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Case Number 347,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

VRAJESHKUMAR PATEL, individually and on behalf of all others similarly situated, and derivatively on behalf of Nominal Defendant TALOS ENERGY INC.,	§	
Plaintiff Below / Appellant,	§	
v.	§	
TIMOTHY S. DUNCAN, NEAL P. GOLDMAN, CHRISTINE HOMMES, JOHN "BRAD" JUNEAU, DONALD R. KENDALL, JR., RAJEN MAHAGAOKAR, CHARLES M. SLEDGE, ROBERT M. TICHIO, JAMES M. TRIMBLE, OLIVIA C. WASSENAAR, RIVERSTONE HOLDINGS, LLC, RIVERSTONE TALOS ENERGY EQUITYCO LLC, RIVERSTONE TALOS ENERGY DEBTCO LLC, APOLLO GLOBAL MANAGEMENT, INC., APOLLO TALOS HOLDINGS, L.P., AP TALOS ENERGY DEBTCO LLC, and GUGGENHEIM SECURITIES, LLC,	§	No. 347, 2021
Defendants Below / Appellees,	§	On Appeal from the Chancery Court of the State of Delaware, C.A. No. 2020-0418-MTZ
-and-	§	
TALOS ENERGY INC.,	§	**PUBLIC VERSION FILED: JANUARY 3, 2022**
Nominal Defendant Below / Appellee.	§	

APPELLANT'S OPENING BRIEF

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NATURE OF THE PROCEEDINGS

This is a stockholder derivative suit on behalf of Talos Energy Inc. ("**Talos**" or the "**Company**"). Plaintiff Below / Appellant Vrajeshkumar Patel ("**Plaintiff**") respectfully appeals from the Memorandum Opinion and resulting Orders of the Court of Chancery dismissing his Verified Stockholder Derivative and Class Action Complaint (the "**Complaint**"). *See Patel v. Duncan et al.*, C.A. No. 2020-0418-MTZ (Mem. Op. Sept. 30, 2021, corrected Oct. 4, 2021) (the "**Opinion**") (Exhibit A).

PRELIMINARY STATEMENT

Plaintiff brought this stockholder derivative action "to recover hundreds of millions of dollars wasted in an interested party transaction that was unfair at every level to the Company and its public stockholders." A0042 (¶ 1). Plaintiff alleges that the Company's two private equity sponsors control Talos, and because of the inherent coercion associated with their presence, caused Talos to buy certain oilfield assets from one of their affiliates at a grossly inflated price. The transaction thus is subject to review under the entire fairness standard. The Court below, however, dismissed the Complaint, holding that Plaintiff did not sufficiently plead the existence of a control group or a claim for waste. Each of those conclusions was an error.

Delaware law is clear: whether a constellation of facts supports an inference of control is a fact-specific inquiry at the pleading stage, where Plaintiff is entitled to every reasonable inference and receives the benefit of the doubt. The Complaint alleges ample historical and transactional ties between the Company's two private equity sponsors (Apollo and Riverstone, defined below) such that it is reasonably conceivable that they controlled Talos. For example, Apollo and Riverstone jointly founded Talos 10 years ago with $600 million in seed capital and collectively held 62.9% of the Company's stock. Apollo and Riverstone were the only shareholder signatories to a stockholders' agreement with the Company, granting them the

power to collectively appoint six of the 10 members of the Talos board of directors (the "**Board**") and to decide "all… matters submitted to stockholders for approval[.]" A3443. Moreover, the Company expressly admitted in its registration statement that:

> ***We are controlled by Apollo Funds and Riverstone Funds. The interests of Apollo Funds and Riverstone Funds may differ from the interests of our other stockholders***…. Through their ownership of a majority of our voting power and the provisions set forth in our charter, bylaws and the Stockholders' Agreement, the Apollo Funds and the Riverstone Funds have the ability to designate and elect a majority of our directors.

A3442 (emphasis in original). Reflecting the reality that Apollo and Riverstone are a group that jointly controlled the Board, the shareholder vote and, therefore, Talos, the Company consistently referenced Riverstone and Apollo in its SEC filings collectively, using joint nomenclature. In addition to these and other historical ties, Apollo and Riverstone controlled the transaction at issue by, among other things, wielding their collective power to enact deal terms without the need for a public stockholder vote and implement a last-minute amendment to ensure the transaction closed sooner than planned.

Against this backdrop, the questions raised in this appeal are simple. ***First,*** did Plaintiff plead facts sufficient to support a reasonable inference that the Company's two private equity sponsors are a control group? ***Second***, did Plaintiff plead facts sufficient to put defendants on notice that his claim against the

Company's directors denominated as a breach of fiduciary duty is for waste? These questions must be answered affirmatively because it is more than reasonably conceivable that Talos is a controlled company and that bad faith permeates this transaction, thereby subjecting it to entire fairness review and satisfying the elements of a claim for waste regardless of how it was denominated.

Accordingly, the Opinion of the Court below should be reversed, and the action remanded for further proceedings.

SUMMARY OF ARGUMENT

1. The Court below erred by finding that Plaintiff did not adequately plead that the Company's two private equity sponsors constitute a control group.

2. The Complaint pleads facts sufficient to support a reasonable inference that the Company's two private equity sponsors, who together controlled a majority of the Company's voting power and appointed a majority of the Company's directors, were a control group. On a motion to dismiss where Plaintiff is entitled to the benefit of all reasonable inferences, the existence of a control group is reasonably conceivable based on the allegations in the Complaint. The transaction at issue is therefore subject to review under the entire fairness standard.

3. The Court below erred by finding that Plaintiff did not plead or brief a claim for waste, which was therefore waived.

4. The Complaint pleads that the transaction at issue was so clearly unfair to the Company that approving it was an act of bad faith. Plaintiff's claim for breach of fiduciary duty is therefore a claim for waste.

PROCEDURAL HISTORY

Plaintiff inspected the Company's books and records under 8 *Del. C.* § 220 ("**Section 220**"). A0042. On May 19, 2020, the Company represented that its production in response to Plaintiff's inspection demand was compete. A4297. Plaintiff filed his Complaint alleging derivative and direct claims on May 29, 2020. A0038 (Dkt. 1).

Two months after Plaintiff filed his Complaint, the Company produced additional books and records for inspection on July 27, 2020. A4300. Plaintiff promptly objected. *Id.*

On August 4, 2020, Defendants Below / Appellees (collectively, "**Defendants**") filed four separate motions to dismiss with four accompanying briefs. A0027-31 (Dkt. 24-28). Plaintiff answered Defendants' motions in one combined brief on October 6, 2020. A0016 (Dkt. 48). Plaintiff's answering brief addressed the new Section 220 documents produced on July 27th.

On October 26, 2020, the Company produced still more additional Section 220 documents. A4624.

On November 10, 2020, Defendants filed four reply briefs that relied on the new Section 220 documents produced on October 26th. A0013-14 (Dkt. 52-55); A4613. With leave of the Court below, Plaintiff filed a sur-reply on November 24,

2020. A0011 (Dkt. 60), A4618. Oral argument on Defendants' motions was held on February 19, 2021. A0007 (Dkt. 73).

On May 17, 2021, the Court below issued a letter decision directing that certain necessary parties be joined in order to afford complete relief. A0005-6 (Dkt. 77), A4823. On June 7, 2021, the Court below entered the parties' stipulated order joining certain necessary parties as Defendants and modifying the caption accordingly (the "**Joinder**"). A0004 (Dkt. 81); *see* A4834-41.

On September 30, 2021, Plaintiff stipulated to dismiss his direct claims in light of this Court's decision in *Brookfield Asset Management, Inc. v. Rosson*, 2021 WL 4260639 (Del. Sept. 20, 2021). A0003-4 (Dkt. 82), A4842. The Court below issued the Opinion later that day.

