UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

U.S. BANK NATIONAL ASSOCIATION, Litigation Trustee of the Idearc Inc. *et al.* Litigation Trust,	§	
Plaintiff,	§	
v.	§	CIVIL ACTION NO. 3:10-CV-1842-G
VERIZON COMMUNICATIONS INC., *et al*.,	§	
Defendants.	§	

PLAINTIFF'S MOTION TO AMEND AND CERTIFY ORDERS RELATING TO STRIKE OF JURY DEMAND FOR INTERLOCUTORY APPEAL AND BRIEF IN SUPPORT

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Because of recent developments in the law, U.S. Bank National Association, Litigation Trustee of the Idearc, Inc., *et al.* Litigation Trust ("Plaintiff" or "Litigation Trust") files this Motion to Amend and Certify Orders Relating to Strike of Jury Demand for Interlocutory Appeal and Brief in Support. Plaintiff requests that the Court certify the jury-strike ruling for interlocutory appeal.[1] Plaintiff requests that the Court amend its Memorandum Opinion and Order (on the Motion to Strike) dated March 21, 2012, *Dkt. 288*, *and* its Memorandum Opinion and Order (on the Motion to Reconsider) dated July 25, 2012, *Dkt. 459*, (collectively, the "Orders") in accordance with 28 U.S.C. § 1292(b) to certify that the Court is of the opinion that the Orders involve "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Plaintiff would show the Court the following:

[1] Plaintiff continues to maintain that the jury-strike ruling should be set aside. The Court, however, denied Plaintiff's Motion to Reconsider. Plaintiff thus requests that the Orders, if not set aside, be certified for interlocutory appeal.

I.
PRELIMINARY STATEMENT

Plaintiff presents this Motion to the Court because material developments in the law have occurred since the time the Court struck Plaintiff's jury demand. Multiple opinions from other courts considering a litigant's right to a jury trial differ from the Court's opinions here and support the conclusion that Plaintiff is entitled to a jury trial in this cause. For example, on May 2, 2013, Western District of Texas Judge Sam Sparks refused to strike a jury demand and issued an opinion that expressly addressed, but declined to follow, the opinion that this Court issued in striking Plaintiff's jury demand. The Western District Court held that *Lagenkamp* does not apply to legal claims brought by a litigation trust in district court—exactly the opposite of the conclusion reached here. Further, in other billion-dollar spinoff litigation currently pending against Verizon in North Carolina, a district court refused Verizon's request to strike the plaintiff litigation trust's jury demand based on the same arguments that Verizon made here.

That three highly respected jurists reached diametrically opposite conclusions on a constitutional right to a trial by jury is alone proof that there is a substantial ground for difference of opinion on the jury-trial issue. But other district and bankruptcy courts have also reached conclusions on the Article III *Langenkamp-Stern* principles that differ from the conclusions reached here. Specifically, courts hold that *Lagenkamp* does not mean that any proof of claim makes every fraudulent transfer claim integral to the claims allowance process; instead, even if a creditor files a proof of claim, *Stern* requires an Article III court (and hence a jury) when the bankruptcy claims allowance process would not necessarily resolve a private-right claim.

A cause of action might necessarily be resolved in the bankruptcy process if, for example, a creditor files a proof of claim to recover on a note and the debtor objects to the claim as a fraudulent transfer. In that circumstance, the fraudulent transfer claim is decided in resolving the

proof of claim, a process that may restructure the debtor/creditor relationship and impact the bankruptcy estate. Some courts hold that a bankruptcy court does not run afoul of Article III by adjudicating the claim and objection in that circumstance. That is far from the circumstance here.

The claims brought in this suit could never be resolved as part of the claims allowance process in the closed bankruptcy proceeding. VCI's proof of claim is one for indemnity for certain misrepresentations. It has nothing to do with the claims brought in this suit; deciding VCI's right to indemnity will not resolve whether fraudulent transfers occurred. Moreover, regardless of the outcome of this suit, resolution of Plaintiff's private-right fraudulent transfer, breach of fiduciary duty, unlawful dividend, and promoter liability claims will not alter the Idearc/Verizon debtor/creditor relationship or impact the bankruptcy estate. Indeed, individual Defendant Diercksen never filed a proof of claim, and VCI's proof of claim is irrelevant to the analysis of the right to a jury trial on the claims against Diercksen. This Court's conclusion that *Langenkamp* controls and VCI's proof of claim extinguishes Plaintiff's right to a jury contradicts other courts that recognize that *Stern* requires an Article III court and a jury on claims that will not necessarily be resolved in the bankruptcy claims allowance process.

A failure to resolve the differences of opinion between this and other courts on whether a judge or a jury decides hotly disputed fact issues risks millions of dollars in wasted legal fees and staggering losses of judicial time and resources. Thus, the jury-trial issue meets the requirements for certification for interlocutory appeal pursuant to § 1292(b)—substantial difference of opinion exists on a controlling question of law, the resolution of which will materially advance the ultimate termination of the litigation. Other courts have agreed that the jury-trial issue is proper to certify for interlocutory appeal. An appeal will allow the Fifth Circuit an opportunity to resolve the conflicts between the courts in its circuit and to answer the thorny jury-trial and

Article III issues that have puzzled many hardworking jurists, while saving judicial and party resources and time.

II.
BACKGROUND

Defendants Verizon Communications Inc. ("VCI"), Verizon Financial Services, LLC ("VFC"), GTE Corporation ("GTE") and John W. Diercksen ("Diercksen") filed a Motion to Strike Plaintiff's Demand for a Jury Trial and Brief in Support (the "Motion to Strike"), *Dkt. 89, 90*. After further briefing, *Dkt. 94, 123, 144, 213, 258*, the Court granted the Motion to Strike on March 21, 2012, *Dkt. 288*. Plaintiff filed a Motion to Reconsider Order Granting Strike of Demand for Jury Trial and, alternatively, to Empanel an Advisory Jury and Brief in Support, *Dkt. 315*, which the Court denied on July 25, 2012, *Dkt. 459*, after further briefing, *Dkt. 345, 352*. Immediately upon the denial of pending motions for summary judgment on September 14, 2012, *Dkt. 523*, Plaintiff filed a Petition for Writ of Mandamus with the Fifth Circuit Court of Appeals on September 17, 2012, seeking interlocutory review of the strike of the jury prior to the impending bifurcated bench trial set for October 15, 2012, *see Dkt. 528, 529*.

