



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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DUSTIN SEIDMAN,)
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Plaintiff,)
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vs.)
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ELON MUSK, BRAD W. BUSS,)
ROBYN M. DENHOLM, IRA)
EHRENPREIS, ANTONIO J. GRACIAS,)
STEVEN JURVETSON, JAMES)
MURDOCH, KIMBAL MUSK, and)
LINDA JOHNSON RICE,)
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Defendants,)
))
and)
))
TESLA, INC., a Delaware Corporation,)
))
Nominal Defendant.)
_____)

C.A. No. _____

VERIFIED STOCKHOLDER DERIVATIVE COMPLAINT

Plaintiff Dustin Seidman (“Plaintiff”), derivatively on behalf of Defendant Tesla, Inc. (“Tesla” or the “Company”), brings this Complaint against Elon Musk (“Musk”) – Tesla’s co-founder, Chief Executive Officer (“CEO”), controlling stockholder, and former chairman of the board of directors (“Tesla Board” or the “Board”) – and all other members of the Tesla Board for their knowing and flagrant breaches of their fiduciary duties of due care, good faith, and loyalty owed

to the Company and its stockholders. The allegations of the Complaint are based upon Plaintiff's personal knowledge with regard to Plaintiff's holding of Tesla stock, and on information and belief based on the investigation of Plaintiff's counsel and their review of publicly available information, including Musk's Twitter postings, news articles, analyst reports, the Company's website and public blog postings, filings with the United States Securities and Exchange Commission ("SEC"), and court filings, as to all other matters.

I. NATURE OF THE ACTION

1. This action arises from Musk knowingly disseminating a series of materially false and misleading statements concerning a purported "going private" transaction for which he claimed he had "[f]unding secured" for a transaction priced "at \$420" per share. He made such claims in bad faith on his Company-sanctioned personal Twitter account and on the Company's own website from August 7, 2018 through August 24, 2018.

2. As of the time Musk knowingly disseminated this false information, the Board had failed to put in place any controls on Musk's use of his Twitter account to disseminate information pertaining to Tesla, despite the Board knowing that he had previously spread false, misleading, irresponsible and defamatory information via his Twitter account. The Board's failure in this regard was all the more egregious because Tesla had issued a November 5, 2013 Form 8-K, which

stated expressly that Musk's account provided "material information" concerning Tesla. Moreover, at no time during the period of Musk's false statements from August 7 to August 24, 2018, did the Board correct any of the false statements made by Musk. Accordingly, this action also arises from the fact that the Board failed to correct these false statements despite knowing that they were false.

3. As a result of these materially false and misleading statements, Tesla has been, and will continue to be, harmed. To date, the Company 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 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.

4. Tesla, as well as Plaintiff and all other Tesla stockholders, have also been harmed by the impact that Musk's false statements have had on the Company's market capitalization and stock price. 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 market price closed the next trading day, August 27, 2018, at \$319.27 per share. Thus, the overall share price impact was \$23.25 per share (\$342.52 minus \$319.27), and

Tesla's market capitalization had fallen by approximately \$3.96 billion (stock price impact times 170.59 million shares outstanding), hurting the Company and its stockholders. This action seeks to redress the many harms caused to the Company by the breaches of fiduciary duties by Musk and the Board.

II. THE PARTIES

5. Plaintiff is a current stockholder of the Company and was a stockholder at the time of the misconduct complained of herein.

6. Nominal Defendant Tesla is a Delaware corporation headquartered in Palo Alto, California. Tesla makes electric cars and energy generation and storage systems. The Company was founded in 2003 by a group of engineers including Elon Musk. Its stock trades on the NASDAQ Global Select Market under the ticker symbol "TSLA." It reports on a calendar year. Tesla's Board is comprised of nine members – Elon Musk, Brad W. Buss, Robyn M. Denholm, Ira Ehrenpreis, Antonio J. Gracias, Stephen T. Jurvetson, Kimbal Musk, James Murdoch, and Linda Thompson Rice. Each of the directors is a Defendant in this Complaint.

7. Tesla operates in the United States, China, Norway, and internationally. The Company operates in two segments: Automotive; and Energy Generation and Storage. The Automotive segment offers sedans and sport utility vehicles and provides electric vehicle powertrain components and systems to other manufacturers, as well as services for electric vehicles through its company-owned

service centers and mobile technicians. The Automotive segments sells its products through a network of Company-owned stores and galleries. The Energy Generation and Storage segment offers energy storage products, such as rechargeable lithium-ion battery systems for use in homes, commercial facilities, and utility grids. It designs, manufactures, installs, maintains, leases, and sells solar energy systems to residential and commercial customers and sells renewable energy to residential and commercial customers. The Company sold its first car in 2008. Tesla was formerly known as Tesla Motors, Inc. and changed its name to Tesla, Inc. in February 2017.

8. Defendant Elon Musk, co-founder of Tesla, has served as the Company's CEO since 2008. He served as the Chairman of the Board from 2004 until October 2018, when he was required to step down as part of the SEC Settlement (defined below). Musk is Tesla's largest stockholder, owning approximately 20% of Tesla's outstanding common stock through the Elon Musk Revocable Trust. Musk also served as the Company's Chief Product Architect.¹ Tesla has acknowledged in its SEC filings that Musk is not an independent director.

¹ In its SEC filings, Tesla has stated that it is "highly dependent on the services of Elon Musk," and states that if it were to lose Musk's services, the loss would "disrupt [Tesla's] operations, delay the development and introduction of [its] vehicles and services, and negatively impact [its] business, prospects and operating results as well as cause [its] stock price to decline."

9. Since May 2002, Musk has also served as the CEO, chief technology officer, and chairman of Space Exploration Technologies Corporation (“SpaceX”), a private aerospace manufacturer and space transport services company. Musk also served as the Chairman of SolarCity Corporation (“SolarCity”) from 2006 until it was acquired by Tesla in 2016. On the August 1, 2016 conference call the day that Tesla announced the proposed acquisition of SolarCity, Musk repeatedly referred to Tesla as “my company.” Elon Musk is also an investor in Valor Equity Partners II, L.P. (“Valor Equity”), an investment firm managed by Valor Management Corporation. Defendant Antonio Gracias is the CEO, director and majority owner of Valor Management Corporation.

10. Defendant Brad W. Buss has been a member of the Tesla Board since November 2009. Tesla’s 2015 proxy statement acknowledged that Buss is not an independent director. Buss received compensation valued at \$4,954,785 as a Tesla director in 2015 and \$3,357,002 in 2017. He has been a member of the Board’s Compensation Committee since July 2017. He is also a member of the Audit Committee and the Nominating and Governance Committee. From August 2014 until he retired in February 2016, Buss served as Chief Financial Officer of SolarCity, which was founded by Musk and bought by Tesla in a widely criticized transaction. Buss received total compensation of \$32 million from his employment at SolarCity. Buss was one of three directors on the special committee formed in

August 2018 in connection with Musk’s announced consideration of a transaction to take the Company private (the “Going Private Transaction”). Although the special committee members were claimed by the Board to be independent, Plaintiff contests that they were in fact independent.

11. Defendant Robyn M. Denholm has served as a director of Tesla since August 2014. She is also a member of Compensation Committee and Chair of the Audit Committee. As a Tesla director, Denholm received compensation valued at \$7,181,066 in 2014, \$4,979,785 in 2015, and \$4,921,810 in 2017. Ms. Denholm was one of three directors on the special committee formed in August 2018 to evaluate the Going Private Transaction. Although the special committee members were claimed by the Board to be independent, Plaintiff contests that they were in fact independent.

12. Defendant Ira Ehrenpreis has been a member of Tesla’s Board since 2007. He is the Chair of the Nominating and Governance Committee and the Compensation Committee. Ehrenpreis has been a Managing Partner and co-owner of venture capital firm DBL Partners. He is also a manager of DBL Partners III. Both Ehrenpreis and DBL III are investors in SpaceX, a company controlled by Musk.² In addition, Ehrenpreis is an investor in, and serves on the board of

² Ehrenpreis co-founded DBL Partners with fellow managing partner and co-owner Nancy Pfund, who was an observer on the Tesla Board from 2006 to 2010.

directors of, Mapbox, Inc., which provides custom online maps. Tesla and Mapbox entered into an agreement in December 2015 pursuant to which Tesla was to pay Mapbox ongoing fees, including \$5 million over the first twelve months of the agreement.

