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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 Court Below: Court of Chancery of the State of Delaware, C.A. No. 2018-0408-KSJM

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT TESLA, INC.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

This case presents a question of paramount import to the Chamber and its members incorporated in this state: can disinterested stockholders decide fundamental business questions for themselves? Traditionally, Delaware's answer to this question has been "yes." In this case, the Court of Chancery concluded otherwise.

Respectfully, the Chamber's position is that fully informed and uncoerced stockholders are entitled to ratify important business decisions with "real world" economic consequences. Likewise, the Chamber's members are affected by a ruling that ratification is not available post-trial but before final judgment. The Chamber believes that Delaware law should enable rather than foreclose the option of seeking ratification by disinterested stockholders. If upheld, the Court of Chancery's decision will have ramifications well beyond the unique circumstances of this case that the parties have addressed—hence the Chamber's desire to participate as *amicus*. Delaware courts have long declined to use their equitable power when stockholders are able to protect themselves at the ballot box. The Court of Chancery's bright-line ruling declining to give effect to a stockholder vote in this case signaled a concerning departure from those core principles.

The Court of Chancery's award of $345 million in attorneys' fees—the largest in Delaware history—also concerns the Chamber because of the effect it will likely have on class and derivative actions across the country. In recent decades, the Chamber's members have been the targets of ever-increasing numbers of stockholder lawsuits, almost all lawyer-driven. Outsized fee awards distort the incentives of the plaintiffs' bar, encouraging more lawsuits targeting the largest corporations with the deepest pockets. They also contravene public policy. Delaware courts need not award fees of nearly $18,000 per hour to incentivize plaintiffs' firms to take on nonfrivolous cases. Awards of that magnitude merely divert earnings from stockholders, the ostensible beneficiaries of representative litigation.

Many of the Chamber's members choose to incorporate in Delaware because Delaware corporate law offered the "predictable guidance" required for businesses to thrive.[1] Delaware courts also aimed to be "neither 'management-friendly' nor 'stockholder-friendly.'"[2] The result below—plaintiffs' lawyers receiving a nine-figure fee for relief that stockholders twice rejected—runs counter to core principles of Delaware law. It also struck many as counterintuitive.[3] The Chamber asks this Court to reinforce the predictability and balance that have long been a hallmark of Delaware jurisprudence.

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[1] *See Maffei v. Palkon*, --- A.3d ----, 2025 WL 384054, at 28 (Del. Feb. 4, 2025). All internal citations, quotations, and alterations are omitted unless otherwise noted.

[2] *See Why Businesses Choose Delaware*, State of Delaware, https://corplaw.delaware.gov/whybusinesses-choose-delaware/ (last visited Mar. 9, 2025).

[3] *See, e.g.*, The Editorial Board, *Musk Loses, Trial Lawyers Win*, THE WALL STREET JOURNAL (Dec. 3, 2024) ("About two-thirds of Fortune 500 companies are incorporated in Delaware owing to the state's well-established corporate law principles, which the ruling upends. It will encourage more dubious lawsuits that enrich plaintiff attorneys, whom the judge awarded $345 million—payable in Tesla stock or cash."); Matt Levine, *Matt Levine's Money Stuff: Elon Still Can't Get His Money*, BLOOMBERG (Dec. 3, 2024) ("This struck me as roughly fair: Ultimately the shareholders should get to decide how much to pay their chief executive officer, and if they weren't fully informed when they voted on the options in 2018, then why shouldn't they just be able to vote again, in 2024, with full information?"); Keith Paul Bishop, *Delaware Court Awards Attorneys Nearly $18,000/Hour For Frustrating The Will Of The Stockholders*, THE NATIONAL LAW REVIEW (Dec. 10, 2024) ("The Delaware Court of Chancery is famously a court of equity. It is hard to see the equity in one judge overturning not once, but twice, the will of directors and shareholders and forcing them to pay hundreds of millions of dollars for a result that they believed was not in their best interests.").

STATEMENT PURSUANT TO SUPREME COURT RULE 28(C)(4)

Pursuant to Supreme Court Rule 28(c)(4), *amicus curiae* states that (i) no party's counsel authored this brief in whole or in substantial part; (ii) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (iii) no person—other than the *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

I. Delaware courts can be counted on to protect stockholders in the absence of another independent, disinterested, and sufficiently informed decision maker.[4] Conversely, when those stockholders have "the free and informed chance to decide on the economic merits of a transaction for themselves," Delaware courts refrain from "second-guess[ing] the determination of impartial decision-makers with . . . an actual economic stake in the outcome."[5] To depart from this principle of judicial restraint would be to disturb the very "[f]oundation[]" of Delaware corporate law.[6] Respectfully, the decision below does just that.