Defendants urged the Fifth Circuit to deny the petition, asserting a § 1292(b) interlocutory appeal or ordinary appeal after final judgment could provide an adequate remedy to review the jury strike. But Defendants adamantly opposed delay of trial to resolve the constitutional jury-trial issue. *Dkt. 557*. Upon Defendants' response, the Fifth Circuit denied the petition on September 27, 2012. With two weeks to trial, insufficient time existed to undertake the multi-step § 1292(b) appeal process (that Defendants had urged to the Fifth Circuit) before the bench trial date insisted upon by Defendants. Thus, the opportunity to resolve the jury-trial issue before Phase I to the bench dissipated at Defendants' request.

The case proceeded to a bifurcated trial to the bench on the narrow fact of "Idearc's value

at the time it was spun off from Verizon in November of 2006." *Dkt. 504 at 2*. Following the Phase I trial, the Court entered a finding related to valuation, *Dkt. 646*, and asked Plaintiff to show cause what issues and claims remained to be tried in the subsequent phases of the trial, *Dkt. 647*. Plaintiff provided the Court with an extensive list of issues and claims that remain to be resolved, *Dkt. 648*, and filed a Motion for Entry Judgment on Admissions and Stipulated Facts, *Dkt. 649*. Further trial would require intensive preparation, extensive witness involvement, and a lengthy Phase II trial—all at great time and expense to the Court, the parties, and the witnesses.

III.
§ 1292(b) CERTIFICATION REQUIREMENTS SATISFIED

Section 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

28 U.S.C. § 1292(b). Thus, a court may certify an interlocutory appeal if the order involves (1) a controlling question of law, (2) substantial ground for difference of opinion as to its correctness, and (3) an immediate appeal of which may materially advance the ultimate termination of the litigation. *See, e.g., Katz v. Carte Blanche Corp.*, 496 F.2d 747, 754 (3d Cir. 1974).[2] The jury-trial issue here satisfies all three requirements to certify the jury strike for interlocutory appeal.

A. There is a substantial ground for—and actual conflicting—difference of opinion regarding the bases for striking the jury demanded in this case.

A substantial ground for difference of opinion on an issue is recognized when courts reach different conclusions, there is a split of authority, or the law is "unsettled" or "in dispute."

[2] A district court may amend an order at any time to certify it for interlocutory appeal. The court has authority to amend any order prior to final judgment, and the interlocutory appeal provisions impose no deadline for interlocutory appeal certification. 28 U.S.C. § 1292(b); FED. R. APP. P. 5(a)(3). As noted in the text, Plaintiff sought expeditious interlocutory review by mandamus prior to Phase I of the trial, and the development in the law since the Court's last consideration of the jury-trial issue warrants certification for interlocutory appeal prior to further trial.

See, e.g., In re Trans-Indus., Inc., No. 10-10401, 2010 WL 727971, at *2 (E.D. Mich. Feb. 12, 2010) (split of authority on jury-trial issue under ERISA); *Chao v. Meixner*, No. 1:07-CV-0595-WSD, 2008 U.S. Dist. LEXIS 51317, at *10 (N.D. Ga. July 3, 2008) (different results between district courts); *In re Hooker Invs., Inc.*, 122 B.R. 659, 662 (S.D.N.Y. 1991) (unsettled law on jury trial rights in adversary proceedings); *In re Stoecker*, 117 B.R. 342, 347 (N.D. Ill. 1990) ("law surrounding a fundamental right is subject to a great deal of dispute among both district and circuit courts").

Here, a substantial difference of opinion is shown when other courts have reached different conclusions than the Court did here on the issue of whether—

- a jury trial is required before an Article III court, when demanded,
- on legal money-damage claims, including fraudulent transfer claims,
- asserted after the close of the bankruptcy
- by a litigation trust
- against a third party that filed no proof of claim ***and*** business entities that filed a proof of claim where the asserted fraudulent conveyance or other state-law claims would not necessarily be resolved in determining the proof of claim.

1. The Court's opinions in this case.

In its original opinion and order striking the jury, the Court discussed *Langenkamp v. Culp*, 498 U.S. 42 (1991), and *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), in detail in analyzing the effect of VCI's proof of claim on the Litigation Trust's right to a jury trial on the fraudulent transfer claims in district court. *Dkt. 288*. In so doing, the Court held, among other things, that (1) the Litigation Trust stands in the shoes of the debtor for all purposes [at 12], (2) *Lagenkamp* applies to fraudulent transfer claims that are brought and adjudicated in district (not bankruptcy) court [at 13], (3) under *Langenkamp*, VCI's proof of claim extinguished the Litigation Trust's right to demand a jury in district court [at 12], and (4) *Picard v. Katz*, No. 11 Civ. 3605 (JSR) (S.D.N.Y. Nov. 23, 2011), failed to apply *Langenkamp* and failed to recognize

that fraudulent transfer claims are "necessarily integral to" the claims allowance process [at 7-8, 10-11, 13-14]. Like the difference of opinion with *Picard*, it is these very grounds on which other courts have recently written and held differently than the Court did here.

