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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE TESLA, INC. DERIVATIVE LITIGATION	No. 534, 2024 No. 10, 2025 No. 11, 2025 No. 12, 2025 Case Below: Court of Chancery of the State of Delaware C.A. No. 2018-0408-KSJM

ANSWERING BRIEF OF PLAINTIFF-BELOW/APPELLEE

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GLOSSARY OF TERMS

2009 Plan	Musk's 2009 compensation plan
2012 Plan	Musk's 2012 compensation plan
2024 Proxy	Tesla's April 29, 2024 proxy
2024 Vote	Tesla's June 13, 2024 stockholder vote
Ahuja	Former Tesla CFO Deepak Ahuja
Aon/Radford	Technical compensation advisor Aon plc.
ARK	ARK Investment Management LLC
Bebchuk	Harvard Law School Professor and Plaintiff's expert Lucian Bebchuk
Board	Tesla Board of Directors
Brown	Compensia Principal Tom Brown
Burg	Aon/Radford partner Jon Burg
Buss	Board member from November 2009 until June 2019 Brad Buss
Chang	Former Tesla Deputy General Counsel Jonathan Chang
Clawback Provision	Tesla policy clawing back compensation upon restatement of financial statements
Compensation Committee or Committee	Tesla's Compensation Committee
Compensia	Compensation advisor Compensia, Inc.
Defendants	Musk, Denholm, Gracias, Murdoch, Linda Johnson Rice, Buss, and Ehrenpreis

Denholm	Board member since August 2014 Robyn Denholm
Ehrenpreis	Board member since May 2007 Ira Ehrenpreis
FDS	Fully Diluted Shares
Fee Award	$345M fee award
Fee Petition	Plaintiff's March 1, 2024 Motion for an Award of Fees and Expenses
GDFV	Grant Date Fair Value
Gracias	Board member from May 2007 to October 2021 Antonio Gracias
Grant	Musk's 2018 compensation plan
Hold Period	5-year post-exercise prohibition on Musk selling newly-exercised shares
IDOB	Individual Director-Appellants' Opening Brief
Jackson	New York University Law Professor, former SEC Commissioner, and Plaintiff's expert Robert J. Jackson, Jr.
Kimbal	Board member since April 2004, and Musk's brother, Kimbal Musk
Leadership Requirement	Requirement for Musk to be "CEO or Executive Chairman and Chief Product Officer"
M&A Adjustment	Requirement to account for M&A impact on Grant's market capitalization milestones
Maron	Former Tesla General Counsel Todd Maron
Motion to Revise	Individual Defendants' June 28, 2024 Motion to Revise the Post-Trial Opinion

Murdoch	Board member since July 2017 James Murdoch
Musk	Elon Musk
Objectors	Amy Steffens, California Public Employees' Retirement System, David Israel, Kurt Panouses, and ARK Investment Management LLC
OOB	Objector-Appellants' Opening Brief
Op.	Jan. 30, 2024 Post-Trial Opinion (Ex. C to DD's Notice of Appeal)
Phillips	Former Tesla Associate General Counsel Phuong Phillips
Proxy or 2018 Proxy	February 8, 2018 Tesla proxy
R.Op.	Dec. 2, 2024 Opinion Awarding Attorney's Fees and Denying Motion to Revise the Post-Trial Opinion (Ex. B to DD's Notice of Appeal)
Steffens	Objector Amy Steffens
Taylor	Wharton School Professor and Plaintiff's expert Daniel Taylor
Tesla	Tesla, Inc.
TOS	Total Outstanding Shares
RPP	Amicus Curiae Brief of Current and Retired Practitioners and Professors in Support of Reversal
Special Committee	Tesla director Kathleen Wilson-Thompson
Texas	Amicus Curiae Brief of the Texas Association of Business in Support of Reversal
TOB	Tesla's Opening Brief
Wilson Sonsini	Wilson Sonsini Goodrich & Rosati

NATURE OF PROCEEDING[1]

On this appeal, Defendants fault the trial court's application of the entire fairness standard of review to the Tesla Board's award of the largest pay package in human history to Musk. The Chancellor's 200-page post-trial Opinion—which scrupulously applies well-settled Delaware law to its careful factual findings following a full merits trial and consideration of thousands of exhibits and dozens of live witnesses and deposition transcripts—speaks for itself.

In their opening briefs, Defendants argue that transaction-specific control does not exist; that even if it does, Musk did not exercise it over the Grant; that even if he did, transaction-specific control should not trigger entire fairness review; and that a board-majority did not lack independence from Musk.

Defendants' argument—not raised below—that transaction-specific control cannot invoke entire fairness defies long-standing Delaware law, recently confirmed by this Court in *Oracle*. And the trial court's finding that Musk controlled the Grant—based on meticulous and logical post-trial fact-finding—is not clearly erroneous.

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[1] Unless otherwise noted, all emphasis is added; internal citations and quotation marks are omitted.

Although the trial court did not need to (and thus did not) decide general control given the transaction-specific control doctrine, the trial court's control-related factual findings fully support a finding that Musk generally controlled Tesla.

Ironically, notwithstanding the extensive arguments put forward in *nine* briefs in support of reversal, nowhere will the Court find Defendants' concession to the trial court that "*if this Court finds a material disclosure deficiency, it should review the transaction for entire fairness*."[2] The trial court found several material disclosure deficiencies and, therefore, for that additional reason, correctly applied the entire fairness standard. If those disclosure findings stand—and they should—*this Court need not reach issues of control.* The Grant proxy was materially misleading and omissive, and that alone justifies affirming the trial court's application of entire fairness. Although the findings on control are fully supported by the record and careful legal analysis, this appeal can be resolved without reaching them.

Similarly, the trial court's application of entire fairness is sound. The trial court's careful analysis, built on extensive factual findings, clearly supports the conclusion that Defendants failed to prove entire fairness.

Defendants' challenge to the trial court's rescission remedy fails because they never timely or directly objected to rescission as legally improper, they identify no

[2] A1737.

legal error in the trial court's decision, and they failed to carry *their* burden of identifying an alternative remedy.

As to Defendants' ratification argument, the trial court correctly found it procedurally barred. Even if injecting Defendants' newly-created evidence manufactured a year and a half after trial—and months after the Opinion—was procedurally proper (it is not), their "ratification" theory has no basis in Delaware law. Defendants' counsel conceded that their theory is not time-bound and would apply to this Court's rulings, meaning Tesla stockholders could simply overrule this Court's opinion even if this Court affirmed the trial court unanimously *en banc*.[3]

Whatever one makes of Defendants' policy arguments, stockholders of Delaware corporations lack the power to overrule *this Court's* decisions. Otherwise, no judgment would ever be "final" and Delaware courts—including this one—would be limited to issuing advisory opinions. As Lord Coke opined over four hundred years ago: "[I]f there should not be an end of suits, then a rich and malicious man would infinitely vex him who hath right by suits and actions."[4] Our judicial system is not an Athenian democracy, and this Court should not abandon its responsibility as the final authority on Delaware law.

[3] A3697-A3699, Tr. 55:14-57:1.

[4] *Ferrer v. Arden* (1598) 77 Eng. Rep. 263, 266; 6 Co. Rep. 7 a (Eng).

Finally, the trial court grounded its fee decision in live and affidavit testimony from accomplished academics. That testimony supported the court's conclusion that this litigation created a quantifiable benefit—reversing the dilutive effect of the Grant shares—worth approximately $51 billion as of the January 30, 2024 post-trial liability decision. R.Op. 96. Although the trial court recognized precedent supporting the request made, it exercised its discretion—guided by this Court's decision in *Dell*—to reduce the request by *roughly 95%*, representing just 0.6% of the benefit created. To avoid a windfall, the trial court awarded 15% of the $2.3 billion reversed accounting charge that Tesla took in connection with the Grant, acknowledging that *this figure significantly understated the value created by the litigation*. Still, it awarded a fee well within the bounds of *Americas Mining* even though the benefit conferred here was approximately *38x* higher.

The headline value of the fee award in dollar terms obscures the reality: it is substantially *smaller* than *Americas Mining* in inflation-adjusted dollars and roughly *half* that award on an hourly basis under the *Sugarland* crosscheck. The trial court's exercise of discretion was sound. The award is neither unprecedented nor a windfall and should be affirmed.

SUMMARY OF ARGUMENT

1. Denied. The trial court correctly concluded that entire fairness was the appropriate standard of review regarding the Grant based on factual findings that were not clearly erroneous. This Court can affirm because entire fairness applies to the Grant for at least five independent reasons: (i) Musk exercised transaction-specific control over the Grant; (ii) at least half the Tesla directors who voted on the Grant lacked independence from Musk; (iii) Musk exercised general control over Tesla; (iv) the Compensation Committee lacked independence from Musk; and (v) the Proxy was false and misleading. Defendants' efforts to de-escalate the standard of review to business judgment based on the uninformed vote of Tesla stockholders and affirmative vote of conflicted directors contravenes settled law for obvious reasons.

2. Denied. The trial court concluded, based on the voluminous evidentiary record, that Defendants failed to carry their burden to prove the Grant's entire fairness. The trial court's factual findings that (i) Musk controlled the initiation and timing of Grant negotiations, (ii) the Compensation Committee was conflicted and failed to engage in arm's-length, adversarial negotiations with Musk over the Grant, and (iii) a majority of Tesla directors who voted on the Grant were beholden to Musk or had compromising conflicts, were not clearly erroneous. Likewise, the trial court correctly concluded that Defendants failed to prove that the

Grant fell within a range of fairness. Indeed, Defendants elected not to identify *any* purported "range of fairness" for the Grant.

3. Denied. The trial court properly exercised its discretion in rescinding the Grant. As a threshold matter, Defendants failed to preserve the issue below by not timely objecting to rescission until after post-trial briefing. Regardless, relying on precedent, the trial court appropriately exercised its discretion in rescinding the Grant. Defendants' failure to carry their burden to identify an alternative remedy in pursuit of an "all-or-nothing" strategy is no basis to overturn the trial court's proper exercise of discretion.

4. Denied. The trial court correctly found Defendants' motion to revise the post-trial opinion procedurally barred. The trial court also properly rejected Defendants' ratification arguments. Ratification is an affirmative defense that Defendants failed to raise until after trial and which Defendants based on evidence newly created by Tesla, making it both procedurally improper and untimely. Additionally, neither law nor logic supports Defendants' novel and boundless ratification theory, which would render decisions of Delaware trial courts and this Court mere advisory opinions. The ratification vote was also based on a materially false and misleading proxy, was undermined by coercion and failed to comply with *MFW*.

5. Denied. As a threshold matter, Objectors' arguments are entirely duplicative of those made by Defendants. And Objectors lack standing to object to the Fee Petition, as they are neither "person[s] from whom payment is sought" (Defendants are) nor "person[s] with standing to object to a proposed dismissal or settlement" (there was no dismissal or settlement) under Court of Chancery Rule 23.1(e)(2). Objectors' arguments respecting Plaintiff's adequacy are waived—they never sought this relief below—and fail to carry Objectors' very difficult burden. Regardless, this Court need not reach the merits of Objectors' adequacy argument if it finds the fee award appropriate and correctly affirms the trial court's rejection of Tesla's ratification argument.

6. Denied. The trial court did not abuse its discretion in awarding Plaintiff's counsel fees in consideration for a $51 billion benefit conferred on Tesla via total victory at trial. After considering the evidence, including live expert testimony, the trial court exercised its sound discretion in awarding a fee based on proper application of the *Sugarland* factors and analysis of relevant policy considerations articulated in this Court's *Americas Mining* and *Dell* decisions. The result was a fee award 95% smaller than what Plaintiff's counsel initially requested, 50% smaller than what the trial court found could have been justified, and significantly below the implied hourly rate and time-and-expenses multiple approved by this Court in *Americas Mining*.

STATEMENT OF FACTS

A. Pre-Trial Factual Background

1. Musk Exercises Outsized Influence Over Tesla

"Musk wield[ed] unusually expansive managerial authority" "over all aspects of Tesla and often without regard to Board authority, rendering Tesla highly dependent on him." Op. 116-17, 120. He "occupied the most powerful trifecta of roles within a corporation" at all relevant times: Board chairman, CEO and founder. Op. 9, 12, 116. "Tesla's entire corporate strategy is Musk's brainchild—he conceived both the 'Master Plan' and 'Master Plan, Part Deux.'" Op. 117. "Musk is Tesla's public face, and he describes Tesla as 'my company.'" *Id.* (quoting A922, 625:22-626:21).

Musk "clarified his intentions at the time and at trial: Musk is committed, Tesla forever." Op. 161. He "stat[ed] unequivocally" that "he would have remained at Tesla even if stockholders had rejected a new compensation plan because he was 'heavily invested in Tesla, both financially and emotionally, and viewed Tesla as part of his family.'" Op. 38 (quoting A927, 643:24-644:15). Trial witnesses testified that Musk never said he had any plans to quit Tesla, had no intention to resign, and the Board had made no effort to identify his successor. Op. 38-39. Musk publicly confirmed: "I intend to be actively involved with Tesla for the rest of my life." Op. 38 (A4030 at 20).

2. Musk Controlled the Board and Compensation Committee

Tesla's entire Compensation Committee—Ehrenpreis (chair), Gracias, Denholm, and Buss—were beholden to Musk.

Ehrenpreis conceded his relationships with Musk and Kimbal—which span two decades—had a "significant influence on his professional career." Op. 21 (citing B1753-B1760, 59:17-66:4 and quoting A757, 192:6-10). Ehrenpreis had been a Tesla director since 2007, which had "been a real benefit in fundraising" for his funds, and "nett[ed] over $200 million" from selling "less than a quarter" of his Tesla options, which he admitted was material to him. Op. 21 (citing A757, 192:15-18; A760, 202:8-204:11). Ehrenpreis "invested tens of millions of dollars in Musk-controlled companies," including SpaceX, which he otherwise could not have accessed, and held "interests worth at least $75 million in Musk-controlled companies other than Tesla" prior to the Grant. Op. 21, 125.[5] Ehrenpreis has known Kimbal since 1999 (and Musk for over 15 years), attended Kimbal's wedding in Spain, and invested in Kimbal's private companies. Op. 21-22 (citing A758, 193:13-23; B1742, 48:11-18, B1753, 59:9-10).

Gracias amassed "dynastic or generational wealth" by investing in Musk's companies. Op. 25-26 (quoting A959, 774:22-24). An early Paypal investor, Gracias—through his fund, Valor—"netted billions of dollars by investing in

[5] *See also* Op. 21-22 (citing A460-A461, ¶¶92-95; B3140-B3141, 392:24-393:16).

Musk's companies," often investing solely at "Musk's personal invitation." Op. 25-26 (citing, *e.g.*, A958, 767:14-15, 769:14-770:19, A959, 771:20-772:4; A463, ¶115)). As of 2021, Gracias held Tesla stock worth approximately $1 billion. Op. 26. Gracias, who was a director at several Musk companies, "touted endorsements from Musk in marketing his own fund" and both Musk brothers invested "in Gracias's ventures." Op. 26-27 (citing, *e.g.*, B3537, A944-A960, 713:11-775:22).

Gracias had also been "close friends" with Musk and Kimbal for decades, spending holidays and dozens of vacations together with their families—including trips to Africa, the Bahamas and Europe—and attending each other's family events, including weddings and birthdays. Op. 27-28, 123-24 (citing, *e.g.*, A955-A956, 757:14-762:15). Gracias invested in Kimbal's businesses and Musk and Kimbal, in turn, invested millions of dollars in Valor. Op. 26-28.

Denholm had been a Tesla director since 2014. Op. 24. She "derived the vast majority of her wealth" from Tesla director compensation, including approximately $280 million—a "life-changing" amount—from selling "some of [her] Tesla options" in 2021 and 2022. Op. 24-25, 125 (quoting A839, 397:6–12). Denholm became Tesla's Board Chair in connection with Musk and Tesla's settlements with the SEC relating to his "funding secured" tweet in November 2018. Op. 93-94. Despite accepting significant responsibilities for overseeing Musk under that settlement, Denholm neither knew nor understood those responsibilities and

apparently did little, if anything, to execute them, instead deferring to Musk. Op. 94-95 (citing, *e.g.*, A833-A835, 375:9-382:12); Op. 126 n.645.

Buss had been a Tesla director since 2009 and served as SolarCity's CFO from 2014 to 2016. Op. 22-23. Roughly 44% of his net worth—"a large portion of his wealth"—came from Musk entities, including $17 million in Tesla director compensation and $24 million from selling Tesla shares he received as pay. Op. 23-24, 125 (citing, *e.g.*, B1187, ¶26; A1191-A1195, 1409:13-1427:13).

Murdoch—the Compensation Committee on the Grant and voted to approve it[6]—has invested over $70 million in SpaceX, including through his private-investment company, which constituted his primary professional endeavor. Op. 29 (citing A978, 849:16-850:18). Murdoch's close friendship with Musk included family vacations to the Bahamas, Mexico, and Israel in 2016-2018. Op. 28 (citing A978, 849:16-850:11). During one such trip—which Gracias and Kimbal also attended—Musk decided to invite Murdoch onto Tesla's Board. Op. 28. Murdoch is also longtime friends with Kimbal and attended his wedding in Spain. Op. 29 (citing A978, 850:19–24).

3. Musk Proposes the Grant and Dictates the Timing

Before the Grant, Musk received two equity-based compensation plans: the 2009 Plan and the 2012 Plan. Op. 16. By 2017, Musk had achieved six of the 2012

[6] Op. 28-29, 126.

Grant's ten milestones. Op. 19. "By this time, Musk had accumulated beneficial ownership of 21.9% of the outstanding shares of Tesla common stock through his early investments and the two prior grants." *Id.*

On an April 9, 2017 call with Ehrenpreis, Musk proposed the Grant's fundamental structure and size, which included tranches tied to $50 billion market capitalization milestones and conferring 1% of Tesla's shares per tranche—representing a possible award of 15% of Tesla's outstanding shares. Op. 30-31, 134.

Ehrenpreis immediately spoke with Maron, "Musk's divorce-attorney-turned-general-counsel" "whose admiration for Musk moved [him] to tears during his deposition." Op. 167-68. Maron "owed his career to," "had genuine affection" for, and "was totally beholden" to Musk. Op. 35.

Maron enlisted other Tesla employees, including his direct reports Chang and Phillips. Op. 31, 36. "Maron's team began analyzing Musk's initial proposal on April 10, roping in Tesla's legal counsel at Wilson Sonsini" and "lining up compensation consultants." Op. 37. Maron proposed retaining Compensia, whom Tesla had engaged in connection with the 2009 and 2012 Grants. Op. 37.

The Board was not advised that a new compensation plan for Musk was in the works until a June 6, 2017, Board meeting—chaired by Musk—where the discussion was "brief and, apparently, forgettable." Op. 39. On June 18, Maron emailed the

Compensation Committee stating: "*We* would like to…discuss Elon's next stock grant." Op. 40 (quoting B0423).

The Compensation Committee first discussed the plan at the June 23 meeting, even though Tesla had been modeling Musk's compensation plan for months. Op. 42. By then, Maron's team had already prepared an aggressive timeline—the work was to be done "by July 17 or 24." Op. 40, 43; B0431. Ehrenpreis was "aligned on the plan and timing" and never questioned the approach. Op. 40, 129-30. When Compensia pushed back on the "recklessly fast"[7] timeline, Ehrenpreis responded, "this is the timeline we are working with." Op. 44 (citing A1210-A1211, 1487:21-23, 1488:3-21).

At the June 23 Compensation Committee meeting, the Committee did not review "any proposed terms for a compensation plan," but was "told to be prepared to approve it in July." Op. 43-44. The message was clear: "move at full tilt." Op. 44. That same day, Ehrenpreis formed a working group comprising Gracias, Ehrenpreis, Maron, Chang, Phillips, Tesla's CFO Ahuja, Compensia's Tom Brown, Aon/Hewitt's (Tesla's compensation advisor) Jon Burg, and Wilson Sonsini attorneys. Op. 45. Denholm and Buss "were optional [Working Group] attendees." *Id.*

[7] Op. 47, 129.

4. The Committee Fails to Ask Key Questions and Tesla Backs into Achievable Operational Milestones

On July 6, before the Committee ever discussed the substance of Musk's compensation plan, Musk—through Maron—decelerated the timeline from a July completion date to August or September. Op. 47-48.

On July 7, the Committee reviewed for the first time the Grant terms Musk proposed in April. Op. 48. The presentation given to the Committee only included a valuation for Musk's proposal and not for any alternative compensation packages. Op. 49. It also omitted "a traditional benchmarking study." Op. 50, 142. Indeed, the Committee *never* received any benchmarking analysis,[8] which compares the proposed compensation plan to other plans, is "foundation[al]" to the development of any compensation plan, and, as Defendants' trial "witnesses agreed…is typical and critical."[9]

The Committee failed to discuss other critical issues concerning Musk's compensation plan. It never considered whether his pre-existing 21.9% Tesla

[8] Op. 140 (citing A1204, 1461:10-1462:6).

[9] Op. 141 (citing, *e.g.*, A1067, 1058:7-1059:18 (testifying that compensation advisors provide benchmarking data to "fulfill their responsibilities"); *id.* at A1167-A1168, 1313:10-1319:3 (confirming that competitive pay analysis is "industry standard" in advising clients on executive compensation as it "provides a critical benchmark"); *id.* A1167, 1315:2-16 ("testimony stating benchmarking is 'what every compensation consultant will do.'"); *id.* at A1204, 1461:10-1462:4 (stating that Compensia typically provides benchmarking to its clients).

ownership sufficiently incentivized him, despite the issue being raised during an August 1, 2017 meeting. Op. 43, 57-58, 178-79. And it never asked Musk to make a time commitment to Tesla in connection with the Grant (Op. 6, 58 (A744-A745, 140:4-141:1)), notwithstanding that he was only a part-time Tesla employee. *See* Op. 13-14 & n.51; A1463-A1464.

In late July 2017, Musk told Maron to put the process "on hold," and "progress on Musk's compensation plan had slowed to a halt." Op. 56-57.

On September 8, Ehrenpreis and Denholm spoke to Musk about his compensation plan, but "the most notable aspect of this conversation concerns a question that went undiscussed." Op. 58. Although the script for the call included a discussion of whether "some type of commitment [should] be included as part of comp structure," no one "deliberated over it," it did not "appear[] in any Board or committee materials," and "no one raised this issue with Musk." Op. 58-59 (quoting B0510), 140; A831-A832, 367:19-368:1; A747, 150:11-21). According to Musk, the issue "was not raised in this compensation structure" because the idea was "silly." Op. 59.

