

TABLE OF CONTENTS

	<u>Page</u>
I. PRELIMINARY STATEMENT	1
II. UNLAWFUL DIVIDEND.....	3
A. Plaintiff’s Unlawful Dividend Claim Remains Viable	3
1. A Duly Constituted Board Of Idearc Never Declared the Dividend.....	3
2. No Surplus or Net Profits Existed on October 31, 2006.....	5
3. Idearc’s Board Never Acted to Determine if a Surplus Existed.....	6
4. Diercksen Willfully or Negligently Violated Delaware Dividend Law.....	8
5. Remaining Issues of Fact for Phase II	9
III. Promoter Liability.....	11
A. Plaintiff’s Promoter Liability Claim Remains Viable And The Plaintiff Is Entitled To Judgment On That Claim.....	11
B. Disputed Issues of Fact	13
IV. breach of fiduciary duty and aiding & abetting breaches of fiduciary duty	14
A. Plaintiff’s Breach of Fiduciary Duty Claims Remain Viable	14
B. Disputed Issues of Fact	15
V. Actual fraudulent transfer	16
A. Solvency Does Not Resolve Actual Fraudulent Transfer Claims.....	16
B. Disputed Issues of Fact	18
VI. ALTER EGO	19
A. Plaintiff’s Alter Ego Claim Is Viable.....	19
B. Disputed Issues of Fact	20

TABLE OF AUTHORITIES

	<u>Page</u>
CASES	
<i>AGR Halifax Fund, Inc. v. Fiscina</i> , 743 A.2d 1188 (Del. Ch. 1999).....	4
<i>Beard Research, Inc. v. Kates</i> , 8 A.3d 573, 601 (Del. Ch. 2010).....	13
<i>Cutaia v. The Tel X Group, Inc.</i> , 2006 WL 920420	7
<i>Farland v. Willis</i> , 1975 WL 1960 (Del. Ch. 1975)	6
<i>Fish v. Tandy Corp.</i> , 948 S.W.2d 886 (Tex. App.—Ft. Worth 1997, writ denied)	11
<i>Gladstone v. Bennett</i> , 153 A.2d 577 (Del. 1959)	11, 14
<i>In re Bailes</i> , 444 F.2d 1241 (5 th Cir. 1971)	12
<i>In re Lexington Oil & Gas Ltd.</i> , 423 B.R. 353 (Bankr. E.D. Okla. 2010).....	17
<i>In re Magnesium Corp. of America</i> , 399 B.R. 722 (Bankr. S.D.N.Y. 2009).....	8
<i>In re Sheffield Steel Corp.</i> , 320 B.R. 405 (N.D. Okla. 2004).....	8, 12
<i>In re Sheffield Steel Corp.</i> , 320 B.R. 423 (N.D. Okla. 2004).....	7
<i>In re Tronox, Inc.</i> , 450 B. R. 432 (U.S. Bankr. S.D.N.Y. 2011).....	12
<i>Klang v. Smith’s Food & Drug Centers, Inc.</i> , 702 A.2d 150 (Del. 1997)	6, 7, 8
<i>Lorillard Tobacco Co. v. American Legacy Found.</i> , 903 A.2d 728 (Del. 2006)	11

McCandless v. Furlaud,
296 U.S. 140 (1935).....12

Morris v. Standard Gas & Elec. Co.,
63 A.2d 577 (Del. Ch. 1949).....6

Pereira v. Cogan,
294 B.R. 449 (S.D.N.Y. 2003).....4, 5, 8

Sinclair Oil Corp. v. Levien,
280 A.2d 717 (Del. 1971)14

Smith v. American Founders Financial Corp.,
365 B.R. 647 (S.D. Tex. 2007)16, 17

Stringer v. Electronics Supply Co.,
2 A.2d 78 (Del. Ch. 1938).....11

Triton Constr. Co. v. Eastern Shore Electrical Services,
2009 WL 1387115 Del. Ch. May 18, 2009 at *27.....12

U.S. Bank Nat. Ass'n v. Verizon Comm's,
817 F.Supp.2d 934 (N.D. Tex. 2011)16

U.S. Bank Nat. Ass'n v. Verizon Comm's Inc.,
2012 WL 3100778 (N.D. Tex. Jul. 31, 2012).....19

U.S. Bank Nat. Ass'n. v. Verizon Comm's Inc.,
2012 WL 4050088 (N.D. Tex. Sep. 14, 2012).....3, 5, 6, 10

U.S. v. Evseroff,
No. 06-5391-cv, 2008 WL 749617 (2nd Cir. Mar. 21, 2008).....17

Union Carbide Corp. v. Montell N.V.,
944 F.Supp. 1119 (S.D.N.Y. 1996)19

Vogtman v. Merchants' Mtg. & Credit Co.,
20 Del. Ch. 364 (Del. Ch. 1935).....6

Western Oil and Gas JV, Inc. v. Griffiths,
91 Fed. App'x 901 (5th Cir. 2003)19

STATUTES

8 DEL. CODE ANN. TIT. § 102(b)(7)(ii) (2012).....15

DEL. CODE ANN. TIT. 8 §141(f)5, 8

DEL. CODE ANN. TIT. 8 §1605, 8

DEL. CODE ANN. TIT. 8 §170 4, 5, 7, 8
DEL. CODE ANN. TIT. 8 §1733, 5, 7, 8
DEL. CODE ANN. TIT. 8 §174(a)..... 8, 12
TEX. BUS. & COM. CODE § 24.005(a)(1).....16, 17
UNIFORM FRAUDULENT TRANSFER ACT § 116A(1)17
FED. R. CIV. P. 12(b)(6)7

