EXHIBIT A

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

[PROPOSED] AMICUS BRIEF OF *AMICUS CURIAE* PROFESSOR CHARLES M. ELSON IN SUPPORT OF PLAINTIFF

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I. STATEMENT OF AMICUS CURIAE'S INTEREST IN THE CASE

Professor Charles Elson is the retired Edgar S. Woolard, Jr. Chair in Corporate Governance and the founding Director of the John L. Weinberg Center for Corporate Governance at the University of Delaware. Professor Elson is a leading expert in Delaware corporate law and believes the Court may benefit from his unique perspective based on his decades-long career in academia and his practical experience as a director of many public corporations.

Professor Elson submitted a prior *amicus* brief in this action concerning the development and goals of equity-linked executive compensation, which the Court found "persuasive."[1] He writes now to address Nominal Defendant Tesla, Inc.'s[2] unprecedented and unsupported assertion that this Court's judgment rescinding an unfair equity award to Tesla's conflicted controller can be extinguished or otherwise "materially impact[ed]" by a post-trial stockholder vote to ratify the award.

[1] *Tornetta v. Musk* ("*Post-Trial Opinion*"), 310 A.3d 430, 536-37 (Del. Ch. 2024).

[2] "Tesla."

II. INTRODUCTION

The Court entered judgment for Plaintiff, holding that Defendants breached their fiduciary duties in connection with the 2018 equity compensation award to Elon Musk.[3] To remedy that breach, the Court ordered rescission of the Award.[4] Now, months after judgment, Tesla informs the Court that it is asking its stockholders to ratify the Award "under Delaware common law or statutory law, including Section 204 of the Delaware General Corporation Law."[5] It asserts that "[r]atification of the 2018 CEO Performance Award would materially impact these proceedings[.]"[6]

The magic of Delaware corporate law is that nothing is new under the sun. No matter how unusual a set of facts, the Court can usually find an earlier decision where the Court confronted similar issues. Here, Tesla's Board's attempt to seek stockholder ratification after trial may truly be without precedent. But Defendants' willingness to go further than anyone has gone before does not mean that they can escape the gravitational pull of settled law. No matter the outcome of the vote, it cannot extinguish Plaintiff's claim or overturn the Court's judgment.

First, Tesla's assertion that Section 204 can ratify fiduciary breaches is preposterous. The provision is "designed to remedy [problems of] the technical

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[3] The "Award."

[4] *Post-Trial Opinion*, 310 A.3d at 445.

[5] Trans. ID 72762129 at 2.

[6] *Id.*

validity of the act or transaction; it is not intended to modify the fiduciary duties applicable to either the approval or effectuation of a defective corporate act or transaction or any ratification of such act or transaction."[7]

Second, common law ratification is an affirmative defense. Like any affirmative defense, it can be waived, which Defendants have surely done by raising the defense after trial.

Third, equity disregards form in favor of substance. The Court has ordered rescission of the Award. Any attempt to revive the Award after judgment is, in substance, "a transfer of corporate assets ... for which no consideration at all is received. Such a transfer is in effect a gift."[8] A gift, which inherently has no corporate purpose, can be ratified only by a unanimous stockholder vote.

Finally, even if the Court does not construe the proposed revival of the Award as a gift, common law ratification cannot extinguish Plaintiff's duty of loyalty claim. At most, a fully informed stockholder vote could shift the burden of proving entire fairness, which would not change the outcome.

[7] H.B. 127 syn., 147th Gen. Assem. (2013).

[8] *Lewis v. Vogelstein*, 699 A.2d 327, 336 (Del. Ch. 1997).

III. ARGUMENT

A. There Is No Such Thing As "Statutory Ratification" Of A Fiduciary Breach

The definitive proxy for Tesla's 2024 annual meeting[9] asserts that this Court "concluded that failure to have a fully informed stockholder approval of the 2018 CEO Performance Award at the 2018 Special Meeting rendered the 2018 CEO Performance Award voidable. Accordingly, the Company believes that it is subject to statutory ratification under Section 204 of the DGCL."[10]

One wonders whether this Court is even the intended audience for an assertion so divorced from the realities of Delaware law.[11] As Delaware lawyers know, Section 204 exists "to fix defective corporate acts that otherwise might be void."[12]

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[9] The "Proxy."

