The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BAROVIC v. BALLMER, et al.,	Lead Case No. 2:14-cv-00540-JCC (Consolidated with Case No. 2:14-cv-00586-JCC)
This Document Relates To: ALL ACTIONS	REPLY IN SUPPORT OF INDIVIDUAL DEFENDANTS' MOTION TO DISMISS Noted on Motion Calendar: October 31, 2014

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I. INTRODUCTION[1]

Plaintiffs' Opposition provides no facts or legal argument sufficient to state a claim holding the Individual Defendants responsible for a technical error in code included in a service pack update to European Windows users. The law does not impose on officers and directors the responsibility for software coding mistakes by rank and file employees absent facts showing the officers and directors knew about (and intentionally disregarded) the errors or utterly failed to establish internal controls. Here, Plaintiffs' Opposition points to no facts suggesting the Individual Defendants fell short of their legal duties. Accordingly, the Court should dismiss with prejudice the claims for inadequate oversight, as well as Plaintiffs' ancillary claims for an allegedly inaccurate disclosure and unjust enrichment.

First, Plaintiffs ignore the heightened standard for pleading inadequate corporate oversight. To meet that standard—and to allege misconduct not exculpated or indemnified by Microsoft—Plaintiffs must allege facts showing the Individual Defendants ***knew*** they were not discharging their fiduciary obligations. Instead, Plaintiffs simply repeat unsupported conclusions from the Consolidated Complaint and insist those bare conclusions show the Individual Defendants breached their duties. Given the absence of specific allegations of knowing and intentional misconduct, the corporate oversight claims (Counts II, III, V, and VI) fail as a matter of law. The Court should dismiss them.

Second, Plaintiffs fail to allege the Individual Defendants knew about the browser choice screen omission before the European Commission advised Microsoft of the error. Knowledge of that technical error cannot be imputed to the Individual Defendants, as Plaintiffs theorize, because Plaintiffs fail to allege that ***anyone***—at Microsoft or elsewhere—knew of the mistake until it was discovered in July 2012. Absent knowledge, the Individual Defendants could not have deliberately failed to disclose it in communications to Microsoft's shareholders.

[1] As Microsoft explains in its Motion to Dismiss [Dkt. 19] and supporting Reply, the business judgment rule protects the Board's decision, which cannot be disturbed. Accordingly, the Court should dismiss this derivative action on Microsoft's motion and need not reach this motion by the Individual Defendants.

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Third, Plaintiffs' unjust enrichment claim depends on, and therefore cannot survive dismissal of, the breach of fiduciary duty claims. Moreover, Plaintiffs still do not identify how the Individual Defendants were purportedly enriched by the technical error.

Finally, the Court should dismiss with prejudice. Although Plaintiffs have had more than two years to investigate the alleged misconduct, their Consolidated Complaint still fails to state a claim, simply repeating conclusory statements from their original complaints. And Plaintiffs offer nothing to suggest an amendment could satisfy the applicable pleading standard.

II. ARGUMENT

A. Plaintiffs Fail to State Claims for Inadequate Oversight[2]

1. Plaintiffs Cannot Ignore the Required Pleading Standard or Avoid Microsoft's Exculpatory Provision

Plaintiffs' oversight claims require them to plead "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment." *In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996). (Plaintiffs do not even bother to cite *Caremark*.) They must allege facts "showing that the directors ***knew*** they were not discharging their fiduciary obligations." *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 370 (Del. 2006) (emphasis added). "[O]nly a sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exists—will establish the lack of good faith that is a necessary condition to liability." *Caremark*, 698 A.2d at 971. That demanding test benefits shareholders because it makes qualified persons more likely to serve as directors if they know they will not be subjected to personal liability for unintentional mistakes within a corporation. *Id.*

Further, because Plaintiffs seek to assert a derivative claim, standing in Microsoft's shoes, Plaintiffs must satisfy the pleading burden that Microsoft would bear if it brought these claims directly. In that respect, Microsoft's Articles of Incorporation exculpate the directors from personal liability—and require Microsoft to indemnify its directors and officers—unless

[2] Plaintiffs' Opposition accepts the division of Plaintiffs' claims into three categories: (1) inadequate corporate oversight; (2) failure to disclose; and (3) unjust enrichment. *See* Opp. at 24, 27 n.20, 28, & 28 n.21.

