IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

STEAMFITTERS LOCAL 449 PENSION FUND,	)	
Plaintiff,	)	
v.	)	C.A. No. 2024-0808-KSJM
HENRY KRAVIS, GEORGE ROBERTS, JOSEPH BAE, SCOTT NUTTALL, DAVID SORKIN, ROBERT LEWIN, ROBERT SCULLY, MARY DILLON, PATRICIA RUSSO, THOMAS SCHOEWE, XAVIER NIEL, ADRIANE BROWN, ARTURO GUTIERREZ HERNANDEZ, DANE HOLMES, JOSEPH GRUNDFEST, JOHN HESS, EVERCORE GROUP L.L.C.,	)	
Defendants, and	)	
KKR & CO. INC.,	)	
Nominal Defendant.	)	

MEMORANDUM OPINION

Date Submitted: September 11, 2026
Date Decided: November 24, 2026

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McCORMICK, C.

This stockholder derivative suit challenges a series of integrated transactions through which KKR & Co. Inc. ("KKR") reorganized its "Up-C" structure.

Before the reorganization, KKR had three sets of shareholders: public shareholders, who held common and preferred stock; KKR Management LLP, which held a single Series I preferred share called the "Golden Share"; and KKR Holdings L.P. ("Holdings"), which held most of the firm's equity in Series II preferred shares. Two of KKR's founders controlled KKR Management LLP and its Golden Share, which gave them the unilateral ability to appoint and fire KKR's directors. The founders and other KKR employees held the units of Holdings, which they could exchange for publicly traded shares of KKR. The exchanges were taxable for the unitholders and created a corporate tax benefit for the public company in the form of a deduction against future income. Under a tax receivable agreement between Holdings and KKR, KKR paid Holdings unitholders 85% of any corporate tax benefit derived from the exchanges; KKR retained the remaining 15%.

In mid-2021, two of KKR's founders proposed that the firm collapse its Up-C structure. Holdings unitholders would exchange all of their units for KKR shares—tax-free—and, on some future date six months after both founders died or were permanently disabled, the founders would give up the Golden Share. Because this would eliminate the unitholders' ability to share in future taxable exchanges, management also proposed that KKR pay to terminate the tax receivable agreement. The unitholders, including the founders, would receive $1.25 billion total from KKR—8.5 million KKR common shares and the balance in cash.

The founders' initial proposal presupposed that they would maintain control over a separate entity called the "carry pool," which allocates carry proceeds from KKR's investment funds. The carry pool funds a material equity incentive program for KKR investment professionals and senior employees. As it stood, the founders unilaterally controlled the carry pool's distributions (including distributions to themselves), giving them another source of control over KKR and its executives.

The KKR board fully empowered a committee of independent outside directors to assess the proposal, negotiate, and recommend or reject a potential transaction based on what was in the best interests of the company. The committee engaged its own financial advisor, Evercore, and its own counsel. Evercore advised that, on the terms proposed, the cost of the transaction outweighed its benefit to KKR. The committee thus rejected management's initial proposal.

Months of negotiations followed, through which the committee secured the founders' agreement to surrender not only the Golden Share but also control of the carry pool by a date certain—no later than December 31, 2026 (the "Sunset Date"). The committee further negotiated to reduce financial consideration payable to Holdings unitholders, agreeing to pay the 8.5 million shares of common stock (restricted for five years) but not any cash. Based on the committee's recommendation, KKR's independent directors approved the reorganization, which KKR announced on October 11, 2021.

The plaintiff owns KKR stock. It claims that KKR's directors and officers, including the founders, breached their fiduciary duties by causing KKR to overpay

the founders and other Holdings unitholders and that Evercore aided and abetted these fiduciary breaches. The plaintiff's theory is that KKR's founders saw that the founders of The Carlyle Group and Apollo Global Management had obtained nine-figure payoffs in connection with restructuring transactions at those firms as compensation for the founders' forgone value under similar tax receivable agreements. According to the plaintiff here, KKR's founders proposed the reorganization to get their due share.

The defendants moved to dismiss the complaint under Court of Chancery Rule 23.1. All of the plaintiff's claims are derivative and therefore subject to Rule 23.1's demand requirement. To meet that requirement, a plaintiff must either make a demand or plead with particularity that demand would be futile. The plaintiff here chose the latter route.

To plead demand futility, a plaintiff must plead particularized facts from which the court can infer that a majority of the directors on the nominal defendant's board at the time the complaint was filed are incapable of impartially considering a litigation demand.

The demand futility analysis here hinges on three of the members of the committee that negotiated with management. The plaintiff alleges that all three are incapable of impartially considering a demand because they face a substantial likelihood of liability for having approved the reorganization in bad faith. The plaintiff reasons that the Carlyle and Apollo transactions survived motions to dismiss

in this court, and the plaintiff's claims challenging KKR's similar transaction pose a substantial likelihood of liability, rendering demand futile.

Yet unlike in the Carlyle and Apollo transactions, KKR's reorganization resulted in the founders agreeing to terminate the Golden Share and release control of the carry pool within roughly five years of closing. Quite soon, therefore, KKR will have a fundamentally different capital structure.

The plaintiff attempts to dismiss these distinguishing features as window dressing, claiming that the defendant directors knew that the 8.5-million-share consideration was really payment for termination of the tax receivable agreement, not for relinquishment of the Golden Share and carry pool, and that the directors acted with a controlled mindset when approving the transaction. The allegations in the complaint, however, do not support that inference.

The plaintiff advances three other theories of liability, claiming that the defendants knew that Evercore's analysis was methodologically flawed, facilitated a conflict-laden process, and inexplicably allowed the founders to reallocate unvested Holdings units forfeited by former employees to themselves and their successors. But as pled, none of these theories state a claim for breach of the duty of loyalty as necessary to show a substantial likelihood of liability.

In sum, the plaintiff fails to plead that any of the three relevant directors face a substantial likelihood of liability. The plaintiff has thus failed to adequately allege demand futility. Because the plaintiff has failed to meet the demand futility standard, the entire complaint is dismissed with prejudice.

I. FACTUAL BACKGROUND

The facts are drawn from the Second Amended Verified Complaint and the documents it incorporates by reference.[1] By stipulation, the documents incorporated by reference include KKR's production made under 8 *Del. C.* § 220, "as consistent with the incorporation conditions imposed in *Amalgamated Bank v. Yahoo!*, 132 A.3d 752 (Del. Ch. 2016)."[2]

A. KKR Is Formed.

Defendants Henry Kravis and George Roberts, and non-party Jerome Kohlberg, Jr., founded Kohlberg Kravis Roberts & Co. L.P. ("KKR LP") under Delaware law in 1976. Kravis and Roberts (the "Founders") continued to shape the firm after Kohlberg left in 1987, serving as co-CEOs until 2021. The Founders also formed and controlled KKR LP's managing partner, KKR Management LLC.

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[1] C.A. No. 2024-0808-KSJM, Docket ("Dkt.") 32 ("Second Am. Compl.").

[2] Dkt. 37 ("Xu Aff.") Ex. 1 ¶ 6. As to the Section 220 production, "[a]lthough the parties agree the [documents] are incorporated by reference into the [Second] Amended Complaint, this agreement does not enable the court to weigh evidence" at the pleading stage. *Wei v. Levinson*, 2025 WL 1565356, at *8 n.50 (Del. Ch. June 3, 2025). "When a document leads to competing factual conclusions or interpretations, the court draws inferences in Plaintiff['s] favor." *Id.* "The doctrine of incorporation by reference does not enable a court to weigh evidence on a motion to dismiss, nor does it mean that the defendants receive inferences in their favor that run contrary to allegations of the complaint." *In re Dell Techs. Inc. Class V S'holders Litig.*, 2020 WL 3096748, at *14 (Del. Ch. June 11, 2020). "If there are factual conflicts in the documents or the circumstances support competing interpretations, and if the plaintiff has made a well-pled factual allegation, then the allegation will be credited." *Id.* (citing *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896 (Del. 2002)). "[I]f a document supports more than one possible inference, and if the inference that the plaintiff seeks is reasonable, then the plaintiff receives the inference." *Id.*

KKR LP allocated a portion of the realized and unrealized carried interest earned on its funds to KKR Associates Holdings L.P. (the "Carry Pool"). The Founders controlled this entity, too. The Carry Pool was not a KKR LP subsidiary, but KKR LP senior employees were eligible to receive some of its carried interest. The Founders alone controlled those distributions, including distributions to themselves.

B. KKR Goes Public.

In a 2009 business reorganization, KKR Management Holdings L.P. and KKR Fund Holdings L.P. (together, the "2009 HoldCos") became holding companies for the firm's global asset management business.

The firm then adopted an "Up-LP" structure in 2010, when KKR LP conducted an initial public offering of common units and created a dual-class equity structure. KKR LP's primary asset was units collectively representing a 30% interest in the 2009 HoldCos. KKR principals held units representing the remaining 70% interest in the 2009 HoldCos through KKR Holdings L.P. ("Holdings"). KKR principals could exchange their share of Holdings' 2009 HoldCos units for KKR LP common units on a one-for-one basis. Through Holdings, KKR's principals also held special voting units in KKR LP equal in number to the amount of exchangeable 2009 HoldCos units then held by Holdings.

The exchange of 2009 HoldCos units for KKR LP units had tax consequences. For KKR LP, it created a "step-up" in tax basis, which would ultimately reduce KKR

LP's future tax liability. For the unitholders, however, it was a taxable event, meaning it increased their tax liability.

Like several of its peers, KKR LP employed an inventive solution to encourage unitholders to exchange their units despite the tax consequences. KKR LP and Holdings entered into a tax receivable agreement (the "TRA") in connection with the IPO. Under the TRA, KKR LP agreed to pay exchanging unitholders 85% of KKR LP's realized cash savings from reduced tax liabilities. KKR LP would keep the remaining 15%. "The idea is that everybody wins."[3]

KKR LP only had to make these payments on taxable exchanges. If an exchange was not taxable, it would not generate tax benefits for KKR LP to share with the exchanging unitholder. And KKR LP only had to pay the unitholder after KKR LP actually used the resulting tax asset, which could be amortized over at least a 15-year period, and only in years in which KKR LP had sufficient taxable income to use those tax assets. For several years, KKR LP did not have sufficient taxable income, so no TRA payments came due.

KKR LP had the option to terminate the TRA early. To do so, KKR LP would have to pay the unitholders the discounted present value of all future TRA payments.

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[3] Lina G. Dimachkieh & Robert Seber, *What's Up with Up-Cs? 8 Things You Need to Know*, Lexology (Jul. 26, 2018), https://www.lexology.com/library/detail.aspx?g=ba02beb3-ed2c-4933-88ff-d8262a03aa6e#; *see also* Gregg D. Polsky & Adam H. Rosenzweig, *The Up-C Revolution*, 71 Tax. L. Rev. 415, 437 (2018) ("It is a win-win for the exchanging owners and *Newco*[.]").

