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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

BRIEF OF CURRENT AND RETIRED PRACTITIONERS AND PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF REVERSAL

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici, who are identified in the Appendix to this brief, are a diverse group of current and retired practitioners, including former leaders of the Business Law Section of the American Bar Association; and professors who study and teach in the areas of corporate law and/or governance, corporate finance, and/or executive compensation. *Amici* regularly study, teach, and advise clients in the areas of corporate law, corporate governance, stockholder rights and/or executive compensation. Many of the *Amici* are regularly cited as authorities on issues of corporate law and/or governance and/or executive compensation.

Amici are seeking to file the attached brief on their own behalf and not on behalf of any entity, including any law firm, corporation and/or academic institution. Each *Amicus* has authority to file a brief on their personal behalf and has personally authorized filing this brief.

Amici have no direct economic interest or personal stake in the outcome of this case. They also have varying opinions about Elon Musk's activities outside of his role as CEO of Tesla Inc., and most certainly do not endorse his harsh criticisms of the Delaware judiciary. But this case affects more than Musk and Tesla; otherwise, *Amici* would not be submitting this brief.

Stockholders, general counsels, and directors across a wide range of Delaware companies are rightly concerned that the decisions of the trial court call into question

the reasonableness and predictability of Delaware's corporation law, and thus harm the very stockholders that Delaware law seeks to protect. The decisions below inject uncertainty into decisions that do not require statutory approval by stockholders and elevate the court's business judgment above stockholder voting rights long held sacrosanct. *Amici* wish to promote a legal regime of sound public policy and predictability that advances wealth maximization through allowing proper risk-taking while protecting the rights of stockholders from faithless fiduciaries, not from their own informed decisions.

RULE 28(c)(4) STATEMENT

Pursuant to Supreme Court Rule 28(c)(4), *Amici* state that no party's counsel authored the brief in whole or in substantial part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than counsel for the *Amici*—contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION

The decisions on appeal are problematic in two principal ways: First, the January 30, 2024 Post-Trial Opinion ("Op.") determined that Musk was a "transaction-specific controller," based, in part, on him being a "Superstar CEO." In the trial court's view, Musk's equity incentive compensation plan was not simply an "interested fiduciary" transaction—i.e., a transaction that would be subject to entire fairness review unless approved by *either* independent and disinterested directors at the board or committee level or a vote of the disinterested stockholders—but rather was a "conflicted controller" transaction. The trial court thus determined that adoption of the plan was subject to entire fairness review absent prior compliance with the process laid out in *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) ("*MFW*"), even though no stockholder vote was required by statute.

Second, even though the challenged transaction consisted of stock-option compensation—a type of "interested fiduciary" transaction that is normally reviewed only for waste if approved by the disinterested stockholders, *see, e.g.*, *Calma ex rel. Citrix Sys., Inc. v. Templeton*, 114 A.3d 563, 587 (Del. Ch. 2015) (collecting cases)—the trial court held in its December 2, 2024 Ratification Opinion ("Ratif. Op.") that Musk's adjudicated status as a "transaction-specific control[ler]" and the application of the *MFW* framework meant that the disinterested stockholders

could not ratify the compensation package, either in 2018 or after the fact in 2024. Ratif. Op., 38-40 & n.161.

As the trial court rightly observed at the pleadings stage, Delaware law's "doctrinal suspicion" of transactions with controlling stockholders "has its costs….A rule holding corporate fiduciaries personally accountable for *all* transactions with conflicted controllers *unless* the fiduciaries demonstrate the transaction is entirely fair will necessarily suppress at least some beneficial transactions." *Tornetta v. Musk*, 250 A.3d 793, 798 (Del. Ch. 2019). This case highlights that problem.

If permitted to stand, the rulings below—which foretell an impractical, litigation-driven approach to numerous transactions, especially executive compensation—draw into question Delaware's longstanding position as the leading jurisdiction in the United States on corporate law. The trial court's approach to "transaction-specific control" creates substantial uncertainty in making decisions (including those about executive compensation) that are necessary for businesses to function. The considerations of "inherent coercion" that motivate this Court's historical suspicion of conflicted-controller transactions either do not apply, or apply with vastly less weight, when a fiduciary only exercises "control" over a specific transaction. This is particularly true when the transaction is an executive compensation package and the disinterested stockholders have a free and fair opportunity to adopt or reject the package. The Post-Trial Opinion does not offer any principled distinction between a fiduciary "controlling" a specific

transaction in which he is interested and the directors simply failing in that case to act independently of that fiduciary. It is difficult to see why the former scenario should be subject to significantly more stringent review than the latter. Rejection of the stockholders' ability to ratify executive compensation arrangements when a "transaction-specific controlling stockholder" is involved likewise enhances litigation risk and chills the ability of Delaware corporations to offer bespoke incentive packages, thereby reducing the utility of the corporate form.

