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.	:	

PROFESSOR CHARLES M. ELSON'S MOTION FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE*

Non-party Professor Charles M. Elson, by and through his undersigned counsel, respectfully moves for leave to appear and file as *amicus curiae* a brief in the above-captioned action of less than 3,500 words. The proposed brief is attached as Exhibit A (the "Brief"). The grounds for this motion are as follows.

I. INTRODUCTION AND BACKGROUND

1. In January 2024, the Court issued its Post-Trial Opinion, entering judgment for Plaintiff and finding that Defendants breached their fiduciary duties in

connection with Elon Musk's unprecedented equity compensation award from Nominal Defendant Tesla, Inc. ("Tesla" and the "Award").[1] To remedy that breach, the Court ordered recission of the Award. Tesla's Board is now trying to undo the Court's order. The Board is asking stockholders to ratify the Award "under Delaware common law or statutory law, including Section 204 of the Delaware General Corporation Law[,]" at its 2024 Annual Meeting and Tesla has informed the Court that it believes "[r]atification of the … Award would materially impact these proceedings[.]"[2]

2. Professor Elson, a leading authority on corporate law,[3] moves for leave to submit a second proposed *amicus curiae* brief in this action. Professor Elson

---

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

[2] Trans. ID 72762129 at 2.

[3] *See, e.g.*, Charles M. Elson, *Why Delaware Must Retain Its Corporate Dominance and Why It May Not*, in CAN DELAWARE BE DETHRONED?: EVALUATING DELAWARE'S DOMINANCE OF CORPORATE LAW 225 (Stephen M. Bainbridge et al. eds., 2018); Charles M. Elson & Craig K. Ferrere, *Executive Superstars, Peer Groups, and Overcompensation: Cause, Effect, and Solution*, 38 J. CORP. L. 487, 488 (2013); Charles M. Elson, *The Answer to Excessive Executive Compensation Is Risk, Not the Market*, 2 J. BUS. & TECH. L. 403 (2007); Charles M. Elson, *Enron and the Necessity of the Objective Proximate Monitor*, 89 CORNELL L. REV. 496, 499 (2004); R. Franklin Balotti, Charles M. Elson, and J. Travis Laster, *Equity Ownership and the Duty of Care: Convergence, Revolution, or Evolution?*, 55 BUS. LAW. 661 (2000); Sanjai Bhagat, Dennis C. Carey, Charles M. Elson, *Director Ownership, Corporate Performance, and Management Turnover*, 54 BUS. LAW. 885 (1999); Charles M. Elson, *Director Compensation and the Management-Captured Board-the History of A Symptom and A Cure*, 50 SMU L. REV. 127 (1996); Charles M. Elson, *The Duty of Care, Compensation, and Stock Ownership*, 63 U. CIN. L. REV. 649 (1995); Charles M. Elson, *Executive Overcompensation—A Board-Based Solution*, 34 B.C. L. REV. 937, 937 (1993).

previously submitted an *amicus* brief concerning the development and goals of equity-linked executive compensation during the post-trial briefing stage of this action, which the Court found "persuasive."[4] Professor Elson now writes to provide the Court with additional context and analysis in connection with the Tesla Board's unprecedented attempt to seek a post-trial stockholder vote to ratify the Award.

II. ARGUMENT

A. Musk, Acting Through Tesla, Tried To Bully Professor Elson Out of Filing This Brief

3. Plaintiff consents to this motion. Defendants do not and Musk was willing to go to extraordinary—and appalling—lengths to prevent this Court from reading the Brief.

4. Early Friday morning, Professor Elson's counsel emailed a copy of the Brief to counsel for the parties, asking whether they would consent to a motion for leave to file it. Plaintiff's counsel responded that they did not oppose its submission. Tesla's counsel from DLA Piper telephoned Professor Elson's counsel to assert, without further explanation, that Professor Elson "may have a conflict" and asked counsel to hold off on filing the brief.

5. Soon after, Professor Elson received an email from Holland & Knight LLP, a law firm with which Professor Elson had a consulting relationship. Holland

[4] *Post-Trial Opinion*, 310 A.3d at 536-37.

& Knight informed Professor Elson that the firm represents Tesla in certain unrelated matters and that Tesla had threatened to fire Holland & Knight if Professor Elson submitted this *amicus* brief.

