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Case No. 2018-0408-KSJM

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

RICHARD J. TORNETTA, derivatively on behalf of all other similarly situated stockholders of TESLA, INC., Plaintiff, v. ELON MUSK, ROBYN M. DENHOLM, ANTONIO J. GRACIAS, JAMES MURDOCH, LINDA JOHNSON RICE, BRAD W. BUSS, and IRA EHRENPREIS, Defendants, and TESLA, INC., a Delaware corporation, Nominal Defendant.	C.A. No. 2018-0408-KSJM

NOMINAL DEFENDANT TESLA, INC.'S ANSWERING BRIEF IN OPPOSITION TO PLAINTIFF'S COUNSEL'S REQUEST FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES

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TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 8

A. Adoption of the 2018 Plan and Stockholder Approval. 8

B. This Litigation. 12

C. The Uncontroverted Event Studies and Expert Evidence Refute Entirely Plaintiff's Corporate Benefit Speculation. 13

D. Tesla's Stockholder Ratification Proposal. 15

E. Plaintiff's Counsel's $5.6 Billion Fee Request. 16

ARGUMENT 17

I. First *Sugarland* Factor: Plaintiff Overstates and Cannot Quantify the Benefit Achieved, Thus Requiring a *Quantum Meruit* Award. 18

A. Plaintiff Has Not Proven Any Meaningful Benefit To Tesla. 20

B. Plaintiff Has Not Proven the Value of Any Benefit to Tesla. 28

C. This Case Is Governed by the Numerous Cases Finding That Fees for Rescission Results Should Be Awarded Under *Quantum Meruit*. 38

II. Second *Sugarland* Factor: The Contingent Nature of Counsel's Fee Does Not Justify a Multi-Billion Dollar Fee Award. 43

III. Third *Sugarland* Factor: The Efforts of Counsel and Time Invested Militate in Favor of a Reasonable *Quantum Meruit* Award. 46

IV. The Remaining *Sugarland* Factors Do Not Support a $5.6 Billion Fee. 49

V. This Court Should Award Plaintiff's Counsel Their Lodestar. 50

VI. This Court Should Not Compel Tesla to Issue Shares That Are Not Currently Issued or Registered. 50

CONCLUSION 55

TABLE OF AUTHORITIES

Cases **Page**

Ams. Mining Corp. v. Theriault,
51 A.3d 1213 (Del. 2012)... *passim*

Boyer v. *Wilmington Materials, Inc.*,
1999 WL 342326 (Del. Ch. May 17, 1999) 47

Brookfield Asset Management, Inc. v. *Rosson*,
261 A.3d 1251 (Del. 2021)...12, 25, 26

Byrne v. *Lord*,
1995 WL 684868 (Del. Ch. Nov. 9, 1995)...21

Cal-Maine Foods, Inc. v. *Pyles*,
858 A.2d 927 (Del. 2004)..40

Citron v. *Burns*,
1985 WL 11533 (Del. Ch. Feb. 4, 1985)..32

Craft v. *Barigilio*,
1984 WL 8207 (Del. Ch. Mar. 1, 1984) 6

Dann v. *Chrysler Corp.*,
215 A.2d 709 (Del. Ch. 1965) 42, 44

Emerald Partners v. *Berlin*,
726 A.2d 1215 (Del. 1999)...6

Energy Transfer, LP v. *Williams Cos., Inc*.,
2023 WL 6561767 (Del. Oct. 10, 2023)...48

Friedman v. *Baxter Travenol Laby's., Inc*.,
1986 WL 2254 (Del. Ch. Feb. 18, 1986)..19

Garfield v. *Boxed, Inc*.,
2022 WL 17959766 (Del. Ch. Dec. 27, 2022) 47

Gentile v. *Rossette*,
906 A.2d 91 (Del. 2006)...26

Hegarty v. *Am. Comm. Power Corp.*,
163 A. 616 (Del Ch. 1932) 34

In re 3M Combat Arms Earplug Prods. Liab. Litig.,
2023 WL 9034299 (N.D. Fla. Dec. 31, 2023) 53

In re Anderson Clayton S'holders Litig.,
1988 WL 97480 (Del. Ch. Sept. 19, 1988)..19

In re Barnes & Noble S'holder Deriv. Litig.,
C.A. No. 4813-CS (Del. Ch. Sept. 4, 2012) 48

In re Cheniere Energy, Inc. S'holders Litig.,
C.A. Nos. 9710-VCL, 9766-VCL (Del. Ch. Mar. 16, 2015).......................*passim*

In re Compellent Techs., Inc. S'holder Litig.,
2011 WL 6382523 (Del. Ch. Dec. 9, 2011) 28, 49

In re COVID-Related Restrictions on Religious Servs.,
285 A.3d 1205 (Del. Ch. 2022) 51

In re Cox Radio, Inc. S'holders Litig.,
2010 WL 1806616 (Del. Ch. May 6, 2010) 17, 45

In re Dell Techs. Inc. Class V S'holders Litig.,
300 A.3d 679 (Del. Ch. 2023)..*passim*

In re Dunkin' Donuts S'Holders Litig.,
1990 WL 189120 (Del. Ch. Nov. 27, 1990)...20

In re Ebix, Inc. S'holder Litig.,
2014 WL 3696655 (Del. Ch. July 24, 2014) 45

In re Energy Transfer Equity, L.P. Unitholder Litig.,
2019 WL 994045 (Del. Ch. Feb. 28, 2019)..20, 21

In re Infousa, Inc.,
2007 WL 3325921 (Del. Ch. Aug. 13, 2007)...31

In re Invs. Bancorp, Inc. S'holder Litig.,
C.A. No. 12327-VCS (Del. Ch. June 17, 2019) 3, 19, 41

In re Loral Space & Commc'ns Inc. Consol. Litig.,
C.A. No. 2808-VCS (Del Ch. Dec. 22, 2008) 19

In re Medley Cap. Corp. S'holders Litig.,
C.A. No. 2019-0100-KSJM (Del. Ch. Nov. 19, 2019)....................................7, 44

In re MultiPlan Corp. S'holders Litig.,
268 A.3d 784 (Del. Ch. 2022)..31

In re S. Peru Copper Corp. S'holder Deriv. Litig.,
2011 WL 6382006 (Del. Ch. Dec. 20, 2011)..1, 46, 52

In re S. Peru Copper Corp. S'holder Deriv. Litig.,
C.A. No. 961-CS (Del. Ch. Dec. 19, 2011)..45, 48, 52

In re Xencor, Inc.,
C.A. No. 10742-CB (Del. Ch. Dec. 10, 2015)..19

Klita v. *Cyclo3pss Corp.*,
1997 WL 33174421 (Del. Ch. Apr. 8, 1997)..51

Knight v. *Miller*,
2023 WL 3750376 (Del. Ch. June 1, 2023)..38

Krinsky v. *Helfand*,
156 A.2d 90 (Del. Ch. 1959)..38

La. Mun. Police Emps. Ret. Sys. v. *Bergstein*,
2014 WL 4470955 (Del. Ch. Sep. 10, 2014)..49

La. State Emps.' Ret. Sys. v. *Citrix Sys., Inc.*,
2001 WL 1131364 (Del. Ch. Sept. 19, 2001)...*passim*

Off v. *Ross*,
2009 WL 4725978 (Del. Ch. Dec. 10, 2009)..20

Oliver v. *Bos. Univ.*,
2006 WL 1064169 (Del. Ch. Apr. 14, 2006)..22

Palkon v. *Maffei*,
2024 WL 1211688 (Del. Ch. Mar. 21, 2024)..21-22

Pogostin v. *Rice*,
480 A.2d 619 (Del. 1984)...33

Ravenswood Inv. Co., L.P. v. *Est. of Winmill*,
2018 WL 1410860 (Del. Ch. Mar. 21, 2018)..32

Rovner v. *Health-Chem Corp.*,
1998 WL 227908 (Del. Ch. Apr. 27, 1998)..40

Sciabacucchi v. *Howley*,
2023 WL 4345406 (Del. Ch. July 3, 2023)..*passim*

Seinfeld v. *Coker*,
847 A.2d 330 (Del. Ch. 2000)..43

Siegman v. *Palomar Med. Techs., Inc.*,
1998 WL 409352 (Del. Ch. July 13, 1998)..33

State of Wis. Inv. Bd. v. *Bartlett*,
2002 WL 568417 (Del. Ch. Apr. 9, 2002)..53

Strassburger v. *Earley*,
752 A.2d 557 (Del. Ch. 2000)..4

Sugarland Indus., Inc. v. *Thomas*,
420 A.2d 142 (Del. 1980)..*passim*

Tooley v. *Donaldson, Lufkin, & Jenrette, Inc.*,
845 A.2d 1031 (Del. 2004)..20

Tornetta v. *Musk*,
310 A.3d 430 (Del. Ch. 2024)..*passim*

Weinberg v. *Waystar, Inc.*,
294 A.3d 1039 (Del. 2023)..36

Wilderman v. *Wilderman*,
328 A.2d 456 (Del. Ch. 1974)..24, 25

Ya II PN, Ltd. v. *Taronis Techs., Inc.*,
435 F. Supp. 3d 622 (S.D.N.Y. 2020)...53

PRELIMINARY STATEMENT

Plaintiff's Counsel seeks an unprecedented $5.6 billion stock-based fee award for obtaining an opinion rescinding Tesla's option-based compensation agreement with its CEO, Elon Musk. To put this request in perspective, such a fee would be 17 times larger than any award in Delaware history,[1] exceed by more than three-fold the University of Delaware's endowment,[2] amount to a lodestar multiple of more than 413x or more than $288,000 per hour based on the $191.59 closing price of Tesla stock as of January 30, 2024, the date of this Court's Post-Trial Opinion[3] (Dkt. 296 ("Fee Request") at 38 n.127), and make Plaintiff's Counsel the third largest non-institutional owner of Tesla common shares.[4] Simply put, redistributing the benefits of the billions in stockholder value created by Tesla and its employees to Plaintiff's Counsel by making them one of Tesla's largest

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[1] *In re S. Peru Copper Corp. S'holder Deriv. Litig.*, 2011 WL 6382006, at *1 (Del. Ch. Dec. 20, 2011), *aff'd sub nom. Ams. Mining Corp*. v. *Theriault*, 51 A.3d 1213 (Del. 2012).

[2] University of Delaware, 2023 Consolidated Financial Statements, at 37, https://bpb-us-w2.wpmucdn.com/sites.udel.edu/dist/0/3249/files/2023/11/F_AICPA_UniversityofDelaware_FS.pdf.

[3] *Tornetta* v. *Musk*, 310 A.3d 430, 547 (Del. Ch. 2024) (the "Opinion").

[4] Affidavit of Aaron Beckman In Support of Tesla's Opposition to Plaintiff's Counsel's Request for Award of Attorney's Fees and Expenses dated June 6, 2024 ("Beckman Aff.") ¶ 23.

stockholders would do violence to the equitable and market-based outcomes for which the Delaware courts have been known.

Unsurprisingly, Counsel's justification for their extraordinary request defies established Delaware caselaw, mangles basic economics, and seeks to evade entirely the fairness checks this Court imposes on fees. Plaintiff and his counsel bear the burden of demonstrating both the benefit created and the reasonableness of the Fee Request. *See Sciabacucchi* v. *Howley*, 2023 WL 4345406, at *3 (Del. Ch. July 3, 2023). They have not come close to meeting these burdens, and the request should be denied. This Court should instead award Plaintiff's Counsel a fee equal to the $13.6 million claimed lodestar, but in no event more than a 4x multiple to the lodestar, which would be more than reasonable under this Court's precedents.

