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Case No. 2018-0408-KSJM

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF NOMINAL DEFENDANT

WHITEFORD, TAYLOR & PRESTON LLC

Daniel A. Griffith (#4209)
600 North King Street
Wilmington, DE 19801
(302) 357-3254

Attorneys for Amicus Curiae
Chamber of Commerce of the United States of America

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

In recent decades the Chamber's members have been the targets of abusive stockholder litigation driven by a rent-seeking plaintiffs' bar. And "[b]y awarding fees in those cases, the court may well have contributed to the harm that they caused."[1] Rejecting this fee request—which seeks an "unprecedented" fee award that exceeds the market capitalization of most of the Chamber's members—will discourage further abuses.[2]

A multi-billion dollar fee request shocks the conscience. It goes far beyond the "reasonable" attorneys' fee that Chancery Court Rule 23.1 authorizes,

[1] *In re Dell Techs. Inc. Class V S'holders Litig.*, 300 A.3d 679, 686 (Del. Ch. 2023). All internal citations, quotations, and alterations are omitted unless otherwise noted.

[2] *See* Plaintiff's Opening Brief ("Open. Br.") at 3, 38 n.127.

contravenes the public policy underlying the common fund and corporate benefit doctrines, and constitutes a windfall under a quantum meruit approach. It also invites increased agency costs. Unnecessarily large fee awards distort the incentives of the plaintiffs' bar, encouraging more lawyers to bring ever more frivolous lawsuits against large corporations in pursuit of the proverbial pot of gold. That will mean more unmeritorious cases burdening litigants and the judiciary, the potential loss of meaningful settlements, and more opportunities for lawyers to divert earnings from corporations and stockholders to their own pockets.

Delaware law does not compel this result. Nor would this result be just for Delaware corporations and their stockholders. It is critical to the Chamber's members that the Court avoid setting a dangerous precedent by awarding any fee approaching the Plaintiff's request. Instead, the Court should take this opportunity to return to first principles and award a fee "that produces appropriate incentives without a significant risk of producing socially unwholesome windfalls."[3]

[3] *Seinfeld v. Coker*, 847 A.2d 330, 334 (Del. Ch. 2000).

SUMMARY OF ARGUMENT

This brief addresses a fundamental question for the Court: how much is too much? Put another way, is a multi-billion dollar fee award consistent with Delaware Chancery Court Rule 23.1, the public policy underlying fee awards, and the Court's historic and ongoing mission to do equity? The Chamber respectfully submits that the answer is no.

This case concerns the executive compensation plan of Elon Musk, the CEO of Tesla, Inc. Tesla, the nominal defendant and purported beneficiary of this derivative action, has revolutionized the electric vehicle industry and generated massive wealth for its stockholders. But Plaintiff's counsel, representing an individual holding nine shares of Tesla stock, brought this action to rescind that compensation plan. Following a trial, the Court ordered the rescission of the compensation plan as requested.[4]

Now Plaintiffs' counsel seek the largest fee award in this Court's history. The Court previously characterized the "task of proving the fairness of the largest potential compensation plan in the history of public markets" as "unenviable,"[5] but the task of deciding whether Plaintiff's counsel should receive the largest fee award

[4] *See Tornetta v. Musk*, 310 A.3d 430, 448 (Del. Ch. 2024) (the "Post-Trial Opinion"). This brief focuses solely on Plaintiff's fee application, and does not address the parties' underlying claims and defenses.

[5] *Id.* at 446.

in Delaware history is unenviable too. The requested fee award—29.4 million shares of Tesla stock worth approximately $5.95 billion when the application was filed (the "Fee Request")—is approximately 20 times larger than the largest fees awarded in this Court's history, which were in *Americas Mining Corporation v. Theriault* and *In re Dell Technologies Inc. Class V Stockholders Litigation*. And the lodestar cross-check—by Plaintiff's own calculation, an implied hourly rate of $288,888 and a lodestar multiple of approximately 413.47x—is not even remotely close to those record-shattering precedents.

This Court must apply the five *Sugarland* factors to determine the fee award.[6] Although *Sugarland* places the greatest weight on the "benefit achieved" for the corporation, those factors are a means to an end: "an equitable award of attorney fees."[7] And the Court retains the discretion to reduce the percentage of the benefit or to impose a cap to achieve an equitable result.[8]

To reach an equitable result, the Court must consider the purposes underlying the common fund and corporate benefit doctrines. At bottom, these doctrines ensure that representative plaintiffs recover the fees incurred in bringing the litigation.[9] Beyond that, the Court seeks to provide an "incentive for shareholders to bring

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[6] *See Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142 (Del. 1980).

[7] *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1254 (Del. 2012).

[8] *Id.* at 1258; *Goodrich v. E.F. Hutton Grp., Inc.*, 681 A.2d 1039, 1048, 1050 (Del. 1996); *Sugarland*, 420 A.2d at 150.

[9] *Ams. Mining*, 51 A.3d at 1253.

meritorious lawsuits that challenge alleged wrongdoing and . . . litigate such lawsuits efficiently."[10] "But a point exists at which these incentives are produced, and anything above that point is a windfall . . . . serving no other purpose than to siphon money away from stockholders and into the hands of their agents."[11] Massive fee awards that are untethered from these basic principles risk encouraging abusive litigation.

