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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.,	§	
Nominal Defendant Below / Appellee.	§	

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

Only two questions are on appeal. ***First***, is it reasonably conceivable at the pleading stage that Apollo and Riverstone jointly control Talos? ***Second***, has Plaintiff pled a claim for waste? *See* Plaintiff's Opening Brief ("**OB**") at 23, 38.[1]

As to the first question, there is little more that Apollo and Riverstone could have done to cement their joint control over Talos. They are far from being simply "two unaffiliated minority stockholders" as Defendants characterize in their Answering Brief ("**AB**"). Apollo and Riverstone founded Talos, funded it with a $600 million co-investment, and installed friendly management. When Talos went public, they secured the right to collectively appoint six of the Company's ten directors to assert their influence over a majority of the Board. Throughout the Company's existence, Apollo and Riverstone always owned a majority of Talos stock and thus had control over any shareholder vote. With their hands controlling every lever of corporate power, Apollo and Riverstone pursued their mission to use Talos as a platform to extract non-ratable benefits at the expense of Talos and its public stockholders.

Talos itself certainly viewed Apollo and Riverstone as substantially more than "two unaffiliated minority stockholders." The Company's disclosures

[1] Unless otherwise stated, capitalized terms have the same meanings as in the OB, all emphasis in quotations is added, and all internal quotations and citations are omitted.

consistently refer to Apollo and Riverstone using joint nomenclature such as "Sponsor Stockholders" and "Majority Stockholders" and acknowledge their power to control corporate activity. The Company would surely not describe two unaffiliated minority stockholders using joint nomenclature, or say that it is "***controlled***" by unaffiliated stockholders whose holdings just happen to add up to a majority. The fact the Company did so reflects the reality that Apollo and Riverstone consistently acted as a coordinated group that controls Talos.

Apollo and Riverstone's controlling fingerprints are all over the structure and timing of the Challenged Transaction. The 11 million share consideration to Riverstone was guaranteed by the written consent of the Majority Stockholders (*i.e.*, Apollo and Riverstone), thereby eliminating any risk that public stockholders would reject such a lopsided transaction. Apollo and Riverstone further wielded their control to revise the consideration and accelerate the timing of the transaction, which was impossible without an understanding between them. These are simply not the actions of two unaffiliated minority stockholders. Rather, Apollo and Riverstone acted in concert to further their shared goal of establishing a controlled public company to act as a counterparty in related-party transactions skewed in their favor.

In response to the abundance of facts showing that Apollo and Riverstone coordinated their joint control over Talos from its inception, Defendants are left to

cherry-pick from various factors considered in prior cases in an attempt to manufacture a self-serving standard for identifying a control group. This is improper. A control group is determined by considering all the facts of a given case in context. Here, the substantial record of ties and coordination between Riverstone and Apollo makes it reasonably conceivable that they formed a group that controls Talos.

As to the waste question, Defendants fail to engage the allegations in the Complaint and Plaintiff's arguments below. Plaintiff pled facts regarding the Challenged Transaction and the Board that amount to waste, so a claim for waste was not waived.

Finally, the issues raised by Defendants relating to demand futility and Plaintiff's claims against Guggenheim and the three directors beholden to Riverstone are not properly on appeal before the Court.

ARGUMENT

I. It is Reasonably Conceivable that Riverstone and Apollo Jointly Control Talos

A. All of the Facts Must be Considered Together in Context

The Court must decide whether all of Plaintiff's allegations taken as a whole, with Plaintiff getting the benefit of the doubt and receiving all favorable inferences, are enough to make it reasonably conceivable that Apollo and Riverstone together control Talos. *See In re Hansen Medical, Inc. S'holders Litig.*, 2018 WL 3025525, at *7 (Del. Ch. June 18, 2018) ("[A]ll of these factors, ***when viewed together***… make it reasonably conceivable that [defendants] functioned as a control group").[2] Therefore, Defendants' invitation to consider each of the facts in isolation instead of in context must be rejected. As the Court below recognized, "it is possible to plead a control group despite the failure of any individual factor, or any lesser combination thereof, to carry the day." Opinion 38 (citing *Hansen* and *Garfield*).

