

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MICROSOFT CORPORATION, a)
Washington Corporation,)
)
Plaintiff,)
v.)
) C.A. No. 8092-VCP
AMPHUS, INC., a Delaware Corporation;)
ST. CLAIR INTELLECTUAL)
PROPERTY CONSULTANTS, INC., a)
Michigan Corporation; PATENT)
REVENUE PARTNERS, LLC, a)
California Limited Liability Company;)
HENRY FUNG, an Individual; and)
MICHIO FUJIMURA, an Individual;)
)
Defendants,)
and)
)
VADEM, LTD., a British Virgin Islands)
International Business Company; and)
VADEM, a California Corporation;)
)
Nominal Defendants.)

MEMORANDUM OPINION

Submitted: June 27, 2013
Decided: October 31, 2013

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PARSONS, Vice Chancellor.

This action arises from the restructuring of a British Virgin Islands (“BVI”) company in late 1999 and early 2000. Under the restructuring, the BVI company spun off its assets into four subsidiary operating entities in exchange for substantial equity interests in each of those operating entities. The derivative plaintiff, a shareholder in the BVI company, alleges that one of the company’s directors breached his fiduciary duties to the company by using the restructuring to fraudulently obtain a larger financial stake in some of the company’s valuable intellectual property and usurping the company’s opportunity to sell that intellectual property to an outside party at a time when the company needed cash. The derivative plaintiff further alleges that various entities and another individual either aided and abetted the director’s breaches of fiduciary duties or conspired with him to commit the alleged breaches. The plaintiff seeks, among other relief, damages for the director’s breach of fiduciary duties and rescission of the resulting fraudulent intellectual property transaction with the company.

The defendants have moved to dismiss the complaint in its entirety on the grounds that this Court lacks personal jurisdiction over several defendants and that the plaintiff’s claims are time-barred by the statute of limitations and the corresponding equitable doctrine of laches. In addition, the defendants argue that the plaintiff lacks standing to bring certain claims on behalf of a subsidiary of the BVI company, and that one of the defendants lacks capacity to be sued.

Having considered the parties’ briefs and heard argument on the motions, I conclude that the defendants’ motions to dismiss the plaintiff’s complaint should be granted with respect to two defendants: one who lacks capacity to be sued and the other

over whom this Court lacks personal jurisdiction. Because Count VII of the complaint is directed solely at the individual over whom this Court lacks personal jurisdiction, it also is dismissed. In all other respects, the defendants' motions to dismiss are denied.

I. BACKGROUND

A. The Parties

Plaintiff, Microsoft Corporation, is a Washington corporation with its principal place of business at One Microsoft Way, Redmond, Washington. Microsoft has continuously owned Series F Preferred Stock in Nominal Defendant, Vadem Ltd., since 1999.

Nominal Defendant, Vadem Ltd. ("Vadem" or "Vadem BVI"), is a privately held international business company incorporated under the laws of the British Virgin Islands with its principal place of business at 473 Sapena Court, Suite 5, Santa Clara, California.

Nominal Defendant, Vadem, Inc. ("Vadem California"), is a California company with its principal place of business at the same address as Vadem. Vadem California is a wholly owned subsidiary of Vadem and was the former assignor of certain patents related to power management and conservation for computer systems (the "Vadem Patents"). The Vadem Patents were transferred to Defendant Amplus, Inc. ("Amplus") in June 2000.

Defendant Henry Fung is a co-founder of Vadem, its former Chief Technology Officer, and its current CEO. Fung is one of two current directors on Vadem BVI's board of directors (the "Vadem BVI Board" or the "Board"), and has served as a director since Vadem's inception in 1993. Fung is the named inventor of several of the Vadem

Patents. In addition, Fung was a founder, director, and CEO of Defendant Amphus and is a manager of Defendant Patent Revenue Partners, LLC (“PRP”).

Defendant Amphus is a now-dissolved Delaware corporation that maintained its principal place of business at the same office as Vadem and Vadem California in Santa Clara, California. Amphus was formed on December 8, 1999. Vadem BVI initially owned 40 percent of the equity in Amphus, and later increased its share to 50 percent. At inception, Fung owned 20 percent of the equity in Amphus. Amphus was dissolved on December 24, 2008, at which point its remaining assets were purchased by Vadem and Defendant St. Clair Intellectual Property Consultants, Inc. (“St. Clair”).

Defendant St. Clair is a Michigan corporation with its principal place of business at 16845 Kercheval Avenue, Suite 2, Gross Pointe, Michigan. St. Clair is the purported current owner of the Vadem Patents.

Defendant PRP is a California limited liability company with its principal place of business in the same California office as Vadem, Vadem California, and Amphus. PRP was formed on December 24, 2001 and, in 2008, replaced Amphus as the recipient of certain revenue streams from St. Clair related to the Vadem Patents.

Defendant Michio Fujimura is a director of Vadem and Vadem California, and has been a director of both entities since at least 1999. Fujimura is also a partner in PRP and was a director of Amphus from the time of its formation to the time of its dissolution.

B. Facts¹

1. Formation of Amphus

In December 1999, a struggling Vadem BVI began exploring ways to restructure itself to improve shareholder value. The Vadem BVI Board determined that the best course of action would be for Vadem BVI to become a holding company. To achieve this objective, Vadem BVI decided to create four new operating companies and transfer its assets and business into those new entities in exchange for a substantial stake in the operating companies' equity.

On December 6, 1999, Fung presented his idea for one of the operating companies to the Vadem BVI Board. Specifically, Fung proposed forming a new entity named Amphus as a Delaware corporation and moving Vadem BVI's chip product business into that company. The chip product business included numerous patents, among them the Vadem Patents. Fung's proposal also outlined Amphus's management and ownership structure. Fung would be a "founder" and the CEO of Amphus and would have a 20 percent ownership stake in the company.² Of the remaining 80 percent, Vadem BVI would receive a 40 percent interest in the company, and the final 40 percent would be divided among Amphus's other "founders" and new outside investors.

¹ Unless otherwise indicated, the facts recited in this Memorandum Opinion are based on the allegations in Plaintiff's Complaint, documents integral to or incorporated in the Complaint, or facts of which the Court may take judicial notice.

² Fung owned 7.9 percent of Vadem BVI's equity at the time Amphus was created.

At the time of his proposal, Fung knew that Vadem BVI was running out of cash. Vadem BVI previously had raised cash by selling patents to Microsoft. Although Fung believed Vadem BVI could find a buyer for the Vadem Patents, he did not share that belief with the Board or suggest that Vadem BVI explore such a possibility.

At the December 6 meeting, the Vadem BVI Board accepted Fung's proposal, and the two sides began negotiating the terms of Vadem BVI's asset transfer to Amphus. Although Fung believed that the Vadem Patents were worth "hundreds of millions of dollars,"³ he represented to the Vadem BVI Board that the patents were worthless. In contemplation of the Amphus transaction, Vadem BVI conducted an internal valuation of the Vadem Patents and also retained KPMG in December 1999 to provide an outside valuation perspective. During these valuation processes, Fung intentionally made statements and representations to Vadem BVI and KPMG designed to drive the valuation of the Vadem Patents as low as possible. Based on Fung's representation that "the existence of competing patent designs diminish the possibility of earning future royalties from [the Vadem Patents],"⁴ KPMG determined that those patents had no value.

By means of a Bill of Sale dated March 7, 2000, Vadem BVI purported to transfer various assets, including the Vadem Patents, to Amphus. The consideration for the Vadem Patents was nominal. On April 20, 2000, Vadem BVI and Amphus executed a stock purchase agreement in which Vadem BVI was issued approximately 40 percent of

³ Compl. ¶¶ 14, 17, 21.

⁴ *Id.* ¶ 14.

Amphus's issued and outstanding stock. As a result of these transactions, Vadem BVI's 100 percent interest in the Vadem Patents was reduced by 60 percent.

2. The Vadem BVI Board sends shareholders the Information Statement

On March 8, 2000, a day after Vadem BVI and Amphus executed the bill of sale, the Vadem BVI Board sent shareholders, including Microsoft, an information statement (the "Information Statement") notifying them that the Board had commenced a restructuring of the company. According to the Information Statement, Vadem BVI already had begun forming operating companies and transferring its assets to those entities. Although the Vadem Patents were not identified specifically, Vadem shareholders were informed that certain intellectual property assets were being transferred to the operating companies. The Information Statement also warned shareholders that the asset transfers to the operating companies would cause "an immediate substantial dilution" of Vadem's shareholders' ownership interests. Vadem BVI did not seek shareholder approval for the asset transfers,⁵ nor did Vadem shareholders ever approve those transfers.

⁵ As originally conceived, the restructuring also was supposed to include Vadem BVI merging into a Vadem-formed California limited liability company. Vadem shareholders were asked to provide their written consent to this proposed merger, which also was described in the Information Statement. Although the asset transfers to operating companies were completed in 2000, Vadem BVI never consummated a merger with the California limited liability company.

3. The Vadem Patents are sold to St. Clair

Before the bill of sale was executed on March 7, 2000, Amphus asked its outside counsel to locate a company that would be interested in buying the Vadem Patents. Also before March 7, Amphus and St. Clair began discussing St. Clair's interest in purchasing the Vadem Patents. Fung did not inform Vadem BVI that an opportunity existed for Vadem BVI to sell the Vadem Patents to St. Clair rather than transferring them to Amphus.

During its due diligence into the Vadem Patents, St. Clair discovered that Vadem California, and not Vadem BVI, had title to the Vadem Patents. At St. Clair's request, Amphus had Vadem California transfer title to the Vadem Patents to Amphus on June 15, 2000. The next day, Amphus sold the Vadem Patents to St. Clair. In consideration for the patents, Amphus received an initial payment of \$300,000, the rights to the first \$1,000,000 in licensing revenue that St. Clair collected on the Vadem Patents, and the rights to 50 percent of all Vadem Patent licensing revenues that St. Clair received thereafter. As a result of a later agreement between Amphus and St. Clair, Amphus's interest in the ongoing licensing revenues was reduced from 50 to 30 percent.