The sheer magnitude and unprecedented nature of the Fee Request also raises the question whether the Court should impose, for future cases, additional protections for corporations and stockholders—the purported beneficiaries of representative litigation—that were not present in this case. Class and derivative counsel face an inherent and fundamental conflict of interest when it comes to fees, and all the more so when millions (or billions) of dollars are at stake. To be a "fair and adequate" representative under Chancery Court Rule 23.1, a representative plaintiff must be able to fulfill her fiduciary duties and ensure that counsel is not obtaining a greater fee award than is necessary. And because stockholder plaintiffs are often unable to monitor counsel effectively, the Court should also consider increased transparency for fee arrangements at the outset of a case, a step that might curb unnecessarily large fee requests later.

[10] *Seinfeld*, 847 A.2d at 333.
[11] *Id.* at 334.

ARGUMENT

I. The Fee Request is neither reasonable nor equitable.

Chancery Court Rule 23.1 authorizes the Court to "award *reasonable* attorney's fees and expenses to derivative counsel."[12] This authority is rooted in "the historic power of the Court of Chancery to do equity in particular situations."[13] And while the "determination of any attorney fee award is a matter within the sound judicial discretion of the Court of Chancery,"[14] the Court must exercise that discretion to fashion an award that "produces appropriate incentives" without "producing socially unwholesome windfalls."[15]

The Fee Request is precisely the sort of "socially unwholesome windfall" against which the Court must vigilantly guard. Plaintiff's counsel seeks an award consisting of "29,402,900 shares of freely tradeable Tesla common stock."[16] By

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[12] Del. Ch. Ct. R. 23.1(e)(1) (emphasis added); *see also* Del. R. Prof. Conduct 1.5(a) ("A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."); *Ams. Mining*, 51 A.3d at 1252–53; *Sugarland*, 420 A.2d at 153.

[13] *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1166 (Del. 1989).

[14] *Ams. Mining*, 51 A.3d at 1255.

[15] *Seinfeld*, 847 A.2d at 334.

[16] Open. Br. at 11–12. This brief focuses primarily on the amount of the Fee Request. Requests to be paid in stock, however, may raise novel and challenging issues which are outside the scope of this brief, including the implications of a plaintiffs' firm holding a substantial position in a public company and the potential for market disruption if the shares were sold in large blocks. Here, for example, if counsel's stake was liquidated in a single day, it could significantly disrupt the market given Tesla's average volume of 92 million shares. *See* Tesla, Inc., Common Stock (TSLA) Institutional Holdings, NASDAQ, https://tinyurl.com/28sdhz99.

Plaintiff's own admission, the Fee Request is "unprecedented."[17] If counsel chooses to hold this stock, they would instantly be one of Tesla's largest stockholders, holding more stock than many institutional stockholders hold on behalf of individuals through retirement and brokerage accounts.[18] If liquidated, based on the closing price of Tesla stock on March 1, 2024, the date Plaintiff filed his fee application ($202.64 per share), the award would be worth approximately $5.95 billion—an amount exceeding the value of numerous transactions prominently litigated in this Court, and over four times Delaware's 2023 franchise tax revenue.[19] Put another way, the Fee Request exceeds the reported net worth of any Delaware resident by a factor of greater than five.[20] In terms of law firm performance, Plaintiff's counsel would rank second in the Am Law 100 based on gross revenue if the Fee Request is granted.[21]

Most salient to this Court's analysis, though, is the scope of this Fee Request in comparison to any other it has considered. Even if the Court grants a fraction of

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[17] Open. Br. at 3, 38 n.127.

[18] *See* Tesla, Inc., Common Stock (TSLA) Institutional Holdings, NASDAQ, https://tinyurl.com/28sdhz99.

[19] *See* Governor's Recommended Budget Fiscal Year 2025: Governor's Budget Financial Summary and Charts, State of Delaware Office of the Governor, https://budget.delaware.gov/budget/fy2025/index.shtml.

[20] Delaware News Journal, *A List of 9 Wealthiest Delawareans Features Familiar Faces*, https://tinyurl.com/y74dyaha (identifying the net worth of the wealthiest state resident as $900 million).

[21] The American Lawyer, *The 2024 AmLaw 100: Ranked by Gross Revenue* (Apr. 16, 2024), https://tinyurl.com/33853748.

the Fee Request, the award would easily be the largest in Delaware history. The Fee Request represents an 18-fold increase over the fees awarded in *Americas Mining* and *Dell* (now on appeal), themselves record-shattering precedents set over the last decade, and both of which produced a common fund from which the fees were awarded.[22] But that too understates the scale of the ask. The Fee Request is an order of magnitude greater than the fees awarded in the litigation surrounding the collapse of Enron and the Deepwater Horizon disaster.[23] The only fee awards in the same stratosphere appear to be those arising out of heavily litigated consumer class actions in nationwide tobacco and opioid litigation, each of which represent the total fees awarded across many lawsuits.[24] Those cases are a far cry from an executive compensation dispute.

Plaintiff's counsel invoke the first *Sugarland* factor (the results achieved) to justify the request, claiming that the benefit achieved at trial was "massive," so counsel is entitled to a percentage-based award of up to 33% of the value of Musk's

[22] *Ams. Mining Corp.*, 51 A.3d at 1263 (affirming award of $304 million in fees); *Dell*, 300 A.3d at 686–87, 735 (awarding fees of $266.7 million).

