IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICROSOFT CORPORATION, a Washington corporation, Plaintiff Below, Appellant, v. VADEM, LTD., a British Virgin Islands International Business Company, AMPHUS, INC., a Delaware corporation, St. Clair INTELLECTUAL PROPERTY CONSULTANTS, INC., a Michigan Corporation, and HENRY FUNG, Defendants Below, Appellees.	No. 290, 2012 ON APPEAL FROM C.A. NO. 6940-VCP IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE **REDACTED, PUBLIC VERSION**

APPELLEES' ANSWERING BRIEF

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Dated: August 13, 2012

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NATURE OF THE PROCEEDINGS

A. Court of Chancery Action

In the action below, Microsoft Corporation ("Microsoft") brought derivative and direct claims against Vadem Ltd., a British Virgin Islands company ("Vadem BVI"), [redacted] As additional defendants, Microsoft named Amphus, Inc. ("Amphus"), a defunct Delaware corporation with its former offices in California; Patent Revenue Partners, LLC ("PRP"), a California limited liability company; and St. Clair Intellectual Property Consultants, Inc. ("St. Clair"), a Michigan corporation. [redacted] During briefing on Defendants' motions to dismiss, Microsoft moved to amend the Complaint to add Vadem, Inc. ("VADEM"), a California corporation, the previous record owner of the Fung Patents.

Defendants moved to dismiss the Complaint on several grounds: (1) in filing the action, Microsoft ignored a fundamental requirement of the law of the British Virgin Islands ("BVI"), which required Microsoft, as a shareholder of Vadem BVI, to seek and obtain leave of the BVI High Court before filing this derivative action, and therefore lacked standing; (2) the Fung Patent rights transferred to St. Clair were never owned by Vadem BVI, the entity in which Microsoft owned shares. Instead, they were owned by VADEM, an entity in which Microsoft has never been a shareholder; and (3) the direct claims

[redacted]

(Counts VII and VIII) were barred by the applicable statute of limitations. [redacted]

During the Chancery Court proceedings, Microsoft admitted:

- [redacted][1];
- [redacted];
- [redacted]; and
- With regard to Counts VII and VIII, "its claims accrued at some point in 2000 and that the three-year Delaware statute applies to its direct claims and, by analogy, to its derivative claims." (A203)

On April 27, 2012, the Court of Chancery issued its opinion dismissing with prejudice the two (2) direct counts (Counts VII and

[1] The Appendix to Appellant's Opening Brief will be cited herein as (A__).

[redacted]

VIII) of Microsoft's complaint as time-barred.[2] The Court found Microsoft lacked standing to bring the remaining six (6) derivative counts because it failed to seek and obtain leave of the BVI High Court to assert the derivative claims as required by the BVI Business Companies Act of 2004 (the "2004 Act").

Microsoft's appeal challenges only the dismissal of direct Counts VII and VIII as time-barred. This is Appellees' Answering Brief in opposition to Microsoft's appeal.

B. British Virgin Islands Action

On May 23, 2012, Microsoft made application to the BVI High Court seeking leave to file its derivative claims. A hearing on that application is scheduled for November 8, 2012.[3]

C. Related Patent Action

On May 15, 2009, St. Clair sued several companies for infringement of the Fung Patents in the United States District Court for the District of Delaware (the "Patent Action"). Microsoft was not named as a defendant in the Patent Action, although it was alleged that certain features of Microsoft Windows were elements of the infringement of the Fung Patents. On April 7, 2010, Microsoft filed a

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[2] The Opinion of the Court of Chancery was attached as Exhibit "A" to Appellant's Opening Brief (hereinafter cited "Opinion at __"). The facts relied upon by the trial court were drawn from the Complaint and presumed true for purposes of Defendants' motions to dismiss. Opinion at 3, n. 4.

[3] Appellees reserve all of their rights in respect to the merits of all of Microsoft's claims, both derivative and direct.

[redacted]

complaint for declaratory judgment of non-infringement and invalidity against St. Clair, asserting the Fung Patents were invalid and not infringed. St. Clair counterclaimed, accusing Microsoft of contributory infringement of the Fung Patents. The Patent Action is at the summary judgment stage.

