EFiled: Aug 11 2022 04:26PM EDT
Filing ID 67922697
Case Number 181,2022

IN THE

Supreme Court of the State of Delaware

IN RE TESLA MOTORS, INC. STOCKHOLDER LITIGATION	**No. 181, 2022** COURT BELOW: COURT OF CHANCERY OF THE STATE OF DELAWARE, CONSOL. C.A. NO. 12711-VCS

APPELLEE ELON MUSK'S ANSWERING BRIEF

ROSS ARONSTAM & MORITZ LLP

David E. Ross (Bar No. 5229)
Garrett B. Moritz (Bar No. 5646)
Benjamin Z. Grossberg (Bar No. 5615)
Hercules Building
1313 North Market Street, Suite 1001
Wilmington, Delaware 19801
(302) 576-1600

Attorneys for Defendant Below, Appellee Elon Musk

Of Counsel:

Evan R. Chesler
Daniel Slifkin
Vanessa A. Lavely
Helam Gebremariam
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019
(212) 474-1000

August 11, 2022

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Other Authorities

NATURE AND STAGE OF PROCEEDINGS

This is an appeal from a post-trial decision in which the Court of Chancery found that Defendant Elon Musk ("Elon"), the CEO and then-Chairman of Tesla, Inc. ("Tesla") did not breach any fiduciary duty owed to Tesla's stockholders, was not unjustly enriched, and did not commit corporate waste in connection with Tesla's 2016 acquisition ("Acquisition") of SolarCity Corp. ("SolarCity").

In July and August 2021, Vice Chancellor Slights held an 11-day trial, during which he heard testimony from 11 live fact witnesses (and one by deposition video) and 7 live expert witnesses and admitted 575 exhibits into evidence. Following post-trial proceedings, the Vice Chancellor issued a 131-page Memorandum Opinion on April 27, 2022.

Although the trial presented multiple factual and legal issues that could have led to deferential, business judgment review, the Court of Chancery bypassed those arguments. Instead, it gave "no deference to Elon" and assumed, without deciding, that the entire fairness standard—"the highest degree of scrutiny recognized in [Delaware] law"—applied.

In applying that standard, the Vice Chancellor noted that "the test for fairness is not a bifurcated one" and "[a]ll aspects of the issue must be examined as a whole". Vice Chancellor Slights then conducted a detailed analysis in which he found, as a matter of fact, that (i) the process leading up to the Acquisition was led

by a Director (Denholm) who "doggedly viewed the Acquisition solely through the lens of Tesla and its stockholders", the Acquisition was "meaningfully vetted" by the rest of the Board, and the process not only did not "'infect' the price" but "led to a fair price"; and (ii) based on the evidence presented at trial, the price at which the Acquisition was consummated was "'*entirely*' fair in the truest sense of the word" and not "near the low end of a range of fairness". Based on those factual findings, the Court of Chancery concluded that "the persuasive evidence reveals that the Acquisition was entirely fair" and entered judgment for Elon.

Plaintiffs filed their Notice of Appeal on May 26, 2022, and their opening brief on July 12, 2022. This is Elon's answering brief.

SUMMARY OF ARGUMENT

Plaintiffs' opening brief asks this Court to set aside the Vice Chancellor's detailed factual findings, credibility determinations, and careful weighing of all the evidence presented at the 11-day trial. Plaintiffs now claim legal error by highlighting only their preferred selections from the paper record and by omitting the Vice Chancellor's key factual findings, including all of his credibility determinations. In effect, Plaintiffs seek to retry this case. But Plaintiffs' assertions of legal error are meritless, and Plaintiffs are not entitled to a "do over".

1. Denied. The Court of Chancery correctly formulated the entire fairness standard and correctly applied it to the evidence. Plaintiffs' arguments about the "fair process" prong of the entire fairness standard are actually challenges to the Vice Chancellor's factual findings as to which Plaintiffs cannot establish clear error. Plaintiffs accuse the trial court of applying an improper "bifurcated" entire fairness standard (which it did not), but it is Plaintiffs who engage in a bifurcated analysis, effectively arguing that purported process defects require a *per se* finding of unfairness. Plaintiffs' rigid approach to entire fairness is not supported by Delaware law.

1(a). Denied. The Court of Chancery engaged in a robust factual analysis of the Acquisition process, examining the documentary evidence and testimony of every significant participant. That analysis considered both "flaws" and

"strengths" in the deal process, and was based on fact-finding and credibility determinations. Indeed, the Court of Chancery's process analysis depended on specific findings that every member of the Board, its lead negotiator (Denholm), and its financial advisor (Evercore) provided credible testimony. (Op. 93 n.419, 99, 102 & nn.456-57, 103.) And contrary to Plaintiffs' assertion that the Court of Chancery "refused to issue any ruling at all with regard to fair process", following 17 pages of analysis on fair dealing (Op. 87-103), the Court of Chancery concluded, in support of its decision that the Acquisition was entirely fair, that "the Tesla Board ensured … that the process led to a fair price" (Op. 102) and "the Board meaningfully vetted the Acquisition" (Op. 103).

1(b). Denied. The Court of Chancery properly applied this Court's precedents in conducting its entire fairness analysis. As its lengthy process analysis demonstrates, the Court of Chancery did not focus "exclusively on fair price". Rather, it correctly recognized that price is the "paramount" consideration in an entire fairness determination. And the Vice Chancellor did not clearly err in concluding, based on specific factual findings, that the deal process led to a fair price.

1(c). Denied. The Court of Chancery correctly articulated the circumstances in which the deal process may "infect" the deal price, but after

weighing all the evidence (including the "assumed conflicts"), specifically found as a matter of fact that such circumstances were not present. (Op. 84-85, 103.)

2. Denied. The Court of Chancery correctly articulated the entire fairness standard and correctly applied it to the evidence. Plaintiffs' arguments about the "fair price" element of the entire fairness standard mischaracterize the Vice Chancellor's analysis and boil down to challenges to his careful factual findings, none of which can support a finding of clear error. This Court should decline Plaintiffs' invitation to re-weigh the Vice Chancellor's factual findings regarding price.

2(a). Denied. The Court of Chancery did not apply "a bifurcated entire fairness test that focused exclusively on fair price". The trial court expressly stated that "[e]ntire fairness is a composite" and "the test for fairness is *not* a bifurcated one as between fair dealing and fair price." (Op. 82 (emphasis added).) The Court of Chancery correctly recognized that, under this Court's precedents, price is the "paramount" consideration within the entire fairness analysis, particularly where, as noted, the Vice Chancellor made specific factual findings that the process led to a fair price.

2(b). Denied. Consistent with this Court's precedents, the Court of Chancery appropriately considered SolarCity's unaffected stock price as one indication of SolarCity's value in finding that the price was fair. Plaintiffs' and

amici's arguments that the trial court relied solely on SolarCity's unaffected market price mischaracterize the Opinion. In rejecting Plaintiffs' "all in" (and "unconvincing") $0-value insolvency hypothesis, the trial court considered many other indications of value, including apples-to-apples analyses measured at closing, such as the uncontested evidence that Tesla paid less for SolarCity than the net value of its assets. (Op. 64 & n.318, 109 n.481, 116 & n.509.)

2(c). Denied. The Court of Chancery appropriately considered SolarCity's future cash flows in its fair price analysis. There is no basis to disturb the Vice Chancellor's careful weighing of that evidence. Regardless, Plaintiffs' comparison between SolarCity's expected future cash flows and gross debt ignores half the ledger. As the trial court recognized, Tesla acquired SolarCity's *assets as well as its liabilities*, and paid less for SolarCity than its *net* assets were worth at closing. (Op. 64 & n.318, 109 n.481.) The trial court also recognized that SolarCity's future cash flows were "estimated to be worth billions of dollars … *after* accounting for the repayment of associated debt". (Op. 27 & n.136 (emphasis added).)