OTHER AUTHORITIES

Balotti and Finklestein, *Delaware Law of Corporations and Business Organizations* §
5:32 (2011).....8
WILLIAM MEAD FLETCHER *Cyclopedia of the Law of Corporations*.....5, 11

On January 22, 2013, the Court entered a 66 page memorandum (ECF 646). The opinion did not squarely answer the issue set for separate trial: the value of Idearc on the date of the Spin-off. On this issue, the Court was agnostic. The Court did find that the value of Idearc on November 17, 2006 was at least \$12 billion.

Contemporaneously with this response to the Show Cause Order, Plaintiff has moved for judgment based on the undisputed evidence adduced at the Phase I trial, focusing in large part on a stipulation concerning Idearc's minute book received in evidence. The motion seeks judgment against Verizon as a matter of law under counts 9 and 11, and in the alternative, against Diercksen and Verizon under count 8. The motion asks for a trial if the Court believes there are genuine issues that need to be resolved before judgment is entered against Defendants. This motion for judgment is incorporated herein for all purposes.

In the Show Cause Order, the Court directed the Plaintiff to submit a brief explaining why any (or all) of Plaintiff's legal claims are viable in light of the Court's finding on Idearc's value and identifying any disputed fact issues that remain for resolution in a second phase of trial.² *Id.* at 2. This brief sets forth that information.

² In the Show Cause Order, the Court stated that, after the resolution of various motions to dismiss and motions for summary judgment, the following legal claims remain: (1) Counts 1 and 2 of the Amended Complaint (¶¶ 32-43, docket entry 161) alleging fraudulent transfer, but only insofar as those fraudulent transfers relate to contractual obligations assumed by Idearc in the spinoff; (2) Count 3 of the same (¶¶ 44-46) alleging breaches of fiduciary duty by the defendant John W. Diercksen, limited to the amount of any applicable insurance coverage; (3) Count 4 (¶¶ 47-48) alleging that Verizon aided and abetted Diercksen's breaches of fiduciary duty; (4) Counts 5 and 6 (¶¶ 48-68) alleging fraudulent transfer related to discrete steps in the transactions consummating the spinoff; (5) Count 8 (¶¶ 76-78) alleging unlawful dividend, but only with respect to the notes Idearc transferred to Verizon in the spinoff; (6) Count 9 (¶¶ 79-114) alleging promoter liability; and (7) Count 11 (¶¶ 128-133) alleging alter ego, but only as a theory of recovery should any of the plaintiff's other claims succeed. Show Cause Order at 2.

II. UNLAWFUL DIVIDEND³

A. Plaintiff's Unlawful Dividend Claim Remains Viable

Plaintiff's claim for the recovery of an unlawful dividend [Count 8] remains viable after Phase I. The Court previously determined that the distributions from Idearc to Verizon during the Spin-off were a dividend. *U.S. Bank Nat. Ass'n. v. Verizon Comm's Inc.*, 2012 WL 4050088, at *22 (N.D. Tex. Sep. 14, 2012) (the "MSJ Order"). The Trust may prevail on its unlawful dividend claim by establishing any of the following: (1) a duly constituted board of directors of Idearc never declared the dividend, (2) on the date Defendant Diercksen acted unilaterally in violation of Idearc's bylaws to purportedly authorize the dividend, October 31, 2006, Idearc did not possess a surplus or net profits from which the dividend could be paid, (3) Idearc's board of directors never acted to determine if an adequate surplus existed⁴ or (4) Defendant Diercksen willfully or negligently declared the dividend in violation of Section 173 of the Delaware Code. The undisputed facts establish each of these issues in the Trust's favor. Yet if the Court disagrees, the issues remain to be resolved in Phase II of the trial.

1. A Duly Constituted Board Of Idearc Never Declared the Dividend

The Court's ruling regarding Idearc's value on November 17, 2006 does not resolve whether the dividend that Idearc paid to Verizon was illegal. A dividend is unlawful under Delaware law if a corporation pays the dividend without a prior, valid act of its board of directors authorizing the dividend. A dividend paid without board authorization is illegal even if the corporation was solvent at the time the dividend was declared and paid:

The payment of a stock dividend while a corporation is insolvent, or one that renders a company insolvent, is illegal under Delaware law. It is also illegal for a company to pay dividends that are not

³ Plaintiff's Amended Complaint [ECF 161], Count 8, ¶¶ 76-78.

⁴ Idearc did not have sufficient net profits for payment of the dividend.

declared by the Board in accordance with Section 170 of the Delaware General Corporation Law.

Pereira v. Cogan, 294 B.R. 449, 539 (S.D.N.Y. 2003) (internal citations omitted), *vacated and remanded on other grounds*, 413 F.3d 330 (2d Cir. 2005), *cert. denied*, 547 U.S. 1147 (2006).

