



**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

ZACHARY ELTON, Derivatively on  
Behalf of Nominal Defendant, TESLA,  
INC.,

Plaintiff,

vs.

ELON MUSK, DEEPAK AHUJA, BRAD  
W. BUSS, ROBYN M. DENHOLM, IRA  
EHRENPREIS, ANTONIO J. GRACIAS,  
STEVE JURVETSON, JAMES  
MURDOCH, LINDA JOHNSON RICE,  
and KIMBAL MUSK,

Defendants,

and

TESLA, INC., a Delaware Corporation,

Nominal Defendant.

C.A. No.

**VERIFIED SHAREHOLDER DERIVATIVE COMPLAINT**

Plaintiff Zachary Elton (“Plaintiff”), by and through his undersigned attorneys, submits this Verified Shareholder Derivative Complaint (the “Complaint”) against defendants named herein. Plaintiff alleges the following based upon information and belief, except as to those allegations concerning Plaintiff, which are alleged upon personal knowledge. Plaintiff’s information and belief is based upon, among other things, the investigation conducted by and under the supervision of their counsel which included, among other things: (a) a review and analysis of regulatory filings filed by Tesla, Inc. (“Tesla” or the “Company”) with the United States Securities and Exchange Commission (“SEC”); (b) a review and analysis of press releases and media reports issued and disseminated by Tesla; (c) a review of other publicly available information concerning Tesla, including articles in the news media and analyst reports; (d) complaints and related materials in litigation commenced against some or all of the Individual Defendants (defined below) and/or the Company; and (e) applicable rules and regulations.

### **SUMMARY OF THE ACTION**

1. This is a shareholder derivative action brought for the benefit of Nominal Defendant Tesla. Tesla designs, develops, manufactures and sells high-performance fully electric vehicles, and energy generation and storage systems, and also installs and maintains such systems and sells solar electricity. Tesla is a Delaware corporation and is headquartered in Palo Alto, California. This derivative

action is brought against certain current members of the Company's Board of Directors (the "Board") and certain current officers (collectively, the "Individual Defendants") seeking to remedy the Individual Defendants' violations of state law and breaches of fiduciary duty.

2. On November 5, 2013, Tesla publicly filed a Form 8-K with the SEC stating that it intended to use CEO and Chairman of the Board defendant Elon Musk's ("E. Musk") Twitter account as a means of announcing material information to the public. Since that time, E. Musk has used his Twitter account as a means of issuing material information about the Company, including forward-looking guidance concerning key Tesla financial metrics and key non-financial metrics including production forecasts, production achievements, and new product releases.<sup>1</sup> At no time did Tesla, however, have any disclosure controls or procedures in place whatsoever to assess whether the information E. Musk disseminated via his Twitter account was required to be disclosed in reports Tesla files pursuant to the Securities Exchange Act of 1934 ("Exchange Act") within the time periods specified in the SEC's rules and forms. Nor did the Company have sufficient processes in place to

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<sup>1</sup> *SEC v. Tesla, Inc.*, Civil Action No. 1:18-cv-8947 (S.D.N.Y. Sept. 29, 2018), at ¶¶ 2, 3, 12.

ensure the information E. Musk published via his Twitter account was accurate or complete.<sup>2</sup>

3. On August 7, 2018, E. Musk posted the following on Twitter.com to his more than twenty-two million followers: “Am considering taking Tesla private at \$420. Funding secured.” Later that same day, E. Musk issued another post on Twitter.com: “Investor support is confirmed. Only reason why this is not certain is that it’s contingent on a shareholder vote.” Also, on the same day following the announcement by E. Musk on Twitter.com, Tesla posted to its website an email from E. Musk to Tesla employees titled “Taking Tesla Private.” This email provided some additional information to employees including that shareholders would be given a choice, “they can stay investors in a private Tesla or they can be bought out at \$420 per share.”

4. Following these statements, Tesla’s stock price surged, reaching an intraday high of \$387.46 per share, before closing at \$379.57 per share on August 7, 2018, a nearly 11% increase from the previous closing price. Over the next several days, additional information was publicly disseminated about the so-called ‘going-private deal.’

5. On August 8, 2018, *The Wall Street Journal* published an article entitled “SEC Probes Tesla CEO Musk’s Tweets,” reporting that U.S. regulators

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<sup>2</sup> *Id.*, ¶ 3.

were inquiring whether “Elon Musk was truthful when he tweeted that he had secured funding” for the proposed buyout of Tesla and whether E. Musk had a “factual basis” for posting “that the going-private transaction was all but certain, with only a shareholder vote needed to pull it off.” On news of the SEC probe, Tesla’s stock price fell \$9.23 per share, or 2.43%, to close at \$370.34 on August 8, 2018.

6. On August 9, 2018, *Bloomberg* published an article entitled “The SEC Is Intensifying Its Probe of Tesla,” reporting that SEC regulators were “intensifying its scrutiny of Tesla Inc.’s public statements in the wake of Elon Musk’s provocative tweet Tuesday about taking the electric-car company private.” That same day, *Reuters* published an article entitled “Exclusive – Tesla’s board seeking more information on Musk’s financing plan – sources,” reporting that the Company’s board of directors had “not yet received a detailed financing plan from Musk and specific information about who will provide the funding.” As a result of these additional disclosures, indicating the lack of funding for taking the Company private, Tesla’s stock price fell an additional \$17.89 per share, or 4.83%, to close at \$352.45 per share on August 9, 2018.

7. On August 13, 2018, defendant E. Musk tweeted; “I’m excited to work with Silver Lake and Goldman Sachs as financial advisors, plus Wachtel, Lipton, Rosen & Katz and Munger, Tolles & Olson as legal advisors, on the proposal to take

Tesla private.” That same day, *The New York Times* published an article entitled “Tesla Board Surprised by Elon Musk’s Tweet on Taking Carmaker Private,” reporting that some members of Tesla’s Board were “totally blindsided by Mr. Musk’s decision to air his plan on Twitter,” which had not been “cleared” by the board.

8. On August 14, 2018, *Bloomberg* published an article entitled “Goldman’s Missing mandate Adds to Clues Musk Tweeted Out of Turn,” reporting that neither Silver Lake or Goldman Sachs were yet working with E. Musk pursuant to a signed agreement or in an official capacity when E. Musk said on Twitter late Monday, August 13, 2018, both firms were working with him as financial advisors.

9. Following these public revelations, Tesla’s stock price fell \$8.77 per share, or 2.46%, to close at \$347.64 per share on August 14, 2018.

10. On August 16, 2018, after the close of the market, *The New York Times* published an in-depth interview with E. Musk entitled “Elon Musk Details ‘Excruciating’ Personal Toll of Tesla Turmoil,” which revealed the stress E. Musk had been under, his use of Ambien, and the manner in which the August 7, 2018, going-private tweets had been conceived. That same day, *The Wall Street Journal* reported that the “SEC is investigating whether Mr. Musk intentionally misled investors when he tweeted about the proposal in a bid to hurt short-sellers by driving up tesla’s stock price.” The article went on to state that “regulators are pressing

Tesla’s directors to reveal how much information Mr. Musk shared with them before he tweeted about it last week.”

11. On this news, Tesla’s stock price dropped \$29.95 per share or 8.92%, to close at \$305.50 per share on August 17, 2018. Indeed, on August 24, 2018, after the close of the market, the Company revealed through a post on its corporate blog that the Company would remain public, adding that existing shareholders believed the Company to be “better off as a public company.”

12. As a result of E. Musk’s tweets concerning taking Tesla private and the public revelations that those statements were materially false and misleading causing a substantial drop in the price of the Company’s stock price, numerous securities class actions were filed against Tesla, E. Musk and others. They are: *Isaacs v. Musk, et al.*, Case No: 3:18-cv-04865 (N.D. Cal. Aug. 10, 2018); *Chamberlain v. Tesla, Inc., et al.*, Case No: 3:18-cv-04876 (N.D. Cal. Aug. 10, 2018); *Yeager v. Tesla, Inc., et al.*, Case No: 3:18-cv-04912 (N.D. Cal. Aug. 13, 2018); *Maia v. Musk, et al.*, Case No: 3:18-cv-04939 (N.D. Cal. Aug. 14, 2018); *Dua v. Tesla, Inc., et al.*, Case No: 3:18-cv-04948 (N.D. Cal. Aug. 15, 2018); *Horwitz v. Tesla, Inc., et al.*, Case No: 5:18-cv-05258 (N.D. Cal. Aug. 28, 2018); *Left v. Tesla, Inc., et al.*, Case No: 3:18-cv-05463 (N.D. Cal. Sept. 6, 2018); *Fan v. Tesla, Inc., et al.*, Case No: 4:18-cv-05470 (N.D. Cal. Sept. 6, 2018); *Sodeifi v. Tesla, Inc., et al.*, Case No: 3:18-cv-05899 (N.D. Cal. Sept. 26, 2018) (collectively, the “Securities Class Actions”).