6. The assertion that Professor Elson was conflicted is risible—which is presumably why Tesla's then-counsel raised no objection when Professor Elson submitted his prior *amicus* brief in this matter. The rules of professional conduct prevent a **lawyer** from representing a **client** if the representation of one client will be directly **adverse** to another client.[5] None of those elements was present here:

- Professor Elson is neither acting as a lawyer nor representing a client in this action; he is represented by counsel and seeks leave to file a brief as an *amicus*.

- Nor was Professor Elson acting as a lawyer at Holland & Knight; the rules of professional conduct do not impute conflicts from a consultant to a law firm or from a law firm to a consultant.

- Nor is Professor Elson acting adversely to Tesla; his brief is defending a multi-billion-dollar judgment in Tesla's favor.

7. A law professor cannot allow his academic judgment to be compromised by threats. Yet, while the asserted conflict lacked any substance as a legal matter, the economic threat to Holland & Knight was real. To protect that firm from retaliation while upholding the important principle of academic freedom,

[5] Del. R. Prof. Cond. 1.7(a).

Professor Elson resigned from Holland & Knight earlier this morning, ending a relationship of nearly thirty years.

8. The Court should have no illusions about what happened here. The frivolous assertion of a conflict was a fig leaf for Musk, acting through Tesla, to try to bully a law professor by making a serious economic threat to a law firm with which the professor had a consulting relationship. This is not the first time that Tesla has threatened to fire a law firm for employing someone who annoyed Elon Musk by doing his job.[6] That it did so again here only emphasizes the correctness of the Court's conclusion that Musk controls Tesla.[7]

9. Musk's actions speak volumes. This self-defeating tactic is reminiscent of Jim Dolan responding to a complaint in the *In re Madison Square Garden Entertainment* matter—alleging that Dolan was a bullying controller—by causing the nominal defendant to "send[] a completely idiotic letter ... for presumptively vindictive reasons" barring plaintiffs' counsel from Madison Square Garden.[8] The Court saw that tactic for what it was and we trust that it will do so again here.

---

[6] *See* Rebecca Elliott, Justin Scheck, and Drew FitzGerald, *Elon Musk's Tesla Asked Law Firm to Fire Associate Hired From SEC*, WALL STREET JOURNAL (Jan. 15, 2022).

[7] *Post-Trial Opinion*, 310 A.3d at 505 (noting, in support of conclusion that Musk was a controller, that "Tesla employees described Musk as having a reputation among employees as a 'tyrant' who fires people 'on a whim.'").

[8] *In re Madison Square Garden Entertainment Co. S'holders Litig.*, Consol. C.A. No. 2021-0468-KSJM (Del. Ch. Nov. 3, 2022) (Transcript) at 34. Madison Square Garden

B. The Court Should Permit Professor Elson To File The Brief

10. This Court has "no rule governing the submission of *amicus curiae* briefs … [but] such briefs are permitted at the Court's discretion."[9] The Court routinely grants leave for *amicus* submissions where appropriate.[10] "When both sides are represented by counsel, the purpose of an *amicus curiae* is to (1) assist the Court by supplementing the efforts of counsel … in a case of general public interest'; or (2) draw attention to 'broader legal or policy implications that might otherwise escape its consideration in the narrow context of a specific case.'"[11]

11. Professor Elson is well-suited to provide the Court with additional guidance in this matter. He 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. In addition to his decades-long career in academia, Professor Elson has vast practical experience in corporate law matters. He

---

Entertainment Corporation was represented in that action by the same national law firm that recently began representing Tesla here.

[9] *La. Mun. Police Emps.' Ret. Sys. v. Hershey Co.*, 2013 WL 1776668, at *1 (Del. Ch. Apr. 16, 2013).

[10] *See, e.g.*, *Post-Trial Opinion*, 310 A.3d at 536-37; *Hollinger Int'l, Inc. v. Black*, 844 A.2d 1022, 1030 n.2 (Del. Ch. 2004); *Saito v. McKesson HBOC, Inc.*, 2002 WL 31657622, at *8 & nn.54–56 (Del. Ch. Oct. 25, 2002) (citing to *amicus* brief); *S. St. Corp. Recovery Fund I v. Salovaara*, 1999 WL 504778, at *4 (Del. Ch. July 9, 1999); *Chapin v. Benwood Found., Inc.*, 402 A.2d 1205, 1209 (Del. Ch. 1979), *aff'd sub nom. Harrison v. Chapin*, 415 A.2d 1068 (Del. 1980); *In re N. European Oil Corp.*, 129 A.2d 259, 261 (Del. Ch. 1957).

