



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

RICHARD J. TORNETTA, Individually
and on Behalf of All Others Similarly
Situating and Derivatively on Behalf of
Nominal Defendant 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-KSJM

PUBLIC VERSION FILED:
October 24, 2022

STIPULATION AND [PROPOSED] PRE-TRIAL ORDER

Pursuant to Court of Chancery Rule 16, and subject to the approval of the Court, plaintiff Richard J. Tornetta (“Plaintiff”), defendants Elon Musk (“Musk”), Robyn M. Denholm (“Denholm”), Antonio J. Gracias (“Gracias”), James Murdoch (“Murdoch”), Linda Johnson Rice (“Johnson Rice”), Brad W. Buss (“Buss”), and Ira Ehrenpreis (“Ehrenpreis,” and collectively, the “Director Defendants”), and nominal defendant Tesla, Inc. (“Tesla,” the “Company,” or “Nominal Defendant,” and together with Plaintiff and the Director Defendants, the “Parties,” and each a “Party”) jointly submit this Stipulation and [Proposed] Pre-Trial Order (the “Stipulation”).

I. NATURE OF THE ACTION AND PROCEDURAL HISTORY

A. NATURE OF THE ACTION

1. This is a derivative action (the “Action”) brought by Plaintiff on behalf of Nominal Defendant Tesla against: (i) certain past and/or present members of the board of directors of Tesla (the “Tesla Board” or “Board”) alleging breach of fiduciary duty claims¹ and (ii) Musk, including in his capacity as controlling stockholder of Tesla, alleging breach of fiduciary duty claims and unjust enrichment.

2. The Parties’ dispute arises out of the 2018 grant, subject to certain vesting conditions, of a stock option award to Musk, Tesla’s Chief Executive Officer (the “2018 Plan”).

3. The Parties respectfully refer to their forthcoming pre-trial briefs for detailed statements regarding the nature of this Action.

B. PROCEDURAL HISTORY

4. In February 2018, Plaintiff served a demand to inspect certain Tesla books and records pursuant to 8 *Del. C.* § 220.

5. On June 5, 2018, Plaintiff filed a Verified Stockholder Class Action and Derivative Complaint asserting breaches of fiduciary duty and waste against the Tesla Board, including: (i) Musk, (ii) Denholm, (iii) Gracias, (iv) Murdoch,

¹ Plaintiff’s Verified Amended Derivative Complaint (the “Amended Complaint”) alleges a waste claim that has been dismissed, “solely to preserve the claim for purposes of appeal.” Dkt. No. 209 at 138, n.245.

(v) Johnson Rice, (vi) Buss, (vii) Ehrenpreis, (viii) Steve Jurvetson (“Jurvetson”), and (ix) Kimbal Musk (“K. Musk”) (the “Complaint”). The Complaint also asserted an unjust enrichment claim against Musk, and named Tesla as Nominal Defendant. Dkt. No. 1.

6. On August 30, 2018, the Director Defendants, K. Musk, Jurvetson, and Tesla moved to dismiss the Complaint (the “Motion to Dismiss”). Dkt. No. 10.

7. After full briefing and argument on the Motion to Dismiss, on September 20, 2019, the Court issued a Memorandum Opinion largely denying the Motion to Dismiss but dismissing the waste claim (the “Motion to Dismiss Opinion”). Dkt. No. 32.²

8. Between October 9, 2019 and September 19, 2021, the Parties engaged in fact and expert discovery.

9. On January 25, 2021, the Court granted a Stipulation and Order for Class Certification. Dkt. No. 94.

10. On September 20, 2021, the Supreme Court of the State of Delaware issued its opinion in *Brookfield Asset Management, Inc. v. Rosson*, 261 A.3d 1251 (Del. 2021) (the “*Brookfield* Decision”), expressly overruling its earlier opinion in *Gentile v. Rossette*, 906 A.2d 91 (Del. 2006).

² *Tornetta v. Musk*, 250 A.3d 793 (Del. Ch. 2019).

11. On September 30, 2021, Plaintiff filed a Motion for Leave to File a Verified Amended Derivative Complaint (the “Motion to Amend”). Dkt. No. 161.

12. On October 1, 2021, K. Musk and Jurvetson filed a Motion for Summary Judgment. Dkt. No. 162. That same day, Plaintiff filed a Motion for Summary Judgment. Dkt. No. 163.

13. On October 27, 2021, in response to the *Brookfield* Decision, the Parties entered, and the Court subsequently granted, the Stipulation and Order Governing Decertification of the Class, Dismissal with Prejudice of Direct Claims, and the Schedule and Terms for Plaintiff’s Motion for Leave to File Verified Amended Derivative Complaint. Dkt. No. 175. Pursuant to that stipulation, Plaintiff’s direct claims in Counts I and II of the Complaint were voluntarily dismissed with prejudice; all claims in the Complaint against K. Musk and Jurvetson were voluntarily dismissed with prejudice; and the Director Defendants were granted leave to file a motion for summary judgment related to any claim in the Amended Complaint that the Director Defendants breached their fiduciary duties by issuing a false and/or misleading proxy. *Id.* at ¶¶ 3, 9.

14. On November 19, 2021, the Director Defendants filed a Motion for Partial Summary Judgment. Dkt. No. 188.

15. On January 12, 2022, following the announcement of Vice Chancellor Joseph R. Slights III's retirement, the Action was reassigned to Chancellor Kathaleen St. J. McCormick. Dkt. No. 199.

16. On February 24, 2022, the Court granted Plaintiff's Motion to Amend and declined to further consider the Parties' respective motions for summary judgment, but expressly provided leave for the parties to "reassert their arguments made in support of summary judgment in their pre-trial and post-trial briefs" Dkt. No. 207 at 2.

17. On March 2, 2022, Plaintiff filed the Verified Amended Derivative Complaint (the "Amended Complaint"). Dkt. No. 209.

18. On May 6, 2022, Defendants asked if Plaintiff would accept service of a sur-reply expert report of Paul Gompers. Plaintiff agreed to accept service of Professor Gompers' sur-reply report, which Defendants served on May 23, 2022, and Plaintiff deposed Professor Gompers regarding his sur-reply report on July 28, 2022. Dkt. Nos. 214, 215.

19. A pretrial teleconference is scheduled in this Action for November 7, 2022 beginning at 11:00 a.m. Dkt No. 220.

20. A five-day trial is scheduled for November 14-18, 2022 beginning at 9:15 a.m. in Courtroom 7E at the Leonard L. Williams Justice Center, 500 North King Street, Wilmington, Delaware. *Id.*

II. STATEMENT OF FACTS WHICH ARE ADMITTED AND REQUIRE NO PROOF

21. The facts set forth below have been admitted or stipulated as true and require no proof, although the inclusion of any fact herein is not an admission of its relevance or materiality to any issue in this Action. However, nothing in this Stipulation shall be construed as shifting the burden of proof or otherwise conceding that any of the stipulated facts are sufficient to establish any legal claim or principle.

A. THE PARTIES

1. Plaintiff

22. Plaintiff has beneficially owned shares of Tesla common stock continuously since at least February 8, 2016.

23. Plaintiff beneficially owned nine shares of Tesla common stock as of February 7, 2018.

24. Plaintiff received Tesla's Definitive Proxy Statement dated February 8, 2018.

25. Plaintiff abstained from voting his shares on the proposal to approve the 2018 Plan to Musk at Tesla's special meeting held on March 21, 2018.

2. Nominal Defendant Tesla

26. Tesla is a Delaware corporation founded in 2003 as Tesla Motors, Inc.

27. Tesla's stock trades on the NASDAQ Global Select Market under the ticker symbol "TSLA."

28. Until December 2021, Tesla maintained its corporate headquarters in Palo Alto, California. On December 1, 2021, Tesla relocated its corporate headquarters to Austin, Texas.

29. Tesla designs, develops, manufactures, sells, and leases electric vehicles (“EVs”) and energy generation and storage systems, and offers services related to its products.

30. On June 29, 2010, Tesla conducted its initial public offering.

31. Tesla introduced the Tesla Roadster, its first vehicle, in 2008.

32. Tesla “began delivering in June 2012” the Model S.

33. Tesla’s Annual Report for 2015 stated that Tesla “began selling our home [energy storage] systems in 2013 and our commercial and utility [energy storage] systems in 2014.”