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they engage in intentional misconduct, knowingly violate the law, or act under a financial conflict of interest. *See* Rummage Decl. [Dkt. 24], Ex. B, art. X & art. XII at 12.2. Plaintiffs therefore must state plausible, non-conclusory claims that ***non-exculpated*** conduct occurred, i.e. "(1) 'intentional misconduct,' (2) 'a knowing violation of law,' (3) 'conduct violating RCW 23B.08.310 . . . ' or (4) 'any transaction from which the director will personally receive a benefit . . . to which the director is not legally entitled.'" *Grassmueck v. Barnett*, 281 F. Supp. 2d 1227, 1233 (W.D. Wash. 2003) (quoting RCW 23B.08.320).[3]

Plaintiffs incorrectly assert the Court must ignore Microsoft's exculpation and indemnification clauses on this Motion. Opp. at 29. To the contrary, Washington law allows this Court to consider the exculpation clause on a motion to dismiss. *Grassmueck*, 281 F. Supp. 2d at 1232 (director protection statutes shield directors from liability unless plaintiffs sufficiently allege the directors breached the duty of care "intentionally, knowingly, or in bad faith"). Indeed, this Court has rejected the argument that the exculpation statute creates only an affirmative defense that cannot form a basis for dismissal. *Fernandes v. Bianco*, 2006 WL 6862716, at *6 (W.D. Wash. June 22, 2006) (finding the argument "not persuasive" and granting motion to dismiss because plaintiffs failed to demonstrate the exculpation statute would not protect the directors against potential liability). The Court emphasized, "[w]hether a director faces a substantial likelihood of personal liability … requires the consideration of what a director can be held liable for." *Id.*

Courts applying Delaware law likewise regularly consider exculpatory clauses on motions to dismiss. "To bring an action premised on the theory that directors breached their fiduciary duties, plaintiff must allege that directors intentionally engaged in bad faith or in self-interested conduct that is ***not immunized by the exculpatory charter provision*** . . . ." *Ausikaitis ex rel. Masimo Corp. v. Kiani*, 962 F. Supp. 2d 661, 679 (D. Del. 2013) (emphasis added) (citing *McMillan v. Intercargo Corp.*, 768 A.2d 492, 495 (Del. Ch. 2000) & *Malpiede v. Townson*, 780 A.2d 1075, 1094 (Del. 2001)). *See also, e.g., In re Lear Corp. S'holder Litig.*,

[3] RCW 23B.08.310, which concerns unlawful distributions, does not apply here.

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967 A.2d 640, 648 (Del. Ch. 2008) (when directors exculpated, plaintiff must plead more than gross negligence; "what is critical is that they plead facts suggesting that the Lear directors breached their duty of loyalty by somehow acting in bad faith for reasons inimical to the best interests of the Lear stockholders"); *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 720-21, 189 P.3d 168 (2008) (applying Delaware law and holding that "only if there are allegations establishing a breach of the duties of loyalty or good faith can the complaint survive a motion to dismiss" when corporation's charter exculpates directors); *Grassmueck*, 281 F. Supp. 2d at 1232. Exculpation "may be raised on a Rule 12(b)(6) motion to dismiss." *Emerald Partners v. Berlin*, 787 A.2d 85, 91 n.35 (Del. 2001) ("*Emerald Partners III*") (quoting *Malpiede*, 780 A.2d at 1092).[4]

Accordingly, to state viable claims for inadequate oversight, Plaintiffs must allege well-pled facts showing the Individual Defendants ***knowingly*** failed to discharge their duties, engaged in ***intentional*** misconduct, or ***consciously*** violated the law. As the brevity of their oversight discussion suggests, Plaintiffs do not and cannot state such claims.

