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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE TESLA, INC. DIRECTOR COMPENSATION STOCKHOLDER LITIGATION	CONSOLIDATED No. 52, 2025 & No. 53, 2025 Case Below: Court of Chancery of the State of Delaware, C.A. No. 2020-0477-KSJM **PUBLIC VERSION** **FILED: May 19, 2025**

APPELLEES ELON MUSK, BRAD BUSS, ROBYN M. DENHOLM, IRA EHRENPREIS, LAWRENCE J. ELLISON, ANTONIO J. GRACIAS, STEPHEN T. JURVETSON, LINDA JOHNSON RICE, JAMES MURDOCH, KIMBAL MUSK, KATHLEEN WILSON-THOMPSON, AND HIROMICHI MIZUNO'S ANSWERING BRIEF

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Dated: May 2, 2025

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NATURE OF PROCEEDINGS

This appeal arises from the Court of Chancery's approval of a settlement agreement in a derivative action related to non-employee board compensation at Tesla, Inc. ("Tesla").[1] After extensive arm's-length settlement negotiations, the parties entered into a Stipulation and Agreement of Compromise and Settlement on July 14, 2023. The Settlement was negotiated between the Police and Fire Retirement System of the City of Detroit ("Plaintiff"), derivatively on behalf of Tesla, and certain current and former directors of the Tesla Board of Directors ("Board"), with the assistance of a respected mediator.[2] Plaintiff and its counsel were adequate, the terms were fair, and proper notice of the Settlement was given to Tesla's stockholders.

The Settlement was supported by Plaintiff and Settling Defendants, who argued in favor of its approval at a settlement hearing before the Court of Chancery. Michael R. Levin ("Levin") was one of three stockholders that properly

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[1] Unless otherwise defined herein, any capitalized terms used in this brief have the same meaning as ascribed in the Settlement. ("Settlement", A260-297).

[2] "Director Defendants" refers collectively to non-employee former and current Tesla directors Brad Buss, Robyn M. Denholm, Ira Ehrenpreis, Lawrence J. Ellison, Antonio J. Gracias, Stephen T. Jurvetson, Kimbal Musk, James Murdoch, Linda Johnson Rice, Kathleen Wilson-Thompson, and Hiromichi Mizuno. "Defendants" refers collectively to Director Defendants and Elon Musk, a fellow Tesla director and Tesla's Chief Executive Officer. "Settling Defendants" refers collectively to Defendants and Tesla.

objected to the Settlement and the only one to appear at the settlement hearing.[3] On January 8, 2025, after considering the parties' briefing and oral arguments, as well as written arguments from the objectors and an oral argument by Levin, the Court of Chancery approved the Settlement, finding it to be fair, reasonable, and adequate.[4] (Opening Brief of Appellant Tesla, Inc., Ex. B. ("Op.").) The Court of Chancery issued Final Judgment on January 13, 2025. (Appellant Michael R. Levin's Opening Brief, Ex. A)

Levin filed a notice of appeal on February 10, 2025, and his opening appeal brief ("Levin Br.") on March 31, 2025. On appeal, Levin reiterates his objections below, arguing that the Court of Chancery erred when it approved the Settlement because (1) the Settlement does not include a director-by-director allocation of the amount to be paid ("Ratable Allocation Objection"), and (2) the Settlement allegedly does not make clear that the annual stockholder vote to approve non-employee director compensation during the five-year Settlement Governance Period is mandatory ("Approval Vote Objection").

[3] The SOC Investment Group filed similar objections to Levin's but did not appeal the Court of Chancery's approval of the Settlement. Another stockholder complained (in a non-filed letter) that the Settlement did not provide any benefits to the Tesla stockholders. The Court of Chancery correctly rejected that objection, and that stockholder did not appeal.

[4] The Court of Chancery also awarded attorneys' fees, which nominal defendant Tesla is currently appealing, as well as an incentive award.

This Court should affirm the Court of Chancery's approval of the Settlement. Levin's two objections are immaterial and baseless.

Ratable Allocation Objection. The Settlement unambiguously provides that the "Director Defendants shall, jointly and severally, provide to Tesla the value of 3,130,406 options ("Settlement Options") using the methods set forth in [Section 2]." (A275 § 2.1.) "Director Defendants" is a defined term that includes each of the non-employee former and current Tesla directors named as defendants; it does *not* include Musk. (A261.) Accordingly, the plain language of the Settlement makes clear that Musk is not contributing to the Settlement Option Amount (*i.e.*, the value due pursuant to the terms of the Settlement). Although the Director Defendants had no obligation to contribute to the Settlement based on any particular formula, given that they faced joint and several liability in this action, they confirmed through an unequivocal representation by counsel that there is no basis for Levin's concern: "Aside from those directors who received little to no compensation for their Board service during the Relevant Period, each Director Defendant will fund the Settlement Option Amount in direct proportion to the compensation that he or she received during the Relevant Period." (B22.)[5]

[5] Citations to the "B" appendix are to the Appendix to Appellees Elon Musk, Brad Buss, Robyn M. Denholm, Ira Ehrenpreis, Lawrence J. Ellison, Antonio J. Gracias, Stephen T. Jurvetson, Linda Johnson Rice, James Murdoch, Kimbal Musk, Kathleen Wilson-Thompson, and Hiromichi Mizuno's Answering Brief, filed herewith.

