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Case No. 2018-0408-KSJM

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

RICHARD J. TORNETTA, Individually and on Behalf of All Others Similarly Situated and Derivatively on Behalf of Nominal Defendant TESLA, INC.,	)	C.A. No. 2018-0408-KSJM
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.	)	

FLORIDA OBJECTORS' OBJECTIONS TO PLAINTIFF'S APPLICATION FOR AN AWARD OF FEES AND EXPENSES

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INTRODUCTION

David Israel ("Israel") and Kurt Panouses ("Panouses")(collectively the "Florida Objectors") are long-term shareholders in Tesla, collectively owning over 15,000 shares with a current market of approximately $2.8 million.[1] Together, they respectfully object to Plaintiff Richard Tornetta's ("Plaintiff" or "Tornetta") Application for an Award of Fees and Expenses (the "Fee Application") on the grounds, *inter alia*, that the Plaintiff has not conferred any benefit to Tesla but has instead caused them and Tesla harm. Accordingly, the Florida Objectors are filing these objections (the "Objections), giving notice of their attorneys' intent to appear at future hearings in this case, and respectfully asking this Court to favorably consider the Objections and award no fees or costs to Plaintiff.

SUMMARY

Tesla's bold, innovative and risky mission is well aligned with Delaware's public policy: "It is the 'public policy of Delaware to reward risk-taking in the interests of shareholders.' *In re Plains Res. Inc.,* 2005 WL 332811, at *6 (Del.Ch. Feb. 4, 2005)." *In re Activision Blizzard, Inc. S'holder Litig.*, 124 A.3d 1025, 1073 (Del. Ch. 2015).

[1] Measured as of the market close on June 13, 2024, the date of the Annual Shareholders Meeting and the approval of the 2024 Ratification Proposal ratifying the 2018 Grant (*see*, *n*. 3, *infra*).

Consistent with Delaware's policy of rewarding risk-taking and applying it to startup companies and their founders, Tesla, Inc. ("Tesla"), Elon Musk ("Musk") and Tesla's board of directors (the "Board") entered into an ambitious and risky "performance-based equity-compensation plan"[2] (the "Compensation Plan" or the "2018 Grant") in 2018 (and ratified in 2024, *infra* at *n*. 3) designed to benefit shareholders in a way that only disruptive and innovative companies like Tesla could be bold enough to implement.

The Compensation Plan included substantial stock awards to Musk if he could hit the "stretch" goals set forth in that plan, goals that seemed at the time to reflect another Musk interplanetary space fantasy, impossible to achieve at all much less in only five years. To fully vest, Musk was required to cause Tesla's market capitalization to increase from approximately $56 billion in January 2018 to $600 billion in 2023, or an increase of more than 10 times the value at the inception of the grant. If Musk failed to hit any tranche target at all, he would receive no compensation for his labor as CEO of Tesla.

With the understanding that Musk would only be compensated for his services if he achieved one or more of the tranche goals in the Compensation Plan, the Board and shareholders (including the Florida Objectors) overwhelmingly approved the

[2] *Tornetta v. Musk*, 310 A.3d 430, 448 (Del. Ch. 2024) (the "Opinion").

2018 Grant in 2018 (and again in 2024 in approving the 2024 Ratification Proposal[3]). Thereafter, Musk fully performed the contract and, against all odds, succeeded in achieving *all* of the moonshot targets in the 2018 Grant and thereby became entitled to stock for his services that was potentially worth at the time of exercise after 10 years (in 2028) as much as $55.8 (the "Stock Grant").

The Florida Objectors and a majority of Tesla shareholders supported the 2018 Grant in 2018 and again in 2024 and fully expected Musk to be compensated in accordance with its terms. *Declaration of Florida Objector David Israel in Support of His Objections to Plaintiff's Application for an Award of Fees and Expenses* ("Israel Declaration") at ¶14. One shareholder owning 9 shares (the Plaintiff), however, felt differently and filed this lawsuit in 2018 shortly after the plan was first approved, alleging that the Board had breached its fiduciary duty to the shareholders and seeking modification or rescission of the grant. After full performance of the contract by Musk, this Court applied the "entire fairness" doctrine and agreed, finding the price unfair and the process flawed, and ruled that the 2018 Grant must be rescinded in full.

[3] The defined term "Ratification Proposal" is adopted from the Court's Letter Opinion dated May 28, 2024 (the "May 28, 2024 Opinion"), and refers to the shareholder meeting agenda item "asking Tesla stockholders to 'ratify[] Elon Musk's compensation under the CEO pay package that [its] stockholders previously approved at [its] 2018 special meeting.'" May 28, 2024 Opinion at 3, n. 6.

Following that decision, the Plaintiff filed the Fee Application and seeks as much as almost $6 billion in attorneys' fees based on the application of a hindsight test claiming that he allegedly conferred a substantial benefit on Tesla and is entitled to a common fund or benefit percentage fee. As long-term shareholders, the Florida Objectors oppose Plaintiff's Fee Application in its entirety because despite prevailing at trial, the Plaintiff has offered no proof that he procured *any benefit* for Tesla or its shareholders. To the contrary, the Plaintiff has harmed Tesla and its shareholders (including the Florida Objectors) as evidenced by the market reaction to the Opinion and, respectfully, he is entitled to no fees or costs in this case.

FACTUAL BACKGROUND

> "Was the richest person in the world overpaid? The stockholder plaintiff in this derivative lawsuit says so. He claims that Tesla, Inc.'s directors breached their fiduciary duties by awarding Elon Musk a performance-based equity-compensation plan. The plan offers Musk the opportunity to secure 12 total tranches of options, each representing 1% of Tesla's total outstanding shares as of January 21, 2018. For a tranche to vest, Tesla's market capitalization must increase by $50 billion and Tesla must achieve either an adjusted EBITDA target or a revenue target in four consecutive fiscal quarters. With a $55.8 billion maximum value and $2.6 billion grant date fair value, the plan is the largest potential compensation opportunity ever observed in public markets by multiple orders of magnitude - 250 times larger than the contemporaneous median peer compensation plan and over 33 times larger than the plan's closest comparison, which was Musk's prior compensation plan. This post-trial decision enters judgment for the plaintiff, finding that the compensation plan is subject to review under the entire fairness standard, the defendants bore the burden of proving that the compensation plan was fair, and they failed to meet their burden." [4]

[4] Opinion, 310 A.3d at 445.

As set forth in the Israel Declaration, Objector Israel is a long-term shareholder of Tesla stock first purchased after decades of investigation and research while employed in Florida regarding solar energy, electric vehicles and Elon Musk. Now retired and living in Vermont, Israel's purchases were made in his pension plan for his retirement and were thoroughly researched prior to any purchase. The single most important reason that Israel purchased Tesla shares in his retirement account is, in two words, Elon Musk.

Objector Panouses is an estate planning attorney, Certified Public Accountant and risk management expert. Known as the "Power Ball Lawyer" and "Sudden Wealth Expert," he helps clients navigate the blessings (and curses) of lottery winnings and new-found fame, including the winner of the largest jackpot $1.58 billion Powerball. Lottery winners are frequent victims of financial scams and threats of harm, and Panouses' goal is to ensure his clients' privacy and safety. *See, generally*, https://www.powerballlawyer.com.