[23] *See In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on Apr. 20, 2010*, 2016 WL 6215974 (E.D. La. Oct. 25, 2016) (awarding approximately $600 million in fees); *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 586 F. Supp. 2d 732 (S.D. Tex. 2008) (awarding $688 million in fees).

[24] *See, e.g., Brown & Williamson Tobacco Corp. v. Chesley*, 7 A.D.3d 368, 374 (N.Y. App. Div. 1st Dep't 2004); *In re: Nat'l Prescription Opiate Litig.*, MDL 2804, Case No. 1:17-md-2804 (N.D. Ohio Aug. 6, 2021), Dkt. 3814 at 2.

entire compensation package.[25] The existence and size of the benefit conferred undoubtedly will be contested, and is likely not quantifiable.[26] But the value of the benefit conferred is plainly not the entire value of Musk's compensation, which is certain to be revisited. Indeed, it is possible that no benefit (or even a net harm) accrues to stockholders as a result of this litigation if the fee awarded to counsel exceeds the difference between the invalidated compensation package and the compensation he eventually receives, the sum of which is yet unknown.[27] But, even accepting Plaintiff's assertions of value, Plaintiff's counsel is not entitled to *this* massive a fee award.

Sugarland established factors, not a formula. Although the benefit achieved is assigned "the greatest weight," the Court must still "consider and weigh" the other factors too, including "the time and effort of counsel" and "any contingency factor."[28] And the Court must bear in mind the ultimate goal: to "do equity" by

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[25] *See* Open. Br. at 3, 13.

[26] *See La. State Emps.' Ret. Sys. v. Citrix Sys., Inc.*, 2001 WL 1131364, at *9 (Del. Ch. Sept. 19, 2001) (awarding fees based on a quantum meruit approach when the benefit conferred by unwinding an executive compensation plan was not quantifiable).

[27] *See* Nominal Defendant Tesla, Inc.'s Answering Brief in Opposition to Plaintiff's Counsel's Request for an Award of Attorneys' Fees and Expenses at 18–42. The Chamber leaves it to the parties to litigate whether and to what extent a benefit was conferred.

[28] *Ams. Mining*, 51 A.3d at 1254.

making "an independent determination of reasonableness."[29] That is why the process of determining a fee "is necessarily fact-specific and case-specific."[30] Plaintiff's overreliance on the purported size of the benefit achieved and historical percentages assigned to cases taken to trial is precisely the sort of "mechanical" approach that Delaware's Supreme Court has repeatedly rejected.[31]

Delaware law provides the Court with multiple tools to craft an award that is both reasonable and equitable in this case.

First, even if this case implicates the common fund doctrine, Plaintiff admits that an hourly cross-check "is still part of the *Sugarland* paradigm."[32] Although the Supreme Court has rejected a mechanical use of the lodestar method,[33] that does not mean that consideration of the hours expended has "little to no usefulness."[34] Rather, this Court has continued to use counsel's time and effort expended as a "cross-check on the reasonableness of a fee award"[35] because failure to consider whether "the

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[29] *Goodrich*, 681 A.2d at 1046; *Ams. Mining*, 51 A.3d at 1260; *Tandycrafts*, 562 A.2d at 1166.

[30] *Seinfeld*, 847 A.2d at 334.

[31] *See Ams. Mining*, 51 A.3d at 1254; *Goodrich*, 681 A.2d at 1050.

[32] Open. Br. at 34.

[33] *See Ams. Mining*, 51 A.3d at 1257.

[34] *See* Open. Br. at 34.

[35] Open. Br. at 38; *see also Dell*, 300 A.3d at 692 ("Hours worked are considered as a crosscheck to guard against windfall awards, particularly in therapeutic benefit cases.").

percentage of the fund yields a reasonable hourly rate . . . . may result in a windfall."[36]

The "cross check" in this case speaks for itself. Plaintiff requests freely tradeable Tesla shares worth approximately $5.95 billion. At 19,499.95 hours worked, the Fee Request yields "an implied hourly rate of $288,888 and a lodestar multiple of approximately 413.47x."[37] These metrics dwarf even those of *Americas Mining* ($35,000 per hour, 66x multiple) and *Dell* ($5,000 per hour, 7x multiple).[38] If the cross-check is to serve any purpose, it is to prevent fee awards that are this far off the charts.[39]

Second, for cases in which a plaintiff recovers a common fund, the Court may consider caps or adjustments to the percentage of the benefit achieved to fashion a reasonable award. Although the Supreme Court did not impose a declining percentage rule or cap in *Americas Mining*, it left open the use of those tools.[40] Indeed, the Supreme Court ultimately affirmed an award in which "the Court of

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[36] *Seinfeld*, 847 A.2d at 338.

[37] *See* Open. Br. at 38 n.127.

[38] *Ams. Mining*, 51 A.3d at 1257; *Dell*, 300 A.3d at 726.

[39] *See Seinfeld*, 847 A.2d at 337 ("It simply cannot be the case that a 426 percent increase over hourly rates, assuming an opportunity cost rate of $500 per hour, is necessary to preserve the wholesome incentives with which we are concerned").

[40] *Ams. Mining*, 51 A.3d at 1261 ("we *decline to impose* either a cap or the mandatory use of any particular range of percentages for determining attorneys' fees in megafund cases") (emphasis added).

