EFiled: Mar 11 2021 04:57PM EST
Transaction ID 66415547
Case No. 2021-0199-JRS

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CHASE GHARRITY, Plaintiff, vs. ELON MUSK, BRAD W. BUSS, ROBYN M. DENHOLM, IRA EHRENPREIS, LARRY ELLISON, ANTONIO J. GRACIAS, STEVE JURVETSON, HIROMICHI MIZUNO, JAMES MURDOCH, KIMBAL MUSK, LINDA JOHNSON RICE, and KATHLEEN WILSON-THOMPSON Defendants, - and - TESLA, INC., Nominal Defendant.	C.A. No. 2021-0199-JRS PUBLIC VERSION DATED: MARCH 11, 2021

VERIFIED STOCKHOLDER
DERIVATIVE COMPLAINT

Plaintiff Chase Gharrity brings this action derivatively on behalf of Nominal Defendant Tesla, Inc. ("Tesla" or the "Company"), and alleges upon: (1) personal knowledge as to himself and his own acts; (2) a 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 Plaintiff's demands

made pursuant to 8 Del. C. § 220 (the "Section 220 Demands"), and as to all other matters upon information and belief, as follows:[1]

INTRODUCTION

1. Despite a judgment entered in an action brought by the SEC which prohibits Defendant Elon Musk from "Tweeting" about Specified Information without the pre-approval of a mandated "Securities Counsel" and Tesla's Disclosure Controls Committee, Musk has continued to violate the Judgment and the Board of Directors have continued to fail to exercise effective oversight of Musk.

2. Tesla's failure to abide by the terms of the SEC Judgment exposes it to substantial penalties and fines, As Tesla admitted in its Form 10-K filed February 8, 2021, "if there is a lack of compliance or an alleged lack of compliance, additional enforcement actions or other legal proceedings may be instituted against us."

3. The documents produced by Tesla in response to Plaintiff Gharrity's Section 220 inspection demand demonstrate Defendants' continuing breaches of fiduciary duty. For example, more than a year after the Amended Judgment in the SEC action was entered on April 30, 2019, Musk issued a tweet at 11:11 a.m EST on May 1, 2020 (the "11:11 tweet") that stated "Tesla stock is too high IMO." In response to this Tweet, [redacted]

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

[redacted]

4. Three days later, on May 4, 2020, Tesla [redacted]

5. On May 8, 2020, [redacted] stated that [redacted]

[redacted]

6. [redacted] The letter stated that [redacted]

7. These facts demonstrate the Board's repeated breaches of their duties of loyalty and good faith. The Board was aware of and had approved the judgment and amended judgment with the SEC, and had actual knowledge of the steps that Tesla was required to take in order to comply with the judgments. The Board has repeatedly failed to do so by, [redacted]

8. Similar to its repeated failure to implement and apply internal controls

regarding oversight of Mr. Musk, the Board has also consistently failed to ensure that Tesla has an independent General Counsel who can provide advice untainted by Musk. On December 12, 2009, it was reported that Jonathan Chang was resigning as Tesla's General Counsel in an article entitled "Tesla Loses Its Third General Counsel in a Year."[2] The article noted that "With Chang's departure, Tesla has now lost three general counsels in the past year. Tesla's general counsel Todd Maron left the company in December 2018. Maron's successor, Dane Butswinkas, left the company in February 2019 after just two months on the job because he was not a good cultural fit, a source familiar with the situation told CNBC at the time."

9. The fact that Tesla lost three general counsel's in one year reflects the fact that none of them were able to exercise any independent advice on matters that differed from Musk's desired outcome. The Board was acutely aware of the need for Tesla to have a General Counsel who could provide advice as to what was in Tesla's best interests. It was also well aware that Musk was interfering with the General Counsel and dictating Tesla's positions on issues, including with respect to compliance with the SEC's Judgment. The Board has failed to take necessary action to ensure that Tesla has an independent General Counsel and to ensure that Musk does not improperly interfere with the General Counsel's job of representing the best

[2] *See* Annie Palmer, "Tesla Loses Its Third General Counsel in a Year," CNBC, Dec. 12, 2019.

interests of Tesla, thus breaching its duty of loyalty.

10. [redacted]

11. The genesis of the SEC's lawsuits against Musk and Tesla was the following August 7, 2018 tweet issued by Musk:

12. The Board did not pre-approve this material statement; it also did not make any SEC filings regarding this potential **$71 billion transaction**.

13. Once the market reacted to Musk's offer on Twitter, he subsequently withdrew the offer. Thereafter, multiple lawsuits were filed against Musk and Tesla, including complaints filed by the SEC, *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"), as well as claims against the Company under the federal securities laws that were consolidated before the United States District Court for the Northern District of California, *In re Tesla, Inc. Securities Litigation*, No. 3:18-cv- 04865 (N.D. Cal.). (the "Securities Action"). The Company's motion to dismiss was recently denied in the Securities Action, and the Company faces the prospect of substantial damages in that case. *Id*., 477 F.Supp. 3d 903 (N.D. Cal. Apr. 15, 2020).

14. Just two days after the SEC Action and the Tesla SEC Action were filed, Tesla was forced to settle the cases (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."

15. These settlement terms were designed to prevent future violations of the type alleged by the SEC against Musk and were demanded by the SEC with a view towards preventing Musk from disseminating misleading or inaccurate information via Twitter or other means in the future.

16. A final judgment against Tesla was entered on October 16, 2018 by the U.S. District Court for the Southern District of New York (the "District Court"). The final judgment requires Tesla 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.

17. A final judgment was also entered against Elon Musk that requires Musk, 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.

18. Pursuant to the SEC Settlement, Tesla adopted a "Senior Executives Communications Policy" on December 11, 2018. The Senior Executives Communications Policy required Musk to obtain pre-approval prior to publishing any communications that contain or reasonably could be viewed to contain material non- public information, including any previously unpublished guidance. It took Musk barely two months to breach the policy.

19. In violation of the SEC Judgments, on February 19, 2019 Musk issued the following tweet, which he corrected just four hours later, concerning the Company's production output:

20. The next day, Tesla's General Counsel Dane Butswinkas ("Butswinkas"), the former Chairman of Williams & Connolly 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 just two months after he started.

21. 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.

