EFiled: Sep 08 2023 03:22PM EDT
Transaction ID 70823900
Case No. 2020-0477-KSJM

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

THE POLICE AND FIRE RETIREMENT SYSTEM OF THE CITY OF DETROIT, derivatively on behalf of TESLA, INC., Plaintiff, v. ELON MUSK, BRAD BUSS, ROBYN M. DENHOLM, IRA EHRENPREIS, LAWRENCE J. ELLISON, ANTONIO J. GRACIAS, STEPHEN T. JURVETSON, LINDA JOHNSON RICE, JAMES MURDOCH, KIMBAL MUSK, KATHLEEN WILSON-THOMPSON, and HIROMICHI MIZUNO, Defendants, -and- TESLA, INC., a Delaware Corporation, Nominal Defendant.	**REDACTED - PUBLIC VERSION FILED SEPTEMBER 8, 2023** C.A. No. 2020-0477-KSJM

PLAINTIFF'S CORRECTED OPENING BRIEF IN SUPPORT OF SETTLEMENT APPROVAL, AWARD OF ATTORNEYS' FEES AND EXPENSES, AND INCENTIVE AWARD

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INTRODUCTION[1]

Plaintiff respectfully requests Court approval of the largest derivative claim settlement in this Court's history and the second largest settlement of any kind behind only *In re Dell Technologies Class V Stockholders Litigation*.[2]

This case challenges excessive compensation awarded to Tesla's non-employee directors from 2017 to 2020. Defendants initially lambasted this Action as a "cynical and opportunistic attempt to try to capitalize on a unique and remarkable moment in Tesla's history."[3] But after three years of vigorous litigation, Defendants now agree to personally return and forgo monetary benefits of approximately $919 million and further agree to implement meaningful governance reforms. Specifically, the Settlement requires: (i) return of $735,266,505 in stock options, shares of Telsa stock, and cash from the individual Director Defendants' pockets to the Company; (ii) elimination of three years of compensation for 2021-2023, conservatively valued at another $184,160,026; and (iii) implementation of

[1] Unless otherwise noted, all emphasis is added and citations and quotations are omitted. Capitalized terms shall have the same meanings as set forth in the Stipulation and Agreement of Compromise and Settlement Between Plaintiff and Settling Defendants dated July 14, 2023 (the "Stipulation") (Trans. ID 70397017).

[2] *See* Consol. C.A. No. 2018-0816-JTL, 2023 WL 4864861 (Del. Ch. July 31, 2023), *as revised* (Aug. 21, 2023).

[3] Trans. ID 65939850 at 2.

five years of significant governance reforms, including, among other things, annual reviews of Tesla non-employee director compensation, annual retention of a compensation consultant, annual stockholder approval votes of proposed non-employee compensation, enhanced disclosures, and improvements to internal controls. The $735,266,505 returned compensation alone captures 45% to 99% of possible trial damages, depending on what the Court would deem "fair," as opposed to "excessive," compensation.

To get here, Plaintiff had to advance a novel attack on Defendants' anticipated stockholder ratification defense. Plaintiff then litigated for three years, deep into expert discovery. But for this Settlement, entered into on July 14, 2023, Plaintiff was prepared for a November 2023 trial.

The Settlement fairly balances the strengths and trial risks of the claims. As to strengths, discovery confirmed that the Director Defendants deliberately ignored that their compensation dwarfed that paid to their peers, instead worrying that they were not paid enough, and that there was no meaningful process for reviewing and approving non-employee director compensation. As to risks, Defendants skillfully argued that the unprecedented increase in Tesla's market capitalization during the relevant period warranted equally unprecedented compensation (*i.e.*, "a rising tide lifts all boats") and that Defendants' options-based compensation structure was

uniquely risky, and therefore warranted uniquely high returns, or, at minimum, that damages were far less than the sum obtained in the Settlement. Indeed, Elon Musk has previously prevailed against derivative claims on the entire fairness standard, the standard applicable here, with fair price arguments.[4] The parties here reached the Settlement only after over eight months of negotiation that culminated in the acceptance of the third-party mediator's recommendation.

Through this lens, disgorging $735,266,505 of director compensation, cancelling access to another $184,160,026, and fixing the causal governance failures via the Settlement delivers strong shareholder value, and should be approved.

Only if the Court approves the Settlement, then Plaintiff respectfully requests an award of $1,023,779 in out-of-pocket litigation expenses and $229,600,687 in attorneys' fees, which is 25% of the $919,426,531 monetary benefit less expenses ($919,426,531 minus $1,023,779, multiplied by 0.25) (together, the $230,624,466 "Fee and Expense Award"). Plaintiff also obtained significant governance reforms that will endure for five years and the Fee and Expense Award takes into account the benefit of these reforms. Plaintiff's request is supported by Delaware precedent.

[4] *In re Tesla Motors S'holder Litig.*, Consol. C.A. No. 12711-VCS, 2022 WL 1237185, *aff'd* No. 181, 2022, 2023 WL 3854008 (Del. June 6, 2023).

The parties did not reach a non-opposition stipulation regarding the fee, and Plaintiff anticipates that Defendants will present arguments against the fee request.

Plaintiff seeks a $50,000 incentive fee (the "Incentive Award") for its extraordinary efforts benefitting Tesla and its stockholders.

Plaintiff respectfully requests that the Court approve the Settlement, along with the Fee and Expense Award and Incentive Award.

FACTUAL AND PROCEDURAL BACKGROUND

I. TESLA'S DIRECTOR COMPENSATION POLICY

In January 2010—prior to Tesla's initial public offering—Tesla's board of directors (the "Board") adopted an Outside Director Compensation Policy (the "Policy") providing for a fixed number of stock options and *de minimis* cash retainer.[5] Without ever asking stockholders to approve the Policy, Defendants largely maintained the *status quo* as Tesla's stock price increased, reaping massive gains from excessive option awards.

[5] *See* Transmittal Affidavit of Sarah E. Delia, Ex. 1 (Tesla 2011 Proxy Statement), at 38. Unless otherwise noted, citations to "Ex." are to exhibits attached to the Transmittal Affidavit of Sarah E. Delia.

A. Changes to the Policy

The Policy's option award provisions were also set forth in Tesla's 2010 Equity Incentive Plan (the "2010 Plan"),[6] which expressly permitted the Board to amend its terms, including the number of options they awarded themselves.[7]

In June 2012, with input from a compensation consultant, the Board amended the Policy to transition from annual to triennial option awards of the same annualized number and provide additional option awards for Lead Independent Director and committee service.[8] The Board amended the 2010 Plan accordingly (the "2012 Restatement"), but never asked stockholders for approval.[9] Discovery demonstrated that the Board never again sought external input on, or conducted any meaningful review of, director compensation.

In 2014, the Board adopted ministerial amendments to the 2010 Plan but, when soliciting approval, told stockholders that if they rejected the changes, the 2012 Restatement would remain in effect.[10] A majority of unaffiliated Tesla

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[6] *See* Ex. 2 (Tesla 2014 Proxy Statement), at 19.

[7] *See id.* at A-13.

[8] *Id.* at 19, 51.

[9] *Id.* at 15.

[10] *Id.* at 16.

stockholders rejected these amendments, which were only approved due to Elon Musk's support.[11]

Discovery further revealed that, in October 2018, Tesla retained Aon Consulting, Inc. ("Aon," a third-party compensation consultant) in designing its 2019 Equity Incentive Plan (the "2019 Plan"). While Aon and Tesla's general counsel discussed language limiting director compensation,[12] there is no evidence that the Board considered such limits and none were included in the 2019 Plan.[13] A majority of unaffiliated stockholders rejected the 2019 Plan, which (again) only carried due to Elon Musk's support.[14]

In February 2020, the Board amended the Policy, without seeking stockholder approval, to go back to annual awards (the "February 2020 Policy").[15]

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[11] *See* Ex. 3 (Tesla Current Report (Form 8-K) (June 6, 2014)), at 2; Ex. 2 (Tesla 2014 Proxy Statement), at 56.

[12] *See* Ex. 4 (TSLA_DETROIT_00017860 at -17869).

[13] Ex. 5 (Tesla 2019 Proxy Statement (Form DEF 14A) (Apr. 30, 2019)) at 15-23, A-1-A-14.

[14] Ex. 6 (Tesla Current Report (Form 8-K) (June 12, 2019)), at 2; Ex. 5 (Tesla 2019 Proxy Statement (Form DEF 14A) (Apr. 30, 2019)), at 72.

[15] Ex. 7 (TSLA_DETROIT_DIR_00005956 at -6018).

B. The Policy's Basic Terms

During the Relevant Period, directors paid themselves in cash and options in the following amounts:[16]

Role	Annual Cash Retainer	Option Award[17] Pre/Post-Stock Splits
Initial Award upon Joining the Board	$0	1,389/20,835 per month through the next June 18, when they vested in full
Board Member	$20,000	50,000/750,000 triennial award vesting monthly in 1/36th increments
Lead Independent Director (in 2018)	$0	24,000/360,000 triennial award vesting monthly in 1/36th increments
Board Chair (in 2019)[18]	$300,000	8,000/120,000 annual award vesting monthly in 1/12th increments

[16] The amounts and vesting terms are provided in the Policy. *See* Ex. 8 (TSLA_DETROIT_00038196 at -38212) (as of July 13, 2017); Ex. 9 (TSLA_DETROIT_00001604 at -1609) (as of Nov. 7, 2018); Ex. 7 (TESLA_DETROIT_DIR_00005956 at -6018) (as of Feb. 26, 2020).

[17] These amounts reflect the number of pre-split options and the adjusted number of options to reflect 5-to-1 and 3-1 stock splits that occurred on August 28, 2020 and August 24, 2022, respectively (the "Stock Splits").

[18] In November 2018, the Board created the Board Chair position and set this retainer. Ex. 9 (TSLA_DETROIT_00001604 at -1606).

Role	Annual Cash Retainer		Option Award[17] Pre/Post-Stock Splits	
Committee Service[19]	**Chair**	**Member**	**Chair**	**Member**
Audit	$15,000	$7,500	12,000/ 180,000	12,000/ 180,000
Compensation	$10,000	$5,000	6,000/90,000	9,000/135,000
Nominating/ Governance	$7,500	$5,000	3,000/45,000	6,000/90,000

The February 2020 Policy transitioned to annual option awards for general Board and committee service equal to one-third the triennial award amounts, vesting monthly in 1/12th increments.[20]

Vesting was conditioned upon continued service in the capacity for which the award was issued such that, if a director stepped down from the Board or a committee before a corresponding award completely vested, the unvested portion would be cancelled.[21]

[19] Committee service option awards were triennial and vested monthly in 1/36th increments until February 2020.

[20] Ex. 7 (TESLA_DETROIT_DIR_00005956 at -6020).

[21] *See*, *e.g.*, Ex. 8 (TSLA_DETROIT_00038196 at -38223).

II. FROM 2017 TO 2020, THE DIRECTOR DEFENDANTS AWARD THEMSELVES OUTSIZED COMPENSATION WORTH MILLIONS OF DOLLARS AT THE TIME OF GRANT

From July 2017 through August 2020, Board members granted themselves 11,331,750 options[22] with a grant date fair value of $105,633,863.[23] Like most public companies, Tesla calculated grant date fair value using the Black-Scholes model and annually disclosed valuations of director option awards in its proxy statements.

The vested awards, together with $1,063,173 in cash awards, resulted in outrageous amounts of average annual compensation compared to the average $400,000 annual board compensation paid by Tesla's peers, as further detailed below:[24]

[22] Unless stated otherwise, references to these awards are adjusted to reflect the Stock Splits.

