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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

HBK MASTER FUND L.P., and HBK MERGER STRATEGIES MASTER FUND L.P., Petitioners, v. PIVOTAL SOFTWARE, INC., Respondent.	C.A. No. 2020-0165-KSJM PUBLIC VERSION - Filed: September 30, 2020
IN RE: PIVOTAL SOFTWARE, INC. STOCKHOLDERS' LITIGATION	C.A. No. 2020-0440-KSJM

DEFENDANT VMWARE, INC.'S OPENING BRIEF IN SUPPORT OF ITS MOTION TO DISMISS CLASS PLAINTIFFS' VERIFIED CLASS ACTION COMPLAINT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

REGULATIONS

PRELIMINARY STATEMENT

VMware, Inc. ("VMware") purchased Pivotal Software, Inc. ("Pivotal") at an 81% premium at the end of 2019. Despite this exceptional result for Pivotal's stockholders, Plaintiffs spin a fantastical scheme of a conspiracy and intrigue between VMware and Pivotal's directors and officers. They allegedly orchestrated a drop in Pivotal's earnings, to effectuate a precipitous drop in the stock price, so that VMware could swoop in and buy Pivotal on the cheap before the market and Pi otal stockholders realized what was going on. Like most conspiracy theories, however, this one founders on the facts. Nothing untoward happened here—certainly, no improper conduct is pleaded. This transaction (the "Merger") not only complied with Delaware law, but went beyond the requirements of *Kahn v. M & F Worldwide Corp.* ("*MFW*"), 88 A.3d 635, 645 (Del. 2014). Pivotal stockholders had ample opportunity to determine how much the price drop mattered—which occurred for routine, market-driven reasons. No vote on the deal occurred for at least four months (and two quarters of positive financial information) after it was announced.

The Complaint adds to its unsupported factual narrative myriad legal flaws, but two in particular mandate dismissal. *First*, both VMware and Pivotal, with independent special committees under the guidance of experienced financial and legal advisors, hewed closely to the *MFW* framework as interpreted by this Court and the Delaware Supreme Court. *MFW* applies where the controller self-disables so that it is not on *both* sides of the transaction. This action presents the remarkable case where the alleged controllers of Pivotal—VMware, Dell Technologies Inc. ("Dell"), and Michael Dell—collectively self-disabled so completely that none of them were on *either* side of the transaction. This deal was negotiated between special committees of independent directors of VMware and Pivotal and approved by a majority of the minority of Pivotal's stockholders. Alleged controllers cannot do more to self-disable than was done here. The business judgment rule therefore applies and the Complaint should be dismissed.

Second, even if the Court finds that the Merger did not perfectly comply with *MFW*, it still was entirely fair. All involved went above and beyond to ensure a fair process and as a result Pivotal stockholders received an 81% premium and compensation superior to that received by Dell, one of the alleged controlling parties, for its high-voting Class B shares. The Complaint should be dismissed.

SUMMARY OF ALLEGATIONS[1]

A. The key parties and relevant non-parties.

Dell, VMware, and Pivotal were publicly traded Delaware corporations at the time of the Merger. ¶¶ 22–28, 32. Dell owned 97.5% of the voting power of both

[1] This summary is provided only for purposes of this motion and assumes the truth of—and is based on—the facts alleged in Class Plaintiffs' Verified Class Action

classes of VMware's common stock. Ex. A at 21 (Pivotal Software, Inc. Definitive Proxy Statement (Schedule 14A) (Nov. 27, 2019)) ("Proxy").[2] VMware owned 15.8% of Pivotal's outstanding stock. *Id.* Through its ownership of VMware and Pivotal, Dell was ultimately the beneficial owner of 62.6% of Pivotal's outstanding stock as of October 15, 2019. *Id.* Michael Dell ("Mr. Dell") is the Chairman, CEO, and majority stockholder of Dell. ¶ 29. The Complaint alleges that VMware, Dell, and Mr. Dell collectively controlled Pivotal. ¶ 1.

VMware has nine members on its board of directors (the "VMware Board"), including Mr. Dell, the chairman, and Patrick Gelsinger, VMware's CEO. Proxy at 151. Pivotal's board of directors (the "Pivotal Board") consisted of six "Group I" directors elected by a majority vote of Pivotal's Class B common stock (held by Dell

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Complaint ("Complaint") (Dkt. 1). On a motion to dismiss under Court of Chancery Rule 12(b)(6), the Court may take judicial notice of documents that are "integral to a plaintiff's claim and incorporated into the complaint." *In re Gardner Denver, Inc. S'holders Litig.*, 2014 WL 715705, at *2 (Del. Ch. Feb. 21, 2014) (citation omitted); *see also In re Xura, Inc., Stockholder Litig.*, 2018 WL 6498677, at *1 (Del. Ch. Dec. 10, 2018) (drawing "facts from the allegations in the Complaint, documents incorporated by reference or integral to the Complaint and judicially noticeable facts available in public Securities and Exchange Commission filings"). Citations in the form of "¶ _" or "¶¶ _" refer to the paragraphs in the Complaint. Citations to "Ex." refer to the exhibits to the Declaration of Elena C. Norman, filed concurrently herewith.

[2] *See Orman v. Cullman*, 794 A.2d 5, 15–16 (Del. Ch. 2002) (adopting facts from proxy statement "integral to [plaintiff's] complaint as it is the source for the merger-related facts as pled in the complaint").

and VMware), and two "Group II" directors elected by a majority vote of both classes of Pivotal's common stock voting together, with each class getting a single vote per share. ¶¶ 54, 58. Pivotal's Group I directors included Mr. Dell and Robert Mee, Pivotal's CEO. ¶ 54. Pivotal's Group II directors included Marcy Klevorn and Madelyn Lankton, who each would serve as members of Pivotal's special committee. ¶ 58, 83.

Klevorn was elected to the Pivotal Board in May 2016. ¶ 35. Klevorn has almost forty years of executive experience at Ford Motor Company. *Id.*; Proxy at 141. Lankton was elected to the Pivotal Board in October 2018, and served as Chair of the Pivotal Committee. ¶ 36. Like Klevorn, Lankton has been an executive for almost four decades, in her case at The Travelers Companies, Inc., where she ultimately served as Chief Information Officer. *Id.*

B. VMware and Pivotal's discussions.

In January 2017, VMware and Pivotal explored a deal together but that fell through. ¶ 46–47; Proxy at 22. In early 2018, VMware and Pivotal nonetheless launched a jointly developed software technology called Pivotal Container Service ("PKS"). Proxy at 21. VMware and Pivotal were continuing discussions to streamline and improve this initiative in early 2019 when VMware expressed renewed interest in buying Pivotal. ¶¶ 63–64; Proxy at 21. Gelsinger had preliminary discussions with Mr. Dell and other members of the VMware Board about a potential deal. ¶ 62; Proxy at 22. Mr. Dell asked that the VMware Board consider forming a special committee of independent and disinterested directors to evaluate such a transaction. ¶ 62.[3]

On January 18, 2019, Mr. Dell informed Mee and Paul Maritz (Chairman of the Pivotal Board) that VMware might be interested in exploring an acquisition of Pivotal. ¶ 63. Mr. Dell also suggested that a process be put in place to allow both Pivotal and VMware to independently consider such a transaction. Proxy at 22. Mee m t with Gelsinger three days later. ¶ 64. Gelsinger confirmed VMware's interest in a potential acquisition and indicated that VMware would need [redacted] to assess the strategic rationale for such an acquisition. *Id.*

On February 1, upon Mr. Dell's prompting, ¶ 62, the VMware Board established a special committee (the "VMware Committee") to evaluate the potential transaction. ¶ 62 n.8. The VMware Committee consisted of three independent and disinterested directors: Karen Dykstra, Michael Brown, and Paul Sagan. Proxy at 22. The VMware Committee was empowered to retain its own legal and financial advisors, and to negotiate, evaluate, and make a recommendation on a potential transaction with Pivotal. Proxy at 22. The VMware Board also resolved that it

[3] The Proxy notes that Gelsinger asked the VMware Board to form a special committee. Proxy at 22.

would not approve any deal with Pivotal without the prior recommendation of the VMware Committee. Proxy at 23.