34. Tesla’s Annual Report for 2015 stated that Tesla “recently announced the next generation of our energy storage products under the Tesla Energy brand”, which included the Powerwall (for residential and small commercial systems) and the Powerpack (for commercial and utility systems).

35. Tesla “began delivering the Model X in September 2015.”

36. On August 1, 2016, Tesla announced that it had executed a merger agreement pursuant to which Tesla would acquire SolarCity Corp. (“SolarCity”) in a stock-for-stock transaction.

37. On November 21, 2016, Tesla’s acquisition of SolarCity closed.
38. On February 1, 2017, Tesla changed its corporate name from “Tesla Motors, Inc.” to “Tesla, Inc.”
39. Tesla’s Quarterly Report for Q2 2017 states that Tesla’s “[c]ompletion of the first Model 3 production vehicle” occurred in July 2017.
40. Tesla’s Annual Report for 2019 stated that Tesla “began deliveries of the current generations of our Powerwall and Powerpack products in late 2016 and 2017, respectively, and of our Megapack product in late 2019.”
41. Tesla’s Quarterly Report for Q1 2020 states that Tesla “commenced production and deliveries of Model Y” in the first quarter of 2020.
42. On August 11, 2020, Tesla announced a five-for-one split of Tesla’s common stock in the form of a stock dividend. The stock split was effected after the close of trading on August 28, 2020 via distribution of four additional shares of Tesla common stock for each share held by a Tesla stockholder of record as of August 21, 2020.
43. On August 5, 2022, Tesla announced a three-for-one split of Tesla’s common stock in the form of a stock dividend. The stock split was effected after the close of trading on August 24, 2022 via distribution of two additional shares of Tesla common stock for each share held by a Tesla stockholder of record as of August 17, 2022.

3. Elon Musk

44. Musk co-founded Tesla and has served as Chairman of Tesla’s Board of Directors from April 2004 until November 7, 2018. Musk continues to serve as a Director on Tesla’s Board of Directors.

45. Musk has served as Tesla’s Chief Executive Officer since October 2008.

46. Musk’s titles at Tesla include “Technoking,” which Musk adopted on March 15, 2021, a role he described as similar to a chief technology officer.

47. Musk is the author of Tesla Motors’ “Master Plan,” dated August 2, 2006.

48. Musk is the author of Tesla Motors’ “Master Plan, Part Deux,” dated July 20, 2016.

49. Musk co-founded Zip2 Corporation, a provider of Internet enterprise software and services, with his brother Kimbal Musk, in November 1995. He served as Executive Vice President and Chief Technology Officer until the business was acquired by Compaq in March 1999.

50. In March 1999, Musk co-founded X.com, an electronic payment system, along with Harris Fricker, Christopher Payne, and Ed Ho.

51. Musk was X.com’s largest stockholder and served as its CEO for periods both before and after X.com merged with Confinity in March 2000.

52. In June 2001, X.com was renamed PayPal. In October 2002, PayPal was acquired by eBay.

53. Musk founded Space Exploration Technologies Corporation (“SpaceX”), a company which is developing and launching advanced rockets, in March 2002.

54. Musk has served as Chief Executive Officer, Chief Technology Officer, and Chairman of SpaceX since May 2002.

55. Musk leads SpaceX.

56. Musk served as Chairman of the Board of SolarCity, a solar technology company, from July 2006 until its acquisition by Tesla in November 2016.

57. Musk is Co-Founder of The Boring Company.

58. Musk leads The Boring Company.

59. Musk is Co-Founder of Neuralink Corp. (“Neuralink”).

60. Musk leads Neuralink.

61. Musk was Co-Chair and primary funder at OpenAI’s founding.

62. During the period of April 23, 2017 through April 21, 2018, Musk had the following non-Tesla positions and/or roles: (i) CEO and CTO of SpaceX; (ii) Chairman of the SpaceX Board of Directors; (iii) Co-Chair of OpenAI; (iv) Co-Founder of Neuralink; and (v) Co-Founder of The Boring Company.

63. As of December 31, 2017, Musk beneficially owned 37,853,041 shares of Tesla's common stock, including 33,632,421 shares held of record by the Elon Musk Revocable Trust dated July 22, 2003, and 4,220,620 shares issuable to Musk upon exercise of options exercisable within 60 days after December 31, 2017.

64. Based on 168,796,945 shares of Tesla's common stock outstanding at December 31, 2017, and assuming that all shares of common stock subject to options held by Musk that were exercisable within 60 days of December 31, 2017 were outstanding as of such date, Musk beneficially owned 21.9% of the outstanding shares of Tesla common stock as of December 31, 2017.

65. As of December 31, 2017, the total amount of shares of Tesla common stock Musk held included 13,774,897 Tesla shares pledged as collateral to secure certain personal indebtedness.

66. As of June 23, 2022, Musk had pledged 89,186,960 Tesla shares as collateral to secure personal indebtedness.

67. Musk is—and has been since Tesla's initial public offering on June 29, 2010—the largest stockholder of Tesla.

68. On April 4, 2022, Musk filed a Schedule 13G relating to an investment in Twitter Inc. ("Twitter") disclosing that he beneficially owned 73,486,938 shares or 9.2% of Twitter's common stock.

69. On April 25, 2022, Twitter and Musk announced the execution of an Agreement and Plan of Merger, dated April 25, 2022 (the “Twitter Merger Agreement”), pursuant to which Musk would take Twitter private for \$54.20 per share in cash in a transaction valued at approximately \$44 billion.

70. On April 25, 2022, Tesla had a market capitalization of \$1,033.96 billion.

71. On April 26, 2022, Tesla had a market capitalization of \$907.98 billion.

72. On May 5, 2022, it was reported that Musk planned to serve as temporary CEO of Twitter once the transaction closed.

4. Brad W. Buss

73. Defendant Buss was a member of the Tesla Board from November 2009 until June 2019.

74. Buss served on the Compensation Committee of the Tesla Board of Directors (the “Compensation Committee”) from November 2009 until August 11, 2014, when he vacated his position upon joining SolarCity. He rejoined the Compensation Committee in 2017 and served until June 2019.

75. Buss served on the Nominating and Corporate Governance Committee from 2009 until August 11, 2014, when he vacated his position upon joining SolarCity. He rejoined the Committee in 2017 and served until June 2019.

76. Buss served as Chair of the Tesla Board’s Audit Committee (the “Audit Committee”) from 2009 until August 11, 2014, when he vacated his position upon joining SolarCity. He rejoined the Committee in 2017 and served as a member until June 2019.

77. Buss came out of retirement to join SolarCity as its chief financial officer in 2014.

78. Buss served as the CFO of SolarCity from August 2014 until February 2016.

79. Buss remained a consultant for SolarCity until March 31, 2016.

80. As of December 31, 2017, Buss beneficially owned 140,123 shares of Tesla common stock, which included 131,441 shares issuable upon exercise of options exercisable within 60 days after December 31, 2017.

81. Buss departed the Tesla Board in June 2019.

5. Robyn M. Denholm

82. Denholm has served as a member of the Tesla Board since August 2014.

83. Denholm has served as Chair of the Tesla Board since November 8, 2018.

84. From August 2014 to the present, Denholm has served as a member of Tesla’s Compensation Committee.

85. Denholm has served as Chair of Tesla's Audit Committee from August 11, 2014 to the present.

86. As of December 31, 2017, Denholm beneficially owned 99,110 shares of Tesla common stock, including 99,110 shares issuable upon exercise of options exercisable within 60 days after December 31, 2017.

6. Ira Ehrenpreis

87. Defendant Ira Ehrenpreis has been a member of the Tesla Board since May 2007.

88. Since 2009, Ehrenpreis has served as Chair of Tesla's Compensation Committee.

89. Since 2009, Ehrenpreis has served as Chair of Tesla's Nominating and Corporate Governance Committee.

90. As of December 31, 2017, Ehrenpreis beneficially owned 89,540 shares of Tesla common stock, including 74,268 shares issuable upon exercise of options exercisable within 60 days after December 31, 2017.