22. The SEC and Musk thereafter entered into a revised settlement agreement, according to which Tesla again revised its policies purportedly governing Musk's use of Twitter, and on April 30, 2019, the Court overseeing the SEC Action approved the revised settlement. This revised settlement agreement required that Tesla revise the Senior Executives Communications Policy to explicitly outline additional categories of communications that needed to be pre-approved by "Disclosure Counsel" prior to publication, including communications about guidance, business plans or performance, Tesla's securities, and Tesla's financial condition. (the "Revised Policy")

23. However, Musk has continued to issue Tweets without the required pre-approval of Tesla's Securities Counsel and Disclosure Controls Committee. On July

29, 2019, Musk responded to a reporter's inquiry on Twitter, disclosing previously undisclosed guidance on Tesla's solar roof production (the "Guidance Tweet"):

24. Tesla's Revised Policy applied to the July 29th Guidance Tweet. In response to multiple press inquiries regarding whether this communication was vetted as required, Tesla refused to disclose whether the guidance given had received pre-approval. Tesla did not manufacture 1,000 solar roofs per week in 2019.

25. In response to Plaintiff Gharrity's Section 220 inspection demand, Tesla produced documents [redacted]. Specifically, on August 7, 2019 Tesla [redacted].

26. [redacted]

[redacted]

27. [redacted]

28. [redacted]

29. Despite [redacted], on May 1, 2020 at 11:11 am, Musk once again disregarded the Revised Policy, tweeting that Tesla's stock was overvalued (the "Valuation Tweet"):

30. On May 1, 2020, Tesla's stock price dropped from $761.31 immediately prior to Musk's tweet to a low of $686.93, or 9.7% in the hours following the tweet — amounting to an almost $14 billion loss in market capitalization.

31. In response to this Tweet, [redacted]

32. Three days later, on May 4, 2020, Tesla [redacted]

33. On May 8, 2020, [redacted]

[redacted]

34. The failure of Tesla's Board to ensure compliance with the Amended Final Judgment with the SEC has caused substantial damage to Tesla, including billions of dollars lost in market capitalization and requiring Tesla to spend nearly a billion dollars of its cash to handle a convertible debt maturity. 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, in potential damages and the payment of legal fees related to the federal securities fraud class action cases that were filed in response to Musk's Go-Private tweets, which cases survived a motion to dismiss on April 15, 2020. Tesla's business, goodwill, and reputation with its customers and stockholders also have been harmed.

35. Musk's wrongful conduct has caused, and will continue to cause, substantial harm to Tesla, including damage to 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.

36. Plaintiff has not made a pre-suit demand on the Board because such a demand would be a futile, wasteful, and useless act. The Board has failed to curtail

Musk's unlawful conduct, even after entry of the Judgments, and has 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. Plaintiff

37. Plaintiff Chase Gharrity is a current stockholder of Tesla and has continuously been a stockholder of the Company at all times relevant herein.

B. Nominal Defendant Tesla

38. 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

i. Elon Musk

39. Defendant Musk is a Director, co-founder, 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, Musk owns approximately 20.8% of Tesla's common stock.

ii. Kimbal Musk

40. 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.

41. 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, and a limited partner in Valor Equity Partners II, L.P. (in which his brother Musk has also invested) and Valor Equity Partners III-A, L.P., both of which are funds advised by Gracias's private equity firm, Valor.

42. Elon Elon Musk, Gracias, Ehrenpreis and Jurvetson have each invested in Kimbal Musk's restaurant company, The Kitchen Café.

43. As a director of Tesla, K. Musk earned nearly $7 million in fiscal year 2018.

iii. Gracias

44. 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").

45. 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.

46. Gracias himself testified in the SolarCity Case that he had been close personal friends with Musk for over 20 years. Gracias also testified that he was also good friends with Musk's family, including K. Musk, having vacationed with both around the country and the world, having attended K. Musk's wedding, and having even attended family birthday parties together.

47. 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. Musk has also invested in [redacted].

48. Musk's brother, K. Musk, also invests in [redacted]

[redacted]

49. 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.

50. 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.

51. As a director of Tesla, Gracias earned over $13 million in fiscal year

2018.

iv. Denholm

52. 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. Denholm also assumed the position of Chair of the Disclosure Controls Committee that Tesla was forced to create as part of the SEC judgments. She is also a member of the Audit Committee and the Compensation Committee.

53. 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.

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

55. 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 another nearly $7 million in fiscal year 2018. 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.

v. Ehrenpreis

56. 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.

57. 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.

58. 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.

59. 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."

60. Pfund's and Ehrenpries's DBL Partners has invested approximately $166 million in Musk company SpaceX, Ehrenpreis has personally owned hundreds of thousands of shares of SpaceX stock.

61. Ehrenpreis has stated that Musk has had a significant influence on his professional career. As a director of Tesla, Ehrenpreis earned nearly $10 million in fiscal year 2018.

vi. Ellison

62. 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.

63. [redacted]

[redacted]

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

65. 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.

vii. Mizuno

66. Defendant Hiromichi Mizuno ("Mizuno") has served as a director of the Company since April 2020. Mizuno is a member of the Audit Committee.

67. Prior to his appointment as a director of Tesla, Mizuno was the Chief Investment Officer of Japan's government pension fund, which held almost $1 billion in Tesla stock.

viii. Murdoch

68. Defendant 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. He is also a member of the Disclosure Controls Committee responsible for reviewing Musk's tweets.

69. As a director of Tesla, Murdoch earned over $9 million in fiscal year

2018.

ix. Wilson-Thompson

70. 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. She is also a member of the Disclosure Controls Committee responsible for reviewing Musk's tweets.

Former Directors

a. Buss

71. Defendant Brad W. Buss ("Buss") served as a director of the Company from 2009 until June of 2019. Buss served on the Tesla Board's Audit, Compensation, Nominating and Governance, and Disclosure Controls Committees. Upon information and belief, Buss did not have full time employment from early 2016 until his departure from the Tesla Board, but earned $3,357,002 as a director of Tesla for fiscal year 2017 and $6,877,402.95 in fiscal year 2018.

72. 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.

73. 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.

b. Rice

74. Defendant Linda Johnson Rice ("Rice") served as a director of the Company from 2017 until June of 2019. Rice was a member of the Tesla Board's Compensation Committee.

75. As a director of Tesla, Rice earned over $8 million in fiscal year 2018.

* * *

76. 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; for periods after June 11, 2019, excluding Rice and Buss; and, for

periods after April 23, 2020, Mizuno.

c. Jurvetson

77. Defendant Steve Jurvetson ("Jurvetson") served on the Tesla Board from 2009 until 2020.

78. In a December 29, 2018 article, The New York Times described Jurvetson as having "close personal and professional ties to" Musk. Jurvetson was a managing director of venture capital firm Draper Fisher Jurvetson ("DFJ"). DFJ invested in Tesla before its 2010 initial public offering ("IPO"), participating in Tesla's Series C (closed May 1, 2006), Series D (closed May 11, 2007), and Series E (closed February 8, 2008) venture funding rounds. Thereafter, Jurvetson joined the Tesla Board. In addition, DFJ and Jurvetson owned substantial shares of SolarCity at the time of Tesla's SolarCity acquisition, and under Jurvetson's stewardship DFJ also became a "significant stockholder" of SpaceX, participating in numerous venture funding rounds for that company. Jurvetson also served on the Board of SpaceX.

