No. _____

In the Supreme Court of the United States

U.S. BANK NATIONAL ASSOCIATION,
LITIGATION TRUSTEE OF THE
IDEARC, INC., ET AL., LITIGATION TRUST,
Petitioner,

v.

VERIZON COMMUNICATIONS, INCORPORATED; GTE CORPORATION; JOHN W. DIERCKSEN; VERIZON FINANCIAL SERVICES, L.L.C.
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Seventh Amendment guarantees civil litigants the right to a jury trial in federal court. If demanded, a jury right cannot be lost without intentional waiver. In violation of the Seventh Amendment and in conflict with Rule 38, Rule 39 and precedent of other Circuits, the Fifth Circuit created a new unintentional waiver of jury rights arising from a litigant's purported failure to sufficiently "press" arguments in support of its jury demand.

The Fifth Circuit also held that a proof of claim filed in bankruptcy court extinguishes a Seventh Amendment jury right on actions tried in district court by a litigation trustee that is not a party to the claims-allowance process and received the claims in a confirmed bankruptcy reorganization plan. This holding violates Articles I and III, the Fifth and Seventh Amendments, conflicts with *Executive Benefits Ins. Agency v. Arkinson*, 134 S. Ct. 2165 (2014), *Stern v. Marshall*, 131 S. Ct. 2594 (2011), *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), and Circuit Court precedent, and calls into question the constitutionality of 11 U.S.C. § 502(d).

Therefore, the questions presented are:

1. Whether a party can forfeit a properly demanded Seventh Amendment jury right without intentional waiver of that right.

2. Whether a proof of claim and objection filed in bankruptcy court can constitutionally extinguish a right to a properly demanded jury on a private-right fraudulent transfer action brought in district court.

PARTIES TO THE PROCEEDING

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

Respondents are Verizon Communications, Incorporated, Verizon Financial Services, LLC, and GTE Corporation (referred to collectively as "Verizon" or the "Verizon entities") and John W. Diercksen.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Trustee discloses that the Trust does not have a parent company and there is no stock in the Trust. Only MatlinPatterson Global Opportunities Partners III LP and MatlinPatterson Global Opportunities (Cayman) III LP may own 10% or more of its beneficial interest.

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OPINIONS BELOW

The Fifth Circuit's opinion is reprinted at App. A and is reported at 761 F.3d 409 (5th Cir. 2014). The Fifth Circuit's unpublished order denying full court rehearing is reprinted at App. H. The district court's order striking the jury demand is reprinted at App. G and is unpublished. The district court's orders denying reconsideration of its jury demand strike and refusing to clarify the record are reprinted at App. E and F and are unpublished.

STATEMENT OF JURISDICTION

The Fifth Circuit entered judgment on July 30, 2014, and denied a timely petition for rehearing en banc on September 15, 2014. (App. B, H) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Question Presented 1 involves amendment VII of the Constitution and Federal Rules of Civil Procedure 7(a), 38(a)-(d), 39(a), and 46, which are reproduced in full in an appendix hereto. (App. I)

Question Presented 2 involves Article I, §§ 1, 8, Article III, § 1, amendment V, and amendment VII of the Constitution and Title 11, Section 502(d) of the United States Code, which are reproduced in full in an appendix hereto. (App. I)

INTRODUCTION

The Fifth Circuit made two rulings that severely restrict the fundamental right to trial by jury. One ruling creates uncertainty in jury demand and waiver procedures. The other ruling eliminates jury rights on fraudulent transfer actions in district court when a proof of claim is filed in bankruptcy court. Neither ruling passes constitutional muster.

It is well-established that a party desiring a jury trial need only make a timely jury demand. This constitutional right is fully protected unless the district court finds that there is no right to a jury under federal law. Further, a litigant who makes a timely jury demand is entitled to *de novo* review in the court of appeals of a district court's decision that there is no right to a jury. These uniform rules of trial and appellate procedure have been faithfully and consistently applied throughout federal courts, and any burdens or procedural hurdles imposed beyond a timely jury demand have been uniformly rejected. Until now.

The Fifth Circuit has engrafted new, significant, and unclear burdens on litigants seeking a trial by jury. Specifically, a district court may disregard a timely jury demand if it finds the demanding party failed to sufficiently "press" an argument in support of its jury demand. Here, the district court deemed a footnote in response to a footnote insufficient, thereby justifying its strike of Trustee's timely jury demand. This purported failure to sufficiently explain the basis for a right to a jury trial under federal law also excused the district court from making findings that no right to a jury existed under federal law. On appeal, the Fifth Circuit held that the right to *de novo* review required

the appellant to adequately "press" its legal arguments in the district court, permitting an unconstitutional jury strike to stand without review. Under this reasoning, a district court has broad discretion to determine on a case-by-case basis whether arguments are "sufficient" to establish a right to a jury—the exact opposite of the Rules' bright-line demand procedure designed to protect jury rights "inviolate."

The Court should grant review and resolve a conflict created by the Fifth Circuit as to whether the lower courts can impose procedural burdens in addition to a timely jury demand, shifting the motion practice burden set out in Rule 7 and excusing compliance by the district court with Rule 39. The Court should grant review to resolve whether review of a jury strike is *de novo* or conditional, now depending on the degree to which issues were "pressed" in the district court. This is particularly appropriate and necessary for the Supreme Court to address because the Fifth Circuit's opinion means that a denial of Seventh Amendment rights, even though clearly erroneous, will not be corrected on appeal if the condition precedent to *de novo* review is not fulfilled.

The Fifth Circuit also set new precedent that a pending proof of claim objection in a bankruptcy proceeding extinguishes jury rights on fraudulent transfer actions brought in district court. That holding contradicts this Court's rulings in *Granfinanciera*, *Stern*, and *Executive Benefits*, which together establish that fraudulent transfer actions always require an Article III court and a jury (at least without consent of the parties). Here, if an Article III court and jury would have been required for actions brought in bankruptcy

court, an Article III court and jury was certainly required for actions brought in district court regardless of any pending claims-allowance ruling in bankruptcy court.

Even if not always required, *Stern* makes clear that an Article III court and a jury are required if a private-right fraudulent transfer action is not necessarily resolved in the bankruptcy claims-allowance process. Here, the fraudulent transfer action could never have been resolved in the claims-allowance process—the claims were brought in district court by an assignee not a party to the claims-allowance process and not bound by any bankruptcy court ruling. Resolution of Verizon's indemnification proof of claim could not possibly resolve Trustee's fraudulent transfer actions. Thus, an Article III court and jury were required.

The Fifth Circuit reached its conclusion by misreading *Langenkamp* and misconstruing 11 U.S.C. § 502(d). *Langenkamp* addresses only resolution of a preference action in the proof-of-claim process in bankruptcy court; it does not address a fraudulent transfer action brought in district court by an assignee. Yet the Fifth Circuit held that *Langenkamp* extinguished Trustee's jury right.

Moreover, *Stern* and the Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits hold that an Article III court and a jury are required unless the claims-allowance process will *necessarily resolve* the legal and factual merits of the private-right claim. The Fifth Circuit panel in this case said exactly the opposite, concluding that jury trial rights are lost if the private-right cause of action in the district court could somehow impact the claims-resolution process in the

bankruptcy court. That construction of § 502(d) would render it unconstitutional—eliminating Article III and Seventh Amendment jury rights, granting power to an Article I court to reexamine facts resolved in an Article III court, and granting power to an Article I court improper under Article III and the Seventh Amendment.

This new precedent not only conflicts with this Court's holdings, it throws into doubt routine bankruptcy procedures. District and state courts routinely conduct jury trials after the § 362 automatic stay has been lifted, on remand to state court, or after withdrawal of the reference of a claim to bankruptcy court. That the result in a separate proceeding may impact a pending bankruptcy proceeding—as the Fifth Circuit assumed may happen here—does not eliminate jury trial rights in the district or state court. Indeed, the statutory bankruptcy lift-stay and remand provisions contemplate exactly that result. Additionally, claim assignment to litigation trusts is not uncommon in bankruptcy proceedings; the Fifth Circuit's opinion leaves the jury rights of those assignees in doubt.

The Court should grant the petition to confirm that fraudulent transfer actions require an Article III court and jury, "necessarily resolved" refers to the merits of the private-right claim, and § 502(d) does not allow a bankruptcy court to encroach on Article III or Seventh Amendment rights.

STATEMENT OF THE CASE

After years of declining revenues, Respondent Verizon decided in 2006 to spin off its obsolete yellow pages business to a new company, Idearc. Verizon chose Respondent John Diercksen, head of Verizon's strategic planning, to lead the spin for Verizon and serve as Idearc's sole pre-spin director. In the spin, Idearc (having a book value of roughly $1.3 billion) took on around $9 billion of new debt and distributed $9.5 billion to Verizon. The distribution resembled a dividend, but Idearc never issued stock to Verizon and Verizon never paid for any stock in Idearc.

Not long after the spin, Idearc declared bankruptcy because of its debt. Idearc's bankruptcy plan was confirmed on December 21, 2009, and created the Litigation Trust ("Petitioner"), which received rights to the claims brought here. Verizon filed four proofs of claims in the bankruptcy proceeding. Diercksen filed no proof of claim.

On September 15, 2010, the Litigation Trustee sued the Verizon entities and Diercksen in district court, asserting federal and state statutory fraudulent transfer actions against the Verizon entities and breach of fiduciary duty and wrongful dividend claims against Diercksen and Verizon. Litigation Trustee demanded a jury in its complaint.

Idearc did not object to the Verizon proofs of claim until June 17, 2011, and on December 29, 2011, Verizon and Idearc entered a Stipulation and Agreed Order (the "Stipulated Order") regarding Idearc's objections. (App. A at 13, 15) The only remaining Verizon proof of claim relates to a limited

indemnification in a distribution agreement for misrepresentations in specified financing and registration documents. (App. A at 13-17)

Respondents moved to strike Trustee's jury demand in district court based on Verizon's proofs of claim in the Idearc bankruptcy proceeding, claiming "bankruptcy waiver" as to the fraudulent transfer actions. (App. J) In a footnote in their motion to strike, Respondents also asserted that there was no right to a jury under Delaware law as to Trustee's claims for breach of duty by Diercksen and Verizon's complicity in Diercksen's breach. (App. J at 162-63) Below is the entirety of Respondents' footnote:

> [8] Plaintiff is not entitled to a jury trial on its claims for breach of fiduciary duty (Count 3) and aiding and abetting breach of fiduciary duty (Count 4) because those are not actions at common law, but instead are equitable claims for which there is no jury trial right. See, e.g., Cantor v. Perelman, No. Civ. A. 97-586, 2006 WL 318666, at *9 (D. Del. Feb. 10, 2006) (granting motion to strike jury demand as to fiduciary duty and aiding and abetting fiduciary duty claims); see also In re Hechinger Inv. Co. of Del., 327 B.R. 537, 544 (D. Del. 2005) ("In Delaware, breach of fiduciary duty claims are routinely heard in its chancery court, which is a court of equity.").

Trustee responded to Respondents' waiver arguments and, in a footnote, responded to Respondents' footnote by explaining that claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty are legal and are protected by the

Seventh Amendment. (App. K) Below is the entirety of Trustee's footnote:

> [8] Defendants erroneously argue that Plaintiff is not entitled to a jury trial on its breach of fiduciary duty and aiding and abetting breach of fiduciary duty because such claims are "equitable." *See* Motion to Strike, p. 19 n.8. Because Plaintiff seeks monetary relief for its fiduciary duty breach claims, the claims are "legal" rather than equitable and are protected by the Seventh Amendment. *In re Jensen*, 946 F.2d 371; *see also Pereira v. Farace*, 413 F.3d 330, 340-41 (2d Cir. 2005) (holding that bankruptcy trustee was entitled to a jury trial on its breach of fiduciary duty claim).

Thereafter, Trustee amended its complaint, adding new claims against (1) Diercksen and Verizon for promoter liability and (2) Verizon for unjust enrichment and alter ego. Trustee's Amended Complaint also demanded a jury.

The district court granted Respondents' motion to strike the jury demand as to all counts, including ones not mentioned by Respondents. (App. G) Citing Respondents' footnote but overlooking Trustee's responsive footnote, the district court ruled in a footnote that breach of fiduciary duty/aiding and abetting claims were equitable with no jury right. (App. G at 113-14) On its own initiative, providing its own reasons and authority because Respondents had given none, the court also ruled that Trustee's unlawful dividend and new promoter liability and alter ego claims were equitable with no jury right. (App. G at 113-14)

Trustee filed a motion for reconsideration, bringing its missed footnote to the court's attention and explaining why there was a right to a jury trial on all claims. (App. L) The district court refused to reconsider the jury strike on the basis that Trustee had a burden to sufficiently justify its demand in response to a motion to strike and the district court had the discretion not to consider arguments and (hence) not to correct the jury strike, even if erroneous. (App. F) Specifically, the district court held that Trustee had forfeited its timely jury demand by citing to authority in a footnote. Trustee continued to pursue its wrongfully stricken jury, seeking ruling clarifications, mandamus, interlocutory appeal certification, and reversal here. (App. D, E, M, N)

In October 2012, months after the court refused to undo its jury strike, the district court, *sua sponte*, ordered a Phase I trial to decide Idearc's value on the spin date. After finding a value of "at least $12 billion," the court ordered Trustee to show cause why judgment should not be entered against it on all claims in light of the court's value finding. After Trustee responded, the court entered judgment for Respondents on all claims based on its value finding. (App. C)

The Fifth Circuit affirmed the district court's judgment, finding no right to a jury trial on fraudulent transfer actions in district court based on Verizon's proof of claim in bankruptcy court and refusing to consider arguments in support of a jury deemed insufficiently "pressed," never reviewing the constitutional propriety of the jury strike on the other claims. (App. A at 8-30)

REASONS FOR GRANTING THE PETITION

I. Review is warranted to establish uniform jury demand and waiver procedures.

A timely demand is all that is or can be required to secure a party's Seventh Amendment right to a jury trial. There is no burden to justify or prove the demand with supporting authority, and the only way to waive it is by stipulation on the record. FED. R. CIV. P. 38, 39. There is no dispute that Trustee properly demanded a jury on its legal-right claims. It is also undisputed that Trustee did not stipulate to a bench trial. Nevertheless, the Fifth Circuit expressly adopted a new burden to present "sufficient" arguments to justify a jury demand and refused to review *de novo* the district court's jury strike. This Court should grant review to confirm that a litigant who has properly demanded a jury cannot unknowingly forfeit this constitutional right.

A. The Fifth Circuit created a new variable burden to "sufficiently" justify a jury demand, contrary to the bright line of Rules 38 and 39.

Rule 38 provides that the constitutional right to a jury trial "is preserved to the parties inviolate." (App. I at 130) The burden imposed by the Fifth Circuit to "press" grounds to support a jury demand is nowhere contained in Rule 38 or Rule 39. FED. R. CIV. P. 38, 39. Neither Rule 38 or 39 even requires a response to a motion to strike. The burden to sufficiently present arguments falls squarely on the party moving to strike the jury under Rule 7. FED. R. CIV. P. 7. (providing that the moving party that has the burden to raise and support all grounds for relief). (App. I at 129-30) There

is no basis in the rules or common law precedent for shifting the burden to the non-movant in the context of an erroneous jury strike.[1]

Other Circuits have rejected efforts by district courts to increase the burdens on litigants who timely demand a jury. For example, the Ninth Circuit has held that a court could not by local rule require more than a demand to retain a jury or find wavier by anything other than a Rule 39 stipulation:

> When a party properly files a jury demand …, he has satisfied all that is required by the Rules to avoid waiver, and his jury demand 'may not be withdrawn without the consent of the parties.' [Finding waiver for failure to file jury instructions and verdict forms] … was clearly inconsistent with Rule 38(d)'s limitation of waiver to the failure to file a jury demand …. 'The demand for a jury trial having been properly made …, the failure to fulfill an additional requirement of a local rule … cannot constitute a waiver of a trial by jury.'

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[1] Moreover, Trustee did clearly assert in response to the motion to strike that it was entitled to a jury trial on all of its legal claims for which it sought monetary relief. The fact that certain of Trustee's arguments were made in a footnote in its brief in opposition to the motion to strike does not make them insufficient. *See United States v. One 1978 Mercedes Benz,* 711 F.2d 1297, 1299 n.1 (5th Cir. 1983); *see also Anderson v. Bondex Int'l, Inc.*, 552 F. App'x 153, 155 n.1 (3d Cir. 2014); *Skinner v. U.S. Dep't of Justice*, 584 F.3d 1093, 1100-01 (D.C. Cir. 2009); *Sherman v. Winco Fireworks, Inc.*, 532 F.3d 709, 715-16 (8th Cir. 2008). Although no response is required, that response would have sufficed under Rule 46. FED. R. CIV. P. 46.

Solis v. Cnty. of Los Angeles, 514 F.3d 946, 955 (9th Cir. 2008) (quoting Rule 38 and *Pradier*). The Fifth and Seventh Circuits have held the same.[2]

Nor is implied waiver permitted. Rule 39 cloaks the waiver process in this "sacramental ritual" to assure the "precious right to a jury trial will not be frittered away by casual findings of waiver." *Tray-Wrap, Inc. v. Six L's Packing Co.*, 984 F.2d 65, 66, 68 (2d Cir. 1993); FED. R. CIV. P. 39. Most Circuits recognize only a narrow exception to Rule 39—if a party's conduct constitutes an intentional waiver through "silent acquiescence."[3] Other Circuits have also refused to find implied waiver when a litigant makes known its desire

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[2] *See also Dennis v. Figueroa*, 46 F.3d 66, 1995 WL 29270, at *1 (5th Cir. 1995) (jury demand not waived for failure to comply with local rule requiring demand to be filed on a separate piece of paper); *Partee v. Buch*, 28 F.3d 636, 638 (7th Cir. 1994) (relying on *Pradier*); *Pradier v. Elespuru*, 641 F.2d 808, 810-11 (9th Cir. 1981) (no jury forfeiture from noncompliance with local rule requiring "title of the pleading shall contain the words 'Demand for Jury Trial'").

[3] *See Venture Tape Corp v. McGills Glass Warehouse*, 540 F.3d 56, 62-63 (1st Cir. 2008), *cert. denied*, 556 U.S. 1128 (2009); *Lampkin v. Int'l Union*, 154 F.3d 1136, 1147 (10th Cir. 1998); *Cooper v. Loper*, 923 F.2d 1045, 1049 (3d Cir. 1991); *White v. McGinnis*, 903 F.2d 699, 703 (9th Cir. 1990) (en banc), *cert. denied*, 498 U.S. 903 (1990); *Royal Am. Managers, Inc. v. IRC Holding Corp.*, 885 F.2d 1011, 1018 (2d Cir. 1989); *Molett v. Penrod Drilling Co.*, 826 F.2d 1419, 1423-24 (5th Cir. 1987), *abrogated on other grounds, Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995); *United States v. 1966 Beechcraft Aircraft Model King Air*, 777 F.2d 947, 951 (4th Cir. 1985).

for a jury trial.[4] Underlying these decisions is the principle that "the right to a jury trial is too important … to find a knowing and voluntary relinquishment of the right in a doubtful situation." *Heyman v. Kline*, 456 F.2d 123, 129 (2d Cir. 1972). Any waiver must be clear and unequivocal. *Id.*; *see* U.S. CONST. amend. VII.

Breaking from these precedents, the Fifth Circuit has now endorsed implied waiver of a jury trial. It is undisputed that Trustee timely demanded a jury and did not stipulate or acquiesce to a bench trial. Indeed, Trustee repeatedly beseeched the court to not strike the jury and to undo the erroneous strike. But the Fifth Circuit held "[t]he Trustee bore the burden of rebutting the motion to strike by raising all of the reasons entitling it to a jury" on its non-fraudulent transfer actions. (App. A at 30 n.13) The Fifth Circuit also required that briefing "sufficiently present" and "press" arguments in order to preserve a jury demand. (App. A at 29, 30 & n.13) Although stating its holding did not

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[4] *See McDonald v. Steward*, 132 F.3d 225, 230 (5th Cir. 1998) ("made known his desire for a jury trial in his complaint and at the *Spears* hearing, and did so without equivocation or ambiguity"); *see also Winter v. Minn. Mut. Life Ins. Co.*, 199 F.3d 399, 407 (7th Cir. 1999) (only if party does not reassert right to jury trial prior to bench trial, requests a bench trial or knowingly participates in a bench trial does a party waive his right to jury trial through inaction or inadvertence); *United States v. Cal. Mobile Home Park Mgmt. Co.*, 107 F.3d 1374, 1380 (9th Cir. 1997) ("no Court has expanded [*White*, 903 F.2d at 703] to find a waiver of a right to a jury trial where a plaintiff actively contests the district court's decision to refuse the demand"); *Gargiulo v. Delsole*, 769 F.2d 77, 78-79 (2d Cir. 1985) (no implied waiver of right to jury trial where defendant demanded a jury, pointed out he had requested a jury when case called to trial, and no Rule 39 waiver filed).

rest on waiver of jury rights, only waiver of "arguments," (App. A at 30 n.12), the Panel's affirmance of the jury strike results in loss of a jury without stipulation or intentional waiver.

The Fifth Circuit's new briefing burden conflicts with Rules 38 and 39—it requires more than a demand to retain a jury and allows waiver of a jury by other than stipulation. Moreover, the waiver-by-argument holding conflicts with the law of this and other Circuits that limits waiver of jury rights to silent acquiescence. The Supreme Court should grant review to confirm that nothing more than a demand is required to exercise a jury right, and that right may not be lost by implied waiver.

B. The Fifth Circuit adopted standards that give district courts discretion to refuse a jury trial.

A district court's removal of a case from the jury docket requires *de novo* review by the court of appeals.[5] The right to a jury trial is purely a question of law because there are no factual determinations, and the district court has no discretion. Once a jury is timely demanded, there is no exercise of discretion because Rules 38 and 39 require that the action "must" be placed on the jury docket. FED. R. CIV. P. 38, 39. The

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[5] *See, e.g.*, *Granite Rock Co. v. Int'l Bhd. of Teamsters, Local 287*, 649 F.3d 1067, 1069 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 817 (2011); *Apache Corp. v. Global Santa Fe Drilling Co*., 435 F. App'x 322, 324 (5th Cir. 2011); *Brown v. Sandimo Materials*, 250 F.3d 120, 125 (2d Cir. 2001); *Fischer Imaging Corp. v. Gen. Elec. Co.,* 187 F.3d 1165, 1168 (10th Cir. 1999); *Pandazides v. Va. Bd. of Educ.,* 13 F.3d 823, 827 (4th Cir. 1994).

Fifth Circuit's new "argument" burden, which will result in varying jury rights on a case-by-case basis, demonstrates the danger of engrafting a subjective briefing burden on the objective jury demand and waiver process adopted in the Rules. One court may say briefing is sufficient to "raise all reasons" and "press" a jury right; another may not.

Contrary to the law of almost every Circuit (*see supra* note 5), the Fifth Circuit declined to review *de novo* the district court's jury strike, which effectively denied Trustee any review of the district court's rulings. Specifically, the Fifth Circuit refused to conduct a *de novo* review of either of the district court's erroneous rulings that (1) Trustee had waived its right to a jury trial on its breach of fiduciary duty claim by consenting to Respondents' characterization of the claim as equitable in nature, and (2) Trustee was not entitled to a jury trial on its damage claims for unlawful dividend, promoter liability, unjust enrichment, and alter ego. (App. A at 28-30)

Respondents have yet to articulate a valid reason as to why there is no jury right on the fiduciary-duty-based claims; nor did Respondents dispute on appeal that Trustee's legal-right claim for unlawful payment of dividends requires a jury. Indeed, the Fifth Circuit did not hold that there was no right to a jury. The jury strike error is not harmless; the issues were hotly contested and all claims were ultimately resolved by an erroneous bench trial on value. The consequence of the Fifth Circuit's limited review is that a wrongful jury strike stands even though a jury was properly demanded on claims that carry a right to trial by jury.

II. Review is warranted to resolve when an Article III court and jury are required on fraudulent transfer actions.

The Fifth Circuit held that a proof of claim filed in bankruptcy court extinguishes a Seventh Amendment jury right on private-right fraudulent transfer actions brought and tried in district court by a litigation trustee to which the debtor assigned the claims in a confirmed bankruptcy reorganization plan—even though the litigation trustee is not a party to the claims-resolution process and cannot be bound by a ruling in that proceeding. But prior precedent establishes that (1) fraudulent transfer actions always require an Article III court and a jury whether brought in bankruptcy court *or* district court and (2) even if not, a fraudulent transfer action not necessarily resolved in the bankruptcy court claims-allowance process requires an Article III court and a jury. Holding otherwise unconstitutionally eliminates Seventh Amendment jury rights, limits the constitutional powers and rights in an Article III court based on statutory authority conferred on an Article I bankruptcy court under 11 U.S.C. § 502(d), and calls into question common bankruptcy court procedures used to allow jury trials in district or state court while the bankruptcy proceeding remains pending.

A. The Fifth Circuit's decision conflicts with this Court's rulings that require an Article III court and jury on fraudulent transfer actions.

A fraudulent transfer action is a private, not public, legal right that must be tried to an Article III court; hence, it carries a Seventh Amendment right to a trial

by jury. *See Exec. Benefits Ins. Agency v. Arkinson*, 134 S. Ct. 2165, 2169 n.3, 2170, 2173 (2014); *Stern v. Marshall*, 131 S. Ct. 2594, 2608, 2614, 2620 (2011); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53-54 (1989); *see also* U.S. CONST. art. III, amend. VII. Contrary to the Fifth Circuit's decision, a bankruptcy proof of claim does not alter that jury right whether the fraudulent transfer action is brought in bankruptcy court *or* district court. Instead, together the Court's rulings establish that an Article III court and a jury are always required. Here, if an Article III court and jury would have been required for actions brought in bankruptcy court, an Article III court and jury are certainly required for actions brought in district court regardless of any pending claims-allowance ruling in bankruptcy court.

The Court held in *Granfinanciera*, a bankruptcy court case, that fraudulent transfer actions involve private legal rights, explaining:

> [F]raudulent conveyance actions by bankruptcy trustees- … 'constitute no part of the proceedings in bankruptcy but concern controversies arising out of it' [and] are quintessentially suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res.

492 U.S. at 56 (quoting *Schoenthal v. Irving Trust Co.*, 287 U.S. 92, 94-95 (1932)).

The Court held that the fraudulent transfer defendant had a right to a jury trial under the Seventh Amendment because (1) it had not filed a claim *and* (2) that action was not integral to the restructuring of debtor-creditor claims. *Id.* at 58-59. The Court noted that "[u]nless a legal cause of action involves 'public rights,' Congress may not deprive parties litigating over such a right of the Seventh Amendment's guarantee to a jury trial." *Id*. at 53. The Court reserved the question of whether the Seventh Amendment or Article III allowed jury trials on fraudulent transfer actions in a non-Article III court. *Id.* at 50. The Court also noted, "We do not suggest that the restructuring of debtor-creditor relations is in fact a public right. This thesis has met with substantial scholarly criticism." *Id.* at 56 n.11.

A few years later in another bankruptcy court case, the Court held that a creditor who submits a claim against the bankruptcy estate and is sued by the trustee in bankruptcy court to recover a preference is not entitled to jury trial; the preference action becomes part of the equitable claims-allowance process in bankruptcy court. *Langenkamp v. Culp*, 498 U.S. 42, 44-45 (1990) (per curiam).

Next, in *Stern*, yet another bankruptcy court case, the Court refused to treat the *Stern* proof of claim the same as the *Langenkamp* claim: "We see no reason to treat [the debtor's tortious interference] counterclaim any differently from the fraudulent conveyance action in *Granfinanciera*." *Stern*, 131 S. Ct. at 2618. The Court stressed that the contract-based nature of a fraudulent transfer action augments the bankruptcy estate while the *Langenkamp* and *Katchen v. Landy*,

382 U.S. 323, 325 (1966), preference actions only alter the creditors' pro rata share of the estate. *Stern*, 131 S. Ct. at 2618.

The Court concluded that Congress cannot bypass Article III merely because a claim bears on the bankruptcy if it does not fall within a public rights exception and, even then, the presumption is in favor of Article III courts. *Id. Stern* also referred back to *Granfinanciera* and again stated that it had not held that the restructuring of the debtor-creditor relationship was a "public right" not entitled to a jury. *Id.* at 2614 n.7; *see also id.* at 2621 (Scalia, J., concurring) ("[A]n Article III judge is required in *all* federal adjudications, unless there is a firmly established historical practice to the contrary.").[6]

Finally, most recently in *Executive Benefits*, another bankruptcy court case, the Court reaffirmed *Granfinanciera*—fraudulent transfers are private-right claims that require an Article III court and a jury. *Exec. Benefits*, 134 S. Ct. at 2169 n.3. The Court also reaffirmed that a "*Stern* claim" is one that a

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[6] The Ninth Circuit concluded, at least in an action against a noncreditor, that *Granfinanciera* and *Stern* "together point ineluctably to the conclusion that fraudulent conveyance claims, because they do not fall within the public rights exception, cannot be adjudicated by non-Article III judges" and require a jury under *Granfinaciera*. *Exec. Benefits Ins. Agency v. Arkinson (In re Bellingham Ins. Agency)*, 702 F.3d 553, 561-62, 565 (9th Cir. 2012), *aff'd*, 134 S. Ct. 2165 (2014); *see also Mastro v. Rigby*, 764 F.3d 1090, 1093 (9th Cir. 2014) ("we have 'held that these fraudulent conveyance claims are *Stern* claims'"). The Ninth Circuit noted that *Granfinanciera* and *Stern* did not hold that the bankruptcy restructuring of the debtor-creditor relationship was in fact a public right.

bankruptcy court has statutory, but not constitutional, authority to adjudicate. *Id.* at 2170, 2173. In fact, the *Executive Benefits* parties contemplated a jury trial in district court if the case survived summary judgment. *Id*. at 2169.

The Court in *Executive Benefits* presumed, without deciding, that a fraudulent transfer action is a *Stern* claim. *Id.* at 2174. The Court, however, reserved the question of whether "Article III permits a bankruptcy court, *with the consent of the parties*, to enter final judgment on a *Stern* claim." *Id.* at 2170 n.4 (emphasis added). The Court also shortly thereafter granted the petition for a writ of certiorari and set for argument *Wellness International Network, Ltd. v. Sharif*, No. 13-935, 134 S. Ct. 2901 (2014), on the issue of "[w]hether Article III permits the exercise of judicial power of the United States by bankruptcy courts *on the basis of litigant consent*." (emphasis added) The *Executive Benefits'* reservation and the grant in *Wellness International* imply that a bankruptcy court does not have constitutional authority to finally adjudicate a fraudulent transfer *Stern* claim, at least without party consent.

Consequently, together *Granfinanciera*, *Stern* and *Executive Benefits* mean that fraudulent transfer actions—private-right claims that pre-confirmation would augment the bankruptcy estate—always require an Article III court and a jury under the Seventh Amendment (at least without consent of the parties). *Exec. Benefits*, 134 S. Ct. at 2170; *Stern*, 131 S. Ct. at 2614, 2618; *Granfinanciera*, 492 U.S. at 56. Here, an Article III court and jury are certainly required for actions brought in district court by Trustee post-

confirmation. The Fifth Circuit's decision to the contrary conflicts with those binding authorities, and the Court should grant the petition to confirm that jury rights exist on fraudulent transfer actions both pre- and post-confirmation.

B. The Fifth Circuit's decision conflicts with this and other Courts' holdings that require an Article III court and jury if the claims-allowance process will not necessarily resolve the legal claim.

Stern held, "Congress may not bypass Article III simply because a proceeding may have *some* bearing on a bankruptcy case; the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims-allowance process." 131 S. Ct. at 2618. Prior to the holding here, the Fifth Circuit repeatedly agreed that after *Stern* "[w]here the legal action need not necessarily have been resolved in the course of allowing or disallowing the claims against the … estate … the claim belonged in an Article III court."[7] Fraudulent transfer actions do not stem from the bankruptcy itself. *Granfinanciera*, 492 U.S. at 56. Thus, if not always requiring an Article III court and a jury, *Stern* recognizes that Congress may constitutionally bypass Article III and the Seventh Amendment right to trial by jury *only* if private-right

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[7] *BP RE, L.P. v. RML Waxahachie Dodge LLC (In re BP RE, L.P.),* 735 F.3d 279, 286 (5th Cir. 2013) (citation omitted); *see also Frazin v. Haynes & Boone, L.L.P. (In re Frazin)*, 732 F.3d 313, 319 (5th Cir. 2013); *Fire Eagle L.L.C. v. Bischoff (In re Spillman Dev. Grp.)*, 710 F.3d 299, 306 (5th Cir. 2013); *Technical Automation Servs. Corp. v. Liberty Surplus Ins. Corp.*, 673 F.3d 399, 405-07 (5th Cir. 2012).

fraudulent transfer actions would necessarily be resolved in the equitable bankruptcy claims-allowance process.

1. The claims-allowance process must necessarily resolve the legal and factual merits of the private-right claims, but could not do so here.

Stern makes clear that "necessarily resolved in the claims-allowance process" means that the factual and legal determinations made in ruling on the proof of claim and any objection thereto would completely resolve the claim to which the jury right attaches. 131 S. Ct. at 2611, 2617-18. There, the ruling on the defamation proof of claim would not necessarily have resolved the additional legal and factual elements and punitive damage relief sought in a tortious interference with gift counterclaim. *Id.* at 2617-18. "[T]here was never any reason to believe that the process of adjudicating [the] proof of claim would necessarily resolve [the] counterclaim." *Id.* at 2617. Thus, only an Article III court (and jury if demanded) could adjudicate the counterclaim.

Similarly, generally arising in the context of bankruptcy court constitutional authority, the Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits also look to whether the ruling on the proof of claim and any objection thereto would resolve the merits of the private-right claim. Depending on the facts, some cases find the bankruptcy court's equitable claim

determination would,[8] and others find the bankruptcy court's equitable claim determination would not,[9] necessarily resolve the private-right claim. But in all of those cases, the Circuits inquired whether the

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[8] *See Hart v. S. Heritage Bank* (*In re Hart)*, 564 F. App'x 773, 776 (6th Cir. 2014) ("Bank's nondischargeability claim was 'resolvable by a ruling on the creditor's proof of claim in bankruptcy.'"); *Spillman*, 710 F.3d at 306 (5th Cir.) ("interpretation of the effect of [creditor's] credit bid in fact determinative of [creditor's] claim"); *Sundale, Ltd. v. Fla. Assocs. Capital Enter., LLC (In re Sundale)*, 499 F. App'x 887, 892-93 (11th Cir. 2012) (resolution of proof of claim would resolve state-law recoupment counterclaim); *Waldman v. Stone*, 698 F.3d 910, 919-21 (6th Cir. 2012) (resolution of collection of secured debt would resolve disallowance claim); *Onkyo Eur Elecs. GMBH v. Global Technovations, Inc. (In re Global Technovations, Inc.)*, 694 F.3d 705, 722 (6th Cir. 2012) (resolution of proof of claim would necessarily resolve avoidance of note claim); *Pearson Educ., Inc. v. Almgren*, 685 F.3d 691, 695 (8th Cir. 2012) (nondischargeablility of damages on copyright claims part of claims-allowance process).

[9] *See BP RE*, 735 F.3d at 285-86 (5th Cir.) (bankruptcy court improperly adjudicated state-law claims independent of claims-allowance process); *In re Frazin*, 732 F.3d at 323-24 (DTPA claim not necessarily resolved in claims-allowance process); *Wellness Int'l Network, Ltd. v. Sharif*, 727 F.3d 751, 775-76 (7th Cir. 2013) (state-law alter ego claim not necessarily resolved in bankruptcy objection ruling), *cert. granted*, 134 S. Ct. 2901 (2014); *Waldman*, 698 F.3d at 921 (resolution of collection of secured debt would not resolve claims of fraud seeking affirmative relief); *Ortiz v. Aurora Health Care, Inc. (In re Ortiz)*, 665 F.3d 906, 913-14 (7th Cir. 2011) (that state-law healthcare disclosure claims arose from conduct in bankruptcy case insufficient bearing on bankruptcy proceeding to bypass Article III's requirements); *see also Exec. Benefits*, 702 F.3d at 565 (9th Cir.); *Germain v. Conn. Nat'l Bank*, 988 F.2d 1323, 1327 & n.6 (2d Cir. 1993) (trustee's lender liability claims against bank would augment the bankruptcy estate and would not be necessarily resolved by creditor bank's proof of claim).

equitable determination of the proof of claim would necessarily resolve the legal and factual merits of the private-right claim. Here, the claims-allowance process could never resolve Trustee's fraudulent transfer actions.