First, this Court's caselaw makes clear that the *corporate* benefit from the elimination of a contingent equity grant is not quantifiable, and any fee award paid by a company in a case such as this should be based on *quantum meruit*, not on a percentage of the supposed benefit. Tesla has not recovered a common fund from which a percentage could be awarded as a fee. Plaintiff has not carried his burden to prove some actual financial benefit to Tesla that is *both* quantifiable and the product of this litigation. When, as here, the supposed benefits to the corporation are therapeutic or unquantifiable—as this Court has held repeatedly is the case for rescission or cancelation of equity plans in decisions nowhere mentioned in the Fee

Request—Plaintiff's Counsel should only be awarded fees on a *quantum meruit* basis. *See La. State Emps.' Ret. Sys.* v. *Citrix Sys., Inc.*, 2001 WL 1131364, at *4 (Del. Ch. Sept. 19, 2001) (analyzing amendment to employee stock option plan under "therapeutic or corporate benefit doctrine"); *In re Cheniere Energy, Inc. S'holders Litig.*, C.A. Nos. 9710-VCL, 9766-VCL, at 104:7-18 (Del. Ch. Mar. 16, 2015) (TRANSCRIPT) (same for deferral of an equity compensation plan); *In re Invs. Bancorp, Inc. S'holder Litig.*, C.A. No. 12327-VCS, at 23:2–20 (Del. Ch. June 17, 2019) (TRANSCRIPT) (same for cancellation of executive equity plans).

As Professors Fischel and Grenadier explain in their expert declarations, Plaintiff's effort to value rescission misses several key points. A company's value depends on its expected future cash flows, not its total number of outstanding shares. Declaration of Daniel R. Fischel dated May 8, 2024 ("Fischel Decl.") ¶ 17; Declaration of Steven R. Grenadier dated May 8, 2024 ("Grenadier Decl.") ¶ 47. The Performance Stock Option Award Agreement ("2018 Plan" or "Plan") represented a trade—Musk's future services, which Tesla hoped would increase Tesla's future cash flows, for an option grant, which would not affect Tesla's cash flows, but would (*if* Tesla grew substantially) increase the number of shares claiming a portion of those cash flows. Musk held up his end of the trade by providing services, the expected future cash flows increased, and Tesla grew substantially. Fischel Decl. ¶¶ 8-9. Rescission of the option grant prevents the

options from being exercised and diluting the existing stockholders, but does not affect future cash flows—the value of Tesla as a whole—as a first-order matter. Grenadier Decl. ¶¶ 46, 61. And, rescission does not undo Musk's work or Tesla's growth. Plaintiff's approach implicitly assumes—incorrectly—that Musk will never be compensated for his work. Fischel Decl. ¶ 43. Further, Plaintiff's entire benefit theory is not a benefit attributable to this litigation but to the remarkable stock appreciation due to the innovation and efforts of Tesla and its approximately 140,000 employees, with Musk at the helm. Fischel Decl. ¶¶ 39-40. This litigation did not cause the meteoric rise in Tesla's value, and Plaintiff cannot contend that it did. *Id*.

Rescinding Musk's unexercised options also does not "free[] up" $50+ billion in new shares. Fee Request at 16. No shares ever issued under the 2018 Plan, and rescission of the 2018 Plan would not "return" 267 million shares of common stock to Tesla "for unrestricted use." Fee Request at 2; Beckman Aff. ¶ 19. A judgment from this Court rescinding the options grant thus will not cause a pool of Tesla common stock to be *returned* to Tesla's treasury. Beckman Aff. ¶ 19. As this Court found, rescission was available precisely because "the entire Grant sits unexercised and undisturbed," such that "it is possible for 'all parties to . . . be restored to the *status quo ante*, *i.e.,* to the position they occupied before the challenged transaction.'" 310 A.3d at 547 (quoting *Strassburger* v. *Earley*, 752 A.2d 557, 578 (Del. Ch. 2000)). Plaintiff also has provided no evidence that the rescission

of Musk's options would help Tesla issue and sell stock to raise money. No such plan exists, and if it were to coalesce at some indeterminate future time, Tesla already has approximately *2.8 billion* additional authorized but unissued shares it could use for this purpose. Beckman Aff. ¶ 5.

Importantly, undisputed market evidence confirms Plaintiff achieved little to no discernible value for Tesla or its stockholders. As shown in independent event studies by Professors Fischel and Grenadier, the stock market did not react to the Opinion as conferring a benefit on Tesla (or its stockholders), let alone one worth anything near the $50+ billion claimed by Plaintiff. Fischel Decl. ¶ 34; Grenadier Decl. ¶ 41. To the contrary, these event studies demonstrate that there was no measurable market reaction at all to the Court's decision, and certainly no value creation that would justify the unprecedented fee Plaintiff's Counsel seeks. Fischel Decl. ¶ 31; Grenadier Decl. ¶ 41; *see also Citrix*, 2001 WL 1131364, at *8 (rejecting claim that option plan amendment termination resulted in a $183 million benefit because "one would clearly expect the stock market to reflect this large benefit into

the price of Citrix stock”).[5] Fatally, Plaintiff submitted no market analysis or reliable evidence to the contrary.[6]

At most, any benefit to Tesla from the “unscrambl[ing]” contemplated by the Opinion—rescinding each party’s contractual rights—would be limited to reversing the $2.3 billion accounting charge that Tesla recognized based on the grant date fair value. *Tornetta*, 310 A.3d at 546-47; Declaration of Douglas J. Skinner dated May 8, 2024 (“Skinner Decl.”) ¶ 67. The benefits gained or lost from that outcome are measured as of the formation of the contract in 2018. The goal of the rescissory remedy is to “‘restore[] the parties substantially to the position which they occupied before making the contract.’” *Tornetta*, 310 A.3d at 546 (quoting *Craft* v. *Barigilio*, 1984 WL 8207, at *12 (Del. Ch. Mar. 1, 1984)).

Even that $2.3 billion, however, does not factually, legally, or economically reflect the net value of this litigation to Tesla. The rescission remedy itself, as well as valuation economics and this Court’s fee award precedents, requires considering *all* effects of restoring the pre-Plan status quo when ascertaining the

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5 “[A]n event analysis performed by [objector] Ms. Steffens’s expert, Professor David Larcker, confirms that the Opinion, and the alleged ‘benefit’ Plaintiff produced, had no statistically significant impact on Tesla’s stock price.” Dkt. 354 at 22-23. As Ms. Steffens’s objection notes, Plaintiff’s argument is “even weaker here than” in *Citrix* because in that case, “the market reaction was neutral,” whereas here analyst reports “largely concluded that the rescission negatively affected Tesla’s value.” *Id*. at 24-25.

6 Arguments not raised in an opening brief are waived. *Emerald Partners* v. *Berlin*, 726 A.2d 1215, 1224 (Del. 1999).

value of the benefit. As Plaintiff acknowledged at trial, "[e]ven if the Court were to invalidate the Grant, Tesla would be permitted to award Musk *reasonable* retroactive compensation." Dkt. 274 at 5. Tesla is permitted and determined to do so in *some* fashion, whether by having its stockholders ratify the 2018 Plan or adopting a new one. The pending ratification proposal, if approved by a stockholder vote, or any different plan would reduce any supposed corporate benefit to Tesla. Because there is no quantifiable benefit, this Court should, consistent with prior precedent, award a reasonable fee based on *quantum meruit*, not a percentage of the speculative and unproven benefit proffered by Plaintiff.

Second, the other *Sugarland* factors preclude an award anywhere near what Plaintiff seeks. Plaintiff's Counsel should not be allowed to receive a colossal windfall by basing their fee on the share price of Tesla stock today—thus benefiting from Tesla's massive stock price appreciation since this litigation began—rather than the value of the options when granted, and when Plaintiff sued, in 2018. Plaintiff's Counsel had nothing to do with the incredible success Tesla achieved since the adoption of the 2018 Plan, and this Court should not permit a fee award based on a result Plaintiff's Counsel did not cause. Fischel Decl. ¶¶ 39-40. While this Court sometimes rewards contingency risk with a premium, that premium reflects litigation and collection risks, not entitlement to an outsized share of a company's independent and unrelated success. *See In re Medley Cap. Corp.*

S'holders Litig., C.A. No. 2019-0100-KSJM, at 43-44 (Del. Ch. Nov. 19, 2019) (TRANSCRIPT).

Likewise, this case did not require the herculean efforts that might justify the highest hourly rate in history by many orders of magnitude. Nor is there any reason to think incentivizing meritorious stockholder litigation requires paying Plaintiff's Counsel *more than 400 times* their normal hourly rate.

Not only has Plaintiff's Counsel failed to satisfy their burden, but they have not "offered [this Court] a viable alternative" to the factually and legally unsupported percentage-of-stock approach. *Tornetta*, 310 A.3d at 547. Under that same reasoning of the Opinion, Plaintiff's Counsel's failure to identify any viable fee structure and *prove* its applicability and reasonableness here means that they should receive a fee equal to the $13.6 million claimed lodestar. In no event should Plaintiff's Counsel be rewarded with greater than a 4x multiple to their lodestar, which is at the outer limits of this Court's *quantum merit* precedent, as shown in Exhibit A hereto.

STATEMENT OF FACTS

A. Adoption of the 2018 Plan and Stockholder Approval.

On January 21, 2018, the Tesla Board of Directors convened a special meeting to consider the 2018 Plan, which would grant contingent stock options to Musk as compensation for his services to Tesla. *Tornetta*, 310 A.3d at 485-86. The

Plan comprised 12 tranches, each of which would vest upon satisfaction of one market capitalization milestone and one operational milestone. For a tranche to vest, each achievement of a market capitalization milestone had to be paired with the achievement of one of 16 operational milestones (eight based on revenue and eight based on adjusted EBITDA). *Id*. With the vesting of each tranche, Musk would earn options to purchase the equivalent of 1% of Tesla's outstanding common stock as of January 19, 2018. *Id*. at 486-87. The total number of non-qualified stock options that could be granted if all 12 tranches vested was 303,960,630 at a strike price of $23.33 (after adjusting for two stock splits). *Id.* at 487 & n.416.

The Tesla Board (with Musk and Kimbal Musk recusing themselves) authorized the 2018 Plan, and "subject to the Requisite Stockholder Approval," "authorize[d] and reserve[d] sufficient shares of the Company's common stock for the issuance of such shares pursuant to any vesting and exercise of any portion of the Performance Award in accordance with its terms." Ex. 7 (JX0791.0006).[7] The Board further resolved that, "subject to the Requisite Stockholder Approval" but with the recusal of Musk and Kimbal Musk, Tesla was "*authorize[d] . . . to issue and deliver*, without further authorization by the Board, such number of shares of

[7] Citations to "Ex. __" refer to the exhibits to the Transmittal Affidavit of Ryan D. Stottmann, filed contemporaneously herewith. For convenience, all expert deposition transcripts are included, even if not cited herein.

the Company's common stock as may be required to be issued pursuant to any vesting and exercise of any portion of the Performance Award in accordance with its terms, and *upon such issuance*, such shares shall be considered and treated as being in all respects validly issued, fully paid and nonassessable." *Id*. (emphases added). No such shares have issued.

