IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MASSACHUSETTS LABORERS' ANNUITY FUND,	:	
Plaintiff,	:	
v	:	C. A. No. 2020-0990-JTL
DAVID M. CORDANI, NICOLE S. JONES, ERIC J. FOSS, ISAIAH HARRIS, JR., ROMAN MARTINEZ IV, JOHN M. PARTRIDGE, ERIC C. WISEMAN, DONNA F. ZARCONE, TENEO HOLDINGS, LLC, and TENEO STRATEGY, LLC,	:	
Defendants.	:	

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Chancery Courtroom No. 12B
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Thursday, April 7, 2022
1:00 p.m.

- - -

BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor

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ORAL ARGUMENT and RULINGS OF THE COURT ON DEFENDANTS' MOTIONS TO DISMISS

CHANCERY COURT REPORTERS
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THE COURT: Welcome, everyone.

ATTORNEY MORITZ: Good afternoon, Your Honor.

THE COURT: Mr. Varallo, I see you're already at the podium.

ATTORNEY VARALLO: Your Honor, may it please the Court. Greg Varallo for the plaintiff. With me today from Berman Tabacco in Boston is my co-counsel Nathaniel Orenstein. He's been admitted *pro hac* and, with Your Honor's permission, will make the argument today.

THE COURT: Great. Thank you.

ATTORNEY VARALLO: Thank you, Your Honor.

THE COURT: And for the defendants?

ATTORNEY MORITZ: Good afternoon, Your Honor. Garrett Moritz from Ross Aronstam on behalf of the Cigna defendants. I'm joined by my colleague Ben Grossberg, and I'm also joined by co-counsel from Wachtell Lipton, Ted Mirvis and Graham Meli. And Mr. Mirvis has been admitted *pro hac vice*, and with the Court's permission, he will be presenting argument today.

THE COURT: Great. Well, thank you

all for being here as well.

ATTORNEY MIRVIS: Thank you, Your Honor.

ATTORNEY NORMAN: Good afternoon, Your Honor. Steve Norman on behalf of Teneo. I'd like to introduce Mr. David Hennes, Martin Crisp, and Kyle Shaub. With Your Honor's permission, Mr. Hennes will make the argument today.

THE COURT: Sure. And thank you all for making the trip as well.

ATTORNEY NORMAN: Thank you, Your Honor.

THE COURT: Okay. Mr. Mirvis.

ATTORNEY MIRVIS: Thank you, Your Honor. Good afternoon, and may it please the Court. Ted Mirvis for the Cigna defendants. With the Court's permission, I'd like to reserve, if I have any time left from my 30 minutes.

This is the time set by the Court for argument on defendants' motions to dismiss. The Cigna defendants advance two grounds: demand and timeliness.

On demand, we submit that *Zuckerberg* is controlling. That is probably common ground with my friends, although which way it controls, maybe not

so much. But if one first just lays side by side the basics of the two cases, it seems apparent that the allegations here fall short of even what was insufficient in *Zuckerberg*. *Zuckerberg*, the claim was that directors had approved the transaction to benefit Mr. Zuckerberg. Here, the claim is that the directors' conduct benefited Mr. Cordani.

Mr. Zuckerberg was a controlling shareholder. Mr. Cordani is not. Zuckerberg was an entire fairness transaction case assumed not to be entirely fair. Here, an arm's length cash-and-stock merger with a third-party competitor of Cigna.

In *Zuckerberg*, there were multiple allegations of connections between individual defendants and the CEO-controller. Here, there are no allegations of connections between the directors and Cordani outside of the business of Cigna.

If we then kind of double-click on *Zuckerberg*, the Supreme Court adopted this Court's -- Your Honor's -- three-prong test, which asks, on a director-by-director and claim-by-claim basis, three things: Did the director receive a material personal benefit? Did the director face a substantial likelihood of personal liability? Or did the director

lack independence from someone who fit in categories 1 and 2?

Here, six of the thirteen directors on the demand board are new. No allegation of futility as to them. So the plaintiff has to run the table on each of the six directors other than Cordani, on director-by-director, claim-by-claim, individually, no lumping allowed, based on what *Zuckerberg* called particularized factual allegations -- a stringent requirement; and all, in the face, of course, of a 102(b)(7).

The futility allegations are at paragraphs 208 to 19 of the complaint, five pages. A considerable amount of repetition, but that's all there is to look at.

Zuckerberg 1 is out right away. There is no allegation of material personal benefit as to any of the six directors.

The complaint's focus, rather, is, I think, on *Zuckerberg* 3, independence. Prong 3 requires particularized factual allegations that the director lacks independence from someone who either got a material personal benefit or faces a potential likelihood of liability. Here, in this case, that

means lacks independence from CEO Cordani; assuming, as we do on the motion, that Cordani was interested.

Now, the Supreme Court, in *Zuckerberg*, affirming Your Honor's opinion, dilated on what "independence" means under prong 3. It said it requires particularized facts creating "a reasonable doubt that a director is ... so 'beholden'" -- so beholden -- "to [that person] ... that his or her 'discretion would be sterilized.'" Or perhaps, if pled facts show the "director may feel [] subject to the interested party's dominion ...."

What's alleged on independence here? There are no allegations of financial ties, no social or similar connections, no vacations, partying, the like. No yachts. No pictures from social media. Nothing alleged of any connection outside the boardroom and the business of Cigna. Indeed, the complaint alleges that five of the six demand directors were on the board before Mr. Cordani joined it in October 2009. As to Mr. Harris, Mr. Martinez, Mr. Wiseman, Ms. Zarcone, Mr. Partridge, Mr. Cordani didn't put them on the board. Just the opposite.

So what is alleged that connects Mr. Cordani in some way with these six ostensibly and

presumptively, under our law, independent directors that could excuse demand under prong 3?

It's fair to say that the sum and substance of what the complaint alleges is that the directors thought that Mr. Cordani was an effective chief executive; that he was doing a good job; that, accordingly, he should have a role at the combined company that was envisioned by both sides when the merger agreement was signed, as president and CEO, in charge of all four business lines.

Yes, the complaint does allege that the directors thought Mr. Cordani, who they hired and who they worked with firsthand, was a good -- let's even say great -- executive and that his role was important to them; because the Cigna stockholders were going to own a third of the combined Cigna-Anthem company.

Does that mean that the directors lacked independence from Mr. Cordani under *Zuckerberg*? I submit the answer has to be not just no, but of course not. Directors of Delaware corporations don't lack independence from CEOs who they think are doing a great or even an over-the-moon job. One would hope that would be the norm, not a badge of infidelity or a

sign of disloyalty.

What else on independence? Well, first, plaintiff argues the directors lack independence because they served on the board with Cordani. Their brief says "for a decade or more." That's an empty argument. In *Zuckerberg* itself, the Supreme Court swatted away the argument that status as a long-serving board member created an independence issue. And our reply brief at 5 and 6 collects other precedents to the same effect.

Second, we have the Zollars email. Plaintiff argues from Mr. Zollars' January 5, 2016, email to Cordani, assuring that -- and I apologize if I get the grammar wrong -- that the entire Cigna board have your back. Plaintiff cites this email as impugning the independence of directors Foss, Martinez, Wiseman, and Zarcone, but not, for whatever reason or no reason, of directors Harris or Partridge.

But the Zollars email, we submit, cannot be thought to impugn the independence of anyone. Leave aside that there's no allegation that any other director ever saw the email or agreed to it. The Zollars email, by the complaint's own allegations, was not a love letter out of the blue. According to

the complaint, it was written when the CEO was being told by the counterparty CEO, Mr. Swedish of Anthem, that Anthem was significantly reneging on the understanding of Mr. Cordani's future role in the combined company that, again, would be one-third owned by Cigna stockholders. It was in response to what the complaint itself describes at paragraph 83 as a "testy letter" from Mr. Swedish accusing Cigna of delaying and botching integration.

I submit that directors are allowed to be supportive of the CEO they chose without having their independence besmirched as a result.

Third, plaintiffs cite to Your Honor's footnote, footnote 51 in the Anthem opinion that Cordani, "established remarkably close personal relationships with his directors" and that "[o]ther Cigna directors displayed considerable loyalty to Cordani."

I submit that plaintiff is building a bridge too far, to say the least. There is no mention of directors Foss, Martinez, or Zarcone and Wiseman in the Court's opinion. Of course, the *Anthem* opinion was a contract case, not about directors' independence.

Plaintiff says in their brief at page 19 that it is reasonable to infer that the Court was talking about directors Foss, Martinez, and Zarcone. I have no idea where plaintiff gets that from. But derivative plaintiffs have to plead with particularity disabling facts as to individual directors who are presumed to be independent. We know from *Marchand* that even a close relationship is not enough.

Zuckerberg teaches that a director who was Mark Zuckerberg's close friend and mentor and felt a sense of obligation to him because Zuckerberg had stood with him during scandals -- public scandals -- and there was personal friendship, even that does not disable consideration of demand.