In or around October 2000, St. Clair began offering to license some of the Vadem Patents to various companies that sold personal computers. Amphus was kept apprised of St. Clair's efforts. By February 2001, St. Clair had contacted at least seventeen companies and offered them the opportunity to license the Vadem Patents.

4. Amphus Dissolves

In 2008, Amphus began preparing to dissolve and sell its remaining assets to Vadem BVI and St. Clair. In anticipation of the sale of those assets, Amphus retained Serendib Advisors (“Serendib”) in 2007 to value the portion of Amphus’s business that was to be sold to Vadem BVI. This included Amphus’s right to receive ongoing licensing revenue from the Vadem Patents. In that regard, Fung represented to Serendib that Amphus’s right to revenues from the Vadem Patents had no value. Consequently, in its valuation of Amphus, Serendib assigned no value to Amphus’s right to ongoing revenue from the Vadem Patents.

On May 20, 2008, after Serendib provided its valuation, Amphus and St. Clair amended their patent sale agreement to provide that ongoing revenue from the Vadem Patents would be paid to PRP, instead of Amphus. Amphus created PRP in or around 2001. At its inception, PRP had the same ownership structure as Amphus.⁶ Approximately seven months after Amphus and St. Clair amended their agreement, on December 24, 2008, Amphus was dissolved and its remaining assets were purchased by Vadem BVI and St. Clair. These assets did not include the right to ongoing revenue from the Vadem Patents, because that right already had been transferred to PRP.

⁶ Stated differently, Fung, Vadem BVI, and other “founders” and investors in Amphus were given the same ownership stake in PRP as they had in Amphus. Because Vadem BVI had a 50 percent interest in Amphus at the time, it received a 50 percent interest in PRP.

5. St. Clair files a patent infringement suit against Microsoft's customers

As of May 2009, St. Clair had not generated any licensing revenue from the Vadem Patents. On May 15, 2009, St. Clair brought a patent infringement suit in the United States District Court for the District of Delaware (the "Delaware District Court") against several companies to which it previously had offered to license the Vadem Patents. Because some of St. Clair's infringement claims implicated features of Microsoft Windows, Microsoft commenced a declaratory judgment action against St. Clair, also in the Delaware District Court, seeking a declaration that Microsoft Windows does not infringe the Vadem Patents that were asserted against its customers and that those Vadem Patents are invalid. Pursuant to its agreement with St. Clair, PRP stands to receive 30 percent of any recovery St. Clair obtains as a result of its litigation in the Delaware District Court.

C. Procedural History

On October 14, 2011, Microsoft filed its original verified complaint (the "Original Complaint") in the previous action involving these parties in this Court. That action asserted both direct claims and derivative claims on behalf of Vadem BVI against various defendants. Nominal defendant, Vadem BVI, and the other defendants moved to dismiss the Original Complaint. After briefing and argument, on April 27, 2012, this Court dismissed the Original Complaint in its entirety. Only Microsoft's direct claims, however, were dismissed with prejudice. The Court held that Microsoft had to seek leave from the High Court of the British Virgin Islands (the "BVI High Court") before it could

proceed with a derivative suit on behalf of Vadem BVI, but that Microsoft could seek to re-file its derivative claims after obtaining the necessary leave from the BVI High Court.

On May 23, 2012, Microsoft filed its application for leave with the BVI High Court, which granted that application on November 9, 2012. Approximately one month later, on December 11, 2012, Microsoft filed its verified derivative complaint (the “Complaint”) in this second action against many of the same defendants. On April 22, 2013, all Defendants other than St. Clair moved to dismiss the Complaint in its entirety. The following day, St. Clair moved to dismiss all the counts relating to it. After full briefing on those motions, I heard argument on June 27, 2013. This Memorandum Opinion constitutes my rulings on Defendants’ motions to dismiss.

D. Parties’ Contentions

Microsoft has brought seven derivative counts on behalf of Vadem BVI against Defendants. In Count I, Microsoft claims Fung breached his fiduciary duties to Vadem BVI by: (1) inducing Vadem BVI to transfer the Vadem Patents to Amphus by deliberately misrepresenting the value of the Vadem Patents to the company; (2) engaging in self-dealing in negotiating the terms of the transfer of patents from Vadem BVI to Amphus; (3) failing to disclose to Vadem BVI his belief that the Vadem Patents were worth hundreds of millions of dollars; (4) representing to Serendib in 2007 that the Vadem Patents had no value; (5) destroying Vadem BVI documents in 2010 to hide his breaches of fiduciary duty; and (6) causing Vadem BVI to oppose Microsoft’s lawsuits in Delaware and the BVI in 2010 and 2011.

Count II is a claim against Fung, Amphus, PRP, and St. Clair for conspiracy to commit, or aiding and abetting in, Fung's breaches of fiduciary duties.

In Count III, Microsoft alleges Fung fraudulently induced Vadem BVI to transfer the Vadem Patents to Amphus for nominal consideration by misrepresenting their value to the Vadem BVI Board. Count IV is a claim against Fung, Amphus, and St. Clair for conspiracy to commit, or aiding and abetting in, Fung's fraudulent inducement.

In Count V, Microsoft asserts that Fung usurped Vadem BVI's corporate opportunity to sell the Vadem Patents to St. Clair or a higher bidder. Count VI, against Fung, Amphus, St. Clair, and PRP, alleges that those Defendants conspired to commit, or aided and abetted in, Fung's usurpation of Vadem BVI's corporate opportunity.

Microsoft's final claim, Count VII, is a breach of fiduciary duty claim against Fujimura. Microsoft avers that Fujimura breached his fiduciary duties to Vadem BVI by failing both to monitor Fung's conduct and to attempt to seek any remedy against Fung after Fujimura became aware of Fung's wrongdoing.

Defendants counter that Microsoft's Complaint should be dismissed in its entirety because this Court lacks personal jurisdiction over Fung, St. Clair, and PRP under either Delaware's Long Arm Statute or the conspiracy theory of jurisdiction. In addition, Defendants contend that Amphus lacks capacity to be sued because this lawsuit was filed more than three years after Amphus was dissolved in December 2008. Defendants further argue that, even if this Court has personal jurisdiction over Defendants, all of Microsoft's claims relate to the transfer of the Vadem Patents in 1999 and 2000 and are time-barred by the state of limitations and the equitable doctrine of laches. To the extent

that any of Microsoft's claims are not time-barred, Defendants also aver that, as a shareholder of Vadem BVI, Microsoft lacks standing to bring any claims derivatively on behalf of Vadem California, the entity that actually owned the Vadem Patents and transferred them to Amphus. Finally, Defendants contend that Microsoft has failed to state a claim for rescission of the Vadem BVI-Amphus and Amphus-St. Clair transactions pertaining to the Vadem Patents.

II. ANALYSIS

Before addressing whether this Court has personal jurisdiction over Defendants, I first address Microsoft's standing to bring claims on behalf of Vadem California and whether Amphus has the capacity to be sued.

A. Microsoft has Standing to Bring Claims on Behalf of Vadem California

Defendant St. Clair avers that because the Vadem Patents belonged to Vadem California, and not Vadem BVI, Microsoft cannot bring any derivative claims relating to the Vadem Patents because Microsoft has never been a shareholder of Vadem California. In addition, St. Clair contends that the BVI High Court's order granting Microsoft leave to pursue claims on behalf of Vadem BVI explicitly prohibits Microsoft from asserting claims on behalf of Vadem California. Microsoft counters that its substantive claims against Fung pertain to harm he caused Vadem BVI, and that its standing to pursue claims on behalf of Vadem California is relevant only with regard to its requested relief of rescinding the transfer of the Vadem Patents from Vadem California to Amphus and Amphus's subsequent sale of those patents to St. Clair. According to Microsoft, even if this Court finds that a claim for rescission belongs to Vadem California, Microsoft still

has standing to bring that claim because Vadem California was the “mere instrumentality or alter ego of Vadem BVI.”

To the extent St. Clair’s argument relies on the BVI High Court’s order, that argument has been mooted by the Eastern Caribbean Supreme Court in the Court of Appeal’s (the “Caribbean Supreme Court”) decision on Microsoft’s appeal of the BVI High Court’s order. In that decision, Justice of Appeal Mario Michel held that the BVI High Court pronounced improperly “that Microsoft has no authority and cannot be authorized to prosecute, here or anywhere else, causes of action vested in Vadem California.”⁷ Justice Michel also held that “[w]hether this leave will enable Microsoft (in the name of and on behalf of Vadem BVI) to bring proceedings vested in a wholly-owned subsidiary of Vadem BVI will be determined by the *lex fori*.”⁸ Therefore, BVI law does not preclude Microsoft from pursuing claims on behalf of Vadem California in this proceeding.

For the most part, Microsoft properly has asserted its substantive claims against Fung on behalf of Vadem BVI. Even if Vadem California owned the Vadem Patents, Microsoft adequately has alleged that Vadem BVI was harmed because Fung committed acts of fraud, self-dealing, and usurpation of a corporate opportunity as a member of the Vadem BVI Board and negotiated on behalf of Amphus against Vadem BVI and its

⁷ Microsoft Corp. v. Vadem Ltd., BVIHCVAP2013/0007, Judgment (ECSC CA, Aug. 8, 2013), *available at*: http://www.eccourts.org/wp-content/files_mf/08.08.13microsoftcorporationvvademltd.pdf.

⁸ *Id.* (emphasis added).

Board. Microsoft also has alleged sufficient facts that it is reasonably conceivable that it could succeed in showing that Vadem California was Vadem BVI's instrumentality or alter ego.