As long as the facts of record support a reasonable inference – not necessarily the better inference – that a control group existed, [dismissal] is not

[2] *See also Garfield v. BlackRock Mortg. Ventures, LLC*, 2019 WL 7168004, at *11 (Del. Ch. Dec. 20, 2019) (plaintiff pled a control group through "***the sum-total of the facts alleged*** and inferences therefrom"); *Sheldon v. Pinto Tech. Ventures, L.P.*, 220 A.3d 245, 253 (Del. 2019), citing *Hansen, supra* (considering the "***allegations, taken together***" in determining the existence of a control group); *Voigt v. Metcalf*, 2020 WL 614999, at *22 (Del. Ch. Feb. 10, 2020) (control is inferred from "***a constellation of facts***").

appropriate." *In re Nine Sys. Corp. S'holder Litig.*, 2013 WL 771897, at *6 (Del. Ch. Feb. 28, 2013). As the Court noted in *Hansen*, at the pleading stage "the question is not whether Plaintiffs offer the only, or even the most, reasonably conceivable version of events. Rather, the question is whether Plaintiffs have stated a reasonably conceivable claim for which relief can be granted." 2018 WL 3025525, at *8.

Defendants do not dispute that Plaintiff's facts are all in the record. Thus, this Court may consider record facts regardless of whether they were addressed below because the inference of a control group was decided below and is now properly before this Court. OB 23. This is fully consistent with Supreme Court Rule 8.[3]

B. Apollo and Riverstone Used Talos to Pursue Their Shared Goal of Extracting Non-Ratable Benefits

Defendants' assertion that there was "no mention of a predicate shared goal" below but for a reference to "a purported *quid pro quo* pact," AB 10, is plainly

[3] *See Mundy v. Holden*, 204 A.2d 83, 85 (Del. 1964) ("'when the argument is merely an additional reason in support of a proposition urged below, there is no acceptable reason why… the argument should not be considered'"), quoting *Kerbs v. Cal. Eastern Airways*, 90 A.2d 652, 659 (Del. 1952) (it is proper to consider on appeal a "point [that] falls within the class of additional reasons supporting the plaintiffs' theory."); *N. River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d 369, 382-83 (Del. 2014) (rejecting challenge under Rule 8 and allowing additional reasons to support a "broader issue" properly on appeal). The ties between Riverstone and Apollo have always been the crux of this case.

incorrect. The record amply demonstrates that Apollo and Riverstone collectively exercised control over Talos to achieve their shared purpose of forming a company to serve as a counterparty in related-party transactions "to benefit themselves at the expense of the Company and its public stockholders." A0042 (¶ 3). The Challenged Transaction with Riverstone and the earlier Whistler transaction with Apollo, *see* A0052-55 (¶¶ 43-58), are the fruition of their shared goal to control Talos in order to extract non-ratable benefits for themselves.

Plaintiff has pled an array of plus factors that, when viewed in context, can only reflect the existence of an implicit understanding between Apollo and Riverstone to found, fund and control Talos to achieve their self-serving designs for the Company. *Sheldon*, 220 A.3d at 252 (such an agreement "need not be formal or written" and may be inferred).

1. Talos was Founded as a Controlled Company

Apollo and Riverstone have a long, well-documented history of working together in addition to myriad additional factors supporting a finding of a control group at the pleading stage. Indeed, Defendants concede that Apollo and Riverstone participated in "twenty years of contemporaneous investing in the same industry" with "four transactions prior to the [Challenged] Transaction" including the 2013 buyout of EP Energy and the Whistler bailout. AB 13. Against that backdrop, Apollo and Riverstone co-founded Talos in 2012 as a private company,

funded it with a $600 million co-investment, and installed beholden management led by a CEO they publicly stated they were excited to partner with again on a new venture. A0047-48, 50-51 (¶¶ 23, 37).[4] The Company even filed a registration statement with the SEC while Talos was still private, describing Apollo and Riverstone jointly as Sponsor Stockholders, A3432, and further disclosing to potential public investors in both words and diagrams, in numerous places, that Talos was controlled from the outset and would remain so going forward. *See* Points I(B)(2)(c-d), *infra*.