13. Defendant Antonio Gracias has been a member of Tesla's Board since 2007 and has served as the Company's purported "Lead Independent Director" since 2010. In that role, Gracias has broad authority to direct the actions of Tesla's purportedly independent directors. He is a member of the Company's Audit Committee, Nominating and Governance Committee, and the Compensation Committee. Gracias used to be a member of the SolarCity board of directors. Currently, he is a member of the board of directors of SpaceX, a company that Musk controls. Musk and Gracias are close friends; indeed, Musk gave Gracias the second Tesla Roadster ever made.

14. In addition, Gracias is the founder and has served as the managing partner, CEO, Chief Investment Officer, director and sole owner of private equity firm Valor Management Corp., which does business as Valor Equity Partners ("Valor"). Valor and Gracias participated in several pre-IPO funding rounds for

Ehrenpreis was also a member of the SolarCity Board and one of two members of that board's special committee that negotiated and approved Tesla's acquisition of SolarCity. Pfund is also reported to be a close friend of Musk and has said that "[h]e's always been a master of the universe in my mind."

Tesla and Solar City. Through Valor funds, Gracias participated in four Tesla venture funding rounds between 2005 and 2008, as well as a pre-IPO venture debt offering in 2009. Prior to Tesla's IPO, Valor owned nearly five million Tesla shares. Gracias and his Valor funds also contributed nearly \$25 million to SolarCity's pre-IPO preferred stock financing round. Musk has invested \$2 million in each of the two Valor funds.

15. In May 2018, Proxy adviser Institutional Shareholder Services ("ISS") recommended that shareholders vote against Gracias because he is not sufficiently independent for key board committees. ISS also cited concerns regarding the lack of performance-based elements in Tesla's pay plan in recommending against Gracias, a Compensation Committee member. In June 2018, CtW Investment Group similarly advised against the re-election of Gracias because he "lacks the independence to serve as Lead Independent director, and has not initiated the much needed process of board renewal."

16. Defendant Stephen Jurvetson has been a member of the Board since 2009. Jurvetson received compensation valued at \$6,095,984 as a Tesla director in 2015. He also serves as a member of the board of SpaceX, which is controlled by Musk, and accepted the Silicon Valley Churchill Club's award in 2009 on behalf of SpaceX. Jurvetson was a managing director of venture capital firm Draper Fisher Jurvetson ("DFJ") from 1995 to late 2017. Between 2006 and 2008, before

Tesla's IPO in 2010, DFJ invested in three of Tesla's venture funding rounds. It also invested in SolarCity. After its initial investment in 2006, between 2006 and 2011, DFJ invested at least \$18.9 million in SolarCity via four venture capital funding rounds. Musk is an investor in and limited partner of Draper Fisher Jurvetson Fund X, L.P., an affiliate fund of DFJ. Jurvetson is also a close personal friend of Musk, as evidenced in part by the fact that Musk gave Jurvetson the first Tesla Model S and the second Tesla Model X ever made. Jurvetson also hosted an infamously lewd party at his home in Silicon Valley. *See* <http://fortune.com/2018/01/11/elon-musk-silicon-valley-party/>. As detailed below, after this party, Jurvetson resigned from DFJ and took a leave of absence from the boards of both Tesla and SpaceX. Tesla was criticized over its handling of this, as detailed in an article entitled "Tesla Stalling Over Musk's Board Buddy Raises Investor Hackles," published by Bloomberg in May 2018. Jurvetson remains on leave.

17. Defendant Kimbal Musk has been a member of Tesla's Board since 2004. Kimbal is the brother of Elon Musk. As admitted in the Company's SEC filings, Kimbal Musk is not an independent director. Kimbal Musk received compensation valued at \$4,964,381 as a Tesla director in 2015. Kimbal also serves as a director of SpaceX, and is a limited partner and investor in two Valor funds run by fellow Director Defendant Gracias, including one in which Elon Musk has

also invested. CtW Investment Group urged Tesla investors to vote against Kimbal's re-election to the Board in June 2018 noting that "shares several of Mr. Gracias' conflicts."

18. Defendant James Murdoch has been a member of Tesla's Board since July 2017. He is also a member of the Audit Committee and the Nominating and Governance Committee. Mr. Murdoch received compensation valued at \$1,926,972 for his service on the Tesla Board in 2017. In May 2018, ISS recommended that Tesla stockholders vote against the election of Murdoch as a Tesla Board member because he was "overboarded" because of his membership on Twenty-First Century Fox Inc. and other boards. Similarly, CtW Investment Group urged Tesla stockholders to vote against his reelection to the Board in June 2018. The Group's letter stated: "Despite joining the Tesla board on July 13, 2017, he has not been assigned to any board committees. While adding new directors was a step in the right direction, the choice of Mr. Murdoch as one of those directors does not appear well considered, given his troubled history as an executive and director, the disturbing parallels between nepotistic practices at Fox and Tesla, and his lack of relevant industry experience."

19. Defendant Linda Johnson Rice has been a member of Tesla's Board since July 2017. She is also a member of the Compensation Committee. Ms. Rice received compensation valued at \$1,933,914 for her service on the Tesla Board in

2017. Ms. Rice is also one of the members of the special committee formed to evaluate the Going Private Transaction. Although the special committee members were claimed by the Board to be independent, Plaintiff contests that they were in fact independent.

20. The defendants identified above (excluding Nominal Defendant Tesla) are referred to collectively herein as the Director Defendants, the Board and/or the Tesla Board.

III. WRONGFUL ACTS AND OMISSIONS

Background to Musk's and the Company's False Statements

21. Musk disseminated false information concerning Tesla to stockholders in an effort to, among other things, hurt short-sellers of Tesla stock.

22. In an email sent on August 7, 2018 to Tesla employees, Musk and the Board stated that Tesla was “the most shorted stock in the history of the stock market.” According to a Complaint filed by the SEC on September 27, 2018 against Musk for misleading Tesla investors (“SEC Complaint”), by August 2018 “more than \$13 billion worth of Tesla shares were being ‘shorted,’³ meaning they were sold by investors who did not own them at the time of the sale. Investors who

³ According to Yahoo! Finance, as of September 13, 2018, the Company had 170.59 million shares outstanding, of which 25.19% were held by Company insiders; 127.5 million shares were in the public float; and 33.46 million shares were held short, which equated to 28.5% of the shares in the public float.

sell stock short typically believe the price of the stock will fall and hope to buy the stock at the lower price to cover their short positions and earn a profit.” As the SEC Complaint further states: “If the price of the stock rises, short sellers who then exit their short positions by purchasing the stock at the higher price will incur losses.”

23. A complaint filed by Andrew E. Left, a noted short-seller, who asserted violations of the federal securities laws against Tesla and Musk on September 6, 2018, on behalf of himself and a class of investors who purchased, sold, or otherwise transacted in Tesla securities between August 7, 2018 and August 17, 2018 (“Left Complaint”), similarly explains that shorting or short-selling “is the sale of a security that is not owned by the seller or that the seller has borrowed.” The Left Complaint continues:

The practice is motivated by the belief that a security’s price will likely decline, enabling it to be purchased back at a lower price at a profit. By shorting a stock, short-sellers integrate their own experience and interpretation of public information into the market price of that stock, and have on numerous occasions, successfully anticipated stock declines. For example, on August 6, 2018, during a debate video-streamed on Cheddar, Mark Spiegel, managing member of Stanphyl Capital and well-known Tesla shortseller, questioned the feasibility of a hypothetical Tesla buyout at a \$70 billion enterprise value, stating the stock was “grotesquely overvalued.”

24. Both the SEC Complaint and the Left Complaint note that Musk had a long-standing public feud with short-sellers. The SEC Complaint details that

“Musk has complained that Tesla has been unfairly targeted by short-sellers and predicted that short sellers would be ‘burned.’” The Left Complaint states that Musk often used his Twitter account to taunt and confront skeptics of the Company. These complaints provide two examples of threats Musk had communicated on his Twitter account against Tesla stock short-sellers in the months leading up to his August 7, 2018 tweets that stand at the heart of this case:

On May 4, 2018, Musk tweeted, “*Oh and uh short burn of the century comin [sic] soon. Flamethrowers should arrive just in time*” and that the “*sheer magnitude of the short carnage will be unreal. If you’re short, I suggest tiptoeing quietly to the exit[.]*”

On June 17, 2018, Musk further tweeted that Tesla short-sellers had “*about three weeks before their short position explodes.*”⁴

25. These were not Musk’s first statements showing his antipathy and disdain for investors who shorted the Company’s stock. For instance, on November 15, 2017, in an interview with Rolling Stone magazine, Musk railed against short sellers, calling them “jerks who want us to die.”⁵

⁴ Emphasis has been added in this Complaint by using bolded and italicized type, unless otherwise noted.