The trial court's decisions fail the most basic test: Is the result in the best interests of the average stockholder of a Delaware company? The answer is "no." This Court should restore the ability of Delaware corporations to rely on settled principles of law, including by rejecting the trial court's application of the "transaction-specific controlling stockholder" doctrine and confirming that *ex post* stockholder ratification is available in cases of this nature.

SUMMARY OF ARGUMENT

I. The Post-Trial Opinion erroneously held that Tesla's stock-option incentive-based compensation plan for its CEO ("2018 Plan") was a "conflicted-controller transaction" subject to "entire fairness" review under *MFW*, based on the court's factual determination that Musk was a "transaction-specific controlling stockholder." This conclusion finds no support in precedent. Prior rulings define a controlling stockholder as either a majority holder or a person who lacks majority interest but has "a combination of potent voting power and management control such that the stockholder could be deemed to have effective control of the board without actually owning a majority of stock." *Corwin v. KKR Fin. Holdings, LLC*, 125 A.3d 304, 307 (Del. 2015) (footnote omitted). Controllers are treated more stringently than fiduciaries who are not "controlling stockholder[s]" because of the concern over controllers' coercive and retributive abilities. *See Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1116-17 (Del. 1994). Musk had no such abilities.

II. The Ratification Opinion erroneously refused to give legal effect to the June 13, 2024 vote of Tesla's disinterested stockholders to ratify the 2018 Plan (the "Ratification Vote"). The Ratification Opinion treated Musk's "transaction-specific control" as permanently disabling the stockholders from ratifying an executive compensation plan that they believe is in their corporation's best interest, even after its milestones were met.

The Ratification Opinion conflicts with nearly 75 years of Delaware jurisprudence, which has long-recognized "that the courts will not substitute their own 'business judgment' for that exercised in good faith by the stockholders." *Gottlieb v. Heyden Chem. Corp.*, 91 A.2d 57, 58 (Del. 1952); *see also In re Investors Bancorp, Inc. S'holder Litig.*, 177 A.3d 1208, 1211 (Del. 2017) ("When the directors submit their specific compensation decisions for approval by fully informed, uncoerced, and disinterested stockholders, ratification is properly asserted as a defense in support of a motion to dismiss.").

The Ratification Opinion declined to give any effect to the Ratification Vote in large part on the grounds that *MFW* "would have little meaning, and…would fail to fulfill its central objective[,]" if "a second, later vote" could ratify a transaction that did not comply with *MFW*. Ratif. Op., 40. But the trial court's ruling conflicts sharply with this Court's ratification precedents, particularly those in the field of executive compensation where deference to the stockholder franchise is both longstanding and well-grounded in policy. There is no evidence to suggest that the stockholders were coerced in ratifying the 2018 Plan in 2024, and the trial court identified none. *Amici* urge the Court to determine that an after-the-fact, fully informed and uncoerced ratification vote of the disinterested stockholders renders the transaction subject to review under the business judgment rule, *even if* the transaction initially involved a "controlling stockholder."

ARGUMENT

I. THIS COURT SHOULD REJECT THE TRIAL COURT'S "TRANSACTION-SPECIFIC CONTROLLING STOCKHOLDER" ANALYSIS

The Post-Trial Opinion deviated from established Delaware law when holding that the 2018 Plan was a "*conflicted-controller* transaction" subject to "entire fairness" review based on a "transaction-specific" analysis of control and a newly-coined "superstar CEO" concept. Op., 2 (emphasis added), 147. Even if Musk was a "controlling stockholder" for relevant purposes, this Court should reject the trial court's further determination that *MFW* compliance is required for transactions that do not require stockholder approval under the Delaware General Corporation Law ("DGCL"), including but not limited to executive compensation.

