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The Bulletin is a quarterly newsletter by Kessler Topaz Meltzer & Check to help institutional investors stay

FULLY INFORMED

HIGHLIGHTS

KTMC LEADS $13 BILLION TRIAL AGAINST ELON MUSK

Lee Rudy, Esquire

For two weeks in July 2021, a team of Kessler Topaz lawyers and their co-counsel sought to convince a Delaware court that Elon Musk, the founder and CEO of Tesla, forced Tesla to bail out his cousins' failing solar installation company. Tesla paid $2.4 billion for SolarCity in 2016; plaintiffs allege that at that time, SolarCity was insolvent and its equity was therefore worthless.

Tesla bought SolarCity using Tesla stock as merger consideration. Musk personally received 12 million Tesla shares in the transaction, in exchange for his 22% stake in SolarCity. Those shares, worth $400 million in 2016, are now worth $13 billion. At trial, plaintiffs sought equitable remedies including cancellation of all of the shares Musk improperly received in the transaction.

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THE STEWARDSHIP PROFESSION — A MANIFESTO

Guest Authors: Dr. Alexander Juschus LL.M. and Mike Lubrano

Stewardship is Fiduciary Duty in Action

"Investor Stewardship" is a comparatively new term in the lexicon of capital markets, but stewardship itself is not a new concept. The word "stewardship" goes back to at least the Middle Ages, with echoes of knights left behind to care for their lords' lands while the latter were off doing silly things, like making war on neighboring kingdoms or fighting far-off crusades. Merriam-Webster defines stewardship to mean "the careful and responsible management of something entrusted to one's care". In the context of capital markets, investor stewardship is fiduciary duty in action — it's what those who manage assets on behalf of others are obligated to do to protect such assets' value, for the benefit of their ultimate owners.

The International Corporate Governance Network first issued

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GUEST AUTHORS

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Global Stewardship Principles in 2003, revising them most recently in 2020. The UK's Financial Reporting Council issued the first national Stewardship Code in 2010. Since then, not only standard-setters and regulators but also institutional investors themselves in over twenty other markets have articulated what they believe institutional investors must do effectively to be considered good stewards of the assets they manage. The best of these set expectations around institutional investors' own governance, clear and consistent policies for evaluating and monitoring the environmental, social and governance (ESG) practices of investee companies, investor-company engagement, share voting, and transparency to beneficiaries about stewardship policies, activities and outcomes.

The Tools of the Trade

Legal frameworks, corporate charters and loan agreements accord equity and debt investors alike a variety of powers to impact the behavior of portfolio companies. For shareholders, these powers range from the exercise of voting rights, to the introduction of resolutions and participation in shareholder meetings, all the way to pursuing redress through derivative actions and class action litigation. Holders of debt instruments are accorded specific rights in loan agreements and bond indentures. Like shareholders, they have access to courts to seek protection of the benefits of their bargain with investee companies.

Investors can also influence the direction and behavior of companies through various forms of direct and indirect, one-on-one and collective engagement. Some investor-company engagements are conducted privately. Others take place in the public forum and can also involve non-investor stakeholders with an interest in the company's approach to ESG issues.

Taken together, the "hard power" of legal rights and enforcement actions and the "soft power" of private and public engagement and cajoling, comprise the toolkit of investor stewardship.

Investor Stewardship is a Profession

As the concept of investor stewardship gained greater acceptance over the course of the past couple of decades, institutional investors gradually responded by more explicitly accepting and assigning responsibility for stewardship and ESG integration in their operations. The authors' Outlook contacts are replete with senior managers at large, mid-size and smaller asset owners and fund managers with "stewardship" in their job titles. Others have titles including terms like ESG or sustainability, but whose responsibilities clearly revolve around stewardship. Judging by the number of LinkedIn postings for stewardship, ESG and sustainability positions, this trend is accelerating. Alongside the evident growth of stewardship specialization within institutional investors, service providers and consultants have expanded their stewardship-related services, products and marketing. (Full disclosure: the authors are both affiliated with a consulting firm that includes stewardship in its very name.)

But including a term in the title of a lot of professionals does not by itself make the concept behind that term a profession. Jaded human resource experts will tell you that job titles are sometimes faddish and fanciful. For something to truly amount to a profession, it must involve a common core of acquired knowledge, skills and behaviors, by individuals who regard their activities as a vocation (or even a calling), and that are recognized by others as valued expertise. These three elements of a profession are often reinforced by a fourth — a formal, recognized qualification.

A single individual can profess more than one vocation. A plumber can also be a carpenter. Indeed, it's probably a good idea to seek out a plumber-carpenter when considering putting in new bathroom and kitchen cabinets. Again, perusing through our Outlook and LinkedIn contacts, we see stewardship practitioners with educational and experiential backgrounds in law, accounting, business, finance, environmental science, and a variety of other technical scientific and social science disciplines. This is unsurprising — the broad spectrum of environmental, social and governance topics germane to investors' analysis and engagement with companies militates for bringing into the stewardship fold experts from a range of other disciplines. What they have in common is that they are all working towards the same objective — effectively looking out for the long-term interests of beneficiaries by incorporating ESG in the investment process and engaging with portfolio companies on issues that matter.

Notwithstanding the multi-disciplinary nature of much of the practice of stewardship, we assert that investor stewardship today meets all the requirements to be recognized as a true profession:

- Its practitioners have (or should have) a core set of knowledge and skills relevant to the central environmental (including climate), social and corporate governance topics around which institutional investors' analysis and engagement with portfolio companies revolve. While no one can be an expert in all these areas, true stewardship professionals possess a workable understanding of issues, standards and reporting frameworks applicable to each of them;
- Those engaged in the vocation of stewardship share a common understanding of the hard power and soft power tools of their trade; and
- Others, especially in the leadership of institutional investors, but also their beneficiaries and the broader set of stakeholders, value the expertise and experience that stewardship professionals bring to the investment process and to the investor-company relationship.

Cultivating the Stewardship Profession: StePs© — the Association of Stewardship Professionals

Just as with other recognized professions, investor stewardship stands to benefit from an institution that brings together practitioners, as well as people outside the profession, to improve the quality of training and education, establish professional qualifications and credentials, and support practitioners in career development. With these objectives in mind, a group of respected stewardship professionals from a variety of institutions came together in 2021 and conceived StePs© — the Association of Stewardship Professionals.

With the support of a set of farsighted and generous donors (including Kessler Topaz Meltzer and Check), StePs' central undertaking is to develop a rigorous internationally-recognized professional credential for stewardship practitioners — the Certified Stewardship Professional (CSP©). The educational requirements for the CSP© are expected to revolve around four core pillars of knowledge and skills related to the stewardship toolkit. The educational requirements for the CSP© will build on curricula already being delivered by respected providers of training on environmental sustainability, socially-responsible investment and good corporate governance (such as the International Corporate Governance Network's signature Governance, Stewardship and Sustainability course). StePs© is to be a global institution, availing itself of blended and distance learning technologies to ensure accessibility in all capital markets. The examinations will be overseen by independent experts, with StePs© ultimately seeking formal ISO certification for the CSP© qualification itself.

In addition to providing stewardship professionals with a platform for trainings, testing and credentialling, as a not-for-profit member association, StePs© will serve as a natural focal point for promoting high ethical standards and broad recognition of the stewardship profession. On its own and in collaboration with partners in related fields, StePs© will conduct surveys and sponsor research in areas of interest to stewardship practitioners. By supporting the profession, StePs© will contribute to achieving the central objective of all stewardship practitioners — accelerating progress toward a more accountable and responsible capital market. ■