Contrary to Levin's repeated contentions, there is nothing "vague" about that representation. (*See* Levin Br. 5, 6, 7, 9, 24.) And the Director Defendants have *already* funded the Settlement Option Amount consistent with that representation. The Court of Chancery did not abuse its discretion in approving the Settlement over Levin's Ratable Allocation Objection.

Approval Vote Objection. As part of the governance measures that apply during the five-year Settlement Governance Period, the Settlement unambiguously provides: "On an annual basis, Tesla shall submit the proposed annual compensation to be paid to Non-Employee Directors to an approval vote of the majority of Unaffiliated Tesla Stockholders present in person or represented by proxy and entitled to vote on such decision." (A279 § 2.12.) The Settlement specifies which votes shall count for purposes of that vote. (A279 § 2.12.) The Court of Chancery correctly concluded that "the company is committing to condition director compensation on approval by the minority stockholders," which Defendants' counsel confirmed during oral argument. (Op. 23:17-19.) Levin's unsupported ad hominem attacks, which suggest that Tesla and its directors cannot be trusted, are false and have no bearing on his objection. As the Court of Chancery stated, the Settlement (and the approval vote term) "is as enforceable as any corporate agreement." (Op. 23:20-21.) The Court of Chancery did not abuse its discretion in approving the Settlement over Levin's Approval Vote Objection.

SUMMARY OF ARGUMENT

1. Denied.[6] The Court of Chancery did not abuse its discretion in approving the Settlement. Pursuant to Court of Chancery Rule 23.1(d)(5), the Court of Chancery determined that: (1) Plaintiff and its counsel adequately represented Tesla, (2) adequate notice of the Settlement was provided to Tesla's stockholders, (3) the Settlement was negotiated at arm's length, and (4) the terms of the Settlement fall well within the range of reasonable results. (Op. 15-25.) The Court of Chancery found, in its discretion, that the Settlement was "more than reasonable." (Op. 20:14-15.) The Court of Chancery carefully considered Levin's contentions that the Settlement was flawed, incomplete, or ambiguous, and properly determined that Levin's concerns were either unfounded or allayed by the terms of the Settlement and the representations of Defendants' counsel. (Op. 22-25.)

[6] The Summary of Arguments in Levin's brief are not numbered, as required by Rule 14(b)(iv) of this Court. The numbered paragraphs in this section correspond, in order, to each of the seven un-numbered paragraphs in the "Summary of the Arguments" section in Levin's brief. (Levin Br. 8-9.)

2. Denied. The Settlement clearly reflects the parties' intent.

As to the Ratable Allocation Objection, the Settlement need not contain any specific director-by-director allocation, as the Director Defendants were subject to joint and several liability in this action, which was a *benefit* to Tesla. What's more, as Plaintiff's counsel acknowledged, if Plaintiff had taken the case through trial and won, it could not have achieved an order requiring each director to pay a particular amount. (A786.) But this debate is merely an academic one, as the Director Defendants committed to fund the Settlement Option Amount in direct proportion to the compensation that each received during the Relevant Period, and *they have already done so*. There was plainly no abuse of discretion.

As to the Approval Vote Objection, the Court of Chancery was well within its discretion when it interpreted the "approval vote" term in the Settlement as a mandatory, not advisory vote, which Defendants' counsel also confirmed. There is no ambiguity.

3. Denied. Neither objection is material, nor is it "reasonably foreseeable" that Levin's concerns will have any bearing on Tesla's stockholders.

As to the Ratable Allocation Objection, a term in the Settlement requiring director-by-director allocation of the settlement payment would not materially benefit Tesla, the real party in interest in this derivative action. In any event, given that the Director Defendants committed to ratable allocation and have already

funded the Settlement accordingly, Levin's objection, even if sustained, would have no material effect on the Settlement.

As to the Approval Vote Objection, Levin's request for clarification of an already unambiguous term would have no material effect on the Settlement or Tesla's stockholders.

4. Denied. For the reasons set forth in the preceding paragraphs and further below, the Settlement clearly reflects the parties' intent, which was confirmed by counsel in writing and during oral argument: (1) the Director Defendants will fund the Settlement Option Amount in direct proportion to the compensation that each received during the Relevant Period, and (2) the Tesla Board will condition director compensation on annual approval by the Unaffiliated Tesla Stockholders during the Settlement Governance Period.

5. Denied. Levin has not identified any settlements that contain defendant-by-defendant allocations of settlement payments, nor is such an allocation required by Delaware law. With respect to the governance measures, the terms of the Settlement are clear on their face and consistent with other governance terms that have previously been approved by the Court of Chancery.

6. Denied. For the reasons set forth in the preceding paragraphs and further below, the Court of Chancery did not err when it approved the Settlement as fair,

reasonable, and adequate. Levin's contention that the Settlement's terms invite further litigation are baseless.