A. The Trial Court's Approach Raises Significant Doctrinal Issues

This Court has long deferred to the informed and uncoerced vote of disinterested stockholders who choose to affirm the economic merits of a transaction for themselves: "When the real parties in interest—the disinterested equity owners—can easily protect themselves at the ballot box by simply voting no, the utility of a litigation-intrusive standard of review promises more costs to stockholders in the form of litigation rents and inhibitions on risk-taking than it promises in terms of benefits to them." *Corwin*, 125 A.3d at 313.

This policy of deference to the stockholder franchise applies to stockholder-approved transactions with fiduciaries, including grants of equity incentive compensation to a corporation's directors and officers. *See Investors Bancorp*, 177 A.3d at 1211 ("Stockholder ratification [of equity incentive plans] serves an important purpose—directors can take self-interested action secure in the knowledge that stockholders have expressed their approval."). A grant of equity compensation to an interested fiduciary, if approved by the disinterested stockholders, is reviewable only for waste. *Id.* at 1219-20.

Transactions with "controlling stockholders," however, are treated differently and with markedly greater suspicion than transactions with fiduciaries who are not "controlling stockholders." Through a line of cases including *Kahn v. Lynch Communication Systems, Inc.*, 638 A.2d 1110 (Del. 1994), and *Kahn v. Tremont Corp.*, 694 A.2d 422 (Del. 1997), and continuing through *MFW* and *In re Match Group, Inc. Derivative Litigation*, 315 A.3d 446 (Del. 2024), this Court has moved toward a rule requiring entire fairness review of *any* transaction in which a controlling stockholder receives a material non-ratable benefit, absent compliance with *MFW*.[1] *See Match*, 315 A.3d at 461-63.

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[1] As discussed below, *Amici* question the utility of such a broad rule, both generally as to the category of transactions where the DGCL does not require a stockholder vote, and specifically as to executive compensation transactions. Extending *MFW* into this space functionally imposes a shadow legislative code and overrides Delaware's traditional

The policy basis for this divergent treatment is a concern over a controlling stockholder's coercive or retributive ability. *See Tornetta*, 250 A.3d at 800 (Delaware law presumes that a "conflicted controller…is able to exert coercive influence over the board and unaffiliated stockholders." (footnote omitted)); *see also In re KKR Fin. Holdings LLC S'holder Litig.*, 101 A.3d 980, 991-95 (Del. Ch. 2014), *aff'd sub nom. Corwin v. KKR Fin. Holdings, LLC*, 125 A.3d 304 (Del. 2015).

Musk had no such coercive or retributive power, and the trial court's opinions did not conclude otherwise. Instead, the trial court focused primarily on whether the directors acted independently of Musk, in service of a conclusion that Musk was a "transaction-specific controlling stockholder," and hence that the 2018 Plan implicated the coercion concerns motivating *Lynch*, *Tremont* and *MFW*. *See* Op., 147.

The trial court's approach is unworkable. Two years ago, in another decision involving Musk, this Court left open the question whether the definition of a "controller" should include a 22% stockholder who "may exercise 'managerial supremacy,'" but "lacks the voting power to elect directors, approve transactions, or perhaps use her voting power to block transactions," describing the question as "an

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approach to executive compensation decisions. The fairness-enhancing effect of *MFW*'s dual protections is not cost-free. *See* Lawrence A. Hamermesh, et al., *Optimizing the World's Leading Corporate Law: A Twenty-Year Retrospective and Look Ahead*, 77 Bus. Law. 321, 343-44 (Spring 2022).

important one, which can greatly affect the direction of our law[.]" *In re Tesla Motors, Inc. S'holder Litig.*, 298 A.3d 667, 699 n.117 (Del. 2023) ("*SolarCity*") (citation omitted). Such an expansion "potentially excludes persons from '*Corwin* cleansing' and subjects them to the rigorous entire fairness standard of review." *Id.*

The trial court made several unwarranted analytical leaps from the question left open in *SolarCity.* First, it incorrectly found that "control" existed based almost entirely on Musk's status as a strong and singular personality, and without reference to any coercive or retributive power he may have had *as a stockholder.* Second, the trial court made this determination on a "transaction-specific" basis, finding that Musk controlled the board's actions with respect to its approval of the 2018 Plan, but declining to reach whether Musk was a controlling stockholder generally. Both of these steps were necessary to reach the trial court's conclusion that *Corwin* cleansing was unavailable and only an *MFW* process could secure business judgment review. Neither step is desirable from a policy perspective.

