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Supreme Court of the State of Delaware

IN RE TESLA, INC. DERIVATIVE LITIGATION	**No. 534, 2024** **No. 10, 2025** **No. 11, 2025** **No. 12, 2025** COURT BELOW: COURT OF CHANCERY OF THE STATE OF DELAWARE C.A. NO. 2018-0408

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PRELIMINARY STATEMENT

This case severely threatens stockholders' rights under Delaware law and the federal constitution. Tornetta, a derivative plaintiff with a minimal stake in Tesla, purports to represent all of his fellow stockholders. But again and again, he has tried to silence their voices. When they voted overwhelmingly to ratify a compensation package that they had previously approved, he sought to nullify their vote. And after securing rescission of the original compensation package, he requested *$5.6 billion* in Tesla stock as a fee award for his attorneys—even though such an unprecedented fee would dramatically dilute other stockholders' shares, and Objectors' evidence showed that his suit created no benefit for Tesla.

On appeal, even as Tornetta faults Tesla for failing to award the "smallest [compensation] package" that would "adequately incentivize" Musk, he maintains that his request for $288,000 per hour in compensation for his attorneys was reasonable and that the Court of Chancery reasonably awarded the largest fee in Delaware history. AB 19; *see* AB 80, 124-33.[1] But Tornetta's arguments lay bare how seriously the Court of Chancery erred and how dangerous a precedent this Court would set by affirming. If this Court were to follow Tornetta's proposed course, stockholders would have no opportunity, in this Court or the Court of Chancery, to challenge a derivative plaintiff's adequacy in any case that proceeds to trial.

[1] "AB" is Tornetta's answering brief. "OB" is Objectors' opening brief.

Derivative plaintiffs would be shielded from disqualification even where nearly every other stockholder repudiates the relief they seek. Objectors would be forced to intervene to preserve potential challenges to fee awards *before* any fee is even requested. And the unprecedented $345 million windfall fee awarded to Tornetta's attorneys would stand, notwithstanding that Tornetta's suit created no quantifiable benefit and the Court of Chancery never considered whether a lower fee would provide the necessary incentives.

This Court should not adopt even one of those principles, let alone all of them. Doing so would not only create perverse incentives and deep unfairness but also fly in the face of long-standing precedent, the text of the applicable rules, and federal constitutional law.[2]

[2] Objectors agree with the arguments made by the other appellants in this Court, including that rescission was improper. If the Court accepts those arguments, Tornetta's counsel is entitled to no fee at all.

ARGUMENT

I. TORNETTA IS A CONSTITUTIONALLY INADEQUATE REPRESENTATIVE

A. Objectors Have Standing to Challenge Tornetta's Adequacy

Seeking to evade review of his inadequacy as a representative, Tornetta argues that Objectors failed to preserve an adequacy challenge and lack standing to raise an adequacy objection. AB 116-19. Both arguments are incorrect.

First, contrary to Tornetta's assertions (AB 116-17), Objectors preserved their adequacy challenge. Starting with Objectors' initial challenges to Tornetta's fee request, Objectors described the Court of Chancery's duty to ensure adequate representation, A2760-2761, and explained that Tornetta had failed to act as a "fiduciary" by "offer[ing] no protest when his counsel [sought] over $288,000 in compensation *per hour*" and by seeking to block a ratification vote, A2318-2319 & n.23; *see* A2763-2764. Objectors also made perfectly clear that they sought Tornetta's removal. After the ratification vote—which established that Tornetta lacked majority stockholder support—Objectors explained that Tornetta's failure to act as a fiduciary violated Objectors' "due process right to have adequate representation," A3356-3357, and asked the Court of Chancery to "withdraw Mr. Tornetta's authority to act on behalf of the Company," A3588; *see* A3585-3588, A3356-3357, A3926-3927.