91. Ehrenpreis is a managing partner and co-owner of DBL Partners.

92. As of December 31, 2017, Ehrenpreis beneficially owned 343,602 shares of Space X, including (i) 105,318 shares personally held; (ii) 227,332 shares held by DBL Partners III, L.P.; and (iii) 10,952 shares held by DBL Partners III-A, L.P.

93. Ehrenpreis and DBL Partners Fund III, of which Ehrenpreis was a manager, are investors in SpaceX.

94. As of May 26, 2021, Ehrenpreis's investment firm, DBL Partners, had invested approximately \$10 million in The Boring Company.

95. As of May 26, 2021, Ehrenpreis had invested approximately \$1 million in Neuralink.

96. As of May 26, 2021, Ehrenpreis had invested \$75,000 in The Kitchen Restaurant Group, a K. Musk company.

97. Ehrenpreis is a director of Mapbox, Inc., a company that entered into an agreement with Tesla in December 2015 relating to a vehicle map-related project which had a transaction value of approximately \$5 million over the 2016-2018 period.

7. Antonio J. Gracias

98. Gracias was a member of the Tesla Board from May 2007 to October 2021.

99. Tesla's Definitive Proxy Statement filed May 28, 2020 stated that Gracias "served as [Tesla's] Lead Independent Director from September 2010 to April 2019."

100. Gracias is the founder, managing partner, Chief Executive Officer, director, and sole owner of private equity firm Valor Equity Management LLC, doing business as Valor Equity Partners (“Valor”).

101. As of May 6, 2021, Gracias estimated that he donated between \$200,000 and \$500,000 to K. Musk’s charity, Big Green.

102. Gracias served on the board of directors of K. Musk’s charity Big Green.

103. As of May 6, 2021, Gracias estimated that Valor invested approximately \$10 million in K. Musk’s company, The Kitchen Restaurant Group.

104. As of May 6, 2021, Gracias estimated that Valor had invested between \$5 million and \$10 million in K. Musk’s company Square Roots.

105. As of May 6, 2021, Gracias estimated that Musk had invested approximately \$5 million to \$10 million in Valor Fund II around 2007.

106. From 2009 until April 2019, Gracias served on Tesla’s Compensation Committee.

107. From April 2011 until April 2019, Gracias was a member of Tesla’s Nominating and Corporate Governance Committee of the Board of Directors.

108. As of December 31, 2017, Gracias beneficially owned 483,939 shares of Tesla common stock, including: (i) 4,253 shares held of record by Valor Equity Management II; (ii) 271,778 shares owned by AJG Growth Fund LLC, including

83,205 shares pledged as collateral to secure certain personal indebtedness; and (iii) 207,442 shares issuable upon exercise of options exercisable within 60 days after December 31, 2017.

109. As of December 31, 2017, Gracias was the third largest beneficial owner of Tesla stock among named executive officers and directors.

110. As of May 6, 2021, Gracias's family entities owned approximately between \$900 million and \$1 billion worth of Tesla stock, pre-tax.

111. Valor invested between \$15 million and \$30 million in SolarCity in 2012.

112. Gracias served as a director of SolarCity from February 2012 until its acquisition by Tesla in November 2016.

113. Gracias has served as a director of SpaceX since 2010.

114. As of December 31, 2017, Gracias and Valor beneficially owned 7,117,235 shares of SpaceX. This amount included (i) 898,812 shares held by Valor Equity Partners III L.P.; (ii) 94,720 shares held by Valor Equity Partners III-A L.P.; (iii) 1,526,687 shares held by Valor M33 L.P.; (iv) 3,605,798 shares held by Valor Space Holdings, LLC; (v) 814,815 shares held by Valor IV Space Holdings, LLC and (vi) 176,403 shares held by Valor R&D Series LLC.

115. As of May 6, 2021, Gracias estimated that Valor had invested between \$400 million and \$500 million in SpaceX.

116. MG Capital, a firm founded by Gracias, invested in PayPal in either 1999 or 2000 prior to its merger with X.com.

117. Valor invested approximately \$24 million in SolarCity in 2012.

118. As of May 6, 2021, Gracias estimated that Valor had invested between \$15 million and \$20 million in Neuralink.

119. As of May 6, 2021, Gracias estimated that Valor had invested between \$15 million and \$20 million in The Boring Company.

120. Tesla's Annual Proxy Statement filed April 20, 2017 stated, "[t]he Elon Musk Revocable Trust dated July 22, 2003, of which Musk is the trustee, is a limited partner of Valor Equity Partners II, L.P., which is a fund advised by VMC."

121. Musk invested in Valor Funds I and II around 2007. The investments in Fund I and Fund II were wound down as of August 2021.

8. James Murdoch

122. Murdoch has been a member of the Tesla Board since July 2017.

123. As of December 31, 2017, Murdoch beneficially owned 10,485 shares of Tesla common stock, including 10,485 shares held by the JRM Family Trust.

124. Murdoch is the founder and CEO of Lupa Systems, a private investment company he founded in 2019.

125. Lupa Systems invested a total of approximately \$50 million in SpaceX over the course of 2019 and 2020.

126. Murdoch personally invested a total of approximately \$20 million in SpaceX in 2019.

9. Linda Johnson Rice

127. Johnson Rice was a member of the Tesla Board from July 2017 until June 2019.

128. As of December 31, 2017, Johnson Rice held options to purchase approximately 16,668 shares of Tesla common stock.

129. As of December 31, 2018, Johnson Rice beneficially owned 26,779 shares of Tesla common stock.

B. RELEVANT NON-PARTIES

1. Dismissed Defendants

i. Steve Jurvetson

130. Jurvetson was a managing director at Draper Fisher Jurvetson (“DFJ”)—a venture capital firm that focuses on investments in enterprise, consumer, and disruptive technologies—from 1995 to 2017.

131. Jurvetson is a co-founder of Future Ventures, a venture capital firm.

132. Jurvetson was a member of the Tesla Board from June 2009 until September 2020.

133. From November 13, 2017 to April 2019, Jurvetson was on a leave of absence from Tesla’s Board.

134. Jurvetson was a member of Tesla's Audit Committee between January 29, 2010 and September 2020.

135. As of December 31, 2017, Jurvetson beneficially owned 114,576 shares of Tesla common stock, including 104,243 shares held by Jurvetson Trust and 10,333 shares issuable upon exercise of options exercisable within 60 days after December 31, 2017.

136. Jurvetson has been a member of the SpaceX board of directors from 2009 to the present.

137. As of November 13, 2017, DFJ and affiliated funds owned 6,546,420 shares of SpaceX. That amount included (i) 3,995,674 shares held by DFJ Fund IX, L.P.; (ii) 103,396 shares held by DFJ Fund IX, LLC; (iii) 1,500,879 shares held by DFJ Growth 2006, L.P.; (iv) 121,342 shares held by DFJ Growth Fund 2006, LLC; (v) 570,953 shares held by DFJ Growth 2013 Fund, L.P.; (vi) 31,954 shares held by DFJ Growth 2013 Parallel Fund, LLC; (vii) 211,778 shares held by DFJ Growth III, L.P.; and (viii) 10,444 shares held by DFJ Growth III Parallel Fund, LLC.

138. DFJ was SolarCity's third-largest institutional stockholder, holding 4,827,000 SolarCity shares as of its acquisition by Tesla.

139. At the time Tesla's acquisition of SolarCity closed on November 21, 2016, DFJ's investment in SolarCity was worth \$98,229,450.00.

140. Jurvetson is an investor in The Boring Company.

141. Jurvetson has invested in K. Musk's company The Kitchen Restaurant Group.

ii. Kimbal Musk

142. K. Musk is Musk's brother.

143. K. Musk has been a member of the Tesla Board since April 2004.

144. As of December 31, 2017, K. Musk beneficially owned 202,467 shares of Tesla common stock, including (i) 51,944 shares issuable upon exercise of options exercisable within 60 days after December 31, 2017 and (ii) 148,333 shares pledged as collateral to secure certain personal indebtedness.

145. As of March 31, 2022, K. Musk beneficially owned 683,490 shares of Tesla common stock.

146. K. Musk has been a member of the SpaceX board of directors since 2002.

147. As of December 31, 2017, K. Musk beneficially owned 266,955 shares of SpaceX.

148. Tesla's Annual Proxy Statement filed on April 20, 2017 disclosed that K. Musk was a limited partner of Valor Equity Partners II, L.P. and Valor Equity Partners III-A, L.P., which are funds advised by Valor.

