pipeline Co., L.P.*, 448 B.R. 163, 187 (Bankr. S.D. Tex. Mar. 24, 2011),

[8] *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 849 (1975) (citing *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892)).

vacated in part on other grounds, 459 B.R. 636 (Bankr. S.D. Tex. Oct. 14, 2011); *see* SROA.40821-22 & n.257, SROA.40826-27. In effect, cash moved from one Verizon pocket to another Verizon pocket, no sale took place and the transaction did not involve a payment by or to a financial institution. *Munford, Inc. v. Valuation Research Corp.*, 98 F.3d 604, 610 (11th Cir. 1996).[9]

The Bankruptcy Code's safe harbor provisions are broad, but they are "not boundless." *See* SROA.40821, SROA.40827; *In re Tribune*, No. 12 MC 2296 (RJS), 2013 U.S. Dist. LEXIS 144987, at *12-13 (S.D.N.Y. Sept. 23, 2013). Section 546(e) does not protect unauthorized transfers or unlawful dividends because they do not involve a settlement payment or the purchase or sale of a security. SROA.40828; *In re Appleseed's Intermediate Holdings, LLC*, 470 B.R. 289, 301-02 (D. Del. 2012); *In re Global Crossing, Ltd.*, 385 B.R. 52, 56 n. 1 (Bankr. S.D.N.Y. 2008).

In contrast with other parts of the Bankruptcy Code, such as sections 1123(a), 541(c), and 363(1), the plain language of § 546(e) limits the safe harbors to the broad avoidance power given to a ***trustee in bankruptcy*** but does not pre-empt state court actions that existed prior to the bankruptcy and independent of the bankruptcy system. Section 546(e) does ***not*** provide for blanket preemption of state law claims based on actual fraud, tortious conduct, illegality (including

[9] A sale would have resulted in a taxable transaction.

wrongful dividends) and state law causes of action based on other wrongdoing, which could have been brought by Idearc even if there was no bankruptcy. *See In re OODC, LLC*, 321 B.R. 128, 144-45 (Bankr. D. Del. 2005); *In re Lehman Bros. Holdings*, 469 B.R. 415, 450 (Bankr. S.D.N.Y. Apr. 19, 2012); ROA.12556-58.

The cross reference in § 546(e) to § 548(a)(1)(A) is a cross reference to that subsection, not the entirety of § 548. When read literally, § 548(a)(1)(A) deals with intentional fraudulent transfers, including those under state law. Such a reading of the statute avoids the absurd result of prohibiting intentional fraudulent activity under federal law but sanctioning the very same activity under state law. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 536, 538 (2004). The lower court's ruling that § 546(e) is applicable is demonstrably at odds with the intent of the drafters. *See* ROA.12558, RE274-75/ROA.12699-700; *Grede v. FC STONE, LLC*, 485 B.R. 854, 885-87 (N.D. Ill. 2013); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571-75 (1982).

PRAYER

Trustee prays that the Court reverse the judgment of the district court and render judgment in favor of Trustee, in whole or in part, and to remand, in part or in whole, to conduct a jury trial without bifurcation or otherwise resolve Trustee's remaining claims with instructions, as necessary, on the legal principles under Delaware, Texas, and federal law. Trustee prays for all other and further relief to which it is justly entitled in law or in equity.

Dated: December 2, 2013.

Respectfully Submitted,

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ATTORNEYS FOR APPELLANT U.S. BANK NATIONAL ASSOCIATION as Litigation Trustee on Behalf of the Idearc Inc. et al. Litigation Trust

CERTIFICATE OF COMPLIANCE WITH RULE 32

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 13,957 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 software in Times New Roman 14 point font in text and Times New Roman 12 point font in footnotes.

/s/ Karen S. Precella
Karen S. Precella
Dated: December 2, 2013

CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2013, I electronically transmitted the attached document to the Clerk of the Court of the 5th Circuit Court of Appeals using the ECF System of the Court. The electronic case filing system is to send a "Notice of Electronic Filing" to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

/s/ Karen S. Precella
Karen S. Precella

ECF CERTIFICATION

I hereby certify (i) the required privacy redactions have been made pursuant to 5TH CIR. R. 25.2.13; (ii) the electronic submission is an exact copy of the paper document pursuant to 5TH CIR. R. 25.2.1; (iii) the document has been scanned for viruses using Symantec Endpoint Protection active scan and is free of viruses; and (iv) the paper document will be maintained for three years after the mandate or order closing the case issues, pursuant to 5TH CIR. R. 25.2.9.

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