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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

OPENING BRIEF OF APPELLANT TESLA, INC.

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NATURE OF PROCEEDINGS

In this derivative action brought on behalf of Tesla, Inc., Plaintiff secured a settlement with current and former members of Tesla's Board of Directors that yielded a net financial benefit to Tesla of approximately $296 million. Yet the Court of Chancery allocated nearly *60*% of that benefit to Plaintiff's counsel in attorney's fees ($176.2 million)—totaling nearly 12 times counsel's lodestar, or a rate of more than $8,200 per hour. Worse still, the court awarded this windfall in a case that settled well before trial and after three years of only tepid litigation.

The Court of Chancery reached this $176.2 million fee award—the fourth largest in Delaware history—by assigning an additional $458.6 million in illusory "value" to unexercised stock options canceled as part of the settlement. The court then compounded its error by awarding counsel an outsized 24% of the $734 million in supposed total "value" that was misattributed to the settlement. The resulting fee award thus rewards counsel for benefits they did not achieve, work they did not put in, and risk they did not undertake. The award violates Delaware law and should be substantially reduced for three independent reasons.

First, the Court of Chancery overestimated the benefit achieved by the litigation by nearly a half-billion dollars. In a derivative suit like this one, "Delaware courts award fees to plaintiffs' counsel for the beneficial results they produced *for the defendant corporation.*" *Garfield* v. *Boxed*, *Inc.*, 2022 WL 17959766, at *4 (Del.

Ch. Dec. 27, 2022) (emphasis added). The court disregarded that rule here by treating stock options—returned by the directors and canceled by Tesla—as a $458.6 million corporate "benefit," based on the amount by which those options were "in the money" for the directors as of a month before the settlement. This makes no sense. Tesla cannot reuse those options; by its terms, the Stipulation and Agreement of Compromise and Settlement (the "Stipulation") required Tesla to cancel the options. Nor, of course, could Tesla reissue similar options with the same massively below-market strike price. Instead, the only conceivable financial benefit to Tesla from the surrendered options was the reversal of the compensation expense of $19.9 million that the company incurred when the options were issued. Properly calculated, then, the total benefit *to Tesla* from this litigation is at best $296.5 million—the value of the returned cash, plus $19.9 million for the options—which would not merit anywhere near a $176.2 million fee award.

Second, regardless of the size of Tesla's benefit from this litigation, the percentage deployed by the Court of Chancery to calculate the fee was erroneous. This was a "mid-stage" resolution that typically warrants a fee between 15-25% of the benefits proven by the plaintiff to have been received by the company. Bench Ruling 33; *see Americas Mining Corp.* v. *Theriault*, 51 A.3d 1213, 1259-1260 (Del. 2012). In selecting a percentage at the very top of that range, the Court of Chancery did not ask or answer the question recently posed by this Court: "whether the public

would ever believe that lawyers must be awarded many hundreds of millions of dollars in any given case to motivate them to pursue" the matter. *In re Dell Techs. Inc. Class V S'holders Litig.*, 326 A.3d 686, 702 (Del. 2024). Given the size of the illusory $734 million "benefit" calculation here, that overarching question should have driven the court to adopt a fee percentage at the bottom of the default mid-stage range, or at least to specify "the reasons for no downward adjustment" in view of the eye-watering fee award. *Id.* at 703-704. Proper execution of this Court's instruction "to consider the size of the award in a megafund case when deciding the fee percentage," *id*. at 702, should have (in a best-case scenario for Plaintiff's counsel) capped any award at 15%, or $110 million—which amount must then be cross-checked against the lodestar under *Dell*.

Finally, and critically, the Court of Chancery's $176.2 million fee award is a windfall by any measure. It runs afoul of the guidance this Court laid out in *Dell* regarding the *Sugarland* factors—guidance that the Court of Chancery never acknowledged. This Court held in *Dell* that a $5,000-per-hour fee award that equaled 7x counsel's lodestar reflected the "high end" of reasonableness, even in a $1 billion cash settlement. 326 A.3d at 705. The $176.2 million fee award here translates to an *11.6x* lodestar multiplier, at a rate over $8,200 per hour, far exceeding the "high end" observed in *Dell*. Fee awards in large common-fund cases—though with settlements less than this one—have involved an average lodestar multiplier of

2.83x. *See* Ex. C. Even assuming that this was an above-average case, a fee award of 4.5x counsel's lodestar—or $68.4 million—would more than generously compensate counsel.

In short, the fee award should be reversed. The $176.2 million figure awarded by the Court of Chancery misapplies multiple Delaware principles and ignores the facts of this case. A proper calculation of the benefit achieved and application of the remaining *Sugarland* factors in accordance with Delaware law would yield a still-considerable fee award between $68.4 million (focusing on the lodestar) and $70.9 million (awarding a generous 24% share of Tesla's actual recovery).

SUMMARY OF ARGUMENT

I. The Court of Chancery erred in calculating the benefit conferred on Tesla by this derivative litigation. In estimating the benefit, the court valued options returned to Tesla based on their collective "in the money" value to the directors shortly before the Stipulation. But in calculating attorney's fees in a derivative suit, what matters is "the beneficial results [counsel] produced for" Tesla, not the costs inflicted on third parties. *Garfield*, 2022 WL 17959766, at *4. Here, the Court of Chancery did *not* find that those returned options benefitted Tesla by $458.6 million, and they plainly did not.

The Court of Chancery nevertheless concluded that "intrinsic value" *to the directors* was somehow a permissible measure of benefit *to Tesla* because the Stipulation used that value to calculate the number of options to be returned. That was wrong. Tesla cannot be obligated to compensate Plaintiff's counsel on some percentage-of-benefit theory for benefits Tesla never received. The returned options conferred a value on Tesla of no more than $19.9 million—the grant-date fair value and bookkeeping charge of those options. By valuing the returned options at *23 times* that value, the court misconstrued the Stipulation's terms and departed from clear Delaware precedent that the market value of canceled unexercised options is not a corporate benefit for the purpose of calculating fee awards. Correcting that

error reduces the size of the benefit achieved by this litigation to, at most, $296.5 million.

II. The Court of Chancery further erred in two independent ways by awarding Plaintiff's counsel 24% of the enormous benefit it calculated. *First*, the court did not adjust the fee percentage downward based on the size of the recovery to prevent a windfall, as Delaware law requires. *See Dell*, 326 A.3d at 702. The court should have adjusted the recovery to no more than 15% of the benefit achieved. *Second*, the court failed to reduce the award in light of counsel's actual time and effort, as required by *Sugarland Industries, Inc.* v. *Thomas*, 420 A.2d 142, 149 (Del. 1980). The resulting $176.2 million fee award translates to an *11.6x* multiplier, which cannot be squared with this Court's observation in *Dell* that a 7x multiple is on the "high end" of propriety. 326 A.3d at 705. The award also departs wildly from the average lodestar multiplier of 2.83x for fee awards in large common-fund cases. *See* Ex. C; *see also Sciabacucchi* v. *Howley*, 2023 WL 4345406, at *5 (Del. Ch. July 3, 2023); *S'holder Representative Servs. LLC* v. *Shire US Holdings, Inc.*, 2021 WL 1627166, at *3 & n.14 (Del. Ch. Apr. 27, 2021), *aff'd*, 267 A.3d 380 (table). Under *Dell*, the court should have limited any award to no more than 4.5x counsel's lodestar, or $68.4 million.

