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 BRIEF IN RESPONSE TO DEFENDANTS' JOINT POST-TRIAL BRIEF

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TABLE OF CONTENTS

Page

I. Introduction ... 1

II. Arguments and Authorities ... 2

A. The Court Should Deny Defendants' Request For An Advisory "Directed Verdict" ... 2

1. Defendants Are Not Entitled to an Advisory "Directed Verdict" ... 6

2. Defendants' Requested "Finding" Would Not Assist the Fifth Circuit ... 6

3. Defendants Also Cannot Establish Their Entitlement to Judgment Under Rule 52(c) Regarding the Issue of Valuation ... 7

B. Defendants Cannot Shift the Burden to Plaintiff to "Show Cause" Why Defendants Are Not Entitled to Judgment ... 8

C. Response To Certain Improper Requests For Legal Conclusions ... 9

1. Defendants Have the Burden Of Proof To Show Idearc's Value As Of The Date Of The Spin (Responsive to Defendants' Proposed Findings, Section A.1.) ... 10

2. The Price of Idearc's Stock on November 16, 2006 Is Not Indicative of Idearc's Value (Responding to Defendants' Proposed Findings, Sections C and D, pp. 81-84) ... 11

3. Analyst Reports and Credit Memoranda Are Inadmissible Hearsay (Responding to Defendants' Proposed Findings, Section D.3, pp. 87-90) ... 13

4. Rule 701 Does Not Permit Lay Opinion Testimony Regarding Idearc's Value (Responding to Defendants' Proposed Findings, Section D.4, pp. 91-92) ... 14

5. The Failure to Disclose that Diercksen Appointed Incompetent Officers is Material (Responding to Portions of Defendants' Proposed Findings, Section E, pp. 96-101) ... 16

6. Growth predictions that were knowingly false when made, and concealment of the facts that prove the predictions' falsity, are material 18

7. Ms. Taylor Is The Only Reliable Expert (Responding to Defendants' Proposed Findings, Section E.2, pp. 103-110) 20

   a. No "event study" – Responding to Defendants' Proposed Findings at 103-04, ¶ 60 20

   b. "Double Digit Declines" – Responding to Defendants' Proposed Findings, at 105, ¶ 63 21

   c. DCF Analysis and Company Specific Risk Premium – Responding to Defendants' Proposed Findings, at 106-07 22

   d. Taylor's Discount Rate – Responding to Defendants' Proposed Findings at 106 23

   e. Not Tailored for Litigation – Responding to Defendants' Proposed Findings at ¶ 68 24

   f. Taylor is Qualified – Responding to Defendants' Proposed Findings at p. 107, ¶ 70 24

CERTIFICATE OF SERVICE 27

TABLE OF AUTHORITIES

Page(s)

CASES

Arrieta v. Yellow Transportation, Inc.,
No. 3:05-CV-2271-D, 2009 WL 129731 (N.D. Tex. Jan. 20, 2009)..7

Bushman v. Seiler,
755 F.2d 653 (8th Cir. 1985) 7

Coal. For a Healthy California v. FCC,
87 F.3d 383 (9th Cir. 1996) 6

Delaware Open MRI Radiology Assocs., P.A. v. Kessler,
898 A.2d 290 (Del. Ch. 2006)...22

Eisenberg v. Gagnon,
766 F.2d 770 (3d Cir. 1985)..20

FCC v. Pacifica Found,
438 U.S. 726 (1978)..6

Fener v. Op. Eng'rs Const. Indus. and Misc. Pen. Fund (Local 66),
579 F.3d 401 (5th Cir. 2009) 13, 20

Fliegler v. Lawrence,
361 A.2d (Del. 1976) 10

Geddes v. Northwest Mo. State Univ.,
49 F.3d 426 (8th Cir. 1995) 8

Golden v. Zwickler,
394 U.S. 103 (1969)..6

Holston Inv. Inc. v. Lanlogistics, Corp.,
2010 WL 24954134 (S.D. Fla. June 18, 2010) 23

Hunter TBA, Inc. v. Triple V Sales,
250 F.R.D 116 (E.D.N.Y. 2008) 9

In re Iridium Operating LLC,
373 B.R. 283 (Bankr. S.D.N.Y. 2007) 13, 15, 24

In re Nellson Nutraceutical, Inc.,
2007 WL 201134 (Bankr. D. Del. Jan. 18, 2007) 22, 23

In re Old CarCo LLC,
435 B.R. 169 (Bankr. S.D.N.Y. 2010) 13

In re Oracle Corp. Sec. Lit.,
2009 WL 1709050 (N.D. Cal. Jun. 19, 2009) 13

In re Wells Fargo Sec. Litig.,
12 F.3d 922 (9th Cir. 1993) 17

Int'l Painters & Allied Trades Indus. Pension Fund v. ZAK Architectural Metal & Glass LLC,
736 F. Supp. 2d 35 (D.D.C. 2010) 9

Isquith v. Middle South Utilities, Inc.,
847 F.2d 186 (5th Cir. 1988) 19

James River Ins. Co. v. Rapid Funding, LLC,
658 F.3d 1207 (10th Cir. 2011) 14

Krim v. BancTexas Group, Inc.,
989 F.2d 1435 (5th Cir. 1993) 19, 20

Laxton v. Gap, Inc.,
333 F.3d 572 (5th Cir. 2003) 7

Martin Midstream Partners v. Boone Towing Inc.,
207 Fed. Appx. 439 (5th Cir. 2006) 6

MCI Telecomms. Corp. v. Wanzer,
897 F.2d 703 (4th Cir. 1990) 14

Milton H. Greene Archives, Inc. v. Julien's Auction House LLC,
345 Fed.Appx. 244 (9th Cir. 2009) 14

Nelson v. Walnut Inv. Partners, L.P.,
2011 WL 2711318 (S.D. Ohio July 13, 2011) 23

Orman v. Cullman,
794 A.2d 5 (Del. Ch. 2002) 10

Primrose Op. Co. v. Nat'l Am. Ins. Co.,
382 F.3d 546 (5th Cir. 2004) 15

Raab v. General Physics Corp.,
4 F.3d 286 (4th Cir. 1993) 19, 20

Rosenzweig v. Azurix Corp.,
332 F.3d 854 (5th Cir. 2003) 16, 17

Russell v. McKinney Hosp. Venture,
235 F. 3d 219 (5th Cir. 2000) 5, 7

Segrets, Inc. v. Gillman Knitwear Co.,
207 F.3d 56 (1st Cir. 2000)....................7

Serabian v. Amoskeag Bank Shares, Inc.,
24 F.3d 357 (1st Cir. 1994)....................17

Shapiro v. UJB Fin. Corp.,
964 F.2d 272 (3d Cir. 1992)....................17

U.S. v. 242.93 Acres of Land More or Less,
2012 WL 579503 (S.D. Cal. Feb. 22, 2012)....................14, 15

U.S. v. Davis,
226 F.3d 346 (5th Cir. 2000) 19

United States v. Skilling,
554 F.3d 529 (5th Cir. 2009), *aff'd in part and vacated in part, Skilling v. United States*, 130 S.Ct. 2896 (2010) 17, 20

VFB, LLC v. Campbell Soup Co.,
2005 WL 2234606 (D. Del. Sept. 13, 2005) *aff'd*, 482 F.3d 624 (3rd Cir. 2007).......11, 12, 24

