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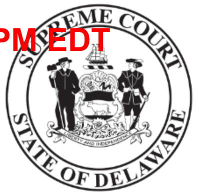

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

AMICUS CURIAE BRIEF OF CORPORATE LAW PROFESSORS IN SUPPORT OF APPELLANTS AND REVERSAL

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF IDENTITY OF AMICUS CURIAE AND INTEREST IN THE CASE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. The Trial Court Erred In Relying on SolarCity's Trading Price 6

    A. The Opinion Below Overstates the ECMH's Teachings 8

    B. SolarCity's Trading Price is an Unreliable Indicator of the Value of What Tesla Acquired 14

II. The Trial Court's Approach Would Fatally Weaken Delaware's Entire Fairness Jurisprudence 19

CONCLUSION 23

TABLE OF AUTHORITIES

Cases **Page(s)**

Chicago Corp. v. Munds,
172 A. 452 (Del. Ch. 1934) 6

Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd,
177 A.3d 1 (Del. 2017)..2, 7

DFC Glob. Corp. v. Muirfield Value Partners, L.P.,
172 A.3d 346 (Del. 2017)..2, 7

Fir Tree Value Master Fund, L.P. v. Jarden Corp.,
236 A.3d 313 (Del. 2020)..2

Gonsalves v. Straight Arrow Publishers, Inc.,
701 A.2d 357 (Del. 1997)..5

In re Cysive, Inc. S'holders Litig.,
836 A.2d 531 (Del. Ch. 2003) 20

In re Dollar Thrifty S'holder Litig.,
14 A.3d 573 (Del. Ch. 2010) 12

In re Trados Inc. S'holder Litig.,
73 A.3d 17 (Del. Ch. 2013) 21

Kahn v. Lynch,
638 A.2d 1110 (Del. 1994)..19

Kahn v. M & F Worldwide Corp.,
88 A.3d 635 (Del. 2014).. 4, 19, 20

Rapid-Am. Corp. v. Harris,
603 A.2d 796 (Del. 1992)..6

Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.,
210 A.3d 128 (Del. 2019).. 11, 16

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457 A.2d 701 (Del. 1983)..19

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Are Markets Efficient?,
CHICAGO BOOTH REVIEW (June 30, 2016),
http://review.chicagobooth.edu/economics/2016/video/are-markets-efficient
(interview with Eugene Fama and Richard Thaler) 13

Eugene F. Fama & Kenneth R. French,
Disagreement, Tastes, and Asset Prices,
83 J. Fin. Econ. 667 (2007) 10

Eugene F. Fama,
Efficient Capital Markets, in *Foundations of Finance: Portfolio Decisions and Securities Prices* 137 (1976) 8

Eugene F. Fama,
Two Pillars of Asset Pricing,
104 Am. Econ. Rev. 1467 (2014) 10

Fischer Black,
Noise, 41 J. Fin. 529 (1986)..11

Frank Partnoy,
Market Prices vs. Fundamental Value: The Case for Using Discounted Cash Flow Analysis in Securities Class Actions (Working paper, Apr. 18, 2022) 14

Jonathan Macey & Joshua Mitts,
Asking the Right Question: The Statutory Right of Appraisal and Efficient Markets, 74 Bus. Law. 1015 (2019) 9, 17

Leo E. Strine, Jr.
Who Bleeds When the Wolves Bite?: A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System,
126 Yale L.J. 1870 (2017) 11

Lynn A. Stout,
The Mechanisms of Market Inefficiency: An Introduction to the New Finance, 28 J. Corp. L. 635 (2003) 10

Nicholas Barbaris & Richard Thaler,
A Survey of Behavioral Finance,
1 Handbook of Economic Finance (2003)..10

Sanford J. Grossman & Joseph E. Stiglitz,
On the Impossibility of Informationally Efficient Markets,
70 Am. Econ. Rev. 393 (1980)...8