[23] Ex. 10 (Defendants' Responses and Objections to Plaintiff's First Request for Admission at Appendix A-1). 1,503,807 of these options were cancelled before they vested and 957,735 options were forfeited due to failure to timely exercise after departure from the Board. Ex. 11 (compiled and excerpted director questionnaires produced by Defendants) details the exact grant date fair value of each of the challenged option awards. Ex. 12 provides detailed tables regarding the Director Defendants' challenged option grants, their cash compensation, and their average annualized compensation over the years in which the challenged options vested.

[24] These average numbers do not account for awards granted in 2014 and 2015 that partially vested in 2017 and 2018, as such awards were not challenged in this Action.

Defendant	Vesting Years of Challenged Awards	Average Annual Compensation
Buss	2017-2019	$1,495,825.52
Denholm	2017-2022	$3,139,836.32
Ehrenpreis	2018-2021	$2,496,311.20
Ellison	2019-2022	$1,472,244.10
Gracias	2018-2021	$3,633,926.43
Jurvetson	2019-2020	$282,884.97
Kimbal Musk	2018-2021	$1,724,650.00
Mizuno	2020-2021	$4,628,158.00
Murdoch	2017-2021	$2,204,610.93
Johnson Rice	2017-2019	$1,545,456.48
Wilson-Thompson	2019-2022	$1,846,684.47

III. THE DIRECTOR DEFENDANTS ENGAGED IN A FLAWED PROCESS AND AWARDED THEMSELVES EXORBITANT COMPENSATION

Although they regularly reviewed Tesla employee compensation, the Director Defendants never engaged in any substantive review of their own after 2012.

A. The Board Consciously Disregarded Its Duty to Review Director Compensation

Tesla's governance documents required the Board to review and evaluate director compensation practices. Specifically, Tesla's Compensation Committee Charter required it to make "recommendations to the Board with respect to

compensation for service as a member of the Board or a Board committee."[25] Likewise, Tesla's Nominating and Governance Committee Charter tasked that committee with "[r]eviewing and making recommendations to the Board with respect to the Directors' stock option grants . . . ."[26] Defendant Buss, a long-time Nominating and Governance Committee member, testified that it made no such recommendations during his tenure.[27]

Tesla Human Resources executives and a representative of Aon described in discovery the processes boards typically employ to assess director compensation, namely: retaining compensation consultants and obtaining peer group benchmarking analyses of director compensation every one to three years.[28] Aon's Rule 30(b)(6) witness agreed that Aon's "standard process" was to benchmark director compensation to a peer group and perform comparisons to the 50th, 75th, and 95th percentiles.[29]

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[25] Ex. 13 (TESLA_DETROIT_DIR_00000016 at -16).

[26] Ex. 14 (TESLA_DETROIT_DIR_00000023 at -24).

[27] Ex. 15 (Buss Tr. 72:4-18).

[28] *See* Ex. 16 (Toledano Tr. 284:1-285:5, 324:17-325:19); Ex. 17 (Tsang Tr. 41:17-44:15).

[29] Ex. 18 (Hilborn Tr. 23:11-19; 24:12-19; 37:2-23).

The Director Defendants implemented these processes in setting employee compensation. Specifically, the Board relied on peer benchmarking data in making employee compensation decisions.[30] Compensation Committee presentations confirmed that Tesla targeted the 50th percentile for some employees and 75th percentile for others.[31] The Company would target a value for employee compensation and then calculate the corresponding equity award, rather than rely on fixed-number equity grants.[32]

The Board employed similar processes in setting CEO compensation. Specifically, in developing Elon Musk's 2018 compensation package, Tesla retained Compensia, Inc. to provide input and analyze how peer companies compensated

[30] *See, e.g.*, Ex. 15 (Buss Tr. 85:12-86:3 ("HR would be looking at, you know, the competitive benchmarks to recruit and retain people.")); Ex. 19 (Denholm Tr. 52:3-53:12 ("[F]or employees, we did look at market information for positions," and such data were "used to make sure that we were competitive in the offers we would either put out or would have for our executives.")); Ex. 20 (Ehrenpreis Tr. 193:22-194:20 (acknowledging that Tesla performed "peer group analysis depending on the level of executives")); Ex. 21 (Gracias Tr. 85:12-23 ("There's a market price for talented engineers in the Bay Area, and we were aware of what that market pricing was, and we were aware that we needed to create compensation that was competitive to that market.")).

[31] Ex. 22 (TESLA_DETROIT_DIR_00009541, -9542 at -9575).

[32] *See* Ex. 19 (Denholm Tr. 125:12-126:10).

their CEOs,[33] retained Wilson Sonsini Goodrich & Rosati to provide legal advice on the Board's fiduciary duties in connection with the package,[34] sought stockholder input,[35] and decided to require stockholder approval of the package.[36]

Certain Defendants even deployed these processes to evaluate their own compensation on other public boards. For instance, during Buss's time on the boards of Advance Auto Parts, Marvell Technology, and AECOM, each board retained consultants to benchmark director compensation, resulting in changes at Advance Auto Parts and Marvell Technology.[37] Similarly, while Kimbal Musk was on Chipotle's board, it retained a compensation consultant to advise on director compensation,[38] as did Omnicom Media Group's board during Rice's tenure.[39]

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[33] Ex. 20 (Ehrenpreis Tr. 131:15-132:15 ("the compensation committee, a set of lawyers, and a comp consultant" were involved in developing Elon Musk's compensation package)); Ex. 19 (Denholm Tr. 29:17-32:8 (compensation consultant provided a "representative sample of some other companies and the way that they had looked at compensation for their CEOs" that focused on "a group of other technology companies")).

[34] Ex. 23 (TESLA_DETROIT_DIR_00028108 at -28111).

[35] Ex. 20 (Ehrenpreis Tr. 137:11-14 ("Q. Okay. Did you seek shareholder feedback during the process of formulating the package? A. yes.")).

[36] Ex. 24 (Tesla Form 8-K dated March 21, 2018).

[37] Ex. 15 (Buss Tr. 29:8-31:15; 31:16-33:20; 35:6-36:8).

[38] Ex. 25 (Kimbal Musk Tr. 166:12-167:8).

[39] Ex. 26 (Rice Tr. 30:3-8, 31:23-32:9).

B. The Tesla Board's Numerous Process Failures

Discovery revealed that, after the 2012 Restatement, the Board never engaged in any meaningful process to evaluate and set director compensation, regardless of its members' knowledge of best practices.

No Fairness Consideration: The Director Defendants never considered whether their self-compensation was fair. No evidence showed that they ever considered the value of their compensation under the fixed-number-of-option structure. They also never considered whether the compensation was excessive,[40] let alone whether it should be reduced.[41] Indeed, certain Director Defendants did not recall discussing or evaluating director compensation at all.[42] While some Director Defendants claimed that the Board periodically revisited the Policy's

[40] *See* Ex. 15 (Buss Tr. 67:22-68:22 (no consideration of whether compensation was excessive in 2017 to 2019 period)); Ex. 20 (Ehrenpreis Tr. 219:20-220:8 (When asked whether awards of 1 million options would be excessive, "I can't tell you an exact number, what would be fair or excessive.")); Ex. 25 (Kimbal Musk Tr. 209:14-21 (When asked whether directors have a duty to ensure their compensation is not excessive, "I don't think people do that.")).

[41] *See* Ex. 15 (Buss Tr. 67:5-12 (no recollection of discussion concerning reducing director compensation)); Ex. 26 (Rice Tr. 69:20-23 (same)); Ex. 27 (Murdoch Tr. 235:2-10 (same); Gracias Tr. 109:5-13 (same)).

[42] *See* Ex. 25 (Kimbal Musk Tr. 208:5-13 (no recollection of discussions)); Ex. 26 (Rice Tr. 66:8-12 (no recollection of evaluation of director compensation)).

appropriateness, they could not identify specific discussions, when they occurred, or who was involved.[43]

No Stockholder Approval: While the Board required unaffiliated stockholder approval of Elon Musk's 2018 compensation package, they never solicited such approval of their own compensation.

No Consulting or Benchmarking: In contrast to the consulting services used in setting employee compensation, following the 2012 Restatement, the Board never again retained a compensation consultant or sought benchmarking analyses prior to making the challenged awards.[44]

No Legal Advice: While the Board retained outside counsel to consult on executive compensation and the initial, IPO-era Policy, it did not seek legal advice on fiduciary duties *vis-à-vis* the challenged awards.[45]

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[43] *See, e.g.*, Ex. 20 (Ehrenpreis Tr. 226:23-228:16); Ex. 21 (Gracias Tr. 118:20-119:3); Ex. 28 (Jurvetson Tr. 141:7-142:6); Ex. 26 (Rice Tr. 80:18-81:4).

[44] Ex. 28 (Jurvetson Tr. 163:19-164:1, 164:11-14, 166:2-10 (no retention of compensation consultant or benchmarking regarding director compensation)); Ex. 15 (Buss Tr. 48:17-49:4; 65:10-18 (same)); Ex. 29 (Wilson-Thompson Tr. 142:18-143:2, 197:21-198:8 (same)); Ex. 26 (Rice Tr. 51:9-20, 67:11-19 (same)); Ex. 21 (Gracias Tr. 127:23-128:3 (no retention of compensation consultant regarding director compensation)); Ex. 27 (Murdoch Tr. 175:8-20 (same)).

[45] Ex. 15 (Buss Tr. 130:14-20 (no recollection of legal presentation regarding fiduciary duties and director compensation)); Ex. 26 (Rice Tr. 63:3-18 (same)).

The lack of process is galling when considering the increase in Tesla's stock price through 2017. The table below demonstrates how the grant date fair value of 16,666 options (*i.e.*, the annualized Board service option award) increased five-fold between 2011 and 2015 due to the stock price increase:

	2011	2012	2014	2015
GDFV of 16,666 options	$265,053	$273,948	$1,650,536	$1,644,928

Moreover, prior to awarding the challenged options, six Director Defendants realized millions in proceeds from previous option awards. The table below details such income from prior to July 2017:[46]

Defendant	Taxable Income Recognized
Antonio Gracias	$4,081,420.30
Brad Buss	$6,294,899.50
Ira Ehrenpreis	$16,688,195.70
Kimbal Musk	$15,916,053.90
Robyn Denholm	$1,036,400.00
Stephen Jurvetson	$15,444,536.40
TOTAL	***$59,461,505.80***

[46] *See* Ex. 30 (Defendants' Responses and Objections to Plaintiff's Second Request for Admission at Appendix A-2).

C. The Director Defendants Shut Down Employee Efforts to Pursue a Process Despite Evidence of Outsized Compensation

Although Tesla management began working to benchmark director compensation in early 2018 and 2020, certain Director Defendants stopped these projects and chose not to raise a consultant's analysis to the Board.

1. March 2018 Aon Report

On February 23, 2018, Tesla Human Resources personnel contacted Aon to request a peer-based benchmarking analysis of director compensation.[47] On February 26, 2018, Christian Facey (Tesla's then-Director, Compensation & Benefits) informed Todd Maron, Tesla's then-General Counsel, of this work:

> We had originally included the topic of Board Compensation in our calendar items for this meeting given that it is formally part of their charter, but we wanted to get your thoughts on the best way to proceed. . . . Typically, we would work with an external consultant to gather the market data and present current state vs. market and then provide recommendations. Christine [Tsang] and I have already reached out to [Aon] to gather some market data, which we should have by Monday next week.[48]

On February 28, 2018, Maron emailed Facey, writing, "I spoke with Ira [Ehrenpreis]. He's going to reach out to Gaby [Toledano, Tesla's former Chief People Officer,] to discuss." *Id.*

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[47] *See* Ex. 31 (TSLA_DETROIT_00028483 at -28485).

