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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

INDIVIDUAL DIRECTOR-APPELLANTS' REPLY BRIEF

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INTRODUCTION

Plaintiff's answering brief ("AB") echoes much of the Court of Chancery's opinion and thus repeats many of its errors. At the same time, Plaintiff retreats from central aspects of the court's reasoning—most conspicuously its "Superstar CEO" concept, which the court invoked a dozen times but Plaintiff does not mention once. Plaintiff's brief thus only reinforces the many grounds for this Court to reverse.

On the threshold question, Plaintiff concedes that Musk is not a controlling stockholder under current Delaware law because he neither owned at least one-third of Tesla's stock nor had the power to select a majority of its directors at the time of the transaction. AB 42-43; 8 *Del. C.* § 144(e)(2). Plaintiff thus stakes his case on the premise that prior Delaware law compels the opposite result. It does not. The control definition adopted by the General Assembly in Senate Bill ("SB") 21 codifies principles that were well-established in Delaware law but misapplied by the Court of Chancery in some cases, including this one. Under a proper application of Delaware law, Musk was not a controlling stockholder because he did not exercise control over Tesla's corporate affairs—or the specific transaction at issue, even though that would not suffice in any event. The Court should accordingly uphold the Award under business judgment review because Tesla's independent directors and its informed, disinterested stockholders approved it—either of which would suffice and neither of which Plaintiff persuasively contests.

Alternatively, this Court could reverse in multiple other ways. The Court could hold that, as in *SolarCity*, the challenged transaction was entirely fair—a conclusion that Plaintiff fails to refute given the Award's historic upside and minimal risk for stockholders. The Court could also reverse on the narrow and straightforward legal basis that rescission was an unjustified remedy given the impossibility of restoring all parties to their bargaining positions as of 2018—a proposition so evident that Plaintiff comes close to conceding it. Likewise, the Court could reverse the rescission remedy because Tesla's stockholders in 2024 properly ratified the Award—a valid exercise of the stockholder franchise that Plaintiff fails to overcome for reasons elaborated in Tesla's separate briefs. Any of those approaches would resolve this controversy on case-specific legal grounds and rightly avoid the untenable result reached below.

ARGUMENT

I. PLAINTIFF FAILS TO REFUTE THAT BUSINESS JUDGMENT REVIEW APPLIES TO THE AWARD

A. Musk Is Not A Controlling Stockholder

Plaintiff concedes that Musk would not be a controlling stockholder were this case filed today in light of SB 21. Musk was likewise not a controlling stockholder under prior Delaware law for two independent reasons that Plaintiff fails to rebut: First, transaction-specific control is not a valid basis for deeming a minority stockholder a controlling stockholder. Second, even if it were, Plaintiff identifies no evidence that Musk *actually exercised control* over the Board in any way that suffices to make him a controlling stockholder under this Court's precedents. *See In re Oracle Corp. Deriv. Litig.*, 2025 WL 249066, at *12-13 (Del. Jan. 21, 2025); *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1114-1115 (Del. 1994). The General Assembly's codification of the principles that preclude a control finding in this case only confirms the Court of Chancery's legal errors in departing from them.

1. Purported Transaction-Specific Control Does Not Trigger Entire Fairness Review

As explained in the Individual Directors ("Defendants") Opening Brief ("IDOB"), transaction-specific control is not a valid basis for deeming a minority stockholder a controlling stockholder. IDOB 16-19; *see* Elizabeth Pollman & Lori W. Will, *The Lost History of Transaction-Specific Control*, __ J. Corp. L. __

(forthcoming 2025) (pp. 3, 15-16);[1] Practitioners & Professors Amici ("Profs.") Br. 13; Sequoia Capital Amicus ("Sequoia") Br. 12. Plaintiff attempts to avoid the substance of this argument by asserting that Defendants waived or estopped themselves from advancing it, AB 40-41, but that is baseless. From the beginning, Defendants have "contest[ed] that Musk is Tesla's controlling stockholder" under any theory of control. MTD Op. 3 n.5. The Court of Chancery explained that it would accept transaction-specific control as a valid theory, *id.*, and Defendants litigated the case within that framework, AB 40 n.42. That hardly supports waiver or estoppel. *See, e.g.*, *ev3, Inc. v. Lesh*, 114 A.3d 527, 533 n.17 (Del. 2014) (no waiver where trial court "articulated the law governing the case" and party "had to deal with that reality until … appeal").