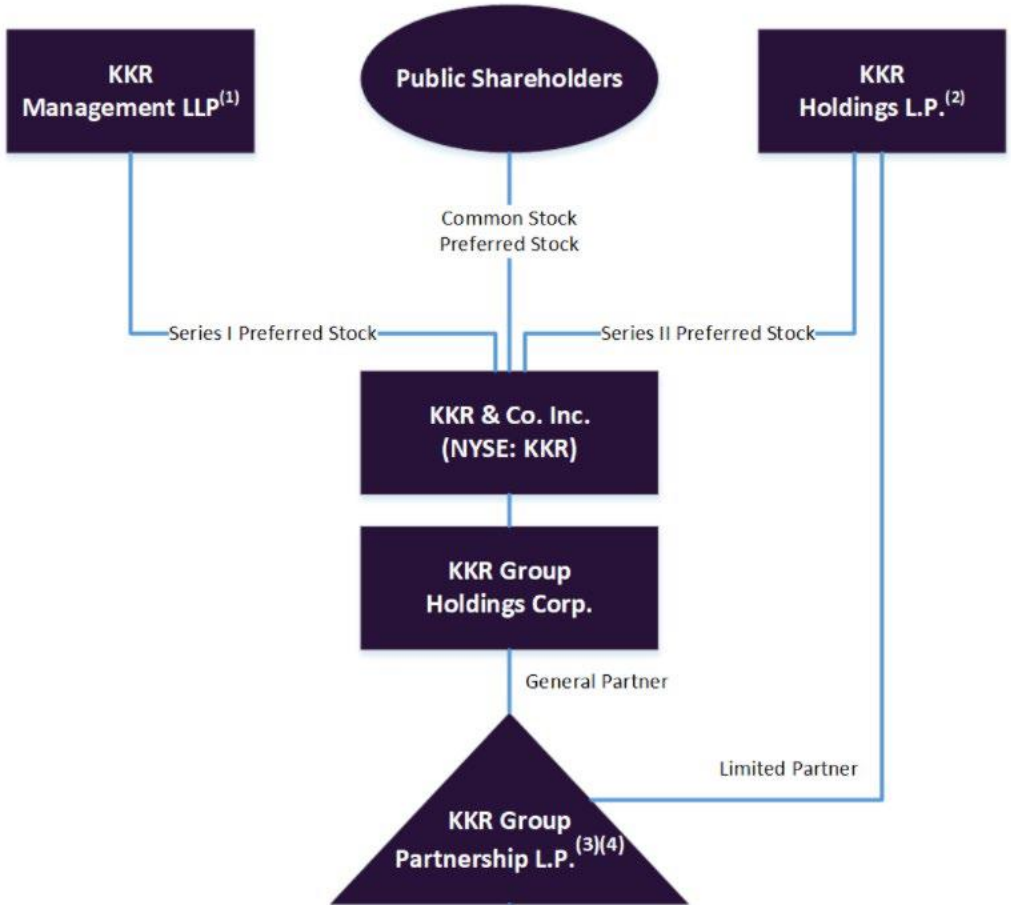
C. KKR Restructures.

KKR LP converted from its Up-LP structure to an Up-C structure in 2018. Through this transaction, KKR LP became nominal defendant and publicly traded corporation KKR & Co. Inc. ("KKR" or the "Company"). In 2020, KKR then also combined several holding companies, including the 2009 HoldCos, into a single holding vehicle called KKR Group Partnership L.P. ("Group Partnership"). As a result of this restructuring, the publicly traded KKR held shares in KKR Group Holdings Corporation, which was general partner of the Group Partnership holding vehicle. The Founders and other KKR employees continued to hold their equity in the firm primarily through Holdings, which was Group Partnership's limited partner.

In the Up-C structure, KKR itself had three sets of stockholders. Public stockholders held common and preferred shares. Holdings also held preferred shares. KKR Management LLP, a successor to KKR Management LLC and likewise controlled by the Founders, held a single Series I preferred share in KKR, which Plaintiff refers to as the "Golden Share."

The Golden Share was freely transferrable. It conferred on the Founders the ability to unilaterally appoint and remove members of KKR's board of directors. That power was not subject to board or stockholder approval. Before the 2021 reorganization, KKR had not issued a proxy statement since 2018. The Golden Share also gave the Founders blocking rights for certain corporate actions, like the adoption of a stockholder rights plan. And the Founders continued to control unilaterally the Carry Pool and its distributions.

KKR diagrammed a simplified version of its Up-C structure as shown below.[4]



In the Up-C structure, Holdings unitholders maintained their existing right to exchange their share of Group Partnership units, now for publicly traded shares of KKR rather than of KKR LP, and receive a payment equal to 85% of KKR's tax benefit.

Under the TRA, KKR paid out exchanging unitholders $11.8 million in 2019 and $7.2 million in 2020. The Founders never exchanged any Group Partnership units.

[4] Second Am. Compl. ¶ 62 (reproducing diagram from KKR & Co. Inc., Annual Report (Form 10-K) 31 (Feb. 19, 2021)).

D. Management Proposes A Reorganization.

In mid-2021, the Founders, both still serving as co-CEOs, proposed that KKR restructure again. This time, KKR would simplify its Up-C structure, combining KKR, Holdings, and other related entities into a single publicly traded corporation. Importantly, this reorganization would be tax-free. Peer firms Apollo Global Management and The Carlyle Group had recently conducted similar reorganizations.

The Founders assembled a term sheet for this proposal on June 22, 2021. According to the Founders, the reorganization's purposes were to "(1) [b]etter align the interests of [Holdings] partners and [KKR public] stockholders" and "(2) [i]ncrease [KKR's] public float, which should increase index buying."[5] Holdings unitholders would exchange their units for KKR stock, and KKR would terminate the TRA, paying out all Holdings unitholders at a discount on the $2.35 billion payment that purportedly otherwise would be triggered by the early termination. The proposal posed "[a]dditional [q]uestions to be [a]ddressed," including the "treatment" of 1 million unvested Holdings units held by the Founders, 2.4 million unvested Holdings units held by KKR co-presidents Joseph Bae and Scott Nuttall, and 3.36 million Holdings units "available for issuance (primarily due to past

[5] Dkt. 34, Transmittal Aff. of Jacob M. Perrone in Supp. of Def. Evercore Gp. L.L.C.'s Opening Br. in Supp. of Its Mot. to Dismiss the Verified Second Am. Compl. ("Perrone Aff.") Ex. H.

forfeitures)."[6] The latter units largely were unvested units forfeited by departing employees (the "Forfeited Units").

KKR's then-general counsel David Sorkin took the Founders' proposal to the Conflicts Committee of KKR's board (the "Committee") on June 30, 2021. The standing Committee was responsible for reviewing and approving all material related-party transactions involving the Founders, including enforcing KKR's rights under the TRA. Defendants Robert Scully, Mary Dillon, Patricia Russo, and Thomas Schoewe comprised the Committee; Scully served as chair.

Scully has been a KKR director since July 2010. Before becoming a KKR director, Scully spent 35 years in the financial services industry, including as an investment banker at Morgan Stanley. According to Plaintiff, "Scully and his wife Nancy Peretsman have longstanding social and business connections with KKR and its Founders."[7]

Dillon has been a KKR director since September 2018. Dillon has served as CEO and board member of Foot Locker and Ulta Beauty, among other executive roles at other companies. Dillon and Kravis were two of twenty members of the executive committee of The Business Council, "an invitation-only group of approximately 200 of the 'world's top CEOs.'"[8]

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[6] *Id.*; Second Am. Compl. ¶ 79. This decision refers to Defendants Bae, Nuttall, David Sorkin, and Robert Lewin collectively with the Founders as "Management."

[7] Second Am. Compl. ¶ 42.

[8] *Id.* ¶ 43.

Russo has been a KKR director since April 2011. Russo has served as an officer and director of multiple public companies, including Eastman Kodak, Hewlett Packard, Merck, and General Motors.

Schoewe was a KKR director from April 2011 to July 13, 2022. He previously served as CFO for Wal-Mart and Black and Decker.

During the June 30 Committee meeting, Sorkin discussed the context and key features of Management's proposal. He told the Committee that, as discussed at the most recent board meeting, the Founders were contemplating stepping down as co-CEOs and appointing Bae and Nuttall as their successors. At the time, Bae and Nuttall were KKR's co-presidents and co-Chief Operating Officers. Sorkin explained KKR's current structure; how it got there, including the TRA that had arisen from that structure; and how Management proposed the structure would change, including eliminating the contractual TRA termination fee at a discount. According to Management, Sorkin said, that termination fee otherwise would be about $2.35 billion. Sorkin also explained Management's interests in the proposed transaction, including his own. Sorkin advised that the Committee should retain its own independent financial and legal advisors.

After Sorkin's presentation, the Committee decided to retain Skadden, Arps, Slate, Meagher & Flom LLP as legal counsel.

E. Negotiations Begin.

Management formally delivered its proposal to the Committee on July 13. Its key terms included the following:

- A $1.25 billion payment to Holdings unitholders to terminate the TRA, payable in 8.5 million shares of KKR common stock at closing, with the remainder paid in cash;
- A "sunset" of the Golden Share six months after the death or permanent disability of both Founders (the "Sunset Date");
- Governance changes following the Sunset Date, including a staggered board, removal of directors only for cause, prohibition of stockholder written consents, and supermajority voting requirements for certain charter amendments;
- Accelerated vesting for 500,000 Holdings units held by each of Kravis and Roberts and 1.455 million Holdings units held by each of Bae and Nuttall; and
- Allocation of 1.15 million of the roughly 3.36 million Forfeited Units to each of Bae and Nuttall, with the remaining 1.06 million Forfeited Units allocated at the Founders' discretion prior to closing.

Under this proposal, the Founders would continue to exercise unilateral control over appointments to and removals from KKR's board until the then-unknowable Sunset Date. The Founders also would maintain complete control over the Carry Pool, with no end date.

The Committee held an "initial informational" meeting to discuss the proposal on July 19.[9] Skadden attended the meeting. "[C]onsistent with prior discussions among Committee members," financial advisor Evercore Group L.L.C. also attended the meeting, although the Committee had not yet formally engaged Evercore on this matter.[10]

[9] Xu Aff. Ex. 9, at 1.

[10] *Id.* at 1–2.

Evercore presented its preliminary assessment of the proposal, including comparisons to Apollo's and Carlyle's reorganizations, in which the firms paid to terminate similar tax receivables agreements. Neither Apollo nor Carlyle had an equivalent to the Golden Share (and, therefore, neither transaction involved a comparable sunset provision). Evercore thus also presented a preliminary analysis of the sunset of the Golden Share compared to dual class share recapitalizations involving immediate relinquishment of voting control—again, analogous in some ways, but different in other ways.