Second, Tornetta's argument (AB 118-19) that objectors categorically lack standing to raise adequacy objections, at least in cases that proceed to trial, is meritless. Tornetta invokes Court of Chancery Rule 23.1(e), arguing that Objectors are neither "person[s] from whom payment is sought" nor "person[s] with standing to object to a proposed dismissal or settlement" within the meaning of that rule. AB 118. In fact, they are both. *See* OB 9-12; pp. 8-9, *infra*. But Rule 23.1(e) is beside the point as to adequacy of representation, as that rule governs only challenges to fee awards. And the rule that does govern adequacy challenges, Rule 23.1(c), places no limit on who may raise an adequacy objection; it authorizes the court to take action *whenever* a derivative plaintiff "fails to adequately represent the interests of the entity in pursuing the derivative action." R. 23.1(c)(4). The rule thus ensures that stockholders—who can vote to remove unfaithful directors but not derivative plaintiffs—have *some* means of alerting a court to inadequate representation.

In any event, even if Objectors had never asked for Tornetta's removal, and even if Rule 23.1 barred such a request, vacatur *still* would be necessary, as Tornetta does not dispute that the Court of Chancery had "an independent and continuing duty" to ensure "adequate representation." *South v. Baker*, 62 A.3d 1, 21 (Del Ch. 2012). By repeatedly alerting that court to Tornetta's inadequacy, Objectors did more than enough to trigger the court's independent obligation to "scrutinize"

Tornetta's adequacy and "take appropriate action," *id.*—yet the Court failed to do so.

B. Tornetta Did Not Adequately Represent Stockholders' Interests

Due process and Delaware law both require that a derivative plaintiff serve as a fiduciary for other stockholders and adequately represent their interests. Tornetta cannot explain how he met either requirement—and he did not do so.

Tornetta first tries to avoid the issue entirely, asserting that this Court need not consider adequacy if it affirms the fee award and the Court of Chancery's rejection of the ratification vote. AB 116, 119. That is wrong. Tornetta's adequacy depends not on the fee *awarded*, but the fee *requested*. *See* OB 28-29. And even if this Court were to rule that the ratification vote was not fully informed, there is no dispute that a large majority of stockholders informed of this litigation chose to repudiate Tornetta's position. *See Firefighters' Pension Sys. v. Presidio, Inc.*, 251 A.3d 212, 260 (Del. Ch. 2021) (whether vote is fully informed does not depend on whether outcome would have been different). Lack of adequacy thus provides an independent basis for reversal.

On the merits, Tornetta echoes the Court of Chancery's conclusion that he "prove[d] himself quite capable." AB 119 (citation omitted). But Tornetta's "total victory," AB 119 n.109, is immaterial; his inadequacy flowed from his total disregard for the economic interests and revealed preferences of his fellow

stockholders. *See* OB 30. Unlike other stockholders, Tornetta stood to gain an incentive award, as he had several months before in another Delaware case. A2293. Tornetta's fee request vividly confirmed his inadequacy by revealing, among other things, "economic antagonism[]" between him and other stockholders. *South*, 62 A.3d at 22. Fee requests always present a risk that the interests of a derivative plaintiff and his counsel will diverge from the interests of other stockholders. *See* OB 28. At the time of the fee request here, that risk had fully materialized: Tornetta's interests ran counter to those of the stockholders he purported to represent, because his extremely "limited holdings" of Tesla stock meant that other stockholders like Objectors would disproportionately "bear the cost" of his massive fee request. A2319. Yet still he did nothing to restrain his attorneys, allowing them to seek a staggering *$5.6 billion* in fees.[3]

With respect to ratification, Tornetta's inadequacy is equally clear. Even Tornetta's principal authority, *Emerald Partners v. Berlin*, 564 A.2d 670 (Del. Ch. 1989), recognizes that the "degree of support" for a plaintiff bears on his adequacy and that a "strong showing" on such a "factor" may be "sufficient" for disqualification. *Id.* at 673-74 (citation omitted). This case presents the strongest possible showing that a derivative plaintiff lacks support, as a supermajority of

[3] Tornetta cannot plausibly defend his fee request on the theory that it was based on "sound methodology." AB 121 (citation omitted). It was not. *See* pp. 10-16, *infra*.

stockholders repudiated the very relief under consideration in the Court of Chancery. *See* A2744.