STATEMENT OF FACTS

The relevant facts below are taken from the Complaint; documents produced to Plaintiff under Section 220 before he filed his Complaint and incorporated by reference therein; documents integral to the allegations in the Complaint; and documents put before the Court below by Defendants in support of their motions to dismiss. The Court below properly disregarded the additional Section 220 documents produced after Plaintiff filed his Complaint. *See* Opinion 18.

I. The Company

Talos is an oil and gas exploration and production company. A0044 (¶ 11). Its largest asset is its share of the giant Zama oilfield in offshore Mexico ("**Zama**"), one of the world's biggest shallow-water oil discoveries in the last 20 years. A0082, A0085 (¶¶ 138, 143). A January 2020 audit by a leading global energy consultant estimated that the Company's interest in Zama contained almost as much oil as the Company's other proved oil reserves – combined. A0083-84 (¶¶ 140-141). The Company's stake in Zama was publicly valued at $440 million by Defendant Below / Appellee Guggenheim Securities, LLC ("**Guggenheim**") just two months before Guggenheim issued its fairness opinion on the Challenged Transaction. A0069, A0082-83 (¶¶ 99, 139); A4211-12, A4216.

At all relevant times, the Board had the following 10 members, all of whom are Defendants Below / Appellees: (i) Timothy S. Duncan ("**Duncan**"), who is also

the Company's President and CEO; (ii) Neal P. Goldman ("**Goldman**"); (iii) Christine Hommes ("**Hommes**"); (iv) John "Brad" Juneau ("**Juneau**"); (v) Donald R. Kendall, Jr. ("**Kendall**"); (vi) Rajen Mahagaokar ("**Mahagaokar**"); (vii) Charles M. Sledge ("**Sledge**"); (viii) Robert M. Tichio ("**Tichio**"); (ix) James M. Trimble; and (x) Olivia C. Wassenaar ("**Wassenaar**"). A0047-50 (¶¶ 23-32).

II. The Company's History

In 2012, Duncan formed the Company's predecessor, Talos Energy LLC ("**Old Talos**"). A0044 (¶ 13). As the Court below explained:

> From its inception, Old Talos was backed by funds affiliated with [Defendants Below / Appellees] Riverstone Holdings, LLC, ("**Riverstone Parent**") and Apollo Global Management, Inc. ("**Apollo Parent**"). Riverstone Parent invested in Old Talos through [Defendants Below / Appellees] Riverstone Talos Energy Equityco LLC and Riverstone Talos Energy Debtco LLC (the "**Riverstone Funds**," and together with Riverstone Parent, "**Riverstone**"). Apollo Parent similarly invested in Old Talos through [Defendants Below / Appellees] Apollo Talos Holdings, L.P., and AP Talos Energy Debtco LLC (the "**Apollo Funds**," and together with Apollo Parent, "**Apollo**").[1]

Opinion 3 (emphasis added).

Old Talos was founded with $600 million in commitments from Riverstone and Apollo. A0047-48 (¶ 23). Apollo and Riverstone received substantial annual

[1] The Riverstone Funds and Apollo Funds were added as defendants by the Joinder.

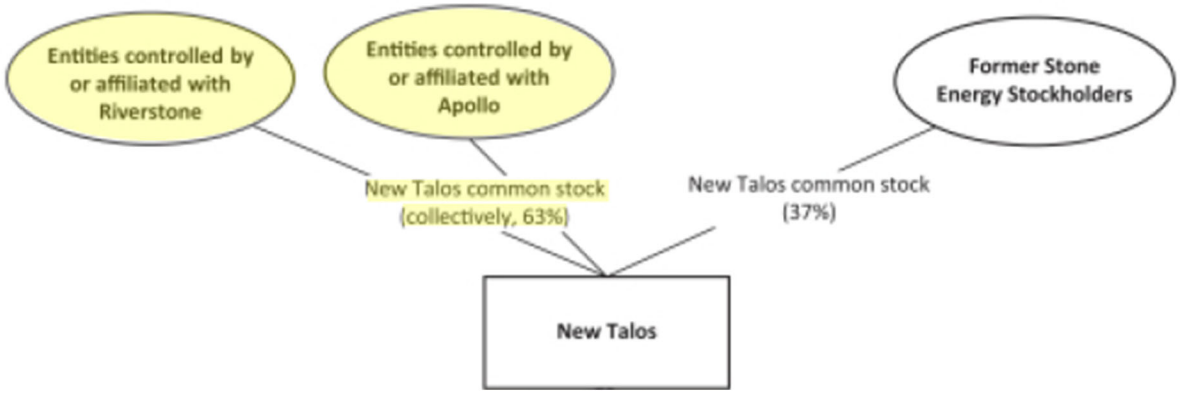
fees for their "services" to Old Talos as well as a "transaction fee" equal to 2% of their original $600 million investment. *Id.*; A0044 (¶ 13).

When Old Talos was formed, Riverstone's co-founders, non-parties Pierre Lapeyre ("**Lapeyre**") and David Leuschen ("**Leuschen**") announced, "We are excited to build another company with Tim [Duncan]. This investment exemplifies Riverstone's strategy of re-partnering with proven management teams.... We look forward to repeating the success we had with Phoenix." A0047-48 (¶ 23). Phoenix was a company co-founded by Duncan in 2006 with $350 million in commitments from Riverstone and its partners. *Id.*

On May 10, 2018, Old Talos combined with non-party Stone Energy Corp. ("**Stone Energy**") to form the Company (the "**Combination**"). A0044 (¶ 12). Stone Energy's financial statements within the Company's registration statement issued in connection with the Combination acknowledge that Old Talos was "controlled" by affiliates of Riverstone and Apollo. A3761; A3813 (same). *See also* A3666 (registration statement disclosing that Old Talos "was controlled by Apollo Global Management, LLC through May 10, 2018," the date of the Combination).

The Combination resulted in Apollo and Riverstone respectively owning 35.4% and 27.5% of the Company's shares. A0045 (¶ 14). This is reflected by a

diagram in the Company's initial registration statement illustrating the corporate structure of the Company ("New Talos" in the diagram):



A0045 (¶ 15) (diagram cropped and highlighting added), A0344 (source). As reflected in the Company's diagram, Apollo and Riverstone are grouped together and "collectively" owned 63% of the Company's common stock following the Combination.

Contemporaneous with the Combination, Riverstone and Apollo, via their controlled affiliates, entered into a Stockholders' Agreement (the "**Stockholders' Agreement**") under which Apollo and Riverstone each designated two members of the Board, agreed to designate the fifth and sixth directors jointly, and agreed that the Company's CEO (Duncan) would initially be on the Board as one of their two joint designees. *See* Opinion 5-6, 7 n.12; A2644 (§ 3.1(a), the initial Board composition); A2645 (§ 3.2(a), Apollo designates two directors); A2646 (§ 3.2(b), Riverstone designates two directors); A2646-47 (§ 3.2(c), Riverstone and Apollo

have "the collective right to designate two additional persons" to the Board, one of whom must be either the Company's CEO or qualify as independent).

Riverstone designated Mahagaokar and Tichio, respectively a principal and a partner at Riverstone. A0049 (¶¶ 28, 30). Tichio was previously a member of the Old Talos and Phoenix boards. *Id.* (¶ 30). Apollo designated Hommes and Wassenaar, both of whom are Apollo partners and served on the Old Talos board. A0048-50 (¶¶ 25, 32). Wassenaar was formerly a Managing Director at Riverstone until she joined Apollo in 2018 and continues to own an interest in Riverstone. *Id.* (¶ 32); A0092-93 (¶ 162(j)). Duncan, who was jointly designated by Riverstone and Apollo, served on the board of Old Talos and was its President and CEO. A0047-48 (¶ 23). Apollo and Riverstone also jointly designated Kendall. A0048 (¶ 27).