2(d). Denied. The Court of Chancery did not clearly err by declining to rely on *ex post* DCF analyses prepared by the parties' experts (but not pressed at trial) in light of the credible contemporaneous valuation evidence. Nor is there any contradiction between the trial court's decision not to rely on expert DCF analyses

and its factual findings, based on the trial testimony, that Evercore's *contemporaneous* valuations (some but not all of which were DCF-based) were credible evidence of fairness in light of the trial testimony.

2(e). Denied. The Court of Chancery did not clearly err by concluding that the overwhelming vote of Tesla's disinterested stockholders in favor of the Acquisition supported a fair price finding. Notably, the trial record established that the very criticisms of the Acquisition advanced by Plaintiffs were publicly aired (including by Glass Lewis) and debated by market commentators and participants prior to the stockholder vote.

If applied, the presumption of so-called "inherent coercion" merely results in entire fairness review; it does not mean that the specific facts regarding a stockholder vote cannot be considered, along with the other trial evidence, in *applying* that standard. Similarly, the fact that the trial court did not reach Plaintiffs' argument regarding potential cross-holdings among disinterested institutional stockholders (because it bypassed the ratification defense and applied the highest standard of review) does not mean that it erred by giving the stockholder vote some weight (albeit "less weight", Op. 96 n.430) in its economic fairness analysis. Such weighing of the evidence was well within the trial court's fact-finding role.

COUNTERSTATEMENT OF FACTS

A. At the Time of the Acquisition, Tesla Was the EV Innovator Propelled by Elon's Clean Energy Master Plan

Tesla "is a publicly traded Delaware corporation that designs, develops, manufactures and sells electric vehicles ('EVs') and energy storage products."[1] Tesla's mission has always been "to 'accelerate the world's transformation to an alternative energy future.'"[2] Elon Musk is Tesla's co-founder, CEO and largest stockholder.[3] "At the time of the Acquisition, Tesla's sitting directors were Elon, Kimbal [Musk], Brad Buss, Robyn Denholm, Ira Ehrenpreis, Antonio Gracias, and Stephen Jurvetson."[4]

EVs are traditionally powered by sources of electricity "derived from fossil fuels", and therefore, by themselves, "are not a complete solution to reducing carbon emissions".[5] Thus, in 2006, Elon published the Tesla Master Plan, in which "he declared that Tesla would 'accelerate the world's transition to sustainable energy' by 'help[ing] to expedite the move from a mine-and-burn hydrocarbon

---

[1] Memorandum Opinion ("Op.") 5-6.

[2] Op. 16.

[3] Op. 6.

[4] Op. 8.

[5] Op. 16.

economy towards a solar electric economy'".[6] The Master Plan's vision has three components, only one of which (EVs) was a direct component of Tesla's business as of 2006: "(1) sustainable energy generation from clean sources, such as solar power; (2) energy storage in batteries; and (3) energy consumption through EVs."[7] "SolarCity was part of this vision."[8] The Master Plan announced that Tesla would co-market SolarCity's solar panels with Tesla's sports car.[9]

Prior to the Acquisition, Tesla took steps to advance the Master Plan by investing "heavily in batteries for its EVs and energy storage products".[10] "In February 2014, Tesla announced the construction of its 'Gigafactory,' a massive lithium-ion battery manufacturing factory" that would "produce more [lithium-ion] batteries … than the entire manufacturing battery production of every other manufacturing facility on the planet earth combined.'"[11] On March 3, 2015, the Tesla Board toured the under-construction Gigafactory. "At the conclusion of the

[6] Op. 15-16.

[7] Op. 16.

[8] Op. 17.

[9] Op. 17.

[10] Op. 18.

[11] Op. 18.

tour, having witnessed firsthand the massive scale and capacity of the facility, the Tesla Board discussed Tesla's long-stated goal of acquiring a solar company."[12]

Shortly thereafter, "Tesla publicly launched Tesla Energy and debuted its Powerwall and Powerpack products", battery products "designed to store solar energy" for home and commercial use.[13] At the launch of Tesla Energy, Elon explained Tesla's vision for addressing CO_2 emissions, expressly identifying solar energy as the third piece of Tesla's EV, battery and clean energy trifecta: "[T]he path that I've talked about, the solar panels and the batteries, it's the only path that I know that can do this. And I think it's something that we must do and we can do and that we will do."[14]

B. SolarCity Was a Market-Leading Solar Company With an Innovative Financing Model

SolarCity "was a publicly traded Delaware corporation founded in 2006 by Elon's cousins, Peter Rive and Lyndon Rive."[15] As Elon testified, it was "largely an accident of history" that SolarCity was formed separately from Tesla.[16]

---

[12] Op. 19-20.

[13] Op. 19.

[14] Op. 19-20.

[15] Op. 7.

[16] Op. 17 n.80.

"SolarCity designed, sold, installed and financed solar [photovoltaic] systems for residential and commercial customers."[17]

"SolarCity had an innovative and aggressive business model that prioritized growth and relied on external financing to fund that growth."[18] "This financing model (and SolarCity's prodigious growth) required SolarCity to raise capital to bridge the gap between its short-term costs and long-term cash flows."[19] This gap existed "[b]ecause most consumers cannot afford to purchase expensive solar panels outright" and therefore the "vast majority of SolarCity's customers chose to finance their systems".[20] Under SolarCity's financing arrangements, "SolarCity would pay the cost of installing and activating the solar panels in exchange for the customer's commitment to repay SolarCity incrementally, with interest, over a period of 20–30 years."[21] "SolarCity historically monetized a portion of its long-term recurring cash flows through variable interest entities (with third-party

[17] Op. 21.

[18] Op. 20.

[19] Op. 22.

[20] Op. 21.

[21] Op. 21.

investors) and financing structures (primarily tax equity funds and asset-backed notes)."[22]

By 2016, SolarCity "was the undisputed market share and cost leader in the solar energy sector, with over 30% market share for U.S. residential solar, 22% market share for U.S. commercial solar, and 15% of total U.S. solar. With respect to residential solar installations and revenues, SolarCity exceeded its two closest competitors (Vivint and Sunrun) combined. And with respect to costs, SolarCity's were 30% lower than its competitors."[23] As of June 21, 2016, "SolarCity had a market capitalization of approximately $2.1 billion."[24]

C. Having Become the Leader in EVs and Batteries, Tesla Considers a Solar Acquisition While Stock Prices Are Low

Before the Acquisition, Tesla had become "the industry leader for both EVs and battery technology", and thus, "was uniquely positioned vertically to integrate EVs, solar energy, and stationary battery storage."[25] Then, macroeconomic headwinds in the solar energy industry in 2016 led to low solar stock prices at the moment Tesla was poised for the next step in its clean energy plan:

---

[22] Op. 22.

[23] Op. 29-30.

[24] Op. 114.

[25] Op. 17.

- "[C]ertain federal tax credits available to solar customers were set to expire, and although Congress had historically extended the tax credits, it had yet to do so";[26]
- Shifting laws on net metering—which "allows solar customers to sell excess solar energy back to the power grid, reducing their electricity bills"—had a "profound" and "highly publicized" impact on the industry;[27] and
- "One of SolarCity's competitors, SunEdison, Inc., filed for bankruptcy", which "increased market scrutiny of solar companies" and "increased the time needed to close asset-backed refinancing deals".[28]

At the same moment, SolarCity faced "cash challenges" in 2016 as a result of its "rapid growth"—and "not market disinterest in its product or poor business execution".[29] These cash challenges arose from a combination of SolarCity's rapid growth[30] and its business model, which required substantial upfront capital

[26] Op. 26.

[27] Op. 26 & n.129.

[28] Op. 26.

[29] Op. 30.

[30] Op. 22 n.107.

expenditure to fund solar installations in exchange for long-term cash flows from customer payments.[31] Combined with industry headwinds, these challenges drove down SolarCity's stock price to "historic lows" in 2016.[32] "Despite its cash problems, the evidence [left] little doubt that SolarCity was still a valuable company in 2016."[33]

D. Elon Proposes the Acquisition, But the Tesla Board Decides To Wait

Elon was "the catalyst and a vocal proponent of the Acquisition."[34] But the Tesla Board did not "explore a transaction when Elon originally asked".[35]

On February 27, 2016, the Tesla Board "considered a potential acquisition of SolarCity to 'complement the Company's Tesla Energy business … and to create other product, service and operational synergies'".[36] "While the Tesla Board recognized the significant potential product synergies, it ultimately declined to

[31] Op. 21.