One would hope, I submit, that well-functioning boards would be populated with directors who select CEOs and other senior managers with whom they form close working relationships, and that ought not to give rise to any inference of disloyalty when those directors have no personal or financial reason to favor the CEO's interest over those of the company or its stockholders.

In one sentence, Your Honor, page 1 of

plaintiff's brief says "a majority" of the demand board is "beholden to Cordani." But there is nothing alleged to back up that conclusory assertion. That is our point, in one sentence.

Next, I submit it is the weakness of all that that drove the plaintiff to its final and somewhat new argument. Presumably relying on *Zuckerberg* 2, a substantial likelihood of liability, plaintiff's brief says that what happened is "inexplicable" -- inexplicable -- other than loyalty to Cordani and disloyalty to Cigna and its stockholders.

Well, the word "liability" doesn't appear in the complaint, nor does "substantial likelihood of liability." Not that, and not "bad faith." The complaint went all-in on independence; even though both *Aronson* and *Rales*, in the pre-*Zuckerberg* world, had substantial likelihood of liability as a ground for excusal. And since time immemorial, plaintiff lawyers have known how to use those words when there's a theory they want to plead. But this plaintiff didn't do that.

We could stop here. Of course, an answering brief can't amend a complaint. But let's

consider this argument, whether it's new or not.

It's a Hail Mary argument. It's what one does, I suppose, when there are five minutes left on the game clock -- and here, actually, I hope to argue, time had already long run out -- and nothing else. Nothing about independence, nothing about personal benefits, none of that seems to work.

But it's about as un-Delawarean an argument as one could imagine. Plaintiff never owns up to what Delaware law requires under *Zuckerberg* 2 or the pre-*Zuckerberg* precedents. It's not enough to say, as plaintiff's brief does, that the board approved actions that Your Honor found to have breached the merger agreement and were not -- as plaintiff's brief says, they were not valid exercises of their business judgment.

It is bedrock that director approval of challenged conduct is insufficient. Otherwise, demand would be excused whenever the demand board had approved the challenged transaction. As the Supreme Court of our state put it in *Wood v. Baum*, director approval of a transaction "even one that later proves to be improper," does not excuse demand.

A plaintiff must plead individual

conduct to overcome the key presumption, underscored yet again in *Cornerstone*, that independent directors are motivated to do their duty with loyalty. You need particularized allegations showing that each director acted for an improper motive.

Building on that bedrock, this Court -- Your Honor -- in *Zuckerberg* put it this way: that a director faces substantial likelihood of liability only if there are particularized allegations that show, one, "harbored self-interest adverse to stockholders' [], acted to advance the self-interest of an interested party from whom they could not be presumed to act independently, or acted in bad faith."

Plaintiff, indeed, cites this very three-part standard from *Zuckerberg* in its brief, at footnote 4 on page 11, where it disclaims any argument of bad faith.

And your Honor, in *Zuckerberg*, went on to reframe that inquiry -- the precise point -- specifically for the purposes of demand under the heightened standard of 23.1, and described -- Your Honor described prong two as follows: "[A] plaintiff seeking to show that a director faces substantial likelihood of liability for having approved a

transaction ... must plead particularized facts providing a reason to believe that the individual director was self-interested, beholden to an interested party, or [3] acted in bad faith."

Again, there's no allegation of self-interest here. Plaintiff demands -- plaintiff disclaims bad faith and hangs its hat on saying, over and over again, that the directors acted to advance Cordani's interest. Not their own interests; Cordani's interest.

Well, that is not beholdenness. Acting to advance a CEO's interest isn't enough. *Zuckerberg* makes that crystal clear. Inexplicable other than loyalty to Cordani? That's aggressive rhetoric, but we submit that it's empty.

Even if we assume that the directors acted with an eye towards Cordani's role, Cigna stockholders were going to own a third of the combined company. It was rather obviously rational and proper for the directors to care what Cordani's role was going to be post-merger. Not because it benefited the directors, but because they could have believed that it benefited the stockholders.

Delaware courts have long recognized

and respected directors' judgments that a particular manager or team was best able to capitalize on a strategic merger. And directors are entitled, especially in a stock-for-stock merger, to take into account who should be leading the company. One might say not just entitled, but required.

Now, Your Honor, of course we are not asking the Court to decide on this motion why these directors did what they did. Your Honor doesn't need to do that, because it's the plaintiff's burden to plead with particularity showing facts, facts that show that the directors acted for a bad reason. Plaintiffs can't satisfy that burden without facts, just with a conclusion that directors' actions were "inexplicable," like it was, what, *res ipsa loquitur*? Our point is, that just doesn't cut it.

Indeed, plaintiff's brief is internally inconsistent with this new theory. Plaintiff's brief at 42 to 43: "Rejecting the Merger or terminating the Merger Agreement alone would not necessarily suggest breaches of fiduciary duty." And at page 52 they talk about their inability to make the leap from breach of contract to breach of fiduciary duty.

And let me emphasize, Your Honor, that for our part, we are not challenging Your Honor's finding after the *Anthem* trial that the way Cigna reacted to these events breached its contractual duties to Anthem. We accept that on this motion. But the question here is about the loyalty, the motives, the independence of these directors.

The point is that a director loyal to Cigna certainly could have pushed back on Anthem or, if unsuccessful, taken the steps that the complaint alleges, like hiring counsel, hiring a PR firm, scaling down integration; and, ultimately, after an antitrust injunction had issued, seeking to terminate a merger with the competitor.

All this happened, as the complaint alleges, in the context of a deal, that, from the get-go, was under serious antitrust attack from the government and that Your Honor found would have failed no matter what Cigna did. The directors had to make choices about what to do, how to weigh and protect Cigna's interests, given that it was clear that closing could be unlikely or, ultimately, impossible; the type of complex judgments that the business judgment rule is made for.

And, of course, the issue here is not whether everyone in this room agrees with the judgments the board made. As Chancellor Allen put it in the *Time Warner* case, directors' judgments can be even dismayingly wrong. And as Your Honor pointed out in *PWP*, a case cited by the plaintiffs, directors' decisions can be found to have breached a contract and yet "readily comply with fiduciary duties." But judgments by directors with no well-pleaded personal motive to hurt the company cannot support a nonexculpated breach of the duty of loyalty.

To go through the specific allegations quickly, for directors Foss, Martinez, and Zarcone, literally all there is is that, yes, they were on the board; that, to use plaintiff's litany, that board approved hiring Wachtell Lipton, descoping integration, terminating, and litigation strategy. And for them, for these three directors, there is no description of any individual conduct, as this Court required in *Zuckerberg* in discussing directors Hastings, Thiel, and others.

Given the math, we could stop. But for completeness, for Mr. Wiseman, paragraph 218 alleges that he attended the February 2016 meeting of

the Newco designees. That's the meeting where the Anthem designees agreed with the Cigna designees about Cordani's role. And plaintiff's brief argues that he knew about the hiring of Teneo, though the complaint doesn't actually say that.

But is that enough to infer disloyalty of Mr. Partridge? They again cite the July 2015 email, where he says he was all in if called to serve on the Newco board. Plaintiff stretches to argue that this shows self-professed fealty of the sort that Facebook director Marc Andreessen famously showed by back-channel emails and coaching with Mark Zuckerberg while serving on the Facebook special committee. I submit that Mr. Partridge's email is hardly the same thing.

For Mr. Harris, the plaintiff's brief argues that he, too, delivered Cigna's position on Cordani to the Anthem designees and was involved in the hiring of Wachtell Lipton and Teneo. Again, nothing that would undermine independence. Nothing of closeness that even approaches what *Zuckerberg* and *Beam* rejected.

Last point on demand. I think it is common ground with the plaintiff that if Count I is

dismissed, the claim against the directors, Counts II and III against officers and Teneo, must be dismissed as well.

Timeliness. Timeliness. Rarely argued. Rarely happens that it's an issue.

Plaintiff's position is that the three years begins on March 6, 2018, when Anthem filed a motion to compel in the contract case, because plaintiff argues it could have no inkling -- no inkling -- of Teneo's role until then. Until then it was "practically impossible to discover the existence of a cause of action."

Well, plaintiff did not sue until November 2020; 20 months after the motion to compel and three and a half years after termination of the merger agreement in May 2017. And now they invoke every tolling agreement in the book. But I would submit that the silver bullet here, the headshot -- and apologies if that's mixing metaphors -- is inquiry notice. Because even when there is tolling, inquiry notice ends it.

We submit that, under any fair view, by May 2017 -- May 2017 -- this plaintiff had more notice, more of the information that it now claims

forms the basis for a fiduciary complaint, much more than the normal stockholder plaintiff. Maybe more than any stockholder plaintiff in history.

Inquiry notice, of course, turns not only on the facts that are known, but it turns on the facts that ought to arouse suspicion plus what that suspicion would lead to have diligently pursued, including by use of 220, books and records.

