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	:	C. A. No. 2020-0165-KSJM
PIVOTAL SOFTWARE, INC.,	:	
Respondent.	:	
IN RE: PIVOTAL SOFTWARE, INC. STOCKHOLDERS' LITIGATION	:	C.A. No. 2020-0440-KSJM

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Chancery Court Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Tuesday, June 29, 2021
3:16 p.m.

- - -

BEFORE: HON. KATHALEEN St.J. McCORMICK, Chancellor

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TELEPHONIC RULINGS OF THE COURT ON DEFENDANTS' MOTIONS TO DISMISS

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THE COURT: Good afternoon. This is Kathaleen McCormick.

I'll ask, Doug, that you gather appearances for the transcript after I'm done my bench ruling.

This is my bench ruling addressing defendants' motions to dismiss. For the reasons I'll explain, I'm denying the motion, except as to one element of Count III, which I'll be granting.

I'll begin by briefly recounting the facts. I'll try to be brief, anyway. The facts come from the verified class action complaint, which I'll refer to as the "complaint," and documents incorporated therein. Any additional facts are subject to judicial notice.

This case arises from a December 2019 merger between Pivotal Software, Inc., which I will refer to as "Pivotal," and VMware, Inc., which I will refer to as "VMware." I'll refer to the transaction as the "merger."

Pivotal was an enterprise software application company that provided cloud-based platforms that allow customers to efficiently develop and launch applications without the complexity of

building or maintaining their own technology infrastructures.

Pivotal was initially formed by EMC Corporation and VMware in 2013 as a privately held spinoff. In September 2016, before the merger, an entity controlled by defendant Michael Dell, called Dell Technologies Inc., purchased EMC. I'll refer to Dell Technologies Inc. as "Dell." So as not to be confused with Michael Dell, I'll refer to Michael Dell as "Michael Dell."

Before the merger, Dell beneficially owned all of VMware's Class B shares and approximately 28.1 percent of its Class A shares through EMC, giving it control of approximately 97.5 percent of VMware's voting power and an approximately 80.8 percent economic stake.

Dell was also the *de facto* controller of Pivotal before the merger through its interests in EMC and VMware. More specifically, EMC was the beneficial owner of 70.6 percent of Pivotal's voting power and held a 46.8 percent economic stake. VMware was the beneficial owner of 23.8 percent of Pivotal's voting power and held a 15.8 percent economic stake. Through its control of EMC and VMware, Dell held

94.4 percent of Pivotal's combined voting power and a 62.6 percent economic stake across both classes of Pivotal stock before the merger. Dell also appointed six of Pivotal's eight directors, including Michael Dell and Pivotal's CEO, defendant Robert Mee.

Beyond its voting control, Dell also played a significant role in Pivotal's business. Dell and VMware were Pivotal customers. In addition, Pivotal relied on Dell and VMware's sales teams to sell its subscriptions and services. According to an August 15, 2019 RBC analyst report "transactions processed through Dell-EMC and VMware accounted for 37%" of Pivotal's 2018 revenue.

In 2017, principals of Pivotal and VMware executed an NDA and began discussing a possible transaction. VMware received due diligence through this process and the VMware board formed a transaction committee. After these discussions stalled, Pivotal began working toward an initial public offering of its Class A shares. On April 20th, 2018, Pivotal completed its IPO, issuing 37 million Class A shares to the public at $15 per share. Pivotal's share price reached a height of nearly $30 per share by September 2018.

In December 2018 and January 2019, Michael Dell floated the possibility of a transaction between VMware and Pivotal to VMware CEO Patrick Gelsinger and other members of the VMware board. Michael Dell then contacted Mee and another Pivotal director and then-chairman of the Pivotal board, Paul Maritz, to inform them about his interest in a potential VMware/Pivotal transaction. On January 22, 2019, Gelsinger met with Mee and expressed his interest in acquiring Pivotal.

On February 1, 2019, VMware established a special committee to review and evaluate any potential transaction between VMware and Pivotal. And I will refer to this special committee as the "VMware committee." The VMware committee retained Gibson Dunn & Crutcher as its legal counsel and Lazard Frères as its financial advisor.