Tamara Belinfanti & Lynn Stout,
Contested Visions: The Value of Systems Theory for Corporate Law,
166 U. Pa. L. Rev. 579 (2018)...9

Warren E. Buffett & Lawrence A. Cunningham,
The Essays of Warren Buffett: Lessons for Corporate America
(5th ed. 2019)...12

William J. Carney & Keith Sharfman,
The Death of Appraisal Arbitrage: Ending Windfalls for Deal Dissenters, 43 Del. J. Corp. L. 61 (2018)...6

Zohar Goshen,
The Efficiency of Controlling Corporate Self-Dealing: Theory Meets Reality, 91 Cal. L. Rev. 393 (2003)...20

STATEMENT OF IDENTITY OF AMICUS CURIAE AND INTEREST IN THE CASE

Amicus Curiae (collectively "*Amici*") are professors, listed in Exhibit 1, who study and teach in the areas of corporate law, corporate finance, mergers and acquisitions, valuation, and the economic analysis of law. Their research examines stockholder rights, and they are regularly cited as authorities on corporate law and governance questions. *Amici* have no direct economic interest in the case on appeal. They wish to promote a legal regime that comports with economic insights and sound public policy.

This appeal raises the question of how much weight to place on various forms of market-based evidence of fair value in reviewing a conflicted transaction. It further raises the question of when such evidence should be deemed to meet the defendant's burden of proving a conflicted transaction's entire fairness. *Amici*'s academic work addresses these questions.

SUMMARY OF ARGUMENT

In recent years, Delaware courts have placed great emphasis on market-based evidence when called upon to place a value on the stock of publicly traded companies. *See*, *e.g*., *DFC Glob. Corp. v. Muirfield Value Partners, L.P*., 172 A.3d 346 (Del. 2017) ("*DFC Global*"); *Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd.*, 177 A.3d 1, 6 (Del. 2017) ("*Dell*") (the market for Dell stock was "efficient and, therefore, likely a possible proxy for fair value"); *Fir Tree Value Master Fund*, *L.P. v. Jarden Corp.*, 236 A.3d 313 (Del. 2020) ("*Jarden*"). As this Court has observed, "[m]arket prices are typically viewed [as] superior to other valuation techniques because, unlike, e.g., a single person's discounted cash flow model, the market price should distill the collective judgment of the many based on all publicly available information about a given company and the value of its shares." *DFC Global*, 172 A.3d at 369-70. Consistent with this thinking, the Court of Chancery's opinion below placed "heavy reliance"—indeed, nearly exclusive reliance—on "market-based evidence" in concluding "that Tesla paid a fair price for SolarCity." Op. at 111-12.[1]

Deference to market prices is perfectly appropriate and indeed affirmatively desirable in many contexts. Context, however, matters, as the evidentiary value of

[1] The Memorandum Opinion ("Op.") is attached as Exhibit A to the Notice of Appeal (Trans. ID 67665231).

market evidence is highly context-dependent. Most relevantly here, a stock's trading price cannot be a reliable marker of value where the market is not fully informed. In this case, the context shows the "market-based evidence" cannot support anything near the weight the Court of Chancery placed upon it. The sole piece of "market-based evidence" upon which the Court of Chancery relied was the "pre-announcement price"—the trading price of SolarCity stock prior to the June 21, 2016 announcement of Tesla's agreement to acquire SolarCity. Op. at 112-14. The pre-announcement price, however, reflected only the information known to the market as of that date. As the opinion below makes clear, the most sophisticated market participants—including Evercore—did not appreciate the depth of SolarCity's problems at that time. Op. at 49-54.

Furthermore, the Court of Chancery discounted the significance of a further piece of "market-based evidence" that was, if anything, more germane: the reaction of Tesla's stock price to the announcement of the SolarCity acquisition. Tesla's stock price dropped by more than 10% upon announcement of the deal, on a day where the overall market was nearly flat. This drop represented a loss in value of approximately $3 billion—one-and-a-half times the prevailing market capitalization of SolarCity. Op. at 44. We do not suggest that this drop in Tesla's stock price is conclusive evidence of an unfair price. The drop demonstrates, however, that the

market evidence in this case is at best equivocal and unable to support the great weight the court below placed upon it.