2. Apollo and Riverstone Continued Their Joint Control Over Talos After it Went Public

Apollo and Riverstone's control over Talos continued unabated even after it became a public company. What Defendants derisively call a "mishmash" of factors in reality was a well-planned strategy executed by Apollo and Riverstone to maintain control over all the levers of corporate power that operated Talos: they appointed a beholden management team, A0047-48 (¶ 23); retained power to jointly appoint a majority of the Board, A0046 (¶¶ 17-19); and continuously held

[4] Defendants' observation that "a ten year history of co-investment in the company they founded together" supported a finding of control in *Garfield* applies equally here. AB at 13, citing 2019 WL 7168004, at *9. Indeed, the relationship here is even stronger than *Garfield* because Apollo and Riverstone had at least one other co-investment in contrast to no others in *Garfield*. *See* A0051-52 (¶¶ 38-42). The absence of any other co-investment in *Garfield* belies Defendants' argument that a history of multiple co-investments (as in *Hansen*) is a prerequisite for finding control.

together more than 50% of the Company's stock voting power, A0045, 61 (¶¶ 14, 76). Apollo and Riverstone's long-term, methodical plan can only reflect an agreement between them to control Talos for the shared purpose of extracting non-ratable benefits for themselves.

a. Apollo and Riverstone Control the Shareholder Vote

Defendants do not dispute Apollo and Riverstone's ownership of a majority of the Company's stock, giving them control over a majority of the shareholder vote. *See*, *e.g.,* OB 11,13; A1260 (SEC filing acknowledging Apollo and Riverstone's power to "approve any matter brought to a vote of our stockholders without the affirmative vote of any other stockholder"). They have always owned a majority of the stock, and their interest in the Company even increased as a result of the Challenged Transaction. A0045, 61 (¶¶ 14, 76); Opinion 16.

b. Apollo and Riverstone Appoint a Majority of the Board

The Stockholders' Agreement gives Apollo and Riverstone another layer of control over Talos by granting them the joint right to appoint a majority of the Board. Defendants are simply wrong in saying that the Stockholders' Agreement "did not require Riverstone and Apollo… to vote together on any matter." AB 20-21. In fact, the Stockholders' Agreement specifically requires Apollo and Riverstone to vote for the other's two Board designees and further requires them to agree on the remaining two joint Board designees. A2650 (§3.4(b)). The

Stockholders' Agreement thus requires the Majority Stockholders to reach an agreement between themselves to appoint six out of the Company's ten directors. In contrast, the shareholders' agreement in *Sheldon* did not give the power to appoint a majority of the Board. 220 A.3d at 254. And, unlike the voting agreements in *Sheldon* and *van der Fluit v. Yates*, 2017 WL 5953514 (Del. Ch. Nov. 30, 2017), both of which had many other signatories, Apollo and Riverstone are the only two stockholders party to their agreement. *See* OB 30-31 (90 signatories to the agreement in *Sheldon* and "numerous" signatories in *Yates*).

Defendants point out that the Stockholders' Agreement allows Apollo and Riverstone to vote as they choose on other matters. But that does not take away from the fact that it allows Apollo and Riverstone to appoint a majority of the Board as part of their overall control of the Company in general.[5]

c. <u>SEC Filings Identify Apollo and Riverstone as a Group</u>

There is no doubt that Talos was controlled by Apollo and Riverstone when it was a private company, and the Company continued to acknowledge their control when it went public and in connection with the Challenged Transaction.