⁵ Other Musk tweets similarly showed the danger of the Tesla Board allowing Musk to make statements via Twitter on behalf of and/or about Tesla without pre-clearing them through appropriate Company and legal advisor channels. For instance, under a caption “Tesla Goes Bankrupt,” Musk tweeted the following statements on April 1, 2018: “Despite intense efforts to raise money, including a last-ditch mass sale of Easter Eggs, we are sad to report that Tesla has gone completely and totally bankrupt. So bankrupt, you can’t believe it.” And, while

26. Based on these and other statements that Musk had made in the years leading up to his “funding secured” tweets of August 7, 2018, each member of the Board knew (a) of Musk’s antipathy to the short-sellers who had made the Company “the most shorted stock in the history of the stock market,” and (b) that Musk was planning to take an imminent, affirmative action to “burn” investors who were holding short positions in Tesla stock. As the SEC Complaint states:

Musk created a profile on the social media application Twitter (twitter.com/elonmusk) in 2009. Since that time, Musk often used Twitter to communicate about Tesla’s business. Tesla’s Chief Financial Officer described Musk’s Twitter statements as a “strong channel of marketing” with Musk acting as a “spokesman” for Tesla. Indeed, on November 5, 2013, Tesla publicly filed a Form 8-K with the SEC stating that it intended to use Musk’s Twitter account *as a means of announcing material information to the public about Tesla and its products and services and has encouraged investors to review the information about Tesla published by Musk via his Twitter account.*

27. The SEC Complaint further notes that in August 2018, over 22 million people, including members of the press, “followed” Musk on Twitter and that his tweets “were published instantaneously to those people and were also publicly available to anyone with Internet access.” However, even with the known risk that Musk would act through his Twitter account to manipulate the market for Tesla

not pertaining to Tesla’s business, on July 15, 2018, Musk launched a vicious Twitter attack against one of the men who helped rescue a group of youth soccer players from a cave in Thailand, calling him a “pedo” after the man criticized Musk’s bid to aid the boys.

stock in order to “burn” the shorts, the Board had taken *no actions* to limit or pre-clear tweets pertaining to Tesla that Musk might place on his Twitter account, which the Company had expressly acknowledged would be a channel for the dissemination of “material information to the public about Tesla” and that it “encouraged investors to review.”

28. Given Musk’s disdain for Tesla short-sellers, it was foreseeable by the Board that he would use any excuse to try to harm the short-sellers regardless of the long-term negative effects for Tesla. In 2018, such an opportunity presented itself.

29. According to the SEC Complaint, beginning in January 2017, Musk had three or four in-person meetings with representatives of a foreign sovereign investment fund (the “Fund”), which has since been identified as Saudi Arabia’s Public Investment Fund. During these meetings, according to Musk, the lead representative of the Fund expressed a verbal desire to make a large investment in Tesla and establish a Tesla production facility in the Middle East.

30. The SEC Complaint states that on July 28, 2018, a representative of the Fund requested a meeting with Musk. A few days later, on the evening of July 31, “Musk and his chief of staff met with three representatives of the Fund at Tesla’s factory in Fremont, California for approximately 30 to 45 minutes. Tesla’s CFO joined midway through the meeting. According to Musk, at the meeting the

Fund’s lead representative told Musk that the Fund had recently acquired almost five percent of Tesla’s common stock on the open market, expressed interest in taking Tesla private, and confirmed that he was empowered to make investment decisions for the Fund.” Musk later stated that he assumed without confirming that the lead Fund representative was proposing a “standard” going-private transaction, but the terms of any such deal were not discussed.

31. According to the SEC Complaint, during the July 31 meeting, the lead Fund representative raised the prospect of Tesla establishing a production facility in the Middle East, to which Musk (according to him) expressed openness but made no commitment. Musk assumed that whether a Tesla production facility in the Middle East was a precondition to the Fund’s willingness to take Tesla private would depend on the amount of capital the Fund was required to commit to the transaction but, according to the SEC Complaint, Musk did not discuss his assumption with the representatives of the Fund.

32. The Board was apprised of Musk’s desire to take the Company private by August 2, 2018. According to the SEC Complaint, after the market close on that day, Musk sent an email with the subject, “Offer to Take Tesla Private at \$420,” to Tesla’s Board of Directors, Chief Financial Officer, and General Counsel. In the email, Musk explained his reasons for wanting to take Tesla private, including that being public “[s]ubjects Tesla to constant defamatory

attacks by the short-selling community, resulting in great harm to our valuable brand.”

33. According to the SEC Complaint, Musk asked the Board in the email that the “matter be put to a shareholder vote at the earliest opportunity” and stated that the “offer expires in 30 days.” According to Musk, he calculated the \$420 price per share based on a 20% premium over that day’s closing share price because he thought 20% was a “standard premium” in going-private transactions. This calculation resulted in a price of \$419, and Musk stated (apparently in discussions with the SEC and elsewhere publicly since that time) that he rounded the price up to \$420 because “he had recently 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.’”⁶

34. Prior to Musk’s meeting with Fund representatives on the evening of July 31, Tesla’s stock had closed at approximately \$298 per share, so a 20% premium would have been approximately \$358. However, as stated in the SEC Complaint, between the July 31 meeting and Musk’s August 2 email to Tesla’s Board, Tesla’s share price had increased over 17% following the Company’s

⁶ For discussion of the significance of the number 420, see Aaron Smith, “4/20 is Black Friday for marijuana merchants,” CNN Money (April 20, 2017) (accessible at <https://money.cnn.com/2017/04/20/news/companies/marijuana-420-shopping/index.html>).

August 1 earnings announcement. According to the SEC Complaint: “Musk realized that a spike in Tesla’s share price might make a going-private transaction not feasible because it would require an investor in the transaction to pay a ‘premium on a spike.’ Musk, however, said that he assumed *without confirming with the Fund or any other funding source* that the 17% spike in Tesla’s share price did not affect the feasibility of taking Tesla private at that time.”

35. As further stated in the SEC Complaint, according to Musk, he thought that there was “a lot of uncertainty” regarding a potential going-private transaction at the time of his August 2 email to Tesla’s Board, “but it was worth investigating.” In response to Musk’s August 2 email about taking Tesla private, Tesla’s Board held a telephonic meeting with Musk on the night of August 3. According to the SEC Complaint, during that call, Musk informed the Board that the Fund was interested in funding a going-private transaction. Musk also told Board members that he wanted existing investors to stay with the Company. However, according to Musk, at least one board member told him that it would be “really difficult for small investors” to remain stockholders in a private Tesla. During the August 3 call, Musk told the Board that he wanted to contact existing stockholders to assess their interest in participating in a going-private transaction. According to the SEC Complaint, the Board agreed that Musk could contact certain investors and asked him to report back on those conversations. Notably,

although knowing that Musk tweeted that short-sellers would imminently be “burned,” there is no mention in the SEC Complaint or elsewhere that the Board imposed any limitations on what Musk was or was not authorized to say to the market at large with respect to his discussions with the Fund or the possibility of a going-private transaction.

Musk’s and the Company’s August 7, 2018 Statements

36. On Tuesday, August 7, 2018, Musk published a series of statements about a transaction to take Tesla private using his Twitter account. At approximately 12:48 PM EDT on August 7, 2018, Musk published a tweet, “*Am considering taking Tesla private at \$420. Funding secured.*” As noted in the SEC Complaint, Musk published this tweet in the middle of the day’s official market trading, and immediately after this tweet, the trading volume and price of Tesla shares spiked. Indeed, Tesla’s stock immediately spiked 7 percent before trading was suspended. Yet, funding had clearly not been “secured” either from the Saudi Arabian sovereign wealth fund or from any other source or sources. And every member of the Board knew – based on their conversations with Musk on August 3, 2018 – that the prospect of taking Tesla private was only in the investigatory phase, and such a transaction was not nearly as concrete as Musk’s tweet made it out to be.