[32] Op. 95.

[33] Op. 29.

[34] Op. 2.

[35] Op. 95.

[36] Op. 32.

proceed with an acquisition."[37] "[N]otwithstanding Elon's strong endorsement" of a solar acquisition, the Board wanted management to "focus on resolving Tesla Model X production and delivery challenges".[38]

At a March 2016 Tesla Board meeting, the Board "once again discussed the possibility of acquiring SolarCity", but "it 'determined not to proceed' with an acquisition" at that time.[39] However, the Board discussed preparatory steps with management, and Tesla engaged Wachtell, Lipton, Rosen & Katz (for the first time) to advise the Tesla Board regarding the potential transaction.[40]

E. Tesla Pursues the SolarCity Acquisition

At a May 31, 2016 meeting, the Tesla Board determined "the timing was right for an acquisition" because "Tesla had stabilized Model X production and was poised to commence Model 3 production, which it expected to be difficult but manageable in light of the Model X experience."[41] The "Board authorized management to: (1) engage an independent financial advisor; (2) assess a potential solar acquisition; and (3) instruct Tesla's deal counsel, Wachtell, to undertake a

---

[37] Op. 32.

[38] Op. 32-33.

[39] Op. 33-34.

[40] Op. 33-34.

[41] Op. 38.

legal review."[42] Thus, the Tesla Board pursued the Acquisition when "the timing was right for Tesla", "only after Tesla had dealt with the Model X rollout and before it attempted its biggest launch yet—the Model 3."[43]

Following the meeting, the Board "selected Evercore as the financial advisor for the potential" acquisition.[44] "[L]ike Wachtell, Evercore had not previously worked for Tesla or SolarCity."[45] Elon and Gracias were not involved in Evercore's selection.[46]

The Board also reached various decisions at a special meeting on June 20, 2016:

- ***Recusals***: The Board decided that "Elon and Gracias should be recused from any vote relating to the transaction" but given that their "perspectives regarding the solar industry and SolarCity, in particular, would be helpful … the two could participate in

[42] Op. 38.

[43] Op. 94-95.

[44] Op. 38.

[45] Op. 39.

[46] Op. 38-39.

certain high-level strategic discussions regarding the Acquisition";[47]

- ***Offer Target and Range***: Following an Evercore presentation identifying "potential solar acquisition targets", which concluded that "SolarCity was the 'clear market leader' and 'the most attractive asset in the solar market'", and with Elon and Gracias recused, the Board decided to make an offer to acquire SolarCity at an exchange ratio range of 0.122-0.131 shares of Tesla stock per share of SolarCity stock;[48]
- ***Majority of the Minority Vote***: The Board decided "that any acquisition proposal would be conditioned 'on the approval of a majority of disinterested SolarCity stockholders *and* Tesla stockholders voting on the transaction'";[49] and
- ***No Bridge Loan***: The Board decided not to "include a bridge loan" to SolarCity "in the preliminary proposal"—"despite

[47] Op. 39-40.

[48] Op. 40, 42-43.

[49] Op. 43.

Elon's request" and discussions with Lyndon—as Evercore and the Tesla Board "'didn't think it was in Tesla's best interest.'"[50]

Tesla publicly announced its offer to SolarCity after market close on June 21, 2016.[51] "Tesla's offer caused delays in SolarCity's financing efforts, which ultimately exacerbated SolarCity's liquidity problem."[52]

F. Denholm Leads Due Diligence and Negotiations, Supported by "Top-Tier" Advisors

Director Robyn Denholm, whose "disinterest in the Acquisition" and "independence were not seriously questioned at trial",[53] "led due diligence and negotiations with SolarCity".[54] The trial court found Denholm to be "an extraordinarily credible witness"—"If [Denholm] says she was in charge, then she was in charge."[55] She spent "hundreds of hours on the Acquisition" and "met with

[50] Op. 37-38, 43

[51] Op. 44.

[52] Op. 45.

[53] Op. 13.

[54] Op. 47.

[55] Op. 47 n.233.

the chairman of SolarCity's special committee, managed the due diligence team, reported to the Tesla Board and led the exchange of offers and counteroffers."[56]

Denholm and the Board were aided in diligence and negotiations by "independent, top-tier advisors", Wachtell and Evercore.[57] "Evercore performed extensive diligence."[58] Evercore banker "[Courtney] McBean credibly testified that Evercore's 10-member team spent thousands of hours reviewing SolarCity's financial condition, conducting valuation analyses and negotiating with [SolarCity's financial advisor[59]] Lazard."[60]

Evercore and the Board conducted diligence of SolarCity's liquidity situation.[61] Based on that diligence, Evercore created "downside" case projections and presented SolarCity's liquidity situation to the Tesla Board, including that SolarCity risked tripping the "Liquidity Covenant" on its revolving debt facility by

[56] Op. 47.

[57] Op. 47, 96.

[58] Op. 47.

[59] Op. 46.

[60] Op. 47.

[61] Op. 49.

the end of July.[62] "From McBean's perspective, the Tesla Board fully understood and was 'particularly concerned' about SolarCity's financial challenges."[63]

"Given the information discovered in diligence, Evercore decided to recommend that Tesla lower its offer."[64] On July 24, 2016, "the Tesla Board 'determined to make a revised proposal to acquire SolarCity at a lower price that reflected [Tesla's] due diligence findings", offering SolarCity "an exchange ratio of 0.105 shares of Tesla stock per SolarCity share."[65] The revised offer was well below Tesla's initial June 20 offer range (0.122–0.131).[66]

Following additional negotiations, "[o]n July 30, 2016, the Tesla Board offered to pay 0.110 shares of Tesla stock for each share of SolarCity stock", a price that Evercore had concluded was fair to Tesla.[67] On July 31, 2016, "Tesla and SolarCity executed the Agreement and Plan of Merger … and announced the Acquisition the following day."[68] In the end, it was the Board—not Elon—who

---

[62] Op. 50-51.

[63] Op. 52.

[64] Op. 53.

[65] Op. 53-54.

[66] Op. 44.

[67] Op. 54-55.

[68] Op. 55.

"set the price paid, as the Tesla Board, led by Denholm, negotiated the price down well below the initial offer range."[69]

G. After Extensive Public Debate, Tesla's Stockholders Overwhelmingly Support the Acquisition

"On August 31, 2016, Tesla filed a preliminary proxy that included: (1) an explanation of the Acquisition's strategic rationale; (2) descriptions of the deal process, including the scope of Elon's and Gracias' recusals; (3) estimated cost synergies; (4) the financial advisors' projections and sensitivity cases; (5) the fairness opinions and valuation methods of Lazard and Evercore; (6) disclosures of the Tesla directors' holdings in related companies; and (7) a description of the risks posed by SolarCity's liquidity challenges."[70] "On October 12, 2016, Tesla and SolarCity filed the definitive Proxy incorporating by reference their recent SEC filings."[71]

"The market's reaction to the Acquisition announcement was mixed, with extensive commentary."[72] Some analysts considered the offer "too low" or "a steal for TSLA shareholders"; others were skeptical "that there [we]re near-term

---

[69] Op. 92 n.415.

[70] Op. 58.

[71] Op. 61.