STATEMENT OF FACTS

A. The Retirement System Files This Derivative Action

On June 17, 2020, the Retirement System filed a derivative complaint on behalf of Tesla against certain current and former members of the company's Board of Directors. A66. The Retirement System alleged that the directors received excessive stock options as compensation for their board service between 2017 and 2020. A67, A140-141. It asserted claims for breach of fiduciary duty and unjust enrichment against the directors for granting and accepting their compensation awards, as well as a breach-of-fiduciary-duty claim against director and CEO Elon Musk. A140-141.

The directors' compensation was a product of Tesla's unique compensation philosophy. In 2010, Tesla's Board adopted an equity incentive plan that provided for outside directors to be compensated principally through a fixed number of stock options and a small cash retainer. A588-590. The 2010 Plan was amended several times over the years—including by stockholder vote in 2014—but the basic structure stayed the same. A348. In 2019, the Board adopted a new equity incentive plan providing for directors to receive the same amount of options, but awarded annually instead of triennially. A697-700. The 2019 Plan was approved by 67% of voting stockholders. A386.

The directors' compensation structure helped Tesla retain talented outside directors by "align[ing] the value of their compensation with the market value of [Tesla's] stock." A698. That approach has paid off for the stockholders. Between June 2017 and June 2023—the period at issue in this litigation—Tesla's stock price increased over ten-fold, from $24.76 to $260.54. A449. The financial value of the directors' stock options grew dramatically as Tesla's stock price skyrocketed. The gravamen of the Retirement System's complaint was that the number of options awarded was unfair and excessive, in light of their increased value.

B. The Litigation

In September 2020, the directors answered the complaint. No defendant moved to dismiss or for summary judgment.

In October 2020, the case moved to discovery. A262. Over the next two years, Plaintiff's counsel took typical discovery, including document production requests and interrogatories. A426. All told, counsel obtained about 13,500 documents from Tesla and some third parties. A429. Other than one discovery dispute, no substantive motion practice of any kind occurred in the Court of Chancery. A428-429.

Beginning in November 2022, the parties attempted to negotiate a settlement, including through mediation. A265. After initial settlement efforts were unsuccessful, the parties proceeded to deposition discovery. A264. Over the next

few months, the Retirement System deposed fact witnesses, and in April 2023 the parties commenced expert discovery. A264. During this time, the parties continued to engage in settlement discussions directly and through a mediator. A265.

C. The Settlement Stipulation

In June 2023, the parties reached an agreement in principle to settle the litigation, which was memorialized in the July 14, 2023 Stipulation. *See* A260-297; *see also* A525-531. At that point, any trial was at least four months away; expert reports had been exchanged but expert depositions had not occurred; and the parties' counsel had not yet begun any trial preparation. Transcript Ruling dated January 8, 2025 (Ex. B, "Bench Ruling") 33.

The Stipulation provided for the release of all claims relating to outside director compensation awarded between 2017 and the date of the Stipulation. A261. The Stipulation included four buckets of consideration, only two of which are relevant here: (i) Returned Cash and Returned Stock, and (ii) Returned Options. Those two buckets collectively had to equal the Settlement Option Amount, which was an amount equal to "the value of 3,130,406 options" as of a specified date (June 16, 2023). A274-275.

(1) Returned Cash/Stock: The directors were required to deliver to Tesla $276.6 million in some combination of cash or issued and outstanding Tesla stock. In accordance with the Stipulation, Tesla submitted a certification confirming that

the directors satisfied this obligation solely through $276.6 million in cash payments to Tesla. A868-869.

(2) Returned Options: The directors were required to return to Tesla the number of Tesla options that collectively were in the money by an amount equal to $458.6 million as of June 16, 2023. The parties agreed that "Tesla shall cause the Returned Options to be canceled on the next Business Day after Final Approval," which would increase the number of shares authorized for issuance under the 2019 Plan. A276. That provision of the Stipulation also restated the requirements of the 2019 Plan, which provided that "[s]ubject to certain exceptions, if an Award (as defined in the 2019 EIP) expires, becomes unexercisable, or is surrendered or forfeited, the Shares become available for future grant under the 2019 EIP, but cannot be sold by Tesla." A520.

The Stipulation included other consideration, which ultimately did not factor into the Court of Chancery's fee award. Specifically, the directors agreed to "forego permanently" certain other awards and compensation that they had already given up voluntarily. A278. As the Stipulation made clear, the directors had already forgone that compensation in June 2021 and May 2022. *See* A262-263. Tesla also agreed in the Stipulation to implement certain changes to outside-director compensation practices and procedures for a period of five years. A278.

Finally, the Stipulation expressly addressed any "Fee and Expense Award" that might be payable by Tesla to Plaintiff's counsel. It provided that any award would be payable only out of *benefits Tesla actually received*: the Fee and Expense Award "shall be paid by Tesla out of the Settlement Option Amount . . . and shall reduce the settlement consideration *paid to Tesla*." A286-287 (emphasis added). After paying the notice costs and the Fee and Expense Award, "Tesla shall retain the balance of the Settlement Option Amount." A287-288.

D. The Court Of Chancery Awards Plaintiff's Counsel $176.2 Million In Fees

Plaintiff's counsel filed a motion seeking attorney's fees and expenses equal to about $230.6 million, or twice last year's $114.9 million annual budget for the entire Delaware judiciary.[1] In October 2023, the Court of Chancery held a hearing on the settlement and fee request, but deferred ruling on those matters until after deciding post-trial motions in *Tornetta* v. *Musk*, 326 A.3d 1203 (Del. Ch. 2024). In a January 8, 2025 bench ruling, the Court of Chancery approved the settlement and awarded Plaintiff's counsel $176,160,000, inclusive of expenses. Bench Ruling 38. The merits of the settlement are not at issue in this appeal; the propriety of the fee award is.

[1] State of Delaware Administrative Office of the Courts, *2024 Annual Report of the Delaware Judiciary* 9, https://courts.delaware.gov/aoc/annualreports/fy24/doc/2024AnnualReport.pdf.

The Court of Chancery awarded the fourth-largest fee in Delaware history. Employing Delaware's "percentage of the benefit" approach to calculate a fee award, the court first turned to quantifying the benefit provided by the settlement. Bench Ruling 25. It noted that the parties agreed on the value of the returned stock and cash ($276.6 million) and that the governance benefits were unquantifiable. Bench Ruling 27-28. The court did not assign any monetary value to the compensation that was never awarded to the directors, because it was "hard to quantify" and risked creating "a windfall." Bench Ruling 32.