37. Over the next few hours, Musk made additional statements about taking Tesla private. *At no time did any member of the Board, or the Board as a whole, attempt to stop Musk from presenting this type of false information to the market.* At approximately 1:15 PM EDT, Musk responded to another Twitter user's question, "At what price?" by repeating "420." At approximately 1:23 PM EDT, about 35 minutes after Musk's initial tweet about taking Tesla private, Tesla's Chief Financial Officer sent a text message 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?" Musk responded, "Yeah, that would be great." Tesla's Chief Financial Officer then replied, "Working on it. Will send you shortly."

38. At approximately 1:40 PM EDT, 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 approximately 2:00 PM EDT, 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 [a privately held company for which Musk serves as CEO, as the SEC Complaint notes] 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).”

39. Musk continued to issue tweets throughout the rest of the afternoon of August 7, 2018. At approximately 2:07 PM EDT, in response 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 ...,” Musk replied by tweeting, “Absolutely. Am super appreciative of Tesla shareholders. Will ensure their prosperity in any scenario.”

40. The SEC Complaint notes that “Nasdaq rules specify that listed companies such as Tesla must notify Nasdaq at least ten minutes prior to publicly releasing material information about corporate events like a proposed going-private action.” Musk did not notify Nasdaq prior to publishing his August 7 tweets. Accordingly, at approximately 2:08 PM EDT, Nasdaq halted trading in Tesla shares. Nevertheless, at approximately 2:13 PM EDT, Musk tweeted, “Shareholders could either to [sic] at 420 or hold shares & go private.” And at approximately 3:07 PM EDT, 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.*”

41. According to the SEC Complaint, later that same day, Musk “retweeted” the statement he had issued at approximately 2:13 PM EDT, causing it to be published again in his Twitter feed. Further, at approximately 3:16 PM EDT – again without any Board efforts to correct or place any limits on this clearly improper set of communications to the market – Musk sent an email to Tesla employees, *the content of which was published on a publicly available Tesla blog at 3:32 PM EDT*. In the email entitled “Taking Tesla Private” and blog post, Musk explained his reasons for wanting to take Tesla private, *including asserting that Tesla was “the most shorted stock in the history of the stock market” and stating that “being public means there are large numbers of people who have incentive to attack the company.”* In the Company-wide email and blog post, Musk reiterated that he would like to structure a Tesla going-private transaction “so that all shareholders have a choice. Either they can stay investors in a private Tesla or they can be bought out at \$420 per share” He also wrote and published: “This proposal to go private would ultimately be finalized through a vote of our shareholders.”

42. As the SEC Complaint recounts, a few minutes after publishing the blog post, at approximately 3:36 PM EDT, Musk tweeted a link to it in a tweet that stated, “Investor support is confirmed. Only reason why this is not certain is that it’s contingent on a shareholder vote.” Approximately nine minutes later, at 3:45

PM EDT, Nasdaq lifted the trading halt on Tesla shares. After trading resumed, Tesla's stock price continued to rise, closing at \$379.57, up over 6% from the time Musk first tweeted about taking Tesla private earlier that day.

Reaction to Musk's and the Company's August 7, 2018 Statements

43. As noted in the SEC Complaint, investors, stock analysts, and journalists immediately sought clarification of Musk's August 7 statements. At 1:00 PM EDT, just 12 minutes after Musk published his tweet stating, "Am considering taking Tesla private at \$420. Funding secured," Tesla's own head of Investor Relations sent a text to Musk's chief of staff asking, "*Was this text legit?*" At approximately 1:13 PM EDT, a Tesla investor and friend of Musk's chief of staff texted the chief of staff, "What's Elon's tweet about? Can't make any sense of it. Would be incredibly disappointing for shareholders that have stuck it out for so long." A few minutes later, at approximately 1:32 PM EDT, as recounted in the SEC Complaint, a business reporter texted Musk's chief of staff, "*Quite a tweet! (Is it a joke?)*."

44. At approximately 2:23 PM EDT, another reporter sent Musk an email with the subject, "Are you just messing around?" and wrote, "Reaching out to see what's going on with your tweets about taking the company private? Is this just a 420 joke gone awry? Are you serious? It seems like you are dancing into some pretty tricky legal territory by messing about with the markets this way. Is there an

actual explanation coming?” *The Company thereafter published Musk’s email to Tesla employees on its Company blog at approximately 3:32 PM EDT.* An investment bank research analyst emailed Tesla’s head of Investor Relations at approximately 5:09 PM EDT, saying: “In the tweet, he said financing is secured but in the letter he doesn’t address this. Can you clarify?” Tesla’s head of Investor Relations responded approximately ten minutes later, “*I can only say that the first Tweet clearly stated that ‘financing is secured’. Yes, there is a firm offer.*” Notably, even with such false communications coming from official Company channels, the Board did nothing!

45. At approximately 5:23 PM EDT, another research analyst emailed Tesla’s head of Investor Relations and another Investor Relations employee, “Had some questions/clarifications on today’s news and blog post. Can either of you speak?” As detailed in the SEC Complaint, Tesla’s head of Investor Relations responded, “[A]part from what has been tweeted and what was written in a blog post, we can’t add anything else. *I only wanted to stress that Elon’s first tweet, which mentioned ‘financing secured’ is correct.*” After Tesla’s head of Investor Relations received another inquiry from another investment bank research analyst at approximately 7:20 PM EDT, he asked whether the analyst had read Tesla’s “official blog post on this topic.” The analyst responded, “I did. Nothing on funding though?” The head of Investor Relations replied, “*The very first tweet*

simply mentioned ‘Funding secured’ which means there is a firm offer. Elon did not disclose details of who the buyer is.” The analyst then asked, “Firm offer means there is a commitment letter or is this a verbal agreement?” The head of Investor Relations responded, *“I actually don’t know, but I would assume that given we went full-on public with this, the offer is as firm as it gets.”*

Subsequent Statements by Musk and the Company

46. According to the SEC Complaint, Musk did not make any attempt to clarify his August 7 statements until August 13, 2018. During the interim, Musk continued to publish statements via his Twitter account, including an apparent joke on August 10 about *“Short shorts coming soon to Tesla merch[andise].”*

47. On August 12, 2018, a news outlet reported that “people with knowledge of the [F]und’s plans” said that it “hasn’t made any firm decisions on whether to increase its stake, or by how much, but talks are ongoing” The following day, August 13, 2018, a blog post attributed to Musk called “Update on Taking Tesla Private” was published on Tesla’s public blog. In the blog post, Musk stated that when he had tweeted, “Am considering taking Tesla private at \$420. Funding secured,” it was based on his impression that there was “no question” that a deal with Fund could be closed and that it was “just a matter of getting the process moving.” Musk’s August 13 post also stated that he was still in discussions with the Fund and a number of other investors about taking Tesla private and that

no detailed proposal had been presented to the Board or any Board committee. As the SEC Complaint notes: “This was contrary to Musk’s August 7 tweet stating, ‘Only reason why this is not certain is that it’s contingent on a shareholder vote.’”

48. The SEC Complaint further states that although Musk’s August 13 blog post provided some new information about a potential transaction to take Tesla private, it “still did not disclose that the \$420 share price had not been agreed to by any potential funding source for a transaction to take Tesla private.” In the blog post, Musk again stated that his “proposal was based on using a structure where any existing shareholder who wished to remain as a shareholder in a private Tesla could do so, with the \$420 per share buyout used only for shareholders who preferred that option.” But as the SEC Complaint alleges, “Musk did not disclose that he had still not determined whether such a structure would be possible.”

49. Finally, at approximately 11:15 PM EDT on Friday, August 24, 2018, well after the close of official Nasdaq trading, a blog post was published on Tesla’s public blog announcing that Musk *had abandoned the process of attempting to take Tesla private*. The August 24 blog post, attributed to Musk, stated:

Given the feedback I’ve received, it’s apparent that most of Tesla’s existing shareholders believe we are better off as a public company. Additionally, a number of institutional shareholders have explained that they have internal compliance issues that limit how much they can invest in a private company. There is also no proven path for most retail investors to own shares if we were private. Although the majority of shareholders I spoke to said they would remain with Tesla

if we went private, the sentiment, in a nutshell, was “please don’t do this.”