With that healthy skepticism and experience, Panouses and other family members purchased Tesla stock years ago and are long-time owners. Like Objector Israel, Panouses deeply respects Elon Musk.[5]

[5] Due to traveling schedules, Panouses' declaration is not available for inclusion with this filing but will be filed this week in further support of this Objection and will confirm these statements.

Following the Opinion, Plaintiff filed the Fee Application and requested a fee of approximately $5.6 billion, an "unusual [dollar] amount" according to the Court.[6] The Objectors, long-time shareholders of Tesla shares purchased almost entirely because of Elon Musk, object to any award of fees or expenses to the Plaintiff or his attorneys on the grounds that they have conferred no benefit to Tesla or its shareholders and, indeed, have harmed them both.

And most recently, Tesla held its Annual Shareholder Meeting on June 13, 2024 in Austin, Texas where the shareholders considered and approved the Ratification Proposal, *see*, *n*. 3, *supra,* including support from two of the largest and most sophisticated investment managers in the world, Blackrock and Vanguard:

> While conceding that the share grant was a "substantial outlier" to any other in corporate history, Vanguard said "the unique circumstance of evaluating the plan retroactively eliminated our concerns".
>
> The $9.3tn asset manager said it had changed its position [from 2018] after meeting Musk and Tesla directors. It concluded that *"the strong alignment of executive pay with shareholder returns since 2018 and the benefits the board asserted related to the motivational value for the CEO in preserving the original deal" were enough to justify its shift.*
>
> BlackRock, the second-biggest, also supported both resolutions.
>
> *Elon Musk takes victory lap after 77% of Tesla shareholder votes back his $56bn pay; Company reveals clear majority of investors back stock options and Texas move*, Financial Times, June 13, 2024 (emphasis added).

[6] May 28, 2024 Opinion at 2.

STANDING TO OBJECT

Under Delaware law, the Florida Objectors have standing to object to the Fee Application just as they have standing to object to a proposed settlement or dismissal of a class or derivative action. *See*, Ch. Ct. R. 23.1(e)(2), and 23.1(d)(4)(A); *see, also, e.g.*, *Prezant v. De Angelis*, 636 A.2d 915, 918 (Del. 1994)(objectors to class action settlement had standing to object in the trial court (and on appeal) an adverse determination in the Court of Chancery).[7]

In addition, Delaware courts have considerable discretion in managing all aspects of derivative and class actions and the participation therein by shareholders. This Court's role includes ensuring that the interests of the corporation and all of its shareholders are fairly represented: "The potential divergence between the personal interests of the attorneys conducting the litigation and the interests of the class or corporation they represent means that 'the Court of Chancery must ... play the role of fiduciary in its review of these settlements....' *In re Resorts Int'l S'holders*

[7] *Cf.*, Manual for Complex Litigation, Fourth, § 21.633 ("The notice of the fairness hearing should tell objectors to file written statements of their objections with the clerk of court by a specific date in advance of the hearing and to give notice if they intend to appear at the fairness hearing."). Although the hearing on July 8, 2024 is not a fairness hearing in connection with the settlement of a class action lawsuit, it is analogous in that shareholders have a right to appear and object to the payment of attorneys' fees in this derivative action. *See*, Ch. Ct. R. 23.1(e)(2), and 23.1(d)(4)(A). *Cf.,* Fed. R. Civ. P. 23(e)(5)(A) ("Any class member may object to the proposal [for settlement] if it requires court approval under this subdivision (e).").

Litig. Appeals, 570 A.2d 259, 266 (Del. 1990). *In re Activision Blizzard, Inc. S'holder Litig.,* 124 A.3d 1025, 1042–43 (Del. Ch. 2015), *as revised* (May 21, 2015), *judgment entered sub nom.*" *In re Activision Blizzard, Inc.Stockholder Litig.*, C.A. No. 8885-VCL, 2015 WL 2415559 (Del. Ch. May 20, 2015).

This broad power implies that this Court may, or at times must, consider objections from shareholders such as the Florida Objectors without formal intervention where, as here, their appearance aligns with the Court's duty to protect all shareholders' interests.[8]

ARGUMENT

I. Plaintiff Has Not Met His Burden of Proving That He Conferred a Benefit on Tesla.

In the Fee Application, the Plaintiff's attorneys have requested "the largest potential compensation opportunity ever observed in [attorneys' fee requests] in

[8] In the event this Court disagrees, the Florida Objectors respectfully request that the Court do so without prejudice such that they will be free seek to intervene pursuant to, *inter alia*, Court of Chancery Rules 24(a) and 24(b). Absent the ability to object or intervene, the Florida Objectors will have no opportunity to object to and oppose any finding of entitlement to attorneys' fees, or to object to and oppose the amount of any such award. The decisions of this Court will directly impact them and all shareholders with dilution of their shares because of Plaintiff's attorneys' request to be paid in-kind with Tesla shares (payment in cash would also be objectionable and would impose a direct and indirect cost on the Florida Objectors). In addition, no existing party can protect the rights of the Florida Objectors and, in order for this Court's decisions to be binding on the Florida Objectors, due process requires that they be given an opportunity to object and be heard. *See, generally*, *Becherer v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 193 F.3d 415, 423 (6th Cir. 1999)(en banc).

public markets by multiple orders of magnitude – [eight] times larger than … the [] closest comparison which…" was "the most complex securities fraud litigation thus far in the United States."[9]

For the Plaintiff to recover any fees in this action, however, it is his burden to prove entitlement:

> To recover fees arising from the settlement of a derivative action, *the requesting party must demonstrate* (1) that the "suit was meritorious when filed;" (2) that "action producing *benefit to the corporation* was taken by the defendants before a judicial resolution was achieved;" and (3) that "the resulting corporate benefit was causally related to the lawsuit."
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> *Allied Artists Pictures Corp. v. Baron,* 413 A.2d 876, 878 (Del. 1980).[10]

In the Fee Application, rather than offering proof of a benefit, the Plaintiff simply asserts that "This Action secured an unprecedented benefit – full rescission of the fully-vested $51+ billion Grant." Fee Application at 14. As shown elsewhere in this Objection, the Florida Objectors have demonstrated that "full rescission" of the Grant has harmed, and not benefited, Tesla. Without proof of a corporate benefit,

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[9] *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 586 F. Supp. 2d 732, 767 (S.D. Tex. 2008)($688 million total fees approved equal to 9.52% of the recovery).

[10] *See, also*, "In the ordinary course, the burden of showing causation lies with the shareholder seeking to recover fees rather than the corporation. See, e.g., Bird v. Lida, Inc., 681 A.2d 399, 404 (Del.1996); *Chrysler Corp. v. Dann*, 223 A.2d 384, 389 (Del.1966)," *In re Pfizer Inc. S'holder Derivative Litig.*, 780 F. Supp. 2d 331, 334 (S.D.N.Y. 2011).

despite his attorneys' claim of protracted professional services leading up to the order of rescission, the Plaintiff is not entitled to fees: [11]

> "Under Delaware law, which applies here, courts are permitted to "order the payment of counsel fees and related expenses to a plaintiff whose efforts result in ... the conferring of a corporate benefit." *Chan v. Diamond,* 2005 WL 941477, at *3 (S.D.N.Y. Apr. 25, 2005) *quoting Tandycrafts, Inc. v. Initio Partners,* 562 A.2d 1162, 1164 (Del. 1989).
>
> *In re Pfizer Inc. S'holder Derivative Litig.*, 780 F. Supp. 2d 331, 334 (S.D.N.Y. 2011)(emphasis added).