During August and September—while the Committee remained substantially idle—Ahuja and the working group "gave some thought" to operational milestones. Op. 60-61. Ehrenpreis tried to remove the operational milestones from the Grant, but Maron and Ahuja insisted they were necessary for "accounting reasons." Op. 36

& n.187, 71-72. Ahuja "started with" the $50 billion market capitalization milestones that Musk established and backed into revenue and EBITDA targets. Op. 72. Tesla targeted operational milestones that would be "achieve[d]…roughly once every 12 to 15 months over the next 3 years." Op. 46-47 (quoting B0436); *see also* A1075, 1091:5-20. The operational and market capitalization milestones were engineered "to be somewhat aligned" and "to be achieved at around the same time[.]" Op. 72 (quoting A1076, 1094:7-1095:14).

5. Musk Negotiates Against Himself; the Committee Never Engages in Arm's-Length Negotiations

On November 9, Musk renewed compensation discussions, telling Maron: "I'd like to move forward with that now, but in a reduced manner from before." Op. 62 (quoting B0650). Musk revised his original Grant proposal—*i.e.*, 15 tranches for 15% of Tesla's total outstanding shares ("TOS")—to 10 tranches for a "10% increment in [his] Tesla ownership," on a fully diluted share ("FDS") basis, which would factor the Grant into the amount of Tesla's outstanding shares. Op. 62-63 (quoting B0645). Musk stated: "I'd like to take board action as soon as possible." Op. 63 (quoting B0645). Ehrenpreis relayed Musk's new ask to the Board during a November 16 meeting. Op. 63.

Musk's proposal prompted renewed urgency. The Board directed the Committee and management to develop revenue and EBITDA operational milestones. Op. 71. Ahuja took the already achievable operational milestones

developed in September and, by December 10, made them even easier to achieve, modeling a 10% EBITDA/revenue ratio, on the low end of peers. Op. 71-72. "Tesla ultimately based the Grant's EBITDA milestones on an 8% EBITDA/revenue margin, making them even easier to achieve." Op. 72.

The Board also projected Tesla would likely soon achieve many of the Grant's milestones. Tesla had one set of internal projections, which "were developed in the ordinary course, approved by Musk and the Board, regularly updated, shared with investment banks and ratings agencies, and used by the Board to run Tesla." Op. 73, 186. "Several Tesla executives affirmed their quality, accuracy, and reliability" at trial. Op. 185. In early December 2017, Musk approved Tesla's projections. Op. 73. The one-year projections underlying Tesla's operating plan predicted achievement of three milestones in 2018 alone; the three-year projections reflected that Tesla would achieve seven and eleven operational milestones by 2019 and 2020, respectively. Op. 73. The Board reviewed and approved Tesla's then-current operating plan and projections on December 12, 2017, and the projections were sufficiently reliable that Tesla "shared [them] with investment banks and rating agencies in connection with a debt offering." Op. 73, 84-85, 186.

On December 1, Maron informed Musk that Musk's November 16 proposal (10 tranches for 10% of Tesla's FDS including dilution from the Grant)

unintentionally increased his demand.[10] Musk told Maron to "go with 10% of the ***current*** FDS number" (*i.e.*, excluding the Grant from the FDS calculation), resulting in fewer shares. Op. 65. In Musk's own words, this proposal was "me negotiating against myself." Op. 66 (quoting B3491, 263:2-4).

On December 10, the Committee approved a Grant with 12 tranches for 12% of Tesla's TOS—essentially matching Musk's December 1 proposal of 10% of current FDS—because the "Board preferred to measure the Grant by total outstanding shares for simplicity's sake," not because "it was better for the minority stockholders." Op. 70. Chang's notes from the December 10 meeting explained: "We seem to be at the right place as far as size: *10% of FDS (~12% of TOS)*...Agreed to 12 tranches of 1% each." Op. 69 (citing B4448).

Ehrenpreis, Gracias, and Maron all viewed the process as collaboration with Musk, not arm's-length negotiation. Op. 144. In their own words:

- **Ehrenpreis**: "*We were not on different sides of things.* We were trying to make sure if we were going to go through this exercise that he was on board." Op. 145 (quoting B2887-B2888, 139:18-140:3).
- **Gracias**: "*We never engage[d] in these positional negotiations*." Op. 145 (quoting A968, 808:16-809:14).
- **Gracias**: "*I did not have a negotiation starting lower and going higher with [Musk] about the tranches or the size of the award*." Op. 145 n.729 (quoting B2191-B2192, 244:25-245:20).

[10] Op. 65. Given the Grant's size, 10% of Tesla's FDS (including the Grant) was more shares than 15% of Tesla's TOS. *Id.*

- **Maron**: "*It was a cooperative, collaborative process*." Op. 146 (quoting B2432-B2434, 100:2-102:11).

The Committee neither attempted to identify the smallest package that would "adequately incentivize" Musk nor considered the lowest amount he "would take" or the maximum amount the Committee was willing to provide.[11]

Nor did the Committee propose or pursue any mechanism "to keep Musk engaged in Tesla despite his significant time commitments at his other companies," such as requiring Musk to spend time at Tesla or less time at other companies. Op. 139-40 (citing A822, 328:9-24; B1543-B1544, 292:1-293:20; B2799, 51:6-13).

6. The Committee Finalizes—and the Board Approves—the Grant

After the December 12 Board meeting, the key Grant terms were finalized. Op. 74. What remained were the so-called "constraints"[12] on Musk—the Clawback Provision, Leadership Requirement, Five-Year Hold Period, and M&A Adjustment—which were neither negotiated nor truly "constraints."

The only back-and-forth concerned the M&A Adjustment, which excluded certain large acquisitions when measuring the market capitalization milestones.

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[11] *See, e.g.*, A963, 787:24-791:2, 790:19-22 (Gracias could not "recall any negotiations regarding the total number of shares achievable under the grant"), 790:23-791:2 (Gracias could not "remember anybody ever proposing to Mr. Musk that he receive less than 1[%] of Tesla per tranche").

[12] *See* IDOB 8.

Op. 50, 75, 138. The M&A Adjustment was industry-standard and irrelevant because Tesla would not "be making big acquisitions." Op. 4, 50, 76-77, 138, 166-67 (quoting B0654-B0655). "Musk himself conceded that this was at most a minor feature of his compensation plan that he did not care about." Op. 138 (citing B0654-B0655 and B0657). The Leadership Requirement was *less restrictive* than the 2012 Grant, which conditioned vesting on Musk remaining CEO. Op. 74, 166. This time, the Board *lowered* the bar, allowing vesting if Musk was not CEO but remained Executive Chairman and Chief Product Officer. Op. 74-75, 139. The Grant includes no "guardrails on how much time or energy Musk had to put into Tesla" or any "restriction on the amount of time and attention [Musk] could devote to companies other than Tesla[.]" Op. 139, 182.

The Five-Year Hold Period was also not negotiated— Ehrenpreis raised it as a "creative option" to increase the likelihood of stockholder approval by achieving "a bigger discount" on the Grant's publicly disclosed GDFV. Op. 50 (quoting B0439 at 10), 54-55, 78 (quoting B0469-B0470).[13] The Clawback Provision was equally toothless, requiring forfeiture only if Tesla restated its financials—the bare minimum under existing Tesla policy. Op. 49, 166.

[13] This was perceived as desirable, in part, because it allowed Tesla to expense compensation charges as Musk became probable to achieve a Grant target.

On January 21, 2018, the Board approved the Grant, consisting of twelve tranches, each vesting upon satisfaction of any one of twelve market capitalization milestones paired with any one of sixteen operational milestones.[14] Each tranche entitled Musk to options to purchase 1% of Tesla's TOS as of January 19. Op. 81. The total option amount purposefully corresponded to Musk's December 1 ask for 10% of Tesla's then-current FDS.

The Grant had "a $55.8 billion maximum value and $2.6 billion [GDFV]." Op. 1, 189. The $2.6 billion GDFV—which accounts for the probability of achieving (or never achieving) the Grant's milestones—"was 33x larger than Musk's 2012 Grant's $78M [GDFV]." Op. 189.

7. The False and Misleading Proxy

To secure approval from a majority of disinterested stockholders, Tesla filed the Proxy on February 8, 2018. Op. 82. The Proxy was materially false and misleading.

First, the Proxy falsely and repeatedly described all Compensation Committee members as "independent directors" and omitted their financial and personal connections with Musk. Op. 82-83, 150-52.

Second, the Proxy's description of the process was omissive and materially misleading:

[14] Op. 80-81.

> [T]he Board engaged in more than six months of active and ongoing discussions regarding a new compensation program for Mr. Musk, ultimately concluding in its decision to grant the CEO Performance Award. These discussions first took place among the members of the Compensation Committee…, all of whom are independent directors, and then with the Board's other independent directors…Linda Johnson Rice and James Murdoch.

Op. 83 (A4099 at 10).

That description omitted, among other things, the April 9, 2017 conversation between Musk and Ehrenpreis in which *Musk* proposed the Grant's key terms. Op. 83, 154-55. That information was sufficiently material to have "appeared in at least four earlier drafts of the Proxy." Op. 83, 154. And the Proxy's statement that Grant discussions "first took place" among Committee members was false—trial showed that the Committee did not discuss the Grant until months *after* Musk proposed the Grant's structure and terms to Ehrenpreis. Op. 30-42.

Third, the Proxy misleadingly described the Grant's milestones as "very difficult to achieve," "stretch goals," "ambitious," and "challenging." Op. 83 - 84. In reality, the Board knew that at least three operational milestones were greater than 70% probable of achievement within approximately one year of the Grant date, with several more probable of achievement shortly thereafter.

Tesla's December 2017 and March 2018 projections both predicted achievement of at least three milestones within one year after Grant approval. *See* Op. 84-85. In April 2018, the Audit Committee—*i.e.*, Gracias, Denholm, and

Buss—relied on those projections in deeming three milestones probable of achievement (*i.e.*, "> 70% probable") within a year of the Grant. Op. 88-91, 186 (citing, *e.g.*, B0902, B0923)). Tesla thus began recognizing compensation expense for the first three tranches as of the March 21, 2018 stockholder vote. B3629; B0785; B1046; A988, 889:12-890:12.

Fourth, the Proxy omitted Musk's competing interests outside of Tesla. The Court deferred its factual finding regarding this disclosure violation but found it "likely material." Op. 156 n.775. As of the Grant date, Musk was actively engaged with SpaceX, The Boring Company, Neuralink, and OpenAI, spending roughly half his time working for Tesla. Op. 14 (citing A931, 661:7-15, A908, 568:16-569:9; B1222).[15] The Proxy vaguely mentions Musk's "other business interests" once, and never mentions SpaceX, Neuralink, The Boring Company, or OpenAI, much less Musk's roles and obligations at these companies. A4121.

8. The Grant is Approved; Tesla Hits its Projections and Musk Makes Billions

Both ISS and Glass Lewis recommended against the Grant, criticizing its size—ISS called it "staggering" and Glass Lewis said "any relative comparison of the grant's size would be akin to stacking nickels against dollars[]"—and deeming it unnecessary given Musk's existing Tesla stake, while also raising concerns about

[15] *See also* A964, 793:13-794:14; *id.* at A983, 868:9-869:13.

his outside interests. Op. 86-87. Stockholders likewise criticized the Grant, noting Musk's pre-existing equity already provided "sufficient motivation." Op. 87. After Maron told Musk two large stockholders were voting against the Grant due to its excessive size, Musk directed Maron to arrange a call where Musk would "convince them to divest from Tesla and any of [his] companies ever. They are not welcome." Op. 88 (quoting B0744-50).

Stockholders approved the Grant on March 21, 2018, with 73% of votes cast in favor. Op. 88.

The Grant began vesting in 2020 and Tesla's business soared as projected. Op. 92. As early as October 31, 2017, the Board knew that the Model 3 was about to hit the "steep portion" of the manufacturing S-curve, driving "non-linear production growth[.]" Op. 62 (quoting B0632). Tesla hit the first three milestones, consistent with its projections, by September 30, 2020. Op. 186 (citing A485, ¶¶265–71). Four tranches vested by the end of 2020; three more vested in 2021. Op. 92. By April 29, 2022, eleven tranches had vested. By January 2023, all 303,960,630 options were vested and in-the-money. R.Op. 6, 9.

B. Post-Trial Factual Background

1. The Trial Court Rescinds the Grant

Plaintiff filed this Action on June 5, 2018. Op. 97. A "knockdown, drag-out lawsuit ensued." R.Op. 6. The November 14-18, 2022 trial included 1,704 exhibits,

live testimony from nine fact and four expert witnesses, video testimony from three fact witnesses, deposition testimony from 23 fact and five expert witnesses, and 255 stipulations of fact. Op. 8, 101.

"Plaintiff achieved total victory," with the trial court rescinding the Grant to remedy Defendants' loyalty breaches. R.Op. 9. The trial court concluded that Musk controlled Tesla "[a]t least as to this transaction," and thus entire fairness applied. Op. 2. The court also found that the stockholder vote—a condition precedent to the Grant's effectiveness—was premised on a materially misleading Proxy, requiring Defendants to prove the Grant's entire fairness. Op. 3, 82-86.

The Court found that the process leading to the Grant was "deeply flawed." Op. 3. Among other things, the Board and Compensation Committee were beholden to Musk and acted with a controlled mindset, "there was no meaningful negotiation over any of the terms of the" Grant, and work on the Grant occurred "under significant time pressure imposed by Musk." Op. 3-4. Defendants likewise failed to prove fair price because Musk's existing ownership stake "gave him every incentive to push Tesla to levels of transformative growth," he "had no intention of leaving Tesla," and the milestones under the Grant were not "ambitious or difficult to achieve." Op. 6. Further, "the Compensation Committee did not ask its advisors to provide a traditional benchmarking analysis, which would have given them some perspective on how (in Musk's words) 'really crazy' the Grant was," *because* "they

knew benchmarking would expose the Grant as many multiples larger than any conceivable comparison." Op. 167.

2. Musk Directs the Board to Redomesticate Tesla; the Board Seeks to "Ratify" the Grant

Immediately after the trial court issued the Opinion, Musk attacked Delaware on social media and declared that Tesla would "move immediately to hold a shareholder vote to transfer state of incorporation to Texas." R.Op. 11. The Board obliged, promptly forming a two-person committee to consider Musk's proposal and ultimately whether the Grant "should be ratified" simultaneously. R.Op 11. One member subsequently stepped down given personal ties to Musk. R.Op. 11-12.

Meanwhile, Plaintiff's counsel moved the case towards finalization, filing the Fee Petition on March 1, 2024.

The Board filed the 2024 Proxy on April 29, 2024, recommending that stockholders "ratify" the same Grant the post-trial Opinion rescinded (the "2024 Vote"), stating the Board did "not agree with what the Delaware Court decided" and intended to "*fix* the issue." B3939 at Letter to Stockholders; R.Op. 15.

Plaintiff filed expedited motions to preserve the Court's judgment and jurisdiction.[16] Given Tesla's assurances that the Opinion was a "final judgment on

[16] *See* A1800, A1816, B3912, B3929.

the merits,"[17] and that "ratification" "would [not] 'interfere with this Court's…ability to enter a final judgment so that the case may be appealed,'"[18] the Court denied those motions, without prejudice.

3. Tesla and the Director Defendants Seek to "Revise" the Opinion

On June 7, 2024, Defendants and so-called "objectors" opposed Plaintiff's Fee Petition.[19] Tesla stockholders approved the reclassification proposal on June 13, 2024. R.Op. 13. On June 28, Defendants filed the Motion to Revise, claiming the 2024 Vote ratified the Grant and requesting that the trial court enter judgment for Defendants. R.Op. 14. The trial court heard argument on the Fee Petition and Motion to Revise on July 8 and August 2, respectively. R.Op. 14.

The trial court's December 2, 2024 Ratification Opinion rejected Defendants' efforts to "ratify" the Grant, concluding that (i) Defendants had no "procedural ground" to reverse an adverse post-trial decision by creating post-trial evidence, (ii) Defendants did not timely raise the affirmative defense of common-law ratification, (iii) a stockholder vote alone cannot ratify a conflicted-controller transaction, and (iv) the 2024 Proxy contained multiple, material misstatements.

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[17] A2278.

[18] A2279 (quoting A1833 at 5-6).

[19] R.Op. 15 n.75, 41-42. "Objectors"—Amy Steffens, joined by CalPERS and David Israel and Kurt Panouses (joined by ARK)—also sought fees and expenses. B4411.

R.Op. 1-2.[20] Also on December 2, the trial court declined to extend standing to the "objectors," but granted their motions to intervene "for the limited purpose of allowing them to appeal [the] December 2 Letter Opinion denying them standing and rejecting their Rule 23.1 challenges to Plaintiff's adequacy." B4411; B4415.

[20] Having concluded the 2024 Vote was not fully informed, the trial court did not reach coercion notwithstanding Plaintiff's compelling showing thereof. R.Op. 41.

ARGUMENT

I. THE TRIAL COURT DID NOT CLEARLY ERR IN ITS FACTUAL FINDINGS TRIGGERING APPLICATION OF THE ENTIRE FAIRNESS STANDARD

A. Question Presented

Did the trial court commit clear error in weighing the trial evidence and finding that the entire fairness standard of review applied to the Grant?

B. The Standard and Scope of Review

The trial court's decision to apply entire fairness to the Grant implicates questions of law and fact, as "the control question is a judicial conclusion that is reached after a fact specific analysis." *In re Oracle Corp. Deriv. Litig.*, ---A.3d---, 2025 WL 249066, at *13 (Del. Jan. 21, 2025). Although "[t]he Court of Chancery's legal conclusions are reviewed *de novo*," the "deferential 'clearly erroneous' standard applies to findings of historical fact," including findings of both "historical facts that are based upon credibility determinations" and those "that are based on physical or documentary evidence or inferences from other facts." *RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816, 849 (Del. 2015).

The Court does not weigh evidence on appeal. *Arrants v. Home Depot*, 65 A.3d 601, 605 (Del. 2013). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *RBC*, 129 A.3d at 849. The trial court's "factual findings will be accepted if they are sufficiently supported by the record and are the product of an orderly and logical

deductive process." *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1385 (Del. 1995).

C. Merits of the Argument

1. The Trial Court's Fact-Intensive Finding of Transaction-Specific Control Is Not Clearly Erroneous

The trial court's finding that Musk controlled the Grant is based on well-established law and sound factual findings.

"To streamline the sprawling set of issues presented," the trial court's analysis focused on transaction-specific control, which examines whether the potential controller "exercise[d] actual control over the board of directors during the course of a particular transaction[.]" Op. 109 (quoting *In re W. Nat'l Corp. S'holders Litig.*, 2000 WL 710192, at *20 (Del. Ch. May 22, 2000)). As the trial court correctly noted, "transaction-specific control call(s) for a holistic evaluation of sources of influence" as "[d]ifferent sources of influence that would not support an inference of control if held in isolation may, in the aggregate, support an inference of control." Op. 109-10. The Court also recognized: "[T]he facts and circumstances surrounding the particular transaction will loom large." Op. 110.

The trial court correctly found that Musk controlled the Grant, based on clear evidence of general and specific control.

a) Musk's General Control over Tesla

The trial court correctly noted that "the sources of influence identified by Plaintiff in support of a finding of general control factor into the transaction-specific analysis" as "[b]roader indicia of effective control also play a role in evaluating whether a defendant exercised actual control over a decision." Op. 110. Thus, in analyzing transaction-specific control, the trial court analyzed the broader evidence of Musk's control of Tesla. *See* Op. 112-27.

First, the trial court recognized that given his 21.9% stake, Musk "wield[ed] significant influence over Tesla," "g[iving] him a sizable leg-up for stockholder votes" and "great influence in the boardroom[.]" Op. 113, 115. The trial court noted that if "a 21.9% block[holder] favors a particular outcome, then the holder will win as long as holders of approximately one-in-three shares vote the same way." Op. 113. The trial court also noted that (i) control is assumed under Section 203 of the DGCL at 20% ownership;[21] (ii) stockholder rights plans "routinely cap ownership at 15% or less, thereby forcing a stockholder to stop short of the 20% figure";[22] and (iii) Musk's "significant block operated in conjunction with a supermajority voting requirement" to allow him to block amendments to Tesla's

[21] Op. 114 (citing 8 *Del. C.* § 203(c)(4)).

[22] *Id*. (citing *Williams Cos. S'holder Litig.*, 2021 WL 754593, at *1 (Del. Ch. Feb. 26, 2021)).

bylaws that could limit his control, and that Musk had twice blocked bylaw amendments. Op. 114-15.

Second, the trial court recognized Musk's "Boardroom and Managerial Supremacy." Op at 115. As the court correctly noted, "the ability to exercise outsized influence in the board room" can contribute to a control finding. *Id*. Courts evaluating an individual's influence consider, *inter alia*, whether that individual (i) holds "high-status roles like CEO, Chairman, or founder" (all of which Musk held);[23] (ii) "can interfere with or kibosh management decisions" (which Musk could);[24] and (iii) can replace management (which Musk did unilaterally). Op. 116 (citing *Reith v. Lichtenstein*, 2019 WL 2714065, at *8 (Del. Ch. June 28, 2019)).

The trial court then listed—in eleven separate bullet points with comprehensive record citations—just some of the "avalanche of evidence" demonstrating Musk's overwhelming influence over Tesla's Board and management, including that Musk (i) "is Tesla's public face," and describes Tesla as "my company";[25] (ii) "has 'the power to direct operational decisions at Tesla'";[26] (iii) makes Tesla's compensation, hiring, and firing decisions for high-level

[23] Op. 115 (citing *Basho Techs. Holdco B, LLC v. Georgetown Basho Invs., LLC*, 2018 WL 3326693, at *27 (Del. Ch. July 6, 2018)).

[24] *Id.* 116; *see* B2256, 309:1-9.

[25] Op. 117 (citing B1071 and quoting A922, 625:22-626:21).

[26] *Id*. (citing B0195-B0196).

positions;[27] (iv) "operates under his own set of rules at Tesla";[28] (v) "operates as if free of Board oversight, as shown by his treatment of the SEC Settlement";[29] (vi) ignores specific Board directives;[30] and (vii) "regularly uses Tesla resources to address projects at other companies he owns." Op. 119-20. The trial court thus logically concluded that "Musk wield[ed] unusually expansive managerial authority," strongly indicating control over Tesla. Op. 120.

Third, the trial court analyzed Musk's extensive personal and business relationships with the Board, which gave him control over it. Op. 20-30. The court cited the relevant case law, noting the relevance of past and future controller-granted rewards to this "highly fact specific" analysis. Op. 123 (quoting *Calesa Assocs. v. Am. Cap., Ltd.*, 2016 WL 770251, at *10-12 (Del. Ch. Feb. 29, 2016)). The court found that Kimbal, Gracias, and Murdoch were generally beholden to Musk. Together with Musk, these directors comprised half the Board's active members.

