

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MICROSOFT CORPORATION, a Washington)
Corporation,)
)
Plaintiff,) C. A. No. 6940-VCP
)
v.)
)
VADEM, LTD., AMPHUS, INC., ST.)
CLAIR INTELLECTUAL PROPERTY)
CONSULTANTS, INC., PATENT REVENUE)
PARTNERS, LLC, and HENRY FUNG,)
)
Defendants.)

MEMORANDUM OPINION

Submitted: January 4, 2012

Decided: April 27, 2012

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PARSONS, Vice Chancellor.

This action is before the Court on a motion to dismiss. The defendants, various companies and an individual associated with the restructuring of Vadem, Ltd., a computer technology company formed under the laws of the British Virgin Islands, contend that the plaintiff, Microsoft Corporation, lacks standing to bring derivative claims on behalf of Vadem, Ltd. The defendants also argue, among other things, that this Court lacks personal jurisdiction over the defendants and that Microsoft's claims are untimely.

For the reasons stated in this Memorandum Opinion, I conclude that Microsoft was required to, but did not, seek leave from the High Court of the British Virgin Islands before bringing a derivative suit on behalf of Vadem, Ltd. As a result, Microsoft lacks standing as to the six derivative claims it asserted. I also find that, as to the two remaining counts in the Complaint, those claims are time-barred. Therefore, I grant the motion to dismiss.

I. BACKGROUND

A. The Parties

Plaintiff, Microsoft Corporation, is a Washington corporation with its principal place of business at One Microsoft Way, Redmond, Washington.

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

Proposed Defendant Vadem, Inc. is a California company with its principal place of business also at the same address as Vadem, Ltd. Vadem, Inc. is a wholly owned

subsidiary of Vadem, Ltd. and was the former assignee of certain patents related to power management and conservation for computer systems (the “Fung Patents”)¹ that were transferred to Defendant Amphus, Inc. in June 2000.²

Defendant Henry Fung is a co-founder of Vadem, Ltd., its former Chief Technology Officer, and its current CEO. He owns 7.9% of Vadem, Ltd.’s stock and is also a director on its board (the “Board”). In addition, Fung is a founder, director, and the current CEO of Defendant Amphus and 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, Ltd. and Vadem, Inc. in Santa Clara, California. The business unit that comprised Amphus was spun off from Vadem, Ltd. on December 8, 1999. At Amphus’s inception, Vadem, Ltd. owned 40% of Amphus and Fung owned 20%. Amphus was dissolved on December 24, 2008, at which point its remaining assets were purchased by Vadem, Ltd.³

¹ The Fung Patents include U.S Patent Nos. 5,710,929, 5,758,175, 5,892,959, and 6,079,025, all of which relate to power management and power conservation for computer systems. Fung assigned all of these patents to Vadem, Inc. in 1990.

² The original Complaint did not name Vadem, Inc. as a defendant, but Microsoft has moved to amend its Complaint to include Vadem, Inc. Accordingly, I have considered the pending motion to dismiss as though Vadem, Inc. was a party defendant. Having determined that all the claims in this action should be dismissed, I also deny Microsoft’s motion to amend as futile.

³ Although Amphus is a defunct company, because it was dissolved less than three years before the initiation of this lawsuit, it continues as “body corporate” for purposes of this action under 8 *Del. C.* § 278.

Defendant St. Clair Intellectual Property Consultants, Inc. (“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 Fung Patents.

Defendant PRP is a California limited liability company with its principal place of business in the same California office as Vadem Ltd., Vadem, Inc., and Amphus. PRP was formed to replace Amphus as the recipient of certain revenue streams from St. Clair related to the Fung Patents. PRP initially had the same ownership structure as Amphus, with Fung as a 20% shareholder.

B. Facts⁴

1. Microsoft’s investment in Vadem, Ltd.

Microsoft’s relationship with the Vadem entities began in 1992, when it licensed Vadem, Inc.⁵ to sell Microsoft’s Flash File System. The relationship between these companies expanded over the next few years, with Microsoft entering into several licensing agreements with Vadem, Ltd. and its related entities for the distribution of Microsoft’s DOS and CE operating systems and the use of those operating systems in Vadem, Ltd.’s devices.

⁴ Unless otherwise noted, the facts recited herein are drawn from the Complaint and presumed true for purposes of Defendants’ motion to dismiss.

⁵ Vadem, Ltd. was incorporated the following year, 1993, and Vadem, Inc. then became a wholly-owned subsidiary of Vadem, Ltd.