The dividend that Idearc paid to Verizon in the Spin-off was not properly authorized. Idearc's bylaws in effect at all times that Defendant Diercksen was an Idearc director required Idearc's board to consist of two persons and mandated that nothing less could constitute a quorum for board action. PX 2018, Idearc Bylaws, Art. 2.02 at App. 023 (two director board) & 2.06 at App. 024⁵ (quorum requires the presence of a majority of "authorized" directors – not a majority of those yet appointed). Yet, Idearc's incorporator only appointed one director, Diercksen, and there is no evidence that the incorporator ever appointed a second director. PX 422, Incorporator's Action In Lieu of Organizational Meeting; PX 2018 at App. 099; PX 2018 at App. 001-097, Tr. Vol. 2A 35:14-16 (Diercksen identifying himself as Idearc's sole director). The only evidence of purported board action authorizing the Spin-off distributions from Idearc to Verizon is the "resolution" that Diercksen unilaterally signed on October 31, 2006. PX 893, Consent in Lieu of Meeting of the Board of Directors of Idearc, Inc. at App. 100-118. But that resolution was of no effect because Diercksen was only one of the two "authorized" directors. He, therefore, could not act alone as the quorum of the board necessary for any valid Idearc board of directors action. Indeed, the Court previously held in a related context that Idearc board resolutions "not properly accomplished under Delaware law" are "void as a matter of law." August 8, 2012 Memorandum Opinion and Order at 7 [ECF 485]; *see also AGR Halifax Fund, Inc. v. Fiscina*, 743 A.2d 1188, 1195 (Del. Ch. 1999) ("[O]nly the lawful *de jure* board of

⁵ Citations to 'App. __' are to Plaintiff's Appendix to Brief Pursuant to Order to Show Cause, which Plaintiff filed contemporaneously with this brief.

directors . . . [is] empowered to take . . . action, either at a meeting or by unanimous written consent.”).

On November 17, 2006, the Spin-off transaction closed and Idearc transferred, *inter alia*, \$7.115 billion in debt to Verizon in the form of a dividend. *See, e.g., U.S. Bank Nat.*, 2013 WL 230329, at *2 (describing Spin-off transfers). The dividend was unlawful under Delaware law because it was not authorized by Idearc’s board of directors. *See Pereira*, 294 B.R. at 539-40 (dividend paid without board approval is unlawful); *compare* DEL. CODE ANN. TIT. 8 §170 (providing the “directors of every corporation” with the power to “declare and pay dividends”) *with* DEL. CODE ANN. TIT. 8 §173 (“no corporation shall pay dividends except in accordance with this chapter.”).

In the MSJ Order, the Court cited *Fletcher Cyclopedia of Corporations* (“Fletcher”) for the proposition that – in certain circumstances – courts have recognized dividends as legal even if the dividend was not declared by the corporation’s board of directors. MSJ Order, p. 47. That statement in *Fletcher* is not pertinent, however, because *Fletcher* was discussing appellate decisions in states other than Delaware. None of the cases cited by *Fletcher* are from Delaware or even apply Delaware law. *Fletcher Cyclopedia of the Law of Corporations*, §5350, fn. 4 – 8 (2012). As noted above, Delaware law mandates that a dividend paid without a prior board of directors declaration is illegal.

2. No Surplus or Net Profits Existed on October 31, 2006

A determination that Idearc had a positive value on November 17, 2006, does not address whether Idearc possessed either a surplus or net profits from which to declare a dividend on October 31, 2006. This was the date that Diercksen unlawfully declared the dividend to Verizon. PX 893, Consent in Lieu of Meeting of the Board of Directors of Idearc, Inc. App. at 100-118. A corporation must possess either sufficient surplus or net profits 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 (“the directors of every corporation . . . may *declare and pay dividends* upon the shares of its capital stock . . . either (1) out of its surplus . . . or (2) in case there shall be no surplus, out of its net profits . . .”) (emphasis added); *see also Vogtman v. Merchants’ Mtg. & Credit Co.*, 20 Del. Ch. 364, 370 (Del. Ch. 1935) (“In deciding whether a dividend was rightfully made, the transaction must be viewed as of the time when it was declared.”).

3. Idearc’s Board Never Acted to Determine if a Surplus Existed

The Trust is also entitled to prevail on its unlawful dividend count because – setting aside that Diercksen could not unilaterally declare a dividend – no Idearc board ever determined if there was a surplus from which to declare a dividend. The evidence demonstrating this fact is discussed in greater detail in the Trust’s Motion for Partial Summary Judgment [ECF 332] and Brief in Support [ECF 333], which are incorporated herein by reference.

Before a dividend may be declared, a corporation’s board must affirmatively determine whether a surplus exists.

I see no cause for alarm over the fact that this view [taking assets at actual value] required directors to make a determination of the value of the assets at each dividend declaration. On the contrary, *I think that is exactly what the law always has contemplated that directors should do.*

Morris v. Standard Gas & Elec. Co., 63 A.2d 577, 582 (Del. Ch. 1949) (emphasis added); *see also Morris*, 63 A.2d at 582 (“In concluding that a formal appraisal . . . is not required, I do not mean to imply that the directors are not under a duty to evaluate the assets on the basis of acceptable data and by standards which they are entitled to believe reasonably reflect present ‘values.’”); *Farland v. Willis*, 1975 WL 1960 at *6 (Del. Ch. 1975) (directors are under a duty to evaluate the assets to determine the assets’ value).

