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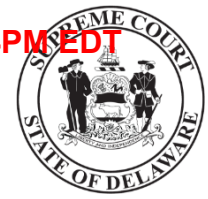

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE TESLA MOTORS, INC. STOCKHOLDER LITIGATION	C.A. No. 181, 2022 Court Below: Court of Chancery of the State of Delaware, C.A. No. 12711-VCS Consolidated

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PRELIMINARY STATEMENT

The trial court's opinion, if allowed to stand, provides an all too easy roadmap for even the most conflicted of transactions to sail through entire fairness review. First, independent negotiating committees will be replaced by a single independent director that has some involvement in the process, bolstered only by self-serving assurances by the remaining conflicted directors that they had not allowed their conflicts of interest to influence their decisions. Second, ***proven*** process flaws regarding "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,"[1] such as the 11 specific process flaws the trial court found here,[2] will become irrelevant. Third, ***proven*** instances of conflicted directors breaching their duty of disclosure will also become inconsequential.[3] The net result will be that the "fair dealing" component of the entire fairness analysis will no longer matter. As commentators agree, the bottom line of the trial court's opinion, if

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1 *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983).

2 Opinion at 90-94.

3 *See generally* Appellants' Opening Brief ("AOB") at 14-25.

upheld, will be that "all roads in the realm of entire fairness ultimately lead to fair price,"[4] no matter how unfair the process.

If the trial court's opinion stands, the fair price prong of entire fairness will also be diminished. The entire fairness analysis would be reduced to a single question: is the ultimate purchase price paid somewhere near the target company's "unaffected" stock price—even if that price is months before the transaction closed and material, previously non-public information became known after the "unaffected" date? This Court's holding in *Aruba,*[5] that reliance on unaffected market price is legal error where previously non-public value-relevant information was disclosed in the months-long period between the date of the unaffected price and the consummation of the merger, would be rendered a nullity.[6]

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[4] Opinion at 83; J. Ducayet & M. Svatek, "All Roads Lead to Fair Price: The Tesla Decision," Sidley (May 11, 2022), *at* https://ma-litigation.sidley.com/2022/05/all-roads-lead-to-fair-price-the-tesla-decision/; J. Fleming, "All Roads to Fair Price: The Lesson of Tesla," Block and Leviton (June 22, 2022), *at* https://www.blockleviton.com/news/all-roads-lead-to-fair-price-the-lesson-of-tesla.

[5] *Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, 210 A.3d 128, 139 (Del. 2019).

[6] This entire fairness case involves a different issue than the appraisal issue in *Aruba* (*i.e.*, whether the acquiror paid ***too little***). Here, the question is whether, in an entire fairness context, Musk caused Tesla to pay ***too much*** for SolarCity when he and a majority of the Board had interests in and associations with SolarCity. *See Kahn v. Tremont Corp.*, 694 A.2d 422, 423, 428-29 (Del. 1997) (applying entire fairness to one controlled corporation's purchase of stock of another company the controller also controlled).

In short, the entire fairness standard—the "most onerous standard" under Delaware law[7]—will become a paper tiger, and four decades of carefully crafted jurisprudence, from *Weinberger*[8] to *Aruba*,[9] will become all but irrelevant. This Court should reverse and remand to the trial court with instructions that it correctly apply longstanding principles of Delaware law.

[7] *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 44 (Del. Ch. 2013).

[8] *Weinberger*, 457 A.2d 701.

[9] *Aruba*, 210 A.3d 128.

ARGUMENT

A. Plaintiffs Challenge Only Legal Conclusions

Musk argues that Plaintiffs challenge the trial court's factual findings, asking this Court to make contradictory findings.[10] Not true. Plaintiffs' Opening Brief demonstrates that the trial court's own factual findings require reversal of its ***legal conclusion*** that Musk satisfied his burden of proving entire fairness. This Court's review of the trial court's formulation and application of the entire fairness standard is *de novo* and plenary and requires no deference to the trial court.[11] The trial court's factual findings can, and here should, be the basis for a reversal of its legal holding that a transaction was entirely fair.[12]

In arguing that this Court should give deference to the trial court's application of the entire fairness standard, Musk relies heavily on the supposedly "similar holding" in *Cinerama, Inc. v. Technicolor, Inc.* ("*Cinerama II*").[13] That case is distinguishable, because there "[t]he Court of Chancery found . . . that 'a large majority of the board of Technicolor was disinterested and independent with respect

[10] Appellee Elon Musk's Answering Brief ("MAB") at 3, 26.