The Court found Gracias generally beholden given his extensive personal and professional relationship with Musk, correctly holding: "The combination of business and personal ties make it undeniable that Gracias lacked independence from

[27] Op. 118 (citing A979, 851:6-852:5 and A919, 612:23-613:6).

[28] *Id*. (citing A916,601:11-602:10).

[29] Op. 119 (citing B1181).

[30] *Id*. (citing A919, 613:19-614:10).

Musk."[31] As discussed above, Gracias (i) had realized over $1 billion from investments in Musk-controlled entities prior to Grant approval, which provided him "dynastic or generational wealth";[32] and (ii) had a decades-long relationship with Musk "which included joint family vacations" and a 20-year friendship with Kimbal. Op. 123-25.

The trial court similarly found Murdoch generally beholden given his personal relationship with Musk: Murdoch "was a long-time friend of Musk before he joined the Board" and had invested $70 million in Musk companies. Op. 28, 126-27.

The Court then analyzed Ehrenpreis's, Denholm's, and Buss's independence, noting (i) Ehrenpreis's "weighty" personal and professional relationships with Musk that "had a 'significant influence' on his professional career" and his $75 million investment in non-Tesla, Musk-controlled companies; (ii) Denholm's "life-changing" Tesla director compensation; and (iii) Buss's tens of millions of director compensation which "was a large portion of his wealth." Op. 125-26; *see also supra* SOF A.2. The trial court declined to expressly find these three directors generally

[31] Op. 124 (citing, *e.g.*, *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 54–55 (Del. Ch. 2013) (finding director conflicted *post-trial* where he "had a long history with" the controller including work at a controller's company and ~$300,000 invested in controller's funds); *In re Loral Space & Commc'ns Inc.*, 2008 WL 4293781, at *20-22 (Del. Ch. Sept. 19, 2008) (finding director conflicted *post-trial* where he had successfully solicited investments from the controller's companies).

[32] Op. 123 (quoting A959, 774:22-24).

beholden, but noted that the above facts contributed to its finding that they "acted beholden to Musk in the process leading to the Grant." Op. 112.

Of the seven active directors other than Musk, the trial court found that three were beholden to him, and three of the remaining four had significant potential conflicts that undermined their independence. Op. 112, 127.

b) Musk's Specific Control Over the Process

Applying the proper framework, the trial court focused on Musk's control over the Grant process after analyzing the general control factors.

Having already found half the Board not independent of Musk, the trial court reaffirmed that, under Delaware law,[33] the Board and Committee (comprised of Gracias, Ehrenpreis, Buss, and Denholm) lacked independence from Musk regarding the Grant and suffered from a "controlled mindset":

> There is no greater evidence of Musk's status as a transaction-specific controller than the Board's posture toward Musk during the process that led to the Grant. Put simply, neither the Compensation Committee nor the Board acted in the best interests of the Company when negotiating Musk's compensation plan. In fact, there is barely any evidence of negotiations at all.

Op. 128.

[33] Op. 127 ("Delaware courts consider not only the directors' relationships with the party to whom they are allegedly beholden, but also how they acted with respect to that party.") (citing *Viacom*, 2020 WL 7711128, at *24; *In re S. Peru Copper Corp. S'holder Deriv. Litig.*, 52 A.3d 761, 789 (Del. Ch. 2011), *aff'd sub nom., Ams. Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012)).

The trial court then analyzed various aspects of the Grant process that revealed Musk's control over the process. Op. 128.

First, the trial court detailed the evidence demonstrating Musk's control of the Grant process's timing. The trial court noted, *inter alia*, that (i) before any Board or Committee Grant discussions, Musk's team initiated a "recklessly fast," less-than-three-week process, but no Committee member questioned the pace;[34] (ii) "[t]he process decelerated to a reasonable pace only because Musk made it so";[35] (iii) Musk paused the process in July, then "restarted discussions" on November 9, urging the board to act "as soon as possible";[36] (iv) "Musk tried to pause the process again on November 14" and the "final timeline…included the delay Musk requested";[37] and (v) Musk "made last-minute proposals…prior to six out of the ten Board or Compensation Committee meetings during which the Grant was discussed." Op. 132 (citing B0424, B0437, A4056, B0501, B0645, B0646, B0651, and B0653). The trial court reasonably concluded from that extensive evidence that "Musk controlled the [Grant's] timing." Op. 133.

[34] Op. 129-30 (citing B0425-B0426, B0435, and A740-A741,124:11-125:11).

[35] Op at 130 (citing B0437, A4056, B0501, and B0503).

[36] Op. 130-31 (citing A4056 and B0645).

[37] Op. 132 (citing B0646, B0648, and B0651).

Second, the trial court detailed the evidence demonstrating that Musk dictated the key Grant terms.

As to the Grant's size, "Musk made an initial proposal, and that proposal was the only one seriously considered until Musk unilaterally changed it six months later." Op. 133. After dictating his preferred plan on April 9—"15 tranches awarding 1% of Tesla's total outstanding shares for each market capitalization increase of $50 billion"—Musk "unilaterally lowered his ask" on November 9. Op. 134. And after learning his revised ask exceeded his April 9 proposal, he unilaterally changed it back on December 1, describing the reduction as "me negotiating against myself." Op. 134 (A940, 696:7-697:7). Musk's December 1 proposal never fundamentally changed, and "[t]he Compensation Committee did not consider alternatives." Op. 135 (citing B0483-B0486, B0493-B0494, B0527-B0531, B0648, B0649).

As discussed above, the trial court also closely examined the evidence and found no meaningful negotiation over—or value from—the Grant's purported "constraints." "[T]he only back-and-forth in the record concerned the M&A Adjustment," which "Musk himself conceded…was at most a minor feature of his compensation plan that he did not care about." Op. 138 (citing B0654-B0655 and B0657). And the trial court noted that although one of the Board's "biggest purported concerns…was their desire to keep Musk engaged in Tesla despite his

significant time commitments at his other companies," no one proposed anything—such as requiring Musk to spend time at Tesla or less time at other companies—to accomplish that goal. Op. 139 (citing A822, 328:9-24; B1543-B1544, 292:1-293:20; B2799, 51:6-13). Defendants claimed Musk would have rejected such asks, but the trial court correctly explained that "the court will 'never know because the...Committee and its advisors never had the gumption to give it even the weakest of tries.'" Op. 140 (quoting *Loral*, 2008 WL 4293781, at *25).

Musk's control over the Grant's size and terms was also demonstrated by the lack of benchmarking, which is a "foundation[al]" requirement that Defendants' trial "witnesses agreed...is typical and critical." Op. 141. Rejecting Defendants' claim that benchmarking was unnecessary because the Grant was "unprecedented," the trial court explained, "the extraordinary nature of the Grant should have made benchmarking more critical, not less." Op. 143 (citing A1204,1462:5-1463:1 and quoting A1746). The Committee avoided benchmarking because "they knew benchmarking would expose the Grant as many multiples larger than any conceivable comparison." Op. 167.[38] Indeed, "the Grant was 33x larger than Musk's 2012 Grant's $78M grant date fair value." Op. 189.

[38] This Action has since meaningfully influenced benchmarking. Similar "moonshot" packages surged in response to the Grant but dropped sharply following the Opinion, with $100 million CEO pay deals disappearing in 2024. *See, e.g.*, Theo Francis, *For CEOs, $100 Million Pay Packages Are Disappearing*, WSJ (last

Thus, after reviewing the evidence, the trial court correctly found that Musk controlled the Grant's terms.

Third, as discussed *supra*, the trial court acknowledged that the key trial witnesses "effectively admit[ed] that they did not view the process as an arm's length negotiation," but "a form of collaboration with Musk." Op. 129, 144. Among other concessions, the court noted that (i) Ehrenpreis testified that Musk and the Committee "*were not on different sides of things*";[39] (ii) Gracias testified that Committee did not "*engage in…positional negotiations*'" with Musk, opting "for subjective feelings—'*what feels fair*'";[40] and (iii) Maron stated "there wasn't a conflict of interest" but instead "a cooperative collaborative process." Op. 146 (quoting B2432-B2434, 100:2-102:11). The trial court concluded that those and other admissions further established Musk's control. Op. 129, 146.

* * *

Based on those and other fact-intensive findings, the trial court correctly concluded that entire fairness applied.

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accessed Apr. 24, 2025) https://www.wsj.com/business/ceo-pay-2024-data-bc6ecb11?st=Y4gyZN&reflink=article_email_share.

[39] Op. 145 (quoting B2887-B2888, 139:18-140:3) (emphasis in original).

[40] Op. 145 (quoting A968, 808:16-809:14) (emphasis in original).

c) Defendants' Counterarguments Fail

First, Defendants' lead argument—that "controlling stockholder status cannot arise from a minority stockholder's control over a specific transaction alone"[41]—is (i) waived as it was not presented below, (ii) estopped as Defendants argued the opposite below, (iii) contrary to Delaware law, and (iv) unavailing as Musk generally controlled Tesla.

Defendants not only failed to make this argument below, they conceded transaction-specific control's applicability.[42] Defendants' new argument—that transaction-specific control does not exist—is waived. *See* Del. Sup. Ct. R. 8. ("Only questions fairly presented to the trial court may be presented for review....").[43]

Defendants are also estopped from making the argument. "[J]udicial estoppel operates [] where the litigant contradicts another position that the litigant previously took *and* that the Court was successfully induced to adopt in a judicial ruling."

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[41] IDOB 15.

[42] *See, e.g.*, A592 ("Plaintiff...must [show] that Musk, as a minority stockholder, 'exercises control over the business affairs of Tesla *or exercised control over the 2018 Plan*.'" (quoting *Sheldon v. Pinto Tech. Ventures, L.P.*, 220 A.3d 245, 251 (Del. 2019))); A1375 ("As previously addressed in Defendants' Pretrial Brief…*Plaintiff must prove that Musk exercises…control over the 2018 Plan*."); *see also* B3735 (DEFS' COUNSEL: "The most important thing is...[t]here needs to be evidence that Mr. Musk controlled *this transaction*[.]").

[43] *See also, e.g.*, *Oracle*, 2025 WL 249066, at *10 ("The plaintiffs did not directly raise the argument below. It is waived on appeal.").

Motorola Inc. v. Amkor Tech., Inc., 958 A.2d 852, 859-60 (Del. 2008). Having urged the trial court to analyze Musk's transaction-specific control, Defendants cannot now argue that the trial court erred because transaction-specific control does not exist. *See MidAtlantic Farm Credit, ACA v. Morgan*, 2015 WL 1035423, at *5 (Del. Ch. Mar. 4, 2015) (finding estoppel where litigant "would derive an unfair advantage from his shifting positions" between related proceedings).

That argument is also clearly wrong. Delaware law has long recognized transaction-specific control. *See, e.g.*, *Oracle*, 2025 WL 249066, at *12 (stating "a minority stockholder can be a controlling stockholder…by exercising actual control over a specific transaction" and citing cases); *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1115 (Del. 1994) (affirming Court of Chancery transaction-specific control finding). No Delaware decision has even questioned that fundamental tenet.

And despite claiming the trial court committed "legal error" by applying transaction-specific control,[44] Defendants' real complaint is with Delaware law itself. Defendants concede "this Court…acknowledged the concept of transaction-specific control" in *Oracle* and ask this Court to "correct and recalibrate the law" by "return[ing] to the traditional, principled approach to control." IDOB 18-19. The

[44] IDOB 15; *see also id.* at 18 ("Reversing the decision below based on its erroneous reliance on transaction-specific control therefore would be consistent with this Court's precedent.").

trial court could not have committed "legal error" by applying existing law and failing to unilaterally "recalibrate" this Court's precedent.

Moreover, Defendants' underlying argument against transaction-specific control—which relies almost entirely on a "forthcoming" article—is unsound. *See* IDOB 17. Defendants argue that *Kahn* did not endorse transaction-specific control, rendering all later Delaware decisions that did "suspect,"[45] but *Kahn* affirmed a transaction-specific control finding. 638 A.2d at 1114 (noting trial court finding of control "at least with respect to the matters under consideration at its August 1, 1986 board meeting"). And, independent of *Kahn*, transaction-specific control has been reaffirmed in numerous cases and remains consistent with Delaware's "foundational principles" of protecting minority stockholders in transactions that carry "the specter of impropriety." *In re Ezcorp Inc. Consulting Agreement Derivative Litig.*, 2016 WL 301245, at *11 (Del. Ch. Jan. 25, 2016).[46]

Further, any feigned concern over transaction-specific control's role in future Delaware law is substantially addressed by the passage on March 25, 2025—*i.e.*, after Defendants filed their briefs—of amendments to 8 *Del. C.* §144, which, for all

[45] IDOB 19 (quoting Elizabeth Pollman & Lori W. Will, *The Lost History of Transaction-Specific Control*, __ J. Corp. L._(forthcoming 2025) (acknowledging transaction-specific control is "embedded" in Delaware law and arguing "that Delaware law should course-correct by excising the concept").

[46] *See also* Op. 105 ("When a controller displaces or neutralizes a board's power to direct corporate action, then the controller assumes fiduciary obligations.").

cases filed after February 17, 2025, (i) limit who qualifies as a controller, and (ii) subject only Rule 13e-3 transactions to dual-pronged requirements for de-escalation to business judgment. *See* 8 *Del C.* § 144 (b), (c) & (e)(2).

Finally, even if transaction-specific control is inapplicable (it is not), the Grant is still subject to entire fairness for several other reasons.

First, Defendants baselessly fault the trial court for analyzing Musk's general control when assessing transaction-specific control. IDOB 19-20. Delaware law recognizes that "indicia of effective control also play a role in evaluating whether a defendant exercised actual control over a decision." *Basho*, 2018 WL 3326693, at *27. The trial court correctly recognized, "transaction-specific control call[s] for a holistic evaluation of sources of influence" as "[d]ifferent sources of influence that would not support an inference of control if held in isolation may, in the aggregate, support an inference of control." Op. 109-10.

Second, Defendants' one-off arguments regarding Musk's general control over Tesla ignore Delaware's holistic control inquiry—and are wrong. For example, Defendants' argument that "Musk's ownership stake…provided no mechanism for an actual exercise of control over the Board in connection with the [Grant]"[47] ignores that, "[a]t a minimum, a 21.9% holding supplies a powerful 'rhetorical card[] to play

[47] IDOB 21.

in the boardroom,'"[48] which was consistent with how the Board and Musk behaved during the Grant process. *See* Op. 127-46. Similarly, Defendants argue that Musk's "unusually expansive managerial authority" and relationships with directors "would at most suggest that he had the potential to control the transaction—not that he actually did so." IDOB 21. Again, those factors were not independently determinative of control; they merely "factor[ed] into the transaction-specific analysis." Op. 110.

Third, Defendants' statement that "the court concluded that Musk *controlled* the transaction because he *participated* in it" ignores the trial court's nearly 20-page analysis of the trial evidence demonstrating Musk's transaction-specific control. IDOB 25 (emphasis in original). The trial court actually concluded that the evidence—which demonstrated the Board and Committee's controlled mindset and that Musk controlled the Grant's terms, timing, and structure—established that Musk controlled the Grant. Op. 127-47.

Defendants attempt to undermine the trial court's comprehensive control analysis and findings by isolating one statement from the Opinion regarding the "*absence* of 'evidence that Musk set the table for the negotiations by acting in a manipulative or duplicitous manner[.]'" IDOB 25 (quoting Op. 161). But a control

[48] Op. 114 (quoting *Voigt v. Metcalf*, 2020 WL 614999, at *19 (Del. Ch. Feb. 10, 2020)).

finding does not require manipulative or duplicitous behavior,[49] and Defendants ignore that the very next paragraph states: "Although Musk did not manipulate the *initial timing* of the process, he repeatedly and unilaterally manipulated the timeline of the process." Op. 162 (emphasis in original).

2. Entire Fairness Applies Because Half the Directors Who Approved the Grant Lacked Independence

"[I]f…at least half of the directors who approved the transaction were not disinterested or independent, then the transaction is subject to entire fairness review." *FrontFour Cap. Grp. LLC v. Taube*, 2019 WL 1313408, at *22 (Del. Ch. Mar. 11, 2019). Because entire fairness applies given Musk's control of the Grant, the trial court did not directly rule on whether entire fairness applied because half the approving directors lacked independence. Op. 104. Critically, however, the trial court held: "The factual findings that render Musk a controller…support a finding that the majority of the Board lacked independence." Op. 104 n.546. Indeed, of the six approving directors, the trial court correctly determined that *five* lacked independence from Musk—Gracias and Murdoch generally and Ehrenpreis, Buss, and Denholm regarding the Grant. Op. 112. Entire fairness thus applies for this independent reason.

[49] *See, e.g.*, *Voigt*, 2020 WL614999, at *12, *22 (finding control without allegations of manipulative/duplicitous conduct and reaffirming that "there is no magic formula to find control").

Defendants' Board independence arguments fail. If correct, Defendants' claim that Gracias's, Murdoch's, and Ehrenpreis's deep "social and business ties to" Musk—including repeated "joint family vacations" and massive investments in Musk's companies conferring substantial wealth—are "routine" and thus do not undermine their independence[50] would render Delaware's independence inquiry a nullity. At trial, responding to questions about his independence, Gracias effectively conceded his conflict while simultaneously conveying the same disregard for conflicts embodied by the independence arguments Defendants now assert, testifying: "Yes, yes, yes, yes, yes, yes, yes, yes, yes…I stipulate to yes." A961, 781:12-15.

The trial established overwhelming evidence of the directors' conflicts[51]—far more severe than those found to undermine independence in other cases. *See, e.g.*, Op. 124-26 (citing cases). Defendants' piecemeal challenges to individual conflict facts ignore the holistic independence analysis Delaware law requires and the trial court undertook. *See Del. Cnty. Emps. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1022 (Del. 2015) (requiring "all...facts regarding a director's relationship to the interested party be considered in full context"). For example, Defendants incorrectly claim the trial court "conclud[ed] that investments by Gracias and Ehrenpreis in other Musk-

[50] IDOB 28 (quoting Op. 123).

[51] *See supra* at SOF A.2.

related entities made them beholden to Musk." IDOB 29.[52] As to Gracias, the trial court cited those investments *along with* numerous other facts, including longstanding personal relationships with Musk and Kimbal. Op. 123-24; *see also* Op. 25-28. And though Ehrenpreis had extensive personal and professional ties to Musk, the trial court declined to find him generally beholden, explaining: "Even if one could debate whether these ties rendered Ehrenpreis beholden to Musk in general, his actions in connection with the Grant demonstrate that he was beholden for that purpose." Op. 125.[53]

Similarly, Defendants imply that the trial court held that "Denholm's and Buss's compensation as Tesla Directors make them beholden to Musk." IDOB 29. But the court considered those directors' "life-changing" compensation "when evaluating how Denholm and Buss acted when negotiating the Grant," ultimately finding that their actions demonstrated their lack of independence. Op. 125-26.

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[52] Defendants cite *Zimmerman ex rel. Priceline.com, Inc. v. Braddock*, 2002 WL 31926608, at *11 (Del. Ch. Dec. 20, 2002), but that case merely states that a director's investment in a controller's company "without more" may not be sufficient to undermine the director's independence, demonstrating the trial court's holistic analysis was correct.

[53] Defendants imply Tesla's directors were independent because "they faced no pressure or threats from Musk regarding the [Grant]" (IDOB 29), but "pressure or threats" are not required to find a director beholden. *See, e.g.*, *Sandys v. Pincus*, 152 A.3d 124, 134 (Del. 2016) ("[The] mutually beneficial network of ongoing business relations...ha[d] a material effect on the parties' ability to act adversely toward each other."); *In re The Limited, Inc.*, 2002 WL 537692, at *7 (Del. Ch. Mar. 27, 2002) ("One may feel 'beholden' to someone for past acts….").

Defendants seemingly claim Denholm was independent because the trial court in *SolarCity* found her an "effective buffer" to Musk in a transaction over six years before trial here. IDOB 29 (quoting *In re Tesla Motors, Inc. S'holder Litig.*, ("*SolarCity I*"), 2022 WL 1237185, at *37-38 (Del. Ch. Apr. 27, 2022)). But as the trial court here explained, "that was not a factual finding that carries forward for all time," and "Denholm's approach to enforcement of the SEC Settlement, including unawareness of one of its key requirements, suggests a new lackadaisical approach to her oversight obligations." Op. 126 n.645.

At minimum, the trial court's reasoned application of the numerous conflict facts to the applicable case law was not clearly erroneous and thus non-reversible. *See In re Tesla Motors, Inc. S'holder Litig.* ("*SolarCity II*"), 298 A.3d 667, 715 (Del. 2023) ("We agree with the trial court's weighing of the evidence….The trial court also expressly grounded its holding on the 'credible evidence presented at trial.' We have no basis in the record to disturb these findings.").

3. Entire Fairness Applies for Reasons Not Reached by the Trial Court

a) Musk Generally Controlled Tesla

Although the trial court did not need to—and thus did not—decide general control, an "avalanche of evidence" establishes Musk's general control over Tesla. Op. 117. "Musk is Tesla's public face, and he describes Tesla as 'my company,'" and "Tesla's entire corporate strategy is Musk's brainchild[.]'" *Id.* His 21.9% stake

gave him "a sizable leg-up for stockholder votes" and "great influence in the boardroom." Op. 115. He exercised "unusually expansive managerial authority" "over all aspects of Tesla and often without regard to Board authority," and the Board and Committee lacked independence from him. *See* Op. 116-17, 120, 129. The Grant process itself demonstrates Musk's general control: the supine Committee handed Musk 12% of Tesla without any benchmarking or arm's-length "negotiations over the magnitude of the Grant or its other terms." Op. 129.

Musk's general control over Tesla independently triggers entire fairness review of the Grant.

b) The Compensation Committee Lacked Independence From Musk

Entire fairness also applies because Musk controlled the Compensation Committee. A plaintiff can establish transactional control by "prov[ing] that at least half of the [deciding] [c]ommittee members were not independent from [the controller] when negotiating the…[t]ransaction." *FrontFour*, 2019 WL 1313408, at *22; *see also In re Tesla Motors, Inc. S'holder Litig.*, 2018 WL 1560293, at *13 (Del. Ch. Mar. 28, 2018) (same). As explained above, trial established that no Committee member was independent of Musk regarding the Grant. Entire fairness applies for this independent reason.