The Stockholders' Agreement refers to Apollo and Riverstone together as a group to the exclusion of others. *See, e.g.,* A2642-43 (defining "Stockholder Group" as Riverstone and Apollo collectively, "Other Stockholder" as someone "that is not a member of the Stockholder Group", and "Related Party Transaction" as a transaction in which the Company is a participant and "any… member of any Stockholder Group… has a direct or indirect interest"); A2648-49 (§ 3.2(j)) (the Company agrees to avail itself of "controlled company" exceptions to corporate

governance listing standards "[s]o long as the Stockholder Group owns at least a majority of the outstanding shares of Company Common Stock[.]").

After the Combination, the Company filed a Form S-4 Registration Statement on September 14, 2018 (the "**Registration Statement**") in which it disclosed the extent of Riverstone and Apollo's control over the Company. *See* A3422, A3431 *et seq.* The Registration Statement discloses that:

> ***We are controlled by Apollo Funds and Riverstone Funds. The interests of Apollo Funds and Riverstone Funds may differ from the interests of our other stockholders.***

A3442 (emphasis in original). *See also* A0094-95, A0098 (¶¶ 171, 190). The Registration Statement further discloses that:

> Through their ownership of a majority of our voting power and the provisions set forth in our charter, bylaws and the Stockholders' Agreement, **the Apollo Funds and the Riverstone Funds have the ability to designate and elect a majority of our directors**. As a result of the Apollo Funds' and the Riverstone Funds' ownership of a majority of the voting power of our common stock, we are a "controlled company" as defined in [the NYSE] listing rules….

A3442-43 (emphasis added). It also discloses that:

> **Apollo Funds and Riverstone Funds also have control over all other matters submitted to stockholders for approval**…. Apollo Management and Riverstone may have different interests than other holders of our common stock and may make decisions adverse to your interests.

A3443 (emphasis added). It then discloses that:

> Among other things, **Apollo Funds' and Riverstone Funds' control could… result in the consummation of such a transaction that other stockholders do not support**.

Id (emphasis added). Elsewhere, the Registration Statement refers to Apollo Parent and Riverstone Parent jointly as the "Sponsors," A3573, A3676, A3732; to Riverstone and Apollo jointly as the "Sponsor Stockholders," A3432; and to transactions involving Apollo and Riverstone's affiliates as the "Sponsor Equity Exchange" and "Sponsor Debt Exchange." A3431, A3717, A3751. Regarding the latter, the Registration Statement describes how "the Apollo Funds and Riverstone Funds contributed $102.0 million in aggregate principal amount" of 9.75% senior notes to the Company in exchange for common stock, without distinguishing between their respective contributions but rather always characterizing it as a joint contribution. *See, e.g.,* A3432; A3489; A3509. The financial statements attached to the Registration Statement likewise characterize the $102 million contribution by Riverstone and Apollo as made by a group. *See* A3717, A3746, A3751, A3754; A3761; A3813.

The Company's other SEC filings, including its Schedule 14C Information Statement dated March 10, 2020, similarly refer to Apollo and Riverstone as a group to the exclusion of others. *See, e.g.,* A1183-84, A1192 (referring to Apollo and Riverstone as the "Majority Stockholders"); A1266 (describing how Old Talos "completed a transaction with the Majority Stockholders" in February 2012 by

which it received a private equity commitment). *See also* A1260 (noting that "Apollo Funds and Riverstone Funds, by virtue of their ownership of a majority of the voting power of our Common Stock… will be able to approve any matter brought to a vote of our stockholders without the affirmative vote of any other stockholders"); A1261 (noting that "Although the Apollo Funds and Riverstone Funds own a majority of our capital stock, **our [charter and bylaws] contain provisions that may delay, defer or discourage another party from acquiring control of us**.") (emphasis added). In other words, the Company acknowledged that it is structured to discourage outsiders from "acquiring control" of the Company from the Apollo and Riverstone group.

III. Riverstone and Apollo's Other Historical Ties

Riverstone and Apollo have ties going back over a decade. Riverstone was founded in 2000 by Lapeyre, Leuschen and non-party Gregory Beard ("**Beard**"). A0050-51 (¶ 37). In 2010, Beard moved to Apollo and became its Global Head of Natural Resources. A0050 (¶ 36).

In 2012, Beard orchestrated the transaction by which Riverstone and Apollo gained control of Old Talos, aided by his fellow Riverstone co-founders Lapeyre and Leuschen. A0050-51 (¶ 37).

In 2013, Apollo and Riverstone bought EP Energy Corp. ("**EP Energy**") for approximately $7.2 billion. Riverstone and Apollo together owned over 68% of EP

Energy's stock and, through a stockholder's agreement, designated seven directors to EP Energy's 11-member board. A0051 (¶ 38). After six years, the EP Energy investment ended in disaster with the company's 2019 bankruptcy, which resulted in Riverstone and Apollo collectively losing $2.6 billion. A0051-52 (¶ 41).

Apollo and Riverstone first used Talos to assist one another in 2018, a year before the transaction at issue. Several years earlier, Apollo had loaned Whistler Energy II, LLC ("**Whistler**") $135 million in secured financing, but the company suffered operational setbacks and its creditors commenced involuntary bankruptcy proceedings. When Whistler emerged from bankruptcy in March 2018, Apollo received only $35 million on its $135 million investment. In August 2018, Talos acquired Whistler and made Apollo nearly whole. A0052-55 (¶¶ 43-55); Opinion 9-10. Plaintiff pleads with particularity how the Company greatly overpaid for Whistler to make Apollo whole. A0054-55 (¶¶ 55-57). Although the Whistler transaction was objectively unfair to Talos, Riverstone and its Board designees nevertheless acceded to the transaction.

IV. The Challenged Transaction

On December 10, 2019, the Company announced that it had entered into agreements with non-party affiliates of Riverstone (the "**Sellers**") to acquire a portfolio of U.S. Gulf of Mexico oil-producing assets, prospects and acreage (the "**Challenged Transaction**" to acquire the "**Riverstone Assets**"). A0055-56 (¶ 59).

The December 10, 2019 Form 8-K announcing the Challenged Transaction disclosed that "[s]imultaneous with the execution of definitive documentation, affiliates of [Apollo Parent] and [Riverstone Parent], which collectively control approximately 63% of the Company's outstanding common stock, provided their stockholder approvals." A1177 (emphasis added). The Form 8-K also disclosed that Guggenheim issued a fairness opinion to the Company in connection with the Challenged Transaction. *Id. See also* Talos Energy Inc. Form Prem 14C dated January 30, 2020 at 23 ("On December 10, 2019, the parties executed definitive agreements" concerning the Challenged Transaction; stating that Guggenheim's opinion was dated as of December 10, 2019; and disclosing that "On December 10, 2019, the Majority Stockholders delivered to the Company the Written Consent approving the Stock Issuance" contemplated under the Challenged Transaction."[2]

The Company filed another Form 8-K on December 16, 2019 disclosing that the relevant agreements provided that in exchange for the Riverstone Assets, the Sellers would receive consideration of $385 million in cash plus 11 million shares

[2] *See* Preliminary Information Statement (Form Prem 14C) filed January 30, 2020, available at https://www.sec.gov/Archives/edgar/data/0001724965/000119312520018807/d835469dprem14c.htm. This document is properly before the Court because it is the source of Plaintiff's allegations at A0056-58 (¶¶ 62-65) and is therefore integral to the Complaint. *See, e.g., In re Gardner Denver, Inc. S'holders Litig.,* 2014 WL 715705, at *2-3 (Del. Ch. Feb. 21, 2014).

of Talos common stock worth approximately $691 million as of that date. A0056 (¶ 60).