Over-reliance on ambiguous market evidence threatens not only incorrect results in individual cases but also broader undesirable policy consequences. One of the great attractions of the rule this Court announced in *MFW* is it creates beneficial incentives for parties to a conflicted transaction. *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) ("*MFW*"). Conflicted parties who adopt *MFW*'s procedural safeguards are rewarded by a substantially more forgiving standard of review. Those who fail to adopt such safeguards bear the burden of showing entire fairness, subject to the Court of Chancery's unyielding scrutiny. If, however, a defendant can meet this burden simply by pointing to some form of "market-based evidence"—especially evidence as weak and equivocal as in this case—these incentives lose essentially all their force. Whatever inconvenience the need for a trial may represent for a conflicted party, it pales in significance next to the private benefits secured by relegating disinterested decision-makers to the sidelines and retaining a free hand in transactions involving billions of dollars. The Court of Chancery's approach, thus, threatens to fatally undermine *MFW* by substantially negating the incentives *MFW* promotes.

In hastening to rely on market evidence even where that evidence is ambiguous and contestable, the opinion below represents a troubling extension of

this Court's recent valuation jurisprudence. In short, this is deference to market evidence run amok. Of course, the allure of deferring to easily observable trading prices can be difficult to resist for courts otherwise facing hard judgment calls. But this convenience comes at a cost of accuracy when the trading price is, as here, out-of-date and uninformed, or otherwise measuring the wrong thing. In such cases, market evidence cannot substitute for traditional approaches to determining fair value, however devoutly a law-trained judge may wish for it to do so. Any resulting burden on the Court of Chancery to conduct traditional valuations can be mitigated in at least two ways: (1) judges can appoint a neutral economic expert to recommend valuation findings; or (2) this Court can tailor its prior ruling in *Gonsalves v. Straight Arrow Publishers, Inc.*, 701 A.2d 357 (Del. 1997), to permit the Court of Chancery to utilize procedures that incentivize greater moderation among competing experts.

ARGUMENT

I. THE TRIAL COURT ERRED IN RELYING ON SOLARCITY'S TRADING PRICE

Delaware law has reached a curious place. Historically, Delaware's courts have been famously skeptical of the reliability of market prices as a measure of value. This skepticism was memorably encapsulated in *Chicago Corp. v. Munds*: "When it is said that the appraisal which the market puts upon the value of the stock of an active corporation as evidenced by its daily quotations, is an accurate, fair reflection of its intrinsic value, no more than a moment's reflection is needed to refute it." 172 A. 452, 455 (Del. Ch. 1934). Nor was this skepticism of market pricing confined to the dusty past. *See, e.g.*, *Rapid-Am. Corp. v. Harris*, 603 A.2d 796, 806 (Del. 1992) ("*Munds'* succinct evaluation of the market has lost none of its lustre"). Indeed, Delaware courts' apparent hostility to market evidence was long a target of criticism from law and economics scholars. *See*, *e.g.*, William J. Carney & Keith Sharfman, *The Death of Appraisal Arbitrage: Ending Windfalls for Deal Dissenters*, 43 Del. J. Corp. L. 61, 75 (2018) ("generations of careful theory and evidence of markets and valuation by brilliant, and in some cases, Nobel Laureate financial economists, [have] validat[ed] efficient capital markets in the scientific literature, but not in the courts") (footnote omitted).