[72] Op. 60.

customer, product or technology synergies".[73] Proxy advisory service "ISS recommended the Acquisition, characterizing it as 'a necessary step towards TSLA's goal of being an integrated sustainable energy company' for which Tesla was paying 'a low to no premium.'"[74] But "Glass Lewis recommended against the deal, calling it a 'thinly veiled bail-out plan' and 'significantly value destructive' to Tesla because 'SolarCity's principal stand-alone business, as it exists today, is increasingly and materially incapable of supporting itself.'"[75]

"[O]n November 17, 2016, Tesla's stockholders overwhelmingly voted to approve the Acquisition. Approximately 85% of votes cast by Tesla's stockholders were voted in favor of the deal."[76] At closing (November 21, 2016), Tesla paid $20.35 per share of SolarCity common stock (in Tesla stock), or approximately $2.1 billion.[77]

---

[73] Op. 60 n.298.

[74] Op. 61.

[75] Op. 61.

[76] Op. 63.

[77] Op. 56, 64.

H. As a Result of Acquiring SolarCity, Tesla Becomes the "World's First Vertically Integrated Sustainable Energy Company"

"SolarCity brought substantial value to Tesla."[78] As of closing, "[SolarCity] had 15,000 employees, $200 million a month in business, over $3 billion in future cash flows, over 300,000 customers, and net assets in excess of its market capitalization (as confirmed by KPMG), resulting in Tesla booking an $89 million gain on the Acquisition."[79] In addition, "as of closing, SolarCity had accumulated and continued to accumulate substantial net retained value"[80]—the future cash flows from customer payments on installed solar systems that SolarCity did not sell to third parties.[81] Despite its liquidity challenges in 2016, SolarCity had "sufficient cash to meet its requirements and never breached its Liquidity Covenant."[82]

"As long-promised, following the Acquisition, Tesla became 'the world's first vertically integrated sustainable energy company, offering end-to-end clean

---

[78] Op. 64.

[79] Op. 64.

[80] Op. 64.

[81] Op. 27-28 & n.136.

[82] Op. 36 n.175.

energy products.'"[83] "Tesla's value has massively increased following the Acquisition"[84] and while "once valued as a car company, Tesla is now valued as 'a first-of-its-kind, vertically integrated clean energy company.'"[85]

[83] Op. 67.

[84] Op. 66.

[85] Op. 126-27.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY FORMULATED THE FAIR DEALING COMPONENT OF THE ENTIRE FAIRNESS ANALYSIS AND DID NOT CLEARLY ERR IN ITS FACTUAL FINDINGS

A. Question Presented

Did the Vice Chancellor commit clear error in weighing the trial evidence regarding the fairness of the Acquisition process? Fair process was raised by Defendant (B228-42, B306-24, A2150-68) and considered by the Court of Chancery (Op. 87-103).

B. Scope of Review

"This Court reviews errors of law de novo", *Brigade Leveraged Cap. Structures Fund Ltd. v. Stillwater Mining Co.*, 240 A.3d 3, 9 (Del. 2020) (citation omitted), but post-trial factual findings are subject to deferential review.

In reviewing "the Court of Chancery's factual findings following a post-trial application of entire fairness standard to a challenged merger", if the "findings made by the trial judge … are sufficiently supported by the record and are the product of an orderly and logical deductive process, in the exercise of judicial restraint [this Court] accept[s] them, even though independently [this Court] might have reached opposite conclusions." *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1178-79 (Del. 1995) ("*Cinerama II*") (internal quotations omitted).

This Court may make findings of fact contradictory to those made by the trial court "only when the findings below are clearly wrong and the doing of justice requires their overturn." *Id.* at 1179. "When the determination of facts turns on a question of credibility and the acceptance or rejection of 'live' testimony by the trial judge, his findings will be approved upon review. If there is sufficient evidence to support the findings of the trial judge, this Court, in the exercise of judicial restraint, must affirm." *Id.*

C. Merits of the Argument

As set out by this Court, "[t]he concept of fairness has two basic aspects: fair dealing and fair price." *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983). Fair dealing and fair price "must be examined as a whole since the question is one of entire fairness". *Id.* Fair dealing "embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained." *Id.* "'[P]erfection is not possible, or expected' as a condition precedent to a judicial determination of entire fairness." *Cinerama II*, 663 A.2d at 1179 (citation omitted).

1. The Court of Chancery's Finding That the Acquisition Was Entirely Fair, Although No Special Committee Was Formed, Accords with Settled Law

In an effort to obtain *de novo* review, Plaintiffs advocate for a *per se* rule unsupported by case law—that failing to employ a special committee in a transaction involving an allegedly conflicted board and purportedly conflicted controlling stockholder requires the imposition of liability "as a matter of law".[86] Plaintiffs incorrectly equate the absence of a procedural mechanism necessary to trigger business judgment review (or shift the burden of proof) with the ultimate liability determination under the entire fairness standard.

It is well-settled that "the decision that the *procedural* presumption of the business judgment rule has been rebutted does not establish *substantive* liability under the entire fairness standard", and thus, "does not preclude a subsequent judicial determination that the board action was entirely fair". *Cinerama II*, 663 A.2d at 1163; *see Emerald Partners v. Berlin*, 787 A.2d 85, 93 (Del. 2001) ("A determination that a transaction must be subjected to an entire fairness analysis is not an implication of liability." (citations omitted)). That is why "a finding of perfection is not a *sine qua non* in an entire fairness analysis." *Cinerama II*, 663 A.2d at 1179. It cannot be; the entire fairness standard applies only when there is

[86] *See* Appellants' Opening Brief ("AB") at 2, 31, 34-36, 39.

evidence sufficient to rebut the business judgment rule presumption or the presence of a conflicted controlling stockholder. *Id.*; *Kahn v. Lynch Commc'ns Sys., Inc.*, 638 A.2d 1110, 1115 (Del. 1994). In other words, a hypothetically "perfect" process would never trigger entire fairness review, so that standard, by definition, does not require perfection.

In those circumstances, the board must face entire fairness review at trial—"the highest degree of scrutiny recognized in our law."[87] The presence of "an independent bargaining structure" may be "strong evidence of the fairness" of the transaction, but "the use of such a committee is not essential to a finding of fairness." *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 938 n.7 (Del. 1985).

Delaware courts repeatedly have held that a challenged transaction was entirely fair despite the absence of a special committee. In *In re Trados Inc. Shareholder Litigation*, the Court of Chancery held that defendant directors proved a transaction was fair even though they did not "consider forming a special committee", "obtain a fairness opinion", or "consider[] conditioning the Merger on the vote of a majority of disinterested common stockholders". 73 A.3d 17, 65, 76 (Del. Ch. 2013). The *Trados* defendants were therefore "forced to"—and did—"prove at trial that the Merger was entirely fair." *Id.* at 78. Similarly, in *Emerald*

[87] Op. 81.

Partners v. Berlin, the Court of Chancery determined that an acquisition involving a conflicted controlling stockholder was entirely fair even though the defendant board did not "constitute[] … a special committee of independent directors to negotiate the proposed merger." 2003 WL 21003437, at *1, *22, *38 (Del. Ch. Apr. 28, 2003), *aff'd*, 840 A.2d 641 (Del. 2003).

The trial court correctly applied the settled law here. Vice Chancellor Slights acknowledged Plaintiffs' theories that "a majority of the Tesla Board was conflicted with respect to the Acquisition and that Elon is a conflicted controlling stockholder".[88] He then "*assume[d]* Plaintiffs' best case on standard of review—that entire fairness applies—and *consider[ed] the trial evidence through that lens*."[89] In addition, Vice Chancellor Slights confirmed he "was mindful of" the assumed board-level conflicts "and scrutinized carefully each director's decision-making and rationale for supporting the Acquisition."[90] Based on the entirety of the evidence, Vice Chancellor Slights concluded that the Acquisition was entirely fair.

Plaintiffs' argument—that not using procedures that could have avoided application of entire fairness review *mandates* liability under the fair dealing

---

[88] Op. 71.

[89] Op. 72 (emphasis added).

[90] Op. 90.

component of that standard—results in the very bifurcation of entire fairness of which their appeal complains.