Virginia Bankshares, Inc. v. Sandberg,
501 U.S. 1083 (1991)....................17

Weber v. Gainey's Concrete Prods., Inc.,
159 F.3d 1356 (5th Cir. 1998) 6

Weinberger v. UOP, Inc.,
457 A.2d 701 (Del. 1983) 11

OTHER AUTHORITIES

Delaware General Corporation Law, Section 141(f) 10

FED. R. CIV. P. 12(b) & 12(c)....................9

FED R. CIV. P. 37(c)(1)....................15

FED. R. CIV. P. 56....................9

FED. R. EVID. 801(c) 13

Pratt, Shannon P., et al., *Valuing a Business* (5th ed. 2008)....................23

Restatement (Second) of Torts § 538 (1976)....................19

Plaintiff U.S. Bank National Association, Litigation Trustee of the Idearc Inc., *et al* Litigation Trust, ("U.S. Bank" or "Plaintiff") files this Brief in Response to Defendants' Joint Post-Trial Brief ("Post-Trial Brief") [ECF 636].

I. Introduction

Year after year, VIS (the yellow pages business) had posted approximately 5% overall declines in revenue. Year after year, VIS had suffered double digit declines in the North East market, its largest market and the one most sensitive to internet competition. Year after year, VIS created forecasts or "plans" that it missed dramatically. In 2005, VIS was in 'harvest mode" and had been for years when Seidenberg, Diercksen and Xu teamed up to spin-off a sinking ship into the sea of commerce manned by an incompetent crew. Marketed to the world as a "growth" company in the process of turning itself around, Idearc's stock enjoyed incredible and unrealistic prices on the strength of "negotiated" projections of future profits and events concocted to serve as one time excuses used to justify "turn around stories" to explain past disappointments. These inflated stock prices continued for a while as Kathy Harless and her crew fed the same "guano" to the investing public that they had fed to the New Board before the New Board took over from Defendant Diercksen. While to the public all was proceeding according to plan, the real truth was that Ms. Harless was at war with her CEO, Mr. Coticchio. To help continue the myth of growth after the spin, Harless moved the job of underwriting the credit worthiness of customers from Finance to Sales, an "internal affair" as Dee Jones described it at trial, and one not to be disclosed to the investing public. But Diercksen, he knew better. He knew about rampant credit issues. He had "seen that movie before." Coticchio was fired in Fall of 2007. Harless was fired on Valentine's Day, 2008. Mueller, formerly the acting chairman of the board, briefly took over

the reigns as CEO only to resign weeks later. Then Idearc cast about until it filed for bankruptcy protection.

This was the case tried in this Court, but Defendants' brief is written with such an arrogant pen that it assumes Defendants have already prevailed in Phase I. Defendants boldly ask this Court to make advisory opinions that Plaintiff's case was so baseless that the Court would have directed verdict if only there had been a jury – all to assist Defendants in an appeal they predict they must defend. Plaintiff does not presume to know how this Court has resolved the issues of fact adduced in two weeks of testimony and involving thousands of documents, but this case is meaty and has been ably presented. This Court even observed in its Order denying Defendants' summary judgment motions that serious issues of disputed facts deserved to be tried, and tried they were.

II. Arguments and Authorities

A. The Court Should Deny Defendants' Request For An Advisory "Directed Verdict"

At trial, Plaintiff presented much of the same evidence that the Court considered when denying Defendants' motions for summary judgment. The evidence at trial included even more evidence corroborating that Idearc's value was less than $9.1 billion – *e.g.*, the testimony of Verizon's CEO, Ivan Seidenberg, that he knew before the Spin-off that Idearc could not be changed into a growth company; and Defendant Diercksen's admission that he knowingly appointed incompetent officers to manage Idearc after the Spin-off. In the order denying Defendants' summary judgment motions, the Court found that "a reasonable factfinder could determine that Idearc was either worth more or less than $9.1 billion." *Memorandum Opinion*

and Order [ECF 523], pp. 17-18.[1] Despite the Court's ruling, Defendants urge the Court to provide them with an advisory and wholly inconsistent directed verdict finding that no reasonable finder of fact could conclude that Idearc's value was less than $12.8 billion. The Court denied Defendants' motions for judgment during Phase I of the trial. *Trial Tr.*, Vol. 5B at 65:2; *Trial Tr.*, Vol. 10B at 68:4-5, 68:14-18, 69:16-18; *see also Defendants' Joint Notice of Intent to Renew Motion for Judgment under Rule 52(c)* [ECF 607], pp.3-4 (seeking directed verdict to benefit the Fifth Circuit and "enhance judicial economy"). Not to be deterred though, Defendants yet again renew their request in their Post-Trial Brief.

Even a brief review of the evidence presented during Phase I demonstrates the folly of Defendants' claim that the record would not permit a reasonable fact finder to conclude the market value of Idearc's stock was inflated on the date of the Spin-off. For example, it was undisputed during Phase I that no one ever disclosed to the market any of the following material facts that negatively impacted Idearc's value:

1. Despite the "turnaround" story that Verizon presented to the market, Verizon's CEO, Ivan Seidenberg, knew before the Spin-off that it was not possible to make Idearc a growth company. *See Trial Tr.* Vol. 6A, pp. 103:24 – 104:2 ("We tried to stabilize it, but we were unable to change the fact that it was not a growth company.").

2. Recognizing pre-Spin-off that the directory business would remain in decline, Verizon placed it in "harvest mode" for three years before the Spin-off. *See Px* 1161.

3. Idearc's lone director before the Spin-off, Defendant John Diercksen, knowingly appointed individuals to serve as Idearc's officers even though Diercksen believed they were incompetent and that they had already reduced the value of Verizon's directory business by more than $5 billion. *See Px 869*; *Trial Tr.* Vol. 2A, pp. 64:14 – 65:2 (Ms. Harless, Mr. Coticchio, Mr. Jones, Mr. Mundy and the entire directory business organization were part of the "rising tide of incompetence").

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[1] *Memorandum Opinion and Order* [ECF 523], pp. 17-18 (citing (1) Verizon's internal analysis suggesting a $6.5 billion value, (2) the McKinsey report casting doubt on Verizon's projections, (3) internal Verizon emails suggesting that Verizon did not believe Idearc would be a flourishing business, and (4) Carlyn Taylor's expert opinion).

4. Before the Spin-off, Verizon knew that the "turn around" strategies it presented to the market as the means for reversing the directory business' revenue declines would not work because Verizon had already tried the strategies and they did not work. *See Px* 45 ("VIS' initiatives to-date to fend off competition . . . haven't been successful . . . we have already tried (and possibly exhausted) organic turnaround strategy . . .."); *Px* 181 (McKinsey's recommended turn around strategies – hiring more sales people, more advertising, etc… -- were not "anything knew" for Verizon's directory business).

5. Verizon knew the projections of Idearc's future financial performance presented to Idearc's lenders and the ratings agencies were unrealistic and not credible because the projections were prepared by the same people that prepared grossly inaccurate projections in each of the five years leading up to the Spin-off. *See Px 27*, p. 21; *Taylor, Trial Tr.* Vol. 3A at 74:16-75:9.

