



IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE TESLA, INC. DERIVATIVE : No. 534, 2024
LITIGATION : No. 10, 2025
: No. 11, 2025
: No. 12, 2025
:
: Court Below: Court of Chancery
: of the State of Delaware
:
: C.A. No. 2018-0408-KSJM

**AMICUS CURIAE BRIEF OF
CHARLES M. ELSON IN SUPPORT OF APPELLEE**

Of Counsel:

Joel Fleming
Amanda Crawford
**EQUITY LITIGATION GROUP
LLP**
1 Washington Mall #1307
Boston, MA 02108
(617) 468-8602

Christine M. Mackintosh (#5085)
GRANT & EISENHOFER, P.A.
123 Justison Street
Wilmington, DE 19801
(302) 622-7000
cmackintosh@gelaw.com

*Counsel to Amicus Curiae
Charles M. Elson*

Dated: May 19, 2025

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
INTERESTS OF <i>AMICUS CURIAE</i>	1
RULE 28(C)(4) CERTIFICATION	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. DISAPPOINTED LITIGANTS OFTEN THREATEN THE DELAWARE FRANCHISE.....	4
II. MUSK AND HIS <i>AMICI</i> ASK THIS COURT TO CHANGE SETTLED LAW.....	10
III. THE COURT SHOULD NOT CHANGE THE LAW FOR THIS CASE....	15
CONCLUSION	19

TABLE OF AUTHORITIES

Page(s)

Cases

<i>City Capital Assocs. Ltd. v. Interco, Inc.</i> , 551 A.2d 787 (Del. Ch. 1988)	5, 6
<i>Corwin v. KKR Fin. Holdings LLC</i> , 125 A.3d 304 (Del. 2015)	12, 15
<i>Desktop Metal, Inc. v. Nano Dimension Ltd.</i> , 2025 WL 904521 (Del. Ch. Mar. 24, 2025)	16, 17
<i>Grand Metro. Pub., Ltd. Co. v. Pillsbury Co.</i> , 558 A.2d 1049 (Del. Ch. 1988)	5, 6
<i>In re Match Grp., Inc. Deriv. Litig.</i> , 315 A.3d 446 (Del. 2024)	13, 15
<i>In re Oracle Corp. Deriv. Litig.</i> , 2025 WL 249066 (Del. Jan. 21, 2025)	12, 14, 15
<i>Paramount Commc'ns Inc. v. QVC Network Inc.</i> , 637 A.2d 34 (Del. 1994)	18
<i>Paramount Commc'ns, Inc. v. Time, Inc.</i> , 571 A.2d 1140 (Del. 1989)	6
<i>In re Shorenstein Hays-Nederlander Theatres LLC Appeals</i> , 213 A.3d 39 (Del. 2019)	18
<i>Tornetta v. Musk</i> , 2024 WL 3494118 (Del. Ch. July 22, 2024)	1
<i>Tornetta v. Musk</i> , 310 A.3d 430 (Del. Ch. 2024)	1

Statutes

Del. Ct. Ch. R. 23.1	13
----------------------------	----

Del. Sup. Ct. R. 28(c)(4).....	2
--------------------------------	---

Other Authorities

Katie Balevic, <i>Delaware governor tells BI things may 'need to change' as companies threaten to leave the state</i> , BUSINESS INSIDER (Feb. 2, 2025), https://www.businessinsider.com/delaware-governor-matt- meyer-corporate-law-elon-musk-bill-ackman-2025-2	8
Elisabeth Bumiller, <i>'People Are Going Silent': Fearing Retribution, Trump Critics Muzzle Themselves</i> , N.Y. TIMES (Mar. 6, 2025), https://www.nytimes.com/2025/03/06/us/politics/trump- democracy.html	8
William B. Chandler III & Anthony A. Rickey, <i>Manufacturing Mystery: A Response to Professors Carney and Shepherd's 'The Mystery of Delaware Law's Continuing Success,'</i> 2009 U. ILL. L. REV. 95, 98 (2009).....	11
Kate Conger and Lauren Hirsch, <i>Elon Musk Completes \$44 Billion Deal to Own Twitter</i> , N.Y. TIMES (Oct. 27, 2022)	16
Jens Dammann, <i>Homogeneity Effects in Corporate Law</i> , 46 ARIZ. ST. L.J. 1103 (2014)	6
Charles Elson, <i>Directors and the New Delaware</i> , DIRECTORS & BOARDS (Mar. 27, 2025), https://www.directorsandboards.com/legal-and- regulatory/directors-and-the-new-delaware/	15
Charles M. Elson, <i>Why Delaware Must Retain Its Corporate Dominance and Why It May Not</i> , in Bainbridge, et al., CAN DELAWARE BE DETHRONED: EVALUATING DELAWARE'S DOMINANCE OF CORPORATE LAW 236 (2018)	10
Joel Edan Friedlander, <i>The Desegregation Decrees of the Delaware Court of Chancery</i> , 18 DEL. L. REV. 1, 4 (2023).....	17