Delaware courts will respect corporate formalities, absent a basis to “pierce the corporate veil.”⁹ One such basis is “where a subsidiary is in fact a mere instrumentality or alter ego of its owner.”¹⁰ A subsidiary may be the alter ego or mere instrumentality of its parent when the two “operate[] as a single economic entity such that it would be inequitable for this Court to uphold a legal distinction between them.”¹¹

Vadem BVI and Vadem California share directors, management, and business facilities.¹² All Vadem employees worked for and were paid by Vadem BVI.¹³ Fujimura and Fung both are directors of Vadem BVI and Vadem California. Yet, they have expressed confusion about the distinction between Vadem BVI and Vadem California and for which of these companies they serve as directors.¹⁴ Similarly, B.J. Olson, the General Counsel of both Vadem entities, did not realize that she had been General

⁹ *Geyer v. Ingersoll Publ'ns Co.*, 621 A.2d 784, 793 (Del. Ch. 1992).

¹⁰ *Id.*

¹¹ *Mabon, Nugent & Co. v. Texas Am. Energy Corp.*, 16 Del. J. Corp. L. 829, 838 (Del. Ch. 1990).

¹² Compl. ¶ 38.

¹³ *Id.* ¶ 36.

¹⁴ *Id.* ¶¶ 35, 37.

Counsel of Vadem California, despite having signed documents in that capacity.¹⁵ These allegations support a reasonable inference that Vadem BVI and Vadem California function as a single entity and that it would be inequitable to uphold a legal distinction between them. Based on the evidence before the Court for purposes of Defendants' motions to dismiss, Microsoft has presented a *prima facie* case that its claims against Fung belong to Vadem BVI and that it has standing to pursue any related claims that belong to Vadem California because it is Vadem BVI's alter ego. St. Clair's motion to dismiss Microsoft's claims for lack of standing, therefore, is denied.

B. Amphus Lacks Capacity to be Sued

Defendants argue that under 8 *Del. C.* § 278, Amphus lost its capacity to be sued on December 24, 2011, three years after Amphus's dissolution on December 24, 2008. Microsoft responds that its original action against Amphus was filed before December 24, 2011, and that its claims against Amphus remained "pending" after the expiration of the statutory period. Therefore, according to Microsoft, this Court should exercise its discretion under Section 278 to extend Amphus's existence for the purpose of resolving those claims.

Section 278 of the Delaware General Corporation Law ("DGCL") states in relevant part:

All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of 3 years from such expiration or dissolution or

¹⁵ *Id.* ¶ 36.

for such longer period as the Court of Chancery shall in its discretion direct, bodies corporate for the purpose of prosecuting and defending suits, whether civil, criminal or administrative, by or against them, and of enabling them gradually to settle and close their business With respect to any action, suit or proceeding begun by or against the corporation either prior to or within 3 years after the date of its expiration or dissolution, the action shall not abate by reason of the dissolution of the corporation.¹⁶

Thus, this Court possesses some discretion to extend the existence of a dissolved corporation.

The Court's discretion under Section 278, however, is not unlimited. "[T]he statute, as amended, gives this Court *no power* to continue a corporation for winding up purposes on an application made after the statutory three-year period has expired and thus after the corporation has ceased to exist as a legal entity."¹⁷ Accordingly, this Court may extend the duration of a corporate entity under Section 278 "only for the purpose of resolving *pending* litigation or disposing of remaining assets."¹⁸

Microsoft filed this action against Defendants on December 12, 2012, nearly a year after Amphus lost its capacity to be sued under Section 278. The issue, therefore, is whether Microsoft's prior lawsuit against many of the same defendants for many of the

¹⁶ 8 *Del. C.* § 278.

¹⁷ *In re Citadel Indus., Inc.*, 423 A.2d 500, 507 (Del. Ch. 1980) (internal quotation omitted) (emphasis added).

¹⁸ *In re Dow Chem. Int'l Inc.*, 2008 WL 4603580, at *1 (Del. Ch. Oct. 14, 2008).

same alleged wrongs provides a basis for finding that Amphus has the capacity to be sued in this action. For the following reasons, I conclude that it does not.

Microsoft knew that Amphus was in the process of dissolving when it filed the Original Complaint. It also was aware that the three-year statutory period to bring suit against Amphus under Section 278 was nearly up. When faced with a motion to dismiss the Original Complaint based on standing grounds, Microsoft chose to litigate the issue rather than ask this Court to stay the proceedings until it could rectify the alleged deficiency. In doing so, Microsoft took the risk that the Original Complaint would be dismissed and that it would not have any pending litigation against Amphus that was commenced before December 24, 2011. Because Microsoft's Original Complaint was dismissed in its entirety, it must accept the consequences of its chosen litigation strategy.

Microsoft emphasizes that this Court dismissed its derivative claims in the previous action without prejudice and "expressly recognized" that Microsoft could refile its derivative claims after seeking leave from the BVI High Court.¹⁹ The Court's recognition that Microsoft could refile its claims after it acquired the necessary standing to do so, however, did not constitute either an explicit or implicit waiver of Microsoft's obligation to comply with Section 278. Because Microsoft's Original Complaint was filed within three years of Amphus's dissolution, there was no question that Amphus's existence for purposes of that litigation would not abate upon the expiration of the three-year period specified in Section 278. Thus, in dismissing the earlier action, this Court

¹⁹ Microsoft Ans. Br. 36.

addressed Section 278 only insofar as recognizing that, at the time the motion to dismiss that action was pending, Amphus could be sued under its provisions.²⁰ Furthermore, because none of Microsoft's original derivative claims named Amphus as the sole defendant, those claims could have been refiled without including Amphus. In permitting Microsoft to refile its derivative claims, therefore, this Court did not provide Microsoft with any sort of waiver from, or immunity from the effects of, Section 278.

As a technical matter, this Court could have exercised its discretion during the pendency of Microsoft's original action and before December 24, 2011, to extend Amphus's capacity to be sued beyond that date. But, the Court did not do so, and Microsoft did not request such an extension. By the time the earlier case ended, the three-year window prescribed in Section 278 had expired. This Court, therefore, no longer has the power to extend Amphus's capacity to be sued.²¹ Accordingly, Amphus is dismissed from this action on the ground that it lacks capacity to be sued. I now turn to the issue of personal jurisdiction.

C. Personal Jurisdiction

Defendants argue that this Court lacks personal jurisdiction over all the remaining Defendants. I first address Plaintiff's contention that this Court can exercise personal jurisdiction directly over Fung, St. Clair, and Fujimura under Delaware's Long Arm

²⁰ *Microsoft Corp. v. Vadem, Ltd.*, 2012 WL 1564155, at *1 n.3 (Del. Ch. Apr. 27, 2012).

²¹ *See* note 16 *supra* and accompanying text.

Statute. I then will consider Microsoft’s argument that Defendants also are subject to jurisdiction in Delaware under the conspiracy theory of jurisdiction.

1. Legal Standard

Under Court of Chancery Rule 12(b)(2), the plaintiff bears the burden of demonstrating this Court’s jurisdiction over a nonresident defendant. When evaluating a 12(b)(2) motion, the court may consider facts and evidence outside of the complaint such as affidavits and any discovery of record.²² Whatever record the court considers is construed in the light most favorable to the plaintiff.²³ If no evidentiary hearing has been held, the plaintiff must make a *prima facie* showing of personal jurisdiction.²⁴

Delaware courts use a two-step analysis in determining whether a nonresident party is subject to personal jurisdiction. First, the court must decide whether the party’s conduct falls under Delaware’s Long Arm Statute.²⁵ The Long Arm Statute is broadly construed to “confer jurisdiction to the maximum extent possible under the Due Process Clause.”²⁶ If jurisdiction exists under the statute, the next step is to evaluate whether

²² *Ryan v. Gifford*, 935 A.2d 258, 265 (Del. Ch. 2007).

²³ *Id.*

²⁴ *Id.*

²⁵ *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 437 (Del. 2005).

²⁶ *Hercules Inc. v. Leu Trust & Banking (Bahamas) Ltd.*, 611 A.2d 476, 480 (Del. 1992).

exercising personal jurisdiction over the party in question is consistent with the Due Process Clause of the Fourteenth Amendment.²⁷

2. Personal jurisdiction over Fung

Microsoft asserts two statutory bases for personal jurisdiction over Fung in Delaware: Delaware’s Nonresident Director and Officer Statute²⁸ and Delaware’s Long Arm Statute.²⁹ I address these contentions in turn.

a. Fung is not subject to personal jurisdiction under 10 *Del. C.* § 3114

Under Section 3114, nonresident directors and officers of Delaware corporations are subject to jurisdiction in Delaware

in all civil actions or proceedings brought in this State, by or on behalf of, or against such corporation, in which such [director or] officer is a necessary or proper party, or in any action or proceeding against such [director or] officer for violation of a duty in such capacity, whether or not the person continues to serve as such [director or] officer at the time suit is commenced.³⁰

With respect to nonresident directors, Delaware courts have interpreted Section 3114 to apply “only to those actions directed against a director of a Delaware corporation for acts on his part performed only in his capacity as a director.”³¹ The statute’s application to

²⁷ *Id.*

²⁸ 10 *Del. C.* § 3114.

²⁹ 10 *Del C.* § 3104.

³⁰ 10 *Del. C.* § 3114.

³¹ *Hana Ranch, Inc. v. Lent*, 424 A.2d 28, 30-31 (Del. Ch. 1980).

nonresident officers is identical.³² Thus, for a nonresident director or officer of a Delaware corporation to be subject to personal jurisdiction in Delaware under Section 3114, the plaintiff must allege that the director or officer, acting in that capacity, breached a fiduciary duty to the Delaware corporation that they serve.³³

Fung was a director and officer of Amphus, a Delaware corporation. Plaintiff's claims against Fung, however, do not relate to any fiduciary duties Fung owed Amphus. Microsoft alleges that Fung breached his fiduciary duties to Vadem BVI, a BVI company, but the Complaint is devoid of any allegations that Fung harmed, or breached any duty owed to, Amphus. Because there are no such allegations, Fung is not subject to personal jurisdiction in Delaware under Section 3114.

b. Fung is subject to personal jurisdiction under 10 Del. C. § 3104(c)(1)

Under Section 3104(c)(1), “a court may exercise personal jurisdiction over any nonresident, or a personal representative, who in person or through an agent: (1) [t]ransacts any business or performs any character of work or service in [Delaware],” when the cause of action arises from that transaction of business.³⁴ Microsoft claims that

³² See *Ryan v. Gifford*, 935 A.2d 258, 269 (Del. Ch. 2007) (“the language and holdings of pre-2004 section 3114 director cases apply with equal force to officers under section 3114(b).”).