2. The Court of Chancery's Fair Dealing Finding Is Supported by the Trial Record and Is Not Clearly Erroneous

Plaintiffs assert that the Court of Chancery "refused to issue any ruling at all with regard to fair process".[91] Not so. Vice Chancellor Slights stated that "[a]ll aspects of [entire fairness] must be examined as a whole";[92] he did just that. Following 17 pages of analysis on fair dealing, the Vice Chancellor concluded, in support of his decision that the Acquisition was entirely fair, that "the Tesla Board ensured … that the process led to a fair price" and "the Tesla Board meaningfully vetted the Acquisition".[93] The trial court could have found that a finding of fair price precluded liability even where there was "*no process* to protect the interests of the minority shareholders". *Oliver v. Boston Univ.*, 2006 WL 1064169, at *25 & n.239 (Del. Ch. Apr. 14, 2006) (emphasis added). But that is not what happened here.

---

[91] AB 6.

[92] Op. 82.

[93] Op. 82, 87-103; *see also Cinerama II*, 663 A.2d at 1180 (affirming similar holding by Court of Chancery).

Moreover, the Court of Chancery's conclusion that the Acquisition was entirely fair—based in part on its fair dealing analysis—is the result of an "orderly and logical" analysis of 11 days of trial that included testimony from 19 witnesses and 575 exhibits. *See Cinerama II*, 663 A.2d at 1178-79.

Contrary to their assertion, the Court of Chancery did not "require[] Plaintiffs to prove 'the entirety of the deal process' was unfair."[94] Plaintiffs attempt to manufacture a legal error in Vice Chancellor Slights' thoughtful analysis by telling only half the story of Elon's involvement in the Acquisition. But it is the role of the trial court to weigh any flaws in the board's process "against its other findings of fact concerning the board's proper conduct". *Cinerama II*, 663 A.2d at 1179. That is what Vice Chancellor Slights did.

For example, Plaintiffs point to the trial court's observation that Elon was "the catalyst and a vocal proponent of the Acquisition" as a finding that required a determination that an unfair process affected the deal price.[95] Yet the trial court also found that the Tesla Board pursued the Acquisition when "the timing was right for Tesla" and "declined to explore a transaction when Elon originally asked,

[94] AB 32.

[95] AB 36 (quoting Op. 2).

choosing instead to pursue the Acquisition only after Tesla had dealt with the Model X rollout and before it attempted its biggest launch yet—the Model 3."[96]

Plaintiffs also assert that Elon's "problematic" involvement included communications "with management, legal and financial advisors, and others 'without any approval or knowledge of the Tesla Board.'"[97] Yet, as the Opinion explained, these communications did not result in Elon wielding coercive power over the Acquisition: (i) the Board did not authorize the bridge loan Elon discussed with Lyndon; (ii) the Board "rebuffed" the Acquisition presented to them in February 2016 "until it determined the timing was right for Tesla"; (iii) Elon's daily calls with Evercore were "to speed up diligence, not to influence the bankers regarding substantive aspects of the Acquisition"; and (iv) Evercore's call to Elon before advising the Board to lower its offer was "no more than Evercore providing Elon with an update of its analysis [and] Elon did not oppose lowering the price".[98] Plaintiffs' brief omits these factual findings.

Plaintiffs also ignore the Court of Chancery's eight pages of findings of process strengths:

---

[96] Op. 94-95.

[97] AB 31.

[98] Op. 91 & nn.410, 412, 92 & n.416, 93 & n.418.

- The timing was right for Tesla, given the (i) success of the Model X rollout; (ii) the "historic lows" in solar company stock prices; and (iii) the construction of the Gigafactory.[99]
- The Tesla Board conditioned the Acquisition on the approval of the majority of disinterested Tesla stockholders, "one of the most extolled and powerful protections afforded Delaware stockholders".[100]
- Tesla was advised by "independent, top-tier advisors".[101]
- Evercore reviewed the solar industry as a whole with the Board.[102]
- Elon and Gracias were recused "from the final decision-making on price and from voting on the Acquisition."[103]

[99] Op. 94-95.

[100] Op. 95-96.

[101] Op. 96.

[102] Op. 96.

[103] Op. 97.

- Denholm—"who doggedly viewed the Acquisition solely through the lens of Tesla and its stockholders"—led diligence and negotiations, which led to a lower offer.[104]
- "[T]he record contains several instances where the Tesla Board simply refused to follow Elon's wishes."[105]
- "The material aspects of the Acquisition were known to Tesla stockholders."[106]

Plaintiffs argue that the Court of Chancery committed legal error by "requir[ing] persuasive evidence that Elon exploited the coercion inherent in his status as a controller to influence the Tesla Board's decision making with regard to this 'particular transaction.'"[107] Plaintiffs conflate a presumption that has been used to justify heightened scrutiny (inherent coercion) with the ultimate merits analysis under such scrutiny, and based on that presumption ask this Court to ignore the trial court's factual findings. That is not the law.

---

[104] Op. 101.

[105] Op. 97-99, 102-03.

[106] Op. 100.

[107] AB 32-33.

In any event, the Court of Chancery assumed for purposes of its entire fairness analysis that Elon was in fact Tesla's controlling stockholder and was "mindful" of the implications of that assumption as it conducted its detailed fair dealing analysis.[108] That assumption produced the same legal consequence—review under the entire fairness standard—that would have followed from a factual finding of control.

3. The Court of Chancery's Finding That Process Flaws Did Not Infect the Deal Price Is Supported by the Record

The Court of Chancery found that "Elon proved that the process did not 'infect' the price".[109] Plaintiffs did not seriously articulate a theory of "misuse of confidential information, secret conflicts, or fraud".[110] And even if their single-sentence fraud-on-the-board allegation had been timely raised to the trial court (it was not), Vice Chancellor Slights noted that he "necessarily … considered the state of the Tesla Board's knowledge at the relevant times during the deal process."[111]

---

[108] Op. 87.

[109] Op. 103.

[110] Op. 85 (quoting *Basho Techs. Holdco B, LLC v. Georgetown Basho Invs., LLC*, 2018 WL 3326693, at *37 (Del. Ch. July 6, 2018), *aff'd sub nom. Davenport v. Basho Techs. Holdco B, LLC*, 221 A.3d 100 (Del. 2019) (TABLE)).

[111] Op. 77-78 n.373.

Plaintiffs argue that "the trial court's findings establish that Musk did exploit his inherently coercive status by repeatedly and improperly injecting himself into the Acquisition process."[112] Again, Plaintiffs' interpretation of the inherent coercion presumption impermissibly collapses the standard of review with the ultimate merits decision. *See Emerald Partners*, 787 A.2d at 93; *Cinerama II*, 663 A.2d at 1163. And Plaintiffs' argument finds no support in the trial court's factual findings. Vice Chancellor Slights concluded, based on the extensive trial evidence, that "even assuming Elon had the ability to exercise control over the Tesla Board, the credible evidence produced at trial shows that he simply did not do so with respect to the Acquisition."[113]

In fact, the Court of Chancery considered and rejected Plaintiffs' theories. For instance, Plaintiffs assert that Elon "improperly pressured" the Board to offer a high opening exchange ratio.[114] Yet the trial court found that the conversation to which Plaintiffs refer "ultimately did not set the price paid, as the Tesla Board, led by Denholm, negotiated the price down well below the initial offer range".[115]

---

[112] AB 33.

[113] Op. 88-89.

[114] AB 36.

[115] Op. 92 n.415.

Plaintiffs also assert that Elon "pressed Evercore to accelerate the Acquisition process",[116] but the trial court determined that Elon's purpose was "not to influence the bankers regarding the substantive aspects of the Acquisition".[117] Plaintiffs assert that Elon "unilaterally published his 'Master Plan Part Deux'" to "garner Tesla stockholder support for the Acquisition," which they claim "affected the price Tesla paid".[118] They ignore the trial court's conclusion that (i) the Master Plan Part Deux discussed more than Tesla's solar aspirations; (ii) the substance of the plan was "well-known to Tesla Board members"; and (iii) the plan was not a "surprise [to] many investors".[119]

4. The Court of Chancery's Finding That the Stockholder Vote Was Adequately Informed and Disinterested Is Supported by the Record

The trial court considered and rejected Plaintiffs' disclosure allegations. Each of Plaintiffs' arguments to the contrary fails.