Moreover, in the Court's opinion and order on the Motion to Reconsider, the Court reiterated its holdings, among other things, that (1) under *Langenkamp*, VCI's proof of claim extinguished the Litigation Trust's right to a trial by jury, (2) based on *Langenkamp*, *Stern v. Marshall*, 131 S. Ct. 2594 (2011), did not require an Article III court (and hence a right to a trial by jury), and (3) the *Picard* court erred in its analysis of a jury right for claims in district court as not "integral to the claims allowance process" under *Stern*. *Dkt. 459 at 5-8*. Additionally, in deciding not to reconsider the ruling on the jury-strike on the breach of fiduciary duty claim, the Court noted that Diercksen was acting for Verizon. *Id. at 11*.[3] Again, it is these very grounds on which other courts have recently held differently than the Court did here.

2. A Western District of *Texas* Court disagrees on several grounds with the Court's reasoning in striking the jury.

A Western District of Texas Court specifically considered but expressly refused to follow the reasoning provided here in the Court's Order striking the jury. App. Ex. A at App. 5-24, Order, *Crescent Res. Litig. Trust v. Duke Energy Corp., et al.*, No. A-12-CV-009-SS (W.D. Tex. May 2, 2013), ECF No. 113, Hon. Sam Sparks presiding (hereinafter "*CRLT*").[4] In that case, a complex real estate transaction allegedly resulted in the transfer of $1.6 billion in cash to Duke

[3] Defendants urged the Court not to reconsider the right to a jury trial on the breach of fiduciary duty claim because "the parties exhaustively briefed" the issue on all claims and the arguments in the Motion to Reconsider were "the same arguments [Plaintiff] made before." *Dkt. 345 at 3, 10*. But, after noting the issue as to "Diercksen is not as clear," the Court declined to reconsider the jury strike as to Diercksen on the breach of fiduciary duty and aiding abetting claims, in part, because the breach of fiduciary duty claim had been addressed by both parties in a footnote. *Dkt. 459 at 11-12*. Regardless of the difference of opinion on jury-trial rights on money-damage claims against an individual, like Diercksen, numerous differences of opinion exist on jury-trial rights on fraudulent transfer claims.

[4] Exhibits in the concurrently filed Appendix to Plaintiff's Motion to Amend and Certify Orders Relating to Strike of Jury Demand for Interlocutory Appeal and Brief in Support are referred to herein as "App. Ex. [#] at [App. ##]."

and debt imposed on the debtor in amounts that rendered the debtor insolvent. *Id.* at App. 7. CRLT, a litigation trust formed pursuant to the debtor's bankruptcy plan of reorganization, brought suit against Duke, Duke's officers, and others and asserted claims of state-law fraudulent transfer, wrongful distributions, unjust enrichment, breach of fiduciary duty, civil conspiracy, and equitable subordination, as well as objections to several bankruptcy claims. *Id.* at App. 8. Duke and an individual defendant moved to strike the litigation trust's jury demand on the fraudulent transfer claims. *Id.* The facts here are analogous—the litigation trust formed pursuant to Idearc's reorganization plan brought fraudulent transfer, breach of fiduciary duty, promoter liability, and wrongful dividends claims in district court against Verizon and Diercksen (an officer) in his individual capacity. But, unlike here, the Western District Court rejected the defendants' arguments and refused to strike the jury.

a. A defendant's proof of claim in bankruptcy does not deprive a litigation trust of its right to a jury trial on fraudulent transfer claims brought post-confirmation in district court.

Like Verizon here, Duke in *CRLT* argued that "there is no right to a jury determination of fraudulent conveyance claims against defendants who have filed proofs of claim in the bankruptcy proceeding…." *Id.* at App. 9. Duke relied on *Langenkamp* and this Court's jury-strike Order in support of its motion to strike. *Id.* In that Order, this Court held that *Langenkamp* controls and the right to a jury trial is extinguished for both the debtor and the creditor that files the proof of claim. *Dkt. 288 at 7-8.* In so concluding, the Court rejected Plaintiff's arguments that VCI's proof of claim did not eliminate the Litigation Trust's right to a jury. *Dkt. 288 at 12*; *see also Dkt. 123 at 16-22; Dkt. 213 at 5-6; Dkt. 315 at 9-16; Dkt. 352 at 5-7.* The Western District Court acknowledged, but respectfully declined to follow, the Court's reasoning and conclusion. Instead, the Western District Court found that the Supreme Court holdings Duke relied upon "do

not apply to an action by a litigation trust…" and held that the litigation trust had a right to trial by jury. App. Ex. A at App. 10-12.

The Western District Court noted that the plaintiff in *Langenkamp* was the bankruptcy trustee, not a litigation trust. The court also noted:

> More importantly, *Langenkamp* and *Granfinanciera* considered actions by the bankruptcy trustee, acting to directly augment or preserve the bankruptcy estate. Here a plan of reorganization has been confirmed, and as part of the plan the bankruptcy court created a litigation trust. Although Judge Fish found this distinction immaterial in *U.S. Bank*, the Court disagrees.

Id. at App. 11. Quoting *Grede v. Bank of New York Mellon*, 598 F.3d 899, 902 (7th Cir. 2010), the Western District Court noted that a litigation trust is a post-bankruptcy vehicle, just like the reorganized entity. *Id.* The court held that *Langenkamp* and *Granfinanciera* were not applicable to the actions of a litigation trust outside the auspices of the bankruptcy court and after confirmation of the reorganization plan. The court also held that, in light of the Fifth Circuit's direction to protect jury-trial rights, the fraudulent transfer claims sound in law, not equity, and are triable to a jury. *Id.* at App. 11-12.

The same is true here—VCI's proof of claim in the bankruptcy court cannot deprive the Litigation Trust of its right to trial by jury for claims filed in the district court after the close of the bankruptcy. This suit does not relate to the restructuring of any Verizon/Idearc debtor/creditor relationship and is simply independent of the closed bankruptcy proceeding. In fact, resolution of the remaining Verizon proof of claim will have no effect on the reorganized Idearc or its now closed estate. The Western District Court would agree with Plaintiff; this Court agreed with Defendants. Thus, a substantial and actual difference of opinion on the jury-trial issue exists and creates a conflict among the district courts in the Fifth Circuit.

b. A proof of claim in bankruptcy court does not eliminate the right to a jury trial in district court.