Tesla's Proxy Statement disclosed that "unless and until Tesla's stockholders approve the [2018 Plan], no portion of the [2018 Plan] may be exercised, regardless of whether any portion of the [2018 Plan] may have vested before such stockholder approval." Ex. 8 (JX0878.0021). And, "Mr. Musk will have no rights or privileges of a stockholder of Tesla with respect to the shares underlying the [2018 Plan] *unless and until the shares actually are issued, recorded on the records of Tesla or its transfer agents or registrars, and delivered to Mr. Musk*." *Id*. (emphasis added).

The 2018 Plan took effect on March 21, 2018 following stockholder approval. *See Tornetta*, 310 A.3d at 490. Tesla thereafter accounted for the compensation award according to U.S. Generally Accepted Accounting Principles (GAAP) Accounting Standards Codification Topic 718, *Compensation—Stock Compensation* (ASC 718), under which the cost of options-based compensation is recognized as an expense over the relevant period of service by the employee receiving the options. Skinner Decl. ¶ 11. In connection with the negotiation and

approval of the 2018 Plan, Tesla conducted Monte Carlo simulations to measure the fair value of the options in the 2018 Plan and recognized approximately $2.3 billion of options-related expense in its audited financial statements for fiscal years ended December 31, 2018 through 2022—the period of Musk's service covered by the 2018 Plan. *Tornetta*, 310 A.3d at 485; Skinner Decl. ¶ 11.

Because the 2018 Plan was entirely options-based, no shares of Tesla stock were issued under the Plan. Beckman Aff. ¶¶ 16-19. Instead, as it does for all equity plans, Tesla's instructed its transfer agent, Computershare Limited ("Computershare"), to add to its share "reserve" an amount equal to the maximum potential future shares associated with the 2018 Plan. *Id*. ¶¶ 7, 9, 17-18. A "reserve" made by Computershare is merely a bookkeeping note meant to ensure that all possible future stock issuances under Tesla's contracts do not collectively cause Tesla to exceed the total number of shares authorized by Tesla's Charter. *Id.* ¶ 7.

The creation of a bookkeeping reserve at Computershare did not create or issue any shares or attach to any specific shares. *Id*. Tesla's approximately 400 million "reserved" shares are nothing more than a numerical count of the maximum number of shares Tesla has agreed to potentially issue to employees or third parties under various contracts. *Id.* ¶ 5.

In just over four years, Tesla achieved all market capitalization milestones and nearly all of the operational milestones: 11 of the 12 tranches had

vested by April 29, 2022, and as of June 30, 2022, all market capitalization, all adjusted-EBITDA-related operational milestones, and three revenue-related operational milestones had been achieved—conditions sufficient for the final tranche to vest. *Tornetta*, 310 A.3d at 492. Today, "the entire Grant sits unexercised and undisturbed." *Id*. at 547. No shares ever issued under the 2018 Plan, because those shares can issue only upon exercise of the options, which has not happened. Beckman Aff. ¶¶ 16-19.

B. This Litigation.

On June 5, 2018, Plaintiff filed this action, before any 2018 Plan options vested. On October 27, 2021, following the Delaware Supreme Court's decision in *Brookfield Asset Management, Inc.* v. *Rosson*, 261 A.3d 1251 (Del. 2021), this Court entered an order granting Plaintiff's request to dismiss his class claims and to decertify the previously certified class, leaving this action to "continue exclusively as a derivative action." Dkt. 175 ¶ 1.

On January 30, 2024, this Court issued its Opinion, concluding that the 2018 Plan was subject to review under the entire fairness standard and that the Defendants had failed to prove that the 2018 Plan was entirely fair or that any alternative issuance short of the 2018 Plan was "a fair one." *Tornetta*, 310 A.3d at 497, 548. This Court invalidated the Board approval of the Plan and the stockholder vote approving the Grant, determining the stockholder vote was not fully informed.

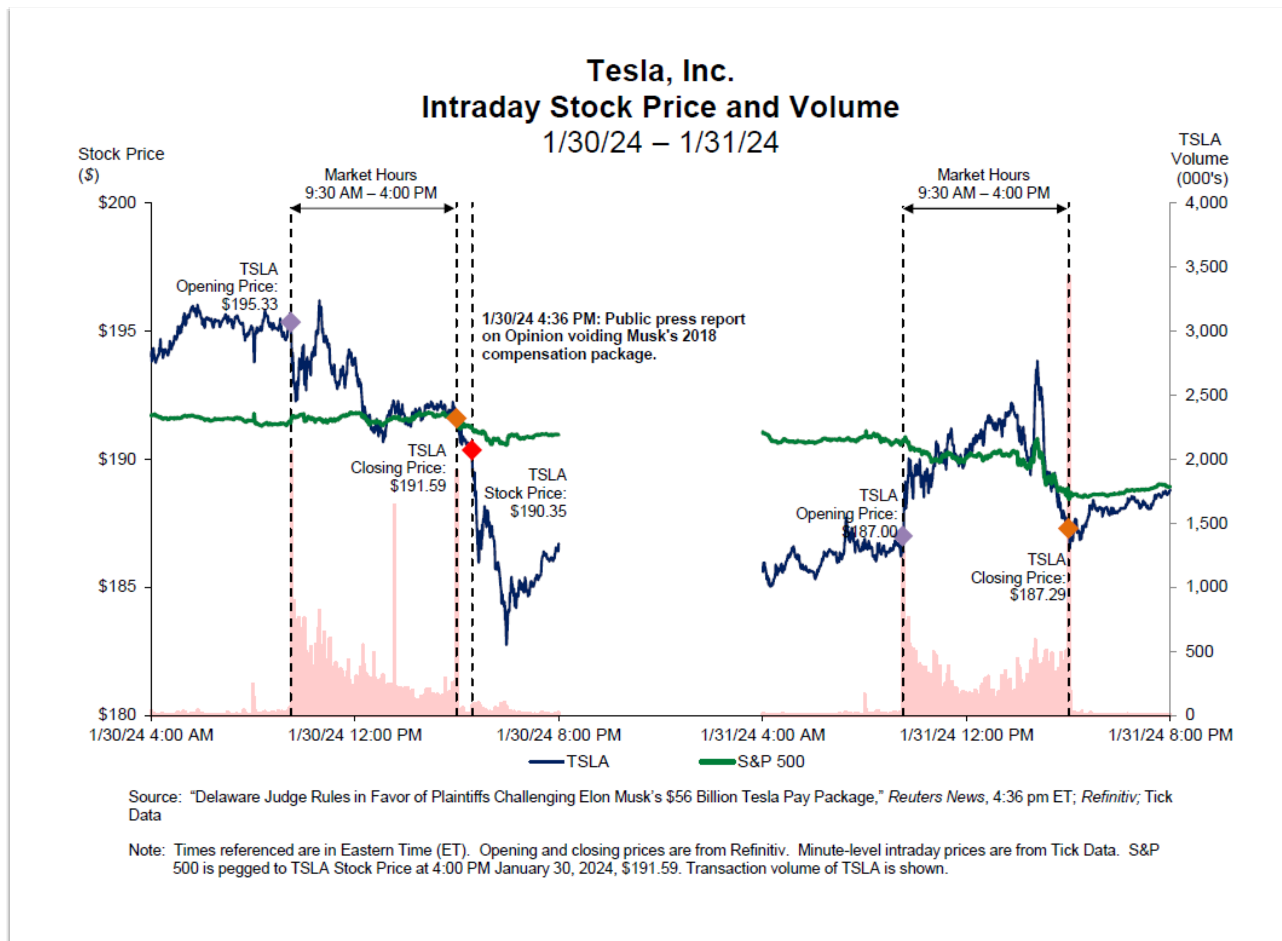
Id. at 521. This Court then ordered the rescission of the 2018 Plan, explaining that "the entire Grant sits unexercised and undisturbed," and no shares ever issued under the 2018 Plan but, if any did issue, they "would be subject to the Five-Year Hold Period." *Id*. at 547.

Musk did not exercise any options, and Tesla did not issue any stock in connection with the 2018 Plan. Thus, rescission will not in any sense result in the return of any stock to Tesla's treasury. Beckman Aff. ¶ 19. As would have been the case had the Opinion issued in 2018, rescission now would simply terminate Tesla's executory obligation to issue restricted stock and revoke Musk's right to exercise the options, resulting in a reversal of the $2.3 billion accounting charge that Tesla took over the vesting period. *Id*. ¶ 21.

C. The Uncontroverted Event Studies and Expert Evidence Refute Entirely Plaintiff's Corporate Benefit Speculation.

Tesla's public stock price showed no statistically significant movement following the Opinion. Grenadier Decl. ¶¶ 39-41. On January 30, the stock opened at $195.33, and closed marginally lower at $191.59. *Id*. at Ex 1. Following release of the Opinion at 4:30 p.m. on January 30, Tesla's stock traded *down* in after-market trading, to as low as $182.75. Fischel Decl. ¶ 31. The stock opened the next day at $187.00 and closed at $187.29, *down* $4.30 from the prior day's close:[8]

[8] Grenadier Decl., Ex. 1.



The absence of a stock price increase following issuance of the Opinion indicates Tesla investors did not perceive a material benefit to the company from the relief anticipated in the Opinion—not the $2.3 billion compensation expense that would be reversed by rescission, much less some benefit worth over $50 billion, as Plaintiff speculates. Grenadier Decl. ¶ 41; Fischel Decl. ¶ 31. Indeed, the fact that the stock did not move up at all in the wake of the Opinion (let alone in a statistically significant way) indicates the market did not perceive *any* incremental, material value to Tesla (or its stockholders) from the decision. Grenadier Decl. ¶ 45; Fischel Decl. ¶¶ 31, 34.

D. Tesla's Stockholder Ratification Proposal.

On February 10, 2024, Tesla's Board created a Special Committee which considered, among other things, whether stockholders should ratify the 2018 Plan. Special Committee Report at 1.[9] As the Special Committee noted, many large institutional stockholders and thousands of retail investors reached out to the Board or the Court to express support for the 2018 Plan. *Id*. at 5, 38.

The Special Committee worked closely with Sidley Austin LLP, Abrams & Bayliss LLP, and other independent advisors over an eight-week period. *Id.* at 8-9. Ultimately, the Special Committee determined that a stockholder vote on ratification was in the best interest of Tesla and all of its stockholders. *Id.* at 1. Negotiating a replacement compensation plan for Musk "would likely take substantial time in light of the *Tornetta* decision, and incur a new, incremental accounting charge of billions of dollars." *Id*. at 7. On balance, "[r]atification would be faster, would avoid any new compensation expense, and would avoid a prolonged period of uncertainty regarding Tesla's most important employee." *Id*.

On April 29, 2024, in connection with Tesla's forthcoming June 13, 2024 Annual Meeting of Stockholders, Tesla filed a Proxy Statement with the

[9] A copy of the Special Committee Report was attached as Ex. 1 to Tesla's Consolidated Opposition to Plaintiff's Three Motions. Dkt. 324.

Securities and Exchange Commission ("2024 Proxy").[10] As set forth in the 2024 Proxy, following the Special Committee's recommendation, Tesla's Board (with Musk and Kimbal Musk recusing themselves) determined that it is in the best interests of Tesla and its stockholders for the stockholders to have the opportunity to vote to ratify, and further recommended that the stockholders ratify the 2018 Plan. 2024 Proxy at 90.