Delaware courts place great value on stockholder votes, in many circumstances giving them dispositive effect. Delaware law thereby "seeks to balance the interest in promoting fair treatment of stockholders and the utility of avoiding judicial inquiries into the wisdom of business decisions."[7] The trial court's concerns for "the deterrent effect of derivative litigation" do not provide sufficient grounds to cast aside this core principle.[8]

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[4] *See* J. Travis Laster, *The Effect of Stockholder Approval on Enhanced Scrutiny*, 40 Wm. Mitchell L. Rev. 1443, 1443 (2014).

[5] *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 313 (Del. 2015).

[6] *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 207 (Del. Ch. 2007).

[7] *Id.*

[8] *See Tornetta v. Musk*, 326 A.3d 1203, 1227 (Del. Ch. 2024) (the "Ratification Opinion").

The Chamber believes that disinterested stockholders of Delaware corporations should be entitled to ratify an agreement or transaction that they believe is in their best interests. Ratification allows stockholders with the economic stake in the corporation to determine, on a fully informed basis, whether to accept or reject the costs and benefits of the transaction. Rather than protect stockholders, however, the Court of Chancery's decision raises significant questions of general applicability as to when ratification is a viable option in corporate governance, which in turns affects predictability for the Chamber's members. Corporations are less likely to undertake the costs and risks of stockholder votes if it is uncertain whether and how those votes will be given weight by Delaware courts. Moreover, post-trial ratification should not be foreclosed in all circumstances, as the decision below appears to do. Stockholders should be the final arbiters of their own best interests. There is no sufficient justification to extinguish that principle entirely because of the progress of litigation that is itself intended to protect those same stockholders.

II. The Court of Chancery also awarded excessive attorneys' fees. As this Court explained last year, at some point fee awards "exceed their value as an incentive to take representative cases and turn into a windfall."[9] The $345 million fee award here is the largest in Delaware history, even when compared to lawsuits

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[9] *In re Dell Techs. Inc. Class V Stockholders Litig.*, 326 A.3d 686, 702 (Del. 2024) ("*Dell II*").

that generated a common fund, and despite the fact that a majority of disinterested stockholders armed with the post-trial opinion rejected the "substantial benefit" of a rescinded equity grant on which the fee award was based. The award far exceeded what was necessary to defray the fees and costs incurred litigating the case. Nor is a fee in the hundreds of millions of dollars, translating to an hourly rate in the tens of thousands, necessary to incentivize plaintiffs' counsel to pursue cases like this one. Outsized fee awards will encourage more lawyer-driven litigation targeting corporations, including the Chamber's members, and risk undermining public confidence in the law and the courts.

ARGUMENT

I. The Court of Chancery erred by foreclosing the possibility that stockholders may ratify a transaction after trial.

A. Ratification reflects bedrock principles of Delaware law.

Stockholder ratification reflects "[f]oundational principles" of Delaware law to which Delaware courts have adhered for decades.[10] Departure from those principles is inconsistent with longstanding Delaware public policy, removes the ability of disinterested stockholders to determine what is in their best interests, and makes Delaware law less predictable.

Delaware courts consistently give powerful weight to the views of stockholders in a variety of contexts, and for good reason. Delaware courts have long recognized that "informed, uncoerced, disinterested shareholder ratification of a transaction in which corporate directors have a material conflict of interest has the effect of protecting the transaction from judicial review except on the basis of waste."[11] Ratification allows stockholders "to affirm that action taken is consistent

[10] *See Netsmart*, 924 A.2d at 207.

