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Case No. 2018-0408-KSJM

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

RICHARD J. TORNETTA, derivatively on behalf of all other similarly situated stockholders of TESLA, INC., Plaintiff, v. ELON MUSK, ROBYN M. DENHOLM, ANTONIO J. GRACIAS, JAMES MURDOCH, LINDA JOHNSON RICE, BRAD W. BUSS, and IRA EHRENPREIS, Defendants, and TESLA, INC, a Delaware corporation, Nominal Defendant.	C.A. No. 2018-0408-JRS **PUBLIC [REDACTED] VERSION AS FILED ON MARCH 9, 2022**

VERIFIED AMENDED DERIVATIVE COMPLAINT

Plaintiff Richard J. Tornetta ("Plaintiff"), for the benefit of nominal defendant Tesla, Inc. ("Tesla" or the "Company"), brings the following Verified Amended Derivative Complaint (the "Amended Complaint") against (i) certain past and/or present members of the Tesla board of directors (the "Tesla Board" or "Board") for breaching their fiduciary duties and for waste and (ii) Elon Musk ("E. Musk") for breaching his fiduciary duties as Tesla's controlling stockholder and for unjust enrichment. The allegations of the Amended Complaint are based on the knowledge of Plaintiff as to himself, and on information and belief, including the investigation of counsel, the review of publicly-available information, the review of certain books and records produced by the Company in response to Plaintiff's demand made under 8 *Del. C.* § 220, and the review of documents, testimony and other evidence secured through discovery undertaken in this action, as to all other matters.

I. INTRODUCTION

1. In 2018, Tesla part-time CEO and controlling stockholder E. Musk exploited his control over the Company and its conflicted Board to secure a gift of the largest executive compensation plan in history (the "2018 Grant" or the "Grant"), which contemplated increasing his existing roughly 22% Tesla equity stake by over 50%, to fund his personal ambition to colonize Mars. In the first approximately three-and-a-half years of its ten-year duration, the 2018 Grant has already provided E. Musk vested options worth over $35 billion, thus fueling his ascent to being the richest person on Earth.

2. The controlled Board approved the 2018 Grant following a fatally conflicted process in which E. Musk and his loyalists outlined the fundamental contours of his preferred compensation plan long before any involvement from Tesla's Compensation Committee (the "Compensation Committee" or "Committee"), then dictated to the Committee the 2018 Grant's key terms and

timing. Despite seeking to justify the 2018 Grant on the basis that it was necessary to maintain E. Musk's focus on Tesla, in approving the Grant the Board understood, among other things, that the Grant (i) was not necessary to keep E. Musk engaged; (ii) failed to contain any provisions that would actually require E. Musk to dedicate to Tesla his time, focus or attention; (iii) was not negotiated at arms' length; and (iv) would very likely provide E. Musk ***billions of dollars*** in compensation within just the first few years of the Grant's ten-year duration.

3. The 2018 Grant is subject to entire fairness review because E. Musk was Tesla's controlling stockholder. *First*, E. Musk generally controlled Tesla through his control over Tesla's majority-conflicted Board, which allowed E. Musk to steer the Company pursuant to his own desires. Moreover, E. Musk (i) was Tesla's largest stockholder; (ii) was the face of Tesla; (iii) was Tesla's longtime Board Chairman, CEO and Chief Product Architect; (iv) singularly dictated Tesla's corporate strategy; and (v) dominated management of the Company [redacted]

4. *Second*, E. Musk controlled Tesla specifically with respect to the 2018 Grant, as he controlled the process leading to and culminating in the Grant. Every

[1] TESLA-Tornetta-0225352.

member of the Compensation Committee was beholden to E. Musk. Committee Chairman Ira Ehrenpreis ("Ehrenpreis") had a longstanding friendship and a lengthy and lucrative professional and investing relationship with E. Musk. Indeed, E. Musk and Ehrenpreis have publicly expressed love for one another. After Ehrenpreis, the Committee member who played the biggest role in connection with the Grant was Antonio Gracias ("Gracias"), who shared a roughly 20-year friendship with E. Musk that included vacationing with one another's families and attending family gatherings, as well as a longstanding and lucrative professional and investing relationship. Further, all four Committee members were conflicted by the substantial compensation they received through their service on Tesla's Board, with Robyn Denholm ("Denholm") and Brad Buss ("Buss") each reaping many tens of millions of dollars in director fees.

5. E. Musk and his loyalists (including Ehrenpreis) developed the Grant's general structure and size, selected outside legal and compensation advisors for the Compensation Committee, and established an absurdly and needlessly accelerated initial timeline for approval of the Grant. Only then did E. Musk and his loyalists involve the rest of the Committee, which (i) dutifully acquiesced to moving forward with the Grant and with the pre-selected advisors, (ii) failed to engage in any meaningful negotiations or adversarial discussions regarding the Grant and (iii)

simply rubberstamped E. Musk's preferred terms. The Grant was then approved by Tesla's majority-conflicted Board. Despite the clear conflicts of most of Tesla's directors—including James Murdoch ("Murdoch"), whose longstanding personal friendship with E. Musk includes several international family vacations and an investing relationship that has been lucrative to Murdoch—only E. Musk and his brother Kimbal Musk ("K. Musk") recused themselves from the vote.

6. The 2018 Grant is extraordinarily unfair to Tesla and its stockholders. The Grant provides E. Musk the ability to secure ***12%*** of Tesla's total outstanding shares worth roughly $55.8 billion, and the Grant's initially publicly disclosed grant date fair value—which discounts for the potential non-achievement of the Grant's market capitalization milestones—was a staggering $2.62 billion, making it the largest compensation plan in history by multiples. Even modest market capitalization growth substantially below Tesla's historical growth rate would be sufficient to provide E. Musk billions of dollars in compensation under the Grant, and growth significantly ***below*** Tesla's historical growth rate would be sufficient for E. Musk to achieve the Grant's full value. Moreover, the Grant was spring-loaded, as Tesla's projections reflected that E. Musk would achieve several tranches—worth billions of dollars—in the Grant's first few years.

7. Despite its massive size, the 2018 Grant failed to achieve its stated goal—*i.e.*, to incentivize E. Musk to spend his time and attention on Tesla rather than other companies and/or endeavors. For example, the Committee and Board failed to include within the Grant any (i) requirements regarding the amount of time, attention or focus that E. Musk must dedicate to Tesla; or (ii) restrictions or limitations on E. Musk's ability to dedicate time and focus to companies and/or endeavors other than Tesla. The Grant was also unnecessary, as the Board was aware that, as E. Musk had publicly and contemporaneously avowed, he had no intention of leaving or quitting Tesla, and his roughly 22% pre-existing equity stake already powerfully motivated him to work towards Tesla's success, including because the increased value of that stake would subsidize and further his ambition to colonize Mars.

8. The Grant also fails to include necessary protections for Tesla or its stockholders. Indeed, the Grant is devoid of any forfeiture or clawback provisions in the event that, among other things, (i) E. Musk fails to provide sufficient—or indeed, ***any***—time, attention or focus to Tesla; (ii) E. Musk is terminated for cause, resigns without good reason, or takes a leave of absence from Tesla; or (iii) after achievement of one or more tranches of the Grant, Tesla's performance and/or market capitalization degrades below the level necessary to achieved such

tranche(s).

9. The proxy issued on February 8, 2018 in connection with the 2018 Grant (the "Proxy") failed to disclose patently material information, including that Tesla's then-current internal operating plan—and the Company's best (and only) set of internal projections underlying that operating plan—reflected that (i) at least three of the Grant's 12 tranches (worth billions of dollars) were probable of achievement within just 1.5 years of the Grant's approval and (ii) at least nine of the Grant's operational milestones would be achieved within just three years of the Grant's approval.

10. The Proxy also falsely or misleadingly disclosed, among other things, that (i) "the members of the Compensation Committee [were] all independent directors" unaffiliated with E. Musk, when in reality, all four Compensation Committee members suffered disabling conflicts; (ii) "discussions [concerning the Grant] first took place among the members of the Compensation Committee" which "engaged in more than six months of active and ongoing discussions regarding [the 2018 Grant]," when in reality the 2018 Grant was devised by E. Musk and his loyalists months before the full Compensation Committee's involvement, and no meaningful negotiations took place during the Compensation Committee's process; and (iii) "[i]f you are the stockholder of record and you fail to vote, it will have no

effect on the [2018 Grant]," when each non-vote actually increased the likelihood of the Grant's approval by amplifying the power of each vote cast in favor of the Grant, including by the various Board members who E. Musk counted among his closest friends and/or business associates.

11. Through this action, Plaintiff seeks to recover for the harm caused by E. Musk and the other Defendants' fiduciary breaches and other misconduct in connection with the 2018 Grant.

II. THE PARTIES

PLAINTIFF

12. Plaintiff is and has been, at all relevant times, a beneficial owner of shares of Tesla common stock.

DEFENDANTS

13. Nominal Defendant Tesla is a Delaware corporation headquartered in Palo Alto, California. Tesla designs, develops, manufactures and sells high-performance fully-electric vehicles and energy storage products. Tesla's stock trades on the NASDAQ Global Select Market under the ticker symbol "TSLA".

14. Defendant E. Musk has served as Tesla's CEO since October 2008, and as Tesla's "Technoking" since March 2021, a role E. Musk describes as similar to a chief technology officer. E. Musk also served as the Company's Chairman of the Board from 2004 until September 2018, and as Tesla's longtime Chief Product Architect. As of early 2018 E. Musk was Tesla's largest stockholder, owning roughly 21.9% of Tesla's common stock through the Elon Musk Revocable Trust (the "Musk Trust"). Since May 2002, E. Musk has also served as CEO, Chief Technology Officer and Chairman of Space Exploration Technologies Corporation ("SpaceX"), a private space exploration company. E. Musk also served as Chairman of SolarCity Corporation ("SolarCity") from July 2006 until its acquisition by Tesla

in 2016. Through the Musk Trust, E. Musk is an investor and limited partner in Valor Equity Partners II, L.P. ("Valor Equity"), an investment firm that is managed by Valor Management Corporation ("VMC" and together with Valor Equity, "Valor"). Defendant Antonio J. Gracias ("Gracias") is the CEO, director and majority owner of VMC.

15. Defendant Gracias has been a member of the Tesla Board since May 2007 and has served as the Company's purported "Lead Independent Director" since September 2010. Gracias serves as a member of Tesla's Compensation Committee and Nominating and Governance Committee (the "Compensation Committee" or "Committee"). Gracias will reportedly resign from the Tesla Board at Tesla's 2021 annual meeting on October 7, 2021. Gracias was formerly a member of SolarCity's Board of Directors. Currently, he is a member of the Board of Directors of SpaceX, which is controlled by E. Musk. Gracias is the founder, managing partner, CEO, Chief Investment Officer, director and sole owner of private equity firm VMC, d/b/a Valor Equity Partners.

16. Defendant Ira Ehrenpreis ("Ehrenpreis") has been a member of the Tesla Board since May 2007. He also is the Chair of Tesla's Compensation Committee. Since 2014, Ehrenpreis has also 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"). 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.

17. Defendant Buss was a member of the Tesla Board from November 2009 until June 2019. Buss served on the Compensation Committee that approved the 2018 Grant. From August 2014 until his retirement in February 2016, Buss served as the Chief Financial Officer ("CFO") of SolarCity. During his 18-month tenure as SolarCity's CFO, Buss earned $32 million, allowing him to retire at the age of 52.[2] In fiscal year 2017, Buss earned $3,357,002 as a director of Tesla.[3]

18. Defendant Robyn M. Denholm ("Denholm") has been a member of the Tesla Board since August 2014, and Chairman of the Board since November 2018 (replacing E. Musk). Denholm is a member of the Compensation Committee and was a member when the Compensation Committee approved the 2018 Grant. In fiscal year 2017, Denholm earned $4,921,810 in compensation for her service as a Tesla director. Prior to becoming the chairperson of Tesla, she served as the COO

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[2] According to Buss's LinkedIn profile, he does not currently have full-time employment. *See* LinkedIn Profile of Brad W. Buss, https://www.linkedin.com/in/brad-w-buss-38434a47/.

[3] TESLA565.

of Telstra Corporation Ltd. ("Telstra"), where in 2017 she earned a comparatively modest $890,006 in total compensation from Telstra. Denholm resigned from Telstra in connection with assuming the mantle of chairperson from E. Musk.[4]

19. Defendant James Murdoch has been a member of Tesla's Board since July 2017.

20. Defendant Linda Johnson Rice was a member of Tesla's Board from July 2017 until June 2019.

21. The Defendants identified in Paragraphs 14 through 20, *supra*, are referred to collectively as the "Director Defendants."

RELEVANT DISMISSED PARTIES

22. Steve Jurvetson ("Jurvetson") was a member of the Tesla Board from June 2009 until September 2020. He also serves on the Board of Directors of SpaceX, which is controlled by E. Musk. 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.

23. Kimbal Musk ("K. Musk") has been a member of the Tesla Board since April 2004. K. Musk is E. Musk's brother. Tesla concedes in its filings with the

[4] Denholm Tr. at 96-97.

U.S. Securities and Exchange Commission ("SEC") that K. Musk is not an independent director of the Company. He also serves as a director of SpaceX. Additionally, K. Musk is a limited partner and investor in Valor alongside his brother and Defendant Gracias. K. Musk is also a limited partner in Valor Equity Partners III-A, L.P another investment firm managed by VMC.

III. SUBSTANTIVE ALLEGATIONS

A. E. Musk Controls Tesla

1. E. Musk Generally Controls Tesla

24. *First*, E. Musk is the clear public face of Tesla. As Ed Kim, vice president of industry analysis at AutoPacific explained: "Elon is Tesla, Tesla is Elon. He comes across as being extremely hands-on in the development process."[5]

25. *Second*, E. Musk is Tesla's largest stockholder. According to the Proxy, as of December 31, 2017, E. Musk beneficially owned 21.9% of Tesla's outstanding shares of common stock.[6]

26. *Third*, E. Musk has occupied a number of the most important positions

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[5] David Undercoffler, "Elon Musk The Showman Takes Center Stage At Tesla," LOS ANGELES TIMES, Oct. 10, 2014, http://www.latimes.com/business/autos/la-fi-the-tesla-show-20141011-story.html.

[6] Tesla's bylaws contain certain super-majority voting requirements allowing E. Musk significant control over certain corporate matters while only owning approximately 22% of Tesla's outstanding common stock.

at Tesla. He currently serves as the Company's CEO and has served in that position since 2008. According to a July 3, 2014 article posted on *SFGate*,[7] E. Musk assumed the role of CEO because he believed "the company wasn't going to make it."

27. In addition to serving as the Company's CEO, E. Musk also served as the Company's Chairman of the Board from 2004 until September 2018, when he was forced to resign pursuant to a settlement with the SEC regarding a tweet in which E. Musk claimed he had "funding secured" to take Tesla private at $420 per share.[8] Moreover, E. Musk served as Tesla's longtime Chief Product Architect, playing a key role in the design of all Tesla products. Tesla's website states E. Musk "leads all product design, engineering and global manufacturing of the company's electric vehicles, battery products and solar energy products."[9]

28. In March 2021, E. Musk bestowed on himself the new role of "Technoking" of Tesla, which E. Musk compared to being a "monarch."[10] E. Musk kept his role as CEO, and stated of his new Technoking role: "It's sort of like . . . chief technology officer . . . . [Y]eah, technoking means the same thing."[11] E. Musk

[7] *SFGate* is a website published by the San Francisco Chronicle.

[8] https://twitter.com/elonmusk/status/1026872652290379776?lang=en.

[9] https://www.tesla.com/elon-musk.

[10] E. Musk Tr. 24:6-8.

[11] E. Musk Tr. 22:11–27:08.

did not consult the Board before granting himself that new role. Indeed, several Tesla directors first learned about the new role and title when information regarding that development became public via Tweet.

29. *Fourth*, E. Musk closely manages personnel decisions at Tesla, including the hiring, firing and compensation of Tesla employees. Specifically, E. Musk has demonstrated a willingness to remove individuals at Tesla who challenge him and/or his overall strategy for the Company. For example, in August 2007, E. Musk, who held a Board meeting without giving notice to then-Tesla Motors' CEO Martin Eberhard ("Eberhard")—in violation of the Company's bylaws—removed Eberhard as CEO.[12] In commenting on Eberhard's firing, Mike Harrigan, VP of Marketing for Tesla at the time, said "[E. Musk] is the kind of boss where day to day you don't know if you have a job or not."[13] Harrigan further noted that E. Musk's demonstrated willingness to remove people "happened many times to many people, and that's what happened with Martin [Eberhard]. Once [E. Musk] determined that Martin [Eberhard] couldn't be the CEO of Tesla any longer, that was it. He [*i.e.*,

[12] Drake Baer, "Tesla's Original CEO Reveals What It's Like To Get Fired By Elon Musk," Business Insider, Nov. 18, 2014, http://www.businessinsider.com/how-elon-musk-fired-tesla-ceo-2014-11.

[13] *Id.*

Eberhard] was fired."[14] As Dave Sullivan, an analyst with AutoPacific, explained: "All the people that worship at the church of [E.] Musk will come at you with a pitchfork if you say something bad . . . . They're believers."

30. Murdoch confirmed that [redacted][15] and several Tesla directors confirmed that [redacted][16] Indeed, one Tesla employee described E. Musk [redacted] and another stated that E. Musk would [redacted][17]

31. Tim Higgins's recent book "Power Play" about E. Musk and Tesla details E. Musk's tyrannical style, which includes E. Musk repeatedly firing or threatening to fire any employee(s) who disagreed with him or gave him an answer

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[14] *Id.*

[15] Murdoch Tr. 116:19-24.

[16] K. Musk Tr. 137:7-9.

[17] TSLA-Tornetta-0225352 at -356.

he did not like. For example, when a paint shop manager "told [E.] Musk that what he was proposing wasn't possible[,] [E.] Musk told him to find another job—he was fired. [The paint shop manager] was one of many who would learn to keep their doubts to themselves if they wanted to keep their job."[18] In another incident, when E. Musk learned that customers were complaining about defective vehicles, E. Musk called Tesla's Marina del Rey delivery center and "threatened to begin firing people at the center if he heard any more complaints about defective vehicles."[19] The Board failed to take any meaningful action in response to such behavior, much less action sufficient to prevent the recurrence of similar behavior in the future.

32. The *Wall Street Journal* recounted a stark example of E. Musk's domineering manner (also included in Higgins' book). In September 2018, E. Musk reportedly confronted a sales manager who had resigned, "screaming profanities as he towered over him, telling [the manager] to leave[,]" and then followed the manager into the parking lot, where E. Musk allegedly assaulted the manager.[20]

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[18] Tim Higgins, Power Play: Tesla, Elon Musk and the Bet of the Century 240 (2021).

[19] *Id.* at 298.

[20] Tim Higgins, *Elon Musk's Trip Through Hell: Inside the 2018 Scramble to Avoid the Collapse of Tesla*, July 30, 2021, THE WALL STREET JOURNAL, https://www.wsj.com/articles/elon-musks-trip-through-hell-inside-the-2018-scramble-to-avoid-the-collapse-of-tesla-11627660800?mod=hp_lead_pos5.

"The scene was ugly and public enough that the board ultimately investigated, amid accusations that Mr. Musk had physically pushed the manager."[21] The Board ultimately refused to discipline E. Musk over the incident.[22]

33. In addition to his propensity for firing employees, E. Musk is also closely involved in hiring decisions at Tesla. Indeed, E. Musk "generally interviews ***all*** high-level employees" that are seeking a job at Tesla.[23] Murdoch also confirmed that "executive decision-making in terms of [ ] hiring . . . will be made by Elon."[24]

34. E. Musk also controls executive compensation at Tesla. E. Musk testified that for senior executives, he makes the compensation "recommendation in the first instance."[25] Indeed, while the 2018 Grant process was ongoing, E. Musk was also personally finalizing the compensation scheme for executives at Tesla, and testified that he unilaterally offered Tesla executives a plan similar to his 2018 Grant.

35. *Fifth*, both Tesla and E. Musk have made a multitude of concessions regarding E. Musk's powerful influence over the Company and the Tesla Board. As for the Company, its public filings disclose:

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[21] *Id.*

[22] *Id.*

[23] Viecha Tr. 32:4-10.

[24] Murdoch Tr. 116:19-24.

[25] Musk 61:5-11.

- "In addition to serving as the CEO since October 2008, Mr. Musk has contributed significantly and actively to us since our earliest days in April 2004 by recruiting executives and engineers, contributing to the vehicle engineering and design, raising capital for us and bringing investors to us, and raising public awareness of the Company."[26]

- "[Tesla is] highly dependent on the services of Elon Musk, [who is] highly active in [the Company's] management, [and if Tesla were to lose his services, it could] disrupt our operations, delay the development and introduction of our vehicles and services, and negatively impact our business, prospects and operating results as well as cause our stock price to decline."[27]

- "Mr. Musk spends significant time with Tesla and is highly active in [Tesla's] management"[28]

- The "concentration of ownership among [Tesla's] existing executive officers, directors and their affiliates may prevent new investors from influencing significant corporate decisions," [such that] "these stockholders will be able to exercise a significant level of control over all matters requiring stockholder approval, including the election of directors, amendment of our certificate of incorporation and approval of significant corporate transactions."[29]

[26] Tesla's Definitive Proxy Statement, filed with the SEC on April 17, 2013, at 22.

[27] *See* Tesla's Form 10-K, filed with the SEC on March 1, 2017, at 22-23.

[28] *Id*. at 23.

[29] *See* Tesla's Form 10-K, filed with the SEC on February 26, 2015, at 40.

36. On an August 1, 2016 conference call, E. Musk repeatedly referred to Tesla as "my company." E. Musk also testified that Tesla was "Elon's company."[30] Moreover, E. Musk has repeatedly confirmed his deep commitment to the Company, stating: "I intend to be actively involved with Tesla for the rest of my life."[31]

37. *Sixth*, E. Musk is the dominant force behind Tesla's corporate strategy, which (i) proceeded for a decade according to E. Musk's "Master Plan," which was personally authored by E. Musk and was published to the Company's website on August 2, 2006; and (ii) now proceeds according to E. Musk's "Master Plan, Part Deux," which was published to the Company's website on July 20, 2016.

