IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

U.S. BANK NATIONAL ASSOCIATION, Litigation Trustee of the Idearc Inc., *et al.* Litigation Trust, *Plaintiff*, v. VERIZON COMMUNICATIONS INC., VERIZON FINANCIAL SERVICES LLC, GTE CORPORATION, and JOHN W. DIERCKSEN, *Defendants*.	CIVIL ACTION NO. 3:10-CV-1842-G ECF

DEFENDANTS' JOINT POST-TRIAL REPLY BRIEF

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INTRODUCTION AND SUMMARY

Plaintiff's post-trial submissions read as though the Phase I trial never occurred. Plaintiff presents its same, pre-trial mischaracterizations of documents, ignoring the trial testimony of the fact witnesses who created those documents. Plaintiff urges the Court to make factual findings that, in light of the Phase I trial record, are clearly wrong — such as that the projections in Idearc's final financing model were "more aggressive" than the projections in VIS's Plans of Record from 2005 and 2006. And Plaintiff asks the Court to decide Idearc's value based exclusively on the flawed analysis of a single paid expert who ignored relevant facts, while numerous key fact witnesses at trial — including Ms. Toben, Mr. Fitzgerald, Mr. Jones, and Ms. Nason — make no (or virtually no) appearance in Plaintiff's proposed findings.

In addition to addressing key ways that Plaintiff's submissions disregard the trial record — which confirmed that Idearc's fair market value as of the Spin-Off was at least $12.8 billion, and that no reasonable fact-finder could conclude otherwise — Defendants address the following three points. First, in valuing publicly traded companies such as Idearc, courts routinely rely on the trading price of the company's common stock, not discounted cash flow ("DCF") valuations, as Plaintiff contends. In any event, the trial record contains numerous DCF valuations, including many contemporaneous to the Spin-Off, that are consistent with Idearc's $12.8 billion valuation. Ms. Taylor's after-the-fact DCF calculation is both an outlier and flawed in numerous respects, rendering it unsupportable under Rule 702. Second, under controlling precedent, generalized statements about Idearc's opportunities for growth in areas of its business and about the strength and experience of its management are immaterial as a matter of law. Moreover, the challenged statements were all accurate. Third, Plaintiff has improperly submitted proposed findings on its claim that every corporate action taken by VDDC, and then Idearc, before and including the Spin-Off was invalid, even though the Court excluded this claim from Phase I.

ARGUMENT

I. PLAINTIFF DISREGARDS THE OVERWHELMING TRIAL EVIDENCE THAT REFUTES ITS CLAIMS

The evidence introduced at the Phase I trial overwhelmingly disproved Plaintiff's contention that Idearc's value on November 17, 2006 was $8.15 billion. Defendants highlight the most glaring omissions and misrepresentations from Plaintiff's post-trial filings, which exemplify Plaintiff's wholesale disregard of the record.

A. Plaintiff Ignores the Majority of the Trial Witnesses

Plaintiff's Proposed Findings are remarkable for what they ignore. Ms. Nason and Mr. Decker, two of the bankers who led the financing for the Spin-Off, and Mr. De Rose, who led the Houlihan team that found Idearc solvent, are mentioned only in passing, and their testimony is disregarded.[1] The same is true of Ms. Toben (Verizon's CFO), Mr. Rievman (the lead tax lawyer on the Spin-Off), and Mr. Slutzky (the lead disclosure lawyer).[2] The testimony of other critical participants in the Spin-Off, including Mr. Fitzgerald, Mr. Jones, Ms. Harless, Mr. Coticchio, Mr. Mueller,[3] and Mr. Rosen is mentioned only once or twice, while ignoring all of the substance. Each witness refuted Plaintiff's allegations and testified to his or her belief that Idearc's value at the time of the Spin-Off exceeded its debt.[4]

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[1] Pl.'s Proposed Findings ¶¶ 17(a), (d), 19(a).

[2] Pl.'s Proposed Findings ¶¶ 12(o), 15(c), 15(e).

[3] Although Plaintiff proposes (¶ 79) that the Court find that Mr. Mueller had no access to non-public information concerning Idearc, Mr. Mueller testified to the contrary. *See* Tr. Vol. 8B at 58:11-59:23.

[4] Plaintiff's attempts to discredit Ms. Kearns (¶ 113), Mr. Yourkoski (¶ 115), and Mr. Smith (¶ 118) as biased fail. Although JP Morgan was paid for its work on the Spin-Off, the $125 million in Idearc debt it continued to hold through the bankruptcy vastly exceeded its banking fees, and — as a beneficiary of the Trust — it stands to benefit if Plaintiff were to prevail. Tr. Vol. 7A at 111:20-112:4 (testimony of Ms. Nason). Similarly, Morgan Stanley's commitment to fund $100 million of the Term Loan A and Revolver dwarfs the $3 million in advisory fees it earned. Tr. Vol. 9A at 31:2-3, 44:19-22 (testimony of Mr. Yourkoski). Moreover, Ms. Kearns testified that JP Morgan's and her most valuable asset is their reputation. Tr. Vol. 9B at 97:12-14. If she believed that she had been misled in any way, she presumably would have testified *against* Verizon. Finally, that Mr. Yourkoski (Morgan Stanley) and Mr. Smith (Goldman Sachs) appeared voluntarily buttresses rather than undercuts their credibility.

B. Plaintiff Ignores Trial Evidence that Contradicts Its Characterization of Documents

Against overwhelming evidence corroborating the NYSE valuation of Idearc, Plaintiff reiterates its misreading of isolated documents, while ignoring all the testimony about them.

1. The July 2005 Directories – Analysis of Alternatives (PX27)

Plaintiff asks the Court to find, based on PX27, that "Verizon concluded" in July 2005 that VIS's print directories business had a value of between $6.5 billion and $7.6 billion.[5] Not only does PX27 refute that interpretation, but also Plaintiff disregards Mr. Fitzgerald's extensive testimony about PX27. The initial analysis in PX27 — which Mr. Fitzgerald testified was prepared in a few weeks without any direct input or assistance from VIS — sets forth potential enterprise valuations for VIS ranging from $6.5 billion to $17.8 billion.[6] PX27 does not contain any "conclusion" as to the value of VIS: the page entitled "Conclusions" has no valuation figures, and Mr. Fitzgerald testified that PX27 did not reflect Verizon's internal determination of VIS's value.[7] Instead, "the final valuation was what it was when the transaction was completed," *i.e.*, $12.8 billion.[8] Plaintiff ignores this testimony, as well as Mr. Fitzgerald's testimony about the numerous errors in the July 2005 DCF calculations.[9] Given Mr. Fitzgerald's testimony and the plain language of PX27, no reasonable fact-finder could conclude that PX27 sets forth Verizon's conclusions about the total enterprise value of VIS or its print business.

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[5] Pl.'s Proposed Findings ¶¶ 21(p)-(q).

[6] PX27 at 32 of 54 (Directories – Analysis of Alternatives); *see* Tr. Vol. 6B at 127:19-128:1, 128:25-129:6 (testimony of Mr. Fitzgerald).

[7] PX27 at 44 of 54 (Directories – Analysis of Alternatives); Tr. Vol. 7A at 7:22-8:8.

[8] Tr. Vol. 7A at 8:11-18 (testimony of Mr. Fitzgerald that "I can't say we ever really finalized a valuation").

[9] Mr. Fitzgerald testified that the DCF calculation in PX27 improperly "combin[ed] historical growth rates near term" with "plan growth rates longer term"; "attributed absolutely no value to the electronic business at the low end"; and used a weighted average cost of capital ("WACC") that was much higher than the industry norm, producing a materially lower valuation. Tr. Vol. 7A at 21:11-18, 14:11-22, 20:16-21, 12:15-21.