Plaintiff pleads at length and with particularity why Guggenheim's fairness opinion was fatally defective and unsound on its face, and how the opinion deliberately overvalued the Riverstone Assets and undervalued the Company, resulting in Talos grossly overpaying for the Riverstone Assets. A0066-86 (¶¶ 91-147). Most egregiously, Guggenheim's fairness opinion **did not even mention or place any value on the Company's interest in Zama**, the Company's most valuable asset, which Guggenheim had recently publicly valued at $440 million. A0068-69, A0080-85 (¶¶ 98-99, 130-134, 138-142). Another glaring defect is that Guggenheim ignored that oil reserves are more valuable than natural gas reserves on an energy equivalent basis, leading Guggenheim to overvalue the Riverstone Assets (51% oil and 40% gas) and undervalue Talos's reserves (74% oil and 18% gas), resulting in the Riverstone Assets being overvalued by approximately 50%. A0074-76 (¶¶ 113-118).

The Company disclosed in its January 30, 2020 Preliminary Information Statement that directors Mahagaokar, Tichio and Wassenaar were recused from the decision to enter into the Challenged Transaction because of their ties to Riverstone. A0057-58 (¶ 65). Apollo's designee Hommes, however, was not

recused, and neither were Riverstone and Apollo's joint designees Kendall and Duncan. *Id.*

[redacted] *Id*. (¶ 65) (citing confidential Board minutes). *See also* A2679, A2682, A2685, A2750-2753, A2756, A2761 (additional minutes showing the same).

On February 24, 2020, Riverstone and Apollo executed a joint written consent to modify the terms of the Challenged Transaction: instead of issuing 11 million shares of common stock to the Sellers, the Company would now issue 110,000 shares of preferred stock, each of which would automatically convert into 100 shares of common stock 20 calendar days after the Challenged Transaction closed. A0058-9 (¶ 68); A2867 *et seq.* This change allowed the Challenged Transaction to close 20 days early because it dispensed with the need to notice a stockholder vote as the original terms of the Challenged Transaction had required under SEC and NYSE rules. Although the vote was a formality in light of Apollo and Riverstone's control of a majority of the Company's voting power, the 20-day notice period would have allowed the Company's public stockholders the

opportunity to object to the Challenged Transaction or seek to enjoin it. A0059-60 (¶¶ 69-72). Despite the last-minute change to the terms of the Challenged Transaction, neither Talos management nor the Board asked Guggenheim to update its fairness opinion. This failure is even more egregious because by this time the price of oil had fallen below the fairness opinion's "downside case" of $50 a barrel. A0063-64 (¶¶ 84-85).

The Company disclosed the restructured Challenged Transaction in a revised information statement on Form PRER-14C filed on February 25, 2020. A0058 (¶ 67). The Challenged Transaction closed three days later on February 28, 2020. A0060-61 (¶ 74). Following the closing, Riverstone's holdings in Talos increased from 27.5% to 39.8% of the Company's common stock. A0056-57 (¶¶ 62). Other stockholders, including Apollo, were diluted. *Id.*, Opinion 16. The final Schedule 14C Information Statement states that upon completion of the Challenged Transaction, "the Majority Stockholders [*i.e.,* Riverstone and Apollo] will own an approximate 75.2% equity stake in the Company." A1201; *see also* A0061 (¶ 76).

V. Plaintiff's Claims

Plaintiff alleges that the Challenged Transaction is a controller transaction subject to entire fairness review and was unfair to Talos because it "wasted" hundreds of millions of dollars by grossly overpaying for the Riverstone Assets. A0042 (¶ 1); A0066-86 (¶¶ 91-148). The Complaint asserts derivative claims for

breach of fiduciary duty against the Board (Count IV), and against Riverstone and Apollo (Count V); for aiding and abetting breach of fiduciary duty against Guggenheim (Count VI); and for unjust enrichment against Riverstone (Count VII). The Complaint originally asserted direct claims arising out of the same misconduct, but Plaintiff stipulated to voluntarily dismiss them after this Court's decision in *Brookfield, supra*. A0003-4 (Dkt. 82), A4842.

VI. The Opinion

The Opinion granted Defendants' motions to dismiss under Court of Chancery Rules 12(b)(6) and 23.1. The Court below held that Plaintiff failed to adequately plead that a conflicted control group effectuated the Challenged Transaction. Opinion 2, 38-39, 45. Absent a control group, Apollo and Riverstone did not owe fiduciary duties to the Company and the Challenged Transaction was not subject to entire fairness review. *Id.* at 21-22. Acknowledging that Defendants conceded futility as to Mahagaokar, Tichio and Wassenaar and that Duncan has "deep ties with Riverstone," the Court below held that in the absence of a control group, there was no basis to conclude that Apollo's designee Hommes was conflicted, meaning that at least six members of the 10-member Board could have fairly considered a litigation demand. *Id.* at 44-46, 46 n.132, 52. The Court below also held that Plaintiff waived a claim for waste because it had been neither pled nor briefed. *Id.* at 22, 49-50.

Plaintiff respectfully appeals from the Opinion.

ARGUMENT

I. Plaintiff Sufficiently Pled That Riverstone and Apollo Jointly Controlled Talos

A. Question Presented

Did Plaintiff plead facts sufficient to support a reasonable inference that Riverstone and Apollo together controlled the Company, thereby subjecting the Challenged Transaction to review under the entire fairness standard? This issue was preserved below in Plaintiff's brief opposing Defendants' motions to dismiss and at oral argument. A4228-39; A4760-79.

B. Standard of Review

This Court reviews *de novo* whether Plaintiff pled facts sufficient to support a reasonable inference that Apollo and Riverstone are a control group. In performing this analysis, the Court must accept all well-pled allegations as true and draw all reasonable inferences in Plaintiff's favor. *Sheldon v. Pinto*, 220 A.3d 245, 253 (Del. 2019). The Court should "not affirm a dismissal unless the plaintiff would not be entitled to recover under any reasonable set of circumstances." *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 535 (Del. 2011). Whether the circumstances supporting a claim are "reasonably conceivable" is a "low threshold." *Israel Disc. Bank of New York v. First State Depository Co., LLC*, 2012 WL 4459802, at *13 (Del. Ch. Sept. 27, 2012) (denying motion to dismiss), *aff'd*, 86 A.3d 1118 (Del. 2014). Indeed, the standard

is met when there is merely the "possibility" of recovery. *Central Mortg.*, 27 A.3d at 537 n.13. In short, it is a "plaintiff-friendly" standard that Plaintiff has amply satisfied. *Clouser v. Doherty*, 175 A.3d 86 (Del. 2017) (Table).

C. Merits of the Argument

The Challenged Transaction is between Talos and Riverstone's affiliates, and should be scrutinized under the entire fairness standard because Riverstone and Apollo control the Company. As movants under Rule 12(b)(6), Riverstone and Apollo had the burden of demonstrating that the facts alleged in the Complaint do not give rise to any reasonably conceivable scenario in which entire fairness will be the standard at trial. *See, e.g., In re LNR Prop. Corp. S'holders Litig.*, 896 A.2d 169, 178 (Del. Ch. 2005) (denying motion to dismiss a "bare-boned" complaint alleging entire fairness standard). Given the well-pleaded allegations in the Complaint, the Court below erred in holding that Defendants met this high burden.

As alleged in the Complaint, Apollo and Riverstone collectively owned a majority of the Company's outstanding stock and appointed a majority of the Company's Board. A0045-46 (¶¶ 14-19); Opinion 7 n.12. The Complaint alleges substantial historical and transactional ties between Apollo and Riverstone supporting a reasonable inference that they comprised a control group owing fiduciary duties to the Company and its minority public stockholders. *See, e.g., Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1239 (Del. 2012) ("When a

transaction involving self-dealing by a controlling shareholder is challenged, the applicable standard of review is entire fairness, with the defendants having the burden of persuasion."). Entire fairness further applies because Riverstone stood on both sides of the Challenged Transaction and there were no procedural protections for the minority stockholders in place. *See generally, Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014).