38. *Seventh*, as detailed below, a majority of the nine-member Tesla Board in place at the time that the Grant was approved was not independent of E. Musk. Vivek Wadhwa, a professor at Carnegie Mellon University, has referred to the Tesla Board as E. Musk's personal "echo chamber"[32] given the numerous ties between the Board members and himself.

39. These overlapping relationships created a web of conflicts that The

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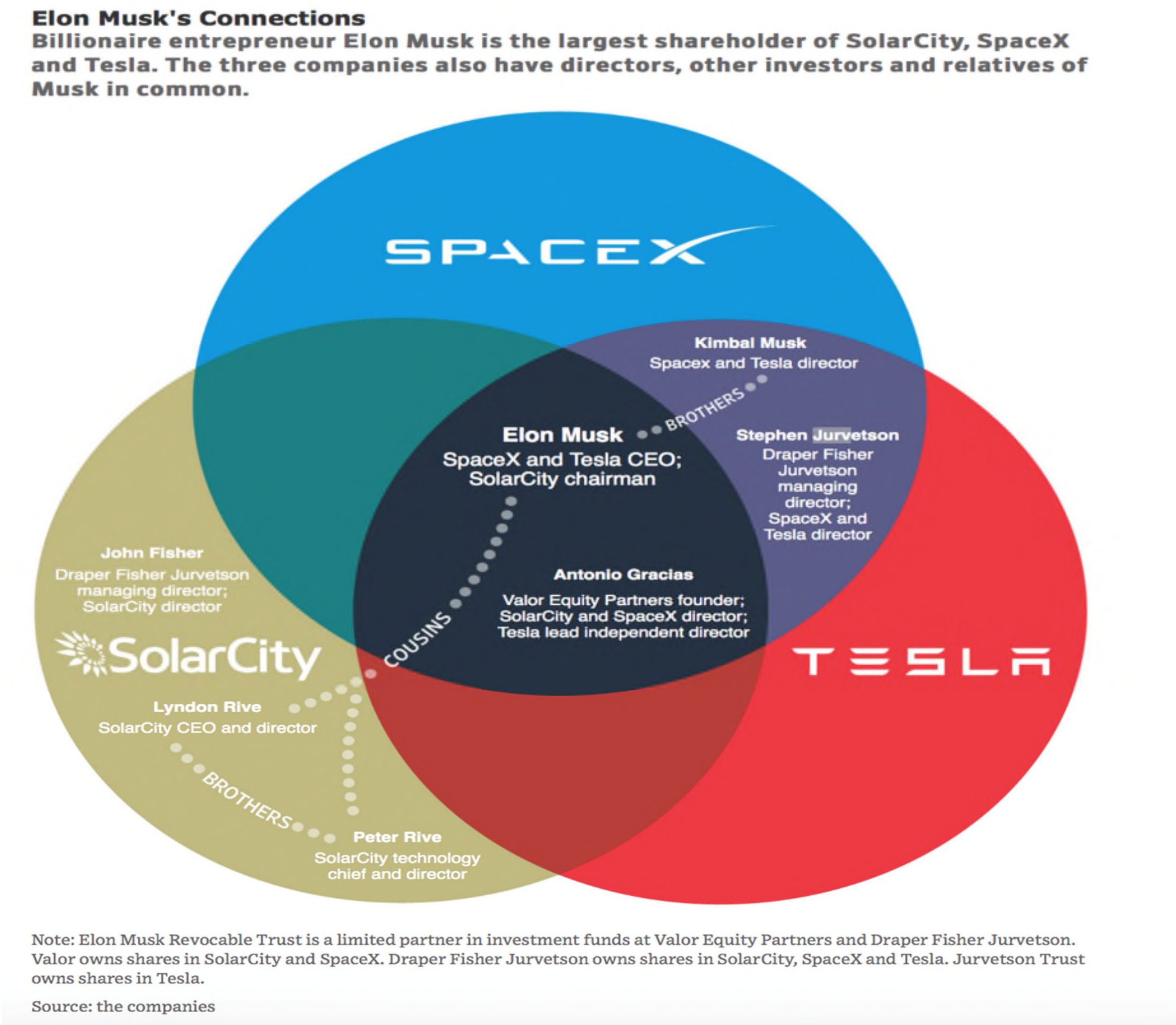
[30] E. Musk Tr. 28:9-13.

[31] TESLA_TORNETTA_DIR0009252, at -271.

[32] Aman Jain, "Is Tesla's Motors' Board of Directors An Elon Musk 'Echo Chamber'?", LearnBonds, Oct. 10, 2016, https://learnbonds.com/131596/tesla-motors-elon-musk-board-directors/ .

Wall Street Journal depicted as follows:[33]



Not included in the above figure are directors Ehrenpreis, who is also an investor in both Tesla and SpaceX, and former director Buss, the former chief financial officer

[33] Susan Pulliam, Mike Ramsey and Brody Mullins, "Elon Musk Supports His Business Empire With Unusual Financial Moves," THE WALL STREET JOURNAL, Apr. 27, 2016, https://www.wsj.com/articles/elon-musk-supports-his-business-empire-with-unusual-financial-moves-1461781962.

of SolarCity.

40. Indeed, E. Musk often steers the Company pursuant to his own desires, without the Board's involvement, consultation and/or recommendation. [redacted]

41. Furthermore, in connection the SEC's lawsuit against E. Musk for his tweet regarding his purported intent to take Tesla private at $420 per share, E. Musk forced the Board to reject the SEC's initial settlement proposal despite the Board's view that the proposal was fair and the Board's initial intent to accept the proposal. Specifically, The *New York Times* reported that "[i]n a phone call with directors before their lawyers went back to federal regulators with a final decision [regarding the proposed settlement], Mr. Musk threatened to resign on the spot if the board insisted that he and the company enter into the settlement," and "the board caved to his demands."[35] Professor Jeffery Sonnenfeld of the Yale School of Management

[34] E. Musk Tr. 83:5-10.

[35] James B. Stewart, *Elon Musk's Ultimatum to Tesla: Fight the S.E.C., or I Quit*,

stated: "What it tells us is this board, as a strategic plan, must be using the Jim Jones-Jonestown suicide pact . . . . They are drinking the Kool-Aid of the founder. It is completely as self-destructive as Musk is."[36]

42. After rejecting the proposal, E. Musk almost immediately realized his error and directed Tesla lawyers to go back to the SEC and seek another settlement. E. Musk then allowed the Board to agree to a revised settlement (the "SEC Settlement"), but his obstinance cost Tesla $20 million through an SEC imposed fine that was not included in the initial settlement that E. Musk forced the Board to reject.

43. To address the SEC's apparent view that E. Musk was able to run roughshod over the Board, the SEC Settlement also required that Tesla (i) replace E. Musk with an independent Board Chairman, (ii) appoint two new independent directors to the Board, (iii) establish a new Board committee of independent directors and other controls to oversee E. Musk's communications, and (iv) ensure that certain of E. Musk's communications are pre-approved by Tesla lawyers.

October 2, 2018, The New York Times, available at https://www.nytimes.com/2018/10/02/business/tesla-elon-musk-sec.html.

[36] *Id.*

44. E. Musk has essentially ignored the requirements of the SEC Settlement and the Board has failed to control E. Musk's reckless behavior. In February 2019, the SEC petitioned the court that approved the SEC Settlement to hold E. Musk in contempt for communications the SEC deemed to have violated the SEC Settlement. The SEC and Tesla then amended the SEC Settlement to make it more precise, but Tesla thereafter continued to fail to control E. Musk's communications to stockholders.

45. Further, the SEC has repeatedly sent letters to Tesla accusing it of failing to comply with the SEC Settlement requiring prior review and approval of E. Musk's communications. For example, in May 2020, the SEC wrote to Tesla stating: "In the face of Mr. Musk's repeated refusals to submit his covered written communications on Twitter to Tesla for pre-approval, we are very concerned by Tesla repeated determinations that there have been no policy violations . . . ."[37] Shortly thereafter, E. Musk demonstrated his long-held antipathy for the SEC, tweeting: "SEC, three letter acronym, middle word is Elon's."[38] That tweet likely

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[37] Dave Michaels and Rebecca Elliot, *Tesla Failed to Oversee Elon Musk's Tweets, SEC Argued in Letters*, June 1, 2021, The Wall Street Journal, available at https://www.wsj.com/articles/tesla-failed-to-oversee-elon-musk-s-tweets-sec-argued-in-letters-11622582765.

[38] https://twitter.com/elonmusk/status/1278764736876773383?lang=en.

again violated the SEC Settlement, but the Board again failed to discipline E. Musk. [redacted]

[redacted]

Thus Musk continues to fail to abide by the SEC Settlement.

46. Notably, Gracias testified that if E. Musk told the Board that [redacted] A February 2018 Barron's article also confirmed that "[E.] Musk has pretty much had his way with the board over the years,"[40] and proxy advisor Institutional Shareholder Services Inc. ("ISS") has internally expressed "doubts about the board's willingness/ability to stand up to Musk, given the ties so many directors have to him . . . ."[41]

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[39] E. Musk Tr. at 30:03-32:05.
[40] InnisfreeM&A0002337.
[41] ISS_00078.

47. *Eighth*, E. Musk has historically caused the Company to enter into unfair transactions to advance his own personal interests. For example, in 2016, E. Musk caused Tesla to acquire—and therefore save—his and his cousins' struggling solar company SolarCity for a bloated price of $2.6 billion.

2. E. Musk Specifically Controlled Tesla With Respect to the 2018 Grant

48. As described in detail below, E. Musk controlled the process leading to and culminating with the 2018 Grant. E. Musk first discussed his desired Grant with his close friends Ehrenpreis and Tesla General Counsel Todd Maron ("Maron"), no later than early April 2017. Ehrenpreis and Maron then enlisted the help of others that reported directly to Maron or E. Musk, and sought out advisors to justify the Grant and foster a patina of independent analysis and review.

49. With the general structure and size of the Grant established, the Compensation Committee was belatedly brought into the process on June 23, 2017. Every member of the Compensation Committee had a disabling conflict with E. Musk. Accordingly, the Compensation Committee simply acquiesced to E. Musk's desired plan, failing to engage in any meaningful negotiations and instead rubberstamping a multibillion dollar gift to E. Musk. Indeed, E. Musk was directly responsible for the only truly meaningful change to his initially desired plan: the

reduction from 15 tranches. E. Musk described the decision to reduce the tranches as “me negotiating against myself” rather than with the Compensation Committee.[42]

B. E. Musk Receives Grants from the Board in 2009 and 2012

50. In December 2009, the Board granted E. Musk a compensation plan which gave him the potential to acquire 8% of Tesla (the “2009 Grant”). The 2009 Grant consisted of (i) options to purchase shares of Tesla’s common stock, representing 4% of fully diluted shares as of the 2009 Grant date (December 4, 2009), with one-fourth of the options subject to vesting immediately, and the remaining options scheduled to vest each month over three years;[43] and (ii) an additional grant of stock options, giving E. Musk rights to purchase an additional 4% of Tesla’s fully diluted shares outstanding as of December 4, 2009 based entirely on achieving certain operational milestones.

51. Specifically, under the 2009 Grant, E. Musk was entitled to receive 1% of Tesla’s fully diluted shares outstanding upon the achievement of each of the following four objectives: (i) the completion of the Model S Engineering Prototype; (ii) the completion of the Model S Vehicle Prototype; (iii) the completion of the first Model S Production Vehicle; and (iv) the completion of the 10,000th Model S

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[42] E. Musk Tr. 262:18-263:4.

[43] Tesla Form S-1, filed with the SEC on Jan. 29, 2010, at 131.

Production Vehicle.

52. In 2010 and 2011, E. Musk did not receive any equity grants, as the Compensation Committee "believed his existing [2009 Grant] already provided sufficient motivation for Mr. Musk to perform his duties as [CEO]."[44]

53. On August 1, 2012, the Board again awarded E. Musk an executive compensation package, which was entirely comprised of stock options that would vest upon achievement of certain specified performance milestones (the "2012 Grant"). E. Musk testified that in discussing with the Board what would ultimately become the 2012 Grant, he "suggest[ed] [] something that was . . . high gain, but for high risk."[45] At the time, E. Musk held approximately 28.9% of Tesla's total outstanding shares, valued approximately at $165 million.

54. The 2012 Grant had a ten-year term, and consisted of options to purchase 5,274,901 shares of Tesla's common stock at an exercise price of $31.17 per share. The vesting milestones for the 2012 Grant comprised ten tranches, with each tranche requiring Tesla to (i) increase market capitalization by $4 billion, and (ii) achieve an additional specified operational milestone. Achievement of each tranche would provide E. Musk with 0.5% of Tesla's total issued and outstanding

[44] Tesla Form DEF 14-A, filed with the SEC on Feb. 8, 2018, at 5.

[45] E. Musk. Tr. 136:4-136:21.

shares as of August 13, 2012, such that achievement of all ten tranches would provide E. Musk with 5% of Tesla's total issued and outstanding shares of Tesla.

55. Subsequently, Tesla disclosed a grant date fair value for the 2012 Grant of approximately $78 million, which assumed that all of the operational milestones associated with the 2012 Grant were probable of achievement.

56. Tesla repeatedly disclosed that the 2012 Grant's "milestones were viewed at the time as very difficult to achieve."[46] However, as of April 2017—less than five years after the Board awarded E. Musk the 2012 Grant—seven of the 2012 Grant's ten tranches had vested, providing E. Musk 3.5% of Tesla's total outstanding shares. Three of the 2012 Grant's ten tranches remained outstanding, and more than five years remained on the 2012 Grant's ten-year term. Indeed, as of the date of filing of the Amended Complaint, one tranche of the 2012 Grant remains outstanding, and despite bestowing on E. Musk by far the most massive compensation plan in history, the Board elected to also keep the 2012 Grant active and intact.

[46] *See, e.g.*, Proxy at 35.

C. E. Musk and His Loyalists Formulate E. Musk's Desired New Compensation Plan

57. No later than April 8, 2017, E. Musk began discussing a new compensation package with Ehrenpreis.

58. On April 8, 2017—one day after the vesting of the seventh of the 2012 Grant's ten tranches—Ehrenpreis sent E. Musk a text message asking to discuss "comp related issues," *i.e.*, a new compensation plan.[47] In this initial conversation regarding the 2018 Grant, E. Musk proposed "something similar to what was done in the past" but with "a larger amount," and "something that would result in . . . owning 10 percent of the company, incrementally taking into account dilution of my own shares."[48] E. Musk also said to Ehrenpreis that the 2018 Grant should provide him 1% of Tesla's shares per tranche; the 2018 Grant's $50 billion market cap milestone increments also derived from an April conversation between E. Musk and Ehrenpreis.

59. Shortly after E. Musk's and Ehrenpreis's initial conversation regarding the 2018 Grant on April 8, 2017, E. Musk and Ehrenpreis communicated to Tesla's then-General Counsel Todd Maron ("Maron") E. Musk's desired new compensation

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[47] TESLA_TORNETTA_DIR0007217.

[48] E. Musk Tr. 144:19-145:8.

plan—including that E. Musk would receive 1% of the Company per tranche—and sought Maron's help in bringing that plan to fruition.[49] Maron had a close personal relationship with E. Musk given Maron's service as E. Musk's personal divorce attorney before E. Musk recruited Maron to serve as Tesla's General Counsel, notwithstanding Maron's lack of corporate, securities or regulatory experience. Maron testified that he "care[d] about [E. Musk] a tremendous amount," and has "always cared about him and wanted him to have . . . success in life."[50]

60. No later than April 9, 2017, Maron enlisted the help of his Deputy General Counsels Jonathan Chang ("Chang") and Phillip Rothenberg ("Rothenberg") in effectuating E. Musk's desired plan. Maron and his team then promptly "started reaching out to all the relevant people that we wanted to have involved in this and started bringing them into the [2018 Grant] process."[51] They were assisted in that process by, among others, Tesla lawyers Phuong Phillips ("Phillips") and Yun Huh ("Huh") (both of whom reported to Maron), as well as Tesla's CFO Deepak Ahuja, who reported directly to E. Musk.

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[49] Maron had likely already had conversations with E. Musk regarding the Grant. Maron told The New York Times that "informal" "conversations" about the Grant started "early last year" and that a "more formal" process "started around the Spring 2017 . . . ." SVC00008167.

[50] Maron Tr. 199:12-13, 200:1-5.

[51] Maron Tr. 132:2-24.

61. On April 10, 2017, Rothenberg and other Tesla lawyers reached out to Wilson Sonsini Goodrich & Rosati ("Wilson Sonsini") to assist Tesla with effectuating E. Musk's desired compensation plan. Wilson Sonsini was E. Musk's preferred legal advisor and "ha[d] been used by Tesla for a long time in various matters."[52] Notwithstanding the fact that the Compensation Committee had yet to interview or engage with Wilson Sonsini regarding the Grant, from that point forward, Wilson Sonsini remained involved with the Grant process, representing both Tesla and the Compensation Committee at various times.

62. On May 12, 2017, with discussions regarding the 2018 Grant ongoing, Tesla co-founder J.B. Straubel emailed E. Musk regarding "Equity Incentives," and requested that E. Musk "consider giving [Straubel] the same vesting milestones that [E. Musk] and the board set up for [E. Musk] and tie to that some smaller percentage of the equity awards when they are achieved."[53] E. Musk responded that he was "planning on something really crazy, but also high risk" vis-à-vis his new compensation plan.[54]

63. On or around June 18, 2017, Maron and Ehrenpreis discussed various

[52] E. Musk Tr. 90:16-21.

[53] TESLA_TORNETTA_DIR0001740.

[54] TESLA_TORNETTA_DIR0001740.

issues regarding the Grant. At the time, Tesla was envisioning an "accelerated" process with Board approval of the 2018 Grant in "a little over one month" (*i.e.*, before the end of July 2017).[55]

64. By no later than June 18, 2017, Phillips reached out to Compensia to advise Tesla regarding the 2018 Grant, in part because Compensia was Wilson Sonsini's preferred compensation advisor. Around the same time, Tesla also reached out to compensation consultant Semler Brossy, which informed Tesla that no other compensation plans "meet the standard that [Tesla was] considering" for the 2018 Grant.[56]

65. On June 19, 2017, Phillips, Huh and Compensia's Tom Brown ("Brown") convened a call to discuss the 2018 Grant. During that call, Brown was informed that he would be "working towards"[57] a grant which would include (i) 15 tranches; (ii) a per-tranche award of 1% of Tesla's shares to E. Musk; (ii) operational milestones; and (iii) market cap milestones with $50B increments. Brown understood this to be Tesla's "preliminary thinking"[58] and was unaware that E. Musk

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[55] TSLA-Tornetta-0319333.

[56] TSLA-COMP-0001794.

[57] Maron Tr. 169:19-170:10.

[58] Maron Tr. 170:4-170:10.

and Ehrenpreis had already determined that the 2018 Grant would have that structure in April.

66. Two days later, on June 21, 2017, Tesla convened a second call with Brown, which this time also included Ehrenpreis, Maron, Rothenberg, Chang and Tesla Chief People Officer Gaby Toledano. During that call, it was again confirmed, among other things, that the contemplated Grant would entail "Mkt cap goals at $50B each" and "Operational Goals."[59]

67. The call also included discussion of "Stock price vs. Mkt Cap" goals, and Brown's handwritten notes from the call reflect that "Stock price = better acctg" and that "Mkt cap goal can be met w/out benefitting existing [shareholders]."[60] Finally, Tesla confirmed that the contemplated timing for approval of the Grant discussed during the June 21, 2017 call was to achieve "sign-off by 3rd wk of July."[61] Thus, that same day, Brown reached out to Aon/Radford's Jonathan Burg ("Burg") to ask him what his "bandwidth look[ed] like over the next 3 weeks to do another one of these LTI [*i.e.*, Long-term Incentive] projects," because "the client [*i.e.*, Tesla] wants to get through the analysis faster than Oracle just did, hence the next

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[59] AON-Musk-000569, at -570-71.

[60] AON-Musk-000569, at -570-71 (emphasis in original).

[61] AON-Musk-000569, at -570-71.

three weeks questions."[62]

68. Also around that time, Rothenberg internally circulated a model for the 2018 Grant—created by Tesla in May 2017—which confirmed the terms from Musk's and Ehrenpreis's April discussions. Specifically, the model included the following: [63]

> 1. $50 billion market cap for Tesla as starting point
> 2. 15 tranches, dual triggered - performance milestone and market cap milestone
> 3. Each tranche worth roughly 1% of Tesla, or 1.6 million shares (currently ~165 million shares outstanding)

The model calculated a $57.6 billion maximum value for the Grant (*i.e.*, close to the $55.8 billion ultimate maximum value of the 2018 Grant).

D. With the 2018 Grant's Structure and Size Determined, the Conflicted Compensation Committee is Belatedly Brought Into the Grant Process

69. On June 18, 2017, Maron emailed the Board's Compensation Committee stating: "We would like to discuss Elon's next stock grant."[64] Then, on June 23, the Compensation Committee met for the first time to discuss a new compensation package for E. Musk. Before that meeting, Ehrenpreis—despite his

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[62] AON-Musk-0002389.

[63] TSLA-Tornetta-0289684.

[64] TESLA_TORNETTA_DIR0000020.

close personal friendship and business connections with E. Musk—was the lone Compensation Committee member involved with the discussions regarding the 2018 Grant.

70. The other three members of the Compensation Committee—Gracias, Denholm, and Buss—also had disabling relationships and/or affiliations with E. Musk. As explained above, (i) Gracias was a longtime close friend of E. Musk who vacationed with E. Musk (along with their respective families) and had invested in several E. Musk companies, (ii) Buss was the former CFO of SolarCity and had received compensation worth over $10 million from Tesla and (iii) Denholm received compensation worth at least $81 million from Tesla, which she acknowledged was material to her financial well-being.