7. Denied. As explained by the Director Defendants' counsel in the proceedings below, it would not be "simple and easy" to amend a settlement that involved 12 defendants. The Settlement resulted from months of challenging negotiations, managed by an experienced mediator. In any event, for the reasons set forth in the preceding paragraphs and further below, no modification is warranted because the Settlement is fair, reasonable, and more than adequate on its face.

STATEMENT OF FACTS

A. Tesla's Director Compensation Policy.

In January 2010, the Tesla Board adopted its outside director compensation policy ("Director Compensation Policy"), which provided for outside directors to receive a fixed number of stock options and a small cash retainer annually for their service. (Op. 6.) The Director Compensation Policy was amended several times over the years, but its basic structure—compensating almost exclusively with a fixed number of high-risk options—remained unchanged. (Op. 6.) Throughout the Relevant Period (June 2017 to 2023), the Director Defendants received nearly all of their compensation in options, which meant they received value only if Tesla's stock price rose above the option strike price (set at Tesla's stock price on the day the option was granted). (A550.) The Director Compensation Policy was thus fully aligned with the interests of Tesla's stockholders. (A550-556.)

The Director Defendants risked receiving little to nothing for their Tesla Board service. For many years, that is exactly what happened. Before 2020, the Director Defendants' options were underwater—*i.e.*, Tesla's stock was below the strike price of the options—during long stretches. But the Tesla Board stayed committed to the Director Compensation Policy in bad times and good, betting on the future success of Tesla when most were betting it would fail. It took many

years, but the Board's commitment to a long-term vision of Tesla eventually yielded massive value for all Tesla stockholders. (A555-556.)

B. Litigation and Settlement.

On June 17, 2020, Plaintiff filed a derivative suit claiming that Tesla's non-employee directors breached their fiduciary duties by excessively compensating themselves during the Relevant Period. (Op. 4, 11.) Count I of Plaintiff's complaint alleged a breach of fiduciary duties against all Defendants, and Count II alleged unjust enrichment against the Director Defendants. (Op. 11.)

Plaintiff and the Director Defendants litigated the claims for approximately three years. (Op. 11.) During the litigation, Plaintiff and the Director Defendants exchanged written discovery, obtained discovery from third parties, deposed fact witnesses, and exchanged expert reports. (Op. 11.)

While the litigation was ongoing, the Tesla Board unanimously approved and adopted resolutions to forgo previously approved option grants for board service in 2021 and 2022. The Director Defendants ultimately agreed to forgo compensation for Tesla Board service for 2023 as well. (Op. 12; A278.)

In 2023, in an effort to resolve the litigation, Plaintiff and the Director Defendants participated in three full-day mediation sessions facilitated by respected mediator Bob Meyer, in addition to extensive discussions facilitated by Mr. Meyer between those sessions. (Op. 11, 18-19; B1-9.) On July 14, 2023,

Plaintiff and the Director Defendants entered into the Settlement, which was subject to approval by the Court of Chancery. (Op. 5.)

The Settling Parties filed the Settlement in the Court of Chancery on July 14, 2023, along with a proposed scheduling order, a proposed notice to be distributed to Tesla's stockholders, and a proposed order approving the Settlement. (A19; A260-297.) The Court of Chancery approved the scheduling order four days later. (A19), and notice was timely provided to stockholders. (Op. 16-17; A525-540.)

C. Settlement Terms.

In agreeing to settle, the Settling Defendants denied (and still deny) all allegations of wrongdoing, fault, liability, or damage whatsoever, and deny having breached any duties. (A266.) They also maintain that they acted in good faith at all relevant times and that they had meritorious defenses to all of Plaintiff's claims. (A266.) The Settling Defendants nevertheless agreed to the Settlement to eliminate the uncertainty, risk, burden, and expense of further litigation for themselves and for Tesla. (A266-267.) The Settlement includes several key terms:

Return of Options: The Director Defendants agreed to provide to Tesla, jointly and severally, the value of 3,130,406 options ("Settlement Options") using the methods set forth in the Settlement. (A275 § 2.1.) The Director Defendants could return the Settlement Options in the form of unexercised options (awarded as compensation to the Director Defendants during the Relevant Period), cash, or

Tesla stock; provided that the total value equals the Settlement Option Amount. (A275, A277 §§ 2.2, 2.6.)

Foregone Compensation: The Director Defendants agreed to forgo permanently any compensation for Board service for 2021, 2022, and 2023. (A278 § 2.8.)

Governance Measures: Tesla and the Tesla Board agreed to implement certain governance measures concerning non-employee director compensation and maintain those measures during the Settlement Governance Period (a five-year period, as defined in the Settlement). (A278-280 §§ 2.9-2.14.) Among other measures, the Tesla Board agreed to condition director compensation on minority stockholder approval during the Settlement Governance Period: "On an annual basis, Tesla shall submit the proposed annual compensation to be paid to Non-Employee Directors to an approval vote of the majority of Unaffiliated Tesla Stockholders present in person or represented by proxy and entitled to vote on such decision." (A279 § 2.12.) For purposes of the Settlement, "Unaffiliated Tesla Stockholders" means all Tesla stockholders of record other than (i) Defendants and (ii) Other Tesla Directors (but only while such Other Tesla Directors serve on the Tesla Board). (A279 § 2.12.)