The extension of control to a 22% stockholder without board nomination or veto rights confuses "control" in the sense used by this Court in prior opinions—the unilateral ability to replace the board, or to obtain a desired result or prevent an undesired result at the board level, displacing the business judgment of the directors—with lack of independence. The trial court's discussion illustrates the problem that arises if a finding of "control" is not based upon the potential coercive power possessed by a controller

but not an interested fiduciary. The trial court analyzed whether the other directors acted independently of Musk when they approved the 2018 Plan, concluded that they did not, and on that basis determined that Musk possessed "control." Op., 103-46. But this approach to finding control places the judicial cart before the horse. The trial court did not explain how that finding was different from a simple finding of lack of independence, which would not render the 2018 Plan incapable of ratification by the stockholders. Under that rendering, when would a finding that the directors did not act independently *not* be control?

The trial court's second leap is even more problematic and unjustifiable. Stockholders who own less than a majority of shares either "have such formidable voting and managerial power that they, as a practical matter, are no differently situated than if they had majority voting control[,]" or they do not. *In re PNB Holding Co. S'holders Litig.*, 2006 WL 2403999, at *9 n.39 (Del. Ch. Aug. 18, 2006). The extent of the stockholders' "voting and managerial power" does not change with each transaction. "Transaction-specific control," as an instrument for shifting a transaction from the "interested fiduciary" category to the "conflicted controller" category, has no support in precedent.[2] On this point, too, the trial court conflated the directors' lack of independence with a finding that Musk had "control."

[2] The statement in *In re Oracle Corp. Derivative Litigation*, __ A.3d __, 2025 WL 249066, at *12 (Del. Jan. 21, 2025), that a "minority stockholder can be a controlling

The trial court's formulation of a "holistic" test for finding "actual control over the board of directors during the course of a particular transaction," Op., 109 (citation omitted), reveals the difficulties. The analysis considers all "possible sources of influence that could contribute to a finding of actual control over a particular decision," which can change depending upon "the facts and circumstances surrounding the particular transaction" at issue. Op., 109-10 (citations omitted). The trial court even stated in a footnote that the "factual findings that render Musk a controller…support a finding that the majority of the Board lacked independence," without explaining what (if anything) distinguishes lack of independence on the one hand from the presence of a controlling stockholder on the other. Op., 104 n.546.

This approach to "control" is unsupportable. "Control" is a common English word with multiple meanings. Directors granting themselves an incentive equity compensation package *by definition* "control" that decision, in the sense described by the trial court. But such a decision—classic "interested-fiduciary" self-dealing—is reviewed only for waste if the stockholders ratify it. *Investors Bancorp*, 177 A.3d at 1219-20. No policy supports treating a CEO's compensation differently on the basis that the board lacked independence from the CEO.

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stockholder…by exercising actual control over a specific transaction" is dicta. The trial court had determined that Larry Ellison was *not* a controlling stockholder, and no party asked this Court to rule on the viability of the "transaction-specific controlling stockholder" theory.

The trial court's "transaction-specific control" approach is also circular. The Post-Trial Opinion evaluated Musk's and the other directors' conduct in-depth *before* determining whether Musk controlled the board's decision on the transaction, and therefore the standard of review would be entire fairness. Op., 103-46. That approach inevitably means that fiduciaries, directors and advisors face considerable uncertainty beforehand over whether a transaction will be evaluated under the entire fairness standard of review, which means the transaction must comply with *MFW*. This is both because a contrary determination can only be made through litigation, and because the conduct that could constitute "transaction-specific control" will still be in the future. Since a finding of "transaction-specific control" will usually be outcome-determinative as to entire fairness, this results in an unpredictable and ad hoc approach to the standard of review that is not desirable.[3]

[3] For example, in *Oracle*, the board formed a special litigation committee to consider the claims, but the committee later returned control of the claims to the stockholder-plaintiffs. This was in large measure because the parties could not be certain whether Larry Ellison would be deemed a "controlling stockholder" and thus what the standard of review would be. *See In re Oracle Corp. Deriv. Litig.*, 2020 WL 3867407, at *2 (Del. Ch. July 9, 2020). *See also* Elizabeth Pollman & Lori W. Will, *The Lost History of Transaction-Specific Control*, Journal of Corporation Law (forthcoming 2025), https://ssrn.com/abstract=5138377.