Trustee is an assignee whose rights could not be determined by any subsequent proof of claim ruling. Yet the Fifth Circuit held, under *Langenkamp*, Verizon's proofs of claim (to which Idearc objected in the bankruptcy proceeding) would have extinguished Idearc's right to a jury, so the Litigation Trust also lost its right to a jury because Trustee "stands in the shoes" of Idearc for purposes of this litigation. (App. A at 20; *see also* 17-28) Ignoring Idearc's right to a jury on private-right fraudulent transfer actions in bankruptcy court, the Fifth Circuit's reasoning is flawed.

Trustee is not Idearc, does not stand in the shoes of Idearc, and is not its agent or surrogate. Any hypothetical subsequent judgment by the bankruptcy court on Idearc's § 502(d) objection to Verizon's proof of claim would not be binding on Trustee—the rights were assigned prior to Idearc's objection to Verizon's claim and Trustee is not a party to Idearc's claim objection proceeding. *Laster v. Am. Nat'l Fire Ins. Co.*, 775 F. Supp. 985, 989 (N.D. Tex. 1991), *aff'd*, 966 F.2d 676 (5th Cir. 1992).

Nor could collateral estoppel apply without "privity" between Trustee and Idearc. *See Vines v. Univ. of La. at Monroe*, 398 F.3d 700, 705 (5th Cir. 2005) (citing *Terrell v. DeConna*, 877 F.2d 1267, 1270 (5th Cir. 1989)). Trustee, however, was never, and is not, in privity with Idearc. *See Meza v. Gen. Battery Corp.*, 908 F.2d 1262, 1266 (5th Cir. 1990) (citing *Howell*

Hydrocarbons, Inc. v. Adams, 897 F.2d 183, 188 (5th Cir. 1990)). Trustee and Idearc are unrelated entities.

Consequently, the fraudulent transfer actions of Trustee against Verizon could not possibly be resolved in the Idearc bankruptcy claims-allowance process. Trustee should not be deprived of rights in an Article III district court based on what may transpire in an Article I court proceeding to which it is not, was not, and will never be a party; that result would deprive Trustee of its due process rights. U.S. CONST. art. I, III, amend. V, VII.

Further, Verizon's only potential (but moot) remaining claim in Idearc's bankruptcy proceeding relates to an extremely limited indemnification in a distribution agreement for misrepresentations in specified financing and registration documents. (App. A at 13-17) Resolution of whether there was a misrepresentation in those documents (not the basis for the claims here) would not resolve Trustee's fraudulent transfer or other claims. Moreover, Trustee did not bring its lawsuit as part of a claims-allowance process, did not object to the Verizon bankruptcy claim, and is not involved in the closed Chapter 11 case. Any recovery in this suit would not go to the estate but to the Trust. Thus, the claims-allowance process would never resolve Trustee's claims.

Because transfer of claims to a litigation trust in favor of creditors is common in Chapter 11 bankruptcy cases, the Court should grant the petition and resolve whether *Langenkamp*'s reasoning can deprive an assignee litigation trustee of jury rights in district court, particularly when the proof of claim process would never resolve the private-right action.

2. Section 502(d) does not alter the meaning of "necessarily resolved."

Had the Fifth Circuit applied the proper *Stern* analysis—looking to whether the claims-allowance process would resolve the legal and factual merits of the fraudulent transfer actions—not the other way around, as it did—the court would have reversed the erroneous jury strike. Instead, the Fifth Circuit held that if a bankruptcy court may "consider" a fraudulent transfer action previously adjudicated in another court as a "component" of a § 502(d) ruling, the two are "interconnected" and the claims-allowance process will "necessarily resolve" the fraudulent transfer action—the exact opposite of what *Stern* held. (App. A at 14, 16, 28)

Although acknowledging that the fraudulent transfer action rights were transferred to the Litigation Trust and Trustee filed suit on those claims in district court before Idearc objected to Verizon's proof of claim, the Fifth Circuit based its analysis on the following "mandatory language of § 502(d)," (App. I at 129):

> … the court shall disallow any claim of any entity from which property is recoverable under section … 550 … of this title or that is a transferee of a transfer avoidable under section …544 [or] … 548 … of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section … 550 … of this title.

11 U.S.C. § 502(d). The court concluded:

> At the time Idearc objected, the Trustee had already filed this case in district court and was vigorously pursuing its fraudulent transfer claims. The validity of Idearc's objections does not alter the fact that the bankruptcy court was required to *consider* the fraudulent transfer issue *as a component* of the claims-allowance process.
>
> …
>
> The resolution of the fraudulent transfer claims in this lawsuit and Claim No. 2450 in the bankruptcy proceeding are *interconnected*.
>
> …
>
> *Resolution of Verizon's proof of claim in the bankruptcy court would necessarily resolve the fraudulent transfer issue.* In fact, in this specific case, the bankruptcy court entered an order that provisionally disposed of the claim subject to the outcome of this very litigation, thus clarifying that the claims in this court are indeed *related to* the restructuring of the debtor-creditor relationship.

(App. A at 14, 16, 28, emphasis added) Those holdings conflict with *Stern*'s holding that some "overlap" with or "bearing on a bankruptcy case" is not enough. 131 S. Ct. at 2617-18. Moreover, Idearc waived its § 502(d) rights at confirmation by assigning the fraudulent

transfer right to Trustee, and Idearc no longer had standing to assert an objection in bankruptcy court.[10]

Rather than look to whether resolution of the proof of claim would resolve the legal and factual merits of the fraudulent transfer actions already at issue, the court relied on a Verizon/Idearc Stipulated Order regarding Verizon's proof of claim that if Trustee recovered on the fraudulent transfer actions, Verizon and Idearc could move to reopen the bankruptcy to obtain a ruling on Verizon's proof of claim, if the claim had not been determined in this lawsuit. (Quoted in App. A at 15-16) Trustee is not a party to the Stipulated Order. Yet based on the Stipulated Order, the Fifth Circuit held:

> [Trustee] misconstrues what it means for a claim to have *necessarily been resolved* in the course of the claims-allowance process. *This inquiry does not consider the basis for the underlying claim against the bankruptcy estate*, it *turns on the merits of the § 502(d) objection*.

(App. A at 17, emphasis added) But that misapplies the *Stern* test. The inquiry indeed does turn, in part, on the nature of the claim against the bankruptcy estate—if the proof of claim would not resolve the legal and

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[10] Section 502(d) can only be asserted by the owner of the avoidance claims, and Idearc does *not* own the fraudulent transfer actions against Verizon that it transferred to Trustee. *See, e.g.*, *Energy Income Fund, L.P. v. Compression Solutions, Co. (In re Magnolia Gas Co.)*, 255 B.R. 900, 914-15 (Bankr. W.D. Okla. 2000); *Holloway v. IRS* (*In re Odom Antennas, Inc.)*, 340 F.3d 705, 708-09 (8th Cir. 2003); *Picard v. Estate of Chais (In re Bernard L. Madoff Inv. Sec., LLC)*, 445 B.R. 206, 239 (Bankr. S.D.N.Y. 2011).

factual merits of the private-right claim, then the private-right claim would not be necessarily resolved in the claims-allowance process—an Article III court and a jury would be required.

Nonbankruptcy courts frequently conduct jury trials on claims despite pending bankruptcy proceedings, even if resolution may subsequently impact a pending bankruptcy case. *See, e.g.*, *Picard v. Katz*, 825 F. Supp. 2d 484, 486-87 (S.D.N.Y. 2011) (jury trial on fraudulent transfer after reference withdrawal); *Broadhurst v. Steamtronics Corp.*, 48 B.R. 801, 802-03 (D. Conn. 1985) (lift stay for state jury trial). Section 1452 expressly contemplates exactly that process in the context of state court proceedings—a remand for determination of a claim, particularly to protect a right to trial by jury.[11] An even more routine example is when the bankruptcy court lifts the automatic stay of § 362 to allow a claim against the debtor to be tried before a jury in a nonbankruptcy court. 11 U.S.C. § 362. Thus, that an independent proceeding in another court may later impact the bankruptcy proceeding does not eliminate a jury right or mean that the claims-allowance process will "necessarily resolve" the private-right claim entitled to a jury.

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[11] 28 U.S.C. § 1452(b); *see, e.g.*, *Citigroup, Inc. v. Pac. Inv. Mgmt. Co.* (*In re Enron Corp.*), 296 B.R. 505, 509 (C.D. Cal. 2003) (remand to state court for jury trial); *Rachmale v. Conese*, 515 B.R. 567, 574-75 (Bankr. E. D. Mich. 2014) (remand to state court for jury trial); *White Oak Corp. v. Am. Int'l Group, Inc. (In re Nat'l E. Corp.)*, 391 B.R. 663, 670 (Bankr. D. Conn. 2008) (remand to state court for jury trial)*; In re Salisbury*, 123 B.R. 913, 916-17 (Bankr. S.D. Ala. 1990) (remand to state court for jury trial).

In short, the Fifth Circuit created a new "necessarily resolved" test that runs directly contrary to what "necessarily resolved in the claims-allowance process" must mean constitutionally and under *Stern* and Fifth and other Circuit Court precedent. The Court should grant the petition and confirm that § 502(d) does not alter what *Stern* and the Circuit Courts have held—"necessarily resolved" means that the equitable determination of the proof of claim would necessarily resolve the legal and factual merits of the private-right claim.

3. The Fifth Circuit's construction of § 502(d) would render it unconstitutional.

Nothing in the language of § 502(d) (quoted above at pages 26-27) supports the Fifth Circuit's construction or overrides *Stern*. 11 U.S.C. § 502(d), *see supra* at pp. 21-30. That a party may need to return to bankruptcy court to enforce a judgment or to obtain a proof of claim ruling does not render proceedings in other courts equitable. Instead, as discussed above, bankruptcy courts frequently lift the automatic stay or remand to state or district court for jury trials while the bankruptcy proceeding continues to pend. *See supra* p. 29. The Second Circuit rejected a similar § 502(d) argument even for claims in a pending bankruptcy. *Germain*, 988 F.2d at 1327 (holding neither *Langenkamp* nor § 502(d) rendered trustee's lender liability claim equitable or eliminated a jury right when claim would not be decided *within* bankruptcy court's equitable claims-allowance process). Additionally, *Stern* requires that the private-right claim more than

"bear on" a bankruptcy proceeding to permissibly bypass a jury right. *Stern*, 131 S. Ct. at 2618.

The Fifth Circuit reversed *Stern*'s "necessarily resolved the merits" test by holding that if the Article III suit could have an effect on the Article I claims-resolution proceeding, then the Article III suit automatically becomes a solely equitable proceeding. If that were the test, § 502(d) would eliminate Article III and Seventh Amendment jury rights for a litigant in an Article III case who is not involved in the Article I claims-resolution process—a denial of rights without due process. U.S. CONST. amend. V. It also would grant power to a non-Article III judge to reexamine facts that should have been resolved by a jury under the Seventh Amendment and redetermine issues decided by an Article III court; that would violate both the Seventh Amendment reexamination clause and Article III. U.S. CONST. art. III, § 1, amend. VII. Moreover, to the extent Congress attempted to confer such power, that would violate the restrictions of Article I—it would not be an act for a valid legislative purpose. U.S. CONST. art. I, §§ 1, 8; *see, e.g.*, *Granfinanciera,* 492 U.S. at 54-55.

In short, by expanding the claims-resolution process in bankruptcy courts to reach lawsuits brought outside the bankruptcy case to litigants not party to the proceeding, the Fifth Circuit's holding would make § 502(d) unconstitutional. U.S. CONST. art. I, III, amend. V, VII.

4. *Langenkamp* does not apply to claims brought in district court.

None of *Granfinanciera*, *Langenkamp*, *Stern*, or *Executive Benefits*—all involving claims in bankruptcy

court—holds that a litigant that brings its causes of action in district court is deprived of a jury right in that Article III court based on what may or may not later transpire on an objection to a proof of claim in a bankruptcy court when the district court litigant is not a party to the claim objection in the bankruptcy court and cannot be bound by a ruling in that proceeding. *See supra* at pp. 16-21. Yet the fundamental premise on which the Fifth Circuit's holding rests is that, under *Langenkamp*, a creditor's proof of claim extinguishes a jury right on a fraudulent transfer action whether resolved in bankruptcy court or tried in district court. (App. A at 28) But *Langenkamp* simply does not apply to Trustee's claims in district court.

Langenkamp addresses *preference* actions in *bankruptcy court* where resolution of a creditor's proof of claim will concurrently resolve the preference. *See Langenkamp*, 498 U.S. at 45. It does not address *fraudulent transfer* actions in *district court*. It also predates *Stern*'s development of the law on the limits of a bankruptcy court's constitutional authority. *Langenkamp* and *Stern* are not inconsistent, and *Langenkamp* does not hold that a proof of claim waives the debtor's (or its assignee's) jury right on private-right claims, like fraudulent transfer actions, particularly in district court. *Stern*, 131 S. Ct. at 2615-16, 2620.

The Fifth Circuit's extension of *Langenkamp* to allow an objection by a debtor to a proof of claim in bankruptcy court to extinguish jury rights of a different litigant in district (or state) court, violates the Seventh Amendment and Article III as well as calls into question the constitutionality of routine practices in

bankruptcy proceedings. U.S. CONST. art. III, amend. VII; *see supra* at pp. 26-30.

This Court should grant the petition and clarify that *Langenkamp* does not create the constitutional infirmities arising from the Fifth Circuit's decision. Instead, as discussed above, *Stern* requires an Article III court and jury at least when, as here, the bankruptcy claims-allowance process will not necessarily resolve the fraudulent transfer claim. *See supra* at pp. 16-21, 21-25.

CONCLUSION

The Fifth Circuit's opinion affirming a constitutionally erroneous jury strike raises issues that warrant review by the Court. For all of the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Dated: December 15, 2014.

Respectfully Submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-10752

[Revised September 2, 2014]
[Filed July 30, 2014]

U.S. BANK NATIONAL ASSOCIATION, Litigation Trustee of the Idearc, Inc., et al, Litigation Trust,

Plaintiff – Appellant

v.

VERIZON COMMUNICATIONS, INCORPORATED; GTE CORPORATION; JOHN W. DIERCKSEN; VERIZON FINANCIAL SERVICES, L.L.C.,

Defendants – Appellees

Appeal from the United States District Court
for the Northern District of Texas

Before KING, HAYNES, and GRAVES, Circuit Judges.

KING and HAYNES, Circuit Judges:

Idearc, Inc. is a Delaware corporation that was spun-off from its parent corporation, Verizon

Communications, Inc., in 2006. In March 2009, in the throes of the recession that began in 2008, Idearc filed for bankruptcy protection pursuant to Chapter 11. The confirmed plan of reorganization created a litigation trust to pursue, inter alia, Idearc' s fraudulent transfer claims against Verizon and related parties. The Trustee, U.S. Bank National Association, filed this lawsuit against Verizon and two of its subsidiaries, GTE Corporation and Verizon Financial Services, L.L.C., and against former Idearc director John W. Diercksen, alleging various federal and state law claims in connection with the spin-off.

The Trustee requested a jury trial, but the district court struck the jury demand and bifurcated the trial into two phases. For the first phase, the district court held a ten-day bench trial on a single fact issue: the value of Idearc following the spin-off transaction. The district court found that Idearc was solvent on the date of the spin-off, and it ordered the Trustee to show cause as to why the district court should not enter judgment against the Trustee on all of its remaining claims. After the parties submitted briefing, the district court issued its conclusions of law and entered judgment against the Trustee. The Trustee now appeals: the order striking the jury demand; evidentiary rulings before and during the trial; the findings of fact; the conclusions of law; and several pre-trial rulings on dispositive motions. For the following reasons, we AFFIRM the judgment of the district court.

I. Factual and Procedural Background

In 2005, the board of directors of Verizon Communications, Inc. ("Verizon") decided to spin-off Verizon's domestic print and electronic directories

business into an independent company pursuant to 26 U.S.C. § 355. As a spin-off under § 355, the formation of the business would be tax-free to Verizon and its shareholders. To effectuate the spin-off, Verizon created Idearc, Inc. ("Idearc"), a Delaware corporation. Verizon chose John W. Diercksen, head of Verizon's strategic planning and former head of Bell Atlantic's yellow pages business, to lead the spin-off for Verizon and serve as the "pre-spin" director of Idearc.

On June 20, 2006, the certificate of incorporation for Idearc was filed, authorizing one hundred shares of common stock. The bylaws initially required that the corporation have a two-member board of directors and provided that those two members would constitute a quorum. Only Diercksen was originally appointed to the board of directors. Diercksen appointed Kathy Harless, who had previously run Verizon's directory business, as President of Idearc. Diercksen then authorized Harless to issue one share of common stock and to sell that share to Verizon. Idearc continued basically as a shell corporation until the consummation of the spin-off.

Verizon hired JP Morgan and Bear Sterns to conduct due diligence on the directories business and develop the proposed capital structure. JP Morgan and Bear Sterns estimated that Idearc's initial value would be between $11.7 and $12.5 billion, and they recommended that the capital structure include $9.1 billion in debt, some of which was to be held by Verizon and some of which was to be publicly held. Comprehensive disclosures of the risks associated with Idearc post-spin-off were made in documents filed with the Securities and Exchange Commission and in the

offering documents for the publicly-held debt. Those disclosures included risks associated with the tax sharing agreement with Verizon, which was imposed to protect the tax-free status of the spin-off.

The spin-off occurred on November 17, 2006. Under the terms of the spin-off, Idearc received Verizon's print and online domestic directory business. In exchange, Verizon received 145,851,861 shares of common stock to be distributed to Verizon stockholders, $7.115 billion in Idearc debt, and $2.5 billion in cash. Idearc incurred a total of $9.1 billion in debt, which included the debt issued to Verizon. This debt comprised: (1) a $1.515 billion secured Term Loan A; (2) a $4.75 billion secured loan ("Tranche B debt"); and (3) $2.85 billion in 8% Senior Notes due in 2016 ("Unsecured Notes"). Idearc also received commitments from financial institutions to lend it up to $250 million through a revolving credit facility. On the day of the spin-off, Idearc's stock, which was trading on the New York Stock Exchange ("NYSE"), closed at $26.25 per share.

Following the spin-off, Idearc was an independent, publicly traded company. It paid quarterly dividends of approximately $50 million in 2007 and the first quarter of 2008. Six months after the spin-off, Idearc's shares traded at a high of $37.66 per share. In October 2008, Idearc acquired another company by using cash from its ongoing operations. The corporation also made every interest payment on its debt through March 2009.

Idearc's business, heavily dependent on revenues from the sale of advertising, was adversely affected during the recession that began in 2008. In March 2009, Idearc filed for Chapter 11 bankruptcy. The

Bankruptcy Code authorizes a plan of reorganization to "provide for . . . the retention and enforcement by the debtor, by the trustee, *or by a representative of the estate appointed for such purpose*, of any . . . claim or interest."[1] Pursuant to that authorization, Idearc's Plan of Reorganization (the "Plan"), confirmed in late December 2009, created a litigation trust (the "Litigation Trust") as the representative of Idearc to evaluate independently a variety of claims owned by Idearc, including claims against its officers and directors and fraudulent transfer claims against Verizon and its affiliates, and to pursue those claims thought promising for the benefit of holders of Idearc's unsecured claims. U.S. Bank National Association was appointed the trustee (the "Trustee") of the Litigation Trust.

On September 15, 2010, the Trustee filed this action in federal district court against Verizon; two of its subsidiaries, GTE Corporation ("GTE") and Verizon Financial Services, L.L.C. ("VFS"); and Idearc director John W. Diercksen (collectively, "Appellees"). According to the Trustee, Verizon created Idearc as a receptacle to place its "obsolete" directory, or "yellow pages," business and "load it up" with over $9 billion of Verizon's debt. According to Appellees, Idearc was a

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[1] 11 U.S.C. § 1123(b)(3)(B) (emphasis added). Under § 1123, a plan may transfer legal claims to a litigation trust, even when the debtor remains in possession of all of its other assets. *Compton v. Anderson (In re MPF Holdings US LLC)*, 701 F.3d 449, 453 (5th Cir. 2012); *McFarland v. Leyh (In re Tex. Gen. Petroleum Corp.)*, 52 F.3d 1330, 1335 (5th Cir. 1995). After a plan is confirmed by the bankruptcy court, a debtor will not have standing to bring claims that were transferred to a litigation trust. *In re MPF Holdings*, 701 F.3d at 454.

successful business that became insolvent during the 2008 financial crisis. The Trustee's second amended complaint contained a jury demand and eleven counts, summarized ever so briefly as follows: (1) & (2) fraudulent transfer against Verizon and VFS in connection with the spin-off; (3) breach of fiduciary duty against Diercksen; (4) aiding and abetting a breach of fiduciary duty against Verizon and VFS; (5) fraudulent transfer against Verizon and VFS in connection with a loan made by Idearc's subsidiary to Idearc; (6) fraudulent transfer against GTE and Verizon in connection with the "GTW distribution"; (7) fraudulent transfer against Verizon in connection with the interest payments subsequent to March 31, 2007; (8) unlawful dividend against Diercksen and Verizon; (9) promoter liability and breach of fiduciary duty; (10) unjust enrichment; and (11) alter ego.

On March 21, 2012, upon a motion by Appellees, for the reasons more fully discussed below, the district court struck the Trustee's jury demand. The Trustee moved to reconsider the order striking the jury demand, which the court denied. On September 17, 2012, the Trustee petitioned this court for a writ of mandamus, seeking review of the district court's orders striking the jury demand and denying the motion to reconsider. The motions panel denied the petition on September 27, 2012.

On July 31, 2012, the district court granted in part and denied in part Appellees' motion to dismiss the amended complaint. It dismissed in part Counts One and Two for fraudulent transfer with respect to the Unsecured Notes and Tranche B debt. The district court also dismissed Count Ten for unjust enrichment

and Count Eleven for alter ego insofar as it alleged a stand-alone claim.

Less than a month later, the district court issued a trial management order that bifurcated the four-week trial into two phases. The order stated that following the first phase, the court would decide Idearc's value at the time it was spun-off from Verizon in November 2006. The district court planned to make any other necessary factual determinations during the second phase of the trial, which was left unscheduled at the time of the order.

On September 14, 2012, the district court ruled on three pending motions for summary judgment. Among other things, the court's order limited the Trustee's recovery on its breach of fiduciary duty claim against Diercksen (Count Three) to the available insurance unless the Trustee could show that Diercksen engaged in willful misconduct or gross neglect, and it entered partial summary judgment in Appellees' favor as to Counts One and Two for fraudulent transfer with respect to the $2.5 billion in cash paid to Verizon and Count Eight for unlawful dividend with respect to the cash.

From October 15 to 26, 2012, the district court conducted Phase I of the bench trial in order to resolve a single factual issue: the value of Idearc as of the date of the spin-off. On January 22, 2013, the district court issued a Memorandum of Decision containing its factual findings. After reviewing the testimony and exhibits, the district court found that the value of Idearc as of the spin-off date, November 17, 2006, was at least $12 billion. The same day that it issued its factual findings, the district court ordered the Trustee

to file a brief explaining whether its remaining legal claims were viable in light of the valuation finding. The Trustee complied and submitted a brief arguing that almost all of its remaining claims were still viable.

On June 18, 2013, the district court issued its conclusions of law, holding that, based on its factfinding on Idearc's value as of November 2006, none of the Trustee's remaining claims could be maintained. The district court held that Phase II of the trial was no longer necessary, and it entered judgment in Appellees' favor. The Trustee timely appealed the following: the order granting the motion to strike the jury; the evidentiary rulings before and during the bench trial; the factual findings following the bench trial; almost all of the district court's conclusions of law following the bench trial; aspects of the district court's order dismissing some of the Trustee's claims; and aspects of its order granting partial summary judgment for Appellees.

II. Right to a Jury Trial

The Trustee appeals the district court's order striking the jury demand, claiming that it was entitled to a jury trial under the Seventh Amendment. The district court held that the Trustee's constitutional right to a jury trial was extinguished because the resolution of its fraudulent transfer claims was part of the equitable claims-allowance process. We agree with the district court.

A. Applicable Law

Whether a party is entitled to a jury trial is a legal question that is reviewed de novo. *Provident Life &*

Accident Ins. Co. v. Sharpless, 364 F.3d 634, 639 (5th Cir. 2004).

The Seventh Amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. Const. amend. VII. The Amendment's reference to "Suits at common law" denotes suits brought to determine legal rights, as opposed to equitable rights. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41 (1989). To determine whether a claim is legal or equitable, courts first compare the action in question to those actions of the Eighteenth Century that were brought in the courts of law and equity, and, second, consider whether the remedy sought is legal or equitable in nature. *Id.* at 42. The second prong is generally considered the more significant of the two. *Id.* Typically, actions to recover preferential or fraudulent transfers are considered suits at common law and are eligible for a jury trial under the Seventh Amendment. *Id.* at 48.

However, the right to a jury trial on a fraudulent transfer claim may be extinguished in certain circumstances in the bankruptcy context. It is well-settled that "when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be 'preserved' in 'suits at common law.'" *Id.* at 51 (quoting *Atlas Roofing Co., Inc. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 455 (1977)). Public rights include "seemingly 'private' right[s]" that are created by Congress, "acting for a valid legislative

purpose pursuant to its constitutional powers under Article I, . . . that [are] so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." *Id.* at 54 (quotation marks and citation omitted). Bankruptcy is an example of an area involving "public rights," since Congress has

> [E]stablish[ed] uniform laws on the subject of bankruptcy, [which] convert[] the creditor's legal claim into an equitable claim to a pro rata share of the res. . . . As bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession, and as the proceedings of bankruptcy courts are inherently proceedings in equity, there is no Seventh Amendment right to a jury trial for determination of objections to claims[.]

Katchen v. Landy, 382 U.S. 323, 336–37 (1966) (internal citations omitted); *see also N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982).

In *Granfinanciera*, the Supreme Court considered whether the public-rights doctrine transformed a fraudulent conveyance claim into an equitable claim when the claim had been brought by a debtor against a creditor. *See* 492 U.S. at 36–37, 51–55. The creditor-defendant requested a jury trial, but the bankruptcy court denied the motion and held a bench trial. *Id.* at 37. The Court held that a creditor triggers the process of "allowance and disallowance of claims" when it files a claim against the bankruptcy estate, which in turn subjects the creditor to the equitable power of the bankruptcy court. *Id.* at 58–59 & 59 n.14

(citing *Katchen*, 382 U.S. at 336). Because the creditor-defendant in *Granfinanciera* had not submitted proofs of claim against the bankruptcy estate, the creditor had not subjected itself to the equitable power of the bankruptcy court and triggered the public-rights exception. *Id*. at 58. Therefore, the creditor-defendant was entitled to a jury trial. *Id.* at 58–59.

One year after *Granfinanciera,* the Supreme Court decided *Langenkamp v. Culp*, 498 U.S. 42 (1990) (per curiam). In *Langenkamp*, creditors submitted a claim against a bankruptcy estate, and the bankruptcy trustee later sued the creditors to recover preferential transfers. *See id.* at 42–43. The Court held that unlike *Granfinanciera*, the creditor-defendants were not entitled to a jury trial because the proof of claim and trustee's action became "integral to the restructuring of the debtor-creditor relationship through the bankruptcy court's equity jurisdiction." *Id.* at 44 (citing *Granfinanciera*, 492 U.S. at 57–58).

More recently, *Stern v. Marshall*, --- U.S. ---, 131 S. Ct. 2594, 2617 (2011) reaffirmed *Langenkamp. Stern* clarified that "*Langenkamp* . . . explained . . . that a preferential transfer claim can be heard in bankruptcy when the allegedly favored creditor has filed a claim, because then the ensuing preference action by the trustee become[s] integral to the restructuring of the debtor-creditor relationship." *Id.* But, in *Stern,* "there was never any reason to believe that the process of adjudicating [the creditor's] proof of claim would necessarily resolve [the debtor's] counterclaim." *Id.* Additionally, the debtor's counterclaim was "in no way derived from or dependent upon bankruptcy law; it is

a state tort action that exists without regard to any bankruptcy proceeding." *Id.* at 2618. Thus, the Court held that Article III precluded the bankruptcy court from finally resolving the state law counterclaim. *Id.* at 2618.

B. Analysis

At issue before us is whether a litigation trust for a bankruptcy estate has a right to a jury trial on a fraudulent transfer claim against a creditor when the creditor has filed a proof of claim in the bankruptcy proceedings and the bankruptcy court is required, before disposing of that claim, to determine whether, under 11 U.S.C. § 502(d), property of the creditor is recoverable as a fraudulent transfer. The district court held that the Trustee was not entitled to a jury trial under *Langenkamp* because the resolution of the debtor's fraudulent transfer claims against Verizon was integral to the resolution of Verizon's claims against the debtor and therefore integral to the restructuring of the debtor-creditor relationship. In order to determine whether *Langenkamp* applies to the present matter and extinguishes the Trustee's right to a jury, we must consider: (1) whether the creditor (here Verizon) has filed proofs of claim in the bankruptcy proceeding; (2) whether the proofs of claim have been resolved, and, if not, whether their resolution will necessarily require the resolution of the debtor's fraudulent transfer claims (asserted by the Trustee) against Verizon; (3) whether a debtor, as opposed to a creditor, is bound by *Langenkamp*; (4) whether a litigation trust, succeeding to the rights of the debtor, has a right to a jury trial when the debtor itself would

have no such right; and (5) whether *Stern* requires a jury trial in this case. We address each issue in turn.

1. Proofs of Claim

Verizon filed four proofs of claim in the Idearc bankruptcy litigation: one on August 10, 2009 (No. 1779)(pre-petition breaches of contract), and three on December 31, 2009 (Nos. 2448, 2450, 2451)(contracts rejected under the Plan). ROA 21344, 21357. While the avoidance and recovery claims for fraudulent transfers under §§ 544 and 550 of the Bankruptcy Code were transferred to the Litigation Trust simultaneously with the confirmation of the Plan, the claims-allowance process continued in the bankruptcy court as contemplated by the Plan. On June 17, 2011, Idearc objected to all four proofs of claim under 11 U.S.C. §§ 105 and 502, and asserted that the claims should be disallowed until Verizon "has paid the amount, or turned over the property, for which it is liable, if any, under [§§] 544 and 550."[2] ROA 21342, 21348, 21349, 21350.[3]

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[2] Sections 544 and 550 are the Bankruptcy Code's avoidance and recovery statutes, and the Trustee brought four claims under these sections in its amended complaint. ROA 6093, 6094, 6096, 6098.

[3] Idearc had initially objected to all four of Verizon's claims on June 29, 2010, but on different grounds. *See In re Idearc Inc.*, No. 09-31828 (BJH) (Bankr. N.D. Tex. June 29, 2010) (Doc. 2173) (arguing the claims had been fully satisfied). On June 17, 2011, Idearc amended its objections to include its argument that the claims should be disallowed because Verizon had been the recipient of a fraudulent transfer. ROA 21342, 21348, 21349, 21350.

The Trustee argues that Idearc did not have the authority to object to the proofs of claim because Idearc filed its objection after the Plan had been confirmed, creating the Litigation Trust and transferring the right to pursue Idearc's §§ 544 and 550 claims against Verizon. Even assuming that the Trustee is correct, and that Idearc lacked such authority, this is irrelevant in light of the way that § 502(d) is worded:

> [T]he [bankruptcy] court *shall* disallow any claim of any entity from which property is recoverable under section . . . 550 . . . of this title or that is a transferee of a transfer avoidable under section . . . 544 [or] . . . 548 of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section . . . 550 . . . of this title.

11 U.S.C. § 502(d) (emphasis added). Verizon filed proofs of claim, and under the mandatory language of § 502(d), the bankruptcy court could not resolve those claims in favor of Verizon if Verizon had been the transferee of a fraudulent transfer. At the time Idearc objected, the Trustee had already filed this case in district court and was vigorously pursuing its fraudulent transfer claims. The validity of Idearc's objections does not alter the fact that the bankruptcy court was required to consider the fraudulent transfer issue as a component of the claims-allowance process. Thus, we reject the Trustee's argument.

2. Resolution of the Proofs of Claim

Claim No. 2450 appears to be provisionally resolved, and Idearc is specifically authorized to reopen the

claim following the outcome of this litigation.[4] On December 29, 2011, the bankruptcy court entered a stipulated order on Idearc's objections to all four of Verizon's claims. *See In re Idearc Inc*., No. 09 -31828 (Bankr. N.D. Tex. Dec. 29, 2011) (Doc. 3019). The order acknowledged that this lawsuit was pending in the district court. *Id*. at 3. The bankruptcy court provisionally disposed of Claim No. 2450, which it called the "Distribution Agreement Claim," as follows:

> Determination of Distribution Agreement Claims. With the exception of the. . . § 502(d) Objections, the allowance and amount of Verizon's Distribution Agreement Claims *may be determined in the Litigation Trust / Verizon Lawsuit*. To the extent those claims are so determined and allowed, such determination and allowance shall be binding on the Reorganized Debtors, except that the . . . § 502(d) Objections shall be preserved. In such event, if (i) a judgment is entered in the Litigation Trust/Verizon Lawsuit against Verizon for actual or constructive fraudulent transfer, or for any cause of action brought by the Litigation Trust premised on fraud, including but not limited to promoter fraud or alter ego, and (ii) the Reorganized Debtors'

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[4] Additionally, Claim No. 1779 was "withdrawn with prejudice except to the extent of Verizon's claims under the Distribution Agreement [Claim No. 2450]." *In re Idearc Inc*., No. 09-31828 (Bankr. N.D. Tex. Dec. 29, 2011) (Doc. 3019 at 4). Since Claim No. 2450 may be re-opened should the Trustee prevail in this litigation, it is possible that Claim No. 1779 could be impacted by this litigation as well.

> Bankruptcy Cases have been closed pursuant to section 350 of the Bankruptcy Code, within 60 days following the completion, including all appeals, of the Litigation Trust/Verizon Lawsuit, the Reorganized Debtors, at Verizon's request, shall file an agreed motion *to re-open the Bankruptcy Cases for the sole purpose of determining the . . . § 502(d) Objections to the Verizon Proofs of Claim*. If the allowance and amount of Verizon's Distribution Agreement Claims are not determined in the Litigation Trust/Verizon Lawsuit, then the agreed motion to re -open the Bankruptcy Cases shall be for the purpose of determining the allowance and amount of Verizon's Distribution Agreement Claims and resolving . . . § 502(d) Objections to the Verizon Proofs of Claim.

Id. at 5 (emphasis added).

The resolution of the fraudulent transfer claims in this lawsuit and Claim No. 2450 in the bankruptcy proceeding are interconnected. The bankruptcy court has expressly permitted Verizon to re-open Claim No. 2450 depending on the outcome of this litigation. Thus, the resolution of the fraudulent transfer claims before us will directly impact the claims-allowance process.[5]

The Trustee asserts that Verizon's proofs of claim are "irrelevant" to the Trustee's jury rights. It argues that the fraudulent transfer claims would not

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[5] As discussed above, even absent the bankruptcy court's express order, it is clear that the resolution of Claim No. 2450 in the bankruptcy court would have required the resolution of the Trustee's fraudulent transfer claim.

"necessarily have been resolved in the course of allowing or disallowing the claims against" Idearc, since Claim No. 2450 relates to a limited indemnification in a distribution agreement for misrepresentations in financing and registration documents. However, the Trustee's argument misconstrues what it means for a claim to have necessarily been resolved in the course of the claims-allowance process. This inquiry does not consider the basis for the underlying claim against the bankruptcy estate; it turns on the merits of the § 502(d) objection.

3. Langenkamp Applies to Debtors

Next, we consider whether the rule in *Granfinanciera* and *Langenkamp* applies to a debtor, even though *Langenkamp* considered the jury rights of a creditor. This court considered a similar question in *In re Jensen*, 946 F.2d 369 (5th Cir. 1991), *abrogated on other grounds*, *In re El Paso Elec. Co.*, 77 F.3d 793, 794 (5th Cir. 1996). There, a debtor sought a jury trial on its pre-petition state law claims. *Id.* at 370. The court held that the debtor was entitled to a jury trial because "the debtors' claims do not here 'arise as part of the process of allowance and disallowance of claims.' Nor are they 'integral to the restructuring of debtor-creditor relations.'" *Id.* at 374 (quoting *Granfinanciera*, 492 U.S. at 58) (internal citation omitted). Relevant to our inquiry is that *In re Jensen* framed the right to a jury trial in terms of the nature of the claims, placing no importance on the fact that the debtor, as opposed to the creditor, sought a jury trial. In fact, in resolving this issue, *In re Jensen* agreed with the Seventh Circuit's decision in *In re Hallahan*, which "reasoned

that if creditors lose their jury trial rights by presenting claims against the estate, 'debtors who initially choose to invoke the bankruptcy court's jurisdiction to seek protection from their creditors cannot be endowed with any stronger right.'" *Id.* (quoting *In re Hallahan*, 936 F.2d 1496, 1505 (7th Cir. 1991)). Thus, under *In re Jensen*, a creditor and a debtor alike are bound by the rule in *Langenkamp*.

