



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LABORERS' DISTRICT COUNCIL)
AND CONTRACTORS' PENSION)
FUND OF OHIO, GLORIA LUPKIN)
and JEFFREY H. KRIPITZ c/f Sasha I)
Kripitz UTMA, Derivatively on)
Behalf of TESLA, INC.,)

Plaintiffs,)

v.)

ELON MUSK, BRAD W. BUSS,)
ROBYN M. DENHOLM, IRA)
EHRENPREIS, LARRY ELLISON,)
ANTONIO J. GRACIAS, STEVE)
JURVETSON, KIMBAL MUSK,)
JAMES MURDOCH, LINDA)
JOHNSON RICE, and KATHLEEN)
WILSON-THOMPSON)

Defendants,)

and)

TESLA, INC.,)

Nominal Defendant.)

C.A. No.

PUBLIC VERSION

Filed: March 12, 2019

VERIFIED DERIVATIVE COMPLAINT

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VERIFIED DERIVATIVE COMPLAINT

Plaintiffs Laborers’ District Council and Contractors’ Pension Fund of Ohio. Gloria Lupkin, and Jeffrey H. Kriptiz c/f Sasha I Kripitz UTMA (“Plaintiffs”) hereby bring this action derivatively on behalf of Nominal Defendant Tesla, Inc. (“Tesla” or the “Company”), and allege upon: (1) personal knowledge as to themselves and their own acts; (2) review of publicly available information, including court filings; (3) filings with the United States Securities and Exchange Commission (“SEC”);

and (4) the investigation of counsel, including books and records produced by the Company in response to Plaintiffs' demands made pursuant to 8 *Del. C.* § 220 ("Section 220"), and as to all other matters upon information and belief, as follows:¹

INTRODUCTION

1. Plaintiffs require the urgent aid of this Court to enjoin Defendant Elon Musk ("Musk") from causing Tesla imminent, irreparable harm by continuing to make statements about Tesla on his personal Twitter account without obtaining the pre-approval required by the Company's policies, settlement agreements with the SEC and final judgments entered in the Southern District of New York; and to enjoin Tesla from using Musk's personal Twitter account to disseminate material information about Tesla.

2. For over half a year, the Board has stood idly by while Musk continued to make increasingly unhinged statements on Twitter and other social media in wanton disregard of his fiduciary obligations.

3. The genesis of this action (the "Action") occurred on August 7, 2018, when Musk sent a tweet heard around the world:

¹ Unless otherwise noted, all emphasis is added and internal citations are omitted.



4. On that date, the Company did not issue any SEC filings regarding this potential transaction offer—concerning as much as **\$71 billion** in consideration—nor did the Tesla board of directors (the “Board”) otherwise publicly comment.

5. Once the market reacted to Musk’s offer on Twitter, he subsequently withdrew that offer, claiming that stockholders preferred the Company stay public.

6. The announcement of the offer and its withdrawal led to a flurry of trading activity and multiple lawsuits, including complaints filed by the SEC against both Musk and Tesla. *SEC v. Elon Musk*, No. 1:18-cv-8865 (S.D.N.Y.) (referred to herein as the “SEC Action”); *SEC v. Tesla, Inc.*, No. 1:18-cv-8947 (S.D.N.Y.) (the “Tesla SEC Action”).

7. The SEC Action and the Tesla SEC Action were settled two days after the SEC Action was filed (the “SEC Settlements”). As part of the financial settlements with the SEC, both Musk and Tesla each agreed to pay \$20 million. In addition, Tesla agreed to implement—and Musk agreed to comply with—mandatory procedures to oversee and pre-approve Musk’s Tesla-related written

communications that reasonably could contain information material to Tesla or its stockholders. Pursuant to the SEC Settlements, Tesla also formed a Disclosures Control Committee, consisting of Defendants Antonio Gracias, Brad Buss, and James Murdoch, who have purportedly “engaged in continuous monitoring and audit of compliance with the Final Judgments.”

8. As the SEC has specifically noted, these settlement terms were tailored to prevent future violations of the type alleged by the SEC against Musk and were designed to prevent Musk from disseminating misleading or inaccurate information via Twitter or other means in the future.

9. On October 16, 2018, the U.S. District Court for the Southern District of New York (the “District Court”) entered a final judgment against Tesla that required it to, among other things:

implement mandatory procedures and controls to oversee all of Elon Musk’s communications regarding the Company made in any format, including, but not limited to, posts on social media (*e.g.*, Twitter), the Company’s website (*e.g.*, the Company’s blog), press releases, and investor calls, and to pre-approve any such written communications that contain, or reasonably could contain, information material to the Company or its shareholders. The definition of, and the process to determine, which of Elon Musk’s communications contain, or reasonably could contain, information material to the Company or its shareholders shall be set forth in the Company’s disclosure policies and procedures.

10. In turn, the District Court also entered a final judgment against Musk that ordered him, among other things, to:

comply with all mandatory procedures implemented by Tesla, Inc. (the “Company”) regarding (i) the oversight of communications relating to the Company made in any format, including, but not limited to, posts on social media (*e.g.*, Twitter), the Company’s website (*e.g.*, the Company’s blog), press releases, and investor calls, and (ii) the pre-approval of any such written communications that contain, or reasonably could contain, information material to the Company or its shareholders.

11. Pursuant to the SEC Settlement, Tesla purportedly adopted a “Senior Executives Communications Policy” on December 11, 2018.² It took Musk barely two months to breach the policy.

12. On February 19, 2019 Musk would tweet, and then four hours later correct, material Company information regarding Company’s production output:

² Notably, the Senior Executives Communications Policy was not produced to Plaintiffs in response to their demands made pursuant to Section 220.



13. The next day, Tesla’s General Counsel—high-profile trial attorney Dane Butswinkas (“Butswinkas”), who was hired by the Company in the wake of the SEC Settlements and whose presence the market had widely hoped would be a check on Musk’s increasingly erratic behavior—announced he would be leaving the Company, not two months after he started.

14. On February 25, 2019, the SEC filed a Motion to for an Order to Show Cause in the SEC Action, alleging that Musk had violated the SEC Settlement. The next day, the District Court ordered Musk to respond by March 11, 2019.

15. On resigning as General Counsel, Butswinkas told the *Wall Street Journal* that his firm, Williams & Connelly, would continue to represent Tesla. But just three days after the Motion for an Order to Show Cause was filed, on February

28, 2019, Williams & Connelly moved to withdraw as counsel for Musk in the SEC Action.

16. Musk's self-destructive behavior already has caused enormous harm to the Company, including billions of dollars lost in market capitalization and requiring Tesla to use nearly a billion dollars of its cash to handle a convertible debt maturity. To date, the Company—desperately needing to turn a profit—has agreed to pay a \$20 million fine to the SEC for the failure to monitor Musk's statements on Twitter, and faces hundreds of millions of dollars, if not more, of payments in legal fees and for the possible resolution of federal securities law class actions that were commenced after Musk's August 7, 2018 tweets. Tesla's business, goodwill and reputation with its customers and stockholders also have been harmed.

17. Tesla, as well as Plaintiffs and all other Tesla stockholders, also have been financially harmed by the impact that Musk's false statements had on the Company's market capitalization and stock price, as well as the costs of attorneys' fees, lost productivity, and other costs associated with the SEC Actions, class action securities litigation, and related investigations. This action seeks to redress this and the other harms caused to the Company by the breaches of fiduciary duties by Musk and the Board. This action also seeks to put an end to Musk's uncontrolled and

reckless public statements, which pose a serious risk of immediate and irreparable injury, loss, and damage to the Company.

18. Plaintiffs have not made a pre-suit demand on the Board because such a demand would be a futile, wasteful, and useless act, because Musk controls the Board. As a result of his control, Musk and the Board have taken various actions that provide a reason to doubt that the Board would conduct credible investigation into Musk and/or Tesla's other directors and officers alleged breaches of their fiduciary duties. The Board has permitted misconduct to persist and failed to ensure proper oversight and to enact adequate internal controls, causing (and continuing to cause) financial and reputational harm to the Company.

THE PARTIES

A. Plaintiffs

19. Plaintiff Laborers' District Council and Contractors' Pension Fund of Ohio is a current stockholder of Tesla and has continuously been a stockholder of the Company at all times relevant herein.

20. Plaintiff Gloria Lupkin is a current stockholder of Tesla and has continuously been a stockholder of the Company at all times relevant herein.

21. Plaintiff Jeffrey H. Kripitz c/f Sasha I Kripitz UTMA is a current stockholder of Tesla and has continuously been a stockholder of the Company at all times relevant herein.

B. Nominal Defendant Tesla

22. Nominal Defendant Tesla is a Delaware corporation headquartered in Palo Alto, California. Tesla common shares are traded on the NASDAQ under the symbol “TSLA.” Tesla designs and manufactures high-end electric cars. Tesla is dominated and controlled by Musk, Tesla’s co-founder, CEO, largest stockholder, and former Chairman.

C. The Tesla Board Defendants

a. Musk

23. Defendant Musk is a Director, the CEO, and “Product Architect” of Tesla. Musk has served as CEO since October 2008. Musk previously served as Chairman of the Tesla Board from April 2004 until September 2018, when Musk was forced to step down as Chairman in connection with the SEC Settlement. Tesla admits in its SEC filings that Musk is not an independent director of the Company. At all relevant times, Musk has also been the Company’s largest stockholder. As of the filing of this Complaint, [REDACTED]

[REDACTED]

24. As the Delaware Court of Chancery recently affirmed, “That Musk is the ‘face of Tesla’ cannot meaningfully be disputed.” *In re Tesla Motors, Inc. Stockholder Litigation*, C.A. No. 12711-VCS, at 46 (Del. Ch. Mar. 28, 2018) (Trans. ID 61851776). In fact, Tesla freely admits—including in its most recent Form 10-K, filed February 19, 2019 (at 27-28)—that the Company is “highly dependent on the services of Elon Musk” and that Musk “spends significant time with Tesla and is highly active in [Tesla’s] management.” Thus, Musk is inextricably involved in the Company’s affairs and exerts a level of influence and day-to-day control over Tesla far beyond what would be typical given his equity stake.

25. Further, Tesla’s bylaws contain several supermajority voting requirements. For example, any changes at Tesla, including certain mergers, acquisitions, or changes to the Board’s compensation or bylaws concerning the Board’s composition must be approved by 66 2/3 percent of total voting power of outstanding Tesla voting securities. This supermajority standard allows Elon Musk significant control over corporate matters while only owning approximately 20% of Tesla’s common stock.

26. In addition to his “highly active” role with Tesla, Musk holds himself out as a visionary in the areas of alternative energy, electric cars, and space travel. Using a select group of favored investors, including Tesla Board members Jurvetson,

Gracias, and Ehrenpreis, Musk has sought to build enterprises serving each of those sectors. An essential aspect of this investing relationship is the low cost of capital provided to Musk in light of his “visionary” status. Musk and these favored investors understand the link between the failure of any of Musk’s ventures and an increase in the cost of capital for Musk’s other enterprises, which could very well stymie his future endeavors in which they would expect to be included as early investors.

27. Musk also has served as the CEO, Chief Technology Officer and Chairman of the Board of Space Exploration Technologies Corporation (“SpaceX”) since 2002. SpaceX is a private aerospace manufacturer and space transport services company founded by Musk to develop advanced rockets for satellite and human transportation. Musk personally contributed \$100 million in seed money to start SpaceX, which is believed to be one of the most valuable privately held companies in the world and was valued at an estimated \$12 billion as of June 2016.