[11] *Lewis v. Vogelstein*, 699 A.2d 327, 334, 336 (Del. Ch. 1997); *see also In re Invs. Bancorp, Inc. Stockholder Litig.*, 177 A.3d 1208, 1211 (Del. 2017) ("Stated generally, stockholder ratification means a majority of fully informed, uncoerced, and disinterested stockholders approved board action, which, if challenged, typically leads to a deferential business judgment standard of review."); *Marciano v. Nakash*, 535 A.2d 400, 405 n.3 (Del. 1987) (fully-informed stockholder approval "permits invocation of the business judgment rule and limits judicial review to issues of gift or waste with the burden of proof upon the party attacking the transaction"); *Michelson v. Duncan*, 407 A.2d 211, 219 (Del. 1979) ("[V]oidable acts are

with shareholder interests"[12] because "the entire atmosphere is freshened and a new set of rules invoked where formal approval has been given by a majority of independent, fully informed stockholders."[13]

This deference to the views of stockholders extends to a variety of other contexts beyond "classic" common-law ratification.[14] The Delaware General Corporation Law authorizes stockholders to cure voidable or defective corporate acts.[15] Fully informed, uncoerced, and disinterested stockholder votes likewise "cleanse" purported breaches of fiduciary duty arising from a transaction for which stockholder approval is required—a doctrine that, once reaffirmed, helped curb a wave of burdensome strike suits.[16] Even in transactions involving a conflicted

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susceptible to cure by shareholder approval . . . It is only where a claim of gift or waste of assets, fraud or Ultra vires is asserted that a less than unanimous shareholder ratification is not a full defense."); *Kerbs v. Cal. E. Airways*, 90 A.2d 652, 655 (Del. 1952) ("Stockholders' ratification of voidable acts of directors is effective for all purposes unless the action of the directors constituted a gift of corporate assets to themselves or was *ultra vires*, illegal, or fraudulent."); *Lewis v. Hat Corp. of Am.*, 150 A.2d 750, 753 (Del. Ch. 1959) ("It is clearly established in Delaware that stockholder ratification of corporate action which is not *per se* void renders such action immune from minority stockholder attack[.]"); *Gerlach v. Gillam*, 139 A.2d 591, 592–93 (Del. Ch. 1958) ("an attack on [a] ratified transaction normally must fail").

[12] *Lewis*, 699 A.2d at 334, 335.

[13] *Gottlieb v. Heyden Chem. Corp.*, 91 A.2d 57, 59 (Del. 1952).

[14] *See Gantler v. Stephens*, 965 A.2d 695, 713 (Del. 2009).

[15] *See* 8 *Del. C.* §§ 144, 204.

[16] *Corwin*, 125 A.3d at 306; *see also id.* at 309 n.19 (collecting cases).

controlling stockholder, a vote of fully informed, uncoerced, and disinterested stockholders can shift the burden of proof at trial[17] or, when coupled with a special committee of disinterested and independent directors, invoke the business judgment rule.[18] These examples demonstrate the many ways in which Delaware courts historically have respected the voice of stockholders in corporate governance.

The Chamber respectfully submits that the policy rationales underlying Delaware's respect for stockholder votes—including judicial restraint, fairness, and predictability—remain vibrant and of critical importance today for Delaware corporations.

First, Delaware courts have long recognized that stockholders are better positioned than courts to make business decisions affecting the companies in which they have invested. "[T]he power to review is the power to decide."[19] Historically, Delaware courts have been circumspect in exercising that power, instead "desir[ing] to let business decisions be made by the directors and stockholders of Delaware corporations."[20] That is because "judges are poorly positioned to evaluate the

[17] *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1117 (Del. 1994).

[18] *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, 653–54 (Del. 2014).

[19] Stephen M. Bainbridge, *Director Primacy in Corporate Takeovers: Preliminary Reflections*, 55 Stan. L. Rev. 791, 815 (2002).

[20] William T. Quillen & Michael Hanrahan, *A Short History of the Court of Chancery 1792–1992*, https://courts.delaware.gov/chancery/history.aspx (last visited Mar. 17, 2025); *see also* Laster, *supra* n.4, at 1443 ("When a stockholder plaintiff claims that a corporate decision constituted a breach of fiduciary duty, a court applying

wisdom of business decisions."[21] In particular, "the size and structure of executive compensation are inherently matters of judgment."[22]

Fully informed and uncoerced stockholders are also better situated to decide the merits of challenged transactions—even if a court might disagree with their decision. Unlike courts, stockholders have an "actual economic stake in the outcome."[23] Indeed, "what legitimizes the stockholder vote as a decision-making mechanism is the premise that stockholders with economic ownership are expressing their collective view as to whether a particular course of action serves the corporate goal of stockholder wealth maximization."[24] "In this day and age in which investors also have access to an abundance of information about corporate transactions from sources other than boards of directors, it seems presumptuous and paternalistic to

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Delaware law searches for an independent, disinterested, and sufficiently informed decision maker. If one exists, then the court defers to the decision that the qualified decision maker made. Only in the absence of a qualified decision maker will the court assume that role for itself.").