E. Plaintiff's Counsel's $5.6 Billion Fee Request.

On March 1, 2024, Plaintiff's Counsel filed their Fee Request, seeking an award of 29,402,900 unrestricted shares of Tesla common stock and expense reimbursement. Fee Request at 11, 38. The Fee Request bluntly declines to "debate the value conferred to Tesla by cancelling the options or the value of the underlying stock returned to Tesla." *Id*. at 2. It argues that, as a result of the Opinion, 266,947,208 Tesla common shares will be "freed up" for Tesla to "utilize for any purpose." *Id*. at 16. The 29,402,900 Tesla common shares requested by Plaintiff's Counsel are equivalent to approximately 11% of the shares that were never issued under the 2018 Plan. Plaintiff's Counsel characterizes their request as "[c]onservative," claiming that Delaware "precedent establishes Plaintiff's Counsel's entitlement to 33%" of the imaginary shares Plaintiff's Counsel claim

[10] A copy of the 2024 Proxy was attached as Ex. 2 to Tesla's Consolidated Opposition to Plaintiff's Three Motions. Dkt. 324.

have been returned to Tesla. Fee Request at 18. Based on Tesla's stock price as of the date of the Opinion, the Fee Request amounts to approximately $5.6 billion—making it by far the highest fee award ever sought in the history of this Court. The $5.6 billion Fee Request translates to an hourly rate of approximately $288,888 for the 19,499.95 hours of work claimed by Plaintiff's Counsel—an hourly rate and lodestar multiple miles higher than that of any fee award previously granted by this Court and over 55 times higher than the award approved in *Dell*. Fee Request at 38 & n.127.

ARGUMENT

On an application for attorneys' fees, this Court applies the *Sugarland* factors, which include consideration of (1) the result achieved, (2) the contingent nature of counsel's fee arrangement, (3) the efforts of counsel and time invested, (4) the complexity of the litigation, and (5) counsel's standing and ability. *Sugarland Indus., Inc.* v. *Thomas*, 420 A.2d 142, 149 (Del. 1980). It is Plaintiff's burden to both "establish the value of the claimed benefit" and "demonstrate the reasonableness of the amount sought for achieving that benefit." *Sciabacucchi*, 2023 WL 4345406, at *3. "Delaware courts apply rigorous scrutiny to fee requests to ensure that they are reasonable." *In re Cox Radio, Inc. S'holders Litig.*, 2010 WL 1806616, at *20 (Del. Ch. May 6, 2010) (internal quotation marks omitted), *aff'd*, 9 A.3d 475 (Del. 2010) (TABLE).

I. First *Sugarland* Factor: Plaintiff Overstates and Cannot Quantify the Benefit Achieved, Thus Requiring a *Quantum Meruit* Award.

The first *Sugarland* factor, the benefit achieved, is the most important. *Sciabacucchi*, 2023 WL 4345406, at *3. With barely a mention of the phrase "common fund," either in his brief or in his experts' submissions, Plaintiff proposes the type of analysis this Court employs in "common fund" cases.[11] As this Court explained in *Dell*, when there is a tangible monetary benefit, "[i]f the results are quantifiable, then '*Sugarland* calls for an award of attorneys' fees based upon a percentage of the benefit.'" 300 A.3d at 692 (quoting *Ams. Mining*, 51 A.3d at 1259). In such a situation, this Court will view the time and effort expended by counsel as a cross-check for reasonableness. *See, e.g.*, *Cheniere*, C.A. Nos. 9710-VCL, 9766-VCL, at 97:23-24.

But this is not a common fund case like *Dell*. Plaintiff did not recover $50 billion in cash or other assets for Tesla. Rather, Plaintiff obtained cancelation of the grant of options to Musk, subject to Tesla's obligation to compensate Musk for his past six years of work. The value of this result is non-quantifiable because the options have no intrinsic value to Tesla, and the value of the replacement compensation for Musk is uncertain. Therefore, the net value of the avoided dilutive issuance is doubly unproven.

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[11] Plaintiff's expert paid no attention to the "doctrinal nuances" between common fund and corporate benefit precedents. Ex. 1 ("Bebchuk Dep.") at 31:9-15.

Unlike "a self-pricing and certain cash fund, where a percentage of the benefit approach is typically used to guard against windfall awards" (*Sciabacucchi*, 2023 WL 4345406, at *4), in cases where the likelihood or magnitude of any benefit is uncertain, "an award expressed as a percentage [of the benefit] is *inappropriate*." *In re Anderson Clayton S'holders Litig*., 1988 WL 97480, at *5 (Del. Ch. Sept. 19, 1988) (emphasis added); *see also Friedman* v. *Baxter Travenol Laby's., Inc*., 1986 WL 2254, at *4-5 (Del. Ch. Feb. 18, 1986) (because "there [wa]s substantial room to dispute the validity of" the claimed benefit, and "there [wa]s no basis by which the benefit c[ould] be meaningfully valued in quantitative terms").

In the absence of a tangible, measurable monetary benefit that is *proven* here, Delaware courts apply *quantum meruit*, particularly in cases involving terminated executive equity compensation plans. *See Invs. Bancorp*, C.A. No. 12327-VCS, at 27:1-4 (awarding fees at twice the normal hourly rate in a case involving the surrender and cancelation of equity grants of unquantifiable net value); *In re Loral Space & Commc'ns Inc. Consol. Litig.*, C.A. No. 2808-VCS, at 74-77 (Del Ch. Dec. 22, 2008) (TRANSCRIPT) (awarding fees at four times the normal hourly rate following post-trial judicial amendment of equity investment by controlling stockholder); *In re Xencor, Inc.*, C.A. No. 10742-CB, at 50:10-14 (Del. Ch. Dec. 10, 2015) (TRANSCRIPT) ("[T]he *Sugarland* factors are indeed

considered, but . . . in this kind of context [with non-quantifiable benefits], the hourly considerations of the fee application take greater prominence.”).

Under a *quantum meruit* approach applicable where, as here, the litigation conferred no quantifiable benefit to Tesla, this Court begins with time and expenses of counsel, and then applies a premium or discount in view of the result achieved and the incentive effects. “[T]he Court would consider the work the attorneys performed to achieve the benefit, and the amount and value of attorney time required for that purpose, taking into account the experience of counsel and the contingent nature of the case.” *Off* v. *Ross*, 2009 WL 4725978, at *7 (Del. Ch. Dec. 10, 2009); *see also In re Energy Transfer Equity, L.P. Unitholder Litig.*, 2019 WL 994045, at *5 (Del. Ch. Feb. 28, 2019).

A. Plaintiff Has Not Proven Any Meaningful Benefit To Tesla.

In this derivative action, “the recovery, if any, flows only to the corporation.” *Tooley* v. *Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031, 1036 (Del. 2004). For the same reason, the only relevant inquiry is whether and to what extent this litigation has benefitted Tesla as a *corporation*. *See, e.g.*, *In re Dunkin' Donuts S'holders Litig.*, 1990 WL 189120, at *4 (Del. Ch. Nov. 27, 1990) (“Typically the corporation benefits-such as in a benefit conferring derivative action-so the corporation must compensate.”); *Energy Transfer*, 2019 WL 994045, at *4

(applying the corporate benefit doctrine where "clarification . . . [was] a benefit to the entity going forward").

There is no quantifiable benefit to Tesla from the rescission. As explained by Professor Grenadier, under basic principles of corporate finance, the value of a company is "measured by the present value of its expected cash flows," which does not change as a result of the issuance or rescission of equity-based compensation. Grenadier Decl. ¶ 46. Rather, an equity issuance or cancelation is a reallocation of unchanged value among the stockholders. Fischel Decl. ¶ 19. Indeed, the point of equity compensation is to incentivize the recipient employees to increase the business's cash flows, and therefore the value of the overall business, in an amount that offsets the dilutive impact of the issuance.[12] *Byrne* v. *Lord*, 1995 WL 684868, at *4 (Del. Ch. Nov. 9, 1995) (employee option plan "must involve an identifiable benefit to the corporation, . . . [and] the value of the options must bear a reasonable relationship to the value of the benefit passing to the corporation").

The market's non-reaction to the Opinion confirms rescission conferred no material benefit on Tesla. Delaware courts frequently rely on event studies to test claimed benefits or harms to the company in derivative litigation. *Palkon* v.

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[12] As noted in the Opinion, in the case of the 2018 Plan, "defendants offered Musk an opportunity to increase his Tesla ownership by about 6% (from about 21.9% to at most 28.3%) if, and only if, he increased Tesla's market capitalization from approximately $50 billion to $650 billion." 310 A.3d at 447.

Maffei, 2024 WL 1211688, at *4 (Del. Ch. Mar. 21, 2024) ("[T]he court would likely look to the stock price reaction (if any) to the conversion proposals as an indication of whether and to what extent the market reaction suggested harm."); *Oliver* v. *Bos. Univ.*, 2006 WL 1064169, at *23 (Del. Ch. Apr. 14, 2006) (relying on event study that showed no harm from allegedly dilutive equity issuance); *Citrix*, 2001 WL 1131364, at *8 ("event study analysis" by Professor Grenadier showed no reaction to adoption or withdrawal of equity plan). It is Plaintiff's burden to prove and quantify the claimed benefit or the avoided harm to Tesla, and yet he has offered absolutely no reliable economic evidence to meet that burden. *See Ams. Mining*, 51 A.3d at 1232 ("Plaintiff offered no evidence that these stock market fluctuations provided a reliable basis for assessing the fairness of the deal because it did not conduct a reliable event study."). Plaintiff's experts could only speculate about potential confounding information that *could* explain the lack of price impact, which *proves* nothing, but serves only to confirm that the benefit here is indeterminate.[13]

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[13] Plaintiff's experts (without conducting an event study of their own) surmised at depositions that the market may not have assigned $50+ billion of value to news of the rescission of Musk's options because investors believed that the decision could be reversed on appeal, or that Musk might react to the decision in a value-negative way. As Grenadier explained, however, information is only confounding for purposes of an event study if it is (1) previously unknown, (2) significant enough to be value-relevant, and (3) not a product of the news itself. Grenadier Dep. at 159. The possibility of reversal on appeal that or that the Company would pursue alternative compensation for Musk are obviously ramifications of the decision. *Id*. at 107-10, 178-79. So too is the possibility that, without compensation, Musk may lose focus, leave Tesla, or prefer to focus his efforts on other projects. *Id*. at 82-85, 125-28. Ramifications of the Opinion do not render the event studies valueless;

Tesla's January 31, 2024 market capitalization was about $596 billion. Grenadier Decl. ¶ 64. If Plaintiff is correct that the Opinion caused a sudden $50 billion boost to Tesla's value—roughly 8% of its then-existing market capitalization—"one would clearly expect the stock market to reflect this large benefit into the price of [the company's] stock." *Citrix*, 2001 WL 1131364, at *8. But as demonstrated by independent event studies by Professors Fischel and Grenadier, Tesla's stock price went down following the widely reported release of the Opinion (Fischel Decl. ¶¶ 31-34; Grenadier Decl. ¶¶ 39-41), and the stock price did not exhibit any statistically significant response to the Opinion, proving that rescission is not a meaningful net benefit to Tesla, let alone a benefit equivalent to "$51+ billion" of value, or even the $2.3 billion expense reversal. Grenadier Decl. ¶ 41; Fischel Decl. ¶ 34. Tesla's value is based on its future cash flows, and this action has not at all benefitted Tesla's future cash flows. Grenadier Decl. ¶¶ 46-54; Fischel Decl. ¶ 21.