Like Verizon here, Duke in *CRLT* suggested that if the proof of claim in bankruptcy court and the fraudulent transfer claim in district court were "intertwined" (or in Verizon's words, "linked") then the litigation trust had no right to a jury trial as to any defendant. App. Ex. A at App. 12-13. The Western District Court rejected that argument, noting that the fraudulent transfer issues exceeded mere resolution of the objection on the proof of claims. The court also noted that the bankruptcy court is part of the district court, which may withdraw the reference where one party demanded trial before an Article III court. *Id.* The *Picard* court had similarly held that once the reference to the bankruptcy judge is withdrawn, the fraudulent transfer claims are no longer part of the bankruptcy claims allowance process, the hierarchical re-ordering of creditors' claims, or the larger bankruptcy regulatory scheme enacted by Congress, and a jury trial is required. No. 11 Civ. 3605 (JSR) (S.D.N.Y. Nov. 23, 2011). This Court declined to follow *Picard* and held that *Langenkamp* is not limited to cases where the bankruptcy court will determine the fraudulent transfer claims, the resolution of fraudulent transfer claims is "'integral' to the claims allowance process," and "the right to trial by jury is extinguished" for both the debtor and the creditor that filed the claim. *Dkt. 288 at 6-8, 10-11, 13-14*; *Dkt. 459 at 5-8*.

The Idearc Litigation Trust chose to bring its claims in an Article III court and has demanded a jury on claims that will not, and could not, be resolved in the claims resolution process (as discussed below). *Dkt. 123 at 16-22; 213 at 5-6; Dkt. 315 at 9-16; Dkt. 352 at 5-7.* The Western District Court would agree with Plaintiff that claims brought by a litigation trust in district court must be tried to a jury, if demanded; this Court reached a contrary conclusion and agreed with Verizon. Thus, a substantial and actual difference of opinion on the controlling legal question exists and creates a conflict among the district courts in the Fifth Circuit.

c. The right to a jury trial on claims against an individual defendant is not extinguished by a business entity's proof of claim in bankruptcy.

Like Verizon here, Duke in *CRLT* treated all defendants as one for purposes of evaluating the right to trial by jury. The Western District Court noted that all defendants, even if related, were legally separate entities, including Duke and the Crescent officers who were sued. App. Ex. A at App. 12-13 & nn. 2-3. Because some of the individuals did not file proofs of claim, the Western District Court held that the *Langenkamp-Granfinanciera* holdings were inapplicable and the claims against those entities were legal, not equitable. *Id.* Plaintiff urged the same here because Diercksen did not file a proof of claim in the Idearc bankruptcy case. *Dkt. 123 at 7-9, 16-20; Dkt. 213 at 5-6; Dkt. 315 at 6-9, 9-16; Dkt. 352 at 2-5, 5-7.* But the Court concluded that "Diercksen was acting in an official capacity for Verizon, which was the beneficiary of this allegedly wrongful gain." *Dkt. 459 at 11.*

Plaintiff asserts against Diercksen, who filed no proof of claim, breach of fiduciary duty, unlawful dividend, and promoter liability claims that seek a money judgment and require a jury in an Article III court. *N. Am. Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 76 (1982). That Diercksen, who is sued individually, is an officer of Verizon or that the Litigation Trust received its claims from the debtor does not alter the legal nature of Plaintiff's claims or its right to a jury. The Western District Court would agree with Plaintiff; this Court agreed with Verizon. Thus, a substantial and actual difference of opinion on the controlling legal question exists and creates a conflict among the district courts in the Fifth Circuit.

d. That some claims sound in equity does not eliminate the right to trial by jury on legal money-damage claims.

Like Verizon here, Duke in *CRLT* suggested that some claims were equitable and the jury thus should be stricken. The Western District Court dismissed that argument, noting that "the fact that some claims or issues are not triable by jury is no reason to strike the entire jury

demand, and indeed, formally, CRLT has only demanded a jury 'as to all claims so triable.'" App. Ex. A at App. 9. Plaintiff raised the same point here. *Dkt. 123 at 21-22; 213 at 4-6; Dkt. 315 at 1-9; Dkt. 352 at 2-5.* That is, Plaintiff stressed that if any claim against any Defendant was legal in nature a right to jury trial remained intact. Thus, even if the fraudulent transfer claims against Verizon were equitable, which they are not, the legal money-damage claims against Diercksen (and Verizon) require a jury. Moreover, a jury must determine all issues of fact common to all Defendants. *In re WSC, Inc.*, 286 B.R. 321, 334 (Bankr. M.D. Tenn. 2002); *see also In re Jensen*, 946 F.2d 369, 372 (5th Cir. 1991). This Court did not reach the same conclusion as the Western District Court; the result here thus differs from the result in *CRLT*.

3. In another case involving Verizon and a litigation trust, a Western District of *North Carolina* Court refused to strike the jury despite Verizon's reliance on its arguments and the Court's order in this case.

Verizon has been sued by a different litigation trust in North Carolina based on a different $2 billion spinoff transaction related to certain landline assets. According to that lawsuit, Verizon saddled FairPoint Communications, Inc. with an unsustainable debt load (approximately $2.5 billion) before spinning it off to the marketplace. FairPoint Communications, Inc. filed for bankruptcy not long after the spin-off. *See* App. Ex. B at App. 26-27, Pl.'s Second Amended Complaint, *FairPoint Commc'ns, Inc., et al., Litig. Trust v. Verizon Commc'ns, Inc., et al.*, No. 3:11-CV-597 (W.D.N.C. June 28, 2012), ECF No. 68, Hon. Frank D. Whitney presiding. A litigation trust was formed pursuant to the debtor's bankruptcy plan of reorganization. *Id.* at App. 27.