[21] *See Corwin*, 125 A.3d at 313.

[22] *Brehm v. Eisner*, 746 A.2d 244, 263 (Del. 2000); *see also* Lawrence A. Hamermesh, Jack B. Jacobs & Leo E. Strine, Jr., *Optimizing the World's Leading Corporate Law: A Twenty-Year Retrospective and Look Ahead*, 77 Bus. Law. 321, 342 n.99 (2022) ("Appraising a company sold in a conflicted merger with no market test is difficult enough; judicial pricing of compensation packages is unmoored in standards that would make any exercise of discretion reviewable in any coherent and consistent way.").

[23] *Corwin*, 125 A.3d at 314.

[24] *See Crown EMAK Partners, LLC v. Kurz*, 992 A.2d 377, 388 (Del. 2010).

assume that the court knows better in a particular instance than a fully informed corporate electorate with real money riding on the corporation's performance."[25]

Second, there is "a gut-level sense of fairness" to giving stockholders—the residual risk bearers—the final say about their company.[26] Most representative litigation in corporate America is lawyer-driven. Aside from plaintiffs, who often hold a nominal number of shares, stockholders have no real say in choosing the lawyers or in how the litigation is conducted.[27] When a corporation is confronted with an unwanted lawsuit, Delaware law should not allow "self-appointed stockholder plaintiffs . . . to seek to hold directors liable for a decision that a majority of the stockholders endorsed[.]"[28]

Third, the Chamber and its members benefit from the certainty of knowing that ratification is a viable option in corporate governance and that fully informed, uncoerced stockholder votes will be given weight under Delaware law. For the Chamber and its members, it is critical that "specific disputes are consistently handled by courts, thus giving business[persons] predictable guidance by which to

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[25] *Harbor Fin. Partners v. Huizenga*, 751 A.2d 879, 901 (Del. Ch. 1999).

[26] Laster, *supra* n.4, at 1457 n.50.

[27] *See In re Straight Path Commc'ns Inc. Consol. Stockholder Litig.*, 2022 WL 728844, at *5 (Del. Ch. Mar. 11, 2022) ("While the stockholders have chosen the corporate director or manager, they have no such election as to a plaintiff who steps forward to represent them.").

[28] *Corwin*, 125 A.3d at 313, n.28.

order their relations."[29] Granting effect to stockholder ratification provides Delaware corporations with increased certainty while allowing disinterested stockholders to make the ultimate decision over a challenged business decision. But holding a ratification vote is not a cost-free or risk-free exercise.[30] Corporations are less likely to undertake those costs and risks if they do not believe Delaware law will honor the views of their stockholders.

[29] *See Maffei*, 2025 WL 384054, at *28.

[30] Hamermesh et al, *supra* n.22, at 380.

B. The Court of Chancery erred by foreclosing post-trial ratification.

In declining to give the Ratification Vote any effect, the Court of Chancery established what is effectively a bright-line rule that disinterested stockholders can never vote to ratify an action after trial. The Chamber respectfully submits that this result is inconsistent with Delaware law and that, from a policy perspective, Delaware corporations are much better served by the ability to submit a challenged transaction to disinterested stockholders, allowing them to make the ultimate decision as to what is in their best interests.

Much of the Court of Chancery's decision focused on the purported unprecedented nature of post-trial ratification.[31] But Delaware courts do not apply the doctrines of ratification and cleansing "narrowly."[32] On the contrary, Delaware courts have "allowed a party to raise an affirmative defense based on a stockholder vote that occurred during litigation" at various stages of a case.[33] The decision below

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[31] *Ratification Opinion*, 326 A.3d at 1212, 1221, 1226, 1228.

[32] *See In re Anaplan, Inc. Stockholders Litig.*, 2024 WL 3086013, at *6 (Del. Ch. June 21, 2024), *aff'd*, 2025 WL 369753 (Del. Feb. 3, 2025).