In recent years, the pendulum has swung far in the other direction. Recent decisions have employed language suggesting a confidence in the reliability of

market prices that occasionally goes beyond what is justified by the academic literature, and beyond that which would be claimed by academic proponents of the Efficient Capital Markets Hypothesis (the "ECMH"). Most prominently, in the *Dell* and *DFC Global* appraisal cases, this Court characterized the ECMH in sweeping terms, concluding that "[i]n an efficient market you can trust prices, for they impound all available information about the value of each security." *DFC Global*, 172 A.3d at 370; *id*. at 368-69 ("In economics, the value of something is what it will fetch in the market. That is true of corporations, just as it is true of gold.") (footnote omitted); *see also Dell*, 177 A3d at 24 (the Court of Chancery's finding of a "valuation gap . . . ignored the efficient market hypothesis long endorsed by this court.").

Here, the Court of Chancery took this Court's endorsement of reliance on market prices a step further, extending it beyond appraisal to the context of a duty of loyalty claim involving a conflicted merger transaction. In particular, the court below embraced this Court's observation that '"[m]arket prices are typically viewed [as] superior to other valuation techniques because, unlike, e.g., a single person's discounted cash flow model, the market price should distill the collective judgment of the many based on all the publicly available information about a given company and the value of its shares'" Op. at 111 (quoting *DFC Global*, 172 A.3d at 369-70). The Court of Chancery's reliance on trading prices in this case, however, was an

error. In particular, the Court of Chancery's opinion (1) makes claims for the reliability of trading prices that are not justified by the ECMH in general, and (2) ignores context that calls into question the reliability of the trading prices as a marker of value in this case.

A. The Opinion Below Overstates the ECMH's Teachings

The ECMH, as developed by financial economists over the decades, makes relatively modest claims. The central insight is that market prices are determined by the interaction of the buying and selling decisions of market participants, all competing to identify and analyze information that will allow them to predict future prices. *See* Eugene F. Fama, *Efficient Capital Markets*, in *Foundations of Finance: Portfolio Decisions and Securities Prices* 137 (1976). Furthermore, where there are many market participants and liquid trading, market prices can be expected to reflect publicly available information quickly, such that it is difficult or impossible to consistently beat the market using publicly available information. *See* Sanford J. Grossman & Joseph E. Stiglitz, *On the Impossibility of Informationally Efficient Markets*, 70 Am. Econ. Rev. 393, 393-95 (1980) (defining a market as "informationally efficient" when "prices are such that all arbitrage profits are eliminated"). This definition of market efficiency is known as the "semi-strong" version of the ECMH, and an overwhelming mass of empirical evidence suggests the market prices for widely traded stocks are at least approximately informationally

efficient most of the time. *See* Jonathan Macey & Joshua Mitts, *Asking the Right Question: The Statutory Right of Appraisal and Efficient Markets*, 74 Bus. Law. 1015, 1019 (2019) ("Macey & Mitts") (the semi-strong form of the ECMH rests on "overwhelming empirical support"). By contrast, the "strong" version of the ECMH posits that *all* information, including non-public information, is rapidly reflected in market prices. This version of the ECMH—which would imply that insider trading could not be profitable—is not supported by empirical evidence. *See id.* (financial economists have accumulated "sufficient evidence to refute the strong form of the ECMH").

The well-supported notion of informational efficiency should not be conflated with the unfounded and widely discredited notion of "fundamental value efficiency"—that the market price of any particular security is necessarily "right." *See*, *e.g.*, Tamara Belinfanti & Lynn Stout, *Contested Visions: The Value of Systems Theory for Corporate Law*, 166 U. Pa. L. Rev. 579, 593 n.70 (2018) ("By the close of the twentieth century, . . . the idea that stock market prices always capture fundamental value had been largely abandoned by sophisticated commentators in the face of an enormous and growing empirical and theoretical literature demonstrating this often was not true."). Fundamental value efficiency is unproven and likely unprovable due to the lack of any widely accepted alternative method for measuring a company's fundamental value in the first place—a difficulty known as

the "joint hypothesis problem." *See*, *e.g.*, Eugene F. Fama, *Two Pillars of Asset Pricing*, 104 Am. Econ. Rev. 1467, 1467-68 (2014).

