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

PLAINTIFF'S OPENING BRIEF IN SUPPORT OF APPLICATION FOR AN AWARD OF FEES AND EXPENSES

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In its Post-Trial Opinion,[1] the Court ordered full rescission of Elon Musk's 2018 compensation package (the "Grant"). The Opinion indicates that all issues, including fees, should be resolved prior to entry of the Court's Order and Final Judgment.[2] This is Plaintiff's Counsel's petition for fees and reimbursement of expenses.[3]

By this motion (the "Motion"), Plaintiff's Counsel seek: (i) an award of attorneys' fees payable in shares of Tesla common stock (the "Share Award"), and (ii) reimbursement of costs incurred in litigating the case (the "Expense Reimbursement," and together with the Share Award, the "Fee and Expense Award").

INTRODUCTION

After extensive motion practice, searching discovery and a full trial on the merits, followed by briefing, oral argument and supplemental briefing, Plaintiff won complete recission of the largest pay package ever issued. Our research demonstrates that the Court's decree of recission, conservatively valued, was the largest compensatory award in the history of American jurisprudence by multiples.[4]

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[1] Capitalized terms not defined herein have the meaning ascribed in the Court's Post-Trial Opinion, dated January 30, 2024 (the "Post-Trial Opinion," "Opinion," or "Op.").

[2] Op. at 200.

[3] This excludes costs reimbursed pursuant to Court of Chancery Rule 54(d). Plaintiff will file a separate motion for such costs absent agreement between the parties.

[4] There were, in fact, two larger jury verdicts in recorded U.S. legal history, but both were

The Court's well-grounded opinion mandates the rescission of more than 303 million vested options improperly awarded to Musk under the Grant. Every one of those options had a share of common stock reserved for issuance by the Company upon conversion. The trial record includes the January 2018 Board resolution which "reserve[d] sufficient shares of the Company's common stock for . . . issuance" and authorized delivery of such stock upon option vesting and exercise. By rescinding the vested options under the Grant, Plaintiff's efforts have freed up 303,960,630 shares reserved for issuance of these options for any use for which equity can be used by public companies and avoided billions of dollars in dilution to Tesla stockholders.

Rather than debate the value conferred to Tesla by cancelling the options or the value of the underlying stock returned to the Tesla treasury free of restriction, Plaintiff's Counsel instead seeks a fee award in kind—a percentage of the shares returned for unrestricted use by Tesla (rather than cash). In other words, we are prepared to "eat our cooking." This structure has the benefit of linking the award directly to the benefit created and avoids taking even one cent from the Tesla balance sheet to pay fees. It is also tax-deductible by Tesla.

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larger than this verdict solely by virtue of the addition of punitive damages. Ironically, both verdicts were issued by Texas juries.

Below we explain the requested percentage of returned shares, how that request fits into the broader framework of the law (which supports granting a percentage approximately 3x higher than Plaintiff's Counsel's request), and the various adjustments that we propose the Court impose on this award. We recognize that the requested fee is unprecedented in terms of absolute size. Of course, that is because our law rewards counsel's efforts undertaken on a fully contingent basis that, through full adjudication, produce enormous benefits to the company and subject the lawyers to significant risk. And here, the size of the requested award is great because the value of the benefit to Tesla that Plaintiff's Counsel achieved was massive.

To assist the Court's analysis in evaluating this Motion and the proper framework for a fee award, Plaintiff submits herewith affidavits and a joint declaration from four leading experts: Harvard Law School Professor Lucian A. Bebchuk; former SEC Commissioner and current New York University School of Law Professor Robert J. Jackson, Jr.; The Wharton School of the University of Pennsylvania Professor Daniel J. Taylor; and University of Virginia School of Law Professor Ethan Yale. If helpful to the Court, Plaintiff's experts are prepared to testify live and answer any questions from the Court in its evaluation of this Motion.[5]

[5] *Cf. In Re Baker Hughes, A GE Co., Deriv. Litig.*, No. 169,2023 (Del. Feb. 1, 2024) (ORDER).

STATEMENT OF FACTS

The Court's 200-page Post-Trial Opinion painstakingly detailed the Court's relevant factual findings. Below is an abbreviated recitation of that record.

I. THE GRANT

On January 21, 2018, the Tesla Board held a special meeting to approve the Grant.[6] The Grant comprised 12 tranches, each of which would vest upon satisfaction of one market capitalization milestone and achievement of one operational milestone.[7] Each completed tranche provided Musk options to purchase 1% of Tesla's common stock outstanding as of January 19, 2018.[8] If fully vested, the Grant would provide Musk options to purchase 20,264,042 Tesla shares.[9] The strike price for each option was $350.02, representing the January 19, 2018 closing price of Tesla common stock.[10] Following a five-for-one stock split in 2020 and a three-for-one stock split in 2022, the total options conferrable under the Grant increased to 303,960,630, and the strike price for each of those options decreased to $23.33.[11]

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[6] Op. at 80.

[7] *Id.*

[8] *Id.* at 81.

[9] *Id.*

[10] *Id.* at 81-82.

[11] *Id.*; *see also* 2023 Tesla Proxy at 45 (available at https://www.sec.gov/ixviewer/ix.html?doc=/Archives/edgar/data/0001318605/000119312

In connection with approving the Grant, the Board approved resolutions that (i) "authorize[d] and reserve[d] sufficient shares of the Company's common stock for the issuance" of shares under the Grant, and (ii) "authorize[d] the Company to issue and deliver, without further authorization of the Board, such number of shares of the Company's common stock as may be required to be issued pursuant to any vesting and exercise of any portion of the [Grant] 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."[12]

The February 8, 2018 Proxy regarding the Grant disclosed a $55.8 billion maximum value—and $2,615,190,052 grant date fair value ("GDFV")—for the Grant.[13] As of June 30, 2022, all of the Grant's market capitalization and adjusted EBITDA milestones had been achieved, and three revenue milestones had been achieved with one more deemed probable of achievement.[14] According to Note 13 to Tesla's audited financial statements included in its Form 10-K dated January 29,

523094075/d451342ddef14a.htm). As a technical matter, the per-share exercise price is $23.33466666 (resulting in a total exercise price of $7,092,819,980.84, as per the Grant agreement), but for simplicity, Plaintiff and Plaintiff's experts use the rounded number—used by the Court in her Opinion (Op. at 82)—of $23.33 in this brief and the accompanying expert affidavits.

[12] JX0791 at JX0791.0006.

[13] Op. at 189.

[14] *Id.* at 92.

2024: "Each of the 12 vesting tranches . . . vested upon certification of the Board of Directors."[15] Musk has not exercised any of the options underlying the Grant.

II. THE ACTION

After undertaking an initial investigation in January and February 2018, sending a books-and-records demand under Section 220 of the Delaware General Corporation Law on February 21, 2018, and receiving documents pursuant thereto, Plaintiff filed the Action on June 5, 2018.[16] Defendants moved to dismiss (the "MTD"), and on May 9, 2019, after full briefing by the parties, the Court held oral argument on the MTD over the course of more than three hours.[17] The parties then engaged in a series of post-argument written submissions regarding certain substantive issues raised during the MTD argument.[18]

On September 20, 2019, the Court substantially denied Defendants' MTD, dismissing only Plaintiff's waste claim.[19] The Court held that Plaintiff had "cleared the bar" to demonstrate it was "reasonably conceivable the [Grant] is unfair to Tesla" but that Plaintiff's underlying allegations were on the "very outer margins of

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[15] Tesla, Inc. Form 10-K, dated January 29, 2024 (available at https://www.sec.gov/ixviewer/ix.html?doc=/Archives/edgar/data/0001318605/000162828024002390/tsla-20231231.htm).

[16] Op. at 97.

[17] *See* Dkt. 28.

[18] *See* Dkts. 29, 30, and 31.

[19] *Tornetta v. Musk*, 250 A.3d 793, 814 (Del. Ch. 2019).

adequacy," such that Defendants' arguments "may well carry the day" in the context of summary judgment or trial.[20] Thus, in the emergent days of the Covid-19 pandemic, Plaintiff commenced discovery to substantiate the allegations underlying the Action and prepare the case for trial.

