



IN THE
Supreme Court of the State of Delaware

IN RE TESLA, INC. DERIVATIVE
LITIGATION

No. 534, 2024

No. 10, 2025

No. 11, 2025

No. 12, 2025

COURT BELOW:

COURT OF CHANCERY
OF THE STATE OF DELAWARE
C.A. No. 2018-0408

OBJECTOR-APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDINGS

The Court of Chancery awarded \$345 million to counsel for Plaintiff Tornetta—the largest fee award in this State’s history—even though his derivative action produced no quantifiable benefit for Tesla or its stockholders. To the contrary, the objectives Tornetta pursued defy the informed preferences of a supermajority of Tesla’s shareholders, who voted in 2018 to approve and in 2024 to ratify the stock grant to Elon Musk that Tornetta’s suit invalidated. The unprecedented fee award should be set aside for two separate, but equally fundamental, reasons.

First, the trial court’s justification for the fee award fails to faithfully apply governing law and lacks evidentiary support. The court was obliged to ensure that Tornetta’s counsel did not receive a windfall. But the court did not hold Tornetta to his burden of proving the absence of a windfall, and gave no weight to Objectors’ comprehensive empirical analysis demonstrating that the highest award that could be justified as necessary to create adequate incentives for plaintiff’s counsel would be a fraction of \$345 million. The court compounded that error by relying on grant-date fair value, a subjective accounting estimate that it applied with no deductions, as a baseline that purportedly quantified the value to stockholders of rescinding Musk’s stock grant. And given the absence of any measurable monetary benefit to stockholders, the court erred by failing to apply *quantum meruit*.

Second, the trial court denied Objectors (and the supermajority of stockholders whose interests align with those of Objectors) their rights under Delaware law and the Due Process Clause of the U.S. Constitution to adequate representation. The \$5.6 billion fee that Tornetta permitted his counsel to request is, as the trial court recognized, “a windfall no matter the methodology used to justify it.” Ex. B (“Fee Opinion” or “FO”) 2. But only a feckless representative could endorse a fee so exorbitant that it is impossible to justify using any methodology. Tornetta made no effort to limit his counsel’s efforts to siphon funds from the stockholders whose interest this lawsuit purportedly advanced. If fee-award proceedings are to have any credibility, it is imperative that this Court enforce meaningful fiduciary obligations that representative plaintiffs must satisfy when requesting fees for their counsel, disqualify Tornetta for defaulting on those obligations, and order appointment of an alternative representative on remand.

At bottom, both the fee award and the underlying rulings for which the award was granted are impossible to reconcile with the bedrock premise that stockholders’ rights and interests are paramount under Delaware law. This Court should not allow them to stand.

SUMMARY OF ARGUMENT

1. The court below erred by denying Objectors standing to object to the Fee Petition. Objectors had standing under Rule 23.1(e)(2)'s plain text, and the court's claimed policy concerns cannot thwart that rule.

2. Objectors have standing to challenge the fee opinion on appeal. Formal intervention was unnecessary, and the court could not properly have denied intervention under Rule 24 in any event.

3. The court erred by awarding Tornetta's counsel a \$345 million fee. The court failed to consider whether that fee constituted a windfall, which it plainly did. Moreover, the court erroneously based the award on grant-date fair value, which, among other problems, ignores the considerable costs of this litigation. Because the litigation produced no measurable benefit, the court should have used *quantum meruit* to assess fees.

4. The court erred by allowing Tornetta to continue as a representative after he sought to disenfranchise Tesla stockholders and endorsed a \$5.6 billion fee request. That violated Rule 23.1(c) and federal due-process guarantees.

STATEMENT OF FACTS

A. The Grant and Tornado's Suit

Tesla faced existential challenges in 2017. Ex. A (“Post-Trial Opinion” or “PTO”) 12-13. To incentivize Musk to overcome them, Tesla’s Board approved a stock-option-based compensation package (the “Grant”) that would vest only if Tesla achieved aggressive market-capitalization and performance milestones. *Id.* at 43, 80-81. Tesla stockholders overwhelmingly approved the grant in 2018. *Id.* at 88.

Musk thereafter transformed Tesla into a dominant force in the electric-vehicle market. PTO 92. Tesla’s market capitalization soared, and investors reaped massive profits. A2356-2357.

Tornado, a stockholder who held nine shares of Tesla stock, sued to rescind the Grant and sought a “fully informed stockholder vote.” A444, 452. In January 2024, the Court of Chancery concluded that the vote approving the Grant was not fully informed and rescinded the Grant. PTO 149-199. Tesla’s stock price dropped immediately. A2364.