The Plaintiff has not proven that his efforts conferred a corporate benefit on Tesla, nor can he. Without such proof, he is entitled to no attorneys' fees.

A. The Market Reaction to Plaintiff's "Success" Establishes that He Conferred No Benefit on Tesla at Any Time.

As set forth below and in the Report of Stephen Pomerantz, Ph.D., attached as Exhibit A (the "Pomerantz Report and Shareholder Meeting Supplement") documenting the market reaction to the Opinion and the 2024 Ratification Proposal, Plaintiff created no benefit for Tesla. To the contrary, he has harmed, and continues to harm, the company. Unless he can rebut the evidence of that market reaction discovered only after his "success," he is entitled to *no* attorneys' fee:

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[11] "The derivative action device cannot be used by the courts to reward failure. There is an understandable tendency on the part of plaintiffs' counsel in this type of case to equate protracted professional services with benefit." *Dann v. Chrysler Corp.*, 215 A.2d 709, 716 (1965), aff'd 223 A.2d 384 (1966)(emphasis added). Similarly, in this case, Plaintiff's attorneys' "protracted professional services" do not automatically translate into a finding of benefit for Tesla or the attorneys' entitlement to an award of fees and costs.

> … fees might be sought on the basis of the "*results accomplished for the benefit of all shareholders* of Sugarland Industries, Inc." That is the common yardstick by which a plaintiff's counsel is compensated in a successful derivative action. *Cf., Dann v. Chrysler Corp.*, 215 A.2d 709 (1965), aff'd 223 A.2d 384 (1966); *Gottlieb v. Heyden Chemical Corp.*, 105 A.2d 461 (Del. Supr. 1954).
>
> *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 147 (Del. 1980) (emphasis added).

Here, there are no "results accomplished for the benefit of all shareholders" of Tesla. As evidenced by this Objection, not "all" shareholders agree that the Plaintiff's claims had (or have) merit and, more importantly at this time, not all shareholders agree there was a corporate benefit. In fact, the wisdom of the crowd (*i.e*, the market) has established – three times[12] – that the Plaintiff has harmed, and not benefitted, Tesla.

In order to meet his burden of proof regarding his claimed causation of some benefit, Plaintiff would have to prove that, at the time Plaintiff's "success" was publicly disclosed to the market, the reaction (measured by stock price and market capitalization) was an increase in the market value of Tesla equal to the Plaintiff's claimed benefit of approximately $56 billion resulting from the rescission of the 2018 Grant (or 7.7% of equity according to Plaintiff's experts). Bebchuk and Jackson (Plaintiff's experts) Declaration ¶ 51.

[12] *I.e*., in 2018 at the time of adoption of the 2018 Grant, between 2018 and 2023 during performance of that grant, and in 2024 with the approval of the Ratification Proposal at the 2024 Tesla Annual Shareholder Meeting.

To the contrary, however, the stock price and market capitalization *declined* between the announcement at the market close on January 30, 2024 and the market open on January 31, 2024 and continuing through the market close on January 31, 2024. Contrary to Plaintiff's anticipated benefit, Telsa common stock did *not* increase to reflect the claimed $56 billion benefit claimed by the Plaintiff but was instead *down* by almost 5% after publication of the Opinion with news of no other material events. Pomerantz Report at 6-11. Importantly, during the same period, Tesla's competitor GM actually saw an increase in its market value and the stock price of competitor Ford was relatively unchanged.

The Florida Objectors were not surprised by Tesla's dramatic loss in value (rather than the increase Plaintiff claims) following news of Plaintiff's "success" because the value Musk brings to Tesla is much greater than the cost of issuing shares in compliance with the 2018 Grant. Israel Declaration at ¶14. As a result of Plaintiff's efforts, Tesla and its shareholders (including the Florida Objectors) have been harmed and the Plaintiff is therefore not entitled to an award of fees.[13]

[13] Another example of the value the market places on benefits CEO Musk confers on Tesla can be seen from his recent visit to China promoting Tesla's fully autonomous driving (Full Self Driving or "FSD") in that country. Following a meeting with China's leadership, Tesla's stock price increased by approximately 15%. *Tesla jumps 15% after passing key hurdle to roll out advanced driver-assistance tech in China*, Ryan Browne, CNBC, April 29, 2024. In dollar terms, with a market capitalization at the time of approximately $600 billion, 15% equals approximately $100 billion, or almost double the amount of the bonus payable under the 2018 Grant.

B. In Contrast to the Market Reaction to Plaintiff's "Success," Musk Conferred Benefits on Tesla for which Plaintiff Cannot Take Credit.

In contrast to the negative reaction to Plaintiff's "success" that caused the destruction of Tesla shareholder value, the value of Tesla during the term of the 2018 Grant during which time Musk was CEO of Tesla *increased* by over 1,400%, an extraordinary benefit conferred on Tesla *by Musk*. Pomerantz Report at 7.

Moreover, absent rescission, Musk would have been obligated to continue providing his services for an additional five years (2028) *before* being able to sell *any* of the shares he may have acquired as a result of the 2018 Grant, Opinion, 310 A.3d at 484, thus ensuring continued alignment of interests between the company and Musk. As recently observed by Cathie Wood, the CIO of ARK, Invest, one of the largest shareholders of Tesla stock:

> I'd argue that no other executive is as aligned with shareholders as @elonmusk who committed to no salary, no bonus, no stock comp FOR 10 YEARS, unless he created tremendous value for @Tesla shareholders.

https://x.com/cathiedwood/status/1798818756141154473?s=57&t=GSiGyJNwoO7lC1erUn8G5A

And as Professors Hamdani and Kastiel (relied upon by the Court) observed:

> Under Elon Musk's leadership, Tesla's share price increased over 23,000% in a little more than a decade since its 2010 IPO, making Tesla the world's most valuable automaker. *Forbes* magazine recently named Elon Musk today's most successful business mind (along with Jeff

> Bezos), noting that he "works to revolutionize transportation both on Earth and in space." Musk is often viewed as the "face of Tesla."[81] The CEO of Panasonic recently suggested Musk is "a genius who defies common sense." And as another prominent expert in the auto industry put it: "Elon is Tesla, Tesla is Elon."
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> Assaf Hamdani & Kobi Kastiel, *Superstar CEOs and Corporate Law*, 100 Wash. U. L. Rev. 1353 (2023)(hereinafter "*Superstar CEOs*") at 1368-1369 (Introduced in the Opinion, 310 A.3d at 446, n. 3).

Finally, the two largest investment managers in the United States (Blackrock is first, and Vanguard is second[14]) supported the Ratification Proposal because they were convinced that Musk caused the meteoric increase in shareholder value during the term of the 2018 Grant:

> [Vanguard] concluded that *"the strong alignment of executive pay with shareholder returns since 2018 and the benefits the board asserted related to the motivational value for the CEO in preserving the original deal" were enough to justify its [support in 2024].*
> Financial Times, June 13, 2024, *supra*, at 7-8.

The benefit conferred by Musk is unprecedented and was recognized by the market and two of the world's largest money managers as such. Together, the market reaction to both events provides no support for Plaintiff's claim of conferring a corporate benefit.

[14] https://investingintheweb.com/blog/largest-asset-managers/

C. If Musk Could "Eat Plaintiff's Cooking" and Apply the Hindsight *Sugarland* Formula to the 2018 Grant, Musk Would be Owed $60 billion, an Amount that Validates the Market Reaction to the Opinion and the 2024 Ratification Proposal.

