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, an Individual, 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 VERSION FILED SEPTEMBER 7, 2012

APPELLANT'S REPLY BRIEF

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I. MICROSOFT'S CLAIM SHOULD NOT HAVE BEEN DISMISSED BECAUSE VOID ACTS ARE NOT SUBJECT TO ANY LIMITATIONS PERIOD

Microsoft never conceded that void transactions are subject to statutes of limitations and is not judicially estopped from making that argument now. Likewise, Microsoft has not waived the argument that the patent transfers were void *ab initio* because under Delaware law - which applies as a result of Delaware's most-significant relationship to the challenged transactions - void acts are legal nullities that cannot be cured by any action or inaction of a plaintiff. For that same reason, void acts cannot be subject to statutes of limitations or laches, and this Court should reverse the trial court's dismissal of Microsoft's claims as time-barred.

A. Neither Waiver nor Judicial Estoppel Prevent this Court from Considering Microsoft's Argument

1. Because void acts are legal nullities, challenges to them cannot be waived, and it is in the interests of justice for the court to consider Microsoft's argument

When it is in the interests of justice, this Court is permitted to consider any question, even those not raised before the trial court. SUP. CT. R. 8. Contrary to Defendants' claim that Microsoft "fail[ed] to offer any reason why the interest of justice exception applies, instead merely contending the issue is unresolved under Delaware law," (AB at 16),[1] Microsoft explained that the exception applies because "a void act has no legal effect and '[n]o action on the part of plaintiff, nor inaction on the part of the defendant, can

[1] Citations to "AB" are to Appellee's Answering Brief, D.I. 12.

invest it with any of the elements of power or of vitality.'" (OB at 14[2] (quoting *Lorenzetti v. Hodges*, 2012 WL 1410103, at *7 (Del. Super.)).) As a result, a void act "cannot be given legal force by any inaction or action by a plaintiff, including the omission of an argument in a brief." (OB at 15.) Defendants do not address that argument.

Defendants instead erroneously suggest that Rule 8's interest of justice exception applies only where the trial court committed "plain error." (AB at 15-16.) Although plain error is a common basis for finding that the interests of justice exception applies, this Court has invoked the exception in numerous other circumstances. For instance, this Court has invoked the exception when the issue raised on appeal was "one of first impression," *McBride v. State*, 477 A.2d 174, 184 (Del. 1984), when "consideration of the issue [would] promote judicial economy," *Sandt v. Delaware Solid Waste Authority*, 640 A.2d 1030, 1035 (Del. 1994); *see also Turnbill v. Fink*, 668 A.2d 1370, 1377 n.5 (Del. 1995) (holding the same), when the issue was "outcome determinative" and would "have significant implications for future cases," *Sandt*, 640 A.2d at 1035, and when the issue was "intertwined with" an argument raised below, *Clark v. State*, 957 A.2d 1, *3 (Del. 2008) (table). Those cases - none of which invokes plain error review - demonstrate that the interests of justice exception is applicable in any circumstance when this Court determines, in its discretion, that the interests of justice would be served by consideration of a matter.

[2] Citations to "OB" are to Appellant's Opening Brief, D.I. 11.

Here, the interests of justice exception is warranted because, when an act is void *ab initio*, it is a legal nullity to which neither a court's authority nor a plaintiff's inaction can give life. *See Apple Computer, Inc. v. Exponential Tech., Inc.*, 1999 WL 39547, at *6 (Del. Ch.) ("Void acts. . . are legal nullities incapable of cure."). Accordingly, Microsoft's argument cannot be waived because waiver would result in the cure of an incurable act. *Id.* Additionally, it is in the interests of justice for this Court to resolve Microsoft's question because it is an issue that has arisen before, and may arise again, but has so far been left unanswered. *See Belfint v. Lyons & Shuman, P.A. v. Pevar*, 844 A.2d 991, at *2 (Del. 2004) (table). Resolving such questions is in the interests of justice. *Cf. McBride*, 477 A.2d at 184 (holding that addressing a question "of first impression" was in the interests of justice). Accordingly, this Court should consider Microsoft's argument that void acts are not subject to statutes of limitations.