In 1998, Vadem, Ltd. experienced significant financial difficulties. As part of an effort to raise capital, Vadem, Ltd. sent Microsoft a private placement memorandum. Microsoft responded to the solicitation in May 1999 by purchasing 1,554,403 shares of Vadem, Ltd. Series F Preferred Stock (“Series F Stock”) for \$9 million. The investment amounted to 39% of Vadem, Ltd.’s Series F Stock and 7.49% of the equity of the entire company. 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, Ltd. As an owner of Series F Stock, Microsoft had certain voting rights under Vadem, Ltd.’s Memorandum of Association,⁶ including the right to vote as part of a class of Series D, E, and F Preferred Stockholders to approve any “disposition of all or substantially all of the assets of the Company.”⁷

⁶ A Memorandum of Association under BVI law is equivalent to an American certificate of incorporation. Affidavit of Phillip Kite (“Kite Aff.”) ¶ 10. In support of their interpretation of BVI law, Defendants submitted an affidavit from BVI lawyer Phillip Kite, a partner at the law firm of Harny Westwood & Riegels in the BVI and an expert on BVI procedural law. *See* Ct. Ch. R. 44.1 (“The Court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43. The Court’s determination shall be treated as a ruling on a question of law.”). I find Kite’s Affidavit to be reliable evidence of BVI law. I also note that Microsoft did not introduce any opposing expert report. The conclusions made herein regarding BVI law are based on the Kite Affidavit, as well as my own interpretation of the relevant BVI statutory law and U.S. cases interpreting BVI law.

⁷ Compl. Ex. A, Memorandum of Association, § 7(D)(1)(e)).

2. The restructuring of Vadem, Ltd.

Following Microsoft's investment, on December 6, 1999, the Board approved a restructuring of Vadem, Ltd. and its business units. Under the terms of the restructuring, the Board decided to transfer the assets controlled by Vadem, Ltd.⁸ into four different operating companies based on its four primary business divisions. The new operating companies were: (1) Amplus, a Delaware corporation, which would receive Vadem, Inc.'s chip products business and the Fung Patents; (2) MobileWorks Corporation, a California corporation, which would receive personal digital assistant patents; (3) Infolio, Inc., a Delaware corporation, which would receive the mobile information services business; and (4) Paragraph, Inc., a Delaware corporation, which would receive the handwriting technologies business. After the transfer of these assets to the new operating companies, Vadem, Ltd. was expected to merge into newly-formed Vadem LLC, a California company, which would serve as a holding company for the new operating companies' stock.

To effect the restructuring plan, the Board prepared a draft shareholder information statement (the "Draft Information Statement") describing the proposed transactions and informing shareholders that they had a right to vote on the proposed

⁸ The Complaint incorrectly alleges that the Fung Patents were transferred from Vadem, Ltd. to Amplus. In fact, the Fung Patents were owned by Vadem, Inc. The briefing did not indicate, however, whether Vadem, Inc. also owned the assets transferred to the other operating companies during the restructuring. For purposes of this Memorandum Opinion, therefore, I assume without deciding that all of the relevant assets were owned by either Vadem, Ltd. or Vadem, Inc.

merger and asset transfers. The Board, however, never circulated the Draft Information Statement to Vadem, Ltd.'s shareholders. Instead, the Board caused the assets to be transferred to the operating companies without a shareholder vote. Then, in March 2000, the Board sent its shareholders, including Microsoft, a different information statement (the "Final Information Statement") soliciting approval of the proposed merger of Vadem, Ltd. into Vadem LLC.⁹ Unlike the Draft Information Statement, the Final Information Statement did not solicit the shareholders to vote on the asset transfers; instead, it simply informed shareholders that Vadem, Ltd. was causing the asset transfers to be made to the operating companies.

3. The sale of the Fung Patents to Amphus

With regard to the creation of Amphus, Fung proposed that he become its CEO and 20% owner. Vadem, Ltd. would receive 40% of the remaining equity in Amphus and the other 40% would be divided up among other founding members and new investors.¹⁰ Fung also proposed that he take the Fung Patents with him to Amphus. Although Fung believed that the patents could be very valuable, perhaps worth "hundreds of millions of dollars," he represented to the Board during negotiations that the patents were virtually valueless. Fung likewise represented to KPMG, which performed a valuation of the Fung Patents in December 1999, that the patents were valueless because certain competing

⁹ Although Vadem, Ltd.'s shareholders approved the merger with Vadem LLC, the merger was never consummated.

¹⁰ When Amphus was created, Fung owned 7.9% of Vadem, Ltd.

patents could limit the possibility of earning future royalties. In reliance on Fung's representations, the Board agreed to transfer the Fung Patents to Amphus for nominal consideration of \$2.

The Board caused the Fung Patents to be assigned from Vadem, Inc. to Amphus on or about June 15, 2000.¹¹ The next day, Amphus sold the same patents to St. Clair for an initial payment of \$300,000 plus the first \$1,000,000 in licensing revenues and 50% of all licensing revenues received thereafter. St. Clair knew that Vadem, Inc. was the record owner of the Fung Patents when it began negotiating to purchase the Fung Patents. St. Clair also knew the terms of the transaction by which the Fung Patents were transferred from Vadem, Inc. to Amphus.

Eight years later, on May 30, 2008, the revenue-sharing agreement between Amphus and St. Clair was amended to reduce Amphus's share of ongoing licensing revenues from 50% to 30%. The agreement also was amended to transfer the right to the ongoing revenue stream from Amphus to PRP. Once the patent revenue was redirected to PRP, Amphus was dissolved and its remaining assets were sold back to Vadem, Ltd.