When he reaches the merits, Plaintiff attempts to defend the validity of transaction-specific control by asserting that this Court affirmed a "transaction-specific control finding" in *Lynch*. AB 41-42. That is wrong. *Lynch* is a *general* control case. The Court there expressly stated that a stockholder is a controlling stockholder "*only if* it owns a majority interest in or exercises control over the *business affairs of the corporation*." 638 A.2d at 1113 (emphases altered). Applying that test, the Court affirmed a finding that a minority stockholder became a

[1] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5138377

controlling stockholder when it "exercise[d] actual control over [a corporation] by dominating its corporate affairs"—*i.e.*, exercising general control. 638 A.2d at 1115; *see id.* at 1114 ("the threshold question to be answered by the Court of Chancery was whether, despite its minority ownership, Alcatel exercised control over Lynch's business affairs"); Pollman & Will, *supra*, at 10-14 (analyzing *Lynch* in detail).

Plaintiff points to the trial court opinion in *Lynch*, which stated that the court found control "at least with respect to the matters under consideration at [Lynch's] August 1, 1986 board meeting." AB 42 (quoting *Lynch*, 638 A.2d at 1114). But even that snippet does not support Plaintiff's position that *Lynch* relied on transaction-specific control, because there were multiple transactions under consideration at that board meeting, 638 A.2d at 1114, and this Court affirmed based on the trial court's "subsequent factual finding that, notwithstanding its 43.3 percent minority shareholder interest, Alcatel did exercise actual control over Lynch by *dominating its corporate affairs*," *id.* at 1115 (emphasis added); *see also Kahn v. Lynch Commc'n Sys., Inc.*, 669 A.2d 79, 82 (Del. 1995) (reiterating that Alcatel was a controlling stockholder based on its veto of a transaction and "dominat[ion of] Lynch's board *on other occasions*") (emphasis added).

Plaintiff also cites *Oracle*, AB 41, but he does not suggest that *Oracle* applied transaction-specific control to conclude that a minority stockholder was a controlling stockholder. This Court has *never* done that, and for good reason: control over a

specific transaction alone does not implicate the concerns that this Court has long invoked to trigger the entire fairness standard. *See* IDOB 18-19; Profs. Br. 13-15.

Changing tack, Plaintiff makes the striking suggestion that resolving the proper scope of Delaware law on control is not worthwhile in this case because the General Assembly adopted a prospective definition of control in SB 21. AB 42-43. That self-serving proposal lacks any foundation. While the parties here seemingly agree that SB 21 eliminates any theory of transaction-specific control, litigants may well argue otherwise and it is unclear how the Court of Chancery will respond. But even if Plaintiff is correct that transaction-specific control has no future, that hardly justifies wrongly applying it to cases filed in the past.

2. Musk Did Not Exercise The Actual Control Required To Trigger Entire Fairness Review

In any event, Musk was not a controlling stockholder under transaction-specific control or any other valid theory. IDOB 19-26. Although a *majority* stockholder is presumed to be a controlling stockholder, *Oracle*, 2025 WL 249066, at *11, Plaintiff does not dispute that Musk owned only a *minority* of Tesla voting shares in 2018, AB 12. Nor does Plaintiff dispute that a minority stockholder can become a controlling stockholder only by "*exercising actual control*," rather than merely having "the *potential* to control" a specific transaction or general corporate affairs. *Oracle*, 2025 WL 249066, at *12, *13 n.107 (emphases added). The "test for actual control by a minority stockholder 'is not an easy one to satisfy.'" *Id.* at *12

(citation omitted). The minority stockholder must engage in "domination" of the board, *Lynch*, 638 A.2d at 1114 (citation omitted), such that "as a practical matter," it is "no differently situated than if [it] had majority voting control," *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 307 n.8 (Del. 2015) (citations omitted).

The Court of Chancery identified no such exercise of control by Musk. Plaintiff concedes that only one of the four categories of control indicia invoked by the court pertains to Musk's purported exercise of control over the Award. *See* AB 31 (describing the other categories as purportedly supporting general control); Op. 108-109. Within that category, Plaintiff recites the court's reliance on Musk's purported role in shaping the Award's "terms, timing, and structure." AB 44; *see* AB 35-39. Like the court, however, Plaintiff identifies no conduct by Musk that approaches the kind of "domination" of the board that would place him in effectively the same position as a stockholder with majority voting power—as would be required to make him a controlling stockholder. *Lynch*, 638 A.2d at 1114 (citation omitted); *see, e.g.*, *Basho Techs. Holdco B, LLC v. Georgetown Basho Invs., LLC*, 2018 WL 3326693, at *28-31 (Del. Ch. July 6, 2018) (finding transaction-specific control when significant minority stockholder exercised blocking rights, withheld funds, and threatened to fire management), *aff'd*, 221 A.3d 100 (Del. 2019); *cf. Sciannella v. AstraZeneca UK Ltd*., 2024 WL 3327765, at *22-25 (Del. Ch. July 8, 2024) (declining to find transaction-specific control when minority stockholder did

not threaten to terminate contracts or place company in a "position of having no other alternatives," even though company was "substantially reliant" on minority stockholder), *aff'd*, 2025 WL 946148 (Del. Mar. 26, 2025).