4. The Material Disclosure Failures Independently Require Application of Entire Fairness

Defendants argued below that entire fairness would apply if the Proxy was materially deficient. The Court accepted that position and correctly found material disclosure failures. *See* Op. 148-55. Defendants are thus estopped from now arguing otherwise. *See Motorola Inc.*, 958 A.2d at 859-60.

a) Defendants Argued Below that Entire Fairness Applies if the Proxy Contained a Material Disclosure Failure

Plaintiff argued below that, because Grant approval was expressly conditioned on a fully informed stockholder vote, the Grant was invalid if the trial court found a single material disclosure failure. A670; A1467. After Defendants failed to meaningfully respond to that argument in briefing or post-trial argument, the trial court gave Defendants another chance via supplemental briefing:

> *First*, there is the plaintiff's lead argument—that 'even a single material disclosure failure invalidates' the challenged compensation package. Is this correct under Delaware law?...The defendants' post-trial briefs...did not meaningfully grapple with this argument or authorities on this issue. I assume that the defendants' de-emphasis on this argument was not inadvertent and was a strategic decision. Still, I would find further discussion helpful.

B4445-46; *see also* B3745. In response, Defendants argued that a material disclosure failure did *not* invalidate the Grant, but did trigger entire fairness. *See* A1737-A1738. The Opinion accepted Defendants' position, rejecting Plaintiff's

argument that a single material disclosure failure invalidates the Grant and instead triggers entire fairness. Op. 158-59.

Now, after the trial court relied on their arguments below, Defendants seek an "unfair advantage" by "shifting positions"[54] to argue that even if there are material disclosure failures, entire fairness *does not* apply. *See* IDOB 13-30. They are estopped from doing so. Entire fairness applies because the Proxy is materially deficient.

b) The Trial Court Correctly Found that the Proxy Contained Numerous Material Disclosure Failures

The trial court correctly held that Defendants—seeking the benefits of a fully informed stockholder vote—"b[ore] the burden of proving the vote was fully informed,"[55] and then logically applied its factual findings to rule that Defendants had failed to carry that burden. Op. 147-55.

First, the trial court reaffirmed the bedrock principle that directors must disclose not only actual conflicts with a transactional counterparty, but that "a director's *potential* conflict with a transactional counterparty is material information that should be disclosed." Op. 149 (citing, *e.g.*, *In re Orchard Enters., Inc. S'holder Litig.*, 88 A.3d 1, 22 (Del. Ch. 2014); *Millenco L.P. v. meVC Draper Fisher*

[54] *MidAtlantic*, 2015 WL 1035423, at *5.

[55] Op. 147 (citing *Solomon v. Armstrong*, 747 A.2d 1098, 1128 (Del. Ch. Mar. 25, 1999)).

Jurvetson Fund I, Inc., 824 A.2d 11, at 15-29 (Del. Ch. 2002)). The Proxy repeatedly described the directors as "independent" while omitting any disclosure of the Committee's *potential*—let alone actual—conflicts. Op. 150 (citing *Millenco*, 824 A.2d 11, at 15 (Del. Ch. 2002) ("[W]here…omitted information goes to the independence or disinterest of directors who are identified as the company's 'independent' or 'not interested' directors, the 'relevant inquiry is not whether an actual conflict of interest exists, but rather whether full disclosure of potential conflicts of interest has been made.'" (citation omitted)). The trial court found, based on the evidence, that "all of the directors acted under a controlled mindset, calling into question the disclosure as to each of them." Op. 150. The court held: "At a minimum, Musk's relationships with Ehrenpreis and Gracias gave rise to potential conflicts that should have been disclosed." Op. 150. The court also correctly concluded: "At a minimum, a corporation cannot disclose false information, such as describing key negotiators as independent." Op. 158.[56]

Second, the trial court correctly held that stockholders "are entitled to a full and accurate description" of a transaction committee's process as "[t]he components and effectiveness of [that] process, including the parties' bargaining positions, are

[56] *See also City of Fort Myers Gen. Emps.' Pension Fund v. Haley*, 235 A.3d 702, 718 (Del. 2020) ("It is elementary that under Delaware law the duty of candor imposes an unremitting duty on fiduciaries…to 'not use superior information or knowledge to mislead others….'").

of 'obvious importance' to stockholders." Op. 152 (citing *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1277 (Del. 1994) & quoting *Clements v. Rogers*, 790 A.2d 1222, 1242 (Del. Ch. 2001)). The court then acknowledged that the Proxy "does not disclose the level of control that Musk exercised over the process—*e.g.*, his control over the timing, the fact that he made the initial offer, the fact that his initial offer set the terms until he changed them six months later, the lack of negotiations, and the failure to benchmark, among other things." Op. 154.

In finding a material disclosure failure based on the trial evidence, the trial court focused on the Proxy's omission of Musk's April 9, 2017 proposal to Ehrenpreis, which "set the terms of discussion for the first six or so months of the Grant's development, and many of its features persisted in the final structure." Op. 155-56. The trial court also correctly held that, even if that information—which several prior drafts of the Proxy included—was not material on its own (it was), "Defendants chose to disclose aspects of the process" and thus "had an obligation to provide accurate, full, and fair information about that process, which they failed to do." Op. 157 (citing *Arnold*, 650 A.2d at 1280).

Third, the Proxy failed to accurately disclose the achievability of the Grant's milestones. The trial court "defer[ed] making a factual finding on this purported disclosure violation having found Plaintiff already proved the transaction was not entirely fair," but found the deficiency "likely material." Op. 156 n.775. Indeed,

the Proxy characterized each milestone as an "ambitious," "difficult to achieve," and "challenging" "stretch goal." Op. 83-84 (quoting JX-878, at 4, 17, 18, 22, 41). But the evidence established the Board knew at least three operational milestones were greater than 70% probable of achievement within approximately one year of the Grant date, with several more probable of achievement shortly thereafter. *See supra* 23; *infra* 77.

Fourth, the Proxy omitted Musk's competing interests outside of Tesla. The Court also deferred its factual finding regarding this disclosure violation, but again found it "likely material." Op. 156 n.775. As of the Grant date, Musk spent roughly half his time working for Tesla, dedicating the rest to four other companies he founded. Op. 14 (citing A931, 661:7-15; A908, 568:16-569:9; B1222).[57] The Proxy includes none of that information, vaguely mentioning Musk's "other business interests" once without details. A4121. That material omission independently renders the Proxy deficient.

Defendants' counterarguments fail. Defendants' lead argument—that stockholders only need to know the economic terms of a transaction to cast an informed vote[58]—"finds no support in Delaware law." Op. 156. The trial court held:

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[57] *See also* A964, 793:13-794:14; *id.* at A983,868:9-869:13.

[58] IDOB 30-32. Although the trial court credited Defendants with making some version of this argument "[d]uring post-trial argument" (Op. 156), it was absent from their trial briefs.

> No case has held that a corporation needs to disclose only the economic terms of a transaction when securing a stockholder vote. In fact, then-Vice Chancellor Strine rejected as "frivolous" the argument that "the only material facts necessary to be disclosed" regarding a stock incentive plan are the "exact" economic terms of the plan.

Op. 156 (quoting *Sample v. Morgan*, 914 A.2d 647, 652, 663-67 (Del. Ch. Jan. 23, 2007) (rejecting "economic terms" argument as "frivolous" because stockholders would also want to know the plan's origination, the self-interested purpose of those who created it, and benchmarking information)).

Delaware has long-recognized the materiality of process and conflict disclosures. *See, e.g.*, Op. 155 (citing, *e.g.*, *Weinberger* & *Orchard*). At a minimum, once Defendants "cho[]se to provide the history of a transaction, they ha[d] an obligation to provide shareholders with an accurate, full, and fair characterization of those historic events." *In re Mindbody, Inc. S'holder Litig.*, 2023 WL 2518149, at *39 (Del. Ch. Mar. 15, 2023).[59] Even assuming stockholders need only know "economic terms" to approve compensation plans, Defendants never explain why Delaware's partial disclosure doctrine does not apply.

As Defendants' argument defies foundational Delaware law, their authorities are easily distinguishable.

[59] *See also* Op. 155 (citing *Globis Partners, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *14 (Del. Ch. Nov. 30, 2007)).

In re Investors Bancorp, Inc. Stockholder Litigation, 177 A.3d 1208 (Del. 2017), had nothing to do with the materiality of process or conflict disclosures. There, this Court found that "the affirmative defense of ratification" could not be used to dismiss a complaint challenging a "pool of equity awards that the directors can later award to themselves in amounts and on terms they decide." *Id.* at 1211, 1226. This Court's ruling that a ratification vote cannot cleanse a discretionary equity compensation pool for directors "if stockholders [did not] know precisely what they [we]re approving,"[60] cannot be stretched to mean that stockholders need only know the "economic terms" when approving compensation plans (including the largest in history (by multiples), facilitated by a conflicted committee, and transferring up to 12% of the Company to its controller).

Similarly, in *Cambridge Retirement System v. Bosnjak*, 2014 WL 2930869, at *7-9 (Del. Ch. June 26, 2014), the plaintiff challenged equity awards to outside directors—not a controller, CEO founder, or largest stockholder—issued under a previously stockholder-approved and unchallenged incentive plan, arguing the proxy failed to disclose benchmarking data. The *Cambridge* court only held that the "absence of benchmarking information" was not a material omission because the proxy "disclosed all material terms of the precise equity awards that the stockholders were being asked to approve." *Id.* at *9. No other disclosure claims were addressed,

[60] IDOB 31 (citing *Invs. Bancorp*, 177 A.3d at 1222).

and as the court here noted, "no one claims here that the absence of disclosed benchmarking information rendered the stockholder vote uninformed." Op. 157 n.778.

In *SolarCity II*, the court did not examine the stockholder vote for its cleansing effect, but as part of its fairness analysis, deciding to give "less weight to the Tesla stockholders' approval of the Acquisition than [it] might have otherwise in recognition of Appellants' disclosure arguments." 298 A.3d at 715. There, defendants never argued that the proxy, which included process and other information, only needed to disclose the economic terms of the transaction, and this Court found "no basis to disturb the Vice Chancellor's finding or weighing of this evidence." *Id.* at 713.

Defendants' remaining arguments primarily quibble with the trial court's factfinding and weighing of evidence. Defendants claim that "[t]he supposedly undisclosed director relationships involved routine business and social connections that this Court has repeatedly held do not compromise independence." IDOB 32. After weighing the evidence and analyzing the applicable case law, the trial court correctly found otherwise. Op. 123-27. Regardless, and as Defendants admitted,[61]

[61] B3742-B3743 (COURT: "Do you agree that potential conflicts can alter the total mix of information?" DEFS' COUNSEL: "If there's a real potential, right, such that it would be material to the shareholders' vote, yes, I would agree.").

"potential conflicts" must be disclosed, and the Tesla directors' numerous personal and professional relationships qualify as at least potential conflicts.

Defendants' reliance on the "NASDAQ definition of an 'independent director'" fails, given the numerous relationships the trial court found "would interfere with the exercise of independent judgment." IDOB 32. And under Delaware law, "independence standards established by stock exchanges and the requirements of Delaware law, such that a finding of independence (or its absence) under one source of authority is not determinative for purposes of the other[.]" *Ezcorp*, 2016 WL 301245, at *36. Regardless, the Proxy repeatedly described Tesla's directors as simply "independent"—without referencing NASDAQ or other rules—when discussing the Grant's process and approval. *See. e.g.*, Proxy at Introductory Letter, 4-5, 15.

As to the process disclosures, Defendants claim the trial court "relied on cases—drawn mostly from the merger context—involving disclosure issues entirely different from those presented here." IDOB 33. False. As explained above, the trial court relied on cases—including those involving controllers and compensation plans[62]—demonstrating Delaware's disclosure law does not exempt controller-

[62] *See* Op. 155-157 (citing, *e.g.*, *Weinberger*, 457 A.2d 701 (involving controlling stockholder); *Sample*, 914 A.2d at 651 (involving incentive plan granted to company's "insider majority"); *Maric Cap. Master Fund, Ltd. v. Plato Learning, Inc.*, 11 A.3d 1175, 1179 (Del. Ch. 2010) (involving failure to disclose future CEO's stock options and future management makeup and other accompanying incentives).

dominated compensation plans. Defendants' criticism of "the court's suggestion that the proxy should have disclosed the Board's 'failure to benchmark,'" ignores that the court did not find that omission material.[63]

* * *

Defendants argued below that entire fairness applies if there was a material disclosure failure. The trial court rightly held there were material disclosure failures. If this Court affirms that holding—which it should, including because "the trial court's weighing of the evidence in assessing the materiality of th[e relevant] information"[64] was careful and correct—Defendants are estopped from disputing that entire fairness applies.

5. Defendants' De-Escalation Argument Fails

Defendants' argument for de-escalating the standard of review based on director or stockholder approval fails for two independent reasons. IDOB 26-34. *First*, it defies Delaware law requiring satisfaction of *both* the independent director and unaffiliated stockholder approval conditions for de-escalation, as this Court held in rejecting the same argument in *Match*. *Second*, because the Grant satisfied *neither*

[63] *Compare* IDOB 34 *with* Op. 157 n.778 (noting that *Plaintiff* did not claim that "the absence of disclosed benchmarking information rendered the stockholder vote uninformed").

[64] *SolarCity II*, 298 A.3d at 714-15.

approval condition, Defendants cannot satisfy even their (incorrect) proposed single-condition de-escalation standard.

Defendants' assertion—that they can de-escalate the review standard from entire fairness to business judgment "so long as *either* the Board was independent *or* the stockholder vote approving the [Grant] was fully informed" (IDOB 26 (emphasis in original))—contradicts this Court's holding in *Match*. There, defendants likewise asserted that "because the [challenged transaction] was not a freeze out," business judgment review governed if *either* cleansing device was used. *In re Match Grp., Inc, Deriv. Litig.*, 315 A.3d 446, 457 (Del. 2024); *see also id.* at 463. This Court rejected that argument, "conclud[ing], based on long-standing Supreme Court precedent, that": (i) where a controlling stockholder stands "on both sides of a transaction with the controlled corporation and receive[s] a non-ratable benefit, entire fairness is the presumptive standard of review"; (ii) the controller "can shift the burden of proof to the plaintiff by properly employing a special committee *or* an unaffiliated stockholder vote"; and (iii) "the use of just one of these procedural devices does not change the standard of review" such that "[i]f the controlling stockholder wants to secure the benefits of business judgment review, it must follow *all MFW*'s requirements." *Id.* at 451.

That rule makes sense. When a controller "transacts with the controlled corporation and receives a non-ratable benefit," the controller "bears the burden of

demonstrating 'the most scrupulous inherent fairness of the bargain'" because "without arm's length negotiation, controlling stockholders can exert outsized influence over the board and minority stockholders." *Id.* at 460 (quoting *Weinberger*, 457 A.2d at 710). The Grant's unfair process and price vividly illustrate the legitimacy—and severity—of those risks.

Defendants simplistically ask this Court to ignore *Match* because "the Court's holding [there] did not involve executive compensation." IDOB 26-27 (citing *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000) & *Investors Bancorp*). But in *Match* this Court referenced both *Brehm* and *Investors Bancorp* en route to confirming the bright-line rule requiring compliance with "all *MFW*'s requirements" to de-escalate the standard of review for conflicted controller transactions, including executive compensation agreements. 315 A.3d 459 nn.85-86 (*Brehm*), *id.* at 465 n.129 (*Investors Bancorp*). Defendants misleadingly state that *Match* "noted that 'Delaware courts have "applied business judgment to executive compensation decisions involving controlling stockholders,"[65] but *Match* distinguished those cases as "confined to the demand [futility] review context." 315 A3d at 470 n.157; *see also id.* at 452.

Defendants nevertheless posit that "executive-compensation arrangements," including the Grant, are different because "the executive generally receives neither

[65] IDOB 26-27 (quoting *Match*, 315 A3d at 470, n.157).

a benefit in his capacity as a stockholder nor any benefit otherwise available to minority stockholders." IDOB 27. Not so. The Grant transferred roughly 12% of Tesla's equity, worth tens of billions of dollars, from Tesla (and its minority stockholders) to Musk. And Defendants do not—and cannot—proffer any case law supporting their false premise, which (i) has no basis in *Match* (or Delaware law generally); (ii) contradicts *Match*'s holding that de-escalation requires both procedural protections in *any* transaction where a controller "transacts with the controlled corporation and receives a non-ratable benefit"; and (iii) defies the fundamental principle underlying that holding, *viz.*, that "without arm's length negotiation, controlling stockholders can exert outsized influence over the board and minority stockholders" in *any* conflicted transaction. 315 A.3d at 460.

Finally, Defendants' citation to *Maffei v. Palkon* fails. IDOB 27 (citing --- A.3d ---, 2025 WL 384054, at *15 (Del. 2025)). There, this Court held that corporate fiduciaries' reduced possibility of future legal exposure arising from a hypothetical transaction following redomestication does not constitute a non-ratable controller benefit triggering entire fairness. That highly fact-specific circumstance and holding is irrelevant to the executive compensation plan bestowed on Musk. Indeed, in *Maffei*, this Court confirmed that "Delaware decisions have applied the entire fairness framework to compensation arrangements…between a controller…and the

controlled entity," removing any doubt that Defendants cannot insulate the Grant from entire fairness review.[66]

Nevertheless, even if their proposed single-condition de-escalation standard were valid (it is not), Defendants still could not de-escalate the review standard because, as explained above, the Grant satisfied neither the independent director approval condition nor the unaffiliated stockholder approval condition.

[66] *Id.* at *19 (quoting *Ezcorp*, 2016 WL 301245, at *13, *15) (citing *Carlson v. Hallinan*, 925 A.2d 506, 529-38 (Del. Ch. 2006) (entire fairness standard applied to, *e.g.*, compensation paid to controller)).

II. THE TRIAL COURT'S APPLICATION OF ENTIRE FAIRNESS WAS FREE FROM ERROR AND FULLY SUPPORTED BY THE EVIDENTIARY RECORD.

A. Question Presented

Did the trial court commit clear error in weighing the trial evidence and finding that the Grant was not entirely fair?

B. The Standard and Scope of Review

The trial court correctly examined the Grant "through the lens of the entire fairness standard—our corporate law's most rigorous standard of review." *SolarCity II*, 298 A.3d at 699. "[D]efendants bear the burden of proving that the transaction with the controlling stockholder was entirely fair to the minority stockholders." *Id.* at 700.

"The standard and scope of appellate review of the Court of Chancery's factual findings following a post-trial application of the entire fairness standard…is governed by *Levitt v. Bouvier*." *Id.* at 698-99 (citing 287 A.2d 671 (Del. 1972)). "If [the trial court's findings] are sufficiently supported by the record and are the product of an orderly and deductive process, in the exercise of judicial restraint we accept them, even though independently we might have reached opposite conclusions." *Levitt*, 287 A.2d at 673.[67] "The Court of Chancery's post-trial determination of

[67] *See also, e.g.*, *Ams. Mining*, 51 A.3d at 1248-49 (affirming post-trial determination that transaction was not entirely fair where "factual findings are supported by the

entire fairness must be accorded substantial deference on appeal." *Ams. Mining*, 51 A.3d at 1248.

This Court "do[es] not weigh evidence on appeal." *Oracle*, 2025 WL 249066, at *12. The Court's "review of the formulation and application of legal principles" is *de novo*. *SolarCity II*, 298 A.3d at 699.

C. Merits of the Argument

The trial court correctly applied entire fairness to the evidentiary record. As Musk argued in *SolarCity II*, Defendants' counterarguments "are actually challenges to the [trial court's] factual findings as to which [the Defendants] cannot establish clear error," and "mischaracterize the [trial court's] analysis and boil down to challenges to [her] careful factual findings, none of which can support a finding of clear error." B3546, B3548. This Court should affirm the trial court's finding that the Grant was not entirely fair.

1. The Trial Court's Post-Trial Findings Foreclose a Burden Shift

In a single paragraph, Defendants claim the trial court committed "a threshold error" by not shifting the burden of proof based on the Grant's approval by "Tesla's independent directors and fully informed, disinterested stockholders[.]" IDOB 37. But after weighing the evidence, the trial court correctly found the Grant received

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record and its conclusions are the product of an orderly and logical deductive reasoning process.").

neither independent director approval nor fully informed disinterested stockholder approval. *See, e.g.*, Op. 2-3, 103, 147. As discussed above, those findings were correct. Defendants' claimed legal error regarding burden shifting merely recycles their challenge to the trial court's fact-intensive director independence and disclosure findings, and likewise fails.

2. The Trial Court's Unfair Process Findings Are Supported by the Trial Record and Not Clearly Erroneous

Delaware courts undertaking the entire fairness inquiry first examine process fairness, then "turn to fair price." *SolarCity II*, 298 A.3d at 716. That is logical because, as the Grant illustrates, "an unfair process can infect the price." *Id.* at 702 (quoting *Trados*, 73 A.3d at 78).[68] In challenging the trial court's application of entire fairness, Defendants invert that order, addressing fair process *after* fair price. Their goal is clear: because the Grant process was so deficient and infected the fair price inquiry, they hope to downplay it (or skirt it altogether). *See, e.g.*, Op. 171 & n.823. The Court should reject Defendants' attempt to circumvent the trial court's careful factual findings regarding the Grant's process, and affirm the "heavily fact-and-credibility-laden determination" that the process was unfair. *SolarCity II*, 298 A.3d at 712.

[68] *See also* Op. 171 (quoting *Bomarko, Inc. v. Int'l Telecharge, Inc.*, 794 A.2d 1161, 1183 (Del. Ch. 1999), *aff'd*, 766 A.2d 437 (Del. 2000)).

The trial court correctly stated that a transaction's initiation, negotiation, structure, and approval are "the core of a court's fair dealing analysis." Op. 160 (citing *SolarCity II*, 298 A.3d at 702 & *Weinberger*, 457 A.2d at 711). The trial court faithfully applied those factors to the evidence, incorporating by reference the copious "facts pertinent to the fair dealing inquiry" it detailed "when discussing how Musk controlled the process and the disclosure deficiencies." Op. 160. The trial court then revisited certain of those "findings while mapping them onto the *Weinberger* factors," correctly finding the Grant's process unfair. *Id.*

Defendants challenge the trial court's findings as to all four of *Weinberger*'s fair process factors. Each challenge fails.