Lawrence Hamermesh, <i>How We Make Law in Delaware, and What to Expect from Us in the Future</i> , 2 J. BUS. & TECH. L. 409 (2007)	10, 15
Liz Hoffman, <i>MAGA offers corporations cover to flee Delaware</i> , SEMAFOR (Mar. 5, 2025), https://www.semafor.com/article/03/05/2025/maga-offers-corporations-cover-to-flee-delaware	8
Randy J. Holland, <i>Delaware Independent Directors: A Judicial Contextual Evolution</i> , 24 U. PA. J. BUS. L. 781 (2022)	14
Sujeet Indap, <i>Delaware braced for change after attacks from Elon Musk and others</i> , FINANCIAL TIMES (Mar. 4, 2025), https://www.ft.com/content/ec6d8ad9-46cf-4347-8e43-c8d02882ff00	8
Jonathan Lemire, <i>Elon Musk Is President</i> , THE ATLANTIC (Feb. 3, 2025), https://www.theatlantic.com/politics/archive/2025/02/president-elon-musk-trump/681558/	8
Ann Lipton, <i>Delaware Decides Delaware Law Has No Value</i> , BUSINESS LAW PROF BLOG (Feb. 17, 2025), https://www.businesslawprofessors.com/2025/02/delaware-decides-delaware-law-has-no-value/	15
Ann Lipton, <i>The Delaware Contretemps Continues</i> , BUS. L. PROF. BLOG (Apr. 26, 2024), https://www.businesslawprofessors.com/2024/04/the-delaware-contretemps-continues/	14
Martin Lipton, <i>The Interco Case</i> , WACHTELL LIPTON ROSEN & KATZ (Nov. 3, 1988), https://theliptonarchive.org/wp-content/uploads/340-The-Interco-Case-dated-November-3-1988.pdf	5

Martin Lipton, <i>You Can't Just Say No in Delaware No More</i> , WACHTELL LIPTON ROSEN & KATZ (Dec. 17, 1988), https://theliptonarchive.org/wp-content/uploads/346-You-Cant-Just-Say-No-in-Delaware-No-More-dated-December-17-1988.pdf	6
Tabby Kinder and Stephen Morris, <i>Tesla's Chair on Elon Musk: "I Might Wake Up to a Tweet. I Don't Wake Up to a Strategy Shift"</i> , FINANCIAL TIMES (May 17, 2024), https://www.ft.com/content/aa5464fd-c7c5-4f38-a2df-374a07439d88	7
William Meyers, <i>Showdown in Delaware: The Battle to Shape Takeover Law</i> , INSTITUTIONAL INVESTOR (Feb. 1989).....	6
Matt O'Brien, <i>What if Musk loses the Twitter case but defies the court?</i> , THE SEATTLE TIMES (Oct. 4, 2022), https://www.seattletimes.com/business/what-if-musk-loses-the-twitter-case-but-defies-the-court/	16
Will Oremus, <i>Delaware's grip on corporations seemed solid. Elon Musk led a revolt.</i> , WASHINGTON POST (Mar. 4, 2025), https://www.washingtonpost.com/technology/2025/03/04/delaware-corporate-law-elon-musk/	3, 8
Chief Justice John G. Roberts, Jr., 2024 Year End Report on the Federal Judiciary (Dec. 31, 2024), https://www.supremecourt.gov/publicinfo/year-end/2024year-endreport.pdf	17
Nick Robins-Early, <i>Elon Musk lashes out at US judges as they rule against Doge</i> , THE GUARDIAN (Mar. 22, 2025), https://www.theguardian.com/technology/2025/mar/22/elon-musk-doge-judges-usaid	7
Chief Justice Collin Seitz, Testimony Before the Joint Finance Committee (Feb. 20, 2025)	17

Sonam Sheth, <i>Musk Rages Against Judge’s Refusal to Reinstate \$56 Billion Pay Package</i> , NEWSWEEK (Dec. 2, 2024), https://www.newsweek.com/elon-musk-reacts-tesla-pay-package-delaware-ruling-1994527	3
Leo E. Strine, Jr., <i>The Story of Blasius Industries v. Atlas Corp.: Keeping the Electoral Path Clear</i> in J. M. Ramseyer, CORPORATE LAW STORIES 275 (2009)	5, 11
Eric Talley, Sarath Sanga, and Gabriel Rauterberg, <i>Delaware Law’s Biggest Overhaul in Half a Century: A Bold Reform – or the Beginning of an Unraveling?</i> , CLS BLUE SKY BLOG (Feb. 18, 2025), https://clsbluesky.law.columbia.edu/2025/02/18/delaware-laws-biggest-overhaul-in-half-a-century-a-bold-reform-or-the-beginning-of-an-unraveling/	15

INTERESTS OF *AMICUS CURIAE*

Amicus curiae, Professor Charles M. 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 who has written extensively about the Delaware corporate franchise. He writes in support of Appellee, Richard Tornetta.

