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Case No. 2020-0418-MTZ

IN THE COURT OF CHANCERY 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,	)	C.A. No. 2020-0418-MTZ
v.	)	
TIMOTHY S. DUNCAN, NEAL P. GOLDMAN, CHRISTINE HOMMES, JOHN "BRAD" JUNEAU, DONALD R. KENDALL, JR., RAJEN MAHOGAOKAR, CHARLES M. SLEDGE, ROBERT M. TICHIO, JAMES M. TRIMBLE, OLIVIA C. WASSENAAR, RIVERSTONE HOLDINGS, LLC, APOLLO GLOBAL MANAGEMENT, INC. and GUGGENHEIM SECURITIES, LLC,	)	
Defendants,	)	
-and-	)	
TALOS ENERGY INC.,	)	
Nominal Defendant.	)	

OPENING BRIEF IN SUPPORT OF DEFENDANT APOLLO GLOBAL MANAGEMENT, INC.'S MOTION TO DISMISS

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INTRODUCTION

The claims against Apollo Global Management, Inc. ("Apollo") depend upon a single key allegation: that Apollo is a member of a controlling stockholder group of Talos Energy Inc. ("Talos"). Absent that, Apollo owes no fiduciary duty to the other stockholders or to the company, and thus Plaintiff's direct and derivative claims for breach of fiduciary duty fail. And, as the facts pled by Plaintiff demonstrate, under no circumstances can Apollo be deemed to be part of a controlling stockholder group at Talos, and so the claims against Apollo should be dismissed.

This case is a putative derivative action brought against the purported controlling stockholder group of Talos, namely the two private equity firms of Apollo and Riverstone Holdings, LLC ("Riverstone"). The crux of Plaintiff's complaint is that Apollo and Riverstone—neither of which was a majority stockholder during any relevant time period—supposedly entered into an arrangement whereby they would collectively assert their control to compel Talos to engage in two different unprofitable transactions, separated by nearly two years, one for the benefit of Apollo and the other for the benefit of Riverstone.

In essence, Plaintiff's complaint revolves around this supposed *quid pro quo*. But the arrangement presumed by Plaintiff is implausible on its face. According to Plaintiff, the financial stakes of the two transactions are immensely disproportionate:

the first transaction, which allegedly benefitted Apollo, was only worth $52.3 million, while the second transaction, which supposedly aided Riverstone, was an order of magnitude greater—$635 million. And since Apollo owned ~35% of Talos, the economic impact of the second transaction would be far more significant to Apollo than any purported value received from the first transaction. In short, the entire complaint as to Apollo hinges on Apollo allegedly engaging in conduct that is implausible and against Apollo's own interests.

Plaintiff further manifestly fails to allege facts sufficient to support its theory. Most importantly, Plaintiff does not demonstrate that Apollo and Riverstone constituted a controlling stockholder group. Plaintiff offers few facts in support of its theory and instead relies only on conclusory allegations. Principally, Plaintiff alleges that a control group can be inferred based upon Apollo and Riverstone's history of collaboration, and by a stockholders' agreement between Apollo and Riverstone in which they agreed to support each other's nominees to the Talos board of directors. But business relationships alone are insufficient to establish a control group, and an agreement to support director nominees is nothing more than typical stockholder agreement boilerplate—it is simply a customary mechanism to ensure that the intent of the stockholders' agreement is borne out in practice. In any case, it is quite distinct from an arrangement where Apollo and Riverstone (and their

nominated directors) agree to support *any* proposal from Apollo or Riverstone regardless of the underlying merits.

Delaware law provides significant protections for minority stockholders. But to invoke these rights, stockholders cannot simply level conclusory allegations of abusive behavior towards other stockholders. Rather, a supposedly disenfranchised minority stockholder—particularly one, like Patel, who has had pre-suit discovery of the company's books and records—must proffer facts that not only demonstrate the substance of the purported wrongdoing, but also that the alleged wrongdoer owed the plaintiff a fiduciary duty or other obligation. Here, Plaintiff has failed to allege sufficient facts to do so.

Plaintiff has not, and cannot, show that Apollo was part of a controlling stockholder group and therefore owed a fiduciary duty to Talos and the minority stockholders. In the absence of a fiduciary duty, Plaintiff's direct and derivative claims for breach of fiduciary duty cannot survive. Plaintiff's claims against Apollo should be dismissed in their entirety.