4. Langenkamp Applies to Litigation Trusts

Since a debtor would be bound by *Langenkamp*, Idearc would not have a right to a jury trial on its fraudulent transfer claims against Verizon. Yet, the Trustee claims that, as a representative of the Litigation Trust, it has a right to a jury trial where the debtor would have none.

To evaluate this claim, we consider the precise rights transferred to the Litigation Trust under the Plan. *See, e.g., Torch Liquidating Trust ex rel. Bridge Assocs. L.L.C. v. Stockstill*, 561 F.3d 377, 387 (5th Cir. 2009) ("To show standing based on the plan's effectuation of such a transfer, the trustee must show: '(1) that it has been appointed, and (2) that it is a representative of the estate.'" (quoting *In re Tex. Gen. Petroleum Corp.*, 52 F.3d at 1335)). The Plan transferred "to the Litigation Trust the Litigation Trust Rights, with good, clean title to such property, free and clear of all liens, charges, Claims, encumbrances and interests, to be pursued by the Litigation Trustee for the benefit of [unsecured

creditors]."[6] ROA 7406. The purpose of the Litigation Trust, as defined by the Plan, was to "prosecut[e] the Litigation Trust Rights and distribut[e] the proceeds thereof in accordance with the Plan and the Litigation Trust Agreement, with no objective to continue or engage in the conduct of a trade or business." ROA 7406. The Plan defines "Litigation Trust Rights" as the

> Litigation Rights of the Debtors and the Debtors' Estates consisting of claims or causes of action, including applicable privileges, (i) arising under or pursuant to Chapter 5 of the Bankruptcy Code, which include, but are not limited to, actions involving . . . preferences and fraudulent transfers . . . , and (ii) belonging to the Debtors and the Debtors' Estates against the Debtors' officers or directors . . . . Unless otherwise released or enjoined by the Plan, compromise approved by the Bankruptcy Court, or other order of the Bankruptcy Court, Litigation Trust Rights shall also include all claims and causes of action of the Debtors and the Estates, including applicable privileges, against Verizon . . . and other Persons relating to the spinoff of the Debtors from Verizon, including, without limitation, *avoidance causes of action under Bankruptcy Code sections 544, 547, 548, 550 and 551* and claims and causes of action for

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[6] The "unsecured creditors" mentioned in the Plan are the: "Allowed Unsecured Note Claims, Allowed Unsecured Credit Facility Claims[,] and Allowed General Unsecured Claims (to the extent the holders of such Allowed General Unsecured Claims have elected treatment under Sub-Class 1 of Class 4 of the Plan) as provided in the Plan and Litigation Trust Agreement." ROA 7406.

> (a) breach of fiduciary duty, (b) fraud, (c) fraud in the inducement, (d) aiding and abetting a breach of fiduciary duty, (e) illegal dividends, (f) unjust enrichment, and (g) violations of state and federal securities laws or other applicable state or federal law.

ROA 7389 (emphasis added).

The confirmed plan clearly transferred Idearc's §§ 544 and 550 claims to the Litigation Trust, without modification. In so doing, Idearc lost standing to pursue these claims on behalf of the estate. *In re MPF Holdings*, 701 F.3d at 454. As contemplated by § 1123(b)(3)(B) of the Bankruptcy Code, the Litigation Trust is the representative of Idearc in pursuing these claims. Thus, the district court correctly observed that the Trustee stands in the shoes of Idearc. Since the Trustee is effectively Idearc for the purposes of this litigation, and since Idearc would have no Seventh Amendment right to a jury trial, the Trustee also lacks such a right.

The Trustee, ignoring the text of the Plan and § 1123(b)(3)(B) of the Bankruptcy Code, challenges the conclusion that a litigation trustee will generally stand in the shoes of the debtor. It argues that the Trustee acts instead for the beneficiaries, here unsecured creditors,[7] and its right to a jury trial should not be extinguished even if Idearc would have lacked such a right. The Trustee relies heavily on *Crescent Resources*

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[7] Unsecured creditors, of course, are exactly for whom Idearc would have been acting if the fraudulent transfer claims had not been transferred to the Litigation Trust and had been, instead, pursued by Idearc post confirmation.

Litigation Trust v. Duke Energy Corp., No. A-12-CA-009-SS, 2013 WL 1865450 (W.D. Tex. May 2, 2013). In *Crescent*, the debtors entered into bankruptcy, and the bankruptcy court confirmed the debtor's plan of reorganization which, inter alia, created a litigation trust to "pursue causes of action which the Debtor could have asserted, including avoidance actions and other claims arising outside of the ordinary course of business of the Debtors." *Id.* at *2. The litigation trust brought a fraudulent conveyance action against two creditors in district court. *Id.* at *3. The trust demanded a jury trial, but one creditor sought to strike the jury. *Id.* The creditor argued that the right was extinguished because the defendants filed proofs of claim in the bankruptcy proceeding, and the debtor objected to the proofs of claim on the basis of fraudulent conveyance under § 502(d). *Id.*

Crescent agreed with the trust, holding that *Langenkamp* did not apply to litigation trusts and explicitly disagreeing with the district court's holding in this case. *Id.* at *4. In so doing, *Crescent* relied on a Seventh Circuit decision that differentiated between a liquidation trust and a debtor. *Id.* (quoting *Grede v. Bank of New York Mellon*, 598 F.3d 899, 902 (7th Cir. 2010)). According to the Seventh Circuit in *Grede*,

> Although the terms of the Bankruptcy Code govern the permissible duties of a trustee in bankruptcy, the terms of the plan of reorganization (and of the trust instrument) govern the permissible duties of a trustee after bankruptcy. A liquidation trust is no different in this respect from a reorganized debtor. . . .

> People are tempted to assume that bankruptcy is forever and that the Code continues to regulate the conduct of former debtors. We have held otherwise. The . . . Liquidation Trust is a post-bankruptcy vehicle[.]

Grede, 598 F.3d at 902 (internal citations omitted). *Crescent* acknowledged that *Grede* considered a different issue than the one before the court, but it believed that *Grede*'s "holding that the strictures of the Bankruptcy Code do cut off at some point, and actions by a liquidation trust, post-plan confirmation[,] is after that point, is helpful here in determining whether the holdings of *Granfinanciera* and *Langenkamp* are applicable to . . . a post-plan litigation trust." *Crescent*, 2013 WL 1865450, at *5 n.1. Therefore, *Crescent* concluded that *Langenkamp* was limited to bankruptcy trustees and did not apply to litigation trustees. *Id.* at *5.

Crescent's reliance on *Grede* is misplaced, since the Seventh Circuit answered a different legal question than the one at issue in *Crescent* and here. *Grede* concerned the authority of a litigation trustee to bring claims on behalf of third parties (as well as the debtor).[8] 598 F.3d at 900. *Grede* acknowledged that,

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[8] In *Grede*, Sentinel Management Group, Inc., entered bankruptcy, the bankruptcy court confirmed a Chapter 11 reorganization plan, and the bankruptcy court appointed a liquidation trustee. *See* 598 F.3d at 900. Many of Sentinel's customers believed that Sentinel had defrauded them along with the Bank of New York Mellon, which was Sentinel's clearing bank, lender, and depository for investment pools. *Id*. As part of the reorganization plan, Sentinel's fraudulent conveyance claims against the Bank had been transferred to a liquidation trust. *Id*. Although the investors'

under the Supreme Court's decision in *Caplin*, 406 U.S. at 428, a bankruptcy trustee does not have the authority to sue third parties on behalf of investors who believed that the third party's act had injured them and the debtor jointly. *Id*. However, the court distinguished *Caplin*, explaining that none of the concerns raised in *Caplin* applied to a suit by a liquidation trustee on assigned claims from third parties. *Id.* at 902.

Returning to the present issue (and the issue before the *Crescent* court), we must consider the nature of the claim brought by the Trustee, and whether that claim is legal and entitled to a jury trial, or equitable because of its connection with the resolution of the claims-allowance process. *Grede* was concerned with a liquidation trustee's authority to bring the assigned claims of third parties. We have no quarrel with *Grede*'s conclusion that a post-bankruptcy liquidation trust established by a confirmed plan would be governed by the plan itself (as distinguished from the Bankruptcy Code). But *Grede* did not hold that a claim that is by law integral to the resolution of the claims-allowance process is no longer integral to that process when it is pursued by a litigation trustee. Since *Grede* is not on point, and since the Trustee has

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claims against the Bank did not belong to Sentinel and were not part of the bankruptcy estate, the terms of the liquidation trust also permitted investors to assign their claims to the trust for collection, which many investors did. *Id*. The trustee filed a fraudulent conveyance action in federal court to pursue the investors' claims. The Bank objected to the trustee's authority to bring the action on the ground that the trustee lacked authority to pursue the investors' claims under *Caplin v. Marine Midland Grace Trust Co*., 406 U.S. 416 (1972). *Id.*

presented us with no authority to support its position, we cannot say that a litigation trustee would have a right to a jury trial where the debtor, whose claims it is pursuing, would have none. Thus, we reject the Trustee's argument that *Langenkamp* does not apply to a litigation trustee pursuing the debtor's fraudulent transfer claims.

5. Stern *Did not Overrule* Langenkamp

The Trustee's final argument relies on *Stern*, --- U.S. ---, 131 S. Ct 2594, to assert that the fraudulent transfer action must be tried by an Article III court before a jury, irrespective of the proofs of claim filed in the bankruptcy court. The Trustee concludes that *Langenkamp* is simply inapplicable under *Stern*. However, *Stern* is not as broad as the Trustee suggests; in fact, *Stern* both distinguished and explicitly preserved *Langenkamp*. *See* 131 S. Ct. at 2617–18.

In *Stern,* a creditor filed a proof of claim in the bankruptcy proceeding seeking recovery from the estate on a state law defamation claim. *Id.* at 2601. The debtor later filed a counterclaim against the creditor for fraudulent inducement. *Id.* The bankruptcy court entered final judgment in the debtor's favor on the counterclaim. *Id.* The issue before the Supreme Court was whether the bankruptcy court had jurisdiction to hear the counterclaim. *Id.* The Court held that the debtor's counterclaim was a core proceeding under the plain text of 28 U.S.C. § 157(b)(2)(C), which states that "counterclaims by the estate against persons filing claims against the estate" are "core proceedings." *Id*. at 2604–05 (internal quotation marks omitted). However, *Stern* also declared that § 157(b)(2)(C) was unconstitutional to the extent that it permitted

bankruptcy courts to enter final judgments in state law counterclaims that would not necessarily be resolved in the process of ruling on a creditor's proof of claim. *Id*. at 2620.

In reaching its holding, *Stern* addressed the debtor's argument that the bankruptcy court had the authority to adjudicate its counterclaim under *Langenkamp* because the creditor had filed a proof of claim in the bankruptcy proceedings. *Id.* at 2615–16. *Stern* distinguished *Langenkamp*, explaining that, under *Langenkamp*,

> [A] preferential transfer claim can be heard in bankruptcy when the allegedly favored creditor has filed a claim, because then "the ensuing preference action by the trustee become[s] integral to the restructuring of the debtor-creditor relationship." If, in contrast, the creditor has not filed a proof of claim, the trustee's preference action does not "become[] part of the claims-allowance process" subject to resolution by the bankruptcy court.

Id. at 2617 (quoting *Langenkamp*, 498 U.S. at 44, 45) (internal citation omitted) (alterations in original). Unlike *Langenkamp*, the debtor's counterclaim against the creditor was not part of the claims-allowance process in *Stern*. The Court explained that the bankruptcy court made several factual and legal determinations in ruling on the counterclaim that were not dispositive of the creditors' claim against the estate. *Id.* Despite some similarity between the debtor's counterclaim and the creditor's defamation claim, "there was never any reason to believe that the process of adjudicating [the creditor's] proof of claim would

necessarily resolve [the debtor's] counterclaim." *Id.* Likewise, while in *Langenkamp* "the trustee bringing the preference action was asserting a right of recovery created by federal bankruptcy law," in *Stern,* the debtor's counterclaim was "in no way derived from or dependent upon bankruptcy law; it is a state tort action that exists without regard to any bankruptcy proceeding." *Id.* at 2618.

After distinguishing *Langenkamp*, *Stern* analogized the debtor's counterclaim to the fraudulent conveyance action in *Granfinanciera*, which had been entitled to a jury trial. *Id.* The Court explained that

> *Granfinanciera*'s distinction between actions that seek "to augment the bankruptcy estate" and those that seek "a pro rata share of the bankruptcy res," reaffirms that Congress may not bypass Article III simply because a proceeding may have some bearing on a bankruptcy case; the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process.

Id. (quoting *Granfinanciera*, 492 U.S. at 56) (internal citation omitted).

It is clear from *Stern* that *Langenkamp* is still good law. *Stern* did not displace *Langenkamp*; in fact, it took great care to distinguish the facts before it from the facts in *Langenkamp*. Moreover, the claim at issue here is analogous to the one in *Langenkamp* and distinguishable from the debtor's counterclaim in *Stern*. As previously discussed, resolution of Verizon's proof of claim will require ruling, under § 502(d), on

whether Verizon was the recipient of a fraudulent transfer. This involves the same factual and legal determinations made by the district court in this case in resolving the fraudulent transfer claim by the Trustee, the debtor's representative, against Verizon. Also, unlike the debtor's counterclaim in *Stern*, here the Trustee's claim is derived, in part, from bankruptcy law (§§ 544 and 550).

The Supreme Court very recently revisited *Stern* in *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165, --- U.S. --- (2014). *Executive Benefits* describes *Stern*'s core inquiry as whether Article III of the Constitution prohibits a bankruptcy court from finally adjudicating certain types of claims but noted that *Stern* "did *not*, however, decide how bankruptcy or district courts should proceed when a '*Stern* claim' is identified." *Id.* at 2168.[9] *Executive Benefits* resolved how courts should proceed in adjudicating a "*Stern* claim" and held that while a bankruptcy court may not enter a final judgment on a "bankruptcy-related claim," a bankruptcy court may issue proposed findings of fact and conclusions of law to be reviewed de novo by the district court. *Id.* In reaching this conclusion, *Executive Benefits* did not discuss the right to a jury trial.[10] In

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[9] *Executive Benefits* defined a "*Stern* claim" as "a claim designated for final adjudication in the bankruptcy court as a statutory matter, but prohibited from proceeding in that way as a constitutional matter." 134 S. Ct. at 2170.

[10] The Court's only mention of a jury trial in *Executive Benefits* was in the procedural background, when it commented that there had been some dispute in the district court as to whether the trustee's claims should proceed before a jury in district court. 134 S. Ct. at 2169. The trustee ultimately moved for summary judgment,

light of the Supreme Court's recent clarification of *Stern*, we reject the Trustee's argument that *Stern* requires that its fraudulent transfer claim against Verizon be heard by a jury.

In sum, the Trustee's fraudulent transfer claims against Verizon are "integral to the restructuring of the debtor-creditor relationship through the bankruptcy court's equity jurisdiction." *See Langenkamp*, 498 U.S. at 44. Resolution of Verizon's proof of claim in the bankruptcy court would necessarily resolve the fraudulent transfer issue. In fact, in this specific case, the bankruptcy court entered an order that provisionally disposed of the claim subject to the outcome of this very litigation, thus clarifying that the claims in this court are indeed related to the restructuring of the debtor-creditor relationship. Additionally, while it is no problem, it is also of no import, that a litigation trustee has brought this claim, since a *Langenkamp* inquiry focuses on the *nature* of the claim and not on *who* has brought the claim. *See, e.g.*, *In re Jensen*, 946 F.2d at 374. Accordingly, we affirm the district court's order granting the motion to strike the jury.

C. Waiver

On appeal, the Trustee raises numerous challenges to the district court's ruling that have been waived. This court will typically not consider an issue or a new argument raised for the first time in a motion for

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indicating that the matter of a jury trial was not relevant to the legal issue presented to the Supreme Court. *Id.* Additionally, the Court briefly summarized the holding of *Granfinanciera* in a footnote, which mentioned the right to a jury trial. *Id*. at 2169 n.3.

reconsideration in the district court. *Lincoln Gen. Ins. Co. v. De La Luz Garcia*, 501 F.3d 436, 442 (5th Cir. 2007); *Leverette v. Louisville Ladder Co.*, 183 F.3d 339, 342 (5th Cir. 1999) (per curiam). Additionally, "[i]t is not enough to merely mention or allude to a legal theory" in order to "raise an argument." *United States v. Scroggins*, 599 F.3d 433, 446 (5th Cir. 2010) (citing *McIntosh v. Partridge,* 540 F.3d 315, 325 n. 12 (5th Cir. 2008)). Rather, "a party must press its claims," which entails "clearly identifying a theory as a proposed basis for deciding the case—merely intimat[ing] an argument is not the same as pressing it." *Id.* at 447 (internal quotation marks and citation omitted) (alteration in original).

The Trustee raised its arguments concerning a right to a jury trial on its non-fraudulent-transfer claims and claims against Diercksen for the first time in its motion for reconsideration of the district court's order striking the jury. Although the Trustee made a brief reference to its breach of fiduciary duty and aiding and abetting claims in its response in opposition to the motion to strike, this is insufficient to preserve the Trustee's arguments.[11] *Scroggins*, 599 F.3d at 446. Accordingly,

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[11] The Trustee's only reference to its non-fraudulent transfer claims is contained in a footnote that reads:

> [Appellees] erroneously argue that [the Trustee] is not entitled to a jury trial on its breach of fiduciary duty and aiding and abetting breach of fiduciary duty because such claims are "equitable." Because [the Trustee] seeks monetary relief for its fiduciary duty breach claims, the claims are "legal" rather than equitable and are protected by the Seventh Amendment.

ROA 21597 n.8 (internal citation omitted). This footnote only

in its order denying reconsideration, the district court concluded that these arguments had been waived.[12] *U.S. Bank (Reconsideration)*, 2012 WL 3034707, at *4. We agree. Since the arguments concerning the right to a jury trial on the non-fraudulent-transfer claims and on the claims with respect to Diercksen have been waived, we will not consider them here.[13]

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states that the breach of fiduciary duty and aiding and abetting claims are legal claims; it in no way asserts that these claims are not part of the equitable claims-allowance process, which is at issue here. Additionally, it does not discuss Diercksen, nor does it allege that the claims against Diercksen should be treated differently for jury trial purposes. The district court, in its order denying reconsideration, commented that the Trustee "only alluded to its claims of breach of fiduciary duty and aiding and abetting breach of fiduciary duty" in its briefing on the motion to strike, so the court concluded that the Trustee's discussion of these claims in its motion for reconsideration constituted the presentation of a new argument. *U.S. Bank Nat. Ass'n v. Verizon Commc'ns Inc.*, 3:10-CV-1842-G, 2012 WL 3034707, at *4 (N.D. Tex. July 25, 2012) (hereinafter "*U.S. Bank (Reconsideration)*"). We agree. This footnote alone cannot be said to have sufficiently presented the legal issues to the district court for review.

[12] The Trustee mischaracterizes the district court's and Appellees' discussion of waiver, and claims that it never waived its right to a jury trial. However, the discussion of waiver is limited to arguments that were not properly raised before the district court.

[13] The Trustee also contends that the district court granted relief on grounds not raised by Appellees since Appellees' motion to strike the jury demand did not address all of the Trustee's claims. This argument is unavailing. Appellees' motion to strike incorporated all of the Trustee's claims. ROA 1866 ("its claims are part of the claims[-]allowance process"), 1869 (discussing "its fraudulent transfer and other claims"). Additionally, the motion was clearly labeled as a motion to strike the jury. ROA 1843,

III. Subsidiary Issue

During summary judgment, the district court found that Idearc was a wholly-owned subsidiary of Verizon prior to the spin-off, and the court later referenced this finding as part of its evidentiary rulings, findings of fact, and conclusions of law. Thus, in challenging many of the district court's rulings, the Trustee frequently argues that the district court erred in part because Idearc was not Verizon's wholly-owned subsidiary. Accordingly, we will address Idearc's subsidiary status separately since the matter is raised throughout the appeal.

In its September 14, 2012 order granting in part and denying in part summary judgment, the district court addressed the subsidiary issue. *See U.S. Bank Nat'l Ass'n v. Verizon Commc'ns Inc.*, 892 F. Supp. 2d 805, 817–18 (N.D. Tex. 2012) (hereinafter "*U.S. Bank (Summary Judgment)*"). Diercksen moved for summary judgment on the Trustee's breach of fiduciary duty

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1866–69. Appellees did not move to strike the jury for only portions of the trial. The district court correctly concluded that the motion sought to strike a jury as to *all* claims contained in the complaint. The Trustee bore the burden of rebutting the motion to strike by raising all of the reasons entitling it to a jury trial. The Trustee is represented by sophisticated counsel, and the record indicates that the district court routinely permitted additional briefing and enlarged the page limits to accommodate the parties. Thus, the Trustee was afforded ample opportunity to raise its arguments before the district court. However, the Trustee only raised arguments concerning the fraudulent transfer claims with respect to Verizon in its response and sur-reply in opposition to the motion to strike. In so doing, it waived its arguments concerning its claims against Diercksen and its non-fraudulent transfer claims against Verizon. *Lincoln Gen.*, 501 F.3d at 442.

claim, arguing that his fiduciary duties were owed to Verizon because Idearc was a wholly-owned subsidiary of Verizon.[14] *Id.* The court noted that the parties disputed whether Idearc was a wholly-owned subsidiary of Verizon, and, after considering the evidence presented by both parties, held that "no reasonabl[e] factfinder could conclude that Idearc was not a wholly-owned subsidiary of Verizon." *Id.* at 818. However, because Diercksen would owe Idearc fiduciary duties if the corporation was insolvent on the day of the spin-off, and since there was a fact dispute as to the value of Idearc on that date, the district court denied summary judgment on the claim. *Id.* at 814, 818.

Following the bench trial, the Trustee re-raised its argument that Idearc was not a wholly-owned subsidiary in its response to the district court's order to show cause. The district court interpreted the Trustee's arguments as a belated request to reconsider its subsidiary finding in the summary judgment order. *See U.S. Bank Nat'l Ass'n v. Verizon Commc'n, L.L.C.*, No. 3:10-cv-1842-G-BK (N.D. Tex. June 18, 2013) (Doc. 671 at 18) (hereinafter "Conclusions of Law"). Since the Trustee offered no new evidence that was not available to it during the summary judgment phase, and since there was no intervening change in the law, the district court declined to reconsider its holding that Idearc was a wholly-owned subsidiary. *Id.*

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[14] Diercksen's argument was based on the Delaware Supreme Court's ruling in *Anadarko Petroleum Corp. v. Panhandle E. Corp.*, 545 A.2d 1171, 1174 (Del. 1988). *Anadarko* will be discussed at length in Sections VI.D. and VI.E.

On appeal, the Trustee argues that the district court's reliance on its summary judgment subsidiary statement was improper because the statement was dictum.[15] We disagree. "A statement is dictum if it could have been deleted without seriously impairing the analytical foundations of the holding and being peripheral, may not have received the full and careful consideration of the court that uttered it." *Int'l Truck & Engine Corp. v. Bray*, 372 F.3d 717, 721 (5th Cir. 2004) (internal quotation marks and citation omitted). However, if the statement is "necessary to the result or constitutes an explication of the governing rules of law," it is not dictum. *Id.* Here, whether Idearc was a wholly-owned subsidiary was squarely before the court, and it was considered as part of the analysis of the breach of fiduciary duty claim. Diercksen had argued that because Idearc was a wholly-owned subsidiary of

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[15] The Trustee also claims that under Federal Rule of Civil Procedure 56(g), the "subsidiary statement" was not binding because: (1) Appellees did not request a finding on this fact; (2) the district court did not refer to Rule 56(g) or state that any facts would be treated as established in this case; and (3) the fact was "irrelevant" to the denial of summary judgment. The Trustee's Rule 56(g) argument is unavailing. Under Rule 56(g), "[i]f the court does not grant all the relief requested by the motion, it *may* enter an order stating any material fact . . . that is not genuinely in dispute and treating the fact as established in the case." Fed. R. Civ. P. 56(g) (emphasis added). The Rule's use of the word "may," as opposed to "shall," indicates that district courts are not *required* to enter a separate order under Rule 56(g). Further, the Trustee has not presented us with Fifth Circuit caselaw that interprets Rule 56(g) in such a manner. More importantly, the Trustee did not raise its Rule 56(g) argument before the district court in its response to the order to show cause, and it only briefly mentioned the Rule for the first time in its reply brief. Thus, this argument has been waived. *Jones v. Cain*, 600 F.3d 527, 541 (5th Cir. 2010).

Verizon, it owed no fiduciary duties to Idearc. *U.S. Bank (Summary Judgment)*, 892 F. Supp. 2d at 817. The Trustee countered that Idearc was not a wholly -owned subsidiary. *Id.* The district court necessarily analyzed this issue in order to determine the legal duties owed by Diercksen to Idearc, and it concluded that there was no genuine issue of material fact as to Verizon's sole ownership of Idearc. *Id.* Thus, the district court's statement was not dictum since it was necessary to its final breach of fiduciary duty analysis.

Next, the Trustee appeals the district court's refusal to reconsider its summary judgment ruling in light of the "undisputed evidence" that Verizon did not validly own stock.[16] The undisputed evidence has two components. First, the Trustee focuses on the failure of Verizon to properly form Idearc's board. Idearc's bylaws created a two-member board of directors and a quorum also required two members. The Trustee argues that since Diercksen was the only board member, all of his unilateral actions were illegal and void, including his resolution issuing stock. Second, the Trustee claims that Verizon never validly owned Idearc stock because the resolutions issuing one share of stock and authorizing Harless to sell that share did not list

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[16] The Trustee briefly argues that the district court's summary judgment order failed to "take into account the evidence that Idearc never validly issued shares"; however, the Trustee does not specifically appeal this aspect of the summary judgment order. The Trustee did appeal other elements of the summary judgment order, but did not identify the subsidiary finding as one of the issues on appeal. Rather, the focus of the Trustee's appeal appears to be on the denial of reconsideration.

a price. According to the Trustee, Verizon consequently did not pay for the stock, so it never owned the stock.

We review the district court's denial of a request to reconsider a summary judgment ruling for abuse of discretion. *Templet v. HydroChem Inc.*, 367 F.3d 473, 477 (5th Cir. 2004). "[A] district court has considerable discretion in deciding whether to reopen a case in response to a motion for reconsideration, [but] such discretion is not limitless." *Id.* at 479. The court must balance two competing interests in ruling on a motion to reconsider: "1) the need to bring litigation to an end; and 2) the need to render just decisions on the basis of all the facts." *Id.* When a party requests reconsideration of a summary judgment order and submits evidentiary materials in support of its motion that were not previously provided to the court, the court may consider the following factors:

> 1) [T]he reasons for the moving party's default; 2) the importance of the omitted evidence to the moving party's case; 3) whether the evidence was available to the non-movant before it responded to the summary judgment motion; and 4) the likelihood that the non-moving party will suffer unfair prejudice if the case is reopened.

Id. at 482 (citing *Lavespere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167, 174 (5th Cir. 1990), *overruled on other grounds*, *Little v. Liquid Air Corp.,* 37 F.3d 1069 (5th Cir. 1994)). However, a request to reconsider a non-final, non-appealable partial summary judgment order "remains within the plenary power of the district court to revise or set aside in its sound discretion without any necessity to meet the

requirements of Fed. R. Civ. P. 60(b)." *Avondale Shipyards, Inc. v. Insured Lloyd's*, 786 F.2d 1265, 1269 (5th Cir. 1986).

Here, the Trustee did not file a formal motion for reconsideration following the entry of the district court's summary judgment order. Months later, after the trial, the Trustee included a request to reconsider the subsidiary issue in its response to the order to show cause. The district court made note of the Trustee's request to reconsider its subsidiary finding in its conclusion of law, but it declined to do so. According to the district court, reconsideration of the subsidiary issue was inappropriate because the Trustee had not requested reconsideration of the summary judgment order, cited no intervening change in the law, and had access to all the evidence on which it relied to reargue this point during the summary judgment stage. Conclusions of Law at 18–19.

The subsidiary finding at summary judgment was not a final judgment on a claim, so it is not subject to the strict requirements of Rule 60. *See Avondale Shipyards*, 786 F.2d at 1269. Yet, the decision to reconsider the finding is nonetheless left to the sound discretion of the district court. *Id.* The district court did not abuse its discretion. The request for reconsideration was untimely and the evidence presented by the Trustee in response to the order to show cause was available at the summary judgment stage. The Trustee does not dispute this. Due to the size of the record and the number of extensions granted by the district court throughout the proceedings, it is unclear why the Trustee failed to timely raise its arguments.

Additionally, we are not persuaded that the Trustee's arguments have merit, specifically because the Trustee does *not* claim that any other person or entity owned Idearc before the spin-off (a fact that, if it were true, would affect Diercksen's fiduciary duties). Likewise, the Trustee does not argue that Idearc or its board owed fiduciary duties to non-Verizon shareholders prior to the spin-off. The Trustee only cursorily responds that Delaware law does not require that a corporation issue stock in order to exist. *See* Del. Code Ann. tit. 8, § 106 (West 2014). However, this one-sentence explanation only raises more questions, none of which the Trustee answers. As a practical matter, if no one owned Idearc, then to whom did Diercksen owe fiduciary duties before the spin-off? At that time, Idearc was a shell corporation, with no assets, that existed only on paper. To base a $9.1 billion claim for damages on Diercksen's alleged breach of fiduciary duties owed solely to an empty shell corporation is, to say the least, problematic. At minimum, this is an issue that deserves more than one sentence in a lengthy brief. Moreover, the Trustee failed to argue before the district court in its response to the order to show cause that Idearc could exist without shareholders, even though the district court had also noted at summary judgment that the Trustee had failed to indicate who may have owned Idearc. *U.S. Bank (Summary Judgment)*, 892 F. Supp. 2d at 818 (holding that the Trustee "has not put forth any evidence that any other entity owned Idearc at the time leading up to the spin-off").

Because the request to reconsider was untimely, based entirely on evidence that was available at the

summary judgment stage, and lacks merit, we affirm the district court's denial of reconsideration.

IV. Evidentiary Rulings

The Trustee raises two challenges to the district court's evidentiary rulings. First, the Trustee claims that the district court erroneously admitted hundreds of allegedly irrelevant exhibits prior to the Phase I trial. Second, it contests the court's exclusion of supposedly relevant evidence and testimony during the trial. We reject these arguments.

This court reviews evidentiary rulings for abuse of discretion. *Gabriel v. City of Plano*, 202 F.3d 741, 745 (5th Cir. 2000). "[A] trial court has broad discretion in determining the admissibility of evidence based on relevance and materiality, and that determination will be overturned only when the abuse of that discretion is *clearly* shown from the record." *United States v. Collins*, 690 F.2d 431, 438 (5th Cir. 1982) (emphasis added). Even when evidence is relevant, it may be excluded "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403.

If the district court has abused its discretion in excluding or admitting evidence, "[w]e reverse judgments for improper evidentiary rulings only where the challenged ruling affects a substantial right of a party. The burden of proving substantial prejudice lies with the party asserting error." *Gabriel*, 202 F.3d at 745 (internal quotation marks and citations omitted); *see also First Nat'l Bank of Louisville v. Lustig*, 96 F.3d

1554, 1574 (5th Cir. 1996). A ruling has affected the substantial rights of the party if, when considering all of the evidence presented at trial, the ruling had a substantial effect on the outcome of the trial. *See United States v. Limones*, 8 F.3d 1004, 1008 (5th Cir. 1993). However, if the error was harmless, it will be excused. *See United States v. Hart*, 295 F.3d 451, 454 (5th Cir. 2002).

Turning to the Trustee's first challenge, the allegedly irrelevant exhibits at issue were exhibits initially identified by the Trustee and included on its exhibit list, without objection from Appellees. At the pre-trial conference, the district court informed the parties that, given the large number of exhibits that would be presented at trial, the court would admit evidence from the exhibit lists in groups if there was no objection from the opposing party. ROA 16259. After the pre-trial conference and only a week before trial, the Trustee sought to exclude 315 of its own exhibits from the trial. The district court ultimately admitted all the exhibits, believing that the attempt to exclude them was "a tactic on behalf of the [Trustee]." ROA 16335.

On appeal, the Trustee has not discussed the content of the admitted documents, nor has it explained why these documents were irrelevant. Absent even a description of the documents, we cannot conclude whether the court's decision to admit them was an abuse of discretion. *Collins*, 690 F.2d at 438. Additionally, the Trustee has not shown how the admission of these documents affected its substantial rights, so any error would not be reversible. *Gabriel*, 202 F.3d at 745.

The Trustee's second challenge is to the district court's refusal to admit evidence of Idearc's alleged corporate deficiencies. This includes the following: testimony that no board of Idearc was ever appointed; testimony that the issuance of Idearc stock was "false"; evidence that Idearc never properly issued any stock, so it could not have been a wholly-owned subsidiary; evidence that Idearc's corporate records, including a stock certificate, were backdated; and a memo "demonstrat[ing] that the backdated stock certificates and secretary certificates . . . were not sent to [directors] for signature until . . . after the private letter ruling issued." The Trustee claims that the errors affected the court's valuation finding and conclusions of law, particularly with respect to the court's holding that Idearc was a wholly-owned subsidiary.

The Trustee's challenge fails for two reasons. First, the district court had previously ruled, at summary judgment, that Idearc was a wholly-owned subsidiary of Verizon. *See U.S. Bank (Summary Judgment)*, 892 F. Supp. 2d at 817–18. Later, while ruling on a motion *in limine*, the district court noted that the Trustee had failed to show that the failure to observe corporate formalities prior to the spin-off "significantly affected the underlying fundamentals of the company." ROA 13631. Idearc's subsidiary status had already been decided, and that decision had gone unchallenged up to that point. Even if the Trustee's proffered evidence had been relevant to the valuation issue (and it is not clear that it is), the court did not abuse its discretion by declining to hear more evidence on a matter that had already been decided. *See* Fed. R. Evid. 403.

Assuming that the district court did err in excluding the evidence, it is unclear how it impacted the Trustee's substantial rights. *See Limones*, 8 F.3d at 1008. The Trustee conclusorily states that the evidence was relevant to the valuation finding, but does not discuss how each specific piece of evidence was likely to affect the outcome of the trial, in light of all the evidence presented. *Id.* Accordingly, we affirm the district court's evidentiary rulings.

V. Valuation Finding

Next, the Trustee appeals the district court's findings of fact following the ten-day bench trial, arguing that the court erred in concluding that Idearc was worth more than $12 billion on the date of the spin-off.

We review findings of fact made by a district judge during a bench trial for clear error. *Dickerson v. Lexington Ins. Co.*, 556 F.3d 290, 294 (5th Cir. 2009). "A finding is 'clearly erroneous' when there is no evidence to support it, or if the reviewing court, after assessing all of the evidence, is left with the definite and firm conviction that a mistake has been committed." *Baldwin v. Taishan Gypsum Co., Ltd. (In re Chinese-Manufactured Drywall Prods. Liab. Litig.)*, 742 F.3d 576, 584 (5th Cir. 2014). When "the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573–74 (1985). If we determine that "there are two permissible views of the evidence," then

we may not conclude that the court's choice between them was clearly erroneous. *Id.*

Following the bench trial, the district court issued a sixty-six page Memorandum of Decision that carefully discussed the exhibits and testimony presented at trial. *See U.S. Bank Nat'l Ass'n v. Verizon Commc'ns Inc.*, 3:10-CV-1842-G, 2013 WL 230329 (N.D. Tex. Jan. 22, 2013) (hereinafter "*U.S. Bank (Findings of Fact)*"). The district court found, based on exhibits and the testimony of witnesses, that the value of Idearc on November 17, 2006, was at least $12 billion. *Id.* at *1. The district court first considered the testimony of the Trustee's expert witness, Carlyn Taylor. *Id.* at *2. While the court found her highly qualified to offer an expert opinion, it ultimately concluded that her valuation of Idearc at $8.15 billion was unpersuasive. *Id.* at *3, *9. The court considered the three valuation calculations Taylor performed to arrive at the $8.15 billion figure, but it rejected them because: (1) they did not include all available information, such as the trading price for Idearc on NYSE; (2) the financial projections on which she relied were unreliable; and (3) there were "multiple instances of double counting that infected both Taylor's . . . analysis and her overall conclusions." *Id.* at *7–9. In coming to this conclusion, the district court relied on t he expert testimony of Mark Hopkins, an expert witness for Appellees, and on the market evidence of the value of Idearc at the time of the spin-off. *Id.* at *6.