As in this case, Verizon argued that FairPoint's jury demand should be stricken, citing again to *Langenkamp* and to this Court's order striking Plaintiff's jury demand. App. Ex. C at App. 77-78, 90, 97, 102 (Transcript of Hearing on Motion to Strike, October 22, 2012). Also as in this case, Verizon repeated its argument that because Verizon filed proofs of claim in the

bankruptcy, "the plaintiff is not entitled to a jury" if the fraudulent conveyance claim must be decided as part of the claims allowance process. *Id.* at App. 77-80. Verizon cited a claw-back provision that it argued meant that the bankruptcy claim would not be final until the fraudulent conveyance claim was resolved as part of the claims allowance process. *Id.* at App. 84-85, 102.

The litigation trust in *FairPoint* disagreed with Verizon's characterization and noted that any recovery by the litigation trust would not be returned to the closed bankruptcy estate. Thus, the matter would not be resolved as part of the claims allowance process or alter the bankruptcy estate. *Id.* at App. 88-95. Plaintiff raised those arguments here. *Dkt. 123 at 14, 16-20; Dkt. 213 at 5-6; Dkt. 315 at 14-16; Dkt. 352 at 5-7.* Verizon responded in *FairPoint* by quoting from the Court's Order here: "The right to a jury trial is lost not because it is waived but because the legal dispute has been transformed into an equitable dispute." App. Ex. C at App. 102.

Citing to *Granfinanciera*, the North Carolina court quoted, "To the extent that a trustee seeks money damages as compensation for an allegedly fraudulent transfer, this remedy is aptly characterized as legal remedies as opposed to equitable remedies." The Court found "that under the Seventh Amendment plaintiff is entitled to a trial by jury, which it has demanded." *Id.* at App. 107-108.[5] As such, Judge Whitney rejected the mirror arguments proffered here by Verizon, which demonstrates a further difference of opinion on striking Plaintiff's jury demand.

4. Recent circuit, district and bankruptcy opinions on *Stern* are at odds with the denial of a jury trial here when the claims in this suit would not necessarily be resolved by the bankruptcy claims allowance process.

Since the last time this Court considered the jury-trial issue in July 2012, several circuit, district and bankruptcy courts have issued opinions that address relevant *Stern*-related issues—whether an Article III tribunal and jury-trial right is required for claims that would not necessarily be resolved in the bankruptcy claims resolution process. The circuit opinions

[5] The docket reflects a hearing on Verizon's motion to consider its jury-strike request on May 22, 2013.

involved claims initiated in the bankruptcy court, not private-right claims initiated *in district court by a litigation trust* as in the Western District Court's *CRLT* holding. The cases, however, address a bankruptcy court's constitutional authority under Article III to enter final judgment. That authority is equated with the Seventh Amendment jury right. *Granfinanciera*, 492 U.S. at 53. Thus, if an Article III court is required, the Seventh Amendment protects the right to a jury, and the circuits hold that an Article III court is required if the bankruptcy claims allowance process will not necessarily resolve the private-right claims. District and bankruptcy courts reach similar conclusions. That differs from the Court's conclusion here that *Langenkamp* controls and extinguishes a right to a jury on fraudulent transfer claims for the debtor and creditor.

a. The Court did not adopt the "necessarily resolved in the claims allowance process" test that other courts have adopted from *Stern*.

After sua sponte calling for amicus briefs, the Ninth Circuit issued an opinion analyzing *Stern*. *See Executive Benefits Ins. Agency v. Arkinson (In re Bellingham Ins. Agency, Inc.)*, 702 F.3d 553 (9th Cir. Dec. 4, 2012), *cert. pet. filed*, (Apr. 3, 2013) (No. 12-1200). In that case, the bankruptcy court granted summary judgment in favor of the trustee on his affirmative fraudulent conveyance claims filed in the bankruptcy court against a party who had not filed a proof of claim; the district court affirmed. *Id.* at 557. On appeal, the defendant argued that the bankruptcy court was constitutionally prohibited by Article III from entering a final judgment on the trustee's claims. *Id.* The court traced the law from *Northern Pipeline* (plurality holding that assignment of debtor's state-law, private-right claims to bankruptcy judge for resolution violated Article III) to *Granfinanciera* (holding that a fraudulent conveyance claim was a private right and Congress could not deny a right to a jury trial for private-right claims) to *Stern*. Although not addressing a jury-trial right in that summary judgment case, the court made a series of relevant observations and holdings regarding *Stern*:

> [T]he Court explained that the state-law counterclaim at issue [in *Stern*] was indistinguishable from the fraudulent conveyance claim in *Granfinanciera*….This common character of the claims in *Granfinanciera* and *Stern* **means that neither can be consigned to the bankruptcy courts without doing violence to the constitutional separation of powers….Here, the Trustee's fraudulent conveyance claims are not matters of "public right," and *ipso facto,* cannot be decided outside the Article III courts**.
> …
> Our conclusion is buttressed by the Supreme Court's equation of litigants' Article III rights with their Seventh Amendment jury trial rights in bankruptcy-related cases.

Id. at 562-63 (emphasis added, citations omitted).

> [T]he only principled basis on which to distinguish *Katchen* from *both Stern* and *Granfinanciera* is that ***Katchen*** **involved a claim against a creditor that necessarily had to be resolved in the course of the claims allowance process, and *Stern* and *Granfinanciera* did not.**

Id. at 564-65 (emphasis added). Regardless of the reach of the court's holding that fraudulent transfers are private-right actions that cannot be decided outside Article III courts, the court's synthesis of *Katchen*, *Granfinanciera* and *Stern* is clear—claims (even against creditors) that would not necessarily be resolved in the claims allowance process remain private-right claims subject to the Seventh Amendment and thus triable to a jury on demand. Plaintiff raised the same issues in opposing Verizon's jury-strike request. *Dkt. 128 at 16-22; Dkt. 213 at 4-6; Dkt. 315 at 14-16; Dkt. 352 at 5-7.* But the Court declined to apply *Stern*.