[redacted]

SUMMARY OF ARGUMENT

1. Denied. This Court should not entertain Microsoft's newly-raised argument that its breach of contract claims asserted in Counts VII and VIII are not subject to any limitations period. Not only did Microsoft fail to present the issue to the trial court, it readily agreed that these claims were subject to a three-year limitations period. Furthermore, the issue advanced by Microsoft – whether alleged *ultra vires* acts which are void *ab initio* are subject to a limitations period under Delaware law is not an issue presented by the facts in this matter; Count VII does not even plead *ultra vires* acts. Under the internal affairs doctrine, BVI law governs Counts VII and VIII.

2. Denied. The Court of Chancery correctly dismissed Counts VII and VIII as time-barred. Well-established Delaware law does not require a plaintiff to know of his economic injury before a statute begins to run; rather, he must only have inquiry notice of the wrongful act. Microsoft admitted it was aware of the alleged breach of the Memorandum (*e.g.*, the wrongful act) in March 2000. Microsoft further admitted it knew economic harm would result from the alleged breach, acknowledging [redacted].

3-4. Denied. The Court of Chancery's dismissal of Counts VII and VIII is on all-fours with binding case law mandating that a plaintiff with knowledge of a wrong, investigate and file a claim to

[redacted]

preserve its rights. Here, Microsoft admits knowledge of the wrong (alleged breach of the Memorandum) in March 2000. No injustice or public policy should allow Microsoft, on this record, to file claims based on a known breach of contract eleven years (11) after-the-fact.

[redacted]

STATEMENT OF FACTS

The sole issue on appeal is whether the Court of Chancery erred in dismissing with prejudice Counts VII and VIII of Microsoft's Complaint as time-barred. Counts VII and VIII are basic breach of contract claims; the contract being the Memorandum of Association of Vadem BVI, and the alleged breach being a transfer of assets by the Vadem BVI board without first obtaining shareholder approval.

A. The Parties

Vadem BVI is a privately held international business company incorporated in 1993 under the laws of the British Virgin Islands ("BVI") with its principal place of business in California. Opinion at 1. (A19) Microsoft, a Washington corporation, became a shareholder in Vadem BVI in 1999. (A18)

VADEM[4] is a California corporation [redacted]. (A217) VADEM was founded ten (10) years prior to the formation of Vadem BVI. In 1993, [redacted]

[4] VADEM was not named as a defendant in Microsoft's original Complaint. Microsoft moved to amend the Complaint to add VADEM as a defendant and the Chancery Court considered Defendants' motions to dismiss as though VADEM was a party defendant. Opinion at 2. Microsoft's motion to amend which attached the proposed amended complaint (without exhibits) is found in Appellees' Appendix at B1-B54.

[redacted]

[redacted]. Microsoft has at no time been a shareholder in VADEM. (A217-218)

Mr. Fung is a co-founder of Vadem BVI, its former Chief Technology Officer and its current board Chairman. Opinion at 2.

Amphus is a now-dissolved Delaware corporation. Id. [redacted] At Amphus' inception, Vadem BVI owned 40% of Amphus and Mr. Fung owned 20%. Opinion at 2. Amphus was dissolved on December 24, 2008, when, according to the Complaint, Vadem BVI purchased its remaining assets. Id.

St. Clair is a Michigan corporation. (A19, ¶7) [redacted]

B. **The Fung Patents**

Mr. Fung obtained several patents directed to power management and power conservation for computer systems, including U.S. Patent Nos. 5,710,929; 5,758,175; 5,892,959 and 6,079,025 (collectively, the "Fung Patents"). Opinion at 2. The applications that resulted in the Fung Patents were duly assigned to VADEM in 1990. (A144) Title of the Fung Patents passed from VADEM to Amphus, and then to St. Clair. (Id.) Microsoft concedes that Vadem BVI has never held title to the Fung Patents. (A145)

[5] PRP, a California limited liability company, was a defendant below, but is not a party to this appeal.

[redacted]

C. Governance of Vadem BVI

Vadem BVI is governed by its Amended and Restated Memorandum of Association, dated December 1, 1998 (the "Memorandum").[6] Opinion at 4; (A40, ¶46) [redacted]

D. Microsoft's Investment in Vadem BVI

[redacted] In May, 1999, following a lengthy due diligence period, Microsoft invested $9 million in Vadem BVI, acquiring 1,554,403 shares of Vadem BVI Series F preferred stock.

[6] A Memorandum of Association under BVI law is equivalent to an American certificate of incorporation. Opinion at 4 *citing* A

[7] [redacted]

Opinion at 4; (A20, ¶11) This investment amounted to 39% of Vadem BVI's Series F Stock and 7.49% of the equity of the entire company. Id. As part of the same transaction, Microsoft also purchased $10 million in intellectual property assets from, and entered into a $1 million Maintenance and Development Agreement with, Vadem BVI. Id.