28. In addition, Musk served as Chairman of the Board of Directors for the former SolarCity Corporation (“SolarCity”), a solar panel company, from its founding in July 2006 until it was acquired by Tesla in November 2016. Musk is the cousin of SolarCity’s co-founders, Lyndon Rive and Peter Rive, and at the time of Tesla’s acquisition of SolarCity, Elon Musk owned approximately 21.9% of SolarCity’s common stock, making him its largest stockholder. Through the

Company's acquisition of SolarCity, Elon Musk personally received over half a billion dollars' worth of Tesla shares. [REDACTED]

29. By Musk's own account, Tesla, SpaceX, and SolarCity are a "pyramid" atop which he sits, and it is "important that there not be some sort of house of cards that crumbles if one element of the pyramid of Tesla, SolarCity and SpaceX falters."

b. Buss

30. Defendant Brad W. Buss ("Buss") has served as a director of the Company since 2009. Buss serves on the Tesla Board's Audit, Compensation, Nominating and Governance, and Disclosure Controls Committees. Upon information and belief, Buss does not currently have full-time employment, but earned \$3,357,002 as a director of Tesla for fiscal year 2017 and [REDACTED]

31. In a December 29, 2018 article, *The New York Times* described Buss as having "close personal and professional ties to" Musk. For example, Buss was previously the Chief Financial Officer for, and a consultant to, SolarCity, and as a

result he is indebted to Elon Musk because of, among other things, the \$32 million Buss received for 18 months of work as SolarCity's CFO.

32. Further, prior to joining SolarCity, Buss was the CFO and EVP of Finance and Administration of Cypress Semiconductor Corporation ("Cypress"), a semiconductor design and manufacturing company. Cypress provided a third-party manufacturer engaged by Tesla with semiconductors for use in Tesla's Model S. Payments by Tesla allocable to the Cypress semiconductors were approximately \$35,000 in 2012, \$605,000 in 2013 and \$817,000 in 2014. Tesla's selection of Cypress's "TrueTouch automotive touchscreen solution for the infotainment system in the Model S" was touted by Cypress as a significant highlight of its third fiscal quarter of 2012.

c. Denholm

33. Defendant Robyn M. Denholm ("Denholm") has served on the Tesla Board since August 2014. Since November 2018, Denholm has served as Chair of the Tesla Board, after Musk was forced to step down in connection with the SEC Settlements concerning the Go-Private Tweets. She is also a member of the Audit Committee and the Compensation Committee.

34. Denholm previously served as Executive Vice President, Chief Financial and Operations Officer at Juniper Networks, Inc. ("Juniper") from July

2013 until her retirement in February 2016. Previously, she served as Juniper's Executive Vice President and CFO since August 2007. Tesla purchases networking equipment manufactured by Juniper in the ordinary course of business through resellers.

35. Denholm was the CFO and Head of Strategy of Telstra Corporation Ltd. ("Telstra"), [REDACTED]

36. Denholm is indebted to Elon Musk. Denholm left Juniper in July 2016, and until 2017 did not have a full-time job. Yet, as a director of Tesla, she earned nearly \$5 million in fiscal years 2016 and 2017 and [REDACTED]

[REDACTED] In addition, as described further herein, Musk's has admitted that he "handpicked" Denholm to succeed him as Chair of the Board, and that it is "not realistic" that Denholm has any ability to control or restrict his actions..

d. Ehrenpreis

37. Defendant Ira Ehrenpreis ("Ehrenpreis") has served on the Tesla Board since May 2007. He is the Chair of both the Compensation Committee and the Nominating and Governance Committee of the Tesla Board.

38. In a December 29, 2018 article, *The New York Times* described Ehrenpreis as having “close personal and professional ties to” Musk. Ehrenpreis was an early investor in all things Elon Musk and has stuck with the entrepreneur during some of his darkest days.

39. Ehrenpreis is also an investor in and serves on the board of directors of Mapbox, Inc. (“Mapbox”), a provider of custom online maps. In December of 2015, Tesla and Mapbox entered into an agreement pursuant to which Tesla expects to pay Mapbox certain ongoing fees, including \$5 million over the first 12 months of the agreement.

40. Since 2015, Ehrenpreis has been a managing partner and co-owner of venture capital firm DBL Partners (“DBL Partners”), which he co-founded with fellow managing partner and co-owner Nancy Pfund (“Pfund”). Pfund was an observer on the Tesla Board from 2006 to 2010. Pfund was also a member of the SolarCity board of directors and one of the two members of the Special Committee of the SolarCity board that negotiated and approved Tesla’s acquisition of SolarCity. Pfund is a close friend of Elon Musk’s and has said that “[h]e’s always been a master of the universe in my mind.”

41. As a director of Tesla, Ehrenpreis earned nearly [REDACTED]

[REDACTED]

e. Ellison

42. Defendant Larry Ellison (“Ellison”) has served as a director of the Company since December 27, 2018. Ellison became part of Tesla’s Board in connection with the SEC Settlements, which required Tesla to add two independent board members and an independent chairman.

43. [REDACTED]

44. Ellison is the founder and Chief Technology Officer of Oracle Corporation, of which Tesla is a customer.

45. Though designated as an independent board member, Ellison describes Musk as his “very close friend” and has been publicly critical of what he claims is unfair media coverage of Musk. Further, Ellison has a \$1 billion stake in Tesla, making him the Company’s second-biggest individual investor after Musk.

f. Gracias

46. Defendant Antonio J. Gracias (“Gracias”) has served as a director of the Company since May 2007. Gracias is the founder, managing partner, CEO, Chief Investment Officer, director and sole owner of private equity firm Valor Management Corp., d/b/a Valor Equity Partners (“Valor”).

47. Gracias has been described as one of Elon Musk’s closest friends, and in a December 29, 2018 article, *The New York Times* described Gracias as having “close personal and professional ties to” Musk. Musk even gave Gracias the second Tesla Roadster ever made.

48. Among other things, Gracias has long been an investor in Elon Musk’s enterprises, dating back to his investment in PayPal. Gracias and Valor participated in several pre-IPO venture funding rounds for SolarCity, Tesla and SpaceX, and Gracias served on the boards of directors of all three companies at the time of the acquisition of SolarCity by Tesla. He continues to serve on the boards of both Tesla and SpaceX. [REDACTED]

[REDACTED]

49. [REDACTED]

50. Notwithstanding his friendship and involvement with Musk, Gracias has served as Tesla’s purported “Lead Independent Director” since September 2010. Tesla has stated that this role gives Gracias “broad authority to direct the actions of [Tesla’s] independent directors.” In this role, Gracias, among other things: (a) reviews the agenda and materials for meetings of the independent directors; (b) consults with the CEO and Chairman (i.e., Elon Musk) regarding Tesla Board meeting agendas, schedules and materials; (c) communicates with the CEO and Chairman; (d) acts as a liaison between the CEO and Chairman and the independent directors when appropriate; (e) raises issues with management on behalf of the independent directors; (f) annually reviews, together with the Nominating and Corporate Governance Committee, the Tesla Board’s performance during the prior year; and (g) serves as the Tesla Board’s liaison for consultation and communication with stockholders as appropriate.

51. Glass Lewis and Institutional Shareholder Services (ISS) recommended that shareholders vote against Gracias when he was last up for re-election to the board in 2018.

52. As a director of Tesla, Gracias earned over [REDACTED]

[REDACTED]

57. In November 2017, Jurvetson was ousted from his own firm, DFJ, following scandalous revelations about his personal conduct. Nonetheless, thanks to his friendship with Musk—who himself was implicated in one Jurvetson’s infamous parties—Jurvetson has not suffered the same fate with respect to his roles with Tesla and SpaceX. While Tesla and SpaceX placed him on “leave,” he continues to attend events for both companies as a VIP, and Tesla’s website still lists him as a Director.

h. Kimbal Musk

58. Defendant Kimbal Musk (“K. Musk”) has served on the Tesla Board since April 2004. Although not an employee of the Company, Tesla concedes in its SEC filings that Kimbal Musk is not an independent director of the Company.

59. K. Musk is the brother of Elon Musk and cousin of Lyndon and Peter Rive, SolarCity’s founders. K. Musk is also a director of Space X, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

60. As a director of Tesla, K. Musk earned nearly [REDACTED]

[REDACTED]

i. Murdoch

61. Defendant James Murdoch (“Murdoch”) has served as a director of the Company since 2017. Murdoch is a member of the Tesla Board’s Nominating and Governance Committee, Audit Committee, and Disclosure Controls Committee.

62. As a director of Tesla, Murdoch earned over [REDACTED]

j. Rice

63. Defendant Linda Johnson Rice (“Rice”) has served as a director of the Company since 2017. Rice is a member of the Tesla Board’s Compensation Committee.

64. As a director of Tesla, Rice earned over [REDACTED]

k. Wilson-Thompson

65. Defendant Kathleen Wilson-Thompson (“Wilson-Thompson”) has served as a director of the Company since December 27, 2018. Wilson-Thompson became part of Tesla’s Board in connection with the SEC Settlements, which required Tesla to add two independent board members and an independent chairperson.

* * *

66. As used herein, the “Board” or the “Tesla Board” collectively refers to Defendants Musk, Buss, Denholm, Ehrenpreis, Gracias, Jurvetson, Murdoch, K. Musk, and Rice; and, for periods after December 27, 2018, Ellison and Wilson-Thompson.

FACT BACKGROUND

A. Tesla

67. Tesla was founded in 2003 by Silicon Valley engineers Martin Eberhard and Marc Tarpinning, who “wanted to prove that electric cars could be better than gasoline-powered cars.”

68. Over the next few years, Elon Musk acquired a controlling stake in the Company, participating in Tesla’s Series B, C, D and E venture funding rounds. Prior to the Company’s IPO, Elon Musk invested approximately \$70 million in Tesla.

69. In November 2007, Elon Musk forced founder and then-CEO Eberhard out of the Company. In October 2008, he appointed himself CEO. Around that time, Tesla was in financial distress. The Company was reportedly spending approximately \$4 million per month attempting to bring the Roadster to market. To keep Tesla afloat and bring the Roadster to market, in early 2009, Elon Musk personally borrowed \$20 million from SpaceX to satisfy a 2008 pledge to fund that

amount in Tesla (the “SpaceX Loan”). Having survived its financial problems, the Company later expanded its automotive line to include a luxury sedan (the Model S) and an SUV (the Model X).

70. Tesla conducted its IPO on June 29, 2010. Musk repaid the SpaceX Loan by selling 1.4 million shares of Tesla common stock for about \$23.8 million. Since the IPO, Elon Musk has been by far the Company’s largest stockholder, at all relevant times, owning nearly 20% of the Company’s stock, if not more.

B. Tesla Adopts Musk’s Social Media Communications

71. Tesla and Musk have routinely promoted the image of Musk as the “face of Tesla” and the dominant force behind Tesla’s corporate strategy, which proceeds according to his purported “master plan.”

72. In or about 2009, Musk created a profile on the social media application Twitter (www.twitter.com/elonmusk). Since that time, Musk often used Twitter to communicate about Tesla’s business (referred to as “publishing a tweet” or “tweeting”).

73. On November 5, 2013, Tesla filed a Form 8-K with the SEC stating that it intended to use Musk’s personal Twitter account in addition to the Company’s Twitter account as a means of announcing material information to the public about Tesla and its products and services. In that Form 8-K, Tesla stated:

Tesla investors and others should note that we announce material information to the public about our company, products and services and other issues through a variety of means, including Tesla's website, press releases, SEC filings, blogs and social media, in order to achieve broad, non-exclusionary distribution of information to the public. We encourage our investors and others to review the information we make public in the locations below as such information could be deemed to be material information. Please note that this list may be updated from time to time.