149. As of May 6, 2021, Gracias estimated that K. Musk invested approximately \$1 million to \$2 million in Valor funds.

2. Compensation Committee Advisors

150. Aon plc (“Aon/Radford”) is an American British multinational financial services firm that provides risk-mitigation products and strategy consulting for businesses.

151. Aon/Radford was engaged by Tesla on June 26, 2017.

152. Jon Burg (“Burg”) was a partner of Aon from March 2009 until May 2019.

153. Compensia, Inc. (“Compensia”) is a compensation consulting firm.

154. On June 27, 2017, Compensia was engaged by the Compensation Committee and Tesla.

155. The Compensation Committee retained Compensia in connection with Tesla’s December 4, 2009 grant of Tesla stock options to Musk (defined below as the “2009 Option Award Grant”).

156. Tesla’s Definitive Proxy Statement dated April 17, 2013 stated that, in 2012, the Compensation Committee retained Compensia “to review CEO equity compensation....”

157. Tom Brown (“Brown”) is a Principal and Chairman of the Executive Committee at Compensia.

158. In 2017 and 2018, PricewaterhouseCoopers LLP (“PwC”) was Tesla’s independent registered public accounting firm.

159. Camberview Partners, LLC was engaged by Tesla to advise on and assist with institutional investor solicitation in connection with the 2018 Plan.

160. Innisfree M&A Inc. was retained by Tesla to assist in its solicitation of proxies in connection with the 2018 Plan.

161. Sard Verbinnen & Co. (“Sard”) served as a communications consultant to the Tesla Board in connection with the 2018 Plan.

162. Strategic Governance Advisors worked with Sard to provide Tesla with public and investor relations advice in connection with the 2018 Plan.

3. Proxy Advisors

163. Institutional Shareholder Services (“ISS”) “empowers investors and companies to build for long-term and sustainable growth by providing high-quality data, analytics and insight.”

164. On March 8, 2018, ISS issued a Proxy Analysis & Benchmark Policy Voting Recommendation recommending Tesla’s stockholders vote against the 2018 Plan.

165. Glass, Lewis & Co. publishes “Proxy Paper research” that “feature case-by-case, independent analysis of all the proposals contained in tens of thousands of shareholder meetings held each year across more than 100 markets worldwide.”

166. On February 28, 2018, Glass Lewis issued a Proxy Paper recommending Tesla's stockholders vote against the 2018 Plan.

4. Tesla Executives and Officers

167. Todd Maron ("Maron") was Tesla's General Counsel from September 2014 until January 2019, and Tesla's Deputy General Counsel from September 2013 until September 2014.

168. Maron attended Tesla Board and Committee meetings regarding the 2018 Plan.

169. Prior to his tenure at Tesla, Maron was an attorney at Jaffe and Clemens.

170. In September 2013, Maron joined Tesla as Deputy General Counsel.

171. In September 2014, Maron was promoted to General Counsel.

172. Jonathan Chang ("Chang") was Deputy General Counsel at Tesla from April 2011 until December 2019. Chang served as Tesla's General Counsel from February 2019 to December 2019.

173. Chang attended Tesla Board and Compensation Committee meetings regarding the 2018 Plan.

174. Phillip Rothenberg ("Rothenberg") was Vice President, Legal at Tesla from July 2017 until November 2018, Deputy General Counsel from November

2014 until July 2017, and Associate General Counsel from May 2011 until November 2014.

175. Rothenberg attended Compensation Committee meetings regarding the 2018 Plan.

176. Phuong Phillips (“Phillips”) was Associate General Counsel at Tesla from November 2016 until September 2017.

177. Phillips attended Compensation Committee meetings regarding the 2018 Plan.

178. Yun Huh was Associate General Counsel at Tesla from February 2017 until February 2020, Managing Counsel from November 2014 until February 2017, and Senior Counsel from November 2012 until November 2014.

179. Matt Tolland was Managing Counsel at Tesla from February 2017 until October 2017.

180. Deepak Ahuja (“Ahuja”) was Tesla’s CFO from August 2008 to November 2015.

181. Ahuja returned to Tesla as CFO between March 2017 until March 2019.

182. Ahuja attended Tesla Board and Committee meetings regarding the 2018 Plan.

183. Gabrielle Toledano (“Toledano”) was Tesla’s Chief People Officer from May 2017 until October 2018.

184. Toledano attended Compensation Committee meetings and Tesla Board meetings regarding the 2018 Plan.

185. Ron Klein (“Klein”) has been Tesla’s Vice President-Treasurer since March 2018 and was Tesla’s Assistant Treasurer from February 2017 until March 2018.

186. Kenneth Moore (“Moore”) has been Tesla’s Technical Accounting Director since May 2017.

187. Moore attended Tesla Board and Committee meetings regarding the 2018 Plan.

C. THE 2009 OPTION AWARD GRANT

188. On December 4, 2009, the Tesla Board approved a grant of stock options to Musk (the “2009 Option Award Grant”).

189. Tesla’s Form 10-K filed February 26, 2015 stated, the 2009 Option Award Grant “represent[ed] 4% of [Tesla’s] fully-diluted share base prior to such grant as of the grant date, or 3,355,986 stock options, with 1/4th of the shares vesting immediately, and 1/36th of the remaining shares scheduled to vest each month over three years, assuming continued employment through each vesting date[.]”

190. Tesla’s Form 10-K filed February 26, 2015 stated, the 2009 Option Award Grant included “an additional 4% of [Tesla’s] fully-diluted shares prior to such grant as of the grant date, or 3,355,986 stock options, with a vesting schedule

based entirely on the attainment of performance objectives as follows, assuming our CEO's continued employment and service to us through each vesting date[:]"

- (a) Successful completion of Model S Engineering Prototype;
- (b) Successful completion of Model S Validation Prototype;
- (c) Completion of the first Model S Production Vehicle; and
- (d) Completion of the 10,000th Model S Production Vehicle.

191. As of December 31, 2013, all performance milestones in the 2009 Option Award Grant had been achieved.

D. THE 2012 PLAN

192. On August 1, 2012, the Tesla Board approved a grant (subject to certain vesting conditions) to Musk of options to purchase 5,274,901 shares of Tesla common stock at an exercise price of \$31.17 per share representing 5% of total issued and outstanding shares as of August 13, 2012, the effective date (the "2012 Plan").

193. Tesla's Form 10-Q dated August 2, 2012 stated, the 2012 Plan "consist[s] of ten vesting tranches, each equal to 0.5% of our outstanding common stock as of the [e]ffective [d]ate" and "will have a vesting schedule based entirely on the attainment of both operational and market capitalization milestones."

194. Tesla's Annual Proxy Statement filed April 17, 2013 stated, under the 2012 Plan, "[e]ach of the ten vesting tranches requires that [Tesla] meet a

combination of an operational milestone achievement and a significant increase in our market capitalization of \$4.0 billion.”

195. For the 2012 Plan, Tesla’s “[m]arket capitalization for purposes of milestone achievement will be determined based on a rolling six month historic average (based on trading days only).”

196. Tesla’s Annual Proxy Statement filed April 17, 2013 stated the ten operational milestones for the 2012 Plan were:

- (a) Successful completion of the Model X Engineering Prototype (Alpha);
- (b) Successful completion of the Model X Vehicle Prototype (Beta);
- (c) Completion of the first Model X Production Vehicle;
- (d) Successful completion of the Gen III (the Model 3) Engineering Prototype (Alpha);
- (e) Successful completion of the Gen III (the Model 3) Vehicle Prototype (Beta);
- (f) Completion of the first Gen III (the Model 3) Production Vehicle;
- (g) Gross margin of 30% or more for four consecutive quarters;
- (h) Aggregate vehicle production of 100,000 vehicles;
- (i) Aggregate vehicle production of 200,000 vehicles; and
- (j) Aggregate vehicle production of 300,000 vehicles.