C. Procedural History

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

¹¹ Compl. ¶ 17. The record is unclear as to the actual process by which the Fung Patents were transferred from Vadem, Inc. to Amphus. Drawing all reasonable inferences in favor of Microsoft, however, I assume for purposes of this motion that the Vadem, Ltd. Board caused the Fung Patents to be transferred by Vadem, Inc.

Action”). Although Microsoft was not originally a defendant in that action, St. Clair alleged that various features of Microsoft Windows met certain claim elements of four of the seven asserted Fung Patents. In response to these allegations, Microsoft sued St. Clair on April 7, 2010 for a declaratory judgment of noninfringement and invalidity as to the Fung Patents. St. Clair then asserted a counterclaim against Microsoft for contributory infringement. The Patent Action currently is at the summary judgment stage.

Microsoft claims that it first learned about the allegedly improper transfer of the Fung Patents to Amphus and of Fung’s involvement in the sale and resale of those patents during discovery in the Patent Action. Based on that discovery, Microsoft filed the Complaint in this action on October 14, 2011. Defendants then filed the pending motions to dismiss.¹²

D. Parties’ Contentions

Microsoft has asserted a total of eight claims, either derivatively or directly, against Defendants for breach of fiduciary duty, usurpation of corporate opportunity, rescission, conspiracy, and aiding and abetting. Defendants have moved to dismiss all of those claims and have advanced multiple grounds for doing so. In reaching the decision reflected in this Memorandum Opinion, I focused primarily on three of those grounds. First, Defendants argue that, under the applicable BVI law, Microsoft lacks standing to

¹² One motion to dismiss was filed by Defendant St. Clair; the other was filed on behalf of all the other Defendants, collectively.

bring derivative claims on behalf of Vadem, Ltd.¹³ Second, Defendants assert that this Court lacks personal jurisdiction over all Defendants, except Amphus, which is a Delaware corporation. Finally, Defendants aver that the relevant statute of limitations for Microsoft's claims expired three years after the alleged harm occurred in 2000 and that, therefore, Microsoft's claims are barred by the doctrine of laches.

II. ANALYSIS

A. Microsoft Lacks Standing to Pursue Counts I through VI

As an initial matter, I must determine whether Microsoft has standing to pursue its derivative claims on behalf of Vadem, Ltd.¹⁴ Defendants contend that because Vadem, Ltd. is incorporated under the BVI Business Companies Act of 2004 (the "2004 Act"), Microsoft must seek and obtain leave from the High Court of the BVI (the "BVI High

¹³ Defendants also assert that because the patents belonged to Vadem, Inc., and not its parent, Vadem, Ltd., Microsoft, which is not a shareholder of Vadem, Inc., could only bring its claims as double derivative claims. Defendants further contend, however, that double derivative claims are not recognized under BVI law. Because I dismiss Microsoft's claims on other bases, I need not address this particular argument any further.

¹⁴ *See Dover Historical Soc'y v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1110 (Del. 2003) ("The term 'standing' refers to the right of a party to invoke the jurisdiction of a court to enforce a claim or to redress a grievance. Standing is a threshold question that must be answered by a court affirmatively to ensure that the litigation before the tribunal is a 'case or controversy' that is appropriate for the exercise of the court's judicial powers. The issue of standing is concerned 'only with the question of *who* is entitled to mount a legal challenge and not with the merits of the subject matter in controversy.") (footnotes omitted); *see also Crescent/Mach I P'rs, L.P. v. Turner*, 846 A.2d 963, 972-73 (Del. Ch. 2000) (determining whether plaintiffs had standing to bring their direct claims before considering whether the Court had personal jurisdiction over defendants).

Court”) before proceeding with derivative claims on behalf of the Company. Because Microsoft did not obtain such leave before filing its Complaint in this action, Defendants argue that Microsoft’s derivative claims must be dismissed.

Whether Microsoft is required to seek leave to bring its derivative claims depends entirely on BVI law.¹⁵ The relevant BVI statute is the 2004 Act. Therefore, consideration of this question must begin with the plain language of the statute itself. Section 184C of the 2004 Act states:

- (1) Subject to subsection (3), the Court may, on the application of a member of a company, grant leave to that member to
 - (a) bring proceedings in the name and on behalf of that company; or
 - (b) intervene in the proceedings to which the company is a party for the purpose of continuing, defending or discontinuing the proceedings on behalf of the company.
- (2) Without limiting subsection (1), in determining whether to grant leave under that subsection, the Court must take the following matters into account
 - (a) whether the member is acting in good faith;
 - (b) whether the derivative action is in the interests of the company taking account of the views of the company’s directors on commercial matters;
 - (c) whether the proceedings are likely to succeed;
 - (d) the costs of the proceedings in relation to the relief likely to be obtained; and
 - (e) whether an alternative remedy to the derivative claim is available.

¹⁵ See *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A.*, 34 A.3d 1074, 1078 (Del. 2011) (“Because the standing issue is one that involves Uniland’s ‘internal affairs,’ that makes applicable the internal affairs doctrine, which requires a Delaware court to apply the law of Uniland’s state (or in this case, country) of incorporation . . .”).