2. Mr. Seidenberg's E-Mails Regarding the Potential Spin-Off (PX32, PX121, and PX367)

Plaintiff asks the Court to find that Mr. Seidenberg believed VIS was a business in long-term decline, that Verizon needed to cash it out quickly, and that nothing could be done to stabilize the business.[10] Yet Mr. Seidenberg testified at trial that VIS "was a great business" that "was extremely stable," and that the Spin-Off would give it "a pivot, a reset, . . . a chance to try new and different things."[11]

Plaintiff also ignores Mr. Seidenberg's testimony about his e-mails from July 2005 (PX32) and December 2005 (PX121) to Mr. Diercksen and Ms. Toben, incorrectly suggesting that Mr. Seidenberg believed VIS should be sold off for parts.[12] Mr. Seidenberg testified that he anticipated an independent VIS would follow the same approach as the telephone industry, which "ended up with mergers[] [and] consolidation" that "created value," and that those opportunities were not available to VIS as a subsidiary of Verizon.[13] He also testified that "a separate, private public company would create really new opportunities for further growth"[14]:

> So my view is that a spun-out VIS would be able to take actions to invest in new product, perhaps cut pricing if that's what they needed to do, perhaps adjust their cost structure if that's what they needed to do and actually behave much more like a separately positioned independent public company . . . .[15]

The additional inferences Plaintiff asks the Court to draw from PX121 and Mr. Seidenberg's May 2006 e-mail to Mr. Diercksen (PX367) are also refuted by the evidence:

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[10] Pl.'s Proposed Findings ¶ 81(i).

[11] Tr. Vol. 6A at 73:11-18, 42:16-17.

[12] *See, e.g.*, Pl.'s Proposed Findings ¶ 34.

[13] Tr. Vol. 6A at 62:15-18, 93:3-15.

[14] Tr. Vol. 6A at 48:8-10.

[15] Tr. Vol. 6A at 64:1-19, 64:25-65:7; *see also* Tr. Vol. 7A at 83:3-21 (testimony of Ms. Nason) (corroborating Mr. Seidenberg's testimony); Tr. Vol. 8B at 99:24-100:8 (testimony of Mr. Smith) (same); Tr. Vol. 9A at 16:20-17:24 (testimony of Mr. Yourkoski) (same); Tr. Vol. 5B at 88:22-89:10 (testimony of Mr. Jones) (same); Vol. 9A at 66:18-24 (testimony of Ms. Harless) (same).

- Although Plaintiff claims that Verizon failed to disclose Mr. Seidenberg's belief that "there was a secular shift in the business," as VIS faced competition from the Internet and from new independent print companies,[16] Verizon made this disclosure (including by Mr. Seidenberg, in an analyst call), and the issue was widely discussed in analyst reports and at industry conferences and was well known by prospective investors in Idearc debt.[17]

- Plaintiff's suggestion that prospective investors in Idearc were unaware that Verizon was "'experiencing a quicker secular shift in [its] markets' than its competitors"[18] is refuted by the overwhelming evidence showing that analysts and lenders understood that VIS's revenue and EBITDA declines exceeded those of its competitors.[19]

The Court should also reject Plaintiff's proposed finding that Verizon failed to disclose Mr. Seidenberg's purportedly unique knowledge that Verizon's previous investments in the electronic business "never got enough traction to reverse VIS's downward momentum."[20] Idearc's Form 10 separately disclosed the operating revenue generated by both its electronic and print businesses. Any prospective investor could compare the declines in print revenue to the growth in the electronic business, and using simple arithmetic conclude that print revenue declines ($343 million from 2003 to 2005) had exceeded electronic revenue growth ($61 million from 2003 to 2005).[21]

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[16] *See* Pl.'s Proposed Findings ¶ 81(d), (g). Ms. Harless testified that the most frequent question she received during the roadshow presentations was how Idearc "[was] going to overcome Google and Yahoo." Tr. Vol. 9A at 61:15-18. The Form 10 also included a risk disclosure about competition from Google, Yahoo, and other Internet companies. PX901 at 32 of 158. In light of this evidence, Plaintiff had no good faith basis for its assertion that Verizon and VIS failed to disclose competition from Google and Yahoo. *See* Pl.'s Proposed Findings ¶ 21(h).

[17] *See* Defs.' Proposed Findings ¶¶ 127-129.

[18] Pl.'s Proposed Findings ¶¶ 2(f), 35-37, 81(d), 82(d) (quoting PX367).

[19] *See* Defs.' Proposed Findings ¶¶ 133-134.

[20] Pl.'s Proposed Findings ¶ 81(b).

[21] PX901 at 54-56, 65-66, 68 of 158 (Form 10). Plaintiff's proposed finding (¶ 81(f)) that Verizon failed to disclose "material information" that "VIS had been losing customers on a net basis" is also refuted by the trial record. Idearc's Form 10 discloses a decline in print advertising customers of 110,000 from 2004 to 2005, and an increase of 19,000 electronic advertisers during that same period. PX901 at 67 of 158 (Form 10). It also discloses an 87,000 decline in print advertisers and a 30,000 increase in electronic advertisers in the 12 months ending September 30, 2006. *Id.* at 65 of 158.

3. VIS and Idearc Forecasts (PX27, PX100, DX314)

Plaintiff repeatedly asks the Court to find that Verizon "mandated" or "dictated" to Idearc a financing model that was "more aggressive" than both VIS's 2005 Plan (PX27) and its 2006 Plan (PX100).[22] The Phase I trial record is directly to the contrary.

The table below shows the projections in the financing model (DX314), as well as those in the 2005 and 2006 Plans of Record. Comparing these projections demonstrates that the final financing model was *less aggressive* than the earlier Plans of Record.[23]

Projections by Year (in bns)[24]	**2006**	**2007**	**2008**	**2009**	**2010**
Revenue					
2005-2009 Plan	$3.443	$3.495	$3.581	$3.696	
2006-2010 Plan	$3.256	$3.245	$3.278	$3.345	$3.427
Financing Model	$3.233	$3.235	$3.248	$3.284	$3.341
EBITDA					
2005-2009 Plan	$1.639	$1.646	$1.659	$1.665	
2006-2010 Plan	$1.551	$1.561	$1.567	$1.575	$1.584
Financing Model	$1.559	$1.555	$1.555	$1.566	$1.574

The remaining inferences that Plaintiff has asked the Court to draw about Idearc's forecasts are not supported by the evidence:

- Every witness involved in developing the financing model testified that the forecasts were neither "mandated" nor "dictated" by Verizon, but were the product of good-faith debate among various constituencies within Verizon — a debate that

[22] *See, e.g.*, Pl.'s Proposed Findings ¶¶ 2(i)-(m), 21(d).

[23] The trial record thus refutes Plaintiff's proposed finding that the final overall projections were "*more aggressive* than the projections McKinsey had told Verizon were not credible," and that the "final Spin-Off EBITDA projections were significantly higher than originally projected by Verizon and VIS management." Pl.'s Proposed Findings ¶¶ 56, 60 (emphasis added). The only exception is the EBITDA number in the financing model for 2006, which is 0.5 percent higher than the EBITDA number in the 2006 Plan, because it reflects "stand-alone adjustments and the full year impact" of a renegotiated print contract. DX314 at 8 of 14 (Confidential Information Memorandum – Private Siders).

[24] *See* PX27 at 22 of 54 (Directories – Analysis of Alternatives) (2005 Plan); PX100 at 53 of 115 (VIS Strategic Plan 2006-2010) (2006 Plan); DX314 at 8 of 14 (Confidential Information Memorandum – Private Siders) (Financing Model).

was typical of the budgeting and forecasting process for every line of business at Verizon — and represented the "realistic expectation for the business."[25]

- Ms. Kearns testified that replacing the preliminary 2006 Plan of Record (which was based on VIS's business as a Verizon subsidiary) with the final financing model (which reflected VIS as a stand-alone business, and contained *less aggressive* forecasts) in the dataroom was both standard and appropriate.[26]

4. E-mails by Mr. Diercksen and Mr. Rosen (PX528, PX587, and PX869)

Plaintiff asks the Court to make unsupportable findings about Idearc's valuation from a handful of colorful e-mails sent by Mr. Diercksen and Mr. Rosen.[27] Yet Plaintiff ignores the context of these e-mails and the trial testimony that explained them.