197. Tesla's Annual Proxy Statement filed April 17, 2013 stated, "[t]he term of the 2012 CEO Grant is ten years, so that if any vesting tranches remain unvested after expiration of the 2012 CEO Grant, they will be forfeited."

198. Tesla's Annual Proxy Statement filed April 17, 2013 stated, under the 2012 Plan, Musk "will forfeit any unvested options if he is terminated as CEO of the Company, whether for cause or otherwise."

199. Tesla disclosed an "aggregate grant date fair value computed in accordance with FASB ASC Topic 718" for the 2012 Plan in the amount of \$78,110,730.

E. VESTING OF THE 2012 PLAN'S TRANCHES

200. As of September 30, 2014, the 2012 Plan's first tranche had vested.

201. As of March 31, 2015, two of the ten tranches in the 2012 Plan had vested.

202. As of December 31, 2015, the 2012 Plan's third tranche had vested.

203. As of December 31, 2015, the 2012 Plan's fourth tranche had vested.

204. As of April 15, 2016, the 2012 Plan's fifth tranche had vested.

205. As of March 31, 2017, the 2012 Plan's sixth tranche had vested.

206. As of March 31, 2017, the 2012 Plan's seventh tranche had vested.

207. As of September 30, 2017, the 2012 Plan's eighth tranche had vested.

208. As of February 8, 2018, the 2012 Plan's ninth tranche had vested.

209. As of June 23, 2022, the 2012 Plan's tenth tranche had not vested.

210. As of June 23, 2022, only one operational milestone, requiring that Tesla achieve gross margin of 30% or more for four consecutive quarters, had not been achieved.

F. THE PROCESS LEADING TO THE 2018 PLAN

211. On June 6, 2017, the Tesla Board held a regular meeting.

212. On June 18, 2017, Phillips contacted Compensia regarding a possible stock award for Musk.

213. On June 22, 2017, Tesla had a call with compensation consultant Semler Brossy regarding a possible stock award for Musk.

214. On June 23, 2017, the Compensation Committee held a special meeting via teleconference at which a stock option award for Musk was discussed. The Compensation Committee authorized the retention of Compensia and WSGR as compensation consultant and legal counsel, respectively, to the Compensation Committee.

215. Musk did not retain any advisors in connection with the 2018 Grant.

216. On June 30, 2017, a working group held a meeting via teleconference regarding the 2018 Plan.

217. On July 6, 2017, a working group held a meeting regarding the 2018 Plan.

218. On July 7, 2017, the Compensation Committee held a regular meeting via teleconference, during which a stock option award for Musk was discussed and representatives of Compensia gave a presentation.

219. On July 17, 2017, a working group held a meeting via teleconference regarding the 2018 Plan.

220. On August 1, 2017, the Compensation Committee held a special meeting via teleconference, during which a stock option award for Musk was discussed and representatives of Compensia provided a presentation.

221. On August 3, 2017, a working group held a meeting via teleconference regarding the 2018 Plan.

222. On August 14, 2017, the Compensation Committee held a regular meeting via teleconference, during which a stock option award for Musk was discussed.

223. On September 8, 2017, Ehrenpreis and Denholm had a call with Musk, during which a stock option award was discussed.

224. On September 8, 2017, the Compensation Committee held a regular meeting via teleconference, during which a stock option award for Musk was discussed.

225. On September 19, 2017, the Tesla Board held a special meeting, during which a stock option award for Musk was discussed and representatives of Compensia provided a presentation.

226. On November 9, 2017, the Compensation Committee held a regular meeting via teleconference, during which a stock option award for Musk was discussed.

227. On November 16, 2017, the Tesla Board held a special meeting via teleconference, during which a stock option award for Musk was discussed.

228. On December 8, 2017, the Compensation Committee held a regular meeting via teleconference, during which a stock option award for Musk was discussed.

229. On December 10, 2017, the Compensation Committee held a special meeting, during which a stock option award for Musk was discussed.

230. On December 12, 2017, the Tesla Board held a special meeting via teleconference, during which a stock option award for Musk was discussed.

231. On January 21, 2018, the Tesla Board held a special meeting via teleconference, during which a stock option award for Musk was discussed.

232. Musk and K. Musk both recused themselves from voting on the Board resolutions approving the 2018 Plan.

233. On January 21, 2018, the Tesla Board—with Musk and K. Musk abstaining—unanimously approved the 2018 Plan, conditional on a majority vote of the disinterested stockholders in favor of the 2018 Plan.

G. TESLA’S PROXY STATEMENT REGARDING THE 2018 PLAN

234. On January 23, 2018, Tesla filed a Preliminary Proxy Statement regarding the 2018 Plan.

235. On February 8, 2018, Tesla filed a Definitive Proxy Statement which, among other things, notified stockholders of a special meeting to be held on March 21, 2018 to consider and vote on a proposal to approve the 2018 Plan (the “Proxy”).

H. THE 2018 PLAN

236. Tesla’s Definitive Proxy Statement filed February 8, 2018 stated the 2018 Plan is “comprised of performance-based nonqualified stock options,” which, if fully vested, would grant Musk options to purchase 20,264,042 shares of Tesla common stock.

237. The grant date strike price for each option was \$350.02, representing the closing price of Tesla’s common stock on January 19, 2018.

238. The 2018 Plan is divided into 12 vesting tranches. Each tranche vests upon satisfaction of one market capitalization milestone and the achievement of one operational milestone.

239. The number of shares underlying each tranche of the 2018 Plan was equivalent to 1% of the 168,867,016 shares of Tesla common stock outstanding as of January 19, 2018 (*i.e.*, 1,688,670 pre-stock split shares). The total number of shares underlying the 2018 Plan is equivalent to 12% of the total number of shares of Tesla's common stock outstanding as of that date.

240. The Proxy stated that “Mr. Musk must also remain as Tesla's CEO or serve as both Executive Chairman and Chief Product Officer, in each case with all leadership ultimately reporting to him, at the time each milestone is met in order for the corresponding tranche to vest.”

241. The 2018 Plan has twelve market capitalization milestones, which increase in \$50 billion increments.

	Market Capitalization Milestones (in billions)
1	\$100
2	\$150
3	\$200
4	\$250
5	\$300
6	\$350
7	\$400
8	\$450
9	\$500
10	\$550
11	\$600
12	\$650

242. In order for a market capitalization milestone for any tranche to be met, on the determination date, Tesla's market capitalization must equal or exceed the

value of that applicable market capitalization milestone as measured by (i) the sum of Tesla’s daily market capitalization for each trading day during the six (6) calendar month period immediately prior to and including the determination date, divided by the number of trading days during such period and (ii) the sum of Tesla’s daily market capitalization for each trading day during the thirty (30) calendar day period immediately prior to and including the determination date, divided by the number of trading days during such period.

243. The 2018 Plan has sixteen operational milestones, and the achievement of any one of the sixteen operational milestones could be paired with the achievement of a market capitalization milestone for each tranche to vest.

244. The 2018 Plan has the following operational milestones with (i) eight milestones based on “Revenue” (defined below) ranging from between \$20.0 billion to \$175.0 billion; and (ii) eight milestones based on “Adjusted EBITDA” (defined below) ranging between \$1.5 billion and \$14.0 billion.

	Revenue-Based Operational Milestones (in billions)	Adjusted EBITDA- Based Operational Milestones (in billions)
1	\$20.0	\$1.5
2	\$35.0	\$3.0
3	\$55.0	\$4.5
4	\$75.0	\$6.0
5	\$100.0	\$8.0
6	\$125.0	\$10.0
7	\$150.0	\$12.0
8	\$175.0	\$14.0

245. For purposes of the 2018 Plan’s operational milestones, “Revenue” is defined as total Tesla revenues, as reported in Tesla’s financial statements on Forms 10-Q or 10-K filed with the SEC for the previous four consecutive fiscal quarters.

246. For purposes of the 2018 Plan’s operational milestones, “Adjusted EBITDA” is defined as (i) net income (loss) attributable to common stockholders before (ii) interest expense, (iii) (benefit) provision for income taxes, (iv) depreciation and amortization, and (v) stock-based compensation, as each such item is reported in Tesla’s financial statements on Forms 10-Q or 10-K filed with the SEC for the previous four consecutive fiscal quarters.