³³ *Id.* See also *Armstrong v. Pomerance*, 423 A.2d 174, 176 (Del. 1980) (“Thus, [Section] 3114 authorizes jurisdiction only in actions which are inextricably bound up in Delaware law and where Delaware has a strong interest in providing a forum for redress of injuries inflicted upon or by a Delaware domiciliary, i. e., the Delaware corporation.”).

³⁴ 10 Del C. § 3104(c)(1).

Fung caused the creation of Amphus and that the creation of that Delaware corporation constitutes a transaction of business in Delaware. Microsoft contends further that its cause of action against Fung arises from his formation and use of Amphus to misappropriate the Vadem Patents. Defendants counter that Vadem BVI, and not Fung in his individual capacity, created Amphus. According to Defendants, this means that only Vadem BVI “transacted business” in Delaware and only Vadem BVI is subject to personal jurisdiction in Delaware for a cause of action that arose from Amphus’s formation.

It is settled Delaware law that the formation of a Delaware entity constitutes a “transaction of business” within the meaning of Section 3104(c)(1), if the formation is done as part of a wrongful scheme.³⁵ It is equally well-established that a party that forms a Delaware entity as part of a wrongful scheme has constitutionally sufficient “minimum contacts” with Delaware for purposes of personal jurisdiction.³⁶ Defendants do not dispute that Microsoft’s claims against Fung arise from the formation of Amphus. Therefore, whether this Court can exercise jurisdiction over Fung under Section 3104 turns on the nature of Fung’s involvement in the formation of Amphus. Based on the specific facts of this case, I conclude that the creation of Amphus can be attributed to Fung.

³⁵ *Connecticut Gen. Life Ins. Co. v. Pinkas*, 2011 WL 5222796, at *2 (Del. Ch. Oct. 28, 2011); *Cairns v. Gelmon*, 1998 WL 276226, at *3 (Del. Ch. May 21, 1998).

³⁶ *Papendick v. Bosch*, 410 A.2d 148, 152 (Del. 1979).

Defendants correctly point out that this Court historically has recognized that when a corporation creates a Delaware entity, that action will not be attributed to the corporation's officers and directors.³⁷ None of the previous cases, however, addressed facts similar to those alleged in this case. Fung did not merely vote, as a director of Vadem BVI, to approve the formation of Amphus. Fung proposed the creation of Amphus to the Vadem BVI Board. He further proposed that he would be a founder, director, and the CEO of Amphus and also would have a twenty percent stake in the new entity, thereby nearly tripling his personal interest in the Vadem Patents. Furthermore, the Complaint contains allegations sufficient to make a *prima facie* showing that Fung made his proposal to the Vadem Board for the purpose of securing the future benefits of the Vadem Patents for himself at an unfair price, and that Fung deliberately misled the Vadem Board to achieve that goal. In sum, Microsoft has alleged that Fung purposefully harmed Vadem BVI and purposefully availed himself of the laws of Delaware by choosing to induce Vadem BVI to create a Delaware entity that Fung could use to facilitate his wrongdoing. Under the facts alleged in this case, therefore, Fung's conduct went beyond mere approval of the creation of Amphus as a director of Vadem BVI to his orchestrating that action and subsequently using Amphus to facilitate his wrongful

³⁷ See e.g., *Hamilton P'rs, L.P. v. Englard*, 11 A.3d 1180, 1201 (Del. Ch. 2010) ("Through its corporate counsel, NYHC caused the formation of Transaction LLC. This act subjects NYHC to personal jurisdiction in this Court. But Hamilton Partners has not explained how that jurisdiction-conferring act can be attributed to the Director Defendants."); *Ruggiero v. FuturaGene, plc.*, 948 A.2d 1124, 1134 (Del. Ch. 2008) ("a corporate director or officer of a foreign corporation cannot be haled into a Delaware court for an act of the corporation simply because the officer or director has directed the corporation to take that act.").

scheme. Accordingly, I find that Fung is subject to personal jurisdiction in Delaware under 10 *Del. C.* § 3104(c)(1) and that the exercise of jurisdiction over him under that statute comports with Due Process.

3. Personal jurisdiction over Fujimura

Microsoft relies on the same two statutory bases of jurisdiction that it invoked as to Fung to demonstrate the existence of jurisdiction over Fujimura.

a. Fujimura is not subject to personal jurisdiction under 10 *Del. C.* § 3114

Fujimura was a director of Amphus. Microsoft's claims against Fujimura, however, have nothing to do with his status as a director of Amphus; instead, they pertain to his alleged breach of fiduciary duties owed to Vadem BVI. For the same reasons discussed in Section II.C.2.a, *supra*, as to Fung, Microsoft has failed to show that Section 3114 provides a basis for subjecting Fujimura to personal jurisdiction here.

b. Fujimura is not subject to personal jurisdiction under 10 *Del. C.* § 3104(c)(1)

According to Microsoft, “[t]hrough his participation in the formation and direction of Amphus, Fujimura facilitated Fung’s wrongdoing, and Microsoft’s claim for breach arises from his failure to correct the wrongdoing he had facilitated even after discovering it.”³⁸ Unlike with Fung, however, Microsoft has not shown that Fujimura played any meaningful role in Amphus’s creation. At most, Fujimura voted as a director of Vadem BVI in favor of its creation of Amphus under the laws of Delaware. As previously discussed, this act is not sufficient to warrant attributing Vadem BVI’s action to

³⁸ Microsoft’s Reply Br. 26.

Fujimura. The Complaint lacks any suggestion that Fujimura had the ability to control the Vadem BVI Board or was aware of Fung's alleged scheme and deliberately sought to assist him.³⁹ There is no basis, therefore, to hold Fujimura personally accountable for Vadem BVI's actions,⁴⁰ and Microsoft has not identified any other contact that Fujimura has had with Delaware. Thus, Microsoft has failed to make a *prima facie* showing that Fujimura transacted business in Delaware under Section 3104(c)(1) or that Fujimura is otherwise subject to jurisdiction here. Accordingly, this Court lacks personal jurisdiction over Fujimura and will dismiss the derivative claim asserted against him in Count VII of the Complaint.

4. Jurisdiction over St. Clair

Microsoft argues that St. Clair is subject to jurisdiction under Section 3104(c)(1) because St. Clair commenced a patent infringement action against several Microsoft customers in the Delaware District Court. According to Microsoft, St. Clair's action constitutes a transaction of business within the meaning of Section 3104(c)(1) and its

³⁹ Microsoft has not asserted that Fujimura is subject to personal jurisdiction in Delaware under the conspiracy theory of jurisdiction, which it has relied upon as to other Defendants.

⁴⁰ Where a director acts solely in that capacity to cause a corporation to take action, the corporation's action will not be attributed to the director for purposes of jurisdiction unless the plaintiff can establish that the corporation was acting as the director's agent or alter ego. *Ruggiero v. FuturaGene, plc.*, 948 A.2d 1124, 1135 (Del. Ch. 2008). Establishing the corporation was acting as the director's agent or alter ego is tantamount to piercing the corporate veil. *Id.* Microsoft has alleged no facts that would support a finding that Vadem BVI was Fujimura's agent or alter ego.

conspiracy and aiding and abetting claims against St. Clair “arise from” that transaction of business, which was in furtherance of “Defendants’ shared goal of capitalizing on the assets transferred out of Vadem.”⁴¹ St. Clair does not dispute that the filing of a lawsuit in Delaware can constitute an “act of business” under Section 3104(c)(1), but contests Microsoft’s assertion that its claims against St. Clair “arise from” St. Clair’s patent infringement suit against Microsoft’s customers. St. Clair argues that Microsoft’s conspiracy and aiding and abetting claims cannot “arise from” a patent infringement suit that involves different parties, relates only to Federal patent law, and was filed ten years after Fung’s alleged breach of fiduciary duties occurred. Because Section 3014(c)(1) only provides this Court with specific jurisdiction, I consider separately whether either of Microsoft’s aiding and abetting or conspiracy claims “arise from” St. Clair’s patent infringement lawsuit in Delaware.

a. Microsoft’s aiding and abetting claims do not arise from St. Clair’s patent infringement suit in Delaware

“The ‘arising from’ language in 10 *Del. C.* § 3104(c)(1) requires that the defendant’s act set ‘in motion a series of events which form the basis for the cause of action before the court.’”⁴² In addition, the “arise from” language has been interpreted to

⁴¹ Microsoft’s Reply Br. 16.

⁴² *Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 2737409, at *9 (Del. Ch. July 14, 2008) (quoting *Haisfield v. Cruver*, 1994 WL 497868, at *4 (Del. Ch. Aug. 25, 1994)).

encompass a party's "acts within the jurisdiction that were 'critical steps in the chain of events' resulting in the cause of action before the court."⁴³

"[A]iding and abetting is a cause of action that focuses on the wrongful act of providing assistance."⁴⁴ Microsoft claims that St. Clair aided and abetted Fung's alleged breach of fiduciary duties, usurpation of Vadem's corporate opportunity to sell the Vadem Patents to St. Clair, and fraudulent inducement of Vadem's disposal of the Vadem Patents. These events occurred in 1999 and 2000, approximately a decade before St. Clair filed its patent infringement suit in Delaware.⁴⁵ The argument that St. Clair assisted Fung in breaching his fiduciary duties in 1999 and 2000 by filing a somewhat related lawsuit a decade later is too tenuous to be persuasive. As pled in the Complaint, Microsoft's aiding and abetting claims against St. Clair stem from St. Clair's knowledge and actions around the time that Amphus was created and the Vadem Patents were transferred to Amphus.⁴⁶ This is within the same time frame that Fung is alleged to have

⁴³ *Id.* at *9 n.64 (quoting *Sears, Roebuck & Co. v. Sears plc*, 752 F. Supp. 1223, 1227 (D. Del. 1990)).