On February 7th, 2019, VMware sent Pivotal a draft nondisclosure agreement. The parties signed the NDA on March 7th, 2019. On March 8th, 2019, VMware sent Pivotal a diligence list seeking information about Pivotal's business. On March 14th, 2019, Pivotal's CFO, defendant Cynthia Gaylor, told Stephanie Reiter, who was Pivotal's vice president of

corporate finance, that Mee was "inclined to give [VMware] what they want in terms of" diligence materials.

On March 14, 2019, Pivotal announced its fiscal year and fourth quarter 2019 financial results and held an earnings call. Pivotal's financial performance generally exceeded consensus expectations and highlighted growth. Pivotal's fiscal year 2019 revenue grew 29 percent year-over-year, with subscription revenue growing 55 percent. Pivotal's operating income in the fourth quarter of 2019 exceeded expectation, while earnings-per-share outperformed expectations by 3 cents.

On March 15th, 2019, the Pivotal board held a meeting, at which Maritz explained that Pivotal had been approached by VMware about a potential merger. The Pivotal board then formed a special committee consisting of both Group II directors -- Marcy Klevorn and Madelyn Lankton -- to evaluate and negotiate any potential transaction between Pivotal and VMware. I will refer to that special committee as the "Pivotal committee." The Pivotal board agreed not to approve any merger between Pivotal and VMware unless it was recommended by the Pivotal committee.

Shortly after its creation, the Pivotal committee held its first meeting where the committee selected Latham as its legal counsel and Morgan Stanley as its financial advisor.

Following the Pivotal committee's creation, diligence work on a potential transaction continued.

On March 16th, 2019, Gaylor asked for Morgan Stanley's help with VMware's diligence list and noted that Pivotal was "pretty far along." On March 17th and 18th, Gaylor and Reiter continued working on Pivotal's long-term model, including "some high level assumptions on the balance sheet/cash flow -- aka stuff needed to build a dcf."

On March 21st, Pivotal opened the data room for VMware, the VMware committee, and their advisors.

On March 29th, 2019, the Pivotal committee held a meeting and discussed "the current status of the diligence process ... including next steps and outstanding diligence requests."

The Pivotal committee considered "whether other Companies might have an interest in a Potential Transaction with the Company," but decided

against a wider sale process because of Dell and VMware's "ability to prevent an alternative transaction from being consummated."

Also on March 29th, Lazard sent a list of follow-up diligence requests to Pivotal. By this time, Gaylor believed that "they have pretty much all they need [to make an offer] at this point barring any critical items."

On April 1st, 2019, Pivotal provided supplemental diligence to VMware. Morgan Stanley and management formulated "key talking points" for talks with VMware, noting "[w]e have shared an enormous amount of information ... [m]ore than is typical before receiving a preliminary bid."

On April 2nd, 2019, Gelsinger suggested that he and Mee have "dinner sometime next week."

On April 5th, 2019, the Pivotal committee held a meeting with Mee, Pivotal's general counsel Andrew Cohen, Gaylor, Morgan Stanley, and Latham to discuss negotiation strategy and potential ways of progressing discussions with VMware.

The Pivotal committee also considered whether other companies may be interested in acquiring

Pivotal but decided not to contact other companies because of "the Company's governance structure and that such other companies that might otherwise be interested may also take into account that the Company had a controlling stockholder" and because third party discussions may impact "the ongoing negotiations with VMware."

At the meeting, the Pivotal committee also advised Mee and Gaylor that they should not discuss a potential transaction directly with VMware executives. Following this advice, Mee postponed the scheduled dinner with Gelsinger. Upon receiving Mee's postponement, Gelsinger expressed disappointment, writing "I consider this most unfortunate as I wanted to discuss with you thoughts on integration strategy, go forward strategy and your potential role at VMware." Reversing course, Mee responded that based on the proposed agenda, the dinner need not be postponed.