[11] *Tremont*, 694 A.2d at 428.

[12] *Id.* at 433-34 (Quillen concurring).

[13] 663 A.2d 1156, 1178-79 (Del. 1995); *see, e.g.*, MAB at 25-27, 30 n.93, 31.

to this transaction.'"[14] Here, by contrast, the trial court found that six of the seven Tesla Board members were heavily conflicted, with most having strong financial incentives on the SolarCity side of the Acquisition.[15]

Moreover, the application of entire fairness in *Cinerama II* was based on a breach of the duty of care, not the presence of conflicted directors and a conflicted controlling stockholder.[16] *Cinerama II* held that "*each* of the fiduciary duties retains independent *substantive* significance in an entire fairness analysis."[17] Here, the trial court's findings of substantial conflicts of interest make this case fundamentally different than *Cinerama II*, where the trial court made factual determinations that the Technicolor directors were *not* laboring under a conflict in evaluating and negotiating the challenged transaction.

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[14] 663 A.2d at 1168.

[15] *See* AOB at 8-9.

[16] *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1139 (Del. Ch. 1994).

[17] *Cinerama II* at 1164-65.

B. Plaintiffs Do Not Argue for a *Per Se* Standard

Musk claims that "Plaintiffs advocate for a *per se* rule … that failing to employ a special committee" when the board and controlling stockholder are conflicted "requires the imposition of liability 'as a matter of law.'"[18] This strawman argument mischaracterizes Plaintiffs' position, which is entirely in accord with well settled Delaware law.

Plaintiffs' position is that the absence of a special committee ***plus*** the numerous specific process flaws the trial court found due to the Board's failure to manage conflicts[19] are the factors that require the imposition of liability as a matter of law. From *Weinberger* through *Kahn v. M&F Worldwide Corp.*,[20] this Court has consistently recognized that the presence or absence of an independent committee is critical to determining whether the entire fairness standard applies, and if it does, whether the transaction is entirely fair. The absence of an independent committee, when combined with (i) the trial court's finding that "[w]ith no formal independent negotiating body to manage conflicts, Elon was permitted to participate in the deal process to a degree greater than he should have been," and (ii) 11 specific findings

[18] MAB at 27.

[19] Opinion at 90-94.

[20] 88 A.3d 635, 642-43 (Del. 2014).

of process flaws, establishes that the trial court's conclusion that Musk proved entire fairness is legal error.[21]

Plaintiffs also do not, as Musk suggests, argue that "***purported*** process defects require a *per se* finding of unfairness."[22] Rather, the trial court's ***actual*** findings of numerous process defects resulting from the absence of an independent committee are what require a legal conclusion of unfairness.

The cases on which Musk relies do not require any different conclusion. Like *Cinerama II*, *Emerald Partners v. Berlin*[23] involved a board with an independent majority, and *Rosenblatt v. Getty*[24] involved an independent committee and an independent appraiser. These cases have no bearing on the situation here, where all directors but one were conflicted, there was no independent committee, and there were numerous process flaws that may have been ameliorated had there been an independent committee. Finally, in *Trados*[25] the trial court expressly found the lack of a special committee was evidence of unfair dealing.

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[21] Opinion at 91-94.

[22] MAB at 3 (emphasis added).

[23] 2003 WL 21003437 (Del. Ch. Apr. 28, 2003).

[24] 493 A.2d 929 (Del. 1985).

[25] 73 A.3d 17.

Musk argues for a rule that the absence of an independent committee and the existence of 11 process defects do not matter if there was one independent director (out of seven) and the remaining conflicted directors self-servingly testify that they "meaningfully vetted" the conflicted transaction.[26] If the entire fairness standard can be satisfied simply by having heavily conflicted directors say that the controller and their own financial conflicts did not influence them, and that they acted for stockholders' interests despite numerous proven instances of unfair dealing, then entire fairness is no longer a stringent test.