Recognizing this fatal flaw, Plaintiff's expert alternatively argues the rescission creates an "opportunity" for Tesla to sell the cancelled shares into the market at today's prices. Joint Declaration of Lucian Bebchuk & Robert J. Jackson,

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they confirm that rescission is not frictionless for Tesla and that Plaintiff's valuation approach of assuming away all friction makes no sense. *Id*. at 18-20.

Jr. dated March 1, 2024 ("Bebchuk/Jackson Decl.") ¶¶ 33-35. They posit that by agreeing to issue over 300 million shares to Musk if the options vested and were exercised, Tesla forewent the future opportunity to sell those same 300 million shares at their present market price, and therefore bestowed a benefit that can be measured at existing prices. *Id*. ¶ 42. Not so.

"[R]ecovery by plaintiff of his attorneys' fees . . . in a successful derivative action is obviously in no way connected with the ultimate use to which a corporation so benefited may put the net balance of funds recovered as a result of the efforts of plaintiff's counsel." *Wilderman* v. *Wilderman*, 328 A.2d 456, 458 (Del. Ch. 1974) (cited in Fee Request, at 16 n.64). This Court has flatly rejected efforts to claim a "benefit" from hypothetical alternative future uses of canceled compensation that "rests on a series of assumptions and unknowns." *Sciabacucchi*, 2023 WL 4345406, at *4. This wisdom is borne out here: Plaintiff wrongly assumes the 2018 Plan constrained Tesla's ability to raise new equity capital. *See* Grenadier Decl. ¶ 62. It did not. Tesla's Charter authorizes 6 billion total shares, with only 3.2 billion currently outstanding. Beckman Aff. ¶ 5. Tesla has billions of shares at its disposal with or without the 2018 Plan, and an *unlimited* additional supply if its stockholders vote to increase that authorization. Plaintiff could not possibly prove, as is his burden, that "freeing up" a fraction of an unconstrained share supply for

future use provides any benefit to Tesla, and any such hypothetical future use "is in no way connected" to any viable fee theory. *Wilderman*, 328 A.2d at 458.

The Fee Request makes a passing reference seeking to justify some common benefit theory supposedly stemming from "a reversal of the Grant's dilution and accretion to all Tesla stockholders." Fee Request at 16. Yet, Plaintiff did not even try to show any "accretion" to Tesla stockholders, because there was none. Tesla's stock price went down—not up—in response to the Opinion. Grenadier Decl. ¶¶ 39-41; Fischel Decl. ¶¶ 31-34. Accretion is absent, and the Fee Request nowhere argues otherwise.

The Fee Request likewise makes no attempt to explain Plaintiff's avoided dilution theory, and for good reason. As Professors Fischel and Grenadier show, a dilutive issuance is not a harm to the Company, and the economic evidence refutes, rather than supports, any theory that Tesla benefited materially by the cancelation of the 2018 Plan. Fischel Decl. ¶ 19; Grenadier Decl. ¶ 46.

Plaintiff's experts wrongly assume that Delaware law treats dilution as a harm to the Company and thus a common injury that can justify an outsized fee award. *See* Bebchuk/Jackson Decl. ¶ 46. Dilution may be a symptom of an underlying injury to a corporation—an injury that creates derivative standing to recover *for the injury to the corporation*. *Brookfield*, 261 A.3d at 1260. However, dilution does not harm a corporation itself. *Id*. at 1266. The derivative plaintiff's

claim is not for its own dilution, but for "the reduction in the value of the entire corporate entity, of which each share of equity represents an equal fraction." *Id*. Stockholder dilution is neither a corporate injury nor a measure of any corporate harm, but merely a consequence that "flow[s] indirectly to [stockholders] in proportion to, and via, their shares in [the company], and thus any remedy should flow to them the same way, derivatively via the corporation." *Id*. In other words, the "classic derivative claim" contends that "the worth of the stockholder's interest is reduced *to the extent [the company] was harmed*." *Id*. (emphasis added).

Indeed, Delaware jurisprudence concerning equity issuances makes clear that the claim is ***not*** for the value of any dilution, but for "the value of the overpayment" by the company. *Id*. In that case, "the corporation is both the party that suffers the injury (*a reduction in its assets or their value*) as well as the party to whom the remedy (a restoration of the *improperly reduced value*) would flow." *Gentile* v. *Rossette*, 906 A.2d 91, 99 (Del. 2006) (emphasis added). "[T]he amount of the overpayment deprives the corporation of assets to which minority shareholders have only a *pro rata* claim as residual claimants on the corporation's assets." *Brookfield*, 261 A.3d at 1277. Accordingly, even if Plaintiff had proven some avoided dilution benefit—and he has not—stockholder dilution is not an injury

to the corporation, and cannot qualify as any corporate benefit or provide some monetary measure of any alleged benefit.[14]

Plaintiff is left to prove the amount of some overpayment, for Musk's services, but he has refused to do so, presumably because he cannot for the reasons set forth below. And, in all events, Plaintiff cannot claim credit for avoiding dilution without accounting for the 1,000%+ growth in Tesla's value to which that dilution was tied. Plaintiff's experts argue that the benefit should be valued at current market rates based on the impact of a reversal in dilution. Bebchuk/Jackson Decl. ¶¶ 36-42. But the 2018 Plan was structured to offset the impact of any dilution by the growth in value of the underlying shares: Tesla's stockholders would be diluted by approximately 6% ***only if*** Tesla grew from roughly $60 billion in market capitalization to roughly $650 billion—tenfold growth in less than six years. Plaintiff cannot claim credit for avoiding the 6% dilution, while ignoring the massive growth to which it was tied.[15]

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[14] *See* Ex. 4 ("Fischel Dep.") at 257-58 (Claim that dilution is "a benefit to the company . . . is an economic error. It's a reordering of claims among stockholders. By itself, in isolation, it is not a benefit to the company.").

[15] Ironically, while not contributing in any manner to Tesla's massive growth since 2018, Plaintiff's Counsel now seeks to dilute Tesla's stockholders by "approximately 1 percent" via the issuance of over 29 million new shares of Tesla stock. Fee Request at 11; Dkt. 354 at 15.

B. Plaintiff Has Not Proven the Value of Any Benefit to Tesla.

Even if Plaintiff could show the rescission materially benefited Tesla, he fails to quantify that benefit in any defensible way. The Opinion makes clear that rescission "restore[s] the parties substantially to the position which they occupied before making the contract." 310 A.3d at 546 (internal quotation marks omitted). It follows that any benefit to Tesla from rescission must be measured by comparing Tesla's positions immediately before and after the 2018 Plan—the agreement this Court has now undone. *See In re Compellent Techs., Inc. S'holder Litig.*, 2011 WL 6382523, at *20 (Del. Ch. Dec. 9, 2011) ("Assessing the benefits of the settlement as of the time it was agreed to, rather than in light of after-the-fact events knowable only through hindsight, comports with how Delaware courts evaluate decisions made by fiduciaries."). But Plaintiff provides no valuation of the supposed benefit to Tesla based on the value of the stock options when granted in 2018, and when this suit was filed.

Plaintiff's argument for valuing the stock price on the date of the Opinion is also wrong as a matter of basic economics. Valuing the benefit of a rescinded option award based exclusively on an *ex post* measure of the value of Tesla's shares produces absurd results. Skinner Decl. ¶ 44. Professors Bebchuk and Jackson point to the example of the same options grant under two different scenarios: one in which the stock price rises steeply after the date of the award, leading to a

significant increase in the grant's value, and another scenario in which the stock price plummets, leaving the options out of the money. Bebchuk/Jackson Decl. ¶ 67. By relying exclusively on the *ex post* market value of the stock, the *same* litigation efforts of the *same* counsel obtaining rescission of the *same* grant would result in an outsized fee award in the first scenario, and nothing in the second. Fischel Decl. ¶ 48. But the reason for such a differential in fee awards would have nothing to do with differences in the efforts of counsel, the relief achieved or the benefits to the issuer, and everything to do with the changes in value of the underlying stock through no effort of counsel.

Meanwhile, by basing his calculation on the *current*, *ex-post* value of Tesla's stock, Professor Taylor gives Plaintiff credit for the more than tenfold increase in Tesla's market capitalization between the issuance of the 2018 Plan and the date of the Opinion. Fischel Decl. ¶ 39.[16] But this lawsuit had nothing to do with that incredible runup in value—which was created by Tesla's employees,

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[16] Professor Taylor offers no opinion on the benefit achieved by this litigation. Ex. 3 ("Taylor Dep.") at 24. He used January 30, 2024 market price to value the options solely because he was instructed by Plaintiff's Counsel to do so and confirmed that the date has no basis in any accounting standard. *Id*. at 27-28. He did not analyze the value of Musk's services from 2018 to 2024, nor how much of the increase in Tesla's market capitalization was attributable to Musk. *Id*. at 43-45.

including Musk—a fact Plaintiff does not and cannot contest.[17] Plaintiff's Counsel did not contribute to the growth in Tesla's cash flows during that interval, nor did they invest and bear the risk of loss in the same fashion that Tesla's equity investors—including Musk—did.[18] *Id*. at ¶ 40.

The options' estimated value to Musk simply reflects the risky, performance-based compensation he agreed to in exchange for his CEO services. Musk bore all the risk that the options might end up underwater, as well as the future risks of the five-year holding period that has yet to commence. Indeed, up until and but for this Court's decision, Musk still faced that risk of loss, as there was no guarantee Tesla's stock price would (or will) exceed the strike price of the options under the 2018 Plan if exercised, underscoring the indeterminacy of any claimed benefit to Tesla. As explained by Professor Skinner, employee stock options ("ESOs") "are a risky form of compensation for the employee" because "their value to the employee depends on subsequent changes in the company's stock price (among other factors)," and "[t]he risk of such post-grant-date changes in value is

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[17] As Professor Fischel explained, "[i]t's not just claiming a benefit based on value creation that they had no part of, but it goes beyond that because it's claiming a benefit for a value creation that they opposed." Fischel Dep. at 257.

[18] To be clear, Tesla does not dispute Plaintiff's Counsel bore litigation risk in pursuing this case, but that is of a different character from the equity risk accepted by Tesla's stockholders. Delaware courts reward such contingency risk through the application of a lodestar premium—not by tying fee awards to the market price of the underlying company stock.

one-sided and borne entirely by the employee." Skinner Decl. ¶ 11.b. Eliminating a speculative $51 billion benefit to *Musk* does not mean bestowing a $51 billion benefit on Tesla.[19]

At best, from an *ex ante* perspective, Plaintiff could have attempted to value—but did not—the rescission based on the $2.3 billion accounting charge Tesla took for the 2018 Plan. Yet, Tesla's stock price did not go up in response to the Opinion,[20] so the economic evidence flatly refutes even this figure as a measure of any benefit to Tesla. This is presumably so for a host of reasons, including the economic reality that Musk remains entitled to reasonable pay for his uncompensated years of service. *See In re Infousa, Inc.*, 2007 WL 3325921, at *28 n.85 (Del. Ch. Aug. 13, 2007) ("[A]ssuming *arguendo* that the grant of options was

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[19] Plaintiff's expert agreed that the value of an option to the option holder is not necessarily equal to the value of the option to the issuer, particularly an option with bespoke terms like the five-year hold period. Bebchuk Dep. at 66:12-14. Plaintiff's failure to account for the five-year hold period further overstates any "benefit" claimed here. *In re MultiPlan Corp. S'holders Litig.*, 268 A.3d 784, 811 (Del. Ch. 2022) (noting "the lock-up . . . lowered the value of the alleged windfall" and "hypothetically" discounting locked-up shares "at an aggressive 20% per year").