Initiation and Timing. In assessing this factor the trial court carefully weighed the evidence, identifying "a handful of facts in [Defendants'] favor" and finding that "Musk did not manipulate the *initial timing* of the process[.]" Op. 161 (emphasis in original). But the trial court's thorough evidentiary examination concluded that Musk "repeatedly and unilaterally manipulated the timeline of the process." Op. 162. As explained above, Musk dictated the Grant's timing, starting and stopping the process at his discretion. Importantly, the trial court also found that "Musk's 'red light, green light' approach negatively affected the process in two ways": (i) "most of the work occurred during small bursts under Musk-imposed time pressure," and (ii) Musk's pattern of "ma[king] determinations at the last minute"

and "habit of shaking up the timeline or changing his proposal just before a meeting made it tough for directors and their advisors to meaningfully evaluate the Grant and respond," thus "impair[ing] the process." Op. 162-63.

In their lone paragraph addressing this factor, Defendants focus myopically on the "timing of the *first* discussion" regarding the Grant. IDOB 44 (quoting Op. 161). But highlighting that factual finding merely underscores the trial court's careful and even-handed factfinding. Defendants' assertion that the trial court "suggested" that Musk's subsequent approach "imposed time pressure" (*id.*) understates the trial court's findings that Musk "repeatedly and unilaterally manipulated the timeline of the process" in ways that "negatively affected" and "impaired the process." Op. 162-63.

Instead of engaging with those clear, specific, and sound factual findings, Defendants argue that a controller's "*initiation* 'is not incompatible with the concept of fair dealing so long as the controlling shareholder does not gain financial advantage at the expense of the controlled company.'" IDOB 44 (quoting *Kahn v. Tremont*, 694 A.2d 422, 431 (Del. 1997)). But *Tremont* supports the trial court's findings here. By his initiation, Musk *did* gain substantial financial advantage (*i.e.*, stock worth tens of billions of dollars) at Tesla's expense. And Musk did much more than "initiate" the process; he repeatedly and unilaterally impaired it, and manipulated the timeline.

Negotiations. "Negotiations that are 'vigorous and spirited' are an indicium of fair dealing"[69] but "the opposite is also true. The lack of arm's-length negotiations can overshadow positive aspects of a process." Op. 164 (citing *FrontFour*, 2019 WL 1313408, at *26).

After examining Defendants' negotiation-related arguments and evidence, the trial court found: "Although Defendants cast the negotiations as the strongest aspect of the process, they are actually the most dramatic failure." Op. 165.

The trial court's examination was thorough. The court incorporated its factual findings that "the Compensation Committee was compromised by conflicts" and "could not negotiate at arm's length against Musk" and found (i) that "none [of the Committee members] viewed the process as an arm's length negotiation" but rather "as a form of collaboration with Musk," (ii) "there [wa]s no evidence of any adversarial negotiation with Musk concerning the [Grant's] size," and (iii) "the Board backed into 12 tranches when translating Musk's demand of 10% [FDS] into a round percentage of [TOS] while maintaining the $50 billion/1% per tranche approach that Musk proposed back in April." Op. 144-45, 165-66.

Ignoring those and other substantive factual findings, Defendants cite superficial, generic statistics regarding the number of meetings and length of the

[69] *SolarCity II*, 298 A.3d at 711 (quoting *Gesoff v. IIC Indus., Inc.*, 902 A.2d 1130, 1148 (Del. Ch. 2006)); *see also* Op. 163-64 ("This factor proves pivotal, because arm's-length negotiations can make up for other flaws.").

process, then quote a single advisor's statement that the Board "asked 'hard questions about the structure, how it worked,' and 'how shareholders would view it.'" IDOB 44 (quoting A1220).[70] Defendants make no attempt to counterbalance those generic statistics, which the trial court held "elide the lack of substantive work." Op. 5. The only conceivable evidence of negotiation Defendants cite is Musk's admission that he was "negotiating against [him]self," which they claim shows "good-faith negotiations[.]" IDOB 44-45. But Musk's need and ability to negotiate against himself *underscores* the total absence of any real negotiation.

Unable to cite any Grant size negotiations, Defendants instead assert that "the Board secured multiple stockholder protections." IDOB 44. Yet the trial court, weighing the evidence, found that "the purported concessions secured by the Compensation Committee did not result from negotiations either," and provided little-to-no value. Op. 166; *see supra* 19-21.

[70] Likewise, the Committee's retention and consultation of outside advisors (*see* IDOB 44) elides the trial court's findings that (i) the advisors "played no role in the negotiations and were not tasked with challenging the committee's thinking or presenting alternatives to the Grant"; (ii) the "Committee relied more on conflicted management members than its outside advisors"; (iii) the Committee undercut its advisors' efficacy, including by "avoid[ing] using objective benchmarking data"; and (iv) Musk's conduct "made it tough for the…advisors to be prepared." Op. 4, 63, 167.

To manufacture a claim of legal error, Defendants assert the trial court's finding that the Committee operated under a "controlled mindset"[71] is irrelevant to the fair process inquiry. IDOB 45. That is plainly false. *See, e.g.*, *Southern Peru*, 52 A.3d at 798 ("[F]rom inception, the Special Committee fell victim to a controlled mindset and allowed [the controller] to dictate the [transaction's] terms and structure….") (cited in Op. 168 n.808).[72]

Defendants also challenge the factual "controlled mindset" finding itself, curiously abandoning the negotiation factor to rehash their timing-based argument that "the court erred in criticizing the timing without tying it to any harm to the company or stockholders." IDOB 45. That *non sequitur* argument is irreconcilable with the trial court's specific findings regarding how the Grant's timing "negatively affected" and "impaired the process." Op. 162-63.

Tacitly conceding the absence of meaningful arm's-length negotiations, Defendants ask the Court to disregard it—despite case law deeming it fatal—because "executive compensation negotiations are typically 'cooperative and collaborative' when 'there's a good relationship between the board and CEO.'" IDOB 46 (quoting A770). The quoted language is not Delaware authority, or any legal authority at all. Instead, it comes from Maron, "Musk's divorce-attorney-

[71] IDOB 45 (quoting Op. 127-28, 168).

[72] *See also id.* at 800, 801, 804, 811 (discussing "controlled mindset").

turned-general-counsel…whose admiration for Musk moved [him] to tears during his deposition." Op. 167-68. Maron's beliefs cannot override Delaware law or the post-trial record.

Finally, Defendants argue that their intentional avoidance of benchmarking is not fatal because "the only meaningful precedent for the [Grant] was Musk's prior compensation plans with Tesla[.]" IDOB 46. The trial court not only found that benchmarking was "standard and essential" based on testimony from the Committee's own advisors, it held that the Committee did not ask for benchmarking, "which would have given them some perspective on how (in Musk's words) 'really crazy' the Grant was," *because* "they knew benchmarking would expose the Grant as many multiples larger than any conceivable comparison." Op. 167. "[T]he committee avoided using objective benchmarking data that would have revealed the unprecedented nature of the compensation plan." Op. 4

Rather than confront those damning factual findings, Defendants claim that "mandat[ing] benchmarking would…preclude innovation in executive compensation[.]" IDOB 46. But the trial court did not "mandate benchmarking." It correctly found, based on the evidence, that Defendants' intentional avoidance of benchmarking was relevant to the fair process inquiry *because benchmarking would demonstrate the Grant's unfairness*. Op. 167.

Structure and Approval. "The last *Weinberger* factor examines how the transaction was structured and approved." Op. 169. Based on the totality of the testimonial and documentary evidence, the trial court correctly found that "[f]ive of the six directors who voted on the Grant were beholden to Musk or had compromising conflicts" and that "the Board secured stockholder approval through a materially deficient proxy." Op. 170. Defendants' single-paragraph argument on this issue merely recycles their previous challenges to the trial court's fact-intensive findings regarding director conflicts and disclosure failures, and fails for the same reasons. IDOB 46-47.

* * *

The trial court's "heavily fact-and-credibility-laden determination[s]" (*SolarCity II*, 298 A.3d at 712) regarding the Grant's unfair process were fully "supported by the record and…the product of an orderly and deductive process." *Levitt*, 287 A.2d at 673.

3. The Trial Court's Unfair Price Findings Are Supported by the Trial Record and Not Clearly Erroneous

This Court should also affirm the trial court's "heavily fact-and-credibility-laden determination" that the Grant's price was unfair. *SolarCity II*, 298 A.3d at 712.

a) The Fair Price Inquiry

"In the fair price analysis, the court looks at the economic and financial considerations of the transaction to determine if it was substantively fair[.]" Op. 171 (quoting *Ravenswood Inv. Co. v. Estate of Winmill*, 2018 WL 1410860, at *13 (Del. Ch. Mar. 21, 2018)). "[A]n unfair process can infect the price." *SolarCity II*, 298 A.3d at 702; *see also* Op. 171.

The trial court noted that "[t]here is no absolute limit on the magnitude of a compensation grant that could be considered fair." Op. 171 (citing *Brehm* , 746 A.2d at 263). But "where the pricing terms of a transaction that is the product of an unfair process cannot be justified by reference to reliable markets or by comparison to substantial and dependable precedent transactions, the burden of persuading the court of the fairness of the terms will be exceptionally difficult." Op. 171-72 (quoting *Valeant Pharms. Int'l v. Jerney*, 921 A.2d 732, 748 (Del. Ch. 2007)).

Properly applying the applicable legal framework to the evidence, and based on numerous factual findings and credibility determinations, the trial court correctly rejected Defendants' scattershot arguments and concluded that "Defendants did not prove that the Grant falls within a range of fairness." Op. 173.

b) Defendants' Challenge to the Trial Court's Give/Get Analysis Findings Fails

Defendants claim the fair price analysis should focus on "compar[ing] the value of what [Tesla] 'got' to the value of what it 'gave' in the transaction," and that

"[b]y any measure, Tesla stockholders got far more than they gave through the [Grant], making the price fundamentally fair." IDOB 38 (quoting *SolarCity II*, 298 A.3d at 700).

The trial court noted, "[t]here are many alternative ways to analyze price fairness," and given the evidence in this case, "there are good reasons to reject the give/get model where no market-based evidence supports the price." Op. 172 (citing *SolarCity I*, 2022 WL 1237185, at *39-48 & *Valeant*, 921 A.2d at 750). Nevertheless, undertaking the give/get analysis urged by Defendants, the trial court examined the record to ascertain that "the goals in structuring [the Grant] were to 'retain[]' Musk, 'properly incentiviz[e] Musk,' and '[k]eep…Musk as the Company's fully-engaged CEO[.]'" Op. 173 (quoting B0427); *see also id.* at 173-74 & n. 831. Nonetheless, the Grant was *less restrictive* than the 2012 Grant and did not even require Musk to remain "the Company's fully-engaged CEO," and even "allowed Musk to step down to the role of 'Chief Product Officer.'" Op. 173 (quoting B0427), 176.

Defendants fixate on three generic points within the court's expansive analysis, none of which indicates erroneous findings or conclusions.

First, Defendants claim the Grant created "full alignment between executive pay and stockholder returns." IDOB 38. But as the trial court correctly found, Musk's 21.9% pre-existing stake—which independently provided him "over $10

billion for every $50 billion increase" in Tesla's market capitalization—*already* aligned Musk with stockholder returns. Op. 177-79. More generally, theoretical alignment between executive pay and stockholder returns based on a plan's structure says nothing about what constitutes fair financial terms within that structure.

Second, Defendants claim the Grant would provide Musk nothing "[i]f Tesla performed just adequately, or even reasonably well." Op. 177-79. That ignores:

- The Grant's GDFV—which accounted for the probability of achieving (or never achieving) the Grant's milestones[73]—was approximately *$2.6 billion*. Op. 1, 79.[74]

- Musk could achieve three-quarters of the Grant "even if earnings d[id] not clear the EBITDA performance hurdles," allowing Musk to "still receive billions under the Grant without Tesla experiencing the fundamental growth that the Grant was intended to incentivize." Op. 183 (quoting B0756).

- The "contemporaneous evidence" established that three milestone were "70% likely to be achieved soon after the Grant was approved," with several more projected for achievement soon thereafter. Op. 73, 186.

Even if the Grant truly would provide no compensation absent outsized performance (which is false), that structural consideration again fails to inform what constitutes fair financial terms within that structure.

[73] The Grant's approximately $2.6B GDFV expressly accounted for "the probability of hitting the [Grant's] market capitalization milestones" (Op. 78-79), which Tesla engineered "to be achieved around the same time" as achievement of the Grant's operational milestones. Op. 72 (quoting A1076, 1094:17-1095:14).

[74] The Grant's approximately $2.6B GDFV was "more than 30x greater than its nearest comparable plan…[*i.e.*,] Musk's 2012 Grant." Op. 180.

Third, Defendants claim the Grant "incorporated multiple, interlocking safeguards not typically found in CEO compensation plans[.]" IDOB 38. As noted above, the trial court's careful analysis of those "safeguards" exposed them as ineffective, irrelevant, untethered to the Grant's purported purpose, or the byproduct of prioritizing *Musk*'s interests over Tesla's interests.

None of Defendants' one-off challenges to the trial court's give/get analysis withstand scrutiny, let alone present any basis for reversal.

c) Defendants' Other Claims of Error Fail

Based on their false premise that the trial court's give/get findings were incorrect, Defendants claim three other errors.

First, Defendants claim the trial court failed to consider "whether the [Grant's] terms fell within a 'range of fairness.'" IDOB 38. False. The first paragraph of the trial court's fair price analysis notes that "the court's task is to determine whether the transaction price falls *within a range of fairness*." Op. 171 (quoting *Weinberger*, 457 A.2d at 713 & *SolarCity I*, 2022 WL 1237185, at *32). And in exhaustively analyzing Defendants' fair price arguments, the trial court considered whether "the Grant was within the range of reasonable approaches to achieve the Board's purported goals[.]" Op. 179. Based upon the evidence, the trial

court held: "Defendants did not prove that the Grant falls within a range of fairness." Op. 173.[75]

Despite repeatedly acknowledging and applying the "range of fairness" standard, Defendants nevertheless claim the trial court "inverted the entire fairness test" in finding that Musk's "preexisting 21.9% equity stake diminished the need for additional performance-based compensation[.]" IDOB 38-39. False. Defendants elected not to identify *any* purported "range of fairness" for the Grant. Nevertheless, the trial court dutifully attempted to identify one under the give/get framework urged by Defendants, considering Tesla's "get" from the Grant, which Defendants portrayed as Musk's incremental incentive to create value for stockholders. *See* Op. 173 (citing B0427). Determining Musk's *incremental* incentive to create stockholder value obviously requires knowing Musk's *pre-existing* incentive. The trial court's consideration of Musk's pre-existing incentives—including his 21.9% Tesla stake—was thus a necessary component of the "range of fairness" analysis Defendants now falsely claim the trial court failed to undertake.[76]

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[75] *See also* B3588 (arguing "there is no…requirement under Delaware law" to "specify[] the lower and upper bounds of a 'reasonable range'").

[76] Defendants cite *Cinerama Inc. v. Technicolor, Inc.* to assert that Delaware law does not ask "whether some hypothetical alternative might have worked better" than the challenged transaction (IDOB 39), but omit that the cited portion of *Cinerama* relates to "the non-self-dealing context," thus excluding the self-dealing Grant. 663 A.2d 1134, 1143 (Del. Ch. 1994).

Defendants' assertion that "there was *no evidence* that Musk would have accepted materially less than the [Grant]" is also false. IDOB 39 (emphasis in original). It ignores the extensive evidence the trial court considered (and Defendants acknowledge) proving that, as Musk "stat[ed] unequivocally" at trial, "he would have remained at Tesla even if stockholders had rejected a new compensation plan because he was 'heavily invested in Tesla, both financially and emotionally, and viewed Tesla as part of his family.'" Op. 38 (quoting A927, 643:24-644:15).[77] Indeed, Musk "clarified his intentions at the time and at trial: Musk is committed, Tesla forever." Op. 161.

Ignoring that unequivocal testimony—and the mountain of evidence supporting it—Defendants merely note that on one occasion when Musk publicly committed to remain "actively involved with Tesla for the rest of [his] life," he also indicated "he would not be 'CEO forever.'" IDOB 40 (quoting A4030 at 20). But the Grant did not require Musk to remain Tesla's CEO. Op. 74-75, 176.[78]

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[77] *See also, e.g.*, B0734 ("Elon is heavily invested in Tesla, both financially and emotionally, and views Tesla as part of his family."); Op. 38 ("Trial witnesses…testified that they never heard Musk say he had any plans to quit Tesla"); Op. 39 (noting the lack of any succession plans or identification of a successor).

[78] Defendants' claim that the trial court "ignored Musk's role as a serial entrepreneur with numerous companies competing for his attention"—particularly SpaceX (IDOB 39)—is also false. The trial court considered Defendants' argument "that Musk needed additional incentives to stay on at Tesla or he would spend more time at SpaceX[.]" Op. 182. As the court held, Defendants' related assertion that "[t]he Board thus confronted a real risk that Musk would redirect his energy to other

Critically, Defendants did not—and cannot—demonstrate that Musk would *not* have accepted materially less than the unprecedentedly massive Grant, including because Defendants concededly never engaged Musk in price negotiations. Op. 144-46; *see also, e.g.*, Op. 129, 133-38. Defendants thus resort to noting that Musk "*wanted* a plan '*structured* like the 2012 Grant' but with even more challenging goals." IDOB 39 (quoting Op. 31). But what Musk "wanted" does not establish what he would have accepted, and his desired Grant *structure* fails to inform the fairness of its *size*, which provided Musk expected compensation roughly 33x higher than the 2012 Grant. Op. 1, 180, 189; *see also* B3611.

Finally, Defendants acknowledge the trial court's analysis of their argument that Musk's stated ambition to colonize Mars justified the Grant, but disagree with its evidence-based rejection of that argument. IDOB 40. That post-trial finding rests on credibility determinations and documentary evidence. It is not reversible.

Second, Defendants claim that the trial court erred because it "did not even acknowledge the $700 billion increase in stockholder value" that occurred years *after* the Board bestowed the Grant on Musk, and reached incorrect findings regarding the Grant's purported "safeguards." IDOB 41-42. Both arguments fail.

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pursuit" (IDOB 39) rings hollow given the Board did "not place guardrails on how much time or energy Musk had to put into Tesla[.]" Op. 182.

The trial court not only "acknowledge[d]" the "$700 billion increase in stockholder value" argument; it devoted an entire subsection to this "Hindsight Defense." Op. 191-92. Based on the evidence, the trial court found that "Defendants failed to prove that Musk's less-than-full time efforts for Tesla were solely or directly responsible for Tesla's recent growth, or that the Grant was solely or directly responsible for Musk's efforts." *Id*. Notably, Defendants still cannot identify any such evidence.[79] And Defendants fail to explain how or why Tesla's stock price movements years *after* the Grant's approval would establish what price was "fair" at the time of approval.[80]

Defendants' quibbles with the trial court's analysis of the Grant's purported "safeguards" changes nothing. The trial court carefully analyzed each such "safeguard" based on the relevant evidence. *See supra* 19-21, 78; Op. 183-85. Defendants concede that the trial court "dissected each" purported safeguard's

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[79] *Cf.* A3758 (Tesla conceding market factors and non-Musk employees contributed to Tesla's growth).

[80] Defendants' citation to *Nixon v. Blackwell*, 626 A.2d 1366 (Del. Ch. 1993) is puzzling. In *Nixon*—where directors allegedly maintained a discriminatory policy regarding an employee option plan ("ESOP") and insurance policies—this Court held that the trial court "erred as a matter of law in concluding that the liquidity afforded to the employee stockholders by the ESOP and the key man insurance required substantially equal treatment for the non-employee stockholders." *Id.* at 1377. It is unclear how that holding relates to Defendants' criticism of the trial court's determination that Tesla's post-Grant stock performance did not render the Grant's price fair. Indeed, as noted above, the trial court clearly did "evaluate and articulate" (*id.*) Tesla's post-Grant performance. *See, e.g.*, Op. 92, 191-92.

merits. IDOB 41. The best critique of those studied, evidence-based findings Defendants can muster is a refrain of their spurious assertion that the trial court failed to consider whether the Grant's terms "f[e]ll within a reasonable range[.]" IDOB 42. That argument fails because the trial court expressly framed its inquiry—and explicitly predicated its finding—on the "range of fairness" framework Defendants falsely claim it ignored. *See supra* 78-79; Op. 171-90.

Third, Defendants claim the trial court erred by "dismissing" stockholders' Grant approval "as evidence of fair price" because "*informed* stockholder approval" evidences fair price. IDOB 42. That argument fails too. Defendants nowhere dispute that (i) the trial court considered that "[t]he stockholder vote is one component of the fair price analysis"; (ii) under *Weinberger*, "an *uninformed* stockholder vote is totally 'meaningless'"; and (iii) the trial court found that multiple material disclosure failures undermined the Grant's stockholder vote. Op. 148-56, 190-91 (quoting *Weinberger*, 457 A.2d at 712). The trial court's decision to accord that vote no weight cannot be erroneous.

Defendants cite *SolarCity II*'s finding that it "was not erroneous" for the trial court there to find that the stockholder vote indicated fairness. IDOB 42-43. But Defendants omit critical aspects of *SolarCity II* that undermine this argument. There, Musk acknowledged that the "the amount of weight" a trial court accords to a stockholder vote in an entire fairness analysis "is a classic example of trial court

discretion," and this Court agreed. *SolarCity II*, 298 A.3d at 727 (quoting Musk Answering Brief at 56).

Likewise, the trial court here acted squarely within its discretion in according no weight to the stockholder vote on the Grant. Particularly given this Court's longstanding precedent holding uninformed stockholder votes are "meaningless," the trial court could not have abused its discretion in finding that the materially uninformed vote on the Grant "does not support a finding of fair price." *Id.*; *see also* Op. 191.

III. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN RESCINDING THE GRANT.

A. Question Presented

Did the trial court abuse its discretion in rescinding the Grant based on Defendants' loyalty breaches, including issuing a false and misleading proxy? The issue was not fairly raised below. *Infra*.

B. Scope of Review

"This Court reviews the Court of Chancery's fashioning of remedies for abuse of discretion." *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 175 (Del. 2002). This Court "defer[s] substantially to the discretion of the trial court in determining the proper remedy…to be awarded for a found violation of the duty of loyalty by a corporate fiduciary." *Int'l Telecharge, Inc. v. Bomarko, Inc.*, 766 A.2d 437, 439 (Del. 2000).

C. Merits of Argument

Defendants' argument that the trial court improperly granted rescission fails because Defendants failed to (i) timely and directly object to rescission as a legally improper remedy, (ii) identify any legal error in the trial court's granting of rescission, or (iii) carry their burden of identifying an alternative remedy.

