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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
	)	

BRIEF AMICUS CURIAE OF TESLA RETAIL STOCKHOLDERS IN SUPPORT OF APPELLANTS AND REVERSAL

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INTEREST OF AMICI CURIAE

Amici Alexandra Merz, Laurence Goldberg, Farzad Mesbahi, Herbert Ong, and John Stringer are sophisticated and prominent retail investors and longtime holders of Tesla stock.

Alexandra Merz is an investment professional with over 30 years of experience in the financial industry. She is the Founder and CEO of an investment analysis and consulting firm. When Merz first sat in a Tesla vehicle in 2020, she recognized the transformative nature of the product, which she compares to switching from a dial phone to a modern smartphone. She invested that week and poured thousands of hours into researching Tesla. She is now in the process of ordering her fifth Tesla car.

Farzad Mesbahi is a former Tesla employee who works full time creating content about Tesla and other technology topics on YouTube. Mesbahi worked for Tesla from 2017 to 2021 and has owned Tesla stock since 2012.

Herbert Ong is an entrepreneur who has founded three startups and currently serves as the CEO of one. He hosts a twice-daily podcast about Tesla and has been a Tesla stockholder since 2012.

Laurence Goldberg is an author, angel investor, and founder of six companies. He first invested in Tesla in 2014. He has purchased five Teslas and has driven across the country in a Tesla eight times.

John Stringer is the Founder and President of the Tesla Owners Club of Silicon Valley. He became a Tesla stockholder in 2019, shortly after purchasing his first Tesla vehicle. Like Merz, that experience was transformational for Stringer: he felt that Tesla was to cars what Amazon was to bookstores.

Amici all participated in the stockholder vote held at Tesla's 2024 annual meeting ("2024 Ratification Vote"), where they voted to ratify Elon Musk's 2018 performance-based compensation package ("Performance Plan"). Mesbahi, Ong, and Goldberg had participated in the previous stockholder vote to approve the Performance Plan in 2018. Amici believe that the Performance Plan was instrumental in incentivizing Musk to deliver unprecedented growth to Tesla between 2018 and 2024, which in turn generated significant returns for stockholders. When the Chancellor rescinded the Performance Plan in January 2024, Amici were among the thousands of stockholders who expressed frustration with the decision and welcomed an opportunity to reaffirm their support for the Performance Plan.

Amici closely reviewed the Proxy Statement that accompanied the 2024 Ratification Vote, along with the Chancellor's January 2024 post-trial opinion. After carefully considering these materials, Amici voted to ratify the Performance Plan along with 72 percent of Tesla's other disinterested stockholders, concluding that the package is in both Tesla's and Amici's best economic interests.

When the Chancellor declined to give legal effect to the 2024 Ratification Vote, Amici were shocked and dismayed that a single judge (in a lawsuit brought by a single stockholder) could overrule the deliberate and informed judgment of an overwhelming majority of Tesla's stockholders, all purportedly in the name of protecting *their* best interests. Amici fear that an adverse decision in this Court will devalue their investment in Tesla and deprive Amici and other Tesla stockholders of their right under Delaware law to be the ultimate judges of their economic best interests. Amici therefore have a strong interest in ensuring that this Court upholds the 2024 Ratification Vote and continues to recognize the right of stockholders to ratify the voidable acts of a corporate board.

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

Pursuant to Supreme Court Rule 28(c)(4), Amici state 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 persons – other than Amici, its members, or its counsel – contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

The question at the heart of this case is simple: does a majority of a corporation's fully informed, disinterested stockholders get to judge whether their board's actions are in their best interest? Under Delaware law, the answer to that question is plainly yes. But in the decision below, the Chancellor thwarted the informed judgment of a supermajority of stockholders, imposing unjustified impediments to the well-established right of stockholders to ratify officer-compensation decisions. The impact of that decision is not limited to Elon Musk's compensation or the threat the decision poses to the value of Tesla stockholders' shares. It also threatens the foundations of Delaware corporate law, which, at bottom, aims to protect and promote stockholders' own reasoned decision making—not supplant stockholders' considered judgments.