That left the returned options. The Court of Chancery began its analysis by observing that, "[u]nlike in *Tornetta*, plaintiff does *not* argue that because the shares were fully vested they were priced into Tesla's trading price[;]" "*[n]or* does Plaintiff advance a reverse dilution theory." Bench Ruling 29 (emphases added). In other words, Plaintiff did *not* argue that some supposed benefit conferred on Tesla stockholders could form the basis of a fee award in this lawsuit. Nevertheless, the court relied on its own *Tornetta* decision to rule that "investor-level benefits are a proper basis for compensating plaintiff's counsel," proclaiming that "there is an argument that they are priced into the market," Bench Ruling 30—even though (as the court acknowledged, *see* Bench Ruling 29) *Plaintiff made no such argument here*.

The Court of Chancery next addressed "Plaintiff's primary argument" that valuing the Returned Options by "measuring the intrinsic value of the underlying shares" is called for by "the Settlement Stipulation itself." Bench Ruling 29. Because the Stipulation included a formula for determining the *number* of options to be returned by the directors based on current market value, the court embraced wholesale the Retirement System's argument that the same $458.6 million benchmark could be repurposed for calculating fees. In doing so, the court rejected Tesla's arguments that the Stipulation intentionally treated Returned Cash and Returned Stock differently from Returned Options, and that the $458.6 million figure represents some theoretical value only "to the Director Defendants," while "the analysis of the benefit achieved must focus on the benefits to Tesla alone." Bench Ruling 30.

The Court of Chancery likewise rejected Tesla's suggestion that the benefit from the Returned Options was limited to their grant-date fair value—$19.9 million—which was the method the court itself had used in *Tornetta*. The court did not dispute that the grant-date fair value was the only actual financial benefit to Tesla of the options. Nor could it: the $19.9 million figure represented the only compensation expense recorded by Tesla for the Returned Options, which expense would be reversed on Tesla's books upon return. Yet the court reasoned that it had adopted the grant-date fair value as a measure of the corporate benefit in *Tornetta*

only "to avoid awarding a windfall in fees," and that this method should be reserved for "exceptional cases." Bench Ruling 31. Adding the threads of its analysis together, the court valued the benefit achieved by the settlement at $734 million.

Next, the Court of Chancery set a fee percentage of 24% of that supposed $734 million benefit. The court explained that the parties had settled in the middle of expert discovery, thereby "plac[ing] them squarely within the 15 to 25 percent range" set in *Americas Mining*. Bench Ruling 33. Although the court acknowledged that the pleadings had never been tested by motion and the case had settled in the midst of expert discovery, the court awarded just 1% less than the maximum percentage permitted under *Americas Mining* for a case that settles after "meaningful litigation." Bench Ruling 33. Applying that 24% to the calculated benefit of $734 million yielded a fee award of $176.2 million. Bench Ruling 34.

Finally, the Court of Chancery held that the remaining *Sugarland* factors did not warrant any adjustment to the outsized fee. The court acknowledged that the proposed fee award represented an 11.6x lodestar multiple (Bench Ruling 34), but found that this 11.6x multiplier was not "outside the range of reasonable fee awards." Bench Ruling 34.

On January 13, 2025, the Court of Chancery entered final judgment. A3. Tesla timely appealed.

ARGUMENT

I. THE $176.2 MILLION FEE AWARD IS CONTRARY TO DELAWARE LAW AND THE STIPULATION, AND IT SHOULD BE REDUCED

A. Question Presented

Did the Court of Chancery err by awarding Plaintiff's counsel a fee of $176.2 million? The issue was presented and decided below. *See* A390-469; A470-505; A736-772; Bench Ruling 25-38.

B. Scope of Review

"The standard of review of an award of attorney fees in Chancery is well settled under Delaware case law: the test is abuse of discretion." *Sugarland*, 420 A.2d at 149. However, the legal principles applied by the Court of Chancery in reaching its award decision are reviewed *de novo*. *In re Del. Pub. Schs. Litig.*, 312 A.3d 703, 715 (Del. 2024). The proper interpretation of a settlement agreement is likewise a question of contract law reviewed *de novo*. *Cox Commc'ns, Inc.* v. *T-Mobile US, Inc.*, 273 A.3d 752, 760 (Del. 2022). Additionally, in the event that this Court determines that the fee award should be reduced, it may, "in the interest of justice and judicial economy, determine the appropriate fee," rather than remanding for the Court of Chancery to try again. *Sugarland*, 420 A.2d at 151.

C. Merits of the Argument

Delaware law is clear that the Court of Chancery "must make an independent determination of reasonableness" when awarding fees. *Goodrich* v. *E.F. Hutton Grp., Inc.*, 681 A.2d 1039, 1046 (Del. 1996). In determining a fee award, the court should apply the *Sugarland* factors, which include (1) the results achieved, (2) the contingent nature of counsel's fee arrangement, (3) the efforts of counsel and time invested, (4) the complexity of the litigation, and (5) counsel's standing and ability. *Sugarland*, 420 A.2d at 149; *see Dell*, 326 A.3d at 693. It is Plaintiff's burden to both "establish the value of the claimed benefit" and "demonstrate the reasonableness of the amount sought for achieving that benefit." *Sciabacucchi*, 2023 WL 4345406, at *3.

The Court of Chancery overstated the benefit achieved in this case by over $400 million because it erroneously conflated the value to the *directors* of the Returned Options with the much smaller benefit *Tesla* experienced from the return of those options. As a result, the fee award should be reduced to at most $70.9 million, which would reflect the actual benefit conferred on Tesla by this lawsuit, even under the oversized 24% fee percentage adopted by the Court of Chancery.[2]

[2] A total fee award of $70,918,136 would represent 24% of $295,492,233 (rounded). Tesla below proposed a fee award of $63,530,830, which equated to 21.5% of the $295 million benefit to the company from the settlement. Tesla is not here appealing the Court of Chancery's rejection of its proposed 21.5% fee percentage in favor of the 24% fee percentage.

And regardless of whether this Court agrees with the Court of Chancery's views regarding the value of the "benefits" to Tesla here, the fee award must be reduced substantially under the *Sugarland* framework to reflect the size of the recovery and the efforts of counsel, and to avoid an obvious windfall. Proper consideration of these factors supports a fee of at most 4.5x Plaintiff's counsel's lodestar, or $68.4 million.