Other circuits have also construed *Stern* and held that only an Article III court could enter final judgment on claims that would not necessarily be resolved in the bankruptcy process. *Waldman v. Stone*, 698 F.3d 910, 919, 921 (6th Cir. 2012) ("[W]hen a debtor pleads an action arising only under state-law, as in *Northern Pipeline*; or when the debtor pleads an action that would augment the bankrupt estate, but not 'necessarily be resolved in the claims allowance process,' then the bankruptcy court is constitutionally prohibited from entering final judgment.") (emphasis added); *Ortiz v. Aurora Health Care, Inc. (In re Ortiz)*, 665 F.3d 906, 913-14 (7th Cir.

2011) (holding state-law claims based on improper disclosure of medical information in bankruptcy proofs had insufficient bearing and overlap to bypass Article III's requirements).

Only when the claims would necessarily be resolved in the bankruptcy process do the circuit courts hold final adjudication by the bankruptcy court passes constitutional muster under *Stern*. *See In re Spillman Dev. Group, Ltd*., 710 F.3d 299, 306 (5th Cir. Feb. 28, 2013) (*Stern* inapplicable when effect of creditor's bid on senior indebtedness is inextricably intertwined with rights under federal bankruptcy law);[6] *Sundale, Ltd. v. Fla. Assocs. Capital Enters., Inc. (In re Sundale)*, 449 Fed. Appx. 887, 2012 WL 5974125, *7-8 (11th Cir. Nov. 29, 2012) ("bankruptcy courts lack 'the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim'") (emphasis added); *Onkyo Am. Inc. v. Global Technovations, Inc. (In re Global Technovations, Inc.)*, 694 F.3d 705, 722 (6th Cir. 2012) ("When a claim is 'a state law action independent of the federal bankruptcy law and not necessarily resolvable by a ruling on the creditor's proof of claim in the bankruptcy,' the bankruptcy court cannot enter final judgment.") (emphasis added); *Pearson Educ. Inc. v. Almgren*, 685 F.3d 691, 695 (8th Cir. 2012) ("In *Stern*, the Court held that a bankruptcy court, as a non-Article III court lacked constitutional authority to enter final judgment on a counterclaim by the debtor against a creditor even though the creditor had filed a claim in defamation against the bankruptcy estate because 'there was never any reason to believe that the process of adjudicating [the creditor's] proof of claim would necessarily resolve [the debtor's] counterclaim.' The Court expressly distinguished *Katchen* and *Langenkamp* as cases in which

[6] The Fifth Circuit also had an opportunity to review the *Stern* holding in the context of a magistrate's jurisdiction to enter final judgment on state-law claims. *Technical Automation Servs. Corp. v. Liberty Surplus Ins. Corp.*, 673 F.3d 399, 405-06 (5th Cir. 2012). The court agreed that *Stern* held that a bankruptcy court did not have constitutional authority to enter final judgment on a claim that did not stem from the bankruptcy itself or would not be necessarily resolved in the claims allowance process. Such claims are reserved for Article III courts. *Id.* The Fifth Circuit, however, refused to extend the holding to magistrate judges without an express Supreme Court holding.

resolution of the ensuing action was 'part of the process of allowing or disallowing claims.") (emphasis added).

Like the circuit courts, district courts have struggled with the contours of *Stern*. For example, in *Rosenberg v. Bookstein*, 479 B.R. 584 (D. Nev. 2012), the court cited bankruptcy courts that had concluded that their authority to decide fraudulent conveyance claims remained even after *Stern*. *Id.* at 589. But the court reviewed *Stern* and *Granfinanciera* and concluded that a fraudulent conveyance claim is a private-right claim that must be decided by an Article III court with a jury, if demanded. *Id.* (citing consistent cases); *see also The Rhodes Cos.*, No. 12-01099-LBR, 2012 WL 5456084, at *4 (D. Nev. Nov. 7, 2012) (recognizing conflicting authority and holding a "court deciding a fraudulent conveyance action exercises its Article III judicial power, and the Seventh Amendment entitles a litigant to a jury trial on such claims").

In *In re Lehman Brothers Holdings, Inc.*, 480 B.R. 179, 188-92 (S.D.N.Y. 2012), faced with a motion to withdraw the reference, the court reviewed various private-right claims, including fraudulent conveyance, to determine if the claims would necessarily be resolved in the claims allowance process. Because all of the private-right claims would not be necessarily resolved by the claims allowance process, the court held that the bankruptcy court could not finally adjudicate the claims (and hence a jury trial would be required, if demanded). *Id.* at 192 (declining to withdraw reference until clear trial required);[7] *see also Dang v. Bank of Am., N.A.*, No. 10-216, 2013 WL 1683820, at *10 (D. Md. Apr. 17, 2013).[8]

[7] That district understands *Stern* "to mean a bankruptcy court lacks final adjudicative authority over a core claim where all of the following three conditions are met: (1) the claim at issue did not fall within the public rights exception; (2) the claim would not necessarily be resolved in ruling on a creditor's proof of claim; and (3) the parties did not unanimously consent to final adjudication by a non-Article III tribunal." *In re Quebecor World (USA)*, No. 10-02212, 2013 WL 1741946, at *2 (Bankr. S.D.N.Y. Apr. 23, 2013).

[8] Bankruptcy courts have also recognized that courts have adopted broad and narrow readings of *Stern*. *See, e.g., In re Agriprocessors, Inc.*, 479 B.R. 835 (Bankr. N.D. Iowa 2012) (collecting cases and concluding under divided authority that it could, at a minimum, hear claims and propose findings of facts and conclusions of law); *see also*

The Court here held that *Stern* did not disturb *Langenkamp* and that a defendant's proof of claim in bankruptcy court extinguished the Litigation Trust's right to a jury trial in district court. *Dkt. 459 at 6-7*. The Court did not adopt the "necessarily resolved" holding from *Stern* as have other courts. Those other courts would agree with Plaintiff; the Court agreed with Defendants that *Langenkamp* controls and extinguishes a jury right. Thus, a substantial ground for difference of opinion with other courts exists on the bases for striking the jury here.

b. Plaintiff's claims in this suit do not relate to and cannot be resolved by the bankruptcy claims allowance process.