[5] Defendants' attempt to compare the Stockholders' Agreement to other voting agreements falls flat. *Silverberg v. Padda*, 2019 WL 5295141 (Del. Ch. Oct 18, 2019), involved a charter amendment, not a stockholders' agreement. *In re PNB Holding Co. Shareholders Litigation*, 2006 WL 2403999 (Del. Ch. Aug 18, 2006), involved no agreement of any kind between the alleged controllers, who owned just 33.5% of the company's stock.

For example, the Registration Statement refers to Apollo and Riverstone as the Company's "Sponsors" and "Sponsor Stockholders," and contains a diagram depicting them as a group owning 63% of the Company's Stock. A0344, A3573, A3676, A3732. In the Information Statement notifying the public stockholders of the Challenged Transaction, Apollo and Riverstone are referred to as the "Majority Stockholders." A1183-84, A1192, A1266.

The Company's use of grouping language is akin to the language the Courts considered favorably in *Hansen,* 2018 WL 3025525, at *7 ("Principal Purchasers"), and in *Garfield* 2019 WL 7168004, at *8-10 ("strategic investors" and "Key Stockholders"). This consistent use of joint terminology describing Apollo and Riverstone is therefore not simply "short-hand nomenclature," as Defendants dismissively claim (AB 16), but rather reflects the reality that Talos always viewed Apollo and Riverstone as a group.

In addition to the joint nomenclature, the Company has described investments made by Apollo and Riverstone in joint terms. For example, the Registration Statement described Apollo and Riverstone's initial $600 million co-investment as being made jointly. A3676.[6] Talos also characterized Apollo and

[6] "On February 3, 2012, the Company completed a transaction with funds affiliated with, and controlled by, [Apollo], funds affiliated with, and controlled by, [Riverstone] (…together with Apollo, our "Sponsors") and members of management pursuant to which the Company received a private equity capital commitment[.]"

Riverstone's subsequent additional contribution of $102 million as being made jointly, *see* OB 14. This pervasive use of joint terminology referring to Apollo and Riverstone and describing their investment activities shows that Talos viewed the two as group, and not as two unaffiliated minority stockholders.

d. The Company Admits it is "Controlled" by Apollo and Riverstone

Since its founding, Talos disclosed in its Registration Statement that the Company is *"**controlled by Apollo Funds and Riverstone Funds**."* A3442 (emphasis original); A0094 (¶ 171). Defendants' attempt to distract from the Company's clear admission by referencing NYSE rules completely misses the point.

First, Section 303A.00 of the NYSE Listed Company Manual[7] provides that certain listing requirements do not apply to controlled companies, which are companies where over 50% of the voting power for the election of directors is held by "an individual, a group or another company[.]" The fact that the Company made a Section 303A disclosure indicates that it considers Apollo and Riverstone a group under the NYSE rules. At the same time, the Company did not make a Section 303A disclosure for any other collection of Talos stockholders with collective holdings exceeding 50% of the voting power. In particular, the same

[7] *See* OB 30 n.3 (link).

Registration Statement which disclosed that the Company "***is controlled by Apollo and Riverstone Funds***" (emphasis original) lists the stockholders who owned more than 5% of the Company's shares in this table:

	Shares Beneficially Owned	
	Number	Percent
5% Stockholders		
Apollo Funds(1)	19,191,451	35.4%
Riverstone Funds(2)	14,926,683	27.6%
MacKay Shields LLC(3)	4,045,851	7.5%
Franklin Resources(4)	7,209,575	13.3%

A3568. Collectively, Apollo (35.4%), McKay Shields (7.5%) and Franklin Resources (13.3%) owned 56.2% of the Company's stock. Yet, Talos did not make a Section 303A disclosure for Apollo, McKay and Franklin. The obvious conclusion is that while the Company viewed Apollo, McKay and Franklin as a collection of unaffiliated minority stockholders, and therefore not subject to Section 303A, the Company did consider Apollo and Riverstone as a "group" that controls the Company.