[redacted]

E. Restructuring of Vadem BVI

[redacted] On December 6, 1999, the seven-person Vadem BVI Board approved a restructuring of Vadem BVI and its business units. Opinion at 5. [redacted] Specifically, the Vadem BVI Board transferred the assets into four different operating companies based upon Vadem BVI's four main business divisions.[9] Opinion at 5; (A25, ¶22; A107-108) The newly formed operating companies included: (1) Amphus, a Delaware corporation, which received VADEM's chip products business and the Fung Patents; (2) MobileWorks Corporation, a California corporation, which received personal digital assistant patents; (3) Infolio, Inc., a Delaware corporation, which received the mobile information services

[redacted]

[9] [redacted]

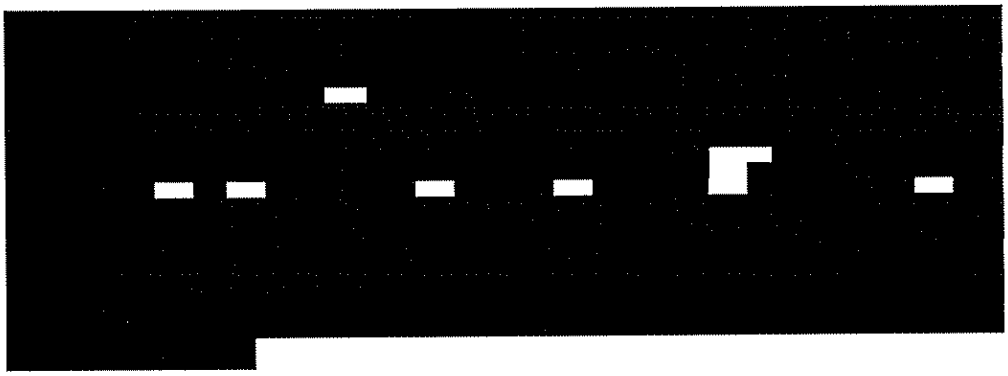
[redacted]

business; and (4) Paragraph, Inc., a Delaware corporation, which received the handwriting technologies business. Id. [redacted]

[redacted]

F. **Independent Fair Market Valuation of Vadem BVI**

[redacted]



[redacted]

G. **The Information Statement**

[redacted]

[redacted]

[redacted]

[10] [redacted]

[redacted]

H. Amphus and the Fung Patents

[redacted] the Vadem BVI Board approved a capital structure for each of the four (4) new operating companies, including Amphus, resulting in the issuance to Vadem BVI of preferred securities representing approximately 40% of the equity ownership of each operating company.[11] Opinion at 4; (A108; A220) Mr. Fung became Amphus' CEO and 20% owner.[12] Opinion at 2; (A19, ¶5)

On or about this same time, Amphus acquired the Fung Patents from VADEM. Opinion at 7. [redacted]

[redacted]

[redacted]

[redacted]

I. Amphus-St. Clair Transaction

St. Clair purchased the Fung Patents from Amphus in June, 2000 for an initial payment of $300,000 plus the first $1,000,000 in licensing revenues and a further 50% share of all future licensing revenues. Opinion at 7; (A23, ¶18).

[redacted]

[redacted][14]

[redacted]

ARGUMENT

I. SUPREME COURT RULE 8 BARS MICROSOFT'S FIRST ISSUE ON APPEAL; EVEN IF THE COURT WERE TO CONSIDER THE NEWLY-RAISED ISSUE, *ULTRA VIRES* ACTS ARE NOT VOID *AB INITIO* UNDER CONTROLLING BVI LAW, RENDERING THE ISSUE MOOT.

A. Question Presented

Whether this Court should consider Microsoft's argument that its breach of contract claims presented in Counts VII and VIII are not subject to any limitations period when Microsoft (i) failed to present the issue to the trial court, (ii) fails to provide any reason for this Court to apply the "interest of justice" exception under Supreme Court Rule 8, and (iii) argues the issue as a matter of Delaware law, when BVI law is applicable [redacted].