What did plaintiff have by May 2017? February 8, 2017, Judge Jackson's opinion in the antitrust case noting that Anthem and Cigna were accusing each other of breaching the merger agreement.

February 14, Cigna's press release that it was seeking to terminate; the act that plaintiff, at times, seems to claim is the sole predicate of its case.

February 14, Anthem's complaint in this Court alleging that directors and management were sabotaging the merger "to preserve their employment positions." No surprise Anthem's complaint is cited extensively in plaintiff's complaint here.

February 14, Anthem's TRO motion, asserting that Cigna's board and management were sabotaging the merger "in order to preserve their own

employment positions."

February 15, this Court's TRO ruling that Anthem's position was not only colorable, but more persuasive.

May 11. May 11, 2017. This Court's decision on Anthem's PI motion, finding a reasonable probability that Cigna had breached and faced potentially massive damages and referencing the claim that "Cigna sabotaged the Merger so that its management could keep their jobs."

All public. Enough for suspicion? I submit that if the *Caremark* doctrine applied to stockholder plaintiffs, the *Caremark* claim against this plaintiff would be a slam dunk.

What does plaintiff say about all this? Well, the complaint alleges, as I mentioned, that it wasn't until March 2018 that Teneo documents, plaintiff quotes this Court as saying, "eliminated any doubt about whether the Cigna ELT had attempted to prevent the Merger from closing."

Eliminated any doubt? That's not the standard; and especially not about the secondary role of Teneo.

Second, plaintiff alleges that it

asserted its claims when it made a 220 demand in March 2019. But that's wrong. A 220 demand does not save an untimely suit. This Court so held just this past October, in Vice Chancellor Will's opinion in the *Sorenson* case.

Third, plaintiff argues that when it sent its 220 letter, Cigna's counsel, Wachtell Lipton, admonished it to delay filing, in our response letter of April 22, 2019, that we cautioned that it would be inappropriate and premature for a Cigna stockholder to sue Cigna while Anthem was suing Cigna.

Really? That a defense counsel's letter asking a stockholder plaintiff not to take the side of the company's litigation adversary overrides the statute of limitations without even a request from the plaintiffs for a tolling agreement? And then it waits a full year and a half?

Now, on April 2019, the statute of limitations wasn't even a glimmer in anyone's eye. There was probably at least a year left. No one interpreted our letter as meaning we were agreeing to relieve them from the statute of limitations if they let it expire.

When the complaint was finally filed,

it has an entire section called "Tolling of the Statute of Limitations" without any suggestion that they had asked for or thought they had a tolling agreement. It all just begs the question, why didn't they file that complaint earlier, rather than spending their time coming up with all the tolling agreements that they allege in their complaint?

Now, plaintiff does not appear to dispute, and actually appears to agree, that it was on notice of a case for Cigna's breach of contract by May 2017. But their argument is that knowledge of the claimed breach of the merger agreement is not sufficient inquiry notice of a fiduciary breach claim since, plaintiff concedes, this Court has recognized that doing something that breaches a contract is not inconsistent with the board's readily complying with its fiduciary duties; citing, again, to Your Honor's opinion in *PWP*.

Fair enough. But the point here is that the facts plaintiffs plead for its fiduciary claim are in large part the same facts in Anthem's case for breach of contract back in February 2017. What plaintiffs are doing here, we submit, is they're just blinking at the fact that they had an unusually

large source of information available to it from the 2017 proceeding in the *Anthem* litigation and claiming they should get tolling because that litigation didn't generate even more documents.

Yes, I get it. Plaintiff is arguing that early 2017, it didn't have everything about Teneo, who it claims had secondary liability. But look at their brief. The very documents about Teneo which they rely on, Exhibits A and C to their brief, are board-level documents that plaintiff got when it finally decided to use 220 in March 2019. The law is clear, plaintiff is charged with knowledge of those documents as of the time there was reasonable grounds for suspicion, when it could have used 220 back in 2017.

And that's -- all of this is apart from the fact that Teneo's role was, indeed, public by May 9, 2017, when Anthem's counsel referred in open court to Teneo being involved and referred to Teneo as apparently having a sort of -- sort of has a track record of trying to get out of deals.

Plus, of course, step back for a second. A plaintiff doesn't get tolling until it has every piece of paper that it claims is helpful to its

case. If that were the law, every case would be tolled forever. That cannot be right. Especially not given the secondary role of Teneo.

A final word, if I may. When my friends say that they relied on Cigna's publicly stated position that Anthem, not Cigna, had breached, that is why they had no inkling, perhaps there's no better response than the way Vice Chancellor Strine put it in the *ML/EQ* opinion, where he wrote: "The deep and abiding trust that is reposed in directors by plaintiffs' lawyers rarely manifests itself outside of the statute of limitations context."

We submit, in conclusion, Your Honor, that the complaint should be dismissed on either or both of the grounds we've advanced.

Thank you very much, Your Honor.

THE COURT: Thank you.

ATTORNEY HENNES: Good afternoon, Your Honor. Good to be back in person. David Hennes from Ropes & Gray, may it please the Court, on behalf of Teneo. Always an honor to follow Mr. Mirvis.

Your Honor, if the claim against the Cigna defendants is dismissed for either of the reasons that Mr. Mirvis has argued, it will also be,

of course, dismissed as to Teneo. So clearing out that chaff, I would like to briefly focus on the aiding and abetting allegations and touch briefly on the statute of limitations that Mr. Mirvis handled so capably.

As an initial matter, I'd like to highlight what the complaint does not contain, what the plaintiffs do not plead, Your Honor. They don't plead that Teneo was conflicted in any way. They don't plead that Teneo misled the board in any way. They don't plead that Teneo committed a fraud on the board in any way. And the plaintiff has identified no case -- and we're aware of none -- where this Court has sustained an aiding and abetting claim against an advisor under those circumstances.

That is not surprising, given the Supreme Court's decisions in *RBC* and *Singh*, which reject gatekeeper liability and hold that there is a high degree of insulation for aiding and abetting liability for third parties and advisors, including an effective immunity from due care liability.

So while there may be narrow circumstances where such a claim can be pled, these circumstances are not here. Our briefs make clear,

there are no colorable aiding and abetting claims, or claim, because there's no scienter. There's no substantial assistance. And there's no causation.

The claim here is premised on knowledge of a breach of contract. And -- but the plaintiff can't conflate knowledge of a breach of contract with allegations that there was a breach of fiduciary duty. And the plaintiff even concedes that, as Mr. Mirvis mentioned, and I'm going to come back to that.

If that were the case, it would improperly expand aiding and abetting liability for advisors and would, in essence, make advisors like Teneo guarantors for their client's conduct, which is not what the Supreme Court had in mind in *RBC* and *Singh*, which Your Honor knows quite well.

Under that circumstance, where it's a breach of contract that's pled, the advisor would have to get its own counsel to decide whether or not the underlying fiduciary was breaching its duty rather than just breaching a contract. So that's not what Delaware law stands for, Your Honor, at least in my view.

So turning to the elements of the

claim briefly. I'll go through each of the three elements. As Your Honor knows quite well, pleading scienter requires an illicit state of mind and knowledge that the conduct was legally improper. And so what that means for this analysis, Your Honor, is there must be factual allegations that Teneo both knew of the underlying conduct and that the conduct constituted a breach of fiduciary duty. It's got to know that it constituted a breach of fiduciary duty. And there are no allegations that Teneo knew that in the complaint in this case, Your Honor.

The alleged breach of fiduciary duty is that there was supposedly a decision to favor Mr. Cordani's personal interests over the stockholders' interests. That's paragraphs 5 and 240 in the complaint. But the complaint and the answering brief establish that the plaintiff only alleges and argues that Teneo knew that Cigna was seeking to avoid its obligation to close the deal. There is no allegation that Teneo knew of any supposed plan to favor Mr. Cordani's personal interest for an improper purpose.

In other words, the plaintiff is conflating the knowledge of the breach of the

agreement with the knowledge of the breach of fiduciary duty. And as Mr. Mirvis argued, as we've just heard, the two are not coextensive under Delaware law. The plaintiff concedes this point. Your Honor found it in the *PWP Xerion* case, which I won't go through again.

But the quotes from the plaintiffs' brief, I thought were very instructive. They're not coextensive with breach of a merger agreement, not coextensive with the breach of fiduciary duty, and "rejecting the Merger or terminating the Merger Agreement alone would not necessarily suggest breaches of fiduciary duty." Those concessions are on pages 42 and 43 of their brief. Again, they cite the *Xerion* case.

That's why knowledge of the alleged plan, of the supposed plan to favor Mr. Cordani's interest, is required to be pled. The plaintiff's claim, boiled down to it, is the general knowledge of anti-merger activities is sufficient to plead that Teneo knew the directors were breaching their duties. But, Your Honor, they're not coextensive. That's, we submit, a lot like then-Chancellor Bouchard's decision in *Lee v. Pincus*, where he rejected an aiding and

abetting claim, where the plaintiff failed to plead that the underwriter defendants, who knew of a breach of contract, also knew that their actions would facilitate a breach of fiduciary duty. Chancellor Bouchard rejected the claim in that case.