13. Subsequently, on September 27, 2018, the SEC brought an enforcement action against E. Musk concerning his tweets about taking Tesla private docketed at *SEC v. Musk*, Civil Action No.: 1:18-cv-8865 (S.D.N.Y. Sept. 27, 2018) and on September 29, 2018, against Tesla docketed at *SEC v. Tesla, Inc.*, Civil Action No. 1:18-cv-8947 (S.D.N.Y. Sept. 29, 2018) (collectively, the “SEC Actions”). In fact, according to the SEC Actions, E. Musk did not have funding secured and had not even discussed key deal terms, including the price, with any potential funding source. Furthermore, it was not feasible to take the Company private in the way that E. Musk described and there were many additional contingencies that E. Musk failed to consider that made any such going-private plan highly uncertain.

14. The SEC Actions settled quickly on September 29, 2018, subject to court approval. According to the two settlements, E. Musk and Tesla must each pay \$20 million or \$40 million total, which is to be used to compensate defrauded shareholders. None of the monies paid may be used as an offset in connection with any related shareholder litigation, including the Securities Class Actions.

15. The terms of the settlements of the SEC Actions are as follows: (i) E. Musk is to resign from his role as chairman of the Board of Tesla for a period of at least three years; (ii) the Company is to add two independent directors to its Board; (iii) the Board is to create a permanent committee, consisting of solely independent directors, to oversee: (a) implementation of the terms of the settlements; (b) controls



and procedures governing the Company's and its senior executives' disclosures and/or public statements that relate to the Company; and (c) review and resolution of human resources issues or issues raising conflicts of interest that involve any member of executive management; (iv) employ or designate an experienced securities lawyer to review communications made through Twitter and other social media by the Company's senior officers in a manner consistent with the Company's disclosure policy and procedures, including those set forth in; (v) below, as well as advising the Company on securities issues, including compliance with all federal laws and regulations; and (vi) implement mandatory procedures and controls to oversee all of E. Musk's communications regarding the Company in any format and to pre-approve all such communications that contain, information material to the Company and its shareholders.

16. E. Musk is no stranger to making outrageous and false public statements. For example, E. Musk made unfounded claims that Vernon Unsworth, a British spelunker who assisted in the rescue of a group of Thai youth trapped in a cave, is a pedophile. As a result of that outburst, E. Musk is now facing a defamation lawsuit. E. Musk also used his Twitter account on April 1, 2018, at a time that the Company was rumored to have solvency issues, to make an "April fool's joke" that Tesla was bankrupt, and posted a picture of himself with a caption that included,

“Elon was found passed out against a Tesla Model 3, surrounded by ‘Teslaquilla’ bottles, the tracks of dried tears still visible on his cheeks.”

17. E. Musk has also made other recent newsworthy appearances in other media outlets, including as a guest on comedian Joe Rogan’s podcast on September 6, 2018, where he smoked marijuana during a rambling interview that lasted more than two hours.

18. Furthermore, the Board is well aware of E. Musk’s prior history of making false and misleading statements resulting in alleged violations of the federal securities laws, specifically those related to Model 3 production volume and issues with the production process. Indeed, a class action complaint alleging violations of the federal securities laws concerning misstatements about the Company’s well-publicized production issues with the Model 3 was filed on October 10, 2017 and docketed as *Wochos v. Tesla, Inc., et al.*, Case No: 3:17-cv-05828 (N.D. Cal. Oct. 10, 2017). The allegedly false and misleading statements also prompted another SEC investigation. A second amended complaint was recently filed on September 28, 2018.

19. Despite being put on notice of E. Musk’s propensity for erratic public communications that have harmed the Company and its stockholders, the Board consciously disregarded his actions and failed to do anything. The Board put their loyalties to E. Musk ahead of their fiduciary duties to the Company and its

shareholders. Moreover, a majority of the Board lacks independence from E. Musk due to extensive business and personal relationships.

20. The Individual Defendants breached their fiduciary duties by: (i) failing to implement and enforce a system of effective internal controls and procedures; (ii) failing to exercise their oversight duties by not monitoring the Company's compliance with Company procedures and federal and state regulations; and (iii) consciously disregarding and failing to ensure that E. Musk's public statements were proper and accurate.

### **PARTIES**

21. Plaintiff Zachary Elton is currently and has continuously been a stockholder of Tesla at all relevant times herein. Plaintiff is a citizen of Virginia.

22. Nominal Defendant Tesla is incorporated under the laws of the State of Delaware and maintains its headquarters at 3500 Deer Creek Road, Palo Alto, California. According to the Company's SEC filings, Tesla designs, develops, manufactures and sells high-performance fully electric vehicles, and energy generation and storage systems, and also installs and maintains such systems and sells solar electricity. Tesla's common stock trades on the NASDAQ Global Select Market ("NASDAQ") under the symbol "TSLA." As of July 27, 2018, the Company had 170,593,144 shares of the Company's common stock outstanding.

### ***Elon Musk***

23. Defendant Elon Musk (“E. Musk”) has been Tesla’s Chief Executive Officer (“CEO”) since October 2008 and Chairman of the Tesla Board since April 2004 and a Director of the Company since 1997 when he co-founded the Company.

24. E. Musk is Tesla’s largest stockholder, owning approximately 22% of Tesla’s common stock. As of December 31, 2017, Musk owned 37,853,041 shares of Tesla’s common stock.

25. E. Musk also founded and serves as the CEO and Chief Technical Officer of SpaceX, and Chairman of SolarCity Corporation (“SolarCity”). SolarCity, a subsidiary of Tesla, was founded by E. Musk’s cousins and subsequently was acquired by Tesla in 2016. Finally, E. Musk is the co-founder and a significant stockholder of The Boring Company.

### ***Deepak Ahuja***

26. Defendant Deepak Ahuja (“Ahuja”) has been Tesla’s Chief Financial Officer (“CFO”) since February 2017, having previously served as Tesla’s CFO from 2008 until 2015.

27. As of December 31, 2017, Ahuja owned 69,564 shares of Tesla’s common stock.

***Brad W. Buss***

28. Defendant Brad W. Buss (“Buss”) has served as a Director of the Company since November 2009. Buss is a member of the Audit Committee, Compensation Committee, and Nominating and Corporate Governance Committee.

29. Buss served as the Chief Financial Officer (“CFO”) of SolarCity from August 2014 until his retirement in February 2016. During his 18-month tenure as SolarCity’s CFO, Buss earned \$32 million.

30. As of December 31, 2017, Buss owned 140,123 shares of Tesla’s common stock.

***Robyn M. Denholm***

31. Defendant Robyn M. Denholm (“Denholm”) has served as a Director of the Company since August 2014. Denholm is the Chairperson of the Audit Committee. Denholm is also a member of the Compensation Committee.

32. Denholm is currently the Chief Operating Officer (“COO”) of Telstra Corporation Ltd. (“Telstra”).

33. As of December 31, 2017, Denholm owned 99,110 shares of Tesla’s common stock.

***Ira Ehrenpreis***

34. Defendant Ira Ehrenpreis (“Ehrenpreis”) has served as a Director of the Company since May 2007. Ehrenpreis is the chairperson of the Compensation

Committee and is also the chairperson of the Nominating and Corporate Governance Committee.

35. Since 2014, Ehrenpreis has been a Managing Partner and co-owner of venture capital firm DBL Partners, which he co-founded with fellow management partner and co-owner Nancy Pfund (“Pfund”). Ehrenpreis is a manager of DBL Partners Fund III (“DBL III”). Both Ehrenpreis and DBL III are investors in SpaceX. Ehrenpreis is an investor and member of the board of directors of Mapbox, Inc., a provider of custom online maps.