[48] Ex. 32 (TSLA_DETROIT_00009149).

On March 3, 2018, Aon sent Tsang and Facey a presentation, entitled "Tesla Board of Director Compensation Review" (the "Aon Presentation"),[49] including a "Financial Peer Group" of 34 companies "selected based on financial and industry parameters."[50] This was largely the same group Aon had previously used for benchmarking Tesla's executive compensation, as is typical practice.[51]

Aon summarized Tesla's director compensation program, including the grant date fair value of the Director Defendants' option awards using the Black-Scholes model, which Tesla also used for purposes of SEC filings. Aon reported that the triennial awards alone had an annualized value of $2.2 million, with additional committee service awards ranging from $265,000 to $1.06 million in annualized value. In addition, Tesla's Lead Independent Director option award to Antonio Gracias had an annualized value of $1.06 million.[52]

Aon then compared director compensation at Tesla to its peers:

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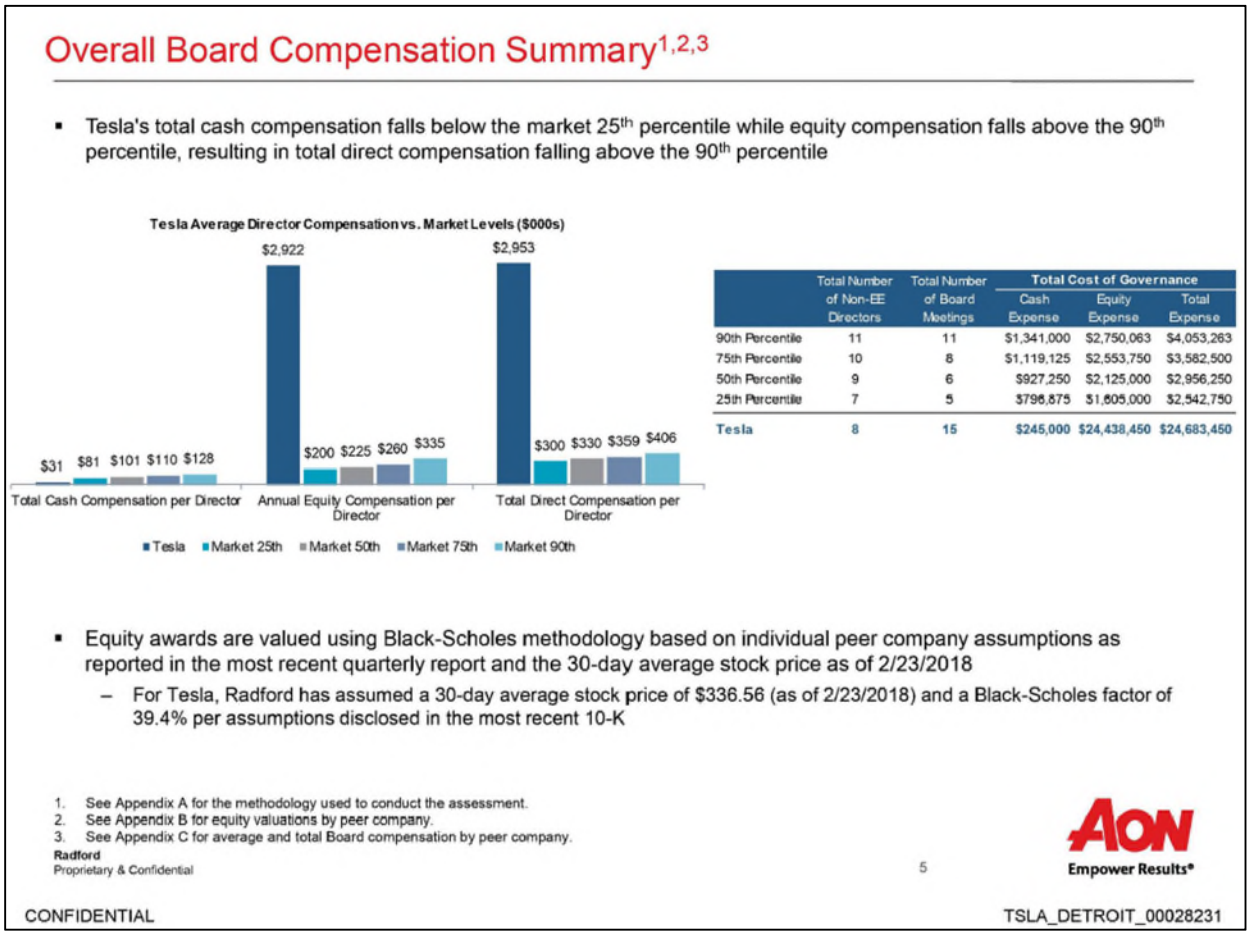
[49] Ex. 33 (TSLA_DETROIT_00028225, -28227). Plaintiff first identified the Aon Presentation through third-party discovery after Defendants failed to produce it, as set forth below.

[50] *Id.* at -28229.

[51] *See* Ex. 18 (Hilborn Tr. 183:9-22; 219:18-220:1; 248:6-22); Ex. 16 (Toledano Tr. 345:23-346:9); Ex. 17 (Tsang Tr. 80:15-81:3).

[52] Ex. 33 (TSLA_DETROIT_00028227 at -28230).



Aon calculated that the Director Defendants awarded themselves, on average, $2.953 million each year, compared to only $406,000 paid to 90th percentile peer directors. Aon reported that Tesla's program resulted "in total direct compensation falling above the 90th percentile."[53] That was a gross understatement. Their compensation was more than seven times that paid to 90th percentile directors.

[53] *Id.* at -28231.

Aon preliminarily recommended that Tesla restructure its director compensation policy. Noting that "97% of Tesla's peers establish equity awards based on a dollar value," Aon recommended that Tesla "[t]arget[] a dollar value rather than setting the grant as a fixed number of shares."[54]

Aon specifically warned that Tesla's current policy could result in litigation and advised Tesla to "mitigate the risks of a plaintiff's suit for excessive director compensation" by "[o]btain[ing] shareholder approval on a 'meaningful' limit on total annual compensation" and "[b]enchmark[ing] non-employee director compensation annually."[55]

Toledano discussed the Aon Presentation with Ehrenpreis, the Compensation Committee Chair,[56] who instructed Toledano not to raise the Aon presentation during the March 2018 Compensation Committee meeting.[57] On March 13, 2018, Toledano emailed Ehrenpreis:

[54] *Id.* at -28232.

[55] *See id.* at -28233.

[56] *See* Ex. 16 (Toledano Tr. 412:10-20); Ex. 20 (Ehrenpreis Tr. 378:7-380:8).

[57] Ex. 16 (Toledano Tr. 438:12-17); Ex. 20 (Ehrenpreis Tr. 405:18-406:8).

> Hi there,
> Per our discussion, I won't raise it, you will for discussion in Executive Session today or for you to discuss with Elon.
>
> The data we have does indicate that the Board should move to value vs. units and we're currently significantly above market. I think you all have a 3 year grant coming up, so ideally would address before that. There could be shareholder noise on disclosure of grants, if not addressed before then. FYI only, happy to help, as we have the Radford data, but you could do a study, as mentioned when we talked, with Compensia.
>
> P.S. I'll wait for you to call in to start the Comp Committee meeting. Here's the dial in: **iPhone one-tap:** US +18558801246,341419711#
>
> Gaby

[58]

While Ehrenpreis claimed to have conveyed the information in the Aon Presentation to the Compensation Committee during the March 2018 meeting,[59] its other members testified they were unaware of the Aon Presentation or its contents prior to this litigation.[60] Nor was any other Director Defendant then-serving on the Board made aware of the information in, or the existence of, the Aon Presentation.[61]

Notwithstanding Toledano's recommendation to address director compensation before the upcoming triennial grants, the Compensation Committee

[58] Ex. 34 (TSLA_DETROIT_00028224). Toledano did not recall discussing the Aon Presentation with any other director. Ex. 16 (Toledano Tr. 414:17-20).

[59] Ex. 20 (Ehrenpreis Tr. 408:7-17).

[60] *See* Ex. 19 (Denholm Tr. 151:8-14); Ex. 21 (Gracias Tr. 128:4-12); Ex. 15 (Buss Tr. 164:9-165:21).

[61] *See* Ex. 25 (Kimbal Musk Tr. 229:5-14); Ex. 35 (Elon Musk Tr. 106:1-108:20, 110:7-13); Ex. 27 (Murdoch Tr. 176:7-177:5); Ex. 26 (Rice Tr. 13:19-14:3; 68:9-69:12).

failed to do so.[62] In June 2018, Defendants Denholm, Ehrenpreis, Gracias, Murdoch, Kimbal Musk, Buss, and Rice granted themselves triennial awards with a grant date fair value of $60,122,573.[63]

2. 2020 Tesla Internal Benchmarking Exercise

Tesla management's early-2020 effort to develop a peer group was sidelined by the Board immediately following the commencement of this action in June 2020.

In connection with the February 26, 2020 meeting of the Compensation Committee, management provided a presentation describing a "2020 Peer Group" and a methodology to develop that group.[64] Management "recommend[ed] establishing a formal peer group for executive compensation decisions" and noted that the peer group would "[p]rovide a reference point for Board of Director compensation programs and equity utilization trends."[65] The presentation included a "Proposed Peer Group" consisting of technology and automotive companies.[66]

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[62] *See* Ex. 34 (TSLA_DETROIT_00028224); *see also* Ex. 16 (Toledano Tr. 319:21-320:16 (it would be "best practices" to review director compensation in advance of a triennial grant)).

[63] Ex. 10 (Defendants' Responses and Objections to Plaintiff's First Request for Admission at Appendix A).

[64] Ex. 36 (TSLA_DETROIT_00027888 at -27914).

[65] *Id.*

[66] *Id.* at -27915.

Tesla management then began work to compare Tesla's director compensation to that paid to peer directors. In a draft Compensation Committee presentation circulated on June 10, 2020, one slide, entitled "Director Compensation: Annual Membership Peer Comparison," listed "[r]ecommended changes," including "[m]ove to 1-year value based grants rather than 3-year share based grants."[67] Another slide, comparing Tesla's director compensation to peers, showed that the highest-paid peer directors only received $452,500 annually, with compensation of only $315,000 for peers at the 50th percentile.[68] Tesla's directors were shown to receive multiples of these amounts.[69]

Although there is no documentary evidence that these analyses reached the Board, Steve King, Tesla's former Senior Manager of Global Compensation and an author of the presentation, testified that he routinely met with Ehrenpreis to discuss draft presentations in advance of Compensation Committee meetings.[70] But the final

[67] Ex. 37 (TSLA_DETROIT_00020334, -20335 at -20346).

[68] *Id.* at -20347.

[69] *See id.* Although the calculations presented in this draft presentation are inaccurate due to an error, the comparison accurately reflects that Tesla's Board compensation far outpaced its peers.

[70] Ex. 38 (King Tr. 137:14-138:5).

presentation for this meeting did not include any reference to director compensation, nor did Mr. King recall discussing it.[71]

Denholm claimed that, sometime between February and June 2020, the "Compensation Committee and the Board did start to discuss whether [they] should change the amount of options" granted due to the "sustained increase in the stock price."[72] However, no contemporaneous documents reflect such a discussion, the Board never retained a compensation consultant post-2012 and pre-lawsuit, and on June 18, 2020 and August 18, 2020, the Director Defendants proceeded with the option awards contemplated by the February 2020 Policy to Mizuno and Denholm, respectively.[73]

IV. IN RESPONSE TO THIS ACTION, THE DIRECTOR DEFENDANTS SUSPEND 2021 AND 2022 COMPENSATION

On June 17, 2020, Plaintiff filed its Complaint,[74] alleging that the Defendants breached their fiduciary duties in awarding excessive director compensation from 2017 through 2020, resulting in unjust enrichment. Based on Tesla's closing stock

[71] *Id.* at 239:6-242:4.