1. The Possible Application of Entire Fairness Precludes Dismissal on the Pleadings

"A controlling or dominating shareholder standing on both sides of a transaction… bears the burden of proving its entire fairness." *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1115 (Del. 1994); accord *Theriault,* 51 A.3d at 1239; *LNR*, 896 A.2d at 176 n.41. To avoid liability under entire fairness, the fiduciary must prove that the challenged transaction is both entirely fair in price and entirely fair in process; accordingly, a determination that entire fairness applies will almost always act to "preclude dismissal of complaint" at the pleading stage. *In re Atlas Energy Res., LLC,* 2010 WL 4273122, at *11 (Del. Ch. Oct. 28, 2010) (citation omitted); *see also LNR*, 896 A.2d at 178 (denying motion to dismiss because the challenged transaction might ultimately be reviewed for entire fairness).

2. The Elements of a Control Group

"Delaware law imposes fiduciary duties on those who effectively control a corporation." *Voigt v. Metcalf*, 2020 WL 614999, at *11 (Del. Ch. Feb. 10, 2020), quoting *Quadrant Structured Prods. Co. Ltd. v. Vertin*, 102 A.3d 155, 183-84 (Del. Ch. 2014) (citing authorities). It is well settled under Delaware law that a control group exists when a group of stockholders "are connected in some legally significant way – such as by contract, common ownership, agreement, or other arrangement – to work together toward a shared goal." *Sheldon v. Pinto Tech. Ventures, L.P.*, 220 A.3d 245, 251-52 (Del. 2019) (quotation marks and citations omitted). To plead a "legally significant connection," Plaintiff "must allege that there was more than a mere concurrence of self-interest among certain stockholders. Rather, there must be some indication of an actual agreement, although it need not be formal or written." *Id.* at 252. A plaintiff pleads "'more than a mere concurrence of self-interest' by identifying an array of plus factors," including historical and transaction-specific ties, allowing "the Court to infer 'some indication of an actual agreement.'" *Garfield v. BlackRock Mortg. Ventures, LLC*, 2019 WL 7168004, at *9 (Del. Ch. Dec. 20, 2019), quoting *id.*

"Because the analysis of whether a control group exists is fact intensive, it is particularly difficult to ascertain at the motion to dismiss stage when dismissal is inappropriate unless the plaintiff would not be entitled to recover under any

reasonably conceivable set of circumstances[.]" *In re Hansen Medical, Inc. Shareholders Litigation*, 2018 WL 3025525, at *6 (Del. Ch. June 18, 2018) (noting that a "reasonable" inference of a control group need not be "conclusive"). *See also In re Nine Sys. Corp. S'holders Litig.*, 2013 WL 771897, at *6 (Del. Ch. Feb. 28, 2013). ("[A]s long as the facts of record support a reasonable inference – not necessarily the better inference – that a control group existed, summary judgment is not appropriate."); *Williamson v. Cox Communs., Inc.*, 2006 WL 1586375, at *6 (Del. Ch. June 5, 2006) (denying motion to dismiss control group allegations because "whether a shareholder is a controlling one is highly contextualized and is difficult to resolve based solely on the complaint."); *Voigt*, 2020 WL 614999, at *22 (plaintiff alleged "facts sufficient to support a reasonable inference" that a defendant was a controller, noting that "[w]hether a constellation of facts supports an inference of control is a fact-specific inquiry" and that "plaintiff receives the benefit of the doubt in a close case.").

3. Plaintiff Pled Sufficient Facts to Support a Reasonable Inference That Riverstone and Apollo are a Control Group

"When weighing the alleged transaction-specific ties against the backdrop of the alleged historical connections" between Riverstone and Apollo, "it [is] reasonably conceivable that the stockholders 'functioned as a control group[.]'" *Garfield*, 2019 WL 7168004, at *9, citing *Hansen*, 2018 WL 3025525, at *7. The Complaint alleges an array of "plus factors" including historical and transaction-

specific ties between Riverstone and Apollo that are more than sufficient for the Court to infer at the pleading stage that Riverstone and Apollo agreed to act as a control group, thereby triggering entire fairness review. *See Garfield*, *supra* (denying motion to dismiss because "the sum-total of the facts alleged and inferences therefrom make it at least reasonably conceivable that [defendants] formed a control group.").

a. Historical Ties

The historical ties between Apollo and Riverstone are long and deep. ***First***, Riverstone and Apollo have a decade-long history of cooperation and coordination. The relationship began no later than 2012 when they jointly invested $600 million as founding investors in Old Talos. A0047-48 (¶ 23); A3676. In 2018, Apollo and Riverstone once again jointly invested in the Company in connection with the Combination between Old Talos and Stone Energy. The corresponding Registration Statement referred to this $102 million investment as a joint investment by Apollo and Riverstone. *See, e.g.,* A3432; A3489; A3509. The financial statements attached to the Registration Statement likewise treat the $102 million contribution by Apollo and Riverstone as made by a group. *See* A3717, A3746, A3751, A3754; A3761; A3813. In addition to their $702 million joint investments in Talos, in 2013 Apollo and Riverstone co-invested in EP Energy and jointly maintained that investment until late 2019. Thus, Apollo and Riverstone

have a decade-long uninterrupted history of joint investments in Talos (and at least one other company) with no gaps. *See Garfield*, 2019 WL 7168004 at *9 (inferring a control group because "BlackRock and HC Partners share a ten-year history of co-investment in PennyMac with no gaps.")

Second, as in *Hansen* and *Garfield*, the Company consistently used joint nomenclature and definitions to reference Apollo and Riverstone collectively. For example, the Company's disclosures describe Apollo and Riverstone as "Sponsors," A3573, A3676, A3732; as "Sponsor Stockholders," A3432; and as "Majority Stockholders." A1183-84, A1192, A1266. *See also* A0344 (diagram in registration statement depicting Apollo and Riverstone as a group owning 63% of the Company's stock). *Cf. Hansen*, 2018 WL 3025525, at *2, *7 (private placement documents describe the control group defendants collectively as the "Principal Purchasers"); *Garfield*, 2019 WL 7168004, at *9 (filings describe control group collectively as "strategic investors").

Third, the Company repeatedly stated that Riverstone and Apollo are a group that controls Talos. And these statements go well beyond the Company's regulatory obligations under Section 303A.00 of the NYSE Listed Company

Manual.[3] In particular, the September 14, 2018 Registration Statement prominently states in bold, italic type that "***We are controlled by Apollo Funds and Riverstone Funds.***" A3442 (emphasis in original). The Registration Statement further acknowledges that "Apollo Funds and Riverstone Funds also **have control** over all other matters [in addition to the election of directors] submitted to stockholders for approval[.]" A3443 (emphasis added). The Company also informed the minority shareholders that Apollo and Riverstone collectively have the power to adversely impact their interests. *See* A1260 (March 10, 2020 Information Statement referring to Apollo and Riverstone's power to "approve any matter brought to a vote of our stockholders without the affirmative vote of any other stockholders"); A1261 (same disclosure referring to provisions that may "discourage another party" besides Riverstone and Apollo "from acquiring control of us."); A3443 (September 14, 2018 Registration Statement disclosing that Apollo and Riverstone's "concentrated control" could discourage investors and harm the Company's stock price, and that "Apollo Management and Riverstone may have different interests than other holders of our common stock and may make decisions adverse to your interests," such as "the consummation of... a transaction that other stockholders do

[3] Available at https://nyse.wolterskluwer.cloud/listed-company-manual/document?treeNodeId=csh-da-filter!WKUS-TAL-DOCS-PHC-%7B0588BF4A-D3B5-4B91-94EA-BE9F17057DF0%7D--WKUS_TAL_5667%23teid-68.

not support."). "At the pleading stage, the plaintiff is entitled to the benefit of the inference that the disclosure meant what it said" – that Talos is controlled by Riverstone and Apollo. *Voigt*, 2020 WL 614999 at *15.