Contrary to the Trustee's claims, the district court found that the evidence of Idearc's value based on the market price of Idearc stock was a reliable indicator of Idearc's value because the market was not misled. *Id.*

at *10. Upon careful consideration of the evidence, the district court concluded that the information that the Trustee alleged was withheld from the market was actually disclosed or, if not disclosed, was not material. *Id.* at *10–29.

There is no clear error in the district court's factual findings. We reject the Trustee's assertion that the district court valued Idearc without considering the clouds on its value. Clouds, such as questions regarding ownership or the ability to convey an asset, are material and can impact the value of an asset. However, the district court had previously concluded that there were no clouds on Idearc's value prior to trial, and it did not need to reconsider this finding.[17] The Trustee has not appealed these earlier rulings.

Likewise, the Trustee's argument that the district court erroneously relied on Idearc's stock price at the date of the spin-off lacks merit. We must affirm the factual finding of a district court when its interpretation of the evidence is plausible after viewing the record as a whole. *Anderson*, 470 U.S. at 573–74. The district court made lengthy findings concerning the information that was and was not disclosed and the impact of that information on the market value of Idearc. We have reviewed those findings and the massive record, and we believe that the district court's

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[17] *See U.S. Bank (Summary Judgment)*, 892 F. Supp. 2d at 818 (holding that Idearc was a wholly-owned subsidiary of Verizon); ROA 13631 (order denying the Trustee's motions *in limine*, and holding that the Trustee had not shown that the corporate formalities in the spin-off and in the issuance of Idearc stock and debt significantly affected the underlying fundamentals of the company).

conclusion that Verizon sufficiently disclosed the risks associated with a directory business is plausible in light of the record as a whole.

The Trustee's final challenge is that the district court erred by not sufficiently crediting Taylor's expert testimony and using her valuation finding. However, Taylor was heavily criticized by Hopkins, another expert witness. Although Taylor was "qualified," Hopkins was also qualified,[18] and he noted numerous errors in her methodology. The trial record also contained ample evidence with which to challenge Taylor's methods and conclusions. At minimum, Taylor's valuation and Hopkins's criticism of her methodology presented "two permissible views"; we cannot reverse the district court for adopting one permissible view over the other. *Id.*

There is evidence in the record to support the district court's factual findings, so we conclude that the court's finding that Idearc was worth at least $12 billion on the date of the spin-off is not clearly

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[18] The Trustee states that Hopkins was not qualified to criticize Taylor's valuation because he had never done a yellow pages valuation. "[T]he only question for the trial court is whether the expert is *generally* qualified to render an opinion on the question in issue." *Christophersen v. Allied–Signal Corp.*, 939 F.2d 1106, 1110 (5th Cir. 1991) (en banc) (emphasis added). The court has wide discretion in determining whether an expert is qualified. *Moore v. Ashland Chemical, Inc.*, 151 F.3d 269, 274 (5th Cir. 1998). Hopkins has worked as a financial advisor and has performed many solvency and valuation analyses in the media, telecommunications, and energy industries. *U.S. Bank (Findings of Fact)*, 2013 WL 230329 at *6. Thus, the district court did not abuse its discretion in believing Hopkins was sufficiently qualified to offer an opinion on Taylor's valuation methodology.

erroneous. *See In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 742 F.3d at 584.

VI. Conclusions of Law

The same day the district court issued its factual findings, it also ordered the Trustee to show cause"why any (or all) of its legal claims are viable in light of the court's finding on Idearc's value," and to "identify any disputed fact issues that remain for resolution in a second phase of trial." The Trustee complied, and after reviewing the briefs submitted by the parties, the district court disposed of the Trustee's remaining claims and entered judgment in favor of Appellees. The Trustee now challenges the use of the order to show cause as a vehicle to enter judgment on behalf of Appellees, as well as aspects of the court's legal conclusions with respect to its claims for fraudulent transfer, breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, promoter liability, unlawful dividend, and alter ego. We will discuss each challenge in turn.

A. Standard of Review

This court reviews conclusions of law made pursuant to Federal Rule of Civil Procedure 52 de novo. *Bursztajn v. United States*, 367 F.3d 485, 489 (5th Cir. 2004). We review challenges to a district court's docket management and trial procedure for abuse of discretion. *Garcia v. Woman's Hosp. of Tex.*, 143 F.3d 227, 229 (5th Cir. 1998) (per curiam).

B. Procedural Challenge

The Trustee first attacks the procedures of the district court, claiming that its use of the show-cause

order following the Phase I bench trial was inappropriate because there were outstanding fact issues and the Trustee was not afforded the opportunity to "marshal its proof" on the remaining claims. We interpret this as a challenge to the district court's case management procedures, and we find that the district court did not abuse its discretion in utilizing an order to show cause to provide the Trustee with a final opportunity to address its claims before issuing conclusions of law.

Under the Federal Rules of Civil Procedure, following an action tried without a jury, "the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court." Fed. R. Civ. P. 52(a)(1). Once a party has been heard on an issue during a bench trial, "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." Fed. R. Civ. P. 52(c).

Here, the district court issued an extensive memorandum opinion discussing its factual findings following the bench trial in accordance with Rule 52(a). On the same day it issued its factual findings, it entered the show-cause order, indicating that the court was prepared to enter judgment in favor of Appellees on all of the claims, but that it wished to provide the Trustee with an additional opportunity to demonstrate whether factual issues remained, necessitating a Phase II trial.

On appeal, the Trustee accuses the district court of failing to disclose its intended procedures, suggesting that it was unaware that the court would require it to provide evidence of its claims. The lack of notice purportedly violated the Trustee's due process rights under the Fifth Amendment.

Admittedly, the district court did not unequivocally state that the Trustee had to present the court with evidence necessary to establish that there remained disputed issues of material fact warranting a second phase of the trial. Nonetheless, the order to show cause did specify that the Trustee had to identify such disputed issues in order to save its claims. Also, the court had announced a tentative conclusion that the Trustee could not meet its burden of proof on these claims, signaling that the Trustee needed to present the court with evidence to meet its burden on each claim. Accordingly, we conclude that under the circumstances presented here, the district court's order provided sufficient notice that the Trustee had to "marshal its proof"and demonstrate the need to proceed to Phase II of the trial. *See, e.g.*, *Am. Airlines, Inc. v. Allied Pilots Ass'n*, 228 F.3d 574, 578 (5th Cir. 2000)("The district court need not anticipate every action to be taken in response to its order, nor spell out in detail the means in which its order must be effectuated.").

Not only was the order sufficient, but there are situational factors that indicate that the Trustee was on notice that it was expected to present evidence in support of its remaining claims. Discovery had closed, motions for summary judgment had been filed and ruled upon, and a trial had concluded. By that stage,

the Trustee would have been fully aware of all evidence that supported its claims.

Finally, as will be discussed in more detail below, the district court did not impermissibly rule on disputed fact issues. While it noted the absence of evidence on some elements of the Trustee's claims, it did not resolve factual issues in its conclusions of law. Therefore, we find no error in the district court's case management procedures.

C. Actual Fraudulent Transfer Claim

The Trustee's complaint alleged that the transactions effectuating the spin-off amounted to fraudulent conveyances, both "actual" (made with intent to hinder, delay, or defraud creditors) and "constructive" (made for less than reasonably equivalent value at a time of the transfer or was rendered insolvent or undercapitalized).[19] *See, e.g.*, *In re Soza*, 542 F.3d 1060, 1064 (5th Cir. 2008); Tex. Bus. & Com. Code Ann. § 24.005 (West 2013). Given Idearc's solvency at the time of the spin-off, it was clear that the Trustee's constructive fraud claim would fail. However, the Trustee maintained that its actual fraudulent transfer claim would survive; the district court disagreed.

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[19] The Trustee alleged numerous fraudulent transfer claims against Verizon, GTE, and VFS involving various transfers of cash and debt. Aspects of some of the Trustee's fraudulent transfer claims were disposed of during pre-trial motions. The remaining claims were grouped together in the district court's conclusions of law and are discussed collectively on appeal.

According to the district court, for the Trustee to establish that the transfers Idearc made as part of the spin-off were fraudulent, the Trustee would need to produce evidence to show that Appellees had actual intent to hinder, delay, or defraud a creditor. *See* Conclusions of Law at 5. The district court held that the Trustee had not "presented specific direct evidence of [Appellees'] fraudulent intent, nor has it pointed to any such evidence that it may yet present." *Id.* Additionally, the district court held that the weight of the evidence on intent was negated by the valuation finding. *Id.*

The district court first considered whether the Trustee had proffered direct evidence regarding fraudulent intent, but held that the Trustee had only made general allegations concerning Appellees' intent and that there was no "specific evidence" contained in the "many briefs it has submitted in this case." *Id.* at 5–6. In the absence of any testimony, communications, or other evidence that tended to reveal the state of mind of the Verizon officers, the district court was left to consider whether the Trustee had pointed to circumstantial evidence of intent. *Id.* at 6.

Under Texas law, there are eleven indicators of fraudulent intent, called "badges of fraud." *In re Soza*, 542 F.2d at 1066; Tex. Bus. & Com. Code Ann. § 24.005(b). The Trustee had argued that there was evidence of five of the eleven badges; however, the district court noted that the factual finding that Idearc was worth at least $12 billion negated two of those badges. Conclusions of Law at 6 (citing Tex. Bus. & Com. Code Ann. §§ 24.005(b)(8) (reasonably equivalent value) & 24.005(b)(9) (solvency)). The remaining three

badges were transfer to an insider, concealment, and transfer shortly before a substantial debt was incurred. Tex. Bus. & Com. Code Ann. § 2405(b)(1), (3), & (10). The district court held that because it found that a "plethora of material information relating to the spin[-]off was actually disclosed to the market," the Trustee had not established "concealment." Conclusions of Law at 6. Thus, the only remaining badges were transfer to an insider and transfer shortly before a substantial debt was incurred. The district court explained that these two badges alone could not support a finding of intent in a spin-off since they "are a feature of every spin[-]off transaction that involves debt." *Id.* at 7. Additionally, the district court held "that the presence of so few badges, in such a context, is insufficient as a matter of law to support a finding of actual intent to hinder, delay or defraud." *Id.* (citing *MFS/Sun Life Trust-High Yield Series v. Van Dusen Airport Servs. Co.*, 910 F. Supp. 913, 935 (S.D.N.Y. 1995); *Tex. Custom Pools, Inc. v. Clayton*, 293 S.W.3d 299, 314 (Tex. App.—El Paso 2009, no pet.)). Thus, it entered judgment in Appellees' favor on the actual fraudulent transfer claims. *Id.*

The Trustee only briefly challenges the district court's determination that it failed to present specific direct evidence of fraudulent intent by claiming that the court "waded into factual disputes outside the scope of Phase I by making a *sua sponte* determination that there was" insufficient evidence. Notably, the Trustee does not argue that it had presented the district court with any direct evidence of fraudulent intent in its response to the order to show cause. However, the district court did not resolve or decide a factual issue; rather, it noted that Appellees had not provided any

direct evidence of fraud, so it had to consider the available circumstantial evidence. As previously discussed, under the circumstances in this case, the Trustee should have been well aware that it needed to present the district court with any direct evidence of fraud in its response to the order to show cause. Yet, the Trustee failed to do so. The district court's comment that it had not been presented with direct evidence of fraud constitutes an observation of the lack of evidence, which is permissible.

Additionally, the Trustee does not challenge the district court's badge-of-fraud analysis, nor does it claim that there was sufficient circumstantial evidence to create an issue of fact concerning Appellees' intent to defraud. In the absence of such an argument, we affirm the district court's entry of judgment in favor of Appellees on the fraudulent transfer claims.

D. Breach of Fiduciary Duty Against Diercksen and Aiding and Abetting Against Verizon

Counts Three and Four in the Trustee's amended complaint allege that Diercksen breached his fiduciary duty to Idearc and that Verizon and VFS aided and abetted that breach of fiduciary duty. Following the bench trial, the district court entered judgment in favor of Appellees on these counts, relying in part on its prior ruling that no reasonable factfinder could conclude that Idearc was not Verizon's wholly-owned subsidiary. Conclusions of Law at 16. The Trustee appeals on the grounds that Idearc was not a wholly-owned subsidiary and that the court misapplied Delaware law.

Under Delaware law, a corporate parent owes its wholly-owned subsidiary no fiduciary duties, other

than a duty not to take actions that cause it to be unable to meet its legal obligations. *See Anadarko*, 545 A.2d at 1174. Likewise, a director of a wholly-owned subsidiary, such as Diercksen, owes the subsidiary only the duty to manage it in the best interest of the corporate parent so long as the subsidiary is able to meet its legal obligations. *Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168, 200–01, 203 (Del. Ch. 2006), *aff'd*, 931 A.2d 438 (Del. 2007)). Since Idearc was solvent on the date of the spin-off, the district court held, "it cannot be argued plausibly that Verizon or Diercksen caused it to be unable to meet its legal obligations."[20] Conclusions of Law at 8. It also dismissed the Trustee's "titillating allegations concerning Verizon and Diercksen's conduct in connection with the spin[-]off," commenting that these allegations could not "be said to have *caused* Idearc to be unable to meet legal obligations." Conclusions of Law at 8–9.

Even if Idearc were not a wholly-owned subsidiary and Diercksen did owe the company fiduciary duties, the district court still believed that the Trustee's breach of fiduciary duty claim would fail. The district court held that the Trustee had failed to show how the $9 billion in damages sought for this claim was "'logically and reasonably related to the harm' for which compensation is sought." Conclusions of Law at 9 (quoting *In re J.P. Morgan Chase & Co. S'holder*

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[20] The Trustee argues that whether Verizon or Diercksen caused Idearc to fail to meet its duties is an issue of fact that warranted a second phase of trial. We disagree. The district court's comments amount to an observation of a lack of evidence on causation.

Litig., 906 A.2d 766, 774 (Del. 2006)).[21] The district court found that the Trustee had not explained "how Diercksen's alleged breaches or Verizon's supposed knowledge could possibly have damaged Idearc's creditors (particularly in so great an amount) in light of the court's valuation and solvency findings." Conclusions of Law at 10. Thus, the court entered judgment in Diercksen's favor.

Because a claim for aiding and abetting a breach of fiduciary duty requires a showing of an underlying breach in the fiduciary duty, *see Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*,817 A.2d 160, 172 (Del. 2002), this claim also failed, and the district court entered judgment in Verizon's favor. Conclusions of Law at 10.

Since we have already affirmed the district court's reliance on its summary judgment ruling that Idearc

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[21] In *In re J.P Morgan Chase & Co.*, 906 A.2d at 776, the shareholder plaintiffs alleged that J.P. Morgan Chase ("JPMC") overpaid for Bank One, and in so doing, the JPMC directors breached their fiduciary duties, including their duty of disclosure, owed to the shareholders of JPMC. The shareholders sought $7 billion in damages, which represented the alleged overpayment. The Delaware Supreme Court explained that the damage amount "ignores the fundamental principle governing entitlement to compensatory damages, which is that the damages must be logically and reasonably related to the harm or injury for which compensation is being awarded." *Id.* at 773. Although the alleged damages "would be a logical and reasonable consequence (and measure) of the harm caused to JPMC for being caused to overpay for Bank One, that $7 billion figure has no logical or reasonable relationship to the harm caused to the shareholders *individually* for being deprived of their right to cast an informed vote." *Id.* (emphasis in original).

was a wholly-owned subsidiary of Verizon, we move directly to the Trustee's contention that the solvency finding does not "relieve" Diercksen of his fiduciary duties to Idearc. The Trustee contends that Diercksen still had a duty of loyalty to Idearc, which required Diercksen to establish the "entire fairness" of the spin-off in order to show that Diercksen did not breach his duty. However, *Anadarko* expressly rejected such a claim. *Anadarko* noted that "[i]t is a basic principle of Delaware General Corporation Law that directors are subject to the fundamental fiduciary duties of loyalty and disinterestedness. Specifically, directors cannot stand on both sides of the transaction nor derive any personal benefit through self-dealing." 545 A.2d at 1174. Immediately after acknowledging this general rule, the court explained that "in a parent and wholly-owned subsidiary context, the directors of the subsidiary are obligated only to manage the affairs of the subsidiary in the best interests of the parent and its shareholders." *Id.* Additionally, *Trenwick*, 906 A.2d at 200, applied the rule in *Anadarko* to a director, explaining that a director does not owe a fiduciary duty to a subsidiary corporation, except to the extent that the director does not cause the corporation to breach its legal duties. Since Idearc was solvent, Diercksen fulfilled any fiduciary duty that he had to Idearc. Thus, the district court did not need to inquire into the entire fairness of the transaction.

Because we find that the district court properly relied on the solvency finding and its previous finding that Idearc is a wholly-owned subsidiary, we also affirm its judgment in favor of Appellees on the breach of fiduciary duty and aiding and abetting counts. *See Gotham Partners*, 817 A.2d at 172.

E. Promoter Liability and Breach of Fiduciary Duty Against Verizon

In Count Nine of the Trustee's amended complaint for "Promoter Liability and Breach of Fiduciary Duty," the Trustee alleges that Verizon and Diercksen, as promoters of Idearc, owed fiduciary duties to Idearc and that they breached those duties. ROA 6107–08. Following the district court's valuation findings, the district court entered judgment in favor of Appellees on these claims. The Trustee now appeals both the district court's interpretation of the underlying facts and the application of the law with respect to its promoter liability claim against Verizon.

Under Delaware law, the promoters of a corporation have a fiduciary relationship with the corporation itself. *Gladstone v. Bennett*, 153 A.2d 577, 582 (Del. 1959); *see also Bailes v. Colonial Press, Inc.*, 444 F.2d 1241, 1244 (5th Cir. 1971) ("[P]romoters of a corporation stand in a fiduciary relation to the corporation, charged with the duty of good faith as in cases of other trusts. The fiduciary relation continues until the plan or scheme of promotion has been accomplished."). As previously explained, a wholly-owned subsidiary generally is not owed fiduciary duties by its corporate parent in the absence of minority shareholders. *See Trenwick*, 906 A.2d at 191–92; *Westlake Vinyls, Inc. v. Goodrich Corp.*, 518 F. Supp. 2d 918, 938–39 (W.D. Ky. 2007) (holding that a promoter-parent owed no fiduciary duty to its wholly -owned subsidiary). There is an exception to this rule, under which a parent owes fiduciary duties to a subsidiary when that subsidiary is insolvent. *See N.*

Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 101–02 (Del. 2007).

Based on its subsidiary finding during summary judgment and its solvency finding after the bench trial, the district court concluded that this case was "squarely within the holdings articulated in both *Anadarko* . . . and *Westlake Vinyls*." Conclusions of Law at 16. Because Idearc was a wholly-owned subsidiary, Verizon and Diercksen, as promoters, did not owe Idearc fiduciary duties. Since Verizon did not owe Idearc any fiduciary duties, the court also concluded that "judgment should be entered for the defendant on the [Trustee's] promoter liability claim." *Id.* at 17.

Just as it did with the fiduciary duty count and the aiding and abetting count, the district court explained that even if it were to conclude that Idearc was not a wholly- owned subsidiary, the Trustee could not prevail on the promoter claim. According to the district court, the Trustee could not show, in light of the solvency finding, how Idearc or its creditors were damaged by the actions enumerated in the complaint, motions for summary judgment, responses to motions for summary judgment, the proposed findings of fact and conclusions of law, and the joint pretrial order. *Id.* at 19. The district court explained that the Trustee had previously argued that Diercksen and Verizon schemed in the promotion of Idearc to accomplish a tax-free debt-for-debt exchange, which would relieve Verizon of a significant debt burden and load Idearc with debt that it could not support. *Id.* at 20. Thus, the Trustee had claimed that Diercksen and Verizon were liable for the "unsustainable debt with which they saddled Idearc"; however, this theory failed because the district

court found that Idearc was not "saddled" with unsupportable debt. *Id.* It was after subsequent events, including the "Great Recession," that Idearc became unable to support its debt, and these "intervening events . . . sever any causal link between Verizon and Diercksen's actions and Idearc's bankruptcy." *Id.* The district court held that the Trustee had not even attempted to show how, given Idearc's solvency, any damage to Idearc's creditors could be logically related to the alleged breaches of duty by Verizon and Diercksen. Therefore, the district court entered judgment in favor of Verizon on Count Nine.[22]

On appeal, the Trustee again argues that the district court was factually wrong as to its subsidiary finding and that the district court was legally wrong because *Anadarko* does not extinguish the fiduciary duties of a promoter.[23]

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[22] The Trustee argues that the district court's comment that the Great Recession constituted an intervening event was a finding of fact that warranted a second phase of trial. However, the Trustee mischaracterized the comment. We construe this comment as pointing to a lack of evidence to support causation.

[23] The Trustee also comments that it is entitled to "its day in court" on the promoter liability claim. It explains that the "economic reality" of the spin-off was that "through the unlawful actions of Verizon's officer, Diercksen[,] . . . Verizon helped itself to $2.5 billion in cash and got the full benefit of the $7.1 billion in Idearc debt." Because Idearc had no board, and because the unlawful board paid illegal dividends, the Trustee maintains that it is entitled to a trial on the promoter liability claim. We have previously addressed the issue of a jury trial, as well as the propriety of the procedure used by the district court in addressing the Trustee's claims following the bench trial.

Since we previously affirmed the district court on the subsidiary issue, we move to the Trustee's *Anadarko* argument. The Trustee claims *Anadarko* does not apply to this case, arguing that the holding is limited to corporate parents and their wholly-owned subsidiaries, but that here, Verizon is more than a parent—it is a promoter. The Trustee explains that in *Anadarko*, the parent corporation spun-off a subsisting subsidiary that already had a seven-member board and separate legal counsel, making the parent only an owner and not a promoter. In support of its limited approach to *Anadarko*, the Trustee points to language which states that the case should be "confined to its specific facts." 545 A.2d at 1177. Although a federal district court applied *Anadarko* to a parent-promoter in *Westlake Vinyls*, the Trustee claims that *Westlake Vinyls*'s holding is flawed since *Anadarko* did not involve promoters. However, it offers no caselaw to suggest that a parent-promoter falls outside the ambit of *Anadarko*.

We disagree with the Trustee, as the distinction between a parent and a parent-promoter is a distinction without a difference. First, Verizon's role as promoter did not change its status as the sole owner of Idearc. Second, the Trustee has not offered any argument for why a parent-promoter should be treated differently than a parent in terms of defining its duties to its wholly-owned subsidiary. Third, the Trustee has not provided any caselaw to support its theory, whereas at least one other court has applied *Anadarko* to a parent-promoter. *See Westlake Vinyls*, 518 F. Supp. 2d at 938–39.

Verizon's role as a promoter does not change the fact that it was the promoter of its own wholly-owned subsidiary. Thus, to the extent Verizon owed duties to Idearc as a promoter, those duties overlapped with the duties it owed its wholly-owned subsidiary, so *Anadarko* applies. Under *Anadarko*, Verizon does not owe Idearc fiduciary duties, so we affirm the judgment of the district court on Count Nine.[24]

F. Unlawful Dividend

Count Eight of the amended complaint alleges that Diercksen, as Idearc's sole director, approved an unlawful dividend for the benefit of Verizon, and that both Diercksen and Verizon are liable for an unlawful dividend claim under Delaware law. The district court entered judgment in Appellees' favor, concluding that Idearc had sufficient surplus to issue a dividend and that its failure to follow corporate formalities was an

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[24] Despite the numerous arguments on this point, the Trustee has failed to challenge the district court's conclusion that, even if Idearc was not a wholly-owned subsidiary and Appellees had breached their fiduciary duties, the Trustee had not shown that the breach resulted in harm to the creditors. *See* Conclusions of Law at 19 (holding that the "problem for [the Trustee]" is that it "cannot show, in light of the court's solvency finding, how Idearc or its creditors were damaged by the specific actions" about which [the Trustee] complained). This was offered as an independent reason for its entry of judgment for Appellees on this count. When an appellant challenges only one of the district court's alternative holdings, any argument that the alternative holding was in error is waived. *See R.R. Mgmt. Co., L.L.C. v. CFS La. Midstream Co.*, 428 F.3d 214, 220 n.3 (5th Cir. 2005). The Trustee waived any challenge to the district court's alternative holding entering judgment in favor of Verizon on Count Nine, so its appeal to Count Nine necessarily fails.

insufficient basis on which to hold that the dividend was unlawful.[25] We agree with the district court.

Delaware law permits the directors of a corporation to "declare and pay dividends . . . [from] its surplus . . . or . . . out of its net profits for the fiscal year in which the dividend is declared[.]" Del. Code Ann. tit. 8, § 170(a). Delaware law describes the process by which a corporation may declare dividends, and the relevant section begins with the admonition: "No corporation shall pay dividends except in accordance with this chapter. " *Id.* § 173. Under § 173, "Dividends may be paid in cash, in property, or in shares of the corporation's capital stock." *Id.* Directors may be held liable for a "wilful or negligent violation of § 160 or § 173 . . . to the corporation, and to its creditors in the event of its dissolution or insolvency, to the full amount of the dividend unlawfully paid[.]" *Id.* § 174.

Delaware law is silent as to whether technical infractions as to the declaration of a dividend are sufficient to render a dividend unlawful. Similarly, the cases on which the Trustee relies are silent as to whether an unlawful dividend claim may rest on these infractions alone. The Trustee points to *Pereira v. Cogan*, 294 B.R. 449 (S.D.N.Y. 2003), *vacated and remanded*, 413 F.3d 330 (2d Cir. 2005), in support of its

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[25] According to the Trustee, the district court refused to address fact issues relating to the violation of corporate formalities, so judgment was not authorized under Federal Rule of Civil Procedure 52(a). However, the district court did not address these issues because it proceeded under the assumption that Idearc had not properly observed corporate formalities, but it found that the failure to follow formalities was legally irrelevant. Thus, the district court did not err.

proposition that a dividend is illegal when it is not declared by the board in accordance with Delaware law. However, this overstates the holding of *Pereira*, which found that a dividend was illegal because the dividend was not declared by the board in accordance with § 170 *and* it was issued when the corporation was insolvent. *Id.* at 539–40. *Pereira* does not state that the failure of the board to declare a dividend in accordance with § 170 alone was sufficient to warrant a legal remedy.

The Trustee also argues that because the dividend was declared before the spin-off was finalized (and before Idearc had a surplus from which to issue a dividend), the dividend was in violation of Delaware law. Again, the Trustee relies on a case that is not squarely on point.[26] In *Vogtman v. Merchants' Mortgage and Credit Co.*, 178 A. 99, 102 (Del. 1935), the Delaware Supreme Court considered whether a corporation had sufficient surplus to declare a dividend. The court held that "whether a dividend was rightfully made, the transaction must be viewed as of the time when it was *declared*." *Id.* at 102 (emphasis added). The Trustee relies heavily on this statement, reasoning that, as a matter of law, a dividend is unlawful if there was insufficient surplus on the date it was declared, irrespective of whether there was sufficient surplus on the date on which the dividend was actually paid. However, the actual analysis performed by the *Vogtman* court indicates that the

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[26] Idearc declared the dividend on October 31, 2006. At that time, Idearc had no assets, since the spin-off (and thus the transfers of property from Verizon to Idearc) did not occur until November 17, 2006.

truly relevant inquiry is whether the surplus existed on the date of payment. Notably, the opinion does not state the date on which the dividend was declared. Rather, the court extensively reviews the corporation's balance sheet as of December 31, 1932, the day immediately prior to the payment of the dividend. *Id.* at 102–03. The court held that the dividend was to be "disregarded" because there were insufficient assets from which to pay the dividend on the day before the dividend was paid. *Id.* at 103. Given the fact that *Vogtman* was ultimately concerned with the state of the company's balance sheet immediately prior to the payment of the dividend, we reject the Trustee's contention that *Vogtman* requires that the surplus be available on the precise date it is declared. Since there was undoubtedly sufficient surplus on the date the dividend was paid, we find that the requirements in *Vogtman* have been satisfied.

The Trustee's final argument is that the dividend was illegal because Idearc's board did not determine whether a surplus actually existed prior to declaring the dividend.[27] It attacks the district court's reliance on *Klang v. Smith's Food and Drug Centers, Inc.*, 702 A.2d 150, 152, 156 (Del. 1997), for the proposition that "perfection in [the] process [of revaluing assets] is not required," and that "[a] mistake in documenting [a]

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[27] In support of this argument, the Trustee cites a lone statement from Diercksen's deposition testimony. ROA 27687. Diercksen was asked if he had ever "tried to ascertain whether there was adequate capital and surplus with which to declare such a dividend," and he responded in the negative. *Id.* Diercksen then immediately asked if the Trustee's attorney could repeat the question because he thought he "answered it way too fast." *Id.*

surplus will not negate the substance of the action, which complies with the statutory scheme." However, additional caselaw suggests that a violation of corporate formalities when issuing a dividend is not enough to substantiate a tort claim when there was in fact sufficient surplus for the dividend, thus indicating that the district court's interpretation of *Klang* is likely correct.

In *Paramount-Richards Theatres, Inc. v. Commissioner of Internal Revenue*, 153 F.2d 602 (5th Cir. 1946), this court reviewed the decision of a tax court denying deductions claimed by a Delaware corporation and two shareholders. *Id.* In addressing the tax issue, *Paramount-Richards* considered whether dividends were issued, concluding,

> Corporate earnings may constitute a dividend notwithstanding that the formalities of a dividend declaration are not observed; that the distribution is not recorded on the corporate books as such; that it is not in proportion to stockholdings, or even that some of the stockholders do not participate in its benefits.

Id. at 604; *see also* Fletcher Cyclopedia of the Law of Corporations § 5350 (West 2011) ("Courts have recognized . . . that a distribution to shareholders may amount to a legal dividend without formal vote and resolution of directors, even though it was not designated as a dividend by the directors." (citing numerous non-Delaware cases) (internal footnote omitted)). Given that this court has acknowledged that a corporation can declare a dividend without observing formalities, it would be counterintuitive to simultaneously require strict adherence to those

formalities to avoid liability for allegedly unlawful dividends when there was sufficient surplus to fund the dividends.

Such an interpretation of *Paramount-Richards* is consistent with the Delaware Supreme Court's statements in *Klang*. Although *Klang* is distinguishable in that the board of directors there did perform some investigation into the corporation's available assets, the court still spoke generally about the need to consider the underlying purpose of Delaware law when applying it to corporate transactions. *See* 702 A.2d at 152, 154. This functional approach coincides with *Paramount-Richards*'s "constructive" dividend holding. Delaware law is written to prevent the payment of a dividend when there are insufficient funds; here, Idearc was solvent, so the dividend did not violate the purpose of the law. Accordingly, we affirm the district court's decision with respect to the unlawful dividend claim.

G. Alter Ego

Count Eleven of the amended complaint for alter ego alleges that the court should "pierce Idearc's corporate veil and hold Verizon liable for all of Idearc's debts, including all debt and other obligations incurred by Idearc in connection with or because of the [s]pin-off." Before the trial, the district court had explained that "alter ego" is not a separate cause of action but a remedy to enforce a substantive right. *U.S. Bank Nat'l Ass'n v. Verizon Commc'ns Inc.*, 3:10-CV-1842-G, 2012 WL 3100778, at *16 (N.D. Tex. July 31, 2012) (citing *Western Oil & Gas JV, Inc. v. Griffiths*, 91 F. App'x 901, 903–04 (5th Cir. 2003) (unpublished); *In re Grothues*, 226 F.3d 334, 337 (5th

Cir. 2000)). In its order granting in part and denying in part the motion to dismiss, the district court did not dismiss the alter ego claim to the extent that it could be used as a theory of recovery on the other claims. *Id.* At summary judgment, the district court again stated that it had "already dismissed the plaintiff's alter ego claim, but only to the extent that it is pled as a separate cause of action." *U.S. Bank (Summary Judgment)*, 892 F. Supp. 2d at 829. Following the bench trial, the court necessarily found that the alter ego claim failed since the Trustee had not prevailed on any of the other claims. Conclusions of Law at 21.

According to the Trustee, "regardless of whether the alter ego is a 'claim' or a 'remedy,' the district court's dismissal was improper in the bankruptcy context" because the Trustee is empowered to sue Verizon based on the underlying claims of the creditors. The Trustee argues that the alter ego claim was independent of a valuation determination and that it should be tried before a jury. However, under Texas law, while alter ego theory is a means to pierce the corporate veil, it still relies on an underlying claim. *In re Grothues*, 226 F.3d at 337–38. Since we affirm the district court's entry of judgment in favor of Appellees on the other claims, we affirm the district court on the alter ego claim.

VII. Moot Issues (Motion to Dismiss and Summary Judgment)

The Trustee also appeals aspects of the district court's orders on dispositive motions. Specifically, the Trustee challenges the dismissal of its unjust enrichment claim; the dismissal of its fraudulent transfer claims with respect to the Unsecured Notes

and Tranche B debt; the entry of summary judgment in Appellees' favor on the fraudulent transfer and unlawful dividend claims relating to the transfer of $2.5 billion in cash from Idearc to Verizon; and the summary judgment ruling limiting the Trustee's potential recovery on the breach of fiduciary duty claim. Appellees argued that these issues are moot in their response brief, since any error at the motion to dismiss and summary judgment stage would be harmless based upon the district court's findings of fact and conclusions of law. The Trustee did not refute this point in its reply brief.

We agree th at these claims are moot. First, because the district court found that Idearc received reasonably equivalent value for the cash it transferred and the debt issued to Verizon, the Trustee's unjust enrichment claim would have failed on the merits even if it survived the motion to dismiss. Second, the district court found that the Trustee could not demonstrate the necessary fraudulent intent in order to establish actual fraudulent transfer, and the solvency finding barred recovery for constructive fraudulent transfer; thus, it is moot that the district court disposed of some of the fraudulent transfer claims. Third, the district court entered judgment in favor of Appellees on the breach of fiduciary duty claim, so any limitations on the Trustee's potential recovery are irrelevant. Since these issues are moot, we will not consider the merits of the Trustee's arguments.

VIII. Conclusion

We find no reversible error in the district court's case management decisions, factual findings, and legal

conclusions. Accordingly, we AFFIRM the judgment of the district court.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-10752

D.C. Docket No. 3:10-CV-1842

[Filed July 30, 2014]

U.S. BANK NATIONAL ASSOCIATION, Litigation Trustee of the Idearc, Inc., et al, Litigation Trust,

Plaintiff - Appellant

v.

VERIZON COMMUNICATIONS, INCORPORATED; GTE CORPORATION; JOHN W. DIERCKSEN; VERIZON FINANCIAL SERVICES, L.L.C.,

Defendants - Appellees

Appeal from the United States District Court for the Northern District of Texas, Dallas

Before KING, HAYNES, and GRAVES, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE:

A True Copy
Attest

Clerk, U.S. Court of Appeals, Fifth Circuit

By: _____
Deputy

New Orleans, Louisiana

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3:10-CV-1842-G

[Filed June 18, 2013]

U.S. BANK NATIONAL ASSOCIATION, Litigation Trustee of the Idearc Inc. *et al.* Litigation Trust,	)
Plaintiff,	)
VS.	)
VERIZON COMMUNICATIONS INC., ET AL.,	)
Defendants.	)

CONCLUSIONS OF LAW

On January 22, 2013, the court found, based on extensive evidence presented at a bench trial, that the value of Idearc, Inc. ("Idearc") on November 17, 2006 was at least $12 billion and that it was therefore solvent. *See* Memorandum of Decision ("Decision") of January 22, 2013 at 2, 22 (docket entry 646). On the same date the court ordered the plaintiff in this case to show cause why, in light of this finding, judgment for

the defendants should not be entered on the plaintiff's claims not previously disposed of. *See* Order of January 22, 2013 ("Show Cause Order") (docket entry 647). Upon consideration of the briefing and motions submitted in response to that order, the court concludes, for the reasons stated below, that judgment for the defendants should be entered on all of the plaintiff's remaining claims[1] in this case. In addition, the plaintiff's motion for entry of judgment on admissions and stipulated facts (docket entry 649) is denied.