6. Despite Verizon's representations to the lenders and ratings agencies that growth in Idearc's electronic business would offset future declines in Idearc's print business, Verizon knew this was not true. *See Px 27*, p. 26 (electronic initiatives have not resulted in revenues and it is "unlikely that VIS will be able to reorient strategy again").

Contrary to Defendants' assertion, the evidence presented during Phase I demonstrates that no reasonable juror could conclude that the trading price of Idearc's stock accurately reflected Idearc's true value on November 17, 2006. Those trading Idearc's stock were unaware of material facts regarding Idearc's business. This is why Carlyn Taylor, the only expert witness during Phase I with experience in the telephone directory business, concluded that Idearc's value cannot be determined from the market price of Idearc's stock because she had never seen such blatant concealment of facts from the market. Even though Defendants spent more than $7 million to purchase expert testimony, Defendants could not find a single expert witness with experience in the telephone directory business to testify that the concealed facts were immaterial to Idearc's value. Not one defense expert had any relevant experience in the directories business.

Moreover, although Defendants called to testify investment bankers reliant upon Verizon for continuing business, they notably chose not to call Sophia Xu or Diercksen to testify in their case in chief regarding why any of the facts listed above were immaterial to Idearc's value.

Defendants made this decision after having said they would recall Mr. Diercksen to testify during their case. *Trial Tr.* Vol. 2B, p. 71:2 – 71:8. Thus, although Defendants had under their control the two people who were in charge of Idearc's Spin-off, Defendants did not call either to testify about Idearc's value or the facts Defendants concealed from the market.

To obtain an advisory ruling about whether the Court would have granted a directed verdict motion in a jury trial, Defendants effectively ask the Court to either ignore or find non-credible the documentary and testimonial evidence Plaintiff presented at trial. This is evidence the Court already determined would enable a reasonable fact finder to "determine that Idearc was either worth more or less than $9.1 billion." *Memorandum Opinion and Order* [ECF 523], pp. 17-18. Further, the Court already informed Defendants that Rule 50 does not permit a court to "make credibility determinations and evaluate the strength or weaknesses of the plaintiff's case." *Trial Tr.*, Vol. 10B at 69:3-7; *see also Trial Tr.*, Vol. VB at p. 63:12-18 ("[I]n a Rule 50 context, I have to assume that the jury as the fact-finder would believe all of the evidence produced by the party with the burden of proof and decide that, notwithstanding that, the opposing party would be entitled to judgment as a matter of law."); *Russell v. McKinney Hosp. Venture*, 235 F. 3d 219 (5th Cir. 2000) ("Reviewing all of the evidence in the record, we must draw all reasonable inferences in favor of the nonmoving party, and we may not make credibility determinations or weigh the evidence.") (internal quotations omitted).[2] Defendants' request that the Court entirely ignore Plaintiff's evidence flies in the face of this standard.

Moreover, given that directed verdicts apply only in *jury* trials, Defendants' request is wholly inappropriate here – where the Court conducted a *bench* trial on a single fact issue. Defendants therefore are not entitled to a judgment as a matter of law.

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[2] *See also Defendants' Proposed Findings*, p. 115, ¶84-86 (seeking findings in connection with Rule 50 motion that "Plaintiff has no credible evidence") & pp. 112-13, ¶79 ("The court must not make credibility decisions or weigh the evidence in making its determination," citing *Kilchrist,* 2012 WL 3599383 at *4).

1. Defendants Are Not Entitled to an Advisory "Directed Verdict"

Rule 50(a), which provides for judgment as a matter of law, is inapplicable in a bench trial. *Martin Midstream Partners v. Boone Towing Inc.*, 207 Fed. Appx. 439, 440 (5th Cir. 2006); *Weber v. Gainey's Concrete Prods., Inc.*, 159 F.3d 1356 n.1 (5th Cir. 1998). Nevertheless, Defendants improperly ask the Court to exceed the boundaries of Rule 52 and enter an advisory "directed verdict" under Rule 50(a).

The Court has consistently declined to make advisory rulings throughout the case. *See Trial Tr.*, Vol. 3B at 4:22-6:1 (declining request for ruling and explaining that "anything I told you now would be an advisory opinion"); *see also Golden v. Zwickler*, 394 U.S. 103, 108 (1969) ("[T]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions."); *Coal. For a Healthy California v. FCC*, 87 F.3d 383, 383 (9th Cir. 1996) (*citing FCC v. Pacifica Found*, 438 U.S. 726, 734-35 (1978) ("[F]ederal courts have never been empowered to issue advisory opinions.")). At the very least, such a finding would constitute mere *dicta*, which is of no value to the appellate court. The Court should, therefore, decline Defendants' request.

2. Defendants' Requested "Finding" Would Not Assist the Fifth Circuit

Although Defendants dress up their request with language about increasing judicial efficiency, they overtly acknowledge that their goal is to game the system by preventing appellate review of a critical issue. *See Defendants' Post-Trial Brief*, p. 3 (asking the Court to "assist" the Fifth Circuit by "moot[ing] what Plaintiff has indicated is likely to be its principal argument on appeal if this Court enters judgment for Defendants: that this Court should not have stricken Plaintiff's demand for a jury trial."). Defendants' effort to usurp the Fifth Circuit's appellate function is entirely futile, further undermining their "judicial economy" argument.

Even if Defendants were able to convince the Court to take on the role of advocating Defendants' case by providing advisory opinions, the Fifth Circuit would review an advisory directed verdict finding *de novo*. *Russell*, 235 F. 3d at 222 (5th Cir. 2000); *Laxton v. Gap, Inc.*, 333 F.3d 572, 577 (5th Cir. 2003); *see also Defendants' Proposed Findings*, p. 112, ¶78 ("the Court's finding would be reviewed *de novo*"). This is because the Fifth Circuit must independently assess all evidence presented at trial to determine whether a "directed verdict" is appropriate.[3] Consequently, granting an advisory ruling to Defendants would not even serve the purpose advanced by Defendants. The Court should deny Defendants' request for such ruling and reject their proposed Conclusions of Law Nos. 73-82.

3. Defendants Also Cannot Establish Their Entitlement to Judgment Under Rule 52(c) Regarding the Issue of Valuation

Defendants' request for a Rule 52 judgment on valuation[4] is likewise unsupported.

The Court has twice rejected Defendants' motion for a 52(c) judgment. There is no reason (and certainly none cited by Defendants) to reconsider that ruling. *See Memorandum Opinion and Order* [ECF 459] (in which the Court stated that motions for reconsideration "are only appropriate to allow a party to correct manifest errors of law or fact or to present newly discovered evidence." (citing *Arrieta v. Yellow Transportation, Inc.,* No. 3:05-CV-2271-D, 2009 WL 129731, *1 (N.D. Tex. Jan. 20, 2009)).

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[3] Additionally, Defendants do not cite a single case in which a trial court made a hypothetical Rule 50 finding after a bench trial. The two principal cases on which Defendants rely, *Segrets, Inc. v. Gillman Knitwear Co.*, 207 F.3d 56 (1st Cir. 2000) and *Bushman v. Seiler*, 755 F.2d 653 (8th Cir. 1985), are inapposite. In *Segrets*, the appellate court expressly conducted its own review of the record to determine whether a directed verdict could have been granted. The *Bushman* court simply determined that a motion to dismiss—considered by the district court as a motion for directed verdict—was appropriate because the defendant was protected by immunity as a matter of law.