2. Microsoft did not concede that limitations periods apply to void acts

Defendants also argue that Microsoft is estopped from now claiming no statute of limitations applies because, before the trial court, "Microsoft agree[d] with Defendants. . . that the three-year Delaware statute applies." (AB at 17 (quoting A-203).) Defendants' selective quotation omits the context of Microsoft's agreement, which reveals that Microsoft did not concede that limitations periods apply to void acts.

Microsoft's agreement was in response to Defendants' argument that, because Delaware's three-year limitations period was shorter

than BVI's six-year period, Delaware's borrowing statute dictated that the shorter three-year period would apply. (*Compare* A-158 *with* A-203.) In agreeing with Defendants, Microsoft was not answering - or even addressing - the question of whether a limitations period can ever apply to a void act. Rather, Microsoft was only agreeing that, as between the Delaware limitations period and the BVI limitations period, Delaware would apply. That agreement cannot be construed as a more general concession that limitations periods apply to void acts - something neither Microsoft nor Defendants addressed. Consequently, Microsoft is not estopped from now arguing that limitations periods cannot apply to void acts.

Additionally, judicial estoppel only precludes a litigant from seeking to gain an advantage from each of two contrary positions. *See Louisiana Municipal Police Employees' Retirement System v. Pyott*, 46 A.3d 313, 330 (Del. Ch. 2012) ("'Judicial estoppel. . . precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position.'" (quoting *Risetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 598, 600 (9th Cir. 1996))); *Whittington Dragon Group L.L.C.*, 2011 WL 1457455, at *9 (Del. Ch.) ("'A third consideration [with respect to judicial estoppel] is whether the party seeking to assert an inconsistent position would derive an unfair advantage. . . .'" (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001))). Because Microsoft was disadvantaged by its agreement before the trial court that a three-year, rather than a six-year, statute of

limitations would apply to its claims, judicial estoppel is inapplicable.[3]

B. The Transfer of the Vadem Patents Was Void *Ab Initio*

1. Delaware law applies to this transaction

Defendants argue that, pursuant to the internal affairs doctrine, BVI law applies here. As a result, Defendants claim that the patent transfers were not void *ab initio* because section 29 of BVI's Business Companies Act (the "BCA") provides that "no act of a company and no transfer of 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." (AB at 19 (quoting BCA § 29).) Defendants' argument is flawed because the most significant relationship test, not the internal affairs doctrine, governs choice of law for transfers of property to third parties. Here, Delaware has the most significant relationship and, therefore, Delaware law applies.

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[3] Defendants also suggest that this Court should not consider Microsoft's argument because Microsoft "has not pled in Count VII that such conduct was *ultra vires*." (AB at 19.) Although Microsoft did not use the magic words "*ultra vires*" in Count VII, Count VII pleads facts showing that the conduct was *ultra vires*, which is all that is required. *See Orman v. Cullman*, 794 A.2d 5, 23 n.44 (Del. Ch. 2002) (explaining that a complaint need not use a "magic word" so long as "facts are pled from which a reasonable inference [of the required element] can be drawn"). Moreover, the Complaint uses the words "*ultra vires*" on four other occasions to describe the conduct complained of in Count VII. (*See* A-18 at ¶ 2, A-29 at ¶ 31, A-33-34 at ¶ 56, A-37 at ¶ 87.)