STATEMENT OF FACTS[1]

A. Relevant Parties

Plaintiff Vrajeshkumar Patel ("Plaintiff") purports to be an owner and holder of Talos common stock. (Compl. ¶ 10.)

Nominal Defendant Talos Energy Inc. is a Delaware corporation traded on the New York Stock Exchange. (Compl. ¶ 11.) There is no majority stockholder of Talos. (Compl. ¶ 14.)

Defendant Apollo Global Management, Inc. is a private equity firm organized as a Delaware corporation. (Compl. ¶ 20.) Prior to the challenged transactions, funds managed by Apollo's affiliates owned 35.4% of Talos. (Compl. ¶ 14.) Specifically, AP Talos Energy LLC, AP Talos Energy Debtco LLC, AP Overseas

[1] The facts set forth herein are drawn from the allegations in the Verified Stockholder Derivative and Class Action Complaint (the "Complaint" or "Compl.") and documents referenced therein. *See Norton* v. *K-Sea Transp. P'rs L.P.*, 67 A.3d 354, 358 n.7 (Del. 2013) (considering a partnership agreement in deciding a motion to dismiss "because the Complaint incorporates [it] by reference"); *In re Dean Witter P'ship Litig.*, 1998 Del. Ch. LEXIS 133, at *27 n.46 (Del. Ch. July 17, 1998) (considering "Partnership prospectuses, property profiles, customer account statements, quarterly and annual reports and SEC filings" in deciding a motion to dismiss because "by expressly referring to and so heavily relying on these documents in the Amended Complaint, plaintiffs have incorporated them by reference into the Amended Complaint"), *aff'd*, 725 A.2d 441 (Del. 1999); *Albert* v. *Alex Brown Mgmt. Servs., Inc.*, 2005 Del. Ch. LEXIS 100, at *40 (Del. Ch. June 29, 2005) (considering "audited financial reports and semi-annual investor reports" in deciding a motion to dismiss because they "were consulted, relied upon, and quoted from extensively by the plaintiffs in drafting the complaints").

Talos Holdings Partnership, LLC, AIF VII (AIV), L.P. and ANRP DE Holdings, L.P. own Talos stock and are managed by affiliates of Apollo. (Ex. 6.[2])

Defendant Riverstone Holdings, LLC is a private equity firm organized as a Delaware limited liability company. (Compl. ¶ 21.) Prior to the challenged transactions, Riverstone's affiliates owned 27.5% of Talos. (Compl. ¶ 14.)

Defendants 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, and Olivia C. Wassenaar (collectively, the "Directors") are members of the board of directors of Talos. (Compl. ¶¶ 23-33.)

B. Alleged Control Group

Plaintiff alleges that Apollo and Riverstone constituted a control group over Talos. (Compl. ¶ 2.)

1. Ties Between Apollo and Riverstone

Plaintiff claims that Apollo and Riverstone "have business and professional ties going back years." (Compl. ¶ 35.) Specifically, Plaintiff identifies two individuals who worked at both Riverstone and Apollo from 2010 to present (Compl.

[2] Attached as Exhibit 6 to the Affidavit of Justin T. Hymes is a true and correct copy of the May 10, 2018 Talos Stockholders' Agreement, which was produced to Plaintiff by Talos in response to a Section 220 demand and is therefore incorporated by reference into the Complaint.

¶¶ 36, 37), and describes one other transaction where Apollo and Riverstone were co-investors. (Compl. ¶¶ 38-42.)

2. Stockholders' Agreement

When forming Talos, certain affiliates of Apollo and Riverstone had entered into a Stockholders' Agreement. (Compl. ¶ 16; Ex. 6.) This Stockholders' Agreement provided that Apollo's affiliates would nominate two of the ten members of the Talos board of directors and that Riverstone's affiliates would likewise nominate two of the ten members of the Talos board of directors, and that the affiliates of Apollo and Riverstone would have the collective right to jointly designate two additional director nominees as long as the affiliates of Apollo and Riverstone collectively owned more than fifty percent of the outstanding Talos shares. (Compl. ¶¶ 16, 19.) These affiliates of Apollo and Riverstone further agreed that they would vote in support of each other's nominees to the Talos board of directors. (Compl. ¶ 16; Ex. 6, § 3.4.) The Stockholders' Agreement did not contain any provision mandating that the affiliates of Apollo or Riverstone vote their respective Talos shares in support of anything other than nominees to the Talos board of directors. (Ex. 6.)