[72] Ex. 19 (Denholm Tr. 85:4-90:22).

[73] *See* Ex. 39 (TSLA_DETROIT_00029141 (June 18, 2020 Compensation Committee meeting minutes reflecting discussion of director compensation, post-filing of Complaint)); Ex. 19 (Denholm Tr. 105:8-107:7).

[74] Trans. ID 65705240.

price on June 12, 2020, the challenged awards then had a net present value of $437,581,504.[75]

In response to this Action, the Director Defendants suspended their equity compensation and, except for Mizuno, declined to take their cash retainers for 2021 and 2022.[76] In June 2021, the Board decided to "forego any automatic grants of annual stock option awards under the Director Compensation Policy or otherwise previously approved by the Board until July 2022."[77] In May 2022, the Board extended its decision until July 2023.[78]

V. PLAINTIFF FORGOES EARLY RESOLUTION TO COMPLETE DISCOVERY

A. Document Discovery

Between October 2020 and April 2023, Plaintiff propounded to Defendants 50 requests for production of documents, and 84 interrogatories, as well as requests for admission confirming the granting, vesting, cancellation, forfeiture, sales

[75] *Id.* at ¶113 and Ex. B.

[76] *See* Ex. 40 (Mizuno Tr. 135:12-136:3 ("I mean because of this [lawsuit], I didn't receive my stock option for the last two years.")).

[77] Ex. 41 (Tesla 2021 Proxy Statement (Form DEF 14A) (Aug. 13, 2021) at 51). Mizuno was the only director to receive a cash retainer in 2021. Ex. 42 (Tesla 2022 Proxy Statement (Form DEF 14A) (June 23, 2022), at 58).

[78] *See* Ex. 42 (Tesla 2022 Proxy Statement (Form DEF 14A) (June 23, 2022), at 59). Mizuno was the only director to receive a cash retainer in 2022. *See* Ex. 43 (Tesla 2023 Proxy Statement (Form DEF 14A) (Apr. 6, 2023), at 57).

pursuant to, and exercises of the Director Defendants' options awards. Plaintiff also served 23 third-party subpoenas. After negotiations, Plaintiff obtained documents from a total of 23 custodians, including the eleven Director Defendants, Elon Musk, and eleven current and former Tesla employees.

Based on its review of Defendants' initial productions, Plaintiff identified additional types and sources of relevant documents and repeatedly pressed for production. Through negotiation, Plaintiff developed a robust record without the need for multiple discovery motions. For example, after reviewing the initial productions, Plaintiff obtained documents from four additional custodians: Toledano and three Tesla public relations employees. Plaintiff also obtained documents regarding compensation consultants' work on director compensation after the filing of the Complaint and garnered productions from seven custodians on that topic. Plaintiff further identified and obtained specific documents missing from Defendants' productions, including Board minutes and materials and stock option award agreements.

Through third-party discovery, Plaintiff obtained arguably the most important document in this case—the Aon Presentation—which Defendants had failed to produce. Aon only produced that presentation after months of negotiations and Plaintiff's repeated follow-up on Defendants' purported privilege review of Aon's

proposed production. Plaintiff confronted Defendants with their failure to independently produce the presentation from the agreed-upon custodians' files, and Defendants finally produced a copy, claiming it had been subject to a purported privilege review, although it was never identified in Defendants' privilege logs and there was no basis for privilege. Plaintiff obtained the Aon Presentation before engaging in any mediation sessions with Defendants – with the benefit of the presentation's reporting on the excessiveness of the Director Defendants' compensation, Plaintiff was well-positioned once mediation discussions began in late 2022, as set forth below.

Plaintiff also successfully pursued a motion to compel Defendants' production of certain documents withheld on claims of privilege. Defendants' initial privilege logs spanned 2,080 entries. Plaintiff reviewed the logs and underlying documents to identify improperly withheld documents. Plaintiff secured Defendants' agreement to re-review all documents underlying the challenged entries and Defendants produced many previously withheld documents as a result. Unable to reach agreement on the remaining disputes, on October 24, 2022, Plaintiff filed a motion to compel, which the Court granted- and denied-in part on January 31, 2023. Consequently, Defendants produced communications between Jurvetson and Tesla in-house counsel that detailed errors in the awarding and vesting of Jurvetson's

options. An important component of the Settlement is the institution of effective controls regarding director compensation in light of these and other errors in the administration of non-employee director compensation.

Altogether, Plaintiff's Counsel secured—and reviewed—13,493 documents spanning 95,298 pages.[79]

Producing Party	Documents	Pages
Tesla and Defendants	9,429	79,471
Aon	1,793	7,294
Compensia	3	4
Fox Corporation	3	133
Innisfree	243	884
ISS	772	3,941
Oracle	1	18
PricewaterhouseCoopers	53	69
Russel Reynolds	1	2,110
Walgreens	1,194	1,366
21st Century Fox	1	8
TOTAL	**13,493**	**95,298**

Plaintiff also responded to 28 requests for production of documents propounded by Defendants and produced 1,075 documents spanning 13,203 pages and a privilege log.

[79] Although Plaintiff served 23 third-party subpoenas seeking documents and, in some instances, testimony, many of the third parties did not have relevant documents responsive to the subpoenas in their possession, including several former Tesla employees.

B. Plaintiff Pursues Depositions Rather than Settling Early

Beginning in August 2022, the parties commenced discussions to mediate before Robert A. Meyer (the "Mediator").[80] In October 2022, the parties exchanged mediation statements and exhibits in advance of a full-day session on November 5, 2022, and engaged in an additional full-day session on November 22, 2022. These sessions occurred before Plaintiff had taken a single deposition. Although the parties exchanged demands and offers, Plaintiff did not agree to settle the Action at this stage, and instead commenced depositions.

Over the ensuing months, Plaintiff's Counsel deposed the following ten fact witnesses, prior to attending an additional mediation session on March 2, 2023, at Defendants' request.

Name	Role	Date
Deepak Ahuja	Former CFO, Tesla	12/28/2022
Christian Facey	Former Head of Global Rewards, Tesla	1/13/2023
Steve King	Former Senior Manager, Compensation, Tesla	2/2/2023
Todd Maron	Former General Counsel, Tesla	2/7/2023
Linda Johnson Rice	Defendant, Director	2/10/2023
Kimbal Musk	Defendant, Director	2/10/2023
Aaron Beckman	Senior Manager, Stock Administration, Tesla	2/15/2023
Pam Greene	Rule 30(b)(6) witness, Aon	2/17/2023
Stephen Jurvetson	Defendant, Director	2/17/2023
Kathleen Wilson-Thompson	Defendant, Director	2/23/2023

[80] *See generally* Affidavit of Robert A. Meyer, dated August 28, 2023 ("Meyer Affidavit").

Although these depositions yielded important evidence, at the time of the March 2, 2023 mediation session, Plaintiff's Counsel had yet to depose the most important witnesses, including the senior Tesla executives involved in the Aon Presentation (Toledano and Tsang) and eight of the twelve named Defendants, including Ehrenpreis (Chair of the Compensation Committee) and Denholm (Chair of the Board and Member of the Compensation Committee). These depositions were the riskiest for Plaintiff's case, as these witnesses may have testified to a process that was not reflected in document discovery. Nonetheless, after exchanging additional offers and demands, Plaintiff again elected to pursue further discovery rather than settle on terms that it did not deem favorable to the Company.

Plaintiff's Counsel then deposed an additional twelve fact witnesses:

Name	Role	Date
Brad Buss	Defendant, Director	3/3/2023
Hiromichi Mizuno	Defendant, Director	3/8/2023
James Murdoch	Defendant, Director	3/10/2023
Gabrielle Toledano	Former Chief People Officer, Tesla	3/14/2023
Ira Ehrenpreis	Defendant, Compensation Committee Chair	3/17/2023
Spencer Gibson	Rule 30(b)(6) witness, Aon	3/20/2023
Adam Hilborn	Rule 30(b)(6) witness, Aon	3/20/2023
Robyn Denholm	Defendant, Board Chair	3/22/2023
Christine Tsang	Former Global Head of Compensation, Tesla	3/23/2023
Elon Musk	Defendant, CEO	4/5/2023

Name	Role	Date
Antonio Gracias	Defendant, Director	4/6/2023
Lawrence Ellison	Defendant, Director	4/18/2023

The 22 depositions spanned more than 71 hours on record and yielded 5,275 pages of transcripts. Plaintiff's Counsel introduced 384 exhibits. As set forth above, deposition testimony further supported that the Director Defendants had granted themselves excessive compensation without engaging in a fair process.

VI. THE PARTIES CONDUCT EXPERT DISCOVERY AND PLAINTIFF PREPARES AN AMENDED COMPLAINT WHILE CONTINUING TO NEGOTIATE A RESOLUTION OF THE ACTION

On April 28, 2023, Plaintiff served three opening expert reports from: (i) Jesse Fried, the Dane Professor of Law at Harvard Law School, regarding whether the amount of, and process for awarding, the Director Defendants' compensation was fair and the amount of compensation that would have been fair; (ii) Carl Saba, a partner of Hemming Morse, regarding the calculation of the amount of excess compensation the Director Defendants awarded themselves based on Fried's opinion; and (iii) David Yermack, the Albert Fingerhut Professor of Finance and Business Transformation at New York University, regarding the incentives and risks associated with director compensation and the appropriate process for assessing and setting director compensation. These reports spanned 145 pages in total.

Defendants served an opening 61-page expert report from Kevin Murphy, the Kenneth Trefftz Chair in Finance at the University of Southern California Marshall School of Business. Murphy opined that: (i) Tesla's fixed-number option grants to directors were consistent with its compensation philosophy; (ii) the director compensation structure aligned with stockholder interests; (iii) the process by which Tesla set the Policy at the time of IPO was fair (and, thus, the process for awarding the challenged compensation pursuant to the same structure was fair); and (iv) the amount of compensation was fair in light of the riskiness of options, the nature of service as a Tesla director, and the fairness of the amount of compensation at the time the IPO-era Policy was established.

The parties served rebuttal expert reports from Fried and Murphy on June 9, 2023. Fried's rebuttal report spanned 51 pages, and Murphy's rebuttal report spanned 55 pages.

Throughout expert discovery, the parties continued to negotiate directly and through the Mediator. The parties were actively preparing for expert depositions, which were imminent at the time the parties reached an agreement in principle.

During this time, Plaintiff prepared an amended complaint (the "Amended Complaint") that would conform the pleading to the evidence obtained in discovery, including by, among other things, precisely quantifying the value

obtained by the Director Defendants from their excessive compensation, and challenging the option awards that the Director Defendants granted after commencement of the Action. Because the earliest of those awards was granted on June 18, 2020, Plaintiff was prepared to timely file the Amended Complaint challenging those awards on June 16, 2023. Plaintiff secured a tolling agreement with Defendants to continue the ongoing negotiations but was ready to file the Amended Complaint had the parties not reached a resolution, while keeping the existing trial dates.

