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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
	§	

AMICUS CURIAE BRIEF OF CORPORATE LAW ACADEMICS IN SUPPORT OF APPELLEE

Ned Weinberger (Bar No. 5256)
Mark D. Richardson (Bar No. 6575)
LABATON KELLER SUCHAROW LLP
222 Delaware Avenue, Suite 1510
Wilmington, DE 19801
(302) 573-2540

Counsel to Amici Curiae Anat Alon-Beck, James An, Joan MacLeod Heminway, Katharine Jackson, Brian JM Quinn, and Anne Tucker

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INTERESTS OF *AMICI CURIAE*

Amici curiae are law professors and other legal academics who teach and write about corporate law.

- **Anat Alon-Beck** is an Associate Professor of Law at Case Western Reserve University School of Law
- **James An** is a Teaching Fellow in the LL.M. Program in Corporate Governance and Practice, and Lecturer in Law at Stanford Law School
- **Joan MacLeod Heminway** is a Professor of Law at the University of Tennessee Knoxville College of Law
- **Katharine Jackson** is an Associate Professor of Law at the University of Cincinnati College of Law
- **Brian JM Quinn** is a Professor and the David & Pamela Donohue Faculty Fellow at Boston College Law School
- **Anne Tucker** is a Professor of Law at the Georgia State University College of Law

Amici write in support of Appellee and to respond to the arguments advanced by Tesla as well as the *amici* practitioners and professors who support Tesla concerning the effect of the 2024 stockholder vote purportedly "ratifying" the challenged 2018 Award. *Amici* have no financial interests in the outcome. They share a deep interest in the development of Delaware's corporate law and ensuring that the Court receives an accurate explanation of Delaware's ratification doctrine.

CERTIFICATION PURSUANT TO RULE 28(C)(4)

No party or party's counsel authored the brief in whole or in substantial part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *Amici*'s counsel—contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

Just last year, in *Match*, this Court resolved purported confusion about whether a conflicted-controller transaction that was not a squeeze-out could be cleansed through a single cleansing device. Applying decades of consistent Supreme Court precedent, *Match* confirmed that the answer is no.[1] When a conflicted controller stands on both sides, entire fairness applies unless the transaction is conditioned, from the beginning, on approval by (i) a fully empowered independent committee that discharges its duty of care in negotiating on behalf of the company and minority investors and (ii) a fully informed and uncoerced vote of minority stockholders.

Tesla and its *amici* ask this Court to reopen the door that it just closed. No special committee ever negotiated on behalf of Tesla or its stockholders, yet Tesla and its *amici* argue that the 2024 vote by Tesla's stockholders cleansed the 2018 award to Elon Musk. Repeating many of the same arguments that this Court already rejected in *Match*, Tesla and its *amici* say that this case falls in a double-secret exception to *Match* because this case involves executive compensation and the second stockholder vote took place after the Court of Chancery found a fiduciary breach. These arguments find no support in Delaware law and ignore the central policy at the heart of *Match* and *MFW*. The dual cleansing mechanisms serve

[1] At least for cases, like this one, not governed by Senate Bill 21.

independent functions; they are complements, not substitutes. The Court of Chancery was correct to hold that the 2024 vote did not cure Musk's fiduciary breach.

ARGUMENT

I. THE COURT OF CHANCERY CORRECTLY HELD THAT EQUITABLE OR FIDUCIARY RATIFICATION WAS THE ONLY POTENTIALLY APPLICABLE FORM OF RATIFICATION

Ratification "finds its roots in the law of agency, where it developed as a series of processes for the principal to become legally bound by the unauthorized acts of her agent."[2] But "[a] business entity with multiple owners is a very different setting than the single-principal-single-agent setting" and the "corporate context is even more removed from the classic agency model[.]"[3]

So stockholder ratification in corporate law works differently than classic ratification in the law of agency. Delaware has long acknowledged the "need to be sensitive to the peculiarities of the corporate context when applying general principles of ratification."[4] Under the law that applies to this case,[5] ratification could mean three different things.

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[2] James D. Cox, Tomas J. Mondino, Randall S. Thomas, *Understanding the (Ir)relevance of Shareholder Votes on M&A Deals*, 69 DUKE L.J. 503, 544 (2019).