C. The Challenged Transaction

Plaintiff asserts that two transactions entered into by Talos, the acquisition of Whistler Energy II, LLC in August 2018 ("Whistler Transaction") and the

acquisition of certain assets from Castex and ILX in February 2020 ("Castex/ILX Transaction"), constituted an improper *quid pro quo* between the alleged controllers, Apollo and Riverstone. (Compl. ¶¶ 43, 59, 74.) Plaintiff's Complaint, however, only pleads claims related to the Castex/ILX Transaction. And it pleads no facts of any kind to support the conclusory allegation that Apollo and Riverstone ever agreed to a *quid pro quo*, only that the two transactions occurred.

1. Whistler Transaction

On August 31, 2018, Talos acquired Whistler Energy II, LLC for $52.3 million, including the assumption of $23.8 million in liabilities. (Compl. ¶ 55.)[3] Certain credit funds managed by affiliates of Apollo (the "Apollo Credit Funds") were the secured lenders to Whistler. (Compl. ¶ 54.)[4]

Plaintiff alleges that "Talos [] greatly overpa[id] for Whistler." (Compl. ¶ 56.) Specifically, Plaintiff alleges that the price paid for Whistler was a substantial premium over the typical price paid in the industry. (Compl. ¶¶ 56, 57.) However,

[3] Plaintiff also includes the release of $46 million of cash collateral securing Whistler's surety bonds as part of its claimed value to the Apollo Credit Funds of $98.3 million. (Compl. ¶ 55.) But it is not appropriate to include this money when calculating the value of the transaction, as the money in question was already in the possession of the relevant Apollo affiliates.

[4] According to Plaintiff, Apollo also received an additional $35 million through the Whistler Chapter 11 bankruptcy. (Compl. ¶¶ 53-55.) That bankruptcy was filed in 2016, two years prior to the Whistler Transaction, and payments to creditors such as Apollo were in no way contingent on the later Whistler Transaction. (*Id.*)

Plaintiff fails to allege any particularized facts demonstrating that the price Talos paid in the Whistler Transaction was inappropriate. And Plaintiff fails to allege any facts whatsoever to support the notion that the alleged controllers dominated the Talos board's decision to purchase the Whistler assets.

2. Castex/ILX Transaction

On February 28, 2020, Talos acquired certain assets from Castex Energy 2014, LLC and ILX Holdings, LLC. (Compl. ¶ 59, 74.) Castex Energy 2014, LLC and ILX Holdings, LLC are affiliates of Riverstone. (Compl. ¶ 59.) Talos paid $385 million in cash and 110,000 shares of preferred stock (which would automatically convert into 11 million shares of common stock) for the assets. (Compl. ¶ 74.) This transaction was first announced on December 10, 2019, nearly fifteen months after the Whistler Transaction, and was valued at $635 million. (Compl. ¶¶ 59-60, 98.)

Plaintiff claims that "Talos . . . was caused to vastly overpay for the [] [a]ssets." (Compl. ¶ 91.) Specifically, Plaintiff alleges that Talos overpaid by "hundreds of millions of dollars." (Compl. ¶¶ 1, 147.)

3. Alleged *Quid Pro Quo*

Plaintiff claims that Apollo and Riverstone entered into an arrangement in which the Castex/ILX Transaction "was entered into as a *quid pro quo* for bailing out Apollo from its disastrous investment in Whistler." (Compl. ¶¶ 171, 190.) Plaintiff fails to allege any specific facts in support of the supposed *quid pro quo*

beyond the existence of the transactions themselves and does not provide any basis for explaining the mechanics of the alleged *quid pro quo* arrangement in light of the two transactions being at least fifteen months apart. There are no allegations that the Castex/ILX Transaction was contemplated at the time of the Whistler Transaction in August 2018. Further, Plaintiffs fail to identify the individuals who allegedly agreed to the *quid pro quo* from either Apollo or Riverstone, let alone the involvement of any Talos directors.