And that is the decisions in *Capitaliza*, the District of Delaware case, and *Jacobs*, which found that general alleged wrongdoing in atypical transaction terms did not amount to breach of duty. And we discuss those cases in our briefs, Your Honor.

So for that same reason, the argument that Teneo's actions were inherently wrongful is, we submit, without merit. It again conflates the breach of the merger agreement with the alleged breach of duty for which there are no allegations that Teneo knew.

And the other allegations that plaintiffs cite to reflect Teneo -- that supposedly reflect their knowledge of the breach of fiduciary duty, is nothing more than Teneo was providing the services that Cigna asked them to provide, as Mr. Mirvis noted. And we go through those allegations, those contractually noted allegations, on

pages 19 and 20 of our brief.

And, of course, providing services at the direction of your client does not equate to a breach -- to knowledge of breach of fiduciary duty. And as I mentioned earlier, that's for good reason. That would turn your advisors into guarantors of their client's conducts, which is obviously, we would submit, contrary to the policies of this Court in *Singh* and *RBC*, and that is gatekeeper liability, which makes the conduct coextensive with the underlying conduct.

And that is consistent, Your Honor, with the Court of Chancery decisions which we cite in *Lee*, *Buttonwood*, and *Morrison*, all of which dismissed claims against advisors where there were no allegations that the advisor knew of the underlying fiduciary breach.

So I'm trying to move quickly, Your Honor, given the time, and I apologize for that.

I'll tick quickly through the only allegations that they use to try to establish a reasonably conceivable set of circumstances that we knew, and Teneo knew, and none of them satisfy that standard, Your Honor.

The first one is Teneo's attendance at the March 31 board meeting, 2016, at which the Wachtell Lipton firm presented on the board's fiduciary duties. Your Honor, if anything, that supports an inference of good faith. Teneo's knowledge that the board was receiving legal advice from Wachtell Lipton, a preeminent law firm, would reasonably lead it to the conclusion that the directors were complying with their fiduciary duties, not the opposite, Your Honor.

And the argument that Teneo entered into an NDA and spoke to reporters off the record -- that's page 29 of their brief -- conflates normal-course client-directed conduct by a communications advisor with scienter, which we submit that that can't constitute knowledge of breach of duty, which is alleged.

And, finally, privilege assertions by Cigna in the *Anthem* litigation can't create a reasonable inference that Teneo knew years earlier that the directors were supposedly breaching their duties.

So that's scienter, Your Honor. That's an independent basis for dismissal as to Teneo.

Moving quickly through the other two prongs. Participation, the plaintiffs also fail to allege that Teneo participated in the breach, which requires substantial assistance. And as the Supreme Court in *Malpiede* said, that means pleading that Teneo either participated in the board's decisions, conspired with the board, or caused the board to make the decisions at issue, all focused on the decision-making.

But as I just detailed, no allegation in the complaint that Teneo had any involvement in any decision, supposed decision, to favor Mr. Cordani.

And, in fact, the plaintiff affirmatively pleads that Teneo was only retained in March of 2016, which is two months after the allegedly key decisions were made in January and February. That's in paragraphs 90 to 120 of the complaint. That's when the supposed breach occurred, in January and February. Teneo was not hired until March. So, in other words, the breach occurred before -- the alleged breach occurred before Teneo was retained and before Teneo took any steps.

So, Your Honor, the answering brief ignores this timing argument in its entirety and, we

would submit, concedes it. So that's participation, Your Honor.

Proximate cause. Proximate cause suffers from a similar defect. Delaware law, as Your Honor well knows, requires the plaintiff to plead facts that but for Teneo's conduct, Cigna would have collected the reverse termination fee.

As I went through a few moments ago, because Cigna was only -- Cigna retained Teneo in March of 2016, after the alleged decisions were made, there can't be but-for causation. Nothing that Teneo is alleged to have done would have caused a different result or caused anything to have unfolded differently under those circumstances, given that the decisions that were taken, the supposed decisions in January and February, were already made.

So we make those arguments in our brief. The plaintiff's only allegation is a conclusory allegation in paragraph 251 and a conclusory argument on page 35 of its brief. And they don't address the timing issue and how that disposes of any argument that there could be but-for causation. So aiding and abetting fails for that third reason as well, Your Honor.

And -- almost done.

On statute of limitations, I'll make the brief point, because Mr. Mirvis covered the universe, that once the plaintiffs are on inquiry notice that there may be a claim -- which Mr. Mirvis argued began in February, all the way through May of 2017 -- that puts them on notice of all facts, all claims against all parties, including any claims against Teneo. That's the *Pomeranz* decision that we cite.

They didn't need to know Teneo-related breaches in March of 2018, a secondary actor, as Mr. Mirvis argued, in order to have its claim -- to be fully aware of its claim. That's not the standard. You only need sufficient knowledge to raise suspicions.

And, Your Honor, we would submit that all of the facts related to Teneo which were out there, as Mr. Mirvis pointed out, in May, at the preliminary injunction hearing -- the subpoena, the briefs, the arguments -- plaintiff says, well, it's not reasonable for us to monitor the docket to determine whether this exists -- these facts exist.

But, Your Honor, they point to that

very same docket in March of 2018 to say it was the brief that they saw then which caused them and put them on notice, when they finally had everything they needed to make that argument. Well, they're pointing to the same docket that they're saying it would have been unreasonable to -- to have monitored in May of 2017.

So we would submit that if the Court grants either of Mr. Mirvis's arguments, including on demand and including on statute of limitations, Teneo should be dismissed, including for the additional reasons that I've noted based on the pleading failures, Your Honor.

Thank you.

THE COURT: Thank you.

ATTORNEY HENNES: And I apologize for moving quickly.

THE COURT: Quite all right.

ATTORNEY ORENSTEIN: Good afternoon, Your Honor. My name is Nathaniel Orenstein. I'm here on behalf of plaintiff, the Massachusetts Laborers' Annuity Fund, to argue against the defendants' motions to dismiss.

But before I begin, there were several

exhibits that plaintiff attached to our answering brief. And, with your permission, I would like to provide additional copies of certain of those exhibits to the court's clerk and counsel. These copies include some added highlighting of certain language within the exhibits, and I expect to refer to them today.

THE COURT: We're probably good. I've got my set, I think everybody's got their set, so why don't we just drive forward.

ATTORNEY ORENSTEIN: Okay.

At their core, defendants' motions to dismiss boil down to two essential questions: First, demand futility. Did plaintiffs plead allegations sufficient to conclude that the director defendants engaged in bad faith or knowingly wrongful conduct? And for purposes of today, it's not my mission to convince you that something bad happened here. Your opinion lays that out in detail and was affirmed by the Supreme Court.

Rather, my goal is to show where and how, based on direct evidence and reasonable inference, that the board understood and approved Teneo's covert communications campaign. We didn't

disclaim bad faith; we merely said that it was not the only way to establish demand futility. And, indeed, there are numerous facts establishing bad faith. We showed it rather than said it.

The second issue, Your Honor, is statute of limitations. Defendants' affirmative efforts to mislead their stockholders about the nature of the Cigna-Anthem dispute continued through trial of the *Anthem-Cigna* breach litigation and throw reasonable stockholders off the trail of inquiry of defendants' bad faith.

There are other questions, of course, aiding and abetting issues such as knowing participation, substantial assistance, causation.

And I won't deny that many of these questions are deserving of additional proof. But there are, however, three events that alone go a long way towards establishing plaintiff's allegations of defendants' bad faith and plaintiff's arguments that its claims are timely. There was a February 23 and 24, 2016, meeting of the Cigna board of directors. Another meeting a month later, on March 31 of the same year. And then, a month after that, on April 25, there was a communications update that was provided to

Cigna's board of directors.

So I won't give you a full recounting of the facts, because the unique and outrageous nature of defendants' conduct is clearly laid out in the complaint and this Court's opinion.

Now, the events at issue, I suppose, predated the merger agreement, but the problems here arose from them. Cigna's board was reluctant to enter into any merger in which David Cordani would not remain as chief executive officer of the new company. But after Anthem issued its bear-hug letter and Cigna's stockholders pressed, the board relented and shrewdly negotiated this transaction.

The merger agreement guaranteed David Cordani's role as chief operating officer of the new company, and four Cordani loyalists would join him on the Anthem board. Foreseeing that the merger could face antitrust challenges, the board insisted on a $1.85 billion reverse termination fee.

And then, on December 3, 2015, nearly unanimously, 99 percent of Cigna stockholders voted to approve the acquisition of Cigna by Anthem in spite of Cordani's limited role. And the two companies geared up to figure out how to integrate and to begin the

uphill fight to get antitrust approval.