36. As of December 31, 2017, Ehrenpreis owned 89,540 shares of Tesla’s common stock.

***Antonio J. Gracias***

37. Defendant Antonio J. Gracias (“Gracias”) has served as a Director of the Company since May 2007. Gracias has served as the Company’s purported “Lead Independent Director” since September 2010. Gracias serves as a member of Tesla’s Compensation Committee, Audit Committee, and Nominating and Corporate Governance Committee.

38. Gracias is a member of the Board of Directors of SpaceX, which is controlled by E. Musk. Gracias was formerly a member of SolarCity’s Board of Directors.

39. Gracias is the founder, managing partner, CEP, Chief Investment Officer, director and sole owner of private equity firm VMC, d/b/a Valor Equity Partners.

40. As of December 31, 2017, Gracias owned 483,939 shares of Tesla's common stock.

***Steve Jurvetson***

41. Defendant Steve Jurvetson ("Jurvetson") has served as a Director of the Company since June 2009.

42. Jurvetson also serves on the Board of Directors of SpaceX, which is controlled by E. Musk.

43. Jurvetson was a Managing Director of Draper Fisher Jurvetson ("DFJ"), a venture capital firm from 1995 to late 2017. E. Musk is an investor and limited partner in Draper Fisher Jurvetson Fund X, L.P., an affiliate fund of DFJ.

44. As of December 31, 2017, Jurveston owned 114,576 shares of Tesla's common stock.

***James Murdoch***

45. Defendant James Murdoch has served as a Director of the Company since July 2017. Murdoch serves as a member of the Audit Committee and the Nominating and Corporate Governance Committee.

46. As of December 31, 2017, Murdoch owned 10,485 shares of Tesla's common stock.

***Linda Johnson Rice***

47. Defendant Linda Johnson Rice ("Rice") has served as a Director of the Company since July 2017. Rice serves as a member of the Compensation Committee.

***Kimbal Musk***

48. Defendant Kimbal Musk ("K. Musk") has served as a Director of the Company since April 2004.

49. K. Musk is E. Musk's brother. Tesla concedes in its SEC filings that K. Musk is not an independent director of the Company. K. Musk also serves as a director of SpaceX.

50. K. Musk is an investor in Valor Management Corporation ("Valor") alongside his brother; Defendant Gracias is the CEO and majority owner of Valor. K. Musk is also a limited partner in Valor Equity Partners III-A, L.P. another investment firm managed by Valor.

51. As of December 31, 2017, K. Musk owned 202,467 shares of Tesla's common stock.



52. Defendants E. Musk, Buss, Denholm, Ehrenpreis, Gracias, Jurvetson, Murdoch, Rice and K. Musk are sometimes collectively referred to herein as the “Current Director Defendants.”

53. Defendants E. Musk, Ahuja, Buss, Denholm, Ehrenpreis, Gracias, Jurvetson, Murdoch, Rice and K. Musk are sometimes collectively referred to herein as the “Individual Defendants.”

### **FIDUCIARY DUTIES OF THE INDIVIDUAL DEFENDANTS**

54. By reason of their positions as officers, directors and/or fiduciaries of Tesla and because of their ability to control the business and corporate affairs of the Company, the Individual Defendants owed Tesla and its shareholders fiduciary obligations of due care, good faith, loyalty and candor, and were and are required to use their utmost ability to control and manage the Company in a fair, just, honest and equitable manner. The Individual Defendants were and are required to act in furtherance of the best interests of Tesla and its shareholders so as to benefit all shareholders equally and not in furtherance of their personal interest or benefit.

55. Each director and officer of the Company owes to Tesla and its shareholders the fiduciary duty to exercise good faith and diligence in the administration of the Company’s affairs and in the use and preservation of its property and assets, and the highest obligations of fair dealing.

56. The Individual Defendants, because of their positions of control and authority as directors and/or officers of Tesla, were able to and did, directly and/or indirectly, exercise control over the wrongful acts complained of herein, as well as the contents of the various public statements issued by the Company and E. Musk. Due to their positions with Tesla, each of the Individual Defendants had knowledge of material non-public information regarding the Company.

57. To discharge their duties, the Individual Defendants were required to exercise reasonable and prudent supervision over the management, policies, practices and controls of the Company. By virtue of such duties, the officers and directors of Tesla were required to, among other things:

- a. Exercise good faith to ensure that the affairs of the Company were conducted in an efficient, business-like manner so as to make it possible to provide the highest quality performance of their business;
- b. Exercise good faith to ensure that the Company was operated in a diligent, honest and prudent manner and complied with all applicable federal, state and foreign laws, rules, regulations and requirements, and all contractual obligations, including acting only within the scope of its legal authority;

- c. Exercise good faith in supervising the preparation, filing and/or dissemination of financial statements, press releases, audits, reports, public statements, or other information required by law, and in examining and evaluating any reports or examinations, audits, or other financial information concerning the financial condition of the Company;
- d. Refrain from unduly benefiting themselves and other Company insiders at the expense of the Company; and
- e. When put on notice of problems with the Company's business practices and operations, exercise good faith in taking appropriate action to correct the misconduct and prevent its recurrence.

58. Moreover, Tesla maintains a Code of Business Conduct and Ethics Conduct (the "Code"), which applies to everyone at every level of the Company, including all employees, officers, and all members of the Board. The Code states the following, in part:

Tesla aspires to be a "do the right thing" company – in other words, engaging in conduct that your family would be proud of. That higher principle, if followed correctly, pretty much takes care of this whole topic.

Anyone who violates this Code or any other applicable standards of his or her position will be subject to disciplinary action, potentially including termination.

59. Further, the Company maintains Corporate Governance Guidelines (the “Guidelines”), which apply to all directors and management of the Company. The Guidelines state the following, in part:

An important component of the Board’s leadership structure is having a Lead Independent Director in place with broad authority to direct the actions of the independent directors and regularly communicate with the Chief Executive Officer.

The fundamental responsibility of the Board is to exercise their business judgment to act in what they reasonably believe to be the best interests of Tesla and its stockholders. It is the duty of the Board to oversee management’s performance to ensure that Tesla operates in an effective, efficient and ethical manner. Additionally, the Board has responsibility for risk oversight, with reviews of certain areas being conducted by the relevant board committees.

60. The Company also has an Audit Committee, Compensation Committee, and a Nominating and Corporate Governance Committee. Each committee has a respective charter that outlines the committee’s duties and responsibilities.

61. Each Individual Defendant, by virtue of his or her position as a director and/or officer, owed to the Company and to its shareholders the fiduciary duty of loyalty, good faith and the exercise of due care and diligence in the management and administration of the affairs of the Company, as well as in the use and preservation of its property and assets. The conduct of the Individual Defendants complained of herein involves a knowing and culpable violation of their obligations as directors and/or officers of Tesla, the absence of good faith on their part and a conscious

disregard of their duties to the Company and its shareholders that the Individual Defendants were aware or should have been aware posed a risk of serious injury to the Company.

62. The Individual Defendants breached their duties of loyalty, care and good faith by: (i) failing to implement and enforce a system of effective internal controls and procedures; (ii) failing to exercise their oversight duties by not monitoring the Company's compliance with Company procedures and federal and state regulations; and (iii) consciously disregarding and failing to ensure that E. Musk's public statements were proper and accurate.

### **SUBSTANTIVE ALLEGATIONS**

#### **A. Background**

63. Tesla designs, develops, manufactures and sells high-performance fully electric vehicles, and energy generation and storage systems, and also installs and maintains such systems and sells solar electricity.

64. Founded in 2003, the Company was formerly known as Tesla Motors, Inc., and changed its name to Tesla, Inc. in February 2017. Tesla is headquartered in Palo Alto, California, and its stock trades on NASDAQ under the ticker symbol "TSLA."

65. E. Musk is the Company's co-founder, CEO and largest stockholder. According to the Company's definitive proxy statement filed with the SEC on

February 8, 2018 (“2018 Proxy Statement”), as of December 31, 2017, E. Musk beneficially owned 21.9% of Tesla’s outstanding shares of common stock.

66. On November 5, 2013, Tesla filed a Form 8-K with the SEC stating that the Company intended to use E. Musk’s Twitter account as a means of announcing material information to the public about Tesla and encouraged investors to review the information about Tesla published on E. Musk’s Twitter account. In fact, more than 22 million people “follow” E. Musk on Twitter, thus supporting the position that any information posted on E. Musk’s Twitter account would be widely disseminated to the public and the Company’s shareholders.