D. Levin's Objections to the Settlement.

On September 20, 2023, Levin filed his objections. (B10-15.)[7] He raised two objections:

Ratable Allocation Objection: Levin objected that the Settlement "fails to designate for each individual Director Defendant a specific amount that each individual Director Defendant will return to Tesla as their share or portion of the Settlement Option Amount, as defined in the Settlement Agreement (Section 2.6)." (B226.)

Approval Vote Objection: Levin objected that the Settlement's approval vote "lacks an enforcement mechanism, such that if the stockholder vote on proposed annual compensation fails to gain the vote of a majority of Unaffiliated Tesla Stockholders, then the Settlement Agreement does not set forth specific consequences for such failure." (B226.)

E. Defendants' Written Representations Below.

On October 6, 2023, Defendants responded to Levin's objections. (B19-28.) Defendants squarely addressed the Ratable Allocation Objection. Levin's core concern seemed to be "whether Elon Musk is paying for some or all of the Settlement." (B20.) The Settlement makes clear that the Director Defendants are

[7] Levin filed a modified statement of objections on October 9, 2023. (B225-234.)

obligated to fund the Settlement; that does not include Musk. (A275 § 2.1; B20-21.) Defendants further explained the allocation terms:

- Levin questioned "how much each individual Director Defendant will return to Tesla pursuant to the Settlement." Defendants unequivocally responded: "Aside from those directors who received little to no compensation for their Board service during the Relevant Period, each Director Defendant will fund the Settlement Option Amount in direct proportion to the compensation that he or she received during the Relevant Period." (B22.)

- "The Returned Options will be provided by Director Defendants who still hold sufficient vested but unexercised options from their Relevant Period Director Compensation." (B22.)

- "The Returned Cash and/or Returned Shares will be provided by Director Defendants who previously exercised the options from their Relevant Period Director Compensation." (B22.)

Defendants also directly addressed the Approval Vote Objection. Defendants explained that Levin's position—that the Settlement does not include sufficient detail regarding the "approval vote"—is refuted by the plain terms of the Settlement, which are consistent with governance terms that have previously been approved by the Court of Chancery. (B23-27.)

F. Defendants' Representations During the Settlement Hearing.

On October 13, 2023, the Court of Chancery held a Settlement approval hearing, where both Plaintiff and the Director Defendants presented arguments in favor of the settlement, while Levin argued his objections. (A773-869.) During the hearing, counsel for the Director Defendants reaffirmed to the Court of Chancery that the Director Defendants would fund the Settlement Option Amount proportionally, based on the compensation that they received during the Relevant Period. (A810.) Counsel for the Director Defendants also confirmed that Musk would not be paying any portion of the settlement. (A809-810.)

Regarding the stockholder approval vote, both Plaintiff's counsel and the Director Defendants' counsel confirmed that "approval means approval, not advisory." (A787-788; A812.)

G. The Court of Chancery Approves the Settlement.

On January 8, 2025, the Court of Chancery approved the Settlement. The Court of Chancery determined, in accordance with Court of Chancery Rule 23.1(d)(5), that (1) Plaintiff and its counsel adequately represented Tesla, (2) adequate notice of the settlement hearing was provided to Tesla's stockholders, (3) the proposed settlement was negotiated at arm's length, and (4) the terms of the settlement fell well within the range of reasonable results that a person not forced or compelled to settle would accept. (Op. 15-25.)

In considering the terms of the Settlement, the Court of Chancery appropriately assessed the strength of the claims; the costs, risks, and delay of trial and appeal; the scope of the release; and the objections. (Op. 19-20.) Under those factors, the Court of Chancery found, in its business judgment, that the Settlement was "more than reasonable." (Op. 20.)

With respect to Levin's Ratable Allocation Objection, the Court of Chancery relied on counsel's representation that each Director Defendant would fund the Settlement Option Amount in direct proportion to the compensation that he or she received during the Relevant Period. (Op. 22-23.) "Given the representation, Levin's first concern is allayed." (Op. 23.)

With respect to Levin's Approval Vote Objection, the Court of Chancery explained, "Levin argues that the stockholder approval contemplated by the settlement 'lacks an enforcement mechanism.' I don't see it that way. As I read the [Settlement], the company is committing to condition director compensation on approval by the minority stockholders. That agreement and that term is as enforceable as any corporate agreement." (Op. 23.)

In sum, the Court of Chancery found, "Given the benefits of the settlement, the strength of the claims, the risks of continued litigation, the appropriate scope of release, and my rulings on the objections, I conclude that this is a good settlement,

certainly well within the range of results that someone not compelled to settle would accept." (Op. 24-25.)

H. The Director Defendants Fund the Settlement.

On February 26, 2025, Tesla submitted, as required by the Settlement, a certification from its Chief Accounting Officer and Chief Financial Officer (the "Certification"). (A288 § 7.2; A867-869.) The Certification confirms that Tesla received $276,616,721 in cash from certain Director Defendants. (A868-869 ¶ 6.) It further confirms that other Director Defendants "returned, subject to Final Approval, 1,957,861 Settlement Options in the form of Returned Options, the value of which was calculated using the valuation method set forth in Section 2.3 of the Settlement".[8]

As required, Tesla also certified that the Settlement Option Amount that Tesla received from the Director Defendants was applied in accordance with the terms of the Settlement. (A869 ¶¶ 8-11.)