[26] MAB at 1-2, 4, 30. The trial court noted that whether the testimony of conflicted directors that they complied with their fiduciary duties could overcome proven facts establishing self-interest or lack of independence was a "question not yet answered in Delaware" and said that it would not answer that question, yet the Opinion did just that, holding that the self-serving testimony of Tesla's conflicted directors that their approval of the Acquisition was not influenced by Musk or their own financial interests in SolarCity overcame not only their self-interestedness, but also the trial court's own numerous factual findings of process defects. Opinion at 81 n.378, 88-90, 96 n.433, 99 n.444, 102 n.457, 103.

C. Inherent Coercion Affects the Substantive Fair Dealing Component

Without authority, Musk argues that inherent coercion is pertinent only to the determination of the applicable "standard of review," but then disappears when the court is making "the ultimate merits decision."[27] Musk was Tesla's founder, largest stockholder, CEO, Board Chairman, and Technoking throughout the Acquisition, and the trial court acknowledged that as the controlling stockholder, Musk "brings with him into the boardroom an element of 'inherent coercion,'" and therefore the court's deliberations should have included an analysis of whether "Elon exploited the coercion as controller to influence the Tesla Board's decision-making."[28] The trial court, however, failed to do so.

Instead, the trial court ignored its own numerous factual findings that Musk inappropriately injected himself into the deal process. For example, when Musk insisted that the initial offer for SolarCity be higher than the offer Evercore was advising the Board to make,[29] the Board ignored Evercore's advice and made an

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[27] MAB at 36. Musk cites *Emerald Partners v. Berlin*, 787 A.2d 85, 93 (Del. 2001) and *Cinerama II*, 663 A.2d at 1163. Neither case discusses inherent coercion.

[28] Opinion at 87-88.

[29] *Id.* at 41-42.

offer closer to what Musk had advocated.[30] When Evercore learned what Musk already knew regarding SolarCity's impending liquidity crisis and financial distress, Evercore immediately called Musk, not Denholm or other Board members.[31] Musk's response was to order that due diligence be accelerated so the merger agreement could be signed quickly.[32] When Evercore subsequently informed the Board of SolarCity's liquidity crisis, the Board followed Musk's lead and pushed the process to a quick signing rather than hitting the pause button so the Board could fully and carefully examine the depth of SolarCity's financial distress and analyze the impact of the expected SolarCity stock price decline after its negative results and lowered guidance were disclosed, so it could start the bidding at a lower number.[33] As the trial court summarized its findings, "Elon's recusal from deliberations was fluid and the evidence reveals that, when he was present, he simply could not help but to 'voice [his] opinion, obviously;'"[34] and "Elon's involvement was problematic

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[30] *Id.* at 43.

[31] *Id.* at 49.

[32] *Id.*

[33] AOB at 19-25.

[34] Opinion at 89.

because Tesla 'should have been able to negotiate [] unhindered' by his 'dominating hand.'"[35]

But rather than requiring Musk to prove that his repeated interjections into the process, combined with his inherently coercive position within Tesla, did not create an unfair process, the trial court instead held that Plaintiffs had to prove that Musk engaged in pressure tactics; aggressive, threatening, disruptive, or punitive behavior; with threats, fits, or fights.[36] Thus, the trial court not only shifted the unfairness burden to Plaintiffs, but also held that Plaintiffs must satisfy this burden by proving Musk used actual threats and bullying tactics, rather than the inherent coercion that accompanied his status at Tesla and his improper intrusions into the deal process. This was legal error.

Splicing together two parts of the Opinion that are 17 pages apart, Musk wrongly suggests the trial court held that only a showing of "misuse of confidential information, secret conflicts or fraud" is sufficient to show that process infected price.[37] First, the trial court's "process did not affect price" holding was based almost exclusively on the presence of one purportedly independent director and

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[35] *Id.* at 94.

[36] *Id.* at 88, 102 n.457.

[37] MAB at 35.

heavily conflicted directors self-servingly claiming that they "meaningfully vetted" the transaction.[38] Second, the trial court quoted *Basho Techs. Holdco B, LLC v. Georgetown Basho Investors, LLC*, 2018 WL 3326693, at *37 (Del. Ch. July 6, 2018), which only presented a non-exhaustive list of some factors that could render a transaction unfair where the price might fall within a range of fairness.[39]

[38] Opinion at 103.

[39] *Id.* at 84-85.