On April 8th, Mee emailed the Pivotal committee seeking approval to meet Gelsinger for dinner. Mee told the Pivotal committee that the dinner would contain no discussion about deal terms. Mee neglected to tell the Pivotal committee that the

proposed agenda for the meeting included integration strategy, go forward strategy, and Mee's potential role at VMware. The Pivotal committee approved of the dinner based on Mee's description of the agenda.

On April 10th, Mee and Gelsinger met for dinner, during which Gelsinger told Mee that VMware was working on other matters and as a result, was slowing down the process toward a potential transaction.

On April 12th, the Pivotal committee met to discuss VMware's diligence process and next steps. At the meeting, Mee informed the Pivotal committee that VMware was unlikely to submit an offer in the near-term.

On April 19th, at a Pivotal committee meeting, Morgan Stanley confirmed that VMware would not be making a proposal. Based on this information, "the Committee determined to pause the due diligence process."

On May 23rd, 2019, Michael Dell forwarded Mee an email he had sent to Gelsinger earlier in the month. In the email, Michael Dell wrote that "Raven," which was the codename VMware gave the potential transaction, "will be very powerful."

Michael Dell's email to Mee also included Gelsinger's response, in which he explained that there was "[t]oo much friction between VMW and Pivotal field teams leading both to be less effective than desired." Gelsinger concluded the email with "[s]imply, need to get it done."

On May 29th, Mee responded to Michael Dell, writing "[l]et's touch base by phone when you can regarding Raven."

On June 4th, 2019, Pivotal held an earnings call to report Q1 2020 results and provide updated guidance, informing investors that Pivotal's remaining performance obligation, or RPO -- a noncash metric estimating future expected revenue from existing contracts -- was up only 10 percent year-over-year, below the mid-teens estimate Pivotal management provided previously. Pivotal management also informed investors that "[i]n Q2, we expect RPO to be flat year-over-year relative to Q2 of last year." These results -- and management's warning -- effectively cut Pivotal's growth rate in half. Pivotal management explained that the drop was caused by some of the deals that management expected to close in Q1 slipping into Q2.

In addition to its missed guidance, Pivotal cut its fiscal year 2020 topline revenue guidance from $798 to $806 million to a range of $756 to $767 million. For Q2 2020, Pivotal projected total revenue of approximately $10 million below consensus.

Following the earnings call, numerous investment banks reduced their price targets. Pivotal's stock price dropped from $18.54 on June 4th, 2019 to $10.89 on June 5th; roughly a 41 percent decline.

Diligence between Pivotal and VMware restarted in July 2019. On July 3rd, Lazard sent additional diligence requests to Morgan Stanley. Pivotal responded to these requests on July 12th. On July 15th, the Pivotal committee met and discussed the diligence requests and the progress to date. The meeting minutes state that the Pivotal committee "determined not to contact other companies that might have an interest in acquiring Pivotal." Over the next several days, Pivotal and VMware exchanged information regarding due diligence requests and related matters.

On July 29th, 2019, the Pivotal committee held a meeting at which the committee noted that "the preliminary due diligence process was

substantially complete" and again chose "not to contact other companies that might have an interest in acquiring Pivotal."

Pivotal's Q2 2020 closed on August 2, 2019. That evening, Gaylor asked's Pivotal vice president of finance, Roger Martin, to confirm that based on a preliminary reading of the results, Pivotal "would expect to be at the top end of our guidance range" for total revenue. Martin confirmed that Gaylor's reading was accurate.

On August 4th, 2019, Lazard informed the VMware committee that Pivotal expected to meet or exceed its forecasted revenue for the second quarter. Later that day, VMware made an offer to buy out Pivotal's Class A stockholders for $13.75 per share in cash. The offer represented a premium over Pivotal's stock price, which had closed the day before at $9.52 per share.

VMware made the offer contingent upon Dell's acceptance of a support agreement concerning "the conversion of the shares of Class B common stock held by Dell for shares of VMware." As part of its offer, VMware also conditioned any agreement "on the affirmative vote by the holders of a majority of

Pivotal common stock unaffiliated with Dell and VMware" and on "approval of the Pivotal Special Committee."