B. Fee Requests and Ratification

Tornado filed a fee petition (the “Fee Petition”) seeking 29,402,900 unrestricted shares of Tesla common stock—then worth \$5.6 billion—and expense reimbursement of \$1.12 million. A1768-1769. Tornado based that eye-popping

request on the theory that his lawsuit had created \$51 billion in value for the company, an amount equivalent to the purported value of the rescinded options on January 30, 2024. A1772-1773.

Invoking Rule 23.1(e)(2), Steffens objected to the Fee Petition, supported by two experts. A2281-2448. She explained that she had standing to object and that the requested fee would constitute an impermissible windfall. A2301-2319. She also explained that the net economic value of rescinding Musk's option grant was indeterminate; that such indeterminacy mandated application of *quantum meruit* to determine any fee; and that, at most, a fee between \$20 million and \$47 million would be appropriate. A2320-2329. Israel and Panouses (later joined by ARK Investment Management, A3003-3008) also objected and submitted an expert report demonstrating that Tornetta's suit created no benefit for Tesla or its stockholders. A2748-2823. They explained that they had constitutional standing to object and asserted their entitlement to intervene in the event the court disagreed. A2760-2761. Tesla also opposed the Fee Petition, agreeing that *quantum meruit* should govern and suggesting that \$54.5 million was the highest permissible award. A2449-2657.

At the hearing on the Fee Petition, Objectors' counsel presented argument, including as to Tornetta's adequacy as a representative plaintiff. No one objected. A3273-3299.

Meanwhile, Tesla filed a proxy statement recommending that stockholders ratify the Grant. A1834-2273. The proxy included the full Post-Trial Opinion and a summary of that opinion. A1921-1925, A2173-2268. With that information, stockholders overwhelmingly voted to ratify. FO 13.

Defendants and Objectors argued that the ratification vote should be given effect by vacating the rescission order. A2921-3002, A3575-3588. The Florida Objectors argued that the vote was fully informed and submitted a supplemental expert report demonstrating that the market reacted positively to the vote. A3575-3580, A2824-2829. Steffens argued that Tornetta's efforts to invalidate the ratification vote and allow his counsel to seek a multi-billion-dollar fee demonstrated his inadequacy under the federal Due Process Clause and Delaware law. A3584-3587.

At the hearing addressing ratification, Objectors' counsel again presented argument without objection. A3775-3804, A3923-3932. Objectors subsequently moved for their own attorneys' fees and expenses. A3945-3949.

C. The Fee Opinion and the First and Second Letter Opinions

The Court of Chancery's December 2024 Fee Opinion declined to vacate the rescission order, finding that the ratification defense was untimely and unsupported and that the 2024 proxy statement contained material misstatements. FO 17-43.

The court also awarded Tornetta’s counsel a record-setting \$345 million fee, reflecting an effective hourly rate of over \$17,000. The court declined to apply *quantum meruit*, concluding that rescission’s benefit could be quantified by measuring the Grant’s dilutive effect on then-outstanding Tesla shares. FO 80. Yet the court did not rely on that dilution theory to calculate the fee award. Instead, after observing that Tornetta “did not attempt to value the governance and disclosure benefits,” FO 51, the court looked to the grant-date fair value (“GDFV”)—that is, Tesla’s 2018 estimate of the accounting expense associated with the Grant—and ruled that this \$2.3 billion accounting charge could stand in as a measure of the litigation’s benefit. *Id.* at 93-94.

The court acknowledged that using GDFV “generate[d] problems,” including because it might not “reflect economic reality.” FO 94-95. Yet the court decided that 15% of GDFV—\$345 million—was an appropriate fee. *Id.* at 96-100.

The court also issued a letter opinion concluding, without citing the governing rule, that Objectors lacked standing to challenge the award. Ex. C (“First Letter Opinion” or “FLO”) 3. The court opined that permitting stockholder objections after trial, rather than after settlement, would be “inefficient” and “potentially undermine” the parties’ “control.” *Id.* The court then denied Objectors’ fee requests and, in a footnote, rejected their challenges to Tornetta’s adequacy as a stockholder representative. *Id.* at 4 & n.3.

In response, the Florida Objectors filed a Motion for Clarification and Reconsideration, pointing out that the court had not ruled on their argument that they were entitled to be recognized as intervenors and that their appearance (by objection or intervention) was mandated by due process. A3950-3958. Steffens formally moved to intervene shortly thereafter. A3959-3968. The court granted intervention for purposes of appealing the First Letter Opinion but denied intervention as untimely as to matters “beyond the Fee Petition.” Ex. D (“Second Letter Opinion” or “SLO”) 3-6.