(a) The internal affairs doctrine does not apply to the patent transfers

Under the internal affairs doctrine, the law of the place of Vadem BVI's incorporation applies to only "matters peculiar to corporations, that is, those activities concerning the relationships *inter se* of the corporation, its directors, officers and shareholders." *QVT Fund LP v. Eurohypo Capital Funding LLC I*, 2011 WL 2672092, at *7 (Del. Ch.). The doctrine "does not apply where the rights of third parties external to the corporation are at issue." *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1113 n.14 (Del. 2005). Those rights are put at issue in situations where corporations "enter into contracts, commit torts, and *deal in personal and real property.*" *McDermott Inc. v. Lewis*, 531 A.2d 206, 215 (Del. 1987) (emphasis added). The internal affairs doctrine has no applicability to those situations. *Id.*

Here, Microsoft is challenging, as void, a transfer of patents from Vadem California to Amphus and then from Amphus to St. Clair. (A-38.) That transfer of patents involves "the rights of third parties external to the corporation," *VantagePoint*, 871 A.2d at 1113 n.14, and is not a matter "peculiar to corporations" or concerning the "relationships *inter se* of [Vadem BVI], its directors, officers and shareholders," *QVT Fund*, 2011 WL 2672092 at *7. It is a conveyance of property and "the internal affairs doctrine has no applicability in these situations."[4] *McDermott*, 531 A.2d at 215.

[4] To the extent the internal affairs doctrine has any role, it is limited to a question for which BVI law and Delaware law provide the

(b) Delaware law applies because Delaware has the most significant relationship to the transfers at issue

Because the internal affairs doctrine is inapplicable to the patent transfers, this Court should apply the law of the state with the most significant relationship to the transactions at issue. *See In re American Intern. Group, Inc.*, 965 A.2d 763, 779 (Del. Ch. 2009) (applying the Restatement's "most significant relationship" test when the internal affairs doctrine was not directly invoked). Many factors demonstrate that Delaware is the state with the most significant relationship.

Microsoft seeks to have this Court determine whether a transfer of patents from a BVI corporation (or its wholly-owned California subsidiary) to a Delaware corporation and then from that Delaware corporation to a Michigan corporation is void. While BVI, California, or Michigan law might be invoked with respect to one of the two

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same answer - whether the transfers were *ultra vires*. Specifically, like Delaware law, both BVI law and the British law on which it is based hold that an act prohibited by a company's governing documents is *ultra vires*. *See, e.g., Village Cay Marina Ltd. v. Barclays Bank PLC*, C.A. No. 8 of 1995, at *12, 25, 28 (BVI Ct. App. 1995) (explaining that an act "beyond the scope or purpose and intent of the Articles" is *ultra vires*); *Bayoumi v. Women's Total Abstinence Educ. Union Ltd.*, [2004] 2 P. & C.R. 11, ¶ 45 (EWCA Civ. 2003) (holding that corporate acts contravening "restrictions in the company's memorandum of association" are "*ultra vires* the company" and "beyond the capacity of the company"). Defendants have never disputed that the transfers were prohibited by the Memorandum - nor could they - and, thus, the transfers were *ultra vires*. Having established that the transfers were *ultra vires*, the internal affairs doctrine has no further application because whether an *ultra vires* transfer of patents to a third party is void plainly places at issue "the rights of third parties external to the corporation," *VantagePoint*, 871 A.2d at 1113 n.14, and is not a matter of the "relationships *inter se* of [Vadem BVI], its directors, officers and shareholders," *QVT Fund*, 2011 WL 2672092 at *7.

transactions, Delaware law would be appropriately invoked with respect to both. The Court of Chancery has explained that "the protection of justified expectations" and "certainty, predictability, and uniformity of result" - two key factors in a choice of law analysis - "can best be achieved through the application of a single law." *Viking Pump, Inc. v. Century Indem. Co.*, 2009 WL 3297559, at *7 (Del. Ch.).