With respect to Mr. Diercksen's October 2006 e-mail to Mr. Reed at Verizon (PX869), for example, Mr. Diercksen testified that he was expressing his frustration over a proposal that would result in double bonuses being paid to Idearc's management team, which he believed to be inappropriate.[28] Mr. Diercksen also rejected Plaintiff's suggestion (¶ 79) that he believed Ms. Harless had misled the incoming Idearc Board, testifying that his reference to "guano" in his September 2006 trip report (PX587) reflected his displeasure at what he believed was Ms. Harless's "badmouthing" of Verizon at the meeting.[29] The text of PX587 corroborates Mr. Diercksen's testimony. The e-mail describes Ms. Harless as stating that "progress has been

[25] Tr. Vol. 5B at 106:23-107:11; Tr. Vol. 6A at 18:24-19:1 (testimony of Mr. Jones); Tr. Vol. 9A at 64:6-17, 20-25, 65:1-10 (testimony of Ms. Harless); *see also* Tr. Vol. 8B at 87:19-21 (testimony of Mr. Mueller) ("I believed at the time that the collective revenue growth number and EBITDA number could be exceeded."); Tr. Vol. 9B at 34:18-25 (testimony of Ms. Toben) ("Similar to all the other segments, corporate would come up with potentially some objectives. We would send them out to the groups. The groups would then come up with their own numbers, and typically as in any place in corporate America the numbers tend to be higher and the unit tend to be a little [bit] lower.").

[26] Tr. Vol. 9B at 86:14-16 ("In my experience, there would be only one set of projections [in a lender dataroom]. It would be pretty confusing for me as I'm trying to analyze the company if there were multiple sets."); *id.* at 86:24-87:1 ("I would expect the projections that I would have access to to be the most current view that the management team has on what their projection model should look like.").

[27] *See, e.g.*, Pl.'s Proposed Findings ¶¶ 67-69, 77-80, 86-88.

[28] Tr. Vol. 2A at 40:19-20; *see* Defs.' Proposed Findings ¶¶ 142-145.

[29] Tr. Vol. 2B at 44:8-11.

accomplished" in 2006 because Verizon permitted VIS "to make investments in their company" that it previously had not allowed. PX 587 at 1 of 1. Plaintiff ignores this evidence.

Mr. Rosen testified about his August 2006 e-mail to Ms. Drost (PX528) discussing the timing of appointing Idearc's independent directors. Plaintiff continues to focus on this e-mail despite its irrelevance to valuation. Mr. Rosen explained that he was involved in numerous conversations about "when it made sense to seat the [new] board given the fact that the board was ultimately going to be the new board for a new public company whose shareholders over time would diverge."[30] Mr. Rosen explained that, while his language was "a bit colorful," "the substance is quite correct and appropriate."[31] At that stage in the process, Mr. Rosen testified, "there was no role for separate decision makers" at Idearc because, as "a wholly owned subsidiary of Verizon," the decisions about "what its business would be" were decisions that would be made by its parent company, Verizon.[32] Plaintiff ignores this testimony as well.

5. The Tax Sharing Agreement (PX1068)

Plaintiff asks the Court to find that Ms. Taylor appropriately discounted the weight she assigned to her "comparable transaction" methodology based on her contention that the Tax Sharing Agreement ("TSA") between Verizon and Idearc "restricted Idearc's ability to engage in transactions in the capital markets."[33] Plaintiff's proposed finding ignores Ms. Taylor's admitted lack of tax expertise, as well as the testimony of Mr. Wessel, a tax expert, that the TSA did not provide any basis to reduce Idearc's market value. Plaintiff further ignores the fact that the TSA was publicly filed with the SEC, Ms. Taylor's testimony that its terms were plain and obvious,

[30] Tr. Vol. 8B at 25:7-8, 18-21.

[31] Tr. Vol. 8B at 26:7-9.

[32] Tr. Vol. 8B at 26:7-17.

[33] Pl.'s Proposed Findings ¶ 244; *accord id.* ¶ 179.

and the absence of record evidence that any lender or analyst believed, at any point before or after the Spin-Off, that the TSA imposed any limits on Idearc's marketability.[34]

Mr. Wessel offered un-rebutted testimony that the TSA permitted Idearc to engage in expansive merger and acquisition activity. He testified that the TSA did not limit the ability of:

- any third party to acquire 100 percent of Idearc's equity without triggering any tax liability pursuant to a Treasury Regulation known as the "Super Safe Harbor";[35]
- Idearc to acquire any entity for cash[36]; or
- Idearc to acquire any entity in exchange for up to 49.9 percent of Idearc's outstanding equity, allowing Idearc to double in size through a merger of equals.[37]

Mr. Wessel further testified that a transaction that triggered prepayment of Idearc's debt would not jeopardize the status of the Term Loan B or the Unsecured Notes as "securities," as Idearc and Verizon expected the debt to be long-term at the time it was issued.[38] There is no evidence supporting Plaintiff's proposed findings that the TSA would limit the marketability of Idearc or its ability to engage in any mergers and acquisitions.[39] The record is all to the contrary.

C. Plaintiff Ignores the Trial Evidence Concerning Expectations for Idearc's Post-Spin "Growth"

1. Idearc Was Marketed as a Mature, Stable Business

Plaintiff asks the Court to find that Verizon falsely portrayed VIS as a "growth company" or a "turnaround growth story" because increasing EBITDA and revenue figures were essential

[34] Defs.' Proposed Findings ¶ 107.

[35] Tr. Vol. 6B at 62:18-64:15 (testimony of Mr. Wessel); Treas. Reg. § 1.355-7(b)(2).

[36] Tr. Vol. 6B at 62:6-9 (testimony of Mr. Wessel); *id.* at 15:19-22 (testimony of Mr. Rievman).

[37] Tr. Vol. 6B at 108:6-16.

[38] Tr. Vol. 6B at 65:24-66:17, 96:13-24 (testimony of Mr. Wessel that the critical factor to securities status is that both Idearc and the debt holders expected the debt to be long-term at the time of issuance); *see* Defs.' Proposed Findings ¶ 111.

[39] Plaintiff proposes that the Court find (¶ 246) that an internal e-mail characterized the TSA as a "poison pill." But, as Mr. Wessel testified, that e-mail referred to an early draft of the TSA, and the final TSA permitted Idearc to prepay its debt as discussed in the text. Tr. Vol. 6B at 101:25-102:22, 103:15-106:17.

to investors' willingness to finance Idearc or to purchase its common stock.[40] Plaintiff also asks the Court to adopt its distinction between a "growth business" and a "harvest business" — which Plaintiff characterizes as a business that should be sold off for parts — and to find, based on inferences from e-mails, that Mr. Seidenberg and Ms. Harless secretly believed (but did not disclose) that VIS was such a "harvest business."[41]

The trial evidence establishes that Plaintiff's construct is built on false premises. Investors valued the steady cash flows and high EBITDA margins generated by VIS, which was marketed as a stable, mature business (with declining incumbent print revenue but increasing revenue in the smaller independent print and electronic segments), not as a growth company.[42]

- Various lenders, including Citibank and Morgan Stanley, were willing to make loans to Idearc and to acquire its debt, even though they prepared their own forecasts of Idearc's business, in which they projected year-over-year revenue and EBITDA declines:
  - Citibank agreed to finance Idearc after developing a "base case" that estimated revenue declines of 2 percent year-over-year and falling EBITDA.[43]
  - Morgan Stanley agreed to finance Idearc after developing a "base case" that estimated EBITDA declines from $1.558 billion in 2006 to $1.320 billion in 2013.[44]
- Ms. Harless testified that her reference to "[h]arvest mode" in a post-Spin-Off e-mail to the Idearc Board (PX1161) "referr[ed] back to when we were in Verizon, and we were cutting costs and not investing back into the directories business. Verizon had other priorities in which they were investing the dollars."[45] She

[40] *See, e.g.*, Pl.'s Proposed Findings ¶¶ 89, 105, 138, 161.