As we now know, to say that the sides had their differences would be an understatement. In February 2016, Cordani initially enlisted the board to engage in what was called Project Alpha. There was an attempted boardroom coup that sought to install Cordani as the post-merger CEO in place of Joseph Swedish. At that time, a former Cigna director -- and I apologize for my pronunciation of names -- William Zollars, made clear to Cordani that the entire board was loyal to him and would follow him to the dark side and have his back.

Now, that dark side was exactly where Cigna's board wound up, acting to sabotage the merger. And, indeed, nothing in the record shows that any of the director defendants departed from this path or did anything other than fully support Cordani in his objectives.

Now, Project Alpha failed. Anthem's board would not agree to replace Swedish with Cordani or give Cordani anything other than a subordinate COO position. This effort was viewed distastefully by Anthem's directors and Mr. Swedish, and the back and forth was a focus of the Chancery litigation and

opinion.

Plaintiffs aren't alleging that Project Alpha itself was a breach of fiduciary duty, but Project Alpha was not the end of defendants' efforts to entrench Cordani. In fact, it was just the beginning. And defendants were, as Zollars suggested, on a path to the dark side. And the conduct from here on out shows defendants' bad faith.

Now, Exhibit B to plaintiff's answering brief are the minutes of the February 23 and 24, 2016, meeting of Cigna's board. And this took place at the Royal Palms Hotel in Phoenix, Arizona, and this is where Cigna's board authorized the executive leadership team to start withdrawing from the merger, as we pleaded on paragraphs 113 to 114. This was the first step of the board's bad faith.

If you skip to the fourth page of these minutes, we can see who is present on the second day of this meeting. In attendance were all of the Cigna defendants -- directors Harris, Foss, Martinez, Partridge, Wiseman, and Zarcone. Cordani and Jones were there as well.

And then, on pages 9 and 10, you can see what the board authorized at the end of this

meeting. The full board decided to hold a meeting a month later, at the end of March, to discuss the "red flag issues" with the Anthem transaction. These were Cigna's executive leadership team's concerns with how Anthem was approaching the process and integration of Cigna's management into the new company.

And in the meantime, they directed that management reassess and, as necessary, descope the company's integration planning efforts; to refresh the company's stand-alone strategy and, critically, to hire advisors to evaluate the company's rights and obligations under the merger agreement based on the red flag issues.

I submit that this was to see whether and how Cigna could exit the deal. And, indeed, a month after this meeting, the conspirators met again to continue down their dark path of bad faith.

For the March 31 meeting, I direct you to Exhibit A. These are the minutes from Cigna's March 31, 2016, board meeting. Every single defendant was present at this meeting. The director defendants -- Harris, Foss, Martinez, Wiseman, Zarcone, and Partridge -- by phone; Cordani and Jones were there, multiple representatives from Wachtell,

and Teneo's chair, Robert Mead. And then, on the next page, we see, with Teneo present, outside counsel "provided an overview of the Board's fiduciary duties as a framework for the Board's discussion ...."

This must be seen in the context of the meeting a month before. And this was an in-depth session. The minutes state that the board asked questions and made comments, all of which were addressed by members of the Wachtell team. Cigna's board was fully engaged; and Teneo, at this point, was fully aware of the implications of its engagement.

Turning to the next page, the second-to-last bullet. We see that counsel also discussed the merger agreement implications of the various red flag issues.

Now, while this Court observed in its opinion that the minutes were carefully crafted for the impression that they would give and do not give the details of Wachtell's presentation, and we don't know yet, at this stage, whether defendants will assert an advice of counsel defense, certain things are clear. Stockholders had overwhelmingly approved the merger agreement, and there was no way to exit the deal without breaching it. Thus, if they followed the

stand-alone strategy, they would breach the contract.

Now, we did learn from the opinion that Wachtell did provide certain advice: what would happen if the merger were not approved and how to avoid supporting Anthem's divestiture efforts, paragraph 142 of the complaint.

But, notably, the board made no evaluation or decision that the benefits of walking away from this merger would outweigh the loss of the reverse termination fee. But nevertheless, Cigna's board chose to walk away from its duty to finalize and close the merger, and this demonstrates an intentional dereliction of duty. But the meeting continued.

So continuing in Exhibit A to the final bullet point on page 3, and armed with this knowledge from Wachtell, Teneo proceeded to review "the key tenets, objectives and approach to the [Company's] communication strategy tied to the transaction."

And, again, while the minutes do not describe the plan in detail, the complaint and opinion reflect the bad faith of Cigna's and Teneo's plan and go on about it at length. This presentation focused entirely on a future in which the merger failed,

opinion at 40.

Indeed, when Teneo's role was revealed at trial, we learned that the strategy called for Teneo to launch a covert communications campaign to portray the merger as anti-competitive, anti-consumer, and anti-innovation, the very grounds on which the DOJ was seeking to block the merger. "Teneo 'spoke with reporters, attorneys, and law professors to spread the anti-Merger narrative ...." Paragraph 130.

Secrecy was also essential to the board's plan. Defendants simply could not be caught with their fingerprints on Cigna's efforts to sabotage the merger or their breaches of contract and fiduciary duty would be laid bare.

Now, I submit, the inferences flowing from this meeting are remarkable and make a number of defendants' arguments untenable. As noted above, the board and Teneo were specifically briefed on fiduciary duties. With this knowledge, they directed management to work with Teneo to build out the secret communications strategy, which is the final paragraph on page 3.

We now understand that to be a detailed plan to exit the merger by surreptitious

means. It's discussed in more detail in paragraphs 128 through 141 of the complaint. And it's precisely this secrecy that cements the board's bad-faith conduct.

They acted in secret because they knew that their conduct was wrong. Cigna's board could not do it themselves, so they retained a third party to do it for them. Indeed, early in the opinion, the Court recognized that the Cigna ELT could not openly undermine the merger without advertising that Cigna was breaching its obligations under the efforts covenant.

But the March 31 minutes show it was not just the executive leadership team. It was also the board. This is evocative of subjective bad faith. They knew that what they were doing was wrong and they did it anyway, secretly. This is precisely the type of misconduct implicated by 102(b)(7)(ii): intentional misconduct, intentional dereliction of duty, and subjective bad faith.

This, Your Honor, establishes demand futility. Each of the director defendants faces a substantial likelihood of liability for approving this bad-faith plan, and the directors' substantial

likelihood of liability makes them unable to evaluate Counts II and III for the same conduct in which they participated.

So with that, I'd like to change focus to the timeliness of plaintiff's claims. And for that I'd like you to turn to Exhibit C in the package. This is the April 25, 2016, communications update to the board of directors. This was presented at the board meeting on April 27th. The communications update provided an overview of Cigna's communication plan tied to the merger.

This attached Teneo's leak response protocol. This protocol was dated as of April 14, 2016, two weeks after this was authorized by the board and two weeks before this board meeting. And this was a centerpiece of the covert communications campaign, but by no means all of it.

As the opinion found, on page 7, "Cigna [] worked to hide their efforts and manufacture an alternative narrative. In that substitute storyline, Cigna tried hard to complete the Merger but was thwarted by Anthem's incompetence."

On page 5 of that package, 5 of 12, we see that the leak response protocol was framed as

responses to a potential leak of information. Now, while it's agnostic as to the source of the leak, the board had already authorized management to stymie integration efforts over Cordani's role.

And this document merely foreshadowed that a leak of this may occur; that progress on the merger was being stymied over Cordani's role. As we would only learn after trial, the leaks themselves came from Cigna's Jones and Teneo.

On page 6 of 12, we see that the plan kept the board closely informed, with the board being notified of any action plan within 90 minutes of a reporter or investor inquiry. The board was being kept informed in real time.

Now, before I continue discussing the leak response protocol, I'd like to consider for a moment defendants' statute of limitations arguments. First, affirmative defenses such as laches or statute of limitations are not ordinarily well-suited for treatment on a 12(b)(6) motion. And this is particularly true here, where defendants anticipated that Anthem would allege that they failed to act with due care. Understanding exactly how the covert communications plan impacted how investors would view

this information is an inquiry that should be undertaken on a full record.

Defendants also argue that there was no fraudulent concealment, because no concealment was directed to investors. But on page 7 of 12, the leak response protocol was explicitly directed at investors.

Moreover, note that each page of this leak response protocol is marked privileged and confidential, prepared at the request of counsel. That's already, by April 14, 2016, Cigna and Teneo were anticipating potential breach litigation, manufacturing a basis of privilege over Teneo's work, paragraphs 125 through 27, further concealing these acts.

Had plaintiff sought books and records in early 2017, as suggested by defendants, we would not have received any of this information, neither in the board minutes nor in the exhibits. Because through this time, the company was protecting this information under spurious claims of privilege. We could not have learned about the board's bad-faith conduct. And, indeed, it was not just the leak response protocol by which defendants sought to hide

their misconduct.

