



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

EMPLOYEES' RETIREMENT  
SYSTEM OF RHODE ISLAND,

Plaintiff,

v.

ELON MUSK, KIMBAL MUSK, IRA  
ENHRENPREIS, JAMES  
MURDOCH, ROBYN M. DENHOLM,  
KATHLEEN WILSON-THOMPSON,  
JOE GEBBIA, JB STRAUBEL,  
LARRY ELLISON, and HIROCHIMI  
(HIRO) MIZUNO,

Defendants,

and

TESLA, INC.,

Nominal Defendant

MICHAEL PERRY, Derivatively on  
Behalf of Nominal Defendant TESLA,  
INC.,

Plaintiff,

v.

ELON MUSK, ROBYN M.  
DENHOLM, IRA ENHRENPREIS,  
HIROCHIMI MIZUNO, JOE  
GEBBIA, JAMES MURDOCH,  
KIMBAL MUSK and KATHLEEN  
WILSON-THOMPSON,

Defendants,

and

TESLA, INC., a Delaware corporation,

Nominal Defendant

Case No. 2024-0631-KSJM

Case No. 2024-0560-KSJM

CLEVELAND BAKERS AND  
TEAMSTERS PENSION FUND,  
DANIEL HAZEN, and MICHAEL  
GIAMPIETRO, derivatively on behalf  
of Nominal Defendant TESLA, INC.,

Plaintiff,

v.

ELON MUSK, ROBYN M.  
DENHOLM, IRA ENHRENPREIS,  
JOE GEBBIA, JAMES MURDOCH,  
KIMBAL MUSK JB STRAUBEL, and  
KATHLEEN WILSON-THOMPSON,

Defendants,

and

TESLA, INC.,

Nominal Defendant

Case No. 2024-0646-KSJM

**PLAINTIFF MICHAEL PERRY’S OPPOSITION TO EMPLOYEES’  
RETIREMENT SYSTEM OF RHODE ISLAND AND CLEVELAND  
BAKERS AND TEAMSTERS PENSION FUND’S JOINT MOTIONS TO  
CONSOLIDATE ACTIONS**

Plaintiff Michael Perry (“Perry”) submits this opposition to the joint motion of Employees Retirement System of Rhode Island (“Rhode Island” or “RI”) and Cleveland Bakers and Teamsters Pension Fund’s (“Cleveland Bakers” or “CB”) (collectively “Movants”) joint motion to consolidate the above captioned actions (the “Consolidation Candidates”) pursuant to Court of Chancery Rule 42.

## I.

### INTRODUCTION

1. Movants seek consolidation of three dramatically different actions. Rhode Island’s case stems from Musk’s yearlong on-and-off Twitter acquisition; Cleveland Baker’s case concerns a multiyear effort by Musk to usurp from Tesla any corporate opportunity in xAI. Perry’s case targets only a two-month period of insider trading where the alleged MNPI based on Tesla’s Q-4 2022 vehicle orders, production and delivery numbers.

2. The only overlap between the other actions and Perry’s first filed *Brophy* case, as Movants admit, is a “small slice” of the Rhode Island action. Movants Br. ¶¶ 5, 15. The benefits Movants cite as justification for consolidation (*i.e.*, ease of administration, efficiency, consistency) are already available by virtue of the actions being before one Chancellor.

3. Movants urge the Court to consolidate the first filed Perry case into their two subsequent cases on the grounds that Rule 42’s requirement of “. . . a common question of law or fact” is all that need be considered. *Id.* ¶ 9 *citing DeAngelis v. Salton/Maxim* at fn.3.

4. Movants argue that “Rule 42 is easily satisfied here” (*Id.* ¶ 10) but then ignore the diverse factual basis of the claims and vastly different time periods and focus superficially on the “nearly identical list of defendants” and an

exaggerated “overlap” of “facts alleged and claims at issue,” superficially similar “legal issues” and argue that all cases seek “similar remedies. . . damages and disgorgement.” *Id.* ¶ 11.

5. Movants argue disingenuously that the action has “. . . the same factual allegations” whose consolidation will avoid the “cumbersome, duplicative, unnecessary and unworkable” process of separate actions. These superficial similarities, Movants exaggerate, “. . . will require the Court to make nearly identical determinations.” *Id.* ¶ 12.<sup>1</sup> Just as superficially, Movants deny that any prejudice will result. *Id.* ¶ 13. Those assertions do not come close to meeting the Movants’ burden of establishing the prerequisites for consolidation. *See Connelly v. Kingsland*, 2010 WL 2979049, at \*2 (Del. Super. July 30, 2010).