---

[116] AB 37.

[117] Op. 92 n.416.

[118] AB 37.

[119] Op. 92-93 n.417.

a. Elon's Involvement

Plaintiffs cite the trial court's summary judgment opinion to argue that details of Elon's involvement in the Acquisition would have been material.[120] But the Court of Chancery explained at summary judgment that "[t]his determination will be made after a trial".[121] There was a trial. And based on that trial, the Vice Chancellor found that there was (i) no evidence of coercion by Elon, (ii) the process flaws from Elon's involvement did not affect the Acquisition price, and (iii) Elon was recused from decision-making on the Acquisition.[122] The trial court considered and rejected Plaintiffs' other disclosure theories regarding Elon's involvement.[123]

While the Court of Chancery stated that Elon's daily calls with Evercore "may well have been material given Elon's conflicts",[124] "a single disclosure problem may not be outcome-determinative" after a trial "[d]epending on the evidence as a whole." *In re Orchard Enters., Inc. S'holder Litig.*, 88 A.3d 1, 29

---

[120] AB 40-41 & n.151.

[121] *In re Tesla Motors, Inc. S'holder Litig.*, 2020 WL 553902, at *9 (Del. Ch. Feb. 4, 2020).

[122] Op. 88-89. 96-97, 102 n.455.

[123] *E.g.*, Op. 34 & n.169, 48 & n.242, 53 & n.267; *see also* A2166-67; B239-42; B311-22.

[124] Op. 49 n.250.

(Del. Ch. 2014). The trial court weighed those daily calls as part of the totality of the evidence in reaching its fairness findings.[125]

b. Solar Roof

The Court of Chancery weighed the evidence concerning the Solar Roof and concluded that the alleged misstatements "either occurred after the stockholder vote, were qualified or were accurate".[126] Having weighed the trial record, the trial court was "satisfied investors knew the Solar Roof was a part of Tesla's 'vision for the future' and a 'goal,' not a ready-for-market product offering."[127] Moreover, the trial court correctly noted Plaintiffs' "temporal confusion"—Plaintiffs have repeatedly asserted that Elon's statement about "doing the solar roofs in volume" "preceded the stockholder vote with the explicit intent to induce the stockholders to vote for the Acquisition".[128] Elon's statement was, in fact, made *after* the close of voting on the Acquisition.[129]

---

[125] Op. 50, 92.

[126] Op. 93 n.420.

[127] Op. 93.

[128] Op. 62 n.208, 118; AB 41-42; A1975; A2042.

[129] B6, B9.

c. Evercore's Advice Regarding SolarCity's Liquidity Covenant

The Court of Chancery considered and rejected Plaintiffs' argument that the market lacked information regarding the full extent of SolarCity's liquidity situation. Plaintiffs now focus on one narrow disclosure issue—that "Evercore advised the Board that a SolarCity breach of its liquidity covenant would threaten SolarCity's solvency".[130] But the trial court weighed that issue against the fact that "SolarCity never breached the Liquidity Covenant."[131] In addition, "[t]he trial evidence reveal[ed] that SolarCity accurately disclosed the existence and terms of its debt covenants, that its covenant compliance margins decreased in Q1 and Q2 of 2016, the potential consequences of a breach, its quarterly cash balances and its debt maturities.[132] Indeed, Plaintiffs' expert witnesses, Moessner and Beach, conceded that market participants were aware of the risk that SolarCity might breach its Liquidity Covenant."[133]

---

[130] AB 42.

[131] Op. 51-52 & n.260.

[132] Op. 112.

[133] Op. 112 & n.494.

d. Credit Downgrades

Plaintiffs claim that Bank of America's ("BAML") *internal* credit downgrades of SolarCity in 2016 should have been disclosed. The evidence established that BAML did not abandon SolarCity following its credit review; instead, BAML continued to lend and deepen ties with SolarCity.[134] The trial court's factual finding is logical: "If SolarCity's largest lender was undeterred by the change in its credit rating, it is difficult to see how or why the market would have viewed the information differently."[135]

e. Cross-Holdings

Plaintiffs' argument regarding cross-holdings by institutional investors is a red herring. In short, Plaintiffs disagree with the trial court's weighing of the evidence, which is entitled to deference. *See Eagle Force Holdings, LLC v. Campbell*, 235 A.3d 727, 737 (Del. 2020), *cert. denied*, 141 S. Ct. 1371 (2021) ("Even if a reviewing court were to come out differently, that is not a basis to overturn the decision of the trial court. Plaintiffs' dissatisfaction with the weight given to this evidence does not constitute reversible error.").

Moreover, Plaintiffs' proposed rule—that cross-holding institutional investors must be excluded from the stockholder electorate—is neither workable

[134] B277-80.

[135] Op. 113-14.

nor required by Delaware law. There is no practical way for a Board to determine, *ex ante*, the other holdings of stockholders. And Plaintiffs are not entitled to an electorate of stockholders with interests identical to their own. As this Court has explained, it is "well established law that nothing precludes" a stockholder, "as a stockholder[,] from acting in its own self-interest". *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1344 (Del. 1987).

II. THE COURT OF CHANCERY CORRECTLY FORMULATED THE FAIR PRICE COMPONENT OF THE ENTIRE FAIRNESS ANALYSIS AND DID NOT CLEARLY ERR IN ITS FACTUAL FINDINGS

A. Question Presented

Did the Vice Chancellor commit clear error in weighing the trial evidence regarding the fairness of the Acquisition price? Fair price was raised by Defendant (B211-28, B266-306, A2129-50) and considered by the Court of Chancery (Op. 103-128).

B. Standard of Review

While this Court reviews errors of law *de novo*, post-trial factual findings are subject to deferential review. *See* Point I.B, above.

C. Merits of the Argument

1. The Court of Chancery Correctly Recognized the Primacy of Price Within the Entire Fairness Analysis

Plaintiffs argue the Court of Chancery erred by conducting a "bifurcated" entire fairness analysis in which it concluded that "fair price alone satisfied entire fairness", in violation of this Court's longstanding instruction that the test of fairness is unitary.[136] But that is not what the trial court did.

The Court of Chancery expressly stated that entire fairness is a "composite" that "is not bifurcated" and under which "[a]ll aspects of the issue must be

[136] AB 44-45.

examined as a whole".[137] To be sure, the Vice Chancellor *also* recognized that, under this Court's precedents, "[t]he paramount consideration … is whether the price was a fair one".[138] But that is settled Delaware law.

The Court of Chancery correctly applied this standard. As described above, the Vice Chancellor carefully weighed the evidence regarding all aspects of the Acquisition, including the deal process (to which the Opinion devotes 17 pages of factual analysis), and assessed the credibility of every significant participant in the Acquisition. And consistent with this Court's precedents, the trial court's analysis considered whether any alleged process infirmities infected the Acquisition price.[139]

Based on that careful review, the Vice Chancellor concluded that "Elon proved that the process did not 'infect' the price".[140] The Vice Chancellor specifically found, among other factual findings, that the process involved "no

[137] Op. 82 & n.382.

[138] Op. 83 (quoting *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1244 (Del. 2012)); *see also* Op. 83 n.386 (collecting cases).

[139] Op. 83 & n.384.

[140] Op. 103 & n.459.

threats";[141] was not dominated by Elon;[142] and was driven by the "independent, powerful and positive" force of Denholm, who, with Evercore, "lower[ed] the price substantially".[143] Plaintiffs provide no basis for revisiting those factual findings on appeal.