Professor Elson previously submitted *amicus* briefing in the trial court. His first *amicus* brief concerned the development and goals of equity-linked executive compensation. The Court of Chancery found that brief “persuasive” and relied on it in its Post-Trial Merits opinion.¹ Professor Elson submitted a second *amicus* brief concerning Defendants’ post-trial ratification arguments. The Court of Chancery accepted that brief—over Tesla’s objection—writing that it “welcome[d] the thoughts of Professor Elson, a leading authority on Delaware law who previously assisted the court in this action.”²

¹ *Tornetta v. Musk* (“*Post-Trial Merits Opinion*”), 310 A.3d 430, 536-37 (Del. Ch. 2024).

² *Tornetta v. Musk* (“*Amicus Decision*”), 2024 WL 3494118, at *2 (Del. Ch. July 22, 2024).

RULE 28(C)(4) CERTIFICATION

Pursuant to Supreme Court Rule 28(c)(4), no party, party's counsel, or other person (other than *amicus* and his counsel) authored this brief in whole or in substantial part or contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

“Never incorporate your company in the state of Delaware.”³ With those words, tweeted out within an hour of the Court of Chancery’s Post-Trial Merits Opinion, Elon Musk began to “lead a revolt” against Delaware,⁴ punctuated by false and abusive attacks on the Chancellor.⁵ Now, Musk’s *amici* point to a Musk-driven “perception that Delaware’s judicial approach is faltering”⁶ in support of their claim that this Court must reverse the judgment below by changing the law and imposing new bright-line rules contradicting controlling precedents.

The Court should refuse that invitation. Threatening the franchise is not a new strategy. Disappointed litigants have long used this tactic in hopes of influencing Delaware courts. But what has made Delaware great is the predictability of its law and the expertise and courage of its courts. Accepting Musk’s *amici*’s arguments and discarding core precedents to save Musk’s pay package would harm that reputation. The Court should affirm the judgment below.

³ Elon Musk, X (Jan. 30, 2024), <https://x.com/elonmusk/status/1752455348106166598>.

⁴ Will Oremus, *Delaware’s grip on corporations seemed solid. Elon Musk led a revolt.*, WASHINGTON POST (Mar. 4, 2025), <https://www.washingtonpost.com/technology/2025/03/04/delaware-corporate-law-elon-musk/> (cleaned up).

⁵ Sonam Sheth, *Musk Rages Against Judge’s Refusal to Reinstate \$56 Billion Pay Package*, NEWSWEEK (Dec. 2, 2024), <https://www.newsweek.com/elon-musk-reacts-tesla-pay-package-delaware-ruling-1994527>.

⁶ Amicus Brief of Washington Legal Foundation (“WLF Br.”) at 6.

ARGUMENT

I. DISAPPOINTED LITIGANTS OFTEN THREATEN THE DELAWARE FRANCHISE

Many of Musk’s *amici* simply repeat his threats to Delaware’s franchise:

- “Delaware has been the first choice for incorporation for a century because Delaware courts have had the humility to know that directors, officers, and stockholders are better positioned than judges to run companies and maximize stockholder wealth.”⁷
- “If permitted to stand, the rulings below ... draw into question Delaware’s longstanding position as the leading jurisdiction in the United States on corporate law.”⁸
- “[A]ffirming the decision below will send a clear signal to corporate America that Delaware is no longer a reliable home for incorporation” and “would seriously jeopardize Delaware’s status as a preferred state for incorporation.”⁹
- “Texas-headquartered companies deserve more from their Delaware incorporation. The alternative is that they can ... come to Texas.”¹⁰

These arguments reflect a more refined version of the attacks that Musk has been issuing on Twitter ever since the Post-Trial Merits Opinion in this case. For example:

- “Never incorporate your company in the state of Delaware.”¹¹

⁷ WLF Br. at 14.

⁸ Amicus Brief of Current and Retired Practitioners and Professors (“Profs’ Br.”) at 5.

⁹ WLF Br. at 2, 10.

¹⁰ Amicus Brief of the Texas Association of Business (“Texas Br.”) at 8 (cleaned up).

¹¹ Elon Musk, X (Jan. 30, 2024), <https://x.com/elonmusk/status/1752455348106166598>.