Quite the opposite: Musk *recused* from voting on the Award as a Director and stockholder, negotiated exclusively in his capacity as an *executive*, and in no way threatened to take action against the Board using his stock or otherwise. IDOB 21. Indeed, Musk could have engaged in precisely the same conduct regarding the Award's "terms, timing, and structure," AB 44, if he owned *no Tesla stock at all*. That fact, which Plaintiff does not refute, powerfully undermines the Court of Chancery's conclusion that Musk's conduct in the Award negotiations made him a controlling stockholder.

Much of the Court of Chancery's control reasoning focused on the Board's purported dependence on Musk, which the court dubbed a "controlled mindset." Op. 150. Plaintiff reiterates the same approach. AB 44. But that analysis conflates the controlling stockholder inquiry with the separate inquiry into whether the Board was independent—a different question with different (and less severe) consequences. *See* IDOB 24; Profs. Br. 12-14; *In re Tesla Motors, Inc. S'holder Litig.*, 298 A.3d 667, 699 n.117 (Del. 2023) ("*SolarCity*"). The Court of Chancery all but admitted as much, stating that its "factual findings that render Musk a controller … support a finding that the majority of the Board lacked independence." Op. 104 n.546.

Plaintiff's primary response is to try to establish Musk's *general* control of Tesla—a finding the Court of Chancery expressly declined to make—either as a separate basis to affirm or to buttress the court's transaction-specific control holding. AB 31-35, 43-45. But that pivot fails, because Plaintiff again demonstrates at most that Musk had the *potential* to control Tesla, not that he *actually exercised control* of Tesla such that he was "'no differently situated than if [he] had majority voting control,'" *Corwin*, 125 A.3d at 307 & n.8 (citation omitted); *see Oracle*, 2025 WL 249066, at *12-13.

Plaintiff relies heavily on Musk's purported "Boardroom and Managerial Supremacy," AB 32 (quoting Op. 115), while conspicuously abandoning the Court of Chancery's description of Musk as a "Superstar CEO," *e.g.* Op. 2, 120-122. But an executive's value and influence are not the same as control of the company for purposes of the controlling stockholder inquiry; after all, a successful executive can have great value and influence without obtaining anything approaching majority voting power. IDOB 22. "[E]xpanding the definition of a 'controller'" to include such valuable and influential executives would both defy precedent, *SolarCity*, 298 A.3d at 699 n.117, and create "unworkable" standards for Delaware companies given the difficulty of identifying in advance which influential executives would qualify, Profs. Br. 16-19; IDOB 23. It would also produce counterintuitive public policy: "Stated plainly, Delaware law should not subject [influential executives] to

heightened scrutiny for being an asset and benefit to all stockholders." Sequoia Br. 10; *see Oracle*, 2025 WL 249066, at *13 ("[T]he controlling stockholder question is not a license to sue on every transaction involving a corporation with a founder/visionary leader."). On this central point, Plaintiff has effectively no response. AB 44.[2]

Although an application of this Court's precedent suffices to reverse the Court of Chancery's control holding, the flaws in the court's reasoning are only clearer following SB 21. That legislation codifies key aspects of this Court's precedent regarding control, including the critical link between *controlling stockholder* status and *stockholding*. Specifically, SB 21 limits the definition of a controlling stockholder to a stockholder who (a) "[o]wns or controls a majority in voting power," (b) "[h]as the right, by contract or otherwise," to select a majority of directors, or (c) "[h]as the power functionally equivalent to that of a stockholder that owns or controls a majority in voting power … by virtue of ownership or control of at least 1/3 in voting power … and power to exercise managerial authority over the business and affairs of the corporation." 8 *Del. C.* § 144(e)(2). That legislative definition—

[2] Plaintiff likewise offers no response to the Court of Chancery's mistaken reliance on aspects of Musk's purported managerial supremacy that postdate the 2018 Award, *see* IDOB 20; Op. 116-120, even though the control inquiry turns on circumstances at "the time of the challenged transaction," *Sciannella*, 2024 WL 3327765, at *19 (citation omitted).

which Plaintiff concedes excludes Musk, AB 42-43—is "entitled to great weight" here, even though SB 21 is not expressly applicable retroactively and thus "not conclusive." *New Castle Cnty. Council v. State*, 688 A.2d 888, 891 (Del. 1996); *see Shotzberger v. Piazza*, 333 A.2d 167, 168 (Del. 1975) (giving weight to "a recent public policy change by the General Assembly" in crafting a common-law standard).

B. Business Judgment Review Applies Based On The Board's Independence And The 2018 Stockholder Vote

Because Musk was not a controlling stockholder, the Award is subject to business judgment review so long as it was approved by *either* an independent Board *or* a majority of fully informed and disinterested stockholders. IDOB 14-15, 26. Plaintiff again mounts a baseless waiver claim, this time asserting that Defendants conceded that the absence of a fully informed vote alone would trigger entire fairness review. AB 50-51. In fact, Defendants argued that any material disclosure deficiencies in the 2018 proxy on the Award would trigger entire fairness review only *if Musk is a controlling stockholder*. A1737-A1738 (citing A1679).

