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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TABLE OF CONTENTS

TABLE OF CITATIONS

Page(s)

Cases

Statutes

Rules

Other Authorities

PRELIMINARY STATEMENT

Tornetta never acknowledges the crisis that Tesla faced after the Court of Chancery rejected the compensation agreement under which Elon Musk had labored since 2018. The company needed to determine how to compensate its CEO for leading perhaps the most successful six-year period in American corporate history, and how to motivate him going forward. But because Tesla's value had increased over 1100% since 2018, negotiating a new compensation package would have imposed a raft of new costs, including potentially billions of dollars in new accounting charges.

Under those unique circumstances, Tesla's informed stockholders made a deliberate and knowing decision in 2024 to ratify the company's 2018 compensation agreement with Musk. They had the benefit of exhaustive information, including a proxy statement detailing the agreement's terms, 200 pages of criticisms of the agreement by the Court of Chancery, hindsight knowledge about the substantial value that Musk had created and the compensation he was poised to receive, and a robust public debate. Additionally, an independent special committee had cautioned that renegotiating the 2018 Agreement would impose substantial new costs on the company. With all that information, Tesla's stockholders overwhelmingly chose to ratify the agreement and to save the company billions of dollars.

Tornetta asks this Court to disregard the judgment of Tesla's independent special committee and its stockholders on this quintessential business decision and to rescind the 2018 Agreement. He does so even though rescission would harm the company, and even though he purports to act on the company's behalf in this derivative suit. And he does so because he fundamentally misunderstands what the 2024 ratification vote represented. Just as the Court of Chancery did, Tornetta conflates respecting that ratification vote with reversing the Court of Chancery's finding of breach. But the real question before this Court is whether stockholders have the power to ratify a voidable corporate act after trial but before final judgment. This Court answered that question 73 years ago in *Kerbs* v. *California Eastern Airways, Inc.*, 90 A.2d 652 (Del. 1952) (*Kerbs II*). And even if the question remained open, the answer should still be a resounding yes. There is no good reason—least of all in an executive-compensation case—to strip stockholders of the ability to make a fully informed and value-maximizing business decision before a final judicial decision.

Tornetta also proposes novel procedural limitations that would restrict courts' ability to account for post-trial developments. Those proffered restrictions cannot be squared with Delaware courts' authority to revisit their rulings "at any time" before final judgment. Ct. Ch. R. 54(b). And Tornetta's procedural arguments rest on the same error as his substantive ones: his conception of the

2024 ratification as “new evidence” bearing on a (supposed) 2018 fiduciary breach. The stockholders in 2024 simply chose to keep the benefits of the 2018 Agreement, regardless of any defects in how it was first struck.

Tornetta does no better in justifying why Tesla stockholders should be on the hook for paying $345 million in attorney’s fees—the largest fee award in Delaware history and 25x counsel’s hourly rate—as a reward for achieving a result that stockholders twice determined was not in Tesla’s interests. Tornetta does not deny that fee award was reached by counting only the purported “benefits” that his lawsuit produced, without netting out the countervailing costs that will be imposed on Tesla. He still makes no attempt to quantify those costs, meaning that fees are proper only under a *quantum meruit* approach. By any metric, Tesla’s proposed $54 million award—equivalent to $2,800 per hour and 4x counsel’s lodestar—would more than adequately compensate counsel.

ARGUMENT

I. THE 2024 RATIFICATION MOOTS THE NEED FOR RESCISSION.

A. The 2024 Ratification Is Substantively Valid.

Ratification is a tool for informed and disinterested stockholders to accept a voidable transaction. It does not implicate the concerns that the *MFW* framework was designed to address, and does not require compliance with that framework. *See Kahn* v. *M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) (*MFW*). In any event, the ratification here followed a dual-layered, stockholder-protective process adapted from *MFW*, and that process should be enough.

1. Delaware Law Recognizes Post-Trial Ratification.

Tornetta substantively challenges the 2024 ratification vote in two ways. He contends that (1) post-trial ratification is flatly impermissible under Delaware law, and (2) any ratification must follow *MFW* to be effective. He is wrong on both fronts. For 73 years, Delaware has afforded stockholders the backstop of ratification, even after trial. *See Kerbs II*, 90 A.2d 652. Tornetta cannot justify extending the *MFW* doctrine for pre-transaction approval to the different post-transaction ratification context—particularly not here, where the ratification concerns an executive-compensation decision based on a fully completed performance.

a. Tornetta's answering brief (AB) disparages post-trial ratification as "unprecedented," "made-up," "fabricated," and "nouveau." AB 94, 105-109, 111.