ARGUMENT

I. OBJECTORS HAVE STANDING

A. Question Presented

Whether the trial court erred by holding that Objectors—Tesla stockholders harmed by any fee award to Tornetta’s counsel—lacked standing to object to the Fee Petition. A2301-2303, A2760-2761.

B. Scope of Review

This Court reviews standing *de novo*. *Brookfield Asset Mgmt. v. Rosson*, 261 A.3d 1251, 1262 (Del. 2021).

C. Merits of Argument

The plain terms of Rule 23.1(e)(2) grant Objectors standing. The decision below does not cite that rule—which Objectors had briefed—and substitutes misconceived policy arguments that no party advanced.

Rule 23.1(e)(1)-(2) provides that a “person” may “object” to a fee award in a “derivative action” in either of two circumstances. Both apply here.

First, “[a]ny person from whom payment is sought may oppose the award.” Ct. Ch. R. (“R.”) 23.1(e)(2). Because Tornetta requested a fee consisting of freely tradable Tesla shares, each Objector was a “person from whom payment is sought.” *Id.* Granting Tornetta’s request would have diluted Objectors’ shares, costing Steffens, for example, roughly \$31,000. A2370-2371.

Second, “any person with standing to object to a proposed dismissal or settlement may object to the award” issued “[i]n a derivative action.” R.23.1(e)(1)-(2). That grant of standing is broad because the proxy for such standing is itself broad: Rule 23.1 provides that “[a]ny person situated similarly to the derivative plaintiff” may object to “a proposed dismissal or settlement.” R. 23.1(d)(4)(A), (e)(1)-(2). Objectors are similarly situated to Tornetta under Rule 23.1 because the resolution of this case and any fee for Tornetta’s counsel will affect each of them as stockholders in exactly the same way that it affects Tornetta himself.¹ Delaware courts routinely entertain stockholder objections to derivative settlements for precisely that reason. *E.g., Griffith v. Stein*, 283 A.3d 1124, 1137 (Del. 2022).

Ignoring Rule 23.1(e)(2), the trial court gave two legally erroneous reasons for denying standing. The court noted that prior decisions addressing stockholder standing to challenge fee awards in derivative actions arose following settlements rather than, as here, a trial. FLO 3. The court also expressed concern that permitting objections where the parties are “zealous[]” would be “inefficient” and “potentially undermine” their “control.” *Id.*

Those points are irrelevant because Rule 23.1(e)(2) is “unambiguous”—which means that its “plain meaning” controls. *State v. Lewis*, 797 A.2d 1198, 1201

¹ All Objectors but Panouses held Tesla stock at the Grant and throughout this litigation. A2336-2337, A2800, A2916, A3005.

(Del. 2002). That provision, which is set apart from the paragraph governing “[d]ismissal or [s]ettlement,” R. 23.1(d), requires neither a prior settlement nor a particular arrangement of other parties’ incentives. The court had no warrant to impose such additional, atextual requirements. *See Lewis*, 797 A.2d at 1201; *Griffith*, 283 A.3d at 1138.

In all events, the court’s reasoning lacks merit. Most stockholder-objector decisions arise in settlement contexts because derivative actions often settle. The court did not identify any precedent stating that objectors who meet Rule 23.1’s requirements nevertheless lack standing to object in a derivative action that went to trial—and none exists. *See In re Cox Commc’ns*, 879 A.2d 604, 639 (Del. Ch. 2005) (stockholders have “standing to comment” on fee requests).

The court’s concern that allowing post-trial stockholder objections might be “inefficient” or undermine party control fares no better. As Rule 23.1 effectively recognizes, and this case confirms, objectors often provide valuable information that makes litigation *more* efficient and fair. *E.g., Griffith*, 283 A.3d at 1139. For instance, although the court faulted defendants for failing to justify the lodestar multiplier they proposed, *see* FO 89-90, Steffens thoroughly justified her proposed multiplier with empirical expert analysis, A2316-2318. And in some cases (as here, *see* Sec. IV.C, *infra*), a representative plaintiff *should* lose control of the litigation—

which is why the rules contemplate challenges to a derivative plaintiff's adequacy and replacement of inadequate plaintiffs. *See* R. 23.1(c)(1)(A)(ii), (c)(4).

II. OBJECTORS MAY APPEAL THE FEE OPINION

A. Question Presented

Whether Objectors may challenge the Fee Opinion on appeal. A2761, A3950-3968.

B. Scope of Review

This Court reviews legal issues such as appellate standing *de novo*, see *Int'l Telecharge v. Bomarko*, 766 A.2d 437, 439 (Del. 2000), and reviews denial of a motion to intervene as untimely for abuse of discretion, see *Cooper v. Connor*, 508 A.2d 72, 72 (Del. 1986) (Table).