VII. THE PARTIES RESOLVE THE ACTION

On June 19, 2023, the Mediator made a proposal whereby the Director Defendants would return 3,130,406 options, with the parties valuing returned equity using Tesla's closing stock price on June 16, 2023 (*i.e.*, $260.54 per share), the Director Defendants would forgo all compensation for 2021 and 2022 (except for the cash retainers previously paid to Mizuno), and the Current Director Defendants would forgo all compensation for 2023. The recommendation was subject to separately reaching agreement on governance reforms regarding director compensation. On June 20, 2023, the Mediator informed the parties that both sides had accepted the recommendation.

Following these negotiations, the parties separately agreed to governance reforms on June 28, 2023. The parties negotiated the terms of the Stipulation filed on July 14, 2023, which does not address any fee, expense, or incentive award. The parties were unable to subsequently reach agreement on those terms.

On July 17, 2023, Plaintiff's Counsel posted the Stipulation and Notice on Bleichmar Fonti & Auld LLP's and Fields Kupka & Shukurov LLP's websites. On July 20, 2023, Tesla filed a Form 8-K with the SEC announcing the settlement and attaching a copy of the Notice. By no later than September 22, 2023, Tesla will file with the Court an affidavit regarding the dissemination of the Notice as provided in paragraph 6 of the Scheduling Order. To date, no Tesla stockholder has objected to any aspect of the Settlement.

ARGUMENT

The Settlement is the largest derivative case settlement in Delaware history, delivers more than $919 million in value to Tesla and its stockholders, captures between 45% and 99% of possible trial damages, eliminates real trial and appellate risk, is an unprecedented recovery for a director compensation case, and thus warrants the Court's approval.

I. THE SETTLEMENT MERITS APPROVAL

In Delaware, "voluntary settlements are highly favored and will be enforced whenever possible." *Trexler v. Billingsley*, 166 A.3d 101 (Del. 2017). This Court is charged with approving derivative settlements and will do so where a settlement is fair, reasonable, and adequate and in the best interests of the corporation. DEL. CT. CH. R. 23.1; *In re Activision Blizzard, Inc. S'holder Litig.*, 124 A.3d 1025, 1042-43 (Del. Ch. 2015). In making its determination, the Court "looks to the facts and circumstances upon which the claim is based, [looks to] the possible defenses thereto, and then exercises a form of business judgment to determine the overall reasonableness of the settlement." *Polk v. Good*, 507 A.2d 531, 536 (Del. 1986). In its fiduciary role, the Court "determine[s] whether the settlement falls within a range of results that a reasonable party in the position of the plaintiff, not under any compulsion to settle and with the benefit of the information then available, reasonably could accept." *Activision*, 124 A.3d at 1064. The Court does not have to "decide any of the issues on the merits." *Polk*, 507 A.2d at 535-36.

When considering a motion for settlement approval, the Court is tasked with "assessing the reasonableness of the 'give' and the 'get'" of the settlement. *Activision*, 124 A.3d at 1043; *see also Solak v. Huff*, C.A. No. 2022-0400-LWW, at 30 (Del. Ch. Jan. 11, 2023) (TRANSCRIPT) (approving a settlement of claims

concerning non-employee director compensation where the "give and the get [were] roughly even"). In doing so, the Court weighs the following factors:

> (1) the probable validity of the claims, (2) the apparent difficulties in enforcing the claims through the courts, (3) the collectibility [sic] of any judgment recovered, (4) the delay, expense and trouble of litigation, (5) the amount of the compromise as compared with the amount and collectibility [sic] of a judgment, and (6) the views of the parties involved, pro and con.

Polk, 507 A.2d at 536. Application of these factors demonstrates that the Settlement's "get" compared to the Company's "give" is reasonable.

A. The "Get" Is the Largest Derivative Settlement in Delaware History

The consideration underlying the Settlement comprises three components: returned compensation, forgone compensation, and corporate governance reforms. This consideration's value, when weighed against the range of potential outcomes in continued litigation, including the risk of no recovery, supports approval.

1. The Settlement Consideration Confers Unprecedented Value on the Company

The first component requires the Director Defendants to return "the value of 3,130,406 options" equal to $735,266,505.[81] The Director Defendants can return this value in the form of cash, shares, or vested but unexercised options.[82]

[81] Stipulation, ¶¶2.1, 2.6.

[82] *Id*. ¶2.2.

$458,649,785 will be returned in options, while $276,616,720 will be returned in cash or shares.[83]

The methodology for valuing the components of the Settlement Options, as provided for in the Stipulation, looks to the $260.54 closing price of Tesla stock on June 16, 2023, the date specified by the Mediator's proposal.[84] Settlement Options returned as Returned Options are valued using their actual intrinsic value (*i.e.*, $260.54 less each option's actual exercise price), Returned Stock is valued at $260.54, and Returned Cash is valued at face value.[85] In this way, the $735,266,505 figure represents the value that the Director Defendants agreed to give up on the date the Settlement terms were agreed upon, which is the bargain the parties reached.[86]

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[83] *Id.* ¶2.6. The Director Defendants reserve the right to "return a different combination of (i) Returned Options and (ii) Returned Cash and/or Returned Stock than what is reflected in" the Stipulation, but any "such adjustment shall not decrease the [$735,266,505] Settlement Option Amount."

[84] Stipulation, ¶1.26 (defining the "Settlement Stock Price").

[85] Stipulation, ¶¶2.3-2.5.

[86] This valuation methodology renders irrelevant the allocation of the returned Settlement Options among the various Director Defendants. No matter how many Settlement Options Director A returns relative to Director B, the total value being returned "jointly and severally" to Tesla in the aggregate will always equal $735 million under this methodology. For that reason, the Stipulation does not, and need not, require that any specific Director Defendant return any specific number or value of Settlement Options.

It is possible to value the Returned Options differently than the formula stated in the Stipulation, but the result would be higher. For instance, as provided in the Stipulation, "[t]he number of authorized shares under Tesla's 2019 Equity Incentive Plan ("EIP") (as described in Tesla's SEC's filings) shall be increased by the total number of Returned Options upon cancelation of the Returned Options."[87] In other words, the equity underlying the Returned Options will go back to the available pot under the EIP and represent units of equity that the Company can use to compensate other employees or attract new talent. In the event the Company were to issue that equity as restricted stock units on June 16, 2023 (*i.e.*, the point in time when the deal was struck and the equity could have been used to compensate other employees, but for the delay imposed by the procedural requirements of Rule 23.1), the values of those RSUs would actually be significantly higher than the intrinsic value, because they would each be valued at the $260.54 stock price, without having to deduct the exercise price. Similarly, the Black-Scholes fair value of each of the returned options as of June 16, 2023, also exceeds their intrinsic values.[88] The Stipulation

[87] Stipulation, ¶2.3.

[88] *See* Affidavit of Carl Saba, dated August 30, 2022 ("Saba Affidavit), ¶¶7-8.

value of $735,266,505 is thus a conservative approach to valuing the benefit that the Settlement provides Tesla.[89]

The Director Defendants' agreement to return the value of over 3.1 million options is an unparalleled "get." The value of the Settlement Options alone is more than triple the next approved comparator, *Activision*, which settled for $275 million. But the Settlement confers even more quantifiable benefits.

The second component of the Settlement requires that the Director Defendants "forego permanently" the 2021 and 2022 Foregone Options and provides that they shall not receive any other compensation for those years, and that the Current Director Defendants "forego permanently any compensation for Tesla Board service for 2023."[90] According to Defendant Mizuno, the Director Defendants' decision to forgo equity compensation during the pendency of this Action is attributable to Plaintiff. Ex. 40 (Mizuno Tr. 135:12-136:3 ("I mean because of this [lawsuit], I didn't receive my stock option for the last two years.")); *see also Infinity Broadcasting Corp. S'holders Litig.*, 802 A.2d 285, 290 (Del. 2002) (regarding the

[89] To be clear, Plaintiff does not propose using these higher alternative valuation models for the approval analysis, but they exist should the Court wish to cross-check the Stipulation value against another valuation model such as Black-Scholes.

[90] Stipulation, ¶2.8.

presumption of causation). And while the Board solely in response to this lawsuit had adopted resolutions to forgo equity compensation in 2021 and 2022, these resolutions were temporary suspensions until June 2023.[91] The Board was not restricted from granting retrospective compensation—until the Defendants entered into the Settlement.[92]

Assuming the Director Defendants had awarded themselves the fixed number of options set forth in the Policy (which is the number they had granted themselves in every single prior grant period), their 2021, 2022, and 2023 option awards would have been worth approximately $90,672,366, $76,099,510, and $17,388,150, respectively, for a total intrinsic value of $184,160,026, using the same valuation methodology set forth in the Stipulation.[93]

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[91] Ex. 41 (Tesla 2021 Proxy Statement (Form DEF 14A) (Aug. 13, 2021) at 51); Ex. 42 (Tesla 2022 Proxy Statement (Form DEF 14A) (June 23, 2022) at 59.

[92] Stipulation, ¶2.8.

[93] Saba Affidavit Exs. B.1, C.1, & D.1. The Foregone Compensation can also be valued in alternative ways, such as the Black-Scholes fair value as of June 16, 2023 ($779,305,400) or the Black-Scholes fair value on the date the grants would have been issued ($685,815,786). *See id.* But these valuations also greatly exceed the intrinsic values. Once again, valuing the forgone compensation using the Stipulation's valuation formula yields a conservative result.

There is also at least some possibility that the Director Defendants would not have granted themselves the full slate of options that they were authorized to grant. This is not the most reasonable assumption because it assumes that the Director Defendants would have altered their standard course and imposed some

The third component of the Settlement consideration includes several meaningful governance reforms, covering a period of five years from the effective date of the Stipulation, including:[94]

- amendments to the Compensation Committee charter to provide for (i) annual reviews and assessments of non-employee director compensation, (ii) retention of a compensation consultant, and (iii) annual recommendations to the full Board;
- annual full Board review and approval of proposed non-employee director compensation;
- annual stockholder approval votes of the Board's proposed non-employee director compensation, excluding the votes of the Defendants and affiliates;
- enhanced proxy disclosures concerning non-employee director compensation; and
- annual review and, where necessary, enhancement of internal controls specific to non-employee director compensation.

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meaningful process when no such process had ever been implemented before. *See infra* Secs. III.B-C. In fact, not only did the Director Defendants not revise their compensation when Tesla's stock price and the value of their compensation increased, they actually granted three awards after this lawsuit was filed. Accordingly, there is no basis to believe they would have changed their behavior in 2021-2023, but for this lawsuit and Settlement.

The $184,160,026 intrinsic value thus falls on the low end of a scale bounded by the (incredible) position that the Director Defendants would have awarded themselves no compensation had this lawsuit never occurred and the valuation models of $600-800 million.

[94] Stipulation, ¶¶2.10-14.

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These reforms are targeted at the precise lack of process that led to this Action and are designed to prevent excessive future compensation. While it is difficult to ascribe value to intangible prospective reforms like these, they provide substantial benefits. *See, e.g.*, *Ryan ex rel. Maxim Integrated Prods. v. Gifford*, C.A. No. 2213-CC, 2009 WL 18143, at *10 (Del. Ch. Jan. 2, 2009) ("It is difficult to place a value on such non-pecuniary benefits; however, such governance reforms can provide substantial benefits and are appropriately considered by the Court when evaluating a proposed settlement."). In fact, in *Pascal v. Czerwinski*, this Court described stockholder approval of director compensation (which is just one element of the governance reforms achieved here) as the "ideal settlement" because it "reinforces the rights of stockholders to control decisions that would otherwise, under the [Delaware General Corporation Law] be controlled by conflicted fiduciaries." C.A. No. 2020-0320-SG, at 19-20 (Del. Ch. Feb. 7, 2022) (TRANSCRIPT).