- “If the extreme violation of shareholder rights by the activist posing as a judge in Delaware is allowed to stand, Delaware’s entire economy will be destroyed.”¹²
- “Any lawyer still recommending incorporation in Delaware at this point should be sued for malpractice.”¹³
- “Kathleen [*sic*] McCormick’s legacy will be bankrupting the state of Delaware.”¹⁴

Musk and his *amici* did not invent this strategy. There is a long history of powerful interests trying to influence Delaware courts by threatening the franchise. The tactic can be traced back at least as far as *Interco*. There, Chancellor Allen held that *Unocal* prevented Interco’s board from maintaining a rights plan in response to the “mild threat” of a noncoercive, all-cash, all-shares tender offer.¹⁵ Then, in the words of former Chief Justice Strine, “Marty [Lipton] roared” back.¹⁶ Lipton (who had advised Interco’s board) issued an infamous client memorandum suggesting that *Interco* “raise[d] a very serious question as to Delaware incorporation” and that “[p]erhaps it [was] time to migrate out of Delaware.”¹⁷ Weeks later, in *Pillsbury*,

¹² Elon Musk, X (Nov. 21, 2024), <https://x.com/elonmusk/status/1859481858305618316>.

¹³ Elon Musk, X (Feb. 1, 2025), <https://x.com/elonmusk/status/1885750647938760791>.

¹⁴ Elon Musk, X (Mar. 23, 2025), <https://x.com/elonmusk/status/1903937937722478761>.

¹⁵ *City Capital Assocs. Ltd. v. Interco, Inc.*, 551 A.2d 787, 801 (Del. Ch. 1988).

¹⁶ Leo E. Strine, Jr., *The Story of Blasius Industries v. Atlas Corp.: Keeping the Electoral Path Clear* in J. M. Ramseyer, CORPORATE LAW STORIES 275 (2009) (“Strine”).

¹⁷ Martin Lipton, *The Interco Case*, WACHTELL LIPTON ROSEN & KATZ (Nov. 3, 1988), <https://theliptonarchive.org/wp-content/uploads/340-The-Interco-Case-dated-November-3-1988.pdf>.

Justice Duffy (sitting as a Vice Chancellor) followed the reasoning of *Interco*.¹⁸ Lipton repeated the threat, suggesting companies would “leav[e] Delaware for a more hospitable state of incorporation” unless these decisions were reversed.¹⁹

This Court eventually overruled the *Interco/Pillsbury* rule in *Paramount v. Time*.²⁰ There is no evidence that threats to the franchise actually caused or contributed to that outcome²¹ but some people apparently believed they did²² and that was enough to ensure the occasional repetition of this tactic.

Nevertheless, no disappointed corporate litigant has ever attacked Delaware or its judges with the ferocity of Mr. Musk. Less than an hour after Chancellor

¹⁸ *Grand Metro. Pub., Ltd. Co. v. Pillsbury Co.*, 558 A.2d 1049 (Del. Ch. 1988).

¹⁹ Martin Lipton, *You Can't Just Say No in Delaware No More*, WACHTELL LIPTON ROSEN & KATZ (Dec. 17, 1988), <https://theliptonarchive.org/wp-content/uploads/346-You-Cant-Just-Say-No-in-Delaware-No-More-dated-December-17-1988.pdf>.

As former Chief Justice Strine recounts, Lipton continued his attacks on Chancellor Allen's decision in the months that followed. *See* Strine, at 275-276. One widely circulated article quoted Lipton stating that “Delaware has misled Corporate America” and that “[y]ou’ve got a bunch of judges down in Wilmington who are threatening our future, who are depressing the standard of living for the U.S. public. I’m sure Judge [*sic*] Allen doesn’t recognize this.” William Meyers, *Showdown in Delaware: The Battle to Shape Takeover Law*, INSTITUTIONAL INVESTOR (Feb. 1989) at 64, 77.

²⁰ *Paramount Commc’ns, Inc. v. Time, Inc.*, 571 A.2d 1140, 1153 (Del. 1989).

²¹ “Most likely, the court’s action in *Paramount* had less to do with a ‘race to the bottom’ or a ‘race to the top’ and more with a heartfelt concern that a case-by-case, fact-based approach to takeovers was necessary.” Ian E. Garfield, *Paramount: The Mixed Merits of Mush*, 17 DEL. J. CORP. L. 33, 62 (1992).

²² Jens Dammann, *Homogeneity Effects in Corporate Law*, 46 ARIZ. ST. L.J. 1103, 1117 & n.58 (2014) (“This episode struck many observers as a demonstration of Delaware’s willingness to bow before the dictates of the charter market.”) (collecting citations).

McCormick issued the Post-Trial Merits Opinion, Musk tweeted “[n]ever incorporate your company in the state of Delaware.”²³ Since then, Musk has routinely made hyperbolic and false attacks on the Chancellor to his millions of followers on social media. A sampling:²⁴

- “She has done more to damage Delaware than any judge in modern history”²⁵
- “Absolute corruption”²⁶
- “She’s a radical far left activist cosplaying as a judge”²⁷
- “No one has done more damage to the state of Delaware than that activist pretending to be a judge!”²⁸

There is, of course, no truth to these claims. In recent months, Musk has leveled similar attacks at multiple federal judges who have ruled against various actions taken by Musk’s “Department of Government Efficiency” or “DOGE.”²⁹

²³ Elon Musk, X (Jan. 30, 2024), <https://x.com/elonmusk/status/1752455348106166598>.