In the midst of the pandemic, Plaintiff's Counsel undertook significant documentary discovery efforts, including: (i) serving on Defendants four sets of document requests, five sets of interrogatories, and one set of requests for admission, and securing numerous amended and/or supplemented interrogatory responses; (ii) serving subpoenas on twelve non-parties;[21] and (iii) obtaining a total of 429,644 pages of Defendant and third-party documents. To avoid burdening the Court with motion practice, the parties also entered into—and the Court granted—a stipulation pursuant to Delaware Rule of Evidence 510.[22] On April 2, 2021, Plaintiff also filed a motion to compel against Defendants, which was argued on May 3, 2021 following full briefing, and granted in part.[23]

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[20] *Id.* at 812-13 (quotations omitted).

[21] Plaintiff served subpoenas on (i) Glass Lewis & Co. LLC; (ii) Compensia, Inc.; (iii) Institutional Shareholder Services, Inc.; (iv) Semler Brossy Consulting Group, LLC; (v) Innisfree M&A Incorporated; (vi) Aon Radford Valuation Services; (vii) Space Exploration Technologies Corp.; (viii) Sard Verbinnen & Co., LLC; (ix) PJT Partners Inc.; (x) PricewaterhouseCoopers LLP; (xi) Goldman Sachs & Co. LLC; and (xii) Morgan Stanley & Co. LLC.

[22] Dkt. 86.

[23] Dkt. 104.

Plaintiff also took 17 fact depositions, several of which occurred over the course of multiple days.[24]

On June 24, 2021, Plaintiff served an expert report on behalf of Brian D. Dunn, and Defendants served expert reports on behalf of Kevin J. Murphy, Paul A. Gompers, and Jonathan F. Foster. On August 16, 2021, Plaintiff served expert rebuttal reports on behalf of Professor Dunn, Andrew Restaino, and Brent Goldfarb, and Defendants served an expert rebuttal report on behalf of Professor Murphy. Plaintiff's Counsel subsequently deposed Professors Murphy and Gompers, and defended the depositions of Professor Dunn, Mr. Restaino, and Professor Goldfarb.

On September 30, 2021, Plaintiff filed a motion for leave to file an amended complaint, which attached the proposed amended complaint as an exhibit.[25] On October 1, 2021, Plaintiff, on the one hand, and Defendants Kimbal Musk and Steve Jurvetson, on the other hand, filed cross-motions for summary judgment.[26]

On October 27, 2021, the parties filed a stipulation and proposed order pursuant to which, among other things, (i) in light of the Delaware Supreme Court's

[24] Plaintiff took the following fact depositions: (i) Deepak Ahuja, (ii) Tom Brown, (iii) Jon Burg, (iv) Brad Buss, (v) Jonathan Chang (two days), (vi) Robyn Denholm (three days), (vii) Ira Ehrenpreis, (viii) Antonio Gracias, (ix) Linda Johnson-Rice, (x) Todd Maron (two days), (xi) Kenneth Moore, (xii) James Murdoch, (xiii) Elon Musk, (xiv) Kimbal Musk, (xv) Phuong Phillips, (xvi) Gabrielle Toledano, and (xvii) Martin Viecha.

[25] Dkt. 161.

[26] Dkts. 162, 163.

then-recent decision in *Brookfield Asset Management, Inc. v. Rosson*,[27] which overturned *Gentile v. Rossette*,[28] the Class was decertified; (ii) Plaintiff's direct claims asserted under *Gentile* were voluntarily dismissed; and (iii) Plaintiff's claims against Kimbal Musk and Steve Jurvetson were voluntarily dismissed with prejudice, and the summary judgment motion filed by those Defendants was denied as moot.[29]

On November 18, 2021, Defendants filed a motion for partial summary judgment.[30]

On February 24, 2022, following full briefing, the Court (i) granted Plaintiff's motion to amend the complaint and (ii) denied the pending cross-motions for summary judgment.[31] On March 2, 2022, Plaintiff filed the Verified Amended Derivative Complaint.[32]

On May 6, 2022, Defendants served a sur-reply expert report on behalf of Professor Gompers.[33] On July 28, 2022, Plaintiff's counsel deposed Professor Gompers a second time.

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[27] 261 A.3d 1251 (Del. 2021).

[28] 906 A.2d 91 (Del. 2006).

[29] Dkt. 175.

[30] Dkt. 184.

[31] Dkt. 207.

[32] Dkt. 209.

[33] Dkt. 214.

The parties then undertook pre-trial work, including submission of a proposed pre-trial order and pre-trial briefs.[34]

III. THE TRIAL

Beginning on November 14, 2022, roughly four-and-a-half years after commencing the Action, Plaintiff tried the Action. Trial occurred over five days, and the record comprised 1,704 trial exhibits, live testimony from nine fact and four expert witnesses, video testimony from three fact witnesses, deposition testimony from 23 fact and five expert witnesses, and 255 stipulations of fact.[35]

Plaintiff and Defendants both subsequently submitted opening and answering post-trial briefs, and the Court heard post-trial argument on February 21, 2023.[36] Between March 14 and April 11, 2023, the parties engaged in supplemental briefing regarding certain issues raised at the post-trial argument and documented by the Court in a letter requesting such briefing.[37] On April 25, 2023, the parties submitted a Joint Schedule of Evidence.[38]

Plaintiff achieved total victory at trial. In its Post-Trial Opinion issued January 30, 2024, the Court "order[ed] rescission of the Grant as a remedy for

[34] Dkts. 226, 227, and 228.

[35] Op. at 8; *see also* Dkts. 245-249.

[36] Dkts. 263, 264, 274, and 275.

[37] Dkts. 285, 288, and 289.

[38] Dkt. 290.

Defendants' fiduciary breaches," "concluding that Plaintiff is entitled to rescission of the Grant in its entirety."[39]

ARGUMENT

I. THE FEE AND EXPENSE AWARD SHOULD BE GRANTED

"The determination of any attorney fee award is a matter within the sound judicial discretion of the Court of Chancery."[40] "Delaware courts recognize the value of representative litigation."[41] As such, "Delaware decisions have sought to align the interests of entrepreneurial plaintiffs' counsel with the classes they represent by granting minimal fees for minimal benefits and major fees for major results."[42] In determining the amount of a fee award in a given case, the Court considers the factors detailed in *Sugarland Industries, Inc. v. Thomas*: (i) the results achieved; (ii) the contingent nature of counsel's fee; (iii) the litigation's relative complexities; (iv) counsel's efforts, including time and expenses; and (v) counsel's standing and ability.[43]

As explained in detail below, the requested Fee and Expense Award consists of (i) 29,402,900 shares of freely tradeable Tesla common stock (previously defined

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[39] Op. at 103, 192.

[40] *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1255 (Del. 2012) (citation omitted).

[41] *In re Del Monte Foods Co. S'holders Litig.*, 2011 WL 2535256, at *14 (Del. Ch. June 27, 2011).

[42] *Id.*

[43] 420 A. 2d 142, 149 (Del. 1980).

as the "Share Award"),[44] and (ii) an expense reimbursement of $1,120,115.50 (previously defined as the "Expense Reimbursement"). *Sugarland* and subsequent Delaware precedent support this request.

A. The Action Conferred an Unprecedented Benefit

The size of the benefit conferred "is the heart of the *Sugarland* analysis,"[45] such that "Delaware courts have assigned the greatest weight to the benefit achieved in litigation."[46] Indeed, in opposing the fee request submitted in connection with the settlement of a challenge to Tesla director compensation from 2017 to 2020,[47] Tesla expressly agreed that "the most important factor in determining a fee award is the first *Sugarland* factor—the size of the benefit achieved."[48] This benefit may be the "creation of a common fund" or "the conferring of a corporate benefit."[49]

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[44] In the event of a Tesla stock split, the requested Share Award would need to be adjusted accordingly.

[45] *Seinfeld v. Coker*, 847 A.2d 330, 336 (Del. Ch. 2000).