On August 5th, the Pivotal committee met to discuss the offer. Morgan Stanley advised that Pivotal not counter VMware's offer, but instead respond that "$13.75 is not a basis upon which we are prepared to engage" because, among other reasons, "the offer is not even at the IPO price ($15)."

Lankton took handwritten notes during Morgan Stanley's presentation, writing: "Michael wants this deal done!"; "Pat [Gelsinger] won't do Pivotal any favors if the deal doesn't happen"; and "Michael [Dell] -- if Pivotal is on its own -- can't get Pat to play." Lankton's notes also reflect disagreement between Morgan Stanley and Mee about whether the Pivotal committee should counter VMware's offer. Specifically, Lankton's notes indicated that Morgan Stanley advised against countering, but Mee encouraged the Pivotal committee to make such a counteroffer.

The Pivotal committee eventually determined to counter VMware's offer at $16.50 in cash for each Class A share. This counteroffer also

included a go-shop provision. On August 6, the VMware committee upped its offer to $14.25 in cash per Class A share, but rejected the inclusion of a go-shop provision. After meeting about this revised offer, the Pivotal committee decided to counter again, this time at $15.75 in cash per Class A share and again with a go-shop included. During these negotiations, Pivotal management was also continuing to prepare Pivotal's Q2 financial results, which continued to trend positively.

On August 9th, Gibson Dunn -- the VMware committee's legal counsel -- told Latham that "Dell may need to file an amendment to its Schedule 13D in respect of its ownership of VMware common stock, which would likely include the status of negotiations of the parties."

On August 10th, Gaylor sent Morgan Stanley a document that Pivotal management planned to provide to VMware. The document explained that Pivotal's Q2 performance was "ahead of street consensus estimates for revenue and operating income."

On August 11th, Lazard discussed with the VMware committee that "Pivotal's updated expectations for its recently completed financial

quarter showed revenue and operating profits higher than previously communicated."

On August 14th, the VMware committee approved the best and final offer of $15 per share of Pivotal Class A common stock and Lazard communicated the proposal to Morgan Stanley. Upon receiving the offer, the Pivotal committee "determined that it would be willing to proceed with negotiating transaction documents on the basis of VMware's latest proposal, subject to understanding the economics of the exchange of shares of Class B common stock held by Dell for shares of VMware Class A common stock."

Later on August 14th, Dell filed its Schedule 13D, disclosing that VMware and Pivotal committees "are proceeding to negotiate definitive agreements with respect to a transaction to acquire all of the outstanding shares of Class A common stock of Pivotal for cash at a per share price equal to $15.00."

On August 21st, the VMware committee and board approved the merger.

On August 22nd, the Pivotal committee held a meeting and recommended the merger to the Pivotal board. The Pivotal board -- with the

exception of Group I directors Egon Durban and Zane Rowe, who abstained -- voted later that day to approve the merger. Later that day, Pivotal and VMware issued a joint press release announcing the merger. In addition to the $15 per share of Class A common stock, the press release disclosed that "Pivotal's Class B common stockholder, Dell Technologies, will receive approximately 7.2 million shares of VMware Class B common stock, at an exchange ratio of 0.0550 shares of VMware Class B common stock for each share of Pivotal Class B common stock." As a result of this exchange, Dell increased its economic stake in the entity from 62.6 percent to 81 percent and reduced its economic stake in VMware by approximately 0.2 percent.

On September 4th, Pivotal released its financial results for Q2 2020. Pivotal reported total revenue of $192.9 million for the quarter, exceeding its guidance range of $185 to $189 million and consensus estimates of $186.57 million. Pivotal also beat earnings per share estimates by $0.04.

On November 27th, Pivotal issued its proxy seeking stockholder approval of the merger. Pivotal supplemented the proxy on December 27th. Also on December 27th, Pivotal stockholders approved the

merger, which closed three days later. Pivotal's Class A stockholders received $15 per share in cash, while Dell received 0.0550 shares of VMware Class B stock for each Pivotal Class B share.

Lead plaintiff Kenia Lopez was a Pivotal stockholder at all relevant times. On December 26th, 2019, the plaintiff filed a complaint under Section 220 of the Delaware General Corporation Law to enforce her rights to inspect Pivotal's books and records in connection with the merger. The plaintiff and Pivotal settled that action on February 20th, 2020. On June 4th, 2020, the plaintiff filed this action on behalf of herself and former owners of Pivotal Class A common stock.