If the same hindsight test proffered by Plaintiff for determining the value of his attorneys' claimed benefit was applicable to Musk, the resulting compensation for his services when applying the same 11.0145%-of- benefit requested by the Plaintiff, Musk would have been owed approximately $60 billion. Fee Application at 22; Pomerantz Report at 16. That amount is close to the maximum $56 billion payable under the Stock Grant, offering still further validation of size of the award to Musk.

This comparison is compelling because, like transactions with control persons governed by corporate law, The Delaware Lawyers' Rules of Professional Conduct ("DLRPC") require attorneys' fee agreements to be fair. DLRP Rule 1.5. When courts consider contingent fee payment applications for approval under those bar rules, they must determine the reasonableness of fees charged by looking at an attorney's efforts and results in hindsight.

In the Fee Application, the Plaintiff's attorneys do just that and request fees based on a hindsight test that the Court ruled Board fiduciaries could not use. Opinion, 310 A.3d at 545. The Florida Objectors do not disagree with applying a hindsight test to determine whether value was added by attorneys under a contingent fee contract or common fund basis and suggest the same test could fairly be applied

to Musk for illustration purposes to demonstrate that Plaintiff conferred no benefit to Tesla – only Musk did.

The following summarizes how the *Sugarland* factors could apply to Musk, including the indicated compensation for the benefit he conferred on Tesla accepting arguendo the Plaintiff's proposed 11.0415% factor as also appropriate for Musk:

1. Musk Conferred an Unprecedented Benefit on Tesla.

Of course, the value of the benefit conferred "is the heart of the *Sugarland* analysis." *Seinfeld v. Coker*, 847 A.2d 330, 336 (Del. Ch. 2000). The benefit conferred by Musk is described above and summarized by emphasizing that the value of Tesla during the term of the 2018 Grant (during which time Musk was CEO of Tesla) increased by over 1,400%, an extraordinary benefit conferred on Tesla by Musk. Pomerantz Report at 7.

Thus, the benefit "heart" of *Sugarland* is well established, and the secondary *Sugarland* factors would, if applied, also weigh heavily in favor of substantial compensation for Musk having delivered unprecedented performance benefits.

2. Musk Faced a "Massive Contingency Risk" with the Very Real Possibility of Zero Recovery After Five Years of Effort.

In the grant compensation contract, Musk risked receiving no compensation for services as CEO; like Plaintiff's counsel, "If [Musk] lost, [he] would get nothing." Fee Application at 28. "Thus, [Musk, like Plaintiff claims,] went all-in

on a concentrated bet, where [he] invested a material amount of [] resources to get an outcome." Fee Application at 28, 29 (citations omitted). If applied, this secondary factor would support substantial compensation for Musk.

3. Musk Faced the Complex Matter of Managing Tesla.

Like Plaintiff's attorneys' claims of complexity, managing a $600 billion company on the cutting edge of disruption is also "challenging and complex…". Fee Application at 30. Musk had to "grapple with difficult issues that could have doomed the [company] at [an early] stage." *Id*. Managing a disruptive company in a mature industry "also presented novel and difficult issues." *Id*. at 31. Musk's Efforts Were Substantial and Conferred Extraordinary Benefits on Tesla.

Like the Plaintiff's attorneys' claimed efforts, "[Musk's] efforts were substantial." *Id*. at 32. It is no small thing managing a large, disruptive company like Tesla, just as it may be challenging to manage a significant piece of litigation.

Here, the Plaintiff's attorneys claim their "efforts were substantial," *id*., with each of the 12 lawyers identified in the Opinion spending on average approximately 271 hours per year on this case, including associates and paralegals. *Id*. at 37-38 (data for calculations). In other words, they pursued these claims on a part-time basis, and with only five days of trial and 17 depositions, Fee Application at 7-10, it does not compare with the substantial efforts of the attorneys in the *Enron* litigation. *See, n*. 9, *supra* and related text.

On the other hand, Musk testified to the Court's satisfaction at trial that his efforts were as substantial as his pain threshold would tolerate: "[t]he sheer amount of pain required to achieve that goal, there are no words to express.' This aspect of Musk's testimony was totally credible." Opinion, 310 A.3d at 473-74. Musk's efforts were substantial by any measure, conferred extraordinary benefits, and this secondary factor could, if applicable, support substantial compensation for Musk.

4. Musk's Standing and Ability are Peerless.

a. Musk is Genuinely a Superstar CEO.

Throughout the Fee Application, the Plaintiff's attorneys bestow accolades on themselves and their defense counterparts, and with good reason as they are highly accomplished lawyers. For example:

a. "Facing a steep uphill climb, Plaintiff's Counsel shouldered significant risk in marching forward against *elite defense counsel*…". *Id*. at 29 (emphasis added).

b. "Defendants – at all times represented by *world-class law firms* – fiercely defended…". *Id*. at 30 (emphasis added).

c. "Plaintiff's Counsel [are] … 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." *Id*. at 39 (emphasis added).

d. "Plaintiff's Counsel litigated against an *all-star team* from Cravath…". *Id*. at 40 (emphasis added).

The Florida Objectors readily concede the talent of the Plaintiff's and Defendants' lawyers in this case, and agree they constituted an "*all-star team*." *Id*.

Musk also faced a steep uphill climb, shouldered significant risk in marching forward in the face of adversity, has successfully taken high stakes positions in Tesla corporate matters, and has competed for almost two decades against all-star teams of incumbent automotive manufacturers and technology companies from around the world.

And yet for some reason, Musk's accomplishments – though similar or even identical to those supporting Plaintiff's attorneys' application for a record attorneys' fee despite proving no corporate benefit – are treated by Plaintiff with disdain and disapproval, including discounting his "part-time" contributions.

Just like the "all-star team[s]" of lawyers on the field in this case, however, Musk is an all-star in his own right, a "Superstar CEO" in the dictionary sense of the term, with accomplishments including engineering and building re-useable rockets that can enter and return from outer space (something even NASA, now an important Musk customer, had been unable to do); implanting devices in human brains allowing completely paralyzed quadriplegic persons to once again enjoy the pleasure and thrill of causing movement in objects and better communicating with people; creating Starlink, a global network of satellites allowing the internet to be brought to the entire world where it is changing lives; contributing tens of millions of dollars to help ensure that artificial intelligence will benefit rather than harm mankind; and, of course, designing, engineering, building and scaling electric vehicles with full

self-driving autonomous features with models built and sold around the globe, all contributing toward solving the world's reliance on fossil fuels[15]

> One self-described "small investor in Tesla," Steve Lindenmuth of Union City, California, wrote: "I only invest in Tesla for one reason. That reason was because Elon Musk was the CEO. For years I told people I would invest in Musk if he had stock in himself." [16]

Musk's standing and ability as examined in this secondary factor support substantial compensation for Musk.

b. Like Plaintiff's Attorneys, Musk Is Not Focused Solely on One Matter (or Company), but a Part-Time Focus Has Not Prevented Plaintiff's Attorneys from *Claiming* an "Unprecedented Benefit," Nor Has It Prevented Musk From Actually *Conferring* an Unprecedented Benefit on Tesla.

In the Fee Application, no attorney claims to have spent full-time on this single matter. Indeed, the essence of a trial lawyer's practice is to juggle the conflicting demands of numerous clients and courts simultaneously while zealously representing them all, all the time.