[10] Proxy at 84.

[11] Tesla is asking its stockholders to approve a reincorporation to Texas that Mr. Musk announced based on a Twitter poll one day after the Court issued its post-trial opinion. Proxy at 22.

The Company's proposed Texas bylaws select the not-yet-operational Business Court in the Third Business Court Division of the State of Texas as the mandatory forum for all future internal affairs claims. The Section 204 argument may reflect cynical posturing for the benefit of a Texas court less familiar with Delaware law.

[12] *Applied Energetics, Inc. v. Farley*, 239 A.3d 409, 435 (Del. Ch. 2020); *id.* at 449 ("validating the contract itself will not lead automatically to its enforcement, because validation 'only removes the taint of voidness or voidability that stems from the 'failure of authorization.' Defective corporate acts, even if ratified or validated, 'are subject to traditional fiduciary and equitable review.'") (quoting H.B. 127 syn., 147th Gen. Assem. (2013)); *see also In re Numoda Corp.* ("*Numoda II*"), 128 A.3d 991, 991 n.1 (Del. 2015) (Sections 204 and 205 enable ratification and validation of "corporate acts that were taken without adherence to corporate formalities under the DGCL or the corporation's organizational documents").

It cannot cure fiduciary breaches.[13]

When Section 204 was adopted, two of the firms now representing Tesla explained this distinction. Morris Nichols acknowledged that "the legislative synopsis ... makes clear that Sections 204 and 205 only address the technical validity of prior defectively-authorized [*sic*] acts, and do not affect fiduciary duties or any equitable claims against such acts."[14] Richards Layton agreed: "[T]he statute only addresses technical defects giving rise to a claim that an act is void or voidable. An act that is properly ratified under section 204 may be given retroactive legal effect from a technical standpoint, but it would not be insulated from an equitable challenge."[15] The synopsis to House Bill 127 (2013) confirms their analysis:

> Ratification of a defective corporate act under § 204 is designed to remedy the technical validity of the act or transaction; it is not intended to modify the fiduciary duties applicable to either the approval or effectuation of a defective corporate act or transaction or any ratification of such act or transaction. Defective corporate acts, even if ratified under this section, are subject to traditional fiduciary and equitable review.

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[13] John W. Noble, *Fixing Lawyers' Mistakes: The Court's Role in Administering Delaware's Corporate Statute*, 18 U. PA. J. BUS. L. 293, 303 (2016) ("the §§ 204-205 processes do not eliminate or immunize any breach of fiduciary duty that may accompany the defective corporate act.").

[14] Jeffrey R. Wolters and James D. Honaker (Morris, Nichols, Arsht & Tunnell LLP), *Analysis of the 2013 Amendments To The Delaware General Corporation Law*, https://www.law.upenn.edu/live/files/6893-analysis-of-2013-dgcl-amendmentspdf.

[15] C. Stephen Bigler and John Mark Zeberkiewicz (Richards, Layton & Finger, P.A.), *Restoring Equity: Delaware's Legislative Cure for Defects in Stock Issuances and Other Corporate Acts*, 69 BUS. LAWYER 393, 414 (2014).

There are thirty-two reported and unreported decisions citing Section 204. Unsurprisingly, not one holds, suggests, or even considers the possibility that Section 204 could ratify a fiduciary breach.[16]

B. Common Law Ratification Is An Equitable Defense That Cannot Be Raised After Judgment

Common law ratification is equally unavailing. Ratification is an affirmative defense.[17] Like other affirmative defenses, it can be waived.[18] It is hard to imagine a clearer case of waiver than this one.

In addition to unfairly prejudicing Plaintiff, allowing Defendants to present a ratification defense based on a re-vote after trial would create a serious moral hazard by reducing the risks of soliciting stockholder approval through a materially misleading proxy.[19] If these Defendants get a "mulligan" after misleading stockholders once, then the Court will be incentivizing other directors to act equally

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[16] *See also In re Numoda Corp. S'holders Litig.* ("*Numoda I*"), 2015 WL 402265, at *10 (Del. Ch. Jan. 30, 2015) ("it is unlikely that the General Assembly intended the legislation to extend far beyond failures of corporate governance features.") *aff'd sub nom. Numoda II*, 128 A.3d 991.