Her complaint asserts four counts.

Count I asserts a direct claim against Dell, Michael Dell, and VMware for breaching fiduciary duties they owed to Pivotal's Class A stockholders by virtue of their status as controlling stockholders of Pivotal.

Count II asserts a direct claim for breach of fiduciary duty against Michael Dell and Mee as Pivotal Group I directors.

Count III asserts a direct claim for

breach of fiduciary duty against Mee and Gaylor as executive officers of Pivotal.

Count IV asserts a claim against VMware for allegedly aiding and abetting Michael Dell, Mee, and Gaylor's breaches of fiduciary duties.

The defendants have moved to dismiss the complaint pursuant to Court of Chancery Rule 12(b)(6) for failure to state a claim. The motions to dismiss were fully briefed on January 29th, 2021, and I held oral argument on April 27th, 2021.

I want to take a brief break to get water, and then I'll turn to the legal analysis. And I apologize for not keeping to my promise to keep the facts brief.

Turning to the legal analysis. Under Delaware law, the governing pleading standard is reasonable conceivability. When considering a motion to dismiss under Rule 12(b)(6), the Court must "accept all well-pleaded factual allegations in the [c]omplaint as true, ... draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof." And that's a quote from

Central Mortgage.

This court, however, need not "accept conclusory allegations unsupported by specific facts or ... draw unreasonable inferences in favor of the non-moving party." And that's a quote from *Price v. E.I. Du Pont*.

Plaintiff contends that Michael Dell, Dell, and VMware stood on both sides of the merger and as a result, the merger triggers the entire fairness standard of review. Defendants do not dispute that Pivotal was a controlled company, nor could they given Dell's majority voting control of Pivotal through EMC and VMware. Instead, defendants' primary argument in support of dismissal is that the business judgment standard applies under *Kahn v. M & F Worldwide Corp*. -- or *MFW*, as it's more commonly known by -- and that the complaint fails to state a claim under that standard.

Under *MFW*, a claim is subject to the business judgment standard of review if six prerequisites designed to protect the rights of the minority stockholders are present. Those prerequisites, set forth at page 639 of the Supreme Court's *MFW* decision, are well known and I

will not repeat them here.

Plaintiff challenges three of the prerequisites, contending (ONE), that the *MFW* conditions were not imposed early enough or *ab initio* or at the "germination stage"; (TWO), that the Pivotal committee was not sufficiently empowered or informed; and (THREE), that the stockholder vote was not fully informed.

I'll focus my analysis on the first challenge concerning the *ab initio* requirement, which I view as dispositive on this issue.

For the business judgment standard to apply under *MFW*, an alleged controller must invoke the *MFW* conditions "at the outset of the process." In *Flood v. Synutra International, Inc.*, our Supreme Court concluded that the timing requirements of *MFW* are satisfied "so long as the controller conditions its offer on the key protections at the germination stage of the Special Committee process, when [the committee] is selecting its advisors, establishing its method of proceeding, beginning its due diligence, and has not commenced substantive economic negotiations with the controller[.]"

The Court made clear that the

ab initio requirement eschews a bright-line test in both directions; it does not require that the first proposal be conditioned on *MFW* protections, nor does it necessarily bless a process in which the first proposal contains such conditions. Instead, the inquiry is highly fact-specific: Were the procedural protections "put in place early and before substantive economic negotiations took place"? becomes the relevant question.

Delaware courts have found the *ab initio* requirement unmet in *Olenik*, where "the parties engaged in a joint exercise to value" a target company and, in *Alon USA Energy*, where negotiations involved "the deal structure, exchange ratio, and price terms."

Here, the parties seemingly agree that the deal was not conditioned on *MFW* protections until August 4th, 2019, when VMware made its first offer to the Pivotal committee.

The parties disagree about whether the complaint sufficiently alleges that substantive economic negotiations occurred before August 4th.

