debtor—when deciding the proper valuation standard under § 506(a).[FN5] *See id.* at 962, 117 S.Ct. 1879 ("The 'disposition or use' of the collateral thus turns on the alternative the debtor chooses...."). When a debtor elects "to use the collateral to generate an income stream" as in a cram down, the Court noted, use of a foreclosure-value standard would be improper because "a foreclosure sale ... will not take place." *Id.* 963, 117 S.Ct. 1879. By contrast, the replacement-value standard "values 'the creditor's interest in the collateral in light of the proposed [repayment plan] reality: no foreclosure sale and economic benefit for the debtor derived from the collateral equal to ... its [replacement] value.' " *Id.* (quoting *In re Winthrop Old Farm Nurseries,* 50 F.3d at 75) (alterations in original). Accordingly, the Court held that "under § 506(a), the value of property retained ... is the cost the debtor would incur to obtain a like asset for the same 'proposed use,' " i.e., its replacement value.[FN6] *Id.*

FN5. The Court considered three possible valuation standards: "(1) what the secured creditor could obtain through foreclosure sale of the property (the 'foreclosure-value' standard); (2) what the debtor would have to pay for comparable property (the 'replacement-value' standard); or (3) the mid-point between these two measurements." *Rash,* 520 U.S. at 955–56, 117 S.Ct. 1879.

FN6. The Supreme Court expressly left "to bankruptcy courts, as triers of fact, identification of the best way of ascertaining replacement value on the basis of the evidence presented." *Rash,* 520 U.S. at 965 n. 6, 117 S.Ct. 1879.

[9][10][11][12] Courts have recognized that similar reasoning applies with equal force in the Chapter 11 reorganization context. *See, e.g., In re Mayslake Village–Plainfield Campus, Inc.,* 441 B.R. 309, 320 n. 2 (Bankr.N.D.Ill.2010) ("The same [replacement] value can be used in this matter, even though a Chapter 11 cram down plan is involved."). Where a Chapter 11 plan of reorganization provides for a debtor to ***142** retain and use collateral to generate income with which to make payments to creditors, a § 506(a) valuation based upon a hypothetical foreclosure sale would not be appropriate, as it would be inconsistent with the provision's dictates. "In ordinary circumstances the present value of the income stream would [instead] be equal to the collateral's fair market value." *In re Winthrop Old Farm Nurseries,* 50 F.3d at 75. Indeed, the *Rash* Court considered its "use of the term replacement value ... consistent with ... the meaning of fair-market value" because both reflect "the price a willing buyer in the debtor's trade, business, or situation would pay a willing seller to obtain property of like age and condition." 520 U.S. at 959 n. 2, 117 S.Ct. 1879. The proper measure under § 506(a) must therefore be the collateral's fair market value because it is most respectful of the property's anticipated use.[FN7]

FN7. Like the appropriate measure of fair market value, the appropriate time as of which to value collateral may differ depending on the facts presented. *See* King, 4 Collier on Bankruptcy ¶ 506.03[10] (15th ed. rev. 2009) (discussing the potentially relevant dates of valuation for purposes of § 506(a)). As with the replacement valuation technique, bankruptcy courts are best situated to determine when is the appropriate time to value collateral in the first instance. We, therefore, defer to their considered judgment.

[13][14][15] By contrast, the Cornerstone Investors urge a market-based, or wait-and-see, approach to valuation of the Project. They argue that if the property, when sold, will bring in sufficient dollars to pay their secured claims in full, their claims should reflect that value. They suggest that, because Debtors will continue to develop and sell lots during the plan's life, the extent to which their claims are secured should similarly be calculated

over time. To our knowledge, however, under no circumstances has such an approach been used, even when the collateral at issue was of a similar nature. *See, e.g., In re Tamarack Trail Co.,* 23 B.R. 3, 5–6 (Bankr.S.D.Ohio 1982) (valuing a partially completed development project based on the fair market value in its current condition). Its absence is for good reason. A wait-and-see approach would in effect do away with bankruptcy courts' obligation to determine value under § 506(a).[FN8] That result is at odds with the Bankruptcy Code. In § 506(a), Congress expressly provided for the division of allowed claims supported by liens into secured and unsecured portions during the reorganization, before the plan's success or failure is clear. The fact that its "proposed disposition or use" should be factored into the valuation does not mean that the time as of which property is valued is to be postponed or altered.

FN8. Federal Rule of Bankruptcy Procedure 3012—pursuant to which the Committee made its motion—allows interested parties to request that a bankruptcy court value claims and therefore necessarily requires that collateral's worth be affixed in advance of a reorganization's completion. Parties like the Committee would have very little, if any, reason to make such motions for valuations pursuant to Rule 3012 if bankruptcy courts adopted the approach here urged by the Cornerstone Investors. This is further reason to reject it as discordant with bankruptcy practice.

Both the Bankruptcy Court and the District Court accurately characterized the budget as simply a set of projections offered in support of the plan's feasibility, i.e., to demonstrate that the plan would have a "reasonable probability" of success. *See In re TCI 2 Holdings, LLC,* 428 B.R. 117, 148 (Bankr.D.N.J.2010) ("The key element of feasibility is whether there is a reasonable probability the provisions of the plan can be performed."). It was not intended to function as anything more, and most certainly not as a determination of the value of the Cornerstone Investors' ***143** interest in the Project. This is clear from the fact that the plan expressly states that the amount of their secured claims will be determined by the Bankruptcy Court pursuant to the Committee's motion. More fundamentally, the projections regarding monies to be realized from the sale of lots over time do not equate to "value" as of confirmation because they anticipate Debtors spending time and money to realize value at a later date. That future value should not be credited to the secured creditor at confirmation. A "probability" of realizing the budget is not a certainty of its realization. In sum, valuations must be based upon realistic measures of present worth.

[16] Applying these precepts to the matter at hand, we hold that the Bankruptcy Court properly concluded that the fair market value of the Project as of the confirmation date controls whether the Cornerstone Investors' claims are secured or not. That is because the confirmed plan of reorganization called for Debtors to retain ownership of the real estate subdivision in order to complete its development. The discounted fair market value of the property as of the confirmation date, therefore, best approximated just how secure the liens held by creditors—namely, the Bank Lenders and Cornerstone Investors—were at the relevant point in Debtors' bankruptcy.[FN9] Because, as the Cornerstone Investors stipulated, the appraisal accurately calculated the Project's fair market value, the Bankruptcy Court correctly concluded that claims of the Cornerstone Investors were wholly unsecured.

FN9. "[T]he value of the property should be determined as of the date to which the valuation relates." *In re Savannah Gardens–Oaktree,* 146 B.R. 306, 308 (Bankr.S.D.Ga.1992). "Where, as here, the purpose of the valuation is to determine the treatment of a claim by a plan, the values determined at the § 506(a) hearing must be compatible with the values that will prevail on the confirmation date...." *In re Stanley,* 185 B.R. 417, 423–24 (Bankr.D.Conn.1995). We, therefore, agree with the Bankruptcy Court's determination that the appropriate time at which to assess the Project's fair market value in deciding the Committee's motion was on, or close to, the plan's confirmation date. *See, e.g., In re Melgar Enters., Inc.,* 151 B.R. 34, 39 (Bankr.E.D.N.Y.1993) (finding that a real estate project should be valued in its present state and "in close proximity to the effective date of the plan"). No party has argued otherwise.

C. *Lien Stripping in Chapter 11 Reorganizations*

[17] The Cornerstone Investors argue that denying them future lot sale proceeds that exceed the Project's judicially determined value as of confirmation constitutes a form of lien stripping disallowed by the Supreme Court's decision in *Dewsnup.* For the reasons set forth below, however, we reject this argument.

In *Dewsnup,* the Supreme Court considered "some ambiguities" in § 506 and its relationship to other provisions of the Bankruptcy Code when a Chapter 7 debtor's property increases in value between the time of its judicial valuation and the time of its foreclosure sale. 502 U.S. at 416, 112 S.Ct. 773. Guided by the principle that liens are to pass through bankruptcy unaffected, the Court rejected the notion that a mortgagee could be forced to accept the judicially determined value, even if the foreclosure sale produced more:

> The practical effect of petitioner's argument is to freeze the creditor's secured interest at the judicially determined valuation. By this approach, the creditor would lose the benefit of any increase in the value of the property by the time of the foreclosure sale. The increase would accrue to the benefit of the debtor, a result some of the parties describe as a "windfall."
>
> ***144** We think, however, that the creditor's lien stays with the real property until the foreclosure. That is what was bargained for by the mortgagor and the mortgagee.

Id. at 417, 112 S.Ct. 773. Expressly limiting its focus to the specific facts presented, the Court held that "[a]ny increase over the judicially determined valuation during bankruptcy rightly accrues to the benefit of the creditor." *Id.* at 416–17, 112 S.Ct. 773.

Dewsnup involved a Chapter 7 liquidation proceeding and the Supreme Court did not address whether the same result would be reached in Chapter 11 reorganization cases. *See id.* "A great majority of courts that have considered the issue ... have concluded that the holding in *Dewsnup* should be limited to Chapter 7 cases...." *In re Johnson,* 386 B.R. 171, 175 (Bankr.W.D.Pa.2008). That is because "[t]he rationales advanced in the *Dewsnup* opinion for prohibiting lien stripping ... have little relevance in the context of rehabilitative bankruptcy proceedings under Chapter[ ] 11." *In re Bartee,* 212 F.3d 277, 291 n. 21 (5th Cir.2000) (internal quotation marks and citation omitted). Particularly significant is the fact that, as hinted by the *Dewsnup* Court itself, "pre-Code law did provide for the modification of liens in reorganization cases." *Harmon v. United States,* 101 F.3d 574, 582 n. 4 (8th Cir.1996). "Congress must have enacted the Code with a full understanding of this practice." *Dewsnup,* 502 U.S. at 419, 112 S.Ct. 773. The distinction makes sense: Chapter 7 liquidation proceedings involve the sale of liened property; Chapter 11 reorganizations involve the retention and use of that property in the rehabilitated debtor's business. The Code makes that clear: "the process of lien stripping is ingrained in the reorganization provisions of the Bankruptcy Code to such an extent that any attempt to extend the holding in *Dewsnup* to Chapter 11 cases would require that numerous provisions of the statute be ignored or construed in a very convoluted manner." [FN10] *Johnson,* 386 B.R. at 176; *see also In re Dever,* 164 B.R. 132, 133 (Bankr.C.D.Cal.1994). Indeed, Congress's post- *Dewsnup* addition of 11 U.S.C. § 1123(b)(5)

—permitting modification of the rights of holders of secured claims, except those secured solely by a debtor's principal residence—seems to constitute explicit approval of lien stripping in Chapter 11 bankruptcies. *Johnson,* 386 B.R. at 176–77.

FN10. Two provisions in Chapter 11 demonstrate the complications inherent in the Cornerstone Investors' invocation of *Dewsnup.* The first is § 1129(b), pursuant to which a Chapter 11 plan must provide for the retention of liens only up to the value of the secured creditor's collateral in order to satisfy the requirements of a cram down. *See In re 680 Fifth Ave. Assocs.,* 156 B.R. 726, 731 n. 7 (Bankr.S.D.N.Y.1993). That the lien a plan must preserve need only collateralize a "secured claim," as defined in § 506(a), is indicative of Chapter 11 debtors' ability to strip liens down to the collateral's value. *Id.* The second is § 1111(b), pursuant to which undersecured creditors may opt out of the lien stripping found in § 1129 and instead be treated as fully secured to the extent of their allowed claims. That undersecured creditors have that option similarly suggests that Chapter 11 debtors possess the authority to limit secured claims to the value of the collateral. *See Wade v. Bradford,* 39 F.3d 1126, 1129 (10th Cir.1994).

We therefore agree with the majority of courts that *Dewsnup*'s holding should not be imported into Chapter 11 cases. That this particular plan of reorganization provides for Debtors to develop and sell all of the lots does not alter our conclusion, because that is Debtors' business. As appealing as it might be to apply the *Dewsnup* Court's holding to the "sale" context here, it simply does not fit. Debtors' collateral is not being sold in a Chapter 7 ***145** liquidation. There is neither foreclosure nor loss of opportunity to "credit bid," which seem to have animated the Court's reasoning in *Dewsnup.* Unlike Chapter 7 liquidations, Chapter 11 reorganizations call for the creditor to receive payments equal to the value of its interest in the collateral over time. *See In re Bowen,* 174 B.R. 840, 855 (Bankr.S.D.Ga.1994) ("Unlike the creditor in *Dewsnup,* creditors in reorganization cases receive something in exchange for the voiding of their liens: payment obligations under a plan of reorganization."). Thus, we find no impermissible stripping of the Cornerstone Investors' liens.

Accordingly, the Bankruptcy Court correctly found that the fair market value of the Project was less than the secured claim of the Bank Lenders, and did not violate *Dewsnup,* or any other principle of bankruptcy law, by adjudging the Cornerstone Investors' claims wholly unsecured.

D. *Burden of Proving the Project's Value*

[18] Having now disposed of the Cornerstone Investors' principal arguments for why the Project's fair market value as of confirmation cannot control here, we return to the burden of proof. To reiterate, when a party moves for a bankruptcy court to value secured claims pursuant to § 506(a), a burden-shifting framework will govern. Application of the framework here demonstrates that the Cornerstone Investors' appeal must fail.

The Committee filed the motion seeking to have the Cornerstone Investors' claims deemed wholly unsecured, and it was therefore obligated to present evidence that the Project's fair market value, together with the value of other collateral held by Debtors, was less than the Bank Lenders' secured claim. Its submission of an appraisal previously accepted as evidence of the Project's value at a cash collateral hearing, as adjusted, satisfied the Committee's burden. The veteran appraiser it enlisted used well-accepted techniques of real estate appraisal to calculate the Project's fair market value. That the appraiser did so in light of the property's "proposed disposition or use" is clear from its acceptance of results derived from the "Developer's Approach," an income capitalization "method of estimating land value when subdivision and development are the highest and best use of the parcel of land being appraised." Dictionary of Real Estate Appraisal (4th ed.) 279–80. That approach most "accurately considered the time and expenses" that would be incurred by the Debtors in developing the property. The Bankruptcy Court, therefore, did not err by accepting the appraiser's calculation of the Project's fair market value, namely, $9,543,396.23 after adjustment.

On appeal, the Cornerstone Investors attempt to chip away at the appraisal, contending that the appraiser's methodology was flawed in certain respects. However, the Cornerstone Investors leveled no such challenges before the Bankruptcy Court. At the hearing on the Committee's motion, they conceded that the appraisal accurately calculated the Project's fair market value and urged only that the fair market value should not control. Even assuming, however, that their failure to challenge the accuracy of the appraisal's fair market value determination did not waive the contention on appeal, the Cornerstone Investors' arguments still fail to demonstrate any error by the Bankruptcy Court.

The purported missteps by the appraiser to which they point do not undermine the appraisal's suitability to satisfy the Committee's initial burden. First, the Cornerstone Investors suggest that the appraiser improperly applied discounts "to attract a buyer" because the plan did not ***146** contemplate sale to a single developer. Those discounts, however, merely accounted for the risks and uncertainty inherent in the build-out in which Debtors were engaged. In other words, they were necessary to establish the Project's *present* fair market value. Second, the Cornerstone Investors urge that the appraisal was too stale to be acceptable, having been completed over a year before the plan's confirmation. However, through stipulations of fact presented to the Bankruptcy Court, the fair market value of the Project was reduced to account for sales of homes that occurred between the date of appraisal and the date of confirmation. Although the adjustment did not account for potential shifts in land value or the residential home market that may have occurred during that period, the Cornerstone Investors offered no evidence of any such changes. The Bankruptcy Court, therefore, did not err by adopting the adjusted appraisal value of $9,543,396.23 as a fair reflection of the Project's worth as of the date on which the plan was confirmed.

[19] Under a burden-shifting framework, the Cornerstone Investors had the ultimate burden of persuading the Bankruptcy Court that the appraisal undervalued the Project and that the Project was instead worth enough to secure their claims under § 506(a). At the hearing on the Committee's motion, the Cornerstone Investors, however, expressly declined to have "an appraiser ... come in and say that either [the Committee's] appraisal was wrong or that we had a higher ... fair market value." Instead, they relied upon the plan budget as providing the proper valuation. The Bankruptcy Court and District Court properly held that the budget was not a valuation, but, rather, a projection and refused the Cornerstone Investors' invitation to use a wait-and-see approach. The Cornerstone Investors thus failed to satisfy their burden.

Thus, the Bankruptcy Court properly accepted the valuation put forth by the Committee because it satisfied the Committee's burden of overcoming the presumed validity and amount of the Cornerstone Investors' secured claims. The Cornerstone Investors, by contrast, did not satisfy their burden of proving that their secured claims were worth more than the Committee's valuation indicated. Accordingly, the Bankruptcy Court did not clearly err by concluding that, in total, the collateral securing the secured debt was worth $11,165,477.15 and that therefore the Cornerstone Investors' claims were unsecured.

IV. *Conclusion*

For the foregoing reasons, we will affirm the Bankruptcy Court's determination that the secured claims of the Cornerstone Investors should be valued at zero. Pursuant to Debtors' plan of reorganization, then, they are to be treated as members of

Class 5, unsecured claimants.

C.A.3 (N.J.),2012.
In re Heritage Highgate, Inc.
679 F.3d 132, 56 Bankr.Ct.Dec. 145, Bankr. L. Rep. P 82,313

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Only the Westlaw citation is currently available.

United States District Court,
N.D. Texas,
Dallas Division.
U.S. BANK NATIONAL ASSOCIATION, Litigation Trustee of the Idearc Inc. et al. Litigation Trust, Plaintiff,
v.
VERIZON COMMUNICATIONS INC., et al., Defendants.

Civil Action No. 3:10–CV–1842–G.
Jan. 22, 2013.

Micah Ethan Skidmore, Haynes & Boone, Patrick D. Keating, Charles M. Gearing, David R. Taubenfeld, Douglas J. Buncher, John Marshall Bunting, John D. Gaither, Nicholas A. Foley, Philip McCall Bridwell, Robin E. Phelan, Seymour Roberts, Jr., Werner A. Powers, Dallas, TX, for Plaintiff.

J. Robert Arnett, II, E. Leon Carter, Carter Stafford Arnett Hamada & Mockler PLLC, Paige Holden Montgomery, Weil Gotshal & Manges, T. Ray Guy, Dallas, TX, Alfredo Perez, John B. Strasburger, Houston, TX, David Lawrence Schwarz, Joseph S. Hall, Reid M. Figel, Saritha K. Tice, Scott H. Angstreich, Steven F. Benz, William J. Rinner, Kellogg Huber Hansen Todd Evans & Figel PLLC, Washington, DC, Philip D. Anker New York, NY, for Defendants.

MEMORANDUM OF DECISION

A. JOE **FISH**, Senior District Judge.

***1** From October 15, 2012 to October 26, 2012, the court conducted a ten-day bench trial [FN1] in this case. That trial was devoted to the resolution of a single factual question: What was the value of Idearc, Inc. ("Idearc") on November 17, 2006, the date of its spinoff from Verizon Communications Inc. ("Verizon")? The parties presented documentary exhibits and the testimony of witnesses to answer this question.[FN2] Based on this evidence, the court finds and concludes that the value of Idearc on November 17, 2006 was at least $12 billion.

FN1. On March 21, 2012, the court granted the defendants' motion to strike the plaintiff's jury demand. *See* Memorandum Opinion and Order of March 21, 2012 (docket entry 288). On July 25, 2012, the court denied the plaintiff's motion for reconsideration of the order striking the jury demand. *See* Memorandum Opinion and Order of July 25, 2012 (docket entry 459). On September 10, 2012, the court denied the plaintiff's motion for clarification of the order striking the jury demand. *See* Order of September 10, 2012 (docket entry 521).

FN2. The plaintiff introduced live testimony from three witnesses (two fact and one expert) and presented video depositions from two additional fact witnesses. The defendants called 16 live fact witnesses and four expert witnesses, and they also presented a video deposition from one additional fact witness.