- (3) Leave to bring or intervene in proceedings may be granted under subsection (1) only if the Court is satisfied that
 - (a) the company does not intend to bring, diligently continue or defend, or discontinue the proceedings, as the case may be; or
 - (b) it is in the interests of the company that the conduct of the proceedings should not be left to the directors or to the determination of the shareholders or members as a whole.

- (6) Except as provided in this section, a member is not entitled to bring or intervene in any proceedings in the name of or on behalf of the company.¹⁶

The plain language of the statute establishes a process by which a shareholder or member of a BVI company may initiate a derivative action. The language is written in the present tense and nothing in § 184C or the 2004 Act differentiates between that section's applicability to conduct that occurred before and after the section's or the Act's effective date.¹⁷ On its face, § 184C appears to require that any member of a BVI company must obtain leave before bringing a derivative suit on behalf of the company.

In resisting this conclusion, Microsoft attempts to inject complexity into the plain language of the 2004 Act. Specifically, it argues that § 184C only applies where the conduct at issue occurred after its effective date. Notably, Microsoft cited no BVI authority to support its position and submitted no affidavit or testimony from an expert in

¹⁶ The BVI Business Companies Act § 184C (2004) (B.V.I.).

¹⁷ Section 184C was an amendment to the 2004 Act. It became effective on January 1, 2006. Second Affidavit of Phillip Kite (“Second Kite Aff.”) ¶ 3.

BVI law. Instead, Microsoft bases its opposition to the application of § 184C here entirely on its reading of two U.S. decisions applying BVI law to derivative suits brought on behalf of BVI companies in the United States. Having considered each of these cases, I find Microsoft's argument unpersuasive and hold that it must seek leave of the BVI High Court before bringing its derivative claims.

Microsoft's argument rests primarily on the decision in *Seghers v. Thompson*¹⁸ and the later construction of that case in *Vaughn v. LJ International, Inc.*¹⁹ In *Seghers*, the federal district court dismissed derivative claims brought on behalf of a BVI company because the plaintiffs had failed to bring their claims under an exception to the British (and thus BVI) common law rule governing derivative actions. The conduct complained of in *Seghers* took place in 2002. The complaint, however, was not filed until January 13, 2006, approximately two weeks after the effective date of § 184C. Because the *Seghers* court applied BVI common law and not the 2004 Act in dismissing the derivative action, Microsoft reads *Seghers* as standing for the proposition that § 184C does not apply retroactively to challenged conduct committed before its effective date.

A careful reading of *Seghers*, however, belies Microsoft's interpretation. The company in *Seghers* was incorporated under the International Business Corporations Act of the British Virgin Islands (the "IBC"). The IBC has no provision corresponding to § 184C. Instead, derivative suits on behalf of companies incorporated under the IBC

¹⁸ 2006 WL 2807203 (S.D.N.Y. Sept. 27, 2006).

¹⁹ 174 Cal. Rptr. 4th 213 (Cal. Ct. App. 2009).

were governed by BVI common law. In that context, it is understandable that the *Seghers* court applied BVI common law and not the 2004 Act. Moreover, although the 2004 Act was enacted before the complaint in *Seghers* was filed, the company had not been reincorporated under the 2004 Act. Thus, the IBC presumably still controlled the company's internal affairs. Indeed, at least some of the claims in *Seghers* alleged violations of the IBC.²⁰

The decision in *Vaughn* reinforces this interpretation of *Seghers*. In *Vaughn*, the court explicitly noted that the company in *Seghers* was governed by the IBC. According to the *Vaughn* court, the decision in *Seghers*

was based on conduct in 2002, two years before section 184C was enacted as part of the 2004 BVI Act. . . . The applicable law in *Seghers* was the predecessor [IBC], which contained no provision concerning shareholder derivative actions. It is therefore not surprising that, with no applicable statute involved, the parties in *Seghers* agreed the case should be analyzed according to British common law.²¹

The 2004 Act also required all BVI companies to reincorporate under the Act by January 1, 2007. As a result, unlike the situation in *Seghers*, every BVI company, including *Vadem, Ltd.*, is now governed by the 2004 Act and § 184C.²² Therefore,

²⁰ *Seghers*, 2006 WL 2807203, at *1 (“Plaintiffs’ first and second causes of action allege violations of IHO’s Articles of Association and Information Memorandum . . . and violations of the [IBC] . . .”). There is no mention of the 2004 Act in *Seghers*.

²¹ *Vaughn*, 174 Cal. Rptr. 4th at 229.

²² In reaching this conclusion, I reject Microsoft’s assertion that Kite’s expert testimony in *Seghers* conflicts with the opinions expressed in his affidavits in this

Microsoft was required to seek leave from the BVI High Court before bringing its derivative claims on behalf of Vadem, Ltd. Because it has not done so, I must dismiss the derivative claims Microsoft has asserted in Counts I through VI of the Complaint for lack of standing.