Reasonable minds might disagree about whether the Performance Plan is in stockholders' best interest. But Amici and their fellow Tesla stockholders are entitled to make that judgment for themselves, free of second-guessing by courts that purportedly have their best interests at heart. Because the result below contravenes longstanding principles regarding the stockholder franchise and corporate democracy, this Court should reverse.

I. TESLA'S STOCKHOLDER BASE MADE A FULLY INFORMED DECISION IN RATIFYING THE PERFORMANCE PLAN

A. Tesla Has A Uniquely Informed And Engaged Stockholder Base

Tesla has a unique mix of stockholders that sets it apart from other publicly traded companies. One of the most notable attributes of Tesla's stockholder base is its high proportion of retail investors, who are known for their close monitoring of Tesla's affairs and their deep engagement with and enthusiasm for the company. *See* Harring, *How Tesla Rose to Retail Investor Stardom*, CNBC (Dec. 20, 2023); Hull, *Elon Musk Has Made Millionaires Out of His Most Loyal Fans*, Bloomberg (Dec. 18, 2020). At the time of the 2024 Ratification Vote, 43 percent of Tesla's common stock was held by disinterested retail investors—the largest proportion of retail investors of any company in the S&P 500. *See* Kerber, *Tesla Turns to Musk's Small Shareholder Fans to Back $56 Billion Payday*, Reuters (June 10, 2024).[1]

Tesla's retail investors are one-of-a-kind. They pour considerable effort into researching and understanding the company's operations and have constructed a "dense, sprawling ecosystem of podcasts, Reddit threads[,] and YouTube channels dedicated to nearly every facet of Tesla." Hull, *supra*. Few other public corporations

[1] By contrast, retail investor ownership of General Motors, Amazon, and Microsoft is 12, 17, and 21 percent, respectively. Root, *Who Owns Tesla Stock? A Lot of Ordinary Investors*, Barron's (Mar. 2, 2023); *General Motors Company is Heavily Dominated by Institutional Owners*, Yahoo! Finance (Feb. 20, 2025).

boast a retail stockholder community with such a strong grassroots network dedicated to understanding their company's operations and finances.

Amici are active and prominent participants in this community. After leaving Tesla, Farzad Mesbahi started a YouTube channel, where he hosts podcasts and creates videos dedicated to educating his 295,000 subscribers—many of whom are fellow Tesla stockholders—about the auto market, Tesla, and Musk. *See* Farzad, YouTube, https://tinyurl.com/Farzad-YT-Channel. Herbert Ong has also devoted significant resources to educating the general public and fellow stockholders about Tesla. He created a website called "Brighter $TSLA," which serves as an all-in-one resource for Tesla investors seeking information about the company's operational milestones and financials. *See Brighter $TSLA*, Brighter with Herbert, https://www.herbertong.com/pages/for-the-mission-for-the-investor. Ong also hosts a twice-daily podcast about Tesla and related topics on his YouTube channel, which has over 100,000 subscribers and averages 100,000 views per day. Brighter with Herbert, YouTube, https://tinyurl.com/Herbert-YT-Channel. Alexandra Merz regularly posts about Tesla news and financial data on X.com, where she has 182,000 followers. *See* AleXandra Merz (@TeslaBoomerMama), X.com, https://x.com/TeslaBoomerMama. She also cohosts a weekly podcast, "CyberBull$," where she and other Tesla investors analyze Tesla's strategy and financials. Laurence Goldberg similarly comments on Tesla affairs on X.com,

where he has over 40,000 followers. *See* Larry Goldberg (@TeslaLarry), X.com, https://x.com/teslalarry. He also appears periodically as a podcast guest to discuss Tesla and related topics. Goldberg estimates that he spends approximately ten hours per week studying Tesla. And John Stringer is the Founder and President one of the largest Tesla owners clubs in the country, Tesla Owners Silicon Valley, which has over 1.1 million followers on X.com. He also cohosts a weekly podcast called Tesla Beat.