[3] *Id.*; *see also* Katharine Jackson, *Public and Private Fiduciaries: Representation in States, Corporations, Trusts and Agents*, 19 OHIO STATE BUS. L. J. 1, 109–14 (2025) (exploring some of the challenges of mapping traditional agency concepts onto the corporate context).

[4] *Espinoza v. Zuckerberg*, 124 A.3d 47, 59 (Del. Ch. 2015).

[5] Section 3 of Senate Bill 21 provides that it does not apply to this case or any other "action or proceeding commenced in a court of competent jurisdiction that is completed or pending . . . on or before February 17, 2025."

First, ratification could refer to statutory ratification under Section 204 of the Delaware General Corporation Law. This form of ratification cures only statutory defects; it does not "eliminate or immunize any breach of fiduciary duty that may accompany the defective corporate act."[6] Here, Defendants raised, but ultimately, "dropped [a] Section 204 argument[.]"[7]

Second, under the applicable (*i.e.*, pre-Senate-Bill-21) version of Section 144, informed ratification by stockholders prevents a director conflict from rendering a transaction void or voidable.[8] But this is just "a limited safe harbor for directors from incurable voidness for conflict transactions. It is not concerned with equitable review."[9]

Third, and relevant here, informed and uncoerced stockholder ratification can affect the Court's equitable review by either cleansing a transaction (*i.e.*, reducing the standard of review from entire fairness or enhanced scrutiny to business judgment) or shifting the burden of proof. The Court of Chancery correctly concluded that (1) equitable or "fiduciary ratification" was the only category

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[6] John W. Noble, *Fixing Lawyers' Mistakes: The Court's Role in Administering Delaware's Corporate Statute*, 18 U. PA. J. BUS. L. 293, 303 (2016).

[7] *Tornetta v. Musk* ("*Ratification Opinion*"), 326 A.3d 1203, 1220 (Del. Ch. 2024).

[8] *Fliegler v. Lawrence*, 361 A.2d 218, 222 (Del. 1976).

[9] *In re Match Grp., Inc. Derivative Litig.*, 315 A.3d 446, 463 n.115 (Del. 2024).

potentially applicable here,[10] (2) the second stockholder vote could not cleanse the 2018 Award "absent the full suite of *MFW*[11] protections,"[12] and (3) the "ratification" process here did not comply with *MFW*.[13]

[10] *Ratification Opinion*, 326 A.3d at 1231.

[11] *Kahn v. M & F Worldwide Corp.* ("*MFW*"), 88 A.3d 635 (Del. 2014), *overruled in part on unrelated grounds by Flood v. Synutra Int'l, Inc.*, 195 A.3d 754 (Del. 2018).

[12] *Id.* at 1234.

[13] *Id.* at 1232-33.

II. TO CLEANSE A FIDUCIARY BREACH THROUGH RATIFICATION, DEFENDANTS HAD TO COMPLY WITH *MFW*

Tesla and the practitioners and professors who join Tesla as *amici* train most of their fire at the second proposition. Tesla says that the *MFW* doctrine "is inapposite to ratification."[14] The professors and practitioners agree: "the trial court's ruling" that Defendants had to follow *MFW*'s roadmap to cleanse the Award "conflicts sharply with this Court's ratification precedents, particularly those in the field of executive compensation where deference to the stockholder franchise is both longstanding and well-grounded in policy."[15]

They are mistaken.

Most importantly, none of the executive-compensation cases on which Tesla and its *amici* rely involved a controlling stockholder. There was no controller in

[14] Tesla Br. at 6.

[15] Brief Of Current And Retired Practitioners And Professors As Amici Curiae In Support Of Reversal ("Practitioners and Professors Br.") at 8.

Kerbs,[16] *Gottlieb*,[17] *Elster*,[18] *Vogelstein*,[19] *Calma*,[20] or *Investors Bancorp.*[21] That, of course, makes all the difference. "The ratification decisions that involve duty of loyalty claims" break down into two different categories: "(a) 'interested' transaction cases between a corporation and its directors ... and (b) cases involving a transaction between the corporation and its controlling shareholder."[22] Just last year, this Court re-confirmed that the same rule applies to *all* cases in the latter, conflicted-controller category: cleansing requires compliance with *MFW*.[23] The use of a single cleansing device alone can only shift the burden.