C. Merits of Argument

Objectors have standing to appeal the Fee Opinion absent formal intervention. In *Braun v. Fleming-Hall Tobacco Co.*, 92 A.2d 302 (Del. 1952), this Court held that an objector who appeared, filed an objection, and argued against a settlement engaged in conduct that “amounted to actual intervention, even though it was without express leave of court,” and therefore had standing to appeal. *Id.* at 308; e.g., *Devlin v. Scardelletti*, 536 U.S. 1, 10-11 (2002); *Kaplan v. Rand*, 192 F.3d 60, 67 (2d Cir. 1999). That holding controls.

The Court of Chancery did not rule that Objectors are barred from appealing the Fee Opinion, and there would be no basis for such a ruling. See SLO 5 (deeming untimely only submissions that “went beyond the Fee Petition” and “attacked” the

“Post-Trial Opinion”). The Fee Opinion and the First Letter Opinion issued on the same day—and if Objectors could appeal only the latter decision, which concluded that they lacked standing to challenge the Fee Opinion, they would have paradoxically won recognition of their ability to challenge the Fee Opinion but lost the ability to actually challenge that opinion in this Court.

Finally, even if formal intervention were necessary *and* the Second Letter Opinion could be construed to deny it, denial of intervention was improper. As to Rule 24(a) mandatory intervention, the fee award impairs Objectors’ interests, as stockholders ultimately bear the fee. Those interests were not adequately represented by Tornetta, who endorsed an outlandish fee request at Objectors’ expense, or by defendants, whose focus was preserving the Grant rather than contesting Tornetta’s adequacy. A3965-3966. As to Rule 24(b) permissive intervention, Objectors’ arguments shared with the main action several common questions, including whether this litigation created a benefit for Tesla and whether Tornetta was an adequate representative. A3966-3967.

Rather than address those points, the trial court discussed only the timeliness of Objectors’ submissions. SLO 3-7. But Objectors could not challenge the Fee Petition until Tornetta presented it. Their timely challenges and intervention requests came no later than six business days after the First Letter Opinion—i.e., at the first moment that their right to appeal the Fee Opinion was questioned. A4-5,

A20-26, A40.² It cannot be correct that a stockholder must intervene *before* a plaintiff’s fee request to preserve the right to challenge it; that requirement would create inefficiency and cannot be squared with *Braun*. Moreover, Tornetta suffers no prejudice from Objectors’ appeal of the fee award, as he has long been aware of their arguments and never challenged their standing. Objectors, by contrast, *would* suffer prejudice if they cannot appeal, not only because of their considerable economic stake in the fee amount but also because they alone advance arguments challenging Tornetta’s adequacy.

² The Florida Objectors, in fact, asserted their entitlement to intervene in June 2024—more than five months before the First Letter Opinion. A2761 n.8.

III. THE COURT OF CHANCERY ERRED BY AWARDING AN UNPRECEDENTED FEE

A. Question Presented

Whether the trial court erred by awarding Tornetta’s counsel a \$345 million fee. A2303-2331, A2761-2794, A3003-3008, A3582-3588.

B. Scope of Review

This Court “review[s] an award of attorney fees” for “abuse of discretion.” *Sugarland v. Thomas*, 420 A.2d 142, 149 (Del. 1980). An exercise of discretion is proper only “[i]n the absence of legal error,” such as failure to consider a “relevant factor” or overreliance on an “improper factor.” *Homestore, Inc. v. Tafeen*, 886 A.2d 502, 506 (Del. 2005).

C. Merits of Argument

1. The Fee Award Is a Legally Impermissible Windfall

The Court of Chancery may award only a “reasonable” fee. R. 23.1(e)(1). Reasonableness generally depends on multiple factors, including “results achieved”; “time and effort of counsel”; “relative complexities of the litigation”; any “contingency factor”; “standing and ability of counsel”; and “‘cause and effect’ between what counsel accomplished through the litigation and the ultimate result.” *In re Dell Techs. Inc. Class V S’holders Litig.*, 326 A.3d 686, 697-98 (Del. 2024); *see Sugarland*, 420 A.2d at 149-50.

Critically, a proposed award may be “so large” that those “typical yardsticks” must “yield to the greater policy concern of preventing windfalls to counsel.” *Dell*, 326 A.3d at 702. “At some point,” fees “exceed their value as an incentive to take representative cases”—and thus “serv[e] no other purpose than to siphon money away from stockholders and into the hands of their agents.” *Id.* at 702-03 (quoting *Seinfeld v. Coker*, 847 A.2d 330, 334 (Del. Ch. 2000)). Accordingly, a court must “estimate the point at which proper incentives are produced” and award a fee no greater than that amount. *Id.*

Despite rejecting counsel’s outrageous \$5.6 billion fee request, FO 76-77, the trial court never assessed the point at which proper incentives would be produced. That failure alone requires vacatur.