2. Plaintiffs Fail to Identify Any Facts Showing the Individual Defendants Knowingly Breached Their Duties

In their Motion, the Individual Defendants pointed out Plaintiffs' failure to allege ***any facts***—let alone well-pled facts—supporting their allegations that the Individual Defendants (a) "caused" the browser choice screen to be omitted from Windows 7 Service Pack 1 in Europe, (b) failed to establish internal controls, or (c) neglected to remedy the technical error when it was discovered. In response, Plaintiffs merely recycle the bare conclusion that the Individual Defendants did not maintain adequate internal controls. *See* Opp. at 27:13-16 (citing Compl. ¶¶ 58, 82-85); *id.* at 27 n.20 (citing Compl. ¶ 58). The cited paragraphs assert the

[4] The case Plaintiffs rely on, *Emerald Partners v. Berlin*, 726 A.2d 1215 (Del. 1999) ("*Emerald Partners II*"), was superseded by *Emerald Partners III*, in which the Delaware Supreme Court clarified how Delaware's exculpatory statute applies. The exculpation afforded by Delaware law "must be *affirmatively* raised by the director defendants," making it "in the '*nature* of an affirmative defense.'" *Id.* at 91 (quoting *Emerald Partners II*, 726 A.2d at 1223). Courts must then recognize a "practical reality: . . . in actions against the directors of Delaware corporations with [an exculpatory] charter provision, a shareholder's complaint must allege well-pled facts that, if true, implicate breaches of loyalty or good faith." *Id.* at 92. (After remand and another appeal, an unpublished order finally closed the case, *Emerald Partners v. Berlin*, 840 A.2d 641 (Del. 2003) ("*Emerald Partners IV*")).

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browser choice screen omission was a technical error, that Microsoft promptly corrected the mistake and accepted responsibility for it, and that the Individual Defendants purportedly "ignored the obvious and pervasive problems with Microsoft's internal controls." Compl. ¶¶ 58, 84. Those statements do not approach a viable claim for inadequate oversight.

Indeed, the allegations negate any inference of culpable wrongdoing. The fact that (as alleged) Microsoft promptly corrected and accepted responsibility for the mistake when informed of it hardly evidences intentional, bad faith conduct by the Individual Defendants. Compl. ¶¶ 56-58. To the contrary, that allegation discredits Plaintiffs' inconsistent and conclusory allegation that "[d]efendants did nothing to halt the illicit scheme." Compl. ¶ 53; Opp. at 9:8-10. And Plaintiffs still offer no substantiating facts for the theory that the Individual Defendants ignored "obvious and pervasive" internal control deficiencies. *See* Opp. at 27:10-16. For example, they do not identify the deficient internal controls, how or why the defects were supposedly obvious and pervasive, or the relationship between those deficient controls and the omission of the browser choice screen from a Windows update in Europe.[5]

Further, Plaintiffs' one-page explanation of the oversight claims says nothing about their accusation that the Individual Defendants "caused" the omission of the browser choice screen. Compl. ¶¶ 4, 49, 52, 97. If that theory is still afoot, the Court should reject it as rank speculation, not a particularized fact allegation sufficient to meet the required pleading standard. *See In re China Auto. Sys., Inc. Deriv. Litig.*, 2013 WL 4672059, at *8 (Del. Ch. Aug. 30, 2013) ("A mere statement that the Defendants 'caused' the filing of the allegedly