During its first meeting, the VMware Committee retained Gibson, Dunn & Crutcher LLP as its independent legal advisor and Lazard Frères & Co. LLC ("Lazard") as its independent financial advisor. ¶ 62 n.8. The VMware Committee met nine times between March and May 2019. Proxy at 23. At these meetings, the VMware Committee determined that any proposal made to Pivotal would include a no -waivable condition that the transaction be approved by (i) a special committee of independent Pivotal directors; and (ii) the holders of a majority of Pivotal capital stock unaffiliated with Dell and VMware (*i.e.*, a "majority-of-the-minority vote") (together, the "*MFW* safeguards"). Proxy at 23.

On February 7, VMware sent Pivotal a draft nondisclosure agreement, which Pivotal signed on March 7. ¶ 68. On March 8, Lazard sent a proposed timeline and diligence list to Cynthia Gaylor, Pivotal's CFO. ¶ 70. On March 14, Pivotal announced its earnings for the previous quarter and year and provided guidance for the upcoming 2020 fiscal year—projecting a net loss. ¶¶ 78–79; Proxy at 23.

C. The Pivotal Committee is formed and the parties conduct preliminary due diligence in March 2019.

On March 15, the Pivotal Board met to discuss a potential transaction between Pivotal and VMware. ¶ 83. Pivotal's external legal counsel—Davis Polk &

Wardwell LLP—provided the Pivotal Board with an overview of the process and duties of Pivotal's directors in connection with such a transaction, including the benefits of establishing a special committee of disinterested, independent directors to evaluate the potential transaction and of conditioning any transaction on a majority-of-the-minority stockholder vote. Proxy at 23.

Following this presentation, the Pivotal Board formed a special committee (the "Pivotal Committee") to "evaluat[e] and negotiate[e] . . . any Potential Tr nsaction." ¶ 83. It also appointed two disinterested, independent directors to that Committee: Lankton and Klevorn. ¶ 83; Proxy at 24. The Pivotal Committee was empowered to select its own independent legal and financial advisors; to evaluate and negotiate a potential transaction, including the ability to solicit, evaluate, and negotiate alternative transactions with entities other than VMware; and to elect not to pursue a potential transaction. Proxy at 24. The Pivotal Board also conditioned its own authority to approve or consummate a potential transaction upon the Pivotal Committee's prior favorable recommendation. *Id.*

The Pivotal Committee held its first meeting on March 15, shortly after the Pivotal Board adjourned. ¶ 84. During the meeting, the Pivotal Committee retained Morgan Stanley & Co. LLC as its independent financial advisor and Latham & Watkins LLP as its independent legal advisor. ¶ 84; Proxy at 24. Before retaining Morgan Stanley and Latham, the Pivotal Committee was again advised that it was empowered to select any legal or financial advisors of its choosing, subject only to checking for conflicts. Proxy at 24.

The Pivotal Committee selected Morgan Stanley because of its familiarity with Pivotal—including Morgan Stanley's experience as an underwriter for Pivotal's IPO—its expertise in Pivotal's industry, and its substantial experience with transactions such as the potential transaction with VMware. *Id.* [redacted] ¶ 88.

Over the next two weeks (March 19 to March 28), Pivotal and VMware held due diligence meetings. Proxy at 24. But in April 2019, the VMware Committee decided not to make an offer [redacted] ¶ 119.

D. Pivotal announces Q1 earnings and talks resume.

On June 4, Pivotal announced its Q1 2020 earnings and provided updated guidance cutting its forecasts for the year. ¶ 132–33. The following day, Pivotal's stock price dropped from $18.54 to $10.89. ¶ 138.

The VMware Committee met again on both June 13 and June 25. Proxy at 26. On June 25, the VMware Committee asked VMware management to conduct a more thorough due-diligence review of Pivotal and authorized one of its members, Dykstra, to contact Lankton on the Pivotal Committee to open a channel of communication. *Id.* On June 27, Dykstra called Lankton and informed her that

VMware's due diligence of Pivotal's business was progressing but that the VMware Committee had not yet decided whether to make an offer. *Id.* Diligence continued throughout July. *See* Proxy at 26–27.

E. VMware makes first offer, which it conditions on *MFW*.

On July 25, the VMware Committee again affirmed that "any transaction would include a non-waivable condition that the transaction be approved by (i) the Pivotal Special Committee and (ii) the holders of a majority of Pivotal capital stock un ffiliated with Dell and VMware." Proxy at 27. On July 30, the VMware Committee decided to offer Pivotal $13.75 in cash per share of Pivotal Class A common stock—which had closed the day before at $9.52 per share[4]—again conditional on *MFW* safeguards. Proxy at 28. The first offer was authorized on August 4. ¶ 152. In addition to the *MFW* safeguards, the VMware Committee determined that the offer would be contingent on Dell's acceptance of a separate support agreement for the conversion of Dell's shares of Pivotal Class B common stock for VMware stock. ¶ 153. This conversion would be at an implied value per share *less* than the cash being offered to holders of Class A common stock. ¶ 153.

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[4] *See Miramar Police Officers' Ret. Plan v. Murdoch*, 2015 WL 1593745, at *8 n.40 (Del. Ch. Apr. 7, 2015) (taking judicial notice of "reported stock prices because they [were] not subject to reasonable dispute").

Later that day, Dykstra called Lankton and relayed the verbal offer of $13.75 per share of Pivotal Class A common stock. Proxy at 29. Dykstra emphasized that the offer was conditioned on *MFW* safeguards, the Dell support agreement to convert Dell's Class B shares at an implied value per share less than the cash offered to holders of Class A common stock, and the completion of due diligence. *Id.*

F. The VMware and Pivotal Committees negotiate economic terms.

On August 5, the Pivotal Committee met to discuss the VMware Committee's op ning offer. ¶ 158. Morgan Stanley prepared a script for this meeting to give to the Pivotal Committee to use in negotiations against the VMware Committee. ¶ 156. This negotiation script stated [redacted]. *See* ¶ 156; Ex. B (Morgan Stanley, Proposed Script for Pivotal Committee (Aug. 5, 2019)). Morgan Stanley also presented to the Pivotal Committee on [redacted] during which Lankton took diligent notes. ¶ 159. The Pivotal Committee then made a counteroffer to the VMware Committee of $16.50 in cash per share of Class A common stock with a "go-shop" provision allowing the Pivotal Committee to solicit offers from other potential buyers. ¶ 162.

The VMware Committee discussed this counteroffer the next day and raised its offer to $14.25, rejecting the go-shop provision. ¶ 164. The Pivotal Committee countered at $15.75 and reinserted the "go-shop" provision. ¶ 165.

The VMware Committee also considered buying Dell's shares of Pivotal Class B common stock in connection with the transaction. Proxy at 30. The VMware Committee's counsel informed its Pivotal counterpart that the proposal might require Dell to file with the SEC an amendment to its Schedule 13D—Dell's "beneficial ownership report" for its ownership of VMware common stock (the "Amendment"). Proxy at 31.[5]

On August 11, the VMware Committee authorized an opening offer for the su port agreement to acquire Dell's shares of Pivotal Class B common stock at an exchange ratio of 0.0550 of a share of VMware Class A common stock for each share of Pivotal Class B common stock. *Id.* On August 13, Lazard delivered to Dell's financial advisor, Goldman Sachs & Co. LLC, a draft support agreement proposing the 0.0550 exchange ratio to acquire Dell's shares of Pivotal Class B common stock. Proxy at 32. Later that day, the Dell board of directors met to discuss the VMware Committee's offer and directed Dell to file the Amendment. *Id.*

On August 14, the VMware Committee met to discuss making another offer to the Pivotal Committee. Proxy at 32. VMware management told the VMware Committee that the interim due diligence had improved the business case for

[5] *See* 17 C.F.R. § 240.13d-2(a); 17 C.F.R. § 240.13d-101.

acquiring Pivotal. *Id.* The VMware Committee approved a best and final offer of $15 per share of Pivotal Class A common stock, which Lazard gave Morgan Stanley later that day, again with the *MFW* safeguards. ¶ 175; Proxy at 32. The Pivotal Committee agreed to move forward with negotiating transaction documents based on the VMware Committee's $15 per share offer. ¶ 176.

G. The VMware and Pivotal Committees approve the Merger.

Between August 16 and August 22, the Pivotal Committee and the VMware Committee negotiated the terms of a definitive agreement for the transaction (the "Merger Agreement"). ¶ 179; Proxy at 33–35. On August 20, the Pivotal Committee determined to "forgo a 'go-shop' provision in the Merger Agreement." Proxy at 34. Instead, the Pivotal Committee accepted a compromise "window-shop" provision allowing Pivotal to engage in discussions over any unsolicited proposals from third parties. *Id.* No proposals were received. Proxy at 37.