²⁴ Tesla’s Chair, Robyn Denholm, has followed Musk’s lead. See Tabby Kinder and Stephen Morris, *Tesla’s Chair on Elon Musk: “I might wake up to a tweet. I don’t wake up to a strategy shift”*, FINANCIAL TIMES, May 17, 2024, <https://www.ft.com/content/aa5464fd-c7c5-4f38-a2df-374a07439d88> (Denholm describing aspects of the Court of Chancery’s opinion as “crap” and “absolute BS”).

²⁵ Elon Musk, X (Feb. 1, 2024), <https://x.com/elonmusk/status/1753271394408829106>.

²⁶ Elon Musk, X (Dec. 2, 2024), <https://x.com/elonmusk/status/1863728056474419580>.

²⁷ Elon Musk, X (Dec. 3, 2024), <https://x.com/elonmusk/status/1863984642216329473>.

²⁸ Elon Musk, X (Feb. 1, 2025), <https://x.com/elonmusk/status/1885584993792970829>.

²⁹ Nick Robins-Early, *Elon Musk lashes out at US judges as they rule against Doge*, THE GUARDIAN (Mar. 22, 2025), <https://www.theguardian.com/technology/2025/mar/22/elon-musk-doge-judges-usaid>.

Musk’s assaults on Delaware and Chancellor McCormick are meritless but his words are influential. Musk is the owner of a popular social media platform, the world’s richest man, and one of the two most powerful men in the United States government.³⁰ The NEW YORK TIMES recently reported that some of the most powerful corporate leaders in the country “say they are intimidated by the prospect of online attacks” from Musk.³¹

Because of his powerful status, Musk’s slanderous attacks on the Chancellor have received extensive media coverage. Musk has largely driven the public “DExit” conversation³² to which his *amici* now point as evidence that the judgment below

³⁰ Jonathan Lemire, *Elon Musk Is President*, THE ATLANTIC (Feb. 3, 2025), <https://www.theatlantic.com/politics/archive/2025/02/president-elon-musk-trump/681558/>.

³¹ Elisabeth Bumiller, *‘People Are Going Silent’: Fearing Retribution, Trump Critics Muzzle Themselves*, N.Y. TIMES (Mar. 6, 2025), <https://www.nytimes.com/2025/03/06/us/politics/trump-democracy.html>.

³² Will Oremus, *Delaware’s grip on corporations seemed solid. Elon Musk led a revolt.*, WASHINGTON POST (Mar. 4, 2025), <https://www.washingtonpost.com/technology/2025/03/04/delaware-corporate-law-elon-musk/>; Sujeet Indap, *Delaware braced for change after attacks from Elon Musk and others*, FINANCIAL TIMES (Mar. 4, 2025), <https://www.ft.com/content/ec6d8ad9-46cf-4347-8e43-c8d02882ff00>; Liz Hoffman, *MAGA offers corporations cover to flee Delaware*, SEMAFOR (Mar. 5, 2025), <https://www.semafor.com/article/03/05/2025/maga-offers-corporations-cover-to-flee-delaware>; Katie Balevic, *Delaware governor tells BI things may ‘need to change’ as companies threaten to leave the state*, BUSINESS INSIDER (Feb. 2, 2025), <https://www.businessinsider.com/delaware-governor-matt-meyer-corporate-law-elon-musk-bill-ackman-2025-2> (“[Governor] Meyer said[,] ... ‘It’s really important we get it right for Elon Musk or whoever the litigants are in Delaware courts.’”).

must be reversed.³³ Musk’s *amici* say this Court must reverse or DExit will follow. They’re wrong. It won’t work and it will create terrible incentives.

³³ *See, e.g.*, WLF Br. at 6 (“News and commentary in 2024 and early 2025 highlights a growing perception that Delaware’s judicial approach is faltering...”).

II. MUSK AND HIS *AMICI* ASK THIS COURT TO CHANGE SETTLED LAW

Musk and his *amici* state that Delaware law should promote predictability.³⁴ That much is true. As *Amicus* has written elsewhere, “Delaware’s preeminent role in corporate regulation has endured ... for decades” because “[i]nvestors, directors, and managers respect its even-handedness and predictable approach to regulation and the resolution of corporate controversy. This is the product of a highly advanced corporate code and a judiciary renowned for its neutrality and corporate specialization.”³⁵

But promoting predictability and neutrality does not mean reversing well-established precedents to adopt the problematic approach that Musk and his *amici* call for. Delaware’s corporate law has long been criticized for “indeterminacy” and, for just as long, judges and commentators have recognized that “this is not a fair way to describe the world, nor a fair way to describe what [courts] can realistically accomplish[.]”³⁶ “By its very nature, equitable review is situationally-specific and

³⁴ Individual Directors’ Brief (“Musk Br.”) at 23-24; WLF Br. at 1; Texas Br. at 3, 6-8; Profs’ Br. at 2, 15; Amicus Brief of the Chamber of Commerce of the United States (“Chamber Br.”) at 3, 6, 8, 12-13, 17.