I. *FINDINGS OF FACT*

A. *Procedural Background*

1. *Nature of Action*

On September 15, 2010, U.S. Bank National Association, as Litigation Trustee of the Idearc, Inc. *et. al.* Litigation Trust (the "Trustee"), filed this action against Verizon, Verizon Financial Services LLC ("VFS"), GTE Corporation ("GTE"), and John W. Diercksen ("Diercksen") (collectively, the "defendants"), alleging a variety of claims arising out of Idearc's spinoff from Verizon. *See* Plaintiff's Original Complaint (docket entry 1). The Trustee filed an amended complaint on November 30, 2011. *See* Plaintiff's Amended Complaint and Jury Demand ("Amended Complaint") (docket entry 161).

On July 31, 2012, the court granted in part and denied in part the defendants' motion to dismiss the amended complaint. *See* Memorandum Opinion and Order of July 31, 2012 (docket entry 469). The court dismissed the Trustee's fraudulent conveyance claims (Counts 1 and 2 of the amended complaint) related to $7.1 billion in debt and the shares of stock that Idearc issued to Verizon in exchange for Verizon's domestic directories business. *Id.* at 19. The court additionally dismissed the Trustee's claim for unjust enrichment (Count 10) and for alter ego (Count 11) to the extent it was pled as a separate cause of action. *Id.* at 34, 36.

On August 8, 2012, the court granted in part and denied in part the Trustee's motion for summary judgment. *See* Memorandum Opinion and Order of August 8, 2012 (docket entry 485). The court granted summary judgment as to the new Idearc Board members' express ratification of certain spinoff resolutions dated November 16, 2006. *Id.* at 7. The court denied summary judgment as to the defendants' affirmative defense of ratification and did not decide whether the new Idearc Board approved or ratified the actions of the Idearc officers to effect the spinoff. *Id.* at 7–8.

On September 14, 2012, the court granted in part and denied in part the defendants' motion for summary judgment and denied the Trustee's motion for partial summary judgment. *See* Memorandum Opinion and Order of September 14, 2012 (docket entry 523). The court granted summary judgment dismissing the Trustee's fraudulent conveyance claims (Counts 1 and 2) related to Idearc's transfer to Verizon of approximately $2.5 billion in cash on the ground that such claims were barred by § 546(e) of the Bankruptcy Code. *Id.* at 24. The court also granted summary judgment on the Trustee's fraudulent conveyance claim related to interest that Idearc paid on its debt (Count 7), *id.* at 35, and that portion of the Trustee's promoter fraud claim (Count 9) related to alleged aiding and abetting of attorneys' alleged fiduciary duty breaches and seeking punitive damages. *Id.* at 51. The court granted summary judgment on the breach of fiduciary duty claim against Diercksen (Count 3) insofar as it sought recovery in excess of applicable insurance coverage. *Id.* at 29. The court also concluded that the Trustee's unlawful dividend claim (Count 8) was preempted by the Bankruptcy Code insofar as it related to the approximately $2.5 billion transfer of cash. *Id.* at 40–45.

***2** On August 22, 2012, the court issued an order bifurcating the trial of this action, limiting the first phase of the trial to a determination of "[w]hat was Idearc's value at the time it was spun off from Verizon in November of 2006?" *See* Order of August 22, 2012 (docket entry 504). All remaining factual questions were reserved for a potential second phase of trial. *Id.*

2. *The Parties*

The plaintiff is the trustee of a trust authorized to pursue claims as the successor-in-interest to Idearc, which was a wholly owned subsidiary of Verizon prior to the November 17, 2006 spinoff. After more than two years of operations as an independent, New York Stock Exchange-traded company, and in the wake of the Great Recession, Idearc filed a petition for reorganization under Chapter 11 of the Bankruptcy Code in March 2009. *See* Amended Complaint ¶ 25. The Litigation Trust was created as part of Idearc's Plan of Reorganization to pursue, among other things, potential claims against the defendants. *Id.* ¶¶ 29–30.

Defendant Verizon is a publicly traded company organized under Delaware law. *Id.* ¶¶ 10. The defendants VFS and GTE are entities owned by Verizon. *Id.* ¶¶ 2, 11–12. The defendant Diercksen is an officer of Verizon and served as the sole director of Idearc (formerly known as Verizon Directories Disposition Corporation) ("VDDC"), from its formation in June 2006 through November 16, 2006, the day before the spinoff. *Id.* 1111 3, 21, 45, 107.

B. *The Idearc Spinoff and its Terms*

In connection with the spinoff, Verizon contributed its domestic print and electronic directories business to Idearc in exchange for approximately $7.115 billion in Idearc debt, $2.5 billion in cash, and 146 million shares of Idearc common stock. *Id.* ¶¶ 2, 18. Thereafter, Verizon distributed the Idearc common stock to its existing shareholders. *Id.*

In connection with the spinoff, Idearc incurred $9.115 billion in indebtedness and received commitments from financial institutions to lend it up to an additional $250 million through a revolving credit facility. Idearc's debt was comprised of four components: (i) a $1.515 billion secured Term Loan A; (ii) a $250 million credit facility known as the "Revolver"; (iii) a $4.75 billion secured Term Loan B; and (iv) $2.85 billion in 8% Senior Notes due 2016 (the "Unsecured Notes"). *See* Plaintiff's Exhibit ("PX") 1103 at 9–12 of 550 (Idearc, Inc. Form 8–K filed on November 21, 2006, describing debt components); *see also* PX 1062 at 8 of 135 (Credit Agreement describing $1.515 billion in Term Loan A debt, $4.75 billion in Term Loan B debt, and $250 million revolver); PX 1084 at 6 of 145 (Indenture describing $2.85 billion unsecured notes).

C. *Carlyn Taylor's Expert Report and Testimony*

The only evidence of Idearc's value that the Trustee presented was in the form of Carlyn Taylor ("Taylor")'s expert report and testimony. The court does not find this report and testimony persuasive and therefore does not accept Taylor's conclusion that the value of Idearc was $8.15 billion on the date of the spin-off.

1. *Taylor's Background and Qualifications*

***3** Carlyn Taylor earned undergraduate and graduate degrees in economics. *See* Trial Transcript ("Tr.") Vol. 3 at 11:18–20. She currently holds three investment banking licenses from FINRA. *Id.* at 12:3–4. She is a certified public accountant, holds an accreditation in business valuation, and is a certified insolvency and restructuring accountant. *Id.* at 12:5–8. Taylor currently serves as a senior managing director and heads the telecom, media, and entertainment industry practice at FTI Consulting, Inc. *Id.* at 9:18–10:15. Taylor has advised clients in numerous engagements in the telecom industry. *Id.* at 31:20–32:4. She routinely advises clients with respect to valuation matters. *Id.* at 18:13–24:24; 25:4–28:5. Taylor has worked on eleven different engagements in the yellow pages business, many of which involved performing valuations for investors. Tr. Vol. 4A at 31:22–24. The court finds that Taylor is highly qualified to offer an opinion regarding Idearc's value as of November 17, 2006.

2. *Summary of Taylor's Valuation Conclusions*

a. Methodology for calculating total enterprise value

Taylor made three separate calculations of Idearc's value on the date of the spinoff, one based on discounted cash flow (the "DCF method"), a second based on EBITDA [FN3] multiples of a select group of public companies ostensibly similar to Idearc (the "market multiple method"), and a third based on EBITDA multiples implied by transactions involving public companies ostensibly similar to Idearc (the "comparable transaction method"). Tr. Vol. 4A at 19:8–21:3. Using the DCF method, Taylor arrived at a value for Idearc ranging from $5.4 to $6.3 billion. *Id.* at 92:14–22. Using the market multiple method, Taylor arrived at a value ranging from $11.7 to $13 .2 billion. Tr. Vol. 4B at 4:9–13. Using the comparable transaction method, Taylor arrived at a value ranging from $13.4 to $15.8 billion. *Id.* at 5:11–6:6. By weighting the DCF method calculation at 70%, the market multiple method calculation at 15%, and the comparable transaction method calculation at 15%, Taylor ultimately arrived at a value for Idearc that ranged from $7.5 to $8 .8 billion. Tr. Vol. 4A at 28:12–18, 115:7–9. The midpoint of that range is $8.15 billion, which Taylor concluded was the value of Idearc on November 17, 2006, the date of its spinoff from Verizon. *Id.* at 28:15–18.

> FN3. EBITDA is "earnings before interest, taxes, depreciation, and amortization."

Taylor gave no weight to the price at which Idearc's common stock traded on the New York

Stock Exchange ("NYSE"), and she did not include in her report any determination of what total enterprise value for Idearc was implied by this trading price. Tr. Vol. 3 at 56:20–57:4; Tr. Vol. 4B at 7:2–4.

b. Taylor's conclusions under the market multiple method

Taylor used data about the trading multiples of five public companies comparable to Idearc in order to arrive at a trading multiple range and ultimately a valuation range for Idearc. Taylor used the same companies (and multiples) that Houlihan Lokey had used when it performed a valuation analysis in connection with a solvency opinion it prepared for Idearc in the fall of 2006. Tr. Vol. 4A 93:11–16. These companies were: Eniro, Seat Pagine Gialle SpA, Yellow Pages Income Fund, Yell Group plc, and RH Donnelley. *Id.* at 95:3–98:20. Of these, only RH Donnelley was, like Idearc, an incumbent print company operating in the United States. *Id.* at 93:17–94:11; 95:20–96:5.

***4** Using the market multiple method, Taylor arrived at a value for Idearc ranging from $11.7 billion to $13.2 billion. Tr. Vol. 4B at 4:9–13.

In her final calculation of a valuation range for Idearc, Taylor assigned the market multiple method only 15% weight. Tr. Vol. 4A at 115:7–9. Taylor testified that one reason for this weighting included VIS's inferior financial performance relative to the other comparable directories companies. *Id.* at 97:12–19. Since the ostensibly comparable companies had shown recent revenue growth, while VIS had shown recent revenue decline, Taylor opined that the companies were not comparable enough to warrant weighting the market multiple method more highly. *Id.* Taylor also discounted the weight given to this method, because only RH Donnelley was an incumbent print company operating in the United States. *Id.* at 93:17–94:11; 95:20–96:5. Finally, she discounted this method, because RH Donnelley had received significant tax benefits in connection with its purchase of the Dex directories company, tax benefits that would not be available to Idearc after the spinoff. *Id.* at 98:1–20, 105:3–106:15.

c. Taylor's conclusions under the comparable transaction method

The comparable transaction method examines sales of comparable companies, whether public or private, to derive a valuation multiple implied by each sale that can be applied, with appropriate adjustments, to the subject company. *Id.* at 99:3–10. Taylor's analysis began with the list of 17 company transactions compiled by Houlihan Lokey when it prepared its solvency opinion for Idearc. *Id.* at 99:11–23. Taylor then independently examined all available information regarding each transaction and determined the extent to which those transactions were relevant useful comparables for valuing Idearc. *Id.*

Using the comparable transaction method, Taylor arrived at a value for Idearc ranging from $13.4 billion to $15.8 billion. Tr. Vol. 4B at 5:11–6:6.

In her final calculation of a valuation range for Idearc, Taylor assigned the comparable transaction method only 15% weight. Taylor testified that the reasons for this weighting included (1) the fact that the 17 transactions compiled by Houlihan did not involve reasonably comparable companies, *see* Tr. Vol. 4A at 99:19–100:16, and (2) the fact that a Tax Sharing Agreement ("TSA") between Verizon and Idearc, *see* PX 1068,[FN4] in her opinion, prevented Idearc from accessing the transactions market (which conflicts with a premise of the comparable transaction method, namely, that the subject company has the ability to access that market). Tr. Vol. 4A at 109:3–7; 109:15–110:9; 111:4–8; 111:14–112:3.

FN4. Since the spinoff had been structured as a tax-free transaction, the Tax Sharing Agreement was entered by the parties to allocate liability in the event the Internal Revenue Service later determined the transaction did not qualify for tax-free status.

d. Taylor's DCF assumptions, methods and conclusions

A DCF valuation involves the following steps: (a) project the company's free cash flow (EBITDA minus adjustments for capital expenditures and working capital changes) for a five-year period (the "Projection Period") (here, 2006–2010), and discount that projected cash flow back to the target date (here, November 17, 2006) using an appropriate discount rate; (b) estimate a "terminal value" of the company after the Projection Period (based on an estimated growth rate after the Projection Period), and discount that terminal value back to the target date using the same discount rate used in step (a); and (c) add the values derived from the first two steps together. Tr. Vol. 4A 21:8–22:9; 73:3–74:8.

i. *Projections*

***5** Taylor made three different calculations of Idearc's value under the DCF method. These three calculations were based on three different projections of Idearc's free cash flow for the Projection Period. The projections Taylor utilized included (1) a projection prepared by Taylor, in which she made adjustments to a "base case" projection that had been prepared by Verizon in 2006 (the "FTI Case"), *see* Tr. Vol. 4A at 53:20–54:3; 54:15–55:6; 58:11–16; PX 1849; PX 1851, (2) a (pessimistic) stress-test projection prepared by Houlihan Lokey before Houlihan offered its solvency opinion (the "Houlihan Downside Case"), *see* Tr. Vol. 4A at 48:19–20; 51:20–52:1; 57:25–58:5, and (3) a mathematical extrapolation of the trend of VIS's actual historical performance from 2003 to 2006 (the "Trend Case"). Tr. Vol. 4A at 48:19–22; 53:3–9; PX 1849; PX 1851.

ii. *Terminal growth rate*

Taylor derived her terminal growth rate using the Gordon Growth Model, standard in valuation literature. Tr. Vol. 4A at 77:3–78:9; 81:1–9. Taylor employed the same terminal growth rate as the growth rate she used for the five-year Projection Period. Tr. Vol. 4A at 77:11–78:5. Terminal growth rate is the expected growth rate of the target company in perpetuity beyond the Projection Period.

iii. *Discount rate*

As is standard, Taylor applied the same discount rate to the calculated free cash flow in the Projection Period and the calculated terminal value of Idearc. She arrived at her chosen discount rate of 9.75% by using a standard accepted formula called "Weighted Average Cost of Capital" (or "WACC"). Tr. Vol. 4A at 74:9–13. The formula uses two components, the cost of equity and the cost of debt. The analyst weights these two components according to the optimal capital structure (debt to equity ratio) of the target company. Tr. Vol. 4A at 75:11–76:14. Taylor also applied a company specific risk premium of 2% in her calculation of Idearc's cost of equity. Tr. Vol. 4A 76:17–77:2. This resulted in an overall discount rate that was 1% higher than it would have been, had she not applied the company specific risk premium to Idearc's cost of equity. *Id.* Taylor testified that she added this premium to account for disadvantages and issues unique to Idearc (*e.g.,* operations concentrated in lower-growth, highly competitive urban markets; performance that lagged competitors; inexperienced management; and the TSA, which Taylor opined would have restricted Idearc's ability to execute certain strategic and financial options). Tr. Vol. 4A 76:23–77:2.

iv. *Taylor's DCF method conclusions*

By applying the 9.75% discount rate to both the terminal value and the three sets of projected cash flows for the Projection Period, Taylor arrived at a range of values for Idearc from $5.4 billion on the low end to $6.3 billion on the high end. Taylor concluded that the midpoint of this range ($5.85 billion) most accurately reflected the value of Idearc on November 17, 2006 under the DCF method. Tr. Vol. 4A 83:22–84:4; 92:14–93:3.

***6** The trading multiple implied by Taylor's DCF valuation ranges from 3.5x to 4.2x Idearc's actual 2006 EBITDA. Tr. Vol. 10A at 82:25–83:25; Defendant's Demonstrative ("DD") 4.13. No competitor of Idearc had a market value anywhere approaching that low a multiple. Tr. Vol. 10A at 83:15–25; DD 4.13.

e. Taylor's rejection of certain market evidence of Idearc's value

As part of her analysis of value, Taylor did not consider the trading price of Idearc on the NYSE on the date of the spinoff. She testified that, in her opinion, investors overvalued Idearc because of various alleged misrepresentations and omissions made by Verizon. Tr. Vol. 3 at 56:13–57:4; Vol. 4A at 17:19–18:15; Vol. 4B at 33:20–34:9 (conceding that her opinion "turn [s]" on the proposition that "the market was misled" into inflating Idearc's equity value by at least $4 billion). First, Taylor concluded that Verizon failed to disclose the significant differences in the EBITDA margins generated by VIS's incumbent print and electronic businesses. Tr. Vol. 3 at 104:16–105:12; Vol. 4A at 15:2–17:18; Vol. 4B at 63:9–64:16. Second, she also concluded that Verizon concealed the year-over-year declines in revenue in specific northeastern urban markets. Tr. Vol. 3 at 96:17–99:14; 101:4–101:10; Vol. 4A at 12:2–17. Third, Taylor opined that the fact that management had consistently failed to meet its projections, but hadn't disclosed these missed projections to the market, rendered Idearc's stock price unreliable. Tr. Vol. 4A at 10:10–13. Fourth, Taylor opined that the fact that Verizon did not disclose a pessimistic report by the consulting firm McKinsey about the directories business's future prospects rendered Idearc's stock price unreliable. *Id.* at 14:5–12. Taylor further testified that this was the first time she had ever opined that the market price of stock was completely unreliable as to a firm's value. *Id.* at 18:7–15.

3. *Hopkins' Expert Rebuttal*

Mark Hopkins ("Hopkins") testified as Verizon's expert witness about both the value of Idearc and in rebuttal of Carlyn Taylor's report and testimony. Hopkins was educated at Oxford University, where he received a Master of Arts with honors in chemistry. Tr. Vol. 7B at 108:1–12. He is currently employed as a senior managing director at CEG Group, working as a financial advisor in the restructuring and reorganization area. *Id.* at 107:15–25. He has also been employed as global head of shipping at Bank of America and as a partner at Ernst and Young in the restructuring group. *Id* . at 108:13–23. Hopkins testified that he has performed many valuation and solvency analyses in the media industry, the telecommunications industry, and the energy industry. *Id.* at 108:24–109:16. The court recognized Hopkins's expertise and qualifications to express opinions in the areas of valuation and solvency. *Id.* at 116:3–4.

i. *Taylor's DCF analysis: projections*

Hopkins testified that the financial projections (the free cash flows Taylor calculated during the Projection Period) that formed the foundation of Taylor's DCF valuation were unreliable for several reasons. Tr. Vol. 8A at 57:1–24. First, he testified that use of a purely historical average for a projection (which Taylor used in the "Trend Case") is incorrect, under accepted valuation principles. *Id.* at 58:1–18; 59:16–24. Second, he testified that use of a "stress test" projection like the Houlihan Downside Case is inappropriate for a DCF valuation, since the projection was prepared as a sensitivity analysis and not for purposes of valuation. *Id.* at 59:25–60:4. Third, he testified that the FTI Case that Taylor created makes inappropriate adjustments to VIS's projections [FN5] and that, functionally, it is another "sensitivity case" (like the Houlihan Downside Case) that is inappropriate to use for valuation purposes. *Id.* at 60:20–61:1.