79. Further, not only did DFJ invest in Musk, Musk invested in DFJ: the Elon Musk Trust is a limited partner in the Draper Fisher Jurvetson Fund X, L.P.

80. [redacted]

81. 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 he still serves as a Director of both Tesla and SolarCity.

82. Recently, Jurvetson participated in early funding rounds for Musk's The Boring Company — a company that manufactures hats and flamethrowers, and aims to provide infrastructure and tunnel construction services.

FACTUAL BACKGROUND

A. A Brief History of Tesla and Elon Musk's Use of His Personal Twitter Account to Disseminate Information About Tesla

83. On June 29, 2010, Tesla conducted its IPO. The Company was founded on July 1, 2003 in San Carlos, California.

84. After's Tesla's founding, Elon Musk acquired a controlling stake in the Company, participating in Tesla's Series B, C, D and E venture financing rounds. Prior to the Company's IPO, Elon Musk invested approximately $70 million in Tesla.

85. Musk solidified his control of Tesla in November 2007, when he forced the founder and then-CEO Eberhard out of the Company. In October 2008, Musk appointed himself CEO.

86. At all times since Tesla's IPO, Elon Musk has been the Company's largest stockholder, owning nearly at least 20% or more of the Company's stock.

87. Few companies are so closely associated with the identity of a single individual. Musk is the "face of Tesla" and the dominant force behind Tesla's corporate strategy.

88. As the Delaware Court of Chancery recently stated, "[t]hat 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.

89. 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.

90. Each of the Company's directors depend on Musk to indemnify them against personal liability arising from their service on the Board of Tesla. In its Form 10-K for fiscal year 2019, Tesla disclosed that Tesla canceled its directors and officers liability insurance policy for the 2019 to 2020 year due to "disproportionately high premiums quoted by insurance companies." Instead, Tesla disclosed that Musk is personally providing coverage to Tesla's directors and officers. It is no stretch of logic to infer that the "disproportionately high premiums quoted by insurance companies" were a result of Musk's increasingly erratic behavior and misconduct and the Board's continuing failure to demonstrate any ability to control him. Now, Musk controls whether the directors and officers of Tesla are insured for, among other things, failing to oversee his misconduct, the terms on which they settle any litigation, whether they settle any litigation, or whether those directors and officers have to reach into their own pockets should they be accused of any wrongdoing.

91. 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 $36 billion as of February 2020.

92. Elon Musk also 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. In August 2018 — in the midst of the flurry caused by Musk's tweets — Musk received $65 million in repayments from Tesla attributable to Musk's SolarCity investments.

93. Musk also is a defendant in a derivative and class action litigation against the Tesla Board concerning Tesla's and Musk's alleged bailout of Musk's failing solar energy company, SolarCity (the "SolarCity Action"). The plaintiffs in that litigation allege that Musk controlled Tesla and the Board in a transaction that made several of Tesla's directors millions of dollars, but that those plaintiffs allege harmed Tesla in the billions. According to Court filings in that case, the Board, other

than Musk, entered into a settlement of the claims against them for $60 million. The trial against Musk is scheduled for July 2021.

94. 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."

95. In 2009, Musk established a personal account on Twitter and began using the personal account to communicate about Tesla's business.

96. 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

97. At all times 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.

98. 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."

99. 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 follow Musk on Twitter, which results in Musk's tweets being automatically sent directly to those users.

100. Through his Twitter account, Musk both publishes tweets himself and also responds to tweets published by others. In neither circumstance does Musk or Tesla ever announce or disclose any distinction between Musk's personal tweets and tweets being published as Tesla communications.

101. Prior to August 2018, Tesla purportedly had in place at least one policy that governed Musk's tweets and other social media communications.[3]

102. [redacted]

103. [redacted]

104. [redacted]

[3] The August 18, 2018 minutes of a Special Meeting of the Tesla Board, produced pursuant to Section 220, states that at that time the Board discussed [redacted] However, it is unclear whether [redacted] have been produced in response to the 220 Demands. One "Social Media Policy" was produced, but it was undated.

[redacted]

105. [redacted]

B. [redacted]

106. At 3:27 PM on August 2, 2018, Musk emailed Tesla's Board, as well as Todd Maron (Tesla's then-General Counsel) and Deepak Ahuja (Tesla's then-CFO), with the subject line "Offer to Take Tesla Private at $420." The email did not state who made the offer but stated "Unless another bidder comes forward with a better offer, I would ask that this matter be put to a shareholder vote at the earliest opportunity. This offer expires in 30 days."

107. [redacted]

108. That evening, the Board of Directors held a special meeting—not attended by Directors Musk, K. Musk, or Jurvetson — [redacted]

[redacted]

109. The following day, on August 3, 2018, the Board of Directors again met, this time with Musk present. At the meeting, [redacted]

110. Elon Musk has publicly displayed his animosity to those who were short-selling Tesla stock. On May 2, 2018, Musk responded to analysts' questions about Tesla's first-quarter earnings by responding "Boring, bonehead questions are not cool, Next?" and "These questions are so dry. They're killing me."

111. On Twitter, Musk defended his answers by posting "two sell-side analysts who were trying to justify their Tesla short thesis." On May 4, 2018, he further tweeted the following: "Oh and uh short burn of the century comin [sic] soon.

Flamethrowers should arrive just in time." And immediately after, he posted "Looks like sooner than expected. The sheer magnitude of short carnage will be unreal. If you're short, I suggest tiptoeing quietly to the exit . . . ."

112. On May 7, 2018, Musk bought $9.85 million worth of Tesla shares to force a burst of the short-covering, which caused Tesla's stock price to increase from $297.50 to $302.77. Musk did this again on June 12, 2018 to maintain Tesla's stock price while Tesla laid off 46,000 employees (roughly 9% of the workforce).

113. A few days later, Mr. Musk tweeted that "[the shorts] have about three weeks before their short position explodes." By the end of July 2018, Tesla's short-stock interest was 35 million shares (20% of outstanding stock). Many speculated that the Go-Private Tweets were the fulfillment of Musk's promised "short burn of the century."