Fourth, Apollo and Riverstone are the sole shareholder signatories to a Stockholders' Agreement that grants them joint control over "all… matters submitted to stockholders for approval, including changes in capital structure, transactions requiring stockholder approval under Delaware law, and corporate governance[.]" A3443. *See also Hansen*, 2018 WL 3025525, at *7 (the alleged controllers' reservation of special rights was a significant historical tie). In particular, the Stockholder's Agreement grants Apollo and Riverstone the right to collectively appoint six of the ten Company directors, thereby ceding control of the Company to Apollo and Riverstone. *See Voigt*, 2020 WL 614999, at *14 (where even "the ability of an alleged controller to designate directors (albeit less than a majority) is an indication of control."); *id.* at *14 n.12 (citing additional authority). And, unlike the agreements in *Sheldon* and *van der Fluit v. Yates,* which were diluted with numerous shareholder signatories outside of the control group, Riverstone and Apollo were the only shareholder signatories to the Stockholders' Agreement. *See Sheldon,* 220 A.3d at 248 (20 "Key Shareholders" and 70 "Significant Shareholders" in addition to the three alleged controllers, who appointed only three directors to the seven-member board); *Yates*, 2017 WL

5953514, at *6 (Del. Ch. Nov. 30, 2017) (agreements did not bear on the election of directors and included "numerous other signatories" in addition to the two alleged controllers).

Finally, the Stockholders' Agreement requires that after Apollo and Riverstone each appoint two directors of their choice, they must agree on the selection of directors five and six. A2645-47 (§§ 3.2(a) – (c)); A4232 n.11. In other words, the only way that Apollo and Riverstone gain control of the Board is if they come to an agreement on the selection of two of the six directors. Thus, the Stockholder's Agreement is a "legally significant connection" between Apollo and Riverstone "to work towards a shared goal" of controlling the Company in furtherance of their self-interest. *See Sheldon*, 220 A.3d at 251-52 (quotation marks omitted).

Accordingly, leading up to the Challenged Transaction, Apollo and Riverstone jointly founded and funded the Company with over $700 million, jointly controlled the Board of Directors, and were designated by the Company as Majority Stockholders that collectively owned 62.9% of outstanding Talos stock.

b. <u>Transactional Ties</u>

Against the backdrop of Apollo and Riverstone's "ten-year history of co-investment" and coordination in Talos "with no gaps," *Garfield*, 2019 WL 7168004, at *9, Riverstone and Apollo worked closely together to facilitate the

Challenged Transaction. Importantly, the Challenged Transaction could never have occurred without Apollo's agreement of support.

A significant part of the original consideration the Company offered to Riverstone during the negotiations of the Challenged Transaction was 11 million shares of Talos common stock. A0056 (¶ 60). Given that Riverstone and Apollo collectively owned 62.9% of Talos common stock, A0045 (¶ 14), the *only* way an issuance of that magnitude of shares was possible is if Apollo agreed to vote in favor. It is therefore reasonable to infer that discussions between Apollo, Riverstone and Talos to secure Apollo's advance agreement were part of the deal negotiations. This conclusion is buttressed by that fact that the Company's filings announcing the Challenged Transaction disclosed that "[s]imultaneous with the execution of definitive documentation" Riverstone and Apollo "provided their stockholder approvals." A1177. *See also* January 30, 2020 Form Prem 14C, *supra* n.2, at 23 ("On December 10, 2019, the Majority Stockholders delivered to the Company the Written Consent approving the Stock Issuance" contemplated under the Challenged Transaction). Providing their written consents simultaneous with the execution of the definitive documentation further indicates that Apollo was included in the negotiations of the Challenged Transaction and agreed to vote in favor of the share issuance for the benefit of Riverstone. *See Hansen*, 2018 WL 3025525, at *7 (voting agreements obtained from controllers concurrently with the

transaction is a transactional tie); *Frank v. Elgamal*, 2012 WL 1096090, at *8 (Del. Ch. Mar. 30, 2012) (control group may be inferred where "all of the members of the Control group contemporaneously entered into the Voting Agreements, the Exchange Agreements, and the Employment Agreements.").

Riverstone and Apollo, as Majority Stockholders, continued to exercise joint control by executing an eleventh-hour joint written consent that materially altered the form of consideration to avoid a stockholder vote, thereby allowing the deal to close immediately.[4] A0058-60(¶¶ 67-71). As in *Garfield*, this "late-in-the-game revision… requiring the consent of both" of the alleged controllers is a transactional tie supporting "a reasonably conceivable inference that the alleged group had more than a mere concurrence of self-interest and an actual agreement to work together" in connection with the Challenged Transaction. 2019 WL 7168004, at *10 (quotation marks omitted).

In fact, the only logical inference is that there was an understanding between Riverstone and Apollo to use their collective voting power to facilitate the Challenged Transaction. Apollo had no direct economic interest in the Challenged

[4] Rule 14c-2 (17 CFR § 240.14c-2) requires a Form 14C information statement to be disseminated at least 20 days prior to the earliest date that a corporate action may be taken by stockholder consent. Rules 312.03(b) and 312.03(c) of the NYSE Listed Company Manual (*supra* n.3) require stockholder approval for Talos to issue 11 million shares of common stock but not 110,000 shares of preferred stock. A0059 (¶ 69).

Transaction; indeed, it diluted Apollo. A0056-57 (¶ 62); Opinion 16. This is, therefore, not a case where two equity holders are acting independently in their own self-interest. Even with no skin in the game, Apollo took numerous affirmative steps to facilitate the Challenged Transaction, including having Apollo-appointed board members support the deal and using its voting power to initially approve and then revise the deal. With no economic stake, the *only* logical inference is that Apollo acted pursuant to an agreement with Riverstone to wield their collective power as controllers for the benefit of group-member Riverstone.

And this was not the first time that one controller voted in favor of a transaction for the benefit of the other. In August 2018, the Company purchased Whistler from Apollo for $98.3 million, which greatly overvalued Whistler and was unfair to Talos. A0054-55 (¶¶ 55-58). At the time of the transaction, Whistler had just emerged from almost two years in bankruptcy and Apollo had lost $100 million of its $135 million investment. *Id.* (¶ 55). Even though Riverstone stood to gain no economic benefit from the transaction, it nevertheless helped facilitate the deal through its Board representation. A0055 (¶ 58). As with the Challenged Transaction, the only logical inference is that Riverstone agreed to exercise control jointly with Apollo for the economic benefit of group-member Apollo. Thus, as part of a control group with a long history of shared economics, each group member had sufficient influence with the other to leverage their joint control for its

own individual benefit. *See Voigt*, 2020 WL 614999, at *11 ("[A] plaintiff may allege facts supporting a reasonable inference that a defendant or a group of defendants exercised sufficient influence that they, as a practical matter, are no differently situated than if they had majority voting control.") (internal quotation omitted).

Given the history of ties between Riverstone and Apollo – including their founding of Talos; subsequent joint investments; the Stockholders' Agreement giving them joint Board control; their identification by and interactions with the Company as a group; the Company's disclosures that it is controlled by Riverstone and Apollo; and their repeated use of corporate control for the benefit of control group members collectively and individually – Plaintiff has pled more than enough facts to support a reasonable inference that Riverstone and Apollo formed a control group for purposes of a motion to dismiss, subjecting the Challenged Transaction to entire fairness review and excusing demand under Prongs 1 and 3 of the test for demand futility under *United Food and Commercial Workers Union v. Zuckerberg (Zuckerberg II),* 2021 WL 4344361 (Del. Sept. 23, 2021) (demand is excused if the director received a material personal benefit, or lacks independence from someone who received a material personal benefit or would face a substantial likelihood of liability).

Plaintiff respectfully submits the Court below erred in holding that Plaintiff did not sufficiently plead the existence of a control group.