B. The Trial Court's "Superstar CEO" Doctrine Is Unprecedented and Unworkable

The trial court based its "transaction-specific control" finding in large part on a novel and unworkable concept, the "Superstar CEO," Op., 110-46, which this Court should reject.

Doctrinally, the trial court's determination that Musk exercised control over the 2018 Plan because of his attributes as a "Superstar CEO" and "visionary" leader (Op., 2, 8, 111 n.571, 115 n.588; *see also id.* at 115-22) is, quite literally, without precedent in Delaware law. The Post-Trial Opinion is the first and only reported decision of a Delaware court to use the phrase "Superstar CEO," which came from a 2023 law review article that is, in large measure, about Musk. *Id.* at 2, 120-21 (citing and quoting Assaf Hamdani & Kobi Kastiel, *Superstar CEOs and Corporate Law*, 100 Wash. U. L. Rev. 1353 (2023) (hereinafter "*Superstar CEOs*")).

But even that article recognizes the inherent analytical shortcomings in treating a "Superstar CEO" as a controlling stockholder, not the least of which is that a "Superstar CEO['s] power…differs from that of majority shareholders" because it is necessarily "limited in scope and duration[:]" A board "is more likely to challenge such CEOs if they lose their star aura or if the expected harm from self-dealing exceeds the surplus generated by their unique contribution to company value." *Id.* at 1399. Majority stockholders are not subject to the same constraints, *id.*, and the Post-

Trial Opinion highlights the flawed logic of treating a "Superstar CEO" as a controlling stockholder.

After summarizing evidence concerning Musk's influence over Tesla's management, Op., 117-20, the trial court asserted that "CEO superstardom is relevant to controller status because the belief in the CEO's *singular* importance shifts the balance of power between management, the board, and the stockholders." *Id.* at 121 (emphasis in original). According to the trial court, "Superstar CEO status creates a distortion field that interferes with board oversight[,]" justifying a finding of control and enhanced judicial oversight. *Id*. at 121-22 (footnote and internal quotation marks omitted).

That is a statement about independence rather than a statement about "control." In other words, the Superstar CEO's influence on directors derives from his ability to provide a benefit to the corporation and, by extension, to the directors (which relates to independence), not from his ability to dictate the directors' votes (which relates to control). As learned commentators recently observed, "[b]eing valuable to the company does not make an executive a controlling stockholder, nor does it implicate the concerns underlying *Lynch*—namely, the potential to use affirmative voting power to unseat directors and implement transactions that the minority stockholders do not like, and use blocking voting power to impede other transactions." Hamermesh, *Optimizing the World's Leading Corporate Law* at 346.

The distinction between influence over directors or even value to the corporation and control is critical since the *MFW* framework was developed to address concerns about "a controlling stockholder['s]…inherently *coercive* authority over the board and the minority stockholders." *Match*, 315 A.3d at 467 (emphasis added).

Any leverage Musk had in negotiating the 2018 Plan was not tied to any coercive authority deriving from his status as a stockholder, but to his right to say "no" and direct his talents and attention elsewhere. Every executive negotiating compensation has that option. The "Superstar CEO" wields comparatively greater influence by dint of their greater perceived importance to the company, not because of coercion based on actual control. The potential for perverse incentives, for punishing success by eliminating the "Superstar CEO's" ability to have compensation approved by the stockholders, is clear. Adopting this concept would allow Delaware courts to intrude on executive compensation—an area where they should only be involved when the stockholders cannot speak for themselves.

The Post-Trial Opinion recognizes the inherent problems with the "Superstar CEO" concept, noting that the term "lacks definitional precision" and cautioning that "the concept should not be deployed far and wide." Op., 122 n.632. But the litigation benefit of successfully asserting "Superstar CEO" status ensures that the claim will arise frequently unless this Court checks it. The trial court's acknowledgment of the novelty of this approach should give this Court pause in deciding whether to

incorporate it into control jurisprudence. Hamermesh, *Optimizing the World's Leading Corporate Law* at 345 (noting that courts "have been cautious in determining that a minority holder with a significant role in the company was a controller").