6. In circumstances similar to those here, this Court has refused to consolidate actions. *see e.g., Miradi v. Picard*, CA 17495, 2002 WL 749164 (Del. Ch. April 22, 2002); *Joseph v. Shell Oil Co.*, 498 A.2d 1117 (Del. Ch. 1985). Movants’ motion for consolidation should be denied.

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<sup>1</sup> Given the materially different factual scenarios of fiduciary breaches by Musk and Tesla’s board, here, as in *Mirachi v. Picard*, CA No. 17495, 2002 WL 749164 at \*3, even the Court’s demand futility analysis will necessitate “separate judicial review” which in *Mirachi* required denial of consolidation. *Id.*

## II.

### **THE FACTUAL BACKGROUND OF THE CONSOLIDATION CANDIDATES**

7. There are profound differences among the three Consolidation Candidates as demonstrated below. Notwithstanding these differences, Rhode Island and Cleveland Bakers have an agreement to share responsibility if all actions are consolidated.<sup>2</sup>

8. Movants' counsel demanded of Perry's counsel that Movants be allowed to assume and co-opt all responsibility for litigating Perry's first filed action for which Perry (but neither Rhode Island nor Cleveland Bakers) fought for 220 documents. Perry takes no position on whether Rhode Island's and Cleveland's actions should be consolidated, although there is no logical reason to consolidate any of the Consolidation Candidates.

#### **Rhode Island Complaint for Twitter Acquisition**

9. In contrast to Perry's tightly focused three-month claim, the Rhode Island action is overwhelmingly centered on Musk's actions from 2021 through October 2022, in connection with his acquisition of Twitter which closed in

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<sup>2</sup> Movants argue that the Rhode Island action and the Cleveland Action "challenges [some of] the same usurpation of corporate opportunities regarding X.AI." Movants admit that Cleveland and Rhode Island name the same defendants (except for two) and "seek the same relief." *Id.* ¶ 6. But even that is an exaggeration given the differences in Rhode Island's and Cleveland Bakers' respective claims which overwhelm the purported similarities.

October 2022 (*see e.g.*, RI Cmpl. ¶¶ 1-20, 171, 172, 176, 177), including Musk’s 2021 and 2022 sales of Tesla stock to finance the Twitter purchase (which closed in October 2022), *Id.* ¶ 14, and Musk’s allegedly false and misleading statements made over the course of 2021 and 2022 in connection with his Twitter acquisition. *Id.* ¶¶ 68, 76, 150.

10. The Rhode Island claims involve numerous layers of misconduct not present in Perry’s case. It’s complaint’s relevant time period for alleged Twitter related fiduciary breaches begins September 14, 2021 and ends on October 6, 2022 (the date the Chancery Court ordered that the Twitter merger deadline be extended to October 28, 2022). *Id.* ¶ 163. Musk’s last insider sales before closing the Twitter deal occurred in August 2022. *Id.* ¶ 165. The Rhode Island action alleges fiduciary breaches in connection with (1) the making of misleading public statements, *Id.* ¶¶ 68, 76, 150, 158; (2) five instances of sales of Tesla stock from 2021 to August 2022, *Id.* ¶¶ 161, 293; (3) the planning by Musk to acquire and the subsequent acquisition of Twitter, *Id.* ¶¶ 7-11; (4) Musk’s own fiduciary breaches which violated the revised Code of Ethics on five occasions before the acquisition of Twitter, *Id.* ¶¶ 11-20; (5) allegations that Musk “continuously breached the

Code of Ethics,” *Id.*; and (6) a breach of Musk’s fiduciary duties to Tesla merely by being Twitter’s principal executive. *Id.* at pgs. 107-110; 110-139.<sup>3</sup>

**Cleveland Bakers Complaint for Musk’s Usurpation of Tesla’s Corporate Opportunity in xAI**

11. In contrast to Perry’s lawsuit, Cleveland Bakers’ lawsuit sprawls over several years. Cleveland Cmplt. ¶¶ 32-34.

12. Cleveland Bakers’s complaint is based on Musk’s alleged usurpation of corporate opportunities from Tesla and which he diverted to his privately owned company, xAI. *See* Cleveland Cmplt. Counts I, II and II, ¶¶ 138-144; 145-149 and 150-154.

