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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

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NATURE OF PROCEEDINGS

The Court of Chancery's ratification decision contravenes a fundamental principle of Delaware corporate law: that when stockholders are empowered to act through free and informed voting, they have the final say over the company they own. Delaware law safeguards stockholders from exploitation and coercion, but it has never second-guessed their knowing and voluntary business decisions. And when an independent board or committee tasks disinterested stockholders with making a quintessential business decision—how to compensate the CEO—there can be no clearer or fairer mandate. That is precisely what happened in the ratification vote here: Tesla and its fully informed, disinterested stockholders agreed to hold onto the deal of a lifetime, despite any flaws in its inception. Delaware law should respect their choice.

The Court of Chancery, however, did not. It declined to give a supermajority stockholder ratification vote any effect at all. In the court's view, the directors had wagered too much, even if stockholders happened to take home the jackpot. Stockholders could not decide that they were satisfied with the deal they got. They could not make a fresh decision about how to move forward, with their investments and even their life savings at stake. They could not seize the chance to pay their CEO using far lower 2018 stock prices, and without hefty new accounting charges. They were flatly foreclosed from choosing the option they viewed as most beneficial to them and their company, all in the name of stockholder protection.

The Court of Chancery's unnecessary and unwanted judicial "protection" has harmed Tesla stockholders in several ways. They have lost their say in compensating the company's once-in-a-generation CEO, as their votes were disregarded. They have lost value in their shares, as Tesla's stock price dropped with each Court of Chancery decision that disregarded their wishes. They have lost certainty in the company they own, as Tesla's contract with its CEO was torn up. And Tesla and its stockholders may suffer further losses still if, rather than ratifying a compensation deal at 2018 prices, Tesla is forced to negotiate a replacement deal that incurs tens of billions of dollars in new accounting charges, with significant adverse consequences for the company's earnings.

All of those harms stem from the Court of Chancery's basic doctrinal error of conflating two distinct business decisions. The first decision came in 2018, when Tesla's Board negotiated a new compensation plan for Elon Musk. Knowing that the company's ambitious goals depended on Musk's vision and drive, the Board and 73% of disinterested stockholders approved an incentive-based compensation package. The plan worked: under Musk's leadership, Tesla grew from a startup to the most valuable car company in the world, by far. But after a single stockholder brought a derivative suit, the court found that Tesla's directors had breached their fiduciary duties and ordered that the compensation package be rescinded.

That decision left Tesla facing a crisis. With no plan in place, the company still needed to compensate Musk for an extraordinarily successful six years of leadership, and to motivate him going forward. But negotiating a new compensation package would impose a raft of new costs, including tens of billions of dollars in accounting charges. And walking away from the company's visionary leader was not a realistic option: it was sure to send Tesla's value and stockholders' shares plummeting.

So in 2024, Tesla and its stockholders made a new decision. Stockholders were asked a simple question: even if the 2018 deal had been adopted through a flawed process, did they want to keep it anyway? In what was likely the most informed stockholder vote in Delaware history, the Board provided stockholders with the Court of Chancery's 200-page opinion criticizing the deal, and scores of commenters publicly and vigorously debated its merits. Stockholders also had the unique benefit of hindsight: they could evaluate Musk's performance under the 2018 deal, understand how much he stood to earn, and ask themselves whether to take the deal or require the company to negotiate a new one. They overwhelmingly opted to take the deal, with 72% of disinterested voting shares choosing to ratify the transaction.

The Court of Chancery rejected their effort to hold onto a deal that they could never strike again on the same terms. The court viewed ratification as an attempt to erase the directors' breach, and concluded that (1) any ratification vote had to and could not satisfy the framework in *Kahn* v. *M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2015) (*MFW*); (2) stockholders should not have been told that ratification could be effective; (3) ratification happened too late under various procedural rules; and (4) ratification should have been pleaded as an affirmative defense to breach. Each of those rationales reflects the same fundamental misunderstanding of ratification and its purpose. Stockholders did not turn back the clock or overrule the court's finding that directors had breached their fiduciary duties. Instead, ratification gave stockholders a clean opportunity to decide for themselves whether the terms of the deal were in Tesla's—and their own—best interests in 2024, notwithstanding any deficiencies in the 2018 process.

There is no reason to strip a fully empowered and informed stockholder supermajority of the opportunity to make a fresh business judgment about how to move forward. Principals can ratify the acts of faithless agents, and beneficiaries can ratify the decisions of wayward trustees. Stockholders, too, should be allowed to ratify transactions involving conflicted directors. Foreclosing ratification does not protect judicial supremacy; it simply reduces investor choice. This Court should restore the power of ratification and entrust such core business decisions to Tesla's knowledgeable stockholders.

To make matters worse, the Court of Chancery awarded Tornetta's counsel $345 million—the largest fee award in Delaware history and a 25x lodestar multiple—for purportedly "achiev[ing]" a "benefit" that stockholders twice said they do not want. Rat. Op. 2. Tornetta's counsel cannot receive a share-of-recovery award because they achieved no quantifiable net benefit, given the uncertain cost of replacing the rescinded deal. The court acknowledged that Tesla could replace Musk's compensation plan, but it refused to account for that indisputably substantial countervailing cost—an approach contrary to common sense and Delaware precedent.

This Court should reverse the Court of Chancery's ratification decision and rescission order, and reduce the fee award.

SUMMARY OF ARGUMENT

I. The Court of Chancery erred in refusing to revise its post-trial opinion to give effect to Tesla stockholders' 2024 vote to ratify Elon Musk's 2018 compensation plan. That ratification is an independent corporate act that moots any need to rescind the plan based on defects in the 2018 process.

Substantively, an uncoerced and fully informed stockholder vote is sufficient to ratify a corporate act that might otherwise be voidable due to a fiduciary breach. The Court of Chancery held otherwise by erroneously imposing the *MFW* framework, but that doctrine is inapposite to ratification. *MFW* allows directors to secure business-judgment protection to insulate their conduct from heightened judicial scrutiny before entering into a transaction; it does not constrain stockholders from voluntarily electing to accept an outcome despite a fiduciary breach. Such ratification, if made with full disclosure of any perceived conflicts or flaws in the original approval process, does not need *MFW*'s full suite of protections. And even if *MFW* could apply to an after-the-fact ratification, it would not apply here because Musk, who had only a 12.9% stake by the ratification vote, was not a controller for purposes of that vote.

In any event, Tesla complied with the spirit of *MFW*, as best adapted to the ratification context. Tesla used an independent, empowered special committee and obtained a supermajority vote of disinterested stockholders.

That vote was as fully informed as any in Delaware history. The 2024 proxy statement gave stockholders every conceivably relevant detail about the deal and the process leading up to it, including by attaching the 200-page Court of Chancery decision criticizing the deal. The Court of Chancery still found that stockholders were not fully informed, but only because it disagreed with the proxy's heavily qualified legal conclusion that ratification was a tool available to stockholders. The court's finding that the proxy was "misleading" was thus simply a rehash of its misapplication of *MFW*.

Procedurally, Tesla's request to revise the post-trial order was proper, including under Court of Chancery Rules 54(b) and 59(a). The Court of Chancery's decision to the contrary rested on a supposed inability to modify remedies in light of intervening events; inapposite authority about *post*-judgment relief; and a misreading of this Court's decision in *Kerbs* v. *California Eastern Airways, Inc.*, 90 A.2d 652 (Del. 1952), which endorsed post-trial stockholder ratifications. And Tesla plainly could not have been required to raise a 2024 ratification vote as an affirmative defense in a case filed in 2018 ostensibly on its behalf.

II. The Court of Chancery also erred in awarding Tornetta's counsel a record-setting $345 million fee award, at more than 25 times counsel's hourly rate. The court reached that number by mistakenly treating the benefit conferred as "quantifiable," even though Delaware courts have consistently held otherwise. It then compounded the error by calculating a one-sided "benefit" supposedly produced by Tornetta's counsel: it gave Tornetta credit for causing rescission of Musk's 2018 compensation plan, while ignoring the cost of an inevitable replacement plan. That approach conflicts with *every* prior Delaware decision calculating fees in the context of rescinded compensation plans. Because Tornetta's counsel failed to satisfy their burden of establishing a quantifiable benefit achieved—taking into account the replacement costs Tesla will be forced to incur—their fee should be based on *quantum meruit*, not a percentage of a distorted benefit.