114. However, at an August 3, 2018 meeting, the Board noted specifically that [redacted] Tesla's Board authorized Musk to [redacted] and asked Musk [redacted]

115. Within a few days, Musk flaunted the Board's limited authorization,

with no reprimand from the Board.

C. Musk Issues the Go-Private Tweets in Violation of the Board's Directives

116. 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***." Musk selected the price in a nod to marijuana culture to "amuse" his girlfriend.

117. 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."

118. The texts in the two preceding paragraphs 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 the Board's authorization, Company policy, regulatory requirements, and the truth — all while leading to a flurry of speculative trading, news reports, lawsuits and governmental inquiries.

119. Musk's Go-Private tweets were highly material information from the Company's key insider and largest shareholder, and caused an immediate reaction from analysts.

120. Musk's tweets also caused severe market reaction since the Company's authorized representatives confirmed the tweets. Mr. Viecha (Tesla's Senior

Director of Investor Relations) immediately received three e-mails inquiring about Mr. Musk's tweets. First, an analyst asked the following, "In the tweet, [Mr. Musk] said financing is secured but in the letter he doesn't address this. Can you clarify?" Mr. Viecha responded saying "I can only say that the first Tweet clearly stated that ' financing is secured .' Yes , there is a firm offer." Second, another analyst e-mailed Mr. Viecha and another Tesla investor-relations member and asked "Had some questions/clarifications on today's news and blog post. Can either of you speak?" Mr. Viecha responded that "[A]part from what has been tweeted and what was written in a blog post, we can't add anything else. I only want to stress that Elon's first tweet, which mentioned ' financing secured ' is correct."

121. At the close of trading on August 8, 2018, Tesla's stock price dropped 2.5%—from $379.59 to $370.34 because contrary to what Musk had said on August 7, 2018, a press release from Tesla's Board said it was investigating the tweet, but did not state that funding for a going-private transaction had been “secured.” On August 9, 2018, Tesla's stock closed with a further drop from $370.34 to $352.45, which reflected a 5% decline, due to the Wall Street Journal's publication of an SEC investigation into the August 7, 2018 tweet.

122. Mr. Musk then tweeted the following on August 13, 2018: " 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."

123. On the same day, Bloomberg reported that neither Goldman Sachs nor Silver Lake were yet working with Musk pursuant to a signed agreement or in an official capacity. Similarly, the New York Times reported that Goldman Sachs and Silver Lake were only in talks with Tesla, but there was nothing finalized.

124. Tesla's stock price rose following Mr. Musk's August 13, 2018 statement —from $356.41 to $361.13. But on August 14, 2018, Tesla's stock closed at $347.64, which represented a 2.5% decline from $356.41 because of reports that Defendants did not retain the financial advisors mentioned in Mr. Musk's Twitter post.

125. On August 15, 2018, the Wall Street Journal reported that the SEC formally subpoenaed Tesla regarding Mr. Musk's tweets. The same day, Tesla's stock fell from $346.64 to $338.69, a 2.5% decline.

126. The New York Times published an article on August 17, 2018, summarizing a recent interview with Mr. Musk. The article reported that, during the interview, Mr. Musk revealed that no one reviewed his August 7, 2018 tweet before he posted it, he chose the $420 price per share because of "better karma," and the going-private transaction was far from secure because financing was not in fact secured. At the close of trading on August 17, 2018, Tesla's stock price closed at $305.50, which was a 9% fall from the previous day at $335.45.

127. The Go-Private Tweets plainly flaunted the Board's [redacted]

128. The Go-Private Tweets also violated [redacted]. For example, [redacted]

129. The Go-Private Tweets reportedly blindsided the Company's other senior executives, including CFO Ahuja, who had been present at the August 3, 2018 meeting where the Board [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

[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.

responded "Yeah, that would be great." A few hours later, Musk blogged to 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]

130. The Go-Private Tweets also 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.

131. 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*, WAL. 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, https://www.nytimes.com/2018/08/13/business/dealbook/elon-musk-tesla-twitter.html.

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.

132. 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***."
>
> 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]

* * *

[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.

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 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]

---

[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.

[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*.

133. 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]

134. Finally, the Go-Private Tweets were false and misleading. As later admitted by Tesla, neither Musk nor Tesla had actually lined up the necessary financing. In addition, Musk had only engaged in 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]

135. 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 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]

136. 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***

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

[14] SEC Action Compl. ¶21.

[15] *Id*. at ¶24.

> ***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]

D. The Board Fails to Exercise Effective Oversight of Musk in the Face of Musk's Unlawful Go-Private Tweets

137. As alleged *supra*, in connection with the Go-Private Tweets, Musk consciously 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

[16] Id. ¶¶62, 69, 71.

any communications from the board at all. I definitely did not get calls from irate directors."

138. At 4:30 PM on August 7, 2018 — the day the Go-Private Tweets were made — the Board (other than Musk, K. Musk, or Jurvetson) [redacted]

139. [redacted] Indeed, in an e-mail produced in connection with the Section 220 Demands, [redacted]

140. Tesla's Board held another Special Meeting nearly a week later, on August 13, 2018, which Musk attended. [redacted] — even though, 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.

141. Still, at another Special Meeting held three days later, on August 16, 2018, [redacted]. Instead, the Board [redacted]

142. [redacted] 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."

143. *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, the minutes of another Special Meeting of the Board on the day after the interview was published, August 17, 2018, [redacted].

144. Finally, at another Special Meeting the following day, on August 18, 2018, the Board discussed the [redacted] Yet, the Board [redacted] Instead, the Board simply [redacted]

E. Musk Derails SEC Settlement Efforts with the Acquiescence of Tesla's Board

145. On August 24, 2018, Musk changed course and announced that Tesla

would stay public.[17]

146. The following day, [redacted] Despite Musk's erratic behavior and concerning interview with *The New York Times* a few days prior, [redacted]

147. Yet, even if Tesla was no longer considering going private, the SEC was still investigating the Go-Private Tweets — which made it 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").

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

148. At a special meeting of Tesla's Board on September 10, 2018, the Board discussed [redacted]

149. [redacted]

150. 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

[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

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]

151. 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.

152. In its complaint, the SEC alleged that for at least five years, Tesla failed to maintain disclosure controls and procedures concerning Musk's dissemination of information concerning Tesla.

153. 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.

154. 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

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

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.

155. 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.

F. The Board Creates the Appearance of Compliance with the SEC Settlement, While at the Same Time Facilitating Musk's Ongoing Violations of the Restrictions

156. Tesla's settlement with the SEC imposed a heightened duty on the Board to ensure compliance with the terms of the settlement and to exercise increased oversight of Musk, who the Board knew was engaging in unlawful conduct that put the Company at a materially increased risk of harm. The Board failed to fulfill its duties, however, since Musk's conduct continued unabated.