247. The Proxy stated that the market capitalization and operational milestones “are subject to adjustment pursuant to the terms of this Agreement relating to certain corporate transactions.”

248. On August 24, 2022, Tesla enacted a three-for-one stock split, and following that, 25,330,050 shares now underlie each tranche of the 2018 Plan.

249. The term of the 2018 Plan is ten years.

250. The Proxy stated that the 2018 Plan was conditioned on a majority vote of the disinterested stockholders in favor of the 2018 Plan.

251. The Proxy stated, “in the event of a restatement of our financial statements previously filed with the SEC, if a lesser portion of the [2018 Plan] would

have vested based on the restated financial results, then Tesla will require forfeiture (or repayment, as applicable) of the portion of the [2018 Plan] that would not have vested based on the restated financial results....”

252. As early as April 2015, the Tesla Board adopted new Corporate Governance Guidelines providing that 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.”

253. The Proxy stated that “a calculation of the preliminary aggregate fair value estimate on the date that the [2018 Plan] was granted by [Tesla’s] Board, pursuant to ASC Topic 718” in the amount of \$2,615,190,000.

254. The Proxy stated that the “maximum theoretical value” of the 2018 Plan, should 12 tranches be earned, was \$55,800,000,000.

255. The Proxy stated that the “maximum theoretical value” of the 2018 Plan did “not take into account any other future dilutive events over the next ten years even though such events will occur.”

256. The Proxy stated that the “maximum theoretical value” of the 2018 Plan “also assumes that Mr. Musk does not exercise any of the stock options in the [2018 Plan] until the very end of the 10-year term, which results in a significantly larger value being attributed to Mr. Musk than would be the case if he were to exercise as soon as the stock options vest.”

257. The Proxy was distributed to stockholders on or about February 12, 2018.

258. All Tesla stockholders of record, as of the close of business on February 7, 2018, were invited to attend a special meeting of stockholders and cast their vote on the 2018 Grant.

I. THE SPECIAL MEETING OF TESLA STOCKHOLDERS

259. On March 21, 2018, Tesla filed a Form 8-K, which stated: “On March 21, 2018, Tesla held a special meeting of stockholders (the “Special Meeting”) at which a quorum was present and Tesla’s stockholders approved the [2018 Plan].”

260. The Form 8-K stated, “[t]he votes cast in favor of approving the [2018 Plan] constituted approximately 73% of all votes cast in person or by proxy at the Special Meeting, excluding votes of shares owned, directly or indirectly, by Messrs. Elon and Kimbal Musk.”

J. ACHIEVEMENT OF THE 2018 PLAN MILESTONES

261. On May 7, 2018, Tesla filed a Form 10-Q, which stated: “Starting on March 21, 2018 when the grant was approved by our stockholders we recorded stock-based compensation expense of \$6.7 million related to the [2018 Plan] for the three months ended March 31, 2018.”

262. The Form 10-Q also stated 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.”

263. As of March 31, 2019, Tesla had achieved the first revenue milestone and the first adjusted EBITDA milestone, and the second adjusted EBITDA milestone was considered probable of achievement.

264. 263. Tesla’s Annual Report for 2019 stated that “As of December 31, 2019, . . . no market capitalization milestones have been achieved.”

265. As of May 28, 2020, the 2018 Plan’s first tranche had vested.

266. On July 24, 2020, the 2018 Plan’s second tranche vested.

267. As of September 30, 2020, the 2018 Plan’s third tranche had vested.

268. As of December 31, 2020, the 2018 Plan’s fourth tranche had vested.

269. As of April 29, 2021, the 2018 Plan’s fifth tranche had vested.

270. As of April 29, 2021, the 2018 Plan’s six tranche had vested.

271. As of December 31, 2021, the 2018 Plan’s seventh tranche had vested.

272. As of April 29, 2022, the 2018 Plan’s eighth tranche had vested.

273. As of April 29, 2022, the 2018 Plan’s ninth tranche had vested.

274. As of April 29, 2022, the 2018 Plan’s tenth tranche had vested.

275. As of April 29, 2022, the 2018 Plan’s eleventh tranche had vested.

276. As of June 30, 2022, all market capitalization milestones for the 2018 Plan had been achieved, all adjusted EBITDA milestones had been achieved, and three revenue milestones had been achieved. One revenue milestone (*i.e.*, \$75 billion in revenue) remained probable of achievement.

III. ISSUES OF FACT AND LAW THAT REMAIN TO BE LITIGATED

277. The Parties respectfully refer the Court to their respective pre-trial briefs, filed on or before October 25, 2022, for the principal issues of fact each intends to prove at trial and their positions on the legal issues that remain to be litigated.

IV. STATEMENT OF RELIEF SOUGHT

A. PLAINTIFF

278. Plaintiff seeks an Order from this Court entering final judgment in favor of Plaintiff and derivatively on behalf of Tesla as follows:

- (a) Finding that a majority of the Board were conflicted and/or lacked independence and/or disinterestedness in approving the 2018 Plan;
- (b) Finding that the stockholder vote on the 2018 Plan was not fully informed;
- (c) Finding that the entire fairness standard of review applies to the 2018 Plan;
- (d) Finding that the 2018 Plan conferred to Musk was not entirely fair;

- (e) Finding the Director Defendants liable for breaching their fiduciary duties;
- (f) Finding that Musk (i) was the controlling stockholder of Tesla at all times relevant to this Action; and/or (ii) the controlling stockholder of Tesla in connection with the 2018 Plan;
- (g) Finding that Musk breached his fiduciary duties in his capacity as (i) the controlling stockholder of Tesla; and/or (ii) as controlling stockholder of Tesla in connection with the 2018 Plan;
- (h) Finding Musk liable for unjust enrichment;
- (i) Directing Tesla to rescind, whether at law or in equity, the 2018 Plan and/or the tranches vested thereunder;
- (j) Directing Tesla to cancel the remaining unvested tranche of the 2018 Plan;
- (k) Awarding reasonable attorneys' and expert witnesses' fees and other costs; and
- (l) Awarding such other and further relief as this Court may deem just and proper.

B. DEFENDANTS

279. Defendants respectfully seek an Order from this Court:

- (a) Entering judgment in Defendants' favor and against Plaintiff on all of Plaintiff's claims that remain for trial, including but not limited to each and every Count (I-IV) contained in Plaintiff's Amended Derivative Complaint, with prejudice; and
- (b) Awarding Defendants the costs, expenses and attorneys' and professionals' fees and such other and further relief as the Court deems just and proper.

V. AMENDMENTS TO THE PLEADINGS

280. Requests to amend pleadings to conform with evidence shall be governed by Court of Chancery Rule 15.

VI. WITNESSES

281. As ordered by the Court, the Parties identified trial witnesses on December 23, 2021.

A. PLAINTIFF

282. Plaintiff presently intends to offer testimony from the following witnesses live at trial in his case-in-chief:

- (a) Deepak Ahuja
- (b) Tom Brown
- (c) Brad W. Buss³

³ Brad Buss will appear remotely.

- (d) Robyn M. Denholm⁴
- (e) Brian D. Dunn (expert)
- (f) Ira Ehrenpreis
- (g) Brent Goldfarb (expert)
- (h) Antonio J. Gracias
- (i) Todd Maron
- (j) James Murdoch
- (k) Elon Musk
- (l) Kimbal Musk
- (m) Andrew P. Restaino (expert)

283. In addition, subject to the agreements herein, Plaintiff may rely on some or all of the transcripts, including excerpts, of the depositions of any named Defendant or any individual under Defendants' control as part of Plaintiff's case-in-chief.

284. Any witness identified as an "(expert)" in section A or B above may be called for rebuttal.

B. DEFENDANTS AND NOMINAL DEFENDANT

285. Defendants presently intend to offer testimony from the following witnesses live at trial in their case-in-chief:

⁴ Robyn Denholm will appear remotely.