STATEMENT OF FACTS

A. Tesla's Board And Stockholders Approve The 2018 Agreement.

In 2017, Tesla's Board recognized that the company's future hinged on its visionary CEO, Elon Musk. To incentivize Musk to continue innovating and to focus on Tesla over his other endeavors, the Board negotiated a compensation package with a pure-performance structure and robust stockholder protections. *See* Directors' Br. 7-10; Post-Trial Opinion (Ex. C, "Op.") 80-82. The final plan ("2018 Agreement") comprised 12 tranches, each of which would vest upon satisfaction of a $50 billion market-capitalization milestone and accompanying operational milestone. Op. 80-81. If Musk hit all 12 tranches, among other requirements, he would be entitled to as much as 6.4% in additional equity (accounting for future dilution), and the value of existing stockholders' shares would increase 13-fold. *See* A4122. If Musk failed to at least double the company, the plan paid nothing. In March 2018, 73% of Tesla's disinterested voting shares jumped at that deal. Op. 88.

The bargain paid off. By mid-2022, Tesla had achieved every plan milestone, creating $600 billion in value for stockholders. Op. 92. Musk did not stop there. For the remaining years of the 2018 Agreement, he continued to propel explosive growth, and Tesla's value ballooned to over $1 trillion. Op. 9.

B. The Court Of Chancery Orders Rescission Of The 2018 Agreement.

Shortly after disinterested stockholders approved the 2018 Agreement, Tornetta filed this action. Op. 97. Tornetta alleged, as relevant here, that Tesla's Board had breached its fiduciary duties in negotiating the 2018 Agreement. Among other things, he sought a final judgment directing Tesla to "rescind" the 2018 Agreement and (until he changed course months before trial) to "subject the [Agreement] to a fully informed stockholder vote." A303. The case proceeded to a five-day trial. Op. 101.

In January 2024, the Court of Chancery issued a post-trial opinion rescinding the 2018 Agreement. The court concluded that Musk had "transaction-specific control" over the 2018 Agreement, Op. 103-146, and that Tesla stockholders were insufficiently informed before their vote, Op. 147-158. Accordingly, the court reviewed the 2018 Agreement for entire fairness, and found that defendants had failed to prove that the Agreement was entirely fair. *Id.* at 158-192. The court also found that defendants had failed to justify any remedy short of rescission, and thus ordered rescission. *Id.* at 192-199. The court did not immediately enter a final judgment, as it had yet to adjudicate Tornetta's fee petition. *Id.* at 200.

Stockholders and the broader market did not see the Court of Chancery's decision as benefitting Tesla's stockholders. Tesla's stock declined over the next day by 2.2%, underperforming the S&P 500. A2534-2535.

C. Tesla's Independent Special Committee Sends A Ratification Vote To Stockholders.

The Court of Chancery's post-trial opinion introduced a number of difficult decisions: how to compensate Musk for his six years of unprecedented success and motivate him to continue delivering the same results, how to minimize the costs of replacing the plan that the court had rescinded, how to maintain investor confidence in the company, and how to preserve Tesla's reputation for fairness in its dealings. Two weeks after the court's decision, the Board created a Special Committee charged with considering Tesla's corporate future. *See* Ratification Opinion (Ex. B, "Rat. Op.") 11. The Committee was tasked with addressing Musk's compensation for his work since 2018, and was fully empowered to consider all options. *Id.*

The Special Committee initially comprised directors Joe Gebbia and Kathleen Wilson-Thompson. Rat. Op. 11. But when the Committee's remit expanded to consider Musk's compensation, Gebbia resigned out of an abundance of caution, leaving Wilson-Thompson as the Committee's sole member. A2056, A2076. Wilson-Thompson is an attorney-turned-corporate leader who has spent three decades in senior management and director roles. A2056, A2078-2079. She has no personal, business, or financial ties to Musk; serves on the boards of two other public companies; and is not financially dependent on her service to Tesla. A2078-2079.

The Special Committee, advised by Sidley Austin LLP and Abrams & Bayliss LLP, undertook an expansive review. A2056, A2077. The team "reviewed 2,000 pages of documents," "interviewed management and directors," and met "16 times." Rat. Op. 12; *see* A2056, A2080-2081, A2087. Together, the Committee and its advisors devoted almost 4,500 hours to its work. A2080. The Committee operated free from outside influence, including from Musk. A2057, A2081.

Given the Court of Chancery's decision and the continued need to compensate Musk for six years of work and to motivate him going forward, the Special Committee had limited options before it. It could recommend that stockholders vote to ratify the 2018 Agreement, which would impose no additional accounting expenses beyond the $2.3 billion charge that had already been recorded in 2018. Or the company could negotiate a new, comparable plan with Musk. A1930, A1932. To re-create a similar deal at 2024 stock prices, Tesla would have to incur a far larger accounting expense—upwards of $25 billion, *id.*—that could significantly cut into the company's earnings.

Tesla could also roll the dice by aggressively negotiating with Musk for a smaller plan than the one he had relied on for years, undermining the company's most important relationship. And potentially for no benefit: because the company's stock price had soared since 2018, a new equity-based compensation plan even one-tenth the size of the 2018 Agreement would carry the same $2.3 billion accounting expense. A2073. It would also risk leaving Musk without compensation large enough to focus his time and energy on Tesla, *see* A1930, given his other available opportunities and his unique personal and financial motivations, *see* Directors' Br. 7, 39-40.

Option 1:
Recommend Ratifying the 2018 Agreement

- **Benefits**
  - Avoids restarting process and incurring an additional multi-billion-dollar accounting charge.
  - Motivates Musk to continue delivering growth.
  - Demonstrates fairness and respect to Tesla's stockholders and CEO.
  - Corrects any previous perceived information deficiencies.
  - Could reduce attorney's fees.
- **Costs**
  - Some legal uncertainty about whether the Court of Chancery will permit ratification.

Option 2:
Negotiate an Equivalent Agreement

- **Benefits**
  - Likely motivates Musk to continue delivering growth.
  - Demonstrates fairness and respect to Tesla's stockholders and CEO.
- **Costs**
  - Could incur an additional $25B accounting charge, significantly cutting into Tesla's earnings.
  - Jeopardizes stockholder protections in the 2018 Plan.
  - Requires an expensive and time-consuming process.
  - Could be subject to future legal challenges.

Option 3:
Negotiate a Less Valuable Agreement

- **Benefits**
  - Possibility of less stockholder dilution.
- **Costs**
  - Disincentivizes Musk from devoting his time and energy to growing Tesla.
  - Ignores stockholders' choice.
  - Still incurs a substantial accounting charge, significantly cutting into Tesla's earnings.
  - Jeopardizes stockholder protections in the 2018 Plan.
  - Requires an expensive and time-consuming process.
  - Exposes Tesla to potential legal liability for reneging after Musk has already performed.

The Special Committee determined that Option 1, ratification, was in the best interests of Tesla and its stockholders. A2054. The Committee observed that ratification "could avoid a prolonged period of uncertainty" concerning Musk, whom the Board continued to believe was well worth motivating. A2055. It could give a voice to the stockholders, who were clamoring to have a say in Musk's compensation plan, and could fill the disclosure gaps that the Court of Chancery had found. A2070-2073. And it could avoid needless, enormous accounting charges. A2073.

D. Stockholders Ratify The 2018 Agreement.

To ensure that stockholders could assess the benefits and costs themselves, Tesla filed a proxy statement in April 2024, ahead of the company's June 2024 annual meeting. The 2024 proxy informed stockholders that the Board (with Musk and Kimbal Musk recused), at the Special Committee's recommendation, had determined that stockholders should have the opportunity to ratify the 2018 Agreement. A1933. The Board and Special Committee further recommended that the stockholders vote for ratification. *Id.*

Stockholders had an extraordinary amount of information available to them. The proxy statement contained an explanation of the 2018 Agreement's substantive terms, A1907-1916, and the negotiations leading to its approval, A1917-1921. The proxy also contained a summary and full copy of the Court of

Chancery's 200-page post-trial opinion, which criticized the negotiation process, each director's relationship with Musk, and the 2018 Agreement's economic terms. A2173-2268; Op. 19-82. That opinion contained every piece of information the court had deemed material that was not provided to stockholders in the 2018 proxy. Op. 147-156. Finally, the 2024 proxy also attached the Special Committee's 40-page report, which explained why the Committee thought ratification was warranted, including because a new compensation plan would likely need to be of a "similar magnitude," which would "result in a very large, incremental accounting charge" potentially "in excess of $25 billion." A2070-2074.