Between August 18 and August 21, the VMware Committee negotiated the support agreement to acquire Dell's shares of Pivotal Class B common stock. Proxy at 34. The parties agreed that each of Dell's shares of Pivotal Class B common stock would be exchanged for 0.0550 shares of VMware Class B common stock. Based on the unaffected trading prices, Dell's consideration was worth $8.30; the Complaint concedes that on a cash basis this is significantly less than the minority stockholders received. ¶ 22.

On August 21, after hearing from its financial advisor that the agreements were fair to VMware from a financial point of view, the VMware Committee resolved to recommend to the VMware Board that it approve the Merger Agreement and the support agreement. Proxy at 35. After this recommendation, the VMware Board approved both agreements. ¶ 181.

The Pivotal Committee discussed the Merger Agreement the next day. ¶ 182. After Morgan Stanley gave its opinion—later confirmed in writing—that the co sideration to Pivotal stockholders was fair, the Pivotal Committee resolved to recommend to the Pivotal Board to enter into the Merger Agreement. ¶ 182; Proxy at 36. The Pivotal Board then approved the Merger Agreement and directed that the agreement be submitted to Pivotal's stockholders for approval by a majority-of-the-minority vote, and Pivotal and VMware executed the Merger Agreement. Proxy at 36–37.

Pivotal issued the Definitive Proxy for the Merger on November 27. ¶ 200. A majority of Pivotal stockholders unaffiliated with VMware or Dell voted to approve the Merger Agreement on December 27, 2019, and the Merger closed on December 30, 2019. ¶¶ 207–08.

H. Plaintiffs commence this litigation.

On December 26, 2019—one day before the Pivotal stockholder vote—Lead Plaintiff Kenia Lopez filed a complaint under 8 *Del. C.* § 220 demanding to inspect

Pivotal's books and records in connection with the Merger Agreement (the "220 Action"). *See* C.A. No. 2019-1032-KSJM (Del. Ch.), Dkt. 1.[6] Plaintiff Lopez and Pivotal settled that action on February 20, 2020. *See id.*, Dkt. 25 (stipulation of settlement). While Pivotal did not concede that Plaintiff Lopez's 220 demand was proper, it agreed to produce documents responsive to Plaintiff Lopez's requests in order to avoid unnecessary litigation. *Id.* Pivotal produced more than six thousand pages of documents—including board and special committee materials as well as emails of Mee, Gaylor, Mr. Dell, and others—to Plaintiff Lopez pursuant to the settlement agreement.

On June 4, 2020, Plaintiff Lopez filed a putative class action on behalf of herself and former owners of Pivotal Class A common stock, alleging that the $15 per share of Class A common stock that they received pursuant to the Merger was unfair. Dkt. 1. On July 16, 2020, Plaintiff Stephanie Howarth filed a second putative class action asserting similar claims after receiving the same 220 documents as Plaintiff Lopez. C.A. No. 2020-0583-KSJM, Dkt. 1. On August 14, 2020, the Court

[6] Plaintiff Lopez served Pivotal with a 220 demand letter on November 21, 2019, nearly two months after Pivotal and VMware announced the Merger Agreement. *Id.* ¶ 6.

granted a stipulation consolidating these two class actions and designating Lead Plaintiff Lopez's Complaint as operative. Dkt. 53.[7]

The Complaint asserts breach-of-fiduciary-duty claims against (i) Dell, Michael Dell, and VMware, in their capacities as purported controlling stockholders of Pivotal, for allegedly entering into the Merger "without ensuring it was entirely fair to Plaintiff[s] and the Class," ¶¶ 230–236; (ii) Michael Dell and Robert Mee, in their capacities as Pivotal directors, for allegedly entering into the Merger "knowing th t the process and price of the [Merger] were not entirely fair to Plaintiff[s] and the Class," ¶¶ 237–242; and (iii) Robert Mee and Cynthia Gaylor, in their capacities as Pivotal executive officers, for allegedly "participating in an unfair take-private process . . . that resulted in an unfair price," ¶¶ 243–248. The Complaint further asserts an aiding and abetting claim against VMware, alleging that it "knowingly participated in the foregoing Defendants' breaches of their duties." ¶¶ 249–54. All Defendants have moved to dismiss for failure to state a claim.

ARGUMENT

VMware's acquisition of Pivotal was both procedurally compliant with Delaware law and entirely fair to Pivotal's minority shareholders, who approved it. It was procedurally compliant with Delaware law in that the alleged controlling

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[7] Lead Plaintiff Lopez and Plaintiff Howarth are collectively referred to as "Class Plaintiffs" or "Plaintiffs."

parties self-disabled, insulating themselves from the negotiations with two different special committees. Indeed, the Complaint contains no cognizable allegations that any controlling parties took an active role in the negotiations. The two special committees negotiated this transaction between themselves.

In deciding a motion to dismiss, the Court need not "accept as true conclusory assertions unsupported by specific factual allegations." *Aspen Advisors LLC v. United Artists Theatre Co.*, 843 A.2d 697, 704 (Del. Ch. 2004). Instead, it accepts on y "well-pled allegations of fact as true and draw[s] all reasonable inferences from those facts in the plaintiffs' favor." *Id*. A plaintiff must base its allegations on the record that actually exists: "The requirement to draw reasonable inferences is not an invitation to irrational, plaintiff-friendly speculation." *Lazard Debt Recovery GP, LLC v. Weinstock*, 864 A.2d 955, 964 (Del. Ch. 2004). The Court accepts "only truly reasonable inferences," *Pfeffer v. Redstone*, 965 A.2d 676, 683 (Del. 2009), not "every strained interpretation of the allegations proposed by the plaintiff," *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001). "Strained interpretation" and "plaintiff-friendly speculation" is precisely what Plaintiffs offer here.

A. The Merger complied with *MFW*'s requirements.

VMware's acquisition of Pivotal is protected by the business judgment rule. The fact that Dell, VMware, and Pivotal share common ownership does not in any way make the transaction suspect; to the contrary, Delaware law *encourages* companies "to replicate the value-enhancing structure of an arms-length transaction and thereby re-invoke the business judgment rule" so that "value-maximizing transactions [still] go forward where they might otherwise be eschewed in light of the onerous entire fairness standard." *Salladay v. Lev*, 2020 WL 954032, at *1 (Del. Ch. Feb. 27, 2020). VMware did everything required of it under Delaware law to obtain business judgment review; indeed it went beyond what was required.

Under *MFW*, "[t]he business judgment standard of review governs mergers pr posed by a controlling stockholder and its corporate subsidiary when conditioned from the beginning 'upon the approval of an independent, adequately-empowered Special Committee that fulfills its duty of care; and the uncoerced, informed vote of a majority-of-the-minority of stockholders.'" *Olenik v. Lodzinski*, 208 A.3d 704, 715 (Del. 2019) (citation omitted).

MFW mandates compliance with the following requirements to "re-capture" the benefits of the business judgment rule. Because it is Plaintiffs' burden to plead a failure of the controller to comply with the *MFW* requirements, *Flood v. Synutra Int'l, Inc.*, 195 A.3d 754, 764 (Del. 2018), the Complaint must plead facts giving rise to an inference of non-compliance with the following six requirements:

i. "the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders";

ii. "the Special Committee meets its duty of care in negotiating a fair price";

iii. "the Special Committee is empowered to freely select its own advisors and to say no definitively";

iv. "the Special Committee is independent";

v. "the vote of the minority is informed"; and

vi. "there is no coercion of the minority."

MFW, 88 A.3d at 645. The Complaint fails to carry this burden. The transaction pr cess diligently followed all six of the requirements to achieve an arm's-length, value-maximizing transaction for Pivotal stockholders.

(i) Requirement #1: VMware committed to the *MFW* conditions before substantive economic negotiations began.