[20] *See, e.g.*, Fischel Dep. at 68 ("[T]he results of the event study are inconsistent with and contradict the Plaintiff's claims."), 192 ("[T]he whole purpose of the event study, as well as the review of analysts' commentary was to show that the economic evidence was inconsistent with the claim of demonstrated benefit. And if anything, more consistent with the claim that benefit, if any, is indeterminate."), 255, 259-60; Ex. 5 ("Grenadier Dep.") at 82-83 ("And, lastly, it's my opinion that the reason, as you asked about the event study, has this dramatic result is because these factors that I summarized here [future compensation, unfocused CEO, potential loss of key employee] turn out to be really important.").

given pursuant to a separate agreement between Vinod Gupta and Clinton, and that Vinod Gupta was not authorized to enter into such a contract, rescinding the options . . . might well leave Clinton with a claim against the company for unjust enrichment."). Indeed, as Plaintiff previously conceded to this Court, "the Board retains the power, in the proper exercise of its fiduciary responsibilities, to make an award in recognition of Musk's services rendered to the Company," and "the [B]oard is authorized under our law, subject always to a proper exercise of fiduciary duties, to grant compensation for past services where, among other things, an implied contract can be shown." Dkt 274 at 63-64; Dkt. 284 at 78:21-24. Despite these representations, the Fee Request includes no reduction to account for this reality, and thus cannot prove any specific value the rescission had for Tesla. *See Ravenswood Inv. Co., L.P.* v. *Est. of Winmill*, 2018 WL 1410860, at *22 (Del. Ch. Mar. 21, 2018) (all parties to rescinded contract must return benefits), *aff'd*, 210 A.3d 705 (Del. 2019) (TABLE).

Plaintiff makes no effort to value the offsetting corporate value of the 2018 Plan or a replacement plan because he cannot do so. *Citron* v. *Burns*, 1985 WL 11533, at *2 (Del. Ch. Feb. 4, 1985) ("The real issue for resolution is what benefit has the corporation received by reason of the settlement and at what cost."). "The consideration typically involved in stock options, i.e., continued and greater efforts by employees, is ephemeral and not susceptible of identification and

valuation in dollar terms." *Pogostin* v. *Rice*, 480 A.2d 619, 625 (Del. 1984), *overruled on other grounds by Brehm* v. *Eisner*, 746 A.2d 244 (Del. 2000). That is one among several reasons why this Court has consistently relied on *quantum meruit* when assessing fee requests in cases involving terminated equity compensation plans.

Moreover, if Tesla's stockholders vote in favor of ratification on June 13, the benefit to Tesla from this Court's ruling would be limited to the therapeutic benefit of a second stockholder vote that fully disclosed this Court's findings with respect to the March 21, 2018 stockholder vote. *See Siegman* v. *Palomar Med. Techs., Inc.*, 1998 WL 409352, at *6 (Del. Ch. July 13, 1998) (rejecting claim for $50 million from void preferred stock issuance that was corrected during the litigation, and awarding $125,000 in fees). The parties presumably will address that issue, if at all, in further submissions with this Court's approval.

Finally, even if this Court were to disregard the value of a replacement plan and quantify the benefit to Tesla's stockholders provided by rescission of the options, a reversal of the 2018 accounting charge taken in connection with issuance of the options would be the highest possible benefit conferred. Under GAAP, a "reasonable approach" by Tesla in response to an order of rescission would be to treat the options awarded in the 2018 Plan as analogous to either a forfeiture of

unvested options or a clawback of vested ones (scenarios for which there is accounting guidance).[21] Under applicable accounting principles, a company will account for a forfeiture or clawback of employee stock options by reversing the previously recorded accounting entry. Skinner Decl. ¶ 48. Because Tesla recognized a total of approximately $2.3 billion in compensation expenses for the 2018 Plan, reversing this accounting entry would result in a "corresponding non-cash increase in pre-tax earnings in the period it is reversed (*e.g.*, fiscal [year] 2024)." *Id*. ¶ 66.

This accounting treatment also reflects the practical reality of reversing or otherwise unwinding vested ESOs: A court-ordered rescission effectively puts Tesla back on the same footing as if the 2018 Plan had never occurred (*Hegarty* v. *Am. Comm. Power Corp*., 163 A. 616, 619 (Del Ch. 1932) (rescission "regard[s] the contract as never having been entered into")), except for the fact that the Company has already benefited from the as-yet uncompensated services Musk has provided since the 2018 Grant (which obviously cannot be unwound).

Professor Taylor criticizes the $2.3 billion charge as merely a "historical cost" that fails to "reflect subsequent changes in market conditions." Dkt. Affidavit of Daniel J. Taylor dated March 1, 2024 ("Taylor Decl.") ¶ 20. But that

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[21] Skinner Decl. ¶ 11.f . Professor Taylor agrees. Taylor Dep. at 67.

economic argument has nothing to do with the claims and remedies at issue here.[22] As explained in the Opinion, the legal effect of rescission is to reach back in time and undo the bargain at the time it was made. 310 A.3d at 546.

Moreover, Professor Taylor's effort to dismiss the $2.3 billion accounting charge fails because the economic impact of such "subsequent changes" fell entirely on Musk—not Tesla. And, the "historical cost" concept invoked by Professor Taylor is a measurement basis applied to company *assets*. Skinner Decl. ¶ 11.g. But ESOs are equity securities that are used to compensate the employee—not company assets. *Id*. ¶¶ 11.b, 11.g.[23] As Professor Skinner notes, Plaintiff and Professor Taylor "confuse the value of an ESO to a company with the hypothetical future value ***to the employee***," but "ESOs do not have value to a company because they are not assets of the company (*i.e.*, the company does not control or own the ESOs)." *Id*. ¶ 74.[24] Put differently, the only relevance *to Tesla* of the $2.3 billion

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22 Professor Taylor conceded that he used the phrase "historical cost" in a "colloquial" sense and not the "technical way" FASB uses it. Taylor Dep. at 164-65.

23 Professor Taylor concedes that stock options are not company assets. Taylor Dep. at 63. He also clarified that the way he uses the phrase "opportunity cost," requires a *choice* between one opportunity or another, but could not identify any opportunity Tesla had to forgo because of the existence of the 2018 Plan. *Id*. at 81-82.

24 *See also* Fischel Dep. at 29 ("It's not really a cost, and it's not a cost to Tesla. It's the expected value of the grant based on different potential future outcomes, which, if realized, would affect Musk['s] compensation but would not be, either at the time of the grant or subsequently, a cost to Tesla.").

accounting charge (which is an estimate of the grant date fair value of the ESOs) is the extent to which it represents the relevant accounting measure at the time the bargain was struck (*i.e.*, the grant date of January 21, 2018)—it is *not* a "historical cost" to the Company. *Id*.[25]

Professors Jackson and Bebchuk also argue that, in *Police and Fire Retirement System of Detroit* v. *Musk*, Tesla did not dispute that the value of returned shares was equivalent to the market price of those shares at the time of the settlement. Jackson/Bebchuk Decl. at ¶ 32. This argument mischaracterizes that case and is also irrelevant because *Detroit* concerned a settlement that resulted in a return of actual property to Tesla and a release by the defendants of any right to alternative compensation. The *Detroit* settlement reflected two elements of economic value: (a) the return of 1,172,545 *exercised* options in the form of cash or stock; and (b) the cancelation of approximately 1.9 million options. Stipulation & Agreement of Compromise & Settlement Between Plaintiff & Settling Defendants ¶ 2.6, *Detroit*, C.A. No. 2020-0477-KSJM (Del. Ch. July 14, 2023). With respect to the former, the parties agreed to give the Director Defendants in *Detroit* the option to return the relevant amounts in either cash, stock, or options with a specified value. *Id*. ¶ 2.2.

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[25] Delaware courts have recognized that equity compensation aligns the incentives of directors and officers with stockholders. *See Weinberg* v. *Waystar, Inc.*, 294 A.3d 1039, 1060 (Del. 2023) ("[A] typical and logical purpose of an equity incentive plan is to align employee incentives with those of the company."). Giving equity to opposing counsel creates no such alignment.

Because the settlement agreement treated the cash and stock as interchangeable, the parties stipulated to a valuation formula for purposes of establishing an agreed-upon cash value for each share of returned stock. *Id*. ¶ 2.4. As to the latter, Tesla valued the canceled options based on their grant date fair value of $19.9 million. Nominal Defendant Tesla, Inc.'s Answering Brief in Opposition to Plaintiff's Request for Award of Attorneys' Fees and Expenses at 3, *Detroit*, C.A. No. 2020-0477-KSJM (Del. Ch. Sept. 29, 2023).

The Opinion does not result in the return of any cash or stock to Tesla. This Court has not ordered Musk to transfer common stock from exercised options or to pay Tesla any equivalent amount in cash—and cannot order such a return, as the shares underlying the 2018 Plan have never been issued. That element of value is thus irrelevant. Instead, the equivalent element of value is the canceled options: Just as the Director Defendants in *Detroit* agreed to the cancelation of 1.9 million options, this Court has ordered the rescission of over 300 million options. In *Detroit*, Tesla's position was that it was prepared to value the canceled options based on their grant date fair value, as part of a settlement, when the defendants waived any offsetting right to alternative compensation. Here, the grant date fair value of the forfeited options must be offset by compensation due to Musk for the last six years of work, and outsized benefit, provided to Tesla as its CEO.

C. This Case Is Governed by the Numerous Cases Finding That Fees for Rescission Results Should Be Awarded Under *Quantum Meruit*.

As shown above, Plaintiff's arguments fail to justify anything but a *quantum meruit* award. That outcome is confirmed by a host of directly on-point cases uniformly holding that unwinding equity compensation plans yields an inherently unquantifiable therapeutic benefit requiring a *quantum meruit* fee award, none of which are mentioned in the Fee Request. *See, e.g.*, *Knight* v. *Miller*, 2023 WL 3750376, at *5 (Del. Ch. June 1, 2023) (noting that changes to formula for awarding equity compensation "might arguably have provided some tangible (albeit modest) benefits to the nominal defendant"); *Krinsky* v. *Helfand*, 156 A.2d 90, 94 (Del. Ch. 1959) (finding that in "a dispute between the parties as to the measure of value of the cancellation of Rhoden's stock options," the "value may not be measurable in dollars and cents").

In *Citrix*, for example, a stockholder plaintiff sued to invalidate an amendment to the issuer's employee stock option plan. 2001 WL 1131364, at *1. Defendants subsequently withdrew the proposed amendment. *Id*. at *3. The plaintiff claimed that its mooted challenge to the amendment had generated a benefit of $183 million, estimated using a Black-Scholes valuation of the present value of the options proposed in the amendment, and claiming that the litigation had

prevented dilution in that amount. *Id*. at *7. Plaintiff's expert here offers a similarly inapt present value theory. Fee Request at 15 n.61.

Chancellor Chandler rejected this argument, holding that the plaintiff was entitled to claim only the *net* benefit—including the offsetting effects that withdrawal of the options plan had on employee recruitment, retention, and motivation. 2001 WL 1131364, at *8.[26] The Court reasoned that, if the withdrawal of the amendment "actually resulted in a $183 million benefit to Citrix shareholders, one would clearly expect the stock market to reflect this large benefit into the price of Citrix stock. . . . [But] [a]ccording to the event study analysis performed by Professor Grenadier, the evidence indicates neither that the market reacted negatively to any disclosure of information related to" the adoption or withdrawal of the amendment. *Id*. "If anything, Professor Grenadier's analysis suggests that investors determined that the approval and eventual withdrawal of Proposal 3 resulted in no clear net economic benefit or harm to Citrix shareholders." *Id*. Similarly, here, Professors Grenadier and Fischel conducted event studies showing that there was no clear net economic benefit or harm to Tesla's shareholders.