I dismiss these claims without prejudice, however. Court of Chancery Rule 15(aaa) provides that:

In the event a party fails to timely file an amended complaint or motion to amend under this subsection (aaa) and the Court thereafter concludes that the complaint should be dismissed under Rule 12(b)(6) . . . such dismissal shall be with prejudice . . . unless the Court, for good cause shown, shall find that dismissal with prejudice would not be just under all the circumstances.²³

Here, there is good cause not to dismiss Microsoft's derivative claims with prejudice. Microsoft's argument apparently raised a question of first impression in Delaware and in the BVI, as well. There is no BVI precedent on point and only two other U.S. courts have addressed the issue. Although I disagree with Microsoft's interpretation of these cases and the relevant foreign law, its position is not unreasonable. In these

action. As already discussed, Microsoft's position is based on an erroneous interpretation of the 2004 Act, as well as the *Seghers* and *Vaughn* decisions. As explained in the Second Kite Affidavit, Kite's testimony in *Seghers* is consistent with the assertions he has made here to the effect that the 2004 Act codified the BVI common law leave requirement for derivative actions. Second Kite Aff. ¶ 18. Based on my review of Kite's affidavits in this case, as well as the decisions in *Seghers* and *Vaughn*, I find that the positions taken by Kite here and in *Seghers* are not inconsistent and that they comport with the conclusion reached in this Memorandum Opinion.

²³ Ct. Ch. R. 15(aaa).

circumstances, I find that a dismissal with prejudice would be unduly harsh. Therefore, I dismiss Counts I through VI without prejudice to Microsoft's ability to refile these claims after it seeks leave in the BVI.

B. Microsoft Has Standing to Pursue its Direct Claims

Microsoft's remaining claims consist of direct claims for breach of contract and rescissory damages. In Count VII, Microsoft, as a holder of Series F Stock in Vadem, Ltd., claims that Vadem, Ltd. breached the terms of its Memorandum of Association by disposing of substantially all of its assets without a vote of the Series D, E, and F Preferred Stockholders. Similarly, in Count VIII, Microsoft seeks rescissory damages from Vadem, Ltd., St. Clair, Amphus, and Fung for disposing of substantially all of Vadem, Ltd.'s assets without receiving the consent of the holders of a majority of its Series D, E, and F Preferred Stock. Thus, according to Microsoft, the assignment of the Fung Patents to Amphus was an *ultra vires* act caused by Vadem, Ltd.'s breach of the Memorandum of Association and by Fung's self-dealing, in which Amphus and St. Clair were complicit.

Defendants seek dismissal of Counts VII and VIII on the grounds that Microsoft lacks standing to bring those claims and that, in any event, this Court lacks personal jurisdiction over Defendants as to either of those claims. With respect to standing, Defendants argue that because the direct claims relate to asset transfers by Vadem, Inc.,

of which Microsoft was not a shareholder, Microsoft has no standing to assert claims challenging a transfer of assets held by Vadem, Inc.²⁴

In its Answering Brief, Microsoft responded by narrowly defining the nature of its direct claims as follows:

[the] direct claims against Vadem [Ltd.] are based on the failure of the Vadem [Ltd.] Board to solicit shareholder vote before it approved the Asset Transfers, as required by the Memorandum. . . . Although some of the approved Asset Transfers may have involved assets held by Vadem [Ltd.]’s wholly owned subsidiaries, it is the Vadem [Ltd.] Board’s approval of those transfers without obtaining the required shareholder vote that Microsoft challenges. As a shareholder of Vadem [Ltd.] with voting rights under Vadem [Ltd.]’s Memorandum, Microsoft has standing to challenge the acts of the Vadem [Ltd.] Board that were made in direct contravention of Microsoft’s voting rights.²⁵

Defendants then clarified in their Reply Brief that they “do not contend . . . that Microsoft lacks standing to assert direct claims against Vadem Ltd. for any purported breaches of the Memorandum.”²⁶ Instead, Defendants asserted only that Microsoft’s allegedly “direct” claims were an improper attempt to circumvent the fact that Microsoft was trying to challenge asset transfers by Vadem, Inc.

Accepting Microsoft’s narrow characterization of its direct claims as relating only to Vadem, Ltd.’s alleged breach of its Memorandum of Association, I uphold Microsoft’s

²⁴ Defs.’ Opening Br. 17.

²⁵ PAB 19-20.

²⁶ Defs.’ Reply Br. 15.

standing to pursue as direct claims the causes of action asserted in Counts VII and VIII. In that context, Defendants' standing argument is unpersuasive.

C. This Court Has Personal Jurisdiction over Vadem, Ltd. as to Counts VII and VIII

On a motion to dismiss under Rule 12(b)(2), the plaintiff has the burden to show a basis for the Court's jurisdiction over the nonresident defendants.²⁷ "Delaware courts will apply a two-prong analysis to the issue of personal jurisdiction over a nonresident. The court first must consider whether Delaware's long-arm statute is applicable, and next evaluate whether subjecting the nonresident to jurisdiction in Delaware violates the Due Process Clause of the Fourteenth Amendment"²⁸ Regarding Delaware's long-arm statute, 10 *Del. C.* § 3104, I note that Delaware courts traditionally have construed that statute "very broadly in order 'to confer jurisdiction to the maximum extent possible under the Due Process Clause.'"²⁹ Relevant to this case, § 3104(c)(1) confers personal jurisdiction where a defendant "[t]ransacts any business or performs any character of

²⁷ *Albert v. Alex. Brown Mgmt. Servs.*, 2005 WL 2130607, at *14 (Del. Ch. Aug. 26, 2005); *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 437 (Del. 2005); *Hart Hldg. Co. v. Drexel Burnham Lambert, Inc.*, 593 A.2d 535, 539 (Del. Ch. 1991).