Chancery did reduce the percentage it awarded due to the large amount of the judgment," and confirmed that "the use of a declining percentage, in applying the *Sugarland* factors in a common fund cases, is a matter of discretion"—the same approach that federal courts have adopted.[41] Similarly, *Sugarland* itself affirmed an award that was based on a percentage of the fund, but subject to a cap.[42] These cases counsel the Court to impose a reasonable cap, guided by the implied hourly rates and lodestar multiples that reflect this Court's prior awards in corporate governance suits, to ensure that its award does not constitute an unjust windfall.

In short, Delaware law does not permit, much less require, the massive fees sought here. Rather, the Court must reject the Fee Request and craft an award that is "reasonable."[43]

II. Massive fee awards distort the incentives of the plaintiffs' bar and undermine the public policy underlying fee awards.

Huge fee awards like the Fee Request unnecessarily depart from the longstanding public policy rationales underlying the common fund and corporate benefit doctrines. The Chamber is increasingly concerned about the costs imposed by the plaintiffs' bar that regularly sues businesses in this Court—effectively

[41] *Id.* at 1258–59; *see also id.* at 1260–61 (examining Third Circuit precedent); *Goodrich*, 681 A.2d at 1048.

[42] *Sugarland*, 420 A.2d at 150; *see also Goodrich*, 681 A.2d at 1048, 1050.

[43] *See* Del. Ch. Ct. R. 23.1(e)(1).

expanding the well-documented "merger tax"[44] into something like a "Delaware litigation tax."

One firm's success in securing a large fee should be expected to prompt similar lawsuits against other companies regardless of whether they serve any public good. Stockholder litigation has become predominantly lawyer-driven—cases are sourced not from the aggrieved parties in interest (i.e., investors), but by lawyers based on their prospects for obtaining attorneys' fees.[45] This has long been an issue with entire fairness cases.[46] More recently, plaintiffs' firms have pursued more lawyer-driven director and officer oversight cases,[47] attacks on advance notice and proxy access bylaws,[48] challenges to director compensation,[49] and other lawsuits.[50]

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[44] *See, e.g., Anderson v. Magellan Health, Inc.*, 298 A.3d 734, 748 (Del. Ch. 2023); *In re Trulia, Inc. S'holder Litig.*, 129 A.3d 884, 891–99, n.36 (Del. Ch. 2016).

[45] *See W. Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, 310 A.3d 985, 997 (Del. Ch. 2024) (noting that the plaintiffs' bar does not have "any type of systematic and proactive enforcement agenda").

[46] *See, e.g., In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604, 605 (Del. Ch. 2005) (discussing the settlement value associated with an entire fairness case "not necessarily because of its merits but because it cannot be dismissed").

[47] *See Clem v. Skinner*, 2024 WL 668523, at *1 (Del. Ch. Feb. 19, 2024) ("Over the past several years, *Caremark* suits have proliferated in Delaware.").

[48] *See Kellner v. AIM ImmunoTech Inc.*, 307 A.3d 998, 1027–36 (Del. Ch. 2023). By the Chamber's count, at least 20 such actions were filed in the first quarter of 2024 alone.

[49] *See Knight v. Miller*, 2023 WL 3750376, at *7 (Del. Ch. June 1, 2023) ("[T]he Court of Chancery has had a steady diet of breach of fiduciary duty suits regarding allegedly excessive director compensation. These claims have become fodder for quick settlements and substantial fee requests.").

[50] *See, e.g.*, Stephen J. Choi, Jessica Erickson & Adam C. Pritchard, *Piling On? An Empirical Study of Parallel Derivative Suits*, 14 J. of Empirical Legal Stud.

Those dynamics make it all the more important for the Court to consider the incentives it is creating for other lawyers in bringing future cases and the resulting impact to corporations and stockholders generally. Huge fee awards promote harmful incentives in at least three ways.

First, the prospect of multibillion-dollar fee awards will only exacerbate the "Willie Sutton effect," i.e. the tendency of plaintiffs' counsel to "focus on bigger issuers."[51] Plaintiff's counsel will be incentivized to go "where the money is," rolling the dice by challenging big-dollar contracts, compensation, and transactions in the hopes of receiving a percentage-based fee. Counsel may file endless suits lacking merit for one that produces a fee award of the magnitude contemplated here. The combination of simple math and lawyer self-interest will lead to more, but not more meritorious, lawsuits.

Second, massive fee awards could undermine Delaware's traditional public policy in favor of settlements.[52] The Court appears to have awarded generous fees

653, 681 (2017) (finding evidence that derivative claims that "piggyback" on securities class action suits "may not offer much additional value" and may be the result of plaintiffs' counsel "doing a volume business that does not benefit shareholders").

[51] *Moelis*, 310 A.3d at 997; *see also* Charles R. Korsmo & Minor Myers, *The Structure of Stockholder Litigation: When Do the Merits Matter?*, 75 Ohio St. L.J. 829, 871 (2014) ("merger litigation is disproportionately targeted towards larger deals and deeper pockets, and the larger the deal the more intense the litigation activity").