FN5. Hopkins testified that an adjustment Taylor made to Verizon's incumbent print revenue projection was inappropriate, because the projection Verizon had made was already conservative in that the projection was more pessimistic than industry reports indicated. Tr. Vol. 8A at 61:24–62:8. He also testified that the downward adjustment Taylor made to Verizon's projection of independent market growth was unjustified, because the company had historically experienced strong growth in this segment of its revenue and the company's projections for growth were again more conservative than industry expectations. *Id.* at 62:9–15. Hopkins further testified that, in his opinion, Taylor had misinterpreted some of the electronic commerce numbers that Taylor had rejected in her analysis (and that had resulted in a lower projection for Verizon's electronic commerce revenue). *Id.* at 62:16–18. And finally, Hopkins testified that he did not accept Taylor's view that Idearc would be unable to reduce its bad debt expense as much as Verizon projected it would. *Id.* at 62:19–63:3.

ii. *Taylor's DCF analysis: terminal value*

***7** Hopkins testified that, in her analysis of Idearc's terminal value, Taylor assumed an annual rate of EBITDA decline in perpetuity that is commercially unreasonable and inappropriate in a DCF valuation. *Id.* at 64:1–25. Hopkins testified that no one performing a (contemporaneous) valuation would have assumed such a sharp annual perpetual decline in Idearc's EBITDA, because an analyst would have assumed that management would take steps (possibly drastic steps) to assure that such steep EBITDA declines did not occur. *Id.* at 64:20–25. Here, for example, Idearc had planned for an annual $200 million dividend that could be withdrawn in the event projected revenues did not meet their targets. *Id.* at 65:1–18.

iii. *Taylor's DCF analysis: discount rate*

Hopkins also testified that the discount rate Taylor arrived at was too high for multiple reasons. *Id.* at 65:22–66:3. First, it assumed a capital structure of 44% debt, 56% equity, which, while common in European companies, would not have been appropriate for a U.S. company like Idearc. *Id.* at 66:6–15. Hopkins testified that RH Donnelley, the company most comparable to Idearc, had a capital structure much more heavily weighted toward the debt side, an assumption that analysts would mimic in their calculation of a discount rate. *Id.* at 66:16–25. Second, Taylor's discount rate included a company specific risk premium of 2%. Hopkins testified that not only are company specific risk premiums disfavored as a means for the analyst to improperly insert his or her subjective hindsight, but that application of the company specific risk premium here constitutes a kind of "double counting," which violates standard valuation practice. *Id.* at 67:1–18. Hopkins testified that Taylor double counted, because she had already assumed drastically lower cash flows (by means of the adjustments she made to VIS's projections) than contemporaneous analysts. *Id.* Thus Taylor's model had already accounted for the company-specific risks Idearc faced, and there was no need to add a further "risk premium" in her calculation of a discount rate.

Indeed, it appears to the court that there were multiple instances of double counting that infected both Taylor's DCF analysis and her overall conclusions. For example, some of the same reasons that drove Taylor to apply a company specific risk premium drove her to weight the market multiple method and the comparable transaction method at only 15% each (*i.e.,* the fact that Idearc showed negative growth in revenue relative to its competitors and the fact that the TSA supposedly prevented Idearc from accessing the transactions market). *See, e.g.,* Tr. Vol. 4A at 76:23–77:2, 115:7–116:10. The defendants also pointed out in post-trial briefing that one of the reasons Taylor weighted the market multiple method at 15% was that the companies used in Houlihan Lokey's analysis were not similar enough to Idearc. *See* Defendants' Joint Post–Trial Reply Brief at 16 n. 69 (docket entry 639). However, in its own analysis, Houlihan had already applied a multiple discount to account for this dissimilarity. *Id.; see also* Tr. Vol. 7B at 33:2–37:17. Thus, to apply Houlihan's discounted multiple and then to weight the market multiple method at only 15% constitutes another form of double counting.

***8** At nearly every step in the DCF analysis, Taylor selected inputs that forced Idearc's value lower. From her selection of only the most pessimistic projections of Idearc's future performance, to her reliance on a "commercially unreasonable" terminal value projection and calculation, to her selection of a remarkably high discount rate, the method produced a valuation that is low in the extreme and that implied an incredibly low trading multiple for Idearc. Hopkins testified that merely correcting for the errors in Taylor's discount rate and terminal value calculations would have yielded a DCF value $4.3 billion higher than Taylor's. Tr. Vol. 8A at 68:11–69:7. Thus, these corrections alone would have yielded a DCF valuation range of $9.7–10.6 billion, even before weighting that range and adding to it the weighted results of the market-based valuations.

iv. *Outlier nature of Taylor's DCF valuation*

Hopkins testified that Taylor's calculation of Idearc's value using the DCF method resulted in a significant outlier in relation to her calculations under the market multiple method and the comparable transaction method. Tr. Vol. 8A 55:16–20; DX 507 at 6. Hopkins also testified that typical valuation practice, according to the standard treatise authored by Shannon Pratt, dictates that in such a situation one would normally disregard the outlier. *Id.* at 56:7–23. Another option, which Taylor rejected, would have been to weight the outlier valuation lower than the other, moreconsistent valuations. *Id.* A final option, according to the Pratt treatise, is to inquire further into the model that generated the outlier in order to determine what went wrong in producing such an outlier. *Id.* Taylor testified that this final option describes the approach her report took. Tr. Vol. 4B at 31:18–32:2. In light of Hopkins' testimony that Taylor's DCF valuation relied on generally unsupportable methods and inputs, or unsupportable combinations of methods and inputs, Taylor's testimony that she looked deeply at any potential flaws in her DCF valuation is not credible. Rather than disregarding or assigning low weight to her DCF valuation, Taylor did the opposite. She assigned low weight to the consistent valuations (the market multiple valuation and the comparable transaction valuation).

4. *Market "Misrepresentations" and "Omissions"*

Taylor testified that, while it would be customary for a valuation professional to consider the price of a company's stock publicly traded on an efficient market as a prime indicator of its value, for her work in this case she refused to look at Idearc's stock price because she believed that material information had been withheld from the market. Tr. Vol. 3 at 53:8–17, 56:22–57:4.

The defendants presented evidence regarding the information Idearc disclosed in its Form 10 and Offering Memorandum for its Unsecured Notes. These documents contained comprehensive risk disclosures that were modeled upon the disclosures made by other public directories companies. Tr. Vol. 9A at 99:16–23; 100:10–101:13; 102:25–103:7. The Form 10 and Offering Memorandum contained extensive disclosures about the risks that Idearc would face following the spinoff. They disclosed the general declining usage of print directories. PX 901 at 33 (Form 10); PX 909 at 36–37 (Offering Memorandum). They disclosed the changing technologies and user preferences and uncertainty surrounding whether Idearc would be able to respond adequately to these changes. PX 901 at 32; PX 909 at 36. They disclosed increased and widespread competition from other print directory publishers, including independent directories. PX 901 at 32; PX 909 at 35. They disclosed Idearc's reliance on small and medium-sized businesses. PX 901 at 35; PX 909 at 39. They referred to the fact that a prolonged economic downturn or other events could produce changes in shopping patterns. PX 901 at 36; PX 909 at 40. They disclosed disruptions or turnover among sales representatives. PX 901 at 36; PX 909 at 40.

***9** The defendants also presented evidence about the effects of the Tax Sharing Agreement on Idearc's ability to access the merger and acquisition market. Thomas Wessel ("Wessel"), a tax expert, opined that the TSA permitted Idearc to engage in expansive merger and acquisition activity. Tr. Vol.

6B at 61:15–24. Specifically, he testified that the TSA did not limit the ability of (1) any third party to acquire 100 percent of Idearc's equity without triggering any tax liability pursuant to a Treasury Regulation known as the "Super Safe Harbor," *id.* at 62:6–9, (2) Idearc to acquire any entity for cash, *id.* at 62:18–64:15; *see also* Treasury Reg. § 1.355–7(b)(2), or (3) Idearc to acquire any entity in exchange for up to 49.9 percent of Idearc's outstanding equity, Tr. Vol. 6B at 108:6–16, allowing Idearc to double in size through a merger of equals. Wessel further testified that a transaction that triggered prepayment of Idearc's debt would not jeopardize the status of the Term Loan B or the Unsecured Notes as "securities," as Idearc and Verizon expected the debt to be long-term at the time it was issued. *Id.* at 67:4–68:10. Furthermore, the TSA was publicly filed with the SEC and the court notes that its terms are not opaque or indecipherable by investment professionals.

5. *Court's Conclusions*

Taylor's outlier valuation of Idearc under the DCF method drove her conclusion that Idearc was worth only $8.15 billion on November 17, 2006, the date of the spinoff from Verizon. There is no dispute that Taylor's valuation of Idearc using the DCF method produced an extreme outlier even within her own analysis, *see, e.g.,* DX 507 at 6, compared to the valuations that the market multiple and comparable transactions methods produced. The court is not persuaded that Taylor's DCF valuation is more reliable than these other methods, which showed that Idearc was solvent on November 17, 2006. The court is, however, persuaded by the expert rebuttal of Mark Hopkins, which showed that Taylor's DCF valuation was flawed in significant ways with respect to its most important inputs. The court therefore has no evidence before it to conclude that Idearc was insolvent on November 17, 2006. The only credible evidence before the court of Idearc's value shows that it was solvent on this date. That evidence is found both in Taylor's report and in the following.

D. *Market Evidence of the Value of Idearc on November 17, 2006*

On November 17, 2006, the day of the spinoff, the closing price of Idearc's common stock, as quoted on the NYSE, was $26.25 per share. DX 611 at 2. Idearc's common stock traded on a when-issued basis between November 6, 2006 and November 16, 2006. *Id.; see also* DX 1629. It closed on November 6, 2006 at $25.96, and it traded between $25.80 and $28.15 during the when-issued trading period, *id.,* with average daily trading volume of approximately 1.45 million shares. DX 1629; *see also* Tr. Vol. 8A at 9:13–24 (testimony of Hopkins). Idearc's stock price increased following the spinoff, reaching its highest closing price of $37.66 on May 23, 2007, more than six months after the spinoff. DX 611 at 5. The stock price remained above $24.00 through November 2, 2007. *Id.* at 7. On the date of the spinoff, there were 145,851,862 shares of Idearc common stock issued and outstanding. PX 979 at 1; PX 1092 at 1. Accordingly, the market value of Idearc's equity-that is, the market value of its assets in excess of its liabilities-was $3,828,611,378 on November 17, 2006. Given Idearc's $9.115 billion in outstanding debt, and after subtracting the $100 million in cash on hand, which is included in the company's equity value but is not considered part of the company's total "enterprise value," *see* Tr. Vol. 8A at 11:9–15 (testimony of Hopkins), the total enterprise value of Idearc implied by trading on the NYSE was no less than $12.8 billion.[FN6]

FN6. The court finds it likely that this figure accurately represents the value of Idearc on November 17, 2006. The court remains agnostic about the precise final figure but finds it clear that Idearc's value was at least $12 billion on the date of the spinoff.

E. *Was the Market Misled as to Idearc's True Value?*

***10** The Trustee argued at trial that, while it is normally true that the market price of a company's stock is a reliable guide to value, in this case Verizon made misrepresentations and omissions about the business of Idearc that were material to the stock's value. Tr. Vol. 1A at 6:5–19. These misrepresentations and omissions, the Trustee urges, render the market price of Idearc's stock an unreliable guide to its value. *Id.*

The court will thus review the voluminous record the Trustee compiled, in order to determine whether material information was withheld from the market or material misrepresentations were made to the market. For ease of presentation, these items are divided into two separate categories: (1) information the Trustee alleges was withheld from the market, but that the court has found was actually disclosed; and (2) information that was apparently withheld from the market, which the Trustee argues was material, but that the court finds is immaterial to Idearc's value.

1. *Information Alleged to Have Been Withheld from the Market That Was Actually Disclosed*

The following are items of material information that the Trustee argued were not disclosed to the market and that therefore render Idearc's stock price an unreliable guide to its value. The court finds, based on extensive evidence presented by the defendants, that each of these items of information was available to the market.

a. Idearc's historical and projected future performance: dying "harvest business" or stable "cash cow"?

The Trustee argued that Verizon promoted Idearc to the market as a company with significant growth potential, when Verizon knew that Idearc was actually a dying business that would only continue to decline. *Id.* at 6:20–7:24. The Trustee attempted to paint a distinction between a "growth company" and a "harvest business" (*i.e.,* a dying business whose most efficient use is to be sold off in parts for cash as it continues to decline), and to argue that key executives at Verizon, including CEO Ivan Seidenberg ("Seidenberg") and VIS President Kathy Harless ("Harless"), secretly believed (but did not disclose) that VIS was a dying harvest business. *Id.*

In contrast, the defendants presented ample evidence that Idearc was a mature, stable business, capable of generating significant cash flow (what it termed a "cash cow," *see, e.g.,* Tr. Vol. 9B at 20:7–10) and that, for this reason, it was an attractive business to investors. The defendants also attempted to show that this picture of Idearc's business and prospects was both widely available to the market and was consistent with what top executives at Verizon believed and disclosed to the market at or around the time of the spinoff.

At the time of the spinoff, Verizon's Information Services division was the second-largest directories business in the United States, publishing more than 1,200 directories (or "books") in 35 states and the District of Columbia. DX 416 at 6, 16; PX 901 at 79. Its electronic yellow pages business, known as "Superpages.com," was the leading Internet yellow pages in the country by market share. DX 416 at 16, 18; PX 901 at 16–17, 78–79. Idearc was the incumbent publisher in 316 markets in the legacy GTE and Bell Atlantic regions, and also an independent publisher in 42 markets. It had a presence in 81 of the top 100 telecommunications markets across the United States and had a market share of at least 72 percent in its top 15 markets. DX 416 at 16; PX 901 at 79.

***11** VIS, which was the name that Verizon used to describe the directories business in segment reporting in Securities and Exchange Commission ("SEC") filings, was a stable generator of large cash flows, considered by Verizon's senior management to be a "cash cow." Tr. Vol. 9B at 20:7–10 (testimony of CFO Doreen Toben ("Toben")); Tr. Vol. 5B at 86:9–18 (testimony of VIS officer Dee Jones ("Jones")).

VIS historically had generated more than $3.4 billion in annual operating revenue. DX 525 at 184–85. For 2006, pro forma "LTM 6/30/06" revenue (*i.e.,* revenue for the "last twelve months ending June 30, 2006") was $3.256 billion. DX 416 at 6; DX 313 at 41; PX 901 at 51. VIS had adjusted EBITDA of $1.7 billion in 2005. DX 416 at 50; DX 313 at 41. VIS's 2006 EBITDA, the year of the spinoff, was estimated in the financing model to be approximately $1 .559 billion. DX 416 at 57; DX 314 at 8. Historically, VIS's EBITDA margins were approximately 50 percent. DX 416 at 50; DX 313 at 24.

Seidenberg testified about the historical performance of VIS, as reported in Verizon's annual SEC 10–K filings. Describing the performance of the business in 2003, Seidenberg testified that:

> The way I look at this is from the CEO's perspective. You have a top line of 3.763 billion dollars, and then you have a segment income after all the taxes and expenses are taken care of-an income of 1.128 billion which basically says about a third of your business revenues show up in terms of [the] bottom line. That's an extraordinarily powerful business ... [I]t's very, very powerful.

Tr. Vol. 6A at 41:13–21.

Although VIS generated significant free cash flow, Verizon's management did not believe the division was fairly valued by investors as a component of Verizon's stock price. At a time when standalone directories companies were trading at as much as 10 times EBITDA, Verizon was trading at only 5 to 5.5 times EBITDA. Tr. Vol. 9B at 26:16–19. Seidenberg testified that investors viewed Verizon's directories business "as having less value because [Verizon] owned it than if it was outside the company." Tr. Vol. 6A at 53:13–15. As a result, the investment bankers advising Verizon were of the view that "Verizon, plus Directories, as two separate companies, would be more valuable if investors could hold them that way than as one stock." Tr. Vol. 7A at 86:22–87:3; Vol. 9B at 26:19–23.

In 2005 and 2006, there was significant investor interest in directories businesses. Tr. Vol. 7A at 80:23–81:3; 81:18–22; Vol. 8B at 97:8–13. Jennifer Nason ("Nason"), an executive at JP Morgan, testified that investors were buying up directories businesses and there was substantial interest in their steady cash flow. Tr. Vol. 7A at 80:23–81:3. Jonathan Yourkoski ("Yourkoski"), a Managing Director at Morgan Stanley, gave similar testimony concerning investor interest in directories businesses, stating that "[t]he capital markets were very receptive to directories companies, both the debt and equity portions of those markets." Tr. Vol. 9A at 9:7–9.

***12** The directories industry generated approximately $15 billion in revenue in 2005. DX 450 at 4. Industry analysts such as the Kelsey Group forecasted continued year-over-year growth in the industry, with revenue gains for independent directories and small declines for incumbent print directories. DX 416 at 25; PX 1060 at 74, 151. According to a memorandum submitted to Morgan Stanley's credit committee in connection with its investment in Idearc's debt, "[d]irectory advertising is often the primary form of paid advertising used by small- and medium-sized businesses due to its low cost and broad demographic distribution." DX 450 at 4. Continued demand from small and medium-sized businesses, coupled with substantial renewal rates-which for Verizon were approximately 86 percent-caused at least some investors to conclude that the revenue stream generated by incumbent directories businesses would remain stable. *Id.* at 12.

Between 2002 and 2006, there were numerous mergers and acquisitions in the directories industry. Among other transactions, in 2002, RH Donnelley bought the Sprint directories business at an 8 .6 times EBITDA multiple, and private equity investors the Carlyle Group and Welsh Carson bought Qwest Dex at a 7.8 times EBITDA multiple; in 2004, private equity investor Bain Capital acquired Verizon's Canadian directories business at close to a 13 times EBITDA multiple; in 2005, Yell bought Transwestern at a 12.6 times EBITDA multiple; and, in 2005, RH Donnelley acquired Dex Media at approximately a 10.9 times EBITDA multiple. PX 27 at 31; DX 330 at 43. Moreover, the EBITDA multiples for these and other directories transactions ranged from 7.4 times EBITDA to 14.1 times EBITDA, and were increasing over time. PX 27 at 31. Private equity firms-referred to by investment bankers as financial sponsors-exhibited significant interest in directories businesses because of their high and stable cash flow. DX 446 at 5; Tr. Vol. 9A at 16:9–19.

On August 25, 2005, Deutsche Bank Securities Inc. published a research report by equity analyst Paul Ginocchio entitled, "Wall Street's view of the [Yellow Pages] Industry, which stated, "Love the YP industry: RHD [RH Donnelley] and DEX [Dex] have been our best two stock picks in the last year (out of 21 stocks covered)-still more upside to go." DX 1856 at 3–4. Under the heading "Why Yellow Pages stocks are 'working,' " the analyst report touted the steady generation of free cash flow by yellow pages businesses and noted that Deutsche Bank's two global directories stock indices had risen 9 percent and 10.5 percent year to date versus only 3.6 percent growth of the S & P 500. DX 1856 at 23–24, 27.

According to a separate Morgan Stanley analysis, which was presented to Verizon in November 2005, the price of Dex's common stock had traded up 42 percent between July 2004 and November 2005, and the price of RH Donnelley's common stock had increased by 50 percent during that same time period. DX 446 at 5. Morgan Stanley reported that "[i]nvestors are favoring directories ... companies due to predictable free cash flow and attractive yields." *Id.* In late August 2006, Morgan Stanley again reported that "[i]nvestors continue to be attracted to high margins and modest capital requirements characterizing the [directories] business." DX 448 at 4; Tr. Vol. 7B at 65:21–66:3; Tr. Vol. 8B at 97:10–13; DX 437 at 4.

***13** In October 2005, RH Donnelley announced that it had reached an agreement to purchase Dex Media for approximately $4.2 billion. DX 446 at 12. To finance the transaction, RH Donnelley borrowed $2.3 billion, leaving the combined company with approximately $10.9 billion in outstanding debt. PX 1333 at 130; DX 1417 at 59. This debt represented approximately 7 times RH Donnelley's projected 2006 EBITDA. DX 446 at 12; DX 776 at 8.

The Idearc spinoff resulted in significant demand for Idearc's debt securities. Each tranche of the financing-the $1.515 billion Term Loan A and the $250 million Revolver; the $4.750 billion Term Loan B; and the Unsecured Notes, the most junior tranche of debt in the capital structure-was oversubscribed by a substantial amount. The Term Loan A and Revolver were oversubscribed by 1.66 times, meaning that there were requests to finance 66 percent more of the Term Loan A and Revolver than was necessary to complete the transaction. PX 973; DX 382; Tr. Vol. 9B at 117:1–23; Vol. 10B at 23:18–25:10. The Term Loan B was oversubscribed by 1.37 times, while the Unsecured Notes were oversubscribed by 3.5 times. Tr. Vol. 10B at 24:2–25:10; Vol. 10A at 41:24–43:13. As a result of the significant demand for Idearc debt, the yield on the debt instruments (*i.e.,* their interest rate) was even lower than the bankers advising Verizon had anticipated. Tr. Vol. 9B at 118:6–10.