²⁸ *Aeroglobal Capital Mgmt.*, 871 A.2d at 438; *see also Werner v. Miller Tech. Mgmt., L.P.*, 831 A.2d 318, 326 (Del. Ch. 2003) (citing *LaNuova D & B, S.p.A. v. Bowe Co.*, 513 A.2d 764, 768-69 (Del. 1986)).

²⁹ *Friedman v. Alcatel Alsthom*, 752 A.2d 544, 549 (Del. Ch. 1999) (quoting *Hercules, Inc. v. Leu Trust & Banking, Bah. Ltd.*, 611 A.2d 476, 480 (Del. 1992)).

work or service in the State” from which the plaintiff’s cause of action arises.³⁰ As this Court explained in *Haisfield v. Cruver*, “[t]he ‘arising from’ language 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.’”³¹

Here, the transactions allegedly giving rise to this Court’s personal jurisdiction over Defendants were the incorporation of Amphus and Paragraph as Delaware corporations.³² According to Microsoft, this Court has jurisdiction over Vadem, Ltd. because its incorporation of Amphus and Paragraph was an “integral component of the total transaction to which [Microsoft’s] cause of action relates.”³³ Relying on *Papendick*

³⁰ 10 *Del. C.* § 3104(c)(1); *see also Fisk Ventures, LLC v. Segal*, 2008 WL 1961156, at *7 (Del. Ch. May 7, 2008), *aff’d*, 984 A.2d 124 (Del. 2009).

³¹ 1994 WL 497868, at *4 (Del. Ch. Aug. 25, 1994) (quoting *Sears, Roebuck & Co. v. Sears plc*, 752 F. Supp. 1223, 1227 (D. Del. 1990)).

³² It is unclear from the record whether a third operating company incorporated by Vadem, Ltd., Infolio, was also a Delaware corporation. The Final Information Statement states that it is, but Microsoft did not reference Infolio in its personal jurisdiction argument. For purposes of the pending motion to dismiss, I have assumed that Infolio is a Delaware corporation, but do not believe that assumption is material.

³³ PAB 24 (quoting *Conn. Gen. Life Ins. Co. v. Pinkas*, 2011 WL 5222796, at *2 (Del. Ch. Oct. 28, 2011) (“[M]erely participating in the formation of a Delaware entity, without more, does not create a basis for jurisdiction in Delaware. Instead, the formation must be ‘an integral component of the total transaction to which plaintiffs cause of action relates.’” (quoting *Shamrock Hldgs. of Cal., Inc. v. Arenson*, 421 F. Supp. 2d 800, 804 (D. Del. 2006))). In addition, Microsoft also argues that this Court has personal jurisdiction over (1) Vadem, Inc. because it is an alter ego of Vadem, Ltd. and (2) the remaining Defendants on conspiracy grounds.

v. Bosch,³⁴ Microsoft asserts that “the basis for jurisdiction over Vadem [Ltd.] is a perfect parallel of that in *Papendick*: Vadem [Ltd.] formed two Delaware entities—Amphus and Paragraph—for the purpose of transferring its assets into those entities . . . and the transfer of those assets forms the basis for Microsoft’s breach of contract claim against Vadem [Ltd.] (as well as its derivative claims against the other Defendants).”³⁵

I agree with Microsoft that Vadem, Ltd.’s incorporation of Amphus and Paragraph as Delaware corporations was sufficient to subject Vadem, Ltd. to personal jurisdiction in Delaware. The gravamen of Counts VII and VIII is that Vadem, Ltd. breached the Memorandum of Association by disposing of all or substantially all of its assets without a shareholder vote. The “total transaction” from which Microsoft’s cause of action arose

³⁴ 410 A.2d 148 (Del. 1979).

³⁵ PAB 25. In *Papendick*, the defendant corporation, Bosch, incorporated a wholly owned subsidiary in Delaware to effect the purchase of equity in a third-party corporation. Following the acquisition, the plaintiff, Papendick, sued claiming that Bosch breached a related contract under which Papendick was entitled to receive a “finder’s fee” from Bosch for presenting the third-party company opportunity to Bosch. In considering whether there was personal jurisdiction in Delaware over Bosch, a West German company, the trial court initially found that the incorporation of the Delaware subsidiary did not create sufficient “minimum contacts” with Delaware to satisfy the Due Process Clause of the Fourteenth Amendment. The Supreme Court reversed, however, holding that the incorporation of the Delaware subsidiary established sufficient “minimum contacts” in Delaware because it was “an integral component of its total transaction . . . to which the plaintiff’s instant cause of action relate[d].” *Papendick*, 410 A.2d at 152; accord *EBG Hldgs. LLC v. Vredezicht’s Gravenhage 109 B.V.*, 2008 WL 4057745, at *6 (Del. Ch. Sept. 2, 2008). Because the incorporation of a Delaware corporation as an integral component of a total transaction to which a plaintiff’s cause of action relates is sufficient to satisfy § 3104 and constitutional due process, I need not discuss separately the second prong of the personal jurisdiction analysis.