It is critical to recognize that informational efficiency does not necessarily imply value efficiency. Indeed, informational efficiency only leads to value efficiency if one makes highly artificial assumptions, such as the assumption that all investors have the exact same expectations as to future risks and returns. *See*, *e.g.*, Lynn A. Stout, *The Mechanisms of Market Inefficiency: An Introduction to the New Finance*, 28 J. Corp. L. 635 (2003). A stock may trade in an informationally efficient market without ever being priced in a value-efficient way. That is, a stock may quickly incorporate new publicly available information, and thus appear informationally efficient, while nonetheless persistently trading at a price above or below fair value in a fashion that cannot be reliably exploited by arbitrageurs. *See* Eugene F. Fama & Kenneth R. French, *Disagreement, Tastes, and Asset Prices*, 83 J. Fin. Econ. 667, 683 (2007) ("Offsetting actions by informed investors [will] not typically suffice to cause the price effects of erroneous beliefs to disappear with the passage of time."); *see generally* Nicholas Barbaris & Richard Thaler, *A Survey of Behavioral Finance*, 1 Handbook of Economic Finance 1053-1128 (2003). As a result of these limits to arbitrage, most leading economists have modest expectations for value efficiency. The legendary economist Fischer Black, for example, regarded "an efficient market as one in which price is within a factor of 2 of value, i.e., the

price is more than half of value and less than twice value." Fischer Black, *Noise*, 41 J. Fin. 529, 533 (1986).

Consequently, although trading prices in informationally efficient markets will often be highly relevant evidence of fair value, the market's pronouncements are hardly oracular in nature. In merger cases, where the primary concern is underlying fair value—in contrast to securities fraud cases where the primary concern is the market reaction to fraudulent information, and underlying fair value is rarely essential—reliance on prices in informationally efficient markets should be approached with caution. To the extent this Court's language in recent cases has led the lower courts to place more weight on market prices than they can bear, it would be well to remind them, "*Dell* and *DFC* did not imply that the market price of a stock was necessarily the best estimate of the stock's so-called fundamental value at any particular time." *Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, 210 A.3d 128, 137 (Del. 2019) ("*Aruba*"); *see also* Leo E. Strine, Jr. *Who Bleeds When the Wolves Bite?: A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 Yale L.J. 1870, 1930 (2017) ("[T]he claim of the efficient market hypothesis is not that a corporation's stock price at any time is a reliable estimate of fundamental value, but rather that it is not possible to design a trading strategy that will outguess the guesses of the market as a whole.") (citation omitted); *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 611 (Del. Ch.

2010) (Strine, V.C.) (rejecting the idea the Court should follow "blindly some crude rendition of the semi-strong form of the efficient capital markets hypothesis, one in which any board should treat the current market price as a reliable guidepost to decisionmaking. My understanding of ECMH is that it makes much less drastic claims.") (citation omitted).

Examples of apparent violations of value efficiency—and even informational efficiency—have multiplied over the decades. These include, of course, market-wide bubbles and slow market reactions to difficult-to-understand information. Limitations to the general ECMH have persisted and been debated for decades, most famously in the successful investment philosophy known as value investing associated with Warren Buffett. *See* Warren E. Buffett & Lawrence A. Cunningham, *The Essays of Warren Buffett: Lessons for Corporate America* (5th ed. 2019). Further, examples abound of apparently irrational reactions to content-free events, such as companies having their stock prices jump after adding ".com" to their names in the late 1990s, or, more recently, adding "Blockchain," without any change to the underlying business.