³⁵ Charles M. Elson, *Why Delaware Must Retain Its Corporate Dominance and Why It May Not*, in Bainbridge, et al., CAN DELAWARE BE DETHRONED: EVALUATING DELAWARE’S DOMINANCE OF CORPORATE LAW 236 (2018).

³⁶ Lawrence Hamermesh, *How We Make Law in Delaware, and What to Expect from Us in the Future*, 2 J. BUS. & TECH. L. 409, 410 (2007).

proceeds in the common law fashion ... [T]hat can lead to what some scholars like to call indeterminacy[.]”³⁷

Delaware law has always been “far from ... entirely determinate. No law applied by human judges to the myriad actions brought by skilled and well-financed business organizations could ever hope to be wholly certain.”³⁸ There is only “one bright-line rule that would eliminate all indeterminacy in this area. A state could adopt a law declaring that no suit may be brought for breach of fiduciary duty ... After shareholders had run screaming from such a lawless jurisdiction, however, all other states would still be left with laws of various degrees of indeterminacy.”³⁹

While some would, no doubt, prefer such a regime, changing the law in this case to move to the no-liability end of the spectrum would be bad for the Delaware brand. “[T]he state’s entire approach to the corporate law has been centered on investor protection. ... Investors are keenly aware of this fact and seek and respect the approach.”⁴⁰ It would harm Delaware’s reputation for predictability and investor protection to reverse the heavily fact-intensive decision below by accepting Musk’s

³⁷ Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 683 (2005).

³⁸ William B. Chandler III & Anthony A. Rickey, *Manufacturing Mystery: A Response to Professors Carney and Shepherd’s ‘The Mystery of Delaware Law’s Continuing Success,’* 2009 U. ILL. L. REV. 95, 98 (2009).

³⁹ *Id.* at 129.

⁴⁰ Elson, *Why Delaware Must Retain Its Corporate Dominance* in Bainbridge, et al., CAN DELAWARE BE DETHRONED at 225.

and his *amici*'s invitation to adopt new, bright-line rules for Musk's benefit that conflict with controlling law. A few examples should suffice.

First, Musk himself makes clear that he is asking the Court to change the law, not simply apply it. For critical propositions of his argument, he relies solely on law review articles asserting what the law *should be* while ignoring controlling precedent from this Court stating what the law *is*. For example, Musk cites a law review article for the proposition that Delaware should not recognize transaction-specific control.⁴¹ He ignores that, in *Oracle*, this Court recognized that “a minority stockholder can be a controlling stockholder ... by exercising actual control over a specific transaction.”⁴² Musk cites an anonymous student note for the proposition that “[t]he court’s reliance on Musk’s managerial stature [improperly] conflates controlling stockholder status with influence over the Board.”⁴³ He ignores that, in *Corwin*, this Court recognized that a minority stockholder can be a controller where it has a “combination of potent voting power and management control such that the stockholder could be deemed to have effective control of the board.”⁴⁴

Second, Musk’s “practitioners and professors” *amici* argue that “[t]his Court has never spoken to whether a conflicted-controller transaction not requiring

⁴¹ Musk Br. at 17.

⁴² *In re Oracle Corp. Deriv. Litig.*, 2025 WL 249066, at *12 (Del. Jan. 21, 2025).

⁴³ Musk Br. at 22.

⁴⁴ *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 307 (Del. 2015).

statutory approval by stockholders (such as ordinary-course transactions like executive compensation ...) must nonetheless comply with *MFW* to receive business judgment rule protection” and that “expanding *MFW* to encompass transactions that do not require stockholder approval is unwise and will promote needless litigation while deterring valuable actions.”⁴⁵ Musk makes a similar pitch.⁴⁶

This is simply not correct. Less than a year ago, this Court “conclude[d], based on long-standing Supreme Court precedent, that in a suit claiming that a controlling stockholder stood on both sides of a transaction with the controlled corporation and received a non-ratable benefit, entire fairness is the presumptive standard of review,” absent compliance with *MFW*.⁴⁷ Recognizing that this rule would extend to executive compensation awards to a controller, the Court explained that “derivative claims against controlling stockholders, which typically arise from ordinary course transactions *such as compensation decisions* and intercompany agreements, are subject to Court of Chancery Rule 23.1 and our demand review precedent.”⁴⁸

⁴⁵ Profs’ Br. at 19.

⁴⁶ Musk Br. at 26-27 (“Although *Match* extended the *MFW* framework beyond the freezeout-merger context, the Court’s holding did not involve executive compensation.”).