The 2024 ratification vote garnered unprecedented public debate. For example, ISS and Glass Lewis recommended voting against ratification.[1] Meanwhile, some stockholders who had opposed the Agreement in 2018 changed their position and supported ratification in 2024. For example, Vanguard, one of Tesla's largest stockholders, explained that the "unique circumstances of

[1] *See generally* Ross Kerber, *Top proxy adviser ISS recommends against Tesla CEO Musk's 'excessive' $56 bln pay*, Reuters (May 31, 2024), https://www.reuters.com/business/autos-transportation/iss-recommends-votes-against-2018-pay-plan-tesla-ceo-elon-musk-2024-05-31.

evaluating the plan retroactively eliminated [its] concerns that significant pay could be earned without company outperformance relative to the market or peers."[2]

A sizable majority of disinterested Tesla stockholders voted to ratify the 2018 Agreement. With over 80% of disinterested shares participating, 72% voted for ratification. A2744. Tesla's stock price rose 2.9% following the ratification vote.[3]

After the ratification vote, Tesla and the individual defendants moved to revise the post-trial opinion. At oral argument, defendants made the limited scope of their request "very clear." Rat. Op. 16 (citing A3651:3-9). They did not seek to revisit the Court of Chancery's factual findings or legal conclusions as to the directors' fiduciary breach; rather, they argued that the ratification meant stockholders had elected to retain the 2018 Agreement's terms, mooting the need for the rescission remedy in the court's post-trial opinion.

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[2] *See* Vanguard, *Redomestication and executive pay proposals at Tesla, Inc.* (June 2024), https://corporate.vanguard.com/content/dam/corp/advocate/investment-stewardship/pdf/perspectives-and-commentary/tesla_insights.pdf.

[3] *See* Lora Kolodny, *Tesla shareholders vote to reinstate Elon Musk's $56 billion pay package*, CNBC (June 13, 2024), https://www.cnbc.com/2024/06/13/tesla-shareholder-elon-musk-pay-package-at-annual-meeting.html?msockid=3feced2c6e5466330826feaa6fa46718; A2585-2588.

E. The Court Of Chancery Denies The Motion To Revise And Awards Tornetta's Counsel $345 Million.

In December 2024, the Court of Chancery rejected the 2024 ratification and awarded attorney's fees.

The Court of Chancery held that "four fatal flaws" prevented the stockholders' ratification vote from having any effect. Rat. Op. 1. First, the court held that there is no procedural avenue for considering ratification after trial. *Id.* at 17-27. Second, the court held that ratification is an affirmative defense, which Tesla had forfeited by holding the ratification vote after the court's post-trial opinion. *Id.* at 28-34. Third, the court concluded that stockholders could not ratify the 2018 Agreement at all because the court had already ruled that the Agreement did not comply with the *MFW* framework. *Id.* at 34-40. And fourth, the court concluded that the ratification vote was uninformed because the proxy had materially misled stockholders by saying that the vote could be legally effective, when the court had just concluded it was not. *Id.* at 41-43.

On fees, the court awarded Tornetta's counsel $345 million—the highest fee award in Delaware history, and the equivalent of 25.3 times their hourly rate. In doing so, the court disregarded that Tornetta's "win" would generate tens of billions of dollars in costs, including the cost of a replacement compensation plan for Musk and the significant accounting charges that would come with it. The court awarded 15% of the 2018 Agreement's grant-date fair value of $2.3 billion, treating the award value as a quantifiable, costless recovery for the company. Rat. Op. 96.

Immediately after the court released its ratification opinion, Tesla's stock price dropped another 1.6%, again suggesting that stockholders and the market did not view the Court of Chancery's decision as benefitting Tesla's stockholders.[4]

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[4] *See* Mauro Orru, *Tesla Stock Slides Premarket After Musk's Pay Package Rejected Again by Judge*, Barron's (Dec. 3, 2024), https://www.barrons.com/livecoverage/stock-market-today-120324/card/tesla-stock-slides-premarket-after-musk-s-pay-package-rejected-again-by-judge-zzKfQNkyxokjWC3i7YAS?siteid=yhoof2; A2585-2588.

ARGUMENT

I. THE RATIFICATION MOOTED THE NEED TO RESCIND THE 2018 AGREEMENT.

A. Question Presented

Did the Court of Chancery err by holding that the 2018 Agreement should still be rescinded even after being ratified by Tesla's stockholders in a fully informed 2024 vote? The issue was presented and decided below. *See* A2923-2985; A2986-3001; Rat. Op. 1-2, 15-44.

B. Scope Of Review

Whether a post-trial stockholder ratification has legal effect is a question of law reviewed *de novo*. *Wilmington Tr., Nat'l Ass'n* v. *Sun Life Assurance Co. of Canada*, 294 A.3d 1062, 1071 (Del. 2023). The adequacy of legal disclosures is a mixed question of law and fact, and courts review *de novo* the legal question whether the disclosures in a proxy statement "fully satisfy the standards of Delaware law." *Rosenblatt* v. *Getty Oil Co.*, 493 A.2d 929, 946 (Del. 1985); *see Levitt* v. *Bouvier*, 287 A.2d 671, 673 (Del. 1972). Finally, although a trial court's application of procedural rules is subject to review for abuse of discretion, a court's interpretation of those rules is reviewed *de novo*. *In re Celera Corp. S'holder Litig.*, 59 A.3d 418, 428 (Del. 2012).

C. Merits Of The Argument

Whatever this Court thinks about the original process culminating in the approval of the 2018 Agreement, Tesla's stockholders did something different in 2024. They ratified an agreement that, with full information about any fiduciary breaches and perfect hindsight about the caliber of Musk's performance, they determined to be in Tesla's and their own best interests. Substantively, Delaware law permits—and indeed has historically deferred to—such core decision-making by informed and disinterested stockholders. And procedurally, Delaware rules enable courts to take account of new case-altering developments, especially before final judgment.

1. The 2024 Ratification Is Substantively Valid.

This Court has labeled informed stockholder voting "the highest and best form of corporate democracy." *Williams* v. *Geier*, 671 A.2d 1368, 1381 (Del. 1996). Because Tesla's fully informed and disinterested stockholders overwhelmingly chose to ratify the 2018 Agreement, that act of ratification should give the Agreement full force and effect, regardless of any improper acts that previously rendered it voidable.

The Court of Chancery saw it differently. The court held that the ratification had no effect because it did not check every box under *MFW*—the framework the court had used to evaluate the 2018 process. But *MFW* does not apply to the 2024 ratification. *MFW* prescribes a prophylactic process that, if followed, decreases the likelihood that directors *will be found to be in breach* of their fiduciary duties in certain transactions with controlling stockholders. *MFW* does not constrain whether disinterested stockholders may voluntarily accept a transaction *despite a judicial finding of breach*. At a minimum, Tesla did everything it could to follow the spirit of *MFW* in this context, including establishing an independent special committee with world-class advisors and conditioning the ratification on a majority vote of disinterested stockholders. Those disinterested stockholders were fully informed, and a supermajority voted to ratify. This Court should give effect to their clearly expressed will.

a. The ratification adopts the 2018 Agreement and eliminates the need for rescission.

The precise effect of ratifying a conflicted-controller transaction after a finding of breach is an issue of first impression for this Court. The underlying principles, however, are not new. Under those principles, Tesla stockholders' fully informed and uncoerced vote should be given full effect as an independent authorization of the 2018 Agreement, thereby mooting any need for rescission. To be clear, the stockholders' ratification did not reverse any judicial findings about any fiduciary breach. Instead, the ratification vote reflects the stockholders' desire to accept—with full knowledge of the defects the Court of Chancery found—the benefits and burdens of the fully performed 2018 Agreement, rather than to negotiate a new compensation agreement with Musk.

i. A "[f]oundational principle[] of Delaware law" is that it "strives to give effect to business decisions approved by properly motivated directors and by informed, disinterested stockholders." *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 207 (Del. Ch. 2007); *see Gottlieb* v. *Heyden Chem. Corp.*, 91 A.2d 57, 58 (Del. 1952) ("[C]ourts will not substitute their own 'business judgment' for that exercised in good faith by the stockholders."). When "disinterested stockholders make a mature decision about their economic self-interest, judicial second-guessing is almost completely circumscribed by the doctrine of ratification." *In re Lear Corp. S'holder Litig.*, 926 A.2d 94, 114-115 (Del. Ch. 2007).

Ratification is the established mechanism for stockholders to respond to a fiduciary breach. It finds its roots in agency law, where a principal may ratify "the legal authority of an agent in circumstances in which the agent had no authority or arguably had no authority." *Lewis* v. *Vogelstein*, 699 A.2d 327, 334 (Del. Ch. 1997). The same is true in the law of trusts, where after a breach by a trustee, beneficiaries "are entitled . . . to ratify the transaction." Restatement (Third) of Trusts § 100 (2012); *see* Restatement (Second) of Trusts § 210 (1959) ("[T]he beneficiary can at his election reject the purchase or affirm it.").