[52] *See Fins v. Pearlman*, 424 A.2d 305, 309 (Del. 1980).

in recent years due to a perceived need to incentivize plaintiffs' counsel to "identify[] real cases" and avoid settling them early for weak consideration.[53] But the Court should be careful to avoid incentivizing plaintiffs' counsel to prolong litigation because they believe Delaware law will credit it towards a higher fee award. Even *Americas Mining* did not mandate the stage-of-case method as the applicable method of fee calculation in every case.[54] Indeed, this Court has recognized that the stage-of-case method that Plaintiff's counsel advocates here "is vulnerable to the criticism that it undercompensates counsel who achieve everything they might have obtained after trial through an early-stage settlement."[55] Likewise, this method does not account for situations in which plaintiffs achieve "*most* of what counsel might have obtained" early in the litigation without the attendant transaction costs of protracted litigation.[56] Delaware courts have thus awarded fees even for quick settlements because "our fee awards are not structured to reward lawyers for needlessly

[53] *See* Open. Br. at 13, 18–20; *Dell*, 300 A.3d at 686, 693 ("Awarding increasing percentages as counsel pushes deeper into a case ensures that counsel's incentives remain aligned with the case.").

[54] *See Ams. Mining*, 51 A.3d at 1260; *see also Sciabacucchi v. Howley*, 2023 WL 4345406, at *4 (Del. Ch. July 3, 2023) ("The percentage of the benefit is only one possible method of calculating an award. Basic economic principles instruct us that it cannot always be best.").

[55] *Dell*, 300 A.3d at 695 n.7.

[56] *See id.* (emphasis in original); *see also id.* at 724 (estimating "[t]he cost to defend an entire fairness case through trial" as "between $10 million and $30 million").

prolonging litigation."[57] In its own way, if adhered to in every case, the "stage-of-case" method implicates some of the same historic concerns that prompted the Supreme Court to eschew the lodestar method.[58] The better solution to premature settlements of valuable claims is the case-by-case scrutiny mandated under Chancery Court Rules 23 and 23.1, and the "fact-specific and case-specific" consideration of fee awards.[59]

Third, massive fee awards will not deter bad or weak claims. The Court has described large fee awards for "real cases" as a response to the M&A litigation epidemic, but the problem of "weak cases" being filed "on an industrial scale" is a separate (albeit related) problem from the premature settlement of strong claims.[60] The solution to the former problem is now clear: plaintiffs' counsel who do not bring "real cases" should not be rewarded *at all*, even if they obtain the proverbial peppercorn.[61] It is not necessary to award windfalls—which come directly from the

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[57] *Seinfeld*, 847 A.2d at 333.

[58] *See id.* ("the Court does not want to be in a position of encouraging the churning of wheels and devoting unnecessary hours to litigation in order to be able to present larger numbers to the Court"); Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 248 (1986) ("there appears to be a conscious, or perhaps unconscious, desire to keep the litigation alive despite a reasonable prospect of settlement, to maximize the number of hours to be included in computing the lodestar").

[59] *See Seinfeld*, 847 A.2d at 334; *Trulia*, 129 A.3d at 895 (discussing cases, including *Rural Metro*, in which valuable claims "almost were released through disclosure settlements" that were ultimately rejected).

[60] *See Dell*, 300 A.3d at 686, 694.

[61] *See Anderson*, 298 A.3d at 749; *Trulia*, 129 A.3d at 898, 891.

pockets of corporations and stockholders who are the purported beneficiaries of representative litigation—to plaintiffs' counsel for doing what the Court already entrusts them to do.[62]

A return to first principles avoids each of these problems. Delaware still "follows the American Rule in awarding attorneys' fees, which provides that a litigant must, himself, defray the cost of being represented by counsel."[63] The common fund and corporate benefit doctrines are exceptions to that rule, rooted in equity, to serve specific purposes.[64] Historically, the common fund doctrine ensured that representative plaintiffs could recover fees and expenses incurred from the pool of money recovered from defendants.[65] A fee award drawn from the common fund allowed a representative plaintiff to spread those costs "proportionately among those benefitted," thereby preventing unjust enrichment of absent stockholders.[66] More recently, the Court has awarded fees to provide an "incentive for shareholders to bring meritorious lawsuits that challenge alleged wrongdoing and . . . for plaintiffs to litigate such lawsuits efficiently."[67] This compensates plaintiffs' counsel for the

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[62] *See, e.g.*, *Dell*, 300 A.3d at 686 ("[O]ur entity law depends on private litigation for enforcement. Entrepreneurial plaintiff's counsel therefore perform a valuable service by pursuing litigation in a world where stockholders are rationally apathetic.").

[63] *In re Delaware Pub. Sch. Litig.*, 312 A.3d 703, 715 (Del. 2024).

[64] *See Goodrich*, 681 A.2d at 1043–44.

[65] *Ams. Mining*, 51 A.3d at 1253.

[66] *Goodrich*, 681 A.2d at 1044.

[67] *Seinfeld*, 847 A.2d at 333.

inevitable losses that are inherent in their business model,[68] not by reference to compensation that might be paid in other professions.[69] This Court has declined to award attorneys' fees when doing so is unnecessary to advance these objectives.[70]

For the same reasons, the Court should not award greater fees than are necessary to achieve these objectives.[71] Instead, fee awards must be "made with moderation and a jealous regard to the rights of those who are interested in the fund."[72] As Chancellor Chandler once explained:

> This Court has proceeded in the past on the unstated premise that awarding large fees will necessarily produce the incentives of encouraging meritorious suits and encouraging efficient litigation. But a point exists at which these incentives are produced, and anything

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[68] *See In re Oracle Corp. Derivative Litig.*, 2024 WL 472396, at *2 (Del. Ch. Feb. 7, 2024) ("I feel sympathy for Plaintiffs' counsel here, who proceeded derivatively, in good faith and with great skill and vigor, at great cost and effort to themselves. . . . Nonetheless, this is counsels' business model: sue derivatively, on a contingency basis, accept the freight in a losing case, while seeking a multiple of a lodestar in a successful one.").