[17] *In re Inv'rs Bancorp, Inc. S'holder Litig.*, 177 A.3d 1208, 1211 (Del. 2017) ("when the stockholders have approved an equity incentive plan, the affirmative defense of stockholder ratification comes into play."); *Calma v. Templeton*, 114 A.3d 563, 586 (Del. Ch. 2015) ("One principle is that the affirmative defense of ratification is available only where a majority of informed, uncoerced, and disinterested stockholders vote in favor of a specific decision of the board of directors.").

[18] *James v. Glazer*, 570 A.2d 1150, 1153 (Del. 1990) ("Generally, an affirmative defense must be pled or the defense is waived.").

[19] *Post-Trial Opinion*, 310 A.3d at 446 ("the proxy statement inaccurately described key directors as independent and misleadingly omitted details about the process.").

unseriously with respect to their disclosure obligations. Directors will know that if they are thwarted the first time, they can always try again.[20]

C. In Substance, Defendants Are Seeking To Reissue The 2018 Award, Which Is A Gift

To the extent that the Court does not consider ratification waived, it should require a unanimous stockholder vote to attribute any ratifying effect, because the Tesla Board has engaged in making a simple gift—a wildly non-proportional asset transfer—without appropriate corporate purpose. In form, of course, the 2024 one-member Special Committee determined to recommend a *post hoc* vote to ratify the 2018 award. But "equity regards substance rather than form."[21] And, in substance, the Special Committee's recommendation to seek a post-trial ratification of the 2018 award is effectively an attempt to give back to Mr. Musk the 304 million shares that the Court took away.

The Proxy makes clear that the Board viewed this as a way of righting a perceived wrong to Mr. Musk and expressing its disagreement with this Court's decision:

> Because the Delaware Court second-guessed your decision, Elon has not been paid for any of his work for Tesla for the past six years that has helped to generate significant growth and stockholder value. That strikes us — and the many stockholders from whom we already have

[20] *Cf. Klig v. Deloitte LLP*, 2010 WL 3489735, at *6 (Del. Ch. Sept. 7, 2010) ("a practice of granting counsel a do-over ... for this type of extreme behavior reinforces problematic incentives[.]").

[21] *Monroe Park v. Metro. Life Ins. Co.*, 457 A.2d 734, 737 (Del. 1983).

> heard — as fundamentally unfair, and inconsistent with the will of the stockholders who voted for it.[22]

As other legal academics have already recognized,[23] the Board's decision to give Mr. Musk a second bite at this multi-billion-dollar apple is a canonical example of a gift.[24] In the handful of cases where the Court has rejected similar claims for "the payment of compensation for past services rendered, ... [t]he payments made were ... typically as part of a severance or retirement arrangement."[25] Giving a controller shares worth billions of dollars to express disagreement with this Court's decision is not that. It is a "gift," that "diver[ts] ... corporate assets for improper or unnecessary purposes."[26]

"Contemporary Delaware decisions have brought waste [in the form of inappropriate asset transfers] within the fiduciary framework of the business judgment rule by reconceiving [such transfers] as a means of pleading that the directors acted in bad faith."[27] But it remains the law that a gift requires unanimous

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[22] Proxy, Letter to Stockholders from Robyn Denholm (Chair of Tesla's Board).

[23] Ann Lipton, *Tesla and Waste*, BUSINESS LAW PROF BLOG (Apr. 18, 2024), https://lawprofessors.typepad.com/business_law/2024/04/tesla-and-waste.html ("[A]warding back pay in this instance looks like – a gift. A sheer gift to Musk out of gratitude for his past work for Tesla.").

[24] *Fidanque v. Am. Maracaibo Co.*, 92 A.2d 311, 320–21 (Del. Ch. 1952) (retroactive payment for "past services" was "an illegal gift of corporate assets.").

[25] *Feuer v. Redstone*, 2018 WL 1870074, at *16 (Del. Ch. Apr. 19, 2018).

[26] *Michelson v. Duncan*, 407 A.2d 211, 217 (Del. 1979).

[27] *In re McDonald's Corp. S'holder Deriv. Litig.*, 291 A.3d 652, 693 (Del. Ch. 2023).

ratification.[28] Anything short of a unanimous vote should not ratify the revival of the Award.