In the MSJ Order, the Court cited *Klang* for the proposition that “[a] mistake in documenting the surplus will not negate the substance of the action, which complies with the statutory scheme.” *U.S. Bank*, 2012 WL 4050088, at *22 (citing *Klang v. Smith’s Food & Drug Centers, Inc.*, 702 A.2d 150, 152 (Del. 1997)). However, *Klang* is distinguishable from the case before this Court on several grounds. First, the board of directors in *Klang* actually made an affirmative determination that a surplus existed, then made an error in documenting the amount of the surplus in the board resolution. *Klang*, 702 A.2d at 155-56. It is undisputed that the Idearc board never acted at all to determine whether a surplus existed before Idearc made the Spin-off distributions to Verizon. Plaintiff’s Brief in Support of its Motion for Partial Summary Judgment (ECF 333), p. 9 (quoting Diercksen’s deposition admission). This is an important distinction from the facts before the *Klang* court – there, a board acted to confirm a surplus existed, but stated the amount incorrectly in a board resolution. *See Cutaia v. The Tel X Group, Inc.*, 2006 WL 920420 at **7-8 (Del. Ch. 2006) (denying Rule 12(b)(6) motion to dismiss and distinguishing *Klang* from the facts alleged in the complaint because “unlike in *Klang*, however, where the board in fact appropriately revalued its corporate assets to comply with the statute, here it is alleged that the Telx board did not perform such a revaluation”).

Another distinguishing factor from *Klang* is that *Klang* dealt with a corporation that redeemed its stock under Section 160 of the Delaware Code. *Klang*, 702 A.2d 153. *Klang* did not consider a dividend paid under Section 170 of the Delaware Code. *See In re Sheffield Steel Corp.*, 320 B.R. 423, 449 (N.D. Okla. 2004) (“Whether the director’s prerogative to revalue assets for the purpose of avoiding an “impairment of capital” under Section 160 applies with equal force when determining ‘surplus’ for the purpose of complying with Section 170 was not decided by *Klang*”). This is a key distinction because, while Section 160 does not require board

action to authorize a stock redemption (the section generally authorizes corporations to redeem stock), Section 173 only grants a corporation's directors the authority to declare and pay dividends. *Id.*; compare DEL. CODE ANN. TIT. 8 §160 ("Every corporation may . . . redeem . . . its own shares . . .") with DEL. CODE ANN. TIT. 8 §170 (providing the "directors of every corporation" with the power to "declare and pay dividends") & DEL. CODE ANN. TIT. 8 §173 ("no corporation shall pay dividends except in accordance with this chapter."); see also *Pereira*, 294 B.R. at 539 (it is illegal for a company to pay a dividend not declared by a board). This is why the *Klang* opinion states that the stock redemption would have been valid in the absence of a board resolution. *Klang*, 702 A.2d at 156. A dividend, however, cannot be valid unless it is declared by a corporation's board of directors. *Pereira*, 294 B.R. at 539.

4. Diercksen Willfully or Negligently Violated Delaware Dividend Law

The Court's ruling in Phase I also does not resolve whether Defendant Diercksen willfully or negligently violated Section 173 of the Delaware Code in connection with unlawful dividends that Idearc paid to Verizon. 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 §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 America*, 399 B.R. 722, 778 (Bankr. S.D.N.Y. 2009); Balotti and Finklestein, *Delaware Law of Corporations and Business Organizations* § 5:32 (2011). The Trust believes that the undisputed facts establish this issue in the Trust's favor. If the Court disagrees, however, the issue whether Diercksen acted willfully or negligently remains to be resolved in Phase II of the trial.

5. Remaining Issues of Fact for Phase II

While the Trust believes that the undisputed facts establish each of the issues listed below in the Trust's favor, the Court's ruling in Phase I did not resolve any of these issues and they remain for resolution in Phase II to the extent, if any, that the Court believes these issues are not already established in the Trust's favor:

- (a) Whether on June 22, 2006, Verizon incorporated an entity named "Verizon Directories Disposition Corporation" ("VDDC") in Delaware and had Idearc's incorporator, a lawyer hired by Verizon, appoint Diercksen as one member of VDDC's two director board.
- (b) Whether VDDC was formed "to hold the assets and liabilities comprising Verizon's domestic print and Internet directories publishing business currently operated by [VIS]."
- (c) Whether VDDC became known as Idearc Inc. prior to the Spin-off.
- (d) Whether Idearc's board was properly constituted before the Spin-off;
- (e) Whether a duly constituted board of directors of Idearc validly declared the dividend that Idearc paid to Verizon on November 17, 2006 before Idearc paid the dividend;
- (f) Whether Idearc possessed adequate surplus or net profits on October 31, 2006 out of which a dividend could be declared;
- (g) Whether on or about October 31, 2006, Diercksen, in his capacity as an Idearc director, signed a Consent In Lieu of Organizational Meeting of the Board of Directors of Idearc, Inc. pursuant to Section 141(f) of the Delaware General Corporation Law, purporting to approve the Spin-off and authorize Idearc to undertake the actions necessary to effectuate and complete the Spin-off.
- (h) Whether a duly constituted board of Idearc ever acted to determine if adequate surplus existed before Idearc paid the dividend to Verizon on November 17, 2006; and
- (i) Whether Defendant Diercksen acted willfully or negligently in causing the dividend to be paid.
- (j) Whether Diercksen as a director of Idearc acted with gross neglect.