For their part-time effort, attorneys are often well rewarded as well they should be. Despite the similar allocation of capital and resources among many projects by Plaintiff's attorneys and Musk alike, however, only Musk is unfairly

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[15] *See, e.g.*, *Elon Musk's 8 Greatest Accomplishments to Date*, April 29, 2022,
[16] *The Financial Times*, https://www.ft.com/content/70d99ef8-fa1a-4b4f-9f7b-7964f40ee1f8?shareType=nongift

criticized.[17] Respectfully, that results (whether from attorneys or executives) are more important than hours serves as the very foundation of the common fund percentage fee payment sought by the Plaintiff in this case.

Collectively, those *Sugarland* factors demonstrate that Musk is entitled to be well rewarded for his efforts, and especially so given the factors above. Using the Plaintiff's chosen methodology and percentage, Musk could be entitled to compensation for his labor during the term of the 2018 Grant of approximately $60 billion (*i.e.*, multiplying the market capitalization increase under Musk of $544 billion times 11.0145%). Pomerantz Report at 16. Thus, application of this methodology validates Musk's contribution to Tesla and establishes that the only benefit to the company came from Musk.

II. Delaware's Presumption of Attorney Causation and the Market Integrity Presumption Embedded in the Fraud on the Market Theory Establish that Musk, And Not Plaintiff, Conferred a Benefit on Tesla.

Although this Court found that Defendants "…failed to prove that Musk's …

[17] Tesla under Musk is such a desirable place to work that last year, according to legendary investor Ron Baron, Tesla had over 6 million job applications with only 12,000 open positions. https://www.cnbc.com/2024/06/05/ron-baron-big-tesla-shareholder-supports-elon-musks-56-billion-pay-package.html. Baron, one of the largest owners of Tesla stock, also said "Without [Musk's] relentless drive and uncompromising standards, there would be no Tesla. Especially considering how he slept on the floor of Tesla's Fremont factory when the company was going through what he called 'production hell!"

efforts for Tesla were solely or directly responsible for Tesla's recent growth,"[18] numerous presumptions are available under Delaware law in circumstances where, for example, causation or reliance is found to be a natural consequence of market events. In this case, two such presumptions are relevant, and both confirm finding that Musk, and not Plaintiff's attorneys, was responsible for the explosive growth at Tesla as reflected in its market capitalization and stock price.

A. Any Presumption of Causation by Entrepreneurial Attorneys Should Apply Equally to Entrepreneurial CEOs like Musk.

Under Delaware law, there is a presumption of causation of a benefit by entrepreneurial attorneys under certain circumstances:

> …there is ample justification for Delaware law to establish a rebuttable presumption of a causal linkage between the filing of a meritorious shareholder derivative lawsuit and the corporation taking action to moot the claims made therein…

In re Pfizer Inc. S'holder Derivative Litig., 780 F. Supp. 2d at 335.

As the Court found in its Opinion, "Tesla desperately needed Musk…". Opinion, 310 A.3d at 448. The Court further found that Musk had indeed created value (benefit) for Tesla but also found he had been sufficiently compensated for that already. With these findings by the Court of desperate need and Musk's

[18] Opinion, 310 A.3d at 544 (within "The Hindsight Defense"). In addition, the shareholder vote approving the 2024 Ratification Proposal that supports reinstating Musk's compensation under the 2018 Stock Grant is additional evidence that shareholders believe that Musk caused the benefits enjoyed by Tesla during the term of that grant.

conferring a benefit on Tesla, and Musk incentivized as Tesla's CEO under the 2018 Grant to earn a spectacular return on his labor, it is reasonable to find a "presumption of a causal linkage between" Musk's efforts following the 2018 Grant and the obvious corporate benefit of a 1,400% increase in Tesla's market capitalization, and especially so when combined with the presumption of market integrity.

B. The Recognition of Market Integrity Embedded in the Fraud on the Market Theory and Twice Tested (in 2018 and 2024) Establishes a Presumption that Musk, and Not Plaintiff, Conferred a Benefit on Tesla.

A similar presumption is applicable in certain class and derivative litigation in Delaware and other courts, one regularly relied on by Plaintiff's attorneys, *i.e.*, the presumption of reliance that flows from market integrity known as the theory of fraud on the market:

> As explained by the United States Supreme Court in *Basic, Inc. v. Levinson*:[19]
>
> > The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business.... Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements.[20]
>
> The fraud on the market theory is simply a "rebuttable presumption of reliance."[21]
>
> *Alessi v. Beracha*, 849 A.2d 939, 944 (Del. Ch. 2004)(footnotes omitted).

Although the fraud on the market theory appears narrower in Delaware than in federal courts, *see, e.g., Malone v. Brincat*, 722 A.2d 5, 13 (Del. 1998)(declining

to recognize a state common law cause of action against directors for "fraud on the market."), "statements made to shareholders in conjunction with a request for shareholder action" may still result in application of the fraud on the market presumption of reliance that flows from recognition of market integrity. *Id.* Such a presumption rests entirely on courts' findings that an "open and developed securities market," *id*., allows individual investors to benefit from market movement by not required to provide individual proof but to instead rely on the integrity of the market itself.

In this case, the market's positive move throughout Musk's service as CEO during the term of the 2018 Stock Grant should carry with it a presumption that the market valued Musk's contributions to Tesla as a benefit, leading to the further conclusion that Musk – not Plaintiff – caused Tesla's 1,400% increase in value during its term. The Florida Objectors acknowledge, however, that this Court found that Defendants had not proven at trial that Musk caused this increase in market value:

> "Tesla thrived *because of* the 2018 Plan." With this argument, Defendants ask the court to infer a direct causal relationship between the Grant and Tesla's subsequent performance. But Defendants failed to prove that Musk's less-than-full time efforts for Tesla were solely or directly responsible for Tesla's recent growth, or that the Grant was solely or directly responsible for Musk's efforts. This last argument is empty rhetoric, not evidence of fair price.
>
> Opinion, 310 A.3d at 544.

The Defendants apparently asked the Court to infer a direct causal relationship between events, but it does not appear that the Court considered applying a presumption of market integrity that may provide the proof necessary to find the causal connection the Court found unproven. In any event, the Florida Objectors offer this argument not to revisit what the Court has already decided, but to support a finding that Musk caused or was otherwise responsible for Tesla's increase in market value.

C. The Recognition of Market Integrity Embedded in the Fraud on the Market Theory Also Establishes that Plaintiff Conferred No Benefit on Tesla and Plaintiff's Attorneys are Therefore Entitled to No Fee.

While the presumption afforded by the fraud on the market theory of market integrity supports a finding that Musk caused Tesla to enjoy a material benefit following the 2018 Grant, it similarly supports a finding that the Plaintiff created no benefit for Tesla. In both instances, the market reaction to each undertaking is the proof giving rise to the presumption: in the case of Musk, the market skyrocketed during the term of the 2018 Grant, while in the case of the Plaintiff, the market declined by almost 5% when by Plaintiff's calculations it should have risen by 7.7% (Bebchuk and Jackson Declaration ¶ 51), or a delta of almost 13%.

In this case, the market's negative move following publication of the statements in the Opinion should carry with it a presumption that the market valued the Plaintiff's "success" as set forth in the Opinion as a detriment to, and not a

benefit, for Tesla and its valuation. As it is axiomatic that both Plaintiff and Musk cannot take or receive credit for having conferred the same benefit, Plaintiff can receive no credit here.