[5] In *In re Bank of America Corp. Securities, Derivative, & ERISA Litigation*, plaintiffs likewise tried to state a *Caremark* claim, alleging insufficient internal controls related to the bank's subprime holdings and Countrywide acquisition. 2013 WL 1777766, at *13 (S.D.N.Y. Apr. 25, 2013). The court dismissed the claim, because plaintiffs failed to "allege what those controls should have entailed … [or to] identify where a breakdown in oversight mechanisms allegedly occurred." *Id.*; *see also In re China Auto. Sys. Deriv. Litig.*, 2013 WL 4672059, at *8 (Del. Ch. Aug. 30, 2013) (dismissing derivative oversight claim where complaint failed to identify any internal control deficiencies or set forth facts showing directors consciously disregarded duties); *South v. Baker*, 62 A.3d 1, 18 (Del. Ch. 2012) (rejecting plaintiffs' *Caremark* claim; "Plaintiffs' counsel could not cite a single decision in which a court had inferred knowledge of wrong-doing or conscious indifference to alleged red flags … where the complaint's allegations did not attempt to set forth facts suggesting conscious indifference"); *Desimone v. Barrows*, 924 A.2d 908, 940 (Del. Ch. 2007) (rejecting *Caremark* claim because plaintiff failed to allege facts showing deficiency of defendant's internal controls or that the board had any reason to know about the problem).

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misleading financial statements with the SEC is not, without more, a particularized allegation of fact.").

Leaving aside the fatal vagueness of the oversight allegations, Plaintiffs allege no facts showing the Individual Defendants ***knowingly*** breached their duties or engaged in any ***intentional*** misconduct. Instead, in discussing their disclosure claim, they urge the Court to ***impute*** knowledge to the Individual Defendants. Opp. at 25-26. (The Court should reject that suggestion with respect to the disclosure claim, for reasons explained below. *See infra* § II.B.) But Plaintiffs do not argue for imputed knowledge concerning their oversight claims, Opp. at 27, and for good reason. Plaintiffs must allege the Individual Defendants actually ***knew*** they were not discharging their fiduciary obligations. *Stone*, 911 A.2d at 370. In rare circumstances, a plaintiff may adequately plead that level of knowledge by citing facts pointing to a "systematic failure" to exercise oversight, such as an "utter failure" to implement a "reasonable information and reporting system." *Caremark*, 698 A.2d at 971. Here, however, Plaintiffs' oversight claims rest on a single mistake in a European Windows Service Pack 1 update—not a sustained and systematic failure to implement internal controls—and the unsubstantiated conclusion the Individual Defendants knew about the omission of the browser choice screen from this update and failed to address it. Plaintiffs provide no particularized facts to support that conclusion. And Plaintiffs cite ***no cases*** suggesting they can survive a motion to dismiss on such a thin Complaint. *See* Opp. at 27. To the contrary, on a motion to dismiss, the Court need not accept assumptions and conclusions as true. *See Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014).

Reduced to its core, Plaintiffs' theory is that because Microsoft breached the settlement with the European Commission and incurred a large fine, the Individual Defendants bear responsibility because it happened on their watch. But Delaware courts routinely reject conclusory allegations that because errors occurred, internal controls must have been deficient, and the board must have known of the deficiencies. *Desimone v. Barrows*, 924 A.2d 908, 940 (Del. Ch. 2007) (citing *Stone*, 911 A.2d at 373). Plaintiffs cannot simply point to the end result

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and claim the Individual Defendants ***must*** have failed to maintain adequate internal controls. The Court should dismiss Plaintiffs' inadequate oversight claims with prejudice.

B. Plaintiffs Fail to State a Claim for Failure to Disclose

Plaintiffs allege in Count I that the Individual Defendants breached a disclosure duty by allegedly "causing or allowing the Company to disseminate to Microsoft shareholders materially misleading and inaccurate information" about the browser choice screen omission. Compl. ¶ 80. In moving to dismiss the disclosure claim, the Individual Defendants observed that Plaintiffs failed to identify ***any*** inaccurate statement. Mot. [Dkt. 23] at 14. Like the Complaint, the Opposition fails to identify any inaccurate statement. Instead, Plaintiffs now complain about an alleged omission: "Defendants' [sic] failed to disclose that under their direction, the Company was violating the terms of the Settlement, which could expose the Company to hundreds of millions of dollars in fines." Opp. at 25:14-16.