[46] *Ams. Mining*, 51 A.3d at 1254; *see also, e.g.*, *In re Nat'l City Corp. S'holders Litig.*, 2009 WL 2425389, at *5 (Del. Ch. July 31, 2009), *aff'd*, 998 A.2d 851 (Del. 2010) (acknowledging that Delaware courts have "consistently noted that the most important factor in determining a fee award is the size of the benefit achieved").

[47] *Police & Fire Ret. Sys. of the City of Detroit v. Musk*, C.A No. 2020-0477-KSJM (the "Director Compensation Case").

[48] Nominal Defendant Tesla, Inc.'s Answering Brief in Opposition to Plaintiff's Request for Award of Attorneys' Fees and Expenses, C.A. No. 2020-0477-KSJM (Dkt. 157) ("Tesla Dir. Comp. Ans. Br.") at 6 (quotations omitted).

[49] *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1164 (Del. 1989).

"When the benefit is quantifiable . . . *Sugarland* calls for an award of attorneys' fees based upon a percentage of the benefit."[50] "Delaware case law supports a wide range of reasonable percentages for attorneys' fees[.]"[51] Under well-settled Delaware law, and as the Court has explained, "a full adjudication"—as here—"warrant[s] an award of 33%."[52] Indeed, in litigation that concluded with a pre-trial settlement, the Court has awarded fees exceeding 30% of the benefit conferred by the litigation.[53] As former Chief Justice Strine explained: "If some

[50] *Ams. Mining*, 51 A.3d at 1259.

[51] *Id.*

[52] *In re Dell Techs. Inc. Class V S'holders Litig.*, 300 A.3d 679, 695 (Del. Ch. 2023); *see also, e.g.*, *In re CVR Refining, LP Unitholder Litig.*, Consol. C.A. No. 2019-0062-KSJM, at 26 (Del. Ch. Dec. 16, 2022) (TRANSCRIPT) (approving all-in fee award in post-trial settlement representing 33% of the settlement amount; observing, "when a case progresses to post-trial adjudication, a 33 percent award is often appropriate"); *In re El Paso Pipeline P'rs, L.P. Deriv. Litig.*, 2016 WL 451320, at *2 (Del. Ch. Feb. 4, 2016) (ORDER) (awarding fees representing one-third of damages); *Fox v. CDX Hldgs., Inc.*, 2015 WL 5163790, at *7 (Del. Ch. Sept. 2, 2015) (ORDER) (awarding fees representing one-third of damages less expenses); *In re Rural/Metro Corp. S'holders Litig.*, 2015 WL 725425, at *1 (Del. Ch. Feb. 19, 2015) (ORDER), *aff'd sub nom. RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816 (Del. 2015) (awarding "fees and expenses in the amount of one-third of the full amount of damages plus pre- and post-judgment interest, which the Court finds fair and reasonable"); *Gatz v. Ponsoldt*, 2009 WL 1743760 (Del. Ch. June 12, 2009) (awarding 33% in case litigated extensively, including through an appeal in the Delaware Supreme Court); *Thorpe ex rel. Castleman v. CERBCO, Inc.*, 1997 WL 67833, at *6 (Del. Ch. Feb. 6, 1997) (awarding one-third of the common fund due to difficulty of issues, counsel's "very high quality work," and because plaintiffs had "fought their position with vigor and skill" over an extended period); *In re Dole Food Co.*, 110 A.3d 1257, 1259 (Del. Ch. 2015) (awarding $33,882,616.30, or 30% of the post-trial class recovery, after deducting $2,530,422.96 in expenses).

[53] *See, e.g.*, *In re Mindbody, Inc. S'holder Litig.*, C.A. No. 2019-0442-KSJM, at 23 (Del. Ch. June 8, 2022) (TRANSCRIPT) (awarding "30 percent of the [settlement] fund . . . net of the expenses" for a pre-trial settlement).

plaintiff's lawyer goes to trial and wins a $10 billion recovery, I will say right now, that's when I am most likely to award 33 percent. I just am. Why? Because that's when the real risk has been taken."[54]

This Action secured an unprecedented benefit—full rescission of the fully-vested $51+ billion Grant. Following stock splits in 2020 and 2022, the total number of options conferrable under the Grant increased to 303,960,630,[55] and the strike price for those options decreased to $23.33.[56] Upon approving the Grant on January 21, 2018, the Board resolved as follows:

> **RESOLVED**: . . . [the Board] hereby *authorizes and reserves 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 [Grant] in accordance with its terms, and the transfer agent of the Company is hereby authorized and directed to act in accordance with this resolution* and any further instructions as may be furnished to it by any proper officer of the Company.
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> **RESOLVED FURTHER**: . . . [the Board] hereby authorizes *the Company to issue and deliver, without further authorization by the Board, such number of shares of the Company's common stock as may be required to be issued* pursuant to any vesting and exercise of any portion of the [Grant] in accordance with its terms, and upon such

[54] *Lewis v. Engle*, C.A. No. 497-VCS, Strine, V.C. (Del. Ch. Dec. 29, 2004) (ORDER).

[55] *See* 2023 Tesla Proxy at 45 (available at https://www.sec.gov/ixviewer/ix.html?doc=/Archives/edgar/data/0001318605/000119312523094075/d451342ddef14a.htm); *see also* Daniel J. Taylor Affidavit dated March 1, 2024 ("Taylor Aff.") at ¶11.

[56] Taylor Aff. at ¶11.

> issuance, *such shares shall be considered and treated as being in all respects validly issued, fully paid and nonassessable*.[57]

Thus, for each option achievable under the Grant, the Board "authorize[d] and reserve[d]" a share of Tesla stock for the sole and exclusive purpose of delivery to Musk upon vesting and exercise of the share's corresponding option.

Based on the $191.59 per share closing price of Tesla stock on the date of the Post-Trial Opinion[58] and the exercise price of $23.33[59] (which equates to 37,013,422 shares), the 303,960,630 vested and now-cancelled options could have been exercised on a cashless basis (*i.e.*, net of exercise price) for a total of 266,947,208 shares.[60] Thus, the benefit conferred by this Action is the cancellation of 303,960,630 options, which frees up at least 266,947,208 Tesla shares—based on Tesla's closing price on the date of the Post-Trial Opinion—that were expressly reserved and set aside in Tesla's corporate treasury and would have been issued to Musk upon the cashless exercise of those 303,960,630 options.[61] Thus, through this

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[57] JX0791 at JX0791.0006 (emphasis added).

[58] For purposes of calculating and valuing the requested Share Award, Plaintiff uses the most logical and appropriate date—*i.e.*, the date of the Opinion. Plaintiff recognizes that Tesla stock is volatile, and that the value of the requested fee will fluctuate based on changes—whether positive or negative—to Tesla's stock price.

[59] 2018 Tesla Grant Proxy at A-1, (available at https://www.sec.gov/Archives/edgar/data/1318605/000119312518035345/d524719ddef14a.htm).

[60] Taylor Aff. at ¶13. The actual number is 266,947,208.12 shares, but Plaintiff has rounded down to the nearest whole share for simplicity.

[61] Without expressing an opinion on the benefit achieved by the Action, Professor Taylor

Action, Plaintiff freed up 266,947,208 Tesla shares that the Company may now utilize for any purpose.[62] And, as detailed in Joint Declaration of Professors Bebchuk and Jackson, the result here is a reversal of the Grant's dilution and accretion to all Tesla stockholders.[63]

B. A Fee Award in Freely Tradeable Shares Is Appropriate

Tesla shares are the appropriate—and indeed, optimal—currency for payment of attorneys' fees in this Action.

First, this approach directly and most closely relates to the benefit achieved—the cancellation of 303,960,630 vested Tesla options conferred via the Grant and the resulting availability of 266,947,208 shares for Tesla to use for any corporate purpose.[64]

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has calculated the value of the options as if exercised on the date of the Court's opinion at over $51.1 billion. Taylor Aff. at ¶13. Professor Taylor's affidavit also demonstrates that a Black-Scholes-Merton value of the options at the point of the Court's opinion was more than $52.2 billion. *Id.* at ¶¶18-19.