Consider an example from 2017 Nobel Prize winning economist Richard Thaler involving Herzfeld Caribbean Basin Fund, a closed-end mutual fund with other publicly traded securities as its assets. An investor could therefore replicate the fund's assets by simply buying the underlying securities directly. As Thaler tells it,

“[f]or many years, [the fund] traded at a discount of about 10-15 percent of net asset value, meaning that you could buy $100 worth of its assets for $85-90.” *Are Markets Efficient?*, CHICAGO BOOTH REVIEW (June 30, 2016), http://review.chicagobooth.edu/economics/2016/video/are-markets-efficient (interview with Eugene Fama and Richard Thaler). By itself, this so-called “closed-end mutual fund” discount is a puzzle. The fund traded under the ticker symbol “CUBA,” and on the day President Obama announced a thawing of relations with Cuba (the country) the value of CUBA (the mutual fund) skyrocketed, even as the value of the underlying securities held by CUBA remained flat. *Id.* The same assets the market “valued” at $90 on one day cost $170 the following day. *Id.*

In the same interview, Eugene Fama, whose pioneering work on market efficiency and other topics earned him the Nobel Prize in 2013, dismisses examples like this as “anecdotes.” *Id.* But even Fama does not dismiss the CUBA example because he believes the fundamental value of CUBA (the mutual fund) actually skyrocketed when President Obama relaxed tensions with Cuba (the country). He dismisses it as an “anecdote” only to suggest that this and similar examples do not furnish generalizable predictions that would form the basis for a new asset pricing model as an alternative to CAPM and its progeny. As Fama himself notes, “[t]he point is not that markets are efficient. They’re not. It’s just a model.” *Id.*

A fiduciary duty complaint, however, is itself an anecdote. The court's task in considering the market price is not to forge a new general model of asset pricing, but rather to evaluate how well the traditional model functions in the case—the anecdote—before it. Frank Partnoy, *Market Prices vs. Fundamental Value: The Case for Using Discounted Cash Flow Analysis in Securities Class Actions*, at 1 (Working paper, Apr. 18, 2022) (distinguishing between an inquiry into "the fundamental value of firms" and "the market price of their shares"). To assume the trading price demonstrates conclusively the fair price in a conflicted transaction misapplies the ECMH. Even if trading markets are generally correct *on average*, the question is whether the trading price is a valid proxy for fair price *in this particular case*. Moreover, the actions of the judiciary do not stand apart from the market. That is, if the courts rely on stock prices to approve conflicted transactions, the market price will reflect this information. In situations where a conflicted transaction appears likely, the market price will reflect this likelihood—together with the likely judicial response—creating a self-fulfilling prophecy. To assume the conclusion — that the stock price reflects fair value—would render the entire universe of fiduciary protections circular and largely nugatory.

B. SolarCity's Trading Price is an Unreliable Indicator of the Value of What Tesla Acquired

If caution is called for in relying on trading prices even in an informationally efficient market, even greater caution is necessary before concluding that a market

is informationally efficient in the first place. Market prices can only reflect information that is actually known to the market. Where material information exists that is unknown to the market, or material information becomes known only after a price-distorting transaction has been announced, the pre-announcement price says little, if anything, about fair price at the close of the transaction.

In this case, the Opinion below makes abundantly clear that material information about SolarCity at the closing was not known to the market at the announcement of the deal with Tesla. In particular, the market was not aware of the depth of SolarCity's cash flow problems at the time of the announcement. This is clear from the fact that, as the opinion below recounts, even sophisticated market participants—including Evercore and Tesla's board themselves—did not appreciate the depth of these problems. It was only as due diligence revealed confidential information, not publicly known, that the extent of the problems became clear. The Tesla board used the non-public information it learned in due diligence "to lower the price substantially—even below the original offer range." Op. at 97. In revising their views, Evercore and Tesla were relying on material non-public information that could not have been reflected in the market price before the June 21 announcement.