E. The Compensation Committee Fails to Critically Review the Grant

71. Unsurprisingly, the conflicted Compensation Committee simply acquiesced to E. Musk's desired plan. Indeed, no meaningful negotiation between E. Musk and the Compensation Committee occurred at any point during the 2018 Grant process. Gracias, for example, explained that he did not "think about" the negotiations in terms of the smallest compensation package that would have

adequately incentivized E. Musk, or "the least amount he's going to take[.]"[65] Maron confirmed it "was a cooperative, collaborative process," and that he did not recall anybody taking an adversarial position in connection with discussions relating to the 2018 Grant.[66] Burg was not aware of ***any*** specific negotiations relating to the 2018 Grant, including relating to the number of tranches and/or the number of milestones.[67]

72. Notably, throughout the process, E. Musk's close friend Ehrenpreis "was the point person" with respect to the 2018 Grant and dominated the Compensation Committee's process.[68] Ehrenpreis functioned as the principal—if not only—point of contact for the Compensation Committee's advisors, Compensia and Aon/Radford, with the other Committee members having little or no interaction with Compensia and Aon/Radford outside of official meetings. Ehrenpreis also almost exclusively handled discussions with E. Musk during the Grant process concerning E. Musk's desires related to the 2018 Grant. "[T]he full committee [was not] part of those conversations."[69]

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[65] Gracias Tr. 255:22-256:9, , 273:16-274:3.

[66] Maron Tr. 100:11-101:21.

[67] Burg Tr. at 273:10-13.

[68] Johnson Rice Tr. 108:21-109:1.

[69] Murdoch Tr., at 199:13-20.

73. Gracias—the second most conflicted member of the Compensation Committee—played a supporting role to Ehrenpreis. Buss and Denholm largely remained on the sidelines. Maron acknowledged that "the two people that I was speaking with most frequently on the comp committee about this outside of regularly scheduled comp committee meetings were Ira [Ehrenpreis] and Antonio [Gracias]."[70]

74. Indeed, although substantive discussions regarding the 2018 Grant had begun no later than April 8, 2017 and the fundamental terms of the Grant discussed during that period had remained consistent (as reflected by the discussion of those terms with Compensia on June 19 and 21, and the model of the Grant circulated internally by Tesla around this time), it was only in connection with the June 23 meeting that Compensation Committee members Denholm and Buss first learned about ***any*** discussions regarding the 2018 Grant. Moreover, the contemplated terms of the 2018 Grant were not discussed with Denholm and Buss at the June 23 meeting, nor were they addressed in the materials provided to the Committee in connection with that meeting.

[70] Maron Tr. 261:11-262:8.

75. Instead, at the June 23 meeting, Ehrenpreis merely discussed the general need for a new compensation package for E. Musk. Ehrenpreis also "informed the Committee that . . . he and [Tesla] management had been speaking with several potential consultants."[71] During that same meeting—alerted to the breakneck schedule E. Musk and his loyalists had instituted for approval of the Grant—the Committee reflexively approved the engagement of (i) Wilson Sonsini, *i.e.*, Tesla's longtime counsel that had been assisting the Company on the 2018 Grant since April; and (ii) Compensia, which was selected by Tesla in-house counsel and Wilson Sonsini several days prior. Compensia subsequently suggested that Tesla engage Aon/Radford to perform valuation services in connection with the 2018 Grant, and Tesla did so shortly thereafter. E. Musk retained no advisors in connection with the 2018 Grant.

76. On June 26, 2017, Tesla reaffirmed its intention to secure Board approval of the 2018 Grant before the end of July. Brown believed that the timeline—which Gracias stated likely emanated from Ehrenpreis—"felt aggressive" and Brown therefore "pushed for a little bit more time so that we would have a timeline I thought we could manage to."[72] Burg similarly believed the contemplated

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[71] TESLA00000001, at -002.

[72] Brown Tr. 165:7-11.

timing was "fast," and he had no understanding of why the 2018 Grant needed to be approved so quickly.[73]

F. Tesla Chooses Market Cap Milestones Over Stock-Based Milestones

77. In early July, Tesla in-house counsel, Compensia and Aon/Radford also discussed whether to use stock price-based milestones or market cap-based milestones. In connection with that discussion—and echoing Compensia's Brown's June 21 notation that "Mkt cap goal can be met w/out benefitting existing [shareholders]"[74]—Aon/Radford's Burg noted that "[t]rue market cap runs the risk of not being shareholder friendly"[75] because market cap can increase without actually benefiting stockholders.

78. By contrast, as Burg also explained, stock price milestones do not present similar risks to stockholders. Moreover, Burg and Brown confirmed that stock price-based milestones are far more common than market cap-based milestones. Nevertheless, the Compensation Committee and Board ultimately agreed to use market cap-based milestones rather than stock price-based milestones in the Grant.

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[73] Burg Tr. 73:13-22.

[74] AON-Musk-000569, at -570-71 (emphasis in original).

[75] TSLA-Tornetta-0289756, at -9756_0002.

G. Tesla Correlates the Grant's Market Capitalization and Operational Milestones

79. Tesla employees, Compensia and Aon/Radford recognized that there was typically a correlation between a company's financial performance and its market capitalization. Thus, having chosen to use both operational milestones based roughly on Tesla's performance and market cap milestones, Tesla—with assistance from its advisors—sought to correlate the two sets of milestones within the Grant.

80. From July through September, at the request of Mr. Ahuja, Aon/Radford conducted certain analyses regarding the correlation between market capitalization and revenue with respect to the 2018 Grant. Specifically, Aon/Radford analyzed market cap-to-revenue ratios to determine the correlation between the two. Its purpose in doing so was to determine what incremental operational milestones would support certain market cap milestones.

81. For example, on July 19, 2017, Burg sent Ahuja data detailing the market capitalization to revenue ratio "for the Top 10 tech companies."[76] That analysis revealed a declining ratio between market capitalization and revenue.

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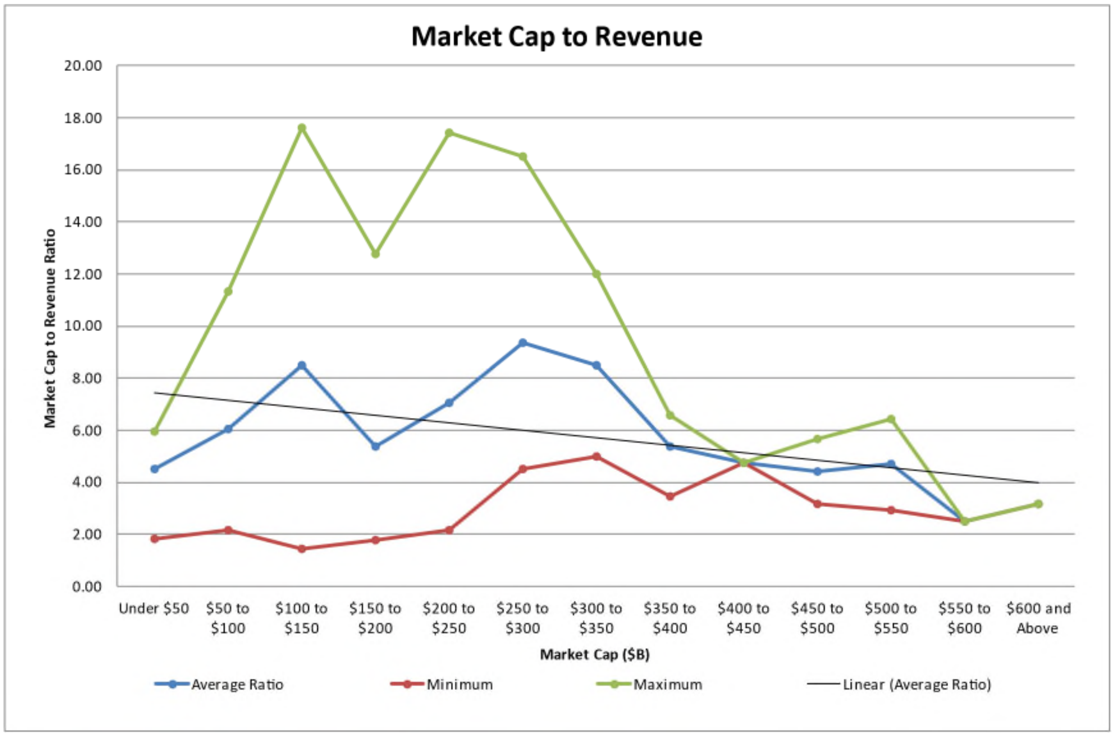
[76] AON-Musk-0001187.



In other words, Aon's analysis demonstrated that as market capitalization increased, the revenue multiple declined.

82. Ahuja and others also analyzed the correlation among Revenue, adjusted EBITDA and market capitalization.

83. These analyses by Tesla and Aon/Radford helped shape the operational milestones incorporated into the Grant. Ultimately, that exercise helped "align" the operational milestones with the already determined market cap milestones because

"[i]t has to make sense to be able to be achieved around the same time or what you think is the same time . . . ."[77]

H. The Compensation Committee Fails to Request, Receive or Consider Benchmark Analyses for the 2018 Grant

84. On July 6, 2017, Tesla's timeline for the Grant shifted to target issuance of the Grant "in August or September instead of within the next couple weeks."[78] The next day, *i.e.*, July 7, 2017, the Committee convened its second meeting regarding the 2018 Grant. The materials presented in connection with that meeting (i) confirmed the same fundamental terms for the 2018 Grant established by E. Musk and Ehrenpreis in early April 2017 and (ii) included limited information on other CEO compensation plans.

85. Specifically, the "Structure under Consideration" as reflected within the July 7 Committee materials entailed a 10-year grant consisting of 15 tranches, each of which would be achievable by satisfying a market cap and an operational goal and would result in vesting of the determined number of Tesla stock options.[79]

86. The appendices to the July 7 Committee materials included certain information regarding top-paid CEOs in 2016 and four other prior compensation

[77] Chang Tr. 342:19-343:7.

[78] TSLA-Tornetta-0294463.

[79] TSLA-Tornetta-0294650, at -653.

grants. That information—which Brown hoped presented a "clear statement that th[e 2018 Grant] would be an award that was larger than was otherwise available in any comparables"[80]—was the ***only*** conceivable "benchmarking" information the Committee or Board ever received in connection with the 2018 Grant. Presented with the Committee and Board's failures to request, receive or consider benchmarking information, Brown testified that the "contemplated quantum" of the Grant rendered benchmarking irrelevant.[81]

87. Brown also explained that Compensia did not conduct a benchmark study for the 2018 Grant because when he was hired there was already an understanding of "what the award might look like,"[82] as E. Musk and Ehrenpreis had already determined the Grant's general size and structure in April. Burg similarly recalled no comps or benchmarks ever being presented to the Compensation Committee or Board with respect to the 2018 Grant, and Murdoch explained that neither Compensia nor anybody else was able to identify any comps for the Grant.

[80] Brown Tr. 92:3-10.

[81] Brown Tr. 86:2-22.

[82] Brown Tr. 78:6-23.

I. Ehrenpreis Attempts to Artificially Reduce the 2018 Grant's Grant Date Fair Value

88. Around this time, Ehrenpreis also spearheaded an effort with Aon/Radford and Compensia to identify "creative options" for "getting a bigger discount" on the Grant's grant date fair value.[83] Ehrenpreis did so notwithstanding the fact that a lower grant date fair value would make the Grant ***appear*** less valuable without actually changing the amount of Tesla equity transferred to E. Musk through the Grant.

89. However, reducing the grant date fair value would have at least two significant impacts. *First*, making the Grant ***appear*** less valuable—whether viewed independently or relative to other comparables—would reduce the Compensation Committee's negotiating leverage to the extent it saw fit to engage in meaningful negotiations with E. Musk (it did not), and conversely would ***increase*** E. Musk's negotiating leverage in the context of any such discussions. *Second*, making the Grant appear less valuable would reduce the likelihood of criticism regarding the Grant's size, while increasing the likelihood that stockholders would approve the Grant.

[83] AON-Musk-000691.

90. In response Ehrenpreis's directive for Aon/Radford and Compensia to identify "creative options" for "getting a bigger discount" on the Grant's grant date fair value, Aon/Radford's Burg identified the five-year holding period for exercised shares as one such mechanism, as the holding period would provide Aon/Radford a basis—albeit a questionable one—to apply to the Grant an "illiquidity discount" that would reduce the Grant's grant date fair value.[84]

91. Ultimately, the illiquidity discount applied to the Grant's valuation based on that 5-year holding period reduced the 2018 Grant's grant date fair value by roughly $300 million. And yet, as was obvious to all those involved with bringing the Grant to fruition, the holding period had little to no practical impact on E. Musk given that, among other things, (i) E. Musk had never sold Tesla shares other than to pay taxes, (ii) nothing would prevent E. Musk from selling any of the millions of Tesla shares he already owned, and (iii) the Grant contained no constraints on E. Musk's ability to pledge any newly issued options and/or vested shares as had been his practice for many years.

92. By no later than August 1, 2017, all parties to the process were generally aware of the expected grant date fair value of the 2018 Grant, as

[84] TSLA-Tornetta-0287216.

Aon/Radford "calculat[ed] an estimated grant date value for the full award of [~$2.0B - $3.0B]" (*i.e.*, a range that neatly encompassed the $2.6 billion ultimate grant date fair value).[85]

J. Tesla Management Develops Operational Milestones for the 2018 Grant Consistent with Its Long-Term Projections

93. During the early April discussions regarding the Grant, E. Musk, Maron, Ehrenpreis and Ahuja, among others at Tesla, began discussing the creation of operational milestones in connection with the 2018 Grant.[86]

94. Initially, Ehrenpreis advised Tesla management that he preferred the Grant be composed solely of market capitalization milestones.[87] However, Maron informed Ehrenpreis that there are significant "accounting implications of recognizing stock based comp[ensation] expense."[88] Specifically, according to Ahuja:[89]

> There is an accounting implication of recognizing stock based comp expense, not a tax issue, depending on whether the equity award has only market cap condition or a both a market cap and performance condition: If the award only has a market condition, the SBC expense will start on date of grant and there is no expense reversal if the award

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[85] TESLA_TORNETTA_DIR0002869.

[86] TESLA_TORNETTA_DIR0009231, at -32.

[87] TSLA-Tornetta-0319333, at -34.

[88] TSLA-Tornetta-0320781.

[89] TESLA_TORNETTA_DIR0009231, at -32.

> is ultimately forfeited[.] If the award has both a market and a performance condition, the expense is first recorded when probability of achievement exceeds 70% (with a catch-up from the date of grant); however, if the award is ultimately forfeited, any previously recorded expense is reversed . . . . Based on this old analysis, it is highly recommended to have both conditions.

95. On July 1, 2017, Tesla in-house counsel Chang circulated an email "following up on yesterday's discussion regarding operating milestones," and which reflected the plan regarding revenue-based operational milestones for the Grant.[90] Chang envisioned that under the 2018 Grant, Tesla would "expect to achieve a milestone roughly once every 12 to 15 months over the next 3 years."[91]

96. In addition to Revenue-based milestones, the 2018 Grant also contained Adjusted EBITDA-based operational milestones. In formulating and assessing appropriate operational milestones for the Grant, the Compensation Committee had available to it Tesla's three-year financial plans, which were shared and vetted with Tesla's Audit Committee and Board, including E. Musk himself. In fact, E. Musk was closely involved with creating the three-year internal plans, which reflected Tesla's "best assumptions" regarding Tesla's future financial performance.[92]

97. Throughout the 2018 Grant process, Tesla disseminated to the Board

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[90] TSLA-Tornetta-0289756 at -756_0003.

[91] TSLA-Tornetta-0289756.

[92] Ahuja Tr. 337:6-338:16.

and third parties its three-year operating plan and/or projections, which included the only financial performance forecasts on which Tesla's Board relied. Indeed, Gracias confirmed that Tesla only had one set of projections, testifying:[93]

> [W]e have only one set of goals. Everyone is relying on those goals. Elon, as the CEO, insisted on this. There aren't two sets of books. One set of books. And I think some companies run with two sets of books, one for the internal and one for the external. That's not how we run. Never have.

98. From approximately July 15 to approximately July 20, 2017, in connection with long-term fundraising efforts, Tesla's management sent its underwriting banks, including Morgan Stanley & Company ("Morgan Stanley") and The Goldman Sachs Group, Inc. ("Goldman Sachs"), and rating agencies, including Moody's Investors Service ("Moody's") and S&P Global Ratings ("S&P"), Tesla's three-year financial projections in connection with an approximate $1.5 billion debt financing. The projections presented the following revenue and adjusted EBITDA forecasts for 2018, 2019, and 2020, respectively:[94]

	TESLA, INC.'S JULY/AUGUST 2017 OPERATING PLAN[95]		
	2018	**2019**	**2020**

[93] Gracias Tr. 295:14-296:8.

[94] MS_00000406.

[95] MS_00000406; TSLA-Tornetta-0320414; TSLA-Tornetta-0320415.

Revenue	$27.5B	$41.9B	$69.6B
Adjusted EBITDA	$3.8B	$8.1B	$14.3B

99. These projections were subsequently approved by the Audit Committee on August 3, 2017, also in connection with Tesla's ongoing capital raising efforts.

K. Tesla Management Designs the Operational Milestones To Make Certain Milestones Easier to Achieve

100. On July 23, 2017, Tesla's internal financial team began consideration of additional performance-based milestones composed of Tesla's adjusted EBITDA.

101. In an email exchange between Ahuja and Maron, Ahuja initially proposed "annual EBITDA of $4B, $8B, $12B, and $16B as additional operational milestones over and above the 15 revenue-based milestones."[96] In addition, Ahuja advised Maron that Tesla "should be able to get to $12 B EBITDA in the next 4-5 years depending on volumes (in excess of 1 million vehicles, 4.5 GW Solar, and 16 GWh energy storage and margin assumptions (~25%))."[97]

102. Several days later, on July 30, 2017, work on the new grant was "put . . . on hold for a few weeks," at E. Musk's request.[98]

[96] TSLA-Tornetta-0284725.

[97] *Id.*

[98] TESLA_TORNETTA_DIR0001800.

103. On or around September 17, 2017, Tesla's management was given a greenlight to "finalize a CEO comp[ensation] package" for Musk.[99] Later that day, Ahuja emailed Branderiz to discuss the operational milestones. According to Ahuja, "the thinking is now to ***focus more on adjusted EBITDA*** (EBITDA less SBC, similar to our definition in the bond offering rather than revenue metrics. These operational metrics will line up with 15 increments of $50B in market cap. I am thinking we may have 15 Adjusted EBITDA metrics ranging from $2B to $25B. Would like to give some comps from the tech world."[100] Specifically, Ahuja referenced Apple, Amazon, and Google as Tesla's peers.

104. Ahuja also requested that Tesla's internal finance team provide him data on: (i) Adjusted EBITDA/Revenue; and (ii) Market Cap to Adjusted EBITDA multiples based on the same peers.

105. On September 20, 2017, Ahuja emailed Moore noting that his analysis was "helpful" and that "Amazon comes closest to Tesla in terms of the two recent metrics."[101] Ahuja further noted that he was "attempting to develop 10 Adjusted EBITDA based metrics that end at a revenue of about $150B and market cap of

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[99] TSLA-Tornetta-0305005, at -08.

[100] *Id*.

[101] *Id*. at -06.

$800B using % and multiples which start high and progressively become lower."[102] Later that same day, Moore replied to Ahuja providing a "10 milestone model," noting that "[i]t's difficult to reach both the implied revenue goal at $150B and the $800B mkt [market] cap."[103] On September 21, 2017, at Ahuja's request, Moore added the adjusted EBITDA idea to the milestone model.[104] Importantly, according to Tesla's own model, at the time of preparing these operational milestones Tesla had a market capitalization/adjusted EBITDA multiple of 34.6x, which greatly exceeded the market capitalization/adjusted EBITDA multiples of Amazon (28x), Apple (12x), and Alphabet (*i.e.*, Google) (17x), respectively.

106. On or around December 10, 2017, Ahuja and Tesla's internal finance team began working in earnest to finalize the operational milestones for the 2018 Grant. The December 10, 2017 draft used a 10% adjusted EBITDA margin. Yet, on December 11, 2017, Tesla management ***lowered*** the adjusted EBITDA goals, by choosing Amazon's adjusted EBITDA margin of 8% rather than the adjusted EBITDA margin of Tesla, Apple, and/or Google. The effect of this change resulted in the first operational milestone moving from $2.1B to $1.5B.

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[102] *Id*. at -05-06.

[103] *Id*. at -05.

[104] TSLA-Tornetta-0305009.

107. The decision by Tesla's management to rely on Amazon's adjusted EBITDA margin (i) made the adjusted EBITDA milestones within the 2018 Grant ***easier*** to achieve; and (ii) misaligned the Grant's adjusted EBITDA milestones relative to Tesla's own internal projections. As reflected in the following chart, Tesla's management forecasted an adjusted EBITDA margin as high as 20.6% in 2020:

	Aug. 2017 Plan (Approved)[105]			**Mar. 2018 Plan (Rating Agencies)**[106]		
	2018 (billions)	2019 (billions)	2020 (billions)	2018 (billions)	2019 (billions)	2020 (billions)
Projected Revenue	$27.5	$41.9	$69.6	$23.4	$35.1	$68.1
Projected Adj. EBITDA	$3.8	$8.1	$14.4	$2.1	$5.8	$11.4
Margin (Rounded)	14.0%	19.4%	20.6%	9.0%	16.6%	16.7%

108. Further, as of December 10, 2017—*i.e.*, simultaneous with the development of the operational milestones—the Company had forecasted an adjusted EBITDA margin of 13% in 2018. However, the adjusted EBITDA

[105] MS_00000406.

[106] TESLA_TORNETTA_DIR0003179.

milestones ***actually used*** in the Grant were developed using Amazon's significantly lower ten-year historical average adjusted EBITDA margin of 8%.

109. Notably—as the Tesla Board saw on December 11, 2017—in deriving the Grant's adjusted EBITDA milestones using Amazon's 10-year historical average of 8%, Tesla disregarded Apple's and Google's ***substantially higher*** 10-year historical average adjusted EBITDA margins, which were 34% and 42%, respectively.

110. Thus, in setting the 2018 Grant's adjusted EBITDA milestones using an 8% adjusted EBITDA margin, Tesla made those milestones a significantly smaller percentage of the Grant's revenue milestones—and therefore significantly lower—than they would have been had Tesla's, Apple's, and/or Google's adjusted EBITDA margins been used. For example, Amazon's, Apple's, and Google's 10-year historical average for adjusted EBITDA/Revenue margin were 8%, 34%, and 42%, respectively. Taking into consideration a 10-year historical average of market capitalization/adjusted EBITDA, Amazon was 29%, Apple was 9%, and Google was 15%. Using Tesla's predicted revenue, the adjusted EBITDA as a percentage of revenue should have been around 31%, not the 8% chosen by Tesla management. This adjusted EBITDA margin would still have been significantly below Tesla's self-chosen peers other than Amazon (*i.e.*, Apple (34%), Google (42%), and Intel

(42%)).