On April 10, 2007, Idearc filed a registration statement with the SEC related to the $2.85 billion Unsecured Notes. PX 1196. Beginning in early June 2007, after the registration statement was declared effective, and until November 2007, the Unsecured Notes traded at, above, or near par, reflecting investor confidence in Idearc's debt. DX 612 at 1–4; Tr. Vol. 10A at 43:14–44:8.

There are, of course, significant questions that remain, notably whether Idearc was actually in much worse position than other directories companies but, by virtue of alleged misrepresentations and omissions, was unjustifiably swept up in a wave of general investor confidence in the apparent stability of the directories industry. To answer this question, it is necessary to look to whether Verizon misrepresented to investors either the historical or projected performance of Idearc. Verizon's annual SEC filings on Form 10–K and Idearc's Form 10 reflected that VIS had declining revenues from 2001 through 2006. DX 525 at 184–85; PX 901 at 24, 51. Industry analysts, including the Kelsey Group and Simba, predicted further declines for the incumbent print business. PX 1060 at 219; Tr. Vol. 4B at 54:5–25; 56:7–58:2. Many public equity analysts also predicted continued revenue declines for VIS. Tr. Vol. 4B at 111:17–113:12; DX 1855 at 5; Tr. Vol. 9B at 40:12–41:5.

No equity investor or public-side debt investor had access to Idearc's financial projections. Tr. Vol. 9B at 89:13–19. They were not included in the Form 10 that Idearc filed with the SEC and were not included in any of the presentations that were made to public-side lenders. Tr. Vol. 9A at 110:16–111:3; PX 901. Accordingly, the only widely disseminated public information available to equity and public-side debt investors showed actual, historical revenue declines (from Verizon's public SEC filings) and projected future revenue declines (published by third-party analysts). DX 488 at 36; Tr. Vol. 9B at 94:23–95:8.

***14** The management forecasts that VIS made available to private-side investors did not reflect substantial increases in revenue or free cash flow. The forecasts projected essentially flat EBITDA from 2006 through 2010–decreasing from $1.559 billion in 2006 to $1.555 billion in 2007 and in 2008, and then increasing slightly to $1.566 and $1.574 billion in 2009 and 2010. DX 416 at 57; DX 314 at 8; DX 494 at 5. The forecast of Idearc's free cash flow also reflected declines, decreasing from a projected $459 million in 2006, to $432 million in 2007, to $425 million in 2008 and 2009, before increasingly slightly to $437 million in 2010. DX 416 at 59. The Idearc forecasts were provided only to private-side lenders who agreed not to trade in Idearc securities in the public markets, and to two rating agencies. Tr. Vol. 4B at 41:4–42:5.

The Trustee did not produce evidence of any investor that relied upon Idearc's financial forecasts, which had projected flat EBITDA and free cash flow results, in making a decision to invest in Idearc debt or equity securities. The Trustee also failed to introduce any evidence that supported its assertion that investors were only willing to purchase Idearc debt and equity, because they believed Idearc would have significant revenue and EBITDA growth.

Morgan Stanley, Citibank, and JP Morgan, three private-side investors that received Idearc management's financial forecasts, prepared their own projections for revenue, EBITDA, and free cash flow, rather than simply relying on the forecasts provided by Idearc's management.

Morgan Stanley's credit committee considered a “base case” of financial projections done by that firm, *see* Tr. Vol. 9A at 38:22–39:9, that estimated a decline in EBITDA from $1.558 billion in 2006 to $1.320 billion in 2013. DX 450 at 15. Morgan Stanley also forecasted a decline in free cash flow from $406 million to $360 million during the same time period. DX 450 at 15; *see also id.* at 13. Nevertheless, Morgan Stanley concluded that, on the date of the spinoff, Idearc would have a total enterprise value of $12.5 billion and an equity value of approximately $3.4 billion. DX 450 at 4.

Citibank's base case estimated year-over-year revenue declines, as well as declining EBITDA margins. DX 745 at 11. Nevertheless, Citibank concluded that Idearc had a total enterprise value of $11.7 billion to $14.4 billion. *Id.* at 19.

JP Morgan created a downside case that estimated annual declines in net revenue ranging from negative 4.2 percent to negative 2 percent and adjusted EBITDA falling from an estimated $1.559 billion in 2006 to $1.244 billion in 2014. DX 422 at 83.

Goldman Sachs similarly prepared a downside forecast reflecting that EBITDA would decline annually between 2006 and 2014 by percentages ranging from 0.2 percent (2009) to 1.3 percent (2014). PX 803 at 21. Goldman Sachs' downside case reflected an estimated decline in free cash flow from $423.8 million in 2006 to $397.5 million in 2014. *Id.* Goldman Sachs calculated the enterprise value of Idearc on the date of the spinoff to be $12.465 billion, with an equity value of approximately $3.45 billion. *Id.* at 5; Tr. Vol. 8B at 106:10–23. Goldman Sachs' credit committee approved a $200 million commitment to the Term Loan A and the Revolver, recognizing, among other things, Idearc's "strong financial profile with significant free cash flow." PX 803 at 11; Tr. Vol. 8B at 103:3–4.

***15** Seidenberg also testified about his belief that Idearc would appeal to a different type of investor from those who held Verizon common stock. In his view, Idearc would appeal to investors that were interested in stable cash flow and a large dividend. Tr. Vol. 6A at 73:11–18.

The defendants further presented evidence that indicates that, while VIS had not been growing, Verizon and VIS management believed at the time of the spinoff that VIS was a valuable, steady producer of EBITDA and free cash flow and that it could prosper as an independent company. The Trustee's allegations that Seidenberg and Harless believed that the directories business was in "harvest" mode, and that Seidenberg and Harless withheld this information from prospective investors, are unsupported by the evidence.

The evidence introduced during the Phase I trial indicates that, prior to the spinoff, the future leadership of Idearc believed that VIS had not been able to reinvest into its business the substantial free cash flow that it had generated. Harless testified that VIS had been unable to invest in its sales organization, in the print product, or in advertising in the years preceding the spinoff, and further that Idearc intended to make such investments following the spinoff. Tr. Vol. 9A at 59:15–60:10. Harless also testified that, during Idearc "roadshows" (investment presentations), she communicated to prospective investors Verizon's historical practice of utilizing the cash flow generated by the directories business to invest in other Verizon lines of business that were higher priorities to the overall company (such as wireless and broadband), rather than investing the cash flow generated by the directories business back into the business itself. *Id.* at 58:2–7; DX 1730.

The Trustee introduced an e-mail, *see* PX 1161, that Harless sent to members of the Idearc Board in January 2007, shortly after the spinoff, which memorialized questions that Harless had received from investors and her responses thereto. In response to questions about whether Idearc could cut costs further, Harless's e-mail stated that "No–We have been in Harvest mode for three years." PX 1161. Questioned about this e-mail, Harless explained that, "number one, I'm referring back to when we were in Verizon, and we were cutting costs and not investing back into the directories business. Verizon had other priorities in which they were investing the dollars." Tr. Vol. 9A at 69:13–17. Although the Trustee suggested that this e-mail reflects the internal views of Seidenberg and Harless, and that those views were withheld from the investment community, Harless testified that this e-mail reflected her actual statements to investors in various meetings that occurred in January 2007. *Id.* at 68:18–69:2.

The Trustee also alleged that, in July 2005, Diercksen and others entered into a fraudulent scheme to represent falsely that VIS would achieve a 2 percent growth in print revenues. Tr. Vol. 1A at 18:1–9, 19:3–18. The Trustee contended that, with this false projection of revenue growth, Verizon could maintain that its directories business had a value of $13 billion, which purportedly was necessary to support $9 billion in deleveraging through the spinoff. There was no credible evidence that any such scheme occurred.

***16** The Trustee repeatedly sought to elicit testimony that VIS's revenue and EBITDA forecasts were knowingly false. To establish this, the

Trustee sought to elicit testimony that the valuation ranges for the directories business, as presented to the Verizon Board in a November 2005 "Strategic Update," *see* PX 57, were based on unsupportably optimistic forecasts contained in the VIS 2006–2010 Plan of Record, *see* PX 100. The Trustee alleged that the $10.5 billion to $15 billion DCF valuation range presented to the Verizon Board was premised on 2 percent annual growth for print business revenues. Tr. Vol. 1A at 94:18–22, 97:3–6, 97:11–17; *but see* PX 100 at 54 (showing that the 2006–2010 Plan of Record only projected year-over-year overall revenue growth of 2 percent in 2009). The Strategic Update itself, however, makes clear that the valuation range was based on the previous five-year Plan of Record forecasts (2005–2009) which projected a decline, not growth, in incumbent print revenue. PX 57 at 8. Moreover, John Fitzgerald ("Fitzgerald"), who was responsible for the valuation section of the Strategic Update, testified that the primary input into a DCF valuation is the perpetual growth rate for free cash flow, rather than changes in revenue in any single year. Tr. Vol. 7A at 41:14–22; 42:9–43:13.

The Trustee also claimed that forecasts in the VIS financing model were knowingly false. Tr. Vol. 1A at 8:9–10. The evidence did not support this contention. Among other things, the evidence established that, in order to forecast Idearc's performance following the spinoff, it was necessary for VIS to develop a business plan that reflected projected financial performance of the directories business as a separate, stand-alone entity, *i.e.,* wholly separated from Verizon. This necessarily required VIS to develop financial assumptions different from those when VIS was a wholly owned subsidiary of Verizon. Then–VIS Director of Financial Planning Jones, who had primary responsibility for the budgeting and planning process, testified that VIS "took [its] normal course five-year strategic plan, and then it was refined and adjusted to reflect the stand-alone aspect of it versus it being a subsidiary of Verizon." Tr. Vol. 5B at 88:12–15; 92:2–94:3. Jones testified that this forecast was prepared based on input from VIS President Harless and VIS chief financial officer Andy Coticchio ("Coticchio"), and with consideration of the views of Verizon's corporate finance department and McKinsey. *Id.* at 91:19–103:19, 107:1–18. The financing model also reflected actions that Idearc management intended to adopt in response to industry conditions.

The financing model included estimated expenses associated with Idearc's assumption of various responsibilities that had previously been performed by Verizon. *Id.* at 102:10–16. The goal, as Jones testified, was to develop "a set of forecasts that was achievable and realistic and supportable." *Id.* at 104:11–13.

***17** Numerous Verizon and Idearc executives testified credibly to their belief in the solvency of Idearc on the date of the spinoff, contradicting the Trustee's attempts to show that Verizon and Idearc's upper-level management knew that Idearc was a dying, "harvest" business. *Id.* at 108:11–14; 113:3–7 (testimony of Jones); Vol. 9A at 64:6–13, 20–25 (testimony of Harless); Vol. 9B at 54:24–55:4 (testimony of Coticchio); Vol. 8B at 64:4–10 (testimony of Mueller, Idearc's post-spinoff Chairman of the Board).

Seidenberg, the chief executive officer of Verizon on the date of the spinoff, testified that he "supported and agreed with the opinion of all the experts that came in and showed us the net result of all the work they did. So I agreed with the valuation number of 12.5 [billion dollars]." Tr. Vol. 6A at 72:7–13.

Toben, the chief financial officer of Verizon on the date of the spinoff, testified that she believed Idearc's total enterprise value to be 7.5 times its estimated 2006 EBITDA or approximately $12.1 billion. Tr. Vol. 9B at 43:24–44:3.

Jack Mueller, the Chairman of the Board of Idearc as of the spinoff, who had extensive experience in the telecommunications industry and spent hundreds of hours studying Idearc's business, its historical performance, its business model, and meeting with management in advance of the spinoff, testified to his belief that the "enterprise value of the to be spun Idearc" was "at least" "[$] 11.5 to [$] 12.5 billion." Tr. Vol. 8B at 68:10–12, 17–18; 58:11–59:23.

Harless, Idearc's chief executive officer at the time of the spinoff, testified that she believed that "the implied equity value[ ] of between [$]2.6 billion and $4.1 billion" (which corresponds to a total enterprise value for Idearc of between $11.7 billion and $13.2 billion) was "very representative of the business ." Tr. Vol. 9A at 71:25–72:10. Harless further testified that she believed that the value of Idearc's assets exceeded the value of its debts on November 17, 2006, and that she would not have agreed to be Idearc's CEO had she believed otherwise. *Id.* at 72:16–73:1.

Coticchio, Idearc's chief financial officer as of the spinoff, testified that he executed the Solvency Certificates associated with the Credit Agreement for the bank financing, *see* PX 1058 and the Unsecured Notes, *see* DX 652b, and that he believed the representations contained in the Solvency Certificates to be accurate on the date of their execution, November 17, 2006. Tr. Vol. 9B at 65:14–66:15, 68:7–69:24. The Solvency Certificate includes (among other things) the representation that "the fair value of the assets of [Idearc], at a fair valuation, will exceed its debts and liabilities, subordinated, contingent or otherwise." PX 1058 at 2.

Jones, the Executive Director of Financial Planning and Analysis at the time of the spinoff (and later chief financial officer of Idearc and its successor, SuperMedia), testified that he believed Idearc was solvent on the date of the spinoff and that Idearc could pay its debts as they became due. Tr. Vol. 5B at 133:3–5, 133:15–17. Jones additionally testified that he received approximately 80,000 shares in Idearc and that, other than to cover owed taxes, he held all of these shares up through Idearc's bankruptcy. *Id.* at 132:3–17.

***18** The court finds this testimony credible and that the evidence contradicts the picture the Trustee attempted to paint of a conspiracy among high-level Verizon and Idearc executives to present to the market a false picture of Idearc's historical and future prospects.

b. Specific financial numbers

i. *Revenue declines in urban markets*

The Trustee alleged that Verizon's yellow pages business "had been suffering a double digit decline" in "the major urban markets" and that this decline was not "shared with the market place." Tr. Vol. 1A at 8:16–23; 20:6–9. According to the Trustee, these undisclosed declines were the "canary in the mineshaft," because major urban markets were more likely to experience Internet competition and an "intrusion by Google and Yahoo!." *Id.* at 8:9–9:10. The evidence, however, demonstrated that investors knew that VIS had experienced greater revenue declines in its major urban markets.

Bear Stearns and JP Morgan were provided with detailed information about declining revenue in urban markets, including historical revenue figures on a book-bybook basis. Tr. Vol. 7A at 94:20–97:7; Vol. 7B at 87:8–88:16. VIS management held a two-day meeting in Dallas on March 22–23, 2006, which was attended by representatives from JP Morgan, Bear Stearns, and the law firm Debevoise & Plimpton. During that meeting VIS's senior management reviewed historical results region-by-region, including year-over-year performance in individual urban markets. PX 233b; Tr. Vol. 9A at 95:23–96:25. VIS management met again with the JP Morgan and Bear Stearns advisory and financing teams on April 18, 2006, during which they reviewed the same type of historical information. Tr. Vol. 9B at 107:25–108:15. Historical and projected performance on a book-by-book basis were included in the electronic data room that Idearc made available to the investment banks and their outside law firm, Cravath, Swaine & Moore. *Id.* at 93:18–94:7; PX 2008; PX 2009.

The JP Morgan credit committee memo demonstrated a full awareness of historical revenue declines in major urban markets. For example, the memo described declining print revenue in Manhattan from $105.5 million in 2004 to $85.3 million in 2005 to $64.3 million in 2006, and indicated that year-over-year declines were 9.7 percent, 19.2 percent, and 24.6 percent respectively in the years 2004–2006. DX 422 at 106. That credit memo further discussed print revenue declining in Boston from $145.8 million in 2004, to $136.2 million in 2005, to $126.4 million in 2006, and indicated that the year-over-year declines in print revenue were 5.6 percent, 6.6 percent, and 7.2 percent respectively in the years 2004–2006. *Id.* JP Morgan's credit committee memo states that Verizon had provided JP Morgan with projections for 2006 to 2010 that were "built up on a directory by directory basis" and that predicted continued declines in books like Manhattan (negative 18.5 percent CAGR FN7 for 2005–2010) and Boston. *Id.* at 72.

FN7. CAGR is "compound annual growth rate."

***19** Verizon provided Houlihan Lokey with historical revenue information on a book-by-book basis in connection with its due diligence for its solvency opinion. Tr. Vol. 7B at 20:13–22. Morgan Stanley received similar information. Morgan Stanley's files included historical market-by-market revenue information on both an as-published and an amortized basis, further broken down by national and local print. DX 936; DX 937; DX 939. Yourkoski testified that Morgan Stanley received "historical, as well as projected, results for the national print revenue, I believe local print revenue as well as book-by-book or cluster-by-cluster information for the directories business." Tr. Vol. 9A at 32:4–9. These materials included the year-overyear results for the very northeast urban markets that the Trustee contended were not disclosed.

In addition, information concerning broadband penetration, competition from independent publishers, and the general decline in yellow pages revenue in the northeast urban markets was widely known at the time of the spinoff. DX 563 at 3; DX 491 at 4–5; DX 361 at 4. These issues were discussed in industry reports published by entities such as Simba and the Kelsey Group. DX 842 at 3. They were discussed in equity analyst reports. DX 1725 at 26; DX 510 at 33; DX 822 at 3. They were also identified as "risk factors" in Idearc's Form 10 and in the Offering Memorandum for the Unsecured Notes. PX 901 at 32, 36, 63; PX 909 at 35, 40–41, 62.

ii. *Difference in profit margins between electronic and print business*

The Trustee's valuation expert, Taylor, testified that, in reaching her opinion that Idearc's value from operations was $7.5 billion to $8.8 billion, she disregarded the price of Idearc's common stock as traded on the NYSE and under-weighted the two other leading market-based valuation methodologies (the comparable transaction and market multiple methods). Taylor testified that she did so based on her opinion that the market price of Idearc was inflated because Verizon concealed material nonpublic information about, among other things, the difference in profit margins between VIS's incumbent print business and its electronic (Internet) business. Tr. Vol. 4A at 9:7–18:3. Taylor testified that this was a "very important issue," that she had "scoured the record," and that there was no evidence of any disclosure that EBITDA margins on electronic business were lower than the EBITDA margins on the incumbent print business. Tr. Vol. 4B at 63:9–64:15; 64:17–22; 65:1–5.

The evidence at trial strongly contradicted Taylor's testimony on this point. Citibank's credit committee memo stated that "[i]ncumbent print directories traditionally enjoy[ ] low–50% EBITDA margin, while independent print and internet have achieved high–10% margin and low–20% margin, respective [ly]." DX 745 at 11. The memo additionally stated that Idearc's future chief financial officer Coticchio "mentioned that the Company expects margins of independent print and internet to improve to high–20% and approximately 30%, respectively." *Id.*

***20** Wachovia's credit committee memo stated that incumbent print margins are currently "Low 50%" but projected to be "Mid 50%"; Internet margins are currently "Mid 20%" and expected to grow to "High 30%"; and independent print margins are currently "High Teens %" and forecast to grow to "Upper 20%." DX 491 at 4.

The Royal Bank of Scotland credit memo stated that the growth of the Internet and independent print businesses undercut overall EBITDA margins because they were lower margin businesses and that "the impact on EBITDA is magnified as growth segments generate lower margins (c.20%) versus the c. 50% margins of the incumbent directories business." Tr. Vol. 4B at 72:22–73:21.

BlackRock's credit memo stated that "internet has lower margins than print directories." DX 361 at 4.

An Idearc presentation to the rating agency Moody's states that "independent margins expected to move toward[ ] target levels of 25%–30% (Yellow book is 24%) over the plan period. (2006–18% overall)." "Internet margins expected to continue to improve over the plan period to high 30's low 40's (2006 in the mid 20's)." DX 2392 at 12; Tr. Vol. 4B at 79:2–14.