Finally, Tornetta's arguments cannot be squared with the federal Due Process Clause. *See Phillips Petrol. v. Shutts*, 472 U.S. 797, 812 (1985). Contrary to Tornetta's suggestion, AB 122, the constitutional adequacy requirement, which is not a "procedural technicality," demands more than simply "notice [and] an opportunity to be heard." *MCA, Inc. v. Matsushita Elec. Indus.*, 785 A.2d 625, 635 (Del. 2001). It imposes substantive, "fiduciary obligations" on a derivative plaintiff, which "includ[e]"—but are not limited to—the requirements of Rule 23.1. *South*, 62 A.3d at 21. Accordingly, an adequacy objection under the federal constitution cannot "fail as a matter of Delaware law." AB 122. And such an objection requires the court to engage in a "much broader" analysis than a mere inquiry into whether a particular disposition resulted from "collusion" between a plaintiff and his attorneys. *MCA*, 785 A.2d at 637. This Court should therefore go beyond the kind of restrictive inquiry Tornetta urges, AB 120-21—and under the proper inquiry, it is clear that Tornetta is not an adequate representative, OB 27-30.

II. THE FEE AWARD CANNOT STAND

A. Objectors Have Standing to Challenge the Fee Award

Objectors have explained at length why they had standing to challenge the fee award in the Court of Chancery and why they likewise have standing to challenge the award on appeal. OB 9-15. Tornetta offers barely any response, and what little he does say is unpersuasive.

Tornetta never squarely disputes that Objectors had standing to challenge the fee award in the Court of Chancery, as stockholders "of course" have standing to comment on requested fees. *In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604, 639 (Del. Ch. 2005). As discussed above, in the course of disputing Objectors' standing to challenge his adequacy, Tornetta does assert that Objectors do not meet the requirements of Rule 23.1(e)(2), which addresses challenges to fee awards. AB 118-19; *see* p. 4, *supra*. But the Court of Chancery never mentioned that argument, and it is plainly wrong. Objectors are "person[s] from whom payment is sought," R. 23.1(e)(2), because a fee consisting of Tesla shares dilutes Objectors' Tesla holdings. That argument does not "disregard the corporate form," AB 118; it acknowledges the real-world effect of the requested fee, *cf.* A3271-3273 (Tornetta's counsel arguing that antidilutive effect of rescission benefited "shareholders"). Objectors also are "person[s] with standing to object to a proposed dismissal or settlement," R. 23.1(e)(2), regardless of the fact that the case did not end in the trial

court in one of those ways. Contrary to Tornetta's suggestion, Rule 23.1(e)(2)—unlike Rule 23.1(d), which governs "[d]ismissal" or "[s]ettlement"—does not require the existence of a dismissal or settlement in the case at hand. *See* OB 10-11.

This case illustrates the wisdom of affording stockholders standing to object. Objectors offered unique evidence and arguments, including data regarding fees previously awarded to Tornetta's attorneys and event studies that accounted for confounding events and showed no benefit to Tesla from rescission. *See* OB 17-18, 20-21.

As for the Objectors' standing to challenge the fee award on appeal, Tornetta simply states that the Court of Chancery denied Objectors leave to appeal the fee. AB 121. He fails to address Objectors' arguments that the Court of Chancery did not so hold, or that any such holding could not be squared with either *Braun v. Fleming-Hall Tobacco Co.*, 92 A.2d 302 (Del. 1952), or Rule 24. *See* OB 13-14. Ultimately, Tornetta appears to believe that Objectors should have intervened *before* the fee request was ever made. *See* OB 14-15. But such a requirement would encourage any potential objector who somehow learns of an impending fee request to file a protective intervention motion to guard against the mere possibility of an excessive fee. That is not—and cannot be—what Delaware law requires.

B. The Fee Award Is Plainly Unlawful

Relying on his cursory standing argument, AB 124, Tornetta mostly ignores Objectors' arguments regarding the fee award. The few responses he does offer lack merit.

1. The Court of Chancery Failed to Consider Whether $345 Million Was a Windfall

Strikingly, Tornetta does not meaningfully engage with the Court of Chancery's failure to analyze whether the $345 million fee amounted to an unlawful windfall.