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[26] The Court commented: "As the defendants correctly recognize, any attempt to accurately value the net economic benefit conferred by either the passage or the withdrawal of Proposal 3 is at best an inexact science. . . . Quantitatively speaking, any attempt by this Court to directly calculate the precise value of the employee recruitment, retention, and motivation effects provided by Proposal 3 seems more like ill-conceived alchemy than science." *Citrix*, 2001 WL 1131364, at *8.

Grenadier Decl. ¶ 41; Fischel Decl. ¶¶ 34-37. Plaintiff has submitted no economic analysis to the contrary.

The *Citrix* Court declined to "engage in complicated and highly speculative intellectual exercises in attempting to quantify what is, in essence, the non-quantifiable benefit achieved by this litigation." 2001 WL 1131364, at *9. Without a reliable method to value the net benefit conferred on the company, the Court adopted a *quantum meruit* approach to the *Sugarland* factors in estimating a reasonable fee, applying a premium of 100% to plaintiff's counsel's billing rates. *Id*. at *10 & n.56; *see Rovner* v. *Health-Chem Corp*., 1998 WL 227908, at *5 (Del. Ch. Apr. 27, 1998) ("[B]enefits conferred to Health-Chem shareholders [from company options] are speculative."); *Cal-Maine Foods, Inc*. v. *Pyles*, 858 A.2d 927, 929-30 (Del. 2004) (increase in market capitalization was a substantial benefit, "although not one that was readily quantifiable" to the corporation).

Vice Chancellor Laster reached a similar conclusion in *Cheniere*, another challenge to an employee equity compensation plan. As part of a comprehensive settlement, the company agreed not to seek stockholder approval for further equity issuances for compensation purposes for a period of three years. *Cheniere*, C.A. Nos. 9710-VCL, 9766-VCL, at 18:13-19. The plaintiff's expert valued the forgone equity compensation in excess of $1 billion based on the market value of the equity the company would otherwise have issued over that period. *Id*.

at 21:10-15. The Court squarely rejected that contention, and instead suggested that a "responsible estimate of value" would compare "what people are going to get now, post-settlement, and what they would have gotten before. As the *Citrix* case shows, you have to take into account that there's going to be some additional compensation or other plan put into place. You don't just take away incentives without recognizing that there are trade-offs." *Id*. at 102:19-103:1. Because the Court could not value the benefit, the Court applied a lodestar-based metric, and awarded $2 million in fees for the deferral of the equity compensation the plaintiffs achieved in order to avoid giving plaintiffs' counsel a windfall. *Id*. at 104:7-18.

Vice Chancellor Slights adopted the same approach in *Investors Bancorp*, after equity incentive compensation grants to two executives were canceled, subject to later board action to consider new equity grants to those same executives. C.A. No. 12327-VCS, at 9:21-10:1. Plaintiffs contended that the benefit of this portion of the recovery should be the full value of the canceled grants, but defendants argued that an offset for the future replacement grants was appropriate, and that *quantum meruit* was the correct approach. *Id*. at 10:4-21. The Court considered *Citrix* and *Cheniere* and the difficulties in quantifying the benefits from rescission of an equity compensation grant that had not yet been replaced by an alternative. *Id*. at 16:15-19:3. The Court ultimately awarded fees on a *quantum*

meruit basis, at a rate of twice the plaintiffs' counsel's lodestar. *Id*. at 23:9-14, 27:1-15.

The current circumstances also support a fee award based on a *quantum meruit* approach. As in *Citrix*, *Cheniere*, and *Investors Bancorp*, Plaintiff cannot simply claim the value of the compensation plan being rescinded. Any such analysis must also consider the value of any replacement plan and the impact on other matters such as employee retention and incentives.[27] Critically, Plaintiff's approach fails to net the claimed benefit against potential costs to Tesla as an entity (or to the stockholders). *See Dann* v. *Chrysler Corp.*, 215 A.2d 709, 714 (Del. Ch. 1965) ("[T]he value placed on [surrendered executive stock options] by plaintiffs is based on hindsight evidence, i.e., increase in the value of Chrysler stock after the event. But more to the point, I think it reasonable to infer that these or equivalent options were issued to a replacement [executive]."). To award anything here other than a fee based on a *quantum meruit* approach would, to use Vice Chancellor Laster's words, "result in an unwholesome windfall" to Plaintiff's Counsel. *Cheniere*, C.A. Nos. 9710-VCL, 9766-VCL, at 103:12-13.

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[27] *See* Fischel Dep. at 254-55 ("The effect of incentives, the effect of loss of incentives, the effect of potential alternative compensation results, the effect of other companies getting the benefit of innovations in artificial intelligence, all of those things need to be taken into account. That analysis is supported by market commentary on the effect of the rescission announcement, as well as the event study results that I've described.").

II. Second *Sugarland* Factor: The Contingent Nature of Counsel's Fee Does Not Justify a Multi-Billion Dollar Fee Award.

Plaintiff's Counsel has represented that they litigated this case solely on a contingency basis. Fee Request at 28. While Delaware public policy seeks to reward such risk taking by awarding a premium to plaintiffs' counsel who bring meritorious claims (*Dell*, 300 A.3d at 726), "a point exists at which these incentives are produced, and anything above that point is a windfall." *Seinfeld* v. *Coker*, 847 A.2d 330, 334 (Del. Ch. 2000) ("[I]f a fee of $500,000 produces these incentives in a particular case, awarding $1 million is a windfall, serving no other purpose than to siphon money away from stockholders and into the hands of their agents.").[28] Such windfalls are "socially unwholesome." *Id*.

Plaintiff's Counsel's request for $5.6 billion in Tesla stock based on the Company's recent trading price obliterates that principle. The demand rests on a false equivalence between the risk Plaintiff's Counsel shouldered and the risk borne by Tesla's stockholders and Musk. As Professor Fischel explains, stockholders risk their capital and invest in a company "with the hope that their investment will generate a return based on the performance of the [company]" and result in an increased value of their purchased stock. Fischel Decl. ¶ 40. Accordingly, "general gains in stock price deriving from increases in value appropriately accrue to"

[28] *Cf*. Bebchuk Dep. at 189:15-17 ("So you don't want to spend more money on providing incentives than is efficient from a [cost]-benefit calculus.").

stockholders to compensate them for risking their capital. *Id*. In contrast, Plaintiff's Counsel "did not invest [capital in Tesla] and bear the risk of loss in the same way that investors in Tesla's stock did." *Id*. What Plaintiff's Counsel did invest in this litigation is their time—"and thus[,] the appropriate return should be based on [Counsel's] efforts rather than general increases in the value of Tesla." *Id*.

Plaintiff points to no economic or legal principle pursuant to which incentivizing meritorious litigation necessitates compensating plaintiffs' lawyers as though they were equivalent to equity investors, much less visionaries, particularly where, as here, Plaintiff's Counsel seeks to capitalize on the benefit of hindsight to expropriate the spoils of risks already borne by Tesla investors. Tesla's success is the product of innovation and hard work by its management and employees. Plaintiff and Plaintiff's Counsel had no hand in creating that value. Awarding Plaintiff's Counsel a windfall based on Tesla's market capitalization would improperly decouple the incentive structure from the merits and mechanics of the underlying litigation. *See Medley*, C.A. No. 2019-0100-KSJM, at 43-44 (under *Dann*, plaintiffs "could not take credit for any benefits flowing not from their litigation, but from the general resurgence of the automobile industry").

That decoupling, in turn, would produce perverse effects. Plaintiffs' lawyers would flock to sue the largest, most valuable companies regardless of the strength of their claims. Gigantic fee awards divorced from the social value of the

litigation would place a bounty on corporate treasuries. The size of the defendant's market capitalization, not the merits of the case, would become the animating factor for too many suits. Delaware law firmly forecloses that distortion.

It is no surprise, then, that the traditional "cross-check" applied by this Court to test the reasonableness of a fee award is not the value of the company's stock—but counsel's lodestar. *Cox Radio*, 2010 WL 1806616, at *23 n.172 (counsel's lodestar "may be used as a 'backstop check' when assessing the reasonableness of a fee award"). In other circumstances, this Court has also considered whether a reasonable plaintiff, if asked before the suit was filed, would have agreed in advance to the fee in view of the results achieved. *In re S. Peru Copper Corp. S'holder Deriv. Litig*., C.A. No. 961-CS, at 83-84 (Del. Ch. Dec. 19, 2011) (TRANSCRIPT) (noting a "fundamental test of reasonableness" is whether "the hypothetical plaintiff would walk away" if the lawyer sought agreement to the fee based upon a specified outcome at the outset). Tesla submits that no objective, independent director of Tesla (or any public corporation) would agree—in advance or in hindsight—to pay its lawyers $5.6 billion to terminate the incentive compensation plan of the company's chief executive. *See In re Ebix, Inc. S'holder Litig.*, 2014 WL 3696655, at *19 (Del. Ch. July 24, 2014) (derivative plaintiffs "stand in the shoes" of directors).

To put the demand in perspective, Plaintiff's Counsel spent 19,500 hours on this case through trial, an investment worth $13.6 million at their usual billing rates—neither of which reveals outsized efforts compared to typical Court of Chancery litigation. *See, e.g.*, *Dell*, 300 A.3d 679 at 726 ("Plaintiff's counsel spent 53,000 hours litigating this case" prior to an eve-of-trial settlement, which "at customary rates would be $39,431,415.50."). Plaintiff's Counsel's requested $5.6 billion award thus represents an hourly rate of $288,888 and a lodestar multiplier of 413x. Fee Request at 38 n.127. No one has identified a single instance of lawyers collecting that kind of money for a lawsuit. Ever. The highest fee award in the history of this Court is $300 million—roughly 5% of what Plaintiff's Counsel seeks here. *See S. Peru*, 2011 WL 6382006, at *1.

III. Third *Sugarland* Factor: The Efforts of Counsel and Time Invested Militate in Favor of a Reasonable *Quantum Meruit* Award.

Plaintiff's Counsel's demand for Tesla stock valued at approximately $5.6 billion translates to a breathtaking implied hourly rate of $288,888 per hour for the 19,499.95 hours logged on this case and a lodestar multiple of 413x. Fee Request at 38 n.127. Plaintiff's Counsel has not identified a single attorney in United States history that has ever been compensated so highly.

Nor do Plaintiff's Counsel anchor their requested fee in the time and efforts they expended in pursuing this litigation. To justify a lodestar multiple of 413x, one would think Plaintiff's Counsel had faced truly insurmountable obstacles

and odds. Yet, apart from having to "navigat[e] the Covid-19 pandemic," Plaintiff's Counsel's own recap of the litigation reveals nothing novel, unusual, or unprecedented about this litigation or their efforts to take the case through trial. Fee Request at 35-36. Tesla "navigated" the pandemic by delivering hundreds of billions of dollars in value to its stockholders. Plaintiff's Counsel urges this Court to "eschew" an hourly cross-check because "the fee sought is not in cash but in shares of stock." Fee Request at 33-35. But just the opposite is true: an hourly cross-check confirms that Plaintiff's Counsel's requested stock-based fee award bears no relation whatsoever to their efforts, as they can point to nothing beyond Tesla's enormous increase in market capitalization to justify their astronomically large fee request.