Interested in keeping up with Tesla?

For more information on Tesla and its products, please visit: teslamotors.com

For more information for Tesla investors, please visit: ir.teslamotors.com

For the latest information from Tesla, including press releases and the Tesla blog, please visit: teslamotors.com/press

For additional information, *please follow Elon Musk's and Tesla's Twitter accounts:* twitter.com/elonmusk and twitter.com/TeslaMotors

74. Since November 2013, Musk has used his Twitter account to publish material information about Tesla, including forward-looking guidance regarding Tesla's financial metrics and key non-financial information such as production forecasts, production achievements, and new product releases.

75. Likewise, Tesla has continued to encourage investors to review the information about Tesla published by Musk via his Twitter account. For example, on November 7, 2016, Tesla filed a Form 425 referring to, and containing a

screenshot of, a tweet by Musk about how to vote on Tesla’s acquisition of SolarCity. Tesla’s Chief Financial Officer (CFO) described Musk’s Twitter statements as a “strong channel of marketing” with Musk acting as a “spokesman” for Tesla.”

76. At all relevant times, Musk’s Twitter account was public, meaning that anyone with access to the internet could view his Twitter publications (or “tweets”). In addition, tens of millions of people “followed” Musk on Twitter, meaning that Musk’s tweets would be sent directly to those users.

77. Through his Twitter account, Musk both publishes tweets *sua sponte*, and also publishes tweets responding to tweets published by other users. In neither circumstance is there an apparent or announced distinction between Musk’s personal tweets and tweets being published as Tesla communications.

78. [REDACTED]

[REDACTED]³

³ [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

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[Redacted]

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[Redacted]

[Redacted]

[Redacted]

86. [REDACTED]

87. Musk’s hatred for those shorting Tesla stock was nothing new. On May 4, 2018, Musk tweeted “Oh and uh short burn of the century comin soon. Flamethrowers should arrive just in time.” Many speculated that the Go-Private Tweets were the fulfillment of Musk’s promised “short burn of the century.”

88. [REDACTED]

[REDACTED]

89. [REDACTED]

[REDACTED]

D. Musk Defies the Board and Makes the Go-Private Tweets

90. On August 7, 2018, at 12:48 p.m. EDT, Musk posted on his Twitter account: “Am considering taking Tesla private at \$420. Funding secured.”

91. Throughout the day, Musk continued to tweet about the going-private plan without any oversight by the Board:

- At 1:15 p.m., Musk responded to a Twitter user’s question, “At what price?” by repeating “420.”
- At 1:40 p.m., Musk tweeted, “I don’t have a controlling vote now & wouldn’t expect any shareholder to have one if we go private. I won’t be selling in either scenario.”
- At 2:00 p.m., Musk tweeted, “My hope is *all* current investors remain with Tesla even if we’re private. Would create special purpose fund enabling anyone to stay with Tesla. Already do this with Fidelity’s SpaceX investment.” In response to this tweet another Twitter user asked, “Could we still invest once private?” Musk responded, “Yes, but liquidity events would be limited to every 6 months or so (like SpaceX).”
- At 2:07 p.m., Musk responded to a Twitter user who wrote, “Or if you do take Tesla private, please have a provision for retail investors who have held Tesla shares prior to Dec 31, 2016 that those shares will be converted into private shares in the new private company. . . .” by

tweeting, “Absolutely. Am super appreciative of Tesla shareholders. Will ensure their prosperity in any scenario.”

- At 2:13 p.m., Musk tweeted, “Shareholders could either to [sic] at 420 or hold shares & go private.”
- At 3:07 p.m., Musk responded to a Twitter user’s comment about a “forced buyout” by tweeting, “Def. no forced sales. Hope all shareholders remain. Will be way smoother & less disruptive as a private company. Ends negative propaganda from shorts.”
- At 3:36 p.m., Musk tweeted a link to a blog post and stated, “Investor support is confirmed. Only reason why this is not certain is that it’s contingent on a shareholder vote.”

92. The texts in Paragraphs 89-90 are referred to herein as the “Go-Private Tweets.” The Go-Private Tweets caused a surge in Tesla’s stock price, reaching an intraday high of \$387.46 per share, before closing at \$379.57 per share August 7, 2018, a nearly 11 percent jump from the previous closing price. Trading volume spiked to 30 million shares (compared to an average of 8 million), representing over \$11 billion of purchases in the open market. All the while, the Go-Private Tweets flaunted [REDACTED], regulatory requirements, and the truth—all while leading to a flurry of speculative trading, news reports, lawsuits and governmental inquiries.

93. *First*, the Go-Private Tweets plainly flaunted [REDACTED]

[REDACTED]

[REDACTED]

94. *Second*, the Go-Private Tweets violated [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

95. Instead, the Go-Private Tweets reportedly blindsided the Company's other senior executives, including CFO Ahuja, [REDACTED]

[REDACTED]

[REDACTED] After the Go-Private Tweets began, Ahuja sent a text to Musk: "Elon, am sure you have thought about a broader communication on your rationale and structure to employees and potential investors. Would it help if [Tesla's head of communications], [Tesla's general counsel], and I draft a blog post or employee email for you?"⁴ Musk responded "Yeah, that would be great." A few hours later, Musk blogged to

⁴ SEC Action Complaint, ¶35 (filed Sept. 27, 2018) (bracketed text in original). At the time, Tesla's head of communications was Sarah O'Brien, who would leave the Company just a month later; while Tesla's general counsel was Todd Maron, who would leave the Company by the end of the year.

employees that he was “considering taking Tesla private at a price of \$420/share” but that the “final decision has not yet been made.”⁵

96. *Third*, the Go-Private Tweets violated pertinent regulatory requirements. For example, the Go-Private Tweets violated NASDAQ rules specifying that listed companies must notify NASDAQ at least ten minutes prior to publicly releasing material information. In fact, because Musk published the Go-Private Tweets in the middle of the trading day, investors quickly inflated the price of Tesla shares to a point where the NASDAQ halted trading for more than two hours.

97. The Go-Private Tweets also violated SEC requirements that stockholders also be alerted to material news in other ways.⁶ George S. Canellos, the SEC’s former acting enforcement chief, explained that the SEC rule provides that social media is not an appropriate vehicle “if the access is restricted or if investors don’t know that’s where they need to turn to get the latest news.”⁷ Yet Musk

⁵ Elon Musk, *Taking Tesla Private*, Tesla Blog, Aug. 7, 2018, <https://www.tesla.com/blog/taking-tesla-private>.

⁶ *See, e.g.*, David Michaels & Michael Rapoport, *SEC Probes Tesla CEO Musk’s Tweets*, WALL. ST. J., Aug. 8, 2018, <https://www.wsj.com/articles/sec-has-made-inquiries-to-tesla-over-elon-musks-taking-private-tweet-1533757570>.

⁷ Andrew Ross Sorkin, *Elon Musk’s Tweets on Tesla Started a Tizzy. Someone Should Hit the Brakes*, Aug 13, 2018, N.Y. TIMES DEALBOOK,

repeatedly has blocked individuals from his Twitter account and did not issue a broader release of his intentions to take the Company private through the SEC, while Tesla did not itself file a Form 8-K with the SEC regarding Musk’s tweets and the potential take-private transaction until August 14, 2018.

98. Further, in the days after the Go-Private Tweets, media outlets reported the views of various respected legal analysts that the Go-Private Tweets violated the anti-fraud and market manipulation provisions of the federal securities laws:

It is illegal for a director or officer of a public company “to knowingly or recklessly make material misstatements about that company,” said John Coates, a professor at Harvard Law School who teaches mergers and acquisitions. Mr. Musk’s “tweets seem cryptic at best, and *it is hard to see how he has complied with his duty to not be misleadingly incomplete.*”

“That’s a clear factual statement,” said John C. Coffee Jr., a professor at Columbia Law School who specializes in corporate law and securities fraud. “*If it’s not fully secure, that’s potentially a very material misrepresentation, and a very straightforward violation of Rule 10b-5 of the securities law – in short, securities fraud.* Mr. Musk’s “tweets seem cryptic at best, and *it is hard to see how he has complied with his duty to not be misleadingly incomplete.*”

<https://www.nytimes.com/2018/08/13/business/dealbook/elon-musk-tesla-twitter.html>.

If there is evidence that the financing wasn't fully locked down, Musk's claim would expose him to allegations of fraud, Coffee said.⁸

* * *

If his motive for the tweet "was frustration with short sellers, then that could be a case of market manipulation," John Coffee Jr., a Columbia University law professor and corporate-governance expert.⁹

* * *

"As an officer of a public company that was a clearly a market-moving event and he knew or should have known that," said Laura Unger, a former S.E.C. commissioner, said of Mr. Musk's initial tweet. "***He was at least reckless whether he meant to drive up the price or not.***"¹⁰

* * *

John Coffee, a securities and corporate law professor at Columbia University, said the SEC can credibly argue that Mr. Musk's tweet last week, which caused Tesla's stock price to jump 11% the day he posted it, didn't give shareholders the full picture they needed. . . .

"This is a clear statement that he has nothing more than an expression of interest as opposed to a binding commitment," Mr. Coffee said. "***It***

⁸ James B. Stewart, *Did Elon Musk Violate Securities Laws With Tweet About Taking Tesla Private?*, N.Y. TIMES, Aug. 8, 2018, <https://www.nytimes.com/2018/08/08/business/elon-musk-tesla-sec.html>.

⁹ Christopher Rugaber, *Tesla CEO Musk Taunts Short Sellers Amid Legal Scrutiny*, AP NEWS, Aug. 11, 2018, <https://www.apnews.com/a8b14ee7114b499bbb288d19d6ca2090>.

¹⁰ Jessica Silver-Greenberg et al., *Tesla Board Surprised by Elon Musk's Tweet on Taking Carmaker Private*, N.Y. TIMES DEALBOOK, Aug. 13, 2018, <https://www.nytimes.com/2018/08/13/business/dealbook/tesla-elon-musk-saudi-arabia.html>.

will tell the SEC that they have a virtually open-and-shut case if they wish to sue.”¹¹

“The probability that there will be an SEC enforcement action is, I think, quite high,” said Joseph Grundfest, a law professor at Stanford University and a former SEC commissioner.¹²

99. Indeed, as the market later learned, SEC investigators unsurprisingly began questioning Tesla and Musk the very next day after the Go-Private tweets, and formally served subpoenas on the Board and Musk.¹³

100. *Finally*—and perhaps most disturbingly—the Go-Private Tweets were in large parts inaccurate. In fact, neither Musk nor Tesla had actually lined up the necessary financing aside from having preliminary conversations with some investors, which did not address “even the most fundamental terms of a proposed going-private transaction,” such as price, premium, and ownership percentage.¹⁴

101. Further, Musk stated in an interview with the SEC that in fact the \$420 per share offer was based on a 20% premium, which resulted in a price of \$419 per

¹¹ Dave Michaels & Michael Rapoport, *Musk’s Tweets on Tesla Buyout Face Scrutiny After Saudi Disclosure*, WALL ST. J., Aug. 14, 2018, <https://www.wsj.com/articles/musks-tweets-on-tesla-buyout-face-scrutiny-after-saudi-disclosure-1534244400>.

¹² *Id.*

¹³ *The Wall Street Journal*, “SEC Sends Subpoena to Tesla in Probe Over Musk Tweets,” Aug. 15, 2018.