Furthermore, the Company's acknowledgment that it is "***controlled by Apollo Funds and Riverstone Funds***" (emphasis original) goes well beyond NYSE requirements of disclosing that they have over 50% voting power to elect directors. For example, immediately following this acknowledgment, the Company further admits that "Apollo Funds and Riverstone Funds also ***have control*** over all other matters submitted to stockholders for approval" and that "***Apollo Funds' and Riverstone Funds' control*** could result in the consummation of such a transaction

that other stockholders do not support." A3443. Also, Talos admits in its SEC filings that its charter and bylaws "contain provisions that may… discourage ***another party from acquiring control*** of us." *See* OB 15, citing A1261. The obvious implication is that Apollo and Riverstone *do* control the Company. Thus, the Company discloses, without qualifying language (such as "potential" or "hypothetically"), that Apollo and Riverstone have actual control over Talos.[8] Plaintiff, therefore, "is entitled to the benefit of the inference that the [Company's] disclosure meant what it said." *Voigt* 2020 WL 614999, at *15.[9]

3. Apollo and Riverstone Wielded Their Control Over the Challenged Transaction

Having taken the Company public while maintaining their control, Apollo and Riverstone were finally in a position to execute their long-held shared goal of extracting non-ratable benefits from Talos. First came the Whistler transaction with Apollo, which closed in August 2018, just two months after Talos went public.

[8] Defendants' argument that an inference of a control group requires the Majority Stockholders to "actually [take] steps to exert leverage" is not the law. AB at 27-28. In *In re Cysive, Inc. S'holders Litig.*, 836 A.2d 531, 553 (Del. 2003), this Court held that a controller inquiry examines the means that "enable[] him to control the corporation ***if he so wishes***." Defendants' reliance on *In re Sea-Land Corp. S'holders' Litig.,* 1987 WL 11283 (Del. Ch. May 22, 1987) is misplaced. There, a minority stockholder "took [no] steps to exert leverage" over the Company, could only nominate directors (who were never elected) and alleged no other facts supporting an inference of a control group. *Id.* at *5.

[9] Defendants argue that *Voigt* did not refer to the existence of a control group, AB 19, but its straightforward holding applies regardless.

A0044, A0052 (¶¶ 12, 42-43). *See* A0052-58 (¶¶ 43-58) (describing how Talos overpaid to acquire assets from Apollo). The Challenged Transaction with Riverstone was announced the next year.

The record makes it clear that Apollo, consistent with the long-term goal it shared with Riverstone, played an integral role in controlling the substance and timing of the Challenged Transaction. First, Apollo was the Company's largest stockholder before the Challenged Transaction, and its representative attended every Board meeting discussing it and raised no objections. *See* Opinion 12.[10] Thus, it is more than reasonable to conclude that Apollo agreed to the Challenged Transaction before its public disclosure.

The Majority Stockholders' control over the Challenged Transaction is further evidenced by numerous disclosures in the Company's SEC filings. A1177, OB 17 n.2, 33. For example, Apollo and Riverstone delivered their joint written consent approving the Challenged Transaction simultaneously with the execution of definitive documentation. Apollo and Riverstone delivered subsequently delivered a second joint written consent revising the consideration and timing of the Challenged Transaction. Indeed, it would have been impossible to change the

[10] Riverstone's representative likewise attended the Board meetings where the Challenged Transaction was discussed, *see id.*

consideration and advance the closing without Apollo and Riverstone's joint consent.

The fact that Apollo and Riverstone were twice able to deliver their joint written consent simultaneously with execution of definitive documentation shows that they were not passive unaffiliated stockholders who happened to reach a consensus after independent consideration. Rather, Apollo and Riverstone were privy to every part of the Challenged Transaction, and they used their joint control of Talos to effectuate the Challenged Transaction consistent with their shared goal of exploiting Talos for their own non-ratable benefits.