Further reinforcing Delaware's significant relationship is that the answer to the legal question at issue - whether the transfers were void - may dictate whether Delaware's statute of limitation applies.[5] A key consideration in a choice of law analysis is the forum's interest in ensuring that the law is applied in a manner consistent with its own public policies. *See Sinnott v. Thompson*, 32 A.3d 351, 354 (Del. 2011) (describing "the relevant policies of the forum" as one of the primary factors in a choice of law analysis). Here, Delaware has a strong interest in determining whether its own public policy permits applying statutes of limitations to void acts. No other forum has any interest in ensuring that Delaware statutes of limitations are applied consistent with Delaware public policy. *See id.* (describing "the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue" as another key factor).

Delaware also has a strong interest in ensuring that its corporations are not used as instruments of fraud or corporate waste, both of which resulted from Fung's fraudulent concealment of the value

[5] Microsoft and Defendants agree that, if any statute of limitations applies, it is Delaware's.

of the Vadem Patents and the resulting wasteful transfer of those patents to Amphus. Finally this action was brought in Delaware, and the interest of the "forum state in applying its law and policies to those who seek relief in its courts is paramount." *Sinnott*, 32 A.3d at 357. In sum, because a Delaware court is being asked to determine whether a Delaware statute of limitations applies to a claim challenging a fraudulent and wasteful transfer of assets to and then from a Delaware corporation, Delaware has the most significant relationship and Delaware law should apply.

2. Under Delaware law, the patent transfers were void

Defendants have not disputed that, under Delaware law, the patent transfers would be void *ab initio* – instead arguing only that Delaware law does not apply. Therefore, Microsoft will not repeat that argument, but incorporates herein the portion of its Opening Brief arguing that the transfers were void *ab initio* under Delaware law.[6] (OB at 16-17.)

C. Limitations Periods Do Not Apply to Void Transfers

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[6] Microsoft also notes that, even if BVI law applied, as Defendants argue, the result would be the same. Section 29 of the Business Companies Act, on which Defendants rely, was not enacted until 2004, four years after the transfers at issue were consummated. The applicable law in 2000 was BVI's International Business Companies Act (the "IBCA"), which allows transactions that a company was "without capacity or power to perform" to be challenged "in proceedings by a member against the company," IBCA § 10.1(a), and empowers courts to "set aside" those acts. IBCA § 10.2(a)-(c). Where those acts were *ultra vires* - which the patent transfers were under BVI law, *see supra* n.4 - British common law provides that that the acts are void and are "in law a nullity." *Bedfordshire CC v. Fitzpatrick Contractors Ltd.*, No. 1997-ORB-286, 2000 WL 1918536, at *16 (Queen's Bench Div. 2000).

Courts in many jurisdictions have held that that void corporate acts and other void private transactions cannot be subject to statutes of limitations or laches because they are legal nullities that cannot be given life by a plaintiff's action or inaction. In Delaware, that same rule has been applied to void judgments and to at least some void corporate acts. Because the reasoning of those other cases applies equally to void asset transfers like the one at issue here, this Court should hold that those transfers are not subject to any statute of limitations or laches.

1. Void corporate acts or private party transactions are not subject to limitations periods

Defendants claim that the cases Microsoft cited to support its argument "pertain to void judgments. . . not to corporate transactions" and not "to breach of contract claims between private parties." (AB at 20-21.) Defendants are mistaken. Microsoft cited and discussed numerous cases, both in Delaware and elsewhere, holding that void corporate transactions or private party contracts are not subject to limitations periods. Defendants simply fail to address any of those cases.

For instance, Microsoft cited and relied on *Lions Gate Entertainment Corp. v. Image Entertainment Inc.*, in which the Court of Chancery held that laches - as well as several other equitable defenses - was inapplicable to a void corporate transaction because it would effectively require the court to "alter the terms of [the corporation's] bylaws." 2006 WL 1668051, at *10 (Del. Ch.). Although Microsoft discussed *Lions Gate* at length, Defendants do nothing more

than acknowledge its existence in a footnote, without offering any reason why it does not apply here.