[4] Defendants make only passing reference to Rule 52 in their Brief, *see* Defendants' Brief at 6, but their proposed Conclusions of Law seek a judgment that "Idearc's fair market value was at least $12.8 billion on the date of the Spin-Off." *See* Defendants' Findings of Fact at pg. 116, ¶ 87.

Rule 52(c) applies in bench trials only in very limited circumstances. *See* FED. R. CIV. P. 52(c); *Geddes v. Northwest Mo. State Univ.*, 49 F.3d 426, 429 n.7 (8th Cir. 1995). Rule 52(c) provides:

> If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party *on a claim or defense* that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).

FED. R. CIV. P. 52(c) (emphasis added).

Thus, Rule 52(c) authorizes judgment on claims or defenses, not fact issues such as value. Indeed, recognizing that no actual claims were to be decided during Phase One, Defendants ask for a Rule 52 judgment not on any claim—as contemplated by the Rule—but on the *issue* of valuation: that "Idearc's fair market value was at least $12.8 billion on the date of the Spin-Off." *See Defendants' Proposed Findings*, p. 116, ¶87.

Under the plain language of the Rule, judgment can only be entered on a "claim or defense," not an "issue" such as valuation. Defendants fail to cite a single case granting a Rule 52 judgment on an issue (as opposed to a claim) and Plaintiff has identified none. Accordingly, Defendants' request for a Rule 52 judgment on the issue of Idearc's value is unfounded and the Court should reject their proposed Conclusions of Law Nos. 83-87.

B. Defendants Cannot Shift the Burden to Plaintiff to "Show Cause" Why Defendants Are Not Entitled to Judgment

On pages 7 – 13 of their Post-Trial Brief, Defendants place the proverbial "cart before the horse" by asking the Court to require Plaintiff to show cause why Plaintiff's claims should not be dismissed if the Court resolves Phase I in Defendants' favor. Not only is their request premature because the Court has not yet issued its Phase I finding, Defendants advocate a novel procedure

not authorized by the FEDERAL RULES OF CIVIL PROCEDURE. Although the Rules include various procedures for defendants to seek dismissal of a plaintiff's claims by filing a motion specifying the basis for dismissal, the Rules do not include a means by which a defendant may reverse that procedure and require a plaintiff to show cause why the plaintiff's claims should not be dismissed. *See* FED. R. CIV. P. 12(b) & 12(c) (pre-trial motions to dismiss); FED. R. CIV. P. 56 (motion for summary judgment). The Court is not faced with one of the limited circumstances in which a party may be required to show cause why an adverse order should not be entered against the party, such as contempt of a court order or failure to comply with a subpoena. *See, e.g.*, *Int'l Painters & Allied Trades Indus. Pension Fund v. ZAK Architectural Metal & Glass LLC*, 736 F. Supp. 2d 35, 38 (D.D.C. 2010) (in civil contempt proceeding, the burden to show cause why a finding of contempt should not be entered shifts to the respondent after the movant establishes that the respondent failed to comply with a court order); *Hunter TBA, Inc. v. Triple V Sales*, 250 F.R.D 116 (E.D.N.Y. 2008) (judgment debtor ordered to show cause why he should not be held in contempt after the judgment creditor established the debtor's failure to comply with a subpoena) Thus, Defendants' request that the Court require Plaintiff to show cause is unfounded.

Defendants also incorrectly assert that a finding in Phase I that Idearc was worth $12.8 billion on November 17, 2006, would lead to dismissal of all of Plaintiff's claims. Although Defendants are wrong, Plaintiff will not respond here to Defendants' arguments regarding each of Plaintiff's claims because the issue is not yet ripe for consideration.

C. Response To Certain Improper Requests For Legal Conclusions

Let's face it. Defendants' "Proposed Legal Conclusions" are in fact a brief under a different name. Plaintiff is simply unable to respond to Defendant's fifty pages of erroneous

briefing within these twenty-five pages. While Plaintiff does not have space to respond to all of the errors in Defendants' "proposals," space does permit the following.

1. Defendants Have the Burden Of Proof To Show Idearc's Value As Of The Date Of The Spin (Responsive to Defendants' Proposed Findings, Section A.1.)

Defendants have the burden of proof with respect to Plaintiff's unlawful dividend and breach of fiduciary duty claims, among others. With respect to the breach of fiduciary duty claims, because Diercksen stood on both sides of the Spin-off transaction while he was a Verizon officer and Idearc director, Defendants bear the burden to prove the "entire fairness" of the Spin-off to Idearc. *See, e.g., Orman v. Cullman*, 794 A.2d 5, 22-24 & 29-31 (Del. Ch. 2002) (directors bore the burden to establish the entire fairness of the transaction at issue because they received compensation from the majority shareholder through consulting and other arrangements); *see also Fliegler v. Lawrence*, 361 A.2d, 218, 221 (Del. 1976) (defendants who served as officers and directors of both corporations involved in a transaction, and were also shareholders of one company, bore the burden to demonstrate the "intrinsic fairness" of the transaction).

Diercksen was both a Verizon officer and an Idearc director when he (a) purportedly enacted a resolution of the Idearc board of directors on October 31, 2006 approving the Spin-off and authorizing an Idearc officer to sign the Distribution Agreement under which the Spin-off would occur; and (b) directed Verizon's Spin-off efforts and signed that Distribution Agreement on November 13, 2006 on behalf of Verizon (while still Idearc's sole director).[5]

The Delaware Supreme Court explained the heavy burden the entire fairness standard places upon a defendant:

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[5] *Trial Tr.* Vol. 2B at 63:10-64:14, 64:22-65:4, 67:13-17; *Px* 893 (Consent in Lieu of Meeting of the Board of Directors of Idearc, Inc. Pursuant to Section 141(f) of the Delaware General Corporation Law, authorizing Spin-off as Idearc's sole director); *Px* 985, pp. 34-35 of 35 (Distribution Agreement, signature pages).

> When directors of a Delaware corporation are on both sides of a transaction, they are required to demonstrate their *utmost good faith and the most scrupulous inherent fairness of the bargain*. The requirement of fairness is unflinching in its demand that where one stands on both sides of a transaction, he has *the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts.*
>
> There is no dilution of this obligation where one holds dual or multiple directorships, as in a parent-subsidiary context. Thus, individuals who act in a dual capacity as directors of two corporations, one of whom is parent and the other subsidiary, owe the same duty of good management to both corporations, and in the absence of an independent negotiating structure…, or the directors' total abstention from any participation in the matter, this duty is to be exercised in light of what is best for both companies.

Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983) (emphasis added). Here, the value of the directory assets, insolvency of Idearc, and the existence of surplus are clearly key to the transaction's fairness, an issue on which *Defendants* bear the burden of proof.

With respect to Plaintiff's unlawful dividend claim, the Court has already determined that Defendants have the burden of proof. In its September 14, 2012 Memorandum Opinion and Order, the Court held:

> Therefore, if the Defendants can establish at trial that Idearc had sufficient surplus at the time of the spin-off to declare the dividend, then the alleged dividend from Idearc to Verizon will have complied with the Delaware statutory scheme, . . .

ECF 523 at 48.