I. RULE 52(c)

"[When] a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue," FED. R. CIV. P. 52(c) authorizes the court to enter judgment "on a claim . . . that, under the controlling law, can be maintained . . . only with a favorable finding on that issue." FED. R. CIV. P. 52(c). The plaintiff has been fully heard on the issues of Idearc's value and solvency. The court has found against the plaintiff on those issues. *See* Decision at 2, 22. For the reasons set forth below, none of the plaintiff's claims can be maintained without a favorable finding on Idearc's value and solvency. Entry of judgment against the plaintiff on all remaining claims is therefore appropriate.[2]

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[1] A complete and accurate list of these claims may be found in the court's show cause order. *See* Show Cause Order at 2.

[2] For a brief introduction to the nature of this action, the parties, and the relevant facts, *see* Decision at 2-6.

II. FRAUDULENT TRANSFER

A. Constructive Fraudulent Transfer

Because the plaintiff did not address the viability of its constructive fraudulent transfer claims in its response to the court's order to show cause, it has effectively conceded that these claims fail. *See generally* Plaintiff's Brief Pursuant to Order to Show Cause ("Brief") (docket entry 648) and Plaintiff's Reply in Support of its Response to Order to Show Cause ("Reply") (docket entry 656).

The constructive fraudulent transfer claims[3] obviously fail on the merits, however, in light of the court's findings as to Idearc's value and solvency. This is because those claims require the plaintiff to prove that Idearc was insolvent on the date of the spinoff and that it did not receive reasonably equivalent value for the cash and debt it transferred to Verizon in

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[3] In Counts 5 and 6 of its amended complaint, the plaintiff singles out as fraudulent transfers specific transactions associated with the overall spinoff. *See* Plaintiff's Amended Complaint and Jury Demand ("Complaint") ¶¶ 49-68 (docket entry 216); *see also* Memorandum Opinion and Order of September 14, 2012 at 30-32 (docket entry 523). The court sees no reason to consider these transactions separately from the entire spinoff taken as a whole. However, even if the counts and the transactions at issue in them were considered separately, they would fail for the same reasons that Counts 1 and 2 fail. The court's valuation finding implies that the entities at issue (Idearc Media Corp. and Idearc Information Services) were solvent and received reasonably equivalent value (for purposes of constructive fraudulent transfer), and there are not sufficient badges of fraud as would indicate the transfers were made with "actual intent to hinder, delay, or defraud" (for purposes of actual fraudulent transfer).

connection with the spinoff. *See* TEX. BUS. & COM. CODE § 24.005(a)(2)[4] and 24.006.[5]

In the context of a spinoff, the court has already noted that there is no effective difference between the insolvency analysis and the reasonably equivalent value analysis. *See* Memorandum Opinion and Order of September 14, 2012 ("SJ Opinion") at 15 n.3 (docket entry 523), citing *VFB LLC v. Campbell Soup Company*, 482 F.3d 624, 636 (3d Cir. 2007). Because Idearc had a total enterprise value of at least $12 billion on the date of the spinoff, it was both solvent[6]

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[4] "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or within a reasonable time after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation . . . without receiving a reasonably equivalent value in exchange for the transfer or obligation."

[5] "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation."

[6] "A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation." TEX. BUS. & COM. CODE § 24.003(a). It is undisputed that Idearc's debts totaled approximately $9.1 billion on November 17, 2006, the date of the spinoff. *See*, *e.g.*, SJ Opinion at 15. Given the court's finding that Idearc's total enterprise value was at least $12 billion on November 17, 2006, Idearc clearly met Texas law's test for solvency at that time.

and received reasonably equivalent value[7] for the $9.1 billion in cash and debt it transferred to Verizon.

Judgment will therefore be entered for the defendants on the plaintiff's remaining constructive fraudulent transfer claims.

B. Actual Fraudulent Transfer

To sustain its claim that the transfers Verizon caused Idearc to make in connection with the spinoff were actual fraudulent transfers, the plaintiff must show that Verizon Communications Inc., GTE Corporation, Verizon Financial Services LLC ("Verizon") or John Diercksen ("Diercksen") (collectively, the "defendants") caused those transfers to be made "with actual intent to hinder, delay, or defraud any creditor" of Idearc. TEX. BUS. & COM. CODE § 24.005(a)(1).

The plaintiff argues that Idearc's value and solvency are immaterial to a determination of Verizon or Diercksen's intent in connection with the transactions consummating the spinoff. *See* Brief at 16. It cites a number of decisions that have held a solvency finding immaterial to particular actual fraudulent transfer claims. *Id.* at 17-18. There are two problems for the plaintiff, however. First, it has not presented specific direct evidence of the defendants' fraudulent intent, nor has it pointed to any such evidence that it may yet present. See, *e.g.*, *id.* at 17-18. Second, the weight of

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[7] "[A] party receives reasonably equivalent value for what it gives up if it gets 'roughly the value it gave.'" See *VFB*, 482 F.3d at 631, quoting *In re Fruehauf Trailer Corporation*, 444 F.3d 203, 213 (3d Cir. 2006).

any circumstantial evidence of the defendants' intent the plaintiff has presented, or has noted remains to be presented, is negated by virtue of the court's valuation finding.

Direct evidence of fraudulent intent is, of course, always difficult to obtain. See, *e.g.*, *Texas Custom Pools, Inc. v. Clayton*, 293 S.W.3d 299, 312 (Tex. App.--El Paso 2009, mandamus denied). Other than general allegations, the plaintiff has pointed to no such specific evidence in the many briefs it has submitted in this case. Neither has the plaintiff in the briefing presently before the court pointed to any specific direct evidence (*e.g.*, testimony, communications that reveal the state of mind of Verizon officers, *etc.*) of the defendants' fraudulent intent with regard to the spinoff transactions.[8] The plaintiff is therefore left to rely on circumstantial evidence of the defendants' fraudulent intent, *i.e.*, the so-called "badges of fraud." *See* TEX. BUS. & COM. CODE § 24.005(b)(1)-(11).

The plaintiff has elsewhere argued that it has evidence of five of the eleven badges of fraud. *See* Brief in Support of Plaintiff's Omnibus Response in Opposition to Defendants' Motions for Summary Judgment ("Summary Judgment Response") at 77 (docket entry 430). The finding that Idearc was worth

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[8] The court will not consider at this late stage of the litigation the plaintiff's generic assertions that Idearc "acted with intent" to hinder, delay, or defraud. *See*, *e.g.*, Brief at 18. If the plaintiff cannot now, after voluminous discovery, point to specific examples of direct evidence of the defendants' fraudulent intent which remain to be presented, the court has no confidence that the plaintiff will uncover any at some indeterminate time in the future.

at least $12 billion, though, negates two of those badges, reasonably equivalent value and solvency. *See above* at 4 n.6-7; *see also* TEX. BUS. & COM. CODE § 24.005(b)(8)-(9). A third, concealment, is negated by virtue of the court's findings that a plethora of material information relating to the spinoff was actually disclosed to the market. *See* Decision at 41-58; *see also* TEX. BUS. & COM. CODE § 24.005(b)(3). The only two badges of fraud that remain, transfer to an insider and transfer shortly before a substantial debt was incurred, *see* TEX. BUS. & COM. CODE § 24.005(b)(1) and (10), are plainly insufficient, standing alone, to support a finding that the defendants acted in the spinoff with actual intent to hinder, delay, or defraud its creditors. This is because these two "badges" are features of every spinoff transaction that involves debt. Moreover, case law suggests that the presence of so few badges, in such a context, is insufficient as a matter of law to support a finding of actual intent to hinder, delay, or defraud. See, *e.g.*, *Texas Custom Pools, Inc.*, 293 S.W.3d at 313-14; *MFS/Sun Life-Trust High Yield Series v. Van Dusen Airport Services Company*, 910 F. Supp. 913, 935 (S.D. N.Y. 1995). The court concludes that the presence of these two badges alone (transfer to an insider and transfer shortly after a substantial debt was incurred), in the context of a spinoff transaction such as this one, is insufficient as a matter of law to support a conclusion that the defendants actually intended to hinder, delay, or defraud Idearc's creditors.

For these reasons, the court's valuation findings are dispositive with respect to the plaintiff's actual fraudulent transfer claims, and the court concludes that judgment is properly entered for the defendants on those claims.

III. BREACH OF FIDUCIARY DUTY

A. Breach of Fiduciary Duty: John Diercksen

The court has already found, in connection with its consideration of the motions for summary judgment, that Idearc was Verizon's wholly-owned subsidiary. *See* SJ Opinion at 26-27. The court declines to reconsider that ruling at this stage of the case, especially in view of the fact that the plaintiff has never requested such reconsideration. The court agrees with the defendants that this prior finding puts this case squarely within the rule, articulated in *Anadarko Petroleum Corporation v. Panhandle Eastern Corporation*, 545 A.2d 1171, 1174 (Del. 1988), that a corporate parent owes its wholly-owned subsidiary no fiduciary duties, other than a duty not to take actions that cause it to be unable to meet its legal obligations. In addition, the director of a wholly-owned subsidiary (here, Diercksen) owes the subsidiary only the duty to manage it in the best interests of the corporate parent, so long as this does not "render the subsidiary unable to meet its legal obligations." See *Trenwick America Litigation Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168, 200-01, 203 (Del. Ch. 2006), *aff'd*, 931 A.2d 438 (Del. 2007) (table); *see also* Defendants' Joint Consolidated Response to Plaintiff's Response to Order to Show Cause ("Response") at 6-7 (docket entry 651). Since Idearc was solvent on the date of the spinoff, it cannot be argued plausibly that Verizon or Diercksen caused it to be unable to meet its legal obligations.[9] While the plaintiff

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[9] It is clear that the *Trenwick* court focused exclusively on solvency, when considering whether a corporate subsidiary was rendered "unable to meet its legal obligations" by the transaction

has pointed to a number of titillating allegations concerning Verizon and Diercksen's conduct in connection with the spinoff, *see*, *e.g.*, Brief at 14-16 and Reply at 3-9, none of these allegations can be said to have *caused* Idearc to be unable to meet legal obligations. *See also* SJ Opinion at 25. Therefore, neither Diercksen nor Verizon owed Idearc any other fiduciary duties. For this reason alone, the plaintiff cannot prevail on its breach of fiduciary duty claim against Diercksen.

That is not the only reason this claim fails, however. It is elementary that a plaintiff seeking compensatory damages must show damage "logically and reasonably related to the harm" for which compensation is sought. See, *e.g.*, *In re J.P. Morgan Chase & Company Shareholder Litigation*, 906 A.2d 766, 774 (Del. 2006). The problem for the plaintiff in this case is that, despite making numerous references to Diercksen's allegedly unsavory conduct in connection with the spinoff, *see above* at 8-9, the plaintiff has not demonstrated to this court that it has a coherent notion of how these unsavory actions are, in light of the solvency finding, logically or reasonably related to the $9 billion damage award it seeks.

In its post-trial briefing, the only references the plaintiff makes to damage to Idearc connected to the Counts 3 and 4 breach of fiduciary claims are found on pages 14-16 of its response to the show cause order. *See* Brief at 14-16. There, the plaintiff recites the basic elements of breach of fiduciary duty claims, before it

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at issue in the case (the corporate parent causing its subsidiary to take on more debt). See *Trenwick*, 906 A.2d at 203-04.

asserts that "Diercksen breached his duties of care and loyalty by . . . acting unilaterally to authorize the Spin-off and declare the dividend paid to Verizon" and "Verizon . . . had knowledge that Idearc's board was not fully constituted, that Diercksen's purported board actions were ineffective, and that, as a result, the Spin-off and related transfers were never properly authorized, damaging Idearc in at least the amount of the unauthorized transfers." *Id.* at 14.

What the plaintiff does not say is how Diercksen's alleged breaches or Verizon's supposed knowledge could possibly have damaged Idearc's creditors (particularly in so great an amount) in light of the court's valuation and solvency findings. Whatever corporate procedural missteps may have occurred preceding the spinoff, and whatever alleged "scheming" accompanied these missteps, the fact remains that as of November 17, 2006, Idearc's creditors were left with an entity that had assets worth well in excess of what would be required to protect their interests.

B. Aiding and Abetting Breach of Fiduciary Duty: Verizon

In light of the fact that Diercksen is entitled to judgment on the plaintiff's claim against him for breach of fiduciary duty, there is no breach of duty remaining in this case for Verizon to have "aided and abetted." Thus, the Verizon defendants are also entitled to judgment on the plaintiff's claim against them for aiding and abetting Diercksen's alleged breaches of fiduciary duty.

IV. UNLAWFUL DIVIDEND

In its summary judgment opinion of September 14, 2012, the court observed that the plaintiff's "unlawful dividend claim will fail" if "Idearc had sufficient surplus[10] at the time of the spin-off to declare the dividend."[11] *See* SJ Opinion at 48. The plaintiff attempts to resist the force of this observation by focusing the court's attention on a number of alleged formal missteps associated with the dividend's declaration and payment.[12] *See* Brief at 3-10. What is unclear to the court, upon review of this briefing, is how the plaintiff arrives at the conclusion that these missteps warrant any remedy, let alone the outsized remedy it seeks in connection with them. *See* Plaintiff's

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[10] Surplus is, as the court noted in that context, "the excess of net assets over the par value of the corporation's issued stock." *Klang v. Smith's Food and Drug Centers, Inc.*, 702 A.2d 150, 153 (Del. 1997); *see also* 8 DEL. C. § 154. "Net assets means the amount by which total assets exceed total liabilities." *Id.* § 154. In this case, the par value of each share of Idearc stock was one cent. Brief in Support of Defendants' Response to Plaintiff's Motion for Partial Summary Judgment ("Defendants' Response to Plaintiff's First Motion") at 14 (docket entry 363). Because Idearc issued more than 146 million shares, the total par value of Idearc's stock was approximately $1.46 million.

[11] The court has found that Idearc's total enterprise value on the date of the spinoff was at least $12 billion. Decision at 2. This finding implies that Idearc plainly had assets in excess of its total liabilities, which totaled $9.1 billion, at the time of the spinoff. Idearc therefore had sufficient surplus to pay a dividend.

[12] The only transaction that remains a part of the plaintiff's unlawful dividend claim is Idearc's issuance of $7.1 billion in debt to Verizon. *See* SJ Opinion at 41.

Amended Complaint ("Complaint") ¶ 78 (docket entry 216) ("Verizon is likewise liable to the Trust for the full amount of the unlawful dividends.")

The plaintiff first argues that the dividend was illegal, because a duly constituted board never declared it. Brief at 3-5. As authority for this proposition the plaintiff cites a Southern District of New York case that neither cites any Delaware case law nor is square with the facts of this case. *Id.* at 3-4. In *Pereira v. Cogan*, 294 B.R. 449 (S.D. N.Y. 2003), *vacated and remanded*, 413 F.3d 330 (2d Cir. 2005), *cert. denied*, 547 U.S. 1147 (2006), the court found a dividend illegal on two grounds. The first was that the corporation issuing the dividend was insolvent at the time of the transaction, contrary to the situation here. *Pereira*, 294 B.R. at 540. The second reason the court gave was that the dividends were not declared by the Board in accord with section 170 of title 8 of the Delaware Code. *Id.*; *see also* 8 Del. C. § 170. The *Pereira* court gives no indication whether this second reason would have supported a finding of an "illegal" dividend, if the corporation had been solvent. Nor does it indicate what remedy it would have considered appropriate in such an instance. Nor finally does that court speculate on who might have standing to press such a claim. In fact, this court has been unable to find any case in which a court found, in favor of creditors, that a solvent corporation's dividend was illegal solely because of a technical violation of § 170.

The plaintiff next argues that the dividend was illegal, because it was "declared" on October 31, 2006, before the transfers in connection with the spinoff were effected, and thus before Idearc actually had any

surplus with which to declare a dividend. Brief at 5-6. In support of its argument, the plaintiff cites 8 Del. C. § 170's statement that "the directors of every corporation . . . may declare and pay dividends upon the shares of its capital stock . . . out of its surplus . . . or . . . out of its net profits." The plaintiff also relies on a statement in *Vogtman v. Merchants' Mortgage and Credit Company*, 178 A. 99, 20 Del. Ch. 364 (1935), that "[in] deciding whether a dividend was rightfully made, the transaction must be viewed as of the time when it was declared." *Id.* at 370.

The plaintiff's rigid interpretation of the statute is undermined by a careful reading of *Vogtman*, by the lack of further case law supporting it, and by common sense. The defendants rightly argue that the *Vogtman* case does not come close to standing for the proposition that the plaintiff cites it for. *See* Response at 18. The defendants point out that the court "focused on whether the dividend had been paid out of surplus," noting accurately that "the *Vogtman* court repeatedly discussed the date the dividend was paid . . . and did not even note the date on which the dividend was declared." *Id*. Multiple times the *Vogtman* court relied on evidence of the corporation's net assets on December 31, 1932, the day prior to the dividend's payment. *Vogtman*, 20 Del. Ch at 370-72. Nowhere did it discuss the value of the corporation's net assets on the date the dividend was declared. The plaintiff has thus cited no relevant authority for the rigid view that a corporation must have the requisite surplus on the date the dividend is declared. Moreover, the plaintiff's strained interpretation of the statute would lead to absurd results; that interpretation would make it exceedingly

difficult for any corporation to accomplish a spinoff without running afoul of the statutory scheme.

The plaintiff's third argument is that the dividend was illegal because Idearc's board never acted to determine if a surplus existed. Brief at 6-8. The plaintiff's argument is undermined by case law and policy considerations. In its summary judgment opinion, the court quoted the statements in *Klang v. Smith's Food and Drug Centers, Inc.*, 702 A.2d 150, 152, 156 (Del. 1997), that "perfection in [the] process [of revaluing assets] is not required," and that "[a] mistake in documenting [a] surplus will not negate the substance of the action, which complies with the statutory scheme." *See* SJ Opinion at 48. The plaintiff correctly notes that the "statutory scheme" at issue in *Klang* was the Delaware Code's section 160 scheme for redemption of stock, which does not explicitly require board participation. Brief at 7-8; *see also* 8 Del. C. § 160. It argues that sections 170-173 set up a different statutory scheme, which does require such participation. *Id.* at 8; *see also* 8 Del. C. § 170-173.

The plaintiff, however, conveniently ignores the *Klang* court's policy discussion, which was the key to its holding that "perfection" in the asset revaluation process was not required to validly accomplish the stock redemption at issue in that case. The *Klang* court observed that "[i]t is helpful to recall the purpose behind Section 160. The General Assembly enacted the statute to prevent boards from draining corporations of assets to the detriment of creditors and the long-term health of the corporation." *Klang*, 702 A.2d at 154. While the *Klang* court was discussing section 160, there can be no doubt that the purpose (at least as to a

corporation's creditors) driving the section 170 and 173 statutory scheme governing payment of dividends is the same. *See* SJ Opinion at 37. The dividend here did not so "drain" Idearc of assets that its creditors were inadequately protected. Indeed, in the absence of a showing that there was inadequate surplus (or no net profits) with which to declare a dividend, this court doubts whether the trustee of a litigation trust representing creditors of a bankrupt corporation has standing to complain of other imperfections in the process of such dividend's payment.

Moreover, an overly rigid reading of the statutory scheme seems inappropriate in the spinoff context. The court has already accepted the plaintiff's argument that such an approach to the definition of the term "dividend" is inappropriate. *See* SJ Opinion at 39-40. In this court's opinion, what is crucial is that Verizon's management team (even if they themselves did not consider the spinoff transactions a technical "dividend") made reasonable efforts to ascertain what Idearc's value would be on the date of the spinoff. The court has documented some of these efforts in its Memorandum of Decision. *See* Decision at 34-41 and 58-61. The result of these estimations would have revealed, had management considered the question, that Idearc would have sufficient surplus with which to declare a "dividend" on the date of the spinoff. In light of the court's valuation finding, Verizon's pre-spin valuation estimations were not only reasonably performed but were reasonably accurate as well.

In any case, the ruling the plaintiff seeks here could have potentially breathtaking consequences, in that it could theoretically allow creditors in cases of

bankruptcies that are not even plausibly connected to (or caused by) a prior spinoff to recover the full amount of any debt or cash transferred in that spinoff, because of any minor noncompliance with Section 170 or 173's requirements.[13] This court refuses to sanction such a sweeping elevation of form over substance.

Because the court has found that Idearc had adequate surplus on the date of the spinoff with which to pay a dividend, the defendants are entitled to judgment on the plaintiff's unlawful dividend claim.

V. PROMOTER LIABILITY

The court has previously ruled that no reasonable fact finder could conclude that Idearc was not Verizon's wholly owned subsidiary. *See* SJ Opinion at 26-27. The effect of this ruling is to place this case squarely within the holdings articulated in both *Anadarko*, *see above* at 8, and *Westlake Vinyls, Inc. v. Goodrich Corporation*, 518 F. Supp. 2d 918, 939 (W.D. Ky. 2007) ("The weight of authority holds that a parent corporation owes no fiduciary duties to its wholly-owned subsidiary."). Since the court has found that Idearc was solvent, Verizon and Diercksen owed it no fiduciary duties that would give rise to a claim of promoter liability. For this reason alone, judgment should be entered for the defendants on the plaintiff's promoter liability claim.

In conjunction with its response to the court's show cause order of January 22, 2013, the plaintiff filed an unsolicited motion for judgment, citing Rule 52(c) as

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[13] Indeed, a holding in accord with what the plaintiff seeks could have such grave consequences even if a bankruptcy were not in view.

the primary authority for this motion. *See generally* Motion and Brief for Entry of Judgment ("Motion") (docket entry 649). This motion attempts to bolster the plaintiff's promoter liability claim. *Id.* at 7, 12. Rule 52(c) permits judgment on partial findings against a party only where the court "finds against the party" on a dispositive issue. FED. R. CIV. P. 52(c). The court did not find against the Verizon defendants on any dispositive issue in its Memorandum of Decision. *See generally* Decision. More specifically, the court most certainly did not find against the Verizon defendants on the issue of Idearc's value, *see* Decision at 1, despite the plaintiff's absurd philosophical waxing on the indeterminate nature of the court's valuation finding. *See* Motion at 2. The plaintiff's motion for judgment is therefore denied.[14]

Moreover, the plaintiff attempts to incorporate the substance of this motion for judgment into its response to the court's show-cause order and its reply in support of this response. *See* Brief at 11 and Reply at 9. This amounts to an attempt on the part of the plaintiff to file oversized briefs without first obtaining leave from the court. Incredibly, the plaintiff has the audacity to complain about the Northern District of Texas's general briefing page limits without ever having

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[14] The plaintiff attempts to rescue the motion by requesting that the court consider it a summary judgment motion. *See* Motion at 2. The court declines this invitation, since the plaintiff has already filed two summary judgment motions, *see* docket entries 332 and 378. In the absence of leave to file multiple motions, the local rules permit only one summary judgment motion, *see* LR 56.2(b). The plaintiff has not requested leave to file a third summary judgment motion.

requested leave from the court to file briefs exceeding those limits. *See* Reply at 3. The court has shown itself perfectly willing in this case to allow the parties both to supplement the record and to submit argument in excess of what the local rules typically permit. *See generally* 3:10-CV-1842-G docket sheet. Where a party does not first seek leave, however, the court will not permit blatant violations of its local rules. For this reason, the court declines to consider any argument the plaintiff attempts to incorporate from the motion for judgment or the reply supporting the motion for judgment (docket entries 649 and 655) into the response and reply to the show cause order.

With respect to promoter liability, the plaintiff continues to press the notion that, as of the date of the spinoff, Idearc was not Verizon's wholly-owned subsidiary. *See* Brief at 11-15 and Reply at 6-7. The court agrees with the defendants that this exercise is, in substance, a request for the court to reconsider its holding in its summary judgment opinion of September 14, 2012. *See* Response at 12-15. All the evidence the plaintiff attempts to put on in support of this (re)argument, *see*, *e.g.*, Motion at 15, is evidence that was available to the plaintiff on the multiple motions to dismiss and for summary judgment. The plaintiff has cited no intervening change in the law binding on this court governing promoter liability, or ownership of subsidiaries, since the various motions to dismiss and for summary judgment were filed. The court therefore declines to reconsider its earlier holding that no reasonable fact finder could conclude that Idearc was not Verizon's wholly-owned subsidiary. SJ Opinion at 26-27.

Even if the court were to reconsider this holding, however, the court would still conclude that entry of judgment for the defendants on the plaintiff's promoter liability claim is appropriate at this time. The problem for the plaintiff with respect to this claim, as with its breach of fiduciary duty claim against Diercksen, is that the plaintiff cannot show, in light of the court's solvency finding, how Idearc or its creditors were damaged by the specific actions the plaintiff names in the complaint, the motions for summary judgment, the responses to the motions for summary judgment, the proposed findings of fact and conclusions of law, and the joint pretrial order.

This is precisely why the promoter liability claim the plaintiff presses in its post-trial briefing relies on an entirely different theory, and refers to a different set of facts, than what appeared in the complaint. The plaintiff's promoter liability claim has, at least until the post-trial briefing, been quite specifically a claim for breach of fiduciary duty, *see* Complaint ¶ 111.[15] The core allegations of the plaintiff's promoter liability claim, as set forth in the amended complaint, have been that Diercksen and Verizon schemed in the "promotion" of Idearc to accomplish an (allegedly fraudulent) tax-free, debt-for-debt exchange, which would relieve Verizon of a significant debt burden and load Idearc with debt it was unable to support. *Id.* ¶¶ 82-90. As a result, the plaintiff claimed, Diercksen and Verizon are liable for the allegedly unsustainable debt with which they saddled Idearc. *Id.* ¶¶ 113-14.

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[15] In this claim the plaintiff seeks to recover compensatory damages, which, as outlined above in section III. A., would require a showing of damage logically related to the alleged breach of duty.

The fatal flaw in this theory, in light of the court's finding about Idearc's solvency, is that, in fact, the late-2006, post-spinoff Idearc was not "saddled" with unsupportable debt. Subsequent events -- including the Great Recession -- intervened, and Idearc later became unable to support its debt. However, in light of the court's solvency finding, these intervening events do not implicate Verizon and Diercksen, and they sever any causal link between Verizon and Diercksen's actions and Idearc's bankruptcy. The plaintiff has not even attempted to show, with any degree of specificity or detail, how -- in light of Idearc's solvency -- there could be any damage to Idearc's creditors that is logically and reasonably related to the specific breaches of fiduciary duty (*i.e.*, the actions in furtherance of the "tax scheme," *see* Complaint ¶ 83) that have, from the time of the amended complaint, formed the core of the promoter liability claim.[16]

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[16] As already noted, it is obvious that the theory underlying the plaintiff's promoter liability claim has undergone a metamorphosis in the plaintiff's response to the court's show cause order. Now for the first time the plaintiff includes, specifically in relation to this claim, bare allegations that Verizon: (1) caused Idearc to enter illegal contracts; (2) caused Idearc to falsify record documents; (3) failed to stop Idearc from incurring debt; and (4) filed for bankruptcy protection, among others. *See* Brief at 12. As far as the court has been able to determine, these allegations were never connected to the promoter liability claim in (1) the joint pretrial order filed by the parties (docket entry 572); (2) the plaintiff's proposed findings of fact and conclusions of law (which were addressed not simply to Phase I of the trial but to all issues remaining to be tried in the case) (docket entry 543); (3) the plaintiff's two summary judgment motions (docket entries 332 and 378); or (4) the plaintiff's responses to the defendant's motions for summary judgment and motions to dismiss (especially docket

For all the foregoing reasons, the defendants are entitled to judgment on the plaintiff's promoter liability claim.

VI. ALTER EGO

Because the court has concluded that the plaintiff cannot prevail on its other claims in this case, judgment for the defendants will also be entered on the plaintiff's alter ego "claim." *See* SJ Opinion at 51 and Show Cause Order at 2 n.*.

VII. CONCLUSION

For the reasons stated above, the plaintiff's motion for entry of judgment (docket entry 649) is **DENIED**. Judgment will be entered for the defendants in accordance with these conclusions.

SO ORDERED.

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entry 430). The court does not consider itself bound to allow the plaintiff to continue expending huge volumes of energy, time and money in pursuit of a claim that, after nearly three years of litigation, still does not appear to have a coherent theory underlying it. Nor is the court required to consider a novel theory raised this late in the litigation. See *Cutrera v. Board of Supervisors of Louisiana State University*, 429 F.3d 108, 113 (5th Cir. 2005) ("A claim which is not raised in the complaint but, rather, is raised only in response to a motion for summary judgment is not properly before the court."); see also *O'Hara v. General Motors Corporation*, 2006 WL 1094427 (N.D. Tex. Apr. 25, 2006) (Fish, C.J.) (refusing to consider legal theories raised for the first time in a plaintiff's response to a motion for summary judgment), *rev'd in part on other grounds*, 508 F.3d 753 (5th Cir. 2007).

June 18, 2013.

/s/A. Joe Fish
A. JOE FISH
Senior United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3:10-CV-1842-G

[Filed June 18, 2013]

U.S. BANK NATIONAL ASSOCIATION, Litigation Trustee of the Idearc Inc. *et al.* Litigation Trust,	)
Plaintiff,	)
VS.	)
VERISON COMMUNICATIONS INC., ET AL.,	)
Defendants.	)

JUDGMENT

This judgment is entered pursuant to F.R. CIV. P. 58 and the Conclusions of Law filed June 18, 2013, the Memorandum of Decision filed January 22, 2013, and the Memorandum Opinion and Order filed September 14, 2012. For the reasons stated in those documents, it is **ORDERED** that the plaintiff take nothing from the defendants on its claims in this case and that the defendants recover their costs of court.

June 18, 2013.

/s/A. Joe Fish
A. JOE FISH
Senior United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3:10-CV-1842-G

[Filed June 5, 2013]

U.S. BANK NATIONAL ASSOCIATION, Litigation Trustee of the Idearc Inc. *et al.* Litigation Trust,	)
Plaintiff,	)
VS.	)
VERIZON COMMUNICATIONS INC., ET AL.,	)
Defendants.	)

ORDER

Before the court is the plaintiff's motion to amend and certify prior orders of this court (docket entry 668). In order for the court to certify that an order involves a question immediately appealable under 28 U.S.C. § 1292(b), the court must find that such appeal would "materially advance the ultimate termination of the litigation." Since the court has already conducted a bench trial and issued findings of fact, the court is of

the opinion that an interlocutory appeal of its prior orders striking the plaintiff's jury demand and denying reconsideration (docket entries 288 and 459) would not materially advance the ultimate termination of this litigation. The plaintiff's motion is therefore **DENIED**.

SO ORDERED.

June 5, 2013.

/s/A. Joe Fish
A. JOE FISH
Senior United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3:10-CV-1842-G

[Filed September 10, 2012]

U.S. BANK NATIONAL ASSOCIATION, Litigation Trustee of the Idearc Inc. *et al.* Litigation Trust,	)
Plaintiff,	)
VS.	)
VERIZON COMMUNICATIONS INC., ET AL.,	)
Defendants.	)

ORDER

Before the court is the plaintiff's September 10, 2012 letter in which the plaintiff requests that the court clarify the record regarding the court's order granting defendant's motion to strike plaintiff's demand for a jury trial (docket entry 288). The court construes this letter as a motion to clarify the record. So construed, the motion is **DENIED**.

SO ORDERED.

September 10, 2012.

/s/A. Joe Fish
A. JOE FISH
Senior United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3:10-CV-1842-G

[Filed July 25, 2012]

U.S. BANK NATIONAL ASSOCIATION, Litigation Trustee of the Idearc Inc. *et al.* Litigation Trust,	)
Plaintiff,	)
VS.	)
VERIZON COMMUNICATIONS INC., ET AL.,	)
Defendants.	)

MEMORANDUM OPINION AND ORDER

Before the court is the plaintiff's motion to reconsider the court's order striking the plaintiff's jury demand (docket entry 315). For the reasons set forth below, this motion is denied.

I. BACKGROUND

This case deals with claims arising out of a large spin-off transaction, whereby Idearc Inc. ("Idearc")

became a stand-alone company apart from its parent, Verizon Communications Inc. ("Verizon"). Defendants Verizon Communications Inc., Verizon Financial Services LLC, GTE Corporation, and John W. Diercksen's Motion to Strike Plaintiff's Jury Demand for a Jury Trial and Brief in Support ("Motion to Strike") at 3 (docket entry 89). The court has already set forth the factual background of this case. Memorandum Opinion and Order of September 19, 2011 (docket entry 106).

The plaintiff's original complaint, filed on September 15, 2010, contained a jury demand. Plaintiff's Original Complaint ¶ 80 (docket entry 1). On February 17, 2012, the plaintiff filed an amended complaint which also contained a jury demand. Plaintiff's Amended Complaint and Jury Demand (Filed Under Seal) ("Complaint") ¶ 134 (docket entry 2I6). On August 25, 2011, the defendant brought a motion to strike the plaintiff's jury demand. *See generally* Motion to Strike. The court granted the defendant's motion to strike the jury demand on March 21, 2012. Memorandum Opinion and Order of March 21, 2012 (the "Order") (docket entry 288).

The plaintiff now brings this motion to reconsider the court's order granting the defendants' motion to strike the jury demand. Plaintiff's Motion to Reconsider Order Granting Strike of Demand for Jury Trial and, Alternatively, to Empanel an Advisory Jury and Brief in Support ("Motion to Reconsider") at 1 (docket entry 315).

II. ANALYSIS

In its motion for reconsideration, the plaintiff asserts that "[i]f any of the claims or issues [in the instant action] require a jury trial, . . . the strike of [the p]laintiff's jury demand is" in violation of the Seventh Amendment. Motion to Reconsider at 3. The plaintiff's argument is then broken down into two principal components. First, the plaintiff contends that the court erred in concluding that the fraudulent transfer claims are equitable and therefore do not entitle the plaintiff to a jury trial. *Id.* at 9-16. Second, the plaintiff insists that its remaining claims are also legal claims entitled to a jury trial. *Id.* at 7-9.

A. Legal Standard for Reconsideration

"[T]he Federal Rules of Civil Procedure do not recognize a general motion for reconsideration . . . . " *St. Paul Mercury Insurance Company v. Fair Grounds Corporation*, 123 F.3d 336, 339 (5th Cir. 1997). However, courts do rule on motions for reconsideration under Rules 54(b), 59, and 60. See *Rotella v. Mid-Continent Casualty Company*, No. 3:08-CV-0486-G, 2010 WL 1330449, at *5 (N.D. Tex. Apr. 5, 2010) (Fish, J.). A request that the court reconsider an interlocutory order falls under Rule 54(b). *See* Fed. R. Civ. P. 54(b); see also *Lavespere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167, 185 (5th Cir. 1990), *cert. denied,* 510 U.S. 859 (1993), *abrogated on other grounds by Little v. Liquid Air Corporation*, 37 F.3d 1069, 1075 n.14 (5th Cir. 1994) (en banc).

Under Rule 54(b), "any order or other decision, however designated, that adjudicates fewer than all claims or the rights and liabilities of fewer than all the

parties . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Although the precise standard for evaluating a motion to reconsider under Rule 54(b) is unclear, "whether to grant . . . a motion [to reconsider] rests within the discretion of the court." *Dos Santos v. Bell Helicopter Textron, Inc. District*, 651 F. Supp. 2d 550, 553 (N.D. Tex. 2009) (Means, J.). Further, even though the standard for evaluating a motion to reconsider under Rule 54(b) "would appear to be less exacting than that imposed by Rules 59 and 60 . . . , considerations similar to those under Rules 59 and 60 inform the Court's analysis." *Id.*

In contrast to Rule 54(b), which deals with reconsideration of interlocutory orders, Rules 59 and 60 deal with reconsidering judgments. Under these two rules, "[m]otions for reconsideration have a narrow purpose and are only appropriate to allow a party to correct manifest errors of law or fact or to present newly discovered evidence." *Arrieta v. Yellow Transportation, Inc.*, No. 3:05-CV-2271-D, 2009 WL 129731, at *1 (N.D. Tex. Jan. 20, 2009) (Fitzwater, C.J.) (citation and internal quotation marks omitted), *a'ffd* 641 F.3d 118 (5th Cir. 2011), *pet. for cert. filed*, 80 USLW 3650 (May 9, 2012) (No. 11-1361). In addition, such motions are *not* the proper vehicles for rehashing old arguments or raising new arguments that could have been presented earlier. *Id.* Accordingly, the court expects litigants to advance their strongest case the first time the court considers the matter. *Texas Instruments, Inc. v. Hyundai Electronic Industries, Company Limited*, 50 F. Supp. 2d 619, 621 (E.D. Tex. 1999).