Thus, Riverstone and Apollo controlled both the key terms and timing of the Challenged Transaction. They pre-approved the transaction before it was publicly disclosed, and approval from both was needed for the transaction to close without any input from the public stockholders. While it may have been mathematically possible for the original form of the Challenged Transaction to be approved without Apollo by a vote of Riverstone and a random combination of smaller stockholders, putting a lopsided transaction up for stockholder vote would carry enormous risk. The written consent delivered by the Majority Stockholders eliminated that risk. Furthermore, the subsequent change in consideration and

timing of the Challenged Transaction could not have occurred without their joint approval. [11]

Accordingly, the Complaint pled more than enough facts to conclude that Apollo and Riverstone acted as a group to control the Challenged Transaction. This is especially so given that Apollo had no direct economic benefit in the Challenged Transaction and but acted in concert with Riverstone consistent with their shared goal to control and exploit Talos. The Challenged Transaction was simply Riverstone's turn to take a bite of the apple (Apollo took its bite in the Whistler transaction). Therefore, given the fact that ***(i)*** Apollo and Riverstone methodically took complete control over Talos since they founded and funded the Company, ***(ii)*** the Company continuously admitted that Apollo and Riverstone always acted as a group that controlled Talos, and ***(iii)*** Apollo and Riverstone, as a group, controlled the substance and timing of the Challenged Transaction, Plaintiff has pled more than enough facts to support a reasonably conceivable inference that Apollo and Riverstone agreed to act as a control group in connection with the Challenged Transaction.

[11] Because Apollo and Riverstone jointly controlled Talos, and the Challenged Transaction was between Talos and Riverstone, it is not surprising that Apollo did not engage in any negotiations that would place it at odds with its fellow controller.

II. Plaintiff Pled His Waste Claim

The gravamen of Plaintiff's waste claim is that Defendants knowingly overpaid for the Riverstone Assets. *See, e.g., Steiner v. Meyerson*, 1995 WL 441999, at *5 (Del. Ch. July 19, 1995) (waste is a transaction "that no informed person could in good faith believe… advantageous" to the company). Arguing that Plaintiff pleads no facts constituting waste requires Defendants to substitute the allegations in the Complaint for their own self-serving counter-narrative.

A. Defendants Ignore the Allegations in the Complaint

Defendants' counter-narrative is most notable for the facts it pretends do not exist. The most blatant example, as before the Court below, is Zama – the Company's giant oil field in offshore Mexico. Zama has almost as much oil as the rest of the Company's reserves combined. Guggenheim, which publicly valued Zama at $440 million, attributed no value to Zama in its fairness opinion just two months later. A0082-84 (¶¶ 138-142). Plaintiff alleges that the entire Board was well aware of Zama's "enormous present value," but went ahead with the Challenged Transaction premised on Zama (and the Company's other Mexican assets) having no value at all. *Id.*, A0082-85 (¶¶ 138-146).

Defendants never explain why this does not constitute a breach of loyalty or waste. As they did below, Defendants simply ignore Zama although it is discussed extensively in the Complaint, Plaintiff's answering brief below (A4198-4292), and

his Opening Brief here. As counsel noted below, Defendants treat Zama as though it is "the oil field that must not be named." A4735-36.

Whether Plaintiff pled a claim for waste is an intensely factual question requiring dissecting the allegations in the Complaint, not ignoring them. Plaintiff alleges that Zama was worth at least $440 million and that the Company's other Mexican assets added significant value. If Defendants believe these assets are so trivial that it is not reasonably conceivable the Board ignored them in bad faith, they must make that argument – but they never do. And if they believe Plaintiff did not argue waste before the Court below, they must address the numerous examples in Plaintiff's Opening Brief showing the contrary, *see* OB 40-44. But again, they never do.