This Court should reaffirm that a "controlling stockholder" must have coercion based on voting power (i.e., is a majority owner) or on "a combination of potent voting power and management control" that results in "effective control," *Corwin*, 125 A.3d at 307 (footnote omitted), which "effective control" exists regardless of the transaction. The "Superstar CEO" concept should be rejected.

C. *MFW* Should Not Apply to Transactions That Do Not Require Stockholder Approval

This Court has never spoken to whether a conflicted-controller transaction not requiring statutory approval by stockholders (such as ordinary-course transactions like executive compensation or intracompany agreements) must nonetheless comply with *MFW* to receive business judgment rule protection. *Amici* respectfully submit that expanding *MFW* to encompass transactions that do not require stockholder approval is unwise and will promote needless litigation while deterring valuable actions.

MFW is rooted in Delaware's difficulty grappling with squeeze-outs by controlling stockholders that previously were always subject to entire fairness review, which prospect created litigation risk and chilled otherwise valuable transactions. *See*

In re MFW S'holders Litig., 67 A.3d 496, 524-36 (Del. Ch. 2013), *aff'd sub nom. Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014); *In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604, 614-24 (Del. Ch. 2005); Hamermesh, *Optimizing the World's Leading Corporate Law* at 338-39; William T. Allen, et al., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 Bus. Law. 1287, 1306-09 (August 2001). The solution, for a category of transactions where both board and stockholder approvals were required by statute, was to formalize a process by which both board and stockholder action could be conclusively deemed free of the coercive influence of the controlling stockholder before trial.

Delaware policymakers have never required a statutory vote on executive compensation, and even federal policymakers have required only an expressly non-binding "say-on-pay" vote. *See* 15 U.S.C. § 78n-1. The effect of the trial court's decisions, however, is to almost always require such a vote in any situation when a CEO who also owns shares is critical to the company. This Court should be wary of effectively cobbling on to executive compensation decisions a stockholder approval requirement that the legislature could have adopted, but never has.

This Court should restore the settled law that approval by *either* a fully independent committee *or* a majority of the minority vote suffices to invoke the business judgment rule, as to the compensation of a controlling stockholder or an

affiliate of the controller. This alone would do much to restore confidence that Delaware's traditional balanced approach to corporate governance remains reliable.

* * *

The trial court's determination that Musk was a controlling stockholder, and its consequent determination that only compliance with the *MFW* process could protect the 2018 Plan under the business judgment rule, were erroneous. Application of the entire fairness standard in these circumstances was contrary to this Court's precedents and to sound policy.

II. THE TRIAL COURT'S STOCKHOLDER RATIFICATION ANALYSIS MISUNDERSTANDS DELAWARE LAW AS APPLICABLE TO EXECUTIVE COMPENSATION

Amici also disagree with the trial court's rejection of the June 13, 2024 Ratification Vote. Under Delaware corporate law, the stockholders are the ultimate stakeholders. Because the "business and affairs" of corporations are "managed" by fiduciaries, 8 *Del. C.* § 141(a), Delaware has developed standards of review to police *fiduciary conduct* to protect stockholders. Stockholder votes, however, are reviewed only for coercion and disclosure violations—i.e., the Court does not protect stockholders from themselves. The trial court misunderstood the concept of "ratification" as applied in the executive compensation context.

Delaware courts have recognized that a fully informed, uncoerced stockholder ratification vote approving equity compensation packages for directors or officers results in judicial deference under the business judgment rule unless the transaction amounts to waste. *See, e.g.*, *Kerbs v. Cal. E. Airways, Inc.*, 90 A.2d 652, 655 (Del. 1952); *Gottlieb*, 91 A.2d at 179; *Beard v. Elster*, 160 A.2d 731, 736-39 (Del. 1960). In this context, reliance on the disinterested stockholders' ratifying vote is "a more rational means to monitor compensation than judicial determinations of the 'fairness,' or sufficiency of consideration, which seems a useful technique principally, I suppose, to those unfamiliar with the limitations of courts and their litigation processes." *Lewis v. Vogelstein*, 699 A.2d 327, 338 (Del. Ch. 1997). The

principle that "valid stockholder ratification leads to waste being the doctrinal standard of review for a breach of fiduciary duty claim" is "well-established and non-controversial." *Calma*, 114 A.3d at 587. This Court held that, at least when stockholders ratify either "specific director awards" or a "plan [that is] self-executing, meaning the directors had no discretion when making the awards," then, "[w]hen stockholders know precisely what they are approving, ratification will generally apply." *Investors Bancorp*, 177 A.3d at 1222.