Indeed, even the practitioners and professors admit elsewhere that *Match* applied a "rule requiring entire fairness review of *any* transaction in which a

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[16] *Kerbs v. California E. Airways*, 90 A.2d 652 (Del. 1952) (cited in Tesla Br. at 23; Practitioners and Professors Br. at 22).

[17] *Gottlieb v. Heyden Chem. Corp.*, 91 A.2d 57 (Del. 1952) (cited in Tesla Br. at 22; Practitioners and Professors Br. at 22).

[18] *Beard v. Elster*, 160 A.2d 731 (Del. 1960) (cited in Practitioners and Professors Br. at 22).

[19] *Lewis v. Vogelstein*, 699 A.2d 327 (Del. Ch. 1997) (cited in Tesla Br. at 22; Practitioners and Professors Br. at 22).

[20] *Calma v. Templeton*, 114 A.3d 563 (Del. Ch. 2015) (cited in Practitioners and Professors Br. at 23).

[21] *In re Inv'rs Bancorp, Inc. S'holder Litig.*, 177 A.3d 1208 (Del. 2017) (cited in Practitioners and Professors Br. at 23).

[22] *In re Wheelabrator Techs., Inc. S'holders Litig.*, 663 A.2d 1194, 1203 (Del. Ch. 1995).

[23] *Match*, 315 A.3d at 451.

controlling stockholder receives a material non-ratable benefit, absent compliance with *MFW*."[24] The arguments for reversing that rule here are wholly unconvincing.

First, Tesla argues that *MFW* should not apply because Musk was "no longer a controlling stockholder," at the time of the second stockholder vote in 2024, because his stock ownership had declined.[25] Even if the claim about Musk's controller status in 2024 were true,[26] that's not how this doctrine works. As this Court recognized in *Lodzinski*, the relevant measurement date for determining controller status—and thus whether *MFW* compliance is required for cleansing—is when substantive economic negotiations begin and "set the . . . playing field for later negotiations."[27] Here, the only negotiations took place in 2017 and 2018.[28] There *were* no negotiations in 2024; the playing field was already set. The one-member

[24] Practitioners and Professors Br. at 10.

[25] Tesla Br. at 24.

[26] The Court of Chancery didn't reach that question because it interpreted defense counsel's confusing responses as a waiver. *Ratification Opinion*, 326 A.3d at 1233 n.161.

[27] *Olenik v. Lodzinski*, 208 A.3d 704, 719 (Del. 2019) ("Defendants are not entitled to a pleading stage dismissal based on lack of control because the facts pled support the reasonable inference that EnCap acted as Earthstone's controlling stockholder while key economic negotiations took place between Earthstone and Bold which set the financial playing field for later negotiations.").

[28] *Tornetta v. Musk* ("*Merits Opinion*"), 310 A.3d 430, 460 (Del. Ch. 2024).

Special Committee formed in 2024 "expressly and consciously did not negotiate (or renegotiate) with Mr. Musk about his compensation[.]"[29]

Second, Tesla argues that "*MFW* has no application here" because "*MFW* . . . says nothing about whether or how stockholders can ratify a *transaction*—as distinct from *director conduct*—after a court has deemed the transaction to be unfair."[30]

Tesla cites no case drawing that distinction because there is none; the distinction does not exist in Delaware law. "Shareholder ratification is a broad term of art intended to describe any approval of challenged board action by a fully informed vote of shareholders[.]"[31] When a court asks whether a cleansing doctrine like *Corwin* or *MFW* applies, it is asking whether there was an "informed ratification of that transaction."[32]

Tesla continues in this vein. "*MFW* allows directors to secure business-judgment protection to insulate their conduct from heightened judicial scrutiny before entering into a transaction," Tesla says, but "it does not constrain stockholders from voluntarily electing to accept an outcome despite a fiduciary breach."[33] It cites

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[29] *Ratification Opinion*, 326 A.3d at 1247 n.277 (quoting Proxy Statement at 87).

[30] Tesla Br. at 26-27.

[31] *Solomon v. Armstrong*, 747 A.2d 1098, 1113 n.40 (Del. Ch. 1999), *aff'd*, 746 A.2d 277 (Del. 2000) (cleaned up).

[32] *Sciabacucchi v. Liberty Broadband Corp.*, 2017 WL 2352152, at *15 (Del. Ch. May 31, 2017).