Even if Musk were a controlling stockholder, either the Board's or the stockholders' approval would validate the Award. That position follows directly from *Investors Bancorp*, in which this Court held that specified awards of compensation by directors to themselves—namely "equity incentive plans in which the award terms are fixed and the directors have no discretion how they allocate the awards"—are subject to business judgment review if "approv[ed] by fully informed,

uncoerced, and disinterested stockholders." *In re Invs. Bancorp, Inc. S'holders Litig.*, 177 A.3d 1208, 1211 (Del. 2017). If anything, that rule is even more clearly applicable to the Award, which has similarly fixed terms and was not issued by the directors to themselves but rather to Musk following negotiations and a Board vote from which Musk was recused. *See* IDOB 26-27; Profs. Br. 19-21.

Plaintiff's response relies almost entirely on *Match*. AB 60-62; *see In re Match Grp., Inc. Deriv. Litig.*, 315 A.3d 446 (Del. 2024). Although *Match* extended *MFW* beyond the freezeout merger context, it did not involve stockholder approval of compensation decisions, much less overrule *Investors Bancorp*. IDOB 26-27. Plaintiff cites *Match*'s observation that entire fairness could apply to some compensation decisions, but that is fully consistent with *Investors Bancorp*, which applied entire fairness to stockholder-approved compensation plans lacking fixed, non-discretionary terms. 177 A.3d at 1211.

More fundamentally, *Match* applied the *MFW* framework to protect minority stockholders from controlling stockholders' abuse of their position to obtain non-ratable benefits. IDOB 27. But the Award compensates Musk's performance as an *executive*, not a *stockholder*. It therefore does not implicate the minority-protection concerns animating *MFW*, as this Court recently clarified in *Maffei v. Palkon*,

2025 WL 384054, at *19 (Del. Feb. 4, 2025) (declining to extend *MFW* beyond its significant but limited scope).[3]

1. The Board Was Independent

Business judgment review applies because Tesla's Board acted independently in approving the Award. Plaintiff concedes that the Court of Chancery never found that the Board lacked independence when it approved the Award. AB 45. Plaintiff nonetheless asks this Court to affirm the decision below by making that finding on appeal. *Id*. There is no basis for such a finding.

As a threshold matter, both Plaintiff and the Court of Chancery ignore the presumption of director independence, a core feature of Delaware law. *Weinstein Enters., Inc. v. Orloff*, 870 A.2d 499, 512 (Del. 2005). Plaintiff also doubles down on the court's reliance on ordinary business and social relationships to suggest a lack of independence, AB 46-48, while ignoring this Court's precedents and powerful public-policy arguments for why such relationships cannot trigger a finding of non-independence, *see* IDOB 27-29; Sequoia Br. 15 (warning against a director-

[3] SB 21 resolves any tension among *Investors Bancorp*, *Match*, and *Maffei*. For going-private transactions, SB 21 codifies *MFW*'s dual-protection framework. 8 *Del. C.* § 144(c). But for other transactions with controlling stockholders, including executive compensation, SB 21 provides a different path: either committee or stockholder approval can invoke business judgment review. *Id.* § 144(b). This statutory distinction shows that *Match*'s extension of *MFW* does not (and should not) reach fixed-term executive compensation plans, which—as *Maffei* reaffirms—remain governed by *Investors Bancorp*'s framework.

independence standard that demands "an ascetic idealism" and "fails to recognize the positive nature of relationships in building and growing companies"). Plaintiff similarly offers no response to the Court of Chancery's mistaken reliance on transactional relationships—such as Directors' investments in other Musk-affiliated entities—that would have, if anything, made Musk more dependent on them rather than the other way around. IDOB 29. And Plaintiff ignores that the Directors' compensation in Tesla stock aligned their interests with the majority of Tesla's stockholders—not Musk's alone. IDOB 30.[4]

2. The 2018 Stockholder Vote Was Fully Informed

Business judgment review also applies based on the 2018 vote of Tesla's fully informed and disinterested stockholders to approve the Award. Plaintiff does not dispute that the proxy statement preceding the 2018 stockholder vote fully disclosed all the economic terms of the Award, as well as its purpose and consequences. IDOB 31. Under a long line of decisions addressing stockholder approval of compensation awards, that disclosure provided stockholders with all the material information needed to decide whether to accept the compensation plan. *See Invs. Bancorp*, 177 A.3d at 1211; *Cambridge Ret. Sys. v. Bosnjak*, 2014 WL 2930869, at *9 (Del. Ch. June 26, 2014); Chamber of Commerce Amicus ("Chamber") Br. 5, 8.