67. During 2018, there has been increasing skepticism from stock analysts and investors as to Tesla’s ability to meet its production targets and earn sufficient revenue to sustain its operations. This has led to significant short seller activity and by August 2018, more than \$13 billion worth of Tesla’s shares were being “shorted.”

68. E. Musk has been a frequent critic of the short sellers. For example, on May 4, 2018, E. Musk tweeted, “Oh and uh short burn of the century comin [sic] soon. Flamethrowers should arrive just in time.” On June 17, 2018, E. Musk tweeted that short sellers “have about three weeks before their short position explodes.”

**B. August 7, 2018 Going-Private Announcement**

69. On August 7, 2018, at approximately 12:48 PM EDT, E. Musk issued the following post on Twitter.com: “Am considering taking Tesla private at \$420. Funding secured.”

70. E. Musk then posted a few more tweets in the next couple hours regarding the going-private transaction.

71. NASDAQ halted trading in TSLA shares at approximately 2:08 PM EDT.

72. E. Musk was still not deterred from tweeting. At approximately 2:13 PM EDT he posted, “Shareholders could either to [sic] sell at 420 or hold shares & go private.”

73. Later that same day, at approximately 3:36 PM EDT, E. Musk issued another post on Twitter.com: “Investor support is confirmed. Only reason why this is not certain is that it’s contingent on a shareholder vote[.]” This tweet was accompanied by link to a public Tesla blog post entitled “Taking Tesla Private” that provided some additional information to employees, including that shareholders would be given a choice: “they can stay investors in a private Tesla or they can be bought out at \$420 per share.”

74. NASDAQ lifted the trading halt at approximately 3:45 PM EDT on August 7, 2018. Tesla’s stock price continued to rise, closing at \$379.57, up over

6% from the time E. Musk first tweeted about taking Tesla private earlier the same day.

75. Following the release of skeptical analysis in the next couple days, including reports of inquiries made by the SEC, the share price of Tesla common stock declined and closed at \$352.27 per share on August 9, 2018.

**C. E. Musk Provides an Update on Taking Tesla Private**

76. On August 13, 2018, Tesla posted a blog post from E. Musk on its website. This blog post included the following statements:

- “On August 2nd, I notified the Tesla Board that, in my personal capacity, I wanted to take Tesla private at \$420 per share.”
- “After an initial meeting of the board’s outside directors to discuss my proposal (I did not participate, nor did Kimbal), a full board meeting was held. During that meeting, I told the board about the funding discussions that had taken place (more on that below) and I explained why this could be in Tesla’s long-term interest.”
- “At the end of that meeting, it was agreed that as a next step, I would reach out to some of Tesla’s largest shareholders.”
- “Going back almost two years, the Saudi Arabian sovereign wealth fund has approached me multiple times about taking Tesla private.”
- “I left the July 31st meeting with no question that a deal with the Saudi sovereign fund could be closed, and that it was just a matter of getting the process moving. This is why I referred to ‘funding secured’ in the August 7th announcement.”
- “I continue to have discussions with the Saudi fund, and I also am having discussions with a number of other investors, which is something that I always planned to do since I would like Tesla to



continue to have a broad investor base. It is appropriate to complete those discussions before presenting a detailed proposal to an independent board committee.”

- “My best estimate right now is that approximately two-thirds of shares owned by all current investors would roll over into a private Tesla.”
- “If and when a final proposal is presented, an appropriate evaluation process will be undertaken by a special committee of Tesla’s board, which I understand is already in the process of being set up, together with the legal counsel it has selected. If the board process results in an approved plan, any required regulatory approvals will need to be obtained and the plan will be present to Tesla shareholders for a vote.”

77. Therefore, the August 7, 2018 announcement by E. Musk was materially false and misleading because, contrary to E. Musk’s representations to investors and the public on Twitter.com, funding was not secured and the going-private transaction was contingent on more than just shareholder approval. As explained in E. Musk’s August 13, 2018 blog post, there was no agreement in place with the Saudi Arabian sovereign wealth fund at the time and, in fact, E. Musk stated that he was also having discussions with other potential investors. Furthermore, the August 13, 2018 blog post explained that not only did E. Musk not have an agreement in place to fund the transaction, but he also still needed a special committee of Tesla’s Board to approve the plan and then obtain required regulatory approvals. Indeed, as a result of the public dissemination of the materially false and misleading statements, the SEC initiated the SEC Actions, described in detail below,

which provide a thorough explanation as to the reasons why any going-private transaction was merely in its infancy. Furthermore, as a result of the dissemination of the false and misleading statements, the Securities Class Actions were initiated.

78. On August 13, 2018, E. Musk issued the following post on Twitter.com: “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.” The very next day, *Bloomberg* reported that Goldman Sachs and Silver Lake had not been formally hired to advise E. Musk. According to *Bloomberg*, there was no formal agreement in place between E. Musk and Silver Lake or Goldman Sachs to act as financial advisors when E. Musk posted that on Twitter on August 13, 2018.<sup>3</sup> By the market’s close on August 17, 2018, the price of Tesla stock closed at \$305.50 per share.

79. On August 27, 2018, Plaintiff’s counsel served upon the Board a demand for inspection of books and records pursuant to 8 Del. C. § 220 seeking information related to the going-private transaction. Plaintiff’s counsel has not yet received any documents. However, the need for such documents has been eliminated

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<sup>3</sup> Sridhar Natarajan and Alex Barinka, “Goldman’s Missing Mandate Adds to Clues Musk Tweeted Out Of Turn,” BLOOMBERG, Aug. 14, 2018, <https://www.bloomberg.com/news/articles/2018-08-14/goldman-sachs-is-said-to-have-had-no-mandate-when-musk-tweeted> (last accessed Oct. 17, 2018).

by the SEC’s thorough investigation and detailed findings outlined in the SEC’s complaints filed against E. Musk and Tesla.

#### **D. THE SEC ACTIONS**

##### ***The SEC/Musk Complaint***

80. The SEC filed a civil complaint against E. Musk on September 27, 2018 (the “SEC/Musk Complaint”), as a result of “a series of false and misleading statements made by Elon Musk . . . on August 7, 2018, regarding taking Tesla, a publicly traded company, private.” (SEC/Musk Complaint, ¶ 1). The SEC/Musk Complaint focuses on the tweet that E. Musk sent out on August 7, 2018 in which he states that he is “considering taking Tesla private at \$420” and that he had “funding secured” for this transaction. In the hours that followed his first tweet, E. Musk made a series of additional statements that the SEC alleges were also materially false and misleading. (*Id.* at ¶ 2).

81. The SEC/Musk Complaint explains, “Musk’s statements, disseminated via Twitter falsely indicated that, should he so choose, it was virtually certain that he could take Tesla private at a purchase price that reflected a substantial premium over Tesla stock’s then-current share price, that funding for this multi-billion dollar transaction had been secured, and that the only contingency was a shareholder vote.” (SEC/Musk Complaint, ¶ 1).

82. The SEC determined that, “[i]n truth and fact, Musk had not even discussed, much less confirmed key deal terms, including price with any potential funding source.” (SEC/Musk Complaint, ¶ 1).

83. According to the SEC/Musk Complaint, E. Musk acknowledged that a July 31, 2018 meeting (“July 31 Meeting”) between E. Musk and a sovereign investment fund (the “Fund”) was the most specific discussion of a transaction to take Tesla private. (SEC/Musk Complaint, ¶ 22). This discussion, however, did not cover the following: “(1) any dollar amount or specific ownership percentage for the Fund’s investment in a going-private transaction; (2) any acquisition premium to be offered to current Tesla shareholders; (3) any restrictions on foreign ownership of a significant stake in Tesla; (4) the Fund’s available liquid capital; (5) whether the Fund had any past experience participating in a going-private transaction; (6) any regulatory hurdles to completion of a going-private transaction; or (7) the board approval necessary to take Tesla private.” (*Id.* at ¶ 21).

84. During the July 31 Meeting, the Fund expressed a desire to establish a production facility in the Middle East. (SEC/Musk Complaint, ¶ 20). E. Musk expressed openness to the idea but did not make a commitment nor did he ask whether such a facility would be a requirement of a going-private transaction. *Id.*

85. Following the July 31 meeting, E. Musk did not communicate with representatives of the Fund again about a going-private transaction until August 10, 2018. (SEC/Musk Complaint, ¶ 22).