[33] Tesla Br. at 6.

no authority for this claim. Nor could it. Everyone admits that no case has ever held that a stockholder vote could ratify an adjudicated fiduciary breach.[34] This is pure *ipse dixit*. And it implies that it should be easier to cleanse an adjudicated fiduciary breach than any other type of conflicted-controller transaction. The argument is self-refuting.

Third, Tesla says "there is no reason to extend [*sic*] *MFW* to executive-compensation decisions involving a controlling stockholder."[35]The practitioners and professors supporting Tesla parrot this argument in a footnote, saying that they "question the utility of" applying *MFW* because "[e]xtending [*sic*] *MFW* into this space functionally imposes a shadow legislative code and overrides Delaware's traditional approach to executive compensation decisions."[36] They repeat this argument later, saying that "expanding [*sic*] *MFW* to encompass transactions that do not require stockholder approval is unwise and will promote needless litigation while

[34] A3662:14-22 ("THE COURT: All right. So let me just ask it again. Is there a single case in which common law ratification has been invoked to ratify an adjudicated breach of the duty of loyalty? ATTORNEY ROSS: We are not aware of a case, Your Honor, where it's been invoked[.]").

[35] Tesla Br. at 24.

[36] *Id.* at 10-11 (citing Lawrence A. Hamermesh, et al., *Optimizing the World's Leading Corporate Law: A Twenty-Year Retrospective and Look Ahead*, 77 Bus. Law. 321, 343-44 (Spring 2022)).

deterring valuable actions" and that "*MFW* is rooted in Delaware's difficulty grappling with squeeze-outs."[37]

This should all sound familiar. It is the same argument that the *Match* defendants made, relying on the same law review article.[38] *Match* squarely rejected that ahistorical take on Delaware's "traditional approach," and "read our Supreme Court precedent differently."[39] As this Court laid out in *Match*, a long line of Supreme Court authority from *Tremont II*[40] through *Lodzinki*[41] confirms that—for any case not governed by Senate Bill 21—a conflicted-controller transaction can be cleansed only through the use of dual cleansing mechanisms imposed from the beginning of negotiations.[42] We agree that this Court should apply "the settled law,"[43] but the settled law is the rule articulated in *Match*, not the alternate history presented by Tesla and its *amici*.

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[37] *Id.* at 19.

[38] Trans. ID 70364115 (Supplemental Opening Brief of the IAC Defendants in *In re Match Group, Inc. Derivative Litigation*, No. 36, 2022) at 1, 9, 10, 21, 25, 29, 31, 32, 37.

[39] *Match*, 315 A.3d at 463.

[40] *Kahn v. Tremont Corp.* ("*Tremont II*"), 694 A.2d 422 (Del. 1997).

[41] *Olenik*, 208 A.3d 704.

[42] *Match*, 315 A.3d at 464-65.

[43] Practitioners and Professors Br. at 20.

Finally, the practitioners and professors supporting Tesla say that "[e]ven if the trial court was correct to subject the 2018 Plan to *MFW* in the first instance . . . *MFW* should have no application to an informed stockholder ratification vote of a previously approved transaction, particularly with respect to compensation."[44] Why? Because "if the judiciary once determines that an executive compensation transaction involves a conflicted controller—even a transaction-specific controller who is not a controller with respect to a future ratifying vote—then that transaction is forever outside the control of the corporation and its stockholders. That cannot be Delaware law."[45]

This is wrong in several ways.

For one, the premise is incorrect. In its thoughtful post-trial merits opinion, the Court of Chancery found that Musk's award was not, in fact, "previously approved" by an informed vote because "the proxy statement inaccurately described key directors as independent and misleadingly omitted details about the process."[46] Unless this Court overrules that fact-intensive finding, the 2018 vote is irrelevant.

Moreover, it is simply not true that a determination "that an executive compensation transaction involves a conflicted controller" would mean that the

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[44] *Id.* at 25.

[45] *Id.*

[46] *Merits Opinion*, 310 A.3d at 446.

"transaction [was] forever outside the control of the corporation and its stockholders."[47] The controller and the board could follow *MFW* if they wanted to cleanse it. Or the board could create a special litigation committee to evaluate a derivative challenge to the transaction. Defendants refused to follow either course.