In my view, the well-pled allegations in the complaint support a reasonable inference that

substantive economic discussions or negotiations between VMware and Pivotal occurred before August 4th. The complaint alleges that before August 4th, before the merger was conditioned on *MFW* protections (ONE), the Pivotal committee had already engaged Morgan Stanley as its financial advisor and Latham as its legal counsel and "principals of VMware and Pivotal executed an NDA" to permit the exchange of non-public information.

(TWO), executives at VMware and Pivotal participated in numerous diligence meetings in which Pivotal shared detailed and confidential information.

(THREE), Mee and Gelsinger met for dinner to discuss how the potential combined company would be run after the merger was complete. That discussion included topics such as "integration strategy, go forward strategy, and [Mee's] potential role at VMware."

(FOUR), Pivotal provided VMware "an enormous amount" of nonpublic information. Indeed, Morgan Stanley expressly noted in talking points with Pivotal's management that the amount of information Pivotal provided to VMware was "[m]ore than is typical

before receiving a preliminary bid."

(FIVE), the Pivotal committee determined that "the preliminary due diligence process was substantially complete" and VMware management expressed that "confirmatory due diligence" was all that remained.

These facts, considered in their totality, support a reasonable inference that the *MFW* conditions were not in place at the germination stage.

The amount of time between the Pivotal committee's creation and VMware's first offer -- paired with these other allegations -- further support a reasonable inference that substantive economic negotiations occurred before August 4th. As the complaint highlights, VMware did not make an offer conditioned on *MFW* until 199 days after Michael Dell informed Mee that VMware was exploring an acquisition of Pivotal. The first offer was also 143 days after the Pivotal committee was formed.

In contrast, 18 days passed between VMware's first proposal on August 4th and the Pivotal committee's approval of the merger on August 21st. I make this point not to set a timeline by which *MFW* protections must be put in place. Certainly, *Flood v.*

Synutra says that there is no bright-line rule and that the inquiry is substantive. Still, coupled with the other allegations, the passage of time supports a reasonable inference that the merger was not conditioned on *MFW* early enough in the process, and that substantive economic negotiations occurred before August 4th.

Perhaps most supportive of this conclusion, the complaint alleges that the Pivotal committee believed negotiations between the parties had begun well before August 4th. Specifically, at paragraph 108 of the complaint, the plaintiff describes an April 5th, 2019 Pivotal committee meeting at which the Pivotal committee "determined not to contact other companies" regarding a potential acquisition of Pivotal because of how a leak of such third-party discussions could affect "the ongoing negotiations with VMware." From this statement -- made some four months before the merger was conditioned on *MFW* -- it is reasonable to infer that negotiations were ongoing at that time.

Furthermore, construing the complaint in the light most favorable to the plaintiff, it is reasonably inferable that those "ongoing negotiations"

between Pivotal and VMware included substantive economic terms. Indeed, far from contending otherwise, defendants seem to at times ignore the substance of this allegation and request a defense-friendly inference that I may not make at the pleading stage.

In sum, the complaint adequately pleads at this stage of the case that the *ab initio* requirements of *MFW* was not satisfied because the merger was not conditioned on *MFW* protections "early and before substantive economic negotiation took place." Because I find this requirement not satisfied at this stage, I need not address the parties' other arguments concerning *MFW*.

I'll turn to the next argument made by defendants in support of dismissal. Against the great weight of Delaware precedent, defendants argue that "[e]ven if the Merger did not comply with the *MFW* safe harbor and assuming that the entire fairness applies ... the Complaint still fails to state a claim on the merits."

Application of entire fairness review "typically precludes dismissal of a complaint under Rule 12(b)(6)," as this Court noted in *Sciabacucchi v.*

Liberty Broadband Corp. "The concept of fairness has two basic aspects: fair dealing and fair price," as the Supreme Court noted in *Weinberger*.

Fair dealing, per *Weinberger*, fair dealing addresses "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." Again, per *Weinberger*, fair price concerns "the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and other elements that affect the intrinsic or inherent value of a company's stock."