2. The Settlement Options Constitute 45% to 99% of Likely Recoverable Damages

From July 2017 through August 2020, the Director Defendants granted themselves 11,331,750 options, only 8,870,208 of which fully vested and were not forfeited. Thus, any potential pool of damages would be limited to the latter number of options. Further, based on discovery, this pool would have been reduced by the number of Defendants Rice's and Jurvetson's vested options, because Plaintiff

would not have contended that that compensation was unfair at the time of trial.[95] This reduces the pool to 8,694,210, which had a grant date fair value of $82,942,886.

However, assuming that Plaintiff were able to show a breach of duty, "it would have been unlikely that the entire amount of compensation that the directors received would have had to be disgorged" and "[i]nstead, it's likely that the outcome would have been some delta between a fair rate of compensation and what the directors received." *Solak v. Sato*, C.A. No. 2020-0775-JTL, at 40 (Del. Ch. Apr. 16, 2021) (TRANSCRIPT). Thus, the Court would have to determine what would be fair compensation for relevant Board-related services performed by each Director Defendant between (i) the grant date of each director's first challenged option award and (assuming no new compensation is paid until after the trial) (ii) either the end of 2023 or the date on which a Director Defendant retired from the Board. Depending on the Court's determination of what would have been a fair rate of compensation,

[95] Defendant Rice has exercised all her vested and not forfeited 96,000 options and sold the underlying stock for $67,523.10 in net proceeds, which, along with her total cash compensation of 44,054, does not raise to the levels of unfair compensation. Similarly, the grant date fair value of Defendant Jurvetson's vested 79,998 options only equaled $526,477.95, which, considering his seventeen months of Board services between the grant date and his resignation, does not raise to unfair levels.

the 3,130,406 Settlement Options represent anywhere between 45.3% and 98.6% of recoverable damages, as follows:[96]

Average Annual Fair Compensation Rate	# of Vested Options	Grant Date Fair Value of Vested Options	Grant Date Fair Value of Excessive Options	# of Excessive Options	% of recovery
$400,000	8,694,210	$82,942,886	$ 67,061,153	6,916,899	45.3%
$600,000	8,694,210	$82,942,886	$ 58,661,153	5,981,719	52.3%
$800,000	8,694,210	$82,942,886	$ 50,261,153	5,046,538	62.0%
$1,000,000	8,694,210	$82,942,886	$ 41,861,153	4,111,357	76.1%
$1,200,000	8,694,210	$82,942,886	$ 33,461,153	3,176,177	98.6%

3. The Unprecedented Settlement Value Reflects the Strength of Plaintiff's Claims Weighed Against the Risks of Trial

The over $919 million in value obtained by Plaintiff reflects the strength of Plaintiff's claims as well as Plaintiff's candid and informed assessment of the potential outcomes at trial.

a. Plaintiff's Claims Are Subject to Entire Fairness Review

Plaintiff's first count required proof that the Settling Defendants breached the duty of loyalty that they owed to Tesla. *Metro Storage Int'l LLC v. Harron*, 275 A.3d 810, 840-41 (Del. Ch. 2022). Because this claim concerned discretionary director self-compensation that was not awarded pursuant to a stockholder plan

[96] Exhibit 44 provides the detailed calculations. These calculations do not account for awards granted in 2014 and 2015 that partially vested in 2017 and 2018 because such awards were not challenged in this Action.

containing meaningful limits, it is subject to entire fairness review. *In re Inv'rs Bancorp, Inc. S'holder Litig.*, 177 A.3d 1208, 1211 (Del. 2017); *accord Telxon Corp. v. Meyerson*, 802 A.2d 257, 265 (Del. 2002) ("[D]irectoral self-compensation decisions lie outside the business judgment rule's presumptive protection[.]"). And because Plaintiff pleaded claims for unjust enrichment, a finding of breach of fiduciary duty against even just one director would have likely put the entire pool of excessive Board compensation in play. *Frederick Hsu Living Tr. V. ODN Holding Corp.*, C.A. No. 12108-VCL, 2017 WL 1437308, at *5 (Del. Ch. Apr. 14, 2017), *as corrected* (Apr. 24, 2017). Due to the fact-intensive nature of the inquiry, application of entire fairness review will often necessitate trial, as it would have here, where the case schedule did not provide for summary judgment motions.

Application of entire fairness review, however, has never been a silver bullet for Delaware plaintiffs. *See, e.g.*, *In re Cysive, Inc., S'holder Litig.*, 836 A.2d 531 (Del. Ch. 2003) (finding of fairness after trial); *see also In re Tesla Motors S'holder Litig.*, Consol. C.A. No. 181, 2022, 2023 WL 3854008, at *2 (Del. June 6, 2023). This has held true since the Supreme Court's explication of entire fairness in *Kahn*

v. M&F Worldwide Corp., 88 A.3d 635 (Del. 2014), which some practitioners feared might lead to a deluge of plaintiff-friendly findings.[97]

Against this backdrop, Plaintiff had to assess the "get" against the range of potential outcomes at trial.

b. Plaintiff's Claims Were Strong but Faced Real Risk at Trial

Plaintiff believed its case was strong when it first filed the Complaint and after discovery. As described in detail above, Plaintiff would likely have proven that Defendants did not engage in any meaningful process with regard to director compensation,[98] did not engage any compensation consultant or perform any benchmarking analyses against peer companies in the years 2017-2020,[99] failed to even consider whether their compensation was unfair, including whether it was

[97] *See generally* Meredith Kotler, Ethan Klingsberg, and Marques Tracy, "In re BGC Partners: Maybe Entire Fairness Review Isn't So Bad After All," Harvard Law School Forum on Corporate Governance (October 4, 2022), *available at*, https://corpgov.law.harvard.edu/2022/10/04/in-re-bgc-partners-maybe-entire-fairness-review-isnt-so-bad-after-all/.

[98] *See infra* Sec. III.B.

[99] *See id*. In contrast with their own compensation, the Director Defendants did both in setting Elon Musk's and other employees' compensation. *See* Ex. 20 (Ehrenpreis Tr. 131:15-132:15; 193:22-194:20); Ex. 19 (Denholm Tr. 29:17-32:8; 52:3-53:12); Ex. 15 (Buss Tr. 85:12-86:3); Ex. 21 (Gracias Tr. 85:12-23).

excessive,[100] should be reduced,[101] or restructured,[102] and certain Defendants were not even aware of their compensation structure.[103] In fact, when someone at Tesla attempted to perform such an analysis, independently reaching out to Aon for assistance, Ehrenpreis specifically told Gaby Toledano, Tesla's "Chief People Officer," not to raise the Aon Presentation during the March 2018 Compensation Committee meeting.[104] While Ehrenpreis claimed he conveyed the information to the Committee during that meeting,[105] the minutes do not reflect this[106] and the other members of the Committee each testified they were unaware of the analysis and Aon Presentation prior to this litigation.[107]

Plaintiff nevertheless faced serious risks in establishing an unfair price, notwithstanding the evident failures in the process. As Vice Chancellor Laster

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[100] *See* Ex. 15 (Buss Tr. 67:22-68:22); Ex. 20 (Ehrenpreis Tr. 219:20-220:8); Ex. 25 (Kimbal Musk Tr. 209:14-21).

[101] *See* Ex. 15 (Buss Tr. 67:5-12); Ex. 26 (Rice Tr. 69:20-23); Ex. 27 (Murdoch Tr. 235:2-10; Ex. 21 (Gracias Tr. 109:5-13).

[102] *See* Ex. 19 (Denholm Tr. 123:19-124:21); Ex. 15 (Buss Tr. 176:15-178:3).

[103] *See* Ex. 29 (Wilson-Thompson Tr. 237:13-238:1).

[104] Ex. 16 (Toledano Tr. 438:12-17); Ex. 20 (Ehrenpreis Tr. 405:18-406:8); Ex. 34 (TSLA_DETROIT_00028224).

[105] Ex. 20 (Ehrenpreis Tr. 408:7-17).

[106] Ex. 45 (TSLA_DETROIT_00029472).

[107] *See* Ex. 19 (Denholm Tr. 151:8-14); Ex. 21 (Gracias Tr. 128:4-12); Ex. 15 (Buss Tr. 164:9-21).

plainly said just last month: "No one who is actually familiar with litigation in this court could think that" the "combination of the entire fairness test plus as-pled flaws in the deal process mean[s] that liability [is] never seriously in doubt." *In re Dell Techs. Inc. Class V S'holders Litig.*, Consol. C.A. No. 2018-0816-JTL, 2023 WL 4864861, at *27 (Del. Ch. July 31, 2023), *as revised* (Aug. 21, 2023). Indeed, the Court need look no further than the Company itself for a prime example of a problematic process that nonetheless resulted in a price that was ultimately deemed fair. *See Tesla Motors S'holder Litig.*, No. 181, 2022, 2023 WL 3854008, at *2 (Del. June 6, 2023).

In this context, Plaintiff faced significant headwinds arising from Tesla's exceptional performance: the price of Tesla stock increased significantly during the relevant period, from $24.76 on June 16, 2017, to $260.54 on June 16, 2023. Defendants skillfully developed a "rising tide lifts all boats" narrative under which Tesla's outlier director compensation was an inevitable and blameless happenstance of Tesla's stock price increase during that period. The Court might have determined that the Director Defendants were not "unjustly" enriched, as opposed to just enriched. Alternatively, the Court could have determined that the Director Defendants should not have earned all they received but, to reflect Tesla's outlier performance, should nonetheless have received much more than a typical director.

Plaintiff faced a serious risk that it would not be able to recover anywhere near this Settlement.

4. The Settlement Compares Favorably to Other Settlements

This $919 million monetary benefit of this Settlement stands alone, both generally and in excessive director compensation settlements specifically. It is 3.34 times the value of the next closest derivative case settlement, namely, the $275 million recovery in *Activision*.

For excessive director compensation settlements, this Settlement is unrivalled. The majority of such cases settle for future reductions in compensation and governance reforms and achieve no monetary recovery. *See, e.g.*, *In re Salesforce.com, Inc. Deriv. Litig*., C.A. No. 2018-0922 (Del. Ch. Sept. 17, 2019) (cap on future compensation and corporate governance) (STIPULATION); *Solak v. Sato,* C.A. No. 2020-0775 (Del. Ch. Jan. 13, 2021) (STIPULATION) (same); *Calma v. Templeton*, C.A. No. 9579 (Del. Ch. May 13, 2016) (STIPULATION) (same).

The rare cases where litigants recovered past compensation yielded far lower sums than this Settlement. *See* Plaintiffs' Opening Brief in Support of Their Motion to Approve the Proposed Settlement, Fee Application, and Incentive Awards, *In re Inv'rs Bancorp, Inc. S'holder Litig*., C.A. No. 12327-VCS, 2019 WL 1642491 (Del. Ch. Apr. 10, 2019) (plaintiff recovered 95,694 restricted stock units and

2,500,000 options, representing 8.7% of all RSUs and 100% of all options, respectively, that were granted to non-employee directors and challenged in the lawsuit; by the time of the settlement, the fair value of the cancelled options was less than their grant-date fair value and the RSUs were worth only approximately $1.2 million); *Michaeli v. King*, C.A. No. 8994-VCL (Del. Ch.) (plaintiff recovered $1.5 million in cash on potential maximum damages of approximately $4.2 million).