In this case, the plaintiff's motion for reconsideration sets forth no newly discovered evidence and alleges no intervening change in the law. Instead, the plaintiff attempts to establish that the court clearly erred by either rehashing arguments previously made or raising new arguments that could have been made earlier.

B. The Plaintiff's Fraudulent Transfer Claims

The court has already set forth at length the appropriate legal standard for the right to a trial by jury under the Constitution for fraudulent transfer claims. Memorandum Opinion and Order of March 21, 2012 (the "Order") (docket entry 288). In its motion for reconsideration, the plaintiff reasserts its argument that its fraudulent transfer claims are legal claims and thus require a jury. In particular, the plaintiff relies heavily in its motion on the Supreme Court's decision in *Stern v. Marshall*, ___ U.S. ___, 131 S. Ct. 2594 (2011). After reviewing the plaintiff's arguments, the court concludes that it did not err in holding that the plaintiff's fraudulent transfer claims do not entitle it to a jury trial.

In *Stern,* a creditor filed a proof of claim against a bankruptcy estate. *Id.* at 2601. The debtor responded by filing in the bankruptcy proceeding a state law counterclaim for tortious interference. *Id.* The question before the Supreme Court was whether the bankruptcy court could enter a final judgment on the state law counterclaim under 28 U.S.C. § 157 and Article III. *Id.* at 2595. The Court concluded that the counterclaim could not be finally adjudicated by the bankruptcy court because if it did decide the counterclaim, the Article I bankruptcy court would be exercising the

judicial power of the United States, which the Constitution reserves for Article III courts. *Id.* at 2618-19.

The plaintiff here maintains that "*Stem* clarifies that a fraudulent transfer action must be finally adjudicated by an Article III court, not a bankruptcy court." Motion to Reconsider at 9-10. Because of this requirement, the plaintiff argues, it is entitled to a jury trial on its fraudulent transfer claims. However, this argument wholly ignores *Langenkamp v. Culp*, 498 U.S. 42 (1990), which *Stern* distinguished but did not disturb. *Stern,* 131 S. Ct. at 2615-18. Under *Langenkamp*, the fraudulent transfer claim was subject to "the equitable jurisdiction of the bankruptcy court" when the defendant filed a proof of claim against the bankruptcy estate. *Langenkamp*, 498 U.S. at 45. Thus, the plaintiff's argument on this point is without merit.

The plaintiff further submits that it has a right to a jury trial because it did not "consent" to a non-jury trial. Motion for Reconsideration at 10-12. Indeed, the Supreme Court in *Stern* held that the creditor defendant did not consent to a non-Article III court by filing a proof of claim in the bankruptcy proceeding. 131 S. Ct. at 2614. However, as this court has already explained, a proof of claim "extinguishes" the right to a jury trial. *See* Order at 6-7. The issue of consent is irrelevant. Having reviewed the opinion in *Stern*, the court concludes that *Stern* does nothing to change this result.

Next, the plaintiff argues that *Langenkamp* is inapplicable because *Stern* and *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989), support the notion that "fraudulent transfer and preference actions differ."

Motion for Reconsideration at 12. In *Granfinanciera*, the right to a jury trial for the fraudulent transfer claim was preserved. 492 U.S. at 55. In *Langenkamp*, on the other hand, the right to a jury trial for the preference action was extinguished. 498 U.S. at 45. The plaintiff argues that the reason behind the different outcomes in these two cases was the difference in the claims brought. However, the real distinction between *Granfinanciera* and *Langenkamp* is whether a proof of claim was filed in the bankruptcy proceeding. Moreover, the court has found no compelling reason, in *Stern* or elsewhere, to distinguish preference actions from fraudulent transfer actions in this context. See Order at 9-10 ("[M]ost courts do not recognize a distinction between fraudulent transfer claims and preferential transfer claims.").

Finally, the plaintiff asserts that "[t]he claims resolution in bankruptcy court cannot extinguish the [plaintiff's] jury trial right . . . in district court." Motion for Reconsideration at 14. Plaintiff relies on the interpretation of *Stern* in *Picard v. Katz*, No. 11 Civ. 3605 (JSR), 2011 WL 5873806 (S.D.N.Y. Nov. 23, 2011), to support this argument. *Id.* However, this court has already dealt with this argument in its previous opinion. Order at 10-12.

C. The Plaintiff's Other Claims

In its motion for reconsideration, the plaintiff argues that its "[b]reach of fiduciary duty, aiding [and] abetting [breach of fiduciary duty], illegal dividends, promoter liability, and unjust enrichment are legal claims requiring a jury." Motion for Reconsideration at 7. In addition, the plaintiff argues that "[t]he *alter ego* count is a legal claim that requires a jury trial." *Id.* at

16. The plaintiff admits that it "did not 'exhaustively brief whether [the] [p]laintiff is entitled to a jury trial on [these] claims'" before the court granted the motion to strike the jury demand. Plaintiff's Reply in Support of Motion to Reconsider Order Granting Strike of Demand for Jury Trial and, Alternatively, to Empanel an Advisory Jury and Brief in Support ("Plaintiff's Reply") at 2 (docket entry 352). In fact, the plaintiff only alluded to its claims of breach of fiduciary duty and aiding and abetting breach of fiduciary duty one time -- in a single footnote in its response to the defendants' motion to strike the jury demand. Plaintiff's Response to Defendants' Motion to Strike Plaintiff's Demand for a Jury Trial and Brief in Support ("Plaintiff's Response") at 15 n.8 (docket entry 123). None of the plaintiff's other state-law claims was even mentioned in the plaintiff's response to the motion to strike. Moreover, the plaintiff provides no explanation or justification for waiting until the motion for reconsideration to argue in any detail that these claims require a jury trial. Accordingly, the court concludes that the plaintiff is raising new arguments that should have been made earlier and will only reconsider the decision to strike the plaintiff's jury demand if the conclusions in its previous order were clearly erroneous.

1. *The Plaintiff's Breach of Fiduciary Duty and Aiding and Abetting Breach of Fiduciary Duty Claims*

The Supreme Court promulgated the following two-pronged test to determine whether the Seventh Amendment guarantees a right to trial by jury: "First, . . . compare the statutory action to 18th-century

actions brought in the courts of England prior to the merger of the courts of law and equity." *Granfinanciera*, 492 U.S. at 42 (internal punctuation and citation omitted). "Second, . . . examine the remedy sought and determine whether it is legal or equitable in nature." *Id.* (internal punctuation and citation omitted). "The second stage of this analysis is more important than the first." *Id.* (citation omitted).

The plaintiff argues that the breach of fiduciary duty claims against Diercksen and the Verizon entities and the aiding and abetting the breach of fiduciary duty claim against the Verizon entities are legal claims because they seek a money judgment. Motion for Reconsideration at 7-8. Under the first prong of the *Granfinanciera* test, the court concludes that " [c]laims for breach of fiduciary duty have always been within the exclusive jurisdiction of the courts of equity." *In re Jensen*, 946 F.2d 369, 371 (5th Cir. 1991). However, the application of the second prong is not as straightforward.

The monetary nature of the relief sought in *Granfinanciera* weighed heavily in favor of denominating the right invoked in that case as legal rather than equitable. 492 U.S. at 47; see also *Chauffeurs, Teamsters and Helpers, Local Number 391 v. Terry*, 494 U.S. 558, 570 (1990) ("Generally, an action for money damages was the traditional form of relief offered in the courts of law.") (internal punctuation and citation omitted). However, "[a]wards of monetary relief are for present purposes not without their ambiguities." *In re Jensen*, 946 F.2d at 372. "The reality is that there may be situations in which an award of monetary relief is equitable." *Id.* The Supreme

Court has never held that monetary relief necessitates that a claim be deemed legal. *Terry*, 494 U.S. at 570 (citations omitted). In fact, the Court has found two exceptions to the general rule that monetary relief is legal.

First, monetary relief that is intertwined with an injunction is considered equitable. *Id.* at 571. Because no injunction is sought in the instant action, however, the court concludes that this exception is inapplicable. Second, monetary damages are characterized as equitable "where they are restitutionary, such as in actions for disgorgement of improper profits." *Id.* at 570 (citing cases) (internal punctuation omitted).

Black's Law Dictionary defines "restitution" as a "return or restoration of some specific thing to its rightful owner or status." BLACK'S LAW DICTIONARY (9th ed. 2009). Under this definition, it appears that the plaintiff's breach of fiduciary duty claims against the Verizon entities are restitutionary in nature because the plaintiff is seeking to have Idearc's money, in the form of cash and debt obligations, returned by Verizon. However, characterizing the plaintiff's claim against Diercksen is not as clear. On the one hand, none of the money the plaintiff seeks was ever in Diercksen's control; therefore, there is nothing to be returned. On the other, at the time of the spin-off, Diercksen was acting in an official capacity for Verizon, which was the beneficiary of this allegedly wrongful gain.

In this case, the court declines to reconsider its decision that the plaintiff's breach of fiduciary duty and aiding and abetting a breach of fiduciary duty claims do not entitle the plaintiff to a jury trial. Except for one

two-sentence footnote in its response to the motion to strike, Plaintiff's Response at 15 n.8, the plaintiff wholly failed to argue why its fiduciary duty claims were entitled it to a jury trial. Moreover, in the initial briefing on the motion to strike, the plaintiff provided no argument at all as to why the fiduciary duty claims against Diercksen should be considered legal and not equitable.

The role of the court is to decide the legal disputes brought before it. The court cannot effectively discharge this duty if the parties effectively fail to bring to the court's attention all arguments that support a particular outcome. This is especially true in a case like this one, where the monetary stakes are enormous, the parties are sophisticated, and they are represented by intelligent and industrious lawyers.

Therefore, the court declines the plaintiff's invitation to reconsider its determination that the plaintiff's fiduciary duty claims entitle it to a jury trial.

2. *The Plaintiff's Unlawful Dividend, Promoter Liability, Unjust Enrichment and Alter Ego Claims*

The plaintiff further argues that its unlawful dividend, promoter liability, unjust enrichment, and alter ego claims against Diercksen and Verizon are money-damage legal claims that require a jury. Motion to Reconsider at 7-9 (citing *Jensen*, 946 F.2d at 372). Because the plaintiff did not argue that these claims entitled it to a jury trial in the initial briefing on the motion to strike, the court will not consider these arguments now.

D. Advisory Jury

The plaintiff requests, in the alternative, that the court empanel an advisory jury under Federal Rule of Civil Procedure 39(c). Rule 39(c) gives a district court discretion to decide whether to "try any issue with an advisory jury" during "an action not triable of right by a jury." *See* Rule 39(c), F. R. Civ. P.; Motion to Reconsider at 18. The plaintiff provides no arguments or cited cases to support this request. The court is persuaded by the defendants' arguments in their response to the motion to reconsider. Defendant's Response at 14-18. The court concludes that empaneling an advisory jury in case would do nothing more than add expense and confusion to the trial. See *Fort Henry Mall Owner, LLC v. U.S. Bank N.A.*, No. 11-CV-287, 2012 WL 523657, at *5 (E.D. Tenn. Feb. 15, 2012) ("A trial using an advisory jury has all the disadvantages of a normal jury trial: it slows the trial; it is expensive; it requires mid-trial evidentiary ruling that probably would be pretermitted in a bench trial; and, in this case, preparing jury instructions will entail hours upon hours of precious judicial time."). Accordingly, the court denies the plaintiff's request to empanel an advisory jury.

III. CONCLUSION

For the reasons stated above, the plaintiff's motion to reconsider the court's order striking the plaintiff's jury demand is **DENIED.**

SO ORDERED.

July 25, 2012.

/s/A. Joe Fish
A. JOE FISH
Senior United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3:10-CV-1842-G

[Filed March 21, 2012]

U.S. BANK NATIONAL ASSOCIATION, Litigation Trustee of the Idearc Inc. *et al.* Litigation Trust,	)
Plaintiff,	)
VS.	)
VERIZON COMMUNICATIONS INC., ET AL.,	)
Defendants.	)

MEMORANDUM OPINION AND ORDER

Before the court is the defendants' motion to strike the plaintiff's jury demand (docket entry 89). For the reasons set forth below, this motion is granted.

I. BACKGROUND

This case deals with claims arising out of a large spin-off transaction. The plaintiff is U.S. Bank National Association ("U.S. Bank"), acting as litigation

trustee of the Idearc Inc. *et al.* Litigation Trust. The defendants are Verizon Communications Inc. ("Verizon"), GTE Corporation ("GTE"), John W. Diercksen ("Diercksen"), and Verizon Financial Services LLC ("VFS") (collectively, the "defendants"). The court has already set forth the general factual background of this case. Memorandum Opinion and Order of September 19, 2011 ("Opinion") (docket entry 106).

In March of 2009, Idearc filed for bankruptcy. Defendants Verizon Communications Inc., Verizon Financial Services LLC, GTE Corporation, and John W. Diercksen's Motion to Strike Plaintiff's Demand for a Jury Trial and Brief in Support ("Motion") at 8 (docket entry 89). In connection with Idearc's bankruptcy, Verizon filed a number of proofs of claim against the bankruptcy estate. *Id*. Four of these proofs of claim remain outstanding. *Id*. Idearc has objected to the payment of these four claims under 11 U.S.C. § 502(d), which requires a court to disallow a creditor's claim, where the creditor received a voidable preference or fraudulent conveyance, unless the creditor has paid the amount for which it is liable. *Id*. at 9. Idearc's objections under Section 502(d) remain pending. *Id*.

A plan of reorganization for Idearc was confirmed in December of 2009. *Id*. at 8. This plan created the Idearc litigation trust. *Id*. As the trustee of the litigation trust, U.S. Bank is "designated as the Debtors' and the Estates' representative and the successor in interest to the Debtors and Estates for all purposes with respect to all Litigation Trust Rights, including, without limitation, the commencement, prosecution, settlement and collection thereof." Plaintiff's Amended Complaint

and Jury Demand (Filed Under Seal) ("Complaint") ¶ 30 (docket entry 216). As such, U.S. Bank has brought eleven causes of action against the defendants: fraudulent transfer, breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, unlawful dividend, promoter liability and breach of fiduciary duty, unjust enrichment, and *alter ego*. *Id*. ¶ 32-133.

In its complaint, U.S. Bank demanded a jury trial. *Id*. ¶ 134. The defendants now bring this motion to strike the plaintiff's jury demand. Motion at 1. In their motion, the defendants make two arguments as to why the plaintiff is not entitled to a jury trial: (1) "[T]he Idearc Parties contractually waived their rights to a trial by jury on all of the claims set forth in the Complaint."; (2) "Plaintiff's claims are inexorably intertwined with Verizon's proofs of claim filed in the Idearc bankruptcy case, thus invoking the equitable jurisdiction of bankruptcy proceedings for which the plaintiff is not entitled to trial by jury." *Id*. In particular, the defendants argue that the plaintiff's fraudulent conveyance claims are "integral to the restructuring of the debtor-creditor relationship and part of the claims-allowance process which is triable only in equity." *Id*. at 20 (internal quotations omitted).[1]

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[1] The parties do not appear to dispute the fact that the plaintiff is not entitled to a jury trial under any of the other claims. The defendants provide two case citations as to why the plaintiff is not entitled to a jury trial on its breach of fiduciary duty and aiding and abetting breach of fiduciary duty claims. *See* Motion at 19 n.8 (citing *Cantor v. Perelman*, No. Civ. A. 97-586-KAJ, 2006 WL 318666, at *9 (D. Del. Feb. 10, 2006); *In re Hechinger Investment Company of Delaware*, 327 B.R. 537, 544 (D. Del. 2005), *aff'd*, 278 Fed. App'x. 125 (3d Cir. 2008)). The plaintiff does not appear to dispute this characterization.

II. ANALYSIS

A. Legal Standard

Under the United States Constitution, the right of a trial by jury is preserved for suits at common law. U.S. CONST. amend VII. The phrase "suits at common law" refers to "suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41

However, the defendants never argue that the plaintiff's unlawful dividends, promoter liability, unjust enrichment, and *alter ego* claims are equitable in nature. By the same token, the plaintiff never argues that any of its claims, other than its fraudulent transfer claims, are "suits at common law."

Nevertheless, the court's research on this matter shows that these remaining claims apparently do not entitle the plaintiff to a jury trial. See *Nichols v. Heslep*, 273 F.3d 1098, at *2 (5th Cir. 2001) ("[U]njust enrichment [i]s an equitable [claim] and not triable of right by a jury."); *Harrell v. DCS Equipment Leasing Corporation*, 951 F.2d 1453, 1458 (5th Cir. 1992) ("[T]he alter ego doctrine is an equitable method of piercing the corporate veil.").

Moreover, while there appears to be very little relevant extant case law, both plaintiff's promoter liability and unlawful dividend claims appear to be equitable as well. The plaintiff's promoter liability claim is essentially a breach of fiduciary duty claim, and as a result is equitable in nature. *See* Complaint ¶ 111 ("Verizon and Diercksen were both promoters and as such both owed fiduciary duties to Idearc. They breached their duties."); see also *Cantor v. Perelman*, 2006 WL 318666 at *9. The plaintiff's claim for an unlawful dividend against Diercksen and Verizon is equitable as well. Briggs, L. L., *Stockholders' Liability for Unlawful Dividends*, 8 TEMPLE LAW QUARTERLY 145, 167 (1934) ("It has been held by many courts that a suit in equity is the proper remedy to compel stockholders to return illegal dividends.").

(1989) (emphasis in original) (quoting *Parsons v. Bedford*, 3 Pet. 433, 447 (1830)). Moreover, the Supreme Court has held that actions to recover preferential or fraudulent transfers are considered suits at common law. *Id*. at 48 (citing *Schoenthal v. Irving Trust Company*, 287 U.S. 92 (1932)).

However, Congress has the power to block application of the Seventh Amendment, and deny trials by jury in actions at law, in certain cases where "public rights" are litigated. *Id*. at 51. In determining whether something is a public right, in a case not involving the federal government, the crucial question is whether "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, [has] create[d] a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." *Id*. at 54. "If a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court." *Id*. at 54-55. "If the right is legal in nature, then it carries with it the Seventh Amendment's guarantee of a jury trial." *Id*. at 55.

In *Granfinanciera*, the Supreme Court held that when a bankruptcy trustee brings a fraudulent conveyance action against another party, the suit is generally considered a suit at common law. *Id*. at 56. As a result, the right to a jury trial under the Seventh Amendment is preserved. However, this is true only when the defendant in the fraudulent conveyance suit

has not submitted a proof of claim against a bankruptcy estate in the bankruptcy case. *Id*. at 36, 57-58 (1989). Instead, when a creditor does file a claim against a bankruptcy estate, "the creditor triggers the process of 'allowance and disallowance of claims,' thereby subjecting himself to the bankruptcy court's equitable power." *Langenkamp v. Culp*, 498 U.S. 42, 44 (1990). Therefore, "[i]f the creditor is met, in turn, with a preference action from the trustee, that action becomes part of the claims-allowance process which is triable only in equity." *Id*. "In other words, the creditor's claim and the ensuing preference action by the trustee become integral to the restructuring of the debtor-creditor relationship through the bankruptcy court's equity jurisdiction." *Id*. (emphasis in original removed). As a result, the creditor that filed the proof of claim is no longer entitled to a jury trial on the preference or transfer action.

Under these circumstances, the right to a jury trial is extinguished for both the debtor and the creditor that files the proof of claim. In *Langenkamp*, the parties that filed the proof of claim against the debtor were the ones that sought a jury trial. *Id.* at 43-44. However, other courts have recognized that the same principle applies when it is the bankruptcy trustee that seeks a trial by jury. See, *e.g.*, *In re Crown Vantage*, No. C-02-3838 MMC, 2007 WL 172321, at *3 (N.D. Cal. Jan 18, 2007); *In re Washington Manufacturing Company*, 133 B.R. 113, 117 (M.D. Tenn. 1991); *In re B&E Sales Company, Inc.*, 129 B.R. 133, 134, 136-37 (Bankr. E.D. Mich. 1990). This is because "the holding in *Langenkamp* is not based on the concept of 'waiver.'" *Crown Vantage*, 2007 WL 172321 at *2. Instead, "[t]he right to a jury trial is lost not so much because it is

waived, but because the legal dispute has been transformed into an equitable issue." *Id*.

The Second Circuit's decision in *Germain v. Connecticut National Bank*, 988 F.2d 1323 (2nd Cir. 1993), explains why a debtor's preference or fraudulent transfer action becomes, in the words of *Langenkamp*, 498 U.S. at 44, "integral to the restructuring of the debtor-creditor relationship through the bankruptcy court's equity jurisdiction." In *Germain*, the trustee had brought a series of claims against a creditor that had filed a proof of claim in the bankruptcy case. 988 F.2d at 1326. None of these claims were preference or fraudulent transfer actions. *Id.* The court held that the bankruptcy trustee was entitled to a jury trial because the trustee's claims did not affect the "claims-allowance process." *Id.* at 1327. The Second Circuit contrasted the facts in *Germain* with the facts in *Langenkamp*, where "the issue was whether the trustee may void a preferential transfer without a jury trial." *Id.* The court cited 11 U.S.C. § 502(d), which requires a court to disallow "any claim of any entity from which property is recoverable because of a preferential transfer or fraudulent conveyance." *Id*. "Thus, before a claim may be allowed, a court *must* resolve any preference issues that the trustee might raise." *Id*. (emphasis in original). Therefore, Section 502(d) makes the resolution of the preference or fraudulent transfer issue "integral" to the claims allowance process. In those circumstances, the right to a jury trial is extinguished for both parties.

The plaintiff relies on two cases where the court determined that the right to a jury trial was not extinguished, notwithstanding the fact that a creditor had brought a claim against a debtor and the debtor

had brought a preference or fraudulent transfer action. The first such case is *Mirant Corporation v. The Southern Company*, 337 B.R. 107 (N.D. Tex. Jan 10, 2006) (McBryde, J.). In that case, the court was faced with motions to withdraw the reference and to transfer to another United States district court. *Id*. at 108-09. In deciding the motion to withdraw, the court considered whether the creditor was entitled to a jury trial. *Id*. at 119-22. As in *Langenkamp*, the creditor in *Mirant* had filed proofs of claim against the debtor, and the debtor had filed various claims against the creditor, including one for fraudulent "conveyances or transfers." *Id*. at 109-10, 121. The plaintiffs argued, and the bankruptcy judge concluded, that the creditor had "forfeited" its right "to trial by jury by virtue of having filed proofs of claim in the title 11 cases." *Id*. at 121.

However, the district judge in *Mirant* concluded that the creditor was indeed entitled to a jury trial. *Id*. The court first emphasized that it "must indulge in a presumption against wavier of the Seventh Amendment right to a jury trial." *Id*. The court's decision that the creditor was entitled to a jury trial was based in part on the fact that there was "no suggestion in the record that [the creditor] has knowingly, voluntarily, and intelligently waived its right to trial by jury." *Id*. However, one bankruptcy court has criticized *Mirant* on this issue, suggesting that this waiver analysis is not consistent with the Supreme Court's decisions in *Granfinanciera* and *Langenkamp*. See *In re Endeavour Highrise L.P.*, 425 B.R. 402, 408 n.3 (Bankr. S.D. Tex. 2010). Having reviewed the Supreme Court's opinions in both *Granfinanciera* and *Langenkamp*, this court concludes that there is no requirement that a creditor that files a

claim also "knowingly, voluntarily, and intelligently" waive its jury trial right. See also *Germain*, 988 F.2d at 1330 ("[T]he right to a jury trial is lost not so much because it is waived, but because the legal dispute has been transformed into an equitable issue.").

Moreover, *Mirant* appears to make a distinction between preference actions and fraudulent transfer actions. In that case, the court recognized that in *Langenkamp*, the Supreme Court held that there was no jury trial right because a preference action was "part of the process of allowance and disallowance of claims." *Mirant*, 337 B.R. at 121. However, Judge McBryde distinguished *Langenkamp* from the case before him by stating that "[t]he issue of disgorgement of an alleged voidable preference is not presented by any of the legal claims as to which [the creditor] has entitlement to a jury trial." *Id*. Instead, the debtor in *Mirant* brought a fraudulent conveyance or transfer action under 11 U.S.C. § 544(b). *Id*. at 109-10. Nevertheless, most courts do not recognize a distinction between fraudulent transfer claims and preferential transfer claims. First, the Supreme Court does not appear to make a distinction between fraudulent transfer actions and preference actions. *Granfinanciera* dealt with an alleged fraudulent transfer, while *Langenkamp* dealt with an alleged preferential transfer. See *Granfinanciera*, 492 U.S. at 36; *Langenkamp*, 498 U.S. at 42-43. Second, Section 502(d) deals with both preferential transfer and fraudulent conveyance actions. See *Germain*, 988 F.2d at 1327. Finally, many courts have applied *Langenkamp* in the context of fraudulent transfer claims. See *In re Crown Vantage*, 2007 WL 172321 at *3; *In re Washington*

Manufacturing Company, 133 B.R. at 117; *In re B&E Sales Company, Inc.*, 129 B.R. at 136-37.

The second case relied on by the plaintiff is *Picard v. Katz*, No. 11 Civ. 3605 (JSR), 2011 WL 5873806 (S.D.N.Y. Nov. 23, 2011). In that case, the trustee sought a jury trial on its fraudulent transfer claims against the defendants, who had submitted a claim in the bankruptcy court. *Id*. at *2 & n.1. The court held that the trustee was entitled to a jury trial, notwithstanding the defendant creditor's claims. *Id*. at *2. Judge Rakoff justified his decision on the grounds that the court had granted the defendants' motion to withdraw the reference of the adjudication of the fraudulent transfer proceeding. *Id*. He argued that this "substantially sever[ed]" the trustee's fraudulent transfer action from both "the claims allowance process and the hierarchical reordering of creditors' claims." *Id*. "Put differently, adjudication of the Trustee's fraudulent transfer claims occurs here apart from the larger regulatory scheme Congress has enacted for 'allowance and disallowance' of claims." *Id*.

However, the court is not persuaded that it should follow *Picard*. First, *Picard* does cite *Germain* for the statement that "neither precedent nor logic supports the proposition that either the creditor or the debtor automatically waives all right to a jury trial whenever a proof of claim is filed." 988 F.2d at 1330. However, *Picard* fails to recognize that the *Germain* opinion expressly cites *Langenkamp* and preference actions as an example where a debtor's claim would be part of the "claims-allowance process." See *id*. at 1327. *Picard* also fails to recognize that Section 502(d) seems to make preference and fraudulent conveyance actions

necessarily integral to this process. See *Picard*, 2011 WL 5873806 at *1-3. Finally, *Picard* argues that the adjudication of the fraudulent transfer claim is "substantially sever[ed]" from the claims-allowance process because of the defendants' granted motion to withdraw the reference under 28 U.S.C. § 157(d). *Id.* at *2. However, the court provides no legal citation to support this position, and other courts that have granted motions to withdraw the reference have still found that *Langenkamp* applies. See *In re Crown Vantage*, 2007 WL 172321 at *1.

B. Application

In this case, the black-letter law of *Langenkamp* seems to indicate that the plaintiff's right to a jury trial has been extinguished. The defendants have filed proofs of claim in the bankruptcy court. Motion at 21. The plaintiff has brought fraudulent transfer claims against the defendants. *Id*. at 22. The defendants argue that, under Section 502(d), the bankruptcy court must "disallow any claim of any entity from which property is recoverable" as a fraudulent transfer. *Id*. Because of Section 502(d), the fraudulent transfer actions become "integral to the restructuring of the debtor-creditor relationship" and "part of the claims-allowance process which is triable only in equity." See *Langenkamp*, 498 U.S. at 44-45. As a result, the jury trial right is extinguished. *Germain*, 988 F.2d at 1330.

However, the plaintiff argues that, notwithstanding *Langenkamp*, its fraudulent transfer claims are separate enough from the general claims allowance process that it is entitled to a jury trial. First, the plaintiff notes that it is trustee for a litigation trust that has been given certain causes of action against the

defendants; Idearc itself is not bringing these claims.[2] Plaintiff's Response to Defendants' Motion to Strike Plaintiff's Demand for a Jury Trial and Brief in Support ("Response") at 16 (docket entry 123). However, the litigation trust acts as the "representative and successor in interest to the Debtors and the Estates for all purposes." Motion at 8. Because the trust stands in the shoes of the debtor, it cannot have a greater or lesser right to a jury trial than the original debtor.

Second, the plaintiff argues that Idearc cannot invoke Section 502(d), because both the causes of action as well as the defenses to the claims were transferred to the litigation trust under the confirmed plan of reorganization. Response at 16 ("[Idearc] thus does not have the right to assert §502(d) as a counterclaim or as a defense to Verizon's claim in the [Idearc] bankruptcy."). However, the mandatory language of Section 502(d) suggests that Idearc could not lose any rights to object to the proofs of claim under Section 502(d). Section 502(d) states that a court "*shall* disallow any claim of any entity from which property is recoverable" as a fraudulent transfer. *Id*. (emphasis added); see also *Germain*, 988 F.2d at 1327 ("Under the Bankruptcy Code a court *must* disallow any claim of any entity from which property is recoverable because of a preferential transfer or fraudulent conveyance.") (emphasis added) (internal quotations omitted). Moreover, Idearc itself has argued in the bankruptcy

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[2] In its response, the plaintiff refers to Idearc post-confirmation by its new name: SuperMedia, Inc. Response at 6. For the sake of clarity, the court will continue to refer to it as Idearc.

case that Verizon's pending proofs of claim must be disallowed under Section 502(d). Motion at 22.

Third, the plaintiff argues that *Langenkamp* is "limited to the situation where the bankruptcy court determines the creditor's claim." Response at 18. However, the court has not found anything in the text of the *Langenkamp* decision that provides support for this statement, and the plaintiff has provided no direct legal citation for this position. Moreover, in *In re Crown Vantage*, the court struck the jury demand under *Langenkamp*, even though it was unclear at that point whether the claim would be heard in the district court or the bankruptcy court. 2007 WL 172321 at *3.

Finally, the court is not persuaded by the plaintiff's case citations to *Mirant* and *Picard*. As was explained earlier, the court does not agree with certain aspects of *Mirant's* and *Picard's* interpretations of the law in this area. See *supra* II.A.

III. CONCLUSION

For the reasons stated above, the defendants' motion to strike the plaintiff's jury demand is **GRANTED**.

SO ORDERED.

March 21, 2012.

/s/A. Joe Fish
A. JOE FISH
Senior United States District Judge

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-10752

[Filed September 15, 2014]

U.S. BANK NATIONAL ASSOCIATION, Litigation Trustee of the Idearc, Inc., et al, Litigation Trust,

Plaintiff - Appellant

v.

VERIZON COMMUNICATIONS, INCORPORATED; GTE CORPORATION; JOHN W. DIERCKSEN; VERIZON FINANCIAL SERVICES, L.L.C.,

Defendants - Appellees

Appeal from the United States District Court for the Northern District of Texas, Dallas

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion _____ , 5 Cir., _____ , _____ , F.3d _____)

Before KING, HAYNES, and GRAVES, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

The mandate shall issue forthwith.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/Carolyn Dineen King
UNITED STATES CIRCUIT JUDGE

*Judges Stewart, Higginbotham, Jones, and DeMoss did not participate in the consideration of rehearing en banc.

APPENDIX I

U.S. CONST. art. I, §§ 1, 8.

Article I, Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

* * *

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the

Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings;-And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. CONST. art. III, § 1.

Article III, Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST. amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

11 U.S.C. § 502(d).

* * *

(d) Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.

* * *

Fed. R. Civ. P. 7(b)(1).

* * *

(b) Motions and Other Papers.

(1) In General. A request for a court order must be made by motion. The motion must:

(A) be in writing unless made during a hearing or trial;

(B) state with particularity the grounds for seeking the order; and

(C) state the relief sought.

* * *

FED. R. CIV. P. 38(a)-(d).

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution—or as provided by a federal statute—is preserved to the parties inviolate.

(b) Demand. On any issue triable of right by a jury, a party may demand a jury trial by:

(1) serving the other parties with a written demand—which may be included in a pleading—no later than 14 days after the last pleading directed to the issue is served; and

(2) filing the demand in accordance with Rule 5(d).

(c) Specifying Issues. In its demand, a party may specify the issues that it wishes to have tried by a jury; otherwise, it is considered to have demanded a jury trial on all the issues so triable. If the party has demanded a jury trial on only some issues, any other party may—within 14 days after being served with the demand or within a shorter time ordered by the court—serve a demand for a jury trial on any other or all factual issues triable by jury.

(d) Waiver; Withdrawal. A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent.

* * *

FED. R. CIV. P. 39(a).

(a) When a Demand Is Made. When a jury trial has been demanded under Rule 38, the action must be designated on the docket as a jury action. The trial on all issues so demanded must be by jury unless:

(1) the parties or their attorneys file a stipulation to a nonjury trial or so stipulate on the record; or

(2) the court, on motion or on its own, finds that on some or all of those issues there is no federal right to a jury trial.

* * *

FED. R. CIV. P. 46

A formal exception to a ruling or order is unnecessary. When the ruling or order is requested or made, a party need only state the action that it wants the court to take or objects to, along with the grounds for the request or objection. Failing to object does not prejudice a party who had no opportunity to do so when the ruling or order was made.

APPENDIX J

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

CIVIL ACTION NO. 10-CV-1842-G
(JURY DEMANDED)
ECF

[Filed August 25, 2011]

U.S. BANK NATIONAL ASSOCIATION, Litigation Trustee of the Idearc Inc. *et al.* Litigation Trust,	)
Plaintiff,	)
vs.	)
VERIZON COMMUNICATIONS INC., VERIZON FINANCIAL SERVICES, LLC, GTE CORPORATION and JOHN W. DIERCKSEN,	)
Defendants.	)

DEFENDANTS VERIZON COMMUNICATIONS INC., VERIZON FINANCIAL SERVICES LLC, GTE CORPORATION, AND JOHN W. DIERCKSEN'S MOTION TO STRIKE PLAINTIFF'S DEMAND FOR A JURY TRIAL AND BRIEF IN SUPPORT

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Defendants Verizon Communications Inc. ("VCI"), Verizon Financial Services LLC ("VFS"), GTE Corporation ("GTE"), and John W. Diercksen ("Diercksen") (collectively, the "Verizon Parties") file this Motion to Strike Plaintiff's Demand for a Jury Trial and Brief in Support (the "Motion") and move to strike the demand for a jury trial made by Plaintiff U.S. Bank National Association, as Litigation Trustee of the Idearc Inc., *et al.*, Litigation Trust ("Plaintiff") with respect to each of the causes of action asserted against the Verizon Parties in the complaint (the "Complaint"). In support thereof, the Verizon Parties respectfully state as follows:[1]

I. PRELIMINARY STATEMENT

Plaintiff, as the successor to the Idearc Parties,[2] is not entitled to trial by jury on its claims set forth in the Complaint for two independent reasons: first, the Idearc Parties contractually waived their rights to a trial by jury on all of the claims set forth in the Complaint; and second, Plaintiff's claims are inexorably intertwined with Verizon's proofs of claim filed in the Idearc bankruptcy case, thus invoking the equitable jurisdiction of bankruptcy proceedings for which Plaintiff is not entitled to trial by jury.

The Idearc Parties are not entitled to a jury trial because they have contractually waived any such right. Each of the key agreements effectuating Idearc's spin-

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[1] The Motion is filed subject to, and without waiving, the Verizon Parties' pending Motion to Dismiss Plaintiff's Original Complaint.

[2] Capitalized but undefined terms contained in this Preliminary Statement are defined in subsequent portions of the Motion.

off from VCI contained an unambiguous and conspicuous waiver of any right to a trial by jury of any claims "arising out of" or "related to" either the agreements or the Spin-Off itself. These jury waivers should be enforced because they were made both knowingly and voluntarily. The Idearc Parties are a sophisticated, publicly traded family of companies that had over $3 billion in annual revenue at the time they entered into the waivers and were fully capable of understanding and consenting to jury waivers, as they did in effectuating the Spin-Off. The jury waivers are also broad—applying, by their terms, to both contract and tort claims. All of the claims in the Complaint are covered by the jury waivers executed by the Idearc Parties, and the Idearc Parties would not have been entitled to a jury on any of the claims contained in the Complaint if the Idearc Parties had filed it themselves. Under well-established law, Plaintiff, as the transferee of litigation rights that belonged to the Idearc Parties, has no more right to a trial by jury than the Idearc Parties. Because the Idearc Parties knowingly and intentionally entered into broad jury waivers, applicable to all claims of the Complaint, Plaintiff's request for a jury trial should be struck.