Defendants' arguments that the complaint fails to state a claim under the entire fairness standard are premature and quarrel with the facts alleged in the complaint and further ask the Court to make defendant-friendly inferences that are improper at a motion to dismiss stage. Having closely reviewed the complaint, the allegations therein adequately allege that the process and price were not entirely fair to Pivotal's Class A stockholders. Because I find it is reasonably conceivable that the

conditions of *MFW* were not satisfied, Count I states a claim for relief against Michael Dell, Dell, and VMware.

I will now address the motions to dismiss Counts II and III, which assert breach of fiduciary duty claims against Michael Dell and Mee in their roles as Pivotal board members and Mee and Gaylor in their roles as Pivotal executives, respectively.

I'll start with Michael Dell. His primary argument in support of dismissal is that the complaint fails to state a claim under *MFW*. As I've already discussed, I disagree. The complaint adequately alleges at this stage that entire fairness, not business judgment, is the applicable standard of review. And the complaint adequately alleges a claim under the entire fairness standard. As such, Mr. Dell's first argument is without merit.

Mr. Dell does not make any separate argument regarding Count II. Instead, under the framework of *MFW*, he seems to contend that the complaint should be dismissed because it fails to allege that he "Interfered in the Pivotal/VMware Negotiations."

But this argument is contradicted by the reasonable inferences drawn from the complaint. Specifically, the complaint alleges after VMware determined to pause negotiations, Mr. Dell forwarded an email exchange between himself and Gelsinger to Mee, in which Michael Dell stated that "Raven will be very powerful" and Gelsinger responded that the parties "need to get it done." Mee responded to Michael Dell's email, writing "Let's touch base by phone when you can regarding Raven." These allegations, drawing all inferences in favor of the plaintiffs, as I must, reflect that Michael Dell did not totally abstain from the process, as his briefing suggests. So this nuanced argument made by Mr. Dell, in addition to relying on the *MFW* arguments, fails on its face, and Count II states a claim against Michael Dell.

Turning to Mee and Gaylor. Both argue that the complaint fails to state a claim because "the Complaint fails to allege any misconduct by them that could constitute a breach of their fiduciary duties to Pivotal's shareholders." In response, plaintiff argues that Mee and Gaylor "played a critical role in negotiations -- including, most significantly,

affecting's Pivotal stock price by releasing unduly pessimistic guidance -- and acted to support Dell's best interests by pushing through an unfair transaction."

As Vice Chancellor Laster observed in *Ezcorp Inc. Consulting Agreement Derivative Litigation*, "senior corporate officers generally lack independence for purposes of evaluating matters that implicate the interests of a controller."

Per the Court's discussion in *In re Baker Hughes Incorporated Merger Litigation*, whether an executive lacks independence or is interested is not the sole inquiry. Instead, the Court must also consider whether, even "assuming they were so motivated," the corporate officers "tainted the decisionmaking of" the ultimate decider -- in this case the Pivotal committee.

So I'll layer on the *Baker Hughes* guidance in conducting this analysis.

With that framework in mind, the complaint adequately alleges facts to support a breach of fiduciary duty claim against Mee, but not Gaylor.

Beginning with Mee, the complaint alleges that he was intimately involved in the

negotiations and withheld material information from the Pivotal committee regarding his potential future employment. Specifically, the complaint alleges that after Mee initially rejected Gelsinger's offer to have dinner, he eventually agreed when Gelsinger informed him that the dinner would involve discussions about "integration strategy, go forward strategy and [Mee's] potential role at VMware ...."

When seeking the Pivotal committee's approval for the dinner, Mee omitted any mention of these agenda items, including Gelsinger's desire to discuss Mee's future employment.

Mee argues that this omission and talk regarding his future employment is irrelevant because "there are no facts to suggest any employment offer was ever made, much less that Mr. Mee would ever have considered accepting a position had it been offered." This argument seeks a defendant-friendly inference that no discussion about Mee's future employment occurred at the dinner and also misconstrues and oversimplifies problems with this interaction. As pled, the facts support an inference that Mee and Gelsinger discussed a potential role for Mee at VMware post-merger and that the Pivotal committee was unaware

of these discussions throughout the sales process. And that to me is enough to implicate Mee.