1. Tesla Did Not Benefit $458.6 Million From The Directors' Returned Options

The "primary factor" in any *Sugarland* analysis is the result achieved by the litigation. *In re Dell Techs. Inc. Class V S'holders Litig.*, 300 A.3d 679, 692 (Del. Ch. 2023), *aff'd*, 326 A.3d 686 (Del. 2024). There is and was no dispute that Tesla benefitted from this litigation by at least $276.6 million, which was the Returned Cash/Returned Stock portion of the settlement that was paid to Tesla in cash. But the Court of Chancery erred in adding $458.6 million to the benefit achieved, by calculating the loss to the directors of returning their stock options rather than the benefit to the company of receiving those options. Tesla did not benefit from the Returned Options in any amount remotely approaching the $458,649,785 ascribed market value to those unexercised options. Tesla incurred a $19.9 million compensation expense when the options were issued; the same expense was reversed when the options were returned. Tesla incurred no other detriment when the options issued, and it enjoyed no other benefit when the options were returned. The court's

calculation error inflated the final fee award by over $100 million, conferring a windfall on Plaintiff's counsel that warrants reversal.

a. Tesla never stipulated that it benefitted $458.6 million from the Returned Options

The Court of Chancery largely based its benefit analysis on the terms of the Stipulation, ruling that the Returned Options qualified as a $458.6 million settlement "benefit" because "the Settlement Stipulation speaks for itself." Bench Ruling 30. As an initial matter, the Stipulation cannot control the fee award here. As this Court has explained, a mere "stipulation of settlement . . . among the parties to end the litigation" does not equate to a "concession that plaintiffs ha[ve] conferred any benefit" to the company. *Chrysler Corp.* v. *Dann*, 223 A.2d 384, 387 (Del. 1966) (*Chrysler II*). Regardless of the terms of a settlement, the "burden" rests on the plaintiffs to prove the "benefits which entitled [them] to fees." *Dann* v. *Chrysler Corp.*, 215 A.2d 709, 713 (Del. Ch. 1965) (*Chrysler I*), *aff'd*, 223 A.2d 384 (Del. 1966). In any event, the Court of Chancery misread the Stipulation, which does not suggest that the value ascribed to Returned Options was a "benefit" that could support attorney's fees. Indeed, the Stipulation says the opposite—Tesla can be obligated to pay attorney's fees only from the consideration Tesla itself received in the settlement.

First, the Stipulation does not support the Court of Chancery's valuation because it expressly treats cash and stock differently from options. Under the terms of the Stipulation, Returned Cash and Returned Stock are interchangeable. A277. Because the directors had the option to satisfy their $276.6 million obligation through a cash payment to the company, the parties agreed in the Stipulation that Returned Cash and Returned Stock reflected a dollar-for-dollar benefit to Tesla. And the $276.6 million in fact was paid to Tesla entirely in cash, providing a clear and undisputed benefit to Tesla. A868-869.

By contrast, the Stipulation does not provide any comparable treatment to the Returned Options so as to make them equivalent to a cash dollar amount. Instead, for purposes of the Returned Options, the Stipulation refers to an aggregate "in the money" option value only to measure the *number* of options to be returned. By treating options differently, the Stipulation at least implicitly recognizes that the Returned Options do not translate to a cash benefit to Tesla. Once the court approved the settlement, the directors could not adjust the number of options to return in the same way they could cash and stock. A277.

Second, and critically, the Stipulation does not remotely suggest that the market value of the Returned Options is a viable benchmark for valuing the benefits of the litigation for purposes of any attorney's fees. Rather, the Stipulation provides that the Fee and Expense Award "shall be paid by Tesla out of" the Returned Stock,

Returned Cash, and/or Returned Options, "and shall reduce the settlement consideration paid to Tesla accordingly." A286-287; *see* A275, A287-288 ("Tesla shall pay Plaintiff's Counsel the Fee and Expense Award" from the "Settlement Option Amount," and "Tesla shall retain the balance of the Settlement Option Amount"). By its terms, the Stipulation thus permits payment of a fee award only from the financial benefits *Tesla* received in the settlement. Otherwise, that award could not be paid "out of" the "consideration paid to Tesla."

Plaintiff did not argue in the Court of Chancery—and that court did not find—that *Tesla* received $458.6 million from the Returned Options. It did not. Any value that the Stipulation ascribed to those Returned Options therefore was not part of the consideration paid to Tesla from which any attorney's fees could be paid. Hence, the Stipulation rules out—rather than supports—reliance on some benefit or detriment to third parties as the basis for a fee award.

b. Under Delaware law, the Returned Options benefitted Tesla no more than their $19.9 million grant-date fair value

Delaware courts also have consistently rejected the claim that, for purposes of the corporate-benefit doctrine, returned stock options confer a benefit equal to their market value upon surrender. *See* pp. 21-22, *infra*. That rejection is particularly appropriate here, where the value of the Returned Options is neither a function of the cause of action asserted (allegedly excessive when-issued compensation), nor a

consequence of the remedy agreed to (a return of some agreed fraction of the allegedly excessive number of options). The value of the Returned Options simply reflects Tesla's enormous run-up in value *to the directors* during the pendency of this case. The value to Tesla of those Returned Options, which must be canceled immediately upon receipt, does not depend at all on the happenstance of Tesla's stock price at any point in time.

In *Chrysler*, stockholders brought a derivative suit against the directors of an automobile company. As in this case, the plaintiffs challenged the directors' compensation and stock-option agreements, alleging that the directors had mismanaged the company and engaged in self-dealing. *Chrysler II*, 223 A.2d at 386. After a settlement involving a change in management, the plaintiffs asked for fees based on the purported $315,000 benefit they achieved for Chrysler with the cancellation of an ousted corporate officer's stock options. *Chrysler I*, 215 A.2d at 714. But the Court of Chancery rejected that benefit calculation. *Id.* The court was hesitant to value the returned options in "hindsight," particularly because at the time of the cancellation, the "options had a period of years to run," and the price of Chrysler stock was fluctuating. *Id.* While admittedly a benefit, the value of the returned options was "questionable" and "substantially less" than $315,000. *Id.* Accordingly, the court declined to "fix a dollar value on the benefit flowing from

this claim," but simply gave the cancelled options "some consideration" in its ultimate fee award. *Id.*

Other courts have similarly viewed the value of returned options with a "healthy dose of skepticism" when calculating fees. *Rovner* v. *Health-Chem Corp.*, 1998 WL 227908, at *5 (Del. Ch. Apr. 27, 1998). Most have found the benefit conferred by stock options to be too "speculative" to quantify. *Id.*; *see also Krinsky* v. *Helfand*, 156 A.2d 90, 94 (Del. 1959) (concluding that the value of returned options "may not be measurable in dollars and cents," even though "the difference between the option and market prices was approximately $200,000"); *Ryan* v. *Gifford*, 2009 WL 18143, at *13 (Del. Ch. Jan. 2, 2009) (treating the "cancellation, re-pricing, and surrender of thousands of stock options" as a "non-monetary recovery" similar to corporate governance reforms).

Even the lone ruling the Court of Chancery cited as support did not simply equate the market value of forfeited options with the benefit achieved. *See* Bench Ruling 29 (citing *Willcox* v. *Dolan*, C.A. No. 2019-0245-SG, at 13, 31 (Del. Ch. Sept. 8, 2020) (TRANSCRIPT)). In *Willcox*, the forfeited options had declined in value since issuance, which the court concluded supported a benefit in the range between the when-issued value and the lower market value. The court merely posited that the returned options were worth "[s]omething over" their depressed face value, and held that by any stretch, counsel had earned the full $3.5 million fee

sought. *Id.* at 31. If anything, that case simply confirms that the corporate benefit from returned equity could equal only as much as the when-issued compensation expense that is reversed. *Id.* at 13, 31.