[33] *Ratification Opinion*, 326 A.3d at 1228; *see, e.g.*, *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 723 (Del. Ch. 1999) (pleadings), *aff'd sub nom. Walker v. Lukens, Inc.*, 757 A.2d 1278 (Del. 2000); *Michelson*, 407 A.2d at 216 (summary judgment pending); *Kleinman v. Saminsky*, 200 A.2d 572, 575 (Del. 1964) (after summary judgment); *Kerbs*, 90 A.2d at 659 (after entry of a final order denying the relief sought).

was the first to proscribe ratification based on the stage of a case, even though the court had not yet entered final judgment.

The basic principles underlying ratification are equally, if not more, applicable after a trial on the merits. The threat of coercion is significantly reduced because the court has adjudicated a purportedly disloyal act and ordered a remedy, giving stockholders optionality. Stockholders also have the benefit of a fully developed trial record (and in cases like this one, an opinion).[34] The Chamber respectfully disagrees that giving effect to a post-trial ratification "flies in the face of the policy bases for all relevant rules of procedure and the law-of-the-case doctrine—finality, efficiency, consistency, and the integrity of the judicial process."[35] Allowing stockholders—rather than courts—to be the final arbiters of their own best interests would promote those values, as Delaware courts have recognized for many years.

The Court of Chancery's concern that post-trial ratification "would eviscerate the deterrent effect of derivative suits" is also misplaced.[36] Derivative actions are a

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[34] *See Mayer v. Adams*, 141 A.2d 458, 461 (Del. 1958) (declining to require presuit demand upon stockholders because, among other reasons, "in the ordinary case the stockholders in meeting could not satisfactorily determine the probable merits of a minority stockholder's suit without a reasonably complete presentation and consideration of evidentiary facts").

[35] *See Ratification Opinion*, 326 A.3d at 1227–28.

[36] *Id*. at 1225–26.

means of "protect[ing] the stockholder."[37] So too are the rules of equitable review.[38] "When the real parties in interest . . . can easily protect themselves at the ballot box . . . 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."[39] Ratification does not invite fiduciary misconduct. On the contrary, it allows disinterested stockholders to decide whether to ratify a transaction they believe to be beneficial to their interests.

Simply put, disinterested and uncoerced stockholders armed with a fully-developed factual record are not going to ratify a transaction that they do not want.[40] Rational directors are just as unlikely to present an unwanted or detrimental transaction for ratification in the first instance. And if a transaction is attractive enough that disinterested, informed, and uncoerced stockholders may approve it,

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[37] *Hawes v. City of Oakland*, 104 U.S. 450, 453 (1881).

[38] *See* Adolph A. Berle, Jr., *Corporate Powers As Powers in Trust*, 44 Harv. L. Rev. 1049, 1049 (1931) (powers granted to the management of a corporation "are necessarily and at all times exercisable only for the ratable benefit of all the shareholders as their interest appears. . . . many of the rules nominally regulating certain specific uses of corporate powers are only outgrowths of this fundamental equitable limitation, and *are consequently subject to be modified, discarded, or strengthened, when necessary in order to achieve such benefit and protect such interest*") (emphasis added).

[39] *Corwin*, 125 A.3d at 313.

[40] *See Singh v. Attenborough*, 137 A.3d 151, 152 (Del. 2016) ("[S]tockholders would be unlikely to approve a transaction that is wasteful.").

particularly after an adverse ruling at trial, then ratification may further protect stockholders from opportunistic litigation by making plaintiffs' counsel think twice about whether litigation is actually advancing stockholder interests.

The most effective checks on post-trial ratification would be those that Delaware law has recognized for decades: stockholders must be "fully informed" and "uncoerced."[41] The trial court made no finding of coercion in connection with the ratification vote.[42] Instead, the court found a disclosure violation based not on the process or the economics, but the supposed failure of the proxy statement to "fully capture the issues" regarding the legal effect of the stockholder vote.[43] The Chamber respectfully submits that a failure to accurately predict an uncertain legal outcome should not doom a ratification vote.

American businesses operate in a complex legal environment. The law is not always clear. The Court of Chancery's disclosure holding, however, carries potentially broad implications about corporate disclosures relating to legal risks. Being candid with stockholders about legal uncertainty should not be a disclosure violation.

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[41] *See Corwin*, 125 A.3d at 312.

[42] *Ratification Opinion*, 326 A.3d at 1233.

[43] *Id.* at 1233–34.

