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Re: *The Police and Fire Retirement System of the City of Detroit v. Elon Musk et al.*, C.A. No. 2020-0477-KSJM

Dear Counsel:

This letter decision addresses the plaintiff's motion to compel information withheld by the defendants on the ground of the attorney-client privilege.[1] Through this stockholder derivative action, the plaintiff claims that the defendants—the members of Tesla, Inc.'s Board of Directors—breached their fiduciary duties by awarding themselves excessive and unfair compensation between 2017 and 2020.[2] After the January 9, 2023 hearing on the plaintiff's motion, I conducted an *in camera* review of certain categories of documents

[1] C.A. No. 2020-0477-KSJM, Docket ("Dkt.") 98 ("Mot. to Compel").

[2] *Id.* ¶ 2.

sought by the plaintiff.[3] Based on that review, the parties' submissions, and oral argument,[4] I am granting the motion in part and denying it in part.

Delaware Rule of Evidence 502(b) establishes the legal standard applicable to the plaintiff's motion. Under Rule 502(b), a party may assert the privilege over "confidential communications made for the purpose of facilitating the rendition of professional legal services to the client[.]"[5] A communication is confidential if it is "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication."[6] The privilege can be asserted over communications:

> (1) between the client or the client's representative and the client's lawyer or the lawyer's representative, (2) between the lawyer and the lawyer's representative, (3) by the client or the client's representative or the client's lawyer or a representative of the lawyer to a lawyer or representative of a lawyer representing another in a matter of common interest, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.[7]

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[3] S*ee* Dkt. 119 ("Oral Arg. Tr."); Dkt. 118 ("*In Camera* Submission").

[4] *See* Dkt. 111 ("Defs.' Opposition to Pl.'s Mot. to Compel"); Dkt. 113 ("Pl.'s Reply in Supp. of Mot. to Compel"). In its reply, the plaintiff abandoned its challenge to the defendants' assertion of privilege over documents shared with the defendants' executive assistants. Pl.'s Reply in Support of Mot. to Compel ¶ 19.

[5] D.R.E. 502(b).

[6] D.R.E. 502(a)(2).

[7] D.R.E. 502(b).

Disclosure to a third party who is neither a representative of the client nor the lawyer waives privilege under Rule 502. "To bring a communication shared with a third party within the ambit of the rule and sustain a claim of privilege," the party asserting privilege must "explain how the third party organization or individual was a qualified representative for purposes of Rule 502(b) or otherwise within the scope of the definition of confidentiality in Rule 502(a)(2)."[8] "The burden of establishing that otherwise discoverable information is privileged rests 'on the party asserting the privilege.'"[9]

The plaintiff has moved to compel production of four categories of documents. First, the plaintiff challenges the defendants' assertions of privilege over documents shared with Tesla's independent auditor, PricewaterhouseCoopers ("PwC").[10] Second, the plaintiff mounts a similar challenge to the defendants' assertion of privilege over documents shared with employees of Valor Equity Partners ("Valor"), an investment firm founded and run by Antonio Gracias, one of the defendants.[11] Third, the plaintiff argues that the defendants improperly assert privilege over an email regarding Defendant Elon Musk's offer to personally indemnify Tesla's directors.[12] Finally, the plaintiff challenges

[8] *Mechel Bluestone, Inc. v. James C. Justice Cos., Inc.*, 2014 WL 7011195, at *5 (Del. Ch. Dec. 12, 2014).

[9] *Id.* at *4 (quoting *Moyer v. Moyer*, 602 A.2d 68, 72 (Del. 1992)).

[10] Mot. to Compel ¶ 19.

[11] *Id.* ¶¶ 22–23.

[12] *Id.* ¶¶ 25–26.

the defendants' redaction on privilege grounds of portions of an email thread between Defendant Steve Jurvetson and Tesla attorney Yun Huh.[13]

As to the first category, the plaintiff argues that the defendants cannot assert privilege over documents shared with third-party PwC because outside auditors are not representatives for purposes of Rule 502(b).[14] Generally, Delaware courts do not treat outside auditors as "'part of the circle of persons . . . with whom confidential information may be shared without destroying the privilege'" as a consequence of their responsibility to the public.[15] This is due to independent auditor's unique responsibility to the public. As the Supreme Court of the United States explained in *U.S. v. Arthur Young & Co.*, "[b]y certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a public responsibility transcending any employment relationship with the client."[16] When an auditor is fulfilling that responsibility to the public, an auditor is not a representative of the corporation for privilege purposes.[17]

The defendants do not respond to this argument in any meaningful way. They instead rely on *Baxter International, Inc. v. Rhone-Poulenc Rorer, Inc.*, where this court

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[13] *Id.* ¶¶ 27–28.