¹⁴ SEC Action Compl. ¶21.

share. Musk told the SEC he rounded the price up to \$420 because he had learned about the number's significance in marijuana culture and thought his girlfriend "would find it funny, which admittedly is not a great reason to pick a price."¹⁵

102. According to the SEC:

Musk's statements that funding was "secured" and investor support was "confirmed" were false and misleading because, in reality, ***Musk had no "secured" or "confirmed" commitment from any source to provide any amount of funding.*** In addition, he had never even discussed taking Tesla private at a price of \$420 per share with the Fund or any other potential investor.

* * *

Musk's statements were ***premised on a long series of baseless assumptions and were contrary to facts that Musk knew.***

* * *

Unlike market participants reading his tweets, Musk knew that his ostensibly "secured" funding was based on a 30 to 45 minute conversation regarding a potential investment of an unspecified amount in the context of an undefined transaction structure. Musk also knew that there were many uncertainties beyond just a shareholder vote that would have had to be resolved before any going-private transaction could have been possible. As a result, Musk knew or was reckless in not knowing that his August 7 statements were false and misleading.¹⁶

¹⁵ *Id.* at ¶24.

¹⁶ *Id.* ¶¶62, 69, 71.

E. The Board Is Supine In The Face of Musk’s Reckless Go-Private Tweets

103. As just described, in connection with the Go-Private Tweets, Musk wantonly disregarded the Board, the Company’s policies, regulatory requirements, and the truth. Yet Tesla’s Board failed to place any controls on Musk’s continuing use of social media in disseminating public information—nor did the Board take steps to correct or to clarify the public information Musk had disseminated. In fact, in an interview published on August 16, 2018, Musk said that Board members had not complained to him about his tweet—“I don’t recall getting any communications from the board at all I definitely did not get calls from irate directors.”

104. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

105. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

106. [REDACTED]

[REDACTED]

[REDACTED] that same day, August 13, 2018, Musk again took to Twitter to falsely announce that he was “excited to work with Silver Lake and Goldman Sachs’ as financial advisers on his proposal to privatize Tesla.” In fact, neither of these entities had signed on as financial advisors to Musk.

107. [REDACTED]

[REDACTED]

108. The Board’s focus on protecting Musk is all the more alarming in light of what *The New York Times* interview revealed when it was published. The article, entitled “Elon Musk Details ‘Excruciating’ Personal Toll of Tesla Turmoil,” described Musk as “alternat[ing] between laughter and tears” as he discussed the stress that he had been under, his use of Ambien, and the manner in which the Go-Private Tweets had been conceived. Musk confirmed that “no one saw or reviewed his tweet about the plan to take the electric-car maker private before he posted it,” and that he typed the initial Go-Private Tweet *as he was driving himself to an airport*. The interview also revealed that, as *The New York Times* summarized elsewhere, that Musk had “taken to Twitter impulsively” and “*because he was not the kind of person who could hold things in, and was angry at the company’s critics.*”

109. *The New York Times* also reported that some members of Tesla’s Board were “blindsided” by the Go-Private tweets, and that “some board members have expressed concern” about Musk, including “his use of ambien.” Nonetheless, despite even Musk’s own troubling admissions about his headspace and behavior, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

110. [REDACTED]

F. Musk Derails SEC Settlement Efforts With The Acquiescence Of Tesla's Board

111. Just as abruptly as he announced that he was considering going private, on August 24, 2018, Musk changed course and announced that Tesla would stay public.¹⁷

112. [REDACTED]

¹⁷ Elon Musk, *Staying Public*, Tesla Blog, Aug. 24, 2018, <https://www.tesla.com/blog/staying-public>.

[REDACTED]

113. Yet, even if Tesla was no longer considering going private, the SEC was still investigating the Go-Private Tweets—which made all the more egregious that Musk continued his reckless social media communications. For example, on September 6, 2018, Musk participated in a live video podcast hosted by Joe Rogan, during which he smoked marijuana and drank whiskey (the “Rogan Podcast”).

114. [REDACTED]

115. [REDACTED]

[REDACTED] pursuant to which Musk and the Board were offered a settlement that would have allowed Musk to remain as CEO, provided that he step down as Chairman for two years and pay a \$10 million fine. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

116. However, Musk threatened to “resign on the spot” if the Board accepted the settlement offer and also “demanded the board publicly extol his integrity.”¹⁸ The Board caved to Musk’s demands. Tesla’s stock price fell 14% following disclosure of Tesla’s refusal to settle. Jeffrey Sonnenfeld, a professor at the Yale School of Management, characterized as the decision of the Board as “drinking the Kool-Aid of the founder,” and noting the decision to pull out of the settlement “is completely as self-destructive as Musk is.”¹⁹

¹⁸ James B. Stewart, *Elon Musk’s Ultimatum to Tesla: Fight the S.E.C., or I Quit*, N.Y. TIMES, Oct. 2, 2018, <https://www.nytimes.com/2018/10/02/business/tesla-elon-musk-sec.html>.

¹⁹ <https://www.nytimes.com/2018/10/02/business/tesla-elon-musk-sec.html>.

117. On September 27, 2018, the SEC initiated the SEC Action by filing a complaint charging Musk with securities fraud. In addition to financial damages, the SEC Action sought to bar Musk from serving as an executive or director of any public company. The lawsuit did not name Tesla as a defendant.

118. On September 29, 2018, the SEC announced that it had entered into a settlement agreement with Musk to resolve the lawsuit filed two days earlier. The SEC also filed the Tesla SEC Action, charging Tesla with failing to have sufficient internal controls, and settled that action as well.

119. Among other things, the SEC Settlements required that:

- Musk “comply with all mandatory procedures implemented by Tesla... regarding (i) the oversight of communications relating to the Company made in any format, including, but not limited to, posts on social media (e.g., Twitter)... and (ii) the pre-approval of any such written communications that contain, or reasonably could contain, information material to the Company or its shareholders”;
- Musk step down as Tesla’s Chairman and be replaced by an independent Chairman. Musk will be ineligible to be re-elected Chairman for three years;
- Tesla appoint a total of two new independent directors to its board;
- Tesla establish a new committee of independent directors and put in place additional controls and procedures to oversee Musk’s communications; and
- Musk and Tesla each pay a \$20 million penalty. The combined \$40 million in penalties will be distributed to harmed investors under a court-approved process.

120. Thus, because the Board gave in to Musk’s threats and did not settle with the SEC just a few days earlier, Musk was forced to pay double the initial fine offered *and* the Company was charged by the SEC and forced to pay a \$20 million penalty.

G. Even As Tesla Superficially Complies With The SEC Settlement, The Board Turns A Blind Eye To Musk’s Erratic Public Behavior

121. Musk’s behavior did not change after the SEC Settlements – even though the District Court still had to enter final judgments in the SEC Actions. On October 1, 2018, Musk tweeted a link to the video for the song “O.P.P.” and captioned the video “Naughty by Nature” with a winking emoji.²⁰ Then, on October 4, 2018, Musk openly mocked the SEC by tweeting:

²⁰ *The Wall Street Journal*, “Elon Musk Stirs Controversy on Twitter in Wake of SEC Settlement,” Oct. 1, 2018.



122. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

123. On October 16, 2018, the District Court overseeing the SEC Action and the Tesla SEC Action entered the terms of the SEC Settlements as part of final judgments (the “Final Judgments”) (attached hereto as Exhibits A and B and incorporated herein by reference).

124. Not content to lick his wounds and move on, just ten days later, on October 26, 2018, Musk said on Twitter that the \$20 million fine was “worth it.”

125. On November 7, 2018, as required by the SEC Settlement, Musk relinquished his position as Chairman of the Tesla Board. The position was filled instead by Denholm.

126. During a *60 Minutes* interview a month later, Musk revealed that Denholm as mere window-dressing, stating:

Lesley Stahl: Did you handpick her?

Elon Musk: Yes.

Lesley Stahl: The impression was that she was put in to kind of watch over you.

Elon Musk: Yeah, I mean that's not realistic. I mean I'm the largest --

Lesley Stahl: Like a babysitter --

Elon Musk: Yeah. It -- it's not realistic in the sense that I am the largest shareholder in the company. And I can just call for a shareholder vote and get anything done that I want.

127. During that *60 Minutes* interview, Musk also revealed that—in violation of the SEC Settlements—Tesla was not taking seriously its duty to monitor his social media posting, and that Musk himself had no respect for the SEC:

Lesley Stahl: Have you had any of your tweets censored since the settlement?

Elon Musk: No.

Lesley Stahl: None? Does someone have to read them before they go out?

Elon Musk: No.

Lesley Stahl: So your tweets are not supervised?

Elon Musk: The only tweets that would have to be reviewed would be if a tweet had a probability of causing a movement in the stock.

Lesley Stahl: And that's it?

Elon Musk: Yeah, I mean otherwise it's, "Hello, First Amendment." Like Freedom of Speech is fundamental.

Lesley Stahl: But how do they know if it's going to move the market if they're not reading all of them before you send them?

Elon Musk: Well, I guess we might make some mistakes. Who knows?

Lesley Stahl: Are you serious?

Elon Musk: Nobody's perfect.

Lesley Stahl: Look at you.

Elon Musk: I want to be clear. ***I do not respect the SEC. I do not respect them.***

128. Shortly after Musk revealed his and Tesla's noncompliance with the SEC Settlements, on December 11, 2018, Tesla purportedly adopted a "Senior Executives Communications Policy." The Senior Executives Communications Policy states:

Written Communications that contain, or reasonably could contain, information material to Tesla or its stockholders must, prior to posting or other publication, be submitted to Tesla's General Counsel and Disclosure Counsel (or in the event of the General Counsel's unavailability, Tesla's Chief Financial Officer and Disclosure Counsel) for pre-approval. Authorized Executives are not authorized to post or publish Written Communications that contain, or reasonably could contain, information material to Tesla or its stockholders without obtaining pre-approval.²¹

129. Musk qualifies as an "Authorized Executive" under the Senior Executives Communications Policy, which is defined as "Tesla's Chief Executive Officer ("CEO"), Head of Communications (who shall receive appropriate guidance from the General Counsel), and any Tesla Vice President or higher employee designated in writing by the CEO." The Senior Executives Communications Policy also provides a non-exclusive list of examples of information that may be "material to Tesla or its stockholders," which includes "projections, forecasts, or estimates regarding Tesla's business." Further, the Senior Executives Communications Policy also requires that:

[i]f an Authorized Executive (i) further edits a pre-approved Written Communication, or (ii) desires to release a Written Communication more than two (2) days, after receipt of written pre-approval, such Authorized Executive will re-confirm the pre-approval in writing in accordance with this Policy prior to release.

²¹ SEC Action, ECF No. 18-1.

130. On December 28, 2018, Tesla announced that—also pursuant to the SEC Settlement—it had elected Ellison and Wilson-Thompson to its Board. In the same announcement, Tesla stated that it “intend[ed] to certify to the [SEC] that it and Elon have timely completed each of their respective actions required pursuant to the Settlement.”

131. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] seriously called into question Ellison’s independence and fitness to help Tesla comply with the SEC Settlement.

H. In 2019, Musk Continues to Willfully Flaunt Company Policies and the SEC Settlements

132. As 2019 began, Williams & Connolly chair Dane Butswinkas—who Bloomberg described as a “power lawyer”—replaced Moran as Tesla’s new General Counsel. In a December 2018 press release announcing the hiring, Butswinkas stated that he was personally motivated by Tesla’s mission to join the Company: “I would have never imagined joining a company in-house. But Tesla presents a unique and inspiring opportunity. Tesla’s mission is bigger than Tesla—one that is critical to the future of our planet. It’s hard to identify a mission more timely, more essential, or more worth fighting for.”