This question was neither fairly presented nor preserved before the trial court. Microsoft expressly agreed with Defendants that the claims presented in Counts VII and VIII were subject to a three-year statute of limitations. (A203)

B. Scope of Review

The Court may excuse Microsoft's failure to fairly present and/or preserve the issue presented in Argument I "if it finds that the trial court committed plain error requiring review in the interests of justice." Smith v. Delaware State University, 2012 WL 2583394, *5 (Del. 2012) *quoting* Turner v. State, 5 A.3d 612, 615 (Del. 2010). When reviewing for plain error, "the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." Id. *quoting* Wainwright

[redacted]

v. State, 504 A.2d 1096, 1100 (Del. 1986); Beebe Medical Center, Inc. v. Bailey, 913 A.2d 543, 555 (Del. 2006).

C. Merits of Argument

1. *Supreme Court Rule 8 Affords No Relief to Microsoft.*

Microsoft admits it did not preserve for appeal the issue of whether [redacted]. OB at 14. It argues that nevertheless, "this Court may consider this question because it is in the interest of justice." Id. *citing* Sup. Ct. R. 8.

Supreme Court Rule 8's "interest of justice" exception is extremely narrow and limited. Microsoft is required to "state why the interests of justice exception to Supreme Court Rule 8 may be applicable." Del. Supr. Ct. R. 14(b)(vi)(A)(1); *See also* Russell v. State, 5 A.3d 622, 627 (Del. 2010). Microsoft fails to offer any reason why the interest of justice exception applies, instead merely contending the issue is unresolved under Delaware law, a fact falling far short of establishing "plain error" by the trial court.[15] Regardless, "plain error" cannot be shown when the trial court adopts and accepts a concession made by a party – here, by Microsoft, that Delaware's three-year statute of limitations applies to Counts VII and VIII.[16]

[15] Any attempt by Microsoft to cure this deficiency via its reply brief should be rejected as unfair and prejudicial to Appellees.

[16] Nowhere does Microsoft attempt to justify its complete failure to raise this new issue below. Its effort to change positions on appeal from its earlier admission is best seen as an attempt to get another bite at the apple in view of the failure of Microsoft's strategic decisions below.

[redacted]

Defendants expressly argued the direct claims asserted in Counts VII and VIII were governed by a three-year statute of limitations (A158), ***and Microsoft agreed***:

> Microsoft agrees with Defendants that its claims accrued at some point in 2000 and that the three-year Delaware statute applies to its direct claims and, by analogy, to its derivative claims.

(A203). Furthermore, the trial court accepted Microsoft's position and it formed the basis for the trial court's ruling:

> It is undisputed that [Count VII and VIII]'s causes of action accrued sometime in 2000, when the assets were transferred. **The parties further agree that, absent some form of tolling, the three-year Delaware statute of limitations for breach of contract, and thus, the analogous laches period, expired in 2003.**

Opinion at 20-21 (emphasis added). It would be an affront to the judicial process and contrary to the interests of justice to allow Microsoft's about-face on appeal. Reviewing courts seek to avoid such threats to the stability of the judicial process by estopping parties from changing prior concessions and arguments that were relied upon by the trial court in rendering its decision.

Thus, in addition to being barred by Rule 8, Microsoft is estopped from now claiming no statute of limitations applies to Counts VII and VIII.[17] *See*, Siegman v. Palomar Med. Tech., Inc., 1998 WL 409352, *3 (Del. Ch.) ("Judicial estoppel prevents a litigant from advancing an argument that contradicts a position previously taken by that same litigant, and that the court was persuaded to accept as the

[17] The determination of judicial estoppel is a question of law and is reviewed *de novo*. Motorola Inc. v. Amkor Technology, Inc., 958 A.2d 852, 859 (Del. 2008).

basis for its ruling."); Motorola Inc. v. Amkor Technology, Inc., 958 A.2d 852, 859 (Del. 2008) (the "doctrine is meant to protect the integrity of the judicial proceedings.") Indeed, the integrity of the trial process would be prejudiced if Microsoft was allowed to now take a fundamentally different position on the statute of limitations issue. Microsoft fails to meet its burden as required by Supreme Court Rule 8 and the newly-raised issue should not be considered by the Court.

2. *Even if the Court Were to Consider the Issue in the Interest of Justice, Under BVI Law,* [redacted]

a. [redacted]

BVI law controls the relationship between Vadem BVI and its shareholders under the "internal affairs" doctrine. Sagarra Inversiones, S.L. v. Cementos Portland Vadlerrivas, S.A., 34 A.3d 1074, 1081-1082 (Del. 2011). Thus, Counts VII and VIII, [redacted], are governed by BVI law, specifically the 2004 Act.[18] Opinion at 10. However, citing only Delaware law, Microsoft argues that [redacted]. *See,* OB pp. 16-17. Microsoft's argument based on Delaware law is irrelevant and should be rejected.[19]

[18] Microsoft has not challenged on appeal the trial court's conclusion that BVI law controls and the relevant BVI statute is the 2004 Act.