⁴⁷ *In re Match Grp., Inc. Deriv. Litig.*, 315 A.3d 446, 451 (Del. 2024).

⁴⁸ *Id.* at 451-52 (emphasis added).

The Delaware General Assembly later passed Senate Bill 21, which, if constitutional, would modify that rule by statute but the statutory change does not apply to this case. Laws of Delaware, vol. 85 ch. 6 (2025) (session law adopting Senate Bill 21) § 3 (“Sections 1 and 2 of this Act do not apply to or affect any action or proceeding commenced in a court

Third, Musk’s *amici* from Sequoia Capital state that the decisions below should be reversed because of “uncertainty” arising from the “Delaware courts’ increased focus on director relationships.”⁴⁹ Yet, the two authorities that Sequoia cites for this proposition both make clear that Chancellor McCormick’s holistic, contextual analysis of director conflicts, including personal relationships, was entirely consistent with Delaware precedent, including controlling decisions by this Court.⁵⁰

of competent jurisdiction that is completed or pending, or any demand to inspect books and records made, on or before February 17, 2025.”).

⁴⁹ Amicus Brief of Sequoia Capital (“Sequoia Br.”) at 15 (citing Randy J. Holland, *Delaware Independent Directors: A Judicial Contextual Evolution*, 24 U. PA. J. BUS. L. 781, 783–84 (2022); Ann Lipton, *The Delaware Contretemps Continues*, BUS. L. PROF. BLOG (Apr. 26, 2024), https://lawprofessors.typepad.com/business_law/2024/04/the-delaware-contretemps-continues.html).

⁵⁰ Holland, *Delaware Independent Directors A Judicial Contextual Evolution*, 24 U. PA. J. BUS. L. at 790 (“Determinations of director independence by Delaware courts continues to evolve. Those judicial evaluations involve a contextual examination of the materiality of the entire panoply of human relationships that may compromise a person’s objectivity.”); Lipton, *The Delaware Contretemps* (“some of the sturm und drang has its antecedents in *In re Oracle* ... when then-Vice Chancellor Strine held that the independence of a special committee was compromised by close professional and networking ties. The case was a break from prior Delaware jurisprudence, which treated directors as independent in almost all situations that didn’t involve either blood or money, and the Delaware Supreme Court rejected his approach in *Beam v. Stewart* ... Once Strine ascended to the Delaware Supreme Court, though, the caselaw started inching back his way, starting with *Sanchez*, continuing on with *Sandys v. Pincus*, and culminating in *Marchand v. Barnhill*.”).

III. THE COURT SHOULD NOT CHANGE THE LAW FOR THIS CASE

This is an odd moment and a strange case for a Court that is used to making forward-looking policy for future transaction planners. Senate Bill 21 imposed sweeping statutory changes that dramatically rewrite much of Delaware’s corporate law, including most of the key legal issues that Musk and his *amici* raise.⁵¹ Yet Senate Bill 21 does not apply here⁵² and the bill’s drafters emphasized that the statutory change was intended to have no effect on this case.⁵³ So, if Senate Bill 21 is constitutionally valid, then the Court’s decision here will have, at best, limited precedential value in terms of formal doctrine for future transaction planners.

There will, however, be a broader message. Musk’s *amici* want this Court to change the law for this case—retreating from *Match*, *Oracle*, *Corwin*, *Marchand*

⁵¹ See generally Charles Elson, *Directors and the New Delaware*, DIRECTORS & BOARDS (Mar. 27, 2025), <https://www.directorsandboards.com/legal-and-regulatory/directors-and-the-new-delaware/>; Ann Lipton, *Delaware Decides Delaware Law Has No Value*, BUSINESS LAW PROF BLOG (Feb. 17, 2025), <https://www.businesslawprofessors.com/2025/02/delaware-decides-delaware-law-has-no-value/>; Eric Talley, Sarath Sanga, and Gabriel Rauterberg, *Delaware Law’s Biggest Overhaul in Half a Century: A Bold Reform – or the Beginning of an Unraveling?*, CLS BLUE SKY BLOG (Feb. 18, 2025), <https://clsbluesky.law.columbia.edu/2025/02/18/delaware-laws-biggest-overhaul-in-half-a-century-a-bold-reform-or-the-beginning-of-an-unraveling/>.

⁵² Laws of Delaware, vol. 85 ch. 6 (2025) (session law adopting Senate Bill 21) § 3 (“Sections 1 and 2 of this Act do not apply to or affect any action or proceeding commenced in a court of competent jurisdiction that is completed or pending, or any demand to inspect books and records made, on or before February 17, 2025.”).

⁵³ Testimony of Lawrence Hamermesh (one of the lead drafters of Senate Bill 21), Senate Hearing (Mar. 13, 2025) (“Mr. Musk and his companies have now left Delaware. The retroactivity provisions in this bill now make it clear that the bill will not apply to their pending litigation, which deals with past transactions.”).

and other leading cases—because of a Musk-driven “perception that Delaware’s judicial approach is faltering[.]”⁵⁴ Doing so would be highly detrimental to the Delaware brand for two reasons.