D. The Stockholder Vote Was Uninformed

In denying summary judgment in this case, the trial court held (correctly) that "[i]f Musk is a controller, then his involvement in the process beyond what was disclosed in the proxy would likely have been something a reasonable stockholder would have considered important when deciding whether to vote for the Merger."[40] The Opinion presumed that Musk was Tesla's controller,[41] and acknowledged that numerous facts concerning Musk's involvement in the process were not disclosed in the Proxy.[42] Based on its findings concerning Musk's inappropriate involvement, the trial court determined that Musk's involvement was "problematic," that Musk failed to "separate himself from Tesla's consideration of the Acquisition," that Musk "was permitted to participate in the deal process to a degree greater than he should have been," and that Musk's involvement was a "process flaw."[43] By the trial court's own logic, "'there is a substantial likelihood that a reasonable stockholder would consider [Musk's involvement] important in deciding how to vote.'"[44]

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

[41] Opinion at 80-81, 88.

[42] *Id.* at 31 n.156, 32 n.158, 34 nn.167, 169, 48 n.242, 49 nn.244, 250, 53 n.267.

[43] *Id.* at 89-94.

[44] *In re GGP, Inc. S'holder Litig.*, 2022 WL 2815820, at *17 (Del. July 19, 2022) (quoting *Loudon v. Archer–Daniels–Midland Co.*, 700 A.2d 135, 143 (Del. 1997)).

Yet rather than reaching the inescapable conclusion that the stockholder vote was not adequately informed, the trial court held that certain of Musk's various involvements in the process were not, in and of themselves, material to Tesla's stockholders.[45] The trial court's piecemeal materiality conclusions missed the point of its own summary judgment holding: ***Musk's involvement*** in all these matters, collectively, went well beyond what was disclosed in the Proxy and would "have been something a reasonable stockholder would have considered important when deciding whether to vote" for the Acquisition.[46]

Musk, nonetheless, argues that the failure to disclose his full involvement in the process is immaterial because of the trial court's findings that (i) Musk did not actually employ coercive tactics, (ii) process flaws did not affect price, and (iii) Musk was partially recused.[47] Musk, however, cites no authority—because there is none—that proof of actual coercion, effect on price, and/or participation in all decisions are requirements for finding that a reasonable stockholder would consider Musk's involvement material.

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[45] Opinion at 32 n.158, 34 nn.167, 169, 48 n.242, 53 n.267, 100-101.

[46] *Tesla*, 2020 WL 553902 at *9.

[47] MAB at 38.

Musk also attempts to minimize the trial court's finding that the failure to disclose Musk's daily calls with Evercore "may well have been material given Elon's conflicts"[48] as merely a "single disclosure problem [that] may not be outcome-determinative" of unfair process.[49] That ignores not only the several other undisclosed Musk involvements, but also the trial court's many findings of other process defects, such as Musk's representations concerning the Solar Roof.[50]

Finally, the stockholder vote is undermined by the extensive cross-holdings by institutional investors, information which proxy solicitors can readily determine and Evercore provided to the Board.[51]

[48] Opinion at 49 n.250.

[49] MAB 38-39 (quoting *In re Orchard Enterprises, Inc. S'holder Litig.*, 88 A.3d 1, 29 (Del. 2014).

[50] AOB at 41-42; Opinion at 93.

[51] *Id.* at 43; AR1 at AR16.

E. The Trial Court Improperly Reduced Entire Fairness to a Single "Fair Price" Test

The trial court decreed that the "linchpin" of entire fairness is fair price and that a finding of fair price "carries the day" and "puts the nail" in any entire fairness claim.[52] As noted above, commentators from both the stockholder and corporate defense bars agree that the bottom-line message from the trial court's opinion is that "all roads in the realm of entire fairness ultimately lead to fair price."[53] And expectedly, Musk endorses this "only fair price matters" approach, arguing that the entire fairness standard can be satisfied by a finding of fair price, even if there was ***no process*** to protect the interests of the stockholders.[54] Musk further argues that the trial court did hold that the process was fair, relying on various "redeeming features" the Opinion discussed.[55] However, the trial court, (i) at the outset of its entire fairness discussion, (ii) at the conclusion of its discussion of fair process, and

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[52] Opinion at 73; Ducayet & Svatek, *supra* n.4.

[53] *See supra* n.4; Opinion at 83.