Similarly, Microsoft cited numerous cases outside of Delaware holding that statutes of limitations do not apply to void corporate acts or contracts. (*See* OB at 20 (discussing *Corporate Dissolution of Ocean Shores Park, Inc. v. Rawson-Sweet*, 134 P.3d 1188, 1193 (Wash. App. Div. 2006), *Found. Ventures LLC v. F2G, Ltd*, 2011 WL 1642245, at *2 (S.D.N.Y.), and *Jersey City v. Roosevelt Stadium Marina*, 509 A.2d 808, at 816 (N.J. Super. A.D. 1986)).) Defendants do not discuss any of those cases. (*See* AB at 22 n.22.) Thus, Defendants provide no reason why those opinions should not be persuasive to this Court.

2. The reasons behind Delaware's rule that limitations periods do not apply to void judgments is equally applicable to void corporate transactions

Delaware has adopted a blanket rule that challenges to a void judgment are not subject to limitations periods because that judgment "never had lawful existence" and therefore "[n]o action on the part of plaintiff, nor inaction on the part of defendant, can invest it with any of the elements of power or of vitality." *Lorenzetti*, 2012 WL 1410103 at *7 (internal quotation marks omitted).

Just like a void judgment - which "never had lawful existence" - a void corporate transaction is a "legal nullit[y] incapable of cure." *Apple*, 1999 WL 39547 at *6. Consequently, just as with a void judgment, "[n]o action on the part of plaintiff, nor inaction on the part of defendant, can invest it with any of the elements of power or of vitality." *Lorenzetti*, 2012 WL 1410103 at *7. Defendants identify no distinction between void judgments and void corporate acts that

would permit a plaintiff's inaction to give life to one and not the other. Instead, Defendants simply state that applying the rule to void corporate transactions would be "unworkable" or that it would "eviscerate any finality in corporate transactions." (AB at 21-23.) Yet Defendants cite no authority suggesting that the rule has been unworkable with respect to void judgments or explaining why it would be less workable in the corporate context. Similarly, Defendants cite no authority suggesting that similar rules applied in Washington, New York, or New Jersey have been unworkable, or eviscerated finality with respect to any transactions. Moreover, the rule has already been applied by the Court of Chancery in *Lions Gate*, without any of Defendants' fears coming to pass. This Court should follow those earlier cases and find that void corporate transactions are not subject to statutes of limitations.[7] Accordingly, this Court should reverse the Court of Chancery's holding that Microsoft's claims are time-barred.

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[7] Defendants also assert that this rule has already been rejected, citing *Council of S. Bethany v. Sandpiper Dev. Corp.*, 1986 WL 13707 (Del. Ch.). (AB 20.) Microsoft addressed *Sandpiper* in its Opening Brief, explaining that *Sandpiper* is inapplicable because it involved a jurisdictional and unwaivable 60-day statute of repose, not a statute of limitations, and because the court's rule was based on policy considerations unique to land use. (OB at 19 n.5.) Because Defendants do not respond to either of those arguments, Microsoft will not address *Sandpiper* further.

II. MICROSOFT'S CLAIMS SHOULD NOT HAVE BEEN DISMISSED BECAUSE MICROSOFT WAS NOT ON INQUIRY NOTICE OF ITS INJURY UNTIL 2011, AND ANY APPLICABLE LIMITATIONS PERIOD SHOULD HAVE BEEN TOLLED UNTIL THAT TIME

Although no limitations period applies to Microsoft's direct claims - because the challenged transfers were void *ab initio* - if a limitations period did apply, it should have been tolled until 2011 under both the doctrines of equitable tolling and fraudulent concealment. Equitable tolling applies because Microsoft "reasonably relied upon the competence and good faith of a fiduciary," *In re Tyson Foods, Inc.*, 919 A.2d 563, 585 (Del. Ch. 2007), when it relied on the Vadem Board's representation that the asset transfers were in the best interest of (i.e., did not injure) the Vadem BVI shareholders. (*See* OB at 23-24.) Fraudulent concealment applies because Microsoft's injury was hidden by Fung's affirmative act of concealing the value of the Vadem Patents and his scheme to resell those patents at a profit. (*See id.*) Accordingly, any limitations period should have been tolled until Microsoft was on inquiry notice both of the Board's transfer of assets in breach of the shareholder voting rights and of the "possibly injurious effect" of that breach. *Pomeranz v. Museum Partners, L.P.*, 2005 WL 217039, at *2 (Del. Ch.). Because Microsoft's Complaint pleads that Microsoft's reliance on the Vadem Board's good faith and Fung's fraud prevented Microsoft from learning of the possibly injurious effect of the patent transfers until 2011, any statute of limitations should have been tolled until that time.