50. The SEC Complaint notes that this “was the first time that Musk publicly disclosed the obstacles to allowing current Tesla investors to remain invested if Tesla went private and thus corrected his multiple previous misstatements that any going-private transaction would allow all current shareholders to remain invested.”⁷ On the next trading day, August 27, 2018, Tesla stock closed at \$319.27, down over 15% from the closing price of \$379.57 on August 7, the date of Musk’s initial tweets about taking Tesla private.

51. The market’s reactions to Musk’s tweets, and other statements posted on the Company’s website and blog post, caused immediate and significant reactions that Musk and other members of the Tesla Board could not have ignored. Following Musk’s tweets on August 7, 2018, when Musk published, *inter alia*, “Am considering taking Tesla private at \$420. Funding secured.” and “Investor support is confirmed. Only reason why this is not certain is that it’s contingent on a shareholder vote,” Tesla’s stock price surged, 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

⁷ The SEC Complaint states in this regard that after abandoning the going-private transaction, Musk admitted that his assumption that it would be possible for small shareholders to remain invested in Tesla as a private company was a “fundamental misunderstanding.”

(compared to an average of 8 million), representing over \$11 billion of purchases in the open market.

52. As alleged in the Left Complaint, in response to the tweets, many Tesla short-sellers were forced to cover their positions at artificially high prices, losing approximately \$1.3 billion in a single day, according to media reports. They are among the investors seeking damages from the Company in the securities class actions filed against Tesla and Musk. Other investors bought shares of Tesla stock in reliance on Musk's statements that funding was secured for a going-private transaction priced at \$420 per share, for which they are also seeking damages from the Company and Musk in the securities class action lawsuits.

53. On August 8, 2018, certain members of Tesla's Board issued a statement revealing that the Board was still evaluating the prospects of taking Tesla private, and confirmed that such a deal was subject to Board approval. However, this was hardly a correction of the false and misleading statements that Musk – and the Company itself – had issued on August 7. On the same day, The Wall Street Journal published an article entitled “SEC Probes Tesla CEO Musk's Tweets,” reporting that U.S. regulators were inquiring into whether “Elon Musk was truthful when he tweeted that he had secured funding” for the proposed buyout of Tesla. According to the report, SEC officials wanted to know if Musk had a

“factual basis” for posting “that the going-private transaction was all but certain, with only a shareholder vote needed to pull it off.”

54. The following day, on August 9, 2018, Bloomberg published an article entitled “The SEC Is Intensifying Its Probe of Tesla,” reporting that SEC regulators were “intensifying its scrutiny of Tesla Inc.’s public statements in the wake of Elon Musk’s provocative tweet Tuesday about taking the electric-car company private.” Reuters published an article the same day entitled “Exclusive - Tesla’s board seeking more information on Musk’s financing plan – sources,” reporting that the Company’s Board of Directors had “not yet received a detailed financing plan from CEO Elon Musk” or “specific information on who will provide the funding.”

55. Notably, even after taking some actions, the Board does not appear to have reigned in Musk’s ability to issue further statements on his own via his Twitter account. On August 13, 2018, a week after the secured funding tweet, Musk tweeted: “I’m excited to work with Silver Lake and Goldman Sachs as financial advisors, plus Wachtell, Lipton, Rosen & Katz and Munger, Tolles & Olson as legal advisors, on the proposal to take Tesla private.” However, according to a Bloomberg article entitled “Goldman’s Missing Mandate Adds to Clues Musk Tweeted Out of Turn,” which was published on August 14, 2018, neither Goldman Sachs nor Silver Lake were yet working with Musk pursuant to a

signed agreement or in an official capacity when Musk had issued his August 13 tweet. And there is no indication that Musk was required to pre-clear his August 13, 2018 tweet with anyone else at the Company, including the Board, before issuing his statement.

56. Further details surrounding Musk's tweets of August 7, 2018 and thereafter came out on August 16, 2018, after the market close, when *The New York Times* published an interview with Musk. The article, entitled "Elon Musk Details 'Excruciating' Personal Toll of Tesla Turmoil," revealed the stress Musk had been under, his use of Ambien, and the manner in which the August 7, 2018 tweet had been conceived. However, the Board's failure to take actions with respect to Musk's communications even after that interview, when Musk admitted that he was highly stressed and taking medications to help alleviate the stress, led to further harmful or, at least, unnerving situations for the Company.⁸ Indeed, in the interview, which reported that some members of Tesla's Board were "totally blindsided by Mr. Musk's decision to air his plan on Twitter," which had not been

⁸ For instance, on September 5, 2018, in a series of emails to a reporter published by BuzzFeed, Musk double downed on his personal attack against the British diver who had been instrumental in the rescue of the boys trapped in a Thai cave, ***calling him without basis a "child rapist" who took "a child bride who was about 12 years old at the time."*** And on September 6, 2018, Musk ***appeared to smoke marijuana*** during an interview on "The Joe Rogan Experience" podcast, which went viral and sparked extensive criticisms of Musk and, by implication, his ability to lead Tesla.

“cleared” by the Board, Musk admitted that he had “taken to Twitter impulsively” and said he had done so “*because he was not the kind of person who could hold things in, and was angry at the company’s critics.*”

57. *The Wall Street Journal* reported on August 16, 2018, in an article titled “SEC Probes Tesla Over Model 3 Production Disclosures,” that the SEC was investigating the “funding secured” tweet. According to the article, the SEC was investigating issues at Tesla, including its car sales projections, long before Musk’s August 7 tweet. In 2017, the SEC began investigating whether the Company misled investors about its Model 3 car production issues. *The Wall Street Journal* reported that SEC regulators subpoenaed a parts supplier for the Company as part of the Model 3 probe long before it began investigating Musk’s “funding secured” tweet. The article further reported that the SEC subpoenaed Tesla’s directors in order to learn what they knew about Musk’s plan to take Tesla private.

58. *The Wall Street Journal* further reported that people familiar with the matter stated that the SEC was investigating whether Musk intentionally misled investors when he tweeted about the proposal to take the Company private in an attempt to hurt short-sellers by driving up Tesla’s stock price.

59. *Business Insider* reported on the same day that the *Fox Business* and *The New York Times* reported that the SEC had sent subpoenas to Tesla concerning the Company’s plans to go private and Musk’s tweet. *See*

<https://www.businessinsider.com/sec-investigating-if-elon-musk-tried-to-hurt-tesla-short-sellers-report-2018-8>. Business Insider also reported that the SEC was investigating what Musk had told Tesla's Board before he tweeted that he had secured funding to take the Company private.

60. In addition, Bloomberg News reported that the United States Department of Justice is also investigating whether Musk misled investors.

61. Musk's tweets and other statements are a clear violation of the Company's Code of Business Conduct and Ethics (the "Code of Conduct"), which was last revised on December 12, 2017. The Code of Conduct provides that "Tesla aspires to be a '*do the right thing*' company – in other words, engaging in conduct that your family would be proud of." See <http://ir.tesla.com/code-business-conduct-and-ethics-0>. The Code of Conduct states "[t]he CEO and all senior financial officers, including the CFO and principal accounting officer, are bound by the provisions set forth [in the Code of Conduct] relating to ethical conduct, conflicts of interest *and compliance with law*." There is also a Code of Ethics for the CEO and Senior Financial Officers on the Company's website.

62. Musk's "funding secured" tweet, and others that followed, constituted a clear violation of the Code of Conduct and the Code of Ethics applicable to the CEO.

The SEC Complaint and SEC Settlement

63. On September 27, 2018, the SEC filed its securities fraud complaint against Musk on the basis that Musk had made “multiple materially false statements on August 7, and taken together, his August 7 statements left market participants with the false and misleading impression that if Musk chose to take Tesla private at \$420 per share, the only outstanding requirement to be satisfied was a shareholder vote.” The SEC further alleged that Musk’s statements, taken together, “also created the misleading impression that certain terms of a transaction to take Tesla private had been determined when, in fact, they had not even been explored, and in some cases, proved to be impossible.” One such statement was that all current Tesla investors “would be able to remain invested in Tesla after a going-private transaction.”