D. Claims at Issue Against Apollo

Plaintiff asserts seven causes of action against the various defendants. (Compl. ¶¶ 164-205.) Of these seven claims, only two are asserted against Apollo: the Second Cause of Action, which claims that Apollo breached its fiduciary duty as a controlling stockholder to Talos' non-controlling stockholders (Compl. ¶¶ 169-173), and the Fifth Cause of Action, which Plaintiff asserts derivatively on behalf of Talos, claiming that Apollo breached the fiduciary duty it owed to Talos as a controlling stockholder (Compl. ¶¶ 188-192). Both causes of action depend upon Apollo's supposed status as a controlling stockholder and provide no other basis for a fiduciary relationship.

LEGAL STANDARD

Under Court of Chancery Rule 12(b)(6), a motion to dismiss must be granted where "the plaintiff could not recover under any reasonably conceivable set of

circumstances susceptible of proof." *Central Mortg. Co.* v. *Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011). Although "the plaintiff is entitled to all reasonable inferences that logically flow from the face of the complaint," the trial court need not "accept every strained interpretation of the allegations proposed by the plaintiff." *Malpiede* v. *Townson*, 780 A.2d 1075, 1083 (Del. 2001). When evaluating the sufficiency of a complaint, the Court is not required to "accept mere conclusory allegations as true or make inferences unsupported by well-pleaded factual allegations." *In re Solera Hldgs., Inc. S'holder Litig.*, 2017 Del. Ch. LEXIS 1, at *15 (Del. Ch. Jan. 5, 2017); *see also Zlotnick* v. *Newell Cos.*, 1984 Del. Ch. LEXIS 591, at *5-6 (Del. Ch. July 30, 1984) ("[A] cause of action exists only if specific facts are alleged in the Complaint to support the conclusion upon which relief is claimed. The conclusory allegation of fiduciary duty must be supported by facts from which the duty arises."). "Moreover, failure to plead an element of a claim precludes entitlement to relief and, therefore, is grounds to dismiss that claim." *In re Alloy, Inc.*, 2011 Del. Ch. LEXIS 159, at *22 (Del. Ch. Oct. 13, 2011).

ARGUMENT

I. THE COMPLAINT FAILS TO STATE A CLAIM FOR BREACH OF FIDUCIARY DUTY AGAINST APOLLO BECAUSE NO FIDUCIARY DUTY EXISTS

Plaintiff's only claim against Apollo is an alleged breach of fiduciary duty, which "requires proof of two elements: (1) that a fiduciary duty existed and (2) that the defendant breached that duty." *Beard Research, Inc.* v. *Kates,* 8 A.3d 573, 601 (Ch. 2010). Plaintiff has failed to allege any facts from which this Court can reasonably infer that Apollo owed any fiduciary duty with respect to the Castex/ILX Transaction, and as such, the Court should dismiss the second and fifth causes of action against Apollo. *In re Alloy, Inc.*, 2011 Del. Ch. LEXIS 159, at *22 ("[F]ailure to plead an element of a claim precludes entitlement to relief and, therefore, is grounds to dismiss that claim.").

Fiduciary duties are owed only when a fiduciary relationship exists. *See Simons* v. *Cogan,* 549 A.2d 300, 304 (Del. 1988) ("Before a fiduciary duty arises, an existing property right or equitable interest supporting such a duty must exist."). Plaintiff alleges only that Apollo owes a fiduciary duty to the Plaintiff and other stockholders as a "controlling stockholder," and fails to allege any other basis for a fiduciary relationship. (Compl. ¶¶ 170, 189.) But Plaintiff has failed to demonstrate that Apollo is, in fact, a controlling stockholder with any attendant fiduciary duty and, as such, the claims must be dismissed. Where, as here, "such facts are lacking

in the complaint, then the control question can be determined as a matter of law on a motion to dismiss." *In re Rouse Props. Fiduciary Litig.*, 2018 Del. Ch. LEXIS 93, at *28-29 (Del. Ch. Mar. 9, 2018); *see also, e.g.*, *Dubroff* v. *Wren Hldgs., LLC*, 2009 Del. Ch. LEXIS 89, at *6-21 (Del. Ch. May 22, 2009) (granting motion to dismiss with prejudice where insufficient facts pled to support control theory).