[41] *See* Pl.'s Proposed Findings ¶¶ 102-106.

[42] *See generally* Defs.' Proposed Findings ¶¶ 20-42.

[43] DX745 at 11 of 27 (Citibank Credit Memorandum). Citibank nevertheless concluded that Idearc had a total enterprise value of $11.7 billion to $14.4 billion. *Id.* at 19 of 27.

[44] DX450 at 15 of 16 (Morgan Stanley CCC Materials). Morgan Stanley nevertheless concluded that Idearc would have a total enterprise value of $12.5 billion. *Id.* at 4 of 16; Tr. Vol. 9A at 37:1-16.

[45] Tr. Vol. 9A at 69:13-17.

further testified that PX1161 reflected her statements to investors in meetings in January 2007, refuting any suggestion that her views were not disclosed.[46]

- Idearc's management projections, which went only to private-siders and the Ratings Agencies, showed EBITDA decreasing from $1.559 billion in 2006 to $1.555 billion in 2007 and 2008, and then increasing slightly to $1.566 and $1.574 billion in 2009 and 2010.[47]

- Idearc's projections of incumbent print revenue reflected annual declines, from 2006 (estimated $2.887 billion) to 2010 (estimated $2.676 billion), a greater rate of decline than that projected by the Kelsey Group for the industry as a whole.[48]

- The consensus of industry equity analysts, whose reports were publicly available, projected *negative* compound annual growth rates for VIS revenues.[49]

Plaintiff also proposes findings that mischaracterize Idearc's disclosure documents. Plaintiff erroneously claims that statements in those documents describing Idearc's opportunities for growth in the *independent print* and *electronic* business constituted representations about the *incumbent print* business that everyone in the industry — Kelsey, public equity analysts, and Idearc itself — forecasted would continue to decline.[50] For example, while Plaintiff asks the Court to find (¶ 162) that Idearc's public-side lender presentation (DX488) was misleading

[46] Tr. Vol. 9A at 68:18-69:2. Ms. Harless's testimony in this regard is corroborated by extensive evidence. *See, e.g.*, DX1730 at 7 of 31 (roadshow materials describing a "[s]trategy shift" in which Idearc would begin to reinvest in the "sales team" and the "print product," while also investing in advertisement and other "growth initiatives").

[47] DX416 at 57 of 77 (Rating Agency Presentation); DX314 at 8 of 14 (Confidential Information Memorandum – Private Siders); DX494 at 5 of 8 (Private Side Lender Presentation). The Form 10 and the Offering Memorandum did not include projections, but reported historical revenue declines from $3.760 billion in 2002 to $3.374 billion in 2005. PX901 at 51 of 158 (Form 10); PX909 at 49 of 247 (Offering Memorandum).

[48] DX314 at 9 of 14; Tr. Vol. 5B at 110:25-111:20 (testimony of Mr. Jones). Given management's forecast of continued incumbent print revenue declines, Plaintiff has no good faith basis for asserting (¶ 21(a)) that Verizon failed to disclose that incumbent print would likely continue to decline.

[49] DX1855 at 5 of 22 (Verizon Board Presentation, Sept. 7, 2006) (analyst consensus of *negative* 2.1 percent CAGR); Tr. Vol. 9B at 40:12-41:5 (testimony of Ms. Toben concerning analyst forecasts); Tr. Vol. 4B at 111:17-113:12 (testimony of Ms. Taylor that consensus equity analyst forecasts were *negative* 1.7 percent CAGR).

[50] Idearc's Form 10 filings, for example, disclosed the decline in print revenue, noted that the company was putting in place "[m]arket specific strategies" to help "mitigate further revenue declines," and indicated that "[t]o the extent these strategies are successful, we believe the decline in our print products revenues may diminish over time." PX901 at 63 of 158 (Form 10). Far from suggesting growth in print revenue, the Form 10 indicated that strategies were intended to "diminish" the rate of decline. *Id.*

because it mentioned "[r]esponsible investment in growth initiatives," the evidence established that VIS had been investing in two business lines — independent print and electronic — that were growing year-over-year.[51] DX 488, in fact, emphasized that Idearc perceived a "very high opportunity to add customers in *independent markets*," and discussed VIS's "tactics" of "[s]electively expand[ing] into . . . high-growth [independent] markets" to "[c]ompete aggressively with incumbents"[52] — facts that were undisputed at the Phase I trial.[53] McKinsey agreed that the electronic and independent print segments would continue to grow in the future.[54] Accordingly, representations that VIS was investing in "growth initiatives" were fully accurate.

2. The 2003 Voluntary Separation Package Had a Significant Short-Term Impact on VIS

Plaintiff repeatedly asks the Court to find that Verizon's 2003 voluntary separation package had limited impact on VIS's performance and, citing a Verizon e-mail (PX245), claims that the sales force reduction was used as an "excuse[]" for a business trajectory that would never reverse.[55] The evidence does not support this finding.

The evidence showed that the voluntary separation package offered to employees in 2003 caused VIS to lose half of its sales force, and adversely affected financial performance for years.[56] VIS immediately took steps to replace the sales force losses, but because it "takes time to build relationships" and "to reestablish" relationships lost as a result of the sales force

[51] DX416 at 50 of 77 (Rating Agency Presentation); DX488 at 36 of 45 (Public Side Lender Presentation).

[52] DX488 at 12, 20, 25 of 45 (Public Side Lender Presentation) (emphasis added).

[53] The lender presentation also noted that "rapid industry evolution" in the online advertising industry "provides significant growth opportunity," and indicated that VIS's "product innovation" was helping to "drive revenue growth." DX488 at 28, 31 of 45.

[54] DX761 at 32, 43 of 58.

[55] Pl.'s Proposed Findings ¶¶ 93(f), 98.

[56] Tr. Vol. 5B at 116:5-117:6 (testimony of Mr. Jones concerning impact of voluntary separation package).

reduction, and for the new sales force to gain "experience," it took time to stabilize print revenue.[57] By summer 2006, VIS had rebuilt its sales force and revenues had stabilized to levels near that of its peers. VIS's August 2006 Operations Review described a "turnaround" in print revenue, significant improvements over the prior year, and performance that was in line with the financing model projections.[58]

II. THE PRICE OF IDEARC'S COMMON STOCK AS TRADED ON THE NYSE PROVIDES THE BEST MEASURE OF IDEARC'S FAIR MARKET VALUE

A. The Court Should Rely on the $12.8 Billion Valuation Derived from the Contemporaneous Trading Price of Idearc's Common Stock

This Court previously ruled that, "under the right conditions," "the market price of publicly traded stock is normally assumed to be one of the most reliable indicators of a company's value."[59] That ruling is consistent with the weight of authority.[60] Plaintiff conceded as much at trial, agreeing that, "[i]n most every case, it's far better to have the market establish the value of [a] business than to have it established by paid expert testimony after the fact."[61] There is no dispute that the total enterprise value of Idearc, as calculated by trading on the NYSE, was no less than $12.8 billion on the date of the Spin-Off.

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[57] Tr. Vol. 5B at 116:22-117:6 (testimony of Mr. Jones).

[58] DX2345 at 2, 5-6 of 9 (VIS Operations Review); Tr. Vol. 5B at 119:13-121:2 (testimony of Mr. Jones); *see also* PX871 (K. Harless Oct. 28, 2006 e-mail to incoming Idearc Board) ("[T]he revenues on an as sold basis have regain[ed] traction and are improving every day . . . the southeast, central, and west territories are all positive results with the northeast and mid-atlantic performing better than plan and approaching flat (the sales momentum is back!!!)"); DX1677 at 3 of 22 (Natexis Bleichroeder Nov. 1, 2006 analyst report) ("There have been some signs of turnaround, however; in 2006, the company estimates an ad sales decline of 2.5%-3.0%, which is an improvement from the decline of 5.6% between 2004 and 2005.").