[62] Plaintiff's Counsel are *not* requesting a percentage of the full 303,960,630 shares that they freed up through this Action because we have assumed a cashless exercise by Musk. We have done so to present a more conservative approach and to avoid unnecessary disputes as to whether Musk would have paid the strike price to receive more shares or used the cashless exercise feature.

[63] Joint Declaration of Lucian Bebchuk & Robert J. Jackson, Jr. dated March 1, 2024 ("Bebchuk/Jackson Decl.") at ¶46.

[64] *See Wilderman v. Wilderman*, 328 A.2d 456, 458-59 (Del. Ch. 1974) (holding that attorneys' fees should be awarded based upon the actual benefit conferred upon the corporation).

Second, this approach frees Tesla from any obligation to make a large cash payment out of its cash on hand[65] in connection with Plaintiff's fee request, instead awarding the fee directly out of the share-based recovery in the Action. Further, as detailed in the concurrently submitted affidavit of Professor Ethan Yale, the requested attorneys' fee provides Tesla a tax benefit that can be recognized either now or at some future date.[66] Specifically, Tesla receives a tax deduction up to 21% of the value of any Tesla shares provided to Plaintiff's Counsel as an attorneys' fee.[67]

Third, this approach aligns with prior treatment of large attorneys' fees. In *Americas Mining*, for example, the trial Court directed that the controller "may satisfy the judgment by agreeing to return to [the controlled company] such number of its shares as are necessary to satisfy this remedy," and, notably, that "*[a]ny attorneys' fees shall be paid out of the award*."[68] Likewise, in *Sanders v. Wang*, where this Court granted the plaintiffs judgment on the pleadings as to the improper issuance of 4.5 million shares, the Court approved a settlement and awarded

[65] Tesla's recently filed Form 10-K lists "sufficient cash flow" as a "Risk Related to [] Operations" in light of the Company's $4.68 billion indebtedness. Tesla 10-K, filed with the SEC on January 26, 2024, at 23-24.

[66] Affidavit of Ethan Yale dated March 1, 2024 ("Yale Aff.") at ¶¶13-15.

[67] *Id*. at ¶¶13-14.

[68] *In re Southern Peru Copper Corp. S'holder Deriv. Litig.*, 52 A.3d 761, 819 (Del. Ch. 2011) (emphasis added); *see also Ams. Mining*, 51 A.3d at 1250 ("The Court of Chancery also ruled that any attorneys' fees would be paid out of the award.").

plaintiffs a fee comprising 20% of the 4.5 million recovered shares, *i.e.*, 900,000 freely tradeable shares.[69]

Fourth, awarding Plaintiff's Counsel a percentage of the actual benefit conferred in this Action—*i.e.*, the 266,947,208 Tesla shares returned to Tesla's treasury—avoids a potential dispute as to whether the value of rescinding the Grant and freeing up those shares for Tesla to use for any corporate purpose somehow differs from the value of those shares.

Thus, Plaintiff's Counsel hereby seek an attorneys' fee comprising a percentage of the benefit conferred as a direct result of this Action.

C. The Requested Fee Award Is Conservative Under Delaware Law

Well-established precedent establishes Plaintiff's Counsel's entitlement to 33% of the quantifiable conferred benefit—*i.e.*, 88,092,578 whole Tesla shares—given that Counsel litigated the Action on a fully contingent basis through trial, and Defendants have already confirmed that they will appeal the Post-Trial Opinion.[70]

Under Delaware law, the unprecedented size of the benefit conferred does not alter Plaintiff's Counsel's entitlement to 33% of that benefit.[71] Directly confronted

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[69] 2000 WL 34015564, at *3 (Del. Ch. June 22, 2000).

[70] *See, e.g.*, February 14, 2014 Joint Letter to the Court (Dkt. 295) at 2 (contemplating "a stay pending appeal of the final judgment and an award of fees and expenses").

[71] Indeed, there is authority for *increasing* the percentage as the recovery grows larger. *See, e.g.*, ALBA CONTE, 1 *Attorney Fee Awards*, 3d Ed., § 2.9 (Database Updated October 2008) ("In contrast, to provide a sufficient financial fee-award incentive to maximize the

with the question of whether to replace the *Sugarland* analysis with a regime requiring decreased fee percentages for megafund recoveries, the Delaware Supreme Court "decline[d] to impose either a cap or the mandatory use of any particular range of percentages for determining attorneys' fees in megafund cases."[72]

Decisions since *Americas Mining*—including recent ones—have likewise uniformly rejected fee reductions for megafund recoveries.[73] Rather, as Vice Chancellor Laster explained in his 2023 *Dell* decision:

> *Americas Mining* and its progeny neither call for nor commend a practice of reducing the percentage of the benefit awarded as a fee in a mega-fund case . . . . Under *Americas Mining* and *Sugarland*, a court does not make a downward adjustment to the indicative percentage based on the size of the fund.[74]

As further explained in *Dell*—and as Tesla acknowledged in the Director Compensation Case—Delaware's approach aligns the interests of counsel with the interests of stockholders: "A percentage of a low or ordinary recovery will produce

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recovery achieved, at least one court has adopted an intended fee schedule with an upward scale as the recovery increases. In *American Continental Corporation/Lincoln Savings & Loan Securities Litigation*, Judge Bilby, before any decision on the merits, set forth the level of fees that would be awarded in the event that plaintiffs were ultimately successful. Significantly, the court stated that it would award 25% of the first $150 million and *29%* of any class recovery in excess of $150 million." (citation omitted)).

[72] *Ams. Mining*, 51 A.3d at 1261.

[73] *See, e.g.*, *Dell*, 300 A.3d at 703-04 (Del. Ch. July 31, 2023); *In re CBS Corp. S'holder Class Action & Deriv. Litig.*, Consol. C.A. No. 2020-0111-SG, at 29 (Del. Ch. Sep. 6, 2023) (TRANSCRIPT) (awarding fees equal to 27.5% of the recovery net of expenses in case that settled two months before trial).

[74] *Dell*, 300 A.3d at 703-04.

a low or ordinary fee; the same percentage of an exceptional recovery will produce an exceptional fee . . . . The wealth proposition for plaintiffs' counsel is simple: If you want more for yourself, get more for those whom you represent."[75]

Nevertheless, in an effort to be conservative, Plaintiff's Counsel does not seek the 33% warranted under *Sugarland* and its progeny. Rather, Plaintiff's Counsel predicates their fee request on the fee awarded—and affirmed by the Delaware Supreme Court—in *Southern Peru/Americas Mining*, which represented the largest stockholder recovery in Delaware history before this Action.

In *Southern Peru*, the trial court "encouraged the plaintiffs to be conservative in their [fee] application,"[76] admonishing plaintiff's counsel to "tak[e] into account the reality [that] their own delays affected the remedy awarded and are a basis for conservatism in any fee award."[77] The *Southern Peru* plaintiff had "moved too slowly," seeking summary judgment *six years* after filing the action,[78] and even "waiv[ing] the right to seek rescissory damages because of 'his lethargic approach to litigating the case.'"[79] Following that admonition, the *Southern Peru* plaintiff

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[75] *Id*. at 693 (quoting *In re Orchard Enters., Inc. S'holder Litig.*, 2014 WL 4181912, at *8) (Del. Ch. Aug. 22, 2014); Tesla Dir. Comp. Ans. Br. at 2 (quoting same language from *Orchard*).

[76] *Ams. Mining*, 51 A.3d at 1262.

[77] *Southern Peru*, 52 A.3d at 819, n.206.

[78] *Ams. Mining*, 51 A.3d at 1234.

[79] *Id.* at 1249; *see also, e.g.*, *id.* at 1262 ("[O]ne of the things . . . defendants got credit for

requested a conservative fee representing 22.5% of the benefit conferred, to which the trial court further "applied a[n] [even more] 'conservative metric because of Plaintiff's delay,'" reducing the fee to 15%,[80] which the Delaware Supreme Court affirmed in *Americas Mining*.

By contrast, Plaintiff litigated this Action with alacrity, and therefore, the 15% award in *Southern Peru* is inappropriate here. Nevertheless, in an effort to be conservative, and to minimize the dispute between the parties and simplify the Court's decision, Plaintiff proposes to use the *Americas Mining* fee as a basis for the fee request, and proposes an *additional* adjustment to it based on the nature of the fee requested here.