A Deutsche Bank equity analyst report dated November 27, 2006, 10 days after the spinoff, stated that "[i]ncumbent directory EBITDA margins are in the low 50s percent range, independent margins are in the mid-teens and expected by management to get to the high 20s, and online margins in the mid 20s but expected by management to get to the high 30s." DX 510 at 4.

On cross-examination, Taylor was unable to offer any credible explanation for her failure to locate any of these disclosures.

iii. *The "secular shift"*

Taylor also testified that investors were unaware either that Verizon's directories business was undergoing a "secular change" or that Seidenberg believed that the business was supposedly in "harvest mode" and therefore needed to be sold off. Tr. Vol. 4A at 9:20–10:2.

The evidence demonstrated that investors were aware that VIS, as well as other incumbent directories businesses, was undergoing a secular change. In October 2004, Seidenberg stated in a Verizon quarterly earnings call that Verizon's directories business was facing "secular" change, comparing VIS to Verizon's traditional landline telephone business. Seidenberg also disclosed that print revenue-as reflected in Verizon's publicly reported financial statements, which disclosed VIS financial performance as a separate segment-was declining. DX 2354 at 31.

Documents introduced at trial from various banks also reflected a broad awareness that the directories business was experiencing "secular" change. Citibank's credit memo, for example, states that "[t]otal revenue growth has been slowly declining in recent years due to a secular decline in print directory demand." DX 745 at 10. A December 2005 equity analyst report published by the RBC Capital Markets stated that "VIS ... is experiencing a secular revenue decline," particularly "a secular decline in print directory usage ." PX 89 at 2–3; Tr. Vol. 5A at 11:20–12:3.

21** More generally, the competitive pressures facing incumbent directories businesses were widely discussed prior to November 2006. In an August 2005 report on Wall Street's view of the Yellow Pages industry, Deutsche Bank equity analyst Paul Ginocchio stated that "Independent competition is ***the number one concern of directory shareholders, versus non-holders whose biggest concern is the Internet." DX 1856 at 9. The Kelsey Group predicted declining revenues for the incumbent print industry based on the competitive pressures from the Internet and independent publishers. DX 842 at 3. The Trustee's assertions that investors were unaware (1) that the directories business was facing "secular change," (2) of Seidenberg's views of that issue, or (3) that incumbent print revenue was declining in the face of competitive threats, were refuted by this evidence. *See also* PX 1161, Tr. Vol. 9A at 68:18–69:2; DX 1730 at 7; Tr. Vol. 9A at 58:19–60:4.

In its opening statement, the Trustee claimed that an e-mail, *see* PX 121, from Seidenberg to Toben and Diercksen, in which Seidenberg provided feedback on a proposed work plan from McKinsey, demonstrated that Seidenberg believed that VIS's print business should be sold off for parts and that its leading electronic business was worthless. Tr. Vol. 1A at 14:18–15:19. Seidenberg testified at length about this e-mail, explaining that it reflected his perception that the directories business was undergoing a transformation similar to that experienced in the traditional telephone business. Tr. Vol. 6A at 62:9–15. He testified that his use of the term "secular change" reflected his perception of competition from "print businesses [that were] being established inside the territories where we were operating our own businesses"-*i.e.,* a reference to competition from independent publishers-as well as the impact of the Internet. *Id.* at 63:3–12. Seidenberg further testified that, prior to November 2006, these issues were frequently discussed by him and others at "conferences, external conferences and analyst meetings." *Id.* at 63:19–20.

Seidenberg explained his reference in the e-mail to "a new business model separate from Verizon" as follows:

> That's a summation of a complicated problem into a couple of ideas. So when you think about it, every new print company that came into existence to compete with Verizon came in with lower margins. They cut prices. They established a very different model for the business than we had. So my view is that a spun-out VIS would be able to take actions to invest in new product, perhaps cut pricing if that's what they needed to do, perhaps adjust their cost structure if that's what they needed to do and actually behave much more like a separately positioned independent public company much the same way that we did to ourselves in our telephone books ...
>
> So in the longer term I thought that allowing the business to pivot to a public company and then create a new business from where we started was a good answer. And the other obvious point to me was a spun-out VIS would have been the largest independent print business in the industry at that time. So I think it would have commanded a lot of attention and would have been able to drive strategies around what I thought was ripe to unfold.

***22** Tr. Vol. 6A at 64:8–19; 64:25–65:7.

Seidenberg's observations about how a private equity firm might manage Verizon's directories business (if a private equity firm were to acquire it) by slashing costs did not constitute a recommendation that VIS should do the same. On the contrary, Seidenberg testified that he believed that an independent VIS would follow the approach taken in the telephone industry-"[w]e ended up with mergers, consolidation. Consolidation created value, and I think this was something that I was interested in pursuing here in the VIS business ." Tr. Vol. 6A at 62:15–18.

The Trustee also suggested that Verizon had failed to disclose that it was experiencing secular decline more rapidly than its competitors. Tr. Vol. 10B at 6:13–14. The internal analyses by the institutions that extended loans to Idearc or purchased Idearc debt in connection with the spinoff reflect a pervasive awareness that VIS had experienced greater quarter-over-quarter and year-over-year declines in revenues than its competitors. A Morgan Stanley presentation dated August 29, 2006, for example, included a table entitled "Directories Year over Year Revenue Growth" that shows, on a quarter-by-quarter basis from 2004 through the second quarter of 2006, the revenue growth numbers for VIS, AT & T, BellSouth, Dex, and RH Donnelley. DX 448 at 12. In each quarter, VIS had greater revenue declines than each of its competitors. The same page of that presentation contained another table reflecting declines in EBITDA margins on a quarter-by-quarter basis. Again, VIS's margins were generally lower than those of its competitors. *Id.* Morgan Stanley identified "Company Releases" as the source for these figures. *Id.*

Documents prepared by JP Morgan and Bear Stearns demonstrated that these investment banks understood how VIS's revenue declines compared to its competitors. A November 28, 2005 JP Morgan and Bear Stearns presentation contained a series of tables that analyze estimated revenue growth and EBITDA growth for the period between 2005 and 2007. DX 387 at 17. By these financial metrics, VIS was performing more poorly than Dex, RH Donnelley, BellSouth, and SBC. *Id.* The JP Morgan and Bear Stearns documents identified company filings and Wall Street research as the source of this information. *Id.*

c. The nature of the tax sharing agreement

Verizon structured the Idearc spinoff to qualify as a tax-free transaction under § 355 and other sections of the Internal Revenue Code. PX 901 at 15; PX 1142 at 28. Verizon obtained a ruling from the IRS that the transaction would meet certain requirements necessary to qualify for tax-free treatment, and Verizon obtained an opinion letter from the law firm Skadden Arps Slate Meagher & Flom, its outside tax counsel, with respect to the tax-free treatment of those aspects of the transaction not addressed by the IRS ruling. Tr. Vol. 6B at 9:3–6; DX 543 at 5–18; Tr. Vol. 6B at 9:7; PX 1087 at 1–14.

***23** As part of the spinoff Verizon and Idearc executed a Tax Sharing Agreement that allocated tax responsibilities between the two entities and that was intended to protect the tax-free status of the spinoff. PX 1068 at 7–9. In its opening statement, the Trustee said it would prove that Verizon engaged in a "false tax scheme" and that the TSA was "onerous" and "basically tied the hands of Idearc." Tr. Vol. 1A at 10:2; 10:24–25. The Trustee also contended that, by calling the agreement a "Tax Sharing Agreement" (rather than, for example, a "Tax Indemnity Agreement"), Verizon concealed Idearc's obligation to indemnify Verizon for any post-transaction conduct by Idearc that might cause the transaction to become taxable. *Id.* at 23:1–4. The Trustee additionally asserted, through its valuation expert Taylor, that the TSA reduced the marketability of Idearc and created a contingent tax liability that reduced Idearc's value. The evidence admitted during the Phase I trial did not support these contentions.

A draft of the TSA was attached as an exhibit to Idearc's Form 10 Amendment No. 4 that was filed with the SEC on October 26, 2006. DX 564 at 74–86; PX 901 at 4; Tr. Vol. 9A at 115:21–24. In addition, the final executed copy of the TSA was filed with the SEC on November 21, 2006. Tr. Vol. 4B at 42:23–43:4; PX 1068 at 1, 13–14. The Form 10 described the TSA and contained extensive risk factors associated with it. PX 901 at 4, 21–22, 26–27, 33, 38–39, 47, 115, 122; Tr. Vol. 9A at 113:10–116:6. Accordingly, the terms of the TSA, including Idearc's indemnification obligations, were fully disclosed. Taylor testified that its terms were plain and obvious, and could be readily understood without any tax expertise. Tr. Vol. 4B at 44:11–46:16. Taylor further testified that this "indemnification was something in the public domain," that "you don't have to be a tax person to understand [it]," and that "this is clear as to what they are indemnifying for." *Id.* at 46:23–49:10.

The defendants' tax expert, Wessel, one of the leading practitioners in the field of tax-free spinoffs and the principal author of a 1,000–page treatise on transactions qualifying for tax-free status under § 355 of the Internal Revenue Code, *see* Tr. Vol. 6B at 49:23–50:24, testified that tax sharing agreements are typical in spinoff transactions. He testified that each of the 25 or more consummated tax-free spinoffs with which he has been involved included a tax sharing agreement. *Id.* at 44:17–24, 46:21–23. Wessel further testified that the primary effect of a tax sharing agreement is to create incentives for the spun off company to exercise diligence before engaging in a post-spin transaction that could undermine the tax-free status of the earlier spinoff. *Id.* at 45:4–5, 45:16–46:5.

Wessel's testimony about the effects of the TSA on Idearc is reviewed above. Wessel also testified that companies spun off from their corporate parents are routinely acquired in the two years following their spinoff despite agreements that contain terms that are materially identical to those contained in the Verizon–Idearc TSA. *Id.* at 71:4–73:2. Wessel testified that, consistent with the TSA, Idearc could be acquired after the spinoff without triggering any indemnification obligation to Verizon. As an example, Wessel testified that, if Google had wanted to acquire Idearc the day after the spinoff, it could have done so without triggering any tax obligations so long as there had been no substantial negotiations between Verizon and Google in the two years prior to the spinoff. *Id.* at 63:12–20.

***24** The TSA did not impose onerous restrictions on Idearc's ability to prepay or refinance its debts following the spinoff. The TSA imposed no restrictions on Idearc's ability to prepay or refinance its $1.5 billion Term Loan A debt. *Id.* at 22:8–16, 60:20–23. Rather, the restrictions on prepayment or refinancing applied only to the Term Loan B and the Unsecured Notes, in order to ensure those instruments would meet the definition of "securities" under § 361 of the Internal Revenue Code. *Id.* at 65:9–66:17; *see also* 26 U.S.C. § 361(a). That determination depends, in part, on whether those instruments had sufficiently long-term maturities on the date of issuance, and whether there was a plan to prepay the debt. Here, officers of both Verizon and Idearc signed a certification on the date of the spinoff stating that they had no intent to prepay Idearc's debt securities before maturity. PX 1087 at 21, 22–23. Wessel testified that the diligence contemplated by the TSA would be limited to confirming these facts. Tr. Vol. 6B at 67:4–68:10. Accordingly, if there had been a change in circumstances following the spinoff that caused Idearc management to want to prepay the debt, the representations in the certificate would still be true, and the prepayment would not have jeopardized the status of the Term Loan B or Unsecured Notes as "securities." *Id.* at 65:24–66:17.

In this regard, the TSA imposed a reasonableness requirement on Verizon that permitted Idearc to engage in an acquisition or debt prepayment or refinancing upon providing to Verizon a "reasonably satisfactory" tax opinion from counsel or a new ruling from the IRS that such a transaction would not affect the tax-free status of the spinoff. PX 1068 at 8; Tr. Vol. 6B at 58:13–59:3; 67:20–68:10. Refusing to accept such an opinion might subject Verizon to liability for failing to deal with Idearc in good faith. *Id.* at 68:6–10.

d. The "turnaround stories"

The Trustee represented that it would prove that Verizon developed and communicated "several false turnaround stories," including that past revenue declines were caused by one-time events such as a 2003 Voluntary Separation Package that was offered to Verizon employees, the Big Dig in Boston, and the events of September 11, 2001 in Manhattan. Tr. Vol. 1A at 9:17–25. According to the Trustee, these events were "just made up stories," intended to disguise more fundamental operational and financial deficiencies in Verizon's directories business. *Id.* at 21:3–4. The Trustee failed to prove these allegations.

The evidence demonstrated that each of these events did, in fact, have at least some short-term impact on VIS, were well known to the financial institutions that lent money to Idearc or purchased its debt, and were accurately disclosed by Verizon and Idearc. PX 901 at 36, 63–64. For example, Verizon offered a voluntary separation package to employees in 2003, which was accepted by a substantial number of VIS sales personnel and significantly impacted historical financial performance. Jones testified about the impact of this event, explaining that VIS lost half of its sales force as a result of this program. Tr. Vol. 5B at 116:22–117:6.

***25** At the beginning of 2003, VIS's sales force was 3,023. DX 416 at 51. VIS experienced turnover of 87.6 percent that year, such that approximately 375 sales persons who were working for VIS at the beginning of 2003 were still employed at year's end. *Id.* VIS began to rebuild its sales force almost immediately, ending 2003 with 2,155 sales personnel, reflecting a 28.7 percent total decline in the sales force and approximately 1,780 new hires. *Id.* Jones testified that VIS "had to rebuild the sales force. We had to give them time to gain tenure and get better at their job and more efficient and effective." Tr. Vol. 5B at 116:9–11; 116:22–117:6. The voluntary separation program had a significant impact on VIS's financial performance for several years. DX 416 at 51. By the time of the spinoff, VIS had rebuilt its sales force, that sales force had been able to gain experience, and VIS reasonably expected that print revenue would stabilize in the future as a result. Tr. Vol. 5B at 115:13–17.

The defendants also presented unrebutted evidence that the terrorist attacks on September 11, 2001, and the resulting changes in business and commuting patterns, reduced print revenue attributable to the Manhattan directories. The terrorist attacks affected VIS's ability to deliver directories in high rise buildings, changed traffic patterns, and changed consumer usage. Tr. Vol. 5B at 117:7–17. VIS responded by "re-scoping" its books (*i.e.*, changing their geographic coverage) and by making changes to their delivery and distribution schedules. DX 422 at 106, 112; DX 801 at 49, 53.

These one-time events adversely affected VIS's financial performance, and VIS responded with new initiatives and new strategies. Tr. Vol. 5B at 116:12–20. By 2006, VIS reasonably was "expecting and ... forecasted similar performance" in the incumbent print business to that of its peers. *Id.* at 115:21–22. The defendants introduced evidence demonstrating that VIS's performance in 2006 was, in fact, improving in accordance with VIS's expectations. PX 768 at 38; DX 2345 at 6; *see also* Tr. Vol. 8A at 34:17–22 (testimony of Hopkins explaining how the company is able to look ahead at its future revenues). Although as-sold print revenue declined in 2005 by between 4 and 6 percent during the first eight months of the year (January through August), VIS's performance showed a 4 percentage point improvement in 2006 and revenue results that were consistent with its competitors. DX 416 at 52. Moreover, VIS's performance was in line with its business plan through August 2006 and had met its commitments to Verizon corporate (its budget) and to the bankers (the financing model). DX 2345 at 2, 5; Tr. Vol. 5B at 119:13–121:2. In an Operations Review with Verizon corporate, VIS characterized its performance as exhibiting a "turnaround" in print revenue. DX 2345 at 6. Although print revenues were forecast to continue to decline, the rate of that decline had stabilized, and was expected to remain stable, consistent with the expectations for the industry as a whole. Tr. Vol. 5B at 115:11–17. Likewise, in an October 28, 2006 report to the incoming Idearc Board, Harless reported that "the revenues on an as sold basis have regain[ed] traction and are improving every day ... the southeast, central, and west territories are all positive results with the northeast and mid-atlantic performing better than plan and approaching flat (the sales momentum is back!!!)." PX 871.

***26** The Trustee asserted that DX 142, an e-mail from Sophia Xu ("Xu"), a Verizon employee in the Strategic, Development, and Planning organization, constituted evidence of an allegedly false turnaround story. The events described in Xu's e-mail (which included the voluntary separation package and the terrorist attacks), however, were not false. They were real and affected VIS's business performance. In addition, this e-mail was written following a March 2006 meeting in Dallas of representatives of Verizon, VIS, JP Morgan, Bear Stearns, and McKinsey, and Verizon's and VIS's outside counsel. Tr. Vol. 9A at 95:23–98:7. Given the extensive disclosures in the Form 10 and the other financing documents, and in light of the consistent testimony from Harless, Jones, and Coticchio (from VIS),[FN8] as well as others,[FN9] concerning the accuracy of the disclosures, the court finds Xu's word choice ("turnaround stories") to be irrelevant and of no evidentiary value.

FN8. Tr. Vol. 9A at 56:11–24 (Harless testimony); Vol. 5B at 78:2–8, 78:14–79:24 (Jones testimony); Vol. 9B at 58:10–59:4 (Coticchio testimony).

FN9. Tr. Vol. 9B at 109:1–25 (testimony of Jessica Kearns from JP Morgan); Vol. 9A at 91:8–96:25 (testimony of Steven Slutzsky); Vol. 8B at 18:13–17 (testimony of Jeff Rosen).

2. *Information That Was Not Disclosed to the Market But That Is Not Material*

a. Verizon's internal "valuation" of Idearc in summer 2005

The Trustee claimed that it would prove that Verizon senior executives knew that the actual enterprise value of VIS was only $6.5 billion and therefore made affirmative misrepresentations or omissions about the directories business in order to obtain a higher valuation. The Trustee relies on PX 27, a July 2005 powerpoint presentation entitled "Directories–Analysis of Alternatives," to support this allegation. The evidence introduced during the Phase I proceedings demonstrated that the Trustee's interpretation of this document was incorrect.

Verizon Executive Director of Corporate Development John Fitzgerald testified that PX 27 did not reflect Verizon's internal determination that VIS had an enterprise value of $6.5 billion. Tr. Vol. 7A at 8:11–18; *see also* Vol. 1A at 75:6 (testimony of Diercksen that he never believed that the business had a value of $6 .5 billion). Fitzgerald testified that "[t]he final valuation was what it was when the transaction was completed"-that is, $12.8 billion. Tr. Vol. 7A at 8:11–18. The $6.5 billion figure resulted from a downside case DCF analysis that evaluated a worst case scenario for the print business alone, totally ignoring VIS's growing and valuable electronic business, and that was based upon a set of assumptions as to both future projections and the appropriate WACC, or discount rate. *Id.* at 5:4–6:10, 7:9–25.

Fitzgerald also testified about the circumstances surrounding the creation of this document. He testified that, in June 2005, Verizon's Strategy, Planning and Development group began a preliminary analysis of VIS in order to explore potential options if Verizon management decided to divest the business. Tr. Vol. 6B at 120:3–9, 126:10–17. The initial analysis, which is set forth in PX 27, was prepared by different portions of the Strategy, Planning and Development organization in a few weeks, without any direct input or assistance from any VIS executive involved in operating the directories business. *Id.* at 127:19–128:1, 128:25–129:6. The document included a preliminary evaluation of the market for directories businesses, as well as a wide range of possible values for VIS. Tr. Vol. 7A at 8:6–8. PX 27 set forth potential enterprise valuations for VIS ranging from $6.5 billion to $17.8 billion. PX 27 at 32.

***27** Fitzgerald testified that, beginning in late August 2005, he refined the potential valuation analysis based on, among other things, discussions with investment bankers and reviews of industry analyst reports. Tr. Vol. 7A at 9:6–11. This included Fitzgerald's review of an August 2005 Deutsche Bank analyst report by Paul Ginocchio. In that report, Deutsche Bank stated that a capital structure with a high debt to equity ratio (resulting in a lower discount rate, and therefore a higher valuation) was appropriate for an independent directories business. *Id.* at 12:15–21.