Tornetta bore the burden of proving that his attorney's fee was reasonable, *Sciabacucchi v. Howley*, 2023 WL 4345406, at *3 (Del. Ch. July 3, 2023); *see* OB 17—which meant proving, among other things, that the fee was not "so large" as to create a "windfall[] to counsel." *In re Dell Techs., Inc. Class V S'holders Litig.*, 326 A.3d 686, 702 (Del. 2024). A fee qualifies as a windfall when it "exceed[s] [its] value as an incentive to take representative cases." *Id.* Yet Tornetta has never explained why it would take a $345 million fee (or, for that matter, the $5.6 billion fee he actually requested) to adequately incentivize his attorneys—doubtless because any such argument would be implausible. And critically, the Court of Chancery made no such finding, notwithstanding Objectors' (unaddressed) evidence that Tornetta's attorneys regularly litigate complex securities claims for fee awards an order of magnitude lower than the fee awarded in this case. *See* OB 17-18.

Tornetta tries to plug that fatal hole in the Fee Opinion, but to no avail. First, he observes that his petition predated *Dell*. AB 124-25. But *Dell* controlled on the date that the Court of Chancery issued its opinion, which is all that matters. And in any event, *Dell* drew its windfall analysis directly from *Seinfeld*, which was decided in 2000 and was a central focus of Objectors' arguments. *See* 326 A.3d at 702-03 (quoting *Seinfeld v. Coker*, 847 A.2d 330, 334 (Del. Ch. 2000)). At all relevant times, the law mandated analysis of whether a $345 million fee would constitute a windfall.

Second, Tornetta asserts that the Court of Chancery somehow undertook that mandatory analysis by weighing "policy concerns." AB 126-27. But the court's policy discussion contains no analysis of whether Tornetta's counsel could have been properly incentivized by an award of less than $345 million. Tornetta intimates that the windfall analysis required under *Dell* and *Seinfeld* does not actually require any consideration of counsel's incentives, *id.*—but that is flatly inconsistent with *Dell*. This Court explained in *Dell* that fees may "exceed their value as an incentive to take representative cases" and then provided the solution to that problem: courts must "estimate the point at which proper incentives are produced." 326 A.3d at 702-03 (citation omitted). The Court of Chancery's failure to undertake that analysis is sufficient to require vacatur of the extraordinary fee award in this case.

2. The Fee Award Is an Abuse of Discretion

On the merits, Tornetta says nothing that rehabilitates the flawed methodology that led to the windfall fee in this case. *See* OB 16. Instead, he mostly parrots the Fee Opinion.

To start, Tornetta merely describes, without defending, the Court of Chancery's decision to treat a "reversed accounting charge ($2.3 billion) as the 'benefit' on which to award a fee." AB 127. But the Court of Chancery did not conclude that GDFV accurately measured the benefit of this litigation. *See* OB 21-22. And below Tornetta argued *against* any such conclusion, insisting repeatedly that GDFV is "divorced from basic principles of financial economics." A1780-1784.

Tornetta's sole defense of the $2.3 billion "benefit" number is that it is "*smaller*" than $51 billion, which is the value that the Court of Chancery assigned to rescission. AB 127. But $51 billion is, if anything, a more fanciful measure of any benefit of this litigation. Tornetta insists that the Court of Chancery made an "evidence-based finding" that this suit "restor[ed] around $51 billion in value to Tesla stockholders." AB 126-28 (citation omitted). But he does not even try to explain the evidence purportedly supporting that view. He does not dispute that rescission had no effect on Tesla's ability to sell stock or on the company's enterprise value. OB 19. He has never attempted to quantify any therapeutic benefits resulting

from this litigation. *See* A3264. And he simply ignores Objectors' empirical evidence, developed through multiple event studies, that the stock market saw no net benefit in rescission. *See* OB 20-21.[4]

There is only one possible conclusion: the rescission of Musk's unexercised stock options did not create a quantifiable benefit. And in the absence of such a benefit—as Tornetta does not dispute, *see* AB 129—the only proper means of awarding fees is *quantum meruit*. *See, e.g.*, *La. State Emps.' Ret. v. Citrix Sys.*, 2001 WL 1131364, at *7-*9 (Del. Ch. Sept. 19, 2001).[5] By basing a fee award on the work attorneys actually perform, *quantum meruit* provides the most "equitable means of determining a reasonable fee." *In re First Interstate Bancorp*, 756 A.2d 353, 363 (Del. Ch. 1999) (citation omitted), *aff'd*, 755 A.2d 388 (Del. 2000). And here, that approach might well yield a substantial fee for Tornetta's counsel. *See* OB 25.