Most importantly, the practitioners and professors' suggested approach would make Delaware law incoherent. The dual cleansing mechanisms serve "independent integrity-enforcing functions"; they are "complements and not substitutes."[48] "A transactional structure with both these protections is fundamentally different from one with only one protection. . . . A majority-of-the-minority vote provides stockholders a chance to vote . . . but with no chance to have an independent bargaining agent work on their behalf[.] . . . These protections are therefore . . . not substitutes[.]"[49] If, as *Match* holds, a stockholder vote is alone insufficient to cleanse a transaction with a conflicted controller, then that must be the rule no matter how many votes are held. Tesla and its *amici* make no attempt to engage with this analysis, which lies at the heart of *MFW*.

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[47] *Contra* Practitioners and Professors Br. at 25.

[48] *In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604, 619 (Del. Ch. 2005).

[49] *In re MFW S'holders Litig.*, 67 A.3d 496, 503 (Del. Ch. 2013), *aff'd sub nom. MFW*, 88 A.3d 635.

III. DEFENDANTS' ATTEMPTED RATIFICATION DID NOT COMPLY WITH *MFW*

The Court of Chancery's conclusion that Defendants failed to comply with *MFW* is hard to dispute but Tesla tries. Tesla is mistaken, even if this Court were to conclude that the 2024 vote was fully informed.

First, as the Court of Chancery found, "[t]he Board and Musk began negotiating the Grant in 2017, but the Board did not establish the '*MFW'* conditions until 2024. The conditions did not come before the start of economic negotiations."[50] Tesla admits this but says "preconditioning makes no sense in the context of ratification, which occurs after a deal has already closed."[51] It cites no case adopting this logic because, as discussed above, the distinction that Tesla tries to draw does not exist in Delaware law.

More importantly, Tesla ignores why precommitment is important. "Having *MFW*'s dual requirements in place at the start of economic negotiations . . . helps replicate a third-party process and, simultaneously, incentivizes controllers to precommit to *MFW*'s conditions early[.]"[52] Only if the controller self-disables from

[50] *Ratification Opinion*, 326 A.3d at 1232–33.

[51] Tesla Br. at 31.

[52] *Flood v. Synutra Int'l, Inc.*, 195 A.3d 754, 763 (Del. 2018).

the beginning will "both the controller and Special Committee bargain under the pressures exerted on both of them by these protections."[53]

Second, even if precommitment wasn't required, the Special Committee failed to discharge its duty of care in 2024 by failing to negotiate. Tesla says that the "[t]he Special Committee employed robust processes to fulfill its duty of care" because it had a lot of advisors who billed a lot of hours.[54] But *MFW* requires that the special committee "meet[] its duty of care *in negotiating* a fair price."[55] And this Special Committee refused to negotiate at all.[56] The point of a special committee is to ensure "that there is a bargaining agent who can negotiate price and address the collective action problem facing stockholders."[57] But the special committee must actually bargain.

Third, for a stockholder vote to have meaning, it must be uncoerced. Here, in the 2024 proxy, Tesla told stockholders that the alternative to "ratifying" the 2018

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[53] *Id.*

[54] Tesla Br. at 30.

[55] *MFW*, 88 A.3d at 645 (emphasis added).

[56] *Ratification Opinion*, 326 A.3d at 1247 n.277.

[57] *MFW*, 67 A.3d at 503; *In re Dell Techs. Inc. Class V S'holders Litig.*, 2020 WL 3096748, at *17 (Del. Ch. June 11, 2020) ("*MFW*'s dual protections contemplate that the Special Committee will act as the bargaining agent for the minority stockholders[.]"); *Cox Commc'ns,* 879 A.2d at 606 ("the directors have the capability to act as effective and active bargaining agents, which disaggregated stockholders do not.").

award was issuing a replacement package to Musk with a potential "accounting charge in excess of $25 billion."[58] Musk himself made prominent threats on social media[59] that he was "uncomfortable growing Tesla to be a leader in AI & robotics without having ~25% voting control" and that he would divert those corporate opportunities "outside of Tesla" if he didn't get his way.[60] This was, in the words on one prominent Tesla investor, "blackmail."[61] Musk subsequently refused to meet with a significant investor who voted against his wishes.[62]

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[58] *Ratification Opinion*, 326 A.3d at 1219.