Specifically, because the cancelled Grant options included a five-year post-exercise holding period, but Plaintiff seeks freely tradeable Tesla shares (*i.e.*, no holding period), an additional adjustment to the fee request by the amount of the illiquidity discount arising from the five-year holding period can be taken into account.

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in this case is that the plaintiffs were slow . . . . [I] also . . . have to take that into account in the percentage I award for the plaintiffs[,] . . . [a]nd I took that into account.").

[80] *Id.* at 1257.

As calculated by Professor Taylor using a Finnerty Model and using Tesla's most recently disclosed volatility of 63%, a five-year holding period applied to otherwise freely tradeable Tesla shares equates to a 26.57% illiquidity discount.[81]

Notwithstanding that the five-year holding period applicable to Musk (only) is irrelevant to the benefit conferred to *Tesla* through cancellation of the options, Plaintiff proposes to use the 26.57% illiquidity discount as the basis for an additional adjustment to the already conservative fee awarded in *Americas Mining*.[82] Starting with the 15% awarded in *Americas Mining*, utilizing the lower number of shares to account for a cashless exercise, forgoing any upward adjustment to reflect Plaintiff's substantially greater alacrity in this Action, and applying a conservative liquidity-related adjustment, Plaintiff seeks 11.0145% of the 266,947,208 shares that are now available for other use by Tesla as a direct result of this Action—a total of 29,402,900 shares.[83] The liquidity adjustment of 26.57% reduces Plaintiff's request by 10,639,181 shares.

[81] Taylor Aff. at ¶13, n.3; *see also* TSLA-Tornetta-023942; Tesla 10-K filed January 29, 2024 at 81. We note that we have utilized this discount, rather than the smaller 10.88% utilized by Aon at the time of the Grant, because it is more conservative and recognizes the high degree of volatility present in the trading of Tesla securities.

[82] 26.57% of 15% = 3.9855%. 15% - 3.9855% = 11.0145%.

[83] This amount has been rounded down to the nearest whole share.

D. A Fee Award Based on the Retroactive GDFV Is Unsupportable

Plaintiff anticipates that Defendants might reprise their argument from the Director Compensation Case that, according to the rules of the Financial Accounting Standards Board ("FASB"), the value of the benefit conferred on Tesla by fully rescinding the Grant should be based not on the value of the options cancelled and the underlying shares freed up, but instead on the purported technical accounting impact of cancelling those options and underlying shares, which Defendants describe as a reverse accounting charge.[84] As noted above, structuring the attorneys' fee as a percentage of the *actual benefit conferred* rather than a cash payment reflecting *a percentage of a quantification of the value of the benefit conferred* cuts through any such gambit.

The value of the benefit conferred by rescinding the Grant should be based on the options' actual value at the time of rescission, as opposed to an historical cost basis accounting valuation: Plaintiff freed up 266,947,208 Tesla shares—worth over $51.4 billion—that Tesla may now utilize for any purpose. This approach is not

[84] Put another way, Tesla's view is that rescinding an option produces no economic value to the Company because doing so does not expand the pool of shares that the Company is "free [to] do whatever [it] want[s with] for corporate purposes." Bebchuk/Jackson Decl. at ¶56-57.

only logically sound, but also supported by decades of Delaware precedent addressing the issue.[85]

Indeed, Plaintiff's experts demonstrate that Defendants' "reverse accounting charge" argument is divorced from basic principles of financial economics.[86]

First, as Professors Bebchuk and Jackson explain more fully in their Joint Declaration, it is widely accepted that accounting changes are not synonymous with

[85] *See* Plaintiff's Reply Brief in Further Support of Settlement Approval, Award of Attorneys' Fees and Expenses, and Incentive Award, C.A. No. 2020-0477-KSJM (Transaction ID 71045492) ("Compensation Case Reply") at 9-10 ("Delaware courts value options cancelled in a settlement by looking to their intrinsic or fair value ***at the time of settlement***, just as provided for in the Stipulation. *See, e.g.*, *Wilcox v. Dolan*, C.A. No. 2019-0245-SG, at 13, 31 (Del. Ch. Sep. 8, 2020) (TRANSCRIPT) (when weighing settlement supported by underlying consideration of a 'one-time signing grant with a grant date fair value of $40 million' and certain performance stock units, the Court looked to the 'present value of around $31 million' of that consideration); *Moses v. Pickens*, 1982 WL 17825, at *1 (Del. Ch. Nov. 10, 1982) ('Under the terms of the settlement Mr. Pickens agreed to surrender his option on 1,200,000 shares of Mesa common stock. The options provided for the purchase of the stock at $11.50 per share but the stock is presently trading for $15-$17 per share. Thus it is clear that the value to Mesa by the surrendering of the options is approximately 4 million dollars.'); *Wietschner v. Rapid-Am Corp.*, 1977 WL 918, at *4 (Del. Ch. Jan. 19, 1978) ('[T]he options . . . have a [present] relinquishment value to the corporation as well as a possessory value to Riklis and Becker of $1.00 each, or, in total, a value to the corporation for the purpose of this settlement of $300,000.'); *Krinsky v. Helfand*, 156 A.2d 90, 94-95 (Del. 1959) (crediting this Court's 'fair estimate of value' based on the 'difference between the option and market prices' notwithstanding the 'dispute between the parties as to the measure of value of the cancellation of [the] stock options'); *see also Alpha Venture Capital Partners LP v. Pourhassan*, C.A. No. 2020-0307-PAF, at 54-56 (Del. Ch. June 21, 2021) (TRANSCRIPT) (rejecting defendants' argument that cancelled stock options and warrants were unquantifiable benefits to the company and that plaintiff's fair market valuation represented the benefit surrendered by defendants and not the benefit obtained by the company)." (emphasis in original)).

[86] *See* Bebchuk/Jackson Decl. at ¶¶55-67.

equivalent changes in economic value.[87] Defendants themselves acknowledged this fact in their pre-trial briefing.[88] For example, using a *historic* accounting-related GDFV estimate from 2018 makes no economic sense as a measure of the Grant's *current* value to Tesla.[89] It ignores, among other things, Tesla's projections at the time of the Grant, which indicated that several tranches would vest soon after the Grant's issuance,[90] as well as everything that has transpired—including the massive increase in the Grant's value—in the roughly six ensuing years.

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[87] *Id.* at ¶¶62-64.

[88] Director Defendants' Pretrial Brief, at 56-57 ("[T]he Proxy does disclose the 'grant date fair value' (known as ASC 718)—an accounting term representing stock-based compensation expense a company recognizes for an option award, *not the value to Musk or to Tesla's stockholders*."); *id.* (describing ASC 718 disclosure as "flawed as a measure of value").

[89] *See* Bebchuk/Jackson Decl. at ¶¶63-67.

[90] Op. at 79 ("The [GDFV] did not . . . incorporate Tesla's internal projections."); 85 ("The one-year [December 2017] projections underlying the operating plan . . . predicted achievement of three milestones in 2018 alone. The longer three-year projections underlying that plan reflected that by 2019 and 2020, Tesla would achieve seven and eleven operational milestones, respectively."); 86 ("The March 2018 Projections . . . predicted achievement of one revenue and two adjusted EBITDA milestones by March 31, 2019, and further two revenue and four adjusted EBITDA milestones by the end of 2020."); 186 ("Tesla viewed its projections as reliable. They were developed in the ordinary course, approved by Musk and the Board, regularly updated, shared with investment banks and ratings agencies, and used by the Board to run Tesla. Several Tesla executives affirmed their quality, accuracy, and reliability. Plus, Tesla hit the first three milestones, consistent with its projections, by September 30, 2020."); 72 ("[T]he operational and market capitalization milestones 'have to be somewhat aligned. It has to make sense to be able to be achieved around the same time or what you think is the same time.'").