In September 2005, Fitzgerald and his group were directed to evaluate divestiture options in greater detail, and they set forth their analysis in a formal presentation for senior management. DX 129; Tr. Vol. 7A at 16:22–17:16. Fitzgerald testified that he was primarily responsible for this analysis, which "was intended to be presented" to the Chairman's Leadership Council ("CLC"). *Id.* at 17:9, 17:13–16. Fitzgerald's presentation included a slide that contained a "football field," showing possible valuations ranging from $11.5 billion (the low end of a DCF analysis) to $16.5 billion (the high end of a comparable transactions analysis). DX 129 at 7; Tr. Vol. 7A at 18:18–21:3. Fitzgerald testified that the updated DCF analysis resulted in a higher valuation for VIS than that set forth in PX 27 because he utilized a lower discount rate. Tr. Vol. 7A at 20:16–21. Fitzgerald explained that using a lower discount rate was appropriate because of an intervening reduction in the "risk free rate" provided by Verizon Treasury, as well as the Deutsche Bank analysis. DX 1856 at 88, 90; Tr. Vol. 7A at 14:11–22. Fitzgerald also testified that he corrected several analytical flaws in the July 2005 DCF, which was improperly "combining historical growth rates near term and then applying plan growth rates longer term." *Id.* at 21:11–18. Fitzgerald additionally included revenues from VIS's electronic business in the later analysis, which he concluded resulted in a higher—and in his view more reliable-valuation of VIS. *Id.* at 21:19–22, 22:11–14.

Fitzgerald testified that this updated valuation was not final, but that it "beg[an] to narrow the range that we are thinking about, but there's still no stated conclusion as to an answer." *Id.* at 22:18–20.

The court is persuaded by Fitzgerald's testimony about the internal process at Verizon of valuing the directories business. It cannot accept the Trustee's characterization of the $6.5 billion figure in PX 27 as a conclusion Verizon made in 2005 about the value of the directories business. Nor can the court accept the Trustee's allegation that Verizon falsely represented the value of Idearc, or that the market had a distorted impression of Idearc's value because of such a representation. In fact, the court finds that the failure to disclose to the market PX 27, and the number $6.5 billion represented therein, is immaterial to Idearc's value.

b. Subjective views of individuals as to Idearc's management team

***28** The Trustee asserted that the market value of Idearc was inflated because senior Verizon officials, including Diercksen, "knew that the management that would take over Idearc was not competent," but failed to share this alleged view with investors. The court does not find this argument persuasive. Tr. Vol. 1A at 8:2–4, 6–7.

Seidenberg testified that he had full confidence in Kathy Harless, the President of VIS and one of his direct reports. Seidenberg testified that he "thought Kathy was extremely capable." Tr. Vol. 6A at 43:21; *see also id.* at 43:9–13.

Diercksen authored an e-mail in which he stated, when contemplating incentives for Idearc's future management, that "approving a very large pool of options 'feels' like the wrong thing to do, and seems like we are feeding 'the rising tide of incompetence.' " PX 869. Diercksen testified that his e-mail reflected his frustration over a proposal under consideration to grant double bonuses to Idearc's management team. Tr. Vol. 2A at 40:19–20. Diercksen testified that, while he "respected Ms. Harless's management skills," he wrote this e-mail because he believed that awarding a double bonus was inappropriate. *Id.* at 42:14–18. The subjective views of one Verizon manager, expressed in this context, are insufficient to impose a disclosure obligation on Verizon about management competence, particularly in light of Seidenberg's views.

The evidence further established that Diercksen and Harless had a strained relationship. JP Morgan and Bear Stearns were aware of this tension and made an independent determination as to whether it was material to their decision to invest in Idearc and to lead its financing. JP Morgan's Nason testified that she became aware of "some tension between Mr. Diercksen and Ms. Harless," which caused her "to take a longer, harder look perhaps at management and to have that as part of the diligence process." Tr. Vol. 7A at 98:3–10. Following its due diligence, JP Morgan concluded that VIS had "a very competent management team that knew their business very well." *Id.* at 98:1–2. Bear Stearns' Andrew Decker testified that he was aware of a "competitive dynamic" between Harless and Diercksen, which gave him no cause for concern because "large corporations have different personnel issues." Tr. Vol. 7B at 82:13–19. The Trustee failed to provide any evidentiary basis to require Verizon to make further disclosures about the competence of Idearc management.

The court finds that the (admittedly) strongly negative views of one individual within Verizon about the management at Idearc would not have been material to the market and do not undermine Idearc's stock price as an indicator of value.

c. The internal negotiation of Idearc's final financing model and the data room "cover up"

The Trustee argued that Verizon's corporate executives schemed to force upon the management of VIS their version of a final financing model for Idearc, that this version was unsupportably optimistic, and that, in order to defraud investors (and ultimately the market), Verizon removed prior projections for its directories business from the VIS data room and concealed a pessimistic report prepared by McKinsey.

***29** The Trustee focused its attention on a string of e-mails between John Fitzgerald, John Diercksen, and Thomas Bartlett, a Senior Vice President and Controller in Corporate Financial Planning and Analysis at Verizon. An April 11, 2006 e-mail from Fitzgerald states that a review of VIS's plan with Toben and Diercksen would be followed by a "dictate to VIS on the final plan." PX 283. In responding on April 12, 2006 to an e-mail containing a purported "offer" from VIS to Verizon corporate regarding the financial model, Diercksen stated "where do they come off with a best and final offer! ... I think we need to talk to Ivan [Seidenberg] and enforce this view on them." PX 287. Diercksen e-mailed Bartlett on April 13, 2006 and stated that "I suggest you call Andy [Coticchio] and tell him that this is a mandate." PX 300.

In response, the defendants presented testimony from both the Verizon corporate department and the VIS/Idearc management stating that the process of arriving at a final financing model for Idearc involved all of the normal give and take negotiation one would expect to find in the budgeting process in corporate America. In addition, members of Idearc's management testified that the final financing model represented a "realistic expectation for the business." FN10

FN10. Tr. Vol. 5B at 106:23–107:11; Vol. 6A at 18:24–19:1 (testimony of Jones); Vol. 9A at 64:6–17, 20–25, 65:1–10 (testimony of Harless); Vol. 8B at 87:19–21 (testimony of Mueller); Vol. 9B at 34:18–25 (testimony of Toben).

Jessica Kearns, a Managing Director at JP Morgan who worked on the spinoff, testified that replacing the preliminary 2006 Plan of Record (which was based on VIS's business as a Verizon subsidiary) with the final financing model (which reflected VIS as a stand-alone business, and contained less aggressive forecasts) in the data room was both standard and appropriate. Tr. Vol. 9B at 86:14–16.

The defendants also point out that the final financing model that the corporate and management teams arrived at was less aggressive than prior plans of record. *See* Defendants' Joint Post–Trial Reply Brief at 6.

The court finds that, despite the aggressive language exhibited in some e-mails by executives in Verizon's corporate department, there is not evidence sufficient to conclude that those executives forced an overly aggressive and ultimately unsustainable financing model on the management of VIS or Idearc. Thus, disclosure of either the (sometimes aggressive) process of budget negotiation, or of the removal of prior financing plans from Verizon's data room, would not have had a material effect on the price of Idearc's stock.

II. *CONCLUSION*

Based on the foregoing evidence, the court finds and concludes that the total enterprise value of Idearc on November 17, 2006 was at least $12 billion.

N.D.Tex.,2013.
U.S. Bank Nat. Ass'n v. Verizon Communications Inc.
Slip Copy, 2013 WL 230329 (N.D.Tex.)

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H

United States District Court,
D. Arizona.
In re RED MOUNTAIN MACHINERY CO., Debtor.
Comerica Bank, Appellant.
v.
Red Mountain Machinery Co., et al., Appellees.

No. CV 11–1079–PHX–JAT.
Bankruptcy No. 2:09–bk–19166–RLH.
Adversary No. 2:09–ap–00941–CGC.
March 29, **2012**.

Background: Confirmation hearing was held on debtors' proposed Chapter 11 plan, and lender objected on "feasibility" grounds, on ground that debtors had improperly placed its unsecured deficiency claim in separate class from that of other general unsecured claims, based on alleged inadequacy of "cramdown" interest rate, and based on plan's alleged failure to satisfy "absolute priority" rule. The Bankruptcy Court, Randolph J. Haines, J., 448 B.R. 1, overruled objections and entered order confirming plan, and creditor appealed. Debtor moved to dismiss.

Holdings: The District Court, James A. Teilborg, J., held that:
(1) mere fact that, if district court disturbed bankruptcy court's decision on creditor's statutory election to be treated as fully secured or on appropriate "cramdown" interest rate, then debtor would have to pay more money to creditor than what was contemplated in plan as confirmed, did not prevent district court from hearing creditor's appeal on mootness grounds;
(2) appeal challenging the adequacy of new value provided by equity holders in corporate debtor in exchange for being allowed to retain their equity interests in reorganized entity was moot;
(3) order entered by bankruptcy court on objection to debtor's Chapter 11 disclosure statement, that resolved formula that court would use if creditor made statutory election to be treated as fully secured, was a final determination, from which immediate appeal would lie as of right; and
(4) bankruptcy court could use "formula" approach for calculating Chapter 11 "cramdown" interest.

Motion granted in part and denied in part; interest rate determination affirmed.

West Headnotes

[1] Bankruptcy 51 ⚷3776.5(5)

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3776 Effect of Transfer
51k3776.5 Supersedeas or Stay
51k3776.5(5) k. Effect of want of stay; conclusiveness of sale. Most Cited Cases

Bankruptcy 51 ⚷3781

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3781 k. Moot questions. Most Cited Cases

Mere fact that, if district court disturbed bankruptcy court's decision on creditor's statutory election to be treated as fully secured or on appropriate "cramdown" interest rate, then Chapter 11 debtor would have to pay more money to creditor than what was contemplated in plan as confirmed by unstayed order of bankruptcy court, did not prevent district court from hearing creditor's appeal from "statutory election" and "interest rate" determinations, either on constitutional or equitable mootness grounds, absent showing as to how increase in debtor's payment obligations to creditor would impact on debtor's ability to go forward. 11 U.S.C.A. §§ 1111(b), 1129(b)(2)(A)(i)(II).

[2] Bankruptcy 51 ⚷3781

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3781 k. Moot questions. Most Cited Cases

Substantial consummation of Chapter 11 plan, without more, does not render moot an appeal challenging certain aspects of confirmed plan.

[3] Bankruptcy 51 ⟹3776.5(5)

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3776 Effect of Transfer
51k3776.5 Supersedeas or Stay
51k3776.5(5) k. Effect of want of stay; conclusiveness of sale. Most Cited Cases

Bankruptcy 51 ⟹3781

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3781 k. Moot questions. Most Cited Cases

Appeal challenging the adequacy of new value provided by equity holders in corporate Chapter 11 debtor in exchange for being allowed to retain their equity interests in reorganized entity was rendered moot when, as result of appellant's failure to obtain stay pending appeal, this new value was advanced and spent on distributions under confirmed plan, such that, if district court altered either the amount of new value which equity holders would have to contribute or the equity interests that they would receive in reorganized debtor, and if equity holders chose not to participate in plan, court would have to pursue disgorgement from multiple creditors, and an unworkable and unmanageable situation would be created.

[4] Bankruptcy 51 ⟹3774.1

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3774 Notice of Appeal; Time
51k3774.1 k. In general. Most Cited Cases

Requirement that, as prerequisite to pursuing bankruptcy appeal, appellant must file a timely notice of appeal is jurisdictional. Fed.Rules Bankr.Proc.Rule 8002(a), 11 U.S.C.A.

[5] Bankruptcy 51 ⟹3767

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3766 Decisions Reviewable
51k3767 k. Finality. Most Cited Cases

Courts apply a pragmatic approach to finality of bankruptcy court orders, for purpose of appeal, given that certain proceedings in bankruptcy case are so distinctive and conclusive either to rights of individual parties or ultimate outcome of case that final decisions as to them should be appealable as of right. 28 U.S.C.A. § 158(a)(1).

[6] Bankruptcy 51 ⟹3767

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3766 Decisions Reviewable
51k3767 k. Finality. Most Cited Cases

Pragmatic approach applied by court to finality of bankruptcy court orders emphasizes the need for immediate review, rather than whether order is technically interlocutory. 28 U.S.C.A. § 158(a)(1).

[7] Bankruptcy 51 ⟹3767

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3766 Decisions Reviewable
51k3767 k. Finality. Most Cited Cases

Bankruptcy court order is considered "final," and thus appealable as of right, where it (1) resolves and seriously affects substantive rights, and

(2) finally determines discrete issue to which it is addressed. 28 U.S.C.A. § 158(a)(1).

[8] Bankruptcy 51 ⚿3767

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3766 Decisions Reviewable
51k3767 k. Finality. Most Cited Cases

While finality rule is given additional flexibility in bankruptcy context, traditional finality concerns nonetheless dictate that courts avoid having a case make two complete trips through appellate process. 28 U.S.C.A. § 158(a)(1).

[9] Bankruptcy 51 ⚿3767

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3766 Decisions Reviewable
51k3767 k. Finality. Most Cited Cases

Bankruptcy 51 ⚿3774.1

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3774 Notice of Appeal; Time
51k3774.1 k. In general. Most Cited Cases

Order entered by bankruptcy court on objection to debtor's Chapter 11 disclosure statement, that resolved formula that court would use if creditor made statutory election to be treated as fully secured, was a final determination on how election would be calculated, such that creditor, if it disagreed with bankruptcy court's determination, was obligated to file notice of appeal within ten days of entry of order. 28 U.S.C.A. § 158(a)(1); Fed.Rules Bankr.Proc.Rule 8002(a), 11 U.S.C.A.

[10] Bankruptcy 51 ⚿3782

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3782 k. Conclusions of law; de novo review. Most Cited Cases

Bankruptcy 51 ⚿3784

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3784 k. Discretion. Most Cited Cases

On appeal from bankruptcy court's determination of appropriate Chapter 11 "cramdown" interest rate, district court would consider the methodology used by bankruptcy court for determining "cramdown" interest de novo, but would give substantial deference to factual calculation of interest rate. 11 U.S.C.A. § 1129(b)(2)(A)(i)(II).

[11] Interest 219 ⚿31

219 Interest
219II Rate
219k31 k. Computation of rate in general. Most Cited Cases

Bankruptcy court could use "formula" approach for calculating Chapter 11 "cramdown" interest, and was not limited to taking testimony on current market rates for similar loans. 11 U.S.C.A. § 1129(b)(2)(A)(i)(II).

[12] Interest 219 ⚿31

219 Interest
219II Rate
219k31 k. Computation of rate in general. Most Cited Cases

Bankruptcy court, in utilizing "formula" approach to calculate appropriate rate of Chapter 11 "cramdown" interest, did not commit legal error by misapprehending its ability to utilize other approaches, as demonstrated by court's comments, in utilizing "formula" approach, that there was no efficient market for similar loans. 11 U.S.C.A. § 1129(b)(2)(A)(i)(II).

[13] Interest 219 ⚿31

219 Interest
219II Rate
219k31 k. Computation of rate in general.
Most Cited Cases

Bankruptcy court did not have to consider loan-to-collateral value as characteristic of loan when using "formula" approach to calculate appropriate rate of "cramdown" interest. 11 U.S.C.A. § 1129(b)(2)(A)(i)(II).

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ORDER

JAMES A. TEILBORG, District Judge.

Pending before the Court is Appellees' motion to dismiss this appeal for mootness (Doc. 41). Also pending is Appellees' motion to dismiss the appeal of the bankruptcy court's ruling on the § 1111(b) election as untimely (Doc. 23). Finally, both parties have fully briefed the merits of the appeal (Docs. 21, 25, and 40).

I. Motion to Dismiss for Mootness

A. Law Governing Equitable Mootness

Appellees argue this appeal should be dismissed because it is moot based on equitable considerations.

On the issue of equitable mootness, the Ninth Circuit Court of Appeals has instructed,

> An appeal from a bankruptcy court's order is equitably moot "when, in the absence of a stay, events occur that make it impossible for the appellate court to fashion effective relief." *In re Spirtos,* 992 F.2d 1004, 1006 (9th Cir.1993) (citing *In re Roberts Farms, Inc.,* 652 F.2d 793 (9th Cir.1981)). In *Roberts Farms,* we dismissed an appeal because the appellant did not obtain a stay of the bankruptcy court's confirmation of a Plan of Arrangement and, as a result, a significant portion of the plan had been carried out before the appeal could be heard. We reasoned that overruling the bankruptcy court's confirmation of the plan would "create an unmanageable, uncontrollable situation for the Bankruptcy Court" to undo the portion of the ***245** plan that had been carried out and thus the appeal was equitably moot. *See Roberts Farms,* 652 F.2d at 797.
>
> We have also held, however, that an appellant's failure to obtain a stay before appealing a bankruptcy court's award of fees does not necessarily render the appeal equitably moot. *See In re Cascade Roads, Inc.,* 34 F.3d 756 (9th Cir.1994); *In re Spirtos,* 992 F.2d 1004 (9th Cir.1993); *In re International Envtl. Dynamics, Inc.,* 718 F.2d 322 (9th Cir.1983). In *International Environmental Dynamics*, even though the appellant failed to obtain a stay before appealing the bankruptcy court's order granting the debtor's counsel attorney fees, we held that the appeal was not equitably moot because the counsel was a party before the bankruptcy court and knew the appellant contested the fee award. *See International Envtl. Dynamics,* 718 F.2d at 326; *see also Cascade Roads,* 34 F.3d at 761 (holding that an appeal was not equitably moot because the person who was issued the money was a party and was aware when the payment was made that the award would be appealed); *Spirtos,* 992 F.2d at 1006–07 (same).

In re S.S. Retail Stores, Corp., 216 F.3d 882, 884–85 (9th Cir.2000).

Additionally, the Court of Appeals further explained,

> While the doctrine of equitable mootness focuses on whether it is, for all practical purposes, impossible to award effective relief, other equitable considerations center on whether it would be unfair to grant the relief requested. Therefore, even if an appeal is not equitably moot, a court may still hold that the equities weigh in favor of dismissing the appeal. *See, e.g., In re Federated Dep't Stores, Inc.,* 44 F.3d 1310, 1320 (6th Cir.1995) (holding that even though the appeal was not moot because effective relief was possible, it was inequitable to require that the debtor's counsel disgorge fees and costs awarded by the bankruptcy court).

Id. at 885.

The first concept discussed above is also referred to as real or constitutional (Article III) mootness. *In re National Mass Media Telecommunication Systems Inc.,* 152 F.3d 1178, 1180 (9th Cir.1998) (constitutional mootness "applies when an event occurs while a case is pending appeal that makes it impossible for the court to grant any effectual relief." (internal quotations omitted)). Quoting *Matter of UNR Indus., Inc.,* 20 F.3d 766, 769 (7th Cir.1994), the Court stated, "There is a big difference between *inability* to alter the outcome (real mootness) and *unwillingness* to alter the outcome ('equitable mootness')." *Id.* at 1180 n. 3.

In this case, Appellee moved for a stay pending appeal, which this Court denied. Doc. 15. The Debtor moves to dismiss the appeal based on "equitable mootness" but argues largely constitutional mootness, including citing extensively this Court's decision in *Coleman v. ANMP (In re Dexter Distrib. Co.),* 2010 WL 1052828 (D.Ariz. Mar. 18, 2010), which was based, in relevant part, on constitutional mootness. Thus, the Court will analyze mootness applying both constitutional mootness and equitable mootness.

Appellant raises three claims of error on appeal: 1) the bankruptcy court erred in allowing in part and denying in part Appellant's § 1111(b) election; 2) the bankruptcy court erred in determining the adequacy of the value of the contribution by Owen and Linda Cowing; and 3) whether the bankruptcy court erred in determining the interest rate Appellant would be paid going forward. First, the Court will summarize the arguments as to each claim.

