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Attorney fees for total victory: Is Musk's Tesla pay case a blueprint?

By Brian Danitz

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In her final order in the landmark case challenging "the largest executive compensation award in the history of public markets" – Tesla's $55.8 billion stock grant to Elon Musk – Chancellor Kathaleen McCormick declared: "Plaintiff achieved total victory." *Tornetta v. Musk*, 2024 WL 4930635, at *4 (Del. Ch. Dec. 2, 2024) ("*Tornetta*").

The court previously ordered rescission of the grant as a remedy for breaches of the duty of loyalty by the board for capitulating to Mr. Musk, who is Tesla's CEO and controlling shareholder, and then failing to prove that the grant was entirely fair to Tesla.

In response, Mr. Musk held a stockholder vote to reincorporate Tesla under Texas law and to ratify his grant, which the stockholders did. He then asked the court to revise its order in his favor based on the ratification, which the court declined to do for multiple reasons, including that the proxy statement had "mangle[d] the truth." *Id* at *18.

With the motion to revise denied, the last remaining issue for the court to decide was plaintiff's petition for attorney's fees. Under the "common benefit" doctrine, courts award attorney's fees where a litigation confers a substantial benefit upon a class or, in a derivative action, the corporation, typically based on a percentage of the benefit achieved. See, e.g., *Laffitte v. Robert Half Internat. Inc.*, 1 Cal. 5th 480, 503 (2016) ("We join the overwhelming majority of federal and state courts in holding that . . . the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created.").

In *Americas Mining Corp. v. Theriault*, the Delaware Supreme Court adopted a stage-of-litigation approach, instructing that fees should be calculated as a percentage of the benefit achieved, with percentages ranging from 10% to 33% depending on the stage at which the case is resolved. 51 A.3d 1213 (Del. 2012).

Other factors, such as the time and effort of counsel, the relative complexities of the litigation, any contingent factor, and the standing and ability of counsel may cause the court to adjust the fee up or down. "The overarching goal is to right-size fee awards to the benefit achieved." *Tornetta*, 2024 WL 4930635, at *21.

What to do in this case? The plaintiff had achieved "total victory," successfully securing the rescission of the largest compensation package ever granted, after more than six years of litigation, culminating in a trial on the merits, in a complex case, facing substantial risks in litigating against the richest person in the world who had tweeted his "commitment" to "never surrender/settle" a case that he believed was unjust. Delaware law theoretically supported a fee award of 33% of the $56.8 billion grant. The plaintiff's attorneys requested 11%–about $5.6 billion in Tesla shares–to which the court responded: "In a case about excessive compensation, that was a bold ask." *Id* at *1.

Concerned about the prospect of a windfall award, the Chancellor considered various approaches, including the sliding scale deployed by some courts where recoveries approach $500 million; but found that "Plaintiff's 11% ask is already at the lowest end of the range applied under that method." *Id* at *34.

Ultimately, the court landed on a unique solution. Because the value of the 2018 grant had ballooned over the course of the litigation due to stock splits and increasing share price, the court valued the benefit achieved based on the $2.3 billion fair value of the grant on the date it was made and applied "a conservative 15% to that figure result[ing] in a fee award of $345 million–an appropriate sum to reward a total victory." *Id* at *1.

Did the court strike the right balance? Plaintiff's fee request took a substantial "haircut" both in terms of valuation of the benefit achieved and the percentage applied. At the same time, $345 million is the largest fee award in the history of Delaware litigation (see, e.g., *Americas Mining*, 51 A.3d at 1252 (affirming $304 million fee award based on $2.03 billion judgment), and $345 million represents a 25.3 multiplier above the $13.6 million in lodestar hours billed by plaintiff's counsel on the case.

To support this award, the court looked to precedents and weighed the policies underpinning the common benefit doctrine. "As lawyers and judges, we understand that representative litigation performs a valuable service to stockholders who individually might not have the resources or the will to pursue fiduciaries for breach of their duties. The potential for large fees incentivizes counsel to accept challenging cases. They assume the risk of recovering nothing in the end." *Tornetta*, 2024 WL 4930635, at *22.

As in most class action and shareholder derivative cases, "Plaintiff's counsel litigated this action on a fully contingent basis. If they lost, they would get nothing. They were responsible for funding their out-of-pocket expenses, which were significant." *Id* "Accepting contingency risk is what enables counsel to receive an award based on the results generated by the litigation that exceeds their lodestar." *Id*. "And contingent-fee attorneys are presently the only persons incentivized to bring these claims." *Id* at *29.

Fiduciary breaches through board domination by CEOs and controlling shareholders with outsized influence are not uncommon. Given the substantial financial risk involved in these cases, eliminating the prospect of a substantial recovery "would eliminate fiduciary challenges and their attendant deterrent effect in a large category of executive compensation transactions. That would be bad." *Id* These policies are recognized in jurisdictions throughout the United States. Without the common benefit doctrine to incentivize representative actions, consumer and shareholder rights will go unprotected, and the cause of justice will suffer.

The policies are sound. But the case is an outlier, and the method applied to calculate fees is one-of-a-kind, designed to address a unique "windfall risk" which "flow[ed] not from the selected percentage [but] from the sheer magnitude of the compensation plan that plaintiff successfully challenged" (*Id* at *34); that is, the failed attempt by Mr. Musk, the richest person in the world, to increase his controlling interest in Tesla and to further enrich himself. For some people, no matter how much they have, it will never be enough. But for plaintiff's counsel in Tornetta, $345 million was a reasonable fee award for their total victory.

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