[59] Mem. Op. & Order at 5-6, ECF No. 577 (Oct. 2, 2012).

[60] *See, e.g.*, *VFB LLC v. Campbell Soup Co.*, C.A. No. 02-137 KAJ, 2005 WL 2234606, at *21-*22 (D. Del. Sept. 13, 2005), *aff'd*, 482 F.3d 624 (3d Cir. 2007); *In re Iridium Operating LLC*, 373 B.R. 283, 291, 293 (Bankr. S.D.N.Y. 2007); *Metlyn Realty Corp. v. Esmark, Inc.*, 763 F.2d 826, 835 (7th Cir. 1985).

[61] Tr. Vol. 1A at 6:10-12 (Plaintiff's opening statement); *see also* Tr. Vol. 3 at 56:17-19 (testimony of Ms. Taylor) ("normally you would look at the market value of the stock as a best indicator of the value of a company").

Plaintiff, however, now contends that courts normally give the discounted cash flow methodology the "most weight," rather than the price at which a public company's common stock trades on an efficient market like the NYSE.[62] Yet many of the cases Plaintiff cites involved *privately held* companies, which did not have publicly traded stock,[63] and those that involved publicly traded companies (like Idearc) do not support Plaintiff's claim. For example, in *ASARCO LLC v. Americas Mining Corp.*, 396 B.R. 278 (S.D. Tex. 2008), the court looked beyond the market price because the stock of the company at issue (unlike Idearc) did not trade heavily and, therefore, there was not an efficient market, *see id.* at 343-44. Despite that, the company's valuation using the DCF methodology ($853 million) was comparable to the valuation using the stock market price ($811.4 million), and the court found that the company's value fell between those two figures. *See id.* at 362-63. In *Cede & Co. v. Technicolor, Inc.*, Civ. A. No. 7129, 1990 WL 161084 (Del. Ch. Oct. 19, 1990), the court valued the shares of minority shareholders in a cash-out merger applying a Delaware statute (not applicable here) under which the "stock market value cannot be the sole source of relevant information in fixing 'fair value.'" *Id.* at *18 n.39. Nonetheless, the court found it an "important factor" that the stock price was consistent with the valuation by one side's expert. *Id.* at *31.[64]

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[62] Pl.'s Post-Trial Br. at 2.

[63] *See Frymire-Brinati v. KPMG Peat Marwick*, 2 F.3d 183, 185 (7th Cir. 1993) (valuing limited partnerships); *In re Med Diversified, Inc.*, 334 B.R. 89, 98-99 (Bankr. E.D.N.Y. 2005) (valuing a privately held company); *Lippe v. Bairnco Corp.*, 288 B.R. 678, 681 (S.D.N.Y. 2003) (valuing assets transferred between two privately held subsidiaries of a holding company), *aff'd*, 99 F. App'x 274 (2d Cir. 2004); *Steiner Corp. v. Benninghoff*, 5 F. Supp. 2d 1117, 1129 (D. Nev. 1998) (valuing a privately held company); *Andaloro v. PFPC Worldwide, Inc.*, No. Civ. A. 20336, 2005 WL 2045640, at *1, *8 (Del. Ch. Aug. 19, 2005) (valuing privately held company in appraisal action by minority shareholders); *In re Radiology Assocs., Inc. Litig.*, 611 A.2d 485, 487, 493 (Del. Ch. 1991) (same).

[64] *In re Orchard Enterprises, Inc.*, C.A. No. 5713-CS, 2012 WL 2923305 (Del. Ch. July 18, 2012), arose in the same context as *Cede*, *see id.* at *1. In addition, the district court in *Orchard* rejected one expert's reliance on the comparable companies and precedent transactions approaches because of specific errors in that expert's methodology. The court did *not* express a preference for the DCF approach over market-based approaches. *See id.* at *2 ("Although Orchard purports to rely upon both the comparable companies and comparable transactions

The only case Plaintiff cites in which a court rejected a valuation derived from a public company's trading price on an efficient market is *In re Winstar Communications, Inc.*, 348 B.R. 234 (Bankr. D. Del. 2005).[65] The facts in *Winstar*, however, were very different from those here. There, the court found that Lucent "h[eld] back on issuing [a] refinancing notice" to Winstar, knowing the notice "would have dire consequences for Winstar." *Id.* at 266, 276. Therefore, "Lucent, but not the average investor, knew that Winstar's true financial picture was much bleaker than [Winstar's] publicized financials would indicate." *Id.* at 276. That finding led the *Winstar* court to reject the use of the stock market as a measure of fair market value. *See id.*

Here, Plaintiff does not claim that Idearc's true financial picture was bleaker than its public financial information indicated. On the contrary, Ms. Taylor testified that, to reach the lowest valuation she calculated ($5.4 billion), she used Idearc's *publicly reported financial information* — which Plaintiff never questioned — to project its future performance.[66] She conceded that "anyone in the world" could have done the same calculation.[67] *Winstar*, therefore, provides no support for Plaintiff's claim that the Court should prefer any DCF valuation — let alone Ms. Taylor's valuation — to Idearc's $12.8 billion value based on trading on the NYSE.

Moreover, Plaintiff did not carry its burden during the Phase I trial to give this Court a "substantial reason" to "find that the value implied by an efficient market is not a trustworthy benchmark" for the fair market value of a company. *Iridium*, 373 B.R. at 303; *see also Campbell*

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methods in coming to its position on value, its analyses based on these methods are not reliable."); *id.* at *10-*12 (identifying flaws in Orchard's expert's comparable companies and comparable transactions analysis).

[65] Plaintiff cites two other, inapposite cases involving public companies. *In re Chemtura Corp.*, 439 B.R. 561 (Bankr. S.D.N.Y. 2010), considered challenges to the plan of reorganization of a formerly publicly traded company, so the court had no stock market evidence for the reorganized company, *see id.* at 568, 586-87. *Questrom v. Federated Dep't Stores, Inc.*, 84 F. Supp. 2d 483 (S.D.N.Y. 2000), involved whether JP Morgan — which had calculated the compensation due to Federated's CEO — complied with the CEO's contract, *see id.* at 484-85, 488.

[66] *See* Tr. Vol. 4B at 15:13-16:7.

[67] *Id.* at 16:8-10, 17:9-12.

Soup, 2005 WL 2234606, at *22. Although Plaintiff again recites its litany of facts supposedly not disclosed publicly that led Ms. Taylor to reject the stock market's valuation, Plaintiff ignores the extensive evidence introduced at trial showing that those facts were disclosed.[68] Plaintiff also ignores that the Phase I trial demonstrated that Ms. Taylor: (1) departed from accepted valuation principles by overweighting an outlier DCF valuation, double counting Idearc's underperformance relative to its industry peers,[69] and relying on her view that, in hindsight, every directories company was overvalued; (2) relied on factual assumptions that the trial record contradicted regarding what was disclosed to the marketplace and the effect of the TSA; and (3) offered the *ipse dixit* opinion — ungrounded in an event study or other recognized methodology — that the price of Idearc's common stock was inflated by information that was allegedly withheld, but which the trial record showed was actually disclosed.[70] Her valuation opinion is unsupportable under Rule 702 and is entitled to no weight.

B. If the Court Considers DCF Valuations, It Should Rely on Those that Corroborate the $12.8 Billion Valuation Based on NYSE Trading

1. Contemporaneous DCF Valuations and Mr. Hopkins' DCF Valuation Are Consistent With Idearc's Stock Price and Other Market-Based Valuation Methodologies

Even if the Court were to consider valuations calculated using the DCF methodology, the Court should bear in mind that "the DCF method is subject to manipulation and should be validated by other approaches." *In re Bachrach Clothing, Inc.*, 480 B.R. 820, 866 (Bankr. N.D.