[69] *See Ams. Mining*, 51 A.3d at 1263 (Berger, J., concurring and dissenting) (cautioning against fee awards based on the Court's "own world views on incentives, bankers' compensation, and envy," which are factors not "based on *Sugarland*"); *see also Homestore, Inc. v. Tafeen*, 886 A.2d 502, 506 (Del. 2005) ("an abuse of discretion can occur . . . when an irrelevant or improper factor is considered and given significant weight").

[70] *See, e.g., Mentor Graphics Corp. v. Quickturn Design Sys., Inc.*, 789 A.2d 1216, 1231 (Del. Ch. 2001) (declining to award attorneys' fees to a losing bidder "because bidders for corporate control have no need for any fee-award incentive to bring lawsuits which further their self-interest in acquiring corporate control"), *aff'd sub nom. Mentor Graphics Corp. v. Shapiro*, 818 A.2d 959 (Del. 2003).

[71] *Cf. Post-Trial Opinion*, 310 A.3d at 448 ("the board never asked the $55.8 billion question: Was the plan even necessary for Tesla to retain Musk and achieve its goals?").

[72] *Internal Imp. Fund Trs. v. Greenough*, 105 U.S. 527, 536–37 (1881).

> above that point is a windfall. In other words, if a fee of $500,000 produces these incentives in a particular case, awarding $1 million is a windfall, serving no other purpose than to siphon money away from stockholders and into the hands of their agents.[73]

Here, "[t]here is simply no evidence that the added incentive provided by a [fee award] of *this* magnitude [i]s necessary, much less fair."[74] The lodestar in this case is $13.6 million, or approximately 0.22% of the Fee Request.[75] No one, including Plaintiff, contends that competent counsel would not have taken this case for a far lesser sum. A fee need only be large enough to "induce monitoring behavior."[76] Nothing more should be awarded here.

III. The Court should adopt additional safeguards to protect corporations and stockholders in derivative actions.

The Fee Request is "unprecedented" in the most literal sense of the word.[77] This Court has never considered a fee application of this magnitude. The sheer size of the Fee Request suggests that Tesla—the intended beneficiary of this case and the party ultimately on the hook for the fee award—might have benefited from vigorous monitoring of the fee arrangement by Plaintiff, or at least greater transparency as to that fee arrangement at an earlier stage of the case. The Court can and should probe

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[73] *Seinfeld*, 847 A.2d at 334.

[74] *See Post-Trial Opinion*, 310 A.3d at 539.

[75] Open. Br. at 37.

[76] *Seinfeld*, 847 A.2d at 333–34; *see also Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 52 (2d Cir. 2000) ("Obviously, it is not ten times as difficult to prepare, and try or settle a 10 million dollar case as it is to try a 1 million dollar case.").

[77] *See* Open. Br. at 3, 38 n.127.

these issues as it considers the Fee Request. Moreover, the outlandish request in this case suggests that, going forward, additional safeguards may be necessary to reduce agency costs in derivative actions, especially in the context of cases like this that proffer an outsized purported benefit to justify outsized fees.[78] These agency costs are of particular relevance in derivative actions, where the corporation bears the costs of litigation.

"[D]erivative stockholder plaintiffs are fiduciaries" and thus "owe the company and their fellow stockholders the duties of care and loyalty."[79] Derivative counsel are fiduciaries too.[80] When it comes to attorneys' fees, however, counsel's conflict of interest is clear. Once some form of favorable outcome is achieved, "the plaintiffs' attorney's role changes from one of fiduciary for the clients to that of a claimant against the fund created for the clients' benefit."[81] And "[w]hen a large attorney's fee means a smaller recovery to plaintiff, a significant conflict of interest

[78] *See In re Fox Corp. Derivative Litig.*, 307 A.3d 979, 992 n.2 (Del. Ch. 2023) ("If derivative actions perform an important role—and our law claims to believe that—then we should strive to improve the mechanism and address its weaknesses. That means taking steps to minimize agency costs and other conflicts of interest.").

[79] *OptimisCorp v. Atkins*, 2023 WL 3745306, at *10 (Del. Ch. June 1, 2023). In fact, derivative plaintiffs operate under a more stringent standard than directors and officers. *Id.* at *14–15 (as agents, derivative plaintiffs "owe a duty of care under a simple negligence standard" and "operate under a more stringent duty of loyalty").

[80] *Seinfeld*, 847 A.2d at 335 (noting "the attorney's role as fiduciary").

[81] *Goodrich*, 681 A.2d at 1045; *see also Dell*, 300 A.3d at 693 (noting that a "widely acknowledged conflict exists between the incentives of class and counsel" with respect to early-stage settlements).

between client and attorney is created."[82] In other words, while counsel may enhance their "wealth proposition" by "get[ting] more for those [they] represent,"[83] they can also do so by seeking a far bigger share of the fund or payment from the nominal defendant corporation than is necessary to "provide[] appropriate incentives."[84] Unfortunately, these types of conflicts are not merely academic.[85]

Fortunately, this Court specializes in problems of agency: "insuring that those acting for the benefit of others perform with fidelity, rather than doing what comes naturally to men and women—pursuing their own interests, sometimes in ways that

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[82] *Court Awarded Attorney Fees*, 108 F.R.D. at 266.