The record here is clear that the financial benefit to Tesla from the Returned Options is limited to at most the reversal of the grant-date-fair-value compensation expense of $19.9 million. An option is nothing more than a "right to purchase a share of stock from a company at a fixed price, referred to as the 'strike price,' on or after a specified vesting date." *United States* v. *Reyes*, 577 F.3d 1069, 1073 (9th Cir. 2009). The company calculates the grant-date fair value of the option at the time of issuance based on the Black-Scholes method and records that expense on its financial statements. A510. The calculation takes into account many uncertainties: the stock's volatility, the option's time to maturity, the expected exercise price, and market interest rates. A302. But if the right to purchase is rescinded, the company simply reverses the expense, and no shares or funds ever change hands. *See* A512. Thus, the only benefit to the company of cancelling options is that it can reverse the compensation expense that it already incurred. *Id.*

The Stipulation requires Tesla to "cancel[]" the Returned Options on the next business day after final approval, meaning that they ceased to exist upon the effective date of the settlement. A269, A276. Return of the options does not give Tesla a tangible new asset, like cash. The entire impact to Tesla's financial condition from

the return of the options was the expense reduction and corresponding $19.9 million improvement to reported income. A512. As Tesla's Senior Accounting Manager attested, the options "will result in no [other] recognizable accounting value" to Tesla. *Id.* The record thus does not support a finding of "net benefit" to Tesla of more than twenty times that amount.

To be clear, those options were worth a lot more to the directors, who would eventually have been able to exercise them and capture the value between the strike price and the exercise date's stock price. But Tesla cannot redeem the options and capture that difference in stock price; it must cancel them. A276. Canceling the options is thus worth "substantially less" to Tesla. *Chrysler I*, 215 A.2d at 714. And the pure loss of profit to the directors is not itself a benefit to the company. *See Garfield*, 2022 WL 17959766, at *4, *13 & n.116 (explaining that fee awards are not concerned with benefits to third parties).

Plaintiff sought to invent other collateral "benefits" to Tesla from the cancelled options, contending that the treasury shares reserved for issuance under the options could be used by Tesla for other purposes. A755-756. This argument is wrong—compensation-plan shares freed up "become available for future grant under the 2019 EIP, but *cannot be sold by Tesla*." A520 (emphasis added). Plaintiff never even contended, much less proved, that this meager addition to the 138 million shares already available for issuance under Tesla equity compensation plans (a 1.4%

increase, *see* A521) ever would be of any use to Tesla, which did "not expect to come close to awarding the maximum limit of available Shares during the term of the 2019 EIP." A521. And in any event, this argument serves only to underscore the illogic in attaching "in the money" values to forfeited options.

Further, the "recovery by plaintiff of his attorneys' fees . . . in a successful derivative action is obviously in no way connected with the ultimate use to which a corporation so benefited may put the net balance of funds recovered." *Wilderman* v. *Wilderman*, 328 A.2d 456, 458 (Del. Ch. 1974). Plaintiff's conjecture about hypothetical alternative future uses of canceled compensation proves no calculable corporate benefit because it "rests on a series of assumptions and unknowns." *Sciabacucchi*, 2023 WL 4345406, at *4. Plaintiff did not prove, as was its burden, that freeing up shares for future use provides any quantifiable benefit to Tesla, and any such hypothetical future use is "in no way connected" to any viable fee theory. *Wilderman*, 328 A.2d at 458.

Even the Court of Chancery had previously valued returned options at their grant-date fair value for the purpose of calculating fees. In *Tornetta*, the same court calculated the benefit to Tesla from rescinded options granted to Tesla's CEO Elon Musk by using the grant-date fair value of the options—*i.e.*, the compensation expense recorded upon issue that would be reversed upon rescission. 326 A.3d at 1261. As here, the *Tornetta* plaintiff argued that the "net benefit" of the litigation—

rescission of the options—should be valued based on some current market value of the rescinded options, then equal to about $51 billion because of the astronomical increase in Tesla's stock price. *See id.* at 1239-1251. But awarding fees by that measure would have been a "windfall" to plaintiff's counsel. *Id.* at 1251-1252. After rejecting Tesla's argument that fees should be awarded on a *quantum meruit* basis because the value of surrendered stock options was unquantifiable, *id.* at 1253, 1259, the Court of Chancery ruled that the benefit from the rescission of Musk's options should equal their $2.3 billion grant-date fair value, which corresponds to the same $19.9 million figure Tesla proposed here. *Id.* at 1261.

The Court of Chancery here, however, ruled that the grant-date-fair-value benefit calculated in *Tornetta* is reserved for "exceptional cases," to be deployed only when necessary to "avoid awarding a windfall in fees," which the court ruled inexplicably was not the case here. Bench Ruling 31. This was error. As set forth above, there was no argument or finding that the Returned Options conferred any benefit *to Tesla* beyond the reversed compensation expense. Moreover, the court's invented rule fails on its own terms: the fee award here is a windfall by any yardstick, as even a comparison to the unprecedented *Tornetta* award reveals. Although the compensation plan rescinded after trial in *Tornetta* was 100 times

larger,[3] the $176.2 million fee award before trial here is still more than half the size of Delaware's largest-ever $345 million fee award in *Tornetta* (which itself was otherwise erroneous).[4] Any fee award here tied to the increase in market value of the Returned Options following the grant date is self-evidently a windfall, impermissibly untethered to the claims at issue or the efforts of counsel. *See* Sec. 1(c), *infra*; *see also Chrysler I*, 215 A.2d at 716 ("Certainly plaintiffs cannot take credit for the benefit flowing from the great increase in profits to the extent they resulted from the general resurgence of the automobile industry.").

Delaware has long recognized the difficulty of valuing returned stock options, and thus treats them as worth no more than their grant-date fair value—if they are quantifiable at all. The benefit to Tesla of these returned options is entirely "dissimilar to a . . . certain cash fund," and treating them as cash-equivalent generates a "windfall award[]." *Sciabacucchi*, 2023 WL 4345406, at *4. Thus, the

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[3] The options in *Tornetta* had a grant-date fair value of $2.6 billion and a market value of $55.8 billion. 326 A.3d at 1214. The options here have a grant-date fair value of $19.9 million, with a $458.6 million market value.

[4] *Tornetta* accurately valued the options based on their grant-date fair value, but then failed to consider two factors that rendered the benefits of the litigation at best unquantifiable: (i) the offsetting costs of a replacement compensation plan, or (ii) the effects of the stockholders' ratifying vote. *See* Tesla's Br. 47-54, *In re Tesla Deriv. Litig.*, No. 534, 2024 (Mar. 11, 2025). Here, by contrast, the litigation created a $276.6 million certain cash fund, the director defendants agreed to forgo all other compensation for the period at issue, and no ratification has occurred, so unlike *Tornetta*, the settlement conferred a quantifiable and quantified common benefit.