2. The Price of Idearc's Stock on November 16, 2006 Is Not Indicative of Idearc's Value (Responding to Defendants' Proposed Findings, Sections C and D, pp. 81-84)

In its Post-Trial Brief [ECF 638], Plaintiff established that the evidence and case law support the Court's reliance on valuation methods applied by Plaintiff's expert Carlyn Taylor, rather than Idearc's stock price, to determine Idearc's value as of the Spin-off. Defendants rely almost exclusively on *VFB, LLC v. Campbell Soup Co.*, 2005 WL 2234606 (D. Del. Sept. 13, 2005) *aff'd*, 482 F.3d 624 (3rd Cir. 2007) to support their argument that "the price of Idearc

common stock as traded on the New York Stock Exchange establishes the fair market value of Idearc" on November 17, 2006. The fact is, however, that the *Campbell Soup* decisions do not support Defendants' position.

In *Campbell Soup*, the trial court stated that "the value the market placed on the . . . business is of utmost importance, but the legitimacy of the value necessarily depends on what information the market had when the shares in question were being traded." 2005 WL 2234606 at *11. On appeal, the Third Circuit stated that "[a]ll agree that if the market capitalization was inflated by Campbell's manipulation it was not good evidence of value . . . ." 482 F.3d at 632. In fact, the *Campbell Soup* courts *did not* rely on the spun company's stock price at the time of the spin. *Id.* Instead, the trial court determined that at that time, Campbell's concealment of various facts manipulated the market, making market capitalization on the spin date untrustworthy. *Id.* As a result, the court examined market capitalization several months later when the truth had been revealed. *Id.*

Here, the highly material, relevant information about Idearc that Verizon withheld from the public market before the spin was *never* disclosed, and until this litigation, the true facts of Idearc's pre-spin condition were *never* known to the public. There is *no* evidence that the public ever knew the fact that Idearc's management's forward-looking projections were consistently unreliable. There is *no* evidence that the public ever knew that Idearc could not become a growth company and that Idearc's turnaround story could not work. There is *no* evidence that the public ever knew that Idearc's sole director knowingly appointed incompetent management to run Idearc, which management had already diminished Idearc's value by more than $5 billion.

Because Defendants failed to disclose crucial facts about Idearc to the public market, both before and after the Spin-off, Idearc's stock price was artificially high at the time of the

Spin-off and for months thereafter until it filed bankruptcy. Thus, Idearc's stock price on November 17, 2006 is not a reliable basis for determining Idearc's value as of that date.

3. Analyst Reports and Credit Memoranda Are Inadmissible Hearsay (Responding to Defendants' Proposed Findings, Section D.3, pp. 87-90)

Defendants introduced a plethora of analyst reports and credit memoranda, with no sponsoring witness, as purported evidence of Idearc's value. *See, e.g., Defendants' Proposed Findings,* pp. 23-25, 35-40. These out-of-court statements regarding Idearc's value, offered by Defendants for their truth, are classic hearsay. FED. R. EVID. 801(c); *In re Oracle Corp. Sec. Lit.*, 2009 WL 1709050, *8 (N.D. Cal. Jun. 19, 2009) (excluding out-of-court analyst reports as hearsay); *see also Fener v. Op. Eng'rs Const. Indus. and Misc. Pen. Fund (Local 66)*, 579 F.3d 401, 409 (5th Cir. 2009) ("analyst reports . . . contain little more than well-informed speculation"). The Court may not rely upon such evidence when determining Idearc's value.

The cases Defendants cite confirm this axiom. In *Iridium*, for example, "the Court [did] not accept [underwriter] valuations as true," reasoning that "[t]hese underwriter valuations fall into the category of anecdotal information that does not prove solvency or establish enterprise value." *In re Iridium Operating LLC*, 373 B.R. 283, 332 (Bankr. S.D.N.Y. 2007). Because out-of-court "assessments of value by analysts [could] not establish the value of Iridium," the "analyst reports were not admitted into evidence for the truth of the conclusions reached regarding Iridium's enterprise value." *Id.* at 349; *see also In re Old CarCo LLC*, 435 B.R. 169, 193-94 (Bankr. S.D.N.Y. 2010) (considering market evidence to determine whether Daimler acted with fraudulent intent, not as evidence of CarCo's value).

4. Rule 701 Does Not Permit Lay Opinion Testimony Regarding Idearc's Value (Responding to Defendants' Proposed Findings, Section D.4, pp. 91-92)

Testimony regarding Idearc's enterprise value exceeds the scope of lay opinion testimony allowed under Rule 701 and is thus subject to the strictures of Rule 702.[6] Under Rule 701, lay opinions as to value must be based on the witness's "particularized knowledge" as a result of his position, and not on "experience, training or specialized knowledge within the realm of an expert." FED. R. EVID. 701, Advisory Committee Note to 2000 Amendments; *U.S. v. 242.93 Acres of Land More or Less*, 2012 WL 579503, at *2 (S.D. Cal. Feb. 22, 2012). Defendants cannot meet that standard.

Any opinion testimony by the investment bankers and lenders Defendants called (Mrs. Nason, Mr. Decker, Mr. Smith, Mr. Yourkoski) exceeds the scope of Rule 701 and should have instead been offered as an expert opinion pursuant to Rule 702. *242.93 Acres of Land*, 2012 WL 579503, at *2; *see also James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207, 1215 (10th Cir. 2011) (concluding that owner's valuation testimony as to the value of the insured building should not have been admitted as lay opinion testimony under Rule 701 where, *inter alia*, the witness's calculations "were based in part on his professional experience in real estate").

The opinions of the other advisors to Verizon and Idearc in the Spin-off are similarly inadmissible. Mr. DeRose, who provided a solvency analysis and report on Idearc at the time of the Spin-off, is certainly subject to the expert requirements of Rule 702. In forming his opinion of Idearc's value, Defendants contend that "Mr. DeRose . . . carefully analyzed Verizon's directories business . . . and provided a written opinion that Idearc would be solvent under all

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[6] Rule 701 only applies to live testimony and provides no basis for the admission of out-of-court hearsay statements contained in analyst reports and credit memos. *See* FED. R. CIV. P. 701 ("Opinion Testimony by Lay Witness") (emphasis added). Indeed, the cases Defendants cite all involved witness testifying live. *See Milton H. Greene Archives, Inc. v. Julien's Auction House LLC*, 345 Fed.Appx. 244, 247 (9th Cir. 2009); *MCI Telecomms. Corp. v. Wanzer*, 897 F.2d 703, 706 (4th Cir. 1990).

three tests of solvency." Conclusions of Law at ¶ 33. Mr. DeRose's opinion, which Defendants claim "reflected his professional judgment based on his careful review of financial facts and data," clearly depended upon his experience, training, and specialized knowledge and is clearly within the realm of a valuation professional. *Id.* Accordingly, Mr. DeRose's testimony also exceeds the scope of Rule 701. *242.93 Acres of Land*, 2012 WL 579503, at *2.

Defendants did not identify Mr. DeRose, or any of the foregoing witnesses, as a testifying expert in compliance with Rule 26. *See Defendants' Joint and Supplemental Joint Rule 26(a)(2) Disclosures* [ECF 366 and 417]. At no time during trial did Defendants establish a foundation for the admissibility of these witnesses' opinions. "If a party fails to provide information . . . as required by Rule 26(a) or 26(e), the party is not allowed to use that information or witness . . . at a trial . . . ." FED R. CIV. P. 37(c)(1); *Primrose Op. Co. v. Nat'l Am. Ins. Co.*, 382 F.3d 546, 563 (5th Cir. 2004).