1. Defendants Waived Objections to Rescission

In pursuing their all-or-nothing trial strategy, Defendants never argued against rescission until after post-trial briefing. On notice since March 2, 2022—the date of

the Amended Complaint—that Plaintiff sought rescission,[81] Defendants' pre- and post-trial briefs were tactically silent on remedy. Defendants waited until their *post-trial supplemental reply brief* to finally argue rescission was improper, and *only* in response to Plaintiff's disclosure violations argument. A1743-44. Because Defendants never properly raised the issue below, it is waived on appeal.[82]

2. Rescission Was Proper

"Delaware law dictates that the scope of recovery for a breach of the duty of loyalty is not to be determined narrowly." *Bomarko*, 766 A.2d at 441. Under *Weinberger*, the trial court has broad discretion to "fashion any form of equitable and monetary relief as may be appropriate, including rescissory damages." *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 371 (Del. 1993). "[O]nce a breach of duty is established, uncertainties in awarding damages are generally resolved against the wrongdoer." *Thorpe v. CERBCO, Inc.*, 1993 WL 443406, at *12 (Del. Ch. Oct. 29, 1993), *aff'd in pertinent part, rev'd in part on other grounds*, 676 A.2d 436 (Del. 1996).

[81] A162, A301, A303; *see also* A486-A487, ¶278.

[82] *Oracle*, 2025 WL 249066, at *10; *LCT Cap., LLC v. NGL Energy Partners LP*, 249 A.3d 77, 101-02 (Del. 2021) (argument raised in reply waived); *Wright v. State*, 980 A.2d 1020, 1024 (Del. 2009) (tactical decisions preclude review).

Rescission is the "preferable remedy"[83] in "self-dealing transactions,"[84] particularly where one party has misled another. Rescission "restore[s] the parties *substantially* [*i.e.*, not necessarily completely] to the position which they occupied before making the contract." *Craft v. Bariglio*, 1984 WL 8207, at *12 (Del. Ch. Mar. 1, 1984); *see also Geronta Funding v. Brighthouse Life Ins. Co.*, 284 A.3d 47, 61 (Del. 2022) ("[R]escission results in abrogation or unmaking of an agreement, and *attempts* to return the parties to the status quo."). It is granted at the trial court's discretion. *Gotham*, 817 A.2d at 164.

Here, the trial court correctly held that the Grant, the product of an unfair process and untethered from market-based measures, failed under entire fairness. Op. 158-92. The court correctly ordered rescission of the Grant and disgorgement of all associated options. Op. 192. The court rightly held rescission was "reasonable, appropriate, and practicable," noting the Grant was "not 'too complex to unscramble.'" Op. at 192, 198 (quoting *In re Sunbelt Beverage Corp. S'holder Litig.*, 2010 WL 26539, at *14 (Del. Ch. Jan. 5, 2010)). With "no third-party

[83] *Lynch v. Vickers Energy Corp.*, 429 A.2d 497, 501 (Del. 1981), *overruled on other grounds by Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983).

[84] *See Zutrau v. Jansing*, 2014 WL 3772859, at *26 (Del. Ch. July 31, 2014) ("[R]escission frequently is granted where self-dealing transactions are found not to be entirely fair[.]"); *see also, e.g., eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 46 (Del. Ch. 2010) (ordering rescission for fiduciary breach); *Valeant*, 921 A.2d at 752 (ordering rescission where defendant failed to prove entire fairness and had "no right to retain" a $3 million bonus).

interests" at stake, the Grant "unexercised and undisturbed," and any "exercised shares" still subject to "the Five-Year Holding Period," the parties could be substantially restored to their prior positions. Op. 198.

Defendants' argument that "Musk cannot 'unscramble' the years of work he did to grow Tesla's value" and "Tesla stockholders [cannot] return the benefits" of his performance (IDOB 49-50) wrongly casts rescission as requiring an unrealistically literal *status quo ante* restoration. But that is foreign to the strictures of equity.[85] To justify rescission, a plaintiff need only show it is both "reasonable and appropriate." *Lenois v. Lawal*, 2017 WL 5289611, at *20 (Del. Ch. Nov. 7, 2017). The trial court correctly found that Plaintiff made that showing here.

As to restoring Musk, the trial court found that, apart from the Grant, Musk was fairly compensated for his services. Musk was still under contract for the 2012 Grant, *which only expired in August 2022* after nine of ten tranches vested. A4006; A728, 73:14-75:3. He further reaped *tens of billions of dollars* from his preexisting stake, which the court noted "provided a powerful incentive for Musk to

[85] *See Detroit Med. Ctr. v. Provider Healthnet Servs., Inc.*, 269 F. Supp. 2d 487, 496 (D. Del. 2003) ("Under Delaware law, rescission requires the substantial rather than the complete restoration of both contracting parties to their respective positions before executing the contract."); *Griggs v. E.I. DuPont de Nemours & Co.*, 385 F.3d 440, 448-49 (4th Cir. 2004) ("[C]ourts of equity did not automatically deny relief to a plaintiff seeking rescission in cases where complete restoration of benefits could not be accomplished. Instead, [they] would order rescission where the equities of the situation so demanded.").

stay and grow Tesla's market capitalization" and was the typical compensation for tech company founders. Op. 177-79. Indeed, "for every $50 billion increase," Musk stood to gain over "$10 billion"—entirely independent of the Grant. Op. 179-80.[86] If further compensation is appropriate, the Board remains free to grant it consistent with their fiduciary duties. Op. 63-64. Musk also chose not to cross-claim at trial for additional compensation under *quantum meruit*, an available equitable safeguard following rescission. *See Zutrau*, 2014 WL 3772859, at *26.

As for restoring Tesla, Defendants offered no evidence that "Musk's less-than-full time efforts for Tesla were solely or directly responsible for Tesla's recent growth or that the Grant was solely or directly responsible for Musk's efforts." Op. 191-92. Rescission restores Tesla by reversing the $2.3 billion Grant-related accounting charge on its balance sheet. *See, e.g.*, A2848; B3828, ¶62.

In awarding rescission, the trial court found *Valeant* "instructive." Op. 198-99. There, a director and CEO failed to show that his compensation was entirely fair and rescinded his bonus. *Valeant*, 921 A.2d at 752. As here, the court found the defendant "was adequately, if not generously, compensated for his prior years of service." *Id.* at 752 n.47.

[86] Musk ultimately gained over $100 billion—reflecting his 21.9% stake—for his services. B3711, 78:16-19.

Defendants' attempt to distinguish *Valeant* as involving disgorgement rather than rescission fails. IDOB 52. The *Valeant* court connected the two remedies: "As between Jerney and the company, that payment must be *rescinded*, requiring Jerney to *disgorge* the full payment." 921 A.2d at 752. So too here. The unfair Grant resulted from a loyalty breach. Rescission voids the Grant, forcing Musk to disgorge what he improperly received. The remedies are two sides of the same coin.

Defendants' authorities are inapt. In *Stenta v. General Motors Corporation*, 2009 WL 1509299, at *10 (Del. Super. Ct. May 29, 2009), the Court refused rescission, which required restoring title to a vehicle since resold. Here, "no third-party interests are implicated." Op. 198. In *Sunbelt*, 2010 WL 26539, at *14, the Court declined rescission due to valuation complexities and regulatory hurdles. Here, "the entire Grant sits unexercised and undisturbed." Op. 198. In *Ravenswood*, 2018 WL 1410860, at *22, rescission would have "significantly reduce[d] (if not completely eliminate[d]) the Company's available cash." Here, rescission *helps* the Company by reversing the $2.3 billion accounting charge.

3. Defendants Failed to Carry Their Burden of Identifying an Alternative Remedy

Defendants claim they had no burden to propose an alternative to rescission. IDOB 51. False. Defendants knew Plaintiff sought rescission since March 2, 2022. At trial, Defendants bore the burden of proving either "the reasonableness of his compensation" or his entitlement to *quantum meruit*. *See Technicorp Int'l II, Inc. v.*

Johnston, 1997 WL 538671, at *15 (Del. Ch. Aug. 25, 1997).[87] Defendants strategically offered *no evidence* on what portion of the Grant Musk should retain or *any* alternative compensation. Op. 199 (Defendants "failed to identify any logically defensible delta between the Grant and a fair one," and "there is nothing in the record to allow the court to fashion a remedy that would order rescission only to the extent the Grant was unfair."); *see also* B3744-B3745, 111:14-112:6; A3877, 235:1-5. Confronted with that choice—and given the fundamental equitable principle that "[o]nce a breach of duty is established, uncertainties in awarding damages are generally resolved against the wrongdoer"[88]—the trial court exercised its discretion to order rescission.

Unable to explain their failure, Defendants claim Plaintiff forced the trial court's hand (IDOB 2), an argument the court rejected. Op. 192. Plaintiff, not Defendants, identified a potential alternative to full rescission. *Id.* Citing nothing, Defendants argue that presenting evidence of lesser compensation "would put them in an impossible position." IDOB 51. But alternative arguments are routine in litigation. Defendants simply bet everything on a narrow strategy and lost.

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[87] Defendants' reliance on *ENI Holdings, LLC v. KBR Grp. Holdings, LLC*, is misplaced as the court there declined to address rescission *at the pleading stage* as it required a "fact specific" inquiry. 2013 WL 6186326, at *24 (Del. Ch. Nov. 27, 2013).

[88] Op. 199 (quoting *In re Dole Food Co., S'holder Litig.*, 2015 WL 5052214, at *14 (Del. Ch. Aug. 27, 2015)).

Courts have repeatedly refused to excuse that strategy, including in *Valeant* and *SolarCity II*. In *Valeant*, the plaintiff brought fiduciary duty claims against former executives and directors who awarded themselves large bonuses, all of whom settled pre-trial but one. 921 A.2d at 735-36. The remaining defendant insisted "the entirety of his bonus was fair" (Op. 199) but failed to prove it—the trial court found the transaction process flawed and tainted by self-interest, and "little evidence" that the bonus was fair. *Valeant*, 921 A.2d at 736. The defendant urged the trial court to "reduce, rather than eliminate entirely, the bonus paid to him," (*id*. at 745, 751-52) but given his "failure of proof," (Op. 199) the trial court ordered full disgorgement. *Valeant*, 921 A.2d at 752. Likewise, in *SolarCity II*, plaintiffs pursued an all-or-nothing insolvency theory, which the trial court dismissed as "incredible." 298 A.3d at 721. Musk, there the appellee, criticized plaintiffs for "ma[king] a strategic choice to go 'all in.'" *SolarCity II*, Appellee Answering Brief, 50. With no alternative theory, plaintiffs were left with no credible unfair price evidence, and thus the trial court and this Court found the transaction entirely fair. *SolarCity II*, 298 A.3d at 721-22.

Here, Defendants deployed the same high-risk strategy used in *Valeant* and *SolarCity II*, "swinging for the fences" with "no credible countervailing evidence." *Id.* at 719 n.269, 733. The trial court—left with no basis to uphold any part of the Grant—properly rescinded it in full.

On appeal, Defendants argue for the first time that Plaintiff is entitled to, at most, nominal damages. IDOB at 52. Ignoring the propriety of rescission, they misapprehend the derivative nature of this suit, where remedies benefit Tesla at the expense of faithless fiduciaries. Moreover, Defendants never raised this argument below and never explain why "the interest of justice" warrants considering it now. The argument is waived.[89]

[89] *See* Del. Sup. Ct. R. 8; *see also Shawe v. Elting*, 157 A.3d 152, 169 (Del. 2017) ("[C]onstitutional arguments [are] waived for failure to raise them first in the Court of Chancery.").

IV. THE TRIAL COURT CORRECTLY DENIED THE MOTION TO REVISE THE POST-TRIAL OPINION.

A. Question Presented

Did the trial court err in denying the Motion to Revise, which sought entry of judgment for Defendants based on the 2024 Vote?

B. Scope of Review

Post-trial motions are generally reviewed for abuse of discretion. *Sussex Cnty., Del. v. Morris*, 610 A.2d 1354, 1360 (Del. 1992). As are decisions to admit or deny evidence and to deny a motion for a new trial. *Bell Sports, Inc. v. Yarusso*, 759 A.2d 582, 587 (Del. 2000). A trial court's application of the law-of-the-case doctrine is reviewed *de novo*. *Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 36 (Del. 2005). A trial court's decision to consider an affirmative defense is reviewed for abuse of discretion. *Sunder Energy, LLC v. Jackson*, 332 A.3d 472, 491 (Del. 2024). A finding of waiver of an affirmative defense is reviewed for plain error. *N. Am. Leasing, Inc. v. NASDI Holdings, LLC*, 276 A.3d 463, 470 (Del. 2022). Trial strategy and tactical decisions preclude a claim of error. *Wright*, 980 A.2d at 1024.

Ratification is a mixed question. *Yiannatsis v. Stephanis*, 653 A.2d 275, 279 (Del. 1995). Questions of law are reviewed *de novo*, while fact-dominated ratification findings are subject to limited review under the clearly erroneous standard. *Id.*; *Bäcker v. Palisades Growth Cap. II, L.P.*, 246 A.3d 81, 94 (Del. 2021).

A trial court's disclosure adequacy findings will not be overturned if sufficiently supported by the record and the product of an orderly and logical deductive process. *RBC*, 129 A.3d at 857-58.

C. Merits of The Argument

Defendants argue the trial court erred by holding that: (i) their newly created, post-trial evidence was procedurally barred; (ii) their "ratification" defense was untimely; (iii) Delaware law does not recognize Tesla's made-up ratification; (iv) the ratification did not satisfy *MFW*; and (v) the 2024 Vote was uninformed. TOB 20-40. Each argument fails.

1. The Trial Court Correctly Found Defendants' Motion to Revise Procedurally Barred

The trial court correctly held that Defendants were procedurally barred from admitting evidence of the 2024 Vote, emphasizing this was "an independent basis for denying the Motion to Revise." R.Op. 27.

a) Court of Chancery Rules 59(a) and 60(b) Do Not Permit Consideration of Newly Created Evidence

The trial court rejected Defendants' attempt to use Court of Chancery Rules 59(a) and 60(b) to admit their newly created evidence. Those rules "allow the court to reopen the trial record for the purpose of considering newly *discovered* evidence (*i.e.*, evidence 'in existence at the time of trial' but hidden or unknown), not newly *created* evidence (*i.e.*, evidence not 'in existence at the time of trial')." R.Op. 18

(quoting *Lebanon Cnty. Emps.' Ret. Fund v. Collis*, 2023 WL 2582399, at *7 (Del. Ch. Mar. 21, 2023), *rev'd on other grounds*, 311 A.3d 773 (Del. 2023)). Because "Defendants created [the 2024 Vote] after the Post-Trial Opinion," the trial correctly court held the 2024 Vote ineligible for Rule 59(a) or 60(b) relief. *Id.*; *see Bachtle v. Bachtle*, 494 A.2d 1253, 1256 (Del. 1985) ("The $218,000 sale price…was not in existence at the time of judgment; hence, that figure constitutes new evidence, not newly discovered evidence.").

Defendants now abandon Rule 60(b) to argue the trial court "wrongly conflated Rule 59(a) with Rule 60(b)." TOB 39. They concede both rules require "newly discovered evidence" but claim only Rule 60(b) requires "newly discovered evidence that was 'in existence at the time of trial[.]'" *Id.* 38-39 (quoting R.Op. 18).

First, Defendants never explain why the standard would differ between the two rules. Both rules "govern[] what evidence can be admitted post-trial" and "speak to 'two important values: the integrity of the judicial process and the finality of judgments. The rules exist to serve the first; their administration must acknowledge the second.'" R.Op. 18. Admission of post-trial evidence offends both values. Even if new—not newly discovered—evidence were permissible under Rule 59(a) (it is not), evidence newly *created* by the party seeking its admission to undo a judgment does not serve "the integrity of the judicial process and the finality of judgments." It does the opposite.

Defendants attempt to support Rule 60(b)'s purportedly "heightened standard" with state and federal authorities that do not mention Rule 59—much less compare it to Rule 60(b). TOB 39. Federal courts, which are persuasive authority, have rejected Defendants' interpretation,[90] and "[d]ecisions interpreting the Federal Rules of Civil Procedure are usually of great persuasive weight in the construction of parallel Delaware rules." *Cede & Co. v. Technicolor, Inc.*, 542 A.2d 1182, 1191 n.11 (Del. 1988).

Second, Defendants misleadingly claim that "the only cases the court cited concerned Rule 60(b), not Rule 59(a)." TOB 39 (citing R.Op. 18 n.86). That argument ignores that the trial court grounded its analysis in persuasive authority, quoting 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* (3d ed.) § 2808: "[T]o comply with Rule 59, the court must find that the newly discovered evidence itself, as well as the facts that it supports, were in existence at the time of trial." R.Op. 18 n.86. It also ignores the Court's citation to *Collis*, which discusses the overlap between Rule 59 and 60 and acknowledges that Rule 59 requires "that the newly discovered evidence itself…w[as] in existence at

[90] *See Compass Tech., Inc. v. Tseng Lab'ys, Inc.*, 71 F.3d 1125, 1130 (3d Cir. 1995) ("Rule 59 and Rule 60(b)(2) share the same standard for granting relief on the basis of newly discovered evidence."); *Eastern Air Lines v. United States*, 110 F. Supp. 499, 500 (D. Del. 1953) (applying "existing at the time of trial" standard to Rule 59(a)).

the time of trial." R.Op. 18 n.86 (citing *Collis*, 2023 WL 2582399, at *7).[91] The dearth of case law on this specific point is unsurprising—Defendants are seemingly the first parties to seek to reopen a months-old merits judgment under Rule 59(a) with evidence they created a year and half after trial.

Third, Defendants mischaracterize their lone case, *In re Altaba, Inc.*, as "grant[ing] a Rule 59(a) motion in light of a deal announced post-trial," which "was plainly not evidence 'in existence at the time of trial.'" TOB 39 (citing 2021 WL 3288534, at *2 (Del. Ch. July 30, 2021)). *Altaba* granted Rule 59(a) relief from a "Security Order" based on a business sale announced "the day before the court issued the Security Order," finding that movants could not have discovered the sale with reasonable diligence *because the company had concealed it* "during discovery and at trial." 2021 WL 3288534, at *2. These circumstances bear no resemblance to the 2024 Vote.

Finally, Defendants argue reopening the record is "warranted here to prevent the injustice of forcing Tesla to incur new costs." TOB 39-40 (cleaned up). Whether evidence is new or newly discovered is a threshold question under Rule 59(a)—because the evidence here is "new," the Court need not examine the "injustice" prong under a Rule 59(a) analysis. *See Bachtle*, 494 A.2d at 1256.

[91] *See also Collis*, 2023 WL 2582399, at *3-6 (observing from case survey: "Believing Rule 59(a) to be unavailable until after judgment is entered, this court sought to fill the resulting gap by…looking to Rule 60(b)(2)….").

And Tesla will not incur "injustice" from rescission, which benefits Tesla. *See supra* 89-90; *infra* 130. Tesla will only incur "costs" if its directors reapprove the Grant, or approve another unfair Grant that is the product of fiduciary breaches. By contrast, admitting the evidence would impose extreme prejudice on Plaintiff, including because: "Defendants raised the [2024] Vote defense six years after this action was filed, one and a half years after trial, and five months after the Post-Trial Opinion. Wherever the outer boundary of non-prejudicial delay lies, Defendants crossed it." R.Op. 34.[92]

b) The Trial Court Correctly Found Rule 54(b) Inapplicable

The trial court correctly found Rule 54(b) inapplicable. Even if applicable, declining to revise the Opinion under Rule 54(b) was within—and a valid exercise of—the trial court's discretion.

The trial court found that Rule 54(b) was inapplicable because "[t]he Post-Trial Opinion [had] *completed* fact finding and resolved all claims and defenses timely raised." R.Op. 19. The trial court acknowledged that a judgment is nonfinal for appeal purposes when fee applications are unresolved but held: "[Rule 54(b)] is

[92] *See also Manichaean Cap., LLC v. SourceHOV Holdings, Inc*, 2020 WL 3097678, at *3 (Del. Ch. June 11, 2020) (finding even "practically conclusive evidence that would contradict a final judgment" would not entitle Rule 59(a) relief if evidence "concededly could have been presented earlier had the moving party been [more] diligent.").

motivated by Delaware's policy against piecemeal litigation, which is designed to conserve judicial resources and avoid prejudicial delay resulting from interlocutory appeals. It is not intended to make it easier for litigants to attack factual findings at the trial-court level." *Id.* at 19-20 (citing, *inter alia*, *Showell Poultry, Inc. v. Delmarva Poultry Corp.*, 146 A.2d 794, 795 (Del. 1958) and *Tyson Foods, Inc. v. Aetos Corp.*, 809 A.2d 575, 580 (Del. 2002)).

Defendants again cite *Southpaw Credit Opportunity Master Fund, L.P. v. Roma Rest. Holdings, Inc.*, 2017 WL 3701232 (Del. Ch. Aug. 22, 2017)—their "lone case" below under Rule 54(b), which the trial court correctly distinguished. R.Op. 19. In *Southpaw*—which involved defendants who pushed a directly contrary position in separate litigation they initiated—the court invoked Rule 54(b) to vacate an order dismissing the case, where the vacated order expressly stated: "'The Court has made no findings of fact with respect to any assertions in the litigation.' The Post-Trial Opinion, by contrast, completed fact finding and resolved all claims and defenses timely raised." R.Op. 19 (quoting *Southpaw Credit Opportunity Master Fund, L.P. v. Roma Rest. Holdings, Inc.*, 2017 WL 2362839, at *1 (Del. Ch. May 30, 2017) (ORDER)).

Defendants' new citation—*Washington v. Preferred Communication Systems. Inc.*, C.A. No. 10810-VCL (Del. Ch. Sept. 10, 2015) (TRANSCRIPT)—is equally inapplicable. The court there granted a Rule 54(b) motion to modify—unlike the

final merits judgment here—a partial summary-judgment order "made early in the case based on the record that existed at the time," brought into dispute by a pre-existing but newly discovered document in the possession of a non-party. *Id.* at 39-40.[93]

Even if Rule 54(b) were a proper procedural tool here (it is not), "the outcome would be the same" because judgment revisions under 54(b) are, "at a minimum," subject to the law-of-the-case doctrine. R.Op. 20. The court considered the policy goals underpinning that doctrine—finality, judicial efficiency, intra-case consistency, and preventing litigants from taking two bites at the apple (all weighing against Defendants)—but acknowledged revision can still be appropriate "where 'there has been an important change in circumstance, in particular, the factual basis for issues previously posed.'" R.Op. 21-22 (quoting *Weedon v. State*, 750 A.2d 521, 527-28 (Del. 2000)). Distinguishing Defendants' cases (both abandoned on appeal), the trial court then found the 2024 Vote did not constitute an "important change in circumstance" because Defendants were "not asking for a change of factual finding" or seeking "to rebut pleading stage inferences. They present the [2024] Vote to avoid

[93] Defendants also cite two inapposite federal cases: (i) *Motorola, Inc. v. J.B. Rodgers Mechanical Contractors, Inc.*, 215 F.R.D. 581, 585-86 (D. Ariz. 2003), where a court denied a motion for reconsideration of a discovery ruling; and (ii) *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, 461 F. Supp. 3d 336, 337-38 (E.D. Va. 2020), where the Titanic's natural deterioration—confirmed by independent experts—warranted narrowly modifying an active, twenty-year-old injunction.

the consequences of post-trial findings." R.Op. 24 (citing A3660, 10-16). The trial court concluded:

> At bottom, Defendants seek to introduce a new fact that they created for the purpose of flipping the outcome of the Post-Trial Opinion. Defendants do not cite to a single case where a court has provided such relief under Rule 54(b) or otherwise. And no wonder: Were the court to condone the practice of allowing defeated parties to create new facts for the purpose of revising judgments, lawsuits would become interminable.