Second, the FASB rules do not instruct companies to incorporate changes over time into an accounting charge.[91] Nor do the FASB rules preclude companies from incorporating current economic values into their accounting charges.[92] As explained by Professors Bebchuk and Jackson: "[T]he design of accounting rules is influenced by various considerations that do not favor changing accounting figures to track economic values as the latter change."[93]

Third, Tesla's contention that the reversal of a historical accounting charge yields an economic benefit equal in magnitude to the accounting charge leads to absurd consequences, as Professors Bebchuk and Jackson illustrate more fully in their affidavit.[94] For example, the simultaneous cancellation of two option packages that differ merely in the historical accounting charge and the time granted would have different valuations, according to Tesla, even though each cancellation would have the exact same consequence on the company's future cash flows.[95] Similarly, under Tesla's view, cancellation of two option packages with the same historical

[91] Bebchuk/Jackson Decl. at ¶65.

[92] *Id.*

[93] *Id.*

[94] *Id.* at ¶¶65-66.

[95] *Id.* at ¶65.

accounting charge would produce the same economic benefit to a company, even if one option package were deep in the money and the other deep out of the money.[96]

Tellingly, Defendants' stipulation to the value of the relevant options in the Director Compensation Case based on the options' fair value at the time of the settlement reveals that, outside the context of the present fee dispute, Defendants themselves recognize the fallacy of their "reverse accounting charge" argument.[97]

E. The Secondary *Sugarland* Factors Support the Requested Fee and Expense Award

1. Counsel Faced Massive Contingency Risk

The contingent nature of the litigation is the "second most important factor considered by this Court in awarding the counsel fee."[98] "It is the 'public policy of Delaware to reward risk-taking in the interests of shareholders.'"[99] Thus, "[t]his

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[96] *Id.* at ¶66. The Joint Declaration of Professors Bebchuk and Jackson also explains why the requested Share Award would not present risk of disruption to the marketplace for Tesla stock. Bebchuk/Jackson Decl. at ¶¶93, 96. Indeed, were this Court to award a fee in shares, Plaintiff's Counsel, like all other Tesla stockholders, would share a common interest in allowing the market to operate in an efficient manner and an incentive not to trade shares in a value-destructive manner.

[97] Compensation Case Reply at 2-3 ("Stipulation Section 2.1 states that the Director Defendants shall '***provide to Tesla*** the value of 3,130,406 options . . . using the methods set forth in this Section, which shall have the total value set forth in Section 2.6 of this Stipulation.' Section 2.6 further states that the 'Director Defendants ***shall deliver to Tesla the value of the Settlement Options, which is equal to $735,266,505***,' including '$458,649,785 in Returned Options.'" (emphasis in original)); *see also* Bebchuk/Jackson Decl. at ¶¶58-67.

[98] *Dow Jones & Co. v. Shields*, 1992 WL 44907, at *2 (Del. Ch. Jan. 10, 1992).

[99] *In re Activision Blizzard, Inc. S'holder Litig.*, 124 A.3d 1025, 1073 (Del. Ch. 2015) (citation omitted).

Court has recognized that an attorney may be entitled to a much larger fee when the compensation is contingent than when it is fixed on an hourly or contractual basis."[100] "Accepting contingency risk is what enables counsel to receive an award based on the results generated by the litigation that exceeds their lodestar."[101]

Plaintiff's Counsel litigated this Action on a fully contingent basis. "If they lost, they would get nothing. They also were responsible for funding their expenses. Plaintiff's Counsel are therefore entitled to a results-based fee based on the *Sugarland* factors."[102]

Plaintiff's Counsel have not been paid for their work, nor have any of their costs or expenses been reimbursed, and litigating this Action required the allocation of a substantial amount of Plaintiff's Counsel's time and resources over six years, including considerable out-of-pocket expenses.

Moreover, this Action presented significant risk. "Plaintiff's counsel did not enter the case with a ready-made exit or obvious settlement opportunity. There was a serious possibility that plaintiff's counsel would lose and receive nothing."[103] Thus, Plaintiff's Counsel "went all-in on a concentrated bet, where they invested a

[100] *Ryan v. Gifford*, 2008 WL 18143, at *13 (Del. Ch. Jan. 2, 2009).

[101] *Dell*, 300 A.3d at 726.

[102] *Id.*

[103] *Id.*

material amount of their firm's resources to get an outcome."[104] Defendants' and their counsel's track record of pushing their cases to trial and prevailing compounded the contingency risk.[105] Indeed, Plaintiff's Counsel still face significant additional work, and ongoing contingency risk: "It remains possible that on appeal . . . the Delaware Supreme Court could disagree with the [Opinion]," in which case "plaintiff's counsel will receive zero."[106]

Further, that contingency risk was clear—and reinforced—throughout the litigation. Critically, *not a single other plaintiff* stepped forward to seek the unprecedented recovery secured by Plaintiff and Plaintiff's Counsel in this Action. In short, especially against these Defendants, there was no obvious "exit ramp" short of trial. Thus, this Action likely would have gone unprosecuted absent Plaintiff's Counsel's willingness to incur substantial contingency risk. Additionally, during the lengthy argument on Defendants' MTD, the Court identified and probed various challenges facing the Action both at the pleading stage and beyond.

Facing a steep uphill climb, Plaintiff's Counsel shouldered significant risk in marching forward against elite defense counsel, painstakingly developed a discovery

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[104] *Kurz v. Holbrook*, C.A. No. 5019-VCL, at 105 (Del. Ch. July 19, 2010) (TRANSCRIPT).

[105] *See, e.g.*, *In re Tesla, Inc. Sec. Litig.*, No. 3:18-cv-04865 (N.D. Cal.); *Unsworth v. Musk*, No. 2:18-cv-08048 (C.D. Cal.); *In re Tesla Motors, Inc. S'holder Litig.*, 2023 WL 3854008 (Del. 2023).

[106] *Sciabacucchi v. Salzberg*, 2019 WL 2913272, at *8 (Del. Ch. July 8, 2019).

record supporting Plaintiff's claims, and secured total—and unprecedented—victory at trial. Plaintiff never engaged in the sort of "risk aversion [that] manifests itself as a natural tendency to favor an earlier bird-in-the-hand settlement that will ensure a fee, rather than pressing on for a potentially larger recovery for the class at a cost of greater investment and with the risk of no recovery."[107]

In sum, "[t]he true contingency risk in this case supports a results-based award using the *Americas Mining* percentages."[108]

2. The Action Was Complex

Another "secondary *Sugarland* factor[] is the complexity of the litigation. All else equal, litigation that is challenging and complex supports a higher fee award."[109]

Plaintiff achieved an unprecedented outcome: full rescission of the largest compensation plan ever. Defendants—at all times represented by world-class law firms—fiercely defended the $51+ billion Grant at every turn. In the MTD phase, Wachtell Lipton advanced novel and complex arguments that forced Plaintiff—and the Court—to grapple with difficult issues that could have doomed the Action at the pleadings stage. After Plaintiff defeated the MTD, Defendants enlisted Cravath Swaine & Moore, who secured the trial victory in the *SolarCity* matter tried in this

[107] *Orchard*, 2014 WL 4181912, at *8.

[108] *Dell*, 300 A.3d at 726.

[109] *Id*. at 728 (quoting *Activision*, 124 A.3d at 1072).

Court (and affirmed on appeal), and of whom the Court stated: "If any set of attorneys could have achieved victory in these unlikely circumstances, it was the talented defense attorneys here."[110] Building a discovery record capable of securing victory at trial—then prevailing at trial—against such capable counsel entailed substantial difficulty and challenge.

Substantively, this Action also presented novel and difficult issues. For example, Plaintiff had to piece together what transpired in a transaction process spearheaded by a close-knit group of Musk loyalists, and in which Tesla General Counsel Maron—whose involvement gave rise to privilege claims over relevant documents—was "a primary go-between Musk and the committee[.]"[111] Plaintiff also faced significant complexity regarding technical accounting issues that required the retention of an accounting expert. Moreover, Plaintiff had to formulate a damages theory with respect to an unprecedented compensation plan regarding which—as Plaintiff succeeded in proving at trial—nobody ever undertook any benchmarking or negotiations that might illuminate what would constitute "fair price."

For these and other reasons, Plaintiff submits that the Action's complexity fully supports the requested Fee and Expense Award.