VMware conditioned the Merger on complying with *MFW* from the very beginning. At a minimum, the Complaint pleads nothing from which the Court can infer that substantive economic negotiations occurred prior to the self-disabling of the alleged controllers. *MFW* explains that the "the controller must 'self-disable'" by conditioning the deal on the approval by both a special committee and a majority of minority stockholders. *Olenik*, 208 A.3d at 707 (citation omitted). That disabling action must be taken "before the start of substantive economic negotiations." *Flood*, 195 A.3d at 763. As the Supreme Court made clear, "[t]he essential element of *MFW* . . . is that [its] requirements cannot be dangled in front of the Special Committee, when negotiations to obtain a better price from the controller have commenced, as a substitution for a bare-knuckled contest over *price*." *Id.* (emphasis added). So long as the *MFW* conditions were implemented without jeopardizing these policy concerns, the "*ab initio*" requirement was satisfied. *Id.*

MFW conditions were in place before any substantive negotiations. Plaintiffs have not met their burden to plead non-compliance with the requirement to self-disable. VMware and Pivotal put the *MFW* conditions in place before beginning substantive economic negotiations. Indeed, VMware *exceeded MFW*'s re uirements by promptly creating a special committee—taking any decision-making authority out of the hands of the alleged controllers. In December 2018 and into January 2019, VMware's CEO and directors, including Mr. Dell, preliminarily discussed VMware acquiring Pivotal. ¶ 62; Proxy at 22. On February 1, 2019, those same directors—chaired by Mr. Dell—formed an independent special committee that later resolved that "any proposal made to Pivotal would include a non-waivable condition that the transaction be approved by" both "a special committee of independent Pivotal directors" and a majority of the minority of Pivotal stockholders. ¶¶ 29, 155; Proxy at 23. So even though *MFW* specifically blesses "the *controller*" directly negotiating with the controlled company's special committee, *Flood*, 195 A.3d at 763, here, the alleged "controller[s]" did not negotiate with Pivotal or the Pivotal Committee—the VMware Committee did.[8] The alleged controllers—VMware, Dell, and Mr. Dell—voluntarily "disabled" themselves almost *immediately*. The VMware Committee also made clear that it would follow *MFW* with unwavering fidelity. *See* Proxy at 23. On the Pivotal side of the transaction, it also was clear well in advance of the first offer that any deal would be *MFW*-compliant. Pivotal formed its own special committee on March 15, 2019, and the Pivotal Board conditioned its own authority to approve any merger on th Pivotal Committee's recommendation. ¶¶ 82–83.

The very first offer was made on August 4, 2019, and it was conditioned on compliance with *MFW*. ¶ 155. Even if, contrary to the record, the "self-disabling" had only taken place then, *that would be enough* because no substantive economic negotiations occurred before that. This Court routinely approves of companies including the *MFW* conditions in their first offers—and in some instances even later. *See MFW*, 88 A.3d at 640, 654 (holding *MFW* satisfied where first written offer included MFW conditions); *In re Books-A-Million, Inc. S'holders Litig.*, 2016 WL 5874974, at *8 (Del Ch. Oct. 10, 2016) (same); *see also In re Martha Stewart Living*

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[8] Note that the only way Plaintiffs can claim VMware is a controller is by throwing it into a control group; VMware itself held only 15.8% of Pivotal's stock. ¶ 52. But to the extent that Plaintiffs are attacking Dell and Mr. Dell as the controlling parties, they are yet further from the transaction. And in any event none of the three supposed controllers participated in the negotiations; the two committees did all the negotiation.

Omnimedia, Inc. S'holder Litig., 2017 WL 3568089, at *18 (Del. Ch. Aug. 18, 2017) (explaining *MFW* conditions can be included in the initial offer). The analysis of this factor should end here—the conditions were in place long prior to the first offer; indeed, they were in place many months before.

Plaintiffs' attempt to expand the law should be rejected. Because Plaintiffs cannot meet their burden, they make three equally specious arguments: *first*, that Mr. Dell and VMware's CEO did not invoke *MFW* when they first told Pivotal's C O of VMware's interest; second, that between the formation of the two special committees and the first offer, the companies exchanged some documents; and *third*, that the CEOs of the two companies had dinner in April. This is unsupported by any caselaw.

In the rare cases in which this Court has imposed an obligation to self-disable prior to the first offer, it has always been in the context of unusual facts not present here. For example, in *Olenik,* prior to the *MFW* conditions being implemented, the parties "engaged in a joint exercise to value" the envisioned combined company, which involved presentations by the target to the buyer showing both a low and high valuation for the target. 208 A.3d at 717. This price collar, the Court reasoned, "set the field of play for the economic negotiations to come by fixing the range in which offers and counteroffers might be made." *Id.* Likewise, in *Salladay*, before a special committee had been formed, the CEO and Chairman of the target's board of directors told the buyer to "base an offer on the 'independent value'" of the target "rather than the trading price" and "effectively told [the buyer] that the [target's] Board would be receptive to an acquisition offer of $3.50 to $4.00 per share." *Salladay*, 2020 WL 954032, at *4, 11. The Court reasoned that, like *Olenik*, these "*pre*-committee" "valuation and price discussions" "set the state for future economic negotiations." *Id.* at 12 (emphasis added).[9]

Plaintiffs have nothing like that to allege here. No caselaw supports Plaintiffs' fir t claim that *MFW* must be invoked from the very first, exploratory conversation. And yet Plaintiffs complain that when Pivotal's CEO was informed that VMware was looking into purchasing Pivotal, "M. Dell and Gelsinger did not condition the Acquisition on approval by an independent committee of the Pivotal Board or

[9] Two recent cases confirm the egregious facts necessary to preclude defendants from meeting the "*ab initio*" requirement. In *Arkansas Teacher Retirement System v. Alon USA Energy, Inc.*, 2019 WL 2714331, at *20 (Del. Ch. June 28, 2019), prior to the first offer mentioning the *MFW* conditions for the first time, the controller's CEO and the Chairman of the not-yet-formed-or-even-empowered special committee met six times over a period of six months "to discuss potential deal terms" like "deal structure, exchange ratio, and price terms." The court unsurprisingly held that these discussions qualified as "substantive economic negotiations" such that the "*ab initio*" requirement was not met. *Id.* And in *In re HomeFed Corporation Stockholder Litigation*, the court held that the controller "anchored negotiations and undermined the [s]pecial [c]ommittee's ability to bargain effectively" when it bypassed the special committee to negotiate the exchange ratio of the merger—that is, the price—with the target company's largest minority shareholder, months before the first *MFW* offer. 2020 WL 3960335, at *11 (Del. Ch. July 13, 2020).

disinterested stockholders." ¶ 5. It is settled that "preliminary discussions between a controller's representatives and representatives of the controlled company do not pass the point of no return for invoking *MFW*'s protections." *Olenik*, 208 A.3d at 716. An alleged controller's CEO's "express[ing] interest" to the controlled company's CEO in acquiring his company can hardly be said to move beyond "preliminary discussions." ¶ 64.

Plaintiffs' second claim about the initial exchange of documents can likewise be dispensed with quickly, and for the same reasons. As an initial matter, it is important to note that these documents were exchanged *after* the two special committees were formed. It is entirely proper for documents to be exchanged under such circumstances. And although Plaintiffs try to paint this exchange as nefarious "value-driving diligence" that allowed VMware to run its own financial models by "provid[ing] critical valuation inputs," ¶¶ 16, 73, an assessment of a transaction is the entire point of due diligence; that any document exchange provided useful information is to be expected. The proper legal question is whether this diligence "fix[ed]" the range for offers. *Olenik*, 208 A.3d at 717. It did not, and Plaintiffs fail to plead any facts suggesting to the contrary. There is no allegation of discussions of actual deal terms, much less a price collar for the VMware Committee's offer that anchored the negotiation price from there on out. The exchange of diligence items such as a "Forecast Methodology," ¶ 73, is an absolutely standard, logical first step in any discussion. If the exchange of such materials were enough to "fix the range" of offers like in *Olenik* and *Salladay*, then no diligence could *ever* occur without a would-be acquirer first announcing to the world that any transaction that *could* result from the diligence would be subject to *MFW*'s conditions. *Olenik* and *Salladay both* involved presentations by the target to the buyer giving the buyer *an actual price range* at which to value the target. *Olenik*, 208 A.3d at 717; *Salladay*, 2020 WL 954032, at *11.[10] Nothing like that is alleged here.

Plaintiffs' third claim is equally baseless. The Complaint seeks to make much of a dinner shared by Gelsinger and Mee and takes great pains to try to make it sound suspect. ¶¶ 107–16. But the Complaint concedes that [redacted] ¶ 112. And just two days after this dinner, Mee informed the Pivotal Committee that "it did not appear that VMware would submit a proposal in the near-term." Proxy at 25. If anything was discussed at the dinner, then, it was that VMware would *not* be moving forward with a deal—far from a negotiation over price terms for that deal.