[4] Plaintiff similarly ignores that Denholm and Ehrenpreis received "life-changing compensation" from their Tesla stock only *after* the 2018 Award and the company's ensuing explosive growth. IDOB 30; *see* note 2, *supra*.

Plaintiff tries but fails to avoid those precedents. He notes that *Investors Bancorp* found stockholder approval invalid when it concerned a "pool of equity awards that the directors can later award to themselves in amounts and on terms they decide." AB 56 (citation omitted). But he does not suggest that the Award matches that description. And critically, he ignores that *Investors Bancorp* confirmed—relying on decades of Delaware precedent—that stockholder approval *would* be valid for "equity incentive plans in which the award terms are fixed and the directors have no discretion how they allocate the award." 177 A.3d at 1211. The Award *does* match that description. *Investors Bancorp* thus provides powerful support for the validity of the 2018 stockholder approval.

Plaintiff also relies on *Sample v. Morgan*, which declined to give weight to stockholder approval of a compensation plan when the proxy statement failed to disclose that a new stock-incentive plan purportedly created for "attracting and retaining key employees" would in fact be awarded entirely to three senior executives. 914 A.2d 647, 650-51 (Del. Ch. 2007) (internal quotation marks omitted). The lack of anything even resembling such disclosure deficiencies here underscores how far Plaintiff must reach to impugn the 2018 vote.

Plaintiff's remaining disclosure arguments turn on the mistaken premise that the 2018 proxy had to disclose various insignificant details, such as certain director relationships or process mechanics. AB 51-59. But "[a]n omitted fact is material"

only "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *SolarCity*, 298 A.3d at 712 (citation omitted). Plaintiff provides no reason to believe that any Tesla stockholder who supported the Award would have changed his mind if only he knew that Musk occasionally went on vacation with Murdoch or attended birthday parties with Gracias. IDOB 28-29. So too for the fact that Musk proposed the terms of the Award in a conversation with Ehrenpreis, AB 53, at the beginning of "more than six months of active and ongoing discussions" in developing the Award, A4108. Delaware law has never required a "play-by-play description of [transaction] negotiations," *Globis Partners, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *14 (Del. Ch. Nov. 30, 2007) (citation omitted), and has long rejected standards that "would make proxy statements so voluminous that they would be practically useless," *City of Dearborn Police & Fire Revised Ret. Sys. v. Brookfield Asset Mgmt. Inc.*, 314 A.3d 1108, 1141 (Del. 2024) (citation omitted), but that is ultimately what Plaintiff seeks.

Relatedly, Plaintiff errs in disputing the proxy's characterization of the Award's milestones as "ambitious" and "challenging." AB 54 (citation omitted). The record shows that Tesla regularly missed internal projections and the targets required Tesla to achieve more than almost any company had ever achieved. *See* A1649-1653 (collecting sources). That is why Gracias characterized the projections Defendants cite as "stretch goals" that were "very difficult" to meet. A951.

Commentators went further, calling the milestones "laughably impossible." A4097. Similarly, the 70% probability assessment that Plaintiff cites for the achievement of some tranches of the Award was made for conservative accounting purposes, not as a reflection of true likelihood of achievement. A861-862. And although the Court of Chancery suggested the proxy should have disclosed the Board's decision not to conduct benchmarking studies on the Award, Plaintiff expressly disclaims that position on appeal. AB 59 n.63.

Finally, Musk's involvement with other companies was well-known to the market and disclosed in various of Tesla's public filings. *See, e.g.*, A3983; A4181. Additional disclosure would have added nothing to the robust total mix of information available to stockholders about Musk, Tesla, and the Award.

In sum, Plaintiff fails to refute that Tesla's stockholders knew "exactly what they [were] being asked to approve," and did so by a wide margin. *Invs. Bancorp*, 177 A.3d at 211. And even if some disclosure deficiency occurred, no "single disclosure violation" could have meaningfully "affect[ed] the total mix provided to stockholders." *SolarCity*, 298 A.3d at 713. The stockholder vote was accordingly fully informed and provides an independent basis for business judgment review. *Corwin*, 125 A.3d at 305-06.

II. PLAINTIFF FAILS TO REFUTE THAT THE AWARD WAS ENTIRELY FAIR

Even if this Court were to apply entire fairness review (or assume it applies), reversal would still be warranted. The entire fairness standard is not "impossible to satisfy," *Maffei*, 2025 WL 384054, at *17 n.159, even when the Court of Chancery concludes to the contrary, *Nixon v. Blackwell*, 626 A.2d 1366, 1377 (Del. 1993). It is satisfied here. The Award fully aligned Musk's compensation with stockholder returns and allowed him to be paid only if the stockholders took home far more. It included extensive stockholder protections that were negotiated by the Board. A4113-4118. And it worked, helping to ignite explosive stockholder growth. Plaintiff repeatedly cites the Court of Chancery's reliance on purportedly "careful factual findings" in paradoxically finding the Award unfair to the very stockholders who received massive benefits, AB 66, but he largely overlooks that Defendants assert principally *legal* errors, *see* IDOB 38-47. Plaintiff thus does not persuasively address the basis to reverse the decision below on a case-specific holding of entire fairness.