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[110] Op. at 3.

[111] *Id.*

3. Plaintiff's Counsel's Efforts Were Substantial

As the Delaware Supreme Court explained in *Americas Mining*, "*Sugarland* does not require . . . courts to use the hourly rate implied by a percentage fee award, rather than the benefit conferred, as the benchmark for determining a reasonable fee award. To the contrary, in *Sugarland*, this Court refused to adopt the Third Circuit's lodestar approach, which primarily focuses on the time spent."[112]

Thus, at most, "[t]he time and effort expended by counsel is [a] secondary, or even tertiary, consideration to the benefits achieved."[113] Indeed, the Court sometimes "give[s] no weight to the hours expended."[114]

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[112] *Ams. Mining*, 51 A.3d at 1257; *see also Stroud v. Milliken Enters., Inc.*, 1990 WL 113345, at *4 (Del. Ch. Aug. 2, 1990), *aff'd*, 583 A.2d 660 (Del. 1990) ("Under *Sugarland*, if there is a monetary or measurable economic benefit, the primary basis for ascertaining the amount of attorney fees to be awarded is a percentage of the economic benefit and the time spent is of little or no importance.").

[113] *Garfield v. Boxed, Inc.*, 2022 WL 17959766, at *15 (Del. Ch. Dec. 27, 2022) (citation omitted).

[114] *Id.* ("Defendant argues the Court should adopt the lodestar method to measure counsel's time and effort and cut the requested fee accordingly. Courts have repeatedly acknowledged the shortcomings of the lodestar method, which include incentives to inflate attorney hours or billing rates. Accordingly, Delaware courts should first look to precedents on which to base a fee award, which I have done."); *De Felice v. Kidron*, C.A. No. 2021-0255-MTZ, at 24:3-9 (Del. Ch. Apr. 27, 2022) (TRANSCRIPT) (awarding attorneys' fees "without regard to hours worked."); *Hawkes v. Bettino*, C.A. No. 2020-0360-PAF, at 105:1-13 (Del. Ch. Apr. 12, 2021) (TRANSCRIPT) (awarding attorneys' fees but giving no weight to the hours expended); *Salzberg*, 2019 WL 2913272, at *7 (holding that the time and effort factor did not warrant reducing "the precedent-based award."); *see also Olson v. EV3, Inc.*, 2011 WL 704409, at *15 (Del. Ch. Feb. 21, 2011) ("I give no weight to the hours expended . . . . Counsel should not be penalized for achieving complete victory quickly."); *In re AMC Ent. Holdings, Inc. S'holder Litig.*, 2023 WL 5165606, at *38 (Del. Ch. Aug. 11, 2023) ("Plaintiffs' counsel spent 3,425.9 hours on

Eschewing the hourly crosscheck is particularly logical where, as here, litigation through post-trial judgment confers a quantifiable benefit, such that the relevant methodology and metric for calculating an attorneys' fee is the appropriate percentage of that benefit. That is especially true where, as is also the case here, the quantified value of the benefit conferred by the judgment is massive. In such circumstances, the greater the benefit achieved, the less probative the hourly crosscheck becomes. A contrary rule would perversely incentivize future plaintiff's counsel to litigate inefficiently and generate maximum lodestar, notwithstanding the additional burden that doing so could impose on the Court, other litigants and non-parties.

Indeed, Plaintiff's Counsel's time is best used as a "cross check" in determining the reasonableness of an attorneys' fee request in the settlement context, where counsel has chosen to compromise the claims. That is so because the settlement context presents the possibility of "different incentive problems, including the risk of cheap early settlements."[115] Where the interests of lawyer and

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this case through May 1, but I give no weight to the hours expended.").

[115] *See also Franklin Balance Sheet Inv. Fund v. Crowley*, 2007 WL 2495018, at *13-14 (Del. Ch. Aug. 30, 2007) (utilizing "backstop check" where plaintiffs' counsel expended 1,047 hours on the case, and stating: "[T]he fact that Plaintiffs' underlying action never progressed beyond the motion to dismiss stage warrant[ed] a reduction in the percentage rate used in calculating fees, as this Court has a history of properly awarding lower percentages of the benefit where cases have settled well before trial."); *In re Nat'l City Corp.*, 2009 WL 2425389, at *5 (noting the "omnipresent threat that plaintiffs would trade

client might diverge, courts thus appropriately exercise vigilance as to fee requests. But where, as here, counsel has not compromised and indeed has taken the case through judgment, there is no risk of diverging interests.

Though large, the fee sought here would be neither unexpected nor unearned. Plaintiff's Counsel litigated this matter through trial with the understanding that losing meant they would receive *nothing*, a risk that remains through appeal. If they won, they expected their efforts would be rewarded with a significant fee measured as a percentage of the benefit they created.[116] Plaintiff's Counsel made that investment and took that risk on behalf of Plaintiff and Tesla. Thus, Plaintiff's Counsel submits the hourly crosscheck has little to no usefulness under these circumstances.[117]

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off settlement benefits for an agreement that the defendant will not contest a substantial fee award.") (internal citations and quotations omitted).

[116] *See, e.g., Joseph v. Troy Grp., Inc.*, C.A. No. 4676-CS, at 28 (Del. Ch. June 29, 2011) (TRANSCRIPT) ("If there's ever a case like this, and it's clear that the sole reason a class got $2 billion is because of the lawyers, ***I got no problem, and I will sleep better than I usually do if the lawyers get 33 percent of $2 billion***." (emphasis added)); *In re Am. Int'l Grp., Inc. Consol. Deriv. Litig.*, C.A. No. 769-VCS, at 9-10 (Del. Ch. Jan. 25, 2011) (TRANSCRIPT) ("[S]ometimes it's forgotten when folks see things like this is that big fees, when much is achieved, they're deserved, particularly when much is at risk. The plaintiffs as a collective put in thousands of hours which could have come to naught . . . . And so it's a big fee, but I think it's important – and I've said this before and I will continue to say it – that, you know, you don't reduce people's fees because they gain much. You should, in fact, want to create an incentive for real litigation. That's what benefits diversified investors, when people will take, you know, good cases and actually prosecute them and take risk. What doesn't benefit investors is simply the filing of a case every time there's a valuable business opportunity and simply having a handout and getting a toll.").

[117] *Del Monte*, 2011 WL 2535256, at *12.

Moreover, because the fee sought is not in cash but in shares of stock that fluctuate in value every business day, the "cross check" is an even less useful tool here. In the case of a security as volatile as Tesla stock, which experiences wide swings in trading prices, the cross check's usefulness is greatly reduced relative to the ordinary cash fee context.[118]

To the extent this factor is considered at all, "[t]he time (*i.e.* hours) that counsel claim to have worked is of secondary importance."[119] Delaware seeks to incentivize, not punish, efficient litigation.[120] Thus, "[m]ore important than hours is 'effort, as in what plaintiffs' counsel actually did.' In this case, the answer is 'quite a bit.'"[121]

Plaintiff's Counsel litigated the Action aggressively, diligently but efficiently, unwaveringly optimizing their efforts with the sole goal of maximizing the recovery for the Company. These efforts included: (i) undertaking a books-and-record investigation pursuant to Section 220, then filing a meritorious complaint; (ii)

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[118] In 2023, Tesla was ranked "the most volatile stock" in the S&P 500. Patrick Foot, "*What Are the Most Volatile Stocks In 2023?*", *Forex.com*, Oct. 16, 2023, https://www.forex.com/ie/news-and-analysis/most-volatile-stocks/.

[119] *In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1138 (Del. Ch. 2011).

[120] *See, e.g.*, *Activision*, 124 A.3d at 1074 ("Lead Counsel did not throw a horde of junior timekeepers at the matter that would have inflated the overall number of hours. It created efficiencies for the four senior lawyers who comprised the trial team to take all of the depositions, work with the expert, and immerse themselves in all facets of the case.").