But Plaintiffs fail to allege an essential element of a claim for the alleged omission: that the Individual Defendants ***knew*** the error was occurring. As Plaintiffs concede, when directors do not seek shareholder action, a failure to disclose is actionable only if directors and officers ***deliberately*** misinform shareholders. Opp. at 24:20-23 (citing *Malone v. Brincat*, 722 A.2d 5, 14 (Del. 1998)). The necessary "level of proof is similar to, but ***even more stringent than***, the level of scienter required for common law fraud." *Metro Commc'n Corp. v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 158 (Del. Ch. 2004) (emphasis added). But Plaintiffs plead no facts establishing the Individual Defendants knew a software engineering team made a technical error jeopardizing Microsoft's compliance with the Settlement. They allege only that the Individual Defendants were informed of the error no earlier than the summer of 2012, Compl. ¶¶ 53, 56-57, when Microsoft promptly disclosed the omission in its 2012 Form 10-K. *See* Rummage Decl. [Dkt. 24], Ex. A at 8-9.

Plaintiffs concede their inability to allege the required knowledge by asking this Court to infer the Individual Defendants ***must*** have known of the browser choice error. *See* Opp. at 25:17-26:18. But that deductive leap cannot be made on Plaintiffs' bare allegations.

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First, knowledge cannot be imputed from thin air. By definition, corporate knowledge cannot be attributed to officers and directors if no alleged facts show ***someone*** in the company possessed the knowledge. In Plaintiffs' cases, defendants themselves had knowledge of facts giving rise to the claims, or the knowledge was so widespread it could not have escaped defendants' attention. For example, in *In re Countrywide Financial Corp. Derivative Litigation*, 554 F. Supp. 2d 1044, 1058-59 (C.D. Cal. 2008), the complaint cited testimony by Countrywide employees showing general corporate understanding of significant deviations from underwriting standards. *See also id.* at 1059-64 (board structure required certain director defendants to assess red flags about underwriting practices); *Ryan v. Gifford*, 918 A.2d 341, 354-56 (Del. Ch. 2007) (plaintiff sufficiently pleaded demand futility because derivative claims for illegal options backdating alleged facts showing that the defendant directors authorized nine option grants, each at a low point in the stock price). In contrast, Plaintiffs fail to allege ***anyone*** at Microsoft knew the browser choice screen was omitted until the European Commission notified Microsoft of the error in summer 2012.

Second, the other cases Plaintiffs cite involve fact-specific applications of the "core operations inference"—but Ninth Circuit law forecloses such an inference here. The Ninth Circuit follows the general rule that knowledge about particular aspects of a business may not be attributed to directors and officers simply by virtue of their position. *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1000 (9th Cir. 2009). It recognizes two primary exceptions, *id.*, but "[p]roof under this theory is not easy." *Police Ret. Sys. of St. Louis v. Intuitive Surgical, Inc.*, 759 F.3d 1051, 1062 (9th Cir. 2014).

Under the first exception, falsity may indicate scienter when "combined with 'allegations regarding a management's role in the company' that are 'particular and suggest that the defendant had ***actual access*** to the disputed information.'" *Zucco Partners*, 552 F.3d at 1000 (quoting *S. Ferry LP, No. 2 v. Killinger*, 542 F.3d 776, 786 (9th Cir. 2008)) (emphasis added). *See In re NVIDIA Corp. Sec. Litig. (Cohen v. NVIDIA Corp.)*, --- F.3d ----, 2014 WL 4922264, at *15 (9th Cir. Oct. 2, 2014) (affirming 12(b)(6) dismissal without leave to amend;

