

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

United States District Court
Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE PIVOTAL SECURITIES
LITIGATION

Master File No. 3:19-cv-03589-CRB

**ORDER GRANTING MOTION TO
DISMISS**

This consolidated class action alleges violations of the Securities Act of 1933 (“the Securities Act”) and the Securities Exchange Act of 1934 (the “Exchange Act”) against Pivotal Software, Inc. (“Pivotal”). Purchasers of Pivotal’s securities argue that they are entitled to damages caused by Pivotal’s alleged false and misleading statements about its financial and business condition. Pending before this Court is Pivotal’s motion to dismiss Plaintiffs’ Consolidated Amended Class Action Complaint (“CAC”). Because Plaintiffs fail to plausibly allege that any statement was false or misleading, and for other reasons explained below, the Court GRANTS Pivotal’s motion to dismiss.

I. BACKGROUND

A. Parties

Defendant Pivotal is a San Francisco-based information technology and software company founded in 2013. CAC (dkt. 75) ¶ 4. Pivotal provides a cloud-native application platform, Pivotal Cloud Foundry (“PCF”), and strategic services. *Id.* Pivotal’s platform enables software developers to accelerate and streamline their processes for modernizing cloud-based applications. *Id.* Pivotal’s consulting services assist companies in developing

software and adapting to cloud computing. *Id.* ¶ 21. Pivotal generates most of its revenue

1 from the sale of time-based PCF subscriptions. Id. ¶ 5; MTD (dkt. 80) at 1. Pivotal’s
 2 flagship product is Pivotal Application Service (“PAS”), and in February 2018, Pivotal
 3 made its new product, Pivotal Container Service (“PKS”) commercially available. CAC ¶
 4 5; MTD at 1. PKS allows customers to “more easily deploy and operate Kubernetes,” an
 5 open-source system designed for managing containerized workloads and services. CAC ¶
 6 5.

7 At all relevant times, Defendant Robert Mee (“Mee”) served as Pivotal’s Chief
 8 Executive Officer, and Defendant Cynthia Gaylor (“Gaylor”) served as Pivotal’s Chief
 9 Financial Officer. Id. ¶ 32. Defendants Mee and Gaylor possessed the power and
 10 authority to control the contents of Pivotal’s Securities and Exchange Commission
 11 (“SEC”) filings, press releases, and other market communications. Id. ¶ 35.

12 Defendants Paul Martiz, Egon Durban, William Green, Marcy Klevorn, Khozema
 13 Shipchandler, and Michael S. Dell each signed the Registration Statement, solicited the
 14 investing public to purchase securities issued pursuant thereto, hired and assisted the
 15 underwriters, and planned and contributed to the initial public offering (“IPO”) and
 16 Registration Statement. Id. ¶¶ 36–43.

17 Defendants Morgan Stanley & Co. LLC; Goldman Sachs & Co. LLC; Citigroup
 18 Global Markets Inc.; Merrill Lynch, Pierce, Fenner & Smith Inc.; Barclays Capital Inc.;
 19 Credit Suisse Securities (USA) LLC; RBC Capital Markets, LLC; UBS Securities LLC;
 20 Wells Fargo Securities LLC; KeyBanc Capital Markets Inc.; William Blair & Company,
 21 L.L.C.; Mischler Financial Group, Inc.; Samuel A. Ramirez & Co., Inc.; Siebert Cisneros
 22 Shank & Co., LLC; and Williams Capital Group, L.P. (“Underwriter Defendants”) are
 23 financial services companies that acted as underwriters for Pivotal’s IPO, helping to draft
 24 the Registration Statement and solicit investors to purchase securities issued pursuant
 25 thereto.¹ Id. ¶¶ 44–59. Representatives for the Underwriter Defendants allegedly
 26
 27

1. The Underwriter Defendants have moved to join Pivotal’s motion to dismiss the CAC, and Pivotal’s reply to the opposition. See generally Mot. for Joinder (dkt. 88); Notice of Joinder (dkt.

1 conducted a “due diligence” investigation into Pivotal’s operations and financial prospects,
2 met with Pivotal executives for “drafting sessions,” and caused the Registration Statement
3 to be filed with the SEC. Id. ¶ 59.

4 The Plaintiff class consists of all persons and entities, other than the defendants,
5 who purchased or otherwise acquired (1) Pivotal’s common stock traceable to the
6 registration statement and prospectus issued in connection with Pivotal’s April 2018 IPO,
7 and/or (2) Pivotal securities between April 20, 2018 and June 4, 2019 (the “Class Period”).
8 Id. ¶ 3. The Lead Plaintiffs in this matter are the Oklahoma City Employee Retirement
9 System and the Police Retirement System of St. Louis (“Plaintiffs”). Id. ¶ 1.

10 **B. Factual Background**

11 On December 15, 2017, Pivotal filed a confidential draft registration statement on
12 Form S-1. Id. ¶ 75. On or about April 18, 2018, Pivotal filed a final amendment to the
13 registration statement, which registered over 37 million shares of Pivotal common stock
14 for public sale. Id. ¶ 79. The SEC declared the registration statement effective on April
15 19, 2018. Id. On or about April 20, 2018, Pivotal filed the final prospectus for the IPO.
16 Id. ¶ 80.