Tesla's stockholders, including Amici, are drawn to the company in large part because of their strong belief in the ability of Tesla's CEO, Elon Musk, to deliver value to stockholders. For example, Musk is a major reason why Ong first purchased Tesla stock in 2012: he believed in Musk's creativity and vision and was encouraged by the fact that Musk had put so much of his own money into the company. The same is true of Goldberg. He first invested in Tesla in 2014 after conducting extensive research on the company's product and Musk himself. He views Musk as a once-in-a-generation CEO who combines technical expertise with transformative business acumen. Ong and Goldberg are hardly outliers. The trust Tesla stockholders have in Musk's capabilities and performance are why 95 percent of shares voted to reelect Musk to the board of directors at Tesla's 2023 annual meeting. *See* Tesla, Inc., Current Report (Form 8-K) (May 16, 2023).

Retail investors' strong belief in Musk also makes them more likely to stick with the company for the long haul. Musk's unique leadership style and proven track record make many investors confident that, under his direction, Tesla's "share price will continue to surge" over time. Harring, *supra*. Thus, fluctuations in the stock price over the years haven't "made [retail investors] doubt the company" as much as they've led them to double down on the opportunity to pick up more shares. *Id.*; Hull, *supra*. Stringer's and Goldberg's experiences with the stock are characteristic. Although Tesla's stock price has increased significantly since 2014, it has also experienced dramatic peaks and troughs. Goldberg therefore believes Tesla can be a difficult stock for short-term investors to hold. For similar reasons, Stringer focuses on the company's long-term prospects. Retail investors like Goldberg and Stringer have weathered these ups and downs because of their strong conviction in Musk.

The key for Amici, as with many investors, is Musk. If he were to depart the company, then a significant reason why Amici have invested in Tesla and have confidence in its future performance would disappear.

B. Tesla Stockholders Were Highly Engaged In The 2024 Ratification Vote

The Chancellor's January 2024 post-trial opinion rescinding the Performance Plan galvanized retail stockholders, a majority of whom had previously voted to approve the plan in 2018. Many stockholders, including Amici, were shocked by

the decision. In its aftermath, thousands "sent unsolicited letters and emails to the Board or to the *Tornetta* court supporting the reinstatement of Mr. Musk's equity compensation." Tesla, Inc., Proxy Statement 86 (2024) ("Proxy"). Alexandra Merz organized one such letter on behalf of 5,821 stockholders. *Id.* at E-5 n.4. That letter stated:

> As Tesla shareholders, we want our shareholder votes to count (not be rescinded years later); we want Tesla CEO Elon Musk to be compensated for his Past Work (that is keep ALL stock options previously awarded for meeting the 2018 Musk Incentive Comp Plan milestones). … [We] [w]ould like the Board to explore options to affirm the shareholder vote in support of keeping … Tesla's 2018 CEO Compensation Plan active and in place.

Id. at E-5.

The run up to the 2024 Ratification Vote featured considerable stockholder engagement and debate. The impending vote received substantial news coverage, and major stockholders and proxy advisors staked out public positions. Proxy advisor firms Institutional Shareholder Services and Glass Lewis recommended against the proposal, and some institutional investors publicly announced that they would oppose ratification. *See* Kerber, *Top Proxy Adviser ISS Recommends Against Tesla CEO Musk's "Excessive" $56 Bln Pay*, Reuters (May 31, 2024).

But other major stockholders publicly stated that they would vote to ratify the Performance Plan. *See* Root, *An Obvious Reason Musk's Pay Package Will Pass*, Barron's (June 12, 2024). Ron Baron of Baron Capital notably penned an open letter

urging stockholders to ratify the package, writing: "Elon is the ultimate 'key man' of key man risk. Without his relentless drive and uncompromising standards, there would be no Tesla…. Tesla is better with Elon. Tesla is Elon." Baron, *Baron Capital Supports Elon Musk's 2018 Compensation Contract* (June 4, 2024).

Amici closely covered the 2024 Stockholder Vote on their social media platforms. Merz organized stockholder participation and posted extensively about the issue on X.com, where she received millions of views. *See, e.g.*, AleXandra Merz (@TeslaBoomerMama), X.com (May 9, 2024), https://tinyurl.com/5-9-24-XPost. Mesbahi and Ong, meanwhile, devoted multiple podcast episodes to stockholder education. *See, e.g.*, Farzad, *Tesla Investors Are Going to War*, YouTube (June 10, 2024); Brighter with Herbert, *Top 10 Tesla Shareholders: Who's Voting YES?*, YouTube (June 4, 2024). In Amici's experience, the vast majority of stockholders they interacted with during this process expressed frustration that the Performance Plan had been rescinded and wanted to find a way to reinstate it.