D. Even If Not Viewed As A Challengeable Gift, Common Law Ratification Cannot "Extinguish" Duty Of Loyalty Claims; Here It Could, At Best, Shift The Burden

Finally, even if the Court does not construe the Tesla's board's attempt to revive the grant to Mr. Musk as a gift, a stockholder vote should not extinguish the claim or affect the outcome. The Proxy misstates how common law ratification works almost as badly as it misstates the scope of Section 204. The Proxy says that common law ratification can "extinguish claims for breach of fiduciary duty by authorizing an act that otherwise would constitute a breach. When properly implemented, common law ratification 'reaches back' to validate the challenged act as of its initial enactment. The Company believes that, under the *Tornetta* Opinion, the 2018 CEO Performance Award is such an act that may be ratified under Delaware common law."[29]

The claim that the forthcoming vote could "extinguish" Plaintiffs' claim is flatly incorrect. "Ratification is a concept deriving from the law of agency which contemplates the *ex post* conferring upon or confirming of the legal authority of an

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[28] *Michelson*, 407 A.2d at 224; *Calma*, 114 A.3d at 587; J. Travis Laster, *The Effect of Stockholder Approval on Enhanced Scrutiny*, 40 WM. MITCHELL L. REV. 1443, 1445 (2014).

[29] Proxy at 84.

agent in circumstances in which the agent had no authority or arguably had no authority."[30] Delaware has rejected wholesale importation of "general principles of common law ratification into the corporate context" and recognizes the "need to be sensitive to the peculiarities of the corporate context when applying general principles of ratification."[31] In the corporate context, "[t]he only species of claim that shareholder ratification can validly extinguish is a claim that the directors lacked the authority to take action that was later ratified."[32]

Similarly, under Section 144, ratification "removes an 'interested director' cloud ... and provides against invalidation of an agreement 'solely' because ... a director or officer is involved."[33] But "nothing in the statute sanctions unfairness ... or removes the transaction from judicial scrutiny."[34]

Ironically, the Proxy's multiple, material misstatements of the effect of the vote will prevent that vote from having *any* ratifying effect.[35] "For a vote to have

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[30] *Vogelstein*, 699 A.2d at 334 .

[31] *Espinoza v. Zuckerberg*, 124 A.3d 47, 59 (Del. Ch. 2015).

[32] *Gantler v. Stephens*, 965 A.2d 695, 713 n.54 (Del. 2009).

[33] *Fliegler v. Lawrence*, 361 A.2d 218, 222 (Del. 1976).

[34] *Id.*; *see also In re Match Grp., Inc. Derivative Litig.*, 2024 WL 1449815, at *10 n.115 (Del. Apr. 4, 2024) ("Section 144 ... offers a limited safe harbor for directors from incurable voidness for conflict transactions. It is not concerned with equitable review.").

[35] The vote also appears coerced, insofar as Tesla's directors appear to be not-so-subtly threatening stockholders with a $25 billion charge against earnings if they vote against ratification. *See* Proxy at 89 ("stockholders should take into account the following considerations and risks associated with not ratifying the 2018 CEO Compensation Plan, including ... if the Company needed to replace Mr. Musk's compensation with similar

ratifying effect, the stockholders must be told specifically ... what the binding effect of a favorable vote will be."[36] "Although it may be possible to envision statements of the law that suffer from a technical inaccuracy but are not necessarily material to a stockholder's decision about how to vote, this is not one of them."[37] The Proxy's false statements about the effect of the vote will render that vote not fully informed, thus "negating [any] effect of the ... vote."[38]

Even if the vote was fully informed, however, it could, at most, shift the burden of proof. As explained in *Wheelabrator*—which the Supreme Court cited favorably in *Gantler*[39] and *Corwin*[40]—"the ratification cases involving duty of loyalty claims have uniformly held that the effect of shareholder ratification is to alter the standard of review, or to shift the burden of proof, or both."[41] And as

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compensation in lieu of Ratification, such amounts would likely result in significant accounting charges, for the Company. The Company has determined if Tesla were to issue new stock option awards to purchase approximately 303.96 million shares of common stock ... the accounting implication would be an incremental compensation expense in excess of $25 billion[.]").

[36] *Garfield v. Allen*, 277 A.3d 296, 353 (Del. Ch. 2022).