⁴⁴ *Hospitalists of Del., LLC v. Lutz*, 2012 WL 3679219, at *15 (Del. Ch. Aug. 28, 2012).

⁴⁵ The Complaint also alleges that Fung breached his fiduciary duties to Vadem BVI in several instances between 2007 and 2012. Compl. ¶ 47. The Complaint does not allege, however, that St. Clair aided and abetted Fung regarding those later breaches.

⁴⁶ *See* Compl. ¶ 54 ("St. Clair aided and abetted and knowingly participated in Fung's breach of his fiduciary duties and self-dealing by, among other acts, negotiating to purchase the Vadem Patents from Amphus while knowing that Vadem California held title to those patents and purchasing the Vadem Patents

harmed Vadem BVI. Ten years later, the alleged misconduct, and any actions by St. Clair that aided and abetted that conduct, had long since occurred. It follows, therefore, that any act that could be considered a “critical step in the chain of events” leading to the aiding and abetting claim or any act that “set in motion a series of events” which form the basis of the aiding and abetting cause of action, also must have occurred roughly contemporaneously with Fung’s alleged breach of fiduciary duties in 1999 and 2000. Although St. Clair’s patent infringement suit appears to have at least some relation to Microsoft’s aiding and abetting claims, Section 3104 requires claims to “arise from,” not merely be “related to,” conduct in Delaware. Microsoft has not made a *prima facie* showing that its aiding and abetting claims “arise from” St. Clair’s patent infringement suit. Therefore, St. Clair’s patent infringement lawsuit does not provide an adequate basis for this Court to exercise jurisdiction over St. Clair with respect to Microsoft’s aiding and abetting claims.

b. Microsoft’s conspiracy claims against St. Clair “arise from” St. Clair’s patent infringement lawsuit

Microsoft’s conspiracy claims against St. Clair largely resemble its aiding and abetting claims. According to Microsoft, St. Clair conspired with Fung, and others, for Fung to breach his fiduciary duties to Vadem BVI, for Fung to fraudulently induce Vadem BVI to transfer the Vadem Patents to Amphus, and to deprive Vadem BVI of its

while knowing that Amphus had obtained them for less than they were worth.”). Paragraphs 67 and 84 of the Complaint, which address fraudulent inducement and usurpation of a corporate opportunity, respectively, allege essentially identical conduct.

corporate opportunity to sell the Vadem Patents to St. Clair. In each of its conspiracy claims, Microsoft alleges that St. Clair commenced its patent infringement suit in Delaware in furtherance of its conspiracy with Fung and others.⁴⁷ Furthermore, at least with respect to its conspiracy claims pertaining to breach of fiduciary duty and fraudulent inducement, Microsoft also alleges that the goal of the conspiracy was to “profit from BVI’s transfer of the Vadem Patents to Amphus for less than they were worth.”⁴⁸

Although they are closely related, “there is a distinction between civil conspiracy and aiding and abetting.”⁴⁹ The focus of a civil conspiracy claim is on the agreement, rather than the wrongful act of providing assistance.⁵⁰ In this case, Microsoft has alleged that at or around the time that Amphus was created, St. Clair and others formed a conspiracy (*i.e.*, reached an agreement) to profit from the transfer of the Vadem Patents. As discussed, *infra*, Microsoft has alleged sufficiently that St. Clair participated in such a civil conspiracy with Fung and PRP. Because the alleged conspiratorial goal was to profit from the Vadem Patents, the conspiracy was ongoing, and lasted at least as long as St. Clair was attempting to monetize the Vadem Patents. Under these facts, I conclude that Microsoft’s conspiracy claims against St. Clair can be characterized as “arising

⁴⁷ Compl. ¶¶ 56, 69, 87.

⁴⁸ *Id.* ¶¶ 56, 68.

⁴⁹ *Malpiede v. Townson*, 780 A.2d 1075, 1098 n.82 (Del. 2001).

⁵⁰ *Hospitalists of Del.*, 2012 WL 3679219, at *15.

from” St. Clair’s attempt to achieve the conspiratorial goal by filing a patent lawsuit to enforce the Vadem Patents in the Delaware District Court.

Having determined that St. Clair’s patent lawsuit satisfies Section 3104(c)(1) of the Long Arm Statute in that it constitutes the transaction of business in Delaware, I also must address whether subjecting St. Clair to jurisdiction in Delaware would be consistent with the Due Process Clause of the Fourteenth Amendment. Personal jurisdiction over a nonresident is consistent with due process when it comports with traditional notions of fair play and substantial justice.⁵¹ To meet this standard, the “defendant’s conduct and connection with the forum state should be such that he can reasonably anticipate being haled into court in the nonresident forum.”⁵² “A basic tenet of the due process analysis of a court’s exercise of personal jurisdiction is whether the party ‘purposefully availed’ itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.”⁵³

Under Delaware law, “[a] defendant who has so voluntarily participated in a conspiracy with knowledge of its acts in or effects in the forum state can be said to have purposefully availed himself of the privilege of conducting activities in the forum state,

⁵¹ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477-78 (1985).

⁵² *Werner v. Miller Tech. Mgmt., L.P.*, 831 A.2d 318, 330 (Del. Ch. 2003).

⁵³ *Id.* at 330 n.46.

thereby fairly invoking the benefits and burdens of its laws.”⁵⁴ As discussed in greater detail in Section II.C.5, *infra*, St. Clair voluntarily participated in a civil conspiracy and plainly has knowledge of its own actions in Delaware in furtherance of that conspiracy. Accordingly, St. Clair purposefully availed itself of the laws of Delaware and is properly subject to personal jurisdiction under Delaware’s Long Arm Statute with respect to Microsoft’s claim for conspiracy.

5. Conspiracy theory of jurisdiction

In addition to arguing that statutory grounds for jurisdiction exist as to Fung, Fujimura, and St. Clair, Microsoft asserts that this Court has jurisdiction over Defendants Fung, St. Clair, and PRP pursuant to the conspiracy theory of jurisdiction.⁵⁵ Under the five-part test established by the Delaware Supreme Court in the *Istituto Bancario* case, a plaintiff relying on the conspiracy theory of jurisdiction must make a factual showing that:

- (1) a conspiracy to defraud existed;
- (2) the defendant was a member of that conspiracy;
- (3) a substantial act or substantial effect in furtherance of the conspiracy occurred in the forum state;
- (4) the defendant knew or had reason to know of the act in the forum state or that acts outside the forum state would have an effect in the forum state; and
- (5) the act in, or effect

⁵⁴ *Hamilton P’rs, L.P. v. England*, 11 A.3d 1180, 1196 (Del. Ch. 2010) (quoting *Istituto Bancario Italiano SpA v. Hunter Eng’g Co.*, 449 A.2d 210, 225 (Del. 1982)).

⁵⁵ The Complaint also alleges that Amphus participated in the alleged conspiracy. I have not attempted to analyze, however, what, if any, role Amphus may have played in the alleged conspiracy because Amphus lacks capacity to be sued.

on, the forum state was a direct and foreseeable result of the conduct in furtherance of the conspiracy.⁵⁶

The conspiracy theory often is used in connection with Delaware’s Long Arm Statute because the “acts of one conspirator that satisfy the long-arm statute can be attributed to the other conspirators,”⁵⁷ since “[f]or jurisdictional purposes, conspirators are considered agents of each other when acting in furtherance of the conspiracy.”⁵⁸ Nevertheless, the conspiracy test “is a strict test with a narrow scope, and, as a result, factual proof of each enumerated element is required.”⁵⁹

a. First and second *Istituto Bancario* factors – based on aiding and abetting

A plaintiff can satisfy the first two *Istituto Bancario* factors by pleading sufficiently either a claim for aiding and abetting a breach of a fiduciary duty⁶⁰ or a claim for civil conspiracy.⁶¹ A claim for aiding and abetting has three elements: (1) the existence of a fiduciary relationship; (2) a breach of the fiduciary’s duty; and (3) a knowing participation in that breach.⁶²

⁵⁶ *Istituto Bancario*, 449 A.2d at 225.

⁵⁷ *In re Am. Int’l Gp., Inc.*, 965 A.2d 763, 814 (Del. Ch. 2009).

⁵⁸ *Id.*

⁵⁹ *Matthew v. Laudamiel*, 2012 WL 605589, at *7 (Del. Ch. Feb. 21, 2012).

⁶⁰ *Dubroff v. Wren Hldgs., LLC*, 2011 WL 5137175, at *14 (Del. Ch. Oct. 28, 2011).

⁶¹ *Hospitalists of Del., LLC v. Lutz*, 2012 WL 3679219, at *10 (Del. Ch. Aug. 28, 2012).

⁶² *Gatz v. Ponsoldt*, 925 A.2d 1265, 1275 (Del. 2007).

There is no dispute that Fung was a director of Vadem BVI and owed the company fiduciary duties at all times relevant to Microsoft’s claims. Furthermore, there is no dispute that the Complaint contains factual allegations sufficient to state claims that Fung breached his fiduciary duties to Vadem BVI. Based largely on Fung’s own statements, the Complaint asserts that Fung deliberately played down the value of the Vadem Patents even though he believed they were valuable, negotiated the terms of the Vadem-Amphus transaction to personally benefit himself at the expense of Vadem, knew of an opportunity for Vadem to sell the Vadem Patents to St. Clair while Vadem still owned the patents, and utilized that opportunity for personal gain without disclosing it to Vadem. All of these allegations support the existence of colorable claims that Fung breached his fiduciary duties to Vadem BVI. Therefore, the first two elements of aiding and abetting are satisfied here.