There is no principled reason not to apply these presumptions to Musk's CEO efforts after the making of the 2018 Grant and to the market reaction to news of the Plaintiff's "success" in this case – three times. Therefore, the Court should find that Musk's efforts caused the increased market value of Tesla during the term of the 2018 Grant as reflected by the market's 1,400% increase in value, that the Plaintiff played no role in causing such benefit.

III. This Court's Finding that Musk Created Value for Tesla Further Rebuts Plaintiff's Claimed Benefit Creation Even As That Finding Conflates *Return on Capital* With *Return on Labor*.

As discussed above, this Court found that Musk's efforts caused benefits to Tesla (despite also finding that Defendants offered no such proof). This Court also found, however, that Musk was adequately compensated for conferring those benefits on Tesla because, as a major shareholder, the value of his shares increased as a result of his efforts [19] as did the value of all other shareholders as Tesla's market

[19] *E.g.*, Opinion, 310 A.3d at 542-43 ("… Musk is already earning more than the 20% a hedge fund would earn …" recognizing that Musk is "earning," *i.e.*, contributing a benefit to Tesla for which he was compensated by virtue of his stock holdings. "Earning" is defined as "something (such as wages) earned" and "earned" is defined as "to receive for effort and especially for work done or services rendered." Merriam-Webster, https://www.merriam-webster.com/thesaurus/earned.

capitalization increased overall. This finding by the Court that Musk created value rebuts any claim by the Plaintiff that he conferred a benefit on Tesla, and that conclusion is buttressed by understanding the conflating of Musk's returns on labor with his returns on capital.

A. This Court Found that Musk's Efforts as Tesla's CEO Conferred Benefit on Tesla and, Like the Foregoing Presumptions Benefitting Musk, that Finding Rebuts a Finding that Plaintiff Conferred Any Benefit on Tesla.

As noted above, it is axiomatic that both Plaintiff and Musk cannot claim or receive benefit for causing Tesla's increase in value of 1,400%. Although somewhat obscured by the Court's ultimate holding in this case, the Court does find that Musk conferred a benefit on Tesla, *id.*, but the Court declines to give him credit for doing so in the context of the 2018 Grant because he had already been "paid extremely well:"

a. "Musk worked hard toward these [2012 Grant] goals. And he was paid extremely well. In the end, the value of Musk's holdings increased from approximately $981 million to $13 billion, meaning that Musk ultimately received approximately 52x the 2012 Grant's grant date fair value." Opinion, 310 A.3d at 454.

b. "Musk already is earning more than the 20% a hedge fund would earn as a typical carried interest." Opinion, 310 A.3d 544.

c. "The defendants proved that Musk was uniquely motivated by ambitious goals and that Tesla desperately needed Musk to succeed in its next stage of development but these facts do not justify the largest compensation plan in the history of public markets." Opinion, 310 A.3d at 448.

The importance of these findings is that they establish that Musk, not Plaintiff,

conferred a benefit on Tesla. Moreover, since Musk created this value after Plaintiff filed his complaint in this case, if the Plaintiff's attorneys are awarded any fee, it must be based on the claimed benefit to Tesla at the time this case was filed in 2018.

As noted, the Court found that Musk had conferred a benefit on Tesla. As a result of this Court's conflating a "return on capital" with a "return on labor," the Court also found that Musk was well paid for having conferred such benefit. After unwinding those conflated terms, however, it is even more obvious that Plaintiff conferred no benefit on Tesla for which he or his attorneys should be compensated, while at the same time it becomes obvious that Musk would have received no return on his labor that resulted in conferring a benefit on Tesla had he not successfully achieved the goals set forth in the 2018 Grant (and with rescission of that grant, Musk may never be paid for those services).

Financial returns on capital refers to the profits or income generated from investments in assets such as stocks, bonds, or real estate. These returns can take various forms, such as dividends and capital gains. The fundamental characteristic of returns on capital is that they are derived from the deployment of financial resources, rather than from direct labor or services. *See, generally,* https://chrismercer.net/understanding-return-on-labor-vs-return-on-capital-the-two-small-business-owners/

Financial returns on labor, on the other hand, pertain to the income "earned"

by individuals such as Musk through the provision of their labor or services such as wages, salaries, and bonuses. Unlike returns on capital, returns on labor are directly tied to the individual's effort, skills, and time spent working. *Id*. Here, Musk has been paid nothing for his labor during the term of the 2018 Grant.

Returns on labor are governed by employment laws and regulations while returns on capital are not. These different forms of returns are also taxed differently, with returns on labor generally taxed at ordinary income rates and returns on capital generally taxed at capital gains rates. *Id*. Here, Musk had no earned income from Tesla during the term of the 2018 Grant.

In finding that Musk has been well compensated for his efforts of *labor* by virtue of his *ownership of stock* in Tesla, the Court blurs the differences between returns on capital and returns on labor. In fact, Musk's rate of return on capital (*i.e*., his return on his Tesla stock holdings) is exactly the same as any other shareholder's rate of return on capital, including those of the Plaintiff and the Florida Objectors, so Musk's return on capital is irrelevant, and adds nothing to, his zero return on labor.

On the other hand, neither Plaintiff nor the Florida Objectors (based on information and belief) ever earned any return on labor by virtue of employment with Tesla. Clearly Musk was an employee (CEO) of Tesla, and as a result of the Court's rescission of the 2018 Grant, Musk has been paid nothing for his labor

services as CEO. Accordingly, only Musk may claim entitlement to payment for his rendering of services (a benefit) to Tesla - not Plaintiff, and not Plaintiff's attorneys.[20]

B. Another Method of Validating the Existence and Value of the Benefits that Musk Conferred on Tesla as its CEO, and Invalidating any Claim of Benefit by Plaintiff, is by Comparison to Other Capital Allocators' Compensation.

The Florida Objectors acknowledge that the Court considered and rejected evidence proffered by the Defendants regarding its "Private-Equity Analogy" and finding that "Musk already is earning more than the 20% a hedge fund would earn as a typical carried interest." Opinion, 310 A.3d 542-43. Respectfully, to establish size context and validate the benefit created by Musk and not by Plaintiff, and not to dispute here the findings of the Court, the Florida Objectors offer what the Court found the Defendants did not, *i.e.*, "theoretical justification for comparing the Grant to [other] compensation structures…". Opinion, 310 A.3d at 542.

There are theoretical and practical justifications for comparing the Grant to other compensation structures. It appears that the sheer size of award to Musk in the 2018 Grant drove the Court's findings that process was flawed, *i.e.*, awarding an

[20] Although beyond the scope of relief sought with this objection, the Florida Objectors question how Musk, as a party to the rescinded 2018 Grant, can be restored to his *status quo ante* since he has never been paid for his labor and he has fully performed under that contract.

"unfathomable sum"[21] to the "richest man in the world" could only have come from a flawed process and not independent arms' length negotiations.[22] In context, however, the amount of that award is comparable and even conservative once the respective responsibilities of CEOs and other capital allocators are understood, and the "price" of the award becomes entirely fair.

This comparison also explains the favorable market reaction to Tesla's performance under Musk during the term of the 2018 Grant (1,400% increase in market capitalization) and, conversely, the negative market reaction to the Plaintiff's

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[21] Opinion, 310 A.3d at 538 (but note the "unfathomable" sum owed to Musk was uncertain in 2018, and is equally uncertain in 2024 since no shares may be sold prior 2028; thus, the gain potential (and accompanying loss potential) continues to have a "golden handcuff" effect on Musk through 2028 for the benefit of Tesla and its owners.