involves the disposition of substantially all of the assets that Vadem, Ltd. controlled, either directly or through subsidiaries, such as Vadem, Inc. The challenged asset transfers were accomplished, in part, by Vadem, Ltd.'s incorporation of four operating companies, including Amphus and Paragraph, which served as counterparties to the asset transfers. Microsoft's claim arises from Vadem, Ltd.'s failure to seek shareholder approval of the asset transfers to those Delaware entities, among others. Therefore, I hold that Microsoft has established a sufficient basis for subjecting Vadem, Ltd. to personal jurisdiction in this Court.

D. Microsoft's Direct Claims are Time-Barred

Having found personal jurisdiction over at least Vadem, Ltd. and Amphus as to Microsoft's direct claims, I find it unnecessary to consider whether personal jurisdiction also exists over the remaining Defendants because, in any event, Microsoft's direct claims are barred by the doctrine of laches.³⁶ As discussed *supra*, Counts VII and VIII relate only to Vadem, Ltd.'s alleged breach of the Memorandum of Association by disposing of all or substantially all of its assets without a shareholder vote. It is undisputed that those 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

³⁶ That is, even if this Court has personal jurisdiction over Vadem, Inc. and the other Defendants based on theories of alter ego and conspiracy, as Microsoft contends, because Microsoft is time-barred from bringing its direct claims against Vadem, Ltd., it also would be time-barred from bringing the claims in Counts VII and VIII against the remaining Defendants.

period, expired in 2003.³⁷ Nevertheless, Microsoft argues that laches does not bar its claims, because the relevant limitations period was tolled under the theories of equitable tolling and fraudulent concealment. Therefore, I next examine each of those tolling arguments.

At the threshold, however, I note that those issues essentially are before me on a motion to dismiss under Court of Chancery Rule 12(b)(6). Pursuant to Rule 12(b)(6), this Court may grant a motion to dismiss for failure to state a claim if a complaint does not assert sufficient facts that, if proven, would entitle the plaintiff to relief. As recently reaffirmed by the Supreme Court, “the governing pleading standard in Delaware to survive a motion to dismiss is reasonable ‘conceivability.’”³⁸ That is, when considering such a motion, a court must

accept all well-pleaded factual allegations in the Complaint as true, accept even vague allegations in the Complaint as “well-pleaded” if they provide the defendant notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.³⁹

This reasonable “conceivability” standard asks whether there is a “possibility” of

³⁷ See 10 Del. C. § 8106; *Pomeranz v. Museum P’rs, L.P.*, 2005 WL 217039, at *2 (Del. Ch. Jan. 24, 2005) (“[T]his court typically applies the limitations period at law by analogy to equitable claims in order to apply the doctrine of laches.”).

³⁸ *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 537 (Del. 2011) (footnote omitted).

³⁹ *Id.* (citing *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del. 2002)).

recovery.⁴⁰ If the well-pleaded factual allegations of the complaint would entitle the plaintiff to relief under a reasonably conceivable set of circumstances, the court must deny the motion to dismiss.⁴¹ The Court, however, need not “accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party.”⁴² Moreover, failure to plead an element of a claim precludes entitlement to relief and, therefore, is grounds to dismiss that claim.⁴³

1. Equitable tolling

Microsoft contends that the statute of limitations, and the analogous laches period, for its direct claims should have been tolled on equitable grounds or for fraudulent concealment until at least 2010, when it first came to be on inquiry notice of the inadequate compensation Vadem, Ltd. received in exchange for the transfer of the Fung Patents.⁴⁴ Equitable tolling requires that the statute of limitations be 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.”⁴⁵ Under

⁴⁰ *Id.* at *5 & n.13.

⁴¹ *Id.* at *6.

⁴² *Price v. E.I. duPont de Nemours & Co., Inc.*, 26 A.3d 162, 166 (Del. 2011) (citing *Clinton v. Enterprise Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009)).

⁴³ *Crescent/Mach I P’rs, L.P. v. Turner*, 846 A.2d 963, 972 (Del. Ch. 2000) (Steele, V.C., by designation).

⁴⁴ PAB 38.

⁴⁵ *Weiss v. Swanson*, 948 A.2d 433, 451 (Del. Ch. 2008).

equitable tolling, however, the statute of limitations is tolled only until “a plaintiff discovers, or by exercising reasonable diligence should have discovered, his injury. Thus, the limitations period begins to run when the plaintiff is objectively aware of the facts giving rise to the wrong, *i.e.* on inquiry notice.”⁴⁶

As previously discussed, Microsoft’s direct claims under Counts VII and VIII are not based on the receipt of inadequate consideration for the Fung Patents. Instead, Microsoft’s direct claims stem solely from its allegation that substantially all of Vadem, Ltd.’s assets improperly were transferred to other entities without a vote of its shareholders. Therefore, in determining whether the statute of limitations in relation to these claims was tolled, the only relevant inquiry is when Microsoft received inquiry notice that the asset transfers had occurred.⁴⁷ Whether Vadem, Ltd. received adequate consideration for the Fung Patents is irrelevant to Counts VII and VIII.