[54] MAB at 30. The only case Musk cites, *Oliver v. Boston University*, 2006 WL 1064169, at *25 (Del. Ch. Apr. 14, 2006), is inapposite. There, the target company made no attempt to value certain potential derivative claims when agreeing to a merger. The court held that the potential derivative claims were valueless, so the plaintiffs were not entitled to damages despite defendants having made no effort to value them. *Id.* at 21-25.

[55] MAB at 30-35.

(iii) in concluding that the price was fair, made explicit that it based its entire fairness holding on fair price and not a holding that there was no unfair dealing.[56] Hence, contradicting decades of well-established law, the trial court effectively abandoned the fair dealing component of entire fairness and focused exclusively on the fair price component.

[56] Opinion at 83, 102-03, 127-28.

F. The Trial Court's Analysis of the Fair Price Component of Entire Fairness Was Legally Erroneous

1. The Trial Court Applied the Wrong Fair Price Standard

"In resolving issues of valuation the Court of Chancery undertakes a mixed determination of law and fact."[57] Quoting *Kahn v. Tremont Corp.*, 1996 WL 145452, at *1 (Del. Ch. Mar. 21, 1996), the trial court said its task was "to determine whether the price the *buyer* paid was 'a price that is within a range that reasonable men and women with access to relevant information might [have paid].'"[58] The trial court said the Court of Chancery opinion in *Tremont* was reversed on other grounds.[59] However, this Court's opinion in *Tremont* actually reversed the Court of Chancery's holding that a price within a broad range of fairness satisfies entire fairness, saying:

> But here the process is so intertwined with price that under *Weinberger's* unitary standard a finding that the price negotiated by the Special Committee might have been fair does not save the result.[60]

[57] *Tremont*, 694 A.2d at 432.

[58] Opinion at 104 n.463.

[59] *Id.*

[60] *Tremont*, 694 A.2d at 432.

The *Tremont* Court further held that the Chancellor's finding that the price was within a range of fairness "does not satisfy the *Weinberger* test."[61] The Court concluded:

> It is the responsibility of the Court of Chancery to make the requisite factual determinations under the appropriate standards, which underlie the concept of entire fairness.[62]

Here, as in *Tremont*, the trial court made factual findings but did not correctly apply to those findings the standards underlying entire fairness.

2. The Trial Court Misapplied the Standard for Using Market Price

The trial court acknowledged that it was required to determine valuation using "'methodologies [that] are most appropriate under Delaware law and in light of the particular circumstances of this case.'"[63] The only valuation "methodology" the court purported to employ, however, was to look at the $20.35/share value of the Tesla stock paid at closing ***on November 21*** compared to SolarCity's $21.19/share "unaffected stock price" ***from June 21***, which the trial court concluded showed that

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[61] *Id.*

[62] *Id.* at 433.

[63] Opinion at 104-05 (quoting *S. Muoio & Co. LLC v. Hallmark Ent. Invs. Co*., 2011 WL 863007, at *16 (Del. Ch. Mar. 9, 2011)).

"Tesla paid no premium."[64] Plaintiffs challenge the trial court's legal conclusion that the fair price element of entire fairness was satisfied because that conclusion was based almost entirely on one piece of "market evidence"—the market price of SolarCity's stock five months before the Acquisition closed.[65]

Comparing stock prices five months apart was not an "appropriate" methodology in light of the trial court's extensive factual findings regarding SolarCity's and the solar industry's rapidly declining performance during the five-month period after Tesla's June 21 offer.[66] Under this Court's precedents, the trial court was required to justify its reliance on SolarCity's June 21 stock price as a reliable indicator of fair value at closing based on the specific facts of this case.[67] Again, the trial court did not do so.

Musk cites *In re Appraisal of Jarden Corp.*, 2019 WL 3244085, at *31 (Del. Ch. July 19, 2019), where the Court of Chancery rejected petitioners' argument that the unaffected stock price was stale when the merger occurred five months later,

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[64] *Id.* at 114-15.

[65] AOB at 48-49.

[66] *See Aruba*, 210 A.3d at 132, 139 (holding that trial court erred by focusing on stock prices three to four months prior to valuation date).