[19] As such, Microsoft's reliance on Solomon v. Armstrong, 747 A.2d 1098 (Del. Ch. 1999), Adams v. Calvarese Farm Main. Corp., 2010 WL

[redacted]

Section 29 of the 2004 Act addresses the validity of acts of a BVI company, providing:

> 29. (1) No act of a company and no transfer of an asset by or to a company is invalid by reason only of the fact that the company did not have the capacity, right or power to perform the act or to transfer or receive the asset.

(B148) Section 29 expressly provides that no corporate transfer of an asset is invalid by reason only of the fact that the company did not have the right or power to transfer the asset. Id. Section 29 is specifically designed to save the transaction. While the act or transfer may give rise to claims for directors' malfeasance or breach of a company's memorandum, the transfer itself is unassailable. It is a valid transfer of legal title. Accordingly, [redacted].

b. The Issue Microsoft Requests the Court Decide Will Not Resolve Any Issue on Appeal; Delaware Substantive Law Does Not Apply to Counts VII and VIII.

Microsoft's argument seeking to have this Court decide whether [redacted]

3944961 (Del. Ch. 2010), and Steiner v. Meyerson, 1995 WL 441999 (Del. Ch. 1995) is misplaced.

[redacted]

Thus, the issue sought to be raised for the first time on appeal is irrelevant to Count VII.

Moreover, Delaware substantive law does not govern Counts VII and VIII - rather, BVI law will determine the rights and obligations vis-à-vis Vadem BVI and its shareholders under the Memorandum. VantagePoint Venture v. Examen, Inc., 871 A.2d 1108, 1112 (Del. 2005); McDermott Inc. v. Lewis, 531 A.2d 206, 216-217 (Del. 1987). Accordingly, because Argument I presents a "hypothetical question", it should be rejected. *See,* Stroud v. Milliken Enterprises, Inc., 552 A.2d 476, 479 (Del. 1989) *citing* Rollins Int'l, Inc. v. Int'l Hydronics Corp., 303 A.2d 660, 662 (Del. 1973).

Assuming *arguendo* the Court takes up this issue, the cases cited by Microsoft are inapposite. They pertain to void *judgments*, not alleged void acts generally, and not to corporate transactions, specifically, and do not involve application of BVI law.[20] The cited cases are factually distinguishable, addressing the legal effect of

[20] *See, e.g.*, Lorenzetti v. Hodges, 2012 WL 1410103 (Del. Super. 2012) (discussing legal effect of judgment rendered by court without jurisdiction); Belfint, Lyons & Shuman, P.A. v. Pevar, 844 A.2d 991 (Del. 2004)(Table) (remanding issue of waiver of right to challenge a void judgment to Superior Court to consider all relevant factors, including excusable neglect and inherent right of courts to manage docket), *on remand* Belfint, Lyons & Shuman, P.A. v. Pevar, 862 A.2d 358 (Del. 2004)(Table) (affirming Superior Court's decision that "voidness" argument was moot); Holman v. Family Health Plan, 227 N.W.2d 478 (Wis. 1999) (holding only that a default judgment entered on a complaint that has been superseded is a nullity under Wisconsin law); Osage Conservation Club v. Board of Sup'rs of Mitchell County, 611 N.W.2d 294 (Iowa 2000)(holding acts taken by a zoning board lacking subject matter jurisdiction to be void under Iowa law); Lions Gate Ent. Corp.v. Image Ent. Inc., 2006 WL 1668051 (Del. Ch.) (deciding case based upon application of Delaware General Corporation law).

[redacted]

specific acts by U.S. courts and/or governmental bodies lacking authority, [redacted].

For instance, in Council of S. Bethany v. Sandpiper Dev. Corp., Inc., 1986 WL 13707 (Del. Ch. 1986), relied upon by Microsoft, a developer, Sandpiper, challenged the validity of a zoning ordinance, arguing it was void *ab initio* because it was adopted without compliance with statutorily mandated publication requirements. In rejecting this position, then Vice-Chancellor Jacobs wrote:

> In its reargument brief Sandpiper raises, for the first time, the argument that the Zoning Ordinance, having been adopted without compliance with the statutorily mandated publication requirements, is void *ab initio* and that, therefore, no challenge thereto can be barred by the statute of limitations. Although not articulated in these precise terms, Sandpiper's position appears to be that whenever a claim is advanced that a zoning ordinance is invalid by reason of having been enacted in violation of statutory procedural requirements, that claim falls outside the scope of any statute of limitations. No authority is cited for that proposition, and in my view, both authority and logic compel the precise opposite conclusion.