First, it would make Delaware seem far less predictable, neutral, and reliable to the millions of corporations and other entities who select Delaware to resolve their internal disputes and interpret their external contracts. During *Twitter v. Musk*, for example, some commentators expressed concerns that Musk might defy a court order to close the Twitter sale.⁵⁵ And some suggested that the Court of Chancery might try to avoid that risk by refusing to compel specific performance, notwithstanding the weakness of Musk’s arguments against that outcome.⁵⁶ Musk and his lawyers ultimately knew better, which is why he agreed to close the transaction at the original price.⁵⁷ *That* is why merger parties pick the Court of Chancery as their preferred forum to resolve disputes.⁵⁸ In this and far more socially

⁵⁴ WLF Br. at 6

⁵⁵ Matt O’Brien, *What if Musk loses the Twitter case but defies the court?*, THE SEATTLE TIMES (Oct. 4, 2022), <https://www.seattletimes.com/business/what-if-musk-loses-the-twitter-case-but-defies-the-court/>.

⁵⁶ *Id.*

⁵⁷ Kate Conger and Lauren Hirsch, *Elon Musk Completes \$44 Billion Deal to Own Twitter*, N.Y. TIMES (Oct. 27, 2022), <https://www.nytimes.com/2022/10/27/technology/elon-musk-twitter-deal-complete.html>.

⁵⁸ *Desktop Metal, Inc. v. Nano Dimension Ltd.*, 2025 WL 904521, at *1 (Del. Ch. Mar. 24, 2025) (“Chalking up yet another victory for deal certainty, this post-trial decision awards Desktop specific performance.”).

important contexts, “[t]he enduring success of [the Delaware Supreme Court and the Court of Chancery] is due in no small part to the courage of the many judges who were not afraid to make unpopular decisions.”⁵⁹

Second, social media campaigns such as Musk’s can create physical danger. Musk may have a larger platform than anyone but he is hardly alone in deploying an attack-the-judge strategy on social media. As Chief Justice Roberts recently wrote, “in the computer era, intimidation can take different forms. Disappointed litigants rage at judicial decisions on the Internet, urging readers to send a message to the judge. They falsely claim that the judge had it in for them[.]”⁶⁰ This can “prompt dangerous reactions by others.”⁶¹ This Court has previously written special addenda to rebuke misconduct by other litigants that was less severe than Musk’s behavior

⁵⁹ Chief Justice Collin Seitz, Testimony Before the Joint Finance Committee (Feb. 20, 2025); Joel Edan Friedlander, *The Desegregation Decrees of the Delaware Court of Chancery*, 18 DEL. L. REV. 1, 4 (2023) (“All four decisions [by the Court of Chancery granting relief to plaintiffs challenging educational segregation] were controversial. Ruling for the plaintiffs required professional courage by trial judges who lacked lifetime tenure.”).

⁶⁰ Chief Justice John G. Roberts, Jr., 2024 Year End Report on the Federal Judiciary (Dec. 31, 2024), <https://www.supremecourt.gov/publicinfo/year-end/2024year-endreport.pdf>, at 6.

⁶¹ *Id.* at 7.

here.⁶² It may wish to do so again. But the Court should certainly decline to change the law because of the furor that has been unleashed.

⁶² *In re Shorenstein Hays-Nederlander Theatres LLC Appeals*, 213 A.3d 39 (Del. 2019) (Addendum); *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34 (Del. 1994) (Addendum).

CONCLUSION

Musk's wealth and power have allowed him to drive a public conversation and create a DExit narrative based on misinformation and personal attacks. This Court should not change the law in response to that campaign. Musk breached his fiduciary duties and the Court of Chancery correctly held him accountable. This Court should affirm that judgment.

Of Counsel:

Joel Fleming
Amanda Crawford
**EQUITY LITIGATION GROUP
LLP**
1 Washington Mall #1307
Boston, MA 02110
(617) 468-8602

Dated: May 19, 2025

GRANT & EISENHOFER P.A.

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

*Counsel to Amicus Curiae Charles M.
Elson*

Multi-Case Filing Detail: The document above has been filed and/or served into multiple cases, see the details below including the case number and name.

Transaction Details

Court: DE Supreme Court

Document Type: Amicus Brief

Transaction ID: 76301302

Document Title: Amicus Curiae Brief of Charles M. Elson in Support of Appellee (eserved) (jkh)

Submitted Date & Time: May 19 2025 4:10PM

Case Details

Case Number	Case Name
534,2024C	In re Tesla, Inc. Derivative Litigation
11,2025C	In re Tesla, Inc. Derivative Litigation
10,2025C	In re Tesla, Inc. Derivative Litigation
12,2025C	In re Tesla, Inc. Derivative Litigation