Verizon's and Idearc's attorneys (Mr. Rosen, Mr. Slutzky, and Mr. Rievman) are not qualified to give opinion testimony regarding Idearc's value because, as attorneys, they have no "particularized knowledge" regarding business valuation. FED. R. EVID. 701, Advisory Committee Note to 2000 Amendments; *242.93 Acres of Land*, 2012 WL 579503, at *2. And as *Iridium* makes clear, Mr. Rosen, Mr. Slutzky, and Mr. Rievman's actions in connection with the Spin-off are *not* evidence of Idearc's value and should "not [be] admitted into evidence for the truth of the conclusions reached regarding [Idearc's] enterprise value." 373 B.R. at 349.

The hearsay analyst reports containing opinions of the value of Idearc unsupported by any testimony from a live witness who prepared the reports, improper lay opinion testimony from lenders, investment bankers and professional advisors, and expert opinion testimony from

undisclosed experts regarding Idearc's value is inadmissible as evidence of Idearc's value for the reasons set forth above.

5. The Failure to Disclose that Diercksen Appointed Incompetent Officers is Material (Responding to Portions of Defendants' Proposed Findings, Section E, pp. 96-101)

Defendants rely on a single case—*Rosenzweig v. Azurix Corp.*[7] —for the proposition that Diercksen's knowing installation of incompetent management is not relevant to the value of Idearc. *Rosenzweig* stands for no such thing. The Fifth Circuit considered whether the district court had properly dismissed a securities fraud complaint. The prospectus at issue contained generic statements regarding, *inter alia*, the expertise of management." The court affirmed the complaint's dismissal because the plaintiffs had failed to allege that "defendants knew, or reasonably should have known, the statements were false or misleading *when made*."[8] The court also held that a "company's expressions of confidence in its management or business are not actionable, especially where, as here, *all historical information appears to be factually correct*."[9]

Rosenzweig is a red herring. It does not hold that an insider's assessments of the competence of management are irrelevant to a determination of value. Instead, it holds that a plaintiff fails to adequately plead securities fraud by alleging a defendant made untrue statements about management's qualification unless the plaintiff also alleged facts demonstrating the defendant knew the representations were not true. Here, Plaintiff established through a document authored by Diercksen before the Spin-off and through his trial testimony that Diercksen knew he had appointed incompetent management to run Idearc. Defendants misled the market to believe that the Idearc management was capable of executing a turnaround of a declining business and that the downturn in Verizon's yellow pages business was due to the 2003

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[7] 332 F.3d 854, 869 (5th Cir. 2003).
[8] *Id.* at 861 (emphasis in original).
[9] *Id.* at 869 (emphasis added).

separation of sales personnel, not bad management and other more fundamental reasons.[10] Plaintiff has presented ample evidence that these statements were not generalized puffery; they were material and knowingly false when made.[11]

Setting aside that this case is not one for securities fraud, *Virginia Bankshares, Inc. v. Sandberg*[12] and *United States v. Skilling*,[13] which were briefed in *Plaintiff's Post-Trial Brief* [ECF 638] at 20-22, are much more analogous. In *Skilling*, Mr. Skilling cited *Rosenzweig* to argue that his statements, even though false, were merely opinions that could not form the basis of liability.[14] The Fifth Circuit found *Rosenzweig* to be readily distinguishable:

> although Skilling correctly points out that "generalized, positive statements about [a] company's competitive strengths . . . and future prospects" can in some cases constitute immaterial puffery, such statements of opinion by corporate insiders are not *per se* immaterial . . . ***If Skilling honestly believed these predictions, then they would not be actionable. However, if Skilling did not honestly believe them, then . . . the jury could conclude that such statements were actionable statements of material fact.***[15]

As in *Virginia Bankshares*, Verizon's endorsement of Idearc's "incompetent" management was so contrary to the verifiable facts (e.g., Px 869) as to falsely "misstate the speaker's [true] reasons." 501 U.S. at 1090. As in *Skilling*, Plaintiff has shown that Defendants "did not honestly believe" in their public endorsement of Idearc's management at the time the endorsement occurred.[16] Defendants' lack of faith in Idearc management is undoubtedly

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[10] *See generally Px* 901.
[11] *See, e.g.*, *Px* 869, at 1; *Trial Tr.* Vol. 2A at 64:1-25; *Px* 322, at 1.
[12] 501 U.S. 1083, 1090 (1991).
[13] 554 F.3d 529 (5th Cir. 2009), *aff'd in part and vacated in part, Skilling v. United States*, 130 S.Ct. 2896 (2010).
[14] 554 F.3d at 552.
[15] *Id.* at 553, 555 (quoting *Rosenzweig*) (emphasis added); *see also, e.g.*, *Serabian v. Amoskeag Bank Shares, Inc.*, 24 F.3d 357, 364-65 (1st Cir. 1994) (deeming material defendant's statements that loan review capabilities were "strong" and allowance for loan losses were "sufficient"); *In re Wells Fargo Sec. Litig.*, 12 F.3d 922, 930 (9th Cir. 1993) (deeming material defendant's statements that loan loss reserves were "adequate" or "substantially secured"); *Shapiro v. UJB Fin. Corp.*, 964 F.2d 272, 282 (3d Cir. 1992) (deeming material defendant's statements that loan loss reserves were "adequate" or "solid").
[16] *See, e.g.*, *Px 869*, at 1; *Trial Tr.* Vol. 2A at 64:1-25; *Px* 322, at 1.

something that potential investors wanted to know, and should have been told. Jennifer Nason, one of the defense's witnesses, put it best:

> Q. But you agree that the competence of management is a significant factor in assessing whether or not to extend credit to a company, correct?
>
> A. Yes. I'm asked that question directly by my own credit committee.[17]

Defendants' public touting of Idearc's management as competent and capable of restoring Idearc as a growth company, when Defendants' undisclosed internal belief was directly to the contrary, is highly material in determining Idearc's value as of the Spin-off.

6. Growth predictions that were knowingly false when made, and concealment of the facts that prove the predictions' falsity, are material

Defendants realized that potential buyers of Idearc stock and debt would base the price they were willing to pay largely on Idearc's potential for growth.[18] Before the Spin-off, Defendants analyzed Idearc's growth potential and concluded that it faced a "significant risk of underperformance" and that a "turnaround was nowhere in sight."[19] Defendants hired McKinsey & Co., which determined that Idearc's prospects were *even worse* than the company itself had predicted.[20] Despite knowing that potential investors would rely on Idearc's growth prospects, Defendants concealed their many pessimistic growth analyses from the market and instead provided the market with unrealistic and unreasonable growth projections.[21] Defendants now ask this Court to find *as a matter of law* that none of these omissions and misstatements were material to the market. Defendants knew that growth potential was important to investors, so their misrepresentations and concealment of Idearc's true growth trajectory was material.

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[17] *Trial Tr.* Vol. 7A, at 129:9-13.