[8] For the reasons set forth in the Certification (footnote 2), Tesla received $209 more than the Settlement Option Amount. (A868.)

The Settlement did not require Tesla's Chief Accounting Officer to specify the director-by-director allocation of the Settlement Option Amount. As set forth in Section 7.2, the Settlement requires certification of only two points:

- "Tesla has received the full Settlement Option Amount (returned in any form permitted by and calculated pursuant to Section 2 of this Stipulation). The certification shall include the **aggregate amount and value** of each of the Returned Cash, Returned Stock, and Returned Options (*e.g.*, the total number of Returned Options and the value of those Returned Options using the method set forth in Section 2)." (A288 § 7.2(a) (emphasis added).)
- "The Settlement Option Amount has been applied pursuant to the terms of Section 7.1 of this Stipulation." (A288 § 7.2(b).)

As the Settlement and Certification make clear, the return of the Returned Options was subject to Final Approval, to avoid prematurely cancelling options (which could not be reversed).[9] (A288 § 7.3; A868 ¶ 5.) After Levin's appeal was filed, it was clear that even if it succeeded (which it should not), it would not change the allocation of the settlement payment among the Director Defendants, and would not materially affect the governance terms, or any other terms. Accordingly, Tesla's Board authorized the cancellation of the Returned Options pertaining to the Director Defendants who continue to serve on the Tesla Board

[9] Final Approval means when appeals have been resolved. (A270 § 1.8.)

(the "Current Director Defendants"). On May 1, 2025, the Current Director Defendants filed Form 4s, reflecting the Settlement Options that were cancelled for each of those Directors. (B294-299.)

ARGUMENT

I. THE COURT OF CHANCERY DID NOT ABUSE ITS DISCRETION IN APPROVING THE SETTLEMENT, AND ITS DECISION SHOULD BE AFFIRMED.

A. Question Presented.

Did the Court of Chancery abuse its discretion in approving the Settlement as fair, reasonable, and adequate? The issue was presented and decided below.[10] (A436-453; B10-18; B225-234; A541-572; A744; B19-28; A773-866; Op. at 17-25.)

B. Scope of Review.

"The applicable standard of appellate review requires this Court to examine the record for an abuse of discretion by the Court of Chancery in approving the settlement." *Kahn v. Sullivan*, 594 A.2d 48, 51 (Del. 1991) (examining the Court of Chancery's rejection of settlement objections and concluding that the Court of Chancery did not abuse its discretion). "[W]hen the Court of Chancery reviews the fairness of a settlement, it must evaluate all of the circumstances of the settlement by using its own business judgment. The Court of Chancery's broad special role contrasts sharply with this Court's own limited one. Because the Court of Chancery's decision constitutes an exercise of discretion, this Court reviews the

[10] Levin's argument is not subdivided in a manner that identifies clearly the question being presented in his appeal, as required by Rule 14(b)(iv) of this Court. Defendants do not dispute, however, that the issue of whether the Court of Chancery properly approved the Settlement was presented and decided below.

record simply to determine whether that discretion has been abused. We do not exercise our own business judgment in an effort to evaluate independently the intrinsic fairness of the settlement." *Id.* at 63 (citations and quotation marks omitted).

C. Merits of the Argument.

1. The Court of Chancery's Analysis of the Settlement Under the Rule 23.1 Framework Was Well-Reasoned.

In approving the Settlement, the Court of Chancery duly considered the required factors under Delaware law. (Op. 15-25.) The only factor relevant to this appeal is the Court of Chancery's consideration of Levin's Objections, which it appropriately rejected. (Op. 22-25.)

2. The Court of Chancery Did Not Abuse Its Discretion in Considering and Rejecting the Ratable Allocation Objection.

Levin's Ratable Allocation Objection is baseless for various reasons, and the Court of Chancery correctly rejected it.

The Plain Language of the Settlement Provided More than Adequate Information to Tesla's Stockholders. The plain language of the Settlement—and the Director Defendants' representations below—make clear that Musk is not funding the Settlement. The Settlement states, in relevant part: "**Director Defendants** shall, jointly and severally, provide to Tesla the value of 3,130,406 options . . . using the methods set forth in this Section." (A275 § 2.1 (emphasis

added).) It further states: "Using the valuation methods set forth in this Stipulation, **Director Defendants** shall deliver to Tesla the value of the Settlement Options, which is equal to $735,266,505 . . . ." (A277 § 2.6 (emphasis added).) The term "Director Defendants" does not include Elon Musk. The term is defined to include only "non-employee former and current Tesla directors Brad Buss, Robyn M. Denholm, Ira Ehrenpreis, Lawrence J. Ellison, Antonio J. Gracias, Stephen T. Jurvetson, Kimbal Musk, James Murdoch, Linda Johnson Rice, Kathleen Wilson-Thompson, and Hiromichi Mizuno." (A261.) The distinct Settlement term "Defendants" includes both Elon Musk and the Director Defendants. (*Id*.) Therefore, Elon Musk is not among the group that is jointly and severally liable to pay the Settlement Option Amount. The Director Defendants' counsel confirmed the same in writing and at oral argument.[11] (B20-21; A810-811.)