This Court has recognized that ratification is available to stockholders, too. In *Kerbs* v. *California Eastern Airways, Inc.*, 83 A.2d 473 (Del. Ch. 1951) (*Kerbs I*), the plaintiffs sought to enjoin a profit-sharing plan and argued that the board had been conflicted in approving the plan. *Id.* at 474. After trial, and after the Court of Chancery's decision, the company called a special meeting of stockholders to ratify the plan. *Kerbs* v. *Cal. E. Airways, Inc.*, 90 A.2d 652, 655 (Del. 1952) (*Kerbs II*); *see Kerbs* v. *Cal. E. Airways*, 94 A.2d 217, 218 (Del. Ch. 1953) (*Kerbs III*) (explaining history). This Court concluded that the plan would have been void if not for the ratification. But it held that where "[a] majority of the stockholders" ratifies a transaction post-trial, "[t]hat ratification cures any voidable defect in the action of the Board," including approval by self-interested directors. *Kerbs II*, 90 A.2d at 655, 659. This Court thus remanded for the Court of Chancery to examine whether the plan had been effectively ratified, and if so, to deny plaintiffs' request to enjoin the plan. *Id.* at 660. *Kerbs* clearly treats ratification as conceptually distinct from a conflicted approval process, and this Court has never said otherwise.

ii. There is every reason to give full effect to Tesla stockholders' decision to ratify the 2018 Agreement. For starters, the 2024 ratification was not a controlled transaction. By that time, Musk was no longer a controlling stockholder even under the Court of Chancery's sweeping logic, as he had only 12.9% equity ownership and no control over the Special Committee. *See In re GGP, Inc. S'holder Litig.*, 2021 WL 2102326 (Del. Ch. May 25, 2021) (holding that a 35.3% stakeholder did not control a transaction where there was an independent special committee), *rev'd in part on other grounds*, 282 A.3d 37 (Del. 2022).[5] And even if he was, there is no reason to extend *MFW* to executive-compensation decisions involving a controlling stockholder, given that Delaware trusts informed stockholders to referee directors' decisions about their own compensation. *See* Directors' Br. 26-27. For either reason, *MFW* simply has no relevance here.

Moreover, none of the concerns that have driven this Court to second-guess stockholder decisions in conflicted-controller transactions—coercion of stockholders, bypass of directors, and tunneling by a controller—are relevant here. There was no risk of stockholder coercion in a post-trial ratification: stockholders could simply "reject the transaction and maintain the status quo." *In re Dell Techs. Inc. Class V S'holders Litig.*, 2020 WL 3096748, at *25 (Del. Ch. June 11, 2020). By 2024, stockholders had already fully received the benefits of Musk's performance under the 2018 Agreement, and so were free to vote without fear that those past benefits might be taken away. There was also no risk that Musk might

[5] The Court of Chancery was clearly incorrect to say that defendants "abandoned" this issue during the hearing. Rat. Op. 40 n.161 (citing A3674:10-23). Defendants affirmatively and repeatedly advanced this argument—including in the portion of the transcript the court cited. *See* A3674:20-23; A3720:4-24; A3721:1-22; A3745:15-20; A3746:2-24.

"bypass the board to unilaterally achieve [his] goals" or else "tunnel[]" funds to himself, Rat. Op. 38, because an independent Special Committee of the Board decided to submit the vote to stockholders.

In the post-trial context, stockholders are also uniquely well informed. A judicial finding of a fiduciary breach gives disinterested stockholders the benefit of a court's "careful[] analy[sis] [of] the factual circumstances" and "articulat[ion] [of] the bases upon which it decide[d] the ultimate question." *Cinerama, Inc.* v. *Technicolor, Inc.*, 663 A.2d 1156, 1179 (Del. 1995). The circumstances of this vote again bear that out. Tesla conducted likely the best-informed stockholder vote in Delaware history, and disclosed well beyond "the specific amounts and terms" of the 2018 Agreement. *In re Invs. Bancorp, Inc. S'holder Litig.*, 177 A.3d 1208, 1211 (Del. 2017). Tesla's disinterested stockholders had the benefit of, among other things: the Court of Chancery's opinion, which was both summarized and included in full in the proxy; the opinions of the two largest proxy advisors and various institutional investors, both for and against ratification; and extensive public discourse. *See* A1921-1925, A2173-2268, A3428-3553. Tesla's disinterested stockholders also had full hindsight regarding Musk's performance under the 2018 Agreement, allowing them to assess (rather than predict) the value of his performance under the very deal being scrutinized. *See* A4122; Op. 92.

In short, this is the strongest case for post-trial ratification that this Court will likely ever encounter. There was a free and fully informed stockholder vote, and stockholders had the benefit of both Musk's full performance and the Court of Chancery's complete analysis. That vote was put to stockholders by the Tesla Board on the recommendation of a disinterested Special Committee. In those circumstances, the question should no longer be whether the judiciary thinks an agreement was entirely fair to stockholders, but whether it will treat as dispositive stockholders' "mature decision about their economic self-interest." *Lear*, 926 A.2d at 114-115.

The 2024 ratification eliminates any justification for rescinding the 2018 Agreement. The Court of Chancery's order of rescission was based on its conclusion that remedying the adjudicated breaches would return Tesla to its pre-Agreement status quo. *See* Directors' Br. 50. But the 2024 ratification was an independent decision by the stockholders to move past that status quo. As a result, rescinding the 2018 Agreement would not remedy the 2018 deficiencies; it would nullify a separate 2024 corporate action that has not been challenged here.

iii. The Court of Chancery disagreed. It held that the ratification vote was ineffective unless it was part of a full *MFW*-compliant process. Rat. Op. 38-39. But as explained, *MFW* has no application here. *MFW* formulated a mechanism for directors to obtain business-judgment protections before entering into a conflicted-controller transaction. 88 A.3d at 645. It says nothing about whether or how stockholders can ratify a *transaction*—as distinct from *director conduct*—after a court has deemed the transaction to be unfair. *See id.* at 644-646. *MFW* likewise does not call into question the new corporate actions of a different board and different stockholders that take place six years after the initial transaction.

The Court of Chancery grounded its rejection of ratification not in this Court's precedents, but in unwarranted policy concerns. The court feared that if a stockholder ratification like this one were given effect, controlling stockholders would give up on trying to meet *MFW*'s requirements and would force through unfair transactions with the expectation that they could get the transaction ratified after trial if needed. Rat. Op. 40. That is not a realistic fear. No transaction planner would willingly cast off protections and engage in unfair transactions, banking on the ability to win over disinterested and fully informed stockholders after a long, expensive judicial process. And stockholders who are duped into an unfair transaction on the front end, and who then receive a judicial opinion that walks through all of the transaction's price and process deficiencies, are extremely unlikely to rally together afterward to demand the rejected deal.

If anything, limiting stockholders' ability to ratify transactions post-trial would have far more problematic repercussions. The court's decision means that corporations have only one chance to get transaction processes "right." Even when stockholders overwhelmingly support a deal that a court finds to be adopted in a flawed process, they would be powerless to keep the benefits of the deal. Such a rule would take business decisions out of the hands of the people in the best position to make them—the people with "an actual economic stake in the outcome." *Corwin* v. *KKR Fin. Holdings LLC*, 125 A.3d 304, 313-314 (Del. 2015). That effort to protect stockholders from their own best judgment cannot be squared with Delaware's creed that "the highest and best form of corporate democracy" is when "stockholders control their own destiny through informed voting." *Geier*, 671 A.2d at 1381.

b. <u>The ratification complies with *MFW*'s dual protections in any event.</u>

If this Court nevertheless decides to impose new limits on the power of stockholders to ratify conflicted-controller transactions, it should at least preserve ratification when the dual protections of *MFW* are in place. The ultimate purpose of *MFW* is to encourage companies to apply two layers of review to ensure that a controlling stockholder cannot "exert outsized influence over the board and minority stockholders." *In re Match Grp., Inc. Deriv. Litig.*, 315 A.3d 446, 460 (Del. 2024); *see MFW*, 88 A.3d at 646 (engaging in a "[d]ual [p]rotection [i]nquiry"). Those two layers of review can be achieved in the ratification context if (1) an independent special committee recommends ratification to stockholders, and (2) the disinterested stockholders ratify in a fully informed vote. Both protections were present here.

i. First, Tesla's Special Committee put the question of ratification to the fully informed, disinterested stockholders, and they voted nearly three-to-one to accept the terms of the 2018 Agreement. *See* pp. 14-16, *supra*; pp. 32-35, *infra*.

Second, as required by *MFW*, 88 A.3d at 645, the Special Committee that recommended ratification to stockholders was independent, was empowered, and satisfied its duty of care.