Against this backdrop, investors received Tesla's Proxy Statement, which set forth all the relevant facts necessary to assess the Performance Plan. *See* Proxy 63-72, 74-78. The Proxy Statement included the independent special committee's report, *see id.* at Annex E, and the Chancellor's post-trial opinion, which criticized the terms of the Performance Plan as well as the Board's conflicts and negotiation process, *id.* at Annex I.

But these voluminous proxy materials—themselves sufficient to fully inform stockholders under Delaware law—composed only a sliver of the information available to stockholders in advance of the 2024 Ratification Vote. As the unprecedented stockholder engagement and intense public debate preceding the vote shows, the 2024 Stockholder Vote was likely one of the best-informed stockholder votes in Delaware history. Given the mountain of information available to investors and well-voiced, opposing perspectives to consider, there is little doubt stockholders understood precisely what they were approving.

C. Tesla Stockholders Made An Informed Judgment That The Performance Plan Was In Their Economic Self-Interest

Stockholder participation at Tesla's 2024 annual meeting was extraordinarily high: 82 percent of outstanding shares participated, reflecting sky-high stockholder enthusiasm at the opportunity to express their views on a matter of fundamental importance to the company. *See* Tesla, Inc., Current Report (Form 8-K) (June 13, 2024) (2.62 billion shares present) ("2024 Stockholder Meeting Report"); Tesla, Inc., Quarterly Report (Form 10-Q) (Mar. 31, 2024) (3.19 billion shares outstanding).[2] Of that group, 77 percent—including 72 percent of all disinterested

[2] By comparison, only 52 percent of Tesla's share capital voted at its 2019 stockholder meeting. *See* Papadopoulos, *An Overview of Vote Requirements at U.S. Meetings*, Harv. L. Sch. Forum on Corp. Governance (July 6, 2019).

shares—voted to ratify the Performance Plan. *See* 2024 Stockholder Meeting Report.

Retail investors voted overwhelmingly for ratification. *See* Root, *supra*. But so did two of Tesla's largest institutional stockholders—BlackRock and Vanguard. *See Vote Bulletin: Tesla, Inc.*, BlackRock (July 19, 2024); *Redomestication and Executive Pay Proposals at Tesla, Inc.*, Vanguard (June 2024) ("*Vanguard Letter*").

Vanguard's support was particularly noteworthy, since the investment firm had originally voted *against* the Performance Plan in 2018. *See Vanguard Letter*, *supra*. Explaining the change in position, Vanguard staff wrote that "the unique circumstance of evaluating the plan retroactively eliminated our concerns that significant pay could be earned" if prices in the market or sector generally increased but Tesla did not "outperform[] relative to the market or [its] peers." *Id.* at 2. Rather, with the benefit of hindsight, Vanguard could now be certain that there was "strong alignment of executive pay with shareholder returns," noting that, between 2018 and 2024, Tesla's "total shareholder return was in the 98th percentile of all Russell 3000 companies" and "few companies … created as much absolute market value appreciation." *Id.*

The 2024 Ratification Vote, moreover, did not reflect a mere rubberstamping of the Board's recommendation. At the very same meeting, stockholders passed two proposals against the Board's recommendation, cutting director terms from three

years to one and lowering the passage threshold for shareholder proposals to a simple majority. *Compare* 2024 Stockholder Meeting Report (noting the adoption of proposals six and seven), *with* Proxy 95, 97 (recommending against adoption of proposals six and seven).

There are many reasons why an overwhelming percentage of stockholders viewed the Performance Plan as in their best interest. Herbert Ong, for example, has supported the Performance Plan since its inception and voted to approve it in both 2018 and 2024. He has long felt that the plan's pegging of compensation to value-creation milestones created a "dream relationship" for any corporation with its CEO. Laurence Goldberg also voted in favor of the Performance Plan in 2018 and 2024 and considered himself to be fully informed each time. Although Goldberg supported the Performance Plan in 2018, he thought it was a close call at that time given the potential payout Musk could earn at the high end. Ultimately, after reading both positive and negative commentaries and giving the matter careful thought, he concluded the plan was carefully calibrated to incentivize Musk and deliver stockholder value.