13. Cleveland Bakers’ complaint harkens back to 2015 for the background of the claims asserted therein (*Id.* ¶ 32-33) and alleges wrongful acts and statements during 2019, 2020 (*Id.* ¶¶ 33-34), 2022, 2023 and 2024 (*Id.* ¶¶ 35, 37-41).

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<sup>3</sup> The few paragraphs in Rhode Island’s complaint about Musk’s November and December 2022 stock sales are poorly developed imitations of the Perry claims. RI Cmplt. ¶¶ 170-178. Rhode Island failed to make any 220 demands as to any claims/issues raised in its pleading. Delaware Courts have long bemoaned claims “filed hastily” based on snippets.” *See e.g., TCW Technology Limited Partnership v. Intermedia Communications*, C.A. No. 18289 (Del. Ch. Oct. 17, 2000). (Letter at page 8-9). Allowing poorly supported complaints to usurp factually more developed complaints are ultimately not in the best interest of the Company. *See, e.g., California State Teachers’ Ret. Sys. v. Alvarez*, 179 A.3d 824 (Del. 2018) (citing preclusive effect upon a Delaware derivative complaint that was factually supported by 220 documents of a federal court’s dismissal of a derivative claim not supported by 220 documents).

14. Cleveland Bakers' action does not assert a *Brophy* claim and indeed makes no mention of Musk's Tesla stock sales. It does not seek disgorgement, rescission, or other monetary damages from insider trading.

**Perry's *Brophy* Claims are Based on a Three-Month Period During Which Musk Allegedly Misused MNPI About Tesla Vehicle Production, Orders and Deliveries**

15. By contrast, Perry's claims, supported by 220 records, are limited in scope, time and subject matter. At issue in Perry's action are only Musk's Tesla sales in November and December 2022. The scope of the material non-public information ("MNPI") allegedly misused by Musk is limited to the time period from October 19, 2022 to December 14, 2022. Perry Cmplt. ¶¶ 63-70; 85-90. The subject of the MNPI alleged in Perry is similarly limited and nuanced: consisting only of Tesla's Q-4 2022 vehicle orders, production and delivery numbers. *Id.* ¶¶ 63-70.

**The Complex Multiyear, Multifaceted Cleveland Bakers and Rhode Island Claims Will Materially Delay Resolution Of The Perry Claims For Years**

16. It is obvious that once threshold motions are resolved, the compact Perry Action can move to dispositive motions and trial within a year of beginning of discovery.

17. Both the Cleveland Bakers' and Rhode Island's cases, should they survive Rule 12(b)(6) motions, will require far broader discovery than Perry. The scope of the alleged MNPI in Rhode Island's case ranges from late 2021 through

2022. The Rhode Island action will require depositions of dozens of witnesses including Twitter personnel; directors of both Tesla and Twitter companies; bankers of both companies; Musk’s lenders; investors in the Twitter purchase; as well as Musk’s own panoply of personal bankers, lawyers and a personal business manager. RI Cmplt. ¶ 127(a) (Morgan Stanley); *Id.* ¶ 127 (Musk personal advisor Birchall); *Id.* ¶ 137(a) (Twitter’s Board of Directors); *Id.* ¶ 138(a) (Twitter CEO); *Id.* ¶ 148(a) (“other equity investors” in Musk’s purchase of Twitter); ¶ 158 (“Musk personal lawyer); *Id.* ¶ 166 (debt financing entities); *Id.* ¶ 168 (SpaceX witnesses); *Id.* ¶ 182 (Linda Yaccarino, Twitter’s CEO as of June 2023); *Id.* ¶ 188 (three Tesla engineers pulled by Musk to work at Twitter); *Id.* ¶ 228 (NVIDIA).

18. Cleveland Bakers’ action will require a discovery program nearly as extensive as Rhode Island’s. Proof of Cleveland Bakers’ allegations will require evidence from numerous non-parties. *See, for example*, Cleveland Bakers’ Cmplt. ¶¶ 5, 28 (X.AI Corp.), 8 (NVIDIA); ¶ 47 (Open AI); ¶ 63 (Tesla engineers diverted to X.AI); ¶ 82 (seven X.AI investors in a \$6 billion funding round).