86. On August 2, 2018, E. Musk sent an email to Tesla’s Board, CFO and General Counsel with the subject heading: “Offer to Take Tesla Private at \$420.” (SEC/Musk Complaint, ¶ 23). In this email, E. Musk explained his reasons for wanting to take Tesla private, including that being public “[s]ubjects Tesla to constant defamatory attacks by the short-selling community, resulting in great harm to our valuable brand.” *Id.* E. Musk then requested that the “matter be put to a shareholder vote at the earliest opportunity” and stated that the “offer expires in 30 days.” *Id.*

87. The SEC/Musk Complaint also explains why E. Musk chose a price of \$420:

According to Musk, he calculated the \$420 price per share based on a 20% premium over that day’s closing price because he thought 20% was a “standard premium” in going-private transactions. This calculation resulted in a price of \$419, and Musk stated that ***he rounded the price up to \$420 because he had recently learned about the number’s significance in marijuana culture and thought his girlfriend “would find it funny, which admittedly is not a great reason to pick a price.”***

(SEC/Musk Complaint ¶ 24) (emphasis added).

88. When E. Musk met with the Fund, however, a 20% premium on the July 31, 2018 closing price would have been approximately \$358. Tesla’s share

price increased 17% following the Company's August 1, 2018 earnings announcement. E. Musk "assumed without confirming with the Fund or any other funding source that the 17% spike in Tesla's share price did not affect the feasibility of taking Tesla private . . . Musk did not discuss a \$420 price per share with any potential funding source for a Tesla going-private transaction prior to sending his email to Tesla's board." (SEC/Musk Complaint, ¶ 25).

89. Contrary to his prior representations to the public, the SEC/Musk Complaint stated that E. Musk thought there was a likelihood of consummation *of about 50% at the time of his August 2, 2018 email to the Board* due to what he described as "*a lot of uncertainty.*" (SEC/Musk Complaint, ¶ 26) (emphasis added).

90. On August 3, 2018, the Board had a telephonic meeting with E. Musk concerning his email the prior day. (SEC/Musk Complaint, ¶ 27). E. Musk informed the Board that the Fund was interested in funding a going-private transaction. *Id.* E. Musk also told the Board that he wanted existing investors to stay with the Company and, according to E. Musk, at least one Board member questioned whether this would be feasible. (*Id.* at ¶ 28). E. Musk told the Board that he wanted to contact existing shareholders to assess their interests in a going-private transaction, and the Board authorized E. Musk to contact certain investors and report back regarding those conversations. (*Id.* at ¶ 29).

91. E. Musk had a discussion with a private equity fund partner on August 6, 2018 and discussed the potential going-private transaction. During this call, E. Musk was told that in order to execute the potential going-private transaction, the number of Tesla shareholders needed to be below 300. At the time, Tesla had over 800 institutional shareholders. The private equity fund partner advised E. Musk that the transaction structure that E. Musk was contemplating was “unprecedented.” (SEC/Musk Complaint, ¶ 31).

92. According to the SEC/Musk Complaint:

Between the July 31 meeting with representatives of the Fund and the morning of August 7, Musk (1) did not have any further substantive communications with representatives of the Fund; (2) did not discuss a going-private transaction at a share price of \$420 with any potential funding source; (3) had a conversation with a private equity fund representative about the process, but did not actually contact any additional potential strategic investors to assess their interest in participating in a going-private transaction; (4) did not provide Tesla’s Board of Directors with a more specific proposal to take Tesla private; (5) did not contact existing Tesla shareholders to assess their interest in remaining invested in Tesla as a private company; (6) did not formally retain any advisors to assist with a going-private transaction; (7) did not determine whether retail investors could remain invested in Tesla as a private company; (8) did not determine whether there were restrictions on illiquid holdings by Tesla’s institutional investors; and (9) did not determine what regulatory approval would be required for such a transaction or whether they could be satisfied.

(SEC/Musk Complaint, ¶ 30).

93. As a result, the SEC sought, among other remedies, that E. Musk be prohibited from acting as an officer or director of any public company.

### ***The SEC/Tesla Complaint***

94. The SEC filed a civil complaint against Tesla on September 29, 2018 (the “SEC/Tesla Complaint”), due to the Company’s failure “to have disclosure controls or procedures in place to assess whether the information Musk disseminated via his Twitter account was required to be disclosed in reports Tesla files pursuant to the Exchange Act within the time periods specified in the Commission’s rules and forms. Nor did it have sufficient processes in place to ensure the information Musk published via his Twitter account was accurate or complete.” (SEC/Tesla Complaint, ¶ 3).

95. In fact, “Musk did not routinely consult with anyone at Tesla before publishing Tesla-related information via his Twitter account” and “no one at Tesla reviewed Musk’s tweets prior to publication.” (SEC/Tesla Complaint, ¶ 32).

96. The SEC found that prior to the August 7, 2018 tweets, Tesla did not have any corporate policies that specifically addressed E. Musk’s Twitter activity. (SEC/Tesla Complaint, ¶ 33).

97. According to the SEC/Tesla Complaint, E. Musk did not consult with the Company’s Board or any other Tesla employees prior to publishing the series of tweets on August 7, 2018. (SEC/Tesla Complaint, ¶ 14).



## **E. The SEC Settlement**

98. On September 29, 2018, two days after the SEC/Musk Complaint was filed, E. Musk and Tesla agreed to a settlement (the “SEC Settlement”), subject to court approval.

99. Amongst other remedies, the terms of the SEC Settlement require the following:

- E. Musk will step down as Tesla’s Chairman and be replaced by an independent Chairperson. E. Musk will be ineligible to be re-elected Chairman for three years;
- Tesla will appoint a total of two new independent directors to its board;
- Tesla will establish a new committee of independent directors and put in place additional controls and procedures to oversee E. Musk’s communications; and
- E. Musk and Tesla will each pay a separate \$20 million penalty. The \$40 million in penalties will be distributed to harmed investors under a court-approved process.
- Tesla will employ or designate an experienced securities lawyer whose qualifications are not unacceptable to the SEC and maintain such counsel for as long as the Company remains a reporting company.

## **F. E. Musk's Erratic Behavior**

### ***The New York Times Interview***

100. *The New York Times* interviewed E. Musk for an August 16, 2018 article.<sup>4</sup> The article explains that, “some board members have expressed concern not only about Mr. Musk’s workload but also about his use of Ambien.”

101. In the interview, E. Musk provided a timeline of events leading up to his Twitter posts on August 7, 2018. E. Musk says that he was driving himself to the airport when, en route, he posted the announcement regarding his hopes to take Tesla private. E. Musk stated that no one had seen or reviewed this message before he posted it on Twitter.com.

102. In the interview, where E. Musk alternated between laughter and tears, E. Musk blamed short-sellers for much of his stress. The article also describes the Board’s worry that E. Musk posts messages on Twitter late at night after taking Ambien. Moreover, the article confirmed that some Board members are also aware of occasional recreational drug use by E. Musk.

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<sup>4</sup> David Gelles, *et al.*, “Elon Musk Details ‘Excuciating’ Personal Toll of Tesla Turmoil,” THE NEW YORK TIMES, Aug. 16, 2018, <https://www.nytimes.com/2018/08/16/business/elon-musk-interview-tesla.html> (last accessed Oct. 17, 2018).

### ***April Fool's Tweet***

103. E. Musk used his Twitter account on April 1, 2018, at a time that the Company was rumored to have solvency issues, to make an 'April fool's joke' that Tesla was bankrupt and with a picture of himself with a caption that included, "Elon was found passed out against a Tesla Model 3, surrounded by 'Teslaquilla' bottles, the tracks of dried tears still visible on his cheeks."<sup>5</sup>

104. The Board was thus put on notice in April 2018 by the latest of E. Musk's outlandish behavior on Twitter and failed to put in reasonable disclosure controls or procedures to oversee E. Musk's communications with the public.

### ***Defamatory Statements Directed at British Diver***

105. E. Musk's erratic behavior continued when, on July 15, 2018, E. Musk made an unfounded claim that Vernon Unsworth, a British diver who used his expertise in the rescue of all twelve members of a soccer team and their coach when they were trapped in a cave in Thailand, is a pedophile. E. Musk's tweet referred to Mr. Unsworth as "pedo guy." E. Musk was seemingly angry that Mr. Unsworth referred to E. Musk's mini-submarine that E. Musk sent to aid the rescue as just a

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<sup>5</sup> Alex Davies, "A Brief History of Elon Musk's Market-Moving Tweets," WIRED, <https://www.wired.com/story/elon-musk-twitter-stock-tweets-libel-suit/> (last accessed Oct. 17, 2018).