[67] *Fir Tree Value Master Fund, LP v. Jarden Corp.*, 236 A.3d 313, 325 (Del. 2020); *Dell Inc. v. Magnetar Global Event Driven Master Fund Ltd.*, 177 A.3d 1 (Del. 2017).

finding "[t]here is no evidence to suggest that Jarden gained value from the date set for the Unaffected Market Price and the closing of the merger." In an appraisal action where petitioners' theory was that the corporation was worth **more** than the market price, the Court of Chancery found that the market price was not stale because the information that became known after that date (*e.g.*, declines in income and projections) was not value enhancing.[68] Here, by contrast, Plaintiffs contend SolarCity was worth **less** on the Acquisition Date than the market price five months earlier, and the trial court found that several pieces of negative value-relevant information about SolarCity became public after the trial court's selected "unaffected" date.

Musk failed to address *Aruba*, which provides a much closer comparison to the facts proven at trial here.[69] In *Aruba*, this Court reversed the trial court's fair value determination based on unaffected stock price where (i) "the unaffected market price was a measurement from three to four months prior to the valuation date," and (ii) "Aruba was set to release strong earnings that HP knew about but the

[68] *See also Jarden*, 236 A.3d at 322 (noting that the trial court found "the unaffected market price was not stale as of the merger date because the evidence showed that Jarden's financial prospects worsened between the unaffected trading date and closing the merger").

[69] AOB at 45-46, 52; *Aruba*, 210 A.3d 128.

market did not."[70] Here, the Acquisition closed five months after the "valuation date" the trial court selected, and the trial court found that there were subsequent disclosures of material, non-public, company-specific information that would have caused SolarCity's stock price to decline, *e.g.*, SolarCity's declining second quarter performance and reduced installation guidance, which were not fully disclosed until months after the "valuation date."[71] Musk's own expert likewise acknowledged industry-specific challenges that would have caused SolarCity's stock price to decline by nearly 24 percent in the same time period.[72]

In short, the cases Musk cites (*Jarden*, *Dell*, *DFC*) and the case he fails to cite (*Aruba*) uniformly demonstrate that the trial court erred as a matter of law by assigning almost exclusive weight to the June 21 stock price.[73]

The trial court said that SolarCity's problems and reduced guidance were accurately and timely disclosed.[74] But that misses the point. Even if the disclosures were timely and accurate for purposes of the November 17, 2016 Tesla stockholder

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[70] *Id.* at 139.

[71] Opinion at 53-54.

[72] A385:¶32.

[73] *Compare* MAB at 48 *with Dell*, 177 A.3d at 35; *DFC Global Corp. v. Muirfield Value Partners, LP.*, 172 A.3d 346, 367 (Del. 2017).

[74] Opinion at 112-13 & nn.493-94, 498.

vote, the disclosures were made ***after*** June 21, 2016. The market price on June 21 could not reflect information that was not disclosed until weeks or months later. The trial court's "temporal confusion"[75] is demonstrated by its citation to Quintero's "conce[ssion] that the guidance reductions were all public before the stockholder vote."[76] That is true but irrelevant because the guidance reductions were not public before the June 21 valuation date the trial court chose. Indeed, as the trial court acknowledged, the first disclosures of lowered guidance were not made until ***August 9, 2016***, when SolarCity issued its Second Quarter 2016 Shareholder Letter, and second quarter 10-Q.[77] As another source of disclosure, the Opinion cited to pages of the ***October 12, 2016*** Proxy Statement (AR434) that described events occurring in late ***July and August 2016***.[78] Finally, the trial court relied on AR123, a ***July 8, 2016*** email to Lyndon Rive that downplayed SolarCity's then-current guidance.[79] The record the trial court cited refutes its fair price conclusion.[80]

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[75] *Id.* at 118.

[76] *Id.* at 113 & n.498 (citing A1585 at 887:6-13 (Quintero), where Quintero agreed that SolarCity put out new guidance in August of 2016).

[77] *Id.* at 112 n.493 and 113 n.498; AR145 at AR148; AR162.

[78] Opinion at 112 n.493.

[79] *Id.* at 113 n.498; AR123.

[80] *Dell*, 177 A.3d at 23-24.

3. Musk's Other Fair Price Arguments Fail

Musk argues that the trial court also considered factors other than market price, including "SolarCity's current and future cash flows," "Evercore's fairness opinion," and "substantial anticipated synergies."[81] But this information is not a valuation "methodolog[y] . . . appropriate under Delaware law and in light of the particular circumstances of this case."[82] It amounts to nothing more than anecdotal or atmospheric circumstances that exist in almost any merger and only suggest that SolarCity had some value.