***246 B. Claims of Error on Appeal**

1. 1111(b) Election

With respect to this claim, Appellant argues that this Court can grant relief because the only change would be, "[Appellant's] claim against the Debtor would be entitled to treatment under the Plan as fully secured and the Debtor's payments to [Appellant] would have to be incrementally higher over the Plan's terms." Doc. 45 at 5. Appellees respond and argue that if this Court changed the § 1111(b) election, the lender who provided exit financing and the Cowings (who provided additional equity contribution) would not get the benefit of their bargain and would be entitled to a refund of their money. Doc. 46 at 3. Further, Appellees argue that such a result would necessitate clawing back from creditors all of this money that has already been spent. *Id.* Appellant concedes that giving it relief on this claim would require the Debtor to make higher payments to Appellant over the next 15 years. Doc. 45 at 6. However, Appellant argues that the Appellees fail to identify with specificity "how incrementally higher Plan payments to [Appellant] over 15 years would imperil the Debtor's contracts with customers and vendors, the Debtor's exit financing ..., or any facet of the Debtor's ongoing operations." *Id.* (emphasis omitted).

2. Value of Contribution

Again, Appellees argue that because the Plan has been consummated, this Court cannot remand to the bankruptcy court to determine anew whether the Cowings made a substantial enough financial contribution for the interest they received. Specifically, the Cowings contributed $480,000 in new capital in exchange for being permitted to retain all of the equity interest in the Debtor. Doc. 21 at 5. Appellant argues, "How an order of this Court remanding the case back to the bankruptcy court so that the Debtor can meet its evidentiary burden on the new value contribution affects at all the Debtor's post-confirmation business affairs is nearly impossible even to imagine." Doc. 45 at 6. Conversely, Appellee argues,

> ... Owen Cowings and Linda Cowing made a new equity contribution of $480,000.... Lender Arlington RMMC Investments, LLC, provided exit financing, of which $834,591.37 had been funded.... Debtor used these funds to pay creditor claims according to the terms of the Plan.... In all fairness, if the Court were to vacate and or materially change the terms of the Plan (as requested by [Appellant]), it must provide Arlington, Owen Cowing and Linda Cowing [the] opportunity to rescind their loan and investment.... At a minimum, the Court would have to order every claimant paid so far under the Confirmed Plan to fully disgorge its payment. In effect, this would require unwinding the entire plan—a plan that has been substantially consummated.

Doc. 46 at 3–4.

3. Interest Rate

The parties make virtually identical arguments on the interest rate issue as the § 1111(b) election issue.

C. Analysis

In general terms, Appellees argue that this Court should dismiss this appeal as moot because there has been: "1) substantial infusion of new equity, 2) substantial payment of taxes, 3) substantial payment to creditors, and 4) substantial implementation of new financing." Doc. 41 at 10 (citing *Coleman,* 2010 WL 1052828 at *3.) Appellees go on to argue that an appeal is moot when the remedies sought would affect third parties who are not participants in the appeal. *Id.* (citing ***247***Coleman,* 2010 WL 1052828 at *4).[FN1] Finally, Appellee argues that because the plan has been substantially consummated, this Court cannot fashion relief. Doc. 41 at 7 (quoting *Clarke v. Duck (In re Clarke),* 98 B.R. 979, 980 (9th Cir. BAP 1989) ("It is now well recognized that when a stay of an order confirming a reorganization plan has not been obtained and the plan has been consummated, appeals seeking to attack the confirmed plan may be precluded.")). Further, quoting the Bankruptcy Court in the Southern District of New York, Appellees argue that, "substantial consummation requires only that there was a commencement of distribution under the plan."). Doc. 41 at 8 (quoting *In re Fansal Shoe Corp.,* 119 B.R. 28, 30 (Bankr.S.D.N.Y.1990)). Appellant responds and argues that it is Appellees' burden to establish that there is no effective remedy that the Court can provide and that Appellees have failed to meet this burden. Doc. 45 at 4 (citing five cases including *In re Focus Media, Inc.,* 378 F.3d 916, 923 (9th Cir.2004)).

> FN1. And quoting *Trone v. Roberts Farms, Inc. (In re Roberts Farms, Inc.),* 652 F.2d 793, 797 (9th Cir.1981) ("Certainly, reversal of the order confirming the plan of arrangement, which would knock the props out from under the authorization for every transaction that has taken place, would do nothing other than create an unmanageable, uncontrollable situation for the Bankruptcy Court.").

1. Section 1111(b) Election and Interest Rate

[1][2] As discussed above, if this Court granted relief on either of these claims, the Debtor would be required to pay Appellant more money over the next 15 years. Because the Court can imagine that a complete restructuring of the payment plan would affect a variety of people who are not parties to the appeal, the Court strongly suspects that the relief sought is moot. Further, neither party disputes that the plan has been substantially consummated; however, Appellant argues that substantial consum-

mation alone does not render the appeal to be moot. *See* Doc. 45 at 7 (quoting *First Fed'l Bank of California v. Weinstein (In re Weinstein),* 227 B.R. 284, 289 (9th Cir. BAP 1998) ("the fact that a plan is substantially consummated and that the appellant failed to obtain a stay pending appeal does not, by itself, render an appeal moot. The appellate court should still consider whether it can grant effective relief.")).

The Court agrees with Appellant, that Appellees have failed to point out with any particulars or specifics why or how the Debtor paying more to a particular creditor would necessarily result in unwinding the entire plan. Certainly the Court can hypothesize that changing the Debtor's repayment obligations could potentially have a domino effect on all other aspects of the Plan. If such were true, then the Court would find the appeal of these claims to be moot. However, on this record, and not knowing for certain that the Debtor making a higher payment would impact the Debtor's ability to go forward, the Court does not find the appeal of these claims to be constitutionally/equitably moot.

2. Value of New Equity Contribution

[3] As to this claim, Appellees have provided significant specifics regarding how the Plan has been consummated and how a change in the value of the new equity contribution would require an unwinding of the Plan. Specifically, the Cowings provided $480,000 in new capital in exchange for the equity in the Debtor. If the Court changed either the amount of the value the Cowings would receive or the amount of money the Cowings would have to pay (assuming the Cowings could pay more), the Cowings may not desire or be ***248** able to go forward with the Plan. Further, without the Cowings contribution, the Lender may not choose to fund the exit financing (or financing might be moot because without the Cowings' contribution the Debtor may not be able to go forward).

Thus, considering that both the Lender and the Cowings have already paid the money, and that the money has been spent, the Court finds that the substantial consummation of the Plan in this regard prevents the Court from fashioning any relief. There are a variety of creditors (including taxes) that have been paid, from whom disgorgement may not be possible. Further, even assuming disgorgement is available from all creditors, this would create the unworkable and unmanageable situation that the Court of Appeals has cautioned against. Accordingly, the Court finds that the Appellant's appeal with respect to the value of the new equity contribution is constitutionally/equitably moot and the Court will not consider the merits of that claim of error.

II. Motion to Dismiss Appeal on Section 1111(b) issue as untimely

The parties agree that the Order of the Bankruptcy Court from which this claim of error arises was entered on January 6, 2011. *See* Doc. 23 at 2. The parties agree that Appellant did not file a notice of appeal with respect to that specific order. *See id.* The parties further agree that the Bankruptcy Court's order confirming the Plan was entered on May 24, 2011. *See id.* Finally, the parties agree that on June 7, 2011, Appellant timely appealed the May 24, 2011, Order. *See id.* However, the parties dispute whether the January 6, 2011 order was a final order from which the June 7, 2011 appeal would be untimely.

[4] The parties also agree as to the law governing appeals. Rule 8002(a) required that a notice of appeal be filed within 10 days [FN2] of the date of the entry of the judgment, order, or decree appealed from. Doc. 23 at 3. The requirement of filing a timely notice of appeal is jurisdictional. *Id.* (citing Rule 8001(a)). Additionally, appeals under 28 U.S.C. § 158(a), must be file within the 10 day time frame. As Appellee quotes,

FN2. This deadline is currently 14 days.

Section 158(a)(1) states:

(a) the district courts of the United States shall have jurisdiction to hear appeals—

(1) from final judgments, order, and decrees;

(2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and

(3) with leave of court, from other interlocutory orders and decrees.

Doc. 23 at 4.

Appellee then further states,

A bankruptcy order is final and thus appealable where it 1) resolves and seriously affects substantive rights and 2) finally determines the discrete issue to which it is addressed. *In re Lewis,* 113 F.3d 1040, 1043 (9th Cir.1997) (quotation marks omitted). To be appealable pursuant to § 158(a)(1), therefore, an order must be final in substance and it must be final in form.

Doc. 23 at 4. Again, the parties agree that this law governs whether Appellant was required to immediately appeal the January 6, 2011 Order. Doc. 26 at 1. Where the dispute lies is whether under this controlling law Appellant was required to appeal within 10 days of January 6, 2011.

***249** Appellees argue that this Court should, by analogy, base its decision an the appealability of rulings under 11. U.S.C. § 506(a). Doc. 23 at 5. "Section 506(a) 'operates to bifurcate [an under] secured creditor's allowed claim into secured and unsecured interests based upon the bankruptcy court's valuation of the secured property." *Id.* (quoting *In re 1441 Veteran Street Co.,* 144 F.3d 1288, 1291 (9th Cir.1998)). In the Section 506(a) context, factual determinations of value are not immediately appealable. *Id.* (quoting *In re Rodriguez,* 272 B.R. 54, 57 (D.Conn.2002)). However, determinations of a method or formula for **valuation** can be final prior to the plan **confirmation** because no future order would affect that calculation (whereas the factual value might change). *Id.* In this case, Appellees argue that the formula the Bankruptcy Court applied to the § 1111(b) election closely resembles the § 506(a) election, and therefore, should be governed by the same finality/appealability standard.

Appellant argues that an analysis of the § 506(a) election is inapposite in this case because typically the § 1111(b) election follows the § 506(a) election, but in this case the Debtor proceeded to objecting to the § 1111(b) election first. Doc. 26 at 9. Further, Appellant argues that the method of the Debtor's objection is significant, because the objection was in a disclosure statement. *Id.* at 9–10. Appellant argues that it is clear under Ninth Circuit law that the orders of the Bankruptcy Court approving disclosure statements are interlocutory and not appealable until the plan is confirmed. *Id.* at 9 (citing *Everett v. Perez (In re Perez),* 30 F.3d 1209, 1217 (9th Cir.1994)). Finally, Appellant argues that this Court should apply the pragmatic approach to determining the finality of the Bankruptcy Court's order, and find the January 6, 2011 non-final. Doc. 26 at 6.

[5][6][7][8] The Court of Appeals has explained,

We have adopted a "pragmatic approach" to finality in bankruptcy because "certain proceedings in a bankruptcy case are so distinctive and conclusive either to the rights of the individual parties or the ultimate outcome of the case that final decisions as to them should be appealable as of right." [citation omitted] Our approach "emphasizes the need for immediate review, rather than whether the order is technically interlocutory." [citation omitted]

Under our pragmatic approach, a bankruptcy court order is considered to be final and thus appealable "where it 1) resolves and seriously affects substantive rights and 26 finally determines the discrete issue to which it is addressed." [citations omitted] "Although this finality rule is given additional flexibility in the bankruptcy proceedings context, traditional finality concerns

> nonetheless dictate that 'we avoid having a case make two complete trips through the appellate process.' " [citations omitted]

In re Bonham, 229 F.3d 750, 761 (9th Cir.2000).

[9] Applying the pragmatic approach, this Court finds that the January 6, 2011 Order was final. Specifically, it resolved the formula that Bankruptcy Court would use for purposes of the § 1111(b) election. That was a final determination on how the election would be calculated. Additionally, Appellant's substantive rights were seriously effected and the January 6, 2011 Order resolved how those rights would be allocated. All that remained was to factually determine the dollar value of the two classes of claims, to which the parties ultimately stipulated. Accordingly, Appellant was required to appeal the January 6, 2011 Order within the time limit of ***250**Rule 8002(a). Appellant did not appeal within that time limit; thus, the motion to dismiss for lack of jurisdiction will be granted.

III. Merits of the Appeal

Following the Court's above rulings on the motions to dismiss, the only remaining issue for the Court to reach on the merits of the appeal is the interest rate applied to the remaining loan between the debtor and the Appellant.

A. Standard of Review

Citing nothing, Appellant states, "the appropriate standard for determining the interest rate to be applied to [Appellant's] secured claim [is] a legal issue that this Court reviews de novo." Doc. 21 at 2. Citing two Ninth Circuit Court of Appeals cases, Appellees state that this Court should review the interest rate issue as a question of fact, and give substantial deference to the Bankruptcy Court's determination of the appropriate interest rate. Doc. 25 at 13. Appellant did not discuss the interest rate issue in its reply brief. At oral argument, Appellee conceded that deciding which method a court should use for calculating interest is a question of law reviewed de novo.

[10] In *In re Fowler,* 903 F.2d 694, 696 (9th Cir.1990), the Court of Appeals stated, "A bankruptcy court should be accorded substantial deference in making cramdown interest rate determinations." Thus, the Court will consider the methodology used for determining interest de novo, but will give substantial deference to the factual calculation of the interest rate.

B. Analysis

Both sides agree that the Bankruptcy Court's determination of the cramdown interest rate must be fair and equitable. Doc. 25 at 13; Doc. 21 at 13. In *Fowler,* the Court of Appeals adopted the "market" approach to determining the cramdown interest rate. 903 F.2d at 697. The bankruptcy court can determine the market rate of interest using one of two approaches: 1) determining the market interest rate for similar loans in the region; or 2) using a formula. *Id.*

The Court of Appeals further elaborated on the two approaches as follows:

> Under [the first] approach, the court sets the cramdown rate by taking testimony on current market rates regarding loans for the length of time involved secured by the type of property involved. [citation omitted]
>
> ... Under [the second] approach, the court starts with a base rate, either the prime rate or the rate on the treasure obligations, and adds a factor based on the risk of default and the nature of the security (the "risk factor"). [citation omitted] We approved the use of the formula approach in *Camino Real,* 818 F.2d [1503] at 1508 [(9th Cir.1987)].

Fowler, 903 F.2d. at 697.

[11] In this case, it appears undisputed that the Bankruptcy Court used the second, formula approach. Appellant argues that the Supreme Court case that approved the use of a formula was a Chapter 13 case; but the formula approach is not

appropriate in a Chapter 11 case, such as this one. Doc. 21 at 14–15. *Fowler,* which clearly approved of the use of a the formula approach, was a Chapter 12 case. 903 F.2d at 695. However, *Camino Real,* which the *Fowler* court points to as the case that approved the formula approach, was a Chapter 11 case. *Camino Real,* 818 F.2d at 1504. Thus, considering which method to use de novo, this Court finds that applying the formula approach, standing alone, is not reversible error.

***251** [12] Nonetheless, Appellant argues that "blindly" applying the formula approach is error. Doc. 21 at 15. Appellant argues that there may be market methods that better reflect the value of the creditor's claim than the formula approach. *Id.* (quoting *In re SJT Ventures, LLC,* 441 B.R. 248, 254 (Bankr.N.D.Tex.2010)). Thus, Appellant appears to argue that the Bankruptcy Court erred in applying the formula approach without acknowledging its option to apply an alternative approach. Doc. 21 at 16 (Appellant states, "Any fair reading of the Confirmation Opinion compels the conclusion that the bankruptcy court unwaveringly applied the [formula] approach to analyze the appropriate interest rate to be applied to [Appellant's] secured claim under the Plan.").

In ruling on Appellant's objection to using the formula or "*Till*" FN3 approach, the Bankruptcy Court ruled as follows:

FN3. *Till v. SCS Credit Corp.,* 541 U.S. 465, 124 S.Ct. 1951, 158 L.Ed.2d 787 (2004).

> Although *Till* was a chapter 13 case, the Court indicated that the relevant statutory language—"value, as of the effective date of the plan"—requires a court to discount a st[r]eam of deferred payments back to their present dollar value. 541 U.S. at 474 & n. 10 [124 S.Ct. 1951]. And because this statutory language is identical in the present §§ 1325(a)(5)(B)(ii) and 1129(b)(2)(A)(i)(II), the Court held that "we think it likely that Congress intended bankruptcy judges and trustees to follow essentially the same approach when choosing an appropriate interest rate under any of these provisions." *Id.* The only possible difference the Court noted was that there might be an efficient market for financing loans to Chapter 11 debtors, and that if such a market were available it would be appropriate to consider what rate such an efficient market would dictate. *Id.* at 477 n. 14 [124 S.Ct. 1951]. Here, however, all parties and experts agreed there is no market for a loan equivalent to the plan's treatment of Comerica's secured debt, so that possible exception to *Till's* analysis in a chapter 11 case does not apply.

Doc. 22–2 at 12, n. 19.

Although on appeal Appellant argues that the Bankruptcy Court failed to consider and give sufficient weight to Appellant's expert's testimony, this Court finds that the Bankruptcy Court did consider that testimony as it related to the interest rate question. Further, the above quoted language from the Bankruptcy Court's Order makes clear that the Bankruptcy Court knew it could consider an alternative market approach. Considering the law applied by the Bankruptcy Court de novo, this Court finds that the Bankruptcy Court did not err in using the formula or *Till* approach to calculate the interest rate.

[13] Finally, Appellant argues that even if the formula/ *Till* approach was appropriate, the Bankruptcy Court misapplied it. Doc. 21 at 16–17. Citing *Till,* Appellant argues that under the formula approach, the bankruptcy court must consider the characteristics of the loan. Doc. 21 at 17 (citing *Till,* 541 U.S. at 479, 124 S.Ct. 1951). Appellant further notes that *Till* does not elaborate on what constitutes the characteristics of the loan. *Id.* at 16. Appellant then argues that the Bankruptcy Court here erred by failing to consider the loan-to-collateral-value as a characteristic of the loan. *Id.* at 16–17.

Considering that *Till* did not mandate what constitutes the characteristics of the loan, and giving substantial deference to the Bankruptcy Court's determination of the interest rate, this Court finds that the ***252** Bankruptcy Court did not err in failing to consider loan-to-collateral-value as a characteristic of the loan. The Bankruptcy Court gave a detailed analysis of all the facts it considered in applying the formula approach (Doc. 22–2 at 14–16) and this Court finds that analysis correctly applied the *Till* considerations. Giving substantial deference to the Bankruptcy Court's calculation, this Court will not reverse the Bankruptcy Court's determination of the interest rate.

IV. Conclusion

Based on the foregoing,

IT IS ORDERED that the motion to dismiss for mootness (Doc. 41) is granted as to the new value contribution claim of error, and denied as to the § 1111(b) election and interest rate claims of error.

IT IS FURTHER ORDERED that the motion to dismiss for lack of jurisdiction as to the § 1111(b) election claim of error (Doc. 23) is granted.

IT IS FINALLY ORDERED that the decision of the Bankruptcy Court on the calculation of the interest rate is affirmed. Pursuant to Federal Rule of Bankruptcy Procedure 8016(a), the Clerk of the Court shall enter a judgment consistent with this Order. The Court reads 28 U.S.C. § 158(d) as requiring only a judgment, and not a mandate, from this Court. However, if either party disagrees, that party may move for issuance of a mandate within 21 days.

D.Ariz.,2012.
In re Red Mountain Machinery Co.
471 B.R. 242

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H

United States Bankruptcy Court,
N.D. Illinois,
Eastern Division.
In re GAC STORAGE LANSING, LLC, et al., Debtor.

No. 11–40944.
Jan. 10, **2013**.

Background: Debtor-limited liability company (LLC) moved for plan confirmation in jointly administered Chapter 11 cases. Secured creditor objected, and moved for relief from automatic stay.

Holdings: The Bankruptcy Court, Jacqueline P. Cox, J., held that:
(1) debtor failed to establish plan's feasibility with respect to proposed balloon payment to secured creditor;
(2) debtor failed to establish adequacy of its projections, so as to show that plan was feasible;
(3) creditor's proposed interest rate of 8.2% was appropriate rate to capture risk that debtor would not satisfy creditor's claim;
(4) debtor did not comply with statutory disclosure requirements;
(5) transfer of new equity under proposed plan did not trigger absolute priority rule;
(6) release purporting to enjoin creditor's collection actions against guarantors could not be approved; and
(7) cause existed to lift automatic stay.