Mr. Musk was treated differently than the other Defendants in this Action for a reason. This Action challenged Tesla's director compensation, and the Settlement concerns the options and cash that the Director Defendants were granted during their service on the Tesla Board between June 17, 2017 (three years

[11] Levin suggests that Musk could later indemnify the Director Defendants for their contribution to the Settlement. (Levin Br. 15.) Even assuming such an indemnity were made (which is not contemplated), it would have to be disclosed at the time, which would give Levin an opportunity to address any alleged independence concerns, as Defendants' counsel explained below. (A810-811.)

before the date of the Complaint) and July 14, 2023 (the date of the Settlement), which is defined as the "Relevant Period Director Compensation." (A261.) Mr. Musk did not receive any Relevant Period Director Compensation. Indeed, he has never received compensation for serving as a Tesla Board member. (B22.)

Delaware Law Does Not Require Ratable Allocation. Even if the Director Defendants had not funded the Settlement in proportion to the compensation they received during the Relevant Period (which they have), Levin offers no authority (and there is none) for his position that the parties were required to include such an allocation in the Settlement. Given that Defendants faced joint and several liability in this litigation, Plaintiff would not have obtained a director-by-director allocation even if it had pursued its claims through trial and prevailed, as its counsel acknowledged.[12] (A786-787.)

In addition, joint and several liability is a benefit to Tesla, the beneficiary of this derivative settlement. As Plaintiff's counsel argued in response to Levin's objection during the Settlement hearing, "If one specific person is unable to pay the proportional share, all the other ones must stump up to put that $735 million of

[12] *See Laventhol, Krekstein, Horwath & Horwath v. Tuckman*, 372 A.2d 168, 170 (Del. 1976) (finding joint and several liability applicable to accountants and board of directors for alleged conspiratorial violations of fiduciary duties during a merger); *see also In re Rural Metro Corp. S'holders Litig.*, 88 A.3d 54, 87-88, 101 (Del. Ch. 2014) (discussing joint and several liability for a breach of fiduciary duty).

value as disgorgement back into the company." (A786-787.) Thus, a settlement that reflects joint and several liability is fair and reasonable in this case.[13]

The Court of Chancery Appropriately Relied on Counsel's Representations Regarding the Ratable Allocation. Although the Director Defendants were not required to contribute to the Settlement ratably, they did. The Director Defendants' counsel confirmed in writing that aside from those who received little to no compensation for their Board service during the Relevant Period, each Director Defendant funded the Settlement Option Amount in direct proportion to the compensation that he or she received during the Relevant Period. (B22.) Contrary to what Levin repeatedly asserts, there is nothing "vague" about counsel's representation. The Court of Chancery highlighted this representation during Levin's oral argument, noting that it should allay the Ratable Allocation Objection. (A800-801.) Levin conceded that the representation would allay his concern, "[a]ssuming it's true and it's completely enforceable". (A801.)

Levin misrepresents the record below. He asserts: "The testimony from defendants about [the] allocation asserts only Elon Musk will not pay any share of the settlement amount. It does not testify about ratable allocation of the settlement

[13] *See, e.g.*, B65 § 2(b) (settlement in *Hignett v. Adams*, C.A. No. 12694-VCG, 2018 WL 4922098 (Del. Ch. Oct. 9, 2018) providing for joint and several payment obligation); B94, § 2.1 (settlement in *In re Tyson Foods, Inc. Consol. S'holder Litig.*, C.A. No. 1106-CC, 2008 WL 2914648 (Del. Ch. Apr. 11, 2008) providing for the same.).

amount among Director Defendants." (Levin Br. 21.) This is incorrect. As detailed above, the Director Defendants' representations to the Court of Chancery made explicit reference to the Director Defendants themselves funding the Settlement "in direct proportion" to the compensation that he or she received during the Relevant Period. (B22.) To the extent Levin's argument seeks to draw a distinction between a *written* representation by counsel and an *oral* (in court) representation by counsel, that distinction is meaningless.

Either way, the Court of Chancery did not abuse its discretion in relying on counsel's representations. Such reliance is proper under Delaware law. *See, e.g., Franklin v. State*, 166 A.3d 103, 2017 WL 2705747, at *1 (Del. 2017) (TABLE) (finding "the Superior Court was entitled to rely on defense counsel's representation" regarding client's agreement); *Khanna v. McMinn*, 2006 WL 1388744, at *44 (Del. Ch. May 9, 2006) ("It is within the Court's discretion . . . to rely on [counsel's] representations as officers of the Court."); *IMC Global, Inc. v. Moffett*, 1998 WL 842312, at *3 (Del. Ch. Nov. 12, 1998) ("Where, as officers of the Court, attorneys can represent the full extent of information flow between them to the Court it is within the Court's discretion to rely on those representations where there is seemingly no danger of intrusion on the fairness of the adjudication process. Courts rely on the integrity and honesty of counsels' representations all of

the time; it is an unstated but always relied upon tenet of modern American litigation.").

