Barovic v. Ballmer, Et Al.

COURT: United States District Court for the Western District of Washington
CASE NUMBER: 2:14-cv-0058

A shareholder derivative action filed on behalf of Kim Barovic and Stephen DiPhilipo (collectively, "Plaintiffs") brought for the benefit of Microsoft Corporation ("Microsoft" or the "Company"), against certain officers and directors of the Company including Bill Gates and Steve Ballmer. This action stems from the Board of Directors of Microsoft's ("Board") investigation and subsequent improper and deficient refusals of Plaintiffs' litigation demands (the "Demands"), which sought to remedy breaches of fiduciary duty and other misconduct which ultimately resulted in Microsoft paying a fine of approximately $732.2 million.

Specifically, beginning in 2007, the European Union ("EU") began probing the Company regarding antitrust violations arising from the inclusion of Internet Explorer (and only Internet Explorer) with the Windows Operating System ("Windows"). Ultimately, in 2009, EU regulators agreed to drop the antitrust case against Microsoft after Defendants caused the Company to agree to offer consumers a choice of rival Web browsers with Windows (the "2009 Settlement"). Significantly, pursuant to the terms of the 2009 Settlement, Microsoft (and, in turn, Defendants) was responsible for monitoring its own compliance with thee 2009 Settlement. In the summer of 2012, the EU antitrust chief, Joaquin Almunia, warned Defendants that notwithstanding the 2009 Settlement terms, in certain instances Microsoft software was not providing users the full access to competing Web browsers. Defendants apologized to Mr. Almunia and "accepted full responsibility" for the Company's violations of the 2009 Settlement; however, on March 6, 2013, it was announced that the European regulators fined Microsoft approximately $732 million for violating the 2009 Settlement.

As a result of Defendants' breaches of fiduciary duties, Plaintiffs issued the Demands on March 21 and 22, 2013. Over ten months later, the Board refused the Demands and Plaintiffs initiated this action on behalf of Microsoft on April 11, 2014. Plaintiffs alleged that the Demands were wrongfully refused and asserted claims under Washington law on behalf of the Company against Defendants for breach of fiduciary duty, unjust enrichment, abuse of control, and gross mismanagement. The Company and the Defendants subsequently moved to dismiss the action, both under Federal Rules of Civil Procedure 23.1 and 12(b)(6). The Court denied the motions to dismiss on December 10, 2014, finding that Plaintiffs adequately alleged with particularity pursuant to Rule 23.1 and that the Demands were wrongfully refused, and that Plaintiffs adequately alleged all of the claims set forth in the Complaint pursuant to Rule 12(b)(6).

Despite the fact that Court, found that the Board's investigation was "restricted in scope," "shallow in execution," "pro forma," and "half-hearted," Microsoft filed a motion for summary judgment re-challenging Plaintiffs' Rule 23.1 standing on May 1, 2015. Plaintiffs filed their opposition to the summary judgment motion on June 25, 2015.

While the summary judgment motion was still pending before the Court, the parties reached an agreement to settle the action. On October 28, 2015, the Parties entered into a Stipulation and Agreement of Settlement setting forth the terms and conditions of the proposed Settlement. On November 24, 2015, the Court entered a Preliminary Approval Order in connection with the Settlement which, among other things, preliminary approved the Settlement, authorized notice of the Settlement to Current Microsoft Shareholders, and scheduled the Settlement Hearing to consider whether to grant final approval of the Settlement. The Settlement Hearing was held before The

Honorable John C. Coughenour on January 12, 2016. The Court granted final approval of the Settlement on January 13, 2016.

Pursuant to the Settlement, Microsoft will adopt and maintain significant corporate governance measures concerning the Company's compliance with antitrust laws and regulations. Specifically, Microsoft has agreed to: (i) create an Antitrust Compliance Office to be led by Microsoft's Antitrust Compliance Officer ("ACO"), responsible for monitoring the Company's antitrust compliance efforts; (ii) strengthen antitrust compliance reporting requirements to the Company's Board of Directors (the "Board") by requiring the ACO to report to the Regulatory and Public Policy Committee (the "RPPC") at every scheduled meeting of the RPPC and to the Board at least annually; (iii) increase the scope of responsibility and authority of the ACO regarding the Company's compliance with antitrust laws and regulations including the ACO's authority and responsibility to monitor employee, customer, competitor, regulatory or other third-party complaints against the Company concerning the Company's existing antitrust commitments with the EC and EU or U.S. antitrust laws or regulations governing tying, bundling and exclusive dealing contracts; and (iv) provide $8,500,000 per year to fund the Antitrust Compliance Office and related antitrust compliance activities. Microsoft further agreed that the Antitrust Compliance Office shall continue to operate and report to the RPPC for a minimum of five (5) years following the Settlement. Each of those enhancements is based on input from corporate governance experts and is in line with best practices.

Case Documents

- October 28, 2015 - Stipulation and Agreement of Settlement
- November 24, 2015 - Order Preliminarily Approving Settlement and Providing for Notice
- June 26, 2014 - Verified Consolidated Shareholder Derivative Complaint