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"absent some additional allegation of specific information conveyed to management and related to the fraud or other allegations supporting scienter, the core operations inference will generally fall short of a strong inference of scienter") (internal quotation marks, citation omitted); *S. Ferry LP*, 542 F.3d at 784 (prohibiting "total reliance on the core-operations inference absent other particularized supporting allegations"). Plaintiffs make no allegations—particularized or general—supporting their claim that the Individual Defendants knew (before the summer of 2012) the European service pack omitted the browser choice screen. They do not allege the Individual Defendants had access to this knowledge or spoke with individuals who possessed the knowledge. Indeed, Plaintiffs make no allegation ***anyone*** had the required knowledge. *See In re NVIDIA Corp. Sec. Litig.*, 2014 WL 4922264, at *16 (refusing to apply core operations inference because plaintiff presented no evidence management received relevant information); *S. Ferry LP, No. 2 v. Killinger*, 687 F. Supp. 2d 1248, 1259, 1261 (W.D. Wash. 2009) (core operations inference applied to only three defendants who publicly represented they had access to the disputed knowledge).[6]

The second exception allows the core operations inference "where 'the nature of the relevant fact is of such prominence that it would be "absurd" to suggest that management was without knowledge of the matter.'" *Zucco Partners*, 552 F.3d at 1000 (quoting *S. Ferry*, 542 F.3d at 786); *see also In re NVIDIA Corp. Sec. Litig.*, 2014 WL 4922264, at *15. In other words, "[w]here the defendants 'must have known' about the falsity of the information they were providing to the public because the falsity of the information was obvious from the operations of the company, the defendants' awareness of the information's falsity can be assumed." *Zucco Partners*, 552 F.3d at 1001. "[R]eporting false information will only be indicative of scienter where the falsity is patently obvious—where the 'facts [are] prominent

[6] In *South Ferry*, the Ninth Circuit summarized the types of allegations that can satisfy the Private Securities Litigation Reform Act's scienter requirement, then remanded for analysis of whether the alleged facts could survive the motion to dismiss. 542 F.3d at 785-86. On remand, this Court held the core operations inference could be used as to three of the defendants, because those defendants publicly represented they had access to the disputed knowledge. *See S. Ferry LP*, 687 F. Supp. 2d at 1259, 1261. The Court did ***not*** rely on the inference as to the remaining defendants because plaintiffs failed to allege they had access to the relevant knowledge. *Id.* at 1262. Plaintiffs fail to allege access to the relevant knowledge here.

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enough that it would be "absurd" to suggest that top management was unaware of them.'" *Id.* (alteration in original) (quoting *Berson v. Applied Signal Tech., Inc.*, 527 F.3d 982, 989 (9th Cir. 2008)). For example, in *Berson*, the Ninth Circuit applied the inference when the defendants misstated the status of several stop-work orders that respectively halted between $10 to $15 million of work on the company's largest contract with one of its most important customers, caused the company to reassign 50-75 employees, and required defendant to complete massive volumes of paperwork—facts so central to the company's viability that defendants had to know them. 527 F.3d at 988 n.5. Courts applying the core operations inference thus require the operation to be central or essential to the company and to be a substantial enough problem or event to be obvious to any director or officer. *See, e.g., In re Countrywide Fin. Corp.*, 554 F. Supp. 2d at 1049, 1058-59 (inferring knowledge of bank-wide failure to follow underwriting standards); *In re Biopure Corp. Deriv. Litig.*, 424 F. Supp. 2d 305, 306-08 (D. Mass. 2006) (inferring knowledge of FDA's hold on "the company's principal product"); *cf. In re Keyspan Corp. Sec. Litig.*, 383 F. Supp. 2d 358, 387-88 (E.D.N.Y. 2003) ("[A]lthough the court might charge senior KeySpan officials with knowledge of a major contract dispute with the Company's largest customer, say, the problems at [a company KeySpan had not yet acquired] are simply not of such a magnitude as to excuse plaintiffs from the usual rule requiring specificity.").