The same considerations leading this Court to overturn the trial court's reliance on market prices in *Aruba* apply in even greater measure here. As in *Aruba*, "the unaffected market price was a measurement from three to four months prior to

the valuation date, a time period during which it is possible for new, material information relevant to a company's future earnings to emerge." *Aruba*, 210 A.3d at 139. Also as in *Aruba*, the buyer "had more incentive to study [the target] closely than ordinary traders . . . and also had material, nonpublic information that, by definition, could not have been baked into the public trading price." *Id.* These considerations explain, in part, the Court's focus in *Dell* and *DFC Global* on the negotiated *transaction* price, rather than the *trading* price. As this Court summarized in *Aruba*, "*DFC* and *Dell* merely recognized that a buyer in possession of material nonpublic information about the seller is in a strong position (and is uniquely incentivized) to properly value the seller when agreeing to buy the company at a particular deal price, and that view of value should be given considerable weight by the Court of Chancery absent deficiencies in the deal process." *Id.* at 137. In a conflict-of-interest transaction like this, without the procedural safeguards enshrined in *MFW*, the "deficiencies in the deal process" render the "negotiated" price uninformative; yet the inadequacies of the pre-announcement price as a fair-value measure remain.

It is also worth noting that another piece of market evidence exists in this case, and it paints a very different picture of the fair value of SolarCity. Tesla's stock price dropped by approximately 10.5% upon the announcement of the SolarCity deal, on a day where the market as a whole was nearly flat. Op. at 44. This drop reflected a

loss in market capitalization of approximately $3 billion—one-and-a-half times the pre-announcement market capitalization of SolarCity.

This reaction suggests the market believed Tesla was massively over-paying for SolarCity. Macey & Mitts at 1057 ("[A] decline in the stock price of a publicly traded acquirer upon announcement of the transaction provides strong evidence that the deal price exceeds the fair value of the target."). Indeed, that the drop was larger than the cost of the deal suggests market participants not only viewed the deal as an overpayment, but also believed the nature of the SolarCity deal called into question the wisdom and probity of Tesla's board more generally, lowering the market's estimate of Tesla's future performance.

We do not suggest the drop in Tesla's stock price demonstrates conclusively that the price paid was not fair. To be sure, as the opinion below points out, Tesla's stock price had largely recovered by a week later, which may or may not indicate anything in particular about the value of SolarCity. Perhaps that recovery was the result of the market coming to appreciate SolarCity's value to Tesla. Or perhaps it had something to do with other aspects of Tesla's business. As is often the case, the market movements at issue are ambiguous and subject to multiple interpretations. But if it was a mistake to rely on the "market evidence" provided by SolarCity's preannouncement price, that mistake was compounded by simultaneously discounting countervailing market evidence. *See* Macey & Mitts, at 1064 ("[A]s

decades of literature in financial economics has recognized, a statistically significant decline in the acquirer's stock price upon announcement of the transaction is prima facie evidence of overpayment").

II. THE TRIAL COURT'S APPROACH WOULD FATALLY WEAKEN DELAWARE'S ENTIRE FAIRNESS JURISPRUDENCE

The trial court's approach here—allowing a single piece of "market evidence" to satisfy the defendant's burden to show entire fairness in a conflict-of-interest transaction—would dramatically undermine Delaware's carefully-constructed jurisprudence concerning such transactions. From *Weinberger v. UOP*, 457 A.2d 701 (Del. 1983), through *Kahn v. Lynch,* 638 A.2d 1110 (Del. 1994), and culminating in *MFW*, this Court has crafted a set of procedural safeguards for transactions involving profound conflicts—chief among them a committee of independent directors empowered to say no and stockholder approval by a majority of disinterested stockholders. *MFW*, 88 A.3d at 635.

Employing these safeguards can come at a significant cost to conflicted parties, depriving them of the ability they would otherwise have to impose their will and transact on any terms they may wish, often—as here—with billions of dollars at stake. To give boards sufficient incentive to nevertheless employ these best practices in conflicted transactions, Delaware law relaxes the applicable standard of review applied to such deals. Instead of placing the burden on the defendant to demonstrate, subject to rigorous scrutiny, that the transaction is entirely fair, a transaction employing the *MFW* safeguards is shielded by the business judgment rule.