[22] Compare the standard for imposing liability on mutual fund investment advisors' alleged breach of fiduciary duty in connection with the payment or receipt of compensation for services: "[W]e conclude that *Gartenberg* was correct in its basic formulation of what § 36(b) requires: to face liability under § 36(b), an investment adviser must charge a fee that is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's length bargaining." *Jones v. Harris Assocs. L.P.,* 559 U.S. 335, 345-46, (2010). If that standard applied in this case (it does not literally apply but is analogous as an analysis of the fiduciary duty associated with payments), there would be deference to the Board's decision with respect to the 2018 Grant unless that grant "could not have been the product of arm's length bargaining." *Id*. That grant was negotiated once in 2018, and ratified by the 2024 Ratification Proposal during the June 13, 2024 Shareholder Meeting. By their vote, the shareholders approved the 2018 Grant compensation plan once again after full disclosure that reportedly included the Opinion, all of which implies that the grant could have been and was the product of arm's length bargaining under the standard applicable in *Jones v. Harris Assocs. L.P., id*.

"success" (a decrease in market capitalization) following this Court's rescission of the 2018 Grant in its entirety. The same market reaction (favorable to Musk and unfavorable to the Plaintiff) was repeated in June 2024 in the lead-up and aftermath of shareholder approval of the Ratification Proposal supporting Musk's compensation. Pomerantz Supplement at 3-5. Clearly the market established that Musk's contributions created value while those of the Plaintiff did not, and specifically with reference to the Fee Application, it established the reasonableness of the amount of the award to Musk.

1. Capital Allocation by CEOs (including Musk) and Other Professionals.

Elon Musk's most important responsibility as CEO of Tesla is the proper allocation of capital:

> Even though capital allocation is the most important responsibility of the chief executive officer (CEO), not all know how to do it well.
>
> *Capital Allocation Results, Analysis, and Assessment,* Morgan Stanley Investment Management, December 15, 2022 (emphasis added) (https://www.morganstanley.com/im/publication/insights/articles/article_capitalallocation.pdf)

It may be true that "not all CEOs know how to do it well," but one cannot say that about Elon Musk when objectively looking at the results of his performance as CEO of Tesla. Effective capital allocation is pivotal in maximizing shareholder value, ensuring sustainable growth, managing risks, and maintaining Tesla's competitive edge in the electric vehicle, artificial intelligence and autonomous

driving, and renewable energy markets.

For example, allocating capital to (investing in) in vertical integration and supply chain management (such as Musk's decision to allocate capital to support development of Gigafactories) enhances operational efficiency, reduces production costs, and improves product quality, leading to increased profitability and shareholder value. Allocating capital to new markets and product lines, such as Musk's allocation to solar energy and energy storage solutions, diversified Tesla's revenue streams and reduced dependency on a single market.

By way of comparison, well known professional investors like Bill Ackman and Warren Buffett are also capital allocators, allocating capital across a diverse portfolio of companies. Unlike Musk, Ackman's and Buffett's decisions are more about where to allocate capital externally rather than internally within a single enterprise:

> Warren Buffett, chairman and CEO of Berkshire Hathaway, the multinational conglomerate, gets to the point: "Once they become CEOs, they face new responsibilities. They now must make capital allocation decisions, a critical job that they may have never tackled and that is not easily mastered."
>
> *Capital Allocation Results, Analysis, and Assessment, supra* p. 32, at 1.

Ackman, CEO of Pershing Square Capital Management, focuses on identifying undervalued companies with potential for significant improvement. His approach has historically involved active engagement with management to influence

hard strategic decision-making and improve capital allocation[23] within the target company.

Buffett, through Berkshire Hathaway, allocates capital by acquiring entire businesses or significant stakes in companies with strong fundamentals and long-term growth potential. His strategy emphasizes buying entire businesses with strong management teams and solid competitive advantages, allowing them to operate relatively independently while benefiting from Berkshire's capital support.

Compensation for CEOs and other capital allocators such as Ackman and Buffett reflects the success of those allocation decisions. Of course, between 2018 and 2023, Elon Musk agreed to compensation based solely on his performance of the entire business of Tesla. Similarly, Bill Ackman's compensation as a hedge fund manager through Pershing Square Capital Management combines management fees and performance fees. Typically, hedge fund managers like Ackman earn a management fee of around 2% of assets under management (AUM) and a performance fee of about 20% of profits. Opinion, 310 A.3d at 542-43.

For these reasons, the comparison of Musk with other capital allocators makes theoretical and practical sense, and again underscores the contribution of Musk from his labor and services as CEO of Tesla.

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[23] *Capital allocation, Mother stork throws out immature baby to increase survival chances of other babies*, Bill Ackman, X, March 29, 2023 (https://x.com/BillAckman/status/1641529349118500865?lang=en)

2. Comparison of Market Compensation for the Capital Allocation Skills of CEOs (including Musk) with Other Capital Allocators.

Other professionals are also compensated for their labor in methods and amounts similar to Musk, and comparison with them validates and makes fathomable the amount of compensation payable to Musk pursuant to the 2018 Grant.

a. Attorneys.

As discussed previously, if Musk had been compensated in the same fashion as Plaintiff's attorneys seek in this case, he would have earned approximately $60 billion for his labor and services. Successful attorneys are excellent allocators of time, and time is their inventory such that their allocation of time is their allocation of capital.

b. Registered Investment Advisors and Managers of Mutual Funds (Investment Companies).

Registered investment advisors and managers of mutual funds (investment companies) are compensated for their labor and services with widely varying arrangements, but a common arrangement for a registered investment advisor is to charge a fee equal to 1% of the assets under management.[24] If such a fee schedule

[24] https://www.investopedia.com/articles/personal-finance/071415/how-cut-financial-advisor-expenses.asp#:~:text=%222019%20RIA%20Industry%20Study%3A%20Total,Average%20Fee%20is%201.17%25.%22.

applied to Musk for managing the entire company, with an average market capitalization or assets under management equivalence of $512 billion,[25] the fee payable to Musk during the term of the 2018 grant would equal approximately $31 billion (for capital allocation services alone).

c. Private Partnership (Hedge Fund) Managers

As the Court found, Opinion, 310 A.3d at 542-43, a typical hedge fund pays its manager a percentage of assets under management, typically between 1% and 2% per year, and an additional payment (typically 20%) in the form of a carried interest that serves to align the manager's long-term interest with that of investors. With this compensation structure, "a fund who would manage Tesla's assets" would pay its manager a fee of approximately $202 billion during the term of the 2018 Grant. Pomerantz Report at 11-12. Once again, the playing field for comparable pay for services validates the compensation payable to Musk pursue it to the 2018 Grant.

IV. Other Domestic Car Manufacturers Without Compensation Plans Comparable to Tesla's Experienced Little or No Growth During the Term of the 2018 Grant.

As the Court recognized, the goals in the 2018 Grant were, to say the least, ambitious:

To put Musk's proposal in perspective, each market capitalization

[25] *I.e.*, $57 billion in 2018, $1 trillion plus in 2021, $544 billion in 2024 for an average between 2018 and 2024 of $512 billion. Source: Morningstar. This demonstrates roughly equivalent compensation levels and establishes a contextual playing field of large numbers.