[21] Again, even if so held by the Court, this rule would be inapplicable to the present appeal since Delaware substantive law does not control.

[redacted]

Council of S. Bethany, 1986 WL 13707, *2. The court further noted that to "permit [Sandpiper's president] to lay back and withhold his 'invalidity' contentions for 8 years until it became economically advantageous for him to assert them, would be antithetical to any sound concept of equity or common sense." Id. at *5. The same rationale applies here. As discussed in Arg. II,

[redacted]

Finally, Microsoft's public policy argument, premised upon decisions from multiple United States jurisdictions, is misguided.[22]

[redacted]

[22] *See, e.g.*, Foundation Ventures LLC v. F2G, Ltd., 2011 WL 1642245 (S.D.N.Y. 2011) (applying New York substantive law to challenge the validity and enforceability of contract requiring finder's fee be paid for arranging financing); Jersey City v. Roosevelt Stadium Marina, 509 A.2d 808 (N.J. Super. A.D. 1986) (applying New Jersey substantive law to dispute whether settlement agreement entered into by City which violated mandatory public bid laws was subject to equitable defenses of laches or estoppel); Marley v. Dep't of Labor and Ind. Of State, 886 P.2d 189 (Wash. 1994) (finding order of court lacking jurisdiction is void and no statute of limitations applies to challenge of order's validity); Corporate Dissolution of Ocean Shores Park, Inc. v. Rawson-Sweet, 134 P.3d 1188 (Wash. App. Div. 2006) (stating Washington substantive law that statute of limitations does not apply where an act or instrument (i.e., trust) is void at its inception) *citing* Colman v. Colman, 171 P.2d 691 (Wash. 1946); Apple Computer , Inc. v. Exponential Tech., Inc., 1999 WL 39547 (Del. Ch. 1999) (discussing Delaware substantive corporate law on issue of ratification).

[redacted]

[redacted] Such a rule would eviscerate any finality in corporate transactions. This rule of law Microsoft seeks to establish via its newly-raised argument spurns sound public policy. This Court should reject it.

[redacted]

II. THE TRIAL COURT CORRECTLY DISMISSED WITH PREJUDICE COUNTS VII AND VIII AS TIME-BARRED.

A. Question Presented

Did the Court of Chancery properly dismiss Counts VII and VIII as time barred?

B. Scope of Review

This Court reviews *de novo*, for errors of law, the dismissal of a complaint under Rule 12(b)(6). VLIW Tech., LLC v. Hewlett-Packard Co., 840 A.2d 606, 610 (Del. 2003). As to tolling, however, Microsoft bears the burden of pleading specific facts to demonstrate that the statute of limitations was tolled. U.S. v. Cellular, 677 A.2d 497, 504 (Del. 1996); Weiss v. Swanson, 948 A.2d 433, 451 (Del. Ch. 2008)(same).

C. Merits of Argument

The Court of Chancery was correct in its dismissal of Counts VII and VIII as time-barred because Microsoft admitted [redacted]

Despite these admissions, Microsoft argues the limitations period was tolled "until Microsoft became aware of its economic injury." OB

at 4. Microsoft seeks to re-write well-established Delaware law by conflating the concept of "injury" (*e.g.* breach of the Memorandum) with "economic injury" (*e.g.*, damages flowing from the breach). Microsoft is wrong. Delaware law does not require a plaintiff to know of his economic injury before a statute begins to run, rather, he must only have inquiry notice of a wrongful act [redacted]. The Court of Chancery's dismissal of these Counts as time-barred was correct and should be affirmed.