Those characterizations cannot be reconciled with ratification's deep roots in Delaware law, tracing back to the law of agency and trusts. *See* Tesla's Opening Br. (TOB) 22. Indeed, Tornetta never disputes that ratification of a voidable transaction is available to principals wronged by agents or beneficiaries wronged by trustees. *See* Restatement (Second) of Agency § 416 cmt. c (1958); Restatement (Second) of Trusts § 218(2) & cmt. a (1959). Stockholders may likewise "ratify a transaction between the corporation and its director," even if they do not ratify the underlying "breaches of the directors' duty of loyalty." 2 Treatise on the Law of Corporations § 10:21 (4th ed. 2024).[1]

Nor can Tornetta's charges of fabrication be squared with this Court's precedents. This Court has recognized that stockholders retain the power to ratify compensation agreements after a challenge to the transaction is initiated, *Michelson* v. *Duncan*, 407 A.2d 211 (Del. 1979), and even while a case is on appeal following a full merits trial, *Kerbs II*, 90 A.2d 652. Tornetta has identified

[1] Tornetta cites a proposed order filed by the Individual Defendants seeking the entry of judgment "for Defendants on all counts," in connection with their motion to revise. AB 101 (quoting Rat. Op. 16). But they contemporaneously clarified that they were seeking to "vacate the relief ordered" in the post-trial opinion. A2921. And regardless of what the *Individual Defendants* said, *Tesla* clearly requested "judgment finding Plaintiff's claims moot" in light of the ratification vote, rather than trying to relitigate the finding of breach. A3001, A3572.

no reason why ratification should apply differently in this (supposedly) conflicted-controller context.

Tornetta would treat *Kerbs* as old and "anomalistic" and cabin it to its facts. AB 103-104 (quoting Rat. Op. 33). In his view, *Kerbs* permits post-trial ratification only where (i) the ratification vote reached the same conclusion as the trial court's post-trial ruling, AB 103, and (ii) the ratification was announced (but not necessarily held) before the trial court released its trial opinion, AB 104. Nothing in *Kerbs* relied on either feature, and for good reason. On the first, there is no logical reason why ratification should be permitted where it aligns with a trial court's disposition, but not where it conflicts. That would make ratification a largely useless exercise of confirming a trial court's opinion. *See* TOB 41. On the second, there is likewise no logical reason to require that ratifications be announced, but not held, before the trial court releases its decision. There is no clear finality benefit of that arbitrary rule, either: a ratification announced the day after a post-trial ruling and held promptly would be untimely, but one announced the day before a post-trial ruling and held long after would be timely. *Kerbs*'s rationale in no way reflects the two gerrymandered features that Tornetta highlights.

The only sensible reading of *Kerbs* is the one consistent with deeply rooted principles of agency law: a voidable transaction can be ratified until it is "terminated" or "discharged," including by a final judgment. Restatement (Second) of Agency § 88. That is also consistent with how *Kerbs* has long been understood. *See, e.g.*, *Smith* v. *Brown-Borhek Co.*, 200 A.2d 398, 402 (Pa. 1964) ("In the *Kerbs* case, the Supreme Court of Delaware recently held that ratification, otherwise unobjectionable, is not invalid even *after trial* and while appeal is pending.").

Tornetta cites no case that conflicts with the most natural reading of *Kerbs*, and instead appeals entirely to misplaced policy concerns.[2] AB 107-108. He complains that allowing post-trial ratification would turn courts into "advisory bodies." AB 107. Not so. The ratification process afforded Tesla's stockholders the ability to say yes or no to *the 2018 Agreement*, not to the Court of Chancery's findings. Ratifying a transaction takes only the rescission remedy off the table. The Court's authority to impose other remedies, like nominal damages or corporate reforms (when requested and otherwise proper), remains unchanged. There is nothing remotely unusual about the concept that significant new developments can affect whether and how courts grant relief. *See, e.g.*, *Sannini* v. *Casscells*,

[2] Tornetta briefly alludes to some unexplained "conflict[]" between post-trial ratification and 8 *Del. C.* § 102(b)(7). AB 109-110. There is no conflict. "Section 102(b)(7) expressly addresses the extent to which a provision *in the corporate charter*" can prospectively "limit or eliminate monetary liability for breach of fiduciary duty." *New Enter. Assocs. 14, L.P.* v. *Rich*, 295 A.3d 520, 549-550 (Del. Ch. 2023) (emphasis in original). It otherwise leaves stockholders with "freedom to enter into private agreements." *Id.* at 550.

401 A.2d 927, 929-930 (Del. 1979) (finding that defendants' sale of a disputed property "deprive[d] the appellate court of the ability to grant the relief sought").