Moreover, Plaintiff also is not entitled to trial by jury because Plaintiff's claims are part of the claims allowance process in Idearc's bankruptcy. If a claim brought by a debtor in bankruptcy, or an entity such as Plaintiff standing in the shoes of such a debtor, affects the bankruptcy "claims allowance process," the claim is equitable and the plaintiff therefore has no right to a jury trial. Here, VCI and its subsidiaries ("Verizon") have filed proofs of claim in Idearc's bankruptcy case. Plaintiff's claims against Verizon in this action will

affect the resolution of Verizon's claims against Idearc, thus necessarily implicating the claims allowance process. Indeed, as Idearc has itself argued in its bankruptcy case, Verizon's proofs of claim are subject to disallowance under bankruptcy law if Plaintiff prevails in this case on its fraudulent transfer claims. In addition, Plaintiff's Complaint and Verizon's bankruptcy claims arise from the same underlying transaction, namely Idearc's spin-off from VCI. Because Plaintiff's and Verizon's claims are integrally related, and because the resolution of Plaintiff's claims in this litigation will squarely impact the allowance of Verizon's claims in the Idearc bankruptcy, Plaintiff's claims in this action are, as a matter of law, part of the equitable bankruptcy claims allowance process, and are, therefore, not eligible for trial by jury. Thus, Plaintiff's jury demand should be struck.

II. RELEVANT FACTUAL BACKGROUND

The allegations in the Complaint arise out of a spin-off transaction (the "Spin-Off"), whereby Idearc Inc. ("Idearc") became a stand-alone company separate from VCI, its former parent. (See Compl. ¶ 1.) Generally, the Complaint alleges that the Spin-Off constituted a series of fraudulent transfers from Idearc, Idearc Media Corp. ("IMC"), and Idearc Information Services, LLC ("IIS," and together with IMC and Idearc, the "Idearc Parties") to VCI, VFS, and GTE, that Diercksen breached fiduciary duties owed to Idearc by approving the Spin-Off, that VCI and VFS aided and abetted that alleged breach of fiduciary duty, and that VCI and Diercksen violated Delaware statutes related to the payment of dividends through the Spin-Off. (See

generally id. ¶¶ 32-79.) The Complaint requests that "all triable issues be determined by a jury." (Id. ¶ 80.)

A. The Spin-Off Was Effectuated Through the Distribution Agreement, Credit Agreement, and Guarantee Agreement.

The Spin-Off was accomplished when VCI transferred to Idearc all of its ownership interest in IIS and other assets, businesses, and employees related to VCI's domestic print and internet yellow pages directories publishing operations. (Id. ¶¶ 18, 20.) The Spin-Off was effectuated through a Distribution Agreement, dated November 13, 2006, between VCI and Idearc (the "Distribution Agreement," included in the Appendix[3] at Ex. 1 and incorporated herein by reference). The Distribution Agreement was the operative document setting forth the terms of the Spin-Off, and incorporated all of the other agreements by its terms. (App. at 31 (Ex. 1) § 8.1.) It was pursuant to the terms of the Distribution Agreement that "Verizon contributed to Idearc all of Verizon's interests in [IIS] and other assets that were associated with the directories business of Verizon." (Compl. ¶ 20; see also App. at 1-35 (Ex. 1), App. at 377 (Transcript of Deposition of William G. Mundy, included in the Appendix as Ex. 11) [Mundy Dep. at 202:3-7] ("Q. And in general, what did [the Distribution Agreement] do? A. I think that actually distributed the assets back and

[3] The "Appendix" is the Appendix in Support of Defendants Verizon Communications Inc., Verizon Financial Services LLC, GTE Corporation, and John W. Diercksen's Motion to Strike Plaintiff's Demand for a Jury Trial and Brief in Support filed contemporaneously herewith.

forth between the parent and the sub.").) The terms of the Distribution Agreement were reviewed by counsel for the Idearc Parties and negotiated between VCI and the Idearc Parties. (App. at 477-517 (Email from P. Marx to B. Mundy et al. July 30, 2006, included in the Appendix at Ex. 15 and incorporated herein by reference); App. at 518-588 (Email from M. Diz to B. Mundy et al. dated November 11, 2006, included in the Appendix at Ex. 16 and incorporated herein by reference); App. at 378 (Ex. 11) [Mundy Dep. at 228:5-18] ("Q. We discussed a number of the commercial agreements, and I may have left one out in some of my wrap-up questions. Did you or did you not review the distribution agreement on behalf of Verizon Information Services prior to it being signed? . . . A. I did review it. Q. And was the distribution agreement negotiated as between Verizon Information Services on the one hand and Verizon Communications on the other? . . . A. Yes.").)

As part of the Spin-Off, Idearc "[became] indebted to Verizon in the amount of $4.3 billion pursuant to a Credit Agreement dated November 16, 2006." (Compl. ¶ 18.) VCI became a Lender to Idearc under that Credit Agreement (the "Credit Agreement," included in the Appendix at Ex. 2 and incorporated herein by reference). Plaintiff also alleges that "Verizon caused [IMC] to loan $475,410,408" to Idearc and this money was combined with the proceeds of the Credit Agreement and transferred to VFS as part of the Spin-Off. (Compl. ¶¶ 51-52.) Both IIS and IMC guaranteed Idearc's obligations under the Credit Agreement. (Compl. ¶¶ 52, 62; see also Guarantee and Collateral Agreement dated November 17, 2006 (the "Guarantee Agreement," included in the Appendix at Ex. 3 and

incorporated herein by reference).) The terms of the Credit Agreement were reviewed by counsel for the Idearc Parties and negotiated between the Idearc Parties and the lenders under the Credit Agreement. (App. at 589-623 (Email from D. Kauffman to A. Coticchio et al. dated September 11, 2006, included in the Appendix at Ex. 17 and incorporated herein by reference); App. at 624-760 (Email from D. Wicklund to T. Kozlark et al. dated November 10, 2006, included in the Appendix at Ex. 18 and incorporated herein by reference); App. at 761 (Email from G. Woods to N. Olson et al. dated October 31, 2006, included in the Appendix at Ex. 19 and incorporated herein by reference); App. at 376 (Ex. 11) [Mundy Dep. at 158:12-15, 160:17-22, 227:19-228:3] ("Q. Did you have involvement in drafting the credit agreement? A. We would have reviewed the credit agreement. . . . Q. And Idearc had counsel in the form of the Debevoise firm? A. Yes. Q. As well as in-house lawyers for Idearc and Verizon? A. Yes. . . . . Q. Do you recall whether or not the credit agreement was, in fact, a document that was negotiated between counsel for Verizon and Idearc on the one hand and counsel for the investment banks on the other? . . . A. Yes. Q. It was? A. Yes.")

B. <u>The Distribution Agreement, Credit Agreement, and Guarantee Agreement Contain Waivers of The Right to a Jury Trial</u>.

The Distribution Agreement was executed by both Idearc and VCI. (App. at 34-35 (Ex. 1).) The Credit Agreement was entered into by Idearc, VCI, and an administrative agent acting on behalf of the Lenders, which also included VCI. (App. at 152-154 (Ex. 2).) The Guarantee Agreement was executed by IIS, IMC, and

the administrative agent acting on behalf of the Lenders. (App. at 207-209 (Ex. 3).)

Each of the Distribution Agreement, the Credit Agreement, and the Guarantee Agreement contains provisions in which the Idearc Parties agree to waive any rights to a trial by jury in any legal proceeding arising out of or relating to those agreements or the Spin-Off more generally.[4] (App. at 33, § 8.13 (Ex. 1); (App. at 149, § 9.10 (Ex. 2); (App. at 204, §7.10 (Ex. 3).) Each provision is clearly and conspicuously set forth in its own section, and appears in all capital letters. (See id.) More specifically, the Distribution Agreement provides:

> Waiver of Jury Trial. EACH PARTY IRREVOCABLY AND UNCONDITIONALLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY AND ALL RIGHT TO TRIAL BY JURY IN ANY LEGAL PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT, ANY OTHER RELATED DOCUMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY OR THEREBY.

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[4] The Distribution Agreement also specifically incorporates several other agreements to effectuate the Spin-Off, each of which contains jury waivers executed by Idearc. (See App. at 31, §8.1 (Ex. 1); Branding Agreement (App. at 247, § 14 (Ex. 4); Employee Matters Agreement (App. at 285, § 12.9 (Ex. 5); Publishing Agreement (App. at 325, § 9.5 (Ex. 6); and Tax Sharing Agreement (App. at 342, 9.05 (Ex. 7).)

(App. at 33,§ 8.13 (Ex. 1).) Similarly, both the Credit Agreement and the Guarantee Agreement provide as follows:

> WAIVER OF JURY TRIAL. EACH PARTY HERETO HEREBY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN ANY LEGAL PROCEEDING DIRECTLY OR INDIRECTLY ARISING OUT OF OR RELATING TO THIS AGREEMENT, ANY OTHER LOAN DOCUMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY (WHETHER BASED ON CONTRACT, TORT OR ANY OTHER THEORY). EACH PARTY HERETO (A) CERTIFIES THAT NO REPRESENTATIVE, AGENT OR ATTORNEY OF ANY OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PARTY WOULD NOT, IN THE EVENT OF LITIGATION, SEEK TO ENFORCE THE FOREGOING WAIVER AND (B) ACKNOWLEDGES THAT IT AND THE OTHER PARTIES HERETO HAVE BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION.

(App. at 149, § 9.10 (Ex. 2); (App. at 204, § 7.10 (Ex. 3).)

Each of the jury waiver provisions contained in the Distribution Agreement, the Credit Agreement, and the Guarantee Agreement (the "Jury Waivers") is conspicuous, and each clearly and unmistakably states

that the parties thereto waive the right to a jury trial in any action arising from or relating to that document or the Spin-Off. The Idearc Parties also expressly concede in the Credit Agreement and Guarantee Agreement that the jury waiver is material, and that VCI was induced to enter into these agreements as a result of the existence of the jury trial waiver provision. (See App. at 149, § 9.10 (Ex. 2); (App. at 204, § 7.10 (Ex. 3).)

C. The Idearc Board Ratifies the Spin-Off.

The Spin-Off was effective as of November 17, 2006. On November 16, 2006, Diercksen, in his continued capacity as director of Idearc, adopted resolutions electing five new members to the Idearc Board. On November 16, 2006, in its first official action, this new Idearc Board, which included four independent members,[5] unanimously accepted Diercksen's resignation (effective that day) and ratified the transactions related to the Spin-Off. (See App. at 360 (Unanimous Written Consent of the Board of Directors in Lieu of a Special Meeting Dated November 16, 2006, included in the Appendix at Ex. 8 and incorporated herein by reference); see also App. at 381 (Transcript of Deposition of Stephen L. Robertson, included in the Appendix as Ex. 12) [Robertson Dep. at 98:16-99:5] ("Q. What did you think you were doing when you were

[5] The members of the new Idearc Board were accomplished individuals with a long history of service in the telecommunications industry, including individuals who had been executives of a directories business. (See App. at 860-862 (Idearc Inc. Amendment No. 6 to Form 10 dated November 1, 2006, included in the Appendix as Ex. 20 and incorporated herein by reference).)

signing that document? . . . A. Approving all -- approving the transaction. Q. All aspects of the transaction? A. Yes.").) In doing so, the Idearc Board ratified the Jury Waivers included in the Distribution Agreement, the Credit Agreement, and the Guarantee Agreement. Similarly, the boards of IMC and IIS approved and ratified the Guarantee Agreement. (App. at 362-367 (Consent in Lieu of Meeting of the Board of Directors of Idearc Media Corp., included in the Appendix as Ex. 9 and incorporated herein by reference); App. at 368-373, (Idearc Information Services LLC Unanimous Written Consent of the Board of Directors to Action Without a Meeting, included in the Appendix as Ex. 10 and incorporated herein by reference).) These agreements were never amended in the years following the Spin-Off and before Idearc filed for bankruptcy protection.

D. Idearc Files for Bankruptcy Protection, and Verizon Files Proofs of Claim.

In March 2009, over two years after the effective date of the Spin-Off, Idearc's management decided that Idearc and its subsidiaries, including IMC and IIS, should file for bankruptcy protection. (Compl. ¶¶ 25-26.) A plan of reorganization was confirmed in December 2009 (the "Plan"). (Id. ¶ 28.) A Litigation Trust was created pursuant to the Plan and acts as the "representative and successor in interest to the Debtors and the Estates for all purposes" with respect to certain claims previously held by the Idearc Parties and their estates. (Id. ¶¶ 29-30.)

In connection with Idearc's bankruptcy filing, Verizon filed a number of proofs of claim. (App. at __ (Ex. 27, Declaration of Brenda Funk).) Four of those

proofs of claim remain outstanding. (App. at __ (Ex. 27).) These four proofs of claim each arose out of the commercial agreements entered into as a result of the Spin-Off, including the Distribution Agreement. (See App. at 948-966 (Ex. 23-26, Proofs of Claim by Verizon Communications Inc. and its subsidiaries against Idearc Inc. in Bankruptcy Case No. 09-31828).) In its four outstanding proofs of claim, Verizon asserts damages arising from Idearc's breach of the Distribution Agreement, Employee Matters Agreement, and Tax Sharing Agreement. (See id.)

Idearc objected to the payment of Verizon's four outstanding claims in June 2010; Idearc amended that objection in June 2011, asserting that Verizon's claims should be disallowed because, among other reasons, Verizon had not repaid alleged avoidable transfers. In particular, Idearc cited to section 502(d) of the Bankruptcy Code, which provides that the court presiding over a bankruptcy case "shall disallow any claim" of any creditor that received a "transfer avoidable" as a fraudulent conveyance unless the creditor has "paid the amount" for which it is "liable." (See App. at 926-929 (Ex. 21, Reorganized Debtors' Amended Forty-Fourth Omnibus Objection Seeking Disallowance of Certain Proofs of Claim under 11 U.S.C. §§ 105 and 502 and Fed. R. Bankr. P. 2007), citing 11 U.S.C. § 502(d).) Idearc's objection to Verizon's proofs of claim remains pending.

E. The Complaint Seeks to Circumvent the Unambiguous Jury Waivers and the Claims Allowance Process.

The Litigation Trust, through Plaintiff, filed the Complaint on September 15, 2010 seeking recovery

from the Verizon Parties for claims arising out of or relating to the Spin-Off. Plaintiff's claims for fraudulent transfers brought on behalf of the Idearc Parties are based upon the exchanges that effectuated the Spin-Off, and the results of the Idearc Parties' participation in the Distribution Agreement and the Credit Agreement. Counts 1 and 2 are based upon the alleged fraudulent transfer of assets pursuant to the Distribution Agreement. Counts 3 and 4 are claims based upon Diercksen's approval of the transactions effectuated through the Distribution Agreement. Count 5 is based upon IMC's loan to Idearc, while Count 6 is based upon VCI's alleged direction of IIS's distribution of its assets to GTE—both required steps to effectuate the Spin-Off under the Distribution Agreement. Count 7 is based upon interest payments made by Idearc on debt it incurred, including under the Credit Agreement, to effectuate the Spin-Off. Finally, although it is unclear what "dividend" Plaintiff alleges to be unlawful in Count 8, this claim must be based upon one of the transfers alleged in the Complaint, all of which were effectuated by one or more of the Distribution Agreement or the Credit Agreement. (See generally Compl.)

In short, all of the claims in Plaintiff's Complaint are based upon the transactions effectuating the Spin-Off through the Distribution Agreement and the Credit Agreement. Plaintiff requests a jury trial as to "all triable issues," notwithstanding the fact that the Idearc Parties clearly and unambiguously waived any right to a jury trial of all the claims included in the Complaint and that Verizon has outstanding proofs of claim to which Idearc has objected based on these same transactions.

III. ARGUMENTS AND AUTHORITIES

Plaintiff's jury demand is prohibited for two independent reasons: first, Plaintiff has contractually waived its rights to a jury trial in actions against the Verizon Parties; and second, Plaintiff has no right to a jury trial against the Verizon Parties because Verizon has outstanding proofs of claim in Idearc's bankruptcy case to which Idearc has objected, and resolution of Plaintiff's claims in this litigation will affect resolution of Verizon's claims in the bankruptcy.

Plaintiff has contractually waived its rights to a jury trial by the terms of the Distribution Agreement, the Credit Agreement, and the Guarantee Agreement. Knowing and voluntary waivers of a right to a trial by jury, such as those contained in the Jury Waivers, are routinely enforced by federal courts and should be enforced in this case. The Jury Waivers are broadly drafted and apply by their terms to all of Plaintiff's claims. The Jury Waivers are enforceable against Plaintiff because Plaintiff brings its claims standing in the Idearc Parties' shoes; because the Idearc Parties waived their rights to a jury trial on these claims, Plaintiff is also bound by that waiver. Because the Jury Waivers were made knowingly and voluntarily, are applicable to all claims contained in the Complaint, and are enforceable as against Plaintiff, the Court should strike the jury demand contained in the Complaint.

Moreover, Plaintiff has no right to a jury trial because Verizon has filed proofs of claim in the Idearc bankruptcy case and resolution of Plaintiff's claims in this action will affect the allowance of those proofs of claim in Idearc's pending bankruptcy case. When a

creditor has filed a proof of claim and the debtor (or its successor) files its own action against the creditor that would eliminate the basis for the creditor's claim, the debtor's action becomes integral to the restructuring of the debtor-creditor relationship through the equitable jurisdiction of bankruptcy, and thus there is no right to a jury trial on the debtor's claim. See, e.g., Langenkamp v. Culp, 498 U.S. 42, 44-45 (1989); Bankr. Servs., Inc. v. Ernst & Young (In re CBI Holding Co., Inc.), 529 F.3d 432, 468 (2d Cir. 2008). Because Idearc has objected to Verizon's outstanding proofs of claim in Idearc's bankruptcy case and the resolution of the objection to the proofs of claim are intertwined with Plaintiff's claims in this litigation, Plaintiff's claims in this action implicate the claim allowance process, an equitable process under which Plaintiff is not entitled to a trial by jury.

A. The Jury Trial Waiver Clauses in the Distribution Agreement, the Credit Agreement, and the Guarantee Agreement Should Be Enforced Against Plaintiff.

Generally speaking, the Seventh Amendment preserves the right to a jury trial for actions at common law, including claims for fraudulent transfer. See Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 64 (1989) (citing U.S. Const. amend VII). However, the right to trial by jury may be waived so long as the waiver is made knowingly and voluntarily. See, e.g., Merrill Lynch & Co. Inc. v. Allegheny Energy, Inc., 500 F.3d 171, 188 (2d Cir. 2007) (upholding decision enforcing jury trial waiver in a purchase agreement where defendant alleged counterclaim of fraudulent inducement to execute that purchase agreement);

Morgan Guar. Trust Co. of N.Y. v. Crane, 36 F. Supp. 2d 602, 603 (S.D.N.Y. 1999) (motion to strike jury demand granted enforcing jury waiver in promissory note); TransFirst Holdings, Inc. v. Phillips, No. 3:06-CV-2303-P, 2007 WL 867264, at *3 (N.D. Tex. Mar. 22, 2007) (enforcing jury trial waivers in employment agreements).

1. The Jury Waivers Were Made Knowingly and Voluntarily.

In this case, the Idearc Parties knowingly and voluntarily waived their right to a trial by jury. In determining whether a contractual waiver of the right to trial by jury was knowing and voluntary, courts consider many factors, including: 1) the negotiability of contract terms; 2) the conspicuousness of the jury waiver provision; 3) the relative bargaining power of the parties; and 4) the business acumen of the party opposing the waiver. See, e.g., Morgan Guar. Trust Co., 36 F. Supp. 2d at 604; see also RDO Fin. Servs. Co. v. Powell, 191 F. Supp. 2d 811, 813-14 (N.D. Tex. 2002) (same). Federal courts frequently uphold jury waivers in complex business documents because each of these factors is present in most commercial agreements. See, e.g., Morgan Guar. Trust Co., 36 F. Supp. 2d at 603 ("Nevertheless, jury trial waivers are common in loan agreements and loan guarantees, and these are regularly enforced."). In this case, the Jury Waivers were entered into knowingly and voluntarily, and each of the Morgan factors weighs in favor of enforcement. See Morgan Guar. Trust Co., 36 F. Supp. 2d at 604; see also RDO, 191 F. Supp. 2d at 813-14.

a. *The Terms of the Agreements Were Negotiable*.

The Jury Waivers were both negotiable and negotiated. As stated in the Credit Agreement and the Guarantee Agreement, the "PARTIES HERETO HAVE BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL [JURY] WAIVERS." (App. at 149, § 9.10 (Ex. 2); App. at 204, § 7.10 (Ex. 3).) Both Idearc and VCI were represented by counsel when entering into the Distribution Agreement and the Credit Agreement. (See App. at 31, § 8.3 (Ex. 1); App. at 110, §4.01(b) (Ex. 2).) Similarly, IIS and IMC also were represented by counsel in entering into the Guarantee Agreement. The terms of each agreement were also negotiated by the Idearc Parties. (See App. at 518-919 (Exs. 16-20); see also App. at 376, 378 (Ex. 11) [Mundy Dep. at 158:12-15, 160:17-22, 227:19-228:18].) Even if the Jury Waivers had not been negotiated, that fact "does not mean that the [jury] waiver or other terms in the [agreements] were not negotiable." Oei v. Citibank, N.A., 957 F. Supp. 492, 523 (S.D.N.Y. 1997); see also Morgan Guar. Trust Co., 36 F. Supp. 2d at 604 (upholding a jury waiver in part because "there [was] no indication that the terms of the note were not negotiable," and "[s]imply because the [defendants] did not attempt to negotiate its provisions does not mean that" they were precluded from so negotiating). Moreover, the post-Spin-Off Idearc board ratified the Spin-Off, including the Jury Waivers. (See App. at 360 (Ex. 8); see also App. at 381 (Ex. 12) [Robertson Dep. at 98:16-99:5].).

b. *The Jury Waivers Were Conspicuous*.

The Jury Waivers were conspicuously displayed in each of the Distribution Agreement, the Credit Agreement, and the Guarantee Agreement. In each agreement, the waiver provision was set forth in its own section and appeared in all capital letters. Courts have held that where a jury waiver is set forth in its own section and in all capital letters, the provision meets the test for conspicuousness. See, e.g., Adelphia Recovery Trust v. Bank of Am., N.A., No. 05-Civ. 9050 (LMM), 2009 WL 2031855, at *4 (S.D.N.Y. July 8, 2009) ("The jury waiver provisions in the Credit Agreements were conspicuous. In the [credit agreements] the jury waivers appear in all caps and are set off in their own sections."). Courts have found jury waivers inconspicuous where the jury waiver is buried in the middle of a paragraph and not set apart by any other emphasis or distinction, which is not the case here. See, e.g., RDO, 191 F. Supp. 2d at 814. Because the Jury Waivers were conspicuously displayed, the Idearc Parties' waiver of their right to a trial by jury was both knowing and voluntary.

c. *The Parties to the Jury Waivers Had Relatively Equal Bargaining Power*.

Courts routinely find that bargaining power was relatively equal—for example, even between a major bank and individual borrowers. See Morgan Guar. Trust Co., 36 F. Supp. 2d at 604 (upholding a jury waiver provision despite difference in bargaining power between the parties, because the party opposing the waiver was not completely unfamiliar with either the process involved or the party with whom it was contracting, and therefore maintained the ability to

negotiate effectively). Both the Idearc Parties and VCI were sophisticated business parties, with both sides represented by experienced executives and legal counsel in the Spin-Off, and therefore each had relatively equal bargaining power. See, e.g., Adelphia, 2009 WL 2031855, at *4 (holding that debtors had relatively equal bargaining power with lending banks in entering into credit agreement). (See also App. at 376 (Ex. 11) [Mundy Dep. Tr. 160:13-22] ("Q. As far as you know, did the investment banks have counsel in negotiating the form of the credit agreement? A. Yes. Q. And Idearc had counsel in the form of the Debevoise firm? A. Yes. Q. As well as in-house lawyers for Idearc and Verizon? A. Yes.").)

d. *The Idearc Parties Possessed Sufficient Business Acumen*.

Finally, the Idearc Parties had sufficient business acumen to determine whether they wished to enter into a jury waiver. See Adelphia, 2009 WL 2031855, at *4. At the time of the Spin-Off, Idearc was a sophisticated company, destined to be listed on the New York Stock Exchange as of November 20, 2006. (App. at 389-476 (Idearc Inc. Annual Report for the Fiscal Year Ended December 31, 2006, included in the Appendix at Ex. 14 and incorporated herein by reference).) In 2006, its annual revenue, including the combined financials of its subsidiaries IIS and IMC, was approximately $3.2 billion. (App. at 430 (Ex. 14).) Both the Distribution Agreement and the Credit Agreement were signed by Andrew Coticchio on behalf of Idearc. (App. at 35 (Ex. 1); App. at 152 (Ex. 2).) The Guarantee Agreement was also signed by Mr. Coticchio, acting on behalf of IIS and IMC. (App. at 207, 209 (Ex. 3).) Mr. Coticchio is a CPA

with more than thirty (30) years of financial and executive management experience. (See App. at 384-388 (Ex. 13) [Coticchio Dep. at 11:17-13:16, 80:13-81:1].) More specifically, Mr. Coticchio was the Chief Financial Officer of Idearc at the time of the Spin-Off and had previously served in numerous other financial management positions. (Id.) There can be no credible argument that the Idearc Parties did not have business acumen. (App. at 843 (Ex. 20) ("We have a strong and experienced senior management team across all areas of our organization . . . Our senior management team has an average of approximately 25 years of experience in the telecommunications and directory publishing industries.").) In any case, even where the party opposing the waiver was an individual as opposed to the large business entities in this case, they are often found to have sufficient business acumen. See Morgan Guar. Trust Co., 36 F. Supp. 2d at 604.

2. Plaintiff's Claims Are Within the Scope of the Jury Waivers.

The Jury Waivers are broad and encompass all legal proceedings arising out of or relating to the agreements or the Spin-Off. Specifically, the Distribution Agreement waives any right to a jury trial "IN ANY LEGAL PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT, ANY OTHER RELATED DOCUMENT *OR THE TRANSACTIONS CONTEMPLATED HEREBY OR THEREBY*." (App. at 33, § 8.13 (Ex. 1) (emphasis added).) Similarly, both the Credit Agreement and the Guarantee Agreement waive any right to a jury trial "IN ANY LEGAL PROCEEDING DIRECTLY OR INDIRECTLY ARISING OUT OF OR RELATING TO THIS

AGREEMENT, ANY OTHER LOAN DOCUMENT *OR THE TRANSACTIONS CONTEMPLATED HEREBY* (*WHETHER BASED ON CONTRACT, TORT OR ANY OTHER THEORY*)." (App. at 149, § 9.10 (Ex. 2) (emphasis added); App. at 204, § 7.10 (Ex. 3).) The Credit Agreement defines "Transactions" as including both "the Spin-Off and the Financing Transactions." (App. at 74 (Ex. 2).) The definitions of "Spin-Off" and "Financing Transactions" make clear that they include the transactions that form the basis of Plaintiff's Complaint.[6] (See App. at 57, 72 (Ex. 2).)

Plaintiff asserts claims for fraudulent transfer, breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, and unlawful dividend based upon the Idearc Parties' standing. (See generally Compl.) Broad jury trial waiver clauses, such as the Jury Waivers, are frequently construed to apply to tort claims such as those alleged in the Complaint on the Idearc Parties' behalf. See Adelphia, 2009 WL 2031855, at *13-15 (discussed below); see also Brown v. Cushman & Wakefield, Inc., 235 F. Supp. 2d 291, 294 (S.D.N.Y. 2002) (jury trial waiver applied to all employment claims including those arising under discrimination statutes because clause included "any matters whatsoever arising out of this agreement"); In re Actrade Fin. Techs. Ltd., ADV. No. 05-03657 ALG, 2007 WL 1791687, at *1 (Bankr. S.D.N.Y. June 20, 2007) (holding jury waiver broad enough to encompass

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[6] Notably, both the "Special Distribution" referenced in the definition of "Spin-Off" and the "loan proceeds" referenced in the definition of "Financing Transactions" refer to the payment by Idearc to VCI that is the subject of Count 5 of the Complaint. (App. at 57, 72 (Ex. 2); Compl. ¶ 51.)

related tortious interference claims where waiver included any dispute "arising from the relationship" between the parties and that tortious interference causes of action would not exist were it not for the relationship between the parties to the contract); Smith v. Lucent Techs., Inc., No. 02-0481, 2004 WL 515769, at *8 (E.D. La. Mar. 24, 2004) (noting that phrase "relating to" is generally interpreted more broadly than language such as "arising out of").

Plaintiff is not entitled to a jury trial on Counts 1, 2, 5, 6, and 7 for fraudulent transfers. The Adelphia case is on point. There, the court struck the litigation trust's jury trial demand on its fraudulent transfer claims because, as in the present case, the allegedly fraudulent transfers arose out of the credit agreements that had been executed by the applicable debtors and that contained jury trial waivers. Adelphia, 2009 WL 2031855, at *14 ("The [language of the jury waiver] provision covers payments made to BNS by Adelphia since these payments arose directly from the Co-Borrowing Facility according to the complaint.") Because the fraudulent transfer claims arose out of a contract containing a jury waiver, the Adelphia Recovery Trust was not entitled to a jury trial on those claims. Id.

The Adelphia decision also address jury trial waiver related to claims for breach of fiduciary duty (Count 3) and aiding and abetting a breach of fiduciary duty (Count 4). See id. at *14-15. There, the court held that "[a]ll of the alleged breaches of fiduciary duty directly spring from the [credit agreements] and are thus covered by the jury trial waivers." Id. at *14. As Plaintiff's claims against Diercksen also spring from

his actions in approving the contracts effectuating the Spin-Off, Plaintiff is also not entitled to a jury trial on its Counts 3 and 4.

The Jury Waivers in this case are broad. Because Plaintiff's claims "arise out of" and "relate to" the Spin-Off and the transactions giving rise to the Spin-Off, the Jury Waivers apply to Plaintiff's claims and Plaintiff is not entitled to a jury trial. The allegedly "fraudulent" transfers pled in the Complaint are precisely those transactions contemplated and effectuated by the Distribution Agreement and the Credit Agreement. (Compare Compl. ¶¶ 32-49, 70-79 with App. at 1-35 (Ex. 1).) These same "transfers" also give rise to Plaintiff's claims for breach of fiduciary duty and also appear to constitute the alleged dividends that Plaintiff asserts are unlawful in Count 8. Therefore, all of Plaintiff's claims fall within the broad "arising out of or relating to" language in the Distribution Agreement, the Credit Agreement, and the Guarantee Agreement, and the Jury Waivers apply to these claims.

3. The Jury Waivers Should Be Enforced Against Plaintiff.

The fact that the Idearc Parties filed for bankruptcy protection years after entering into the agreements containing the Jury Waivers does not obviate or limit the effectiveness of the Jury Waivers.[7] Courts

[7] As a preliminary matter, Idearc's rejection of the agreements in the bankruptcy process does not terminate its obligations under those agreements. Rejection of an executory contract in a bankruptcy proceeding does not constitute a "termination" of all obligations under the contract. Instead, rejection simply constitutes a breach of the contract. See, e.g., In re Mirant, 378

considering the effect of bankruptcy upon a jury waiver have concluded that the bankruptcy estate is bound by a jury waiver entered into knowingly and voluntarily by the debtor prior to seeking bankruptcy protection. In In re Reggie Packing Co., Inc., for example, the court held that the debtor-in-possession was also bound by a pre-bankruptcy jury waiver clause because the plaintiff/debtor-in-possession was the same entity that existed prior to the filing of the bankruptcy petition, and therefore, could not "escape the binding effect of its waiver." 671 F. Supp. 571, 574 (N.D. Ill. 1987)

The court in Adelphia addressed whether a jury waiver entered into by debtors before bankruptcy should be enforced against a litigation trust created under the debtors' confirmed plan of reorganization. Adelphia, 2009 WL 2031855, at *3, 13. In that case, the action was brought by the Adelphia Recovery Trust, a

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F.3d 511, 519 (5th Cir. 2004) ("Under the Bankruptcy Code . . . rejection of the [Agreement] is a *breach* of that contract."); In re Austin Dev. Co., 19 F.3d 1077, 1082 (5th Cir. 1994) ("rejection of a lease 'constitutes a breach' . . . this language does not mean that the executory contract or lease has been terminated, but only that a breach has been deemed to occur."); In re American REIT, Inc., No. 07-40308, 2008 WL 1771914,*4 (Bankr. E.D. Tex. Apr. 15, 2008) (concluding that rejection of an executory contract does not terminate the agreement but merely breaches it); In re Mirant, 316 B.R. 234, 238 n.5 (Bankr. N.D. Tex. 2004) (concluding that rejection of the agreement "simply means it has been breached"). Just as Idearc's breach of the Distribution Agreement and the Credit Agreement would not have allowed Idearc to avoid the effects of the Jury Waivers, rejection in bankruptcy of the two agreements is similarly ineffective to invalidate the Jury Waivers. See Mowbray v. Zumot, 536 F. Supp. 2d 617, 622 (D. Md. 2008) (applying jury waiver to claim for breach of contract including the jury waiver).

litigation trust similar to Plaintiff in this case. The Adelphia Recovery Trust argued that it should not be bound by the jury waivers entered into by the debtors. The court rejected that argument and struck the trust's jury demand (except to the limited extent that it was suing on behalf of the one Adelphia debtor that had not executed a jury trial waiver). The court reasoned that the Adelphia Recovery Trust was the successor to the debtors, and was bound by the terms of the credit agreements, executed by those debtors, including the jury trial waivers found in those agreements. Id. at *3 ("To the extent ART stands in the shoes of the Obligor Debtors it is bound by the Credit Agreement Waivers."). The same reasoning applies to Plaintiff's request for a jury trial, and, accordingly, it should be struck.

B. The Litigation Trust Is Not Entitled to a Jury Trial Because Resolution of the Complaint Is Tied to the Equitable Bankruptcy Claims Allowance Process.

Plaintiff's jury demand should also be struck on an additional ground: its claims are part of the claims allowance process in bankruptcy and thus are triable in equity. While the Seventh Amendment generally preserves the right to a jury trial for actions at common law, including fraudulent conveyance claims, see Granfinanciera, 492 U.S. at 64, this general rule does not apply where, as here, the creditor has filed a proof of claim.[8] In such a situation, "the creditor triggers the

[8] Plaintiff is not entitled to a jury trial on its claims for breach of fiduciary duty (Count 3) and aiding and abetting breach of fiduciary duty (Count 4) because those are not actions at common

process of 'allowance and disallowance of claims,' thereby subjecting himself to the bankruptcy court's equitable power." Langenkamp, 498 U.S. at 44 (quoting Granfinanciera, 492 U.S. at 58-59 n.14). If the debtor or a bankruptcy trust files a fraudulent transfer or other avoidance action against that creditor, or brings any other claim against the creditor that involves the same nucleus of operative facts or legal issues as those presented in the creditor's proof of claim, that action becomes "integral to the restructuring of the debtor-creditor relationship" and "part of the claims-allowance process which is triable only in equity." Langenkamp, 498 U.S. at 44-45; see also 11 U.S.C. § 502(d) (a creditor's claim against the bankruptcy estate must be disallowed if the creditor received an avoidable transfer and has not repaid the transfer); CBI Holding, 529 F.3d at 466 ("If the bankruptcy trustee responds [to a creditor's proof of claim] by filing its own claim against the creditor that would eliminate the basis for the creditor's claim, those two claims 'become integral to the restructuring of the debtor-creditor relationship through the bankruptcy court's equitable jurisdiction.'"). In such an action, "there is no Seventh Amendment right to a jury trial." Langenkamp, 498 U.S. at 45; see also CBI Holding, 529 F.3d at 466 (quoting Langenkamp, 498 U.S. at 45).

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law, but instead are equitable claims for which there is no jury trial right. See, e.g., Cantor v. Perelman, No. Civ. A. 97-586, 2006 WL 318666, at *9 (D. Del. Feb. 10, 2006) (granting motion to strike jury demand as to fiduciary duty and aiding and abetting fiduciary duty claims); see also In re Hechinger Inv. Co. of Del., 327 B.R. 537, 544 (D. Del. 2005) ("In Delaware, breach of fiduciary duty claims are routinely heard in its chancery court, which is a court of equity.").