Their efforts continued through trial in the Chancery litigation to perpetuate and conceal their breaches of fiduciary duty, to ensure that they would receive the reverse termination fee. Details of this are in paragraphs 196 through 207 of the complaint.

How could plaintiff be penalized for not having sorted this out when defendants took oaths and nevertheless lied, even at trial. For example, Cordani testified falsely that Teneo's communications initiative was never activated and that he had not received the strategic positioning initiative developed by Teneo for the communications initiative.

Likewise, Cordani's testimony that Teneo did not run a campaign criticizing the merger was obviously inaccurate. It took Your Honor's fact-finding to burst through this obfuscation.

While this document foreshadows the ongoing nature of defendants' wrong and provides strong bases to support both equitable and fraudulent tolling, as we have set forth in our answering brief, the secrecy of the plan also supports application of the unknowable injury doctrine.

However, the more interesting question this document addresses relates to inquiry notice. As the document shows, from the very beginning of Teneo's covert communications plan, the defendants were anticipating that Anthem would allege that Cigna had breached the merger agreement and developed a communications strategy that would cause investors to view Anthem's allegations of breach by Cigna as spurious, sour grapes, trying to deflect blame for its own failures in connection with the merger.

Even if an investor had become suspicious of defendants' conduct, an investigation exercising reasonable diligence would merely show a contentious merger during which, at worst, Cigna did not try hard enough to close.

Defendants argue for a world where the failure of a merger for any reason is sufficient to put stockholders on notice of possible breach of fiduciary duty. But this is wrong. To determine whether a plaintiff is on inquiry notice, *Primedia* explains that if the stockholder could not obtain the information necessary to file a viable complaint, then the stockholder could continue to rely reasonably on the competence and good faith of the fiduciary, and

equitable tolling would continue to apply.

Now, considering this in the context of *Zuckerberg* shows that information raising suspicion of a possible breach of the duty of care only implicates exculpated conduct. This would, therefore, be insufficient to provide inquiry notice to allow the stockholder to file a viable complaint.

Indeed, the Cigna defendants nowhere explain how, if at all, plaintiff ought to have made a leap to ascertain that there was potential bad faith that it could have pleaded sufficiently under Rule 11.

Moreover, to the extent that a stockholder read into the decisions and the facts adduced in Anthem's complaint possible bad-faith conduct, what would a reasonably diligent investigation be able to ascertain, amidst the fog of Cigna's and Teneo's comprehensive misinformation campaign?

As the opinion observed, at page 99, Teneo boasted that its strategy and communications advisory capabilities relating to litigation can dramatically change the outcome of high-stakes litigation. Indeed, Teneo, by influencing the information that an investor investigation would

reveal, affirmatively prevented investors from receiving effective notice of their potential claims.

Now, turning to pages 8 through 10 of Exhibit C, we see these pages which are described as potential public responses and message areas. And they describe two components of the campaign. On the one hand, there was the potential public response; and, on the other hand, there are the secret background message areas from Teneo.

Why was it structured this way? Because Cigna could not have its fingerprints on the campaign against the merger. So, instead, Teneo did the dirty work. Now, this establishes that Teneo was a knowing participant and a conspirator in this scheme and provided substantial assistance and that all of the defendants were acting in bad faith.

Indeed, if I can focus you on page 9 of 12, we can see exactly how defendants plan to do this. They capitalized on the real possibility that a leak would occur suggesting that progress on the merger was being stymied over Cordani's role. But, in fact, Teneo and Cigna themselves leaked the dispute letters showing the friction over Cordani's role.

Remember, on February 24, the board

had already descoped integration efforts because of Cordani's role. But the official public message from Cigna was different. "Cigna remains committed to its transaction with Anthem. We have been working to support a successful transaction and closing," and any suggestion otherwise was false.

Meanwhile, Teneo would continue to message in the background, saying Cigna is unique and well-positioned for stand-alone success; Anthem failed to disclose critical disputes; Anthem's work was falling behind schedule; Cigna was being frozen out of the process; Anthem outsourced the process; it remains unclear that Anthem is properly managing the processes necessary to bring the deal to completion.

They were planting the seeds of blame for the merger's failure at Anthem's feet. This campaign of "passive-aggressive resistance" that this Court recognized in its opinion was a deliberate effort by the defendants to throw investors off the trail of their wrongdoing, to tee up an argument that it was Anthem's incompetence, not Cigna's opposition, that led to the merger's demise.

Now, this leak response protocol document is just a part of Teneo's work with Cigna to

lead investors astray. They proceeded to mount a self-described Trojan horse messaging campaign designed to pique antitrust regulators' interest, even providing false testimony under oath again concerning a fictitious Bias to Blue strategy by Newco.

When an investor inquired about Cigna's actions, they revved up their team to pump out talking points about Cigna's supposed commitment to integration and Anthem's purported lack of commitment. There may be a question about the effectiveness of that campaign, but we can't establish on this record that it just didn't work. Teneo's efforts even continued after the merger was terminated. Opinion at 99.

Meanwhile, defendants Cordani and Jones continued to take affirmative acts in connection with Plan B, concealing what they had done and repeatedly denied positions they had previously taken. The opinion documents numerous instances where Cordani and Jones provided inaccurate, noncredible testimony and testimony unsupported by the factual record, perpetuating falsehoods even into trial of the Chancery litigation. This implicates the continuing wrong doctrine. They made these false statements to

achieve the goals of Plan B, to receive the reverse termination fee in spite of their willful breach.

Alongside their misleading testimony, they also continued to hide Teneo's involvement behind spurious claims of privilege, the details of which establish the defendants' bad faith. This happened until at least March 2018, when Anthem filed a motion to compel in the Chancery litigation.

Now, plaintiff didn't contend that that's when we learned about it. That's when we acknowledge that perhaps we could have. And until then, even if a stockholder were scouring the public filings -- indeed, as I suggested, even with a 220 demand, there was no evidence to support a credible basis to infer possible bad faith on the part of Cordani, Jones, Cigna's board, or Teneo.

Thus whether the Court looks at these facts as establishing a continuing wrong with a limitation date beginning as late as trial in this matter or under the tolling doctrines, this action is timely. Defendants now wish to capitalize on the success of their concealment to avoid accountability for their bad faith wrongdoing.

So while defendants point to a series

of litigation events that purportedly put plaintiff on notice, in the context of defendants' affirmative efforts to mislead, these events are entirely insufficient to put plaintiffs on inquiry notice. So when the District Court observed that Anthem and Cigna were accusing one another of breaching the merger agreement and positioning for potential breach litigation, and then when the parties sued each other in Chancery Court and Anthem alleged facts merely suggesting that Cigna did not try hard enough to close the merger, these events all played into Teneo's message.

Cigna stockholders had been primed that Cigna was supportive of the merger and trying to close, despite Anthem's lackluster efforts to get regulatory approval. Anthem has wasted enormous sums in its ill-fated adventure. Anthem had left execution of the merger to outsiders, botched the regulatory efforts. Anthem was looking for a scapegoat. Cigna was merely trying to protect itself, its stockholders, and its customers. Of course Anthem would blame Cigna for its own failings in the merger process. Allegations that all sounded in the duty of care.

So while defendants' acts in

furtherance of their scheme continued through trial in the Chancery litigation, March 4, 2019, investors had no inkling the defendants may be acting in bad faith until perhaps facts were revealed in Anthem's pretrial brief, made public in February 18, 2019; or, at the earliest, perhaps investors could have inquired beginning in March 2018, when Anthem moved to compel information about Teneo's involvement.

When plaintiff learned about defendants' bad-faith conduct, from trial in the Chancery litigation, it issued its 220 demand on March 25, 2019. And rather than rushing to 220 litigation, plaintiff agreed to a limited scope of 220 books and records.

Now, had plaintiff filed suit, the statute of limitations would have been tolled. But because plaintiff did not file suit but, instead, was reasonable and negotiated, it shouldn't be penalized.

Moreover, the parties entered into a confidentiality agreement that provided that if a stockholder decides that it does not intend to pursue the stated purpose of the demand any further, stockholder's counsel shall promptly so inform Cigna and its counsel in writing. They knew we were still

looking at it.

Now, in the context of busy court dockets, the Court should not opt for a policy that encourages the filing of 220 litigation to toll the statute of limitations when the parties are engaged in a good-faith 220 process.

Teneo's aiding and abetting arguments also fail. As I addressed in the context of the March 31 meeting and the April 25 presentation, they provided substantial assistance, they knowingly participated; and as for causation, the fact that Cigna didn't raise this argument speaks volumes.

As the Court found, each must deal independently with the consequences of their costly and ill-fated attempts to merge. Thus far, Cordani, Jones, and Cigna's board defendants have not faced any consequences for their bad-faith acts.

I'm happy to explain any of the points I've made in more detail or answer any other questions the Court may have. But if nothing else, then we will otherwise stand on our papers.

THE COURT: Thank you so much. I appreciate it.

ATTORNEY ORENSTEIN: Thank you.