“PR stunt”, as well as other criticism Mr. Unsworth directed at E. Musk. E. Musk subsequently deleted the “pedo guy” tweet.<sup>6</sup>

106. E. Musk, however, stuck to his original comment, tweeting again on July 15 “Bet ya a signed dollar it’s true” in response to someone who criticized him on Twitter for the remark. E. Musk also tweeted, “You don’t think it’s strange he hasn’t sued me?”

107. According to the SEC/Tesla Complaint, the Company did not have any disclosure controls or procedures in place when E. Musk made the August 7, 2018 going-private announcement. Therefore, the Board did not create disclosure controls or procedures following the “pedo guy” tweet discussed above.

108. E. Musk continued to pile on his baseless attacks against Mr. Unsworth. In a series of bizarre emails to *BuzzFeed News* on August 30, 2018, E. Musk asserted that Unsworth moved to a location in Thailand because of a “child bride” who was “12 years old at the time,” and that the area he moved to was only known for “child sex-trafficking” not for cave diving. E. Musk also told the reporter to, “stop

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<sup>6</sup> Alix Langone, “Elon Musk Calls a Diver That Rescued Thai Soccer Team a ‘Pedo’ on Twitter,” *TIME*, July 15, 2018, <http://time.com/5339219/elon-musk-diver-thai-soccer-team-pedo/> (last accessed Oct. 17, 2018).

defending child rapists, you fucking asshole.” E. Musk then said he “hopes” that Mr. Unsworth sues him.<sup>7</sup>

109. *BuzzFeed News* also spoke with Mr. Unsworth’s longtime girlfriend, who is forty-years old and has been in a relationship with Mr. Unsworth for more than seven years, to refute E. Musk’s claims. *BuzzFeed News* also refuted other baseless claims made by E. Musk in his emails where he claimed that Unsworth was not an important part of the rescue, with one Australian specialist who worked on the rescue saying that Mr. Unsworth was “absolutely vital to this mission” and that the rescue “wouldn’t have happened without him.” *Id.*

110. As a result of E. Musk’s outburst, E. Musk is now facing a defamation lawsuit in the United States District Court for the Central District of California.<sup>8</sup>

### ***The Joe Rogan Podcast***

111. On September 6, 2018, E. Musk was a guest on comedian Joe Rogan’s popular podcast (the “Rogan Podcast”). The rambling interview lasted approximately 2 hours and 30 minutes. During the Rogan Podcast, E. Musk smoked

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<sup>7</sup> Ryan Mac, “In a New Email, Elon Musk Accused a Cave Rescuer of Being a ‘Child Rapist’ And Said He ‘Hopes’ There’s a Lawsuit,” BUZZFEED NEWS, Sept. 4, 2018, <https://www.buzzfeednews.com/article/ryanmac/elon-musk-thai-cave-rescuer-accusations-buzzfeed-email> (last accessed Oct. 17, 2018).

<sup>8</sup> *Vernon Unsworth v. Elon Musk*, Docket No. 2:18-cv-08048 (C.D. Cal. Sept. 17, 2018).

marijuana while on video which led to immense scrutiny, due, in part, to E. Musk's other recent controversial antics.<sup>9</sup>

112. The day after the release of the Rogan Podcast, shares of Tesla were down as much as 9%.

### ***Post-Settlement Twitter Remarks***

113. Following the agreed-upon settlement with the SEC, E. Musk has continued to use Twitter. On October 1, 2018, in one of his first tweets since the settlement was announced, E. Musk posted the music video for the Naughty by Nature song "O.P.P." He captioned the tweet with "Naughty by Nature," followed by a winking emoji, seemingly a reference to the SEC Actions.

114. In a more transparent tweet, E. Musk posted on October 4, 2018: "Just want to [sic] that the Shortseller Enrichment Commission is doing incredible work. And the name change is so on point[.]" an obvious criticism of the SEC. The Board has taken no action in response to these derogatory remarks by E. Musk concerning the SEC.

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<sup>9</sup> Jethro Mullen and Daniel Shane, "Weed, whiskey, Tesla and a Flamethrower: Elon Musk Meets Joe Rogan," CNN, Sept. 7, 2018, <https://money.cnn.com/2018/09/07/technology/elon-musk-joe-rogan/index.html> (last accessed Oct. 17, 2018).

## **DAMAGES TO TESLA CAUSED BY THE INDIVIDUAL DEFENDANTS**

115. As a direct and proximate result of the Individual Defendants' misconduct, the Individual Defendants allowed for materially inadequate controls over the Company's policies and practices, caused and/or consciously permitted the Company to issue materially false and misleading statements during the Relevant Period, and substantially damaged the Company's credibility, corporate image and goodwill. Further, the company had no controls or procedures whatsoever concerning whether the information in E. Musk tweets should be formally filed with the SEC and the timing of such filings.

116. Tesla has expended and will continue to expend significant sums of money. Additional expenditures and damages that the Company has incurred as a result of the Individual Defendants' breaches of their fiduciary duty include:

- a. Costs incurred from compensation and benefits paid to the Individual Defendants who have breached their duties to Tesla;
- b. Costs and fees paid investigating, defending and settling the SEC Actions;
- c. Costs incurred from investigating, defending and paying any settlement or judgment in connection with the Securities Class Actions;
- d. Costs incurred from the loss of Tesla's customers' confidence in the Company's services; and
- e. Costs incurred in complying with the settlements in the SEC Actions.

117. Finally, Tesla's credibility, reputation and goodwill have likewise been damaged, and the Company remains exposed to significant potential liability going forward.

### **DERIVATIVE AND DEMAND FUTILITY ALLEGATIONS**

118. 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 Individual Defendants' multiple breaches of fiduciary duty.

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

120. Tesla is named as a nominal defendant in this case solely in a derivative capacity. This is not a collusive action to confer jurisdiction on this Court that it would not otherwise have. Prosecution of this action, independent of the current Board of Directors, is in the best interests of the Company.

121. Plaintiff will adequately and fairly represent the interests of the Company and its shareholders in enforcing and prosecuting its rights.

122. The wrongful acts complained of herein subject, and will continue to subject, Tesla to continuing harm because the adverse consequences of the actions are still in effect and ongoing.



123. The wrongful acts complained of herein were unlawfully concealed from Tesla shareholders.

124. As a result of the facts set forth herein, Plaintiffs have not made any demand on the Current Director Defendants to institute this action since demand would be a futile and useless act because the Current Director Defendants are incapable of making an independent and disinterested decision to institute and vigorously prosecute this action.

125. The wrongful acts complained of herein show multiple breaches by the Current Director Defendants of their fiduciary duties of loyalty, due care and oversight. A majority of the Board is incapable of disinterestedly and independently considering a demand to commence and vigorously prosecute this action for the reasons set forth below.

126. Tesla's Current Board consists of the following nine (9) individuals: defendants E. Musk, Buss, Denholm, Ehrenpreis, Gracias, Jurvetson, Murdoch, Rice and K. Musk.

127. Thus, in order to adequately show that demand is futile, Plaintiff needs to only show a lack of independence and/or disinterest for 5 of the Current Director Defendants. However, as discussed in detail below, at least a majority of the Current Director Defendants lack independence from E. Musk and among one another.

128. The Current Director Defendants failure of oversight reflects a conscious and deliberate disregard of their fiduciary duties—namely, inaction in the face of circumstances that plainly called for immediate action. This constitutes bad faith. As such, the Current Director Defendants face a substantial likelihood of liability, rendering demand upon them futile.

***A Majority Of The Board Lacks Independence Or Is Interested***

129. **Defendant E. Musk** cannot disinterestedly and independently consider a demand. E. Musk is the Company’s founder, CEO and a director. As conceded in Tesla’s public filings, including the Company’s 2018 Proxy Statement, E. Musk lacks independence.

130. The facts evidencing E. Musk’s control over Tesla caused the Chancery Court to find that it was reasonably conceivable that E. Musk was the Company’s controlling stockholder as recently as March 2018. *See In re Tesla Motors, Inc. Stockholder Litig.*, No. CV 12711-VCS, 2018 WL 1560293, at \*13 (Del. Ch. Mar. 28, 2018).