The courts have concluded that this principle applies fully not only where the creditor that filed the proof of claim seeks a jury trial, but also where the debtor (or its successor) does so. After all, the debtor invoked the equitable jurisdiction of bankruptcy in the first place by filing for bankruptcy. See, e.g., In re Crown Vantage, Inc., No. C-02-3838, 2007 WL 172321, at *3 (N.D. Cal. Jan. 18, 2007) (striking trustee's jury demand holding that the trustee cited "no case in which a court has concluded a trustee is entitled to a jury trial on a fraudulent transfer claim filed against a creditor who has made a claim in the bankruptcy court. Rather, courts that have considered the issue have found such *trustee was not entitled to a jury trial*") (emphasis added); In re Washington Mfg. Co., 133 B.R. 113, 117 (M.D. Tenn. 1991) (denying motion to withdraw the reference and stating that "[s]ince [the creditor] has filed a claim against the bankruptcy estate in this case, the trustee's fraudulent conveyance claim arises out of the allowance of claims process, and *no Seventh Amendment right to a jury trial exists*.") (emphasis added); In re B&E Sales Co., Inc., 129 B.R. 133, 136-37 (E.D. Mich. 1990) (holding that "trustee has no right to trial by jury" on its fraudulent transfer claim against a creditor that had filed a proof of claim because the fraudulent conveyance action "became inextricably intertwined with the claims allowance process"); Billing v. Ravin, Greenberg & Zackin, P.A., 22 F.3d 1242, 1252-53 (3d Cir. 1994) (holding that debtor had no right to jury trial on malpractice claim that was asserted as a counterclaim to creditor attorney's claim for fees because counterclaim "clearly . . . arise[s] out of the claims allowance process") (internal quotations omitted); Centre Strategic Invs. Holdings Ltd. v. Off. Comm. of Unsecured Creditors of SLP, L.L.C. (In re

Senior Living Props., LLC), 294 B.R. 698, 702-03 (Bankr. N.D. Tex. 2003) (noting that any jury trial right on suit brought by creditors' committee against a creditor that had filed a proof of claim "must yield to the bankruptcy process, for the reasons concerning the claims allowance process."); Charlotte Commercial Grp., Inc. v. Fleet Nat'l Bank (In re Charlotte Commercial Grp., Inc.), 288 B.R. 715, 718-20 (Bankr. M.D.N.C. 2003) (granting motion to strike on grounds that action implicated claims allowance process and existence of contractual jury trial waiver).[9]

Under this settled body of law, Plaintiff's jury trial demand should be stricken. Verizon has filed proofs of claim in the Idearc bankruptcy. (See App. at 948-966 (Exs. 23-26).) The proofs of claim seek, among other relief, damages for Idearc's breach of the Distribution Agreement, Employee Matters Agreement, and Tax Sharing Agreement. (See id.) Plaintiff's claims in this action against Verizon necessarily implicate the equitable "claims allowance process" with respect to Verizon's outstanding proofs of claim for at least two independent reasons.

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[9] See also Andrews v. AmSouth Bank (In re Andrews), No. 01-42562-JJR-13, 2007 WL 2819523, at *3-4 (Bankr. N.D. Ala. Sept. 26, 2007); WSC, Inc. v. Home Depot, Inc. (In re WSC, Inc.), 286 B.R. 321, 331 (Bankr. M.D. Tenn. 2002); Aaron Gleich, Inc. v. Hous. Auth. of New Haven (In re Aaron Gleich, Inc.), 200 B.R. 464, 466 (Bankr. D. Me. 1996); Romar Int'l Ga., Inc. v. Southtrust Bank of Ala. NA. (In re Romar Int'l Ga., Inc.), 198 B.R. 407, 411-12 (Bankr. M.D. Ga. 1996); Auto Imports, Inc. v. Verres Fin. Corp. (In re Auto Imports, Inc.), 162 B.R. 70, 72 (Bankr. D. N.H. 1993); Splash v. Irvine Co. (In re Lion Country Safari, Inc.), 124 B.R. 566, 573 (Bankr. C.D. Cal. 1991).

First, Plaintiff has brought fraudulent transfer claims against Verizon. Based on these very claims, and invoking Section 502(d) of the Bankruptcy Code, Idearc has argued that Verizon's proofs of claim must be disallowed. (See App. at 943-945 (Ex. 22, Reorganized Debtors' Reply to Response to Amended Forty-Fourth Omnibus Objection Seeking Disallowance of Certain Proofs of Claim under 11 U.S.C. §§ 105 and 502 and Fed. R. Bankr. P. 2007 (objecting to Verizon's claims on the ground that "Verizon was the transferee of an avoidable transfer; thus, the claims are statutorily disallowed pursuant to 11 U.S.C. § 502(d)"); see also App. at 926-929 (Ex. 21).) Second, Plaintiff's fraudulent transfer and other claims arise out of the same transaction—the Spin-Off of Idearc—out of which Verizon's bankruptcy claims also arise. Indeed, the same agreements that underlie Plaintiff's claims, including the Distribution Agreement pursuant to which Verizon spun-off Idearc, underlie Verizon's proofs of claim. (Compare Complaint ¶ 29 (referencing the various agreements pursuant to which the Spin-Off of Idearc from Verizon was effected) with App. at 948-966 (Exs. 23-26).) Thus, the resolution of this lawsuit will necessarily affect the allowance or disallowance of Verizon's proofs of claim.

Accordingly, as in Langenkamp, and the numerous other cases cited above applying it, Plaintiff is not entitled to a jury trial. See, e.g., Langenkamp, 498 U.S. at 44-45; In re Crown Vantage, Inc., 2007 WL 172321, at *3; see also supra note 8 and corresponding text. Therefore, the Court should strike Plaintiff's demand for a jury trial.

IV. CONCLUSION AND REQUESTED RELIEF

Because the Jury Waivers were made knowingly and intentionally, are sufficiently broad to be applied to the claims of the Complaint, and are enforceable against Plaintiff, and because Verizon has filed proofs of claim in the Idearc bankruptcy and Plaintiff's claims implicate the resolution of those proofs of claim, the Verizon Parties respectfully request that the Court strike Plaintiff's request for a jury trial in paragraph 80 of the Complaint as to each of Plaintiff's claims. The Verizon Parties also respectfully request such further relief to which they may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

The undersigned attorney hereby certifies that on August 24, 2011, he conferred with counsel for Plaintiff, Werner Powers, regarding this Motion. Plaintiff's counsel stated that he was opposed to this Motion.

/s/ T. Ray Guy
T. Ray Guy

* * *

[*The Certificate of Service Has Been Omitted in the Printing of this Appendix*.]

APPENDIX K

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3:10-CV-1842-G

[Filed October 14, 2011]

U.S. BANK NATIONAL ASSOCIATION, Litigation Trustee of the Idearc Inc. *et al.* Litigation Trust,	)
Plaintiff,	)
v.	)
VERIZON COMMUNICATIONS INC., *et al.*,	)
Defendants.	)

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S DEMAND FOR A JURY TRIAL AND BRIEF IN SUPPORT

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APPENDIX L

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3:10-CV-1842-G

[Filed April 18, 2012]

U.S. BANK NATIONAL ASSOCIATION, Litigation Trustee of the Idearc Inc. *et al.* Litigation Trust,	)
Plaintiff,	)
v.	)
VERIZON COMMUNICATIONS INC., *et al.*,	)
Defendants.	)

PLAINTIFF'S MOTION TO RECONSIDER ORDER GRANTING STRIKE OF DEMAND FOR JURY TRIAL AND, ALTERNATIVELY, TO EMPANEL AN ADVISORY JURY AND BRIEF IN SUPPORT

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1. Breach of fiduciary duty, aiding/abetting, illegal dividends, promoter liability and unjust enrichment are legal claims requiring a jury (Counts 3-4, 8-10). 7

a. Dierckson 7

b. The Verizon entities 8

2. Fraudulent transfer is a legal claim requiring a jury (Counts 1, 2, 5, 6, 7). 9

a. *Stern* clarifies that a fraudulent transfer action must be finally adjudicated by an Article III court, not a bankruptcy court. 9

b. *Stern* clarifies that a defendant's proof of claim does not extinguish a

plaintiff's right to trial by jury 10

(i) A bankruptcy proof of claim (by the party seeking the jury) does not consent to a non-jury trial by a non-Article III court. . . . 10

(ii) Fraudulent transfer and preference actions differ, making *Langenkamp* inapplicable. 12

(iii) The claims resolution in bankruptcy court cannot extinguish the Trust's jury trial right for a private right in district court. 14

3. The alter ego count is a legal claim that requires a jury trial (Count 11). 16

4. A jury trial right on any issue or claim requires a jury trial 17

B. VCI's inclusion of jury waivers in various agreements does not alter Plaintiff's right to a jury trial. 17

C. Alternatively, given the various claims against multiple parties, the Trust re-

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APPENDIX M

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September 10, 2012

Via Hand Delivery

Ms. Eleanore Piwoni, Judicial Assistant to
The Honorable A. Joe Fish
United States District Court
Northern District of Texas, Dallas Division
1100 Commerce Street, Room 1404
Dallas, Texas 75242

Re: *U.S. Bank National Association, Litigation Trustee of the Idearc Inc., et al. Litigation Trust v. Verizon Communications Inc., et al.;* Civil Action No. 3:10-cv-01842-G; in the United States District Court, Northern District of Texas, Dallas Division

Dear Ms. Piwoni:

Please recall that we represent the Plaintiff in the above-referenced civil action. The Court's pretrial orders require that the parties submit by September 21

either findings of fact for a bench proceeding or suggested jury instructions for a jury trial. The Pretrial Order orders us to present questions to you. This letter seeks guidance as to what to file.

I am really hesitant to send this letter, but I thought it better to raise the matter now rather than later. At 60 my hearing is not what it was the last time I tried a case before Judge Fish, but I do hear him loud and clear on this one—no jury. But the law may require me to continue to make clear that we do not consent to the withdrawal of our jury demand on any of our claims by, for example, submitting proposed findings of fact. *See, e.g., Solis v. County of Los Angeles*, 514 F.3d 946 (9th Cir. 2008). Moreover, I believe the current written orders leave an open question regarding the jury demand. My opposing counsel knows that I am sending a letter, and while he disagrees with my position, he does not object to my raising the matter by letter under the Court's protocol.

In looking at the Order striking the jury [ECF Doc. 288], I think that there may have been a mistake and the relief granted by the Order is not clear to me. I wonder if the Court may have assumed that Defendants' motion asked for relief that was not actually in the motion.

I am not asking the Court to reconsider anything. I just want to let this Court know what I have discovered and see if he might clarify the record.

The following facts are undisputed:

1. The Plaintiff filed an Amended Complaint adding new claims to this civil action on

February 17, 2012. This Amended Complaint contained a jury demand.

2. The Defendants have never filed a motion to strike the jury demand in the Amended Complaint.

3. The Defendants have never filed a motion to strike any jury demand as it relates to the claims that were added by the Amended Complaint.

4. The relief ordered by this Court in striking the jury demand "granted the Defendants' Motion," a motion filed before the Amended Complaint was filed, before more claims were added, and which motion was expressly limited only to the claims in the Original Complaint.

Because the file in this case is so voluminous, I am enclosing copies of the following:

1. The Original Complaint, filed September 15, 2010. [ECF Doc. 1]

2. The Defendants' Motion to Strike the Jury Demand, filed August 25, 2011. [ECF Doc. 89] The motion on Page 1 "move(s) to strike the demand ... with respect to each of the causes of action asserted in the [Original] Complaint." At page 23, Defendants pray that the Court strike "Plaintiff's request for a jury trial in paragraph 80 of the [Original] Complaint."

3. The Amended Complaint and Jury Demand, dated February 17, 2012. [ECF Doc. 216] Counts

9 through 11 are new, and the jury demand appears in paragraph 134.

4. The Court's Order, entered March 21, 2012. [ECF Doc. 288] The Order at page 14 grants Defendants' motion to strike the jury demand, which did not and could not have addressed the new claims in the Amended Complaint and asked to strike the wrong paragraph from the wrong complaint.

5. The Court's Order on the Motion to Reconsider, entered July 25, 2012. [ECF Doc. 459] That order did not modify or enlarge the prior relief granted.

I think I may have uncovered the source of the problem. At page 3 of the Court's Order striking the jury demand, the Court writes as follows:

> In its complaint, U.S. Bank demanded a jury trial. *Id.* at ¶ 134. The defendants *now* bring this motion to strike the plaintiff's jury demand. (emphasis supplied).

The problem is that ¶ *134* is the jury demand contained in the *Amended Complaint.* The Defendants' Motion to Strike was only addressed to the jury demand in ¶ *80* of the *Original Complaint.* It was only addressed to the claims in the Original Complaint. The quoted language seems to have transformed the Defendants' Motion to Strike the Jury Demand as to claims in the Original Complaint as one seeking to strike the jury demand even as to newly-added claims in the Amended Complaint.

So the question raised by this letter is this: Did the Court intend to strike the jury demand in the Amended Complaint even though the Defendants have never moved for that relief under Rule 7(b), FED. R. CIV. P.? Rule 7(b) requires that a motion specify the grounds and state the relief sought. Here, the only relief sought by Defendants in their motion was to strike the jury demand in ¶ 80 of the Original Complaint as to claims in the Original Complaint. The Order, on its face, grants only that relief. But the Amended Complaint superseded the Original Complaint.

Pursuant to Rule 39(a), once demanded, an action "must be designated on the docket as a jury action" unless the parties stipulate to withdrawal of the demand or a court finds there is no federal right to a jury on some or all issues. But, here, there is no stipulation, and there is no order ruling that "there is no federal right to a jury trial" as to the Amended Complaint at all, and particularly not as to the additional state law claims that were first raised in the Amended Complaint and that were not the subject of the motion to strike granted by the Court. FED. R. CIV. P. 39(a).

Would the Court enter an order to clarify the record? Did the Court intend to expand upon Defendants' requested relief in its Order striking the jury demand? If the Court only intended to grant the relief requested in Defendants' Motion to Strike, would the Court identify for the parties which claims and issues will be tried to the jury?

Very truly yours,

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APPENDIX N

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 3:10-CV-1842-G

[Filed June 3, 2013]

U.S. BANK NATIONAL ASSOCIATION, Litigation Trustee of the Idearc Inc. *et al.* Litigation Trust,	)
Plaintiff,	)
v.	)
VERIZON COMMUNICATIONS INC., *et al.*,	)
Defendants.	)

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

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2. A Western District of *Texas* Court disagrees on several grounds with the Court's reasoning in striking the jury. . 7

a. A defendant's proof of claim in bankruptcy does not deprive a litigation trust of its right to a jury trial on fraudulent transfer claims brought post-confirmation in district court. 8

b. A proof of claim in bankruptcy court does not eliminate the right to a jury trial in district court. 10

c. The right to a jury trial on claims against an individual defendant is not extinguished by a business entity's proof of claim in bankruptcy. . . 11

d. That some claims sound in equity does not eliminate the right to trial by jury on legal money-damage claims . 11

3. In another case involving Verizon and a litigation trust, a Western District of *North Carolina* Court refused to strike the jury despite Verizon's reliance on its arguments and the Court's order in this case. 12

4. Recent circuit, district and bankruptcy opinions on *Stern* are at odds with the denial of a jury trial here when the claims in this suit would not necessarily be resolved by the bankruptcy claims allowance process 13

a. The Court did not adopt the "necessarily resolved in the claims allowance process" test that other

courts have adopted from *Stern*. 14

b. Plaintiff's claims in this suit do not relate to and cannot be resolved by the bankruptcy claims allowance process. 18

5. The jury-trial Orders raise other important issues. 19

B. The constitutional right to a jury trial is a controlling question of law, and resolution of the jury-trial issue will materially advance the ultimate termination of the litigation. 20

C. Plaintiff requests that the Court amend the Orders to certify the jury-trial issue for interlocutory appeal . . 23

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

I.
PRELIMINARY STATEMENT

Plaintiff presents this Motion to the Court because material developments in the law have occurred since the time the Court struck Plaintiff's jury demand. Multiple opinions from other courts considering a litigant's right to a jury trial differ from the Court's opinions here and support the conclusion that Plaintiff is entitled to a jury trial in this cause. For example, on

---

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

May 2, 2013, Western District of Texas Judge Sam Sparks refused to strike a jury demand and issued an opinion that expressly addressed, but declined to follow, the opinion that this Court issued in striking Plaintiff's jury demand. The Western District Court held that *Lagenkamp* does not apply to legal claims brought by a litigation trust in district court—exactly the opposite of the conclusion reached here. Further, in other billion-dollar spinoff litigation currently pending against Verizon in North Carolina, a district court refused Verizon's request to strike the plaintiff litigation trust's jury demand based on the same arguments that Verizon made here.

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

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

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

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

A failure to resolve the differences of opinion between this and other courts on whether a judge or a jury decides hotly disputed fact issues risks millions of dollars in wasted legal fees and staggering losses of judicial time and resources. Thus, the jury-trial issue meets the requirements for certification for

interlocutory appeal pursuant to § 1292(b)—substantial difference of opinion exists on a controlling question of law, the resolution of which will materially advance the ultimate termination of the litigation. Other courts have agreed that the jury-trial issue is proper to certify for interlocutory appeal. An appeal will allow the Fifth Circuit an opportunity to resolve the conflicts between the courts in its circuit and to answer the thorny jury-trial and Article III issues that have puzzled many hardworking jurists, while saving judicial and party resources and time.

II.
BACKGROUND

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

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

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

III.
§ 1292(b) CERTIFICATION REQUIREMENTS SATISFIED

Section 1292(b) provides:

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

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

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

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

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

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

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

1. The Court's opinions in this case.

In its original opinion and order striking the jury, the Court discussed *Langenkamp v. Culp*, 498 U.S. 42 (1991), and *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), in detail in analyzing the effect of VCI's proof of claim on the Litigation Trust's right to a jury trial on the fraudulent transfer claims in district court. *Dkt. 288*. In so doing, the Court held, among other things, that (1) the Litigation Trust stands in the shoes of the debtor for all purposes [at 12], (2) *Lagenkamp* applies to fraudulent transfer claims that are brought and adjudicated in district (not bankruptcy) court [at 13], (3) under *Langenkamp*, VCI's proof of claim extinguished the Litigation Trust's right to demand a jury in district court [at 12], and (4) *Picard v. Katz*, No. 11 Civ. 3605 (JSR) (S.D.N.Y. Nov. 23, 2011), failed to apply *Langenkamp* and failed to recognize that fraudulent transfer claims are "necessarily integral to" the claims allowance process [at 7-8, 10-11, 13-14]. Like the difference of opinion with *Picard*, it is these very grounds on which other courts have recently written and held differently than the Court did here.

Moreover, in the Court's opinion and order on the Motion to Reconsider, the Court reiterated its holdings, among other things, that (1) under *Langenkamp*, VCI's proof of claim extinguished the Litigation Trust's right to a trial by jury, (2) based on *Langenkamp*, *Stern v. Marshall*, 131 S. Ct. 2594 (2011), did not require an Article III court (and hence a right to a trial by jury), and (3) the *Picard* court erred in its analysis of a jury right for claims in district court as not "integral to the claims allowance process" under *Stern*. *Dkt. 459 at 5-8*. Additionally, in deciding not to reconsider the ruling on

the jury-strike on the breach of fiduciary duty claim, the Court noted that Diercksen was acting for Verizon. *Id. at 11*.[3] Again, it is these very grounds on which other courts have recently held differently than the Court did here.

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

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

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

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

resulted in the transfer of $1.6 billion in cash to Duke and debt imposed on the debtor in amounts that rendered the debtor insolvent. *Id.* at App. 7. CRLT, a litigation trust formed pursuant to the debtor's bankruptcy plan of reorganization, brought suit against Duke, Duke's officers, and others and asserted claims of state-law fraudulent transfer, wrongful distributions, unjust enrichment, breach of fiduciary duty, civil conspiracy, and equitable subordination, as well as objections to several bankruptcy claims. *Id.* at App. 8. Duke and an individual defendant moved to strike the litigation trust's jury demand on the fraudulent transfer claims. *Id.* The facts here are analogous—the litigation trust formed pursuant to Idearc's reorganization plan brought fraudulent transfer, breach of fiduciary duty, promoter liability, and wrongful dividends claims in district court against Verizon and Diercksen (an officer) in his individual capacity. But, unlike here, the Western District Court rejected the defendants' arguments and refused to strike the jury.

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

Like Verizon here, Duke in *CRLT* argued that "there is no right to a jury determination of fraudulent conveyance claims against defendants who have filed proofs of claim in the bankruptcy proceeding…." *Id.* at App. 9. Duke relied on *Langenkamp* and this Court's jury-strike Order in support of its motion to strike. *Id.* In that Order, this Court held that *Langenkamp*

controls and the right to a jury trial is extinguished for both the debtor and the creditor that files the proof of claim. *Dkt. 288 at 7-8.* In so concluding, the Court rejected Plaintiff's arguments that VCI's proof of claim did not eliminate the Litigation Trust's right to a jury. *Dkt. 288 at 12*; *see also Dkt. 123 at 16-22; Dkt. 213 at 5-6; Dkt. 315 at 9-16; Dkt. 352 at 5-7.* The Western District Court acknowledged, but respectfully declined to follow, the Court's reasoning and conclusion. Instead, the Western District Court found that the Supreme Court holdings Duke relied upon "do not apply to an action by a litigation trust…" and held that the litigation trust had a right to trial by jury. App. Ex. A at App. 10-12.

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

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

Id. at App. 11. Quoting *Grede v. Bank of New York Mellon*, 598 F.3d 899, 902 (7th Cir. 2010), the Western District Court noted that a litigation trust is a post-bankruptcy vehicle, just like the reorganized entity. *Id.* The court held that *Langenkamp* and *Granfinanciera* were not applicable to the actions of a litigation trust outside the auspices of the bankruptcy court and after

confirmation of the reorganization plan. The court also held that, in light of the Fifth Circuit's direction to protect jury-trial rights, the fraudulent transfer claims sound in law, not equity, and are triable to a jury. *Id.* at App. 11-12.

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

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

Like Verizon here, Duke in *CRLT* suggested that if the proof of claim in bankruptcy court and the fraudulent transfer claim in district court were "intertwined" (or in Verizon's words, "linked") then the litigation trust had no right to a jury trial as to any defendant. App. Ex. A at App. 12-13. The Western District Court rejected that argument, noting that the fraudulent transfer issues exceeded mere resolution of the objection on the proof of claims. The court also noted that the bankruptcy court is part of the district court, which may withdraw the reference where one

party demanded trial before an Article III court. *Id.* The *Picard* court had similarly held that once the reference to the bankruptcy judge is withdrawn, the fraudulent transfer claims are no longer part of the bankruptcy claims allowance process, the hierarchical re-ordering of creditors' claims, or the larger bankruptcy regulatory scheme enacted by Congress, and a jury trial is required. No. 11 Civ. 3605 (JSR) (S.D.N.Y. Nov. 23, 2011). This Court declined to follow *Picard* and held that *Langenkamp* is not limited to cases where the bankruptcy court will determine the fraudulent transfer claims, the resolution of fraudulent transfer claims is "'integral' to the claims allowance process," and "the right to trial by jury is extinguished" for both the debtor and the creditor that filed the claim. *Dkt. 288 at 6-8, 10-11, 13-14*; *Dkt. 459 at 5-8*.

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

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

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

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

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

Like Verizon here, Duke in *CRLT* suggested that some claims were equitable and the jury thus should be stricken. The Western District Court dismissed that argument, noting that "the fact that some claims or issues are not triable by jury is no reason to strike the entire jury demand, and indeed, formally, CRLT has only demanded a jury 'as to all claims so triable.'" App. Ex. A at App. 9. Plaintiff raised the same point here. *Dkt. 123 at 21-22; 213 at 4-6; Dkt. 315 at 1-9; Dkt. 352 at 2-5.* That is, Plaintiff stressed that if any claim against any Defendant was legal in nature a right to jury trial remained intact. Thus, even if the fraudulent transfer claims against Verizon were equitable, which they are not, the legal money-damage claims against Diercksen (and Verizon) require a jury. Moreover, a jury must determine all issues of fact common to all Defendants. *In re WSC, Inc.*, 286 B.R. 321, 334 (Bankr. M.D. Tenn. 2002); *see also In re Jensen*, 946 F.2d 369, 372 (5th Cir. 1991). This Court did not reach the same conclusion as the Western District Court; the result here thus differs from the result in *CRLT*.

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

Verizon has been sued by a different litigation trust in North Carolina based on a different $2 billion spinoff transaction related to certain landline assets. According to that lawsuit, Verizon saddled FairPoint

Communications, Inc. with an unsustainable debt load (approximately $2.5 billion) before spinning it off to the marketplace. FairPoint Communications, Inc. filed for bankruptcy not long after the spin-off. *See* App. Ex. B at App. 26-27, Pl.'s Second Amended Complaint, *FairPoint Commc'ns, Inc., et al., Litig. Trust v. Verizon Commc'ns, Inc., et al.*, No. 3:11-CV-597 (W.D.N.C. June 28, 2012), ECF No. 68, Hon. Frank D. Whitney presiding. A litigation trust was formed pursuant to the debtor's bankruptcy plan of reorganization. *Id.* at App. 27.

As in this case, Verizon argued that FairPoint's jury demand should be stricken, citing again to *Langenkamp* and to this Court's order striking Plaintiff's jury demand. App. Ex. C at App. 77-78, 90, 97, 102 (Transcript of Hearing on Motion to Strike, October 22, 2012). Also as in this case, Verizon repeated its argument that because Verizon filed proofs of claim in the bankruptcy, "the plaintiff is not entitled to a jury" if the fraudulent conveyance claim must be decided as part of the claims allowance process. *Id.* at App. 77-80. Verizon cited a claw-back provision that it argued meant that the bankruptcy claim would not be final until the fraudulent conveyance claim was resolved as part of the claims allowance process. *Id.* at App. 84-85, 102.

The litigation trust in *FairPoint* disagreed with Verizon's characterization and noted that any recovery by the litigation trust would not be returned to the closed bankruptcy estate. Thus, the matter would not be resolved as part of the claims allowance process or alter the bankruptcy estate. *Id.* at App. 88-95. Plaintiff raised those arguments here. *Dkt. 123 at 14, 16-20;*

Dkt. 213 at 5-6; Dkt. 315 at 14-16; Dkt. 352 at 5-7. Verizon responded in *FairPoint* by quoting from the Court's Order here: "The right to a jury trial is lost not because it is waived but because the legal dispute has been transformed into an equitable dispute." App. Ex. C at App. 102.

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

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

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

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

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

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

After sua sponte calling for amicus briefs, the Ninth Circuit issued an opinion analyzing *Stern*. *See Executive Benefits Ins. Agency v. Arkinson (In re Bellingham Ins. Agency, Inc.)*, 702 F.3d 553 (9th Cir. Dec. 4, 2012), *cert. pet. filed*, (Apr. 3, 2013) (No. 12-1200). In that case, the bankruptcy court granted summary judgment in favor of the trustee on his affirmative fraudulent conveyance claims filed in the bankruptcy court against a party who had not filed a proof of claim; the district court affirmed. *Id.* at 557. On appeal, the defendant argued that the bankruptcy

court was constitutionally prohibited by Article III from entering a final judgment on the trustee's claims. *Id.* The court traced the law from *Northern Pipeline* (plurality holding that assignment of debtor's state-law, private-right claims to bankruptcy judge for resolution violated Article III) to *Granfinanciera* (holding that a fraudulent conveyance claim was a private right and Congress could not deny a right to a jury trial for private-right claims) to *Stern*. Although not addressing a jury-trial right in that summary judgment case, the court made a series of relevant observations and holdings regarding *Stern*:

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

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

> [T]he only principled basis on which to distinguish *Katchen* from *both Stern* and

> *Granfinanciera* is that ***Katchen*** **involved a claim against a creditor that necessarily had to be resolved in the course of the claims allowance process, and *Stern* and *Granfinanciera* did not.**

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

Other circuits have also construed *Stern* and held that only an Article III court could enter final judgment on claims that would not necessarily be resolved in the bankruptcy process. *Waldman v. Stone*, 698 F.3d 910, 919, 921 (6th Cir. 2012) ("[W]hen a debtor pleads an action arising only under state-law, as in *Northern Pipeline*; or when the debtor pleads an action that would augment the bankrupt estate, but not 'necessarily be resolved in the claims allowance process,' then the bankruptcy court is constitutionally prohibited from entering final judgment.") (emphasis added); *Ortiz v. Aurora Health Care, Inc. (In re Ortiz)*, 665 F.3d 906, 913-14 (7th Cir. 2011) (holding state-law claims based on improper disclosure of medical information in bankruptcy proofs had insufficient

bearing and overlap to bypass Article III's requirements).

Only when the claims would necessarily be resolved in the bankruptcy process do the circuit courts hold final adjudication by the bankruptcy court passes constitutional muster under *Stern*. *See In re Spillman Dev. Group, Ltd*., 710 F.3d 299, 306 (5th Cir. Feb. 28, 2013) (*Stern* inapplicable when effect of creditor's bid on senior indebtedness is inextricably intertwined with rights under federal bankruptcy law);[6] *Sundale, Ltd. v. Fla. Assocs. Capital Enters., Inc. (In re Sundale)*, 449 Fed. Appx. 887, 2012 WL 5974125, *7-8 (11th Cir. Nov. 29, 2012) ("bankruptcy courts lack 'the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim'") (emphasis added); *Onkyo Am. Inc. v. Global Technovations, Inc. (In re Global Technovations, Inc.)*, 694 F.3d 705, 722 (6th Cir. 2012) ("When a claim is 'a state law action independent of the federal bankruptcy law and not necessarily resolvable by a ruling on the creditor's proof of claim in the bankruptcy,' the bankruptcy court cannot enter final judgment.") (emphasis added); *Pearson Educ. Inc.*

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

v. Almgren, 685 F.3d 691, 695 (8th Cir. 2012) ("In *Stern*, the Court held that a bankruptcy court, as a non-Article III court lacked constitutional authority to enter final judgment on a counterclaim by the debtor against a creditor even though the creditor had filed a claim in defamation against the bankruptcy estate because 'there was never any reason to believe that the process of adjudicating [the creditor's] proof of claim would necessarily resolve [the debtor's] counterclaim.' The Court expressly distinguished *Katchen* and *Langenkamp* as cases in which resolution of the ensuing action was 'part of the process of allowing or disallowing claims.") (emphasis added).

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

In *In re Lehman Brothers Holdings, Inc.*, 480 B.R. 179, 188-92 (S.D.N.Y. 2012), faced with a motion to withdraw the reference, the court reviewed various private-right claims, including fraudulent conveyance,

to determine if the claims would necessarily be resolved in the claims allowance process. Because all of the private-right claims would not be necessarily resolved by the claims allowance process, the court held that the bankruptcy court could not finally adjudicate the claims (and hence a jury trial would be required, if demanded). *Id.* at 192 (declining to withdraw reference until clear trial required);[7] *see also Dang v. Bank of Am., N.A.*, No. 10-216, 2013 WL 1683820, at *10 (D. Md. Apr. 17, 2013).[8]

The Court here held that *Stern* did not disturb *Langenkamp* and that a defendant's proof of claim in bankruptcy court extinguished the Litigation Trust's right to a jury trial in district court. *Dkt. 459 at 6-7*. The Court did not adopt the "necessarily resolved" holding from *Stern* as have other courts. Those other

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

[8] Bankruptcy courts have also recognized that courts have adopted broad and narrow readings of *Stern*. *See, e.g., In re Agriprocessors, Inc.*, 479 B.R. 835 (Bankr. N.D. Iowa 2012) (collecting cases and concluding under divided authority that it could, at a minimum, hear claims and propose findings of facts and conclusions of law); *see also Kirschner v. Agoglia*, 476 B.R. 75 (S.D.N.Y. Bankr. 2012) (recognizing *Stern* and *Granfinanciera* holdings that fraudulent conveyance is a private-right to which Article III court and Seventh Amendment attaches but deciding bankruptcy court could issue recommendations and findings).

courts would agree with Plaintiff; the Court agreed with Defendants that *Langenkamp* controls and extinguishes a jury right. Thus, a substantial ground for difference of opinion with other courts exists on the bases for striking the jury here.

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

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

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

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

indemnification in the Distribution Agreement, *Dkt. 123-1 at App. 374-377; Dkt. 315-1 at App. 75-79*. Spinco (Idearc) only purported to provide Verizon a very narrow indemnification for certain Spinco liabilities and certain misrepresentations, if any, in the Registration Statement or financing offering or marketing materials. *Dkt. 123-1 at App. 19-20; Dkt. 315-2 at App. 44-45*.

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

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

In addition to the substantial differences of opinion addressed above, there are other serious issues raised by the Orders in this case, including, among others, the following: (1) Whether a jury demand can be stricken without stipulation by all parties to a bench trial?

(2) May a jury demand in an amended pleading be stricken without a motion addressed to the amended pleading and the claims therein? (3) May a court require a party to do more than demand a jury to protect its constitutional right to a trial by jury? These and other issues present additional reasons—over which substantial ground for difference of opinion exists—that the Court should certify the Orders for interlocutory appeal.

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

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

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[10] District courts generally analyze appeals of interlocutory orders from bankruptcy court under 28 U.S.C. § 158(d)(2)(A)(iii) by referring to the 28 U.S.C. § 1292 standards. *See, e.g., Trans-Indus.*,

Courts describe whether a question of law is controlling in different ways. *See Malbrough v. Crown Equip. Corp.*, 392 F.3d 135, 136 (5th Cir. 2004) (citing *Ahrenholz* with approval); *Ahrenholz v. Bd. of Trustees of the Univ. of Ill.*, 219 F.3d 674, 676 (7th Cir. 2000) (controlling question includes "a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine"); *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319 (9th Cir. 1996) ("order may involve a controlling question of law if it could cause the needless expense and delay of litigating an entire case in a forum that has no power to decide the matter"); *Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991) (question controlling if "interlocutory reversal might save time for the district court and time and expense for the litigants"); *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982) ("all that must be shown in order for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of the litigation in the district court"); *Katz*, 496 F.2d at 755 (controlling question of law encompasses "at the very least every order which, if erroneous, would be reversible error on final appeal"). A question of law need not be dispositive of a claim or terminate the litigation to be controlling; it must be "serious to the conduct of the litigation." *Katz*, 496 F.2d at 755.

Thus, a question of law that advances the progress of the litigation and saves time and resources satisfies § 1292(b). Similarly, materially advancing the litigation looks to whether a retrial can be eliminated to save

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2010 WL 727971, at *1. Thus, district court cases discussing those § 158 appeals are also cited herein.

time and resources and speed the resolution of the litigation. *See, e.g., Kuehner,* 84 F.3d at 319 ("needless expense and delay of litigation"); *Tesco*, 722 F.Supp.2d at 767 ("key concern is…whether permitting an appeal will speed up the litigation"); *Trans-Indus.*, 2010 WL 727971, at *2 ("determination in advance of whether jury trial is permitted will avoid the prospect of trying the case twice" and would avoid protracted and expensive litigation); *Hooker Invs.*, 122 B.R. at 662 (issue regarding jury rights important question of which prompt resolution would speed the conclusion of the proceedings).

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

More recently, after *Granfinanciera* and *Stern*, certification on the jury-trial issue has occurred from the bankruptcy to district court under § 158(d)(2)(A)(iii) (which is generally analyzed under the § 1292(b) standards). *See, e.g.*, *Cruikshank v. Cook*, No. 12-10928-GAO, 2013 U.S. Dist. LEXIS 33201, at *3-4 (D.

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

Still other courts have certified jury-trial issues in non-bankruptcy contexts, and the Fifth Circuit has granted permission to appeal a jury trial issue. *See, e.g., Luera v. M/V Alberta*, 635 F.3d 181, 186 (5th Cir. 2011) (granting permission to appeal denial of jury strike based on issue of admiralty law); *Trans-Indus.*,

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

2010 WL 727971, at *2 ("A right to a jury trial is a controlling question of law."); *Chao*, 2008 U.S. Dist. LEXIS 51317, at *12 (certifying appeal of an order denying jury strike for certain ERISA claims). That is particularly true with the denial of the right to a jury trial—a fundamental constitutional right. *See, e.g., Leannah v. Alliant Energy Corp.*, No. 07-CV-169, 2008 WL 5210855, at *2 (E.D. Wis. Dec. 12, 2008) (denying certification of refusal to strike jury but noting certification of order striking jury would materially advance the litigation).

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

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

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

resolution of that question will materially advance the termination of the litigation.[12]

IV.
PRAYER

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

Respectfully Submitted,

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

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CERTIFICATE OF CONFERENCE

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

/s/ Werner A. Powers
Werner A. Powers

* * *

[*The Certificate of Service Has Been Omitted in the Printing of this Appendix*.]