The final element, knowing participation in that breach, “requires that the third party act with the knowledge that the conduct advocated or assisted constitutes such a breach.”⁶³ It appears from the Complaint that PRP was managed by Fung for the purpose of receiving the anticipated future revenue from the Vadem Patents.⁶⁴ Microsoft has made a sufficient showing that PRP, for all intents and purposes, was Fung’s instrumentality for maintaining a larger share of the Vadem Patent revenues than he would have been entitled to had he honored his fiduciary duties to Vadem BVI. Because

⁶³ *Id.* at 1276 (quoting *Malpiede v. Townson*, 780 A.2d 1075, 1097 (Del. 2001)).

⁶⁴ Compl. ¶ 20.

Fung managed and controlled PRP, everything known to Fung was known to PRP.⁶⁵ Based on the allegations in the Complaint, therefore, I conclude that Microsoft has made a *prima facie* showing that PRP knowingly participated in Fung's breaches of fiduciary duties since at least May 2008.

The issue of knowing participation is closer with respect to St. Clair. Microsoft alleges that: (1) St. Clair began negotiating with Fung and Amphus at a time when St. Clair knew that Amphus did not have title to the patents;⁶⁶ (2) St. Clair knew Amphus obtained the Vadem Patents for inadequate consideration;⁶⁷ (3) St. Clair sought to profit from Vadem BVI's transfer of the Vadem Patents to Amphus for less than they were worth;⁶⁸ and (4) St. Clair commenced patent litigation in Delaware in furtherance of that goal.⁶⁹ St. Clair counters that, even assuming the truth of those allegations, Microsoft has failed to demonstrate that St. Clair participated in any of Fung's wrongdoing, such as his making intentional misrepresentations to the Vadem BVI Board and failure to notify the Board of the opportunity to sell the Vadem BVI Patents to St. Clair.

⁶⁵ See *In re HealthSouth Corp. S'holders Litig.*, 845 A.2d 1096, 1108 n.22 (Del. Ch. 2003) (noting general rule that knowledge of a director or officer is imputed to the corporation); 18A Am. Jur. 2d *Corporations* § 1444 (knowledge of individuals at a certain level within a corporation will be imputed to the corporation).

⁶⁶ Compl. ¶¶ 17-18.

⁶⁷ *Id.* ¶ 18.

⁶⁸ *Id.* ¶¶ 55, 68.

⁶⁹ *Id.* ¶¶ 59, 69, 87.

A party that aids and abets a breach of a fiduciary duty need not actually participate in the underlying act that constitutes the breach of fiduciary duty to be liable. Rather, the alleged aider and abettor must know of the wrongful act and know that their conduct has assisted or facilitated the wrongful act. St. Clair allegedly knew enough about the transfer of the Vadem Patents from Vadem BVI to Amphus to know that Fung was attempting to sell those patents under suspicious circumstances. St. Clair’s alleged knowledge of those suspicious circumstances in combination with other factors is, in this case, sufficient to make out a *prima facie* case that it knowingly participated in Fung’s breach of fiduciary duties to Vadem BVI.

St. Clair relies on this Court’s decision in *Hospitalists of Delaware, LLC v. Lutz* for the proposition that “suspicious” timing and terms of a transaction are insufficient to satisfy the “knowing participation” element of aiding and abetting liability.⁷⁰ St. Clair interprets *Hospitalists* too broadly, however. In *Hospitalists*, this Court held that where “the only even arguably suspicious aspect of this transaction is its temporal proximity to [the nominal defendant’s] dissolution,”⁷¹ “something more than a single conclusory allegation is necessary to permit a reasonable inference that [the defendant] affirmatively participated in the Director Defendants’ breaches of duty.”⁷² The Court also explained,

⁷⁰ St. Clair raises the same argument regarding the “meeting of the minds element” of civil conspiracy discussed *infra*.

⁷¹ *Hospitalists of Del., LLC v. Lutz*, 2012 WL 3679219, at *9 (Del. Ch. Aug. 28, 2012).

⁷² *Id.*

however, that in that case “[t]he only suspicious aspect of the redemption [was] its temporal proximity to [the nominal defendant’s] dissolution, an aspect explained by uncontested evidence that [a defendant] itself was liquidating for unrelated and legitimate reasons during the same period.”⁷³ Therefore, I do not read *Hospitalists* as holding that “suspicious” timing of a transaction cannot support a finding of knowing participation in a breach of fiduciary duty. Rather, the case supports the otherwise unremarkable proposition that if a plaintiff’s evidence to show knowing participation in a breach of fiduciary duty consists solely of the “suspicious” timing of a transaction, and that timing can be explained by “unrelated and legitimate reasons,” then the plaintiff has failed to meet her burden.

The timing of the Amphus-St. Clair transaction in this case raises questions about its propriety, but it is only one of several pieces of incriminating evidence. St. Clair allegedly knew: (1) that when it began negotiating with Amphus, Amphus had not yet obtained title to the Vadem Patents; and (2) that Amphus had paid inadequate consideration for those patents. Furthermore, St. Clair allegedly conducted meaningful due diligence regarding the Vadem Patents.⁷⁴ As a result of that due diligence, St. Clair presumably discovered, if it was not already aware, that Fung was a fiduciary of Vadem BVI and Vadem California. Therefore, it appears likely that St. Clair was aware it was dealing with a corporate fiduciary who was in the process of obtaining intellectual

⁷³ *Id.* at *10.

⁷⁴ Compl. ¶ 18.

property for inadequate consideration from an entity to which he owed fiduciary duties. St. Clair also knew how quickly the fiduciary, Fung, was attempting to monetize the intellectual property he was obtaining through Amphus. Under these circumstances, Microsoft has made a *prima facie* showing that St. Clair acted with the knowledge that it was assisting Fung's breach of his fiduciary duties to Vadem BVI. Because Microsoft has alleged sufficient facts to support a reasonable inference that PRP and St. Clair aided and abetted Fung's breaches of fiduciary duties to Vadem BVI, the first and second *Istituto Bancario* factors have been satisfied.

b. First and second *Istituto Bancario* factors – based on civil conspiracy

Microsoft also claims that it has pled a claim of civil conspiracy against Fung, PRP, and St. Clair that independently would satisfy the first and second *Istituto Bancario* factors. The elements of civil conspiracy are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds between or among such persons relating to the object or a course of action; (4) one or more unlawful acts; and (5) damages as a proximate result thereof.⁷⁵

The Complaint alleges that Defendants Fung, St. Clair, and PRP conspired to deprive Vadem BVI of the Vadem Patents and of an opportunity to sell those patents on relatively favorable terms and sought to accomplish those objectives through, among other things, Fung's orchestration of a self-dealing transaction in which the Vadem

⁷⁵ *Metro. Life Ins. Co. v. Tremont Gp. Hldgs., Inc.*, 2012 WL 6632681, at *19 (Del. Ch. Dec. 20, 2012).

Patents were transferred by Vadem for less than they were worth, fraudulent inducement, and usurpation of a corporate opportunity. As a result, Vadem BVI allegedly was harmed because it was deprived of the profits from the Vadem Patents to which it rightfully was entitled. The only element of Microsoft's civil conspiracy allegations that Defendants seriously have challenged is whether Microsoft has alleged adequately a meeting of the minds among Defendants. As stated in the Complaint, Microsoft based its allegations of a meeting of the minds on "information and belief" that is supported by the timing and terms of the relevant transactions. Defendants argue that such "information and belief" is insufficient.

As already stated, the knowledge element of an aiding and abetting or conspiracy claim can be satisfied, in certain instances, by participation in a transaction with suspicious terms and timing. The timing of the Amphus-St.Clair patent sale was suspicious. It is also suspicious that shortly before Amphus dissolved, it transferred its rights to future revenue from the Vadem Patents to PRP, a Fung instrumentality, rather than allow those rights to revert to Vadem BVI like most of Amphus's other property did. St. Clair knew of this second transfer and actively facilitated it by agreeing to amend the terms of the Vadem Patent sale agreement it had reached with Amphus in 2000. While this second transaction was suspicious in its own right, the fact that Fung had a larger interest in PRP than he did in Vadem lends additional credence to the notion that Fung and PRP, at least, were conspiring to the detriment of Vadem BVI. The terms and timing of the relevant transactions in this case are sufficient to make a *prima facie* showing that Fung, Amphus, St. Clair, and PRP had a "meeting of the minds." Accordingly, Microsoft

has alleged adequately the existence of a civil conspiracy that satisfies the first two elements of the *Istituto Bancario* test.

c. Third *Istituto Bancario* factor

The third part of the *Istituto Bancario* test requires a showing by Microsoft that a “substantial act or substantial effect in furtherance of the conspiracy occurred in [Delaware].” Microsoft claims that two “substantial acts in furtherance of the conspiracy” occurred in Delaware: the formation of Amphus and St. Clair’s prosecution of patent infringement litigation. The formation of a Delaware corporation that facilitates a challenged transaction is a “substantial act” in Delaware for purposes of the *Istituto Bancario* test. Fung allegedly used Amphus as the vehicle to breach his fiduciary duties to Vadem BVI. Furthermore, the Vadem Patent transfer from Amphus to St. Clair was an integral part of the alleged conspiracy linking Defendants. The formation of Amphus in Delaware, therefore, was a “substantial act” in furtherance of the alleged conspiracy.

In addition, St. Clair filed a patent infringement lawsuit based on the Vadem Patents in the Delaware District Court in 2009. The alleged goal of the conspiracy was to profit from the Vadem Patents. Filing a lawsuit to enforce those patents is an act in furtherance of that conspiracy. Thus, St. Clair’s patent lawsuit is conduct in Delaware that also satisfies the third *Istituto Bancario* factor.

d. Fourth *Istituto Bancario* factor

The fourth *Istituto Bancario* factor requires that, “the defendants knew or had reason to know of the act in the forum state.” The Complaint alleges sufficient facts to support a reasonable inference that all Defendants knew or had reason to know of St.