Burden. As a threshold matter, because Tesla's independent directors and fully informed, disinterested stockholders approved the Award, *see* § I.B, *supra*, the court should have at least assigned Plaintiff the burden to prove the Award was not entirely fair. *Match*, 315 A.3d at 462-63. That legal error alone requires vacatur. IDOB 37.

Fair Price. Plaintiff wrongly accuses Defendants of "invert[ing]" entire fairness review by analyzing price before process. AB 66. But as this Court recently reaffirmed, price is the "*paramount consideration*" in fairness review. *SolarCity*, 298 A.3d at 718. Like the Court of Chancery, Plaintiff disregards the stockholders' monumental $700 billion "get," lumping it together with hindsight arguments that the court considered separately. AB 81 (citing Op. 191-192). Hindsight aside, the Award was fair *in 2018* because stockholders did not have to pay Musk anything unless the company's value doubled, and would not pay him the full Award unless the company's value increased more than tenfold—by at least $600 billion. The court legally erred by framing the Award's "give" in financial terms (describing it as "an unfathomable sum") while portraying its "get" in non-financial terms (Musk's "retention, engagement, and alignment"). Op. 178-180; *see SolarCity*, 298 A.3d at 700 (fair price analysis focuses on the "*economic and financial considerations* of the proposed [transaction]") (emphasis added; citation omitted).

Plaintiff also sidesteps the other legal errors the Court of Chancery committed when assessing the Award's price. Chief among them, the court incorrectly formulated the legal standard by focusing on what additional concessions the Board might have extracted in a counterfactual world, rather than assessing whether the Award fell within a fair range. AB 37-39. Plaintiff does not (and cannot) defend the court's flawed analytical framework beyond noting the court made passing

references to the "range of fairness" standard while failing to apply it. AB 77-78, 82. Plaintiff likewise fails to salvage the court's legal error in dismissing the overwhelming stockholder approval as "meaningless" to fair price. Op. 191. Although Plaintiff notes the weight to accord a stockholder vote "is a classic example of trial court discretion," AB 82-83, the court legally erred by deeming the stockholder vote "meaningless" because of supposed disclosure deficiencies that had *nothing to do* with price. IDOB 32-34, 46-47.

Fair Process. Plaintiff fares no better in defending the Court of Chancery's fair dealing analysis. On the timing and initiation factors, Plaintiff concedes but downplays the court's finding that "[t]he timing of the first discussion was dictated by Ehrenpreis, not Musk." Op. 161. Plaintiff fails to refute that a controlling stockholder's initiation can be "[ ]compatible with the concept of fair dealing so long as the controlling shareholder does not gain financial advantage at the expense of the controlled company." *Kahn v. Tremont Corp.*, 694 A.2d 422, 431 (Del. 1997). Plaintiff claims "Musk *did* gain substantial financial advantage (*i.e.*, stock worth tens of billions of dollars) at Tesla's expense," AB 68, but cites nothing for this circular proposition—and indeed, the court never found that Musk's supposed role in initiating discussions of the Award gave him any financial advantage.

On the negotiation factor, Plaintiff faults the Board for its supposed failure to pursue adversarial negotiations with Musk, AB 71-72, but Plaintiff both overlooks

that the Board secured meaningful concessions from Musk on the safeguards in the Award, *see* IDOB 8, 38, and cites no case requiring negotiations between a company and its incumbent CEO to mimic the arm's-length negotiations that would occur between commercial parties negotiating a merger. This Court has held the opposite, stressing that fair process "standards are not carved in stone for all cases because a court of equity must necessarily have the flexibility to deal with varying circumstances and issues." *Nixon*, 626 A.2d at 1378. Indeed, established negotiating treatises underscore that the *positional* bargaining the court demanded would have been value- and relationship-destroying, while the *principled* negotiating that the Board conducted ultimately created hundreds of billions of dollars in stockholder value. *See, e.g.*, Roger Fisher, et al., *Getting to Yes: Negotiating Agreement Without Giving In* 4-7, 84 (3d ed. 2011). There is only one context where this Court requires boards to engage in adversarial negotiations for the sole purpose of getting the best price: when *Revlon* duties apply. *See Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986). Those duties do not apply to executive compensation.

In addition, the Court of Chancery admitted that its fair-process analysis overlapped almost entirely with its transaction-specific control analysis. Op. 160. But if the reasons why a transaction *triggers* entire fairness review also demonstrate that the transaction *fails* entire fairness review, then entire fairness review becomes

"impossible to satisfy"—contrary to this Court's direction. *Maffei*, 2025 WL 384054, at *17 n.159; *see SolarCity*, 298 A.3d at 700 ("A determination that a transaction must be subjected to an entire fairness analysis is not an implication of liability.") (citation omitted). That "circular" reasoning, Profs. Br. 15, provides yet another basis to reverse the decision below.