Next, Tornetta asserts that allowing post-trial ratification would "gut the deterrent effect of stockholder litigation" by giving boards an improper "reset" after losing a derivative claim. AB 108 (quoting Rat. Op. 26-27). But Tornetta forgets who has control over the "reset" button: the stockholders. Post-trial ratification gives stockholders a process for responding to suits instituted on behalf of their company by a fellow stockholder acting as a derivative plaintiff. In the vast majority of derivative suits, the plaintiff will request relief that benefits the company and that stockholders have no reason to reject. Still, ratification remains an essential tool in cases like this one, where a sole derivative plaintiff has idiosyncratic views and seeks remedies that would cost the company potentially billions of dollars.

Finally, Tornetta catastrophizes that if stockholders can vote to ratify a transaction after a finding of breach, legal challenges and subsequent ratification votes might drag on "*ad infinitum*." AB 108. That is wrong. Every dispute must come to an end, but that end comes after a final decision at the conclusion of any appeal process—not after the Court of Chancery issues an interlocutory order or a judgment stayed pending appeal. *See* Op. 200 & n.939; TOB Ex. A at 5. Those rulings do not have the "legal significance" of a final decision terminating a transaction, and so do not cut off stockholders' power to ratify. 46 Am. Jur. 2d *Judgments* § 6 (2025).

By contrast, the advantages of allowing post-trial ratification are substantial. Tornetta never disputes that ratification here allowed stockholders to enter an executive-compensation agreement at 2018 rather than 2024 prices—with the potential to save their company billions of dollars. TOB 12-15. He never disputes that post-trial ratification gives stockholders unparallelled information about the process and results of a corporate transaction—which here resulted in exactly the kind of more-informed vote that Tornetta initially sought. TOB 25, 38. Nor does he dispute the logical result of his position: a fiduciary breach by directors in enacting a transaction would forever deprive stockholders of the benefits of that transaction, regardless of what stockholders believe is in their best interests. *See* TOB 27-28. Delaware law should treat wronged stockholders no worse than wronged beneficiaries or wronged principals, and should not "punish the Tesla non-controlling shareholders, the very cohort that the rules are in place to protect, for breaches of the fiduciary duties that their directors owed to them." Jonathan R. Macey, *"Fair is Fair" in Corporate Law*, Yale L. & Econ. Rsch. Paper 37 (Feb. 16, 2025).

b. Tornetta and a small group of professor-amici also claim that because the underlying compensation agreement did not satisfy the *MFW* process from the beginning, the 2024 ratification must be invalid. AB 110-111; Alon-Beck Amicus Br. 16-17. That makes no sense. For starters, they have no good explanation for why *MFW* should apply at all in the context of ratifying an executive-compensation plan, apart from an overreading of this Court's decision in *In re Match Group, Inc. Derivative Litigation*, 315 A.3d 446 (Del. 2024). *See* Directors' Reply 10-12; Practitioners & Professors Amicus Br. 22-26. Besides, they are again confusing two distinct doctrines: the *MFW* process of prospectively *approving* a transaction and the *Kerbs* process of retrospectively *ratifying* one. None of the justifications animating *MFW* is present in the post-trial ratification context, and there is simply no reason to transplant the *MFW* pre-approval requirements into this new arena. TOB 23-26; *see* Practitioners & Professors Amicus Br. 24.

The professors supporting Tornetta see no difference between ratifying "a *transaction*" and cleansing "*director conduct*," and so would subject all ratification votes to *MFW*'s framework. Alon-Beck Amicus Br. 11. They are wrong to blur those lines. "An important distinction exists between the power of a majority of the shareholders to ratify a transaction between the corporation and its director and their power to ratify breaches of the directors' duty of loyalty." 2 Treatise on the Law of Corporations § 10:21; *see In re Santa Fe Pac. Corp.*, 669 A.2d 59, 68 (Del. 1995) (stockholder ratification of a merger did not *also* "extinguish claimed breaches of [] duties" that were not presented for ratification). *Kerbs* holds that stockholders can at least ratify *a transaction* after trial: the effect of the post-trial ratification vote on the profit-sharing agreement was to authorize that transaction, not to cleanse any underlying breaches. 90 A.2d at 659-660. So the *MFW* rules about the standards for reviewing director misconduct simply do not map onto the question of whether stockholders can ratify the transaction.

Tornetta largely concedes as much, failing to muster any explanation for how the rationales for *MFW* matter when stockholders ratify a transaction. *See* TOB 24-25. He admits that *MFW*'s preconditioning requirement is framed around protecting negotiations, which has no bearing by the time of post-trial ratification. AB 111. And although Tornetta makes some (incorrect) fact-specific arguments to paint this ratification vote as coerced, that is relevant only as part of the inquiry into whether a free and informed ratification vote has occurred. *See* pp. 13-14, *infra*. He points to no reason in this context to *assume* a risk of coercion sufficient to require the additional *MFW* hoops.