Plan confirmation denied; stay relief granted.

West Headnotes

[1] Bankruptcy 51 ⚿3566.1

51 Bankruptcy
51XIV Reorganization
51XIV(B) The Plan
51k3566 Confirmation; Objections
51k3566.1 k. In general. Most Cited Cases

Plan proponent bears the burden of proving by a preponderance of the evidence that each of the requirements for Chapter 11 plan confirmation are met. 11 U.S.C.A. § 1129(a).

[2] Bankruptcy 51 ⚿3559

51 Bankruptcy
51XIV Reorganization
51XIV(B) The Plan
51k3559 k. Feasibility in general. Most Cited Cases

Bankruptcy judge has an affirmative obligation to ensure that a Chapter 11 plan of reorganization is feasible. 11 U.S.C.A. § 1129(a)(11).

[3] Bankruptcy 51 ⚿3559

51 Bankruptcy
51XIV Reorganization
51XIV(B) The Plan
51k3559 k. Feasibility in general. Most Cited Cases

Feasibility requirement for Chapter 11 plan confirmation mandates that plan proponent offer concrete evidence of cash flow to fund and maintain both its operations and its obligations under plan. 11 U.S.C.A. § 1129(a)(11).

[4] Bankruptcy 51 ⚿3559

51 Bankruptcy
51XIV Reorganization
51XIV(B) The Plan
51k3559 k. Feasibility in general. Most Cited Cases

To establish feasibility of Chapter 11 plan, plan proponent is not required to show that plan is guaranteed to succeed; rather, a reasonable assurance of commercial viability is required. 11 U.S.C.A. § 1129(a)(11).

[5] Bankruptcy 51 ⚿3559

51 Bankruptcy
51XIV Reorganization
51XIV(B) The Plan
51k3559 k. Feasibility in general. Most Cited

Cases

In making determination as to feasibility of proposed Chapter 11 plan, court may examine (1) adequacy of capital structure, (2) earning power of debtor's business, (3) economic conditions, (4) ability of management, (5) probability of continuation of same management, and (6) any other matter that may affect debtor's ability to perform plan. 11 U.S.C.A. § 1129(a)(11).

[6] Bankruptcy 51 ⚿3559

51 Bankruptcy
51XIV Reorganization
51XIV(B) The Plan
51k3559 k. Feasibility in general. Most Cited Cases

Bankruptcy 51 ⚿3566.1

51 Bankruptcy
51XIV Reorganization
51XIV(B) The Plan
51k3566 **Confirmation**; Objections
51k3566.1 k. In general. Most Cited Cases

Discrepancies in appraisal report of Chapter 11 debtor's expert and lack of data supporting his conclusions rendered his **valuation** of debtor's self-storage facility unreliable, and therefore debtor failed to show that it would have requisite financing to fund final balloon payment to be made to secured creditor under proposed plan, as required to establish plan's feasibility. 11 U.S.C.A. § 1129(a)(11).

[7] Bankruptcy 51 ⚿3559

51 Bankruptcy
51XIV Reorganization
51XIV(B) The Plan
51k3559 k. Feasibility in general. Most Cited Cases

Bankruptcy 51 ⚿3566.1

51 Bankruptcy
51XIV Reorganization
51XIV(B) The Plan
51k3566 Confirmation; Objections
51k3566.1 k. In general. Most Cited Cases

Chapter 11 debtor, which owned self-storage facility, failed to establish adequacy of its projections, and thus that proposed plan was feasible, as required for plan confirmation; debtor's growth projections were speculative, given economic conditions of area in which facility was located and proximity of debtor's competitor, entity that was to be debtor's sole tenant and source of income during pendency of plan had not yet been capitalized and had not obtained letter of credit or $1,000,000 security deposit due under master lease, and there was no evidence that proposed tenant had adequate capital reserves to fulfill its obligations to debtor if facility did not achieve net operating income projections. 11 U.S.C.A. § 1129(a)(11).

[8] Bankruptcy 51 ⚿3563.1

51 Bankruptcy
51XIV Reorganization
51XIV(B) The Plan
51k3563 Fairness and Equity; “Cram Down.”
51k3563.1 k. In general. Most Cited Cases

To satisfy fair and equitable condition for confirmation, over creditor's objection, of Chapter 11 plan providing for retention of creditor's collateral, plan of reorganization cannot unfairly shift risk of plan's failure to creditor. 11 U.S.C.A. § 1129(b)(2)(A).

[9] Bankruptcy 51 ⚿3566.1

51 Bankruptcy
51XIV Reorganization
51XIV(B) The Plan
51k3566 Confirmation; Objections
51k3566.1 k. In general. Most Cited Cases

While Chapter 11 debtor bears burden of proof on plan confirmation issues, objecting creditor bears burden of establishing that additional risk adjustment is necessary in determining interest rate adequate to ensure realization of creditor's claim. 11 U.S.C.A. § 1129(b)(2)(A).

[10] Interest 219 ⚿31

219 Interest

219II Rate
219k31 k. Computation of rate in general. Most Cited Cases

Interest rate of 8.2% proposed by objecting secured creditor, rather than Chapter 11 debtor's proposed rate of 4.61%, was appropriate rate to capture risk that debtor would not satisfy creditor's claim, as required for plan confirmation under statute's cram-down requirements. 11 U.S.C.A. § 1129(b)(2)(A).

[11] Bankruptcy 51 ⚿3539.1

51 Bankruptcy
51XIV Reorganization
51XIV(B) The Plan
51k3539 Disclosure and Solicitation
51k3539.1 k. In general. Most Cited Cases

Purpose of disclosure statement is to provide creditors the information they need to decide whether to accept or reject debtor's Chapter 11 plan. 11 U.S.C.A. § 1125.

[12] Bankruptcy 51 ⚿3539.1

51 Bankruptcy
51XIV Reorganization
51XIV(B) The Plan
51k3539 Disclosure and Solicitation
51k3539.1 k. In general. Most Cited Cases

Determination of whether Chapter 11 debtor's disclosure statement contains adequate information is made on a case-by-case basis under the facts and circumstances presented. 11 U.S.C.A. § 1125.

[13] Bankruptcy 51 ⚿3539.1

51 Bankruptcy
51XIV Reorganization
51XIV(B) The Plan
51k3539 Disclosure and Solicitation
51k3539.1 k. In general. Most Cited Cases

Chapter 11 debtor did not comply with statutory disclosure requirements for proposed amended plan; debtor failed to provide any information regarding recently executed master lease agreement for debtor's self-storage facility or about identity of tenant under agreement, even though rental income to be paid to debtor under agreement was sole source of funding under plan, disclosure statement did not provide information regarding financial condition of newly formed tenant entity, its parent company, and business relationships between tenant, debtor, and debtor's guarantors, and disclosure statement did not accurately provide for amount of new equity contribution under plan. 11 U.S.C.A. §§ 1125, 1127(c).

[14] Bankruptcy 51 ⚿3539.1

51 Bankruptcy
51XIV Reorganization
51XIV(B) The Plan
51k3539 Disclosure and Solicitation
51k3539.1 k. In general. Most Cited Cases

Proposed Chapter 11 plan, which was silent as to reorganized debtor's management structure, did not satisfy disclosure requirements of confirmation statute. 11 U.S.C.A. § 1129(a)(5)(A)(i).

[15] Bankruptcy 51 ⚿3561

51 Bankruptcy
51XIV Reorganization
51XIV(B) The Plan
51k3561 k. Preservation of priority. Most Cited Cases

Under the "absolute priority rule," claims of any objecting, impaired class must be paid in full before a class of claims junior to it is allowed to retain any interest under a Chapter 11 plan. 11 U.S.C.A. § 1129(b)(2)(B)(ii).

[16] Bankruptcy 51 ⚿3561

51 Bankruptcy
51XIV Reorganization
51XIV(B) The Plan
51k3561 k. Preservation of priority. Most Cited Cases

Bankruptcy 51 ⚿3563.1

51 Bankruptcy
51XIV Reorganization

51XIV(B) The Plan
51k3563 Fairness and Equity; "Cram Down."
51k3563.1 k. In general. Most Cited Cases

Compliance with absolute priority rule is one of conditions of fair and equitable standard that must be met for cram-down confirmation of proposed Chapter 11 plan over objection of impaired creditor. 11 U.S.C.A. § 1129(b)(1).

[17] Bankruptcy 51 3566.1

51 Bankruptcy
51XIV Reorganization
51XIV(B) The Plan
51k3566 Confirmation; Objections
51k3566.1 k. In general. Most Cited Cases

Where one or more classes of claims entitled to vote reject Chapter 11 plan, any member of rejecting class may file an objection to confirmation of plan based on any alleged violation of absolute priority rule. 11 U.S.C.A. § 1129(b)(2)(B)(ii).

[18] Bankruptcy 51 3566.1

51 Bankruptcy
51XIV Reorganization
51XIV(B) The Plan
51k3566 Confirmation; Objections
51k3566.1 k. In general. Most Cited Cases

Bank had deficiency claim in light of value of its collateral established by bankruptcy court, even though proposed Chapter 11 plan treated bank's claim as wholly secured, and therefore bank had standing to invoke absolute priority rule in objecting to plan confirmation. 11 U.S.C.A. §§ 506(a), 1129(b)(2)(B)(ii).

[19] Bankruptcy 51 3561

51 Bankruptcy
51XIV Reorganization
51XIV(B) The Plan
51k3561 k. Preservation of priority. Most Cited Cases

"Absolute priority rule" prohibits current holders of equity from retaining any interests or property on account of their equity interests unless senior classes are paid in full. 11 U.S.C.A. § 1129(b)(2)(B)(ii).

[20] Bankruptcy 51 3561

51 Bankruptcy
51XIV Reorganization
51XIV(B) The Plan
51k3561 k. Preservation of priority. Most Cited Cases

Individual who was to become sole and managing member of reorganized debtor was not current holder of equity interest in Chapter 11 debtor-limited liability company (LLC), within plain meaning of statute setting forth absolute priority rule, and therefore transfer of new equity under proposed plan did not trigger rule, where another LLC was debtor's sole member and individual who was to become reorganized debtor's member was partial owner of that LLC through interest in that LLC held by family trust, none of current members or guarantors were to be involved in management of reorganized debtor, and there was no evidence that proposed new member allowed current owners to retain their equity interest or would act as "straw man" to transfer his interest to former equity holders. 11 U.S.C.A. § 1129(b)(2)(B)(ii).

[21] Bankruptcy 51 3555

51 Bankruptcy
51XIV Reorganization
51XIV(B) The Plan
51k3548 Requisites of Confirmable Plan
51k3555 k. Settlement, adjustment, or enforcement of claims. Most Cited Cases

Standard for approval of a release included in Chapter 11 plan of reorganization in favor of a nondebtor third party is that the provision be narrowly tailored and essential to the reorganization plan as a whole.

[22] Bankruptcy 51 3555

51 Bankruptcy
51XIV Reorganization
51XIV(B) The Plan
51k3548 Requisites of Confirmable Plan

51k3555 k. Settlement, adjustment, or enforcement of claims. Most Cited Cases

Release covering guarantors for Chapter 11 debtor's secured prepetition loan included in proposed plan was overly broad and not essential to debtor's reorganization, and thus could not be approved, where release, which purported to enjoin lender from pursuing collection efforts against guarantors, under debtor's loan or otherwise, so long as reorganized debtor was performing its obligations to lender under plan, appeared to bar lender from pursuing contractual remedies against guarantors for other loans and obligations, guarantors had no claims against estate or reorganized debtor, negating concerns that debtor could be dragged into litigation involving guarantors, and guarantors' time, money, and energy were not directed toward debtor's reorganization.

[23] Bankruptcy 51 ⚷3555

51 Bankruptcy
51XIV Reorganization
51XIV(B) The Plan
51k3548 Requisites of Confirmable Plan
51k3555 k. Settlement, adjustment, or enforcement of claims. Most Cited Cases

Injunction in Chapter 11 plan protecting non-debtor parties may be appropriate where (1) there is danger of imminent, irreparable harm to estate or debtor's ability to reorganize, (2) there is reasonable likelihood of successful reorganization, (3) court has balanced relative harm as between debtor and creditor to be restrained, and (4) court has considered the public interest, which requires balancing of public interest in successful bankruptcy reorganizations with other competing societal interests.

[24] Bankruptcy 51 ⚷3550

51 Bankruptcy
51XIV Reorganization
51XIV(B) The Plan
51k3548 Requisites of Confirmable Plan
51k3550 k. Classification of claims. Most Cited Cases

Statute governing classification of claims or interests in Chapter 11 cases does not mandate that a plan proponent classify similar claims together; however, it provides that dissimilar claims cannot be placed into the same class. 11 U.S.C.A. § 1122(a).

[25] Bankruptcy 51 ⚷3550

51 Bankruptcy
51XIV Reorganization
51XIV(B) The Plan
51k3548 Requisites of Confirmable Plan
51k3550 k. Classification of claims. Most Cited Cases

Although Chapter 11 debtors are prohibited from separately classifying claims to gerrymander an affirmative vote on reorganization, claims may be classified separately if significant disparities exist between the legal rights of the holder which render the two claims not substantially similar. 11 U.S.C.A. § 1122(a).

[26] Bankruptcy 51 ⚷3550

51 Bankruptcy
51XIV Reorganization
51XIV(B) The Plan
51k3548 Requisites of Confirmable Plan
51k3550 k. Classification of claims. Most Cited Cases

Proposed Chapter 11 plan, which failed to classify separately unsecured portion of secured creditor's claim in accordance with statute, did not satisfy plan confirmation requirement mandating that plan comply with Bankruptcy Code's provisions. 11 U.S.C.A. §§ 506(a)(1), 1122(a), 1129(a)(1).

[27] Bankruptcy 51 ⚷3558

51 Bankruptcy
51XIV Reorganization
51XIV(B) The Plan
51k3558 k. Good faith and legality. Most Cited Cases

Bankruptcy judges have broad discretion in determining whether debtor's Chapter 11 plan has been filed in good faith. 11 U.S.C.A. § 1129(a)(3).

[28] Bankruptcy 51 ⚷3558

51 Bankruptcy
51XIV Reorganization
51XIV(B) The Plan
51k3558 k. Good faith and legality. Most Cited Cases

Good faith required for Chapter 11 plan confirmation is generally interpreted to mean that there exists a reasonable likelihood that plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code; further, plan must have a true purpose and fact-based hope of either preserving going concern or maximizing property available to satisfy creditors. 11 U.S.C.A. § 1129(a)(3).

[29] Bankruptcy 51 ⚷3558

51 Bankruptcy
51XIV Reorganization
51XIV(B) The Plan
51k3558 k. Good faith and legality. Most Cited Cases

Chapter 11 plan of debtor-limited liability company (LLC) was not proposed in good faith, as required for plan confirmation, where individual who was to become reorganized debtor's sole and managing member conditioned his $250,000 new equity contribution upon entry of non-consensual injunction protecting guarantors of debtor's prepetition loan, rather than offering new investment opportunity to third-party investors, which effectively foreclosed opportunity for third-party investors to provide larger new equity contribution which could have been used to satisfy lender's claim. 11 U.S.C.A. § 1129(a)(3).

[30] Bankruptcy 51 ⚷2424

51 Bankruptcy
51IV Effect of Bankruptcy Relief; Injunction and Stay
51IV(C) Relief from Stay
51k2422 Cause; Grounds and Objections
51k2424 k. Debtor's want of interest or equity. Most Cited Cases

Bankruptcy 51 ⚷2427

51 Bankruptcy
51IV Effect of Bankruptcy Relief; Injunction and Stay
51IV(C) Relief from Stay
51k2422 Cause; Grounds and Objections
51k2427 k. Unlikelihood of reorganization; lack of plan. Most Cited Cases

Bankruptcy 51 ⚷2429(1)

51 Bankruptcy
51IV Effect of Bankruptcy Relief; Injunction and Stay
51IV(C) Relief from Stay
51k2422 Cause; Grounds and Objections
51k2429 Necessity of Asset for Reorganization or Rehabilitation
51k2429(1) k. In general. Most Cited Cases

Chapter 11 plan must be confirmable to be “effective” within meaning of provision of automatic stay statute allowing for stay relief if debtor lacks equity in property securing creditor's claim and property is not necessary to effective reorganization; thus, plan confirmation requirements must be met. 11 U.S.C.A. §§ 362(d)(2), 1129.

[31] Bankruptcy 51 ⚷2439(4)

51 Bankruptcy
51IV Effect of Bankruptcy Relief; Injunction and Stay
51IV(C) Relief from Stay
51k2435 Proceedings
51k2439 Evidence
51k2439(3) Creditor's Burden
51k2439(4) k. Lack of equity. Most Cited Cases

Bankruptcy 51 ⚷2439(5.1)

51 Bankruptcy
51IV Effect of Bankruptcy Relief; Injunction and Stay
51IV(C) Relief from Stay
51k2435 Proceedings

51k2439 Evidence
51k2439(5) Debtor's or Trustee's Burden
51k2439(5.1) k. In general. Most Cited Cases

Bankruptcy 51 ⚷2439(7)

51 Bankruptcy
51IV Effect of Bankruptcy Relief; Injunction and Stay
51IV(C) Relief from Stay
51k2435 Proceedings
51k2439 Evidence
51k2439(5) Debtor's or Trustee's Burden
51k2439(7) k. Necessity for reorganization or rehabilitation. Most Cited Cases

Moving party seeking relief from automatic stay on ground that debtor lacks equity in property securing creditor's claim and property is not necessary to effective reorganization bears the burden of proof on issue of debtor's equity in property; debtor bears the burden of proof on all other issues, such as whether property is necessary to effective reorganization. 11 U.S.C.A. § 362(d)(2).

[32] **Bankruptcy 51 ⚷2427**

51 Bankruptcy
51IV Effect of Bankruptcy Relief; Injunction and Stay
51IV(C) Relief from Stay
51k2422 Cause; Grounds and Objections
51k2427 k. Unlikelihood of reorganization; lack of plan. Most Cited Cases

Bankruptcy 51 ⚷2429(1)

51 Bankruptcy
51IV Effect of Bankruptcy Relief; Injunction and Stay
51IV(C) Relief from Stay
51k2422 Cause; Grounds and Objections
51k2429 Necessity of Asset for Reorganization or Rehabilitation
51k2429(1) k. In general. Most Cited Cases

To show that property as to which creditor seeks automatic stay relief is necessary to effective reorganization, debtor must show that there is a reasonable possibility of a successful reorganization within a reasonable time. 11 U.S.C.A. § 362(d)(2).

[33] **Bankruptcy 51 ⚷2424**

51 Bankruptcy
51IV Effect of Bankruptcy Relief; Injunction and Stay
51IV(C) Relief from Stay
51k2422 Cause; Grounds and Objections
51k2424 k. Debtor's want of interest or equity. Most Cited Cases

Bankruptcy 51 ⚷2427

51 Bankruptcy
51IV Effect of Bankruptcy Relief; Injunction and Stay
51IV(C) Relief from Stay
51k2422 Cause; Grounds and Objections
51k2427 k. Unlikelihood of reorganization; lack of plan. Most Cited Cases

Cause existed to lift automatic stay in Chapter 11 case, given debtor's failure to establish that its proposed plan was feasible, debtor's failure to establish reasonable possibility of successful reorganization within reasonable period of time, and lack of equity in debtor's property securing creditor's claim. 11 U.S.C.A. §§ 362(d)(2), 1129.

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Bryce Suzuki, Phoenix, AZ, Aaron Davis, Chicago, IL, for Bank of America.

MEMORANDUM OPINION DENYING CONFIRMATION OF DEBTOR'S AMENDED PLAN OF REORGANIZATION AND GRANTING RELIEF FROM STAY (dkt. nos. 612, 548)

JACQUELINE P. COX, Bankruptcy Judge.