17 On April 24, 2018, Pivotal completed the IPO, which, upon the Underwriter
18 Defendants exercising their full over-allotment option to purchase additional shares, issued
19 a total of 42,550,000 shares priced to the public at \$15 per share and generated more than
20 \$638 million for Pivotal. Id. ¶ 81. Pivotal’s 200-page registration statement included an
21 overview of its products, business operations, financial results, and almost forty pages of
22 risk disclosures. MTD at 1 (citing Webb Decl. Ex. 1 at 16–50). The registration statement
23 promoted Pivotal’s “leading” and “turnkey cloud-native platform,” claiming it
24 “combine[d] the latest innovations from open-source projects” and integrated PCF
25 with Kubernetes. CAC ¶ 8. The registration statement also emphasized “the Company’s
26 sales and customer success model.” Id. The CAC alleges that the registration statement
27 and prospectus made false and/or misleading statements regarding Pivotal’s business for
28

1 failing to disclose material information. Id. ¶¶ 9, 148–62.

2 During the Class Period, Pivotal “repeatedly touted the superiority and adoption of
3 its products.” Id. ¶ 15. The CAC alleges that statements made during the Class Period
4 were materially false and/or misleading because Pivotal Defendants failed to disclose
5 “among other things, that Pivotal was facing major problems with its sales execution and a
6 complex technology landscape resulting in lengthening sales cycles and diminished
7 growth, as well as the industry’s sentiment [having] shifted away from Pivotal’s principal
8 product, which was incompatible with Kubernetes, the industry-standard platform.” Id. ¶
9 16. These purportedly misleading statements were made in connection with a January
10 2019 conference and Pivotal’s quarterly earnings reports and calls on four dates:
11 June 12, 2018, September 12, 2018, December 11, 2018, and March 14, 2019. Id. ¶¶ 227–
12 33, 239–48, 254–59, 264–66, 268–80.

13 On June 4, 2019, Pivotal reported its financial results for the first quarter of fiscal
14 year 2020. CAC ¶ 18. Defendant Mee advised investors that Pivotal “closed fewer deals
15 than . . . expected in Q1 due to sales execution and a complex technology landscape that is
16 lengthening [Pivotal’s] sales cycle.” Id. Pivotal lowered its going-forward fiscal year
17 2020 revenue guidance from \$798–806 million to \$756–767 million. Id. ¶ 19; MTD at 3.
18 The next day, Pivotal’s stock price fell \$7.65 per share, or more than 40 percent, from
19 \$18.54 per share to \$10.89 per share. Id. ¶ 20. Following the news, analysts called the
20 quarter a “train wreck” and characterized Pivotal’s operating results as “disastrous” and a
21 “cause for concern.” Id. ¶ 21. On August 22, 2019, Pivotal announced a proposed merger
22 with VMware at \$15 per share; the merger closed at the end of 2019. Id. ¶ 21; MTD at 3.

23 C. Procedural Background

24 In November 2019, this Court consolidated three related securities class actions
25 against Pivotal, and appointed Oklahoma as Lead Plaintiff. See generally Order Granting
26 Consolidation and Appointing Lead Plaintiff and Lead Counsel (dkt. 63).

27 Plaintiffs subsequently filed the CAC on February 11, 2020. See generally CAC.

1 On March 27, 2020, Pivotal filed a motion to dismiss the CAC, see generally MTD, a
 2 declaration in support of the motion that attached twenty-one documents, some of which
 3 were incorporated in the CAC by reference, see generally Webb Decl. (dkt. 81), and a
 4 request for the Court to consider these documents and to take judicial notice of Pivotal’s
 5 SEC filings. See generally Request for Judicial Notice (dkt. 83). Plaintiffs oppose
 6 Pivotal’s motion to dismiss. See generally Opp’n (dkt. 90). Pivotal filed a reply to
 7 Plaintiffs’ opposition. See generally Reply (dkt. 91). The Court also held a motion
 8 hearing on July 17, 2020. See Motion Hearing (dkt. 95).

9 II. LEGAL STANDARD

10 Pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed
 11 for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b).
 12 Dismissal may be based on either “the lack of a cognizable legal theory or the absence of
 13 sufficient facts alleged under a cognizable legal theory.” Godecke v. Kinetic Concepts,
 14 Inc., 937 F.3d 1201, 1208 (9th Cir. 2019). The Court is “not bound to accept as true a
 15 legal conclusion couched as a factual allegation.” Papasan v. Allain, 478 U.S. 265, 286
 16 (1986) (citation omitted); see Clegg v. Cult Awareness Network, 18 F.3d 752, 754–55
 17 (9th Cir. 1994). Rather, a complaint must plead “enough facts to state a claim to relief that
 18 is plausible on its face.” Ashcroft v. Iqbal, 556 U.S. 662, 697 (2009) (citing Bell Atlantic
 19 Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff
 20 pleads factual content that allows the court to draw the reasonable inference that the
 21 defendant is liable for the misconduct alleged.” Id. When evaluating a motion to dismiss,
 22 the Court “must presume all factual allegations of the complaint to be true and draw all
 23 reasonable inferences in favor of the nonmoving party.” Usher v. City of Los Angeles,
 24 828 F.2d 556, 561 (9th Cir. 1987). “Courts must consider the complaint in its entirety, as
 25 well as other sources courts ordinarily examine when ruling on Rule
 26 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by
 27 reference, and matters of which a court may take judicial notice.” Tellabs, Inc. v. Makor

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.