- (a) Deepak Ahuja
- (b) Tom Brown
- (c) Brad W. Buss⁵
- (d) Robyn Denholm⁶
- (e) Ira Ehrenpreis
- (f) Paul Gompers (expert)
- (g) Antonio Gracias
- (h) Todd Maron
- (i) James Murdoch
- (j) Kevin Murphy (expert)
- (k) Elon Musk

VII. AGREEMENTS REGARDING THE PRESENTATION OF LIVE AND DEPOSITION TESTIMONY

286. Without regard to the Court's ruling on who ultimately bears the burden of proof at trial and without prejudice to Plaintiff's position that Defendants bear that burden, Plaintiff will proceed with his case-in-chief first and will provide an expected order of examination for the witnesses he expects to call in his case-in-chief no later than October 18, 2022. The Parties will work in good faith to schedule those witnesses after taking into account witness availability. Defendants and

⁵ Brad Buss will appear remotely.

⁶ Robyn Denholm will appear remotely.

Nominal Defendant will provide the expected order of examination for the witnesses they expect to call in their case-in-chief by no later than October 20, 2022.

287. Notwithstanding the foregoing, the Parties reserve the right to narrow their lists of witnesses and make good faith adjustments to the order of witnesses subject to witness availability. If a Party seeks to narrow or adjust the order of its witness list after the exchange set forth in Paragraph 286 above, it shall raise that issue with the opposing Party as soon as possible.

288. The Parties will negotiate in good faith to make the live witnesses listed above who are under their control available to testify at trial on the date scheduled, without the need for a subpoena.

289. Defendants' witness Robyn Denholm will appear remotely at a time and date at trial arranged by the Court in consultation with the Parties. All parties will participate remotely for Ms. Denholm's testimony.

290. Defendants' witness Brad Buss will appear remotely at a time and date at trial arranged by the Court in consultation with the Parties. All parties will participate remotely for Mr. Buss's testimony.

291. The Parties will use their best efforts to minimize lost trial time due to remote testimony. The Parties agree that trial time lost due to (i) transitioning to or from the courthouse for the remote testimony of Ms. Denholm or Mr. Buss; (ii) technical issues associated with the remote testimony of Ms. Denholm or Mr.

Buss; or (iii) any other issues relating to remote testimony that would otherwise cause the time lost to be shared by both sides, shall be charged against Defendants' trial time, but such charge against Defendants' trial time shall not exceed 45 minutes. If the lost time exceeds 45 minutes through no lack of diligence by Defendants (*i.e.*, unanticipated technical issues), the Parties will jointly petition the Court to be allowed to make up the lost time. Plaintiff reserves all rights to argue that the 45 minutes is not a hard cap.

292. Defendants are currently assessing whether additional precautions can be put in place that will enable Mr. Buss to be able to testify in person. In the event that Mr. Buss testifies in person at trial, the Parties agree that footnotes 3 and 5 and Paragraph 291 above shall be automatically struck.

293. Should a Party determine or learn that any of the listed witnesses will not appear at trial, the Party who controls that witness will provide notice to all other Parties:

- (a) if in advance of the commencement of trial, within 24 hours of reaching that determination or learning of that fact; or
- (b) if trial has already commenced, as soon as possible, but no later than 9:00 p.m. Eastern time two days before that witness was anticipated to testify.

294. Unless the Court orders otherwise for good cause shown, each fact witness will be called only once.

295. The Party controlling a live witness shall conduct that witness's direct examination first, and the Parties agree that, except with respect to rebuttal witnesses, the scope of cross-examination shall not be limited to the scope of the direct examination.

296. The Parties agree that the scope of any re-direct examination of any witness shall be limited to the scope of the cross-examination, and the scope of any re-cross examination shall be limited to the scope of the re-direct examination.

297. For each expert witness, the Party controlling the witness shall present their direct examination first, and the scope of cross-examination shall be limited to (i) the scope of the direct examination and/or (ii) anything contained in their expert reports, without regard to the scope of direct examination.

298. Any witness identified as an "(expert)" in section VI.A or VI.B above may be called for rebuttal.

299. All non-party fact witnesses will be sequestered during trial prior to their testimony, provided, however, that if any Party's designated corporate representative is listed as a trial witness, that representative will not be sequestered.

300. Expert witnesses need not be sequestered during trial.

A. PROVISIONS FOR REMOTE TESTIMONY

301. Unless otherwise ordered by the Court, the following procedures shall govern the testimony of remote witnesses.

302. CourtScribes will serve as host for any remote witness testimony, utilizing Zoom. After the swearing in of the witness, CourtScribes shall mute the audio and blackout the video of all attendees showing only the name of each attendee, except for (i) the Court, (ii) the witness on the stand, (iii) counsel examining the witness on the stand, and (iv) one counsel representing the opposing party. Chambers shall retain the ability to mute participants.

303. Each party may retain its own trial technology vendor who will have co-host capabilities with CourtScribes during examinations conducted by counsel for their respective party. Each vendor may have the capability to turn on or off their respective party's counsel's audio and/or video. Each vendor shall have the capability to screen-share in order to present demonstratives, exhibits, or other documents, video or audio. Attendee video screens shall still be shown on a side panel while documents and/or video are onscreen.

304. Witnesses whose testimony is offered remotely shall be deemed to meet the requirements of Chancery Court Rule 43(a). For the avoidance of doubt, the Parties are prohibited from communicating *ex parte* with a witness testifying remotely once the witness has taken the stand, including during breaks.

B. DEPOSITION TESTIMONY

305. Each Party may use the deposition testimony, whether videotaped or otherwise, of any witness only to the extent permitted by the Court of Chancery Rules and the Delaware Uniform Rules of Evidence.

306. Any Party seeking to offer deposition testimony and/or video recordings as evidence shall cite specific deposition testimony and video recording in any of its trial briefs, reference such testimony or recording in post-trial argument, or use such testimony or recording at trial.

307. In lieu of deposition designations, deposition transcripts and video recordings thereof shall become part of the record to the extent they are cited in any trial briefs, referenced in post-trial argument, used at trial, or otherwise incorporated into materials in the trial record in a manner consistent with the Delaware Rules of Evidence and the Court of Chancery Rules.

308. For convenience only, all deposition transcripts shall be listed on the Joint Exhibit List (defined below) and lodged with the Court in the same manner as the exhibits included on the Joint Exhibit List (the “Joint Trial Exhibits”).

309. The Parties may use deposition testimony, including transcripts and video files, at trial and in post-trial briefing and post-trial argument as appropriate and in accordance with this Order and the Rules of the Court of Chancery and the Delaware Rules of Evidence.

310. This agreement regarding the use of deposition testimony shall not affect the right of any party to compel any adverse party or non-party witness to testify live at trial. In addition, the Parties shall remain free to argue about the weight the Court should place on any such testimony that is admitted.

311. If a Party intends to seek to present at trial videotaped deposition testimony in lieu of live testimony by the same witness, such Party shall provide the other Parties with notice of such intent no later than 9:00 a.m. Eastern time 5 days before the start of trial on November 9, 2022, and specific videotaped designations of the testimony to be presented. Following such notice, the other Party shall identify any objections and provide notice of counter-designations of any portions of any witness's videotaped deposition that should in fairness be considered along with the original videotaped designations or which the other Parties seek to introduce separately within 72 hours. This provision shall not apply to videotaped deposition testimony used for impeachment purposes or during examination of a witness who testifies live at trial. The time used to play video depositions shall be charged against the designating Party.

312. A Party using video deposition of a witness in their case-in-chief will play all such video clips of such witness first. Once that Party has completed playing all its video clips of that witness, immediately thereafter the opposing Parties shall have the right to present their own portions of video deposition of that witness that

should in fairness be considered along with the original videotaped designations. For the avoidance of doubt, this paragraph is not intended to waive any evidentiary objections that any Party may have to such video testimony.

313. A Party may utilize non-argumentative introductory language as transitions in advance of presenting video deposition clips at trial. The Parties reserve all rights regarding introductory language.

VIII. TRIAL EXHIBITS AND OTHER EVIDENTIARY ISSUES

314. The Parties are submitting herewith as Exhibit A a joint list of trial exhibits (the “Joint Exhibit List”). By including an exhibit on the Joint Exhibit List, the Parties do not waive any objections they may have to the introduction of the exhibit at trial.

315. For all joint trial exhibits added to the Joint Exhibit List prior to the commencement of trial (as agreed upon by the Parties), unless an objection to a proposed joint trial exhibit has been noted on the Joint Exhibit List, all exhibits on the Joint Exhibit List shall be deemed pre-admitted into evidence without objection.