Defendants' failure to engage the facts about Zama is repeated in their failure to engage Plaintiff's other principal factual argument – that the Board allowed Riverstone's gas-weighted assets to be valued on an energy-equivalent basis with Talos's oil-weighted assets, despite all of the directors knowing that oil was worth more than three times gas on an energy-equivalent basis. A0074-75 (¶¶ 113-115). Defendants nevertheless argue that Plaintiff pled "no allegations that the Board had anything other than a good-faith belief that the [Challenged] Transaction was in the Company's best interests[.]" AB 32. That argument can

only be made by ignoring the actual allegations in the Complaint about Zama and the relative value of oil and gas reserves.

Plaintiff specifically alleges (in the Complaint's demand futility section, no less) that the Challenged Transaction was "so manifestly unfair to Talos that it cannot be the product of business judgment." A0088, 0093 (¶¶ 161, 163). In this context, "manifestly" means plainly, obviously, or evidently.[12] A transaction that is plainly, obviously, and evidently unfair means that the Board necessarily knew this. A0066 (¶ 91); A0073, A0084-86 (¶¶ 110, 142, 146) (the omissions from Guggenheim's fairness opinion were glaring and obvious). Any good-faith belief that the Challenged Transaction was in the Company's best interest is thus precluded.

The allegations in the Complaint make it reasonably conceivable that the Board approved the Challenged Transaction in bad faith. Ignoring the existence of the Company's single largest asset worth over $440 million cannot be an exercise of good faith, particularly in a transaction where the purchase price was a function of the Company's value.

B. The Answering Brief Below Did Not Waive a Waste Claim

Defendants next argue that Plaintiff waived his waste claim because it was not addressed in his answering brief below. As they do with the Complaint,

[12] https://www.dictionary.com/browse/manifestly (visited Feb. 7, 2022).

Defendants ignore the extensive discussion in Plaintiff's answering brief below about Zama and the relative difference in value between oil and gas reserves. A4215, 4249-50, 4263-64.

Defendants erroneously argue that "Plaintiff devoted *zero* sentences to brief his supposed argument that demand was excused because the Talos Board approved the [Challenged] Transaction in bad faith." AB 33 (emphasis original). This was specifically addressed in Plaintiff's answering brief below:

> The Complaint alleges that Hommes ***breached her fiduciary duty in part by voting to approve the Challenged Transaction while knowing that it was facially unfair to Talos given her experience in the industry***. Compl. ¶¶ 91, 110, 142, 146, 162(c). Thus, there is ample reason to doubt that she could make an independent and disinterested decision about whether to bring the claims asserted in this action.

A4278 (answering brief below at 69). That is precisely the argument that Defendants claim the answering brief below is missing. The answering brief below makes similar arguments about the other directors who approved the Challenged Transaction. *See* A4283-86 (*id.* at 74-77).

Finally, Defendants conflate Plaintiff's description of the Challenged Transaction as "unfair" with the concept of entire fairness. Plaintiff argued that demand is excused on the directors who voted for a transaction that was facially unfair, *i.e.,* unfair on its face and obvious to the Board. If a facially unfair

transaction is approved by a fiduciary, it is reasonably conceivable the fiduciary acted in bad faith. As Plaintiff noted in his answering brief below,

> 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? [Accordingly,] Plaintiff has pleaded an underlying breach of fiduciary duty by the Director Defendants and the Controllers.

A4262 (*id.* at 53). As set forth in Plaintiff's Opening Brief, "waste" is not a magic word, and a claim is not pled through incantation. OB 43-44. Plaintiff's claim for breach of fiduciary duty is plainly for waste, and it was not waived below.

III. Defendants' Remaining Arguments Are Not Before the Court

While the Court may rule on an issue fairly presented to the trial court even if it was not addressed below, the party seeking review must first invoke appellate jurisdiction by filing a notice of appeal or cross-appeal. *See* Supreme Court Rules 7(a-b), 14(b)(vi)(A)(1). Plaintiff filed his notice of appeal and presented the two questions for appellate review addressed above. No defendant cross-appealed.