VMware and Pivotal both did exactly what they were supposed to do, and then did even more. The boards on both sides of the transaction decided early on to place

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[10] *Alon USA* involved negotiations over "structure, exchange ratio, and price." 2019 WL 2714331, at *20. And in *HomeFed* the actual price (via the exchange ratio) was negotiated between the controller and the holder of a majority of minority of the company's stock. 2020 WL 3960335, at *12.

any decision to move forward with a proposed transaction in the hands of two committees of disinterested and independent directors. Those committees had full control over the course of diligence and information. And when the VMware Committee decided to make an offer for Pivotal, that offer expressly embodied the two *MFW* conditions. Nothing more is required.

(ii) Requirement #2: The Pivotal Committee met its duty of care.

Plaintiffs have likewise failed to plead that the Pivotal Committee breached its duty of care; to the contrary, the Complaint demonstrates that the Pivotal Committee upheld that duty in an exemplary manner. It does not come close to demonstrating the required gross negligence, and without such a showing it founders. Tellingly, the Complaint contains no claims against *any* special-committee member—whether on the Pivotal or VMware Committee.

"For purposes of applying the [*MFW*] framework on a motion to dismiss, the standard of review for measuring compliance with the duty of care is whether the complaint has alleged facts supporting a reasonably conceivable inference that the directors were grossly negligent." *Books-A-Million*, 2016 WL 5874974, at *17. "[G]ross negligence is a very tough standard to satisfy," *Swomley v. Schlecht*, C.A. No. 9355-VCL, at 73 (Del. Ch. Aug. 27, 2014) (TRANSCRIPT), and requires a plaintiff to "plead and prove that the defendant was 'recklessly uninformed' or acted 'outside the bounds of reason.'" *In re Synutra Int'l, Inc. S'holder Litig.*, 2018 WL 705702, at *5 (Del. Ch. Feb. 2, 2018) (ORDER). The Complaint does not come close to carrying its burden.

Just as in *MFW*, "[t]he record is clear that the [Pivotal] [C]ommittee met frequently and was presented with a rich body of financial information relevant to whether and at what price a . . . transaction was advisable, and thus there is no triable issue of fact as to its satisfaction of its duty of care." *In re MFW S'holders Litig.*, 67 A. d 496, 516 (Del. Ch. 2013). The Pivotal Committee met at least eighteen times over a span of six months. ¶¶ 84, 102, 108, 118–19, 144, 147, 149, 156, 165, 176, 180, 182; Proxy at 24–36. That alone indicates the Pivotal Committee satisfied its duty of care. *See, e.g.*, *MFW*, 88 A.3d at 651 (eight special committee meetings "during the summer"); *Swomley,* C.A. No. 9355-VCL, at 19 (twenty special committee meetings over eight months); *Olenik v. Lodzinski,* 2018 WL 3493092, at *19 (Del. Ch. July 20, 2018) (sixteen special committee meetings over four months), *aff'd in part, rev'd in part on other grounds*, 2018 A.3d 704; *In re Synutra,* 2018 WL 705702, at *6 (fifteen special committee meetings over ten months). Moreover, "[a] committee can satisfy its duty of care by negotiating diligently with the assistance of advisors." *Books-A-Million*, 2016 WL 5874974, at *18. Here, the Pivotal Committee chose a law firm with "considerable familiarity" with Pivotal's options, ¶ 88, and chose a financial advisor for its "substantial experience with" similar transactions, Proxy at 27, its "familiarity with Pivotal, including through its experience as an underwriter for Pivotal's IPO, and [its] expertise in Pivotal's industry," Proxy at 44.

Indeed, even the evidence the Complaint seeks to highlight shows due care. For example, the Complaint includes Lankton's handwritten notes from one of the many meetings. Those notes were made on the first page of a presentation [redacted] ¶ 159. Lankton's notes demonstrate she expressly co sidered [redacted] ¶ 159, by considering all realities of a potential deal (or no deal). This is precisely the thought process of a committee member acting as she should. Lankton's notes also show that she fully examined all considerations during the price negotiations. [redacted] ¶ 159. [redacted] ¶ 159.[11] All of this shows a special

[11] Ironically, the Complaint faults the Pivotal Committee [redacted] yet it also tries to discredit the Committee's selecting Morgan Stanley as its financial advisor—a genuine have-your-cake-and-eat-it argument.

committee intensely committed to considering all variables of the situation [redacted] ¶ 159.

More broadly, the most reasonable inference from the facts pleaded in the Complaint is that the Pivotal Committee acted with due care. It rejected the VMware Committee's initial overtures and offers, submitted multiple counteroffers, and ultimately obtained a transaction price that was 9% higher than the VMware Committee's initial offer and *81% higher* than Pivotal's stock price on the last un ffected day of trading. *See* Proxy at 38. That price also critically resulted in *more* consideration for minority stockholders than the $8.30 received by Dell for its high-voting Class B shares. ¶ 22.

The most the Complaint does is "[r]ais[e] questions such as 'whether the [Pivotal] [C]ommittee could have extracted another higher bid' or 'whether the [Pivotal] [C]ommittee was too conservative in valuing [the company's] future prospects." *In re Synutra*, 2018 WL 705702, at *5. But that "does not plead a violation of the duty of care." *Id.* And neither does "questioning the sufficiency of the price." *Flood*, 195 A.3d at 768. Plaintiffs have failed to plead sufficient facts to raise an inference that the Pivotal Committee breached its duty of care.

(iii) Requirement #3: The Pivotal Committee was empowered to freely select its own advisors and say no.

Plaintiffs have pleaded no facts that suggest that the Pivotal Committee was not "empowered to freely select its own advisors and to say no definitively." *MFW*, 88 A.3d at 645. The Pivotal Committee was empowered to do both.

i. The Pivotal Committee had the ability to select its own advisors.

The Pivotal Board authorized the Pivotal Committee to hire its own legal and fin ncial advisors, and the Pivotal Committee exercised that authority by hiring Latham and Morgan Stanley. ¶ 84; Proxy at 24. The Complaint tries to plead around this *MFW* element by taking issue with the Pivotal Committee's *choice* of advisors rather than its *ability* to make that choice. The Complaint simply asserts—without citing any evidence (even within the 220 production)—that Latham and Morgan Stanley were "pre-selected" by "Pivotal's conflicted management and/or conflicted directors." ¶ 85. The only basis for this assertion is that Latham was selected "immediately" [redacted] ¶¶ 84, 87, [redacted] ¶ 88, and [redacted] ¶ 88. From those three unremarkable facts Plaintiffs ask this Court to hold that the Pivotal Committee did not have the ability to choose its own advisors.[12] This allegation should be dismissed out of hand as purely conclusory.

And if anything, Latham's [redacted] shows only that the Pivotal Committee chose wisely consistent with its duty of care. So, too, for Morgan Stanley, which was picked because of its "substantial experience" with similar transactions, Proxy at 27, its "familiarity with Pivotal, including through its experience as an underwriter for Pivotal's IPO, and [its] expertise in Pivotal's in ustry." Proxy at 44. But therein lies another fatal flaw in this argument: This *MFW* prong does not concern itself with the *choice* of advisors. The choice of the particular advisors is a question of due care. This "advisors" prong instead asks whether the committee "was empowered to freely select its own advisors." *MFW*, 88 A.3d at 645. It was, and the Complaint points to no facts from which any inference could be drawn to the contrary.

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12 [redacted] Preparation and familiarity are typically reasons that advisors get hired. Plaintiffs offer unvarnished speculation when they suggest [redacted] this is precisely the kind of "strained interpretation of the allegations proposed by the plaintiff," *Malpiede*, 780 A.2d at 1083, that courts must eschew.

ii. The Pivotal Committee had the power to say no.