64. The SEC’s Complaint –which has been cited extensively *supra* – alleges that Musk knew that the potential transaction was uncertain and subject to numerous contingencies, and that he had not discussed specific deal terms, including price, with any potential financing partners. It further alleges that Musk’s statements “*were premised on a long series of baseless assumptions and were contrary to facts that Musk knew,*” and that he “did not discuss the content of the statements with anyone else prior to publishing them to his over 22 million Twitter followers and anyone else with access to the Internet.”

65. The SEC further charged the Company and its Board with failing to have required disclosure controls and procedures relating to Musk’s use of social media. Specifically, according to the SEC Complaint, despite notifying the market in 2013 that the Company intended to use Musk’s Twitter account as a way to announce material information about Tesla and encouraging investors to review his tweets, ***“Tesla has no corporate policies that specifically addressed Musk’s use of Twitter.”*** The SEC Complaint further alleges that the Company did not have processes in place to insure that Musk’s tweets were complete or accurate.⁹

66. According to news reports, the SEC made an offer to settle its claims against Musk on a basis that would not require any payment by the Company. However, at the last minute Musk refused the settlement offer and the Board backed him up on that decision. According to an article of October 4, 2018, in The Wall Street Journal, “Mark Cuban Prodded Tesla’s Elon Musk to Settle SEC’s Charges,” at 8:00 a.m. on Thursday, September 27, 2018, the SEC was set to

⁹ Tesla’s Code of Conduct refers to an undisclosed “Communication Policy” that includes “Tesla’s social media guidelines, media relations and marketing guidelines, and the circumstances and the extent to which individuals are allowed to speak on Tesla’s behalf.” However, based on the SEC Complaint, the Communications Policy must not have required Musk to pre-clear any statements he posted on his Twitter account, notwithstanding that the Company and Musk had encouraged investors to review Musk’s Twitter account for “material information” pertaining to Tesla.

announce a settlement of its charges against Musk, but a lawyer for Musk called and said that Musk had “changed his mind.” The Company’s Board indicated its “full support” for Musk. According to news reports, that settlement offer would not have required any payment from the Company, which is under “heavy pressure to turn a profit because it is burning through \$1 billion in cash every three months and, as of the end of June, had just \$2.2 billion in the bank,” and because “[a]bout \$1.3 billion in Tesla debt is due to be repaid by March, including \$230 million in November.” *See* Associated Press, “New Tesla Chair Must Rein in CEO Musk at Key Moments,” Oct. 1, 2018.

67. But, just two days later, on September 29, 2018, the SEC announced that Musk agreed to settle SEC fraud charges brought in connection with his August 7 tweets (the “SEC Settlement”). Pursuant to the terms of the SEC Settlement, Musk and the Company are each required to make a separate \$20 million payment; Musk is required to step down as Chairman of the Tesla Board for a period of at least three years and will be replaced by an independent chairman; Tesla is required to appoint two additional independent directors to the Board; Tesla must establish a new committee of independent directors; and Tesla must put additional controls and procedures in place to oversee Musk’s communications. Thus, the Board’s action in backing Musk in his decision to reject the SEC’s initial settlement proposal directly cost the Company \$20 million.

68. Indeed, even after reaching this agreement to settle the SEC's case against him, Musk still took to Twitter and tweeted the following statements: "***Just want to [say] that the Shortseller Enrichment Commission is doing incredible work. And the name change is so on point!***" Many commentators noted that the tweet appears to mock the SEC, suggesting that the Commission was enriching investors betting against Tesla by taking short positions in its stock. For instance, 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 Harvey Pitt, who characterized the tweet as "juvenile, narcissistic, stupid, erroneous and petulant." ***That the Board still has not imposed 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.***

69. On October 16, 2018, United States Judge Alison Nathan of the United States District Court for the Southern District of New York signed orders approving the settlements between Elon Musk, Tesla and the SEC.

IV. DERIVATIVE ALLEGATIONS

70. Plaintiff brings this action derivatively on behalf of and for the benefit of the Company to redress the injuries suffered by Tesla as a direct and proximate result of the intentional and flagrant breaches of fiduciary duties alleged herein. The Company is named as a nominal defendant.

71. Plaintiff incorporates by reference all preceding paragraphs as though they were fully set forth herein.

Plaintiff Is an Appropriate Derivative Plaintiff

72. As stated above, Plaintiff has owned Tesla stock continuously during the material times alleged herein and will continue to retain shares in the Company throughout the duration of this litigation.

73. Plaintiff will adequately and fairly represent the interests of the Company and its stockholders in this litigation and has retained competent counsel experienced in stockholder derivative actions.

74. The wrongful acts complained of herein subject have caused harm to the Company and will continue to subject the Company to continuing harm because the adverse consequences of the injurious actions are still in effect and ongoing.

Demand on the Board of Directors Would Be Futile

75. Plaintiff has not made a demand upon the Board of Tesla to institute this action against Defendant Musk or against the Director Defendants as a group because, as detailed above and as further set forth below, it would be a futile and useless act.

76. An examination of Tesla's current Board, which has nine directors including Musk, explains why the demand would be futile. A majority of the Board members are beholden to Musk and have close personal relationships with him. This lack of independence is further evidenced by their knowing and intentional failure to institute controls over a known risk and by their failure to immediately correct Musk's false and misleading tweets of August 7, 2018.

A Demand on Elon Musk Would Be Futile

77. **Elon Musk** lacks independence from the other members of the Board due to his interest in maintaining his executive positions at the Company and avoiding personal legal exposure. This lack of independence renders Musk incapable of impartially considering a demand to commence and vigorously prosecute this action.

78. Tesla is run and dominated by Musk and all the directors are loyal to him. Musk dominates the activities of the Company as its co-founder, CEO,

formerly its Chairman of the Board, controlling stockholder, and chief spokesperson. As the Delaware Court of Chancery found in the litigation concerning Tesla's acquisition of SolarCity: "That Musk is the 'face of Tesla' cannot meaningfully be disputed." Indeed, as noted above, the Company designated Musk's personal Twitter account as an official venue for the dissemination of Company-specific information and encouraged investors to follow Musk on his Twitter account. Musk has also demonstrated a willingness to facilitate the ouster of senior management when displeased, as evidence by the fact that he forced co-founder and then-CEO Eberhard out of the Company in 2007 and thereafter appointed himself as CEO.

79. Tesla's Board, on behalf of the Company, has acknowledged in the Company's public filings that: "In addition to serving as the CEO since October 2008, Mr. Musk has contributed significantly and actively to us since our earliest days in April 2004 by recruiting executives and engineers, contributing to the Tesla Roadster's engineering and design, raising capital for us and bringing investors to us, and raising public awareness of the Company." Musk also infused his own capital into the Company to keep it afloat. And his "Master Plans" provide the architecture by which the Company (along with SpaceX and SolarCity) has been and will be operated.

80. Musk owns approximately 20% of Tesla's stock. As the decision in the Tesla-SolarCity litigation further notes, Musk has stated publicly that (1) Tesla, SolarCity and SpaceX form a "pyramid" on top of which Musk sits, and that it is "important that there not be some sort of house of cards that crumbles if one element of the pyramid ... falters"; and (2) Tesla is "his company." Given the claims in this Complaint directly against Musk as well as against the Director Defendants as a whole, Musk's CEO position with the Company, and, among other factors, his admitted lack of independence, Musk could not independently consider a pre-suit demand to bring the claims alleged in this Complaint.

A Demand on the Other Director Defendants Would Be Futile

81. The rest of the Director Defendants also could not independently consider a pre-suit demand to bring the claims alleged in this Complaint. Musk dominates and controls the Board, handpicking his friends and personal, business and investment contacts to serve as members of the Board. Moreover, as described above and set forth in further detail below, a majority of Board members lack independence from Musk, as many have and have had ties to Musk through overlapping investments, overlapping board memberships, employer-employee relationships, and even familial relationships. Two Board members were beholden to Musk for their executive and board positions at SolarCity, which Musk controlled before its acquisition by Tesla: Buss (CFO); and Gracias (board

member). Four Board members were beholden to Musk for their investments in and/or board positions at SpaceX, one of the world's most valuable private companies, which Musk also controls: Ehrenpreis (investor); Gracias (investor and board member); Jurvetson (investor and board member); and Kimbal Musk (board member). Four Tesla Board members also share investments with Musk in ventures other than Tesla: Ehrenpreis (investor in SpaceX); Gracias (founder, CEO and sole owner of Valor, in which Musk has investments); Jurvetson (managing director of Draper Fisher Jurvetson, which has a fund in which Musk is an investor); and Kimbal Musk (brother and fellow investor with Elon Musk in Valor fund, which is owned by Defendant Gracias).