Evercore told the Committee that the proposed TRA payment was, in short, a bad deal. Evercore disagreed with Management's view that the payment would benefit KKR because it was at a discount to the contractual termination fee. Evercore told the Committee that the reorganization would not, in fact, trigger any payments under the TRA because it was a tax-free exchange. Although Evercore recognized that the proposed payment could have some benefit in "[c]lear[ing a] path to one-share / one-vote," Evercore observed that this could take up to 20 years, whereas Apollo and Carlyle converted to one-share, one-vote immediately.[11]

Evercore's presentation mentioned, but did not analyze in detail, the proposed accelerated vesting of Management's Holdings units and the proposed allocation of the Forfeited Units.

After Evercore left the meeting, the Committee considered whether to retain Evercore as financial advisor. The Committee reviewed Evercore's conflicts

[11] Xu Aff. Ex. 10, at 1.

disclosure with Skadden. Evercore was the Committee's financial advisor for the firm's 2018 Up-C conversion and disclosed that it had earned $73.6 million in fees from KKR since January 2018 for that conversion and other engagements, including transactions which had been announced but not yet consummated.

The Committee decided to engage Evercore. Evercore would receive $1 million as an "Initial Fee," with another $3 million to follow, regardless of whether the reorganization went forward.[12]

The Committee met again on July 20, this time with Skadden but without Evercore. They discussed the possibility of seeking a fairness opinion from Evercore, although Evercore's subsequent engagement letter did not commit to provide one. The Committee also discussed each member's independence and concluded that each had no conflicts that would impact their ability to carry out their duties and obligations in considering Management's proposal. Finally, the Committee considered "whether and how to engage with management to obtain proposal terms more favorable to the Company and minority stockholders."[13] To do so, the Committee planned to ask Evercore to meet with Management.

Later that day, Kravis, Bae, Sorkin, and KKR's CFO Robert Lewin made their pitch to the full board. The directors discussed the Committee's independence and

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[12] Xu Aff. Ex. 11, at 1 (providing for advisory fee of $3 million, "which will be paid upon the first to occur of (a) the determination by the Conflicts Committee whether to formally approve or disapprove the Transaction or (b) the termination of this Agreement by the Conflicts Committee").

[13] Xu Aff. Ex. 12.

qualifications, with all present confirming they were aware of no conflicts that would disqualify any Committee member from evaluating the proposal. The board then fully delegated consideration and, if the Committee deemed appropriate, negotiation of the reorganization to the Committee. The board further committed that it would not "recommend, authorize, adopt[,] or approve the [reorganization] without a prior favorable recommendation by the [Committee]."[14]

On July 25, Management updated its proposal to clarify that the Founders would maintain control of the Carry Pool. Management also added a proposal that Bae and Nuttall be awarded 10 million Holdings units each, convertible into KKR common stock after vesting.

F. The Committee Walks.

The Committee met with Skadden and Evercore to discuss the updated proposal on August 4. Evercore shared analyses estimating the proposal's value to KKR as between negative $476 million and $879 million. The midpoint valuation was $201 million. These valuations factored in a negative present value—meaning a cost to KKR—of between $322 million and $935 million for terminating the TRA, which would eliminate KKR's ability to collect its 15% share of tax savings resulting from taxable exchanges. Evercore estimated the value of sunsetting the Golden Share up to 20 years in the future as between $426 million and $1.09 billion. Evercore did not value the proposed allocation of Forfeited Units to Management.

[14] Xu Aff. Ex. 13, at 4.

During this discussion, a "consensus" emerged among the Committee that Management's proposal was no good.[15] Accordingly, the Committee instructed Evercore to tell Management that "the Committee did not believe further work on the current proposal would make sense" because, in the Committee's view, there was a "significant difference" in what the proposal was worth to KKR compared to what Management proposed the firm pay.[16] If Management wanted to try again, the Committee told Evercore it would consider a revised proposal, but the Committee made no counteroffer.

The next day, Evercore reported back to the Committee that it had done as instructed. Evercore told Management that "there appeared to be a very significant value gap between the Committee's perspective and management's"; that the TRA was a benefit to KKR, not a liability; and that the value of the proposed sunset of the Golden Share "was insufficient to justify a payment of the size" proposed.[17]

G. Management Tries Again.

Management went back to the drawing board and returned with a revised proposal on August 10. This version reduced the total proposed payout from $1.25 billion to $808 million, comprising 8.5 million KKR shares plus a $239 million cash payment at closing. Management rebranded this provision from "TRA Termination Payment" to, simply, "Payment."[18] This time, Management proposed

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[15] Xu Aff. Ex. 16, at 2.

[16] *Id.*

[17] Xu Aff. Ex. 18.

[18] Second Am. Compl. ¶ 122.

that the Founders would agree not to transfer control of the otherwise freely transferrable Golden Share before the Sunset Date. Management also revised the Sunset Date to occur no later than seven years after the reorganization closed.

The Committee and its advisors met to discuss the revised proposal on August 17. Evercore valued the new and improved proposed Sunset Date between $655 million and $932 million, bringing the total transaction value to between negative $250 million and $707 million. The midpoint estimate was now $228 million—incrementally better than the last proposal, but still far below Management's proposed payout of $808 million. Accordingly, the Committee "determined not to respond to management's proposal at that time."[19] The Committee would, however, continue to "develop[] perspectives on . . . post-employment arrangements and post-sunset charter provisions" with the assistance of a compensation consultant.[20]

On August 20, KKR's outside directors who were not Committee members met separately with their own counsel from Wilson Sonsini Goodrich & Rosati, P.C. They discussed with Wilson Sonsini their fiduciary duties in connection with the proposed reorganization and whether they had any potential ties to interested parties that could pose conflicts. After discussion of each director's disclosures, the group concluded that each could consider Management's proposal independently. At the Committee's request, Wilson Sonsini also explained to the outside directors that the

[19] Xu Aff. Ex. 17, at 3.

[20] *Id.* at 2–3.

Committee's "preliminary view as to value [was] very different" from Management's view.[21]

H. The Committee Counters.

The Committee reconvened with its advisors on September 8. Its compensation consultant, Semler Brossy Consulting Group, LLC, presented its preliminary analysis of the value of the proposed accelerated vesting, allocation of Forfeited Units, and post-employment arrangements.

Semler Brossy noted that 2.3 million of the Forfeited Units had been "earmarked for issuance in 2017 at [Bae's and Nuttall's] promotion to Co-Presidents/Co-COOs; an insufficient number of Holdings Units remained unallocated at the time and it was agreed that such awards would be issued, subject to availability from forfeitures."[22] It is not clear where Semler Brossy got this information; it does not appear elsewhere in the current record.

"On balance," Semler Brossy opined that the provisions it analyzed were "generally . . . reasonable and appropriate within the context of the unique: (i) facts and circumstances of the Reorganization transaction and (ii) nature of the Co-Founders' role within the firm and the related planning for their succession."[23] However, Semler Brossy cautioned that "many elements of the proposals have limited market precedent – in form and/or amount – and may very reasonably be expected to

[21] Xu Aff. Ex. 22, at 1.

[22] Xu Aff. Ex. 26, at 8.

[23] *Id.* at 5.

attract significant scrutiny and negative attention by external audiences."[24] Semler Brossy acknowledged that, given KKR's current governance structure, there nonetheless would be limited mechanisms for detractors to take action. Semler Brossy suggested that the Committee consider a counterproposal featuring, among other things, a sunset date for the Founders' control over the Carry Pool.

Evercore also presented an updated analysis of Management's further revised proposal at the September 8 meeting. Evercore now estimated the midpoint value of the transaction as $197 million—about $1.4 billion off from Management's estimate of the midpoint value. Like Semler Brossy, Evercore suggested a counterproposal on the control and governance features. Evercore posited that setting the Sunset Date at no later than three years after the reorganization's closing date (rather than seven years afterward) would bring the transaction value up to a range of negative $79 million to $735 million, with a midpoint of $328 million. In exchange, Evercore suggested that KKR could make a $350 million all-stock payment, rather than the $808 million cash-and-stock payment Management most recently proposed.

Ultimately, the Committee proposed revised terms to Management that incorporated both advisors' suggestions: a three-year deadline for the Sunset Date; all-stock consideration of $350 million; and termination of the Founders' control of the Carry Pool on December 31, 2024.

[24] *Id.*

I. Management Makes Its "Final" Offer.

The next day, Management came back with what it described as a "final" proposal.[25] This version continued to seek a total payment of $808 million, comprising 8.5 million shares and the rest in cash. Management proposed a revised Sunset Date of the earlier of October 1, 2024, or six months after both Founders' death or disability. The Founders would continue to control the Carry Pool, but after the Sunset Date, allocations would be subject to oversight from a new Compensation Committee of the board.

The Committee and its advisors discussed the new proposal on September 10 and reconvened with the other outside directors and Wilson Sonsini, Skadden, and Semler Brossy on September 13. On behalf of the Committee, Skadden reported that negotiations "may have reached an impasse."[26] The "Committee had recently determined that it was unable to recommend" Management's "final proposal."[27] "[T]herefore, at this time, the potential reorganization of the Company was not being considered."[28] However, Scully noted that, despite Management's characterization of this proposal as its "final offer, there was a chance it may not be final given the fact that Company management had requested a meeting with Evercore" and said it disagreed with Evercore's methodology and omission of Apollo's and Carlyle's

[25] Xu Aff. Ex. 27, at 2.

[26] Xu Aff. Ex. 29, at 1.

[27] *Id.*

[28] *Id.*

conversions as precedent transactions.[29] And nonetheless, Scully said, the Committee was comfortable with the outside directors considering Management's related proposals regarding post-retirement arrangements for the Founders, the elevation of Bae and Nuttall to co-CEOs, equity grants for Bae and Nuttall, and control of the Carry Pool. The outside directors discussed those matters accordingly. At the conclusion of the meeting, the outside directors and Wilson Sonsini again discussed potential conflicts and concluded that none posed an issue.

The Committee met separately with its advisors later that day for an update on Evercore's meeting with Management. Among other things, Evercore relayed Management's "continued effort to persuade Evercore as to the comparability of the Apollo and Carlyle transactions as precedents."[30] Nevertheless, Evercore continued to highlight key differences between the proposed reorganization and those transactions, including that both Apollo and Carlyle collapsed their dual-class structure immediately upon closing and that Apollo did so in the face of "significant pressure from LPs and [s]hareholders to resolve social and governance issues."[31]

On September 17, the Committee met again. Scully reported on a call he had with the Founders about equity grants for Bae and Nuttall. He told the Committee that "he understood from [the Founders, specifically Kravis,] that management was not pursuing the proposed reorganization and elimination of the [Golden Share], post-

[29] *Id.* at 4.