Future Litigation Regarding the Settlement Is Not "Reasonably Foreseeable." Levin states that his Ratable Allocation Objection, if not resolved, will lead to "inevitable litigation." (Levin Br. 7.) There is zero basis for that assertion. The Settlement also does not invite further litigation; it provides a comprehensive and final resolution of the claims at issue. Levin's arguments fall flat.

On appeal, Levin now attempts to cast doubt on the integrity of Defendants and their counsel. (Levin Br. 6, 15-16, 19-20.) Among other things, Levin speculates that "[i]t is reasonably foreseeable that Director Defendants will avoid paying their ratable share of the settlement." (Levin Br. 19.) But that baseless accusation has *already* been proven false. The Director Defendants have fully funded the Settlement, and they did so consistent with counsel's representation: each Director Defendant contributed in direct proportion to the compensation that he or she received during the Relevant Period. As set forth in Tesla's Certification, filed with the Court of Chancery on February 26, 2025, Tesla has already received $276,616,721 in cash (A868-869 ¶ 6), which was contributed by the "Director Defendants who previously exercised the options from their Relevant Period Director Compensation" (B22). In addition, the Current Director Defendants

"returned, subject to Final Approval, 1,957,861 Settlement Options in the form of Returned Options". (A868 ¶ 5 & n.2.) Accordingly, Tesla received (subject to Final Approval) the full Settlement Option Amount of "$276,616,721 in cash" and "1,957,861 Settlement Options." (A868-69, ¶¶ 5-6.) The Form 4s subsequently filed by the Current Director Defendants reflect the proportionate Settlement Options that were cancelled for each Director.

Levin infers that the "Director Defendants have already failed to pay" because the Current Director Defendants' Form 4s had not been filed as of March 31, 2025, when he filed his opening brief. But that argument ignores how the Settlement works. As explained above, return of the Returned Options is subject to Final Approval (*i.e.*, after appeal on any material terms), to avoid prematurely cancelling options. The Tesla Board had to await opening appeal briefs before they could determine whether the Returned Options should be cancelled. Given that Levin's appeal, even if successful, would not change the allocation of the settlement payment among the Director Defendants, and would not materially change the governance terms, or any other terms, the Tesla Board authorized the cancellation of the Returned Options, and the Current Director Defendants then filed the required Form 4s. Levin's Ratable Allocation objection is therefore moot.

Levin Has Not Shown Any Abuse of Discretion. Even if Levin's Ratable Allocation Objection were not moot, it should be rejected because Levin has not come close to showing any abuse of discretion by the Court of Chancery.

Levin's assertion that the Settlement would be "simple and easy" ignores that every term was negotiated for months among more than a dozen parties. Levin asserts that modifying the Settlement would "include a listing of each Director Defendant and the amount conveyed, which in turn will require the Chief Accounting Officer merely to compile this information and include it in the settlement agreement." (Levin Br. 23.) Levin's argument reveals his lack of understanding regarding the Settlement and Delaware law. Tesla's Chief Accounting Officer is not a party to the Settlement, and he has no ability unilaterally to bind the Settling Parties to modified terms.

Absent abuse of discretion, which Levin has not shown, the Settlement should be undisturbed. *See Kahn v. Sullivan*, 594 A.2d 48, 58 (Del. 1991) ("Delaware law, as a general proposition, favors the voluntary settlement of contested issues."); *In re Vitalink Commc'ns Corp. S'holders Litig.*, 1991 WL 238816, at *4 (Del. Ch. Nov. 8, 1991) (Delaware courts favor settlements because settlements promote the interest of judicial economy.).

3. The Court of Chancery Did Not Abuse Its Discretion in Considering and Rejecting the Approval Vote Objection.

Levin's Approval Vote Objection is also baseless for various reasons, and the Court correctly rejected it.

The Plain Language of the Settlement Is Clear. Levin contends that the Settlement is deficient because it does not include sufficient detail regarding the "approval vote" on future outside director compensation. That argument fails.

The Settlement appropriately specifies how the approval vote works. The Settlement requires that compensation to be paid to non-employee directors must be submitted to stockholders for an approval vote on "an annual basis" during the Settlement Governance Period.[14] (A279-280 § 2.12.) Prior to such vote, Tesla must make certain proxy disclosures to Tesla's stockholders, as detailed in the Settlement. (A280 § 2.13.) Such disclosures must be made "in a manner consistent with Tesla's operative bylaws."[15] (A280 § 2.13.)

[14] Levin argues that the "consequence of an adverse vote on director pay means directors will not receive any compensation for the year to which the vote pertains. It is simple and easy to express this consequence in clear and unambiguous language in the settlement agreement." (Levin Br. 23-24.) Levin is wrong. If the required stockholder were not obtained during the Settlement Governance Period, Tesla could submit a revised compensation plan to another vote.