82. **Defendant Buss** could not independently consider a pre-suit demand to bring the claims alleged herein. Defendant Buss has been a member of Tesla's Board since November 2009. Buss received compensation valued at \$4,954,785 as a Tesla director in 2015 and \$3,357,002 in 2017. As stated in Tesla's 2015 proxy statement, Buss is not an independent director. Buss previously served as CFO of SolarCity, which was founded by Musk and bought by Tesla in a widely criticized transaction. Buss is indebted to Musk because, among other reasons, he received total compensation of \$32 million for just 18 months of work as SolarCity's CFO, which allowed him to retire at the age of 52.

83. **Defendant Ehrenpreis** could not independently consider a pre-suit demand to bring the claims alleged herein. He has been a member of Tesla’s Board since 2007. He has also been an early and consistent investor in Musk’s “pyramid” of companies (Tesla, SpaceX and SolarCity). Ehrenpreis has been a Managing Partner and co-owner of venture capital firm DBL Partners. He is also a manager of DBL Partners III. Both Ehrenpreis and DBL III are investors in SpaceX, a company controlled by Musk.¹⁰ Prior to Tesla’s acquisition of SpaceX, DBL Investors, an affiliate of DBL Partners, participated in SolarCity’s Series D venture funding round (closed Nov. 1, 2008); contributed \$1 million in capital through a Series E-1 preferred stock financing round (June 2010); and contributed more than \$1.6 million in a Series F preferred stock financing round (June and July 2011).

84. In addition, Ehrenpreis is an investor in, and serves on the board of directors of, Mapbox, Inc., which provides custom online maps. Tesla and Mapbox entered into an agreement in December 2015 pursuant to which Tesla was to pay Mapbox ongoing fees, including \$5 million over the first twelve months of

¹⁰ Ehrenpreis co-founded DBL Partners with fellow managing partner and co-owner Nancy Pfund, who was an observer on the Tesla Board from 2006 to 2010, a member of the SolarCity Board, and one of two members of that board’s special committee that negotiated and approved Tesla’s acquisition of SolarCity. At the time of that acquisition, Pfund beneficially owned (personally and through DBL Investors investment funds) over 1.5 million shares of SolarCity common stock. Pfund is also reported to be a close friend of Musk and has said that “[h]e’s always been a master of the universe in my mind.”

the agreement. And recently, Mapbox announced that it was hiring former Tesla autopilot designer Brennan Boblett to help create digital maps for passengers in driverless cars.

85. Further, in September 2015, Musk gave each member of a select group of five people a brand new Model X, Tesla's first SUV. Ehrenpreis, along with fellow Tesla Board member Jurevson and Musk himself, were among the few to receive the first Model X vehicles ever produced. At the presentation, Musk chose to announce Ehrenpreis first among the five honorees, and Ehrenpreis shared his gratitude with Musk on Twitter shortly thereafter with a picture of the event and the following tweet: "It's X time!!! A total honor to be the first one last night to congratulate Elon and get my new keys!" Two years later, Musk showed his friendship with Ehrenpreis by giving him the rights to the first Tesla Model 3, which Ehrenpreis bought and then gifted back the car to Musk as part of his 46th birthday present, as noted in a Musk tweet of July 8, 2017. Both Musk and Ehrenpreis have further shared on Twitter their "love" for each other and appreciation of their mutual support over the years, and Kimbal Musk has similarly called Ehrenpreis "a close personal friend and business associate of mine."

86. **Defendant Gracias** could not independently consider a pre-suit demand to institute the litigation. He has been a member of Tesla's Board since 2007 and has served as the Company's purported "Lead Independent Director"

since 2010, even though, as shown below, Gracias could hardly be considered to be a director “independent” of Musk. Gracias used to be a member of the SolarCity board of directors. Currently, he is a member of the board of directors of SpaceX, a company controlled by Musk, which is reported to be one of the “world’s most valuable private companies.” Musk and Gracias are also close friends; indeed, Musk gave Gracias the second Tesla Roadster ever made.

87. Gracias’ relationship with Musk dates back to at least 2001. Gracias is the founder and has served as the managing partner, CEO, Chief Investment Officer, director and sole owner of private equity firm Valor Management Corp., which does business as Valor Equity Partners (“Valor”). In 2001, Gracias and Valor invested in then-startup PayPal, Inc., a company co-founded by Musk. That investment subsequently led Musk to present Gracias and Valor with the opportunity to invest in “Tesla Motors,” Tesla’s predecessor, and with the opportunity to invest in pre-IPO venture funding for Space X, where Gracias was appointed to the board.

88. Valor and Gracias participated in several pre-IPO funding rounds for Tesla and Solar City. Through Valor funds, Gracias participated in four Tesla venture funding rounds between 2005 and 2008, as well as a pre-IPO venture debt offering in 2009. Prior to Tesla’s IPO, Valor owned nearly five million Tesla shares. Gracias and his Valor funds also contributed nearly \$25 million to

SolarCity's pre-IPO preferred stock financing round. Musk has invested \$2 million in each of the two Valor funds.

89. It has also been reported that Valor personnel spent more than 100 days at Tesla's battery factory near Reno, Nevada in late 2017 to help increase Tesla's Model 3 sedan production. As the Company disclosed, Gracias and Valor contributed to "numerous improvements that led to increased Model 3 production rates." Thus, Gracias and Valor are more than passive investors in Tesla.

90. In May 2018, Proxy adviser Institutional Shareholder Services ("ISS") recommended that shareholders vote against Gracias because he is not sufficiently independent for key board committees. ISS also cited concerns regarding the lack of performance-based elements in Tesla's pay plan in recommending against Gracias, a Compensation Committee member. In June 2018, CtW Investment Group, similarly advised against the re-election of Gracias because he "lacks the independence to serve as Lead Independent director, and has not initiated the much needed process of board renewal." The CtW letter further states:

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 who he gave the second Tesla Roadster ever built.

91. Finally, in addition to having Musk and his brother Kimbal Musk, a fellow Tesla Board member, personally invest in various Valor funds – thereby making Gracias a fiduciary to both of them – Gracias has also used testimonials from both Elon and Kimbal Musk on the Valor website to help raise money for Gracias' Valor funds. Among the testimonials is one from Elon Musk, thanking Valor for being “a key investor” as well as a “strategic partner,” and saying “I don't think we would've made it without their help, so thank you.” Another testimonial from Musk's cousin and former Chief Operating Officer of SolarCity, Peter Rive, was quoted on Valor's website, as follows:

Valor is simply the best investor I've ever worked with. Their initial diligence is thoughtful and detailed, but their help in improving the company after the investment is invaluable. They have an awesome team who implement lean process methodologies to improve throughput without an increase in operating expenses. I want to emphasize the word “implement” which is key to the Valor guys. They're not consultants who create a set of power point presentations – they actually do the work! The end result is that when Valor invested in our company they simultaneously lowered the execution risk of the business.

92. **Defendant Jurvetson** is incapable of considering a pre-suit demand. He has been a member of the Board since 2009. Jurvetson received compensation

valued at \$6,095,984 as a Tesla director in 2015. He also serves as member of the board of SpaceX, which is controlled by Musk. Jurvetson was a managing director of venture capital firm DFJ from 1995 to late 2017. Between 2006 and 2008, before Tesla's IPO in 2010, DFJ invested in three of Tesla's venture funding rounds. It also invested in SolarCity. After its initial investment in 2006, between 2006 and 2011, DFJ invested at least \$18.9 million in SolarCity via four venture capital funding rounds. Musk is also an investor in and limited partner of Draper Fisher Jurvetson Fund X, L.P., an affiliate fund of DFJ, thereby making Jurvetson a fiduciary of Musk.

93. Jurvetson is also a close personal friend of Musk, as evidenced in part by the fact that Musk gave Jurvetson the first Tesla Model S and the second Tesla Model X ever made. Indeed, Jurvetson was described in a May 16, 2018 article in the Silicon Valley Business Journal as "too close to Tesla founder Elon Musk" to be considered an independent Board member. The following passage from Ashlee Vance's biography of Musk also shows Jurvetson's devotion to Musk:

Steve Jurvetson, an investor with Musk's companies, suggested that Musk is like a combination of Bill Gates and Steve Jobs, with Gates' ability to hire the right people and Jobs' eye for what consumers really want. Jurvetson stated that, without diminishing Jobs' achievements, he believes Musk has already accomplished more than Gates.