When it came to their support in 2024, Ong, Goldberg, and the other Amici were primarily driven by economic concerns about Tesla's future. Like many stockholders, Amici view Musk as the driving force behind Tesla's success. As a result, they see his continued participation and leadership as crucial to Tesla's future.

But Amici recognize that Musk has many competing responsibilities, including stakes in other companies where he can develop new technologies. They see it as critical to the value of their investment that Musk views Tesla as the launchpad for his future innovations. Thus, Amici determined that the Performance Plan was in their economic best interest because it demonstrated strong support for Musk's continued leadership and fairly rewarded him for the outsized returns he generated for stockholders over the relevant period.

At the end of the day, reasonable minds might disagree about the wisdom of the stockholders' collective judgment that the Performance Plan is in their best interest. But as the ultimate owners of the company, Delaware law entitles them to make that judgment, free from second-guessing by the courts.

II. TESLA STOCKHOLDERS ARE ENTITLED TO RATIFY THE BOARD'S VOIDABLE OFFICER-COMPENSATION DECISION

A. Delaware Law Has Long Recognized The Right Of A Majority Of Fully Informed, Disinterested Stockholders To Ratify A Conflicted Board's Officer-Compensation Decisions

This case implicates two core tenets of Delaware corporate law: the stockholder franchise and corporate democracy. As this Court has previously recognized, "corporate democracy" performs an "essential role" in "maintaining the proper allocation of power between the shareholders and the Board." *MM Cos., Inc. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1132 (Del. 2003). "[S]tockholders control[ling] their own destiny through informed voting … is the highest and best form of corporate democracy." *Williams v. Geier*, 671 A.2d 1368, 1381 (Del. 1996). Accordingly, Delaware law generally enables stockholders to exercise their rights and powers through a majority vote. *See* 8 *Del. C.* § 216. And because a corporation is, fundamentally, "a group of individual shareholders united as a single separate entity," 5 Fletcher *et al.*, *Fletcher Cyclopedia of the Law of Corporations* § 1996 (perm. ed., rev. vol. 2024) ("*Fletcher*"), Delaware law effectuates the primacy of stockholders by granting them important rights and protections. *See, e.g.*, 8 *Del. C.* §§ 109, 211, 216, 251.

Because of these "[f]oundational principles," *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 207 (Del. Ch. 2007), "Delaware corporation law gives great weight to informed decisions made by an uncoerced electorate," *Corwin*

v. KKR Fin. Holdings LLC, 125 A.3d 304, 313 n.28 (Del. 2015) (quoting *In re Lear Corp. S'holder Litig.*, 926 A.2d 94, 114-115 (Del. Ch. 2007)). There are "sound reasons" for that approach. *Id.* at 313. "Judges are poorly positioned to evaluate the wisdom of business decisions and there is little utility to having them second-guess the determination of impartial decision-makers with more information … or an actual economic stake in the outcome …." *Id.* at 313-314. Thus, "[w]hen 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." *Id.* at 313. For these reasons, Delaware law recognizes various doctrines that seek to "avoid the uncertainties and costs of judicial second-guessing when the disinterested stockholders have had the free and informed chance to decide on the merits of a transaction for themselves." *Id.*

Stockholder ratification is one such doctrine. This Court has long recognized that a majority of disinterested, fully informed stockholders may cure a voidable action taken by a board of directors through a vote ratifying, and thereby validating, the board's defective action. *See, e.g.*, *Kerbs v. California E. Airways*, 90 A.2d 652 (Del. 1952); 2A *Fletcher* § 764 n.1 (citing *Kerbs*). Ratification is a powerful tonic: when "disinterested stockholders make a mature decision about their economic self-

interest, judicial second-guessing is almost completely circumscribed by the doctrine of ratification." *Morrison v. Berry*, 191 A.3d 268, 274 n.14 (Del. 2018) (quoting *In re Lear Corp. S'holder Litig.*, 926 A.2d at 114–115); *accord Corwin*, 125 A.3d at 313 n.28 (same). Put differently, "where formal approval has been given by a majority of independent, fully informed stockholders," "the entire atmosphere is freshened and a new set of rules invoked." *Gottlieb v. Heyden Chem. Corp.*, 91 A.2d 57, 59 (Del. 1952).