[14] *Id.* ¶ 19.

[15] *Chinn v. Endocare, Inc.*, 2003 WL 21517869, at *1 (Del. Ch. July 1, 2003), *aff'd*, 829 A.2d 935 (Del. 2003) (quoting *United States v. S. Chi. Bank*, 1998 WL 774001, at *3 (N.D. Ill. Oct. 30, 1998)).

[16] 465 U.S. 805, 817 (1984).

[17] *See Chinn*, 2003 WL 21517869, at *1.

denied a motion to compel the production of documents shared with an outside accountant (coincidentally, also PwC).[18] Although the disputed documents in *Baxter* were shared with PwC to facilitate an audit, that audit was in connection with a private contractual dispute between the parties.[19] Here, the defendants concede that the challenged documents were shared with PwC "for the purpose of drafting factually accurate and legally compliant SEC proxy disclosures"—the core public audit function that makes outside auditors unique for privilege purposes.[20] *Baxter* is therefore distinguishable, and the defendants have failed to carry their burden of showing that the documents shared with PwC are privileged. The plaintiff's motion as to the PwC documents is granted.

As to the second category, the plaintiff argues that the defendants cannot assert privilege over documents shared with third-party Valor's employees because they were not acting as representatives for privilege purposes.[21] "Rather than defining the term 'client's representative,' the drafters of the Delaware Rules of Evidence instead elected to let the

[18] 2004 WL 5382079, at *1 (Del. Ch. Sept. 23, 2004); *see also Baxter Int'l, Inc. v. Rhone-Poulenc Rorer, Inc.*, 2004 WL 2158051, at *3–4 (Del. Ch. Sept. 17, 2004) (discussing privilege standard prior to *in camera* review and ruling).

[19] *Baxter*, 2004 WL 2158051, at *1.

[20] Defs.' Opposition to Pl.'s Mot. to Compel ¶ 35.

[21] Mot. to Compel ¶ 22–23; *see also* D.R.E. 502(b). The plaintiff argues in its reply that the Valor employees must be representatives of Tesla, not Gracias, for the privilege to attach. Pl.'s Reply in Support of Mot. to Compel ¶ 12. But directors are treated as joint clients with the corporations they run, meaning that the defendants must only show that the Valor employees were representatives of Gracias with respect to his relevant duties at Tesla. *See Buttonwood Tree Value P'rs, L.P. v. R.L. Polk & Co., Inc.*, 2021 WL 3237114, at *8 (Del. Ch. July 30, 2021).

case law develop its definition."[22] Decisions of this court recognize that a non-lawyer can serve as a representative for purposes of Rule 502 where a communication was shared with the non-lawyer for the purpose of facilitating the rendition of legal services and maintained as confidential.[23]

This standard for establishing that a person is a "representative" under Rule 502 is satisfied where the third-party "'shares responsibility for the subject matter underlying the consultation,'"[24] as was the case in *In re Lululemon Athletica Inc. 220 Litigation*.[25] There, the company's founder, Dennis Wilson, entered into a trading plan pursuant to SEC Rule 10b5-1 to sell up to a certain amount of his shares of common stock over a period of time.[26] Wilson's broker had discretion to sell the shares consistent with the terms of the trading

[22] *In re Lululemon Athletica Inc. 220 Litig.*, 2015 WL 1957196, at *9 (Del. Ch. Apr. 30, 2015) (citing D.R.E. 502 cmts.).

[23] *See, e.g.*, *Tabas v. Bowden*, 1982 WL 17820, at *4 (Del. Ch. Feb. 16, 1982) (holding that a client did not waive privilege by disclosing legal advice to the client's stockbroker because the stockbroker was the client's agent); *Lululemon*, 2015 WL 1957196, at *9 (holding that a privileged communication did not lose its protection where "an executive relay[ed] legal advice to another who shares responsibility for the subject matter underlying the consultation'"); *see also* Donald J. Wolfe & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery*, § 7.02(c) (2d ed. 2021) ("The privilege recognized in Rule 502(b) can extend to communications among nonlawyer representatives of the client, provided that the communications are confidential and exchanged for the purpose of facilitating the rendition of professional legal services to the client.") (citing *Lululemon*, 2015 WL 1957196, at *9) (additional citations omitted).