Independence. The Special Committee was fully independent. It comprised a staunchly independent member, Kathleen Wilson-Thompson. Wilson-Thompson "is not financially dependent" on her Board service, and her equity-based compensation is not "dependent in any way on her continued service . . . and cannot be reduced by any director or officer of Tesla." A2078. Nor did Wilson-Thompson have a relationship with Musk outside of Tesla. *Id.* Wilson-Thompson simply was not "beholden" to Musk regarding the ratification or otherwise. *United Food & Com. Workers Union* v. *Zuckerberg*, 262 A.3d 1034, 1060 (Del. 2021).

Empowerment. The Special Committee was likewise fully empowered. This requirement of *MFW* is met where, as here, a special committee is "empowered to freely select its own advisors and to say no definitively." *MFW*, 88 A.3d at 645. The Committee had full authority to consider the entire ratification question, and the Board committed that it would adopt the Committee's recommendation on ratification. A1917, A1927-1928, A2055-2056. The Committee also had the power to, and did, "select and retain advisors at the Company's expense." A2075; *see* A2056, A2077.

Duty of Care. The Special Committee employed robust processes to fulfill its duty of care. *See Brehm* v. *Eisner*, 746 A.2d 244, 264 (Del. 2000). The Committee considered "all material information reasonably available," *id.* at 259, and relied on the advice of qualified experts, A2077. The Committee and its advisors spent eight weeks and over 4,490 hours considering ratification and related issues. A2080-2081; Rat. Op. 12. The Committee held 16 meetings, reviewed over 2,000 pages of documents, and interviewed 12 individuals, including the other Tesla directors and five members of management. A2080-2085. This intensive, independently advised process led the Committee to conclude that holding a ratification vote was "in the best interests of Tesla and all of its stockholders." A2073; *see* pp. 11-14, *supra*.

ii. The Court of Chancery did not consider—let alone cast doubt on—the Special Committee's independence, empowerment, or faithful exercise of its duties. Instead, it held that these dual layers of protections went into effect too late. Rat. Op. 39-40. The court reasoned that the ratification here failed *MFW*'s requirement that a transaction be "preconditioned," from the outset of negotiations, on dual approvals by an independent special committee and the informed, disinterested stockholders. Rat. Op. 40; *see MFW*, 88 A.3d at 645.

The Court of Chancery never stopped to consider whether *MFW*'s preconditioning requirement—which, again, applies to directors' approval of conflicted-controller transactions—makes any sense for ratification. When it comes to directors' approval of a transaction, preconditioning prevents distortion in the bargaining process by cutting off the controller's ability to "dangle" such protections before the board "late in the process as a deal-closer rather than having to make a price move." *MFW*, 88 A.3d at 644. But preconditioning makes no sense in the context of ratification, which occurs after a deal has already closed. It would require extraordinary foresight for a company to pre-commit, at the start of negotiations, that in the unlikely event that any deal is rescinded by a court, it will be submitted post-trial to an independent special committee and to the stockholders for ratification. And even if negotiating parties could make that deal, it is hard to see how it would secure any value for stockholders. By the time of a ratification vote, the stockholders themselves are in the best position to judge whether there were distortions in the bargaining process, and any such distortions will inform their vote on whether to keep the deal. Preconditioning is thus neither a feasible nor a useful step in this context.

c. The ratification vote was fully informed.

For purposes of either a freestanding ratification analysis or an application of a modified *MFW* framework, the 2024 ratification vote was fully informed. Indeed, as explained above, pp. 14-16, *supra*, the ratification vote was likely the most informed public stockholder vote in Delaware history. Stockholders were armed with extensive knowledge about both the pros and cons of ratification and how the 2018 Agreement had actually panned out.

The Court of Chancery concluded otherwise, but not because stockholders lacked any material information or were misled as to any facts about the compensation package or the ratification process. Rather, the court found that the 2024 proxy statement "mangle[d] the truth" because it got the *law* wrong. Rat. Op. 41. The proxy statement told stockholders, with significant caveats, that a favorable vote could "extinguish" Tornetta's claims, "cure[]" any wrongs, "restore[]" the compensation plan, or "correct[]" any deficiencies—and the court had just held that ratification could not accomplish any of those things. *Id.* at 41 (quoting A1927, A1928, A1929, A1931). Although Tornetta did not bring any freestanding disclosure claims to challenge the ratification, the court found that these alleged disclosure deficiencies meant the ratification had no effect. That is wrong for several reasons.

First, the Court of Chancery's reasoning was circular. The one-paragraph rationale for why the proxy statement was misleading simply incorporated the court's legal reasoning refusing to give effect to the vote under *MFW*. *See* Rat. Op. 42. Because the court's analysis of ratification was wrong, *see* pp. 21-31, *supra*, then so too was its analysis of the proxy.

Second, the proxy was not misleading, no matter who was right on the law. In an abundance of caution, it repeatedly disclosed to stockholders that the legal effect of a ratifying vote could be challenged in court:

- "[E]ven a favorable vote by our stockholders to ratify the 2018 CEO Performance Award may not fully resolve the matter." A1927; *see* A1931.
- "The Special Committee and its advisors . . . could not predict with certainty how a stockholder vote to ratify the 2018 CEO Performance Award would be treated under Delaware law in these novel circumstances." A1927; *see* A1931.
- "This Ratification may be challenged in these novel circumstances . . . ." A1931.
- "The Delaware court, or another court, may find that the Ratification is not fair to stockholders, even if stockholders approve the Ratification proposal, and it may find that the process employed by

> the Special Committee was not adequate or fair, or that the Ratification is otherwise legally defective." A1931.

The proxy described the company's assessment of the legal effects of ratification, and warned stockholders that the company's legal position was subject to judicial scrutiny. There is nothing remotely misleading about that.

The Court of Chancery did not identify a single case where Delaware courts have rejected a stockholder vote as insufficiently informed because a proxy statement supposedly overstated the potential legal effect of the vote. To the contrary, the sole case on which the court relied, *Garfield ex rel. ODP Corp.* v. *Allen*, stands only for the obvious proposition that a vote described to stockholders as "non-binding" and "advisory" could not then "ha[ve] the binding effect of extinguishing any challenge." 277 A.3d 296, 355 (Del. Ch. 2022); *see* Rat. Op. 41 n.165.

Finally, to the extent the Court of Chancery was focused on the precise terms used to characterize the ratification vote's potential legal impact, any legal distinctions were immaterial to stockholders. No reasonable stockholder's vote hinged on whether the ratification would formally "extinguish" the fiduciary-breach claims and "cure" the wrong, or instead simply "restore" the plan and "correct" the deficiencies. A1927, A1928, A1929, A1931. Although some of those formulations might focus more on liability than remedy, every one of those formulations gets to the relevant result: the ratification vote puts the 2018 Agreement into effect. What mattered to stockholders was whether the Agreement would be rescinded—not the precise legal mechanisms for getting there.

2. The 2024 Ratification Is Procedurally Valid.

The Court of Chancery shielded its flawed substantive decision by concluding that it could not consider the ratification vote on procedural grounds. Delaware courts, however, routinely recognize the effect of intervening events that moot the need for judicial relief. *See, e.g.*, *Stotland* v. *GAF Corp*., 469 A.2d 421, 423 (Del. 1983) (dismissing appeal from judgment finding no demand futility because "the issues of this appeal have been rendered moot by the [post-judgment] demand made upon GAF's board"). This case should be no different. The Court of Chancery raised two procedural obstacles to recognizing ratification: (1) the purported lack of a mechanism for considering a post-trial development, and (2) the supposed need to plead ratification in an answer. But these novel procedural roadblocks should not be deployed to eliminate post-trial ratification as a mechanism for stockholder decision-making.

a. <u>The ratification could be considered under Rule 54(b).</u>

i. Rule 54(b) allowed the Court of Chancery to consider the 2024 ratification and revise its post-trial opinion accordingly. Rule 54(b) permits a court to revise "any order or other form of decision . . . *at any time* before the entry of judgment." Ct. Ch. R. 54(b) (emphasis added); *cf. Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 12 & n.14 (1983) (under federal law, "every order short of a final decree is subject to reopening at the discretion of the district judge"). The rule is intentionally flexible: before a final judgment, anything that satisfies a "lesser good-cause standard" can warrant revising an opinion. *Washington* v. *Preferred Commc'n Sys. Inc.*, C.A. No. 10810-VCL, at 40:16-41:2 (Del. Ch. Sept. 10, 2015) (TRANSCRIPT).