III. PLAINTIFF FAILS TO REFUTE THAT RESCISSION IS AN IMPROPER REMEDY

On top of its errors on the merits, the Court of Chancery legally erred by ordering total rescission of the Award—leaving Musk with zero compensation—without determining that such relief would restore *all* the parties to the status quo ante. The court also improperly placed the burden on Defendants to prove what fair compensation would be. Plaintiff's strained arguments fail to rehabilitate those critical legal defects. Thus, even if this Court were to find a breach of fiduciary duty by Defendants, it should reverse the rescission remedy and award at most nominal damages. *See* IDOB 48-52; Sequoia Br. 20-22.

A. The Invalidity Of The Rescission Remedy Is Properly Presented

Contrary to Plaintiff's assertion, AB 84-85, Defendants preserved their objection to a total rescission remedy. Defendants argued in their post-trial answering brief that the "all-or-nothing" remedy Plaintiff seeks "would be inequitable" because Musk had already "delivered on his end of the bargain." A1595-A1596. That was the proper time to raise the objection because issues are generally deemed preserved only if included in *post*-trial briefing—regardless of whether they were raised earlier. *See Oxbow Carbon & Minerals Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC*, 202 A.3d 482, 502 n.77 (Del. 2019). And even if Defendants had not raised their objections to rescission until the post-trial supplemental reply brief, as Plaintiff suggests, the propriety of the rescission remedy

would still be before this Court because the Court of Chancery expressly considered the issue and decided it. Op. 196-199; *see Lawson v. Preston L. McIlvaine Const. Co.*, 552 A.2d 858, 1988 WL 141168, at *2 (Del. Dec. 7, 1988) (TABLE) (issue "was fairly presented" and "properly before this Court on appeal" when lower court raised it "*sua sponte*" and "addressed the merits").

B. Rescission Of The Award Does Not Restore The Status Quo Ante

Rescission "requires that *all* parties to the transaction be restored to the *status quo ante*, i.e., to the position they occupied before the challenged transaction." *Brinckerhoff v. Enbridge Energy Co.*, 2012 WL 1931242, at *4 (Del. Ch. May 25, 2012) (emphasis added; citation omitted), *aff'd*, 67 A.3d 369 (Del. 2013); *see Geronta Funding v. Brighthouse Life Ins.*, 284 A.3d 47, 63-64 (Del. 2022) ("[T]he rescinding party must restore everything of value it has received under the contract from the other party."). Plaintiff quibbles over the standard, suggesting that rescission is warranted if the relief "*attempts* to return the parties to the status quo" or "*substantially*" accomplishes that objective. AB 86 (citations omitted). But even under Plaintiff's preferred formulation, rescission was improper here because it comes nowhere close to returning *any*—much less *all*—of the parties to their positions before adoption of the Award in 2018.

Plaintiff barely attempts to dispute that proposition, and no meaningful dispute is possible. Musk was promised roughly $55 billion if he achieved all the

audacious milestones; he put in herculean efforts and achieved those milestones, making enormous sacrifices and giving up other business and personal opportunities; but under the Court of Chancery's rescission remedy, he will be paid zero and cannot reclaim those years of time and effort. IDOB 49-50. Plaintiff repeats the court's non sequitur that Musk benefitted from the growth of his "preexisting" Tesla holdings, AB 87, but that would not compensate Musk for *six years* of work. The court, moreover, acknowledged "a range of healthy amounts that the Board could have decided to pay Musk" beyond his preexisting holdings, Rat. Op. 9, directly undercutting its suggestion that denying Musk any compensation through rescission was the equivalent of restoring him to the status quo ante in 2018.

Although failure to restore Musk alone is enough to reverse the rescission remedy, the legal defects do not end there. Plaintiff and other Tesla stockholders benefitted enormously from Tesla's spectacular growth under Musk's leadership while the Award was in effect, yet the court's remedy does not require them to return those gains. And while Plaintiff contends that Tesla will benefit from reversal of the $2.3 billion accounting charge it incurred on the Award in 2018, AB 88, he ignores that Tesla cannot be restored to its negotiating position in 2018, when Musk would agree to a ten-year incentive structure valued at $2.3 billion in 2018 dollars. IDOB 50. Given the massive increase in Tesla's value (along with other factors),

the cost of compensating Musk for his work between 2018 and 2024 would be dramatically greater today than it was in 2018. *See* Tesla Opening Br. ("TOB") 52.

In short, rescission not only fails to restore *all* of the parties to (or even close to) their positions in 2018; it fails to restore *any* of them to positions remotely resembling their positions in 2018. *See* Michael Holmes, et al., *Denying Elon Musk's $56 Billion Pay Deal Is an Atypical Remedy*, Bloomberg (Dec. 17, 2024).[5] Whatever else this Court does in this appeal, it should vacate the rescission remedy.