A. Tolling Continues until Microsoft Was on Inquiry Notice of Its Injury, not just of a Breach

Defendants never actually address Microsoft's argument that the statute of limitations should be tolled until Microsoft was on inquiry notice of "the possibly injurious effect" of the Vadem Board's breach. Rather, Defendants attack a straw man, explaining that *Pomeranz* "expressly rejected" the argument that "inquiry notice does not run until [a plaintiff] had notice of the *full economic impact* of the wrong." (AB at 28 (quoting *Pomeranz*, 2005 WL 217039 at *12 (emphasis added)).) But Microsoft never argued that the statute of limitations could be tolled until Microsoft discovered the "full economic impact" of Vadem BVI's breach. Rather, Microsoft argues that the statute of limitations should be tolled until Microsoft was on inquiry notice of "the possibly injurious effect" of Vadem BVI's breach. (OB at 28-29.) That is the rule articulated by *Pomeranz*, which held that plaintiffs' claims were time-barred because plaintiffs were on notice "of both the withdrawal of [defendant]" - i.e., the breach - "and the possibly injurious effect of that event" - i.e., the injury. *Id.* at *2. (emphasis added.)

Defendants cite no authority and make no argument to support the conclusion that tolling is inapplicable to a plaintiff from whom all evidence of injury has been concealed. Defendants never address the crux of Microsoft's argument - that no reasonably diligent person would bring a lawsuit when it had become aware of a breach but, through fraudulent concealment or reliance on a fiduciary, had been misled into believing it suffered no injury from that breach. Under Defendants' view of the law, that person would be required to bring

suit, or else risk having no remedy if it later discovered a serious, but wrongfully concealed, injury. The law should not incent litigants "to go into. . . court and say you had a contract with X and X broke it and you're really annoyed even though you sustained no injury of any sort. . . so please give me a judgment for $1 that I can pin on my wall." *Apple, Inc. v. Motorola, Inc.*, 2012 WL 2376664, at *6 (N.D. Ill.) (Posner, J.).

Defendants claim that the policy considerations cited in Microsoft's Opening Brief are immaterial because "[e]xceptions to the statute of limitations. . . are to be narrowly drawn to prevent injustice." (AB at 31 (internal quotation marks omitted).) But Defendants' position ignores the very purpose of the tolling doctrine, which is to "ensure that fiduciaries cannot use their own success at concealing their misconduct as a method of immunizing themselves from accountability for their wrongdoing." *In re American Intern. Group, Inc.*, 965 A.2d 763, 813 (Del. Ch. 2009). Under Defendants' view of the law, a fiduciary could immunize itself from accountability for misconduct merely by admitting to a breach, but then, through an elaborate fraud, convincing its victims that the breach was harmless. No matter the depth of the fraud or the impossibility of discovering the injury, the fiduciary would be immune from liability so long as it could keep its victim in the dark for three years. Because that result is inconsistent with both good policy and precedent, this Court should hold that any limitations period applicable to Microsoft's claims was tolled until Microsoft was on inquiry notice of both the

Vadem Board's breach and of the possibly injurious effect of that breach.

B. Microsoft Did Not Have Inquiry Notice of Its Injury Until 2011

Defendants argue that Microsoft was aware of the economic injury resulting from the Vadem Board's breach in 2000, because [redacted] However, Defendants omit key portions of that disclosure, which reveal that no economic injury was disclosed.