[15] Tesla's bylaws (which can be amended only by a stockholder vote) specify the process for annual and special meetings, including the notice that stockholders must be given for such meetings. *See* B242-258, Art. II.

The Settlement also requires approval by a "majority of Unaffiliated Tesla Stockholders present in person or represented by proxy and entitled to vote on such decision." (A279 § 2.12.)[16] As described above, "Unaffiliated Tesla Stockholders" is a defined term that excludes Defendants and Other Tesla Directors. The Settlement unambiguously states that "Defendants and Other Tesla Directors (but only while such Other Tesla Directors serve on the Tesla Board) shall . . . abstain from voting in their capacity as stockholders on the votes required by this Section and shall not be counted as shares present or entitled to vote for purposes of determining the majority." (A279-280 § 2.12.)

Levin argues that "approval vote" is "undefined in the settlement, and it is reasonably foreseeable Tesla will use that ambiguity to interpret 'approval' in the same manner as its annual advisory executive say-on-pay vote". (Levin Br. 20.) Levin ignores not only the plain language of the Settlement but also Tesla's prior disclosures for a "say-on-pay vote". For example, with the "Tesla Proposal for Non-Binding Advisory Vote on Executive Compensation" at the 2024 annual meeting, Tesla's proxy statement expressly stated: "The say-on-pay vote is advisory, and therefore not binding on the Company, the Compensation Committee

[16] For purposes of the Settlement, "Unaffiliated Tesla Stockholders" means all Tesla stockholders of record other than (i) Defendants (*i.e.*, Elon Musk and the Director Defendants) and (ii) Other Tesla Directors (but only while such Other Tesla Directors serve on the Tesla Board). (A279 § 2.12.)

or the Board."[17] Similar language was repeated throughout the proxy statement. The same language was included in Tesla's 2023 proxy statement for the same proposal.[18] When Tesla means advisory, it says so. Levin's concern that Tesla will treat the Settlement's "approval vote" as advisory is baseless.

The Record Below Confirms that Levin's Concern Is Baseless. The record below makes clear below that there was no ambiguity as to whether the approval vote was advisory or mandatory:

- Court of Chancery (addressing Levin): "So the language 'approval vote' typically means approval vote, not advisory vote like what you were referencing earlier. That seems pretty clear to me. And maybe it's because I have the understanding of Delaware law on this one, but I don't know that it permits the mischief that you've identified, at least in terms of declaring this sort of vote advisory only. It is true that if the board doesn't act in compliance with this settlement and I approve it, then there would be an enforcement issue, probably another action that would need to be filed. That's kind of true of all board decisions and true of many settlements in this context." (A806-807.)

[17] B292.
[18] B280.

- Defendants' Counsel: The Court of Chancery asked: "[A]s you interpret the language, 'approval' means approval, not advisory; correct?" Defendants' counsel responded: "Correct, Your Honor." (A812.)

- Plaintiff's Counsel: "The second objection is a little bit unclear to me. But it says, in essence, that the stockholder approval vote is an advisory vote. For reasons that are unclear, the word 'approval' is being read to mean advisory. That is not what the stipulation says. An approval vote is an approval vote." (A787.)

The Settlement Is Consistent With Previously Approved Settlements. The Settlement is consistent with other recently approved Delaware settlements. For example, the Court of Chancery recently approved the settlement relating to director compensation in *Espinoza v. Zuckerberg*, which included a similar (but less rigorous) "approval vote."[19] Other settlements approved by the Court of Chancery have included a similar stockholder approval term.[20] Levin has also not identified any settlements with similar governance measures that have been rejected for lack of specificity (or for any other reason). (Levin Br. 22.)

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[19] *See* B157, § 2.1.3; B191 (approving stockholder vote in settlement in *Espinoza v. Zuckerberg*, C.A. No. 9745-CB, 2016 WL 1259422 (Del. Ch. Mar. 30, 2016) as "important" governance measure even where the result of the vote was a "foregone conclusion").

[20] *See, e.g.*, B209, § 2.1(b) (stockholder approval term with no specification on what happens if approval vote fails in *Calma ex rel. Citrix Sys., Inc. v. Templeton*, C.A. No. 9579-CB, 2016 WL 4765407 (Del. Ch. Sept. 9, 2016)).

Levin's Ad Hominem Attacks on Tesla and Its Directors Are False and Irrelevant. In the face of the Settlement's plain terms, the clear record below, and precedent—all of which weighs against his arguments—Levin resorts to ad hominem attacks on Tesla and its directors. (Levin Br. 15-16, 20.) Those false and baseless attacks, which have no bearing on the Settlement, should be rejected.

Levin makes no allegations of wrongdoing by Defendants or their counsel in this action. And the Court of Chancery, in its judgment, concluded that "[e]ach side represented their clients' interests with integrity and professionalism" in reaching the Settlement. (Op. 18.) In the highly unlikely event of any dispute with respect to the Settlement, the Court of Chancery retained exclusive jurisdiction "to consider all further applications arising out of or connected with the proposed Settlement, including any claim of breach of this Stipulation." (A291 § 11.1.) Accordingly, there is no basis for Levin's concerns.

CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Chancery's approval of the Settlement.

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