A. Apollo Is Not Individually a Controlling Stockholder

As an initial matter, Plaintiff has not adequately pled facts to demonstrate that Apollo itself is a controlling stockholder. "[A] controlling shareholder exists when a stockholder: 1) owns more than 50% of the voting power of a corporation; or 2) exercises control over the business and affairs of the corporation." *In re PNB Hldg. Co. S'holders Litig.*, 2006 Del. Ch. LEXIS 158, at *31 (Del. Ch. Aug. 18, 2006). Neither test is met here.

First, at the time of the transaction at issue, Plaintiff admits that Apollo owned only 35.4% of the Company. (Compl. ¶ 62.) Second, Plaintiff has not alleged facts to demonstrate "control" which requires factual allegations of "domination by a minority shareholder ***though actual control of corporation conduct.***" *Kahn* v. *Lynch Commc'n Sys.*, 638 A.2d 1110, 1114 (Del. 1994) (emphasis added; quotation omitted). The test is difficult to satisfy: conclusory allegations are insufficient and the complaint must contain well-pled facts showing domination and control. *In re Morton's Rest. Grp., Inc. S'holders Litig.,* 74 A.3d 656, 664-65 (Ch. 2013). Plaintiff

does not make even conclusory allegations that Apollo alone "controlled" the Company, because there is no factual basis on which to do so. Apollo has no independent fiduciary duty as a 35% stockholder and the claims against it should be dismissed. *See, e.g.*, *In re Sea-Land Corp. S'holders Litig.*, 1987 Del. Ch. LEXIS 439, at *13-14 (Del. Ch. May 22, 1987).

B. Apollo Is Not Part of Any "Control Group"

In a transparent attempt to create a fiduciary duty where none exists (and simultaneously invoke the entire fairness doctrine), the Plaintiff instead alleges that the Company has been "controlled collectively" by Riverstone and Apollo during "all relevant times." (Compl. ¶ 22.)[5] However, Plaintiff's allegations fall far short of his burden to demonstrate that Apollo and Riverstone actually formed a control group under Delaware law such that any fiduciary duty exists.

The mere fact that two stockholders collectively own more than 50% of the corporation's stock does not mean that a control group has been formed. *Emerson Radio Corp. v. Int'l Jensen,* 1996 Del. Ch. LEXIS 100, at *53-54 (Del. Ch. Aug. 20, 1996). "A group of stockholders can collectively form a control group where those shareholders are connected in some legally significant way—e.g., by contract,

[5] Plaintiff also notes Talos' September 2018 registration statement, which states that Talos is "controlled by Apollo Funds and Riverstone Funds." (Compl. ¶¶ 171, 190). But all that means is that Apollo and Riverstone together control a majority of Talos stock—which no one disputes.

common ownership, agreement, or other arrangement—to work together toward a shared goal." *Silverberg* v. *Padda*, 2019 Del. Ch. LEXIS 1322, at *4 (Del. Ch. Oct. 18, 2019) (quotation omitted). To plead a viable claim under this theory "there must be some indication of ***an actual agreement***" and Plaintiff "'must allege more than mere concurrence of self-interest among certain stockholders to state a claim based on the existence of a control group.'" *Van Der Fluit* v. *Yates*, 2017 Del. Ch. LEXIS 829, at *14 (Del. Ch. Nov. 30, 2017) (emphasis added) (quoting *In re Crimson Expl. Inc. S'holder Litig.*, 2014 Del. Ch. LEXIS 213, at *49 (Del. Ch. Oct. 24, 2014)).

The Complaint does not sufficiently allege an actual agreement between Apollo and Riverstone. The Complaint contains no allegations of any contract, written agreement, or common ownership. Indeed, the only "agreement" alleged to exist at all is the Stockholders' Agreement, which, as Plaintiff acknowledges, provides only for the appointment of directors. (Compl. ¶¶ 16-19.) And, as the Delaware Supreme Court has recently held, an agreement among stockholders governing the election of directors is insufficient to constitute a control group. *Sheldon* v. *Pinto Tech Ventures, L.P.*, 220 A.3d 245, 255-56 (Del. 2019). The Stockholders' Agreement does not evidence any agreement between the affiliates of Apollo, Riverstone, or their Board appointees as to voting with respect to particular transactions, and certainly not with respect to the Castex/ILX Transaction—and Plaintiff does not allege otherwise.