C. Defendants Have No Burden To Identify An Alternative Remedy

Scrambling to avoid that result, Plaintiff asserts that Defendants had the burden to prove an alternative to total rescission. That is wrong. Plaintiff brought this lawsuit and sought the rescission remedy; under blackletter law, it was his burden to justify that relief. IDOB 51; *see Brinckerhoff*, 2012 WL 1931242, at *4.

Plaintiff also suggests that Musk should have sued Tesla for quantum meruit. AB 88-90. That is illogical; a derivative plaintiff should not invite claims against the company on whose behalf he purports to act. Moreover, Plaintiff's argument puts the cart before the horse. A quantum meruit award for Musk would be available only if rescission of the Award were justified. *See Technicorp Int'l II, Inc. v. Johnston*, 1997 WL 538671, at *15 (Del. Ch. Aug. 25, 1997) (explaining that an

[5] https://news.bloomberglaw.com/us-law-week/denying-elon-musks-56-billion-pay-deal-is-a-radical-remedy.

"[i]nvalidat[ed]" compensation award was potentially recoverable under quantum meruit). Any arguments about the burden of seeking quantum meruit are unrelated to the antecedent question whether the rescission remedy can stand.

Like the Court of Chancery, Plaintiff invokes the principle that "uncertainties in awarding damages are generally resolved against the wrongdoer." AB 90 (quoting Op. 199). But that principle relates to the "uncertainty of a damages calculation," *Siga Techs., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1111 n.5 (Del. 2015)—not the *form* of relief. Plaintiff also echoes the court in invoking *Valeant Pharms. Int'l v. Jerney*, 921 A.2d 732 (Del. Ch. 2007). AB 88-89. But *Valeant* involved disgorgement, not rescission. IDOB 52; *see Valeant*, 921 A.2d at 752-53. Contrary to Plaintiff's contention, disgorgement and rescission are not "two sides of the same coin." AB 89. "Disgorgement focuses on the defendant's gain from illegal conduct. It is 'the act of giving up something (such as profits illegally obtained) on demand or by legal compulsion.'" *Gener8, LLC v. Castanon*, 2023 WL 6381635, at *31 n.390 (Del. Ch. Sept. 29, 2023) (citation omitted). For disgorgement, there is no requirement that all transaction participants be returned to the status quo ante. *See Kahn v. Kolberg Kravis Roberts & Co., L.P.*, 23 A.3d 831, 840 (Del. 2011). But as discussed above, that is a requirement for rescission, and neither the court nor Plaintiff has established that it is satisfied here.

D. At Most, Plaintiff Is Entitled To Nominal Damages

Although he failed to prove rescission, Plaintiff received an alternative remedy that he requested: a fully informed re-vote. A303. That is a "preferred remedy" that "vindicates" the stockholder franchise. *In re Staples, Inc. S'holders Litig.*, 792 A.2d 934, 960 (Del. Ch. 2001). Any further remedy should be limited to nominal damages. IDOB 52. Contrary to Plaintiff's assertion, Defendants do not "misapprehend the derivative nature of this suit" in addressing the prospect of nominal damages. AB 92. Delaware courts have awarded nominal damages in derivative suits when—as here—a plaintiff fails to establish an entitlement to any other remedy. *See Ravenswood Invs. Co. v. Est. of Winmill*, 2018 WL 1410860, at *2 (Del. Ch. Mar. 21, 2018). And Plaintiff's entitlement to at most nominal damages is not an argument that Defendants can waive; it is the direct legal consequence of *Plaintiff's* waiver of any alternative remedy by choosing to "only seek[ ] recission" but failing to support it. Op. 192; *see Ravenswood*, 2018 WL 1410860, at *2, *19, *25 (awarding nominal damages when court was "unable to award any other form of relief" because plaintiff failed to develop a record on other forms of relief).

IV. PLAINTIFF FAILS TO REFUTE THAT RESCISSION IS UNWARRANTED AFTER STOCKHOLDER RATIFICATION

For the reasons detailed in Tesla's Opening Brief and multiple persuasive amicus briefs, the rescission remedy should be reversed for the additional reason that Tesla stockholders ratified the Award with full information in 2024. TOB 19-45; *see* Profs. Br. 22-26; Chamber Br. 8-18; Tesla Retail S'holders Amicus Br. 5-24; Wash. Legal Found. Amicus Br. 8-15. That result follows from precedent, *see Kerbs v. Cal. E. Airways, Inc.*, 90 A.2d 652, 660 (Del. 1952), and first principles of agency and corporate democracy. Defendants incorporate by reference the further arguments in Tesla's Reply Brief urging vacatur of the rescission remedy based on the stockholders' valid ratification.

CONCLUSION

The Court should reverse the judgment.

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