[18] *See Px 27*, Directories – Analysis of Alternatives, at 33 (the market's valuation of Idearc would "be very sensitive to growth expectations").

[19] *See, e.g.*, *Trial Tr.* Vol. 2A, 5:6-6:15; March 24, 2006 e-mail from Sophia Y. Xu to John P. Fitzgerald, John W. Diercksen and Philip Seskin [*Px* 243].

[20] *See Px 219*, March 17, 2006 e-mail from Laurence D. Fulton to John W. Diercksen; *Px* 213, Project Sunburst – Summary of Perspectives at 6.

[21] *See Plaintiff's Post-Trial Brief* [ECF 638] at 16-18.

The Fifth Circuit has defined a matter as material in the non-securities fraud context if:

(a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or

(b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.[22]

It is beyond dispute that a company's future growth potential is important to a reasonable investor's decision. Furthermore, Defendants *actually knew* that growth information would be important to Idearc investors.[23] Defendants' concealment of Idearc's bleak growth prospects was therefore material.[24]

Neither of Defendants' cases is to the contrary. These cases simply hold that a company is not liable when it predicts future events in good faith and to the best of its ability, even if the predictions later prove false. *See, e.g., Raab v. General Physics Corp.*, 4 F.3d 286, 290 (4th Cir. 1993) (unfair to impose liability on company for "loose prediction" of the future); *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1446 (5th Cir. 1993) (opinion made in good faith and with reasonable basis in fact not actionable when no evidence that management knew about the allegedly omitted information at time prospectus released). By contrast, Verizon released projections to the Spin-off underwriters, rating agencies, and "private siders" that it *knew* were uncoupled from reality and past performance.[25] Verizon knew that Idearc had never been able to accurately predict its own growth in the past and that a turnaround was "nowhere in sight"—information that Verizon failed to disclose and which made its growth projections for Idearc

[22] *U.S. v. Davis*, 226 F.3d 346, 358 (5th Cir. 2000) (quoting Restatement (Second) of Torts § 538 (1976)).
[23] *See Px* 27 (the market's valuation of Idearc would "be very sensitive to growth expectations").
[24] *See Plaintiff's Post-Trial Brief* [ECF 638] at 20-22. This conclusion would result even under the definition of "material" used in securities litigation, where a "material" fact is one which a reasonable investor would consider significant in the decision whether to invest, such that it alters the "total mix" of information available about the proposed investment. *See Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 207-08 (5th Cir. 1988); *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1445 (5th Cir. 1993).
[25] *See Plaintiff's Post-Trial Brief* [ECF 638] at 17.

false and misleading. These projections therefore were not Verizon's "best guess" (as in *Raab*), nor were they made in good faith and with a basis in fact (as in *Krim*). Rather, Verizon's selective release of unlikely predictions was material and intended to mislead.[26]

7. Ms. Taylor Is The Only Reliable Expert (Responding to Defendants' Proposed Findings, Section E.2, pp. 103-110)

a. No "event study" – Responding to Defendants' Proposed Findings at 103-04, ¶ 60. Defendants made this same "event study" argument in their pre-trial *Motion to Strike the Report and Testimony of Carlyn Taylor* [ECF 501, pp. 14-15]. The Court denied that Motion, subject only to "any new objections to this testimony that are raised at trial," *see Order* [ECF 559], at p. 2, and there is nothing new here. The facts remain, an event study is impossible because Verizon *never* disclosed the information it withheld from the market (*i.e.,* there is no disclosure "event" that can support an event study).[27] *See* Response, ¶ 37. Further, a regression analysis is unreliable when, as in this case, there is only one ostensible peer company (here, RH Donnelly) for comparison. *Id.* at ¶ 38. Taylor reiterated these points in her trial testimony. *Trial Tr.* Vol. 4B at 81:16-82:23.

At trial, Plaintiff presented numerous relevant, material facts concerning Idearc that Verizon failed to disclose to the market. *See Plaintiff's Amended Proposed Findings of Fact and Conclusions of Law* [ECF 637], ¶¶ 20-123 (summarizing evidence of material facts known by

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[26] *See Skilling*, 554 F.3d at 555 ("If Skilling honestly believed these predictions, then they would not be actionable. However, if Skilling did not honestly believe them, then they could" allow a jury to find him liable); *Eisenberg v. Gagnon*, 766 F.2d 770 (3d Cir. 1985) (statements relating to predictions or forecasts of future activity may be material misrepresentations if the prediction did not have a reasonable factual basis).

[27] The *Fener* case is inapposite for this reason. In that case, the plaintiffs sued for securities fraud, alleging that they bought a company's securities when the stock price was artificially inflated by the company's fraudulent overstatements of its newspaper circulation, and they were damaged when the company later corrected those statements and the stock price then dropped. *Fener v. Operating Eng'rs Constr. Indus. & Misc. Pension Fund (Local 66)*, 579 F.3d 401, 405 (5th Cir. 2009). The Fifth Circuit required proof that the stock price decline was caused by the company's revelation of truthful information that corrected the prior fraudulent statement. *Id.* at 406-07. Here, Verizon never disclosed the material, relevant information it withheld from the market. Thus, the cornerstone of the *Fener* case – the revelation of truthful information to correct a prior misrepresentation – is completely absent here.

Verizon about VIS that were never disclosed to the ratings agencies, lenders and other market participants), & ¶¶ 124-160 (Taylor's testimony of material facts withheld from the market). Based on her qualifications as a valuation expert and her experience as a licensed investment banker, Taylor stated that a company's stock price is a reliable measure of value only if all material, relevant information is disclosed to the market, and she concluded that that standard was not met in this case. *Trial Tr.* Vol. 3 at 55:1-57:4, 75:18-76:6. Her testimony was admissible and reliable.

Despite the fact that Defendants paid their experts more than $7 million, they were unable to show that the market was aware of these material facts. Moreover, they never controverted the fact that the misrepresentations and omissions would be considered material to the market.

b. "Double Digit Declines" – Responding to Defendants' Proposed Findings, at 105, ¶ 63. The crucial information regarding double digit revenue declines in the major markets *was never disclosed to the public*. Representatives of JP Morgan and Morgan Stanley admitted at trial that they did not share this information with any other market participants. *Trial Tr.* Vol. at 10A 17:17-19:10 (Kearns); *Trial Tr.* Vol. 9A at 49:13-50:2 (Yourkoski). Thus, the Court should not exclude or disregard Taylor's testimony that Verizon failed to disclose relevant information to the public market about VIS's drastic revenue declines in its major urban markets, and that such information would have been highly relevant to the market because trends in the larger markets are an early indicator of the eventual trend of VIS's overall business. *Trial Tr.* Vol. 4A at 12:6-21, 43:11-44:5, 45:4-46:21; *see also* DX 261 (Xu e-mail to Wilson dated 7/11/06: regional revenue information is "not something we put in Form 10 or roadshow.").

c. DCF Analysis and Company Specific Risk Premium – Responding to Defendants' Proposed Findings, at 106-07. Taylor's cash flow projections for the DCF analysis were reasonable. The Trend Case (the lowest projections in the range) was a mathematical extrapolation of the trend of VIS's actual historical performance from 2003-2006 and is consistent with standard valuation methods, which counsel against deviating from historical trends. The FTI Case (the mid-range projections) was based on Taylor's thorough investigation and analysis that corrected four errors in VIS's Base Case projections. And Taylor used Houlihan's projections (the HLHZ Downside Case) for the upper end of the range despite specific weaknesses identified by Taylor. *Trial Tr.* Vol. 4A at 72:8-21. In short, the cash flow projections underlying Taylor's DCF analysis are well-reasoned and far more credible than the Base Case projections, which were prepared by Verizon and VIS management who had a proven track record of failing to meet their projections during the five years preceding the Spin-off even after lowering successive projections in light of each prior year's failure. *See In re Nellson Nutraceutical, Inc.*, 2007 WL 201134, at *27 (Bankr. D. Del. Jan. 18, 2007) (adopting expert's projections "where the evidence clearly indicates that management created an unrealistic business plan for ulterior motives and management has a proven track record of projecting results inaccurately").