- (k) Whether Diercksen, acting as the sole director, delegated the decision to pay a dividend to a duly elected Idearc officer by authorizing the officer to sign the Distribution Agreement.
- (l) Whether on November 17, 2006, Verizon received from Idearc approximately \$7.1 billion in loans and unsecured notes to Verizon.
- (m) Whether in a May 10, 2006 Presentation Regarding the Preliminary Capital Structure and Valuation Analysis regarding the Spin-off, at p. 7., Verizon's financial advisors, Bear Stearns and JPMorgan, referred to the cash distribution as a dividend equal to the amount of Verizon's tax basis in Idearc. Verizon's executives and attorneys who structured the Spin-off also referred to the distribution as a dividend. [See June 29, 2006 e-mail string between David Kaufman, David Rievman and Steve Holtz (referring to the cash transfer as a "dividend"); July 7, 2006 e-mail from Steven J. Slutzky to David A. Brittenham [Depo Ex 253] ("Verizon is planning on deleveraging by around 9 billion in connection with the spin-off by having spin-co issue a combination of new term debt and HY and dividend it up to Verizon"). As late as October 2006, Janet Garrity, Verizon's Vice President of Financing and Cash Operations, referred to the cash payment from Idearc as a "special dividend." Steven Slutzky, a Debevoise attorney involved in structuring the Spin-off, testified in his deposition that "the Idearc entities borrowed money in the form of Term B loans and in the form of high-yield debt, and they dividended them -- dividended them to Verizon" [Deposition of Steven Slutzky at 244:4 - 246:2, 302:16 - 303:2].

In the Joint Pretrial Order [ECF 572], the Trust also identified numerous contested issues of fact relating to each of its claims. *See* Joint Pretrial Order at pp. 24-44. The Court did not set those issues for trial in Phase I. Accordingly, the Trust incorporates herein all other unresolved, contested issues and statements of fact listed in pages 24-44 of the Joint Pretrial Order.

III. PROMOTER LIABILITY⁶

A. Plaintiff's Promoter Liability Claim Remains Viable And The Plaintiff Is Entitled To Judgment On That Claim

Plaintiff is entitled to judgment on its Promoter Liability Claim [Count 9], as specifically set out in Plaintiff's Motion and Brief for Entry of Judgment on Partial Findings, Admissions and Stipulated Facts, filed contemporaneous hereto ("Plaintiff's Motion for Judgment").

To the extent this court does not grant Plaintiff's Motion for Judgment, Plaintiff will show in Phase II that Verizon acted as a promoter vis-à-vis Idearc. "Promoters undertake to form a corporation and to procure for it the rights, instrumentalities and capital by which it is to carry out the purposes set forth in its charter, and to establish it as fully able to do its business." *U.S. Bank*, 2012 WL 4050088, at *22 (internal quotations omitted). Verizon caused Debevoise & Plimpton associate Greg Feldman to incorporate Idearc. Verizon arranged for financing for Idearc. Verizon hired others to design the capitalization of Idearc. Verizon was Idearc's promoter.

As Idearc's promoter, Verizon is liable for all contracts that it caused Idearc to enter during the promotion period. 1A WILLIAM MEAD FLETCHER *Cyclopedia of the Law of Corporations*, § 215 (2012). See also *Lorillard Tobacco Co. v. American Legacy Found.*, 903 A.2d 728 (Del. 2006); *Fish v. Tandy Corp.*, 948 S.W.2d 886, 897 (Tex. App.—Ft. Worth 1997, writ denied); *Stringer v. Electronics Supply Co.*, 2 A.2d 78, 79 -80 (Del. Ch. 1938). Verizon remains on the hook for those contracts until a disinterested board is installed and adopts or ratifies the contracts. Moreover, as Idearc's promoter, Verizon owed Idearc continuing fiduciary duties. *Gladstone v. Bennett*, 153 A.2d 577, 582 (Del. 1959) ("There is, of course, a fiduciary relationship between the promoters of a corporation and the corporation itself.") Verizon owed

⁶ Plaintiff's Amended Complaint (ECF 161), Count 9, ¶¶ 79-114.

Idearc the duty of perfect candor, utmost good faith, and honesty. 1A WILLIAM MEAD FLETCHER *Cyclopedia of the Law of Corporation*, § 192.10. It had the continuing duty to empanel a lawful, disinterested Board of Directors for Idearc. *See Id.*

The Court has not yet ruled on any of the fact issues relating to Plaintiff's promoter liability claim.