Instead, Plaintiff asserts a purported "arrangement" whereby Apollo approved the Castex/ILX Transaction in December 2019 as "*quid pro quo* for [Riverstone] bailing out Apollo from its disastrous investment in Whistler" in August 2018 (Compl. ¶¶ 171, 190)—a claim which Apollo denies. Again, Plaintiff fails to adequately substantiate this self-serving statement, and fails to provide this Court with any reasonable basis to infer such an agreement exists (or how it could or would influence the Talos board of directors). Plaintiff identifies no details at all to explain how this arrangement was reached, who was involved from either Apollo or Riverstone, and what the terms were. He provides no explanation as to how, or when, the parties decided to move forward in this *quid pro quo* manner when the Whistler Transaction was completed in August 2018 (Compl. ¶ 55), but the Castex/ILX Transaction was not announced until December 2019 (Compl. ¶ 59). Instead, Plaintiff essentially states that because Apollo and Riverstone both voted for the Castex/ILX Transaction via written consent, there ***must have been*** a secret agreement (and, again, provides no substantive link to the Talos board of directors). This is the definition of an improper conclusory allegation and the motion to dismiss should be granted. *See Horman* v. *Abney*, 2017 Del. Ch. LEXIS 13, at *29-30 (Del. Ch. Jan. 19, 2017) (granting a motion to dismiss where plaintiff failed to tie conclusory allegations to any "particularized facts" known by defendants, and noting such "inferential layering [was] all the more glaring" following receipt of Section

220 documents). The mere fact that a majority of stockholders voted for a transaction does not give rise to a fiduciary duty, and to find otherwise goes against the maxim that a stockholder is entitled to vote its shares in its own interest. *See, e.g.*, *Ford* v. *VMware, Inc.*, 2017 Del. Ch. LEXIS 70, *40-41 (Del. Ch. May 2, 2017) (finding no violation of fiduciary duty even where the controlling stockholder "exercis[ed] [its] rights as it wished" to advance its own interests).

Plaintiff's alleged *quid pro quo* arrangement also does not make logical sense, and is an unreasonable inference even from the minimal facts alleged. Plaintiff's theory is only rational if—and indeed turns on the requirement that—Apollo gained a respective, and close to equivalent, benefit in exchange to its agreement to vote for the Castex/ILX Transaction. But that is not the case. Plaintiff's Complaint assigns vastly disproportionate values to each transaction—only $52.3 million for the Whistler Transaction (Compl. ¶ 55), and fully $635 million for the Castex/ILX Transaction (Compl. ¶ 98). By Plaintiff's own account, the value of the Castex/ILX Transaction is more than *twelve times* greater than the Whistler Transaction. If the Court accepts Plaintiff's allegations—as it must at this stage of the litigation—then the Castex/ILX Transaction cost Talos stockholders, including 35% stockholder Apollo, "hundreds of millions of dollars" in lost value. (Compl. ¶¶ 1, 147.) And Apollo, as the largest stockholder at the time, would suffer the greatest amount of economic loss if the Castex/ILX transaction were unprofitable. Under similar

circumstances, the Delaware Chancery Court dismissed a complaint because "Plaintiffs' allegations simply do not support a reasonably coherent theory as to why the key players would undersell their millions of shares" as the allegedly damaging transaction "would impact [Defendant] fifteen times as much, given its much larger stock holdings." *In re Crimson Expl.*, 2014 Del. Ch. LEXIS 213, at *54. In other words, it is Plaintiff's allegation that Apollo agreed to an unprofitable transaction with supposedly tens of millions of dollars in losses without any compensation, and that nearly two years earlier Riverstone agreed to the Whistler Transaction without ever knowing what its own consideration would be. This is nonsensical for both parties.

Furthermore, even if Plaintiff was able to identify an actual *quid pro quo* "agreement" between Apollo and Riverstone, he still has not met his burden to state a viable claim because such an "agreement" would not effectuate the Board's approval of the transaction at issue without the significant exertion of actual control over the directors. "A plaintiff who alleges domination of a board of directors and/or control of its affairs must prove it" and plead allegations to demonstrate the alleged control group engaged in the "direction of corporate conduct." *Kaplan* v. *Centex Corp.*, 284 A.2d 119, 122-23 (Ch. 1971); *see also Van Der Fluit*, 2017 Del. Ch. LEXIS 829, at *19 (finding no control group where, *inter alia*, no allegations regarding "in sync behavior" were pled). "[I]f all a complaint alleges is that a group

of shareholders have 'parallel interests,' such allegations are insufficient as a matter of law to support the inference that the shareholders were part of a control group." *Dubroff*, 2009 Del. Ch. LEXIS 89, at *12.