[11] *Hershey*, 2013 WL 1776668, at *1.

is a member of the American Law Institute, the Vice Chairman of the ABA Business Law Section's Committee on Corporate Governance and was a member of the ABA Business Law Section's Committee on Corporate Laws. He previously served on the National Association of Corporate Directors' Commissions on Director Compensation, Director Professionalism, CEO Succession, Audit Committees, Strategic Planning, Director Evaluation, Risk Governance, Effective Lead Director, and Board Diversity. Professor Elson has also served as a director of many public companies[12] and has been cited extensively by this Court.[13]

12. The parties are represented by highly competent counsel and will surely submit polished briefing on whether Tesla's stockholder vote will ratify the Award or otherwise materially impact this action. But "decisions do not just belong to the parties;" they "are 'valuable to the legal community as a whole[,]'"[14] and an *amicus* is often in a position to "focus the court's attention on the broader implications of various possible rulings."[15]

---

[12] Professor Elson has served as a director of Enhabit, Inc., Encompass Health Corporation, Bob Evans Farms, Inc., HealthSouth Corporation, and AutoZone, Inc.

[13] *See, e.g.*, *In re EZCORP Inc. Consulting Agreement Deriv. Litig.*, 2016 WL 301245, at *19 n.9 (Del. Ch. Jan. 25, 2016); *In re PNB Holding Co. S'holders Litig.*, 2006 WL 2403999, at *10 n.47 (Del. Ch. Aug. 18, 2006); *In re Oracle Corp.*, 867 A.2d 904, 930 n.115 (Del. Ch. 2004), *aff'd sub nom. In re Oracle Corp. Deriv. Litig.*, 872 A.2d 960 (Del. 2005).

[14] Luther T. Munford, *When Does the Curiae Need an Amicus?*, 1 J. APP. PRAC. & PROCESS 279, 281-82 (1999) (citation omitted).

[15] Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603, 608 (1984)

13. Here, if the Court were to adopt the Tesla Board's suggestion that a duty of loyalty claim can be extinguished after trial, the impact would extend far beyond this case and dramatically upend settled principles of Delaware law. Professor Elson's proposed brief aims to provide the Court with additional context and insight as it navigates through these uncharted waters.

III. CONCLUSION

14. The Court should permit Professor Elson to file the Brief.

Dated: May 13, 2024

OF COUNSEL:

Joel Fleming
Amanda Crawford
Equity Litigation Group LLP
101 Arch Street, 8th Floor
Boston, MA 02110
(617) 468-8602

GRANT & EISENHOFER, P.A.

/s/ Christine M. Mackintosh
Christine M. Mackintosh (#5085)
123 Justison Street
Wilmington, DE 19801
(302) 622-7000
cmackintosh@gelaw.com

Words: 1,777 of 3,000

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2024, true and correct copies of the foregoing Professor Charles M. Elson's Motion For Leave To Participate As *Amicus Curiae* were caused to be served by File & Serve*Xpress* on the following counsel of record:

Peter B. Andrews
Craig J. Springer
David M. Sborz
Andrew J. Peach
Jackson E. Warren
ANDREWS & SPRINGER LLC
4001 Kennett Pike, Suite 250
Wilmington, Delaware 19807

Gregory V. Varallo
Glenn R. McGillivray
BERNSTEIN LITOWITZ BERGER
& GROSSMANN LLP
500 Delaware Avenue, Suite 901
Wilmington, Delaware 19801

David E. Ross
Garrett B. Moritz
ROSS ARONSTAM
& MORITZ LLP
100 S. West Street, Suite 400
Wilmington, Delaware 19801

Catherine A. Gaul
ASHBY & GEDDES, P.A.
500 Delaware Avenue, 8th Floor
Wilmington, Delaware19801

John L. Reed
Ronald N. Brown, III
Caleb G. Johnson
Daniel P. Klusman
DLA PIPER LLP (US)
1201 North Market Street, Suite
2100 Wilmington, Delaware 19801

William M. Lafferty
Susan W. Waesco
Ryan D. Stottmann
Miranda N. Gilbert
Jacob M. Perrone
MORRIS, NICHOLS, ARSHT
& TUNNELL LLP
1201 N. Market Street, 16th Floor
Wilmington, Delaware 19801

Rudolf Koch
John D. Hendershot
Kevin M. Gallagher
Andrew L. Milam
RICHARDS, LAYTON
& FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, Delaware 19801

/s/ Christine M. Mackintosh
Christine M. Mackintosh (#5085)