This Court's decision in *Michelson v. Duncan* is directly on point and compels reversal of the decision below. 407 A.2d 211 (Del. 1979). *Michelson* considered a challenge to an executive stock-compensation plan that had been authorized by interested directors. After determining that the directors' conflict made the transaction merely voidable, rather than void, the Court held that a ratification vote passed by a majority of disinterested, fully informed stockholders during summary judgment briefing had "related back to cure" the otherwise voidable defects in the directors' action. 407 A.2d at 220; *accord* 5A *Fletcher* § 2139.

Michelson dictates the outcome of this case. Here, as in *Michelson*, a disinterested majority of stockholders voted to ratify an executive stock-option plan approved by conflicted directors while litigation challenging that board decision was pending. And that disinterested majority was fully informed of all the facts necessary to assess whether the compensation plan was in their best interest.

Amici were among this fully informed majority. Like all stockholders, Amici received Tesla's comprehensive Proxy Statement, which included the independent Special Committee's report and the Chancellor's post-trial opinion criticizing the Performance Plan. Moreover, unlike in 2018, Amici could evaluate Musk's performance under the compensation plan with perfect hindsight. Amici closely reviewed the relevant materials, followed and participated in the robust discourse on the Ratification Vote in traditional and social media, carefully weighed the pros and cons of the Performance Plan for Tesla going forward, and voted to ratify with eyes wide open.

The glut of information investors received during the 2024 Ratification Vote plainly satisfies the requirements of Delaware law. *See Michelson*, 407 A.2d at 222 (concluding that "stockholders were informed of the essential facts" where the stockholder materials included the "complete text of plaintiff's complaint" and "all alleged wrongs for which ratification was sought were enumerated in detail"). As a result, the 2024 Ratification Vote has the effect of curing the directors' breach of fiduciary duty and mooting need for the Chancellor's rescission of the Performance Plan. *See Kerbs*, 90 A.2d at 659 (noting the defendants' assertion that ratification mooted the need for judicial inquiry into the validity of a plan adopted by conflicted directors).

B. The Chancellor Erred In Erecting Unjustified Barriers To Ratification

In a decision at odds with this Court's precedents, the Chancellor held below that ratification came too late in the day to affect the outcome of this case. *See* D.I. 80, Ex.B at 27, 34 ("Ratification Op."). That conclusion is wrong as a legal matter and fails to accord with the underlying objectives of Delaware law.

On the legal front, the Chancellor's opinion concludes that the 2024 Ratification Vote could not be given effect in this litigation because it should have occurred in time to be raised as an affirmative defense or, at a minimum, before the court issued its post-trial opinion. *See* Ratification Op. 17, 19–20, 32. Considering a ratification after those points, the Chancellor reasoned, would threaten principles of judicial efficiency and finality. *Id.* at 24, 27, 34.

That rationale cannot be squared with this Court's decision in *Kerbs*, where this Court concluded that a stockholder ratification of a conflicted board's profit-sharing plan could defeat a legal challenge to that plan, even when the ratification occurred *after* the post-trial opinion. 90 A.2d at 655, 659-660. In reaching that conclusion, this Court made no mention of finality, integrity, or efficiency concerns that would prevent a court from considering a ratification vote after judgment. The Chancellor's decision below disregards the clear implication of *Kerbs* that a ratification vote is effective even when it occurs after a post-trial opinion.

The decision below also contravenes the core objectives of Delaware corporate law. The Chancellor's opinion asserts that a string of harms will follow if courts allow post-trial ratifications to be given legal effect, suggesting that "lawsuits would become interminable" and the "practice would eviscerate the deterrent effect of derivative suits." Ratification Op. 24, 27.