[37] *In re GGP, Inc. S'holder Litig.*, 282 A.3d 37, 67 (Del. 2022); *id.* at 69 (proxy was materially misleading where it "misled stockholders about the operation of Section 262(g).").

[38] *In re Tesla Motors, Inc. S'holder Litig.*, 2020 WL 553902, at *12 (Del. Ch. Feb. 4, 2020) ("If SolarCity was insolvent, something clearly not in Tesla's disclosures, the vote was uninformed, negating the effect of the shareholder vote.").

[39] 965 A.2d at 712.

[40] *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 309 (Del. 2015).

[41] *In re Wheelabrator Techs., Inc. S'holders Litig.*, 663 A.2d 1194, 1202–03 (Del. Ch. 1995). "Since *Wheelabrator*, the law governing the effect of ratification on loyalty claims

Wheelabrator recognized, "[t]he ratification decisions that involve duty of loyalty claims are" subdivided into two categories: "(a) 'interested' transaction cases between a corporation and its directors ... and (b) cases involving a transaction between the corporation and its controlling shareholder."[42]

For actions challenging the former category—so-called "classic self-dealing"— transactions, ratification can change the standard of review.[43] But this case involves the latter type of transaction.[44] As the Supreme Court just reaffirmed in *Match*, stockholder ratification of a conflicted-controller transaction will only shift the burden of entire fairness; it cannot, alone, "change the standard of review. If the controlling stockholder wants to secure the benefits of business judgment review, it must follow all *MFW*'s requirements."[45]

Here, there would be no basis to change the standard of review. The Court already held that "there was no well-functioning committee of independent directors," when the Award was first negotiated.[46] Nor could Defendants seriously

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has continued to develop," but it remains true that ratification can, at most, shift the standard of review for a duty of loyalty claim. *Allen*, 277 A.3d at 352 n.26.

[42] *Wheelabrator*, 663 A.2d at 1203.

[43] *Solomon v. Armstrong*, 747 A.2d 1098, 1115–16 (Del. Ch. 1999), *aff'd,* 746 A.2d 277 (Del. 2000).

[44] *Post-Trial Opinion*, 310 A.3d at 520.

[45] *Match*, 2024 WL 1449815, at *1.

[46] *Post-Trial Opinion*, 310 A.3d at 521.

contend that the 2024 Special Committee satisfied *MFW*'s requirements. For one thing, the 2024 Special Committee's report makes clear that it was not engaging in a "new compensation process ... to be judged on [its] own substantive merits."[47] Moreover, if that process was judged on its substantive merits, it would flunk *MFW*. The sole member of the 2024 Special Committee "has realized a pre-tax total of approximately $62 million from the exercise of equity awards received for her service on the Board," which is "a meaningful portion of her net worth."[48] She "did not renegotiate the amount or terms of Musk's 2018 compensation plan," and "did not evaluate whether the amount or terms of Musk's 2018 compensation plan were fair, or opine on the *Tornetta* ruling about [*sic*] its fairness."[49]

Thus, Defendants can expect, at most, a shift of burden. That should not yield a different result. "[S]hifting the burden of persuasion under a preponderance standard is not a major move[.] ... [T]he outcome of very few cases hinges on what happens if in the evidence is in equipoise."[50] This is not one of those rare cases. The

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[47] Proxy at E-20.

[48] Proxy at E-28. *Compare with Post-Trial Opinion*, 310 A.3d at 509-10 ("Ordinary, market-rate compensation does not compromise a director's independence. Outsized director compensation can.").

[49] *Id.* at E-20. *Compare with Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, 645 (Del. 2014) (conflicted controller transaction may only be cleansed if "the Special Committee meets its duty of care in negotiating"), *overruled in part on unrelated grounds by Flood v. Synutra Int'l, Inc.*, 195 A.3d 754 (Del. 2018).

[50] *In re Cysive, Inc. S'holders Litig.*, 836 A.2d 531, 548 (Del. Ch. 2003).

Court found that "Musk dictated the Grant's terms, and the committee effected those wishes," and that "no market-based evidence support[ed] the price[.]"[51] This was not a close call. The burden did not matter.

IV. CONCLUSION

The Court was clearly and unquestionably correct the first time. A *post hoc* stockholder vote cannot undo the outcome.

Dated: May 13, 2024

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[51] *Post-Trial Opinion*, 310 A.3d at 532, 534.