133. Yet, even with a new Board Chairperson, two new Directors, and a new General Counsel, Musk could not be controlled.

134. On February 19, 2019, at 7:15 p.m. Musk once again took to his Twitter account to announce: “Tesla made 0 cars in 2011, but will make around 500k in 2019.” This information was incorrect. Four hours later Musk tweeted: “Meant to say annualized production rate at end of 2019 probably around 500k, ie 10k cars/week. Deliveries for year still estimated to be about 400k.”

135. Statements regarding the Company’s production milestones are clearly material to Tesla shareholders as it addresses “projections, forecasts, or estimates regarding Tesla’s business” and thus triggers the pre-approval requirements imposed Senior Executives Communications Policy and the SEC Settlement.

136. On February 20, 2019, SEC staff asked Musk and Tesla to confirm whether Musk had complied with Tesla’s pre-approval procedures as required by the SEC Settlement. That same day, the Company’s brand new General Counsel Butswinkas announced he was leaving the Company—just months after declaring that Tesla’s mission was “critical to the future of our planet. It’s hard to identify a mission more timely, more essential, or more worth fighting for.”

137. On February 22, 2019, in correspondence on behalf of both Musk and Tesla, counsel for Tesla confirmed that Musk’s 7:15 tweet *had not been pre-*

approved, as required by the Policy. Only after Tesla’s “Designated Securities Counsel” saw the initial tweet did that counsel meet with Musk to draft the correction together.²²

138. On February 25, 2019 the SEC filed a Motion to for an Order to Show Cause in the SEC Action, seeking to hold Musk in contempt for violating the SEC Settlement (attached hereto with all exhibits as Exhibit C and incorporated herein by reference) (the “Contempt Motion”).

139. The Contempt Motion alleges that:

On February 20, 2019, SEC staff asked Musk and Tesla to confirm whether Musk had complied with Tesla’s pre-approval procedures as required by the Court’s Final Judgment before he published the 7:15 and 11:41 tweets. On February 22, 2019, in correspondence on behalf of both Musk and Tesla, counsel confirmed that Musk’s 7:15 tweet had not been pre-approved, as required by Tesla’s Policy and the Court’s Final Judgment. According to counsel, immediately upon seeing Musk’s 7:15 tweet for the first time *after* Musk had published it, Tesla’s “Designated Securities Counsel” arranged to meet with Musk, and they drafted Musk’s corrective 11:41 tweet together. *Id.* The first sentence of the 11:41 tweet acknowledged that Musk’s 7:15 tweet was not accurate: “*Meant to say* annualized production rate at end of 2019 probably around 500k, ie 10k cars/week.”

Ex. C at 5-6 (internal citations omitted). The Contempt Motion also alleges that Musk and Tesla also “acknowledged that they ‘are cognizant of the applicable policies and procedures mandated by the Final Judgments where a written

²² SEC Action, ECF No. 18-4 at 3.

communication contains, or reasonably could contain, material information.” Ex. C at 6 & Ex. C-4, at 3.

140. That same day, Musk responded by mocking the SEC, tweeting in response to a story about the SEC’s motion: “SEC forgot to read Tesla earnings transcript, which clearly states 350k to 500k. How embarrassing ... 🤔”

141. The following day, February 26, 2019, the Court overseeing the SEC Action ordered to respond to the SEC’s motion by March 11, 2019.

142. Once again, and even after the SEC had filed for an Order to Show Cause, Musk publicly insulted the SEC:



143. Early the next day, on February 27, 2019, Musk issued a series of cryptic tweets: “Thursday 2pm”; “California”; “Some Tesla news,” creating further confusion by changing his Twitter handle to “@ElonTusk.” Musk’s mysterious announcements fueled rabid speculation and drove Tesla’s stock price up about 6%.

144. Ultimately, Musk’s attempt to build hype may have backfired: the “Tesla news,” it turned out, was an announcement of a cheaper Model 3 that Tesla told its stockholders it would release in the next few weeks—alongside news that Tesla would not be profitable in the first quarter. Investors were deflated, undoing the speculative gains before and then some, driving the stock price down more than 3% by the close of the following day. One analyst noted that, “Given its seeming abruptness, it does not appear that [the] announcement was made from a position of strength[.]” That announcement and Tesla’s web site indicated that if someone wished to purchase a \$35,000 Model 3, they would receive it “quickly” and Tesla’s order page was updated to reflect that new \$35,000 Model 3 orders would be delivered within two to four weeks of orders.

145. Following the February 28 announcement, Tesla held an unannounced conference call that was not made public either prior to, or after, the call with selected analysts and press, during which a Tesla investor relations person stated “please do not publish the recording or transcripts of this call.” During the call, Musk

spoke on behalf of Tesla, refusing to discuss the \$35,000 Model 3 profit margins despite several questions from analysts and reporters on this point and divulged details about Tesla's plans for significant reductions in force and material information concerning delivery guidance for the \$35,000 Model 3—specifically that new orders would not be delivered until “let’s say June,” directly contradicting Tesla’s earlier guidance. Tesla itself has not issued a Form 8-K with a transcript of that call, despite a Tesla spokesperson advising a reporter from the L.A. Times to “refer to what Elon said on the call” for material information explaining the difference between the Tesla web site delivery estimate and the conference call guidance.

146. Following the February 28, 2019 unannounced and unpublished conference call, on March 1, 2019, Deutsche Bank reportedly published non-public details concerning Tesla’s profit margins on the \$35,000 Model 3. Deutsche Bank analyst Emmanuel Rosner published a report for Deutsche Bank’s clients called “SR M3 Likely Addresses Issues; Questions Now Back To Margin.” In this report, Deutsche Bank reportedly wrote:

In our follow-ups with the company, management outlined a high level bridge to maintaining profitability which includes savings from higher fixed cost absorption Tesla indicated that initially, the \$35k Model 3 will generate a positive cash gross margin (gross profit plus depreciation of approximately \$1,500). . . .

TESLA HAS INCURRED SIGNIFICANT MONETARY DAMAGES

147. Tesla has suffered significant monetary damages because of the conduct alleged herein. Not only has Tesla been forced to pay a \$20 million fine, it has had to pay to defend against the SEC Actions, securities class actions, and investigations related to the conduct described herein due to both Musk's actions and the inaction of the Board, causing substantial financial harm to Tesla.

148. Additionally, the value of Tesla has substantially depleted as a result of the misconduct and inaction alleged herein. Whereas Tesla stock traded intraday at \$342.52 just prior to the August 7 "funding secured" tweet by Musk, by the time Musk ultimately admitted after the close of the market on August 24, 2018 that he would not pursue a going-private transaction, the Company's stock price closed the next trading day, August 27, 2018, at \$319.27 per share. The result of this price drop was that Tesla's total market capitalization fell by approximately \$3.96 billion, hurting the Company and its stockholders.

149. Further, whereas Tesla stock price closed at \$305.64 per share prior to the post-market-close false and misleading deliveries estimate tweet by Musk on February 19, 2019 (*see supra* ¶¶12, 133), after Musk admitted his false statement, the next trading day, February 20, 2019, the Company's stock price closed at

\$302.56 per share. The result of this price drop was that Tesla's total market capitalization fell approximately \$500 million, hurting the Company and its stockholders.

150. On top of the substantial costs to Tesla arising from the misconduct that are summarized above, the misconduct and surrounding fallout imposed heavy downward pressure on Tesla's stock price at a time when the Company would soon need to spend cash to redeem convertible bonds if the stock price dropped too low.

151. Specifically, Tesla had \$920 million in convertible bonds that came due in March 2019 with a conversion price of \$359.87. If Tesla's stock was trading at less than \$359.87 per share, it would have had to spend cash to redeem the bonds. In the aftermath of the Go-Private Tweets and as a result of the misconduct alleged herein, Tesla's stock was trading well below the strike price for the convertible bonds. Indeed, commentators observed that "Elon Musk's latest twitter meltdown almost assures Tesla's \$920M bond will be paid in all cash." On March 1, 2019, commentators' predictions proved correct, and Tesla was forced to deplete its cash reserves to pay off the \$920 million convertible bonds in cash.

TESLA FACES IMMINENT AND IRREPARABLE HARM

152. Without the requested relief, the Company faces near-certain irreparable harm from Musk’s conduct and the Board’s unwillingness to achieve his compliance with the Company’s policies.

153. The inevitability of this harm is best evidenced by the fact that Musk *already* so wantonly flaunted the SEC—and that the Board failed to rein him in—in making many of the tweets described above *despite* the SEC settlement’s condition that Tesla to hire a securities lawyer to review all future social media communications of Tesla’s senior executives, including Musk. As a result, former SEC chair Harvey Pitt described Musk as “a CEO who, I guess for want of a better word, is irrepressible” and lacking “repression of his instinctive drive to go to Twitter.”

154. As a result, the Company faces irreparable harm in several respects.

155. *First*, Musk’s uncontrolled behavior threatens to explode the already considerable exposure faced by the Company from the Go-Private Tweets. Tesla has been named as a defendant in multiple class action lawsuits alleging that Musk’s actions violated federal securities laws. Tesla has incurred, and will continue to incur, substantial costs in connection with the misconduct described herein, including without limitation increased financing costs and costs resulting from

investigations, fines, attorneys' fees and expenses, advancement, and reputational harm. The SEC Settlements did not end the lawsuits and government investigations resulting from the misconduct, which continue to expose the Company to harm, and which in turn Musk's continued recklessness dramatically increases the Company's exposure.

156. **Second**, Musk's uncontrolled behavior may further imperil him and/or the Company as a result of ongoing *criminal* investigations by the Department of Justice ("DOJ"), which have reportedly intensified.²³

157. On September 18, 2018, it was reported that the DOJ had opened a preliminary instigation into Musk's tweets.²⁴ In addition, the FBI has launched a criminal investigation into whether Tesla misstated information about the production of the Model 3 sedans (the "Model 3 Investigation"). In February 2017, during an investor conference call, Musk claimed he was pushing suppliers to "to be ready for

²³ See, e.g., Dana Cimilluca et al., *Tesla Faces Deepening Criminal Probe Over Whether It Misstated Production Figures*, WALL ST. J., Oct. 26, 2018, <https://www.wsj.com/articles/tesla-faces-deepening-criminal-probe-over-whether-it-misstated-production-figures-1540576636>.

²⁴ Matthew Goldstein et al., *Justice Department Is Examining Tesla After Musk Comment*, N.Y. TIMES, Sept. 18, 2018, <https://www.nytimes.com/2018/09/18/business/tesla-elon-musk-justice-department.html>; Tom Schoenberg & Matt Robinson, *Tesla Is Facing U.S. Criminal Probe Over Elon Musk Statement*, BLOOMBERG, Sept. 18, 2018, <https://www.bloomberg.com/news/articles/2018-09-18/tesla-is-said-to-face-u-s-criminal-probe-over-musk-statements>.

a weekly run rate of 1,000 vehicles in July to 2,000 in August and 4,000 in September.” On July 2, 2017, Musk tweeted: “Looks like we can reach 20,000 Model 3 cars per month in Dec.” However, as of September 2017, Tesla’s body shop was not even fully functional. Tesla did not come close to meeting the production goals claimed by Tesla, producing only 2,700 Model 3’s for all of 2017. The FBI is investigating whether Musk disclosed production projections with knowledge that such production capability would be impossible to achieve.²⁵

158. On November 1, 2018, Tesla filed a Form 10-Q with the SEC, reporting that “the SEC has issued subpoenas to Tesla in connection with (a) Mr. Musk’s prior statement that he was considering taking Tesla private and (b) certain projections that we made for Model 3 production rates during 2017 and other public statements relating to Model 3 production. *The DOJ has also asked us to voluntarily provide it with information about each of these matters and is investigating.*”

159. *Finally*, Musk’s uncontrolled behavior—left unchecked—threatens Tesla’s ability to continue.