[59] Musk's own *amici* note that they "most certainly do not endorse his harsh criticisms of the Delaware judiciary." Practitioners and Professors Br. at 1. This is an implicit recognition of the influence that Musk wields through social media.

[60] Elon Musk, Twitter Post (Jan. 15, 2024), https://x.com/elonmusk/status/1746999488252703098 (accessed Apr. 17, 2025).

[61] Jennifer Sor, *Elon Musk is 'blackmailing' Tesla investors by threatening to build new projects outside of the EV company, long-time Tesla bull says*, BUS. INSIDER (Jan. 17, 2024), https://markets.businessinsider.com/news/stocks/elon-musk-tesla-ownership-stock-blackmail-ai-tsla-ross-gerber-2024-1.

Because the trial court found that the 2024 vote was uninformed, it did not reach the coercion question. *Ratification Opinion*, 326 A.3d at 1233.

[62] *Elon Musk clashes with Norway wealth fund CEO; 'friends are as friends do'*, REUTERS (Jan. 28, 2025), https://www.reuters.com/business/elon-musk-clashes-with-norway-wealth-fund-ceo-friends-are-friends-do-2025-01-28/.

IV. CONCLUSION

The Court of Chancery correctly held that the second stockholder vote could not ratify the 2018 Award absent compliance with *MFW*. This Court should affirm that conclusion.

LABATON KELLER SUCHAROW LLP

/s/ Ned Weinberger
Ned Weinberger (Bar No. 5256)
Mark D. Richardson (Bar No. 6575)
222 Delaware Avenue, Suite 1510
Wilmington, DE 19801
(302) 573-2540

Counsel to Amici Curiae Anat Alon-Beck, James An, Joan MacLeod Heminway, Katharine Jackson, Brian JM Quinn, and Anne Tucker

Dated: May 19, 2025

CERTIFICATE OF SERVICE

I, Ned Weinberger, hereby certify that on May 19, 2025, I caused a true and correct copy of the foregoing to be served on the following counsel listed below via File & ServeXpress:

William M. Lafferty
Susan W. Waesco
Ryan D. Stottmann
Jacob M. Perrone
MORRIS, NICHOLS,
ARSHT & TUNNELL, LLP
1201 North Market Street
Wilmington, DE 19801

David E. Ross
Bradley R. Aronstam
Garrett B. Moritz
Thomas C. Mandracchia
ROSS ARONSTAM & MORITZ LLP
100 S. West Street, Suite 400
Wilmington, DE 19801

Rudolf Koch
John D. Hendershot
Kevin M. Gallagher
Andrew L. Milam
RICHARDS, LAYTON & FINGER, P.A.
920 North King Street
Wilmington, DE 19801

Catherine A. Gaul
ASHBY & GEDDES, P.A.
500 Delaware Ave., 8th Floor
Wilmington, DE 19801

Theodore A. Kittila
HALLORAN FARKAS + KITTILA LLP
5722 Kennett Pike
Wilmington, DE 19807

Peter B. Andrews
Craig J. Springer
David M. Sborz
Jackson E. Warren
ANDREWS & SPRINGER LLC
4001 Kennett Pike, Suite 250
Wilmington, DE 19807

John L. Reed
Ronald N. Brown, III
Caleb G. Johnson
Daniel P. Klusman
DLA PIPER LLP (US)

Anthony A. Rickey
MARGRAVE LAW LLC
3411 Silverside Road
Baynard Building, Suite 104
Wilmington, DE 19810

1201 N. Market Street, Suite 2100
Wilmington, DE 19801

David S. Eagle
Sally E. Veghte
KLEHR HARRISON HARVEY BRANZBURG LLP
919 N. Market Street, Suite 1000
Wilmington, DE 19801

Michael A. Barlow
QUINN EMANUEL URQUHART & SULLIVAN, LLP
500 Delaware Avenue, Suite 220
Wilmington, DE 19801

Gregory V. Varallo
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
500 Delaware Avenue, Suite 901
Wilmington, DE 19801

Thompson Bayliss,
Adam K. Schulman
Eliezer Y. Feinstein
ABRAMS & BAYLISS LLP
20 Montchanin Road Suite 200
Wilmington, DE 19807

/s/ Ned Weinberger
Ned Weinberger (Bar. No 5256)

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