[24] *Rembrandt Techs., L.P. v. Harris Corp.*, 2009 WL 402332, at *8 (Del. Super. Ct. Feb. 12, 2009) (quoting *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 518 (D. Conn. 1976)).

[25] 2015 WL 1957196.

[26] *Id.* at *1.

plan.[27] When Wilson sold shares, he notified Tina Swinton, who managed Wilson's investments as CFO of Wilson's family office.[28] On the day that lululemon's then-CEO informed Wilson that she planned to resign, Wilson's broker sold more shares than he had sold on any other day during the first six months of the trading plan.[29] The trade appeared well-timed, and the Wall Street Journal emailed persons at lululemon and Wilsons's family office to confirm facts for a story related to the trade.[30] Wilson's attorney, plus persons at lululemon and Wilson's family office, corresponded by email concerning a coordinated response (the "WSJ Email Chain").[31] Stockholders brought Section 220 actions seeking to investigate the trade, and Wilson withheld versions of the WSJ Email Chain from discovery on grounds of privilege.[32]

The plaintiff stockholder moved to compel the WSJ Email Chain, arguing in part that the defendants had waived privilege over its contents by disclosing it with third parties, including Swinton.[33] To resolve the motion, the court analyzed whether Swinton was a representative for purposes of Rule 502.[34] The court held that Swinton "'share[d]

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[27] *Id.*

[28] *Id.*

[29] *Id.* at *2.

[30] *Id.*

[31] *Id.*

[32] *Id.*at *2–3.

[33] *Id.*at *4.

[34] *Id.* at *9.

responsibility for the subject matter underlying the consultation,'" because she received notifications from Wilson's broker in the event of a trade and was an agent in charge of Wilson's family office, which had responsibility over Wilson's trading activity.[35] These facts supported a finding that Swinton was a representative for Rule 502 purposes.[36]

Relying on the practical approach reflected in *Lululemon*, the defendants argue that "the Valor employees at issue are client representatives who work closely with Mr. Gracias to assist him in performing his duties as a Tesla Director and in managing his Tesla options."[37] Many of the challenged emails were sent to or by Valor's general counsel, Nancy Kowalczyk.[38] Kowalczyk routinely made inquiries to Tesla and its directors on behalf of Gracias concerning Gracias' Tesla holdings and his role as a director of Tesla.[39] It is apparent from the contents of the communications that Kowalczyk shared responsibility with Gracias for his responsibilities at Tesla, in the sense that part of her job was to assist him with those duties. Although Valor is not a family office, Kowalczyk's

[35] *Id.* (quoting *Rembrandt*, 2009 WL 402332, at *8).

[36] *Id.*

[37] Defs.' Opposition to Pl.'s Mot. to Compel ¶ 30.

[38] *See id.*, Appendix 1 at 2; Mot. to Compel, Ex. P (Director Defendants' Second Amended Privilege Log).

[39] *See* Defs.' Opposition to Pl.'s Mot. to Compel, Ex. 3 (Tesla providing summary of Gracias' Tesla holdings in response to email from Kowalczyk stating that Gracias "would like to obtain a current list of his options holdings[.] . . . Could you have someone send us an updated list?"); *In Camera* Submission, entry 799 at 1 (Gracias asking Kowalczyk to "check with" fellow Tesla director Ira Ehrenpreis regarding Tesla indemnification agreement).

emails demonstrate that its employees frequently did act as Gracias's agents with respect to the subject material of the challenged emails and therefore were his representatives for privilege purposes.

The communications at issue also appear to have been confidential. For example, Kowalcyzk asked Gracias for permission to share the indemnification agreement with someone at another firm, and Gracias told her to first ask Jonathan Chang, Tesla's counsel, as well as fellow Defendant and Tesla Board member Ira Ehrenpreis, indicating that they both understood the communication to be confidential.[40] The plaintiff's motion with respect to the Valor documents is therefore denied.

As to the third category, the plaintiff argues that the email at issue involves an adversarial negotiation between Musk and the Tesla Board concerning Musk's offer to indemnify Tesla's directors and officers as a substitute for standard D&O insurance.[41] I have reviewed the redacted email *in camera* and can confirm the accuracy of the defendants' description of the email as containing legal advice on governance issues of common interest to the entire Board, including Musk.[42] The defendants' redaction of the Musk indemnification email was appropriate and the plaintiff's motion with respect to the third category is denied.

[40] *In Camera* Submission, entry 799 at 1.

[41] Mot. to Compel ¶¶ 25–26.