[68] *See* Pl.'s Post-Trial Br. at 14-15; Defs.' Proposed Findings ¶¶ 92-145, 150-152; Defs.' Proposed Conclusions ¶¶ 47-59, 62-65.

[69] One reason Ms. Taylor gave for overweighting her DCF valuation was that many of the companies included in the market-based analyses differed somewhat from Idearc. Tr. Vol. 4A at 115:5-116:10. Yet the Houlihan market-based analyses — which Ms. Taylor adopted in her own analysis, *id.* at 114:7-25 — already took that into account, by significantly discounting the EBITDA multiples of those other companies. Tr. Vol. 7B at 33:2-37:17 (testimony of Mr. De Rose). Ms. Taylor therefore violated accepted valuation principles by "double-count[ing] the issues that arose in the valuation process." Tr. Vol. 5A at 15:13-16:13 (quoting Dr. Pratt treatise).

[70] *See* Defs.' Proposed Findings ¶¶ 150-155; Defs.' Proposed Conclusions ¶¶ 60-68.

Ill. 2012); *accord Iridium*, 373 B.R. at 351 (noting that the DCF methodology "'has been subject to [the] criticism'" that "'a skilled practitioner can come up with just about any value he wants,'" making it "important to validate conclusions reached using [the DCF] methodology by comparing the results [with] other accepted approaches to valuation") (citations omitted).

The Phase I trial record includes many DCF valuations, most of which were done at or around the time of the Spin-Off. Other than Ms. Taylor's, those valuations are overwhelmingly consistent with the $12.8 billion valuation calculated using Idearc's NYSE stock price. Those DCF valuations are also consistent with other market-based valuations of Idearc,[71] including the contemporaneous valuations by prospective lenders to Idearc and acquirers of its debt — as well as research analysts — that applied a multiple to current year EBITDA to value Idearc and other directories companies, rather than calculating DCF valuations.[72]

For example, in October 2006, JP Morgan calculated a DCF valuation of Idearc using its own projections for Idearc's future performance, and estimated the total enterprise value of Idearc to be $10.8 billion to $12.8 billion.[73] That same month, Citibank also prepared a DCF valuation to estimate Idearc's fair market value using projections that it developed internally. Even though Citibank's base case projected annual declines in revenues and EBITDA, Citibank's DCF valued Idearc at between $11.7 billion and $12.9 billion.[74] The Phase I trial

[71] In arriving at her overall valuation, Ms. Taylor valued Idearc at $11.7 billion to $13.2 billion using the "market multiple methodology," and at $13.4 billion to $15.8 billion using the "[c]omparable transaction methodology." Tr. Vol. 4A at 114:7-25. Houlihan calculated the same valuation ranges using those methodologies. *See* DX330 at 24 of 81 (Houlihan Capital Adequacy Report). When Mr. Hopkins applied these same market-based methodologies — which he referred to as "comparative company analysis" and "precedent transaction analysis" — he arrived at comparable valuations of $12 billion to $14.4 billion and $13.2 billion to $15.8 billion, respectively. Tr. Vol. 8A at 12:11-22; *see* Defs.' Proposed Findings ¶¶ 62-63.

[72] *See* Defs.' Proposed Conclusions ¶ 53.

[73] DX422 at 21 of 120 (JP Morgan Client Review Proposal); Defs.' Proposed Findings ¶ 55.

[74] DX745 at 11, 19, 23 of 27 (Citibank Credit Memorandum).

record also included DCF valuations from Morgan Stanley ($11.1 billion to $14.1 billion), Lehman Brothers ($12.9 billion), Natexis Bleichroeder ($13.1 billion to $13.7 billion), and Goldman Sachs ($12.635 billion to $14.996 billion).[75]

Verizon also performed its own DCF calculations before the Spin-Off.[76] In September 2005, Mr. Fitzgerald estimated Idearc's value using the DCF methodology at between $11.5 billion and $15 billion.[77] In presentations to Verizon's Board of Directors in November and December 2005 and September 2006, Verizon estimated Idearc's value using the DCF methodology at between $10.5 billion and $15 billion.[78]

In October 2006, Houlihan performed a DCF calculation, in connection with its solvency opinion. Using that approach, Houlihan valued Idearc at between $10.7 billion and $12.2 billion.[79] Defendants' valuation and solvency expert, Mr. Hopkins, also applied the DCF methodology, calculating a range of value for Idearc of $10.9 billion to $13.7 billion.[80]

All of these DCF valuations are consistent with the $12.8 billion valuation reflected in Idearc's NYSE price on the date of the Spin-Off.

2. Ms. Taylor's Outlier DCF Valuation Is Unsupportable Under Rule 702 and Entitled to No Weight

Although Plaintiff asserts that the Court should prefer Ms. Taylor's DCF calculation over all of the others admitted at the Phase I trial, *see* Pl.'s Post-Trial Br. at 23-24, Ms. Taylor is

[75] DX448 at 35 of 56 (Morgan Stanley Discussion Materials, Aug. 29, 2006); DX841 at 7-8 of 18 (Nov. 28, 2006 Lehman Brothers analyst report); DX1677 at 5, 7 of 22 (Nov. 1, 2006 Natexis Bleichroeder analyst report); DX437 at 30 of 71 (Goldman Sachs Discussion Materials, June 16, 2005) (downside case DCF valuation).

[76] Plaintiff's reliance on the low end of the $6.5 billion to $13.5 billion DCF valuation in PX27 from July 2005 ignores Mr. Fitzgerald's testimony about PX27. *See supra* Part I.B.1; Defs.' Proposed Findings ¶¶ 139, 141.

[77] DX129 at 7 of 15 (Asset Disposition Options, CLC Review); Defs.' Proposed Findings ¶ 139 & n.370.

[78] PX57 at 10 of 35 (Nov. 3, 2005 Verizon Board Presentation); DX516 at 4 of 9 (Dec. 1, 2005 Verizon Board Presentation); DX1855 at 6 of 22 (Sept. 7, 2006 Verizon Board Presentation).

[79] DX330 at 24 of 81 (Houlihan Capital Adequacy Report).

[80] Tr. Vol. 8A at 49:3-50:4; Defs.' Proposed Findings ¶ 67.

simply "one analyst" among many to estimate Idearc's fair market value, and her after-the-fact calculations are "apt to be [less] accurate" than a valuation drawn from the contemporaneous "price at which people actually [bought] and [sold], putting their money where their mouths are." *Metlyn Realty*, 763 F.2d at 835.

Ms. Taylor's DCF valuation of $5.4 billion to $6.3 billion is also — by far — the lowest valuation of Idearc, using any methodology, in the trial record. Ms. Taylor's inability "to reconcile the abundant market data that conflicts with [her] opinion"[81] or "to show any market valuation of [Idearc] contemporaneous with the Spin-off that is anywhere close to the figures [she] urged"[82] provides a sufficient basis under Rule 702 for rejecting her DCF calculation.

Furthermore, Plaintiff offers no defense of Ms. Taylor's DCF valuation against the numerous flaws in the fact selection and the application of those facts to known methodologies that were revealed during the trial. In particular, the inputs to Ms. Taylor's DCF calculation were significantly different from those used in the contemporaneous DCF valuations cited above — and, in each case, the inputs that Ms. Taylor selected had the effect of *reducing* Idearc's value.[83]

In selecting the projections of future cash flow and terminal growth value, Ms. Taylor rejected management's projections as supposedly overly optimistic, not prepared in good faith, and forced on Idearc's management by Verizon.[84] Yet Ms. Harless, Mr. Coticchio, and Mr. Jones all testified to just the opposite: that they believed at the time of the Spin-Off that the projections were reasonable and would be achieved, and were the product of extensive due

[81] *Iridium*, 373 B.R. at 293.