[121] *Del Monte*, 2011 WL 2535256, at *13 (quoting *In re Sauer-Danfoss S'holders Litig.*, 2011 WL 1632336, at *20 (Del. Ch. Apr. 29, 2011)).

substantially defeating Defendants' MTD, which entailed novel and complex arguments and substantive post-hearing written submissions; (iii) navigating the Covid-19 pandemic to engage in substantial and highly effective discovery efforts, including serving on Defendants four sets of document requests, five sets of interrogatories, and one set of requests for admission, and securing numerous amended and/or supplemented interrogatory responses; (iv) serving subpoenas on twelve third parties; (v) securing important discovery materials, including through near-countless pages of written correspondence and time spent on telephonic meet-and-confers, entry into a stipulation pursuant to Delaware Rule of Evidence 510, and a motion to compel; (vi) obtaining 429,644 pages of Defendant and third-party documents; (vii) taking 17 fact depositions (several of which occurred over the course of multiple days), and defending one; (viii) presenting expert reports on behalf of three experts and grappling with expert reports presented by three Defense experts; (ix) taking three expert depositions and defending three expert depositions; (x) successfully moving to file and filing an amended, 140-page complaint; (xi) litigating cross-motions for summary judgment; (xii) successfully trying the case; and (xiii) engaging in post-trial briefing, post-trial oral argument, and post-trial supplemental briefing.

Adjusted for inflation, the fee awarded in *Southern Peru* (and affirmed in *Americas Mining*)—which, as noted above, was significantly reduced because

plaintiff's counsel was so dilatory in litigating the case that they foreclosed the remedy of rescission[122]—equates to approximately $55,600 per hour.[123] But the over $51.4 billion recovery[124] achieved by Plaintiff's Counsel in this Action exceeded the $1.347 billion (pre-interest) recovery in *Southern Peru*[125] by a factor of approximately ***38x***.

From the Action's inception through the date of the Post-Trial Opinion, Plaintiff's Counsel collectively logged 19,499.95 hours amounting to $13,624,462.75 in lodestar and incurred $1,120,115.50 in out-of-pocket expenses:

[122] *See supra* at 14, 30.

[123] The inflation adjustment is calculated using the U.S. Bureau of Labor Statistics, Producer Price Index by Industry: Office of Lawyers data, available at, https://fred.stlouisfed.org/series/PCU541110541110.

[124] Taylor Aff. at ¶13. $191.59 (closing price) – $23.33 (exercise price) = $168.26. $168.26 x 303,960,630 (number of options cancelled) = $51,144,415,604 (options value). Stated another way, 266,947,208.12 (total Grant shares less the total exercise price) x $191.59 = $51,144,415,604. As further explained by Taylor, although it is unnecessary to value the Grant using the Black-Scholes-Merton model, doing so using a conservative volatility assumption of 50% produces an aggregate Black-Scholes-Merton value of $52,463,604,738. *Id.* at ¶19.

[125] 52 A.3d at 819.

Firm	Hours	Lodestar	Expenses
Bernstein, Litowitz, Berger & Grossmann LLP	5,001.00	$3,257,825.00	$284,620.84
Friedman Oster & Tejtel PLLC	7,137.5	$5,131,181.25	$392,393.72
Andrews & Springer LLC	7,361.45	$5,235,456.50	$443,100.94
Totals	**19,499.95**	**$13,624,462.75**	**$1,120,115.50**

Further, the absence of a leadership contest or any other ancillary litigation activity means that 100% of this time and expense was devoted to the singular goal of securing the unprecedented result achieved by the Action. And it goes without saying that significant additional hours and expense will accrue, including in defending against Defendants' upcoming appeal.[126]

Despite recognizing that the hourly cross check is of little value, we provide the specific data here because we acknowledge that it is still part of the *Sugarland* paradigm.[127]

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[126] *Salzberg*, 2019 WL 2913272, *6 (observing that the calculated implied hourly rate "only tells part of the story. Because the defendants intend to appeal the Merits Decision, plaintiff's counsel can expect to expend approximately the same number of hours litigating before the Delaware Supreme Court").

[127] Based upon the $191.59 closing price of Tesla stock as of January 30, 2024, the date of the Post-Trial Opinion, the 29,402,900 freely tradeable shares requested by Plaintiff's Counsel—representing 11.0145% of the 266,947,208 now-available shares—are valued at $5,633,301,611. The total requested attorneys fee excluding out-of-pocket expenses reflects an implied hourly rate of $288,888.00, and a lodestar multiple of approximately 413.47x. Factoring in the $1,120,115.50 requested expense reimbursement increases the implied hourly rate and lodestar multiple to $288,945.44 and 413.55x, respectively. These

Finally, as set forth in more detail in the affidavits filed herewith, Plaintiff's Counsel incurred $1,120,115.50 in out-of-pocket-expenses in litigating this matter. A substantial portion of those expenses were unavoidable transcript and filing fees, and expert fees paid to Plaintiff's experts. The remaining costs include necessary and reasonable items such as duplication costs, computerized research costs, electronic filing fees and travel expenses. Indeed, the total expenses incurred here compares favorably to the expenses reported in litigation that resolved *before* trial.[128]

4. Counsel's Standing and Ability Support the Fee and Expense Award

Finally, under *Sugarland*, the Court considers the "standing and ability of plaintiffs' counsel."[129] Plaintiff's Counsel respectfully submit that they are known to the Court as experienced stockholder advocates who have secured some of the largest recoveries in the Court's history and who have successfully taken high-stakes cases through trial and appeal. Plaintiff's Counsel further submit that the

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implied hourly rates and lodestar multiples are admittedly unprecedented. But that is a function of the gargantuan size of the tort underlying this Action, and Plaintiff's Counsel's achievement of an unprecedented, total victory in challenging that tort. Indeed, whereas the post-trial judgment achieved in this Action exceeds the value of the post-trial judgment in *Southern Peru* by approximately 38x, the implied hourly rate arising from Plaintiff's fee request is approximately 5.2x the inflation-adjusted approximately $55,600 implied hourly rate awarded in *Southern Peru* (and affirmed by the Delaware Supreme Court in *Americas Mining*).

[128] *See, e.g., In re Rural/Metro S'holders Litig.*, C.A. No. 6350-VCL, at 35-38 (Del. Ch. Nov. 19, 2013) (TRANSCRIPT) (awarding $1,296,211.86 in expenses where "plaintiffs' counsel settled deep in the case, after full discovery, on the eve of trial").

[129] *Sauer-Danfoss*, 65 A.3d at 1140.

unprecedented result achieved in this Action could not have been secured without the skill and experience demonstrated here.

That is particularly so given the "talented defense attorneys"[130] who were supremely motivated to prevail in this astronomically high-stakes and high-profile case. Plaintiff's Counsel litigated against an all-star team from Cravath led by its (now-retired) Chairman Emeritus and (former) longtime Presiding Partner Evan R. Chesler, a fellow of the American College of Trial Lawyers, a perennial member of the Lawdragon 500, recipient of, among other awards, the New York Law Journal's Lifetime Achievement Award, and one of the leading trial lawyers of his time. Cravath's team also included Daniel Slifkin, perennially ranked as one of the Top 100 Trial Lawyers in America and Best Lawyers in America for litigation, among many other accolades, and Vanessa Lavely, a member of the Lawdragon 500 Leading Litigators in America, The Legal 500 US for General Commercial Litigation, Crain's New York Business Notable Women in the Law, Best Lawyers in America for Commercial Litigation, and Benchmark Litigation Future Star and 40 & Under List. Defendants' litigation (and trial) team also included distinguished attorneys from Ross Aronstam & Moritz LLP, and Ashby & Geddes, two of Delaware's preeminent firms. Defense counsel's standing and ability—including

[130] Op. at 3.

their trial and post-trial appellate success in the *SolarCity* action involving many of the same Defendants—further supports the requested Fee and Expense Award.[131]

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court approve the requested Fee and Expense Award.

Dated: March 1, 2024

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WORDS: 10,195 (of 14,000 Word Limit)

[131] *Hollywood Firefighters' Pension Fund v. Malone*, 2021 WL 5179219, at *11 (Del. Ch. Nov. 8, 2021) (noting, in evaluating the *Sugarland* factors, that the "standing and ability of both the Plaintiffs' and the Defendants' counsel are well known to this Court to be exemplary").