A cause of action might necessarily be resolved in the bankruptcy process if, for example, a creditor files a proof of claim to recover on a note and the debtor objects to the claim as a fraudulent transfer. In that circumstance, the fraudulent transfer claim is decided in resolving the proof of claim, a process that may restructure the debtor/creditor relationship and impact the bankruptcy estate. In that circumstance, some courts hold that a bankruptcy court does not run afoul of Article III by adjudicating the claim and objection. *See, e.g., Onkyo*, 694 F.3d at 722. But that is far from the circumstance here.

Resolution of VCI's proof of claim is not determinative of the issues raised by Plaintiff's claims in this Court. *Dkt. 123-1 at App. 362-380; Dkt. 315-1 at App. 61-83.* Three of VCI's claims related to a failure to pay certain taxes and employee claims pursuant to rejected tax and employee agreements, *Dkt. 123-1 at App. 362-373, 378-380; Dkt. 315-1 at App. 61-74, 80-83,*[9] and the fourth relates to an extremely limited indemnification in the Distribution Agreement, *Dkt. 123-1 at App. 374-377; Dkt. 315-1 at App. 75-79*. Spinco (Idearc) only purported to provide

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Kirschner v. Agoglia, 476 B.R. 75 (S.D.N.Y. Bankr. 2012) (recognizing *Stern* and *Granfinanciera* holdings that fraudulent conveyance is a private-right to which Article III court and Seventh Amendment attaches but deciding bankruptcy court could issue recommendations and findings).

[9] These claims have been resolved and no longer constitute claims against the Idearc estate or the reorganized Idearc (n/k/a Supermedia).

Verizon a very narrow indemnification for certain Spinco liabilities and certain misrepresentations, if any, in the Registration Statement or financing offering or marketing materials. *Dkt. 123-1 at App. 19-20; Dkt. 315-2 at App. 44-45*.

No one in this case is suing for false representations in the specified documents, and the remaining proof of claim has nothing to do with the claims at issue here. Resolution of whether there was a misrepresentation in the Registration Statement or specified financing documents would not resolve whether the Verizon entities received fraudulent transfers (or aided and participated in breaches of fiduciary, illegally paid dividends, or are liable as promoters). Nor could VCI's proof of claim ever resolve the extensive breach of fiduciary duty issues against Diercksen who filed no bankruptcy proof of claim. Moreover, the outcome of this case will not alter the Idearc/Verizon debtor/creditor relationship or impact the Idearc bankruptcy estate. Thus, under *Stern*, Article III, and the Seventh Amendment a jury trial here is mandated. U.S. CONST. Article III, amend. VII; *Stern*, 131 S. Ct. at 2611.

5. The jury-trial Orders raise other important issues.

In addition to the substantial differences of opinion addressed above, there are other serious issues raised by the Orders in this case, including, among others, the following: (1) Whether a jury demand can be stricken without stipulation by all parties to a bench trial? (2) May a jury demand in an amended pleading be stricken without a motion addressed to the amended pleading and the claims therein? (3) May a court require a party to do more than demand a jury to protect its constitutional right to a trial by jury? These and other issues present additional reasons—over which substantial ground for difference of opinion exists—that the Court should certify the Orders for interlocutory appeal.

B. The constitutional right to a jury trial is a controlling question of law, and resolution of the jury-trial issue will materially advance the ultimate termination of the litigation.

Courts analyze the intertwined "controlling" question and "materially advance the ultimate termination of the litigation" in a similar manner because the two prongs look to the effect of resolution of the issue on the litigation. *See, e.g.*, *Tesco Corp. v. Weatherford Int'l Inc*., 722 F.Supp.2d 755, 767 (S.D. Tex. 2010) ("The requirement that an appeal should materially advance the ultimate termination of the litigation is closely tied to the requirement that the order involve a controlling question of law. A key concern is…whether permitting an appeal will speed up the litigation."); *In re Trans-Indus., Inc.*, 2010 WL 727971, at *1 (holding important that "controlling" question "substantially accelerate the conclusion of litigation").[10]

Courts describe whether a question of law is controlling in different ways. *See Malbrough v. Crown Equip. Corp.*, 392 F.3d 135, 136 (5th Cir. 2004) (citing *Ahrenholz* with approval); *Ahrenholz v. Bd. of Trustees of the Univ. of Ill.*, 219 F.3d 674, 676 (7th Cir. 2000) (controlling question includes "a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine"); *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319 (9th Cir. 1996) ("order may involve a controlling question of law if it could cause the needless expense and delay of litigating an entire case in a forum that has no power to decide the matter"); *Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991) (question controlling if "interlocutory reversal might save time for the district court and time and expense for the litigants"); *In re Cement Antitrust Litig*., 673 F.2d 1020, 1026 (9th Cir. 1982) ("all that must be shown in order for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of the litigation in the district court"); *Katz*, 496 F.2d at 755 (controlling question of

[10] District courts generally analyze appeals of interlocutory orders from bankruptcy court under 28 U.S.C. § 158(d)(2)(A)(iii) by referring to the 28 U.S.C. § 1292 standards. *See, e.g., Trans-Indus.*, 2010 WL 727971, at *1. Thus, district court cases discussing those § 158 appeals are also cited herein.

law encompasses "at the very least every order which, if erroneous, would be reversible error on final appeal"). A question of law need not be dispositive of a claim or terminate the litigation to be controlling; it must be "serious to the conduct of the litigation." *Katz*, 496 F.2d at 755.