157. 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:

158. Tesla's Board called a special meeting the next day, at which [redacted]

159. 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).

160. Just ten days later, on October 26, 2018, Musk said on Twitter that the

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

$20 million fine was "worth it."

161. 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.

162. 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.***

163. 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 say 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***.

164. 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]

165. 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.

166. 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

[21] SEC Action, ECF No. 18-1.

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."

167. Yet Tesla did not disclose what the Board knew [redacted] This undisclosed fact seriously called into question [redacted]

G. In 2019, Musk Continues to Intentionally Disregard Company Policies and the SEC Settlements

168. 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."

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

170. 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, *i.e* 10k cars/week. Deliveries for year still estimated to be about 400k."

171. 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.

172. 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."

173. 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.

174. 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]

175. 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").

176. The Contempt Motion alleged 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, *i.e* 10k cars/week."

Ex. C at 5-6 (internal citations omitted). The Contempt Motion also alleged 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.**

177. 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 … @"

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

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

180. Early the next 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%.

181. 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.

182. 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.

183. 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). . . .

184. The Contempt Motion resulted in a revised settlement agreement, entered by the Court on April 30, 2019, pursuant to which Tesla again revised its Senior Executives Communications Policy (the "Revised Settlement").

185. Among other things, the Revised Policy required that Musk get written pre-approval from Tesla's "Disclosure Counsel" prior to posting or publishing any information that contains "Specified Information," which the Revised Policy defines as:

- the Company's financial condition, statements or results, including earnings or guidance;
- potential or proposed mergers, acquisitions, dispositions, tender offers, or joint ventures;
- production numbers or sales or delivery numbers (whether actual, forecasted, or projected) that have not been previously published via pre-approved written communications issued by the Company ("Official Company Guidance") or deviate from previously published Official Company Guidance;
- new or proposed business lines that are unrelated to then-existing business lines (presently includes vehicles, transportation, and sustainable energy products);
- projection, forecast, or estimate numbers regarding the Company's business that have not been previously published in Official Company Guidance or deviate from previously published Official Company Guidance;
- events regarding Tesla's securities (including the CEO's acquisition or disposition of the Company's securities), credit facilities, or financing or lending arrangements;
- nonpublic legal or regulatory findings or decisions;
- any event requiring the filing of a Form 8-K by Tesla with the Securities and Exchange Commission, including:
    - a change in control; or

- a change in the Company's directors; any principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer, or any person performing similar functions, or any named executive officer; or

- such other topics as the Company or the majority of the independent members of its Board of Directors may request, if it or they believe pre- approval of communications regarding such additional topics would protect the interests of the Company's shareholders.

186. The Policy further provides that once any communication under the policy has been preapproved, such communications should be disseminated outside of NASDAQ trading hours which the Policy states is intended to allow all investors equal, unhurried access to information.

187. Despite the fact that the Revised Policy explicitly prohibits Musk from tweeting about production numbers and forecasted guidance without following the procedures set forth therein, on July 29, 2019 Musk tweeted previously undisclosed guidance about Tesla's purported ramp up of solar roof production, stating that the Tesla would produce 1,000 solar roofs per week by the end of 2019.

188. Expected production numbers for the solar roof previously had not been disclosed by Tesla. Indeed, Tesla did not mention the solar roof product *at all* in its Second Quarter 2019 Update letter to stockholders or provide *any* guidance regarding solar roof production during its earnings call a mere five days prior, though the Company did disclose disappointing results for deployments in its retrofit solar

business during the second quarter. Musk's Guidance Tweet unquestionably was covered by the Policy. Tesla declined to respond to reporters' inquiries into whether the tweet was pre-approved in accordance with the Revised Policy. Because only 56 minutes passed between when Mr. McCaffrey sent his tweet to Musk and when Musk responded to the tweet, and because Tesla did not issue this guidance during its earnings call that took place a mere five days prior, there is ample basis to infer that the Guidance Tweet was published in violation of Tesla's policies and the SEC Settlement.

189. The documents Tesla produced in response to Plaintiff Gharrity's Section 220 Demand confirmed that the tweet was not pre-approved [redacted]

190. [redacted]

[redacted]

191. On August 7, 2019 Tesla [redacted]

192. [redacted]

193. [redacted]

194. [redacted]

[redacted]

195. Moreover, the documents produced in response to Plaintiff Gharrity's Section 220 Demand reveal [redacted] Tesla acknowledges that K. Musk is not independent, among other reasons, because ***he is Elon Musk's brother***. He is not a member of the Audit Committee or the Disclosures Controls Committee. [redacted]

196. Because the Board has done nothing to ensure compliance with the SEC Judgments, E. Musk's unlawful conduct has continued unabated, with Musk openly flaunting any concern about violating the Judgment. As Musk admitted to Lesley Stahl on the 60 Minutes interview, "***Well, I guess we might make some mistakes. Who knows?"*** and "***I want to be clear***. ***I do not respect the SEC. I do not respect them***."

197. The Tesla Board, possessed with actual knowledge of the harm to the Company from Musk's past conduct, and his public defiance of the SEC even after entry of the Judgment, had a heightened duty to prevent unlawful conduct by Musk in order to protect Tesla and its shareholders.

H. [redacted]

198. More than a year after the Amended Judgment in the SEC action was entered on April 30, 2019, Musk issued a tweet at 11:11 a.m EST on May 1, 2020 (the "11:11 tweet") that stated "Tesla stock is too high IMO." In response to this Tweet, [redacted]

199. On May 3, 2020, Tesla's Disclosure Controls Committee met, with Denholm (Chair), Jurvetson, Murdoch, and Wilson-Thompson participating. The Committee discussed [redacted]. The minutes of the meeting indicate that [redacted]

[redacted]

200. Three days later, on May 4, 2020, Tesla [redacted]

201. On May 8, 2020, [redacted]

202. [redacted]

[redacted] The letter stated that [redacted]

203. These facts demonstrate the Board's repeated breaches of their duties of loyalty and good faith. The Board was aware of and had approved the judgment and amended judgment with the SEC, and had actual knowledge of the steps that Tesla was required to take in order to comply with the judgments. The Board has repeatedly failed to do so by, among other things, [redacted]

204. Musk's May 1, 2020 Valuation Tweet destroyed almost $14 billion in Tesla's market capitalization, causing Tesla's stock price to decrease from $761.31 to $686.93, or 9.7% in the hours after the tweet.