Musk also argues the trial court considered "a broad array of other valuation evidence," including (i) Fischel's premium estimate, (ii) KPMG's analysis, and (iii) that SolarCity was a "vibrant operating business."[83] "Professor Fischel's premium estimate," which the trial court mentioned, did not, as the Opinion said, "show[] that Tesla paid, at most, a modest premium at closing."[84] On the contrary, the trial court explicitly noted that Fischel testified that Tesla paid "a modest premium when measured ***at the time of contracting***,"[85] not closing. Moreover, the trial court

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[81] MAB at 47, 55-58.

[82] Opinion at 104-05 (quoting *S. Muoio*, 2011 WL 863007).

[83] MAB at 51.

[84] *Id.*

[85] Opinion at 115 (emphasis added).

expressly held that it "[had] ***not relied*** upon [Fischel's] stock indexing to find that the Acquisition price was entirely fair."[86]

The trial court also did not rely on "KPMG's independent and disinterested appraisal," as Musk claims, except to conclude that SolarCity was not insolvent.[87] Musk's assertion that the KPMG net asset valuation was "uncontested"[88] is false. As Plaintiffs' expert Quintero explained, KPMG's net asset valuation was based on certain GAAP requirements concerning how to allocate the $2.1 billion purchase price between tangible and intangible assets.[89] After making this and other adjustments, as detailed in his report, Quintero arrived at an adjusted appraised net asset value of $7.327 billion (as compared to KPMG's $8.556 billion).[90] Quintero's adjusted appraised net asset value was ***not*** challenged by Musk, and Musk presented ***no*** experts to counter Quintero's net asset value conclusions. So it is Quintero's net asset valuation, not KPMG's, that is—to use Musk's term—"uncontested."

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[86] *Id.* at 116, n.509 (emphasis added).

[87] *Compare* MAB at 51 *with* Opinion at 109 n.481.

[88] MAB at 6.

[89] A694-97; A828.

[90] A828.

Musk states that "[t]he 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."[91] This is misleading at best. The "associated debt" in question—which was specifically identified as "Non-Recourse Project Financing" in the relevant documents[92]—brought the net present value of those cash flows down to $2.2 billion.[93] But in addition to the project financing debt associated with those cash flows, SolarCity carried billions in additional corporate debt that was not "associated" with those cash flows, but that nevertheless would have to be repaid.[94] Thus, as explained in Plaintiffs' Opening Brief,[95] even if SolarCity counted these future cash flows as assets (despite substantial risks they would not be available during the 20-year payout period), they would have to count against the SolarCity's existing corporate debt.[96] Furthermore, the trial court's reference to future cash flows is at odds with its determination to disregard the DCF valuations.[97]

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[91] MAB at 6, 53 n.176 (citing Opinion at 27 & n.136).

[92] AR124 at AR132.

[93] *Id.*

[94] B98.

[95] AOB at 53-54.

[96] B98.

[97] Opinion at 110.

If future cash flows were relevant, then the trial court committed legal error by disregarding the DCF evidence.[98]

Finally, contrary to what Musk claims, nowhere did the trial court find that "at closing, SolarCity was a vibrant operating business," nor would that be a "recognized valuation standard" anyway.[99] And as for the trial court's finding "that the Acquisition was expected to be and has been synergistic,"[100] that does not make the transaction entirely fair. First, the trial court did not make a determination of either the value of synergies created by the Acquisition or the value (if any) that a reasonable buyer with complete information would pay a struggling company like SolarCity to acquire any speculative synergies in a stock-for-stock merger. Second, Musk's expert did not offer any opinion that the Acquisition actually created any synergies at all.[101]

In sum, the trial court's finding of fair price is legally unsupportable and should be reversed.

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[98] *Weinberger*, 457 A.2d at 712-14.

[99] MAB at 51.

[100] *Id.* at 55.

[101] A1868:2626:2-19, 2627:8-18.

CONCLUSION

The Acquisition was not entirely fair, and the trial court's finding to the contrary was erroneous. Judgment for Musk should be reversed and this matter should be remanded for further proceedings.

Respectfully submitted,

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