In addition, even if it were true that this case involved a quantifiable benefit, the Court of Chancery plainly erred by refusing to offset that benefit by the costs of rescission. Tornetta argues otherwise (AB 128-29), but that argument has no

[4] Tornetta briefly mentions *Tesla's* event studies, AB 130, but neither he nor the decision below addresses *Objectors'* studies, *see* OB 20-21.

[5] Tornetta endorses the Court of Chancery's efforts to distinguish *Citrix* and two other analogous decisions, *see* AB 129-30, but those efforts fail, as Objectors have explained, *see* OB 22-25.

support. As Delaware courts have recognized for decades, assessing the benefit to a company from a particular remedy necessarily entails considering the costs associated with that remedy. *See, e.g.*, *Citrix*, 2001 WL 1131364, at *7-*8 (attempting to value "net benefit conferred" by considering offsetting costs); *In re MoneyGram Int'l, Inc. S'holder Litig.*, 2013 WL 68603, at *2 (Del. Ch. Jan. 7, 2013) (explaining that plaintiffs "overstate[d] the value of the fund" by ignoring offsetting cost); *In re Diamond Shamrock Corp.*, 1988 WL 94752, at *4 (Del. Ch. Sept. 14, 1988) (considering whether benefit achieved was offset by competing costs). That rule is grounded in common sense: the value of a benefit of course depends on any attendant costs. *Cf.* Johann Wolfgang von Goethe, *Faust: A Tragedy* (Bayard Taylor trans. 1911).

Tornetta insists that the Court of Chancery need not have accounted for replacement compensation for Elon Musk because the Board might not "re-issue . . . the same wildly inflated package." AB 128. But even Tornetta cannot dispute that the Board would give Musk *some* compensation for the work he has already performed, particularly given the ratification vote.[6] Tornetta never explains how it could have been proper for the Court of Chancery to ignore that fact—and, for that

[6] Indeed, Tesla recently formed a special committee to explore such compensation if the Grant is not reinstated in this case. *See* Morris & Kinder, *Tesla board explores new pay deal for Elon Musk*, Fin. Times, May 13, 2025.

matter, to ignore the various other costs of rescission, including procedural costs, tax liabilities, and the loss of motivational benefits. *See* OB 19-20. Tornetta invokes dicta in a Court of Chancery order stating that a plaintiff who succeeded in invalidating a compensation award "would be entitled to have the benefits measured" by "the full amount of the [o]riginal [a]ward," AB 129 (citation omitted)—but that order nowhere suggests that benefits should not be reduced by attendant costs, and the court in fact awarded attorneys' fees based on a "comparison" between the original compensation package and its replacement. *Shepherd v. Simon*, C.A. No. 7902-VCL, at ¶¶ 5-7 (Del. Ch. Sept. 10, 2014) (Order) (Ex. A). Tornetta also hints that cases that proceed to trial may be unique given the "substantial risks associated with trial," AB 129, but the correct way to account for such a risk is not to artificially inflate an assessment of the benefit of litigation but rather to award counsel a larger portion of any net quantifiable benefit. *See Ams. Mining Corp. v. Theriault*, 51 A.3d 1214, 1259-60 (Del. 2012).

Finally, Tornetta asserts that the lodestar multiplier in this case compares favorably to that in *Americas Mining*. AB 131. But as Objectors have explained, the award in *Americas Mining* has no bearing on this case. OB 26. *Americas Mining* involved a clear, quantifiable benefit from which the court could derive a percentage-based award. *See* 51 A.3d at 1252-53. Here, by contrast, Tornetta has not shown a quantifiable benefit, which means that a fee award must be more closely

tethered to the work counsel actually performed. And whatever may be said of the award in *Americas Mining*, the award in *this* case constituted an impermissible windfall, as neither Tornetta nor the Court of Chancery has "attempt[ed], in a self-conscious and transparent manner," to explain why Tornetta's counsel would have required anything approaching $17,682.35 per hour to litigate this case. *Dell*, 326 A.3d at 703 (citation omitted).

CONCLUSION

The Court should vacate the fee award and direct the Court of Chancery to assess Tornetta's adequacy as a derivative plaintiff; to reconsider the appropriate fee, if any, for Tornetta's counsel; and to determine the appropriate fee for Objectors' counsel.

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