²⁵ Dana Cimilluca *et al.*, *Tesla Faces Deepening Criminal Probe Over Whether It Misstated Production Figures*, WALL ST. J., Oct. 26, 2018, <https://www.wsj.com/articles/tesla-faces-deepening-criminal-probe-over-whether-it-misstated-production-figures-1540576636>.

160. Already, “[t]he uncertainty about regulatory penalties could seriously hinder raising capital and prompt Wall Street firms that arrange securities offerings to progress with caution.”²⁶ For example, Gene Munster, managing partner of Loup Ventures and a leading tech analyst commented, “We still think there is work for Musk to do to rebuild that trust in the market.”²⁷

161. Similarly, Canaccord analyst Jed Dorsheimer said, “What was at best a premature announcement has generated three weeks of distraction from one of Tesla’s most important quarters to date. We feel less confident in the company’s ability to meet it’s 50,000 to 55,000 production guidance indicated at the end of [the second quarter].”²⁸

²⁶ Neal E. Boudette & Peter Eavis, *Elon Musk and Tesla Resolved One Issue. Now for the Rest*, *N.Y. Times*, Aug. 28, 2018, <https://www.nytimes.com/2018/08/27/business/tesla-elon-musk.html>.

²⁷ Chris Isidore, *Elon Musk’s Next Move: 5 Big Challenges Facing Tesla*, *CNNTECH*, Aug. 27, 2018, <https://money.cnn.com/2018/08/27/technology/elon-musk-tesla-challenges/index.html>.

²⁸ Michael Sheetz, *Elon Musk’s Take-Private Drama Created “Distraction” at Crucial Time for Tesla, Analyst Says*, *CNBC*, Aug. 28, 2018, <https://www.cNBC.com/2018/08/28/canaccord-tesla-privatization-plan-at-best-a-premature-distraction.html>.

162. Further, Professor Sonnenfeld explained that “Tesla investors must realize that they have a panicky, erratic, possibly self-destructive C.E.O. at the helm. No C.E.O. is ever this confused and confusing.”²⁹

163. The announcement of the SEC investigation caused Tesla’s stock price to plummet and analysts to downgrade Tesla’s rating. A Tesla analyst at JP Morgan confirmed in a note to investors that “[w]e are concerned that decreased confidence in Tesla on the part of investors may impact the company’s ability to raise capital on amenable terms.”

164. Indeed, as demonstrated by the fact that the Company was compelled to deplete its cash reserves that otherwise could have been redeemed with stock but for the downward pressure on the Company’s stock price caused by Musk’s unlawful tweets, further unchecked tweeting by Musk can have severe ramifications on the Company’s ability to secure financing in the future.

165. Finally, Musk’s unchecked behavior drives out the very voices in the Company meant to stand up to him and protect the Company and its investors. The day after Musk violated the SEC Settlement, Tesla’s esteemed new General

²⁹ David Gelles, *Why Elon Musk Reversed Course on Taking Tesla Private*, N.Y. TIMES, Aug. 25, 2018, <https://www.nytimes.com/2018/08/25/business/elon-musk-tesla-private.html>.

Counsel—who declared Tesla’s mission was “critical to the future of the planet”—quit. “I don’t think it’s a coincidence that the general counsel is leaving after a tweet that appears to violate the agreement,” said Rebecca Lindland, executive editor of RebeccaDrives.com, an auto-industry and car review website. “It calls into question the oversight of the board and the adherence to the S.E.C. settlement.”

166. Should Musk be permitted to continue making reckless communications, similar consequences will occur—with exponentially increasing harm.

DERIVATIVE AND DEMAND FUTILITY ALLEGATIONS

167. Plaintiffs bring this action derivatively in the right and for the benefit of Tesla to redress injuries suffered, and to be suffered, by Tesla as a direct result of the breaches of fiduciary duty by Defendants. Tesla is named as a Nominal Defendant solely in a derivative capacity.

168. Plaintiffs are stockholders of Tesla, were stockholders of Tesla at the time of the wrongdoing alleged herein, and have been stockholders of Tesla continuously since that time.

169. Plaintiffs will adequately and fairly represent the interests of Tesla in enforcing and prosecuting its rights, and has retained counsel competent and experienced in derivative litigation.

170. As a result of the facts set forth herein, Plaintiffs have not made any demand on the Board to institute this action against Musk. Such a demand would be a futile and useless act because the Tesla Board is incapable of making an independent and disinterested decision to institute and vigorously prosecute this action. The Board has consistently proven themselves to be impotent and incapable of preventing Musk from continuing his unlawful and damaging tweets, and a demand that the Board seek an order preventing Musk from tweeting would be fruitless because the Board itself has failed to do anything even as they are supposedly empowered by their own policies to stop Musk.

171. The Tesla Board is currently comprised of eleven (11) members—Defendants Musk, Buss, Denholm, Ehrenpreis, Gracias, Jurvetson, Murdoch, K. Musk, Rice, Ellison, and Wilson-Thompson. Thus, Plaintiffs are required to show that a majority, *i.e.*, six (6), cannot exercise independent objective judgment about whether to bring this action or whether to vigorously prosecute this action.

A. Demand Would Be Futile Because the Board (or, at least, a Majority of the Board) Faces a Substantial Likelihood of Liability as a Result of the Conduct Described Herein.

172. The Board is interested because they engaged in conduct which is not protected by the business judgment rule in connection with their failure to protect

the Company against Musk's harmful social media communications, including by enforcing [REDACTED] and the Senior Executives Communications Policy.

173. Accordingly, the Board faces a substantial likelihood of liability because they caused or otherwise permitted Tesla to issue false and misleading statements concerning the information described herein. Because of their advisory, executive, managerial, and directorial positions with Tesla, the Board had knowledge of material non-public information regarding the Company and were directly involved in the operations of the Company at the highest levels.

174. The Board either knew or should have known of the false and misleading statements that were issued on the Company's behalf and took no steps in a good faith effort to prevent or remedy that situation, proximately causing millions of dollars of losses for Tesla shareholders.

175. The Board (or at the very least a majority of Board members) cannot exercise independent objective judgment about whether to bring this action or whether to vigorously prosecute this action. For the reasons that follow, and for reasons detailed elsewhere in this Complaint, Plaintiffs have not made (and are excused from making) a pre-filing demand on the Board to initiate this action because making a demand would be a futile and useless act.

176. The Board approved and/or permitted the wrongs alleged herein to have occurred and participated in efforts to conceal or disguise those wrongs from the Company's stockholders or recklessly and/or with gross negligence disregarded the wrongs complained of herein and are therefore not disinterested parties.

177. Indeed, Rebecca Lindland, executive editor of RebeccaDrives.com, an auto-industry and car review website, stated that the departure of Tesla's esteemed general counsel after Musk plainly violated the SEC Settlements in February 2019 "***calls into question the oversight of the board*** and the adherence to the S.E.C. settlement."

178. In fact, many highly respected legal scholars have commented on the failures of the Board in addressing the SEC Action and Musk's underlying misconduct ***as the Board continued to neglect their duties:***

"What it tells us is **this board, as a strategic plan, must be using the Jim Jones-Jonestown suicide pact,**" Jeffrey Sonnenfeld, a professor at the Yale School of Management, said Friday on CNBC. ***"They are drinking the Kool-Aid of the founder. It is completely as self-destructive as Musk is."***³⁰

³⁰ James B. Stewart, *Elon Musk's Ultimatum to Tesla: Fight the S.E.C., or I Quit*, N.Y. TIMES, Oct. 2, 2018, <https://www.nytimes.com/2018/10/02/business/tesla-elon-musk-sec.html>.

179. Similarly, Professor Coffee authored an article entitled “Bonfire of the Vanities – 2018 Style: The Case of Elon Musk,”³¹ where he explained:

Rejecting such a favorable settlement is proof that [Musk] needs monitoring. *He didn’t have a legal leg to stand on*, and I’m sure his lawyer told him that. But he got very touchy about not being able to proclaim his innocence.

More important, one large unanswered question remains: **Where was Tesla’s board in all this? The only answer is: missing in action!** Indeed, it publicly stood behind Musk, expressing its support on Thursday, while he placed at risk a large percentage of Tesla’s value for no good reason (other than to avoid personal embarrassment).

The current Tesla board is an old boys club, and none of Musk’s buddies can hold him accountable. . . . *Without a strong monitor, our reckless entrepreneur will predictably fall victim again to his impulses.*

180. As another example, an October 4, 2018 article in the online version of *The Wall Street Journal*, entitled “Elon Musk Tweet Mocks the Securities and Exchange Commission,” observed that Musk’s “openly sneering at federal regulators who only days earlier charged him with fraud and sought to ban him from Tesla takes Mr. Musk’s defiance to a new level.” It also quoted former SEC Commissioner

³¹ John C. Coffee, Jr., *Bonfire of the Vanities – 2018 Style: The Case of Elon Musk*, CLS BLUE SKY BLOG, Oct. 2, 2018, <http://clsbluesky.law.columbia.edu/2018/10/02/bonfire-of-the-vanities-the-case-of-elon-musk/>.

Harvey Pitt, who characterized the tweet as “juvenile, narcissistic, stupid, erroneous and petulant.”³²

181. Even after Musk jeopardized the SEC Settlements by tweeting in violation of the Senior Executive Communications Policy, the Board said nothing as he publicly tweeted that “[s]omething is broken with SEC oversight.” That the Board still has not imposed meaningful restrictions on Musk’s use of his Twitter account, especially when dealing with Tesla’s business and its dealings with its securities regulator, the SEC, further shows the Board’s complete abdication of its fiduciary duties and its bad faith.

182. In other words, at all relevant times the Board was on explicit notice that they were failing in their duties, but nonetheless continued to authorize and/or permit Musk and the Company to make false statements that disseminated directly to the public and made available and distributed to shareholders, authorized and/or permitted the issuance of various false and misleading statements. The Board is the principal beneficiary of the wrongdoing alleged herein, and thus, could not fairly

³² Tim Higgins & Gabriel T. Rubin, *Elon Musk Tweet Mocks the Securities and Exchange Commission*, WALL ST. J., Oct. 4, 2018, <https://www.wsj.com/articles/elon-musk-tweet-appears-to-mock-the-securities-and-exchange-commission-1538685320>.

and fully prosecute such a suit even if they instituted it. Thus, for this reason alone, demand is excused.

183. Further, the Board is unable to independently and disinterestedly consider a demand, because they knowingly abdicated their duties and caused Tesla to violate the Final Judgments, as well as the SEC Settlements and the Senior Executive Communications Policy, all of which were approved by the Board, by failing to oversee Musk's tweets containing material non-public information, exposing the Board, and Tesla, to a substantial threat of liability. Therefore, demand is excused.

B. The Board is Not Independent.

184. Further, a majority of the Board is unable to independently and disinterestedly consider a demand to commence and vigorously prosecute this action.

i. Musk

185. The principal professional occupation of Musk is his employment as CEO of Tesla. According to the Company's most recent Proxy Statement, filed with the SEC on April 26, 2018, the Board acknowledges that Musk is not independent. Musk owns approximately 20% of Tesla's stock. In the March 28, 2018 decision in *In Re Tesla Motors, Inc. Stockholder Litigation*, C.A. No. 12711-VCS, the Delaware

Court of Chancery ruled that it was reasonably conceivable that Musk was the Company's controlling stockholder. Musk also admitted his control over Tesla during his *60 Minutes* interview in which he stated, "I can just call for a shareholder vote and get anything done that I want."