[83] *In Re Orchard Enters., Inc. S'holder Litig.*, 2014 WL 4181912, at *8 (Del. Ch. Aug. 22, 2014).

[84] *See Seinfeld*, 847 A.2d at 334; *see also In re Cendant Corp. Litig.*, 264 F.3d 201, 272 (3d Cir. 2001) (suggesting that "lead counsel who seek an excessive fee may have breached their fiduciary duties to the class, thus entitling the class to recover any excess from its lawyers").

[85] *See, e.g.*, *Fox*, 307 A.3d at 990 (describing the need for "[e]ntreprenurial counsel" to "file as fast as possible in an effort to gain control of a case" so they can "get paid," which "causes the interests of the competing firms to diverge from the interests of the corporation and its stockholders as a whole"); *Anderson*, 298 A.3d at 748 (noting the continued "pursuit of legally meritless disclosure claims"); *Trulia*, 129 A.3d at 891–92 (discussing settlements of merger strike suits that "generate fees for certain lawyers"); *In re Del Monte Foods Co. S'holders Litig.*, 2010 WL 5550677, at *5 (Del. Ch. Dec. 31, 2010) ("Considerable debate has surrounded allegations that plaintiffs' firms induce pension funds to bring securities litigation, a practice known as 'pay-to-play.'"); *Garfield v. Getaround, Inc.*, C.A. No. 2023-0445-MTZ, at 4:20–5:24 (Del. Ch. Feb. 15, 2024) (TRANSCRIPT) ("Seeking a fee that a company CFO has affirmed in a sworn affidavit would render the company insolvent appears to be a betrayal of the stockholders you purport to represent and a betrayal of the functions that plaintiffs counsel plays in the broader ecosystem.").

conflict with the interests of their principals."[86] If the Court is to entertain fee requests of this magnitude, it should adopt additional safeguards early in the litigation to guard against these inherent conflicts of interest. Chancery Court Rule 23.1, which was amended last year to incorporate elements of Federal Rules of Civil Procedure 23 and 23.1, provides at least two potential mechanisms.[87]

First, the Court should probe the adequacy of derivative plaintiffs, even in the absence of a leadership fight. A derivative plaintiff must "fairly and adequately represent the interests of the entity in pursuing the derivative action," and if "only one person has sued derivatively but cannot adequately represent the interests of the entity in pursuing the derivative action, then the Court must dismiss the derivative action without prejudice."[88] Although the Court has come to view derivative counsel as "the main player in a derivative action," derivative plaintiffs must still fulfill their fiduciary duties, and should "own[] a sufficient stake to provide an economic incentive to monitor counsel and play a meaningful role in conducting the case."[89]

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[86] *In re Riverbed Tech., Inc. S'holders Litig.*, 2015 WL 5458041, at *1 (Del. Ch. Sept. 17, 2015).

[87] Del. Ch. Ct. R. 23.1, comment.

[88] Del. Ch. Ct. R. 23.1(c)(1).

[89] *Fox*, 307 A.3d at 994, 997; *see also Del Monte*, 2010 WL 5550677, at *5 ("Poor monitoring creates the potential for agency costs, as the entrepreneurial attorney's interests can diverge from those of the clients. If class counsel have tremendous discretion to run the litigation, they may do so in a manner that maximizes their benefit, even at the expense of the interests of their putative clients."); *In re Fuqua Indus., Inc. S'holder Litig.*, 752 A.2d 126, 133 (Del. Ch. 1999) (the view that a stockholder plaintiff need only "show up to the courthouse with

Indeed, one of the primary goals of the Private Securities Litigation Reform Act of 1995 was to increase investor oversight of counsel in securities class actions.[90]

Plaintiffs with small share ownership often have little economic incentive to monitor counsel's fee requests.[91] Here, Plaintiff owned nine shares of Tesla stock when he filed this lawsuit.[92] Under this Court's precedents, it is doubtful whether this stake could rationally motivate Plaintiff to ensure that counsel's fee would be appropriate and not needlessly "siphon money away from stockholders and into the hands of their agents."[93]

Second, to the extent the Court assumes "a world where stockholders are rationally apathetic"[94] and "the role of the derivative plaintiff is negligible if not

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shares of company stock while the lawyers adduce evidence of director misconduct" is "somewhat out of balance").

[90] *See* 15 U.S.C. § 78u-4(a)(3); H.R. CONF. REP. 104-369 at 35 (1995) ("Institutions with large stakes in class actions have much the same interests as the plaintiff class generally; thus, courts could be more confident settlements negotiated under the supervision of institutional plaintiffs were 'fair and reasonable' than is the case with settlements negotiated by unsupervised plaintiffs' attorneys.").

[91] *See, e.g.*, Jessica Erickson, *The Gatekeepers of Shareholder Litigation*, 70 Oklahoma L. Rev. 237, 241–42 (2017) ("In practice . . . this monitoring function is limited because most representative shareholders lack the necessary incentives to monitor the suit" and "reduced monitoring . . . can increase agency costs by allowing attorneys to seek a higher percentage of the recovery for their fee").