316. All exhibits on the Joint Exhibit List shall be lodged with the Court, along with a flash drive containing electronic versions of all exhibits, including native versions of any Excel files or video or audio files from the Joint Exhibit List (but excluding video files of depositions).

317. All exhibits the Parties expect to be used at trial, excluding purely demonstrative exhibits, shall be identified on the Joint Exhibit List.

318. The Parties will endeavor to stipulate to the admissibility of all documents on the Joint Exhibit List.

319. The Parties reserve the right, in good faith, to supplement the Joint Exhibit List at any time prior to the close of trial, with each side reserving the right to object to any such supplemental exhibits. In the event of any intent to supplement or amend the Joint Exhibit List, the Party offering the new exhibit shall give the other Party notice of their intent as promptly as possible. The Party supplementing the Joint Exhibit List shall ensure that copies of the exhibit(s) added to the Joint Exhibit List are promptly provided to the other Party. Notwithstanding the foregoing, the Party supplementing the Joint Exhibit List shall provide notice to the other Party of the supplemental exhibit(s) by not later than 9:00 p.m. Eastern time on the night prior to when the Party supplementing the exhibit list intends to use the supplemental exhibit(s) at trial, other than by application to the Court for good cause shown or by agreement of the Parties.

320. The Joint Exhibit List shall be arranged chronologically for all exhibits added as of October 11, 2022 with all additions after that date appearing on the Joint Exhibit List as added. The Parties shall make a good faith effort to de-duplicate the list. The Parties stipulate and agree that all documents on the Joint Exhibit List are

authentic for the purposes of admission at trial. The Joint Exhibit List shall provide: (a) the JX exhibit number; (b) the date, if available; (c) a brief description; (d) a notation as to whether the exhibit was used at a deposition; (e) the applicable Bates range (if any); and (f) a space for Parties to indicate their objections.

321. For any Excel files or video or audio files presented only in native format, a slip sheet stating “Produced in Native” is included in the Joint Exhibit List. Native versions presented to a witness shall be entered into the record, subject to objections, in the same manner as other trial exhibits notwithstanding their presentation as native versions. If any Party wishes to present a witness with an Excel file, the Party must endeavor to present the witness with the entire file, including worksheets or tabs that are hidden in the native file.

322. All trial exhibits will be pre-marked (“JX __”).

323. On or before the first day of trial, the Parties will submit to the Court an up-to-date copy of the Joint Exhibit List and four sets of binders containing marked copies of the Joint Trial Exhibits: one for use by the Court; one for use by the Court’s clerk; one to be lodged with the Register in Chancery; and one for use by witnesses. The Parties will likewise provide the Court with four flash drives containing the full set of pre-marked Joint Trial Exhibits: one for the Court; one for the Court’s clerk; one for the court reporter; and one for use by witnesses. Within the flash drives, the deposition transcripts shall appear in a separate folder with PDFs

labeled by deponent's name. The cost of printing, binding, and tabbing the Joint Exhibits will be shared evenly by Plaintiff and Defendants. Plaintiff shall have the ultimate responsibility for filing the Joint Exhibit List, delivering electronic copies, and having binders of the exhibits delivered to the Court. Each Party, to the extent it chooses to use witness binders, is individually responsible for preparing separate binders containing the exhibits that the examining counsel expects to reference when examining a particular witness. The examining Party shall provide three copies of any such witness binder to opposing counsel at the beginning of the relevant examination and shall bear the costs associated with such copies. The Parties shall share the cost of any audio-visual or other equipment or services that both sides intend to use at trial. The parties shall work together and with the Court in advance of trial to make the necessary arrangements.

324. The Parties reserve the right to introduce such additional exhibits as deemed appropriate in rebuttal to any evidence introduced by the opposing Party and to object to the introduction of such exhibits by other Parties.

325. Demonstrative exhibits will not appear on the Joint Exhibit List.

326. The Parties shall exchange any demonstrative exhibits that will be used as part of the direct (or friendly cross) examination of any witnesses by 9:00 a.m. Eastern time the day before the relevant witness is set to testify, unless the Parties otherwise agree in writing. If a demonstrative exhibit is prepared in response to

substantive content provided for the first time at trial, and it is not feasible to provide notice by 9:00 a.m. Eastern time the day before, the Party seeking to use such exhibit shall provide notice and a copy of the demonstrative exhibit as soon as possible.

327. The Parties need not provide the other Parties with any demonstrative exhibits that will be used as part of a hostile cross-examination of a witness until the time such demonstrative exhibit is used at trial. The Parties reserve the right to object to any demonstrative exhibit.

328. The Parties will continue to confer to attempt to resolve any disputes relating to trial exhibits prior to trial.

IX. CONFIDENTIALITY

329. In the event that any Confidential Discovery Material—as defined in the Stipulation and Order Governing the Production and Exchange of Confidential and Highly Confidential Information entered by the Court on December 16, 2019—is used in open court during any court proceeding or lodged as a trial exhibit, the material shall lose its confidential status and become part of the public record, unless the producing Party applies for and obtains an Order from this Court specifically maintaining the confidential status of particular material.

X. ESTIMATED TRIAL TIME

330. The Court will hold a telephonic pre-trial conference on November 7, 2022 at 11:00 a.m. Plaintiff will initiate the call.

331. The trial has been scheduled to commence on Monday, November 14, 2022, in Wilmington, Delaware, and to conclude on Friday, November 18, 2022, beginning each day at 9:15 a.m.

332. The Parties expect that trial will run for a total of 30 hours on the record. Trial time, in the aggregate, shall be divided equally, with half of the total time allotted to Plaintiff and half of the total time allotted to Defendants. Unless otherwise ordered by the Court, each side will be charged with all of the time its attorneys spend addressing in-trial motions or evidentiary issues, questioning a witness, whether on direct examination, cross examination, re-direct examination, re-cross examination, or playing deposition clips. Any time during which either side's attorneys are engaged in the activities described above and the Court addresses or questions that attorney or witness, that time will be attributed to the Party engaged in the activity. Subject to the provisions set forth in Paragraphs 291 and 292, any "dead" time during trial, where neither side's attorneys are engaged in the activities described above, shall be divided equally between Plaintiff and Defendants.

333. The Parties shall consult regularly regarding the ongoing total time that has been expended.

XI. EVIDENTIARY ISSUES REQUIRING RESOLUTION

334. The Parties presently have no disputed issues for the Court to decide at the pre-trial conference.

XII. POST-TRIAL BRIEFING AND SCHEDULE OF EVIDENCE

335. The Parties respectfully request the opportunity to file post-trial briefs following completion of the trial based on a schedule entered by the Court. The Parties will confer and submit a proposed schedule for post-trial briefing following trial. The Parties also respectfully request post-trial argument during a hearing held at the Court's convenience. Within ten (10) business days after post-trial argument, the Parties shall submit to the Court a Schedule of Evidence, which shall be prepared and submitted jointly by the Parties. The Schedule of Evidence shall identify all exhibits, in numerical order, that were cited at trial, or in any trial submissions (including pre-trial and post-trial briefing), as well as any objections to the admissibility or use of such exhibits cited at trial, or in any trial submission. For the avoidance of doubt, exhibits cited on the Parties' demonstrative exhibits shall be included on the Schedule of Evidence. For the convenience of the Court, the Parties will separately deliver copies of their demonstrative exhibits when submitting the Schedule of Evidence. The Parties shall proceed with the expectation that the Court will only review the evidence identified on the Schedule of Evidence when rendering its decision; provided, however, that the Court shall be free to review and rely upon any evidence in the record.

XIII. AMENDMENT OF THE PRE-TRIAL ORDER

336. This Order may be amended upon application to the Court by any Party for good cause shown, or by agreement of the Parties with approval of the Court.

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Dated: October 17, 2022

PUBLIC VERSION FILED:

October 24, 2022

IT IS SO ORDERED this ____ day of _____, 2022.

Chancellor Kathaleen St. Jude McCormick

CERTIFICATE OF SERVICE

I hereby certify that, on October 24, 2022, I caused a true and correct copy of the foregoing *Public Version of Stipulation and [Proposed] Pre-Trial Order* to be served upon the following counsel of record by File & ServeXpress:

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