Id. at 24; *accord Ferrer*, 77 Eng. Rep. at 266 ("[I]f there should not be an end of suits, then a rich and malicious man would infinitely vex him who hath right by suits and actions.").[94]

Defendants also argue the trial court wrongly denied the Motion to Revise under Rule 54(b) because it "misunderst[ood] ratification and Tesla's requested relief." TOB 38. False. The court detailed how "Tesla's Ratification Argument ha[d] evolved over the course of these proceedings," acknowledging the latest formulation of their requested relief and correctly observing:

> Defendants also asked the court to enter an order stating: "Judgment is entered for Defendants on all counts." So, the "only relief" sought by Defendants by the time of oral argument was to "modify the remedy"

[94] The Motion to Revise was also barred by the law-of-the-case doctrine. *See* A3045-A3050; *Taylor v. Jones*, 2006 WL 1510437, at *5 (Del. Ch. May 25, 2006). Ratification was fully litigated on Defendants' motion to dismiss—the trial court held ratification inapplicable because the Grant benefitted a conflicted controller. Dkt. 32. In all material respects, that ruling was indistinguishable from Defendants' new ratification theory—it assumed the Grant benefited a conflicted controller (confirmed at trial) and that the vote was fully informed. *Id.* at 22 n.89, 25.

> of rescission and flip the entire outcome of the case in Defendants' favor. That's all.

R.Op. 16 (citing Dkt. 396).

Tesla argues Plaintiff "recognized that ratification was a proper remedy" by including a fully informed stockholder vote as an alternative remedy in his complaint. TOB 38. But Tesla fails to connect this to Rule 54(b), and admitted before trial, "Plaintiff [now] only seeks rescission" and had "'abandoned' all other remedies before trial." A2998, at 8.

* * *

The trial court correctly found Rule 54(b) inapplicable, and even if applicable correctly exercised its discretion in declining to admit Tesla's newly created evidence. This Court can affirm as to ratification on this basis alone.

2. The Trial Court Correctly Held Ratification Was Not Timely Raised

As a second independent ground for denying the Motion to Revise, the trial court did not abuse its discretion in prohibiting Defendants from raising ratification at that late stage. R.Op. 28-34.

The trial court began with black-letter principles: ratification is an affirmative defense, waivable if not timely raised. *Id.* at 28-30. Defendants' counsel confirmed this. A3686 (counsel for Defendants: ratification "is absolutely an affirmative defense"). The court acknowledged its discretion to permit late-raised defenses—

taking into account potential prejudice—and that the court has allowed a party to raise a ratification defense based on a vote occurring *during* litigation. R.Op. 31-32. But the court found that "[n]o Delaware decision, including *Kerbs* [*v. California Eastern Airways, Inc.*, 90 A.2d 652 (Del. 1952)], has ever allowed a party to raise the defense of stockholder ratification after trial for the purpose of persuading the court to alter (much less flip) its judgment." R.Op. 34. Because "Defendants raised the [2024] Vote defense six years after this action was filed, one and a half years after trial, and five months after the Post-Trial Opinion," the court rejected the defense as untimely. *Id.*

The trial court meticulously analyzed *Kerbs*, the "one possible exception," noting: "No other case in the past seventy years comes close. Its anomalistic quality alone warrants pause." R.Op. 32-34. The court rightly distinguished *Kerbs* on procedural grounds: "There, the initial ruling went in the company's favor, so the court was never asked—as the court is asked here—to consider a stockholder vote conducted with the aim of upending a post-trial decision." R.Op. 34.

In *Kerbs*, stockholders challenged stock-option and profit-sharing plans. The directors called the ratification vote "[a]fter the trial, but before the decision." 94 A.2d 217, 218 (Del. Ch. 1953) (opinion on remand). Before issuing its decision, the trial court knew of the forthcoming vote: it was submitted to stockholders "pursuant to an order of the Chancellor in an action…seeking to compel the calling

of a stockholders meeting." *Kerbs*, 90 A.2d at 659. Because the trial court found the profit-sharing plan valid and declined to enjoin it *irrespective of ratification*, it had no need to consider ratification or wait for the vote's result before issuing its decision. *Kerbs*, 83 A.2d at 478. Only on remand—after this Court held the profit-sharing plan invalid absent ratification—did the trial court consider the effect of the vote. *Kerbs*, 90 A.2d at 660.

Tesla glazes over *Kerbs*'s procedural history and ignores that because the *Kerbs* vote was called *before* the trial decision, the court could have delayed its decision if ratification mattered. *See* TOB 41. *Kerbs*, therefore, represents the principled outer bounds for permissible ratification. A vote called and brought to the trial court's attention before adjudication can be consistent with finality and integrity of the judicial process. Tesla's ancient authority is not to the contrary. *See In re Long Island Loan & Tr. Co.*, 92 A.D. 1, 4 (N.Y. App. Div. 1904) (rejecting purported pre-suit ratification, effectiveness of which required disclosure of "disposition which a court of equity would make under the known facts"—not disposition court had made), *aff'd*, 71 N.E. 1133 (N.Y. 1904).

The trial court rightly distinguished *Kerbs* from Tesla's ratification vote, which Musk called for the express purpose of flipping the trial outcome. R.Op. 34; *see also id.* at 15-16 (quoting B3939: "fix," "extinguish," "cure"). Tesla could have called for a pre-adjudication vote even while retaining the "hindsight" benefits it

now lauds—the Grant fully vested in January 2023, and Plaintiff's pre- and post-trial briefs detailed the Grant's many flaws. Instead, Tesla strategically waited, hoping for a different outcome. With that "tactical decision," Tesla not only waived whatever defense it may have had but also "appellate review of any arguable claim of error." *Wright*, 980 A.2d at 1024 (tactical decision not to object at trial precluded appellate review).

Tesla misconstrues the trial court's reasoning, claiming the trial court "mostly grounded its rejection of *Kerbs* and general aversion to post-trial ratification in policy concerns." TOB 42 (citing R.Op. 25—which does not discuss *Kerbs*). Not so. The trial court properly distinguished *Kerbs* on procedural grounds. R.Op. 32-34. At argument, Defendants repeatedly admitted that no known case has ever permitted ratification of an adjudicated loyalty breach. A3660, A3662-A3664, A3686. The trial court did not abuse its discretion in refusing to create unprecedented and dangerous law.

Tesla also argues it did not waive ratification because it did not file a responsive pleading. TOB 40. But Tesla stipulated to the factual and "legal issues that remain to be litigated," which did not include ratification. A486, ¶277. Tesla is bound by its stipulation.[95]

[95] *Allen v. Scott*, 257 A.3d 984, 990 (Del. 2021) ("[A]greements entered pursuant to pretrial conferences and pretrial stipulations are binding court orders unless they are

Tesla argues it did not waive ratification because it was previously "unavailable." TOB 41. Tesla's authority is unsupportive because Tesla controlled the timing of the 2024 Vote, which was "evidence they created after trial." R.Op. 1; *cf. Tuckman v. Aerosonic Corp.*, 394 A.2d 226, 233 (Del. Ch. 1978) (considering late-raised defense arising only after issuance of U.S. Supreme Court decision).

The trial court correctly found Defendants' affirmative defense untimely.

3. The 2024 Vote Cannot Ratify a Conflicted-Controller Transaction

The trial court correctly held that the 2024 Vote alone could not ratify the Grant, and that Defendants did not satisfy *MFW's* requirements. R.Op. 38-39. Tesla claims error because its new ratification (i) is unrelated to *MFW* and independently effective, and (ii) nonetheless complies with *MFW*. TOB 20-35. Both arguments fail.

a) The Trial Court Correctly Held Delaware Law Does Not Recognize Defendants' "Ratification"

In response to their adjudicated loyalty breaches and a judgment ordering the rescission of the Grant, Defendants proposed what they concede is an unprecedented form of "ratification." A3660, A3662-A3664, A3686. They argue that *MFW* "has

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formally amended."); *Bothwell v. Bothwell*, 877 A.2d 52, 52 (Del. 2005) (TABLE) (finding no abuse of discretion in refusal to admit evidence "consistent with the pretrial order signed by both parties"); *see also In Re Mindbody, Inc. S'holder Litig.*, 332 A.3d 349, 411-12 (Del. 2024) (waiver of right to seek settlement credit where not raised until post-trial brief).

no relevance," that ratification cannot be waived before or at trial, and that it is not really an affirmative defense—yet claim it has the power to reverse any post-trial remedy granted by any Delaware court, including this one. TOB 24, 40-41, 42.[96]

Tesla's new regime reduces the Court of Chancery *and the Delaware Supreme Court* to advisory bodies. Tesla's counsel admitted in open court that even this Court's remedies are mere suggestions, which Tesla's stockholders can take or leave.[97] "[I]n Defendants' view, a stockholder vote can be deployed to reverse any form of judicial ruling, whatever the ruling [including courts of appeals], no matter how final." R.Op. 25. Courts will make factual findings and "resolve[] the directors' liability," but they will only propose—not award—remedies. TOB 42 (limiting the court's role to "detail[ing] the defects it perceived in the deal").

Yet Defendants' nouveau ratification would not end the matter. Plaintiff, having already achieved complete victory at trial (and on appeal), could challenge

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[96] *See also* A3687 ("Attorney Ross:…[Y]es, it can be an affirmative defense in litigation, but it is also a tool available to a principal…to make clear this is something that they want."), A3688 (arguing ratification would apply to rescissory damages), A3690-A3691 (failing to identify remedies not subject to ratification other than "costs of the vote").

[97] A3697-A3698 (Court: "For example, can you just ratify something after the Supreme Court's rule on the issue? I assume this is the logical extension of your argument." Attorney Ross: "Well, doctrinally, I think, yes."), A3699 (Attorney Ross: "…I think it would be fair at that point…for the company to come back in and say…we've had our trial. We've had our findings. We've had a Supreme Court appeal. That has all been provided to stockholders. They were given all of that information, and they said they wanted it.").

the vote's validity in a new case. Should the court deny pleading stage dismissal, the parties then engage in discovery and another trial. A3750-A3755. Or, it follows, Defendants could just attempt to ratify again. Following Tesla's "logic," any court's post-trial, post-appeal, post-second trial, post-second appeal holding could be "fixed" by yet another vote, *ad infinitum*. If accepted, post-judgment ratification will be the norm for adjudicated breaches by controllers.

Delaware (with every other jurisdiction) does not recognize Tesla's made-up ratification. And for good reason. It would eviscerate Delaware law and the purpose of Delaware courts. As the trial court observed: "Defendants' novel request flies in the face of the policy bases for all relevant rules of procedure and the law-of-the-case doctrine—finality, efficiency, consistency, and the integrity of the judicial process." R.Op. 27. Tesla's ratification theory would also gut the deterrent effect of stockholder litigation:

> Stockholders pursuing derivative claims are already subject to a gantlet of procedural barriers erected to protect Delaware's board-centric model. Among other hurdles, they face: the demand requirement; the contemporaneous ownership requirement; the continuous ownership requirement; adequacy standards; the threat of being *Walmarted*; and the risk of being derailed by a special litigation committee. Imagine if, after a stockholder successfully clears these hurdles and achieves total victory, a perpetrator of fiduciary misconduct could then hit "reset" through stockholder vote, as Defendants seek to do here?

R.Op. 26-27.

Tesla concedes its "ratification" theory is made-up.[98] Tesla cites no case supporting this theory, and none exists—no Delaware case even suggests that stockholders can accept or reject a court's post-judgment remedy through "ratification." Tesla instead supports the made-up theory with stray odes to stockholder power from inapposite cases. Even Tesla's primary case (*Kerbs*)—which did not involve a controller, adjudicated breach, or stockholder choice of remedy—showed that this Court can permanently enjoin a transaction (there, the stock-option plan) that a fully informed and uncoerced majority ratified. 90 A.2d at 656, 660.

MFW never suggested stockholders could accept or reject a post-judgment remedy either. Rather, it held that "unless *both* procedural protections for the minority stockholders are established *prior to trial*, the *ultimate* judicial scrutiny of controller buyouts will continue to be the entire fairness standard of review." *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, 646 (Del. 2014).

Tesla's "ratification" theory fails for other reasons. By retroactively eliminating money damages for adjudicated loyalty breaches, it conflicts with

[98] TOB 21 ("The precise effect of ratifying a conflicted-controller transaction after a finding of breach is an issue of first impression for this Court."); A3686 ("Attorney Ross: "We're not aware of a case in which [ratification] has been used in this manner and exactly these circumstances, yes.").

DGCL Section 102(b)(7). It also ignores the coercion inherent in all conflicted-controller transactions.

Tesla's appeal is not really an appeal. The trial court properly applied existing Delaware law, which Tesla is inviting this Court to fundamentally reconceive. This Court should decline the invitation.

b) The Trial Court Rightly Held Defendants' "Ratification" Does Not Satisfy *MFW*

Entire fairness applies to *any* conflicted-controller transaction, including executive compensation. *See Match*, 315 A.3d 446. "If the controlling stockholder wants to secure the benefits of business judgment review, it must follow all *MFW*'s requirements." *Id.* at 451.

Under *MFW*, the standard shifts from entire fairness to business judgment:

> *[I]f and only if*: (i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority.

Kahn, 88 A.3d at 645 (emphasis in original).

Tesla's response to the Grant's obvious *MFW* failures is to claim the 2024 Vote satisfied *MFW*. But as the trial court observed: "One does not '*MFW*' a vote, which is part of the *MFW* protections; one '*MFW*'s a transaction." R.Op. 40.

Regardless, the "ratification" failed to meet *any* of the *MFW* conditions: (i) Tesla did not condition the Grant on special-committee approval *ab initio*; (ii) the lone committee member—Wilson-Thompson—was not independent, having received Tesla stock-option grants worth a life-altering ~$150 million upon her Committee appointment; (iii) Wilson-Thompson was not free to "say no" to the Grant because she never negotiated it; (iv) Wilson-Thompson never met her care duty in negotiating because she never negotiated the Grant; (v) the 2024 Proxy was false and misleading; and (vi) Musk threatened and actively lobbied stockholders to vote for the ratification. A3027-A3037.

Nor does the ratification address *MFW*'s important policy concerns. The *MFW* conditions, especially an independent special committee, ensure the transaction negotiation process simulates arm's-length bargaining. *Match*, 315 A.3d at 473. An after-the-fact—post-judgment—ratification cannot reverse time and simulate arm's-length bargaining.

Tesla argues its made-up ratification blunts Musk's coercive power because Musk has already performed under the Grant and therefore has no leverage. TOB 24-25.[99] But Musk marshaled the conflicted Board and engineered a multi-

[99] Tesla also claims *MFW* does not apply because Musk's 2024 ownership dropped to 12.9%, but the trial court correctly held Tesla waived that argument. R.Op. 40 n.161. Regardless, the argument fails: (i) *MFW* governs the Grant, not the fabricated ratification; and (ii) Musk continued to control Tesla even at 12.9%.

million-dollar coercive lobbying campaign to ensure ratification passed, including personally meeting with stockholders, hiring "a strategic adviser to help bolster the campaign," "set[ting] up an investor website…dedicated to wooing retail shareholders to support the payout"—even offering prizes to voting stockholders, prompting market commentary about the "unusual and public effort to rally support for Musk's pay." A3028-A3032. Worse, after rebranding Tesla as an AI company, Musk publicly threatened to take critical AI opportunities from Tesla—and acted on those threats; the market directly connected those threats to the upcoming ratification vote. A3030-A3031. While the trial court had no need to consider this and other compelling coercion evidence,[100] coercion independently sinks Defendants' ratification gambit.

4. The Trial Court Correctly Held the 2024 Proxy Was Materially Misleading

The trial court correctly held that the 2024 Vote was materially uninformed, another independent ground for affirmance on ratification.

"There [were] many ways in which the [2024] Proxy Statement mangle[d] the truth." R.Op. 41. For example, it falsely described Wilson-Thompson as independent, when she received Tesla stock option grants worth ~$150 million upon her Committee appointment. B3939 at 247, 296, E-28. The trial court focused on

[100] R.Op. 41.

the 2024 Proxy's "multiple, inaccurate statements concerning the potential ratifying effect of the [2024] Vote"—including that ratification would "extinguish claims for fiduciary duty by authorizing an act that otherwise would constitute a breach," "cure[]" "any wrongs'" found by the trial court, permit the Grant's options "to be restored to Musk," and "correct[]" the Grant Proxy's material deficiencies—holding these alone rendered the 2024 Proxy materially false or misleading. R.Op. 41-42 (quoting B3939).

Tesla argues that the trial court erred in three ways. Each argument fails.

First, Tesla claims the trial court's reasoning was circular in relying on its own interpretation of the ratification's effects to assess the Proxy. TOB 33. By Tesla's logic, no court could validly assess disclosures concerning legal effects, which cannot be the law. Here, the trial court relied on this Court's settled precedent in determining the legal effect of the 2024 Vote. Even Tesla disagrees with the 2024 Proxy, taking multiple positions *directly contrary* to its disclosures.[101] Tesla is bound by how it disclosed ratification to stockholders and estopped from arguing otherwise. *Kerbs*, 91 A.2d at 64 ("[T]he appellee is bound by the representations

[101] *Compare* B3939 at 84-85 ("Common law ratification can also extinguish claims for breach of fiduciary duty….") *with* TOB 38 ("[Tesla] did 'not seek to vacate the Court's factual findings or its legal conclusion' about any fiduciary breach…."); B3939 at 85 (options "will be restored to" Musk) *with* A3671-A3672 ("[G]ranting our relief…would not legally restore [the options]."); B3939 at 84 (Grant "subject to statutory ratification under Section 204….") *with* R.Op. 16 (noting Defendants abandoned Section 204 theory).

made to its stockholders, and we will not permit it at this late time to take a diametrically opposite position.").

Second, Tesla claims the 2024 Proxy cabined its false and misleading statements with cautionary language. TOB 33-34. That is not how disclosure works: "For a vote to have ratifying effect, then stockholders must be told specifically…what the binding effect of a favorable vote will be." *Garfield v. Allen*, 277 A.3d 296, 353 (Del. Ch. 2022).[102] Stockholders were misinformed on the binding effect of the vote. Statements that the vote's effect is unclear or ambiguous do not rescue the 2024 Proxy; they doom it. "If the consequences of the stockholder vote are unclear or ambiguous, then the ratifying vote will not have legal effect." *Garfield*, 277 A.3d at 353.

Third, citing nothing, Tesla asserts that the 2024 Proxy's false and misleading statements were immaterial to stockholders. TOB 34-35. That argument fails for the same reason as the second: a proxy must disclose "specifically…what the binding effect of a favorable vote will be." *Garfield*, 277 A.3d at 353.

[102] *See also Michelson v. Duncan*, 407 A.2d 211, 220 (Del. 1979) ("[R]atification is valid only where the stockholders…are adequately informed of the consequences of their acts and the reasons therefor.").

V. THE COURT OF CHANCERY CORRECTLY REJECTED OBJECTORS' ARGUMENTS AS TO PLAINTIFF'S ADEQUACY.

A. Question Presented

Did the trial court commit plain error in declining to disqualify Plaintiff or abuse its discretion in rejecting Objectors' informal challenges thereto as untimely and procedurally improper? The issue was not preserved. *Infra.*

B. Scope of Review

Unless the interests of justice require otherwise, issues not fairly presented to the trial court are not subject to review. Del. Sup. Ct. R. 8. A trial court's failure to act *sua sponte* is reviewed for plain error. *Baker v. State*, 906 A.2d 139, 148 (Del. 2006). Standing is a mixed question: legal issues are reviewed *de novo*, factual findings for substantial evidence. *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994). Denials based on untimeliness are reviewed for abuse of discretion. *Xu v. Cheng*, 2015 WL 1160809, at *1 (Del. Mar. 13, 2015). Adequacy determinations are fact-specific,[103] reviewed for "whether those findings are supported by the record and are the product of an orderly and logical reasoning process." *In re Phila. Stock Exch., Inc.*, 945 A.2d 1123, 1143 (Del. 2008).

[103] *In re Revlon Inc. S'holders Litig.*, 990 A.2d 940, 955 (Del. Ch. 2010) ("Just what measure of representation is adequate is a question of fact that depends on each peculiar set of circumstances.").

C. Merits of Argument

1. Objectors Have Not Preserved the Issue

Objectors claim the trial court erred by not disqualifying Plaintiff and ask this Court to "direct the Court of Chancery on remand to assess [Plaintiff]'s adequacy as a derivative plaintiff." OOB 30-31. This Court need not reach the merits of Objectors' disqualification argument—which hinges on their claims that the fee award is excessive and ratification was proper—if it affirms the fee award and the trial court's rejection of Tesla's ratification theory. Nonetheless, as shown below, Objectors cannot clear the threshold hurdles to even raise disqualification.

First, Objectors never moved for such relief below or to intervene for that purpose.[104] Rather, they injected adequacy arguments in opposing the Fee Petition and supporting the Motion to Revise,[105] and their positions below ran counter to seeking disqualification. *E.g.*, A3587, ¶10 ("These Due Process concerns, however, can be avoided by limiting any fee award[.]"). Accordingly, the issue was not fairly presented below. And because Objectors do not argue the interests of justice nevertheless warrant review, this issue is nonreviewable.

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[104] Steffen's intervention motion was for the limited purpose of preserving appeal rights (A3959-A3960, ¶1); the other Objectors never sought intervention. B4416, n.7.

[105] *See* A3356-A3357; A3588, ¶12 (requesting relief concerning fee and ratification but not disqualification).

Moreover, Court of Chancery Rule 7 requires that "a request for a court order must be made by motion." Having no request before it to "assess [Plaintiff]'s adequacy" or disqualify him, the trial court could only have addressed the issue *sua sponte*. The court's decision not to further inquire into the issue—first raised *after* Plaintiff achieved total victory at trial—was not plain error.