Without citing authority, Plaintiffs next argue that the trial court erred by not specifying the lower and upper bounds of a "reasonable range" that a buyer might have paid in these circumstances.[144] But there is no such requirement under Delaware law. Regardless, as the trial court concluded, this was not a close call: "the price was, in my view, not 'near the low end of a range of fairness,' but '*entirely*' fair in the truest sense of the word."[145]

2. The Court of Chancery Did Not Clearly Err in Finding That Market Evidence (Among Other Valuation Evidence) Supports the Fairness of the Price

Plaintiffs claim that the Court of Chancery erred by "rote reliance" on SolarCity's market price and by failing to apply "recognized valuation standards"

---

[141] Op. 102 & n.457; *cf. Reis v. Hazelett Strip-Casting Corp.*, 28 A.3d 442, 465, 467 (Del. Ch. 2011) (process infected price where process involved "[t]hreats" by controlling stockholder).

[142] Op. 97-99.

[143] Op. 97, 101-102.

[144] AB 45-46.

[145] Op. 128 (emphasis in original).

to determine SolarCity's fair value.[146] *Amici* echo these arguments.[147] But Plaintiffs and *amici* are wrong on the facts and the law. And the purported deficiencies in the valuation evidence Plaintiffs now challenge are entirely of their own making.

First, Plaintiffs and *amici* fundamentally misstate what the Court of Chancery actually did. Plaintiffs do so in an attempt to undo the trial court's careful analysis and reverse its verdict. *Amici* do so to advocate for their preferred policy position, but they argue against a strawman instead of the trial court's actual analysis. The Vice Chancellor did not rely "rote[ly]" on SolarCity's market price or even on market-based evidence to conclude that the price was fair, as Plaintiffs claim.[148] Nor did the Vice Chancellor "allow[] a single piece of 'market evidence' to satisfy the defendant's burden to show entire fairness" or "allow[] the trading price to subsume the remainder of the entire fairness analysis", as *amici* claim.[149] *Amici* do not address the actual trial decision before this Court.

---

[146] AB 45.

[147] *Amicus Curiae* Brief of Corporate Law Professors in Support of Appellants and Reversal at 6-18 ("Amicus Brief").

[148] AB 45.

[149] Amicus Brief 19, 22.

In concluding that the Acquisition price was fair, the trial court considered SolarCity's unaffected market price as one factor among many others, including SolarCity's solvency; SolarCity's current and future cash flows; Evercore's fairness opinion; and the substantial synergies anticipated (and realized) as a result of the Acquisition.[150] Indeed, over the course of 20 pages of detailed analysis, the Vice Chancellor considered and weighed all of the trial evidence regarding price—accepting some and rejecting some as not credible. This Court should not re-weigh that evidence.[151]

Second, the Court of Chancery's decision to give *some* weight to SolarCity's unaffected market price was reasonable and consistent with Delaware law. Delaware courts have repeatedly held that market evidence—including the unaffected market price of a merger target's stock—is evidence of value in both

[150] Op. 107-127.

[151] *Eagle Force*, 235 A.3d at 737 ("[D]issatisfaction with the weight given to this evidence does not constitute reversible error.").

the entire fairness and appraisal contexts.[152] *Amici* concede as much.[153] Yet they criticize the Opinion for relying on arguably "ambiguous and contestable" market evidence.[154] But that is the point of a trial—for the factfinder to weigh the evidence and reach a decision.

As required by this Court's precedents, before giving *any* weight to SolarCity's stock price, the trial court first conducted a careful analysis of the efficiency of the market for SolarCity stock and the information available to the market. Vice Chancellor Slights concluded that the market was efficient (as

---

[152] *E.g.*, *ACP Master, Ltd. v. Sprint Corp.*, 2017 WL 3421142, at *28 (Del. Ch. July 21, 2017) (holding that "[m]arket indications also support[] the fairness of the … per share price", including the stock price "before any media reports of … negotiations"), *aff'd*, 184 A.3d 1291 (Del. 2018) (TABLE); *Kahn v. Tremont Corp.*, 1997 WL 689488, at *2 (Del. Ch. Oct. 28, 1997) ("[W]here an active and *unaffected market* for shares exists … the price determined by that market 'should typically be regarded as fair for fiduciary analysis purposes.'" (emphasis added)); *see also Fir Tree Value Master Fund, LP v. Jarden Corp.*, 2020 WL 3885166 (Del. July 9, 2020) (affirming appraisal determination that unaffected market price reflected fair value); *Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd.*, 177 A.3d 1, 6 (Del. 2017) ("[T]he evidence suggests that the market for Dell's shares was actually efficient and, therefore, likely a possible proxy for fair value."); *DFC Glob. Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346, 373 (Del. 2017) ("[T]he pre-transaction trading price of a public company's shares … is informative of fair value, as that value reflects the judgments of many stockholders about the company's future prospects, based on public filings, industry information, and research conducted by equity analysts.").

[153] Amicus Brief 2.

[154] Amicus Brief 4.

Plaintiffs' experts conceded) and the value-related disclosures were robust, such that SolarCity's stock price could be "trusted as a proxy for value".[155]

Weighing the evidence, Vice Chancellor Slights also rejected the other arguments raised by Plaintiffs and *amici* regarding the unaffected market price. As to Plaintiffs' theory about supposed leaks in March 2016,[156] based on the trial evidence, including the fact that no contemporaneous market participant used a March unaffected date, the Vice Chancellor was "persuaded that the June date is the appropriate date upon which to set SolarCity's unaffected stock price."[157] As to *amici*'s argument that the drop in Tesla's market price following the announcement of the SolarCity offer indicates the price was unfair,[158] even *amici* concede that the evidence is "subject to multiple interpretations."[159] They simply disagree with the trial court's interpretation.[160] But the trial court's finding is entitled to deference on appeal.

---

[155] Op. 112-114.

[156] AB 46.

[157] Op. 114-15 n.504.

[158] Amicus Brief 16-18.

[159] Amicus Brief 17.

[160] Op. 44 & n.221 (crediting the explanation by Evercore's McBean regarding the stock drop).

Third, the Court of Chancery did not err by giving no weight to the alternative, non-$0 valuation analyses that Plaintiffs themselves disclaimed at trial. At trial, Plaintiffs made a strategic choice to go "all in" on their $0-value insolvency hypothesis.[161] Consistent with that strategy, Plaintiffs' expert Quintero conceded, in response to direct questioning from Vice Chancellor Slights, that his illustrative, non-$0 valuations were "not methodologies that [he] believe[d] in for this company" and did "not reflect the appropriate means by which to value this company".[162] Plaintiffs' valuation strategy ultimately failed: Quintero "[swung] for the fences" but "failed to make contact altogether. By relying so heavily on Quintero, in the eyes of [Vice Chancellor Slights], Plaintiffs undermined the credibility of their fair price case completely."[163]

3. The Court of Chancery Did Not Clearly Err in Evaluating the "Give" and "Get" of the Acquisition

Plaintiffs claim that the Court of Chancery erred by failing to assess the "give" and the "get" of the Acquisition as of closing.[164] Plaintiffs are wrong. As discussed above, the Court of Chancery's decision to consider—as one factor

---

[161] Op. 106.

[162] A1585-86 (889:6-891:11).

[163] Op. 108.

[164] AB 47-52.

among many—that Tesla acquired SolarCity for less than its unaffected market price was entirely appropriate and consistent with Delaware law.[165] Moreover, Plaintiffs ignore that the Vice Chancellor also considered and credited a broad array of other valuation evidence as of the Acquisition's closing, including: (i) Professor Fischel's premium estimate (showing that Tesla paid, at most, a modest premium at closing);[166] (ii) KPMG's independent and disinterested appraisal (showing that at closing Tesla acquired SolarCity for less than the value of its net assets);[167] and (iii) at closing, SolarCity was a vibrant operating business, with $200 million in monthly revenues, $3 billion in future cash flows under contract from existing installations, and hundreds of thousands of customers.[168]

4. The Court of Chancery Did Not Clearly Err as to Its DCF Findings

Plaintiffs claim that the Court of Chancery erred by "refus[ing] to consider a DCF methodology" but still crediting certain evidence of expected future cash

[165] *Supra* note 152.

[166] Op. 115-116.

[167] Op. 64 & n.318, 109 n.481.

[168] Op. 64.

flows and synergies as relevant to its fair price determination.[169] Plaintiffs' premise is flawed.