205. The Valuation Tweet was only one in a series of erratic tweets on this date from the same Twitter account. Musk's other tweets included lyrics from the Star Spangled Banner, a tweet that his girlfriend Grimes was mad at him, and several tweets that he was going to sell all of his material possessions, interspersed with

tweets about his other company, SpaceX.

I. The Board Has Breached Its Duties of Good Faith and Loyalty by Failing to Appoint an Independent General Counsel and Prevent Musk From Interfering With the General Counsel's Duties

206. Tesla's general counsel directs the company's legal and policy teams around the world and reports directly to Musk. It is a key position at the company that was once held by Todd Maron, who joined Tesla in 2013 after working as Musk's divorce lawyer. Maron, a confidante of Musk's, became general counsel at Tesla in 2014.

207. Musk has always sought to appoint a General Counsel that would protect his interests first and those of Tesla second. In 2019, Tesla lost three general counsels in one year because the lawyers were either too close to Musk or felt they could not do their job due to interference from Musk.

208. In January 2019, Maron resigned. It was announced that Dane Butswinkas, the Washington-based trial lawyer and chairman of Williams & Connolly, would become the next general counsel to Tesla Inc., arriving as the company attempted to climb out of a period of intense regulatory scrutiny.

209. While Butswinkas was viewed as competent and independent, he quickly learned that Musk ran the show and experienced what he later referred to, when he resigned after less than two months on the job, as "culture clash."

210. But Butswinkas' departure was the result of far more than just a

"culture clash." Butswinkas resigned in an extraordinarily hasty fashion, especially for a publicly-traded company's general counsel. The timing was no coincidence. Butswinkas resigned ***one day*** after Musk published the February 19, 2019 tweet ("Tesla made 0 cars in 2011, but will make around 500k in 2019") that caused the SEC to sue him and Tesla for contempt of the SEC Judgment within a week of Musk's issuance of the tweet.

211. Since Musk admitted the very next day that his tweet was not accurate, and Butswinkas resigned that very day, the implications are very clear that Butswinkas had not been able to curtail Musk's conduct in violation of the Judgment. In fact, the gravity of the harm to Tesla on February 20, 2019 must have been palpable for Butswinkas, who resigned "effective immediately." Presumably Butswinkas did not want to be implicated in any contempt proceeding. "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."

212. But more broadly, these facts shine a light on the Board's failure to implement effective oversight of Musk. The General Counsel role is critical to ensure adequate consideration of the best interests of Tesla. But Musk has always filled that role with someone whose first fealty was to him, not Tesla. Butswinkas'

appointment was perhaps a feeble attempt to break that pattern, but it didn't work; Butswinkas lasted a mere two months.

213. When Butswinkas resigned, Musk predictably filled the role with a long-time insider with loyalty to him. Jonathan Chang, who had worked with Tesla as an employee and outside counsel for more than a decade, was named to replace Butswinkas. Chang had first begun working with Tesla in 2006 at Latham & Watkins. He joined Tesla in 2011 following Tesla's IPO, and had been named vice president of legal in 2017.

214. Chang also had a very short tenure as general counsel. On December 12, 2009, it was reported that Chang was resigning as Tesla's General Counsel in an article entitled "Tesla Loses Its Third General Counsel in a Year."[23] The article noted that "With Chang's departure, Tesla has now lost three general counsels in the past year. Tesla's general counsel Todd Maron left the company in December 2018. Maron's successor, Dane Butswinkas, left the company in February 2019 after just two months on the job because he was not a good cultural fit, a source familiar with the situation told CNBC at the time."

215. The fact that Tesla lost three general counsel's in one year reflects the fact that none of them were able to exercise any advice on matters that differed from

[23] *See* Annie Palmer, "Tesla Loses Its Third General Counsel in a Year," CNBC, Dec. 12, 2019.

Musk's desired outcome. The Board was well aware of the need for Tesla to have a General Counsel who could provide advice as to what was in Tesla's best interests. It was also well aware that Musk was interfering with the General Counsel and dictating Tesla's positions on issues, including with respect to compliance with the SEC's Judgment. The Board has failed to take necessary action to ensure that Tesla has an independent General Counsel and to ensure that Musk does not improperly interfere with the General Counsel's job of representing the best interests of Tesla, thus breaching its duty of loyalty.

216. As an example, in its [redacted] letter to Tesla regarding [redacted]

[redacted]

TESLA HAS INCURRED SIGNIFICANT MONETARY DAMAGES

217. 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.

218. On April 15, 2020, Judge Chen denied the motion to dismiss brought by defendants in the related securities fraud class action complaint, exposing Tesla to significant damages. *See* 477 F. Supp. 3d 903 (N.D. Cal. Apr. 15, 2020). Defendants E. Musk, Brad W. Buss, Robyn Denholm, Ira Ehrenpreis, Antonio J. Gracias, James Murdoch, Kimbal Musk, and Linda Johnson Rice are defendants in that case, and thus face a substantial likelihood of liability in such case, impairing their independence and objectivity in this case.

219. 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.

220. 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, 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.

221. As Musk's escalating recklessness continued and culminated in his making of the Valuation Tweet stating that Tesla was overvalued, Tesla's market capitalization dropped by almost $14 billion in mere hours.

222. 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.

223. 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.

224. 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.

225. 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

[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]

226. 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***."

227. Musk's Guidance Tweet and Valuation Tweet show that the SEC Settlement and Board have failed to curb Musk's behavior.

228. Professor Sonnenfeld has opined that "Tesla investors must realize that they have a panicky, erratic, possibly self-destructive C.E.O. at the helm. No C.E.O.

[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.

is ever this confused and confusing."[26]

229. 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."

230. 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.

231. 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 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

[26] 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.

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.”

232. Defendant Musk’s continuing violation of the SEC settlement and Judgment has caused substantial harm to Tesla. Musk’s Valuation Tweet destroyed almost $14 billion of Tesla’s market capitalization in a single day — more than three times the harm caused to Tesla by Musk’s go-private tweet. This happened despite the SEC Settlements, despite the existence of the Revised Policy, and despite changes to the composition of the Board. Musk and the Board have failed Tesla and their stockholders, and Musk’s misconduct cannot be allowed to continue unchecked.

DERIVATIVE AND DEMAND FUTILITY ALLEGATIONS

233. Plaintiff brings 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.

234. Plaintiff is a stockholder of Tesla, was a stockholder of Tesla at the time of the wrongdoing alleged herein, and has been stockholders of Tesla continuously since that time.