Here, Plaintiffs present no evidence ***anyone*** knew some of Microsoft's European users were not receiving the required browser choice screen until summer 2012. Even the European Commission and Microsoft's competitors apparently remained unaware of the problem. Plaintiffs allege no facts to suggest the technical team that prepared the European Windows Service Pack 1 update performed a "core" operation. Unlike the situation envisioned in *Zucco Partners*, where a relevant fact has such prominence it would be absurd to suggest management lacked knowledge, the opposite is true here. Microsoft's directors and officers cannot remain up to date on all software code written by every engineering team—and Plaintiffs point to no one in management who claimed access to that level of detailed knowledge. Nothing in the

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Complaint suggests the technical work to develop the Windows Service Pack 1 in Europe was "prominent"; it would be absurd to infer management possessed knowledge of it.

C. Plaintiffs Fail to Allege a Viable Unjust Enrichment Claim

Plaintiffs concede their unjust enrichment claim must fail if they do not sufficiently allege the Individual Defendants breached their duties as officers and directors. *See* Opp. at 28:17-20 (explaining "plaintiffs amply assert a claim for unjust enrichment by alleging that, ***as a result of their wrongdoing***, the Defendants unjustly received compensation") (emphasis added). Thus, the Court should dismiss this claim for the reasons explained in §§ II(A) and (B), *supra*. *See also In re Bank of Am.*, 2013 WL 1777766, at *15 (S.D.N.Y. Apr. 25, 2013) ("Because [plaintiff's] unjust enrichment claim is premised on defendants' violation of their fiduciary duties, and the breach of fiduciary duty claim is dismissed, [plaintiff's] unjust enrichment claim is dismissed as well.").

But even if the Court declines to dismiss one or more of Plaintiffs' fiduciary duty claims, the Court should still dismiss Plaintiffs' unjust enrichment claim. Plaintiffs once again fail to allege what ***benefit*** the Individual Defendants unjustly received. Plaintiffs state the Individual Defendants "unjustly received compensation as a result of their false portrayal of Microsoft's true financial health," Opp. at 28:18-20, but they nowhere cite the compensation to which they refer or how the Individual Defendants' allegedly false statements caused them to receive compensation they would not have received otherwise.

Plaintiffs have not addressed—and therefore should be deemed to concede—the Individual Defendants' showing that mere retention of directors' and officers' ordinary compensation cannot sustain an unjust enrichment claim predicated on allegations that these defendants breached their fiduciary duties. *In re Pfizer Inc. S'holder Deriv. Litig.*, 722 F. Supp. 2d 453, 465-66 (S.D.N.Y. 2010).

D. The Court Should Dismiss this Action with Prejudice

The Court should not allow Plaintiffs further leave to amend. A district court has discretion to dismiss a complaint with prejudice, if, among other things, an amendment would

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be futile. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 339 (9th Cir. 1996). "The district court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint." *Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351, 355 (9th Cir. 1996) (internal quotations omitted).

Here, Plaintiffs had over a year to investigate, filed their individual complaints in April 2014, then had the opportunity to prepare a Verified Consolidated Complaint, filed on June 26, 2014. Plaintiffs could have conducted further investigation and provided facts (if any could be mustered) sufficient to state viable claims. Instead, Plaintiffs chose simply to repeat their previous, inadequate allegations. Plaintiffs fail even to cite to the European Commission's detailed and extensive report on the browser choice screen omission. *See* Dunne Decl. in Supp. of Nominal Def. Microsoft's Mot. to Dismiss [Dkt. 20] Ex. A. Nor do Plaintiffs suggest how they might succeed in meeting the rigorous standards for the claims they purport to assert against the Individual Defendants. *See* Opp. at 31 n.23 (requesting leave to amend if the motions to dismiss are granted, but providing no assurance Plaintiffs possess additional, unpleaded facts to support their claims).

III. CONCLUSION

For the foregoing reasons, the Individual Defendants ask the Court to dismiss Plaintiffs' Consolidated Complaint with prejudice.

DATED this 30th day of October, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2014, I had the foregoing electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system. All other parties (if any) shall be served in accordance with the Federal Rules of Civil Procedure.

DATED this 30th day of October, 2014.

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