Court of Chancery should not have relied on any market value ascribed to the Returned Options to enlarge the value of the achieved benefit.

c. Under Delaware law, Tesla cannot be required to compensate counsel for benefits it did not receive

Finally, the Court of Chancery was wrong to suggest that supposed stockholder benefits might support its benefit calculation. While plaintiffs in a derivative suit are "entitled to reimbursement through contribution from" the company whose interests were vindicated, courts do not reward plaintiffs for the effects of a victory on third parties. *See Garfield*, 2022 WL 17959766, at *13. As the Court of Chancery acknowledged, Plaintiff here did *not* argue that its fee request could be based on stockholder "benefits," rather than value conferred on Tesla itself. Bench Ruling 29 ("Unlike in *Tornetta*, plaintiff does not argue that because the shares were fully vested they were priced into Tesla's trading price. Nor does Plaintiff advance a reverse dilution theory."). Nevertheless, the court observed that "there is an argument"—albeit one not made by Plaintiff—"that [the Returned Options] are priced into the market," and that "investor-level benefits are a proper basis for compensating plaintiff's counsel." Bench Ruling 30. This conclusion was wrong as a matter of law for several reasons.

First, Plaintiff forfeited the argument that its fee request could be based on something other than the value the settlement conferred on Tesla. Indeed, the Court of Chancery acknowledged that this theory was never presented or argued as a basis

to support any fee award. The court therefore erred in augmenting its fee award by over $100 million based on arguments it recognized Plaintiff had forfeited. Bench Ruling 29; *see In re Mindbody, Inc.*, __ A.3d __, 2024 WL 4926910, at *46 (Del. 2024) ("[A] party waives any argument it fails properly to raise . . . ."). Moreover, Plaintiff cannot earn an extra $100 million simply because "there is an argument that" some benefit was conferred. Bench Ruling 30. It was Plaintiff's burden to both *prove* "the value of the claimed benefit" and "demonstrate the reasonableness of the amount sought for achieving that benefit." *Sciabacucchi*, 2023 WL 4345406, at *3. A theory *never* raised that *might* provide an argument for some compensable benefit does not come anywhere close to meeting Plaintiff's burden to *prove* the facts justifying the astronomical fee award here.

Second, as explained above, the Stipulation makes clear that any fee award could be paid only out of the consideration Tesla actually received in the settlement. A286-287; A287-288. Thus, under the parties' agreement, benefits conferred on third parties are not a proper measuring stick for any attorney's fee award, because Tesla cannot pay any such award out of benefits it never received.

Third, the Court of Chancery's conclusion that "investor-level benefits"—*if* that theory had been presented and proven as a basis to award a fee—"are a proper basis for compensating plaintiff's counsel" in a derivative case is wrong under Delaware law. Bench Ruling 30. In a derivative action, "the recovery, if any, flows

only to the corporation." *Tooley* v. *Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1036 (Del. 2004); *see also Brookfield Asset Mgmt., Inc.* v. *Rosson*, 261 A.3d 1251, 1266 (Del. 2021). Likewise, the benefits of successful litigation for which Tesla may be required to compensate counsel should extend only to benefits to Tesla as a *corporation*. *See, e.g.*, *In re Dunkin' Donuts S'holders Litig.*, 1990 WL 189120, at *4 (Del. Ch. Nov. 27, 1990) ("Typically the corporation benefits—such as in a benefit conferring derivative action—so the corporation must compensate."); *In re Energy Transfer Equity, L.P. Unitholder Litig.*, 2019 WL 994045, at *4 (Del. Ch. Feb. 28, 2019) (applying the corporate-benefit doctrine where "clarification . . . [was] a benefit to the entity going forward"). Only that understanding accords with the premise of the common-benefit doctrine, which is that the recipient of the benefit must defray the cost of achieving the benefit through the payment of counsel's fees.

In *Tornetta*, the Court of Chancery concluded otherwise, finding that "investor-level benefits are a proper basis for compensating derivative counsel," primarily because investor-level and entity-level recoveries "can be 'reframed' as the other" when fashioning relief. 326 A.3d at 1245-1246 (citation omitted). This skips an important step. To be sure, a settlement or judgment in a derivative action may direct that the corporate benefit be distributed to investors, as the cases *Tornetta* cites make clear. *Id.* at 1245-1246 nn. 265-268. But a derivative action nevertheless can seek remedies only for corporate injuries, and thus the benefits of the litigation

are those that inure to the corporation. *See Tooley*, 845 A.2d at 1035-1036 (explaining that the company "receive[s] the benefit of the recovery" in a derivative action). Some theoretical benefit to Tesla investors—which was never alleged nor proved as a basis for any fee here—is not a benefit to Tesla such that Tesla should be forced to foot the bill incurred in achieving that benefit.

2. The Court Of Chancery Erred In Ordering Tesla To Pay Counsel Nearly A Quarter Of The Purported $735 Million Benefit Tesla Never Received

After erroneously charging Tesla for an additional $458.6 million in benefits it never received, the Court of Chancery exacerbated that error by awarding counsel a percentage near the top of the permissible range under Delaware law, despite the extraordinary size of the resulting award. In common-benefit cases, *Sugarland* calls for Delaware courts to determine the amount of a reasonable fee award as a percentage of the benefit conferred. 420 A.2d at 151. This Court recently held in *Dell* that it is "essential" for the court to "consider the size of the award in a megafund case when deciding the fee percentage," so as to avoid a windfall award that exceeds its value as an incentive to bring meritorious cases. 326 A.3d at 702. Although "the starting point" for arriving at a reasonable fee is a range of percentages tied to the stage at which the litigation resolved, "[o]ther *Sugarland* factors may cause the court to adjust the indicative fee up or down." *Id.* at 692. The

Court of Chancery erred at each of these steps, and instead awarded a patently unreasonable fee.

a. The size of the recovery warrants a downward adjustment of the fee

Delaware law has always guarded against windfall fee awards. Indeed, the Court of Chancery recognized that, "[i]f applied rigidly . . . the stage-of-case [percentage fee] method runs the risk of windfalls, as the Delaware Supreme Court recently warned in *Dell*, and as [the court] discussed in the *Tornetta* decision." Bench Ruling 26. Despite recognizing these risks and the guidance from this Court a few months earlier in *Dell*, the Court of Chancery failed to consider in any detail whether a 24% share was necessary when applied to a supposed $734 million recovery. As a result, it awarded a clear windfall award to counsel.[5]

Delaware law seeks to incentivize productive suits by awarding a premium to plaintiffs' counsel who bring meritorious claims, while also recognizing that an award that exceeds the amount necessary to produce these incentives "serv[es] no

[5] Tesla did not argue in the Court of Chancery that the indicative fee percentage should be adjusted downward based on the size of the benefit because Tesla then contended, as it does here, that the benefit was limited to the $276.6 million of Returned Cash and Returned Stock. Because *Dell* was decided on August 14, 2024 after the briefing and arguments below and the court relied on it, its impact on the fee award is properly considered here. *See Chaverri* v. *Dole Food Co., Inc.*, 245 A.3d 927, 935 (Del. 2021) (recognizing that a court can vacate a final judgment for "a change in the decisional law") (citation omitted); *Wagner* v. *BRP Grp., Inc.*, 316 A.3d 826, 845, 851 (Del. Ch. 2024) (applying recent decisions published after the parties completed briefing).