Clair's patent infringement lawsuit in Delaware.⁷⁶ St. Clair not only knew of its own lawsuit, but it also updated Fung and Amphus about its efforts to monetize the Vadem Patents. Even if St. Clair never provided PRP with the same notifications that it provided to Amphus, Fung, and thus PRP, knew about St. Clair's lawsuit because St. Clair hired Fung as a consultant to advise it during the litigation.⁷⁷ Therefore, St. Clair, Fung, and PRP all had actual or imputed knowledge about St. Clair's patent infringement lawsuit in Delaware.

e. Fifth *Istituto Bancario* factor

The final *Istituto Bancario* factor requires that the act in Delaware has been “a direct and foreseeable result of the conduct in the furtherance of the conspiracy.” Microsoft has alleged that the goal of Defendants' conspiracy was to profit from the Vadem Patents. It is reasonably foreseeable that efforts to license and monetize patents might include patent litigation because the threat of patent litigation is one of a patent holder's greatest sources of leverage over potential licensees. The issue here is whether it

⁷⁶ Although two relevant acts occurred in Delaware, Amphus's formation occurred before PRP was created. In addition, Microsoft has not pled any specific facts that indicate St. Clair joined the conspiracy before Amphus was formed. Because all Defendants were allegedly members of the conspiracy when St. Clair filed its patent infringement suit, the analysis of the remaining two *Istituto Bancario* factors will focus on that act. All parties appear to agree that neither this Court nor the Delaware Supreme Court has addressed whether acts pre-dating a defendant's joining a civil conspiracy can be attributed to the later-joining defendant. For purposes of resolving the issues before me on the pending motion to dismiss, however, I need not address that question.

⁷⁷ Compl. ¶ 29.

was foreseeable to Fung and PRP that such a suit would be brought in Delaware. Generally speaking, the District of Delaware has long been a popular venue for patent infringement litigation. In terms of the number of cases in each of the 94 Districts in the United States, from 2000 to 2009, the District of Delaware had the fifth highest number of patent infringement lawsuits filed in the country.⁷⁸ In 2009, when St. Clair filed its infringement suit to enforce the Vadem Patents, the District of Delaware ranked third in number of patent lawsuits filed.⁷⁹ The District of Delaware's prominence in patent actions evidently has not gone unnoticed by St. Clair. Between 2000 and 2009, St. Clair filed at least eight patent infringement suits in the District of Delaware, not including the Vadem Patent action.⁸⁰

I find, therefore, that it would have been foreseeable to Fung, and thus PRP, that St. Clair, their alleged co-conspirator, would attempt to monetize the Vadem Patents by:

⁷⁸ Elizabeth P. Offen-Brown, *Forum Shopping and Venue Transfer in Patent Cases: Marshall's Response to Ts Tech and Genentech*, 25 Berkeley Tech. L.J. 61, 70 (2010).

⁷⁹ *Id.*

⁸⁰ *See St. Clair Intellectual Prop. Consultants, Inc. v. Sony Corp.*, C.A. No. 01-557-JJF (D. Del. 2001); *St. Clair Intellectual Prop. Consultants, Inc. v. Cannon Inc.*, C.A. No. 3-241-JJF (D. Del. 2003); *St. Clair Intellectual Prop. Consultants, Inc. v. Samsung Elecs.*, C.A. No. 4-1436-JJF (D. Del. 2004); *St. Clair Intellectual Prop. Consultants, Inc. v. Mirage Sys. Inc.*, C.A. No. 5-273-JJF (D. Del. 2005); *St. Clair Intellectual Prop. Consultants, Inc. v. Siemens AG*, C.A. No. 6-403-JJF (D. Del. 2006); *St. Clair Intellectual Prop. Consultants, Inc. v. LG Elecs. Inc.*, C.A. No. 6-404-JJF (D. Del. 2006); *St. Clair Intellectual Prop. Consultants, Inc. v. Fujifilm Hldgs. Corp.*, C.A. No. 8-373-JJF (D. Del. 2008); *St. Clair Intellectual Prop. Consultants, Inc. v. Research in Motion Ltd.*, C.A. No. 8-371-JJF (D. Del. 2008).

(1) bringing a patent infringement suit to enforce them; and (2) bringing that action in Delaware where St. Clair has an established track record of filing patent suits. Therefore, the final *Istituto Bancario* factor is satisfied as to Fung, PRP, and St. Clair.

The Delaware Supreme Court has held that a “defendant who has so voluntarily participated in a conspiracy with knowledge of its acts in or effects in the forum state can be said to have purposefully availed himself of the privilege of conducting activities in the forum state, thereby fairly invoking the benefits and burdens of its laws.”⁸¹ Because Microsoft has shown sufficiently that Fung, PRP, and St. Clair voluntarily participated in a conspiracy with knowledge of its acts in Delaware, Defendants can be said to have purposefully availed themselves of the privilege of conducting activities in Delaware. Subjecting these Defendants to jurisdiction in Delaware, therefore, comports with Due Process.

Accordingly, this Court has personal jurisdiction over Defendants Fung, PRP, and St. Clair relating to Microsoft’s claims, and those Defendants’ motions to dismiss for lack of personal jurisdiction are denied.

⁸¹ *Istituto Bancario Italiano SpA v. Hunter Eng’g Co., Inc.*, 449 A.2d 210, 225 (Del. 1982).

D. Laches⁸²

The core of Microsoft's Complaint revolves around Fung inducing Vadem BVI to transfer the Vadem Patents to Amphus, and Amphus's sale of the Vadem BVI patents to St. Clair. These events happened in 1999 and 2000, over a decade before Microsoft filed its Original Complaint. The statute of limitations for breach of fiduciary duty or fraud is three years.⁸³ The limitations period begins to run when the cause of action arises, even if the plaintiff is unaware of the cause of action or the harm she suffered.⁸⁴ "Equity follows the law and in appropriate circumstances will apply a statute of limitations by analogy."⁸⁵ Accordingly, Microsoft must demonstrate why its fiduciary duty and fraud claims stemming from acts in 1999 and 2000 are not time-barred.⁸⁶

⁸² In the Original Complaint, Microsoft alleged that Vadem BVI breached the terms of Vadem's Memorandum of Association by disposing of all or substantially all of its assets without a shareholder vote. I dismissed Microsoft's breach of contract claims on the basis that the Information Statement put Microsoft on inquiry notice that Vadem BVI was in the process of transferring its assets and, as such, the limitations period for Microsoft's breach of contract claims was not tolled. *Microsoft Corp. v. Vadem, Ltd.*, 2012 WL 1564155, at *10 (Del. Ch. Apr. 27, 2012). Although my ruling in this action is consistent with my previous decision, I have reached my conclusions in this case independently of my holding in Microsoft's original case because the two matters involve materially different causes of action.

⁸³ *In re Am. Int'l Gp., Inc.*, 965 A.2d 763, 812 (Del. Ch. 2009).

⁸⁴ *Isaacson, Stolper & Co. v. Artisans' Sav. Bank*, 330 A.2d 130, 132 (Del. 1974).

⁸⁵ *In re Tyson Foods, Inc.*, 919 A.2d 563, 584 (Del. Ch. 2007).

⁸⁶ *Smith v. Mattia*, 2010 WL 412030, at *5 (Del. Ch. Feb. 1, 2010).

Microsoft argues that this Court should toll the relevant limitations periods under the doctrines of fraudulent concealment and equitable tolling. A plaintiff asserting fraudulent concealment must allege an act of “actual artifice by the defendant that either prevented the plaintiff from gaining material facts or lead the plaintiff away from the truth.”⁸⁷ Under the doctrine of equitable tolling, “the statute of limitations is tolled for claims of wrongful self-dealing, even in the absence of actual fraudulent concealment, where a plaintiff reasonably relies on the competence and good faith of a fiduciary.”⁸⁸ Even if a limitations period is tolled under either of these doctrines, the period is tolled only until the plaintiff is on inquiry notice of their cause of action. “Inquiry notice does not require full knowledge of the material facts.”⁸⁹ “[P]laintiffs are on inquiry notice when they have sufficient knowledge to raise their suspicions to the point where persons of ordinary intelligence and prudence would commence an investigation that, if pursued would lead to the discovery of the injury.”⁹⁰

Defendants aver that even if Microsoft’s claims satisfied the criteria for fraudulent concealment or equitable tolling, neither doctrine is relevant in this case because Microsoft was on inquiry notice of the harms underlying its claims in the year 2000. Therefore, the limitations period for Microsoft’s claim could not have been tolled beyond

⁸⁷ *In re Tyson Foods*, 919 A.2d at 585.

⁸⁸ *Weiss v. Swanson*, 948 A.2d 433, 451 (Del. Ch. 2008).

⁸⁹ *Pomeranz v. Museum P’rs, L.P.*, 2005 WL 217039, at *3 (Del. Ch. Jan. 24, 2005).

⁹⁰ *Id.*

2000, and its claims filed over a decade later are time-barred. The only dispute between Microsoft and Defendants involves whether Microsoft had inquiry notice of its claims before 2011, when Microsoft deposed Fung in the Delaware District Court action. Accordingly, I examine that issue next.

1. Whose knowledge matters?

Defendant St. Clair suggests that the Vadem BVI Board was on inquiry notice of Fung's misconduct and that should bar Microsoft's claims. This inquiry notice, according to St. Clair, arose partially as a function of Fujimura's position as a director of both Vadem BVI and Amphus. In response, Microsoft contends that Fujimura was unaware of any wrongdoing in 2000, and thus, his knowledge during that time period was irrelevant. Microsoft does not address, however, the broader issue of whether the Vadem BVI Board's knowledge is relevant to determining the timeliness of its claims.

St. Clair appears to be making the following argument: Microsoft's derivative claims on behalf of Vadem BVI address harms that Vadem BVI suffered. If Vadem BVI had actual or inquiry notice that it had been harmed, it had a responsibility to take action to protect its rights. A shareholder's right to assert a cause of action derivatively on behalf of a corporation should be no greater than the corporation's right to pursue the claim directly. Therefore, if Vadem BVI slept on its rights to pursue a cause of action and that action is now time-barred, Microsoft's derivative claim should also be time-barred.