Plaintiff has failed to demonstrate that Apollo and Riverstone collectively exerted actual control over the transaction as required. Instead, the Complaint makes the conclusory statements that Apollo and Riverstone "controlled" the Board and "exploited their control over the Board to steer the Company into entering the unfair [Castex/ILX Transaction]" but provides no factual support for those statements. (Compl. ¶¶ 22, 171, 190.) Plaintiff also relies on vague and conclusory assertions that the two entities' interests were aligned because they have "longtime ties" (*Id.* ¶¶ 2, 35-37),[6] but "[t]he simple fact that the interests of two entities are aligned is legally insufficient to establish the existence of a control group." *See, e.g., In re Crimson Expl.*, 2014 Del. Ch. LEXIS 213, at *51. The Complaint not only includes no allegation that Apollo and Riverstone "actually took any steps to exert leverage

[6] In fact, Plaintiff focuses extensively on conclusory allegations of the "long term ties" between Apollo and Riverstone (*see, e.g.*, Compl. ¶¶ 35-37), but the presence of such business and personal connections is insufficient to establish the existence of a control group. *See, e.g., In re PNB Hldg. Co.*, 2006 Del. Ch. LEXIS 158, at *3, *34 (rejecting allegations of a control group when "the directors were not bound together by voting agreements or other material, economic bonds to justify treating them as a unified group" and holding that "[t]he record . . . does not support the proposition that these various director-stockholders and their family members were involved in a blood pact to act together"). Further, the fact that Apollo and Riverstone—two immense private equity funds—may have crossed paths on previous deals is evidence of nothing.

to pressure" the Castex/ILX Transaction, but also does not allege that the companies "acted in any other way so as to influence the . . . directors' conduct." *In re Sea-Land Corp.*, 1987 Del. Ch. LEXIS 439, at *13-14 (dismissing claims for fiduciary duty where no such facts were alleged).

Dubroff v. *Wren Holdings, LLC* is particularly instructive. In *Dubroff*, this Court held that plaintiffs failed to state a claim for breach of fiduciary duty against a purported "control group", where, as here, the pleading stated only that the stockholders "controlled" the board of directors but failed to provide "any facts that could explain how the [p]laintiffs would expect the Court to arrive at that conclusion." 2009 Del. Ch. LEXIS 89, at *12. Further, the factors pointed to by the *Dubroff* plaintiffs—which are essentially the same as the factors Plaintiff points to here—were wholly insufficient to create a fiduciary duty. Among other things, plaintiffs alleged that the three stockholder defendants: exclusively benefited from the transactions at issue; together owned 56% of the company's voting stock; together controlled 4 of the 5 directors of the company; voted as directors through their representatives on the board to approve the transactions; and voted together as stockholders to approve the transactions. *Id.* at *12-21. This Court concluded that none of these allegations "indicate that the Defendants should be grouped together as a control group—i.e., they do not allege that the Defendants are tied together in some legally significant way" and dismissed both the individual and derivative

fiduciary duty claims with prejudice. *Id.* at *15; *see also Kaplan*, 284 A.2d at 123 (finding control not demonstrated even where stockholders' nominees had been appointed to the board). The same result is warranted here.

Because Plaintiff fails to allege any facts from which this Court can reasonably infer that Apollo was a controlling stockholder or exerted any actual control with respect to the Castex/ILX Transaction, Plaintiff has failed to state a viable claim for breach of fiduciary duty and the Court should dismiss the second and fifth causes of action against Apollo.

II. PLAINTIFF ENGAGES IN IMPROPER GROUP PLEADING AND HAS SUED THE WRONG APOLLO ENTITY

Leaving aside the lack of a fiduciary duty, this Complaint should also be dismissed as to Apollo because Plaintiff sued the incorrect Apollo entity, namely Apollo Global Management, Inc.[7] In short, Plaintiff cannot make claims against Apollo Global Management, Inc. Apollo Global Management, Inc. has affiliates that manage the Apollo-related funds that invested in Talos. Given the relationship of Apollo Global Management, Inc. and the relevant funds there is simply no legitimate basis for the Plaintiff to include Apollo Global Management, Inc. as a party here.