A critical basis for the trial court's conclusion that Counts VII and VIII were time-barred was its determination as a matter of law that Microsoft's direct claims accrued at the time it received the Information Statement in March 2000. Counts VII and VIII "relate only to Vadem [BVI]'s alleged breach of the Memorandum of Association by disposing of all or substantially all of its assets without a shareholder vote." Opinion at 20. These claims are "not based on the receipt of inadequate consideration." Opinion at 23. Moreover, Microsoft conceded these two causes of action accrued some time in 2000, when the assets were transferred. Opinion at 20; (A203). Microsoft also conceded the three-year statute of limitations (and by analogy, laches) applied to Counts VII and VIII (and the derivative claims for that matter) and that the statute expired (but for tolling) in 2003. Op. at 20-21; (A203)

Having found that Counts VII and VIII were based solely on the alleged breach of the Memorandum, the issue became when "Microsoft

received inquiry notice that the asset transfers occurred". Opinion at 23. Relying on Pomeranz v. Museum Partners, L.P., 2005 WL 217039 (Del. Ch. 2005), among other cases, the trial court held that inquiry notice is triggered when a "Plaintiff is objectively aware of the facts giving rise to the wrong." Opinion at 23. It does not require "full knowledge of the material facts". Opinion at 23, and fn. 46, quoting Pomeranz.

Here, the trial court determined that the Information Statement Microsoft received in March of 2000 provided inquiry notice of the Asset Transfers. [redacted] Tolling simply has no application here since Microsoft had ***actual notice*** of the breach. Counts VII and VIII of the Complaint were thus time-barred.[23]

The trial court's analysis of inquiry notice is on point with well-established Delaware law that a statute of limitations begins to run when the wrongful act occurs, even if the plaintiff is ignorant of it, and claims for breach of contract accrue at the time of the

23 [redacted]

breach. Pomeranz, 2005 WL 217039, at *3; Nardo v. Guido DeAscanis & Sons, Inc., 254 A.2d 254, 256 (Del. Super. 1969); *See also*, United States Cellular v. Bell Atlantic, 677 A.2d 497, 503 (Del. 1996) ("equitable tolling does not apply here . . . because [Plaintiff] had reason to know of the breach…"). Microsoft has conceded that the breach of contract claims asserted in Counts VII and VIII accrued in March 2000 when it received the Information Statement. Thus, the limitations period, absent tolling, expired in 2003.

In an attempt to evade this dispositive law, Microsoft advances the argument that [redacted]

[24] The cases cited by Microsoft on pages 27 of its opening brief do not alter the well-established rule of law on tolling a statute of limitations. No case in Delaware has held that inquiry notice requires knowledge of the wrongful act [i.e., the breach] ***and*** the damages caused by that act. Cases cited by Microsoft, to the contrary, actually support the well-established rule of law that knowledge of the wrongful act triggers the running of the limitations period. *See*, Weiss v. Swanson, 948 A.2d 433, 451 (Del. Ch. 2008) ("limitations period begins to run when the plaintiff is objectively aware of the facts giving rise to the wrong, i.e., on inquiry notice"); Franklin Balance Sheet Inv. Fund v. Crowley, 2006 WL 3095952, *7 (Del. Ch.) ("laches begins to run when shareholder knew or should have known of the facts alleging the wrong"; In re Tyson Foods, Inc., 919 A.2d 563 (Del. Ch. 2007) (same). Furthermore, the tort cases cited are inapposite. No tort claim is asserted in Counts VII and VIII. Krahmer v. Christies, Inc., 903 A.2d 773 (Del. Ch. 2006) (a tort action accrues at the time of injury to the plaintiff).

[redacted]

This same argument was expressly rejected in Pomeranz. There, the plaintiffs conceded they were on inquiry notice of the breach of a partnership agreement, but that they were "lulled (by a fiduciary) into believing that [the partnership] was thriving" despite that breach (the fact of withdrawal). Pomeranz, 2005 WL 217039, at *12. The plaintiffs knew of the wrongful act [the withdrawal] but claimed it did not know the "economic impact", an argument the Court of Chancery described as a "novel, no harm, no foul" tolling exception. Id. at *12.

The Court of Chancery rejected this argument for several reasons.[26]

> First of all, their argument rests on the dubious proposition that a plaintiff can know of causes of action that she thereafter asserts but argue that the statute was tolled until she understood the economic impact that the wrongful acts had caused her… the plaintiff is arguing that inquiry notice does not run until it had notice of the full economic impact of the wrong. That is not the law - having all the facts necessary to articulate the wrong is not required.
>
> The plaintiffs, even if they relied on a fiduciary, only received the benefit of tolling until they "had reason to know that a wrong has been committed."

Id. at *12.

***

[25] [redacted]

[redacted]

> Contrary to the plaintiffs' assertion here, they may not simply wait until the details of the harm are provided to them before the statute begins to run. Knowing of a wrong is sufficient to require action to preserve one's rights. Delaware law expects some initiative from plaintiffs, even those who rely on fiduciaries.