B. The "Give" of a Narrowly Tailored Release Is Limited to the Single Issue of Non-Employee Director Compensation

Stockholder settlements often provide defendants with a broad release. *See In re Phila. Stock Exch., Inc.*, 945 A.2d 1123, 1145 (Del. 2008). Not so here. In exchange for the substantial "Get" described above, Plaintiff negotiated a narrow release of only claims "against Settling Defendants that arise out of, are based upon, or relate in any way to the Relevant Period Director Compensation" which refers to the compensation granted to the Director Defendants between June 17, 2017 and the date of the Stipulation.[108] Put differently, Plaintiff is releasing claims concerning non-employee director compensation that it challenged and for which Plaintiff obtained relief via the Settlement Options.[109]

[108] Stipulation, ¶1.19, page 2.

[109] *Id.* ¶¶2.1-2.7; Complaint ¶¶186-96.

For those claims concerning director compensation that arose after the filing of the Complaint, Plaintiff obtained additional relief. Specifically, the three challenged option awards issued in June and August 2020, after the filing of the Complaint, are included as part the Settlement Options. In addition, the Director Defendants are forgoing any future compensation for 2021 and 2022, and the Current Director Defendants are forgoing any compensation for 2023.[110] The Defendants also agreed to implement prospective corporate governance reforms.[111] It also is not an issue to release claims arising after the filing of the Complaint (or that would have arisen had Defendants not halted issuing compensation in response to the lawsuit) because those claims arose from the same general conduct as the underlying lawsuit. *See Phila. Stock Exch.*, 945 A.2d at 1146 ("[A] settlement can release claims that were not specifically asserted in the settled action, but only if those claims are based on the same identical factual predicate or the same set of operative facts as the underlying action."); *see also In Re Medley Capital Corp. S'holders Litig.*, C.A. No. 2020-0775-JTL, at 38-39 (Del. Ch. Nov. 19, 2019) (TRANSCRIPT).

[110] Stipulation, ¶2.8

[111] *Id.* ¶¶2.1-2.8.

Finally, while the release is narrow on its face, the Settlement goes one step further and has an express carve-out for "claims already asserted in an action other than this Action, including, but not limited to, the claims asserted in *Tornetta v. Musk, et al.*, C.A. No. 2018-0408-KSJM (Del. Ch.)."[112]

II. PLAINTIFF'S REQUESTED FEE AND EXPENSE AWARD IS APPROPRIATE

"The Court of Chancery has broad discretion in fixing the amount of attorney fees to be awarded." *Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542, 547 (Del. 1998). In exercising this discretion, the Court applies the so-called *Sugarland* factors: "1) the results achieved; 2) the time and effort of counsel; 3) the relative complexities of the litigation; 4) any contingency factor; and 5) the standing and ability of counsel involved." *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1254 (Del. 2012) (*citing Sugarland Industries Inc. v. Thomas*, 420 A.2d 142, 149-150 (Del. 1980)). Plaintiff requests an award of $1,023,779 in out-of-pocket litigation expenses and $229,600,687 in attorneys' fees, consisting of 25% of the monetary benefit achieved (net of expenses) before valuing governance reforms. Each *Sugarland* factor counsels in favor of the Fee and Expense Award.

[112] *Id.*

A. The Benefits Achieved Support the Fee and Expense Award

Delaware courts have "consistently noted that the most important factor in determining a fee award is the size of the benefit achieved." *In re Nat'l City Corp. S'holders Litig.*, C.A. No. 4123-CC, 2009 WL 2425389, at *5 (Del. Ch. July 31, 2009), *aff'd*, 998 A.2d 851 (Del. 2010). This benefit may be the "creation of a common fund" or "the conferring of a corporate benefit." *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1164 (Del. 1989). Plaintiff's efforts resulted in both.

If the Settlement is approved, Plaintiff's efforts will have created a quantifiable benefit of $919,426,531, consisting of $735,266,505 in Returned Options, Cash, and Stock and $184,160,026 in Foregone Compensation. In addition, Plaintiff obtained corporate governance reforms specifically designed to prevent a recurrence of the wrongdoing that gave rise to this Action, including binding stockholder votes on director compensation.

1. Plaintiff Is Entitled to a Percentage of the Benefit Achieved

"Under the common fund doctrine, a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole. The common fund doctrine … is founded on the equitable principle that those who have profited from litigation should share its costs." *Ams. Mining*, 51 A.3d at 1253. "When the benefit is

quantifiable, … *Sugarland* calls for an award of attorneys' fees based upon a percentage of the benefit." *Activision*, 124 A.3d at 1070.

Delaware has "decline[d] to impose either a cap or the mandatory use of any particular range of percentages for determining attorneys' fees in megafund cases." *Ams. Mining*, 51 A.3d at 1261. Rather, subject to the Court's discretion, since the Supreme Court's decision in "*Americas Mining* and its adoption of the stage-of-case method," this Court will typically award a percentage-based fee that turns on the stage of the litigation and efforts undertaken by counsel. *Dell*, 2023 WL 4864861, at *14. As the Supreme Court explained, 33% represents the top end of this range, with lower percentages appropriate for pretrial settlements:

> When a case settles early, the Court of Chancery tends to award 10-15% of the monetary benefit conferred. When a case settles after the plaintiffs have engaged in meaningful litigation efforts, typically including multiple depositions and some level of motion practice, fee awards in the Court of Chancery range from 15-25% of the monetary benefits conferred. A study of recent Delaware fee awards finds that the average amount of fees awarded when derivative and class actions settle for both monetary and therapeutic consideration is approximately 23% of the monetary benefit conferred; the median is 25%.

Ams. Mining, 51 A.3d at 1259-60. Under this approach, which aligns the interests of counsel with the interests of the stockholders, "[a] percentage of a low or ordinary recovery will produce a low or ordinary fee; the same percentage of an exceptional recovery will produce an exceptional fee …. The wealth proposition for plaintiffs'

counsel is simple: If you want more for yourself, get more for those whom you represent." *Dell*, 2023 WL 4864861, at *7.

2. The Fee and Expense Award Is Appropriate Based on the Benefits Achieved and the Stage-of-the-Case

Here, Plaintiff's efforts secured a quantifiable monetary benefit equal to $919,426,531, consisting of a common fund of $735,266,505 in returned Settlement Options and $184,160,026 in Foregone Compensation. As noted, this represents the largest derivative settlement in the Court's history, not even accounting for the significant benefits conferred by the governance reforms.[113] This Action settled at the very end of discovery, with only the taking of expert depositions left to complete before the conclusion of the "mid-stage phase." This posture puts the Action at the upper bound for litigation resolved at the "mid-stage phase," or 25%. *Dell*, 2023 WL 4864861, at *9; *Activision*, 124 A.3d at 1071.

This fee request aligns squarely with the stage-of-case approach applied in other cases, including other nine-figure recoveries. *See, e.g.*, *In re Dole Food Co.*, 110 A.3d 1257, 1259 (Del. Ch. 2015) (awarding $33,882,616.30, or 30% of the post-trial class recovery, after deducting $2,530,422.96 in expenses); *In re El Paso Corp. S'holder Litig.*, C.A. No. 6949-CS (Del. Ch. Dec. 3, 2012) (TRANSCRIPT)

[113] *See infra* Sec. I.A.1.

(awarding 23.6% of $110 million where plaintiff reviewed 450,000 pages of documents and took seven depositions in expedited discovery, argued a preliminary injunction, and settled after additional document discovery); *see also In re Gardner Denver, Inc. S'holder Litig*., No. 8505-VCN (Del. Ch. Sept. 3, 2014) (ORDER AND FINAL JUDGMENT) (awarding 25% of settlement in case that advanced through some pre-closing discovery and settled at the motion to dismiss stage).

Indeed, cases that have settled at earlier stages have yielded percentage fees similar to what Plaintiff seeks here. In *In re Freeport-McMoRan Copper & Gold Inc. Derivative Litigation*, for instance, the parties secured $115 million from D&O carriers, $10 million cash from the Company's bankers, $22.5 million from the Company in a dividend, and $6.25 million in in-kind services from the bank. C.A. No. 8145-VCN, at 70, 89 (April 7, 2015) (TRANSCRIPT). The Court awarded a fee of $32.6 million, and in the process discounted entirely the $22.5 million in dividend funds. *Id*. at 78-79, 92. The resulting percentage of 24.8% (*i.e.*, $32,600,000 / $131,250,000) corresponds to (if not exceeds) the *Americas Mining* stage-of-case framework because the motion to dismiss was still pending and Plaintiff had only taken eleven depositions. Based on the much earlier stage of the case there, the slightly higher percentage of 25% is warranted here.

By contrast, *Activision* advanced almost to trial when the Court awarded $72.5 million in attorneys' fees based on a $275 million common fund and non-monetary benefits. *Activision*, 124 A.3d at 1075. The fee award of 26.36% of the common fund was an all-in amount inclusive of a fee of "$5-10 million" for the non-monetary benefits. *Id.* at 1075. Again, *Activision* was procedurally further along, so an all-in percentage award of 25% here (inclusive of any value attributable to the governance Plaintiff secured) is consistent.

A 25% all-in percentage here is further supported by *Dell*, which referred to a settlement during the phase at which this Settlement occurred as "mid-stage adjudication" and agreed that it "should yield a fee of 15-25%." *Dell*, 2023 WL 4864861, at *9. This case settled at the very end of the "mid-stage" phase, with only expert depositions left. Combined with the massive recovery for the Company, the phase of this Action warrants precisely 25% of the net monetary benefit.

Plaintiff's fee request is also supported by the governance reforms that Plaintiff obtained. Specifically, Plaintiff secured five years of governance reforms, including stockholder approval votes on director compensation, retention of a compensation consultant, enhanced disclosures, and reviews and improvements of internal controls.

The Court has found different ways to award fees associated with governance reforms.[114] Other cases, including other "mega-fund" cases, provide for a range of fees for governance reforms that rectify the alleged breaches of duty. *See Activision*, 124 A.3d at 1071 & n.30 (addition of two independent directors and reforms to stockholder voting rights at large cap company may justify attorneys' fees in the range of $5-10 million); *Pascal*, C.A. No. 2020-0320-SG, tr. at 19-20 (awarding $1.3 million for "an ideal settlement under the circumstances" that gave stockholders the opportunity to decide whether the compensation was fair); *In re Google Inc. Class C S'holder Litig.*, Cons. C.A. No. 7469-CS, at 19-20 (Del. Ch. Oct. 28, 2013) (TRANSCRIPT) (awarding $8.5 million plus expenses for a "largely corporate governance settlement" in which "the benefits are substantial" and "somewhere between a solid single and a double"); *In re Yahoo! S'holders Litig.*, C.A. No. 3561-CC, at 1 (Del. Ch. Mar. 6, 2009) (LETTER OPINION) (awarding $8.4 million for

[114] *See Ryan*, 2009 WL 18143, at *10 ("It is difficult to place a value on such non-pecuniary benefits; however, such governance reforms can provide substantial benefits and are appropriately considered by the Court when evaluating a proposed settlement."). Nonetheless, the standard practice of this Court is to assign a reasonable value to the corporate benefit and determine an appropriate award of attorneys' fees on that basis. *See In re Celera Corp. S'holder Litig.*, 2012 WL 1020471, at *30-31 (Del. Ch. Mar. 23, 2012), *aff'd in part and rev'd in part on other grounds, Celera*, 59 A.3d 418 (Del. 2012).