The Pivotal Committee was empowered, among other things, to "elect not to pursue a potential transaction," to "review and negotiat[e] a potential transaction," and to review and negotiate "any other alternative transaction." Proxy at 24. That empowerment went even further: "The Pivotal Board's authority to approve or recommend, or to enter into or consummate, a potential transaction was conditioned upon the receipt of the Pivotal Special Committee's prior favorable recommendation of uch transaction." *Id.*

Notwithstanding these unambiguous statements, the Complaint alleges that this power was illusory [redacted] ¶ 160. This is nothing more than a "strained interpretation of the allegations proposed by the [P]laintiff[s]." *Malpiede*, 780 A.2d at 1083. A special committee's ability to say no is only undermined if the controlling stockholder threatens or coerces its members. *See Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1113, 1119 (Del. 1994); *In re Dole Food Co., Inc. Stockholder Litig.*, 2015 WL 5052214, at *5, 13, 28 n.15 (Del. Ch. Aug. 27, 2015). [redacted]

[redacted]

[redacted] ¶¶ 159–60.[13] Even a brief review of the cases where "serious threats" were found makes clear that these allegations will not suffice. For example, in *Kahn v. Lynch Communication Systems, Inc.*, 638 A.2d 1110, 1113, 1119 (Del. 1994), the controller gave the target's special committee its "final offer" while also making known that it "was ready to proceed with an unfriendly tender at a lower price" if the special committee did not recommend its final offer to the board. The Delaware Supreme Court held that "the ability of the Committee effectively to negotiate at arm's lengths was compromised by [the controller's] threats to proceed with a hostile tender offer" if its final offer were not approved by the committee and recommended to the board. *Id.* at 1121.[14] Similarly, in *In re Dole Food Co., Inc. Stockholder Litigation*, the controller gave "tongue-lashings" to outside directors, left them "threatening [voicemail] message[s]," demanded one resign, and nullified certain board actions. 2015 WL 5052214, at *5, 13, 28 n.15. There are no allegations here of hostile tender offers, demands for

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[13] Here—and indeed, throughout the Complaint—Plaintiffs engage in rhetorical sleight of hand by intentionally "mixing and matching" the actions of the three alleged control parties, VMware, Dell, and Mr. Dell. In many places, they fail to state who allegedly did what or why that purported action was improper.

[14] Back on appeal after having been remanded to the Court of Chancery, the Delaware Supreme Court affirmed the Court of Chancery's decision that the deal was entirely fair because the allegedly coercive conduct did not have a "material influence." *Kahn v. Lynch Commc'n Sys., Inc.* ("*Lynch II*"), 669 A.2d 79, 86 (Del. 1995).

directors to resign, tongue-lashings, or nullifying board action. The Complaint does not allege that Mr. Dell even *contacted* the Pivotal or VMware Committee members, let alone tongue-lashed them or demand they resign if they didn't recommend a deal. *Id.*[15]

Stripped of overheated rhetoric, there is nothing unusual [redacted] ¶¶ 159–60. The very reason for special committees—and even the *MFW* conditions themselves—is to provide safeguards for transactions involving controllers [redacted] That is the reality of *all MFW* cases. If a controller [redacted] takes one outside *MFW*, that case has no vitality.

Indeed, directors can get themselves in trouble when they plunge their heads into the sand and ignore the business realities around them. *See Marchand v. Barnhill*, 212 A.3d 805, 822–23 (Del. 2019). Yet that is exactly what Plaintiffs argue Lankton should have done here [redacted]

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[15] *See also In re MFW*, 67 A.3d at 508 (power to say no existed even though special committee lacked the "practical authority to market [the Company] to other buyers" because of controller's refusal to sell to other bidders); *In re Synutra*, 2018 WL 705702, at *3 (rejecting argument that controller's "refusal to support a competing bid . . . impaired the Special Committee's ability to say no").

[redacted]

Finally, [redacted] For one, the Pivotal Committee consistently rejected the VMware Committee's offers and asked for more cash for Pivotal's stockholders. Every one of those counteroffers came with the risk that the VMware Committee would walk away from the negotiation table. Yet the Pivotal Committee stood strong—[redacted]. And if it was true that "Pivotal could not afford to have a material dispute with Dell or VMware," ¶ 3, then the reverse was equally true: As alleged controllers of Pivotal, a material dispute between the parties also would have impacted VMware and Dell. According to the Complaint, "Dell and VMware had . . . a 62.6% economic stake" in Pivotal. ¶ 50. [redacted][16] No threats were made to the Pivotal Committee, [redacted] and it always retained the power to say no.

[16] To the contrary, the Complaint concedes that both sides had already previously walked away from a deal in 2017 with no collateral damage. ¶ 47; Proxy at 22.

(iv) Requirement #4: The Pivotal Committee was independent and disinterested.

Delaware law "presum[es] directors are independent," *In re MFW*, 67 A.3d at 509, and nothing in the Complaint serves to rebut that presumption. Plaintiffs bear the burden of setting forth well-pleaded facts "supporting a reasonable inference that a director is sufficiently loyal to, beholden to, or otherwise influenced by an interested party so as to undermine the director's ability to judge the matter on its merits." *Books-A-Million*, 2016 WL 5874974, at *9. The plaintiff must further plead that the influence is *material* to the director in question; that is, "[t]he court must conclude that the director in question had ties to the person whose proposal or actions he or she is evaluating that are sufficiently substantial that he or she could not objectively discharge his or her fiduciary duties." *MFW*, 88 A.3d at 649. The Complaint fails to allege sufficient facts to infer that either of the two Pivotal Committee members, Lankton or Klevorn, were insufficiently independent or disinterested.

Plaintiffs admit that on March 15, 2019 "the Pivotal Board formed a special committee . . . consisting of the two directors not appointed directly by Dell: Marcy Klevorn and Madelyn Lankton." ¶ 8. Both of their interests were fully aligned with Pivotal stockholders, and they were independent in every sense of the word. Lankton was herself a minority stockholder, and stock ownership is "a fact that weighs in support of the presumption that a director objectively considered the merits of the proposed corporate transaction in determining how to cast h[er] vote on that transaction." *Orman v. Cullman*, 794 A.2d 5, 27 n.56 (Del. Ch. 2002). Lankton owned 4,152 shares of Pivotal stock. Proxy at 145. It thus was in her interests to obtain the highest price for both herself and Pivotal's other minority stockholders.

Klevorn's interests similarly were aligned with the Pivotal minority. The Complaint casts aspersions on Klevorn for her ties to Ford Motor Company. ¶ 35. Bu even if Klevorn were to have considered Ford's interests—which there is no reason to suppose she did—she would have had every incentive to obtain the highest price possible given what the Complaint alleges was a "significant pre-IPO investment in Pivotal" that Ford already had written down by hundreds of millions of dollars. ¶ 35.

As for Klevorn's and Lankton's independence, the Complaint does not even try to concoct the usual allegations of a web of purportedly compromising business and social relationships between Klevorn and Lankton and any interested party. There are none. *See, e.g.*, *In re LendingClub Corp. Derivative Litig.*, 2019 WL 5678578, at *16–17 (Del. Ch. Oct. 31, 2019).

At most, the Complaint asserts that "Dell and VMware also controlled the composition of the Group II directors, Klevorn and Lankton." ¶ 58. This, however, is of no moment as it is well-settled that "[m]erely because a director is nominated and elected by a large or controlling stockholder does not mean that he is necessarily beholden to his initial sponsor." *Frank v. Elgamal*, 2014 WL 957550, at *22 (Del. Ch. Mar. 10, 2014).[17] Once again, if Plaintiffs' view were to be accepted, the *MFW* safe harbor would lose its vitality. *MFW* applies in transactions involving a controller; the fact that a director was nominated or elected by that controller will be the usual state of affairs. It certainly does not indicate a lack of independence.

(v) Requirements #5 and #6: The stockholder vote was informed and not coerced.[18]

The Complaint alleges a hodgepodge of disclosure claims to argue that the stockholder vote approving the deal was not fully informed. ¶¶ 200–04. For the reasons set forth below, these allegations are wholly unsupported by the facts or caselaw.

As an initial matter, Plaintiffs did not bring this action in a diligent manner. This Court repeatedly has warned that "[t]he preferred method for vindicating truly

[17] *See also In re Rouse Props., Inc. Fiduciary Litig.*, 2018 WL 1226015, at *15 (Del. Ch. Mar. 9, 2018) ("Our case law is clear, however, that the appointment of a director onto the board, even by the controlling stockholder, is insufficient to call into question the independence of that director."); *In re EZCORP Inc. Consulting Agreement Derivative Litig.*, 2016 WL 301245, at *40 (Del. Ch. Jan. 25, 2016) ("[A] director's nomination or election by an interested party is, standing alone, insufficient to raise a reasonable doubt about his or her independence.").

[18] The Complaint does not appear to take issue with the sixth requirement of *MFW* regarding stockholder coercion. At any rate, the stockholder vote here was not coerced.

material disclosure claims is to bring them pre-close, at a time when the Court can insure an informed vote." *Nguyen v. Barrett*, 2016 WL 5404095, at *7 (Del. Ch. Sept. 28, 2016). This is especially true in "the deal litigation context," where "plaintiffs may avail themselves of the relatively low pleading standard of 'colorability' to obtain discovery in aid of disclosure claims before a stockholder vote." *In re Solera Holdings, Inc. Stockholder Litig.*, 2017 WL 57839, at *8 (Del. Ch. Jan. 5, 2017). Here, the Merger was announced on August 22, 2019, and did no close until over *four months* later. ¶¶ 190, 208. Lead Plaintiff Lopez waited *eleven* weeks to send her demand letter on November 7, 2019, which sought, among other things, to investigate whether "securities filings in connection with the Proposed Transaction [were] misleading." Ex. C (Letter from Mark Lebovitch to Andy Cohen (Nov. 7, 2019)). Plaintiff Lopez did not file a 220 complaint until December 26, 2019—another *seven* weeks later. *See* C.A. No. 2019-1032-KSJM (Del. Ch.), Dkt. 1.