235. Plaintiff 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.

236. As a result of the facts set forth herein, Plaintiff has 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 itself to be incapable of preventing Musk from continuing his unlawful and damaging tweets. Any demand upon the Board to take action against itself or Musk would be futile because the Board itself has failed to do anything to prevent Musk's conduct, even after supposedly enacting policies to curtail Musk's unlawful conduct, which has continued unabated.

237. Because Musk controls indemnification for any liability found against it, the Board is incapable of exercising independent objective judgment about whether to bring this action or whether to vigorously prosecute this action.

238. The Tesla Board is currently comprised of nine (9) members—Defendants E. Musk, Denholm, Ehrenpreis, Gracias, Murdoch, K. Musk, Mizuno, Ellison, and Wilson-Thompson. Thus, Plaintiff is required to show that a majority, i.e., five (5), 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.

239. The Board faces a substantial likelihood of liability because it 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.

240. 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.

241. 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, Plaintiff has not made (and is 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.

242. 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. 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 failing to [redacted] the Senior Executives Communications Policy and Revised Policy.

243. The Board's failure to ensure a truly independent general counsel at Tesla represents an egregious breach of the Board's duty of loyalty, since the general counsel's role is to protect Tesla's interests rather than any personal interests possessed by Elon Musk. 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."

244. Moreover, as detailed herein, the [redacted] about Musk's alleged violation of the Judgment demonstrate that [redacted]

[redacted]

245. The failure of the Board to appoint an independent General Counsel at Tesla demonstrates the Board's breach of its duties of loyalty and good faith.

246. 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***."[27]

247. Similarly, Professor Coffee authored an article entitled "Bonfire of the Vanities — 2018 Style: The Case of Elon Musk,"[28] 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.

[27] 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.

[28] 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/.

> 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***.

248. 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 Harvey Pitt, who characterized the tweet as "juvenile, narcissistic, stupid, erroneous and petulant."[29]

249. 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

[29] 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.

regulator, the SEC, further shows the Board's complete abdication of its fiduciary duties and its bad faith.

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

251. 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.

252. On April 15, 2020, Judge Chen denied the motion to dismiss brought by defendants in the related securities fraud class action complaint, exposing Tesla to significant damages. Defendants E. Musk, Brad W. Buss, Robyn Denholm, Ira

Ehrenpreis, Antonio J. Gracias, James Murdoch, Kimbal Musk, and Linda Johnson Rice are defendants in that case, and thus face a substantial likelihood of liability in such case, impairing their independence and objectivity in this case.

B. The Board Is Not Independent

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

254. Most importantly, the Board is insured, and thus indemnified, by Musk *personally* for a majority of the harm *caused by* Musk alleged herein. The Board cannot be considered independent in any way from Musk in these circumstances. Musk could refuse to pay out the "insurance policy" if the Board elected to proceed with an investigation of him, and the Board would have every incentive to abandon that investigation.

255. Additionally, separate and apart from the fact that Musk is personally insuring the directors of Tesla, at all relevant times, a majority of the Board was not independent from Musk.

a. Elon Musk

256. The principal professional occupation of Elon Musk is his employment as CEO of Tesla. According to the Company's most recent Proxy Statement, filed with the SEC on May 28, 2020, 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."

257. 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 and damaged the Company through the SEC Settlement, as well as the Guidance Tweet and the Valuation Tweet, all of which potentially violated the SEC Settlements and, particularly in the case of the Valuation Tweet, caused Tesla massive damage.

258. 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 and was a director when the Company approved the Revised 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, the Guidance and Valuation Tweets, and potential violation of the SEC Settlements.

259. For all of these reasons, Musk cannot disinterestedly and independently

consider a demand to prosecute the claims alleged herein.

b. Larry Ellison

260. Ellison cannot disinterestedly and independently consider a demand against his "very close friend" Musk.

261. [redacted]

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

263. Ellison also has received very large compensation as a director of Tesla. IN 2019, Ellison was awarded total compensation as a director of Tesla of $5,868,976.

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

c. Gracias

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

266. 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.

267. 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."[30] Gracias uses these testimonials and his relationship with Elon Musk to solicit fund investors and entrepreneurs seeking venture capital on behalf of Valor.

268. Gracias also received out-sized compensation as a member of the Tesla Board. By way of example, in fiscal year 2018, Gracias earned compensation valued at $13,323,657 for acting as a Tesla director.

[30] Testimonials, http://www.valorep.com/about (follow Testimonials hyperlink) (last visited Feb. 28, 2019).

269. 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. ISS wrote that Gracias, CEO of Valor Management Corp, is not sufficiently independent for key Tesla board committees. It also cited concerns regarding the lack of performance-based elements in Tesla's pay plan in recommending the vote against Gracias, a compensation committee member.

270. 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.[31]

271. 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 the independence to serve as Lead Independent director, and has not initiated the

[31] 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.

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 who he gave the second Tesla Roadster ever built.

272. Gracias is further incapable of impartially considering a demand to commence and vigorously prosecute this action because of his personal involvement in the issues at hand. Specifically, the day that Musk made the Go-Private Tweets, the Tesla Board [redacted] Musk's reckless social media communications continued.

273. 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 and the Revised Policy. Gracias faces a substantial likelihood of liability for the Board's failure to enforce the Senior Executives Communications Policy and the Revised Policy, which led to Musk's

February 2019 tweets, the subsequent legal action of the SEC, the Guidance and Valuation Tweets, and potential violation of the SEC Settlement.

274. For all these reasons, Gracias cannot disinterestedly and independently consider a demand to prosecute the claims alleged herein.

d. K. Musk

275. K. Musk cannot disinterestedly and independently consider a demand against his brother, Elon Musk. K. Musk sits on the Boards of Directors of Tesla and SpaceX by virtue of being Elon Musk's brother, and collects significant director fees as a result thereof. By way of example, for serving as a Tesla director, in 2018 K. Musk earned compensation valued at $6,860,523. Tesla admits in its proxy statements that K. Musk is not independent.

276. In May 2018, CtW recommended that shareholders vote against K. Musk as director in Tesla's 2018 elections. In a letter filed with the SEC on May 9, 2018 on Form PX14A6G, CtW wrote that "Kimbal Musk — Elon Musk's brother — shares several of Mr. Gracias's conflicts, has no professional experience in the auto industry, and has proven ineffective as a public company director at Chipotle." In this letter CtW also stated in relevant part:

> 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.

277. 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. As discussed above, [redacted].

278. 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 and the Revised Policy. K. Musk faces a substantial likelihood of liability for the Board's failure to enforce the Senior Executives Communications Policy and the Revised Policy, which led to Musk's February 2019 tweets, the subsequent legal action of the SEC, the Guidance and Valuation Tweets, and potential violation of the SEC Settlements.