As Idearc's promoters, Verizon and Diercksen used the Spin-off as a scheme to raise over \$9 billion in cash, debt, and notes that Verizon could use to retire its existing indebtedness. To prove its promoter liability claim in Phase II, the Plaintiff will show that Verizon and Diercksen acted as Idearc's promoters; that the Spin-off was part of the promotional scheme; that they caused Idearc to pay an unlawful dividend to Verizon in the Spin-off; and that Verizon and Diercksen breached their fiduciary duties as promoters in a variety of ways, including: causing the payment of an unlawful dividend; causing Idearc to enter unlawful contracts; causing Idearc to falsify record documents; failing to constitute a Board for Idearc; failing to stop Idearc from incurring debt, paying illegal dividends, and filing for bankruptcy protection. These facts support a classic promoter liability claim. *See, e.g., McCandless v. Furlaud*, 296 U.S. 140, 156 (1935); *In re Bailes*, 444 F.2d 1241, 1244-45 (5th Cir. 1971); *In re Tronox, Inc.*, 450 B. R. 432, 438-40 (U.S. Bankr. S.D.N.Y. 2011). Under Delaware law, Plaintiff is entitled to the return of the unlawfully paid dividends and the return of any other proceeds of the breach of the promoter's fiduciary duties. *See DEL. CODE ANN. TIT. 8 § 174(a); In re Sheffield Steel Corp.*, 320 B.R. 405, 413-15 (Bankr. N.D. Okla. 2004); *Triton Constr. Co. v. Eastern Shore Electrical Services*, 2009 WL 1387115 Del. Ch. May 18, 2009 at *27 – *30). Because the value of Idearc on November 17, 2006 has no bearing on the elements of the Plaintiff's promoter liability claim, the Plaintiff is entitled to trial on the disputed issues of fact related to that claim.

B. Disputed Issues of Fact

Again, Plaintiff believes that no disputed facts preclude the Court from entering judgment in its favor as to this claim. Alternatively, the following fact issues remain to be resolved in Phase II.

- (a) Whether, in the Spin-off, Verizon and Diercksen (hereafter together referred to as “Verizon”) were promoters engaged in a plan or scheme of promotion with respect to Idearc.
- (b) Whether a Board of Directors was ever duly appointed for Idearc.
- (c) Whether Verizon caused Idearc to pay Verizon a dividend in connection with the Spin-off.
- (d) Whether the dividend was lawfully declared.
- (e) Whether Idearc ever properly issued, sold or traded stock with anyone.
- (f) If a proper Board was ever empanelled, whether it ratified Verizon’s acts.
- (g) Whether Verizon breached its fiduciary duty to Idearc.
- (h) At what point did Verizon’s fiduciary duty to Idearc end, if ever.
- (i) How much must Verizon disgorge?
- (j) What sum of money, if any, would fairly and reasonably compensate Plaintiff for the damages, if any, caused by any breach of fiduciary duty by Defendants during the period of promotion?
- (k) What sum of money, if any, is equal to the value of the benefits received by Defendants in connection with any breach of fiduciary duty by Defendants during the period of promotion?

In addition, Plaintiff identifies and incorporates herein all unresolved contested issues and statements of fact listed in pages 24-44 of the Joint Pretrial Order.

**IV. BREACH OF FIDUCIARY DUTY AND
AIDING & ABETTING BREACHES OF FIDUCIARY DUTY⁷**

A. Plaintiff's Breach of Fiduciary Duty Claims Remain Viable

Plaintiff's breach of fiduciary duty and aiding and abetting breaches of fiduciary duty claims [Counts 3 and 4] remain viable after Phase I. To recover against Diercksen for breach of fiduciary duty, Plaintiff must prove that (1) Diercksen owed Idearc fiduciary duties; (2) Diercksen breached his duties; (3) Diercksen's breach proximately caused Idearc damages. *Beard Research, Inc. v. Kates*, 8 A.3d 573, 601 (Del. Ch. 2010). To recover against Verizon for aiding and abetting breaches of fiduciary duty, Plaintiff must prove that (1) Diercksen owed Idearc fiduciary duties; (2) Diercksen breached his duties; (3) Verizon knowingly participated in the breach; and (3) Diercksen's breach proximately caused Idearc damages. *Id.* The Court did not set for trial, hear evidence on, or determine any of these issues. Accordingly, Plaintiff's breach of fiduciary duty and aiding and abetting claims remain viable regardless of the Court's finding as to value.

Diercksen, as a member of Idearc's board of directors, owed Idearc fiduciary duties. *Sinclair Oil Corp. v. Levien*, 280 A.2d 717 (Del. 1971). As shown above, Verizon owed Idearc fiduciary duties as Idearc's promoter. *Gladstone*, 153 A.2d at 398. The evidence adduced at Phase II will show that, at a minimum Diercksen breached his duties of care and loyalty by, *inter alia*, acting unilaterally to authorize the Spin-off and declare the dividend paid to Verizon. As demonstrated in the Motion for Judgment, Verizon, as Idearc's promoter, had knowledge that Idearc's board was not fully constituted, that Diercksen's purported board actions were ineffective, and that, as a result, the Spin-off and related transfers were never properly authorized, damaging Idearc in at least the amount of the unauthorized transfers.

⁷ Plaintiff's Amended Complaint (ECF 161), Counts 3-4, ¶¶ 44-48.

B. Disputed Issues of Fact

With respect to the Plaintiff's breach of fiduciary duty and aiding and abetting claims, at least the following disputed issues of fact remain to be resolved in Phase II.