111. Had Tesla's finance team determined the Grant's adjusted EBITDA milestones based on a more appropriate adjusted EBITDA margin that corresponded to and was aligned with Tesla's own internal operating plan, the Grant's adjusted EBITDA milestones would have been significantly higher and harder retained, as reflected in the following chart:

Adj. EBITDA Milestones	**Adj. EBITDA Milestones in 2018 Grant**	**Adj. EBITDA Milestones Based on Amazon Margin (8%)**	**Adj. EBITDA Milestone Based on 2019/2020 Projected Tesla Margin (16%)**	**Adj. EBITDA Milestone Based on Highest 2020 Projected Tesla Margin (20%)**
1	$1.5	$1.6	$3.2	$4.0
2	$3.0	$2.8	$5.6	$7.0
3	$4.5	$4.4	$8.8	$11.0
4	$6.0	$6.0	$12.0	$15.0
5	$8.0	$8.0	$16.0	$20.0
6	$10.0	$10.0	$20.0	$25.0
7	$12.0	$12.0	$24.0	$30.0
8	$14.0	$14.0	$28.0	$35.0

112. Thus, by setting the 2018 Grant's adjusted EBITDA milestones by reference to Amazon's adjusted EBITDA margin, Tesla's internal financial team made the adjusted EBITDA milestones became markedly easier to achieve.

L. E. Musk's Grant-Related Preferences Trigger a Shift from 15 to 12 Tranches

113. The most—if not the only—meaningful structural deviation from the initial 2018 Grant terms contemplated by E. Musk and Ehrenpreis before the

Compensation Committee's involvement was the reduction of the Grant's size from fifteen tranches to twelve tranches. This shift resulted not from negotiations between the Compensation Committee and E. Musk, but instead from an evolution in E. Musk's subjective preference regarding the Grant's size.

114. On July 30, 2017, E. Musk told Maron: "Let's put [my Grant] on hold for a few weeks[.]"[107] Although Maron suggested to E. Musk that his team push ahead towards approval, the 2018 Grant process significantly slowed thereafter. Indeed, the Board and Compensation Committee held only one meeting each in September 2017 regarding the Grant, and no Grant-related meetings in October.

115. On November 9, 2017, however, E. Musk emailed Maron and stated with respect to the Grant: "I'd like to move forward with that now, but in a reduced manner from before."[108] E. Musk then specified that he wanted the Grant to provide him a "10% increment in my Tesla ownership if I can get us to a $550B valuation" on a fully diluted ("FDS") basis, rather than on (the smaller) total shares outstanding ("TOS") basis that comprised the 2017 Grant.[109] In other words, as Maron explained, E. Musk was proposing to reduce the number of tranches from fifteen to

[107] TESLA_TORNETTA_DIR0001800.

[108] TESLA-TORNETTA_DIR0004707 at -08.

[109] TESLA-TORNETTA_DIR0004707 at -08.

ten, but that each tranche would provide E. Musk 1% of Tesla's FDS, totaling the 10% E. Musk desired. In the same email in which he outlined his new request, E. Musk stated: "I'd like to take board action as soon as possible."[110]

116. Maron then dutifully informed Ehrenpreis and Gracias that E. Musk wanted to the Grant to comprise 10% on an FDS basis, but did not inform Compensia's Brown of E. Musk's directive. E. Musk's revised vision for the Grant was reflected in talking points for the Board's November 16, 2017 meeting, which Chang circulated via email on November 15.[111] The email noted: "Numbers we are talking about are now lower than before[.] 10 tranches to $550B; 1% per tranche."[112]

117. At its November 16 meeting, the Board discussed whether to use 1% of TOS or FDS. The Board preferred using 1% of TOS not only because it was the "simpler approach," but also because it was the approach used with the 2012 Grant.[113]

118. On November 20, 2017, Chang sent an email revealing the number of options E. Musk would need to receive under the Grant to satisfy E. Musk's request

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[110] TESLA-TORNETTA_DIR0004707 at -08.

[111] TSLA-Tornetta-0306603.

[112] TSLA-Tornetta-0306603.

[113] Maron Tr. 407:17-25.

to increase his holdings by 10% ***on an FDS basis*** (*i.e.*, 28,959,456 shares). Chang also confirmed in that email that the "[t]he goal of this exercise is to increase [E. Musk's] fully-diluted stake by 10%."[114]

119. On November 29, 2017, Maron sent E. Musk calculations "based on the proposal that [E. Musk] outlined" (*i.e.*, the proposal for 10% of FDS).[115] Included in those calculations was the number of shares calculated by Chang, which would allow E. Musk "to go from 18.9% FDS to 28.9% FDS,"[116] per E. Musk's directive.

120. On December 1, 2017, E. Musk responded: "That is more than intended. Let's go with 10% of the ***current*** FDS number [*i.e.*, 20.591 million shares]."[117] E. Musk admitted that when he saw the FDS share number (*i.e.*, 28,959,456 shares) he "was actually surprised [the share number] was so high, and [] thought that was probably too high," which is why he directed Tesla to instead use the lower current FDS number.[118]

121. E. Musk confirmed that his direction to reduce the number of shares

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114 TESLA-Tornetta-0286018.

115 TESLA_TORNETTA_DIR0004709 at -09.

116 TESLA_TORNETTA_DIR0004709 at -09.

117 TESLA_TORNETTA_DIR0004709 at -09 (emphasis added).

118 E. Musk Tr. 257:6-10.

from 10% fully-diluted (including the impact of the Grant) to 10% based on ***current*** fully-diluted outstanding shares on December 1 was not a product of negotiating with the Committee, but instead was "***me negotiating against myself***[.]"[119]

122. Ultimately, the Compensation Committee preferred the simplicity of basing the 1% per tranche on TOS. Thus, the Committee granted E. Musk's request for 10% of the current FDS by increasing the number of TOS-based tranches in the Grant from ten to twelve. Consistent with that approach, on December 10, Chang sent an email attaching revised calculations and stating:[120]

> Grant size would be 20,173,860 shares.
> - 12% of TOS
> - 9.8% of FDS

Brown—the Committee's primary compensation advisor—had no knowledge or recollection that Tesla had backed into twelve-tranche structure in this manner.

M. Tesla's Projections and Operating Plan Consistently Indicated Multiple Operational Milestones Would Be Achieved in the Near-Term

123. On December 11, 2017, the proposed final operational milestone metrics were circulated to the Board. These metrics stated the following milestones

[119] E. Musk Tr. 262:18-263:4 (emphasis added).

[120] TSLA-Tornetta-0286334.

(and plainly indicated that the EBITDA milestones were based off Amazon's lower EBITDA margin):

Final Revenue Milestones	Final Adjusted EBITDA Milestones
20B	$1.5B
35	$3.0B
55	$4.5B
75	$6.0B
100	$8.0B
125	$10.0B
150	$12.0B
175	$14.0B

124. On December 12, 2017, Ahuja developed and E. Musk approved Tesla's then-current operating plan, with projections for one year. The Board saw and discussed this plan, which projected revenues of $27B in 2018 and adjusted EBITDA of $4B.[121] If achieved, the operating plan would have triggered one revenue milestones and two adjusted EBITDA milestones by the end of 2018.

125. The longer three-year projections underlying that operating plan reflected the following revenue and adjusted EBITDA assumptions:[122]

Metric	**2018**	**2019**	**2020**
Revenue	$27,417	$44,929	$80,362
Adjusted EBITDA	$4,327	$6,837	$15,790

Ahuja admitted product and volume assumptions underlying those projections were

[121] TSLA-Tornetta-0290446-48; TSLA-Tornetta-0321648-49.

[122] TSLA-Tornetta-0290446-47.

"reasonably well understood" by himself and those at Tesla.[123]

N. The Board Approves the 2018 Grant

126. On January 21, 2018, the Board approved the 2018 Grant, conditional on a majority vote of the disinterested stockholders in favor of the 2018 Grant. The resolutions approving the 2018 Grant noted, without basis, that the Grant was "fair" to stockholders.[124]

127. In addition to the four conflicted Compensation Committee members, directors Murdoch and Johnson Rice also voted on (and in favor) of the Grant. As described above, Murdoch has a longstanding friendship with E. Musk that includes family get-togethers and several international family vacations, and has invested over $70 million in SpaceX. Johnson Rice is good friends with and runs in the "same social circle in Chicago" as Gracias, who is E. Musk's close friend and confidant.[125]

128. The 2018 Grant consists of a 10-year grant of Tesla stock options that vest in twelve tranches, with each tranche representing 1,688,670 stock options for a total of 20,264,042 shares of Tesla common stock. Consistent with E. Musk's and Ehrenpreis's April 2017 discussions regarding the 2018 Grant—the Grant provided

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[123] TESLA_TORNETTA_DIR0001963.

[124] TSLA-Tornetta-0316944 at -47.

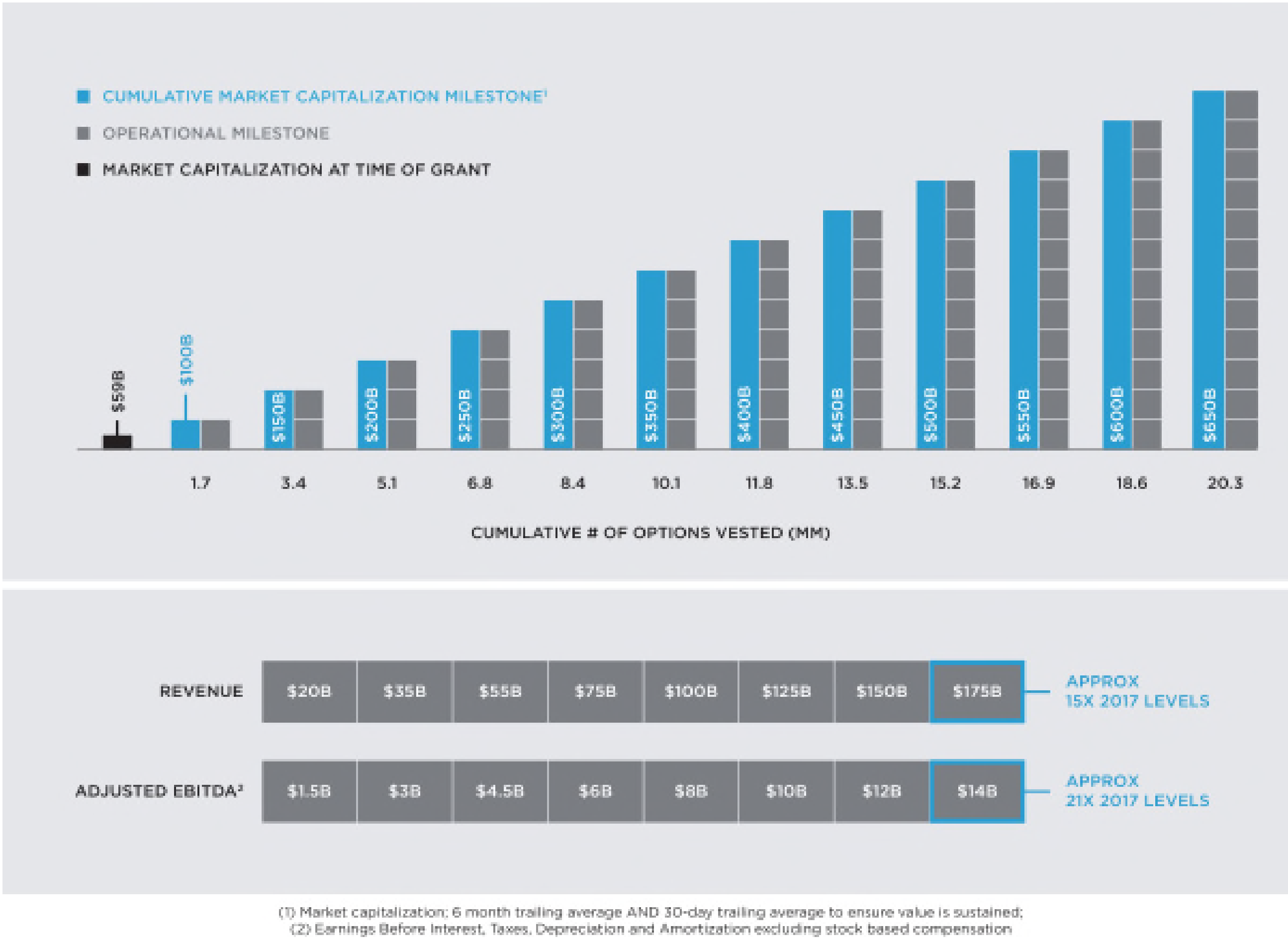
[125] Gracias Tr. 123:14-23.

1% of Tesla's shares per tranche, each of which would be achievable upon satisfaction of twin operational and market cap goals, with $50 billion market cap increments. Further, consistent with the directive issued by E. Musk on December 1, 2017, the options achievable under the 2018 Grant totaled approximately 10% of Tesla's then-outstanding FDS.

129. The exercise price for each option under the Grant is $350.02, representing the closing price of Tesla's stock on January 19, 2018.

130. Each tranche of the 2018 Grant vests upon the satisfaction of (i) one of the Grant's 12 market cap milestones, which consist of $50 billion increments ranging between $100 and $650 billion; and (ii) one of the Grant's 16 operational milestones, eight of which are tied to Tesla's Revenue and eight of which are tied to Tesla's Adjusted EBITDA. For E. Musk to vest all of the Grant's tranches, the Company needs only to achieve 12 of the 16 operational milestones.

131. The following table from the Proxy provides details regarding how options underlying the 2018 Grant would vest over the twelve tranches, as well as the milestone requirements the satisfaction of which will trigger the vesting of the options for each tranche:



132. The 2018 Grant also sets forth an additional vesting condition. Namely, that E. Musk remain Tesla's "(a) the Chief Executive Officer of the Company or (b) Executive Chairman and Chief Product Officer of the Company . . . through each vesting event . . . ."[126] However, the Grant imposes no requirements, restrictions, limitations, or prohibitions that in any way (i) require E. Musk spend a particular amount of time or dedicate a particular amount of focus to Tesla; and/or (ii) restrict

126 TESLA00000274.

or limit E. Musk's ability to dedicate time and focus to companies and/or endeavors other than Tesla.

133. Nor does the Grant provide for any forfeiture and/or contain any clawback provision of previously awarded options if, among other things: (i) E. Musk fails to provide the requisite level of attention to Tesla for the full 10-year term of the Grant; (ii) Tesla's performance falls below the specified operational and/or market cap milestones during the five-year holding period under the 2018 Grant; (iii) E. Musk is terminated for cause or resigns without good reason before the end of the 10-year term of the Grant; and/or (iv) E. Musk takes a leave of absence from Tesla. Rather, the 2018 Grant contemplates a clawback of shares only in the case of a restatement of Tesla's financial results. This clawback was not a concession by E. Musk. Rather, as early as April 2015, the Tesla Board adopted new Corporate Governance Guidelines providing that, among other things, Tesla's "executive officers [are] subject to a clawback policy relating to the repayment of certain incentives if there is a restatement of our financial statements."[127]

134. The 2018 Grant also provides for a five-year holding period for any shares received by E. Musk pursuant to the Grant. Specifically, E. Musk may "not

[127] Proxy at 20.

sell, transfer or dispose of the Shares acquired upon exercise of the Option until after the five (5) year anniversary of the applicable date of exercise of such Shares . . . ."[128] As explained above, the holding period had little to no practical impact on E. Musk given, among other things, that E. Musk is permitted to (i) sell any of the millions of Tesla shares he already owned prior to approval of the Grant, and (ii) pledge newly issued options and/or vested shares he receives from the Grant.

135. As explained in the Proxy, if E. Musk secures all twelve tranches under the 2018 Grant, he will realize ***$55.8 billion*** in value:

Total Tranches Earned	CEO Value Realized ($B)
0 Tranches	$ 0.0
2 Tranches	$ 1.4
4 Tranches	$ 6.3
8 Tranches	$25.3
12 Tranches	$55.8

136. The 2018 Grant's initially disclosed grant date fair value was $2.615 billion—roughly ***thirty-three*** times larger than the 2012 Grant's $78 million grant date fair value. Based on this value, the grant date fair value of each tranche of the 2018 Grant is approximately $220 million. Aon/Radford's Burg—who has worked on thousands of executive compensation plans during his decades-long career—testified that the 2018 Grant had the highest grant date fair value he has ever

[128] TESLA00000274 at -291.

encountered. Similarly, Compensia's Brown testified that the 2018 Grant is the largest award on which he has ever worked.

O. The 2018 Grant Is Unfair

137. *First*, the sheer size of the 2018 Grant is staggering. As revealed by the Proxy, the aggregate fair value estimate of the 2018 Grant at the time of Board approval was more than ***$2.6 billion***:

Name and Principal Position	Year	Salary ('000)($)	Bonus ($)	Option Awards Preliminary Aggregate Fair Value Estimate ('000)($)(1)
Elon Musk *Chief Executive Officer and Chairman*	2018	56	—	2,615,190(2)(3)(4)

138. And yet, that $2.6 billion estimate of the New Compensation Plan's grant date value may be substantially too low. If Tesla's market capitalization grows at annual rates in excess of 10%, the windfall to E. Musk grows exponentially. For example, as reflected in the following chart, if Tesla experiences 19% annual market capitalization growth (and corresponding operational milestones are satisfied), the 2018 Grant would be worth ***$14.3 billion***, and if Tesla experiences 27% annual market capitalization growth (and corresponding operational milestones are satisfied), the 2018 Grant would be worth ***$55.8 billion***:[129]

[129] TESLA00000310, at -325.

Table A.2: Theoretical case. Summary of CEO's current ownership and the theoretical total value/appreciation of the CEO's equity (including current fully diluted ownership of CEO (assuming all outstanding options vest and are exercised)) at varying levels of Company performance over the next 10 years.

		Est. Mkt Cap ($B)	Current Ownership	New Grant (12% of TSO)	Total (Incl. New Grant at Max)
Number of Shares & Options			38,908,022	20,264,042	59,172,064
Percent of Company (long-term fully diluted)			20.6%	9.7%	28.3%
Estimated Paper Value of Shares at the End of 10 Years ***(all values in $B, other than stock price)***					
Current Value: Stock Price =	$350	$59.1	$13.6	$0.0	$13.6
5% Ann. Market Cap Growth; Stk Price ~	$570	$96.3	$22.2	$0.0	$22.2
10% Ann. Market Cap Growth; Stk Price ~	$779	$150.0	$30.3	$1.4	$31.8
19% Ann. Market Cap Growth; Stk Price ~	$1,756	$350.0	$68.3	$14.3	$82.6
27% Ann. Market Cap Growth; Stk Price ~	$3,104	$650.0	$120.8	$55.8	$176.6

139. As reflected in the following chart depicting Tesla's market capitalization growth from 2012 through 2017, 19% – or even 27% – annual market capitalization growth for Tesla would be modest in comparison to the Company's historic market capitalization growth:[130]

[130] Proxy at 4.

140. *Second*, in addition to the staggering absolute size of the 2018 Grant, it is also unprecedented and completely out-of-line with peer CEO compensation. At the outset of the Compensation Committee's process, compensation consulting firm Semler Brossy informed the Committee that:[131]

> What others consider highly leveraged plan designs ***with very aggressive performance requirements will not meet the standard that you are considering***. The closest comparison will be the grant you made in 2012.

141. As reflected in this excerpt from compensation consulting firm

[131] TESLA00000001_Original, at -114 (emphasis added).

Compensia's presentation to the Compensation Committee on July 7, 2017, however, the grant that Tesla made to E. Musk in 2012 was valued at only 3% ($78.1 million / $2.6 billion = 3%) of the 2018 Grant's grant date value:[132]

- Reported value of award in the 2012 Summary Compensation Table = $78,110, 730 (47.5% of grant date face value)
  - 10-K Monte Carlo Assumptions = 1.65% risk-free rate, 55% expected volatility and 10-year term (time-based options valued at ~59% of face value using 63% volatility, 1% risk-free rate and 5.9 year term)

142. Compensia also informed the Committee that the 2018 Grant's size was unprecedented. Specifically, Compensia noted that "[b]ased on our review of market practices, this award will provide a larger compensation opportunity to the CEO than we have observed in the market."[133]

143. The 2018 Grant dwarfed the pay packages of even the highest-paid CEOs of public companies. For example, as reflected in the following chart from Compensia's presentation to the Committee on July 7, 2017, in 2016, the largest CEO compensation package was approximately $98 million and the 50th percentile for CEO pay packages was $32.6 million:[134]

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[132] TESLA00000001_Original, at -115.

[133] TESLA00000001_Original, at -106.

[134] TESLA00000001_Original, at -116.

Equilar 200: The Largest CEO Pay Packages in 2016

Company	Executive	Total Compensation	Revenue Change	TSR
Charter Communications	Thomas M. Rutledge	$98,012,344	197%	n/a
CBS	Leslie Moonves	$68,594,646	4%	36%
Madison Square Garden	David O'Connor	$54,044,394	4%	n/a
Estee Lauder	Fabrizio Freda	$47,691,779	4%	6%
Nike	Mark G. Parker	$47,615,302	6%	10%
Oracle	Mark V. Hurd	$41,121,896	-3%	-6%
Walt Disney	Robert A. Iger	$40,988,618	6%	-8%
Oracle	Safra A. Catz	$40,943,812	-3%	-6%
Discovery Communications	David M. Zaslav	$37,192,354	2%	3%
Activision Blizzard	Robert A. Kotick	$33,065,560	42%	-6%
Hewlett Packard Enterprise	Margaret C. Whitman	$32,935,138	-4%	54%
Johnson Controls	Alex A. Molinaroli	$32,610,507	1%	36%
Time Warner	Jeffrey L. Bewkes	$32,587,664	4%	52%
IBM	Virginia M. Rometty	$32,307,434	-2%	25%
AMC Networks	Joshua W. Sapan	$30,485,596	7%	-30%
Liberty Media	Gregory B. Maffei	$29,827,114	n/a	n/a
Comcast	Brian L. Roberts	$28,641,518	8%	25%
Regeneron Pharmaceuticals	Leonard S. Schleifer	$28,337,520	18%	-32%
Willis Towers Watson	John J. Haley	$28,192,776	106%	-3%
Wynn Resorts	Stephen A. Wynn	$28,156,985	9%	28%
HP	Dion J. Weisler	$28,154,637	-6%	10%
Microsemi	James J. Peterson	$27,958,781	33%	28%
Viacom	Thomas E. Dooley	$27,898,606	-6%	-8%
Yahoo!	Marissa A. Mayer	$27,410,159	4%	16%
JPMorgan Chase	James Dimon	$27,205,551	1%	33%
75th Percentile		$40,988,618		
50th Percentile		$32,587,664		
25th Percentile		$28,192,776		

144. The 2018 Grant also vastly exceeded the compensation to the world's most successful technology executives, including (i) Larry Ellison of Oracle Corp., who received a comparatively meager $41 million in compensation in 2016; and (ii)

Tim Cook ("Cook") of Apple, whose approximate compensation in 2016 was "just" $13 million.[135]

145. *Third*, the 2018 Grant is (and was) wholly unnecessary to incentivize E. Musk. In light of his outsized equity stake at the Company, E. Musk already had a substantial financial incentive to continue to devote substantial time, energy and effort into growing and cultivating the success of Tesla.