Thus, a question of law that advances the progress of the litigation and saves time and resources satisfies § 1292(b). Similarly, materially advancing the litigation looks to whether a retrial can be eliminated to save time and resources and speed the resolution of the litigation. *See, e.g., Kuehner*, 84 F.3d at 319 ("needless expense and delay of litigation"); *Tesco*, 722 F.Supp.2d at 767 ("key concern is…whether permitting an appeal will speed up the litigation"); *Trans-Indus.*, 2010 WL 727971, at *2 ("determination in advance of whether jury trial is permitted will avoid the prospect of trying the case twice" and would avoid protracted and expensive litigation); *Hooker Invs.*, 122 B.R. at 662 (issue regarding jury rights important question of which prompt resolution would speed the conclusion of the proceedings).

The Seventh Amendment right to a jury trial is a legal question for the court. *See St. Paul Fire v. Lago Canyon*, 561 F.3d 1181, 1192 n.10 (11th Cir. 2009). Numerous courts have recognized that a jury-trial right is a controlling question of law, the resolution of which will materially advance the termination of the litigation. In the 1990s, when the question was whether a bankruptcy court had the authority to conduct jury trials, courts certified § 1292(b) appeals. *See, e.g., In re Baker & Getty Fin. Servs., Inc.*, 954 F.2d 1169 (6th Cir. 1992) (holding question was one of controlling law, involving a circuit split, the resolution of which would materially advance the ultimate termination of the proceedings); *Stoecker*, 117 B.R. at 347 (same).

More recently, after *Granfinanciera* and *Stern*, certification on the jury-trial issue has occurred from the bankruptcy to district court under § 158(d)(2)(A)(iii) (which is generally analyzed under the § 1292(b) standards). *See, e.g., Cruikshank v. Cook*, No. 12-10928-GAO,

2013 U.S. Dist. LEXIS 33201, at *3-4 (D. Mass. Mar. 11, 2013) (allowing appeal from bankruptcy court on jury-trial issue for breach of fiduciary duty claim where parties agreed issue was controlling issue of law and the court held that the parties' vigorous debate demonstrated a substantial difference of opinion on the issue that should be decided rather than risk the need for two trials); *In re Genmar Holdings, Inc.*, No. 12-2038-42, 2012 U.S. Dist. LEXIS 141992, at *3 (D. Minn. October 1, 2012) ("There is little question that the creditors' right to a jury trial is a controlling question of law. Nor can there be any doubt that there are 'substantial grounds for difference of opinion' as to whether the creditors have a right to a jury trial on those claims. Indeed, the cases the parties cite for their respective arguments provide a clear indication that this question is both important and highly unsettled…It is more efficient use of judicial resources to determine this important issue and have the claims resolved accordingly.");[11] *Sitka Enters., Inc. v. Segarra-Miranda*, No. 10-1847CCC, 2011 U.S. Dist. LEXIS 90243, at *7-8 (D. P.R. Aug. 12, 2011) (holding question on bankruptcy court's lack of constitutional authority to adjudicate trustee's action to recover fraudulent conveyance is controlling question of law).

Still other courts have certified jury-trial issues in non-bankruptcy contexts, and the Fifth Circuit has granted permission to appeal a jury trial issue. *See, e.g., Luera v. M/V Alberta*, 635 F.3d 181, 186 (5th Cir. 2011) (granting permission to appeal denial of jury strike based on issue of admiralty law); *Trans-Indus.*, 2010 WL 727971, at *2 ("A right to a jury trial is a controlling question of law."); *Chao*, 2008 U.S. Dist. LEXIS 51317, at *12 (certifying appeal of an order denying jury strike for certain ERISA claims). That is particularly true with the denial of the right to a jury trial—a fundamental constitutional right. *See, e.g., Leannah v. Alliant Energy Corp.*, No. 07-CV-169, 2008 WL 5210855, at *2 (E.D. Wis. Dec. 12, 2008) (denying

[11] *Genmar* cites to *Pearson* cited above and *Picard* cited in the jury-strike briefing, *Dkt. 213 at 5-6; Dkt. 315 at 14-15.* This Court rejected the reasoning of *Picard*. *Dkt. 288 at 10-11.*

certification of refusal to strike jury but noting certification of order striking jury would materially advance the litigation).

The strike of the jury here is a controlling question of law, and the resolution of the differences of opinion between the courts will materially advance the termination of the litigation. Certification of an interlocutory appeal pursuant to § 1292(b) is thus proper.

C. Plaintiff requests that the Court amend the Orders to certify the jury-trial issue for interlocutory appeal.

Plaintiff asks the Court amend the Orders, *Dkt. 288, 459*, to reflect that the Orders involve "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation," thereby certifying the jury-trial issue for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Plaintiff seeks appellate resolution of the following question: *Is Plaintiff entitled to a jury trial on any of its claims against any Defendant?* The answer is, yes, and early resolution of that question will materially advance the termination of the litigation.[12]

IV.
PRAYER

Plaintiff requests that the Court amend the Orders, *Dkt. 288, 459*, to reflect that the Court is of the opinion that the Orders involve "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation" and thereby certify the jury-trial issue for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Plaintiff requests all other and further relief to which it may be entitled at law or in equity.

[12] The Court granted, in part, certain motions to dismiss under Rule 12 and motions for summary judgment under Rule 56. As set forth in Plaintiff's responses to those motions, Plaintiff asserts that fact issues remain on viable legal claims on which the Court granted partially dispositive relief. At this juncture, however, the issue is limited to whether a jury trial is required on the claims that survived the dispositive motions.

Respectfully Submitted,

/s/ Werner A. Powers_

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CERTIFICATE OF CONFERENCE

The undersigned attorney hereby certifies that on the 13th day of May, 2013, he conferred with counsel for Defendants, Ray Guy and Leon Carter, regarding this Motion. Defendants' counsel stated that they were opposed to this Motion.

/s/ Werner A. Powers
Werner A. Powers

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served through the ECF system in accordance with the Federal Rules of Civil Procedure on the 3rd day of June, 2013, upon:

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