- (a) Whether Diercksen owed Idearc fiduciary duties;
- (b) Whether Diercksen breached his fiduciary duties of loyalty and care in authorizing the Spin-off;
- (c) Whether Diercksen made sure that Idearc did not have a brain until it was too late to change the terms of the spin;
- (d) Whether Diercksen improperly "appointed" the "new Board" in a manner calculated to make sure that it would take no actions against Verizon after the spin;
- (e) Whether Diercksen schemed to make billions of dollars in unauthorized transfers of cash and debt to Verizon;
- (f) Whether Diercksen schemed to make illegal dividends or distributions to Verizon;
- (g) Whether Diercksen schemed to bypass corporate charters and bylaws to make *ultra vires* payments to Verizon;
- (h) Whether Diercksen schemed to impose Verizon's multi-billion dollar tax obligation related to the Spinoff upon Idearc;
- (i) Whether Diercksen schemed to send Idearc into independence with management he knew was incompetent;
- (j) Whether Diercksen schemed to create an "evergreen" promissory demand note to illegally transfer cash out of an Idearc subsidiary for Verizon's benefit;
- (k) Whether Diercksen schemed to bind Idearc to a Tax Sharing Agreement that severely injured Idearc's ability to survive;
- (l) Whether Diercksen failed to inform Idearc as it struggled and filed for bankruptcy protection that its debts were not valid;
- (m) Whether Diercksen acted with willful misconduct;
- (n) Whether Diercksen was grossly negligent;

- (o) Whether Diercksen's conduct involved "acts or omissions not in good faith or which involved intentional misconduct or a knowing violation of law" such that he cannot rely upon the exculpatory provisions in Idearc's charter and in 8 DEL. CODE ANN. § 102(b)(7)(ii) (2012);
- (p) What is the amount of or value of the benefits Diercksen obtained as a result of his breaches; and
- (q) What damages Idearc suffered as a result of Diercksen's breaches.

In addition to the above, Plaintiff's Claim for Aiding and Abetting a Breach of Fiduciary Duty Against Verizon and VFS Remain to be Tried.

- (a) Whether Verizon and VFS aided and abetted Diercksen's breaches of fiduciary duty by their knowing and substantial assistance in his breaches;
- (b) What damages Verizon and VFS caused as a result of aiding and abetting Diercksen;
- (c) What is the value of the benefit Verizon and VFS reaped as a result of aiding and abetting Diercksen.

In addition, Plaintiff identifies and incorporates herein all unresolved contested issues and statements of fact listed in pages 24-44 of the Joint Pretrial Order.

V. ACTUAL FRAUDULENT TRANSFER⁸

A. Solvency Does Not Resolve Actual Fraudulent Transfer Claims

Plaintiff's actual fraudulent transfer claims [Counts 1, 5, and 6] also remain viable after Phase I. The Trust may prevail on these counts by establishing that Verizon, which controlled Idearc, caused the transfers at issue to be made with "actual intent to hinder, delay, or defraud any creditor" of Idearc. TEX. BUS. & COM. CODE § 24.005(a)(1); *U.S. Bank Nat. Ass'n v. Verizon Comm's*, 817 F.Supp.2d 934, 940 (N.D. Tex. 2011).⁹ Even if the Court's ruling regarding Idearc's value on November 17, 2006 is a finding that Idearc was solvent when it made the Spin-off transfers to Verizon, that does not resolve Verizon's and Idearc's intent in connection with

⁸ Plaintiff's Amended Complaint (ECF 161), Counts 1, 5, 6, ¶¶ 32-43, 48-68.

⁹ Because Verizon controlled Idearc, Verizon's intent is imputed to Idearc. *U.S. Bank*, 817 F.Supp.2d at 940-41.

those transfers. Even if Idearc was solvent, the Trust may prevail on Counts 1, 5 and 6 by establishing that Verizon or the transferor acted with intent to hinder, delay or defraud any creditor of the transferor.

A debtor's solvency or insolvency is not dispositive of a plaintiff's claim for actual fraudulent transfer under Texas Business and Commerce Code section 24.005(a)(1). By way of illustration, in *Smith v. American Founders Financial Corp.*, a bankruptcy trustee argued that he had conclusively proven an actual fraudulent transfer claim because he proved that the debtor had been insolvent at the time of transfer. *Smith v. American Founders Financial Corp.*, 365 B.R. 647, 680 (S.D. Tex. 2007). The court disagreed, clarifying that the debtor's solvency is not an element of an actual (as opposed to constructive) fraudulent transfer claim under TUFTA:

Section 24.005(a)(1) of the TUFTA allows a creditor to avoid a transfer that was made “[w]ith actual intent to hinder, delay or defraud any creditor of the debtor.” Smith only has claims under this section remaining. The issue of insolvency is an element of proof in sections 24.005(a)(2) and 24.006(a), but it is immaterial to Smith's remaining claims under section 24.005(a)(1). Smith's second motion for partial summary judgment is moot.

Id. (internal citations omitted).

Courts applying other states' versions of the Uniform Fraudulent Transfer Act agree with this analysis. For example, a court considering an actual fraudulent transfer claim under Oklahoma's Uniform Fraudulent Transfer Act (substantively identical to the Texas statute) rejected the debtor's contention that its solvency shielded it from liability for actual fraudulent transfer: “The [debtor's] argument misses the mark. For purposes of § 116A(1) of the UFTA, if an actual intent to defraud is found, ‘solvency is immaterial.’ Even if [debtor] were solvent . . . the finding of a fraudulent transfer under § 116A(1) of the UFTA is unaffected.” *In re Lexington Oil & Gas Ltd.*, 423 B.R. 353, 373 (Bankr. E.D. Okla. 2010). The Second Circuit applied the same logic when construing the New York version of the fraudulent transfer statute. *U.S. v.*

Evseroff, No. 06-5391-cv, 2008 WL 749617, at *1 (2nd Cir. Mar. 21, 2008) (“Unlike constructive fraud under §273, ‘a conveyance is fraudulent under §276 when the grantor, even though solvent, is motivated by an intent to hinder, delay or defraud his creditors.’”).