A. Demand Futility

The issue of demand futility is not before the Court on this appeal. The Court below found that Plaintiff did not satisfy Court of Chancery Rule 23.1 for any derivative claim after first finding that Plaintiff did not plead the existence of a control group or a claim for waste. Opinion 45, 49-50. Because Plaintiff pled sufficient facts to infer that Apollo and Riverstone are a control group, as well as a claim for waste, the demand futility analysis will necessarily be different on remand and the Court below will rule accordingly.[13]

Defendants mischaracterize the reference in Plaintiff's Opening Brief to demand futility in relation to a control group. AB 29. Plaintiff does not argue on appeal that demand is excused any time a transaction is subject to entire fairness review. *See* OB 36. As the Court below correctly noted, this Court conclusively

[13] Defendants' claim that the Challenged Transaction was approved by a majority of disinterested directors (AB 23 n.8) assumes that Apollo and Riverstone are not a control group and ignores Plaintiff's claim for waste.

foreclosed that argument in *United Food and Commercial Workers v. Zuckerberg*, 262 A.3d 1034 (Del. 2021). *See* Opinion 49-50. Rather, Plaintiff intends to argue on remand that demand is excused under *Zuckerberg* Prongs 1 and 3 once Apollo and Riverstone are deemed to be a control group because at least five of the Company's ten directors lack independence from one or both controllers.[14] OB 36.

Defendants' argument that demand is not excused under *Zuckerberg* Prong 2 addresses a question that is not before the Court on appeal and was not reached by the Court below because it first erroneously found that Plaintiff did not plead waste. Opinion 49-50. Citing cases for largely unobjectionable propositions, Defendants argue that to state a waste 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.

AB 37. But that is precisely what the Complaint pleads: that the decision to enter into the $691 million Challenged Transaction was in bad faith because it ignored the $440 million value of the Company's largest asset (Zama) and treated oil and gas as equally valuable, which all of the directors knew was wrong. Defendants'

[14] *See* Opinion 8 (Defendants Mahagaokar, Tichio and Wassenaar concededly have disabling ties to Riverstone, and Wassenaar is an Apollo partner); *id.* at 45 (Defendant Hommes is "a partner at Apollo and, thus, certainly shared any interest Apollo had in the Challenged Transaction"); *id.* (noting Defendant Duncan's "deep ties with Riverstone.").

argument that these are "alleged undetected errors" amounting to "nothing more than an overpayment" protected by the business judgment rule, AB 39, ignores both the materiality and magnitude of these red flags, which are so great that the decision to enter into the Challenged Transaction cannot be explained in the absence of bad faith.

B. Defendants' Remaining Arguments are Improper

Defendants concede that the Court below did not reach the sufficiency of Plaintiff's claims against Guggenheim or the three directors with admitted ties to Riverstone, having dismissed the case on other grounds. AB 41. These questions are not before the Court since Plaintiff did not raise them on appeal and Defendants did not file a notice of cross-appeal. *Cf. Unitrin v. Am. Gen. Corp.*, 651 A.3d 1361 (Del. 1995) (party seeking a ruling on an issue not addressed by the Court below invoked appellate jurisdiction via a notice of appeal). These matters are properly addressed on remand, and the interests of justice do not require the Court to review them for the first time. Point III of Defendants' Answering Brief should therefore be struck under Supreme Court Rule 34.[15]

[15] Should the Court nevertheless be inclined to consider Defendants' arguments, Plaintiff's claims against Guggenheim and the three directors with admitted ties to Riverstone should not be dismissed for the reasons in Plaintiff's answering brief below. *See* A4253-4258, 4261-4265.

CONCLUSION

For the reasons above and in his Opening Brief, Plaintiff respectfully requests this Court reverse the Opinion and accompanying orders of the Court below, direct further proceedings consistent therewith, and grant such additional relief as this Court deems just and proper.

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