Taylor properly included a company-specific risk premium of 2% as a component of the overall discount rate of 9.75% used in her DCF valuation. Defendants cite *Delaware Open MRI Radiology Assocs., P.A. v. Kessler*, 898 A.2d 290, 339 (Del. Ch. 2006), for the court's quip that the company-specific risk premium "seems like [a] device" used by experts. Despite that comment, the court in that case actually adopted a valuation expert's company-specific risk premium of 2%, *id.* at 339-40, which is identical to the one Taylor used in this case. *See also,*

e.g., Holston Inv. Inc. v. Lanlogistics, Corp., 2010 WL 24954134, at *12-13 (S.D. Fla. June 18, 2010) (adopting company-specific risk premium of 3% as "conservative"); *Nellson Nutraceutical*, 2007 WL 201134, at *34 (applying company-specific risk premium of 4%).

Defendants' criticism of Taylor's company-specific risk premium as merely "a subjective judgment" is belied by her testimony about specific, objective disadvantages that affected Idearc (e.g., operations concentrated in low-growth, highly competitive urban markets; performance that lagged competitors; inexperienced management with a poor track record of projecting performance; and the Tax Sharing Agreement's restrictions on Idearc's ability to execute various strategic and financial options). *Trial Tr.* Vol. 4A at 76:15-77:2; *see also Nelson v. Walnut Inv. Partners, L.P.*, 2011 WL 2711318, at *5 (S.D. Ohio July 13, 2011) (court rejects assertion that expert's use of company-specific risk premium was solely a "subjective opinion"; expert relied on thorough review of objective company-specific data). Under the relevant valuation literature and standards, these risks justify the application of a company-specific risk rate in this case. *Trial Tr.* Vol. 4A at 76:15-22; Pratt, Shannon P., et al., *Valuing a Business* (5th ed. 2008), p. 202 (company-specific risk premium applicable when subject company faces unique risk characteristics, e.g., lack of management expertise, current competition, new competitors).

d. Taylor's Discount Rate – Responding to Defendants' Proposed Findings at 106. Finally, the discount rate (WACC) Taylor used – 9.75% – is essentially identical to the rate Verizon itself used in the valuation it performed in the summer of 2005. Verizon used a discount rate that weighted out to 9.25%. *Px* 27, p. 25. At that time, interest rates were 50 basis points (*i.e.*, one-half of one percent) lower than when Taylor performed her DCF calculation using a discount rate of 9.75%. *Trial Tr.* Vol. 5A at 48:3-10. After adjusting

for this interest-rate differential, the discount rates used by Verizon and Taylor are equivalent. Taylor's discount rate is hardly an "outlier," as Defendants allege.

e. Not Tailored for Litigation – Responding to Defendants' Proposed Findings at ¶ 68. In this case, unlike *Iridium*, Plaintiff presented substantial evidence—corroborated by Taylor's testimony—of numerous material, relevant facts that Verizon knew about Idearc but did not disclose to the market. *See Plaintiff's Proposed Findings*, ¶¶ 20-160; *supra*, Sec. II.A. For this reason, Defendants' reliance on *Iridium* and *Campbell Soup* is misplaced because in those cases, the courts determined that the public markets were properly informed either at or shortly after the transaction date, and, thus that the companies' stock market price was a reliable measure of their value. *Supra*, Sec. II.A.

Defendants' contention that Taylor based her DCF valuation on "'restated cash flow projections tailored for litigation purposes'" (*Defendants' Proposed Findings,* p. 107, ¶ 68, citing *Iridium*, 373 B.R. 293) is also false. The cash flow projections Taylor used for her DCF valuation were based on a thorough, well-reasoned analysis and included four corrections to Verizon's Base Case projections that were amply supported by Taylor's detailed explanation. *See Plaintiff's Proposed Findings*, [ECF 637], ¶¶ 192-213. *See also Trial Tr.* Vol. 4A at 119:8-120:11.

f. Taylor is Qualified – Responding to Defendants' Proposed Findings at p. 107, ¶ 70. Defendants propose that the Court find that Carlyn Taylor is "'qualified . . . by knowledge, skill, experience, training, or education' to offer opinion testimony in the area of valuation." *Defendants Proposed Findings* [ECF 635] p. 109, ¶ 70. Plaintiff agrees with this proposed finding.

Taylor's training and experience in securities, investment banking and capital markets (*Trial Tr.* Vol. 4A at 4:21-6:24) qualified her to testify about information that public markets would consider material and relevant and, thus, whether Verizon's failure to disclose such information undermines Idearc's stock price as a proper valuation method in this case. Taylor's experience in the telecommunications, media and Yellow Pages industries (*Trial Tr.* Vol. 3 at 14:12-16:12, 32:25-35:10) makes her particularly well-suited to opine on Idearc's value. Her experience with restructuring the debts of distressed companies (*id.* at 20:7-21:23, 30:1-24) bolstered her expertise in this case because, as Taylor testified, valuation is the key starting point for any financial restructuring. Taylor's experience with companies' "bad debt" expenses (*Trial Tr.* Vol. 4A at 69:21-70:6) supports her expertise in analyzing the "bad debt" expenses used in the projections for valuing Idearc under the discounted cash flow valuation methodology (*id.* at 68:5-70:9). Finally, Taylor's experience with transactions involving tax issues affecting the subject companies' marketability (*id*. at 111:4-112:3) qualified Taylor to evaluate the Tax Sharing Agreement's effect on Idearc's ability to engage in market transactions and thus assign proper weight (30%) to the valuation methods that presuppose market accessibility (*id*. at 109:3-110:9, 115:21-116:10). The fact is, Defendants examined Taylor on these matters. In fact, the Court overruled Defendants' objections to Taylor's qualification to testify about three of the matters identified by Defendants: (1) whether Verizon's internal negative conclusions about Idearc set forth in *Px* 27 would have been material and relevant to the public markets (*Trial Tr.* Vol. 4A at 13:4-14:1); (2) the Yellow Pages industry (*Trial Tr.* Vol. 3 at 37:1-10, 39:10-19); and (3) the Tax Sharing Agreement (*Trial Tr*. Vol. 4A at 110:14-22, 111:9-13).

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

CERTIFICATE OF SERVICE

On November 30, 2012, the undersigned electronically submitted the foregoing document with the Clerk of Court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the Court. The undersigned hereby certifies that all counsel and/or *pro se* parties of record have been electronically served in accordance with Federal Rule of Civil Procedure 5(b)(2).

/s/ David Taubenfeld

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