> milestone increase of $50 billion required Tesla to grow in size roughly equal to the market capitalizations of each of Tesla, Ford, and GM as of early 2018. So, Tesla would have to grow an amount in market capitalization equal to that of the most significant domestic car manufacturers for Musk to earn a single tranche of compensation. Musk viewed this proposal as "really crazy."
>
> Opinion, 310 A.3d at 460-461.

After an online search of SEC/Edgar and business databases, it appears that no other domestic car manufacturer entered into CEO compensation agreements similar to that Tesla entered into with Musk. One could speculate that the stock performance of those other car manufacturers may have been dramatically improved with different incentives for their executives, including their CEO, but it is not speculation to observe the reported under-performance of General Motors ("GM"), one of Tesla's competitors referenced in the Opinion, relative to Tesla.

The current CEO of General Motors, Mary Barra, was hired in January 2014. At that time, GM had a market capitalization of approximately $61 billion, almost the same as Tesla's when it entered into the 2018 Grant with Musk, and approximately $58 billion in January 2018.[26] The market capitalization of GM today is still about the same, about $55 billion, or approximately $6 billion less after 10 years of leadership by Ms. Barra. *Id*.

Ms. Barra has been paid an annual salary and bonus compensation since she

[26] https://companiesmarketcap.com/general-motors/marketcap/

was hired. In 2020, she was paid a salary (excluding bonus and stock options) of approximately $40 million. *Id*. During that same year, Musk was paid nothing as a base salary, *id,* and although again informed speculation, it is reasonable to think that the shareholders of GM would have been pleased to have paid Ms. Barra 10% of all market capitalization appreciation occurring on her watch as an incentive to produce more of it. Of course, that would amount to zero based on her actual performance, but history may have been different with better incentives and capital allocation.

This is not to criticize Mary Barra. In comparing the performance of Elon Musk's and Mary Barra's respective companies under their leadership, however, it is objectively certain that Tesla shareholders enjoyed dramatically superior returns compared with those of GM. GM shareholders would have been thrilled if their CEO had been incentivized in the same way as Musk and those GM shareholders had experienced a 1,400% return on their GM stock investment. With the market capitalization of both companies roughly equal at the beginning of the 2018 Grant, Ms. Barra would have been in approximately the same position as Mr. Musk in 2023 and would be the beneficiary of up to $55.8 billion from such performance. While hypothetical, the possibility underscores the reasonableness and fairness of the significant benefit that Musk conferred on Tesla, a benefit the Plaintiff cannot rightfully claim as his own.

Another valid comparison would be with technology companies given that Tesla is as much a tech company as an auto manufacturer even though there is no mention of that in the Opinion. For example, the value of Nvidia CEO Jensen Huang's reported Nvidia stock holdings significantly increased over the past five years, from approximately $3 billion to about $90 billion, or *approximately $86 billion*, $30 billion more than the maximum available to Musk under the 2018 Grant. *See*, *Nvidia CEO Jensen Huang's net worth swells from $3 billion to $90 billion in Five Years*, Kif Leswing, CNBC, May 24, 2024. Despite searching, there appear to be no available reports indicating any material purchases by Mr. Huang in the open market, thus, his shares appear to have been acquired as payment for his labor (services) as CEO (the same position held by Musk at Tesla) resulting from the phenomenal price performance of his employer's stock during the term of the 2018 Grant. According to data retrieved from Investing.com, the price of Nvidia Corporation (NVDA) stock increased from approximately $56.38 in January 2018 to $406.68 in December 2023, representing an increase of about $350.30 per share, or approximately 621%. Source: Investing.com, Nvidia Historical Price Data, and corroborated by data from Nasdaq (Nasdaq, Nvidia Corporation Common Stock Historical Data).

V. Even if the Court Finds that Plaintiff Conferred a Benefit on Tesla, Its Value Must be Determined as of the Date of Filing His Complaint in 2018.

Although the Florida Objectors do not believe that the Plaintiff conferred any benefit on Tesla, and caused only harm, in the event this Court disagrees and finds that the Plaintiff conferred a benefit, the value of that benefit must be determined as of the date of filing the complaint in 2018:

> On appeal, this Court, in affirming the award of counsel fees, noted that *the claimed benefit to the corporation was to be measured at the time of the filing of the action* even though the suit was mooted by a later event, a corporate merger, which arguably produced the benefit independent of the litigation. *Allied Artists Pictures Corp. v. Baron,* 413 A.2d at 878-79. *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1165 (Del. 1989) (emphasis added).

In line with the Delaware Supreme Court's requirement that "the claimed benefit to the corporation was to be measured at the time of the filing of the action," *id*., that means in this case that the Plaintiff's claimed benefit can be no greater than the benefit at the time of filing in 2018. In turn, that claimed benefit can be no more than $2.3 billion, the Grant Date Fair Value, but Defendant's proof will likely result in further discounts and this Court may ultimately determine that any award should be based solely on quantum meruit. Finally, in light of the approval of the 2024 Ratification Proposal, the Court may find that the claimed benefit even when determined as of the time of filing Plaintiff's complaint was and is zero.

This is logical and fair as the Plaintiff should not get the benefit of the

remarkable outperformance of Tesla under Musk's leadership with which he and his attorneys played no role. By considering the amount of any fees payable by reference solely to the time of Plaintiff's filing his complaint, this Court's finding that the 2018 Grant is to be rescinded would not be affected, and, unless this Court or an appellate court changes the current status, Musk would still lose all benefits under that grant even though the value of Tesla rose more than ten-fold during that time (even more than Nvidia).

In addition, the Plaintiff's attorneys would still be able to argue that they are entitled to an *enormous* fee (to which the Florida Objectors still object). Using the 11.0145% that Plaintiff has proposed, an attorneys' fee of up to more than one-quarter of a billion dollars, or $251,569,883 could be sought. (*i.e.*, 11.0145% x $2.3 billion = $251,569,883). This is a very generous multiple of 18.5 times Plaintiff's attorneys' lodestar of $13,624,463 (assuming that lodestar withstands the scrutiny of this Court following discovery in connection with Plaintiff's attorneys proffered evidence).

VI. Any In-Kind (Stock) Fee Payable to Plaintiff, Especially In Light of His Desire that his Attorneys "Eat Their Cooking," Must be Restricted With Sale of Stock Prohibited until 2028.

Although the Plaintiff claims to want to eat his own cooking, he makes a telling exception when it comes to holding the shares he seeks as payment for his attorneys until 2028 as Musk had agreed. Fee Application at 11. It is easy to

understand why he is unwilling to take the same risk Musk agreed to take, given that no one can guess what the value of those shares will be almost 5 years from today. This was a key ingredient in the 2018 Grant recipe, however, that should not be disregarded by this Court if it finds an award of fees in-kind is appropriate.

Accordingly, the Florida Objectors ask this court, in the event it awards any attorneys' fee at all, to order the Plaintiff's attorneys to stand by their commitment to "eat their cooking" and receive restricted securities that cannot be sold for five years after issuance. Although it is likely they will be required to pay income tax on those shares in the year received, and there is no certainty regarding the value of those shares five years on, that is an appropriate level of risk for Plaintiff's entrepreneurial risk-taking attorneys to assume, given that their business model forces them to be comfortable with the possibility of zero recovery at the commencement of this action and others like it. *Id.*

CONCLUSION

The Plaintiff has conferred no benefit on Tesla. In the absence of any benefit, the Plaintiff's Fee Application must be denied.

Dated: June 17, 2024

Respectfully submitted,

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