[30] Xu Aff. Ex. 30, at 1.

[31] Perrone Aff. Ex. W, at 6–7.

retirement benefits or additional charter amendments in light of the positions taken by the Committee, but would instead simply pursue the CEO transition and CEO equity grants with the Board for approval."[32]

As the Committee mulled over what that meant, Scully asked Evercore to present its updated analysis. After discussions with Management, Evercore had recalculated control premia for some of its precedent transactions. Some premia increased; some decreased. These adjustments to Evercore's methodology increased its estimated premium for the proposed reorganization to 4.5%, consequently increasing the midpoint of its total estimated valuation from the previous $328 million to $759 million.

The Committee then discussed whether it would be possible to strike a deal eliminating the Golden Share, which it thought would be beneficial to minority stockholders, "at an attractive value."[33] While the Committee considered whether to "proactively make another proposal to management" in pursuit of such an arrangement, the Committee concluded it would take no action other than continuing to consider the information provided.[34]

J. The Committee Negotiates A Better Deal.

On September 20, when the Committee reconvened, Scully reported that he had talked to Kravis about reopening negotiations. According to Evercore's further

[32] Xu Aff. Ex. 31, at 1.

[33] *Id.* at 2.

[34] *Id.*

updated financial analysis, Management's most recent proposal was "in the zone of fairness."[35] With Evercore's tactical advice, the Committee concluded that it would be "comfortable" with a counterproposal featuring a three-year deadline for the Sunset Date, with the Founders also ceding control of the Carry Pool on that date.[36] The Committee authorized Scully to "signal its receptivity to a proposal along those lines" on a call with Nuttall later that day.[37]

After Scully and Nuttall spoke, the Committee met again. Scully reported that Nuttall told him that the Founders thought the Sunset Date deadline should be longer than three years after closing of the reorganization.

The Committee met next on September 22. Scully shared Management's newest proposal, as conveyed to him by Nuttall:

- The Sunset Date for the Golden Share would be the earlier of December 31, 2026 or six months after the death or disability of both Founders;
- The Founders would cede control over the Carry Pool on the Sunset Date, and any allocations to the Founders before then would only be made as consistent with past practice;
- Management would withdraw its prior proposals regarding post-retirement arrangements and post-Sunset Date governance changes; and
- KKR would pay all-stock consideration of 8.5 million shares.

[35] Xu Aff. Ex. 32, at 2.

[36] *Id.*

[37] *Id.*

When Management formally submitted this revised proposal, it clarified that, at closing, the Founders immediately would become executive co-chairmen and Bae and Nuttall would become co-CEOs, as the outside directors had discussed.

The Committee discussed this new proposal again with its advisors on September 27. In light of the all-stock nature of the transaction and the Sunset Date, Evercore opined "that the terms of the proposal reflected a good outcome."[38]

K. The Committee Recommends The Reorganization.

The Committee met again on October 3. Evercore presented a further revised analysis now estimating the value of the proposed reorganization at between $118 million and $1.086 billion, with a midpoint of $602 million. As in previous iterations, Evercore's estimate was based primarily on termination of the TRA, the Sunset Date, and the Founders' agreement not to transfer the Golden Share. Evercore did not quantify the value of the Forfeited Units or control of the Carry Pool.

Evercore told the Committee that it believed that the proposed reorganization was in the best interest of KKR's minority stockholders. But when Skadden requested that Evercore prepare a formal fairness opinion, Evercore said it could not do so. Evercore said that it had not provided fairness opinions in precedent comparable transactions. Evercore further explained that the proposed reorganization "was unlike a traditional M&A transaction in which there are clear guidelines about assumptions and methodologies and where financial advisors rely

[38] Xu Aff. Ex. 37, at 1–2.

on projections provided by a company's management."[39] Skadden recalled that, at the beginning of Evercore's engagement, the Committee had discussed "Evercore's view that the nature of the proposed transaction was such that it would not be appropriate for Evercore to provide a formal opinion one way or [the] other."[40]

The Committee met to discuss Management's proposal for the last time on October 6. As it did in the prior meeting, Skadden reviewed with the Committee members their fiduciary duties and other legal considerations. Evercore presented its final analysis, reiterating its view that the proposal was in the best interests of the Company and its unaffiliated stockholders. The Committee agreed. It unanimously resolved to recommend that the board approve the proposed reorganization.

KKR's outside directors met later that day. Wilson Sonsini reviewed with the directors their fiduciary duties in connection with Management's proposal. Skadden discussed the independence of the Committee members, recapped the negotiation process, and summarized the proposed terms again. Consistent with its prior analysis, Evercore opined that, while terminating the TRA had negative value to KKR, the Founders' relinquishment of the Golden Share and control over the Carry Pool would make the reorganization net beneficial to the Company and its minority stockholders. Evercore noted that the evolution of Management's proposed terms reflected a concurrent evolution in Management's understanding, like Evercore's and

[39] Xu Aff. Ex. 39, at 2.

[40] *Id.*

the Committee's, that terminating the TRA would be a cost, not a benefit, to the Company. And Evercore underscored again that Apollo's and Carlyle's restructurings "were only of limited utility for Evercore's analysis given the very different circumstances facing those companies at the time of their respective restructurings."[41]

After discussion, and on the Committee's unanimous recommendation, the outside directors unanimously adopted resolutions approving the reorganization, naming the Founders executive co-chairmen, and appointing Bae and Nuttall as co-CEOs. Those resolutions also determined that it was "advisable and in the best interests of the Company and its stockholders" for the Board to consent to Holdings allocating 1.15 million Forfeited Units to each of Bae and Nuttall and for the Founders to allocate any and all other Forfeited Units as the Founders saw fit, "consistent with the proposal previously delivered to the Board."[42]

KKR executed the Reorganization Agreement governing the "Reorganization" on October 8 and announced the transaction publicly on October 11. The following chart compares Management's original proposal with the terms the outside directors ultimately approved.[43]

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[41] Xu Aff. Ex. 42, at 2.

[42] *Id.*, Annex A at 6–7.

[43] Xu Aff. Exs. 8, 14, 36, 54. The chart does not reflect Management's interim proposals on items like post-employment arrangements for the Founders and immediate equity grants for Bae and Nuttall. *See, e.g.*, Xu Aff. Ex. 36, at 2.

Term	**Management's Original Proposal**	**Final Reorganization**
Reorganization	Collapse of Up-C structure	Same
TRA	Terminated	Same
Payment	$1.25 billion, consisting of 8.5 million KKR shares, subject to three-year lock-up, and cash	8.5 million KKR shares (ultimately valued at $524 million at closing), subject to transfer restrictions until Sunset Date
Golden Share	Sunset Date six months after the death or disability of both Founders; ownership transferrable by Founders before the Sunset Date	Sunset Date on the earlier of December 31, 2026 or six months after the death or disability of both Founders; the Founders agree not to transfer ownership of the Golden Share before the Sunset Date
Carry Pool	Founders to maintain control indefinitely	Founders to cede control to KKR on the Sunset Date; pre-Sunset Date allocations to the Founders only as consistent with past practice
Charter Amendments	Upon Sunset Date, adoption of staggered board, limitation on stockholders' ability to remove directors and fill board vacancies, prohibition on stockholders calling special meetings and taking action by written consent, and imposition of supermajority stockholder vote requirement to amend	All withdrawn

	charter provisions, including the above; all subject to the Founders' blocking rights	
Unvested Holdings Units	Accelerated vesting for 500,000 Holdings units held by each of the Founders and for 1.455 million Holdings units held by each of Bae and Nuttall	Same
Forfeited Units	1.15 million Holdings units issued to each of Bae and Nuttall and 1.06 million Holdings units total issued at the Founders' discretion	Same
Firm Leadership	Founders continue to serve as CEOs	Effective on date of approval, Founders become executive co-chairmen and Bae and Nuttall become co-CEOs

The Golden Share and the Founders' absolute control over the Carry Pool will sunset on December 31, 2026. KKR will be fundamentally different from that day forward.[44]

L. Litigation Ensues.

Plaintiff Steamfitters Local 449 Pension Fund has been a continuous beneficial owner of KKR shares throughout KKR's consideration, approval, and execution of the Reorganization. Plaintiff continues to beneficially own KKR shares.

[44] Dkt. 84 at 22:17–23:6.

After KKR announced the Reorganization, Plaintiff served a demand to inspect KKR's books and records pursuant to Section 220. Plaintiff filed suit to enforce that demand on November 11, 2021. KKR produced 201 documents to Plaintiff, subject to a confidentiality agreement in which Plaintiff agreed that KKR's production would be incorporated by reference into any related complaint Plaintiff filed.

KKR completed the Reorganization on May 31, 2022. Plaintiff voluntarily dismissed its books and records action on December 1, 2022.

Two years after the Reorganization, on July 30, 2024, Plaintiff filed this action. In the original complaint, Plaintiff named as defendants Kravis, Roberts, Bae, Nuttall, Sorkin, Lewin, Scully, Dillon, Russo, Schoewe, Xavier Niel, Adriane Brown, Arturo Gutiérrez Hernández, Dane Holmes, Joseph Grundfest, John Hess, and Evercore, and KKR as nominal defendant. Plaintiff soon amended its complaint on August 7. Defendants moved to dismiss on December 19, and, in response, Plaintiff amended its complaint a second time on August 19, 2025.

Plaintiff's Second Amended Complaint asserts five counts. In Count I, Plaintiff alleges that Kravis, Roberts, Bae, Nuttall, Brown, Dillon, Holmes, Niel, Russo, Gutiérrez, Hess, Schoewe, Grundfest, and Scully (collectively, the "Director Defendants") breached their fiduciary duties by causing KKR to overpay the Founders and other Holdings unitholders on terms the Director Defendants knew were not entirely fair to KKR and disproportionately benefited the Founders. In Count II, Plaintiff alleges that the Founders were controlling stockholders and breached their fiduciary duties by causing or allowing KKR to overpay them. In

Count III, Plaintiff alleges that the members of Management breached their fiduciary duties by proposing and standing on both sides of the Reorganization, manipulating its rationale, and accepting its unfair overpayments. In Count IV, Plaintiff alleges that the Director Defendants committed waste by proposing or approving (as applicable) the Reorganization's payout. And in Count V, Plaintiff alleges that Evercore aided and abetted these fiduciary breaches.

Defendants moved to dismiss the Second Amended Complaint on October 6, 2025. The parties completed briefing on February 13, 2026, and the court held oral argument on September 11, 2026.[45]

II. LEGAL ANALYSIS

Defendants seek dismissal of all counts under Court of Chancery Rule 23.1. Defendants Scully, Dillon, Russo, Schoewe, Brown, Gutiérrez, Holmes, Niel, Grundfest, and Hess (collectively, the "Outside Director Defendants") seek dismissal of Count I under Court of Chancery Rule 12(b)(6). The Director Defendants seek dismissal of Count IV under Court of Chancery Rule 12(b)(6). And Evercore seeks dismissal of Count V under Court of Chancery Rule 12(b)(6). Because this decision dismisses the Second Amended Complaint for failure to plead demand futility under Rule 23.1, it does not reach the Rule 12(b)(6) analyses.