In any event, even if *MFW* applied to conflicted-controller ratifications, this case would not qualify. Musk owned only 12.9% of Tesla at the time of ratification and so was not a controlling stockholder. *See* TOB 23-24. Tornetta's two-sentence footnote, AB 111 n.99, offers no reason—in logic or in case law—why a scant 12.9% equity stake would be enough to control a vote of the disinterested stockholders. Nor does he defend the Court of Chancery's inexplicable conclusion that Tesla conceded the argument, when the hearing transcript shows exactly the opposite. TOB 24 n.5.

2. Tesla Nonetheless Employed *MFW*'s Dual Protections.

If this Court were to extend *MFW* to cover post-trial stockholder ratification, it would need to modify *MFW*'s conditions for that context. Again, Tornetta does not defend why preconditioning, or any other aspect of the *MFW* framework, is needed at the post-trial ratification stage, especially when Musk was not then a controlling stockholder. *See* p. 11, *supra*. Even so, Tesla still employed *MFW*'s dual layers of protections to the extent reasonably possible.

Tornetta criticizes Kathleen Wilson-Thompson's independence because she held stock options, but that argument fails. AB 111. Wilson-Thompson's options "align[ed] [her] interests with other stockholders" and left her motivated to maximize Tesla's value. *In re PLX Tech. Inc. S'holders Litig.*, 2018 WL 5018535, at *41 (Del. Ch. Oct. 16, 2018), *aff'd*, 211 A.3d 137 (Del. 2019) (TABLE); *see* TOB 29; A2078. In fact, Wilson-Thompson was added to Tesla's Board at the behest of the SEC precisely because she was "independent" of Musk. A2078; *see* Op. 93.

Tornetta next contends that because the Special Committee did not negotiate the 2018 Agreement, it necessarily lacked the ability to "say no" to the deal and could not have satisfied its duty of care. AB 111. Tornetta once again improperly conflates the corporate act in 2018 (negotiating Musk's compensation plan) with the one in 2024 (recommending stockholders ratify the compensation plan notwithstanding any flaws in its origin). In 2024, the Special Committee devoted substantial work to making its assessment, and was always free to recommend against ratification. TOB 29-30.

Tornetta also argues that the overwhelming stockholder vote in favor of ratification was uninformed and coerced. He is wrong—which explains why he made no effort to raise these issues before the vote, as he could have done. *See, e.g.*, *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813 (Del. Ch. 2011). Likely no stockholder vote has been more informed than the one here. *See* TOB 14-16; Retail Stockholders' Amicus Br. 5-14. As for coercion, Tornetta does not dispute that Tesla stockholders could "reject the transaction and maintain the status quo"—signaling that "the transaction is not coercive." *In re Dell Techs. Inc. Class V S'holders Litig.*, 2020 WL 3096748, at *25 (Del. Ch. June 11, 2020). Instead, Tornetta claims that Musk's lobbying efforts were coercive. AB 111-112. But the various advocacy efforts Tornetta points to—meeting with stockholders, hiring advisors, setting up a website, and encouraging voting—are standard, unobjectionable means of persuading stockholders about "the relative merits of [the compensation agreement]," which has always been fair game. *Williams* v. *Geier*, 671 A.2d 1368, 1383 (Del. 1996).

Tornetta finally asserts, in a single sentence, that "the market" believed that ratification would keep Musk from "tak[ing] critical AI opportunities from Tesla." AB 112. But Tornetta points only to his own brief below, which in turn cited no evidence that stockholders felt coerced into voting for ratification because of a vague fear about the loss of AI opportunities. *Id.* (citing A3030-3031). To the contrary, Tesla's stockholders laid out detailed reasons why they voted for ratification, and the company's future growth into AI was not one of them. *See* Retail Stockholders' Amicus Br. 11-14 (discussing rationales offered by Vanguard, BlackRock, and retail stockholders). Nor is it coercive for a CEO to say that his compensation agreement will affect how he prioritizes his time: incentivizing executives is the point of such agreements.

3. The Proxy Statement Was Not Misleading.

As a backstop, Tornetta argues that the 440 pages of proxy materials left stockholders insufficiently informed. That argument is wrong for several reasons.

Tornetta first contends that the 2024 Proxy falsely described Wilson-Thompson as independent. But as explained above, Wilson-Thompson is a staunchly independent director hired at the federal government's behest. *See* p. 12, *supra*; TOB 29.

Tornetta next contends that the Court of Chancery correctly found the proxy misleading because it failed to predict the court's dim view of the legality of ratification. AB 113. But Tornetta does not seem to dispute that if the court's understanding of ratification was wrong, then its criticism of the proxy on the same basis fails as well.