Defendants argue that Microsoft had inquiry notice of the challenged asset transfers as early as March 2000, when it received the Final Information Statement from Vadem, Ltd. detailing the asset transfers and the proposed merger of Vadem, Ltd. with

⁴⁶ *Id.*; see *Pomeranz v. Museum P’rs, L.P.*, 2005 WL 217039, at *3 (Del. Ch. Jan. 24, 2005) (“Inquiry notice does not require full knowledge of the material facts; rather, plaintiffs 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.”) (internal quotation marks and footnotes omitted).

⁴⁷ The parties do not dispute that Microsoft had actual or constructive knowledge at all relevant times that it was entitled to vote on a transfer of all or substantially all of Vadem, Ltd.’s assets.

Vadem LLC. The Final Information Statement states that “Vadem [Ltd.] is currently involved in asset transfers involving the following entities and assets” and goes on to describe each of the four operating companies, including Amphus and , and the assets being transferred to them.⁴⁸ The Final Information Statement also discloses that Vadem, Inc. “is in the process of effecting th[e] transfer [of certain intellectual property assets] and is also in the process of receiving from Vadem [Ltd.] certain of its residual technology and other assets.”⁴⁹

The Final Information Statement plainly indicates that the disputed assets transfers had already begun and were ongoing as of March 2000. Nevertheless, in a footnote in its Answering Brief, Microsoft denies being on inquiry notice, arguing that because the “proposed merger ultimately did not take place . . . there was no reason for Microsoft to conclude that . . . Vadem [Ltd.] would nonetheless go through with the Asset Transfers.”⁵⁰ Microsoft fails, however, to point to any language in the Final Information Statement that would lead the reader reasonably to believe that the asset transfers were merely being contemplated or that the effectuation of the transfers was dependent on the execution of the proposed merger. Instead, I find that the only reasonable reading of the Final Information Statement is that the asset transfers already were occurring and were

⁴⁸ Compl. Ex. D at 7-9.

⁴⁹ *Id.* at 10.

⁵⁰ PAB 38 n.17.

independent of the merger. Therefore, I find that Microsoft was on inquiry notice of its direct claims under Counts VII and VIII as of the end of 2000 at the latest.

2. Fraudulent concealment

As to fraudulent concealment, Microsoft argues that Fung's deliberate misrepresentations regarding the value of the Fung Patents "prevented Vadem [Ltd.] and its shareholders from learning of Fung's self-dealing or usurpation of a corporate opportunity or of the substantial dilution of the value of Vadem [Ltd.]."⁵¹ As discussed *supra* in relation to Microsoft's equitable tolling argument, however, whether Microsoft had notice of the allegedly inadequate consideration received for the Fung Patents is irrelevant to the question of whether it had inquiry notice that the Fung Patents had been transferred without a vote of the Vadem, Ltd. shareholders. Thus, Microsoft has not alleged facts in the Complaint from which the Court conceivably could infer that the applicable limitations or laches period for its direct claims should be tolled under a theory of fraudulent concealment. Because Microsoft has not alleged any basis for tolling the limitations period on its direct claims under either the doctrine of equitable tolling or fraudulent concealment, those claims are time-barred and I dismiss them with prejudice.

⁵¹ *Id.* at 39. Fraudulent concealment "requires an affirmative act of concealment or 'actual artifice' by a defendant that prevents a plaintiff from gaining knowledge of the facts" underlying the cause of action. *Weiss v. Swanson*, 948 A.2d 433, 451 (Del. Ch. 2008). As with equitable tolling, "[w]here there has been fraudulent concealment from a plaintiff, the statute is suspended only until his rights are discovered or until they could have been discovered by the exercise of reasonable diligence." *Halpern v. Barran*, 313 A.2d 139, 143 (Del. Ch. 1973).

III. CONCLUSION

For the reasons stated in this Memorandum Opinion, I conclude that Microsoft lacks standing to bring its derivative claims under Counts I through VI because it failed to seek leave to assert such claims from the BVI High Court. Therefore, I grant Defendants' motion and dismiss those claims without prejudice. As to Counts VII and VIII, I find that those claims are time-barred and, therefore, dismiss each of them with prejudice.

In ruling on Defendants' motion to dismiss, I assumed *arguendo* that Vadem, Inc. was an additional party Defendant, as reflected in Plaintiff's proposed Amended Complaint. The addition of Vadem, Inc. as a party, however, would not alter my conclusion on standing as to the derivative claims. Likewise, it would not alter my decision to dismiss the direct claims in Counts VII and VIII as time-barred. Therefore, I also deny Microsoft's motion to amend its Complaint to include Vadem, Inc. as a defendant on the ground that the amendment would be futile.

IT IS SO ORDERED.