Delaware courts have made clear that "good cause" under Rule 54(b) includes case-altering factual developments. For example, in *Washington*, the court granted a Rule 54(b) motion to modify a summary-judgment order because a newly discovered document "would have affected the outcome." C.A. No. 10810-VCL, at 39:9-41:13; C.A. No. 10810-VCL, at 1 (Del. Ch. Sept. 10, 2015) (ORDER). And in *Southpaw Credit Opportunity Master Fund, L.P.* v. *Roma Restaurant Holdings, Inc.*, the court granted a Rule 54(b) motion to vacate a dismissal order, because a party's litigation position in another case conflicted with the statements it had made to secure dismissal. 2017 WL 3701232, at *1 (Del. Ch. Aug. 22, 2017).

Federal courts, too, will revise non-final orders under the analogous Federal Rule of Civil Procedure 54(b) based on new material facts that "happened *after* the [underlying] decision." *Motorola, Inc.* v. *J.B. Rodgers Mech. Contractors*, 215

F.R.D. 581, 585-586 (D. Ariz. 2003). For example, years after a court issued a non-final order restricting salvage operations at the Titanic, the ship's Marconi Suite began to deteriorate rapidly. *R.M.S. Titanic, Inc.* v. *Wrecked & Abandoned Vessel*, 461 F. Supp. 3d 336, 339 (E.D. Va. 2020). Although the court declined to "rethink" its previous decision, that "new development" still justified revising the original order to permit the recovery of artifacts for a limited period of time. *Id.* at 339, 343.

Rule 54(b)'s requirements were likewise met here. When Tesla moved to revise the post-trial opinion, no final judgment had been entered. Rat. Op. 19. And the 2024 ratification vote constituted "good cause" to reconsider the rescission order. A supermajority of informed, disinterested stockholders decided that renegotiating a new plan would be a worse outcome for the company than carrying out the terms of the 2018 Agreement, no matter the flaws in its procurement—thus mooting the need for rescission. Surely if a new litigating position in a *different* action provides good cause to revisit a prior decision, *Southpaw*, 2017 WL 3701232, at *1, then an informed stockholder ratification of the *same* plan should as well.

ii. The Court of Chancery declined to apply Rule 54(b) based on a misunderstanding of defendants' arguments. According to the court, defendants' motion to revise the post-trial opinion represented an impermissible attempt to "attack" "completed fact findings" and defy the law-of-the-case doctrine. Rat. Op. 19-24. But that misunderstands ratification and Tesla's requested relief. As Tesla explained below, it did "*not* seek to vacate the Court's factual findings or its legal conclusion" about any fiduciary breach with respect to the original approval of the 2018 Agreement. Rat. Op. 16. It instead requested that the court revise its remedy because, *despite* any flaws in the 2018 process, the 2024 ratification was a separate corporate act that eliminated the need for rescission. A2936; A3660:10-16 ("We're asking only for a modification of the remedy."). Indeed, Tornetta himself initially recognized that ratification was a proper remedy for any breach of duty, by seeking a judgment "[d]irecting Tesla to subject the [2018 Agreement] to a fully informed stockholder vote." A303 at Relief Requested ¶ K.

b. The ratification could also be considered under Rule 59(a).

i. The Court of Chancery had independent authority to revisit its post-trial opinion under Rule 59(a). Under that rule, "[t]he Court may open the judgment if one has been entered, take additional testimony, amend or make new factual findings and legal conclusions, and direct the entry of a new judgment." Ct. Ch. R. 59(a). Rule 59(a) authorizes reopening whenever doing so would prevent "injustice," *Cantor Fitzgerald, L.P.* v. *Cantor*, 2001 WL 536911, at *2 (Del. Ch. May 11, 2001), including when there is "newly discovered evidence" that (1) could not "reasonabl[y]" have been discovered "before trial" and (2) "will probably change the result," *In re Altaba, Inc.*, 2021 WL 3288534, at *2 (Del. Ch. July 30, 2021) (citations omitted). The 2024 ratification satisfies those criteria. It did not exist at the time of trial in 2022, and it mooted the need for rescission, thus changing the bottom-line result.

ii. The Court of Chancery wrongly conflated Rule 59(a) with Rule 60(b). In its view, Rule 59(a) permits reopening only to consider newly discovered evidence that was "in existence at the time of trial." Rat. Op. 18. But the only cases the court cited concerned Rule 60(b), not Rule 59(a). *See* Rat. Op. 18 n.86. A heightened standard applies in the Rule 60(b) context because it addresses reopening *final* judgments only. *Glinert* v. *Wickes Cos.*, 1992 WL 165153, at *3 (Del. Ch. July 14, 1992), *aff'd*, 620 A.2d 857 (Del. 1993) (TABLE); *see Waetzig* v. *Halliburton Energy Servs., Inc.*, __ S. Ct. __, 2025 WL 608110, at *5 (2025) (citation omitted) (explaining that the federal Rule 60(b) is "unnecessary" before an order becomes final, when "a rehearing may be sought at any time").

By contrast, Rule 59(a) applies both before and after judgment and is not limited to evidence in existence at the time of trial. The court in *Altaba*, for example, granted a Rule 59(a) motion in light of a deal announced post-trial. As in this case, that deal was plainly not evidence "in existence at the time of trial." 2021 WL 3288534, at *2. And reopening is further warranted here to prevent the "injustice," *Cantor*, 2001 WL 536911, at *2, of forcing Tesla to incur new costs for a new plan when its stockholders have emphatically voted to honor the terms of the 2018 Agreement.

c. <u>Ratification cannot be waived before it occurs.</u>

Nor did Tesla waive its right to invoke the 2024 stockholder ratification by failing to raise it as a defense in an answer in 2019. Rat. Op. 28-34. To state the obvious, that was impossible, both because Tesla (as the party on whose behalf this derivative suit was prosecuted) filed no answer to the amended complaint, and because ratification occurred long after pleadings were closed. Such a forfeiture rule construes ratification too narrowly and would flatly bar any stockholder ratification that occurs after the pleading stage.

i. Ratification can occur at any stage in a proceeding, whenever stockholders learn of a conflicted transaction. If ratification occurs before a lawsuit is filed, then it can be a waivable affirmative defense as to directors—that is, they cannot keep the vote in their back pocket if they wish to avoid fiduciary-breach liability. *See, e.g.*, *Invs. Bancorp*, 177 A.3d at 1211, 1214; *see also Sunder Energy, LLC* v. *Jackson*, __ A.3d __, 2024 WL 5052887, at *14 (Del. 2024) ("Waiver is a discretionary tool used by the court to prevent unfair surprise."). When ratification happens later in the litigation, though, it can be a changed circumstance that affects a later stage of the dispute or moots the need for other remedies. *See, e.g.*, *Michelson* v. *Duncan*, 407 A.2d 211, 220 (Del. 1979) (considering impact of a ratification vote that occurred while summary-judgment motion was pending). In other words, parties must raise ratification once it occurs, but need not raise events that have not occurred. *See Tuckman* v. *Aerosonic Corp.*, 394 A.2d 226, 233 (Del. Ch. 1978) (defenses cannot be waived until available).

This Court's decision in *Kerbs* confirms that a post-trial ratification is not always a waivable affirmative defense. The ratification in *Kerbs* occurred after trial, and this Court required the trial court to consider it—which would have been pointless if the window for any ratification had already closed. *See* 90 A.2d at 660. Here, the Court of Chancery distinguished *Kerbs* on the ground that the trial court there had ruled in favor of the company, so the stockholder vote was not trying to "flip" an opinion. Rat. Op. 33-34. But nothing in *Kerbs*'s reasoning relied on that fact, and logically such a distinction makes no sense. Whether stockholders have the power to approve a transaction that is already the subject of litigation does not depend on whether a court approves of that transaction; the whole point is that a court might not. A rule allowing ratification after wins but not losses would also require companies to see into the future: if they are going to lose at trial, they must raise stockholder ratification from the beginning as an affirmative defense, but if they are going to win, they can raise it at any time.

ii. The Court of Chancery mostly grounded its rejection of *Kerbs* and general aversion to post-trial ratification in policy concerns. According to the court, post-trial ratification would undermine the courts by allowing a stockholder vote to "reverse any form of judicial ruling, whatever the ruling, no matter how final." Rat. Op. 25. Those concerns are misguided.