Had the court applied this Court’s controlling precedent, it could not have awarded anything close to \$345 million. Tornetta bore the burden of demonstrating reasonableness, *Sciabacucchi v. Howley*, 2023 WL 4345406, at *3 (Del. Ch. July 3, 2023), and he did not (indeed, could not) prove that his attorneys would be adequately incentivized only by that unprecedented award, which represented a lodestar multiplier of 25.3 and an average hourly rate of \$17,692.35. FO 97.

That is powerfully confirmed by Objectors’ uncontested empirical evidence. Tornetta’s lead attorneys routinely litigate complex federal securities-law claims, involving substantially greater attorney investment, to earn fees at an average

lodestar multiplier of about 1.5 and rarely in excess of 3. A2400-2406. In the ten largest securities settlements obtained by Tornetta’s lead firm, the average lodestar multiplier was 1.65, and the multiplier *never* exceeded 3.22. A2402.

The trial court discounted that analysis on the ground that Chancery litigation differs from federal-securities litigation. FO 90-91. But neither the court nor Tornetta offered any support for the counterintuitive view that Chancery litigation is so much more risky, challenging, and complex that it requires incentives almost *eight times greater* than those provided by fee awards in federal litigation, much less that the attorneys here required more than \$17,000 per hour to incentivize them. To the contrary, it is doubtful that “the public would ever believe that lawyers must be awarded many hundreds of millions of dollars in any given case to motivate them to pursue representative litigation.” *Dell*, 326 A.3d at 702.³

2. The Court of Chancery’s Methodology Was Unsound

Beyond the glaring windfall problem, which itself dictates vacatur, the trial court erred by awarding Tornetta’s counsel a percentage of the GDFV. That analysis

³ Following the outlier awards here and in *Americas Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012), the Delaware Senate introduced a concurrent resolution noting “legitimate concerns about whether excessive attorney’s fees have been awarded in cases claiming a corporate benefit” and seeking to “ensure that awards of attorney’s fees provide incentives for litigation appropriately protective of stockholders but not so excessive as to act as a counterproductive toll on Delaware companies and their stockholders.” S. Con. Res. 17, 153d Gen. Assemb. (Del. 2025).

rested on the mistaken premise that this litigation created a quantifiable benefit. And even if use of GDFV were appropriate, the court failed to consider offsetting costs, resulting in a metric divorced from any value created in this case.

a. Tornetta Created No Quantifiable Benefit

The “primary factor” in determining a fee award is the “results achieved” by the litigation. *Dell*, 326 A.3d at 693. But the trial court’s analysis bears scant relation to real-world results. The court keyed its award to a fixed sum purportedly reflecting the benefits of this litigation rather than the reasonable value of the services Tornetta’s attorneys provided. FO 80. Specifically, the court found that its rescission order had “reversed the dilutive effect of the Grant” and “restor[ed] around \$51 billion in value to Tesla stockholders.” *Id.* at 55.

That analysis is mistaken and overlooks Objectors’ evidence that the litigation created no net benefit. *E.g.*, A2812-2822. Rescission did not add a penny to Tesla’s enterprise value. A2365-2366. It did not increase Tesla’s future cash flows or profitability or improve its prospects. *Id.* And it did not give Tesla a greater ability to sell stock in the open market, much less for \$51 billion. A2371-2375.

The trial court nevertheless theorized that rescission benefitted stockholders by reducing the number of Tesla shares outstanding. FO 55. But the court ignored the substantial countervailing costs of rescission, which must be taken into account. *E.g.*, *In re Diamond Shamrock Corp.*, 1988 WL 94752, at *4 (Del. Ch. Sept. 14,

1988) (plaintiffs failed to establish that benefit of litigation “would not be offset by a corresponding reduction” in stock value). First, it was apparent when rescission was ordered that Tesla would need to provide Musk with replacement compensation for the extraordinary value he had already created, and that doing so would reduce or negate any antidilution benefit. A2376. Second, rescission undermines Tesla’s ability to incentivize executives, because it eliminates motivation-related benefits associated with the Grant and increases the likelihood that litigation will void similar arrangements. A2367-2368. Third, rescission generates procedural costs associated with a corporate decision to authorize replacement compensation, including costs Tesla actually incurred in undertaking the ratification vote. A1861-1863, A2056. And finally, any replacement compensation with a higher net present value than the GDFV could impose substantial tax costs on Tesla. A1932.