[redacted] That is not a warning of an economic injury, but of an economic boon. Any "attentive and diligent investor [could] rely, in complete proprietary upon the good faith of the [Vadem Board]" in making those representations. *Weiss v. Swanson*, 948 A.2d 433, 451 (Del. Ch. 2008). It was not until 2011 that Microsoft was put on inquiry notice that those representations were inaccurate, and that the transfers had resulted in assets alleged to be worth "hundreds of

millions" - and now asserted for nearly $2 billion in damages - being transferred away for only $2.[8]

C. Microsoft Pled Facts Showing that Its Injury Was Fraudulently Concealed

Microsoft's Opening Brief directly addresses the trial court's finding that Microsoft had not alleged facts to support tolling under the fraudulent concealment exception, and Microsoft has not made any concession on that point. Defendants' argument to the contrary evinces a misunderstanding of both the trial court's opinion and Microsoft's Opening Brief.

In addressing Microsoft's fraudulent concealment argument, the trial court expressly acknowledged that Microsoft pled that Fung had concealed the value of the Vadem Patents and of his plan to resell them. (Op. at 25.) In the court's opinion, however, "the only relevant inquiry is when Microsoft received inquiry notice that the asset transfers had occurred." (Op. at 23, 25.) Because Fung's fraudulent concealment of the Vadem Patent's value was not relevant to

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[8] In their statement of facts, Defendants assert that the transfer of the Vadem Patents to Amphus was supported by "good and valuable consideration," other than $2 because Vadem BVI received 40 percent of the equity in Amphus - a fact Defendants claim Microsoft has "utterly ignored." (AB at 13.) It is Defendants who have "utterly ignored" the facts, however. Prior to Amphus's formation, Vadem BVI owned 100 percent of all the assets later held by Amphus. By transferring those assets - including the Vadem Patents - to Amphus, Vadem BVI's equity in those assets decreased from 100 percent to 40 percent - a 60 percent dilution. (*See* A-23.) Defendants' seem to argue that the "good and valuable consideration" Vadem BVI received for the 60 percent share it gave away was the 40 percent it did not give away. That argument has no grounding in law or logic, and should be disregarded.

that inquiry, the court concluded that the facts Microsoft pled were irrelevant. (Op. at 25.)

In its Opening Brief, Microsoft explained at length why the trial court erred in concluding that "the only relevant inquiry is when Microsoft received inquiry notice that the asset transfers had occurred," and that the issue of when Microsoft received inquiry notice of its *injury* was equally relevant. (OB at 23-25, 30-31.) Microsoft then cited numerous facts from its Complaint showing that Fung had fraudulently concealed the value of the Vadem Patents and, thus, hid from Microsoft its injury. (*See, e.g.*, OB at 23 (arguing that "Fung's affirmative act of concealing the value of the patents and his scheme to resell those patents at a profit only a day later" was "fraudulent concealment"); *see also* OB at 27-28, 30-31.) Thus, Microsoft affirmatively and repeatedly addressed the trial court's finding regarding fraudulent concealment, and has made no concession of that point.[9]

[9] Even if the trial court's opinion could be interpreted as holding that Microsoft did not plead facts showing that Fung fraudulently concealed Microsoft's injury - rather than as holding that those facts Microsoft pled were not relevant - that would just be further error by the court. Microsoft plainly pled that Fung concealed the value of the Vadem patents from both the Board and KPMG and, through them, from the Vadem shareholders. (*See* A-21-22 at ¶¶ 13-15, A-27 at ¶ 26.) The court was required to assume those facts to be true and, if it did not, that would provide another basis for reversing its decision.

CONCLUSION

For the above-stated reasons, Microsoft respectfully requests that this Court reverse the trial court's holding that Microsoft's claims are time-barred, vacate its order of dismissal, and remand for further proceedings.

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