THE COURT: Juli, how are you holding up?

THE COURT REPORTER: I'm good. Thank you.

THE COURT: Good? All right.

Reply.

ATTORNEY MIRVIS: Thank you, Your Honor. My Apple Watch tells me I have 60 seconds left from my original third.

The argument was made that plaintiff did not disclaim arguing bad faith. Plaintiff's answering brief, at 10 to 11, says, in words of one or two syllables, "plaintiff need not plead conduct amounting to bad faith' ...." And then it cites the three-part *Zuckerberg* standard and underscores the "or," or bad faith. And the words "bad faith" don't appear in the complaint.

Second point, counsel carefully went through three exhibits attached to the complaint as showing bad conduct or a breach of fiduciary duty. All three of those documents could have been gotten in 2017 under a 220 demand. They were not withheld on grounds of privilege. Lots of pieces of paper in our world have the words "privileged and confidential" on

them and are readily produced.

That's all I have. Thank you, Your Honor.

THE COURT: Thank you.

ATTORNEY HENNES: Your Honor, I'll take the same 60 seconds as Mr. Mirvis.

Two points. One, the only fact that I heard about Teneo's knowledge, scienter, of awareness of the alleged breach of fiduciary duty here that is the improper motivation in paragraphs 5 and 240 to benefit David Cordani is the March 31 board meeting, which I addressed in my opening remarks. But plaintiff also added that it, very importantly, has to be viewed in the context of the February 23rd and 24th board meetings, which there's no allegation that Teneo attended because Teneo hadn't been retained as of that time. So if you need that context in order to make that clear, that allegation has to fail.

The other point I'll make about that meeting is my friend made the argument that there was a presentation by Wachtell Lipton which specifically briefed the board on their fiduciary duties. There's no allegation that Teneo should reject -- there's no allegation or reason why Teneo should reject the

presentation by Wachtell Lipton on the board's fiduciary duties, except to require it to hire its own lawyers to second-guess what Wachtell Lipton is saying in the context of the advice it's giving to the board.

So, Your Honor, we would suggest that that's not a reasonable inference to draw; that because Wachtell Lipton was presenting on its fiduciary duties, that Teneo should know that something is amiss. All that we heard about the March 31 meeting is that there was -- excuse me, the March 31 board meeting is they discussed a breach of contract, not a breach of fiduciary duty.

And, finally, I'll address causation briefly. My friend argued that it was -- I think it was striking that Cigna didn't raise the point. That's not our argument. Our argument is that Teneo couldn't have caused any harm because the decisions that are at issue here, the alleged improper conduct, was taken before Teneo was hired. So it's not a Cigna argument; it's a Teneo argument.

And the fact that those decisions were taken, allegedly, in January and February means that anything Teneo did afterward couldn't be a but-for cause of their harm. There is nothing different that

would have happened by virtue of Teneo's hiring as it relates to the breach of fiduciary duty, Your Honor.

Thank you.

THE COURT: All right. Thank you all.

Let's do this: This is one where it's at the motion to dismiss stage. It's also a matter that I think is fairly clearly governed by settled law. Why don't we take five or ten minutes, and then I'll come back and give you my answer.

Let's officially come back at 20 after 2:00. Thank you.

(Court in recess 2:12 to 2:20 p.m.)

THE COURT: Please be seated.

Thank you very much for your briefing and your presentations today. It's a pleasure to hear them. As I said before our break, this is a pleading-stage motion that I think is governed by settled law, so I'm going to go ahead and give you my answer now.

The defendants have advanced multiple grounds for dismissal, but I'm only going to address one, which is demand futility. I'm going to grant the motion on that basis. I do not reach or express any view on the other grounds.

I do have to accept the facts in the complaint as true for purposes of the motion. They are detailed. They rely heavily on a lengthy post-trial decision that I issued in August 2020, which I'll call the "merger decision." I commend interested readers to those sources. I'm only going to provide the sparest of background for purposes of the ruling today.

In 2014, Cigna and Anthem discussed a possible merger between the two companies. One of the defendants, David Cordani, was the chief executive officer of Cigna. Nonparty Joseph Swedish was the CEO of Anthem. There were a number of hurdles to a potential merger, but, relevant to the present motion, the most significant hurdle was the social issue of whether Cordani or Swedish would lead the post-merger entity, which I'll generally refer to as "Newco."

Cordani wanted to lead Newco, and he had strong support from the Cigna board of directors. Despite Cordani's desire, Cigna and Anthem executed a merger agreement in 2015 which provided for Anthem to acquire Cigna. Swedish would serve as CEO. Cordani would serve as president and chief operating officer. The Newco board of directors would consist of nine

Anthem directors and five Cigna directors. In December of 2015 Cigna's stockholders overwhelmingly voted in support of the merger.

As detailed at length in the merger decision, the post-signing period that began after July 23, 2015, was marked by conflicts between Anthem and Cigna at the management level. As those disputes continued, Cordani tried to find ways to assert himself and expand his role and even position himself as the CEO of Newco.

As I've already noted, Cigna had the right to designate five members of the Newco board. One of them would be Cordani. Cordani hand-picked his strongest supporters on the Cigna board to be those nominees, and they were Isaiah Harris, John Partridge, Eric Wiseman, and Bill Zollars.

We then get to a period of time, starting in 2016, when the disputes between Cordani and Swedish amped up another level. As those were unfolding, Zollars wrote Cordani an email, and in it, he stated, "Rest assured that the entire [Cigna] Board and those of us accompanying you to the dark side have your back."

Cordani responded, "Thank you for your

outreach and continued support. We knew this would not be easy but jeez."

Later that month, Swedish openly sought to reduce Cordani's role from what had been contemplated by the merger agreement. Cigna viewed that as a hostile move and started thinking of the merger as a hostile takeover of Cigna by Anthem, and they responded in kind.

They initially embarked on something that was aptly named Project Alpha to try to convince the proposed Newco board that Cordani was the right man to lead the combined company and be its alpha dog. There was a meeting on February 16, 2016, where all of the members of the Newco board convened, including the Cigna designees. That meeting was carefully choreographed to stress Cordani's leadership and express the Cigna board's concerns and put Cordani forward as a leader for the combined company.

Notes from that meeting indicate that the Cigna nominees were on message, including Partridge, who told Swedish, among other things, that the Cigna board had witnessed Cordani create tremendous shareholder value and believed Cordani, as CEO for Newco, would be able to do the same thing for

the Newco shareholders. I've included a few modifications to that quotation, just to try to make it more readable.

The February meeting largely went according to plan, but it didn't generate the result that the Cigna board wanted — namely, a full elevation of Cordani and restoration of his roles as originally contemplated.

And so at a meeting on February 23 and 24, 2016, the Cigna board authorized what was called Plan B, which directed management to reassess and, as necessary, descope the corporation's integration planning efforts. That is euphemistic language for "stop cooperating with the integration effort." The board also authorized the retention of Wachtell Lipton and Teneo. According to the minutes, their job was to assist with the merger and determine what Cigna's rights and obligations were. As I found, in fact, their job was to figure out how to get out of the merger agreement.

From than point on, the advisors in fact worked covertly to undermine the merger. And they had to work covertly, because Cigna was contractually obligated to support the merger. Had

they worked openly against it, it would have plainly resulted in a breach.

The merger decision found that these actions constituted a breach of the merger agreement. But I think part of what is critical for the ruling today is it doesn't necessarily follow that those actions constituted a breach of duty. The directors could have concluded that it was in the best interests of Cigna and its stockholders to escape from the merger agreement, even if that meant losing the termination fee or exposing Cigna to damages for breach.

The main issue for today is the question of why the defendants acted. That translates, for purposes of the analysis that I'm conducting, into whether the particularized factual allegations of the complaint provide reason to doubt that the defendants could consider a demand. The answer largely turns on whether they could be liable on some breach of fiduciary duty claim for terminating the merger agreement, with the most likely claim being that they didn't act in the best interests of the stockholders but acted for some other reason, such as supporting Cordani.

All right. Back to the story.

In July 2016, the Department of Justice sued to block the merger. As explained in the merger decision, the advisors engaged covertly in efforts to support the DOJ's position. The DOJ prevailed at both the district court and appellate level, resulting in the merger being enjoined.

During the trial, as detailed in the merger decision, Cordani engaged in additional behavior that I think is inferably problematic from a fiduciary perspective. The decision questioned the veracity of testimony that he gave under oath. Because compliance with the law is a prerequisite for loyal action, the opposition to a merger based in part on false testimony, to my mind, is not only a breach of the merger agreement, but, at least as to that component, also a breach of the duty of loyalty.

After the merger was enjoined, Cigna asked Anthem whether they could terminate the merger. Anthem said, "No. We want to keep trying to close."

On February 14, 2017, Cigna delivered a notice of termination. Anthem sued later that day and moved for a temporary restraining order precluding Cigna from terminating. Cigna countersued.