The incentive effects of this doctrinal regime are deliberate and long-recognized. Because the procedural protections "incline transactions towards

fairness, the *Lynch* doctrine *encourages them* by giving defendants the benefits of a burden shift if either one of the devices is employed." *In re Cysive, Inc. S'holders Litig.*, 836 A.2d 531, 548 (Del. Ch. 2003) (emphasis added). In adopting the *MFW* standard, this Court adopted the trial court's reasoning that the dual protections "will provide *a strong incentive* for controlling stockholders to accord minority investors the transactional structure that respected scholars believe will provide them the best protection. . . ." *MFW*, 88 A.3d at 644 (emphasis added). *See also* Zohar Goshen, *The Efficiency of Controlling Corporate Self-Dealing: Theory Meets Reality*, 91 Cal. L. Rev. 393, 429 (2003) (under *Kahn v. Lynch* market participants have an "incentive to seek the support of the majority of the minority, thereby reducing the need for judicial judgment on the value of the deal.").

For this incentive to function effectively, however, the benefits gained must be sufficiently large to induce the conflicted party to submit to the procedural safeguards in the first place. In this case, the Court below recognized the critical role that incentives play. Op. at 86 ("Delaware law incentivizes parties 'to employ deal techniques that provide protection to [] stockholders that [are] substantially equivalent to arm's length bargaining.'"). But a conflicted party has no baseline incentive to introduce any dynamic that will counteract its own influence. The *MFW* regime holds out a deferential standard of review in hopes that conflicted parties will surrender their influence to disinterested decisionmakers. The Court below

acknowledged the importance of the incentive effects of the *MFW* regime and argued its approach would preserve them. Op. at 86-87 ("That Elon and the Tesla Board failed to follow this clear guidance [in *MFW* and its doctrinal ancestors] and yet *prevailed here* should not minimize those incentives or dilute the implications of the onerous entire fairness standard of review.") (emphasis added). We are not so sanguine. If a conflicted party can rely on little more than the pre-announcement transaction price to demonstrate the fairness of transaction in question, the party has little to gain from submitting to the procedural protections in *MFW*.

The lesson for the next conflicted party is stark. Facing what is meant to be "Delaware's most onerous standard," *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 44 (Del. Ch. 2013), the conflicted party here satisfied its burden to prove entire fairness by reference chiefly to the pre-announcement price, despite the extensive procedural infirmities cataloged by the Court below and despite the powerful implication of the drop in Tesla's stock price on announcement. So long as a controller can gesture to some roughly contemporaneous trading price, even if based on stale information or lacking access to non-public information, the controller would seemingly be far better off by excluding any disinterested decisionmakers. Why willingly submit to any mechanism that would mimic arm's-length negotiation? The Court below suggests that the next conflicted decisionmaker might still do so to escape "expensive and time-consuming litigation" and avoid the

"unnecessary peril" associated with trial. Op. at 86-87. If the lower court's approach to fair price is affirmed, however, the next conflicted party faces little peril in the face of the entire fairness test, and while the expense associated with trial is no doubt large in everyday terms, it is likely insured and, more importantly, shrinks to insignificance in comparison with the stakes at issue in a multi-billion-dollar transaction.

Moreover, even if a conflicted party were to consent to the creation of a special committee, that committee would have no doctrinal basis on which to insist on price increases, in light of the lower court's approach to valuation. On what grounds besides personal pique could a special committee risk the wrath of a controlling stockholder or other conflicted party in order to fight for better terms? By allowing the trading price to subsume the remainder of the entire fairness analysis, the lower court's approach inhibits special committees—and indeed all boards—from insisting on securing better terms than the trading price.

CONCLUSION

In sum, the lower court's approach to the fair price prong of the entire fairness analysis should be vacated. The pre-announcement trading price cannot do the work the Court asked it to do in this case. It was not a reliable measure of the value of the business Tesla acquired, given the grave problems at SolarCity that were not known publicly at the time. More broadly, the lower court's extreme reliance on trading prices would severely undermine this Court's careful framework for inducing conflicted parties to adopt mechanisms designed to mimic arm's-length bargaining.

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