94. With all of these inter-connections, it is no wonder that this Court concluded in the Tesla-SolarCity acquisition litigation that Jurvetson “is beholden to Musk.”¹¹

95. **Defendant Kimbal Musk**, Musk’s brother, is incapable of impartially considering a pre-suit demand and bringing a legal action against his brother or against the Board as a whole. He has been a member of Tesla’s Board since 2004. As admitted in the Company’s SEC filings, Kimbal Musk is not an independent director. Kimbal received compensation valued at \$4,964,381 as a Tesla director in 2015. Kimbal also serves as a director of SpaceX, and is a limited partner and investor in two Valor funds run by fellow Director Defendant Gracias, including one in which Elon Musk has also invested. CtW Investment Group urged Tesla

¹¹ Jurvetson also hosted an infamously lewd party at his home in Silicon Valley. After this party, Jurvetson resigned from DFJ and took a leave of absence from the boards of both Tesla and SpaceX. Although an article of January 11, 2018, “Steve Jurvetson Is Out At His Own Venture Capital Firm After Allegations Of Sexual Harassment,” in RECODE, described the event as a “sex party,” Musk – who was invited to and attended the event at Jurvetson’s home – denied this characterization of the party. And even though Jurvetson was removed from the venture capital firm that he helped to found and manage, he has not been removed from the Tesla Board. Rather, he has merely been placed on leave. Tesla was criticized over its handling of this, as detailed in an article entitled “Tesla Stalling Over Musk’s Board Buddy Raises Investor Hackles,” published by Bloomberg in May 2018. And even after these events, Jurvetson continued to market himself as a “current member of the three company boards [including Tesla and SpaceX]” and he has attended SpaceX and Tesla events “as a VIP.”

investors to vote against Kimbal's re-election to the Board in June 2018 noting that he "shares several of Mr. Gracias' conflicts." The CtW letter further states:

He is also the cousin of Lyndon and Peter Rive, Solar City's co-founders. Kimbal Musk is also an independent investor in two Valor capital funds, which are managed by Mr. Gracias... we view this decision [to re-nominate him], 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 (see below), 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 year's 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.

96. **Defendant Denholm** is incapable of considering a pre-suit demand because of the large compensation she has received as a member of the Tesla Board. As a Tesla director, Denholm received compensation valued at \$7,181,066 in 2014, \$4,979,785 in 2015, and \$4,921,810 in 2017, which constitutes a majority of Denholm's income over this time period. For instance, while Denholm served as the Chief Operations Officer at Telstra from in or about July 2017 through September 2018 (after serving in other positions with that company for about nine years), Denholm earned \$890,000 in total compensation from Telstra in 2017.

97. **Defendants Rice and Murdoch** are also incapable of considering a pre-suit demand because of the extraordinary compensation they received for their

service as directors in 2017. Both of them joined the Board in July 2017. Rice's compensation in 2017 was valued at \$1,933,914 and Murdoch's compensation in 2017 was valued at \$1,926,972. Indeed, all of Tesla's directors have received extraordinary compensation at Tesla, which compromises their ability to independently and disinterestedly assess a demand to initiate litigation against Musk. According to a Bloomberg article, Tesla's directors were awarded an average of \$1.53 million in compensation in 2017, which is a clear outlier when compared to other similarly sized U.S. automotive and technology hardware, software and services companies such as Oracle (\$553,000 average director compensation), Salesforce.com (\$541,000), Activision Blizzard (\$440,000), Intuit (\$434,000), Apple (\$398,000), Cognizant Technology Solutions (\$358,000), Ford Motor (\$357,000), Electronic Arts (\$350,000) and Adobe Systems (\$350,000).

98. Thus, for each of the nine Tesla Board members, each of whom is a Director Defendant in this litigation, Musk is clearly not independent for purposes of the assessing the derivative claims against him and against each of the Board members in this litigation. Most significantly, his brother Kimbal Musk is admitted to be not independent and also has numerous conflicts that show him not to be independent of Elon Musk; and at least four other Board members – Buss (who Tesla has also previously admitted is not independent); Gracias; Ehrenpreis;

and Jurvetson – are incapable of independently considering the derivative claims against Musk and against each of the Board members in this litigation.

99. For the reasons set forth above, a majority of the members of the Board are beholden to Musk and lack sufficient independence to exercise business judgment as to whether to commence an action for the claims alleged herein. The Board is thus fundamentally unable to impartially consider a demand to commence this action, just as they are incapable of vigorously prosecuting this action.

100. In addition, each of the nine Director Defendants knew or should have known that the Board had not imposed any checks or pre-clearing process for Musk's tweeting, notwithstanding that his Twitter account had been designated by the Company as an official avenue for conveying material information to investors and the market at large about the Company. No Board member, acting in good faith, would ever allow company executives to issue press releases or make SEC filings without any sort of checks or pre-clearing mechanism having been established for the company's communications with investors. Yet, that is precisely what Tesla's Board allowed with respect to Musk's Twitter account, which constitutes bad faith on the part of each member of the Tesla Board.

101. Each of the Board members was also complicit in the wrongdoing alleged in this Complaint based on their failure to immediately correct Musk's August 7 tweets, which the Board members knew to be false or, at the least,

inaccurate and incomplete. The Board members were also complicit by publicly stating their full support of Musk, even after investors had brought securities class action claims against the Company stemming from Musk's August 7 tweets – a self-inflicted wound if there ever was one – and even after the SEC brought charges against Musk and offered him an initial settlement offer that would not have required any payment by the Company, which Musk rejected, thereby further causing injury to the Company.

102. Accordingly, Plaintiff has not made a demand upon the Tesla Board to institute this action because it would be a futile and useless act.

V. DERIVATIVE CLAIMS

**COUNT I
(DERIVATIVE CLAIM FOR DISCLOSURE VIOLATIONS AGAINST
ELON MUSK IN HIS CAPACITY AS DIRECTOR, OFFICER AND
CONTROLLING STOCKHOLDER)**

103. Plaintiff incorporates by reference and re-alleges every allegation contained above, as though fully set forth herein.

104. Elon Musk, as a director, Chief Executive Officer and controlling stockholder of Tesla, owes the Company and its stockholders the fiduciary duties of due care, good faith, and loyalty.

105. When a corporate fiduciary makes “public statements made to the market, [or] statements informing shareholders about the affairs of the

corporation,” that corporate fiduciary owes a duty to stockholders not to speak falsely. *See Malone v. Brincat*, 722 A.2d 5, 11 (Del. 1998).

106. As alleged above, Elon Musk failed to act in accordance with these fiduciary duties. Specifically, based on the facts alleged above, including the findings in the SEC Complaint, Musk’s tweets of August 7, 2018 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.

107. 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 II
(DERIVATIVE CLAIM AGAINST THE DIRECTOR DEFENDANTS FOR BREACH OF FIDUCIARY DUTIES)

108. Plaintiff incorporates by reference and re-alleges every allegation contained above, as though fully set forth herein.

109. The Director Defendants owe the Company and its stockholders the fiduciary duties of due care, good faith, and loyalty.

110. The Director Defendants 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, by failing to immediately correct Musk's tweets of August 7, 2018.

111. The Director Defendants 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 pre-clearing mechanism with respect to Musk's tweets or to otherwise control his dissemination of false or misleading information concerning Tesla. The Director Defendants 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.

112. 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 Director Defendants are liable to the Company.

VI. RELIEF REQUESTED

WHEREFORE, Plaintiff demands judgment as follows:

- (a) Finding Elon Musk and the other members of the Board liable for their breaches of fiduciary duties owed to the Company;
- (b) Awarding, against the Director Defendants and in favor of Tesla, damages, together with pre- and post-judgment interest;
- (c) Awarding to Plaintiff the costs and disbursements of the action, including reasonable attorneys' fees, accountants' and experts' fees, costs and expenses; and
- (d) Granting such other and further relief, whether similar or different, as the Court deems just and proper.

Dated: October 25, 2018

CHIMICLES & TIKELLIS LLP

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