186. Musk is interested because he faces a substantial likelihood of liability for breaching his fiduciary duties of loyalty and good faith for his behavior, including the Go-Private Tweets, which have caused the SEC Action, damaged the Company through the SEC Settlement, and potentially violated the SEC Settlements.

187. Musk is also interested because he was Chairperson on the Board when the Company approved the SEC Settlements and adopted the Senior Executives Communications Policy. As Director, Musk faces a substantial likelihood of liability for the Board's failure to enforce the Senior Executives Communications Policy which led to his February 2019 tweets, the subsequent legal action of the SEC, and potential violation of the SEC Settlements.

188. For all of these reasons, Musk cannot disinterestedly and independently consider a demand to prosecute the claims alleged herein.

ii. Gracias

189. Gracias cannot disinterestedly and independently consider a demand against his close friend Musk.

190. The relationship between Musk and Gracias dates back to at least 2001, when Gracias invested in PayPal. Musk subsequently provided Gracias and Valor the opportunity to participate in several pre-IPO venture funding rounds for SolarCity, Tesla, and SpaceX, and appointed him to the board of directors of each company. In fiscal year 2015, Gracias received almost \$11 million in aggregate director compensation from Tesla and SolarCity, in addition to whatever he earned as a director of SpaceX.

191. In addition, both Musk and K. Musk are invested in various Valor funds. As manager of these funds, Gracias serves as a fiduciary to Musk and K. Musk. Valor's website includes a testimonial from Musk, in which he describes Gracias's value to Tesla: "I'd like to thank Valor for being a key investor. And not just an investor, but a strategic partner. I don't think we would've made it without their help, so thank you."³³ Gracias uses these testimonials and his relationship with Elon Musk to solicit fund investors and entrepreneurs seeking venture capital on behalf of Valor.

³³ Testimonials, <http://www.valorep.com/about> (follow Testimonials hyperlink) (last visited Feb. 28, 2019).

192. Gracias also received out-sized compensation as a member of the Tesla Board. By way of example, [REDACTED], Gracias earned [REDACTED] [REDACTED] for acting as a Tesla director.

193. In May 2018 Institutional Shareholder Services (“ISS”), a proxy advisory firm, recommended that shareholders vote against Gracias as director also in Tesla’s 2018 elections because after its analysis ISS viewed Gracias as non-independent. A May 19, 2018 *Bloomberg* article entitled “Tesla Shareholders Urged to Separate Chairman's Role From Musk” quotes ISS as stating:

Gracias was previously categorized as independent, but he is now categorized as non-independent because Valor Management Corp., of which Gracias is CEO and majority owner, provided consulting services to Tesla in 2017, ISS wrote, noting that VMC provided Tesla consulting services relating to “operational optimization” and was reimbursed over \$34,000 for those services.³⁴

194. In May 2018, CtW Investment Group (“CtW”) recommended that shareholders vote against Gracias as director also in Tesla’s 2018 elections. In a letter filed with the SEC on May 9, 2018 on Form PX14A6G, CtW wrote that “Antonio Gracias, a venture capital investor with multiple ties to Elon Musk, lacks

³⁴ Dana Hull, *Tesla Shareholders Urged to Separate Chairman’s Role from Musk*, BLOOMBERG, May 19, 2018, <https://www.bloomberg.com/news/articles/2018-05-19/tesla-shareholders-urged-to-separate-chairman-s-role-from-musk>.

the independence to serve as Lead Independent director, and has not initiated the much needed process of board renewal.” In this letter CtW also stated:

Antonio Gracias has extensive personal and business ties to Elon Musk, which we believe make him especially ill-suited for a leadership role on the Tesla board. Mr. Gracias, along with his venture capital firm Valor Management Corp., participated in four Tesla venture funding rounds between 2005 and 2008, as well as a pre-IPO venture debt raise in 2009, joined the Tesla board in 2007, and was named Lead Independent Director in 2010. Notably, he does not appear to have served on the board of any public companies that are not associated either with Valor (i.e., its portfolio companies) or Elon Musk. Mr. Gracias has been an investor in multiple companies started by Elon Musk, including PayPal, Solar City (where he was a director), and SpaceX (where he remains a director). Elon Musk in turn has invested in at least one Valor fund, and is a personal friend of Mr. Gracias, to whom he gave the second Tesla Roadster ever built.

195. Gracias is further incapable of impartially considering a demand to commence and vigorously prosecute this action [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Musk’s reckless social media communications continued.

196. Finally, Gracias is also interested because he was a director on the Board when the Company approved the SEC Settlements and adopted the Senior Executives Communications Policy. Gracias faces a substantial likelihood of

Kimbal Musk is Elon Musk's brother, and has served on the Tesla Board since April 2004. He is also the cousin of Lyndon and Peter Rive, Solar City's co-founders. Kimbal Musk is also an investor in two Valor venture capital funds, which are managed by Mr. Gracias. While Tesla acknowledges that Kimbal Musk is not an independent director, the board has nevertheless re-nominated him: we view this decision, following both Tesla's poor first quarter and the court's citation of extensive board conflicts, all but inexplicable. Or, rather, we would find it inexplicable if Tesla were anything like a well-run public company. Unfortunately, we know exactly why Kimbal Musk was re-nominated despite lacking any relevant industry experience or possessing a track record of effective public company board service [], and his re-nomination goes to the heart of the problems with Tesla's board: too many of these directors, including all three of this years' nominees, are incapable or unwilling to contradict Elon Musk's whims and finally insist on a board renewal process that provides shareholders with competent and effective representation.

200. In addition, K. Musk is not independent from Gracias (his brother's close friend with whom he sits on both the Tesla Board and the SpaceX Board), because of Gracias's control over private equity funds in which K. Musk has invested. [REDACTED]

201. Finally, K. Musk is also interested because he was a director on the Board when the Company approved the SEC Settlements and adopted the Senior Executives Communications Policy. K. Musk faces a substantial likelihood of liability for the Board's failure to enforce the Senior Executives Communications

Policy, which led to Musk's February 2019 tweets, the subsequent legal action of the SEC, and potential violation of the SEC Settlements.

202. For all of these reasons, K. Musk cannot disinterestedly and independently consider a demand to prosecute the claims alleged herein.

iv. Ehrenpreis

203. Ehrenpreis cannot disinterestedly and independently consider a demand against Musk. Ehrenpreis, his partner Pfund, and the various funds they manage have collectively invested in all three of Elon Musk's current companies—Tesla, SolarCity, and SpaceX. In addition, Ehrenpreis's interest in Mapbox and the payments to be received in connection therewith from Tesla impact his ability to disinterestedly consider a demand.

204. Ehrenpreis also received out-sized compensation as a member of the Tesla Board. By way of example, for serving as a Tesla director, [REDACTED] Ehrenpreis earned [REDACTED].

205. As an example of level of personal relationship between Ehrenpreis and Musk, in September 2015, Musk gave Ehrenpreis one of the first Tesla Model X's ever produced. And two years later, Musk gave Ehrenpreis the rights to the first Tesla Model 3. Ehrenpreis then paid for the Model 3 and gifted the car back to Musk as part of Musk's 46th birthday present.

206. As stated in the April 26, 2018 Proxy Statement (“2018 Proxy Statement”), Tesla admits:

Mr. Ehrenpreis is a manager of DBL Partners Fund III (“DBL III”). Each of Mr. Ehrenpreis and DBL III is a minority investor in SpaceX. Tesla and certain Tesla directors have relationships with SpaceX.

Mr. Ehrenpreis is a co-owner of DBL Partners. Another co-owner of DBL Partners is a manager of DBL Investors, which is also an investor in Space.

Mr. Ehrenpreis serves [as] a member of the board of directors of Mapbox Inc., a provider of custom online maps (“Mapbox”). In December 2015, Tesla entered into an agreement with Mapbox relating to a vehicle map-related project, pursuant to which Tesla made a prepayment of \$3 million in 2016 for certain fees. Tesla will pay Mapbox to the extent any additional fees for services are incurred in excess of such prepaid fees.

207. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

208. Finally, Ehrenpreis is also interested because he was a director on the Board when the Company approved the SEC Settlements and adopted the Senior Executives Communications Policy. Ehrenpreis faces a substantial likelihood of liability for the Board’s failure to enforce the Senior Executives Communications

Policy, which led to Musk's February 2019 tweets, the subsequent legal action of the SEC, and potential violation of the SEC Settlements.

209. For all of these reasons, Ehrenpreis cannot disinterestedly and independently consider a demand to prosecute the claims alleged herein.

v. Jurvetson

210. Jurvetson cannot disinterestedly and independently consider a demand against Musk. Jurvetson has not tried to hide his admiration for Elon Musk, stating that Musk's "passion is breathtaking" and praising his dedication and vision.

211. In addition, Jurvetson's venture capital firm has invested in Tesla, SolarCity, and SpaceX, and Jurvetson and/or his venture capital partner Fisher serve on the boards of directors of all three companies. DFJ is also a "significant stockholder of SpaceX," which as of January 2015 was valued at approximately \$12 billion. Both Jurvetson and DFJ serve as fiduciaries of [REDACTED] which is a limited partner of DFJ investment fund Draper Fisher Jurvetson Fund X, L.P.

212. The 2018 Proxy Statement represents that "Jurvetson has been a member of [Tesla's] Board since June 2009. Mr. Jurvetson has been on a leave of absence from the Board since November 2017. . . . Mr. Jurvetson is a director of SpaceX, from which he is also on a leave of absence." The 2018 Proxy Statement

also states that “Mr. Jurvetson was a Managing Director of Draper Fisher Jurvetson [“DFJ”], a venture capital firm, from 1995 to 2017.”

213. The 2018 Proxy Statement provides no information or explanation for Jurvetson taking a leave of absence from the Tesla and SpaceX Boards. Tesla also provides no information as to why Jurvetson “left” DFJ in 2017. In fact, Jurvetson was forced out of DFJ after it completed an investigation regarding his treatment of women at DFJ. As reported in a *USA Today* article on November 18, 2018:

Steve Jurvetson left his venture capital firm after an internal investigation ***uncovered a pattern of deception*** with women including extramarital affairs, some of which blurred the line between his professional and personal lives.³⁵

214. Nonetheless, thanks to his friendship with Musk—who himself was implicated in one Jurvetson’s infamous parties—Jurvetson has not been forced out of his roles at Tesla and SpaceX, for both of which he continues to attend events as a VIP, and Tesla’s website still lists him as a Director.

215. In addition, Jurvetson also received out-sized compensation as a member of the Tesla Board. By way of example and as disclosed in Tesla’s 2016

³⁵ Jessica Guynn, *Steve Jurvetson Left DFJ Over Pattern of Deception, Affairs with Women, Report Says*, USA TODAY, Nov. 18, 2017, <https://www.usatoday.com/story/tech/2017/11/18/steve-jurvetson-left-dfj-over-pattern-deception-affairs-women-report-says/878237001/>.

Proxy Statement, for serving as a Tesla director, Jurvetson received compensation valued at \$6,095,984 in 2015.

216. On March 28, 2018 and in that action styled as *In Re Tesla Motors, Inc. Stockholder Litigation*, C.A. No. 12711-VCS, at 52 (Del. Ch.) (Trans. ID 61851776) (emphasis added), the court found that Jurvetson is “beholden” to Musk, stating:

Jurvetson also has substantial connections with the third entity in Musk’s “pyramid,” SpaceX. He serves as a member of the board of directors of SpaceX. And between 2009 and 2015, DFJ participated in four early venture funding rounds for SpaceX and remains a “significant stockholder.”