Id.

Thus, in Pomeranz, the Court of Chancery refused to equate "wrong" (*e.g.*, a breach) with "full economic harm," finding instead that inquiry notice requires a plaintiff to have only "enough facts to put them on inquiry, if pursued, would lead to the discovery of injury" and the "causal link between" the breach and consequent damages. Id. at 14.

The Court of Chancery in Pomeranz relied heavily on In re Dean Witter Partnership Litigation, 1998 WL 442456 (Del. Ch. 1998) to support its analysis, recognizing each of the tolling exceptions[27] apply only "where the facts underlying a claim were so hidden that a reasonable plaintiff could not timely discover them." Dean Witter, 1998 WL 442456, at *5. In Dean Witter, the Court of Chancery held that inquiry notice "does not require actual discovery of the reason for the injury"... [n]or does it require plaintiff's awareness of all aspects of the alleged wrongful conduct." Id. at *7. A plaintiff may not "sit idly by" when it has "sufficient notice of wrongdoing." Id. at *9. *See also* Worrel v. Farmers Bank of Delaware, 430 A.2d 469, 472

[27] Microsoft asserts equitable tolling and fraudulent concealment provide a basis to toll the running of the limitations period. Its opening brief does not address the trial court's finding that Microsoft failed to allege facts to support tolling under the fraudulent concealment exception, and thus, has conceded that point. Opinion at 25.

[redacted]

(Del. 1981) (the "general law as to the accrual of actions for breach of contract" is that "a right of action accrues and the statute begins to run at the time the contract is broken, not at the time when actual damage results or is ascertained") (citations omitted); Albert v. Alex Brown Mgmt. Services, Inc., 2005 WL 1594085 (Del. Ch. 2005) ("the law of Delaware is crystal clear that a claim accrues as soon as the wrongful act occurs. This is so because the plaintiffs were harmed as soon as the alleged wrongful acts occurred. Whether or not the plaintiff could have sued for damages is not dispositive").[28]

By Microsoft's admission, [redacted] Thus, its direct claims are time-barred.

Finally, Microsoft argues that "sound policy reasons" support the tolling of the statute of limitations when a party is aware of a

[28] The cases cited by Microsoft for the proposition that damages (which it defines as "injury"), is an element of a breach of contract claim have no relevance to a tolling inquiry. Microsoft clearly could have filed a claim upon the alleged breach. Similarly, the shareholder rights cases cited by Microsoft, which all involve the link between economic interests and shareholder voting rights, do not involve tolling and are irrelevant to the issues on appeal. Finally, Microsoft's reliance on Apple, Inc. v. Motorola, Inc., 2012 WL 2376664 (N.D. Ill.) is also misplaced. The court's comment that a party cannot file a federal court patent case if it has sustained no injury was made in the context of its analysis that plaintiff did not have a damages' expert to testify at trial. Further, in its opinion, the court acknowledged that a breach of contract "is a wrong", which triggers at least a right to nominal damages. Id.

[redacted]

breach but has been misled as to damages. To hold otherwise, according to Microsoft, would promote "unnecessary lawsuits." These arguments should be rejected for a number of reasons. Exceptions to statute of limitations, designed to provide certainty and fairness to defendants[29], are to be narrowly drawn to "prevent injustice". Pomeranz, 2005 WL 217039, at *13. Inquiry notice requires a plaintiff with notice of wrongdoing to investigate and file a claim to preserve its rights. Id. Here, as Vice Chancellor Parsons found, the critical element to Microsoft's breach of contract claims is the breach, [redacted] Microsoft knew then that an alleged wrong, i.e., failure to get approval, had occurred, that this was an alleged breach of the Memorandum and that it could file a claim or seek appropriate relief then. No alleged injustice or public policy should allow Microsoft, on this record, to complain of an alleged breach of contract eleven (11) years later. The trial court's dismissal with prejudice of Counts VII and VIII as time-barred was proper and should be affirmed.

[29] Rudginski v. Pullella, 378 A.2d 646, 649 (Del. Super. 1977).

[redacted]

CONCLUSION

For the foregoing reasons and authorities cited herein, Appellants Vadem, Ltd., Henry Fung, Amphus, Inc. and St. Clair Intellectual Property Consultants, Inc. respectfully request that this Court affirm the decision of the Court of Chancery dismissing Counts VII and VIII of Microsoft's Complaint as time-barred.

Respectfully submitted,

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