The Court of Chancery expressly *did* consider the DCF analyses conducted by the parties' respective valuation experts.[170] The Court of Chancery declined to rely on Plaintiffs' DCF after their expert (Quintero) testified that his DCF (i) was not a methodology he "believe[d] in"; (ii) did "not reflect the appropriate means by which to value this company"[171]; and (iii) was an "unreliable" and "highly speculative" valuation technique as applied here.[172] The trial court likewise considered, but did not rely on, Elon's DCF. Elon's expert (Fischel) explained that he conducted a DCF "as a check on all the other market evidence" and that he viewed the market evidence as more reliable than any "after-the-fact DCF analysis".[173] It is not error—much less clear error warranting reversal—for a court to consider the case presented to it by sophisticated parties and their experts.

---

[169] AB 52.

[170] Op. 110-11.

[171] A1585-86 (889:6-891:11).

[172] Op. 110 n.487 (citing A1580 (868:19-24).)

[173] A1841 (2516:9-2517:3); Op. 110 n.487 (citing A1841 (2516:15-21), A1856 (2579:14-21)).

Nor was there any inconsistency in the trial court's decision not to credit the experts' DCFs while also crediting Evercore's *contemporaneous* fairness opinion.[174] Evercore's fairness opinion was based on seven different valuation methodologies (including non-DCF methodologies), each of which demonstrated the Acquisition was fair.[175]

5. The Court of Chancery Did Not Clearly Err as to Its Cash-Flow and Synergies Findings

The Court of Chancery also did not clearly err in its findings regarding future cash flow and synergies:

First, there was no error in observing that by acquiring SolarCity, Tesla was also acquiring the cash flows that were due to SolarCity from already installed solar energy systems. As the trial evidence proved, that was SolarCity's business model and part of the value proposition the Acquisition presented to Tesla.[176]

Second, Plaintiffs contend that the trial court erred by "relying on undocumented and unsupported testimony" to support its conclusion that

---

[174] AB 53.

[175] Op. 55.

[176] Op. 119-20, 27 & n.136 (recognizing that SolarCity's future cash flows were "estimated to be worth billions of dollars" and were valued "*after* accounting for the repayment of associated debt").

SolarCity's cash flows were valuable to Tesla.[177] That is an improper attempt to re-weigh the evidence and second-guess the Vice Chancellor's fact-finding. In fact, the trial court found the cash flows supported by documentary evidence and credible testimony from five witnesses.[178]

Third, Plaintiffs repeatedly attempt to inflate the Acquisition price by adding SolarCity's $5.35 billion in liabilities to the $2.1 billion Tesla paid for its equity.[179] But Plaintiffs ignore the $8.5 billion in assets Tesla acquired in the deal.[180] As the trial court found, the evidence proved that Tesla acquired SolarCity's *net* assets for less than they were worth.[181]

Nor did the Court of Chancery err by "crediting all potential cost, revenue, and global strategic synergies Tesla might eventually realize".[182] Plaintiffs do not contend that including synergies is error. Nor could they. Delaware law has long

---

[177] AB 53-54.

[178] Op. 119-20 & nn.524-25.

[179] AB 4-5, 7, 47, 54.

[180] B91.

[181] Op. 64.

[182] AB 54.

recognized that synergies are an important component of value in an acquisition.[183] Instead, Plaintiffs invite this Court to second-guess the Vice Chancellor's well-supported fact-finding that the Acquisition was expected to be and has been synergistic.[184]

In any case, Plaintiffs' argument still fails because the trial court concluded that the price was fair even valuing SolarCity on a *standalone basis* (*i.e.*, excluding synergies).[185]

6. The Court of Chancery Did Not Clearly Err in According Some Weight to the Stockholder Vote

The overwhelming majority of Tesla's disinterested stockholders voted to approve the Acquisition. Not surprisingly, Plaintiffs seek to diminish the significance of that vote. But as Delaware courts repeatedly have held, the approval of stockholders—the ultimate owners of the corporation and beneficiaries of fiduciary duties—is "compelling" and "substantial" evidence of fair price.[186]

---

[183] *Cinerama Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1143 (Del. Ch. 1994) ("*Cinerama I*"), *aff'd*, 663 A.3d 1156 (Del. 1995); *see also Weinberger*, 457 A.2d at 711.

[184] Op. 66-67, 121-27.

[185] Op. 115 & n.505, 116.

[186] *Cinerama II*, 663 A.2d at 1176; *Gesoff v. IIC Indus., Inc.*, 902 A.2d 1130, 1148 (Del. Ch. 2006); *ACP Master*, 2017 WL 3421142, at *29.

The trial court's decision to give some weight to the stockholder vote does not constitute clear error.

First, Plaintiffs argue that it was legal error to consider the vote as evidence of fairness because such votes are "presumed to be coerced" in transactions involving conflicted controllers. Again, Plaintiffs impermissibly conflate a presumption used to justify entire fairness scrutiny (inherent coercion) with the merits analysis under such scrutiny. *Emerald Partners*, 787 A.2d at 93; *Cinerama II*, 663 A.2d at 1163. The presumption of so-called "inherent coercion" cannot be a reason to require trial courts to disregard the economic evidence of an actual stockholder vote as part of a trial on the merits.[187]

Second, Plaintiffs argue that it was inappropriate for the Court of Chancery to give *any* weight to the stockholder vote because it afforded "less weight" to the vote in light of Plaintiffs' disclosure arguments and cross-holdings among certain institutional investors. Determining how much weight to afford a particular price factor is a classic example of trial court discretion that should not be disturbed by

[187] *See, e.g.*, Lawrence A. Hamermesh, Jack B. Jacobs & Leo E. Strine, Jr., *Optimizing The World's Leading Corporate Law: A 20-Year Retrospective and Look Ahead*, 77 BUS. LAW. 321, 341-42 (2022) (arguing that "[m]arket activity since [2001] has only strengthened" the argument that "*Lynch*'s inherent coercion theory was empirically baseless").

this Court.[188] Moreover, as the trial evidence proved, substantially the same criticisms leveled by Plaintiffs at trial were prominently and publicly debated in advance of the stockholder vote (including by Glass Lewis).[189] On that trial record, according some weight to the stockholder vote was hardly an abuse of discretion.

Finally, Plaintiffs criticize Vice Chancellor Slights' footnote statement that he could not "conclude that such a large majority of Tesla's stockholders would have voted to approve a transaction whereby Tesla would acquire an insolvent solar energy company."[190] Plaintiffs argue that the trial court incorrectly required "Plaintiffs to prove that a majority of Tesla's stockholders believed SolarCity was worthless."[191] But that is not what the trial court did—it merely restated in different words its finding that Plaintiffs' insolvency theory was not credible.

Plaintiffs also ignore the trial court's above-the-line analysis, which credited expert testimony that the stockholder vote was "the ultimate market test", because it put directly to stockholders the question whether the Acquisition was worth the

---

[188] *Eagle Force*, 235 A.3d at 737.

[189] Op. 61, 117.

[190] Op. 117-18 n.515; *see* AB 54-55.

[191] AB 55.

price.[192] Ultimately, Plaintiffs failed to demonstrate any credible factual basis for ignoring Tesla's stockholders' affirmation of SolarCity's value.

[192] Op. 117.

CONCLUSION

For the reasons stated above, the Opinion and Order should be affirmed.

ROSS ARONSTAM & MORITZ LLP

By: /s/ Garrett B. Moritz
David E. Ross (Bar No. 5229)
Garrett B. Moritz (Bar No. 5646)
Benjamin Z. Grossberg (Bar No. 5615)
Hercules Building
1313 North Market Street, Suite 1001
Wilmington, Delaware 19801
(302) 576-1600

Attorneys for Defendant Below, Appellee Elon Musk

Of Counsel:

Evan R. Chesler
Daniel Slifkin
Vanessa A. Lavely
Helam Gebremariam
CRAVATH, SWAINE
& MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019
(212) 474-1000

August 11, 2022