[7] Even if Plaintiff had sued the proper Apollo affiliate(s), the claims for breach of fiduciary duty should still be dismissed for failure to adequately plead the existence of a fiduciary duty, as explained in the previous section.

Talos is not and has never been owned by Apollo Global Management, Inc. Rather, as Plaintiff is demonstrably aware, the Apollo-related entities involved in Talos are: (1) AP Talos Energy LLC, (2) AP Talos Energy Debtco LLC, (3) AP Overseas Talos Holdings Partnership, LLC, (4) AIF VII (AIV), L.P., and (5) ANRP DE Holdings, L.P. These entities are the named parties to the Stockholders' Agreement on which Plaintiff relies so heavily in the Complaint. *See* Ex. 6. Indeed, Apollo Global Management, Inc. is not even mentioned in the Stockholders' Agreement.

Apparently, Plaintiff could not be bothered to identify which Apollo entity was the proper target for its lawsuit, and resorted to lumping them together through group pleading. Specifically, according to Plaintiff, "Apollo Global Management, Inc. . . . controls numerous affiliates, including Apollo Management VII, L.P. and Apollo Commodities Management, L.P., two controllers of Old Talos" and that any reference to "Apollo" in Plaintiff's Complaint "refers to Apollo Global Management, Inc., and its affiliates." (Compl. ¶ 20.) But Plaintiff cannot simply sue one corporate entity for the actions undertaken by its affiliates. Such an approach violates Delaware law, which strictly respects the corporate form.

Delaware courts have "declined invitations to ignore the corporate form," *Red Sail Easter Ltd. Partners, L.P.*, v. *Radio City Music Hall Productions, Inc.*, 1992 Del. Ch. LEXIS 143 at *9 (Del. Ch. July 17, 1992), and have instead recognized "the

traditional respect accorded to the corporate form by Delaware law." *Bandera Master Fund L.P.* v. *Boardwalk Pipeline P'rs, LP*, 2019 Del. Ch. LEXIS 1296 at *76 (Del. Ch. July 2, 2019) (quotation omitted). As the Delaware Supreme Court has explained:

> There is, of course, no doubt that upon a proper showing corporate entities as between parent and subsidiary may be disregarded and the ultimate party in interest, the parent, be regarded in law and fact as the sole party in a particular transaction. This, however, may not be done in all cases. It may be done only in the interest of justice, when such matters as fraud, contravention of law or contract, public wrong, or where equitable consideration among members of the corporation require it, are involved.

Pauley Petroleum, Inc. v. *Cont'l Oil Co.*, 239 A.2d 629, 633 (Del. 1968). Here, Plaintiff has not even attempted to satisfy any of the possible ways to pierce the corporate veil, and instead ignores the corporate form entirely by neglecting to distinguish among the various Apollo entities. Such impermissible group pleading dooms Plaintiff's Complaint.

III. APOLLO ADOPTS THE ARGUMENTS PRESENTED BY THE TALOS DEFENDANTS

All of Plaintiff's derivative claims should be dismissed in their entirety for failure to plead demand futility. Specifically, Plaintiff has failed to allege that a majority of the Directors could not have impartially considered a demand or that the Castex/ILX Transaction was not a proper exercise of business judgment, which is the proper standard by which to evaluate the Transaction. In order to avoid

duplication, Apollo adopts and incorporates the legal arguments in Section I of the opening brief of the Defendants 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, and Olivia C. Wassenaar and Nominal Defendant Talos Energy, Inc. (the "Talos Defendants") fully herein.

In addition, the claims labeled as "direct claims" (Counts I-III) in the Complaint must fail for the same reasons. First, even claims that have both a direct and derivative nature are subject to the demand requirement, which Plaintiff has failed to properly plead. Second, Counts I-III, despite their designation by Plaintiff, are clearly derivative claims under Delaware law, and, as such, are subject to the requirements of Rule 23.1. To avoid duplication, Defendant Apollo also adopts and incorporates the legal arguments of Section II of the opening brief of the Talos Defendants fully herein.

CONCLUSION

For the foregoing reasons, Apollo respectfully requests that the Court dismiss the Complaint with prejudice in its entirety as to Apollo.

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