B. Disputed Issues of Fact

With respect to Plaintiff’s actual fraudulent transfer claims, the following issues of fact and questions of law must be resolved in Phase II:

- (a) Whether Verizon dominated and controlled Idearc and its subsidiaries prior to the Spin-off;
- (b) Whether the domination and control related to Idearc’s and its subsidiaries’ disposition of the assets transferred to Verizon in the Spin-off;
- (c) Whether Verizon or the transferors acted with intent to hinder, delay, or defraud any present or future creditor of the transferors in effecting the transfers at issue;
- (d) What was the fair market value of the demand note given to IMC on the date it was given?
- (e) Whether Idearc was engaged or about to engage in a business or transaction for which the remaining assets of Idearc were unreasonably small in relation to the business or transaction;
- (f) Whether Idearc intended to incur, or believed or reasonably should have believed that it would incur debts beyond its ability to pay as such debts matured or became due;
- (g) Whether IMC received reasonably equivalent value;
- (h) Whether IMC was engaged or about to engage in a business or transaction for which the remaining assets of IMC were unreasonably small in relation to the business or transaction;
- (i) Whether IMC intended to incur, or believed or reasonably should have believed that it would incur debts beyond its ability to pay as such debts matured or became due;
- (j) Whether IMC was insolvent;

- (k) Whether, in causing IIS to make the GTE Distribution and guarantee the borrowings under the Credit Agreement, Verizon acted with actual intent to hinder, delay or defraud any present or future creditor of IIS;
- (l) Whether IIS received reasonably equivalent value;
- (m) Whether IIS, when it was engaged or was about to engage in the GTE Distribution and guarantee of Idearc's borrowings under the Credit Agreement, was engaged or about to engage in a business or transaction for which the remaining assets of IIS were unreasonably small in relation to the business or transaction;
- (n) Whether IIS intended to incur, or believed or reasonably should have believed that it would incur debts beyond its ability to pay as such debts matured or became due;
- (o) Whether IIS had one or more qualifying "creditors whose claim arose before the transfer was made or the obligation was incurred."
- (p) Whether IIS was insolvent at the time it made, or became insolvent as a result of, the GTE Distribution and guaranteed Idearc's borrowings under the Credit Agreement.

In addition, the Plaintiff identifies and incorporates herein all unresolved contested issues and statements of fact listed in pages 24-44 of the Joint Pretrial Order.

VI. ALTER EGO¹⁰

A. Plaintiff's Alter Ego Claim Is Viable

"Alter ego is not a claim or independent cause of action – it is a remedy to enforce a claimed substantive right." *U.S. Bank Nat. Ass'n v. Verizon Comm's Inc.*, 2012 WL 3100778, at *16 (N.D. Tex. Jul. 31, 2012) (citing *Western Oil and Gas JV, Inc. v. Griffiths*, 91 Fed. App'x 901, 903–04 (5th Cir. 2003)). The doctrine of alter ego can apply in the corporate parent/subsidiary context. *Id.* (*Union Carbide Corp. v. Montell N.V.*, 944 F.Supp. 1119, 1144 (S.D.N.Y. 1996)). "In order to pierce the corporate veil, a plaintiff must prove (1) the parent and subsidiary operated as a single economic entity; and (2) an overall element of injustice or unfairness is present. *Id.* (internal quotations omitted). The Court did not determine in Phase I

¹⁰ Plaintiff's Amended Complaint [Docket No. 161], Count 11, ¶¶ 128-133.

whether Verizon and Idearc were operated as a single economic entity at the relevant times or whether there was an overall element of injustice or unfairness present. The Court's ruling in Phase I is not dispositive of either of these issues.

B. Disputed Issues of Fact

With respect to the Plaintiff's alter ego claim, the following disputed issues of fact and questions of law must be resolved in Phase II:

- (a) Whether Verizon and Idearc operated as a single economic entity.
- (b) Whether an overall element of injustice or unfairness is present.
- (c) Whether Idearc signed the debt instruments in the Spin-off as the alter ego of Verizon.

In addition, the Plaintiff identifies and incorporates herein all other unresolved contested issues and statements of fact listed in pages 24-44 of the Joint Pretrial Order.

Dated: February 8, 2013

Respectfully submitted,

/s/ Werner A. Powers

Werner A. Powers
State Bar No. 16218800
Robin Phelan
State Bar No. 15903000
Patrick Keating
State Bar No. 00794074

/s/ Nicholas A. Foley

Nicholas A. Foley
Texas State Bar No. 07208620
Douglas J. Buncher
Texas State Bar No. 03342700
John D. Gaither
Texas State Bar No. 24055516

HAYNES AND BOONE LLP
2323 Victory Avenue, Suite 700
Dallas, Texas 75219-7673
Telephone: (214) 651-5000
Telecopier: (214) 651-5940

NELIGAN FOLEY LLP
325 N. St. Paul, Suite 3600
Dallas, TX 75201
Telephone: (214) 840-5300
Telecopier: (214) 840-5301

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

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing motion was served on the all attorneys of record through the Court's ECF system in accordance with Fed. R. Civ. P. 5(b)(3) on February 8, 2013:

/s/ Nicholas A. Foley

Nicholas A. Foley

D-2139255_4