Tornetta also argues that, notwithstanding the repeated cautionary language in the proxy that the legal effects of ratification were uncertain, stockholders were misled. AB 114. Tornetta hinges his argument on *Garfield ex rel. ODP Corp.* v. *Allen*, 277 A.3d 296 (Del. Ch. 2022), which does not support him. In *Garfield*, the defendant-corporation "repeatedly told stockholders that [their vote] would not have any effect," but later changed its position in court and argued that it was bound by the stockholder vote. *Id.* at 354-355. The court stopped the company from making that kind of *factual* misrepresentation about a matter within the company's control—how it would treat a vote. *Garfield* holds that "[i]f stockholders are told that a vote will not have any effect, then it does not have any effect." *Id.* at 354. That is a far cry from demanding certainty from a proxy as to any potential *legal* effect—that is, how a court would treat a vote. This Court has never required the latter.

To the contrary, this Court has recognized that a company need not conclusively predict how a court would assess the legality of a proposed action. In *Santa Fe*, for example, the defendant-corporation filed a proxy about the possibility that a regulatory commission would not approve a proposed merger, and the plaintiff-stockholder argued that the proxy "should have provided more elaboration of the basis for a possible [] rejection of the merger." 669 A.2d at 66. This Court disagreed, holding that stockholders had been apprised of the risks of differing legal interpretations, and "the Board should not have been required to speculate about the intentions and arguments of third parties." *Id.* So too here. Because the proxy expressed uncertainty about how courts would treat ratification, there was no requirement to correctly and confidently guess what the Court of Chancery would do.

Moreover, Tornetta does not offer any reason why any purported misstatement about the legal technicalities of ratification was material to stockholders. Tesla's proxy could not have been clearer: the proposal that stockholders voted for was to "Ratify the 100% Performance-Based Stock Option Award to Elon Musk That Was Proposed to and Approved By Our Stockholders in 2018." A1907. It defies common sense to think that any reasonable stockholder voted for ratification because she thought it "extinguish[ed]" Tornetta's breach claims, but would not have voted for ratification otherwise. TOB 34 (citation omitted). The strong record evidence underscores that what stockholders cared about was putting the 2018 Agreement in place. *See* Retail Stockholders' Amicus Br. 8-14.

B. The 2024 Ratification Is Procedurally Valid.

There is also no procedural obstacle to Tesla's reliance on the 2024 ratification. Contrary to Tornetta's arguments, Court of Chancery Rules 54(b) and 59(a) each permitted the Court of Chancery to take the vote into account. Further, Tesla did not, and could not, waive reliance on the 2024 ratification at any point before it occurred.

1. Rule 54(b) Permits Revision.

Tornetta echoes the Court of Chancery in arguing that Rule 54(b) is "inapplicable" because the court had "*completed* fact finding and resolved all claims and defenses timely raised" before defendants moved to revise. AB 98 (quoting Rat. Op. 19). On that basis, Tornetta purports to distinguish Tesla's authorities because they invoked Rule 54(b) before the court had made any "findings of fact with respect to any assertions in the litigation." AB 99 (quoting Rat. Op. 19).

Tornetta's interpretation is contradicted by the plain text of Rule 54(b), which authorizes the Court of Chancery to revise "any order or other form of decision . . . *at any time* before the entry of judgment." Ct. Ch. R. 54(b) (emphasis added). Not "before trial," and not "before findings of fact"—but "*at any time*" before final judgment. To be sure, if a party sits on its rights until some late stage, that could make it more difficult to meet the applicable "good cause" standard for revisiting an interlocutory order. *Washington* v. *Preferred Commc'n Sys., Inc.*, C.A. No. 10810-VCL, at 40:10-41:2 (Del. Ch. Sept. 10, 2015) (TRANSCRIPT). But not so here, where the basis for invoking Rule 54(b) came into existence only after trial, and the issue was raised as soon as practicable. *Cf. Tuckman* v. *Aerosonic Corp.*, 394 A.2d 226, 233 (Del. Ch. 1978).

Tornetta's rewriting of Rule 54(b) is also inconsistent with persuasive federal authority. Federal courts are generally open to revising their interlocutory decisions under Rule 54(b) based on new factual developments. *See Motorola, Inc.* v. *J.B. Rodgers Mech. Contractors*, 215 F.R.D. 581, 583-586 (D. Ariz. 2003) (explaining that numerous courts follow this practice). Tornetta's only answer (in a footnote) is to claim that federal authority is inapposite, without further explanation. AB 100 n.93.

Tornetta's reliance on the law-of-the-case doctrine, *see* AB 100-101, is similarly misplaced. "The 'law of the case' is established when a specific legal principle is applied to an issue presented by facts which remain constant throughout the subsequent course of the same litigation." *Frederick-Conaway* v. *Baird*, 159 A.3d 285, 296 (Del. 2017) (citation omitted). It does not prevent courts from reconsidering their interlocutory opinions to take account of "changed circumstances," *id.* (citation omitted)—particularly here, as Tesla is not seeking to relitigate any prior legal or factual findings in the Court of Chancery's post-trial opinion. TOB 38. Even more baffling is Tornetta's suggestion that the discussion of ratification at the motion-to-dismiss stage is "law of the case" that bars any subsequent ratification. AB 101 n.94. Plainly, the 2018 vote addressed in the motion-to-dismiss ruling is distinct from the 2024 ratification vote at issue on this appeal.