146. Indeed, in stark contrast to E. Musk, the visionary founders of certain other major Silicon Valley companies receive little to no compensation in exchange for continuing to serve as the CEOs of their respective companies. For example, Facebook, Inc.'s founder, controlling stockholder and CEO Mark Zuckerberg received a salary of $1 in 2017 and $8,852,366 in total compensation, with the overwhelming majority of that amount related to personal security costs. Similarly, Alphabet Inc.'s (formerly Google) co-founder, CEO and substantial stockholder Larry Page received $1 in total compensation for 2017.

147. Moreover, the Board was aware that, as E. Musk had publicly and contemporaneously avowed, he had no intention of leaving or quitting Tesla, which

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[135] In 2011, Cook received a restricted stock grant of one million Apple shares, then-valued at approximately $384 million. Cook's restricted stock grant was conditioned on his agreement to remain an Apple employee for a decade. Despite its extravagance, Cook's stock grant appears modest in comparison to the 2018 Grant.

he loves and considers part of his family. For example, E. Musk openly stated: "I intend to be actively involved with Tesla for the rest of my life."[136]

148. Furthermore, E. Musk has repeatedly and publicly stated that his ambition was to colonize Mars. Thus, achieving that ambition by increasing the value of his substantial ***pre-existing*** Tesla stake strongly incentivized E. Musk to dedicate his time and focus to Tesla.

149. *Fourth*, the Grant was unfair because it failed to achieve its stated goal—*i.e.*, to secure E. Musk's allocation of his time and attention on Tesla rather than other companies and/or endeavors. For example, the Committee and Board failed to include within the Grant any (i) requirements regarding the amount of time, attention or focus that E. Musk must dedicate to Tesla; or (ii) restrictions or limitations on E. Musk's ability to dedicate time and focus to companies and/or endeavors other than Tesla. Indeed, E. Musk testified that since the 2018 Grant's approval, he has dedicated a substantial portion of his time and attention to SpaceX and other endeavors other than Tesla.

150. *Fifth*, the Grant also fails to include necessary protections for Tesla or its stockholders. Indeed, the Grant is devoid of any forfeiture or clawback provisions

[136] TESLA_TORNETTA_DIR0009252, at -271.

in the event that, among other things, (i) E. Musk fails to provide sufficient—or indeed, ***any***—time, attention or focus to Tesla; (ii) E. Musk is terminated for cause, resigns without good reason, or takes a leave of absence from Tesla; or (iii) after achievement of one or more tranches of the Grant, Tesla's performance and/or market capitalization degrades below the level necessary to achieved such tranche(s). Furthermore, the Grant included a five-year holding period, but that holding period provided no protection for stockholders because, among other reasons, the Board failed to include any restrictions on E. Musk (i) selling any of the millions of Tesla shares he already owned prior to approval of the Grant, and (ii) pledging newly issued options and/or vested shares he receives from the Grant.

151. *Sixth*, the Grant was spring-loaded. As explained in detail *supra* and *infra*, Tesla's projections relied on by Tesla management and the Board (and shared with third-party lenders and ratings agencies) reflected that E. Musk would achieve several tranches—worth billions of dollars—in the Grant's first few years. As predicted by Tesla's internal projections at the time the Board approved the Grant, several tranches have vested in the 3.5 years since the Grant's approval by stockholders, entitling E. Musk to over $35 billion in compensation.

152. *Seventh*, as discussed in detail *supra* and *infra*, the 2018 Grant was the result of a conflicted and deficient process and was not meaningfully negotiated with

E. Musk at all, much less at arm's length.

P. Tesla Releases Misleading Proxy Disclosures

153. On February 8, 2018, Tesla issued the false and misleading Proxy, which failed to adequately inform stockholders regarding critical facts and information relating to the 2018 Grant.

154. *First*, the Proxy went to great lengths to emphasize the difficulty—and low likelihood of achievement—of the milestones within the 2018 Grant. For example, the Proxy represented that the Tesla "Board considers the Market Capitalization Milestones . . . [and the Operational] milestones to be challenging," and that the Grant "was designed to be entirely an incentive for future performance that ***would take many years, if at all, to be achieved***. Further, ***each*** of the requirements underlying the performance milestones was selected to be ***very difficult to achieve***."[137] The Proxy also described the milestones as "***ambitious***" and assured stockholders that the Board "based this new award on ***stretch goals***."

155. To underscore that the Revenue Milestones were "challenging," the Proxy stated that "[t]o achieve the first or second of the Revenue milestones, Tesla would have to increase its revenue by 3x and 5x, respectively, from its 2016 revenue

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[137] Proxy at 34-35.

levels."

156. The Proxy also disclosed that in connection with the operational milestones:

> In establishing the Revenue and Adjusted EBITDA milestones, the Board carefully considered a variety of factors, including Tesla's growth trajectory and internal growth plans and the historical performance of other high-growth and high-multiples companies in the technology space that have invested in new businesses and tangible assets. These benchmarks provided revenue/EBITDA to market capitalization multiples, which were then used to inform the specific operational targets that aligned with Tesla's plans for future growth.

157. However, at no time did Tesla disclose, even in summary, the Company's growth trajectory and internal growth plans as they related to the operational milestones. Neither the three-year projections sent to rating agencies and banks nor the one-and-one-half year updated plans discussed by the Board—nor the likelihood of achievement of the Grant's operational milestones reflected thereby—were disclosed or described either in the Proxy or any public filing ahead of the stockholder vote on the Grant. These projections indicated that the Company was projecting that ***at least three*** of the purportedly "challenging" operational milestones were projected to be met ***within one-and-a-half years***—not "many years" to achievement disclosed in the Proxy. Under the March 13, 2018 Plan, Tesla's revenue and Adjusted EBITDA forecasts indicated that three of the operational milestones would be achieved by June 2019. Based on the forecasts of

the December 12, 2018 operating plan discussed by the Board, three of the operational milestones would be achieved by year-end 2018.[138]

158. The fact that, based on Tesla's contemporaneous operating plans, three operational milestones would be probable of achievement within the near-term was known by and/or available to the Board before the stockholder vote. However—as discussed further below—this critical fact was never disclosed to stockholders, who were only informed that ***each of the operational milestones*** were "very difficult" to achieve.

159. On or around March 13, 2018, the Tesla board reviewed and discussed another version of the operating plan, which forecast the Company's performance until June 30, 2019.

160. The operating plan's Revenue and adjusted EBITDA forecasts through Q2 2019 are as follows:

	Q1'18	**Q2'18**	**Q3'18**	**Q4'18**	**Q1'19**	**Q2'19**
Revenue	$ 3,690	$ 4,730	$ 7,476	$ 7,547	$ 7,114	$ 8,444
Adj. EBITDA	$ (132)	$ 208	$ 970	$ 1,060	$ 767	$ 1,119

[138] *See* TSLA-Tornetta-0321649 (December 12, 2017 Board Plan). The December Board plan predicted that Tesla's revenues would exceed $20 Billion and Adjusted EBITDA would exceed $3.0 B in 2018.

161. The three-year projections underlying the March plan were provided to ratings agencies on or around March 20, 2018. Those three-year projections were modestly revised downward from the prior August 2017 projections, as follows:[139]

Metric	**2018**	**2019**	**2020**
Revenue	$23,442	$35,160	$68,121
Adjusted EBITDA	$2,137	$5,841	$11,378

Tesla CFO Ahuja testified that the March 2018 projections were the ***lowest*** projections created during the December 2017 to March 2018 time period.

162. Tesla consistently strived to provide ratings agencies reliable information. Indeed, Maron testified: "Tesla would do its . . . earnest best to . . . do whatever they could to provide quality information" to the rating agencies.[140] E. Musk also confirmed that he personally reviewed the three-year projections before Tesla disseminated them to ratings agencies, and Gracias testified that he had no reason to doubt the accuracy of Tesla's financial forecasts, and that he and the other members of the Board would have spoken up if they thought the plans were unreliable. Ahuja testified that the projections provided to banks and/or rating agencies were "accurate and truthful."[141]

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[139] Musk-Tornetta-0321384; Musk-Tornetta-0321385.

[140] Maron Tr. 391:16-23.

[141] Ahuja Tr., at 353:6-355:15.

163. Tesla's revenue and adjusted EBITDA forecasts consistently projected that a significant number of the Grant's operational milestones would be achieved within the next three years alone. For example, based on the March projections, Tesla would hit three revenue-based milestones and six adjusted-EBITDA milestones by the end of 2020.

164. *Second*, the Proxy disclosed that "the members of the Compensation Committee [were] all independent directors [*i.e.*, purportedly unaffiliated with Musk]." In reality, all four Compensation Committee members had significant potential conflicts that were not disclosed to stockholders: (i) Ehrenpreis—the Committee's Chairman—and Gracias are longtime, close friends of Musk, and each has tens of millions of dollars (if not hundreds of millions of dollars) of joint investments with E. Musk and his entities; (ii) Buss received material compensation as the chief financial officer of Tesla-controlled SolarCity and as a Tesla director; and (iii) Denholm received compensation from Tesla worth tens of millions of dollars.

165. Similarly, the Proxy stated that the 2018 Grant was approved by "the Independent Members of Tesla's Board of Directors" (*i.e.*, Gracias, Ehrenpreis, Buss, Denholm, Rice and Murdoch) and that "[E. Musk], who along with Kimbal . . . recused themselves from the Board process." As explained *supra* and *infra*, each

of those purportedly "independent directors" had significant potential conflicts with E. Musk, none of which were disclosed to stockholders.

166. *Third*, the Proxy misleadingly disclosed that "discussions [concerning the Grant] first took place among the members of the Compensation Committee" which "engaged in more than six months of active and ongoing discussions regarding [the 2018 Grant]," when in reality the 2018 Grant was devised by E. Musk and his loyalists months before the full Compensation Committee's involvement, and no meaningful negotiations took place during the Compensation Committee's process.

167. Similarly, the Proxy also misleadingly states:

> At various points during this process, the independent members of the Board met with Mr. Musk to share their thinking on the award and get his perspective, including as to each of the issues identified above and ultimately to negotiate the terms of the award with him.[142]

In reality, the general terms of the Grant were set long before the Compensation Committee's involvement, and the only meaningful change to the Grant over the course of the Committee's process E. Musk described as "me negotiating against myself."[143]

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[142] Proxy at 5.

[143] E. Musk Tr. 262:18-263:4.

168. *Fourth*, the Proxy also indicates that the Compensation Committee hired “independent compensation consultant” Compensia and “special outside counsel” Wilson Sonsini to advise on the Plan. However, the Proxy failed to disclose that E. Musk and Tesla management selected (i) Wilson Sonsini months before the Compensation Committee’s involvement and (ii) Compensia days before the Compensation Committee’s first meeting.

169. *Fifth*, while the Proxy disclosed that the Board considered the Company’s growth trajectory and the “historical performance of other high-growth and high-multiples companies in the technology space,” stockholders were not told that only one of these comparator companies, Amazon, was used to determine the adjusted EBITDA milestones. Nor were stockholders told that the EBITDA margin used to determine the adjusted EBITDA milestones was the lowest of any of the companies considered comparable, and therefore the adjusted EBITDA milestones were lower than they otherwise would—and should—be.

170. *Sixth*, stockholders were not told that E. Musk spent only about half his professional time on Tesla.

171. *Seventh*, the Proxy misleadingly disclosed that “[i]f you are the stockholder of record and you fail to vote, it will have no effect on the [2018 Grant].” In reality, each non-vote actually reduced the denominator for determining whether

the Grant received approval, and thus increased the likelihood of the Grant's approval by amplifying the power of each vote cast in favor of the Grant (including by the various Board members who E. Musk counted among his closest friends and/or business associates).

Q. Stockholders and Proxy Advisors Criticize the 2018 Grant

172. Tesla's disclosures concerning the 2018 Grant engendered a strong negative reaction from shareholders and proxy advisors. Preeminent advisors ISS and Glass, Lewis & Co. ("Glass Lewis"), both recommended that Tesla stockholders reject the 2018 Grant.

1. ISS

173. In recommending that Tesla stockholders vote against the 2018 Grant, ISS took issue with the Grant's size. Based on its own independent analysis, ISS derived a grant date fair value of $3.7 billion for the 2018 Grant (*i.e.*, approximately $1.1 billion more than the massive $2.6 billon value calculated by Tesla). Based on ***Tesla's*** valuation and annualizing the 2018 Grant over a ten-year term, ISS valued the Grant at $262 million per year. In addition to the "unprecedented" size and value of the 2018 Grant, ISS concluded that if the Grant were approved, Tesla's current shareholders would "see their holdings diluted."[144]

[144] ISS 00431, at -435.

174. ISS also criticized the Grant's broad leave of absence provision, which ISS noted did not align with the Grant's stated goal of ensuring E. Musk would focus his time and attention on Tesla as opposed to his other business ventures. The provision "stipulates that vesting of the options will be 'suspended' in the event of an unpaid leave of absence" and the Grant does not define "leave of absence."[145] ISS stated that the leave of absence provision, therefore, allows E. Musk to "take an unpaid leave to focus on his other, highly publicized business interests, yet resume vesting of the award upon his return to the Company," and therefore, undermines "one of the primary reasons for the [2018 Grant's] design and magnitude . . . ."[146]

175. In addition, in the event that E. Musk were to take a leave of absence from Tesla and then resume "vesting of the award upon his return to the company," E. Musk's chances of achieving the operational and/or market cap milestones would also become "easier" to achieve.[147]

176. ISS also expressed concern about the operational milestones selected by Tesla for the Grant. While ISS acknowledged that the 2018 Grant included "16 as-yet unachieved revenue and adjusted EBITDA hurdles," focus[ed] on Tesla's

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[145] ISS 00431, at -435.

[146] ISS 00431, at -435.

[147] *See* Brown Tr., at 193:6-12.

"top- and bottom-line growth," the Grant failed to "prioritize profitability."[148] ISS considered this "particularly pertinent given that Tesla ha[d] yet to turn an annual profit."[149] Specifically, ISS concluded that "up to eight tranches (three-quarters of the award, or nearly $2 billion in value) may vest based on market capitalization and revenue goals, even if earnings do not clear the EBITDA performance hurdles."[150]

177. ISS also expressed concern regarding the Grant's exclusion of stock-based compensation expense from the adjusted EBITDA operational milestones. Because adjusted EBITDA would include as an addback the expense the Company records for issuing stock-based compensation, the significant expense associated with each achieved tranche of E. Musk's Grant would increase the adjusted EBITDA that Tesla reports. Therefore, ISS noted, given the "massive size" of the 2018 Grant, it would be reasonable for Tesla stockholders to expect E. Musk "to deliver positive earnings above and beyond the amount that is being returned to him as compensation."[151]

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[148] ISS 00431, at -435.

[149] ISS 00431, at -435.

[150] ISS 00431, at -436.

[151] ISS 00431, at -436.

2. Glass Lewis

178. In also recommending that Tesla stockholders vote against the Grant, Glass Lewis expressed serious concerns over the size of the 2018 Grant, explaining "the disclosed dollar value cost of the grant is staggering relative to executive compensation levels among public companies worldwide."[152] In comparing the Grant to Tesla's peers, Glass Lewis explained that "[t]otal compensation for CEOs of blue-chip US Companies is almost universally only a small fraction of this annualized figure," which Glass Lewis calculated to be "$262 million per annum, or around $370 million based on Glass Lewis' option valuation methodology."[153] Glass Lewis also noted that even assuming E. Musk achieved only two tranches of the award under the 2018 Grant, E. Musk would realize "value of some $1.4 billion" or "$280 million per annum for compound share price growth of around 21% and compound revenue growth of 24%."[154] Glass Lewis also noted that "the share price growth would only slightly outpace [the] S&P 500 for the past five years" and would reflect "a sharp deceleration of growth compared to the Company's trailing five years compound growth rates of 68% and 95% for

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[152] DOC_00000025 at 5.

[153] DOC_00000025 at 5.

[154] DOC_00000025 at 6.

market cap and revenue, respectively."[155]

179. Ultimately, Glass Lewis concluded that "[e]ven giving credence to the paradigm by which long time horizons and stretching goals should command a higher cost of compensation, any relative comparison of the grant's size would be akin to stacking nickels against dollars."[156]

180. Like ISS, Glass Lewis also expressed significant concern over the dilutive impact of the Grant, if approved, explaining that while "it is not unusual for a growth stage firm in technology or bioscience to grant up to 1% of outstanding stock to an executive intermittently or as a one-time grant, but such high transfer of share ownership on an annual basis for an extended period at a firm of any size and scope are largely unheard of."[157] In concluding that the 2018 Grant's dilution is excessive, Glass Lewis explained that "[t]he absolute costs to shareholders of this grant if approved and earned are substantial, but the amount of share capital used is even more eye-watering on a relative basis."[158]

181. Glass Lewis also took issue with the fact the Grant allowed "further

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[155] DOC_00000025 at 6.

[156] DOC_00000025 at 7.

[157] DOC_00000025 at 6.

[158] DOC_00000025 at 6.

concentration of [E. Musk's] ownership" in Tesla.[159] Specifically, Glass Lewis noted that if E. Musk were successful in receiving the full vested amount of Tesla shares under the 2018 Grant, E. Musk's economic stake in Tesla would increase to 28.3% of the Company's total shares outstanding. Glass Lewis further explained that given E. Musk is Tesla's "largest stockholder and particularly in view of concerns with the dilution levels resulting from the grant, [it was] acutely aware of the impact of this arrangement on other shareholders."[160] Thus, Glass Lewis concluded that while the Board/Compensation Committee were "mindful" of this impact on Tesla shareholders, "the impact of this consideration is left to the imagination."[161]

3. Significant Institutional and Sophisticated Investors React Negatively to the Grant; E. Musk Threatens Stockholders

182. In addition to the concerns raised by proxy advisors ISS and Glass Lewis—and despite a robust stockholder outreach campaign—significant institutional and/or sophisticated Tesla stockholders raised a number of concerns about the 2018 Grant.

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[159] DOC_00000025 at 6.

[160] DOC_00000025 at 6.

[161] DOC_00000025 at 6.

183. *First*, a number of Tesla's largest stockholders, including The Vanguard Group, Inc. (*i.e.*, Tesla's fourth largest stockholder) and Capital World Investors (*i.e.*, Tesla's six largest stockholder), voted against the Grant apparently because the Grant's design ignored profitability and the adjusted EBITDA milestones were too low.[162] Tesla's second largest stockholder—Ballie Gifford—recognized that the linear milestones in the Grant were inappropriate for an "exponential company" like Tesla.[163]

184. *Second*, a number of significant Tesla stockholders expressed in 2017 (*i.e.*, during discussions of the new Grant with Mr. Maron and Mr. Ehrenpreis) and, later, in 2018 in voting against the Grant, that it provided excessive dilution to existing shareholders. Moreover, stockholders recognized that the dilutive impact of the Grant would be greater because the milestones are based on market capitalization as opposed to stock price.

185. *Third*, a number of Tesla stockholders believed that E. Musk's current Tesla holdings were sufficient motivation, and it was unnecessary to provide additional Company equity to keep E. Musk sufficiently incented. For example, TIAA/Nuveen (*i.e.*, Tesla's tenth largest shareholder) explained that "Elon has

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[162] TSLA-Tornetta-0296642; TSLA-Tornetta-0297563.

[163] TSLA-Tornetta-0305004.

plenty incentive from his existing shares to perform. If he's not motivated now, I don't know when he ever will be."[164]

186. *Fourth*, Tesla stockholders expressed opposition to the Grant because they could not support a grant of its magnitude. For example, BNY Mellon's rationale for ultimately voting against the Grant was "based on quantum of grant and overall dilution to shareholders (including shares to all employees) relative to current market capitalization"[165] and Vanguard stated that the "[p]otential value of the grant is too high."[166]

187. [redacted]

[164] TSLA-Tornetta-0308205.

[165] TSLA-Tornetta-0300020, at -022.

[166] TSLA-Tornetta-0300181.

[167] TESLA_TORNETTA_DIR0002139.

R. A Majority Of Tesla's Outstanding Disinterested Shares Vote Against the 2018 Grant

188. On March 21, 2018, Tesla convened the Special Meeting.

189. Among other things, the Board's approval of the 2018 Grant was expressly conditioned upon receiving a majority of the total votes of shares of Tesla common stock not owned, directly or indirectly, by E. Musk or K. Musk ***actually cast*** at the Special Meeting (the "Disinterested Voting Condition"). Although the 2018 Grant received a sufficient number of votes to satisfy the Disinterested Voting Condition, it did ***not*** garner the support of a majority of ***all*** Tesla's disinterested shares outstanding, whether or not voted at the Special Meeting.

190. Specifically, as of the February 7, 2018 record date for the Special Meeting, Tesla had 168,878,154 shares of common stock outstanding. According to the Proxy, as of December 31, 2017, E. Musk beneficially owned 33,632,421 shares of Tesla common stock. Thus, Tesla had 135,245,733 disinterested shares outstanding with respect to the vote on the Grant.

191. According to the Company's Form 8-K filed with the SEC on March 21, 2018, just 63,014,339 disinterested Tesla shares voted in favor of the 2018 Grant.