Although St. Clair's argument is intuitively appealing, St. Clair has not cited any cases that support its position that in a derivative suit, the nominal defendant company's

knowledge is relevant in determining whether there was inquiry notice. This Court's prior decisions addressing laches in the derivative context appear to focus on the plaintiff's knowledge.⁹¹ For purposes of this case, in determining whether Microsoft's claims are time-barred, I have focused on whether Microsoft, and not Vadem BVI, had actual or inquiry notice of Fung's alleged wrongdoing.⁹²

2. Microsoft did not have inquiry notice of its claims in 1999 and 2000

Defendants assert that Microsoft had inquiry notice of Fung's alleged improprieties by virtue of the Information Statement that was sent to Vadem shareholders in connection with the Company's restructuring and possible merger. The Information Statement disclosed that Vadem BVI was in the process of transferring its assets,

⁹¹ See, e.g., *In re Am. Int'l Gp., Inc.*, 965 A.2d 763, 812-13 (Del. Ch. 2009) (examining whether the plaintiff, not the corporation, had inquiry notice of the alleged claims); *Weiss v. Swanson*, 948 A.2d 433, 451-52 (Del. Ch. 2008) (same); *In re Tyson Foods, Inc.*, 919 A.2d 563, 585-87, 590-91, 594 (Del. Ch. 2007) (same); *Franklin Balance Sheet Inv. Fund v. Crowley*, 2006 WL 3095952, at *7 (Del. Ch. Oct. 19, 2006) (same); *Kahn v. Seaboard Corp.*, 625 A.2d 269, 277 (Del. Ch. 1993) (same).

⁹² A nominal defendant's knowledge conceivably could be relevant in a laches inquiry in a derivative suit. My decision to focus in this case on whether Microsoft, rather than Vadem BVI, had inquiry notice is a function of Defendants' reliance on the concept of imputation to establish Vadem BVI's knowledge of Fung's wrongdoing. In short, Amphus and Vadem BVI had several interlocking directors. Defendants wish to impute these interlocking directors' knowledge to Vadem BVI. Defendants have not pointed, however, to any facts that indicate what these interlocking directors actually knew about the challenged transactions between Amphus and St. Clair, for example. On a motion to dismiss, it would be inappropriate to impute the interlocking directors' presumed knowledge to Vadem BVI when the scope of that knowledge is uncertain. Defendants may reassert their argument regarding Vadem BVI's (and Microsoft's) knowledge of Fung's alleged wrongdoing after a factual record is created through discovery.

including intellectual property assets, to the operating entities. In addition, the Information Statement explicitly warned shareholders that there would be an “immediate substantial dilution” as a result of the transfer. Also of note, the Information Statement notified shareholders that Vadem BVI insiders such as Fung would be receiving a substantial equity stake in the new operating entities as an incentive to grow and develop the new businesses.

Microsoft claims that, in 1999 and 2000, Fung: (1) fraudulently induced Vadem BVI to transfer the Vadem Patents to Amphus for less than they were worth; (2) failed to offer or disclose to Vadem BVI the potential opportunity to sell the Vadem Patents to St. Clair or another outside entity; and (3) engaged in self-dealing at Vadem BVI’s expense by selling the Vadem Patents through Amphus rather than through Vadem BVI. I am not persuaded that the Information Statement gave Microsoft inquiry notice of these claims.

Had Microsoft exercised reasonable diligence and investigated the dilution of their interest in Vadem BVI, there is no reason to believe that they would have discovered that Amphus sold, or was in the process of selling, the Vadem Patents to St. Clair. If Microsoft could not have learned that information through reasonable means, it would not have been on inquiry notice that there was a corporate opportunity to sell the Vadem Patents, let alone that Fung had usurped that opportunity. Drawing all reasonable inferences in Microsoft’s favor, the fact that Microsoft arguably may have had constructive knowledge of the sale six years later when a notice of the assignment and patent sale agreement between Amphus and St. Clair was filed and recorded with the United States Patent and Trademark Office also fails to persuade me that Microsoft had

inquiry notice of Fung's usurpation of Vadem BVI's corporate opportunity. This Court has expressed a reluctance to find inquiry notice when a plaintiff would have to piece together information from various documents.⁹³ Even if that was not the case, it would be unreasonable in this instance to expect Microsoft to draw a connection between the Information Statement and a document that was filed publicly six years later. Based on the allegations in the Complaint, I find that it is reasonably conceivable that Microsoft will be able to prove that it was not on inquiry notice of its usurpation of a corporate opportunity claim against Fung until 2011. Thus, I deny Defendants' motion to dismiss Microsoft's claims as time-barred.

The same can be said of Microsoft's self-dealing and fraudulent inducement claims, both of which stem from Fung's misrepresentations to Vadem BVI about the value of the Vadem Patents. A reasonably diligent investigation into the imminent dilution of its investment would not have led Microsoft to discover that Fung's statements that the Vadem Patents had no value were false. Although Microsoft is a sophisticated party capable of valuing the Vadem Patents independently, the Information Statement did not single out the Vadem Patents or even suggest that those patents were the only assets being transferred out of Vadem BVI. Vadem BVI was being restructured completely, and Microsoft had no basis to believe that of all of the assets that Vadem

⁹³ See *Weiss v. Swanson*, 948 A.2d 433, 452 (Del. Ch. 2008) (“[U]nlike the cases the defendants cite, the information needed to put Weiss on notice of his claims did not appear in one document. In order to discover the alleged pattern of timing, Weiss would have had to cull through the company's Form 4s each time they were filed”).

BVI was disposing of, there was an issue specifically with the Vadem Patents. It is not reasonable to expect Microsoft to perform its own valuation for each asset that Vadem BVI was transferring and analyze whether the company was receiving sufficient consideration for them.

A comprehensive investigation of Vadem BVI's restructuring may have led Microsoft to the KPMG report, but that report, which was produced by a reputable outside valuation company, would have revealed that the Vadem Patents had no value. The Information Statement did not convey any information that should have led Microsoft to believe that the KPMG report was unreliable. Insofar as the KPMG report relied on Fung, Microsoft had no reasonable basis to believe that such reliance was improper given that: (1) Fung invented the patents and likely had unique insight into their value; and (2) Fung was a fiduciary of Vadem BVI and presumably was acting consistently with his fiduciary duties when he consulted with KPMG on the Vadem Patents' value. Fung's admitted dishonesty lies at the heart of Microsoft's self-dealing and fraudulent inducement claims. Neither the Information Statement itself nor the Information Statement in conjunction with reasonable diligence would have led Microsoft to discover Fung's allegedly deliberate misrepresentations. As such, Microsoft was not on inquiry notice of Vadem BVI's self-dealing and fraudulent inducement claims against Fung. Because the limitations period for these claims was tolled by Fung's fraudulent concealment until sometime in 2011, Defendants' motion to dismiss these claims as time-barred is denied.

E. Availability of Rescission as a Remedy

St. Clair's final argument is that Microsoft has failed to state a claim for rescission of the Vadem Patent transfers from Vadem BVI to Amphus and the later transfer of those same patents from Amphus to St. Clair. St. Clair avers that the rescission claim should be dismissed because Microsoft has failed to offer to return Defendants to the *status quo ante* and because rescission is not a practicable remedy given that the underlying transactions happened thirteen years ago. Microsoft responds that a rule requiring a plaintiff to plead that it has offered to restore the defendants to their *status quo ante* position is impractical in the derivative context. In addition, Microsoft avers that it is premature for this Court to determine whether rescission is an appropriate remedy on a motion to dismiss. I find Microsoft's position on these issues to be persuasive.

Neither St. Clair nor Microsoft has provided the Court with case law that directly addresses whether a derivative plaintiff seeking rescission must offer to restore the defendant to their *status quo ante* position. Microsoft was not a party to the transactions that it now challenges derivatively. There does not appear to be any reasonable basis to conclude that Microsoft would have been in a position to make such an offer on behalf of Vadem BVI or that Microsoft, on its own, could have required Vadem BVI to make an offer to restore Defendants to their *status quo ante* position. Accordingly, requiring Microsoft to have made such an offer as a precondition to seeking rescission derivatively on behalf of Vadem BVI would not make sense in the context of this case.

More importantly, I concur with Microsoft that it would be premature to address the availability of rescission at this early stage of the litigation. Because, among other

things, the challenged transactions occurred so long ago, Microsoft will face an uphill battle in meeting its burden to establish that this Court can restore the *status quo ante* between the parties. Regardless, “on a motion to dismiss all that need be decided is whether a claim is stated upon which any relief could be granted. If that question is answered in the affirmative, the nature of that relief is not relevant and need not be addressed.”⁹⁴ Defendants have not shown that Microsoft has failed to state any claims upon which some form of equitable relief could be granted. “At this stage, to decide whether rescission relief is (or is not) feasible would not only go beyond the scope of a motion to dismiss, but also would be imprudent, because the issue is fact driven and cannot be decided in the absence of an evidentiary record.”⁹⁵ Those same considerations apply to this case, where there are outstanding factual issues that must be resolved before the availability of rescission can be determined definitively. Thus, I deny Defendants’ motion to dismiss Microsoft’s request for rescission.

⁹⁴ *Chaffin v. GNI Gp., Inc.*, 1999 WL 721569, at *7 (Del. Ch. Sept. 3, 1999).

⁹⁵ *Id.* See also *Meso Scale Diagnostics, LLC v. Roche Diagnostics GMBH*, 2011 WL 1348438, at *15 n.103 (Del. Ch. Apr. 8, 2011) (holding on motion to dismiss that, although the possibility of rescission-based relief appeared remote, it would be premature to rule it out so early in the case).

III. CONCLUSION

For the foregoing reasons, I grant Defendants' motions to dismiss Defendants Fujimura and Amphus, as well as Count VII of the Complaint. In all other respects, Defendants' motions are denied.

IT IS SO ORDERED.