Although the court ignored those costs, the stock market did not. Had the rescission order created a real-world \$51 billion benefit, Tesla’s stock price would have soared. In reality, it declined, as event-study analyses demonstrated. A2358-2364, A2534-2535, A2811-2817. Moreover, Tesla’s stock price *increased* after the ratification vote, signaling again that the Grant benefited the company. A2826-2829.

The court waved aside those real-world events, citing supposed confounding factors. FO 67-72. But Tornetta bore the burden to show a benefit from rescission, *see Sciabacucchi*, 2023 WL 4345406, at *3, and neither Tornetta nor the court

offered any empirical evidence suggesting that rescission created any benefit, much less *\$51 billion*. Moreover, the event studies were not flawed. One study, which the court ignored, found that no confounding events affected Tesla’s stock price in the aftermath of the rescission order. FO 67; A2362-2363. Other studies compared Tesla’s stock’s performance to peers’ performance, thus accounting for Tesla-specific events. A2818-2828. And the confounding factors the court conjured were caused by the rescission order itself. For example, the court stated that its order revealed governance-related deficiencies, FO 67—but any event study assessing the effect of the order would have accounted for that supposed revelation. Similarly, the court cited comments that Musk made long before and immediately after the order, *id.* at 67-70—but comments about and affected by the order are (as the court apparently recognized) “part of the event under examination,” *id.* at 71, not confounding factors.

Accordingly, Tornetta did not establish, and the court had no basis to find, a quantifiable benefit to Tesla stockholders. That forecloses any percentage-of-benefit-based award and requires use of *quantum meruit*. See Sec. III.C.2.3, *infra*.

b. The Court of Chancery Erred in Relying on Grant-Date Fair Value

The trial court ultimately awarded fees based not on the purported \$51 billion benefit of rescission—a value that led to preposterous results—but on the Grant’s \$2.3 billion GDFV. But as Tornetta himself argued, A1780-1784, GDFV makes no

sense as a baseline for fees. GDFV is a hypothetical, highly subjective accounting charge designed to estimate the Grant's value when awarded. It does not measure the benefit of this litigation, and the court did not find that it did. Rather, as the court acknowledged, GDFV is an "*ex ante* approach," and a "change[] in accounting figures"—e.g., an accounting-charge reversal—is *not* "generally accompanied by equivalent changes in economic value." FO 95 & n.366 (citation omitted). Thus, the court relied on GDFV not because it is sound but (reasoning backwards from a predetermined conclusion) on the theory that it would "eliminat[e] the windfall problem" posed by Tornetta's original outlandish request. *Id.* at 94.

GDFV does not, however, eliminate the windfall problem. Tornetta's counsel introduced no evidence purporting to establish that \$345 million would have been necessary to incentivize plaintiffs' counsel—and any such claim would have been implausible, especially in light of the empirical evidence (introduced by Objectors) that *was* in the record. Moreover, as discussed above, the trial court failed to account for offsetting costs. *E.g.*, *Sutherland v. Sutherland*, 2014 WL 3906500, at *5 (Del. Ch. July 31, 2014) (accounting for results that "offset[]" alleged benefits); *In re MoneyGram Int'l S'holder Litig.*, 2013 WL 68603, at *2 (Del. Ch. Jan. 7, 2013) (same).

3. The Court of Chancery Erred by Declining to Use *Quantum Meruit*

Quantum meruit provides the only lawful basis for awarding fees in this case. There is no justification for awarding fees “based on a percentage” of benefits that cannot be accurately measured. *In re First Interstate Bancorp*, 756 A.2d 353, 363 (Del. Ch. 1999), *aff’d*, 755 A.2d 388 (Del. 2000). Given that, “the *quantum meruit* approach”—based on the amount and value of work the attorneys actually performed—“gives the court a more equitable means of determining a reasonable fee.” *Id.* (citation omitted); *e.g.*, *San Antonio Fire & Police Pension Fund v. Bradbury*, 2010 WL 4273171, at *12 (Del. Ch. Oct. 28, 2010).

Louisiana State Employees’ Retirement v. Citrix System, 2001 WL 1131364 (Del. Ch. Sept. 19, 2001), is illustrative. There, a plaintiff challenged a stockholder-approved plan to increase employee stock options. *Id.* at *1. After the plaintiff sued, the company withdrew the plan. *Id.* at *4. The plaintiff sought a fee award, arguing that the withdrawal created an antidilution benefit of approximately \$183 million. *Id.* at *6. But the court concluded that evaluating the antidilution benefit was “at best an inexact science” given the difficult-to-value costs of withdrawing the plan, including negative effects on “recruitment, retention, and motivation.” *Id.* at *7-8. Moreover, the court observed, if withdrawal had created a \$183 million benefit, “one would clearly expect the stock market to reflect” it. *Id.* at *8. An event study, however, revealed that withdrawal had “no clear net economic benefit.” *Id.*

Here, too, Tornetta asserts an antidilution benefit based on the elimination of stock options. Here, too, determining a quantifiable net benefit would require “ill-conceived alchemy.” *Citrix*, 2001 WL 1131364, at *8. And here, too, event studies show no clear benefit to stockholders.