Finally, Tornetta is wrong to cast the Court of Chancery's procedural decision as an exercise of discretion. AB 102. It was not. If the court had applied the correct "good cause" standard, it would have had no choice but to revise its order in light of stockholders' overwhelming vote to avoid billions of dollars in unnecessary costs to Tesla. *See* TOB 36-37. But instead, the court found that the law-of-the-case doctrine controlled whether it could grant review under Rule 54(b). Rat. Op. 21. Because the court applied the wrong legal standard, *see* TOB 36-37, and misapplied it to boot, its decision cannot be upheld as a proper exercise of discretion.

2. Rule 59(a) Alternatively Permits Revision.

Contrary to Tornetta's arguments, AB 94-98, Rule 59(a) separately permits reconsideration of interlocutory orders based on evidence that did not yet exist at the time of trial. *See* TOB 38-40. Tornetta wrongly asserts that Tesla "never explain[ed]" why Rule 59(a) would allow consideration of new developments while Rule 60(b) does not, AB 95, but Tesla's opening brief explained that

Rule 60(b) imposes a "heightened standard . . . because it addresses reopening *final* judgments only." TOB 39. Although Tornetta cites two additional cases as barring reopening based on new developments, AB 94-95, both of those cases concerned motions made under Rule 60(b), not Rule 59. *See Lebanon Cnty. Emps.' Ret. Fund* v. *Collis*, 2023 WL 2582399, at *3 (Del. Ch. Mar. 21, 2023), *rev'd*, 311 A.3d 773 (Del. 2023); *Bachtle* v. *Bachtle*, 494 A.2d 1253, 1255-1256 (Del. 1985) (applying Superior Court Civil Rule 60(b)).

Tornetta then pivots to limitations on the use of new evidence under federal law. AB 96-97 & n.90. But if Tornetta is right that federal law should be followed on procedural issues, then consideration of new developments was appropriate under Rule 54(b) and this Court need not even consider Rule 59(a). *See* pp. 17-18, *supra*. Moreover, Delaware law is more flexible than federal law in its application of Rule 59(a), which reflects Delaware's "historical readiness to adapt to the circumstances of each case and craft appropriate remedies, in contrast to the perhaps more rigid application of law in jurisdictions without similar traditions." *Taylor* v. *Jones*, 2006 WL 1510437, at *5 (Del. Ch. May 25, 2006). For example, in *In re Altaba, Inc.*, the Court of Chancery modified a security order once the defendant's financial position later changed. 2021 WL 3288534, at *1, *4 (Del. Ch. July 30, 2021). What moved the court to modify its post-trial order was not, as Tornetta incorrectly suggests, a pre-trial "conceal[ment]" of facts, AB 97 (emphasis omitted), but rather the post-trial announcement of changes to the defendant's liquidity, 2021 WL 3288534, at *4. *Altaba* plainly stands for the proposition that Rule 59(a) can be invoked based on developments that arise after trial.

Finally, Tornetta claims that application of Rule 59(a) is unwarranted here because there is no "injustice" to correct. AB 97-98. But that argument is premised on his belief that rescission of the 2018 Agreement "benefits Tesla," AB 98—a belief that the stockholders (and market) have overwhelmingly rejected. *See* TOB 11, 18. Similarly, Tornetta claims that admitting new evidence "would impose extreme prejudice on Plaintiff," *id.*, but Tornetta forgets his role: as a derivative plaintiff, he acts on behalf of the company, not to advance some idiosyncratic personal interest.

3. Tesla Did Not Waive The Right To Raise Ratification.

Finally, Tornetta argues that ratification is an affirmative defense that Tesla failed to timely raise. AB 102-106. That is plainly inconsistent with this Court's decision in *Kerbs*, which gave effect to a ratification vote that occurred after trial (and thus long after pleadings had closed). Tornetta essentially concedes that *Kerbs* conflicts with his "affirmative defense" argument, and so devotes the lion's share of his argument to confining *Kerbs* to its facts. AB 103-104. The fairer reading of *Kerbs* leaves no room for doubt that ratification can be raised whenever it occurs. *See* pp. 5-7, *supra*.