Pursuant to the Disinterested Standard, the votes were as follows:

For	Against	Broker Non-Votes
63,014,339	23,407,632	0

192. Thus, the 2018 Grant was only supported by ***46.6%*** of the total number

of outstanding disinterested Tesla shares.[168]

S. Stockholders Did Not Know That Three Milestones Were Probable of Achievement

193. As described above, stockholders were not informed prior to the approval of the 2018 Grant that the Company's projections supported that three of the operational milestones were probable of achievement within 1.5 years after the stockholder vote on the Grant.

194. Indeed, according to Ahuja, the Company's "methodology" to determine probability of achievement was to "***us[e] the operating plan of record***."[169] Therefore, "to be consistent in [Tesla's] methodology," under the March 13, 2018 operating plan shown to the Board, the Company determined three operational milestones were probable of achievement by June 30, 2019.[170]

195. All the information necessary to make this probability determination was available to the Board as of March 13, 2018, the date on which the operating plan was shown to the Board.

196. Prior to that, all the information necessary to make a similar probability determination was available to the Board: the Board reviewed a similar operating

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[168] 63,014,339 / 135,245,733 = 46.6%.

[169] TSLA-Tornetta-0162646.

[170] TSLA-Tornetta-0162646.

plan in December 2017 which also supported a near-term achievement of three operational milestones, and the December 2017 operating plan was consistent with the operating plan the Board had reviewed in July and August of 2017.

197. Moreover, the three-year projections provided to third parties in July 2017, August 2017 and March 2018 also supported the achievement of a greater number of operational milestones—at least three revenue milestones and far more operational milestones.

198. Yet it was not until May 7, 2018, when Tesla filed a Form 10-Q for the quarter ending March 31, 2018, that stockholders first learned that the 2018 Award they just approved had operational milestones that were ***already*** determined probable of achievement.

199. This Form 10-Q listed, based on the Company's "future financial projections," that "[a]s of March 31, 2018, the following performance milestones were considered probable of achievement:

- Total revenue of $20.0 billion;
- Adjusted EBITDA of $1.5 billion; and
- Adjusted EBITDA of $3.0 billion."

200. The Form 10-Q further disclosed that the probability of meeting an operational milestone had been determined "based on a subjective assessment of our

future financial projections."

201. At no time prior to the approval of the Grant were stockholders informed that the internal projections of the Company would support a probability determination that at least three (if not more) operational milestones would be achieved by June 30, 2019. In light of the Proxy's repeated statements that the operational milestones were, *e.g.*, "challenging," "ambitious" and "difficult to achieve," this omission was materially misleading.

202. Stockholders were *also* not told prior to approving the plan that the Company would immediately begin to incur over $770 million in stock-based compensation expense in recognition that three tranches would vest in the near-term.

203. Indeed, after Tesla determined that three operational milestones were probable of achievement, the Company was obliged to begin recording stock-based compensation expense. Thus, Tesla's May 2018 Form 10-Q disclosed that "[s]tarting on March 21, 2018 when the grant was approved by stockholders," the Company began recording approximately $6.7 million dollars of expenses for the three months ending March 31, 2018, with approximately $770 million more of unrecognized expense to be recognized over the following quarters.[171]

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[171] Tesla Form 10-Q filed May 7, 2018, at p.27.

204. Internal documents reveal that the Company determined probability of achievement of milestones under the Grant by using Tesla's internal operating plan. Indeed, the operating plan accurately predicted when the milestones would vest. By the first half of 2019, the Company had achieved two operational milestones, only missing the third operational milestone by a hair:

Operational Milestone	**Predicted as >70% Probable**	**Results By June 2019**
1	$20 Billion in revenue	$21.5 billion in total revenue by year-end 2018
2	$1.5 billion in EBITDA	$2.4 billion achieved in adjusted EBITDA
3	$3.0 billion in EBITDA	Trailing twelve months' EBITDA as of June 30, 2019 was ***$2.97 billion***

205. Stockholders were also not informed prior to voting on the Grant that the Company determined that three market capitalization milestones were probable of achievement.

206. In their April 2018 meeting, the Audit Committee received an update that three operational milestones were over 70 percent probable of achievement by June 30, 2019. They also received an update that three market capitalization milestones were similarly over 70 percent probable of achievement. The May Form 10-Q lacked any disclosure of this determination by the Company.

T. Tesla's Performance Entitles E. Musk To Tens of Billions of Dollars Through the 2018 Grant

207. Since the Board's approval of the Grant in January 2018, Tesla has performed consistently with the progress implied by the operating plans and projections upon which Tesla relied during the Grant process. Specifically, as of the date of the filing of this Amended Complaint, Tesla has achieved ***all*** 12 of the Grant's market cap milestones, and 6 operational milestones (*i.e.*, 2 revenue-based milestones and 4 adjusted EBITDA-based milestones). Thus, 6 tranches of the 2018 Grant have vested, entitling E. Musk to ***over $35 billion*** in compensation in only three-and-a-half years since Tesla enacted the 2018 Grant.

U. Tesla's Internal Production and Existing Know-How of Mass Production Shows that Several Tranches were Not "Very Difficult To Achieve"

1. Tesla and E. Musk's Master Plan

208. In 2006, E. Musk introduced Tesla's Master Plan. The Company's original product was a "high performance electric sports car called the Tesla Roadster."[172] The original cost of the Roadster was approximately $110,000, and

[172] Elon Musk, *The Secret Tesla Motors Master Plan (just between you and me)*, (Aug. 2, 2006), https://www.tesla.com/blog/secret-tesla-motors-master-plan-just-between-you-and-me (last visited Sept. 28, 2021).

thus "it wasn't a car that your average consumer was interested in."[173] Between 2008 to late 2011, the Company sold the Roadster, but concluded its production in 2012.

209. According to E. Musk, the Company's "long term plan [was] to build a wide range of models, including affordably priced family cars."[174] In the Master Plan, E. Musk also noted that Tesla's strategy "[was] to enter at the high end of the market, where customers are prepared to pay a premium, and then drive down [the] market as fast as possible to higher unit volume and lower prices with each successive model."[175] E. Musk summarized the Company's strategy as follows: "Build sports car[.] Use that money to build an affordable car[.] Use *that* money to build an even more affordable car[.] While doing above, also provide zero emission electric power generation options[.]"[176]

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173 Aaron Brown, *Here's A Look Back At The Tesla Car That Started It All*, BUS. INSIDER (Mar. 30, 2016, 11:50 AM), https://www.businessinsider.com/tesla-roadster-history-2016-3.

174 Elon Musk, *The Secret Tesla Motors Master Plan (just between you and me)*, (Aug. 2, 2006), https://www.tesla.com/blog/secret-tesla-motors-master-plan-just-between-you-and-me (last visited Sept. 28, 2021).

175 Elon Musk, *The Secret Tesla Motors Master Plan (just between you and me)*, (Aug. 2, 2006), https://www.tesla.com/blog/secret-tesla-motors-master-plan-just-between-you-and-me (last visited Sept. 28, 2021).

176 *Id*.

2. Tesla's Introduction into the Mass Production Space

210. While ceasing production on the Tesla Roadster, the Company began work on the Model S. As expressed by E. Musk, "the second model will be a sporty four door family car at roughly half the $89k price point of the Tesla Roadster and the third model will be even more affordable."[177] Like the Roadster, the Company's Model S competed in the high-end luxury vehicle space. In June 2012, Tesla commenced deliveries of the Model S. The Company's Model S originally sold for $58,570. The Model S was the first mass-produced highway-capable electric vehicle ("EV") in North America and Europe.

211. In 2009, when Tesla first introduced the Model S, E. Musk projected a cost of $50,000, which took into consideration a $7,500 federal tax credit. According to E. Musk, if the cost of gas were to rise to $4.00 per gallon, then the cost of owning a Model S would decrease to approximately $35,000. In reality, the Model S ended up costing far more than Tesla and E. Musk predicted.

212. In 2012, Tesla also introduced the Model X, the Company's first luxury SUV. The projected cost of the Model X was $30,000, but like the Model S, the Model X ended up costing far more than Tesla and E. Musk predicted. Each vehicle

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[177] Elon Musk, *The Secret Tesla Motors Master Plan (just between you and me)*, (Aug. 2, 2006), https://www.tesla.com/blog/secret-tesla-motors-master-plan-just-between-you-and-me (last visited Sept. 28, 2021).

was successful in its respective class, but both the Model S and Model X suffered demand issues because of the cost of each vehicle to their respective consumer.

3. Tesla and E. Musk Introduce Master Plan, Part Deux

213. On July 20, 2016, E. Musk introduced his Master Plan, Part Deux.[178] At the core of his Master Plan was the Model 3 (originally referred to internally at Tesla as "Bluestar"[179]), what E. Musk planned would be a "low cost vehicle" for which Tesla could "scale up production volume as quickly as possible."[180]

214. The Company originally priced the Model 3 at $35,000. According to Tesla's own estimates, projected demand for the Model 3 ranged between 900,000 and 2,100,000 ***annually***. Production of the Model 3 began in 2017.

4. Tesla Begins Mass Producing the Model 3

215. In order for Tesla to produce and sell the Model 3, the Company needed to mass produce the vehicle. In general, when mass production is successful, the manufacturing production curve will resemble the letter S (*i.e.*, the "S-curve"), with

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178 Elon Musk, *Master Plan, Part Deux*, (July 20, 2016), https://www.tesla.com/blog/master-plan-part-deux (last visited Sept. 28, 2021).

179 Tim Higgins, POWER PLAY: TESLA, ELON MUSK, AND THE BET OF THE CENTURY (2021), at 170. E. Musk's original vision was to name this vehicle Model E. *Id*. However, the rights belonged to Ford. *Id*.

180 Elon Musk, Master Plan, Part Deux, (July 20, 2016), https://www.tesla.com/blog/master-plan-part-deux (last visited Sept. 28, 2021).

vehicle production slow to start, followed by an acceleration and exponential growth, then a leveling off.[181]

216. On May 7, 2017, during an earnings call with analysts, E. Musk indicated uncertainty as to ***when*** Tesla would meet the S-curve's inflection point—*i.e.*, when production would significantly accelerate. While the exact period of when the Company would enter the acceleration phase of the S-curve was uncertain, there was little doubt that Tesla ***would*** achieve this phase in the near term, and that substantial profits for Tesla would follow.

217. According to E. Musk, "the production starts off slowly and then you gradually eliminate the constraints and eventually it starts taking off exponentially . . . ."[182] In addition, E. Musk stated: "It's a lot easier to predict where the upper flat portion of the S-curve is likely to be, but predicting the rapidly changing portion of the S-curve is just, I think, not within the ability of anyone to predict with accuracy."[183]

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[181] Matt D'Angelo, *What Is The S-Curve? Why Tesla's Model 3 Can Reach High Volume Production*, TESLARATI, https://www.teslarati.com/what-is-s-curve-tesla-model-3-can-reach-high-production-volumes/ (last visited Sept. 28, 2021).

[182] *Id*.

[183] *Id.*

5. Tesla's Mass Production Capabilities

218. In 2017 and 2018, Tesla successfully produced 50,000 Model S's and Model X's per year, respectively. Indeed, in the fourth quarter of 2017, Tesla manufactured 16,288 Model S's and 12,241 Model X's, and in 2017, the Company manufactured 101,097 Model S's and Model X's combined. Thus, by the beginning of 2018, the Company possessed a high degree of manufacturing capability and infrastructure, was primed for mass production effort. E. Musk himself recognized, production of the Model 3 would soon reach the "exponential growth" portion of the S-curve. Evidencing this know-how, Tesla, in a Form 10-Q noted to its investors that "[w]e have designed Model 3 to facilitate volume production, and we believe there are no fundamental problems with our supply chain or any of our production processes."[184]

219. On or around September 1, 2017, the Company featured and leveraged its production capabilities in connection with an approximately $2 billion debt financing to credit rating agencies, Moody's and S&P Global Ratings ("S&P"). In an internal presentation to Moody's and S&P, Tesla noted its "[e]xisting platforms, infrastructure and manufacturing capacity provide capital efficiency and operating

[184] Tesla, Inc., Quarterly Report (Form 10-Q) (Nov. 3, 2017), at 31.

leverage" and further noted that its "[d]ifferentiated, vertically integrated model drives significant long term competitive advantage."[185]

220. In this same confidential presentation to rating agencies, Tesla substantiated its production claims by describing its production progress over the previous 24 months, including (i) delivering 185,000 Model S units, (ii) delivering 47,0000 Model X units, (iii) confirming greater than 455,000 customer reservations of Model 3 as of August 1, 2017,[186] and (iv) confirming operational cell production at the Gigafactory.

221. Further supporting the Company's production advances, in a Q4 2017 earnings call with analysts, Doug Fields, Tesla's then-Engineering Chief, explained: "[The] Model 3 already is a dramatically simpler car to build than the Model S and even many people in operations who have worked their career in volume manufacturers say the Model 3 is a huge step forward from anything they've built."[187] In addition, the Company's own management viewed Model 3 as representing "a $22 billion per-annum revenue opportunity," based on the "expected

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[185] *Id*. at Slide 12.

[186] By comparison, "[t]he Model S collected 3,000 pre-orders in the months after it was revealed." Tim Higgins, POWER PLAY: TESLA, ELON MUSK, AND THE BET OF THE CENTURY (2021), at 237.

[187] SVC00001998, at -2010.

production of 500k vehicles per-annum."[188] Tesla also confirmed in its confidential presentation to rating agencies that it already had a "clear path to Model 3 scale" given the close to half-million paid customer reservations for Model 3.[189]

222. As evidenced by the confidential presentation to rating agencies, by the fall of 2017, the Company had already achieved significant capabilities to achieving mass production, including (i) automobile design, (ii) production design, (iii) inventory and logistics, (iv) human resource practices, (v) supplier identification, (vi) validation and contracting, (vii) battery pack assembly, (viii) cell design and (ix) assembly line development and refinement.

223. In addition to these production achievements, Tesla also internalized these capabilities through a series of strategic hires and acquisitions. Tesla's staff included the following individuals with significant industry experience:

- Doug Fields ("Fields), Senior Vice President of Engineering between September 2014 and August 2018 operating as Tesla's top engineer responsible for manufacturing and scaling the Model S and Model X. Previously, Fields worked as Vice President of Mac Hardware Engineering at Apple, Vice President Design Engineering and Chief Technology Officer at electric scooter company Segway, and Development Engineer at Ford Motor Company. Indeed, many of Tesla's top engineers working on previous model designs were recruited to Tesla by Fields;

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188 *Id*. at -2015.

189 *Id*.

- Jon McNeil (“McNeil”), President (Global Sales, Marketing, Government Relations, Delivery & Service) between September 2015 and February 2018 serving as Tesla’s top engineer overseeing Model 3, which included oversight of manufacturing. Previously, McNeil served as CEO of business software company Enservio for 13 years;

- Peter Carlsson, Vice President, Supply Chain at Tesla between 2011 and 2015 who previously worked as Head of Purchasing and Outsourcing or NXP Semiconductors;

- Travis Pratt (“Pratt”), Maintenance Team Lead at Tesla from December 2015 to December 2018 responsible for, among other things, day-to-day coverage of production line equipment. Previously, Pratt worked as Field Service Engineer at Emerson Network Power and Electronic Technician at Schlumberger;

- Sterling Anderson (“Anderson”), Co-Founder of Aurora Innovation—*i.e.*, an American self-driving vehicle technology company—(previously Chief Product & Program Manager), leading the design, development, and launch of Tesla’s Model X and leading the team that delivered Tesla autopilot between 2014 and 2016. Previously, Anderson co-founded Gimlet Systems where he developed, tailored, and integrated some of the earliest autopilot technology;

- Jerome Guillen (“Guillen”), President of Heavy Duty Trucking from November 2010 to the present (and who was also tasked with shepherding the Model S into production) and previously worked at Daimler AG as Director, Business Innovation overseeing the development of a new generation of semitrailer truck;[190]

[190] Indeed, Guillen’s skills were so pronounced that “German media speculated that he was a strong candidate for promotion to Daimler’s power executive board someday.” Tim Higgins, POWER PLAY: TESLA, ELON MUSK, AND THE BET OF THE CENTURY (2021), at 198.

- Joseph Mardall, Engineering Director at Tesla between September 2014 and January 2021, who previously worked as Aerodynamicist and Mechanical Designer in Engine Systems at McLaren Racing from October 2004 to June 2010;[191]

- Paolo Cerruti, Tesla's Vice President, Operations Planning & Supply Chain, between 2012 and 2016, who had experience in a similar position at Nissan Motors;

- Jens Peter Clausen, Vice President of the Gigafactory 1 at Tesla from 2015 to 2019 where he worked to scale up the Gigafactory, leveraging his prior experience at LEGO Group;

- Kevin Kassekert, Director, Infrastructure Development at Tesla from 2012 to 2020, who previously worked at semiconductor firm SVTC as Vice President, General Manager – Semiconductor Operations & Engineering;

- Kurt Kelty ("Kelty"), Senior Director, Battery Technology between March 2006 and August 2017 where he set Tesla's battery cell usage strategy and delivered the batteries implemented in Tesla's Roadster, Model S, Model X, and Model 3. Previously, Kelty worked as Director, Business Development at Panasonic, where he founded and directed Panasonic's research and development lab in the United States;

- Gilbert Passin ("Passin"), Vice President of Manufacturing between January 2010 and September 2018. Previously, Passin managed the factory for Toyota as its General Manager of West Coast Operations;

- Antoin Abou-Haydar ("Abou-Haydar"), Senior Director of Production and Quality of Model S, Model X, and Model 3 between April 2017 and September 2018. Previously, Abou-Haydar worked at Audi AG serving as Senior Director of General

[191] Tim Higgins, POWER PLAY: TESLA, ELON MUSK, AND THE BET OF THE CENTURY (2021), at 233.

Assembly of Models A4, A5, and Q5 between September 2011 and April 2017;

- Peter Rawlinson, currently CEO and CTO of Lucid Motors, served as Vice President & Chief Engineer of Model between 2009 to 2012, leveraging his prior experience at Jaguar and Lotus;

- Frank von Holzhausen, Tesla's Senior Design Executive responsible, in part, for developing and producing the Model S, who previously worked at Mazda, General Motors ("GM"), and Volkswagen Group; and

- Roger Evans ("Evans"), current Senior Director of Vehicle Development at Lucid Motors, who worked as NVH Engineering Manager at Tesla between September 2008 and July 2012. Evans participated in the development and production of Model S, and previously worked at Ford Motor Company.[192]

224. Tesla also purchased the original Fremont plant from Toyota and GM and originally partnered with Toyota in connection with "the development and production of electric vehicles and components . . . ."[193] Tesla also partnered with Panasonic to build the Gigafactory, whereby Panasonic "would build cells at one end, while Tesla assembled battery packs at the other."[194] Thus, at the time the Board approved the 2018 Grant, Tesla possessed significant know-how and manufacturing

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192 *See also* Ex. X, providing a further list of Tesla employees and/or former employees demonstrating Tesla's know how.

193 Tim Higgins, POWER PLAY: TESLA, ELON MUSK, AND THE BET OF THE CENTURY (2021), at 187.

194 *Id*.

capabilities to support its operating plan and/or financial forecasts.

225. E. Musk's own statements also supported that Tesla was poised to accelerate on the exponential part of the S-curve by January 2018 when the Board approved the Grant. During the May 3, 2017, Q1 2017 earnings call with analysts, E. Musk described the Model 3 production line as "comparable with the best-high volume vehicle production lines in the world" and predicted "1 million cars per year by 2020."[195] In doing so, E. Musk described where the "upper flat portions of the S-curve" would be.[196] Importantly, E. Musk's one-million car projection reflected producing a combination of Model 3 and Model Y vehicles, which share the same platform such that the Model 3 was a stepping stone for the Model Y.

6. Tesla Management Confirm the Company Stood at the Precipice of the Exponential Portion of the S-curve

226. Tesla management backed E. Musk's optimism about entering the exponential part of the S-curve with status updates on the sub-processes of the Model S assembly line.[197]

227. On or around July 15, 2017, Tesla management presented credit rating agencies Moody's and S&P with the Company's confidential, non-public internal

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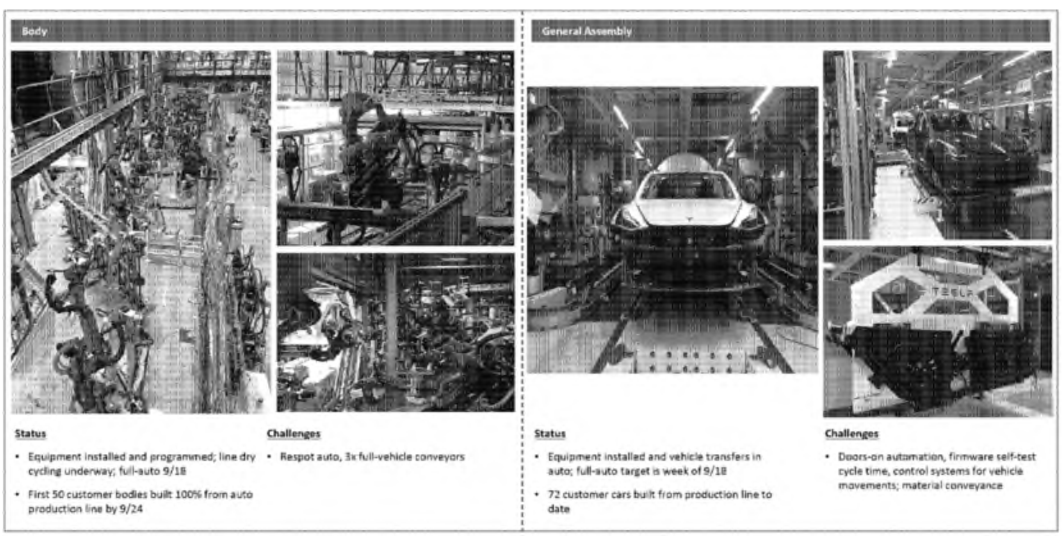
[195] TESLA_TORNETTA_DIR0009252.