Rule 23.1 is the procedural embodiment of the "cardinal precept" of Delaware law "that directors, rather than shareholders, manage the business and affairs of the

[45] Dkts. 34, 36 ("KKR Defs.' Opening Br."), 45 ("Pl.'s Answering Br."), 49 ("KKR Defs.' Reply Br."), 50, 78, 84.

corporation."[46] "In a derivative suit, a stockholder seeks to displace the board's authority over a litigation asset and assert the corporation's claim."[47] Because derivative litigation impinges on the managerial freedom of directors in this way, "a stockholder only can pursue a cause of action belonging to the corporation if (i) the stockholder demanded that the directors pursue the corporate claim and they wrongfully refused to do so or (ii) demand is excused because the directors are incapable of making an impartial decision regarding the litigation."[48]

A stockholder can satisfy the demand requirement by pleading that demand is futile. In *Zuckerberg*, the Delaware Supreme Court adopted the "universal test" for demand futility that blends elements of the two precursor tests: *Aronson* and *Rales*.[49] When conducting a demand futility analysis under *Zuckerberg*, Delaware courts ask, on a director-by-director basis:

> (i) whether the director received a material personal benefit from the alleged misconduct that is the subject of the litigation demand;
>
> (ii) whether the director faces a substantial likelihood of liability on any of the claims that would be the subject of the litigation demand; and
>
> (iii) whether the director lacks independence from someone who received a material personal benefit from the alleged

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[46] *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984) (citing 8 *Del. C.* § 141(a)), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

[47] *United Food & Com. Workers Union & Participating Food Indus. Empls. Tri-State Pension Fund v. Zuckerberg*, 250 A.3d 862, 876 (Del. Ch. 2020) ["*Zuckerberg I*"] (citing *Aronson*, 473 A.2d at 811), *aff'd*, 262 A.3d 1034 (Del. 2021) ["*Zuckerberg*"].

[48] *Id.* (citing *Ainscow v. Sanitary Co. of Am.*, 180 A. 614, 615 (Del. Ch. 1935)).

[49] 262 A.3d at 1058 (adopting blend of *Aronson* and *Rales v. Blasband*, 634 A.2d 927 (Del. 1993)).

> misconduct that would be the subject of the litigation demand or who would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand.[50]

"If the answer to any of the questions is 'yes' for at least half of the members of the demand board, then demand is excused as futile."[51] Although the *Zuckerberg* test displaced the prior tests from *Aronson* and *Rales*, cases properly applying *Aronson* and *Rales* remain good law.[52]

To plead demand futility under any *Zuckerberg* theory, a stockholder must allege "particularized factual statements that are essential to the claim."[53] "[I]t is generally understood that for a fact to be pled 'with particularity,' it must have some indicia of specificity."[54] A plaintiff must do more than provide notice pleading permitted under Rule 8.[55]

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[50] *Id.* at 1059.

[51] *Id.*

[52] *Id.* In 2023, the Court of Chancery amended its rules to reflect the Delaware Supreme Court's adoption of the *Zuckerberg* test and modernize the language and presentation of the Rules to bring them closer in style to the Federal Rules of Civil Procedure. *See In re: Amendments to Rules 7, 10, 17–25, and 171 of the Court of Chancery Rules, Sections, III, IV, and XVI* (Del. Ch. Sep. 25, 2023) (ORDER).

[53] *Brehm*, 746 A.2d at 254.

[54] *Elburn ex rel. Invs. Bancorp, Inc. v. Albanese*, 2020 WL 1929169, at *7 (Del. Ch. Apr. 21, 2020) ["*Invs. Bancorp I*"], *appeal refused*, 237 A.3d 820 (Del. 2020) (TABLE); *see also Zuckerberg I*, 250 A.3d at 877 ("Rule 23.1 requires that a plaintiff allege specific facts[.]"); *Hughes v. Xiaoming Hu*, 2020 WL 1987029, at *10 (Del. Ch. Apr. 27, 2020) (same); *In re GoPro, Inc.*, 2020 WL 2036602, at *8 (Del. Ch. Apr. 28, 2020) ("The plaintiff pleading demand futility must inform the defendants of the precise transactions at issue by describing with particularity the *specific* misconduct in which each defendant is alleged to have participated." (emphasis added) (citation modified) (quoting *Invs. Bancorp I*, 2020 WL 1929169, at *9)).

[55] *Invs. Bancorp I*, 2020 WL 1929169, at *7–9.

The Rule 23.1 particularity requirement is not as strict as the Rule 9 particularity requirement, because Rule 23.1 does not call for "newspaper facts."[56] "Even with Section 220 documents in hand, derivative plaintiffs would be hard pressed to plead . . . 'who, what, when, where and how' facts about fiduciary wrongdoing," as derivative plaintiffs typically do not have the means to know those "newspaper" facts like fraud claimants do.[57] Still, the particularity requirement of Rule 9 remains a "useful guidepost."[58] Rule 9 requires, "with respect to the subjects it treats, some greater degree of specificity in pleading. The rule gives to defendants a right to insist that the circumstances constituting the alleged fraud be specified."[59]

Rule 23.1 imposes a pleading-stage requirement. "While Rule 23.1 requires that a plaintiff allege specific facts, 'he need not plead evidence.'"[60] And although the requirement of factual particularity is a heightened pleading requirement, it "does

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[56] *Id.* at *8; *Elburn ex rel. Invs. Bancorp, Inc. v. Albanese,* 2020 WL 4194865, at *4–5 (Del. Ch. July 21, 2020) ["*Invs. Bancorp II*"] (denying application to certify interlocutory appeal), *appeal refused*, 237 A.3d 820 (Del. 2020) (TABLE).

[57] *Invs. Bancorp I*, 2020 WL 1929169, at *8 (observing that derivative plaintiffs asserting fiduciary breaches "were not in the boardroom[,] and, unlike fraud [claimants], were not the direct targets of the wrongful behavior"); *Invs. Bancorp II*, 2020 WL 4194865, at *5.

[58] *See Invs. Bancorp I*, 2020 WL 1929169, at *9 (describing this court's "articulation of Rule 9(b)'s pleading requirements" in *Kahn Bros. & Co., Inc. Profit Sharing Plan & Tr. v. Fischbach Corp.*, 1989 WL 109406, at *4 (Del. Ch. Sep. 19, 1989), as "a useful guidepost for Rule 23.1").

[59] *Kahn*, 1989 WL 109406, at *4.

[60] *Hughes*, 2020 WL 1987029, at *10 (quoting *Aronson*, 473 A.2d at 816); *Ont. Provincial Council of Carpenters' Pension Tr. Fund v. Walton*, 2023 WL 3093500, at *29 (Del. Ch. Apr. 26, 2023) (same); *Zuckerberg I*, 250 A.3d at 877 (same); *In re Ezcorp Inc. Consulting Agreement Deriv. Litig.*, 2016 WL 301245, at *33 (Del. Ch. Jan. 25, 2016) (same).

not entitle a court to discredit or weigh the persuasiveness of well-pled allegations."[61] "[O]nce a plaintiff pleads particularized allegations, then the plaintiff is entitled to all 'reasonable inferences [that] logically flow from particularized facts alleged by the plaintiff.'"[62] As the high court explained in *Marchand*, "[t]he standard for conducting this inquiry at the demand futility stage is well balanced, requiring that the plaintiff plead facts with particularity, but also requiring that this Court draw all reasonable inferences in the plaintiff's favor."[63]

The demand analysis is conducted as to the board in place at the time that the claims at issue were "validly in litigation."[64] This rule protects representative plaintiffs by preventing defendants from recomposing a board after a derivative claim is filed to strengthen Rule 23.1 arguments.[65]

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[61] *Zuckerberg I*, 250 A.3d at 877.

[62] *Hughes*, 2020 WL 1987029, at *10 (second alteration in original) (quoting *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1048 (Del. 2004)); *see also Melb. Mun. Firefighters' Pension Tr. Fund ex rel. Qualcomm, Inc. v. Jacobs*, 2016 WL 4076369, at *1 n.1 (Del. Ch. Aug. 1, 2016) ("When considering a motion to dismiss under Rule 23.1, this Court affords plaintiffs all reasonable inferences that logically flow from the particularized facts alleged in the complaint." (quoting *Postorivo v. AG Paintball Hldgs., Inc.*, 2008 WL 553205, at *4 (Del. Ch. Feb. 29, 2008))), *aff'd*, 158 A.3d 449 (Del. 2017); *Teamsters Union 25 Health Servs. & Ins. Plan v. Baiera*, 119 A.3d 44, 56 (Del. Ch. 2015) ("I accept as true Plaintiff's particularized allegations of fact and draw all reasonable inferences that logically flow from those allegations in Plaintiff's favor." (citing *White v. Panic*, 783 A.2d 543, 549 (Del. 2001))).

[63] *Marchand v. Barnhill*, 212 A.3d 805, 818 (Del. 2019).

[64] *Braddock v. Zimmerman*, 906 A.2d 776, 785–86 (Del. 2006).

[65] *See Harris v. Carter*, 582 A.2d 222, 231 (Del. Ch. 1990) ("When claims have been properly laid before the court and are in litigation, neither Rule 23.1 nor the policy it implements requires that a court decline to permit further litigation of those claims upon the replacement of the interested board with a disinterested one."); *Park Empls.'*

When Plaintiff filed this action, the Board comprised thirteen members: Kravis, Roberts, Bae, Nuttall, Dillon, Russo, Scully, Niel, Brown, Gutiérrez, and non-parties Matthew Cohler, Kimberly Ross, and Evan Spiegel (collectively, the "Demand Board"). To show demand futility, Plaintiff must allege particularized facts creating a reason to doubt that seven of the thirteen Demand Board members were capable of impartially considering a demand.[66]

Defendants concede that four of the thirteen Demand Board members—Kravis, Roberts, Bae, and Nuttall—are incapable of impartially considering a demand.[67] Plaintiff concedes that three of the remaining nine—non-parties Cohler, Ross, and Spiegel—are capable of impartially considering a demand.[68]

To demonstrate demand futility, therefore, Plaintiff must plead that demand is futile as to three of the remaining six directors—Dillon, Russo, Scully, Niel, Brown, and Gutiérrez. Plaintiff advances arguments as to only Dillon, Russo, and Scully (collectively, the "Committee Defendants"), and only under the second prong of

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& Ret. Bd. Empls.' Annuity & Benefit Fund of Chi. v. Smith, 2016 WL 3223395, at *10 (Del. Ch. May 31, 2016) (describing as "problematic" a situation "where a manipulation of board composition is employed to discourage meritorious derivative litigation"), *aff'd sub nom. Park Empls.' & Ret. Bd. Empls.' Annuity & Benefit Fund of Chi. ex rel. BioScrip, Inc. v. Smith*, 175 A.3d 621 (Del. 2017) (TABLE).