Even setting aside the delay, all of Plaintiffs' "failure to disclose" claims are meritless. They are either entirely circular—in that they require accepting Plaintiffs' conclusory assertions—or are of the "tell me more" variety routinely rejected by this Court. *See, e.g.*, *In re Delphi Fin. Grp. S'holder Litig.*, 2012 WL 729232, at *18 (Del. Ch. Mar. 6, 2012).

<u>*The disclosure allegations are entirely circular.*</u> Most of the Complaint's disclosure allegations depend on accepting the Complaint's conclusory allegations. Specifically, the Complaint alleges that the Proxy:

1) misrepresented that the Pivotal Committee's advisors were independent;

2) failed to disclose "facts undermining Latham's" independence;

3) failed to fully disclose "conflicts or conflicted management's role in pre-selecting" advisors;

4) failed to disclose [redacted] and

5) failed to disclose that the Pivotal Committee did not "gain an appropriate 'understanding of the economics' to Dell."

¶¶ 201–03.

The Complaint merely repackages its allegations as disclosure claims. For example, the Complaint fails to allege sufficient facts to infer that the Pivotal Committee's advisors were preselected or that Pivotal management had any role in that selection, or that [redacted] *See supra* Part A(iii)(i), A(vi). The Complaint also fails to explain why Latham's previous work for a Dell *special committee*—whose job it was to negotiate against Dell's alleged controllers on behalf of Dell's Class V minority stockholders in connection with an entirely unrelated transaction—disqualified them from providing the Pivotal Committee with independent advice. ¶ 86. And the Proxy fully disclosed any of Morgan Stanley's possible conflicts. Proxy at 54. The Complaint also points to no facts from which this Court can infer that the Pivotal Committee did not understand the economics of the deal for Dell. "[A] board is not required to engage in self-flagellation" in its public disclosures. *Stroud v. Grace*, 606 A.2d 75, 84 n.1 (Del. 1992).

The remainder of the allegations are immaterial. The rest of the disclosure allegations are a dog's breakfast of the "tell me more" variety routinely rejected by this Court. Although a stockholder vote must be "fully informed," that "does not mean infinitely informed." *In re Merge Healthcare Inc.*, 2017 WL 395981, at *9 (Del. Ch. Jan. 30, 2017). The law thus puts the burden on plaintiffs "to allege *material* deficiencies." *Id.* (emphasis added). To be material, "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available"; that is, "that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder." *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985) (citation omitted).

Plaintiffs complain about many things that they claim they would have wanted to know, including more details about a dinner between Gelsinger and Mee (which was disclosed in the Proxy); the "full value" Dell received from its receiving VMware Class B stock; and more details about Morgan Stanley. ¶¶ 201–03. But Plaintiffs "cite[] no authority nor provide[] any rationale in support of [their] argument that such information would [have] be[en] material to [Pivotal]'s stockholders." *Dent v. Ramtron Int'l Corp.*, 2014 WL 2931180, at *13 (Del. Ch. Ju e 30, 2014). All of this information might be "interesting, but it goes beyond what is material." *In re Dell Techs. Inc. Class V Stockholders Litig.*, 2020 WL 3096748, at *41 (Del. Ch. June 11, 2020).

Nowhere is this more clear than in the supposed failure to disclose that Gelsinger and Mee had a dinner discussion [redacted]. To be clear, [redacted] Plaintiffs are speculating about a topic that might never have even been discussed, and that (if it even occurred) led nowhere. Plaintiffs thus fail to explain why the substance of Gelsinger and Mee's conversation would have had any significance to stockholders considering how to vote, let alone significantly altered the total mix of information. Similarly, Plaintiffs fail to explain how details about the "full value" Dell received from its share exchange (broad categories of information such as Dell's "expansion of ownership" in Pivotal, "tax benefits," "synergies," and "Pivotal's undisclosed results,") would have been material.[19] "[P]laintiffs must explain why receiving [this Dell-specific] information in addition to the basic financial data [about Dell's consideration] already disclosed w[ould] significantly alter the total mix of information available." *In re CheckFree S'holders Litig.*, 2007 WL 3262188, at *2 (Del. Ch. Nov. 1, 2007).

At any rate, the Proxy needed only to disclose "material information *within the board's control*." *In re Cogent, Inc. S'holder Litig.*, 7 A.3d 487, 509 (Del. Ch. 2010) (emphasis added). "Tax benefits," "synergies" from a *different deal*, and the "u side" and "full value" received by another Pivotal stockholder are not "information within the [Pivotal] board's control," even if it were material—which it is not. It is also exactly the type of disclosure claim Plaintiffs should have pursued pre-closing if they truly believed this information was necessary for an informed stockholder vote. *See Nguyen*, 2016 WL 5404095, at *7.

B. The Complaint should be dismissed under the business judgment standard of review.

The Merger fully complied with the *MFW* conditions, and the alleged controllers even added further protections by asking the VMware Board to establish an independent special committee to run the entire deal process on the buy side.

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[19] It is also not clear what Plaintiffs mean by "Pivotal's undisclosed results" since two more quarters of Pivotal's financial results were released to the public before stockholders voted on the deal. *See* Ex. D (Pivotal Software, Inc., Quarterly Report (Form 10-Q) (Sept. 5, 2019)); Ex. E (Pivotal Software, Inc., Quarterly Report (Form 10-Q) (Dec. 6, 2019)).

Accordingly, the business judgment rule applies, and the Complaint must be dismissed "unless no rational person could have believed that the merger was favorable to [Pivotal's disinterested] stockholders." *MFW,* 88 A.3d at 654. A majority of the minority stockholders approving the Merger prevents any inference of that, though, and that is what happened here. *Class V*, 2020 WL 3096748, at *14 (business judgment rule from *MFW* is "irrebuttable"). The Complaint must therefore be dismissed.

C. The transaction survives entire fairness review in any event.

Even if the Merger did not comply with the *MFW* safe harbor and assuming that entire fairness applies only for purposes of this motion, the Complaint still fails to state a claim on the merits. It is well-settled that it "does not alone constitute a wrong" to execute a transaction with a controller that will be subject to entire fairness review. *Solomon v. Pathe Commc'ns Corp.*, 1995 WL 250374, at *6 (Del. Ch. Apr. 21, 1995). Just so here, where the transaction was entirely fair on its face.

"[V]alue to the entity or its stockholders can inhere" in these types of transactions as much as any other, sometimes more. *Salladay*, 2020 WL 954032, at *1. And such transactions "are perfectly acceptable if they are entirely fair." *Monroe Cty. Emps.' Ret. Sys. v. Carlson,* 2010 WL 2376890, at *2 (Del. Ch. June 7, 2010). "Delaware law is clear," therefore, "that even where a transaction between the controlling shareholder and the company is involved—such that entire fairness review is in play—plaintiff must make factual allegations about the transaction in the complaint that demonstrate the absence of fairness." *Id.* "Simply put, a plaintiff who fails to do this has not stated a claim." *Id.* To actually state a claim, "a plaintiff must do more than allege that a transaction is a self-interested one" or that "the majority shareholder benefitted from the transaction." *Solomon*, 1995 WL 250374, at *6. A complaint must contain allegations in addition to those that "if true would render the transaction unfair." *Id.*; *see also Capella Holdings, Inc. v. Anderson*, 2015 W 4238080, at *5–6 (Del. Ch. July 8, 2015) (dismissing entire fairness complaint because it was "[w]ithout well-pleaded allegations about the unfairness of the transaction"); *Ravenswood Inv. Co. v. Winmill*, 2011 WL 2176478, at *4 (Del. Ch. May 31, 2011) (same). The Complaint fails to do precisely that.