Judicial oversight is critical to protect stockholders in the absence of an informed, disinterested decision maker. But judicial oversight is unnecessary when stockholders can protect themselves. The Court of Chancery's decision to foreclose post-trial ratification made Delaware law less enabling and predictable, removed disinterested stockholders from making an informed decision to what was in their best interests, and should be reversed.

II. The Court of Chancery's fee award was excessive, particularly in light of the stockholder vote.

The Court of Chancery's $345 million fee award to plaintiff's counsel was excessive, highlighting the need for balance when awarding attorneys' fees and the importance of ensuring that Delaware continues to be viewed as "neither 'management-friendly' nor 'stockholder-friendly.'"[44] From the Chamber's perspective, this is a critical issue affecting its members because of the precedent its sets and the resulting incentives that drive class and derivative actions.

The Court of Chancery awarded the largest fee in Delaware history, topping the $304 million award in *Americas Mining* in 2012 and the $266.7 million award affirmed last year in *Dell*.[45] Both of those cases yielded common funds in excess of $1 billion. This case did not yield any common fund. Nor was this case akin to large fee awards in nationwide tobacco and opiate cases which involved physical harm and even deaths allegedly caused by the defendants.[46]

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[44] *See Why Businesses Choose Delaware*, State of Delaware, *supra* n.2, at 2.

[45] *See Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1263 (Del. 2012) (affirming award of $304 million in fees in connection with $2.03 billion common fund); *Dell II*, 326 A.3d at 706 (affirming award of $266.7 million in fees in connection with $1 billion settlement).

[46] *See, e.g., Brown & Williamson Tobacco Corp. v. Chesley*, 7 A.D.3d 368, 374 (N.Y. App. Div. 1st Dep't 2004); *In re: Nat'l Prescription Opiate Litig.*, MDL 2804, Case No. 1:17-md-2804 (N.D. Ohio Aug. 6, 2021), Dkt. 3814 at 2.

The *Sugarland* factors are merely a means to arrive at a "reasonable" fee award.[47] And as this Court recently observed, there is "an inherent conflict" between counsel and client in the context of a fee petition because the "more the attorneys receive, the less goes to the [corporation]."[48] Awarding anything more than a "reasonable" fee "siphon[s] money away from stockholders and into the hands of their agents."[49] Fee awards must therefore be "made with moderation and a jealous regard to the rights of those who are interested."[50]

The Court of Chancery's approach departed from the policies underlying the corporate benefit doctrine. Traditionally, fees were awarded to "spread[] the costs" of litigation,[51] but plaintiffs' counsel sought and received far more than necessary to recover their costs.[52] Nor did the trial court appear to consider in determining the fee award the equity of requiring stockholders to pay (albeit indirectly) for a benefit they twice rejected.

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[47] Del. Ch. Ct. R. 23.1(e)(1); *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 151 (Del. 1980); *see also* Del. R. Prof. Conduct 1.5(a) ("A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.").

[48] *Dell II*, 326 A.3d at 697.

[49] *Id.* at 702-03.

[50] *Internal Imp. Fund Trs. v. Greenough*, 105 U.S. 527, 536–37 (1881).

[51] *Dell II*, 326 A.3d at 697; *see also Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391–97 (1970).

[52] *See Ratification Opinion*, 326 A.3d at 1262.

This Court has noted the need to go beyond cost-shifting to "incentivize[] counsel to accept challenging cases,"[53] but the sheer magnitude of this fee award provides a troubling precedent and the wrong incentives for the plaintiffs' bar. Fees awarded too liberally have given rise to high volumes of meritless litigation.[54] This is well evidenced by the wave of disclosure-only settlements that pervaded Delaware courts for years until *Trulia* was decided. Delaware courts should not overcorrect, however, by awarding unreasonably large fees for meritorious cases. Outsized fee awards exacerbate the "Willie Sutton effect," i.e. the tendency of plaintiffs' counsel to "focus on bigger issuers."[55] Plaintiffs' firms will be further incentivized to challenge—regardless of the merits—big-dollar contracts, compensation, and transactions in the hopes of receiving a percentage-based fee for one of them.

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[53] *Dell II*, 326 A.3d at 702.