[42] *See* Defs.' Opposition to Pl.'s Mot. to Compel ¶¶ 38–39.

The fourth category, which I also reviewed *in camera*, is tricky for a few reasons. The defendants redact up to eight portions of an email exchange between Jurvetson and Tesla in-house counsel Huh concerning Jurvetson's compensation and attendant public disclosures. Jurvetson did not believe that he received compensation to which he was entitled, he reached out to Huh to ask for advice on the issue, and Huh provided information concerning compensation as well as advice on Tesla's disclosure obligations. Jurvetson believed that Tesla shortchanged him compensation and pushed back on the business decisions and legal advice relayed by Huh.

Directors and the corporations they serve are generally treated as join clients with common interests for purposes of Rule 502(b), bringing advice offered to the corporation through its director-agents under the full protection of the attorney-client privilege.[43] This assumption of common interest can break down, voiding the privilege, when the interests of the director and the corporation are adverse rather than common.[44] Given the context of the discussion, it is easy to see why the plaintiff assumed that Jurvetson was sufficiently adverse as to destroy privilege over any aspect of the communication.

Nevertheless, there are good arguments that some of redacted information was privileged. I have reviewed the documents and Huh was, in fact, providing legal advice

[43] *Buttonwood*, 2021 WL 3237114, at *8.

[44] *See Glassman v. Crossfit, Inc.*, 2012 WL 4859125, at *3 (Del. Ch. Oct. 12, 2012) (holding that "parties' interests must be 'substantially similar,' not adverse" for the common-interest doctrine to apply) (quoting *Titan Inv. Fund II, LP v. Freedom Mortg. Corp.*, 2011 WL 532011, at *4 (Del. Super. Ct. Feb. 2, 2011)).

concerning Jurvetson and Tesla's joint disclosure obligations. Jurvetson asked follow-on questions regarding the advice, and Huh responded. It is not immediately apparent from the documents I reviewed that Jurvetson viewed himself as adverse to the company at that time. I would need to dive deeper into the surrounding facts to make a finding of adversity. Given the limited probative value of this email chain, I would prefer not to spend my time that way.

Instead, I propose that the parties revisit the defendants' offer of compromise. The defendants have offered to produce two early (and therefore incomplete) versions of the email chain without redactions pursuant to Delaware Rule of Evidence 510(f), which allows for disclosure without a broad privilege waiver.[45] The plaintiff is not totally averse to this idea, but asks that the full versions of the thread be produced under a Rule 510(f) agreement.[46] The incomplete version offered by the defendants excludes two redacted portions of the thread: the final two paragraphs of Jurvetson's first May 22, 2020 email to Huh and the final sentence and a half of Huh's May 22, 2020 email to Jurvetson.[47] Having reviewed the redacted material *in camera*, I question why the defendants would treat the information that they excluded differently for purposes of the Rule 510(f) arrangement. I encourage the parties to attempt to reach agreement on a production of all or part of the

[45] Oral Arg. Tr. at 9:12–20; Defs.' Opposition to Pl.'s Mot. to Compel, Appendix 1 at 2

[46] Oral Arg. Tr. at 17:21–18:8.

[47] *See* Defs.' Opposition to Pl.'s Mot. to Compel, Appendix 1 at 2; *In Camera* Submission, entry 1166 at 1–2.

Jurvetson thread pursuant to Rule 510(f), with the understanding that I will rule on the privilege assertions if they are unable to do so.

Separately, I note that the defendants' redactions were not consistent across versions of the email thread produced to the plaintiff, such that statements were redacted from certain versions of the thread but not others.[48] Arguably, by disclosing that information from versions of the thread, the defendants waived privilege over the information. In this case, however, waiver is a secondary inquiry; the primary question is whether the inconsistently made privilege calls were appropriate to begin with. At least as to that discrete category of redactions that were not made consistently across the set of documents that I reviewed *in camara*, I am skeptical. I encourage the parties to discuss whether this information should be unredacted across the defendants' production.

IT IS SO ORDERED.

Sincerely,

/s/ Kathaleen St. Jude McCormick

Kathaleen St. Jude McCormick
Chancellor

cc: All counsel of record (by File & ServeXpress)

[48] For example, entries 1169 and 1129 redact a portion of Jurvetson's May 1, 2020 email to Huh, while the remaining versions that the defendants provided for *in camera* review do not. *In Camera* Submission. Entry 1167 does not redact the sixth paragraph of Jurvetson's May 8, 2020 email to Huh, while the remaining versions that the defendants provided for *in camera* review do. *Id.*