In assessing a request for attorneys' fees, this Court "consider[s] the amount of the award requested as it compares to previous awards made by Delaware courts." *Boyer* v. *Wilmington Materials, Inc.*, 1999 WL 342326, at *2 (Del. Ch. May 17, 1999). Typical fees in cases involving executive compensation or equity issuances pale in comparison to the Fee Request. *Garfield* v. *Boxed, Inc.*, 2022 WL 17959766, at *12 (Del. Ch. Dec. 27, 2022) (Delaware "cases support an award in the range of $850,000 to $3.5 million where the plaintiff finds and disables a corporate landmine, particularly one that deals with the shareholder franchise or the company's capitalization, without regard to hours worked"). This Court's *quantum meruit* jurisprudence has awarded fees ranging from less than 1x to approximately

3x the asserted lodestar, and an average of about 1.4x. *See* Ex. A. Even where, *unlike here*, some tangible corporate benefit was quantified, attorney fees awarded as some percentage of the proven benefit very rarely exceed a mid-single digit multiple of the lodestar. *Energy Transfer, LP* v. *Williams Cos., Inc*., 2023 WL 6561767, at *21 (Del. Oct. 10, 2023) ("Contingent fees are reasonable when they utilize a reasonable lodestar multiple and are limited to a reasonable percentage of the recovery.").

Plaintiff's Counsel asserts that by comparison to *Southern Peru*, the hourly rate implied by the requested award in this action is reasonable, but the outlier lodestar multiple in *Southern Peru* was less than one-fifth the multiple sought here. Fee Request at 36-39; *Ams. Mining*, 51 A.3d at 1252. And *Southern Peru*, unlike this case, was a common fund case. *S. Peru*, C.A. No. 961-VCS, at 65-66 ("[H]owever it's paid here, it's a fund . . . of over 1.3 billion plus interest."). The company received over $2 billion in monetary damages—at the time one of the largest damages awards in a derivative case of its kind—and the fee award was calculated as a percentage of that damages fund. Indeed, after deciding *Southern Peru*, then-Chancellor Strine emphasized that this made the case exceptional: "What was most unique about *Southern Peru* that people keep continuing to lose sight of was two billion dollars of uniqueness . . . ." *In re Barnes & Noble S'holder Deriv. Litig.*, C.A. No. 4813-CS, at 81 (Del. Ch. Sept. 4, 2012) (TRANSCRIPT). By

contrast, this litigation has generated no fund of any kind, and the benefit conferred by the litigation—if any—is unquantifiable.

IV. The Remaining *Sugarland* Factors Do Not Support a $5.6 Billion Fee.

The remaining *Sugarland* factors—the complexity of the litigation and the standing and ability of counsel involved—do not warrant an upward or downward adjustment of attorneys' fees.

The Court has held that litigation involving claims for overcompensation of directors or executives is insufficiently complex to warrant any upward adjustment in a fee award. *See, e.g.*, *La. Mun. Police Emps. Ret. Sys.* v. *Bergstein*, 2014 WL 4470955, *3 (Del. Ch. Sep. 10, 2014) (ORDER) (claims challenging executive compensation were "neither particularly complex nor particularly simple" and "[did] not merit an upward or downward adjustment in the awards"); *Cheniere*, C.A. Nos. 9710-VCL, 9766-VCL, at 98 (executive compensation challenge presented "an ordinarily complex case for the Court of Chancery. It wasn't easy. It wasn't hard. It was right there in the middle").

Tesla acknowledges that Plaintiff's Counsel are well-known and highly capable practitioners. Thus, the "standing and ability of counsel" *Sugarland* factor "does not merit an upward or downward adjustment." *Compellent Techs.*, 2011 WL 6382523, at *28.

V. This Court Should Award Plaintiff's Counsel Their Lodestar.

Plaintiff claims that a fee award should properly incentivize plaintiffs' counsel to fight hard for the best possible result. *See, e.g.*, Fee Request at 34 n.116. As explained by Professor Adam Pritchard, the same counsel here routinely take on higher risk cases, involving substantially greater investment, to earn fees at an average lodestar of about 1.5x, and rarely in excess of 3x. Affidavit of Adam Pritchard dated May 21, 2024 ¶¶ 10-15. Nearly $54.5 million, including a 4x lodestar, would be at or above the upper bound of Delaware precedents, and surely would accomplish that objective. If Plaintiff had litigated this case to a judgment in 2018 (or 2019, or even through early-May 2020), when the 2018 Plan's milestones were unvested, rather than six years later, they would have none of their arguments for a super-sized fee. If Plaintiff's Counsel would not have taken this case knowing they would "only" get ~$54.5 million in fees (at a blended hourly rate of nearly $2,800), plus full reimbursement of expenses, they should say so.

VI. This Court Should Not Compel Tesla to Issue Shares That Are Not Currently Issued or Registered.

Plaintiff's request for a fee award payable in freely tradeable shares is unprecedented. It would involve the Court ordering Tesla to register and issue new shares and deliver those shares to Plaintiff or his counsel. Plaintiff cites no case in which this Court, or any other, has ever ordered an issuer to pay a fee award by issuing new shares, except where the issuer itself proposed the arrangement as part

of a settlement. Fee Request at 16-18. Plaintiff's expert was aware of no such case. Bebchuk Dep. at 175:7-19.

Plaintiff is in reality asking the Court for a novel form of mandatory permanent injunctive relief and not for a simple award of attorneys' fees.[29] But this Court has held that a litigant cannot obtain final injunctive relief without demonstrating that legal remedies are inadequate. *See In re COVID-Related Restrictions on Religious Servs.*, 285 A.3d 1205, 1225-32 (Del. Ch. 2022). And where the specific injunctive relief sought is issuance of stock, the applicant bears a further burden of showing "that the stock is of a unique character and is generally unavailable." *Klita* v. *Cyclo3pss Corp.*, 1997 WL 33174421, at *1 (Del. Ch. Apr. 8, 1997) (declining to exercise equitable jurisdiction over action to enforce subscription agreement for stock where issuer's stock was "fungible and traded daily on the public market").

Plaintiff has not attempted to make this showing. Plaintiff's Counsel's requested fees can, and should, be awarded in money, rather than stock. And Plaintiff's Counsel is free to invest some or all of such an award in Tesla stock, if they wish to do so. Plaintiff identifies no case in which a court has compelled a

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[29] Plaintiff's Counsel request that the fee award consist of "freely tradeable" shares (Fee Request at 16-18), but do not explain whether they wish the Court to instruct the Company to register the shares under the securities laws or to rely on an exemption. The need to register or obtain an exemption further reinforces that Plaintiff's Counsel's request for "freely tradeable" shares is a request for mandatory final injunctive relief.

company to register and issue stock to a hostile litigant in order to satisfy a fee award in equity. Plaintiff cites one precedent, *Sanders* v. *Wang* (Fee Request at 17-18), but fails to reveal that the issuer in that case agreed as part of a settlement "that, subject to approval by the Chancery Court, any award of attorneys' fees and expenses shall be in the form of unrestricted, freely-tradeable shares of Computer Associates common stock." Stip. of Settlement ¶ 12, *Sanders*, 2000 WL 35572084 (Del. Ch. June 22, 2000). Nor does *Americas Mining* help Plaintiff's request, for in that case the Court affirmed a decision directing that the *fee* award be paid in cash, not shares, even though it gave the controlling stockholder the option of satisfying the principal balance of the *judgment* by returning shares of the controlled corporation for cancelation.[30] *Ams. Mining*, 51 A.3d at 1262-63; *see also S. Peru*, C.A. No. 961-CS, at 79:4-5 (Del. Ch. Dec. 19, 2011) (TRANSCRIPT) ("I'm going to make the defendants satisfy the attorney fees award in cash."); *S. Peru*, 2011 WL 6866900, ¶ 4.

The authorities cited in paragraph 83 of the Bebchuk/Jackson Declaration similarly involve settlements in which the issuer agreed to use its stock as consideration, after which federal courts were called upon to assess the fairness

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[30] Notably also, the judgment in *Americas Mining* did not involve the controlled issuer issuing new shares for any purpose. Rather, it involved the controlling *holder* using shares of the *issuer* that the controlling holder owned as settlement currency. *See Ams. Mining*, 51 A.3d at 1249-52.

of issuing those shares pursuant to an exemption from federal registration requirements.[31]

Furthermore, a fee award of this magnitude in "freely tradeable Tesla common stock" (Fee Request at 11) is not without risk to the Company Plaintiff purports to represent. An award of 29,402,900 unrestricted shares would amount to over 30% of the average daily trading volume of Tesla stock.[32] Should the Court grant such an award, and should Plaintiff's Counsel elect to immediately monetize their windfall by selling all 29,402,900 shares, as would be their right according to the Fee Request, Tesla's stock price would crater, and its volatility would skyrocket. *See State of Wis. Inv. Bd.* v. *Bartlett*, 2002 WL 568417, at *4 (Del. Ch. Apr. 9, 2002) ("[H]ad all 7.2 million [] shares been sold on February 25, the market in [the company's] shares was too thin to support such a massive sell off and accordingly would have depressed [the company's] stock price."), *aff'd*, 808 A.2d 1205 (Del.

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[31] *See In re 3M Combat Arms Earplug Prods. Liab. Litig.*, 2023 WL 9034299, at *1 (N.D. Fla. Dec. 31, 2023); *Ya II PN, Ltd.* v. *Taronis Techs., Inc.*, 435 F. Supp. 3d 622, 625 (S.D.N.Y. 2020). The no-action letters cited in note 10 to SEC Staff Legal Bulletin No. 3A (CF), cited in footnote 78 of the Bebchuk/Jackson Declaration, all involve proposed settlements of litigation in which an issuer *agreed* to issue stock as settlement consideration. *See* Bebchuk/Jackson Decl. ¶ 83 n.78. The principal issue in that Staff Legal Bulletin, the no-action letters cited therein, and the cases cited in footnote 79 to the Bebchuk/Jackson Declaration, is whether such settlements may cause such shares to be exempt from registration under Section 3(a)(10) of the Securities Act of 1933, 15 U.S.C. § 77c(a)(10). *See* Bebchuk/Jackson Decl. ¶ 83 n.78, n.79.

[32] *See* Tesla, Inc. (TSLA), Yahoo! Finance, https://finance.yahoo.com/quote/TSLA/.

2002).[33] Such a result would undoubtedly harm Tesla, including by reducing its ability to monetize its authorized but unissued shares that form the entire basis for the Fee Request.

Here, Plaintiff failed to justify mandatory permanent injunctive relief in the form of an order requiring Tesla to issue shares and deliver them to Plaintiff's Counsel in satisfaction of a fee award claim.

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[33] Professor Bebchuk acknowledged that Plaintiff's Counsel would be financially motivated to promptly monetize any Tesla shares awarded to them. Bebchuk Dep. at 177-78.

CONCLUSION

Plaintiff failed to meet his burden of showing that a quantifiable benefit was conferred to Tesla and that the unprecedented $5.6 billion Fee Request is reasonable. As such, Tesla respectfully submits that the Fee Request is unreasonable and should not be granted.

To the extent the Court believes it should award a fee at this juncture, Tesla respectfully submits that this Court should (i) use a *quantum meruit* approach in determining the fee award and (ii) award Plaintiff's Counsel a fee equal to their claimed lodestar since Plaintiff has not offered or proven any viable alternative, but in all events adopt a lodestar multiple that is no greater than 4x.

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