[196] *Id.*

[197] *See* Ahuja Tr., at 329:2-330:11.

three-year operating plan. Among other things, Tesla projected approximately 44,350 Model 3's in 2017, 364,150 Model 3's in 2018, 629,400 Model 3's in 2019, and 650,000 Model 3's in 2020. In addition, the Company projected producing over 1 million (*i.e.*, 1,165,4000) vehicles by 2020. Further, Tesla expected "to achieve a production rate of 5,000 Model 3 vehicles per week by the end of the first quarter of 2018 . . . ."[198] The Company's confidential, non-public internal three-year operating plan is further supported by photographs of Tesla's installed and operating assembly lines as evidenced in Tesla's Board materials circulated to directors on or around September 19, 2017 and reproduced here:[199]



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[198] *See* Tesla, Inc., Quarterly Report (Form 10-Q) (Nov. 3, 2017), at 31; *see also* Tim Higgins, POWER PLAY: TESLA, ELON MUSK, AND THE BET OF THE CENTURY (2021), at 235.

[199] TSLA-Tornetta-0284766, at -0009.

228. The above-depicted internal presentation noted that the Company expected Body and General Assembly processes to be fully automated by September 18, 2017. The presentation also noted that Tesla expected to achieve significant milestones for Battery Modules and Packs (*i.e.*, 40 sets and 20 packs) the following day.

229. Similarly, in the Quarterly Update Letter disseminated to Tesla's Audit Committee in connection with the October 31, 2017 Audit Committee Meeting, Tesla described the Model 3 as "***not*** particularly difficult to build[,]" and noted that although the "initial stages of the ramp were challenging[,]" they expected the production rate to "soon enter the steep portion of the manufacturing S-curve . . . ."[200] The Quarterly Update Letter also noted that "[s]everal manufacturing lines, such as drive unit, seat assembly, paint shop and stamping, have demonstrated burst builds in excess of 1,000 units per week" and that "[o]ther lines, such as battery pack assembly, body shop welding and final vehicle assembly, have demonstrated burst builds in excess of 500 units peer week and are ramping up quickly."[201]

230. On December 9, 2017, Ahuja emailed E. Musk updated financial projections, including Model 3 projections, predicting that vehicle production would

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[200] PWC00012479, at -562 (emphasis added).

[201] *Id*.

hit 3,000 units per week by February 2018 and a steady state of 5,500 units per week by late 2018. In response, E. Musk expressed a belief that Model 3 production would exceed those financial projections, noting: "I have a far better sense for the production volume ramp of Model 3 now that I've been immersed in Fremont and Giga for the past few months. The ramp over the next few months we are showing here is too optimistic and ***the ramp later in the year is too pessimistic***."[202] In other words, E. Musk determined steady-state weekly, top of S-Curve production levels ranging from 5,500 to 5,977 were too conservative.[203]

231. Similar numbers were conveyed to Tesla's Board of Directors on December 12, 2017, *prior to* approval of the Grant. Specifically, at that time (i) 35,800 vehicles were projected for the first quarter of 2018 (*i.e.*, 2,753 vehicles per week); (ii) 69,500 vehicles were projected for the second quarter of 2018 (*i.e.*, 5,346 vehicles per week); (iii) 76,000 vehicles were projected for the third quarter of 2018 (*i.e.*, 5,846 vehicles per week); and (iv) 74,000 vehicles were projected for the fourth quarter of 2018 (*i.e.*, 5,692 vehicles per week).[204] Indeed, the Company would later report that it surpassed its own estimates for fiscal year

[202] *See* TSLA-Tornetta-0286306, at -09 (emphasis added).

[203] *Id*. Production during Thanksgiving week was estimated at only 3,872 cars to reflect lower factory utilization due to the holiday. *Id*.

[204] Weekly figures were calculated by dividing quarterly figures by thirteen.

2018, producing "86,555 vehicles, 8% ***more than*** our prior all-time high in Q3 . . . [including] 61,394 Model 3 vehicles, ***in line with our guidance*** and 15% more than Q3 [and] 25,161 Model S and X vehicles, ***consistent with our long-term run rate*** of approximately 100,000 per year."[205]

232. Between December 18, 2017 and February 7, 2018, Tesla's opinion regarding its production capabilities remained unaltered. Indeed, during a February 7, 2018 earnings call with analysts, E. Musk predicted that the Company would reach the top of the S-curve by mid-2018. Specifically, E. Musk stated: "As for Model 3 production, we continue to make significant progress every day, and we're targeting a weekly production rate of 2,500 vehicles by the end of March and 5,000 by the end of Q2."[206] Indeed, "Tesla produced 7,000 cars, including 5,000 Model 3 electric sedans, in the last week of its second quarter" of 2018 ***beating*** its own internal estimates.[207] In describing these results, Ahuja clarified that the Company's

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[205] *See* Tesla, Inc., Press Release (Form 8-K) (Jan. 2, 2019) (emphasis added); *see also* Michael J. Coren, *Tesla reports record production numbers in 2018*, QUARTZ, https://qz.com/1513166/tesla-reports-record-production-numbers-in-2018/ (last visited Sept. 28, 2021).

[206] *Id*. at -99.

[207] *Musk says Tesla pushed out 7,000 cars last week, meeting goal of 5,000 Model 3s*, CNBC, https://www.cnbc.com/2018/06/29/tesla-q2-production-and-delivery-numbers.html (last visited Sept. 28, 2021).

investments should be sufficient to produce 10,000 Model 3's per week. E. Musk agreed.[208] Moreover, both Ahuja and E. Musk described any delay in production ramp as nothing "fundamental," again echoing E. Musk's position that the top of the S-Curve was predictable and expected.[209]

7. E. Musk Causes Production Issues by Seeking to Leapfrog the Competition by Fully Automating Production

233. Following approval of the 2018 Grant, Tesla experienced production delays in ramping up Model 3. Indeed, the challenges were significant enough that the Company temporarily constructed an alternative production line in a tent outside its Fremont, California facility. However, these production issues were "self-inflicted" and caused solely by E. Musk "pushing for greater and greater automation."[210] E. Musk expressly conceding that his issues were his own "mistake," writing on Twitter: "Excessive automation at Tesla was a mistake. To be precise, my mistake. Humans are underrated."[211] When later asked "if the

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[208] *Id*. at -2010 (E. Musk targeting 600,000 Model 3s and another 100,000 Models S's and X's).

[209] *Id*.

[210] Tim Higgins & Susan Pulliam, *Elon Musk Races to Exit Tesla's 'Production Hell'*, WALL STREET JOURNAL (June 27, 2018, 9:36 PM), https://www.wsj.com/articles/elon-musk-races-to-exit-teslas-production-hell-1530149814.

[211] E. Musk Twitter Account, (Apr. 13, 2018), https://twitter.com/elonmusk/status/984882630947753984?lang=en (last visited Sept. 28, 2021).

'production hell' he predicted is self-inflicted, Mr. Musk shrugged. 'Most people are their own worst enemy . . . .'"[212]

234. The intent behind fully autonomous production was E. Musk's attempt to leapfrog Tesla's competition. Indeed, E. Musk "was selling investors on the idea that eventually the factory would need only a few people, similar to the way Tim Watkins had programmed machines to work an overnight shift alone."[213] Had E. Musk remained the course and not sought to fully automate the Company's production line, Tesla would have enjoyed a substantially smoother voyage up the exponential portion of the S-curve, thus achieving the Company's internal projections—and, in turn, several of the Grant's milestones—even faster than it ultimately did.

IV. DERIVATIVE ALLEGATIONS

235. Plaintiff brings this action derivatively to redress injuries suffered by the Company as a direct result of breaches of fiduciary duty and other misconduct by the Director Defendants and E. Musk.

236. Plaintiff currently is a beneficial owner of Tesla common stock and

[212] *See also* Tim Higgins, POWER PLAY: TESLA, ELON MUSK, AND THE BET OF THE CENTURY (2021), at 262.

[213] *Id*. at 269.

has owned Tesla common stock continuously during the relevant time period.

237. Plaintiff will adequately and fairly represent the interests of Tesla and its stockholders in enforcing and prosecuting their rights and has retained counsel competent and experienced in stockholder derivative litigation.

V. THE TESLA BOARD WAS AND IS NOT ABLE TO INDEPENDENTLY AND DISINTERESTEDLY DETERMINE WHETHER TO INITIATE AND PROSECUTE CLAIMS RELATING TO THE 2018 GRANT

238. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein.

239. Plaintiff did not make a demand on the Tesla Board to investigate or initiate the derivative claims asserted herein because demand is excused as futile.

240. Such demand would have been futile and useless, and is thereby excused, because a majority of the Board was either interested or lacked independence from E. Musk.

241. **Defendant E. Musk** was not and is not able to independently and disinterestedly determine whether to initiate and prosecute claims relating to the 2018 Grant because he is the direct beneficiary of the unprecedented multibillion dollar 2018 Grant. To date, the Board has gifted E. Musk six tranches of the 2018 Grant with a paper gain of approximately ***$45 billion***, or ***$4.5 billion*** per year based on a conservative 10-year service period. Assuming a five-year service period, the

Board gifted E. Musk ***$9 billion*** per year.[214] In addition, conceding his conflict of interest, E. Musk recused himself from the Compensation Committee and the Board meetings where they discussed the Grant and abstained from voting with the Board to approve the Grant and voting his shares in favor of the Grant.

242. **K. Musk** was not and is not able to independently and disinterestedly determine whether to initiate and prosecute claims relating to the 2018 Grant because he harbors conflicts of interest that raise doubt regarding his ability to exercise independent judgment in considering a demand or approving the 2018 Grant. Among other conflicts, K. Musk is the brother of E. Musk—*i.e.*, the recipient of the Grant. Tesla's public filings concede K. Musk's lack of independence.[215] Indeed, K. Musk abstained from all Board and Compensation Committee meetings where the Grant was under consideration and abstained from voting on the Grant in light of his fraternal relationship to E. Musk.

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[214] Gompers Tr., at 127:17-24; *see also* Tesla, Inc., Definitive Proxy Statement (Form DEF14A) (Aug. 26, 2021), at 43.

[215] *See* Tesla, Inc., Definitive Proxy Statement (Schedule 14A) (Apr. 26, 2018), at 18; *see also* TSLA-Tornetta-0282130 (Email from Arthur Crozier of Innisfree to Phil Rothenberg noting that "Glass Lewis noted they will likely recommend ***AGAINST*** . . . Kimbal Musk as affiliated director[] on a board that is less than two-thirds independent next time they are up for election."); Doc_00000022 (Proxy Paper from 2011 noting that Kimbal Musk was 1 out of 3 of Tesla's 8 directors that were conflicted, which made Glass Lewis question "the objectivity and independence of the board and its ability to perform its proper oversight role.").

243. K. Musk is also not independent of E. Musk because, as a benefit of being E. Musk's brother, he (i) sits on the board of directors of SpaceX, a company under E. Musk's control; and (ii) has the opportunity to invest in Defendant Gracias' investment firm—*i.e.*, Valor. Additionally, as a director of Tesla, K. Musk has also collected lucrative director fees.

244. K. Musk also lacks independence because of his close ties to other members of the board who lack independence from E. Musk. Indeed, K. Musk is close friends with Gracias, one of E. Musk's close friends. For example, Gracias attended Christmas at K. Musk's home in Boulder, Colorado, and Gracias and K. Musk annually attended a ski trip together with other CEOs. K. Musk, Gracias, and E. Musk also band together for an annual trip to Jackson Hole, Wyoming, a tradition dating back more than a decade. K. Musk has also been to Gracias's home in Chicago and has stayed at Gracias's home in San Francisco when he visits the San Francisco Bay Area.

245. **Defendant Ehrenpreis** was not and is not able to independently and disinterestedly determine whether to initiate and prosecute claims relating to the 2018 Grant because he harbors conflicts of interest that raise doubt regarding his ability to exercise independent judgment. Ehrenpreis has had a close personal and professional relationship with E. Musk and his family for over fourteen years.

Further, K. Musk considers Ehrenpreis "a close friend and business associate" dating back to 1998.[216] Indeed, Ehrenpreis attended K. Musk's wedding. In addition, Ehrenpreis also has close relationships with individuals that are close friends to E. Musk. For example, Ehrenpreis is part of Gracias's social circle and, from time to time, attends parties with E. Musk and Gracias. Like K. Musk, Ehrenpreis was also invited on an annual ski trip with Gracias. Further demonstrating the closeness of the relationship, the Gracias and Ehrenpreis families—children included—socialize together.

246. Ehrenpreis was an early investor in E. Musk's companies and endeavors, including E. Musk's "pyramid" of companies (*e.g.*, Tesla, SpaceX, and SolarCity).[217] Ehrenpreis has also invested in K. Musk's business The Kitchen Restaurant Group through his investment firm. "Ehrenpreis . . . ***[has] been successful backing entrepreneur Elon Musk in his early (and difficult) days***."[218]

247. Since 2014, Ehrenpreis has been a Managing Partner and co-owner of

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[216] K. Musk Ex. 7 ("At the celebration event where we announce the winners, we've invited a close friend and business associate of mine, Ira Ehrenpreis of Palo Alto's Technology Partners, to speak."); *see also* K. Musk Tr. 59:9-10.

[217] Gracias Tr. 90:10-15.

[218] Katie Fehrenbacher, *Early Tesla Investors Close $400 Million Fund For Startups With A Social Cause*, FORTUNE, (June 23, 2015), http://fortune.com/2015/06/23/dbl-third-fund/ (last visited September 28, 2021).

venture capital firm DBL Partners, which he co-founded with fellow managing partner and co-owner Pfund. Pfund was a member of SolarCity's board of directors and was an observer of Tesla's Board from 2006 to 2010.

248. Ehrenpreis is also a manager of DBL III, an affiliate fund of DBL Partners. Both Ehrenpreis (personally) and DBL III are investors in privately-held SpaceX which is controlled by E. Musk. Prior to Tesla's acquisition of SolarCity, DBL Investors, an affiliate of DBL Partners, participated in SolarCity's Series D venture funding round (closed November 1, 2008); a Series E-1 preferred stock financing round (June 2010), contributing $1 million in capital; and a Series F preferred stock financing round (June and July 2011), contributing more than $1.6 million. At the time of the Acquisition, Pfund beneficially owned (personally and through DBL Investors' investment funds) 1,554,114 shares of SolarCity common stock.[219] In addition to DBL and DBL III, Ehrenpreis's other investment company,

[219] This includes: (i) 449,279 shares held of record by Bay Area Equity Fund I, L.P. (of which DBL Investors is the managing member of the general partner), which represents approximately 15–20% of this fund's total assets under management—valued at $52,648,556 according to DBL Investors' most recent Form ADV filed with the SEC on March 29, 2016; (ii) 928,977 shares held of record by DBL Equity Fund BAEF II, L.P.; (iii) 119,208 shares held of record by Pfund as co-trustee of The Pfund Polakoff Family Trust dated February 18, 1993; (iv) 38,000 shares held of record by The Pfund Polakoff 2014 CRUT u/a/d 11/07/14; and (v) 18,650 shares issuable upon exercise of options exercisable within 60 days from September 23, 2016.

Technology Partners, invested over $13 million in Tesla's early financing rounds.

249. Ehrenpreis is also an investor and member of the board of directors of Mapbox, Inc., a provider of custom online maps. In December 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. Recently, Mapbox announced it was hiring former Tesla autopilot designer Brennan Boblett to help create digital maps for passengers in driverless cars.

250. Ehrenpreis' relationship with E. Musk extends beyond common investments and business dealings. In September 2015, E. Musk gave each member of a select group of five people a brand-new Model X, Tesla's first SUV.[220] Ehrenpreis, his colleague Jurvetson and E. Musk himself were among the select few to receive the first Model X vehicles ever produced. At the presentation, E. Musk chose to announce Ehrenpreis first among the five honorees. Ehrenpreis shared his gratitude with E. Musk on Twitter, shortly thereafter:

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[220] Nicolle Gibillini, *The First 5 Joining Elon Musk In The Tesla Model X Owners' Club*, CTVNEWS, (Oct. 6, 2015), https://www.ctvnews.ca/5things/the-first-5-joining-elon-musk-in-the-tesla-model-x-owners-club-1.2596850 (last visited Sept. 28, 2021); E. Musk Tr. 215:20-216:1.

251. Two years later, E. Musk showed his appreciation of Ehrenpreis's friendship (yet again) by giving Ehrenpreis the rights to the first Tesla Model 3. Tellingly, however, after Ehrenpreis paid for the Model 3 (in full), Ehrenpreis gifted the car back to E. Musk as part of his 46th birthday present. E. Musk shared Ehrenpreis' gesture on social media:

Brad Sams @bdsams · 8 Jul 2017
who is the lucky owner?
3 6 176

Elon Musk
@elonmusk
Follow

Replying to @bdsams

Ira Ehrenpreis had rights to 1st car as he was 1st to place a full deposit, but gave those rights to me as my 46th bday present. Tks Ira!

5:39 PM - 8 Jul 2017

209 Retweets 2,806 Likes

252. During their 11-year relationship, Ehrenpreis and E. Musk have not been bashful when it comes to sharing their personal feelings for each other on social media, as both have made their feelings for each other evident:

Ira Ehrenpreis @IraEhrenpreis · 14 Nov 2016
Love is in the air! Congrats @TeslaMotors @elonmusk!!!

Elon Musk @elonmusk
Love you too!
thedrive.com/news/6007/tesl…

1 2

Ira Ehrenpreis Retweeted
Elon Musk @elonmusk · Mar 17
Replying to @IraEhrenpreis @Tesla
Thanks for your support over all those years!
100 161 7.3K

253. 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 World Energy Innovation Forum, which is chaired by Ehrenpreis.

254. Ehrenpreis' affection for E. Musk extends to the rest of his family, as Ehrenpreis has publicly referred to E. Musk's mother, Maye Musk, as an "inspiration" and a "role model":[221]

255. In an October 2010 blog post, K. Musk announced 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."[222]

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[221] Ehrenpreis Tr. 411:20-23.

[222] *Id*. 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 (emphasis added).

256. **Defendant Gracias** was not and is not able to independently and disinterestedly determine whether to initiate and prosecute claims relating to the 2018 Grant because he harbors conflicts of interest that raise doubt regarding his ability to exercise independent judgment in considering a demand or approving the 2018 Grant. He is "one of [E.] Musk's closest friends" dating back to 2007.[223] Indeed, their nearly 20-year relationship includes vacationing annually with one another's families, socializing frequently with each other's family, attending family gatherings (including spending Christmas with the Musk family in 2020 and President's Day together for more than a decade prior to that), and communicating on a weekly basis. Indeed, Gracias's relationship with the Musk family is so close that Gracias was invited to be a groomsman in K. Musk's wedding. Moreover, when

[223] E. Musk Tr. 215:10-14; Gracias Tr., at . Ashlee Vance, *Elon Musk's Space Dream Almost Killed Tesla*, BLOOMBERG, (May 14, 2015), https://www.bloomberg.com/graphics/2015-elon-musk-spacex/; Tsavo Neal, Public Mentors, *Elon Musk*, https://publicmentors.com/elon-musk/ (quoting Ashlee Vance's biography of Elon Musk titled "Elon Musk: Tesla, SpaceX, And The Quest For A Fantastic Future Summary":

> In the first half of 2008, ***Antonio Gracias, the founder and CEO of Valor Equity, met Musk for dinner. Gracias had been an investor in Tesla and had become one of Musk's closest friends and allies***, and he could see Musk agonizing over his future. "Things were starting to be difficult with Justine, but they were still together," Gracias said. 'During that dinner, Elon said, "I will spend my last dollar on these companies. If we have to move into Justine's parents' basement, we'll do it."

tragedy befell E. Musk's very young son in 2002, Gracias was part of an intimate group of people, including K. Musk, that consoled E. Musk.

257. Gracias is also a key director in E. Musk's "pyramid" of companies, including Tesla, SpaceX, and Solar City.[224] Similarly, like Ehrenpreis, Gracias is an investor in K. Musk's company The Kitchen Restaurant Group, initially investing between $5 million and $10 million. [redacted] Gracias was also a member of the SolarCity Board from approximately 2010 until its merger with Tesla in 2016, an entity also affiliated with E. Musk.

258. Gracias' relationship with E. Musk dates back to at least 2001. Gracias is the founder, managing partner, CEO, Chief Investment Officer, director, and sole owner of private equity firm VMC, doing business as Valor Equity Partners. In 2001, Gracias and Valor invested in then-startup PayPal, Inc. ("PayPal"), a company co-founded by E. Musk. Gracias's PayPal investment subsequently led E. Musk to present Gracias and his firm Valor with the opportunity to invest in "Tesla Motors,"

[224] Gracias Tr., at 41:1-19; K. Musk 72:4-5.

Tesla's predecessor.[225] E. Musk also gave Gracias the opportunity to participate in several pre-IPO venture funding rounds for Tesla, SolarCity, and SpaceX where he was appointed to the boards of both companies. Specifically, Valor made the following investments in E. Musk affiliated companies:

- **Tesla**: Valor(including the Family Fund) invested $15 million in Tesla initially. Through his Valor funds, Gracias participated in at least four of Tesla's venture funding rounds: Series B (closed February 1, 2005), Series C (May 1, 2006), Series D (May 11, 2007), and Series E (closed February 8, 2008); as well as a pre-IPO venture debt raise conducted by Tesla in March 2009. Valor owned nearly five million shares immediately prior to Tesla's IPO. At present, the Gracias family holds a current market value of [redacted] in Tesla. In addition, Gracias's personal paper gain in Tesla is between [redacted], pre-tax.

- **SpaceX**: Gracias personally invested approximately [redacted]. Valor (including Family Funds) initially invested $25 million. Valor participated in SpaceX's $50 million Series C round (closed November 8, 2010) and its $1 billion Series E round (January 20, 2015). Today, Valor's investment in SpaceX is worth approximately $400-$500 million, which represents approximately 1½% to 2% of SpaceX. Notably, SpaceX represents between 10 to 20% of Valor's portfolio.

- **SolarCity**: Gracias and his Valor funds also participated in SolarCity's pre-IPO Series G preferred stock financing round (February and March 2012), contributing nearly $25 million.

- **The Boring Company**: Valor has approximately [redacted] invested in the Boring Co.

[225] Gracias Tr., at 35:16-24.

- **Neuralink**: Valor has approximately [redacted] invested in Neuralink.

259. In addition, both E. Musk and K. Musk have personally invested in Valor.[226] According to Gracias, E. Musk invested approximately [redacted] in Valor in 2007 and K. Musk invested [redacted] As a manager or owner of these funds, Gracias serves as a fiduciary to E. Musk and K. Musk.