II. Plaintiff Sufficiently Pled and Did Not Waive His Waste Claim

A. Question Presented

Did Plaintiff sufficiently plead a claim for waste, and was his waste claim waived? This issue was preserved below in Plaintiff's brief opposing Defendants' motions to dismiss and at oral argument. A4214, A4249 *et seq.*, 4253, 4272, A4752-56, A4768-69, A4777-78.

B. Standard of Review

Decisions granting motions to dismiss are reviewed *de novo*. *Central Mortg.*, 27 A.3d at 535. *See* Point I(B), *supra*. The Court thus reviews the record and determines for itself whether Plaintiff stated or waived claim for waste.

C. Merits of the Argument

The Court below erred in holding that "Plaintiff does not go so far as to allege waste" in connection with the Challenged Transaction. Opinion 22. Indeed, the first paragraph of the Complaint states that:

> This action is to recover hundreds of millions of dollars **wasted** in an interested party transaction that was unfair at every level to the Company and its public stockholders.

A0042 (¶ 1) (emphasis added). Plaintiff pleads with particularity why the Challenged Transaction wasted the Company's assets and that the Board approved the Challenged Transaction despite knowing this. The legal substance of a waste claim was repeatedly addressed in Plaintiff's brief opposing Defendants' motions

to dismiss, in which he argued extensively that the Challenged Transaction was so egregious on its face that approving it was a breach of loyalty. The issue was raised at oral argument, where Plaintiff's counsel went through the Complaint in detail, arguing that the substance of a waste claim was pled in the Complaint and not waived.

1. The Elements of a Waste Claim

A transaction typically constitutes waste when the consideration that "the corporation has received is so inadequate in value that no person of ordinary, sound business judgment would deem it worth what the corporation has paid." *Saxe v Brady*, 184 A.2d 602, 610 (Del. Ch. 1962). However, a transaction where the corporation receives substantial consideration is nevertheless waste if the decision that the consideration was acceptable was in bad faith. *Brehm v. Eisner*, 746 A.2d 244, 263 (Del. 2000), citing *Lewis v. Vogelstein*, 699 A.2d 327, 336 (Del. Ch. 1997) (denying motion to dismiss a waste claim denominated as a breach of fiduciary duty).

Saxe and *Brehm* focus on the same underlying circumstances: when no person of ordinary sound business judgment would deem the transaction worth what the Company paid, the transaction was not entered in good faith, and it is waste. *See also Steiner v. Meyerson*, 1995 WL 441999, at *5 (Del. Ch. July 19, 1995) (in practice, corporate waste is a breach of fiduciary duty deliberately

designed to enrich someone at the Company's expense). *See* A0097 (Plaintiff's Fourth Cause of Action against the Board for breach of fiduciary duty).

As discussed below, Plaintiff pleads that none of the individual defendants could have believed in good faith that Talos received fair value in the Challenged Transaction, which constitutes a breach of loyalty for which the non-recused directors face a substantial likelihood of liability. That, in turn, satisfies Prong 2 of the test for demand futility under *Zuckerberg II* (demand is excused if at least half the Board faces "a substantial likelihood of liability on any of the claims that would be the subject of the litigation.").

2. Plaintiff Pleads a Claim for Waste

As set forth in the Statement of Facts above, the focus of Plaintiff's waste claim is Guggenheim's fairness opinion, which repeatedly and uniformly tips the scales in favor of Riverstone. Guggenheim undervalued Talos by ignoring the existence of its most valuable asset (the Zama field in the Gulf of Mexico) and overvalued the Riverstone Assets by comparing both sides' assets on an oil-equivalent basis (which also undervalued Talos). Plaintiff specifically alleges that these deficiencies were so glaring that the Board must have been aware the Company was being shortchanged. A0073-74, A0076, A0082, A0084-86 (¶¶ 110-111, 118, 138, 142, 146).

First, Guggenheim gave no value whatsoever to the Company's single largest asset: its interest in the giant Zama field in offshore Mexico. Nor did Guggenheim place a value on any of the Company's other Mexican assets, or explain why it failed to do so. A0079-85 (¶¶ 128-43). Plaintiff specifically pleads that "every single Defendant was aware not only of Zama and its enormous present value (and its even greater future value when Talos could book its reserves), but of the Company's other Mexican assets including a recently drilled well close to the Mexican coast that appeared to have discovered a substantial reservoir of oil." A0084-85 (¶ 142). Indeed, Zama alone had almost as much oil as the rest of the Company's proved reserves combined. A0083 (¶ 141). Guggenheim assigning no value to Zama is particularly glaring because it had publicly valued Zama at $440 million just two months earlier. A0069, A0082-3 (¶¶ 99, 139); A4211-12, A4216. Assets worth hundreds of millions of dollars thus disappeared from the Company's side of the ledger in Guggenheim's fairness opinion. $440 million is plainly material given – by comparison, the Challenged Transaction was valued at under $700 million. *See* A0056, A0068-69 (¶¶ 60, 98-99). Finally, Plaintiff pleads that the individual defendants could not have failed to notice Zama's absence from Guggenheim's fairness opinion.

Second, Guggenheim improperly compared the value of the Riverstone Assets (which contain a comparatively higher proportion of gas) and the

Company's assets (which contain much more oil relative to gas) on an energy-equivalent basis. Guggenheim did this by converting both parties' natural gas reserves into their "oil equivalent," which looks at the amount of energy in natural gas necessary to produce the same amount of energy as a barrel of oil (approximately 6.04 million BTUs). A0074-75 (¶ 113). As pled in the Complaint, this is improper for valuation purposes because a barrel of oil is more valuable financially than the energy equivalent 6.04 million BTUs of natural gas. *Id*. (¶¶ 114-115).

Assessing the fairness of the Challenged Transaction on an energy-equivalent basis artificially inflated the value of the Riverstone Assets (with a smaller proportion of oil) and depressed the value of the Company's assets (with a larger proportion of oil), making the Riverstone Assets appear more valuable than they actually were while making the Company's reserves appear less valuable. Plaintiff pleads that the relative value of oil and gas on an energy-equivalent basis was well known to all members of the Board as persons experienced in the energy industry. A0073-0075 (¶¶110, 112-114). As such, they cannot have believed that Guggenheim's fairness opinion was reliable. *Id.* And yet the non-recused Board members agreed to overpay at least $200 million in a transaction valued at less than $700 million. A0068-69, A0076 (¶¶ 98, 99, 118).

No person of ordinary sound business judgement could have approved the Challenged Transaction in light of Guggenheim's facially defective fairness opinion. The fairness opinion simply gave away hundreds of millions of dollars in a way that undoubtedly would have been obvious to persons experienced in the oil business, resulting in an enormous windfall to Riverstone. This is plainly a claim for waste, and the Complaint specifically pleads that **"the Challenged Transaction is so manifestly unfair to Talos that it cannot be the product of business judgment."** A0088 (¶ 161) (emphasis added).

The Court below appears to have been concerned that Plaintiff pled a waste claim denominated as a breach of fiduciary duty, and that the word "waste" was seldom used in the Complaint. But so long as the substance of a claim is pled, and particularly for claims subject to notice pleading under Rule 8, "Rule 12(b)(6) should not be read to impose a requirement that certain magic words be repeated throughout a Complaint." *Anderson v. Airco, Inc.*, 2004 WL 1551484, at *7 (Del. Super. 2004) (noting that fraud claims are subject to heightened pleading standards). *Cf. Barriocanal v. Gibbs*, 697 A.2d 1169, 1172 (Del. 1997) (reversing Court below, which "erroneously required an expert to articulate certain 'magic words'" for his testimony to be deemed reliable because that would "exalt form over substance"); *Dobler v. Montgomery Cellular Holding Co., Inc.,* 2001 WL 1334182, at *7 n.28 (Del. Ch. Oct. 19, 2001) ("the Court… does not deny relief for

failure to use the 'magic' words, provided, of course, that the requisite showing is otherwise accomplished.").

Here, Plaintiff satisfied both Rule 8 and Rule 23.1 because he pled with great particularity why the Challenged Transaction was so unfair to Talos that it could not have been the product of business judgment. A0066-86 (¶¶ 91-148). Plaintiff therefore pled that entering into the Challenged Transaction was bad faith, meaning that the Board breached its fiduciary duty of loyalty by wasting the Company's assets, thus satisfying Prong 2 of the *Zuckerberg II* test for demand futility. *See* A0097 (Fourth Cause of Action).

3. Plaintiff Did Not Waive His Claim for Waste

The Court below erred in holding that Plaintiff waived his waste claim by not addressing it in his answering brief responding to Defendants' motions to dismiss.

Despite pages of particularized allegations in the Complaint describing how the Challenged Transaction was so unfair to Talos that approving it was an act in bad faith, Defendants' opening briefs glaringly ignored this claim regardless of how it was denominated. Although the Complaint mentions Zama more than 20 times, it is mentioned only once in Defendants' four motions to dismiss – a cursory reference by Guggenheim shrugging off as a quibble with methodology the total absence from its fairness opinion of an asset that Guggenheim had recently valued

at $440 million. A0117, A0069, A0082-83 (¶¶ 99, 139). The focus of Plaintiff's answering brief was to meet the arguments that Defendants made – not those that they did not.

Contrary to the impression of the Court below, Plaintiff's answering brief defended his claim for waste. For example, Plaintiff argued that:

> [An] unfair process led Talos to overpay hundreds of millions of dollars for Riverstone's assets. The price was justified by a "fairness opinion" which completely ignored the value of the Company's single largest asset – the Zama oilfield – which the same financial advisor had publicly pegged at $440 million just two months earlier. The [fairness] opinion was riddled with numerous abnormalities that should have raised red flags if the Board was negotiating at arm's length instead of providing cover to the Controllers.

A4211-12. "Overpaying hundreds of millions of dollars" through an "unfair process" is simply another way of describing waste. Plaintiff then explains in detail why comparing the value of oil reserves and gas reserves on an energy-equivalent basis is glaringly improper, arguing that:

> Persons with even basic knowledge about the oil and gas industry know that oil is worth far more than its energy equivalent of natural gas, and Talos' directors, who all claim to be highly experienced in the field, were well aware of this difference. [Complaint] ¶¶ 91, 110, 142, 146. **Defendants ignore these allegations, treating them as non-existent**.

A4215-16 (emphasis added). Plaintiff then addresses Zama, arguing that:

> While every director thus knew that Zama was not considered in Guggenheim's fairness opinion…, none of them questioned its omission despite Guggenheim having publicly valued it at $440 million just two months earlier and Talos repeatedly saying that Zama was the Company's future. [Complaint] ¶ 142. **Apart from a passing reference in Guggenheim's brief, Defendants do not mention Zama at all**.

A4217 (emphasis added). Thus, the facts showing waste, the Board's knowledge that the Challenged Transaction was unfair to the Company, and its approval of the Challenged Transaction nonetheless, are all addressed in Plaintiff's answering brief. *See also, e.g.,* A4249-4253 (arguing the Challenged Transaction is unfair as to price); A4253 (arguing that Plaintiff pled a loyalty claim because he "has pleaded a *prima facie* case that the Challenged Transaction was manifestly unfair"); A4278 (Hommes voted to approve the Challenged Transaction despite knowing it was facially unfair); A4283 (demand is futile given "the glaring lopsidedness of the Challenged Transaction, which was so facially egregious that every director must have known it to be unfair"); A4286 (Juneau, Goldman and Sledge "all approved a transaction that was manifestly unfair to Talos [so] they cannot dispassionately consider a demand on the board."). In short, Plaintiff did not waive his claim that the Challenged Transaction constituted waste or his argument that demand is futile because the Board has a substantial likelihood of liability for knowingly entering into it. All of those points were argued at length.

Plaintiff also argued before the Court below that Guggenheim aided and abetted the Board's breach of fiduciary duty in entering into a transaction that was so facially unfair that it could not be the product of reasonable business judgment:

> Ignoring basic economic facts and overlooking assets worth half a billion dollars when valuing one's own company are not innocent mistakes. Given the magnitude of these errors, they can only be the product of gross negligence or intentional misconduct. Could Riverstone, Apollo, or the Director Defendants really have forgotten that Zama and the Company's other Mexican assets existed, or failed to notice that the Company's single largest asset was not even mentioned in Guggenheim's valuation? Put another way, is it reasonably conceivable that the Defendants who did so violated their fiduciary duties? … Plaintiff has pleaded an underlying breach of fiduciary duty by the Director Defendants and the Controllers.

A4262.

In short, contrary to the conclusion of the Court below, Plaintiff's answering brief argued throughout that Defendants breached their fiduciary duty of loyalty by entering into a facially unfair transaction, that they knew the transaction was facially unfair, and that they entered into it anyway. *See, e.g.,* A4215-17, A4252-53, A4263-64, A4272, A4278, A4283, A4286. While Plaintiff did not use term "waste," that is clearly the breach of fiduciary duty that he alleged. Plaintiff further argued that demand was excused under Rule 23.1 because entering into the Challenged Transaction was an act in bad faith that exposed the Board to a

substantial likelihood of liability. A4272. None of those arguments were addressed by the Court below, regardless of how the claim is denominated in the Complaint.

4. Plaintiff Emphasized His Waste Claim at Oral Argument

At oral argument, Plaintiff detailed how his breach of fiduciary duty claim was grounded on waste. The first attorney arguing for Plaintiff made it the centerpiece of his argument, stating "What we are saying is the price here could not have been the product of a good faith judgment by any of the parties, including Guggenheim." A4734. Counsel noted that Defendants' extensive briefing avoided Zama as the "oil field that must not be named" and barely touched on the relative valuation of oil and gas. A4735-36. Counsel argued that the absence of Zama from Guggenheim's fairness opinion "is the single most dispositive factor in this case." A4736. Counsel then took the Court through the valuation section of the Complaint paragraph by paragraph, repeatedly pointing out where Plaintiff pled that Defendants knew the Challenged Transaction was facially unreasonable but approved it nonetheless. A4736-56.

The second attorney arguing for Plaintiff also raised the issue of waste, arguing that the Board's otherwise inexplicable decision to overvalue the Riverstone Assets and undervalue the Company's assets was because the Company was subject to controllers. Although the Opinion cited an exchange

where counsel admitted the term "waste" was not used in the answering brief, *see* Opinion 37, counsel noted:

> But we do plead a claim for breach of fiduciary duty because the transaction was so unfair on price and process that the board cannot have approved it in the exercise of its fiduciary duty. And whether or not the word "waste" is used to characterize that claim, the nature of the claim is a waste claim.

A4777-78. The same claim can be expressed in different ways and this flexibility is a foundation of modern notice pleading. "Waste" is just shorthand for a breach of fiduciary duty by accepting grossly unfair consideration in bad faith, which is precisely what Plaintiff has alleged the individual defendants did by entering into the Challenged Transaction.

Plaintiff has consistently advanced the same claim throughout this case. It was alleged extensively in the Complaint, defended in Plaintiff's answering brief, and addressed at oral argument. No defendant made any real effort to respond to it. Accordingly, the ruling by the Court below that Plaintiff waived a claim for waste is factually and legally erroneous, and should be reversed.

CONCLUSION

For the reasons above, Appellant respectfully requests this Court reverse the Opinion and accompanying orders of the Court below, direct further proceedings consistent therewith, and grant such other and further relief as this Court deems just and proper.

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CERTIFICATE OF SERVICE

I hereby certify that, on January 3, 2022, a copy of the foregoing was caused to be served by File & Serve*Xpress* on the following counsel of record:

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