Citrix is no outlier. In *In re Cheniere Energy, Inc. Stockholders Litigation*, C.A. No. 9710-VCL (Del. Ch. Mar. 16, 2015) (trans.), the Court of Chancery applied *quantum meruit* when evaluating a rescinded compensation package, reasoning that assessing the value of equity that *might* have been issued is speculative. *See id.* at 102:6-17. And in *In re Investors Bancorp, Inc. Stockholder Litigation*, C.A. No. 12327-VCS (Del. Ch. June 17, 2019) (trans.), the Court of Chancery explained that it could not calculate a fee award based on cancelled equity grants without offsetting the claimed benefit by the effects of any replacement compensation, and concluded on that basis that *quantum meruit* was proper. *See id.* at 18-19, 23.⁴

The court below distinguished those cases on the inapposite theory that they involved settlements, reasoning that fee awards should compensate attorneys who “go the distance to trial.” FO 87. But even if counsel’s efforts may properly affect the percentage of a quantifiable benefit a court awards, *see Dell*, 326 A.3d at 699-700, they cannot summon into being a quantifiable benefit that does not exist.

⁴ The transcripts in *Cheniere* and *Investors Bancorp* are reproduced in Tesla’s compendium.

The court's effort to factually distinguish those cases fares no better. As to *Citrix*, the court noted that withdrawing the option plan could not have reversed dilution because the options had never issued. FO 87. But that fact would not make calculating a net benefit easier here than in *Citrix*, given that both involved stockholder-approved compensation plans with never-exercised options. See FO 6; *Citrix*, 2001 WL 1131364, at *7. As to *Cheniere*, the court noted that the forgone compensation could have been replaced by separate compensation, which made evaluating any benefit difficult. FO 84. But the same is true here. Finally, as to *Investors Bancorp*, the court incorrectly asserted that the Court of Chancery appeared "reluctant[]" to apply *quantum meruit*. FO 87. But in reality, *Investors Bancorp* correctly concludes that *quantum meruit* provided a "principled and practical way to award proper fees." C.A. No. 12327-VCS at 23.

Quantum meruit is the only proper approach here too. That approach would have required analyzing the work Tornetta's counsel actually performed in achieving any benefit in this case, "the amount and value of attorney time required for that purpose," and "the experience of counsel and the contingent nature of the case." *Diamond Shamrock*, 1988 WL 94752, at *4. That would not preclude a sizable fee: applying the maximum (3.45) lodestar multiplier for Tornetta's lead firm would result in a fee of \$47 million. A2317.

Contrary to the court’s suggestion, FO 92, *Americas Mining* does not justify the fee award. *Americas Mining* involved a common fund (and therefore a quantifiable benefit), and there was no dispute over the size of the fund from which the fee would be drawn. 51 A.3d at 1252-53. Here, by contrast, Tornetta provided no persuasive evidence of a quantifiable net economic benefit. *See* Sec. III.C.2.a, *supra*. In all events, as this Court recently explained in distinguishing *Americas Mining*, all fee-award measures—whether a percentage of a common fund or an assessment of the reasonable value of counsel’s efforts—“*must yield* to the greater policy concern of preventing windfalls to counsel.” *Dell*, 326 A.3d at 702 (emphasis added).

IV. THE COURT OF CHANCERY ERRED BY ALLOWING TORNETTA TO CONTINUE AS A REPRESENTATIVE

A. Question Presented

Whether the trial court erred by rejecting Objectors' challenge to Tornetta's adequacy as a derivative plaintiff. A2763-2764, A3357, A3585-3588.

B. Scope of Review

This Court reviews *de novo* legal issues regarding a representative plaintiff's adequacy and tests factual findings for record "support[]" and the "order[] and logic[]" of their "reasoning process." *In re Phila. Stock Exch.*, 945 A.2d 1123, 1143 (Del. 2008); *see South v. Baker*, 62 A.3d 1, 21 (Del. Ch. 2012).