[66] *In re INFOUSA, Inc. S'holders Litig.*, 953 A.2d 963, 989–90 (Del. Ch. 2007) ("Plaintiffs must show that a majority—or in a case where there are an even number of directors, exactly half—of the board was incapable of considering demand.").

[67] KKR Defs.' Opening Br. at 42.

[68] Pl.'s Answering Br. at 68–70 (failing to advance arguments as to those directors); *see also* Second Am. Compl. ¶¶ 182–99.

Zuckerberg.[69] Under *Zuckerberg*'s second prong, Plaintiff must plead particularized factual allegations demonstrating that the Committee Defendants each face a substantial likelihood of liability for the Reorganization.[70]

Where, as here, a plaintiff's basis for arguing demand futility centers on a substantial likelihood of liability resulting from the derivative claims at issue, the demand analysis effectively folds into an analysis of the strength of the underlying claims as to the Demand Board members. In this case, therefore, the *Zuckerberg* analysis hinges on the strength of Plaintiff's claims for breach of fiduciary duty against each of the Committee Defendants.

When assessing liability for purposes of the demand futility analysis, the Rule 12(b)(6) standard supplies the analytical framework, overlayed by the requirement that the plaintiff plead facts with particularity.[71]

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[69] Pl.'s Answering Br. at 68–70 ("Demand futility thus turns on whether the Conflicts Committee members face a substantial likelihood of liability in connection with the approval of the TRA Payoff and the Forfeited Units Payoff."); *see also* Second Am. Compl. ¶ 188. To the extent the Second Amended Complaint alleges Niel, Brown, and Gutiérrez also face a substantial likelihood of liability, that argument is waived because Plaintiff did not address it in briefing. *Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived."). These arguments would also fail for substantially the same reasons they fail as to the Committee Defendants.

[70] *L.A. City Empls.' Ret. Sys. v. Sanford*, 352 A.3d 276, 325–27 (Del. Ch. 2026) (discussing the relationship between stating a claim under Rule 12(b)(6) and demonstrating that demand is futile based on a substantial likelihood of liability under *Zuckerberg*).

[71] *Id.* at 326–27 & n.299 ("Putting it all together, a plaintiff can demonstrate a substantial likelihood of liability for demand futility purposes by pleading a claim that meets the Rule 12(b)(6) standard based on particularized factual allegations."); *see also In re Illumina, Inc. Consol. Deriv. S'holder Litig.*, 2026 WL 3269927, at *15 (Del. Ch. Oct. 30, 2026); *Brewer ex rel. Regions Fin. Corp. v. Turner*, 2025 WL 2769895, at *7–9 (Del. Ch. Sep. 29, 2025); *Brewer ex rel. Regions Fin. Corp. v. Turner*,

The Rule 12(b)(6) standard in Delaware "is reasonable 'conceivability.'"[72] When considering such a motion, the court must "accept all well-pleaded factual allegations in the [c]omplaint as true, . . . draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof."[73] The court, however, need not "accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party."[74] And for purposes of the Rule 23.1 analysis, the reasonable conceivability standard must be met with particularized allegations.

KKR's certificate of incorporation contains an exculpatory provision.[75] Under *Cornerstone,* when an exculpatory provision protects directors, a plaintiff must state a non-exculpated claim to survive a motion to dismiss.[76] *Cornerstone* requires that a plaintiff allege facts sufficient to state a non-exculpated claim against each director;

2025 WL 3048942, at *3–7 (Del. Ch. Oct. 30, 2025) (denying application to certify interlocutory appeal), *appeal refused*, 351 A.3d 496 (Del. 2025) (TABLE).

[72] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Hldgs. LLC*, 27 A.3d 531, 537 (Del. 2011).

[73] *Id.* at 536 (citing *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896–97 (Del. 2002)).

[74] *Price v. E.I. DuPont de Nemours & Co.*, 26 A.3d 162, 166 (Del. 2011) (citing *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009)), *overruled in part on other grounds by Ramsey v. Ga. S. Univ. Advanced Dev. Ctr.*, 189 A.3d 1255 (Del. 2018).

[75] Xu Aff. Ex. 52, § 11.02(c).

[76] *In re Cornerstone Therapeutics Inc. S'holder Litig.*, 115 A.3d 1173, 1175–76 (Del. 2015).

group pleading will not work.[77] The most common practical effect of *Cornerstone* is that a plaintiff must plead a duty of loyalty claim.

Plaintiff must plead a loyalty claim against the Committee Defendants here. Plaintiff argues that the Committee Defendants acted disloyally because they approved the Reorganization in bad faith.[78] Plaintiff does not argue that these directors face a substantial likelihood of liability because they "harbored self-interest adverse to the stockholders' interests" or "acted to advance the self-interest of an interested party from whom they could not be presumed to act independently."[79]

Plaintiff alleges that the Committee Defendants' approval was in bad faith for four reasons. First, the Committee Defendants knew that the 8.5-million-share consideration was really for termination of the TRA, not for the Founders' relinquishment of control.[80] Second, the Committee Defendants knew Evercore's analysis was methodologically flawed, and they did not get a fairness opinion.[81] Third, the Committee Defendants "facilitated a conflict-laden process," with Evercore

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[77] *In re Tangoe, Inc. S'holders Litig.*, 2018 WL 6074435, at *12 (Del. Ch. Nov. 20, 2018) (explaining that "plaintiff must well-plead a loyalty breach against each individual director; so-called 'group pleading' will not suffice" (citing *Cornerstone*, 115 A.3d at 1179)).

[78] Second Am. Compl. ¶ 188; Pl.'s Answering Br. at 46–47.

[79] *Cornerstone*, 115 A.3d at 1179–80.

[80] Second Am. Compl. ¶¶ 188–89.

[81] *Id.* ¶¶ 190–93.

and Scully leading negotiations.[82] Fourth, and finally, the Committee Defendants simply gave away the Forfeited Units.[83]

A. The Purported TRA Payoff

Plaintiff argues that the Committee Defendants "knew that the entire premise of the TRA Payoff was bogus" but "allowed Evercore to invent a new payment-for-control justification."[84] According to Plaintiff, the Committee Defendants' "decision to invent reasons to pay more reflects that [they] had succumbed to the 'controlled mindset.'"[85] In response, KKR and the individual defendants (collectively, the "KKR Defendants") argue that Plaintiff has not pled the extreme facts required to show a controlled mindset.[86]

This court recently traced the development of the "controlled mindset" theory in *Fishel v. Liberty Media Corp.* when rejecting an argument similar to Plaintiff's here.[87] As Vice Chancellor Fioravanti observed in *Trade Desk*, "the phrase 'controlled mindset' has become a shibboleth for stockholder plaintiffs to characterize the conduct of a board or committee that negotiates against an alleged controller."[88] The

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[82] *Id.* ¶¶ 193–96.

[83] *Id.* ¶ 197.

[84] Pl.'s Answering Br. at 48.

[85] *Id.* (quoting *In re S. Peru Copper Corp. S'holder Deriv. Litig.*, 52 A.3d 761, 800 (Del. Ch. 2011), *aff'd sub nom. Ams. Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012)).

[86] KKR Defs.' Reply Br. at 15–16.

[87] 2026 WL 982224, at *11–14 (Del. Ch. Apr. 13, 2026), *appeal refused sub nom. Meyer v. Fishel*, 2026 WL 1902246 (Del. July 1, 2026).

[88] *In re Trade Desk, Inc. Deriv. Litig.*, 2025 WL 503015, at *23 (Del. Ch. Feb. 14, 2025), *aff'd*, 350 A.3d 1223 (Del. 2025) (TABLE).

phrase is often shorthand for allegedly ineffective negotiations—conduct that is, "at its core, a process failure."[89]

In only a handful of pleading-stage decisions, this court has deemed extreme process defects packaged as controlled-mindset theories sufficient to support a reasonable inference of disloyal conduct. For example, in *Southern Peru*, extreme facts led the court to hold that special committee members breached their fiduciary duties by falling "victim to a controlled mindset."[90] The committee was "empowered only to evaluate what the controller put on the table," expressed confusion "about whether it was actually empowered to negotiate," and never considered alternatives to the controller's demands or obtained *any* concessions for minority stockholders.[91]

Then, in *Viacom*, the court found it reasonably conceivable that the special committee operated under a controlled mindset where, among other things: the controller "hand-picked" each committee member for the board "after disloyal board members were removed"; the committee accepted the controller's direction that it not consider a transaction other than the transaction favored by the controller; the committee did not request a majority-of-the-minority vote because the controller had resisted that term in the past; the committee failed to request other protections, like a collar on the deal price; the controller was "omnipresent" through the merger

[89] *Id.* at *24.

[90] *S. Peru*, 52 A.3d at 797–98.

[91] *Id.* at 763, 797–98, 800.

discussions; and the "negotiations reflect[ed] a desire to placate the controller, not to land the best transaction possible for all Viacom stockholders."[92]

And in *Berteau v. Glazek*, the court denied the special committee defendants' *Cornerstone* motion because the committee "was not prepared to exercise its ability to say 'no' to the controller[,] . . . inexplicabl[y]" failed to secure minority protections like a majority-of-the-minority vote, failed to object to including conflicted directors in the meeting at which the exchange ratio was set, and also allowed management to select the committee's legal advisor, which "reverted to its former role and advised the Company as its transactional counsel" in the deal after the committee's process was complete.[93]

Ultimately, whether process failures support an inference of bad faith presents a classic judgment call as to whether the facts presented achieve the difficult task of impugning the good faith of otherwise independent and disinterested directors. This is "an issue of fact which must, at this stage, be determined from an examination of the well-pled facts in the [c]omplaint."[94] And Plaintiff has not adequately alleged the extreme facts needed to infer bad faith here.

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[92] *In re Viacom Inc. S'holders Litig.*, 2020 WL 7711128, at *7, *23–25 (Del. Ch. Dec. 29, 2020), *as corrected* (Dec. 30, 2020); *see also In re CBS Corp. S'holder Class Action & Deriv. Litig.*, 2021 WL 268779, at *43 (Del. Ch. Jan. 27, 2021), *as corrected* (Feb. 4, 2021) (finding it reasonably conceivable, based on the same "extreme set of facts" as *Viacom*, that special committee succumbed to controlled mindset).

[93] 2021 WL 2711678, at *22–23 (Del. Ch. June 30, 2021) (citation modified).