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

e. Ehrenpreis

280. 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.

281. Ehrenpreis also received out-sized compensation as a member of the Tesla Board. By way of example, for serving as a Tesla director, in 2018 Ehrenpreis earned compensation valued at $9,910,244.

282. 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.

283. 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.

284. [redacted]

285. 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 and Revised Policy. Ehrenpreis faces a substantial likelihood of liability for the Board's failure to enforce the Senior Executives Communications Policy and Revised Policy, which led to Musk's February 2019 tweets, the subsequent legal action of the SEC, the Guidance and Valuation Tweets, and potential violation of the SEC Settlements.

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

f. Denholm

287. 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.

288. 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, $6,838,600 in 2018, and $ 2,743,679 in 2019. 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.

289. 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 and Revised Policy. Denholm also faces a substantial likelihood of liability for the Board's failure to enforce the Senior Executives Communications Policy and Revised Policy, which led to Musk's February 2019 tweets, the subsequent legal action of the SEC, the Guidance and Valuation Tweets, and potential violation of the SEC Settlements.

290. Denholm is the chair of the Disclosure Controls Committee. The Disclosure Controls Committee is responsible for, among other things:

- overseeing the implementation of and compliance with the terms of Tesla's consent agreement with the SEC dated September 29, 2018, as amended April 26, 2019;
- overseeing the controls and processes governing certain public disclosures by Tesla and its executive officers; and
- reviewing and resolving certain conflicts of interest or other human resources issues involving any executive officer and ensuring appropriate disclosures, if applicable.

291. Denholm has abdicated her duties as Chair of the Disclosure Controls Committee and has failed to curtail Musk's wrongful conduct. For all of these reasons, Denholm cannot disinterestedly and independently consider a demand to prosecute the claims alleged herein.

g. Mizuno

292. Mizuno is interested because he faces a substantial likelihood of liability for the Board's failure to enforce the Senior Executives Communications Policy and Revised Policy, which led to Musk's Valuation Tweet, and potential violation of the SEC Settlements.

293. For all of these reasons, Mizuno cannot disinterestedly and

independently consider a demand to prosecute the claims herein.

h. Murdoch

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

295. ISS has previously recommended against Murdoch's re-election to the Tesla Board, noting that Murdoch is "overboarded" since he serves as the CEO of Twenty-First Century Fox Inc (FOXA.O) and on other boards. Glass Lewis also recommended against Murdoch's re-election.

296. Murdoch is a member of the Disclosure Controls Committee. The Disclosure Controls Committee is responsible for, among other things:

- overseeing the implementation of and compliance with the terms of Tesla's consent agreement with the SEC dated September 29, 2018, as amended April 26, 2019;
- overseeing the controls and processes governing certain public disclosures by Tesla and its executive officers; and

- reviewing and resolving certain conflicts of interest or other human resources issues involving any executive officer and ensuring appropriate disclosures, if applicable.

297. Murdoch has abdicated his duties as a member of the Disclosure Controls Committee and has failed to curtail Musk's wrongful conduct.

298. 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 and $9,031,082 in 2018.

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

i. Wilson-Thompson

300. Kathleen Wilson-Thompson is interested because she faces a substantial likelihood of liability for the Board's failure to enforce the Senior Executives Communications Policy and Revised Policy, which led to Musk's February 2019 tweets, the subsequent legal action of the SEC, the Guidance and Valuation Tweets, and potential violation of the SEC Settlements.

301. Wilson-Thompson also has received very large compensation as a director of Tesla. In 2019, Wilson-Thompson was awarded total compensation as a director of Tesla of $ 7,356,738.

302. Wilson-Thompson is a member of the Disclosure Controls Committee. The Disclosure Controls Committee is responsible for, among other things:

- overseeing the implementation of and compliance with the terms of Tesla's consent agreement with the SEC dated September 29, 2018, as amended April 26, 2019;
- overseeing the controls and processes governing certain public disclosures by Tesla and its executive officers; and
- reviewing and resolving certain conflicts of interest or other human resources issues involving any executive officer and ensuring appropriate disclosures, if applicable.

303. Wilson-Thompson has abdicated her duties as a member of the Disclosure Controls Committee and has failed to curtail Musk's wrongful conduct.

304. Accordingly, Wilson-Thompson cannot disinterestedly and independently consider a demand.

COUNT I
Derivative Claim Against Musk for Breaches of his Fiduciary Duties in his Capacities as Director, Officer, and Controlling Stockholder

305. Plaintiff incorporates by reference and realleges each and every allegation set forth above, as though fully set forth herein.

306. Plaintiff, on behalf of Tesla, has no adequate remedy at law.

307. As alleged throughout the complaint, Elon Musk controls Tesla and the

Board.

308. As Tesla's controlling stockholder, Musk owes fiduciary duties to the Company and its remaining stockholders.

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

310. As alleged above, Musk failed to act in accordance with these fiduciary duties. Specifically, based on the facts alleged above, the Go-Private Tweets, Guidance Tweet, and Valuation Tweet 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.

311. 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.

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

313. 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 Tesla Board
For Breaches of Fiduciary Duties

314. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

315. Plaintiff, on behalf of Tesla, has no adequate remedy at law.

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

317. 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, by failing to comply with the SEC Settlement, and by allowing Musk to continue his misconduct unchecked, including by making the Guidance Tweet and Valuation Tweet.

318. 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.

319. 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.

320. 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.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court:

A. Grant the declaratory relief as requested herein;

B. Find Defendants liable for their breaches of fiduciary duties owed to the Company;

C. Award, against the Defendants and in favor of Tesla, damages, together with pre- and post-judgment interest;

D. Award to Plaintiff the costs and disbursements of the action, including reasonable attorneys' fees, accounts' and experts' fees, costs and expenses; and

E. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

COOCH AND TAYLOR, P.A.

/s/ Blake A. Bennett
Blake A. Bennett (#5133)
The Nemours Building
1007 N. Orange St., Suite 1120
Wilmington, DE 19801
Telephone: (302) 984-3800
Facsimile: (302) 984-3939
Email: bbennett@coochtaylor.com
Counsel for Plaintiff

DATED: MARCH 8, 2021

OF COUNSEL:
BOTTINI & BOTTINI, INC.
Francis A. Bottini, Jr.
Albert Y. Chang
Yury A. Kolesnikov
7817 Ivanhoe Avenue, Suite 102
La Jolla, California 92037
Telephone: (858) 914-2001
Facsimile: (858) 914-2002
Email: fbottini@bottinilaw.com
achang@bottinilaw.com
ykolesnikov@bottinilaw.com