131. **Defendant K. Musk** cannot disinterestedly and independently consider a demand because he is the brother of E. Musk. As conceded in Tesla’s public filings, including the Company’s 2018 Proxy Statement, K. Musk is not an independent director.

132. K. Musk is also not independent of E. Musk because, as a benefit to being E. Musk's brother, he sits on the board of directors of SpaceX, which is controlled by E. Musk. K. Musk was also provided the opportunity to invest in Defendant Gracias' investment firms because of his relationship with E. Musk.

133. K. Musk has been compensated with lucrative director fees as a Director of Tesla. In 2015 alone, K. Musk earned \$4,964,381 as a Tesla director. In 2016 and 2017, K. Musk earned \$24,535 and \$21,721, respectively.

134. **Defendant Buss** cannot independently consider a demand because he is beholden to E. Musk. From August 2014 until his retirement in February 2016, Buss served as the CFO of SolarCity. He is indebted to E. Musk because, among other things, he received \$32 million for just 18 months of work as SolarCity's CFO which allowed him to retire at the age of 52.

135. After his departure from SolarCity's management, Buss remained at SolarCity as either an employee or consultant through at least December 31, 2016. Buss beneficially owned 37,277 shares of Solarcity common stock at the time that Tesla acquired the company.

136. Buss has been compensated with lucrative director fees as a Director of Tesla. In 2017, Buss earned \$3,357,002 as a Tesla director. In 2016, Buss earned \$20,000 as a Tesla director. In 2015, Buss earned \$4,954,785 as a Tesla director.

137. **Defendant Gracias** cannot independently consider a demand because, as this Court has previously found, “Musk and Gracias are close friends; indeed, Musk gave Gracias the second Tesla Roadster ever made.”<sup>10</sup>

138. Gracias is the founder, managing partner, CEO, Chief Investment Officer, director and sole owner of a private equity firm, Valor. In 2001, Gracias and Valor invested in Paypal, Inc. (“Paypal”), a then-startup company co-founded by E. Musk. Gracias’ Paypal investment subsequently led E. Musk to present Gracias and his firm with the opportunity to invest in Tesla. E. Musk also gave Gracias the opportunity to participate in several pre-IPO venture funding rounds of SolarCity and SpaceX where he was appointed to the boards of both companies. Gracias currently sits on the SpaceX board.

139. As the Company recently disclosed, Gracias and Valor contributed to “numerous improvements that led to increased Model 3 production rates.”<sup>11</sup> Valor spent more than 100 days at Tesla’s battery factory near Reno, Nevada late last year to help increase Model 3 sedan production. In exchange for its consulting services, Tesla paid Valor \$34,347 in reimbursement for travel, equipment and lodging near the Nevada factory.

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<sup>10</sup> *In re Tesla Motors, Inc. Stockholder Litig.*, 2018 WL 1560293, at \*3.

<sup>11</sup> Dana Hull, “Tesla Opens Up About Mysterious Payment To a Board Member’s Firm,” BLOOMBERG, May 29, 2018, <https://www.bloomberg.com/news/articles/2018-05-29/tesla-opens-up-about-mysterious-payment-to-a-board-member-s-firm> (last accessed Oct. 17, 2018).

140. E. Musk and his brother K. Musk have personally invested in various Valor funds. As a manager and/or owner of these funds Gracias serves as a fiduciary to E. Musk and K. Musk.

141. Gracias consistently uses testimonials from E. Musk and K. Musk on the Valor website in order to solicit capital. Gracias also uses testimonials from E. Musk's cousin Peter Rive, former COO of SolarCity.

142. Gracias has been compensated with lucrative director fees as a Director of Tesla. In 2015 alone, Gracias earned \$9,790,505 as a Tesla director. In 2016 and 2017, Gracias earned \$37,500 each year as a Tesla director.

143. **Defendant Jurvetson** cannot independently consider a demand to initiate the claims alleged herein because, similar to Gracias, he too is a close friend of E. Musk. Given the extent of Jurvetson's relationship with E. Musk, this Court already has concluded that "Jurvetson is beholden to Musk[.]"<sup>12</sup>

144. The *Silicon Valley Business Journal* has observed that "some say [Jurvetson] is too close to Tesla founder Elon Musk to serve as [an] independent board member."<sup>13</sup>

145. Jurvetson is a SpaceX director.

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<sup>12</sup> *In re Tesla Motors, Inc. Stockholder Litig.*, 2018 WL 1560293, at \*17.

<sup>13</sup> Cromwell Schubarth, "Musk Friend Jurvetson's Long Tesla Board Hiatus Bothers Some Shareholder Advisors," *SILICON VALLEY BUSINESS JOURNAL*, May 16, 2018, <https://www.bizjournals.com/sanjose/news/2018/05/16/steve-jurvetson-tesla-board-absence-tsla.html?ana=RSS&s=article> (last accessed Oct. 17, 2018).

146. E. Musk gave Jurvetson the first Tesla Model S ever made and gave him the second Model X ever made.

147. Jurvetson and his former capital firm DFJ have invested in Tesla, SpaceX and SolarCity.

148. E. Musk has also invested in Jurvetson's former firm – DFJ. E. Musk is an investor and limited partner in Draper Fisher Jurvetson Fund X, L.P., an affiliate fund of DFJ. As such, Jurvetson and DFJ serve as fiduciaries of E. Musk.

149. In November 2017, following an internal investigation, Jurvetson was ousted from DFJ for alleged sexual harassment.<sup>14</sup> In January 2018, DFJ issued an apology when it was reported that Jurvetson allegedly held what has been described as a “sex party” at his home following a DFJ firm event.<sup>15</sup> Although E. Musk denied this characterization of the party, E. Musk confirmed he was invited and attended the event at Jurvetson's home.

150. Despite Jurvetson's removal from the venture capital firm he helped found, Jurvetson has not been removed from the Tesla Board.

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<sup>14</sup> Theodore Schleifer, “Steve Jurvetson Is Out At His Own Venture Capital Firm After Allegations Of Sexual Harassment,” RECODE, Nov. 13, 2017, <https://www.recode.net/2017/11/13/16645274/steve-jurvetson-out-draper-fisherjurvetson-sexual-harassment> (last accessed Oct. 17, 2018).

<sup>15</sup> Theodore Schleifer, “DFJ Has Apologized For The Reported ‘Sex Party’ Event At Steve Jurvetson's Home,” RECODE, Jan. 11, 2018, <https://www.recode.net/2018/1/11/16880806/dfj-steve-jurvetson-sex-party-apology> (last accessed Oct. 17, 2018).

151. Jurvetson has been compensated with lucrative director fees as a Director of Tesla. In 2015 alone, Jurvetson earned \$6,095,984 as a Tesla director. In 2016 and 2017, Jurvetson earned \$27,500 in each year as a Tesla director.

152. **Defendant Ehrenpreis** cannot disinterestedly and independently consider a demand because, like Gracias and Jurvetson, he has a close personal and professional relationship with E. Musk and his family.

153. Ehrenpreis was an early investor in Tesla, SpaceX and SolarCity.

154. Since 2014, Ehrenpreis has been a Managing Partner and co-owner of venture capital firm DBL Partners, which he co-founded with fellow managing partner and co-owner Nancy Pfund. Pfund was a member of SolarCity's board of directors and was an observer of Tesla's Board from 2006 to 2010. Pfund is a close friend of E. Musk's and has said that "[h]e's always been a master of the universe in my mind."<sup>16</sup>

155. Ehrenpreis personally, and through investment companies he controls, has made significant investments in SpaceX, SolarCity and Tesla.

156. Ehrenpreis is an investor in, and serves on the board of directors of, Mapbox, Inc. ("Mapbox"), a provider of custom online maps. In December 2015, Tesla and Mapbox entered into an agreement pursuant to which Tesla expects to pay

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<sup>16</sup> *In re Tesla Motors, Inc. Stockholder Litig.*, 2018 WL 1560293, at \*3.

Mapbox certain ongoing fees, including \$5 million over the first twelve months of the agreement.

157. In September 2015, E. Musk gave each member of a select group of five people a brand new Model X, Tesla's first SUV. Ehrenpreis, along with his colleague Jurvetson (and E. Musk himself), were among the select few to receive the first Model X vehicles ever produced.