other purpose than to siphon money away from stockholders and into the hands of their agents." *Seinfeld* v. *Coker*, 847 A.2d 330, 334 (Del. Ch. 2000). The goal of the Delaware attorney's fee calculation is to strike that balance. Courts should "estimate the point at which proper incentives are produced in a particular case" and award fees "that produce[] appropriate incentives without a significant risk of producing socially unwholesome windfalls." *Id.*

The risks of distorted incentives and windfall fee awards is particularly acute in "megafund" cases claiming larger recoveries, because the effort and risk involved with litigating a claim do not increase proportionately with the claim's monetary value. *See generally* William Rubenstein et al., *5 Newberg and Rubenstein on Class Actions* § 15:81 (6th ed.).[6] The fee award here exemplifies this dynamic. Plaintiff's counsel did not expend any additional effort to procure the Returned Options on top of the Returned Cash. Thus, awarding fees for some illusory $458.6 million value ascribed to Returned Options on top of the $276.6 million Returned Cash compensated counsel three-fold for the same work.

Recognizing these risks, federal courts often apply a declining percentage to fee awards where the typical percentage-of-the-recovery approach would generate windfall awards. For example, as this Court has discussed, in securities class actions

[6] A "megafund" case is generally understood to refer to a case involving a common fund exceeding $100 million. *See* Joseph M. McLaughlin, *2 McLaughlin on Class Actions: Law and Practice*, § 6.24 (21st ed.).

courts have adjusted fee awards to "27% in cases where the settlement is between $25 million and $100 million, 22.4% in cases where the settlement is between $100 million and $500 million, and 11.1% in cases where the settlement is above $500 million." *Americas Mining*, 51 A.3d at 1260 n.116 (citing Dr. Renzo Comolli et al., NERA Econ. Consulting, *Recent Trends in Securities Class Action Litigation: 2012 Mid-Year Review* 31, Figure 31 (July 24, 2012)).

Although this Court has eschewed any formulaic declining fee percentage, it has instructed Delaware courts to at least *consider* modifying the traditional percentage-of-the-benefit approach in light of the size of the recovery and the particularities of the case. *See Dell*, 326 A.3d at 701-702. And where the award could lead to a windfall, it should be reduced. As *Dell* explained:

> Given the equitable principles underpinning fee awards in common fund cases, and this Court's concern for excessive compensation or windfalls, it is entirely appropriate, *and indeed essential*, for the court to consider the size of the award in a megafund case when deciding the fee percentage. An award can be so large that typical yardsticks, like stage of the case percentages, must yield to the greater policy concern of preventing windfalls to counsel.

Id. at 702 (emphasis added) (footnotes omitted). This Court further noted that it is "legitimate to ask . . . whether the public would ever believe that lawyers must be awarded many hundreds of millions of dollars in any given case to motivate them to pursue representative litigation." *Id.* As the Court put it, "[a]t some point, the

percentage of fees awarded in a megafund case exceed their value as an incentive to take representative cases and turn into a windfall." *Id*.

The parties did not dispute that this case reflected a mid-stage settlement that, under *Americas Mining*, would typically start with a presumptive fee range equal to 15% to 25% of the calculated "monetary benefits." 51 A.3d at 1259-1260. While the usual route is to award an increasing percentage within that range as the case progresses further into substantive litigation, the Court of Chancery should have selected the bottom of the mid-stage range to account for (1) the debatable "benefits" of the non-cash Returned Options, and (2) the exorbitant size of the resulting fee, both in absolute terms and in comparison to other Delaware awards. Indeed, for several reasons, the award here is much more of a windfall than the award that barely passed muster in *Dell*.

- The Court of Chancery awarded Plaintiff's counsel nearly double the implied hourly rate granted in *Dell*. Yet *Dell* involved years of protracted litigation and rounds of substantive motion practice not present here. *See* Sec. 2(b), *infra*.
- The fee award here equals nearly 70% of the award in *Dell*, but represents only a tiny fraction of the scope of litigation in *Dell*. *See* Sec. 2(b), *infra*.

- Even accepting the Court of Chancery's inflated analysis of the benefit, what Plaintiff's counsel achieved here—the return of a mix of cash and options, the latter of which have nominal value to Tesla—cannot compare to the achievement of a $1 billion cash settlement in *Dell*.

The sheer size of the premium awarded here relative to fees in other large Delaware settlements is further evidence that applying the upper end of the traditional stage-of-the-case yardstick would yield a windfall. Outside of *Dell*, there have been 14 Delaware common-fund settlements worth over $100 million. *See* Ex. C. Fee awards in these cases, the largest of which settled for $165 million, have ranged from $8.95 million to $45.38 million, with an average fee award percentage of 21.1% and an average lodestar multiplier of 2.83x. *Id*. By contrast, the $176.2 million award here represents 24% of the recovery and an 11.6x lodestar multiplier. It is self-evident that the size of the recovery in this case renders the traditional stage-of-the-case inappropriate: Plaintiff's counsel have been awarded over *four times* the average lodestar multiplier in the other largest settlements in Delaware history.

To arrive at a reasonable fee percentage, both the federal securities cases and the $100+ million Delaware awards serve as valuable guideposts. While Delaware courts have found that federal securities cases are an imperfect analogue to Chancery cases, *see Dell*, 300 A.3d at 707-710, this Court has still viewed them as a valuable comparator because they reveal how courts have grappled with fee awards in rare

cases where recoveries approach or exceed $500 million, *see Americas Mining*, 51 A.3d at 1260-1261. And while the $100+ million Delaware settlements are also an imperfect analogue—their relatively smaller size means a lower risk of windfall under the traditional stage-of-the-case approach—they still provide valuable guidance regarding Delaware's focus on the size of fee that is appropriate to incentivize firms to take on contingent matters.

Using both of these sources as guidance, a fee award of at most 15% of the benefit conferred—an amount between the 11% median for federal securities cases with settlements exceeding $500 million and the 21% average for $100+ million Delaware settlements—is the outer bound of a reasonable fee in this case. 15% of the benefit—even as improperly calculated by the Court of Chancery below—would still yield a presumptive award of $110 million, subject to the remaining *Sugarland* factors.

b. Under *Dell*, the time and effort of counsel should limit any fee award to 7x counsel's lodestar

No matter what "common benefit" is deployed and irrespective of indicative fee percentages, the Court of Chancery's fee award cannot stand when compared to counsel's time and effort. Under *Sugarland*, the time and effort expended by counsel serves as a necessary "cross-check" on the reasonableness of the award. *In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1138 (Del. Ch. 2011). This verifying

mechanism helps ensure that awards "produce the incentives of encouraging meritorious suits" while avoiding windfall awards. *Seinfeld*, 847 A.2d at 333-334.