[92] *Tornetta v. Musk*, No. 2018-0408 (Del Ch. Oct. 24, 2022), Dkt. 379 ¶ 23.

[93] *Seinfeld*, 847 A.2d at 334; *see also Del Monte*, 2010 WL 5550677, at *6–7 (a plaintiff holding "some 350 shares" with a value of "approximately $7,000" did "not have a sufficiently large stake to provide an incentive to monitor counsel and reduce agency costs").

[94] *Dell*, 300 A.3d at 686.

superfluous,"[95] then early and greater Court oversight of fee arrangements may be in order. "In a representative action, a trial court has an independent and continuing duty to scrutinize the representative plaintiff to see if she is providing adequate representation and, if not, to take appropriate action."[96] In the context of a fee application, the "divergence of interests" between a derivative plaintiff and derivative counsel "requires a court to continue its 'third-party' role in reviewing common fund fee applications,"[97] acting as "a surrogate market in setting fee awards."[98]

Transparency would assist the Court in fulfilling its obligations. On at least one occasion the Court has criticized objectors when they "could have stepped up" to litigate and "chose not to,"[99] but absent stockholders can hardly be faulted for waiting to object to fee applications without disclosure of those arrangements at the outset of the case. To the Chamber's knowledge, Plaintiff has not disclosed the fee arrangement that he agreed to with counsel in this case or whether it is in writing,

[95] *Fuqua*, 752 A.2d at 133.

[96] *South v. Baker*, 62 A.3d 1, 21 (Del. Ch. 2012).

[97] *Goodrich*, 681 A.2d at 1045; *see also Knight*, 2023 WL 3750376, at *8 (the Court is "charged with acting as a fiduciary for the nominal defendant" when evaluating proposed derivative settlements).

[98] *In re Riverbed Tech., Inc. S'holders Litig.*, 2015 WL 7769861, at *1 (Del. Ch. Dec. 2, 2015).

[99] *Dell*, 300 A.3d at 720.

despite billions of dollars being at stake.[100] Nor has Plaintiff (again, to the Chamber's knowledge) disclosed whether he negotiated that fee arrangement, requested a fee cap, sought to meet with other law firms to compare their experience and requested fees, or took any other steps to ensure that he obtained the best terms for Tesla in obtaining counsel.

In a leadership dispute, newly amended Rule 23.1 authorizes the Court to "(i) order any applicant to provide information on any subject pertinent to the application and to propose terms for attorney's fees and expenses" and "include in the appointing order provisions about the award of attorney's fees or expenses."[101] These provisions were derived from Federal Rule of Civil Procedure 23, which recognizes that "[a]ttorney fee awards are an important feature of class action practice, and attention to this subject from the outset may often be a productive technique."[102] Early disclosure of proposed fee arrangements would benefit nominal defendants. In the ongoing *Fox* derivative litigation, for example, the Court passed over plaintiffs with no fee arrangement letter in favor of plaintiffs that had engaged in an "intentional, client-initiated, and client-driven" process to engage lead counsel and

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[100] *See San Antonio Fire & Police Pension Fund v. Bradbury*, 2010 WL 4273171, at *13 n.106 (Del. Ch. Oct. 28, 2010) ("an oral contingent fee agreement is not consistent with Rule 1.5(c) of the Delaware Lawyers' Rules of Professional Conduct").

[101] Del. Ch. Ct. R. 23.1(c)(3)(C).

[102] *See* Fed. R. Civ. P. 23(g)(1), Advisory Committee Notes on 2003 Amendments.

negotiated "a written engagement letter with [lead counsel] that, among other things, places a negotiated cap on the fee award that [lead counsel] can seek."[103]

The Court should consider fee arrangements even in the absence of a leadership dispute. Rule 23.1 requires the Court to assess whether derivative counsel can "fairly and adequately represent the interests of the entity in pursuing the derivative action."[104] The extent of counsel's potential conflict as to fees undoubtedly affects the fairness and adequacy of that representation. Early disclosure would provide an up-front check on the reasonableness of a fee request, or may even prompt other plaintiffs' counsel to emerge.[105] Such a step could reduce agency costs and directly benefit corporations and stockholders—the intended beneficiaries of representative litigation in Delaware.

CONCLUSION

The Chamber respectfully submits that the Court should deny the fee application, and award a fee that is no more than necessary to achieve the purposes of the common fund and corporate benefit doctrines.

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[103] *See Fox*, 307 A.3d at 987.

[104] Del. Ch. Ct. R. 23.1(c)(2); *see also Dell*, 300 A.3d at 717 (requesting disclosure from plaintiff's counsel of past fee agreements when considering a fee application).

[105] *See, e.g.*, *Amador v. Logistics Express, Inc.*, 2010 WL 3489038, at *2 (C.D. Cal. Aug. 27, 2010) (ordering a "competitive bidding process" for lead counsel pursuant to Federal Rule of Civil Procedure 23(g)(1)).

WHITEFORD TAYLOR & PRESTON LLC

OF COUNSEL:

Johnathon E. Schronce
Steven M. Haas (#4867)
James M. Lockerby
HUNTON ANDREWS KURTH LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219
(804) 788-8200

Daniel A. Griffith (#4209)
600 North King Street
Wilmington, DE 19801
(302) 357-3254
dgriffith@whitefordlaw.com

Attorneys for Amicus Curiae *Chamber of Commerce of the United States of America*

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