[94] *Viacom*, 2020 WL 7711128, at *24 (quoting *Calesa Assocs., L.P. v. Am. Cap., Ltd.*, 2016 WL 770251, at *11 (Del. Ch. Feb. 29, 2016)).

As a threshold matter, Plaintiff's argument that the Committee Defendants "invented" a reason to pay Management presupposes that the change-in-control provisions were worthless. That is not reasonably inferable. Even setting aside Evercore's allegedly flawed valuations, it is not reasonably conceivable that unfettered, unilateral control over KKR's board composition and multi-billion-dollar carry pool was worth nothing. Indeed, it is that same absolute control that Plaintiff claims enabled the Founders to extract this payout in the Reorganization.[95] Plaintiff's assertion that there was no indication the Founders planned to pass that control down to their heirs is pure speculation.[96]

If the sunset of the Golden Share and the Founders' control over the Carry Pool were worth something to KKR, the Committee Defendants did not "invent" a reason to pay the Founders. The Committee Defendants declined to pay for something they, on behalf of the Company, did not want—termination of the TRA—but offered to pay for something that they, on behalf of the Company, *did* want—termination of the Founders' absolute control. In other words, the Committee Defendants negotiated. That is not bad faith.

The Committee Defendants' process also did not suffer from the egregious flaws that drove the court to infer bad faith in *Southern Peru*, *Viacom*, *CBS*, and *Berteau*. After Management's first proposal, the Committee independently selected

[95] *See, e.g.*, Second Am. Compl. ¶ 198.

[96] *See, e.g.*, *id.* ¶ 16.

and consulted with Skadden and Evercore numerous times.[97] Evercore consistently told the Committee that terminating the TRA would be a net negative for the Company but also that even an uncertain Sunset Date would be significantly valuable.[98] With that in mind, the Committee flatly rejected Management's proposal with no counteroffer.[99] Even when Management proposed better change-in-control terms, the Committee declined to respond at all and continued to consider how to improve those terms because it felt Management's valuation was too far off.[100] When Management responded to the Committee's counteroffer with a same-day "final" offer, the Committee, still unsatisfied, told the other outside directors that it could not recommend approving the proposal and that negotiations may have reached an impasse.[101] And only after Management proposed that the Founders relinquish control not just of the Golden Share but also of the Carry Pool, after two weeks of discussion and analysis, did the Committee recommend approval.[102]

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[97] Xu Aff. Ex. 7, at 2; Xu Aff. Ex. 9; Xu Aff. Ex. 12; Xu Aff. Ex. 16, at 1–2; Xu Aff. Ex. 17, at 1–2; Xu Aff. Ex. 18; Xu Aff. Ex. 24; Xu Aff. Ex. 27; Xu Aff. Ex. 30; Xu Aff. Ex. 31; Xu Aff. Ex. 32; Xu Aff. Ex. 33; Xu Aff. Ex. 35, at 1; Xu Aff. Ex. 37; Xu Aff. Ex. 39; Xu Aff. Ex. 40, at 1–2.

[98] Xu Aff. Ex. 10, at 3; Xu Aff. Ex. 15, at 1; Xu Aff. Ex. 20, at 2; Xu Aff. Ex. 25, at 2; Xu Aff. Ex. 28, at 2; Xu Aff. Ex. 46, at 2; Xu Aff. Ex. 54, at 2.

[99] Xu Aff. Ex. 16, at 2.

[100] Xu Aff. Ex. 17, at 3.

[101] Xu Aff. Ex. 29, at 1.

[102] Xu Aff. Ex. 35, at 1; Xu Aff. Ex. 40, at 2.

There is no question that the Committee here was empowered to negotiate, unlike in *Southern Peru*.[103] And it did. This Committee rejected Management's proposal in full; then it later considered, proposed, and obtained alternative terms more favorable to KKR than what Management offered. It obtained a significant concession in control of the Carry Pool—a term that was not on the table for much of the negotiation—reducing concerns that, as in *Berteau*, the Committee was only negotiating just enough to make the process look legitimate.[104] Plaintiff points to no troubling incidents like those in *Viacom* and *CBS*, where the controller removed board members she considered disloyal, handpicked their successors, and told them not to consider any other proposals but hers.[105]

The lawsuits challenging Apollo and Carlyle's TRA termination payouts are also distinguishable. This court denied dismissal in each, but the allegations were worse. And neither Apollo nor Carlyle (nor either's respective carry pool) was comparably ruled by a Golden Share.

In Apollo's case, the payout was framed similarly: partly for terminating the TRA and partly for a change of control.[106] But there, before negotiations even began, Apollo's founder Leon Black already had announced publicly his intent to retire, in

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[103] *See* 52 A.3d at 797.

[104] *See* 2021 WL 2711678, at *24 ("Plaintiff's allegations support a reasonable inference that negotiations over deal terms were limited to the minimum necessary to confer a scintilla of legitimacy to the Special Committee process[.]").

[105] *See* 2020 WL 7711128, at *23–25; 2021 WL 268779, at *42–43.

[106] *Anguilla Soc. Sec. Bd. v. Black*, C.A. No. 2023-0846-JTL, at 10:5–13 (Del. Ch. Sep. 20, 2024) (TRANSCRIPT).

the wake of significant negative public reaction to recent revelations about his ties to Jeffrey Epstein.[107] In other words, Black had no real choice but to exit the firm, with or without a payout.[108] The firm's decision to pay him for ceding control nonetheless was, therefore, inferably pretextual. The court also undertook a different analysis than that applicable here, considering whether the directors were not independent, rather than whether they faced a significant likelihood of liability for approving the transaction in bad faith.[109]

In Carlyle's case, the payout was solely for terminating the TRA.[110] There was no concomitant change of control. And Carlyle's general partner ensured that the conflicts committee was given incomplete and incorrect information, including that the TRA would be terminated in the transaction and would trigger contractual termination payments exceeding the proposed payout, which was not true.[111] Finally, Carlyle's founders and other unitholders never actually transferred their units to Carlyle, for which they were being paid.[112] But Carlyle still paid them.[113] The Committee's process here does not suffer from similar defects.

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[107] *Id.* at 6:20–10:13.

[108] *Id.* at 10:14–12:9.

[109] *Id.* at 21:16–22:10.

[110] *City of Pittsburgh Comprehensive Mun. Pension Tr. Fund v. Conway*, 2024 WL 1752419, at *1, *6, *10 (Del. Ch. Apr. 24, 2024).

[111] *Id.* at *17–18.

[112] *Id.* at *13.

[113] *Id.*

Plaintiff accordingly has not pled that the Committee Defendants acted in bad faith by approving the proposed payment.

B. Evercore's Analysis

Plaintiff argues that the Committee Defendants acted in bad faith because they "knew that Evercore's analysis was facially flawed, contrived, and unreliable."[114] This is so, Plaintiff says, because Evercore did not analyze the value of allocating the Forfeited Units; "attribut[ed] massive value to the contrived, artificial notion that the Founders were being paid for relinquishing control"; "cherry-picked" precedent transactions; and would not provide a fairness opinion.[115] According to Plaintiff, the "problems with Evercore's methodology are so obvious and extreme that it constitutes waste."[116]

The KKR Defendants respond that it is not enough to second-guess Evercore's analysis. Instead, Plaintiff must point to well-pleaded, particularized allegations that the Committee Defendants purposely relied on analysis they knew was inaccurate and did so for some improper reason.[117]

The court can infer bad faith if a "decision is sufficiently extreme, . . . but the decision must be so extreme that it could not be rationally explained on another

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[114] Second Am. Compl. ¶ 190; *see also* Pl.'s Answering Br. at 52 ("Rather than exercise oversight, the Committee allowed Evercore to invent a new justification for paying the Founders and accepted a facially flawed analysis.").

[115] Second Am. Compl. ¶¶ 190–93.

[116] Pl.'s Answering Br. at 53.

[117] KKR Defs.' Reply Br. at 16–18.

basis."[118] "That means of pleading bad faith matches the standard for a claim for waste[.]"[119] To plead bad faith in the form of waste, the decision must be "so egregious or irrational that it could not have been based on a valid assessment of the corporation's best interests."[120] "To constitute waste, 'the company would *literally have to get nothing whatsoever* for what it gave.'"[121]

The KKR Defendants have the better argument. The primary issue with Plaintiff's theory is, again, that it assumes the change-of-control features of the deal were worthless. Those features would have to be worthless, or nearly so, to present the "extreme disparity" (there, of nearly $700 million) between the TRA buyout and the value of the TRA liability that the court found indicated waste and bad faith in *GoDaddy*.[122] As explained above, it is not reasonably conceivable that the sunset of the Golden Share and the Founders' dominion over the Carry Pool were worth so little as to be similarly disparate from the $524 million consideration approved here.

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[118] *IBEW Loc. Union 481 Defined Contribution Plan & Tr. ex rel. GoDaddy, Inc. v. Winborne*, 301 A.3d 596, 622 (Del. Ch. 2023) ["*GoDaddy*"] (citing *In re Orchard Enters., Inc. S'holder Litig.*, 88 A.3d 1, 34 (Del. Ch. 2014)); *see also In re J.P. Stevens & Co., Inc. S'holders Litig.*, 542 A.2d 770, 780–81 (Del. Ch. 1988) ("A court may, however, review the substance of a business decision made by an *apparently* well motivated board for the limited purpose of assessing whether that decision is so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith.").

[119] *GoDaddy*, 301 A.3d at 622.

[120] *Id.* (quoting *Panic*, 783 A.2d at 554 n.36).

[121] *In re Anaplan, Inc. S'holders Litig.*, 2024 WL 3086013, at *11 (Del. Ch. June 21, 2024) (quoting *CBS*, 2021 WL 268779, at *48), *aff'd*, 339 A.3d 694 (Del. 2025) (TABLE).

[122] Pl.'s Answering Br. at 53–54 (quoting *GoDaddy*, 301 A.3d at 626).

Even factoring in the 3.36 million Forfeited Units—and, as discussed further below, it is not clear that they should be—valued at $61.68 per unit as of closing, the control features would still need to be worth little to nothing to be that far off from the total consideration of roughly $731 million.[123] And though Evercore's analysis did not explicitly estimate the value of allocating those Forfeited Units, it also did not estimate the value of the Founders ceding control of the Carry Pool.[124] The purported gulf between the payout and the transaction value might have been even narrower. At bottom, if, as this decision concludes, the control features were *not* worthless, that means KKR did not get literally nothing, as required to plead waste, and the Committee Defendants had a rational basis to approve the transaction.