19. There is no rationale reason to burden the Perry claims and litigants with the extensive delay which consolidation will cause.

### III.

#### ARGUMENT

##### POINT I

#### CONSOLIDATION IS NOT WARRANTED AND WOULD PREJUDICE EXPEDITIOUS PROSECUTION AND RESOLUTION OF THE PERRY CLAIMS

##### **A. Movant’s Rule 42 Argument Is Based On A Superficial “Analysis” Of Commonality And Disingenuous Legal Argument**

20. Movants argue that the only issue on consolidation is the similarity of legal and factual issues and if commonality exist, the Court must consolidate. But “consolidation” is within the discretion of the Court. The rule itself recites what a Court “may” do and provides three alternatives, only one of which is “consolidation.” *See* Delaware Rules of Court 42(a) (“ . . . **Consolidation.** When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay” [emphasis supplied] ).

21. Delaware jurisprudence has clearly articulated the discretionary nature of a consolidation determination and has identified factors other than commonality that will drive a consolidation order. *See Joseph v. Shell Oil Co.*, 498 A.2d 1117,

1123 (Del. Ch. 1985) (“In determining whether to consolidate actions the Court must employ its discretion to weight the possible savings of time and effort that consolidation would bring against any inconvenience, delay or expense which it could occasion.”).

22. Delaware jurisprudence recognizes that the alternatives to consolidation embedded in Rule 42 are often more efficacious than the complete consolidation of disparate claims sought by Movants. *See e.g., DeAngelis, v. Salton/Maxim Housewares, Inc.*, No. 12420, 1992 WL 161799 (Del. Ch. June 29, 1992). Even though the facts did overlap, the *DeAngelis* Court refused the same type of complete consolidation sought by Movants. The *DeAngelis* Court only partially consolidated the actions solely for trial and pretrial and ordered: “. . . the cases shall not be merged, and each case shall retain its separate identity.” *Id.* at \*2.

23. If the objective of the Movants is, as stated, to avoid duplicative, inefficient litigation (*See* Movants Br. ¶ 13), rather than to satisfy their competitive desire to control all extant Musk related litigation, then here, as in *In re China Agritech, Inc. Shareholder Derivative Litig.*, C.A. No. 7163-VCL, 2013 WL 2181514, at \*27 (Del. Ch. May. 21, 2013), “the better course is to require coordinated discovery on overlapping issues.”

24. Movants have failed to identify any real savings of “time and effort” that would justify the material delay in the litigation and trial of Perry by

consolidating the narrowly focused claims based on a three-month period alleged in *Perry* with the multi-year, sprawling claims in the Cleveland Bakers and Rhode Island actions. The material delay to the prosecution of Perry's *Brophy* claims is antithetical to Delaware's commitment to "prompt resolution."<sup>4</sup> The prejudice from consolidation here is obvious and palpable. Perry's complaint has developed a detailed and confidential factual record in support of his November 2021-December 2021 *Brophy* claims that is the product of Perry's yearlong persistence to obtain Delaware General Corporation Law 220 materials.

25. Movants chose to forgo a 220 demand, which no doubt hindered their ability to substantiate their broad allegations of Tesla's board's fiduciary lapses. Delaware courts have placed a priority on "the importance of plaintiffs' counsel taking the time to use the 'tools at hand' (such as a 220 books and records demand) to develop a record sufficient to craft pleadings with particularized factual allegations necessary to survive the inevitable motions to dismiss." *See TCW Technology Limited Partnership, supra* at \*6.

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<sup>4</sup> Delaware courts have repeatedly cited the benefits to litigants, corporations and the Court of "prompt resolution" of disputes. *See e.g., La State Empls. Ret. Sys. v. Citrix Sys. Inc.*, 2001 WL 32638 at \*3 (Del. Ch. Jan. 5, 2001) (denying stay of derivative claim because of "Deliver's paramount interest in the prompt resolution of a dispute. . ."); *Carvel v. Andreas Hldgs. Corp.*, 698 A.2d 375, 378-79 (Del. Ch. 1995) (citing Delaware interest in "determining expeditiously" the dispute at hand).