"substantial benefit" of amending employee severance plan in a manner that "made it less expensive to sell Yahoo, making the company a more attractive target to potential suitors"); *Minneapolis Firefighters' Relief Assoc. v. Ceridian Corp*., C.A. No. 2996-CC (Del. Ch. Mar. 24, 2008) (STIPULATED ORDER) (awarding $5.4 million for empowering a potential buyer to present a leveraged recapitalization proposal and eliminating a termination right for the merger partner in the event a new slate of directors was elected before the merger closed); *In Re Medley Capital Corp. S'holders Litig.*, C.A. No. 2020-0775-JTL, at 51, 68 (Del. Ch. Nov. 19, 2019) (TRANSCRIPT) (awarding $3 million for therapeutic benefits).

Again, Plaintiff's Fee and Expense Award in attorney's fees also accounts for the benefit of the governance reforms Plaintiff obtained.

B. The Other *Sugarland* Factors Support the Fee and Expense Award

1. The Contingency Risk Supports the Fee and Expense Award

The assumption of contingent risk is the "second most important factor" in the Court's *Sugarland* analysis. *Dow Jones & Co. v. Shields*, C.A. No. 184,1991, 1992 WL 44907, at *2 (Del. Ch. Jan. 10, 1992). Delaware public policy "reward[s] this risk-taking in the interests of shareholders." *In re Plains Res. Inc. S'holders Litig.*, C.A. No. 071-N, 2005 WL 332811, at *6 (Del. Ch. Feb. 4, 2005). Where counsel assumes contingent risk and achieve a positive result, they are entitled to

both a "risk" premium and an "incentive" premium. *Seinfeld v. Coker*, 847 A.2d 330, 337 (Del. Ch. 2000).

Plaintiff's Counsel litigated this case entirely on a contingent basis. Plaintiff principally used three firms, each of which engaged dedicated teams of senior attorneys, many of whom focused primarily on this case for years. Plaintiff's Counsel "went all-in on a concentrated bet, where they invested a material amount of their firm's resources to get an outcome." *Kurz v. Holbrook*, C.A. No. 5019-VCL, at 105 (Del. Ch. July 19, 2010) (TRANSCRIPT). Indeed, these firms plowed significant investments—in an industry where contingency cases often take years to bear fruit—into expenses, notwithstanding the specter of recovering nothing.

And there can be no doubt that this "case involved a true contingency risk, as "counsel did not enter the case with a ready-made exit or obvious settlement opportunity." *Dell*, 2023 WL 4864861, at *31. Quite the contrary, these specific Defendants have a reputation for trying and winning cases. *See, e.g.*, *In re Tesla, Inc. Sec. Litig.*, No. 3:18-cv-04865 (N.D. Cal.); *Unsworth v. Musk*, No. 2:18-cv-08048 (C.D. Cal.); *Tesla Motors*, 2023 WL 3854008. Plaintiff's Counsel faced a substantial threat of recovering nothing.

And it faced that threat head-on. Plaintiff repeatedly walked away from settlement negotiations that did not yield a satisfactory offer and pursued the

litigation to demonstrate a true trial threat and extract maximum value for the Company, as reflected in the Mediator's proposal. Plaintiff's claims swayed in the balance through discovery and Plaintiff's Counsel faced the ongoing risk that the chance of a recovery could have slipped through their fingers.

2. The Complexity of the Litigation Supports the Requested Fee and Expense Award

"One of the secondary *Sugarland* factors is the complexity of the litigation. All else equal, litigation that is challenging and complex supports a higher fee award." *Dell*, 2023 WL 4864861, at *32 (*citing Activision*, 124 A.3d at 1072).

Excessive director compensation cases are rarely litigated through discovery and virtually never tried. Plaintiff led this case to a Settlement with no road map and almost no precedential landmarks. Expert discovery required Plaintiff to develop novel theories to properly convey to the Court the extent of the Defendants' wrongdoing.

The Settlement negotiations were equally complex largely because the Settlement would be paid personally by the Defendants. There was no insurance coverage and forcing twelve Defendants with varying interests to return $735 million of compensation they undoubtedly feel they deserved (and to forgo three years of additional compensation) was neither a straightforward nor easy

proposition. As the Mediator attested, the Settlement negotiations themselves were complex and hard-fought.[115]

Finally, it is noteworthy that there was no leadership contest in this action – Plaintiff was the only stockholder to advance a legal theory to disregard Elon Musk's votes on the 2014 vote to approve amendments to the 2010 Plan under which much of the challenged compensation was granted and, thus, establish that unaffiliated public stockholders never approved the non-employee director compensation.

3. The Standing and Ability of Plaintiff's Counsel Supports the Requested Fee and Expense Award

Plaintiff's Counsel have achieved noteworthy successes, both nationwide and before this Court.[116] The specific team of attorneys litigating this case includes

[115] Meyer Affidavit ¶21.

[116] *See, e.g., In re Facebook, Inc., Consumer Privacy User Profile Litigation*, No. 18-MD-02843 (N.D. Cal.) ($725 million settlement secured by BFA, the largest settlement ever of a privacy class action in the United States); *In re Teva Securities Litigation*, No. 17-CV-00558 (D. Conn.) ($420 million settlement secured by BFA, the second largest class settlement in the history District of Connecticut (where the case was pending), the then fourth-largest within the Second Circuit (excluding cases arising from restatements or the 2008-09 financial crisis), and among the five largest securities settlements against a pharmaceutical manufacturer); *The Police Retirement System of St. Louis v. Granite Construction Incorporated et al.*, No. 19-CV-04744 (N.D. Cal.) ($129 million settlement secured by BFA, at the time the third largest settlement approved in the Northern District of California in the last decade); *DeFelice v. Kidron*, C.A. No. 2021-0255-MTZ (Del. Ch.); *Spritzer v. Aklog,* C.A. No. 2020-0935-KSJM (Del. Ch.); *In re Tilray Inc. Reorganization Litig.*, 2023 WL 2429416 (Del. Ch. Mar. 8, 2023) ($39.9 million derivative settlement of alleged

seasoned Delaware attorneys with significant Court of Chancery experience. This factor supports the Fee and Expense Award.

Plaintiff's Counsel was matched against formidable defense attorneys from some of the most prestigious firms in the country. The standing and ability of Plaintiff's Counsel's adversaries, and the extraordinary result that Plaintiff's Counsel was able to extract in the face of such opposition, should also be considered in determining the fee award. *See Hollywood Firefighters' Pension Fund v. Malone*, No. CV 2020-0880-SG, 2021 WL 5179219, at *11 (Del. Ch. Nov. 8, 2021) (the "standing and ability of both the Plaintiffs' and the Defendants' counsel are well known to this Court to be exemplary").

4. Plaintiff's Counsel Expended Time and Effort Commensurate with Plaintiff's Requested Fee and Expense Award

The final factor, which serves as a cross-check on the reasonableness of a fee award, is the time and effort expended by counsel. *Dell*, 2023 WL 4864861, at *31 (*citing In re Sauer-Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1138 (Del. Ch. 2011)).

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fiduciary breaches by a controller); *City of Monroe Emps.' Ret. Sys. v. Murdoch*, C.A. No. 2017-0833-AGB (Del. Ch. Nov. 20, 2017) ($90 million derivative settlement for alleged lack for board oversight over sexual harassment at Fox News).

Here, Plaintiff's Counsel prosecuted this matter through expert discovery[117] and expended a total of 21,477 hours.[118] This dedicated effort yields an effective hourly rate of $10,690, which is consistent with other hourly rates approved by this Court where plaintiffs achieved remarkable outcomes. *See, e.g.*, *Ams. Mining*, 51 A.3d at 1252 (affirming implied rate of "over $35,000 per hour worked and 66 times the value of [counsel's] time and expenses"; approximately $53,300/hour after adjusting for inflation);[119] *Activision*, 124 A.3d at 1077 (approving implied rate of $9,685/hour, approximately $13,100/hour after adjusting for inflation).[120]

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[117] *See* Sec. VI, *supra*.

[118] *See* Affidavit of Joseph A. Fonti, dated August 31, 2023, Table 1; Affidavit of William J. Fields, dated August 31, 2023, ¶5; Affidavit of Andrew S. Dupre, dated August 30, 2023, Table 1; Affidavit of Ronald A. King, dated August 31, 2023, Table 1.

[119] Inflation adjustments are calculated using the U.S. Bureau of Labor Statistics, Produce Price Index by Industry: Office of Lawyers data, available at, https://fred.stlouisfed.org/series/PCU541110541110.

[120] *See also Garfield v. Boxed, Inc.*, C.A. No. 2022-0132-MTZ, 2022 WL 17959766, *13, n.116 (Del. Ch. Dec. 27, 2022), *judgment entered*, (Del. Ch. 2023) (in governance case, approving a fee of $850,000, equating to a $19,883 implied hourly rate or a 43.09x multiplier on counsel's $35,287.50 lodestar figure); *Sciabacucchi v. Salzberg*, C.A. No. 2017-0931-JTL, 2019 WL 2913272, at *6 (Del. Ch. July 8, 2019) (in governance case, approving a rate of "$11,262.26 per hour," over concerns that the rate "sound[ed] excessive," given the contingent risk), *rev'd on other grounds*, *Salzberg v. Sciabacucchi*, 227 A.3d 102, 109 (Del. 2020); *In re Genentech, Inc. S'holder Litig.*, C.A. No. 3911-VCS, at 44, 49, 56 (Del. Ch. July 9, 2009) (TRANSCRIPT) (awarding fee award of approximately $5,466 an hour, approximately $8,900 per hour after adjusting for inflation).

The foregoing hours were not "filed by 12 different law firms from the traditional plaintiffs' bar wh[ere] all they did was file a complaint, serve a discovery request, and sit around for confirmatory discovery." *Kurz*, tr. at 104. Nor was it an exercise in "churning of wheels and devoting unnecessary hours to litigation in order to be able to present larger numbers to the Court." *Seinfeld*, 847 A.2d at 337. Rather, Plaintiff was "best[ ]served by having a small trial team with experienced people that know the law and are willing to do the work." *Id.* And do so in as efficient and effective of a way as possible. To illustrate this point, partners and senior associates account for 14,488 hours, or 67.5% of the litigation effort.

III. AN INCENTIVE AWARD OF $50,000 IS MERITED

Plaintiff respectfully requests that the Court approve a $50,000 incentive award to be paid out of the Fee and Expense Award. In considering the propriety of a service award, the Court considers whether a representative party's efforts required a significant amount of time, effort, and expertise and/or yielded a significant benefit. *Raider v. Sunderland*, C.A. No. 19357 NC, 2006 WL 75310, at *1-2 (Del. Ch. Jan. 4, 2006). Both factors merit a service award here.

Though Plaintiff did not sit for a deposition, it produced 13,203 pages of documents, which required electronic searches of emails and texts and manual review of hard copy documents. Plaintiff worked with counsel to advance the case,

continually provided feedback on litigation strategy, and participated in extensive mediation efforts.[121]

With respect to significance of the benefit conferred, Plaintiff's results speak for themselves, with Plaintiff securing the largest derivative recovery in the history of this Court. The *Dell* Court explained at length why incentive fees are appropriate in these circumstances. 2023 WL 4864861, at *37-38. Here, as there, the "requested award of $50,000 is reasonable, even modest, given the time and effort that the plaintiff and its personnel expended[.]" *Id.* at *38.

[121] *See generally* Affidavit of David Cetlinski, dated August 30, 2023.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully submits that the Court should approve the Settlement, Fee and Expense Award, and Incentive Award.

Dated: August 31, 2023

Respectfully submitted,

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WORDS: 13,372

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2023, I caused a true and correct copy of the foregoing **Redacted – Public Version of Plaintiff's Corrected Opening Brief in Support of Settlement Approval, Award of Attorneys' Fees and Expenses, and Incentive Award** to be served via File & Serve*Xpress* on the following counsel of record:

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