Setting *Kerbs* aside, Tornetta suggests that there was no need to wait until after the Court of Chancery's decision to announce the ratification, as Tornetta's own briefs had already detailed the 2018 Agreement's supposed flaws. AB 104-105. Although that is legally irrelevant, it is also wrong on its own terms. A pre-decision ratification will often be wasteful and meaningless because the court might imminently uphold the challenged transaction, and it will never be as informed or as stockholder-protective as one that has the benefit of a trial court's detailed findings. Indeed, even here, the Court of Chancery disagreed with Tornetta in certain ways, *see* Op. 161, 193-196, the full scope of which would not have been knowable until after the opinion was released. The only "tactical decision" Tesla made was to ensure that the stockholders' ratification vote was as informed as possible and conducted only when necessary. AB 105 (citation omitted).

Finally, Tornetta asserts in passing that Tesla waived ratification by stipulating to the pretrial order, which listed the "legal issues that remain to be litigated" without mentioning ratification. AB 105; *see* A447-505. That is a red herring because Tesla, a nominal defendant, was not litigating any issues at trial. Regardless, Delaware law is clear that Tesla could not have waived its right to raise the 2024 ratification as a defense until it became available following the stockholder vote. TOB 40-41.

II. TORNETTA'S COUNSEL'S EXORBITANT FEE REQUEST SHOULD BE SUBSTANTIALLY REDUCED.

Tornetta's counsel did not even try to quantify what a replacement compensation package would look like for Musk, so they are entitled to no more than a reasonable *quantum meruit* award. And under any theory, the Court of Chancery's 25x multiplier award is a windfall that far surpasses the reasonable range noted by this court in *In re Dell Technologies Inc. Class V Stockholders Litigation*, 326 A.3d 686, 705 (Del. 2024). Tornetta's counsel therefore deserve no more than a generous $54 million fee award, representing a 4x multiple on their lodestar.

A. Tornetta Did Not Prove A Quantifiable Benefit To Tesla.

There is no dispute that if Musk is not paid under the 2018 Agreement, Tesla would need to develop a replacement package to compensate him for one of the most successful performances in corporate history. *See* Rat. Op. 79. Tornetta concedes that the Board "remains free" to grant replacement compensation, and that if Musk is not paid under the 2018 Agreement he could have *quantum meruit* claims against the company. AB 88. Musk, in short, will be paid something, in one form or another. The question then is whether the Court of Chancery should have accounted for those inevitable replacement costs when assessing the "benefits" that Tornetta produced through this suit. Every Delaware court to have considered the question before has come out the same way, holding that a fee award must be based on the *net* benefit counsel obtained. TOB 47-49.

Tornetta's first response—that the fee petition adhered to pre-*Dell* Delaware law, AB 124-126—is perplexing. The relevant inquiry is not whether the *fee petition* was reasonable but whether the Court of Chancery's *award* was reasonable. And although Tornetta emphasizes that the court cut counsel's fee request, AB 126-128, that is irrelevant. That Tornetta's initial $5.6 billion fee request was so outlandish and legally improper that the trial court had to reduce it by over 90% has no bearing on the reasonableness of the enormous $345 million fee actually awarded.

Tornetta next attacks a straw man, accusing Tesla of "rel[ying] on the troubling assumption that the Board will eventually simply re-issue Musk the same wildly inflated package." AB 128. Tornetta misses the point: because of Tesla's tremendous appreciation in value over the course of the plan, even a substantially smaller plan a *tenth* the size of the 2018 Agreement would still result in greater accounting charges to Tesla. *Id*. Any uncertainty over what that replacement plan will ultimately entail is a problem for Tornetta, not Tesla: it is Tornetta's burden to establish the value of the net benefit achieved. *Sciabacucchi* v. *Howley*, 2023 WL 4345406, at *3 (Del. Ch. July 3, 2023).

Shepherd v. *Simon*, the sole case Tornetta cites, further confirms the point. AB 129. *Shepherd* concerned a stockholder challenge to a one-time equity-based retention award, which the company mooted after trial by issuing an amended award of lesser value. C.A. No. 7902-VCL, at 2-3 (Del. Ch. Sept. 10, 2014) (ORDER). The court measured the benefit achieved by the litigation as equal to the difference in value between the original and modified awards—embodying Tesla's position that the *net* benefit controls. *Id*. at 6. Although the court observed that it would have awarded a higher fee if the litigation had not led to a replacement, *id*. at 5, that is no help to Tornetta here, where Musk has fully performed and all agree that a replacement plan is proper, AB 88; Rat. Op. 79.