Kerbs again is a full answer to this purported concern. That case was decided 72 years ago. If the Chancellor's concerns have not manifested in that time, they are unlikely to do so now. In any event, the Chancellor's policy concerns are not a sufficient basis for her decision. Revision of court judgments due to post-trial ratifications will occur only when a majority of disinterested stockholders *approves* a transaction after the court's disapproval. There is little reason to think that will always or even usually be the case, particularly when a court has carefully laid out the reasons why a board has breached its fiduciary duty to the stockholders. If, in the face of that information, "the disinterested equity owners" with "an actual economic stake in the outcome" nevertheless vote to approve the transaction, "there is little utility in having [judges] second-guess th[at] determination" in the name of protecting stockholders from interested directors. *Corwin*, 125 A.3d at 313-314.

And even if the risk of post-judgment ratifications were to increase, the Chancellor's approach would still be misguided. Elevating judicial economy concerns over the considered judgment of the stockholders sacrifices the

townspeople to save the town walls. Delaware law emphasizes the stockholder franchise because the stockholders are the ultimate owners of their corporation, and they, not judges, are best "positioned to evaluate the wisdom of business decisions." *Id.* at 313.

The dangers of disregarding that precept are no more evident than here, where the Chancellor's decision risks *decreasing* the value of stockholders' investment in Tesla, all in the name of protecting *them* from a fiduciary breach. In a successful derivative case, the nominal party should emerge stronger than before. But here, Tesla and its stockholders are placed in a far worse position. The 2024 Ratification Vote shows that stockholders currently believe that the Performance Plan is in their best interest, and so the Board is likely to approve the same or a similar compensation package at the end of this litigation. But instead of the $2.3 billion accounting charge Tesla has already incurred in connection with the compensation package, failing to give effect to the 2024 Ratification Vote will require Tesla to incur substantially higher accounting charges for a renewed deal, which in turn will decrease the value of stockholders' shares. Ratification Op. 13, 93. That's because the exact size of the charge depends on Tesla's stock price; at the time of the Ratification Vote, Tesla's $175 share price equated to a $25 billion charge, but a higher share price would result in a higher charge. *See* Morris, *Tesla Fights to Avoid*

the Steep Cost of Scrapping Elon Musk's Pay Package, Financial Times (Dec. 15, 2024).

The Chancellor also erred in holding that the Proxy Statement's failure to accurately predict the Chancellor's ruling on the Ratification Vote's legal validity meant that stockholders were not fully informed ahead of the vote. *See* Ratification Op. 42. That reasoning is circular. And even on the Chancellor's terms, the Proxy Statement was not misleading: it repeatedly explained that while Tesla believed the vote "should be upheld by a Delaware court," it "could not predict with certainty how a stockholder vote to ratify the 2018 CEO Performance Award would be treated under Delaware law." Proxy 84. Amici were aware at the time that ratification was not certain to succeed in the courts—but they hoped it would.

In any event, it blinks reality to assert that stockholders were not "adequately informed of the consequences of their acts" when they voted overwhelmingly for ratification. *See Michelson*, 407 A.2d at 220. The Proxy Statement left no doubt about the intended consequences of the stockholder vote: that it would result in the Performance Plan's reinstatement. And this was no run-of-the-mill ratification process, where the proxy materials might tell the whole story. As Amici's experiences attest, Tesla's retail stockholders reacted to the Chancellor's Post-Trial opinion with intensity. Amici devoted long hours to studying the opinion and, through social media posts that received up to a million views, educated fellow

stockholders about the Chancellor's decision and the impending vote, so that stockholders fully understood the purpose of ratification was to reinstate the Performance Plan if possible.

This Court's decision in *In re Investors Bancorp, Inc. Stockholder Litigation* further underscores why the 2024 Ratification Vote should be given effect. 117 A.3d 1208 (Del. 2017). Here, the Performance Plan is "self-executing"—its "terms … are fixed," and "the directors have no discretion" in its implementation. *Id.* at 1211. With the benefit of hindsight, moreover, Amici knew the total value of compensation Musk would receive when they voted and could compare it to Musk's and Tesla's performance over the relevant period. There can be no question, then, that Amici and other Tesla "stockholders kn[ew] precisely what they [we]re approving." *Id.* at 1222. Thus, as in *Investors Bancorp*, this Court should respect the stockholders' business judgment.

CONCLUSION

For these reasons, Amici Tesla Retail Shareholders respectfully ask this Court to reverse the decision below.

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