260. Gracias and E. Musk are more than just friends and co-investors. E. Musk also relies on and values Gracias' opinion as a special consultant to Tesla. Indeed, Valor (*i.e.*, Gracias) spent more than 100 days at Tesla's battery factory near Reno, Nevada in late 2017 to help increase Model 3 sedan production. As the Company disclosed, Gracias and Valor contributed to "numerous improvements that led to increased Model 3 production rates."[227] In exchange for its consulting services, Tesla paid Valor $34,347 in reimbursement for travel, equipment, and "budget lodging" near the Nevada factory.[228]

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[226] Gracias Tr., at 56:19-57:6; 57:10-15; K. Musk Tr., at 71:12-23.

[227] 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.

[228] Gracias Tr., at 40:11-14.

261. To help raise money for his Valor funds (and presumably increase his management fees), Gracias has consistently used testimonials from E. Musk and K. Musk on the Valor website, including the following:[229]

> 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. - Elon Musk.

262. Gracias also uses testimonials from E. Musk's family to help solicit capital. Peter Rive, E. Musk's cousin and former Chief Operating Officer ("COO") and Chief Technical Officer ("CTO") of SolarCity, is quoted on Valor's website, stating:[230]

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

263. Following approval of the 2018 Grant, Maron thanked Gracias profusely for calling investors "on Elon's comp award, especially during your

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[229] *See* http://www.valorep.com/about.

[230] *Id.*

vacation, which I know is a big imposition."[231]

264. **Jurvetson** was not able to independently and disinterestedly determine whether to initiate and prosecute claims relating to the 2018 Grant because he harbored conflicts of interest that raise doubt regarding his ability to exercise independent judgment, including because he has been a "close friend" of E. Musk since 1995.[232] Indeed, Jurvetson attended K. Musk's wedding in Spain. Like several of his former co-directors, Jurvetson vacations once a year with K. Musk and E. Musk. In addition, each year K. Musk and E. Musk attend Jurvetson's birthday party at Half Moon Bay, California, during which K. Musk stays at Jurvetson's house. E. Musk, K. Musk, and Jurvetson also attend Burning Man each year in the Nevada desert. Given the extent of Jurvetson's relationship with E. Musk, this Court already has previously held that "[Jurvetson] is beholden to Musk."[233]

265. The Silicon Valley Business Journal has described Jurvetson as "too

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[231] PJT0000005913.

[232] K. Musk Tr., at 76:2-14. Ellen Huet, *Tesla Director Jurvetson Investigated By His VC Firm For Misconduct*, BLOOMBERG, (Oct. 24, 2017), https://www.bloomberg.com/news/articles/2017-10-25/tesla-director-jurvetson-investigated-by-his-vc-firm-for-misconduct ("Jurvetson sits on the board of both Tesla Inc. and Space Exploration Technologies Corp., and ***is a close friend of Musk***.").

[233] Tesla/SolarCity Opinion, 2018 Del. Ch. LEXIS 102 at *41-42 (Del. Ch. March 28, 2018).

close to Tesla founder Elon Musk"[234] to be considered an independent Board member. E. Musk gave Jurvetson the first Tesla Model S ever made and gave him the second Model X ever made (the first Model X went to E. Musk himself). Jurvetson also frequently lavishes E. Musk with praise. According to The Wall Street Journal, Jurvetson stated that: "Mr. Musk's 'passion is breathtaking.'"[235] In Ashlee Vance's biography on E. Musk, Jurvetson described E. Musk as follows:[236]

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

266. Prior to his tenure with Tesla, Jurvetson invested in Everdream, a business co-founded by K. Musk's and E. Musk's cousins. During his near decade-long tenure on the Tesla Board, Jurvetson and his former venture capital firm DFJ invested in E. Musk's "pyramid" of Tesla, SpaceX, SolarCity, and The Boring

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[234] According to the Silicon Valley Business Journal, "some say he is too close to Tesla founder Elon Musk to serve as the independent board member." 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.

[235] *See supra* note 16.

[236] Ashlee Vance, Tesla, SpaceX, and the Quest for a Fantastic Future (2015).

Company.[237] Jurvetson is also an investor in K. Musk's business, The Kitchen Restaurant Group. Jurvetson and/or his former co-managing director John H.N. Fisher, serve on the board of SpaceX and also served on the board of SolarCity until its acquisition by Tesla.

267. 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.

268. In November 2017, following an internal investigation, Jurvetson was ousted from DFJ for alleged sexual harassment. 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.[238] Although E. Musk denied this characterization of the party, E. Musk confirmed he was invited and attended the event at Jurvetson's home.

269. Despite Jurvetson's unceremonious removal from the venture capital firm he helped found, Jurvetson was not timely removed from the Tesla Board,

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[237] Gracias Tr., at 94:15-24; K. Musk Tr., at 82:25-83:4; 84:6-18.

[238] 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 visited June 2, 2018).

which corporate governance experts called "quite unusual."[239]

270. While on a temporary leave of absence since his ouster at DFJ, Jurvetson was still "marketing himself as a current member of the three company boards. He has attended SpaceX and Tesla events as a VIP."[240]

271. Jurvetson remains a member of SpaceX's board of directors.

272. **Defendant Buss** was not able to independently and disinterestedly determine whether to initiate and prosecute claims relating to the 2018 Grant because he harbored conflicts of interest that raise doubt regarding his ability to exercise independent judgment in considering a demand or approving the 2018 Grant.[241]

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239 *See also* Buss Tr., at 15:5-14. *Id.* ("But the relationship between SpaceX and DFJ, sources say, is ***very much a relationship between Musk and Jurvetson specifically***.") (emphasis added).

240 Theodore Schleifer, *Elon Musk Still Hasn't Decided What To Do With Board Member Steve Jurvetson After Allegations Of Misconduct*, RECODE, (Apr. 19, 2018), https://www.recode.net/2018/4/19/17248350/elon-musk-steve-jurvetson-spacex-tesla-dfj-board-seats (last visited Sept. 28, 2021).

241 *See* Doc_00000024 (Glass Lewis Proxy Paper: "[***W]e do not believe that shareholders should consider Mr. Buss to be independent***. . . . Director Buss served as the CFO of SolarCity Corporation ('SolarCity') until February 2016. While the Company consider Mr. Buss to be independent, as a result of the Company's acquisition of SolarCity in November 2016, we do not believe shareholders should consider Mr. Buss to be independent.") (emphases added); *see also* InnisfreeM&A0001706 at -707-708 (January 24, 2018 email from Maron to Tesla advisors summarizing a conversation had with Ken Bertsch at the Counsel of Institutional Investors, writing that Bertch asked "hard hitting questions" like "[i]sn't Brad Buss not actually independent.").

Buss served as a Tesla director for approximately ten years and has known E. Musk for approximately 12 years. E. Musk personally played a role in recruiting Buss to become Audit Committee Chairman of the Tesla Board.

273. Between the fall of 2014 until his retirement in February 2016, Buss served as the CFO of SolarCity. Indeed, Buss was personally recruited by E. Musk to come out of retirement to serve as CFO of SolarCity. He is indebted to E. Musk because, among other things, he received $31,255,261 million for just 18 months of work as SolarCity's CFO, which allowed him to retire at just 52 years of age. In addition, upon retiring from SolarCity, Buss remained a consultant until March 31, 2016, which allowed him to continue vesting his equity options.

274. As a Tesla director, Mr. Buss was granted a substantial number of Tesla stock options and reaped between $10 million and $50 million by exercising only a portion of them. For example, in 2019, Buss sold 77,082 Tesla shares for a total of $20.3 million. In fiscal year 2017, Buss earned $3,357,002 as a director of Tesla,[242] which constituted a substantial portion of his income. In fiscal year 2018, the same year the Grant was approved, Buss earned $6,877,403 as a director of Tesla. Lastly, as of September 23, 2016, Buss's total assets were approximately $54 million of

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[242] TESLA-00000565.

which 45% was directly attributable to E. Musk and his affiliated companies.

275. **Defendant Murdoch** was not and is not able to independently and disinterestedly determine whether to initiate and prosecute claims relating to the 2018 Grant because he harbors conflicts of interest that raise doubt regarding his ability to exercise independent judgment in considering a demand or approving the 2018 Grant. Murdoch has long and deep personal and professional ties to E. Musk dating back to 2006. Murdoch and his family socialize with E. Musk and his family, including taking international vacations together to the Bahamas, Mexico and Israel, among other places, and convening for barbeques and pool parties when the Musk and Murdoch families are in Los Angeles, California. Indeed, Murdoch attended K. Musk's wedding in Spain. In addition, E. Musk permitted Murdoch the opportunity to invest over $50 million in SpaceX personally and through his private investment company. In addition, Murdoch invested approximately $20 million in SpaceX personally.

276. In fiscal year 2017, Murdoch earned compensation of $1,926,972 as a Tesla director. Importantly, following Murdoch's vote in favor of the 2018 Grant, he was handsomely rewarded by E. Musk. Indeed, in 2018, Murdoch earned reported compensation of $9,031,083.

277. **Defendant Johnson-Rice** was not able to independently and disinterestedly determine whether to initiate and prosecute claims relating to the 2018 Grant because she harbored conflicts of interest that raise doubt regarding her ability to exercise independent judgment in considering a demand or approving the 2018 Grant. Aside from her directorship at Tesla, Johnson-Rice held no other employment besides her family-owned business—*i.e.*, Johnson Publishing Company—which went bankrupt in April of 2019. Her service as a director was quite lucrative. For example, in fiscal year 2017, Johnson-Rice earned reported compensation of $1,933,914 for serving as a Tesla director. Johnson-Rice was handsomely rewarded after approving the 2018 Grant. In 2018, Tesla reported that Johnson-Rice earned compensation of $8,048,888 for serving as a director at the Company.

278. **Defendant Denholm** was not and is not able to independently and disinterestedly determine whether to initiate and prosecute claims relating to the 2018 Grant because she harbors conflicts of interest that raise doubt regarding her ability to exercise her independent judgment. Following the SEC Settlement requiring E. Musk to step down as Chairman of Tesla, E. Musk handpicked Denholm to be Chairwomen of the Tesla Board as his replacement. According to Denholm's LinkedIn Profile, at present she has no other employment. Indeed, a majority of her

income is derived from serving as a member of Tesla's Board. In fiscal years 2017, 2018, 2019, and 2020, Denholm earned reported compensation of $4,921,810, $6,891,082, $2,743,679, and $5,763,511 as a director of Tesla, respectively. Moreover, Denholm netted over $81 million from exercising a portion of the Tesla options received via her Tesla directorship. Denholm acknowledged that the equity she earned through her directorship has been "material" to her overall financial position.[243]

279. All of Tesla's directors have received lavish compensation at the E. Musk-controlled Company, which compromises their ability to be independent and disinterested in order to assess a demand to initiate litigation adverse to E. Musk's financial interests. By comparison, and according to The Wall Street Journal, mean pay for directors at the biggest 100 companies in 2020 was "$310,000 per year, flat from 2019, and up from $305,000 in 2018."[244]

280. A Bloomberg article entitled "Tesla's Board Sounds the Retweet," highlights the Company's lavish director compensation. That article confirmed that

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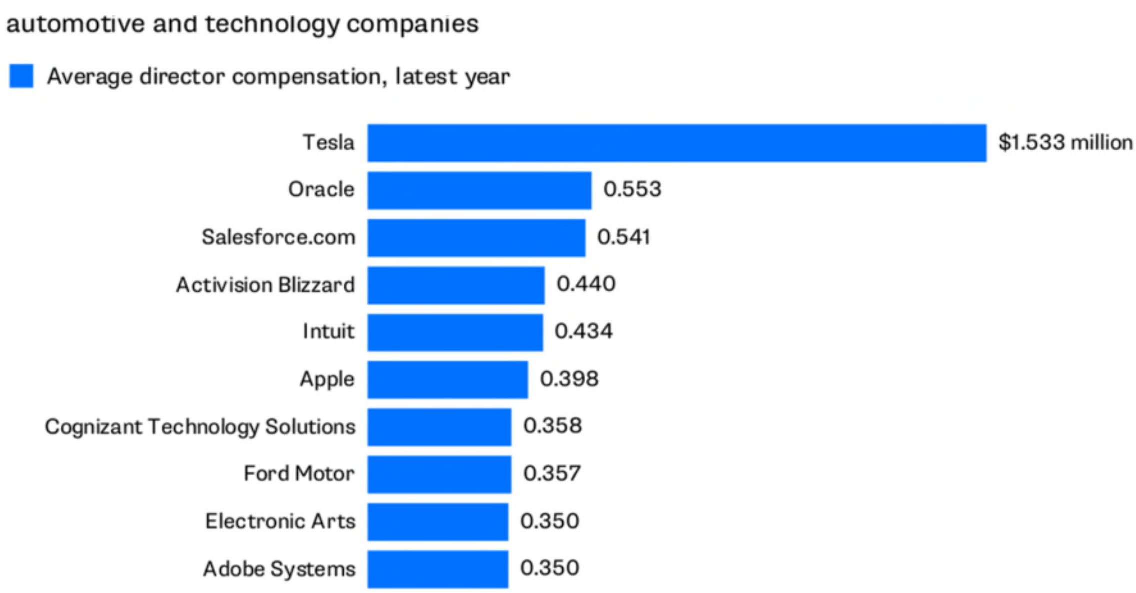
[243] Denholm Tr. (Vol. I), at 110:7-13; 111:18-112:6.

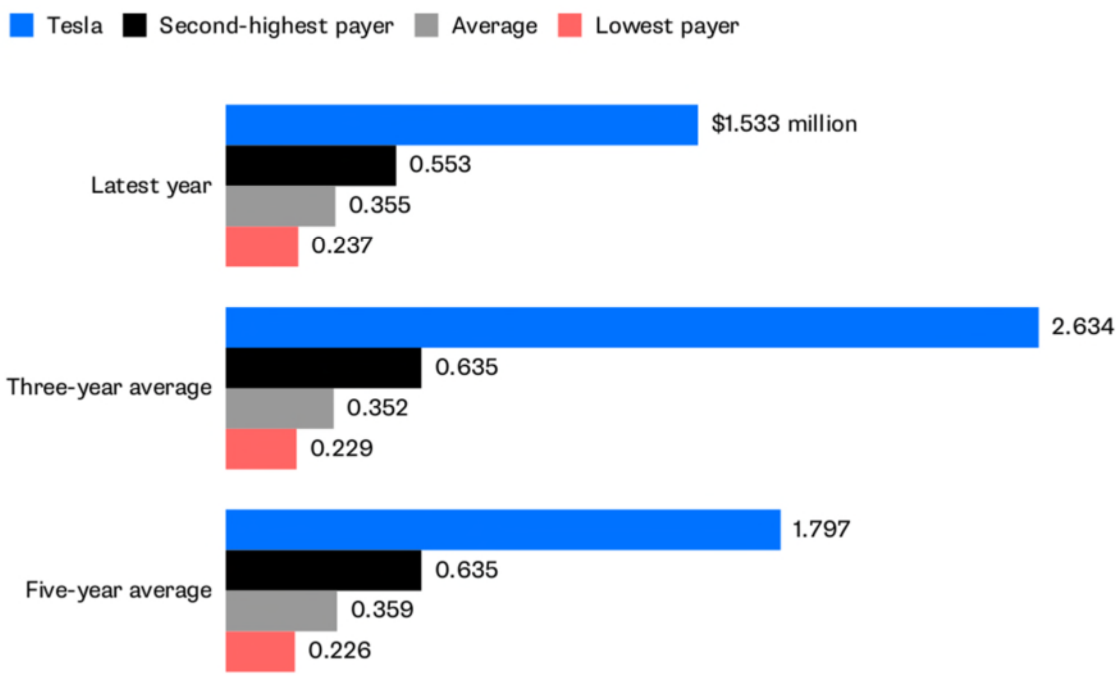
[244] Theo Francis and Emily Glazer, *Pay for Company Directors Stalled Last Year, but That Is Likely to Change*, WALL STREET JOURNAL, https://www.wsj.com/articles/pay-for-company-directors-stalled-last-year-but-that-is-likely-to-change-11631611802 (last visited Sept. 28, 2021).

Tesla's directors were awarded an average of $1.53 million in compensation in 2017. According to Dan Marcec, director of content at compensation-analytics firm Equilar, "[r]arely do we see any director compensation valued at over a million dollars."

281. The chart below compares Tesla's 2017 director compensation with average director compensation at U.S. automotive and technology hardware, software and services companies with a market cap of $25 billion or more.



282. 2017 was not an outlier for Tesla's average director compensation.



283. As the chart below demonstrates, in the seven years leading up to 2018, Tesla directors were handsomely rewarded for their Board service:

Directors	2011	2012	2013	2014	2015	2016	2017	Total
K. Musk	294,153	849,836	26,661	35,423	4,964,381	24,535	21,721	$6,216,710
Gracias	310,134	1,733,506	60,957	37,500	9,790,505	37,500	37,500	$12,007,602
Jurvetson	292,553	1,051,263	27,500	27,500	6,095,984	27,500	27,500	$7,549,800
Ehrenpreis	302,553	1,263,129	37,500	37,500	7,239,683	37,500	37,500	$8,955,365
Buss	310,053	1,523,407	45,000	38,750	4,954,785	20,000	3,357,002	$10,248,997
Denholm	N/A	N/A	N/A	7,181,066	4,979,785	45,000	4,921,810	$17,127,661
Murdoch	N/A	N/A	N/A	N/A	N/A	N/A	1,926,972	$1,926,972
Johnson Rice	N/A	N/A	N/A	N/A	N/A	N/A	1,933,914	$1,933,914

COUNT I
DERIVATIVE CLAIM
FOR BREACH OF FIDUCIARY DUTY
AGAINST E. MUSK IN HIS CAPACITY
AS TESLA'S CONTROLLING STOCKHOLDER

284. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein.

285. As explained herein, E. Musk was and still is Tesla's controlling stockholder. As Tesla's controlling stockholder, E. Musk owed the Company and its stockholders the utmost fiduciary duties of due care, good faith and loyalty.

286. For his own personal benefit and in breach of his fiduciary duties, E. Musk caused the Company to enter into the 2018 Grant. E. Musk breached his fiduciary duties owed to the Company by, *inter alia*, engaging in an unfair process which resulted in E. Musk receiving the 2018 Grant worth billions of dollars.

287. The Company has been harmed as a result of the dramatic overpayment to E. Musk.

288. The Company is therefore entitled to damages for E. Musk's breaches of fiduciary duty.

COUNT II
DERIVATIVE CLAIM
FOR BREACH OF FIDUCIARY DUTY
AGAINST THE DIRECTOR DEFENDANTS

289. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein.

290. The Director Defendants, as Tesla directors and/or officers, owe the Company the utmost fiduciary duties of due care, good faith and loyalty. By virtue of their positions as directors of Tesla and/or officers and/or their exercise of control and ownership over the business and corporate affairs of the Company, the Director Defendants have, and at all relevant times had, the power to control and influence and did control and influence and cause the Company to engage in the practices complained of herein. Each of the Director Defendants was required to (i) use their ability to control and manage Tesla in a fair, just and equitable manner; and (ii) act in furtherance of the best interests of Tesla and its stockholders and not their own.

291. The Director Defendants breached their fiduciary duties owed to the Company and its stockholders by, *inter alia*, overseeing an unfair process, approving an unprecedented and unfair compensation package for E. Musk, and issuing a false and/or misleading Proxy.

292. The Company has been harmed in the amount of the dramatic overpayment to E. Musk.

293. The Company is therefore entitled to damages for the Director Defendants' breaches of fiduciary duty.

COUNT III
DERIVATIVE CLAIM
FOR UNJUST ENRICHMENT AGAINST E. MUSK

294. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein.

295. As detailed herein, the 2018 Grant is unfair to the Company and is the product of breaches of fiduciary duty by E. Musk and the Director Defendants.

296. It would be unconscionable to permit E. Musk to retain the improper benefits received pursuant to the 2018 Grant.

COUNT IV
DERIVATIVE CLAIM FOR WASTE AGAINST
THE DIRECTOR DEFENDANTS[245]

297. Plaintiff repeats and realleges all of the allegations above as though fully set forth herein.

298. The terms of the 2018 Grant, which was gifted to Tesla's part-time

[245] Plaintiff acknowledges that Count IV has been dismissed; it is included in this Amended Complaint solely to preserve the claim for purposes of appeal.

CEO, are so one-sided that no person acting in good faith pursuant to Tesla's interests could have approved its terms.

299. As a result of the waste of corporate assets, the Director Defendants are liable to Tesla.

RELIEF REQUESTED

WHEREFORE, Plaintiff, on behalf of himself and derivatively on behalf of Tesla, prays for judgment as follows:

A. Finding that demand on the Board is excused as futile;

B. Finding that a majority of the Board were conflicted and/or lacking independence and/or disinterestedness in approving the 2018 Grant;

C. Finding that the stockholder vote on the Grant was not fully informed;

D. Finding that the process culminating in the approval of the 2018 Grant and the compensation paid to E. Musk under the Grant was not entirely fair;

E. Finding that the value of the Grant conferred to E. Musk was not entirely fair;

F. Finding the Director Defendants liable for breaching their fiduciary duties;

G. Finding that E. Musk breached his fiduciary duties in his capacity as (i) the controlling stockholder of Tesla; and/or (ii) as controlling stockholder over the challenged transaction;

H. Finding E. Musk liable for unjust enrichment;

I. Finding the Director Defendants liable for waste;

J. Directing Tesla to rescind, whether at law or in equity, the Grant and/or the tranches vested thereunder;

K. Directing Tesla to subject the Grant to a fully informed stockholder vote;

L. Directing Tesla to cancel the remaining unvested tranches of the 2018 Grant;

M. Awarding rescissory damages in an amount which may be proven at trial, together with pre- and post-judgment interest thereon;

N. Awarding Tesla the amount of rescissory damages it sustained as a result of Defendants' breaches of fiduciary duty and other misconduct alleged herein;

O. Awarding reasonable attorneys' and expert witness' fees and other costs; and

P. Awarding such other and further relief as this Court may deem just and proper.

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Dated: March 2, 2022

CERTIFICATE OF SERVICE

I, Glenn R. McGillivray, hereby certify that, on March 9, 2022, the foregoing *Public [Redacted] Version of the Verified Amended Derivative Complaint* was filed and served via File & Serve*Xpress* upon the following counsel of record:

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