[54] *Anderson v. Magellan Health, Inc.*, 298 A.3d 734, 748 (Del. Ch. 2023) (noting the continued "pursuit of legally meritless disclosure claims"); *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884, 891–92 (Del. Ch. 2016) (discussing settlements of merger strike suits that "generate fees for certain lawyers"); *In re Dell Techs. Inc. Class V Stockholders Litig.*, 300 A.3d 679, 686 (Del. 2023) ("By awarding fees in those cases, the [Court of Chancery] may well have contributed to the harm that they caused.").

[55] *W. Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, 310 A.3d 985, 997 (Del. Ch. 2024) ("*Moelis I*"); *see also* Charles R. Korsmo & Minor Myers, *The Structure of Stockholder Litigation: When Do the Merits Matter?*, 75 Ohio St. L.J. 829, 871 (2014) ("merger litigation is disproportionately targeted towards larger deals and deeper pockets, and the larger the deal the more intense the litigation activity").

Huge fee awards also undermine public confidence in the law and the courts. There is a perception that stockholder litigation in Delaware continues to proliferate[56] because of the prospect of generous fee awards. This dynamic has long been an issue with entire fairness cases.[57] There is also a perception that representative litigation is a game sometimes played only by lawyers for personal gain and without regard to the actual stockholders on whose behalf these lawsuits are purportedly brought. Although these abuses are not universal, they are also not merely academic.[58]

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[56] *See, e.g.*, *Clem v. Skinner*, 2024 WL 668523, at *1 (Del. Ch. Feb. 19, 2024) ("Over the past several years, *Caremark* suits have proliferated in Delaware."); *Garfield v. Getaround, Inc.*, C.A. No. 2023-0445-MTZ, at 3:20–4:9 (Del. Ch. Feb. 15, 2024) (TRANSCRIPT) (describing the "unprecedented and highly publicized flood" of "*Boxed* charter amendment cases"); *Knight v. Miller*, 2023 WL 3750376, at *7 (Del. Ch. June 1, 2023) ("[T]he Court of Chancery has had a steady diet of breach of fiduciary duty suits regarding allegedly excessive director compensation. These claims have become fodder for quick settlements and substantial fee requests.").

[57] *See, e.g.*, *In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604, 605 (Del. Ch. 2005) (discussing the settlement value associated with an entire fairness case "not necessarily because of its merits but because it cannot be dismissed").

[58] *See, e.g.*, *In re Fox Corp. Derivative Litig.*, 307 A.3d 979, 990 (Del. Ch. 2023) (describing the incentive for "[e]ntrepreneurial counsel" to "file as fast as possible in an effort to gain control of the case" so they can "get paid"); *In re Del Monte Foods Co. S'holders Litig.*, 2010 WL 5550677, at *5 (Del. Ch. Dec. 31, 2010) ("Considerable debate has surrounded allegations that plaintiffs' firms induce pension funds to bring securities litigation, a practice known as 'pay-to-play.'"); *Garfield*, C.A. No. 2023-0445-MTZ, at 4:20–5:24 ("Seeking a fee that a company CFO has affirmed in a sworn affidavit would render the company insolvent appears to be a betrayal of the stockholders you purport to represent and a betrayal of the functions that plaintiffs counsel plays in the broader ecosystem.").

It is "legitimate to ask, outside our somewhat insular legal universe, whether the public would ever believe that lawyers must be awarded many hundreds of millions of dollars in any given case to motivate them to pursue representative litigation or to discourage counsel from settling cases for less than they are worth."[59] The Court of Chancery recognized that the original fee request was "*many* hundreds of millions beyond what is necessary to motivate attorneys to pursue representative litigation."[60] But a fee award of over $300 million is excessive in itself. Stockholders of Delaware corporations, including many of the Chamber's members, ultimately pay the price when courts award excessive fees.

[59] *Dell II*, 326 A.3d at 702.

[60] *Ratification Opinion*, 326 A.3d at 1251.

CONCLUSION

The Chamber respectfully submits that the Court should reverse the Court of Chancery's opinion, thus reaffirming bedrock principles of stockholder ratification and attorneys' fee awards that provide balance and predictability to Delaware corporations and their stockholders.

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I, Daniel A. Griffith, hereby certify that on April 22, 2025, I caused true and correct copies of the foregoing Corrected Brief of *Amicus Curiae* Chamber of Commerce of the United States of America in Support of Appellant Tesla, Inc., and Certificate of Compliance to be served through File & Serve*Xpress* on the following counsel of record:

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