C. Merits of Argument

Derivative plaintiffs must at all times adequately represent those on whose behalf they act. *See South*, 62 A.3d at 21. That requirement, embodied in Rule 23.1(c), flows from the federal Due Process Clause and "the protection it affords the non-parties on whose behalf the representative plaintiff purports to litigate." *South*, 62 A.3d at 21 (citing *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 811-12 (1985)). "[A] derivative plaintiff serves in a fiduciary capacity," representing others "whose interests are in plaintiff's hands," *id.*, and is "oblig[ed]" to "fairly and adequately protect" those "interests," *Smollar v. Potarazu*, 2016 WL 206288, at *2 (Del. Ch. Jan. 14, 2016). The trial court thus has "an independent and continuing duty to scrutinize the representative plaintiff to see if she is providing adequate

representation and, if not, to take appropriate” steps. *South*, 62 A.3d at 21.

The trial court failed to meet that obligation, thus violating Rule 23.1(c) and the Due Process Clause. As Objectors explained, even assuming that Tornetta was an adequate representative when this litigation began, he abandoned his fiduciary duties following the rescission order. First, after Tesla stockholders overwhelmingly ratified the Grant, Tornetta sought to disenfranchise them, arguing that the ratification vote was a “gimmick” that should be given no effect. A2904-2909. He did so even though a derivative plaintiff’s adequacy depends in significant part on “the degree of support plaintiff receives from the stockholders he purports to represent.” *South*, 62 A.3d at 22 (citation omitted).

Second, Tornetta failed to constrain his counsel’s quest for an unprecedented windfall that would transfer vast sums from the Tesla stockholders to whom he owed a fiduciary duty into his attorneys’ pockets. When it comes to awarding fees, a “divergence of interests” arises between the attorneys and those they purport to represent. *Goodrich v. E.F. Hutton Grp.*, 681 A.2d 1039, 1045 (Del. 1996). A derivative plaintiff’s “independence” from his attorneys is therefore “particularly important” at the time of the fee petition. *In re Fuqua Indus., Inc. S’holder Litig.*, 2006 WL 2640967, at *9 (Del. Ch. Sept. 7, 2006), *aff’d*, 922 A.2d 414 (Del. 2007). Here, however, Tornetta did nothing to restrain his attorneys when they sought the

largest fee award in Delaware history to reward counsel for unwinding compensation that a supermajority of Tesla stockholders approved and then ratified.

Ignoring those points, the trial court addressed Objectors' arguments about Tornetta's inadequacy in a footnote, deeming them untimely and procedurally defective and then adding in a single conclusory sentence that Tornetta had "proven himself quite capable as a representative plaintiff." FLO 4 n.3. None of those points has merit. First, Objectors raised Tornetta's inadequacy as soon as it materialized—promptly after Tornetta filed the Fee Petition. A2763-2764, A3357, A3588-3588. In any event, the court had "an independent and continuing duty" to ensure that Tornetta was "providing adequate representation." *South*, 62 A.3d at 21.

Second, although the court faulted Objectors for failing to follow "the procedure set forth by Court of Chancery Rules" for adequacy objections, FLO 4 n.3, there is no relevant rule of procedure. Rule 23.1(c)(3) arguably addresses procedures governing *appointment* of derivative counsel, but Rule 23.1(c)(4), which addresses *replacement* of a derivative plaintiff, specifies no particular time or format for raising adequacy concerns. It states that, if at *any* time "in pursuing the derivative action" the plaintiff "fails to adequately represent the interests of the entity," the court may order a remedy. R. 23.1(c)(4). And nothing in Rule 23.1 or relevant precedent suggests that intervention is a prerequisite for challenging a derivative plaintiff's adequacy.

Finally, the court’s one-sentence adequacy analysis is insufficient. Tornetta’s *capability* as a plaintiff does not determine his *adequacy*. *Contra* FLO 4 n.3. He was effective in persuading the court. His inadequacy, however, stemmed from his pursuit of a fee award self-evidently contrary to the interests of Tesla and its stockholders. By refusing to remedy that conflict of interest, the court failed to safeguard the interests of those “on whose behalf [Tornetta] purport[ed] to litigate,” and thus violated not only Rule 23.1(c) but also stockholders’ federal due-process rights. *South*, 62 A.3d at 21.

* * *

This Court should vacate the fee award. It also should direct the court on remand to award Objectors’ counsel a fee to incentivize the “[m]eaningful objections” that they raised in this Court and below, including their submission of expert reports providing otherwise unavailable objective data and their efforts to protect stockholders’ rights. *Brinckerhoff v. Texas E. Prods. Pipeline Co.*, 986 A.2d 370, 397 (Del. Ch. 2010); *Alaska Elec. Pension Fund v. Brown*, 941 A.2d 1011, 1017 (Del. 2007).

CONCLUSION

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

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