[82] *Campbell Soup*, 2005 WL 2234606, at *26.

[83] *See* Defs.' Proposed Findings ¶¶ 153-155; Defs.' Proposed Conclusions ¶ 66.

[84] Tr. Vol. 3 at 82:16-83:16; Tr. Vol. 4A at 71:1-8; Tr. Vol. 4B at 11:9-21.

diligence, discussions, and agreement of all parties.[85] In their place, Ms. Taylor did not rely on the more conservative projections developed by potential lenders to Idearc and acquirers of its debt, but instead created her own, after-the-fact projections based on the assumption that Idearc's incumbent print revenues would continue to decrease at a rate of 4.8 percent per year.[86] Yet Ms. Taylor admitted at trial that, under standard valuation principles, a valuation analyst "should not base [her] valuation by blindly applying just trends."[87] Ms. Taylor's violation of that principle was especially problematic here, where the trial evidence established that Idearc's performance in 2006 had *improved*, as compared to the preceding years.[88]

To reach her discount rate (or WACC) of 9.75 percent, Ms. Taylor improperly assumed that Idearc would have a capital structure of 44 percent debt and 56 percent equity, based in part on European directories companies that had a much lower amount of debt in their capital structures than domestic directories companies like Idearc and R.H. Donnelley.[89] Ms. Taylor's willingness to rely on these European companies (rather than Idearc's actual capital structure) when doing so reduced Idearc's value[90] stands in stark contrast to her refusal to rely on those same companies as part of the comparable companies methodology, where doing so would have

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[85] Defs.' Proposed Findings ¶¶ 101-103. Ms. Taylor testified that, to credit her opinion, the Court would need to conclude that Ms. Harless and Mr. Coticchio were not being truthful about the projections. Tr. Vol. 4B at 108:17-109:24, 111:9-16.

[86] Tr. Vol. 4A at 48:7-23, 59:3-60:1, 53:3-9; Tr. Vol. 4B at 15:13-16:3. Ms. Taylor also used the "Houlihan Downside Case," Tr. Vol. 4A at 51:17-53:2, even though Houlihan did not believe those were reasonable projections and used them solely as a stress test to determine whether Idearc would be able to pay its debts as they came due even if it did not achieve its Base Case projections. Tr. Vol. 7B at 27:1-7 (testimony of Mr. De Rose).

[87] Tr. Vol. 4A at 53:10-19.

[88] *See* Defs.' Proposed Findings ¶ 121.

[89] Tr. Vol. 5A at 31:25-33:3 (testimony of Ms. Taylor). Although Houlihan used the same 44:56 ratio — at a time before Idearc's final capital structure was known — it recognized that R.H. Donnelley's debt structure was more leveraged. Houlihan's use of this ratio lowered the resulting valuation of Idearc, consistent with its effort to be "as conservative as [it could]" be. Tr. Vol. 7B at 34:12-22, 40:15-41:15.

[90] Because the cost of equity is higher than the cost of debt, Ms. Taylor's capital structure assumption resulted in a higher discount rate and, therefore, lower valuation for Idearc. Tr. Vol. 5A at 31:3-24, 33:11-16.

increased Idearc's value.[91] Ms. Taylor's contradictory approach highlights the litigation-driven nature of her after-the-fact valuation opinion.

Ms. Taylor further increased her discount rate — and reduced the resulting valuation of Idearc — by adding a company-specific risk premium, based solely on her "subjective judgment."[92] Courts have criticized the use of a company-specific risk premium precisely because it has no methodological moorings and is subject to abuse. *See Delaware Open MRI Radiology Assocs., P.A. v. Kessler*, 898 A.2d 290, 339 (Del. Ch. 2006) (noting that "the company specific risk premium often seems like the device experts employ to bring their final results into line with their clients' objectives, when other valuation inputs fail to do the trick").[93]

For all of these reasons, Ms. Taylor's DCF valuation is unsupportable under Rule 702 and entitled to no weight.

III. PLAINTIFF'S FALSE ENDORSEMENT CLAIMS ARE IMMATERIAL AS A MATTER OF LAW AND CONTRADICTED BY THE EVIDENCE

Under Fifth Circuit precedent, "generalized, positive statements about the company's competitive strengths, experienced management, and future prospects are not actionable because they are immaterial." *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 869 (5th Cir. 2003).[94] All of

[91] *See* Tr. Vol. 4A at 97:12-19 (testimony of Ms. Taylor, in discussing her comparable companies valuation, that "RH Donnelley is the only one that's a similar enough business being [an] incumbent in the U.S.").

[92] Tr. Vol. 4A at 76:23-77:2; Tr. Vol. 5A at 29:1-3.

[93] Although Plaintiff asserts that Ms. Taylor's discount rate of 9.75 percent is effectively the same rate that Verizon used in preliminary July 2005 analysis, *see* Pl.'s Post-Trial Br. at 9 & n.16, Plaintiff ignores the testimony that Verizon revised the discount rate from 8.7 percent (for print) to 8.1 percent in light of an intervening reduction in the "risk free rate" and market analyst views that the appropriate capital structure for a stand-alone directories business would have a higher ratio of debt to equity than the July 2005 analysis assumed. *See* Defs.' Proposed Findings ¶¶ 138-139; DX1856 at 88, 90 of 90 (Directories – Varying Viewpoints on VIS).

[94] Contrary to Plaintiff's claim (at 22 & n.40), the Fifth Circuit in *Rosenzweig* expressly treated its materiality holding as an independent ground for its ruling, notwithstanding its separate ruling that the plaintiffs there had failed to plead scienter. *See* 332 F.3d at 869 ("*Even apart from* the [PSLRA] safe harbor (and plaintiffs' failure to adequately plead scienter), we agree with the district court that none of the challenged representations in the prospectus [is] actionable.") (emphasis added).

Plaintiff's claims that Verizon misled investors with respect to Idearc's opportunities for future growth and its management fall within this rule and, therefore, are immaterial as a matter of law.

The public statements on which Plaintiff relies state only that Idearc had "opportunity for revenue growth"[95] or was a "great company well positioned for the future."[96] Courts applying *Rosenzweig* have found identical statements immaterial as a matter of law. *See, e.g., In re Blockbuster Inc. Sec. Litig.*, No. 3:03-CV-0398-M, 2004 WL 884308, at *6-*7 (N.D. Tex. Apr. 26, 2004) (finding statement that company is "comfortable in [its] ability to grow [its] business in a meaningful and sustainable way over a long period of time" is a "vague expression[] of corporate optimism" that is immaterial as a matter of law); *Hopson v. MetroPCS Communications, Inc.*, Civil Action No. 3:09-CV-2392-G, 2011 WL 1119727, at *19 (N.D. Tex. Mar. 25, 2011) (Fish, J.) (finding statements "portraying a 'strong,' 'resilien[t],' or 'perfectly positioned' company capable of withstanding the deteriorating economic conditions in the United States" to be "immaterial" as a matter of law).

Plaintiff also cites a variety of statements made to private-side lenders or ratings agencies, virtually all of which are similarly immaterial statements about Idearc's opportunities for growth or its position in the marketplace.[97] Furthermore, recipients of that non-public information were prohibited from trading in Idearc securities in the public markets, and Plaintiff has no evidence that any statements to "private-siders" reached the public markets.[98]

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[95] Pl.'s Proposed Findings ¶ 163 (quoting DX488 at 17 of 45 (Public Side Lender Presentation)); *see also, e.g., id.* ¶ 164 (quoting DX313 at 39 of 72 (Confidential Information Memorandum for Public Siders)) (listing "'growth opportunities'" as a rationale for the Spin-Off); *id.* ¶ 165 (quoting PX920 at 17 of 159 (Form 10)) ("'We believe that we have an opportunity to increase the revenues from our independent print and Internet yellow pages directories businesses.'").