I granted Anthem's TRO motion. Expedited proceedings ensued on a preliminary injunction application, which I denied. As a result of the denial, the parties were free to terminate the merger agreement, and the next day they exchanged termination notices, resulting in the merger being terminated as of May 12, 2017.

Massive litigation ensued in this Court, resulting in an eventual trial. And then, on August 31, 2020, I issued the merger decision.

As before the District Court, Cordani and, at this point, also Nicole Jones, the company's general counsel, engaged in conduct before the litigation that I think inferably rises to the level of a fiduciary breach. They gave testimony that I not only discredited but thought was knowingly false. And, again, as I said before, because compliance with the law is a requirement for the duty of loyalty, one can infer for purposes of today that opposing a merger by giving false testimony not only constitutes a breach of contract but also rises to a loyalty breach.

Now I'm going to pivot to what the plaintiffs did. On March 25, 2019 -- so during the midst of the contract breach litigation -- the

plaintiff made a books and records demand. They received some information in 2019. And then, on November 16, 2020, they filed this litigation without making a presuit demand on the board.

They asserted three claims. The first is a claim for breach of fiduciary duty against the directors in their capacity as directors. And those directors are Cordani, Eric Foss, Harris, Roman Martinez, Partridge, Wiseman, and Donna Zarcone. The second count is a claim for breach of fiduciary duty against Cordani and Jones as officers. And the third claim is a claim for aiding and abetting a breach of fiduciary duty by Teneo.

All of the defendants moved to dismiss the complaint. As I noted at the outset, various arguments are raised in support of dismissal, but I need only reach the issue of demand futility.

I'll now go through the legal analysis. All of the claims here are derivative. Under Rule 23.1, in a derivative action, the complaint must allege with particularity the efforts, if any, made by the plaintiff to obtain the action that the plaintiff desires from the directors or comparable authority and the reasons for the plaintiff's failure

to obtain the action or for not making that effort.

From that seemingly innocent language, we have the doctrinal thicket of demand futility. Thankfully, the Delaware Supreme Court has taken some steps to prune the thicket in the *Zuckerberg* decision, and I follow the steps in that analysis here.

Under *Zuckerberg*, demand on the board is excused if the complaint pleads sufficient facts to raise a reasonable doubt as to whether the board in office when the suit was filed included a majority of directors who could properly consider the demand.

In this case, at the time the suit was filed, the board consisted of 13 directors. Therefore, the plaintiff must plead particularized facts that support a reasonable inference that seven of those directors could not properly consider a demand. There are six directors who joined the board after the events in question, and the plaintiff doesn't make any arguments about them, so they are not at issue.

That leaves seven. For purposes of the motion, the defendants don't contest that Cordani could not properly consider a demand. That leaves six directors at issue: Foss, Harris, Martinez, Partridge,

Wiseman, and Zarcone. For the count to work to render demand futile, the plaintiff has to plead facts giving rise to a reasonable doubt as to all six. If any of them could consider a demand, then demand was not futile and the complaint must be dismissed.

The *Zuckerberg* test involves three steps that one applies to each of the directors in question. The first is whether a director received a material personal benefit from the alleged misconduct that is the subject of the litigation demand. None of the six did, so that one is not at issue.

The real debate is under the second and third steps of the *Zuckerberg* analysis, which, as I think of it, coincide for purposes of this decision. And I'll try to explain why.

One question is whether any of the six could face a substantial likelihood of liability on the claims that are the subject of the demand. The other question is whether any of the six lack independence from someone who received a material benefit from the alleged misconduct or who could face substantial liability on the claims in the demand.

Here's why I think it's the same thing for this case. In light of Cigna's exculpatory

provision, the six remaining directors only can face potential liability for a breach of the duty of loyalty. And that includes a failure to act in good faith.

They didn't receive any personal benefits from the merger that would make them self-interested. Thus the real question is whether they acted in good faith. And one could see a good-faith problem existing if they subjectively pursued Cordani's best interests rather than the best interests of Cigna and its stockholders.

The same analytical construct relates to the second path. I've already suggested that Cordani faces a substantial risk of liability on the claims — at least for purposes of the motion. If the actions that the six took suggest that they're beholden to Cordani and acted to serve his interests because of their beholdenness, then we end up in the same place. The real turning point for the motion is thus the relationship between the six and Cordani.

The interesting aspect of this case, I think, is that the plaintiff doesn't ground its allegations about beholdenness or a lack of independence on common and familiar features, such as

an employment relationship or a family connection or years of close friendship. The real source is Cordani's preternaturally charismatic leadership and the bonds that he's been able to forge in the boardroom. As evidence of those bonds, the plaintiff points to the actions the directors took, including resisting the merger. They also point to emails the directors wrote.

At least as I think about it, this is really a case about structural bias. It's really a case about the relationship between the outside directors and management, with the plaintiff attempting to establish a disabling level of structural bias. We know that *Aronson*, in a footnote, said a plaintiff can do that but they to plead it. A Court can't presume it. Here, the plaintiff is trying to establish a disabling level of structural bias by pointing to evidence from the merger dispute and findings in my opinion.

I'm going to go through the directors. The only director that I think is disqualified under this standard is Harris. The complaint contains a lot of facts about Harris. It's clear that Harris and Cordani had a very close relationship. I also can't

put out of my mind my own assessment of demeanor at trial. I think Harris is firmly on team Cordani.

I don't say that to criticize Harris. Nor, in the abstract, do I view that relationship as a bad thing. As the defendants point out and Mr. Mirvis eloquently explained this afternoon, in many settings, it's going to be beneficial for a director and a CEO to have a very close working relationship and to be on the same page. That can be very positive. It can be extremely helpful.

The time it becomes problematic is when the question is whether you're going to sue the CEO. In that sense, this close working relationship is quite similar to any type of really close friendship. It's often a great thing, until you have to try to make an objective judgment as to whether to sue your friend. And it's at that point where there's reason to doubt whether you can make that determination objectively.

So I'm not criticizing Mr. Harris or his relationship with Mr. Cordani as a general matter. I think, in most settings, it's likely a fundamentally positive thing for the company. But in this setting, I do think that it's sufficiently close to be

disabling for demand futility purposes.

I'm next going to talk about Partridge and Wiseman. There's two factors that distinguish them from the other directors on the board and put them, in my mind, between Harris and the last set of directors I'll talk about.

First, both were part of the group, the four, that went on the Cigna board who, inferably, were the most loyal to Cordani and were going to have his back in terms of any dispute with the other directors. Partridge had served on the Cigna board with Cordani for over a decade, and he also wrote an email to Cordani suggesting that Anthem has made a tactical mistake that might result in -- and I'm going to paraphrase, rather than read -- Cordani being able to show the Newco board how good he was, enabling the potential elevation of Cordani at the expense of Swedish, just as the Cigna directors ten years before had elevated Cordani at the expense of the former CEO.

I think these emails show strong support for Cordani and his leadership. I think that joining the Newco board is, likewise, a showing of strong support. But I don't think it necessarily follows that Partridge couldn't consider a demand.

I said I was considering Partridge and Wiseman together, and that's because Wiseman is somewhat similar but a step removed from Partridge. Like Partridge, Wiseman served with Cordani for more than a decade. Like Partridge, he was one of the four directors, one of the four outsiders, who was going to go on the Newco board. But we don't have similar emails. I think that to the extent that I find that there's not a reason to doubt Partridge's ability to consider demand, I have a similar feeling about Wiseman.

And then, lastly, I get to Foss, Martinez, and Zarcone. Here, as one might infer from the order in which I am moving through these directors, I think that the demand analysis again falls short. They weren't part of the group of four that was picked by Cordani to join the Newco board. As with all of these directors, the plaintiff can, and does, allege that they were part of this effort to descope integration and resist the contract. But again, to my mind, that doesn't inherently equate to a fiduciary breach. What I'm looking for is connections to Cordani, and I don't think they are here.

I will say, as a final note, that I

don't think that the Zollars email about the entire Cigna board having Cordani's back is compromising. Again, that, to me, is like the Partridge emails. It expresses support for Cordani and his leadership but does not signal more than that.

I will simply say, as a final matter, that I have tried to consider all of these allegations holistically. I know I've discussed some of these items individually as I've gone through them, but my job is to consider them as a whole, and I've done that.

For the reasons that I've articulated, I don't think that the plaintiff has pled demand futility. I think, based on the allegations of the complaint, the board could consider a demand, and that is sufficient to dispose of the current motions.

Thank you for staying while I went through that ruling. I appreciate your time. As I said previously, I appreciate your presentations and it's nice of you-all to have traveled to be here, so thank you. I'll enter an order on the docket and people can proceed from there.

Have a good rest of the afternoon.

(Court adjourned at 2:46 p.m.)

CERTIFICATE

I, JULIANNE LABADIA, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify that the foregoing pages numbered 3 through 80 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 11th day of April 2022.

/s/ Julianne LaBadia

Julianne LaBadia
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Delaware Notary Public