158. Two years later, E. Musk showed his appreciation of Ehrenpreis by giving Ehrenpreis the rights to the first Tesla Model 3. Ehrenpreis then paid for the Model 3 (in full) and gifted the car back to E. Musk as part of his 46<sup>th</sup> birthday present. E. Musk shared Ehrenpreis' gesture on social media.

159. Throughout their 11-year friendship, Ehrenpreis and E. Musk have not been shy about sharing their personal feelings for each other on social media, including a "Love you too" tweet from E. Musk to Ehrenpreis.

160. Ehrenpreis and E. Musk also support each other's causes outside of the Board room. For example, in May 2016, Ehrenpreis invited E. Musk to speak at the Work Energy Innovation forum, which is chaired by Ehrenpreis.

161. In an October 2010 blog post, K. Musk wrote a blog article announcing that he invited Ehrenpreis to speak at an awards ceremony of the Colorado Cleantech



Industry Association. In making the announcement K. Musk praised Ehrenpreis as being “a close friend and business associate of mine.”<sup>17</sup>

162. Ehrenpreis has been compensated with lucrative director fees as a Director of Tesla. In 2015 alone, Ehrenpreis earned \$7,239,683 as a Tesla director. In 2016 and 2017, Ehrenpreis earned \$37,500 each year as a Tesla director.

163. **Defendant Denholm** cannot disinterestedly and independently consider a demand because a majority of her income is derived from serving as a member of Tesla’s Board. Denholm is currently the COO of Telstra. According to Telstra’s public filings, Denholm earned \$890,006 in total compensation in 2017, a comparatively modest figure compared to her earnings from Tesla.

164. Denholm has been compensated with lucrative director fees as a Director of Tesla. In 2017, Denholm earned \$4,921,810 as a Tesla director. In 2016, Denholm earned \$45,000 as a Tesla director. In 2015, Denholm earned \$4,979,785 as a Tesla director. In 2014, Denholm earned \$7,181,066 as a Tesla Director.

165. **Defendant Murdoch** earned \$1,926,972 in 2017 as a Tesla director.

166. **Defendant Rice** earned \$1,933,914 in 2017 as a Tesla director.

167. In 2017, Tesla’s directors were awarded an average of \$1.53 million in compensation.

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<sup>17</sup> Kimbal Musk, “Colorado Cleantech Is Coming of Age,” HUFFINGTON POST, May 25, 2011, [https://www.huffingtonpost.com/kimbal-musk/colorado-cleantech-is-com\\_b\\_754481.html](https://www.huffingtonpost.com/kimbal-musk/colorado-cleantech-is-com_b_754481.html) (last accessed Oct. 17, 2018).

168. All of Tesla's directors have received lavish compensation at the E. Musk-controlled Company, which compromises their ability to independently and disinterestedly assess a demand to initiate litigation adverse to E. Musk's financial interests.

169. The SEC Settlement recognizes the lack of independence on the Board and requires the Company to appoint two new independent directors. Even once these two new independent directors are appointed, the Board will still lack a majority of independent and disinterested directors.

170. Furthermore, the Current Director Defendants failed to implement adequate and effective internal controls and procedures over the Company and/or E. Musk's statements, which resulted in the SEC Actions and proposed Settlement requiring, among other things, a monetary penalty in the total amount of \$40 million by the Company and E. Musk. Moreover, the Current Director Defendants failed to take action not only when E. Musk first began discussing the going-private transaction with the Board, but also following E. Musk's August 7, 2018 tweet, which was met with silence from the Board.

171. Based on the foregoing, a majority of the Current Director Defendants face a sufficiently substantial likelihood of liability and accordingly, there is a reasonable doubt as to a majority of the Board's disinterestedness in deciding whether pursuing legal action would be in the Company's best interest.

Accordingly, demand upon the Current Director Defendants is excused as being futile.

## **CAUSES OF ACTION**

### **COUNT I**

#### **(Against the Individual Defendants for Breach of Fiduciary Duty)**

172. Plaintiff incorporates by reference and realleges each of the foregoing paragraphs as though fully set forth herein.

173. The Individual Defendants owed and owe Tesla fiduciary obligations, including the obligations of good faith, fair dealing, loyalty and care. Among other things, the Individual Defendants owed a fiduciary duty to Tesla to disseminate truthful, accurate and complete information to shareholders.

174. The Individual Defendants breached their duties of loyalty, care and good faith by: (i) failing to implement and enforce a system of effective internal controls and procedures; (ii) failing to exercise their oversight duties by not monitoring the Company's compliance with Company procedures and federal and state regulations; and (iii) consciously disregarding and failing to ensure that E. Musk's public statements were proper and accurate.

175. The Individual Defendants had actual or constructive knowledge that the Company issued materially false and misleading statements, and they failed to correct the Company's public statements and representations. The Individual

Defendants had actual knowledge of the misrepresentations and omissions of material facts set forth herein, or acted with reckless disregard for the truth, in that they failed to ascertain and to disclose such facts even though such facts were available to them. Such material misrepresentations and omissions were committed knowingly or recklessly.

176. The Individual Defendants had actual or constructive knowledge that the Company was engaging in the practices as set forth herein, and that internal controls were not adequately maintained.

177. As a direct and proximate result of the breaches of fiduciary obligations by the Individual Defendants, Tesla has sustained and continues to sustain significant damages, as alleged herein. As a result of the misconduct alleged herein, the Individual Defendants are liable to the Company.

178. The Individual Defendants' misconduct – through both their actions and conscious inaction – cannot be exculpated under Delaware or other applicable law as it implicated bad faith and a breach of the duty of loyalty.

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

## **COUNT II**

### **(Against the Individual Defendants for Unjust Enrichment)**

180. Plaintiff incorporates by reference and realleges each of the foregoing paragraphs as though fully set forth herein.

181. Through the wrongful course of conduct and actions complained of herein, the Individual Defendants were unjustly enriched at the expense of, and to the detriment to, Tesla. The wrongful conduct was continuous and resulted in ongoing harm to the Company. The Individual Defendants were unjustly enriched pursuant to receiving compensation and director remuneration.

182. Plaintiff, as a shareholder of Tesla, seeks restitution from the Individual Defendants, and seeks an order of this Court disgorging all profits, benefits, and other compensation obtained by the Individual Defendants, from their wrongful course of conduct and fiduciary breaches.

183. By reason of the foregoing, Tesla has sustained and continues to sustain damages.

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

### **COUNT III**

#### **(Derivatively Against the Individual Defendants for Gross Mismanagement)**

185. Plaintiff incorporates by reference and realleges each of the foregoing paragraphs as though fully set forth herein.

186. By their actions alleged herein, the Individual Defendants, either directly or through aiding and abetting, abandoned and abdicated their responsibilities and fiduciary duties with regard to prudently managing the assets

and business of Tesla in a manner consistent with the operations of a publicly held corporation.

187. As a direct and proximate result of the Individual Defendants' gross mismanagement and breaches of duty alleged herein, Tesla has sustained significant damages.

188. As a result of the misconduct and breaches of duty alleged herein, the Individual Defendants are liable to the Company.

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

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff demands judgment as follows:

A. Determining that this action is a proper derivative action maintainable under the law and demand was excused;

B. Directing Individual Defendants to account to Tesla for all damages sustained or to be sustained by the Company by reason of the wrongs alleged herein, including payment of the \$20 million Tesla portion of the SEC Settlement;

C. Directing Tesla to take all necessary actions to reform its corporate governance and internal procedures to comply with applicable laws and protect the Company and its shareholders from a recurrence of the events described herein, including, but not limited to, a shareholder vote for amendments to Tesla's By-Laws or Articles of Incorporation, appointing or creating a Board-level committee

and executive officer position charged with the oversight of E. Musk, and taking such other action as may be necessary to place before shareholders for a vote on corporate governance policies;

D. Awarding to Tesla restitution from the Individual Defendants and ordering disgorgement of all profits, benefits and other compensation obtained by the Individual Defendants;

E. Awarding Plaintiff the costs and disbursements of this action, including reasonable attorneys' and experts' fees and expenses; and

F. Granting such other and further relief as the Court may deem just and proper.

### **JURY DEMAND**

Plaintiff demands a trial by jury.

Dated: October 17, 2018

Respectfully submitted,

**FARUQI & FARUQI, LLP**

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