[96] Pl.'s Post-Trial Br. at 18 (quoting PX768 at 15 of 45 (Lenders' Presentation for Public-Side Investors)).

[97] *See generally* Pl.'s Proposed Findings ¶¶ 162-165, 173-174.

[98] Plaintiff asks the Court to find that Jessica Kearns of JP Morgan testified that "the ratings of the rating agencies can affect the stock price of the subject company." Pl.'s Proposed Findings ¶ 111 (citing Tr. Vol. 10A at

Plaintiff similarly cites public descriptions of Idearc's management that used adjectives such as "strong," "solid," and "experienced."[99] In *Rosenzweig*, the Fifth Circuit held that statements "emphasizing the company's competitive strengths of management" are "not actionable because they are immaterial." 332 F.3d at 859, 869; *see also Milano v. Perot Sys. Corp.*, No. 3:02-CV-1269-D, 2006 WL 929325, at *6-*7 (N.D. Tex. Mar. 31, 2006) (statements that company's employees 'were 'highly motivated,' had 'strong character,' and possessed 'leadership traits'" are immaterial as a matter of law).

Plaintiff, however, asserts that this case is on all fours with *United States v. Skilling*, 554 F.3d 529 (5th Cir. 2009).[100] That is wrong. The statements that the Fifth Circuit held could have been found material by a reasonable jury were representations about *current* performance, which the record in that case showed were "contrary to verifiable historical facts about the conditions of the businesses." *Id.* at 554. One business that Mr. Skilling stated was having "a great quarter" with current "strong growth" was actually "losing money," while another business — which Mr. Skilling represented was not in the "trading business" — was "heavily dependent on unstable, speculative trading." *Id.* While Mr. Skilling's statements were thus "specific representation[s] about . . . present fact[s]" that can be proven to have been "false when made," the statements Plaintiff challenges here are "a certain kind of rosy affirmation" about future opportunities and attributes of management that are "not material as a matter of law." *MetroPCS*, 2011 WL 1119727, at *19-*20 (internal quotation marks omitted).

22:12-23:2). In fact, this Court asked Ms. Kearns specifically whether she had testified that the "rating of a credit agency might have some effect on the equity price of a stock," and Ms. Kearns explained that she had not done so and, instead, had simply noted that, when a ratings agency provides "anything other than a default rating," it is "reasonable to assume" that there is "some equity value underneath the debt." Tr. Vol. 10A at 22:12-23:2.

[99] Pl.'s Proposed Findings ¶¶ 89(c)(v), 166; Pl.'s Post-Trial Br. at 19 (citing generally PX901 (Form 10)).

[100] *See* Pl.'s Post-Trial Br. at 19-22.

In all events, no reasonable fact-finder could conclude, on the evidence admitted at trial, that the statements about Idearc's opportunities and its management were not honestly believed when made. Mr. Seidenberg testified that he believed that "a spun-out VIS would be able to take actions" as a "separately positioned independent public company" that were unavailable to VIS as part of Verizon.[101] Ms. Harless testified that she believed the Spin-Off would create opportunities for Idearc to "grow th[e] business."[102] Ms. Nason also testified to her belief that VIS had a better chance to "achieve higher revenue, achieve higher EBITDA" "as a separate entity," and to "grow and develop in ways" that it could not "as just one division of a conglomerate."[103] Furthermore, Mr. Seidenberg testified that he thought Kathy Harless — who reported directly to him — was "extremely capable," and Ms. Toben testified that she "personally hand-picked" Mr. Coticchio to serve as CFO of the directories business.[104] In its Proposed Findings, Plaintiff ignores all of this testimony, which thoroughly refutes its claims about what Verizon believed prior to the Spin-Off.

IV. THE COURT SHOULD REJECT PLAINTIFF'S PROPOSED "ADDITIONAL FINDINGS," WHICH EXCEED THE SCOPE OF PHASE I

Shortly before trial, Plaintiff asserted that every corporate action that VDDC and then Idearc took prior to — and including — the Spin-Off was invalid and, therefore, the Court should exclude evidence of the prices at which Idearc's common stock and unsecured notes

[101] Tr. Vol. 6A at 64:13-19, 73:11-18 (testimony of Mr. Seidenberg that "being a public company would have given this business a pivot, a reset, give it a chance to try new and different things"); Defs.' Proposed Findings ¶¶ 39, 104.

[102] Tr. Vol. 9A at 66:18-24; *see* Defs.' Proposed Findings ¶ 104.

[103] Tr. Vol. 7A at 83:3-21; *see* Defs.' Proposed Findings ¶ 104.

[104] Tr. Vol. 6A at 43:9-13 (testimony of Mr. Seidenberg); Tr. Vol. 9B at 35:16-21 (testimony of Ms. Toben); *see* Defs.' Proposed Findings ¶¶ 143, 144 n.383.

traded in public markets.[105] In denying Plaintiff's motion, the Court found that Plaintiff had "not shown" why any of the alleged "failure[s] to observe corporate formalities in the spinoff and in the issuance of Idearc stock" — or any of the alleged "misrepresentations about corporate formalities" — "affected the underlying fundamentals" of Idearc or "were material to the value of Idearc as a going concern." Mem. Op. & Order at 5 & n.3, ECF No. 577 (Oct. 2, 2012). At trial, Plaintiff did nothing to cure that failure, and this Court properly held that Plaintiff's assertions regarding corporate formalities are "not the subject of Phase I of this trial." Tr. Vol. 9B at 8:17-9:1. Despite these rulings, Plaintiff asks the Court to find that all of VDDC's and Idearc's corporate actions were invalid.[106] Because these issues were excluded from the Phase I trial, the Court cannot enter Plaintiff's proposed findings. *See Chang v. University of R.I.*, 606 F. Supp. 1161, 1278 (D.R.I. 1985) (holding, in case where "trial was bifurcated," that it "would be premature" and contrary to "[f]undamental fairness" to rule on a "question . . . [that] was not before the court" in the phase one trial).

CONCLUSION

The Court should adopt Defendants' Joint Proposed Findings of Fact and Conclusions of Law in full.

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[105] *See generally* Pl.'s Rule 104 Mot. To Limit Evid. & To Strike All of Defs.' Expert Test. Based on Market Value of Idearc Stock or Debt, ECF No. 509 (Aug. 28, 2012). In response, Defendants demonstrated that Plaintiff's claims are based on a misreading of the relevant corporate documents and Delaware law. *See* Defs.' Joint Resp. to Pl.'s "Rule 104" Mot. and Br. in Supp. at 5-9, ECF No. 531 (Sept. 18, 2012).

[106] *See* Pl.'s Proposed Findings ¶¶ 91, 264-312. Although ¶ 91 appears outside Plaintiff's "Additional Findings" section, it repeats Plaintiff's contention that Mr. Diercksen did not validly authorize Mr. Coticchio to sign the Distribution Agreement. *Compare* Pl.'s Proposed Findings ¶¶ 299, 312. In ¶ 91, Plaintiff asks the Court to find that Mr. Diercksen "admitted . . . [that] he never passed a resolution stating that [Mr.] Coticchio was authorized to sign the Distribution Agreement." In fact, Mr. Diercksen testified only that he "did not recall" such a resolution. Tr. Vol. 2B at 68:12-16. It was Mr. Powers who asserted, in questioning Mr. Diercksen, that he had "not seen any resolution" granting that authority. *Id.* Yet one of Plaintiff's exhibits was an October 31, 2006 resolution, which Mr. Diercksen signed, stating that "each officer of the Corporation is authorized to enter into . . . the Distribution Agreement." PX893 at 2-3, 18 of 18. Plaintiff had no good faith basis for either its Proposed Finding or its question to Mr. Diercksen at trial.

Dated: November 30, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who are deemed to have consented to electronic service are being served with a copy of the foregoing document via the Court's CM/ECF system pursuant to the Court's Local Rules this 30th day of November 2012.

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