"[F]airness has two basic aspects: fair dealing and fair price." *Weinberger v. UOP, Inc.,* 457 A.2d 701, 711 (Del. 1983). Fair dealing "embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained." *Id.* Fair price "relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock." *Id.*

"The entire fairness test is not a bifurcated one; dealing and price must both be considered." *Monroe*, 2010 WL 2376890, at *2. The requirement that both be pleaded is critical in this case because of the paucity of allegations about price; even though price "is often the paramount consideration," *id.*, the Complaint instead focuses almost entirely on process. That is "insufficient to meet the requisite pleading standard." *Id*.

(i) The Complaint fails to allege an unfair price.

What the Complaint does allege about price is devoted to trying to show that Dell obtained "unique benefits" of a "greater value" to Dell. ¶¶ 193, 216. It even goes into tax benefits and synergies that Plaintiffs think Dell achieved. ¶¶ 22–23, 193–97. But "a plaintiff must do more than allege that a transaction is a self-interested one" or that "the majority shareholder benefitted from the transaction" to state a claim. *Solomon*, 1995 WL 250374, at *6. Dell obviously benefitted from the transaction, that was undoubtedly a reason why Dell supported the deal. But that is irrelevant to the proper legal inquiry: whether the deal was entirely fair.

The paucity of the Complaint's allegations about price are also demonstrated by what it does *not* plead. The Complaint fails to include *any* allegations about how Pivotal "could obtain" a better outcome "elsewhere" or "anything about what [Pivotal was] worth relative to the price [VMware] paid." *Monroe*, 2010 WL 2376890, at *2. The Complaint only quibbles with the price based on select analyst reports and malleable DCF analyses. ¶¶ 210–11, 213, 217–19. But "merely alleg[ing] that there are disputes about what the fair price of [Plaintiffs'] shares was" is not enough to show that the price was not entirely fair. *Anderson v. GTCR, LLC*, 2016 WL 5723657, at *7 (D. Del. Sept. 29, 2016). Moreover, the Complaint leaves out something important: The controlling parties were expressly excluded from the $15 per share consideration paid to the minority. Proxy at 114–15. The Complaint therefore "posits no basis for concluding that the [Merger] w[as] priced unfairly." *M nroe*, 2010 WL 2376890, at *2.

(ii) The Complaint fails to allege an unfair process.

The failure to plead adequately that the price was unfair is sufficient to end the analysis, but the Complaint fares no better with its allegations of process. First, claims of an unfair process arising out of the changes in Pivotal's stock price must come to terms with the fact that the stockholder vote on the Merger would not occur *for four months* after it was announced. ¶ 207. During that period, "Pivotal released positive results for the second quarter suggesting the dramatic guidance reductions from three months earlier were, at a minimum, overstated." ¶ 198. Pivotal followed up these "positive results" with another "impressive performance" in the third quarter, which it announced on December 6, 2019—still three weeks before the stockholder vote. ¶ 199. When the stockholders finally voted on the Merger, then, they had ample time and financial data to assess the fairness of the situation for themselves. *Cf. In re Rouse Props., Inc. Fiduciary Litig.*, 2018 WL 1226015, at *21 (Del. Ch. Mar. 9, 2018) (explaining stockholders' receiving "Q4 2015 financial results, along with the rest of the public, . . . nearly four months before the . . . stockholder vote," refutes any argument that "stockholders are being asked to tender shares in ignorance or mistaken belief as to the value of the shares").

Plaintiffs therefore are asking the Court to ignore these stockholders who decided that the Merger price was not just a fair deal but a good one, while Plaintiffs sta ed silent through closing and bided their time to launch their own, personal damages action. That Pivotal's stockholders would not be able to digest this financial information when deciding whether the Merger offered them a "fair price" defies common sense.

Plaintiffs' theory is apparently that Pivotal's directors and management—motivated by reasons completely unknown, and more importantly, *un-alleged*—fraudulently conspired to induce Pivotal to have one bad quarter (followed by two positive quarters) to help VMware buy Pivotal on the cheap. *See, e.g.*, ¶ 131. But there are no facts to support this theory and their own Complaint belies this claim.

For example, the Complaint alleges that Pivotal management was entirely focused leading up to earnings on how to calm the market's reaction—precisely the opposite of what one would expect if they were seeking to drive the price down. Gaylor stressed to her team that [redacted]

[redacted] ¶ 122. In the same vein, Gaylor prepared a script for the June 4, 2019 Q1 2020 earnings call [redacted] ¶ 129. Such statements are entirely inconsistent with an effort to artificially lower Pivotal's stock price.

The Complaint further admits that Gaylor and Mee explained the exact same thi g to the market in the actual earnings call, "t[ying] the mixed results to *transitory* factors." ¶ 134 (emphasis added). For example, Mee stated that while "[s]ome of the deals we expected to close in Q1 slipped[, a] few of those have already closed in early Q2, and we expect some to close in the coming quarters," ¶ 134, and "Gaylor similarly observed that 'the good news there is that we didn't lose the deals[, s]o they're very much still in play,'" ¶ 135. Mee further explained, "We remain confident in our strategy and market opportunity for the long term." Ex. F (Pivotal Software, Inc., Q1 2020 Earnings Call Transcript (June 4, 2019)). Statements like that cannot give rise to any inference of a ploy to decrease Pivotal's market value specifically to allow VMware to purchase it at a decreased price. Rather, Pivotal management was doing everything possible to bolster Pivotal's stock price despite the financial facts on the ground.

At bottom, the Complaint's entire theory of unfairness here—that there was some conspiracy to depress Pivotal's stock price through a fraudulent earnings announcement—is simply not supported by any facts, including the thousands of emails produced to Plaintiffs in response to the 220 complaint.

D. Plaintiffs' tack-on claim for aiding and abetting should be dismissed.

Finally, Plaintiffs toss in a claim against VMware for allegedly aiding and ab tting alleged breaches by the "Controller Defendants," "Director Defendants," and "Officer Defendants." ¶ 250. This claim is circular—the Complaint includes VMware in its definition of "Controller Defendants," ¶ 1—and purely conclusory.

To succeed on an aiding and abetting claim, Plaintiffs must plead facts showing "(1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty, (3) knowing participation in that breach by the defendants, and (4) damages proximately caused by the breach." *Malpiede* v. *Townson*, 780 A.2d 1075, 1096 (Del. 2001) (internal alteration omitted). The Complaint puts forth little effort to meeting this standard and fails to do so for at least three reasons.

First, Plaintiffs have failed to allege any underlying breach of fiduciary duty—precluding any claim for aiding and abetting. *In re Alloy, Inc.*, 2011 WL 4863716, at *14 (Del. Ch. Oct. 13, 2011). *Second*, even if Plaintiffs had adequately alleged any breach of fiduciary duties, the Complaint is "devoid of facts suggesting that [VMware] had any reason to believe [it was] assisting in a breach of fiduciary duty." *Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168, 215 (Del. Ch. 2006). "Knowing participation . . . requires that the third party act with the knowledge that the conduct advocated for or assisted constitutes" a breach of duty. *Malpiede*, 780 A.2d at 1097. "The knowledge standard embedded in [Delaware] aiding and abetting law is 'a stringent one, one that turns on proof of scienter of the alleged abettor.'" *In re Xura, Inc., Stockholder Litig.*, 2018 WL 64 8677, at *15 (Del. Ch. Dec. 10, 2018) (citation omitted).

The allegations here cannot meet this stringent standard. "Plaintiff[s] ha[ve] not alleged anything to support [their] conclusory allegation" regarding VMware's purported knowing participation in any breach of duty. *Id.* The Complaint instead asserts in classic conclusory fashion with no citations that VMware "knowingly participated" in alleged breaches of fiduciary duty. ¶ 251. Nowhere does it allege "any reference to non-conclusory communications . . . that would support an inference of concerted activity," or "facts that would suggest that [any Defendant here] breached [their] fiduciary duties in such 'an inherently wrongful manner' that [VMware] could not help but know of the breach." *In re Essendant, Inc. Stockholder Litig.*, 2019 WL 7290944, at *16015017 (Del. Ch. Dec. 30, 2019) (citation omitted).

Third, assuming VMware did knowingly participate in any breach of duty, the Complaint fails to allege even in conclusory fashion that VMware's alleged participation "constituted *substantial* assistance in causing the [alleged] breach" of duty. *In re Oracle Corp. Derivative Litig.*, 2020 WL 3410745, at *11 (Del. Ch. June 22, 2020) (emphasis added). Delaware law demands more. This claim should be dismissed out of hand.

CONCLUSION

For the reasons set forth above, Defendant VMware, Inc. respectfully requests that the Court dismiss Class Plaintiffs' Verified Class Action Complaint.

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CERTIFICATE OF SERVICE

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