Second, Objectors waived the issue below. Objectors argue their adequacy concerns arose from (i) Plaintiff's fee request and (ii) his opposition to the purported ratification. OOB 29. But their lengthy initial briefs challenging Plaintiff's fee request and supporting ratification[106] *were silent as to adequacy*. Steffens first raised adequacy at the fee hearing—parroting similar comments made by Tesla's counsel minutes earlier—and first briefed the issue in her *post-argument* supplemental objections, leave of which to file was requested but never granted. A3347, A3356-57, A3363-A3364; A3581. The first time the other Objectors arguably raised adequacy was in their motion for clarification and *reconsideration*. A3950. That was inappropriate. *Cabela's LLC v. Wellman*, 2018 WL 6680972, at *1 (Del. Ch. Dec. 19, 2018) ("A motion for reargument is not a mechanism to present new arguments….").

[106] A2288, A2318, at n.23; *see also* A1800, A1816, B3912, B3929, B4384 (Plaintiff's post-trial motions made in response to proposed ratification vote).

Thus, the trial court did not abuse its discretion in finding the Objectors' adequacy attacks untimely and procedurally deficient. B4413, n.3.

2. Objectors Lack Standing

Objectors claim "[t]he plain terms of [Court of Chancery] Rule 23.1(e)(2) grant Objectors standing,"[107] but Objectors do not fall into either of that rule's permitted categories.

First, they are not "person[s] from whom payment is sought." Rule 23.1(e)(2). Plaintiff's claims are derivative and Objectors' arguments disregard the corporate form. *See, e.g.*, *Buechner v. Farbenfabriken Bayer Aktiengesellschaft*, 154 A.2d 684, 686-87 (Del. 1959) ("The corporation is an entity, distinct from its stockholders….").

Second, they are not "person[s] with standing to object to a proposed dismissal or settlement" because there is no dismissal or settlement. That category exists to safeguard against collusion in that context.[108] Those risks are not present here; Plaintiff's Fee Award was and continues to be vigorously challenged apart from Objectors. "None of the [Objectors] identify any case where this court has permitted

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[107] OOB 9.

[108] *See Forsythe v. ESC Fund Mgmt. Co. (U.S.)*, 2012 WL 1655538, at *8 n.2 (Del. Ch. May 9, 2012) ("It is desirable to have as broad a range of participants in the [settlement] fairness hearing as possible because of the risk of collusion over attorneys' fees and the terms of settlement generally." (quoting *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 288 (7th Cir. 2002)).

a stockholder to object in these circumstances." B4412. Tellingly, that holds true on appeal.

Nor would it be sound policy to extend standing here. "Permitting any stockholder to appear and object where the parties have every incentive to zealously represent their clients' interests would lead to deeply inefficient proceedings that potentially undermine the parties' ability to control the litigation." B4412.

3. Objectors' Adequacy Challenge Lacks Merit

Again, this Court need never reach the merits of Objectors' adequacy argument if it finds the fee award appropriate and affirms the trial court's rejection of Tesla's ratification argument. Nonetheless, the trial court correctly concluded—after Objectors belatedly raised adequacy concerns—that Plaintiff was an effective representative, noting he had "proven himself quite capable as a representative plaintiff." B4413.[109]

To disqualify a representative plaintiff, an objector bears "a very difficult burden"[110] of showing "a substantial likelihood that the derivative action is not being maintained for the benefit of the shareholders." *Emerald Partners v. Berlin*, 564 A.2d 670, 674 (Del. Ch. 1989). This standard is rarely met absent "an actual

[109] Indeed, Plaintiff persevered and achieved total victory through trial and ratification despite facing repeated harassment and abuse aimed at pressuring him to abandon the case, resulting in emotional and financial harm. *See* A3384-A3385.

[110] *S. Peru*, 52 A.3d at 766 n.5 (Del. Ch. 2011) (collecting cases).

economic conflict of interest" or "incompeten[ce]." *S. Peru*, 52 A.3d at 766 n.5. Objectors argue neither economic conflict nor incompetence, waiving those issues. *See Youngman v. Tahmoush*, 457 A.2d 376, 379-80 (Del. Ch. Jan. 5, 1983); *see also* Del. Sup. Ct. R. 14(b)(vi)(A)(3). Indeed, under Court of Chancery Rule 23.1(e), Plaintiff was entitled to seek a derivative-plaintiff award but chose not to, undermining any claim of self-interest.

Objectors argue Plaintiff is inadequate because the ratification vote shows stockholder support for the Grant. OOB 28. Setting aside the myriad issues with ratification discussed above, Objectors' argument "would emasculate one of the underlying purposes of stockholder derivative actions which is to rectify instances of corporate misdeeds." *Emerald*, 564 A.2d at 675. "The true measure of adequacy of representation, therefore, is not how many shareholders the derivative plaintiff represents, but rather, how well he advances the interests of the other similarly situated shareholders." *Id.* at 674.

Objectors' reliance on *South v. Baker*, 62 A.3d 1 (Del. Ch. 2012), is flawed. OOB 27. There, the court found a derivative plaintiff inadequate for hastily "fil[ing] a *Caremark* claim" without first using Section 220 to investigate. *South*, 62 A.3d at 22-23. By contrast, Plaintiff has litigated this case for seven years, achieving a record-setting post-trial judgment. *See* B4413, n.3.

As to the Fee Petition, the trial court ruled that the Objectors lacked standing to appeal it.[111] Objectors therefore lack standing to contest the fee in this Court. *See Leighton v. Lewis*, 577 A.2d 753 (Del. 1990) (affirming denial of intervention motion and finding all other issues not "properly before the Court").

Objectors' substantive argument mispresents the fee request and misunderstands the dynamic of derivative litigation. As explained below, Plaintiff's counsel's fee request fell squarely within the *Sugarland* framework. The trial court noted it was based on "sound" "methodology[.]" R.Op. 2, 96. Objectors' complaint that the counsel fees are adverse to their interests ignores the benefit and the "inherent conflict" in compensating counsel for achieving it. *In re Dell Techs. Inc. Class V S'holders Litig.*, 326 A.3d 686, 697 (Del. 2024).

Objectors' reliance on a later *Fuqua* decision is misplaced. *In re Fuqua Indus., Inc. S'holder Litig.*, 2006 WL 2640967, at *1 (Del. Ch. Sept. 7, 2006), *aff'd sub nom. Abrams v. Sachnoff & Weaver, Ltd.*, 922 A.2d 414 (Del. 2007) (TABLE). There, the issue was a plaintiff's conflict in "ha[ving] a financial stake in the recovery in the *Fuqua* litigation." *Abrams*, 922 A.2d at 414. No such conflict exists here.

[111] B4415 (permitting standing only "for the limited purpose of allowing…appeal [of the] December 2 Letter Opinion denying them standing and rejecting their Rule 23.1 challenges to Plaintiff's adequacy.").

Finally, Objectors claim the trial court violated their due process rights by inadequately addressing Plaintiff's adequacy. OOB 30. Objectors do not—and cannot—challenge their notice or opportunity to be heard. Indeed, the trial court permitted them to file multiple submissions and speak at both relevant hearings, then "carefully considered" all their arguments. B4412. Their claim that "the court's one-sentence adequacy analysis is insufficient" lacks authority and substance. OOB 30. And Objectors never argue that the U.S. Constitution imposes a higher duty of representation than Delaware law already does. Instead, Objectors' arguments repackage (or are otherwise entirely derivative of) their and others' objections to the fee award and the rejection of the ratification defense. Simply, Objectors' federal due process claims add nothing to this case and the Court therefore need not separately address them. If it does, it should reject them on the ground that their premises fail as a matter of Delaware law.

Objectors fail to meet their very difficult burden as to adequacy.

4. *Amici* Response

The various *amici* raise broad questions eliding the specific facts of this case. None satisfies Supreme Court Rule 28(a)(2), which requires that *amici* do more than repeat Defendants' arguments.

No *amicus* addresses Defendants' admission that entire fairness must apply if the Court finds any material misstatement or omission in the Proxy. Platitudes and

out-of-context quotes do not change that admission. Like Defendants, each *amicus* concedes that a valid ratification vote must be informed *and uncoerced*. The Retired Practitioners and Professors claim there was "no evidence" of coercion and the trial court gave no "reason to believe" otherwise. RPP 8, 24. But all *amici* ignore the extensive evidence of coercion presented below—and the trial court's decision not to address it given its cumulative nature. R.Op. 41.

Like Defendants, the Retired Practitioners and Professors attack *Match* (RPP 10, n.1), and several others challenge the concept of transaction-specific control and the findings underlying application of that doctrine, as unprecedented. But *Match* bound the trial court, and transaction-specific control has long been recognized in Delaware, as recently reaffirmed in *Oracle*. *See supra* 41-42. *Amici* either ignore or dismiss *Oracle* as *dicta*, and none address the trial court's cases applying the doctrine.

Finally, the Texas Association of Business appears primarily interested in spotlighting Governor Abbott's call for Delaware companies to "come to Texas." Texas 8. The Chamber of Commerce argues that the fee award is "excessive" *per se*,[112] ignoring *Dell* and *America's Mining*. Sequoia Capital advocates a more "nuanced" remedy. Sequoia 20. None meaningfully advance the issues before the Court.

[112] Chamber 22.

VI. THE FEE AWARD REFLECTED THE TRIAL COURT'S SOUND DISCRETION, GROUNDED IN THE APPLICATION OF GOVERNING LAW.

A. Question Presented

Did the trial court correctly award Plaintiff's counsel a fee based on the evidence and proper application of the *Sugarland* factors?

B. Scope of Review

The determination of any fee award is committed to the "sound discretion of the Court of Chancery"; its reasonableness is "reviewed for an abuse of discretion." *Ams. Mining*, 51 A.3d at 1260-61. This Court "will not usually disturb the Court of Chancery's ruling if [it] adequately explains its reasons and properly exercises its discretion when it applies the *Sugarland* factors." *Dell*, 326 A.3d at 701-02.

C. Merits of Argument

As an initial matter, only Tesla may appeal the Fee Award. The trial court "decline[d] to extend standing" to the Objectors to object to the Fee Petition. B4411; *see also* B4416. Any responses to Objectors' arguments do not concede standing to assert those arguments.

1. The Fee Petition Adhered to *Americas Mining*

The Fee Petition pre-dated this Court's decision in *Dell* by several months. When filed, the law was clear: the primary *Sugarland* factor was the benefit created; fees were based on the percentage of that benefit and not capped, even in very large cases. *Ams. Mining*, 51 A.3d at 1255, 1258, 1261-62. Further, the *Dell* trial court

had refused to apply a megafund discount to a $285 million fee request in a case that settled short of trial, holding: "The rationales for using the declining-percentage method in federal securities litigation have not been shown to apply to Chancery M&A litigation[.]" *In re Dell Techs. Inc. Class V S'holders Litig.*, 300 A.3d 679, 715 (Del. Ch. 2023), *aff'd*, 326 A.3d 686 (Del. 2024).

Plaintiff's counsel adhered to then-controlling law. In *Americas Mining*, plaintiffs sought 22.5% of the recovery but received 15% because they delayed prosecuting the case to the point where the optimal remedy, rescission, became infeasible. 51 A.3d at 1249-50, 1257-59. Although the trial court granted rescission here and the financial recovery was roughly *38x greater* than the (pre-interest) recovery in *Americas Mining*, the Fee Petition nonetheless used 15% as a baseline, which Plaintiff's counsel further reduced to 11% to reflect a request for freely transferrable Tesla shares[113] given that the rescinded shares were subject to a five-year holding period.[114]

Further, in the Fee Petition reply brief and again during the Fee hearing, Plaintiff's counsel offered an alternative method—use the *Americas Mining* hourly

[113] Plaintiff's counsel sought Tesla shares, rather than cash, to reflect one of the benefits obtained (*i.e.*, releasing to Tesla shares set aside for the Grant) and control for fluctuation in value of the shares underlying the rescinded options.

[114] Plaintiff's counsel supported the amount of the discount with an expert affidavit from Professor Daniel Taylor, the substance of which was not disputed.

rate, adjusted to 2024 dollars—designed to match, on an economic basis, the fee affirmed in *Americas Mining*, notwithstanding that the result here was substantially greater than the result achieved there.

2. Exercising Its Sound Discretion, the Trial Court Cut Plaintiff's Counsel's Request by 95%

During a full-day hearing on the Fee Petition, the trial court heard live testimony from two expert witnesses in addition to receiving written submissions from another four experts. Professor Robert Jackson of NYU Law School testified, and Professors Jackson, Lucian Bebchuk of Harvard Law School, and Daniel J. Taylor of The Wharton School of the University of Pennsylvania submitted affidavits supporting the Fee Petition. The trial court found the evidence Plaintiff's counsel presented to be "a theoretically sound approach to valuing rescission," under which this Action "restor[ed] around $51 billion in value to Tesla stockholders" at the time of the Opinion. R.Op. 55, 96.

Relying on *Dell*, the trial court correctly described its "overarching goal":

> "[R]ight-siz[ing] fee awards to the benefit achieved" in order to "provide[] incentives for 'counsel to accept challenging cases' despite 'the risk of recovering nothing in the end,' while simultaneously avoiding awards that 'exceed their value as an incentive to take representative cases and turn into a windfall.'"

R.Op. 46 (quoting 326 A.3d at 702). The trial court was required to (and did) "balance" competing important policy concerns, not simply "'estimate the point at

which proper incentives are produced' and award a fee no greater than that amount." OOB 17 (misleadingly quoting *Dell*, 326 A.3d at 702-03).

Nonetheless, and after so framing its analysis, the trial court declined to utilize the evidence of the roughly $51 billion benefit conferred—which it found reliable—due to the "size of the result and not the uncertainty of it," noting: "[T]he windfall risk flows not from the selected percentage. It stems from the sheer magnitude of the compensation plan that Plaintiff successfully challenged." R.Op. 77, 80. Likewise, the trial court considered and, exercising its discretion, rejected the declining percentage method because the request was "*already at the lowest end of the range applied under that method*." R.Op. 77.

The trial court exercised its discretion to use the value of the reversed accounting charge ($2.3 billion) as the "benefit" on which to award a fee.[115] R.Op. 85-86.[116] Even using a "benefit" *22x smaller* than the $51 billion benefit Plaintiff's counsel had proven, and recognizing there was "justification for awarding Plaintiff's counsel 33%" of the smaller amount, "which would result in a fee award of $759

[115] Tesla recently endorsed this approach in *In re Tesla, Inc. Director Compensation Stockholder Litigation*, No. 52, 2025 (Del. Apr. 1, 2025) (Opening Brief of Appellant Tesla, Inc.), stating: "The record here is clear that the financial benefit to Tesla from the Returned Options is limited to at most the reversal of the grant-date-fair-value compensation expense of $19.9 million."

[116] The trial court recognized this as "a bad candidate for a default rule" and, at best, the "least problematic" of Defendants' suggested approaches. R.Op. 95-96.

million," the trial court nonetheless exercised its discretion to reduce the Fee Award to *less than half* of the $759 million that it found was "justif[ied]." R.Op. 96-97.

Tesla's attack on the Fee Award whistles past the trial court's evidence-based finding that Plaintiff had proven that the litigation produced a $51 billion benefit, notwithstanding the court's ultimate conclusion that the "sheer magnitude" of Defendants' breach led to a windfall. R.Op. 77.

Tesla's insistence that the trial court was required to "net out the benefits generated and the costs imposed" fails. TOB 47. The case Tesla cites says nothing of the sort,[117] nor was the benefit "unquantifiable," as discussed above. And the trial court thoughtfully addressed the argument:

> Nor does the court consider the 'replacement value' of any compensation package at this stage.…[Defendants] could have argued during the litigation that a particular alternative compensation package was fair and that the court only should rescind the excess, but they opted for an all-or-nothing defense. After the…Opinion, they could have negotiated a true replacement package for Musk, with any fiduciary challenges to that Board decision likely landing in Texas court. Instead, Defendants attempted to re-approve the exact same compensation package under made-up theories of Delaware law. For the purposes of this decision, they do not get credit for it.

R.Op. 79. Tesla's contrary argument relies on the troubling assumption that the Board will eventually simply re-issue Musk the same wildly inflated package found

[117] *Almond ex rel. Almond Fam. 2001 Tr. v. Glenhill Advisors LLC*, 2019 WL 1556230 (Del. Ch. Apr. 10, 2019) (cited in TOB 47). There, the court did not even "conduct a net benefit analysis", noting instead the "net benefit" concept emanated from "intimat[ion]" and "dictum" from earlier decisions. *Id.* at *7-8 & n.49.

to be the product of fiduciary breaches. The trial court correctly declined to assume this, noting Tesla effectively waived the issue by failing to provide evidence of any lesser amount that Musk was worth. R.Op. 79.

The trial court relied on *Shepard v. Simon*, which recognized: "If the plaintiffs had obtained a decision from the court on the merits that invalidated the [o]riginal [a]ward, then the…plaintiffs…would be entitled to have the benefits measured by the value of the full amount of the [o]riginal [a]ward." C.A. No. 7902-VCL, at ¶ 4 (Del. Ch. Sept. 10, 2014) (ORDER). *Shepard* is the only authority cited by any party expressly addressing the question of how to quantify the benefit achieved in the post-trial context, yet Tesla's appellate brief ignores it.

A rule—consistent with *Shepard*—in which courts do not "net out the benefits" after trial would not, as Defendants argue, lead plaintiffs' lawyers to "categorically reject" pre-trial settlements that would provide "exactly the same outcome post-trial" to receive a larger fee. TOB 51. That argument ignores, among other things, the substantial risks associated with trial, the "significant appellate risk" even assuming a successful trial outcome, and the "natural human tendency toward risk aversion." *See Dell*, 300 A.3d at 694, 696.

Instead, Tesla relies on inapposite decisions arising from settlement or mootness fee applications where the value of the benefit was unquantified. *See* TOB 47-48. In *Louisiana State Employees' Retirement System v. Citrix Systems, Inc.*,

defendants withdrew a contested stock plan amendment, which the court struggled to value because, unlike here, "the Company *never issued* any of these additional options." 2001 WL 1131364, at *7 (Del. Ch. Sept. 19, 2001). Likewise, *In re Cheniere Energy, Inc. Shareholders Litigation* involved equity awards that were never issued.[118] That is readily distinguishable from the issued, fully vested, and in-the-money rescinded options here, to which the trial court assigned an intrinsic value after hearing expert testimony, and which do not require any incentive offset. And in *In re Investors Bancorp, Inc. Stockholder Litigation*, the company eliminated 75% of contested equity awards in connection with a settlement and subsequently authorized and approved replacement equity awards to two executives. Consol. C.A. No. 12327-VCS, at 12 (Del. Ch. June 17, 2019) (TRANSCRIPT). Here, the trial court considered and correctly applied these precedents. *See* R.Op. 87 & 88 n.340.

The trial court also properly rejected Tesla's event study argument. TOB 52; *see also* OOB 20-21. The trial court carefully considered the analyses prepared by Tesla's experts; seven pages of the Ratification Opinion explain the "many reasons" why those analyses were "flawed" and why Tesla's corresponding arguments "would make for awful public policy." R.Op. 66-72.

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[118] C.A. Nos. 9710-VCL & 9766-VCL (Del. Ch. Mar. 16, 2015) (TRANSCRIPT). Notably, in *Cheniere*, neither party valued alternative compensation. *See id.* at 103-04 ("I've considered whether to essentially make the defendants lie in the bed they've made by not allowing them to make any deduction for the unknown plan….").

The trial court also properly disposed of Defendants' argument for a *quantum meruit* award capped at a 4x lodestar, explaining the benefit achieved *was* quantified and there was no legal basis for a 4x *quantum meruit* cap. R.Op. 89-90.

In short, the trial court carefully exercised its discretion in setting this fee with a high degree of sensitivity to this Court's precedents in *Americas Mining* and *Dell*. Even facing the highest recovery in Delaware legal history—by a factor of 38x—the trial court went to extraordinary lengths to reduce the Fee Award in adherence to this Court's guidance in *Dell*. That faithful application of the law should not be disturbed on appeal.

3. The Trial Court Carefully Applied the Secondary *Sugarland* Factors

The trial court also carefully considered the secondary *Sugarland* factors, all of which it found supported the award.

As to counsel's time and efforts, the award represented a 25.3x multiplier—less than *half* the 66x multiplier affirmed in *Americas Mining* and justified here given that "plaintiff's counsel litigated the action efficiently, and to great success" overcoming "every hurdle they faced" to achieve total victory at trial. R.Op. 97. Additionally, "Plaintiff's counsel…invested significant additional effort since the Post-Trial Opinion defending its outcome and no doubt will be required to continue through appeal." *Id.* Respectfully, that is an understatement. Since the January 30, 2024 post-trial decision, Plaintiff's counsel has invested *thousands* of additional

hours of work, moving to preserve the trial court's jurisdiction, as well as addressing Defendants' unfounded attempt to "ratify," "fix," and "extinguish" fiduciary duty claims. R.Op. 15. Those unprecedented post-trial developments—entirely of Defendants' making—render any hourly cross-check significantly less probative, as does the massive benefit created by the litigation. Nonetheless, the trial court faithfully applied it, concluding the award was merited.

The trial court likewise found that the action was highly complex, "fully support[ing]" the Fee Award. R.Op. 98. The court noted the "difficult substantive issues," the "extensive" trial record, the complex accounting issues, and the need to formulate a damages theory regarding an "unprecedented compensation award…[without]…any benchmarking that might illuminate…a fair price." *Id.*

The trial court recognized the "massive contingency risk" Plaintiff's counsel endured, the "significant out of pocket expenses" Plaintiff's counsel incurred, and the fact "Musk does not typically settle cases and…his attorneys would not hold back." R.Op. 98-99. Accordingly, it found "the true contingency risk in this case supports a results-based award using the *Americas Mining* percentages." R.Op. 99.

Finally, as to counsel's standing and ability, the court found that Plaintiff was represented by "experienced stockholder advocates who have secured some of the largest recoveries in the court's history and successfully taken high-stakes cases through trial and appeal" and who "litigated against all-star teams from multiple top-

ranked firms, who were supremely motivated to prevail in this astronomically high-stakes and high-profile case," further supporting the fee. R.Op. 100.

* * *

Having quantified the benefit created based on expert testimony and carefully considered the secondary *Sugarland* factors, the trial court reasonably exercised its discretion to award a fee 95% below that requested, representing just 0.6% of the benefit created. This careful exercise of discretion deserves deference and should be affirmed.

CONCLUSION

This Court should affirm.

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