This Court recently noted in *Dell* that a 7x lodestar multiplier is "at the high end" of Delaware fee awards. 326 A.3d at 705. It did so on the assumption that a 7x multiplier "would not raise a federal eyebrow" or be "so unusual" as to require reversal. *Id.* *Dell* was, if anything, too generous. As recent scholarship has confirmed, a 7x lodestar multiplier is exceedingly unusual in federal courts—"aris[ing] in approximately 23 one-hundredths of one percent of federal class action fee awards." Joseph A. Grundfest & Gal Dor, *Raising the Federal Eyebrow: The Incidence of Multipliers of Seven or More in Federal Class Action Fee Awards* 1 (Rock Center, Working Paper No. 262, 2025). Multipliers much lower than 7x raise a federal eyebrow: treatises of federal cases describe multipliers of 4x as "literally off the[] charts," while federal jurists have labeled multipliers of 10x "absurd." *Id.* at 5 (citations omitted). Regardless, there should be no question that this fee award—with a multiplier near 12x—impermissibly exceeds the high end of lawful fee awards in Delaware.

Plaintiff's counsel logged 21,477 hours in this case. The fee award of $176.2 million therefore translates to an implied hourly rate of $8,204, representing a lodestar multiplier of 11.6x. The Court of Chancery, without any analysis of the work completed by Plaintiff's counsel or citing any authorities other than the "66x

lodestar multiple" in *Americas Mining* (Bench Ruling 34), pronounced that the implied hourly rate and lodestar multiplier were "not outside the range of reasonable fee awards for this Court." Bench Ruling 34.

That is simply wrong. An implied hourly rate of $8,204 and an 11.6x multiplier are in fact well outside the range of awards that Delaware courts have considered reasonable, even in more advanced cases. In fact, multipliers of at most 4.6x have been "deemed reasonable for cases in an advanced stage." *Sciabacucchi*, 2023 WL 4345406, at *5; *see also S'holder Representative Servs.*, 2021 WL 1627166, at *3 & n.14 (finding a 2.5x lodestar multiplier "is on par with or less than awards this court has previously deemed reasonable in the post-trial or advanced-stage litigation context"). In common-fund settlement cases, Delaware fee awards have an average lodestar multiplier of 2.58x, and have exceeded 5x in only six out of 78 identified cases. *See* Ex. C. Fee awards in common-fund settlements since this Court's guidance in *Dell* have ranged from 0.4x to 4.16x, with an average multiplier of 1.78x. *See* Ex. C.

If the fee award in *Dell* following a $1 billion cash settlement in a vigorously litigated case represents the high end of reasonableness under *Sugarland*, the fee award here blows past that limit. The award here far exceeds the *Dell* award on every relative metric. The recency of the *Dell* decision, as well as this Court's approval of its "thorough consideration" of the *Sugarland* factors, 326 A.3d at 705,

makes *Dell* particularly useful for an evaluation of the implied hourly rates that Delaware courts currently consider sufficient to incentivize meritorious stockholder suits while avoiding windfall awards. The following key metrics the *Dell* court used to evaluate the time and effort of counsel all show that the fee award here departs substantially from Delaware law:

Metric	*Dell*	*Detroit*	Comparison
Hours Expended	53,000 hours among five firms	21,477 hours among four firms	40.5% of *Dell* hours
Length of Litigation[7]	Four years	Three years	75% of *Dell* length
Lodestar Multiplier	~6.76x ($266.7M/$39.4M)	~11.6x ($176.2M/$15.2M)	Almost double the *Dell* lodestar multiplier
Implied Billing Rate	~$5,000/hour ($266.7M/ 53,000 hours)	~$8,200/hour ($176.2M/21,477 hours)	Almost double the *Dell* implied billing rate
Number of Defense Firms and Appearances	Nine firms; nearly 100 individual appearances	Two firms for Defendants; 8 appearances	<10% of size of *Dell* defense group
Number of Complaints	Four amendments	One complaint	25%-50% of *Dell* complaints
Motions to Dismiss	Multiple rounds, denied except as to one director	None	No MTD work in *Detroit*
Document Requests to Defendants	66	50 (A426)	76% of *Dell* document requests
Interrogatories to Defendants	710	84 (A426)	<12% of *Dell* interrogatories
RFAs to Defendants	179	2	1% of *Dell* RFAs
Number of Pages of Documents Produced	~2.9 million pages	~95,000 pages (A429)	3.4% of *Dell* document production
Fact Depositions	32	22 (A430-432)	<70% of *Dell* depositions
Discovery from Plaintiffs	"Expansive": 46 RFPs; 173 interrogatories; 59 RFAs	28 requests for production (A429)	Far more discovery requested from plaintiff in *Dell*
Expert Reports	One for Plaintiffs; two for Defendants	Three for Plaintiffs; one for Defendants (A432-433)	One additional expert report in *Detroit*
Trial Exhibit List	Filed (2,887 joint trial exhibits)	N/A	No trial work in *Detroit*
Pretrial Order	Filed (51 pages)	N/A	No trial work in *Detroit*
Pretrial Briefs	Filed ("lengthy pretrial briefs")	N/A	No trial work in *Detroit*

[7] Measured from the filing of the complaint to the filing of settlement.

Ignoring those critical differences, the Court of Chancery awarded Plaintiff's counsel a lodestar multiplier almost double the lodestar multiplier in *Dell*. The court declined to engage in any "comparison" to *Dell* or other cases because it believed that doing so "would effectively back-door in a lodestar method to fee calculation and import all the bad incentives that Delaware courts seek to avoid that are inherent in the lodestar method." Bench Ruling 35.

The Court of Chancery's refusal to parse the fee award here to comport with precedents is contrary to Delaware law and conflates the lodestar method with *Sugarland*'s mandate. Under the lodestar method, a court starts and ends with counsel's time and effort. Under *Sugarland*, the court starts with a share-of-recovery approach for quantifiable awards but is obligated to look at the time and effort of counsel as a "cross-check." *Sauer-Danfoss*, 65 A.3d at 1138. And a proper cross-check requires consideration of "what Plaintiffs' counsel actually did," *Americas Mining*, 51 A.3d at 1258 (citation omitted), and whether an indicative fee constitutes a windfall in comparison to Delaware precedents. No well-reasoned comparison can support a fee in this case of even the 7x multiplier awarded in *Dell*, let alone the 11.6x multiplier awarded by the court here.

The Court of Chancery's failure to adequately account for the time and effort expended by Plaintiff's counsel as a cross-check on the reasonableness of the award constitutes reversible error. A fee award of at most 4.5x Plaintiff's counsel's

lodestar, or $68.4 million—meaningfully higher than the average of 2.58x in common-fund settlements—would more than adequately compensate Plaintiff's counsel for their time, effort, and risk while promoting Delaware's policy goal of avoiding "socially unwholesome" windfalls. *Seinfeld*, 847 A.2d at 334.

CONCLUSION

For the foregoing reasons, this Court should vacate the Court of Chancery's decision and award Plaintiff's counsel a fee of $68.4 million to $70.9 million.

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