Plaintiff also has not sufficiently alleged that the Committee Defendants knew Evercore's analysis was fatally flawed and relied on it anyways for some improper purpose. Although Plaintiff asserts that the Committee Defendants knew Evercore had "ignor[ed]" other precedent transactions in which no premia were paid, it would only make sense to include such transactions if the control provisions were, again, worth nothing.[125] Evercore had explained to the Committee that dual-class recapitalizations in which control was ceded immediately were "different in important ways" from the proposal that the Founders give up the Golden Share.[126]

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[123] Xu Aff. Ex. 54, at 1–2.

[124] *Id.*

[125] Second Am. Compl. ¶ 191.

[126] Xu Aff. Ex. 9, at 2.

Even Apollo and Carlyle's transactions "were of limited utility," in part for this reason.[127] The Golden Share was, in a literal sense, invaluable, because it conferred unprecedented total control over KKR. Plaintiff's criticisms of Evercore's methodology amount to no more than second-guessing the firm's attempt to value the invaluable. That does not plead that the Committee Defendants relied on Evercore in bad faith.[128]

Finally, that Evercore did not provide a fairness opinion does not give rise to an inference of bad faith. Evercore did not suddenly or surprisingly refuse to issue such an opinion. From the beginning, Evercore maintained that it would not be appropriate for the firm to do so, given the nature of the proposed transaction.[129] While Plaintiff argues that Evercore did provide fairness opinions in twelve of its fifteen precedent recapitalizations, that again ignores that those precedent transactions differed from the proposed reorganization.[130]

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[127] *Id.*; *see also* Perrone Aff. Ex. W, at 5–7.

[128] *See City of Hialeah Empls.' Ret. Sys. ex rel. nCino, Inc. v. Insight Venture P'rs, LLC*, 2023 WL 8948218, at *7 (Del. Ch. Dec. 28, 2023) (rejecting attempt to plead bad faith by arguing that financial advisor's "financial projections extend[ed] too far into the future, that the beta was too low, that the weighted average cost of capital was incorrect, and that the set of comparable companies was flawed, among other things" because "[a]llegations of bad faith cannot rest on mere disagreements with methodology 'or a belief that another financial advisor would have done a better job'" (quoting *In re Crimson Expl. Inc. S'holder Litig.*, 2014 WL 5449419, at *25 (Del. Ch. Oct. 24, 2014)), *aff'd sub nom. City of Hialeah Empls.' Ret. Sys. v. Insight Venture P'rs, LLC*, 326 A.3d 1201 (Del. 2024) (TABLE).

[129] Xu Aff. Ex. 39, at 2.

[130] Pl.'s Answering Br. at 53; *see also* Xu Aff. Ex. 9, at 2.

Plaintiff's reliance on *GoDaddy* is misplaced. There, the committee's failure to obtain a fairness opinion contributed to an inference of bad faith where it was coupled with the voting directors' approval of a TRA buyout in a 30-minute meeting without the committee's financial advisor present and while knowing that the committee had refused to approve the transaction and that the payout "conflicted on its face" with the valuation of the TRA liability.[131] In contrast, here, the Committee engaged in months of analysis and negotiation, without a formal fairness opinion but in frequent consultation with Evercore and other advisors, and ultimately recommended approval of a proposal not plagued by the same "extreme disparity" of valuation.[132]

Plaintiff has failed to allege that the Committee Defendants relied on Evercore in bad faith.

C. Purported Conflicts

Plaintiff argues that the Committee Defendants acted in bad faith by allowing Evercore and Scully, each conflicted, to lead negotiations.[133] In the Second Amended Complaint, Plaintiff attempted to allege that Skadden was conflicted, too.[134] But Plaintiff mounted no defense of this theory after the KKR Defendants pointed out its weaknesses.[135] Plaintiff has waived its argument concerning Skadden.[136]

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[131] *GoDaddy*, 301 A.3d at 629.

[132] *Id.* at 626–27.

[133] Pl.'s Answering Br. at 52, 54.

[134] Second Am. Compl. ¶¶ 73, 194.

[135] KKR Defs.' Opening Br. at 55 n.22; *see generally* Pl.'s Answering Br.

[136] *Emerald P'rs*, 726 A.2d at 1224 ("Issues not briefed are deemed waived.").

Plaintiff also has walked back its original allegation that Evercore's conflicts disclosure was "deliberately and materially incomplete."[137] To the contrary, Evercore's July 1, 2021 engagement letter disclosed that the firm had earned approximately $73.6 million in fees from KKR and its funds and portfolio companies, including for transactions announced but not yet consummated.[138] Plaintiff does not dispute that this contradicts its allegation that Evercore "omitted [its] contemporaneous engagements with KKR."[139]

Instead, Plaintiff now argues that the Committee Defendants knew that Evercore was conflicted and that they thus needed "to exercise oversight."[140] But Plaintiff's only reasons for finding fault in the Committee's oversight of Evercore are the same two arguments that this decision has already rejected: that "the Committee allowed Evercore to invent a new justification for paying the Founders and accepted a facially flawed analysis."[141] Further, Semler Brossy—whom Plaintiff does not allege was conflicted—is the advisor who first proposed that the Committee negotiate (and therefore offer to pay) for control of the Carry Pool, not Evercore.[142]

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[137] Second Am. Compl. ¶ 94.

[138] Xu Aff. Ex. 44, at 2.

[139] Second Am. Compl. ¶ 9; Pl.'s Answering Br. at 21 n.3 (arguing instead that the disclosure should have explicitly disclosed fee structure of contemporaneous deal).

[140] Pl.'s Answering Br. at 52 (citing *RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816, 856 (Del. 2015)).

[141] *Id.*

[142] Xu Aff. Ex. 26, at 6.

The Committee reasonably could have viewed Evercore's familiarity with KKR and with Carlyle's TRA transaction as helpful experience, particularly given the difficulty of valuing the sunset of the Golden Share, and Evercore was going to be paid its full fee regardless of whether any transaction went forward in any form. Plaintiff has not alleged that the Committee Defendants acted in bad faith by enlisting Evercore despite these purported conflicts.

As to Scully, it is worth noting that, while Plaintiff alleges that the Committee Defendants face a substantial likelihood of liability based on his lack of independence from the Founders, Plaintiff chose not to plead directly that demand is futile under the third prong of *Zuckerberg* on the same basis. Plaintiff is left with a watered-down version of its "controlled mindset" theory: this time, instead of the whole Committee laboring under the Founders' influence, it is just Scully. For the reasons explained above, this theory is not persuasive.[143] Plaintiff has not pled that the Committee Defendants acted in bad faith on this basis, either.

D. The Forfeited Units

Plaintiff argues that the Committee Defendants acted in bad faith by approving allocation of the Forfeited Units to the Founders, Bae, and Nuttall.[144]

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[143] *See also Trade Desk*, 2025 WL 503015, at *13 ("[M]ere recitation of the fact of past business or personal relationships will not make the Court automatically question the independence of a challenged director." (quoting *Orman v. Cullman*, 794 A.2d 5, 27 n.55 (Del. Ch. 2002)).

[144] Pl.'s Answering Br. at 55–62.

Plaintiff asserts that this, too, constituted waste, in part because the allocation diluted KKR's common shares.[145] But that is not reasonably conceivable. The Forfeited Units were already outstanding, and, like all Holdings units, had carried the right to convert Group Partnership units into common shares of KKR LP, then of KKR, since the 2010 IPO.[146] The total number of exchangeable KKR Group Partnership units did not change, so distributing the Forfeited Units caused no further dilution to KKR stockholders.[147]

Plaintiff also argues that the allocation constituted waste because the Committee Defendants approved it in exchange for no consideration, making it effectively a gift.[148] The KKR Defendants respond that the allocation could not have been a gift or waste because KKR did not own the Forfeited Units.[149] Holdings, not KKR, controlled the Holdings unit pool. And because the Founders controlled Holdings, they controlled the Holdings unit pool, too.

Plaintiff does not dispute that "KKR did not hold the forfeited KKR Holdings Compensation Units immediately before the Reorganization."[150] Plaintiff argues, however, that Holdings's control of those units was not absolute. Plaintiff cites public filings that say that the general partner of Holdings makes discretionary allocations

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[145] *Id.* at 57–58.

[146] Xu Aff. Ex. 45, at 3–4; Xu Aff. Ex. 42, Ex. A at 1, 4–5.

[147] Xu Aff. Ex. 45, at 3.

[148] Pl.'s Answering Br. at 59–60.

[149] KKR Defs.' Reply Br. at 27.

[150] Pl.'s Answering Br. at 57.

subject to the approval of KKR's board.[151] The KKR Defendants respond that this approval was really for "transparency and clarity," because the units were used to compensate senior KKR executives and KKR's board normally reviews such compensation.[152] This argument is not entirely persuasive, but the KKR Defendants are correct that the right to approve allocations does not mean KKR owned these units.

Ultimately, Holdings owned the Forfeited Units. KKR did not. "A claim of waste will arise only in the rare, 'unconscionable case where directors irrationally squander or give away *corporate assets*.'"[153] Plaintiff cites no case in which this court has found waste based on transfer of assets the company did not own. In *GoDaddy*, it was the company's TRA entitlement.[154] In *ODN Holding*, it was the company's business lines and products.[155] And in *Vogelstein*, it was stock options in the company itself.[156] The Forfeited Units were not KKR corporate assets. The Committee Defendants' approval of their allocation therefore was not waste.

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[151] *Id.* at 56.

[152] KKR Defs.' Reply Br. at 22–23.

[153] *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 74 (Del. 2006) (quoting *Brehm,* 746 A.2d at 263) (emphasis added).

[154] *GoDaddy*, 301 A.3d at 627.

[155] *Frederick Hsu Living Tr. v. ODN Hldg. Corp.*, 2017 WL 1437308, at *42 (Del. Ch. Apr. 14, 2017), *as corrected* (Apr. 25, 2017).

[156] *Lewis v. Vogelstein*, 699 A.2d 327, 329, 336 (Del. Ch. 1997).

Ultimately, the court evaluates a plaintiff's allegations holistically when determining whether it is reasonable to infer bad faith.[157] Even if aspects of Plaintiff's demand futility argument resonated, the Committee Defendants' actions, viewed holistically, do not rise to the level of bad faith. Overall, the facts alleged lead inescapably to the conclusion that the Committee Defendants heavily negotiated the Reorganization in the best interests of KKR.

III. CONCLUSION

Plaintiff has failed to meet its burden under the second prong of *Zuckerberg*. Plaintiff has not attempted to plead demand futility under *Zuckerberg's* two other prongs, so Plaintiff cannot demonstrate that demand was futile as to the Demand Board. All of Plaintiff's claims are derivative and subject to Rule 23.1. Because the Second Amended Complaint fails to plead demand futility as required by Rule 23.1, this decision does not reach the KKR Defendants' other arguments or Evercore's motion to dismiss. The KKR Defendants' motion to dismiss the Second Amended Complaint under Rule 23.1 is granted.

[157] *GoDaddy*, 301 A.3d at 631, 632.