Ratification does not threaten courts' traditional role of adjudicating claimed breaches of fiduciary duty. Rather, ratification can be a good-faith response to a judicial decision, allowing stockholders to approve or reject an *outcome* with knowledge of the defects in the original *process* that arrived at that outcome. That is not an attack on the judiciary. *See* pp. 37-38, *supra*. Nor did it make the trial here meaningless: the court detailed the defects it perceived in the deal, which resolved the directors' liability and contributed to a uniquely informed stockholder vote. *See In re Long Island Loan & Tr. Co.*, 92 A.D. 1, 4 (N.Y. App. Div.) (ratification of trustee action is valid only when the beneficiary "ha[s] been told of the disposition which a court of equity would make under the known facts"), *aff'd*, 71 N.E. 1133 (N.Y. 1904). In this derivative action, the court stepped in on behalf of stockholders to correct what it perceived as corporate wrongdoing. That is where its job should have ended; it did not need to further prevent those stockholders from taking new actions that they decide are value-enhancing.

The Court of Chancery's concerns about an unending back-and-forth are also unfounded. Post-trial ratifications, like the vote 73 years ago in *Kerbs* and the one here, are rare. They are likely to arise only where (1) a court has decided a close question of fairness, (2) neither a board nor a controlling stockholder has done anything intentionally manipulative, and (3) the current economic options available make ratification a rational and desirable choice for stockholders. In any event, any concerns about procedural efficiency do not outweigh the rights of fully informed and uncoerced stockholders to protect their own interests.

If anything, policy concerns run in the other direction. "Delaware policy has long recognized the values of flexibility and private ordering." *Maffei* v. *Palkon*, __ A.3d __, 2025 WL 384054, at *30 (Del. 2025). A rule categorically treating ratification as a waivable affirmative defense would cut off any avenue for stockholders to willingly embrace a deal that they believe is in their best interests, so long as a judge deems it the product of a fiduciary breach. Here, it would wipe out Tesla stockholders' chance to adopt a compensation package that, as a result of Tesla's growth since 2018, has massively beneficial accounting treatment compared to any newly negotiated package. Such a waiver rule would also allow corporate director defendants to waive the rights of nonparty stockholders to ratify a transaction subsequently found to be voidable, before those stockholders have any chance (or reason) to consider ratification. Delaware has long embraced protections for minority stockholders, but only to protect their rights from being subverted—never to take value-maximizing options off the table or to protect fully informed stockholders from deciding for themselves.

*   *   *

After the Court of Chancery's post-trial opinion, Tesla put the 2018 Agreement through a new process of review by an independent board committee and stockholders. The result was not close: 72% of Tesla's disinterested voting shares voted to ratify. A2744. Under Delaware law, that overwhelming expression of stockholder will should mean something. Even if Tesla's directors did not live up to their fiduciary obligations in 2018, that is no reason to bar the stockholders from accepting the same plan in 2024, with full information and perfect hindsight. This Court should reverse the Court of Chancery's ratification decision, find the ratification effective, and direct the reversal of the rescission order.

II. TORNETTA'S COUNSEL'S EXORBITANT FEE AWARD SHOULD BE REDUCED.

A. Question Presented

Did the Court of Chancery err by awarding Tornetta's counsel a fee award of $345 million based on a share-of-recovery approach rather than a *quantum meruit* approach? The issue was presented and decided below. *See* A2449-2511; Rat. Op. 2, 44-101.

B. Scope Of Review

The amount of an award of attorney's fees is generally reviewed for abuse of discretion, *see Sugarland Indus., Inc.* v. *Thomas*, 420 A.2d 142, 149 (Del. 1980), but the legal principles applied in reaching the award are reviewed *de novo*, *see In re Del. Pub. Sch. Litig.*, 312 A.3d 703, 715 (Del. 2024).

C. Merits Of The Argument

The Court of Chancery's $345 million fee award to Tornetta's counsel—the largest in Delaware history—is unsupportable. Under this Court's *Sugarland* factors, the "primary factor" for setting a reasonable fee award is the "result[] achieved" by the lawsuit. *In re Dell Techs. Inc. Class V S'holders Litig.*, 300 A.3d 679, 692 (Del. Ch. 2023), *aff'd*, 326 A.3d 686 (Del. 2024). That "result" includes both the benefits to and the costs borne by the company. In a case like this, where the plaintiff achieved no quantifiable net benefit, the right measure for a fee award is *quantum meruit*. *Robert M. Bass Grp., Inc.* v. *Evans*, 1989 WL 137936, at *4

(Del. Ch. Nov. 16, 1989). *Quantum meruit* fees typically range from one to three times counsel's lodestar. *See* A2514-2517. By any measure, the award to Tornetta's counsel—*25.3 times* their lodestar and almost *$18,000 per hour*—exceeds the bounds of reasonableness.

1. Tornetta Conferred At Most An Unquantifiable Benefit.

For starters, if this Court holds that the ratification is valid, then the only benefit Tornetta's counsel will have conferred is prompting a second stockholder vote to ratify the 2018 Agreement. The second stockholder vote passed by roughly the same percentage as the first and reimposed the same economic terms. To be sure, ratification represented an opportunity to hold the fully informed stockholder vote that the Court of Chancery had previously said was missing, and it fortified the 2018 Agreement against further legal challenge. But those are quintessential "intangible" benefits that cannot be quantified, and for which a *quantum meruit* award is appropriate. *See, e.g., Olson* v. *ev3, Inc.*, 2011 WL 704409, at *11 (Del. Ch. Feb. 21, 2011) (revising questionable merger-agreement terms and "defusing a potential corporate landmine" yielded an "unquantifiable" corporate benefit); *Siegman* v. *Palomar Med. Techs., Inc.*, 1998 WL 409352, at *6 (Del. Ch. July 13, 1998).

Even if this Court does not uphold the ratification, Tornetta's counsel still conferred an unquantifiable benefit. To justify its record-setting fee award, the

Court of Chancery credited Tornetta with recovering for the company the 2018 Agreement's grant-date fair value of $2.3 billion. Rat. Op. 96. But that methodology ignores the significant costs that rescission will reimpose on Tesla, and Delaware courts have repeatedly rejected that one-sided approach. Tornetta's counsel failed to even ballpark the cost of a replacement compensation plan, which would be tethered to Tesla's increased stock price. They thus failed to meet their burden of establishing a quantifiable net benefit to anchor the court's fee award.

a. When calculating a fee award, Delaware courts must net out the benefits generated and the costs imposed. *See Almond ex rel. Almond Fam. 2001 Tr.* v. *Glenhill Advisors LLC*, 2019 WL 1556230, at *7 (Del. Ch. Apr. 10, 2019), *aff'd*, 224 A.3d 200 (Del. 2020). Uncertainty about the costs renders the net benefit unquantifiable. For example, in *Dann* v. *Chrysler Corp.*, the Court of Chancery could not "fix a dollar value" on the "net benefit" of the surrender of an executive's stock options when it was "reasonable to infer" that the company needed to issue an identical or similar replacement compensation package. 215 A.2d 709, 714 (Del. Ch. 1965), *aff'd*, 223 A.2d 384 (Del. 1966).

More recently, in *Louisiana State Employees' Retirement System* v. *Citrix Systems, Inc.*, a stockholder plaintiff sued to compel defendant Citrix to withdraw an employee stock-option plan approved in a deficient vote, and Citrix withdrew the plan. 2001 WL 1131364, at *1 (Del. Ch. Sept. 19, 2001). In awarding fees, the

Citrix court held that it needed to consider not just the benefits of withdrawal, but also the forgone intangible benefits that the plan would have had on employee recruitment, retention, and motivation. *Id.* at *7-8. Because the court had no basis to determine the value of those forgone benefits, the court could not reliably calculate the "net benefit conferred" and instead adopted a *quantum meruit* approach. *Id.* at *8-10.

Relying on *Citrix*, every Delaware court until the decision below has found a litigation benefit unquantifiable where the litigation would result in uncertain costs to the company down the road. In *In re Cheniere Energy, Inc. Stockholders Litigation*, the parties settled a challenge to an equity-based compensation plan, agreeing that the company would not pursue further equity-based plans but could provide further non-equity-based compensation. Consol. C.A. No. 9710-VCL, at 91:21-93:4, 94:20-95:6 (Del. Ch. Mar. 16, 2015) (TRANSCRIPT). In awarding fees, the Court of Chancery held that the benefit achieved needed to "*take into account that there's going to be some additional compensation or other plan put into place*." *Id.* at 102:21-103:4 (emphasis added). Because plaintiff's counsel bore the burden and had not reasonably estimated future compensation costs, the court awarded a *quantum meruit*-based fee. *Id.* at 104:7-9, 107:10-108:7.

Likewise, in *In re Investors Bancorp, Inc. Stockholder Litigation*, a corporate defendant settled a challenge to an equity compensation plan by agreeing to cancel prior equity grants to two executives, though the board could (and later did) approve new equity grants for those same executives. Consol. C.A. No. 12327-VCS, at 9:5-10:1 (Del. Ch. June 17, 2019) (TRANSCRIPT). The Court of Chancery, citing *Citrix* and *Cheniere*, explained that it could not "entirely disregard the replacement awards when considering the value of the benefit conferred." *Id.* at 18:18-19:3. The court thus granted a *quantum meruit*-based award, which was "a principled and practical way to award proper fees" given the unquantifiable benefit. *Id.* at 22:9-23:14.