Musk, in turn, is a frequent investing partner with DFJ principals, including Jurvetson and DFJ co-founder, Tim Draper, and is invested in DFJ itself. “Although the actual extent of these relationships is not altogether clear at this point in the litigation, the existence of these interests and relationships is enough” to allow a reasonable inference that *Jurvetson is beholden to Musk*.

217. As an example of Jurvetson being beholden to Musk, Musk gave Jurvetson the first Tesla Model S ever made, and gave him the second Model X ever made.

218. Finally, Jurvetson is also interested because he was a director on the Board when the Company approved the SEC Settlements and adopted the Senior Executives Communications Policy. Jurvetson faces a substantial likelihood of liability for the Board’s failure to enforce the Senior Executives Communications

Policy, which led to Musk's February 2019 tweets, the subsequent legal action of the SEC, and potential violation of the SEC Settlements.

219. For all of these reasons, Juvetson cannot disinterestedly and independently consider a demand to prosecute the claims alleged herein.

vi. Buss

220. Buss is forever indebted to Musk. From August 2014 to February 2016 Buss served as the Chief Financial Officer ("CFO") of SolarCity Corp. On information and belief, Buss received approximately \$32 million for acting as CFO of SolarCity Corp for this very short period of work. Buss's current primary source of income is his lucrative position as a director of Tesla. In fiscal year 2017, Buss earned an astounding \$3,357,002 in director fees and [REDACTED], earned [REDACTED]. As a result, Buss was able to retire at age 52.

221. Accordingly, Buss cannot disinterestedly and independently consider a demand against (i) Denholm, Ehrenpreis, and Gracias, who as members of Tesla's Compensation Committee, make recommendations to the Board as to director compensation; or (ii) his fellow Board members as a whole, who consider the Compensation Committee's recommendations and ultimately approve director compensation.

222. Finally, Buss is also interested because he was a director on the Board when the Company approved the SEC Settlements and adopted the Senior Executives Communications Policy. Buss faces a substantial likelihood of liability for the Board's failure to enforce the Senior Executives Communications Policy, which led to Musk's February 2019 tweets, the subsequent legal action of the SEC, and potential violation of the SEC Settlements.

223. For all of these reasons, Buss cannot disinterestedly and independently consider a demand to prosecute the claims alleged herein.

vii. Denholm

224. Denholm cannot disinterestedly and independently consider a demand against Musk. Indeed, in an interview with *60 Minutes* after Denholm was elected Chairperson as a result of the SEC Settlements, Musk stated that he "handpick[ed] her" and said it was "not realistic" to think Denholm could "watch over" him.

225. Further, Denholm is not capable of considering a pre-litigation demand because of the out-sized compensation she receives as a member of the Tesla Board of Directors. By way of example and as disclosed in Tesla's various Proxy Statements, for serving as a Tesla director Denholm received compensation valued at \$7,181,066 in 2014, \$4,979,785 in 2015, \$4,921,810 in 2017, and [REDACTED]

[REDACTED] By way of comparison, on January 1, 2017, Denholm joined Telstra (a

telecommunications and technology company) as its Chief Operating Officer (“COO”) and earned \$890,006 in total compensation for that year. Denholm became Telstra’s CFO on October 1, 2018.

226. Finally, Denholm is also interested because she was a director on the Board when the Company approved the SEC Settlements and adopted the Senior Executives Communications Policy. Denholm also faces a substantial likelihood of liability for the Board’s failure to enforce the Senior Executives Communications Policy, which led to Musk’s February 2019 tweets, the subsequent legal action of the SEC, and potential violation of the SEC Settlements.

227. For all of these reasons, Denholm cannot disinterestedly and independently consider a demand to prosecute the claims alleged herein.

viii. Murdoch

228. Murdoch also received out-sized compensation as a member of the Tesla Board. As disclosed in Tesla’s 2018 Proxy Statement, for serving as a Tesla director, Murdoch received compensation valued at \$1,926,972 in 2017 [REDACTED]

229. Finally, Murdoch is also interested because he was a director on the Board when the Company approved the SEC Settlements and adopted the Senior Executives Communications Policy. Murdoch also faces a substantial likelihood of

liability for the Board's failure to enforce the Senior Executives Communications Policy, which led to Musk's February 2019 tweets, the subsequent legal action of the SEC, and potential violation of the SEC Settlements.

230. For all of these reasons, Murdoch cannot disinterestedly and independently consider a demand to prosecute the claims alleged herein.

ix. Rice

231. Rice is also not able to consider a pre-suit demand because of the out-sized compensation she received as a member of the Tesla Board. As disclosed in Tesla's 2018 Proxy Statement, for serving as a Tesla director, Rice received compensation valued at \$1,933,914 in 2017 and [REDACTED].

232. Finally, Rice is also interested because he was a director on the Board when the Company approved the SEC Settlements and adopted the Senior Executives Communications Policy. Rice also faces a substantial likelihood of liability for the Board's failure to enforce the Senior Executives Communications Policy, which led to Musk's February 2019 tweets, the subsequent legal action of the SEC, and potential violation of the SEC Settlements.

233. For all of these reasons, Rice cannot disinterestedly and independently consider a demand to prosecute the claims alleged herein.

x. **Ellison**

234. Ellison cannot disinterestedly and independently consider a demand against his “very close friend” Musk.

235. [REDACTED]

236. Finally, Ellison is also interested because he faces a substantial likelihood of liability for the Board’s failure to enforce the Senior Executives Communications Policy, which led to Musk’s February 2019 tweets, the subsequent legal action of the SEC, and potential violation of the SEC Settlements.

237. Accordingly, Ellison cannot disinterestedly and independently consider a demand.

COUNT I
Declaratory Judgment Against Musk for Breaches of Fiduciary Duties
in his Capacities as Director and Officer

238. Plaintiffs incorporate by reference and reallege each and every allegation contained above, as though fully set forth herein.

239. Plaintiffs, on behalf of Tesla, have no adequate remedy at law.

240. A clear controversy exists between Plaintiffs and Musk as to whether Musk breached his fiduciary duties as both a Director and Officer of Tesla through his Twitter communications as described above, including those communications which violated the SEC Settlements as entered as final judgments in the SEC Action and the Tesla SEC Action; and/or applicable Company policies, including the Senior Executives Communications Policy.

241. Judicial declaration is necessary and appropriate at this time to enable the parties to ascertain their rights and duties to each other.

COUNT II
Declaratory Judgment Against the Board
For Breaches of Fiduciary Duties

242. Plaintiffs incorporate by reference and reallege each and every allegation contained above, as though fully set forth herein.

243. Plaintiffs, on behalf of Tesla, have no adequate remedy at law.

244. A clear controversy exists between Plaintiffs and the director defendants as to whether they breached his fiduciary duties as both directors of Tesla by failing to control Musk's Twitter communications as described above and allowing Musk to continue to disseminate false and misleading information concerning Tesla through his Twitter account without necessary oversight or controls, including those communications which violated the SEC Settlements as

entered as final judgments in the SEC Action; and/or applicable Company policies, including the Senior Executives Communications Policy.

245. Judicial declaration is necessary and appropriate at this time to enable the parties to ascertain their rights and duties to each other.

COUNT III
Derivative Claim Against Musk for Breaches of his Fiduciary Duties in his Capacities as Director and Officer

246. Plaintiffs incorporate by reference and re-allege every allegation contained above, as though fully set forth herein.

247. Plaintiffs, on behalf of Tesla, have no adequate remedy at law.

248. Musk, as a director and CEO, owes the Company and its stockholders the fiduciary duties of due care, good faith, and loyalty.

249. As alleged above, Musk failed to act in accordance with these fiduciary duties. Specifically, based on the facts alleged above, the Go-Private Tweets constituted an intentional dereliction of his fiduciary duties and a conscious disregard for his responsibilities not to make false and materially misleading statements to the market and not to attempt to manipulate the market for Tesla stock.

250. Further, Musk knowingly violated Tesla's policies, the SEC Settlements, and the Final Judgments, breaching his fiduciary duties, subjecting Tesla to further damages as a result of those violations.

251. Any breach of the duty of due care by Musk is not exculpated in his capacity as an officer of Tesla.

252. As a direct and proximate result of these breaches of fiduciary duty, Tesla has sustained and will continue to sustain damages, for which Musk is liable to the Company.

COUNT IV
Derivative Claim Against the Tesla Board
For Breaches of Fiduciary Duties

253. Plaintiffs incorporates by reference and re-allege every allegation contained above, as though fully set forth herein.

254. Plaintiffs, on behalf of Tesla, have no adequate remedy at law.

255. The Tesla Board owes the Company and its stockholders the fiduciary duties of due care, good faith, and loyalty.

256. The Tesla Board acted with a conscious disregard for their responsibilities to ensure that the Company's public statements, including those that Musk made on behalf of the Company through his personal Twitter account, were not false and materially misleading, including by failing to immediately correct the Go-Private Tweets and later by failing to comply with the SEC Settlement.

257. The Tesla Board also acted with a conscious disregard for their responsibilities to ensure that the Company's public statements, including those that

Musk made through his personal Twitter account, were not false and materially misleading, by failing to put into place any sort of meaningful pre-clearing mechanism with respect to Musk's tweets or to otherwise control his dissemination of false or misleading information concerning Tesla. The Tesla Board failed to provide such controls despite knowing that Musk disseminated false, misleading, irresponsible and defamatory information via his Twitter account and despite filing with the SEC a Form 8-K on November 5, 2013, in which the Company advised shareholders and the market generally that Musk's Twitter account would provide "material information" concerning Tesla.

258. Further, the Board failed to oversee Musk, knowingly acquiescing to his violations of Tesla's policies, the SEC Settlements, and the Final Judgments, breaching their fiduciary duties, and subjecting Tesla to further damages as a result of those violations.

259. As a direct and proximate result of these breaches, Tesla, Plaintiff, and all other Tesla stockholders have sustained and will continue to sustain damages, for which the Tesla Board are liable to the Company.

COUNT V
Permanent Injunction Prohibiting Musk from Tweeting
about Tesla on his Personal Twitter Account And Enjoining
Tesla From Using Musk's Personal Twitter Account
To Disseminate Material Information About Tesla

260. Plaintiffs incorporate by reference and reallege each and every allegation contained above, as though fully set forth herein.

261. Plaintiffs, on behalf of Tesla, have no adequate remedy at law.

262. By reason of his position as officer and director of Tesla, Musk owes Tesla the highest obligation of fair dealing, loyalty, and due care. Musk has repeatedly violated and breached his fiduciary duties by communicating about Tesla through his Twitter account, including communications that violated the SEC Settlements as entered as final judgments in the SEC Actions; and/or applicable Company policies, including the Senior Executives Communications Policy.

263. Absent injunctive relief, Musk and the Board will continue to breach their fiduciary obligations in Musk's communications about Tesla on his personal Twitter account, causing the Company to suffer significant harm.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs prays that this Court:

- A. Grant the declaratory relief as requested herein;
- B. Permanently enjoin Musk from using his personal Twitter account to communicate about Tesla;
- C. Permanently enjoining Tesla from using Musk's personal Twitter account to disseminate material information about Tesla;
- D. Find Defendants liable for their breaches of fiduciary duties owed to the Company;
- E. Award, against the Defendants and in favor of Tesla, damages, together with pre- and post-judgment interest;
- F. Award to Plaintiffs the costs and disbursements of the action, including reasonable attorneys' fees, accounts' and experts' fees, costs and expenses; and
- G. Grant such other and further relief as the Court deems just and proper.

Dated: March 7, 2019

GRANT & EISENHOFER P.A.

/s/ Michael J. Barry

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