This is a wise policy for many reasons, not least that each executive's compensation is unique and the value of an equity package depends on future stock performance.

Here, there is no doubt that Tesla's stockholders knew precisely how Tesla's stock had performed after 2018 and the amount of compensation they were approving in 2024. Under *Investors Bancorp*, and under the broader ratification doctrine laid out in *Corwin*, the 2018 Plan should have been subject to the business judgment rule.

Amici believe that judicial deference to the fully informed, uncoerced vote of disinterested stockholders is the optimal approach to executive compensation *even if* the recipient is a controlling stockholder (or a "transaction-specific controlling stockholder," if that concept is viable under Delaware law).

The Ratification Opinion justifies application of the entire fairness test by reference to three categories of "risks to minority stockholders"; namely, "coercion risk," "bypass risk" and "tunneling risk." Ratif. Op., 38. But with a stockholder vote on the exact terms of an equity incentive compensation package, particularly in hindsight, these risks are minimal to non-existent. And even if Musk was in some legally significant way a "controlling stockholder" with respect to the 2018 Plan, the usual reasons to suspect implicit coercion are absent in the context of a ratification vote on executive compensation long after the terms of the compensation agreement have been fulfilled.

Regarding coercion risk, the alleged controlling executive has no retaliatory leverage except the unwaivable right to resign if the compensation package offered is unsatisfactory. Here, by the time of the Ratification Vote, Musk no longer even had that leverage because he had already met the relevant milestones. Neither the Post-Trial Opinion nor the Ratification Opinion offers any reason to believe that the stockholders' votes in favor of the 2018 Plan were coerced in any way.

Similarly, regarding bypass risk, the trial court offered no basis to believe that Musk could have obtained the same equity package through alternative means if the Board or the stockholders had voted the package down, particularly if the stockholders had voted it down in 2024. And tunneling risk was at a true minimum where, as here, the stockholders were asked to approve the exact terms of an equity issuance.

The trial court's rejection of the 2024 Ratification Vote on disclosure grounds is circular. The stockholders at that time received the Post-Trial Opinion detailing the trial court's concerns about the original process and vote. The only basis for finding the Ratification Vote to be "uninformed" was that the proxy statement asserted that the Ratification Vote might extinguish the fiduciary duty claims, Ratif. Op., 41-43, even though the proxy statement also noted the possibility that the trial court could reach a different conclusion (as, indeed, it did). The stockholders knew exactly what they were being asked to ratify in 2024, and they chose to do so. It makes no sense to say that the vote was uninformed because stockholders voted to ratify based on statements that their vote might have even *more effect* than the trial court gave it.

Even if the trial court was correct to subject the 2018 Plan to *MFW* in the first instance—it was not—*MFW* should have no application to an informed stockholder ratification vote of a previously approved transaction, particularly with respect to compensation. The result of the trial court's view of the law would be that if the judiciary once determines that an executive compensation transaction involves a conflicted controller—even a transaction-specific controller who is not a controller with respect to a future ratifying vote—then that transaction is forever outside the control of the corporation and its stockholders. That cannot be Delaware law.

To return to the opening: Can this result be seen as in the best interests of the average stockholder of a Delaware company? The answer is "no," because it

subordinates the views of those with their money at stake to an ad hoc judicial judgment. The trial court's approach creates substantial and needless uncertainty, not least by leaving open the possibility in every case that a stockholder-plaintiff will succeed at trial by persuading a court that there is a transaction-specific controlling stockholder, thereby after-the-fact, with no possibility of stockholder ratification, changing the standard of review. It also upends the stockholder franchise by allowing a minority of the minority – or even just one stockholder – to nullify the vote of a supermajority. Uncertainty about the standard of review and the effect of a stockholder vote do not serve the interests of Delaware corporations, their fiduciaries or their stockholders.

CONCLUSION

The trial court's decisions should be reversed on the basis of long-standing, sound principles of Delaware corporate law and policy.

Dated: April 14, 2025

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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

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Dated: April 14, 2025

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