Additionally, the complaint alleges that after the dinner between Mee and Gelsinger, Mee advocated for continued negotiations between the two sides. Specifically, the complaint alleges that after the Pivotal committee received VMware's first offer on August 4th, Morgan Stanley advised Pivotal not to make a counteroffer, but instead to tell VMware that "$13.75 is not a basis upon which we are prepared to engage." According to Lankton's notes from the Pivotal committee's August 5th meeting, Mee disagreed with this assessment and advocated for the Pivotal committee to make a counteroffer. The Pivotal committee -- again, unaware of Mee's potential future role at VMware or the alleged discussions concerning that potential future role -- heeded Mee's advice and made a counteroffer at $16.50 a share.

These allegations are sufficient to sustain a breach of fiduciary duty claim against Mee under the *Baker Hughes* framework, assuming that's our law. As such -- and because it's premature to determine whether Mee took these actions in his role as Pivotal's CEO or as a Pivotal director -- Counts II

and III are adequately stated against Mr. Mee.

Turning to Gaylor, plaintiff's sole arguments to support the breach of fiduciary duty claim is that Gaylor "facilitat[ed] VMware's expansive diligence in order to dominate price negotiations" and "affect[ed] Pivotal's stock price by releasing unduly pessimistic guidance."

The problem with these two allegations as to Gaylor is the fact that Gaylor facilitated diligence and released guidance standing alone does not necessarily implicate Gaylor and does not necessarily state a claim for breach of fiduciary duty against Gaylor. In this instance, I find the allegation simply insufficient.

As to the diligence, nothing in the complaint, again, suggests that Gaylor provided diligence to VMware that was not authorized by the committee as to the updated guidance. Plaintiff's argument is that Gaylor breached her fiduciary duty because the actual Q2 2020 performance exceeded the reduced guidance she helped prepare, but nothing in the complaint supports an inference that Gaylor acted improperly in carrying this out. And nothing prevented the Pivotal committee from reviewing the

revised guidance, rejecting it, and refusing to negotiate until Pivotal's stock price recovered.

For these reasons, the complaint fails to state a claim for breach of fiduciary duty against Gaylor; and as such, Count III is dismissed as to her.

I will now address Count IV, which asserts an aiding and abetting claim against VMware. A claim for aiding and abetting requires: "(1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty, and (3) knowing participation in the breach.

VMware contends that this claim should be dismissed because "Plaintiffs do not point to any facts showing that VMware knowingly participated in any breach ... and they absolutely do not point to any facts showing that VMware substantially assisted in causing the breach." Plaintiff responds that her aiding and abetting claim should survive in the alternative to her breach of fiduciary duty claim because "VMware is liable as an aider-abettor because it was the entity that [Michael] Dell and Dell used to effectuate their breach."

In *EZCorp*, Vice Chancellor Laster noted that "[a]lthough ... a breach of fiduciary duty

claim provides the more straightforward way" of finding liability, "Delaware authority supports the proposition that the entity through which the ultimate controller exercises control can be sued alternatively as an aider and abetter of the ultimate controller's breach."

Here, because I find that Count I states a claim for breach of fiduciary duty against VMware, it would be premature to dismiss the alternatively pled aiding and abetting claim. As such, that motion is denied.

So in sum, I'm denying defendants' motion to dismiss Counts I, II, and IV. As to Count III, I am denying the motion except as to Gaylor.

And I ask that the parties confer and submit a form of order implementing this ruling.

With that, are there any questions?

MR. VARALLO: Not from the plaintiff's side, Your Honor. Thank you very much.

THE COURT: All right. Well, thank you for getting on the line today and thank you for your patience during this rather long bench ruling. I appreciate it.

We are adjourned.

(Proceedings concluded at 3:59 p.m.)

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CERTIFICATE

I, DOUGLAS J. ZWEIZIG, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 4 through 38 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Chancellor of the State of Delaware, on the date therein indicated, except for the rulings, which were revised by the Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 12th day of July, 2021.

/s/ Douglas J. Zweizig

Douglas J. Zweizig
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter