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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,	No. 347, 2021
v.	
	Court Below:
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,	Court of Chancery of the State of Delaware, C.A. No. 2020-0418-MTZ
Defendants Below / Appellees,	
-and-	
TALOS ENERGY INC.,	
Nominal Defendant Below / Appellee.	

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NATURE OF PROCEEDINGS

Plaintiff Vrajeshkumar Patel ("Plaintiff") appeals the dismissal of his Verified Stockholder Derivative and Class Action Complaint ("Complaint") by the Court of Chancery in a September 30, 2021 Memorandum Opinion ("Opinion" or "Op."). The Court of Chancery dismissed the Complaint upon motions by defendants (i) Guggenheim Securities, LLC ("Guggenheim Securities") (A0104–23); (ii) Apollo Global Management, Inc. (together with defendants Apollo Talos Holdings, L.P. and AP Talos Energy Debtco LLC, "Apollo") (A0124–54); (iii) Timothy Duncan, Neal Goldman, Christine Hommes, John Juneau, Donald Kendall, Rajen Mahagaokar, Charles Sledge, Robert Tichio, James Trimble, and Olivia Wassenaar (collectively, the "Individual Defendants"), along with Nominal Defendant Talos Energy Inc. ("Talos" or the "Company") (A0155–4154); and (iv) Riverstone Holdings, LLC (together with defendants Riverstone Talos Energy Equityco LLC and Riverstone Talos Energy Debtco LLC, "Riverstone") (A4155–97) (the "Motions to Dismiss").

SUMMARY OF ARGUMENT

1. **Denied.** The Court of Chancery correctly held that Plaintiff failed to plead with particularity that Riverstone and Apollo jointly controlled Talos.

2. **Denied.** Plaintiff failed to adequately plead that Riverstone and Apollo, unaffiliated minority stockholders standing on opposite sides of the Transaction at issue in this case, formed a "control group." Moreover, even if "entire fairness" scrutiny were applicable, Plaintiff was required—and failed—to plead demand futility with particularity on a director-by-director basis. The Court of Chancery correctly rejected Plaintiff's argument that demand should be excused under *Zuckerberg* prongs one or three, and Plaintiff has not challenged that ruling in his Opening Brief. The issue is therefore waived. Del. Sup. Ct. R. 14(b)A.(3).

3. **Denied.** Plaintiff waived any argument that a majority of the Talos Board faced a substantial likelihood of liability based on a potential waste claim. Whereas Plaintiff (unsuccessfully) invoked *Zuckerberg* prongs one and three below, he neither alleged nor briefed his late-breaking contention that demand was excused under *Aronson* (now *Zuckerberg*) prong two for waste. That theory was thus not presented below and is waived.

4. **Denied.** The Complaint fails to state even a threshold waste claim, much less with adequate particularity to satisfy the heightened pleading requirements of Rule 23.1 and *Zuckerberg* prong two.

5. Irrespective of whether Plaintiff sufficiently alleges demand futility, the claims against the Recused Directors and Guggenheim Securities were properly dismissed because Plaintiff fails to state a claim against those defendants.

COUNTERSTATEMENT OF FACTS

Without accepting allegations outside of the Complaint and newly introduced on appeal, Defendants avoid repeating background facts recited by Plaintiff where possible, Del. Sup. Ct. R. 14(b)(v), and incorporate the summary of alleged facts set forth in the Court of Chancery's Opinion, Op. 2–20.

This action involves a transaction (the "Transaction") through which Talos acquired a broad portfolio of energy producing assets, exploration prospects, and acreages in the Gulf of Mexico from certain Riverstone affiliates (the "Sellers"). A0055–56. At the time of the Transaction, Riverstone held roughly 27.5% of Talos's stock. A0045, A0056–57. Another 35.4% of Talos's stock was held by investment funds managed by affiliates of Apollo. *Id.*

The Talos Board of Directors (the "Board") comprised ten members when the Transaction was considered, negotiated, and approved: Timothy Duncan, Neal Goldman, Christine Hommes, John Juneau, Donald Kendall, Rajen Mahagaokar, Charles Sledge, Robert Tichio, James Trimble, and Olivia Wassenaar. A0047–50, A0088. Talos director appointments are governed, in part, by a Stockholders' Agreement between Apollo, Riverstone, and the Company. Br. 11–12; A0046, A2636–66. Significantly, that agreement does not commit either Apollo or Riverstone to vote their shares in favor of (or against) any particular transaction, and it explicitly requires that any related-party transaction must be approved by a majority of disinterested directors. *See* A0176–77, A2650.

Three Talos directors—Mahagaokar, Tichio, and Wassenaar (the "Recused Directors")—wholly abstained from the Board's evaluation, consideration, and approval of the Transaction because they had either current or residual economic interests in Riverstone at the time of the Transaction. A0057, A2678–2863.[1] For the remaining seven (the "Independent Directors") Plaintiff does not allege that any had a financial interest in Riverstone during any relevant time period. A0047–50, A0089–93. And with the exception of Duncan, Talos's CEO, every Independent Director is considered independent under NYSE listing rules. A0173–74, A0282; *cf.* NYSE Listed Company Manual § 303A.02(b)(i). The Company's Amended and Restated Certificate of Incorporation exculpates Board members from any breach of the duty of care. A0177–78, A0311.

The seven Independent Directors met no fewer than eight times between April 2019 and February 2020 to discuss the Transaction, including to approve a modification in the structure of the stock component of the consideration offered. A0055–66, A0178–81, A2678–2863. The Independent Directors were advised during these meetings by management, legal counsel, and Guggenheim Securities,

[1] Mahagaokar was a Riverstone principal, Tichio was a Riverstone partner, and Wassenaar previously was a Riverstone managing director. A0049.

which Plaintiff admits was a qualified financial advisor that provided the Board with a Fairness Opinion. *Id.*; A1209–10, A4741, A4751, A4775, A4792. The Independent Directors voted unanimously to approve the Transaction on December 6, 2019, and again on February 19, 2020, while changing the stock component of the Transaction from 11 million shares of common stock to 110,000 shares of non-voting preferred stock that converted to 11 million shares of common stock twenty calendar days after the definitive information statement was distributed to the Company's public stockholders. A0058–59, A0180, A2761–2863. The Transaction closed on February 28, 2020, following the delivery of written shareholder consents by Apollo and Riverstone. A0060–61, A0065 ¶ 88. No public shareholder vote was held or required. *See id.*; A0045 ¶ 14, A0311. This lawsuit followed four months later.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD THAT PLAINTIFF FAILED TO PLEAD FACTS SHOWING RIVERSTONE AND APOLLO JOINTLY CONTROLLED TALOS

A. Question Presented

Whether two unaffiliated minority stockholders who together owned a majority of the Company's stock formed a control group implicating entire fairness scrutiny of the Transaction, despite the absence of any agreement to act together with respect to the Transaction and the lack of any significant historical ties between them. This issue was presented to the Court of Chancery. A0143–50, A0200–07, A4180–95, A4708–19, A4722–26.

B. Scope of Review

This Court reviews *de novo* "a decision to grant a motion to dismiss under [Court of Chancery] Rule 12(b)(6)." *Golden Rule Fin. Corp. v. S'holder Rep. Servs. LLC*, 2021 WL 5754886, at *3 (Del. Dec. 3, 2021). Rule 12(b)(6) requires dismissal where the plaintiff cannot recover under any "reasonably conceivable set of circumstances susceptible to proof" based on the complaint's well-pleaded facts. *Sheldon v. Pinto Tech. Ventures, L.P.*, 220 A.3d 245, 251 n.16 (Del. 2019).

Although the Court should "accept all well-pleaded allegations as true and draw reasonable inferences in favor of the plaintiff," *Golden Rule*, 2021 WL 5754886, at *3, it need not "credit conclusory allegations that are unsupported by specific facts or draw unreasonable inferences in the plaintiff's favor," *Allen v.*

Encore Energy Partners, L.P., 72 A.3d 93, 100 (Del. 2013). The Court "is not required to accept every strained interpretation of the allegations proposed by the plaintiff" and should draw only "reasonable inferences that logically flow from the face of the complaint." *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001).

C. Merits of the Argument

The Court of Chancery correctly held that Plaintiff's allegations fail to support a reasonable inference that Riverstone and Apollo acted as a control group in connection with the Transaction. "In effect," the Court observed, "Plaintiff would have the Court impose fiduciary duties on the Venture Capital Defendants and analyze the Transaction under the entire fairness standard because, in his view, the Transaction was not entirely fair." Op. 37. The Court of Chancery rightly declined to "follow Plaintiff down this circular and hindsight-driven path." *Id.*

Plaintiff makes a strained attempt to establish a control group on appeal by amplifying unremarkable and sporadic historical interactions between Riverstone and Apollo. In doing so, Plaintiff repackages his "*quid pro quo*" theory—"the heart of this action" below—wherein Plaintiff alleged that Riverstone agreed to take a loss on one deal in exchange for Apollo's unspoken agreement to approve an undetermined future deal (which became the Transaction) on unfavorable terms. Op. 10. Plaintiff rightly declines to press that theory here, but the historical and transactional ties he proffers instead—some for the first time on appeal—fall well short of the extensive entanglement this Court requires to support a sufficient control-group inference. The Court of Chancery properly rejected Plaintiff's contention that minority Talos shareholders formed a control group and owed the Company fiduciary duties.

1. Plaintiff cannot point to the requisite "shared goal" necessary to plead the existence of a control group.

Because Riverstone and Apollo each own less than 50% of Talos stock and are not alleged to be controllers individually, Plaintiff's case hinges on his ability to plead that they formed a control group, thereby subjecting the Transaction to entire fairness review. Plaintiff, Defendants, and the Court of Chancery all agree that this Court's decision in *Sheldon v. Pinto Technology Ventures, L.P.*, 220 A.3d 245 (Del. 2019), provides the applicable pleading standard.[2] Br. 26–27; Op. 25. Specifically:

> To demonstrate that a group of stockholders exercises control collectively, the [plaintiff] must establish that they are connected in some legally significant way—such as by contract, common ownership, agreement, or other arrangement—to work together toward a shared goal. To show a legally significant connection, the [plaintiff] must allege that there was more than a mere concurrence of self-interest

[2] Plaintiff claims in a heading that the "possible application of entire fairness precludes dismissal on the pleadings." Br. 25. This is incorrect because Plaintiff must first plead the existence of the control group in order to trigger entire fairness review. *See, e.g.*, *Garfield v. BlackRock Mortg. Ventures, LLC*, 2019 WL 7168004, at *11 (Del. Ch. Dec. 20, 2019); *van der Fluit v. Yates*, 2017 WL 5953514, at *1 (Del. Ch. Nov. 30, 2017) (granting dismissal based on inadequate control-group allegations). The lone case cited by Plaintiff, *In re LNR Property Corp. Shareholders Litigation*, 896 A.2d 169 (Del. Ch. 2005), is in accord. *LNR* did not involve allegations of a control group at all, but rather an undisputed controlling stockholder that was "conflicted at the time he negotiated the sale." *Id.* at 178.

> among certain stockholders. Rather, there must be some indication of an actual agreement, although it need not be formal or written.

Sheldon, 220 A.3d at 251–52. Conversely, if Riverstone and Apollo each "had the right" to "act in [its] own self-interest as a stockholder," they were not a control group. *In re PNB Holding Co. S'holders Litig.*, 2006 WL 2403999, at *10 (Del. Ch. Aug. 18, 2006).

Plaintiff purports to have met his burden based on a mishmash "array" of supposed "'plus factors' including historical and transaction-specific ties between Riverstone and Apollo." Br. 28. But Plaintiff makes *no* mention of a predicate "shared goal" that Riverstone and Apollo worked toward together. *Sheldon*, 220 A.3d at 252. In an attempt to satisfy that critical element of the *Sheldon* framework below, Plaintiff previously argued that a purported *quid pro quo* pact established the legally significant connection. Specifically, Plaintiff relied on a vague allegation that at Apollo's behest, Riverstone somehow caused Talos to pay a modest "premium" for certain Apollo-related assets in 2018, in exchange for Apollo's unspoken, unwritten commitment to someday "return[] the 'favor,'" which it supposedly did two years later by supporting Talos's overpayment for Riverstone-related assets. A0043 ¶¶ 4–5, A0055 ¶ 57.

Plaintiff foregoes that argument on appeal—and for good reason. Plaintiff could support it only by circular reasoning, and the allegation makes no economic sense since the *quo* payback subsidy—and Apollo's corresponding "indirect subsidy" as a Talos stockholder—dwarfed the original alleged *quid* "favor." As Plaintiff now acknowledges, Riverstone and Apollo stood on opposite sides of the Transaction, with Apollo, as the then-largest individual Talos shareholder, suffering 35% of any resulting losses. Br. 34. Thus, they lacked even parallel interests in connection with that deal—much less a clear "shared goal." Lacking this foundational predicate for pleading a control group, the fleeting "plus factors" Plaintiff proffers become even more attenuated. *See Sheldon*, 220 A.3d at 251–52; Op. 26 (discussing cases in which plaintiffs "succeeded in pleading a control group because they went beyond alleging mere parallel interests, and pointed to 'an array of plus factors' like historical ties and transaction-specific ties that support a reasonable inference of an actual agreement").

2. Plaintiff's alleged "plus factors" do not support a reasonable inference that Riverstone and Apollo formed a control group.

Plaintiff asserts on appeal that the Complaint alleges "substantial" historical and transaction-specific ties between Riverstone and Apollo. Br. 24. As a threshold matter, many of the purported "facts" he now advances are found nowhere in the Complaint.[3] But even with these new allegations, Plaintiff still fails to identify "any

[3] For example, Plaintiff points to cherry-picked passages—never cited below—from Talos's September 2018 Registration Statement to argue that "the Company consistently used joint nomenclature and definitions to reference Apollo and Riverstone collectively" and "repeatedly stated that Riverstone and Apollo are a group that controls Talos." Br. 28; *see also* Br. 39. Plaintiff could have drawn from

facts that could explain how [he] would expect the Court to arrive at th[e] conclusion" that Riverstone and Apollo jointly controlled Talos in connection with the Transaction. *Dubroff v. Wren Holdings, LLC*, 2009 WL 1478697, at *4 (Del. Ch. May 22, 2009).

a. ***Riverstone and Apollo's limited "historical ties" do not show that they functioned as a control group.***

Plaintiff cites four "historical ties" purportedly evidencing a control group: (1) Riverstone and Apollo's supposed "decade-long history" of alleged "cooperation and coordination"; (2) Talos's use of "joint nomenclature and definitions" in certain public filings "to reference Apollo and Riverstone collectively"; (3) the Company's status as a "controlled company" for NYSE disclosure purposes based on Riverstone and Apollo collectively holding over 50% of Talos shares; and (4) the right of Riverstone and Apollo under the Stockholders' Agreement to designate a majority of Talos directors. Br. 28–32. None is sufficient to plead the existence of a control group under Delaware law.

First, Plaintiff has not alleged facts that, if true, would support a "long, well-documented history" of Riverstone and Apollo making "coordinated investments" and "operat[ing] in tandem." *Sheldon*, 220 A.3d at 250. Despite the

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these sources when preparing his answering brief in response to Defendants' Motions to Dismiss. What he cannot do is rely on facts never presented as a basis for his argument below. Del. Sup. Ct. R. 8.

firms' twenty years of contemporaneous investing in the same industry, Plaintiff points to just four transactions prior to the Transaction: the 2012 formation of Old Talos, the 2013 buyout of EP Energy, the 2018 combination between Old Talos and Stone Energy to form Talos ("2018 Combination"), and Talos's 2018 acquisition of Whistler. *See* Br. 28–29, 35. Only one of those transactions—the EP Energy buyout—occurred outside of Talos. *See* A0044–45 ¶¶ 12–14, A0050–55 ¶¶ 37–58.

This sparse record of alleged overlap pales in comparison to the extensive and long-running ties necessary to sustain a control-group inference. In *In re Hansen Medical, Inc. Stockholders Litigation*, for example, the complaint alleged detailed facts demonstrating a twenty-one-year "history of cooperation and coordination" between the defendant stockholders that included at least *seven* separate joint investments. 2018 WL 3025525, at *7 (Del. Ch. June 18, 2018). The plaintiffs also emphasized that the alleged controllers had explicitly "declared themselves to the SEC as a 'group'" in SEC filings, entered into express voting agreements, and held exclusive rights to determine key terms of the challenged transaction. *Id.*

Similarly, the plaintiff in *Garfield* alleged that the purported controllers shared a ten-year history of co-investment in the company they founded together. 2019 WL 7168004, at *9. Like the stockholders in *Hansen*, moreover, the investors held themselves out publicly as "strategic investors," and "strategic partners"; enjoyed unilateral rights and preferences to block certain company actions, including the challenged transaction; and met "jointly" with "management" to "negotiate" the transaction at issue. *Id.* at *1, *8–10 (finding stockholders' "historical ties," coupled with their "voting power, concurrence of interests, . . . and transaction-specific coordination," supported a control-group inference).

This case stands in stark contrast. Far from a lengthy history of widespread and continuous coordination, Plaintiff can point to Riverstone and Apollo participating in just one transaction beyond Talos—and even then, not as dominant players, but merely as members of a broader investment group pertaining to EP Energy. Br. 15–16; A0051. And Plaintiff fails to explain how, after forming Old Talos, Apollo and Riverstone's subsequent agreement to consummate two follow-on transactions over the next six years supports any inference of an *ongoing* cooperative strategy to control Talos for their mutual benefit. Rather, Plaintiff relies on allegations showing, at most, that in an industry where private equity firms frequently co-invest, Riverstone and Apollo unsurprisingly have participated in a handful of common transactions. But as the Court of Chancery found, an allegation that Riverstone and Apollo "crossed paths in a few" investments is irrelevant to whether they operated as a monolithic vehicle or colluded with respect to the Transaction. Op. 28; *see also Sheldon*, 220 A.3d at 255 (rejecting control-group theory based on alleged common investment history showing stockholders were "loosely connected"); *van der Fluit*, 2017 WL 5953514, at *6 (finding plaintiff did not sufficiently allege that company co-founders jointly exercised control as minority stakeholders where complaint alleged no facts showing that they voted together or operated company in unison). Indeed, Plaintiff conspicuously fails to allege continuous coordination even as to Talos itself.

If minority shareholders' participation in a handful of transactions at the subject company were sufficient to establish "historical ties" for control group purposes, *Sheldon*'s requirement of a "legally significant" connection would be turned on its head. It would practically become the rule—rather than the exception—that a block of minority shareholders constitute a control group simply by virtue of investing in a company long enough to approve or participate in more than two or three transactions.

Plaintiff also ignores that, unlike this case, the purported controllers in *Hansen* and *Garfield* stood on the same side of the table and therefore all stood to gain from the challenged transactions disproportionately compared to other shareholders. *See Hansen*, 2018 WL 3025525, at *1, *12; *Garfield*, 2019 WL 7168004, at *10. The shared goal and mutual benefit in those cases strongly supported the necessary pleading-stage inference that a legally significant connection existed. But Plaintiff here seeks the same inference on the exact opposite facts—with two supposed controllers on opposing sides of the table.

Second, Plaintiff asserts that Defendants "admitted" the existence of a control group in public disclosures. Br. 29. Plaintiff attempts to exploit Talos disclosures that reference Riverstone and Apollo as "Sponsors," "Sponsor Stockholders," and "Majority Stockholders." *Id.* As an initial matter, Plaintiff's reliance on facts not relied on in his arguments below is improper. Del. Sup. Ct. R. 8. But in any event, Plaintiff fails to explain how such generic references evidence anything more than *the potential for* a "concurrence of self-interest among certain stockholders." *Sheldon*, 220 A.3d at 252. References to "Majority Stockholders" in the March 10, 2020 Schedule 14C Information Statement and to "Sponsor Stockholders" and "Sponsors" in the 2018 Registration Statement reflect only the obvious (and undisputed) fact that Riverstone and Apollo both invested in Talos (as separate, minority stockholders) and collectively held a majority of the Company's shares. Such short-hand nomenclature is a far cry from disclosures explicitly representing entities as a unified "group," *Hansen*, 2018 WL 3025525, at *7, "strategic partners," or "strategic investors." *Garfield*, 2019 WL 7168004, at *8–10.

Third, Plaintiff points to the generic disclosure in the Company's 2018 Registration Statement that Talos is "controlled by Apollo Funds and Riverstone Funds," Br. 29–30 (quoting A3442), and claims this amounts to a concession that Riverstone and Apollo *in fact* exercised control over the Company for all purposes—including the Transaction. Plaintiff's quotation, however, selectively omits the explicit clarification that Talos deemed itself "a 'controlled company'" only "as defined in [NYSE] listing rules"—"[a]s a result of the Apollo Funds' and the Riverstone Funds' ownership of a majority of the voting power of [Talos] common stock." A3442.

NYSE listing rules establish the mechanical concept of a "controlled company" simply to exempt any "company in which over 50% of the voting power is held by an individual, group or another company" from certain corporate governance obligations. SEC, NYSE Market Company Guide § 801(a). Here, Riverstone and Apollo collectively owned 62.9% of Talos shares, thereby triggering the NYSE-mandated disclosure. But that disclosure in no way signaled that Riverstone and Apollo agreed to control Talos's decision-making or otherwise held themselves out as coordinated investment partners; it merely recognized that together, as a mathematical matter, they held "over 50% of the voting power" of Talos.[4] *Id.*

Plaintiff similarly misses the mark by invoking language in the 2018 Registration Statement and Talos's 2020 Information Statement cautioning that, by

[4] In fact, although Talos's status as a "controlled company" under NYSE rules exempts the Company from certain corporate governance requirements, including permitting Talos not to have a majority of independent directors on its Board, Talos's public filings make clear that it has "elected not to use th[o]se exemptions." A0281–82. Those filings further confirm that with the one exception of the CEO, who serves both on the Board and in management, each of the Company's directors "is 'independent' pursuant to NYSE rules." A0282.

virtue of their combined holdings, Riverstone and Apollo *could* make decisions on the Company's behalf without the approval of other stockholders. *See* Br. 30–31 (quoting A1260, A1261, and A3443). That two or more stockholders collectively own over 50% of a company's voting shares and thus have the *potential* to approve or defeat certain transactions if they happen to vote in the same manner does not mean that those stockholders have *actually* established a legally significant compact to control the company's decision-making. Thus, "[s]imply alleging that [Riverstone and Apollo] had the *potential* ability to exercise control is not sufficient," *Williamson v. Cox Commc'ns, Inc.*, 2006 WL 1586375, at *4 (Del. Ch. June 5, 2006) (emphasis in original)—particularly where, as here, the stockholders stood on opposite sides of the specific transaction in question. To conclude otherwise would effectively contrive a control group in every instance where blocks of stockholders collectively own over 50% of a company's voting power—regardless of whether those stockholders' interests were even aligned, much less whether they *in fact* exercised coordinated control in connection with a transaction. But a mere concurrence of ownership does not connect stockholders in a "*legally significant* way"—let alone demonstrate a shared commitment "to work together toward a shared goal." *Sheldon*, 220 A.3d at 251–52 (emphasis added).

Citing *Voigt v. Metcalf*, Plaintiff argues that he "is entitled to the benefit of the inference that the disclosure meant what it said." Br. 31 (quoting 2020 WL

614999, at *15 (Del. Ch. Feb. 10, 2020)). But *Voigt* did not consider the possible existence of a control group at all. The disclosure in that case instead indicated that a *majority of the company's board*, including four nominally independent directors, was *"subject to [a stockholder's] control for purposes of Board-level decisions*," and therefore supported the inference necessary for a finding of control by the single stockholder. 2020 WL 614999, at *11–12, *15 (emphasis added). In contrast, to plead control here, Plaintiff must allege a reasonably conceivable *agreement* between Riverstone and Apollo to jointly control Talos, and a mechanism for exercising that supposed control. *See Sheldon*, 220 A.3d at 251–52. Talos's public disclosures do not come close to supporting such an inference.

Fourth, Plaintiff suggests that the Stockholders' Agreement "ced[ed] control of the Company to Apollo and Riverstone" by granting them "the right to collectively appoint six of the ten Company directors." Br. 31. But the ability to nominate a majority of the Talos Board "does not, without more, establish actual domination or control."[5] *Sheldon*, 220 A.3d at 253 (internal quotation marks and citation omitted); *see also In re KKR Fin. Holdings LLC S'holder Litig.*, 101 A.3d

[5] Plaintiff cites *Voigt* for the proposition that "the ability of an alleged controller to designate directors (albeit less than a majority) is an indication of control." Br. 31 (quoting 2020 WL 614999, at *14). As explained, however, *Voigt* discusses an individual stockholder's ability to appoint directors "subject to" his control as an indicia of actual control over a company's board, rather than an agreement between multiple stockholders to act as a control group. *See* 2020 WL 614999, at *11–17.

980, 996 (Del. Ch. 2014) ("[A] director's independence is not compromised simply by virtue of being nominated to a board by an interested stockholder."), *aff'd sub nom. Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304 (Del. 2015); *Frank v. Elgamal*, 2014 WL 957550, at *22 (Del. Ch. Mar. 10, 2014) ("Merely because a director is nominated and elected by a large or controlling stockholder does not mean that he is necessarily beholden to his initial sponsor."). In *Dubroff*, for example, the defendants collectively owned over 50% of the company's voting shares and appointed *four out of the five directors*. 2009 WL 1478697, at *4. Yet those facts, while at most "consistent with the existence of a control group," "d[id] not establish the necessary linkage among" the defendants. *Id.*

Plaintiff tries to avoid this settled law by focusing on the fact that only Riverstone and Apollo signed the Stockholders' Agreement.[6] Br. 31–32. But regardless of its signatories, the Stockholders' Agreement governed merely the general appointment of Talos directors—it did not require Riverstone and Apollo (or

[6] Plaintiff also argues that Riverstone and Apollo's right to jointly nominate at least one director under the Stockholders' Agreement provides a legally significant connection for purposes of establishing control because it requires the firms' agreement as to those joint nominees. Br. 32. Once again, Plaintiff's argument discounts the fact that under the Stockholders' Agreement, Riverstone and Apollo "retain[ed] at all times the right to vote [their shares] in [their] sole discretion on all matters presented to [Talos's] Shareholders for a vote." *Silverberg v. Padda*, 2019 WL 5295141, at *5 (Del. Ch. Oct. 18, 2019) (some alterations in original) (quoting *Sheldon*, 220 A.3d at 249). In any event, all three Talos directors with alleged financial interests in Riverstone undisputedly recused themselves from the Board's final vote and any discussions about the Transaction. *See, e.g.*, A0057 ¶ 65.

their appointed directors) to vote together on any matter, nor provide Riverstone and Apollo with rights to control any Talos directors once appointed. *See* Op. 32 n.86 (observing that the Stockholders' Agreement "did not bind [Riverstone or Apollo] with respect to the [] Transaction"). Nor did the Stockholders' Agreement vest Riverstone or Apollo with unique rights to negotiate transactions involving the Company. *Cf. In re Hansen*, 2018 WL 3025525, at *7. To the contrary, as the Court of Chancery observed, the Stockholders' Agreement imposed restrictive measures *limiting* the parties' actions in any related-party transactions. A2646–47, A2650–51; *see also* Op. 32 n.87. Because the Stockholders' Agreement "contain[ed] no voting, decision-making, or other agreements that bear on the transaction" at issue, *van der Fluit*, 2017 WL 5953514, at *6, it does not support a reasonable inference that Riverstone and Apollo formed a control group for purposes of the Transaction or otherwise. Accordingly, Plaintiff's proffered "historical ties" are insufficient to plead the existence of a control group. *See id.*

b. ***Plaintiff does not identify any transaction-specific ties to support a reasonable inference that Riverstone and Apollo acted in concert.***

The Court of Chancery correctly found that Plaintiff likewise failed to plead any transaction-specific ties. *See* Op. 38. In an effort to show otherwise on appeal, Plaintiff asserts that the "Transaction could never have occurred without Apollo's agreement or support." Br. 33. That argument is factually wrong. And even if taken as true, the same claim could be made in any case where two minority stockholders collectively own more than half a company's shares and happen to both support a transaction.

First, Plaintiff contends that "the only way an issuance of" 11 million Talos shares—as the Transaction terms initially contemplated—"was possible is if Apollo agreed to vote in favor."[7] *Id.* Plaintiff speculates, therefore, that there *must* have been "discussions between Apollo, Riverstone and Talos to secure Apollo's advance agreement [as] part of the deal negotiations." *Id.*

Plaintiff did not plead or argue below that Apollo and Riverstone "must" have agreed in advance to the Transaction based on the circumstantial factors referenced in his Opening Brief, making it improper to raise on appeal. Del. Sup. Ct. R. 8. In any event, his contention is incorrect. Apollo owned only 35.4% of Talos shares at the time of the Transaction, A0045 ¶ 14, which was not enough by itself to block the originally contemplated stock issuance, *see* A0059 ¶ 69 (noting "required approval

[7] Plaintiff fails to challenge the Court of Chancery's conclusions that the Stockholders' Agreement and the alleged passive presence of Apollo and Riverstone non-director representatives at Board meetings did not support any transaction-specific inference of control, *see generally* Br. 32–36, and has thus waived any arguments to the contrary, *see* Del. Sup. Ct. R. 14(b)(vi)(A)(3). In any event, even if the alleged passive presence of a junior Riverstone banker for discussions of the Transaction (briefly mentioned in the Opening Brief's background section) occurred rather than being a scrivener's error in the minutes, a *reasonable* inference is untenable that Riverstone and Apollo were in cahoots to force through the Transaction, particularly given the undisputed fact that every director with Riverstone ties was recused.

by a majority of the common stockholders to issue the 11 million shares of common stock"). Rather, approval of the issuance would have been possible by a majority vote of a combination of Riverstone's shares (27.5% of Talos's stock) and other stockholders' shares.[8]

Second, Plaintiff asserts—again, for the first time on appeal—that Riverstone and Apollo allegedly provided their stockholder approvals of the initial and modified transaction structure simultaneously with the execution of definitive documentation. Br. 33–34. But that alleged fact in no way signifies an agreement between Riverstone and Apollo concerning the Transaction, and Plaintiff's argument "improperly conflates acts of consensus with the act of forming a group." *Silverberg v. Padda*, 2019 WL 4566909, at *7 (Del. Ch. Sept. 19, 2019). One of Apollo's two representatives on the Talos Board (along with six other independent, non-recused directors) vetted and voted to approve the transaction, so it is entirely unsurprising that Riverstone (the seller) and Apollo (the largest shareholder in the buyer) would both be aware of the transaction as it came together and ultimately provide their shareholder consents at the same time.

[8] Plaintiff's argument is likewise incorrect at the Board level. Seven Talos directors voted on the Transaction, four of whom were not designated by Riverstone or Apollo (and six of whom had no alleged financial interest in either entity). *See* A0088–92. Because the Transaction only required approval by majority of disinterested directors, A2650, its approval did not depend on the vote of any Riverstone or Apollo designee.

Plaintiff's cases do not show otherwise. In *Garfield*, for example, in addition to allegations related to the approval of the challenged transaction, the plaintiff alleged that the controllers each enjoyed the unilateral right under a written agreement to block the challenged reorganization and obtained an exclusive right to terminate the reorganization prior to the effective date. *See* 2019 WL 7168004, at *10. As explained above, such allegations are notably absent here. And the other cases Plaintiff cites are equally distinguishable—the plaintiffs there alleged more than mere parallel interests and concurrent consents and pointed to numerous historical ties and transaction-specific *voting* agreements to support an inference of an actual agreement. *See Hansen*, 2018 WL 3025525, at *7 (alleging that voting agreement required alleged controllers to vote their shares in favor of merger); *Frank*, 2012 WL 1096090 (same).

Third, Plaintiff contends, without explanation, that the "eleventh-hour" revision to the Transaction's consideration is somehow a relevant transactional tie, relying on (and mischaracterizing) *Garfield* for support. Br. 34. But the revision in *Garfield* provided the alleged controllers with an "exclusive right" to "terminate the [challenged transaction] prior to the effective date." 2019 WL 7168004, at *10. Here, the revision to the consideration did not provide Apollo or Riverstone with *any* collective rights, much less transaction-specific rights, or result in any change in the substance of the Transaction, and instead was made merely to facilitate an earlier closing date. *See* Op. 33-34 (distinguishing Plaintiff's allegations from *Garfield*, where the "alleged controllers were deeply involved in negotiating and structuring the challenged transactions"); *see also id.* at 34 n.96 (holding Plaintiff waived any argument that the "Written Consent suggested an actual agreement" between Riverstone and Apollo and noting "nevertheless that this Court has been skeptical of such an argument in the past"); A0180. Moreover, there is nothing alleged to suggest that either Riverstone or Apollo had any involvement whatsoever in requesting or advocating for the issuance of preferred instead of common stock.

Fourth, Plaintiff tries to repackage his *quid pro quo* argument—the "heart" of his case below—which the Court of Chancery thoroughly dismantled.[9] Below, Plaintiff argued only that Riverstone (silently) agreed to let Talos overpay for Whistler and that Apollo returned the favor by agreeing—without documentation or any identified oral statement—to support Talos's overpayment for the Transaction. A4235, A4249; *see also* Op. 35 (noting same). On appeal, Plaintiff now claims that because Riverstone "stood to gain no economic benefit" from the Whistler transaction and Apollo purportedly "had no direct economic interest" in the Transaction, these transactions could "*only*" have been the product of an "understanding between Riverstone and Apollo." Br. 34–35 (emphasis added). Of

[9] In fact, although the term "*quid pro quo*" appears no fewer than eleven times in Plaintiff's Complaint and Opposition to Defendants' Motions to Dismiss, it does not appear *once* in Plaintiff's Opening Brief.

course, the premise of that supposition is demonstrably untrue, as Riverstone's and Apollo's Talos holdings unquestionably gave them each a significant interest in both deals.[10]

In addition to resting on a flawed premise, Plaintiff's reframed *quid pro quo* argument suffers from the same fatal defect that it did when Plaintiff previously asserted it—Plaintiff fails to allege any agreement between Riverstone and Apollo with respect to the two deals. As the Court of Chancery put it, Plaintiff did "not allege Riverstone had any role in the Whistler deal; he alleges only that Riverstone 'agreed to let Talos' consummate it and overpay Apollo." Op. 35. And as to the Transaction, the Complaint alleges only "that Apollo supported it, not that it struck any agreement with Riverstone (before or after the Whistler deal)." *Id.* (footnote omitted). These allegations are not enough to support a finding of control. *Cf. Sheldon*, 220 A.3d at 251–52. Absent allegations evidencing an actual commitment between Riverstone and Apollo to support each other's direct interests in the two transactions (e.g., who reached the supposed accord, when they did so, or any details at all as to the purported agreement), Plaintiff's theory is entirely conclusory.

[10] Both of Plaintiff's arguments on appeal assume the conclusion: they ask the Court to conclude that Riverstone and Apollo must have worked together based on the alleged unfairness of the Transaction—the same circular reasoning previously advanced by Plaintiff and rejected by the Court of Chancery. *See* Op. 37.

"Delaware law presumes that investors act to maximize the value of their own investments." *Chen v. Howard-Anderson*, 87 A.3d 648, 670 (Del. Ch. 2014). The logical, presumptive inference is that Riverstone and Apollo thought the Transaction and the Whistler transaction would enhance Talos's performance and, in turn, their respective investment returns—and the market's positive reaction suggests other investors shared the same view.[11] This Court need not—and should not—accept Plaintiff's conclusory and counter-logical allegations of a wink-and-a-nod understanding between Riverstone and Apollo, and affirm the Court of Chancery's ruling that Plaintiff failed to plead any transaction-specific ties. *See Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009) (counseling against drawing "unreasonable inferences" in a plaintiff's favor); *Brehm v. Eisner*, 746 A.2d 244, 257 (Del. 2000) (rejecting "illogical and counterintuitive" allegations).

c. ***Plaintiff fails to allege that Riverstone and Apollo actually controlled the Transaction.***

Finally, even if Riverstone and Apollo could be considered a control group (and they cannot), Plaintiff has nonetheless failed to allege a key element of his claim: that Riverstone and Apollo "actually took any steps to exert leverage to pressure" the Transaction, or that the firms "acted in any other way so as to influence

[11] Plaintiff offers no explanation why, if the acquisition was vastly overpriced, Talos's closing stock price rose a full dollar within a day of the December 10, 2019 announcement and steadily increased over the following weeks. A4174–75.

the . . . directors' conduct" in connection with it. *In re Sea-Land Corp. S'holders Litig.*, 1987 WL 11283, at *5–6 (Del. Ch. May 22, 1987) (dismissing fiduciary duty claims); *see also Garfield*, 2019 WL 7168004, at *8; Op. 35.[12]

Seven Talos Board members considered and approved the Transaction, six of whom were indisputably independent under NYSE rules. A0057–58, A0088, A0173–74, A0282. These seven directors included five outside directors with no cognizable Apollo or Riverstone connection (Goldman, Juneau, Sledge, Trimble and Kendall), one of which (Kendall) was jointly designated by Apollo and Riverstone, Talos CEO Tim Duncan (also jointly designated), and one Apollo principal (Hommes). A0089–93; Op. 44–46. Plaintiff's failure to advance well-pled facts "from which it is reasonable to infer that [Riverstone and Apollo] could prevent the [Talos] board from freely exercising its independent judgment" dooms his control-group theory. *See In re KKR*, 101 A.3d at 995; *Dubroff*, 2009 WL 1478697, at *3–5; *Silverberg*, 2019 WL 4566909, at *7 (noting plaintiff's failure to allege that

[12] For example, Plaintiff does not allege (nor could he) that Riverstone and Apollo dominated the Company's disinterested directors through contractual rights to veto certain corporate decisions, *see Garfield*, 2019 WL 7168004, at *8; commercial relationships offering leverage over the Company, such as status as a key customer or supplier, *see Williamson*, 2006 WL 1586375, at *5; or by possessing a combination of stock voting power and embedded managerial authority that enabled them to control the Company as a practical matter, *see In re Cysive, Inc. Shareholders Litigation*, 836 A.2d 531, 552–53 (Del. Ch. 2003).

"venture capital funds" were "connected in a legally significant way relating to voting, decision-making, or other agreements that bear on the transactions at issue").

3. Plaintiff waived any argument on appeal that demand is excused under *Zuckerberg* prongs one or three.

Even assuming the Complaint properly alleges a transaction with a control group, Plaintiff offers no argument from which this Court could determine Plaintiff pleads particularized facts establishing that demand was excused under *Zuckerberg* prongs one and three. Demand futility must be demonstrated on a director-by-director basis, and the Court of Chancery correctly found that Plaintiff failed to sustain that pleading burden here. Op. 39–44; *United Food and Commercial Workers Union and Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg*, 262 A.3d 1034, 1056, 1059 (Del. 2021). On appeal, Plaintiff relies exclusively on application of entire fairness review to the Transaction in order to argue demand is excused. Br. 36. Beyond the manifestly incorrect argument that demand is automatically excused any time a control party transaction is alleged, *Zuckerberg*, 262 A.3d at 1055–56, Plaintiff waives further argument regarding demand futility under prongs one and three. *See* Del. Sup. Ct. R. 14(b)(vi)(A)(3). Plaintiff does attempt to argue that demand should be excused under prong two; but, as explained in Section II, that argument has been waived for different reasons and is meritless in any event.

II. PLAINTIFF FAILED TO ADEQUATELY PLEAD AND ARGUE DEMAND WAS EXCUSED UNDER *ZUCKERBERG* PRONG TWO

A. Question Presented

Plaintiff's second argument (Br. II) presents two questions: (1) did Plaintiff sufficiently plead a claim for waste, and (2) was his waste claim waived? Br. 38.

The first question was not preserved for appeal because it was not fairly presented below and was correctly found to have been waived. *See* Del. Sup. Ct. R. 8. As noted by the Court of Chancery, Plaintiff consistently advanced a theory below that "[d]emand is excused under the second prong of the *Aronson* test because the [] Transaction is subject to review under the entire fairness standard." Op. 50; A0088 ¶ 161, A0093 ¶ 163, A4271–72. Plaintiff maintained this theory at oral argument, A4790, while confusingly also interjecting what Plaintiff called a "refined" waste theory of demand futility under *Aronson* prong two that was neither alleged in the Complaint nor argued in Plaintiff's briefing, A4755–59.

The Court of Chancery appropriately declined to consider Plaintiff's new argument. Op. 49–50; *Klauder v. Echo/RT Holdings, LLC*, 152 A.3d 581 (TABLE), 2016 WL 7189917, at *2 (Del. Dec. 12, 2016) ("[A] short reference to an issue in an oral argument, where prior briefing has taken place, is not sufficient to fairly present an issue to a trial court."). Plaintiff should be held to the theory he consistently presented below. *Accord In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 55 (Del. 2006).

B. Scope of Review

The first component of question II is subject to *de novo* review, which generally applies to Rule 23.1 dismissals. *See Brehm*, 746 A.2d at 253–54. The second component of question II should be reviewed for an abuse of discretion because a waiver finding is "highly contextual and ultimately a matter within [the Court's] discretion." *See REJV5 AWH Orlando, LLC v. AWH Orlando Member, LLC*, 2018 WL 1109650, at *4 (Del. Ch. Feb. 28, 2018); *see also Terramar Retail Centers, LLC v. Marion #2-Seaport Tr. U/A/D June 21, 2002*, 2019 WL 2208465, at *20 n.22 (Del. Ch. May 22, 2019), *aff'd*, 222 A.3d 581 (Del. 2019).

C. Merits of the Argument

1. Plaintiff waived any waste theory of director liability or demand futility.

The Court of Chancery correctly determined that Plaintiff waived any waste claim or argument that demand was excused based on waste. Op. 49–51. The Complaint alleges only that demand was excused under *Aronson* prong two because the Talos Board approved a transaction that "cannot be the product of business judgment." A0088 ¶ 161, A0093 ¶ 163. Indeed, the Complaint uses the word "unfair" thirty times, while using the word "waste" zero times (and "wasted" just once). The term "bad faith" is used solely to describe the alleged actions of Talos's financial advisor—not any Individual Defendant. A0041–102.

The briefing on Defendants' Motions to Dismiss left no doubt as to what was alleged. Talos argued below that the Complaint "fall[s] well short of pleading the rare, unconscionable case where directors irrationally squander or give away corporate assets" and that "*no claim for waste is or could be alleged.*" A0166–67 (emphasis added) (internal quotation marks omitted). Citing supporting cases, Talos further argued that the Complaint included "no allegations that the Board had anything other than a good-faith belief that the Transaction was in the Company's best interests." A0196. As clearly stated in Talos's briefing, such allegations would be necessary to plead that any Talos director faced a substantial likelihood of liability given the broad exculpation provision in Talos's Charter. A0217, A0311, A4552–54, A4559–60.

Plaintiff never responded to the contention that waste was not alleged. Instead, Plaintiff took less than a page in his opposition brief below to reiterate only his assertion that demand was "excused under the second prong of the *Aronson* test because the [] Transaction is subject to review under the entire fairness standard." A4271–72; *see also* A4253–55. By contrast, Plaintiff argued at length (over fourteen pages) that his Complaint properly alleged demand excusal under *Aronson*'s first prong. A4272–87. And even when an apparent waste theory debuted at oral argument, to the surprise of the Vice Chancellor, Plaintiff *still* failed to fairly present the issue and offered no legal authority as to its merits or to explain how that argument was even preserved. *See* A4754–59.

Issues not briefed are waived. *Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999); *Paul Elton, LLC v. Rommel Del., LLC*, 2020 WL 2203708, at *15 (Del. Ch. May 7, 2020) (finding waiver where plaintiff "failed to meaningfully develop th[e] argument, devoting a mere sentence to th[e] issue in briefing"); *see also Roca v. E.I. du Pont de Nemours & Co.*, 842 A.2d 1238, 1242 n.12 (Del. 2004) ("[A] litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace."); *Edgewater Growth Cap. Partners LP v. H.I.G. Cap., Inc.*, 68 A.3d 197, 234 (Del. Ch. 2013) (noting that waiver rules "show[] deference to fundamental fairness and the common sense notion that, to defend a claim . . . the adverse party deserves sufficient notice of the claim"). Here, even if one overlooked the absence of any supporting allegation in the Complaint, Plaintiff devoted *zero* sentences to brief his supposed argument that demand was excused because the Talos Board approved the Transaction in bad faith.

Plaintiff's contention to the contrary is unfounded. *See* Br. 45–48. The passages he cites in his Opening Brief only reflect Plaintiff's theory below that demand should be excused because the Talos Board approved an "unfair" transaction. Br. 45–46 (quoting at least six different statements arguing the transaction was "unfair"). But a transaction that is not "entirely fair" and one that constitutes "waste" are entirely different under Delaware law—a distinction that Plaintiff continues to ignore even on appeal. Br. 47 ("Defendants breached their fiduciary duty of loyalty by entering a facially unfair transaction[] that they knew . . . was facially unfair").

Likewise, Plaintiff cannot rely on superficial arguments, bereft of legal authority, raised for the first time at oral argument on Defendants' Motions to Dismiss. *See In re Mobilactive Media, LLC*, 2013 WL 297950, at *12 n.152 (Del. Ch. Jan. 25, 2019) (declining to consider legal issues only generally raised in a sentence and accompanying footnote of briefing, holding that "[i]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived") (quoting *Roca*, 842 A.2d at 1242 n.12).

This Court should affirm the Court of Chancery's finding of waiver, whether under an abuse of discretion or *de novo* standard of review.

2. The Complaint fails to plead particularized facts to establish demand futility under *Zuckerberg* prong two.

Independent of waiver, the Court should reject Plaintiff's prong two argument because he fails to clear the high pleading bar for demand futility. *See Zuckerberg*, 262 A.3d at 1059–60. Plaintiff conflates Rule 12(b)(6) notice pleading with Rule 23.1's particularity requirement. *See* Br. 3–4 (contending Plaintiff pled "facts sufficient *to put defendants on notice*" of his purported waste claim) (emphasis added). Plaintiff thus effectively argues—without any supporting authority—that, because the Complaint supposedly pleads a waste claim (it does not), Plaintiff necessarily satisfies prong two of the *Zuckerberg* demand-futility test. *See* Br. 44.

Plaintiff is wrong. "Rule 23.1 is not satisfied by conclusory statements or mere notice pleading." *Brehm*, 746 A.2d at 254; *see also Zuckerberg*, 262 A.3d at 1052 (holding "[a] remote threat of liability is not good enough" to excuse demand under prong two); *Guttman v. Huang*, 823 A.2d 492, 500 (Del. Ch. 2003) (noting demand requirement would be weakened to stockholders' detriment "[i]f the legal rule was that demand was excused whenever, by mere notice pleading, the plaintiffs could state a breach of fiduciary duty claim against a majority of the board"); *Postorivo v. AG Paintball Holdings, Inc.*, 2008 WL 553205, at *9 (Del. Ch. Feb. 29, 2008) ("Even well-pled allegations of waste . . . do not automatically excuse the requirement to make demand; a derivative plaintiff must still satisfy the requirements of the *Aronson* or *Rales* test.").

In re Goldman Sachs Group, Inc. Shareholder Litigation is on point. 2011 WL 4826104, at *5–6, *23 (Del. Ch. Oct. 12, 2011) ("*Goldman*") (distinguishing the pleading requirements of Rules 23.1 and Rule 12(b)(6)). There, the court concluded that merely stating a waste claim did not excuse demand under *Aronson* (now *Zuckerberg*) prong two and the heightened particularity requirements of Rule 23.1. *See id.* at *16–17. Accordingly, the court did not need to reach the question whether a claim was stated under Rule 12(b)(6). *Id.* at *23; *accord Rattner v. Bidzos*, 2003 WL 22284323, at *1, *6 & n.24 (Del. Ch. Sept. 30, 2003); *Seinfeld v. Slager*, 2012 WL 2501105, at *1–3, *5 (Del. Ch. June 29, 2012) (noting "a waste claim must meet both the waste standard and the procedural pleading standard under Rule 23.1").

Plaintiff does not even attempt to show that his Complaint satisfies Rule 23.1's stringent pleading requirements. Indeed, the vast majority of Plaintiff's cited cases do not mention Rule 23.1 *at all*. *See* Br. 38–39. Should the Court reach the merits of question two, Plaintiff must satisfy Rule 23.1's heightened pleading standard.

3. Demand is not excused based on waste.

Even if not waived, and regardless of the applicable pleading standard, Plaintiff's prong two argument should be rejected because the Complaint fails to state a waste claim, and none of the Individual Defendants faces a substantial risk of liability. As Plaintiff tacitly acknowledges, waste is most often associated with "a transfer of corporate assets that serves no corporate purpose; or for which no consideration at all is received." *Brehm*, 746 A.2d at 263 (quoting *Lewis v. Vogelstein*, 699 A.2d 327, 336 (Del. Ch. 1997)); *see* Br. 39. Plaintiff does not attempt to argue such circumstances are pleaded here. *Cf.* A0066–86 (¶¶ 91–147) (alleging only that Talos overpaid for otherwise valuable assets). Rather, Plaintiff falls back on arguing the only other possible basis for alleging waste endorsed by this Court: bad-faith approval of the Transaction by the Talos Board. Br. 39.

Plaintiff bears an extraordinarily heavy burden. *See Goldman*, 2011 WL 4826104, at *13 (noting bad faith is "qualitatively different from, and more culpable than . . . gross negligence"). To state a claim, Plaintiff must allege either that disinterested directors intentionally disregarded their duties, or that their decision was essentially inexplicable on any ground other than bad faith. *In re MeadWestvaco S'holders Litig.*, 168 A.3d 675, 684 (Del. Ch. 2017). "In the transaction context, [an] extreme set of facts [is] required to sustain a disloyalty claim" premised on such failures. *Id.* (quoting *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243 (Del. 2009)).

Nothing close to that "extreme set of facts" is alleged here. Even adopting Plaintiff's own characterization of his Complaint, he pleads only that the Board overpaid for certain assets based on a purportedly flawed buy-side fairness opinion from a financial advisor (i) conceded to be expertly qualified for the engagement, and (ii) with no alleged past or current relationship whatsoever with the Sellers. *See* Br. 40–44; A4741, A4751, A4775, A4792. The Complaint does not allege that the Board failed to fully inform itself; only that the Board should have dug deeper into purported flaws in the fairness analysis. *See id.* But "there is a vast difference between an inadequate or flawed effort to carry out fiduciary duties and a conscious disregard for those duties." *Lyondell*, 970 A.2d at 243.

Here, the Complaint and documents properly referred to in Defendants' dismissal motions demonstrate that Talos's independent directors met numerous times and received advice from legal and financial advisors, and therefore did not fail to fulfill their duties, much less consciously so. A0055–66, A0180–81, A1209–10, A2678–2863. Rather, their sin—according to Plaintiff—amounts to approving a $635 million acquisition that allegedly overpaid by $200 million because Talos's stock (which formed part of the consideration) was purportedly undervalued by Guggenheim Securities. A0068–69.

The Complaint thus alleges nothing more than an overpayment routinely held not to impugn a board's good-faith exercise of business judgment. In *Voigt v. Metcalf*, for example, the plaintiff failed to state a non-exculpated claim against directors for either breach of loyalty or bad faith despite allegations that the directors approved purchasing a company from a controlling stockholder at a 94% premium. 2020 WL 614999, at *1, *26. Notwithstanding the significant overpayment alleged, the court dismissed claims relying only on the directors' purported "decision to approve the [] Transaction on terms that the Complaint depicts as overly generous" to a controller. *Id.* *In re MeadWestvaco* similarly rejected bad-faith allegations premised on directors' "blind" approval of a transaction allegedly depriving the company of at least $3 billion in value. 168 A.3d at 684–85 (noting that "far from 'flying blind,' the board was actively engaged in the process").

Plaintiff's waste theory is reminiscent of the argument rejected in *DiRienzo v. Lichtenstein*, 2013 WL 5503034 (Del. Ch. Sept. 30, 2013). In *DiRienzo*, the court held that a special committee's alleged failure to challenge financial information did not constitute bad faith because the Complaint did not allege that the special committee *knew* the information was wrong or misleading. *Id.* at *14. Similarly, Plaintiff can point only to allegations that mistakes in Guggenheim Securities's fairness opinion "*should have been* readily apparent to persons like defendants with substantial oil and gas experience." A0073 ¶ 110; Br. 42 (emphasis added). As the court held in *DiRienzo*, what a director "*should have known* is substantively less culpable, for liability purposes, than what they *actually knew*." *DiRienzo*, 2013 WL 5503034, at *14 (internal quotation marks and citation omitted) (emphasis in original).

At bottom, no authority is cited for the proposition that a board's reliance on a fairness opinion from a qualified advisor with alleged undetected errors gives rise to a non-exculpated loyalty breach, whether denominated as waste or something else. Giving every reasonable inference to Plaintiff's allegation that the Talos Board should have noticed deficiencies in the fairness opinion it received, the Complaint falls far short of pleading the "extreme" facts illustrating the type of intentional disregard or inexplicable decision-making necessary to state a bad-faith claim.

III. PLAINTIFF FAILED TO STATE A CLAIM AGAINST THE RECUSED DIRECTORS AND GUGGENHEIM SECURITIES

A. Question Presented

Did Plaintiff plead facts sufficient to state a claim against the Recused Directors or Guggenheim Securities? This issue was preserved in briefing by Talos and Guggenheim Securities and at oral argument. A0111–22, A0220–21, A4505–16, A4574–76, A4690–94; A4703–04, A4726–29.

B. Scope of Review

This Court reviews *de novo* the dismissal of a complaint under Court of Chancery Rule 23.1. *Brehm*, 746 A.2d at 253–54. The Court "may affirm on the basis of a different rationale than that which was articulated by the trial court," and "may rule on an issue fairly presented to the trial court, even if it was not addressed by [that] court." *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995).

C. Merits of the Argument

The Court of Chancery did not explicitly address the sufficiency of the Complaint as to the three Recused Directors or Guggenheim Securities, having ruled that demand was not excused for any derivative claim. Op. at 22, 44, 52. As set forth above, that ruling should be affirmed. But even if this Court holds that Plaintiff sufficiently alleges demand futility, the Court should still affirm the dismissal of the claims against the Recused Directors and Guggenheim Securities because Plaintiff failed to plead any basis for holding these defendants liable.

The Recused Directors. "Delaware law clearly prescribes that a director who plays no role in the process of deciding whether to approve a challenged transaction cannot be held liable on a claim that the board's decision to approve the transaction was wrongful." *In re Tri-Star Pictures, Inc., Litig.*, 1995 WL 106520, at *2 (Del. Ch. Mar. 9, 1995); *see also Weinberger v. UOP, Inc.,* 457 A.2d 701, 710–11 (Del. 1983). Plaintiff does not allege that the Recused Directors "played any role, overt or covert, in the board's decision-making process." *Tri-Star,* 1995 WL 106520, at *3; *see* A0220–21. In fact, he concedes that they recused themselves "from the decision to enter into the Original Transaction" and left the room prior to Board discussions concerning the Transaction. A00057–58.

This is a far cry from cases in which recused directors participated in the negotiation, structuring, or approval of a challenged transaction. *See* A4574–75; *cf. Valeant Pharms. Int'l v. Jerney,* 921 A.2d 732, 753 (Del. Ch. 2007). Instead, the facts are much closer to *Tri-Star*, which held that directors cannot be exposed to liability where they "totally abstain[ed] from participating" in the challenged transaction, as the Recused Directors did here. *Tri-Star,* 1995 WL 106520, at *2–3; *see* A0221. Contrary to Plaintiff's suggestion, moreover, the Recused Directors did not have a "duty to alert their fellow directors to the occurrence of a breach of fiduciary duty." A0058 ¶ 66; *Tri-Star,* 1995 WL 106520, at *2–3; A4574–75.

Guggenheim Securities. The Court should likewise affirm the Court of Chancery's dismissal of the aiding and abetting breach of fiduciary duty count against Guggenheim Securities because Plaintiff failed to plead that Guggenheim Securities "knowingly participat[ed]" in the alleged breach, a required element of the claim. *RBC Cap. Markets, LLC v. Jervis*, 129 A.3d 816, 861 (Del. 2015) (citing *Malpiede*, 780 A.2d at 1096).

In order to plead that Guggenheim Securities knowingly participated in the alleged breach, Plaintiff was required to plead that Guggenheim Securities was actually aware of the breach—here, the alleged *quid pro quo* agreement between Apollo and Riverstone—such that it could aid and abet it. Indeed, Plaintiff was obligated to plead "specific facts from which [the] court could reasonably infer knowledge of the breach." *Nebenzahl v. Miller,* 1996 WL 494913, at *7 (Del. Ch. Aug. 26, 1996). Far from meeting that burden, Plaintiff did not plead *any* specific facts demonstrating that Guggenheim Securities was aware that the Individual Defendants, Riverstone, or Apollo breached their fiduciary duties; nor did Plaintiff plead that Guggenheim Securities was aware of Apollo's alleged agreement to give Riverstone a "sweetheart deal," much less that Guggenheim Securities knowingly or intentionally provided an incorrect fairness opinion in an effort to advance that deal. *See Jacobs v. Meghji*, 2020 WL 5951410, at *7 (Del. Ch. Oct. 8, 2020). Instead, Plaintiff relied on conclusory allegations, stating without support that Guggenheim Securities "had to know" of the directors' breaches of their fiduciary duties and contributed to the breach. These naked allegations are insufficient. *In re Santa Fe Pac. Corp. S'holder Litig.,* 669 A.2d 59, 72 (Del. 1995); *see* A0119–22.

Moreover, Plaintiff did not plead any facts suggesting that Guggenheim Securities's fairness opinion reflected purposeful error, rather than the exercise of professional discretion with which Plaintiff simply disagrees. *See* A0121, A4512–16; *In re 3Com S'holders Litig.*, 2009 WL 5173804, at *6 (Del. Ch. Dec. 18, 2009); *cf. In re Morton's Rest. Grp., Inc. S'holders Litig.*, 74 A.3d 656, 673–74 (Del. Ch. 2013). That Plaintiff's quibbles are merely a matter of opinion is reinforced by the substantial support for Guggenheim Securities's opinion in the public record.

Accordingly, the Court of Chancery did not err in dismissing the aiding and abetting claims against Guggenheim Securities—regardless of the points of error raised by Plaintiff.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court affirm the judgment of the Court of Chancery.

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