Tornetta gives passing treatment to the uniform Delaware authority Tesla cited in its opening brief. He never even mentions *Dann* v. *Chrysler Corp.*, which held that the surrender of options was an unquantifiable benefit, in part because the company likely needed to issue a replacement compensation package. 215 A.2d 709, 714 (Del. Ch. 1965), *aff'd*, 223 A.2d 384 (Del. 1966). And he fails to distinguish Tesla's other cases. He highlights that the disputed options in *Citrix* and *Cheniere* were never issued and thus more difficult to value, but that is not the sole reason that the benefits there were unquantifiable. AB 130. *Citrix* explained that "even if" the plaintiff could quantify the dilutive costs of unissued shares, the "argument remains fatally flawed" because the plaintiff made "no attempt to calculate the *net economic benefit*." *La. State Emps.' Ret. Sys.* v. *Citrix Sys., Inc.*, 2001 WL 1131364, at *7 (Del. Ch. Sept. 19, 2001). Similarly, the decision in *Cheniere* centered on the court's duty to "take into account that there's going to be some additional compensation or other plan put into place." *In re Cheniere Energy, Inc. S'holders Litig.*, Consol. C.A. No. 9710-VCL, at 102:21-103:4 (Del. Ch. Mar. 16, 2015) (TRANSCRIPT).

Tornetta also emphasizes that the fees in *Citrix*, *Cheniere*, and *In re Investors Bancorp, Inc. Stockholder Litigation*, Consol. C.A. No. 12327-VCS (Del. Ch. June 17, 2019) (TRANSCRIPT), were awarded after the case mooted or settled, as distinct from after trial. AB 129-130. But aside from the decision below, no court has ever drawn that line, and there is no reason for this Court to draw it here. *Cf. Crothall* v. *Zimmerman*, 94 A.3d 733, 736 (Del. 2014) (noting that a post-trial fee award "failed to consider whether a net benefit . . . had actually been produced" by the litigation). Delaware law already has ample incentives for plaintiffs' counsel to go to trial, including higher percentage recoveries or lodestar multipliers. *See* TOB 51. Tornetta's proposed post-trial exception, by contrast, would over-incentivize trials as a means of flipping the calculus from a *quantum meruit* lodestar method to a share-of-gross-recovery method. *See id.* And although Tornetta retorts that "the substantial risks associated with trial" will discipline counsel, AB 129, that is unrealistic when, as here, the difference between settlement and trial equates to hundreds of millions of dollars.

B. The Fee Award Should Be Reduced To No More Than 4x Tornetta's Counsel's Lodestar.

Because the net benefit conferred by this litigation is unquantifiable, this Court should recalculate the fee award using the *quantum meruit* approach instead of the common-fund approach. *Off* v. *Ross*, 2009 WL 4725978, at *7 (Del. Ch. Dec. 10, 2009). But either way, the fee award should be reduced to no more than 4x Tornetta's counsel's lodestar. *See* TOB 54.

Tornetta declines to address Tesla's arguments in favor of a 4x multiplier, except to recite that the Court of Chancery found "no legal basis for a 4x *quantum meruit* cap." AB 131. Tornetta mischaracterizes Tesla's position. Tesla acknowledges that an award of attorney's fees is a question of reasonableness, where courts do not generally apply strict formulas. But even reasonableness has its outer bounds, which are informed by courts' collective practices. Across a multitude of *quantum meruit* cases, Delaware courts generally award fees between 1x and 3x counsel's lodestar. A2515-2517. As this Court made clear in *Dell*, moreover, a 7x multiple on counsel's lodestar is "at the high end" of reasonableness even in common-fund cases. 326 A.3d. at 705. So under either approach, the 25x multiple awarded here clearly exceeds the bounds of reason. TOB 55.

Tornetta falls back on the reminder that this Court granted a larger multiple in *In re Southern Peru Copper Corp. Shareholder Derivative Litigation*, 52 A.3d 761 (Del. Ch. 2011) (*Americas Mining*), *aff'd*, 51 A.3d 1213 (Del. 2012). AB 131-132. But there is no $2 billion cash common fund for Tesla to draw fees from, as there was in *Americas Mining*. *See* TOB 54-55. And even if there were a quantifiable common benefit here, allowing a single pre-*Dell* extreme outlier to skew all future fee awards would subject large corporate transactions to relentless and meritless challenges. *See* Chamber of Commerce Amicus Br. 19-20. At bottom, a 4x multiplier is not a rigid cap that courts cannot exceed, but a generous outlier. A 4x multiplier here would translate to a $54 million award—a hefty $2,800 blended hourly rate, plus expenses—which surely is enough to incentivize Tornetta's counsel without penalizing the company on whose behalf they are supposedly acting.[3]

[3] Tornetta also notes his counsel's time spent on appeal. AB 131-132. But Delaware law already accounts for substantial post-trial work in awarding fees. *Sciabacucchi* v. *Salzberg*, 2019 WL 2913272, at *6 (Del. Ch. July 8, 2019). Anyway, it would be unreasonable to force Tesla to compensate Tornetta's counsel for their efforts on appeal to cost the company billions of dollars and undermine the stockholders' ratifying vote.

CONCLUSION

The Court should reverse the Court of Chancery's decision denying revision of the post-trial opinion, with instructions to enter judgment deeming any rescission moot and awarding Tornetta's counsel a fee under a *quantum meruit* approach.

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