**B. Movants' Authorities Fail To Support Consolidation Of Perry**

26. Movants' authorities are distinguishable. In *DeAngelis v. Salton/Maxim Housewares, Inc.*, No. 12420, 1992 WL 161799 (Del. Ch. June 29, 1992), the Court consolidated a Delaware action and a Pennsylvania action which all challenged "the same disclosures challenged in the Illinois and Pennsylvania Courts." *Id.* at \*1. The challenged disclosures arose of "the same *Salton/Maxim Housewares* transaction."

27. In *AFSCME Council 81 v. State*, 2011 WL 6945653, at \*1 (Del. Ch. Dec. 29, 2011), the Court's consolidation order was based on factors not present here. Here, unlike *AFSCME*, the bulk of questions of laws in each of the Consolidation Candidates are not even "loosely related," as observed in *AFSCME*. *Id.* Furthermore, here unlike *AFSCME*, the non-moving parties have demonstrated material prejudice from consolidation with Perry.

28. In *In re Duke Energy Corp. Coal Ash Derivative Litig.*, 2015 WL 5135066, at \*1 (Del. Ch. Aug. 31, 2015), the Court noted the "substantial overlap" of the competing actions as grounds for staying a derivative action in favor of an action that would decide the liability of directors for a coal ash release which was also the basis of the derivative claim. No such substantial overlap exists here.

29. The *Nierenberg v. CKx, Inc.*, 2011 WL 2185614, at \*2 (Del. Ch. May 27, 2011) decision provides no useful precedent for Movants given the paucity of details about the commonality of the claims and actions which were consolidated.

## POINT II

### **STAYING OR DISMISSING RHODE ISLAND'S *BROPHY* CLAIMS BASED ON MUSK'S NOVEMBER 2022 AND DECEMBER 2022 SALES IS A MORE EFFICIENT SOLUTION TO ADDRESS MOVANTS CONCERNS**

30. Movants concerns about the meager overlap between Rhode Island and Perry's *Brophy* claims can be solved by staying Rhode Island's post-Twitter closing *Brophy* claims for Musk's November and December 2022 sales since Rhode Island's overlap with Perry constitutes only 10 paragraphs of a 433-paragraph complaint.

31. Rhode Island's November/December 2022 *Brophy* claims do not logically flow with Rhode Island's core claims concerning Musk's misstatements, omissions and misuse of MNPI concerning his Twitter acquisition and are totally incongruous with Rhode Island's allegations of Musk's disloyal pursuit of Twitter and the Board's complicity.<sup>5</sup>

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<sup>5</sup> Given that Rhode Island's complaint was filed on June 10, 2024 and Perry's was filed on May 30, 2024 and the fact that Rhode Island's November/December 2022 *Brophy* claims are post-Twitter closing claims based on materially different MNPI, it is easily conceivable that Rhode Island added the November/December 2022 *Brophy* claim to its draft after seeing the public version of Perry's Complaint after it was available on May 30, 2024.

32. Rhode Island’s Twitter-centric complaint will not suffer at all from staying its prosecution of the November and December 2022 *Brophy* claims.

33. The solution to Movants concerns of overlapping November/December 2022 *Brophy* claims is a stay of Rhode Island’s ten paragraph November/December 2022 *Brophy* claims. “The Court may, in the interests of judicial efficiency stay an action before it in favor of another with identify of parties and issue pending in another [suit].” *See, In re Molycorp, Inc.*, 2014 Del. Ch. LEXIS 77, at \*4 (Del. Ch. February 7, 2014), citing *Joseph v. Shell Oil Co.*, 498 A.2d 1117, 1123 (Del. Ch. 1985) and *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engineering Co.*, 262 A.2d 281, 283 (Del. 1970) at fn. 35.

### **CONCLUSION**

For all of the foregoing reasons, Perry respectfully requests the Court deny the motion in its entirety and stay Rhode Island’s November and December 2022 *Brophy* claims against Musk.

Dated: September 24, 2024

/s/ P. Bradford deLeeuw

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## Transaction Details

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**Court:** DE Court of Chancery Civil Action    **Document Type:** Opposition

**Transaction ID:** 74579224

**Document Title:** Michael Perry's  
Opposition to Employees' Retirement  
System of Rhode Island and Cleveland  
Bakers and Teamsters Pension Fund's  
Joint Motions to Consolidate Actions

**Submitted Date & Time:** Sep 24 2024 2:10PM

## Case Details

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Case Number	Case Name
2024-0560-KSJM	Michael Perry v. Elon Musk, et al.
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