In sum, an unbroken line of Delaware cases shows that calculating the benefit achieved by a plaintiff's counsel for a fee award requires consideration of any replacement costs the company will incur as a result of the rescission of a compensation award.

b. The Court of Chancery did not do that here. It declined even to consider the effect of a replacement award on the benefit conferred. The court attempted to distinguish the line of contrary decisions on three grounds, none of which withstands scrutiny.

First, the Court of Chancery brushed aside the uniform contrary authority because two of the relevant decisions are "bench rulings." Rat. Op. 86. The court elsewhere recognized the precedential value of bench rulings, citing ten of them. *See* Rat. Op. 65 n.268, 67 n.273, 73 n.294, 99 n.378. And as a practical matter, fee-award jurisprudence is "developed through case-by-case adjudication—often in unreported transcript rulings," so ignoring bench rulings would ignore the bulk of Delaware law on the issue. *In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1136 (Del. Ch. 2011). Moreover, *Cheniere* and *Investors Bancorp* were reasoned and thoughtful opinions that grappled with the case law and policy concerns. There is no reason to discount them.

Second, the Court of Chancery sought to distinguish these decisions on their facts. The court noted that the litigation in *Chrysler* had led to the installation of new management, the original options in *Citrix* had not yet been issued, and the cancelled awards in *Cheniere* were prospective in nature—all of which "injected uncertainties into the fee calculation that are not present here." Rat. Op. 87 & 88 n.340. Although that is true, it does not affect the basic legal proposition that the costs of a lawsuit, including the cost of a replacement compensation plan, must be considered when calculating a fee award.

Third, the Court of Chancery discounted this line of cases based on their procedural postures—*i.e.*, that the fee awards in *Chrysler*, *Citrix*, *Cheniere*, and *Investors Bancorp* were decided in mootness or settlement contexts rather than post-trial. Rat. Op. 87 & 88 n.340. That distinction makes no difference. The central inquiry is the net benefit achieved by the litigation, and that arithmetic is the same regardless of when it is performed. Anyway, Delaware law already has reasonable, well-established fee incentives for plaintiffs' counsel to go to trial: where a plaintiff has prevailed on the merits after extensive proceedings, courts generally award greater percentages in share-of-recovery cases, *see Americas Mining Corp.* v. *Theriault*, 51 A.3d 1213, 1260 (Del. 2012), and higher lodestar multiples in *quantum meruit* cases, *see Sciabacucchi* v. *Howley*, 2023 WL 4345406, at *5 (Del. Ch. July 3, 2023).

A special post-trial rule here would create far more troubling incentives. A plaintiff's lawyer would have reason to categorically reject a pre-trial settlement, because obtaining exactly the same outcome post-trial could yield a staggeringly larger fee award. Likewise, a corporate defendant could be forced to settle meritless cases because of the *in terrorem* value of post-trial attorney's fee awards, which would grow by orders of magnitude. The Court of Chancery's novel approach to fees would thus have a real detrimental effect on Delaware corporate law.

Finally, for all its discounting of other on-point decisions, the Court of Chancery cited none supporting its own view. And even if it were writing on a clean slate, it offered no justification for such a one-sided view of the benefits conferred. It is basic economics that if a lawsuit saves stockholders one cost but imposes another, it is not an unalloyed good; the benefits and costs must be netted out to understand what the plaintiff actually achieved.

c. Under a proper analysis of the *net* benefits of a suit, any benefit produced by Tornetta's counsel will likely be more than offset by a replacement Musk compensation package and accompanying accounting charges. There is no dispute that if the 2018 Agreement is ultimately rescinded, a replacement compensation package will be needed to compensate and incentivize Musk. *See* Rat. Op. 79 (disclaiming the view that "Musk should not be paid for his service to Tesla"). The only record evidence on how much Musk should be paid comes from Tesla's independent Special Committee, which explained to stockholders that (1) "any new plan would need to be of a similar magnitude to the 2018 plan," and (2) such a replacement compensation plan "would potentially result in an accounting charge in excess of $25 billion." A2073. That evidence suggests a net loss, not a net benefit, to Tesla and its stockholders.

Indeed, if this suit had actually resulted in a substantial net benefit to Tesla, "one would clearly expect the stock market to reflect this large benefit into the price of [the company's] stock." *Citrix*, 2001 WL 1131364, at *8. That did not happen. A2585-2588, A2534-2535. To the contrary, expert studies showed that Tesla's stock price *decreased* after the post-trial opinion, demonstrating the market's understanding that benefits achieved by this lawsuit (if any) were outweighed by the costs. A2585, A2535.

At best for Tornetta's counsel, the costs of the future replacement compensation package are substantial but uncertain, rendering the net benefit of this lawsuit unquantifiable. Tornetta's counsel has put in no evidence to value Musk's potential replacement compensation package or any attendant corporate costs. And because it is counsel's burden to support their fee claim, they left the Court of Chancery without any basis to find a positive, quantifiable net benefit.

2. The Fee Award Should Be Modified To A *Quantum Meruit* Award.

Because the benefit conferred by this litigation is unquantifiable (or, at a minimum, Tornetta's counsel failed to introduce evidence to quantify it), a recalculation of the fee award using the *quantum meruit* approach is warranted. *Off* v. *Ross*, 2009 WL 4725978, at *7 (Del. Ch. Dec. 10, 2009). This approach begins by multiplying the number of hours worked by counsel's relevant hourly rates, and then adjusting the award based on the *Sugarland* factors. *Id.* Although Delaware public policy seeks to incentivize meritorious suits by awarding a premium to plaintiffs' counsel who bring meritorious claims, an award exceeding the amount necessary to produce these incentives "serv[es] no other purpose than to siphon money away from stockholders and into the hands of their agents." *Seinfeld* v. *Coker*, 847 A.2d 330, 334 (Del. Ch. 2000). Thus, where Delaware courts have adopted a *quantum meruit* approach to fees, awards tend to range from less than 1x to 3x the asserted lodestar, with an average award of 1.4x. *See* A2514-2517.

If this Court validates the ratification vote, Tornetta's counsel will have achieved nothing more than the therapeutic, unquantifiable benefit of a second stockholder vote, and should therefore be awarded no more than their lodestar. But even if this Court were to uphold the rescission remedy, this Court's *quantum meruit* jurisprudence warrants a fee of no more than $54 million, or 4x counsel's lodestar. Tornetta's counsel routinely take on higher-risk cases, involving substantially greater investment, to earn fees at an average lodestar of about 1.5x, and rarely in excess of 3x. A2400-2406. An award of $54 million, or 4x Tornetta's counsel's lodestar, would still be one of the highest ever awarded, and is more than enough to compensate Tornetta's counsel for their effort, their risk, and the outcome they achieved.

The Court of Chancery cited a single Delaware fee award in support of its 25x lodestar multiplier: *In re Southern Peru Copper Corp. Shareholder Derivative Litigation*, 52 A.3d 761 (Del. Ch. 2011) (*Americas Mining*). The court's reliance on that 66x outlier award is misplaced. *Americas Mining* was a common-fund case in which the company received over $2 billion in cash, at the time one of the largest damages awards in a derivative case. 51 A.3d at 1253. This litigation, by contrast, did not create a common fund; there is no account of recovered assets from which attorney's fees can be drawn. Instead, every dollar paid to Tornetta's counsel is a dollar taken from Tesla's current stockholders.

At any rate, even if there were a common fund, a 25x award is well beyond the upper bound of reasonableness. *See In re Cox Radio, Inc. S'holders Litig.*, 2010 WL 1806616, at *23 n.172 (Del. Ch. May 6, 2010) (explaining that the lodestar is Delaware's traditional "backstop check" for ensuring that fee awards are reasonable), *aff'd*, 9 A.3d 475 (Del. 2010) (TABLE). This Court more recently said that a 7x multiple was at the "high end" of propriety even in a common-fund case involving a quantifiable money recovery. *In re Dell Techs. Inc. Class V S'holders Litig.*, 326 A.3d 686, 705 (Del. 2024). This Court should stick to its months-old decision in *Dell* rather than countenancing a 25x multiplier.

CONCLUSION

For the foregoing reasons, this Court should reverse the Court of Chancery's decision denying revision of the post-trial opinion, with instructions to enter judgment deeming any rescission moot and awarding Tornetta's counsel a fee under a *quantum meruit* approach.

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